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Navigating between freedom of navigation and coastal State jurisdiction

An analysis of Russia's participation in the negotiation of the IMO's mandatory Polar Code, 2009-2015, from a deliberative theory framework

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Table of Contents

Acknowledgements iii

List of abbreviations v

1 Introduction 1

1.1 The law of the sea and the Arctic 5

1.2 The IMO and the Polar Code 11

1.2.1 The Polar Code 14

1.2.2 Implications and the future of the Polar Code 20

1.3 Scholarly research on the Polar Code and Russia's NSR 22

1.4 Specifying the research questions 26

2 Introduction to the articles 28

3 Theoretical framework: deliberation and bargaining 31

3.1 The classical dichotomy of arguing and bargaining 34

3.1.1 Arguing and bargaining in the present research 37

3.2 Inclusion of self-interest, and deliberative negotiation 41

3.2.1 Considerations of deliberative negotiation in the present research 43

3.3 Incompletely theorised agreements 45

3.3.1 Incompletely theorised agreements in the present research 47

3.4 Concluding remarks on the theoretical framework 49

4 Methodology: approaching the Polar Code negotiations 51

4.1 Research material and its challenges 51

4.1.1 IMO documentary material 51

4.1.2 Observation at the IMO 53

4.1.3 Interviews with participants 55

4.1.4 Supporting material: audio records and national legal and policy documents 55

4.1.5 Concluding observations on the research material 58

4.2 Digesting the documentary material 59

4.3 Argumentation analysis 62

4.3.1 Challenges and relevance of argumentation analysis 66

4.4 Evaluating arguments 68

4.4.1 Challenges of evaluating arguments 71

5 Interpretation of major findings 73

5.1 Russia, the actor 73

5.1.1 Russia as an actor in Arctic shipping 73

5.1.2 Russia's deliberative performance at the IMO 77
5.1.3 Summary remarks 80
5.2 Russia and Canada in the Polar Code negotiations 81
5.3 Implications for decision-making at the IMO 86
5.3.1 Reaching decisions on lower level questions 86
5.3.2 Incomplete theorisation and the influence of high-level principles 87
5.3.3 Incomplete theorisation throughout 90
5.4 Implications for the future 91
5.4.1 Is the Polar Code a good agreement? 91
5.4.2 Russia and conclusions for future Arctic shipping regulations 95
References 99

List of Tables

Table 1 - IMO Committees and Sub-Committees which discussed the Polar Code, 2009-2015 16
Table 2 - Number of documents submitted by member States 17
Table 3 - The structure of the Polar Code as included in IMO Resolution MEPC.264(68) 18
Table 4 - Structure of the debate on the principle of priority at DE 55 67

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List of abbreviations

AMSA	Arctic Marine Shipping Assessment 2009 Report
Arctic Guidelines	Guidelines for Ships Operating in Arctic Ice-Covered Waters
AWPPA	Arctic Waters Pollution Prevention Act
Basics of Arctic Policy	Basics of the State Policy of the Russian Federation in the Arctic for the Period till 2020 and for a Further Perspective
BIMCO	Baltic and International Maritime Council
CDEM	construction, design, equipment and manning
CLIA	Cruise Lines International Association
COMSAR	Sub-Committee on Radiocommunication and Search and Rescue
CSC	Clean Shipping Coalition
DE	Sub-Committee on Ship Design and Equipment
Danish Arctic Strategy	Kingdom of Denmark Strategy for the Arctic 2011-2020
EEZ	exclusive economic zone
EU	European Union
FOEI	Friends of the Earth International
GAIRAS	generally accepted international rules and standards
G-D-P	goal-description-prescription
GT	gross tonnage
HFO	heavy fuel oil
HTW	Sub-Committee on Human Elements, Training and Watchkeeping
IACS	International Association of Classification Societies
ICS	International Chamber of Shipping
IFAW	International Fund for Animal Welfare

IFSMA	International Federation of Shipmasters' Association
IMCA	International Marine Contractors Association
IMCO	Intergovernmental Maritime Consultative Organization
IMO	International Maritime Organization
IMO Convention	Convention on the International Maritime Organization
INTERCARGO	International Association of Dry Cargo Shipowners
INTERMANAGER	International Ship Managers' Association
INTERTANKO	International Association of Independent Tanker Owners
IPTA	International Parcel Tankers Association
IR	international relations
ITF	International Transport Workers' Federation
LOSC	United Nations Convention on the Law of the Sea
MARPOL	International Convention for the Prevention of Pollution from Ships
MEPC	Marine Environment Protection Committee
MSC	Maritime Safety Committee
NCSR	Sub-Committee on Navigation, Communications and Search and Rescue
NEP	Northeast Passage
NGO	non-governmental organisation
NORDREG	Northern Canada Vessel Traffic Services Zone Regulations
NSR	Northern Sea Route
NSR Federal Act	Federal Act on Amendments to Specific Legislative Acts of the Russian Federation Related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route
Polar Code	International Code for Ships Operating in Polar Waters

Polar Guidelines	Guidelines for Ships Operating in Polar Waters
PWOM	Polar Water Operational Manual
SAR	search and rescue
SDC	Sub-Committee on Ship Design and Construction
SIGTTO	Society of International Gas Tanker and Terminal Operators Ltd
SLF	Sub-Committee on Stability and Load Lines and on Fishing Vessels Safety
SOLAS	International Convention for the Safety of Life at Sea
SSE	Sub-Committee on Ship Systems and Equipment
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
STW	Sub-Committee on Standards of Training and Watchkeeping
UN	United Nations
UNCLOS III	Third United Nations Conference on the Law of the Sea
V-D-P	value-description-prescription
WMO	World Meteorological Organization
WWF	World Wide Fund for Nature

1 Introduction

Due to the decrease in the extent of sea ice covering the Arctic Ocean,[1] coupled with improved technology, the Arctic has witnessed a great increase in human activity, most of which involves navigation. Operating in a region full of natural hazards to navigation – such as ice cover, harsh weather conditions and continuous darkness during part of the year – but largely devoid of supporting infrastructure – such as ports, icebreaker assistance, up-to-date charts, effective search and rescue (SAR) or radar coverage – ships plying the Arctic face very real risks to their safety, including the safety of life of those onboard.[2] At the same time, the presence of an increasing number of vessels in the Arctic poses a risk to the fragile polar environment, not only through accidents but simply by their operation. Operational discharges from ships contribute to a significantly larger share of pollution to the marine environment than accidental pollution.[3] To provide a remedy for at least some of the risks posed by and facing ships in polar waters, a new international legally binding instrument, the International Code for Ships Operating in Polar Waters (Polar Code) was developed by the International Maritime Organization (IMO) and entered into force on 1 January 2017. The regulations of the Polar Code aim to raise the level of protection of the polar marine environment from vessel-source pollution and the safety of ships operating in polar waters to above that already applicable. The basic regulations regarding navigation and the rights and duties of flag States and coastal States[4] are laid down in the 1982 United Nations Convention on the Law of the Sea (LOSC).[5] However, the provisions of the LOSC need further specification through the technical work of the IMO, especially in polar areas on which the LOSC is largely silent.[6] The LOSC as the "Constitution for the Oceans,"[7] creates a careful balance between the two major principles of the law of the sea: freedom of the seas – and its manifestation in the field of shipping, freedom of navigation – and coastal State jurisdiction. However, as will be seen below, the balance between these principles is not as fixed in the Arctic as elsewhere, leaving the negotiation of new instruments

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[1] For data on the Arctic ice extent, both currently and historically, see National Snow & Ice Data Center, "Arctic Sea Ice News & Analysis," https://nsidc.org/arcticseaicenews/ (accessed November 27, 2018).

[2] IMO, "International Code for Ships Operating in Polar Waters (Polar Code)," Res. MSC.385(94), November 21, 2014; and IMO, "International Code for Ships Operating in Polar Waters (Polar Code)," Res. MEPC.264(68), May 15, 2015 (Polar Code), Introduction, 3.1.

[3] See e.g. Alan Khee-Jin Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation* (Cambridge: Cambridge University Press, 2006), 19-22.

[4] To elucidate what flag, coastal and port States are I turn to Robin R. Churchill and A. Vaughan Lowe who give a simple but succinct definition of the capacities States can act in according to the law of the sea:

> A *flag State* is the State whose nationality a particular vessel has. A *coastal State* is the State in one of whose maritime zones a particular vessel lies. A *port State* is the State in one of whose ports a particular vessel lies.

Robin R. Churchill and A. Vaughan Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press, 1999), 344 (original emphasis).

[5] United Nations Convention on the Law of the Sea, Montego Bay, December 10, 1982, 1833 UNTS 3 (LOSC).

[6] The notable exception is Article 234 of the LOSC. For its text, see *infra* note 36.

[7] Tommy T. B. Koh, "A Constitution for the Oceans," in *The Law of the Sea: United Nations Convention on the Law of the Sea* (United Nations, 1983), xxxiii-xxxvii.

especially open to State manoeuvring, in an attempt to stamp their interpretation on the outcome. The Polar Code could, then, both influence that balance and be influenced by interested States. Understandably States with experience and stakes in polar shipping played an important role in the debates on the Polar Code, even if it was negotiated in an international organisation with global membership. The present thesis takes the negotiation of the Polar Code as its research topic and places one significant Arctic actor in that negotiation at its centre: the Russian Federation.

With the longest coastline in the Arctic, the concomitant history and experience in polar shipping and an infrastructure supporting Arctic navigation,[8] though largely developed during Soviet times, together with the continuing socio-economic and strategic-military interests in the region, Russia is a central actor in Arctic shipping. The Northern Sea Route (NSR) off Russia's coast is more open and less clogged by ice than routes through the Canadian Arctic Archipelago. A long list of activities reliant on navigation are present along the Russian coast, such as resource exploration and exploitation, surveying of the continental shelf, scientific research, resupply of remote communities, transportation of construction material and machinery to economic projects and hydrocarbons and hard minerals out of the region, fishing, cruise tourism as well as naval activities. Looking at Russia's behaviour and contribution to the Polar Code's negotiation is, then, important in giving meaning to the Code and its influence on Arctic shipping.

Though the NSR runs along most of the Russian Arctic coast it does not cover the whole of the Northeast Passage (NEP). Starting at the Kara Gates and extending to the Bering Strait, the NSR is a concept originating in Soviet legislation.[9] At the same time, while the possibilities of the NSR as a trans-Arctic route between the Pacific and the Atlantic have been thrust to the fore internationally and actively promoted by Russia since 2009,[10] notably through the pronouncements of President Vladimir Putin,[11] Russia has placed great emphasis on turning its

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[8] This does not, however, mean that the state and level of infrastructure in the Russian Arctic is satisfactory. For the challenges facing the Russian icebreaker fleet due to the different natures of operation, see Arild Moe and Lawson Brigham, "Organization and Management Challenges of Russia's Icebreaker Fleet," *Geographical Review* 107, no. 1 (2016): 1-21.

[9] Most recently, the NSR was defined in Russian Federation, Federal Act on Amendments to Specific Legislative Acts of the Russian Federation Related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route, N 132-FZ, July 28, 2012 (NSR Federal Act). Clause 3 of this Act reads:

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

[10] E.g. Arild Moe, "The Northern Sea Route: Smooth Sailing Ahead?" *Strategic Analysis* 38, no. 6 (2014): 784-802.

[11] Vladimir Putin, "Speech at the Second International Arctic Forum," Arkhangelsk, September 22, 2011,

Arctic into a strategic resource base with the help of the NSR as a national transportation corridor.[12] This duality between the national and the international[13] is also reflected in the Soviet/Russian NSR legislation. While Soviet/Russian scholars, reinforced by the Arctic's place in the national identity, did voice claims to sovereignty over Arctic waters,[14] Russia is one of only two States to rely on the ice-covered waters provision of the LOSC, allowing unilateral regulation of Arctic shipping by coastal States under certain conditions.[15] Russia's legislation with regard to the NSR is, then, mainly based on international law,[16] although historic waters claims provide it with a backup option. Moreover, Russia's recent regulatory reforms brought it more in line with international law.[17] Increasing alignment with international law, however, does not mean that Russian regulations are uncontroversial in relation to the international legal framework. This can be seen with regard to prior authorisation of ships intending to enter the NSR; Russian icebreaking monopoly which also gives comparative

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http://narfu.ru/en/media/news/21110 (accessed September 15, 2017).

[12] Russian Federation, Basics of the State Policy of the Russian Federation in the Arctic for the Period till 2020 and for a Further Perspective, September 18, 2008 (Basics of Arctic Policy), 4 (a) and (d).

[13] Russian uncertainties as regards balancing national aims and international cooperation have been pointed out in general in Robert Legvold, "The Role of Multilateralism in Russian Foreign Policy," in *The Multilateral Dimension in Russian Foreign Policy*, ed. Elana Wilson Rowe and Stina Torjesen (Abingdon: Routledge, 2009), 21-45; Elana Wilson Rowe and Stina Torjesen, "Key Features of Russian Multilateralism," in *The Multilateral Dimension in Russian Foreign Policy*, ed. Elana Wilson Rowe and Stina Torjesen (Abingdon: Routledge, 2009), 1-20; Andrei Zagorski, "Multilateralism in Russian Foreign Policy Approaches," in *The Multilateral Dimension in Russian Foreign Policy*, ed. Elana Wilson Rowe and Stina Torjesen (Abingdon: Routledge, 2009), 46-57; and Robert Legvold, "Encountering Globalization Russian Style," in *Russia's Encounter with Globalization: Actors, Processes and Critical Moments*, ed. Julie Wilhelmsen and Elana Wilson Rowe (Basingstoke: Palgrave Macmillan, 2011), 15-39. For this tension between the national and the international with regard to Russia and the Arctic, see Elana Wilson Rowe and Helge Blakkisrud, "A New Kind of Arctic Power? Russia's Policy Discourses and Diplomatic Practices in the Circumpolar North," *Geopolitics* 19, no. 1 (2014): 77-83; Andrei Zagorski, "Russia's Arctic Governance Policies," in *The New Arctic Governance*, ed. Linda Jakobson and Neil Melvin (Solna: SIPRI and Oxford University Press, 2016), 107-110; and Alexander Sergunin, "Russian Approaches to an Emerging Arctic Ocean Legal Order," *Polar Cooperation Research Centre (PCRC) Working Paper* no. 6 (March 2017): 1-52, http://www.research.kobe-u.ac.jp/gsics-pcrc/pdf/PCRCWPS/PCRC_06_Sergunin.pdf.

[14] See summaries of such views in Erik Franckx, *Maritime Claims in the Arctic: Canadian and Russian Perspectives* (Dordrecht: Martinus Nijhoff Publishers, 1993), 168-175; Jan J. Solski, "New Developments in Russian Regulation of Navigation on the Northern Sea Route," *Arctic Review on Law and Politics* 4, no. 1 (2013): 98-103; and Jan J. Solski, "Russia," in *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States*, ed. Robert C. Beckman et al. (Leiden: Brill Nijhoff, 2017), 188-192.

[15] LOSC, *supra* note 5, Art. 234. The other State to introduce unilateral regulations for Arctic shipping in its waters is Canada. For comparative works on Russian and Canadian unilateral regulations, see *infra* note 126.

[16] For analyses of the Russian legislation in light of Article 234 of the LOSC, see e.g. R. Douglas Brubaker, "The Arctic – Navigational Issues under International Law of the Sea," *Yearbook of Polar Law* II (2010): 59-63; Erik Franckx, "The "New" Arctic Passages and the "Old" Law of the Sea," in *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea*, ed. Henrik Ringbom (Leiden: Brill Nijhoff, 2015), 194-216; Solski, "Russia," *supra* note 14; and Jacques Hartmann, "Regulating Shipping in the Arctic Ocean: An Analysis of State Practice," *Ocean Development & International Law* 49, no. 3 (2018): 285-287.

[17] Erik Franckx, "The Shape of Things to Come: The Russian Federation and the Northern Sea Route in 2011," *The Yearbook of Polar Law* V (2013): 268; and Solski, "Russia," *supra* note 14, 197-215.

advantages to Russian companies authorised to use their own icebreaker assistance; lack of transparency on icebreaker fees; and the increased focus on the purpose of security in exercising jurisdiction.[18] Adding an extra layer to the existing legal issues regarding shipping along the NSR is the new Polar Code.

Looking at Russia as a major actor in the negotiation of the Polar Code is not only interesting and important in and of itself, but also because of the interplay and sometimes clash between international and national regulations of Arctic shipping, reflecting the conflict of deeper underlying principles. While the principle of freedom of navigation, based on uniform and universal international regulations, protects the interests of shipping industry and world trade, coastal State jurisdiction places barriers on these global interests, at the same time professing greater protection to coastal State interests, including for the protection of the marine environment. The Polar Code negotiations may thus be seen as a "playground" for ideas that go beyond the concrete regulations. Whether the Polar Code reflects the interests of the international community – be they environmental protection interests, global shipping interests or indeed both at the same time[19] – or is shaped to the particular interests of a few coastal States is then of importance. This harks back to a dichotomy that, according to Martti Koskenniemi, has been influencing international law: community of States vs autonomy of States.[20] To tease out this aspect of the negotiations of the Polar Code, I employ a theoretical framework based on deliberative democracy, focusing more on the theory's aspects relating to deliberation than democracy.[21] Of significance is deliberative theory's dichotomy between arguing (deliberation) and bargaining (negotiation), which result in a consensus-based common good on the one hand, and the compromise of give-and-take of self-interest on the other. These concepts are underpinned by a further distinction between the impartial reasoning of arguing and strategic pronouncements reliant on unequal power relations characteristic of bargaining. The spectrum

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[18] Solski, "Russia," *supra* note 14, 197-213. It has also been reported that Russia is introducing regulations for foreign warships, including notification requirement before entry into the NSR and the requirement to take pilots onboard, see "Press Review: Moscow Tightens Arctic Passage and Kiev Fears Full Loss of Gas Transit," *TASS*, March 6, 2019, http://tass.com/pressreview/1047602 (accessed April 11, 2019). For an analysis of the proposed draft legislation, see Andrey Todorov, "Where Does the Northern Sea Route Lead to?" Russian International Affairs Council, March 18, 2019, https://russiancouncil.ru/en/analytics-and-comments/analytics/where-does-the-northern-sea-route-lead-to/ (accessed June 1, 2019); and Jan Jakub Solski, "Navigational Rights of Warships through the Northern Sea Route (NSR) – All Bark and No Bite?" *The JCLOS Blog*, May 31, 2019, http://site.uit.no/jclos/files/2019/05/JCLOS-Blog_31.5.2019_Jan-Solski-1.pdf.

[19] Kathrin Keil's analysis reveals that sustained shipping activity and the protection of the Arctic environment are not seen as mutually exclusive by actors involved in Arctic shipping, not even by environmental NGOs, Kathrin Keil, "Sustainability Understandings of Arctic Shipping," in *The Politics of Sustainability in the Arctic: Reconfiguring Identity, Space, and Time*, ed. Ulrik Pram Gad and Jeppe Strandsbjerg (London: Routledge, 2018), 45-46.

[20] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, reissue (Cambridge: Cambridge University Press, 2007), 488-497.

[21] There is a democratic element to the decision-making process of the IMO which is professedly based on consensus and where a wide array of consultative organisations provide voice to the relevant sections of civil society. For further discussion of the IMO and its decision-making process, see section 1.2.

between these poles, representing deliberative negotiation is also of note. In a technical United Nations (UN) body, such as the IMO, one may assume that actors aim towards outcomes that are firmly in the public interest.[22] In fact, such a goal is evident in the case of the Polar Code whose environmental protection and safety aspects are in the interests of the international community. Where Russia's negotiating strategy can be placed between the poles of deliberative theory, how this influenced the negotiation and the outcome of the Polar Code, how Russia's negotiating strategy was impacted by the principles of freedom of navigation and coastal State jurisdiction, and what that says about Russia as an actor as well as State interactions at the IMO more generally, is the focus of this research.

This thesis therefore poses two general research questions which will be further expounded. Suffice it here to formulate them in the following manner:

1) How can Russia's participation in the Polar Code negotiations be interpreted? And, secondarily, what does this say about Russia as an actor in international negotiations of Arctic shipping regulation?

2) What does the negotiation of the Polar Code tell us about the role of the two principles of the law of the sea in largely technical organisations, such as the IMO?

In the course of this doctoral thesis, to answer these questions, I will first outline my findings as presented in my articles in chapter 2. Placing my research at the nexus of international relations (IR) and deliberative democracy, in chapter 3 I give an account of my theoretical framework, its concepts and how I adapted these to my research, as well as its challenges. Chapter 4 explains how I operationalised the theoretical framework to be able to analyse my largely documentary material. These chapters lead finally to the discussion and interpretation of my findings and answering of my research questions in chapter 5.

First, however, I want to give a brief explanation of the international law of the sea, particularly with regard to the underlying dynamic provided by the two principles, freedom of navigation and coastal State jurisdiction, as well as its application to the Arctic. In addition, I provide an introduction to the IMO and the Polar Code, to lay the ground for further discussion.

1.1 The law of the sea and the Arctic

This section serves to introduce the reader to the two historically defining and underlying principles of the law of the sea, which also made their mark on the negotiation of the Polar Code. Related to this, one notably vague provision of the LOSC is also introduced which was a bone of contention in the negotiations: Article 234 Ice-covered areas.

[22] Consider also Jens Steffek, "The Output Legitimacy of International Organizations and the Global Public Interest," *International Theory* 7, no. 2 (2015): 281-284.

The LOSC, negotiated at the third United Nations Conference on the Law of the Sea (UNCLOS III) between 1973 and 1982, lays down the rights and duties of States regarding their uses of the seas – the Arctic Ocean being no different.[23] In doing this, the LOSC both codified and further developed the law of the sea which itself is based on the competing principles of freedom of the seas and coastal State jurisdiction. One of the fundamental freedoms of the sea is freedom of navigation,[24] based on the right to unimpeded international trade as advocated by Hugo Grotius in *Mare Liberum*.[25] Beyond trade considerations, the interests of naval mobility and, thus, global security also support the freedom of navigation principle. At the same time, the principle of coastal State jurisdiction is based on coastal security,[26] and more recently sovereign rights over coastal resources.[27] Importantly for the present thesis – both on account of the IMO's remit and due to the scope of Article 234 of the LOSC introduced below – pollution prevention has also played a significant role in efforts to expand coastal State jurisdiction.[28] As Davor Vidas suggests, the driving forces behind the two principles are territorial appropriation or dominion on the one hand and "economic profit by functional as opposed to territorial access; and […] securing strategic gains of naval powers in distant sea areas" on the other.[29]

To settle the question of ever-extending jurisdictional claims, the LOSC strikes a careful balance between navigation and pollution prevention.[30] For the purpose of the prevention of

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[23] Ilulissat Declaration, Arctic Ocean Conference, May 28, 2008, https://www.regjeringen.no/globalassets/upload/ud/080525_arctic_ocean_conference-_outcome.pdf (accessed May 1, 2019).

[24] The high seas freedoms are listed in LOSC, *supra* note 5, Art. 87. For a praise of the navigational freedoms as enshrined in the LOSC, see John Norton Moore, "Navigational Freedom: The Most Critical Common Heritage," *International Law Studies* 93 (2017): 251-261.

[25] See e.g. Davor Vidas, "Responsibility for the Seas," in *Law, Technology and Science for Oceans in Globalisation: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf*, ed. Davor Vidas (Leiden: Martinus Nijhoff Publishers, 2010), 17-21; M. C. W. Pinto, "Hugo Grotius and the Law of the Sea," in *Law of the Sea: From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos*, ed. Lilian del Castillo (Leiden: Brill Nijhoff, 2015), 27-28; and Michaela Young, "Then and Now: Reappraising Freedom of the Seas in Modern Law of the Sea," *Ocean Development & International Law* 47, no. 2 (2016): 172.

[26] With regard to this, see e.g. Bernard Oxman, "The Territorial Temptation: A Siren Song at Sea," *American Journal of International Law* 100 (2006): 840-843; and Rüdiger Wolfrum, "The Freedom of Navigation: Modern Challenges Seen from a Historical Perspective," in *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos*, ed. Lilian del Castillo (Leiden: Brill Nijhoff, 2015), 98-102.

[27] Tan, *Vessel-Source Marine Pollution*, *supra* note 3, 201.

[28] Oxman, "Territorial Temptation," *supra* note 26, 843-849; Eelco Leemans and Thomas Rammelt, "*Mare Liberum* or *Mare Restrictum*? Challenges for the Maritime Industry," in *The World Ocean in Globalisation: Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues*, ed. Davor Vidas and Peter Johan Schei (Leiden: Martinus Nijhoff Publishers, 2011), 274-275; and Wolfrum, "Freedom of Navigation," *supra* note 26, 94-98.

[29] Vidas, "Responsibility for the Seas," *supra* note 25, 27.

[30] For the negotiation of LOSC in light of the competing maritime and coastal interests in jurisdictional questions, see Tan, *Vessel-Source Marine Pollution*, *supra* note 3, 192-201. John Norton Moore extols the LOSC for

ship-source pollution, the coastal State is afforded rights to regulate ships passing through waters off its coast to a decreasing degree the more out to sea the ship is found, depending on the maritime zone, and largely restricted to generally accepted international rules and standards (GAIRAS).[31] Although navigational rights and freedoms are preserved and protected against unilateral coastal State regulations in various ocean areas, the establishment of the environmental protection framework should be seen as one of the major accomplishments of the LOSC, putting an end to the freedom to pollute.[32] The balance of the two principles in general is also supported by the breakdown of a clear divide between maritime and coastal interests, due largely to the flagging out of fleets to open registries from traditional maritime powers, the ever wider spread of environmental interests as well as the reliance on international trade of even the most zealous coastal States.[33]

While the LOSC appears to have largely created a balance between freedom of navigation and coastal State jurisdiction, two points have to be made. Firstly, Koskenniemi argues that the provisions of the LOSC in general are open to the dichotomy of community vs autonomy and lack material rules, referring disagreements instead to competent international organisations – the IMO considered as such in the realm of commercial shipping – or State agreements.[34] I will return to these claims in the final chapter of this thesis.

Secondly, there is one geographical area where the balance established in the LOSC between navigation and pollution prevention tilts distinctly towards the latter: ice-covered areas.[35] Article 234 of the LOSC provides for more extensive coastal State rights to protect the marine environment by prescribing and enforcing laws and regulations that are stricter than international standards.[36] This article, specifically tailored to Arctic conditions, was negotiated

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resolving an "ancient," four-century-old conflict between navigational and resource issues as well as modernise it, Moore, "Navigational Freedom," *supra* note 24, 257.

[31] The coastal State exercises full sovereignty in its internal waters. This sovereignty extends to the territorial sea but is further qualified, LOSC, *supra* note 5, Art. 2. Here, the coastal State can set unilateral standards on pollution discharges but is limited by generally accepted international rules and standards (GAIRAS) with regard to the regulation of continuously applicable standards, such as construction, design, equipment and manning (CDEM); ibid., Art. 21 (1) (f) and (2). It can only regulate navigation in conformity with GAIRAS in the exclusive economic zone (EEZ) where, in principle, the high seas freedom of navigation applies; ibid., Arts. 56 (1) (b) (iii), 58 (1) and 211 (5). One further manifestation of the freedom of navigation and its objective of global mobility is the right of transit passage through straits used for international navigation, between two parts of the EEZ or the high seas, with minimal interference from strait States; ibid., Part III, Section 2.

[32] Catherine Redgwell, "From Permission to Prohibition: The 1982 Convention on the Law of the Sea and Protection of the Marine Environment," in *The Law of the Sea: Progress and Prospects*, ed. David Freestone, Richard Banes and David M. Ong (Oxford: Oxford University Press, 2006), 180-186; and Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford: Hart Publishing, 2010), 338 and 342-344.

[33] Tan, *Vessel-Source Marine Pollution*, *supra* note 3, 62-73 and 102-104.

[34] Koskenniemi, *From Apology to Utopia*, reissue, *supra* note 20, 488-497.

[35] See also Aldo Chircop, "Jurisdiction over Ice-Covered Areas and the Polar Code: An Emerging Symbiotic Relationship?" *The Journal of International Maritime Law* 22 (2016): 278-281.

[36] LOSC, *supra* note 5, Art. 234. The text of this article reads:

primarily between Canada, the United States and the Soviet Union, and was the result of the clash of the two principles, discussed above, in the Arctic: freedom of navigation and the general maritime interests of the two superpowers; and the special Arctic coastal State interests of Canada and the Soviet Union.[37] The possibility to go above the global level rules and, thus, create a new balance between environmental protection and freedom of navigation arguably also placated the sovereignty considerations on Canada's part, at the same time acknowledging Soviet interests.[38] Moreover, the acceptance of the new regime of straits used for international navigation in general was of importance especially to the United States but also for the Soviet Union. It has to be noted though that the Arctic was not used for international commercial navigation to any extent at the time.

While Article 234 tilts the balance more towards unilateral national environmental protection, much of the language of this article remains vague and open to interpretation: which maritime zone(s) does it apply in (only in the exclusive economic zone (EEZ) or also in the territorial sea); what exactly does it mean for navigational rights and freedoms and to what extent do rights in Article 234 limit these rights and freedoms; and what type of measures may be included under Article 234, a provision aimed at pollution prevention in particular.[39] What is

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> Coastal States have a 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 exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for the 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 of the marine environment based on the best available scientific evidence.

[37] For the negotiation history of Article 234, see Donald M. McRae, "Negotiation of Article 234," in *Politics of the Northwest Passage*, ed. Franklin Griffiths (Kingston: McGill-Queen's University Press, 1987), 98-114; James Kraska, "Governance of Ice-Covered Areas: Rule Construction in the Arctic Ocean," *Ocean Development & International Law* 45, no. 3 (2014): 260-271; and Armand de Mestral, "Article 234 of the United Nations Convention on the Law of the Sea: Its Origins and Its Future," in *International Law and Politics of the Arctic Ocean: Essays in Honor of Donat Pharand*, ed. Suzanne Lalonde and Ted L. McDorman (Leiden: Brill, 2015), 111-124. It must not be forgotten that the United States is an Arctic coastal State as well.

[38] Oxman, "Territorial Temptation," *supra* note 26, 849. See also John Kirton and Don Munton, "The Manhattan Voyages and Their Aftermath," in *Politics of the Northwest Passage*, ed. Franklin Griffiths (Kingston: McGill-Queen's University Press, 1987), 67-97. With regard to the Soviet Union and Article 234 of the LOSC, see McRae, "Negotiation of Article 234," supra note 37, 109-110 and endnotes 32 and 36, 285-286.

[39] See e.g. Donald M. McRae and D. J. Goundrey, "Environmental Jurisdiction in Arctic Waters: The Extent of Article 234," *University of British Columbia Law Review* 16 (1982): 197-228; Donat Pharand, "The Arctic Waters and the Northwest Passage: A Final Revisit," *Ocean Development & International Law* 38, no. 1-2 (2007): 46-48; Kristin Bartenstein, "The "Arctic Exception" in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?" *Ocean Development & International Law* 42, no. 1-2 (2011): 22-52; Erik J. Molenaar, "Options for Regional Regulation of Merchant Shipping Outside IMO, with Particular Reference to the Arctic Region," *Ocean Development & International Law* 45, no. 3 (2014): 276-278; Peter Luttmann, "Ice-Covered Areas under the Law of the Sea Convention: How Extensive are Canada's Coastal State Powers in the Arctic?" *Ocean Yearbook* 29 (2015): 86-99; Janusz Symonides, "Problems and Controversies Concerning Freedom of Navigation in the Arctic," in *Law of the Sea, From Grotius to the International Tribunal for the Law*

clear is that the coastal State is given unilateral rights to adopt and enforce laws and regulations to prevent vessel-source pollution, that is to say without having to consult the international community or conform to GAIRAS.[40] With regard to polar waters, the Polar Code, or at least its mandatory regulations, arguably form part of GAIRAS.[41] While Article 234 does not limit coastal State regulatory rights to the GAIRAS, what this means for the relationship between the Polar Code and Article 234 in practice has been open to debate.[42] Only a few limitations are placed on the coastal State in exercising its rights under Article 234, including for the laws and regulations enacted under it to be non-discriminatory and pay "due regard" to navigation.[43] Only two States have so far relied on Article 234 to introduce unilateral legislation for shipping in their Arctic waters: Canada and Russia.[44] However, some of their regulations are contested

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of the Sea: Liber Amicorum Judge Hugo Caminos, ed. Lilian del Castillo (Leiden: Brill Nijhoff, 2015), 227-130; Roman Dremliuga, "A Note on the Application of Article 234 of the Law of the Sea Convention in Light of Climate Change: Views from Russia," *Ocean Development & International Law* 48, no. 2 (2017): 128-135; Hartmann, "Regulating Shipping," *supra* note 16; and Jan Jakub Solski, "Russian Coastal State Jurisdiction over Commercial Vessels Navigating the Northern Sea Route" (PhD diss., UiT The Arctic University of Norway, 2018), Chapter 4.

[40] In relation to this point, it can be argued that submitting unilateral regulations to the IMO, and through it the international community, for recognition is both a show of good faith and a way of satisfying the due regard to navigation obligation, see Kristin Bartenstein, "Navigating the Arctic: The Canadian NORDREG, the International Polar Code and Regional Cooperation," *German Yearbook of International Law* 54 (2011): 108; and Solski, "Russia," *supra* note 14, 205-206.

[41] Øystein Jensen, "The Polar Code and the Law of the Sea," in *Arctic Governance: Law and Politics*, ed. Svein Vigeland Rottem and Ida Folkestad Soltvedt (London: I.B.Tauris, 2017), 164-169. For an earlier version of this paper, see Øystein Jensen, "The International Code for Ships Operating in Polar Waters: Finalization, Adoption and Law of the Sea Implications," *Arctic Review on Law and Politics* 7, no. 1 (2016): 71-75.

[42] See e.g. Ole Kristian Fauchald, "Regulatory Framework for Maritime Transport in the Arctic: Will a Polar Code Contribute to Resolve Conflicting Interests?" in *Marine Transport in the High North*, ed. John Grue and Roy H. Gabrielsen (Oslo: Novus Forlag, 2011), 82-84; Andrea Scassola, "An International Polar Code of Navigation: Consequences and Opportunities for the Arctic," *The Yearbook of Polar Law* V (2013): 283-288; Ted L. McDorman, "A Note on the Potential Conflicting Rights and Obligations between the IMO's Polar Code and Article 234 of the Law of the Sea Convention," in *International Law and Politics of the Arctic Ocean: Essays in Honor of Donat Pharand*, ed. Suzanne Lalonde and Ted L. McDoman (Leiden: Brill Nijhoff, 2015), 141-159; Chircop, "Jurisdiction over Ice-Covered Areas," *supra* note 35, 283-284; Jensen, "The International Code for Ships," *supra* note 41, 75-77; and Knut Einar Skodvin, "Arctic Shipping – Still Icy," in *Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries*, ed. Myron Nordquist, John Norton Moore and Ronán Long (Leiden: Brill, 2016), 157.

[43] LOSC, *supra* note 5, Art. 234.

[44] Denmark's Arctic strategy also refers to the possibility of doing so, see Denmark, Greenland and the Faroe Islands, Kingdom of Denmark Strategy for the Arctic 2011-2020, August 2011 (Danish Arctic Strategy), 18.

by the United States and, to a lesser degree, the European Union (EU),[45] while to what extent they are in line with Article 234 has also been subject to scrutiny.[46]

Besides the enduring notion of the freedom of the seas, the main reason for placing restrictions on coastal States with regard to pollution prevention in general, and for including the non-discrimination and due regard clauses in Article 234 of the LOSC in particular, is the global nature of the shipping industry. The possibility of ships sailing to any part of the world's oceans is greatly threatened by a fragmented regulatory scene, resulting in a patchwork of regulations difficult for ships to "navigate" and, even worse, incompatible regulations that ships cannot possibly comply with at the same time. The fact that the two States with the longest coastlines in the Arctic – Russia and Canada – have already enacted national legislation in pursuance of Article 234 of the LOSC, means that there is a great need for harmonisation in order to avoid further fragmentation. This has become particularly important given the increasing navigational activity in the Arctic, cited as a reason for embarking on the development of the Polar Code.[47] Since ships operating in the Arctic may be registered in any State, not just Arctic States, and the largest ship registers lie far outside the Arctic,[48] regional regulations would not suffice to provide adequate protection both for the polar environment and for the shipping industry. Thus, regulation of polar shipping was placed in the hands of a global international organisation, the International Maritime Organization (IMO).[49]

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[45] See e.g. J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims*, 3rd ed. (Leiden: Martinus Nijhoff Publishers, 2012), 490-496; and United States, "Diplomatic Note from the United States to Russia regarding the Northern Sea Route," May 29, 2015, reproduced in *Digest of United States Practice in International Law 2015*, ed. CarrieLyn D. Guymon, 526-528, https://2009-2017.state.gov/documents/organization/258206.pdf (accessed June 1, 2019).

[46] For a recent analysis of State practice see Hartmann, "Regulating Shipping," *supra* note 16, 282-287.

[47] Denmark, Norway and the United States, "Work Programme: Mandatory Application of the Polar Guidelines," IMO Doc. MSC 86/23/9, February 24, 2009; and Denmark, Norway and the United States, "Work Programme of the Committee and Subsidiary Bodies: Mandatory Application of the Polar Guidelines," IMO Doc. MEPC 59/20/1, April 6, 2009.

[48] A large number of vessels are registered in States offering open registries, so-called flags of convenience. Since such States are typically developing States, such as Panama and Liberia, they lack the capacity (and often the will) to enforce the international rules and standards applicable to ships flying their flag. Churchill and Lowe, *The Law of the sea*, 3rd ed., *supra* note 4, 258-259. For a table of the largest flags by deadweight tonnage, see United Nations Conference on Trade and Development (UNCTAD), *Review of Maritime Transport 2018* (Geneva: UNCTAD, 2018), http://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf, 35.

[49] See also conclusions in Olav Schram Stokke, "Regime Interplay in Arctic Shipping Governance: Explaining Regional Niche Selection," *International Environmental Agreements: Politics, Law and Economics* 13, no. 1 (2013): 81; and Arctic Council, *Arctic Marine Shipping Assessment 2009 Report*, 2nd print (Arctic Council, April 2009), 6 (AMSA).

1.2 The IMO and the Polar Code

The IMO is a UN specialised agency responsible for international merchant shipping.[50] Established as the Inter-governmental Maritime Consultative Organization (IMCO), it first convened in 1959 and was very much a club for maritime States and the shipping industry.[51] Yet, with the advent of environmental activism and in the wake of major accidents resulting in well-publicised cases of pollution, the IMO's remit was extended to pollution prevention through the establishment of the Marine Environment Protection Committee (MEPC),[52] while environmental non-governmental organisations (NGOs) received consultative status at the IMO on a par with representatives of the shipping industry.[53] The IMO is mainly a technical organisation,[54] with delegates being largely technical experts rather than diplomats in the conventional sense,[55] and is not competent in deciding or adjudicating on jurisdictional matters. In its prescriptive function,[56] the IMO has generated a global regulatory regime for international shipping, a tiny parcel of which is the new Polar Code.

Instruments. Due to the global nature of the shipping industry, it is pertinent for the IMO to develop rules that are universal and uniform, in the sense that they cover ships of all flags equally and consistently. The instruments developed by the IMO pertain to a wide subject area, with the purpose of the IMO described as "promot[ing] safe, secure, environmentally sound, efficient and sustainable shipping through cooperation."[57] Thus, while the work of the IMO is primarily directed at ships and therefore States in their flag State capacity, it also caters for the environmental protection interests of coastal States through its regulations on pollution

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[50] For the IMO's responsibilities under LOSC in general, see Aldo Chircop, "The International Maritime Organization," in *The Oxford Handbook of the Law of the Sea*, ed. Donald R. Rothwell et al. (Oxford: Oxford University Press, 2015), 416-438. For an introduction to the IMO's role regarding polar shipping, see Aldo Chircop, "The IMO, Its Role under UNCLOS and Its Polar Shipping Regulation," in *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States*, ed. Robert C. Beckman et al. (Leiden: Brill Nijhoff, 2017), 107-143. For the workings of the then-IMCO, see Harvey B. Silverstein, *Superships and Nation-States: The Transnational Policies of the Intergovernmental Maritime Consultative Organization* (Boulder, CO: Westview Press, 1978).

[51] The importance of maritime interests at IMCO/IMO is underscored by the fact that IMO instruments' entry-into-force is linked not only to the number of ratifying States but also to the percentage of the world fleet they represent, providing large flag States with an important role in its decision-making. Contributions to the budget of the IMO are also determined based on fleet tonnage.

[52] Chircop, "International Maritime Organization," *supra* note 50, 424-425.

[53] Pursuance of environmental protection issues, again, also results from the change in perspective of traditional maritime States which have lost a large share of their fleets to flags of convenience. Furthermore, the diversification of interests represented at IMO is supported by the increase in number of member States with the inclusion of newly independent, but largely developing States with no significant fleet of their own.

[54] Silverstein, *Superships and Nation-States*, *supra* note 50; and Tan, *Vessel-Source Marine Pollution*, *supra* note 3, 75-76 and 181-184

[55] See e.g. Silverstein, *Superships and Nation-States*, *supra* note 50, 35-45.

[56] For the functions of the IMO, see Chircop, "International Maritime Organization," *supra* note 50, 427-436.

[57] IMO, "Strategic Plan for the Organization (2013-2017)," Assembly Res. A.1037(27), November 22, 2011, Annex 1.

prevention and on ship safety by reducing accidental pollution. Ship safety and environmental protection also underpin the dual aims of the Polar Code.[58]

Due to the universality and globality of IMO instruments, its conventions and recommendatory guidelines and resolutions also apply to ships operating in polar waters.[59] Of major interest here are three Conventions: the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL),[60] the 1974 International Convention for Safety of Life at Sea (SOLAS)[61] and the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW).[62] The first two make the Polar Code mandatory, while the latter is cross-referenced in the Code's chapter regarding manning[63] and has consequently been amended.[64] Furthermore, the work of the IMO includes recommendatory guidelines, two of which led directly to the mandatory Polar Code,[65] while others complement the Polar Code.[66]

Decision-making procedure.[67] A new output is usually initiated in one of the IMO's five Committees by one or more of the IMO's member States, which at the time of writing numbered 174, with three associate members.[68] In the case of the Polar Code, Denmark, Norway and the United States proposed placing a mandatory polar instrument on the agenda of the IMO in 2009,[69] no doubt influenced by the recommendations of the Arctic Council's *Arctic Marine*

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[58] Polar Code, *supra* note 2, Introduction 1.

[59] For an overview of the IMO instruments relevant to ships in polar waters, see Heike Deggim, "Ensuring Safe, Secure and Reliable Shipping in the Arctic Ocean," in *Environmental Security in the Arctic Ocean*, ed. Paul Arthur Berkman and Alexander N. Vylegzhanin (Dordrecht: Springer, 2013), 241-254.

[60] International Convention for the Prevention of Pollution from Ships, as Modified by the Protocol of 1978 Relating Thereto, London, November 2, 1973 and February 17, 1978, 1340 UNTS 61, as amended (MARPOL).

[61] International Convention for the Safety of Life at Sea, London, November 1, 1974, 1184 UNTS 277, as amended (SOLAS).

[62] International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, London, July 7, 1978, 1361 UNTS 190, as amended (STCW).

[63] Polar Code, *supra* note 2, Part I-A, Chapter 12.

[64] IMO, "Report of the Maritime Safety Committee on Its Ninety-Seventh Session," IMO Doc. MSC 97/22/Add.1, December 6, 2016, Annexes 8 and 9.

[65] IMO, "Guidelines for Ships Operating in Arctic Ice-Covered Waters," IMO Doc. MSC/Circ.1056 and MEPC/Circ.399, December 23, 2002 (Arctic Guidelines); and IMO, "Guidelines for Ships Operating in Polar Waters," Assembly Res. A.1024(26), December 2, 2009 (Polar Guidelines).

[66] IMO, "Enhanced Contingency Planning Guidance for Passenger Ships Operating in Areas Remote from SAR Facilities," IMO Doc. MSC.1/Circ.1184, May 31, 2006; IMO, "Guidelines on Voyage Planning for Passenger Ships Operating in Remote Areas," Assembly Res. 999(25), November 29, 2007; and IMO, "Guide for Cold Water Survival," IMO Doc. MSC.1/Circ.1185/Rev.1, November 30, 2012.

[67] For an examination of the IMO's decision-making process in its Legal Committee that in many respects is also applicable to the Committees and Sub-Committees discussed in the present PhD thesis, see Nicholas Gaskell, "Decision Making and the Legal Committee of the International Maritime Organization," *The International Journal of Marine and Coastal Law* 18, no. 2 (2003): 155-214.

[68] IMO, "Member States, IGOs and NGOs," http://www.imo.org/en/About/Membership/Pages/Default.aspx (accessed November 13, 2018).

[69] MSC 86/23/9, *supra* note 47; and MEPC 59/20/1, *supra* note 47.

Shipping Assessment 2009 Report (AMSA).[70] After agreeing to the new output, work usually begins at the next session of the Committee or one of its supporting Sub-Committees, resulting in a somewhat slow process. The Committees and Sub-Committees are open to all member States for participation, while consultative organisations are also present.[71] The latter represent the different sectors of the shipping industry, but also include environmental non-governmental organisations (NGOs). Thus, all possible interests are represented in the discussions, including maritime interests and coastal and environmental interests.[72] The IMO's Committees usually decide on policy points, while the concrete detailed work is delegated to the Sub-Committees which send the outcome back to the Committees for adoption. Sub-Committees usually meet yearly, while the Committees twice a year. While the Committees and Sub-Committees are in session, further work is carried out in working groups of experts representing interested member States and consultative organisations.[73] Between meetings of the Committees and Sub-Committees, intersessional working groups and electronic correspondence groups may continue preparatory work.

The debates at the IMO are based on proposals and information documents submitted by member States as well as consultative organisations. Debate is, however, not free-flowing in the sense that, typically, one delegation is only allowed to comment on a proposal once and it is rare for them to be allowed by the chair to come back and speak on the same issue again. Therefore, it is important for States to prepare reactions to the papers submitted so that their intervention covers all relevant points. Although the IMO Convention states that decision-making at the IMO is by a two-thirds majority vote,[74] the IMO places great emphasis on the notion that in practice it takes decisions by consensus both with regard to recommendatory and mandatory instruments.[75] This would suggest that all States agree to the decisions taken although it is often the case that decisions are taken based on the chairman's perception of the

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[70] AMSA, 2nd print, *supra* note 49.

[71] The IMO is led by the Assembly, comprising all members, and, when it is not in session, the Council where 40 members are elected based on a formula of 10 States having "the largest interest in international seaborne trade," 10 "States with the largest interest in providing international shipping services" and 20 States with "special interests in maritime transport or navigation" (also ensuring global representation). See Convention on the International Maritime Organization, Geneva, March 6, 1948, 289 UNTS 48, as amended (IMO Convention), Article 17. The work of the IMO is supported by the Secretariat, located in London.

[72] For a detailed description of these, see Tan, *Vessel-Source Marine Pollution*, *supra* note 3, 34-74.

[73] The difficulties faced by developing States in attending and contributing to substantive decision-making in these groups even if the subject matter is in their interests has been pointed out by Tan, *Vessel-Source Marine Pollution*, *supra* note 3, 99-101.

[74] IMO Convention, *supra* note 71, Article 62.

[75] See e.g. IMO, "Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization," IMO Doc. LEG/MISC.8, January 30, 2014, where it is pointed out four times in the introduction that the IMO "normally" adopts instruments by consensus, ibid., 7-12. The Secretary-General at the time, Efthimios E. Mitropoulos of Greece, has addressed this issue at MEPC 60, highlighting the divisive nature of voting and the IMO's practice to strive for consensus, see IMO, "Report of the Marine Environment Protection Committee on Its Sixtieth Session," IMO Doc. MEPC 60/22, April 12, 2010, 32.

balance between those member States for and against a proposal, in a quasi-voting fashion.[76] Consultative organisations do not possess a right to vote but are influential in shaping decisions, especially through their practical expertise.

Adoption of instruments. IMO Conventions need ratification for entry into force, where not only the number of ratifying States counts but also the share of the gross tonnage of the world fleet they represent.[77] While this accords greater weight to flags of convenience, once a Convention is in force, this dynamic changes. For an amendment to enter into force, no positive approval is required by member States under the tacit acceptance procedure. Instead, the amendment enters into force on a given date unless objected to by a specified number of States,[78] negating the difference between member States created by the unequal size of their fleets. Thus, the tacit acceptance procedure allows for the continuous and relatively fast updating of these instruments to keep them up to date with technical developments.

1.2.1 The Polar Code

The Polar Code was adopted by the Maritime Safety Committee (MSC) at its 94th session in November 2014 and by the MEPC at its 68th session in May 2015, the Polar Code finally entered into force on 1 January 2017. It is the international community's latest effort to provide uniform and universal standards for ships sailing in polar waters with regards to ship safety and pollution prevention. The development of the Code was proposed emphasising the increasing potential of negative impacts on the safety of vessels and the marine environment, noting that such a development would logically flow from the Polar Guidelines[79] and singling out such issues as SAR and environmental emergency response as well as crew qualification and training.[80] By introducing a new mandatory international legal instrument for polar shipping, the development of the Code also impacts upon the balance of the principles of freedom of navigation and coastal State jurisdiction. It sets a higher level of environmental protection and, thus, potentially raises the threshold for coastal State unilateral action, while at the same time acts to enable practicable shipping in Arctic waters by providing global level safety regulations and a benchmark for insurance purposes.

[76] Nicholas Gaskell observes the importance of the chairman in summing up the "prevailing mood" of the delegations with regard to a particular proposal, see Gaskell, "Decision Making," *supra* note 67, 186-187.

[77] In the case of both SOLAS and MARPOL, as well as MARPOL's optional Annexes, the combined merchant fleets of the parties had to constitute not less than 50 per cent of the gross tonnage of the world's merchant shipping for these instruments to enter into force. See SOLAS, *supra* note 61, Article X (a); and MARPOL, *supra* note 60, Article 15 (1) and (2).

[78] IMO, "Conventions," http://www.imo.org/en/About/Conventions/Pages/Home.aspx (accessed November 13, 2018). For tacit acceptance in the case of SOLAS, see SOLAS, *supra* note 61, Article VIII (b) (vi). For tacit acceptance in the case of the Annexes of MARPOL, see MARPOL, *supra* note 60, Article 16 (2) (f) (iii).

[79] Polar Guidelines, *supra* note 65.

[80] MSC 86/23/9, *supra* note 47; and MEPC 59/20/1, *supra* note 47. Interestingly, questions of SAR and environmental emergency response did not form the major points of the Polar Code negotiations or text.

History and geographical scope. While this thesis deals with the Polar Code debates at the IMO from 2009, when an expressly mandatory Code was placed on the IMO's agenda, the idea of harmonised rules and standards for ships in polar waters first appeared in the 1990s.[81] Developments at that time, however, resulted in recommendatory guidelines,[82] at first for Arctic ice-covered waters but later extended to polar waters, i.e. also including Antarctic waters and not just limited to ice-covered waters. The latter's coverage was kept for the mandatory Polar Code. Thus, the Polar Code applies to ships in the Arctic north of 60°N with the exception of the waters around Iceland, the Norwegian Sea and the western part of the Barents Sea, but including the waters around Greenland as far south as 58°N,[83] while in the Antarctic the Code's application area coincides with the waters in the treaty area of the Antarctic Treaty, up to latitude 60°S.[84]

Negotiating Committees and Sub-Committees. Due to the dual goal of the Polar Code, two Committees were responsible for the work on it: the MSC and the MEPC. However, the Code was mostly developed in the Sub-Committee on Ship Design and Equipment (DE) and, after the IMO's structure was reorganised at the start of 2014,[85] the Sub-Committee on Ship Design and Construction (SDC).[86] The meetings of the Committees and Sub-Committees that discussed the Polar Code are summarised in Table 1.

Participants. Due to the large number of delegations and their divergent interests and resources, not every delegation was equally active with regards to the Polar Code even though, as mentioned above, the Committees and Sub-Committees comprise all IMO member States and

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[81] For these developments see, Lawson W. Brigham, "The Emerging International Polar Navigation Code: Bi-Polar Relevance?" in *Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention*, ed. Davor Vidas (Cambridge: Cambridge University Press, 2000): 244-262.

[82] Arctic Guidelines, *supra* note 65; and Polar Guidelines, *supra* note 65.

[83] SOLAS, *supra* note 61, Chapter XIV, Reg. 1 defines Arctic waters as

> […] those waters which are located north of a line from the latitude 58°00'.0 N and longitude 042°00'.0 W to latitude 64°37'.0 N, longitude 035°27'.0 W and thence by a rhumb line to latitude 67°03'.9 N, longitude 026°33'.4 W and thence by a rhumb line to the latitude 70°49'.56 N and longitude 008°59'.61 W (Sørkapp, Jan Mayen) and by the southern shore of Jan Mayen to 73°31'.6 N and 019°01'.0 E by the Island of Bjørnøya, and thence by a great circle line to the latitude 68°38'.29 N and longitude 043°23'.08 E (Cap Kanin Nos) and hence by the northern shoe of the Asian Continent eastward to the Bering Strait and thence from the Bering Strait westward to latitude 60° N as far as Il'pyrskiy and following the 60th North parallel eastward as far as and including Etolin Strait and thence by the northern shore of the North American continent as far south as latitude 60° N and thence eastward along parallel of latitude 60° N, to longitude 056°37'.1 W and thence to the latitude 58°00'.0 N, longitude 042°00'.0 W.

[84] The Antarctic Treaty, Washington, December 1, 1959, 402 UNTS 71, Article VI.

[85] IMO, "Summary of Decisions," IMO Doc. C 110/D, July 29, 2013, 5.

[86] Other Sub-Committees were also consulted with regard to the content of the Polar Code, including the Sub-Committees on Radiocommunications and Search and Rescue (COMSAR), Fire Protection (FP), Human Element, Training and Watchkeeping (HTW), Safety of Navigation (NAV), Navigation, Communications and Search and Rescue (NCSR), Stability and Load Lines and on Fishing Vessels Safety (SLF), Ship Systems and Equipment (SSE) and Standards of Training and Watchkeeping (STW). See also Table 1.

consultative organisations. In line with expectations and in accordance with their experience and interests in the Arctic region, the five Arctic coastal States – Canada, Denmark, Norway, Russia and the United States – submitted the highest number of documents to the Polar Code negotiations, together with Finland which also has ample experience in navigation in ice-covered waters in the Baltic. Iceland and Sweden, the two remaining Arctic Council member States, come slightly further down on the list, below Germany, Argentina and New Zealand – the former a State influential in maritime affairs with a large economy and corresponding cargo-owning interests; the latter two States with territorial claims and SAR responsibilities in Antarctic waters. The remaining States that submitted proposals to the process come considerably further behind and include such flags of convenience as Liberia, Marshall Islands and Panama, and States associated with maritime and user interests in the Arctic such as China, Japan, South Korea[87] and the UK – the latter also an Antarctic claimant. The number of documents submitted by each State is illustrated in Table 2.

Year	**Body**	**Year**	**Body**
2009	MSC 86 MEPC 59	2013 - continued	COMSAR 17 SLF 55 DE 57 STW 44 MEPC 65 MSC 92 NAV 59
2010	DE 53 MEPC 60 MSC 87 DE 54		
2011	DE 55 NAV 57 MEPC 62	2014	SDC 1 HTW 1 SSE 1 MEPC 66 MSC 93 NCSR 1 MEPC 67 MSC 94
2012	DE 56 MEPC 63 MSC 90 NAV 58 MEPC 64 MSC 91		
2013	FP 56	2015	MEPC 68

Table 1 - IMO Committees and Sub-Committees which discussed the Polar Code, 2009-2015[88]

However, these numbers only reveal one aspect of the negotiations. Firstly, consultative organisations, especially environmental NGOs were especially active in tabling proposals and information papers in order to influence the debates and the outcome, although to what extent

[87] As regards the generally cautious and lukewarm approach of China, Japan and South Korea towards Arctic shipping in general and with regard to the Polar Code process in particular, see Arild Moe and Olav Schram Stokke, "Asian Countries and Arctic Shipping Policies, Interests and Footprints on Governance," *Arctic Review on Law and Politics* 10 (2019): 24-52.

[88] The second session of the HTW Sub-Committee arranged in 2015 is not included in this list in spite of having discussed crewing requirements relating to the Polar Code as this was after the adoption of the Polar Code's safety part. Accordingly, the discussions at HTW 2 should be seen as consequential work.

their concerns were taken on board is questionable.[89] Secondly, it is clear that many of the States listed in Table 1 were more active in the debates than the number of submitted documents would suggest, and more States took part in the discussions even if they did not submit written documents. The few documents in the research material that summarise the proceedings in the working groups and correspondence groups show that many distinct States, such as the Bahamas, Singapore and South Africa, took part in these groups, while many of the States, such as Australia, Chile, China, Japan and South Korea, that submitted only a handful of documents, attended most of the working and correspondence group meetings.

Member State	**Number of documents**	**Member State**	**Number of documents**
Canada	34	Marshall Islands	4
Norway	30	China	3
United States	28	Panama	3
Finland	15	Vanuatu	3
Russia	15	Chile	2
Denmark	12	Liberia	2
Argentina	11	South Korea	2
Germany	11	Australia	1
New Zealand	9	Japan	1
Iceland	8	Kiribati	1
Sweden	8	Netherlands	1
United Kingdom	5	St. Kitts and Nevis	1
France	4	Tuvalu	1

Table 2 - Number of documents submitted by member States[90]

Topics of negotiation. Major procedural issues debated included how to make the Polar Code mandatory, with implications for the applicability of the Code to distinct vessel types as well as the placement of environmental measures within the Code; and the relationship between the Polar Code and other sources of international law, chiefly the LOSC. The Polar Code being a highly technical instrument, discussions on the substance of the Code centred, amongst other things, on the different ship categories defined by the Code, the definition of temperature

[89] The unaddressed concerns of environmental NGOs were listed in a document submitted to the last MEPC meeting before the adoption of the Polar Code, see Friends of the Earth International et al., "Consideration and Adoption of Amendments to Mandatory Instruments: Environmental Protection in the Polar Code," IMO Doc. MEPC 68/INF.37, March 6, 2015. Russia has been particularly outspoken against proposals submitted by "environmental organisation [which] keep mentioning the increased vulnerability of ecological systems of Arctic and Antarctic to the human activity," IMO, "Report to the Maritime Safety Committee," IMO Doc. DE 56/25, February 28, 2012, Annex 21.

[90] These numbers include documents submitted to all the Committees and Sub-Committees that discussed the Polar Code. The numbers for Canada, Norway and the United Kingdom also include those papers submitted by the chairperson of working and correspondence groups provided by these States. It also has to be noted that many of the documents are counted under two or more States due to these being co-sponsored by several delegations. Examples to States which frequently co-sponsored papers together are Finland and Sweden; Argentina and Chile; and China and South Korea. Many documents were submitted by consultative organisations and by the Secretariat of the IMO, which are not accounted for in this table.

measurements, oil discharge requirements and qualifications for crew, including the possibility of using ice navigators.

Preamble Introduction
Part I-A Safety Measures Chapter 1 General Chapter 2 Polar Water Operational Manual (PWOM) Chapter 3 Ship Structure Chapter 4 Subdivision and Stability Chapter 5 Watertight and Weathertight Integrity Chapter 6 Machinery Installations Chapter 7 Fire Safety/Protection Chapter 8 Life Saving Appliances and Arrangements Chapter 9 Safety of Navigation Chapter 10 Communication Chapter 11 Voyage Planning Chapter 12 Manning and Training Part I-B Additional Guidance Regarding the Provisions of the Introduction and Part I-A
Part II-A Pollution Prevention Measures Chapter 1 Prevention of Pollution by Oil Chapter 2 Control of Pollution by Noxious Liquid Substances in Bulk Chapter 3 Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form Chapter 4 Prevention of Pollution by Sewage from Ships Chapter 5 Prevention of Pollution by Garbage from Ships Part II-B Additional Guidance to Part II-A
Appendix 1 Form of Certificate for Ships operating in Polar Waters Appendix 2 Model Table of Contents for the Polar Water Operational Manual (PWOM)

Table 3 - The structure of the Polar Code as included in IMO Resolution MEPC.264(68)

Relationship to Conventions. The Polar Code is not a stand-alone treaty although such an option was considered during its negotiation.[91] It is instead made mandatory through SOLAS and specific MARPOL Annexes.[92] This solution meant that the Polar Code could enter into force expeditiously through the tacit acceptance procedure, whereas a stand-alone treaty would have required ratification and its timely entry into force – if at all – could not have been guaranteed. However, the downside of the Polar Code being an add-on to SOLAS and MARPOL is that it could only contain regulations that fit with the remit of these Conventions and is applicable to those ships these Conventions cover. The Polar Code builds on SOLAS and MARPOL, meaning that the provisions of these Conventions remain applicable to ships in general, with

[91] IMO, "Reports of Sub-Committees: Outcome of DE 55 – Legal Opinion on Making the Polar Code Mandatory," IMO Doc. MEPC 62/11/4/Add.1, May 6, 2011.

[92] IMO, "Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended," Res. MSC.386(94), November 21, 2014; and IMO, "Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973: Amendments to MARPOL Annexes I, II, IV and V (To Make Use of Environment-Related Provisions of the Polar Code Mandatory)," Res. MEPC.265(68), May 15, 2015.

the Code's polar-specific requirements adding an extra layer of protection on top of these for ships operating in polar waters.

Structure. Besides its Introduction that is made mandatory through both Conventions, the Code is made up of two main parts, each containing a mandatory part and additional recommendatory guidance. Thus, Part I of the Code for safety measures includes the mandatory Part I-A and recommendatory Part I-B, while Part II on pollution prevention contains the mandatory Part II-A and recommendatory Part II-B. Part I-A comprises 12 chapters, which regulate certification, the new Polar Water Operational Manual (PWOM), construction, design, equipment and manning (CDEM) standards as well as voyage planning, while Part II-A's five chapters correspond to the Annexes of MARPOL. These contain operational – and in the case of Chapter 1 also structural – requirements that deal with pollution by oil, noxious liquid substances, harmful substances carried by sea in packaged form (left blank intentionally), sewage and garbage. Interestingly, there is no blank chapter to correspond with MARPOL Annex VI regarding air pollution. Table 3 summarises the structure of, and the subject areas covered by, the Polar Code.

Amendments to SOLAS and MARPOL. To make the Polar Code mandatory through SOLAS and the MARPOL Annexes, amendments were necessary to these instruments. Therefore, a new chapter was included in SOLAS – Chapter XIV Safety Measures for Ships Operating in Polar Waters – with regards to the safety part of the Code. This chapter lays down that Part I of the Code applies to SOLAS-certified ships, i.e. cargo ships of, or above, 500 gross tonnage (GT) and passenger ships carrying more than 12 passengers (so-called SOLAS ships).[93] However, there is ambiguity as to whether the Code applies to such ships on non-international voyages, i.e. between the ports of the same State, or only on international voyages.[94] This impacts mainly on the applicability of the Code to vessels sailing to Antarctica due to the lack of ports on that continent, but also to vessels sailing solely on domestic voyages between two ports of the same States, for example along the NSR. Application of the Polar Code to "ships owned or operated by a Contracting Government and used, for the time being, only in Government non-commercial service" is expressly excluded although, at the same time, member States are encouraged to apply the Code's measures to these "so far as reasonable and practicable."[95] This provision, thus, exempts coast guard and naval vessels from the application of the Code,[96] but suggests that icebreakers would be covered by it. Finally, Chapter XIV

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[93] SOLAS, *supra* note 61, Chapter XIV, Reg. 2.1, together with Chapter I, Reg. 2 and 3.

[94] International voyage is defined in SOLAS as "a voyage from a country to which the present Convention applies to a port outside such country, or conversely," ibid., Chapter I, Reg. 2 (d). With regard to this ambiguity, see Jensen, "Polar Code," *supra* note 41, 157-158; and J. Ashley Roach, "The Polar Code and Its Adequacy," in *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States*, ed. Robert C. Beckman et al. (Leiden: Brill Nijhoff, 2017), 150.

[95] SOLAS, *supra* note 61, Chapter XIV, Reg. 2.4.

[96] Jensen, "Polar Code," *supra* note 41, 159.

contains a savings clause stating that the Code shall not "prejudice rights or obligations of States under international law,"[97] such as those contained in the LOSC.

As regards Part II of the Code, each of its chapters is made mandatory through amendments to the corresponding MARPOL Annex, including a new chapter in each, defining the Polar Code as well as the type of vessels the respective chapter shall apply to. Chapter 1 of Part II-A applies to all ships,[98] Chapter 2 to all ships certified to carry noxious liquid substances in bulk,[99] Chapter 4 to all ships certified in accordance with MARPOL Annex IV,[100] and Chapter 5 to all ships to which MARPOL Annex V applies.[101] The new amendments to the MARPOL Annexes do not contain a similar savings clause to that in SOLAS Chapter XIV – however, a general savings clause is already to be found in MARPOL, covering all Annexes.[102]

1.2.2 Implications and the future of the Polar Code

In this section I give a preliminary account of how the Polar Code has been received and what new developments are in the work at the IMO. However, this outline does not represent my findings but provides some of the groundwork for further discussions in chapter 5.

The Polar Code is a living instrument in the sense that it can and will be continuously updated to stay up to date with technological and other developments. The tacit acceptance procedure in SOLAS and MARPOL also means that shortcomings can quickly be rectified. At the same time, the IMO is free to adopt instruments complementing and strengthening the Polar Code.

While environmental NGOs were by and large dissatisfied with the Polar Code's environmental part,[103] the shipping industry has given a warmer welcome to the Code as a tool to make polar

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[97] SOLAS, *supra* note 61, Chapter XIV, Reg. 2.5.

[98] MARPOL, *supra* note 60, Annex I, Chapter 11, Reg. 47.1.

[99] Ibid., Annex II, Chapter 10, Reg. 22.1.

[100] Ibid., Annex IV, Chapter 7, Reg. 18.1. MARPOL Annex IV applies to all ships of 400 GT and above, as well as under but certified to carry more than 15 persons, ibid., Annex IV, Chapter 1, Reg. 2 (1). Any such ship engaging in voyages to ports under the jurisdiction of another State party to MARPOL shall be issued with a certificate, ibid., Reg. 5 (1).

[101] Ibid., Annex V, Chapter 3, Reg. 14.1. MARPOL Annex V applies to all ships unless expressly provided otherwise, ibid., Annex V, Reg. 2.

[102] Ibid., Article 9 (2) reads:

> Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea […] nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.

Note that MARPOL was concluded before, but with anticipation of, the LOSC.

[103] See e.g. ASOC, "Polar Code Too Weak to Properly Protect Polar Environments from Increased Shipping Activity," November 21, 2014, https://www.asoc.org/storage/documents/news/asoc_in_the_news/Polar_Code_too_weak_to_properly_protect_polar_environments_from_increased_shipping_activity___The_Arctic_Journal.pdf (accessed March 20, 2019); and WWF, "New Polar Code a Good First Step, But Lacks Meaningful Protections for the Arctic," December 22,

shipping more practicable and create a level playing field.[104] However, it has been pointed out that while the Polar Code's requirements are especially important for newcomers given the increasing navigational activity in the Arctic, most of its regulations would be familiar to experienced ship operators.[105] At the same time, according to industry representatives, the requirements for the training of crew in general and ice navigators in particular leave room for improvement,[106] while no specific load lines requirements were developed for polar waters.[107]

Certain issues remain outside of the Polar Code's remit and are thus unregulated because of the Code's nature as an add-on to SOLAS and MARPOL. In the realm of environmental protection, the Code had to be restricted to pollution prevention and, even within that, issues such as grey water discharge and noise pollution could not be included. With regards to safety measures, these had to be limited to SOLAS ships, excluding regulation of a number of different vessel types. While the MEPC decided to commence work on measures to reduce risks stemming from the carriage as fuel and use of heavy fuel oil (HFO) in the Arctic in 2017, arguably within the scope of MARPOL, it is unclear whether the outcome of this work would be included in the Polar Code or appear as an amendment to MARPOL.[108] A further development consequent to the Polar Code's ban on oil and oily mixture discharges in the Arctic is a proposal for a regional approach to establishing port waste reception facilities, which would take the shape of a

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2016, http://www.wwf.ca/?23703/New-Polar-Code-a-good-first-step-but-lacks-meaningful-protections-for-the-Arctic (accessed March 20, 2019).

[104] See e.g. "How Does the Polar Code Affect Oil Shipment?" *Petro Industry News*, December 31, 2014, https://www.petro-online.com/news/fuel-for-thought/13/breaking-news/how-does-the-polar-code-affect-oil-shipment/32830 (accessed December 5, 2018). For a view that large Russian shipping companies welcomed the safety part of the Polar Code, see Andrei Zagorski, "Perspective," in *The Arctic in World Affairs: A North Pacific Dialogue on the Arctic in the Wide World: 2015 North Pacific Arctic Conference Proceedings*, ed. Oran R. Young, Jong Deog Kim and Yoon Hyung Kim (Korea Maritime Institute and East-West Center, 2015), 224. For a summary of both optimistic and pessimistic views on the Russian shipping industry's ability to comply with the Polar Code, see Sergunin, "Russian Approaches," *supra* note 13, 27-28. For a view that the Polar Code would rather limit the amount of ship traffic in the Arctic due to its regulations incurring high costs, see Keil, "Sustainability Understandings," *supra* n 19, 46.

[105] David (Duke) Snider, "A Mandatory Polar Code - How Does It Affect Shipping?" *Canadian Sailings*, March 12, 2017, https://canadiansailings.ca/a-mandatory-polar-code-how-does-it-affect-shipping/ (accessed December 5, 2018).

[106] E.g. Ian Evans, "Ice Navigator Training Aims to Plug a Hole in the Polar Code," *News Deeply*, June 19, 2017, https://www.newsdeeply.com/arctic/community/2017/06/19/ice-navigator-training-aims-to-plug-a-hole-in-the-polar-code (accessed June 30, 2017).

[107] Aldo Chircop, "The Load Lines Convention and Arctic Navigation" (paper presented at Arctic Frontiers Conference, Tromsø, January 25, 2017).

[108] For recent developments regarding the use and carriage of HFO, see IMO, "Report of the Marine Environment Protection Committee on Its Seventy-First Session," IMO Doc. MEPC 71/17, July 24, 2017, 61; and IMO, "Report of the Marine Environment Protection Committee on Its Seventy-Second Session," IMO Doc. MEPC 72/17, May 3, 2018, 50-51. A ban on use and carriage (both as fuel and cargo) of HFO in Antarctic waters is already included in MARPOL, *supra* note 60, Annex I, Reg. 43.

MARPOL amendment if accepted.[109] The biggest development with regard to the Polar Code is the possible extension of its safety measures to non-SOLAS vessels in the so-called second phase of the work on the Polar Code. While it was agreed by MSC 99 that the types of vessels to be included in this phase of development would be fishing vessels, yachts above 300 GT that are not engaged in trade and cargo ships between 300-500 GT, it is doubtful whether the new measures would be mandatory in nature.[110]

Finally, the Polar Code, just like any other IMO instrument, is reliant on implementation and enforcement by flag States. While no regional port State control arrangement exists in the Arctic that could enforce compliance with the Code's requirements, it has been suggested that existing port State control arrangements could cover ships enroute to the Arctic.[111] Further, the enforcement rights in Article 234 of the LOSC could be complementary to the Polar Code.[112] These options would still leave the enforcement of the Code open to question in the waters around Antarctica.

In summary, the Polar Code should be seen as a necessary first step in the direction of enhanced ship safety and environmental protection in polar waters. The Polar Code is more of a beginning, rather than the endpoint of mandatory regulation of polar shipping. I will return to this, and to whether the Polar Code is a good agreement, in my conclusion.

1.3 Scholarly research on the Polar Code and Russia's NSR

Forming part of the international regulatory scene within which shipping in the Arctic operates, it is perhaps natural that the Polar Code has been subject to analysis mainly in the field of

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[109] Canada et al., "Any Other Business: Regional Reception Facilities Plan (RRFP) – Outline and Planning Guide for the Arctic," IMO Doc. MEPC 72/16, December 29, 2017. See also Canada et al., "Work Programme of the Committee and Subsidiary Bodies: Proposal for a New Output to Amend MARPOL to Allow the Establishment of Regional Arrangements in the Arctic," IMO Doc. MEPC 74/14/2, February 8, 2019.

[110] IMO, "Report of the Maritime Safety Committee on Its Ninety-Ninth Session," IMO Doc. MSC 99/22, June 5, 2018, 40-45. One important problem regarding fishing vessels not just in the Arctic, but in general, is the lack of international safety regulations for these. The safety of fishing vessels of and over 24 m length and operating on the high seas is regulated by the Cape Town Agreement of 2012 on the Implementation of the Provisions of the 1993 Protocol Relating to the Torremolinos International Convention for the Safety of Fishing Vessels, 1977, Cape Town, October 11, 2012. However, as the Cape Town Agreement has not entered into force and is unlikely to do so in the near future, it cannot – yet – provide a basis for mandatory safety measures for fishing vessels operating in polar waters. For the status of IMO Conventions, see IMO, "Status of Conventions," http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx (accessed November 15, 2018).

[111] For a discussion on the potential need for an Arctic memorandum of understanding on port State control, see Molenaar, "Options for Regional Regulation," *supra* note 39, 284-287. For problems pertaining to ensuring compliance with the Polar Code through port State control, see Tore Henriksen, "Norway, Denmark (in respect of Greenland) and Iceland," in *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States*, ed. Robert C. Beckman et al. (Leiden: Brill Nijhoff, 2017), 275-276.

[112] Chircop, "Jurisdiction over Ice-Covered Areas," *supra* note 35, 284.

international law. Some of this work is descriptive of the Polar Code or its draft at the time,[113] as well as the developments leading up to it.[114] One particular question covered extensively by international law scholars concerns the relationship between the Polar Code and LOSC, especially Article 234.[115] Here opinion is divided as to whether the Polar Code would restrict or limit coastal State legislative rights[116] or whether Article 234 and the Polar Code would complement each other.[117] Furthermore, procedural and substantive principles guiding the provisions of the Polar Code have been assessed,[118] and I will return to this in chapter 3 on the theoretical framework. Another aspect of the Polar Code which has received considerable attention is the goal-based approach utilised in its safety part and what this novel approach means for the development of law.[119] Other issues attracting attention are the way the Polar Code is made mandatory,[120] and the Code's shortcomings, particularly with regards to seafarer training and non-international voyages.[121]

At the same time the Polar Code has largely escaped problematisation from a political science or IR perspective, although some dynamics of the negotiations are touched upon. These mainly

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[113] E.g. Lawson W. Brigham, "The Developing International Maritime Organization Polar Code," in *Arctic Yearbook 2014*, ed. Lassi Heininen, Heather Exner-Pirot and Joël Plouffe (Akureyri: Northern Research Forum, 2014), 496-499; Julia Jabour, "Progress Towards the Mandatory Code for Polar Shipping," *Australian Journal of Maritime & Ocean Affairs* 6, no. 1 (2014): 64-67; and Heike Deggim, "The International Code for Ships Operating in Polar Waters (Polar Code)," in *Sustainable Shipping in a Changing Arctic*, ed. Lawrence P. Hildebrand, Lawson W. Brigham and Tafsir M. Johansson (Springer, 2018), 15-35.

[114] E.g. Peter Kikkert, "Promoting National Interests and Fostering Cooperation: Canada and the Development of a Polar Code," *Journal of Maritime Law & Commerce* 43, no. 3 (2012): 319-334; and Brigham, "The Developing International Maritime Organization Polar Code," *supra* note 113.

[115] E.g. Fauchald, "Regulatory Framework," *supra* note 42; Roach and Smith, *Excessive Maritime Claims*, 3rd ed., *supra* note 45, 494-495; Scassola, "International Polar Code," *supra* note 42, 274-288; Rosemary Rayfuse, "Coastal State Jurisdiction and the Polar Code: A Test Case for Arctic Ocean Governance?" in *Polar Oceans Governance in an Era of Environmental Change*, ed. Tim Stephens and David L. VanderZwaag (Cheltenham: Edward Elgar, 2014), 245-248; McDorman, "Potential Conflicting Rights and Obligations," *supra* note 42, 141-159; Chircop, "Jurisdiction over Ice-Covered Areas," *supra* note 35, 275-290; Jensen, "International Code for Ships," *supra* note 41, 75-77; Skodvin, "Arctic Shipping – Still Icy," *supra* note 42, 153-158; and Jensen, "Polar Code," *supra* note 41, 164-172.

[116] E.g. Fauchald, "Regulatory Framework," *supra* note 42, 82-83. See also Skodvin, "Arctic Shipping – Still Icy," *supra* note 42, 157.

[117] E.g. Chircop, "Jurisdiction over Ice-Covered Areas and the Polar Code," *supra* note 35, 283-285; Jensen, "International Code for Ships," *supra* note 41, 75-77; and Jensen, "Polar Code," *supra* note 41, 170-172.

[118] Jiayu Bai, "The IMO Polar Code: The Emerging Rules of Arctic Shipping Governance," *The International Journal of Marine and Coastal Law* 30 (2015): 680.

[119] E.g. Tore Henriksen, "The Polar Code: Ships in Cold Water – Arctic Issues," *CMI Yearbook 2014* (2014): 332-344; Bai, "IMO Polar Code," *supra* note 118, 683-686 and 690-692; Jensen, "International Code for Ships," *supra* note 41, 70-71; and Jensen, "Polar Code," *supra* note 41, 163-164.

[120] E.g. J. Ashley Roach, "A Note on Making the Polar Code Mandatory," in *International Law and Politics of the Arctic Ocean: Essays in Honor of Donat Pharand*, ed. Suzanne Lalonde and Ted L. McDorman (Leiden: Brill Nijhoff, 2015), 125-140.

[121] E.g. Ibid., 133-135; and Roach, "Polar Code," *supra* note 94.

relate to those actors, Russia and Canada, who have used rights provided to coastal States in Article 234 of the LOSC to introduce unilateral national legislation for shipping in their Arctic waters, noting particularly their efforts to mould the Polar Code's content to reflect their own legislation.[122] The lack of coordination between the Arctic States during the negotiations in general has also been discussed.[123] Furthermore, the Polar Code has been discussed in the context of overlapping international regimes.[124]

With regards to Russia's regulation of Arctic shipping and the NSR, there has been much discussion amongst international legal scholars. Such analyses concentrate on Russia's regulations,[125] as well as offering comparison with other relevant actors, where again Canada is notable.[126] In the realm of political science, the NSR has been discussed in the context of

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[122] E.g. Bartenstein, "Navigating the Arctic," *supra* note 41, 117-118; Scassola, "International Polar Code," *supra* note 43, 274-282; and Rayfuse, "Coastal State Jurisdiction," *supra* note 116, 245-249.

[123] Bartenstein, "Navigating the Arctic," *supra* note 40, 117-118; and Rayfuse, "Coastal State Jurisdiction," *supra* note 115, 248.

[124] Oran R. Young, "Building an International Regime Complex for the Arctic: Current Status and Next Steps," *The Polar Journal* 2, no. 2 (2012): 397; and Stokke, "Regime Interplay," *supra* note 49, 76-78.

[125] R. Douglas Brubaker, "Regulation of Navigation and Vessel-Source Pollution in the Northern Sea Route: Article 234 and State Practice," in *Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention*, ed. Davor Vidas (Cambridge: Cambridge University Press, 2000), 221-243; R. Douglas Brubaker, "Straits in the Russian Arctic," *Ocean Development & International Law* 32, no. 3 (2001): 263-276; Leonid Tymchenko, "The Northern Sea Route: Russian Management and Jurisdiction over Navigation in Arctic Seas," in *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction*, ed. Alex G. Oude Elferink and Donald R. Rothwell (The Hague: Martinus Nijhoff Publishers, 2001), 269-292; Erik Franckx, "The Legal Regime of Navigation in the Russian Arctic," *Journal of Transnational Law & Policy* 18, no. 2 (2008-2009): 327-342; Ivan V. Bunik and Vladimir V. Mikhaylichenko, "Legal Aspects of Navigation Through the Northern Sea Route," in *Environmental Security in the Arctic Ocean*, ed. Paul Arthur Berkman and Alexander N. Vylegzhanin (Dordrecht: Springer, 2013), 231-239; Franckx, "Shape of Things to Come," *supra* note 17, 264-269; Solski, "New Developments," *supra* note 14; Irina Fodchenko, "Russlands ettslige satsing på Den nordlige sjørute – ny lov om handelsskipsfart i Den nordlige sjørutes havområde," *Lov og Rett* 53, no. 7 (2014): 407-422 (in Norwegian); Christopher R. Rossi, "The Northern Sea Route and the Seaward Extension of *Uti Possidetis (Juris)*," *Nordic Journal of International Law* 83 (2014): 476-508; Xia Zhang et al., "From Mandatory Icebreaker Guiding to a Permission Regime: Changes to the New Russian Legislation of the Northern Sea Route," *Advances in Polar Science* 25, no. 3 (September 2014): 138-146; Franckx, "Arctic Passages," *supra* note 16; Viatcheslav V. Gavrilov, "Legal Status of the Northern Sea Route and Legislation of the Russian Federation: A Note," *Ocean Development & International Law* 46, no. 3 (2015): 256-263; Dremliuga, "Application of Article 234," *supra* note 39; Solski, "Russia," *supra* note 14.

[126] Franckx, *Maritime Claims*, *supra* note 14; Brubaker, "Straits," *supra* note 125, 276-279; Brubaker, "Arctic – Navigational Issues," *supra* note 16; Aldo Chircop et al., "Course Convergence? Comparative Perspectives on the Governance of Navigation and Shipping in Canadian and Russian Arctic Waters," *Ocean Yearbook* 28 (2014): 291-327; Leilei Zou, "Comparison of Arctic Navigation Administration between Russia and Canada," in *Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries,* ed. Myron H. Nordquist, John Norton Moore and Ronán Long (Leiden: Brill Nijhoff, 2016), 286-301; and Hartmann, "Regulating Shipping," *supra* note 16.

Russia's Arctic policies,[127] its organisational framework and challenges have been analysed,[128] as have the imaginaries influencing its development.[129] In addition, the Russian State's and Russian shipping companies' understanding of sustainability with regard to Arctic shipping has recently been subject to analysis.[130]

Few academics have combined analyses of the Polar Code and Russia. While Julia Bobrova discusses the NSR regime and the Polar Code side-by-side,[131] Russia's interests and concerns with regards to the Polar Code have to some extent been addressed by Andrei Zagorski and colleagues, but without a closer look at the negotiations or reference to Russia's concrete negotiating position.[132] Two areas of concern can be highlighted. First is the possible conflict between the desire to continue exercising its national jurisdiction over the NSR and the acknowledgement of the need for global mandatory rules, with the possibility of extending Russian national rules to the rest of the Arctic Ocean.[133] In this regard, Zagorski and colleagues concluded in 2012, relatively early in the Polar Code process, that the Polar Code meets the interests of Russia as it will not only leave Russia's rights under Article 234 of the LOSC untouched but it might also provide greater international acceptance of Russia's national regime, whilst allowing it to enforce the Code and prevent unregulated traffic and marine pollution in the central Arctic Ocean.[134] Later, however, Zagorski appears somewhat more pessimistic, noting that the enforcement of the Polar Code in the central Arctic Ocean is

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[127] See e.g. Andrew Foxall, "'We Have Proved It, the Arctic is Ours': Resources, Security and Strategy in the Russian Arctic," in *Polar Geopolitics? Knowledges, Resources and Legal Regimes*, ed. Richard C. Powell and Klaus Dodds (Cheltenham: Edward Elgar, 2014), 105-106; Lassi Heininen, Alexander Sergunin and Gleb Yarovoy, *Russian Strategies in the Arctic: Avoiding a New Cold War* (Moscow: Valdai Discussion Club, 2014), 66-71; Ekaterina Klimenko, "Russia's Evolving Arctic Strategy: Drivers, Challenges and New Opportunities," *SIPRI Policy Paper* 42 (Solna: SIPRI, 2014), 8-12; Marlene Laruelle, *Russia's Arctic Strategies and the Future of the Far North* (Armonk, NY: M.E. Sharpe, 2014), 168-191; Heather A. Conley and Caroline Rohloff, *The New Ice Curtain: Russia's Strategic Reach to the Arctic* (Center for Strategic & International Studies, 2015), 83-87; and Alexander Sergunin and Valery Konishev, *Russia in the Arctic: Hard or Soft Power?* (Stuttgart: Ibidem-Verlag, 2016), 81-88.

[128] E.g. Arbakhan Magomedov, "Russia's Planes for the Northern Sea Route: Prospects and Obstacles," *Russian Analytical Digest* 129 (2013): 7-10; Moe, "Northern Sea Route," *supra* note 10; and Moe and Brigham, "Organization and Management Challenges," *supra* note 8.

[129] Arild Moe, "Voyage Through the North: Domestic and International Challenges to Arctic Shipping," in *Governing Arctic Change: Global Perspectives*, ed. Katrin Keil and Sebastian Knecht (Palgrave Macmillan, 2017), 257-278.

[130] Keil, "Sustainability Understandings," *supra* note 19.

[131] Julia Bobrova, "The Northern Sea Route: National Regime in the Changing International Context," *Russian International Affairs Council Policy Brief* 9 (November 2016): 1-9.

[132] Andrei V. Zagorski et al., *The Arctic. Proposals for the International Cooperation Roadmap* (Moscow: RIAC - Spetskniga, 2012); Zagorski, "Perspective," *supra* note 104; and Zagorski, "Russia's Arctic Governance Policies," *supra* note 13.

[133] Zagorski, "Perspective," *supra* note 104, 222-223; and Zagorski, "Russia's Arctic Governance Policies," *supra* note 13, 92-95 and 108.

[134] Zagorski et al., *Arctic*, *supra* note 132, 23-24.

questionable due to flag State reluctance.[135] The second concern Zagorski suggests is that the stringent pollution prevention regulations of the Code are expected to restrict Russian operations with regard to Arctic resource development, as most of the Russian regulations for shipping along the NSR are concerned with safety and not environmental issues.[136] At the same time, discussing Russia's implementation of the Polar Code, Alexander Sergunin suggests that representatives of the Russian shipping and insurance industry are pessimistic as to the industry's ability to comply with the Code's requirements within the implementation deadlines, suggesting that foreign shipbuilders used the Polar Code, especially its environmental protection measures, to gain advantage over their Russian competitors.[137]

Examining policy and strategy documents as well as legislation and regulations, whilst important, provides only one part of the overall picture. Due to the importance of Russia to any international regulation of Arctic shipping, I contend here that one angle that has been missing in the research is looking at Russia in negotiations on the Arctic shipping regime. Analysing Russia's participation in the Polar Code process tells us something new about, and adds to our understanding of, Russia's interests, motives as well as manoeuvring room with regards to the international use of the NSR.

1.4 Specifying the research questions

It will be recalled that I posed two overarching research questions: 1) How can Russia's participation in the Polar Code negotiations be interpreted, and what does this say about Russia as an actor in international negotiations of Arctic shipping regulation? 2) What does the negotiation of the Polar Code tell us about the role of the two principles of the law of the sea in largely technical organisations, such as the IMO?

Based on the discussion above, with regards to the first general research question we can pose the following sub-questions:

a) What issues did Russia pursue during the negotiations of the Polar Code?

b) In what manner did Russia pursue its interests?

c) How has Russia balanced international versus unilateral national regulations for Arctic shipping during the negotiation of the Polar Code?

d) How does Russia's participation in the Polar Code negotiations compare with other major actors – especially Canada, which faces similar international legal challenges to Russia?

As regards my second general research question, I have introduced two underlying competing principles in the field of the law of the sea: freedom of navigation and coastal State jurisdiction.

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[135] Zagorski, "Perspective," *supra* note 104, 223.
[136] Ibid., 223-225.
[137] Sergunin, "Russian Approaches," *supra* note 13, 27-28.

While the LOSC tried to balance these two principles, the vagueness of Article 234 means that Arctic shipping is still open for contestation between the two. Although the IMO is a technical organisation with no competence in jurisdictional matters of the law of the sea, related questions based on the two principles do seep into the work of the IMO,[138] leading to the following questions:

a) What kind of decision-making process was utilised at the IMO for the negotiation of the Polar Code?

b) How did the IMO's decision-making process influence the role the competing principles of freedom of navigation and coastal State jurisdiction played in the negotiations?

c) How do actors holding different deep-seated principles influence the creation and interpretation of law of the sea instruments?

In order to answer these research questions four articles make up the body of the present thesis. These will be introduced in the next chapter, before embarking on the further discussions.

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[138] This was evidenced by the debates that took place at the IMO regarding Canada's step to make its Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) mandatory. See e.g. IMO, "Report to the Maritime Safety Committee," IMO Doc. NAV 56/20, August 31, 2010, 49-50; United States and INTERTANKO, "Safety of Navigation: Northern Canada Vessel Traffic Services Zone Regulations," IMO Doc. MSC 88/11/2, September 22, 2010; IMO, "Report of the Maritime Safety Committee on Its Eighty-Eighth Session," Doc. MSC 88/26, December 15, 2010, 53-56; and James Kraska, "The Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) and the Law of the Sea," *International Journal of Marine and Coastal Law* 30 (2015): 225-254.

2 Introduction to the articles

In *Russian Proposals on the Polar Code: Contributing to Common Rules or Furthering State Interests?*[139] I give a general overview of the major issues Russia pursued during the negotiation of the Polar Code, analysing where Russia's interests lay between the "truly" international and narrow self-interest. Five issue areas are discussed in the paper and contrasted with what I identify as the goal of the IMO, or the common good[140] – creation of uniform standards to enhance ship safety and polar environmental protection. In spite of expectations, the analysis of the material shows a lukewarm Russian contribution to the debates and a lack of cooperation on proposals with other actors. Russian interests are reflected throughout its proposals, while elements of the IMO's goal are missing in many of these. Russia tried to further its interests first through proposing the primacy of coastal State regulations over the Polar Code and, once it was clear that it could not achieve this goal with its references to Article 234 of the LOSC, Russia focussed on the protection of its interests in a variety of issue areas. This resulted in a more reactive Russian stance and a relative unsuccessfulness in the debates. While Russia emphasised that it was a maritime Arctic State with superior knowledge and experience, this did not translate into a leadership role but resulted instead in a pragmatic picking-and-choosing of issue areas where Russia saw its interests threatened. Thus, Russia's expressed self-image was at odds with the reality of its participation in the negotiations of the Polar Code.

In *Russia and the Polar Marine Environment: The Negotiation of the Environmental Protection Measures of the Mandatory Polar Code*,[141] Russia's proposals with regards to the environmental protection measures of the Code are scrutinised in order to highlight the way Russia promoted these. The choice of issue area here is supported not only by the relatively large number of documents in the research material, but also by Russia's ambiguous history vis-à-vis environmental protection both nationally and internationally, as well as the primary aim of Article 234 of the LOSC in environmental protection. Looking at the content of its proposals in the context of those of other delegations, it is evident that Russia falls behind other delegations in regard to environmental protection, often in stark contrast to the stated aim of the Polar Code. With regards to the mode of communication Russia espoused, strategic use of arguments and efforts at bargaining based on demands were largely unsuccessful in achieving the goals set out in its proposals, while engaging in deliberative negotiation[142] and, thus, explaining its interests yielded some results. This suggests a degree of contempt for engaging

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[139] Dorottya Bognar, "Russian Proposals on the Polar Code: Contributing to Common Rules or Furthering State Interests?" *Arctic Review on Law and Politics* 7, no. 2 (2016): 111-135.

[140] For an introduction of the common good in deliberative theory, see chapter 3.

[141] Dorottya Bognar, "Russia and the Polar Marine Environment: The Negotiation of the Environmental Protection Measures of the Mandatory Polar Code," *Review of European, Comparative & International Environmental Law* 27 (2018): 35-44.

[142] For the introduction of deliberative negotiation, see chapter 3.

in deliberations in an international forum, where Russia's voice is just one amongst many States afforded equal weight in the decision-making process.

In chronologically my last paper *In the Same Boat? A Comparative Analysis of the Approaches of Russia and Canada in the Negotiation of the IMO's Mandatory Polar Code*,[143] I compare Russia's participation in the Polar Code process with that of Canada, asking if the similar challenges they face internationally due to their unilateral national legislation produced comparable positions and mutual support. I answer this question through the analysis of two clusters of issues – and in the process I further expound on topics of my previous articles: the question of safeguarding national regulations and systems of shipping control; and the regulation of discharge of oil and oily mixtures in the Arctic. As regards the former, parallel efforts were made by Russia and Canada to regulate the relationship between the Code and coastal State rights, whilst attempts to model the content of the Code after their respective access limitation systems led to positions that pointed in opposite directions. That Canada was more active in trying to reconcile the Code with its own regime is explained by the fact that it has to accommodate the United States, its closest ally and harshest critic, while Russia appears more comfortable with manipulating international norms. At the same time, both Canada and Russia were concerned about the economic costs stemming from the Polar Code's pollution prevention measures, although their differing positions reflected the different realities they face, with Canada being a traditional coastal State whereas Russia is also a major flag State in the Arctic. In its capacity as a coastal State, the latter is more directed towards interests in utilisation of the waters off its coast and resource exploitation, while Canada is more driven by environmental protection interests, which also serve its sovereignty interests as second-best arguments.[144] A further conclusion reached in this article is the difference between how Canada and Russia used their Arctic shipping experience in the negotiations: Canada played a leadership role in the negotiations, while for Russia experience and leadership only appeared on the rhetorical level.

In *The Elephant in the Room: Article 234 of the Law of the Sea Convention and the Polar Code as an Incompletely Theorised Agreement*,[145] I take the negotiations of the Polar Code's relationship with Article 234 of the LOSC as my research problem and look at the influence of the principles of freedom of navigation and coastal State jurisdiction over the negotiations, linking these to deeper principles of liberal international world order and global security on the one hand, and national sovereignty, identity and security as well as stewardship on the other. Showing that the IMO effectively bracketed the issue and did not allow it to side-track, delay or hamper the development of the Polar Code, I argue that the way the IMO dealt with this

[143] Dorottya Bognar, "In the Same Boat? A Comparative Analysis of the Approaches of Russia and Canada in the Negotiation of the IMO's Mandatory Polar Code" (paper submitted for publication in *Ocean Development & International Law*).

[144] For an explanation of second-best arguments, see chapter 3.

[145] Dorottya Bognar, "The Elephant in the Room: Article 234 of the Law of the Sea Convention and the Polar Code as an Incompletely Theorised Agreement," *The Polar Journal* 8, no. 1 (2018): 182-203.

contentious issue in the context of the Polar Code makes the Code an incompletely theorised agreement, whereby the underlying principles to a negotiation are not debated or reconciled. While arguing that this is a positive outcome, as this technique allowed for the conclusion of an agreement which enables safer and more environmentally sound shipping in the Arctic as well as provides legitimacy to the process, I also suggest that such an outcome leaves room for manoeuvre for States, submitting that States prefer such ambiguity to the outright rejection of their deeply-held principles.

3 Theoretical framework: deliberation and bargaining

As already touched upon in the introductory chapter, I rely on a theoretical framework built on deliberative democracy to study Russia's contribution to the IMO's decision-making process on the Polar Code. It was appealing to apply the distinction underlying deliberative democracy's understanding, between arguing (deliberation) and bargaining (negotiation), to debates within an international organisation for several reasons. Decision-making through deliberation, based on mutual reason-giving and aimed at consensus on the common good, has been viewed as advantageous from a legitimacy point of view.[146] Firstly, the procedure allows for the equal participation of the players and the opportunity for all to have their voices heard and considered, well suited to the sovereign equality of nation States.[147] Moreover, the inclusiveness of deliberation in international organisations can be further enhanced by the participation of not only nation States but also, for example, NGOs – usually in a consultative or observer status.[148] Secondly, it is thought that deliberation produces better outcomes than negotiation through the pooling of knowledge and its aim of consensus on the common good.[149] The inclusive nature of the process together with an outcome of enhanced epistemic quality can, thus, unite participants and enhance compliance, something that is often seen as the Achilles heel of international regimes. At the same time, bringing bargaining (negotiation) into the theoretical framework serves as a counter-point to the ideal-type of arguing (deliberation),[150] and sits better with classical IR thinking of rational nation States primarily concerned with power and interests, even within the setting of international organisations. As Kenneth Abbott calls for a richer institutionalism with the inclusion of different IR

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[146] For a summary, see Isabela Fairclough and Norman Fairclough, *Political Discourse Analysis: A Method for Advanced Students* (London: Routledge, 2012), 31. For a discussion primarily of democratic output legitimacy but also touching on democratic input legitimacy, see Steffek, "Output Legitimacy," *supra* note 22.

[147] Philippe Urfalino notes the search of international organisations, through "decision by consensus," "for a compromise between (i) the need for a procedure preserving the idea of equal sovereignty for each state by an equal right of veto and (ii) the need for negotiations reflecting the real weight of nations," thus allowing for the coexistence of equal participation and unequal influence (which may also be based on knowledge of the issue discussed). Although he makes this observation in the context of a specific type of "decision by consensus" which he terms the rule of non-opposition, it is enlightening in other instances of "consensus" decision-making. See Philippe Urfalino, "The Rule of Non-Opposition: Opening Up Decision-Making by Consensus," *The Journal of Political Philosophy* 22, no. 3 (2014): 335-336 and 338-339.

[148] Steffek, "Output Legitimacy," *supra* note 22, 284-286.

[149] Fairclough and Fairclough, *Political Discourse Analysis*, *supra* note 146, 31; and Steffek, "Output Legitimacy," *supra* note 22, 282-284. Further on, I will discuss the inclusion of interests into deliberative processes, which leads to another point with regard to legitimacy: the outcome might to some degree reflect vital interests of the parties and even if not, these had been aired and listened to.

[150] Mansbridge makes a difference between bargaining and negotiation, suggesting that negotiation is a more communicative form than bargaining and allows for an exploration beyond zero-sum interests. Jane Mansbridge, "Deliberative and Non-Deliberative Negotiations," *HKS Faculty Research Working Papers* no. RWP09-010 (April 2009), http://ssrn.com/abstract=1380433, 28-29.

perspectives,[151] bringing bargaining and arguing together also acknowledges that interests and values intertwine in real-world processes examined by both IR and international law scholars.[152]

The concept of arguing was originally introduced into IR through a debate unfolding in the German *Zeitschrift for Internationale Beziehungen* (ZIB), and was attractive partly due to the introduction of normative concerns into IR. Further, arguing was also thought to elucidate what happens when States actually sit down to negotiate – or as Lars Lose says, "bridge the gap between the motivation to cooperate and the actual achievement of cooperation"[153] – and account for interesting outcomes that were unexpected and could not be explained purely on the basis of power, interest and bargaining. Thomas Risse formulated a separate "logic of arguing" in addition to, and above, the two logics previously contrasted in IR, the logic of consequentialism (strategic bargaining) and the logic of appropriateness (rule-guided behaviour) – understanding the "logic of arguing" as truth-seeking behaviour.[154] Others have also envisaged arguing as a distinct mode of social interaction,[155] researching whether, and under what conditions, arguing so defined occurs in international negotiations and whether, and under what conditions, arguing affects the outcome of such negotiations.[156] Yet empirical results have been elusive.[157] In particular, what has caused problems was 1) showing that persuasion has occurred, and 2) the co-occurrence of instances of arguing and bargaining in the same debate.

In a parallel development in the nexus of IR and international law, Abbott and Duncan Snidal suggest that interest actors are more likely to be influenced by the logic of consequences and value actors by the logic of appropriateness, and they appropriate different strategies in the legalisation process to the two groups of actors: strategic bargaining for interest actors,

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[151] Kenneth W. Abbott, "Toward a Richer Institutionalism for International Law and Policy," *Journal of International Law and International Relations* 1 (2004): 9-34.

[152] Kenneth W. Abbott and Duncan Snidal, "Values and Interests: International Legalization in the Fight against Corruption," *Journal of Legal Studies* XXXI (January 2002): S154-S157.

[153] Lars G. Lose, "Communicative Action and the World of Diplomacy," in *Constructing International Relations: The Next Generation*, ed. Karin M. Fierke and Knud Erik Jørgensen (Armonk, NY: M.E. Sharpe, 2001), 199.

[154] Thomas Risse, ""Let's Argue!": Communicative Action in World Politics," *International Organization* 54, no. 1 (2000): 1-39.

[155] See e.g. Harald Müller, "Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations," *European Journal of International Relations* 10, no. 3 (2004): 395-435; Thomas Risse, "Global Governance and Communicative Action," *Government and Opposition* 39, no. 2 (April 2004): 288-313; Peter Kotzian, "Arguing and Bargaining in International Negotiations: On the Application of the Frame-Selection Model and its Implications," *International Political Science Review* 28, no. 1 (2007): 79-99; and Neta C. Crawford, "*Homo Politicus* and Argument (Nearly) All the Way down: Persuasion in Politics," *Perspectives on Politics* 7, no. 1 (2009): 103-124.

[156] For a summary and critique, see Jens Steffek, "Incomplete Agreements and the Limits of Persuasion in International Politics," *Journal of International Relations and Development* 8, no. 3 (2005): 235-239.

[157] See particularly the frank assessment in Nicole Dietelhoff and Harald Müller, "Theoretical Paradise – Empirically Lost? Arguing with Habermas," *Review of International Studies* 31, no. 1 (2005): 167-179.

normative persuasion for value actors.[158] However, they also acknowledge that interests and values are intertwined and both motivate legalisation processes, while actors in real-world situations are not purely interest or value actors, therefore positing that both interests and values can be part of the explanation.[159]

In light of the above, it has been suggested that arguing and bargaining should be seen as distinct modes of communication [160] as well as applied to individual utterances. [161] The acknowledgement of the co-occurrence of arguing and bargaining is a significant step towards the recognition that at least elements of arguing and bargaining may indeed be complementary – an idea also increasingly present in deliberative democracy.[162] In this regard, Jens Steffek notes the role of incomplete theorisation in diplomatic negotiations, first and foremost over treaty texts, emphasising that diplomacy is not aimed at truth-seeking or reasoned consensus as conceptualised by Risse and others,[163] but rather at settling conflict through the use of legal arguments motivated by the need to find treaty wordings acceptable to all parties.[164] The acknowledgement that arguing and bargaining co-occur allows for the deconstruction of the insistence on the part of some international organisations on consensus decision-making, aligning with other studies into what lies behind consensus, especially regarding silence and tacit consent.[165]

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[158] Abbott and Snidal, "Values and Interests," *supra* note 152, S145-S150.

[159] Ibid., S154-S157.

[160] Thomas Saretzki, ""From Bargaining to Arguing, from Strategic to Communicative Action? Theoretical Distinctions and Methodological Problems in Empirical Studies or Deliberative Policy Processes," *Critical Policy Studies* 3, no. 2 (2009): 161-164.

[161] Notable in this instance, although not within IR but focussing on conflict resolution, is Katharina Holzinger, "Bargaining Through Arguing: An Empirical Analysis Based on Speech Act Theory," *Political Communication* 21, no. 2 (2004): 195-222; and Katharina Holzinger, "Context or Conflict Type: Which Determines the Selection of Communication Mode," *Acta Politica* 40, no. 2 (2005): 239-254. With regard to speech acts, see also Müller, "Arguing, Bargaining and All That," *supra* note 155, 396-397.

[162] See discussion below in section 3.2. For a discussion of "intermixed integration" of deliberation and bargaining, see also Mansbridge, "Deliberative and Non-Deliberative Negotiations," *supra* note 150, 31-34.

[163] Steffek also suggests untying arguing from the result of a reasoned consensus, see Steffek, "Incomplete Agreements," *supra* note 156, 237. However, once arguing is seen as a mode of communication at the level of individual utterances which may intermix with instances of bargaining, there is no need to untie arguing and consensus. Rather, I argue, consensus may be seen as an ideal-type. In fact, later on in his paper Steffek states the same about completely theorised agreements that can be equated with consensus, ibid., 250.

[164] Ibid., 230-239. Conversely, Lars Lose argues that diplomacy is very much aimed at mutual understanding to be translated into norms and rules, fulfilling one of the criteria of communicative action as a mode of social interaction, see Lose, "Communicative Action," *supra* note 153, 189-194.

[165] See e.g. Stéphanie Novak, "The Silence of Ministers: Consensus and Blame Avoidance in the Council of the European Union," *Journal of Common Market Studies* 51, no. 6 (2013): 1091-1107; Urfalino, "The Rule of Non-Opposition," *supra* note 147; Eva Krick, "Consensual Decision-Making Without Voting: The Constitutive Mechanism, (Informal) Institutionalisation and Democratic Quality of the Collective Decision Rule of 'Tacit Consent'," *ARENA Working Paper* 3 (August 2015): 1-27; and Eva Krick, "The Myth of Effective Veto Power

While much of the debate involving arguing in IR has focussed on arguing as a social action, I take arguing and bargaining as modes of communication at the level of individual utterances in my research. Such an approach follows the suggestions of Katharina Holzinger and Thomas Saretzki, also acknowledging that arguing and bargaining can and do co-occur in the same negotiating setting.[166] This approach allows me to depart from pure forms of outcome such as consensus, and focus on forms and outcomes of deliberative negotiations, primarily incompletely theorised agreements that I rely heavily on in my research. Further, as Steffek argues in rejecting previous research questions looking at whether arguing occurs, its conditions and effectiveness, a focus on incompletely theorised agreements – and I argue on non-pure deliberation and negotiation – "can reveal a lot about actors' identities, their normative commitments and historically situated worldviews."[167]

In this vein, I focus on Russia to say something more about its interests and motives as regards Arctic shipping regulation. My primary concern, as stated in the introduction, is related to the problem of the national versus the international in the regulation of shipping in Arctic waters, and whether the proposals reflected, explicitly or implicitly, the particular self-interest of single nation States, or took as their starting point the common interest of the international community.

In the following section I will first introduce classical deliberative theory's dichotomy between (pure) arguing and (pure) bargaining and the characteristics of these, without which any further discussion would be unintelligible. This is followed by a discussion of more recent understanding of the coalescence of elements of deliberation and negotiation and the resulting deliberative negotiation. This is further expanded with regards to incompletely theorised agreements. Throughout, I relate the theory and its concepts to my research and show how I understood and used these.

3.1 The classical dichotomy of arguing and bargaining

Deliberative democracy is made up of two elements: deliberation and democracy. The democratic element of the theory refers to "collective decision making with the participation of all who will be affected by the decision or their representatives."[168] Yet, in the setting of international organisations where the key actors are nation States, the inclusion of all stakeholders may be problematic. In this respect, the IMO is quite progressive among international organisations with the inclusion of consultative organisations in its decision-making, even if these are primarily there because of their particular expertise and not for any

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Under the Rule of Consensus. Dynamics and Democratic Legitimacy of Collective Decision-Making by "Tacit Consent"," *Négociations* 2017/1, no. 27 (2017): 109-128.

[166] See Holzinger, "Bargaining Through Arguing," *supra* note 161; Holzinger, "Context or Conflict Type," *supra* note 161; and Saretzki, "From Bargaining to Arguing," *supra* note 160, 161-164.

[167] Steffek, "Incomplete Agreements," *supra* note 156, 249.

[168] Jon Elster, "Introduction," in *Deliberative Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 1998), 8.

democratic ideal.[169] While consultative organisations can contribute to the debate, I am more interested here in the process of decision-making rather than in the inclusivity of the process. There is, therefore, less emphasis placed on the democratic element of deliberative democracy in this research. To indicate this, I will from now on – as I have done in the articles making up this thesis – refer to the theory as deliberative theory.

The deliberative element of the theory, meanwhile, may be defined as "decision making by means of arguments offered *by* and *to* participants who are committed to the values of rationality and impartiality."[170] This definition needs to be dissected and elaborated further. A central element of deliberation is the process of mutual exchange of arguments. In this, the mutuality presupposes that the parties not only justify their claims but are also open to persuasion by valid claims uttered by others. Thus, although they have a set of preferences and interests, these can be adjusted in order to reach commonality. The transformation of preferences is indeed the point of deliberation. The main motive behind deliberation, or arguing, is reason,[171] allowing us to also talk about mutual reason-giving.[172] Reason is "impartial, both disinterested and dispassionate."[173] These qualities are necessary if parties aim to reach a common understanding, common interest, common good. In its classical understanding, deliberation excludes self-interest and results in a consensus concerning the common good where all parties agree for the same reason.[174] The validity of claims raised in deliberation is based on propositional truth in the case of factual claims,[175] normative rightness – also interpreted as impartiality[176] - in the case of normative claims and, in both instances, sincerity

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[169] This is further highlighted by the lack of equality between nation States, on the one hand, and consultative organisations, on the other. As well, in the Arctic context, one can argue that many important stakeholders' views are underrepresented or not represented at all at IMO, particularly indigenous peoples. No indigenous group has representation at the IMO, unlike their position as Permanent Participants at the Arctic Council, and the first time Arctic indigenous leaders could present their case at IMO was after the adoption of the Polar Code. See e.g. Levon Sevunts, "Arctic Indigenous Leaders to Push for Permanent Voice in World Maritime Body," *Radio Canada International*, October 21, 2016, http://www.rcinet.ca/eye-on-the-arctic/2016/10/21/arctic-indigenous-leaders-to-push-for-permanent-voice-in-world-maritime-body/ (accessed April 4, 2017); and Levon Sevunts, "UN Maritime Body Listens to Arctic Indigenous Voices," *Radio Canada International*, October 28, 2016, http://www.rcinet.ca/eye-on-the-arctic/2016/10/28/un-maritime-body-listens-to-arctic-indigenous-voices/ (accessed April 4, 2017).

[170] Elster, "Introduction," *supra* note 168, 8.

[171] Ibid., 6.

[172] Manbridge and colleagues point at a contemporary development in the theory towards replacing the emphasis on the unitary ideal of reason with mutual justification, suggesting that participants might reasonably disagree, see Mansbridge et al., "The Place of Self-Interest and the Role of Power in Deliberative Democracy," *The Journal of Political Philosophy* 18, no. 1 (2010): 67.

[173] Elster, "Introduction," *supra* note 168, 6.

[174] Mansbridge, "Deliberative and Non-Deliberative Negotiations," *supra* note 150, 3-5; and Mansbridge et al., "Place of Self-Interest," *supra* note 172, 66-67.

[175] Jon Elster, "Arguing and Bargaining in Two Constituent Assemblies," *University of Pennsylvania Journal of Constitutional Law* 2, no. 2 (2000): 372-373.

[176] Ibid., 372-376.

– that is, the participants mean what they are saying.[177] Arguing thus involves the evaluation of claims on these bases and with reference to an external authority for validation, as noted by Saretzki who calls this the triadic structure of arguing.[178] Such external authority is mutually accepted and may include "previously negotiated and agreed-upon treaties, universally held norms, scientific evidence."[179] Thus, what matters in deliberation is the power of the better argument.[180] By contrast, the use of coercive power – including both the threat of sanction and the use of force – is seen as antithetical to deliberation.[181] Such an understanding of coercive power also includes misrepresentation and lying, as "A's lying leads B to act, without B's willing it, against B's own interests in ways that B would otherwise not act."[182] Thus, the deliberative ideal also requires mutual respect.[183]

Formulated this way, arguing is placed squarely in opposition to bargaining. Like arguing, bargaining is a mode of communication and decision-making. Instead of involving the exchange of arguments, bargaining is an exchange of demands,[184] so that parties achieve their set of preferences and give as little in exchange as possible. Demands are supported through the use of threats and promises[185] which are made credible through unequal material resources external to the process and, thus, unequal power relations.[186] These are instances of coercive power use, as is misrepresentation that goes against the mutual justification ideal of deliberation. Further, demands and misrepresentations are made to support the achievement of the parties' narrow self-interest, as opposed to the common good. As Jon Elster observes, while arguing is intrinsically linked to reason, one of the motives behind bargaining is interest.[187]

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[177] Ibid., 377-378. For these criteria, see also Saretzki, "From Bargaining to Arguing," *supra* note 160, 162.
[178] Saretzki, "From Bargaining to Arguing," *supra* note 160, 163-164; and Risse, "Global Governance and Communicative Action," *supra* note 155, 297-298.
[179] Risse, "Global Governance and Communicative Action," *supra* note 155, 298. In this context we can also consider the existence of a common lifeworld to which actors can refer in deliberation, see with a particular focus on IR and diplomacy Risse, "Let's Argue!," *supra* note 154, 14-16; and Lose, "Communicative Action," *supra* note 153, 194-198.
[180] Jon Elster, "Arguing and Bargaining in the Federal Convention and the Assemblée Constituante," in *Rationality and Institutions: Essays in Honour of Knut Midgaard on the Occasion of His 60th Birthday, February 11, 1991*, ed. Raino Malnes and Arild Underdal (Oslo: Universitetsforlaget, 1992), 15; Risse, "Let's Argue!," *supra* note 154, 7; Saretzki, "From Bargaining to Arguing," *supra* note 160, 162; and Mansbridge et al, "Place of Self-Interest," *supra* note 172, 67. For a discussion of the influence of power relations on what counts as a good argument, see Risse, "Let's Argue!" *supra* note 154, 16-18.
[181] Mansbridge, "Deliberative and Non-Deliberative Negotiations," *supra* note 150, 9-10; and Mansbridge et al., "Place of Self-Interest," *supra* note 172, 80-82.
[182] Mansbridge, "Deliberative and Non-Deliberative Negotiations," *supra* note 150, 10; and Mansbridge et al., "Place of Self-Interest," *supra* note 172, 81.
[183] Mansbridge, "Deliberative and Non-Deliberative Negotiations," *supra* note 150, 2; and Mansbridge et al., "Place of Self-Interest," *supra* note 172, 65-66.
[184] Saretzki, "From Bargaining to Arguing," *supra* note 160, 162.
[185] Ibid.
[186] Elster, "Arguing and Bargaining in Two Constituent Assemblies," *supra* note 175, 392 an 395-398.
[187] Elster, "Introduction," *supra* note 168, 6.

Finally, due to the give-and-take of bargaining, the result of this process cannot be consensus but can only end in a compromise.

Elster points to two types of misrepresentation that exploit two of the bases for deliberation's validity claims – truth and rightness – and terms them "strategic uses of argument."[188] In the first case, instead of a threat the speaker utters a warning, thus avoiding the question of credibility. Instead of stating what they will do, the speaker warns of what will happen, an objective fact ostensibly outside the speaker's control.[189] In the second case, the speaker uses appeals to impartial arguments instead of their self-interest.[190] As Elster states:

> The number of plausible-sounding norms of fairness is so large that most groups will be able to find some norm that corresponds, at least roughly, to their self-interest.[191]

While Elster lists several reasons for resorting to the use of arguments instead of bargaining outright, I find three of them to be of interest here. The first reason for turning to strategic use of arguments instead of outright bargaining is the role of social norms and the fear of opprobrium if one resorts to bargaining and reference to self-interest.[192] The second is that, as Elster states, "by citing a general reason one might actually be able to persuade others."[193] While Elster goes on to say that this applies to persuading neutral parties, I think it is more important here to point out that it is possible that some self-interested outcomes might also be in the collective interest. Thus, that interest would turn out to be a generalisable interest.[194] Third, a speaker might refer to principles in order to "avoid humiliating an opponent" and allow them to save face.[195] This statement seems to allude to the mutual respect ideal of deliberation and is important in processes of decision-making where parties continually work together, as in the case of the IMO. These reasons already allude to why there is a need to adjust the concepts of arguing and bargaining for use in research of interactions in institutionalised settings, while also foreshadowing deliberative negotiations, which I discuss further in this chapter.

3.1.1 Arguing and bargaining in the present research

From my empirical experience of how the IMO works, it is clear that the setting of an international organization affects arguing, bargaining and the admissibility of certain utterances

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[188] Jon Elster, "Strategic Uses of Argument," in *Barriers to Conflict Resolution*, ed. Kenneth Arrow et al. (New Yok: W.W. Norton &Company, 1995), 236-257. See also, Elster, "Arguing and Bargaining in Two Constituent Assemblies," *supra* note 175, 405-418; and for the similar concept of rationalisation, Fairclough and Fairclough, *Political Discourse Analysis*, *supra* note 146, 95-98 and 186-187.

[189] Elster, "Strategic Uses of Argument," *supra* note 188, 253.

[190] Ibid., 244-246.

[191] Jon Elster, "Arguing and Bargaining in the Federal Convention and the Assemblée Constituante," *supra* note 180, 18.

[192] Elster, "Strategic Uses of Argument," *supra* note 188, 248 and 256.

[193] Ibid., 247.

[194] On this point, see also Erik Oddvar Eriksen and Jarle Weigård, "Conceptualizing Politics: Strategic or Communicative Action?" *Scandinavian Political Studies* 20, no. 3 (1997): 233-235.

[195] Elster, "Strategic Uses of Argument," *supra* note 188, 248,

during the debate – both in terms of limiting certain utterances and allowing room for others. In this section I discuss the limitations and the consequences for applying the theoretical framework to the IMO's discussions, while section 3.2 will return to the incorporation of certain utterances of self-interest into arguing. Adhering to standards of engagement and social norms in international organisations such as the IMO, actors are inhibited from the most blatantly obvious uses of coercive power. The use of threats, promises and exit-options are restricted in the debates as they are deemed inappropriate, threatening the continued work of the organisation. How is it possible then to identify bargaining and to analytically separate instances of arguing and bargaining? The concept of bargaining is more than just the use of threats, promises and exit-options. To be able to separate arguing and bargaining distinctly from one another, I looked at other characteristics of these concepts as well as adapt these to the circumstances of the IMO. I focussed on the dichotomy between reliance on reason towards the *common good* and reliance on *self-interest* and – to the extent it was possible to identify in the material – demands. This was further aided by the dichotomy between claims of validity in truth and rightness – with implicit or explicit reference to an external authority – rendering reason disinterested and impartial, and claims of credibility based on unequal power relations.

Focussing on the distinction between the common good and self-interest, it was necessary to establish what the common good was that the international community strove for when putting the Polar Code on the IMO's agenda. To identify the common good, several documents were consulted including those that proposed a mandatory code for ships operating in polar waters,[196] laying down the goals of the proposed code, as well as various other IMO documents including the IMO's constitutive Convention [197] and Strategic Plan which includes its mission statement.[198] On the basis of these documents, the common good as pursued in the negotiation of the Polar Code can be identified as containing three elements:[199]

1) The procedural "umbrella:" the creation of uniform, and universally applied, standards;

2) The substantive content of such standards for remote polar areas:

   a) enhanced maritime safety (safe ship operation); and

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[196] MSC 86/23/9, *supra* note 47; and MEPC 59/20/1, *supra* note 47.
[197] IMO Convention, *supra* note 71.
[198] At the time of the proposals for a mandatory Polar Code, the IMO's Strategic Plan was contained in IMO, "Strategic Plan for the Organization (for the Six-Year Period 2008-2013)," Assembly Res. A.989(25), November 20, 2007. While the Strategic Plan has been updated since, the mission statement of the IMO has stayed the same. For the current Strategic Plan, see IMO, "Strategic Plan for the Organization for the Six-Year Period 2018 to 2023," Assembly Resolution A.1110(30), December 6, 2017.
[199] I discuss this in more detail and with quotes from the relevant documents in Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 115-116.

b) enhanced protection of the marine environment (primarily by pollution prevention).[200]

In this, I concur with Jiayu Bai, who suggests that the Code's provisions are guided by the principles of non-discrimination – corresponding to my uniform and universally applied standards – and the substantive principles of safety of life at sea and environmental protection.[201] I want to underline here that, in my view, all three elements of the common good are necessary as they are closely connected. The procedural goal – without the substantive content – is just that: it does not say anything without specifying what the standards are regulating for. Yet it is an important part of the definition as it emphasises the globality and internationality of the Polar Code: it applies to ships of all flags in equal measure in the Arctic (or Antarctic) waters, whether under national jurisdiction or beyond. But the content is sorely needed, and it is made up of two elements: maritime safety and environmental protection. While these have value in themselves, they are also interconnected. Thus ideally both would be served by the Polar Code, although in specific provisions it may be only one of these substantive goals that are represented – even more so due to the nature of the Polar Code being made mandatory through two international Conventions, one covering safety issues, the other pollution prevention measures.

What makes this formulation of the common good really indivisible and – yes – common is also that it amalgamates aspects of the interests of the shipping industry – primarily, uniform and universally applied global rules as well as safety – with the environmental protection interests of developed and coastal States and environmental NGOs.[202] Environmental protection measures (including aspects of safety measures) are, moreover, important as these – or rather the potential lack of consideration of these – might fuel unilateral national measures from coastal States. Such an understanding of the common good in the case of the Polar Code, thus, tries to unify and hold in balance the two main principles of the law of the sea, freedom of navigation and coastal State jurisdiction. The Polar Code would strive to enable the exercise of navigational freedoms in a highly adverse environment, making it more practicable, whilst also providing for a uniform global framework. At the same time, coastal State concerns would be satisfied by the environmental protection measures of the Polar Code, in addition to the indirect effects of its safety measures.

Having said this, beyond the conflict between the IMO's goal of uniform and universal standards and the unilateral exercise of Article 234 rights,[203] there is also an inherent tension

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[200] For the environmental protection element, I added in parenthesis the limitation of pollution prevention as the more general IMO documents – its constitutive Convention and Strategic Plan – emphasise this aspect of environmental protection. Indeed, MARPOL which makes Part II of the Polar Code mandatory deals with specific sources of pollution.

[201] Bai, "IMO Polar Code," *supra* note 118, 680.

[202] Tan, *Vessel-Source Marine Pollution*, *supra* note 3, 34-74.

[203] For a more sympathetic interpretation, seeing multilateral and unilateral Article 234 regulations as a continuum, see Chircop, "Jurisdiction over Ice-Covered Areas," *supra* note 35, 288.

between the substantive elements of the common good. Viewing the safety goal as a way of reducing accidental pollution results in harmony between the safety and the environmental protection goals. However, viewing the safety goal as making polar shipping more practicable and thus enabling it leads to a conflict with the goal of providing enhanced environmental protection. On the other way round: seeing the environmental protection goal as inhibiting shipping also pits the two substantive elements of the common good against each other. There was, thus, a need for debate as to how to reconcile or find the balance between these goals that are interdependent but conflict at the same time. This is exactly what the years of negotiation on the Polar Code had to achieve.

The stark contrast between the contours of the common good and direct self-interest helped me analytically separate arguing and bargaining to enable a discussion and interpretation of single actors' utterances, primarily Russia, in the Polar Code debates. I employed such a sharp distinction between instances of arguing and bargaining in *Russian Proposals on the Polar Code*.

The discussion on the elements of the common good also leads to a theoretical issue. The formulation of the common good as something pre-given appears to clash with the conceptualisation of the common good in deliberative theory as something emerging through deliberation.[204] However, the two are not irreconcilable. When debating at the IMO, States are working on a set agenda, with an idea as to what the regulations they are debating and creating are supposed to aim for. In this sense, the *contours* of the common good are set prior to the debates. However, they emerge through lengthy discussions of their own prior to the negotiations process and are, in this sense, *not* pre-given. These contours need to be filled with meaning which emerges from further detailed deliberation.

Thus, while the common good defined in the case of the Polar Code appears to put the principles of freedom of navigation and coastal State jurisdiction in balance, this would have to be done through the particular provisions of the Code. Thus, where that balance could be found and whether it would tilt in one direction of the other was to be decided through the deliberation of the Code's content. Similarly, how the relationship of the substantive elements is conceived – conflicting or interdependent – emerges from debates: the discussions on what the Polar Code should aim for resulted in an emphasis on the complementary nature of the two substantive goals of the common good, but whether the substance of the Code follows this had to emerge in subsequent debates.

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[204] Steffek discusses whether it is possible to know what the common good is, what is in the interest of the international community. He suggests that this is a "counterfactual ideal" which "can be approximated […] through an inclusive political conversation." Steffek, "Output Legitimacy," *supra* note 22, 273. While the public interest might change or be contested by competing values, some such interests are more constant and less contested than others. He lists as examples supervision of the airspace or hospital hygiene standards. Ibid., 272-276. I argue that ship safety and environmental protection standards also belong into this category.

3.2 Inclusion of self-interest, and deliberative negotiation

While above I have neatly separated arguing and bargaining from each other, the picture is more complicated than that. I have already briefly introduced Elster's strategic use of impartial arguments, whereby a speaker disguises self-interest – a form of misrepresentation and part of bargaining. However, more recent theoretical developments introduce self-interest into deliberation and the common good. In the following, I explain this development towards acknowledging that self-interest can play a role in deliberation and contribute to achieving the common good.

As already suggested, the institutional setting can place constraints on both bargaining and arguing. In practice, it can also be the case that institutional norms allow for the expression of self-interest while still aiming for a common good:

> […] it is both permissible and in some institutional instances required that [participants] take particular concern for their own interests. Participants need not be fully neutral or detached in the deliberative process.[205]

Jane Mansbridge and others posit that the expression of self-interest and the conflict of interests are not necessarily antithetical to deliberation and indeed, suitably constrained, may be complementary to it as "in politics participants make decisions not only for others but also for themselves."[206] Thus, by integrating "conflict with commonality,"[207] self-interest can play a vital function in the furtherance of the common good.

While the expression of self-interest can be reconciled with deliberation, it is important that such expression is not without its constraints. Mansbridge and colleagues suggest two kinds of constraints on the expression of self-interest, a universal one of "moral behaviour and human rights" and a deliberative one of "mutual respect, equality, reciprocity, fairness and mutual justification."[208] In a similar vein, Harald Müller suggests two sets of constraints on the pursuit of self-interest specifically in the case of IR, which is particularly instructive. Motivated by empirical findings showing instances of arguing and bargaining in the same negotiating setting and needing to reconcile this with logics of action, Müller suggests that both arguing and bargaining are guided by the logic of appropriateness, i.e. regulated by norms of what behaviour is appropriate and legitimate under a set of circumstances.[209] Thus, according to him, bargaining can be appropriate if constrained through both a substantial set of constraints which

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[205] Mansbridge et al., "Place of Self-Interest," *supra* note 173, 78.

[206] Ibid., 72. See also, Mansbridge, "Deliberative and Non-Deliberative Negotiations," *supra* note 151.

[207] Jane Mansbridge, "Self-Interest in Deliberation," *Kettering Review* 25, no. 1 (Winter 2007): 62.

[208] Mansbridge et al., "Place of Self-Interest," *supra* note 172, 76.

[209] Müller, "Arguing, Bargaining and All That," *supra* note 155, 410-418. For a critique of this approach suggesting that a resulting focus on the topics and contexts of deliberation would mean that "[w]hat goes on in processes of communication becomes something like a black box again," see Saretzki, "From Bargaining to Arguing," *supra* note 160, 170-172.

define what self-interest is or is not appropriate, while the procedural set of constraints is formulated thus:

> *In negotiations, it is appropriate for actors to pursue their self-interest unless it collides with a valid norm that prescribes different behaviour.*[210]

One such norm, I argue, is the imperative to further the common good. Thus, one might merge Müller's two constraints and say that it is appropriate for actors to pursue their self-interest unless it clashes with the contours of the common good. Self-interest that does not clash directly with the contours of the common good might then be generalisable.[211] Thus, even if it is not included in the outcome after deliberation on it, utterance based on such self-interest is admissible.

Mansbridge lists four reasons why expression of self-interest is important in deliberation, three of which I concentrate on here.[212] First, expressions of self-interest inform the search for the common good, in the sense of providing information as well as direct input when the common good is "only" an aggregation of individual goods.[213] This leads to the second reason, which is that the participants' discussion involving self-interest increases the understanding of the parties both in terms of self-understanding as well as mutual understanding.[214] In the latter case, parties gain an understanding of each other's wants and needs, on the basis of which they can identify conflict fault-lines as well as areas of commonality.[215] Mutual understanding can also facilitate the adoption of the perspective of each other by the parties, satisfying the transformative criteria of deliberation.[216] This also signals where other, non-deliberative mechanisms are needed to make a decision.[217] In practice, for example, deliberations might be brought to a close and a binding decision reached by a voting mechanism.[218] Finally, such a process and the resulting mutual understanding can lead to a heightened sense of solidarity and

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[210] Müller, "Arguing, Bargaining and All That," *supra* note 155, 416 (original emphasis).

[211] Eriksen and Weigård, "Conceptualizing Politics," *supra* note 194, 229. Also consider the following formulation for generalisable interests:

> […] it could be rational to wish that anyone in a similar situation had their interests realized in the same way. This also means that private interests only deserve political legitimacy as far as they serve a common end or are the best alternatives from a public perspective.

Ibid., 234.

[212] The last reason is that incorporating deliberation and self-interest helps subordinate groups "unveil hegemonic understandings of the common good when those understandings have evolved to mask subtle forms of oppression." Mansbridge, "Self-Interest in Deliberation," *supra* note 207, 62 and 66-68.

[213] Ibid., 63-65; and Mansbridge et al., "Place of Self-Interest," *supra* note 172, 73-76.

[214] Mansbridge, "Self-Interest in Deliberation," *supra* note 207, 65-66.

[215] Ibid.; and Mansbridge et al., "Place of Self-Interest," *supra* note 172, 73-74.

[216] Mansbridge et al., "Place of Self-Interest," *supra* note 172, 78.

[217] Ibid., 75.

[218] Eriksen and Weigård, "Conceptualizing Politics," *supra* not 194, 235-236; and Fairclough and Fairclough, *Political Discourse Analysis*, *supra* note 146, 14. For a discussion of voting as a non-deliberative democratic means to reach a decision, see Mansbridge et al., "Place of Self-Interest," *supra* note 172, 85-90.

mutual respect,[219] much needed in institutional settings where the parties work together in repeated interactions, such as in the case of the IMO. This is in contrast to the spirit of community arising from pure consensus decision-making, where expressions of self-interest are excluded which, as a result, may mask important differences. However, it should also be noted that the masking of differences among the parties can have positive effects for reaching a decision, as in incompletely theorised agreements discussed below.

The inclusion of self-interest into deliberation leads to different forms of what has been termed deliberative negotiation, located between pure arguing and pure bargaining. While falling short of the classical ideal of deliberation resulting in consensus, deliberative negotiation does aspire to the regulative ideals of deliberation, and may be defined by both the observance of mutual justification, respect and fairness on the one hand and conflict of interests and the "context of relative openness and disclosure about interests, needs, and constraints" on the other.[220] Indeed, Mansbridge suggests that in practice the need to think in terms of others' interests may generate more respect and joint gain than empathy.[221] One situation, mentioned by Mark Warren and colleagues, which can facilitate deliberative negotiation is precisely repeated interactions of the parties, allowing for increased respect towards, and understanding of, their counterparts.[222] While such repeated interactions may conflict with democratic norms of genuinely contested elections and accountability, this need not concern us in an IR setting. More to the point is that deliberative negotiations, facilitated by repeated interactions, allow workable outcomes to be reached while upholding the ideals of deliberation.

3.2.1 Considerations of deliberative negotiation in the present research

The common good as accepted when the Polar Code was placed on the IMO's agenda is in the interests of the international community in general but also the particular self-interest of individual States. This is the case even if some States would be more affected by a pollution incident or an accident compromising the safety of a ship and those on board than other States. Yet States have a multitude of interests – some of them very distinctive. These interests are given more or less weight when deliberating on how to fill the contours of the common good and, as long as they do not contradict the aims of the Polar Code, they are admissible in the debates and would not be considered bargaining positions.

The problem for the research is separating the two different kinds of self-interest. Here, I return to my second dichotomy mentioned in section 3.1.1: that between claims of validity in truth and rightness and claims of credibility based on unequal power relations. While this dichotomy helps identify arguing and bargaining, it is not without its complications. A lack of support for a proposition in a claim of truth or rightness might not be taken to mean that the aim was not

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[219] Mansbridge, "Self-Interest in Deliberation," *supra* note 207, 66.

[220] Mark E. Warren et al., "Deliberative Negotiation," in *Negotiating Agreement in Politics*, ed. Jane Mansbridge et al. (Washington DC: APSA, 2013), 93.

[221] Mansbridge, "Deliberative and Non-Deliberative Negotiations," *supra* note 150, 33.

[222] Warren et al., "Deliberative Negotiation," *supra* note 220, 104-106.

towards the common good. While it is expected that positions are argued for at the IMO, this might be somewhat relaxed in certain instances, such as when setting out what might be included in a new text early on in the negotiations. As an example, in chapter 4, I will briefly touch upon a Canadian proposal submitted to the 55th meeting of the DE Sub-Committee, document DE 55/12/7.[223] This paper includes many suggestions for what should be included in the Polar Code without many arguments. While in some instances a lengthier argumentation could be desirable to explain the need for a certain provision in the text of the Polar Code, submission papers come with space constraints. Once concrete proposals are tabled, there is space for more argumentation. However, lack of support for a position in a claim of truth or rightness might suggest that a closer look is warranted. After all, instances of arguing are intended to change the preferences of others based on the power of a better argument substantiated by validity. Put simply: without a claim to validity, it is hard to persuade. State delegations at the IMO know that they need to substantiate their points, especially if a proposal is controversial. International organisations, such as the IMO, are structured environments where the logic of appropriateness dictates that decisions are based on sound reasoning. If there are no arguments included in a proposal, does this mean we are facing a self-interested demand? Such was the question, for instance, when considering a Russian proposal in document SDC 1/3/18 trying to overturn an agreed ban on discharges of oil and oily mixtures without much in the way of arguments to support the proposal.[224] Such an interpretation could be supported when considering the document together with a Russian statement that the proposal was to be repeated at the Committee level (that is, at a higher level than the Sub-Committee where document SDC 1/3/18 was tabled) if not accepted.[225] In addition, since overturning an agreed decision is resisted at the IMO and tends to be seen as opening a "can of worms," the Russian delegation should conceivably know that significantly more argumentation was needed to underline why it was imperative to overturn the discharge ban.

Meanwhile, on the other side of the above dichotomy stands reliance on unequal power relations. That means coercive power that would clash with the deliberative ideal, rather than the power of the better argument. The lack of reliance on such power relations when expressing self-interest could, therefore, indicate less of a bargaining position and more of a genuine aim to contribute to deliberative negotiation and the search for the common good through the expression of self-interest. One shortcoming of *Russian Proposals on the Polar Code* is that I do not make explicit the difference between generalisable self-interest compatible with the common good and self-interest contradicting the common good, instead treating them with the same broad brush. In that article, I concentrate very much on instances of bargaining in the Russian position, such as the hidden demand noted above. In later papers, notably in *Russia*

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[223] Canada, "Development of a Mandatory Code for Ships Operating in Polar Waters: Application of Requirements in the Mandatory Polar Code," IMO Doc. DE 55/12/7, January 14, 2011.
[224] Russian Federation, "Development of a Mandatory Code for Ships Operating in Polar Waters: Comments on Chapter 1 of Part II-A," IMO Doc. SDC 1/3/18, November 29, 2013.
[225] Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 119-120.

and the Polar Marine Environment and *In the Same Boat*, I do try to make a point of the possibility of developing mutual understanding. Such is the case notably in the later debates on the discharge ban on oil and oily waters. Here, Russian papers contain arguments regarding the impact of the ban on icebreakers and hydrographic and survey vessels, while the limited scope of the proposed grace period appears to show a regard for the interests and values of those parties in favour of stringent environmental protection standards. That a limited grace period was indeed introduced shows that the expression of suitably constrained self-interest can contribute to formulating the meaning of the common good.[226] These articles thus provide a more nuanced picture than, and an evolution from, what is presented in *Russian Proposals on the Polar Code*.

Furthermore, as I stated above, the inclusion of self-interest into deliberation may signal when non-deliberative mechanisms are needed to arrive at a decision. The purpose of debates at the IMO, as in other functional international institutions, is decision-making. When the self-interest of parties cannot be reconciled with each other or the common good, or when time in a Committee or Sub-Committee meeting is too limited to deliberate all possible positions and arguments before arriving at an outcome, there is a need for a mechanism other than deliberation – and pure consensus decision-making – to achieve a decision. In such a case, the outcome would fall short of ideal deliberation's consensus.[227] One such non-deliberative mechanism is voting. Thus, while in pronouncements the IMO insists on characterising its decision-making as consensus, the way in which the Chairman of an IMO Committee or Sub-Committee "senses" the prevailing mood in the hall as Gaskell describes it[228] – or to put it more mundanely, establishes whether there is a majority for a proposal without calling for an actual vote – should be seen in the light of deliberative negotiation. That is, based on a count of the delegations' statements of support or opposition, the Chairman brings deliberation to a close. In this way, it is also possible to establish whether a particular interest is deemed by the parties to be capable of filling the common good with meaning.

3.3 Incompletely theorised agreements

One form of deliberative negotiation is incompletely theorised agreements, a concept developed by Cass Sunstein.[229] This process formed the basis for my hypothesis explored in *The Elephant*

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[226] Bognar, "Russia and the Polar Marine Environment," *supra* note 141, 43.

[227] It has been suggested that some sort of mechanism, for example, voting is arranged to put a stop at deliberation and lead to a decision, see e.g. Eriksen and Weigård, "Conceptualizing Politics," *supra* note 194, 235-236. Fairclough and Fairclough see this as deliberation "implemented in activity types (such as parliamentary debate) that are designed to lead to a reasonable and legitimate outcome precisely in the absence of consensus," Fairclough and Fairclough, *Political Discourse Analysis*, *supra* note 146, 14.

[228] Gaskell, "Decision Making," *supra* note 67, 186.

[229] See e.g. Cass R. Sunstein, "Political Conflict and Legal Agreement" (The Tanner Lectures on Human Values, delivered at Harvard University, November 29-30 and December 1, 1994) http://dx.doi.org/10.2139/ssrn.2544359; Cass R. Sunstein, "Incompletely Theorized Agreements," *Harvard Law Review* 108 (1995): 1733-1772; Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford: Oxford University Press, 1996); Cass R. Sunstein, "Practical Reason and Incompletely Theorized Agreements," *Current Legal Problems* 51, no. 1 (1998): 267-298;

in the Room and is elaborated on in detail there.[230] Suffice it here to say that such agreements involve agreement on particular outcomes and even low-level principles, but not fundamental or abstract principles.[231] Thus, the parties arrive at an outcome without agreeing to it for the same reasons, which is the core difference between incompletely theorised agreements and the consensus of classical deliberation.[232] The silence that is employed in incompletely theorised agreements resulting in not fulfilling "the demands of the criterion of mutual justification 'all the way down'," [233] further differentiates such agreements from other concepts, which emphasise the need for expanded deliberation or full clarification of disagreements.[234] Such a formulation takes into account the diversity among participants as well as the lack of possibility for more abstract theorisation.[235] The latter may be subject to criticism, which points to the desirability of a genuine agreement based on "fully articulated reasons and larger principles" within politics. [236] Yet, the diversity among participants suits multi-member international organisations well, while the possibility of abstract theorisation might not be possible – not on account of modesty as Sunstein suggests with regard to judiciary[237] but – on account of State sovereignty as well as the practical needs of achieving an outcome among a large number of participants. The use of incompletely theorised agreements as a concept can, thus, be relevant with regards to world politics. In fact, Jens Steffek argues that diplomatic practice is overwhelmingly characterised by incompletely theorised agreements.[238]

While incompletely theorised agreements fall short of deliberative theory's consensus, Sunstein commends them for fulfilling the deliberative ideals of mutual respect, civility and reciprocity.[239] He also claims that the goal of incompletely theorised agreements is reaching

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and Cass R. Sunstein, "Incompletely Theorized Agreements in Constitutional Law," in "Difficult Choices," ed. Arien Mack, special issue, *Social Research* 74, no. 1 (Spring 2007): 1-24.

[230] Bognar, "Elephant in the Room," *supra* note 145, 183-185.

[231] Sunstein, "Incompletely Theorized Agreements," *supra* note 229, 1735-1736.

[232] Mansbridge, "Deliberative and Non-Deliberative Negotiations," *supra* note 150, 12.

[233] Mansbridge et al., "Place of Self-Interest," *supra* note 172, 71. For the use of silence, see also Sunstein, "Practical Reason," *supra* note 229, 267-268.

[234] For example, plural agreements are similar to incompletely theorised agreements in that they, too, emphasise the fact that different people agree to an outcome for different reasons but make a point of the importance of expanded deliberation rather than avoidance of controversial issues, see James Bohman, "Public Reason and Cultural Pluralism: Political Liberalism and the Problem of Moral Conflict," *Political Theory* 23, no. 2 (May 1995): 253-279. Likewise, deliberative acceptance is described as "a form of deliberative agreement to let something stand as the position of the group even if it is not fully shared by every member of the group," but is contrasted with incompletely theorised agreements by the requirement of full clarification of disagreements, see Alfred Moore and Kieran O'Doherty, "Deliberative Voting: Clarifying Consent in a Consensus Process," *The Journal of Political Philosophy* 22, no. 3 (2014): 302-319.

[235] Sunstein, "Incompletely Theorized Agreements," *supra* note 229, 1746-1749.

[236] Mansbridge, "Deliberative and Non-Deliberative Negotiations," *supra* note 150, 14. See also Sunstein, "Incompletely Theorized Agreements," *supra* note 229, 1750-1754.

[237] Sunstein, "Incompletely Theorized Agreements," *supra* note 229, 1749.

[238] Steffek, "Incomplete Agreements," *supra* note 156.

[239] Sunstein, "Practical Reason," *supra* note 229, 277.

"consensus" on particulars.[240] Steffek's observation illuminates this better while respecting the narrow understanding of consensus of classical deliberative theory. He states with regard to diplomatic communication that it builds "bridges across the gaps of disagreements rather than […] closing the gaps."[241] According to Steffek, while the outcome is not completely theorised and is thus not a consensus, arguments do matter due to the nature of such debates where much of the discussion is about finding appropriate (and creative) wording for legal texts.[242] Such questions do not lend themselves to bargaining,[243] even if the resulting outcome is intentional textual ambiguity which can be exploited by rival interpretations.[244] Sunstein suggests that incompletely theorised agreements are built on rules and analogies, providing fixed points on which participants can converge instead of on high-level principles.[245] Such a legal style of reasoning is also evident in settings where international legal instruments are negotiated.[246] While analogies and rules are helpful in further classifying legal arguments, they also provide the kind of external authority which actors relate their arguments to, resulting in the triadic nature of arguing Saretzki talks about.[247] Sunstein's rules and analogies refer to already agreed norms and already decided cases or, as I have shown in the case of the Polar Code,[248] previously reached decisions on other IMO instruments. The authority of analogies might be somewhat more questionable than that of rules, and in need of further argumentation to show their relevance to the case debated, bringing in lower-level principles. While Steffek argues that the textual ambiguity that may result from incomplete theorisation is indispensable to the functioning of international negotiations so that actors can "embark on cooperative enterprise"[249] – and often reaching and signing an agreement is in itself a major achievement – whether incompletely theorised agreements once concluded are successful in achieving their purpose may be questionable.[250]

3.3.1 Incompletely theorised agreements in the present research

In this section I want to address three points regarding my use of the concept of incompletely theorised agreements in the case of the Polar Code in *The Elephant in the Room*. First, based on the history of the law of the sea and its application to the Arctic, I identified two high-level principles – freedom of navigation and coastal State jurisdiction – in the case of the Polar Code

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[240] Ibid., 281.
[241] Steffek, "Incomplete Agreements," *supra* note 156, 236.
[242] Ibid., 238.
[243] Ibid.
[244] Ibid., 231.
[245] Sunstein, "Practical Reason," *supra* note 229, 271-273 and 282-290.
[246] Steffek, "Incomplete Agreements," *supra* note 156, 235-239.
[247] Saretzki, "From Bargaining to Arguing," *supra* note 160, 163-164; and Risse, "Global Governance and Communicative Action," *supra* note 155, 297-298.
[248] Bognar, "Elephant in the Room," *supra* note 145, 193.
[249] Steffek, "Incomplete Agreements," *supra* note 156, 231.
[250] Steffek himself highlights the shortcomings of the implementation of United Nations Framework Convention on Climate Change, his case through which he demonstrates how States arrive at incompletely theorised agreements, ibid., 248.

where the clash between these two principles was not resolved by the negotiations. Yet, as Sunstein suggests, what is "high-level" or "lower-level" is a matter of comparison.[251] Following on from this, I suggested even higher-level abstractions lying behind my two principles which, while clashing in this case, are not irreconcilable. Thus, I did not suggest that Canada and Russia reject the liberal international world order which relies on freedom of navigation. Nor was the intention to imply that the United States or European States object to environmental stewardship. What I claim in *The Elephant in the Room* is that there is a difference in perspective or emphasis: Canada and Russia see the issue of Arctic shipping through a more local perspective, while the United States and others through a global lens.[252]

Second, to the methods of reaching incompletely theorised agreements suggested by Sunstein – rules and analogies – I added second-best arguments in *The Elephant in the Room* and suggested that, without the framing provided by these, arguments evoking rules and analogies would not have worked.[253] Inasmuch as such second-best arguments obscure the ultimate principles at play, they may be seen as misrepresentation, with the implication that incompletely theorised agreements utilising second-best arguments are non-deliberative. At the same time, such second-best arguments can and often do provide genuine arguments for one or the other outcome and, as suggested by Mansbridge and colleagues,

> [t]o the degree that the parties can genuinely offer one another such [mutually acceptable] justifications, based not only on the need to find a *modus vivendi* but on mutual respect for the other's premises, the process of generating incompletely theorized agreements meets the deliberative criteria of mutual justification, mutual respect, reciprocity, fairness, equality among participants, and the absence of coercive power.[254]

I argue that the debates over savings clauses described in *The Elephant in the Room*, while obscuring the ultimate principles, did result in an exchange of genuine arguments that respected those deeply-held principles of the participants as well as the deliberative ideals, without allowing the debates to descend into disputes directly involving ultimate foundations which is what had happened at the IMO just a few years previously. I do not mention the debates at the IMO related to Canada's newly mandatory Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) in *The Elephant in the Room*.[255] However, the possible effect of those debates on the different approaches taken by Russia and Canada when raising the issue

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[251] Suntein, "Practical Reason," *supra* note 229, 275.

[252] Bognar, "Elephant in the Room," *supra* note 145, 189.

[253] Bognar, "Elephant in the Room," *supra* note 145., 196.

[254] Mansbridge et al., "Place of Self-Interest," *supra* note 172, 71. (original emphasis)

[255] The Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) is a vessel traffic service and ship reporting system applicable largely in the Arctic waters of Canada. See Canada, Northern Canada Vessel Traffic Services Zone Regulations, SOR/2010-127, https://laws-lois.justice.gc.ca/eng/regulations/SOR-2010-127/FullText.html (accessed May 8, 2019). Canada made NORDREG mandatory in 2010 without having sought the IMO's approval. This led to debates at the IMO. See e.g. NAV 56/20, *supra* note 138, 49-50; and MSC 88/26, *supra* note 138, 53-56.

of Article 234 of the LOSC in relation to the Polar Code are discussed in *In the Same Boat*, suggesting that Canada had learnt from the NORDREG debates and, thus, showed more respect towards the principled positions of others, notably the United States.[256] In addition, there might be conflicts between the Polar Code and other international legal instruments. Therefore, it is natural to regulate the relationship of these – as I have said in *The Elephant in the Room*, savings clauses are not controversial in themselves.[257] Thus, I argue that the savings clause debates were an exercise in *deliberative* negotiation, although possibly quite close to non-deliberative negotiation.

Third, while incompletely theorised agreements are characterised by the clash of high-level principles and the lack of resolution to this clash, it is also emphasised in the literature that, due to the lack of resolution, the parties agree to the outcome for different reasons.[258] I omitted to explore this facet of incompletely theorised agreements in *The Elephant in the Room*. It is clear that while the only savings clause included in the new text – regulation XIV/2.5 of SOLAS – favoured Canada and Russia because it could be used to justify the primacy of their unilateral national regulations, the United States, Germany and others could agree to it due to the analogies provided as well as the generality of its language and the use of the phrase "rights or jurisdiction." Similarly, the lack of savings clauses in the MARPOL Annexes could be accepted by Canada and Russia because of the framing of the issue in the language of transparency, and because it was expressed during the debates that the Code is not envisaged to impair rights prescribed in LOSC. For others, such an outcome was satisfactory as it did not expressly place the LOSC and the controversial Article 234 rights over the Polar Code. However, I also want to emphasise the commonality among the parties for accepting the outcome: that the IMO was not meant to resolve this issue in the first place as it is not an international legal adjudicator. The use of rules, analogies and second-best arguments allowed for the creation of textual ambiguity that, as Steffek states, may be interpreted differently by the parties.[259]

3.4 Concluding remarks on the theoretical framework

What remains before concluding my theoretical framework is a final note on IR and arguing and bargaining. While I have relied on Müller and his understanding of the logic of appropriateness over arguing and bargaining in my explanation of the inclusion of self-interest into deliberation, I am less wedded to the idea of the triangle of the logics of arguing,

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[256] Bognar, "In the Same Boat?" *supra* note 143.

[257] Bognar, "Elephant in the Room," *supra* note 145, 194-195.

[258] E.g. Sunstein, "Incompletely Theorized Agreements," *supra* note 229, 1742-1745; Sunstein, "Practical Reason," *supra* note 229, 270-273; Steffek, "Incomplete Agreements," *supra* note 156, 236-237; Mansbridge, "Deliberative and Non-Deliberative Negotiations," *supra* note 150, 12-15; and Mansbridge et al., "Place of Self-Interest," *supra* note 172, 70-71.

[259] Steffek, "Incomplete Agreements," *supra* note 156, 231.

consequences and appropriateness to understand the debates that take place at the IMO.[260] One of the problems with these logics of action is that they describe social actions, not modes of communication. In Müller's conceptualisation then, both arguing and bargaining fall under the logic of appropriateness, meaning a focus on the structure that constrains or enables what utterances fit within the norms of the international institution that is the IMO, rather than on actors and their particular utterances. As Saretzki suggests, Müller's formulation places what happens in the communication process into a black box.[261]

Yet, I am more concerned with actors than with the IMO itself.[262] Primarily, I want to understand actors with regards to how they act in the IMO, and particularly with regards to the dichotomies of arguing and bargaining (and deliberative negotiation between the two) and common good and self-interest (and generalisable self-interest between the two). Secondarily, it was necessary to establish also how the IMO functions, for instance how the common good can be understood in the case of the Polar Code. I touch upon the IMO's debates – for example with regards to its avowed consensus decision-making – as a result of looking at the actors and their specific utterances and how these can be reconciled into a decision.

Therefore, I decided to keep the logics of action in the background rather than placing them in the foreground of my research. As has been suggested, opposing, dichotomous, mutually exclusive schools and perspectives "reduce the complexity of a field."[263] In fact, Abbott and Snidal urge for the employment of the logics of appropriateness and consequences together in order not to miss "the richness of law in uniting interests and values" in the process of legalisation, while highlighting that most actors are motivated by both interests and values.[264] I suggest focussing on concrete questions such as: How do actors treat the norms of the organisation they act in? Do they engage to further the common good, even through the expression of their own self-interest, or do they disregard this aim and bring self-interest into the debates which directly clashes with the contours of the common good? How do they express these interests or argue for the common good? And, most importantly for my research, what does this say about the actors – rather than about the IMO? Placing the logic of actions in the background, I form an understanding of the actors acting within the IMO.

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[260] Risse, "Let's Argue!" *supra* note 154, 2-7. As Saretzki suggests in his critique, Müller turns "the triangle around once, putting the logic of appropriateness in the upper corner [instead of the logic of arguing] and designating it to be 'superior'," Saretzki, "From Bargaining to Arguing," *supra* note 160, 171.
[261] Saretzki, "From Bargaining to Arguing," *supra* note 160, 170-172.
[262] In connection to formulating my second set of research questions, I am particularly thankful to Hans-Kristian Hernes for pointing out the obvious difference between the IMO and actors participating in debates *at* the IMO.
[263] Kjell Goldmann, "Appropriateness and Consequences: The Logic of Neo-Institutionalism," *Governance: An International Journal of Policy, Administration, and Institutions* 18, no. 1 (January 2005): 35-52.
[264] Kenneth W. Abbott and Duncan Snidal, "Law, Legalization, and Politics: An Agenda for the Next Generation of IL/IR Scholars," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 39.

4 Methodology: approaching the Polar Code negotiations

In this chapter, in explaining and giving a systematic account of how I conducted my research, I follow the three stages of the process. First, I describe the collection of my data, together with the challenges encountered. This is followed by an account of the selection process with regards to my primary material, IMO documents. In the final two sections of this chapter, I show how I analysed the selected documents through descriptive argumentation analysis and the use of the value-description-prescription (V-D-P) triad. In these two sections, I explain in detail my method of working with my material in order to show how I could still talk about arguing, bargaining and deliberative negotiation as modes of communication in the absence of available minutes from the IMO's meetings. I thus place an emphasis on connecting my methodology to my theoretical framework. My documentary material, combined with a theoretical framework built on the concepts of arguing and bargaining, poses particular research challenges connected to evaluating claims identified through argumentation analysis, which will be discussed as well.

4.1 Research material and its challenges

The research presented in this thesis relies on a number of different source materials, including documents obtained from the IMO which forms the basis of my research, as well as observations made at the IMO, interviews with participants in the negotiation of the Polar Code, audio records of the IMO, national legal and policy documents as well as academic writings.

4.1.1 IMO documentary material

In order to be able to analyse the negotiation of the Polar Code and the positions and justifications provided for these by the different States, especially Russia, the core material is provided by publicly available IMO documents from the negotiation process of the Code. These were collected from the IMO's online documentary database, IMODOCS.[265] A further IMO document was recovered from the website of the Secretariat of the Antarctic Treaty (see below).[266] The documents have the widest possible range in time, authorship and type.

Timeframe. The documents range, in the main, from the 2009 initiation of the development of the mandatory Polar Code to its conclusion in May 2015. The documentary material spans sixteen MSC and MEPC Committee sessions and six sessions of the DE and SDC Sub-Committees.[267] Documents collected from other Sub-Committees of the IMO that discussed parts of the Polar Code were also included.[268] Altogether, 289 IMO documents make up the research material. However, it should be noted that debates in the Sub-Committees other than DE and SDC, whilst highly technical, were largely limited, shown also by the relatively few documents submitted to these bodies. Only a tenth of the documents (29) bear the initials of

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[265] Available after registration at http://webaccounts.imo.org.

[266] The website of the Secretariat of the Antarctic Treaty is available at http://www.ats.aq/.

[267] For these, see Table 1.

[268] See Table 1 and *supra* note 86.

these Sub-Committees.[269] Of these, less than half (12) were authored by member States or consultative organisations, the rest being submitted by the IMO Secretariat. In comparison, of the remaining 260 documents only 47 were submitted by the Secretariat, these largely covering the outcomes of Committee and Sub-Committee meetings.

As stated, the research material covers the period up to the adoption of the environmental part of the Polar Code in May 2015.[270] However, having followed subsequent debates regarding shipping in polar waters, I do refer to papers which were submitted to the IMO after the Code's adoption to highlight more recent developments of significance. Still, these documents do not form the core of the research but are meant for illustration and update.

Authorship. In order to reconstruct the debates on the Polar Code, no documents were initially excluded from the research on account of authorship even if the focus was on Russia. Thus the documentary material includes papers from Russia and the Arctic States – some of the major actors in the debates – as well as from States that have an important stake in the Antarctic, especially SAR responsibilities since the Polar Code affects their interests as well; States with maritime interests, such as Germany; flags of convenience; NGOs representing both industry and environmental protection interests; as well as papers developed by the IMO's organisational apparatus submitted by the IMO Secretariat or Chairs of working and correspondence groups.[271] The papers that were not directly relevant to the issue areas taken up by Russia threw up a number of questions, some of which have been explored in the articles constituting this thesis. Thus, for example, the question of competing principles addressed in *The Elephant in the Room* originates from Canadian proposals, while also resulting in a comparison of the way Russia and Canada approached the relationship between the Polar Code and Article 234 of the LOSC in *In the Same Boat*. Furthermore, reading Russia's proposals

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[269] Both proposal and information documents are denoted with a document number, starting with the abbreviation and the number of the session of the Committee or Sub-Committee the paper was submitted to. For proposal documents, this is followed by the number of the agenda item it relates to and the individual number of the document, while for information papers the designation of the (Sub-)Committee meeting is followed by the abbreviation "INF" and the individual number of the document. Thus, the Russian paper DE 55/12/23 was submitted to the 55th meeting of the Sub-Committee on Ship Design and Equipment (DE) with regard to the 12th item on its agenda – in this case entitled *Development of a Mandatory Code for Ships Operating in Polar Waters* – with number 23 being the Russian paper's individual identifier. Similarly, the reports of (Sub-)Committees are given a number comprising of the abbreviation and number of the (Sub-)Committee session the paper reports on, and the number following the last agenda item number for that session.
[270] One Sub-Committee session not covered in spite of discussing the Polar Code before May 2015 is HTW 2, see *supra* note 88.
[271] For the State delegations that have submitted documents to the Polar Code process, see Table 2. Consultative organisations which submitted papers included, among others (with numbers in parenthesis – also noting, as with Table 2, that many of these papers are counted several times due to co-sponsoring, especially in the case of environmental NGOs): Friends of the Earth International (FOEI) (33), World Wide Fund for Nature (WWF) (33), Pacific Environment (28), International Fund for Animal Welfare (IFAW) (21), Clean Shipping Coalition (CSC) (11), Cruise Lines International Association (CLIA) (11) and International Association of Classification Societies (IACS) (10).

against other actors contributed to the approach employed in *Russia and the Polar Marine Environment*. These documents also provided for a quantitative basis to place Russia's contribution to the negotiations in context.

Document type. The material is made up of proposal documents submitted by the members and consultative organisations of the IMO, information papers submitted by the same actors and reports of the Committees and Sub-Committees. The latter have proven especially helpful in the reconstruction of the major positions and arguments expressed during the debates as well as the decisions made. However, one major deficiency of these reports is that they tend to make the States and NGOs participating in the debates anonymous in the sense that they are only directly identified upon request, usually in relation to a statement or intervention made.

Furthermore, reports of the working and correspondence groups involved in the detailed technical work on the Code have been included in the material. However, only those reports that were submitted between sessions of the Committees and Sub-Committees could be included. Reports of such groups that were submitted during the sessions and thus took the form of working papers are not publicly available through IMODOCS. One such working paper was discovered almost by accident by the author, while working on a blogpost relating to shipping in Antarctic waters. This working paper DE 55/WP.4 was attached to a Norwegian document submitted to the 34th Antarctic Treaty Consultative Meeting. Thus, although originally not a public document, it was included in the present research having already been put into the public domain.

Concluding this introduction to the documentary material from the IMO, it is to be noted that, of the 289 documents gathered, Russia authored fifteen, while nine statements and interventions made by Russia are recorded in reports of the Committees and Sub-Committees. In addition, two papers authored by Norway and one by Canada record the position taken by Russia.[272]

4.1.2 Observation at the IMO

I had the opportunity to observe the plenary sessions of the 68th meeting of the MEPC between 11-15 May 2015, where the Polar Code's pollution prevention part was adopted. Preparation for the observation of this meeting was hampered by the lack of public access on IMODOCS to documents submitted before the meeting. Furthermore, because this session was so late in the Polar Code process, there was scarcely any substantive discussion regarding the Code in

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[272] IMO, "Development of a Mandatory Code for Ships Operating in Polar Waters: Report of the Intersessional Working Group," IMO Doc. SDC 1/3, October 10, 2013, 6; Canada, "Reports of Sub-Committees: Comments on the Outcome of SDC 1: Amendments to the Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating to Thereto (MARPOL)," IMO Doc. MEPC 66/11/7, February 21, 2014, 2; and Norway, "Ship Design and Construction: Draft Polar Code, Part I-B," IMO Doc. MSC 93/INF.4, March 4, 2014, Annex, 6.

plenary.[273] Most of the work was conducted in the drafting group, to hammer out the precise language of the Polar Code text. To this group, observers such as myself were not allowed.

While this clearly shows the limits of the observation at MEPC 68, my presence at this meeting was not futile, even if my observations included discussions unrelated to the Polar Code. Observing the meeting gave a profound insight into how the IMO works in practice. Seated in the gallery amongst other observers, it was possible to follow the flow of the debates.

Among the different sequences observed was the way in which decisions, supposedly taken by consensus according to literature on the IMO, are at times taken by counting those who have spoken for or against an issue.[274] Furthermore, the observations also highlighted that many more delegations are involved in the debates on a given issue than just those that submitted papers or are referenced in the reports of the Committees and Sub-Committees. Even if they are simply stating their support or lack thereof, these State can have a bearing on the outcome in cases where the margins between the different sides are small. Conversely, some small delegations might stay silent on issues of potential interest due to lack of funds and proper representation, unless an inspirational person takes the lead, such as the delegation leaders of the Cook Islands or the Bahamas. My observations also illustrated the issue of groupings of States and interest organisations in the decision-making process, notably groups such as members of the EU, or the grouping of shipping industry representatives and flags of convenience, often supported by other developing States. Whether these groupings also played a part in the negotiation of the Polar Code is hard to say, but one indication of this is a proposal co-sponsored by open registries and shipping organisations.[275]

Finally, one observation that struck me, with possible implications for Russia, was the language in which the debates were held. While the debates observed were conducted in English,[276]

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[273] The only substantive proposal submitted to this meeting was China and the Republic of Korea, "Consideration and Adoption of Amendments to Mandatory Instruments: Proposed Modifications to Regulation 1.2.2 of Chapter 1 of Draft Polar Code, Part II-A," IMO Doc. MEPC 68/6/4, March 16, 2015.

[274] Consider again the Chairperson summing up the prevailing mood in the hall and the sense of the discussion, in Gaskell, "Decision Making," *supra* note 67, 186-187.

[275] Kiribati et al., "Development of a Mandatory Code for Ships Operating in Polar Waters: Reception Facilities for Oil and Oily Mixtures," IMO Doc. SDC 1/3/1, October 11, 2013. The co-sponsors of this documents are the following: Kiribati, Liberia, Marshall Islands, Panama, Saint Kitts and Nevis, Tuvalu, Vanuatu, Baltic and International Maritime Council (BIMCO), CLIA, International Chamber of Shipping (ICS), International Federation of Shipmasters' Association (IFSMA), International Marine Contractors Association (IMCA), International Association of Dry Cargo Shipowners (INTERCARGO), International Ship Managers' Association (INTERMANAGER), International Association of Independent Tanker Owners (INTERTANKO), International Parcel Tankers Association (IPTA), International Transport Workers' Federation (ITF), The Nautical Institute and Society of International Gas Tanker and Terminal Operators Ltd (SIGTTO).

[276] Further issues relating to the use of the English language, such as practical problems of translation delay, questions of text interpretation and cultural imperialism, are raised in Gaskell, "Decision Making," *supra* note 67, 191-195.

interpretation is provided to and from the IMO's official languages.[277] However, the English language skills of some of the delegations who were not able to use their own language left ample room for improvement. Furthermore, debates which went over the working hours of the interpreters had to be conducted in English, causing observable difficulties to those delegations used to expressing themselves in their own language. Moreover, interpretation is not provided for the working and drafting groups. All these points suggest possible impairments for some delegations in communicating and advancing their positions in potentially crucial discussions, including Russia in the latter two cases.

4.1.3 Interviews with participants

Further insight into the IMO's decision-making process in general, and the Polar Code negotiations in particular, was sought by conducting interviews with participants of the Polar Code negotiations, especially with regard to what went on "behind the scenes" in the working groups, correspondence groups and chats among the participants in the corridor.

The first interviewees were those I met during my time at the IMO, as well as the Chair of the working group responsible for the development of the Polar Code, Ms Turid Stemre of Norway. From there, the snowball method was used to gather further interviewees. However, obtaining and conducting interviews was marred with difficulty, with many delegates of national delegations unwilling to answer requests for interviews and, in cases where they did, reluctant to speak on the record about the details of the negotiations or at all, in spite of the anonymity offered in the requests for interview.[278] As a consequence, I shifted focus to interviewing "fringe" participants: delegates from consultative NGOs and advisors in the national delegations. This yielded some results; however, these delegates typically focussed on their field of expertise, thus providing only partial insight. Crucially, being peripheral actors in the negotiations, they were not directly involved in the more interesting political decisions.

Due to the obstacles outlined above, besides informal discussions that took place during my week at MEPC 68, only seven interviews were conducted during the period 2015-2017. These included the working group Chair, four other members of national delegations (Ms Stemre also being a Norwegian delegate) and two members of consultative NGOs. The difficulty in obtaining interviews demonstrates the sensitive nature of the Polar Code negotiations.

4.1.4 Supporting material: audio records and national legal and policy documents

Since getting interviews proved difficult, I turned to other material to help with the analysis of the IMO documents. Firstly, one of my interviewees provided me with access to audio records

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[277] As a UN specialised organ, the IMO has six official languages: Arabic, Chinese, English, French, Russian and Spanish.

[278] Notably but understandably, Ms Stemre would only discuss the IMO's decision-making process, also with regard to the Polar Code, in general due to her impartial role in the negotiations as the Chair of the Polar Code working group – this, however, helpfully complemented my observations of the workings of the IMO.

of debates at the plenary sessions of the IMO's Committees and Sub-Committees. Essentially taking the form of audible minutes, these records provided valuable insight into the discussions, which took place at meetings before I started my research and to which, therefore, I could not gain admission to observe. The first meeting regarding the Polar Code to be covered by these audio records is MSC 91 in 2012. Thus, these records have a shorter temporal scope than the negotiations themselves, leaving out among other things four DE meetings (see Table 1). Even so, the audio records span approximately 30 hours across nine Committee and Sub-Committee meetings.[279]

The audio records had their own challenges. Beyond the possibly sensitive nature of the negotiations that I have become cognisant of from my interviews, I learnt halfway through my research process from my contact that they preferred me not to use the audio records as a direct source or refer to them in my study. From then on, therefore, I treated these records as if they were off-the-record conversations and did not use them as evidence in my research if I could not corroborate them with other sources.

As another supplementary source, national policy documents, laws and regulations, particularly in the case of Russia, were used to pinpoint possible positions during the negotiations and to evaluate claims with regards to State interests or the common good. In the case of Russia, these included four documents with direct bearing on the Arctic:

> two policy documents regarding Russia's Arctic: the 2008 *Basics of the State Policy of the Russian Federation in the Arctic for the Period till 2020 and for a Further Perspective*[280] and the 2013 *Strategy for the Development of the Arctic Zone of the Russian Federation and National Security up to 2020*;[281] and
>
> two new legal instruments updating previous regulations for the NSR: the 2012 *Federal Act on Amendments to Specific Legislative Acts of the Russian Federation Related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route*[282] and the 2013 *Rules of Navigation in the Water Area of the Northern Sea Route*.[283]

Other documents and sources were also consulted, such as the 2001 *Maritime Doctrine of Russian Federation until 2020*[284] and speeches delivered by Vladimir Putin, first as prime minister, then as president, at the biannual International Arctic Forum, The Arctic – Territory

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[279] These meetings are those of MSC, MEPC, DE and SDC.
[280] Basics of Arctic Policy, *supra* note 12.
[281] Russian Federation, Strategy for the Development of the Arctic Zone of the Russian Federation and National Security up to 2020, February 20, 2013.
[282] NSR Federal Act, *supra* note 9.
[283] Ministry of Transport of Russia, Rules of Navigation in the Water Area of the Northern Sea Route, January 17, 2013, No. 7.
[284] Russian Federation, Maritime Doctrine of Russian Federation until 2020, July 27, 2001.

of Dialogue.[285] These sources were complemented by an extensive range of academic literature.[286]

With regards to other key actors, the following policy documents were consulted:

for the United States, the 2009 *National Security Presidential Directive 66 and Homeland Security Presidential Directive 25*[287] and the 2013 *National Strategy for the Arctic Region*;[288]

for Canada, the 2009 *Northern Strategy: Our North, Our Heritage, Our Future*,[289] the 2013 parliamentary report *Canada and the Arctic Council: An Agenda for Regional Leadership: Report of the Standing Committee on Foreign Affairs and International Development*[290] as well as Transport Canada's 2011 pitch for re-election to the IMO Council, *Canada: Committed to the Goals of the International Maritime Community*;[291]

for Denmark, the *Kingdom of Denmark Strategy for the Arctic 2011-2020*.[292]

In the case of Norway, the Norwegian Maritime Authority's website has the reports of the Norwegian IMO delegation for each Committee and Sub-Committee session, providing insight into their work including on the Polar Code.[293] As regards the shipping industry and the

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[285] Putin, "Speech at the Second International Arctic Forum", *supra* note 11; and Vladimir Putin, "Speech at the Plenary Session of the Third International Arctic Forum The Arctic – A Territory of Dialogue," Official Site of the President of Russia, September 25, 2013, http://eng.news.kremlin.ru/transcripts/6032 (accessed March 30, 2015).

[286] See section 1.3. With regard to the 2001 Maritime Doctrine, see Dariya V. Vasilevskaya, Alexander V. Nikolaev and Grigory I. Tsoy, "The Environmental Component of the National Maritime Policy of the Russian Federation in the Arctic Ocean," in *Environmental Security in the Arctic Ocean*, ed. Paul Arthur Berkman and Alexander N. Vylegzhanin (Dordrecht: Springer, 2013), 93-101.

[287] United States, National Security Presidential Directive 66/Homeland Security Presidential Directive 25, January 9, 2009.

[288] United States, National Strategy for the Arctic Region, Washington, May 10, 2013.

[289] Ministry of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians (Canada), Northern Strategy: Our North, Our Heritage, Our Future, Ottawa, 2009.

[290] House of Commons (Canada), Canada and the Arctic Council: An Agenda for Regional Leadership: Report of the Standing Committee on Foreign Affairs and International Development, May 2013.

[291] Transport Canada, Canada: Committed to the Goals of the International Maritime Community, TP 14916, May 2011.

[292] Danish Arctic Strategy, *supra* note 44.

[293] Norwegian Maritime Authority, "Arkiv – gammel struktur underkomiteer," Norwegian Maritime Authority, https://www.sdir.no/om-direktoratet/presentasjon-av-direktoratet/internasjonalt-arbeid/underkomiteene/arkiv-gammel-struktur-underkomiteer/?p=1 (accessed December 12, 2018) (in Norwegian); Norwegian Maritime Authority, "Arkiv – MEPC-rapporter før 2016," Norwegian Maritime Authority, https://www.sdir.no/om-direktoratet/presentasjon-av-direktoratet/internasjonalt-arbeid/imos-miljovernkomite-mepc/mepc-for-2016/ (accessed December 12, 2018) (in Norwegian); and Norwegian Maritime Authority, "Arkiv – MSC-rapporter før 2016," Norwegian Maritime Authority,

expected future user States of Arctic shipping routes, the 2012 and 2014 International Chamber of Shipping (ICS) position papers on Arctic shipping are noteworthy,[294] while for China's policy towards Arctic shipping scholarly writings were relied upon.[295]

4.1.5 Concluding observations on the research material

In this research I placed IMO documents to the fore and interpreted them with the help of the supporting material and secondary literature. This allowed me to focus on what was actually written in the Russian IMO proposals, which would have often served as the only reference to other delegations when preparing for the debates. This means that a more addressee-oriented strategy could be included in the interpretation, less heavily reliant on the opinions and recollections of Russian delegates which would have resulted in a more producer-oriented strategy.[296] At the same time, it remains unclear if any comprehensive document detailing the Russian aims and strategy in the Polar Code negotiations existed.[297] The lack of such a document suggests that the Russian delegation arrived at the IMO without a clear strategy and supports the interpretation that Russia took a reactive stance in the negotiations.[298]

Of course, both addressee- and producer-oriented strategies are present in this research at the same time. However, more weight was given to the addressee-oriented reading when discussing Russia's proposals in the context of other States' and consultative organisations' documents, as

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https://www.sdir.no/om-direktoratet/presentasjon-av-direktoratet/internasjonalt-arbeid/imos-sjosikkerhetskomite-msc/arkiv---msc-rapporter-for-2016/ (accessed December 12, 2018) (in Norwegian).

[294] International Chamber of Shipping, Position Paper on Arctic Shipping, December 2012; and International Chamber of Shipping, Arctic Shipping Position Paper, 2014.

[295] See e.g. Gang Chen, "China's Emerging Arctic Strategy," *The Polar Journal* 2, no. 2 (2012): 358-371; and Nengye Liu, "China's Role in the Changing Governance of Arctic Shipping," *The Yearbook of Polar Law* VI (2015): 545-558. A general overview of the interests of Asian user States of the Arctic shipping routes was provided at the 2015 CIL-JCLOS Conference Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States, Singapore, December 9-11, 2015. For relevant book chapters resulting from this conference, see Deukhoon (Peter) Han and Sung-Woo Lee, "Rights, Interests, Positions and Practices of Asian Flag States, with Special Reference to the Republic of Korea," in *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States*, ed. Robert C. Beckman et al. (Leiden: Brill Nijhoff, 2017), 297-317; and Guifang (Julia) Xue and Yu Long, "Equal Treatment and Non-Discrimination for User States," in *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States*, ed. Robert C. Beckman et al. (Leiden: Brill Nijhoff, 2017), 318-356.

[296] For a summary of the addressee-oriented and producer-oriented interpretation strategies, see Göran Bergström and Kristina Boréus, "Analyzing Text and Discourse in the Social Sciences," in *Analyzing Text and Discourse: Eight Approaches for the Social Sciences*, ed. Kristina Boréus and Göran Bergström (London: Sage Publications, 2017), 12-13.

[297] This may be contrasted with Canada's approach. Canada arrived to the first DE meeting to discuss the Polar Code (DE 53) with a complete draft text of what they wanted to see in the Polar Code, as suggested in Aldo Chircop, Peter G. Pamel and Miriam Czarski, "Canada's Implementation of the Polar Code," *The Journal of International Maritime Law* 24 (2018): 434. For the Canadian draft, see Canada, "Development of a Mandatory Code for Ships Operating in Polar Waters: Proposed Framework for the Code for Ships Operating in Polar Waters," IMO Doc. DE 53/18/2, November 20, 2009.

[298] Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 125-126.

well as when analysing the debates regarding Article 234 of the LOSC and the avoidance of underlying principles; whereas the analysis leant towards a more producer-oriented reading when scrutinising Russian proposals themselves. In this way, the hope is that a more balanced analysis between producer- and addressee-oriented approaches could be found.

4.2 Digesting the documentary material

Before embarking on a discussion of how I analysed my material, there is a need to further elaborate on how the documentary material was read, how selections were made and what kind of documents these are. Since the material comprises 289 documents, it was essential to narrow this down for the analysis. At the same time, I did not want to lose the wider context of the debates as a whole either.

The material was read following the chronological order of the Committees and Sub-Committees. However, among the documents submitted to each Committee or Sub-Committee session, I first read the report summarising the proceedings of that given session, providing an important overview of which proposals were considered together and signalling points of contention and disagreement. Statements or interventions of specific actors included in such reports directed the attention towards specific issues and opinions. Following the reports of Committees and Sub-Committees, each of the proposals and information papers was read in clusters highlighted by the reports, followed by another reading of the report to understand the proceedings in light of what was stated in the concrete proposals. In this second reading, I concentrated on the summary of viewpoints put forward on a given issue and the decisions taken. Furthermore, later reports included draft texts of the Polar Code, allowing me to compare these to each other and the proposals, and follow concrete changes.[299] This way, it was possible to follow the debates in their entirety.

I decided to focus on the MSC, MEPC, DE and SDC meetings since these provided the principal fora for the Polar Code discussions. Furthermore, debates in the other Sub-Committees, which were thus excluded from the analysis, were highly technical, posing a limitation to my layman's understanding. Narrowing the focus down to the MSC, MEPC, DE and SDC meetings did not result in the exclusion of Russian proposals, since all of Russia's documents were submitted to these Committees and Sub-Committees. However, it resulted in the omission from the analysis of one Russian intervention and one statement. The former was made at NAV 59 and concerned Russia's work regarding hydrographic surveying and charting along the NSR.[300] Meanwhile, the Russian statement to HTW 1 emphasised the importance of practical training of crew on ships in polar waters as well as the need for ice navigators onboard such vessels.[301]

Further selection was helped by focusing on the fifteen Russian proposals and the remaining statements and interventions as the core of the material. To provide the context of the debate

[299] Such draft texts could also be found in reports of intersessional working and correspondence groups.

[300] IMO, "Report to the Maritime Safety Committee," IMO Doc. NAV 59/20, October 1, 2013, 35.

[301] IMO, "Report to the Maritime Safety Committee," IMO Doc. HTW 1/21, March 7, 2014, Annex 12.

for these proposals, relevant proposals were selected based, firstly, on the reports since these grouped together those proposals that covered the same or related issues and were thus discussed together during the negotiations, allowing for easy identification of which documents Russia's proposals were considered against.[302] Secondly, each proposal and information document contains on its opening page a section entitled "Related documents" which connects it to papers from previous meetings, thus forming a chain of documents and debates.

In *Russian Proposals on the Polar Code*, chronologically the first article I wrote, I endeavoured to give an overview of Russia's contribution during the Polar Code negotiations. The analysis here thus included all 15 documents as well as statements and interventions to MSC, MEPC, DE and SDC. While this was reduced to six proposals and three statements in *Russia and the Polar Marine Environment*, corresponding to the focus being solely on environmental protection measures, other States' and consultative organisation's submissions on the same subject matters were also included in the analysis.

At the same time, for *The Elephant in the Room*, I wanted to look at how, if at all, Article 234 of the LOSC was discussed, searching my documentary material with the search word "234". Only two Russian documents[303] and DE 55/22,[304] the report of the DE meeting during which the first Russian proposal was discussed, came up. At the same time, from my readings of the material I was aware of papers documenting Canadian concerns regarding savings clauses, clearly impacting how the relationship of the Polar Code and LOSC, and by extension Article 234, should be interpreted. The lack of mention of Article 234 in these documents led to the idea of exploring the Polar Code as an incompletely theorised agreement, making me also re-read my material with this in mind to see if any more mentions of this topic could be found, leading to further documents: a proposal by Germany[305] and an early pronouncement on freedom of navigation by Denmark.[306] Following the draft texts, as well as relying on secondary literature[307] and discovering working paper DE 55/WP.4, also helped trace how regulation of the relationship of the Polar Code and Article 234 unfolded.

Finally, having been aware of the differences in approach to the issue of Article 234 during the negotiations between Russia and Canada, I wanted to see if there might have been similarities

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[302] The reports also pinpointed the debates during which the Russian delegation made a statement which otherwise is located in an annex attached to the report.

[303] Russian Federation, "Development of a Mandatory Code for Ships Operating in Polar Waters: Procedure of Accounting for National Regulations," IMO Doc. DE 55/12/23, February 1, 2011; and Russian Federation, "Development of a Mandatory Code for Ships Operating in Polar Waters: A Proposal to Appoint Categories Depending on the Ice Reinforcements of Ships," IMO Doc. DE 56/10/14, December 24, 2011.

[304] IMO, "Report to the Maritime Safety Committee," IMO Doc. DE 55/22, April 15, 2011, 23-24.

[305] Germany, "Ship Design and Construction: Comments on the Proposed Draft Amendments to SOLAS to Make the Polar Code Mandatory," IMO Doc. MSC 93/10/2, February 21, 2014, 3.

[306] Denmark, "Development of a Mandatory Code for Ships Operating in Polar Waters: HAZID Analysis of Ships Navigating in Arctic Waters," IMO Doc. DE 53/18/5, December 18, 2009, 2.

[307] Most notably, McDorman, "Potential Conflicting Rights and Obligations," *supra* note 42.

in the approaches of the two with regard to the content of the Polar Code. In order to do this, the net was cast wide among the documents of these two States. Accordingly, more issue areas were covered in my presentation at the 9th International Congress on Arctic Social Sciences (ICASS IX) in the summer of 2017,[308] which was eventually revised into *In the Same Boat*. In this revision, the decision was made to concentrate on environmental regulations, as Article 234 of the LOSC entitles coastal States to regulate for environmental protection purposes, while it also appeared that those regulations of the Polar Code were important to both Canada and Russia. However, this has meant that certain subject areas fell victim to this narrowed focus, notably crewing issues.

Formally, the documents analysed for this research are similar as they must adhere to the guidelines of the IMO. These set out the requirements for documents submitted to the IMO, such as that their front page should link these papers to the Strategic Plan of the IMO and include a short summary of the objectives of the proposal, as well as that the document should conclude with a summary of the proposed action.[309] Furthermore, the length of the submissions is also closely regulated. This is linked to deadlines for submission before each Committee and Sub-Committee meeting, also allowing for the submission of documents commenting on papers already received with an extended deadline.[310] Proposal papers are on average approximately 2-4 pages long, discounting annexes. Looking at the Russian proposals, only two of these were more than four pages long, while only two did not utilise the extended deadline for commenting papers further confirming the reactive nature of Russia's proposals.[311] Finally, while the IMO has six official languages, only three of these are used as working languages for documents: English, French and Spanish. Therefore, all the Russian proposals were submitted in English.

As regards the content of the documents, depending on the subject matter, there can be differences in the level of technicality of the proposals contained therein. Thus, some Russian proposals, for example regarding icebreaking capability, are highly technical, including calculation formulae and equivalency tables. These are also, rather unsurprisingly, short on argumentation. Of course, the IMO being a technical organisation, such specialised language is often unavoidable. At the same time, documents regarding policy points, such as that on the

[308] Dorottya Bognar, "A Comparative Analysis of the Positions and Arguments of Russia and Canada in the Negotiation of the IMO's Mandatory Polar Code" (paper presented at ICASS IX, Umeå, Sweden, June 8-12, 2017).
[309] IMO, "Organization and Method of Work of the Maritime Safety Committee and the Marine Environment Protection Committee and Their Subsidiary Bodies," IMO Doc. MSC-MEPC.1/Circ.5/Rev.1, June 13, 2018, Annex, 17-18. While this is the latest guidance, previous versions of it included the same requirements for submissions.
[310] Ibid., Annex, 20-21.
[311] Papers utilising the extended deadline should, according to the IMO's guidelines, refer to the specific paragraph of the guidelines allowing their admittance, making their identification relatively easy. Interestingly, one of the Russian documents longer than four pages appears to indicate that it, too, relied on the extended deadline.

geographical boundary of the Polar Code's application,[312] are less technical and more argumentative, lending themselves better to analysis. Most of the documents submitted, however, fall somewhere between the two.

4.3 Argumentation analysis

In order to reconstruct the debates on the Polar Code, and in particular to analyse Russia's positions in these debates based on the IMO documentary material, I utilised a descriptive approach to argumentation analysis as a starting point to my analysis. Unlike Holzinger who also looks at arguing and bargaining on the level of individual utterances and utilises a methodology based on speech acts,[313] I did not have the minutes for the debates being analysed. I therefore had to find a way to identify equivalents to individual utterances. By using argumentation analysis, I could break up my texts into their building blocks, which in turn could be evaluated with respect to arguing and bargaining.

Argumentation in this context should be understood as including both the central claim of the text – that is, the standpoint argued for – as well as the claims for and against it. Given that the aim of these proposal texts was to persuade the other negotiating parties to support its central claim, I did not expect to find many opposing claims within a single proposal text.

The central statement of the analysed document forms the standpoint argued for, or in other words the issue expression.[314] Issue expressions may be descriptive, prescriptive or normative, where the latter can also be seen as a reformulation of the prescriptive issue expression into an evaluation.[315] Since most of the documents that form my research material are proposals with regard to the form and substance of the Polar Code, the issue expression in most cases is prescriptive even if it is not explicitly stated as such. They call for action: including or excluding new language in the text or changing existing text.

To illustrate how locating the issue expressions worked in practice, I take the example of one of Russia's submissions regarding the principle of priority of national regulations over the Polar Code's requirements, DE 55/12/23.[316] Although, as stated above, one formal requirement of submissions to the IMO is that they conclude with a summary of the proposed action, this is often of no help in identifying the issue expression. Under the heading "Action requested of the

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[312] Russian Federation, "Ship Design and Construction: Development of a Mandatory Code for Ships Operating in Polar Waters: The Delineation of Boundaries of the Polar Code's Scope of Application," IMO Doc. MSC 93/10/9, March 25, 2014.

[313] Holzinger, "Bargaining Through Arguing," *supra* note 161; and Holzinger, "Context or Conflict Type," *supra* note 161.

[314] Arne Næss, *The Selected Works of Arne Næss*, Vol. VII, *Communication and Argument: Elements of Applied Semantics*, trans. Alastair Hannay, ed. Harold Glasser and Alan Drengson (Dordrecht: Springer, 2005), 81-82; and Kristina Boréus, "Argumentation Analysis," in *Analyzing Text and Discourse: Eight Approaches for the Social Sciences*, ed. Kristina Boréus and Göran Bergström (London: Sage Publications, 2017), 59-60.

[315] Boréus, "Argumentation Analysis," supra note 314, 59-60.

[316] DE 55/12/23, *supra* note 303.

Sub-Committee," DE 55/12/23 simply states: "The Sub-Committee is requested to consider this document and decide as appropriate."[317] This hardly sums up the central thesis of the document. Such practice appears to be quite normal among the delegations: ticking all the boxes without having to repeat themselves. In more fortunate cases, the documents' authors would refer to the paragraph where the proposed action is to be found. Instead, we have to look further up in the text to search for the issue expression and find that the document states that Russia "supports the original wording proposed by Canada and suggests to keep it in the Preamble of the Code under development by supplementing the Preamble with [the text of the clause proposed by Canada]."[318] Thus, in effect, we are facing the prescriptive issue expression: "Keep the principle of priority in the Preamble of Code!"

Other elements important in building argumentations are arguments and premises. Here, arguments are understood as claims "made in support of or against another claim,"[319] where the latter can be both an issue expression or another argument. Bridging two claims – an issue expression and an argument or two arguments – explaining the link between the two, one can find a so-called premise (denoted with "φ") which is taken for granted, presupposed and may be implicit.[320] Confusingly, a basic concept of my deliberative theoretical framework is arguing, a mode of communication based on the exchange of reasoned arguments. Needless to say, the two "arguments" are not the same. Both arguments in deliberation and expressions of self-interest in bargaining count as arguments in argumentation analysis, as they are made in support of or against an issue expression or another "argument." To avoid any misunderstanding, in my articles I have consistently tried to avoid using the word "argument" for anything but arguments in the sense used in deliberative theory.[321] Therefore, I often resorted – in the absence of any better option – to using the word "justification" in my articles when I meant argument in argumentation analysis.

Arguments may be classified in different ways. They may be divided into descriptive and normative arguments[322] just as arguments in deliberative theory can be factual and normative, with validity claims in truth and rightness. Further, with respect to their relationship to other claims, arguments may be pro and contra (counter) arguments.[323] In addition, both arguments and premises appear at different levels in the argumentation, depending on whether they relate to the issue expression or to other arguments.[324] This, together with the distinction of pro and

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[317] Ibid., 2.

[318] Ibid., 2.

[319] Boréus, "Argumentation Analysis," *supra* note 314, 60.

[320] Ibid., 61.

[321] Similarly, due to its intrinsic connection with arguments in deliberative theory, I could not use the word "reason" to substitute for the word "argument" in the sense argumentation analysis uses the word.

[322] Boréus, "Argumentation Analysis," *supra* note 314, 60.

[323] Ibid., 60-61.; and Næss, *Communication and Argument*, *supra* note 314, 75-95.

[324] Boréus, "Argumentation Analysis," *supra* note 314, 64-67; and Næss, *Communication and Argument*, *supra* note 314, 82-84.

contra arguments, gives a clear structure to the argumentation of each document by providing a relationship between the arguments.

As an example, the above document, DE 55/12/23, lists several claims to substantiate its issue expression (in order of their appearance in the text):

> it is essential to define the role of the maritime administrations of polar States;
>
> Russia has adopted national regulations and requirements applying to all ships navigating along the NSR within the limits of its EEZ;
>
> the Code should clearly define principles of applying the requirements within the EEZs of polar States.

The first argument is further supported by a second-order argument emphasising that such administrations have the necessary skills and knowledge regarding "ensuring the safety of navigation, […] ice conditions depending on the season and […] weather regimes in areas under their jurisdiction and adjacent to these areas."[325] If required, this argument could be further broken up into three third-level arguments for the three areas listed where the maritime administrations possess skill and knowledge respectively. Also, the second argument has a second-order argument supporting it including a direct quote of coastal State rights in Article 234 of the LOSC. The premise here is that, as Russia has been acting within its international legal rights, its regulatory regime and by extension its basis in rights enshrined in Article 234 should be acknowledged in the text of the Polar Code through the inclusion of the principle of priority. The LOSC here is an external authority, an international treaty accepted by most States involved in the negotiation of the Polar Code.[326] Finally, the last argument regarding a clear definition for applying the national requirements of polar States in the EEZ is justified by the fact that it was already formulated by Canada but later omitted. The arguments listed here are all pro arguments.

Contra arguments were more present when analysing entire debates. Identifying the issue expression and arguments in each document allowed me to set these against each other on the level of debates. When analysing debates, different models are offered on ordering arguments in relation to one another, such as the agent- and substance-oriented models.[327] I aimed to merge these two models so as to not only gain an overview of where each actor stood on a given issue, but also to see on which specific points or arguments these actors clashed. I illustrate this using the debate surrounding the above Russian document DE 55/12/23.

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[325] DE 55/12/23, *supra* note 303, 2.

[326] Even the United States, one of the last States and certainly the most important not to have ratified the LOSC, considers most of the LOSC as forming customary international law and, therefore, binding on itself.

[327] Boréus, "Argumentation Analysis," *supra* note 314, 71-73.

While DE 55/12/23 was discussed along with several other documents grouped together since they related to the framework and structure of the Polar Code, this subject area is too wide to be considered one debate, encompassing other subject matters such as goal-based standards and how to make the Code mandatory.[328] Helpfully, the report of DE 55 highlights that the Russian document and a Canadian one, DE 55/12/7 were objected to for the same reasons by several delegations, including the United States.[329] These contra arguments may be summarised as follows:

There is concern over the legal basis of Russia's (and Canada's) regulatory regime.

There is concern over the practical safety aspects of Russia's (and Canada's) regime.

National regulatory systems should be submitted for adoption by the IMO.

IMO can address the defects of such regulatory systems.

The application of Article 234 of the LOSC by Russia (and Canada) is doubtful.[330]

It is doubtful that the Code would provide international legal basis for Russia's (and Canada's) regime.

The major contention between the United States and Russia then appears to centre on the use of Article 234 as the legal basis, and thus the legality, of the Russian regulatory regime, weakening Russia's arguments for keeping the principle of priority in the text of the Polar Code. The second-order Russian argument regarding the skill and knowledge of polar States' maritime administrations on navigational safety is also countered, although to a lesser extent, by the second American claim.

That the Canadian document DE 55/12/7 is criticised by the United States and others at the same time as Russia's proposal, appears to suggest that that submission might provide support to Russia's arguments. The DE 55 report, again helpfully, describes that only paragraphs 7 and 15 of the Canadian document were subject to counter-argument. However, looking at that document as a whole, as well as the paragraphs singled out, one can mainly find a list of proposals with not much argument supporting any of them. Each proposal may be interpreted

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[328] DE 55/22, *supra* note 304, 23-24.
[329] Ibid., 24.
[330] This claim may arguably be interpreted as a second-order argument substantiating the first argument concerning the legal basis of the Russian (and Canadian) regulatory regimes. However, as they appear somewhat separately in the text, indicated also by the fact that the latter is appropriated solely to the US, while the concern over the application of Article 234 was also supported by other delegations, I treat them as separate claims. Indeed, both Russia and Canada have also relied on legal bases other than Article 234 to support their respective regulatory regimes, including internal waters and historic title claims. In the absence of audio records from the DE 55 meetings, it is not possible to further substantiate any of the two interpretations. In any case, the level of these contra arguments is of less importance than where they clash with pro arguments.

as a small issue expression, with paragraph 7 proposing the requirement of all ships to carry a permit to operate to authorise their entry in different water areas, while paragraph 15 proposes that ships regularly report "where applicable, to coastal States regarding their operations and the prevailing conditions."[331] Paragraph 7 states the argument that such a permit to operate would "assist coastal States in regulating operations in accordance with their own systems of navigational control."[332] Both this first-order argument and the issue expression in paragraph 15 suggest an implicit premise, namely that coastal States have a right (in Article 234 of the LOSC) to establish their own regimes which may include authorising vessel operations and prescribing reporting requirements respectively. Thus, while the Canadian document does not propose the reestablishment of the principle of priority unlike Russia and covers different subject matters from the Russian submission, it similarly takes it for granted that Arctic coastal States have the right to adopt their own national regulatory regimes based on Article 234 of the LOSC, and in this respect provides some support to Russia's proposal.

Table 4 shows the structure of the debate regarding the principle of priority. We can see both the different actors' positions in this debate as would be clear in the actor-oriented model, and the intersections of arguments from the substance-oriented model.

The above example shows, on the one hand, that contra arguments are more likely to be found on the level of debates. On the other hand, it also appears to be the case that States would submit a paper containing an alternative text to be included in the Polar Code as the issue expression rather than outright rejecting and arguing against another State's proposal. In such cases it was, therefore, helpful to build a model of the debate, such as in Table 4, in order to find which arguments States clashed or converged on. Again, as mentioned in the chapter on the theoretical framework, the lack of argumentation for these alternative texts and, thus, support in validity claims would not necessarily mean that we are facing a demand.

4.3.1 Challenges and relevance of argumentation analysis

In the example of the debate on the principle of priority above, I introduced proposals and arguments mainly from three actors: Russia, the United States and Canada. However, more delegations appear to have voiced arguments on the matter as suggested by the mention in the report of DE 55 that the United States was supported by several delegations. Which States' delegations these were[333] and what precise arguments they stated is unclear from the report. This example points towards two distinct problems. Firstly, the reports of the Committees and Sub-Committees would often include the major arguments expressed during the debates without naming any of the delegations expressing these. Thus one runs the risk of missing

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[331] DE 55/12/7, *supra* note 223, 3.

[332] Ibid., 2.

[333] The report of the working group established during DE 55 suggests that, among others, the Bahamas, China and Panama supported the United States' stance to remove the principle of priority from the draft text, IMO, "Development of a Mandatory Code for Ships Operating in Polar Waters: Report of the Working Group (Part 1)," IMO Doc. DE 55/WP.4, March 24, 2011, 3.

important actors from the analysis even if their arguments can be included in the reconstruction of the debates. Further, it is also possible that an argument uttered by a key actor is missed because the speaker is not identified in the report.

Claim	Actor
IE: Keep the principle of priority in the Polar Code's Preamble!	R
P1: It is essential to define the role of the maritime administrations of polar States.	R
P1P1: Administrations avail of the necessary skills and knowledge regarding "ensuring the safety of navigation, […] ice conditions depending on the season and […] weather regimes in areas under their jurisdiction and adjacent to these areas."	R
C1P1P1: There is concern over the practical safety aspects of Russia's/Canada's regime.	U
P2: Russia has adopted national regulations and requirements applying to all ships navigating along the NSR within the limits of its EEZ.	R
P1P2: According to Article 234 of the LOSC, coastal States have the right to adopt laws and regulations.[334]	R
(φP1P2): As Russia/Canada has been acting within its international legal rights, its regulatory regime and by extension its basis in rights enshrined in Article 234 should be acknowledged in the text of the Polar Code.[335]	R, C[336]
C1P1P2: There is concern over the legal basis of Russia's/Canada's regulatory regime.	U
C2P1P2: The application of Article 234 of the LOSC by Russia/Canada is doubtful.	U, O
P3: The Code should clearly define principles of applying the requirements within the EEZs of polar States.	R
P1P3: The principle of priority was already formulated (by Canada's proposal) but later omitted from submitted documents.	R
C1: National regulatory systems should be submitted for adoption by the IMO.	U
P1C1: IMO can address the defects of such regulatory systems.	U
C2: It is doubtful that the Code would provide international legal basis for Russia's/Canada's regime.	U, O

Table 4 - Structure of the debate on the principle of priority at DE 55[337]

Secondly, even if the intervention of a specific State is noted in the report it would often be no more than a sentence, lacking much in the way of arguments. The case is different for statements, as these are attached to reports as annexes rather than included in the main body of the reports, allowing for lengthier texts. Statements are then comparable to proposal documents

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[334] I chose not to include the full text of Article 234 here due to space constraints.

[335] In Russia's case, such acknowledgement should be through the principle of priority.

[336] Although this was expressed in relation to different issue expression by Canada, the Canadian premise nevertheless supports Russia's argument.

[337] Abbreviations: IE – issue expression; P[number] – pro argument; C[number] – contra argument; φ – premise; R – expressed by Russia; C – expressed by Canada; U – expressed by the United States; O – expressed also by other States.

and may even contain more extended argumentation, justifying States' positions. Interventions contained in the reports, however, are more akin to the paragraphs of the Canadian document used in the above example and were treated in a similar manner in the analysis. Nevertheless, interventions could still be very much part of the reconstruction of debates and positions of States.

Likewise, proposals with a more technical content pose a challenge for argumentation analysis. These are often wanting in arguments – or at least arguments intelligible to laymen such as myself. Thus, while these documents did form part of the overall analysis, they were often given a more superficial treatment. Nevertheless, they provided some important contributions to the analysis. As an example, the Russian submission DE 56/10/14, although devoted to the discussion of ice classes and ship categories, includes one sentence regarding limitations placed on navigation imposed by national rules introduced on the basis of Article 234 of the LOSC.[338] This sentence, thus, takes it for granted that Arctic coastal States act within their international rights when introducing such rules unilaterally, similar to the example discussed above, and as such reinforces the Russian stance as regards its perceived rights provided by that article and its relationship to the Polar Code.

Both these problems could, to some degree, be remedied by corroboration with the audio records where such records exist. However, from the audio records as well as from my observations it is clear that many delegations only speak during the debate to express their support for, or opposition to, a proposal without any arguments explaining the grounds for it. This is especially the case if the relevant arguments were already stated by delegations that have already spoken. Similarly, Russia's support for a Canadian proposal regarding the inclusion of savings clauses into the new MARPOL amendments making the Polar Code's environmental part mandatory[339] is noted without further elaboration of the possible Russian arguments for its support. That support would be noted in my combined agent- and substance-oriented model in the "actor" column.

4.4 Evaluating arguments

While identifying the building blocks – issue expressions, arguments and premises – of single documents and whole debates as well as reconstructing their structures on that basis is important in itself, I used that as a starting point to say something more about these arguments, to evaluate them. As Isabela Fairclough and Norman Fairclough argue, arguments can be evaluated from a logical, dialectical and rhetorical perspective, meaning a good argument is rationally persuasive, dialectically reasonable and effective.[340] While in the dialectical perspective

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338 DE 56/10/14, *supra* note 303, 1.

339 MEPC 66/11/7, *supra* note 272, 2.

340 Fairclough and Fairclough, *Political Discourse Analysis*, *supra* note 146, 51-61.

questions are asked of the reasonableness of the proposed action, in the logical perspective what is in focus is the tenability/acceptability, relevance and sufficiency of arguments.[341]

Yet, in my analysis I am not focussed so much on whether the arguments raised in the debates regarding the Polar Code were "good" in the sense of being reasonable, tenable, relevant, sufficient or effective. Of course, it is of interest whether the arguments have succeeded in changing the preferences of other delegations and influenced the textual outcome. But in order to answer my research questions, I set out to evaluate whether claims and justifications put forward were based on self-interest or aimed at the interest of the international community, the common good. As discussed in chapter 3, further distinction between validity claims and credibility claims based on unequal power relations can aid in elucidating instances of arguing and bargaining. However, we may differentiate between generalisable State interests and those interests that do not further the common good but rather clash with it. In some cases, there may be a fine line between the two and it is down to the strength of the argumentation whether a State interest is accepted as furthering the common good. If State interests can be reconciled with deliberation as suggested with regards to deliberative negotiation, then it has to be the case that validity claims based on truth and rightness might be found with regard to these as well. This would be a true combination of arguing and bargaining in one text in the vein of Steffek, who suggests that diplomatic negotiation is about resolving conflict of interests but through arguments, not persuasion.[342]

I have already accounted for the definition of the common good in the case of the Polar Code in section 3.3 and this need not be repeated here. As for gaining an understanding of State interests – both as regards shipping in general and Arctic shipping in particular – I turned to the policy and legal documents introduced above in section 4.1.4 as well as secondary academic literature, especially with regards to my primary focus, Russia. Identifying both the common good and self-interest of specific States helps in classifying the claims – issue expression, arguments and premises – of State proposals regarding the Polar Code.

In order to classify these claims I use a value-description-prescription (V-D-P) triad, where the value statement and the descriptive statement – the latter of which may concern both situations and means-ends – lead to the prescriptive statement.[343] Descriptive statements are also evaluative assessments, at the same time as the circumstances brought up for the

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[341] Tenability and relevance are discussed primarily as grounds for evaluation in Næss, *Communication and Argument*, *supra* note 314, 84-95.

[342] Steffek, "Incomplete Arguments," *supra* note 156, 236-239.

[343] See e.g. Mats Lindberg, "Qualitative Analysis of Ideas and Ideological Content," in *Analyzing Text and Discourse: Eight Approaches for the Social Sciences*, ed. Kristina Boréus and Göran Bergström (London: Sage Publications, 2017), 91-93 and 103-104. This is similar to the structure proposed by Fairclough and Fairclough for analysing practical reasoning, which includes values and goals, circumstances, means-goals and claims for action, see Fairclough and Fairclough, *Political Discourse Analysis*, *supra* note 146, 39-51.

argumentation's sake are affected by the values held by the speakers.[344] The value-dimension itself may be further broken up into a fundamental level value and an operative level goal supported by the fundamental level.[345] On this basis one may have chains on multiple levels: a higher level V-D-P triad and a more operative level goal-description-prescription (G-D-P) triad.[346] This distinction is suited to my research which is also concerned with deeper, more fundamental principles. As suggested in the previous section, arguments in argumentation analysis can be descriptive or normative, which roughly coincides with descriptive and value/goal statements in the V-D-P/G-D-P triad. If stated with sincerity, factual descriptive statements can be questioned for their truth claims, while value/goal statements' basis in impartial and universal norms – that is rightness – may also be challenged.

Turning back to the example of the Russian proposal regarding the principle of priority above, we can illustrate the workings of the V-D-P/G-D-P triad. Starting with the prescriptive statement, this can be found in the issue expression: Keep the principle of priority in the Code! Moving backwards from this statement, it is easy to find the statements describing the situation, referring to the skills possessed by the maritime administrations of the Arctic States as well as the existing legal framework which includes the rights prescribed in Article 234 of the LOSC. Besides this, mention is made of the more specific Russian regulations, building on Article 234. It is conceivable that the maritime administrations avail themselves of the skills and knowledge listed in this text and their factual claim can be challenged and should be possible to defend. Qualifying the skills and knowledge possessed by the maritime administrations as "necessary" also suggests an evaluative assessment of that description. The reference to the LOSC also enhances the validity claim of the argument built on it as an external authority.

While at first glance the value dimension is not specified, I argue that the claim that it is essential to define the role of maritime administration is part of the value dimension, and more specifically a goal statement. Similarly, premise φP1P2 that national regulations based on Article 234 should be acknowledged in the text of the Code (at the expense of the less valued international regulations) is a goal statement. This premise is, of course, based on the particular self-interest Russia has in upholding the national nature of the NSR. The acknowledgement of maritime administrations' role and national regulations may then be interpreted as the operative level goal, whereas the fundamental level value underlying these is coastal State jurisdiction, as opposed to the freedom of navigation and extensive international regulation of Arctic waters. Unilateral national regulations are, after all, what creeping coastal State jurisdiction is all about and is challenged by the principle of freedom of navigation. This conclusion is supported by the fact that although, as mentioned, Article 234 is extensively cited in the document, its second sentence referring to the limitations based on the coastal State rights provided by Article 234,

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[344] Fairclough and Fairclough, *Political Discourse Analysis*, *supra* note 146, 46-47; and Lindberg, "Qualitative Analysis," *supra* note 343, 104.
[345] Lindberg, "Qualitative Analysis," *supra* note 343, 105-107.
[346] Ibid.

specifically due regard to navigation, is omitted. Finally, the means-ends description of how to acknowledge national regulations and the role of maritime administrations refers to keeping the principle of priority, formulated by Canada and later omitted in the text of the Code.

This proposal does not hide the Russian interest in upholding the primacy of national regulations over the Polar Code. As I have said, State interests could be admissible so long as they do not clash with the common good. Article 234 of the LOSC does allow for unilateral national regulations against vessel-source pollution which arguably fits the environmental protection component of the common good. The problem for Russia here is that unilateral national regulations directly clash with the uniform and universal standards element of the common good, thus its interests on which document DE 55/12/23 is based are not generalisable. It is not in the interests of the international community. The reconciliation of the two is seemingly impossible. However, as I have shown in *The Elephant in the Room* and will further discuss in the chapter 5, Canada managed just that.

4.4.1 Challenges of evaluating arguments

One of the challenges when using the V-D-P/G-D-P triad is that some of these elements may be lacking in the texts. These may be found in premises identified through argumentation analysis as the one above reinforcing the goal statement. Thus, some of these elements might be implicit in the text itself. Others might have to be gleaned from other proposals or from the supporting material of policy and legal documents.[347]

Another issue requiring careful consideration is misrepresentation. As discussed in the chapter on the theoretical framework, self-interest may be disguised as claims to principles, and threats may be replaced by warnings in order to make one's claim more palatable to others. Similar to Elster's formulation of strategic uses of argument, Fairclough and Fairclough talk about rationalisation, when the ostensibly offered argument is not what supports the claim for the speaker himself – it is only offered to deceive and garner support for the claim.[348] Thus, sometimes a claim expressed in a document might be expressed overtly in support of what is meant to be the common interest, yet the logical V-D-P chain does not add up and the interpreted value-dimension links to a self-interest.

The use of the reference to the LOSC as an external authority in the above example is coupled with the self-interest of Russia in maintaining its national regulatory regime, at first glance suggesting a strategic use. However, examining the issue more closely, it is clear in this proposal that Russia's position is based on its particular self-interest. Russia is quite clear in its argumentation: Article 234 of the LOSC allows unilateral national regulations, Russia has thus drawn up its regulatory regime, this regime should be given priority over the Code due to LOSC. There is no deception here. Russia does not hide the aim of its proposal as retaining the primacy of its national regulations. The problem stems from the ambiguity of the interpretation

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[347] Lindberg suggests similar ways of proceeding, ibid., 103.

[348] Fairclough and Fairclough, *Political Discourse Analysis*, *supra* note 146, 95-98 and 186-187.

of Article 234. What Russia does is rely on its interpretation of Article 234, omitting to mention the other, inconvenient interpretation based on the due regard obligation. However, it is not to be expected that States would undermine their own proposals with the use of contra arguments, especially considering the interpretation of Article 234 has never been tested in court. Had Russia coupled the acknowledgement of Arctic States' national regulations with a justification based on the (universal) environmental protection element of the common good to support its prescriptive statement, especially if it had remained quiet over its interest in the outcome, one could have conceivably argued for the claim that Russia tried to deceive. As suggested by Fairclough and Fairclough, to be able to show that an argument aims to deceive, one has to show the deceptive intention, and this is not possible based solely on argumentation analysis.[349] Rather, this would be a tentative judgement which may be argued for and confirmed to some degree based on the broader context,[350] hence my reliance on official documents and scholarly writings as well as other proposals relating to the Polar Code.

As suggested by the above example, a great deal of interpretation was often needed when evaluating the documentary material. In my articles I have taken particular care to using extensive quotes and references to these texts in order to substantiate my interpretation and demonstrate the reliability of my argumentation.

[349] Ibid., 97.
[350] Ibid.

5 Interpretation of major findings

Russia in the context of Arctic shipping is an interesting case in itself, with conflicting signals and policies: between a rhetoric aimed at trans-Arctic international traffic and a preference for destinational shipping supporting its resource activities; between legislation tending towards alignment with international law and an emphasis on the national nature of the NSR; and between an interest in the highest practicable international standards for polar shipping and a reliance on contested unilateral rights based on Article 234 of the LOSC.[351] Russia's part in the negotiation of the Polar Code is the focus of this research because of Russia's key role in Arctic shipping. Russia did promote its interests in the debates on the Polar Code but that is, of course, the case of other participants as well. In this sense, Russia is not a unique case. Russia is made special in the case of Arctic shipping because of its unilateral national regulations. It is, therefore, relevant also to compare Russia with the only other actor in a similar position: Canada. Thus, below I discuss Russia on its own, then widen my scope to include Canada. The Polar Code negotiations could not escape the question of Article 234 of the LOSC – with Russia and Canada on one side of the debate. By considering this issue as well as the major principles of the law of the sea, the discussion will be extended further to examine how actors use international technical organisations and how the creation and interpretation of international legal instruments can be understood in this light. Finally, I return to the Polar Code to give my account of whether the Code should be seen as a good agreement, what can be said of its future and new developments for regulating polar shipping as well as Russia's place in these, and what direction research should turn to as a consequence of the research presented in this PhD thesis.

5.1 Russia, the actor

Here I will elaborate on my findings regarding Russia, both when it comes to the substance of the Polar Code negotiation and the mode of Russia's utterances in these debates. The former speaks to Russia as an actor as regards Arctic shipping, while the latter speaks to Russia with regards to its deliberative performance at the IMO more generally. I bring these points together in a summary to discuss a couple of pertinent observations.

5.1.1 Russia as an actor in Arctic shipping

From *Russian Proposals on the Polar Code*, two things are evident as regards the issues Russia pursued during the negotiation process. First, there was a clear distinction in how Russia approached the pursuit of interests between the first half of the negotiations up to the conclusion of DE 56 and the second. Before the Russian-championed principle of priority was finally rejected at DE 56, Russia's proposals were two-pronged – 1) dealing with distinctly technical, less controversial safety matters and 2) directly concerning Article 234[352] – while after DE 56,

[351] Chircop, "Jurisdiction over Ice-Covered Areas," *supra* note 35, 287.

[352] The two issues only mesh in one sentence in document DE 56/10/14, *supra* note 303, 1. Otherwise, unlike Canada, Russia kept issues such as the Ice Certificate separate from the jurisdictional question, see Bognar, "In the Same Boat?" *supra* note 143.

Russia concentrated on single issues where its interests were clearly affected by the Code.[353] This discussion speaks to how Russia dealt with the dilemma between national regulations and international regulations. There was clearly a preference towards the national, as first pursued by the principle of priority, followed by both an aim to align the Code with Russian regulations – as suggested by the multiple references made to the suitability of Russia's NSR regulations[354] – and a support shown for Canadian efforts respecting savings clauses. On the side of the international, Russia appears to have favoured safety measures, chiming with academic literature on Russia and Arctic shipping.[355] However, such efforts subsided after the DE 56 meeting, with a notable exception being the (now recommendatory) regulations on icebreaker assistance[356] and some of the arguments used against POLARIS.[357]

Second, I have found that Russia's proposals showcased a great range of issues and were influenced by concomitant interests – both those that could be reconciled with the contours of the common good and those directly conflicting with it, as suggested by *Russia and the Polar Marine Environment*. To systematise these, we can first discuss issues and interests connected to Russia in its *coastal State* capacity. Within this category, Russia pursued *jurisdictional* interests relating to Article 234 of the LOSC and upholding the primacy of its unilateral national regulations over the new international instrument, thus potentially overriding it and negating its goal and effect. Related to this were issue areas that flowed directly from the existence of specific national regulations, such as icebreaker assistance and ice navigators,[358] contributing to Russia's interest in maintaining control over the NSR waters. Further, Russia's interests as a coastal State include both utilisation-oriented and environmental protection-oriented interests.[359] As regards *utilisation*, I have suggested the protection of its largely unseaworthy Far Eastern fishing fleet as well as the many different issues connected to vessels serving economic projects in the Arctic as important interests – although the latter is more clearly linked to Russia in its flag State capacity as I will reiterate below. Meanwhile, the pursuit of *environmental protection*-oriented interests is a little more ambiguous. I stated in *Russian Proposals on the Polar Code* that Russia did not oppose the introduction of new, stringent regulations for the discharge of noxious liquid substances and untreated sewage and, thus, protected (some of) its environmental protection-oriented interests.[360] Having said this, these

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[353] Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 126.
[354] Ibid., 127.
[355] Zagorski, "Perspective," *supra* note 104, 223-225.
[356] Polar Code, *supra* note 2, Part I-B, 3.2. See also Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 121-122.
[357] Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 123-124.
[358] See Bognar, "Comparative Analysis," *supra* note 308.
[359] My notion of these two orientations originates from a distinction drawn by Erik Molenaar between "utilization-oriented coastal State interests" and "conservation-oriented coastal State interests" in the case of the negotiation of the Central Arctic Ocean Fisheries Agreement, see Erik J. Molenaar, "The CAOF Agreement in the Broader Context of International Law" (paper presented at the Eleventh Polar Law Symposium, Tromsø, Norway, October 2-4, 2018).
[360] Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 128.

issues were not among the most contentious facing delegations with regard to environmental protection. Certainly, the issues of the ban on the discharge of oil and oily mixtures, the establishment of special areas, the regulation of grey water discharges and a ban on HFO use and carriage – examined at detail in *Russia and the Polar Marine Environment* – created more discord. In these areas, Russia placed greater weight on interests other than its environmental protection-oriented coastal State interests, even going as far as to suggest that no special treatment was necessary for polar waters.[361]

Furthermore, I already alluded to Russia acting in its *flag State* capacity. This manifested itself first and foremost in the discussion on technical safety issues related to shipping in Arctic waters, in which admittedly Russia has great experience. Related to this is the interest in upholding its approach to limiting ship operations in ice, which has seen Russia also try to amend the POLARIS system. As I suggested in *In the Same Boat*, this is again an area where Russia's interests in its flag State capacity and its coastal State capacity – this time with regards to jurisdiction and control – intertwine in order to gain indirect influence over ships sailing off its coast.[362] Moreover, it is notable that Russia supported its call for the principle of priority from a safety perspective, suggesting a further entanglement. Another area where Russia's interests in its flag and coastal State capacity – regarding resource utilisation – influenced each other is the discharge ban on oil and oily mixtures in the Arctic. This ban negatively impacted Russia in its capacity as the major flag State to ships in the NSR water area and beyond,[363] thus having a potential knock-on effect on its activities extracting resources in its Arctic Zone. Russia also opposed the discharge ban with a consideration of transit-shipping along the NSR. In regard to this, however, Russia is a coastal State, not a flag State. Furthermore, linked to safety concerns, Russia as a significant *State providing experienced crew* for polar voyages was also engaged in debates on crew training.[364] Finally, Russia is also a *port State* in the Arctic. Yet in its port State capacity, the one thing Russia was interested in – rather than, for example, certificates and ensuring compliance through port State control – was that no provision should

[361] Bognar, "Russia and the Polar Marine Environment," *supra* note 141, 39 and 41.

[362] See the treatment of operational and access limitations in light of the issue of safeguarding national regulations in Bognar, "In the Same Boat?" *supra* note 143. See also the discussion in Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 123-124.

[363] The discharge ban applies to ships in polar waters even if they are sailing between two ports of the same State. As an example, ships sailing between Arkhangelsk (falling outside of the NSR and the Polar Code application area) and Sabetta (a port along the NSR and within the Code's application area) would be required by the Code to observe the discharge ban once they enter the Code's application area.

[364] The issue of crew training may also be interpreted as a show of competitiveness from Russia, as at the 2nd meeting of the HTW Sub-Committee, Russia stated that it is

> at this moment prepared to implement the requirements for training of crew on board ships operating in polar waters on the national legislation level, with no transitional period, as of 1 January 2017, i.e. from the date of entry into force of the Polar Code.

IMO, "Report to the Maritime Safety Committee," IMO Doc. HTW 2/19, February 6, 2015, Annex 9, 2.

be included in the Code requiring it to establish or upgrade reception facilities in all of the ports facing the Polar Code application area, countering general shipping interests.

Looking at the ways in which Russia was impacted by the new measures of the Polar Code, I have shown that Russia is not a distinctly coastal State or maritime user State in the Arctic.[365] Three groups of interests were influential in Russia's positions in the negotiations. First is the jurisdictional coastal State interest. While pursued through the principle of priority and support for the Canadian savings clauses, this interest also stands somewhat apart from the other two which are, in turn, greatly enmeshed. These are the utilisation-oriented coastal State interests and shipping interests which affect Russia in its flag State capacity. Inasmuch as regulations affected Russian-flagged ships, or ships serving Russian resource development-related Arctic projects, the entanglement of these two groups of interests was not problematic. It appears that Russia's concerns as regards shipping are limited to ships flying the Russian flag and ships otherwise related to its Arctic activities, since it argued against other issues that were in the more general interest of flag States, such as the requirement for reception facilities in every Arctic port. Moreover, while Russia appealed to universality among sea areas in its effort to overturn the discharge ban,[366] the exemptions to the ban that it later pursued favoured Russian vessels very much. The complex of shipping – at least as far as ships of interest to Russia are concerned – and utilisation-oriented coastal State interests were furthered by trying to align the Polar Code's requirements with Russian regulations and by keeping the stringency of environmental protection measures to a minimum.

There appear to be several clashes between Russian interests and the common good defined for the Polar Code negotiations. Firstly, Russia's jurisdictional coastal State interest clashes with the procedural element of the common good, uniform and universal standards. Secondly, Russian shipping and utilisation-oriented coastal State interests clashed in several key areas with the environmental protection element of the common good, resulting in Russia's environmental protection-oriented coastal State interests being pushed into the background, only to be followed with regard to less intrusive and controversial questions such as noxious liquid substances.

Thus, interestingly, if we define the coastal State jurisdiction principle of the law of the sea narrowly here, with reference to environmental protection due to the focus of Article 234 of the LOSC (although brief reference is made to its resource exploitation dimension in the Introduction) we could say that, on issue-specific agenda items of the Polar Code, Russia struck a balance between freedom of navigation and coastal State jurisdiction that tended to lean towards the former. Yet, when looking at the purely jurisdictional questions stemming from Article 234 – i.e. the principle of priority and the savings clauses – the Russian emphasis is decidedly towards coastal State jurisdiction. However, the coastal State jurisdiction principle

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[365] Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 128.
[366] Bognar, "Russia and the Polar Marine Environment," *supra* note 141, 43.

can also be defined more broadly, with reference to sovereignty, security and resource development. In that regard, both Russia's utilisation-oriented interests *and* shipping interests – albeit limited to its own ships – fall in line with coastal State jurisdiction. Concerning the higher-level principles identified behind coastal State jurisdiction in *The Elephant in the Room*,[367] of primary importance for Russia are sovereignty, identity, security and resource development, with environmental stewardship holding less importance.

The Soviet Union was always a special case with regard to Article 234, as it was interested both in a special status for Arctic waters – as was Canada – *and* in the specific iteration of the navigational freedom provided for in the transit passage regime for international straits in general – as was the United States. The reconciling of these objectives was relatively easy for the Soviet Union whilst extensive shipping in Arctic waters was not envisaged due to ice cover. The tension between the special status for Russia's Arctic waters and navigation rights has come to the surface now. However, it is not so much due to the increasing ship traffic *per se*, but to the stringent environmental protection measures of the Polar Code which threaten to impede, or at least make more costly, Russia's economic activities in the region.

This has resulted in a mismatch of priorities in the Polar Code process, whereby Russia's material interests support some orientation towards freedom of navigation, at least for Russian ships, while its jurisdictional interests tend towards coastal State jurisdiction supported by Article 234. It appears that Russia is pulled between the two competing principles in the case of the Polar Code. Reconciling these interests is only possible if we understand the coastal State jurisdiction principle in a broader sense and place environmental protection behind other higher-level abstractions supporting this principle for Russia.

5.1.2 Russia's deliberative performance at the IMO

While there were many interests Russia pursued in its proposals to the Polar Code process as discussed above, there was clearly a difference between them. I start here with the two poles of common good and non-generalisable self-interest. On the one hand, Russian proposals for safety measures in the new Code can be placed at the common good end of the spectrum. While some of these were left out of my discussion due to their highly technical nature, they cover icebreaking capability, equivalency of polar classes for ships, machinery and icebreaker escorts.[368] Even where, as in the case of icebreaker escorts, they bear a strong similarity to Russia's NSR Rules, thus suggesting an attempt to align the Code with Russian regulations,[369] I argue that these efforts should be seen as furthering the safety element of the common good. On the other hand, at the other end of the spectrum, Russian proposals clashed on several fronts

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[367] Bognar, "Elephant in the Room," *supra* note 145, 189.

[368] See e.g. Russian Federation, "Development of a Mandatory Code for Ships Operating in Polar Waters: Comments on Document DE 54/13/4," IMO Doc. DE 54/13/10, August 31, 2010. See also Russian Federation, "Development of a Mandatory Code for Ships Operating in Polar Waters: Ice Certificate Used in the Russian Federation," IMO Doc. DE 55/12/22, January 31, 2011.

[369] Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 121-122.

with the common good, both its procedural element – in the case of the principle of priority – and its environmental protection element – best evidenced in the case of the debates on the ban on oil and oily mixture discharges.

These issues were promoted unsuccessfully by Russia. They directly showed that Russia missed the point of the Polar Code: pushing both for unilateral national – as opposed to uniform and universal – regulations as well as for environmental protection standards that were not more stringent than elsewhere and thus did not take into account the special circumstances of polar waters already acknowledged when setting the contours of the common good.[370] Besides the issue of the discharge ban, where Russia suggested that there was no need for more stringent environmental protection standards than in other sea areas, another example is Russia's push for leaving the northern part of the Bering Sea out of the geographical definition of the Polar Code. This would have resulted in less stringent standards for these areas than those provided for by being included in the Polar Code application area.[371]

Yet, the fact that they substantively contradicted the common good is only one – or one part of the – explanation why these Russian proposals failed to gain traction. Added to this are more procedural elements: that decisions had already been reached – as in the case of the discharge ban and the geographical boundaries – as well as the irrelevance of some of the justifications provided by Russia for its positions – such as repeated references to long Russian experience in Arctic shipping or where the Russian legislation draws the boundary for the NSR. These go against the (unwritten) rules of how debates at the IMO are conducted. At best then, these points suggest that Russia did not understand what is expected of, and appropriate for, member States when reasoning at the IMO. At worst, they indicate a Russian disregard for deliberation at the IMO.

On the flip side and moving towards the middle of the scale between pure common good and self-interest conflicting with the common good, some Russian proposals based on self-interest did succeed, demonstrating that they represented generalisable interests. Notably, there was a growing understanding on Russia's part that such proposals had to fit within the contours of the common good, for example in its proposal for a grace period from the discharge ban on oil and oily mixtures, which was limited in both time and scope and abandoned earlier efforts to overturn the ban. In addition, these proposals paid more attention procedurally: they included more relevant explanation, including how Russian interests would be affected, they did not try to overturn decisions already agreed or they introduced proposals on issues where decisions hadn't yet been reached.[372] What is more, in some cases other parties took similar positions in

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[370] Bognar, "Russia and the Polar Marine Environment," *supra* note 141, 43.

[371] Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 122-123.

[372] In the latter regard, I have to account for the issue of reception facilities. Here, decision was reached by the intersessional working group. However, the meeting of the intersessional working group took place between Russia's submission of its proposal on reception facilities to MEPC 67 and MEPC 67 itself. Thus, technically, the

these debates to Russia, for example CLIA as regards POLARIS[373] and Canada and environmental NGOs as regards reception facilities,[374] lending a degree of support to Russia. These points then suggest instances of deliberative negotiation.

Having accounted for Russia's pursuit of the common good, generalisable self-interest and non-generalisable self-interest, there are further factors that point to a bargaining stance employed by Russia in the debates on the Polar Code. These appear to be independent of the content of the proposals and point to more general issues. Above, I have already suggested that the coincidence of a substantive clash with the common good and indifference to the rules of IMO debates, including what counts as relevant argument, can be interpreted as a disregard for deliberative ideals. Such a conclusion is further supported by instances of Russian reliance on its unequal power relations vis-à-vis smaller actors and the employment of demands,[375] as well as recourse to strategic uses of arguments.[376] These are all squarely in the bargaining end of the spectrum. Coupled with – and similar to – the use of unequal power relations towards smaller States and industry actors in the case of reception facilities, is Russia's disrespect towards environmental NGOs, exemplified by its disregard for environmental NGOs' arguments and their not "well substantiated" proposals in the early debates on what the environmental part of the Code should cover.[377] Such an approach has also been observed by the author at MEPC 68 with regard to agenda items unrelated to the Polar Code. Although environmental NGOs are "only" consultative organisations, not members of the IMO, they do have the right to express opinion in the debates – something Russia appears to deny them, thus suggesting a refusal of the deliberative ideal of mutual respect and equal participation. Finally, Russia itself has been subject to criticism due to its cherry-picking of scientific research.[378] Scientific research as external authority to arguments is an important element of deliberation where what counts is the power of the better argument, and Russia's disregard for it further shows a tendency towards a bargaining stance.

Russian proposal did not try to open up an already taken decision. See also Bognar, "Russia and the Polar Marine Environment," *supra* note 141, 42.

[373] CLIA, "Consideration and Adoption of Amendments to Mandatory Instruments: Comments on Document MSC 94/3/7 (POLARIS)," IMO Doc. MSC 94/3/18, September 26, 2014.

[374] Bognar, "Russia and the Polar Marine Environment," *supra* note 141, 41-42.

[375] Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 120-121.

[376] Bognar, "Russia and the Polar Marine Environment," *supra* note 141, 43.

[377] Ibid., 38.

[378] This criticism is best exemplified by a document submitted by the CSC to MEPC 68 with regard to black carbon emissions in the Arctic. On the basis of the lack of proper scientific citations and the use of limitations biasing the research outcome, CSC claimed that a Russian submission "should be considered as a narrative without any sound scientific basis." Clean Shipping Coalition, "Air Pollution and Energy Efficiency: Why Work on the Impact on the Arctic of Black Carbon Emissions from Ships Should Continue," IMO Doc. MEPC 68/3/19, March 19, 2015, 3.

5.1.3 Summary remarks

One pertinent point to take away from what has been said so far concerns the procedural: the Russian tendency towards a more general bargaining strategy with demands, reliance on unequal power relations as well as disrespect for deliberative ideals. The second point is substantive and concerns Russia's pursuit of self-interest – both generalisable and clashing with the common good – even if it is acknowledged that generalisable interests contribute to the common good and early Russian proposals on safety measures are more directly aligned with the common good. In *Russia and the Polar Marine Environment*, I already alluded to Russia's zero-sum approach regarding environmental protection measures,[379] and it is hard to escape the same conclusion when looking at how Russia acted in the international negotiations of polar shipping regulations at the IMO in general: Russia's aim is to avoid being unduly negatively affected where others escape the effect of the new rules on account of their lower stake in polar waters. This points to Russia as an actor in the negotiation of regulations for Arctic shipping who is more influenced by the logic of consequences than by the logic of appropriateness, an actor more in the rationalist interpretation or, in Abbott and Snidal's categorisation, more of an interest actor.[380] This is so even if we acknowledge the instances of deliberative negotiation that show a developing understanding of playing by the rules on Russia's part. Such an understanding of Russia at the IMO, and in the case of the Polar Code negotiations in particular, also appears to align well with the views of those scholars who point to tensions between Russia in the international arena and its national interests and who suggest a more realist Russian understanding of multilateralism and foreign policy in general.[381]

Moreover, I noted both in *Russian Proposals on the Polar Code* and in *In the Same Boat* the lack of Russian leadership on the Polar Code: the reactive nature of Russia's engagement with the process, its relatively small contribution as measured by the number of proposals and arranged workshops and draft texts, and the emphasis on its leadership on Arctic shipping only in its rhetoric.[382] Russia's lacklustre approach can be contrasted with the area where it had the potential to utilise its experience and showed early promise of leading towards the common good, i.e. safety measures. In this context, it has been noted that safety measures have not been seen by Russia as so difficult and intrusive as environmental protection measures and, thus,

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[379] Bognar, "Russia and the Polar Marine Environment," *supra* note 141, 43.

[380] Abbott and Snidal, "Values and Interests," *supra* note 152, S145.

[381] See e.g. Rowe and Torjesen, "Key Features of Russian Multilateralism," *supra* note 13, 2; Zagorski, "Multilateralism in Russian Foreign Policy Approaches," *supra* note 13, 49; and Bertil Nygren, "Using the Neo-Classical Realism Paradigm to Predict Russian Foreign Policy Behaviour as a Complement to Using Resources," *International Politics* 49, no. 4 (2012): 517-529. For Russia's zero-sum thinking and rationale based on relative gains in its discourses on the European Arctic, see Leif Christian Jensen and Pål Wilter Skedsmo, "Approaching the North: Norwegian and Russian Foreign Policy Discourses on the European Arctic," *Polar Research* 29, no. 3 (2010): 444-448.

[382] Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 127-128; and Bognar, "In the Same Boat?" *supra* note 143.

could potentially be considered low politics, lending themselves to cooperation.[383] The lack of contribution to multilateral processes from Russia, a State that views itself as a leader and a relevant power was also highlighted by Zagorski,[384] while Russia's need to be among the leaders in the multilateral setting and its use for the affirmation of its great power status was noted by Elana Wilson Rowe and Stina Torjesen.[385] The importance of the UN for Russia due to its position as a permanent member of the Security Council is of note. However, although the IMO is a UN specialised agency, Russia does not enjoy a similar privileged status in the IMO. Likewise, Russia does not have the same status at the IMO as it enjoys at the Arctic Council, where it is one of a small "club" of Arctic States with full membership.[386] This might explain both its reactive stance and its perceived need to emphasise its leadership in the Polar Code process. In fact, Russia tried to defer decision on port reception facilities to the regional level, to the Arctic Council,[387] perhaps in a bid to move the issue to an arena where it can better protect its interests.[388]

Being only one of two States for whom coastal State jurisdiction is a central question and, therefore, unilateral national regulations need to be carefully balanced against international regulations, I will now turn to look at how we may characterise Canada's contribution to the Polar Code process and discuss Russia in that light, answering my comparative research question.

5.2 Russia and Canada in the Polar Code negotiations

In *In the Same Boat*, I showed both Russia's and Canada's positions in the Polar Code negotiations – as regards the questions of national regulatory systems and environmental protection measures – as being affected by their particular interests. Not even Canada, traditionally a coastal State associated with a strong environmental protection focus,[389] was

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[383] Rowe and Torjesen, "Key Features of Russian Multilateralism," *supra* note 13, 13-14. For the distinction between safety and environmental protection measures in the case of the Polar Code, see Zagorski, "Perspective," *supra* note 104, 223-225.

[384] Zagorski, "Multilateralism in Russian Foreign Policy Approaches," *supra* note 13, 50-54.

[385] Rowe and Torjesen, "Key Features of Russian Multilateralism," *supra* note 13, 8-12.

[386] Arctic Council, "Member States," https://arctic-council.org/index.php/en/about-us/member-states (accessed June 3, 2019).

[387] Russia stated:

> These days, the Arctic Council Member States within the [Protection of the Arctic Marine Environment Working Group] activities are discussing the matter of adequacy of port reception facilities in the Arctic region. After this work has been completed and in case any recommendations [sic] are proposed different from the above, the [IMO] may resume its consideration of the matter in question.

Russian Federation, "Mandatory Code for Ships Operating in Polar Waters: Comments on the Report of the Polar Code Correspondence Group (Part II-A, Chapter 1)," IMO Doc. MEPC 67/9/4, August 15, 2014, 2.

[388] On the matter of subsidiarity in Russia's Arctic policies, see Zagorksi, "Russia's Arctic Governance Policies," *supra* note 13, 107-110.

[389] E.g. Tan, *Vessel-Source Marine Pollution*, *supra* note 3, 71-72; and Suzanne Lalonde, "Canada's Influence on the Law of the Sea," *Canada in International Law at 150 and Beyond* Paper no. 7 (Centre for International Governance Innovation, February 2018).

immune to protecting some of its other interests.[390] However, as I will later show, the pursuit of interests that can support or reasonably fit within the contours of the common good is not unique to Canada and Russia. Quite the contrary.

What sets these two States apart from the rest of the international community in the Polar Code process is twofold. First, being the largest coastal States facing the Arctic, they have more at stake in the negotiations materially. This is reflected in the wide array of topics their proposals covered. The issue areas covered by Russia have been accounted for both here and in *Russian Proposals on the Polar Code*. Canada's many proposals addressed, among others, oil discharges, the ice class of ships, definition of different temperatures, the PWOM, administrative burden for ships on single voyages and ice navigators.[391] The issue areas represented in Canadian proposals show that Canada, like Russia, was impacted in many different capacities: clearly, coastal and port State capacities but also shipping interests were affected through Canada's reliance on chartered ships, a circumstance Canada emphasised several times.[392] Second, and partially concomitant to their material interests, is Russia's and Canada's jurisdictional stake due to their unilateral national regulations in pursuance of Article 234 of the LOSC, which identifies them clearly as advocates of the principle of coastal State jurisdiction on this matter. This gives Russia and Canada a unique set of values and interests that are notoriously difficult to reconcile with the universal and uniform standards element of the common good in the case of the Polar Code.

Yet Russia's engagement with the Polar Code process was notably different from Canada's in a number of ways. The first is connected specifically to the negotiations and has to do with the common good as defined for the Code. As suggested above, Russia's interests and contribution clashed with the common good on several fronts. Not only was Russia's drive to preserve the

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[390] Bognar, "In the Same Boat?" *supra* note 143.

[391] E.g. Canada, Denmark and Norway, "Development of a Mandatory Code for Ships Operating in Polar Waters: Comments to Proposals Related to an Environmental Chapter of a Mandatory Code for Ships Operating in Polar Waters (Polar Code)," IMO Doc. DE 57/11/18, January 25, 2013; Canada and Norway, "Development of a Mandatory Code for Ships Operating in Polar Waters: Guidance for the Determination of Equivalent Ice Class," IMO Doc. SDC 1/3/8, November 15, 2013; Canada, "Development of a Mandatory Code for Ships Operating in Polar Waters: Information and Guidance Regarding the Use of Temperature," IMO Doc. SDC 1/3/9, November 15, 2013; Canada, "Development of a Mandatory Code for Ships Operating in Polar Waters: Polar Waters Operational Manual," IMO Doc. SDC 1/3/10, November 15, 2013; Canada, Liberia and the Marshall Islands, "Mandatory Code for Ships Operating in Polar Waters: Reduction of Administrative Burden," IMO Doc. MEPC 67/9/11, August 22, 2014; and Canada and the Marshall Islands, "Consideration and Adoption of Amendments to Mandatory Instruments: Draft International Code for Ships Operating in Polar Waters (Polar Code) – Compliance with Requirements for Trained and Certificated Personnel," IMO Doc. MSC 94/3/10, September 12, 2014. For a general overview of Canada's contribution to the Polar Code negotiations, see Chircop, Pamel and Czarski, "Canada's Implementation of the Polar Code," *supra* note 297, 433-440.

[392] E.g. MEPC 67/9/11, *supra* note 391, 2; MSC 94/3/10, *supra* note 391, 2; and Canada, "Consideration and Adoption of Amendments to Mandatory Instruments: Draft International Code for Ships Operating in Polar Waters (Polar Code) – Clarification of Certification and Consideration of Administrative Burden," IMO Doc. MSC 94/3/11, September 12, 2014, 2.

primacy of its unilateral national regulations contradictory to the universal and uniform standards element of the common good, the content of many of its proposals was directly at variance with the environmental protection element as well. Meanwhile, for Canada, only the former caused a problem. As regards the environmental protection measures of the Code, Canada was firmly on message.[393] In fact, one of the main reasons Canada opposed the proposed reception facility requirement was that it would have resulted in delayed implementation of the discharge ban.[394] Furthermore, as stated, Canada's national regulations have a more environmental protection focus than Russia's – the latter, as Jan Solski points out, being more recently influenced by an increasing security focus,[395] while also focusing on profitability – and Canada's contribution to the Polar Code's environmental measures shows a better consistency with its stringent national environmental protection regulations, suggesting that Canada is more of a value actor than Russia in Abbott and Snidal's sense, led by the logic of appropriateness.[396]

If we follow the suggestions above, supported by the lack of reference to environmental protection in the Russian Polar Code submission, which propose a principle of priority based on Article 234 of the LOSC,[397] it appears that, for Russia, following the principle of coastal State jurisdiction defined narrowly in an environmental protection sense is less a value in itself, and more of interest in helping it maintain control over the NSR. To be sure, the coastal State jurisdiction principle in the broader context of other abstractions, such as sovereignty and security, is very much a value for Russia. Yet the lesser value of the narrowly construed coastal State jurisdiction partly explains Russia's less significant engagement and commitment in the debates about the proposed savings clauses, which was of primary importance for Canada. In addition, as Zagorski notes and I also indicate in *In the Same Boat*, Russia is not afraid of acting unilaterally if it sees its interests better served that way than by working through international

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[393] Bognar, "In the Same Boat," *supra* note 143. Canada was not among those Sates that proposed the discharge ban on oil and oily mixtures in the first place. However, Canada did not have to propose the ban as a similar prohibition is already in place in the Canadian Arctic. This would just gain additional support both from a discharge ban in the Code and if the Code acknowledged the rights provided for in LOSC Article 234 through the Canadian-proposed savings clauses.

[394] Bognar, "Russia and the Polar Marine Environment," *supra* note 141, 41-42; and Bognar, "In the Same Boat?" *supra* note 143.

[395] Solski, "Russia," *supra* note 14, 210-213.

[396] As Abbott and Snidal point to a normative consistency of value actors spanning different areas, including their "personal behaviour," which for States might be equated with their domestic politics and law. See Abbott and Snidal, "Values and Interests," *supra* note 152, S145-S150.

[397] Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 117-119.

organisations.[398] While this is not an exit-option in the sense of bargaining,[399] it has nevertheless been a more viable backup option for Russia than for Canada.

The second set of differences between Canada and Russia concerns leadership. While I have covered this elsewhere,[400] a couple of points may be added here. First, Canada is far from being alien to unilateral action – indeed, the introduction of its Arctic Waters Pollution Prevention Act (AWPPA) is a case in point.[401] Yet, as Suzanne Lalonde shows, Canada has been forward thinking in its unilateral actions, leading international law towards important change in line with emerging values in environmental protection and resource conservation.[402] Further, Canada has always appeared preoccupied with creating international legal bases, acknowledging its unilateral actions as legal.[403] Canadian leadership in the wider Polar Code process, starting in the 1990s, while not as ground-breaking as on Article 234 itself – although Lalonde points out that the influence of the unilateral Canadian act in the 1970 AWPPA even has an impact on the Polar Code[404] – is indisputable.

Second, Canada has shown more willingness to cooperate with other States and create sometimes unlikely alliances to support and further its positions compared to Russia. It should be noted, however, that Canada did not have co-sponsors when it submitted its several proposals on the savings clauses to regulate the relationship between the Code and the LOSC. By comparison, throughout the negotiations of the Polar Code, Russia remained largely a lone actor, at least as far as cooperating on proposals was concerned, even in the case of safety

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[398] Zagorski, "Multilateralism in Russian Foreign Policy Approaches," *supra* note 13, 49; and Bognar, "In the Same Boat?" *supra* note 143.

[399] Russia never threatened with a withdrawal from the Polar Code process which, beyond negating the positive impacts of developing an international code for ships in polar waters, would have come at a huge reputational cost at the very least, and would technically have been difficult in the setting of an international organisation without touching on the other issues pursued by the IMO. Hence, unilateralism was never a real exit-option.

[400] Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 113-114 and 128; and Bognar, "In the Same Boat?" *supra* note 143.

[401] Canada, Arctic Waters Pollution Prevention Act (Revised Statutes of Canada, 1985, c. A-12) as amended (AWPPA).

[402] Lalonde, "Canada's Influence," *supra* note 389.

[403] E.g. Franckx, *Maritime Claims*, *supra* note 14, 95. Conversely, there have been periods in Canadian foreign policy that have been characterised by an observed increase in unilateral practices and turn away from the multilateral approach of liberal internationalism, notably during the tenure of Prime Minister Stephen Harper (2006-2015). Although Petra Dolata shows the continuity in the fundamentals of Canadian Arctic policy between Harper and previous governments, she notes the unilateral and controversial nature of the Harper government's decisions to extend the application area of the AWPPA from 100 to 200 nautical miles and to make NORDREG mandatory, see Petra Dolata, "A New Canada in the Arctic? Arctic Policies under Harper," *Études canadiennes / Canadian Studies* 78 (2015): 144. Indeed, Canada did not ask for IMO adoption of its mandatory NORDREG system and only submitted details of it for IMO recognition after it was initially challenged by the United States and others at NAV 56, see e.g. NAV 56/20, *supra* note 138, 49; and IMO, "Report of the Maritime Safety Committee on Its Eighty-Eighth Session," IMO Doc. MSC 88/26/Add.1, January 19, 2011, Annex 27, 1.

[404] Lalonde, "Canada's Influence," *supra* note 389, 6.

measures which, as stated, lend themselves more to cooperation from Russia's perspective.[405] At the same time, surprisingly many of Canada's proposals covered safety-related issues, showing its leadership not only when it comes to environmental protection.

However, things appear to be changing, with new developments both for Russia and for Canada. Two issues are prominent here: a proposal for regional reception facilities in the Arctic submitted by all eight member States of the Arctic Council;[406] and impact assessment of the proposed ban on HFO use and carriage for fuel, led by Canada and Russia.[407] This shows a new direction for Russia in cooperating with other States on tabling proposals as will be further discussed in section 5.4.2. On the flip side, this might suggest more of a compromise approach by Canada, acknowledging competing interests to environmental protection, especially indicating less stringent standards in the case of reception facilities.[408]

The last set of differences between Canada and Russia, which also touches on leadership, is the way in which Canada relied on the rules of the IMO's system to a greater extent to achieve success – and this is particularly evident with the issue of the savings clauses. While still relevant in regard to the Polar Code, this is connected more to general traits of how the two States deal with international decision-making. While, as shown, Russia did not shy away from bargaining and a zero-sum approach, Canada stayed within the bounds of deliberative negotiation. Canadian interests were generalisable, particularly when it came to its substantive proposals such as that on reception facilities. As regards the jurisdictional question, there is more to consider. As suggested in *In the Same Boat*, Canada might have learnt from earlier debates at the IMO regarding its NORDREG system, which showed the controversial nature of discussing Article 234 of the LOSC directly.[409] Added to that was the probability that any discussion of unilateral national regulations would fall foul of the universal and uniform element of the common good. To avoid that, Canada resorted to a creative way of reasoning, using second-best arguments. This approach involved providing very real arguments for considering the inclusion of savings clauses in the new text, while also showing respect to other States' principled beliefs, both significant deliberative ideals.[410] Such considerations, especially respect for other States, were notably absent in Russia's approach in general, which involved trying to bully its way through smaller actors, showing disrespect in the process and

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[405] Bognar, "Russian Proposals on the Polar Code," *supra* note 139, 113-114; and Bognar, "In the Same Boat?" *supra* note 143.

[406] MEPC 72/16, *supra* note 109.

[407] Canada and the Russian Federation, "Development of Measures to Reduce Risks of Use and Carriage of Heavy Fuel Oil as Fuel by Ships in Arctic Waters: Report of the Informal Correspondence Group on the Determination of an Appropriate Impact Assessment Methodology," IMO Doc. MEPC 73/9, August 17, 2018.

[408] Bognar, "In the Same Boat?" *supra* note 143.

[409] Ibid.

[410] E.g. Mansbridge, "Deliberative and Non-Deliberative Negotiations," *supra* note 150, 2. Also consider Elster's suggestion that the use of arguments might be justified by "fairness to avoid humiliating an opponent," Elster, "Strategic Uses of Argument," *supra* note 188, 248.

addressing Article 234 directly without any apparent awareness as to how it might be received by other States.

To sum up, even though many aspects of the international regulation of Arctic shipping affect them in similar capacities – and through that their interests – Russia and Canada appear to understand their roles differently and these understandings are often contradictory. These differences appear to stem from their general attitude towards international decision-making, coupled with the content of their unilateral national regulations, notably as regards environmental protection.

5.3 Implications for decision-making at the IMO

In the following sections I discuss aspects of the IMO's decision-making process as regards the Polar Code, and Arctic shipping more generally, and draw general conclusions from it. First, I will briefly consider how decisions are reached on lower level issues at the IMO, followed by the main discussion as regards the role of deep-seated principles in the decision-making of this largely technical organisation, as well as the law of the sea in general.

5.3.1 Reaching decisions on lower level questions

My starting point here is that, as suggested above, all States at the IMO are concerned with reaching an outcome that reflects, or at least does not significantly impede, their interests. Examples for State interests in the Polar Code negotiations include the proposal by flags of convenience to require reception facilities in every Arctic port;[411] the freedom of navigation interest (and, as discussed in *The Elephant in the Room*, principle) of the United States;[412] or the push for the expansion of the Polar Code to non-SOLAS vessels by States with SAR responsibilities in Antarctic waters.[413]

Of course, State interests can conceivably clash with each other on particular issues even if they fit within the contours of the common good. In spite of that, a binding decision has to be reached and in a timely manner. In spite of the IMO's insistence that it operates by consensus, I have already noted that in many cases decisions are reached by the chair summing up the prevailing mood – in effect a non-deliberative voting mechanism.[414] This suggests that States do not agree on the same outcome, far less having the same reason for agreeing – a prerequisite for consensus.

In fact, one of the weaknesses of the empirical application of deliberative theory is the notorious near-impossibility of knowing the reasons for the parties' agreement to an outcome, at least without asking the participants.[415] In the present research, I avoided this obstacle by focussing

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[411] SDC 1/3/1, *supra* note 275.

[412] See e.g. DE 55/22, *supra* note 304, 24.

[413] See e.g. New Zealand, "Ship Design and Construction: Multinational Impact of Maritime SAR Incidents in Antarctic Waters," IMO Doc. MSC 98/INF.8, April 4, 2017.

[414] Mansbridge et al., "Place of Self-Interest," *supra* note 172, 85-90.

[415] Even then, the issue of potential bias emerges, threatening to distort the findings.

on what and how the parties communicated and what this tells us about the actors and the process. Therefore, why States might have agreed to an outcome was not of such significance here. It is also in acknowledgement of the fact that consensus appears to be an ideal, especially in forums with over a hundred participants, as suggested by Steffek.[416]

While we cannot talk about consensus on the Polar Code in the sense deliberative theory understands it, this does not mean that the outcome should be appraised negatively. I want to make two points here. Firstly, due to the lack of consensus, the often-heard charge that the IMO's decisions represent the lowest common denominator may be cast into doubt. The clearest example of this is the fact that Russia's efforts to overturn the ban on the discharge of oil and oily mixtures in the Arctic have not succeeded. What is more, the decision to ban all such discharges – a significant step in the Arctic – was also the more stringent of the two proposals put to the decision of MEPC 65.[417]

Secondly, while there might not be consensus or even unanimity on all – or maybe any – provisions included in the text of the Polar Code, that does not appear to affect the *whole* of the instrument. In fact, when the environmental part of the Code was up for adoption at MEPC 68, there were no dissenting voices in spite of the fact that some of its provisions, or lack of certain regulations, were not in the best interests of some of the participants.[418] In fact, unless there are objections raised against the Code – and its entry into force suggests that this was not the case – it is safe to say that the final text as a whole is accepted by all. Thus, the adoption of the Polar Code might not be dissimilar from incomplete theorisation inasmuch as the *whole* of the text was adopted and entered into force as acceptable to all even if some (or most) States disagreed with single provisions.

5.3.2 Incomplete theorisation and the influence of high-level principles

While deciding in the case of conflicting interests through a voting mechanism is possible, there is a different conflict that does not lend itself well to such a decision-making mechanism. Due to the fundamental nature of deeply held high-level principles, the resolution of a clash between these requires more delicacy. Technical organisations such as the IMO are not immune to high-level, politically charged principles, such as the two main principles of the law of the sea: freedom of navigation and coastal State jurisdiction. The introduction of such principles to the deliberation of technical organisations can be a side-effect of the topic. However, some States might take their chances on introducing such an issue directly, perhaps hoping for easy gains. In fact, one might consider Russia's principle of priority as a deliberate act of introducing the

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[416] Steffek, "Incomplete Agreements," *supra* note 156, 250.

[417] IMO, "Report of the Marine Environment Protection Committee on its Sixty-Fifth Session," IMO Doc. MEPC 65/22, May 24, 2013, 70.

[418] For example, the grace period added to the discharge ban on oil and oily mixtures was still more limited than what Russia proposed; the Polar Code does not include a provision for reception facilities proposed by flags of convenience and shipping organisations although a similar requirement is already contained in MARPOL; and there is no provision on limiting administrative burden as proposed by Canada.

conflict of principles to the discussions. The provision Russia tried to reinstate through its proposal employing the principle of priority did not directly mention Article 234 of the LOSC[419] and, as I suggested in *In the Same Boat*, Russia could have learnt from the debates on NORDREG the highly-charged nature of the topic.[420] In some cases where high-level principles are introduced, they might be discussed head-on, such as in the case of NORDREG or the principle of priority. However, I argue that the case of the Polar Code shows that most States find it preferable to circumvent the direct discussion of principles, both in order to show mutual respect and to provide for useful ambiguity.[421] In *The Elephant in the Room*, I showed how the conflict of the two principles of the law of the sea was neutralised by avoiding a direct debate on it.[422] Thus, I suggested that the Polar Code should be seen as an incompletely theorised agreement.

By proposing to regulate issues that might affect perceived rights laid down in Article 234 of the LOSC, the Polar Code process perhaps inadvertently introduced the conflict between the two principles to the IMO. It should be borne in mind, as pointed out in chapter 3, that the IMO as a technical organisation has no remit and was never meant to adjudicate on the conflict of these two principles. As such, the avoidance of the discussion and decision on the principles was the correct way of proceeding. Did, then, the principles of freedom of navigation and coastal State jurisdiction play a role in the negotiation of the Polar Code? It might be tempting to answer with a straightforward no. However, that would be an incorrect answer. The two principles played subtle and underlying roles in three ways.

First, the setting of the contours of the common good was affected more by the freedom of navigation principle than by the coastal State jurisdiction principle. Framing the need for the Polar Code by emphasising the pressing lack of an international legal instrument for ships operating in polar waters as well as the interconnected nature of environmental protection and maritime safety, the documents tabling the Code leaned more towards the freedom of navigation principle, given the IMO's policies of universalisation and uniformity. After all, the issue was tabled at the IMO, which aims to regulate the global shipping industry by developing standards which are applied uniformly and universally. This, then, necessarily elicited response from those seeking to uphold and protect their rights under Article 234. Russia and Canada had

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[419] The text of the provision reads:

> The Code is not intended to infringe on national systems of shipping control until a harmonized system is in place; in addition to applicable sections of the Code, port, Treaty and coastal States may retain local navigation rules and regulations for certain routes and waterways under their jurisdiction taking account local conditions, infrastructure and procedures.

DE 53/18/2, *supra* note 297, Annex, 7. This provision seems to originate (although expanded) from the Arctic and Polar Guidelines both of which contain the following text in the Preamble: "The Guidelines are not intended to infringe on national systems of shipping control." See Arctic Guidelines, *supra* note 65, P-2.8; and Polar Guidelines, *supra* note 65, P-2.9.

[420] Bognar, "In the Same Boat?" *supra* note 143.

[421] Bognar, "Elephant in the Room," *supra* note 145, 198.

[422] Ibid.

to mitigate any potential damage, and maybe it was no coincidence that of the five Arctic coastal States it was Denmark, Norway and the United States, not Canada and Russia, that proposed the development of a mandatory code for polar shipping. It is, then, no coincidence either that Russia and Canada were the most active among all the States with regard to the Article 234 issue.

Second, even though direct deliberation on Article 234 and, thus, the conflicting principles was avoided, the positions taken by each side to the savings clause debates, as well as the arguments produced, were directly affected by the principles. The second-best arguments used by Canada were selected to support its position. However, their use restricted what it was possible to achieve and in turn led to a savings clause in the new SOLAS Chapter but not in the MARPOL Annexes. Thus, through this chain, the two principles of the law of the sea had an indirect effect on the SOLAS and MARPOL amendments that make the Polar Code mandatory, and on the relationship between the Polar Code and Article 234 of the LOSC.

Third, the freedom of navigation and coastal State jurisdiction principles had an even more indirect effect on the Polar Code inasmuch as they influenced the substantive proposals relating to the Code and, thus, the Code's content. This is well illustrated by the discussion above on Russia's proposals. Two further points are worth mentioning here. First, the Russian example shows that one particular State might be influenced by both principles to different degrees. This also chimes with what I have said in the chapter on the theoretical framework, namely that the high value placed on one principle on the jurisdictional question of the savings clauses does not mean a rejection of the other principle and its underlying, even higher-level abstractions. Second, having said that the content of substantive proposals was influenced by the principles of freedom of navigation and coastal State jurisdiction, it has to be noted that many proposals on the Polar Code were seemingly unaffected by any of these principles.[423] However, we might interpret such documents as conforming to the principle of freedom of navigation by the endorsement of universal and uniform international regulations, not unlike the documents that proposed placing the Polar Code on the IMO's agenda.

Thus, while technical organisations might not be able to escape being influenced by high-level principles, the effect of these, if contained through techniques such as second-best arguments and incomplete theorisation, becomes limited and indirect.

Here, one final note should be made with regard to incompletely theorised agreements, also foreshadowing the next section's theme. As Steffek argues[424] and my comments in *The*

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[423] Consider, for example, the French proposal that the Polar Code should include a requirement regarding telemedicine, see France, "Development of a Mandatory Code for Ships Operating in Polar Waters: Taking into Account Telemedicine," IMO Doc. DE 57/11/17, January 25, 2013.

[424] Steffek states:

> Negotiators can contain their disagreement by properly circumscribing it in appropriate formulations, and move on. If they know where exactly their interpretations differ, they can also intentionally create textual

Elephant in the Room also suggest, it appears that incompletely theorised agreements are ubiquitous. While Sunstein distinguishes between incompletely theorised agreements and incompletely specified agreements[425] – being roughly the opposite of incompletely theorised agreements, thus containing a decision on high-level principles but not on how that translates into concrete or lower-level resolutions – he does not differentiate *among* incompletely theorised agreements. In following Sunstein, I have not made such a differentiation either. As an example, I suggested that Article 234 itself as well as the 1988 US-Canada agreement are incompletely theorised and, thus, similar to the Polar Code, creating a line of Arctic tradition.[426] In addition, the fact that agreement on conflicting principles and jurisdictional questions was avoided and (textual) ambiguity created in these cases says nothing about how this was achieved, treating such agreements and practices with a broad brush.

5.3.3 Incomplete theorisation throughout

Linked to the idea that States find incomplete theorisation and ambiguity beneficial, I suggest that one of the reasons for this – beyond showing respect for the deeply-held principles of the negotiating partners – is that incomplete theorisation and the resulting ambiguity pushes any resolution and decision into the future, either to a later political agreement but more likely to decisions on practical cases. As I have stated in *The Elephant in the Room*, there is ample precedence for key actors agreeing to disagree in the context of the Arctic.[427]

However, incomplete theorisation goes even further than this. I have said that Article 234 itself may be interpreted as a result of incomplete theorisation.[428] In fact, if we follow Martti Koskenniemi, the *whole* of the LOSC appears as an incompletely theorised agreement – or a series of incompletely theorised agreements – between community and autonomy.[429] He describes the strategy of referral as "the Convention treats conflict – by refusing to treat it," seeking "in vain for a material rule,"[430] where the "apparently material provisions are loaded with terms such as […] 'paying due regard' etc."[431] Thus, the Convention avoids addressing material conflict and makes sure that resolution to conflicts "is to be found in agreement or in standards external to the Convention" by competent international organisations such as the IMO.[432] While I partly concur with Koskenniemi, my view is less pessimistic. I argue below

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> ambiguity – that is, a formulation that lends itself to rival interpretation. Such formulations are indispensable because they can save international negotiation from failure and enable actors to embark on a cooperative enterprise.

Steffek, "Incomplete Agreements," *supra* note 156, 231.

[425] Sunstein, "Incompletely Theorized Agreements," *supra* note 229, 1739-42.

[426] Bognar, "Elephant in the Room," *supra* note 145, 197 and 199.

[427] Ibid.

[428] Ibid., 199.

[429] Koskenniemi, *From Apology to Utopia*, reissue, *supra* note 20, 488-497.

[430] Ibid., 495.

[431] Ibid., 494.

[432] Ibid., 495.

that provisions are given meaning incrementally, bit by bit by technical organisations even if they are trying to avoid solving the conflict of underlying principles.

Yet, the conflicts of two sets of principles – freedom of navigation vs coastal State jurisdiction and community vs autonomy – are cross-cutting. If one interprets the interest of the community of States (and other actors in the international system) as lying in freedom of navigation, then the possible priority of Article 234 (or the autonomy of individual States) over the international regulation in the form of the Polar Code should be judged negatively. If one sees the interest of the community as lying in enhanced environmental protection in the fragile Arctic, giving increased autonomy to Arctic coastal States to prevent, control and reduce vessel-source pollution – even if at the expense of the Polar Code through the possible priority of Article 234 – should then be judged more positively. This shows the impossibility of deciding one way or the other without making value judgements – something both the LOSC and States at the IMO in the debate on the savings clauses apparently avoided.

To conclude, the strategy of using incomplete theorisation and ambiguity to avoid decisions on high-level principles is not necessarily unique to technical organisations. In the case of the LOSC, a series of diplomatic conference sessions comprising UNCLOS III also exercised this technique. If one accepts Koskenniemi's arguments, it is not even unique to the law of the sea but pervades international law.[433] The Polar Code and the IMO's decision-making process utilised for the savings clause debates were, then, not as special as they might appear.

5.4 Implications for the future

5.4.1 Is the Polar Code a good agreement?

In light of the discussions of my findings above, it is natural to consider whether the Polar Code is a good agreement, even if this is not one of the main objectives of this thesis. The Polar Code can be appraised in both substantive and procedural terms. As regards its *substance*, the Polar Code might be appraised as somewhat of a mixed bag, as I have already suggested in the introduction. The Code as a living instrument is just the start of mandatory regulations for polar shipping, while its recommendatory Parts I-B and II-B fit in a line of such measures already in place.

What direction further developments may take is, however, not a given. In the chapter on the theoretical framework, I gave an account of my understanding of the common good, with the contours of it being set through their own deliberation prior to deliberations that are meant to fill those contours. However, what is in the interests of the international community, i.e. the common good, is continuously discussed and reinterpreted. It is reinterpreted in light of both the values and interests of the participants but also in light of what has been achieved in the previous "round" of filling the contours of the common good with content, which itself might have changed the values and interests of the parties. Thus, there is a chain of deliberations

[433] For further examples, see ibid., 484-503.

where what is the common good is continuously deliberated, appraised, adjusted and filled with content, for the whole process to then start again. Such an interpretation of a chain of deliberations on the common good is a reinterpretation of Abbott and Snidal's conception of how values and interests intertwine over time to create law in the legalisation process.[434]

The Polar Code illustrates well such a process, both moving forward to future developments and looking back to the past. The Polar Code grew out of the reinterpretation of what is in the interests of the international community in light of the Arctic and Polar Guidelines. In fact, the documents proposing a mandatory polar code bear a title suggestive of this interpretation: "Mandatory Application of the Polar Guidelines."[435] The case of the second phase of the Polar Code, particularly the questions posed as to whether it should be mandatory, what vessel types should be covered and whether work on it should only commence once experience is learnt from implementing the Polar Code,[436] also shows that the common good is discussed in light of how the contours of the common good set for the Polar Code were filled and where to go from there. Abbott and Snidal illustrate their legalisation process with a chain figure.[437] In this thesis then, I took one element of such a chain and placed it under a microscope; and even within that I concentrated particularly on one actor. Further research might want to look at how other States, and especially non-State actors who largely escaped discussion in this thesis, have influenced the Code and were in turn influenced by it.

While Abbott and Snidal illustrate the legalisation process with a chain-like figure, I would depict the Polar Code process as a tree. This is not in a critique of Abbott and Snidal but more in order to better emphasise three things. First, if we take the Polar Code as the trunk of the tree it can have multiple branches growing out of it, suggesting multiple contours of common good stemming from the Polar Code. By this I mean, for example, the second phase of the Code, the proposed HFO ban in the Arctic, consequential amendments for instruments affected by the Code as well as the issue of a regional approach to reception facilities in the Arctic – all of which were discussed separately. This also links with my discussion below of incremental changes, perhaps in different directions. Second, a tree has roots, showing the different processes that influenced the formulation of the contours of the common good for the Polar Code. This would take into account, for example, the two Guidelines already mentioned, other relevant guidelines for operations in polar waters and the AMSA report. While we take the two proposals by Denmark, Norway and the United States as the starting point of the Polar Code, it is also a fact that other proposals were submitted to the IMO at the same time with similar

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[434] Abbott and Snidal, "Values and Interests," *supra* note 152, S155-S156; and Abbott and Snidal, "Law, Legalization, and Politics," *supra* note 264, 43.

[435] MSC 86/23/9, *supra* note 47; and MEPC 59/20/1, *supra* note 47.

[436] See e.g. IMO, "Report to the Maritime Safety Committee," IMO Doc. SDC 4/16, March 8, 2017, 41-42; and IMO, "Report of the Maritime Safety Committee on its Ninety-Eighth Session," IMO Doc. MSC 98/23, June 28, 2017, 48-50.

[437] Abbott and Snidal, "Values and Interests," *supra* note 152, S155; and Abbott and Snidal "Law, Legalization, and Politics," *supra* note 264, 43.

content but with a different focus or background considerations.[438] Third, the image of a tree also envisages an upwards development and, thus, evolution. This adds a normative dimension to this image, chiming with the need for value judgements on Arctic shipping regulation, highlighted above. In that light, the less stringent standards resulting from the proposed regional approach to reception facilities is a backwards step – both from the perspective of environmental protection and for the needs of the global shipping industry. Inasmuch as the interpretation of lowering standards is correct, the issue of a regional approach to reception facilities could be imagined as a "rotten" branch on the metaphoric tree.

That the regional reception facilities were proposed and the common good discussed in that context shows that the direction of deliberations on the common good is not pre-given. Similarly, what direction the second phase of the Polar Code – and any other, related development – will take is very much dependent on political will and some creative solutions, especially as regards making any new measure mandatory while keeping near-universal coverage.[439]

As regards *procedure*, in *The Elephant in the Room* I suggested that a positive appraisal of the Polar Code is in order, as the IMO's decision-making has survived this test, both in the sense that it achieved an outcome without having to adjudicate on Article 234 and that the Polar Code process followed established IMO procedure, even if it was complicated by the fact that it is made mandatory through two Conventions.[440] Future research might want to further problematise the IMO's decision-making procedure and systematically examine how that affects its outcomes. I have already questioned the IMO's notion of consensus decision-making in this thesis.

One point might alter somewhat the positive appraisal of the Code from a procedural perspective regarding Article 234. Although States at the IMO avoided discussing Article 234 and appeared to leave its interpretation for the future, the Polar Code itself incrementally alters the status quo. The Code does not provide a single solution to the problem of the relationship between Article 234 and the Polar Code and of the underlying principles. However, States at the IMO have broken down the political problem into smaller and more technical issues, such as the ban on the discharge of oil and oily mixtures or the recommendatory guidance for icebreaker assistance or "the use of a person(s) other than the master, chief mate or officers of

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[438] See e.g. United Kingdom, "Ship Design and Equipment: Comments on the Report of the Sub-Committee on Ship Design and Equipment," IMO Doc. MSC 86/12/4, April 8, 2009; and Argentina and Chile, "Work Programme: Safety Measures for Navigation in the Antarctic Area," IMO Doc. MSC 86/23/2, January 27, 2009.

[439] New Zealand proposed a creative way forward to making the regulations in the second phase of the Polar Code binding even in the absence of a mandatory instrument specific to non-SOLAS vessel types to build the second phase of the Polar Code on. This was, however, rejected. See New Zealand, "Ship Design and Construction: Application of the Mandatory Code to Non-SOLAS Ships Operating in Polar Waters," IMO Doc. MSC 98/10/1, March 7, 2017.

[440] Bognar, "Elephant in the Room," *supra* note 145, 197.

the navigational watch" instead of directly allowing coastal States to require the use of ice pilots.[441] Ole Kristian Fauchald argues that the Polar Code encroaches on Arctic coastal States' competence in Article 234,[442] while Knut Einar Skodvin suggests that coastal State regulations will have to be measured against the Polar Code in the future.[443] Instead of such a dramatic interpretation of the relationship between the Code and Article 234, I contend here that the relationship between the two is incrementally altered through technical regulations such as those listed above. Thus, while acknowledging some national practices and regulating them, the Code might provide some legitimacy to these above others. If I have characterised the savings clause debates and incomplete theorisation as the avoidance of a politically charged issue by a technical organisation, I might say here that, through technical regulations, such an organisation does have an unintended effect on political issues through incremental changes and solutions to nitty-gritty technical details, instead of a "grand" resolution to a jurisdictional problem.[444] Thus, rather than an ultimate solution which might risk the participation of major parties or the breakdown of work, the rights in Article 234 can be reinterpreted continuously by States through regulations of technical organisations, such as the IMO's Polar Code and other developments.

It is not just how rights granted in Article 234 should be interpreted and their relationship with the Polar Code that might be incrementally changed by the Polar Code. Some of the – equally vague – conditions placed on the exercise of these rights might be influenced by the Code. I am thinking in particular of the definition of ice-covered areas and how to interpret the clause "the presence of ice covering such areas for most of the year."[445] It is now commonplace to say that even when "ice-free" for parts of the year, the Arctic will not literally be ice free, since different forms of ice will be present to a certain degree in these waters, making the interpretation of the above clause even blurrier. In its Introduction, the Polar Code adopts definitions of different forms of ice developed by the World Meteorological Organization (WMO) contained in the WMO Sea-Ice Nomenclature, such as ice of land origin and sea ice.[446] Furthermore, the chapters relating to pollution by sewage and garbage in Part II-A of the Code relate possible discharges to "areas of ice concentration exceeding 1/10."[447] Although the presence of ice in Article 234 is related to obstructions and hazards posed to navigation, I argue that it would be worthwhile to explore whether the Polar Code's definitions and use of ice concentration could have a bearing on Article 234.

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[441] Polar Code, *supra* note 2, Part I-A, 12.3.2 and 12.3.3.
[442] Fauchald, "Regulatory Framework," *supra* note 42, 82-83.
[443] Skodvin, "Arctic Shipping – Still Icy," *supra* note 42, 157.
[444] I am thankful to a discussion with Hans-Kristian Hernes and Knut H. Mikalsen for the idea of incremental changes.
[445] LOSC, *supra* note 5, Art. 234.
[446] Polar Code, *supra* note 2, Introduction, 2. The WMO Sea-Ice Nomenclature is available at https://library.wmo.int/index.php?lvl=notice_display&id=6772#.XKcU0fZuLl4.
[447] E.g. Polar Code, *supra* note 2, Part II-A, 4.2.1, 4.2.3, 5.2.1 and 5.2.2.

5.4.2 Russia and conclusions for future Arctic shipping regulations

To what extent, and how, the Polar Code will be successfully implemented by Russia cannot be gleaned from IMO documents. Others have, however, already started to look at this based on largely Russian sources.[448] At the same time, it is possible to discuss Russia in light of the most recent and future developments of Arctic shipping regulations. For this, I have to take a step back and briefly return to the empirical – specifically, proposals submitted to the IMO since the adoption of the Polar Code. Here, we need to differentiate between the second phase of the Polar Code, which appears to be more important to, and championed by, States with SAR responsibilities in Antarctic waters,[449] and other, related developments. While there is no trace of Russia's opinion on the former in IMO documentary material, it is important to note that Russia has a stake in Antarctic fisheries which might be impacted if fishing vessels are regulated in the second phase of the Polar Code. Thus, it would be interesting to explore to what extent there are similarities and differences between Russia's contribution to the first phase of the Polar Code's development and the second.

The regulation of Arctic shipping is not only contained in the Polar Code, however. Other new developments relating to Arctic shipping have received more focus from Russia, especially those related to environmental protection. I have already mentioned the proposal for a regional approach to reception facilities that Russia has co-sponsored with the other members of the Arctic Council, as well as its cooperation with Canada on an informal correspondence group on the methodology for impact assessment connected to the proposed HFO ban. To what extent these developments strengthen environmental protection in the Arctic is questionable and will depend partly on concrete deliberations. However, the new direction Russia has taken towards increased cooperation is noticeable. It is also important to note that, according to reports,[450] Russia supported a proposal for a new IMO output to reduce the risks flowing from HFO use and carriage as fuel, which also included the possibility of "restricting or phasing out the use of particular types of fuels in all or parts of Arctic waters."[451] However, this support appears to come with caveats. Firstly, the significance of measures not impacting on carriage of HFO as cargo should be highlighted.[452] Second, Russia has emphasised the negative effect the proposed

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[448] Sergunin, "Russian Approaches," *supra* note 13, 23-33; and M. Skaridova and A. Skaridov, "Implementation of the Polar Code in the Context of Russian Arctic Policy and Northern Sea Route Regulation: A Commentary," *The Journal of International Maritime Law* 24 (2018): 480-482.

[449] Dorottya Bognar, "Sea-Change in Polar Shipping: From Arctic to Antarctic Polar Code Initiatives," *The JCLOS Blog*, February 1, 2017, http://site.uit.no/jclos/files/2017/02/Bognar-Sea-change-in-polar-shipping-from-Arctic-to-Antarctic-Polar-Code-initiatives.pdf.

[450] Levon Sevunts, "Canadian Proposal on Heavy Fuel Oil in Arctic Adopted by World Maritime Body," *Radio Canada International*, July 7, 2017, http://www.rcinet.ca/eye-on-the-arctic/2017/07/07/international-maritime-body-adopts-canadian-proposal-on-heavy-fuel-oil-in-arctic-waters/ (accessed July 14, 2017).

[451] Canada et al., "Work Programme of the Committee and Subsidiary Bodies: Measures to Reduce Risks of Use and Carriage of Heavy Fuel Oil as Fuel by Ships in Arctic Waters," IMO Doc. MEPC 71/14/4, March 31, 2017, 4.

[452] For this reason, Russia objected to a paper prepared by environmental NGOs tabled at the same meeting as MEPC 71/14/4. For the Russian document, see Russian Federation, "Any Other Business: Comments on the

ban on HFO use and carriage as fuel could have on maritime trade and local communities and thus, third, suggested that a ban should be the last resort.[453] At the same time, however, Russia has submitted an extensive list of measures to mitigate the risks of HFO pollution in furtherance of the common good in the case of this new output.[454]

It should also be noted that Russia has recently in its proposals actively endorsed the Polar Code as demonstrating a "realistic and well-balanced approach" in its strict standards in general,[455] and its ban on the discharge of oil and oily mixtures in the Arctic in particular.[456] On the one hand, the latter may be explained by Russia's reluctance to move even further towards stringent environmental protection measures, such as a ban on HFO use and carriage, as indeed it emphasised the difficulties already caused by the discharge ban of the Polar Code.[457] This, together with the emphasis placed on the effects the HFO ban would have on trade in particular – even evoking in the process the IMO's Strategic Plan[458] – suggests that Russia's interests have not changed substantially as a result of the deliberation process on the Polar Code. On the other hand, that the Code overall is described in positive terms suggests that the development process of the Code might also have led to the internalisation of the Code by Russia and thus altered values attached to it to a certain degree. I have suggested that the inclusion and acknowledgement of legitimate interests in the debates, particularly as regards a grace period for the introduction of the discharge ban for certain ship types, can increase the legitimacy of the negotiation outcome, the Polar Code. To what degree this has happened and what influence that has had, and continues to have, on Russia's attitudes to further international regulations and to the implementation of the Code and other regulations is an interesting area for further

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Document on the Use of Heavy Fuel Oil in the Arctic (MEPC 71/16/4)," IMO Doc. MEPC 71/16/8, May 12, 2017. For the paper submitted by environmental NGOs, see FOEI et al., "Any Other Business: Current and Projected Vessel Traffic in the Arctic: Heavy Fuel Oil Use and Its Alternatives," IMO Doc. MEPC 71/16/4, March 31, 2017.

[453] Russian Federation, "Development of Measures to Reduce Risks and Use and Carriage of Heavy Fuel Oil as Fuel by Ships in Arctic Waters: Comments on the Document with the Proposal to Ban Heavy Fuel Oil Use and Carriage as Fuel by Ships in Arctic Waters (MEPC 72/11/1)," IMO Doc. MEPC 72/11/3, February 16, 2018, 3.

[454] Russian Federation, "Development of Measures to Reduce Risks of Use and Carriage of Heavy Fuel Oil and Fuel by Ships in Arctic Waters: Proposal for Possible Measures to Reduce Risks of Use and Carriage of HFO as Fuel by Ships in Arctic Waters," IMO Doc. MEPC 72/11, February 2, 2018.

[455] Russian Federation, "Any Other Business: Comments on the Document on Use of Heavy Fuel Oil in Arctic Waters," IMO Doc. MEPC 70/17/9, August 19, 2016, 1. Similar language is contained in MEPC 71/16/8, *supra* note 452, 1.

[456] MEPC 72/11, *supra* note 454, 4.

[457] MEPC 70/17/9, *supra* note 455, 1; and MEPC 71/16/8, *supra* note 452, 1.

[458] MEPC 72/11/3, *supra* note 453, 3, in particular, states:

> 13 The facilitation of sea trade and sustainable shipping are among the statutory objectives of IMO, along with the protection of the marine environment from pollution. […] [The Strategic Plan] says that the IMO organs will continue their work to fulfil the purposes of the Organization […] including through 'ensuring a balance for international shipping between the need for economic development, facilitation of international trade, safety, security and environmental protection'.
>
> 14 In view of the above the Russian Federation considers that for the time being the HFO ban does not conform with the mentioned principle, as it would obviously distort the said balance.

research, with potential consequences for how to conduct negotiations so that the outcome can achieve legitimacy among sceptical parties.

There appears to be a learning curve in Russia's participation in the development process of Arctic shipping regulations, particularly if we also look beyond the Polar Code and include the negotiation of further developments. This includes not only increased cooperation with other States, but also perhaps a more proactive approach as evidenced by Russia's list of mitigation measures against the risk of HFO pollution. Such a proactive approach is particularly visible in a document Russia submitted to MSC 99, pointing out an error in the text of the Code as regards certification of ships, which could lead to misinterpretation and additional administrative burden.[459] This document also includes substantial argumentation to explain and convince of the existence and significance of the error. Another example of Russia's increasing proactiveness, substantive argumentation and cooperation with other actors is its joint proposal with the United States for recommendatory routeing measures in the Bering Strait and the Bering Sea,[460] which was approved and adopted by the IMO in 2018.[461] These proposals show Russia's potential for cooperation when it comes to less controversial and maybe more technical areas, as well as perhaps an improved understanding of what kind of justifications are needed and acceptable at the IMO. Although Russia's argumentativeness and, at times, contempt towards environmental NGOs does not appear to have subsided in recent IMO meetings,[462] there is a new tendency on Russia's part towards greater adherence to deliberative ideals, particularly mutual justification and respect towards State actors.

Are the changes identified above a result of the deliberative process, demonstrating to Russia what it takes to achieve one's interests while contributing to the common good and playing within the rules of the system? The latter links back to Russia's role within the IMO vis-à-vis the Arctic, as exemplified by the Arctic Council where Russia, through cooperation and coalition-building, has similarly changed from an actor missing the mark to one of the leaders.[463] I have shown that Russia miscalculated throughout large parts of the Polar Code negotiations, both through its weak deliberative stance and by clashing with the common good on multiple points. Could it be that Russia misunderstood the Polar Code process, by treating it as an Arctic process rather than seeing it for what it is, a global process in an organisation where Russia has no special status? Could it be that Russia has learnt that it is not able to exert

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[459] Russian Federation, "Any Other Business: Substantive Error in the Text of the Polar Code," IMO Doc. MSC 99/21/13, March 13, 2018.

[460] Russian Federation and the United States, "Routeing Measures and Mandatory Ship Reporting Systems: Establishment of Two-Way Routes and Precautionary Areas in the Bering Sea and Bering Strait," IMO Doc. NCSR 5/3/7, November 17, 2017.

[461] IMO, "Report to the Maritime Safety Committee," IMO Doc. NCSR 5/23, March 9, 2018, 9; and MSC 99/22, *supra* note 110, 60.

[462] See e.g. MEPC 70/17/9, *supra* note 455, 5; and MEPC 72/11/3, *supra* note 453.

[463] Elana Wilson Rowe, *Arctic Governance: Power in Cross-Border Cooperation* (Manchester University Press, 2018), 100-103 and 128-129.

the same influence at the IMO as it does in the Arctic Council, where it is "one of the club" with a more elevated status as a coastal State[464] and where it is increasingly listened to?[465] Could it be that Russia has learnt how to use its experience in Arctic shipping effectively to start to lead the IMO's processes on polar shipping regulations as well as bring Arctic Council cooperation to bear on IMO developments? My tentative answer to these questions is: yes, it appears that Russia has learnt that a different strategy involving more cooperation, more argumentation and respect for others, which in turn generates more respect for Russia's legitimate interests, is needed at the IMO, on account of its position as only one of 174 members – albeit with special knowledge and experience in Arctic shipping that, if used well, can provide it with significant influence over the outcome as shown by the Canadian example. However, one argument against drawing such a conclusion is the fact that delegations to the IMO have a relatively constant core that should be accustomed to the IMO's procedures. To what extent Russian delegates who worked on the Polar Code were new to the process and overlapped with its representatives in specifically Arctic processes and institutions, for example the Arctic Council, should be explored as a logical continuation of this thesis; as well as whether there has been a change in personnel in the Russian IMO delegation. At the same time, I do not intend to imply that parties at the Arctic Council do not deliberate or that deliberative ideals are not important at the Arctic Council. However, a comparative analysis between the IMO's and the Arctic Council's processes may highlight similarities and differences between the rules of how deliberation in these two distinct fora, fulfilling different roles and governance tasks,[466] commences and how that affects both the parties and the outcomes. Future research might also want to use the findings of this doctoral thesis as the starting point to examine the changing Russia's contributions to Arctic shipping regulations in light of the two-level game theory.[467]

The research in this thesis, based on deliberative theory, adds to our understanding of both Russia's contribution to global international regulatory processes vis-à-vis national areas of interest in the field of Arctic shipping, and the workings of these international processes when faced with deeply rooted value principles. I have shown both Russia and the international community navigate between freedom of navigation and coastal State jurisdiction, between the international and the national, in the process also arriving at questions that show new directions for research. While questions relating to Article 234 of the LOSC and the conflicting principles of the law of the sea have been muted since the adoption of the Polar Code and will most probably remain so until new unilateral national acts bring them to the fore again, it will be interesting to see what route Russia will follow in the concrete new developments for polar shipping regulations that touch upon its diverse socio-economic interests.

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[464] Ibid., 64-67.

[465] Ibid., 100-103.

[466] Stokke, "Regime Interplay," *supra* note 49.

[467] See e.g. Robert D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games," *International Organization* 42, no. 3 (1988): 427-460.

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Paper 1

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Russian Proposals on the Polar Code: Contributing to Common Rules or Furthering State Interests?

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Abstract
The mandatory Polar Code was finally adopted by the International Maritime Organization (IMO) in May 2015. The present article examines the role and contribution of the Russian Federation in the decision-making process of the Polar Code through its proposals, in the form of submissions, statements, and oral interventions. The purpose of these proposals is investigated with respect to the safety and environmental protection goals of the IMO and Russian interests in the Arctic, by looking at the reasoning used by Russia in its proposals. The major issue areas represented in the Russian proposals include, among others, the role of coastal State legislation, environmental regulations, and icebreaker assistance; however, the majority of these do not contribute to the IMO's goals of creating globally uniform standards for maritime safety and protecting the marine environment. The Russian proposals served State interests through misrepresentation and reference to Russia's experience in Arctic shipping. While the latter frames Russia as a leading user of Arctic waters, the role that Russia played in the Polar Code negotiations indicates that Russia has more than shipping interests to protect in the Arctic.

Keywords: *Arctic shipping*; *International Maritime Organization*; *decision-making*; *law of the sea*; *Northern Sea Route*

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1. Introduction

The International Code for Ships Operating in Polar Waters (Polar Code) was adopted by the International Maritime Organization (IMO) in November 2014 and May 2015,[1] after years of negotiations. Once it comes into force through amendments to the

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SOLAS[2] and MARPOL[3] Conventions,[4] this new instrument will regulate ship safety and pollution prevention in polar waters. While the Polar Code covers both the Arctic and the Antarctic waters, the present article deals specifically with one Arctic State, the Russian Federation, and its contribution to the negotiation process that resulted in the Polar Code.

Russia is an important player in the Arctic from many perspectives. It has the longest coastline facing the Arctic; the largest Arctic population of all the Arctic States; and a proud reputation, history, and identity connected to the Arctic.[5] Furthermore, because of the resource wealth of its Arctic Zone,[6] comprising hydrocarbons, timber, minerals, as well as fish, Russia also has important industries located in the area, providing a significant percentage of its GDP and export.[7] With its long Arctic coastline, Russia also has considerable experience in Arctic shipping. While shipping activity in the Russian Arctic is mainly connected to resource extraction in the region and supply routes to remote communities, part of the current Russian Arctic policy is to encourage the use of the waters off Russia's Arctic coast, the Northern Sea Route (NSR),[8] for international transit shipping.[9] Much of the shipping activity in Russian waters is supported by different services, such as icebreaker assistance and pilotage. To make shipping through the NSR easier, new legislation was enacted with regard to the NSR in 2012 and 2013.[10]

The main question this article seeks to answer is how Russia's role and contribution to the Polar Code may be characterised. In order to answer this question, the following sub-questions are raised: 1) Did Russia have a prominent role in the negotiation of the Polar Code? and 2) Looking at the content of its proposals, did Russia utilise its experience in Arctic shipping to further the IMO's goals or its own interests? Section 2 of this article introduces the material on which the research has been based. Section 3 examines the first sub-question raised above, with the hypothesis that Russia's size and stakes in the Arctic made it one of the most interested players in the Polar Code negotiations. Section 4 deals with the content of selected Russian proposals, statements, and interventions, in light of the second sub-question. First, I introduce deliberative theory's distinction between arguing and bargaining to help the analysis, and define the IMO's goals in the context of the Polar Code. The hypothesis made is that, while Russia has furthered its own narrow self-interests in the polar region, it has also been interested in enhancing safety and environmental protection through the new Polar Code, especially since the waters north of Russia are expected to open for ship traffic first. Thus, I will consider which Russian interests were promoted through the Russian proposals and how these were furthered, in order to determine whether the Russian proposals served the IMO's goals or particular State interests. Finally, building on the previous analyses, Section 5 discusses what Russia's participation in the Polar Code negotiations can tell us about what kind of Arctic actor Russia is.

2. Research material

During the decision-making process of the IMO, its members and observers submit proposals that are discussed in the different Committees, Sub-Committees, working

groups, and correspondence groups. Below, analysis is made of Russia's proposals to the IMO's Maritime Safety Committee (MSC) and Marine Environment Protection Committee (MEPC), as well as to the Sub-Committee on Ship Design and Equipment (DE) and its successor, the Sub-Committee on Ship Design and Construction (SDC), where the more detailed work on the Polar Code took place.[11] Moreover, statements and interventions found in the reports of the Committees and the two Sub-Committees are covered. Statements and interventions serve to highlight States' opinions that were deemed important enough to record in writing.

The documents analysed are those to which it is possible to gain public access via the IMO's database, IMODOCS.[12] While a great number of decisions were made in the setting of the Committees and Sub-Committees, many others were made in intersessional and correspondence groups among those delegations most interested in polar shipping. While the lack of available documents from these fora imposes limitations on the present research, the volume of documents available – more than 250 in number – compensates for this. This material was further supplemented by interviews conducted with selected delegates to the IMO bodies involved and audio records of the plenary sessions of the Committees and Sub-Committees.[13]

3. Russia's engagement in the Polar Code process

Altogether, there are 15 Russian submissions recorded in the IMO's database in the Polar Code. Moreover, there are three statements and four interventions included in the reports of the Committees and Sub-Committees. In addition to these, a Russian proposal or viewpoint is referenced three times in other delegations' submissions: twice by Norway as chair of the intersessional and working groups,[14] and once by Canada.[15]

These numbers have to be put into perspective. Of the five Arctic coastal States, Canada, Norway, and the United States submitted significantly more documents than Russia: 34, 28, and 22, respectively.[16] The number of Russian proposals is comparable to those made by Finland and Denmark, with 14 and 12 proposals, respectively.

In addition to the number of submissions, there are a few other indicators that show how engaged Russia was in the Polar Code process. Firstly, as indicated above, there were three statements and four interventions recorded from Russia, more than any other Arctic State. That Russia's separate opinion was recorded indicates two things: that Russia had a strong opinion on the matter at hand and that Russia's opinion differed from the other States that spoke on the issue.

Second, proposals submitted to the IMO's Committees and Sub-Committees are often co-sponsored, with two or more members or observers giving their name to the same proposal. This way, multiple participants can show their support for the proposal. In the case of the Polar Code negotiations, the other Arctic States had a significant number of proposals co-sponsored by one another and by other, non-Arctic States, showing an inclination to cooperate. Contrary to this, Russia did not co-sponsor any proposals. Thus, the documents show a certain degree of isolation in Russia's participation in the Polar Code process. This applies to proposals before and after the outbreak of the Ukrainian crisis in 2014. The cooling of relations between

Russia and the West does not appear to have had an effect on this aspect of Russian participation.

Third, as will be discussed below, many of the Russian proposals are responses to previous submissions and decisions. In this sense, the Russian proposals are reactive in nature, not proactive. Thus, Russia does not appear to be driving force in the decision-making process, shaping the discussion. Rather, its submissions should be seen as reactions to previous decisions and other members' ideas.

Therefore, based on its submissions, statements, and interventions, Russia does not fulfil the expectation that it would play a prominent, leading role in the Polar Code negotiations. The factors above point to a surprising lack of prominence on Russia's part when compared to, first and foremost, the rest of the Arctic coastal States. It is less surprising that Russia was more engaged than the remaining three Arctic States that make up the so-called Arctic Eight, Finland, Iceland, and Sweden, considering that these do not border on the marine Arctic.

4. Russian submissions in light of the IMO's goals

4.1. Arguing and bargaining in deliberative theory

In order to provide a framework to analyse Russian submissions about the Polar Code, I will first briefly introduce deliberative theory. Deliberative theory differentiates between different forms of decision-making with distinct motives behind them. As such, the theory will help determine where Russian priorities lay in the Polar Code negotiations.

Central to deliberative theory is deliberation, or arguing, as a decision-making mode. Deliberation is the exchange of reasoned arguments based on the communication of factual or normative assertions which claim to be valid.[17] Validity here is based on the truth and impartiality as well as the consistency of the arguments.[18] However, deliberation is not the only form of decision-making; it can be contrasted with negotiation, or bargaining.[19] As opposed to impartial arguments, bargaining involves demands which claim credibility based on material resources that back up threats, promises, and exit-options.[20]

What is more important to our discussion here is the contrast between the motives behind arguing and bargaining. Deliberation relies on the power of the convincing argument and, therefore, the main motive is disinterested and dispassionate reason.[21] Meanwhile, the main feature of bargaining is a conflict of interests.[22] The exchange of reasoned, dispassionate arguments leads deliberation towards a common good that can be found in consensus, whereas the outcome of bargaining should be imagined as dividing a finite pie and, thus, can only result in a compromise.[23]

It has been highlighted that social norms stop States from openly reasoning in terms of their own self-interest. This can lead to misrepresentation: presenting oneself as not being influenced by interest, cloaking one's message in reasoned arguments.[24] Here self-interested motives are disguised as impartial arguments; thus, arguments are used strategically.[25] One particular mode of misrepresentation is to disguise a threat as a

warning.[26] While such misrepresentation complicates the task of identifying reasoned arguments, it is a good starting point to differentiate between what is a genuinely impartial argument and what is an interested demand.

4.2. Arguing and bargaining in the context of polar shipping

How does the above discussion relate to Russia and the IMO's goals with the Polar Code? The exchange of reasoned arguments in deliberation moves the discussion towards a common good, the aim of the deliberation.[27] This can be linked to what the IMO aimed to achieve with the Polar Code.

In general terms, the IMO, as a specialised organ of the United Nations for international merchant shipping, works to benefit the international community at large. The IMO is also considered the competent international organisation referred to in various articles of the United Nations Convention on the Law of the Sea (LOSC) that exercises quasi-legislative functions with regard to globally uniform minimum standards.[28] Indeed, one of the functions of the IMO as laid down in the convention that established it, the 1948 Convention on the IMO,[29] is 'the drafting of conventions, agreements, or other suitable instruments',[30] with the goal of creating standards for shipping that are globally uniform and are applied in a uniform manner.[31]

However, it has been argued that the flexibility of the Polar Code, especially its safety part, can be problematic for the creation of a uniform set of rules.[32] A further critique often heard is that the IMO's outcomes represent the lowest common denominator among its global membership. Contrary to these critiques, the position taken in this article is that even 'watered down' standards are better than competing and conflicting standards that divide the international community, or no standards at all. Furthermore, flexibility is beneficial in an area where shipping is in its infancy and where novel approaches might be called for.

While the creation of globally uniform standards is an important element of the IMO's goal, such a definition would not account for the content or the issues covered by said standards. Therefore it is proposed here that the creation of a set of globally uniform standards should rather be seen as an umbrella encompassing other goals of the IMO. To find out what constitutes the substance of the IMO's goals, we can turn again to the Convention on the IMO. Article 1 of this convention lists the purposes of the IMO, including:

> 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 ...[33]

These goals are repeated and thus reinforced in the IMO's mission statement:

> The mission of the International Maritime Organization (IMO) as a United Nations specialized agency is to promote safe, secure, environmentally sound, efficient and sustainable shipping through cooperation. This will be accomplished by adopting the highest practicable standards of maritime safety and security, efficiency of navigation and prevention and control of pollution from ships ...[34]

Turning specifically to polar shipping and how the IMO's general goals translate into the polar setting, the submissions proposing the creation of a mandatory Polar Code emphasise the regulatory gap in the area, and highlight that

> Establishing a mandatory set of requirements for ships operating in Polar Regions will enhance the safety of life and protection of the marine environment in these remote areas.[35]

This is reiterated in the Preamble and the Introduction of the Polar Code. While the text of the Preamble can be seen more as embodying the spirit of the instrument than a legal obligation, the Introduction is legally binding both through SOLAS and MARPOL. Therefore, I use the latter to signify the substance of the IMO's goals with regard to the Polar Code. The Introduction states expressly:

> The goal of this Code is to provide for safe ship operation and the protection of the polar environment by assessing risks present in polar waters and not adequately mitigated by other instruments of the Organization.[36]

Thus, in the following discussion, reference to IMO's goals means the creation of uniform standards to achieve the double aims of ship safety and protection of the polar environment.[37]

Russia is a coastal State with an especially long and remote coastline, which makes environmental clean-up extremely difficult. Furthermore, Russia's activities in the region, as well as vessels in transit, necessitate maritime safety. Therefore, the goals of the IMO and the Polar Code can be said to serve Russia's interest as well. However, as the largest Arctic State, Russian interests in the region are diverse. Some of these interests may differ from the goals the IMO aims to achieve with the Polar Code, and can be linked to the motive of self-interest of the bargaining decision-making mode. Therefore, the IMO's goals, the common good towards which the IMO has worked, can be explained in contrast to what it is not.

Much has been written about Russia's strategic interests and policies regarding the Arctic.[38] Here, I will only introduce those interests which are important to this discussion on Russian proposals about the Polar Code. First of all, in the domain of international law, the legal status of some of the waters off of Russia's northern coast, and thus the extent of Russia's coastal State sovereignty and jurisdiction there, is contested. Russia relies heavily on the Arctic exception in LOSC, article 234, and its coastal State right on that basis to adopt and enforce regulations along the NSR without approval from the IMO.[39] This right and practice have been contested by the United States. It has been suggested that Russia would seek to gain international legal recognition for these regulations through the Polar Code, or introduce similar requirements to its own domestic rules, in case art. 234 becomes more controversial in the future.[40] Russia is also keen to use art. 234 and the perceived rights therein to exert control over shipping for security reasons in an area that it sees as vulnerable and where its strategic nuclear weapons are based.

On a more practical level, Russia has been keen to encourage international transit shipping through the NSR, hoping for economic gains from increased activity.

Yet, funds for necessary investments in infrastructure, including port facilities and icebreakers, have been slow, creating delays.[41] New international regulations leading to further costs would not be helpful for Russian shipping aspirations. Beyond the prospects of increased international shipping, domestic Russian activities in the region include, notably, destinational shipping of natural resources and supplies to regional settlements, as well as fishing. The fishing industry is especially important in the Russian Far East where it provides for much needed employment, despite the fact that it is in dire need of a new, seaworthy fleet.[42] It is also worth noting that Russia has been carrying out scientific research as well as surveying related to hydrocarbons and its extended continental shelf. Thus, while Russia is an Arctic coastal State, it also has significant interests related to shipping and navigation.[43] In practice, Russia's coastal State interests are often intertwined with its flag State interests: to be able to enjoy its coastal State rights as regards fisheries and hydrocarbon resources Russia relies on many Russian-flagged vessels, while to keep control over transit along the NSR, Russian icebreakers are used. Russia regulates fishing, survey vessels, and icebreakers not only in its flag State capacity, but also in order to satisfy its interests as a coastal State.

4.3. Russian proposals

Having defined the IMO's goal to create globally uniform minimum standards to achieve safe ship operations in polar waters and to protect the polar environment, as well as having established separate Russian interests in the Arctic, it is now possible to start considering specific Russian submissions about the Polar Code. Did these submissions contribute to the creation of uniform standards for maritime safety and environmental protection, or did they promote other Russian interests?

The Russian proposals, statements, and interventions that are subject to this analysis were concerned with four broad topics: 1) the role of the coastal State's national legislation; 2) environmental regulations, especially with a focus on discharges of oil and oily mixtures; 3) the geographical scope of the Polar Code; and 4) systems for determining limitations for ship operation in ice, including POLARIS.[44] Furthermore, it should be mentioned that a fifth issue espoused by Russia appears in two submissions made by Norway, namely icebreaker assistance. In the following, each of these five topics will be briefly introduced and analysed.

4.3.1. The role of the coastal State's national legislation

Two Russian proposals took up the controversial issue of national regulations, with express reference to LOSC art. 234.[45] The first of these proposals, submitted to the 55th session of the DE Sub-Committee, cites the above-mentioned article excessively, and makes reference to Russian legislation on navigation along the NSR, professedly adopted in accordance with that article. This document leaves no room to the imagination as to what the Russian Federation is aiming to achieve here. The proposal endorses a principle previously included in a Canadian draft of the Polar Code, namely 'the principle of priority of national regulations over the Code's

requirements',[46] and proposes its re-introduction to the Preamble of the Polar Code with the following text:

> The Code is not intended to infringe on national systems of shipping control until a harmonized system is in place; in addition to applicable sections of the Code, port, Treaty and coastal States may retain local navigation rules and regulations for certain routes and waterways under their jurisdiction taking into account local conditions, infrastructure and procedures.[47]

The second proposal only contains one sentence on this topic, stating that 'limitations for navigation in ice conditions are imposed by ... national rules adopted by the coastal State empowered accordingly by article 234'.[48] This subtle reference is no doubt due to the concerns raised by the United States and others during DE 55.[49]

While no further Russian proposals were submitted on the issue of national regulations after DE 56's decision to focus solely on technical matters, not jurisdictional issues,[50] one Canadian proposal includes a brief reference to Russia's support of Canada's position on a savings clause, clarifying the relationship between the Polar Code and other international agreements and international law, notably LOSC.[51]

It should be relatively easy to see that these proposals were meant to further Russia's self-interests, rather than the IMO's goal.[52] First, on the issue of Russian coastal State control over shipping along the NSR, it is in Russia's interest to uphold its regulations. Thus, when Russia gave its support to the 'principle of priority of national regulations over the Code's requirements' and suggested the inclusion of text in the Polar Code stating that the 'Code is not intended to infringe on national systems of shipping control',[53] this is intended to serve as international legal recognition of Russia's interpretation of LOSC art. 234.

Second, giving priority to national regulations over the Polar Code is directly opposite to what we have established as the IMO's goal towards which the Polar Code negotiations worked, namely *uniform standards* for safe ship operations and protection of the polar environment. While uniform standards might be achieved, providing expressed priority to national regulation over these standards undermines the intention to apply them uniformly. Therefore, these Russian proposals are inconsistent with the goal of uniform application.

While the above arguments are enough to categorise this topic as being motivated by self-interest, we still need to look at what reasoning the submissions provided in support of Russia's proposals. DE 55/12/23, which suggests the inclusion of the principle of priority, relies heavily on the coastal States' rights under LOSC art. 234, while also referring to the 'necessary skills and knowledge on ensuring the safety of navigation'[54] possessed by the coastal States' maritime authorities. DE 56/10/14 only contains one sentence referring to the coastal State's national rules, which again highlights that these States are 'empowered accordingly by article 234'.[55] The inclusion of this sentence in a submission otherwise denoted to ship categories related

to ice-strengthening and ice thickness gives the impression that limitations imposed by the national regulations of coastal States contribute to increasing ship safety.

Both of these Russian proposals include reference to the safety of ship operations. Yet, both of them also emphasise the importance of LOSC art. 234, in which Russia's contested claims to jurisdiction are grounded. While the former reasoning can be taken as pointing towards one substantive element of the IMO's goal, the latter casts doubt on this as the invocation of LOSC art. 234 serves to support the acknowledgement of coastal State jurisdiction, one of Russia's interests.

4.3.2. Environmental regulations relating to the discharge of oil and oily mixtures

While there are two Russian statements recorded in the report of DE 56 which are more general in nature and concern many different types of vessel-source pollution, ranging from grey water through heavy fuel oil to SOx and NOx emissions,[56] the bulk of Russian proposals related to the environment deal with the discharge of oil and oily mixtures.

The first proposal that mentions the discharge of oil and oily mixtures was submitted to DE 57.[57] It is similarly broad in nature to the two Russian statements to DE 56. Incidentally, this is the only proposal on this topic submitted before a decision was made two months later at MEPC 65 to prohibit any discharge of oil and oily mixtures from any ships in polar waters.[58]

Starting with the proposal made to SDC 1, Russian submissions addressing the discharge of oil and oily mixtures from machinery spaces seem to continuously change the scope of the Russian proposal, aiming at overturning the decision made previously.[59] This applies to both the kind of vessels exempted and the conditions and circumstances under which discharges would be permitted. The range of vessels in the Russian proposals narrows over time from all ships in the first submission, to ships with structural features preventing compliance in a later submission, and finally to ships operating in polar waters for longer periods of time. The proposed conditions change from a general exception for these ships in the Arctic,[60] to an exemption at the Maritime Administration's discretion, and then to a 5-year exemption period.

The discussion of environmental regulation related to the discharge of oil and oily mixtures seems to be directly connected to the environmental protection part of IMO's goal. However, the Russian proposals urge less strict pollution prevention rules than that agreed upon by MEPC. On the face of it, therefore, it seems that these proposals are counter-productive to enhanced protection.

Furthermore, the fact that Russian proposals made after the MEPC's decision have continuously changed the scope suggests that these proposals were part of a give-and-take on Russia's part, in other words: bargaining. The line of proposals starts with document SDC 1/3/18, a short document containing just one justification: that the complete ban would be 'extremely difficult to adhere to, given the significant length of ships' voyages'.[61] The general lack of justification apparent here is more of an indication of demand to agree with the Russian position than an attempt at deliberation to convince the other States through reasoned arguments.

A hidden demand can be observed in the audio records where Russia states in relation to SDC 1/3/18:

> we understand that the Sub-Committee may decide to go along with the MEPC recommendation, but we'd like to inform you that we will actually be coming forth with a similar proposal at the MEPC meeting.[62]

Another interesting feature of this submission is its espousal of conditions applicable in MARPOL special areas and the requirement on oil filtering equipment with alarm and automatic stopping arrangements. This is notable as Russia was previously sceptical both of establishing such special areas in the Arctic, as well as using the related requirements on oil filtering equipment.[63] This inconsistency in Russia's stance can be evidential of self-interested bargaining.

Further submissions by Russia included more extensive reasoning to justify the Russian proposals, often repeating the same justifications verbatim. Among these are references to scientific research, highlighting that possible discharges in the region were unlikely to pose an environmental threat, and suggesting that calls for a complete ban were not well substantiated. The latter is not explained in further detail, which leaves its truth-claim unverifiable and, thus, its convincing power questionable. It is, therefore, doubtful if this reasoning can be taken as an argument meant to be part of deliberation. Similarly, while some of the scientific research referred to by the Russian proposals are cited, meaning their truth-claim can be established, other passages in the submissions only mention research results in general. The lack of verifiability and the inconsistency of citation within the same proposals suggest the strategic use of arguments said to be based on research.

The proposals also retain the reasoning from SDC 1/3/18, and it is further specified that the vessels likely to be negatively affected by a complete ban are ships operating in the Arctic for months without calling at ports, such as 'icebreakers, hydrographic survey ships and research vessels',[64] as well as ships engaged in transit voyages. Thus, complying with the ban would be potentially detrimental to Russian interests related to maintaining its ability to provide icebreaker support. It could also prove discouraging to transit shipping. Furthermore, warnings are also made in these proposals that a complete ban would adversely affect shipping,[65] and possibly lead to illegal discharges.

Finally, reference is made to Russia's vast experience and the attention it pays to maritime safety and environment protection. These claims can serve to provide legitimacy to the repeated Russian demand to overturn the complete ban, and the justifications brought forth to this end.

Related to the discharges of oil and oily mixtures in the Arctic, Russia also submitted a proposal on reception facilities.[66] This submission highlights the view that the question of adequate reception facilities in the Arctic should not be regulated by the Polar Code—contrary to the proposal of many flag States and shipping organisations contained in document SDC 1/3/1.[67]

It is notable that in MEPC 67/9/4 Russia reasons that there is not a need for reception facilities at each Arctic port, because of the limited nature of Arctic shipping. This seems to be an attempt to argue with convincing, verifiable arguments. Indeed, a study

by the reputable Det Norske Veritas (DNV) under the aegis of the Arctic Council's Working Group on the Protection of the Arctic Marine Environment (PAME) is cited in support of the Russian proposal. However, at the same time, reference is made to the extremely burdensome nature of the requirement on reception facilities and the considerable maintenance costs of such facilities, suggesting that including a requirement to provide for reception facilities at each Arctic port would further add to the costs and difficulties Russia is likely to experience in developing its Arctic infrastructure. During debate on this issue, Russia highlighted that it was not the co-sponsors of SDC 1/3/1 that would have to bear the costs of the proposed reception facilities, and suggested, using non-diplomatic language, that it could agree to the construction of such facilities if the co-sponsors were to fund it.[68]

On the whole, it seems that during the discussion of environmental regulations relating to the discharge of oil and oily mixtures, Russia kept two of its interests in mind. On the one hand, it tried to reduce the costs and difficulties for the shipping industry by exempting some of the Russian vessels, as well as foreign vessels in transit, from complying with the complete ban on oil and oily mixtures discharges, thus, promoting Russian shipping activities in the Arctic, as well as transit shipping. On the other hand, Russia sought to limit its own costs as a port State related to infrastructure development, specifically in relation to the construction of reception facilities in each Arctic port.

4.3.3. Icebreaker assistance

Russia briefly mentioned icebreaker escorts in a proposal to DE 54,[69] and made an intervention at DE 55, observing the lack of consideration given to the issue.[70] These early Russian proposals are limited to a discussion of the need for the inclusion of rules on such escorts.[71] Significantly, the intervention at DE 55 also warns that

> safety of navigation in the Arctic regions adjoining the Russian Federation could not be guaranteed without the aid of icebreakers, except for one or two months of the year . . .[72]

Since this warning is included together with the observation that the issue of icebreaker assistance had not previously been considered sufficiently with regard to Russian submission DE 54/13/10, this can be taken as a hidden demand for more discussion. Common to these documents are references to improved safety through the use of icebreaker assistance and extended navigational seasons. It is true that icebreaker assistance is often necessary to ensure safe passage in ice-covered waters and, thus, the inclusion of regulation related to icebreakers can further the IMO's goal. However, the reference to safety can also be seen as indirectly providing legitimacy to a Russian demand for further discussion on the issue, especially when read together with the reference to extended navigational seasons. Again, the Russian interest to open up the NSR to international transit shipping is noteworthy, as the use of the NSR for extended navigational seasons was expected to generate more income to the Russian authorities through various fees. At the time these documents were submitted, the scope of the Russian Federation's requirements for icebreaker

escorts along the NSR was much wider than in the new 2013 NSR Rules. This can be linked to the Russian statement that all ships are in need of icebreaker support.[73]

This brings us to a Russian proposal made to an intersessional working group on the Polar Code, which is referred to in two Norwegian submissions, and the content of which was included in the recommendatory part of the final version of the Polar Code. The original submission is not publicly available and, therefore, it is not possible to assess any reasoning given by Russia with regard to the proposal, which calls for setting uniform procedures for icebreaker assistance for the maintenance of safety in icebreaker operations. As such the proposal would seem to contribute to the IMO's safety goals. However, a noteworthy aspect of the proposal is its close similarity to paragraphs 26–30 of the Russian *Rules of navigation in the water area of the Northern Sea Route*, dated 17 January 2013, a few months before the intersessional working group which took place from 30 September to 4 October the same year. The report of this meeting is the first document that mentions the Russian proposal on icebreakers. Thus, the inclusion of these regulations appears to further both the IMO's goal and Russia's interest to shape the Polar Code to its own needs.

4.3.4. The geographical scope of the Polar Code

While the Polar Code uses the same geographical area of application as regards Russian waters as the 2002 and 2009 IMO Guidelines,[74] the Russian Federation attempted to modify this at later meetings. First, at SDC 1, Russia's statement is recorded to the effect that the geographical scope of the Polar Code should exclude the northern part of the Bering Sea.[75] This was followed by a proposal and intervention at MSC 93.[76]

The reasoning used by Russia to justify changing the geographical scope of application of the Polar Code was based on hazards specific to the polar region as well as on the 'available experience of shipping in polar areas'.[77] The hazards include the characteristics of the Bering Sea, which make it, in Russia's opinion, a freezing sea that should not be covered by the Polar Code, rather than an Arctic sea. Furthermore, the lack of polar day and polar night, no high latitude zone and the availability of search and rescue services were also mentioned. These reasons seem to be unbiased and their truth-claims should be easily verifiable.

What is more interesting is that this Russian proposal was made relatively late in the Polar Code process, considering that the geographical boundaries had been used in the preceding discussions. With regard to the definition of Arctic waters, Russia states that

> we consider that such a straight transfer of these provisions into a mandatory IMO instrument is not relevant, bearing in mind the importance of the future Code for navigation in Arctic polar waters.[78]

This formulation seems to imply that, for Russia, what makes the difference is whether the IMO instrument is mandatory, not whether operating in the waters in question and the additional hazards present there require new safety or environmental regulations. This is contrary to IMO's aims with the Polar Code.

Russia also suggests that a change in geographical scope should be justified by the actual practice of polar shipping, which provides a clue of Russia's interest in this matter. Along with ships transiting the Bering Strait, to which the Polar Code would apply anyway, Russia also mentions fishing vessels and fishing support vessels. The submission states that these vessels typically navigate near the ice edge,

> thus rendering the application of the Polar Code's requirements in their entirety impractical, and reducing fishing areas to a significant extent.[79]

The Polar Code does not concern the regulation of fishing; therefore, the suggestion that fishing areas would be reduced seems out of place. However, the planned phase-2 of the Polar Code will regulate fishing vessels.[80] Furthermore, MARPOL currently applies to such vessels.[81] Therefore, the geographical scope of the Polar Code will impact the largely unseaworthy fishing fleet of the Russian Far East, on which many livelihoods depend.[82]

Furthermore, Russia also claims that its own regulations on the NSR treat the northern part of the Bering Sea separately from the NSR and that this approach is vindicated by the lack of negative effects on navigational safety in Russia's 'many-year experience of shipping along the Northern Sea Route'.[83] Thus, while the Russian proposals to exclude the northern part of the Bering Sea from the Polar Code also rely on factual claims whose content is verifiable and accordingly can be used as arguments in deliberation, another motive for these proposals is self-interest in the Russian fishing fleet, as well as correspondence of the Polar Code's geographical scope with that of Russia's NSR regulations.

4.3.5. POLARIS and other systems for determining limitations for ship operation in ice

To determine the limitations of ship operation in ice and, thus, to make the Polar Code more practically applicable, the International Association of Classification Societies (IACS) developed the POLARIS system based on the contributions of Canada, Finland, Russia and Sweden. Even though Russia did contribute to the work on POLARIS, three of its proposals to MSC 94 served to criticise and discredit the system.[84]

In its attempt to include POLARIS in a separate instrument, outside the Polar Code, Russia highlights detailed technical problems with POLARIS, including the combination of speed and ice thickness, lack of testing, and problems with the Canadian system that POLARIS is mainly based on. The content of these justifications is verifiable and, thus, may be part of deliberation to produce uniform standards for navigational safety.

Yet, in MSC 94/3/22 Russia discusses at length its suggestion that the prescriptive approach to limitations for ship operations, practiced by Russia, should have equal status to methods based on risk assessment, including POLARIS and the Canadian approach. While it serves the common interest of safety to require each system to have sufficient experience before approval, the general proposal that

> methods based on risk assessment ... may be recommended for application after some experience of their use is available,[85]

also seems to encompass the Canadian system, and would then, in practice, not create equal status for the two approaches.

Furthermore, Russia proposes an amendment to the POLARIS system with Russian ice classes based on prescriptive requirements and Russian shipping experience in the Arctic, since

> this step will definitely make the modelling and approaches of POLARIS much more profound and widely applicable especially in the Arctic region along the Northern part of the Russian Federation.[86]

The separate emphasis on Russian waters, together with Russia's insistence on equal status for its own approach to operational limitation, seems to signal that Russia wants to retain its influence over ships off its coast. As a flag state it could require its vessels to use the prescriptive, Russian approach, highlighted by Russia's insistence on the right of the maritime administration to specifically approve the use of novel operational restriction systems. By modifying the POLARIS system to include the Russian approach, Russia would also have indirect influence over foreign-flagged vessels operating in its waters under POLARIS.

Thus, while Russia can be seen to be contributing to navigational safety by pointing out technical problems with POLARIS,[87] this points in the same direction as Russia's wish to exclude POLARIS from the Polar Code. Both objectives are served by Russia's proposal to develop POLARIS further by amending it with Russian rules, as POLARIS will not be included in the Polar Code as long as it is under amendment.

4.4. Conclusion: self-interested bargaining or arguing to further the IMO's goals?

The definition of the IMO's goal as the development of uniform standards to achieve safe ship operation and the protection of the polar environment has two elements to it: the development of globally uniform standards and their content, the safety of ship operations, and/or the protection of the polar environment. Of the five main themes identified and discussed above, it is the issue of icebreaker assistance which comes closest to fulfilling both elements of this definition. The proposal for icebreaker assistance does serve to promote the safety of ship operation in polar waters and aims at uniform rules. Even though it ended up in the recommendatory section of the Polar Code, the original proposal seems to have contained mandatory language.[88] Without knowledge of the original submission, it is impossible to assess what justifications were used by Russia. However, the correspondence of the proposed text and that of the Russian legislation seems to indicate that, while the proposal contributed to uniform standards for ship safety, it also furthered Russia's self-interest.

In the case of POLARIS, Russia's technical comments as well as its insistence on further testing could be seen to serve maritime safety. It is, however, more questionable whether the Russian proposals contributed to uniform standards. First, as was pointed out, Russia promoted equal status for the two approaches to operation limitation, thus also furthering its own interests. Second, the fact that POLARIS was excluded from the Polar Code, an outcome Russia proposed in its

submissions, makes it more likely that a uniform operation limitation system will not be reached.

With regard to environmental regulations and the geographical scope of the Polar Code, it is not clear how proposals under either of these areas would contribute to safe ship operations or the protection of the polar environment. In both cases, Russian interests were easily identifiable insofar as reference to them was already included in the proposals. Furthermore, we witness an attempt at bargaining in the series of Russian submissions on the issue of oil and oily mixtures discharges. Finally, the Russian submissions concerning coastal State regulations neither contributed to setting uniform standards, nor did they contribute to further navigational safety or environment protection aims.

5. Discussion

Having explored the question in Section 3 as to how prominent a role Russia played in the Polar Code negotiations, as well as in Section 4 as to whether Russia utilised its experience to further the development of uniform rules on safety and environment protection, or to serve its own self-interests, the article now turns to a more general discussion. In the following pages, a couple of conclusions about Russia's participation in the Polar Code process are offered. On the basis of these conclusions, and the findings of the previous section, I examine what can be said about Russia as an Arctic State and about what kind of actor Russia is in the Arctic.

5.1. Reaction versus proaction

Most of the Russian topics discussed in this article can be characterised as reactive rather than proactive. The Russian proposal to include the principle of priority of national regulations over the Polar Code can be seen as a result of the same principle having been omitted from documents after its initial suggestion by Canada. In the case of the regulation of oil and oily mixture discharges, the Russian proposals were a direct result of MEPC 65's decision to ban all such discharges. The proposal on reception facilities came after a provision was included in square brackets in the draft of the Polar Code regarding the coastal State's obligation to provide adequate reception facilities in all ports in the Arctic.[89] Discussion on the geographical scope of the Polar Code was opened by Russia even though the definition of Arctic waters had been used in previous sessions. Indeed, one of the reasons cited in MSC 93's report for rejecting the Russian proposal is that the geographical boundaries had already been agreed upon.[90] Russia's opposition to POLARIS was brought about by the possibility that POLARIS would be incorporated into the Polar Code.

Of these issues, Russia successfully prevented the inclusion of POLARIS and mandatory reception facilities, both of which are areas where decisions had not been reached previously. In the case of geographical scope and discharges, Russia even tried to reopen the debate on issues that had already been agreed upon, thus being counter-productive to the timely adoption of the Polar Code.

The most proactive of the Russian submissions is its proposal for the regulation of icebreaker assistance. Russia did achieve its inclusion in the Polar Code, albeit in the recommendatory section.

5.2. Modes of furthering self-interests

As demonstrated above, most of the Russian proposals were not concerned with contributing to the creation of uniform standards for ship safety and environmental protection. Even those submissions that contained elements of this, for example those on icebreaker assistance and POLARIS, can be linked to Russian State interests. How did Russia go about prioritising its own self-interests?

One of the most important issues for Russia with regard to jurisdiction in the Arctic is the question of domestic coastal State regulation based on LOSC art. 234 and international regulation through the IMO. In relation to this issue, the DE Sub-Committee's 56th session seems to be a watershed. At DE 56, as a response to Canadian and Russian proposals touching upon coastal State jurisdiction, it was decided that priority would be given to technical instead of legal issues, which could be discussed at a later point in time.[91] This decision seems to have led to an observable change in the activity of Russia.

First, the number and composition of the documents submitted by Russia changed. Before the decision of DE 56, Russia submitted four proposals, and five statements and interventions were included in reports.[92] After DE 56, the number of Russian proposals was eleven, along with just one statement and one intervention. Additionally, it was in this period that Russia submitted its proposal on icebreaker assistance to the intersessional working group. Having taken place in early 2012, DE 56 was roughly half-way through the development process of the Polar Code, between 2009 and 2015. Thus, the first period of the negotiations featured half as many Russian proposals, while the number of statements and interventions recorded in the final reports shrunk markedly in the second period of the negotiations.

Second, there was also a difference in the content of the submissions before and after DE 56. Prior to DE 56, the Russian documents were mainly concerned with more technical aspects such as icebreaking capability, ice classes, and icebreaker escorting. One of the proposals discussed in relation to coastal State regulations deals largely with such issues. However, proposals submitted after DE 56 dealt with a larger variety of—and more interest-laden—topics.

Interestingly, while the priority of national regulations espoused by Russia does not re-occur in documents submitted after DE 56, Canada made reference to Russia's support for the inclusion of a savings clause into the amendment of the MARPOL Annexes, which made the Polar Code mandatory.[93] While Canada expressed the belief that the savings clause would make the relationship between the Polar Code and other international agreements and international law, notably LOSC, clear,[94] in effect the savings clause also serves to safeguard the Arctic coastal States' rights with regard to national legislation under LOSC art. 234. Thus, it seems that, after DE 56, the Russian delegation was more circumvent. On the one hand, its practical proposals supported coastal State interests, often intertwined with flag State interests.

These proposals included the question of oil and oily mixtures discharges from icebreakers and survey vessels, rules of icebreaker assistance, the geographical scope of the Code as well as operational limitations through POLARIS. On the other hand, insofar as Russia supported the Canadian proposals on savings clauses, Russia's interests relating to coastal State legislation were clad in a language regarding legal clarity, instead of directly relating to the rights enshrined in art. 234. Furthermore, Russian support for these proposals meant support for a possibly wider application and stronger effect for the savings clauses. This is because these savings clauses were proposed for the chapters making the Polar Code mandatory in the parent Conventions, SOLAS and MARPOL, and not in the Code itself as originally envisaged. Being included in SOLAS and MARPOL would make these savings clauses stronger, while also possibly allowing them to influence the interpretation of other provisions of the Conventions not directly related to the Polar Code.

Thus, while the principle of priority of national regulations was dropped by Russia after it was rejected at DE 56, this did not mean that Russia stopped trying to prioritise its own State interests.

5.3. Russia's experience in Arctic shipping

A running thread of justification found throughout the documents submitted by Russia is reference to Russia's experience in Arctic shipping. The supposed superiority of this experience is underscored by characterising it as 'vast', 'extensive', 'many-year', and '100 year'.[95] Implicit in these references to Russia's experience is the claim that Russia knows better, Russia's proposal is more valid. While Russia does have a long history of shipping off its Arctic coast, it is questionable whether such a justification is relevant to, for example, where the boundaries of the Polar Code's geographical scope should be drawn. Technical areas, such as icebreaking and ice-strengthening, lend themselves better to justification on the grounds of extensive experience in polar shipping. Yet, the small number of Russian proposals submitted during the Polar Code negotiations in general and the even smaller number on the topic of navigational safety, are surprising in light of the eagerness to highlight Russia's vast experience in Arctic shipping apparent in Russia's proposals.

One element of this justification based on Russian experience is reference to the suitability of pre-existing Russian legislation on shipping along the NSR, such as when Russia makes a case for excluding the northern part of the Bering Sea from the geographical scope of the Polar Code. The adequacy of the Russian legislation is again based on the Russian polar shipping experience and, thus, should serve as a leading guide in the formulation of the Polar Code. While the justification for Russia's proposal on icebreaker assistance is not publicly available, the same rationale appears to shine through this proposal, in that it mirrors Russian NSR regulations regarding icebreaker assistance.

An interesting aspect of the emphasis on Russian polar shipping experience is that it frames the Russian Federation not so much as a coastal State, but more as the State with the most extensive use of the Arctic waters, a *maritime* Arctic State. Thus, while Russia is undoubtedly an Arctic coastal State with interests related to that, the

reference to its superior knowledge of polar shipping serves to point out that it also has maritime interests inasmuch as a great deal of its Arctic activities require shipping off its northern coast.

5.4. Russia, the Arctic actor

On the basis of the above, there seems to be a discrepancy between Russia's self-image and the reality of its participation in the Polar Code process. Russia's self-image as the main user of Arctic waters with superior knowledge of polar shipping, as well as Russia's extensive reference to this as justification for its proposals, implies that Russia should take a leading position in questions of Arctic shipping. From the stance of Russia, Russia's proposals and views should be given more weight in debates, as Russia has the most relevant knowledge and understanding.

Yet, as has been shown, Russia's partaking in the Polar Code negotiations can be characterised by a reactive approach to the debate, a somewhat isolated position among the Arctic States and inconspicuous activity considering Russia's size and importance in the Arctic and, not least, its self-image. Leadership is, of course, not established by the numbers of proposals submitted. However, analysis of the content of the Russian submissions shows that, rather than demonstrating leadership on a wide array of issues, Russia pragmatically picked issue areas where it saw its own interests affected. It becomes clear then that Russia favours national regulations over uniform international standards and its own interests over the goals of the IMO, that is, the wider international community.

When looking at the Russian interests put forward in its submissions, it is clear that Russia is not just a coastal State, nor just a maritime user State of Arctic waters, but an actor with a wide array of interests in the Arctic. Russia acted in its capacity as a coastal State both with regard to safeguarding national regulations and over the question of reception facilities.[96] In its attempts to maintain control over shipping along the NSR, Russia acted on its security concerns. It acted in its shipping interest when the question of oil and oily mixture discharges from machinery spaces was debated. Russia acted in its interest relating to fishing when wanting to change the geographical scope of application of the Polar Code. And even though it proposed laxer standards on oil and oily mixture discharges from machinery spaces, Russia did not oppose strict standards on, for example, discharges of noxious liquid substances or untreated sewage. In some cases, therefore, Russia also kept its environmental interests in mind—after all, it has the longest Arctic coastline and clean-up could prove impossible or very costly. Thus, Russia should not be seen as a one-sided actor in the Arctic. Russia has many interests in the region and, in its work on the Polar Code, Russia tried to protect all of these interests, unlike its self-image suggests.

6. Conclusion

The analysis of material from the IMO's database shows that the Russian experience in Arctic shipping did not translate into extensive contributions to the development

of uniform standards for safe ship operation and environment protection in polar areas. First, it has been shown that Russian activity in tabling proposals lagged behind, notably, that of Canada and the United States. Moreover, the majority of the Russian proposals were reactive rather than proactive. Second, the majority of the issue areas and actions Russia espoused did not contribute substantially to navigational safety or protection of the environment, while some of its proposals effectively acted against the aim of creating globally uniform minimum standards. Therefore, Russia's contribution to the Polar Code in general cannot be said to have aided the achievement of the goals which States set out at the onset of the Polar Code negotiations.

Most of the Russian proposals seem to have an underlying motive of self-interest.[97] These interests include upholding Russia's legal, jurisdictional claims as regards the NSR and control over vessels. Russian interests are also linked to the possibly burdensome and negatively perceived consequences of future implementation of the Polar Code's regulations: financial and economic implications, such as upgrading Russian icebreakers, survey and research vessels, and fishing fleet; discouragement of international transit shipping through the NSR[98]; and the burden of providing for adequate reception facilities in each Arctic port. Russia furthered these interests in a pragmatic manner in its proposals, showing that it has a holistic identity in the Arctic setting—as opposed to a distinctly coastal State identity or the maritime user identity emphasised by the Russian proposals.

Regulation regarding fishing vessels are set to come up in the planned phase-2 of the Polar Code, along with other non-SOLAS vessels, such as pleasure crafts and mobile offshore drilling units. It will be interesting to see whether there will be a noticeable change in Russia's approach and participation in the negotiations during phase-2, since it will touch on issues vital to the Russian fishing and offshore hydrocarbon extraction industries. Will Russia continue to further its own interests above the goals set out by the IMO and only pay lip-service to international cooperation in the Arctic? Will Russia continue to be reactive and not share its experience for the benefit of the international community? Or, will Russia live up to its own image as a leading Arctic State with many years of experience in polar shipping?

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NOTES

1. IMO Res. MSC.385(94), adopted on 21 November 2014; and IMO Res. MEPC.264(68), adopted on 15 May 2015.
2. International Convention for the Safety of Life at Sea, London, 1 November 1974.
3. International Convention for the Prevention of Pollution from Ships, as Modified by the Protocol of 1978 Relating Thereto, London, 2 November 1973 and 17 February 1978.
4. The Polar Code will enter into force through the tacit acceptance procedure of SOLAS and MARPOL. The Code contains additional regulations to those previously found in the main IMO Conventions, and complements other IMO regulations.
5. Pavel K. Baev, 'Russia's Arctic Policy. Geopolitics, Mercantilism and Identity-Building', *UPI Briefing Paper* 73 (2010): 5–7; Marlene Laruelle, *Russia's Arctic Strategies and the Future of the Far North* (Armonk, NY: M. E. Sharpe, 2014), 24–46.
6. For a definition of the Arctic Zone of the Russian Federation (AZRF), see Russian Federation, *Basics of the State Policy of the Russian Federation in the Arctic for the Period till 2020 and for a Further Perspective*, 2008. For a discussion of the geographical terminology of the Russian Arctic, see Laruelle, *Russia's Arctic Strategies*, *supra* n. 5, 28–33. For an interpretation of the AZRF as a reinvention of the Soviet sector doctrine, see Lincoln E. Flake, 'Forecasting Conflict in the Arctic: The Historical Context of Russia's Security Intentions', *The Journal of Slavic Military Studies* 28, no. 1 (2015): 94–6.
7. Laruelle, *Russia's Arctic Strategies, supra* n. 5, 135–67.
8. The NSR as a concept originates from Russian legislation where it is defined as 'the historically emerged national transportation route of the Russian Federation', see Russian Federation, *Federal Law on Amendments to Specific Legislative Acts of the Russian Federation Related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route*, signed 28 July 2012, published 30 July 2012. The NSR does not entirely overlap with the Northeast Passage, as the former spans from Novaya Zemlya to the Bering Strait.
9. Russian Federation, *Basic Strategy*, *supra* n. 6. In spite of, and maybe because of, the fall in traffic along the NSR in recent years, plans are being drawn up to make shipping along the NSR more viable, see Trude Pettersen, 'Medvedev Orders Plan to Increase Northern Sea Route Capacity', *Barents Observer*, 10 June 2015, http://barentsobserver.com/en/arctic/2015/06/medvedev-orders-plan-increase-northern-sea-route-capacity-10-06 (accessed 11 June 2015).
10. These instruments are the 2012 Federal Law, *supra* n. 8, and Russian Federation, *Rules of Navigation on the Water Area of the Northern Sea Route*, dated 17 January 2013. For an introduction to these instruments, see Jan J. Solski, 'New Developments in Russian Regulation of Navigation on the Northern Sea Route', *Arctic Review on Law and Politics* 4, no. 1 (2013): 90–119.
11. As a result of the reorganisation of the IMO's Sub-Committees in 2013, the 57th session of the DE Sub-Committee (DE 57) was followed by the 1st session of the SDC Sub-Committee (SDC 1), instead of DE 58.
12. Accessible after registration at https://webaccounts.imo.org/.
13. The available audio records start from DE 57 in 2012 and are accessible to delegates through IMODOCS. The present author was provided access by one of the environmental NGOs with consultative status at the IMO.
14. Chairman of the working group, *Development of a Mandatory Code for Ships Operating in Polar Waters: Report of the Intersessional Working Group*, IMO Doc. SDC 1/3, 10 October 2013; and Norway, *Ship Design and Construction: Draft Polar Code, Part I-B*, IMO Doc. MSC 94/INF.4, 4 March 2014.
15. Canada, *Reports of Sub-Committees: Comments on the outcome of SDC 1: Amendments to the Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating to Thereto (MARPOL)*, MEPC 66/11/7, 21 February 2014.

16. In the case of Norway, it should be noted that part of its submissions were written as chair of a correspondence or intersessional working group entrusted with the detailed work on the Polar Code between the sessions of the Committees and Sub-Committees. The United States also submitted five proposals to Sub-Committees other than DE and SDC.
17. Jon Elster, 'Arguing and Bargaining in Two Constituent Assemblies', *University of Pennsylvania Journal of Constitutional Law* 2, no. 2 (2000): 372–4. For a summary of Elster's arguing and bargaining and its reformulation, see Thomas Saretzki, 'From Bargaining to Arguing, from Strategic to Communicative Action? Theoretical Distinctions and Methodological Problems in Empirical Studies of Deliberative Policy Processes', *Critical Policy Studies* 3, no. 2 (2009): 157–64.
18. Elster, 'Arguing and Bargaining', *supra* n. 17, 373–7; Saretzki, 'From Bargaining to Arguing', *supra* n. 17, 158; and Mark E. Warren et al., 'Deliberative Negotiation', in *Negotiating Agreement in Politics*, ed. Jane Mansbridge et al. (Washington DC: APSA, 2013), 93.
19. Elster, 'Arguing and Bargaining', *supra* n. 17, 371–2; and Saretzki, 'From Bargaining to Arguing', *supra* n. 17, 157–64. In the present article, the term 'bargaining' is preferred over 'negotiation', so as to differentiate between bargaining and the IMO's negotiations of the Polar Code. The latter is not intended to imply that the Polar Code process was dominated by bargaining.
20. Elster, 'Arguing and Bargaining', *supra* n. 17, 392; and Saretzki, 'From Bargaining to Arguing', *supra* n. 17, 158–9.
21. Jon Elster, 'Introduction', in *Deliberative Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 1998), 6.
22. Ibid.
23. See table in Warren et al., 'Deliberative Negotiation', *supra* n. 18, 93a, and for a description of different negotiation outcomes, 94–98.
24. Jon Elster, 'Deliberation and Constitution Making', in *Deliberative Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 1998), 101–4.
25. Elster, 'Arguing and Bargaining', *supra* n. 17, 406–14. There is also what I consider a version of strategically used arguments, legitimacy talk through indirect speech, where one disguises demands with reference to universal values, thereby giving legitimacy to one's claim. See Matthew D. Stephen, "Can You Pass the Salt?' The Legitimacy of International Institutions and Indirect Speech', *European Journal of International Relations* 21, no. 4 (2015): 768–92.
26. Elster, 'Arguing and Bargaining', *supra* n. 17, 414–8.
27. Jane Mansbridge et al., 'Norms of Deliberation: An Inductive Study', *Journal of Public Deliberation* 2, no. 1 (2006): 2–5; and Mark E. Warren et al., 'Deliberative Negotiation', *supra* n. 18, 94.
28. United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. See also, Aldo Chircop, 'The International Maritime Organization', in *The Oxford Handbook of the Law of the Sea*, ed. Donald R. Rothwell et al. (Oxford: Oxford University Press, 2015), 429–31.
29. Convention on the International Maritime Organization, Geneva, 6 March 1948.
30. Ibid., art. 2 (b).
31. In the Arctic setting, the Arctic Council's Arctic Marine Shipping Assessment 2009 Report recommended support for the IMO's efforts in harmonising international standards relating to ship operations in the Arctic.
32. Tore Henriksen, 'The Polar Code: Ships in Cold Water—Arctic Issues Examined', *CMI Yearbook 2014* (2014): 344.
33. Convention on the IMO, *supra* n. 29, art. 1 (a).
34. IMO, *Strategic Plan for the Organization (2013–2017)*, Assembly Res. A.1037(27), 22 November 2011, Annex 1.

35. Denmark, Norway and the United States, *Work Programme: Mandatory Application of the Polar Guidelines*, IMO Doc. MSC 86/23/9, 24 February 2009, 4; and Denmark, Norway and the United States, *Work Programme of the Committee and Subsidiary Bodies: Mandatory Application of the Polar Guidelines*, IMO Doc. MEPC 59/20/1, 6 April 2009, 4.
36. IMO Res. MSC.385(94) and MEPC.264(68), *supra* n. 1, Introduction 1.
37. A similar approach was suggested by Bai when discussing the underlying principles of the Polar Code. She identifies the principles of non-discrimination, which can be linked to the equal application of uniform standards, and safety of life at sea and pollution prevention as 'substantive principles of Arctic shipping governance'. Jiayu Bai, 'The IMO Polar Code: The Emerging Rules of Arctic Shipping Governance', *The International Journal of Marine and Coastal Law* 30, no. 4 (2015): 680.
38. See, for example, Heather A. Conley and Caroline Rohloff, 'The New Ice Curtain: Russia's Strategic Reach to the Arctic', *Report of the CSIS Europe Program*, 2015; Laruelle, *Russia's Arctic Strategies*, *supra* n. 5.
39. Article 234 provides coastal States with 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'. For a discussion on the international legal basis of the NSR regime, see Solski, 'New Developments', *supra* n. 10, 94–103; and Albert Buixadé Farré et al., 'Commercial Arctic shipping through the Northeast Passage: Routes, Resources, Governance, Technology, and Infrastructure', *Polar Geography* 37, no. 4 (2014): 309–11.
40. Andrea Scassola, 'An International Polar Code of Navigation: Consequences and Opportunities for the Arctic', *The Yearbook of Polar Law* V (2013): 286–7. See also the concerns raised by several delegations during the Polar Code negotiations, IMO, *Report to the Maritime Safety Committee*, Doc. DE 55/22, 15 April 2011, para. 12.7.
41. Buixadé Farré et al., 'Commercial Arctic shipping', *supra* n. 39, 313–6; and Arild Moe, 'The Northern Sea Route: Smooth Sailing Ahead?' *Strategic Analysis* 38, no. 6 (2014): 794–7.
42. Conley and Rohloff, 'The New Ice Curtain', *supra* n. 38, 62–4; and Laruelle, *Russia's Arctic Strategies*, *supra* n. 5, 158.
43. While Russia is not among the biggest flag States, there have been plans to boost the presence of Russian-flagged vessels in the Russian Arctic, see Atle Staalesen, 'Russian Arctic for Russian ships', *Barents Observer*, 19 June 2015, http://barentsobserver.com/en/energy/2015/06/russian-arctic-russian-ships-19-06 (accessed 22 June 2015).
44. The Polar Operational Limit Assessment Risk Indexing System (POLARIS) is a system for determining operational limitations in ice conditions, developed by the International Association of Classification Societies (IACS), see IACS, *Consideration and Adoption of Amendments to Mandatory Instruments: POLARIS—Proposed System for Determining Operational Limitations in Ice*, IMO Doc. MSC 94/3/7, 12 September 2014.
45. Russian Federation, *Development of a Mandatory Code for Ships Operating in Polar Waters: Procedure of Accounting for National Regulations*, IMO Doc. DE 55/12/23, 1 February 2011; and Russian Federation, *Development of a Mandatory Code for Ships Operating in Polar Waters: A Proposal to Appoint Categories Depending on the Ice Reinforcement of Ships*, IMO Doc. DE 56/10/14, 24 December 2011.
46. DE 55/12/23, *supra* n. 45, with reference to Canada, *Development of a Mandatory Code for Ship Operating in Polar Waters: Proposed Framework for the Code for Ships Operating in Polar Waters*, IMO Doc. DE 53/18/2, 20 November 2009, 2.
47. Ibid.
48. DE 56/10/14, *supra* n. 45, 1.
49. The United States registered its concerns with regard to the legal basis and safety aspects of Canadian and Russian regulations and was supported by other delegations in its doubts over the use of LOSC art. 234 by these two States, as well as with regard to the possibility that

'the Polar Code in itself would provide the international legal basis for these systems'. See DE 55/22, *supra* n. 40.

50. IMO, *Report to the Maritime Safety Committee*, Doc. DE 56/25, 28 February 2012, para. 10.15.
51. MEPC 66/11/7, *supra* n. 15.
52. While the intention of art. 234 is to enhance the protection of the marine environment through more stringent coastal State legislation, it has been questioned whether some elements of the Russian and Canadian legislation could fit in the scope of art. 234, notably mandatory reporting and authorization to enter certain waters. It has also been highlighted that Canada and Russia might interpret art. 234 as providing the right to maintain legislation that is less stringent than international standards.
53. DE 55/12/23, *supra* n. 45, 2.
54. Ibid.
55. DE 56/10/14, *supra* n. 45, 1.
56. DE 56/25, *supra* n. 50, Annexes 21 and 22.
57. Russian Federation, *Development of a Mandatory Code for Ships Operating in Polar Waters: Proposals Related to an Environmental Chapter of a Mandatory Code for Ships Operating in Polar Waters (Polar Code)*, IMO Doc. DE 57/11/12, 25 January 2013.
58. IMO, *Report of the Marine Environment Protection Committee on Its Sixty-Fifth Session,* Doc. MEPC 65/22, 24 May 2013, para. 11.49.
59. Russian Federation, *Development of a Mandatory Code for Ships Operating in Polar Waters: Comments on Chapter 1 of Part II-A*, IMO Doc. SDC 1/3/18, 29 November 2013; Russian Federation, *Reports of Sub-Committees: Comments on the Outcome of SDC 1: Environmental Issues Related to the Draft Code for Ships Operating in Polar Waters (Polar Code)*, IMO Doc. MEPC 66/11/3, 24 January 2014; Russian Federation, *Mandatory Code for Ships Operating in Polar Waters: Comments on the Environmental Matters in the Polar Code (Part II-A, Chapter 1)*, IMO Doc. MEPC 67/9/2, 8 August 2014; and Russian Federation, *Mandatory Code for Ships Operating in Polar Waters: Comments on the Report of the Polar Code Correspondence Group (Part II-A, Chapter 1)*, IMO Doc. MEPC 67/9/3, 15 August 2014.
60. The Russian proposals concern discharges in the Arctic only, as discharges of oil and oily mixtures in Antarctic waters had previously been prohibited in MARPOL Annex I. Since the Polar Code is supplementary in nature and only deals with issues not already regulated by other IMO instruments, discharges of oil and oily mixtures in Antarctic waters are not touched upon in the Polar Code.
61. SDC 1/3/18, *supra* n. 59, 1.
62. IMO, Meeting Audio, SDC 1, 21 January 2014, 14:41:13.
63. DE 57/11/12, *supra* n. 57. Russia also argued against establishing special areas for other purposes, including sewage and grey waters and heavy fuel oil, in its statement to DE 56, on grounds that proposal for special areas can only originate from Parties to MARPOL and need to be well-grounded; see DE 56/25 Annex 22, *supra* n. 56.
64. MEPC 66/11/3, *supra* n. 59, 2; MEPC 67/9/2, *supra* n. 59, 2; and MEPC 67/9/3, *supra* n. 59, 2.
65. The influence of the Polar Code on shipping and the economic activity of coastal States was also highlighted by Russia in one of its statements, which is more general in nature, see DE 56/25 Annex 21, *supra* n. 56.
66. Russian Federation, *Mandatory Code for Ships Operating in Polar Waters: Comments on the Report of the Polar Code Correspondence Group (Part II-A, Chapter 1)*, IMO Doc. MEPC 67/9/4, 15 August 2014.
67. Kiribati et al., *Development of a Mandatory Code for Ships Operating in Polar Waters: Reception Facilities for Oil and Oily Mixtures*, IMO Doc. SDC 1/3/1, 11 October 2013.
68. IMO, Meeting Audio, SDC 1, 21 January 2014, 15:26:44.

69. Russian Federation, *Development of a Mandatory Code for Ships Operating in Polar Waters: Comments on Document DE 54/13/4*, IMO Doc. DE 54/13/10, 31 August 2010.
70. DE 55/22, *supra* n. 40, para. 12.25.
71. In addition, icebreaker escorts are mentioned in DE 56/10/14, supra n. 45.
72. DE 55/22, *supra* n. 40, para. 12.25.
73. DE 54/13/10, *supra* n. 69, 3.
74. IMO, *Guidelines for Ships Operating in Arctic Ice-Covered Waters*, MSC/Circ.1056/MEPC/Circ.399, 23 December 2002; and IMO, *Guidelines for Ships Operating in Polar Waters*, Assembly Res. A.1024(26), 2 December 2009.
75. IMO, *Report to the Maritime Safety Committee*, Doc. SDC 1/26, 11 February 2014, Annex 10.
76. Russian Federation, *Ship Design and Construction: Development of a Mandatory Code for Ships Operating in Polar Waters: The Delineation of Boundaries of the Polar Code's Scope of Application*, IMO Doc. MSC 93/10/9, 25 March 2014; and IMO, *Report of the Maritime Safety Committee on Its Ninety-Third Session*, Doc. MSC 93/22, 30 May 2014, para. 10.26.
77. MSC 93/10/9, *supra* n. 76, 2.
78. Ibid., 1.
79. Ibid., 2.
80. DE 55/22, *supra* n. 40, para. 12.7.1.
81. For example, Chapter 3 of MARPOL Annex I contains requirements on the discharge of oil from machinery spaces of *all ships*. In accordance with the definitions contained in MARPOL, what is meant by 'ship' is 'a vessel of any type whatsoever operating in the marine environment', see MARPOL, *supra* n. 3, art. 2 (4).
82. Laruelle, *Russia's Arctic Strategies*, *supra* n. 5, 157–8.
83. MSC 93/10/9, *supra* n. 76, 2.
84. Russian Federation, *Consideration and Adoption of Amendments to Mandatory Instruments: Polar Code: Modes of Operation in Ice and Speed Limitations*, IMO Doc. MSC 94/3/21, 26 September 2014; Russian Federation, *Consideration and Adoption of Amendments to Mandatory Instruments: Operational Limitations for Polar Navigation Ships*, IMO Doc. MSC 94/3/22, 26 September 2014; and Russian Federation, *Consideration and Adoption of Amendments to Mandatory Instruments: Draft Polar Code—Proposal for Text Improvement*, IMO Doc. MSC 94/3/23, 26 September 2014.
85. MSC 94/3/22, *supra* n. 84, 2.
86. Ibid., 3.
87. A submission by the Cruise Lines International Association also points out technical problems with POLARIS, see CLIA, *Consideration and Adoption of Amendments to Mandatory Instruments: Comments on Document MSC 94/3/7 (POLARIS)*, IMO Doc. MSC 94/3/18, 26 September 2014.
88. See note of the Chair in MSC 93/INF.4, *supra* n. 14, Annex, 6.
89. Square brackets denote text on which final agreement has not yet been reached.
90. MSC 93/22, *supra* n. 76, para. 10.25.
91. DE 56/25, *supra* n. 50.
92. This number also includes the two statements Russia made at DE 56.
93. MEPC 66/11/7, *supra* n. 15.
94. See among others, SDC 1/26, *supra* n. 75, Annex 10; and MEPC 66/11/7, *supra* n. 15.
95. See for example, MEPC 66/11/3, *supra* n. 59, 2; MSC 93/10/9, *supra* 76, 2; MEPC 67/9/2, *supra* 59, 2; MEPC 67/9/3, *supra* 59, 2; MSC 94/3/21, *supra* n. 84, 3; and MSC 94/3/22, *supra* n. 84, 3.
96. In fact, the draft provisions on reception facilities were the only ones in the Polar Code which directly addressed coastal and port States and created obligations for them.

97. Similar Russian behaviour is observed in the context of three separate environmental regimes examined in Anna Korppoo, Nina Tynkkynen, and Geir Hønneland, *Russia and the Politics of International Environmental Regimes: Environmental Encounters or Foreign Policy?* (Cheltenham: Edward Elgar, 2015).
98. This was underscored in debate when Russia urged for stimulation of the development of Arctic shipping, not prohibitive measures. IMO, Meeting Audio, SDC 1, 21 January 2014, 12:03:01.

Paper 2

Bognar, Dorottya. "Russia and the Polar Marine Environment: The Negotiation of the Environmental Protection Measures of the Mandatory Polar Code." *Review of European, Comparative & International Environmental Law* 27 (2018): 35-44.

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Russia and the polar marine environment: The negotiation of the environmental protection measures of the mandatory Polar Code

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The International Maritime Organization's Polar Code aims at enhancing polar marine environmental protection from vessel-source pollution. Russia, the largest Arctic coastal State will play an important role in the Code's implementation and further development. This article analyses Russia's positions and decision-making mode during the negotiations of the Code's environmental measures. Looking at three issue areas – establishment of special areas, discharge ban of oil and oily mixtures, and reception facilities – it is evident that Russia's environmental interests took a backseat to economic concerns and zero-sum outlook. Further, Russia's negotiating strategy was dominated by bargaining, rather than arguing, which could have produced better understanding among the negotiating parties. There was a disconnect between Russia's aims and the Code's goals, and between Russia's chosen strategy and the strategy from which its proposals could benefit most. This suggests that the Code's implementation and future development could face further challenges from Russia.

1 | INTRODUCTION

With the decrease of polar sea ice and the expected increase of polar shipping, one recent step to protect the Arctic marine environment concerns a new mandatory international legal instrument, the International Code for Ships Operating in Polar Waters (Polar Code), negotiated at the International Maritime Organization (IMO).[1] The Polar Code is a set of region-specific regulations applying to both the Arctic and Antarctic, which adds to already existing major IMO Conventions, including the International Convention for the Prevention of Pollution from Ships (MARPOL).[2] The Code includes mandatory regulations, as well as recommendations, for passenger ships, cargo vessels and their crew, both for the protection of the fragile polar marine environment and for navigational safety, which indirectly contributes to the prevention of accidental pollution of polar waters. The safety measures of the Code address construction, machinery, equipment and training issues as well as voyage planning, while the environmental measures add to the Annexes of MARPOL in the areas of prevention of pollution by oil, noxious liquid substances, sewage and garbage. While the pollution prevention part of the Code originally set out with a much wider coverage, the key issue areas focused on were oil pollution, including the possibility of a ban on the use of heavy fuel oil (HFO) and the possible need for port reception facilities, as well as questions of certification to prove compliance with the Code's requirements.

One of the most affected parties in the negotiation of the Polar Code was the Russian Federation, the largest Arctic coastal State. It is the waters north of the Russian Arctic coast that are most promising for commercial shipping with the predicted reduction of sea ice, and Russia already utilizes these waters in connection with resource extraction in the region. Russia's participation in the Polar Code's negotiation and its efforts to influence the Code's

[1] 'International Code for Ships Operating in Polar Waters (Polar Code)' IMO Doc MSC.385(94) (adopted 21 November 2014, entered into force 1 January 2017); and 'International Code for Ships Operating in Polar Waters (Polar Code)' IMO Doc MEPC.264(68) (adopted 15 May 2015, entered into force 1 January 2017) (Polar Code).

[2] International Convention for the Prevention of Pollution from Ships, as Modified by the Protocol of 1978 Relating Thereto (adopted 2 November 1973 and 17 February 1978, entered into force 2 October 1983) 1340 UNTS 62 (MARPOL), as amended.

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provisions are therefore important for understanding both the Code's future and Russia's possible approach to implementing and complying with it.

Russia's commitment to environmental protection in the past, both in general and in the Arctic in particular, has been chequered. Research points to a pattern whereby Russia appears to place higher importance on foreign policy goals and economic gains, than on environmental protection, in both the national and international settings.[3] However, it is also clear for Russia that the Arctic environment is vulnerable, and environmental protection features in both Russia's 2008 and 2013 Arctic strategies,[4] suggesting that Russia attaches importance to such measures. But how did this translate into the negotiation of regulations regarding ship-source pollution in the Arctic specifically?

To answer this question, I scrutinize Russia's participation in the negotiations on the environmental measures of the Polar Code. First, I ask what proposals Russia tabled during the negotiations regarding environmental protection, and what can be said for Russia's positions vis-à-vis the environment-related proposals of other IMO member States and observer organizations. Another way to answer my main research question is by looking at what characterizes the justifications Russia used in supporting its positions, and how the decision-making mode that Russia engaged in influenced the outcome of the debates. For this I use deliberative theory.

Classical deliberative theory contrasts two forms of decision-making modes, arguing (deliberation) and bargaining (negotiation).[5] The former is built on the review of participants' preferences based on the exchange of reasoned arguments, claiming validity concerning factual truth, normative rightness (impartiality and reliance on principles) and sincerity (consistency), to achieve understanding based on consensus.[6] During bargaining, meanwhile, parties aim at achieving their self-interests through demands that are based on credibility underpinned by material resources.[7] If social norms prohibit the utterance of self-interest, however, arguments might be used by the bargaining parties in support of their claims, to achieve such interests.[8] Thus, an expression of self-interest might be replaced by a claim to principle, or a warning might be stated instead of a threat, replacing the need to rely on the credibility of superior material resources to back up a position with a claim to factual truth.[9] However, the outcome of such strategic uses of argumentation does not always coincide with what was intended. Recently, it has been acknowledged that interests and arguing do not necessarily exclude one another. In fact, explaining one's interest can lead to improved understanding and an outcome that takes into account the preferences of both parties.[10] Where can Russia's stance in the negotiation of the Polar Code's environmental measures be placed between arguing and bargaining?

This article sets out with a short presentation of secondary literature regarding Russia and environmental protection, followed by an introduction to the research material. It then presents the environmental issue areas where Russia participated in the debates, and discusses Russia's positions and their implications, closely linked with the justifications offered. The final sections summarize the findings and offer a short conclusion.

2 | RUSSIA AND ENVIRONMENTAL PROTECTION IN THE LITERATURE

Previous research points at the secondary nature of environmental considerations for Russia, compared to other drivers of its engagement with environmental regulations. In his study of three cases – Baltic Sea pollution, transboundary air pollution and nuclear power safety – Robert Darst suggests that the Soviet Union was guided by broader foreign and domestic policy goals when negotiating international environmental agreements, while after the end of the Cold War attracting money through transnational subsidization of environmental protection projects was important for economic development.[11] More recently, Anna Korppoo and colleagues find an array of issues when analysing three international environmental regimes – the climate regime, marine environmental protection in the Baltic Sea and fisheries management in the Barents Sea – that influenced Russia's participation in these regimes over environmental concerns: again, domestic and foreign policy goals, international image-building and soft power, and economic gain.[12] This is paralleled in the case of the establishment of the Ross Sea Marine Protection Area in the Antarctic where Perry Carter and colleagues suggest that Russia's economic concerns regarding future fishing rights in the area were important in the negotiations, while reinforcing its soft power image

[3]RG Darst, *Smokestack Diplomacy: Cooperation and Conflict in East–West Environmental Politics* (MIT Press 2001) 3–4; A Korppoo, N Tynkkynen and G Hønneland, *Russia and the Politics of International Environmental Regimes: Environmental Encounters or Foreign Policy?* (Edward Elgar 2015) 136–142; and P Carter, AM Brady and E Pavlov, 'Russia's "Smart Power" Foreign Policy and Antarctica' (2016) 6 The Polar Journal 259, 267–269.

[4]Russian Federation, 'Basics of the State Policy of the Russian Federation in the Arctic for the Period till 2020 and for a Further Perspective' (2008) para 4(c); and Russian Federation 'Strategy for the Development of the Arctic Zone of the Russian Federation' (2013) para 16. For the environment as part of Russia's maritime policy for the Arctic Ocean, see DV Vasilevskaya, AV Nikolaev and GI Tsoy, 'The Environmental Component of the National Maritime Policy of the Russian Federation in the Arctic Ocean' in PA Berkman and AN Vylegzhanin (eds), *Environmental Security in the Arctic Ocean* (Springer 2013) 93.

[5]J Elster, 'Arguing and Bargaining in Two Constituent Assemblies' (2002) 2 University of Pennsylvania Journal of Constitutional Law 345, 371–372; J Mansbridge, 'Deliberative and Non-deliberative Negotiations' (2009) <http://ssrn.com/abstract=1380433> 3–5; and ME Warren et al, 'Deliberative Negotiation' in J Mansbridge et al (eds), *Negotiating Agreement in Politics* (American Political Science Association 2013) 86, 93. When the present article uses the phrases 'negotiation of the Polar Code', 'negotiating strategy' and 'negotiating parties', these are not intended to imply that the parties to the Polar Code process engaged mainly in bargaining as a decision-making mode.

[6]Elster (n 5) 371–377; J Mansbridge et al, 'The Place of Self-interest and the Role of Power in Deliberative Democracy' (2010) 18 The Journal of Political Philosophy 64, 66–67.

[7]Elster (n 5) 372, 392–393.

[8]J Elster, 'Strategic Uses of Argument' in K Arrow et al (eds), *Barriers to Conflict Resolution* (W.W. Norton 1995), 237; and Elster (n 5) 405–418.

[9]Elster (n 8) 237–238 and 244–257; and Elster (n 5) 405–418.

[10]Mansbridge (n 5) 5–11; Mansbridge et al (n 6) 72–80; and Warren et al (n 5) 92–93.

[11]Darst (n 3) 3–4, 21–35.

[12]Korppoo et al (n 3) 130–142.

was influential in bringing a solution to the issue, rather than environmental considerations.[13]

Turning to Arctic shipping, Russia has long experience in extensive regulations of shipping on the Northern Sea Route (NSR),[14] today based on the concept of an exclusive economic zone in the United Nations Convention on the Law of the Sea (LOSC), where coastal States are provided with perceived unilateral rights for the protection of ice-covered waters from vessel-source pollution.[15] However, in a region important from a national security perspective, it has been suggested that control over ship traffic may have had higher importance for the regulation of shipping than environmental considerations.[16] Such arguments are also supported by the poor environmental record of the Soviet Union/Russia in the Arctic, exemplified by the Soviet/Russian fleet's inability to comply with strict discharge regulations.[17] Most recently, Andrei Zagorski commented that concerns relating to economic impact had influenced Russia's thinking regarding the Polar Code.[18]

Despite the trends in the secondary literature, it is pertinent to ask if their conclusions are relevant for the negotiation of the Polar Code. As suggested above, Russia has strong, objective environmental interests in the NSR area, which is also reflected in its Arctic strategies.

3 | RESEARCH MATERIAL

The present analysis is built primarily on documents gathered from the IMO's document database, IMODOCS.[19] These include State submissions to the IMO Committee responsible for environmental protection, the Marine Environment Protection Committee (MEPC), as well as two Sub-committees that were tasked with the technical work on the Polar Code: the Sub-committee for Ship Design and Equipment (DE) and its successor, on Ship Design and Construction (SDC).[20] This analysis also includes reports of these bodies where Russia's opinion was recorded, whether in the main text or annexed to the report as a statement. Such inclusions of opinion serve to show strong opinions that were different from the majority of those States that spoke on a given issue.

Russia submitted six documents with regard to the substance of the environmental measures to be included in the Polar Code.[21] Additionally, Russian opinions regarding environmental measures were recorded three times in reports of the Committee and Sub-committees. In my analysis, I compare the content of these documents to other delegations' proposals as well as legal documents already existing at the time of the debates.

State proposals served as the basis of the discussions regarding the content of the Polar Code and provide an insight into the justifications used by States to support their positions, whereas reports of the Committee and Sub-committees give account of the debates. However, expert working group debates and private conversations on the corridors cannot be reproduced from these documents. Therefore, interviews were also conducted with delegates to the IMO in support of the analysis. Interviewees were selected from both national delegations and delegations of environmental nongovernmental organizations (NGOs) in consultative status at the IMO. However, interviewees were reluctant to offer detailed information on the Polar Code negotiations for the record, with most insight provided off-the-record which cannot be reproduced in this article.[22]

4 | RUSSIA AND THE NEGOTIATION OF THE POLAR CODE'S ENVIRONMENTAL PROVISIONS

In the following, I analyse Russia's positions and the justifications behind these, with regard to the environmental part of the Polar Code.[23] These

[13]Carter et al (n 3) 267–269.

[14]The Northern Sea Route is a concept originating from Soviet domestic regulations. It is described as an 'historically emerged national transportation route of the Russian Federation' that stretches from the Kara Sea to the Bering Strait; see Russian Federation, Federal Act on Amendments to Specific Legislative Acts of the Russian Federation related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route, adopted by the State Duma on 3 July 2012, approved by the Council of Federation on 18 July 2012. A collection of routes, the Northern Sea Route is covered by separate Russian regulations regarding, among others, the procedure of navigation, icebreaker assistance, ice pilotage and ship design and equipment; see Russian Federation, Rules of Navigation in the Water Area of the Northern Sea Route, approved by the Order of the Ministry of Transportation No. 7, 17 January 2013, registered by the Ministry of Justice on 12 April 2013.

[15]United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (LOSC) art 234.

[16]E Franckx, 'Nature Protection in the Arctic: Recent Soviet Legislation' (1992) 41 International and Comparative Law Quarterly 366, 384–385; R Vartanov, A Roginko and V Kolossov, 'Russian Security Policy 1945–1996: The Role of the Arctic, the Environment and the NSR' in W Østreng (ed), *National Security and International Environmental Cooperation in the Arctic – The Case of the Northern Sea Route* (Kluwer Academic 1999) 53, 63; and RD Brubaker, 'Regulation of Navigation and Vessel-Source Pollution in the Northern Sea Route: Article 234 and State Practice' in D Vidas (ed), *Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention* (Cambridge University Press 2000) 221, 224.

[17]Vartanov et al (n 16) 63 and endnote 26, 281; and Brubaker (n 16) 224–225.

[18]A Zagorski, 'Perspective' in OR Young, JD Kim and YH Kim (eds), *The Arctic in World Affairs: A North Pacific Dialogue on the Arctic in the Wider World: 2015 North Pacific Arctic Conference Proceedings* (Korea Maritime Institute and East–West Center 2015) 215, 222–225.

[19]These documents are accessible to the public after registration in IMODOCS. IMODOCS is available at <http://webaccounts.imo.org/>.

[20]Due to the reorganization of the IMO's structure, the 57th meeting of DE was followed by SDC 1.

[21]Russia submitted two proposals referring to Article 234 of the LOSC providing for enhanced coastal State rights for prevention of vessel-source pollution. However, these did not concern environmental measures, but rather focused on safety and limitations to navigation. Therefore, these were left out of the analysis. For an analysis of these submissions, see D Bognar, 'Russian Proposals on the Polar Code: Contributing to Common Rules or Furthering State Interests?' (2016) 7 Arctic Review on Law and Politics 111, 117–119; and D Bognar, 'The "Elephant in the Room": Article 234 of the Law of the Sea Convention and the Polar Code as an Incompletely Theorised Agreement' (2016 Arctic Circle Assembly, Reykjavik, 9 October 2016). For the evaluation of the NSR regulations, which were in force until 2013, four years after the beginning of the negotiation of the Polar Code, in light of Article 234 of the LOSC, see Brubaker (n 16). For the importance of Article 234 as a justification of Russian control of navigation in the NSR, see VV Gavrilov, 'Legal Status of the Northern Sea Route and Legislation of the Russian Federation: A Note' (2015) 46 Ocean Development & International Law 256, 260–261.

[22]Seven interviews were conducted in the 2015–2017 period, two of which were with NGO representatives. Interviewees from national delegations were selected from major Arctic States. While many were reluctant to be interviewed, informal discussions also took place during MEPC 68, the final meeting to discuss the Polar Code's environmental measures before their adoption.

[23]The Polar Code makes a linkage between navigational safety and environmental protection as, arguably, accidents can result in discharge of pollutants into the marine environment, see Polar Code (n 1) preamble. However, an analysis of the Russian submissions regarding the safety part of the Code is beyond the scope of this article. For this, see Bognar, 'Russian Proposals' (n 21) 117–119, 121–124.

are grouped in three thematic areas in order of their first appearance in the documentary material. In the process, I also place Russia's proposals and positions in the context of the views of other participants.

4.1 | Regulation of and special areas for grey water, heavy fuel oil and emissions

Early discussions on environmental regulations had a wide scope, including grey water discharge,[24] emissions of sulphur oxides (SO_x) and nitrogen oxides (NO_x) and use of HFO.

4.1.1 | Positions

Environmental NGOs submitted no less than six documents to DE 56, including proposals to prohibit the use of HFO in the Arctic,[25] regulate discharges of grey water, reduce the impact of black carbon and address SO_x and NO_x emissions.[26]

Russian concerns were recorded twice during this meeting. The first one appears to be a response to the environmental NGOs that 'keep mentioning the increased vulnerability of ecological systems',[27] where Russia argued against the regulation of grey water discharges and the proposed ban on HFO use.[28] Second, Russia issued a statement responding to the report of the working group responsible for the Polar Code, in opposition to the proposed establishment of Arctic special areas with regard to a number of issue areas.[29]

4.1.2 | Implications and interpretation

The proposal of environmental NGOs to prohibit the use of HFO pointed to two risks that might be averted through the suggested ban, citing scientific research to buttress this proposal. Emphasizing the expected increase of Arctic shipping, dangers posed by navigational conditions and lack of spill response infrastructure, the proposal suggested that an accidental spill of HFO would be more detrimental to both the unique and vulnerable Arctic environment and coastal residents, including indigenous peoples, than distillate marine fuel.[30] The second benefit of banning HFO use mentioned in this proposal is associated with the health effects of particulate matter emissions, including black carbon, resulting from the use of HFO.[31] As regards the regulation of sewage and grey water, the environmental NGOs pointed to the low tolerance of polar waters to changes in nutrient levels that would result from such discharges, as well as to cumulative effects together with global climate change and associated warmer sea temperatures.[32] This argumentation is found in document DE 56/10/12, a paper that discussed a wide array of issue areas, which the environmental NGOs wanted to see included in the Polar Code. This wide scope, however, also means that justification for many of the positions was not included due to lack of space, including with regard to SO_x and NO_x emissions.

Russian counter-arguments to the proposed regulations, especially the possibility that special areas and emission control areas could be established in the Arctic, were manifold. Russia took issue with the legality of the proposed special areas and emission control areas. Its statement during the plenary session singled out two aspects of the established procedures it saw as being violated. First of these was that proposals to create special areas must be tabled by parties to MARPOL,[33] which are nation States. This argument can be seen as directed against both the environmental NGOs and the working group, whose report suggested special areas as options for inclusion in the Code.[34] The second criticism was that, according to the procedures, proposals to establish special areas have to be 'adequately substantiated'.[35] It is true that the environmental NGOs' proposals in DE 56/10/12 did not contain extensive justifications. However, with regard to the proposed regulations against the use of HFO in the Arctic, Russia appeared not to take note of the extensive references provided. On the face of it, then, Russia did not oppose the introduction of stringent regulations, including special area designations, but argued against perceived violations of the MARPOL procedures, creating an image of itself as the State upholding international law.

Yet, reading these comments against special areas together with an earlier Russian statement sheds more light on Russia's concerns and their origins. Here, Russia suggested that:

> *it would be imprudent to disregard the influence that would be exerted by each Code's requirement on the shipping in polar waters and economic activity in adjacent areas of a number of States.*[36]

Multiple self-interested justifications appear here. First, the increase of costs that would be caused by a switch from HFO to distillate fuel would affect many of the Russian-flagged vessels as well as vessels serving Russian projects along its northern coast. Russia suggested that complying with some of the proposed regulations, such as those suggested for grey water, would be 'extremely difficult'.[37] While it was not further explained what was meant by 'economic activity in adjacent areas',[38] it can be surmised that this referred to the burgeoning extraction industry in the Russian Arctic.

[24] Grey water includes all wastewater streams from ships with the exception of sewage.

[25] Friends of the Earth International (FOEI) et al, 'Development of a Mandatory Code for Ships Operating in Polar Waters: Heavy Fuel Oil Use in Arctic Waters' IMO Doc DE 56/10/10 (24 December 2011).

[26] Friends of the Earth International (FOEI) et al, 'Development of a Mandatory Code for Ships Operating in Polar Waters: Environmental Protection Chapter' IMO Doc DE 56/10/12 (24 December 2011).

[27] 'Report to the Maritime Safety Committee' IMO Doc DE 56/25 (28 February 2012) Annex 21.

[28] ibid.

[29] ibid Annex 22.

[30] DE 56/10/10 (n 25) 2–4.

[31] ibid 4–5.

[32] DE 56/10/12 (n 26) 3.

[33] DE 56/25 (n 27) Annex 22.

[34] ibid.

[35] ibid.

[36] ibid Annex 21.

[37] ibid.

[38] ibid.

Finally, goods delivery to remote communities was also mentioned as being made more difficult as a result of the proposed regulations.[39] As a solution, Russia suggested that regulation of structural requirements would be sufficient, but that ships should not be subject to requirements that exceed those in MARPOL.[40] This latter statement is in direct contradiction with the stated aim of the Polar Code that is to provide additional requirements to those already existing in MARPOL to increase the protection of the polar environment. Thus, it appears that Russia's interests with regard to shipping and economic activities in its Arctic region were in contradiction with stringent environmental regulations in this case.

While these issues are important for the protection of the polar marine environment, they were left out of the Polar Code. This was due mainly to the lack of prior regulations to build on as in the case of grey water and the ongoing work of other IMO bodies on related issues, such as the effects of black carbon emissions by international shipping in general.[41] With regard to the use of HFO, its regulation was viewed as desired but premature.[42] Thus, the focus turned towards the regulation of other pollution sources, such as oily mixtures. This is the subject of the next subsection.

4.2 | Discharge of oil and oily mixtures from machinery spaces

As one of the additional requirements to those already existing in MARPOL, a complete prohibition of discharge of oil and oily mixtures was discussed during many of the IMO's meetings. This proposed prohibition extended not only to discharges from cargo tanks but also from machinery spaces, which would affect many more vessels than just oil tankers. The first meeting to discuss the potential ban, proposed by environmental NGOs, was the 57th session of DE.[43] This resulted in MEPC 65 being asked to decide between a complete ban and the option of subjecting discharge of oil and oily mixtures to certain conditions, with the MEPC favouring the former.[44]

4.2.1 | Positions

During these debates, there is no record of opposing opinion from Russia. However, following the MEPC's decision, Russia tabled a string of proposals to overturn the complete ban and, subsequently, to seek exemptions from it.[45] These submissions included proposals to allow discharges under certain conditions, to allow maritime administrations to exempt ships from the ban and to provide a five-year-long grace period for certain ship types to comply with the discharge ban.

A discharge ban similar to that decided upon has been in place both in the Canadian Arctic and in Antarctic waters, as indicated by Canada, demonstrating that it is possible to comply with this stringent requirement.[46] Canada further suggested that workable solutions did exist, allowing for compliance with the ban while not causing disproportionate difficulties for shipping.[47]

4.2.2 | Implications and interpretation

While the first Russian submission that aimed to overturn MEPC 65's decision did not elaborate on the reason for this other than the 'extremely difficult' nature of complying with the decision,[48] later Russian documents suggested a number of justifications for the proposed overturn or relaxation of the ban.

First, Russia referred to the claim that discharges of oily water with less than 15 parts per million oil content pose smaller danger than pollutants coming into the Arctic from outside.[49] However, Russia cited just one study throughout the submissions to support this statement, while the lack of page numbers accompanying the reference hinder easy verification of the research. Nevertheless, Russia suggested that the decision to impose a complete ban was not well substantiated,[50] disregarding the experience accrued from the Canadian Arctic and Antarctica. These instances show inconsistencies in Russia's argumentation, highlighting the lack of regard by Russia for providing factually based arguments while requiring a

[39]ibid.

[40]ibid.

[41]'Report to the Maritime Safety Committee and the Marine Environment Protection Committee' IMO Doc DE 57/25 (5 April 2013) 25; and 'Report of the Marine Environment Protection Committee on its Sixty-Fifth Session' IMO Doc MEPC 65/22 (24 May 2013) 69–70.

[42]MEPC 65/22 (n 41) 70. The issue of regulating HFO use and carriage has reappeared at the IMO since the adoption of the Polar Code, supported by major Arctic States, such as the United States and Canada; see Canada et al, 'Work Programme of the Committee and Subsidiary Bodies: Measures to Reduce Risks of Use and Carriage of Heavy Fuel Oil as Fuel by Ships in Arctic Waters' IMO Doc MEPC 71/14/4 (21 March 2017). While risk mitigation is supported by Russia, banning the use of HFO is not; see Russian Federation, 'Any Other Business: Comments on the Document on the Use of Heavy Fuel Oil in the Arctic (MEPC 71/16/4)' IMO Doc MEPC 71/16/8 (12 May 2017) 4.

[43]Friends of the Earth International (FOEI), World Wide Fund for Nature (WWF) and Pacific Environment, 'Development of a Mandatory Code for Ships Operating in Polar Waters: Operational Oil Pollution in Polar Waters' IMO Doc DE 57/11/23 (25 January 2013) 2. This document was submitted to support measures proposed by five Arctic States to mitigate the impact of discharges from other than cargo spaces. For this submission, see Denmark et al, 'Development of a Mandatory Code for Ships Operating in Polar Waters: Proposals Related to an Environmental Chapter of a Mandatory Code for Ships Operating in Polar Waters (Polar Code)' IMO Doc DE 57/11/9 (10 January 2013) 3.

[44]MEPC 65/22 (n 41) 70.

[45]Russian Federation, 'Development of a Mandatory Code for Ships Operating in Polar Waters: Comments on Chapter 1 of Part II-A' IMO Doc SDC 1/3/18 (29 November 2013); Russian Federation, 'Reports of Sub-committees: Comments on the Outcome of SDC 1: Environmental Issues Related to the Draft Code for Ships Operating in Polar Waters (Polar Code)' IMO Doc MEPC 66/11/3 (24 January 2014); Russian Federation, 'Mandatory Code for Ships Operating in Polar Waters: Comments on the Environmental Matters in the Polar Code (Part II-A, Chapter 1)' IMO Doc MEPC 67/9/2 (8 August 2014); and Russian Federation, 'Mandatory Code for Ships Operating in Polar Waters: Comments on the Report of the Polar Code Correspondence Group (Part II-A, Chapter 1)' IMO Doc MEPC 67/9/3 (15 August 2014).

[46]Canada, 'Reports of Sub-committees: Development of a Mandatory Code for Ships Operating in Polar Waters – Reception Facilities for Oil and Oily Mixtures' IMO Doc MEPC 66/11/8 (21 February 2014) 3.

[47]ibid 1–2.

[48]SDC 1/3/18 (n 45) 1.

[49]MEPC 66/11/3 (n 45) 2; and MEPC 67/9/3 (n 45) 2. Russia used this justification in a document submitted already to DE 57, see Russian Federation, 'Development of a Mandatory Code for Ships Operating in Polar Waters: Proposals related to an Environmental Chapter of a Mandatory Code for Ships Operating in Polar Waters (Polar Code)' IMO Doc DE 57/11/12 (25 January 2013) 2.

[50]MEPC 66/11/3 (n 45) 2.

much higher standard of reasoning from other negotiating parties, suggesting that Russia might not have aimed for genuine arguing.

On the other hand, Russia appeared to presuppose the supremacy of its own Arctic experience. Multiple Russian proposals emphasized the vast Russian experience with regard to Arctic shipping, as well as the attention Russia had paid to navigational safety and environmental protection in its Arctic waters, as legitimization of Russia's positions.[51] Most illustrative is the document MEPC 66/11/3 stating that Russia

> *drawing on its own vast experience of Arctic shipping, is of the opinion that the Committee's support of the option of total banning of discharge from ships, bilge waters especially, is not well-grounded.*[52]

Therefore, it seems that what, in Russia's eyes, discredited the ban was not so much scientific research results but Russia's experience which could hardly be reasoned against.[53]

One Russian argument, reiterated in three documents, stands out as being inspired by the Polar Code's aim to enhance environmental protection.[54] Russia pointed to the problem of illegal and uncontrolled discharges that could increase as a result of the prohibition of oil and oily mixture discharges in the Arctic. Drawing a comparison with the Baltic Sea, which experiences illegal discharges in spite of better infrastructure and reception facilities than are available in the Arctic, Russia emphasized the difficulty of identifying such discharges. While illegal and uncontrolled discharges are a genuine concern, it is remarkable that Russia used this argument in support of overturning the discharge ban, rather than, for example, to propose construction of better facilities in the Arctic.

An indication of why Russia would use this argument to support overturning the discharge ban is provided by some of the main justifications Russia cited against the ban, namely the difficulties it would cause for upgrading ships, the costs this would entail and the negative effect this would have on shipping in the Arctic.[55] Russia appeared concerned with the difficulties posed for many different ship types that correspond to Russian activities in the region.

First, Russia mentioned ships on transit voyages across the Arctic.[56] Official Russian rhetoric had been vocal about the possibilities that lie in using the NSR between Europe and Asia, trying to promote this route.[57] Such opportunities would be threatened by a discharge ban on oil and oily mixtures that requires ships to keep these wastes on board during the whole length of Arctic voyages or include port stops to offload them along the route. Second, Russia also brought up ships that operate continuously in Arctic waters for long periods of time without port calls, including icebreakers, survey and research ships.[58] These touch upon different activities in Russian waters. First, icebreakers support other activities in the region, such as resource extraction, transit voyages and resupplying local communities. They also serve to showcase Russian Arctic prowess as Russia has the largest number of icebreakers in the world and is the only State with nuclear icebreakers. Their presence in the Arctic is also important in the exercise of Russian jurisdiction and control over the NSR.[59] Second, survey vessels are essential for mapping oil and gas resources that can support continued expansion of the extraction industry in the region. These vessels are instrumental in turning the Arctic into Russia's strategic resource base, providing a backbone to the Russian economy and underpinning its great power revival.[60] Third, scientific research, supported by research vessels in the Arctic, is significant for enhancing Russia's soft power, additionally to the value in itself. Many of these vessels do not routinely leave Russia's Arctic waters, meaning that the option to discharge oil and oily mixtures before entering polar waters is not open to them.

Thus, many Russian interests in the Arctic would be negatively affected by the prohibition of oil and oily mixture discharges from machinery spaces. However, these were not protected with equal vigour by Russia. The proposals countering the discharge ban had a continuously changing and narrowing scope, ranging from overturning the discharge ban, through allowing maritime administrations to exempt ships of their choosing, to introducing grace periods for limited ship types – signifying the give-and-take characteristic of bargaining. The group of vessels Russia tried to protect to the end, and so what can be considered the most important group of vessels for Russia, is those that spend long periods of time sailing in the Arctic without port calls, in spite of the official rhetoric regarding transit passages.

On this basis, it is possible to see the self-interest behind Russia's proposals to overturn the discharge ban, or at least provide exemptions for some of the affected vessels. Therefore, the Russian justification regarding illegal and uncontrolled discharges might be seen as a warning rather than a genuine environmental argument. Warnings, as strategic appeals to truth introduce a factual element to bargaining, thus stating not what the speaker will do, but what will happen – something outside of the speaker's control.[61] Here, Russia stated that illegal and uncontrolled discharges would happen if the ban was introduced, rather than that ships over which it has control would defy the ban. This way, Russia avoids social opprobrium. Russia appears to have appropriated environmental arguments for the purpose of self-interest and to convince other States to

[51]ibid; MEPC 67/9/2 (n 45) 2; and MEPC 67/9/3 (n 45) 2.

[52]MEPC 66/11/3 (n 45) 2.

[53]However, Canada's experience of how a discharge ban, introduced 40 years prior in the 1970 Arctic Waters Pollution Prevention Act, works might be a match to Russia's experience.

[54]MEPC 66/11/3 (n 45) 3; MEPC 67/9/2 (n 45) 2; and MEPC 67/9/3 (n 45) 2.

[55]SDC 1/3/18 (n 45) 1; MEPC 66/11/3 (n 45) 2; and MEPC 67/9/2 (n 45) 2.

[56]MEPC 66/11/3 (n 45) 2–3; and MEPC 67/9/3 (n 45) 2.

[57]See, e.g., V Putin, 'Speech at the Second International Arctic Forum' (Second International Arctic Forum, Arkhangelsk, 23 September 2011) <http://narfu.ru/en/media/news/21110>.

[58]DE 57/11/12 (n 49) 2; MEPC 66/11/3 (n 45) 2; MEPC 67/9/2 (n 45) 2; and MEPC 67/9/3 (n 45).

[59]This is especially so in light of foreign objections to the status of some Arctic straits. For an account of US challenges of the Russian claims in the 1960s, see JA Roach and RW Smith, *Excessive Maritime Claims*, 3rd edn (Martinus Nijhoff 2012) 312–318. See also RD Brubaker, *The Russian Arctic Straits* (Martinus Nijhoff 2005) 41, 146–147, 158–162.

[60]For a connection between resource extraction and Russia's great power revival, see M Laruelle, *Russia's Arctic Strategies and the Future of the Far North* (M.E. Sharpe 2014) 159.

[61]Elster (n 8) 252–253.

change their preferences. However, whether this warning was successful is questionable since Russia's proposals were different in the three submissions containing this warning.

Finally, Russia remarked that the decision to ban any discharges of oil and oily mixtures from all ships in the Arctic was

> *more stringent than the one for special areas, where discharge into the sea of oil and oily mixtures from ships is allowed under certain conditions, and more stringent than those applicable to other areas of the world's oceans.*[62]

While it is possible to criticize the IMO for introducing quasi-special area requirements without going through the procedures for establishing special areas – something Russia had done in the early debates on proposed special areas – here Russia appears instead to denounce the stringency of the new requirements compared to other sea areas. This is remarkable as the development of the Polar Code itself acknowledges the fragility of the polar environment and its need to be protected through measures more stringent than found in the existing IMO instruments.[63] This Russian approach suggests that zero-sum considerations and self-interest, rather than a common goal and concern for the state of the polar environment, led Russia in the negotiations of this issue.

While Russia was not successful in overturning the discharge ban or providing exemptions from it, clarifying Russia's interest did seem to achieve one concession to a proposal preferred by Russia: a grace period for those vessels that spend long periods of time navigating in ice without port calls – the group of vessels Russia most wanted to protect.[64] However, since this grace period is linked to the next survey a given vessel must go through, this grace period will vary from ship to ship between one and four years, less than Russia asked for.[65]

4.3 | Establishment of port reception facilities

As a consequence of the complete prohibition of oil and oily mixture discharges in the Arctic, another issue needed to be considered, namely the presence of adequate port reception facilities where ships can offload their oily wastes. The issue of lack of adequate reception facilities was first discussed as concerns were raised at both DE 57 and MEPC 65 that the proposed complete discharge ban of oil and oily mixtures in the Arctic should take into account whether there were adequate reception facilities in the region.[66]

4.3.1 | Positions

Several major flag States[67] and representatives of the shipping industry submitted a paper to the next meeting, SDC 1, proposing that every Arctic port be required by the Polar Code to have reception facilities, making it easier for ships to comply with the discharge ban.[68] On the other hand, an inclusion of such a requirement in the Polar Code was not well received by Canada,[69] Russia[70] and environmental NGOs.[71] While supporting the need for reception facilities,[72] the United States suggested that, rather than including a duty in the Code, MARPOL should be amended, in order to avoid confusion.[73]

4.3.2 | Implications and interpretation

Interestingly, the international shipping organizations and flag States acknowledged that the lack of facilities was not necessarily a problem, given the existence of such facilities just outside of the Arctic region, the short periods of operation in the Arctic and operating practices minimizing waste generation.[74] It appears then that their proposal was primarily concerned with the needs of the shipping industry. They also suggested that the establishment of reception facilities was needed 'to ensure and facilitate the effective implementation' of the total discharge ban.[75] This passage is further illuminated by a draft provision prepared by the United States, suggesting that the discharge ban be delayed until the establishment of adequate reception facilities.[76]

This would have meant severe implications for the protection of the Arctic environment and drew response from environmental NGOs and Canada. They rejected the notion that the introduction of the discharge ban should be delayed until the lack of adequate reception facilities was remedied, thus impairing the environmental protection part of the Polar Code.[77] Beyond repeating that operational practices and reception facilities in the vicinity of the Arctic region suggested less need for reception facilities,[78] these

[62]MEPC 66/11/3 (n 45) 2.

[63]Polar Code (n 1) preamble.

[64]'Report of the Marine Environment Protection Committee on its Sixty-Seventh Session' IMO Doc MEPC 67/20 (31 October 2014) Annex 10, 6. The text regarding the grace period reads: 'Subject to the approval of the Administration, a category A ship constructed before 1 January 2017 that cannot comply with paragraph 1.1.1 [the discharge ban] for oil or oily mixtures from machinery spaces and is operating continuously in Arctic waters for more than 30 days shall comply with paragraph 1.1.1 not later than the first intermediate or renewal survey, whichever comes first, one year after 1 January 2017. Until such date these ships shall comply with the discharge requirements of MARPOL Annex I regulation 15.3 [regulation of discharges in special areas].'

[65]MEPC 67/9/3 (n 45) 3.

[66]DE 57/25 (n 41) 30; and MEPC 65/22 (n 41) 69–70.

[67]These States, including the Marshall Islands', Panama and Liberia, operate open registries for ships, gathering large fleets whose interests they represent at IMO. However, many of them are developing States, some small island States.

[68]Kiribati et al, 'Development of a Mandatory Code for Ships Operating in Polar Waters: Reception Facilities for Oil and Oily Mixtures' IMO Doc SDC 1/3/1 (11 October 2013).

[69]MEPC 66/11/8 (n 46).

[70]Russian Federation, 'Mandatory Code for Ships Operating in Polar Waters: Comments on the Report of the Polar Code Correspondence Group (Part II-A, Chapter 1)' IMO Doc MEPC 67/9/4 (15 August 2014).

[71]Friends of the Earth International (FOEI), World Wide Fund for Nature (WWF) and Pacific Environment, 'Development of a Mandatory Code for Ships Operating in Polar Waters: Reception Facilities for Oil and Oily Mixtures' IMO Doc SDC 1/3/23 (29 November 2013).

[72]United States, 'Development of a Mandatory Code for Ships Operating in Polar Waters: Part II-A – Applicability and Goal-Based Standards' IMO Doc SDC 1/3/19 (29 November 2013) 2.

[73]United States, 'Mandatory Code for Ships Operating in Polar Waters: Legal and Technical Comments on Polar Code, Part II and Amendments to MARPOL' IMO Doc MEPC 67/9/5 (20 August 2014) 2.

[74]SDC 1/3/1 (n 68) 3.

[75]ibid 2.

[76]SDC 1/3/19 (n 72) 2–3.

[77]SDC 1/3/23 (n 71) 2; and MEPC 66/11/8 (n 46) 1.

[78]SDC 1/3/23 (n 71) 2; and MEPC 66/11/8 (n 46) 2–3.

documents also pointed to the difficulties the proposed requirement would pose for Arctic coastal States and their remote local communities.[79] It was also questioned whether there was a lack of adequate reception facilities, considering the amount and nature of traffic in the Arctic, underlining that vessels on transit voyages do not make use of port facilities.[80]

Russia appears to have first tried to connect the issue of reception facilities to its proposal to overturn the discharge ban on oil and oily mixtures in the Arctic, suggesting that 'special areas can only be designated provided they have enough port reception facilities to collect such wastes from ships'.[81] The suggestion, thus, appeared to be that accepting the Russian proposal overturning the discharge ban would mean that the question of reception facilities could also be discarded.

Later, in expressly suggesting the removal of the reception facility requirement from the draft Polar Code, Russia also revisited some of the justifications used by Canada and the environmental NGOs against the proposed requirement, including the requirement being disproportionate to the amount of vessel traffic in the Arctic, the improbability and impossibility of ships on transit voyages using reception facilities and the burdensome nature of the requirement.[82] It is the latter – the cost associated with the establishment of the reception facilities – that appears to be the main reason for opposing the requirement. It is especially so when considered together with an earlier Russian intervention, expressed in quite undiplomatic language, suggesting that Russia was willing to construct reception facilities in every port if the co-sponsors of the original proposal, mostly small island developing States, would pay for it.[83] This statement appears to resort to a demand, characteristic of bargaining, in trying to rely on Russia's power vis-à-vis the co-sponsors.

What makes Russia's position different from that of Canada and the environmental NGOs is the insistence by the latter two that the requirement of reception facilities should not cause a delay to the discharge ban. This environmental regard is lacking in the Russian proposals. Instead, Russia attempted the opposite: to couple the issue of reception facilities with its bid to overturn the discharge ban.

The final version of the Polar Code does not include a requirement for reception facilities as it was deemed superfluous in light of a broad requirement for adequate reception facilities already found in MARPOL.[84] Russia also highlighted this clause in its proposal,[85] although the decision of MEPC to delete the requirement from the Code appears to be based on the work of an intersessional working group, not on Russia's proposal.[86]

[79]SDC 1/3/23 (n 71) 1; and MEPC 66/11/8 (n 46) 2.

[80]MEPC 66/11/8 (n 46) 2–3.

[81]MEPC 66/11/3 (n 45) 2. While the introduction of the discharge ban itself does not constitute establishment of a special area, it may be seen as a quasi-special area measure due to its stringency.

[82]MEPC 67/9/4 (n 70) 2.

[83]Bognar, 'Russian Proposals' (n 21) 121.

[84]MEPC 67/20 (n 64) 43–44.

[85]MEPC 67/9/4 (n 70) 2.

[86]MEPC 67/20 (n 64) 43–44.

5 | SUBSTANCE AND FORM OF RUSSIA'S ENGAGEMENT

5.1 | The substance of Russian positions

As shown above, many of the Russian proposals regarding the environmental part of the Polar Code were less beneficial to environmental protection than the positions expressed by other parties. This was especially evident in the discussions on the possible establishment of special areas for HFO, grey water and air emissions and the ban on discharges of oil and oily mixtures from machinery spaces in the Arctic. It has been shown how compliance problems for Russian ships and the possible impact of this on Russian Arctic activities were visible throughout Russia's interventions and proposals.

In the case of the debate on port reception facilities in the Arctic, Russia held a similar position to environmental NGOs and Canada. Yet, the difference between Russia and these other parties lay, notably, in the lack of Russian concern for a delay in the implementation of the discharge ban that could have resulted from the requirement for reception facilities, as well as Russia's attempts to link the issue of reception facilities with its proposal to overturn the discharge ban. On this basis, one might consider Russia's stance on the issue of reception facilities to be guided less by environmental concerns than those of the environmental NGOs and Canada.

If environmental concerns appear to have taken a low priority in Russia's positions, then what was guiding Russia's participation in the debates on the environmental measures of the Polar Code? While considerations of shipping and economic activities in the Arctic region appear to have been important, it would be far-fetched to say that Russia's proposals were aimed at positive economic gain. Rather, the chief concern appears to be damage limitation. This included both the costs associated with upgrading its ships to the new standards, avoiding the need to acquire new vessels that comply with the Code's requirements where upgrade is not feasible and, through these, protection of the economic viability of the diverse Russian activities and projects in the Arctic. This appears to confirm Zagorski's submission that the environmental measures of the Code were viewed unfavourably in Russia due to their possible negative economic impacts.[87] While it is understandable that Russia would not want its economic activities in the Arctic to be crippled by the Code, Russia's positions regarding the environmental measures of the Code do not consider the possible positive effects of the Code either as a tool of environmental protection or as a driving force. Thus, it is arguable that a better balance could have been found between protection of short-term financial–economic concerns and environmental measures necessary for the protection of the fragile environment.

The Russian aim to reduce its financial–economic costs might also be seen in the context of foreign policy considerations. This is due, first and foremost, to the fact that Russia's great power revival has been connected to resource extraction, especially in the Arctic.[88]

[87]Zagorski (n 18) 223–224.

[88]Laruelle (n 60) 159.

In this context, it is also remarkable that Russia appears to have espoused a zero-sum outlook in its positions on the environmental measures of the Polar Code. This is evident in Russia's remark comparing the stringency of the discharge ban in the Arctic to other seas.[89] Thus, it is not simply the reduction of the impact of the new environmental measures on its economic activities in the Arctic that appears to be Russia's aim in the negotiations analysed here, but also the reduction of the relative disadvantage the Code could cause Russia vis-à-vis other States, which do not have significant stakes tied up and affected in the Arctic.

One final issue that deserves mention here appears to have underpinned some of Russia's proposals. This is the importance of Russia's jurisdiction and control of the NSR, emphasized by the presence of icebreakers, an important vessel type Russia tried to exempt from the discharge requirements.

Russia's participation in the negotiation of the Polar Code's environmental measures is rather defensive. This manifests itself, first, in the weak environmental protection focus of the Russian proposals vis-à-vis their aim to minimize the effects of the proposed environmental measures on Russia's economic activity, great power revival and jurisdictional control over the NSR. Second, Russia did not propose any environmental measures for inclusion into the Code, but rather reacted to other actors' proposals.

Thus, there is a disconnect between the general goal of the Polar Code and Russia's positions. The former aims to strengthen the environmental protection of the polar regions through stringent regulations, whereas Russia focuses on mitigating the possible negative outcomes of the new measures. Russia's approach appears to miss the objective of the Polar Code. Russia's participation in this negotiation then is not much different than in other international environmental regimes where environmental concerns come relatively low on its list of priorities.

5.2 | The form: arguing, bargaining or in-between?

Throughout the negotiation of the environmental part of the Code, it is obvious that Russian interests were pursued, suggesting that the decision-making mode Russia engaged in was bargaining, rather than arguing. Such a conclusion is also supported by inconsistencies in Russia's position as well as the changing aims of the Russian proposals regarding the discharge ban, trying to pursue a give-and-take deal-making. The closest Russia came to engaging in straightforward bargaining, relying on demands, was over the question of port reception facilities where it tried to rely on its power vis-à-vis developing States to stop the issue progressing further.

Additionally, there is evidence of strategic use of argumentation on Russia's part. It could be argued that Russia's suggestion that ships engaged in polar shipping should not be subjected to regulations that exceed MARPOL, as well as its objection to the discharge ban that is more stringent than applicable in other sea areas around the world, rely on the universality principle of the IMO. However, in these cases this principle is used in order to protect Russian ships from more stringent measures. Thus, self-interest seems to be substituted for impartiality, the basis of arguments in normative rightness. Further, Russia used a warning regarding possible illegal and uncontrolled discharges of oil and oily waters if the discharge ban was to be implemented, thereby relying on the argument's basis in factual truth for what will happen in case of the ban, instead of a bargaining threat of what Russia might do. None of these seems to have led to the desired outcome, however.

What did appear more successful when success is measured against the proposals in the Russian documents, were Russia's open explanations of how its interests would be negatively impacted. As suggested by Jane Mansbridge and colleagues, expressions of interest can be beneficial to deliberation by creating mutual understanding between parties.[90] Accordingly, being open about the problems experienced by ships undertaking voyages in polar waters for long periods of time without port calls, with regard to the discharge ban of oil and oily mixtures from machinery spaces, could have contributed to the MEPC agreeing on a grace period for these. As last among the proposals that Russia submitted on the issue of the complete ban, this had the narrowest scope, thus providing least exemption from the strict new environmental measures, showing also an improved Russian understanding of the positions of the other parties to the debate, facilitating a possible agreement.

As suggested in Section 1, it is possible that open expressions of self-interest can constitute part of arguing, as they elucidate the positions and motives of the parties and thus contribute to reaching a common understanding. According to Mansbridge and colleagues, while coercive power should be excluded, expressions of self-interest are not frowned upon in this decision-making mode, deliberative negotiation.[91] Arguably, since strategic uses of argumentation serve to hide the self-interest of parties, these might also be seen as antithetical to deliberative negotiation. Deliberative negotiation should, therefore, be placed somewhere on the spectrum between arguing and bargaining, balancing between arguing's common understanding and bargaining's self-interest. Russia's explanation of the difficulties it faces in complying with the discharge ban as well as the limited scope of its proposed grace period to placate its negotiating partners, thus creating an understanding, suggests an instance of deliberative negotiation.

This suggests that there was a further disconnect in Russia's participation in the negotiations: a disconnect between the negotiating strategy Russia used and the strategy from which its proposals benefitted most. Russia achieved more success with regard to proposals where it managed to make the other negotiating parties see the issue from its perspective. This involved explaining how its interests would be affected. This deliberative stance was contrasted throughout the negotiations with Russia's overwhelming reliance on bargaining and strategic use of argumentation.

[89]MEPC 66/11/3 (n 45) 2.

[90]Mansbridge et al (n 6) 72–80.

[91]ibid 72–82.

6 | CONCLUSION

Russia's participation in the negotiation of the environmental part of the Polar Code can be characterized by two disconnects: one regarding the content of the Code and one regarding Russia's negotiating strategy. These together suggest that, despite its interest in protecting the vulnerable Arctic environment and its policy documents' emphasis on environmental protection, this concern was trumped by other considerations in the concrete negotiation of the Polar Code. While the fact that some of its concerns were taken into account should be encouraging for Russia, its persistent reactive stance against stringent environmental regulations, readiness to rely on strategic uses of argumentation and demands based on power relations suggest that the implementation and possible further development of the Polar Code could face resistance from the largest Arctic coastal State.

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Paper 3

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The elephant in the room: article 234 of the Law of the Sea Convention and the Polar Code as an incompletely theorised agreement

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ABSTRACT

The International Maritime Organization's (IMO) International Code for Ships Operating in Polar Waters (Polar Code) is a new chapter in the regulation of Arctic shipping. This international legal instrument can affect the interpretation and practice of national coastal State legislation under article 234, the Arctic exception in the United Nations Convention on the Law of the Sea. Relying on documents from the IMO, this paper examines the negotiation of the relationship of these two instruments, investigating the question: how was it possible to agree on the Polar Code while avoiding a resolution of the deep conflict between Arctic coastal State jurisdiction and freedom of navigation? While early debates directly concerned article 234, the peculiarity of later discussions, which focused on savings clauses regulating relationships between instruments, was the lack of reference to this article's provisions. Agreement was possible due to indirect negotiation of this issue, through the use of second best arguments and analogies. It is submitted that precisely the lack of discussion and resolution of this issue allowed for the possibility of completing the Polar Code. This qualifies the Polar Code as an incompletely theorised agreement in deliberative theory.

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Introduction

The International Code for Ships Operating in Polar Waters (Polar Code), regulating for safety and pollution prevention in polar waters, was adopted by the International Maritime Organization (IMO) in November 2014 and May 2015.[1] While the Polar Code is a technical instrument, it seems it was unavoidable that the most challenging issue regarding Arctic shipping would find its way into the negotiations: namely, the question of unilateral coastal State national legislation based on the contentious article 234 of the United Nations Convention on the Law of the Sea (LOSC).[2] The Polar Code could not remain unaffected

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[1]IMO, Res. MSC.385(94); and IMO, Res. MEPC.264(68).
[2]This Convention is referred to both as UNCLOS and LOSC in the literature and in practice. I use the latter, apart from in direct citations.

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by this issue as, on the one hand, it could be seen as a vehicle to provide international legal basis for unilateral national regulations, notably from Canada and Russia, while on the other hand, it could also be seen as setting restrictions on the exercise of the rights contained in article 234 of the LOSC.[3] The IMO's goal of uniform and universal standards for ships, including in the Polar Code, thus comes into conflict with the unilateral exercise of rights in article 234.

The conflict of principles or values can prove an impediment in the creation of international agreements, especially in fora where decisions are not made by politicians, but rather by delegates with a technical background.[4] The present article scrutinises the handling of the issue of coastal State legislation in Arctic ice-covered waters in the setting of the IMO's Polar Code negotiations[5] to answer the question: what can be learned from the case of the Polar Code about how a technical organisation deals with a politically charged conflict where deep-seated values clash?

In order to investigate the negotiation of such conflicts through the case of the Polar Code, I pose the question: how was the contentious issue of coastal State jurisdiction under LOSC article 234 dealt with? This analysis is based on deliberative theory, introduced in the next section. The main hypothesis put forward here is that the Polar Code should be seen as an *incompletely theorised agreement*, whereby agreement is reached without resolving the underlying conflict of principles. Agreement was possible when the parties avoided discussing LOSC article 234. Why was this needed, and how was this possible? The article follows with the examination of these questions. The analysis of the Code's negotiation allows for drawing more general conclusions on the way technical organisations, like the IMO, create international law in the face of deep value conflicts. The issue of the coastal State national legislation in the Polar Code negotiations highlights not only the way deep-seated conflicts are dealt with, but points more generally to the role of nation States vis-à-vis international regulation. These issues are discussed following the analysis of the Polar Code negotiations, while the last section offers concluding remarks.

Deliberative theory and incompletely theorised agreements

To analyse the negotiation of the Polar Code, I use a theoretical framework based on deliberative theory. Classic deliberative theory draws a distinction between different modes of decision-making and contrasts deliberation and negotiation. This theory understands deliberation as being based on impartial and truthful reason-giving or arguing, aimed at reaching a common good, while negotiation is viewed as interest- and power-driven bargaining.[6]

[3]For views on how the Polar Code and article 234 of the LOSC might affect each other in the future, see Fauchald, "Regulatory Framework"; Chircop, "Jurisdiction over Ice-Covered Areas"; Jensen, "International Code for Ships"; and Skodvin, "Arctic Shipping – Still Icy."

[4]In the case of the IMO, the reliance on technological expertise and delegates with technical backgrounds was documented in Silverstein, *Superships and Nation-States*, 35–45.

[5]While the Polar Code provides regulations for both Arctic and Antarctic waters, here the emphasis is placed on the Arctic, due to the special regime arising from The Antarctic Treaty, article IV. Furthermore, article 234 of the LOSC was fashioned for the conflict in the Arctic. For the negotiation of article 234, see McRae, "Negotiation of Article 234," 98–114; and de Mestral, "Article 234," 111–24.

[6]Elster, "Arguing and Bargaining," 371–7; Mansbridge, "Deliberative and Non-Deliberative Negotiations," 3–5; and Mansbridge et al., "Place of Self-Interest," 66–7. In the present article, the use of the phrase "Polar Code negotiations" is not intended to imply that this process was dominated by bargaining.

Yet, it has also been acknowledged that deliberation and negotiation can be and often are complementary; they are not necessarily mutually exclusive.[7] The recognition of interests can and often should be incorporated so as to achieve a just outcome.[8] Many forms of so-called deliberative negotiation have been identified – a fusion of the incorporation of self-interest and the conflict of interests with the deliberative ideals of "mutual justification, respect, and reciprocal fairness".[9]

The different forms of deliberative negotiation range between the two poles of pure deliberation and pure negotiation. One of these forms is incompletely theorised agreements,[10] a concept formulated by Cass Sunstein, who applied it to the U.S. judiciary.[11] In the present researcher's view, it is also applicable to other multi-member organisations representing diverse views, including the IMO and its agreements. The peculiarity of incompletely theorised agreements is that they reach an outcome but leave certain underlying issues unresolved. These underlying issues are typically conflicts of high-level principles, deeply held by the parties. Thus, while a practical outcome is achieved through mutual reason-giving – as well as a possible resolution of low-level principles that help generate the practical outcome – the entire issue is not resolved.[12] By being able to agree on low-level principles or a practical resolution, the parties can unite on an outcome in spite of "profound disagreements over ultimate foundations".[13] In fact, one of the meta-principles, it is argued, is "that of leaving ultimate principles unresolved".[14] Thus, participants can find a *modus vivendi* precisely because the fundamental but conflicting principles are not affected by the agreement.

The practical advantage of incompletely theorised agreements stems from participants not necessarily getting engulfed in lengthy and time-consuming debates about high-level principles, but instead focusing on practical and workable solutions. Thus, such agreements have the advantage of enabling effective decision-making in the face of limited time and capacities.[15] Further, such agreements do not refute the deeply held values of the participants. As such, even if the outcome is a loss to some parties, those parties do not lose face as their principles are not outright rejected. Such agreements, therefore, allow for continued collaboration without unnecessary antagonism, and reduce the political costs to participants.[16]

Methods of reaching agreement

How is it possible to arrive at an outcome to a dispute without resolving the underlying conflict of deeply held principles? Sunstein argues that this is possible by enlisting silence on fundamental questions.[17] Silence is used constructively, to direct the discussion to areas where cooperation is possible and to disconnect negotiations from contested principles.[18]

[7]Mansbridge, "Deliberative and Non-Deliberative Negotiations," 9–11; and Warren et al., "Deliberative Negotiation," 92–3.
[8]Mansbridge et al., "Place of Self-Interest," 72–80.
[9]Warren et al., "Deliberative Negotiation," 92.
[10]For other forms of deliberative negotiation, see Warren et al., "Deliberative Negotiation," 93a–98; Mansbridge et al., "Place of Self-Interest," 69–72; and Mansbridge, "Deliberative and Non-Deliberative Negotiations," 11–20.
[11]Sunstein, "Incompletely Theorized Agreements," 1733–72; and Sunstein, *Legal Reasoning*, 35–61.
[12]Mansbridge et al., "Place of Self-Interest," 71.
[13]Mansbridge, "Deliberative and Non-Deliberative Negotiations," 12 (citing Joseph Raz, *The Morality of Freedom* [Oxford: Oxford University Press, 1986], 58).
[14]Mansbridge et al., "Place of Self-Interest," 71.
[15]Sunstein, "Incompletely Theorized Agreements," 1749.
[16]Ibid., 1746–9.
[17]Sunstein, *Legal Reasoning*, 39; and Sunstein, "Practical Reason," 267–8.
[18]See also Holmes, "Gag Rules."

According to Sunstein, analogies and rules are the most important methods in this regard.[19] Both serve to provide fixed points on which the parties to a dispute can rely, without having to invoke high-level principles. Rules are agreed beforehand and thus "make legal judgments in advance of actual cases".[20] Analogies provide similarities between the dispute at hand and already decided cases. Thus, a lower-level rationale explains the connection between the rule or analogy, on the one hand, and the case to be decided, on the other, while staying silent on issues that could hinder agreement.[21] This makes it easier for the losing party to agree to and comply with the outcome.

Another factor that makes it possible to avoid debate on high-level principles is the use of what I call *second best arguments*. This approach facilitates agreement by misrepresenting the ultimate foundations at play, obscuring considerations that can be important and decisive in reaching an agreement.[22] The strategy of using second best arguments hinges on the fact that sometimes it is better not to utter the real reasons behind a proposal. I base this idea on Jon Elster's strategic use of impartial arguments.[23]

Impartial arguments are used strategically when they are employed in favour of a proposal that is in the interest of one participant. If the use of self-interested reasoning is not likely to lead to agreement on such a proposal, it might be wise to use an impartial argument in order to achieve it.[24] Yet, there might not exist an impartial argument for the proposal, or the use of the impartial argument would be suspicious as it aligns too well with one party's self-interest.[25] In this case, what is needed is an impartial argument that can achieve as close an outcome to the original proposal as possible.[26] However, this maximal – as opposed to a perfect – fit would result in a somewhat diluted outcome.[27]

Elster lists several reasons that one party would choose to employ strategic use of impartial arguments.[28] One of these is mutual gain, where the stronger party avoids humiliating the weaker side and allows them to save face. Agreement is possible, but might not be the same as originally intended by the parties.

Is the Polar Code an incompletely theorised agreement?

To analyse the Polar Code as an incompletely theorised agreement, I investigate two elements. First, there are underlying, deeply held but opposing principles at play. Second, the agreement is arrived at without a resolution to this conflict of principles.

[19]See, for example, Sunstein, *Legal Reasoning*; and Sunstein, "Practical Reason."

[20]Sunstein, *Legal Reasoning*, 21.

[21]This duality parallels Koskenniemi's apology/utopia concept. Koskenniemi, *From Apology to Utopia*, 58. Koskenniemi identifies what he terms "utopia" – normativity seen as the impartial application of law – and "apology" – concreteness of State behaviour, will and interest – with the doctrine necessarily moving between the two.

[22]This works similarly to Brennan and Buchanan's veil of uncertainty. Brennan and Buchanan, *The Reason of Rules*, 29–30. They posit that the likelihood of agreement increases the more general and permanent in time an agreed rule is, as this creates uncertainty about how that rule would impact States in the future. Accordingly, while second best arguments obscure the ultimate principles of the parties, the veil of uncertainty shrouds how these might be affected by the agreement in the future. Also consider Koskenniemi (*From Apology to Utopia*, 590–1), who understands indeterminacy in international law as deliberately ambivalent "because it is based on contradictory premises and seeks to regulate a future" of unsettled preferences.

[23]Elster, "Strategic Uses of Argument," 244–52.

[24]See Ibid., 247–8 for Elster's list of reasons one might turn to impartial arguments.

[25]Ibid., 245–6.

[26]Ibid.

[27]Ibid. See Ibid., 246 for Elster's example of the method to limit Jewish students' enrolment at Yale College in the 1920s.

[28]Ibid., 247–8.

Before I examine these two elements, I will first introduce the IMO and the Polar Code, together with the material on which my case is built. This will be followed by the introduction to the background of the conflict, providing a historical backdrop to the development of the Polar Code and a starting point for the analysis of underlying principles.

The IMO's Polar Code process and the research material

The IMO is a United Nations specialised agency, competent in the area of international merchant shipping, with a global membership of nation States and observers from the shipping industry and environmental non-governmental organisations.[29] The mandatory Polar Code was put on the agenda of the IMO in 2009 at the initiative of Denmark, Norway and the United States,[30] and aims to provide enhanced safety and pollution prevention for polar waters through additional regulations to the International Convention for Safety of Life at Sea (SOLAS)[31] and the International Convention for the Prevention of Pollution from Ships (MARPOL).[32] Accordingly, the Polar Code is made up of two main parts: Part I for safety and Part II for pollution prevention; the former made mandatory by the new SOLAS Chapter XIV, the latter by new chapters in the MARPOL Annexes for which additional measures are included in the Code.[33]

The detailed, technical work on the Polar Code took place in the Sub-Committee on Ship Design and Equipment (DE) and its successor, the Sub-Committee on Ship Design and Construction (SDC).[34] These report on their work to the parent Committees, the Maritime Safety Committee (MSC) and the Marine Environment Protection Committee (MEPC), where mostly higher level policy decisions are taken. Thus, SDC 1 sent the safety part of the Polar Code and SOLAS Chapter XIV to MSC, and the environmental part of the Code and the MARPOL amendments making it mandatory to MEPC, for further discussion, final approval and adoption. While the peculiarity of the Polar Code is that it relates to (and becomes mandatory through the tacit acceptance procedure under) both SOLAS and MARPOL,[35] therefore falling under the remit of both Committees, the usual IMO decision-making procedure was followed throughout the negotiations.

While the present analysis utilises secondary literature when highlighting the high-level principles in the case of the Polar Code negotiations, primary sources from the IMO were used to analyse the debates. Documents relating to coastal State legislation submitted to the above Committees and Sub-Committees were subjected to analysis, along with reports of these bodies.[36] Furthermore, interviews were conducted with delegates to the IMO.

[29]For an introduction, see Chircop, "The International Maritime Organization."

[30]MSC 86/23/9; and MEPC 59/20/1.

[31]International Convention for the Safety of Life at Sea.

[32]International Convention for the Prevention of Pollution from Ships.

[33]These are: Annex I for the prevention of pollution by oil; Annex II for control of pollution by noxious liquid substances carried in bulk; Annex IV for the prevention of pollution by sewage; and Annex V for prevention of pollution by garbage.

[34]Due to the reform of the IMO's structure, DE 57 was followed by SDC 1. The meetings of the Committees and Sub-Committees are denoted by their abbreviation and the sequence number of the meeting.

[35]Under the tacit acceptance procedure, for an amendment to an IMO Convention to enter into force, there is no need to wait until a certain number of parties accepts that amendment. Instead, the amendment enters into force unless there is a specific number of objections by a set date.

[36]These documents are publicly available through the IMO's database, IMODOCS, after registration at http://webaccounts.imo.org. A working paper from the working group dealing with the details of the Polar Code, established at DE 55 by IMO, was accessed from the website of the Antarctic Treaty Secretariat, http://ats.aq/. This paper was attached to document ATCM XXXIV/IP-60.

Case background

Since the 1960s, the history of Arctic shipping regulation has been marred by the contest between freedom of navigation and coastal State jurisdiction, predating the LOSC and its article 234. U.S. vessels have tested both Canada's and the then Soviet Union's responses with regard to Arctic shipping.[37] The voyage with the greatest consequences for the international legal regime of Arctic waters was that of the SS *Manhattan* through the Canadian Arctic in 1969. Canada's decision to enact the *Arctic Waters Pollution Prevention Act* (AWPPA) a year later, incurred protests by the United States and the United Kingdom as unlawfully interfering with freedom of navigation. Canada's efforts to obtain international legal basis for AWPPA resulted in article 234 of the new LOSC, negotiated between 1973 and 1982.[38]

Article 234 is exceptional in the LOSC in that it provides Arctic coastal States with the right to unilaterally adopt regulations which are more stringent than those generally accepted by the IMO. While article 234 provides functional jurisdiction to Arctic coastal States for the protection of their marine environment from vessel-source pollution, many of the provision's phrases are vague, leading to contested interpretations of its temporal, spatial and substantive scope, as well as its link to the regime of straits used for international navigation.[39] The most important questions for the present case are: how should the "due regard to navigation" condition, placed on article 234 rights, be interpreted; and what is the relationship between article 234 and the international straits regime? The international straits regime was created precisely to stop coastal States from using varying or more stringent standards than generally accepted international rules and standards (GAIRAS) to restrict passage through straits used for international navigation. Article 234 was negotiated specifically between the United States, Canada and the Soviet Union, with Canada wanting a special clause for pollution prevention for the Arctic and the United States aiming for acceptance of the new international straits regime. The Soviet Union, then the biggest Arctic coastal State, with sovereignty claims over its northern water areas, could not be left out of the negotiation.

Although article 234 has been hailed as a Canadian success and the Soviet Union/Russian Federation appears to have been satisfied with it,[40] its interpretation has not been resolved and conflicts have resurfaced from time to time.[41] Canada and Russia are the only Arctic

[37]See, for example, Roach and Smith, *Excessive Maritime Claims*, 312–28.

[38]This article reads: "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." LOSC, article 234.

[39]See, for example, McRae and Goundrey, "Environmental Jurisdiction"; Bartenstein, "Arctic Exception," 28–32; Friisk, "Arctic Coastal State Jurisdiction," 14–22; and Molenaar, "Options for Regional Regulation," 276–8. On the Canadian-U.S. debate about whether the Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) are within the scope of LOSC art. 234, see McDorman, "Canada, the United States," 263–6; and Kraska, "Northern Canada Vessel Traffic."

[40]It has been suggested that the Soviet Union/Russia is in a better position than Canada to defend its views regarding the status of the waters north of its coast. See Chircop et al., "Course Convergence," 325; and Zou, "Comparison of Arctic Navigation," 293–5.

[41]To provide further basis for their proclaimed sovereignty and full control over shipping, both Canada and Russia used straight baselines to claim internal waters. The international legality of both has been disputed. See, for example, McDorman, "Canada, the United States," 258–9; and Scovazzi, "Baseline of the Territorial Sea," 82–3. Despite claiming internal waters, Canada sought to justify its mandatory NORDREG on the basis of article 234. See MSC 88/11/3; and MSC 88/26/Add.1, Annex 27.

coastal States to have enacted legislation cognisant of article 234.[42] Both Canadian and Russian legislation regarding control over shipping has been criticised as more excessive than that allowed by international law.[43] Accordingly, both of these States endeavoured to use the Polar Code to buttress their claims in international law.

Conflict of deep-seated principles

The questions surrounding LOSC article 234 and, by extension, the debate that took place in the IMO, are concerned with the extent to which coastal States can control shipping in ice-covered areas. As the areas in question are the Northwest Passage and the Northeast Passage/Northern Sea Route (NSR),[44] article 234's interpretation is intertwined with its relationship with navigational rights applicable to straits used for international navigation. Seemingly, therefore, conflict in this case is between the principles of the freedom of navigation and creeping coastal State jurisdiction. But what are the even deeper ideas lying behind these two?

Freedom of navigation has been the cornerstone of the law of the sea since Hugo Grotius' *Mare Liberum* (1609), where freedom of seas required unhindered navigation. While different coastal maritime zones have since been introduced, navigational freedom is still applicable on the high seas and in the exclusive economic zone (EEZ), and is reflected in the right to unimpeded transit passage to all ships through international straits.[45] Thus, freedom of navigation is safeguarded, although curtailed slightly in the maritime zones by coastal State rules that must conform to GAIRAS. In regard to the Arctic, experts from the United States – as well as international shipping organisations – have argued that the international straits regime applies in the Arctic passages, over the regime created by article 234.[46] In any case, article 234's condition of "due regard to navigation" is also meant to safeguard the interests of maritime States.

The rationale behind the preservation of freedom of navigation in the case of international straits and ice-covered waters lies, on the one hand, in the liberal international world order, its underpinning in free trade and, following from this, its interconnected economy, as most of the world trade is carried by international merchant ships.[47] It is in the interest of the global community and, more narrowly, of the major flag States and States with large interests in seaborne trade, to ensure unobstructed passage of vessels and to curtail creeping coastal State jurisdiction.

On the other hand, freedom of navigation is important from the global security perspective.[48] This requires maintenance of the capacity to operate through the world's straits, both for commercial vessels and for the U.S. Navy, as the United States fears a possible precedence stemming from the Arctic for other areas of the world oceans. As Bernard Oxman notes: "[t]he Arctic is important … as one object of the overall platform of principle maintained

[42]On the Russian view regarding article 234, see Dremliuga, "A Note."
[43]Chircop et al., "Course Convergence," 326; Brubaker, "Straits in the Russian Arctic"; and Roach and Smith, *Excessive Maritime Claims*, 467–506.
[44]The Northern Sea Route, a concept introduced in Soviet legislation, stretches from Novaya Zemlya to the Bering Strait.
[45]LOSC, Part III.
[46]Kraska, "Law of the Sea"; Roach and Smith, *Excessive Maritime Claims*, 478–9; and International Chamber of Shipping, "Position Paper," 5.
[47]It has been highlighted that Grotius's aim when establishing the freedom of seas was protection of the trade rights of the Netherlands. See, for example, Pinto, "Hugo Grotius," 27–8; and Young, "Then and Now," 172.
[48]Pinto, "Hugo Grotius," 39–40.

with respect to the freedoms and rights of navigation and overflight of all states throughout all the seas and oceans of the world."[49] Thus, the freedom of navigation and overflight is, and was especially in the cold war era, linked to security and the United States' role as the world's policeman.

Meanwhile, coastal State jurisdiction is intrinsically connected to many important concepts. First, it can be linked to the idea of stewardship, the protection of the marine environment. This is especially so in the Arctic, where the Canadian legislation emerged from concerns about the impact of increased Arctic shipping on the fragile environment. LOSC article 234 provides functional jurisdiction to the coastal State precisely for environmental protection purposes. Coastal State jurisdiction can then be seen as conflicting with the unfettered "traditional doctrine on freedom of the seas".[50]

In the case of the Russian and Canadian Arctic, the exercise of coastal State jurisdiction has been intertwined with the notions of sovereignty and identity. Control over their Arctic waters has been the focal point of the northern identities of these States. The idea of Canadian sovereignty over its Arctic Archipelago was an important factor in the wake of the SS *Manhattan*,[51] and has remained a discourse in Canadian politics ever since, while the Arctic has an enduring significance in Russian identity.[52] Further, it was highlighted that the parties had to tread carefully during the negotiation of article 234 as the Soviet Union would not accept anything that would compromise its position of full sovereignty in the Arctic.[53] Today, the Arctic is seen as crucial to Russia's national revival, closely connected to the issues of security, nuclear capability and great power status.[54] Furthermore, the vastness, remoteness and, thus, vulnerability of the Russian Arctic also appear to justify security concerns and eagerness to exert control over shipping.[55]

To sum up, for the United States and major flag States, freedom of navigation, as based on the principles of liberal international world order and global security, is decisive when it comes to regulation of Arctic shipping. For Canada and Russia, coastal State jurisdiction is essential, as it rests on the notions of stewardship, sovereignty, identity and national security. It is helpful to borrow an observation from Ted McDorman who points out that the United States sees the Northwest Passage from a global perspective, while Canada views it as a local issue.[56] This logic can also be extended to Russia, which sees the NSR as its national waterway, its own backyard.[57] These perspectives, along with freedom of navigation and coastal State jurisdiction, point in opposite directions.

Agreement without resolution to the underlying conflict

Having established the underlying conflict of principles regarding Arctic shipping, it is now time to turn to the Polar Code negotiations. In order to structure the analysis, I broke the debates into two sections. The first ran from the beginning of the negotiations up to and

[49]Oxman, "Canada's Arctic Waters," 197.
[50]McRae, "Negotiation of Article 234," 101.
[51]Kirton and Munton, "Manhattan Voyages."
[52]See, for example, Hønneland, *Russia and the Arctic*, 31–6.
[53]McRae, "Negotiation of Article 234," 109–10. Also see McRae's endnotes 32 and 36 (Ibid., 285–6).
[54]Laruelle, *Russia's Arctic Strategies*, 39–40; Zysk, "Russia Turns North, Again," 455; and Sergunin and Konyshev, *Russia in the Arctic*, 144.
[55]Laruelle, *Russia's Arctic Strategies*, 123–4; and Sergunin and Konyshev, *Russia in the Arctic*, 91.
[56]McDorman, "Canada, the United States," 259.
[57]Zou, "Comparison of Arctic Navigation," 297–8.

including DE 56, while the second started with SDC 1. The second section also includes debates at MSC and MEPC.

Debates on article 234 and DE 56's decision

There were early indications from the DE 53 meeting in 2010 – the first Sub-Committee meeting to discuss the mandatory Polar Code – that the question of coastal State jurisdiction would be an issue. Canada submitted a draft text that included a provision declaring that "the Code is not intended to infringe on national systems of shipping control,"[58] while Denmark expressed support for ensuring the right to freedom of navigation and for the Polar Code's regulations to supersede national regulations.[59]

Article 234 was first touched upon in a Russian document to DE 55 arguing for a "principle of priority of national regulations over the Code's requirements,"[60] and aiming at reinstating the provision from the Canadian draft mentioned above, which had since been removed. This proposal was explicitly based on coastal State rights in article 234, but cited article 234 without its second sentence containing the duties of coastal States, such as "due regard". The report of DE 55 shows there was fierce opposition to the Russian proposal and to a Canadian paper referring to coastal States' systems of navigational control and the possibility of requiring ships to regularly report to the coastal State.[61] DE 55's report highlights the concerns of the United States over the possible implications of these proposals:

> With regard to documents DE 55/12/7 … and DE 55/12/23 …, the delegation of the United States expressed concern …, reminding the Sub-Committee of ongoing concerns over the legal basis … of Canada's mandatory ship reporting and vessel traffic service system and the Russian Federation's regulations and requirements for ships navigating along the Northern Sea Route in their claimed Arctic waters. … The United States, supported by several delegations, also expressed doubts regarding the application of UNCLOS article 234 by Canada and the Russian Federation, or that the Polar Code in itself would provide the international legal basis for these systems.[62]

These delegations appear to have questioned several things: the reliance on article 234 by Russia and Canada; the extent and scope of national regulations based on article 234; and the possibility that the Polar Code would provide international legal basis for those national regulatory systems. While it is unclear which other delegations are referred to in DE 55's report, the report of the working group established at DE 55 to work out details of the Polar Code indicates that the Bahamas, China and Panama, along with the United States, were not in favour of including the proposed Russian provision in the Polar Code.[63] These are major flag States, while China has also been touted as a major future user of Arctic shipping routes.

While the provision proposed by Russia was included in the draft Polar Code, the working group decided not to discuss the preamble of the Code, but rather embark on the technical parts of the Code.[64] The controversial nature of this issue is shown by the fact that the non-infringement clause was taken out of the draft text between DE 55 and DE 56, leaving only a provision declaring that the Polar Code should not conflict with the LOSC and

[58]DE 53/18/2, Annex, 7.
[59]DE 53/18/5, 2.
[60]DE 55/12/23, 2.
[61]DE 55/12/7.
[62]DE 55/22, 24.
[63]DE 55/WP.4, 3.
[64]Ibid., 2.

other international instruments.[65] Later Russian and Canadian submissions, referencing limitations imposed on navigation by coastal States,[66] were also greeted with concern. In this regard, the Sub-Committee reiterated that: "the working group should consider only technical matters at this time, while legal issues could be considered at a later point in time".[67]

This was, in effect, an attempt to reach agreement on the Code's technical provisions, without deciding on the underlying conflict regarding article 234. Thus, seeing the differences between the parties on how to interpret article 234 and the rights of the coastal State provided therein, the Sub-Committee agreed to solve technical issues without discussing and adjudicating on this deep and political conflict. That this part of the debate relating to article 234 dealt explicitly with this article and the concerns of the different States is significant. The openness and directness at the DE meetings made a consensus agreement on the issue even more difficult, potentially jeopardising the Polar Code.

The decision to focus on technical details is a matter of practicality as well. Instead of spending precious time on contentious legal issues, the Sub-Committee felt it was more important to develop the Code's technical provisions, on which agreement might be easier and more forthcoming. It is precisely the possibility of agreeing on technical matters that shows that reaching agreement on the lower level issues might not need an agreement on higher level principles.

Yet, the door was not closed entirely at DE 56, and left open the possibility of consideration of legal issues later in the process.

Enter the elephant: proposed savings clauses for SOLAS and MARPOL

When the issue of article 234 of the LOSC returned to the agenda two years after DE 56's decision, in 2014, it happened in a more circumspect way, revolving around so-called savings clauses. Such clauses serve to clarify the relationship between different international legal instruments, and the rights and duties they contain.[68] As such, savings clauses are important when considering the relationship between the Polar Code and LOSC article 234.

While an interpretative clause was already included in the preamble of the draft Polar Code, Canada suggested the inclusion of a savings clause in both the new SOLAS Chapter XIV and the new chapters in the relevant MARPOL Annexes making the Polar Code mandatory.[69] In its final adopted form, the Code's preamble no longer contains such a clause. Canada did not succeed on the MARPOL amendments, but SOLAS Chapter XIV does now include a very general savings clause.[70]

Savings clauses in the MARPOL Annexes. Canada first proposed a savings clause for each of the MARPOL Annexes with relevance to the Polar Code during SDC 1 in 2014,[71]

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[65]This clause read: "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." DE 56/10/1, Annex 1, 5. According to a Canadian expert, this can be seen as more of an interpretative language that does not provide unambiguity as to the priority of the LOSC over the Code. See McDorman, "Note on the Potential," 156.
[66]DE 56/10/14; DE 56/10/15; DE 56/10/16; and DE 56/10/17.
[67]DE 56/25, 25.
[68]As Axelrod shows, acknowledging prior agreements is not out of the ordinary, as savings clauses are frequently used to manage interplay between regimes. See Axelrod, "Savings Clauses."
[69]SDC 1/26, Annex 10, 3; MEPC 66/11/7; and MSC 93/10/12.
[70]This clause reads: "Nothing in this chapter shall prejudice the rights or obligations of States under international law." SOLAS, Chapter XIV, Regulation 2.5.
[71]See reference to this in SDC 1/26, 9 and Annex 10, 3.

which was also supported by Russia.[72] One peculiarity of the proposed clause is that it does not mention article 234 of the LOSC. While this could reflect a general concern for the relationship between the Polar Code and international law, it is telling that Canada pursued the inclusion of the savings clauses over the course of several meetings. The reference to "the broader international legal framework applicable in polar waters"[73] and to the LOSC, can only mean article 234. This implies upholding Canada's and, more generally, coastal States' perceived rights in article 234.[74] It appears that Canada was so concerned for the inclusion of such a clause in the MARPOL amendments that it was willing to change the wording of the proposed clause to accommodate other delegations.[75]

The main argument used by Canada for the inclusion of savings clauses in the MARPOL Annexes was the need for legal clarity between the Polar Code and the LOSC, seemingly aiming for transparency, clarity and coherence. Several counter-arguments were voiced against the Canadian call for legal clarity. The existence of a general savings clause in MARPOL article 9(2) was mentioned,[76] as was the opinion that States did not expect a clash between the Code and "other relevant international law"[77] – a very general term that could encompass more than the LOSC, but would also include its article 234. Further, it was suggested that, instead of achieving enhanced clarity, the inclusion of savings clauses in the MARPOL Annexes would lead to confusion and legal uncertainty.[78] This might be due to the fact that at the time there was still an interpretative clause in the preamble in the Code.[79] Canada's argument in this respect was that, unlike the Code's preamble,[80] savings clauses in the text of the MARPOL Annexes would be legally binding, thus giving the savings clauses a stronger position and effect.

Ultimately, MEPC 66, also in 2014, decided that no savings clause was to be included in the MARPOL amendments. In acquiescing to the decision of MEPC 66, Canada requested that the reason for this be expressly stated, and highlighted that it "can go along with" MEPC's decision based on "the view of this Committee that all IMO instruments are to be interpreted in a manner that would not prejudice or impair States' rights and obligations under international law as reflected in UNCLOS."[81] While Canada also mentioned the existence of article 9(2) of MARPOL, the view that LOSC cannot be impaired by the Polar Code appears to have carried more weight in convincing Canada to abandon the MARPOL savings clauses, as Canada had previously dismissed the importance of MARPOL article 9(2).[82]

Savings clause for SOLAS Chapter XIV. At the same time as the savings clauses for the MARPOL amendments were debated, delegations also considered two options for a savings

[72]MEPC 66/11/7, 2.
[73]MSC 93/10/12, 2.
[74]The same conclusion was reached by Roach, "Polar Code."
[75]SDC 1/26, Annex 10, 3. While the original text of the proposed savings clause is not available, there is no indication that article 234 was ever mentioned in its text (see SDC 1/26, 9).
[76]MEPC 66/21, 54. Also see reference to article 9(2) in Canada's statement in SDC 1/26, Annex 10, 3. Article 9(2) is a general clause, found outside of MARPOL's Annexes, stating that nothing in MARPOL "shall prejudice the codification and development of the law of the sea … nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction." MARPOL, article 9(2).
[77]MEPC 66/21, 54.
[78]Ibid.
[79]SDC 1/26, Annex 3, 4.
[80]MEPC 66/11/7, 2.
[81]MEPC 66/21, Annex 20, 12.
[82]SDC 1/26, Annex 10, 3.

clause in the new SOLAS Chapter XIV that makes the Code's safety part mandatory.[83] There were several differences between the two options. Option 1 contained legally binding language, using the "nothing … shall prejudice" phrase, while option 2 was of a more interpretative character, suggesting that the Code is not "intended to imply a change in the rights and obligations" of States. Further, option 2 used the common formula of "rights and obligations." However, option 1 included the phrase "rights or jurisdiction." While option 1 was chosen by the parties during the debate at SDC 1, interestingly, this phrase was changed to "rights or obligations" in the final report of the Sub-Committee: "nothing in this chapter 1 of the Code shall prejudice the rights or obligations of States under international law, as reflected in the 1982 United Nations Convention on the Law of the Sea."[84] This made the text very similar to that proposed by Canada for the MARPOL Annexes.[85] That the phrase "rights or jurisdiction" was changed to "rights or obligations" is significant. First, Canada claims functional jurisdiction over its Arctic waters pursuant to article 234. Secondly, the "rights or jurisdiction" version excludes reference to duties stemming from LOSC; for example, the obligation to show due regard to navigation when exercising rights in article 234. On both counts, the change of language might have proved more palatable to the parties.

That one version of the savings clause, especially the one with the more legally binding language, was accepted suggests that there was more support for that than for the savings clauses proposed for the MARPOL Annexes. However, a significant opposition to the inclusion of any savings clause is registered in the report of SDC 1.[86] This is even more puzzling as the proposed clauses for SOLAS and the MARPOL Annexes used very similar language, prompting the question: what made the difference between the two cases?

While SDC included the savings clause in the draft SOLAS chapter, this was only in square brackets, meaning that this was not a final decision.[87] Debate on this issue resumed at MSC 93, a month after MEPC 66. Thus, Canada knew that stronger argumentation was needed to achieve the inclusion of a savings clause in SOLAS than in the case of the MARPOL Annexes. Both Germany and Canada submitted proposals to MSC 93; the former opposed the inclusion of the savings clause,[88] while the latter supported it.[89] Germany argued that the IMO instruments cannot impair rights and obligations under the LOSC and that there is already a savings clause in the preamble of the Polar Code.[90] At the same time, Canada, beyond concerning itself again with legal clarity, also cited several precedents to savings clauses being included in SOLAS chapters and other recent IMO conventions, and especially highlighted the case of the International Ship and Port Facility Security Code that was, like the Polar Code, incorporated into SOLAS by reference.[91]

One big difference between the MARPOL and SOLAS Conventions was likely to be on the parties' minds during the debate. The main MARPOL text contains a general savings

[83]SDC 1/J/6, 2; and SDC 1/26, 11.
[84]SDC 1/26, 11.
[85]Canada's proposal for the MARPOL Annexes read: "Nothing in the Polar Code shall prejudice the rights or obligations of states under international law as reflected in the 1982 UN Convention on the Law of the Sea." Ibid., Annex 10, 3.
[86]Ibid., 11.
[87]Ibid., Annex 2, 2.
[88]MSC 93/10/2, 3.
[89]MSC 93/10/12.
[90]MSC 93/10/2, 3.
[91]MSC 93/10/12.

clause – article 9(2) – providing priority to the LOSC. However, SOLAS does not have a similar overarching clause in favour of the LOSC. Instead, one can only find separate savings clauses in different chapters of SOLAS that were seen as possibly conflicting with the LOSC.[92] Thus, the savings clause already found in MARPOL could serve as a fall-back option for Canada, especially together with the expressed understanding at MEPC. The absence of a general savings clause and fall-back option in SOLAS is one explanation for Canada's more extensive argumentation, based on analogies, in the SOLAS case.

As the final adopted text of SOLAS Chapter XIV contains a savings clause – albeit a very general one, referring only to international law – it can be surmised that the more extensive Canadian argumentation and the lack of an overarching savings clause in SOLAS managed to convince the opposing parties. This resulted in reaching majority support for the SOLAS savings clause. While the opinions of the other member States, with the exception of Germany, are unknown, strong dissenting opinion would have been recorded in the report of MSC 93, as with the position of the United States during the DE 55 debates. In the case of the United States and the other Arctic coastal States, Norway and Denmark, one can also point to the possibility that these States could benefit from a savings clause with regard to their own coastal State legislation.[93] In this regard, it is important to note that the debates on the savings clauses did not refer to existing national regulations, while the savings clauses merely uphold the potential for these Arctic coastal States to exercise their rights under LOSC article 234.

Article 234 as the elephant in the room and how it could be overcome

It is remarkable that article 234 of the LOSC was not mentioned during the discussions on the savings clauses. It was, however, clear that what was at stake was upholding the rights in article 234 since, as Canada stated, the savings clauses would provide for an informed application of the Polar Code's requirements within the legal framework that exists for polar waters.[94] This being clear, how could the debates on the savings clauses overcome similar polarisation to that encountered at the DE meetings?

First, rules played some role in the debate on the savings clauses relating to the Polar Code; that is, when and whether a savings clause is needed. Most important here is that the Vienna Convention on the Law of Treaties contains a rule specifically on savings clauses and treats them as one method of determining rights and obligations in successive treaties regulating the same subject matter.[95] Thus, there is a rule that lays down when there is a need for savings clauses. Hence, even though there were debates on the savings clauses regarding the Polar Code, savings clauses in themselves are not new, rare or exceptional. Savings clauses only become an issue if they entail the discussion of emotional, deep-seated

[92]As McDorman notes, the lack of a general savings clause in SOLAS is due to the fact that "much of what is covered in the SOLAS Convention is far removed from the LOS Convention." McDorman, "Note on the Potential," 152.
[93]Brubaker has observed that the United States' 1990 *Oil Pollution Act* shows similarities to Russian and Canadian legislation regarding Arctic shipping. Brubaker, "Straits in the Russian Arctic," 277–9; and Brubaker, "Arctic – Navigational Issues," 72–5. For an evaluation of the legislation governing waters around Svalbard (Norway) and Greenland (Denmark) in light of article 234, see Ibid., 77–95.
[94]MEPC 66/11/7, 2; and MSC 93/10/12, 2.
[95]This article reads: "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." Vienna Convention on the Law of Treaties, article 30(2).

principles.[96] Therefore, the debates on the savings clauses regarding the Polar Code were not caused simply by the savings clauses themselves but by what they were intended to regulate. It is the controversial nature of article 234 that caused the debate, not the savings clauses themselves.[97] As witnessed by the DE debates, the issue of article 234 and coastal State jurisdiction could have become a major impediment to the work on the Polar Code. Obscuring this issue, then, contributed to reaching an agreement. The decision not to discuss the matter is significant in this regard.

Second, the parties utilised second best arguments, not just to put the issue on the table again, but also to keep it there and reach agreement by obscuring fundamental principles. This approach was followed by the other States as they aimed to rebuff Canada's second best arguments, instead of the underlying principles. Thus, instead of mentioning article 234, substitutes were used, such as "international law as reflected in UNCLOS." Concerns were further clad in the language of legal arguments not directly related to article 234, centring instead on questions of need and legal clarity. Yet, as suggested by Elster,[98] the use of second best arguments restricted the ability of the parties to achieve the entirety of their goals as they needed to yield to more convincing arguments.

Third, analogies were brought in by Canada to buttress its position without engaging in a debate directly on coastal State jurisdiction. Analogies are discussed by Sunstein as one of the methods used to achieve incompletely theorised agreements. Canada cited concrete examples where specific savings clauses were included in SOLAS and other international agreements.[99]

Fourth, the increasingly general language of the proposed clauses is also significant. It appears that the more general, and less focused on article 234, the language of the clauses was, the more acceptable they became. The principle of priority of national regulations was the most controversial and it was swiftly removed from the text of the draft Code. At the same time, the more general clause declaring that the Code "shall not 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" was retained in the preamble of the Code.[100] Similarly, in the SOLAS savings clause, placed in a stronger position than the Code's preamble, the original reference to the LOSC proposed by Canada was changed to merely "international law."[101] Thus, the final version of the savings clause in SOLAS has the widest and most general language of those proposed, as well as the strongest position.

The disconnect between principles and arguments brought along by both sides thus served to obscure and circumvent the reference to article 234 and make it more palatable for the losing side to go along with the outcome, albeit reluctantly. This is evident from

[96]This was highlighted in the case of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, which also included a discussion on a savings clause, causing a clash between environmental and cultural preferences on the one hand, and trade on the other. Safrin's conclusion in this case is that "the issue may be reframed into the overarching and perhaps unanswerable question of which set of important international goals … holds greater import." Safrin, "Treaties in Collision," 622.

[97]As Koskenniemi suggests, hiding the indeterminacy of international law has often been done by relying on the procedural norms States need to follow to reach agreement (in this case, the savings clauses), rather than resolving conflicts outright. Koskenniemi, *From Apology to Utopia*, 473. For his example regarding LOSC, see Koskenniemi, *From Apology to Utopia*, 488–97.

[98]Elster, "Strategic Uses of Argument," 245–6.

[99]MSC 93/10/12.

[100]DE 56/10/1, Annex 1, 5.

[101]SOLAS, Chapter XIV, Regulation 2.5. A reference to "international law" as opposed to the LOSC was probably also preferable since the United States is not party to the LOSC but views most of its contents as reflecting customary international law.

Canada's statement attached to the report of MEPC 66. While Canada acknowledged the importance of the understanding that the Polar Code should not impair States' rights and obligations in the LOSC, the statement clearly declares: "As the purpose of Canada's proposal was to enhance clarity and transparency in this regard, Canada can go along with the decision of this Committee on this issue."[102] It is important to note the significance of the framing provided by the second best arguments. Without these, neither rules, analogies nor generality of language could have proved sufficient to elicit agreement between the parties. Comparison between the DE debates and later discussions highlights that the main contention, the underlying conflict of principles, could only be managed by being circumnavigated. Framing the issue with reference to need for legal clarity allowed the parties to agree to the outcome.

Without incomplete theorisation, then, the Polar Code negotiation could have become stalled and run into protracted troubles. Thus, Sunstein's submission that incomplete theorisation can lead to agreement between parties holding contradictory values and principles appears valid in the case of the Code.

Lessons from the case of the Polar Code

The negotiation of the Polar Code, while complicated by its incorporation into two Conventions, was not out of the ordinary. Procedurally, the same IMO process was followed as for any other IMO output, through the work of different Committees, Sub-Committees and working groups. What is more interesting is how the overtly political issue of coastal State jurisdiction was handled by this technical organisation, and what this means for the future.

Avoiding conflict and what it means for decision-making

The IMO handled the issue arising from article 234 by avoiding it. This first became evident when the decision was made not to discuss the matter during the early stages of the Code's development. While this allowed parties to return to the issue in the later stages, it served to provide time and opportunity to discuss the substantive technical details of the Code's regulations. Furthermore, it signalled to the parties that, given the deep concerns of both sides, more effort was needed if they wanted to reach a favourable outcome on the question of coastal State jurisdiction. Secondly, this avoidance meant the debate on the savings clauses was framed through the use of second best arguments, rather than high-level principles.

Incompletely theorised agreements make it possible to reach agreement in a timely and respectful manner, making continued work among the participants possible. This is an important factor in the case of the IMO, as many of the delegates meet multiple times a year, representing their respective States in different Committees and Sub-Committees. Keeping relationships cordial is essential for continued collaboration.

Finally, consensus is necessary in the IMO's procedure for reaching agreements, while entry into force through the tacit acceptance procedure requires a certain amount of support – or, rather, lack of objections. Since the Polar Code process followed the IMO's procedures, its adoption and entry into force were helped by an outcome that all parties could

[102]MEPC 66/21, Annex 20, 12.

support. The continued ambiguity on the issue of coastal State jurisdiction and, therefore, the possibility of the different parties agreeing to the outcome, contributed to achieving the necessary support across the parties.

Avoiding conflict and the Polar Code's future

While the avoidance of a clear-cut solution to the Polar Code's relationship with the LOSC might have had a positive effect on the Code's timely completion and the continued work of the delegates, it could raise questions as to the substance and future of the Code.

Firstly, it can be argued that the IMO's decision-making procedures weathered the test posed by the Polar Code. The legitimacy this provides to the Code can lead to greater acceptance and adherence to the Code and an increased willingness for its further development.

"Working around" a controversial political issue without solving it can often make an agreement possible and result in practicable solutions. Sabrina Safrin points to the case of the Cartagena Protocol on Biosafety where the issue of whether global trade or environmental and cultural concerns would triumph was avoided through a curious arrangement of a savings clause followed by two other clauses negating its effect.[103] Meanwhile, Oran Young suggests that the "existence of unresolved jurisdictional issues need not become an insuperable impediment to success",[104] pointing at the case of the fisheries regime in the Barents Sea between Norway and Soviet Union/Russia that operated for decades without a resolution to a maritime boundary. He explains that instead of resolving such conflicts, regimes can be effective by "merely" managing them. This links the Polar Code to other instances of arrangements in the Arctic where divisive resolutions to conflicts of principles were successfully avoided and managed in practical ways.

Second, however, the IMO's avoidance of the issue of coastal State jurisdiction raises a question with significance not only to the Polar Code, but also to wider IMO decision-making and international regulations in general. While the IMO successfully avoided conflict, the strategy of avoidance highlights the possibility that other difficult issues could escape resolution or even discussion. The IMO is often accused of aiming for the lowest common denominator, in order to reach consensus among the different members. The IMO's reputation, as well as the judgement of the Polar Code's success, would not be enhanced by such suspicions. This also applies to international regimes and their outcomes in general.

Third, whether the Polar Code indeed will turn out to be a success also depends on its contents: would the Polar Code be deemed sufficient to ensure safety of navigation and protection of the marine environment?[105] If Arctic coastal States are not satisfied with the Polar Code and its implementation, these States could still argue for the right to adopt and enforce more stringent standards than those included in the Code, based on their perceived jurisdiction in article 234. This would negate the purpose of the Code in providing the uniform regulations necessary for international shipping to thrive. In this regard, it is important that the tacit acceptance procedure provides a vehicle for the continuous updating and strengthening of the Code, making it less likely that additional unilateral coastal

[103]Safrin, "Treaties in Collision."
[104]Young, *International Governance*, 73.
[105]On the sufficiency of the Polar Code, see Chircop, "Jurisdiction over Ice-Covered Areas," 284–6.

State regulations would be considered necessary. It is further encouraging that the IMO is currently considering a second phase for the Code's development.[106]

In the growing literature on the future of the Polar Code, different views appear on the relationship between article 234 and the Code. If the aim is harmonisation, coastal State national regulations on the one hand, and GAIRAS and the Polar Code on the other, appear to be pointing in opposite directions. In Knut Einar Skodvin's view, the Code alters the legal landscape to the extent that all national regulations in the Arctic which differ from the Code would need to be measured against it to assess whether these pay due regard to navigation and environmental protection.[107] This would mean that the Polar Code "expands" into the competence reserved for coastal States in article 234, in a similar way to that suggested by Ole Kristian Fauchald.[108]

It has also been argued that the Polar Code and national regulations should, rather, be seen as complementary in nature. Thus, the adoption of the Polar Code could possibly lead to increasing coastal State reliance on other, uncontroversial provisions in the LOSC to protect the Arctic environment, such as those applicable to the EEZ in general, while article 234 could still exist as a safety-net.[109] Further, article 234 also provides for enforcement jurisdiction of the coastal State which could prove important in enforcing the Polar Code. Yet another view, put forward by Aldo Chircop, sees a symbiotic relationship between the Code and article 234.[110] Chircop also suggests there are good reasons for Russia and Canada to retain existing unilateral regulations, such as the controversial mandatory reporting requirements.[111]

As highlighted above, whether a coastal State would be satisfied with the Polar Code depends on the content and the necessary protection provided by the Code. How far do nation States go to protect what they see as fundamental principles? Since savings clauses uphold nation States' rights and obligations in other international instruments, if these are not resolved to start with, the savings clauses only perpetuate the ambiguity. The savings clauses, together with the unresolved nature of article 234, provide room for manoeuvre regarding where the line can be drawn between the role of nation States and international regulations in general, and regarding permits and mandatory reporting in particular. It is submitted here that this ambiguity might be preferred by the parties to an outright rejection of principles.

Conclusion

Where does this leave us? Has the IMO achieved nothing with the Polar Code? While the Polar Code does not change the status quo of uncertainty on LOSC article 234, I argue that the Polar Code does matter. Article 234 appears to be subject to endless academic discussions and this will continue in the future. However, in the meantime, a set of globally applicable regulations has been created in the shape of the Polar Code which lead to enhanced safety and more environmentally sound shipping in the Arctic. That this has been achieved in a respectful manner and without discarding any of the underlying principles of the parties means that neither side has lost face or faith in the IMO's decision-making process. The

[106]MSC 98/23, 48–50.
[107]Skodvin, "Arctic Shipping – Still Icy," 157.
[108]Fauchald, "Regulatory Framework," 82–3.
[109]Jensen, "International Code for Ships," 75–7.
[110]Chircop, "Jurisdiction over Ice-Covered Areas," 283–4.
[111]Ibid., 285.

possibility of continued collaboration has not been damaged, either in the IMO or in the Arctic in general, and this bodes well for continued development of the Polar Code.

As incompletely theorised agreements can lead to practical results without undermining deeply held principles, it seems States favour these over open conflicts and the possibility of losing the argument on the basis of main principles, as suggested by Sunstein, especially when time is limited. The Polar Code negotiations on the savings clauses show that States are willing to play by the rules of the game. Neither side in the savings clause debate reverted to justifications based on principles and gave up second-best arguments, despite facing partial defeat.

The Polar Code is an incompletely theorised agreement and this feature could be helpful for further cooperation in the realm of Arctic shipping. It is worth remembering that there are precedents for incompletely theorised agreements in the context of Arctic shipping. It can be argued that article 234 itself is the result of an incompletely theorised agreement as it does not indicate whether the Northwest Passage that prompted the conflict between Canada and the United States – or indeed the Northeast Passage – should be considered in the scope of the international straits regime or the ice-covered waters regime.[112] Furthermore, the 1988 Agreement on Arctic Cooperation between the United States and Canada is often described as an "agreement to disagree", as it provides for a practical solution for the operation of U.S. icebreakers in waters claimed by Canada, while not prejudicing the legal position of either State.[113] The Polar Code can be seen as a continuation of this tradition: it does not change the underlying conflict of principles, but encourages safe and environmentally sound Arctic shipping by making it more practicable.

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[112]Bartenstein, "Arctic Exception," 27.
[113]Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation.

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Paper 4

Bognar, Dorottya. "In the Same Boat? A Comparative Analysis of the Approaches of Russia and Canada in the Negotiation of the IMO's Mandatory Polar Code." Paper submitted for publication in *Ocean Development & International Law*.

In the Same Boat? A Comparative Analysis of the Approaches of Russia and Canada in the Negotiation of the IMO's Mandatory Polar Code

Abstract: In the field of Arctic shipping, Canada and the Russian Federation have enacted extensive unilateral national regulations cognizant of Article 234, UN Convention on the Law of the Sea. On the global level, both States have been important actors in negotiating the International Maritime Organization's mandatory Polar Code, a legal instrument with implications for regulations at the national level. This paper compares and contrasts the approaches, positions and arguments of Canada and Russia especially regarding national systems to control navigation and vessel-source pollution. The results suggest different emphases stemming from the two States' political and economic realities and capacities.

Keywords: law of the sea; Polar Code; international decision-making; Northwest Passage; Northern Sea Route

I. Introduction

With the decrease of sea ice in the Arctic, increased ship traffic is expected during this century in the waters of the Northwest Passage (NWP) and the Northern Sea Route (NSR), the sea routes north of Canada and the Russian Federation respectively. The two States with the longest coastlines facing the Arctic, Russia and Canada have a long history connected to this region which is integral to their national identity. This history and identity have underpinned and motivated their national policies and regulatory efforts, not least regarding shipping in the Arctic.

The International Code for Ships Operating in Polar Waters (Polar Code),[1] negotiated at the International Maritime Organization (IMO), is an international legally binding instrument that aims to raise international standards for the safety of navigation and the protection of the marine environment in polar regions. During its negotiation, Russia and Canada were expected to play an important role both on account of their experience regarding Arctic shipping and the potential challenges and opportunities posed by the Code for their national regulatory regimes.

While the national regulatory regimes and policies of Russia and Canada have been subject to comparative analysis,[2] this article compares and contrasts their positions and arguments

[1] IMO, *International Code for Ships Operating in Polar Waters (Polar Code)*, Res. MSC.385(94), 21 November 2014; and IMO, *International Code for Ships Operating in Polar Waters (Polar Code)*, Res. MEPC.264(68), 15 May 2015 (Polar Code).

[2] See e.g. Erik Franckx, *Maritime Claims in the Arctic: Canadian and Russian Perspectives* (Dordrecht: Martinus Nijhoff Publishers, 1993); R. Douglas Brubaker, "The Arctic – Navigational Issues under International Law of the Sea," *The Yearbook of Polar Law Online* 2, No. 1 (2010): 7-114; Aldo Chircop et al., "Course Convergence? Comparative Perspectives on the Governance of Navigation and Shipping in Canadian and Russian Arctic Waters," *Ocean Yearbook* 28 (2014): 291-327; Leilei Zou, "Comparison of Arctic Navigation Administration between Russia and Canada," in *Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries*, eds. Myron H. Nordquist, John Norton Moore and Ronán Long (Leiden: Brill Nijhoff, 2016): 286-301; and Jacques Hartmann, "Regulating Shipping in the Arctic Ocean: An Analysis of State Practice," *Ocean Development & International Law* 49, No. 3 (2018): 276-299.

during the negotiation of the Polar Code.[3] Did the fact that Russia and Canada have extensive Arctic shipping regulations, which were developed following a similar approach and face similar challenges on the international plane, result in comparable positions in the negotiation of the Polar Code?

II. Canada, Russia and the Regulation of Arctic Shipping

The history of regulating Arctic shipping, both in Canada and Russia/Soviet Union, goes back to the mid-20th Century and has been influenced by reactions to actions of foreign States, primarily the United States.[4] It was the Soviet Union whose claimed jurisdiction was first challenged by the United States in the late 1960s,[5] followed by the infamous voyage of the American tanker *Manhattan* through the Northwest Passage and the waters of the Canadian Arctic Archipelago in 1969.[6] The *Manhattan* incident led to the enactment of the Canadian Arctic Waters Pollution Prevention Act (AWPPA),[7] which provides extensive regulation for ships in the waters of Canada's Arctic Archipelago, ostensibly to protect against the pollution of these waters. As Erik Franckx highlights, the establishment of the Northern Sea Route Administration was the Soviet reflection of the Canadian AWPPA.[8]

It was the AWPPA and the need to provide for it a solid international legal basis that led the Canadian delegation to the Third United Nations Conference on the Law of the Sea to seek a provision aimed specifically at the Arctic.[9] After largely trilateral negotiations between Canada, the United States and the Soviet Union, this was achieved in Article 234 of the 1982 United Nations Convention on the Law of the Sea (LOSC),[10] which provides to Arctic coastal States the right to legislate for the prevention, control and reduction of vessel-source pollution as regards ice-covered waters without the requirement to turn to the international community, as represented by the IMO, for approval.[11]

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[3] Writing at the same time as the development of the Polar Code was still in progress, Kristin Bartenstein points at the use of icebreaker escorts and reliance on unilateral regulations for Arctic shipping to illustrate the lack of coordination among Arctic States in the negotiation of the Code. See Kristin Bartenstein, "Navigating the Arctic: The Canadian NORDREG, the International Polar Code and Regional Cooperation," *German Yearbook of International Law* 54 (2011): 117-118.

[4] See e.g. Franckx, *Maritime Claims in the Arctic, supra* note 2, 75-101 and 145-160.

[5] *Ibid.*, 146-151; and J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims*, 3rd edition (Martinus Nijhoff Publishers, 2012), 312-318.

[6] Franckx, *Maritime Claims in the Arctic, supra* note 2, 75-76; and John Kirton and Don Munton, "The Manhattan Voyages and Their Aftermath," in *Politics of the Northwest Passage*, ed. Franklyn Giffiths (Kingston and Montreal: McGill-Queen's University Press, 1987), 67-97.

[7] Canada, Arctic Waters Pollution Prevention Act (R.S.C., 1985, c. A-12) (AWPPA).

[8] Franckx, *Maritime Claims in the Arctic, supra* note 2, 234.

[9] For the negotiation of Article 234, see Donald M. McRae, "The Negotiation of Article 234," in *Politics of the Northwest Passage*, ed. Franklyn Griffiths (Kingston and Montreal: McGill-Queen's University Press, 1987), 98-114; and James Kraska, "Governance of Ice-Covered Areas: Rule Construction in the Arctic Ocean," *Ocean Development & International Law* 45, No. 3 (2014): 260-271.

[10] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 U.N.T.S. 397 (LOSC).

[11] *Ibid*., Article 234. This provision reads:

> 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

Mikhail Gorbachev's 1987 Murmansk speech, suggesting an opening of the NSR to foreign vessels, signaled a change of stance by the Soviet Union in its dying days, leading to the introduction of requirements for navigation along the NSR.[12] Although the growth in traffic plummeted on the NSR with the collapse of the Soviet Union and foreign navigation did not materialize, efforts started to build towards the development of an international regulatory code for ships operating in polar waters in the 1990s. These efforts led to the designation of an Outside Working Group by the IMO, with the lead of Canada, to work out the technical details of the new mandatory code.[13] This work, however, only resulted in a voluntary set of guidelines, the 2002 Guidelines for Ships Operating in Arctic Ice-Covered Waters,[14] extended in 2009 to include both Arctic and Antarctic polar waters as the Guidelines for Ships Operating in Polar Waters.[15]

Finally, while the early 2010s saw Russia reform its national regulations regarding shipping along the NSR, seen as the first step towards aligning its legislation more with international law,[16] Canada introduced mandatory reporting requirements, similar to those existing for the NSR.[17] This Canadian step to make mandatory the Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) drew criticism at the IMO,[18] resulting in debates also regarding Article 234 of the LOSC.[19]

III. The Polar Code

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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.

[12] Franckx, *Maritime Claims in the Arctic, supra* note 2, 264-268.

[13] Lawson W. Brigham, "The Developing International Maritime Organization Polar Code," in *Arctic Yearbook 2014,* eds. Lassi Heininen, Heather Exner-Pirot and Joël Plouffe (Akureyri: Northern Research Forum, 2014): 497. While these early efforts can be seen as forming the broadly understood process of Polar Code negotiations, the present article has a much narrower focus, solely concentrating on the negotiations commencing from 2009 when an output for a mandatory code was placed on the agenda of the IMO.

[14] IMO, *Guidelines for Ships Operating in Arctic Ice-Covered Waters*, Doc. MSC/Circ.1056 and MEPC/Circ.399, 23 December 2002.

[15] IMO, *Guidelines for Ships Operating in Polar Waters*, Res. A.1024(26), 2 December 2009.

[16] See e.g. Erik Franckx, "The Shape of Things to Come: The Russian Federation and the Northern Sea Route in 2011," *The Yearbook of Polar Law* V (2013): 268; and Jan J. Solski, "Russia," in *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States*, eds. Robert C. Beckman, Tore Henriksen, Kristine Dalaker Kraabel, Erik J. Molenaar and J. Ashley Roach (Leiden: Brill Nijhoff, 2017): 197-215.

[17] Canada, Northern Canada Vessel Traffic Services Zone Regulations (SOR/2010-127) https://laws-lois.justice.gc.ca/eng/regulations/SOR-2010-127/FullText.html (accessed 1 May 2019) (NORDREG).

[18] See e.g. United States and INTERTANKO, *Safety of Navigation: Northern Canada Vessel Traffic Services Zone Regulations*, IMO Doc. MSC 88/11/2, September 22, 2010; and IMO, *Report of the Maritime Safety Committee on Its Eighty-Eighth Session*, Doc. MSC 88/26/Add.1, 19 January 2011, Annex 28 Statement by the Delegation of Singapore.

[19] IMO, *Report to the Maritime Safety Committee*, Doc. NAV 56/20, 31 August 2010, 49-50; and IMO, *Report of the Maritime Safety Committee on Its Eighty-Eighth Session*, Doc. MSC 88/26, 15 December 2010, 53-56. See also, Ted L. McDorman, "National Measures for the Safety of Navigation in Arctic Waters: NORDREG, Article 234 and Canada," in *The Law of the Sea Convention: US Accession and Globalization*, eds. Myron H. Nordquist, Hak-So Kim, John Norton Moore, and Alfred H. A. Soons (Leiden: Martinus Nijhoff Publishers, 2012), 409-424; and James Kraska, "The Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) and the Law of the Sea," *International Journal of Marine and Coastal Law* 30 (2015): 225-254.

The Polar Code was developed by the IMO between 2009 and 2015 and entered into force 1 January 2017.[20] Its aim is to enhance the safety of ships navigating in polar waters as well as the protection of the polar marine environment,[21] beyond the regulations that were already applicable through the major IMO conventions.[22] The Polar Code is not a stand-alone treaty, but an add-on to two conventions, the International Convention for the Safety of Life at Sea (SOLAS)[23] and the International Convention for the Prevention of Pollution from Ships (MARPOL),[24] and is made mandatory through these Conventions.[25] The Code has two main parts, corresponding to the two Conventions to which it adds new regulations: Part I for safety measures and Part II for pollution prevention measures.[26] Both of these parts are made up of two sub-parts, one containing mandatory regulations (Parts I-A and II-A) and one containing additional recommendatory guidelines (Parts I-B and II-B).

Due to this complexity, the Polar Code was negotiated in multiple committees of the IMO. The Maritime Safety Committee (MSC) was responsible for the safety part of the Code, while the Marine Environment Protection Committee (MEPC) was in charge of the negotiation of the environmental part. However, in reality, the main body of the work was delegated to the Sub-Committee for Ship Design and Equipment (DE) and, after the 2013 reorganization of the IMO's structure, its successor the Sub-Committee on Ship Design and Construction (SDC).[27] It was at DE/SDC where the technical details were negotiated, particularly amongst

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[20] For the proposals to place a mandatory polar code on the IMO's agenda, see Denmark, Norway and the United States, *Work Programme: Mandatory Application of the Polar Guidelines*, IMO Doc. MSC 86/23/9, 24 February 2009; and Denmark, Norway and the United States, *Work Programme of the Committee and Subsidiary Bodies: Mandatory Application of the Polar Guidelines*, IMO Doc. MEPC 59/20/1, 6 April 2009. The safety part of the Polar Code was adopted in November 2014; see IMO, *Report of the Maritime Safety Committee on Its Ninety-Fourth Session*, Doc. MSC 94/21, 26 November 2014, 17. The environmental protection part of the Code was adopted in May 2015; see IMO, *Report of the Marine Environment Protection Committee on Its Sixty-Eighth Session*, Doc. MEPC 68/21, 29 May 2015, 44. All document submitted to the IMO on the Polar Code were accessed through the IMO's online database, IMODOCS, available at https://webaccounts.imo.org/.

[21] The definition of "polar waters" includes not only Arctic waters, which consist of all waters north of 60° N with the exception of the Norwegian Sea and the western part of the Barents Sea, but also Antarctic waters, i.e. waters south of 60° S.

[22] Polar Code, *supra* note 1, Introduction 1.

[23] 1974 International Convention for the Safety of Life at Sea, London, 1 November 1974, 1184 U.N.T.S. 278, as amended (SOLAS).

[24] 1973 International Convention for the Prevention of Pollution from Ships, as Modified by the Protocol of 1978 Relating Thereto, London, 2 November 1973 and 17 February 1978, 1340 U.N.T.S. 62, as amended (MARPOL).

[25] IMO, *Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended*, Res. MSC.386(94), 21 November 2014; and IMO, *Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973: Amendments to MARPOL Annexes I, II, IV and V (To Make Use of Environment-Related Provisions of the Polar Code Mandatory)*, Res. MEPC.265(68), 15 May 2015. In addition, training requirements of the Polar Code for crew on ships operating in polar waters are elaborated on in the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, London, 7 July 1978, 1361 U.N.T.S. 190, as amended and its Code, as amended.

[26] In addition, the Polar Code starts with an Introduction that is made mandatory through both SOLAS and MARPOL.

[27] For the reform of the IMO's structure, see IMO, "IMO Sub-Committee Restructuring Agreed by MSC," 1 July 2013, accessed 16 April 2019, http://www.imo.org/en/MediaCentre/PressBriefings/Pages/26-restructuring.aspx#.XLWiNvZuKUk. Additionally, specific issues were delegated to other Sub-Committees, such as those responsible for Standards of Training and Watchkeeping (STW, and its successor on Human Element, Training and Watchkeeping, HTW), Radiocommunication and Search and Rescue (COMSAR, and its successor on Navigation, Communications and Search and Rescue, NSCR), Fire Protection (FP) and Ship Systems and Equipment (SSE).

a handful of experts at the working group level. The outline of the work of the Sub-Committees was set by the two Committees which also took policy decisions when requested by DE/SDC on issues which were unclear. The final text of the Polar Code also had to be approved by both Committees.

IV. Canadian and Russian Positions during the Negotiation of the Polar Code

1. The Participation of Canada and Russia in the Negotiations in General, and the Exercise of Leadership and Experience

The region-specific nature of the Polar Code meant that its negotiation was dominated by Arctic States.[28] However, while both Canada and Russia were important players in the debates and had expertise with regard to Arctic shipping and its regulation, there were marked differences between their participation.

Firstly, the number of proposals submitted shows a large disparity. Canada submitted the largest number of proposals of all the participants at the Polar Code negotiations – 34 documents. Compared to this, Russia's tally stands at 15. However, looking at the statements included in the reports of the Committees and Sub-Committees, the situation between the two States is opposite. Russia's views are recorded in these documents nine times compared to Canada's three. This suggests that Russia may have been less successful in achieving its aims during the negotiations than Canada.

Secondly, Canada's experience in previous negotiations seems to have left its stamp on some of its documents, as several of its submissions suggest that Canada was seeking to play a facilitator role, moving the discussions forward rather than expressing a specific Canadian position or opinion.[29] Thus, Canada submitted draft texts for the Code in the early phases of the negotiation process[30] and sample tables for the content of the new Polar Waters Operational Manual (PWOM).[31] This facilitator role is also underscored by Canada's

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[28] On the relative lack of engagement by the States with interests in the Antarctic, see Dorottya Bognar, "Sea-Change in Polar Shipping: From Arctic to Antarctic Polar Code Initiatives," *The JCLOS Blog*, 1 February 2017, http://site.uit.no/jclos/files/2017/02/Bognar-Sea-change-in-polar-shipping-from-Arctic-to-Antarctic-Polar-Code-initiatives.pdf.

[29] While not expressing Canadian positions *per se*, Canada did have room to try to influence the outcome of the Polar Code especially through the contents of the draft texts, leading to debates regarding certain provisions. One example of this, as discussed further on in this article, is the principle regarding national systems of shipping control which was seized upon by the Russian Federation, see DE 55/12/23, *infra* note 42 and accompanying text. Canada also provided the chair of a correspondence group established by the Sub-Committee on Fire Protection to examine the then Chapter 8 (now Chapter 7) of the Polar Code on Fire Safety/Protection, see Canada, *Development of a Mandatory Code for Ships Operating in Polar Waters: Report of the Correspondence Group*, IMO Doc. SDC 1/3/5, 15 November 2013.

[30] Canada, *Development of a Mandatory Code for Ships Operating in Polar Waters: Proposed framework for the Code for Ships Operating in Polar Waters*, IMO Doc. DE 53/18/2, 20 November 2009; and Canada, *Development of a Mandatory Code for Ships Operating in Polar Waters: Discussion Document for Progressing Development of a Mandatory Code for Ships Operating in Polar Waters*, IMO Doc. DE 55/INF.4, 17 December 2010. The latter submission was accompanied by a document detailing the origin of each provision contained in the draft text in DE 55/INF.4, see Canada, *Development of a Mandatory Code for Ships Operating in Polar Waters: Discussion Document for Progressing Development of Mandatory Code for Ships Operating in Polar Waters*, IMO Doc. DE 55/INF.3, 17 December 2010.

[31] Canada, *Development of a Mandatory Code for Ships Operating in Polar Waters: Polar Waters Operational Manual*, IMO Doc. SDC 1/3/10, 15 November 2013; and Canada, *Ship Design and Construction: Development*

participation and organization of different workshops of experts to contribute to the progress of the Code's development.[32] There is, however, a distinct lack of a similar facilitator role in Russia's case. There are no reports of workshops organized by Russia, although Russian experts no doubt participated in such events organized by others. Neither did Russia submit any draft text of the Code. Compared to the extensive Canadian effort, Russia's contribution to the development of the Polar Code seems remarkably little.

Thirdly, while Russia's submissions had no co-sponsors, Canada frequently co-sponsored proposals with other member States and consultative organizations.[33] Co-sponsoring, besides sharing the burden of the preparatory work, serves to indicate before the debate of the document that the proposal is supported by multiple States and/or expert organizations. Of Canada's 34 documents, nearly a third (10) was co-sponsored. This suggests that the Canadian proposals enjoyed a relatively wide appeal, whereas Russia's participation in the negotiation may be characterized by a certain level of isolation. Furthermore, Canada co-sponsored with a wide array of States with different interests. These included, among others, Arctic coastal States Norway and the United States,[34] other Arctic States[35] such as Finland and Sweden,[36] as well as major flags of convenience such as Liberia and the Marshall Islands.[37] On the one hand, this might point at a strategic choice of co-sponsors, especially when opposition to Canadian proposals was anticipated. On the other hand, it also implies a willingness to cooperate on Canada's part.

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of a Mandatory Code for Ships Operating in Polar Waters: Polar Waters Operational Manual, IMO Doc. MSC 93/10/1, 12 February 2014. For the PWOM, see Polar Code, *supra* note 1, Part I-A, Chapter 2.

[32] Such workshops were notably organised regarding the PWOM, see SDC 1/3/10, *supra* note 31, 2 and MSC 93/10/1, *supra* note 31, 2; the identification of risks faced by ships in polar waters, see Canada, *Development of a Mandatory Code for Ships Operating in Polar Waters: Establishment of a Risk Basis for Polar Code Requirements*, IMO Doc. DE 57/11/3, 6 December 2012; and a new system for the determination of operational limitations in ice, POLARIS, see Canada, Sweden, Finland and the International Association of Classification Societies (IACS), *Consideration and Adoption of Amendments to Mandatory Instruments: Technical Background to POLARIS*, IMO Doc. MSC 94/INF.13, 12 September 2014.

[33] There are more than 70 non-governmental organizations that enjoy consultative status with the IMO, including representatives from the shipping industry and environmental organizations. They provide expert input and can, thus, provide document to the debates. For the list of consultative organizations, see IMO, "Non-Governmental international Organizations which have been granted consultative status with IMO," accessed 16 April 2019, http://www.imo.org/en/About/Membership/Pages/NGOsInConsultativeStatus.aspx.

[34] E.g. Canada, Denmark and Norway, *Development of a Mandatory Code for Ships Operating in Polar Waters: Comments to Proposals Related to an Environmental Chapter of a Mandatory Code for Ships Operating in Polar Waters (Polar Code)*, IMO Doc. DE 57/11/18, 25 January 2013; and Canada and the United States, *Ship Design and Construction: Applicability of Part I-A of the Polar Code in the Antarctic Area*, IMO Doc. MSC 93/10/17, 25 March 2014.

[35] It is customary to differentiate between the Arctic Five, the five Arctic coastal States – Denmark (on behalf of Greenland), Canada, Norway, Russia and the United States – and the Arctic Eight, States with territories beyond the Arctic Circle that also make up the member States of the Arctic Council, comprising of – beyond the Arctic Five – Finland, Iceland and Sweden.

[36] E.g. MSC 94/INF.13, *supra* note 32.

[37] E.g. Canada, Liberia and the Marshall Islands, *Mandatory Code for Ships Operating in Polar Waters: Reduction of Administrative Burden*, IMO Doc. MEPC 67/9/11, 22 August 2014.

Thus, whereas Canada's Arctic shipping experience led to a leadership role in the negotiations, quite the opposite was the case for Russia. Russia's Arctic shipping experience can only be found in the text of its submissions providing justification for its proposals.[38]

2. Canadian and Russian Proposals

While the above observations suggest that Canadian and Russian engagement with the Polar Code negotiating process was markedly different, this subsection looks at the substance of the two States' proposals. Were there any similarities between the positions of Canada and Russia on specific issue areas, or were the general differences accompanied by opposing positions and arguments as well?

It is not possible to cover the whole debate on the Polar Code.[39] Therefore, the focus will be on i) national regulations and systems of shipping control, and ii) regulation of the discharge of oil and oily mixtures. The importance of the former is evident from the fact that both Canada and Russia have relied upon Article 234 of the LOSC to support national regulations for Arctic shipping which could be impacted by the new Polar Code. The examination of the latter cluster of issues is justified since these are matters upon which these States can invoke the rights provided in Article 234, namely the prevention, reduction and control of vessel-source marine pollution.

Clusters is an apt approach since several more or less disparate issues are connected to the broadly defined areas. For the first cluster one can examine how Canada and Russia tried to regulate the relationship of the Polar Code with the LOSC, also including the practical matter of operational limitation in ice conditions. The second cluster looks not only at the discharge ban on oil and oily mixtures but also reception facilities.

(a) Safeguarding National Regulations

With regard to safeguarding national regulations and systems of shipping control, it is possible to separate two distinct strategies. First, there is the explicit matter of the relationship between the Polar Code and Article 234 of the LOSC, which serves as the international legal basis for much of Canada's and Russia's national regulations as regards shipping in the Arctic. Besides this, efforts have been expanded to use national regulations as possible models for the content of the Polar Code.

The issue of safeguarding national regulations and systems of shipping control is a distinct cluster of issues that was uniquely common to and supported by Canada and Russia.[40]

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[38] Dorottya Bognar, "Russian Proposals on the Polar Code: Contributing to Common Rules or Furthering State Interests?" *Arctic Review on Law and Politics* 7, No. 2 (2016): 127.

[39] For an overview of Canadian contribution to the Polar Code debates, see Aldo Chircop, Peter G. Pamel and Miriam Czarski, "Canada's Implementation of the Polar Code," *The Journal of International Maritime Law* 24, no. 6 (2018): 433-440. For an overview of Russian contributions to the Polar Code debates, see Bognar, "Russian Proposals on the Polar Code," *supra* note 38.

[40] Although Bartenstein notes that Denmark's Arctic strategy includes the possibility of introducing unilateral measures on the basis of Article 234 of the LOSC, see Bartenstein, *supra* note 3, 118, there is no evidence in my material from the IMO that this resulted in similar efforts to those of Canada and Russia outlined in this section. On the contrary, Denmark voiced a preference for maintaining freedom of navigation and for the Polar Code's

However, elements of the Canadian and Russian efforts did receive support from other States during the debates, such as the requirement to include operational capabilities and limitations in ice into both the new Polar Ship Certificate and the PWOM, also referring to the methodology of such assessment, one of which is the POLARIS system mentioned below.[41] While reference to coastal State rights and control is not included in these technical requirements, both the Canadian and Russian systems of control are accommodated through the possible methodologies mentioned.

(i) Relationship between the Polar Code and LOSC

Much of the debates centering on the regulation of the relationship between the Code and the LOSC in general, and its Article 234 in particular, has been analyzed elsewhere.[42] Suffice it here to recount that early Russian efforts to reintroduce "the principle of priority of national regulations over the Code's requirements,"[43] originating in a Canadian draft text and directly quoting Article 234, failed in 2011 due to opposition, notably by the United States.[44] However, Canada succeeded in tabling the issue again three years later as a question of savings clauses.[45] Through arguments relating to legal clarity and need, while at the same time avoiding the mention of Article 234 and national regulations, Canada achieved a partial victory: the inclusion of a savings clause regulating the relationship between LOSC and the safety part of the Code in the new SOLAS Chapter making the Code mandatory.[46]

(ii) Operational and Access Limitations

Paralleling the efforts outlined above, Canada and Russia tried to shape the Polar Code's content to mirror their respective national regulations with discussions largely centering on operational and access limitation of ships as well as control by coastal States. Canada's first submission on this issue proposed the introduction of a permit to be required of all ships

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regulations to "supersede the countries' national regulations," see Denmark, *Development pf a Mandatory Code for Ships Operating in Polar Waters: HAZID Analysis of Ships Navigating in Arctic Waters*, IMO Doc. DE 53/18/5, 18 December 2009, 2. It has to be noted though that this Danish submission predates the Danish Arctic strategy by two years.

[41] Polar Code, *supra* note 1, Part I-A, Regulations 1.3, 2.2.2 and 2.3.2. See also IMO, *Guidance on Methodologies for Assessing Operational Capabilities and Limitations in Ice*, Doc. MSC.1/Circ.1519, 6 June 2016.

[42] Dorottya Bognar, "The Elephant in the Room: Article 234 of the Law of the Sea Convention and the Polar Code as an Incompletely Theorised Agreement," *The Polar Journal* 8, No. 1. (2018): 182-203.

[43] Russian Federation, *Development of a Mandatory Code for Ships Operating in Polar Waters: Procedure of Accounting for National Regulations*, IMO Doc. DE 55/12/23, 1 February 2011, 2. Coastal State rights based on Article 234 were mentioned once again by Russia, referring to national rules setting limitations for navigation in ice. The extent of this was only a sentence, however, while the rest of the submission was devoted to the discussion of ice classes. See Russian Federation, *Development of a Mandatory Code for Ships Operating in Polar Waters: A Proposal to Appoint Categories Depending on the Ice Reinforcement of Ships*, IMO Doc. DE 56/10/14, 24 December 2011, 1.

[44] IMO, *Report to the Maritime Safety Committee*, Doc. DE 55/22, 15 April 2011, 23-24.

[45] See IMO, *Report to the Maritime Safety Committee*, Doc. SDC 1/26, 11 February 2014, 9, 11 and Annex 10, 3. For further Canadian documents regarding savings clauses, see Canada, *Reports of Sub-Committees: Comments on the Outcome of SDC 1: Amendments to the Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating to Thereto (MARPOL)*, IMO Doc. MEPC 66/11/7, 21 February 2014; and Canada, *Ship Design and Construction: Amendments to the International Convention for the Safety of Life at Sea*, IMO Doc. MSC 93/10/12, 25 March 2014.

[46] SOLAS, *supra* note 23, Chapter XIV, Regulation 2.5.

operating in polar waters, the "Polar Ship Permit to Operate."[47] While such a permit would determine areas where, and environmental conditions under which, a ship would be allowed to sail depending on the fulfilment of the Code's requirements, Canada also suggested that the permit would "assist coastal States in regulating operations in accordance with their own systems of navigational control."[48]

Further, the same document also proposed the requirement that ships report regularly to the coastal States during their voyages "where applicable,"[49] that is, where the coastal State already requires this, such as in the case of Canadian and Russian regulations of Arctic shipping. These efforts tried to establish an international legal basis for prior authorization and reporting requirements, notably the controversial, mandatory Canadian NORDREG system.

Russia also referred to its practices of access limitation, suggesting that a document similar to its Ice Certificate that provides recommendations for safe navigation based on the ship's parameters and performance, be required in order to increase safety in polar waters, explaining its use and practical experience.[50] However, in the case of Russia, the discussion of the Ice Certificate appears to be separate from that of the national regulations. This garnered some support among the delegations,[51] whereas Russia's proposal regarding the principle of priority,[52] discussed at the same meeting, together with the Canadian paper on the Permit to Operate and coastal State control,[53] were criticized for aiming to provide international legal basis for national systems of shipping control.[54]

Canadian efforts also focused on having in the Polar Code a system similar to Canada's regulations limiting access and operation in ice-covered waters, including the Canadian Zone/Date system[55] and the Arctic Ice Regime Shipping System (AIRSS).[56] Firstly, it was proposed that the Polar Ship Certificate and/or the PWOM contain such limitations.[57] However, due to the reference to presumed coastal State jurisdiction, this generated concern

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[47] Canada, *Development of a Mandatory Code for Ships Operating in Polar Waters: Application of Requirements in the Mandatory Polar Code*, IMO Doc. DE 55/12/7, 14 January 2011, 2.
[48] *Ibid*.
[49] *Ibid*., 3.
[50] Russian Federation, *Development of a Mandatory Code for Ships Operating in Polar Waters: Comments on Document DE 54/13/4*, IMO Doc. DE 54/13/10, 31 August 2010, 4; and Russian Federation, *Development of a Mandatory Code for Ships Operating in Polar Waters: Ice Certificate Used in the Russian Federation*, IMO Doc. DE 55/12/22, 31 January 2011.
[51] DE 55/22, *supra* note 44, 24.
[52] DE 55/12/23, *supra* note 43.
[53] DE 55/12/7, *supra* note 47.
[54] DE 55/22, *supra* note 44, 24.
[55] Canada, Shipping Safety Control Zones Order (C.R.C., c. 356).
[56] Canada, Arctic Ice Regime Shipping System (AIRSS) Standards – TP 12259, accessed 16 April 2019, http://www.tc.gc.ca/eng/marinesafety/tp-tp12259-menu-605.htm. See also Canada, Arctic Shipping Safety and Pollution Prevention Regulations (SOR/2017-286), section 8(2).
[57] Canada, *Development of a Mandatory Polar Code for Ships Operating in Polar Waters: Access Limits for Operation in Polar Waters*, IMO Doc. DE 56/10/15, 24 December 2011.

among the other delegations.[58] Following this, Canada used more cautious language, emphasizing that "it is inappropriate to mandate the use of any specific methodology."[59]

Finally, Canada and Russia, along with other States and the International Association of Classification Societies, developed a new system to limit operations in icy conditions, POLARIS, discussed at the last MSC meeting before the adoption of the Code in 2014.[60] However, Canada was the only State to table a document supporting the inclusion of the new system in the Polar Code.[61] Reference was made to Canada's AIRSS system that partly provides the basis for POLARIS, highlighting, among other things, its effectiveness.[62] At the same time, Russia submitted three papers criticizing POLARIS.[63] On the one hand, the criticism was directed at technical issues and flaws.[64] On the other hand, Russia also suggested that POLARIS should not replace the possible use of different approaches to operational limitations, proposing equal status for Russia's prescriptive approach with POLARIS and AIRSS.[65] Russia further suggested that POLARIS should be amended with "[Russian Maritime Register of Shipping] ice classes, based on over 100 years' experience of Arctic-going [sic]" so as to be more applicable in the Russian Arctic.[66]

(b) Regulation of the Discharge of Oil and Oily Mixtures

The possible negative environmental effects of shipping in the Arctic served as the *raison d'etre* for the development of Canada's domestic regulatory regime, including a discharge ban,[67] whereas Russia's attitude towards environmental protection has been ambivalent.[68] While the protection of the Arctic marine environment is one of the main goals of the Polar Code, the scope of its environmental protection part is limited to pollution prevention to correspond with that of MARPOL. Due to this, one of the main environmental protection

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[58] IMO, *Report to the Maritime Safety Committee*, Doc. DE 56/25, 28 February 2012, 25.
[59] SDC 1/3/10, *supra* note 31, 2; and MSC 93/10/1, *supra* note 31, 3.
[60] MSC 94/21, *supra* note 20, 10-11.
[61] Canada, *Consideration and Adoption of Amendments to Mandatory Instruments: Comments on IACS Proposed System for Determining Operational Limitations in Ice (POLARIS)*, IMO Doc. MSC 94/3/19, 26 September 2014.
[62] *Ibid*., 2-3.
[63] Russian Federation, *Consideration and Adoption of Amendments to Mandatory Instruments: Polar Code: Modes of Operation in Ice and Speed Limitations*, IMO Doc. MSC 94/3/21, 26 September 2014; Russian Federation, *Consideration and Adoption of Amendments to Mandatory Instruments: Operational Limitations for Polar Navigation Ships*, IMO Doc. MSC 94/3/22, 26 September 2014; and Russian Federation, *Consideration and Adoption of Amendments to Mandatory Instruments: Draft Polar Code – Proposal for Text Improvements*, IMO Doc. MSC 94/3/23, 26 September 2014, 2-3.
[64] MSC 94/3/21, *supra* note 63; and MSC 94/3/23, *supra* note 63, 2.
[65] MSC 94/3/22, *supra* note 63, 2.
[66] *Ibid*., 3. Also see discussion in Bognar, "Russian Proposals on the Polar Code," *supra* note 38, 123-124.
[67] AWPPA, *supra* note 7, 4(1).
[68] See e.g. R. Douglas Brubaker, "Regulation of Navigation and Vessel-Source Pollution in the Northern Sea Route: Article 234 and State Practice," in *Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention*, ed. Davor Vidas (Cambridge: Cambridge University Press, 2000): 221 and 224-225; and Anna Korppoo, Nina Tynkkynen and Geir Hønneland, *Russia and the Politics of International Environmental Regimes: Environmental Encounters or Foreign Policy?* (Cheltenham: Edward Elgar, 2015). For the observation that Russia does not mention the environment or climate as the referent object of sustainable development in the case of Arctic shipping, see Kathrin Keil, "Sustainability Understandings of Arctic Shipping," in *The Politics of Sustainability in the Arctic: Reconfiguring Identity, Space, and Time*, eds. Ulrik Pram Gad and Jeppe Strandsbjerg (London: Routledge, 2018), 48, endnote 9.

achievements of the Code was the ban on any discharge of oil and oily mixtures in the Arctic, creating a quasi-special area.[69] Due to the introduction of this discharge ban, the need for adequate reception facilities also arose during the debates.[70] However, this issue was not settled in the Code. In the latest development, the eight Arctic States have tabled a paper after the entry-into-force of the Polar Code, proposing the application of a regional approach to port reception facilities in the Arctic,[71] which is a long way from reception facilities in every Arctic port that was originally proposed by flag States and shipping organizations.[72]

(i) Discharge Ban

Canada, which already has zero oil discharge regulations for its Arctic waters under AWPPA,[73] was not among those States that proposed the inclusion of a complete prohibition of oil and oily mixture discharges in the Polar Code,[74] suggesting instead that there be a requirement of oil filtering equipment with alarm and automatic stopping mechanisms for certain categories of ships.[75] Yet, once the total ban was agreed in 2013, Canada supported it.[76]

This contrasts markedly with the Russian stance regarding oil pollution. Russia had already opposed proposed requirements regarding oil filtering equipment as, in their view, such requirements were applicable in special areas which Arctic waters are not designated as.[77] Russia also emphasized that special areas would require adequate port reception facilities for

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[69] Polar Code, *supra* note 1, Part II-A, 1.1. Compare with MARPOL, *supra* note 24, Annex I, Reg. 1.11, which defines special areas as

> a sea area where for recognizable technical reasons in relation to its oceanographical and ecological condition and to the particular character of its traffic the adoption of special mandatory methods for the prevention of sea pollution by oil is required.

[70] The issues of the discharge ban as well as port reception facilities introduced below are discussed in more detail in Dorottya Bognar, "Russia and the Polar Marine Environment: The Negotiation of the Environmental Protection Measures of the Mandatory Polar Code," *Review of European, Comparative & International Environmental Law* 27 (2018): 39-42.

[71] Canada et al., *Any Other Business: Regional Reception Facilities Plan (RRFP) – Outline and Planning Guide for the Arctic*, IMO Doc. MEPC 72/16, 29 December 2017. For a more recent document proposing placing a new agenda item regarding a regional approach to Arctic reception facilities on the IMO's agenda, see Canada et al., *Work Programme of the Committee and Subsidiary Bodies: Proposal for a New Output to Amend MARPOL to Allow the Establishment of Regional Arrangements in the Arctic*, IMO Doc. MEPC 74/14/2, 8 February 2019. Regional agreements and arrangements provide a possibility to satisfy the requirement for adequate port reception facilities in regions with unique challenges, such as areas with many small island developing States.

[72] Kiribati et al., *Development of a Mandatory Code for Ships Operating in Polar Waters: Reception Facilities for Oil and Oily Mixtures*, IMO Doc. SDC 1/3/1, 11 October 2013.

[73] AWPPA, *supra* note 7, 4(1).

[74] See Denmark et al., *Development of a Mandatory Code for Ships Operating in Polar Waters: Proposals Related to an Environmental Chapter of a Mandatory Code for Ships Operating in Polar Waters (Polar Code)*, IMO Doc. DE 57/11/9, 10 January 2013.

[75] DE 57/11/18, *supra* note 34, 2. The ships for which these States propose oil filtering equipment were new category A and B ships, defined as "ship designed for operation in polar waters in at least medium first-year ice, which may include old ice inclusions" and "ship not included in category A, designed for operation in polar waters in at least thin first-year ice, which may include old ice inclusions," respectively, see Polar Code, *supra* note 1, Introduction 2.1 and 2.2.

[76] Canada, *Reports of Sub-Committees: Development of a Mandatory Code for Ships Operating in Polar Waters – Reception Facilities for Oil and Oily Mixtures*, IMO Doc. MEPC 66/11/8, 21 February 2014.

[77] Russian Federation, *Development of a Mandatory Code for Ships Operating in Polar Waters: Proposals Related to an Environmental Chapter of a Mandatory Code for Ships Operating in Polar Waters (Polar Code)*, IMO Doc. DE 57/11/12, 25 January 2013, 2.

vessel-source wastes, "which is time consuming [sic],"[78] while asserting that oily water with an oil concentration of 15 parts per million (ppm) or less does not pose a threat to the marine environment, especially when compared to the wastes entering the Arctic from outside of the region.[79] Once the discharge ban on oil and oily mixtures was agreed, creating a quasi-special area, multiple Russian documents tried to overturn this as well as limit its scope.[80] The Russian proposals added further justifications to those already highlighted, including the suggestion that the discharge ban would lead to increased illegal and uncontrollable discharges in the Arctic,[81] and that compliance would be difficult for ships in the Arctic, especially those that conduct voyages lasting long periods of time between port calls, such as icebreakers and hydrographic survey and research vessels.[82] Icebreakers were of particular importance to Russia in general as further evidenced by the emphasis it placed on icebreaker assistance several times during the debates,[83] as well as its attempt to change the definition of icebreakers to reflect its understanding as meaning specialized vessels, excluding cargo ships with high ice class at the last MSC meeting discussing the Code.[84] Russia's extensive efforts to protect its regime of icebreaker assistance are of significance as Russia has a monopoly over providing icebreaker escorts along the NSR.[85] Although a transitional period for such vessels was achieved, this was shorter than Russia had proposed and has reportedly been subject to criticism by the Russian shipping and shipbuilding industry.[86]

(ii) Port Reception Facilities

Once the discharge ban was agreed, the requirement to provide port reception facilities for the discharge of oily waste in every Arctic port was proposed by a number of flag of convenience States and shipping organizations,[87] drawing opposition from both Canada and Russia.[88] However, while both suggested that the need for such a requirement was questionable

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[78] *Ibid*.
[79] *Ibid*.
[80] Russian Federation, *Development of a Mandatory Code for Ships Operating in Polar Waters: Comments on Chapter 1 of Part II-A*, IMO Doc. SDC 1/3/18, 29 November 2013; Russian Federation, *Reports of Sub-Committees: Comments on the Outcome of SDC 1: Environmental Issues Related to the Draft Code for Ships Operating in Polar Waters (Polar Code)*, IMO Doc. MEPC 66/11/3, 24 January 2014; *Russian Federation, Mandatory Code for Ships Operating in Polar Waters: Comments on the Environmental matters in the Polar Code (Part II-A, Chapter 1)*, MEPC 67/9/2, 8 August 2014; and Russian Federation, *Mandatory Code for Ships Operating in Polar Waters: Comments on the Report of the Polar Code Correspondence Group (Part II-A, Chapter 1)*, IMO Doc. MEPC 67/9/3, 15 August 2014.
[81] MEPC 66/11/3, *supra* note 80, 3; MEPC 67/9/2, *supra* note 80, 2; and MEPC 67/9/3, *supra* note 80, 2.
[82] SDC 1/3/18, *supra* note 80, 1; MEPC 66/11/3, *supra* note 80, 2; MEPC 67/9/2, *supra* note 80, 2; and MEPC 67/9/3, *supra* note 80, 2.
[83] DE 54/13/10, *supra* note 50, 3-5; DE 55/22, *supra* note 44, 29; and DE 56/10/14, *supra* note 43, 4.
[84] MSC 94/3/23, *supra* note 63, 1-2.
[85] Russian Federations, Rules of Navigation in the Water Area of the Northern Sea Route, approved by the Order of the Ministry of Transportation No. 7, 17 January 2013, para. 21.
[86] Alexander Sergunin, "Russian Approaches to an Emerging Arctic Ocean Legal Order," *Polar Cooperation Research Centre (PCRC) Working Paper* No. 6 (March 2017), 38, http://www.research.kobe-u.ac.jp/gsics-pcrc/pdf/PCRCWPS/PCRC_06_Sergunin.pdf.
[87] SDC 1/3/1, *supra* note 72.
[88] MEPC 66/11/8, *supra* note 76; and Russian Federation, *Mandatory Code for Ships Operating in Polar Waters: Comments on the Report of the Polar Code Correspondence Group (Part II-A, Chapter 1)*, IMO Doc. MEPC 67/9/4, 15 August 2014.

regarding the nature and amount of vessel traffic and pointed to the burden of such a requirement, the two States appear to be motivated by other, divergent considerations.

Canada expressed the concern that such a stringent requirement for port reception facilities as a prerequisite for the introduction of the total discharge ban would delay and impede the discharge ban.[89] Thus, Canada's opposition to the proposed requirement seems to be based, at least partially, upon environmental protection considerations, especially when Canada suggested that there were alternative, operational and technical solutions available to achieve compliance with the discharge ban.[90] Such a concern for a delayed or impeded discharge ban is lacking in the Russian position, which used the lack of port reception facilities as one justification to overturn the discharge ban.[91]

V. Positions and the Question of Mutual Support

As expected, both Canada and Russia tried to influence the relationship of the Polar Code with preexisting rights and national regulations. It was especially with regard to the relationship of the Polar Code and coastal State rights in the Arctic under the LOSC that the positions of Russia and Canada were directly aligned. One important difference between the two States in this regard concerned the way they tried to achieve the primacy of Article 234 of the LOSC over the Code. While Russia explicitly referred to and cited Article 234, Canada was more circumspect in its submissions, avoiding direct reference to the provision and talking more generally about the international law applicable to polar waters. Further, Canada tried multiple ways to build acknowledgement of and an international legal basis for its domestic regime as well as seeking to safeguard it. This was attempted through: references to coastal State rights to permit operations and to require reporting from ships navigating in Arctic waters; references to national systems of shipping control in the PWOM; and support for the inclusion of POLARIS in the Polar Code. Russia's efforts were limited mainly to efforts to amend POLARIS to fit its system of operational limitation. In this regard, Canada and Russia supported their respective national systems, apparently to the detriment of each other. Thus, a common position did not assist the two States' efforts to reconcile the Polar Code with their respective national regulations, with the exception of the general relationship between the Polar Code and coastal State rights under Article 234 of the LOSC.

Was there mutual support on the latter between Canada and Russia? Russia did not appear to draw on or expressly support any of the Canadian proposals beyond that used for its principle of priority. There is a similar lack of expressed support from Canada towards Russia. One exception is as regards the savings clauses proposed by Canada for inclusion in the MARPOL Annexes making the Polar Code mandatory, which had apparently received support from Russia.[92] However, this support did not result in any submission or statement from Russia. Thus, it appears that the two States only supported each other's efforts to a limited degree.

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[89] MEPC 66/11/8, *supra* note 76, 1.
[90] *Ibid*., 2-3.
[91] MEPC 66/11/3, *supra* note 80, 2.
[92] MEPC 66/11/7, *supra* note 45, 2.

While the existence of national regulations and systems of shipping control is common to Canada and Russia and resulted to some degree in similar, but parallel, efforts during the negotiations, Canada and Russia expressed directly opposite views on environmental protection matters. This is evident in the case of the ban on the discharge of oil and oily mixtures in the Arctic. Once adopted, Canada supported such a ban as it parallels its own regulations. However, for Russia the adoption of the ban resulted in a series of submissions trying to undermine it or exempt vessel types from it, such as icebreakers, survey and research vessels and, to a lesser degree, ships transiting Russian Arctic waters. To some extent, the debate on the port reception facilities mirrored these differences in spite of both Canadian and Russian opposition to the proposed requirements. While Canada focused on the potential delay in the implementation of the discharge ban, this argument was notably missing in Russia's submission. Neither was there evidence of support by the two States for each other's proposals regarding reception facilities. This observation, however, needs to be put in the context of recent developments. As already mentioned, the proposal regarding a regional approach to port reception facilities was co-sponsored also by Canada and Russia.[93] This proposal was apparently developed by the Arctic Council's Protection of the Arctic Marine Environment (PAME) Working Group.[94] In the proposal, the high costs of new infrastructure appears to take a central place.[95] While there is no reference made to pollution prevention in the list of benefits of such a regional approach in this paper, environmental concerns posed by the installation of such infrastructure are listed among the challenges.[96] It appears that Canada's position has moved closer to that of Russia and, worryingly, concerns over cutting costs placed higher than environmental considerations.

VI. Explanations

1. Capabilities and Economic Realities

Although both Canada and Russia have extensive national regulations for Arctic shipping that had faced possible challenges from the Polar Code,[97] there were major differences in their approaches during the negotiation of the Code. These can be partly attributed to the difference in capabilities and economic realities between Canada and Russia.[98]

Russia's history of developing its Arctic has resulted in more Arctic infrastructure – both ports and vessels – than is the case for Canada. Russia is a major flag State, not only of the many icebreakers plying its Arctic waters, but also of cargo vessels. Much of the traffic taking place in the Russian Arctic also constitutes domestic voyages as opposed to international

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[93] MEPC 72/16, *supra* note 71.
[94] *Ibid*., 1.
[95] *Ibid*., 2-3.
[96] *Ibid*., 2-3. It is worth noting that the regional approach is mentioned as an alternative to direct discharges into the sea. However, this is not a sufficient reason to introduce the regional approach in the Arctic where providing adequate reception facilities is already a requirement, see MARPOL, supra note 24, Annex I, Reg. 38.
[97] See e.g. Ole Kristian Fauchald, "Regulatory Framework for Maritime Transport in the Arctic: Will a Polar Code Contribute to Resolve Conflicting Interests?" in *Marine Transport in the High North*, eds. John Grue and Roy H. Gabrielsen (Oslo: Novus Forlag, 2011): 82-83; and Knut Einar Skodvin, "Arctic Shipping – Still Icy," in *Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries*, eds. Myron H. Nordquist, John Norton Moore and Ronán Long (Leiden: Brill Nijhoff, 2016): 157.
[98] The unevenness of capabilities has also been noted by Chircop et al., *supra* note 2, 295.

voyages in the meaning provided for in SOLAS.[99] This also means that such vessels would not necessarily need to comply with the safety provisions of the Polar Code.[100] Canada is not among the 35 largest flag States by deadweight tonnage,[101] falls far behind of Russia in terms of ownership of vessels[102] and is reliant on chartered ships.[103]

Meanwhile, causing a potential problem for Russia is that, unlike the safety measures of the Code, the environmental protection measures contained in Part II of the Code, notably the discharge ban, are not restricted to ships on domestic voyages and to passenger and cargo vessels over 500 gross tonnage, but apply to all ships.[104] Moreover, much of the infrastructure in the Russian Arctic is left over from the Soviet era and in need of modernization to be able to help comply with the Code's discharge requirements. Therefore, it is no surprise that Russia was opposed to the stringent discharge requirements of the Code, which could result in high bills for upgrades and replacement of ships. Similarly, the requirement for port reception facilities in every Arctic port was seen as a heavy burden for Russia with many, but unfit ports along the NSR. The costs incurred through these regulations would significantly affect the balance sheet of the region, hamper the development of the Russian Arctic resources and adversely impact the resupplying of remote communities. The need to install reception facilities in remote settlements along the Arctic coast would have caused similar difficulties and expense for Canada as for Russia, coupled with the fact that the zero-discharge requirement has been in effect in Canadian waters since the introduction of AWPPA without the need for such facilities. Thus, both Canada and Russia were influenced by concerns that the Polar Code would place restrictions on their activities and result in additional financial burden.

These observations also highlight that although Canada and Russia are the largest coastal States in the region, Canada primarily emphasized its coastal State capacity and interests during the negotiations of the Polar Code. For Russia, the picture was more complex. While it is in Russia's interest as a coastal State to exploit the resources and opportunities of its waters, Russia also is a major flag State. In some respects, its resource development-related interests also serve its flag State interests when the aim is to reduce the costs to the ships serving its Arctic activities. Yet, its flag State interests were countered in the debates on port reception

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[99] *Review of Maritime Transport 2018* (Geneva: UNCTAD, 2018), http://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf, 29.

[100] Having been made mandatory through the SOLAS Convention, the Polar Code's safety part should cover ships on international voyages. See SOLAS, *supra* note 23, Chapter I, Reg. 1(a) and 2(d). However, for a possible ambiguity as regards the application of the Polar Code's safety part, see J. Ashley Roach, "The Polar Code and Its Adequacy," in *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States*, eds. Robert C. Beckman, Tore Henriksen, Kristine Dalaker Kraabel, Erik J. Molenaar and J. Ashley Roach (Leiden: Brill Nijhoff, 2017): 150.

[101] *Review of Maritime Transport 2018*, *supra* note 99, 35.

[102] *Ibid*., 30.

[103] Canada highlighted this several times during the Polar Code debates, see e.g. MEPC 67/9/11, *supra* note 37.

[104] Polar Code, *supra* note 1, Part II-A, Chapter 1, Reg. 1.1. For a discussion of why the environmental part of the Code was viewed with more concern in Russia than the safety part, see Andrei Zagorski, "Perspective," in *The Arctic in World Affairs: A North Pacific Dialogue on the Arctic in the Wider World: 2015 North Pacific Arctic Conference Proceedings*, eds. Oran R. Young, Jong Deog Kim and Yoon Hyung Kim (Korea Maritime Institute and East-West Center, 2015): 223-224.

facilities, although Russia tried to connect the reversal of the discharge ban with its opposition to the port reception facilities requirement.

2. (Geo)Political Positions

While both Canada and Russia have adopted regulations for their Arctic waters, Canada appears to be more concerned than Russia with establishing and reinforcing the international legal bases of these actions.[105] This can be explained in part by the respective positions of Canada and Russia vis-à-vis international organizations and international law. Russia's general wariness towards multilateral organizations, especially where it does not enjoy the special status as one of a small group of leaders has been well documented.[106] Beyond this, Russia's tendency towards unilateralism when that serves its interests has been noted,[107] while Russia's recent actions regarding Crimea and Eastern Ukraine suggest that Russia feels it can disregard or manipulate certain norms of international law. At the same time, even when Canada has acted unilaterally and not in conformity with international law, as in the case of the 1970 AWPPA's adoption, it has expended considerable efforts to accumulate international support and establish a legal basis for the action.

Moreover, influencing Canadian actions in the Arctic is its concern of not provoking or being challenged by its neighbor and close ally, the United States.[108] This happened at the IMO with regard to the Canadian NORDREG regulations in 2010, with the United States questioning the unilateral action of Canada making NORDREG mandatory and criticizing Canada's disregard for freedom of navigation.[109] The resulting debate centered heavily on Canada's understanding of Article 234 of the LOSC. This would have provided ample weariness for the Polar Code debates, especially regarding the relationship between the Code and Article 234. While Russian proposals regarding the Polar Code directly mention Article 234, Canada adopted a more cautious approach. Russia's history as a superpower and ambitions for the revival of its great power status mean that it is more likely to and capable of disregarding challenges to its actions and regulations.[110] Thus, the difference in the way Russia and Canada approached the issue of the relationship between the Code and Article 234 can be attributed to their political relationships with the United States.

Furthermore, Canada's notion of Arctic sovereignty is very much connected to environmental protection, suggesting that the issue of sovereignty also motivated Canada towards a more environment-friendly approach. The way the question of navigating along the NWP has been framed with reference to pollution prevention since the introduction of the AWPPA,[111] thus,

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[105] This has also been noted in general by Chircop et al., *supra* note 2, 325.
[106] E.g. Elana Wilson Rowe and Stina Torjesen, "Key Features of Russian Multilateralism," in *The Multilateral Dimension in Russian Foreign Policy*, eds. Elana Wilson Rowe and Stina Torjesen (Abingdon: Routledge, 2009), 1-20; and Andrei Zagorski, "Multilateralism in Russian Foreign Policy Approaches," in *The Multilateral Dimension in Russian Foreign Policy*, eds. Elana Wilson Rowe and Stina Torjesen (Abingdon: Routledge, 2009), 46-57.
[107] Zagorski, "Multilateralism in Russian Foreign Policy Approaches," *supra* note 106, 49.
[108] Chircop et al., *supra* note 2, 325.
[109] MSC 88/11/2, *supra* note 18; MSC 88/26, *supra* note 19, 53-56; and NAV 56/20, *supra* note 19, 49-50.
[110] Chircop et al., *supra* note 2, 325.
[111] Kirton and Munton, *supra* note 6; and Franckx, *Maritime Claims in the Arctic*, *supra* note 2, 83-84.

influenced Canada's positions on the Polar Code.[112] Besides, genuine concern for the health of the polar marine environment, this necessitated a balancing of Canada's economic interests with environmental concerns. At the same time, Russia's sovereignty in the Arctic is connected more to strategic-military considerations and control over the water areas of the NSR, which is officially defined as a "*national* transportation route."[113] As Jan Solski has observed, recently the role of security-oriented bodies, such as the Ministry of Defense and the Federal Security Service of Russia (FSB), has been increasing in the management of the NSR.[114] While strategic-military interests are not threatened by the Polar Code as it does not apply to warships,[115] control over the waters might be affected by the new regulations that also apply to icebreakers, hence also Russia's efforts to protect these.

6 Conclusion

The positions of Canada and Russia during the negotiation of the Polar Code were marked by one major similarity that stems from their unique status as the only States relying on the extensive coastal State rights granted by Article 234 of the LOSC. The two States tried to protect their national regulatory regimes and using the Polar Code to buttress the international legal basis for these. However, beyond this, differences dominated their positions.

Looking beyond the negotiation of the Code, with regard to implementation, Russia appears to face a larger bill than Canada, while the requirements of the Code appear to be less controversial for Canada than for Russia.[116] As regards the further development of regulations for ships operating in polar waters, the issue of a regional approach to reception facilities suggests that Canada is perhaps moving closer to Russia's position on where to place the balance between environmental protection and economic considerations now that the discharge ban is in force.[117] Further, neither Russia nor Canada have shown unconditional support for a future ban on the use and carriage as fuel of heavy fuel oil,[118] with the former treating such a ban as a last resort[119] and the latter suggesting that the impact of such a ban on

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[112] For the idea of second-best arguments which misrepresent the ultimate reason behind an action to make it more palatable to other players, while at the same time also limiting what is achievable, see Bognar, "The Elephant in the Room," *supra* note 42, 185.
[113] Russian Federation, Federal Law on Amendments to Specific Legislative Acts of the Russian Federation Related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route, adopted by the State Duma 3 July 2012, approved by the Council of Federation 18 July 2012. (emphasis added)
[114] Solski, *supra* note 16, 214.
[115] See in general, SOLAS, *supra* note 23, Chapter I, Reg. 3(a)(i) and in relation to the Polar Code in particular, Chapter XIV, Reg. 2.4: "This chapter shall not apply to ships owned or operated by a Contracting Government and used, for the time being, only in Government non-commercial service. […]"; and MARPOL, *supra* note 24, art. 3(3).
[116] See e.g. Chircop, Pamel and Czarski, supra note 39, 440-449; and Sergunin, supra note 86, 25-33.
[117] As Erik Molenaar suggested, the adoption of such a proposal for a regional approach to port reception facilities would be the first example where a regional approach adopted by the IMO would result in less, rather than more, stringent protection standards. Personal communication, 6 September 2018.
[118] IMO, *Report of the Marine Environment Protection Committee on Its Seventy-Second Session*, Doc. MEPC 72/17, 3 May 2018, 51.
[119] Russian Federation, *Development of Measures to Reduce Risks of Use and Carriage of Heavy Fuel Oil as Fuel by Ships in Arctic Waters: Comments on the Document with the Proposal to Ban Heavy Fuel Oil Use and Carriage as Fuel by Ships in Arctic Waters (MEPC 72/11/1)*, IMO Doc. MEPC 72/11/3, 16 February 2018.

Arctic communities and economies be taken into consideration.[120] The two States also worked together to table the report of an informal correspondence group on the methodology of impact assessment for the future ban.[121] In spite of the shelving of the question of acknowledging coastal State rights, which was the main source of correspondence between the two States' positions, more similarities appear to surface between Canada and Russia, potentially affecting ongoing negotiations on the regulation of polar shipping and their future outcomes.

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[120] Canada and the Marshall Islands, *Development of Measures to Reduce Risks of Use and Carriage of Heavy Fuel Oil as Fuel by Ships in Arctic Waters: Comments on Document MEPC 72/11/1 on Measures to Reduce Risks of Use and Carriage of Heavy Fuel Oil as Fuel by Ships in Arctic Waters*, IMO Doc. MEPC 72/11/4, 16 February 2018.

[121] Canada and the Russian Federation, *Development of Measures to Reduce Risks of Use and Carriage of Heavy Fuel Oil as Fuel by Ships in Arctic Waters: Report of the Informal Correspondence Group on the Determination of an Appropriate Impact Assessment Methodology*, IMO Doc. MEPC 73/9, 17 August 2018.