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Options for Regional Regulation of Merchant Shipping Outside IMO, with Particular Reference to the Arctic Region

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Abstract

Regulation of international merchant shipping is predominantly carried out by global bodies, of which the International Maritime Organization (IMO) is the most prominent. The U.N. Convention on the Law of the Sea nevertheless explicitly or implicitly allows (limited) unilateral prescription by flag, coastal and port states as well as the exercise of these rights collectively at the regional level. Some IMO instruments acknowledge the right to impose more stringent standards and others even encourage regional action. Moreover, while the mandate and practice of the IMO have expanded significantly since its establishment in 1958, further expansion is subject to constraints. This article will explore various options for regional regulation of merchant shipping outside IMO. Special attention will be given to such options in the Arctic region in the context of the efforts within IMO regarding the adoption of the Mandatory Code for Ships Operating in Polar Waters (Polar Code).

Keywords: Arctic, shipping, law of the sea, IMO, regional regulation

Introduction

Regulation of international merchant shipping is predominantly carried out by global bodies, of which the International Maritime Organization (IMO) is unquestionably the most prominent. The pre-eminence of global bodies is a direct consequence of the global nature of international merchant shipping and the interest of the international community in globally uniform minimum regulation. This interest and the importance of global bodies are safeguarded in several ways by the United Nations Convention on the Law of the Sea (LOS Convention).[1]

However, national regulation is not always confined to implementation of standards set by global bodies. As this article will show, the LOS Convention explicitly allows unilateral prescription by coastal states and implicitly by port and flag states. Moreover, nothing in the LOS Convention prevents states from exercising these rights collectively at the regional level. Some IMO instruments acknowledge the right to impose more stringent standards and others even encourage regional action. While the mandate and practice of the IMO have expanded significantly since its establishment in 1958, further expansion is subject to constraints and also does not impact on the prescriptive jurisdiction of states under (the) international law (of the sea). In light of these considerations, this article will explore various options for regional regulation of merchant shipping outside the IMO. Special attention will be given to such options in the Arctic region in the context of the efforts within the IMO towards the adoption of the Mandatory Code for Ships Operating in Polar Waters (Polar Code).[2] At the time of writing, the Polar Code was likely to be adopted by the end of 2014 and to enter into force in 2015 or 2016.

For the purpose of this article, Arctic marine shipping is regarded as the shipping that occurs or could occur in the marine Arctic. As there is no generally accepted geographical definition of the term Arctic, for the purposes here it has an identical meaning as the term “AMAP area”

adopted by the Arctic Monitoring and Assessment Programme (AMAP) working group of the Arctic Council.[3] The Arctic Ocean is defined as the marine waters north of the Bering Strait and north of Greenland and Svalbard, excluding the Barents Sea. The high seas area in the Arctic Ocean is referred to as the Central Arctic Ocean. Five states have coasts on the Arctic Ocean, Canada, Denmark/Greenland, Norway, the Russian Federation and the United States. These Arctic Five are also known as the Arctic Ocean coastal states. The three other members of the Arctic Council[4] - Iceland, Finland and Sweden - are Arctic states by virtue of their membership. Of these three, only Iceland is an Arctic coastal state as it is situated within the marine Arctic.

Arctic marine shipping can be intra-Arctic or trans-Arctic. Trans-Arctic marine shipping can take place by means of various routes and combinations of routes. Two of these routes are the Northwest Passage and the Northern Sea Route. The "official" Northern Sea Route encompasses all routes across the Russian Arctic coastal seas from Kara Gate (at the southern tip of Novaya Zemlya) to the Bering Strait.[5] The Northwest Passage is not defined in Canadian law but is the name commonly given to the marine routes between the Atlantic and Pacific Oceans along the northern coast of North America that span the straits and sounds within the Canadian Arctic Archipelago. Pharand identifies seven main routes, with minor variations.[6] A future alternative to all these routes is the Central Arctic Ocean Route, which runs straight across the middle of the Central Arctic Ocean.

The discussion in this article is structured into three sections: the International Legal Regime for Merchant Shipping; the Mandate and Practice of the IMO~~Mandate and Practice of the IMO~~; and Options for Regional Regulation of Merchant Shipping in the Arctic Region. A final section offers a summary and highlights the main conclusions.

International Legal Regime for Merchant Shipping

Introduction

The international legal regime for merchant shipping seeks to safeguard the different interests of the international community as a whole with those of states that have rights, obligations or jurisdiction in their capacities as flag, coastal, or port states or with respect to their natural and legal persons. While the term flag state is commonly defined as the state in which a vessel is registered and/or whose flag it flies,[7] there are no generally accepted definitions for the terms coastal state or port state. For the purposes of this article, the term coastal state refers to the rights, obligations, and jurisdiction of a state within its own maritime zones over foreign vessels. Finally, the term port state refers to the rights, obligations and jurisdiction of a state over foreign vessels that are voluntarily in one of its ports. In order to avoid an overlap with jurisdiction by coastal states, port state jurisdiction is regarded as relating to illegal discharges by foreign vessels beyond the coastal state's maritime zones, non-compliance with conditions for entry into port, and acts within port.

The jurisdictional framework relating to vessel-source pollution laid down in the LOS Convention is predominantly aimed at flag and coastal states. Apart from one explicit provision,[8] the Convention deals only implicitly with port state jurisdiction (see subsection below – Port State Jurisdiction~~Port State Jurisdiction~~). Prescriptive jurisdiction by flag and coastal states is linked by means of rules of reference to the notion of "generally accepted international rules and standards" (GAIRAS). These refer to the technical rules and standards laid down in instruments adopted by regulatory bodies, in particular the IMO. It is likely that the rules and standards laid down in legally binding IMO instruments that have entered into force can be regarded as GAIRAS.[9]

The basic duty for flag states to exercise effective jurisdiction and control over ships flying their flag as laid down in Article 94 of the LOS Convention is further specified in Article 211(2), which stipulates that flag state prescriptive jurisdiction over vessel-source pollution is mandatory and must at least be at the same level as GAIRAS. While flag states can choose to require their vessels to comply with more stringent standards than GAIRAS, this will impact on their competitiveness.

This mandatory minimum level of flag state prescriptive jurisdiction established by the LOS Convention is balanced by according the vessels of all states the following navigational rights:

- the right of innocent passage, suspendable or non-suspendable, in territorial seas, archipelagic waters outside routes normally used for international navigation or, if designated, archipelagic sea lanes, internal waters pursuant to Article 8(2) of the LOS Convention, and certain straits used for international navigation;
- the right of transit passage in straits used for international navigation;
- the right of archipelagic sea lanes passage within routes normally used for international navigation or, if designated, archipelagic sea lanes; and
- the freedom of navigation within exclusive economic zones (EEZs) and on the high seas.

Coastal state prescriptive jurisdiction over vessel-source pollution is optional under the LOS Convention but, if exercised, cannot be more stringent than the level of GAIRAS.[10] This restriction applies only in relation to pollution of the marine environment, as defined in Article 1(1)(4) of the LOS Convention, but not where coastal state jurisdiction is exercised for another purpose, for instance, for the conservation of marine living resources. As regards anchoring, this view is supported by practice of the United States and, more recently, the Netherlands which regulates anchoring beyond the territorial sea without seeking IMO approval, and apparently not

objected (any longer) by other states.[11] As regards ballast water discharges, the above view is supported by the fact that, instead of a new Annex to the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78),[12] the IMO decided to deal with ballast water management in a stand-alone treaty, the Ballast Water Management (BWM) Convention.[13] Moreover, the BWM Convention allows states, individually or in concert, to regulate more stringently above the minimum ballast water exchange level laid down in the Convention.[14]

Straits Used for International Navigation

The general rule on coastal state prescriptive jurisdiction mentioned in the previous subsection is also applicable to marine areas where the right of transit passage applies.[15] This regime was developed for international straits that would no longer have a high seas corridor once strait states had extended the breadth of their territorial seas to 12 nautical miles (nm). The applicability of the regime of transit passage is nevertheless dependent on various conditions.

One of these conditions is laid down in Article 37 and stipulates that the regime of transit passage only applies to "straits which are used for international navigation". Diverging views exist on the words "are used", whose normal meaning points to actual and not potential usage. Nevertheless, the latter view is adhered to by the United States, which takes the view that "the term 'used for international navigation' includes all straits capable of being used for international navigation".[16] Conversely, Canada and the Russian Federation take the view that the words refer to actual usage, and most commentators support this interpretation.[17] Close reading of the judgment of the International Court of Justice (ICJ) in the *Corfu Channel Case*;[18] from which the phrase originates, reveals that it also touches on potential usage.[19]

Consistent with its above view on potential usage, the United States regards the Northwest Passage and parts of the Northern Sea Route as straits used for international navigation subject to

the regime of transit passage.[20] None of the European Union's (EU) Arctic policy statements in recent years contain a position on the issue, even though the 2009 EU Council "conclusions on Arctic issues" mention transit passage.[21] However, one would assume that at least some states with large fleets engaged in international shipping or with a special interest in Arctic shipping, for instance China, Japan, Norway, South Korea, and several EU Member States, share the view of the United States.

Consistent with its above view on actual usage, Canada does not regard the Northwest Passage as a strait used for international navigation. Canada combines this position with two other positions. First, that the waters within its Arctic archipelago enclosed by its 1985 straight baselines[22] are internal waters based on historic title.[23] As a corollary, it may be argued that the right of innocent passage pursuant to Article 8(2) of the LOS Convention does not apply.[24] Both the United States and the then European Community (EC) Member States lodged diplomatic protests against the 1985 straight baselines, regarding them as inconsistent with international law and explicitly rejecting that historic title could provide an adequate justification.[25] Second, Canada takes the view that even if the transit passage regime would apply, it would be trumped by Article 234 of the LOS Convention (see subsection below - Unilateral Coastal State Prescription~~Unilateral Coastal State Prescription~~).

Despite their bilateral 1988 Agreement on Arctic Cooperation,[26] which deals only with icebreaker navigation, the dispute between Canada and the United States on the legal status of the Northwest Passage and the applicable regime of navigation remains unresolved. The broad saving-clause in section 4 of the 1988 Agreement indicates that it should above all be regarded as an agreement-to-disagree. The 2010 debates within the IMO on Canada's mandatory Northern Canada Vessel Traffic Services (NORDREG) Regulations,[27] which focus predominantly on

Article 234 of the LOS Convention, are further proof that their dispute remains unresolved (see subsection below – Unilateral Coastal State Prescription~~Unilateral Coastal State Prescription~~).

The position of the Russian Federation on the Northern Sea Route seems largely similar to that of Canada and consists of combined positions on actual usage, internal waters included within straight baselines pursuant to historic title, and transit passage being trumped by Article 234.[28]

Unilateral Coastal State Prescription

There are three well known exceptions to the above-mentioned general rule that coastal state prescription cannot be more stringent than GAIRAS. First, as general international law does not grant foreign vessels navigational rights in internal waters, apart from a minor exception laid down in Article 8(2) of the LOS Convention, coastal state prescriptive jurisdiction is in principle unrestricted. The observations on port state jurisdiction below apply therefore *mutatis mutandis* to internal waters.

Second, pursuant to Article 211(2) of the LOS Convention, a coastal state is entitled to prescribe more stringent (unilateral) standards for the territorial sea and archipelagic waters provided they "shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards". Unilateral discharge, navigation, and ballast water management standards are, among others, therefore allowed. The rationale is to safeguard the objective of globally uniform international minimum regulation, which would be undermined if states unilaterally prescribed standards that have significant extra-territorial effects.

A third exception is laid down in Article 234 of the LOS Convention. It is entitled Ice-covered areas and provides:

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

Article 234 was included in the LOS Convention as a result of in particular the efforts of Canada, which sought to ensure that its 1970 Arctic Waters Pollution Prevention Act (AWPPA)[29] and underlying regulations and orders would no longer be regarded as inconsistent with international law. The negotiations on Article 234 were predominantly conducted by Canada, the Soviet Union, and the United States and were closely connected to what eventually became Article 211(6) on special areas.[30]

While Article 234 contains a number of ambiguities, not unlike many other provisions in the LOS Convention, the basic purpose is to provide a coastal state with broader prescriptive and enforcement jurisdiction in ice-covered areas than in maritime zones elsewhere. In particular, in contrast with Article 211(6) on special areas, Article 234 does not envisage a role for the "competent international organization" (primarily the IMO) where the coastal state takes the view that more stringent standards than GAIRAS are needed.

As the wording of Article 234 indicates, however, jurisdiction is subject to several restrictions and can only be exercised for a specified purpose. One such restriction follows from the words "for most of the year". Decreasing ice-coverage will mean that, gradually, fewer states will be able to rely on Article 234 in fewer areas. As regards the phrase "within the limits of the exclusive economic zone," it is submitted that the better interpretation is that this is merely meant to indicate the outer limits of the EEZ but not to exclude the territorial sea.[31]

The purpose for which jurisdiction can be exercised pursuant to Article 234 is "the prevention, reduction and control of marine pollution from vessels." Even though navigation is mentioned twice in Article 234, it does not explicitly grant jurisdiction for the purpose of ensuring maritime safety. It is nevertheless submitted that Article 234 allows regulations that have environmental protection as primary purpose and maritime safety as secondary purpose as well as regulations for which both purposes are more or less equally important.[32]

The LOS Convention does not explicitly address the scenario of waters that are both ice-covered and subject to the regime of transit passage, but many commentators argue that the inclusion of the stand-alone Article 234 in the separate Section 8 of Part XII supports the dominance of Article 234 over transit passage.[33] While the International Chamber of Shipping (ICS) supported the opposite view in 2012,[34] the United States does not seem to have publicly stated that transit passage trumps Article 234, even though this might be its position.[35] There may be several reasons for this, including the fact that the United States is not a party to the LOS Convention, awareness that its position is not very strong, and a preference for a cooperative rather than a confrontational stance.

The following states would currently be entitled to exercise jurisdiction pursuant to Article 234: Canada; Denmark (in relation to Greenland); Norway (in relation to Svalbard but subject to the Spitsbergen Treaty[36]); the Russian Federation; and the United States. So far only Canada and the Russian Federation have actually exercised such jurisdiction.[37] The Kingdom of Denmark's 2011 "Strategy for the Arctic" refers to Denmark's willingness to invoke Article 234 if adequate standards cannot be adopted within the IMO.[38]

The consistency of the national laws and regulations of Canada and the Russian Federation with international law has been questioned from time to time. For instance: the applicability of

certain construction, design, equipment and manning (CDEM) standards to foreign warships and other governmental vessels (re Canada); discriminatory navigation requirements, icebreaker fees, and insurance requirements; lack of transparency; and high levels of bureaucracy (primarily re Russian Federation, even if not stated).[39]

The consistency of Canada's NORDREG Regulations with Article 234 of the LOS Convention was debated within IMO's Sub-Committee on Safety of Navigation (NAV) (56th Session)[40] and the Maritime Safety Committee (MSC) (88th Session)[41] in 2010.[42] Canada introduced the voluntary NORDREG system in 1977 but decided to make it mandatory as a consequence of Canada's 2009 Northern Strategy.[43] The NORDREG Regulations became mandatory on 1 July 2010 within the extended (200 nm) scope of the AWPPA, and therefore have a much wider scope than the Northwest Passage. The cornerstone of the NORDREG Regulations is the requirement for prescribed vessels, whether domestic or foreign, to submit, prior to entering the NORDREG Zone, certain information and to obtain clearance.[44] Contravention of these requirements could lead to the vessel's detention and the imposition of a fine and/or imprisonment,[45] but none of these sanctions seem to have been imposed at the time of writing.[46] The NORDREG Regulations were enacted pursuant to the 2001 Canada Shipping Act, whose objectives include marine environmental protection.[47]

At MSC 88, the debate centered mainly around the question whether or not Canada was required to seek IMO approval before imposing the NORDREG Regulations on foreign vessels. The United States argued that IMO approval was necessary because in its view the International Convention for the Safety of Life at Sea (SOLAS 74)[48] and associated instruments did not provide an adequate basis for imposing the NORDREG Regulations unilaterally. No reference was made to Article 234 or the international law of the sea as such, even though the United

States made such latter references at NAV 56 and in its diplomatic notes to Canada.[49] The requirement in the NORDREG Regulations to obtain clearance is probably the most troublesome for the United States, among other things because it essentially amounts to the need for prior authorization and could have precedent-setting effects in other scenarios where a coastal state argues it has a right to request prior notification or authorization, in particular in relation to waters which the United States regards to be subject to the regime of transit passage. The Russian Federation's requirement for ships navigating the Northern Sea Route to apply for a license would raise similar concerns.[50]

At MSC 88, the United States was in particular supported by interventions from Germany and Singapore. While the former closely followed the United States position, the latter explicitly viewed Canada's actions as inconsistent with the LOS Convention.[51] Prior to MSC 88, France, Germany and the United Kingdom, and presumably other states as well, had sent *Notes Verbales* to Canada.[52] Before the United Kingdom issued its *Note Verbale*, it approached the European Commission to verify if the Commission would be willing to issue a *Note Verbale*. The Commission declined, in part because it felt that it was not evident that Canada's actions warranted a diplomatic protest and in part also due to concerns that a diplomatic protest could compromise the EU's more important interests in cooperation with Arctic states within and outside the Arctic Council.[53]

Canada - supported among others by Norway and the Russian Federation - took the view at MSC 88 that IMO approval was unnecessary as Article 234 provided an adequate basis. While the debates within the IMO were inconclusive and have not resurfaced, they illustrate that more states than just the United States are concerned about navigational rights and coastal state jurisdiction over shipping in ice-covered areas and potential precedent-setting effects elsewhere.

Port State Jurisdiction

As ports lie wholly within a state's territory and fall on that account under its territorial sovereignty, customary international law acknowledges that a port state has wide discretion in exercising jurisdiction over its ports. This was explicitly stated by the ICJ in the *Nicaragua Case*, where it observed that it is "by virtue of its sovereignty, that the coastal state may regulate access to its ports".[54] While there may often be a presumption that access to port will be granted, customary international law gives foreign vessels no general right of access to ports.[55] Articles 25(2), 38(2), 211(3), and 255 of the LOS Convention implicitly confirm the absence of a right of access for foreign vessels to ports as well as the port state's wide discretion in exercising jurisdiction under customary international law. This so-called residual jurisdiction is also recognized in several IMO instruments and has on some important occasions been exercised by the United States and the EU. Nevertheless, some exceptions apply, for instance in case of *force majeure* and distress, and uncertainties exist, for instance on the implications of international trade law. International law only rarely authorizes port states to impose enforcement measures that are more stringent than denial of access or use of port (services) for extra-territorial behavior.[56] Article 218 of the LOS Convention is one of these instances. This provision gives port states enforcement jurisdiction over illegal discharges beyond their own maritime zones, namely the high seas and the maritime zones of other states.

Mandate and Practice of the IMO

Introduction

A large number of global, (sub-)regional and bilateral instruments and bodies either implement the LOS Convention and its two implementation agreements,[57] complement them, or do both. The LOS Convention and its implementation agreements are to a large extent framework

conventions and in many areas do not contain the substantive standards necessary for actual regulation (for example, maritime safety standards or fisheries conservation and management measures) or, except for the International Seabed Authority (ISA), establish regulatory bodies with a mandate to do so. To ensure implementation at the appropriate level, the LOS Convention and its implementation agreements acknowledge the competence of pre-existing global or regional instruments and bodies, impose obligations on states to cooperate and agree on regulations through them, and encourage the adoption and establishment of new instruments and bodies.[58]

While pre-existing international bodies are occasionally mentioned by name,[59] it is more common for the LOS Convention to use non-specific references to "competent" or "relevant" international organizations or similar wording. This acknowledges not only that more than one pre-existing international body may have competence in certain scenarios, but also that the mandates of international bodies may develop over time, and that new international bodies may be established.[60]

Even though the IMO is only explicitly mentioned once in the LOS Convention,[61] it is generally accepted that the IMO is the primary competent international organization for the regulation of international merchant shipping.[62] At the same time, however, the IMO is not the only competent international organization for this sector.[63] Both the International Labour Organization (ILO) and the International Atomic Energy Agency (IAEA) have a long-lasting and widely recognized standard-setting role.[64] Moreover, several international organizations, such as, the International Hydrographic Organization (IHO) and the World Meteorological Organization (WMO) are "competent" as well, even though not for the purposes of standard-setting. Rather, the information and services provided by and through them, safeguard and facilitate safe

shipping as well as provide the scientific basis for standard-setting by other organizations.[65] Lastly, reference must be made to the important role in the merchant shipping sector of self-regulation by international non-governmental bodies, for instance the International Association of Classification Societies (IACS).[66]

Mandate in the IMO Convention and Subsequent Evolution

The IMO was established in 1958 pursuant to the IMO Convention[67] and is a Specialized Agency of the United Nations "in the field of shipping and the effect of shipping on the marine environment".[68] The purposes of the IMO are laid down in paragraphs (a)-(e) of Article 1 of the IMO Convention. Paragraph (a), discussed below, has been subject to various amendments and its current version captures the core of IMO's substantive mandate. Conversely, the purposes laid down in paragraphs (b) and (c), which relate to "discriminatory action and unnecessary restrictions" and "unfair restricted practices," proved an obstacle for the entry into force of the IMO Convention. This was eventually overcome by tacitly agreeing to ignore these purposes within IMO and to address them within the United Nations Conference on Trade and Development (UNCTAD).[69]

The current version of Article 1(a) reads:

> To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article;

According to this paragraph, IMO's substantive mandate relates to maritime safety, efficiency of navigation and vessel-source pollution. The most significant formal change to the IMO's mandate occurred through amendments to the IMO Convention adopted in 1975. These not only

changed the title of the Convention and the name of the IMO, by omitting "Consultative" in both, but also added the phrase "prevention and control of marine pollution from ships" to Article 1(a), and established the Marine Environment Protection Committee (MEPC) under a new Part IX of the IMO Convention.[70]

IMO's mandate has continued to evolve, even though this has not been codified in the IMO Convention by means of new amendments. Its current mandate is, *inter alia*, reflected in the 2011 Mission Statement.

> The mission of the [IMO], as a United Nations specialized agency, is to promote safe, secure, environmentally sound, efficient and sustainable shipping through cooperation. This will be accomplished by adopting the highest practicable standards of maritime safety and security, efficiency of navigation and prevention and control of pollution from ships, as well as through consideration of the related legal matters and effective implementation of IMO's instruments, with a view to their universal and uniform application.[71]

The different substantive components of IMO's mandate can, to some extent, also be deduced from IMO's website[72] and the establishment of seven new sub-committees in 2013, which replaced the nine sub-committees that operated before then. Arguably, the two most important evolutions in IMO's substantive mandate relate to maritime safety and vessel-source pollution.

As regards maritime safety, it is noteworthy that the 2011 Mission Statement refers to maritime safety and security in tandem and thus acknowledges IMO's extensive and expanding practice in relation to unlawful acts against the safety of navigation, terrorism, piracy and armed robbery, drugs smuggling, illegal migrants and persons rescued at sea. These substantive fields reflect broad support for an extensive definition of maritime security.

As regards vessel-source pollution, it can be noted that the first sentence of the 2011 Mission Statement refers to "environmentally sound […] and sustainable shipping", which reflects a broader substantive mandate than vessel-source pollution, referred to in the second sentence.[73]

This broader mandate gradually emerged due to IMO's efforts with respect to, *inter alia*, anchoring, ballast water and sediments, anti-fouling systems, ship recycling and noise.

Types of Standards

Like the expansion of IMO's mandate, the types of standards contained in IMO instruments continue to expand as well. Whereas early IMO instruments mainly contained traditional standards such as CDEM and discharge standards, examples of new types of standards included in more recent IMO instruments are ship reporting systems (SRSs), emission standards and ballast water treatment standards. This trend is a consequence of the overall expansion of IMO's substantive mandate and the associated growing number of diverging shipping issues that the IMO has been asked to address, as well as the technological developments that has facilitated certain standards to be set. This trend on types of standards is bound to continue as it is subject to few restraints and exceptions. One possible constraint may be where a standard consists of, contains, or amounts to, a requirement to give prior notification or obtain prior authorization for ships in lateral passage in the absence of prior flag state consent to such a standard. Flag states commonly object to such standards arguing that they undermine their rights and freedoms of navigation. Canada's NORDREG Regulations are a case in point. Some further observations are made in the subsection below – Constraints on the Expansion of the IMO's Mandate~~Constraints on the Expansion of IMO's Mandate~~.

Proponents of new types of standards will commonly first try to get these approved within the IMO, as this will make them global minimum standards. Failure to secure IMO approval, however, still leaves the option of imposing a new type of standard based on their jurisdiction as flag, coastal or port states as discussed above. In the context of polar shipping and the ongoing negotiations on the Polar Code, it is worth noting that the Polar Code is unlikely to contain

mandatory standards or requirements on icebreaker assistance, convoys or fees.[74] Conversely, these *are* contained in the laws and regulations of Canada and the Russian Federation and are, in principle, permitted by Article 234 of the LOS Convention.

Proponents of a higher level of stringency of an existing type of standard have the same option in case IMO approval cannot be obtained. It can be noted that during the negotiations on the Polar Code, Canada did not secure the necessary support for a complete prohibition of discharges of any garbage, including food waste under certain conditions, as incorporated in Canadian law.[75] The fact that Canada's preference was recorded[76] suggests that Canada may continue to rely on Article 234 of the LOS Convention to impose a more stringent standard than that contained in the Polar Code by means of its national laws and regulations. A saving-clause in the Preamble to the Draft Polar Code underscores Canada's entitlement to do so.[77]

Fostering Compliance with IMO Instruments

Another domain where IMO practice is continuously developing is its efforts to foster compliance with IMO instruments.[78] The traditional mechanisms are the reporting obligations in various IMO instruments.[79] While some IMO instruments also contain provisions on in-port inspection,[80] and the IMO has encouraged the establishment of regional port state control (PSC) arrangements,[81] as well as developed guidance on PSC,[82] this cannot be regarded as an IMO mechanism as such. In-port inspection is based on customary international law and the IMO did not devote serious attention to PSC until the first regional PSC arrangement, the Paris MOU,[83] had been operating for almost a decade and proven successful . Furthermore, while the IMO's efforts at capacity-building, in particular through its Technical Co-operation Committee and its Integrated Technical Co-operation Programme (ITCP), also contribute to compliance, they are best regarded as directed primarily at fostering implementation.

The first genuine IMO compliance mechanism was incorporated in the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW 78) through amendments adopted in 1995[84] that built on the reporting obligation in Article IV. Pursuant to Regulation I/7 of the Annex to the STCW 78 and Section A-I/7 of the STCW Code, parties became required to provide detailed information to the IMO on the measures taken to ensure compliance with the Convention, education and training courses, certification procedures and other factors relevant to implementation of the Convention. The information was to be reviewed by panels of competent persons that would report on their findings to the IMO Secretary-General, who, in turn, would report to the MSC which Parties to STCW 78 were fully compliant. The MSC would then produce the "list of confirmed STCW Parties" in compliance with the STCW 78.[85] The Manila Amendments to the STCW 78 and the STCW Code adopted in 2010 develop and strengthen this mechanism further.[86]

Additional compliance mechanisms were developed by the MSC's Sub-Committee on Flag State Implementation (FSI), including the "Self-Assessment of Flag State Performance" in 1999[87] and the "Voluntary IMO Member State Audit Scheme" in 2005.[88] While both are voluntary, the latter mechanism involves a third party and covers not only obligations of IMO members in their capacities as flag states but also as coastal and port states. This broad focus is also reflected in the decision to replace the FSI by the Sub-Committee on Implementation of IMO Instruments (III). In 2009, the IMO decided to work towards a mandatory or institutionalized Audit Scheme and by the end of 2013 it was expected that the required amendments to legally binding IMO instruments would enter into force in the coming years.[89]

Constraints on the Expansion of the IMO's Mandate

While the discussion above has highlighted the gradual expansion of the IMO's mandate, whether or not codified in the IMO Convention, this does not mean that there are no constraints on further expansion. One of the most important constraints is the mandates of other global bodies. An expansion of the IMO's mandate which would create an overlap with a mandate of another global body is unlikely to find support within the international community. This is particularly evident if the expansion could lead to incompatibility or conflict with the output of other global bodies. Conversely, expansion into domains that are within the mandate of another global body but that have not been used, may attract support. A good example of the latter is the IMO's mandate relating to "discriminatory action and unnecessary restrictions" and "unfair restricted practices", which has remained unused by IMO, but has been taken up by UNCTAD.[90]

Another constraint on the expansion of the IMO's mandate is the domain of the (overarching regime of the) international law of the sea, including the LOS Convention. As this domain is generally accepted to be part of the mandate of the United Nations General Assembly (UNGA) this constraint can also be seen as part of the constraint relating to the mandates of other global bodies discussed just above. However, in view of the IMO's implementation role under the LOS Convention and the fact that the Convention does not explicitly establish a mandate for the UNGA or the Meetings of States Parties to the United Nations Convention on the Law of the Sea (SPLOS),[91] it is not always clear if the IMO "intrudes" into the domain of the international law of the sea or not. As decision-making within the IMO is in principle based on consensus, however, one single state which takes the view that IMO so intrudes or not may be enough. This explains, for instance, why the United States took care to ensure that the debate on the

NORDREG Regulations within MSC 88 in 2010 centered on compliance with SOLAS 74 rather than on the interpretation or application of Article 234 of the LOS Convention.[92]

IMO's implementation role under the LOS Convention can either be implicit – namely through the flag and coastal state obligations linked to rules of reference and GAIRAS - or explicit, for instance in relation to the designation of sea lanes and traffic separation schemes in straits used for international navigation and archipelagic waters.[93] These latter provisions establish so-called "cooperative legislative competence" between the IMO and the relevant strait or archipelagic states. Despite the absence of an explicit basis in the LOS Convention, however, the IMO has also developed similar mechanisms for mandatory ships' routeing measures and ship reporting systems (SRSs) beyond the territorial sea. Even though these new mechanisms involve a need for IMO approval, and thereby implied flag state consent through their IMO membership, it cannot be denied that they create limited coastal state jurisdiction without an explicit basis in the LOS Convention and thereby adjust the jurisdictional balance within the Convention.[94]

These new mechanisms attracted support within the IMO, but it is not difficult to imagine opposition from states in different scenarios on the ground of intrusion into the domain of the international law of the sea.[95] One example relates to Turkey's 1994 decision to commence regulation of the Straits of Istanbul and Cannakale and the Marmara Sea (Turkish Straits), which are in principle not subject to the LOS Convention's regime of transit passage due to Article 35(c) of the LOS Convention in conjunction with the Montreux Convention.[96] As the Montreux Convention does not contain regulations on the safety of navigation and environmental protection, Turkey argued that it retained jurisdiction for these purposes pursuant to the general international law of the sea. Conversely, most, if not all, other IMO members took the view that

strait states have no unilateral jurisdiction in this scenario and that the abovementioned mechanism of cooperative legislative competence applies. Five years of consultations within the IMO did not succeed in bringing Turkey's legislation into full conformity with tailor-made IMO instruments on navigation in the Turkish Straits. In essence, Turkey disagreed that cooperative legislative competence applied.[97]

The applicability of the mechanism of cooperative legislative competence was also at the heart of the debate following the 2003 joint Australia-Papua New Guinea proposals to the IMO to designate the Torres Strait as an extension of the Great Barrier Reef particularly sensitive sea area (PSSA), complemented with compulsory pilotage as an associated protective measure (APM). A 2005 MEPC Resolution approved the PSSA extension but merely recommended governments to "inform ships flying their flag that they should act in accordance with Australia's system of pilotage".[98] Despite this non-mandatory wording, Australia issued a Marine Notice which stipulated that non-compliance with its compulsory pilotage system by foreign vessels would lead to the imposition of non-custodial penalties in port or, for ships in transit, at the next port of call in Australia.[99] Australia thereby intended to circumvent the need for IMO approval by exercising port state jurisdiction. Between 2006-2008 several states, including the United States and Singapore, repeatedly took the view within the IMO and at the UNGA that such sanctions would be inconsistent with the 2005 MEPC Resolution and the LOS Convention.[100] At the same time, however, these states strongly encouraged their vessels to use pilotage in the Torres Strait.[101] Subsequently, Australia issued Marine Notice 07/2009, which stipulates that non-compliance triggers a "risk" of prosecution. Classified United States embassy cables disclosed by WikiLeaks in 2011 suggest that these changes were the result of diplomatic consultations between Australia and the United States.[102] In September 2013, Australian

authorities advised that no instances of non-compliance had occurred since issuing Marine Notice 8/2006.[103] As Australia has never actually denied access to port, either immediately or at a next call, or imposed non-custodial penalties for non-compliance with the pilotage requirements, its practice on port state enforcement jurisdiction does not challenge the applicability of the mechanism of cooperative legislative competence. The similarities between this Australian practice and Canada's practice on enforcing its NORDREG Regulations are worth noting.

A final example of a debate within the IMO related to the domain of the international law of the sea concerns the right of coastal states to request prior notification or authorization for ships carrying hazardous cargoes in lateral passage through their maritime zones. The debate within the IMO resulted in a deadlock,[104] just like earlier debates outside the IMO on such rights over warships and ships carrying hazardous waste.[105]

Options for Regional Regulation of Merchant Shipping in the Arctic Region

Introduction

The section International Legal Regime for Merchant Shipping above has shown that the LOS Convention explicitly allows unilateral coastal state prescription in several scenarios and implicitly acknowledges the residual prescriptive jurisdiction of port states pursuant to customary international law. It is also clear that flag states can decide to impose more stringent standards than GAIRAS on their vessels. Nothing in the LOS Convention prevents coastal, port or flag states from exercising these rights collectively at the regional level. The legality of regional port state prescriptive jurisdiction is acknowledged by Article 211(3) of the LOS Convention, which merely requires regional states to give due publicity to such action. The EU is an example of a regional actor that has exercised (residual) jurisdiction in all three capacities.[106]

An example of a flag state regional approach is Annex IV, "Prevention of Marine Pollution," of the Protocol on Environmental Protection to the Antarctic Treaty.[107]

It is understandable that the official position by IMO members on regional regulation is that this should be avoided in view of the risk it poses to the IMO's authority.[108] Such a risk is not posed by regional implementation of certain IMO instruments which explicitly allow or encourage such implementation. This has led the Arctic Council to facilitate efforts for the regional implementation of the IMO's International Convention on Maritime Search and Rescue[109] by means of the Arctic SAR Agreement[110] and regional implementation of IMO's International Convention on Oil Pollution Preparedness, Response and Cooperation[111] and the International Convention relating to the Intervention on the High Seas in Cases of Oil Pollution Casualties[112] by means of the Arctic MOPPR Agreement.[113] Moreover, as demonstrated in the section above Mandate and Practice of the IMO~~Mandate and Practice of IMO~~, there are several areas for which regional action would not lead to incompatibility or conflict with IMO output. The importance of regional action in the domain of monitoring, surveillance, inspection, and enforcement has, for instance, been acknowledged by the IMO in relation to regional PSC arrangements.[114] As highlighted above, the domain of the international law of the sea is suitable for regional action as well.

The remainder of this section examines various options for regional regulation of merchant shipping in the Arctic region. Its subsections deal with regional PSC arrangements, the Arctic Council and Arctic Council System (ACS), the OSPAR Commission, and options relating to the domain of the international law of the sea. The latter could be pursued by the Arctic Council, the ACS or *ad hoc* groupings of states.

Options for Regional PSC Arrangements

Regional PSC arrangements for merchant shipping were established to enhance compliance with internationally-agreed standards by means of commitments by port state authorities to carry out harmonized and coordinated inspections and to take predominantly corrective enforcement action, i.e., detention for the purpose of rectification. The instruments in which these internationally agreed standards are contained are commonly referred to as "relevant instruments" and include the main IMO conventions such as MARPOL 73/78 and SOLAS 74.[115] A participating Maritime Authority must only apply standards that are not just in force generally but also for that Maritime Authority.[116] Some applicability gaps can therefore be expected .

The regional PSC arrangements are non-legally binding and, rather than states as such, Maritime Authorities are parties to them.[117] Saving-clauses have, nevertheless, been incorporated in the arrangements to ensure that nothing in them affects residual port state jurisdiction, which includes the right to take more onerous enforcement measures.[118]

The expansion of the participation in the Paris MOU and the creation and expansion of eight other regional PSC arrangements,[119] means that almost complete global coverage has now been achieved. However, no such arrangement has been adopted specifically for the Arctic Ocean/region or the Southern Ocean/Antarctic region. Some of the advantages and disadvantages of an Arctic Ocean/region MOU will be discussed below, among other things in view of the likelihood that practically all the ships engaged in either intra- or trans-Arctic marine shipping will make use of ports subject to either the Paris MOU or the Tokyo MOU.[120] None of the other arrangements seem relevant for Arctic marine shipping. However, when considering amendments to the Paris MOU it is, in light of the EU's Directive on Port State Control,[121] and

the need of convergence between that Directive and the Paris MOU,[122] essential to obtain prior agreement within the EU.

The Maritime Authorities of 27 states currently participate in the Paris MOU. (See Table One)

[INSERT TABLE ONE]

The participation by the Danish Maritime Authority extends to Greenland. Moreover, even though the United States Coast Guard has observer status, it has been cooperating with the Paris MOU since at least 1986, when it first attended meetings within the Paris MOU, and the United States PSC system is more or less compatible with that of the Paris MOU.[123]

The Paris MOU does not contain a provision that explicitly defines its spatial coverage. However, Section 9.2 stipulates that adherence is open for: "A Maritime Authority of a European coastal state and a coastal state of the North Atlantic basin from North America to Europe." This has facilitated the participation or cooperation of the Maritime Authorities of all Arctic states, even though the description is not intended to encompass the entire marine Arctic.

As the Maritime Authorities of both Canada and the Russian Federation also participate in the Tokyo MOU (see Table Two) and, in addition, the Maritime Authority of the Russian Federation also participates in the Black Sea MOU,[124] clarity is needed as to which of their ports are subject to which arrangement. In 2009, Canada decided to also subject its Pacific ports to the Paris MOU, including the Paris MOU training requirements. The Pacific ports of the Russian Federation are currently still subject to the Tokyo MOU.[125]

The Maritime Authorities of 19 states or entities currently participate in the Tokyo MOU. (See Table Two)

[INSERT TABLE TWO]

Sections 1.2 and 8.2 of the Tokyo MOU and section 1.1 of its Annex 1, entitled "Membership of the Memorandum," stipulate that the Tokyo MOU applies to the Asia-Pacific region, a term that is not further defined. The United States Coast Guard has observer status with the Tokyo MOU and cooperates in a similar way as with the Paris MOU.

New PSC Initiatives for the Arctic Region

PSC initiatives could either be undertaken within the existing regional PSC arrangements or by establishing a new arrangement, namely an Arctic Ocean/region MOU.

As regards possible initiatives on Arctic marine shipping within existing arrangements,[126] one approach would be to bring as much Arctic marine shipping as possible under the scope of the Paris MOU. This would be based on the assumption that the stringency level and performance of the Paris MOU is the highest of all the regional PSC arrangements. Accordingly, the Russian Federation could follow Canada's example of subjecting all its Pacific ports to the Paris MOU. The Paris MOU would, thereby, cover all intra-Arctic shipping and a sizeable part of trans-Arctic shipping, in particular if use were made of transshipment ports in the high North Atlantic and the high North Pacific.

Further initiatives could also be developed within the Paris MOU. These would not relate to the prescription of new standards but rather would be concerned with harmonized and coordinated inspection, and corrective enforcement action, with respect to existing standards. Initiatives could be specifically tailored to ships that have engaged in Arctic marine shipping since their last port visit and those that will do so before their next port visit. As regards the Paris MOU, adjustments could be made to one or more Port State Control Committee Instructions

(e.g., “Guidance on Type of Inspections”) to include special guidance/instructions for inspections of ships that have engaged or will engage in Arctic marine shipping, as well as specific requirements for the qualification and training of PSC officers in this regard. Such guidance/instructions could also be developed by, and made applicable to, a subset of the Maritime Authorities that participate in, or cooperate with, the Paris MOU.

However, unless trans-Arctic shipping makes extensive use of transshipment ports in the high North Pacific, departure or destination ports in the Asia-Pacific region could constitute a significant gap. Similar dedicated guidance/instructions on Arctic marine shipping should in that case therefore be developed within the Tokyo MOU.

An alternative to developing initiatives under the Paris and Tokyo MOUs would be the development of an Arctic Ocean/region MOU. As participation in regional PSC arrangements is reserved for Maritime Authorities of the region’s coastal states, this means that the Maritime Authorities from the following states could be participants: Canada, Denmark (Greenland), Norway, the Russian Federation, the United States and, especially in case ships involved in Arctic marine shipping are expected to make extensive use of Icelandic ports, Iceland.

As noted above, the Maritime Authorities from these states either already participate in, or cooperate with, both the Paris and Tokyo MOUs (Canada, the Russian Federation, and the United States) or just the Paris MOU (Denmark (Greenland), Iceland, and Norway). While the cost-effectiveness of regional PSC arrangements as a whole would not necessarily be negatively affected by further overlaps in participation, the six Maritime Authorities will have to weigh the costs of participating in, or cooperating with, yet another MOU against the benefits that its establishment would bring. This would seem to depend, among other things, on their views as to: the need and urgency of dedicated PSC initiatives for Arctic marine shipping; the extent to which

Arctic marine shipping is expected to be composed of intra-Arctic shipping and ships using transshipment ports in the high North Atlantic and the high North Pacific; and the prospects of adopting satisfactory dedicated PSC initiatives for Arctic marine shipping within the Paris or Tokyo MOUs.[127]

Options for the Arctic Council or through the Arctic Council System

The Arctic Council is a high-level forum established in 1996 by means of the Ottawa Declaration.[128] The choice for a non-legally binding instrument was a clear indication that the Council was not intended to be an international organization and that the Council cannot adopt legally binding decisions or instruments as such. The Arctic SAR Agreement and the Arctic MOPPR Agreement were not adopted by the Council, even though they were negotiated under its auspices and the Council's 2011 and 2013 Ministerial Meetings were used as the occasion for their signature.

The geographical mandate of the Arctic Council is not specified by the Ottawa Declaration, but can be assumed to be limited to a reasonably defined Arctic.[129] The Arctic Council's substantive mandate is very broad and relates to "common Arctic issues" with special reference to "issues of sustainable development and environmental protection in the Arctic."[130] A footnote specifies that the Council "should not deal with matters related to military security". Maritime shipping falls squarely under this broad mandate and this is also underlined by the fact that the Arctic Council has produced output that relates specifically to maritime shipping as well as less specific or more indirectly relevant output .

The Arctic Marine Strategic Plan (AMSP),[131] which was developed under the Protection of the Marine Environment (PAME) working group and is currently under revision, with adoption of a revised plan scheduled for the 2015 Ministerial Meeting.[132] Also relevant are the Arctic SAR

and Arctic MOPPR Agreements, even though the Arctic SAR Agreement not only implements an IMO instrument but also the Convention on International Civil Aviation,[133] and neither of the Agreements deals exclusively with shipping incidents, but also with incidents relating to air traffic and offshore installations. Finally, the Arctic Council's Emergency Prevention, Preparedness and Response (EPPR) working group has produced a lot of relevant output as well, including through its important role in the negotiation-process of the Arctic MOPPR Agreement by developing the Operational Guidelines now included in Appendix IV to the Agreement, as well as through its mandate to update the Guidelines.[134]

The most important Arctic Council output that focuses specifically on Arctic marine shipping is the Arctic Marine Shipping Assessment (AMSA) Report, completed by PAME in 2009.[135] The AMSA Report contains 17 Recommendations categorized under the headings Enhancing Arctic Marine Safety, Protecting Arctic People and the Environment, and Building the Arctic Marine Infrastructure. Among the recommendations that have been implemented are: recommendation I(B), support for the updating and mandatory application of the Arctic Shipping Guidelines;[136] recommendation I(E), which supports the negotiation of an Arctic search and rescue instrument; and recommendation III(C), which supports, *inter alia*, the development of circumpolar agreements on environmental response capacity. Recommendation I(B) eventually shaped to a considerable extent, in addition to actions undertaken within the Antarctic Treaty System (ATS),[137] the decision to develop the mandatory Polar Code within the IMO and is, therefore, a good example of the Arctic Council's so-called "decision-shaping" function.[138]

As the Polar Code will ultimately be adopted by the IMO, it will be regarded as that body's output and not that of the Council's. The connection between the IMO Polar Code and the

Council is clearly very different from the connection between the Council and the Arctic SAR and Arctic MOPPR Agreements.

This author has introduced the concept of the Arctic Council System (ACS) to clarify that legally binding instruments such as the Arctic SAR and Arctic MOPPR Agreements, and their institutional components, can be considered as part of the Council's output even though they are not, and in fact could not be, formally adopted by it.[139] The ACS concept consists of two basic components. The first is made up of the Council's constitutive instruments, the Ottawa Declaration, Ministerial Declarations, and other instruments adopted by the Arctic Council, for instance, its Arctic Offshore Oil and Gas Guidelines,[140] and the Council's institutional structure. The second component consists of instruments, and their institutional components, negotiated under the Council's auspices. The Arctic SAR and Arctic MOPPR Agreements and their Meetings of the Parties envisaged under Articles 10 and 14 respectively, belong to this category.

While the 2013 Kiruna Ministerial Meeting established four Task Forces, at the time of writing, it was not clear if any of these will culminate in another legally binding instrument through the ACS approach. Opportunities for this were identified during the Arctic Ocean Review (AOR) project carried out by PAME,[141] but did not end up in the "Recommendations" of the AOR Final Report.[142]

PAME has increasingly focused on shipping in recent years and is now mandated to explore the Arctic Marine Tourism Project (AMTP)[143] and AOR follow-up, in addition to the AMSA follow-up. Special reference can be made to AMSA Report Recommendation I(C) "Uniformity of Arctic Shipping Governance," which reads:

> That the Arctic states should explore the possible harmonization of Arctic marine shipping regulatory regimes within their own jurisdiction and uniform Arctic safety and environmental protection regulatory regimes, consistent with UNCLOS, that

> could provide a basis for protection measures in regions of the central Arctic Ocean beyond coastal state jurisdiction for consideration by the IMO.[144]

No steps towards implementation of this recommendation have been taken within PAME and little is to occur until after the adoption of the Polar Code. As the above text indicates, such steps do not necessarily have to be taken within the Arctic Council but can also be initiated by *ad hoc* groupings of states.

The Arctic Council's initiatives in the domain of merchant shipping cannot result in output that is binding, legally or otherwise, on non-Members. While several key flag states have Observer status at the Arctic Council,[145] this alone is not sufficient to bind them to Arctic Council output. To ensure this, a format or mechanism could be developed that allows them - and perhaps even other non-Members - to participate in the output's negotiation as well as to express their consent to be bound. Observers and other non-Members of the Arctic Council were not able to participate in the negotiation of the Arctic SAR and MOPPR Agreements, despite expressions of interest.[146] A more inclusive approach is being pursued by the Task Force for Action on Black Carbon and Methane (TFBCM).[147]

Options for the OSPAR Commission

The spatial mandate of the OSPAR Commission relates to the "OSPAR Maritime Area," which roughly overlaps with the Atlantic sector of the marine Arctic, but about half of which extends further south, and includes areas within as well as beyond national jurisdiction.[148] Nothing in the OSPAR Convention or the acts of the OSPAR Commission challenges the IMO's primacy in the regulation of international merchant shipping, but also does not entirely preclude action in relation to merchant shipping. Article 4(2) of Annex V to the OSPAR Convention stipulates that Members of the OSPAR Commission can raise the need for regulatory action within the IMO and requires them to cooperate on the regional implementation of IMO instruments. An example

of action by the OSPAR Commission in the domain of merchant shipping is the 2007 decision on the voluntary interim application of certain standards of the BWM Convention to ships flying the flag of states of the OSPAR Commission.[149] In 2012, this action was replaced by joint action between the regional seas bodies for the Baltic,[150] Mediterranean Seas[151] and the OSPAR Commission.[152]

The limited spatial and substantive mandate of the OSPAR Commission is not the only reason for its unsuitability for regulating merchant shipping within the marine Arctic, however. The OSPAR Commission cannot impose its acts on non-members, and also has no intention to do so. Three of the five Arctic Ocean coastal states, Canada, the Russian Federation and the United States, are not members and their accession to the OSPAR Convention is unlikely.[153] Moreover, many key user states, in particular from Asia, are also not members and, unlike in the Arctic Council, do not have any participatory status within the OSPAR Commission.

Options Relating to the Domain of the International Law of the Sea

As discussed in the above subsection Constraints on the Expansion of the IMO's Mandate~~Constraints on the expansion of IMO's mandate~~, there will often be insufficient support within the IMO to deal with issues within the domain of the international law of the sea. Such issues could be addressed by the Arctic Council, through the ACS or by *ad hoc* groupings of states. For instance, they could develop a collective, and thereby uniform, exercise of (residual) prescriptive jurisdiction in a flag, coastal or port state capacity. Moreover, there are issues that have an impact on jurisdiction over ships in the marine Arctic that could be examined, such as:

- the legality of the straight baselines of Canada and the Russian Federation under international law;

- the legality of the claims to historic title of Canada and the Russian Federation under international law;
- whether or not the transit passage regime applies to (parts of) the Northwest Passage and the Northern Sea Route; and
- the relationship between transit passage and Article 234 of the LOS Convention.

It may be possible to deal with these issues through an "agreement to disagree," complemented by agreed regulation. Another area for consideration could be regional implementation of the duties of strait/coastal states and (financial) contributions by user-states towards covering the costs of strait/coastal states. The extensive cooperation between strait states and user-states with respect to the Straits of Malacca and Singapore could be a model,[154] but not necessarily by also closely involving IMO in all matters. Certain features of the North Atlantic Ice Patrol established under SOLAS 74[155] could to some extent be used as a model.

Conclusions

As this article has shown, regional regulation of merchant shipping is not inconsistent with the LOS Convention and also not inconsistent with the primary role it accords to the IMO. Regional regulation could, for instance, take the form of a collective, and thereby uniform, exercise of (residual) prescriptive jurisdiction in a flag, coastal or port state capacity. Article 234 of the LOS Convention provides a basis for Arctic Ocean coastal states to impose, individually or collectively, types of standards or requirements on foreign ships in lateral passage through their maritime zones that are not also laid down in the Polar Code, for example, icebreaker assistance or fees,[156] as well as more stringent standards or requirements than those laid down in the Polar Code, for example, discharge standards. While the adoption or entry into force of the Polar Code does not constrain this entitlement as such, it seems reasonable to argue that it triggers a higher

standard of proof for justifying reliance on this entitlement. Arguably, justifying reliance on Article 234 would not only be easier when supported by robust data and analyses on risks and damage, but also when it involves a collective exercise by several coastal states and key user states have been engaged in a meaningful way.

It is understandable that the official position by IMO members on regional regulation is that this should be avoided in view of the risk it poses to the IMO's authority. Such a risk is not posed by regional implementation of certain IMO instruments, as this is explicitly allowed and even encouraged. The Arctic SAR and Arctic MOPPR Agreements negotiated under the auspices of the Arctic Council are examples in this regard. Another option the Arctic Council may consider is anticipatory regional implementation of IMO instruments that are not yet in force. In view of the long overdue entry into force of the BWM Convention, the Arctic Council could join the regional seas bodies for the North-East Atlantic Ocean and the Baltic and Mediterranean Seas in their joint action on ballast water management standards, to ensure that these standards also apply to ships flying the flag of Arctic Council states operating in the marine Arctic.[157]

Other domains for which regional action would not lead to incompatibility or conflict with IMO output include monitoring, surveillance, inspection, and enforcement. Regional action on PSC or on aerial and satellite-based monitoring and surveillance of intentional and accidental pollution incidents could be considered. Other opportunities could include: a collective exercise of (residual) prescriptive jurisdiction in a flag, coastal or port state capacity; resolving issues through an agreement-to-disagree; and regional implementation of the duties of strait/coastal states and (financial) contributions by user-states towards covering the costs of strait/coastal states. Such issues could be addressed by the Arctic Council, through the ACS or by *ad hoc* groupings of states.

[1] U.N. Convention on the Law of the Sea, 10 December 1982, 1833 *U.N.T.S.* 396.

[2] The draft version of the Code referred to in this article is the "Draft International Code for Ships Operating in Polar Waters," Annex to Report of the Working Group, "Development of a Mandatory Code for Ships Operating in Polar Waters," IMO doc. SDC 1/WP.4, 24 January 2014.

[3] Maps and descriptions of the "AMAP area" can be found on the Arctic Monitoring and Assessment Programme website at <www.amap.no> (under "About AMAP - Geographical Coverage").

[4] Concerning the Arctic Council generally see its website at <www.arctic-council.org>.

[5] The Merchant Shipping Code of the Russian Federation (Code of Laws of the Russian Federation, 1999; as amended), Art. 5(1).

[6] D. Pharand, "The Arctic Waters and the Northwest Passage: A Final Revisit", 78 *Ocean Development & International Law* 3-69 (2007), p. 29.

[7] LOS Convention, supra note 1, Art. 91(1).

[8] *Ibid*., Art. 218.

[9] E.J. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (The Hague: Kluwer Law International, 1998), pp. 140-167.

[10] LOS Convention, supra note 1, Arts 21(2), 39(2) and 211(5).

[11] See Molenaar 1998, supra note 9, pp. 416-418 and 'Regulation designating the Saba Bank as Nature Park' (*Regeling van de Staatssecretaris van Economische Zaken, Landbouw en Innovatie van 15 december 2010, nr. 169929, houdende aanwijzing van de Saba Bank als natuurpark*; Staatscourant Nr. 20424, 21 December 2010), at Art. 3.

[12] International Convention for the Prevention of Pollution from Ships, 2 November 1973, as modified by the 1978 Protocol Relating to the International Convention for the Prevention of Pollution from Ships, 17 February 1978, (MARPOL 73/78), 1340 *U.N.T.S.* 61 and the 1997 Protocol to Amend the International Convention for the Prevention of Pollution from Ships, 26 September 1997 and as regularly amended. Entry into force varies for each Annex. At the time of writing Annexes I-VI were all in force.

[13] International Convention for the Control and Management of Ships' Ballast Water and Sediments, 13 February 2004, IMO doc. BWM/CONF/36, 16 February 2004.

[14] *Ibid*., Arts. 2(3) and 13(3), and Section C of the Annex. IMO Assembly Resolution, A.868(20), 27 November 1997, "Guidelines for the Control and Management of Ships' Ballast Water to Minimize the Transfer of Harmful Aquatic Organisms and Pathogens," had already recognized in para. 11.2 that "Member States have the right to manage ballast water by national legislation".

[15] LOS Convention, supra note 1, Arts. 41 and 42(1)(a) and (b).

[16] *United States Senate Executive Report* 110-9 (2007), Text of Resolution of Advice and Consent to Ratification, Section 3(3)(D).

[17] See, for example, D.R. Rothwell, *The Polar Regions and the Development of International Law* (Cambridge, Cambridge University Press: 1996), pp. 189-212 and Pharand, supra note 6, p. 36.

[18] *Corfu Channel Case* (United Kingdom v. Albania), Merits, 9 April 1949, [1949] *I.C.J. Rep.* 4.

[19] T.L. McDorman, "The Northwest Passage: International Law, Politics and Cooperation", in M.H. Nordquist, T.H. Heidar and J.N. Moore, eds., *Changes in the Arctic Environment and the Law of the Sea* (Leiden: Martinus Nijhoff, 2010), pp. 227-250, at p. 238.

[20] United States, National Security Presidential Directive/NSPD-66 and Homeland Security Presidential Directive/HSPD-25, 9 January 2009, at Sec. III(B)(5)) (on file with the author).

[21] "Council conclusions on Arctic issues," 2985th Foreign Affairs Council Meeting, Brussels, 8 December 2009, at <ed.europa.eu/maritime affairs/policy/sea_basins/arctic_ocean/documents/ arctic_council_conclusions_09_en.pdf>.

[22] Canada, Territorial Sea Geographical Coordinates (Area 7) Order, S.O.R./85-872, effective on 1 January 1986.

[23] Briefing, Foreign Affairs, 21 May 1987, excerpt in 25 *Canadian Yearbook of International Law* 406 (1987) and Paper, Foreign Affairs, 29 March 1988, excerpt in 26 *Canadian Yearbook of International Law* 314 (1988). The term "customarily" does not appear in the latter.

[24] S. Lalonde, "Increased Traffic Through Canadian Arctic Waters: Canada's State of Readiness" 38 *Revue Juridique Themis* 49-124 (2004), pp. 74-77.

[25] J.A. Roach and R.W. Smith, *United States Responses to Excessive Maritime Claims* (Leiden: Martinus Nijhoff, 2012, 3rd ed.), pp. 111-112, which includes an excerpt from the 9 July 1986 European Community communication to Canada.

[26] Agreement between Canada and the United States on Arctic Cooperation, 11 January 1988, 1852 *U.N.T.S.* 59.

[27] Canada, Northern Canada Vessel Traffic Services Zone Regulations, SOR/2010-127.

[28] R.D. Brubaker, "The Legal Status of the Russian Baselines in the Arctic" 30 *Ocean Development & International Law* 191-233 (1999); R.D. Brubaker, "Straits in the Russian

Arctic", 32 *Ocean Development & International Law* 263-287 (2001); and J.J. Solski, "New Legal Developments in the Russian Regulation of Navigation in the Northern Sea Route", 4 *Arctic Review on Law and Politics* 90-199 (2013).

[29] Canada, Arctic Waters Pollution Prevention Act, *Revised Statutes of Canada 1985*, s. A-12, as amended.

[30] D. McRae, "The Negotiation of Article 234", in F. Griffiths, ed., *Politics of the Northwest Passage* (Kingston and Montreal: McGill-Queen's University Press, 1987), pp. 98-114; R. Huebert, "Article 234 and Marine Pollution Jurisdiction in the Arctic," in A.G. Oude Elferink and D.R. Rothwell, eds., *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction*, (The Hague: Martinus Nijhoff, 2001), pp. 249-267; and K. Bartenstein, "The 'Arctic Exception' in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?", 42 *Ocean Development & International Law* 22-52 (2011).

[31] Molenaar, supra note 9, p. 419.

[32] See also para. 4 of the Preamble to the Draft Polar Code.

[33] K. Hakapää, *Marine Pollution in International Law. Material Obligations and Jurisdiction*, (Helsinki: Suomalainen Tiedeakatemia, 1981), p. 258; McRae, supra note 30, p. 110; and Pharand, supra note 6, p. 47.

[34] "Position Paper on Arctic Shipping," International Chamber of Shipping, December 2012, at <www.ics-shipping.org>.

[35] As suggested by Roach and Smith, supra note 25, pp. 319-320.

[36] Treaty concerning the Archipelago of Spitsbergen, 9 February 1920, *L.N.T.S.* 7.

[37] See: E. Franckx, *Maritime Claims in the Arctic: Canadian and Russian Perspectives* (Dordrecht: Martinus Nijhoff, 1993); R.D. Brubaker, *The Russian Arctic Straits* (Leiden:

Martinus Nijhoff, 2005); D. VanderZwaag, et al., eds., "Governance of Arctic Marine Shipping," report prepared for the AMSA (Halifax, Nova Scotia: Marine & Environmental Law Institute, Dalhousie University, 2008, at <www.pame.is>); Solski, supra note 28; A. Chircop, I. Bunik, M. McConnell and K. Svendsen, "Course Convergence? Comparative Perspectives on the Governance of Navigation and Shipping in Canadian and Russian Arctic Waters," 28 *Ocean Yearbook* 291-327 (2013) (forthcoming); and American Bureau of Shipping (ABS) Advisory, "Navigating the Northern Sea Route: Status and Guidance," 29 January 2014, at <www.eagle.org>.

[38] "Denmark, Greenland and the Faroe Islands: Kingdom of Denmark Strategy for the Arctic 2011- 2020," August 2011, at <www.nanoq.gl>, p. 18.

[39] E.J. Molenaar, et al., "Legal Aspects of Arctic Shipping," (report commissioned by the European Commission, Directorate-General Maritime Affairs & Fisheries), February 2010, para. 218 (on file with author); and ICS, "Position Paper on Arctic Shipping," supra note 33, p. 5.

[40] "Report to the Maritime Safety Committee", IMO doc. NAV 56/20, 31 August 2010, paras 19.21-19.24.

[41] "Report of the Maritime Safety Committee on its Eighty-Eighth Session," IMO doc. MSC 88/26, 15 December 2010, paras 11.28-11.39 and Annexes 27 and 28.

[42] See generally: T.L. McDorman, "National Measures for the Safety of Navigation in Arctic Waters: NORDREG, Article 234 and Canada", in M.H. Nordquist, J.N. Moore, A.H.A. Soons and H. Kim, eds., *The Law of the Sea Convention. US Accession and Globalization* (Leiden: Martinus Nijhoff, 2012), pp. 409-424.

[43] "Canada's Northern Strategy: Our North, Our Heritage, Our Future" (Ottawa, Minister of Indian Affairs and Northern Development, 2009), p. 12 at <www.northernstrategy.gc.ca>.

[44] See: NORDREG Regulations, supra note 27, sec. 4; Canada Shipping Act 2001, Statutes of Canada, 2001, c. 26, s. 126(1)(a); and "Information on the Mandatory Canadian Ship Reporting System in Canada's Northern Waters (NORDREG)", IMO doc. SN.1/Circ.291, 5 October 2010.

[45] Canada Shipping Act 2001, supra note 43, s. 138.

[46] According to S. Ryder, "Breaking Point. A Legal Analysis of Canadian Practice in relation to Ice Breaking in the Northwest Passage" (unpublished master thesis, University of Tromsø, fall 2013), at p. 32, there were, however, several instances of non-compliance with the NORDREG Regulations in 2012.

[47] Canada Shipping Act 2001, supra note 43, s. 6.

[48] International Convention for the Safety of Life at Sea, 1 November 1974, 1184 *U.N.T.S.* 278, with protocols and as regularly amended.

[49] See: T.L. McDorman, "Canada, the United States and International Law of the Sea in the Arctic Ocean", in T. Stephens and D.L. VanderZwaag, eds., *Polar Oceans Governance in an Era of Environmental Change* (Cheltenham, Northampton, Edward Elgar: 2014), 253-268, p. 265.

[50] See: Chircop, et al., supra note 36, pp. 315-316 and 319-320

[51] MSC, "Report of 88th Session," supra note 40, para. 11.36 and Annex 28.

[52] Based on communications between the author and officials from Germany, France, the United Kingdom and the Commission in late 2010 and early 2011.

[53] *Ibid.*

[54] *Case concerning Military and Paramilitary Activities In and Against Nicaragua*, (Nicaragua v. United States of America), Judgment, 27 June 1986, [1986] *I.C.J. Rep.* 14, para. 213.

[55] A.V. Lowe, "The Right of Entry into Maritime Ports in International Law", 14 *San Diego Law Review* 597-622 (1977), p. 622.

[56] See: E.J. Molenaar, "Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage", 38 *Ocean Development & International Law* 225-257 (2007).

[57] LOS Convention, supra note 1. The implementing agreements are: the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 28 July 1994, 1836 *U.N.T.S.* 42 and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, 2167 *U.N.T.S.* 3.

[58] See, for example, LOS Convention, supra note 1, Arts. 237 and 311 and the Fish Stocks Agreement, supra note 56, Art. 8(5).

[59] For example, the International Civil Aviation Organization (ICAO) in LOS Convention, supra note 1, Art. 39(3)(a).

[60] See: "'Competent or relevant international organizations' under the United Nations Convention on the Law of the Sea", *Law of the Sea Bulletin*, No. 31 (1996), pp. 79-96.

[61] LOS Convention, supra note 1, Annex VIII, Art. 2(2).

[62] "Competent or relevant International Organizations," supra note 59, See also: IMO Secretariat Study, "Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization", IMO doc. LEG/MISC.7, 19 January 2012; C.H. Allen, "Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and its Member States in Implementing the 1982 Law of the Sea Convention' 10 *San Diego International Law Journal* 265-333 (2009).

[63] H. Ringbom, "Regulatory Layers in Shipping", in D. Vidas and P.J. Schei, eds., *The World Ocean in Globalization. Climate Change, Sustainable Fisheries, Biodiversity, Shipping,*

Regional Issues (Leiden: Martinus Nijhoff, 2011) pp. 345-370, p. 348. See also: O.S. Stokke, "Regime Interplay in Arctic Shipping Governance: Explaining Regional Niche Selection", 13 *International Environmental Agreements: Politics, Law and Economics* 65-85 (2013).

[64] As regards ILO, reference can be made to the Maritime Labour Convention, 23 February 2006, U.N. Treaty Reg. No. I-5129, which consolidates and updates a large number of ILO adopted maritime conventions and recommendations. As regards the IAEA, reference can be made to the various IAEA Regulations for the Safe Transport of Radioactive Materials, at <www.iaea.org>.

[65] See "Final Report of the Arctic Ocean Review (AOR) Project 2011-2013", available at <www.pame.is>, p. 37.

[66] See the Draft Polar Code, supra note 2, footnotes 1-6.

[67] Convention on the Intergovernmental Maritime Consultative Organization, 6 March 1948, 289 *U.N.T.S.* 3, as amended. A consolidated version is contained in *Basic Documents, Volume I* (IMO, 2010 ed.), pp. 8-32.

[68] *Ibid.*, Art. 59.

[69] B.O. Okere, "The Technique of International Maritime Legislation", 30 *International and Comparative Law Quarterly* 513-536 (1981), pp. 524-525. Several states parties to the IMO Convention still maintain reservations relating to paras (b) and (c).

[70] Amendments to the Title and Substantive Provisions, 14 November 1975, 1276 *U.N.T.S.* 468. These amendments were adopted pursuant to IMCO Assembly Resolution A.358(IX), 14 November 1975.

[71] IMO Assembly Resolution A.1060(28), 29 November 2013, "Strategic Plan for the Organization (for the six-year period 2014-2019)."

[72] See: IMO website at <www.imo.org/OurWork/Pages/Home.aspx>.

[73] Note that an amendment to Art. 1(d) of the IMO Convention adopted by means of IMCO Assembly Resolution A.400(X), 17 November 1977, 1380 *U.N.T.S.* 268, led to the inclusion of the phrase "the effect of shipping on the marine environment".

[74] Even though "Guidance on navigation with icebreaker assistance" is included in the recommendatory Part I-B of the Draft Polar Code, supra note 2, it does not stipulate under which circumstances icebreaker assistance is required. Para. 14.4 of the Report of the Working Group, supra note 2, notes that the Russian Federation reserved its position on this Guidance.

[75] Arctic Waters Pollution Prevention Act, supra note 29, s. 4.

[76] "Report of the Marine Environmental Protection Committee on Its Sixty-Fifth Session," IMO doc. MEPC 65/22, 24 May 2013, para. 11.58.

[77] Draft Polar Code, supra note 2, preambular para. 8 reads: "Nothing in this Code shall be taken as conflicting with the United Nations Convention on the Law of the Sea, 1982, the Antarctic Treaty System and other international instruments applicable to polar waters."

[78] See: Strategic Direction (SD) 2 contained under para. 3.2 of the IMO's Strategic Plan, supra note 70; IMO Convention, supra note 66, Art. 38(b); and Y. Takei, "Institutional Reactions to the Flag State that has Failed to Discharge Flag State Responsibilities", 59 *Netherlands International Law Review* 65-90 (2012), pp. 76-78.

[79] For example, MARPOL 73/78, supra note 12, Art. 11 and International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, (STCW 78), 1 December 1978, 1361 *U.N.T.S.* 190, as amended, Art. IV.

[80] For example, MARPOL 73/78, supra note 12, Art. 5 and STCW 78, supra note 78, Art. X.

[81] IMO Assembly Resolution A.682(17), 6 November 1991, "Regional Co-operation in the Control of Ships and Discharges."

[82] IMO Assembly Resolution A.1052(27), 30 November 2011, "Procedures for Port State Control, 2011."

[83] Paris Memorandum of Understanding on Port State Control, 26 January 1982. The most recent version is at <www.parismou.org>. This article uses the version that includes the 36th amendment and that came into effect on 20 August 2013.

[84] See in particular: "Consideration of the Draft Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978", IMO doc. STCW/CONF/DC/1, 5 July 1995 (containing the revised Annex) and IMO doc. STCW/CONF/DC/2, 5 July 1995 (containing the STCW Code).

[85] See, for example: "Promulgation of Information related to Reports of Independent Evaluation", IMO doc. MSC.1/Circ.1164/Rev.12, 28 June 2013.

[86] Consolidated versions of the Annex to the STCW 78 and the STCW Code, supra note 78, are contained in "Adoption of the Final Act and Any Instruments, Resolutions Resulting from the Work of the Conference" (Manila amendments), IMO docs STCW/CONF.2/33, 1 July 2010 and STCW/CONF.2/34, 3 August 2010.

[87] IMO Assembly Resolution A.912(22), 29 November 2001, "Self-Assessment of Flag State Performance," which replaced an earlier IMO Assembly Resolution with the same title.

[88] Whereas IMO Assembly Resolution A.946(23), 27 November 2003, "Voluntary IMO Member State Audit Scheme" endorsed the establishment and development of the Audit Scheme as such, the Scheme was essentially established by means of the adoption of IMO Assembly Resolution A.974(24), 1 December 2005, "Framework and Procedures for the Voluntary IMO

Member State Audit Scheme," and IMO Assembly Resolution A.973(24), 1 December 2005, the "Code for the Implementation of Mandatory IMO Instruments" The "Framework and Procedures" and the Code, currently entitled "IMO Instruments Implementation Code," have been amended several times. See also: IMO Secretary-General, "Voluntary IMO Member State Audit Scheme," IMO doc. A 28/9/2, 10 September 2013; Allen, supra note 62, at p. 329 on mandatory third party audits on vessel and port facility safety and security.

[89] See: IMO Assembly Resolution A.1068(28), 4 December 2013, "Transition from the Voluntary IMO Member State Audit Scheme to the Mandatory IMO Member State Audit Scheme." Separate IMO Assembly Resolutions adopted revised versions of the "Framework and Procedures" and the Code (A.1067(28), 4 December 2013 and A.1070(28), 4 December 2013); see also Allen, supra note 62, at pp. 330-333.

[90] **SOURCE - general reference to UNCTAD**

[91] See, however, LOS Convention, supra note 1, Art. 319(e) and A.G. Oude Elferink, "Reviewing the Implementation of the LOS Convention: The Role of the United Nations General Assembly and the Meeting of States Parties", in A.G. Oude Elferink and D.R. Rothwell, eds., *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Leiden: Martinus Nijhoff, 2004), pp. 295-312.

[92] Canada was not isolated in this debate, but received support from the Cook Islands, Norway, the Russian Federation and South Africa (based on an email dated 20 January 2011 to the author by a United States government official). See: MSC, "Report of 88th Session," supra note 40, para. 11.37, which reads in part: "Other delegations were of the view that the issue was much wider and was not within the remit of the NAV Sub-Committee, the Committee or even the Organization itself."

[93] LOS Convention, supra note 1, Arts. 41(4) and 53(9).

[94] Molenaar, supra note 9, p. 527 and Ringbom, supra note 62, p. 350.

[95] States could, in this regard, invoke LOS Convention, supra note 1, Arts. 237 and 311.

[96] Convention regarding the Regime of the Straits, 20 July 1936, 173 *L.N.T.S.* 213.

[97] See: G. Plant, "Navigation Regime in the Turkish Straits for Merchant Ships in Peacetime" 20 *Marine Policy* 15-27 (1996) and E.J. Molenaar, "Navigational Rights and Freedoms in a European Regional Context," in D.R. Rothwell and S. Bateman, eds., *Navigational Rights and Freedoms and the New Law of the Sea* (The Hague: Martinus Nijhoff, 2000), pp. 22-46, pp. 38-43.

[98] Resolution MEPC.133(53), 22 July 2005, doc. MEPC 53/24/Add.2, 1 August 2005, Annex 21, "Designation of the Torres Strait as an Extension of the Great Barrier Reef Particularly Sensitive Sea Area," para. 3.

[99] Australia, Marine Notice 8/2006 (no longer current), done pursuant to the Navigation Act 1912 (Cth) ss. 186G-186L, since replaced by the Navigation Act 2012 (Cth), ss. 162-173. This was softened somewhat by Marine Notice 16/2006, which noted that non-compliance "may result" in prosecution.

[100] D.K. Anton, "Does Australia Make or Break the International Law of Transit Passage? Meeting Environmental and Safety Challenges in the Torres Strait with Compulsory Pilotage", in D.D. Caron and N. Oral, eds., *Navigating Straits: Challenges to International Law* (forthcoming in 2014) and R.C. Beckman, "PSSAs and Transit Passage - Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS", 38 *Ocean Development & International Law* 325-357 (2007).

[101] Ibid.

[102] See: P. Dorling, "Reef Safeguard Sacrificed Secretly for US, Singapore", *Sydney Morning Herald*, 12 September 2011.

[103] Information provided by an Australian government official to the author by email on 13 September 2013.

[104] The debate related to the review of the International Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes in Flasks on Board Ships (INF Code); established under SOLAS 74, supra note 47, IMO Assembly Resolution A.748(18), 4 November 1993, as amended. See, inter alia: "Report of the Marine Environment Protection Committee on Its Forty-Second Session," IMO doc. MEPC 42/22, 16 November 1998, paras 14.1-14.4.

[105] See: Molenaar, supra note 96, pp. 27-31.

[106] See: Ringbom, supra note 62; H. Ringbom, *The EU Maritime Safety Policy and International* Law (Leiden: Martinus Nijhoff, 2008); and V. Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea. Implementing Global Obligations at the Regional Level* (Leiden: Martinus Nijhoff, 2007), pp. 227-257.

[107] Protocol on Environmental Protection to the Antarctic Treaty, 14 October 1991, 30 *I.L.M.* 1461 (1991), Annexes I-IV.

[108] See: IMO Assembly Resolution A.1060(28), supra note 70, para. 2.2 which reads, in part, that the challenge for IMO is to "provide an effective and efficient response to shipping trends, developments and incidents, and in so doing, stave off regional or unilateral tendencies which conflict with the Organization's regulatory framework".

[109] International Convention on Maritime Search and Rescue, 27 April 1979, 1405 *U.N.T.S.* 118.

[110] Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic, 12 May 2011, 50 *I.L.M.* 1119 (2011).

[111] International Convention on Oil Pollution Preparedness, Response and Cooperation, 30 November 1990, 1891 *U.N.T.S.* 77.

[112] International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 29 November 1969, 970 *U.N.T.S.* 211.

[113] Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, 15 May 2013, at <www.arctic-council.org/eppr/agreement-on-cooperation-on-marine-oil-pollution-preparedness-and-response-in-the-arctic>.

[114] See: supra notes 80-83, and accompanying text.

[115] See, for example, Paris MOU, supra note 82, section 1.2 and section 2.

[116] See, for example, *ibid.*, section 2.3.

[117] Molenaar, supra note 55, p. 227.

[118] See, for example, Paris MOU, supra note 82, sections 1.7 and 9.1.

[119] See generally: "Port State Control" on the IMO website at <www.imo.org>.

[120] Asia-Pacific Memorandum of Understanding on Port State Control in the Asia-Pacific Region, Tokyo, 1 December 1993, as amended. The most recent text is at <www.tokyo-mou.org>. This article uses the version that includes the 13th amendment in effect on 20 August 2013.

[121] European Union, Directive 2009/16/EC, 23 April 2009, on port State control, *OJ* 2009, L 131/57.

[122] *Ibid.*, 13th preambular paragraph.

[123] Information provided to the author by C. Droppers, Paris MOU Secretariat, on 25 January 2013. Concerning U.S. port state control, see: <homeport.uscg.mil/myeg/portal/ep/browse/do?channelId=-18371>.

[124] Memorandum of Understanding on Port State Control in the Black Sea Region, 7 April 2000, as amended. The most recent text is at <www.bsmou.org>).

[125] Information provided to the author by C. Droppers, Paris MOU Secretariat, on 11 February 2014.

[126] See, in this regard, "AOR Final Report," supra note 64, Recommendation 5, p. 12, which reads:

> Arctic states should explore, within an appropriate time after the mandatory Polar Code has been adopted, collaborative approaches to encourage effective implementation of any future related IMO measures for the Arctic, including the possible development at IMO of port state control guidelines *and/or initiatives within existing port state arrangements*" (emphasis added)

[127] See also: Stokke, supra note 62, pp. 80-81.

[128] Declaration on the Establishment of the Arctic Council, Ottawa, 19 September 1996, 35 *I.L.M.* 1387 (1996).

[129] See: supra note 3 and accompanying text, as well as the spatial scopes of the Arctic SAR Agreement, supra note 110, Art. 3 and the Arctic MOPPR Agreement, supra note 115, Art. 3.

[130] Ottawa Declaration, supra note 128, Art. 1.

[131] Arctic Council, "Arctic Marine Strategic Plan" (November 2004) at <www.pome.is/arctic-marine-strategic-plan>.

[132] "Final Report of the October 2013 Senior Arctic Officials (SAOs) Meeting," 8 January 2014, p. 13, available on the Arctic Council website, supra note 4.

[133] Convention on International Civil Aviation, 7 December 1944, 15 *U.N.T.S.* 295. For consolidated version see <www.icao.int>.

[134] October 2013 SAOs Meeting, supra note 132, p. 11.

[135] Arctic Council, *Arctic Marine Shipping Assessment 2009 Report* (April 2009).

[136] "Guidelines for Ships Operating in Arctic Ice-Covered Waters", IMO doc. MSC/Circ. 1056 / MEPC/Circ. 399, 23 December 2002.

[137] See generally regarding the Antarctic Treaty System at <www.ata.aq>.

[138] E.J. Molenaar, "Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea", 27 *International Journal of Marine and Coastal Law* 553-595 (2012), p. 571.

[139] *Ibid.*

[140] Arctic Council, "Offshore Oil and Gas Guidelines, 2009", at <www.pame.is/offshore-oil-and-gas/77-arctic-offshore-oil-and-gas-guidelines-2009>.

[141] Arctic Ocean Review Project, "Phase II Report 2011-2013", consolidated version, 9 February 2013, p. 29, on file with the author.

[142] "AOR Final Report," supra note 64.

[143] See: "Arctic Shipborne Tourism Initiative," (ASTI) Draft Work Plan (2013-2015), ACSAO-CA02, March 2014, at <WG_PAMR_AMSA_DOC01_Arctic-Marine_Tourism_Project_work_Plan_AC_SAO_CA02-1.pdg>.

[144] *AMSA Report*, supra note 135, p. 6.

[145] The key flag states with Observer status are: China, France, Germany, India, Italy, Japan, the Netherlands, Poland, Singapore, South Korea, Spain and the United Kingdom.

[146] Molenaar, supra note 138, pp. 575-577.

[147] According to a news release, 13 January 2014, eight observers participated in the TFBCM's second meeting in Stockholm, December 2013. "Addressing Black Carbon & Methane in the Arctic," 13 January 2014, on the Arctic Council website, supra note 4.

[148] Convention for the Protection of the Marine Environment of the North-East Atlantic, (OSPAR Convention), 22 September 1992, 2354 *U.N.T.S.* 67, Art. 1(a).

[149] **SOURCE**

[150] Convention on the Protection of the Marine Environment of the Baltic Sea, 9 April 1992, 1507 *U.N.T.S.* 167.

[151] Convention for the Protection of the Mediterranean Sea Against Pollution, 16 February 1976, 1102 *U.N.T.S.* 44.

[152] Joint Notice to Shipping from the Contracting Parties of the Barcelona Convention, OSPAR and HELCOM on "General Guidance on the Voluntary Interim Application of the D1 Ballast Water Exchange Standard by Vessels Operating between the Mediterranean Sea and the North-East Atlantic and/or the Baltic Sea," Annex 17 to the Summary Record of the 2012 Meeting of the OSPAR Commission (doc. OSPAR 12/22/1-E)

[153] See: Molenaar, et al., supra note 38, para. 837.

[154] See: J. Kraska, "The Law of the Sea Convention and the Northwest Passage," 22 *International Journal of Marine and Coastal Law* 257-282 (2007), pp. 279-282 and T.W.T. Duyzings, *Addressing Legal Controversies on the Northern Sea Route. Potential Routes for Uniform Regulation and Cooperation* (unpublished master thesis Utrecht University: August 2010), pp. 47-49.

[155] SOLAS 74, supra note 47, Regulation V/6 on "Ice Patrol Service" and Chapter V's Appendix on "Rules for the management, operation and financing of the North Atlantic Ice Patrol."

[156] But see supra note 73.

[157] See supra note 151 and accompanying text.