

Arctic Coastal State Jurisdiction in an Era of Climate Change

Vessel-Source Oil Pollution and International Shipping in Norwegian and Russian Arctic Waters

Anders Grønstad Friisk



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Abstract

The main objective of this report is to discuss whether the contemporary international legal framework grants the coastal States of Norway and Russia adequate jurisdiction to prevent, reduce and control vessel-source oil pollution from foreign commercial ships navigating off the coast of Northern Norway and in the Northern Sea Route. It gives an introduction to the characteristics of the Arctic marine environment, climate change and Arctic navigation, as well as a theoretical overview over the contemporary international legal framework on coastal State jurisdiction under UNCLOS and MARPOL 73/78. The report devotes special attention to the interpretation and application of Art. 234 UNCLOS concerning its geographical and temporal scope in Norwegian and Russian 'ice-covered areas'. A separate part is devoted to the latest drafts of the emerging Polar Code, currently being negotiated under the auspices of the International Maritime Organization, and discusses whether it will affect the existing jurisdictional powers under the current legal regime.

Key Words

Coastal state jurisdiction, vessel source oil pollution, law of the sea, IMO, Polar Code, arctic, shipping, MARPOL, UN Convention on the Law of the Sea, Art. 234

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This report is mainly based on the work on my dissertation submitted in part fulfilment of the degree of LL.M in 'International Law' at the University of Glasgow in August 2014. However, this report has been updated as of November 2014, including the latest developments regarding the on-going negotiations on the Polar Code.

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Anders Grønstad Friisk

Lysaker, Norway, November 2014

Abstract

This report asks whether the contemporary international legal framework grants the coastal States of Norway and Russia adequate jurisdiction to prevent, reduce and control vessel-source oil pollution from foreign commercial ships navigating off the coast of Northern Norway and in the Northern Sea Route. It additionally analyses the latest drafts of the emerging Polar Code, currently being negotiated under the auspices of the International Maritime Organization, and discusses whether it will affect the existing jurisdictional powers under the current legal regime.

The analysis reveals that the contemporary international regime in general allocates wide jurisdictional powers to Norway and Russia as coastal States with regard to oil pollution from ships navigating within their marine zones. A range of international binding and non-binding tools are at their disposal. A substantial part is devoted to the interpretation and application of the ambiguous Art. 234 UNCLOS. This author identifies that a broad application of the geographical scope is supported by the basic considerations reflected in UNCLOS and argues that Article 234 also applies in Norwegian and Russian territorial waters. The temporal scope is interpreted narrowly, thus excluding its application in areas covered by ice for less than six months 'of the year' or varies seasonally or yearly. Port State jurisdiction is furthermore highlighted as an important alternative legal basis for these States to protect the Arctic environment where flag and coastal State powers fall short.

The main argument in this work is, despite of these features, that the international legal regime is not adequately granting sufficient jurisdictional powers. There are currently no comprehensive binding IMO oil discharge standards, vessel routing systems for navigation or CDEM standards applying specifically for the Arctic marine areas. Flag State primacy is furthermore still present, and compliance with instruments like MARPOL 73/78 remains to be a problem. Arctic coastal States are additionally prevented from taking actions against pollution occurring in marine areas beyond national jurisdiction. This gap becomes prominent in an Arctic context due to the vastness of the region. It identifies furthermore that the potential prospective application of Art. 234 is threatened, as scientific research reveals that decreasing ice-coverage and higher temperatures is likely in Arctic waters.

The latest developments within the on-going IMO negotiations on the adoption of a mandatory Polar Code reveals that the proposed standards predominantly are not as comprehensive as initially intended. Lack of mandatory use of ice-navigators and ice-beakers, no restrictions on carriage of HFO and minimal regulations on CDEM standards, supports this view. The member States have nevertheless agreed in principle upon a complete ban on oil discharges. This author identifies that the latest draft Polar Code implies that the jurisdictional powers of coastal States under UNCLOS are likely to remain unchanged. The Code is furthermore, despite certain gaps and shortcomings, likely to represent a positive contribution to the ability of coastal States to react to cases of vessel-source oil pollution occurring in marine areas beyond their national jurisdiction.

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1 Introduction

1.1 Presentation

This report focuses on coastal State jurisdiction over vessel-source oil pollution. It asks whether the contemporary international legal framework grants Norway and Russia adequate jurisdiction to prevent, reduce and control vessel-source oil pollution from foreign commercial ships navigating off the coast of Northern Norway and in the Northern Sea Route. It additionally analyses the latest drafts of the emerging Polar Code currently being negotiated under the auspices of the International Maritime Organization, and asks whether it will affect the existing jurisdictional powers under the contemporary legal regime.

1.2 Scope, definitions and delimitations

The current international legal framework is found in a multitude of binding and non-binding rules and regulations. However, the following analysis is limited to the 1982 United Nations Convention on the Law of the Sea¹ (hereinafter UNCLOS), the 1973 International Convention for the Prevention of Pollution from Ships and its 1978 Protocol² (hereinafter MARPOL 73/78), as well as the non-binding IMO 2009 ‘Guidelines for Ships Operating in Polar Waters’ (hereinafter 2009 Guidelines)³ and the drafts and documents from the on-going IMO negotiations on the Polar Code. The interpretation of these instruments will be based on the official English texts. Texts in other official languages, as well as national legislation, will be consulted when relevant for the discussion.

There is by no means any universal agreement on the international legal status of the Northern Sea Route, as it can be regulated by the regime on ice-covered areas, as well as transit through territorial waters and international straits. This report is limited to the assessment of transit through territorial waters and ice-covered areas.⁴ This work will neither engage in the on-going debates regarding determination of Arctic baselines,⁵ nor the specific legal questions concerning the status of Svalbard.⁶

¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entry into force 16 November 1994), text published in ILM, Vol. 21, 1982, pp. 1,261ff.

² MARPOL 73 (adopted 2 November 1973, entry into force 2 October 1983), MARPOL 78 (adopted 17 February 1978, entry into force 2 October 1983), text published in ILM, Vol. 12, 1983, pp. 1,319ff (Convention) and ILM, Vol. 17, 1978, pp. 546ff (Protocol).

³ IMO, ‘Guidelines for Ships Operating in Polar Waters’, Resolution A1024(26), adopted 2 December 2009

⁴ Further readings, D. Brubaker, *The Russian Arctic Straits* (Leiden/Boston, 2005), 111-137. [Brubaker, ‘Russian Arctic Straits’]

⁵ Further readings, T. Scovazzi, ‘The baseline of the territorial sea: The practice of Arctic States’ in Elferink & Rothwell (ed.) *The law of the Sea and Polar Marine Delimitation and Jurisdiction, Publications on Ocean Development* (The Hague, 2001), 69-84.

⁶ Further readings, D.H. Anderson, ‘The Status Under International Law of the Maritime Areas Around Svalbard’ in *Ocean Development & International Law*, Vol 40 Issue 4, 2009, 373-384.

The current international framework regulates many different types of pollutants and pollution origins, such as pollution from land-based sources, sea-bed activities and dumping. This report is restricted to vessel-source oil pollution. The term ‘pollution’ is for this purpose corresponding with Art. 1(1)(4) UNCLOS, which defines ‘pollution of the marine environment’ as

‘(...) the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities’.

Accordingly, marine pollution is only encompassing human behaviour. *How* substances are introduced is, however, irrelevant. Oil discharged from ships is undoubtedly qualifying as ‘pollution’ according to Art. 1(1)(4).

The definition includes furthermore both accidental and operational discharges. The latter event refers to deliberate and ‘routine’ operations (e.g. tank cleaning), whereas accidental discharges occur when vessels collide or are in distress at sea.⁷

This report solely analyses legislative and enforcement jurisdiction. However, criminal and civil jurisdictional competences, as well as private international law issues, such as liability and compensation, are excluded.

As this report only focuses on vessels engaging in international commercial shipping activities, are military vessels and other vessels used in ‘government non-commercial service’ entitled to sovereign immunity under Art. 236 UNCLOS, excluded from the analysis.

1.3 Outline

This report is divided into six main parts. Part 2 gives a brief introduction to the characteristics of the Arctic marine environment, climate change and Arctic navigation. Part 3 provides a theoretical overview over the contemporary international legal framework on coastal State jurisdiction under UNCLOS and MARPOL 73/78. Part 4 devotes special attention to the interpretation and application of Art. 234 UNCLOS concerning its geographical and temporal scope in Norwegian and Russian ‘ice-covered areas’. Furthermore, the latest efforts within the IMO to conclude a mandatory Polar Code is analysed in Part 5. This section discusses in particular its adequacy with regards to environmental protection and its potential impact on the existing jurisdictional framework under UNCLOS. Section 6 sums up key points and identifies legal gaps and challenges within the current framework and attempts to provide potential solutions to these deficiencies. Final conclusions are given in Part 7.

⁷ Ø. Jensen, ‘Coastal State Jurisdiction and Vessel Source Pollution: The International Law of the Sea Framework for Norwegian Legislation’, *FNI Report 3/2006*, 5. [Jensen, ‘Coastal State Jurisdiction’]

2 The Arctic marine environment, climate change and navigation in the High North

2.1 The Arctic marine environment and climate change

Climate change has become the ‘inconvenient truth’ of the modern era.⁸ The Arctic region is currently experiencing some of the most distinct environmental changes on Earth. Average temperatures during the twentieth century have increased by up to 5°C,⁹ leading to decreasing presence of sea-ice during summer.¹⁰ Scientists estimate that great areas of the Arctic Ocean are likely to become free of summer ice in coming decades - possibly as early as the 2020s. Ice is also expected to disappear from Arctic coastlines and retreat to the central Arctic Ocean.¹¹

The Arctic marine environment represents one of the most unique ecosystems in the world.¹² It contributes significantly to global biodiversity, as these waters are natural habitats to species found nowhere else on the planet.¹³ Extreme climatic conditions, such as low temperatures, high geographic latitude and extraordinary light conditions, define its distinctive nature, where organic decomposition processes are slower than elsewhere.¹⁴ The particular vulnerability of these remote areas with regards to climatic changes and human activities is evident.

The Arctic Ocean is surrounded by the five Arctic States of Canada, the United States, Norway, Denmark (Greenland) and the Russian Federation. There are no legal definitions of the ‘Arctic’, but this report bases its geographical scope on the traditional acknowledgement that it refers to the areas north of the Arctic Circle at 66°33’ north latitude.¹⁵ The area encompasses over 30 million square kilometres, where half of it is ocean surface with 90% permanent ice-coverage.¹⁶

⁸ R. Rayfuse, ‘Melting Moments: The Future of Polar Oceans Governance in a Warming World’ (2007) in RECIEL 16(2), 197.

⁹ L. Kriwoken, ‘Environmental change in the Arctic region’ in in T. Stephens & D.L. VanderZwaag (ed.) *Polar Oceans Governance in an Era of Environmental Change, New Horizons in Environmental and Energy Law Series* (Cheltenham, 2014), 42. [Kriwoken, ‘Environmental change’]

¹⁰ Ibid. 55.

¹¹ Ibid.

¹² R. Warner, ‘Charting a Sustainable Course through Changing Arctic Waters’, (2009) in *The Yearbook of Polar Law, Vol. I*, 326-327. [Warner, ‘Changing Arctic Waters’]

¹³ Ibid.

¹⁴ Ø. Jensen, ‘The IMO Guidelines for Ships Operating in Arctic Ice-covered Waters: From Voluntary to Mandatory Tool for Navigation Safety and Environmental Protection?’, *FNI Report 2/2007*, 1. [Jensen, ‘The IMO Guidelines’]

¹⁵ Kriwoken, ‘Environmental change’, 44.

¹⁶ Jensen, ‘The IMO Guidelines’, 1.

2.2 Navigational characteristics in the Arctic

2.2.1 Current and prospective navigation

Arctic navigation has traditionally been restricted to the summer seasons for the purpose of supplying local communities in the region.¹⁷ Current navigation ranges from commercial vessels, including tankers and fishing, to tourist cruises, scientific research vessels, icebreakers in re-supply and offshore exploration vessels.¹⁸ The volume of commercial Arctic shipping is currently modest and limited to the summer months (June-September), but accelerating melting of sea-ice enables navigation in new areas and for longer periods of the year.¹⁹ Traffic has steadily increased in recent years and the focus has mainly been on the Northwest Passage and the Northern Sea Route (hereinafter NSR). The former generally refers to the connection of the North Atlantic Ocean and the Pacific Ocean through a set of alternative sea routes in the Canadian archipelago and the Northern Alaskan coast.²⁰ The NSR officially stretches over 2800nm along the Russian Arctic coast from Novaya Zemlja in the west to the Bering Strait in the east.²¹

The NSR has gained particular attention by the international shipping industry, as it shortens the distance between Rotterdam and Yokohama by 40% compared to navigation via the Suez Canal and the Indian Ocean.²² This can reduce navigation with 14-20 days and result in equivalent reductions in fuel costs.²³ The *MV Nordic Barents* became in 2010 historic as it was the first non-Russian bulk-carrier to transit through the NSR without calling at Russian ports on its voyage between China and Northern Norway.²⁴ Bulk transport through the NSR is believed to increase over the coming decades, from approximately 2 million tons in 2010 till 60-65 million within 2020.²⁵ The opening of new oil and gas fields in the region, is also believed to increase traffic.²⁶

2.2.2 Potential hazards associated with Arctic navigation

Arctic navigation is nevertheless associated with potential hazards. Low temperatures, presence of sea-ice and remote areas makes navigation and

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ E. Molenaar, 'Status and Reform of International Arctic Shipping Law' in Tedsen et al. (ed.) *Arctic Marine Governance. Opportunities for Transatlantic Cooperation* (Heidelberg, 2014), 130. [Molenaar, 'Arctic Shipping Law']

²⁰ W. Østreng, 'Introduction: An operational view of Arctic Waters' in W. Østreng et al (eds) *Shipping in Arctic waters: A Comparison of the Northeast, Northwest and Trans Polar Passages* (Berlin/Heidelberg, 2013), 22.

²¹ Ibid. 13. Pages 13-18. on the official and unofficial Russian coordinates.

²² Fodchencko, I.: 'Russlands rettslige satsning på Den nordlige sjørute – ny lov om handelsskipsfart i Den nordlige sjørutes havområde' in *Lov og Rett*, Vol. 53 Issue 7, 2014, 412. [Fodchencko: 'The NSR']

²³ Ibid.

²⁴ T. Nilsen, "'MV Nordic Barents' makes historic voyage' in Barents Observer (August 26, 2010). Available at <http://barentsobserver.com/en/sections/murmansk-obl/mv-nordic-barents-makes-historic-voyage> (accessed November 10, 2014)

²⁵ Fodchencko: 'The NSR', 412.

²⁶ Jensen, 'The IMO Guidelines', 3.

emergency responses difficult,²⁷ and an oil tanker accident will have serious impacts on the unique Arctic marine environment.²⁸ The same applies for oil spills originating from operational discharges.²⁹ It has thus become a high-priority issue for Arctic coastal States to enhance environmental protection and navigational safety through the adoption of rules and regulations on *inter alia* oil discharges, navigational routing systems and standards on design, construction, manning or equipment (hereinafter CDEM standards) applicable to foreign vessels navigating in their waters.³⁰

²⁷ Molenaar, 'Arctic Shipping Law', 128.

²⁸ Jensen, 'The IMO Guidelines', 3.

²⁹ Ibid.

³⁰ Warner, 'Changing Arctic Waters', 326

3 Arctic Coastal State jurisdiction under the current international legal framework

3.1 Introduction

The Arctic States expressed in the 2008 Ilulissat Declaration that the ‘law of the sea’ provides an ‘extensive international legal framework’ and that the development of a ‘new comprehensive international legal regime to govern the Arctic Ocean’ was not necessary.³¹ A regional treaty governing environmental and jurisdictional issues in the Arctic does not exist. The international community has nevertheless recognised the need to adopt harmonised standards due to the global nature of international shipping.³² A particular key role has been allocated to the International Maritime Organization (hereinafter IMO) and several international instruments aiming to enhance environmental protection and maritime safety have been adopted under its auspices.³³ The contemporary international legal regime is thus found in a ‘conglomerate’ of often highly technical binding and non-binding international rules and regulations.

Both Russia³⁴ and Norway³⁵ are Parties to MARPOL 73/78 and Annex 1 on ‘Prevention of pollution by oil’. This is the most prominent IMO instrument applicable to oil pollution prevention in the Arctic,³⁶ due to its global application and the fact that it has been ratified by 152 States representing 99,2% of the world’s shipping tonnage.³⁷ However, UNCLOS represents the cornerstone of the law of the sea.³⁸ It is generally accepted that the global applicability of UNCLOS also encompass the Arctic Ocean,³⁹ regardless of previous attempts to challenge this.⁴⁰ All five Arctic States, except from the United States, have ratified the Convention. The US has nevertheless accepted that several of its main parts have gained status as customary international law.⁴¹

³¹ Arctic Ocean Conference (28 May 2008), Ilulissat Declaration, para. 3 and 4.

³² E. Molenaar, ‘Arctic Marine Shipping: Overview of the International Legal Framework, Gaps and Options’ (2009), *Journal of Transnational Law & Policy* Vol. 18.2, 300 [Molenaar, Arctic Marine Shipping]

³³ Ibid.

³⁴ Signed 3 November 1983, entry into force 3 February 1984.

³⁵ Signed 15 July 1980, entry into force 2 October 1983.

³⁶ D.R Rothwell, ‘Global environmental protection instruments and the polar marine environment’ in D. Vidas (ed.) ‘Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention’ (Cambridge, 2000), 58. [Rothwell, ‘Environmental Protection Instruments’]

³⁷ IMO, Summary of Status of Conventions (28/07/2014), available at: <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx> (accessed November 10, 2014)

³⁸ Molenaar, Arctic Marine Shipping, 296.

³⁹ Ibid.

⁴⁰ See further B. Vukas.: ‘The LOS Convention and the polar marine environment’ in D. Vidas (ed.) ‘Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention’ (Cambridge, 2000), 35-37.

⁴¹ O.R. Young, ‘Arctic Governance – Pathways to the Future’ in *Arctic Review on Law and Politics* Vol. 1. 2/2010, 165.

UNCLOS recognises the general obligation of States under customary international law to ‘protect and preserve the marine environment’,⁴² and to ‘prevent, reduce and control’ vessel-source pollution by ensuring operational safety and the prevention of intentional and unintentional discharges.⁴³ It attempts to balance between coastal State’s need to ensure environmental protection from the damaging effects of shipping and flag State’s interest in freedom of navigation.⁴⁴ State sovereignty is consequently recognised and rights and obligations concerning environmental protection and jurisdiction applies within different maritime zones of the Arctic.⁴⁵ The relevant areas for shipping in Norwegian and Russian Arctic waters are their internal waters, territorial sea, exclusive economic zone (EEZ) and the high seas. The jurisdictional regime ranges here from coastal State sovereignty in the two former areas, to freedom of navigation on the high seas.⁴⁶ The marine Arctic lies primarily within Norwegian and Russian maritime zones, but four high seas enclaves exist: the ‘Banana Hole’ in the Norwegian Sea, the ‘Loop Hole’ in the Barents Sea, the ‘Donut Hole’ in the Bering Sea and the central Arctic Ocean.⁴⁷

The following sub-sections give a brief overview of the allocation of coastal State jurisdiction over vessel-source oil pollution in Arctic waters under the legal frameworks of UNCLOS and MARPOL 73/78. A particular focus will be on UNCLOS.⁴⁸

3.2 The 1982 United Nations Convention on the Law of the Sea

3.2.1 Introduction

The jurisdictional system within Sections 5 and 6, Part. XII of UNCLOS distinguishes between legislative and enforcement jurisdiction. Jurisdiction under public international law generally refers to the legal competence States enjoy to affect the conduct of others through prescriptive (regulatory) and enforcement measures.⁴⁹ Prescriptive jurisdiction refers to the legislative authority to establish rules and regulations, whereas enforcement jurisdiction refers to the authority to give effect to such rules

⁴² UNCLOS, Art. 192, Birnie & Boyle, *International Law & The Environment*, 351-352.

⁴³ UNCLOS, Art. 194(3)(b)

⁴⁴ O. K. Fauchald, ‘Regulatory Frameworks for Maritime Transport in the Arctic: Will a Polar Code Contribute to Resolve Conflicting Interests?’ in J. Grue et al. (eds), *Marine Transport in the High North* (Oslo, 2011), 73-74. [Fauchald, ‘Arctic Regulatory Frameworks’]

⁴⁵ P. Birnie and A. Boyle, *International Law & The Environment*, 2nd edn. (Oxford, 2002), 348-349. [Birnie & Boyle, *International Law & The Environment*]

⁴⁶ UNCLOS, Art. 2(1) and Art. 87(1)(a)

⁴⁷ I.U. Jakobsen, ‘The Adequacy of the Law of the Sea and International Environmental Law to the Arctic: Integrated Ocean Management and Shipping’ (2013) Vol 22:1 *Michigan State International Law Review*, 295. [Jakobsen, Adequacy of the Law of the Sea]

⁴⁸ For further readings on maritime jurisdiction see *inter alia* R.R. Churchill & A.V. Lowe, *The law of the Sea* 3rd edn. (Manchester, 1999), E. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (The Hague/Boston/London, 1998) and A.K.-J. Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation* (Cambridge, 2006).

⁴⁹ Jensen, *Coastal State Jurisdiction*, 10.

and institute proceedings.⁵⁰ The Convention differentiates furthermore between flag, coastal and port States. The former is generally understood as the State whose nationality a vessel has, which according to Art. 91(1) UNCLOS is to be determined by its place of registration.⁵¹ Neither ‘coastal’ nor ‘port’ State are defined terms, but the following chapters link coastal States to ships navigating through their maritime zones and port States to ships calling or docking at their ports.⁵²

3.2.2 *Flag State jurisdiction*

Article 92(1) UNCLOS confirms that the primary responsibility to exercise legislative and enforcement jurisdiction over the activities of vessels is allocated to the flag State, as it enjoys exclusive jurisdiction on the high seas over ships sailing under its flag. Exceptions follow nevertheless from *inter alia* the right of hot pursuit in Art. 111.

Article 211(2) stipulates a duty to prescribe ‘laws and regulations’ having ‘at least the same effect’ as that of ‘generally accepted international rules and standards’ (hereinafter GAIRES) established by the ‘competent international organization’,⁵³ for the ‘prevention, reduction and control of pollution of the marine environment’ from their vessels. This international minimum standard enhances uniform global application of e.g. CDEM standards, as also non-State parties to international instruments must abide by standards as those stipulated in e.g. MARPOL 73/78 Annex I on oil pollution.⁵⁴ The scope of GAIRES is nevertheless unclear. Some authors argue that it only refers to treaty or customary based binding legal norms,⁵⁵ whereas others argue that it also encompass non-legally binding instruments, such as recommendations and guidelines, as long as they are ‘generally accepted’.⁵⁶

Article 94(1) contains a general duty to ensure effective exercise of jurisdiction and control over its vessels, whereas a duty to ensure ‘effective’ implementation and compliance of ‘applicable international rules and standards (...) irrespective of where a violation occurs’ is further included in Art. 217(1). Measures shall also be taken to prohibit vessels not complying with international CDEM standards from sailing.⁵⁷

3.2.3 *Coastal State jurisdiction*

Coastal States enjoy full prescriptive and enforcement jurisdiction within their *internal waters*.⁵⁸ They are entitled to adopt national standards

⁵⁰ E. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (The Hague/Boston/London, 1998), 75-76. [Molenaar, Coastal State Jurisdiction]. *Ibid.*, 75-88 for a closer analysis of jurisdiction under general international law.

⁵¹ R.R. Churchill & A.V. Lowe, *The law of the Sea* 3rd edn. (Manchester, 1999), 257. [Churchill & Lowe, Law of the Sea]

⁵² Molenaar, Coastal State Jurisdiction, 91.

⁵³ Commonly understood as the IMO, cf. Churchill & Lowe, Law of the Sea, 346-347.

⁵⁴ Birnie & Boyle, *International Law & The Environment*, 363.

⁵⁵ Molenaar, Coastal State Jurisdiction, 141.

⁵⁶ D. König, ‘Marine Environment, International Protection’ (2011) *MPEPIL*, para. 14. [König, Marine Environment]

⁵⁷ UNCLOS, Art. 217(2)

⁵⁸ UNCLOS, Art. 2(1)

concerning ‘prevention, reduction and control of pollution of the marine environment’ such as *inter alia* CDEM or discharge standards, as conditions for the entry of foreign vessels into their ports or internal waters.⁵⁹ The laws adopted must nevertheless be duly published and be communicated to the IMO.⁶⁰

A 12 nm wide *territorial sea* is in accordance with Art. 3 implemented in both Russian⁶¹ and Norwegian legislation, including Svalbard and Jan Mayen.⁶² Here they enjoy full jurisdictional powers, only restricted by the right of foreign vessels to ‘innocent passage through the territorial sea’.⁶³ Such ‘passage’ must however continuously and expeditiously transverse territorial waters ‘without entering internal waters’ or external port facilities,⁶⁴ not be ‘prejudicial to the peace, good order or security of the coastal State’ and be conducted in accordance with UNCLOS and general international law.⁶⁵ Coastal States are according to Art. 21(1)(f) and Art. 211(4) nevertheless granted the right to prescribe stricter national standards for ‘the prevention, reduction, and control of marine pollution from foreign vessels’ in innocent passage. Regulations giving effect to stricter CDEM standards are however only permitted to the extent they give effect to GAIRAS.⁶⁶ This secures effective navigation and lowers costs associated with the drawbacks of having to comply with different national standards.⁶⁷ Hence, Norway and Russia possess wide prescriptive powers to *inter alia* adopt anti-pollution laws and navigational standards going further than GAIRAS, as long as they do not hamper the right of innocent passage, are non-discriminatory and are duly published.⁶⁸

Their enforcement powers depend on whether the foreign passage is ‘innocent’ or not.⁶⁹ Norwegian and Russian authorities are according to Art. 19(2)(h), empowered to ‘take the necessary steps’, including the possibility to exclude the vessel from its territorial waters,⁷⁰ against foreign vessels engaged in ‘any act of wilful and serious pollution contrary to [UNCLOS]’. Where this threshold is not reached, are their enforcement powers restricted to physical inspections, institution of proceedings and detention where ‘clear grounds of believing’ that the vessel has violated national or international standards on vessel-source

⁵⁹ UNCLOS, Art. 211(3)

⁶⁰ Ibid.

⁶¹ Federal Act of the internal sea waters, territorial sea and contiguous zone of the Russian Federation (adopted 2 December 1998)

⁶² Lov om Norges territorialfarvann og tilstøtende sone, 27 June 2003 No. 57 (entry into force 1 January 2004), Article 2 & 5.

⁶³ UNCLOS, Art. 2(1) and Art. 17.

⁶⁴ UNCLOS, Art. 18(1) and (2).

⁶⁵ UNCLOS, Art. 19(1)

⁶⁶ UNCLOS Art. 21(2)

⁶⁷ A.K.-J. Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation* (Cambridge, 2006), 205. [Tan, *Vessel-Source Pollution*]

⁶⁸ UNCLOS, Art. 24 (1) and (2).

⁶⁹ UNCLOS, Art. 25(1)

⁷⁰ Ibid.

pollution, exists.⁷¹ Their discretion is however restricted by the general principles of necessity and proportionality.⁷²

Jurisdictional powers of coastal States are more limited within the 200nm *EEZ*, as they do not enjoy sovereignty, but only certain sovereign rights.⁷³ Both Norway and Russia have established *EEZs* pursuant to UNCLOS.⁷⁴ The Norwegian *EEZ* does not apply to the areas beyond the territorial waters of Svalbard and Jan Mayen, as Norway has only established a Fishery Protection Zone around Svalbard⁷⁵ and a Fishery Zone around Jan Mayen.⁷⁶ Coastal States possess under Art. 56(1)(b)(iii) regulatory powers concerning 'protection and preservation of the marine environment'. These powers are nevertheless limited to national measures giving effect to *GAIRAS* established by the IMO.⁷⁷ Two important exceptions follow from Art. 211(6) and Art. 234. Coastal States may on the basis of Art. 211(6)(a) request the IMO to approve mandatory pollution prevention measures for clearly defined 'special areas' of their *EEZs*, if they regard 'international rules and standards' as inadequate to protect against vessel-source pollution, due to specific technical reasons, oceanographical and ecological reasons. Additional national measures on discharges and navigational practices may, if the IMO approves, be adopted for the same area.⁷⁸ *CDEM* standards are nevertheless excluded.⁷⁹ This exception has so far not been utilised in Arctic waters, probably due to its high threshold of application, strict procedures and requirement of IMO approval.⁸⁰ It seems consequently to be a more theoretical than a practical option for enhanced Arctic environmental protection. Questions concerning the interpretation and application of Art.234 in Arctic waters, are examined in Part 4.

The enforcement powers within the *EEZ* are limited. Coastal States are entitled to require information from ships when 'clear grounds' indicate that international or national environmental standards have been violated.⁸¹ Physical inspections are only permitted when 'clear grounds' indicates that such violations results in 'a substantial discharge' or threatens 'significant pollution of the marine environment', and when the vessel does not provide the requested information or the information given 'manifestly' differs from the factual situation.⁸² Institution of proceedings or detention is only permitted if 'clear objective evidence' shows that violation causes or threatens to cause 'major damage to the

⁷¹ UNCLOS, Art. 220(2), see also Tan, *Vessel-Source Pollution*, 206-207.

⁷² König, *Marine Environment*, para. 18.

⁷³ UNCLOS, Art. 56

⁷⁴ Act of December 17 1977 No. 91 of the Norwegian Exclusive Economic Zone, Article 1(2) and Federal Act of December 2 1998 of the Exclusive Economic Zone of the Russian Federation.

⁷⁵ Decree of June 3 1977 No. 6 on The Fishery Protection Zone around Svalbard

⁷⁶ Royal Decree of May 23 1980 No. 4 on the establishment of a fisheries zone around Jan Mayen.

⁷⁷ UNCLOS, Art. 211(5)

⁷⁸ UNCLOS, Art. 211(6)(c)

⁷⁹ *Ibid.*

⁸⁰ Jakobsen, *Adequacy of the Law of the Sea*, 313.

⁸¹ UNCLOS, Art. 220(3)

⁸² UNCLOS, Art. 220(5)

coastline or related interests of the coastal State' and when the Section 7 safeguards are complied with.⁸³

The general principle of exclusive flag State jurisdiction applies on the *high seas*.⁸⁴ Coastal States are accordingly not entitled to exercise jurisdiction in this zone. However, both Norway⁸⁵ and Russia⁸⁶ are Parties to the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties⁸⁷ (hereinafter Intervention Convention). This enables them, in exceptional situations of collisions and strandings, to take necessary measures to protect their coastlines from a 'grave and imminent danger' of oil pollution reasonably expected to 'result in major harmful consequences'.⁸⁸ The same right is indirectly recognised in Art. 221(1) UNCLOS. It seems nevertheless to operate with a lower threshold, by referring to 'actual or threatened damage' that reasonably is 'expected to result in major harmful consequences'.

3.2.4 Port State jurisdiction

The regime of flag and coastal State jurisdiction is supplemented by the allocation of port State powers.⁸⁹ Ports are normally located within a State's territory and coastal States are under customary international, 'by the virtue of their sovereignty', consequently enjoying the right to 'regulate access to [their] ports'.⁹⁰ No general right of access does thus exist for foreign ships.⁹¹ These prescriptive jurisdictional rights are implicitly recognised in Articles 2(1), 25(2) and 211(3) UNLCOS.⁹² Where ships proceed 'to internal waters or call at a port facility outside internal waters', may port States prescribe entry conditions to 'prevent any breach of the conditions to which admission of those ships to internal waters'.⁹³ They may additionally regulate discharge violations occurring outside a coastal State's maritime zones or prescribe stricter CDEM standards than GAIRAS for ships voluntarily docking, provided that the requirements are duly published, the IMO has been notified and are adopted for the 'prevention, reduction and control of pollution of the marine environment'.⁹⁴

Port States are in addition to their enforcement powers under Art. 25(2), given the right to 'undertake investigations and, where the evidence so

⁸³ UNCLOS, Art. 220(6)

⁸⁴ UNCLOS, Art. 87(1)

⁸⁵ Signed 12 July 1972, entry into force 6 May 1975

⁸⁶ Signed 30 December 1974, entry into force 6 May 1975.

⁸⁷ International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (adopted 29 November 1969, entry into force 6 May 1975), text published in ILM, Vol. 9 (1970), p. 25.

⁸⁸ Intervention Convention, Art. I(1).

⁸⁹ For further readings see E. Molenaar, 'Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage', (2007) *Ocean Development & International Law*, 38: 1-2, 225-257.

⁹⁰ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgment, ICJ Reports 1986, p. 14, para. 213*

⁹¹ Molenaar, Coastal State Jurisdiction, 103.

⁹² Ibid.

⁹³ UNCLOS, Art. 25(2)

⁹⁴ UNCLOS, Art. 211(3)

warrants, institute proceedings' against vessels 'voluntarily' within its ports and that allegedly has violated 'applicable international rules and standards'.⁹⁵ UNCLOS acknowledges thus the potential lack of flag State compliance,⁹⁶ and creates an important exception from the exclusive flag State jurisdiction on the high seas, by enabling reactions towards discharges occurring here or within maritime zones of *other* States.⁹⁷ Limitations follows however from Art. 218(2) and (3) and the safeguards stipulated in Section 7 (Art. 223-233 UNCLOS). States have in this regard concluded non-binding regional Memoranda of Understandings (MOUs) to enhance efficiency and coordination of their jurisdictional powers, eliminate potential 'port shopping' and reduce the burden of repetitive inspection in different ports.⁹⁸ The EU Directive on port State control represented an important development when it was adopted in 2009, as it made port State control mandatory to all the EU member States and established common rules on vessel control to better obtain compliance with international rules and MOUs.⁹⁹

Port State jurisdiction is in an Arctic context of great importance, as the difficult climatic conditions and the vastness of the Arctic Ocean can make flag and coastal State enforcement difficult. Arctic port States may thus deny access to ships they regard as lacking navigational capacities or impose stricter entry conditions than GAIRAS by *inter alia* implementing the IMO Polar Shipping Guidelines into national legislation.¹⁰⁰ They could furthermore, by ensuring seaworthiness before embarking on Arctic navigation, also enhance navigational safety and environmental protection by lowering the likeliness of accidental oil spills.

3.3 MARPOL 73/78

MARPOL 73/78 aims to 'achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances.'¹⁰¹

Coastal States are given limited jurisdictional powers, as the Convention applies to all ships flying 'the flag of a Party to the Convention' or that operate under its authority.¹⁰² Flag States shall ensure compliance and that their ships hold certificates displaying compliance with these standards.¹⁰³ Coastal States are obliged to prescribe and enforce violations of the Convention occurring 'within the jurisdiction' of a

⁹⁵ UNCLOS, Art. 218(1)

⁹⁶ König, *Marine Environment*, para. 22.

⁹⁷ Jensen, *Coastal State Jurisdiction*, 17.

⁹⁸ Tanaka, Y.: *The International Law of the Sea* (Cambridge, 2012), 286. [Tanaka, *Law of the Sea*]

⁹⁹ Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State Control. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0016&from=EN> (accessed November 10, 2014).

¹⁰⁰ Molenaar, *Arctic Marine Shipping*, 309.

¹⁰¹ MARPOL 73, Preamble, Para. 4.

¹⁰² *Ibid.*, Art. 3(1)(a)-(b).

¹⁰³ *Ibid.*, Art. 4(1) and Art. 5(1)

Party.¹⁰⁴ Their powers are anyway limited, as they are precluded from exercising jurisdiction until the vessel enters their maritime zones. Port States are additionally authorised to verify whether a ship have breached the Convention that enters or docks in their ports.¹⁰⁵ Article 5(4) extends the application of the requirements to ships of non-Parties to MARPOL, as they are not given ‘more favourable treatment’ to eliminate advantages of non-compliance.¹⁰⁶

The mandatory Annex I contains detailed provisions on oil pollution prevention. Vessels of different categories are generally obliged to adhere to requirements on equipment and construction standards, such as having crude oil washing installations, monitoring systems, separate ballast tanks and double hulls.¹⁰⁷ Operational discharges of oil are according to Regulation 9 prohibited, except when certain restrictive conditions are fulfilled. Discharges are absolutely prohibited for oil tankers over 400grt. navigating within designated ‘special areas’ that for ‘technical (...), oceanographical and ecological reasons’ requires stricter regulations.¹⁰⁸ Polar sea areas covered by the Antarctic Treaty were in 1992 designated as ‘special areas’, consequently prohibiting oil discharges.¹⁰⁹ Use and carriage of heavy fuel oil (HFO) in the same area was further banned in 2011 through an amendment of Regulation 43, Chapter 9 to Annex I.¹¹⁰ None of these arrangements have been adopted in the Arctic, despite their great potential of enhancing Arctic environmental protection.

¹⁰⁴ Ibid, Art. 4(2)

¹⁰⁵ Ibid, Art. 6(2) and (5)

¹⁰⁶ König, *Marine Environment*, para. 29

¹⁰⁷ Annex I, Regulations 13-18.

¹⁰⁸ Ibid, Regulations 1(10) and 10.

¹⁰⁹ Ibid, Regulation 10(1)(g).

¹¹⁰ MEPC 60/22, Resolution MEPC.189(10)

4 Navigation in Norwegian and Russian Arctic ‘ice-covered areas’ – Legal issues concerning the interpretation and application of Art. 234 UNCLOS

4.1 Introduction

The previous section has shown that the jurisdictional powers of Arctic coastal States for the preservation of the marine environment within their EEZs are limited to national measures giving effect to GAIRAS established by the IMO. However, Art. 234 UNCLOS, in addition to Art. 211(6), gives coastal States

‘(...) 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’.

The measures must furthermore take ‘due regard to navigation’ and be based on ‘the best available scientific evidence’.

This provision, often referred to as the ‘Arctic exception’,¹¹¹ was adopted at UNCLOS III as a reaction to the Canadian efforts to ensure that its 1970 Arctic Waters Pollution Prevention Act¹¹² (hereinafter AWPPA), providing a national legal basis for the adoption of anti-pollution measures within Canadian territorial waters and the area now recognised as its EEZ, complied with international law.¹¹³ It is generally accepted that the provision, despite the broad title referring to ‘ice-covered areas’, in practice only applies to Arctic ‘ice-covered areas’, as it was negotiated with the Northern Hemisphere in mind.¹¹⁴

Article 234 was one of few UNCLOS provisions to be directly negotiated between States.¹¹⁵ The Canadian, Soviet and US negotiators had, despite of competing interests at the Conference in general, a common aim to

¹¹¹ R. Huebert, ‘Article 234 and Marine Pollution Jurisdiction in the Arctic’ in Elferink and Rothwell (ed.) ‘The law of the Sea and Polar Marine Delimitation and Jurisdiction’, Publications on Ocean Development (the Hague, 2001), 249. [Huebert, ‘Article 234’]

¹¹² Adopted, 17 June 1970

¹¹³ D.M. McRae, ‘The negotiation of Article 234’ in F. Griffiths (ed.) *The Politics of the Northwest Passage (Kingston/Montreal, 1987)*, 101.

¹¹⁴ K. Hakapaa et al., Final Report of the Committee on Coastal State Jurisdiction Relating to Marine Pollution, International Law Association, London Conference (2000), 26. [ILA, ‘Final Report’]

¹¹⁵ S. Rosenne & A. Yankov, ‘Article 234’, M.H. Nordquist (ed.) *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. 4, (Dordrecht, 1991), 393. [Rosenne & Yankov, ‘Article 234’]

adopt a provision ensuring protection of the polar marine environment from vessel-source pollution.¹¹⁶ However, their attempt to balance coastal State interests with the general interest of effective navigation,¹¹⁷ resulted in a provision subsequently being characterised as ‘a textbook example of finding a compromise in international treaty negotiations’.¹¹⁸ Vague wordings and lack of guidance in the *travaux préparatoires*¹¹⁹ has made it ‘probably the most ambiguous, if not controversial, clause in the entire treaty’,¹²⁰ as it is *inter alia* disputed whether coastal States according to the phrase ‘due regard to navigation’ are obliged to take GAIAS into account when adopting CDEM standards,¹²¹ or whether they have to respect the regime of transit passage for vessels navigating in international ‘ice-covered’ straits.¹²² The relationship to other provisions within UNCLOS, such as Art. 211(6), also remains unclear.¹²³ Other ambiguities raising additional questions, relates to the threshold for when climatic conditions become ‘particularly severe’, when marine pollution represents a ‘major harm’ and the quantity of ice-presence required.¹²⁴ Canada and Russia appear moreover to be the only States that have adopted legislation based on Art. 234. Their biased views, favouring broad jurisdictional powers, have consequently triggered additional concerns regarding the significance of State practice on the interpretation of the provision.¹²⁵

A sound and adequate analysis of the provision is, due to the close interrelatedness of its conditions, difficult to obtain without assessing it in its entirety. It lies, however, outside the scope of this report to analyse all legal questions triggered by Art. 234. This chapter is thus limited to the geographical and temporal scopes of the provision, due to their great practical importance for navigation and environmental protection in Norwegian and Russian ‘ice-covered areas’.

4.2 The geographical scope of Art. 234

Article 234 limits the application of its jurisdictional powers to ‘ice-covered’ areas ‘within the limits of the exclusive economic zone’. The ambiguous wording and lack of clear guidance in the drafting history has led to a discussion on how the geographical scope is to be construed. A narrow interpretation will only encompass the 188nm area between the outer limits of the territorial sea and the EEZ. A broad interpretation extends the application to the entire 200nm area of these zones, where

¹¹⁶ K. Bartenstein, ‘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: 1-2 (2011)*, 24. [Bartenstein, ‘Arctic Exception’]

¹¹⁷ Rosenne & Yankov, ‘Article 234’, 393.

¹¹⁸ Bartenstein, ‘Arctic Exception’, 27.

¹¹⁹ ILA, ‘Final Report’, 26.

¹²⁰ C. Lamson, ‘Arctic shipping, marine safety and environmental protection’ in *Marine Policy Vol. 11, Issue 1 (1987)*, p. 4.

¹²¹ ILA, ‘Final Report’, 29.

¹²² E. Franckx, *Maritime Claims in the Arctic: Canadian and Russian Perspectives* (Dordrecht, 1993), 96. [Franckx, ‘Maritime Claims’]

¹²³ Bartenstein, ‘Arctic Exception’, 32.

¹²⁴ T. Scovazzi, ‘Legal Issues Relating to Navigation Through Arctic Waters’ in *The Yearbook of Polar Law Vol. 1*, (Leiden/Boston, 2009), 373-374.

¹²⁵ ILA, ‘Final Report’, 27.

current and prospective Norwegian and Russian legislation on CDEM standards applicable in their territorial waters consequently can go further than those giving effect to GAIRAS.¹²⁶ The question in the following sub-section is thus whether the phrase ‘within the limits of the exclusive economic zone’ encompasses Norwegian and Russian territorial waters.

The ordinary meaning of the phrase ‘within the limits of the [EEZ]’ may be understood as only referring to the inner limits of the EEZ, thus excluding its application to territorial waters. Neither the French nor the Russian terms (*‘et comprises dans les limites’* and в пределах исключительной экономической зоны) seem to imply that these linguistic versions seek to reflect the contrary.

A literal understanding of the phrase finds additional support in Article 55, which defines the EEZ as an ‘area beyond and adjacent to the territorial sea’. If seen in conjunction with Article 57, stipulating that the EEZ ‘shall not extend beyond 200 nautical miles from the baselines’, is this supporting that the Convention recognises that the EEZ has both its own outer and inner limits, where its inner limit coincide with the outer limit of the territorial sea.¹²⁷ This solution is in particular supported by Brubaker,¹²⁸ whereas McRae and Goundrey seem to assume the correctness of this interpretation without further discussion.¹²⁹

A narrow interpretation finds additional support in the drafting history, as the negotiations on coastal State powers in particular sea areas focused on sections within the EEZ, which subsequently lead to the adoption of Articles 234 and 211(6).¹³⁰ The drafting history may also imply that the negotiating States deliberately sought to limit their extended jurisdictional powers to the EEZ, as ‘the remaining provisions of the Convention, taken as a whole, were seen to be adequate to protect’ their interests within their territorial seas.¹³¹

Due regard shall also be taken to the beneficial effect a narrow interpretation will have on the regime of innocent passage. It will consequently prevent coastal States from adopting stricter CDEM standards within their ‘ice-covered’ territorial waters, and thus not hamper the right of innocent passage.¹³² It can additionally be argued that exceptions from the multilateral approach within UNCLOS should be narrowly construed, unless compelling contra arguments exists.

The phrase may on the contrary be understood as encompassing the entire 200nm. area, as the term ‘limits’ can be understood as referring to the EEZ’s outer limits. This is additionally supported

¹²⁶ As exceptions from UNCLOS, Art. 21(2) and Art. 211(4)

¹²⁷ Bartenstein, ‘Arctic Exception’, 29.

¹²⁸ Brubaker, ‘Russian Arctic Straits’, 56-57

¹²⁹ D.M McRae & D.J. Goundrey, ‘Environmental Jurisdiction in Arctic Waters: The extent of Article 234’ (1982), *University of British Columbia Law Review*, 221. [McRae & Goundrey, ‘Environmental Jurisdiction’]

¹³⁰ Bartenstein, ‘Arctic Exception’, 29-30.

¹³¹ Rosenne & Yankov, Article 234, 397.

¹³² Molenaar, ‘Coastal State Jurisdiction’, 421.

by Rosenne and Yankov, who argues that it ‘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’.¹³³ This favours an inwards delimitation, as ‘coastline’ generally refers to the interface where sea and land meets.¹³⁴ The statement’s weight may nevertheless be questioned, as it conflicts internally with their previous argument on the adequacy of protection under UNCLOS as a whole.

A teleological interpretation, highlighting the intention of the negotiators, also supports a broad interpretation. Article 234 was initially meant to codify the Canadian measures taken in the AWPPA.¹³⁵ The AWPPA applies in ‘arctic waters’, which does not differentiate between territorial waters and the EEZ, as also ‘adjacent waters’ are included.¹³⁶ This indicates that the intention was to include territorial waters. The existence of Canadian legislation reflects, however, only ‘circumstances of [the] conclusion’ of UNCLOS, which according to Art. 32 of the 1969 Vienna Convention on the Law of Treaties¹³⁷ (hereinafter VCLT) only serves as ‘supplementary means of interpretation’.

The Canadian AWPPA is nevertheless still in force, and its inclusion of territorial waters may indicate that ‘subsequent practice’ (Art. 31(3)(b) VCLT) suggests that the geographical scope is to be broadly construed. Russian legislation regulating activities in the NSR is also based on Art. 234.¹³⁸ The laws and regulations are nevertheless generally characterised as unclear, sparse and lacking clear definitions of the geographical scope of application. Several provisions indicate that the Russian interpretation of the phrase favours an inclusion of the territorial waters. Article 12 of the 1990 Decree implementing the 1983 Environmental Edict, extended the geographical scope of measures adopted pursuant to Art. 3 of the Edict, to marine areas within the NSR.¹³⁹ The NSR is according to Art. 1.2 of the 1990 Regulations for Navigation on the Seaways of the Northern Sea Route,¹⁴⁰ defined as an area ‘situated within (...) inland seas, territorial sea (territorial waters) or exclusive economic zone adjacent to the USSR Northern Coast (...)’. The same broad definition is maintained in the 1998 Federal Act on the territorial sea when Art. 14 is seen in conjunction with Clause 5.1 of the 1999 Merchant Marine Shipping Code of the Russian Federation.¹⁴¹ These definitions are furthermore understood neither to have been altered by Clause 3(1) of the

¹³³ Rosenne & Yankov, Article 234, 397.

¹³⁴ Bartenstein, ‘Arctic Exception’, 29.

¹³⁵ Ibid.

¹³⁶ AWPPA, Section 3(1)

¹³⁷ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entry into force 27 January 1980), text published in ILM, Vol. 8 (1969), pp. 679-735.

¹³⁸ For an introduction to the current Russian legal regime applicable in the NSR, see J.J. Solski, ‘New Developments in Russian Regulation of Navigation in the Northern Sea Route’ (2013) *Arctic Review on Law and Politics* No. 1, Vol. 4, 90-119.

¹³⁹ Brubaker, ‘Russian Arctic Straits’, 87

¹⁴⁰ Approved by the USSR Minister of Merchant Marine 14 September 1990.

¹⁴¹ Adopted 30 April 1999

2012 Federal Law on Amendments,¹⁴² nor the 2013 Rules of navigation on the water area of the Northern Sea Route,¹⁴³ replacing the 1990 Regulations. Article 32 of the Federal Act on the EEZ, also based on Art. 234 UNCLOS, limits on the contrary its geographical scope to the EEZ.

The US has not adopted legislation based on Art. 234, and has been cautious to adopt public statements concerning its view on the application of the provision.¹⁴⁴ The same applies to both Norway and Denmark.¹⁴⁵ Denmark has nevertheless expressed a willingness to rely on its unilateral rights under Art.234 in the future, if international law inadequately protects environmental protection and navigational safety.¹⁴⁶

Furthermore, the 2002 and 2009 IMO Guidelines does not limit their geographical scope to the EEZ.¹⁴⁷ This may indicate that States are developing a view where the distinction between the EEZ and territorial waters has become less important.¹⁴⁸

Overall, it is difficult to clearly identify whether ‘within the limits of the exclusive economic zone’ encompasses Norwegian and Russian territorial waters. The vague wording combined with limited guidance from the drafting history and sparse State practice, consequently suggests that greater weight may be placed on basic considerations reflected in the Convention.

Firstly, it can be argued that Art. 234 was ‘unfortunately phrased’.¹⁴⁹ Opting for a narrow interpretation is arguably contrary to the general system of maritime zones within UNCLOS, where coastal State jurisdiction decreases as the distance to the coastline increases. It would be illogical to grant greater jurisdictional powers within the EEZ than within territorial waters. This view is further supported by Molenaar,¹⁵⁰ Stokke¹⁵¹ and Churchill and Lowe.¹⁵²

An extended allocation of jurisdictional powers within ‘ice-covered’ territorial waters, is secondly also in line with the object and purpose of UNCLOS, as environmental protection is emphasised continuously

¹⁴² 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, 28 July 2012)

¹⁴³ Rules of navigation on the water area of the Northern Sea Route (adopted, 17 January 2013)

¹⁴⁴ Huebert, ‘Article 234’, 257.

¹⁴⁵ Molenaar, ‘Coastal State Jurisdiction’, 425.

¹⁴⁶ L. Boone, ‘The Regulation of International Shipping’ in Molenaar et. al. (ed.) *The law of the Sea and the Polar Regions. Interactions between Global and Regional Regimes*, (Leiden/Boston, 2013), 195-196. [Boone, ‘International Shipping’]

¹⁴⁷ IMO, ‘Guidelines for Ships Operating in Arctic Ice-Covered Waters’, MSC/Circ.1056, MEPC/Circ.399 (23 December 2002), G-3.2 and ‘Guidelines for Ships Operating in Polar Waters’, Resolution A1024(26) (2 December 2009), G-3.3.

¹⁴⁸ Fauchald, ‘Arctic Regulatory Frameworks’, 77

¹⁴⁹ Bartenstein, ‘Arctic Exception’ 28.

¹⁵⁰ Molenaar, ‘Coastal State Jurisdiction’, 419

¹⁵¹ O.S. Stokke, ‘A legal regime for the Arctic? Interplay with the Law of the Sea Convention’ (2007), *Marine Policy* 31, 403.

¹⁵² Churchill & Lowe, *Law of The Sea*, 348.

throughout the Convention. Ships navigating in Norwegian and Russian Arctic waters may encounter equally as much ice within their territorial seas as within their EEZs and are therefore potentially exposed to the same navigational challenges. Ice presence will nevertheless vary, as coastline ice often melts in summer, whereas some parts of the EEZ in the NSR are ‘ice-covered’ throughout the year. Arctic coastal States could thus, due to environmental concerns of potential oil pollution, benefit from an exception from the general multilateral approach favoured in the Convention.

Thirdly, the risk of exploitation of the extended powers is further limited by the high threshold of application, as it additionally requires ‘particularly severe’ climatic conditions and ‘exceptional’ hazards to navigation.

These considerations, combined with the abovementioned arguments, supports in my view the conclusion that the phrase ‘within the limits of the exclusive economic zone’ is to be interpreted as also encompassing Norwegian and Russian territorial waters.

4.3 The temporal scope of Art. 234

Neither ‘ice-covered areas’ nor ‘ice’ are terms defined in the Convention. It is nevertheless generally accepted that the phrase corresponds with the terminology of The World Meteorological Organization.¹⁵³ It is thus not limited to ice originating at sea, but covers all types of ice encountered at sea.¹⁵⁴ However, the application of Art. 234 is not solely identified through this condition. ‘Ice-covered areas’ are additionally associated with areas ‘where particularly severe climatic conditions’ and ‘ice covering such areas for most of the year’ is present.

The vague phrasing makes it difficult to derive from the ordinary meaning how long the areas must be ‘ice-covered’. Neither the *travaux préparatoires* contain published materials explaining the chosen wording.¹⁵⁵ Molenaar suggests nevertheless that areas covered by ice for more than six months of the year lies within the temporal scope,¹⁵⁶ as this implies that the ice-presence at these times is likely to ‘create obstructions’ or hazardous navigation causing ‘major harm to or irreversible disturbance of the ecological balance’.¹⁵⁷ Great areas of the Barents Sea are, in comparison to other Arctic seas, consequently not covered by Art. 234, as navigation is enabled due to the limited temporal presence of ice here.¹⁵⁸

Parts of Arctic waters are, due to climate change, nevertheless experiencing decreasing presence of ice, where some areas are ‘ice-covered’ less than six months of the year or where it varies seasonally or

¹⁵³ Rosenne & Yankov, ‘Article 234’, 397.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Molenaar, *Coastal State Jurisdiction*, 420.

¹⁵⁷ Ibid.

¹⁵⁸ Brubaker, *Russian Arctic Straits*, 3.

yearly.¹⁵⁹ This development is potentially threatening the possibility to rely on Art. 234.¹⁶⁰ The question in the following is thus whether Art. 234 applies in areas covered by ice for less than six months ‘of the year’ or varies seasonally or yearly.

The phrase ‘most of the year’ can be understood as only referring to permanent ice-presence. Such a narrow understanding corresponds arguably also with the argument on interpreting exceptions from the multilateral approach within UNCLOS narrowly. It can on the contrary, due to variations in ice-conditions, be argued that a broader understanding must apply, by emphasizing that these variations are ‘the general characteristics of the climate’ and that the relation to ‘ecology and to navigation in the region concerned (...) should be born in mind’.¹⁶¹

A recognition of these areas as extremely fragile, regardless of seasonal changes, is further supported by a broad interpretation of the word ‘where’. It can arguably refer to the geographical area where ‘severe climatic conditions’, the presence of ice or pollution is likely to cause ‘major harm’ or ‘irreversible disturbance to the ecological balance’, exists as general characteristics.¹⁶² Coastal States can consequently also use their jurisdictional powers when these characteristics are not present. A narrow interpretation suggests on the contrary that ‘where’ can be read as ‘when’, where the scope of Art. 234 is limited temporarily to periods of the year when the prescribed circumstances *actually* exists.¹⁶³

The drafting history indicates furthermore that the State Parties intended to limit the adoption of unilateral measures to those periods where the challenges posed by ice-presence and ‘particularly severe climatic conditions’ hampers navigation unless proper equipment, crew and navigational skills are required.¹⁶⁴ The purpose of the word ‘where’ was thus incorporated to identify the areas in which ‘necessary’ laws can be enacted.¹⁶⁵ However, this interpretation would have the effect that the conditions listed lost their independent meaning, as the area could have been defined by referring to ice-coverage ‘for most of the year’, as this implicitly fulfill the other conditions.¹⁶⁶

A comparison between Art. 234 and Art. 211(6) gives support to both interpretations. The similar drafting and the similarity of the conditions listed in these provisions, suggests that Art. 234 is to be interpreted in a similar, narrow manner, as both can be regarded as providing ‘special situation’ remedies.¹⁶⁷ This additionally corresponds better with the

¹⁵⁹ O. Orheim, ‘The Polar Oceans and Climate Change’ in D. Vidas et. al. (eds.) *The World Ocean in Globalisation. Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues* (Leiden/Boston, 2011), 149.

¹⁶⁰ Molenaar, ‘Arctic Shipping Law’, 137.

¹⁶¹ Rosenne & Yankov, ‘Article 234’, 397.

¹⁶² Franckx, ‘Maritime Claims’, 96.

¹⁶³ *Ibid.*

¹⁶⁴ McRae & Goundrey, ‘Environmental Jurisdiction’, 217

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ Brubaker, ‘Russian Arctic Straits’, 54

limited enforcement mechanisms provided for in Art. 218-220.¹⁶⁸ The conditions in Art. 211(6) does however, not define 'special areas' as such, but rather refers to the purpose the laws and regulations must reflect.¹⁶⁹ The decision to adopt two different provisions suggests thus that the conditions within Art. 234 is broadening the scope by guiding the identification of 'ice-covered' areas.¹⁷⁰

Neither State practice seems to limit the temporal scope narrowly, as neither Canadian nor Russian legislation adopted in accordance with Art. 234 indicate that there are any temporal limitations.¹⁷¹ US statements do not expressly favour a narrow interpretation,¹⁷² and any Norwegian public opinions on the temporal scope are not known to exist.

A broad interpretation minimises furthermore the unfavourable practical effects minor changes in ice-presence would have on the jurisdiction. It will prevent that coastal State's jurisdictional powers change on a seasonal or yearly basis, which forces them to operate with parallel legal regimes where one only applies when the thresholds in Art. 234 are met. It enables furthermore that Norway and Russia can rely on Art. 234 for those parts of their Arctic waters where navigation during the summer seasons is practiced as a consequence of limited ice-presence. Practical difficulties arise in relation to the assessment of when areas are 'ice-covered', as ice declines gradually. Additional challenges arise also with regards to their obligation to duly publish enacted laws and threaten the shipping industry's need for legal foreseeability. The adoption of measures in these periods is arguably restricted by the generally high threshold of the provision in its entirety, and the term 'due regard to navigation' in particular, which restrict it to 'necessary' adoption of national measures.¹⁷³

An interpretation where the term 'where' is understood as 'when' may arguably differ too much from the chosen wording. However, this interpretation functions as a limitation rather than as an extension of coastal States' rights. This approach finds additional support in the argument that the multilateral approach in UNCLOS suggests to limit unilateral measures. It seems furthermore difficult to largely base a broad interpretation on the potential practical effects a conclusion to the contrary may have. The intention of the drafters seems to have been to limit the scope only to 'necessary' measures. I am accordingly, despite of the difficulties to identify a clear-cut conclusion, of the opinion that Art. 234 does not apply in areas covered by ice for less than six months 'of the year' or where ice varies seasonally or yearly.

¹⁶⁸ Ibid.

¹⁶⁹ McRae & Goundrey, 'Environmental Jurisdiction', 218

¹⁷⁰ Ibid.

¹⁷¹ Brubaker, 'Russian Straits', 55.

¹⁷² Ibid.

¹⁷³ Molenaar, *Coastal State Jurisdiction*, 420.

4.4 Final remarks

The broad jurisdictional powers granted in the ‘Arctic Exception’ may, when its conditions are met, accommodate the lack of international regulations specifically applicable for the Arctic.¹⁷⁴ The revealed ambiguities of the provision illustrates nevertheless that identifying the jurisdictional competences within UNCLOS, is not a straightforward exercise. Labelling the provision ‘a witch’s brew, a caldron of legal uncertainty which could be stirred in favour of either the coastal or shipping State’,¹⁷⁵ is to a great extent fitting. The lack of legal certainty concerning its geographical and temporal scope creates a great amount of leeway for States to interpret it in their favour. This may contribute to cause fragmentation of international law and threaten harmonisation and cooperation at the international level. The interpretive uncertainties may furthermore have potential devastating effects on the Arctic marine environment, as some coastal States may be reluctant to use their extended powers as they bear the burden of proof that their enacted measures respect the jurisdictional limits.¹⁷⁶

The cumulative conditions, setting a high threshold of application, contribute to limit its practical significance as a protector and preserver of the Arctic marine environment, as it largely only applies within certain areas of Norwegian and Russian Arctic waters. The potential prospective use of the jurisdictional powers is furthermore threatened, as scientific research reveals that decreasing ice-coverage and higher temperatures is likely in Arctic waters, consequently limiting or eliminating the application of Art. 234.

¹⁷⁴ Jakobsen, Adequacy of LOS, 314.

¹⁷⁵ Lamson C. & VanderZwaag D: ‘Arctic Waters: Needs and Options for Canadian-American Cooperation’ in 18 *Ocean Dev. & Int. Law Journal* (1987), p. 49-50, cited in E. Franckx: *Maritime Claims*, 96.

¹⁷⁶ Bartenstein, ‘Arctic Exception’, 45.

5 IMO Guidelines for ships operating in polar waters and the emerging Polar Code

5.1 Introduction

The contemporary legal regime on coastal State jurisdiction and vessel-source oil pollution in the Arctic is, as we have seen, highly fragmented. Thus, an initiative to harmonise the international instruments through the adoption of a mandatory Polar Code has emerged under the auspices of the IMO. This chapter seeks to explore the latest developments within this work, and analyses in particular the adequacy of the emerging Polar Code within the field of environmental protection concerning vessel-source oil pollution and the potential impact the Code may have on the existing international regime on coastal State jurisdiction.

5.2 The development of a mandatory Code for ships operating in polar waters

Initiatives to develop rules and regulations for ships operating in the Arctic arose during the early 1990s, as Germany proposed to adopt special rules for polar areas as a mean to harmonise the international legal framework.¹⁷⁷ The subsequent negotiations, led by Canada, resulted in the submission of a Draft Polar Code to the Sub-committee on Ship Design and Equipment (hereinafter DE Sub-Committee) in 1998.¹⁷⁸ However, its mandatory status, geographical application to Antarctica and the displacement of national measures, led to limited support from the United States among others.¹⁷⁹ This dissatisfaction made the Maritime Safety Committee (hereinafter MSC) decide that the Code was to become a set of recommendatory guidelines.¹⁸⁰ This led to the subsequent adoption of the 2002 ‘Guidelines for Ships Operating in Arctic Ice-Covered Areas’,¹⁸¹ addressing issues going beyond the existing international instruments. Its provisions were subsequently modified and its geographical application further extended to encompass Antarctica, as the IMO Assembly adopted the 2009 ‘Guidelines for Ships Operating in Polar Waters’¹⁸² negotiated at the 86th MSC session.

Norway, Denmark and the US pointed out, despite the adoption of the Guidelines, that there were still no international regulations specifically addressing safety and environmental concerns for ships operating in the

¹⁷⁷ L.W. Brigham, ‘The emerging International Polar Navigation Code. Bi-polar relevance?’ in D. Vidas (ed.) ‘Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention’ (Cambridge, 2000), 248.

¹⁷⁸ *Ibid.*, 249.

¹⁷⁹ R. Rayfuse, ‘Coastal State Jurisdiction and the Polar Code’ in T. Stephens & D.L. VanderZwaag (ed.) *Polar Oceans Governance in an Era of Environmental Change, New Horizons in Environmental and Energy Law Series* (Cheltenham, 2014), 244. [Rayfuse, ‘Coastal State Jurisdiction’]

¹⁸⁰ Ø. Jensen, ‘Arctic shipping guidelines. Towards a legal regime for navigation safety and environmental protection?’ (2008) *Polar Record* 44 (229), 109.

¹⁸¹ IMO, ‘Guidelines for Ships Operating in Arctic Ice-Covered Waters’, MSC/Circ.1056, MEPC/Circ.399 (23 December 2002)

¹⁸² IMO, ‘Guidelines for Ships Operating in Polar Waters’, Resolution A1024(26), adopted 2 December 2009

polar regions and proposed ‘that the establishment of mandatory requirements would correct [this] significant gap.’¹⁸³ The initiative was followed up by the DE Sub-Committee and other Member States, and was finally approved by the MSC through its inclusion of the development of a mandatory Code for ships operating in polar waters as a high priority item on the DE Sub-Committee’s agenda in 2009.¹⁸⁴ The Code was to be based on the existing Guidelines, be risk- and goal-based, contain mandatory and recommendatory provisions and apply to polar waters exclusively.¹⁸⁵ The Polar Code is furthermore to be made mandatory through resolutions by the MSC and the Marine Environmental Protection Committee (hereinafter MEPC), amending the existing 1974 International Convention for the Safety of Life at Sea¹⁸⁶ (hereinafter SOLAS) and MARPOL 73/78.¹⁸⁷ Discussions and actions taken by the relevant sub-committees have subsequently been reported to the MSC and the MEPC and correspondence groups have coordinated the work in between their sessions.

The initial target date of 2012 has been postponed several times, as the progress has been slower than expected. The vast geographical coverage and negotiations on highly technical issues concerning *inter alia* requirements on classification, equipment and design, are regarded as the main reasons for the delay.¹⁸⁸

However, the work on the Code entered its final and crucial phase in January 2014, as the Sub-Committee on Ship Design and Construction (hereinafter SDC) convened its first session and agreed in principle on the Draft mandatory Polar Code and the amending chapters to SOLAS and MARPOL.¹⁸⁹ The SDC continues the work of the former DE Sub-committee after the restructuring of the sub-committees within the IMO.

The MSC approved the Introduction and the mandatory and recommendatory safety provisions (Part I-A and I-B) during its 93rd session in May 2014. The Committee also approved the new Chapter XIV of the SOLAS Convention on ‘Safety measures for ships operating in polar waters’, making the Code mandatory. These proposals are expected to be considered for adoption during the next MSC session scheduled for 17-21st of November 2014. The preamble, the Introduction, the mandatory and recommendatory environmental provisions (Part II-A and B) and the amendments to the MARPOL 73/78 Annexes were discussed by MEPC 66 in May 2014 and later approved by the Committee during its 67th session (13-17 October 2014). The Committee is expected to consider the

¹⁸³ Denmark, Norway and the United States, Mandatory Application of the Polar Guidelines, MSC 86/23/9, para. 14.

¹⁸⁴ MSC, Report of the Maritime Safety Committee on its Eighty-sixth Session, MSC 86/26, para. 23.32

¹⁸⁵ DE, Report to the Maritime Safety Committee, DE 53/26, para. 18.9.

¹⁸⁶ International Convention for the Safety of Life at Sea, (adopted 1 November 1974, entry into force 25 May 1980), text published in United Nations, Treaty Series, Vol. 1184, p. 2

¹⁸⁷ DE, Report to the Maritime Safety Committee, DE 53/26, para. 18.9.

¹⁸⁸ Boone, ‘International Shipping’, 199.

¹⁸⁹ IMO News; ‘Draft mandatory Polar Code and amendments agreed in principle’ in *The Magazine of the International Maritime Organization* Issue 1 (2014), 15-16.

adoption of environmental provisions and MARPOL amendments at its next session, tentatively scheduled for May 2015. The amendments to SOLAS and MARPOL are, once finally adopted by the committees, expected to enter into force on 1 January 2017.¹⁹⁰

5.3 The main elements of the 2014 Draft Polar Code

The latest complete and published draft of the Polar Code is enclosed in Annex 24 of ‘Report of the Maritime Safety Committee on its ninety-third session’¹⁹¹ (hereinafter Draft Polar Code) from May 2014.

The geographical scope of the Code is based on the coordinates stipulated in the 2002/2009 Guidelines. It encompasses *inter alia* the entire NSR, the Polar Ocean, the Bering Sea, as well as Svalbard.¹⁹² Russia proposed during MSC 93 nevertheless to exempt the Bering Sea, as its ‘characteristics resemble rather those of non-Arctic freezing seas (...)’.¹⁹³ The proposal was however not supported by the Committee, since the boundaries previously agreed upon, took ‘into account all the hazards in the Arctic area’.¹⁹⁴

The Code will in its first phase only apply to ships falling within the scope of Regulation 3, Chapter I of the SOLAS Convention, thus essentially passenger and cargo ships over 500grt. engaging in international voyages.¹⁹⁵ The scope is later expected to be extended to non-SOLAS vessels including fishing vessels and pleasure yachts.¹⁹⁶

The Code has moved away from the IACS ship categories used in the existing recommendatory Guidelines. Vessels are instead classified as Category A, B or C ships. Category A ships are ‘designed for operation in polar waters at least in medium first-year ice, which may include old ice inclusions’, whereas a Category B ship is ‘not included in category A’ and is ‘designed for operation in polar waters at least thin first-year ice, which may include old ice inclusions’. Category C ships ‘designed to operate in open water or in ice conditions less severe than those included in Categories A and B’.¹⁹⁷

Operating ships must apply for a Polar Ship Certificate issued by the flag State that assesses the anticipated operations and the potential

¹⁹⁰ IMO Media Centre, ‘Draft Polar Code approved by IMO’s Marine Environment Protection Committee’, IMO Home Page (October 20, 2014). Available at http://www.imo.org/MediaCentre/PressBriefings/Pages/32-mepec-polar.aspx#.VE5e_WzKzcs (accessed November 10, 2014) [IMO Media Centre, ‘MEPC 67 Press release’]

¹⁹¹ MSC, Report of the Maritime Safety Committee on its Ninety-Third Session, MSC 93/22/Add.3, Annex 24. [Draft Polar Code]

¹⁹² Draft Polar Code, Introduction, para.5.

¹⁹³ Russian Federation, ‘The delineation of boundaries of the Polar Code’s scope of application’, MSC 93/10/9, para. 4.

¹⁹⁴ MSC, Report of the Maritime Safety Committee on its Ninety-Third Session, MSC 93/22, para. 10.25.

¹⁹⁵ J. Janour, ‘Progress towards the mandatory code for polar shipping’ (2014) *Australian Journal of Maritime & Ocean Affairs*, 6:1, 66-67.

¹⁹⁶ *Ibid.*

¹⁹⁷ Draft Polar Code, Introduction, para. 2.1-2.3

navigational hazards the ship may encounter.¹⁹⁸ The flag State is also responsible for surveying the ship and ensuring that it meets the standards stipulated in the Code.¹⁹⁹ The certificate is to be supplemented by a Polar Water Operational Manual (PWOM) providing the owner, captain and crew with information on the ship's operational capabilities and limitations to enhance the quality of their decision-making when navigating.²⁰⁰

The mandatory Part I-A on safety measures covers design, construction, equipment, operational, training, search and rescue. Each chapter is further setting out goals and functional requirements on *inter alia* ship structure, safety of navigation and stability and subdivision. These requirements are in the context of oil spill prevention of particular importance, as they will lower the probability of accidents and oil spills occurring in the aftermath of such events. The provisions on ship structure require that ships are to be built with materials suitable to encounter low temperatures and that the hulls are strengthened to resist ice encounters.²⁰¹ These requirements are however generally less stringent than the comprehensively formulated standards in the 2009 Guidelines, but they contribute nevertheless to enhance navigational and environmental safety as certain minimum standards now becomes mandatory. The weaker standards may be explained by the general assumption that States are less likely to accept stricter binding standards than non-binding standards, especially within vast geographical areas.²⁰²

Ice-navigators and ice-breaking assistance contributes to minimize the risk of accidental oil spills in ice-covered areas, as they enhance safer navigation. Russia has on several occasions sought to make ice-breaker escort mandatory, as it believes that navigational safety in Arctic waters cannot be guaranteed without.²⁰³ Such requirements are nevertheless costly and are presumed to be regarded as a burden by ship owners. Paragraphs 1.2.1 and 1.2.2 of the 2009 Guidelines stipulates that '[a]ll ships operating in polar ice-covered waters should carry at least one Ice Navigator (...)' that 'should be available at all times while the ship is underway and making way in the presence of ice'.

Requirements on ice-navigation and ice-breaking assistance have been discussed in conjunction to the chapters in the Polar Code on voyage planning and training and manning. The SDC considered in January 2014 a proposal where 'icebreaker assistance should be ensured if applicable',²⁰⁴ and where the use of ice-breakers to fulfil this requirement, was regulated in detail.²⁰⁵ However, the SDC decided to move these provisions from the proposed chapter 12 and rather make them recom-

¹⁹⁸ Ibid, Part I-A, para. 1.3.1

¹⁹⁹ Ibid, para. 1.3.2

²⁰⁰ Ibid, para. 2.1

²⁰¹ Ibid, Part I-A, para. 3.2.1.1-2

²⁰² Fauchald, 'Arctic Regulatory Frameworks', 81.

²⁰³ DE, Report to the Maritime Safety Committee, DE 55/22, para. 12.25.

²⁰⁴ Norway, *Development of a Mandatory Code for Ships Operating in Polar Waters*, SDC 1/INF. 10, Annex, para. 12.2.1.5.

²⁰⁵ Ibid., Para. 12.7.1-7.

mandatory under Part I-B, chapter 2.²⁰⁶ This decision has been upheld by the MSC and is incorporated in the latest draft of the Polar Code.²⁰⁷

The SDC did agree upon the inclusion of a clause requiring that '[i]ce Navigator(s) shall be provided, as appropriate',²⁰⁸ as a mean to enhance navigational safety. The SDC failed nevertheless to agree upon the Canadian proposal requiring 'another person' (i.e. ice navigator or ice pilot) to advise the crew on the bridge when navigating.²⁰⁹ The Canadian delegation proposed a similar clause at MSC 93 to help to improve strategic voyage planning through expertise and local knowledge.²¹⁰ The proposal was not supported by the Committee.²¹¹ The Committee did neither agree to refer the proposal to the working group for further considerations, as it considered that it would be inappropriate to reopen the discussion on a question that had been extensively dealt with at the earlier stages of the negotiations.²¹²

The published documents reveal difficulties in relation to the making of the requirements concerning ice navigators and icebreakers in the 2009 Guidelines mandatory. This may contribute to minimise the potential important shift the Code could have represented with regards to navigational safety and environmental protection. These issues are additionally only expected to become more prominent as polar activities in the resource development sector are likely to increase - concerns particularly emphasised by the Canadian delegation following MSC's rejection of Canada's proposal on supplementary assistance in ice navigation.²¹³

Mandatory ship routing systems and vessel traffic schemes are neither included in the draft of the Polar Code. This limits the possibility States have to restrict vessel traffic to allocated areas, as means to concentrate and ensure more effective implementation of measures. Chapter 11 stipulates nevertheless requirements on voyage planning and reporting to enable safe navigation where environmental protection is taken into consideration.²¹⁴

Two issues have been particularly disputed during the negotiations: the inclusion of an environmental chapter (Part II) and the Code's relationship to the existing regime on coastal State jurisdiction under international law. The following sub-sections analyse these issues in an attempt to assess their effects on the existing international legal framework.

²⁰⁶ SDC, *Report to the Maritime Safety Committee*, SDC 1/26, para. 3.53.

²⁰⁷ Draft Polar Code, Part I-B, para. 3.2

²⁰⁸ SDC, *Report to the Maritime Safety Committee*, SDC 1/26, Annex 3, para. 13.2.3.4

²⁰⁹ Norway, *Development of a Mandatory Code for Ships Operating in Polar Waters*, SDC 1/INF. 10, Annex, para. 13.2.1.1.

²¹⁰ Canada, *Urgent matters emanating from the first session of the Sub-Committee*, MSC 93/11/2, para. 8.

²¹¹ MSC, *Report of the Maritime Safety Committee on its Ninety-Third Session*, MSC 93/22, para. 10.38.

²¹² Ibid.

²¹³ MSC, *Report of the Maritime Safety Committee on its Ninety-Third Session, Statements by Delegations and Observers*, MSC 93/22/Add.3, Annex 32, Item 11.

²¹⁴ Draft Polar Code, para. 11.3 and 11.4.

5.4 The Polar Code, environmental protection and vessel-source oil pollution

Both the 2002 and the 2009 Guidelines contain short chapters on environmental protection. They are however mainly focused on standards relating to crewing, construction and equipment, as means of damage control in cases of accidents.²¹⁵ They are additionally only recommending the actors ‘to take into account any applicable national and international rules and regulation and industry best practices’.²¹⁶

Norway has generally supported the idea of a Polar Code with comprehensive environmental protection and received general support for the inclusion of an environmental chapter at the 53rd session of the DE Sub-Committee in 2010.²¹⁷ Norway followed up by submitting a Draft Proposal for an Environmental Protection Chapter during the Committee’s 55th session.²¹⁸ It sought *inter alia* to require stronger hulls,²¹⁹ prohibit any operational discharges of oil²²⁰ and limit the use and carriage of heavy fuel oil (HFO).²²¹ The Committee endorsed the effort in general, but decided to evaluate the specific provisions in subsequent discussions.²²² Some commentators have understood the Norwegian efforts as an attempt to ensure stringent environmental protection in the waters around Svalbard due to the lack of ‘a clear Article 234 [UNCLOS] mandate’.²²³

Several NGOs followed up the Norwegian initiative through submissions of proposals containing extensive environmental measures, such as prohibiting the use and carriage of HFO in the Arctic to the same extent present in Antarctic waters through MARPOL 73/78.²²⁴ An agreement was, however, not reached and the DE Sub-Committee called for further inputs from the MEPC.²²⁵ The proposals failed to obtain sufficient support at the 65th MEPC session, as the majority of the delegations held the view that it was ‘premature to regulate the use of [HFO] on ships operating in Arctic waters’.²²⁶ However, some delegations expressed that such a prohibition could both be desirable and possible in the future.²²⁷ The non-binding Part II-B in the current draft contains nevertheless a proposed text stipulating that ‘[s]hips may, on a voluntary basis, not use

²¹⁵ 2009 Polar Guidelines, section 16.2

²¹⁶ Ibid, section. 16.3

²¹⁷ DE, Report to the Maritime Safety Committee, DE 53/26, para. 18.8.13

²¹⁸ Norway, Draft Proposal for an Environmental Protection Chapter for Inclusion in the Polar Code, DE 55/12/5.

²¹⁹ Ibid., para. 21.2.1

²²⁰ Ibid., para. 21.2.3

²²¹ Ibid., Section 21.3

²²² DE, Report to the Maritime Safety Committee, DE 55/22, para. 12.13.

²²³ Rayfuse, ‘Coastal State Jurisdiction’, 247.

²²⁴ FOEI, CSC, IFAW, WWF, Pacific Environment, Heavy fuel oil use by vessels in Arctic waters, DE 57/11/11, para. 13

²²⁵ DE, Report to the Maritime Safety Committee, DE 57/25, para. 11.18

²²⁶ MEPC, Report of the Marine Environmental Protection Committee on its Sixty-Fifth Session’, MEPC 65/22, para. 11.53

²²⁷ Ibid.

or carry heavy fuel oil in Arctic area'.²²⁸ The proposal was also approved by the MEPC 67 in October 2014.²²⁹

The mandatory environmental chapter (Part II-A) of the MSC 93 Draft Polar Code does however contain a complete ban of 'any discharge into the sea of oil or oily mixtures from any ships'.²³⁰ Russia has throughout the negotiating process been a great supporter of environmental topics in the Code,²³¹ and gained *inter alia* support for the inclusion of provisions enhancing oil spill preparedness.²³² It has on several occasions nevertheless attempted to modify the complete ban on oil discharges by proposing an exception for dischargers 'where all of the conditions indicated in regulation 15.3 (Discharges in special areas) of MARPOL Annex I are satisfied'.²³³ The rationale is that a complete ban on discharges 'would be extremely difficult to adhere to' during lengthy voyages.²³⁴ The proposal did neither gain sufficient support at the SDC's first session in January 2014,²³⁵ nor at the 66th MEPC session in March-April 2014.²³⁶ The issue was recently also discussed at MEPC 67. The Russian delegation requested the Committee to take into account the practical effect a ban would have on ships with lacking facilities on board to accumulate oily mixtures during the voyage, such as ice-breakers, hydrographic survey and research vessels.²³⁷ The delegation expressed concerns with regards to the adverse effects it may have on Arctic shipping and that it might result in an increase of illegal and uncontrolled discharges from such ships.²³⁸ Consequently, Russia suggested that the MEPC 67 should agree to a five-year exemption period for all category A ships operating in polar waters continuously for a minimum of 30 days and where their discharges of processed oily waters do not exceed the limits required for special areas in MARPOL Annex 1.²³⁹ The final report from MEPC 67 has at the time of writing (November 2014) not been made available to the public. The press release from the session indicates nevertheless that the proposal still reflects the clause approved at MSC 93.²⁴⁰ If, or to what extent, the MEPC took the Russian proposals into account, is not known.

A final evaluation of the adequacy of the environmental provisions of the Polar Code is difficult to give when they still are subject to negotiations

²²⁸ Draft Polar Code, Part II-B, Information and Additional Guidance to Part II-A, Recommendatory Measures, 'Additional guidance to chapter 1'

²²⁹ IMO Media Centre, 'MEPC 67 Press release'.

²³⁰ Draft Polar Code, Part II-A, para. 1.4.1.2.

²³¹ Russian Federation, Proposals related to an environmental chapter of a mandatory Code for ships operating in polar waters (Polar Code), DE 57/11/12, para. 4-5.

²³² DE, 'Report to the Maritime Safety Committee'. DE 57/25, para. 11.14.

²³³ Russian Federation, Comments on chapter 1 of part II-A, SDC 1/3/18, para. 3.

²³⁴ *Ibid.*, para. 2.

²³⁵ SDC, Report to the Maritime Safety Committee, SDC 1/26, para. 3.39

²³⁶ MEPC, Report of the Marine Environment Protection Committee on its Sixty-Sixth Session, MEPC 66/21, para. 11.29. [MEPC 66/21]

²³⁷ Russian Federation, *Comments on the environmental matters in the Polar Code (Part II-A, chapter 1)*, MEPC 67/9/2, para. 5.

²³⁸ *Ibid.*, para. 9.

²³⁹ Russian Federation, *Comments on the Report of the Polar Code Correspondence Group (Part II-A, chapter 1)*, MEPC 67/9/3, para. 11.

²⁴⁰ IMO Media Centre, 'MEPC 67 Press release'

and when the latest draft from MEPC is not published. Some trends are nevertheless present.

The Polar Code reveals that safety measures and environmental protection is closely interrelated. The negotiating States have acknowledged that ‘any safety measure taken to reduce the probability of an accident to happen, will largely benefit the environment’.²⁴¹ The technical requirements enclosed in Part I of the Code are thus important contributions to the enhancement of environmental protection. However, a general feature of the draft Code is that several of these requirements are vague, as *inter alia* materials used to enhance ship structure in low temperatures must be ‘suitable’,²⁴² and ship stability must be ‘sufficient’ to encounter ice accretion.²⁴³ These ambiguities create room for diverging interpretations and threaten the Code’s initial purpose of being a harmonising instrument.

The Draft contains, in comparison to the 2009 Guidelines, provisions posing specific obligations upon States within discharge of different pollutants. The absolute prohibition of oil discharges represents an important feature, as it encompasses both operational and accidental vessel-source pollution. The draft has nevertheless been criticised for not containing an environmental chapter as comprehensive as initially envisaged. A wide range of NGOs have criticised the environmental chapter and even stated that it illustrates ‘the active lobbying of the shipping and cruise industry which consistently dismisses ecological concerns’.²⁴⁴ The failure to agree upon a complete ban on HFO is an obvious environmental deficiency, as this clearly would have been beneficial for the unique Arctic marine environment.

A further question is whether the choice of the SOLAS and MARPOL Conventions as means of implementation, gives adequate protection. The main concern is related to the likeliness of non-compliance, as these instruments mainly stipulate flag State obligations. The concerns of coastal States are not curbed, and neither are issues concerning ships sailing under ‘flags of convenience’ solved. The following sub-section identifies nevertheless that coastal States are likely to retain their jurisdictional powers provided for under UNCLOS.

The Code applies further both to Arctic and Antarctic waters. Arctic waters have, in comparison to Antarctic waters, greater presence of sea-ice and multi-year ice. Despite the fact that the Code emphasises that their legal and geographical differences have to be taken into account,²⁴⁵ may one question the lack of efforts to customise or expand certain obligations in relation to Arctic navigation in particular. Nevertheless, the broad geographical scope of the Polar Code may in general contribute to

²⁴¹ Draft Polar Code, Preamble, para. 4.

²⁴² Draft Polar Code, para. 3.2.1.1

²⁴³ Ibid., para. 4.2.1.1

²⁴⁴ Weaver, R.: ‘Environmental groups blasts Polar Code’ in *The Arctic Journal* (February 5, 2014). Available at <http://arcticjournal.com/politics/396/environmental-groups-blast-polar-code> (accessed November 10, 2014)

²⁴⁵ Draft Polar Code, Preamble, para. 5.

extend environmental protection to the high Seas, thus representing a positive expansion of the current legal regime.

5.5 The Polar Code and coastal State jurisdiction

The published documents on the Polar Code's drafting history, shows that the negotiating States have expressed different views on the relationship between the existing international legal regime on coastal State jurisdiction and the Polar Code. Russia and Canada have in particular sought to prevent potential infringements of their existing national regulations based on Article 234 UNCLOS.²⁴⁶ Several shipping nations, including the United States, have on the contrary argued that the Code should seek to prevent the occurrence of national regulations infringing effective navigation.²⁴⁷ The potential impact a new Polar Code may have on the interpretation of Article 234 UNCLOS has additionally received significant academic attention. The question in the following is thus whether the Arctic coastal States retain their broad jurisdictional powers under Article 234.

The non-binding Guidelines do not contain any provisions regulating their relationship to Article 234. Paragraph 2-9 of the 2009 Guidelines, does however indirectly support that national measures adopted according to Art. 234 are not impeded when stipulating that '[t]he Guidelines are not intended to infringe on national systems of shipping control'.

Both Canada and Russia have, not surprisingly, attempted to include a similar 'savings clause' into the draft Polar Code as a mean to retain their existing rights under international law. Russia expressed at an early stage of the negotiations that the Code 'should clearly define principles of applying the requirements within the EEZs of polar States'.²⁴⁸ It supported previous Canadian efforts to give national measures priority by submitting a clause in the draft preamble stipulating that '[t]he Code is not intended to infringe on national systems of shipping control until a harmonized system is in place (...)'.²⁴⁹ Canada submitted further a proposal opting for a combination between national and international measures, where the international measures were to assist coastal State regulation on navigation control and reporting.²⁵⁰ The proposals were discussed thoroughly in the DE Sub-Committee, but were opposed by the United States and several other delegations. They expressed concerns over the legal basis of Canadian and Russian regulations adopted for the Northwest Passage and NSR, and had doubts regarding whether Article 234 UNCLOS or the Polar Code itself 'would provide the international

²⁴⁶ A. Scassola, 'An International Polar Code of Navigation: Consequences and Opportunities for the Arctic' (2013) *The Yearbook of Polar Law* V, 278. [Scassola, 'International Polar Code']

²⁴⁷ Ibid.

²⁴⁸ The Russian Federation, Procedure of accounting for national regulations, DE 55/12/23, para. 5.

²⁴⁹ Ibid.

²⁵⁰ Canada, Application of requirements in the mandatory Polar Code, DE 55/12/7, para. 7 & 15.

legal basis for these systems'.²⁵¹ The Russian proposal did not gain sufficient support, but the Sub-committee agreed nevertheless in principle that 'the Code should not conflict with Antarctic Treaty and UNCLOS provisions'.²⁵²

The relationship between national and international measures was further considered in a later Russian proposal on ice reinforcements categories stating that '[s]pecific limitations for navigation in ice conditions are imposed by the vessel's ice class and national rules adopted by the coastal State empowered accordingly by article 234'.²⁵³ The *Report of the Working Group (Part 2)* of the DE Sub-Committee was further supportive of the Canadian and Russian interests, as its proposed draft Polar Code provided that it was not 'to infringe on national systems of shipping control until a harmonized system is in place',²⁵⁴ and that it was not to 'be taken as conflicting with [UNCLOS]'.²⁵⁵ However, only the latter proposal gained support and was included in the report of the correspondence group prepared by Norway to DE 57.²⁵⁶

The question has additionally received extensive attention within the MSC and MEPC. The Code will, as previously mentioned, become binding through amendments of the SOLAS and MARPOL conventions. As a result, the published documents from the negotiations indicate that a 'savings clause' will not appear in the Polar Code itself, but through the amending chapters of MARPOL and SOLAS making the Code binding.

However, a major discussion during MEPC 66 was whether Art. 9(2) of MARPOL 73 already gave sufficient precision as to the nature of the provisions within the Polar Code and relevant international law, making the inclusion of a savings clause in the draft MARPOL amendments unnecessary. Article 9(2) MARPOL 73 stipulates that '[n]othing in the present Convention shall prejudice (...) the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction'.

The Canadian delegation argued, however, that the inclusion of a tailored clause bringing precision to the nature of the relationship between the environmental aspects of international law contained in the Polar Code and other relevant international agreements, would be of value.²⁵⁷ Canada emphasised in particular that Art. 9(2) was drafted before UNCLOS entered into force and that it directs that it does not prejudice the ongoing negotiations nor the future 'nature and extent of coastal and flag state

²⁵¹ DE, Report to the Maritime Safety Committee, DE 55/22, para. 12.7

²⁵² *Ibid.*, para. 12.7.3

²⁵³ The Russian Federation, A proposal to appoint categories depending on the ice reinforcements of ships, DE 56/10/14, para. 1.

²⁵⁴ DE, Development of a Mandatory Code for Ships Operating in Polar Waters, Report of the Working Group (Part 2), Annex, para. 4

²⁵⁵ *Ibid.*, para. 8.

²⁵⁶ Norway, Development of a Mandatory Code for Ships Operating in Polar Waters, Report of the correspondence group, DE 57/11/6, Annex 1, para. 8.

²⁵⁷ Canada, Amendments to the Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL), Reports of Sub-Committees, MEPC 66/11/7, para. 9.

jurisdiction'.²⁵⁸ A savings clause would additionally give governments better guidance on how the environmental provisions of the Code are to be applied and enforced in the context of other existing international obligations and in general enhance transparency.²⁵⁹ Canada proposed consequently to include a new paragraph in Regulation 2 of MARPOL Annexes I, II, IV and V clarifying that '[n]othing in the Polar Code shall prejudice the rights or obligations of States under international law as reflected in the 1982 United Nations Convention on the Law of Sea'.²⁶⁰

However, the proposal was not supported at MEPC 66. The majority held that Article 9(2) of MARPOL already brought sufficient precision and that a savings clause 'could cause confusion and potential legal uncertainty'.²⁶¹ The Committee emphasised that the environmental provisions in the Polar Code were not expected to conflict with relevant international law and approved the proposal where these questions are to be regulated by Art. 9(2) MARPOL 73.²⁶²

Following the Committee's decision, made the Canadian delegation a statement emphasising that it understood that the decision was based on the presence of Art. 9(2) MARPOL 73 and the view of the Committee 'that all IMO instruments are to be interpreted in a manner that would not prejudice or impair States' rights and obligations under international law as reflected in UNCLOS'.²⁶³

Canada expressed the same considerations concerning the enhancement of legal certainty through a savings clause during MSC 93. The delegation submitted a similar proposal stipulating that '[n]othing in part I-A of the Polar Code shall prejudice the rights or obligations of States under international law, as reflected in [UNCLOS]'.²⁶⁴ The proposal emphasised in particular that a savings clause was of particular importance with regards to the safety provisions of the Polar Code since the SOLAS Convention as such does not contain an overall savings clause applicable to the entire Convention.²⁶⁵ MSC 93 subsequently approved the draft Chapter XIV to the SOLAS Convention where Regulation 2(5) now contains a clause expressing that '[n]othing in this chapter shall prejudice the rights and obligations of States under international law'.²⁶⁶

Despite the fact that it is too early to obtain any clear-cut conclusions at this point in time, the current drafts and documents from the negotiations implies that the Polar Code will not infringe national measures and that the Arctic coastal States are likely to retain their jurisdictional powers under Article 234.

²⁵⁸ Ibid., para. 8.

²⁵⁹ Ibid., para. 7 and 11.

²⁶⁰ Ibid., para. 12.

²⁶¹ MEPC 66/21, para. 11.47.

²⁶² Ibid.

²⁶³ MEPC, Statements by Delegations and Observers, MPEC 66/21 Annex 20, p. 12.

²⁶⁴ Canada, Amendments to the International Convention for the Safety of Life at Sea, MSC 93/10/12, para. 8.1.

²⁶⁵ Ibid., para. 6.

²⁶⁶ MSC, Report of the Maritime Safety Committee on its Ninety-Third Session, Draft New SOLAS Chapter XIV, MSC 93/22/Add. 3 Annex 23.

The academic debate has in addition focused on the uncertain relationship between Art. 234, the GAIRAS formula and the Polar Code. Bartenstein argues that the Polar Code will not affect coastal State's jurisdictional powers under Art. 234. The main argument is that national regulations based on this provision are *lex specialis* to the requirements stipulated in the Polar Code, as Art. 234 does not contain any limiting reference to GAIRAS.²⁶⁷ Fauchald, on the contrary, argues that this argument infringes the general approach in UNCLOS, which seeks to ensure navigation in accordance with GAIRAS and limit coastal State interference.²⁶⁸ He supports this by referring to the requirement stipulated in Art. 234 that national measures 'shall have due regard to navigation'.²⁶⁹ Both lines of arguments are based on rational considerations. However, the interpretation including a GAIRAS condition goes in my view beyond the chosen wording of Article 234. It seems dubious to circumvent the ordinary meaning in favour of broader systemic considerations. Giving the Art. 234 precedence over GAIRAS supports furthermore the view that the unilateral competences allocated are to be seen as an exception from the multilateral approach within UNCLOS. Neither does the phrase 'due regard to navigation' clearly point out that its point of equilibrium favours GAIRAS limitations. A contrary conclusion would additionally limit coastal State's ability to adopt stricter CDEM standards, which are of particular importance in the harsh Arctic environment. Rayfuse notes nevertheless that if Fauchald's interpretation is correct, 'then unless the Polar Code contains technical requirements at least as stringent as those currently adopted in Canadian and Russian national legislation, there seems little incentive for those states to agree to it'.²⁷⁰ These States have throughout the negotiations proposed to include requirements that correspond with their existing national measures requiring *inter alia* ice-breaker assistance and polar classes relating to shipping standards.²⁷¹ The present draft Code fails nevertheless, as mentioned above, to pose strict and comprehensive requirements. A future Polar Code is thus again less likely to restrict the existing coastal State powers under Art. 234.

5.6 Final remarks

It is too early to make any firm conclusions concerning the present draft Polar Code, as final adoption by the MSC and MEPC remains. The analysis above shows nevertheless that the Code holds both potential improvements and shortcomings in relation to environmental protection of the Arctic marine environment. The review of the published IMO materials reveals that the discussions evidently have been subject to strong national interests and where the Arctic States of Russia, Canada, Norway and the US in particular have contributed to a long-lasting debate.

The likely adoption of a mandatory Polar Code that does not infringe the broad jurisdictional powers coastal States are granted under Article 234,

²⁶⁷ Bartenstein, 'The Arctic Exception', 44.

²⁶⁸ Fauchald, 'Regulatory Frameworks', 83.

²⁶⁹ *Ibid.*

²⁷⁰ Rayfuse, 'Coastal State Jurisdiction', 246.

²⁷¹ Scassola, 'International Polar Code', 279.

upholds the possibility of the adoption of diverging national measures. This may on the contrary contribute to mend the environmental shortcomings of the present Draft, if Arctic coastal States retain their allocated powers under the existing legal regime.

The risk-based/goal-based approach of the Code may furthermore admit coastal States a broader margin of appreciation when adopting measures, as States are enabled to specify the requirements on the basis of potential risks.²⁷² The general vagueness of the provisions may additionally give States more leeway when adopting measures on the basis of the Polar Code.

The mandatory requirements stipulated in Part I-A on safety are furthermore regardless of these deficiencies indirectly contributing to enhancing environmental protection and the likeliness of oil spills in Arctic waters. There is no doubt that stricter mandatory requirements concerning design and construction, as well as the requirement if a PWOM enhancing on-board decision-making, may decrease the likeliness of accidental oil spills.

²⁷² Fauchald, 'Regulatory Frameworks', 81-82

6 Tensions, challenges and opportunities

6.1 Introduction

The analysis above supports the view, despite the lack of a regional Arctic treaty, that Norway and Russia are parties to a regime enabling them to address jurisdictional issues arising in relation to international commercial shipping within their maritime zones. UNCLOS grants them wide jurisdictional powers as both coastal and port States. The extended powers stipulated in Art. 234 UNCLOS enhance in particular their basis for environmental protection. The Convention has thus contributed to challenge the traditional flag State focus within the law of the sea. The global applicability of MARPOL 73/78, its wide support by several of the world's biggest shipping nations²⁷³ and the possibility to adopt stricter discharge standards within 'special areas', makes it an important instrument to reduce vessel-source oil pollution in the Arctic. The extension of its requirements to non-Parties that do not enjoy 'more favourable treatment' is additionally an important feature. Several of the relevant provisions and conventions have also gained the status of customary international law, thus becoming binding also to non-State parties regarding them as 'general practice accepted as law'.²⁷⁴

In addition to UNCLOS and MARPOL, several other international conventions contributes directly or indirectly to enhance environmental protection and navigational safety, which consequently mends the lack of adopted binding instruments specifically applicable for the Arctic. The SOLAS Convention, the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW)²⁷⁵ and the 1972 Convention on International Regulations for Preventing Collisions at Sea (COLREG)²⁷⁶ all have the overall aim to prevent accidental pollution by regulating construction, equipment and the operational standards of vessels, including training and qualification of crew. The 1969 Intervention Convention and the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation

²⁷³ Panama, Liberia, Marshall Islands and Hong Kong (China), representing the world's biggest merchant marine shipping fleets of nearly 425 million grt., are Parties to all of the MARPOL 73/78 Annexes. See IMO, 'International Shipping Facts and Figures – Information Resources on Trade, Safety, Security and Environment' (6 March 2012), para. 3.7, table 4, available at <http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/TheRoleandImportanceofInternationalShipping/Documents/International%20Shipping%20-%20Facts%20and%20Figures.pdf> (accessed November 10, 2014) and IMO, 'Status of Conventions (as at 28 July 2014)', available at <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx> (accessed November 10, 2014)

²⁷⁴ Jensen, 'Coastal State Jurisdiction', 5.

²⁷⁵ International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adopted 7 July 1978, entry into force 28 April 1984), text published in British Command Papers, Cmnd. 9266, Treaty Series, No. 50, 1984

²⁷⁶ Convention on International Regulations for Preventing Collisions at Sea (adopted 20 October 1972, entry into force 15 July 1977), text published in British Command Papers, Cmnd., 6961, Treaty Series, No. 77, 1977

(OPRC)²⁷⁷, on the contrary, seeks to define the coastal State's right of intervention in cases of maritime casualties.²⁷⁸

States have over the last decades shown a positive attitude towards harmonisation of national measures and enhancement of Arctic cooperation. This has first and foremost been done under the auspices of the IMO and most recently through the extensive work on the Polar Code. Regional cooperation within the Arctic Council has also been strengthened. The recent establishment of a permanent secretariat in Tromsø, Norway, the introduction of a reporting system intended to ensure implementation of the recommendations from the 2009 Arctic Marine Shipping Assessment (AMSA) report and the adoption of the 2013 Regional Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic²⁷⁹, are the most prominent features of this development.²⁸⁰ Important efforts are also present on bilateral and national levels. The political collaboration within the Joint Norwegian-Russian Environmental Commission, seeking to enhance regulatory cooperation and competence-building in the Arctic marine environment, marked an important step in Russian-Norwegian bilateral cooperation when it was established in 1992.²⁸¹ Russia has, in addition to its adoption of unilateral measures based on Art. 234 UNCLOS, recently sought to assist in the elimination of consequences of vessel-source pollution in the NSR, through the establishment of the Northern Sea Route Administration.²⁸² Norwegian utilisation of its powers under UNCLOS is *inter alia* identified through the IMO adoption of sea-routing lanes beyond the territorial waters between Vardø and Røst outside the Northern Norwegian mainland.²⁸³

6.2 Tensions, challenges and opportunities in Arctic legal governance

The contemporary framework applicable to the Arctic holds, despite the presence of these important trends, considerable gaps and shortcomings

²⁷⁷ International Convention on Oil Pollution Preparedness, Response and Co-operation (adopted November 1990, entry into force 13 May 1995), text published in ILM, Vol. 30 (1991), p. 733

²⁷⁸ Jensen, *Coastal State Jurisdiction*, 6-7.

²⁷⁹ Adopted 15 May 2013. Available at <http://www.arctic-council.org/eppr/agreement-on-cooperation-on-marine-oil-pollution-preparedness-and-response-in-the-arctic/> (accessed November 10, 2014)

²⁸⁰ T. Stephens & D.L. VanderZwaag, 'Polar oceans governance: shifting seascapes, hazy horizons' in T. Stephens & D.L. VanderZwaag (ed.) *Polar Oceans Governance in an Era of Environmental Change, New Horizons in Environmental and Energy Law Series* (Cheltenham, 2014), 6-7.

²⁸¹ Norwegian Ministry of Climate and Environment, 'Norwegian-Russian environmental cooperation', http://www.regjeringen.no/en/dep/kld/Selected-topics/svalbard_og_polaromradene/Norwegian-Russian-environmental-cooperation.html?id=451246/ (accessed November 10, 2014)

²⁸² Northern Sea Route Information Office, Northern Sea Route Administration, http://www.arctic-lia.com/nsr_nsr/ (accessed November 10, 2014)

²⁸³ Report No. 37 to the Storting (2008-2009), *Integrated Management of the Marine Environment of the Norwegian Sea*, 47. Available at <http://www.regjeringen.no/nb/dep/kld/dok/regpubl/stmeld/2008-2009/report-no-37-2008-2009-to-the-storting.html?id=577875> (accessed November 10, 2014)

that may potentially prevent Arctic coastal States from taking adequate measures.

The recurring difficulties in obtaining mutual compromises in international treaty-making has created an international legal framework suffering from general vagueness, where the ambiguous Art. 234 UNCLOS serve as the primary example. Lack of clarity may enable coastal States to legitimise their interests through dubious interpretations of their allocated competences, which ultimately puts the uniform application of international law at stake. Coastal States may additionally, as previously noted, prove to be reluctant to invoke their jurisdictional powers, as the ambiguous framework makes the burden of proof more difficult to assess. The adverse effects of climate change are additionally threatening the jurisdictional basis coastal States are entitled to rely on, as their competences within *inter alia* ice-covered areas to a great extent are qualified by environmental variables, such as ice-presence and low temperatures.

Moreover, there are currently no comprehensive binding IMO oil discharge standards, vessel routing systems for navigation or CDEM standards applying specifically for the Arctic marine area.²⁸⁴ The current international standards applicable are as a consequence deriving from the general international instruments, such as the MARPOL, Annex I standards on discharges and CDEM, and from the navigational routing standards (e.g. traffic separation schemes) adopted by the MSC under the SOLAS and COLREG Conventions.²⁸⁵ However, several of these shortcomings are currently being addressed through the work of the IMO on the Polar Code. The latest draft reveals nevertheless that the proposed mandatory standards predominantly are not as comprehensive as initially intended. Lack of mandatory use of ice-navigators and ice-beakers, no restrictions on carriage of HFO and minimal regulations on CDEM standards supports this view. The draft is furthermore, instead of introducing a comprehensive routing system to concentrate traffic and avoid potential accidents in certain vulnerable areas, only suggesting to include a system of voyage planning and reporting.

An important gap is furthermore seen in the lack of a complete international ban on oil discharges, as Regulation 9 Annex I of the MARPOL 73/78 allows, under certain restrictive conditions, for discharges to be conducted. Such legal discharges may nevertheless also be a potential threat to the vulnerable Arctic marine ecosystem.²⁸⁶

Despite the global endorsement of international instruments such as UNCLOS and MARPOL 73/78, is it a recurring weakness that they still support to the traditional role of the flag State in ensuring implementation and enforcement.²⁸⁷ This weakness becomes particularly evident with regard to ships sailing under ‘flags of convenience’, where the potential

²⁸⁴ Molenaar, ‘Arctic Shipping Law’, 141-143

²⁸⁵ Ibid., 143.

²⁸⁶ Rothwell, ‘Environmental Protection Instruments’, 62-63.

²⁸⁷ T. Mensah, ‘Prevention of and Responses to Marine Pollution from Ships’ (2011), MPEIPL, para. 45.

economic gains of posing limited restrictions give certain States few incentives to ensure compliance.²⁸⁸ The MARPOL Convention is further built on the system of reporting as the major instrument of compliance monitoring, as the Contracting States according to Articles 8, 11 and 12 are obliged to submit reports.²⁸⁹ These obligations seem, however, seldom to be adhered to. According to the IMO Sub-Committee on Flag State Implementation (FSI), did only 26.3% of the Parties submit reports in 2011.²⁹⁰

A general feature of the jurisdictional regime within UNCLOS is its allocation of wider prescriptive coastal State powers than enforcement powers. Coastal States are e.g. granted wide prescriptive powers over vessels in innocent passage within their territorial waters,²⁹¹ whereas their enforcement powers are limited to physical inspections, institution of proceedings and detention where there exists 'clear grounds of believing' that pollution standards have been violated.²⁹² The high threshold for instituting enforcement measures may thus prevent Norway and Russia from effectuating their environmental standards. Moreover, the current international framework lacks an absolute obligation for coastal States to adopt and enforce laws and regulations for the preservation of the Arctic marine environment within their maritime zones. The relevant UNCLOS provisions only grant coastal States, in comparison to flag States, an optional admission to enact such measures.²⁹³ The Arctic marine environment is thus subject to the discretion of coastal State's willingness to protect it.

The introduction of the GAIRAS formula in the Convention had the purpose to include flexibility and to ensure dynamic application to prevent UNCLOS from becoming a static instrument preventing the actors from responding to changing circumstances.²⁹⁴ However, the obligation to respect GAIRAS when adopting measures may, due to *inter alia* the lack of mandatory IMO standards for the Arctic, prevent them from enacting stricter standards where the general international standards are inadequate to protect their interests. The adoption of stricter CDEM standards may for certain areas of Norwegian and Russian territorial waters be crucial to enhance environmental protection and navigational safety. They will however be prevented from doing so where neither GAIRAS nor Art. 234, which arguably in principle also apply within territorial waters, do not apply. The expansions of coastal State powers are on the contrary not fully excluded, as the adoption of GAIRAS may contribute to new developments within customary international law.²⁹⁵

²⁸⁸ Tan, *Vessel-Source Pollution*, 203

²⁸⁹ MARPOL 73, Art. 11(1).

²⁹⁰ FSI, Report to the Maritime Safety Committee and the Maritime Environment Protection Committee, FSI 21/18, para. 4.4.1.

²⁹¹ UNCLOS, Art. 21(1)(f) and Art. 211(4)

²⁹² UNCLOS, Art. 220(2).

²⁹³ UNCLOS, Art. 211(4), (5) and (6).

²⁹⁴ Tan, *Vessel-Source Pollution*, 225.

²⁹⁵ *Ibid.*

The current regime is nevertheless highly technical and detailed, which limits the likeliness of such developments.²⁹⁶

UNCLOS recognises *per se* the sovereign right of coastal States to exploit resources within their EEZs.²⁹⁷ Arctic coastal States are within areas where the threshold of Art. 234 is not met, prevented from protecting these resources through unilateral measures. Tan suggests nevertheless that national regulations within the EEZ on a general basis should be broadened as a mean of 'resource protection' of national security interests rather than pollution control, and where potential abuse of powers can be restricted by requiring prior IMO approval.²⁹⁸ This proposed change of perspective could in my view play a significant role in strengthening Norwegian and Russian jurisdiction in the Arctic. It could thus enhance their pollution response ability in areas that are, or in the future will, suffer from the effects of climate change and where their ability to rely on Art. 234 is not present. There are however limited interpretational support for this perspective within UNCLOS and modifications of the Convention are unlikely to happen, as the cumbersome amendment process and difficulties in obtaining consensus during international treaty negotiations, complicates the process.

Vast Arctic marine areas are furthermore located beyond the national jurisdiction of coastal States. They are accordingly, except from in highly exceptional situations, dependent on flag State compliance of their international obligations in relation to oil pollution occurring on the high seas. Russian legislation indicates nevertheless that it has taken advantage of the vagueness of the exact geographical scope of Art. 234, and seems for certain parts of the NSR to extend its legislation beyond the EEZ.²⁹⁹

The regime of port State jurisdiction under UNCLOS and the harmonisation of measures through MOUs have been highlighted as important means to ensure compliance with international standards and to encounter pollution occurring on the high seas or within the jurisdiction of other States.³⁰⁰ However, a substantial shortcoming is that there currently does not exist a MOU applying exclusively to Arctic ports. Both Russian and Norwegian maritime authorities participate on the contrary in the 1982 Paris MOU, committing them to ensure compliance to international standards, such as the MARPOL and SOLAS Conventions. Russia is additionally participating in the 1993 Tokyo MOU. Both MOUs suffer nevertheless from the lack of clear definitions of their geographical scopes.³⁰¹ The former applies within the 'North Atlantic basin from North America to Europe', and the latter for ports located within the 'Asia-Pacific region'.³⁰² Their practical significance in

²⁹⁶ Jensen, *Coastal State Jurisdiction*, 5.

²⁹⁷ UNCLOS, Art. 56 and 57

²⁹⁸ Tan, *Vessel-Source Pollution*, 223-224.

²⁹⁹ Brubaker, R.D.: 'Regulation of navigation and vessel-source pollution in the Northern Sea Route: Article 234 and state practice' in D. Vidas (ed.) 'Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention' (Cambridge, 2000), 231-232.

³⁰⁰ Molenaar, *Arctic Marine Shipping*, 309.

³⁰¹ Molenaar, 'Arctic Shipping Law', 145.

³⁰² *Ibid.*

an Arctic context may further be limited by the general problem of varying compliance,³⁰³ as *inter alia* the Tokyo MOU inspection rate only reached 70% in 2013.³⁰⁴ The aforementioned 2009 EU Directive on port State control may nevertheless be seen as a sign of a development where the jurisdictional powers granted under UNCLOS can become binding under customary international law in the future.

Another general point of criticism on port State control has been on the lack of adequate port reception facilities.³⁰⁵ This inadequacy may make Arctic port State pollution response under *inter alia* MARPOL 73/78 practically difficult. The 2009 AMSA Report indicates nevertheless that this does not fully apply to Norwegian Arctic ports, due to the unusual high level of port infrastructure with regards to available deep-water ports and towing services.³⁰⁶ Arctic coastal States should accordingly strive to conclude an MOU addressing Arctic ports in particular, or seek to harmonise their measures adopted according to Art. 218 UNCLOS.

None of the special area-based management tools for the protection of particularly vulnerable areas provided for under Art. 211(6) UNCLOS and Annex I, MARPOL 73/78 ('special areas') have been utilised in Norwegian and Russian Arctic waters. Neither has the Particularly Sensitive Sea Areas (PSSA) tool been applied.³⁰⁷ This enables the IMO, under the 'Revised Guidelines on Particularly Sensitive Sea Areas',³⁰⁸ to assess an area that needs 'special protection' from 'damage by international shipping activities' due to 'its significance for recognised ecological, socio-economic, or scientific attributes'.³⁰⁹ The protective measures available within a PSSA are based on existing IMO instruments, such as MARPOL 'special areas', or measures pursuant to Art. 211(6) UNCLOS.³¹⁰ It consequently does not provide for any extended protective measures to be adopted other than those already existing. However, the potential wide geographical scope through its applicability to ocean spaces both within and beyond the territorial sea of the IMO member States,³¹¹ makes PSSAs arguably a particular relevant feature with regards to the adoption of anti-oil pollution measures within different jurisdictional zones, including the Arctic high seas. An increasing use of such transboundary tools may additionally contribute to ease the general criticism aimed at the system of maritime zones' failure to recognise the ocean environment as a unity.³¹²

³⁰³ Tanaka, *Law of the Sea*, 286-287.

³⁰⁴ Annual Report on Port State Control in the Asia-Pacific Region (2013), 13. Available at <http://www.tokyo-mou.org/doc/ANN13.pdf> (accessed November 10, 2014)

³⁰⁵ D. Brubaker, *Marine Pollution and International Law. Principles and Practice* (London, 2000), 128

³⁰⁶ Arctic Council, Arctic Marine Shipping Assessment 2009 Report, 141.

³⁰⁷ IMO website, 'Particularly Sensitive Sea Areas', <http://www.imo.org/OurWork/Environment/PollutionPrevention/PSSAs/Pages/Default.aspx> (accessed November 10, 2014)

³⁰⁸ IMO, Res. A.982(24), Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (6 February 2006).

³⁰⁹ *Ibid.*, para. 1.2.

³¹⁰ *Ibid.*, para. 7.5.2.3 (i)-(iii).

³¹¹ *Ibid.*, para. 4.3.

³¹² Tan, *Vessel-Source Pollution*, 224

The Norwegian Government has since the early 2000s discussed a proposal to recognise parts of the Barents Sea as a PSSA.³¹³ This process is still on-going and the prospective conclusion date for this work is unknown. There are no indications that Russia has an expressed public policy on designating areas of the NSR as PSSAs. Russian public officials have however expressed support for the concept as long as they are specifically defined, reasonably geographically defined and include corresponding specific ‘appropriate associated measures’.³¹⁴ Russia has within the IMO expressed scepticism towards the wide geographical applicability due to the unpredictable consequences of political, legal and economic nature the protective measures may have.³¹⁵ Both States have nevertheless within the Arctic Council participated in the Protection of the Arctic Marine Environment Working Group. The group is to come with recommendations to the Arctic Council and has the aim to develop proposals to the IMO on the use of measures to protect sensitive high sea areas.³¹⁶ This indicates that the focus on protection of sensitive areas in the Arctic is increasing.

The assessment above reveals that there is a multitude of gaps, tensions and opportunities in the contemporary international framework applicable to Arctic shipping. The inadequacies will furthermore become more significant as the level of commercial shipping increases. The unlikelihood of major reforms after the extensive work on the Polar Code, combined with an increased need for Arctic environmental protection, could potentially force coastal States to take unilateral measures going beyond international prescriptions, as *inter alia* seen after the *Exxon Valdez* incident.³¹⁷ Opting for such remedies would cause fragmentation of the regulatory regime and threaten the overall goal of uniform application.³¹⁸ Norway and Russia should thus refrain from such expedients and rather focus on the ultimate utilisation of their powers as coastal and port States, increase pressure on flag States to comply with international law and, individually or collectively, encourage ‘self-regulation’ within the shipping industry by creating favourable conditions for those applying stricter standards.

³¹³ D. Brubaker, ‘Measures Relevant for Sustainable Development and Environmental Protection – the Barents Sea and the Okhotsk Sea’, *FNI Report 2/2005*, 18.

³¹⁴ *Ibid.*, 32.

³¹⁵ The Russian Federation, Proposed amendments to Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, MEPC 52/8/1, para. 4.

³¹⁶ Jakobsen, Adequacy of the Law of the Sea, 309.

³¹⁷ T. Mensah, ‘Prevention of and Responses to Marine Pollution from Ships’ (2011), MPEIPL, para. 46.

³¹⁸ *Ibid.*

7 Conclusions

The main research question in this report was whether the coastal States of Norway and Russia, under the contemporary international legal regime, are granted adequate jurisdiction to prevent, reduce and control vessel-source oil pollution from foreign commercial ships navigating off the coast of Northern Norway and in the NSR.

The previous chapters have revealed that the current legal regime in general allocates wide jurisdictional powers to Norway and Russia as coastal States with regards to vessel-source oil pollution from foreign ships sailing in or through their maritime zones. A range of international binding and non-binding tools are, as shown, at their disposal. The wide unilateral powers granted under Art. 234 UNCLOS are of particular importance, as this provision arguably also applies geographically in Norwegian and Russian territorial waters. The regime of port State jurisdiction may additionally represent an important alternative legal basis for these States to protect the Arctic environment where flag and coastal State powers fall short.

I am, regardless of these findings and the fact that commercial shipping currently is limited, of the opinion that the international legal regime does not allocate 'adequate' powers to Norway and Russia. There are currently no comprehensive binding IMO oil discharge standards, vessel routing systems for navigation or CDEM standards applying specifically for the Arctic marine areas. Coastal States are under UNCLOS prevented from adopting necessary measures, such as CDEM standards, to handle the extreme Arctic climatic conditions and reduce risks of oil pollution, where the generally high threshold of Art. 234 is not met. These deficiencies are additionally being reinforced by the effects of climate change through decreasing presence of ice and higher temperatures. This development poses a threat to the Norwegian and Russian ability to rely on Art. 234 UNCLOS in particular, as many of its requirements are qualified by environmental variables. The traditional rule of flag State primacy is furthermore still present, which in particular, restricts their possibility to take actions against pollution occurring in marine areas beyond their national jurisdiction.

The report also asked whether Norwegian and Russian jurisdictional powers will be affected by the adoption of a binding Polar Code. It is difficult at this point in time to obtain any solid answers to this question, as the discussions on the Code are still ongoing within the IMO. However, the analysis of the most recent Draft Polar Code from May 2014 and the published documents from the negotiations reveal that their jurisdictional powers under UNCLOS are likely to remain unchanged. The wide geographical scope of the Polar Code is nevertheless likely to represent a positive contribution to the ability of coastal States to react to cases of vessel-source oil pollution occurring in marine areas beyond their national jurisdiction.

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