

Article 234 UNCLOS and the Polar Code

The interaction between regulations on different levels in the Arctic region

Candidate number: 5071

Submission deadline: 1 November 2014

Number of words: 17.922



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1 Introduction

1.1 Background

As the ices in the Arctic are melting, the region is currently undergoing significant changes in terms of increased activity such as shipping, tourism, fishing and exploitation of other natural resources. This increased activity leads to new challenges regarding legislative regulation in the region and there are several stakeholders with different interests within the area, which complicates the regulation process further. As regards shipping conditions in the region, it should be highlighted that even if the ices are melting, navigation still remains hazardous in several aspects. Vessels will operate in reduced visibility and extreme cold in an area where there are limited services such as navigation aids and capacity for salvage and pollution response usually available to shipping. Moreover in terms of the environment, significant damage could be caused in the region by discharge of small amounts of pollutants such as fuel oil.¹ As Chircop puts it: “The environmental fragility and challenging navigation conditions require safety and environmental standards for marine transportation like no other.”²

1.2 Purpose

Given this increased activity in the Arctic region in recent years and the urgent need of regulation that follows, the main purpose of this thesis is to examine the current legal situa-

¹ Chircop, Aldo, “Regulatory Challenges for International Arctic Navigation and Shipping in an Evolving Governance Environment”, *Comite Maritime International Yearbook 2013 Annuaire: Beijing II Documents of the Conference*, Paper presented at the Annual Meeting of the Comité Maritime International, Beijing, China, 14-19 October 2012. Revised and current until 15 February 2013, p. 408-427, available at: <http://www.comitemaritime.org/Uploads/Publications/Yearbooks/CMI%20YEARBOOK%202013.pdf>, p. 408(ff); Chircop, Aldo, “The Growth of International Shipping in the Arctic: Is a Regulatory Review Timely?”, *The International Journal of Marine and Coastal Law*, Vol. 24, Issue 2, 2009, p. 355–380, (cited from Hein Online), p. 355, p. 357, p. 359-361.

² Chircop, 2009, p. 357.

tion in the area with a particular focus on the interaction between shipping regulations on different levels. Focus will mainly be put on the connection between national regulations justifiable according to Article 234 in the United Nations Convention on the Law of the Sea (UNCLOS)³ and international regulations such as the International Code for Ships Operating in Polar Waters (the Polar Code), which is currently being negotiated in the International Maritime Organization (IMO).⁴ In this regard, the content of Article 234 UNCLOS itself will also be evaluated in the light of the Polar Code.

Accordingly, the key issues of the thesis are the following:

- Article 234 UNCLOS is being used as a justification for certain Arctic coastal States to adopt and enforce their own national regulations in the Arctic region. What are the conditions for applying this article and how should the wording of the article be interpreted?
- National regulations pursuant to Article 234 UNCLOS have been adopted by Canada and the Russian Federation, are these regulations consistent with the conditions listed in the article?
- The Polar Code is currently being negotiated within IMO. Will the Code have any implications for the applicability or the interpretation of Article 234 UNCLOS and if so, what would they be? Could there be any potential conflicts between the two instruments?

³ United Nations Convention on the Law of the Sea (with annexes, final act and procès-verbaux of rectification of the final act dated 3 March 1986 and 26 July 1993). Concluded at Montego Bay on 10 December 1982, *United Nations Treaty Series*, Vol. 1833, No. 31363, p. 397, (hereinafter UNCLOS).

⁴ Regarding the current negotiations of the Polar Code, see IMO, *Shipping in polar waters: Development of an international code of safety for ships operating in polar waters (Polar Code)*, <http://www.imo.org/MediaCentre/HotTopics/polar/Pages/default.aspx>, (cited 20.9.2014).

1.3 Delimitation

There are many legal challenges in the Arctic region but it is not possible to cover all of them within the rather restricted scope of this thesis. As stated above, focus will be put on the connection between Article 234 UNCLOS and the Polar Code. Other Arctic-related issues that are not directly related to this jurisdictional relationship will therefore not be discussed in this thesis. It should also be noted that the intricacies of the Canadian and Russian claims regarding the legal status of their respective Arctic waters will only be briefly mentioned, and thus not thoroughly assessed.

This thesis is current until October 2014. The results of IMO-meetings related to the Polar Code, such as the outcome of the meeting in the Marine Environment Protection Committee (MEPC) in October 2014 and the meeting of the Maritime Safety Committee (MSC) in November 2014 will therefore, unfortunately, not be taken into account in this thesis.

Since the Polar Code is not yet in force, it means that when references are made to this source it is a draft version of the Code that is being used.⁵ A thorough and complete analysis of the implications of the Code can therefore not be made at this point in time. This, of course, limits the credibility of the analyses made in this thesis to some extent. However, as will be noted in chapter 4 below, the work with the Code has reached quite far and the draft version of the Code is likely to be adopted by MSC in November 2014⁶, meaning that significant changes to at least the safety measures in the draft probably will not be made. It is

⁵ The version of the Polar Code used in this thesis is to be found in *IMO doc. MSC 94/3/1*, of 30 July 2014, "Consideration and Adoption of Amendments to Mandatory Instruments", Annex, "Draft Resolution MSC.[...](94) (adopted on [... November 2014]) Adoption of the International Code for Ships Operating in Polar Waters (Polar Code)", "Draft International Code for Ships Operating in Polar Waters", (hereinafter Draft Polar Code).

⁶ IMO, *Shipping in polar waters: Development of an international code of safety for ships operating in polar waters (Polar Code)*, <http://www.imo.org/MediaCentre/HotTopics/polar/Pages/default.aspx>, (cited 20.9.2014).

therefore meaningful to analyze the scope, content and implications of the Code, despite the fact that it is not yet in force.

1.4 Method and material

There is a specific legal method often referred to as “legal dogmatics”, which is the method most commonly used in commentaries and textbooks relating to law. The method has been described by Peczenik as follows; “the systematic, analytically-evaluative exposition of the substance of private law, criminal law, public law etc. Although such an exposition may also contain some historical, sociological and other points, its core consists in interpretation and systematisation of (valid) legal norms.”⁷ This “legal dogmatics” approach is the general method being used for the purpose of this thesis where legal instruments, with a particular focus on Article 234 UNCLOS, the Polar Code and national regulations pursuant to Article 234, will be evaluated and interpreted. Different approaches from several stakeholders, such as national governments, regional and international organizations and other legal experts, will be taken into account when assessing these legal instruments. By doing so, the ambition has been to create a basis for an analysis as objective and accurate as possible.

A comparative element will also be included in the thesis by comparing the different legal instruments and their interpretations with each other. When assessing the different approaches taken by the different stakeholders, it has been necessary to sometimes be critical, keeping the potential interests behind a certain approach in mind.

With regards to the interpretation of Article 234 UNCLOS, it should in particular be highlighted that the Polar Code will to some extent be used as an instrument to interpret the meaning of the article. The basis for using the Polar Code when interpreting Article 234 is to be found in the fact that it has been recognized that UNCLOS could be given a dynamic

⁷ Peczenik, Aleksander, *On Law and Reason*, Law and Philosophy Library, Vol. 8, Springer, 2009, (e-book, cited from Springer Link), p. 13.

interpretation, meaning that subsequent legal developments should be taken into account when interpreting its provisions.⁸ The development of the Polar Code could be seen as such a legal development, which would make it possible as a usable instrument for interpreting Article 234 UNCLOS.

It has been somewhat challenging to discuss the implications of the Polar Code due to the fact that it is a newly developed instrument not yet in force. This has made it rather difficult to find a wide range of literature discussing the scope, content and potential implications of the Code, since only a limited amount of such sources exists at this point in time. The thesis will thus include both *de lege lata* assessments as well as *de lege ferenda* analyses.

1.5 Structure

The thesis starts with a general overview of the Arctic region and the law of the sea, with a particular focus on the connection between IMO and UNCLOS. Thereafter, an assessment of Article 234 UNCLOS and some examples of national regulations adopted in Canada and the Russian Federation pursuant to this article will follow. Different interpretations of Article 234 will be scrutinized from different perspectives. Further, an examination of the Polar Code and its background and purpose will be presented. Detailed rules will not be included, but a more general approach will be taken and focus will thus be put on the overall content and scope of the Code. Thereafter, a discussion linking the previous chapters together will follow, where focus will be put on the potential implications the Polar Code might have on the interpretation of Article 234, as well as on the legality of the Canadian and Russian regulations. The future of Arctic shipping in general will also be briefly discussed. Finally, conclusions from the abovementioned areas will be drawn.

⁸ Ringbom, Henrik, *The EU Maritime Safety Policy and International Law*, Martinus Nijhoff Publishers, 2008, (e-book, cited from Brill Online), p. 20-21.

1.6 Definition of the geographical scope of the thesis

Unfortunately for the clarity when analyzing Arctic-related issues, it does not exist a generally accepted definition of the geographical scope of the Arctic.⁹ The Arctic has thus been defined in various ways from different perspectives.¹⁰ For the purpose of this thesis, however, it is necessary to look at the definitions of the geographical scope of the two main instruments discussed, namely Article 234 UNCLOS and the Polar Code.

The wording of Article 234 UNCLOS does not contain a static geographical limitation, nor does it refer directly to the Arctic. Instead, the scope of the article is more dynamic and restricted to “ice-covered areas”.¹¹ The scope of the Polar Code, on the other hand, is geographically restricted to polar waters, which is further defined as “Arctic waters or the Antarctic area”¹². The term “Arctic waters” is in turn defined as follows:

Arctic waters means those waters which are located north of a line from the latitude 58°00.0' N and longitude 042°00.0' W to latitude 64°37.0' N, longitude 035°27.0' W and thence by a rhumb line to latitude 67°03.9' N, longitude 026°33.4' W and thence by a rhumb line to Sørkapp, Jan Mayen and by the southern shore of Jan Mayen to the Island of Bjørnøya, and thence by a great circle line from the Island of Bjørnøya to Cap Kanin Nos and hence by the northern shore of the Asian Continent eastward to the Bering Strait and thence from the

⁹ Molenaar, Erik J., “Options for Regional Regulation of Merchant Shipping Outside IMO, with Particular Reference to the Arctic Region”, *Ocean Development & International Law*, Vol. 45, Issue 3, 2014, p. 272-298, (cited from Taylor & Francis), p. 273.

¹⁰ See for example different definitions of the Arctic explained in “Chapter 2, Physical/Geographical Characteristics of the Arctic”, Murray, Janine L. (ed.), in *AMAP Assessment Report 1998*, Arctic Monitoring and Assessment Programme Working Group, Arctic Council, available at: <http://www.amap.no/documents/download/88>, p. 9-10.

¹¹ Article 234 UNCLOS. See further discussions regarding the scope of Article 234 in chapter 3 below.

¹² *IMO doc. MSC 94/3*, of 31 July 2014, “Consideration and Adoption of Amendments to Mandatory Instruments”, Annex 2, ”Draft Resolution MSC.[...](94) (adopted on [...]) Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended”, “Chapter XIV Safety Measures for Ships Operating in Polar Waters”, (hereinafter Chapter XIV SOLAS), Regulation 1.4. See also Paragraph 2 and 5, Introduction, the Draft Polar Code.

Bering Strait westward to latitude 60° N as far as Il'pyskiy and following the 60th North parallel eastward as far as and including Etolin Strait and thence by the northern shore of the North American continent as far south as latitude 60° N and thence eastward along parallel of latitude 60° N, to longitude 56°37.1' W and thence to the latitude 58°00.0' N, longitude 042°00.0' W.¹³

The main difference between the two instruments seems thus to be that the scope of Article 234 is more dynamic and dependent on environmental changes such as ices melting, whereas the scope of the Polar Code is restricted to a specific designated geographical area, regardless of environmental changes.

Another definition of the Arctic also worth nothing in this context is the Arctic Circle, which is the definition originally used as criteria for membership in what first started as Arctic-wide cooperation, and what today constitutes the Arctic Council. Only states with territorial sovereign areas north of the Arctic Circle participate in this cooperation.¹⁴

Comparing instruments with different geographical scopes with each other could be somewhat complicated. As will be noticed throughout the thesis, however, this does not seem to constitute a practical problem and it has thus been possible to discuss and compare the different instruments despite their differences in this matter. The differences should nevertheless be kept in mind when analyzing the various instruments.

¹³ Regulation 1.3, Chapter XIV SOLAS. For references linking this definition to the Polar Code, see also Paragraph 2 and 5, Introduction, the Draft Polar Code. For an illustrative view of this definition of the Arctic, see Annex I of this thesis.

¹⁴ Koivurova, Timo, "Transboundary environmental assessment in the Arctic", *Impact Assessment and Project Appraisal*, Vol. 26, Issue 4, 2008, p. 265-275, (cited from Taylor & Francis), p. 266. For an illustrative view of the Arctic Circle, see Annex II of this thesis. As regards participation in the Arctic Council, see chapter 2.2.2 where other stakeholders also are mentioned.

2 A general overview of the regulation of Arctic shipping

2.1 Relevant international law applicable in the Arctic region

The law of the sea is a part of international law governing several areas, such as state sovereignty, jurisdiction and rights over the waters, the seabed, the subsoil and the airspace of the sea. The law of the sea is not contained in one single document, but consists of a mixture of both bilateral and multilateral customary and treaty law.¹⁵

In this chapter, focus will be put on such parts of the law of the sea that are relevant to the shipping industry in the Arctic region. A presentation of the most commonly used international treaties within this area will therefore be given below. Different jurisdictional zones relevant to the thesis will also be briefly presented. In terms of actors within the region, focus will be put first and foremost on IMO, and a comparison between IMO instruments and UNCLOS will be made. Other actors, such as the Arctic Council and the Arctic Ocean coastal States will also be briefly presented.

2.1.1 UNCLOS

UNCLOS entered into force on 16 November 1994 and is a wide-ranging multilateral treaty constructed by the United Nations, covering nearly all aspects of the law of the sea. UNCLOS is generally applicable which means that it is not confined to any particular areas of the law of the sea. All states, for example the United States of America (US), are not parties to UNCLOS. However, many of the principles contained in UNCLOS are seen as customary law today.¹⁶

¹⁵ Dixon, Martin, *Textbook on International Law*, Seventh Edition, Oxford University Press, 2013, p. 217.

¹⁶ Dixon, 2013, p. 217 – 219.

2.1.1.1 Jurisdictional zones

2.1.1.1.1 *Territorial sea*

According to Article 2 UNCLOS, the territorial sea is defined as an adjacent belt of sea over which the coastal state has sovereignty. This definition of the territorial sea and its legal status means that the coastal state has full legislative jurisdiction over this area in the same way as it has over its land territory. This sovereignty extends to the seabed, the sub-soil and the air space over the sea. The breadth of the territorial sea can, according to Article 3 UNCLOS, be established to a maximum of 12 nautical miles in width. There are certain exceptions to the main rule of sovereignty over the territorial sea.¹⁷ The main exception is that all vessels have the right of innocent passage in the territorial sea pursuant to Article 17 UNCLOS. The meaning of innocent passage is further defined in Article 19 UNCLOS, which also contains a list of activities that are not considered as innocent. Such activities are for example the use of force, fishing activities or acts of willful and serious pollution. Despite the right of innocent passage, a ship would still have to follow laws and regulations of the coastal state applicable in the territorial sea, as long as these rules are in conformity with Article 21 UNCLOS. The rules can relate to, for example, the safety of navigation or pollution prevention, however limited to generally accepted international rules and standards if they relate to design, construction, manning or equipment of vessels.¹⁸

Another exception to the main rule of sovereignty over the territorial sea concerns international straits where the concept of innocent passage also shall apply under certain circumstances. It should be noted that the innocent passage applicable in international straits is non-suspendable, unlike the “ordinary” innocent passage discussed above.¹⁹ The interna-

¹⁷ Article 2 and Article 3 UNCLOS. See also Dixon, 2013, p. 220 – 223.

¹⁸ Article 17, Article 19 and Article 21 UNCLOS; Evans, Malcolm D., ”The Law of the Sea”, in M. Evans (ed.), *International law*, Second Edition, Oxford University Press, 2006, p. 631-633.

¹⁹ Article 25(3), Article 34 and Article 45 UNCLOS; Evans, 2006, p. 634-635.

tional straits can, however, also be subject to the regime of transit passage, according to which also aircraft have a right to overflight. The possibility for coastal states to regulate in a strait where transit passage is applicable is more restricted than in a strait covered by the concept of innocent passage. The freedom of navigation is thus more significant in straits where the regime of transit passage applies.²⁰

2.1.1.1.2 The Exclusive Economic Zone

The Exclusive Economic Zone (EEZ) is defined in Article 55 UNCLOS as an area outside and adjacent to the territorial sea and its width shall not, according to Article 57 UNCLOS, extend beyond 200 nautical miles counting from the baselines of the territorial sea. Coastal states have certain sovereign rights stipulated in Article 56 UNCLOS in terms of for example exploring and exploiting the natural resources within the EEZ.²¹

The EEZ could thus be considered as an area in which the coastal states has sovereign rights over all natural resources, but where several of the freedoms of the high seas still exist. Unless the commercial activity by other states in the EEZ challenges these sovereign rights of the coastal state, the coastal state does not have the right to interfere with such activity, meaning that it has no general power to regulate such activity. There are different views in terms of how to look at the concept of the EEZ. According to most major maritime powers, the EEZ is to be regarded as an area where the coastal state has been granted certain rights and not as an area where the coastal state has pre-existing legal rights. However, some other states do view the EEZ as an area comparable to sovereign territory.²² The legal status of the EEZ is therefore sometimes referred to as having a *sui generis* character,

²⁰ Article 37, Article 38 and Article 42 UNCLOS; Evans, 2006, p. 635.

²¹ Article 55, Article 56 and Article 57 UNCLOS.

²² Dixon, 2013, p. 225 - 226.

meaning that it is somewhere between the legal status of the territorial sea and the high seas.²³

2.1.1.1.3 *The High Seas*

Article 86 UNCLOS defines the high seas as all parts of the sea with the exception of the following areas of a state; the internal waters, the territorial sea, the EEZ and the archipelagic waters of an archipelagic state.²⁴ This definition is regarded as customary law and the high seas are seen as *res communis*, meaning that they may not be subject to the sovereignty of any state and that all states have the right to enjoy the freedom of the seas.²⁵

According to the concept of flag state jurisdiction, all vessels shall be registered in a state and consequently also be subject to the jurisdiction of that state, referred to as the flag state. Within the area of the high seas, the main rule is that the flag state enjoys exclusive jurisdiction over its vessels. There are, however, exceptions to this rule related to for example piracy and hot pursuit.²⁶ There are also exceptions relating to pollution where port and coastal states obtain certain powers even in the high seas.²⁷ In this regard, it should be noted that there is an increasing amount of international conventions aiming at a more common approach between different states to for example pollution control and health and safety at sea. Yet, the scope and content of domestic law applicable to a vessel will differ.²⁸ Even if the exceptions to the main rule of exclusive flag state jurisdiction in the high seas are interesting, they will not be evaluated further within the scope of this thesis.

²³ Harrison, James, *Making the Law of the Sea: A Study in the Development of International Law*, Cambridge University Press, 2011, p. 166.

²⁴ Article 86 UNCLOS.

²⁵ Dixon, 2013, p. 241. See also Article 87 and 89 UNCLOS.

²⁶ Evans, 2006, p. 636 – 638.

²⁷ See for example Article 218(1) and Article 221 UNCLOS.

²⁸ Evans, 2006, p. 636 – 638.

2.1.2 MARPOL

The International Convention for the Prevention of Pollution from Ships (MARPOL)²⁹ was negotiated and adopted in IMO in 1973 and its main purpose is the prevention of pollution of the marine environment from ships. MARPOL consists of six annexes containing detailed and rather complex pollution standards. In Regulation 10 in Annex I of MARPOL, so-called special areas are designated. In these special areas, discharges from vessels are strongly restricted and, with certain exceptions, no discharges at all are permitted.³⁰ The Arctic Ocean is not listed as one of these special areas, it has however been recommended by the Arctic Council that such a designation could be made through IMO.³¹

2.1.3 SOLAS

The International Convention for the Safety of Life at Sea (SOLAS)³² is an IMO convention promoting the safety of shipping in general and seaworthiness of ships in particular. SOLAS contains several regulations in order to enhance maritime safety, such as for example rules regarding the construction of ships, different aspects of the safety of navigation and the carriage of goods.³³

²⁹ Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (with annexes, final act and International Convention of 1973). Concluded at London on 17 February 1978, *United Nations Treaty Series*, Vol. 1340, No. 22484, p. 62, (hereinafter MARPOL).

³⁰ Article 1(1) MARPOL; Regulation 10 of Annex I MARPOL; Churchill, R.R. & Lowe, A.V., *The Law of the Sea*, Third Edition, Manchester University Press, 1999, p. 339-340.

³¹ *Arctic Marine Shipping Assessment 2009 Report*, Arctic Council, April 2009, second printing, available at: http://www.pame.is/images/03_Projects/AMSA/AMSA_2009_report/AMSA_2009_Report_2nd_print.pdf, (hereinafter AMSA Report), Recommendation II(D), p. 7.

³² International Convention for the Safety of Life at Sea, 1974 (with annex and final act of the International Conference on Safety of Life at Sea, 1974). Concluded at London on 1 November 1974, *United Nations Treaty Series*, Vol. 1184, No. 18961, p. 278, (hereinafter SOLAS).

³³ Article 1(b) SOLAS; Churchill & Lowe, 1999, p. 265.

Both MARPOL and SOLAS will be discussed further in chapter 4 when the Polar Code and its connection to these two conventions are being evaluated.

2.2 Actors in the region

2.2.1 IMO

IMO is a United Nations specialized agency created in 1948 with a focus on shipping matters.³⁴ The current mandate of IMO has been specified by the Organization itself as follows:

The mission of the International Maritime Organization (IMO), as a United Nations specialized agency, is to promote safe, secure, environmentally sound, efficient and sustainable shipping through cooperation. This will be accomplished by adopting the highest practicable standards of maritime safety and security, efficiency of navigation and prevention and control of pollution from ships, as well as through consideration of the related legal matters and effective implementation of IMO's instruments, with a view to their universal and uniform application.³⁵

Since IMO is a technical organization, it also consists of several committees and sub-committees in which most of its work is being carried out. The two committees of main relevance for this thesis are the MSC, which is responsible for all safety matters related to shipping, and the MEPC, which addresses matters concerning prevention and control of marine pollution by ships.³⁶

The Polar Code is currently being negotiated within IMO and much of the work has been carried out in MSC, MEPC and in the Sub-Committee on Ship Design and Equipment

³⁴ Harrison, 2011, p. 155-156.

³⁵ *IMO Assembly Resolution A.1037(27)*, of 20 December 2011, "Strategic Plan for the Organization (for the six-year period 2012 to 2017)", Annex, available at: <https://docs.imo.org/Shared/Download.aspx?did=70193>, Section 1.1.

³⁶ *IMO What it is*, Brochure issued by IMO, 2013, available at: http://www.imo.org/About/Documents/What%20it%20is%20Oct%202013_Web.pdf, p. 2.

(DE).³⁷ The working process and the content of the Polar Code will be further evaluated in chapter 4 below.

2.2.1.1 The relation between IMO and UNCLOS

IMO is only mentioned in one article in UNCLOS, namely in Article 2 in Annex VIII. Despite this, IMO claims that when UNCLOS is referring to “the competent international organization”³⁸ in several articles regarding the adoption of international shipping rules and standards relating to maritime safety and the prevention and control of marine pollution, it aims exclusively at IMO.³⁹ Although it is generally acknowledged that this reference normally aims at IMO, it should however be noted that it does not give IMO or any other organization regulatory monopoly status.⁴⁰

As mentioned in chapter 2.1.1 above, UNCLOS could be regarded as a framework convention and, consequently, many of its provisions can therefore only be implemented through regulations in other international agreements, often developed by IMO. By referring to for example “generally accepted international rules or standards”⁴¹, “generally accepted international regulations”⁴² or “international rules and standards”⁴³, UNCLOS creates an obliga-

³⁷ *IMO doc. LEG/MISC.7*, of 19 January 2012, “Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization”, Study by the Secretariat of the International Maritime Organization, available at:

<http://www.imo.org/OurWork/Legal/Documents/Implications%20of%20UNCLOS%20for%20IMO.pdf>, p. 24; IMO, *Shipping in polar waters: Development of an international code of safety for ships operating in polar waters (Polar Code)*, <http://www.imo.org/MediaCentre/HotTopics/polar/Pages/default.aspx>, (cited 20.9.2014).

³⁸ See for example Article 22, Article 60 and Article 211 UNCLOS.

³⁹ *IMO doc. LEG/MISC.7*, 2012, p. 7.

⁴⁰ Ringbom, 2008, p. 235.

⁴¹ See for example Article 21(2) UNCLOS.

⁴² See for example Article 21(4) and 39(2) UNCLOS.

⁴³ See for example Article 211 UNCLOS.

tion for the parties of UNCLOS to apply IMO rules and standards. Such rules and standards can be contained in two different IMO instruments; in resolutions adopted by the IMO Assembly, MSC or MEPC or in IMO treaties. The non-mandatory resolutions in IMO are often adopted by consensus and consist of recommendations and guidelines which parties to UNCLOS are expected to follow. These guidelines are sometimes incorporated into IMO treaties.⁴⁴

The application of IMO treaties will be affected both by specific features in each treaty and also by certain articles in UNCLOS.⁴⁵ Article 311(2) UNCLOS regulates the relationship between UNCLOS and other conventions and international agreements, and stipulates the following:

This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.⁴⁶

Moreover, in terms of conventions regarding the marine environment and its protection and preservation, Article 237 UNCLOS, which seems to some extent more liberal than Article 311(2)⁴⁷, establishes the following relating to the provisions in Part XII UNCLOS:

1. The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.
2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general princi-

⁴⁴ *IMO doc. LEG/MISC.7*, 2012, p. 8-10.

⁴⁵ *IMO doc. LEG/MISC.7*, 2012, p. 10.

⁴⁶ Article 311(2) UNCLOS.

⁴⁷ Ringbom, 2008, p. 455, note 286.

ples and objectives of this Convention.⁴⁸

It should be noted that Article 234 UNCLOS is included in Part XII, and is thus covered by Article 237 UNCLOS. Article 234 will be assessed in chapter 3 below, and its relation to the Polar Code will be discussed in chapter 5 below.

In this context, it should also be highlighted that the IMO Secretariat participated in the work that led to the conclusion of UNCLOS and consequently, this participation ensured that UNCLOS and IMO treaties adopted between 1973 and 1982 are compatible and do not overlap. Moreover, specific clauses have been incorporated in some IMO treaties, stating that these treaties shall not prejudice the development of UNCLOS, avoiding potential conflicts between the work of IMO and UNCLOS. On this basis, together with the quoted articles of UNCLOS above, and the fact that several principles included in IMO treaties are compatible with the principles of UNCLOS, it is possible to establish general compatibility between IMO treaties and UNCLOS, at least according to IMO itself.⁴⁹ However, it is important to remember that the work of IMO is constrained by UNCLOS and since IMO decisions more or less are based on consensus, each state may have the possibility to block decisions it does not consider as compliant with UNCLOS.⁵⁰

Finally, it should be highlighted that the extent to which parties to UNCLOS shall apply and implement IMO rules and standards always depends on the degree of international acceptance of these rules and standards. There has been a great increase in terms of formal acceptance of the most relevant IMO treaties since 1982.⁵¹ In order to determine whether IMO standards are generally accepted or not, the concept of “generally accepted international standards” has to be mentioned. Without going deeper into this rather complex con-

⁴⁸ Article 237(1) UNCLOS.

⁴⁹ *IMO doc. LEG/MISC.7*, 2012, p. 7 and p. 11. See for example also Article 9(2) MARPOL.

⁵⁰ Molenaar, 2014, p. 282.

⁵¹ *IMO doc. LEG/MISC.7*, 2012, p. 11-12.

cept, it should be stated that it is not clearly defined and there is thus room for different interpretations of its meaning. Despite this, it is still possible to determine certain IMO standards as generally accepted whereas the legal status of others is more uncertain. Due to its high level of participation, SOLAS is an example of an IMO instrument that is considered as generally accepted. The same probably applies to MARPOL's two compulsory annexes, as they also have a high level of participation. However, this is not the case for all IMO instruments, and a few of MARPOL's optional annexes, for example, have not obtained the same high level of participation and their status is therefore more uncertain.⁵²

2.2.2 The Arctic Council

The Arctic Council was formally established through the Declaration on the establishment of the Arctic Council⁵³ as a high level forum in which cooperation among the Arctic States on common issues relating to the Arctic should be promoted. It is stipulated in the Ottawa Declaration that focus shall be put on issues regarding sustainable development and protection of the Arctic environment. The only issue being excluded from the scope of the work of the Arctic Council is matters related to military security.⁵⁴ The Council consists of different working groups where most of its work is carried out. One of these working groups is PAME, in which focus is to protect the marine environment in the Arctic from land- as well as sea-based activities.⁵⁵

⁵² Harrison, 2011, p. 171-172.

⁵³ *Declaration on the establishment of the Arctic Council*, Ottawa, Canada, September 19, 1996, available at: <http://www.arctic-council.org/index.php/en/document-archive/category/5-declarations?download=13:ottawa-declaration>, (hereinafter Ottawa Declaration).

⁵⁴ The Ottawa Declaration, Section 1(a) and note 1.

⁵⁵ Molenaar, Erik J., "Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea", *The International Journal of Marine and Coastal Law*, Vol. 27, Issue 3, 2012, p. 553-595, (cited from Brill Online), p. 588; *PAME Work Plan 2013-2015*, Protection of the Arctic Marine Environment Working Group, Arctic Council, available at: http://www.pame.is/images/01_PAME/Work_Plan/2013_2015.pdf, p. 3.

There are different sorts of actors within the Arctic Council. The Member States of the Council are Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden and the US. There are also certain organizations of indigenous people that are Permanent Participants in the Council. There is a requirement that the number of Permanent Participants shall be less than the number of Member States. Further, it is possible to obtain observer status in the Council for non-Arctic states, intergovernmental organizations and non-governmental organizations. A condition for obtaining observer status is that the Council considers that these organizations can contribute to its work.⁵⁶ Actors with an observer status may participate in the meetings and engage in the work of the different working groups, but they cannot vote.⁵⁷

The importance of the Arctic Council has, since its establishment, been growing significantly. Today, the Council has established a permanent secretariat and a joint budget, both strengthening the organizational capacity. Moreover, legally binding agreements between states are now being negotiated in the Council, for example the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (the Arctic MOPPR Agreement).⁵⁸ However, the Council was never intended as an international organization with the capacity to adopt legally binding decisions or instruments, and the Arctic MOPPR Agreement was thus never adopted by the Council, although it was negotiated therein.⁵⁹ It should also be mentioned that, in terms of the composition of the Council, the membership is limited, as is the participation through observers. Given the global nature of shipping as

⁵⁶ The Ottawa Declaration, Section 2 and 3.

⁵⁷ Strategic Comments, *Growing importance of the Arctic Council*, Vol. 19, Comment 16, The International Institute for Strategic Studies, June 2013, available at: <http://www.iiss.org/-/media/Silos/Strategic%20comments/2013/Growing-importance-of-the-Arctic-Council/Growing-importance-of-the-Arctic-Council.pdf>, (hereinafter IISS Article), p.1.

⁵⁸ The IISS Article, 2013, p. 1-2.

⁵⁹ Molenaar, 2014, p. 287.

such, these are factors constraining the ability of the Council to address matters related to international shipping.⁶⁰

Further, regarding the general relation between the Arctic Council and IMO, it should be noted that the Council has not obtained observer status in IMO, nor has IMO obtained such status in the Council. The reason for the Council not obtaining observer status in IMO could be that the Member States of the Council also are Member States of IMO, and therefore have the possibility to ensure their Arctic interests in IMO through that latter membership. From a regional interest point of view, this is not a systematic approach to Arctic-related issues in IMO, even though it might be sufficient to fulfill the national interests of each state. By developing a more coordinated approach in IMO, the Member States of the Council could demonstrate the Council's significance as a strong regional forum for international shipping.⁶¹

In terms of regulating Arctic shipping, an important report of the Arctic Council is the AMSA Report, which was completed by PAME in 2009. Several Recommendations concerning marine safety and marine environmental protection in the Arctic were developed based on the findings in the AMSA Report. Recommendation I(B) in the AMSA Report stipulates that the Arctic States shall support IMO in its work regarding the development of updating and making certain parts of the Arctic Guidelines⁶² mandatory. This Recommendation eventually became significant in terms of shaping the decision within IMO to develop the Polar Code.⁶³

⁶⁰ Chircop, 2013, p. 419.

⁶¹ Chircop, 2009, p. 363-364, p. 367.

⁶² *IMO doc. MSC/Circ.1056/MEPC/Circ.399*, of 23 December 2002, "Guidelines for Ships Operating in Arctic Ice-covered Waters", Annex, available at: <https://docs.imo.org/Shared/Download.aspx?did=18892>, (hereinafter Arctic Guidelines).

⁶³ The AMSA Report, p. 6-7; Molenaar, 2014, p. 287-288; Molenaar, 2012, p. 571.

Moreover, regarding the Arctic Council's view of the work within IMO concerning the Polar Code, the Council has acknowledged the importance of this work and has also decided to strengthen its cooperation in the work towards the completion of the Code.⁶⁴

2.2.3 The Arctic Ocean coastal States

The five Arctic Ocean coastal States are Canada, Denmark, Norway, the Russian Federation and the US. As noted above, they are all members of the Arctic Council. However, in certain cases, these states have acted outside the scope of the Arctic Council. One example is the Ilulissat Declaration, where these five states met and discussed different issues related to the Arctic region. At this meeting, the five states stated that they did not see a need for the development of a new international legal regime in the Arctic region. The reason for this was that they considered the legal framework already existing in the region as sufficient.⁶⁵

2.2.4 Other states and actors in the Arctic region

Besides actors such as the Arctic Ocean coastal States and the Arctic Council, other states are also becoming more and more interested in the Arctic region. In the Kiruna Declaration, certain states, all of which have different economic interests in the region, obtained observer status in the Council. Amongst these new Observer States were China, India, Italy, Japan, the Republic of Korea and Singapore. In this regard, it should be noted that the European Union also has applied for observer status, but the Council has not yet accepted its application.⁶⁶

⁶⁴ *Kiruna Declaration, On the occasion of the Eighth Ministerial Meeting of the Arctic Council*, Arctic Council Secretariat, Kiruna, Sweden, 15 May 2013, available at: <http://www.arctic-council.org/index.php/en/document-archive/category/5-declarations?download=1793:kiruna-declaration-signed-2013>, (hereinafter Kiruna Declaration), p. 4.

⁶⁵ *The Ilulissat Declaration*, Arctic Ocean Conference, Ilulissat, Greenland, 28 May 2008, available at: http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf, (hereinafter Ilulissat Declaration), p. 1-2.

⁶⁶ The Kiruna Declaration, p. 6; The IISS Article, 2013, p. 1.

Apart from the increased interest of non-Arctic states in the region, other groups and organizations also have strong interests in regards to Arctic-related matters. The indigenous peoples of the Arctic naturally have interests in the region, particularly concerning what effects the increased Arctic activity will have on the quality of their living environment. Moreover, in terms of the environment, the uniqueness and the environmental fragility of the region have been emphasized and deep concerns amongst environmentalists have been expressed regarding how the future conservation of the region shall be made.⁶⁷

Against this background of different legal documents and actors in the region, one specific article in UNCLOS, namely Article 234, and its impact and significance in the region will be further described and assessed below.

⁶⁷ Chircop, 2009, p. 363-364, p. 357-358.

3 Article 234 UNCLOS

3.1 Background

The three main states negotiating Article 234 UNCLOS during the UNCLOS III negotiations that took place between 1973 and 1982 were Canada, the Soviet Union and the US. Although they had certain competing interests, these three Arctic Ocean coastal States had a common over-all aim, namely to develop a provision protecting the polar marine environment against pollution from ships. When interpreting the wording of Article 234 UNCLOS, it seems to imply that the provision deals generally with all ice-covered areas, but when the article was negotiated it was primarily negotiated with a focus on the Arctic Ocean.⁶⁸ In this context, it should be noted that Canada wanted to ensure that its national regulation AWPPA⁶⁹ was consistent with international law and Article 234 was therefore in particular a result of Canadian efforts.⁷⁰

Despite their common over-all aim concerning the protection of the Arctic marine environment, the three Arctic coastal States had one major difference in terms of their view of the legal status of the polar sea routes on each side of the Arctic Ocean. The US considered both routes as being international straits where foreign ships had extensive navigational rights, whereas the Soviet Union regarded the waters along its coastline as internal waters. Canada, on the other hand, did not claim the waters along its coastline in the Arctic as internal waters until later. However, Canada's position in the negotiations was to not accept these waters as an international strait. Another distinction that could be made between the

⁶⁸ Bartenstein, Kristin, "The "Arctic exception" in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?", *Ocean Development & International Law*, Vol. 42, Issue 1-2, 2011, p. 22-52, (cited from Taylor & Francis), p. 23-24.

⁶⁹ *Arctic Waters Pollution Prevention Act*, R.S.C., 185, c. A-12, Consolidated version current to September 29, 2014, available at: <http://laws-lois.justice.gc.ca/PDF/A-12.pdf>, (hereinafter AWPPA).

⁷⁰ Molenaar, 2014, p. 276.

three Arctic coastal States during the negotiations was that the US, as a maritime power, wanted to ensure that the freedom of navigation was not being interfered, whereas Canada, as a coastal state with interests in extending coastal state jurisdiction in certain aspects, was part of the “Coastal State Group” where such interests were promoted. Unlike Canada, the Soviet Union was only interested in an extended coastal state jurisdiction in relation to the Arctic Ocean and not in a general right for such jurisdiction. In this context, it should also be noted that the negotiations of Article 234 took place during the cold war which affected the positions of the participating states and in particular of the US and the Soviet Union.⁷¹

The disagreement between the US and Canada regarding the legal status of the Northwest Passage was never actually solved, and the wording of Article 234 therefore allows for different interpretations consistent with the position of each state.⁷²

3.2 Content

In this section, the scope of Article 234 UNCLOS will be assessed and certain parts of its wording will be scrutinized. However, a full and thorough analysis of all possible interpretations of this article will not be given here. Focus will instead be put on certain relevant parts of the article in order to make a comprehensive and valuable comparison with the scope of the Polar Code in chapter 5 below.

Article 234 UNCLOS reads as follows:

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

⁷¹ Bartenstein, 2011, p. 25-27.

⁷² Bartenstein, 2011, p. 27.

based on the best available scientific evidence.⁷³

Thus, the article grants additional unilateral power to coastal states in terms of regulating international shipping within their EEZ. However, it contains several conditions for its applicability.⁷⁴

Before going further into the deeper analysis of Article 234 the following should be briefly mentioned about its general scope. When applying the article, a coastal state may adopt regulations more stringent than international law, but international standards still constitute a minimum requirement.⁷⁵ Moreover, the article gives the coastal state a right not only to prescriptive action but also a right to enforcement action. This is very rare within the field of the law of the sea and in general, the right of coastal states to enforcement action is much more restricted than their right to prescriptive action. Further, there is no requirement for coastal states adopting and enforcing regulations pursuant to Article 234 to go through IMO in order to get approval for these regulations, as is required elsewhere. It should also be noted that it is the coastal state that bears the burden of proof that the regulations adopted and enforced are in line with the requirements in the article. The extent of the coastal state's powers to regulate according to Article 234 is, however, limited by and depending on certain conditions.⁷⁶ Some of these conditions and limitations will be assessed below.

First of all, it should be mentioned that the purpose of the laws and regulations adopted under Article 234 is “for the prevention, reduction and control of marine pollution from vessels”⁷⁷. In this regard, it could be questioned whether the article only covers regulations

⁷³ Article 234 UNCLOS.

⁷⁴ Chircop, 2013, p. 424.

⁷⁵ Rosenne, Shabtai & Yankov, Alexander, *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. IV, Martinus Nijhoff Publishers, 1991, p. 396.

⁷⁶ Bartenstein, 2011, p. 37 and p. 39.

⁷⁷ Article 234 UNCLOS.

concerning pollution prevention or if regulations for safety purposes also would fall under the scope of the article. There are certain regulations concerning safety measures, such as regulations relating to the safety of crew and passengers, which cannot necessarily be associated with pollution prevention. In that case, regulations such as SOLAS and the Arctic Guidelines⁷⁸ would instead be applicable. In practice, however, pollution and safety regulations are often interlinked and can, in particular in an area such as the Arctic region, not always be distinguished between.⁷⁹ Regulations with the primary purpose of pollution prevention and with safety as a secondary purpose would thus be consistent with Article 234. So would also regulations where both purposes are given approximately equal importance.⁸⁰

Moreover, the measures taken by a coastal state have to be taken “within the limits of the exclusive economic zone”⁸¹. It has been questioned whether this wording implies that such measures only could be taken in the EEZ as such, or if they also could be taken in the waters inside the EEZ, such as the territorial sea. There are different views amongst scholars in this regard.⁸² One view, supported by McRae and Goundrey, is that the application of Article 234 is limited to the EEZ and that it does not give equal rights to coastal states within the territorial sea. At the same time, however, McRae and Goundrey are also highlighting that it must be assumed that the regulations adopted by coastal states in their EEZs based on Article 234 cannot exceed the power they have in their territorial seas, meaning

⁷⁸ As will be noted in this chapter and in chapter 4.1 below, the Arctic Guidelines are non-mandatory. It should also be pointed out that the new regulations laid down in the Polar Code might be of interest to mention in this context, see more in chapter 4 and 5 below.

⁷⁹ Chircop, 2009, p. 371.

⁸⁰ Molenaar, 2014, p. 276-277.

⁸¹ Article 234 UNCLOS.

⁸² Bartenstein, 2011, p. 28-29.

that for example the right of innocent passage has to be upheld also in these situations.⁸³ Another view, supported by Pharand, is that the article shall be given a broad interpretation and shall include the territorial sea within its scope.⁸⁴ This latter interpretation is also subscribed to by Molenaar, who states that the wording of Article 234 is only intended to restrict the area to the outer limits of the EEZ and not in terms of its inner limits, and thereby not to exclude the territorial sea from the scope of the article.⁸⁵ Also Rosenne and Yankov seem to subscribe to a similar interpretation, stating that the article “refers to that part of the sea extending from the outer limits of the coastal State’s exclusive economic zone to that State’s coastline”⁸⁶. Given the different views presented above, it is thus not clear how this part of Article 234 shall be interpreted.⁸⁷ It seems, however, most accurate to apply Article 234 to all waters inside the outer limits of the EEZ, since giving a coastal state broader powers in waters further away from its coastline, i.e. the EEZ, than in waters closer to its coastline, i.e. the territorial sea, would be inconsistent.

The right of coastal states to adopt regulations according to Article 234 is further limited by a phrase closely connected to “within the limits of the EEZ”, namely “due regard to navigation”⁸⁸. This limitation is, however, somewhat unclear.⁸⁹ There are three major forms of

⁸³ McRae, D.M. & Goundrey, D.J., “Environmental Jurisdiction in Arctic Waters: The Extent of Article 234”, *University of British Columbia Law Review*, Vol. 16, Issue 2, 1982, p. 197-228, (cited from Hein Online), p. 221.

⁸⁴ Pharand, Donat, “The Arctic Waters and the Northwest Passage: A Final Revisit”, *Ocean Development & International Law*, Vol. 38, Issue 1-2, 2007, p. 3-69, (cited from Taylor & Francis), p. 47.

⁸⁵ Molenaar, 2014, p. 276.

⁸⁶ Rosenne & Yankov, 1991, p. 397.

⁸⁷ See also Chircop, 2013, p. 425.

⁸⁸ Article 234 UNCLOS.

⁸⁹ According to Brubaker, these two phrases have to be interpreted together. See Brubaker, R. Douglas, *The Russian Arctic Straits*, International Straits of the World, Vol. 14, Martinus Nijhoff Publishers, 2005, (e-book, EBSCOhost, available at: <http://web.b.ebscohost.com/ehost/detail/detail?sid=f83c9ac7-1031-41b3-91f2->

international navigation applicable in different maritime zones, namely; the right of innocent passage within the territorial sea, the right of transit passage within international straits and finally, the right of freedom of navigation within the EEZ and the high seas. The question in this regard is what kind of international navigation Article 234 covers. The starting point is that the measures taken by coastal states pursuant to Article 234 have to be reasonable in relation to international navigation needs.⁹⁰ The level of reasonableness is however not clear and scholars have different views on how the wording of the article could be interpreted.⁹¹

One interpretation is that coastal states have to take due regard to the navigation that normally applies in the EEZ, namely the freedom of navigation. This would, however, undermine the purpose of the article, since it is supposed to protect the Arctic marine environment by giving the coastal states additional powers to adopt stricter regulations in this regard.⁹² According to McRae and Goundrey, certain limitations must, however, be put on coastal states' right to regulate pursuant to Article 234. Given their view on how to interpret "within the EEZ" stated above, they reach the conclusion that "due regard to navigation" implies that coastal states cannot adopt regulations in the EEZ that could not also be applied in the territorial sea, meaning that they for example cannot deny vessels the right of innocent passage.⁹³ Since coastal states' powers are subject to certain limitations in the territorial sea, such an interpretation means that they cannot adopt regulations regarding design, construction, manning and equipment that are stricter than already existing interna-

6b02e4da83f2%40sessionmgr112&vid=0&hid=109&bdata=JnNpdGU9ZWZWhvc3QtG12ZQ%3d%3d#db=nlebk&AN=173750, cited 15.9.2014), p. 56.

⁹⁰ Bartenstein, 2011, p. 41. See also Brubaker, 2005, p. 56.

⁹¹ See further discussions in Brubaker, 2005, p. 56-58; McRae & Goundrey, 1982, p. 220-222; Bartenstein, 2011, p. 41-45.

⁹² McRae & Goundrey, 1982, p. 221; Bartenstein, 2011, p. 42.

⁹³ McRae & Goundrey, 1982, p. 221-222.

tional rules and standards.⁹⁴ A third interpretation seems to follow from the argument that “due regard to navigation” probably should be given a different meaning under Article 234 than what normally is the case. By at the same time interpreting “within the EEZ” as also including the waters inside the inner limits of the EEZ, such an interpretation would give coastal states a right to apply their own standards in terms of design, construction, manning and equipment within their entire waters up to the outer limits of the EEZ. This latter interpretation seems to be the one applied in state practice.⁹⁵ Allowing coastal states to adopt such standards also appears to be in line with developments in IMO, in particular with the Arctic Guidelines, which includes several parts relating to design, construction, manning and equipment. However, these Guidelines are not mandatory, and in order to receive reliable information as to how Article 234 shall be interpreted, Bartenstein states that a mandatory instrument with an explicit link to Article 234, such as the Polar Code, is needed.⁹⁶

Another question of interpretation of Article 234 relates to the wording “ice-covered areas”⁹⁷ in general and the word “where”⁹⁸ in particular, which is followed by certain conditions listed in the article. The word “where” could be given either a broad or a narrow interpretation. By adhering to the broad interpretation, the word “where” would merely define the geographical area where the extended jurisdiction of coastal states given in Article 234 is applicable. In a narrow interpretation, on the other hand, the word “where” would simply be given the meaning of the word “when”. The outcome of such an interpretation would thus be that Article 234 would only be applicable in situations where the conditions listed in the article actually exist, namely in areas when “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

⁹⁴ Article 21(2) UNCLOS; Bartenstein, 2011, p. 42-43.

⁹⁵ Brubaker, 2005, p. 57-58.

⁹⁶ Bartenstein, 2011, p. 44-45.

⁹⁷ Article 234 UNCLOS.

⁹⁸ Article 234 UNCLOS.

major harm to or irreversible disturbance of the ecological balance”⁹⁹.¹⁰⁰ There are arguments supporting both interpretations and it is thus not clear which interpretation is the correct one.¹⁰¹ However, the narrow interpretation would, according to Bartenstein, be difficult to apply in practice since coastal states then might have to adopt one set of rules for periods that are ice-free, and another set of rules for the remaining time of the year. This would be complicated, in particular because the ice conditions do not change abruptly at a certain point in time each year, but shift constantly and gradually.¹⁰² Moreover, the broader interpretation seems to be the one supported by state practice, and both Canadian and Russian regulations appear to be consistent with such an interpretation. Further, it should also be noted that the US, although it might have had an initial position similar to the narrow interpretation, has not put forward a claim against neither the Canadian nor the Russian regulations in this regard.¹⁰³ In terms of the wording “for most of the year”¹⁰⁴, it is not precisely clear what this actually means. Since local ice conditions constantly change, it should however be the general features of the climate that are of significance.¹⁰⁵ Taken together, the wording “for most of the year”, the fact that the narrow interpretation contains significant practical problems and that the broader interpretation is the one supported by state practice, all seem to be in favor of the broader interpretation.

Furthermore, the regulations adopted by the coastal state in accordance with Article 234 have to be non-discriminatory. This raises the question whether such regulations cannot discriminate amongst foreign vessels only, or between all vessels, both foreign and national. In this respect, Article 234 could be read in conjunction with Article 227 UNCLOS,

⁹⁹ Article 234 UNCLOS.

¹⁰⁰ McRae & Goundrey, 1982, p. 216; Bartenstein, 2011, p. 30.

¹⁰¹ For a more thorough discussion on these two interpretations, see McRae & Goundrey, 1982, p. 216(ff).

¹⁰² Bartenstein, 2011, p. 31.

¹⁰³ Brubaker, 2005, p. 55.

¹⁰⁴ Article 234 UNCLOS.

¹⁰⁵ Rosenne & Yankov, 1991, p. 397.

where it is stated that discrimination “against vessels of any state”¹⁰⁶ is prohibited. This implies that regulations based on Article 234 cannot discriminate against any vessels, regardless of whether they are foreign or national. Such an interpretation also seems to be in line with state practice, with the potential exception of the Russian rules regarding for example icebreaker fees.¹⁰⁷ Also, with regards to environmental aspects, such an interpretation seems most accurate since acceptance of higher levels of environmental threats from either foreign or national vessels would be inconsequent.¹⁰⁸

Another restriction in terms of the application of Article 234 is that the measures taken by coastal states have to be based on “the best available scientific evidence”¹⁰⁹ regarding the marine environment. The scientific standards have to be internationally accepted and cannot thus be based on solely the coastal state’s own scientific data. This requirement could be regarded as an indirect control of the measures taken by coastal states, since they are not under any international review procedure in IMO.¹¹⁰

3.3 National regulations based on Article 234 UNCLOS

All Arctic Ocean coastal States have the right to exercise jurisdiction and adopt regulations pursuant to Article 234. To this point, however, only Canada and the Russian Federation have in fact done so.¹¹¹ Both states have given the Arctic region high political priority and have issued Arctic policies in which shipping plays an important role. There are both similarities and differences between Canadian and Russian Arctic region interests. In terms of similarities for example, they have claimed similar legal status of their respective Arctic

¹⁰⁶ Article 227 UNCLOS.

¹⁰⁷ Rosenne & Yankov, 1991, p. 396-397; Brubaker, 2005, p. 55-56; Chircop, 2009, p. 371, note 56. For a discussion on new Russian regulations in this regard, see chapter 3.3.2 below.

¹⁰⁸ Bartenstein, 2011, p. 41.

¹⁰⁹ Article 234 UNCLOS.

¹¹⁰ Bartenstein, 2011, p. 40.

¹¹¹ Molenaar, 2014, p. 277.

waters. Further, they are supporting IMO's work as well as having implemented most of the main international maritime law conventions and they are both parties to UNCLOS. However, there are also certain differences that should be mentioned. Unlike Canada, the Russian Federation has a large international fleet and thus not only coastal and port state interests but also interests as a flag state. They also have differences in terms of their capabilities of supporting international navigation in the region.¹¹² In the two sections below, a closer look at the main national regulations adopted by Canada and the Russian Federation pursuant to Article 234 will be made.

3.3.1 Canadian regulations

As noted above, Canada clearly has strong interests in the Arctic region in many different aspects. Before evaluating the Canadian regulations adopted in accordance with Article 234, a brief comment on the legal status Canada claims over its Arctic waters should be made. The Arctic Archipelago of Canada has been enclosed by straight baselines and claimed as Canadian internal waters subject to Canadian sovereignty.¹¹³ Canada has also claimed that these waters are internal waters based on historic title. Without going further into the discussion concerning the legal bases for the Canadian claim, it should be mentioned that it has been criticized by several other states, such as the US and certain Member States of the European Union, arguing that these waters should be regarded as international straits and not Canadian internal waters.¹¹⁴

¹¹² Chircop, Aldo (et al.), "Course Convergence? Comparative Perspectives on the Governance of Navigation and Shipping in Canadian and Russian Arctic Waters", *Ocean Yearbook*, Vol. 28, Issue 1, 2014, p. 291-327, (cited from Brill Online), p. 293-295.

¹¹³ *Oceans Act*, S.C. 1996, c. 31, Consolidated version current to September 29, 2014, available at: <http://laws-lois.justice.gc.ca/PDF/O-2.4.pdf>, Section 5-7, Section 25(a)(i); *Territorial Sea Geographical Coordinates (Area 7) Order*, SOR/85-872, Consolidated version current to September 29, 2014, available at: <http://laws-lois.justice.gc.ca/PDF/SOR-85-872.pdf>; Chircop (et al.), 2014, p. 297-298.

¹¹⁴ Pharand, 2007, p. 4-5, p. 58; Chircop (et al.), 2014, p. 297-298; Chircop, 2013, p. 423-424.

Turning to the Canadian regulation of shipping pursuant to Article 234, one key instrument that was noted in chapter 3.1 above worth highlighting is AWPPA, which is the main legislative framework for Arctic shipping.¹¹⁵ In AWPPA, Canada has defined its Arctic waters as follows:

”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.¹¹⁶

Instead of defining the Northwest Passage, Canada has thus chosen to implement its international shipping regulations in all its Arctic waters as defined above. These Arctic waters are further divided into different shipping safety control zones¹¹⁷ in which regional shipping standards can be regulated. AWPPA consists of two key regulations, namely ASPPR¹¹⁸ and AWPPR¹¹⁹, in which its provisions on pollution prevention are laid down. In terms of discharge rules, Canada has implemented higher standards than what is stipulated in MARPOL.¹²⁰ The Canadian discharge rules are strict and consist of zero discharge requirements of waste and oil, with certain limited exceptions.¹²¹

¹¹⁵ Chircop (et al.), 2014, p. 300-301.

¹¹⁶ AWPPA, Section 2.

¹¹⁷ AWPPA, Section 11; *Shipping Safety Control Zones Order*, C.R.C., c. 356, Consolidated version current to September 29, 2014, available at: http://laws-lois.justice.gc.ca/PDF/C.R.C.,_c._356.pdf, Section 3.

¹¹⁸ *Arctic Shipping Pollution Prevention Regulations*, C.R.C., c. 353, Consolidated version current to September 29, 2014, available at: http://laws-lois.justice.gc.ca/PDF/C.R.C.,_c._353.pdf, (hereinafter ASPPR).

¹¹⁹ *Arctic Waters Pollution Prevention Regulations*, C.R.C., c. 354, Consolidated version current to September 29, 2014, available at: http://laws-lois.justice.gc.ca/PDF/C.R.C.,_c._354.pdf, (hereinafter AWPPR).

¹²⁰ Chircop (et al.), 2014, p. 300-302.

¹²¹ See for example AWPPA, Section 4; ASPPR, Section 28-29.

Furthermore, AWPPA is not just limited to regulations regarding pollution prevention, but consists also of regulations concerning safety matters.¹²² In ASPPR, for example, there are certain regulations relating to construction and polar class standards for vessels.¹²³ Moreover, if a vessel is not in compliance with certain construction and polar class standards laid down in AWPPA or in any of the regulations under this act, that vessel could be prohibited from navigating in the shipping safety control zones of Canadian Arctic waters. In this respect, Canadian authorities have significant enforcement powers and can in certain cases for example order a ship to leave a specific zone. Other enforcement powers, such as ordering ships to participate in clean-ups or report their position, apply with regards to discharges discussed in the section above.¹²⁴

The fact that AWPPA also consists of regulations regarding safety matters could be an issue in terms of the compatibility with Article 234, since the article first and foremost aims at measures relating to pollution prevention. At the same time, however, as also noted in chapter 3.2 above, the scope of Article 234 is not entirely clear and gives therefore room for different interpretations. Moreover, as noted in the same chapter, it is not always possible to distinguish pollution prevention and safety measures from each other, meaning that safety measures might be necessary in order to serve the purpose of pollution prevention.¹²⁵ In this context it should also be highlighted, as mentioned in chapter 3.1 above, that Canada took part in the negotiations of Article 234 *inter alia* because they wanted to ensure AWPPA's consistency with international law. The content of AWPPA could therefore be seen as a reason to interpret Article 234 in a broader way. This seems to be in line with the view of Rosenne and Yankov, who have stated that Article 234 could be considered as a basis for adopting measures such as those contained in AWPPA.¹²⁶ Against this background, it

¹²² Chircop (et al.), 2014, p. 304.

¹²³ See for example ASPPR, Section 4-9.

¹²⁴ See for example AWPPA, Section 12(1) and Section 15.

¹²⁵ Article 234 UNCLOS; Chircop (et al.), 2014, p. 304.

¹²⁶ Rosenne & Yankov, 1991, p. 398.

might be safe to say that AWPPA is in compliance with Article 234. However, if AWPPA would be applied more vigorously with regards to enforcement than earlier, the wide scope of possible interpretations of Article 234 could be questioned in the future.¹²⁷

Another key instrument in Canadian Arctic shipping regulation is the Canada Shipping Act, 2001 (CSA)¹²⁸, with one of its general objectives as protecting the marine environment from harmful shipping activities. This is further specified under Part 9 in CSA and the provisions laid down there allow for example regulations regarding pollution discharges and also regarding design and construction to be made. Moreover, it should be mentioned that this part applies to Canadian waters and waters in its EEZ.¹²⁹

One set of regulations adopted under CSA is the NORDREG Regulations¹³⁰, which were first introduced as voluntary regulations in 1977 but were made mandatory in 2010. According to the NORDREG Regulations some vessels, depending on their tonnage, activity or cargo, have to report and provide certain information before they enter the so-called NORDREG Zone¹³¹. In order to enter that zone, vessels also have to obtain a clearance.¹³² In this regard, certain details of the NORDREG Regulations are worth highlighting. In terms of the requirement of reporting, a sailing plan and a daily position report have to be

¹²⁷ Chircop (et al.), 2014, p. 304. See also chapter 3.2 above where different interpretations of Article 234 are discussed.

¹²⁸ *Canada Shipping Act, 2001*, S.C. 2001, c. 26, Consolidated version current to September 29, 2014, available at: <http://laws-lois.justice.gc.ca/PDF/C-10.15.pdf>, (hereinafter CSA).

¹²⁹ See for example CSA Section 6(c), Section 186(1), Section 187 and Section 190.

¹³⁰ *Northern Canada Vessel Traffic Services Zone Regulations*, SOR/2010-127, Consolidated version current to September 29, 2014, available at: <http://laws-lois.justice.gc.ca/PDF/SOR-2010-127.pdf>, (hereinafter NORDREG).

¹³¹ See NORDREG, Section 2 for a definition of the NORDREG Zone.

¹³² Molenaar, 2014, p. 277; NORDREG, Section 3 and Section 4; CSA, Section 126(1)(A).

submitted.¹³³ Further, a vessel that is acting in non-compliance with for example the requirement of obtaining a clearance before entering a NORDREG Zone, could be subject to a fine or to imprisonment as well as to detention.¹³⁴

The NORDREG Regulations were discussed during MSC's 88th Session in IMO. The US expressed concerns regarding the consistency of the NORDREG Regulations with international law in a document¹³⁵ given to MSC. One issue highlighted by the US was that the NORDREG Regulations had been made mandatory without first submitting them to MSC in order for them to be adopted and recognized by IMO. This, according to the US, had to be done pursuant to SOLAS and it was thus not in line with normal practice in IMO to act unilaterally in this regard. The fact that the NORDREG Regulations were applicable within the EEZ of Canada was also problematic according to the US, since such regulations pursuant to SOLAS only could be made mandatory within a state's territorial sea.¹³⁶ Canada, however, claimed that the NORDREG Regulations were consistent with international law and that the legal basis justifying these regulations, both in terms of their applicability to the EEZ and in terms of making them mandatory without seeking approval from IMO beforehand, was provided in Article 234 UNCLOS.¹³⁷

¹³³ NORDREG, Section 6 and Section 7.

¹³⁴ CSA, Section 138(1a), 138(2) and (4).

¹³⁵ *IMO doc. MSC 88/11/2*, of 22 September 2010, "Safety of Navigation, Northern Canada Vessel Traffic Services Zone Regulations", Submitted by the United States and INTERTANKO, available at: <https://docs.imo.org/Shared/Download.aspx?did=62872>.

¹³⁶ *IMO doc. MSC 88/11/2*, p. 2; *IMO doc. MSC 88/26*, of 15 December 2010, "Report of the Maritime Safety Committee on Its Eighty-eight Session", available at: <https://docs.imo.org/Shared/Download.aspx?did=64360>, p. 53-56.

¹³⁷ *IMO doc. MSC 88/26*, p. 54; *IMO doc. MSC 88/26/Add.1*, of 19 January 2011, "Report of the Maritime Safety Committee on Its Eighty-eight Session", Annex 27, available at: <https://docs.imo.org/Shared/Download.aspx?did=65003>, p. 1-2.

The US never mentioned Article 234 UNCLOS when questioning the NORDREG Regulations in MSC 88, however, they did submit a communication to the Canadian Department of Transport in which this was done. In this communication, the US pointed out the “due regard to navigation”-requirement in Article 234 as not being met in the NORDREG Regulations. The requirement of obtaining a clearance before entering the NORDREG Zone was mentioned as an example of where due regard to navigation was not being taken. Rights such as the freedom of navigation in the EEZ and innocent passage in the territorial sea were mentioned in this context. Further, The US referred to the requirement in Article 234 of regulations being based on the “best available scientific evidence” and questioned, since no information regarding what sort of evidence had caused the development of the regulations had been given, whether the NORDREG Regulations actually were based on such evidence. Moreover, the US questioned whether the limitation of the applicability of Article 234 to “ice-covered areas” was met, in particular as ice levels had been noted to be low. Another part of Article 234 also emphasized by the US, was the requirement of non-discrimination and the fact that the NORDREG Regulations seemed to differentiate between Canadian and foreign vessels in certain aspects. Finally, the US reiterated its position in terms of the legal status of the Northwest Passage as being an international strait.¹³⁸

The discussions in IMO concerning the NORDREG Regulations never reached any conclusions and have not resurfaced. As for the legal status of the Northwest Passage, this remains an unresolved issue between the US and Canada.¹³⁹

3.3.2 Russian regulations

Like Canada, the Russian Federation also has strong interests in the Arctic region and traditionally, its maritime regulations have followed the developments made in Canadian law.

¹³⁸ Letter to Robert Turner, Department of Transport, Ottawa, from Eric Benjaminson, Minister-Counsellor, Economic Energy and Environmental Affairs, Embassy of the United States of America, 19 March 2010, available at: <http://www.state.gov/documents/organization/179286.pdf>.

¹³⁹ Molenaar, 2014, p. 275, p. 278.

Recently, however, the Russian Federation has taken several new initiatives in the Arctic region worth highlighting.¹⁴⁰ Before doing so, a brief overview of the legal status the Russian Federation has claimed over its Arctic waters should be made.

The Russian Federation has claimed that most of the straits in the Arctic are internal waters based on the fact that these waters have been enclosed by straight baselines.¹⁴¹ Whether or not this claim also is based on historic title is debated and thus not clear.¹⁴² For many years, the Russian Federation has relied upon the so-called sector theory when defining the scope of their Arctic waters. This theory was first introduced in Canada and influenced thereafter the Russian definition of their Arctic waters in 1926 as consisting of all lands and islands which were located north of the Russian coastline all the way across to the North Pole, and which did not already belong to any other state at that point in time. Later developments in Russian doctrine, however, shows that the sector theory is being re-evaluated and that generally accepted principles of international law are becoming more important.¹⁴³

Moving on to the Russian regulations in the Arctic, one key instrument is the Russian Basic State Policy, a document issued by the Russian Security Council in 2008 in which the main objectives, goals and priorities of the Russian Federation in the Arctic region are contained. In this policy, it is also stated that the Northern Sea Route and the use of it is a Russian

¹⁴⁰ Chircop (et al.), 2014, p. 325-326.

¹⁴¹ Brubaker, R. Douglas, "Straits in the Russian Arctic", *Ocean Development & International Law*, Vol. 32, Issue 3, 2001, p. 263-287, (cited from Taylor & Francis), p. 265.

¹⁴² Solski, Jan Jakub, "New developments in Russian Regulation of Navigation on the Northern Sea Route", *Arctic Review on Law and Politics*, Vol. 4, Issue 1, 2013, p. 90-119, (cited from Gyldendal Rettsdata), p. 97-98.

¹⁴³ Timtchenko, Leonid, "The Russian Arctic Sectoral Concept: Past And Present", *Arctic*, Vol. 50, Issue 1, 1997, p. 29-35, available at:

<https://vpn2.uio.no/+CSCO+0h756767633A2F2F63686F662E6E76616E2E68706E79746E656C2E706E++/arctic/Arctic50-1-29.pdf>, p. 29-32.

basic national interest in the Arctic.¹⁴⁴ The importance of the Northern Sea Route is further emphasized in a Russian Arctic strategy, which was developed in 2013 in response to the Russian Basic State Policy. This strategy consists of different ways and mechanisms on how the Russian Federation shall reach their goals in the Arctic region. In terms of the Northern Sea Route, it is stated in the strategy that the Russian legal framework for shipping in the Northern Sea Route shall be improved in several ways, including matters relating to security and insurance as well as tariff regulations for icebreaking and other support services.¹⁴⁵

The term Northeast Passage should include the Northern Sea Route and unlike the Northwest Passage, the Northern Sea Route is defined in Russian legislation as follows:¹⁴⁶

The water area of the Northern Sea Route shall be considered as the water area adjacent to the Northern coast of the Russian Federation, comprising the internal sea waters, the territorial sea, the adjacent zone and the exclusive economic zone of the Russian Federation and confined in the East with the Line of Maritime Demarcation with the United States of America and Cape Dezhnev parallel in Bering Strait, with the meridian of Cape Mys Zhelania to the Novaya Zemlya Archipelago in the West, with the eastern coastline of the Novaya Zemlya Archipelago and the western borders of Matochkin Strait, Kara Strait and Yugorski Shar.¹⁴⁷

¹⁴⁴ *Basics of the State Policy of the Russian Federation in the Arctic for the Period till 2020 and for a Further Perspective*, adopted by the President of the Russian Federation, D. Medvedev, 18 September 2008, promulgated 30 March 2009, publication of the official governmental newspaper "Rossiyskaya Gazeta", available at: http://www.arctic-lia.com/docs/nsr/legislation/Policy_of_the_RF_in_the_Arctic.pdf, (hereinafter Russian Basic State Policy), Section I(1) and Section II(4)(d).

¹⁴⁵ *The Development Strategy of the Arctic Zone of the Russian Federation and National Security for the period up to 2020*, approved by President Vladimir Putin on February 20, 2013, available at: <http://www.iecca.ru/en/legislation/strategies/item/99-the-development-strategy-of-the-arctic-zone-of-the-russian-federation>, (hereinafter Russian Arctic Strategy), Section I(1), Section I(2) and Section III(12)(d).

¹⁴⁶ Chircop (et al.), 2014, p. 296-297, p. 317.

¹⁴⁷ *The Russian Federation Federal Law on Amendments to Specific Legislative Acts of the Russian Federation related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route*, adopted by the State Duma on 3 July 2012, approved by the Council of Federation on 18 July 2012, NSR

Given that the EEZ is included as the northern limit of the definition of the Northern Sea Route, the restrictions in Article 234 UNCLOS will be of relevance when regulating in this area. The definition is laid down in the Russian Federal Law 2012, which introduces new provisions by amending several other Russian shipping regulations.¹⁴⁸ For example, it is stated that rules regarding navigation in the Northern Sea Route shall prevent, minimize and control pollution from ships while also ensuring safe navigation. Moreover, the Russian Federal Law 2012 contains information as to how and when permits for navigation in the Route shall be issued.¹⁴⁹

In terms of navigation permits, this is required by the NSR Rules¹⁵⁰, which is one of the new Russian initiatives taken recently. In the NSR Rules, detailed requirements regarding what kind of documentation is required in order to obtain a permit are listed. It is also stated that a ship cannot enter the Northern Sea Route until the permit's validity has commenced.¹⁵¹ The NSR Rules also set certain requirements on ship design and equipment in order for ships to enter and sail in the Route.¹⁵² With regards to pollution prevention, the prohibition of discharge of oil residues in the NSR Rules should also be highlighted.¹⁵³

administration, available at: http://www.arctic-lia.com/docs/nsr/legislation/federal_law_nsr.pdf, (hereinafter Russian Federal Law 2012), Clause 3, adding Clause 5.1(1) to the Merchant Marine Code of the Russian Federation.

¹⁴⁸ The Russian Federal Law 2012; Chircop (et al.), 2014, p. 317-318.

¹⁴⁹ The Russian Federal Law 2012, Clause 3, adding Clause 5.1(2) and Clause 5.1(4) to the Merchant Marine Code of the Russian Federation.

¹⁵⁰ *Rules of navigation in the water area of the Northern Sea Route*, approved by the Order of the Ministry of Transport of Russia No 7, January 17, 2013, available at: http://www.nsr.ru/en/pravila_plavaniya/, (hereinafter NSR Rules).

¹⁵¹ NSR Rules, Section II.

¹⁵² See for example NSR Rules, Section VIII(60)-(61) and Annex 2.

¹⁵³ NSR Rules, Section VIII(65).

Finally, it is worth noting that the NSR Rules are non-discriminatory in terms of ship nationality, which is an issue that has previously been raised.¹⁵⁴

The NSR Rules also contain a section regarding icebreaking. The fee rate for these services are determined by Russian law depending on, for example, capacity and class of the ship.¹⁵⁵ The Russian icebreaker fees have been questioned by the international community on several occasions. One issue is in particular that ships have been required to pay a fee for icebreaker services and other similar support services even if they have not been using them. In practice, ships have thus paid a fee solely based on their presence in the Northern Sea Route.¹⁵⁶ In the Russian Federal Law 2012, however, it is clearly stated that the fees “shall be effected based on the amount of services actually delivered”¹⁵⁷. According to this wording, there is an obligation of the Russian Federation to charge ships only for the services used, and not solely for their presence in the Northern Sea Route. However, the Russian Federation might still try to find other legal bases for requiring such obligatory fees, although it will be difficult to justify under the scope of Article 234 UNCLOS.¹⁵⁸

Regarding the relation between Article 234 UNCLOS and Russian national regulations in the Arctic in general, two main approaches amongst Russian scholars are worth distinguishing. One approach is that Russian regulations have to be adopted in accordance with UNCLOS in general and Article 234 in particular, meaning that Article 234 sets out the legal basis and thus also the limitations for extended jurisdiction in the different zones outside the internal waters. At the same time, however, the scholars promoting this approach sometimes still point out the Russian Arctic as an area of special interest occasionally in

¹⁵⁴ Chircop (et al.), 2014, p. 319.

¹⁵⁵ NSR Rules, Section III(24).

¹⁵⁶ See for example Solski, 2013, p. 113-114; Chircop (et al.), 2014, p. 323; Molenaar, 2014, p. 277.

¹⁵⁷ The Russian Federal Law 2012, Clause 3, adding Clause 5.1(5) to the Merchant Marine Code of the Russian Federation.

¹⁵⁸ Solski, 2013, p. 115.

need of stricter national measures.¹⁵⁹ Another approach is that Arctic marine areas must be handled differently than other marine areas, meaning for example that not only UNCLOS but also international customary law is of relevance when determining the scope of the legal regime in this area.¹⁶⁰ According to Solski, some scholars consider Article 234 UNCLOS as not being the only legal basis upon which national regulations can be relied, but that factors such as the consistent control that the Russian Federation has long exercised over these waters also are of significance. In this context, Solski states that it has been argued that the control exercised by the Russian Federation has never been sufficiently challenged by other states¹⁶¹ .¹⁶²

Taken together, the Russian policy in the Arctic has grown into becoming more focused on economic development and making the Northern Sea Route commercial, and thereby also promoting international navigation in the area. Canada, on the other hand, has a more protective attitude towards the Arctic region, relying on AWPPA and focusing on protecting Arctic sovereignty in its policy.¹⁶³ It can be concluded that the legality of certain parts of both the Canadian and Russian regulations pursuant to Article 234 UNCLOS might be questioned. Further analysis in this regard will be made in chapter 5 below, where also the relation to the Polar Code will be discussed. Before that, however, the scope and content of the Polar Code will be assessed.

¹⁵⁹ This approach is favored by for example Anatolii Kolodkin and V. Yu Markov, as referred to in Solski, 2013, p. 99.

¹⁶⁰ This approach is favored by for example Alexander N. Vylegzhanin, as referred to in Solski, 2013, p. 100.

¹⁶¹ There is however examples of where the US has objected to certain Russian jurisdictional claims in the Arctic Ocean. See "United States Responses to Excessive National Maritime Claims", *Limits in the Seas No 112*, United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, 1992, available at: <http://www.state.gov/documents/organization/58381.pdf>, p. 20-21.

¹⁶² Solski, 2013, p. 100-101.

¹⁶³ Chircop (et al.), 2014, p. 325.

4 The Polar Code

4.1 Background

The development of a mandatory Polar Code has been a long, and is still an on going, process. Back in the 1980s, different national regulations in terms of construction and design of vessels operating in polar waters started to develop. This led to an international situation where various national rules existed, which created confusion among stakeholders such as states and companies as well as classification societies and insurance firms. However, it took some time before actions in order to uniform these different rules actually were taken. During the 1990s, the development of an international polar code started to take form at the international level, but it was not until 2002 that the non-mandatory Arctic Guidelines were finalized by IMO.¹⁶⁴

The objective of the Arctic Guidelines is to “address those additional provisions deemed necessary for consideration beyond existing requirements of the SOLAS Convention, in order to take into account the climatic conditions of Arctic ice-covered waters and to meet appropriate standards of maritime safety and pollution prevention.”¹⁶⁵ The Arctic Guidelines are thus only applicable to the Arctic and not to the Antarctic. In 2009, the non-mandatory Polar Guidelines¹⁶⁶ were adopted. The purpose of the Polar Guidelines is similar to the purpose of the Arctic Guidelines, but instead of referring to SOLAS they refer to “SOLAS and MARPOL” and instead of referring to “Arctic ice-covered waters” they refer

¹⁶⁴ The Arctic Guidelines; Kikkert, Peter, “Promoting National Interests and Fostering Cooperation: Canada and the Development of a Polar Code”, *Journal of Maritime Law & Commerce*, Vol. 43, Issue 3, 2012, p. 319-334, (cited from Hein Online), p. 321 (ff).

¹⁶⁵ The Arctic Guidelines, P-1.2.

¹⁶⁶ *IMO Assembly Resolution A.1024(26)*, of 18 January 2010, "Guidelines for Ships Operating in Polar Waters", Annex, available at:

http://www.imo.org/blast/blastData.asp?doc_id=13816&filename=A%201024%2826%29.pdf, (hereinafter Polar Guidelines).

to “polar waters”.¹⁶⁷

The Polar Guidelines have more or less the same structure as the Arctic Guidelines, but some significant differences exist, such as for example the inclusion of the Antarctic in its geographical scope.¹⁶⁸ Both Guidelines emphasize safety matters, and the recommendations are therefore first and foremost meant as supplementing SOLAS. There are, however, certain environmental aspects too, in particular in the Polar Guidelines.¹⁶⁹

Both Guidelines are, as noted above, non-mandatory and a need for the development of a mandatory instrument still existed. Based on proposals from Denmark, Norway, the US and the United Kingdom, IMO therefore initiated a process of developing a mandatory Polar Code in its DE sub-committee in 2010.¹⁷⁰ In this context, it should be mentioned that other actors, such as the Arctic Council, initially also showed their support for the development of a mandatory Polar Code.¹⁷¹ It should also be mentioned that both the Russian Federation and Canada are participating in the development of the Code.¹⁷²

4.2 Content

At the time of writing, as noted in chapter 1.2 and 1.3 above, the Polar Code is still being negotiated within IMO and the draft version of the Code that will be discussed in this section is therefore neither final nor yet adopted. A thorough analysis of detailed provisions in the Draft Polar Code will not be done in this thesis, instead the assessment will focus on the

¹⁶⁷ The Polar Guidelines, P-1.3.

¹⁶⁸ See for example the Polar Guidelines, G-3.2.

¹⁶⁹ Anderson, H. Edwin III, “Polar Shipping, The Forthcoming Polar Code and Implications for the Polar Environments”, *Journal of Maritime Law & Commerce*, Vol. 43, Issue 1, 2012, p. 59-83, (cited from Hein Online), p. 70-72.

¹⁷⁰ Kikkert, 2012, p. 329.

¹⁷¹ See the AMSA Report, Recommendation I(B).

¹⁷² Chircop (et al.), 2014, p. 295, note 13.

Code's general content, including its scope and objective. The Draft Polar Code is closely related to both SOLAS and MARPOL and several technical cross-references are made between the different IMO instruments. In order to keep the assessment as comprehensive as possible, the thesis will try not to go too deep into these technical references in the respective instruments. Sometimes, however, it has been necessary to at least touch upon the provisions linking the instruments together.

In the Preamble of the Draft Polar Code, it is acknowledged that the demands of operating in the polar waters might not always be fulfilled by the provisions laid down in SOLAS and MARPOL as well as in other binding IMO instruments.¹⁷³ It is further stated that the Code is supposed to “supplement existing IMO 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”¹⁷⁴. Thus, the Draft Polar Code has a supplementary role in relation to the provisions laid down in SOLAS and MARPOL. In this context, the tacit amendment procedure should be mentioned. This procedure is used for annexes of IMO conventions and makes it easier to amend these conventions, as the amendments enter into force unless they are objected to by a certain amount of states.¹⁷⁵ The introduction of the new Chapter XIV SOLAS, for example, and the amendments that will follow, shall be considered as accepted unless a certain amount of states have objected to them. Chapter XIV SOLAS will also make the Polar Code mandatory under that convention.¹⁷⁶

The main objective of the Draft Polar Code is to “provide for safe ship operation and the protection of the polar environment by addressing risks present in polar waters and not ad-

¹⁷³ Paragraph 2, Preamble, the Draft Polar Code.

¹⁷⁴ Paragraph 1, Preamble, the Draft Polar Code.

¹⁷⁵ Churchill & Lowe, 1999, p. 272.

¹⁷⁶ *IMO doc. MSC 94/3*, of 31 July 2014, Annex 2, p. 1; *IMO doc. MSC 94/3/1*, of 30 July 2014, “Consideration and Adoption of Amendments to Mandatory Instruments”, Paragraph 1; Regulation 1.1, Chapter XIV SOLAS.

equately mitigated by other instruments of the Organization”¹⁷⁷. The Draft Polar Code is divided into both mandatory and non-mandatory parts, including one mandatory Introduction, as well as one part with mandatory provisions relating to safety measures and one with mandatory provisions relating to pollution prevention measures. There are also two non-mandatory parts relating to both matters respectively.¹⁷⁸

As noted in chapter 1.6 above, the geographical scope of the Draft Polar Code is restricted to polar waters, which is defined in Chapter XIV SOLAS as including inter alia Arctic waters. These definitions are applicable to Part I-A of the Code, i.e. the mandatory provisions related to safety measures. Regarding Part II-A and the mandatory provisions concerning pollution prevention measures, the definitions stipulated in MARPOL are applicable.¹⁷⁹

With regards to safety measures, vessels operating in polar waters will be required to obtain a Polar Ship Certificate. This Certificate will be issued to vessels after ensuring their fulfillment of certain requirements of the Code.¹⁸⁰ Moreover, the Draft Polar Code contains several detailed provisions regarding the construction, design and equipment of vessels operating in the area as well as provisions relating to matters such as manning, search and rescue.¹⁸¹ However, the Draft Polar Code does not contain any mandatory provisions on icebreaker assistance. Instead, there is a section in the non-mandatory Part I-B of the Code

¹⁷⁷ Paragraph 1, Introduction, the Draft Polar Code. Note that ”the Organization” here aims at IMO, see Paragraph 2.8, Introduction, the Draft Polar Code.

¹⁷⁸ Paragraph 4, Introduction, the Draft Polar Code.

¹⁷⁹ Paragraph 2 and 5, Introduction, the Draft Polar Code. Note that in the Draft Polar Code, it is not yet stated which regulations in MARPOL that define the Arctic waters and the Antarctic area. There is only a reference to specific provisions in SOLAS defining these areas.

¹⁸⁰ Paragraph 1.3, Part I-A, the Draft Polar Code.

¹⁸¹ See Part I-A, the Draft Polar Code.

in which recommendations regarding navigation with icebreaker assistance are laid down.¹⁸²

Regarding pollution prevention measures, the Draft Polar Code contains a prohibition against discharge of oil¹⁸³, but allows certain restricted discharges of for example sewage¹⁸⁴ and waste¹⁸⁵. In this respect, at least with regards to discharges of food waste, the Draft Polar Code seems less strict than for example the Canadian regulation, which, as noted in chapter 3 above, prohibits all kind of waste, with certain limited exceptions.¹⁸⁶

As regards the relation between the Polar Code and other international law, a provision was laid down in the Preamble in an older draft version of the Code, which stated that “Nothing in this Code shall be taken as conflicting with the United Nations Convention on the Law of the Sea, 1982, the Antarctic Treaty System and other international instruments applicable to polar waters.”¹⁸⁷ This provision was however taken away from the Draft Polar Code itself and a similar provision is, at the time of writing, instead included in Chapter XIV SOLAS, stating that “Nothing in this chapter shall prejudice the rights or obligations of States under international law.”¹⁸⁸ Comparing this new text to the older one, it is clear that the old draft included a specific reference to UNCLOS, whereas the new text instead contains a general reference to international law. What potential effect this might have on the

¹⁸² Paragraph 3.2, Part I-B, the Draft Polar Code.

¹⁸³ Paragraph 1.4.1.2, Part II-A, the Draft Polar Code.

¹⁸⁴ Paragraph 4.4.1, Part II-A, the Draft Polar Code.

¹⁸⁵ Paragraph 5.4, Part II-A, the Draft Polar Code.

¹⁸⁶ AWPPA, Section 4; Molenaar, 2014, p. 281.

¹⁸⁷ *IMO doc. SDC 1/WP.4*, 24 January 2014, “Development of a Mandatory Code for Ships Operating in Polar Waters”, Annex, “Draft International Code for Ships Operating in Polar Waters”, Preamble, Paragraph 8.

¹⁸⁸ Regulation 2.5, Chapter XIV SOLAS.

relationship between Article 234 UNCLOS and the Polar Code will be further discussed under chapter 5 below.

Another aspect of the Draft Polar Code which could be related more specifically to Article 234 UNCLOS is Paragraph 4 in the Preamble, where the following is stated: “The relationship between the additional safety measures and the protection of the environment is acknowledged as any safety measure taken to reduce the probability of an accident, will largely benefit the environment.”¹⁸⁹ It seems thus that the link between safety matters and environmental matters is being clearly emphasized in this wording. The potential implications this may have on the interpretation of Article 234 will be further analyzed under chapter 5 below. Before doing so, the next section will briefly mention where in the process the negotiations currently are.

4.3 Current negotiations

The next step on the agenda for the negotiations regarding the Polar Code is the 67th Session of the MEPC in October 2014. At this meeting the environmental chapter, i.e. Part II-A and II-B, will be further discussed. The MSC, however, is planning to adopt the Draft Polar Code as well as the associated Chapter XIV SOLAS at its 94th Session in November 2014, as they are both, in principle, already approved by the MSC.¹⁹⁰ At the time of writing, it is therefore uncertain exactly when the Polar Code as a whole will be finalized and adopted by IMO.

¹⁸⁹ Paragraph 4, Preamble, the Polar Code.

¹⁹⁰ *IMO doc. MSC 94/3/1*, 30 July 2014, “Consideration and Adoption of Amendments to Mandatory Instruments”, Paragraph 1 and Paragraph 2; IMO, *Shipping in polar waters: Development of an international code of safety for ships operating in polar waters (Polar Code)*, <http://www.imo.org/MediaCentre/HotTopics/polar/Pages/default.aspx>, (cited 20.9.2014).

5 The connection between Article 234 UNCLOS, the Polar Code and the Canadian and Russian national regulations

When assessing the connection between Article 234 UNCLOS and the Polar Code, it is important to keep in mind what was presented in chapter 2.2.1.1 in terms of the relation between UNCLOS and IMO, since Article 234 is a part of UNCLOS and the Polar Code is an IMO instrument. In that chapter it was stated that, in order to avoid potential conflicts between the work of IMO and UNCLOS, many IMO instruments include specific provisions stating that the IMO instruments shall not prejudice the development of UNCLOS. In chapter 4 above, it was noted that a similar provision referring specifically to UNCLOS previously had been made in an older draft version of the Polar Code, but that it had been replaced by a provision in Chapter XIV SOLAS in which a more general reference to international law is made. What potential effect this might have on the connection between Article 234 UNCLOS and the Polar Code is not entirely clear.

However, according to Molenaar at least the provision in the older draft version of the Polar Code, which he refers to as a “saving clause”, would allow for example Canada to continue to use Article 234 as a justification for applying stricter discharge rules than those laid down in the Polar Code.¹⁹¹ Regarding safety measures, the same would presumably apply to the newer version in Chapter XIV SOLAS as well, since UNCLOS clearly is a part of international law. If so, coastal states such as Canada and the Russian Federation would still be entitled to adopt and enforce stricter regulations than those found in the Polar Code pursuant to Article 234 UNCLOS. The fact that this “saving clause” is included in Chapter XIV SOLAS instead of in the Draft Polar Code itself is probably not of significance since, as noted in chapter 4 above, the links between the two instruments are clear. Regarding

¹⁹¹ Molenaar, 2014, p. 281.

pollution prevention measures, it should be noted that a similar provision is already laid down in MARPOL but it is of a more general nature, covering the entire convention.¹⁹²

Although there seems to be no current conflict between Article 234 UNCLOS and the Polar Code, the fact that Article 234 is rather complicated to interpret still remains an issue. Even if the Draft Polar Code does not contain any explicit reference to Article 234¹⁹³, it might still be able to shed some further light over how the wording in the article should be understood and interpreted.

One example, stated by Molenaar, is that even if the Polar Code does not seem to affect the right of states as such to rely on Article 234 UNCLOS as a justification for adopting their own regulations, the adoption of the Code still might have a general effect in creating higher standards regarding proof of these justifications. It would for example be easier to justify such regulations if they are based on “robust data and analyses on risks and damage”.¹⁹⁴ The assessment of the condition in Article 234 stating that the regulations shall be based on “best available scientific evidence” might therefore be affected by the adoption of the Code. Since it could be assumed that the provisions in the Code have been and will continue to be negotiated in IMO based on a wide range of scientific investigations, it will perhaps be more difficult for coastal states to justify the need for stricter national regulations from a scientific point of view.

In this context, Molenaar also states that it would be easier to justify the adoption of national measures according to Article 234 if they are supported by several coastal states and

¹⁹² Article 9(2) MARPOL.

¹⁹³ Note that Bartenstein has stated that a mandatory instrument with an explicit link to Article 234 UNCLOS is needed in order to receive reliable information on how the article should be interpreted and in the same context, she refers to the Polar Code as an example of such an instrument. See Bartenstein, 2011, p. 44.

¹⁹⁴ Molenaar, 2014, p. 290.

if other states also are engaged.¹⁹⁵ Since IMO has commonly agreed on stricter international Arctic shipping regulations in the Draft Polar Code, the need for unilateral action by coastal states pursuant to Article 234 might therefore require broader support amongst other states in order to be justified once the Code has been adopted.

Another example where the Polar Code might affect the interpretation of Article 234 seems to be the case regarding the connection between safety matters and environmental matters. As noted in chapter 4.2 above, the link between these matters is emphasized in the Preamble to the Draft Polar Code. The wording in the Preamble, together with the fact that the Code contains provisions both relating to safety and to the environment, could be seen as supporting the interpretation of Article 234 as allowing pollution prevention measures as well as safety measures. It has also been noted in chapter 3.2 above, that it is sometimes difficult to separate these two categories from each other, which also supports such an interpretation. This suggests that not only the pollution prevention measures but also the safety measures taken by Canada and the Russian Federation most likely are justifiable pursuant to Article 234.

However, other parts of the article still give rise to different interpretations. This is problematic from several perspectives, in particular since an interpretation of one sentence of the article might affect the interpretation of another. In this regard, the wordings “within the limits of the EEZ” and “due regard to navigation”, which both were discussed in chapter 3.2 above, should be highlighted. It was noted in that chapter that the two wordings are closely connected and that their respective interpretations are more or less dependent on each other. Suppose that one subscribes to the interpretation where “within the limits of the EEZ” includes not just the EEZ itself, but also the waters inside the EEZ, such as the territorial sea. The question which then automatically arises is what implications this would have on the interpretation of “due regard to navigation”. One could either interpret it as

¹⁹⁵ Molenaar, 2014, p. 290.

meaning that limitations to coastal states' powers normally applicable in the territorial sea shall apply to this entire area, including the EEZ. This would in turn mean that Canadian and Russian safety measures relating to design, construction, manning and equipment that are stricter than generally accepted international rules and standards in fact are non-justifiable pursuant to Article 234.¹⁹⁶ An example of such rules would probably be when vessels have to fulfill certain ship requirements in order for them to get permission to enter the respective coastal state's Arctic waters. These types of rules are, as noted in chapter 3.3.1 and 3.3.2, to be found both in the Canadian NORDREG Regulations and in the Russian NSR Rules. One could, however, also interpret "due regard to navigation" in a broader way, allowing coastal states to adopt and enforce such safety measures. It was noted in chapter 3.2 above, that such an interpretation appears not only to be in line with state practice but also with developments within IMO. Such a broad interpretation also seems to be in line with what was stated in the section above regarding the Polar Code and the close relationship between safety measures and environmental measures.

However, as noted throughout this thesis, certain states have shown their discontent with both Canadian and Russian regulations over the years, which makes it difficult to argue that the regulations are not, or at least have not been, contested. At the same time, since Article 234 gives room for so many different interpretations, it is also difficult to claim with certainty that the regulations are not justified pursuant to the article. The core problem is thus not the Canadian and Russian regulations per se, but the fact that the ambiguity of the article itself creates legal uncertainty.

Several scholars have observed the ambiguity of Article 234¹⁹⁷ and in this regard, Bartenstein has for example stated that: "The numerous interpretational uncertainties are an ob-

¹⁹⁶ See chapter 3.2.

¹⁹⁷ See Chircop (et al.), 2014, p. 304, p. 326; Pharand, 2007, p. 47; McRae & Goundrey, 1982, p. 227.

stacle to a clear contribution of this provision to safer navigation in the Arctic.”¹⁹⁸ Even if the Polar Code would be able to shed some light on how Article 234 should be interpreted, as suggested above, the ambiguity of the wording of the article still remains and continues to create legal uncertainty to some extent.

A further issue in this context is that unilateral action pursuant to Article 234 UNCLOS is not enough to properly address environmental problems. Instead, multilateral action is also required, in particular since problems such as oil spills and discharges of waste are not limited to a certain geographic area. Multilateral action appears thus to be more efficient as it generates more common solutions among states.¹⁹⁹

The adoption of the Polar Code could be seen as a step towards more multilateral action in the Arctic region. However, Chircop argues that, although the Polar Code is an important instrument, a broader approach to international rules relating to Arctic shipping is required. He also suggests that Arctic coastal States should use Article 234 in a more cooperative manner by working together, and by working more closely with IMO, towards achieving higher standards for Arctic shipping. The role of the Arctic Council is also mentioned as important, in particular to develop an enhanced understanding of the needs in the Arctic region.²⁰⁰

Finally, it should be highlighted that regulatory bodies on different levels have to cooperate. This has also been emphasized by Chircop when discussing different challenges Arctic shipping faces, and he states the following: “No one level of governance is equipped to address all these challenges at its level alone.”²⁰¹ He suggests different ways in which the international, regional and national levels could interact and cooperate, while also empha-

¹⁹⁸ Bartenstein, 2011, p. 45.

¹⁹⁹ Bartenstein, 2011, p. 46.

²⁰⁰ Chircop, 2013, p. 420, p. 426-427.

²⁰¹ Chircop, 2009, p. 379.

sizing that it is in the interest of not only Arctic States, but also the international community as a whole, that rules relating to Arctic shipping constitute an integral part of the regime at a global level, and not solely on national and regional levels.²⁰²

²⁰² Chircop, 2009, p. 379.

6 Conclusions

As this study has shown, there are many conditions that have to be fulfilled in order to apply Article 234 UNCLOS. However, these conditions are rather unclear and ambiguous, which creates legal uncertainty. Yet, the article constitutes a basis for states to adopt and enforce national regulations, a right which has been used by Canada and the Russian Federation. The Russian Federation seems more focused on the economic and commercial development of the Northern Sea Route, whereas Canada has shown a more protective approach to the Arctic region. Despite their differences in this regard, they have laid down similar rules in certain aspects. This is the case for example regarding the debated NORDREG Regulations and the NSR Rules, which both contain ship requirements that have to be fulfilled before getting permission to enter the respective areas. The ambiguity of Article 234 is somewhat beneficial to these coastal states, as it gives them the possibility to justify their respective regulations by applying the interpretation of the article most suitable for them. It is therefore difficult to clearly establish whether or not the NORDREG Regulations and the NSR Rules, or other Canadian and Russian regulations, are lawful. However, creating legal certainty should be of highest priority and from that perspective it is hardly possible to see the ambiguity of the article as something positive.

Turning to the general connection between Article 234 UNCLOS and the Polar Code, it does not seem like a conflict between the two instruments exists or will arise in the near future. The “saving clause” incorporated in the Draft Polar Code, through Chapter XIV SOLAS, probably ensures that such a conflict is avoided. Coastal states such as Canada and the Russian Federation will thus continue to have the possibility to adopt and enforce stricter national regulations than those laid down in the Code pursuant to Article 234.

However, although the Polar Code does not seem to be in conflict with Article 234 UNCLOS, it has been established that the Code could have certain implications on the interpretation and applicability of the article. One example is that it might be more difficult for coastal states to justify the need for unilateral action pursuant to Article 234 in general.

Unilateral action will thus probably require a broader support from other states than earlier in order to be justified, since it has to be assumed that the new and stricter global provisions in the Polar Code at least to some extent reduce the need for such action.

Another aspect where the Polar Code might have an affect on the application of Article 234 is regarding the condition that national regulations shall be based on “best available scientific evidence” in order to be justifiable pursuant to the article. The negotiations regarding the Polar Code must reasonably be based on a wide range of international scientific research, meaning that if coastal states would like to adopt higher standards than those laid down in the Code, it might be more difficult for them to justify this need based on scientific evidence.

Looking at the wording of Article 234 in more detail, one key example where the Polar Code might affect its interpretation is regarding the question whether or not the article also covers safety measures and not only pollution prevention measures. As noted in this study, some of the Canadian and Russian regulations such as AWPPA, the NORDREG Regulations and the NSR Rules include safety measures, which clearly indicates that at least state practice consider safety measures to be covered by the article. This also seems like an accurate interpretation if using the Draft Polar Code as an interpretative instrument, since it declares explicitly that safety and environmental issues are closely related and since the Code itself contains measures relating both to safety and to the environment. Moreover, it also seems to be in line with soft law instruments such as the Arctic and Polar Guidelines as well as with AWPPA and the history of the negotiations of Article 234. In view thereof, most indications seem to favor an approach where also safety measures can be justifiable pursuant to Article 234 UNCLOS.

As shown by the examples mentioned above, the Polar Code might be able to clarify the interpretation of Article 234 UNCLOS to a certain extent and thereby decrease its ambiguity in some aspects as well as increase the level of legal certainty. By introducing new global standards relating to safety and the environment in the Arctic region the Polar Code

would contribute to increase the level of legal certainty even further. However, there is still room for other interpretations of Article 234 by, for example, maritime states with a stronger interest in the freedom of navigation than in coastal states' right to adopt stricter national measures. The Code does therefore not seem to solve all issues related to legal certainty, and the article still needs to be further clarified.

One possible way, and perhaps more efficient in enhancing legal certainty from a global perspective, would be to apply Article 234 in a somewhat different manner. By coordinating their national regulations pursuant to Article 234, the coastal states could put pressure on the international community to constantly update and develop stricter global rules and standards, such as for example the Polar Code. In this way, Article 234 would be used as an instrument not only for unilateral action but also for collectively achieving stricter rules on an international level, which is crucial for the effectiveness of international shipping and the protection of the environment.

In this perspective, regional cooperation also has an important role. Such cooperation could in particular be exercised within the Arctic Council. The Council has a unique role in that it has valuable knowledge about the special features and the different needs of the region. In order to increase the Council's legitimacy, however, increased participation of non-Member States in its work is necessary, giving more credibility to the Council as an important actor within international shipping. Moreover, the work between the Council and IMO could be improved and intensified in several aspects, such as increasing the presence of the Council in IMO and vice versa.

Consequently, by developing a broader approach to Arctic shipping, where regulatory bodies on different levels establish common goals in order to work towards aligning their various regulatory frameworks, legal certainty will be enhanced and a global framework protecting the Arctic environment as well as allowing for commercial activity in the region will be created. Not only the Arctic States, but also the international community as a whole, would benefit from such cooperation.

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8 Annex I



Figure illustrating the Arctic region as defined for the purpose of the Polar Code in Chapter XIV SOLAS.²⁰³

Source: Paragraph 5, Introduction, the Draft Polar Code.

²⁰³ See Regulation 1.3, Chapter XIV SOLAS. See also Paragraph 2, Introduction, the Draft Polar Code.

9 Annex II

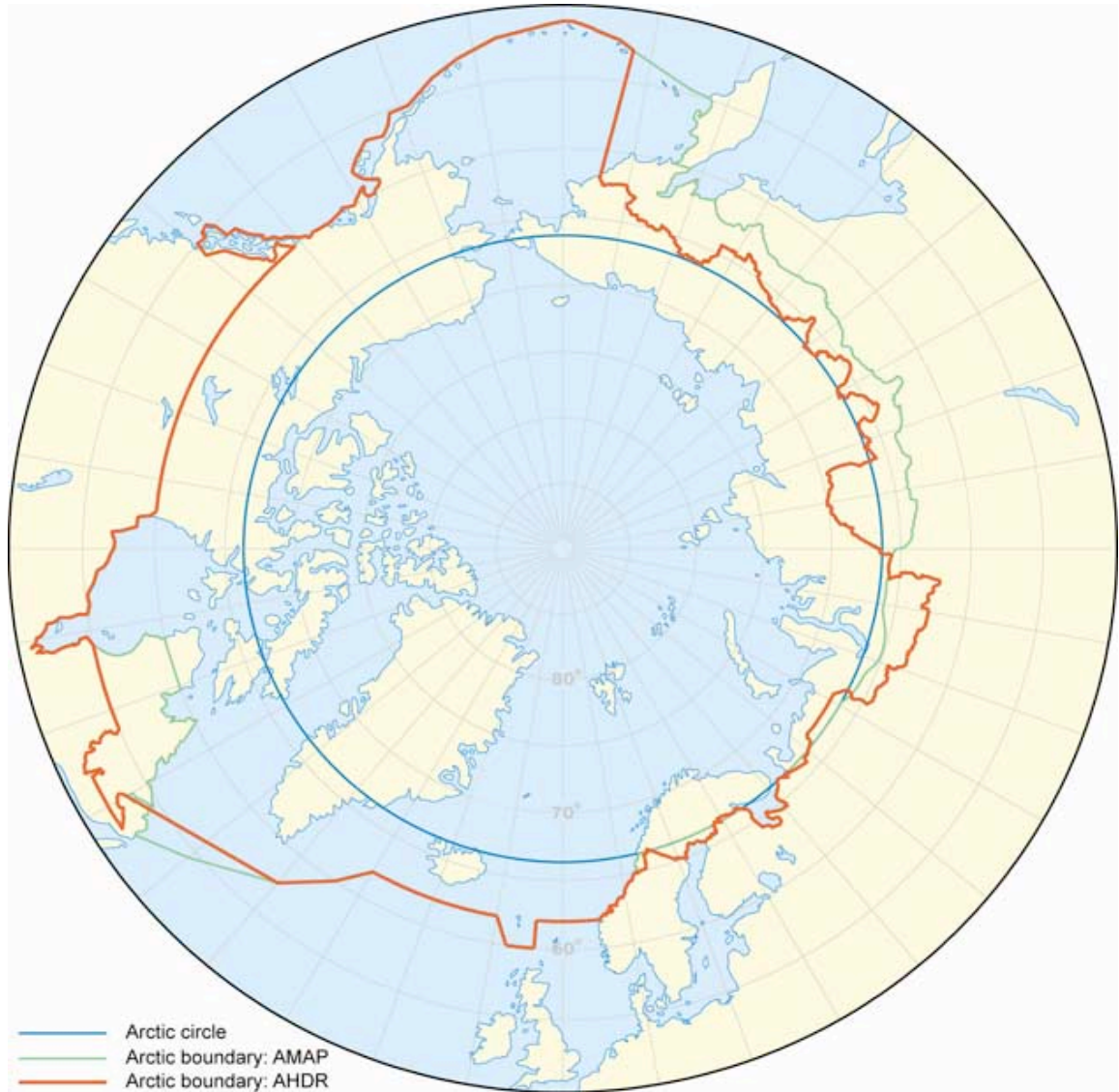


Figure illustrating, inter alia, the Arctic Circle.

Source: http://www.discoveringthearctic.org.uk/images/8b_ahdr.jpg