



MARITIME FORUM

Study - legal aspects of Arctic shipping

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[Executive summary of report \(pdf\)](#) [1]

Conclusions and Options

The legal regime for Arctic marine shipping comprises an intricate multi-layered framework. At the global level it consists of the jurisdictional framework laid down in the LOS Convention and the substantive standards and requirements incorporated primarily in IMO instruments. The predominance of global regulation is a direct consequence of the global nature of international shipping and the interest of the international community in globally uniform international regulation. While regional regulation is not ruled out, care must be taken not to undermine IMO's global primacy in the regulation of shipping for purposes that are within its mandate.

The jurisdictional framework of the LOS Convention sets out the basic rights and obligations of States in their respective capacities as coastal States, port States and flag States as well as the interests of the international community. Part of this jurisdictional balance is achieved through dividing the seas and oceans into maritime zones. In view of the preference for globally uniform international regulation of

marine shipping, the LOS Convention allows coastal States to unilaterally - without the need for IMO involvement or approval - prescribe standards only in a few instances. One of these is Article 234 on 'Ice-covered areas'.

As regards the substantive standards and requirements that are primarily laid down in IMO instruments, this Study pursues a systematic analysis by distinguishing between the main types of standards, most importantly discharge and emission standards, CDEM, navigation standards, contingency, planning and preparedness standards and liability, compensation and insurance standards. The purpose for which such IMO standards have been adopted must fall within IMO's three-tiered mandate, namely maritime safety, environmental protection and maritime security. Some standards serve multiple purposes. In particular standards that have been primarily adopted for maritime safety can have significant environmental protection implications.

An analysis of the global component of the legal regime for Arctic marine shipping reveals that this framework is not sufficiently tailored to the special nature and risks of marine shipping in the Arctic. Most importantly, apart from Article 234 of the LOS Convention and the non-legally binding Arctic Shipping Guidelines and the Polar Shipping Guidelines, there is a lack of legally binding standards within the full range of substantive IMO standards, for instance CDEM, discharge, emission, ballast water exchange and navigation standards. There is currently broad support within IMO to address this situation by means of a mandatory Code on polar shipping, with a target completion of 2012.

There are a number of issues within the current international law of the sea, including the LOSC, on which States disagree. Many of these issues do not have specific spatial scope but apply nevertheless also to the Arctic marine area, for instance a strait State's enforcement powers.

Specifically with respect to the Arctic marine area, however, there are a range of disagreements on issues within the international law of the sea as well. For the purpose of this Study, a distinction can be made between those that relate expressly or directly to merchant shipping and those that do not. The latter issues include the following:

1. the dispute between Canada and Denmark on title to territory over Hans Island;
2. unresolved maritime boundaries between States;
3. absence of final and binding outer limits of the continental shelf beyond 200 nm involving the Commission on the Limits of the Continental Shelf (CLCS); and
4. disagreement on the spatial scope of application of the Treaty of Spitsbergen.

It is submitted that the first two issues may have implications for (the regulation of) merchant shipping but the latter two do not.

Disagreements that relate expressly or directly to merchant shipping include the following:

1. the consistency with international law of the straight baselines drawn by Canada around its Arctic archipelago and, as a corollary, the legal status of the landward waters and the navigational rights for foreign vessels therein, especially those that form part of the Northwest Passage;
2. the legal status of certain marine areas within the NSR;
3. the spatial scope of application of Article 234 of the LOS Convention; and
4. the relationship between the LOS Convention's Article 234 and its regime of transit passage for straits used for international navigation.

The disagreements listed in the previous paragraph converge in the Northwest Passage as well as the NSR. As regards the Northwest Passage, the United States and several EU Member States have protested the straight baselines and the United States also takes the view that the Northwest Passage - or at least part of its routes - is subject to the regime of transit passage and that this regime trumps Article 234. Apart from the issues of straight baselines, the United States has a similar view with respect to the NSR. If the

Canadian and Russian views were to be upheld, they would be entitled to the in principle absolute coastal State authority States in internal waters or the extensive coastal State authority in territorial sea in addition to the far-reaching powers of coastal States pursuant to Article 234.

Based on the analysis of the national laws and regulations on merchant shipping of Canada, Denmark (Greenland), Iceland, Norway, the Russian Federation and the United States carried out in this Study, it can be concluded that only Canada and the Russian Federation have enacted laws and regulations that are significantly more stringent than GAIRAS.

Assuming that not the regime of transit passage but Article 234 would be applicable, the laws and regulations of Canada and the Russian Federation do not seem to overstep the limits imposed by Article 234. Both States formally recognise the various navigational rights of foreign vessels through their maritime zones. Moreover, the analysis did not indicate that the substantive standards or requirements are unreasonable or discriminate unjustifiably between national and foreign vessels.

The Canadian enactment that has most relevance for this Study is the AWPPA, the Act that 'inspired' Article 234 of the LOS Convention. With its scope recently extended to apply throughout Canada's EEZ, the AWPPA and its implementing regulations specify a number of standards that are stricter than GAIRAS, including construction, design, equipment and navigation standards, including mandatory navigation and ice breaker service fees.

For the Russian Federation, the notion of the NSR as a national asset is well established and a specific body of legal rules has been developed for navigation through its Arctic waters. Also in reliance on Article 234 of the LOS Convention, these rules establish standards for the design, equipment and supply of vessels navigating the NSR, stipulate mandatory insurance requirements and impose navigation requirements that include a formal authorisation procedure, the possible requirement to carry a state pilot aboard and mandatory ice breaker pilotage. These laws and regulations also impose standards that are more stringent than GAIRAS. In other words, passage along the NSR is already tightly regulated and may become more so if the draft NSR law is adopted in the form outlined above.

As regards the scope of application of these laws and regulations of Canada and the Russian Federation, it is interesting to note that they do not appear to distinguish between the territorial sea and the EEZ. Arguably, therefore these States take the view that the far-reaching powers of coastal States pursuant to Article 234 can also be exercised in the territorial sea. It is not clear if other States have made formal protests on this particular point.

Even though the current laws and regulations of Canada and the Russian Federation thus appear consistent with Article 234 of the LOS Convention, except arguably in so far as they also apply to warships and other government vessels, and not unreasonable or unjustifiably discriminatory, it must be pointed out that a thorough analysis of the actual enforcement of these laws and regulations to all vessels - both domestic and foreign - may necessitate an adjustment of these conclusions. Moreover, as in particular technical secondary legislation can be rapidly adopted and modified, these conclusions need to be periodically re-evaluated. Finally, a question arises as to the scope of the AWPPA and NSR Rules: it may be appropriate for the international community/EU to maintain a watching brief over the actually extent of ice cover in the waters to which they apply.

While the analysis of relevant laws and regulations of Denmark (Greenland), Iceland, Norway and the United States has led to the conclusion that none of these States need to invoke Article 234 of the LOS Convention for justification, the question should also be raised if they would be entitled to rely on Article 234 in the first place. The phrase "for most of the year" would not give such an entitlement to Iceland at all but for Denmark (Greenland) it would be very broad. For Norway an entitlement would be limited to certain marine areas off Svalbard and for the United States to certain marine areas of the maritime zones off Alaska north of the Bering Strait.

In terms of considering options for consultation and reform, the main rationale for multilateral regulation of Arctic marine shipping is that it would provide a minimum level of regulation and a level playing-field between the participants. The more universal the participation in such multilateral regulation, the fewer free riders with competitive advantages there will be.

At the outset it is appropriate to address a number of more general considerations. These include: (a) whether options for reform should be legally binding or not; (b) whether there is a suitable existing international body where the selected option can be developed and adopted and if not, whether there is a need and sufficient support for establishing a new international body; and (c) whether participation should be limited to Arctic coastal States and the related question as to which vessels should be subject to such regulation.

As regards existing bodies, some such as the Barents Euro-Arctic Council (BEAC), European Maritime Safety Agency (EMSA) and the OSPAR Commission appear to be less appropriate due to their restricted mandate, membership and/or spatial scope of application in terms of Arctic navigation.

On the other hand, while multilateral fora such as the IMO, the Arctic Council and the port State Control (PSC) Committees set up under the Paris and Tokyo MOUs are in principle suitable, their precise mandates and competences may not allow them to carry out all identified desirable options for reform. For example, the IMO, with its relatively technical mandate, is not a suitable forum for resolving such law of the sea controversies as the applicable legal regime for navigation in the Northwest Passage and the NSR.

Options for multilateral reform and cooperation on Arctic shipping discussed in the Study distinguish between options that can be pursued within IMO and options to be pursued outside IMO.

The options within IMO include legally binding and non-legally binding CDEM standards within a IMO Code on Polar Shipping, complemented by a wide range of other standards aimed at maritime safety and pollution prevention, for instance special discharge, emission, fuel content, ballast water exchange and navigation standards.

Outside IMO four types of options are suggested. First, a multifaceted strategy on port State jurisdiction, consisting of:

1. coordinated PSC, including for instance: advocating broader adherence to 'relevant instruments'; action by the Maritime Authorities of Canada and the Russian Federation; amending the spatial scope of the Paris MOU; taking special account of ships that have engaged in Arctic shipping since their last port-visit and those that will do so before their next port-visit in the context of the Paris and Tokyo MOUs; or developing an Arctic Ocean/region MOU.
2. coordinated and optimized use of port State jurisdiction, for instance by making use of Article 218 of the LOS Convention and by exercising departure State jurisdiction; and
3. exercise of residual port State jurisdiction, where desirable.

Second, while taking due account of IMO's mandate and ongoing efforts within IMO, complementary action could be desirable for the following issues:

1. contingency planning, preparedness and response for pollution incidents;
2. search and rescue;
3. places of refuge; and
4. compliance and enforcement, including coordinated aerial and satellite surveillance, at-sea inspection and enforcement and the harmonization of laws, regulations and policies relating to enforcement, including on penalties.

The third option is international consultations on Arctic navigation to address the diverging views of coastal and flag States on which of the law of the sea's navigation regimes apply in the Northwest Passage and the NSR. Finally, it may be desirable to pursue integrated approaches, either confined to the shipping

sector or in the context of integrated, cross-sectoral ecosystem-based ocean management of the Arctic marine area.

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