

The Version of Record of this manuscript has been published and is available in *Ocean Development & International Law*, 6 November 2019, <http://www.tandfonline.com/10.1080/00908320.2019.1680491>

## In the Same Boat? A Comparative Analysis of the Approaches of Russia and Canada in the Negotiation of the IMO's Mandatory Polar Code

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**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),<sup>1</sup> 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,<sup>2</sup> this article compares and contrasts their positions and arguments

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<sup>1</sup> 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).

<sup>2</sup> 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

during the negotiation of the Polar Code.<sup>3</sup> 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-20<sup>th</sup> Century and has been influenced by reactions to actions of foreign States, primarily the United States.<sup>4</sup> It was the Soviet Union whose claimed jurisdiction was first challenged by the United States in the late 1960s,<sup>5</sup> followed by the infamous voyage of the American tanker *Manhattan* through the Northwest Passage and the waters of the Canadian Arctic Archipelago in 1969.<sup>6</sup> The *Manhattan* incident led to the enactment of the Canadian Arctic Waters Pollution Prevention Act (AWPPA),<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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),<sup>10</sup> which provides to Arctic coastal States the right to legislate for the prevention, control and reduction of vessel-source pollution

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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.

<sup>3</sup> 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.

<sup>4</sup> See e.g. Franckx, *Maritime Claims in the Arctic*, *supra* note 2, 75-101 and 145-160.

<sup>5</sup> *Ibid.*, 146-151; and J. Ashley Roach and Robert W. Smith, *Excessive Maritime Claims*, 3rd edition (Martinus Nijhoff Publishers, 2012), 312-318.

<sup>6</sup> 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.

<sup>7</sup> Canada, Arctic Waters Pollution Prevention Act (R.S.C., 1985, c. A-12) (AWPPA).

<sup>8</sup> Franckx, *Maritime Claims in the Arctic*, *supra* note 2, 234.

<sup>9</sup> For the negotiation of Article 234, see Donald M. McRae, "The Negotiation of Article 234," in *Politics of the Northwest Passage*, ed. Franklyn Giffiths (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.

<sup>10</sup> United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 U.N.T.S. 397 (LOSC).

as regards ice-covered waters without the requirement to turn to the international community, as represented by the IMO, for approval.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> This work, however, only resulted in a voluntary set of guidelines, the 2002 Guidelines for Ships Operating in Arctic Ice-Covered Waters,<sup>14</sup> extended in 2009 to include both Arctic and Antarctic polar waters as the Guidelines for Ships Operating in Polar Waters.<sup>15</sup>

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,<sup>16</sup> Canada introduced mandatory reporting requirements, similar to those existing for the NSR.<sup>17</sup> This Canadian step to make mandatory the Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) drew criticism at the IMO,<sup>18</sup> resulting in debates also regarding Article 234 of the LOSC.<sup>19</sup>

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<sup>11</sup> *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 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.

<sup>12</sup> Franckx, *Maritime Claims in the Arctic*, *supra* note 2, 264-268.

<sup>13</sup> 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.

<sup>14</sup> IMO, *Guidelines for Ships Operating in Arctic Ice-Covered Waters*, Doc. MSC/Circ.1056 and MEPC/Circ.399, 23 December 2002.

<sup>15</sup> IMO, *Guidelines for Ships Operating in Polar Waters*, Res. A.1024(26), 2 December 2009.

<sup>16</sup> 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.

<sup>17</sup> 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).

<sup>18</sup> 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.

<sup>19</sup> 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

### III. The Polar Code

The Polar Code was developed by the IMO between 2009 and 2015 and entered into force 1 January 2017.<sup>20</sup> Its aim is to enhance the safety of ships navigating in polar waters as well as the protection of the polar marine environment,<sup>21</sup> beyond the regulations that were already applicable through the major IMO conventions.<sup>22</sup> 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)<sup>23</sup> and the International Convention for the Prevention of Pollution from Ships (MARPOL),<sup>24</sup> and is made mandatory through these Conventions.<sup>25</sup> 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.<sup>26</sup> 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

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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.

<sup>20</sup> 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 documents submitted to the IMO on the Polar Code were accessed through the IMO's online database, IMODOCS, available at <https://webaccounts.imo.org/>.

<sup>21</sup> 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.

<sup>22</sup> Polar Code, *supra* note 1, Introduction 1.

<sup>23</sup> 1974 International Convention for the Safety of Life at Sea, London, 1 November 1974, 1184 U.N.T.S. 278, as amended (SOLAS).

<sup>24</sup> 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).

<sup>25</sup> 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.

<sup>26</sup> In addition, the Polar Code starts with an Introduction that is made mandatory through both SOLAS and MARPOL.

(SDC).<sup>27</sup> It was at DE/SDC where the technical details were negotiated, particularly amongst 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.<sup>28</sup> 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.<sup>29</sup> Thus, Canada submitted draft texts for the Code in the early phases of the negotiation process<sup>30</sup> and sample tables for the content of the new Polar Waters

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<sup>27</sup> 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).

<sup>28</sup> 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 JCLOSE 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>.

<sup>29</sup> 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.

<sup>30</sup> 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*

Operational Manual (PWOM).<sup>31</sup> This facilitator role is also underscored by Canada's participation and organization of different workshops of experts to contribute to the progress of the Code's development.<sup>32</sup> 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.<sup>33</sup> 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,<sup>34</sup> other Arctic States<sup>35</sup> such as Finland and Sweden,<sup>36</sup> as well as major flags of convenience such as Liberia and the Marshall Islands.<sup>37</sup> On the one hand, this might point at a strategic choice of co-sponsors, especially

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*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.

<sup>31</sup> 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 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.

<sup>32</sup> 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.

<sup>33</sup> 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>.

<sup>34</sup> 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.

<sup>35</sup> 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.

<sup>36</sup> E.g. MSC 94/INF.13, *supra* note 32.

<sup>37</sup> 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.

when opposition to Canadian proposals was anticipated. On the other hand, it also implies a willingness to cooperate on Canada's part.

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.<sup>38</sup>

## **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.<sup>39</sup> 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.

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<sup>38</sup> 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.

<sup>39</sup> 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.

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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> Suffice it here to recount that early Russian efforts to reintroduce “the principle of priority of national regulations over the Code’s requirements,”<sup>43</sup> originating in a Canadian draft text and directly quoting Article 234, failed in 2011 due to opposition, notably by the United States.<sup>44</sup> However, Canada succeeded in tabling the issue again three years later as a question of savings clauses.<sup>45</sup> 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.<sup>46</sup>

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<sup>40</sup> 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 regulations to “supersede the countries’ national regulations,” see 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, 18 December 2009, 2. It has to be noted though that this Danish submission predates the Danish Arctic strategy by two years.

<sup>41</sup> 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.

<sup>42</sup> Dorottya Bogнар, “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.

<sup>43</sup> 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.

<sup>44</sup> IMO, *Report to the Maritime Safety Committee*, Doc. DE 55/22, 15 April 2011, 23-24.

<sup>45</sup> 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.

<sup>46</sup> SOLAS, *supra* note 23, Chapter XIV, Regulation 2.5.

*(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 operating in polar waters, the "Polar Ship Permit to Operate."<sup>47</sup> 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."<sup>48</sup>

Further, the same document also proposed the requirement that ships report regularly to the coastal States during their voyages "where applicable,"<sup>49</sup> 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.<sup>50</sup> 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,<sup>51</sup> whereas Russia's proposal regarding the principle of priority,<sup>52</sup> discussed at the same meeting, together with the Canadian paper on the Permit to Operate and coastal State control,<sup>53</sup> were criticized for aiming to provide international legal basis for national systems of shipping control.<sup>54</sup>

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<sup>55</sup> and the Arctic Ice Regime Shipping System (AIRSS).<sup>56</sup> Firstly, it was

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<sup>47</sup> 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.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, 3.

<sup>50</sup> 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.

<sup>51</sup> DE 55/22, *supra* note 44, 24.

<sup>52</sup> DE 55/12/23, *supra* note 43.

<sup>53</sup> DE 55/12/7, *supra* note 47.

<sup>54</sup> DE 55/22, *supra* note 44, 24.

<sup>55</sup> Canada, Shipping Safety Control Zones Order (C.R.C., c. 356).

<sup>56</sup> 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).

proposed that the Polar Ship Certificate and/or the PWOM contain such limitations.<sup>57</sup> However, due to the reference to presumed coastal State jurisdiction, this generated concern among the other delegations.<sup>58</sup> Following this, Canada used more cautious language, emphasizing that “it is inappropriate to mandate the use of any specific methodology.”<sup>59</sup>

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.<sup>60</sup> However, Canada was the only State to table a document supporting the inclusion of the new system in the Polar Code.<sup>61</sup> Reference was made to Canada’s AIRSS system that partly provides the basis for POLARIS, highlighting, among other things, its effectiveness.<sup>62</sup> At the same time, Russia submitted three papers criticizing POLARIS.<sup>63</sup> On the one hand, the criticism was directed at technical issues and flaws.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup>

## **(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’être* for the development of Canada’s domestic regulatory regime, including a discharge ban,<sup>67</sup> whereas Russia’s attitude towards environmental protection has been ambivalent.<sup>68</sup>

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<sup>57</sup> 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.

<sup>58</sup> IMO, *Report to the Maritime Safety Committee*, Doc. DE 56/25, 28 February 2012, 25.

<sup>59</sup> SDC 1/3/10, *supra* note 31, 2; and MSC 93/10/1, *supra* note 31, 3.

<sup>60</sup> MSC 94/21, *supra* note 20, 10-11.

<sup>61</sup> 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.

<sup>62</sup> *Ibid.*, 2-3.

<sup>63</sup> 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.

<sup>64</sup> MSC 94/3/21, *supra* note 63; and MSC 94/3/23, *supra* note 63, 2.

<sup>65</sup> MSC 94/3/22, *supra* note 63, 2.

<sup>66</sup> *Ibid.*, 3. Also see discussion in Bognar, “Russian Proposals on the Polar Code,” *supra* note 38, 123-124.

<sup>67</sup> AWPPA, *supra* note 7, 4(1).

<sup>68</sup> 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.

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 achievements of the Code was the ban on any discharge of oil and oily mixtures in the Arctic, creating a quasi-special area.<sup>69</sup> Due to the introduction of this discharge ban, the need for adequate reception facilities also arose during the debates.<sup>70</sup> 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,<sup>71</sup> which is a long way from reception facilities in every Arctic port that was originally proposed by flag States and shipping organizations.<sup>72</sup>

*(i) Discharge Ban*

Canada, which already has zero oil discharge regulations for its Arctic waters under AWPPA,<sup>73</sup> was not among those States that proposed the inclusion of a complete prohibition of oil and oily mixture discharges in the Polar Code,<sup>74</sup> suggesting instead that there be a requirement of oil filtering equipment with alarm and automatic stopping mechanisms for certain categories of ships.<sup>75</sup> Yet, once the total ban was agreed in 2013, Canada supported it.<sup>76</sup>

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

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<sup>69</sup> 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.

<sup>70</sup> The issues of the discharge ban as well as port reception facilities introduced below are discussed in more detail in Dorottya Bogнар, “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.

<sup>71</sup> 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.

<sup>72</sup> 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.

<sup>73</sup> AWPPA, *supra* note 7, 4(1).

<sup>74</sup> 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.

<sup>75</sup> 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.

<sup>76</sup> 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.

requirements were applicable in special areas which Arctic waters are not designated as.<sup>77</sup> Russia also emphasized that special areas would require adequate port reception facilities for vessel-source wastes, “which is time consuming [sic],”<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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,<sup>81</sup> 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.<sup>82</sup> 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,<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup>

#### *(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

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<sup>77</sup> 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.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> 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.

<sup>81</sup> 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.

<sup>82</sup> 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.

<sup>83</sup> 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.

<sup>84</sup> MSC 94/3/23, *supra* note 63, 1-2.

<sup>85</sup> 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.

<sup>86</sup> 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](http://www.research.kobe-u.ac.jp/gsics-pcrc/pdf/PCRCWPS/PCRC_06_Sergunin.pdf).

States and shipping organizations,<sup>87</sup> drawing opposition from both Canada and Russia.<sup>88</sup> However, while both suggested that the need for such a requirement was questionable 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.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup>

## **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

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<sup>87</sup> SDC 1/3/1, *supra* note 72.

<sup>88</sup> 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.

<sup>89</sup> MEPC 66/11/8, *supra* note 76, 1.

<sup>90</sup> *Ibid.*, 2-3.

<sup>91</sup> MEPC 66/11/3, *supra* note 80, 2.

Annexes making the Polar Code mandatory, which had apparently received support from Russia.<sup>92</sup> 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.

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.<sup>93</sup> This proposal was apparently developed by the Arctic Council's Protection of the Arctic Marine Environment (PAME) Working Group.<sup>94</sup> In the proposal, the high costs of new infrastructure appears to take a central place.<sup>95</sup> 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.<sup>96</sup> 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,<sup>97</sup> there were major differences in their

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<sup>92</sup> MEPC 66/11/7, *supra* note 45, 2.

<sup>93</sup> MEPC 72/16, *supra* note 71.

<sup>94</sup> *Ibid.*, 1.

<sup>95</sup> *Ibid.*, 2-3.

<sup>96</sup> *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.

<sup>97</sup> 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.

approaches during the negotiation of the Code. These can be partly attributed to the difference in capabilities and economic realities between Canada and Russia.<sup>98</sup>

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 voyages in the meaning provided for in SOLAS.<sup>99</sup> This also means that such vessels would not necessarily need to comply with the safety provisions of the Polar Code.<sup>100</sup> Canada is not among the 35 largest flag States by deadweight tonnage,<sup>101</sup> falls far behind of Russia in terms of ownership of vessels<sup>102</sup> and is reliant on chartered ships.<sup>103</sup>

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.<sup>104</sup> 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.

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<sup>98</sup> The unevenness of capabilities has also been noted by Chircop et al., *supra* note 2, 295.

<sup>99</sup> *Review of Maritime Transport 2018* (Geneva: UNCTAD, 2018), [http://unctad.org/en/PublicationsLibrary/rmt2018\\_en.pdf](http://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf), 29.

<sup>100</sup> 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.

<sup>101</sup> *Review of Maritime Transport 2018*, *supra* note 99, 35.

<sup>102</sup> *Ibid.*, 30.

<sup>103</sup> Canada highlighted this several times during the Polar Code debates, see e.g. MEPC 67/9/11, *supra* note 37.

<sup>104</sup> 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.

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 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.<sup>105</sup> 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.<sup>106</sup> Beyond this, Russia's tendency towards unilateralism when that serves its interests has been noted,<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> Thus, the difference in the way Russia and Canada

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<sup>105</sup> This has also been noted in general by Chircop et al., *supra* note 2, 325.

<sup>106</sup> 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.

<sup>107</sup> Zagorski, "Multilateralism in Russian Foreign Policy Approaches," *supra* note 106, 49.

<sup>108</sup> Chircop et al., *supra* note 2, 325.

<sup>109</sup> MSC 88/11/2, *supra* note 18; MSC 88/26, *supra* note 19, 53-56; and NAV 56/20, *supra* note 19, 49-50.

<sup>110</sup> Chircop et al., *supra* note 2, 325.

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,<sup>111</sup> thus, influenced Canada's positions on the Polar Code.<sup>112</sup> 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."<sup>113</sup> 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.<sup>114</sup> While strategic-military interests are not threatened by the Polar Code as it does not apply to warships,<sup>115</sup> 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.<sup>116</sup> 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.<sup>117</sup> Further, neither Russia nor Canada have shown unconditional

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<sup>111</sup> Kirton and Munton, *supra* note 6; and Franckx, *Maritime Claims in the Arctic*, *supra* note 2, 83-84.

<sup>112</sup> 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.

<sup>113</sup> 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)

<sup>114</sup> Solski, *supra* note 16, 214.

<sup>115</sup> 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).

<sup>116</sup> See e.g. Chircop, Pamel and Czarski, *supra* note 39, 440-449; and Sergunin, *supra* note 86, 25-33.

<sup>117</sup> 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.

support for a future ban on the use and carriage as fuel of heavy fuel oil,<sup>118</sup> with the former treating such a ban as a last resort<sup>119</sup> and the latter suggesting that the impact of such a ban on Arctic communities and economies be taken into consideration.<sup>120</sup> 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.<sup>121</sup> 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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<sup>118</sup> IMO, *Report of the Marine Environment Protection Committee on Its Seventy-Second Session*, Doc. MEPC 72/17, 3 May 2018, 51.

<sup>119</sup> 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.

<sup>120</sup> 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.

<sup>121</sup> 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.