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An Ocean Between Us: The Implications of Inconsistencies Between the Navigational Laws of Coastal Arctic Council Nations and the United Nations Convention on the Law of the Sea for Arctic Navigation

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An Ocean Between Us: The Implications of Inconsistencies Between the Navigational Laws of Coastal Arctic Council Nations and the United Nations Convention on the Law of the Sea for Arctic Navigation

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INTRODUCTION

With the continued melting of sea ice in the Arctic, previously inaccessible stretches of Arctic waters have become navigable.¹ With that increased navigability comes the possible opening of more efficient shipping routes through the Arctic Circle.² While the question of who gets to determine navigational laws in the Arctic Ocean has long been an intellectual exercise, the persistence of thick sea ice throughout much of the year kept that question strictly in the realm of the hypothetical.³ Now, however, that thick sea ice is melting and potentially creating a shortcut across the Arctic Ocean that would shave thousands of miles off of currently frequented shipping routes.⁴ The potential for increased ship traffic through the Arctic via those once inaccessible routes has given the question of who determines the “rules of the road” for the Arctic Ocean—and what those rules should look like—new urgency. Arctic environmental and navigational schemes are crucial to answering these questions because the discussions surrounding the two concepts are frequently intertwined.⁵ A primary reason for this is that the amount of ice in Arctic waters, which is necessarily dependent on temperature and climate, dictates the extent of navigation that can occur.⁶ Additionally, the introduction of hitherto unknown volumes of traffic brings the possibility for hitherto unknown volumes of pollution to one of the most unusual, pristine environments remaining on Earth.⁷ Indeed, due to the isolation and extreme nature of the Arctic Circle’s environment, accidental spills of oil or other pollutants would be extremely difficult to mitigate and remediate.⁸

1. Natasha Vizcarra, *Arctic Sea Ice Reaches Fourth Lowest Minimum*, NAT’L SNOW & ICE DATA CTR. (Sept. 15, 2015), https://nsidc.org/arcticseaicenews/2015/09/2015_arctic-minimum/ [<https://perma.cc/4SBJ-TETD>] (discussing the continued downward trend in the amount of Arctic sea ice).

2. See, e.g., Chester Dawson, *Arctic Shipping Volume Rises as Ice Melts*, WALL ST. J. (Oct. 29, 2014), <http://www.wsj.com/articles/arctic-cargo-shipping-volume-is-rising-as-ice-melts-1414612143> [<https://perma.cc/7BBV-B2U4>]; Brad Plumer, *Climate Change Will Open Up Surprising New Arctic Shipping Routes*, WASH. POST (Mar. 5, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/03/05/climate-change-will-open-up-surprising-new-arctic-shipping-routes/> [<https://perma.cc/R6KS-PEHZ>]. But see Christian Haas & Stephen E. L. Howell, *Ice Thickness in the Northwest Passage*, 42 GEOPHYSICAL RES. LETTERS 7673, 7679 (2015) (finding that the ice sheet in the Arctic is still fairly thick, which could indicate that feasible northern shipping routes may still be years in the future).

3. See, e.g., Valur Ingimundarson, *Territorial Discourses and Identity Politics: Iceland’s Role in the Arctic*, in ARCTIC SECURITY IN AN AGE OF CLIMATE CHANGE 174, 177 (James Kraska ed., 2011) (describing the potential for trade routes and navigation through the Arctic as “speculation”); Frédéric Lasserre & Sébastien Pelletier, *Polar Super Seaways? Maritime Transport in the Arctic: An Analysis of Shipowners’ Intentions*, 19 J. TRANSPORT GEOGRAPHY 1465, 1465 (2011) (noting that sea ice melt is “fuelling [sic] many speculative scenarios about the purported

Given these concerns, ensuring safety of navigation and protection of the environment are closely linked, and the conversation surrounding Arctic navigation and shipping routes necessarily requires some discussion of environmental impact.⁹ Unsurprisingly, the existing international legal framework regarding protection of the maritime environment, which includes the United Nations Convention on the Law of the Sea and the Polar Code,¹⁰ is frequently cited in discussions regarding Arctic navigational laws.¹¹ The United Nations Convention

renewal of a 'cold war', [sic] or even an actual armed conflict, in the Arctic, for the control of . . . its sea routes).

4. Paul Brown, *Arctic's Melting Ice Shrinks Shipping Routes*, CLIMATE NEWS NETWORK (Aug. 4, 2015), <http://climatenewsnetwork.net/arctics-melting-ice-shrinks-shipping-routes/> [https://perma.cc/A2PV-X3YZ] (stating that Arctic ice melt is opening up the Northwest Passage, but noting that the Northern Sea Route will likely not be feasible for winter passage until approximately 2030).

5. See, e.g., Int'l Maritime Org. [IMO], *International Code for Ships Operating in Polar Waters (Polar Code)*, at Preamble ¶ 5, MSC.385(94) (Nov. 21, 2014) [hereinafter Polar Code] ("The relationship between the [Polar Code's] additional safety measures and the protection of the environment is acknowledged as any safety measure taken to reduce the probability of an accident, will largely benefit the environment."); ARCTIC COUNCIL, ARCTIC MARINE SHIPPING ASSESSMENT 2009 REPORT 4 (2009) (providing an analysis of the current state of international Arctic navigational laws as they relate to shipping).

6. See, e.g., Dawson, *supra* note 2 (linking the rise in volume of traffic to the decrease in sea ice extent); Haas & Howell, *supra* note 2 (discussing thick sea ice as a reason why feasible Arctic shipping lanes may be years in the future).

7. See, e.g., *Arctic Shipping Issues*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. OFF. OF GEN. COUNS., http://www.gc.noaa.gov/gcil_arctic_shipping.html (last visited Jan. 21, 2016) [https://perma.cc/Z54M-5PHE] (noting the pristine nature of the Arctic environment as well as its vulnerability to potential pollution caused by increased shipping traffic, such as oil spills and potential introduction of alien species via accidental or illegal discharge of bilge water, among other concerns).

8. See, e.g., *Threats to America's Arctic*, PEW CHARITABLE TRUSTS, http://www.pewtrusts.org/~media/legacy/oceans_north_legacy/page_attachments/pewthreatstoamericasarctic.pdf (last visited Jan. 21, 2016) [https://perma.cc/9GW9-CT3E] (stating that "[n]o technology or infrastructure exists to effectively clean up an oil spill in icy Arctic waters, especially in winter when hazardous conditions could delay a response for weeks. A large spill in the Arctic is likely to linger in the ecosystem for decades with devastating consequences to Arctic peoples and the ecosystems on which they depend").

9. See, e.g., Polar Code, *supra* note 5, at Preamble ¶ 5 ("The relationship between the [Polar Code's] additional safety measures and the protection of the environment is acknowledged as any safety measure taken to reduce the probability of an accident, will largely benefit the environment.").

10. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; Polar Code, *supra* note 5.

11. See, e.g., UNCLOS, *supra* note 10; ARCTIC COUNCIL, *supra* note 5, at 4 (providing an analysis of the current state of international Arctic navigational laws as they relate to shipping, written by an Arctic Council working group that focuses on the preservation of the Arctic Ocean environment); Aldo Chircop, *International Arctic Shipping: Towards Scaling-Up of Marine Environment Protection*, in CHANGES IN THE ARCTIC ENVIRONMENT AND THE LAW OF THE SEA (Myron H. Nordquist, John Norton Moore, & Tomas H. Heidar eds. 2010) (examining the maritime regulatory framework and how it works to protect the Arctic marine environment); Ingvild Ulrikke

on the Law of the Sea (“UNCLOS”) is an international agreement that created a vague “due regard” standard for Arctic environmental and navigational laws,¹² and the Polar Code is a very recently promulgated instrument that aims to provide a comprehensive set of Arctic shipping and environmental protection guidelines.¹³ However, due to UNCLOS’s use of poorly defined phrases such as “due regard,”¹⁴ Arctic navigation laws passed by the Arctic Coastal States (Canada, Denmark,¹⁵ Norway, Russia, and the United States)¹⁶ are arguably inconsistent with the framework’s intent, not to mention inconsistent with other nations’ laws passed in response to the same framework.

This Note argues that to remedy those inconsistencies, the UNCLOS standard requiring that Arctic environmental laws have “due regard” for navigation should be interpreted in light of the Voyage Planning Requirements found in the Polar Code.¹⁷ Specifically, this Note examines the Arctic navigation policies of three Arctic Coastal States (Russia, Canada, and the United States), the inconsistencies

Jakobsen, *The Adequacy of the Law of the Sea and International Environmental Law to the Marine Arctic: Integrated Ocean Management and Shipping*, 22 MICH. ST. INT’L L. REV. 291 (discussing the state of current international shipping and environmental laws applicable to the Arctic).

12. UNCLOS, *supra* note 10.

13. Polar Code, *supra* note 5.

14. UNCLOS, *supra* note 10, at art. 234.

15. While Greenland is sometimes listed as a separate Arctic Coastal State, it is an island that was a province of Denmark until 1979 and is now a Danish dependent territory, although one with limited rights of self-government. *Greenland Profile*, BBC NEWS (Feb. 19, 2015), <http://www.bbc.com/news/world-europe-18249474> [<https://perma.cc/4K52-FH35>]. Many sources group Denmark and Greenland together when referring to the Arctic Coastal States, and that is the convention that will be followed in this Note. See, e.g., *The Five Coastal States: Canada, Denmark/Greenland, Norway, Russia, and USA*, THE ARCTIC GOVERNANCE PROJECT, <http://www.arcticgovernance.org/the-five-coastal-states-canada-denmarkgreenland-norway-russia-and-usa.4612672-137746.html> (last visited Jan. 21, 2016) [<http://perma.cc/6V8B-PF8T>] [hereinafter *The Five Coastal States*] (referring to “Denmark/Greenland” as one of the five Coastal States).

16. *The Five Coastal States*, *supra* note 15 (listing the Arctic Coastal States).

17. For the full list of Voyage Planning Requirements, see Polar Code, *supra* note 5, at pt. I-A ch. 11, pt. I-B ch. 12. Any discussion regarding how to interpret multiple international treaties on the same or similar subjects would be incomplete without at least a mention of fragmentation, or the diversification and expansion of international law over time and the attendant complications. See Martti Koskimiini (Chairman of the Int’l Law Comm’n Study Grp.), *Report of the Study Group on the Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, ¶¶ 5–20, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006). The body of literature dealing with how international treaties ought to be interpreted in light of each other is far too broad to be thoroughly explored in this Note; however, the issue this Note addresses is an example of fragmentation, and the proposed solution is a way to resolve tension between two international treaties involving the same or similar subject matter—for example, UNCLOS and the Polar Code. For a more thorough and nuanced introduction to fragmentation as a phenomenon, see *id.* See also Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT’L L. & POL’Y 1049 (2012).

between those policies and the international legal framework, and how those inconsistencies can be easily resolved by understanding “due regard” in Article 234 of UNCLOS to incorporate the Arctic navigational requirements found in the Polar Code. Part I provides an overview of the existing international framework for Arctic navigation. Part II analyzes how well (or poorly) the Russian, Canadian, and American Arctic navigational policies fit into the current international scheme created by UNCLOS and the Polar Code, and examines how inconsistent approaches to Arctic navigation could have far-reaching negative impacts. Part III posits that to avoid those dangers and tensions, “due regard” in UNCLOS Article 234 should be interpreted using the Voyage Planning requirements listed in the Polar Code’s Voyage Planning chapter. Additionally, Part III proposes that reshaping Arctic navigational laws according to this interpretation of “due regard” would increase clarity among countries and increase efficiency in protecting the safety of the ships and crews navigating through the region. Lastly, this Note concludes that such an interpretation would help Arctic Coastal States protect the environment and the safety of individuals navigating the Arctic, as well as allow those States to maintain some level of autonomy and sovereignty.

I. BREAKING THE ICE: GETTING TO KNOW THE CURRENT INTERNATIONAL LEGAL FRAMEWORK FOR ARCTIC NAVIGATION

A. Relevant Nations: The Arctic States

The primary nations in the discussion surrounding Arctic navigation laws are those geographically closest to the Arctic Ocean. While the Arctic Ocean is capped with a thick layer of sea ice that has historically limited navigation, the extent of that sea ice has been steadily declining since 1979.¹⁸ In 1996, representatives from Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden, and the United States—the eight nations with the nearest geographic proximity to the

18. *SOTC: Sea Ice*, NAT’L SNOW & ICE DATA CTR. (Nov. 2, 2015), https://nsidc.org/cryosphere/sotc/sea_ice.html [<https://perma.cc/3SWW-X77Q>] (analyzing the state of the cryosphere). In the twenty-first century, the rate of sea ice melting increased alarmingly quickly, and the extent of Arctic sea ice in January 2016 was the lowest January extent ever recorded. Jane Beitler, *January Hits New Record Low in the Arctic*, NAT’L SNOW & ICE DATA CTR. (Feb. 4, 2016), <https://nsidc.org/arcticseaicenews/2016/02/january-hits-new-record-low-in-the-arctic/> [<https://perma.cc/3W4M-JDQE>] (noting January 2016 as a new record low in Arctic sea ice extent); Rebecca Lindsey, *Arctic Sea Ice*, NASA EARTH OBSERVATORY, http://earthobservatory.nasa.gov/Features/WorldOfChange/sea_ice.php (last visited Jan. 19, 2016) [perma.cc/XW3F-6M3E] (noting the decline in Arctic sea ice).

Arctic Circle—met in Ottawa, Canada, to draw up the Declaration on the Establishment of the Arctic Council, also known as the “Ottawa Declaration.”¹⁹

The Ottawa Declaration established the Arctic Council as an intergovernmental forum to promote discussion of and cooperation on Arctic issues and named the eight nations participating in the Arctic Council the “Arctic States.”²⁰ The Ottawa Declaration does not specifically mention adhering to UNCLOS. However, all of the Arctic Council nations have ratified UNCLOS except for the United States.²¹ Additionally, all eight nations were previously part of a 1991 nonbinding environmental protection agreement called the Arctic Environmental Protection Strategy (“AEPS”) that specifically emphasized the need for environmental protection measures consistent with UNCLOS.²² Given that background, the principles of UNCLOS

19. Arctic Council, *Declaration on the Establishment of the Arctic Council* (Sept. 19, 1996), https://oarchive.arctic-council.org/bitstream/handle/11374/85/EDOCS-1752-v2-ACMMCA00_Ottawa_1996_Founding_Declaration.PDF?sequence=5&isAllowed=y [<https://perma.cc/WK3G-ZA6U>].

20. *Id.*; *The Arctic Council: A Backgrounder*, ARCTIC COUNCIL (May 20, 2015), <http://www.arctic-council.org/index.php/en/about-us> [<https://perma.cc/NZ4X-FUSK>]. The Ottawa Declaration also granted permanent participant status to certain nonprofit organizations representing indigenous Arctic peoples so that the indigenous inhabitants of the Arctic Coastal States would have a voice in the Arctic Council. *Id.* (listing the organizations of indigenous peoples taking part in the Arctic Council as permanent participants). In addition to providing for participation by indigenous peoples, the Ottawa Declaration allows non-Arctic States to apply for observer status, which allows those non-Arctic States to participate in working groups and contribute to the Council. See Steven Lee Myers, *Arctic Council Adds Six Nations as Observer States, Including China*, N.Y. TIMES (May 15, 2013), <http://www.nytimes.com/2013/05/16/world/europe/arctic-council-adds-six-members-including-china.html> [<https://perma.cc/T7C5-T93B>] (discussing the addition of observer states as an indication of the growing global interest in the Arctic and allowing states outside the Arctic Circle to potentially influence the Council’s decisionmaking process).

21. The United States’ failure to ratify UNCLOS is due to the structure of the Convention’s deep seabed mining provisions. However, despite the fact that the United States has not ratified UNCLOS, it views UNCLOS as customary international law and abides by almost all of the provisions. See, e.g., Ronald Reagan, President of the United States 1981–1989, Statement on United States Participation in the Third United Nations Conference on the Law of the Sea (Jan. 29, 1982) (stating that “most provisions of [UNCLOS] are acceptable and consistent with United States interests, [but] some major elements of the deep seabed mining regime are not acceptable”); Steven Groves, *Accession to the U.N. Convention on the Law of the Sea Is Unnecessary to Secure U.S. Navigational Rights and Freedoms*, Heritage Foundation (Aug. 24, 2011), <http://www.heritage.org/research/reports/2011/08/accession-to-un-convention-law-of-the-sea-is-unnecessary-to-secure-us-navigational-rights-freedoms> [<https://perma.cc/KY5U-BHWW>] (noting that “[UNCLOS] merely codified and elaborated upon widely accepted principles of the customary international law of the sea”).

22. Arctic Environmental Protection Strategy at 33–34, June 14, 1991, 30 I.L.M. 1624 (noting the AEPS’s goal of protecting the Arctic environment); Betsy Baker, *The Developing Regional Regime for the Marine Arctic*, in THE LAW OF THE SEA AND THE POLAR REGIONS: INTERACTIONS BETWEEN GLOBAL AND REGIONAL REGIMES 35, 38–39 (Erik J. Molenaar et al. eds., 2013) (discussing the foundation of the AEPS, its structure, and its mission); *Arctic Ocean Map and*

were very likely a foundational principle in the coming together of these eight Arctic States.²³

Of the eight Arctic States, five physically border the Arctic Ocean.²⁴ Those five states are Canada, Denmark, Norway, Russia, and the United States.²⁵ Although all five are part of the greater Arctic Council, they regard themselves as a separate subset within the Arctic Council due to the “unique position” to handle Arctic issues their proximity to the Arctic Ocean provides.²⁶ This sentiment is most clearly demonstrated by the 2008 issuance of the Ilulissat Declaration, which came about in response to Russia’s planting of a Russian flag on the ocean floor at the North Pole.²⁷ Many news sources, countries, and politicians interpreted Russia’s gesture as a power grab.²⁸ In response, Canada, Denmark, Norway, Russia, and the United States came together in May 2008 at the Arctic Ocean Conference in Ilulissat, Greenland, to negotiate what became the Ilulissat Declaration.²⁹ Finland, Iceland, and Sweden, the three Arctic States that do not physically border the Arctic Ocean, were not included in the Ilulissat conference, and the Ilulissat Declaration explicitly states that the “five Coastal States” are “in a unique position to address [Arctic] possibilities

Bathymetric Chart, GEOLOGY.COM (2016), <http://geology.com/world/arctic-ocean-map.shtml> [<https://perma.cc/W4DA-25LV>] (labeling the eight nations nearest the North Pole).

23. See Arctic Environmental Protection Strategy, *supra* note 22, at 33–34 (noting the AEPS’s goal of protecting the Arctic environment and commitment to consistency with UNCLOS); Baker, *supra* note 22, at 38–39 (discussing the foundation of the AEPS and the importance AEPS placed on adhering to UNCLOS); *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements*, UNITED NATIONS DIVISION FOR OCEAN AFF. & THE LAW OF THE SEA (June 23, 2016), http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm [<https://perma.cc/JCP7-XSZK>] [hereinafter Chronological Lists] (listing the nations that ratified UNCLOS in the order of ratification).

24. The Five Coastal States, *supra* note 15.

25. *Id.*

26. Ilulissat Declaration, Arctic Ocean Conference of 27–29 May 2008, 48 I.L.M. 362, 362.

27. See *id.*; Tom Parfitt, *Russia Plants Flag on North Pole Seabed*, THE GUARDIAN (Aug. 2, 2007), <http://www.theguardian.com/world/2007/aug/02/russia.arctic> [<https://perma.cc/3E9V-BJ4C>].

28. Parfitt, *supra* note 27 (stating that with the planting of the Russian flag on the seabed of the North Pole, “Russia symbolically staked its claim to billions of dollars worth of oil and gas reserves in the Arctic Ocean,” but also noting the “ridicule and scepticism” the gesture prompted among other Arctic Coastal States such as Canada); *Russia Makes Renewed Bid for Contentious Arctic Regions*, BBC NEWS (Aug. 4, 2015), <http://www.bbc.com/news/world-europe-33777492> [<https://perma.cc/H375-DFU6>] (noting Russia’s 2007 actions and describing their renewed attempts to stake a similar claim as an attempt to get the United Nations to recognize Russia’s claim to the Arctic continental shelf, a claim which has been rejected by the other Arctic Coastal States).

29. Ilulissat Declaration, *supra* note 26; Baker, *supra* note 22, at 38–39 (describing the Ilulissat Declaration as a response to the outcry over Russia’s planting of a flag on the ocean floor below the North Pole).

and challenges.”³⁰ In addition to distinguishing the five Coastal Arctic States, the Ilulissat Declaration stated that the Coastal States have a continued commitment to UNCLOS, will work together within the bounds of current laws to protect and preserve the marine environment, and “see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.”³¹

This public declaration that the five Arctic Coastal States see themselves as a separate entity within the Arctic Council drew criticism from Iceland, Finland, and Sweden—the three members of the Arctic Council excluded from the Arctic Ocean Conference and Ilulissat Declaration.³² The excluded non-Coastal States have criticized the Ilulissat Declaration’s implied distinction between the “unique[ly] position[ed]” Coastal States and the non-Coastal States.³³ The Swedish government, for example, has stated that the Arctic Council as a whole should discuss Arctic issues to ensure that the concerns of the non-Coastal States and indigenous peoples are not overlooked.³⁴ Nevertheless, the overall goals, viewpoint, and emphasis on compliance with UNCLOS articulated in the Ilulissat Declaration by the five Arctic Coastal States do not appear to have any drastic differences from the stances articulated by the three non-Coastal Arctic States.³⁵ This implies that despite the apparent fractioning of the Arctic States into Coastal and non-Coastal States, the Arctic States as a group have similar priorities and goals for the Arctic region and a willingness—at

30. Ilulissat Declaration, *supra* note 26.

31. *Id.*

32. See, e.g., Greg Poelzer & Gary N. Wilson, *Governance in the Arctic: Political Systems and Geopolitics*, in ARCTIC HUMAN DEVELOPMENT REPORT: REGIONAL PROCESSES & GLOBAL LINKAGES 185, 206 (Joan Nymand Larsen & Gail Fondahl eds., 2014) (noting that the Arctic Coastal States have “come under criticism from non-coastal Arctic states . . . who feel that pan-Arctic issues should be discussed by the wider Arctic Council”).

33. Ilulissat Declaration, *supra* note 26.

34. *Id.*; see also Baker, *supra* note 22, at 38–39 (describing the negative reaction from Sweden, Finland, and Iceland to news of being excluded from the conference which led to the Ilulissat Declaration). Indigenous populations were not invited to participate in the Arctic Ocean Conference, had no input into the contents of the Ilulissat Declaration, and none have signed on to the Declaration, creating further concerns about representation. Julia Rotondo, *Ilulissat Declaration: Legal Regimes to the Rescue?*, ICE CASE STUDIES (Dec. 13, 2010), <http://www1.american.edu/ted/ice/Ilulissat.html> [<https://perma.cc/7J4X-GFP4>].

35. Baker, *supra* note 22, at 38–39 (noting that the backlash from the three excluded States is surprising given the similarities in national Arctic policies between Arctic Coastal States and the rest of the Arctic Council States); Lassi Heininen, *Arctic Strategies and Policies: Inventory and Comparative Study* 67–76 (2012), http://www.rha.is/static/files/NRF/Publications/arctic_strategies_7th_draft_new_20120428.pdf [<https://perma.cc/2WBL-LA8G>] (comparing the objectives and priorities listed in the Arctic policies of the eight Arctic Council Nations and concluding “that there are many commonalities between the current list of indicators on the priorities and objectives of national strategies and state policies [in the Arctic]”).

least on paper—to work within the existing international legal framework.

*B. The International Legal Framework:
UNCLOS and the Polar Code*

The international legal framework governing international maritime law, safety, and environmental protection consists of UNCLOS and the Polar Code, the two main international agreements that touch on international Arctic navigational laws.³⁶ UNCLOS, adopted in 1982, represents an evolution of the historical understanding of maritime jurisdiction and navigational rights.³⁷ Historically, jurisdiction over the ocean was defined by the freedom-of-the-seas doctrine, a principle that limited each nation's territorial ocean rights to a swath of sea extending a few miles past its shore.³⁸ As time passed, however, nations became more interested in expanding their territory and exploiting the seas: coastal states wanted access to the ocean's natural resources, and naval states wanted freedom of the seas and the ability to navigate as they pleased.³⁹ By the mid-twentieth century, many nations had greatly expanded their territorial claims.⁴⁰ That expansion created tension and exacerbated rivalries as nations strove to capture as much territory and as many resources as possible, resulting in inconsistent national laws regarding navigation and disposition of resources.⁴¹ In an attempt to create a standardized law to replace the patchwork of national offshore territorial claims, the United Nations held its first United Nations Conference on the Law of the Sea in 1956.⁴²

36. The Polar Code, a legally binding version of the IMO's 2009 shipping guidelines, had its safety measures adopted in November 2014 and the remaining environmental protection measures in May 2015; the Polar Code went into force on January 1, 2017. *Shipping in Polar Waters: Adoption of an International Code of Safety for Ships Operating in Polar Waters (Polar Code)*, INT'L MAR. ORG. (2016), <http://www.imo.org/en/MediaCentre/HotTopics/polar/Pages/default.aspx> [perma.cc/Y6RC-TMTV] [hereinafter Adoption of a Polar Code].

37. See *The United Nations Convention on the Law of the Sea (A Historical Perspective)*, UNITED NATIONS DIVISION FOR OCEAN AFFS. & THE LAW OF THE SEA (2012) http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm [https://perma.cc/MA76-VTMV] [hereinafter UNCLOS Historical Perspective] (describing how UNCLOS standardized the extent of national jurisdiction and provided overarching regulation for "all aspects of the resources of the sea and uses of the ocean . . . [to] bring a stable order" to the laws of the sea); see also ARCTIC COUNCIL, *supra* note 5, at 4 (stating that "[t]here are no uniform, international standards for ice navigators . . . in polar conditions").

38. UNCLOS Historical Perspective, *supra* note 37.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

That first conference of United Nations members resulted in four separate conventions, or “formal multilateral treaties with a broad number of parties.”⁴³ Those four conventions were finalized in 1958 but did not mark the end of international maritime law’s evolution.⁴⁴ A second United Nations Conference on the Law of the Sea in 1960 failed to result in any new conventions or a compilation of the conventions from the first conference.⁴⁵ The third and final United Nations Conference on the Law of the Sea, convened in 1973, was more successful and ended in 1982 with the adoption of the United Nations Convention on the Law of the Sea (“UNCLOS”).⁴⁶ UNCLOS entered into effect in 1994 and contained provisions regarding navigational rights, territorial sea limits, economic jurisdiction, conservation of marine resources, protection of the marine environment, and a binding dispute settlement procedure, among others.⁴⁷ UNCLOS has been signed by each of the Arctic Council nations and ratified by all the Arctic Council nations except for the United States.⁴⁸

UNCLOS was intended to create a standard framework for international maritime law that would result in a consistent global law of the sea and relatively uniform national maritime laws.⁴⁹ In addition to prescribing universal international laws for such diverse bodies of water as the high seas, straits, and enclosed or semi-enclosed seas,⁵⁰ UNCLOS gives the Arctic Coastal States sovereignty in their “territorial seas,” the band of ocean extending up to twelve nautical miles from the country’s shore.⁵¹ UNCLOS also gives the Arctic Coastal States jurisdiction to prescribe and enforce environmental laws in their

43. Treaty Section of the Office of Legal Affairs, *Treaty Handbook*, UNITED NATIONS 64 (2012), <https://treaties.un.org/doc/source/publications/THB/English.pdf> [<https://perma.cc/ANG2-KZXX>].

44. *Background to UNCLOS*, GRID-ARENDAL (2014), <http://www.continentalshelf.org/about/1143.aspx> [<https://perma.cc/2TC5-7KPM>] (listing the four treaties that came out of that first convention: the Convention on the Territorial Sea and Contiguous Zone, the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas, and the Convention on the Continental Shelf); UNCLOS Historical Perspective, *supra* note 37.

45. *See Background to UNCLOS*, *supra* note 44.

46. *Id.*

47. *Id.*

48. For a discussion of the United States’ reasoning for not ratifying UNCLOS, see *supra* note 21 and accompanying text. *See also* Chronological Lists, *supra* note 23.

49. UNCLOS Historical Perspective, *supra* note 37.

50. UNCLOS, *supra* note 10, pts. III, VII, IX.

51. *Id.* arts. 2–5 (granting nations jurisdiction in their territorial seas and defining the limits of the territorial sea).

exclusive economic zone (“EEZ”), the stretch of ocean extending up to 200 nautical miles beyond the end of the territorial sea.⁵²

Specifically, UNCLOS Article 234 provides Arctic Coastal States with the sovereignty to craft laws regarding the “prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone” provided that the laws crafted by Coastal States give “*due regard*” to navigation.⁵³ “Due regard” is not clearly defined anywhere in UNCLOS, and that ambiguity makes Article 234 open to interpretation.⁵⁴ This lack of clarity has resulted in a patchwork of conflicting Arctic navigational and environmental laws, and there is no clear way to determine whether a national law is consistent with the international legal framework.⁵⁵

Although Article 234 of UNCLOS relates to the adoption and enforcement of marine environment protection laws for ice-covered areas, it is frequently mentioned in discussions of Arctic navigation as a result of the connection between increased navigation and increased potential for pollution and accidental spills.⁵⁶ Specifically, UNCLOS Article 234 gives Coastal States

the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone *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.⁵⁷

52. *Id.* arts. 55–57 (defining the jurisdiction and rights of nations in their EEZ and defining the breadth of the EEZ).

53. *Id.* art. 234 (emphasis added).

54. *Id.*

55. *See infra* Sections II.A, II.B, and II.C (discussion of the Arctic policies of Russia, Canada, and the United States, respectively).

56. *See supra* Introduction.

57. UNCLOS, *supra* note 10, at art. 234 (emphasis added). It is important to note that Article 234 provides a standard rather than a rule for what types of national laws and regulations are appropriate under UNCLOS. One way to conceptualize the difference between the two is the extent to which the law must be interpreted in order to determine if a violation has occurred: standards provide a guideline and therefore require a higher level of interpretation in order to determine whether there has been a violation, while rules lay out what specifically constitutes a violation and so require little—if any—interpretation. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992). Standards tend to save time and transaction costs initially, as they are less specific and therefore require less negotiation than rules, but they create greater transaction costs down the line, as they require interpretation. *See id.* at 577. Rules, on the other hand, are more expensive to promulgate given their specificity, but enforcement costs are much lower. *Id.* Given the extensive international negotiations that went into forming UNCLOS, it is unsurprising that it uses standards; however, given the interpretation required by standards, it is also unsurprising that different and potentially inconsistent interpretations exist. *See infra* Part II.

Focusing on that “due regard” requirement, “due regard” is not specifically defined elsewhere in UNCLOS but can be interpreted as a requirement that Coastal States avoid limiting or curtailing navigation that occurs within the boundaries of their EEZs barring an overriding environmental concern.⁵⁸ This makes sense given the unique nature of the Arctic environment (e.g., extreme cold temperatures, animal life found nowhere else on earth) and the unique concerns affecting the Arctic environment (e.g., climate change leading to melting sea ice, level of difficulty involved in remediating environmental contamination in extreme temperatures).⁵⁹ For example, “due regard” acting as an instruction for nations to respect the navigational needs of ships proceeding through their EEZs is compatible with the sections in UNCLOS regarding innocent passage, which give foreign ships the right to proceed through the waters of other states so long as their passage is expeditious and does not threaten the Coastal State’s national security.⁶⁰ The consistency that such an interpretation of “due regard” lends to UNCLOS is also desirable, especially when the goal is a legal framework to guide national Arctic navigation laws.

Additionally, UNCLOS gives all nations the right of innocent passage through territorial seas,⁶¹ which means that ships may cross a territorial sea so long as their passage is “continuous and expeditious,” they do not enter internal waters or call at a port outside internal waters, and they do not threaten the security of the nation through whose territorial sea they are passing.⁶² Coastal States have the freedom to adopt several different types of laws in their territorial seas.⁶³ Such laws include safety and maritime traffic laws; laws protecting any facilities, installations, pipelines, or cables in their territorial sea; environmental protection and conservation laws; and marine scientific laws, among others.⁶⁴ However, Coastal States cannot

58. Lee Clark, *Canada’s Oversight of Arctic Shipping: The Need for Reform*, 33 TUL. MAR. L.J. 79, 90 (2008) (citing Budislav Vukas, *United Nations Convention on the Law of the Sea and the Polar Marine Environment*, in PROTECTING THE POLAR MARINE ENVIRONMENT: LAW AND POLICY FOR POLLUTION PREVENTION 34, 53 (Davor Vidas ed., 2000)).

59. See, e.g., *Ice Navigation in Canadian Waters*, CANADIAN COAST GUARD 81–83 (Aug. 2012), <http://www.ccg-gcc.gc.ca/folios/00913/docs/ice-navigation-dans-les-galces-eng.pdf> [<https://perma.cc/2PAH-9JQU>] (listing Arctic navigational hazards that include collisions with ice; adverse environmental conditions such as low temperature, snow, and high winds; and accumulation of ice on vessels); *Arctic*, NAT’L WILDLIFE FED’N, <https://www.nwf.org/Wildlife/Wild-Places/Arctic.aspx> (last visited Jan. 21, 2016) [<https://perma.cc/6CQ8-YJLV>] (discussing Arctic wildlife and the unique threats to that wildlife).

60. UNCLOS, *supra* note 10, pt. II, § 3.

61. *Id.* § 3, subsec. A.

62. *Id.* arts. 17–19.

63. *Id.* art. 21.

64. *Id.*

hamper the innocent passage of foreign ships through their territorial sea; impose requirements that essentially deny or impair innocent passage; or discriminate against ships based on whose ships they are, whose cargo they are carrying, and where they are going.⁶⁵ Once a ship is in a nation's EEZ, as opposed to its territorial sea, the ship enjoys even more freedom: UNCLOS Articles 58 and 87 grant ships freedom of navigation through both the EEZ and the high sea, which is the zone beyond the EEZ.⁶⁶

Beyond establishing innocent passage and other navigational rights, UNCLOS also provided for resolution of disputes between member states by establishing the International Tribunal for the Law of the Sea ("ITLOS"),⁶⁷ which is an independent judicial body that arbitrates disputes springing from the interpretation and application of UNCLOS.⁶⁸ Suits regarding the consistency of national maritime laws stemming from UNCLOS are properly heard and arbitrated by ITLOS.⁶⁹

Another important component of the international Arctic navigation law framework is the Polar Code, which is a more recent addition to the international legal framework. The Polar Code grew out of the International Maritime Organization's ["IMO's"] 2009 safety guidelines for polar waters, and came into force on January 1, 2017.⁷⁰ The IMO is a specialized agency of the United Nations that sets global standards for safety and security of shipping as well as environmental protection.⁷¹ There are 171 member states in the IMO, and all eight of the Arctic States are members.⁷² The IMO intended the Polar Code to provide a comprehensive set of mandatory guidelines for all shipping

65. *Id.* art. 24.

66. *Id.* arts. 58, 87. The high seas are "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." *Id.* art. 86. However, while both the EEZ and high seas confer freedom of navigation on ships of all states, the rights of the Coastal State differ in the two zones: no State may exercise sovereignty over the high seas and each nation must exercise their freedom of navigation with "due regard for the interests of other States in their exercise of the freedom of the high seas," while Coastal States may exercise sovereignty in their EEZs regarding the exploring, exploiting, conserving, and managing of natural resources. *Id.* arts. 56, 87.

67. *The Tribunal*, INT'L TRIBUNAL FOR THE LAW OF THE SEA, <https://www.itlos.org/en/the-tribunal/> (last visited Feb. 29, 2016) [<https://perma.cc/94VC-K9C6>].

68. *Id.*

69. *Id.*

70. Adoption of a Polar Code, *supra* note 36.

71. *Introduction to IMO*, INT'L MAR. ORG. (2016), <http://www.imo.org/en/About/Pages/Default.aspx> [<https://perma.cc/7NMP-NSM6>].

72. *Member States*, INT'L MAR. ORG. (2016), <http://www.imo.org/en/About/Membership/Pages/MemberStates.aspx> [<https://perma.cc/PQ2W-RR7X>] (listing all 171 member states and the year they joined the IMO).

and environmental matters in the Arctic and included guidelines in the Polar Code to ensure the protection of ships, sailors, and the environment in the Arctic.⁷³

Navigating in Arctic waters is exceptionally dangerous, and hazards include collisions with ice, adverse environmental conditions such as low temperature, snow, and high winds, and accumulation of ice on vessels.⁷⁴ Because of the extreme nature of the Arctic environment and the hazards associated with Arctic navigation, the IMO followed their 2009 safety guidelines with a push to create a code containing a set of mandatory guidelines.⁷⁵ The resulting Polar Code consists of safety and environmental provisions.⁷⁶ These provisions were incorporated by amendment into two preexisting conventions that were already legally binding on their parties, namely the International Convention for the Safety of Life at Sea (“SOLAS”) and the International Convention for the Prevention of Pollution from Ships (“MARPOL”).⁷⁷ Despite a drawn-out development process and delayed adoption,⁷⁸ the safety provisions of the Polar Code and the amendments to SOLAS required to make them legally binding were passed on November 21, 2014.⁷⁹ The environmental provisions of the Polar Code

73. Adoption of a Polar Code, *supra* note 36 (noting the dates of adoption of the Polar Code and the relevant amendments to the International Convention for the Safety of Life at Sea (SOLAS) and International Convention for the Prevention of Pollution from Ships (MARPOL) required to make it legally binding; the date the Code is expected to enter into force; and a general summary of the Code’s contents).

74. *Ice Navigation in Canadian Waters*, *supra* note 59, at 81–83 (listing hazards associated with navigation in Arctic waters).

75. Adoption of a Polar Code, *supra* note 36 (discussing the background of the Polar Code, the provisions included in the Polar Code, and the dates the Polar Code was adopted and is expected to enter into force).

76. *Id.*

77. SOLAS and MARPOL are considered among the most comprehensive sets of rules and standards on safety and pollution prevention, and as of March 2014 had been ratified by—and therefore were legally binding on—162 and 152 states, respectively. See Koji Sekimizu, Sec’y-Gen., Int’l Mar. Org., Address on The United Nations Convention on the Law of the Sea and the Int’l Maritime Organization (Mar. 18, 2014) (listing SOLAS and MARPOL as two of the three “most comprehensive sets of rules and standards on safety, pollution prevention, and training and certification of seafarers”). The Polar Code, because it has been incorporated into the existing legal mechanisms present in SOLAS and MARPOL through amendments, will be legally binding on the parties to SOLAS and MARPOL. *IMO Adopts Mandatory Code for Ships Operating in Polar Waters*, INT’L MAR. ORG. (Nov. 21, 2014), <http://www.imo.org/en/MediaCentre/PressBriefings/Pages/38-nmsc94polar.aspx#.Vp6IhpMrK8o> [<https://perma.cc/2H3H-TTLW>].

78. *International Shipping Code Delayed*, CBC NEWS (Mar. 1, 2012), <http://www.cbc.ca/news/canada/north/international-shipping-code-delayed-1.1201065> [<https://perma.cc/9M9P-ZLB8>] (reporting a delay in promulgation of the Polar Code, which was initially intended to be ready in 2012—five years before the Polar Code went into effect).

79. *IMO Adopts Mandatory Code for Ships Operating in Polar Waters*, *supra* note 77 (reporting the November 21, 2014 adoption of the safety provisions of the IMO’s Polar Code by the

and the amendments to MARPOL required to make them legally binding were passed on May 15, 2015.⁸⁰ The Polar Code went into effect on January 1, 2017, and is legally binding on all nations that are bound by MARPOL and SOLAS, including all of the Arctic States.⁸¹

Included in the safety provisions section of the Polar Code is a section regarding voyage planning (i.e., considerations that the shipmaster should have in mind when planning a polar voyage).⁸² The list of voyage planning requirements contained in Chapter 11 of the Polar Code was intended to “ensure that the Company, master and crew are provided with sufficient information to enable operations to be conducted with due consideration to safety of ship and persons on board and, as appropriate, environmental protection.”⁸³ The “due consideration” language, which echoes UNCLOS Article 234’s “due regard” language, indicates that the Polar Code’s voyage planning requirements are a list of the considerations that the IMO believes must be taken into account in order to adequately protect the safety of the ship, the sailors, and the environment when navigating through Arctic waters. The list itself consists of nine considerations the shipmaster must take into account when planning a voyage through polar waters:

Maritime Safety Committee’s 94th session, as well as the amendments to SOLAS required to make those provisions legally binding on signatory parties).

80. *Polar Code Environmental Provisions Adopted*, INT’L MAR. ORG. (May 15, 2015), <http://www.imo.org/en/MediaCentre/PressBriefings/Pages/18-Polar-Code-MEPC.aspx> [<https://perma.cc/2L85-5XRM>] (reporting the Marine Environment Protection Committee’s adoption of the Polar Code’s environmental provisions as well as the amendments to MARPOL to make them legally binding during its 68th session).

81. Together, those nations represent ninety-nine percent of the gross tonnage of the world’s merchant fleet. Sekimizu, *supra* note 77. For a complete list of signatories to MARPOL and SOLAS, see *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions*, INT’L MAR. ORG. 13–17, 102–07 (Oct. 28, 2016), <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202016.docx.pdf> [<https://perma.cc/9GBW-ZZLD>]

82. Polar Code, *supra* note 5, at pt. I-A ch. 11, pt. I-B ch. 12.

83. *Id.* pt. I-A ch. 11.

1. the procedures required by the [Polar Water Operational Manual];⁸⁴
2. any limitations of the hydrographic information and aids to navigation available;
3. current information on the extent and type of ice and icebergs in the vicinity of the intended route;
4. statistical information in ice and temperatures from former years;
5. places of refuge;
6. current information and measures to be taken when marine mammals are encountered relating to known areas with densities of marine mammals, including seasonal migration areas;
7. current information on relevant ships' routing systems, speed recommendations and vessel traffic services relating to known areas with densities of marine mammals, including seasonal migration areas;
8. national and international designated protected areas along the route; and
9. operation in areas remote from search and rescue (SAR) capabilities.⁸⁵

Further guidance on the voyage planning requirements provided in Part I-B of the Polar Code notes that in the development and execution of a ship's voyage plan, "any existing best practices" to minimize disturbance of marine mammals should be considered, and if the ship's route will be near an area of "cultural heritage or cultural significance," the voyage plan should be constructed to minimize the ship's impact on those areas.⁸⁶ Together, the list of voyage planning requirements and additional guidance provided in Part I-B contemplate safety protocols,⁸⁷ presence of ice and icebergs, statistical information regarding temperature and presence or absence of ice, and places of refuge on the journey. The voyage planning requirements include all of the factors a shipmaster needs to weigh in order to pick a safe navigational route for an Arctic expedition and arguably encompass

84. The Polar Water Operational Manual includes a list of the capabilities and limitations of the ship, specific procedures the ship should follow in the course of normal operations, procedures to follow in case the ship meets with an accident, and procedures to be followed should the ship find itself in conditions it is unable to withstand. *Id.* pt. 1-A ch. 2, pt. 1-B ch. 3.

85. *Id.* pt. 1-A ch. 11.

86. *Id.* pt. 1-B ch. 12.

87. See *supra* note 84 (discussing the safety protocols included in the Polar Water Operations Manual and incorporated by reference into the Polar Code's voyage planning requirements).

environmental concerns as well.⁸⁸ Critically, the Polar Code includes environmental considerations on the list of voyage planning requirements and in the accompanying guidance. Rather than using vague terms to describe the outlines of what national Arctic environmental laws should look like, the Polar Code sets out an Arctic navigation planning process that actually contemplates environmental concerns.

The Polar Code is a legally binding piece of international law that represents a step toward a uniform approach to international shipping laws.⁸⁹ However, the Polar Code is not without issues: it has been critiqued by scholars, activist groups, the media, and even the Secretary-General of the IMO for being “weak” and relying on flag states to monitor their own compliance rather than providing active enforcement mechanisms.⁹⁰ Given its recent adoption and entry into force, it remains to be seen whether the Polar Code will be adequately enforced.⁹¹ Between UNCLOS’s lack of definitions for critical phrases like “due regard” and the Polar Code’s reliance on flag states to enforce

88. The guidance on the voyage planning requirements in Part I-B of the Polar Code does mention minimizing disturbances to marine mammals, and disruption of marine fauna is one of many concerns scientists have had about the introduction of higher traffic through the Arctic. However, this is also an example of the intertwining of environmental and navigational interests: minimizing disturbance to marine mammals minimizes the risk of animal-induced structural damage, which is a serious concern for ships. See generally NATHANIEL PHILBRICK, *IN THE HEART OF THE SEA* (2001) (detailing the 1820 tragedy of the whale ship Essex, in which a whale rammed the ship and sank it, stranding the twenty-man crew in the middle of the ocean with little food or fresh water).

89. Polar Code, *supra* note 5, pt. I-A ch. 11, pt. I-B ch. 12.

90. See, e.g., Fran Ulmer, *Alaska and the Arctic*, 31 ALASKA L. REV. 161, 165 (2014) (expressing the feeling that the Polar Code is a step in the right direction regarding the protection of the Arctic, but also that it fails to go far enough in addressing Arctic concerns); Richard Wanerman, *Freezing Out Noncompliant Ships: Why the Arctic Council Must Enforce the Polar Code*, 47 CASE W. RES. J. INT’L L. 429, 429, 431 (2015) (noting that “neither the existing guidelines nor the final Polar Code will have active enforcement powers,” and instead will rely on self-policing of party states to ensure that parties act in conformity with guidelines); Sekimizu, *supra* note 77 (noting that enforcement of IMO regulations are limited to the actions taken by flag and Coastal States, and that “[i]n principle, IMO treaties do not regulate the nature and extent of coastal State jurisdiction”); Kate Colwell, *Polar Code Too Weak to Properly Protect Polar Environments from Increased Shipping Activity*, FRIENDS OF EARTH (Nov. 21, 2014), <http://www.foe.org/news/archives/2014-11-polar-code-too-weak-to-properly-protect-polar-environments> [<https://perma.cc/2X5S-7F3U>] (including quotes from policy analysts stating various weaknesses of the Polar Code); Karl Mathieson, *Polar Code Agreed to Prevent Arctic Environmental Disasters*, THE GUARDIAN (Nov. 21, 2014), <https://www.theguardian.com/environment/2014/nov/21/polar-code-agreed-to-prevent-arctic-environmental-disasters> [<https://perma.cc/YLG7-E3N8>] (quoting a source as saying that “[t]he safety net is only as good as the [the Polar Code safety manual], and [that manual] is only as good as how it is enforced by the flag state. There are many [flag states] who have both eyes closed”).

91. See Wanerman, *supra* note 90; Sekimizu, *supra* note 77; Colwell, *supra* note 90; Mathieson, *supra* note 90.

its provisions, the current international scheme for Arctic navigation is at best poorly defined and at worst ineffective at creating a uniform navigational scheme in the region.

II. INCONSISTENT NATIONAL APPLICATION OF THE INTERNATIONAL FRAMEWORK: ANALYSIS OF THREE CASE STUDIES

As it stands, the framework of international Arctic navigation is hampered by vague language and reliance on member nations to enforce its laws. To deal with the day-to-day business of handling Arctic navigation, the Arctic Coastal States have promulgated their own individual Arctic navigational laws.⁹² This Note focuses specifically on the laws of Russia, Canada, and the United States not only because of their roles as Arctic Coastal States, but also because they are the three countries primarily responsible for negotiating Article 234 of UNCLOS.⁹³ However, although Russia, Canada, and the United States have all ratified (or at least recognized) UNCLOS,⁹⁴ and are the nations responsible for the final form of UNCLOS Article 234,⁹⁵ their Arctic navigational laws and policies do not necessarily provide “due regard to navigation” in “ice-covered areas” as required by UNCLOS Article 234.⁹⁶

92. See, e.g., Northern Canada Vessel Traffic Services Zone Regulations (NORDREG), SOR/2010-127 (Can.) (stating the law of navigation in Canadian Arctic waters); Rules of Navigation on the Water Area of the Northern Sea Route, approved by the Ministry of Transport of Russia, Jan. 17, 2013, registered by the Ministry of Transport of Russia, Apr. 12, 2013, No. 7 (Russ.); THE WHITE HOUSE, NATIONAL STRATEGY FOR THE ARCTIC REGION 1–11 (2013) (discussing the Arctic strategy and policies of the United States).

93. 4 CTR. FOR OCEANS LAW & POLICY, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, A COMMENTARY 393 (Myron H. Nordquist et al. eds., 1991) (stating that “Article 234 . . . is one of the few provisions in the Convention the terms of which were negotiated directly between the States concerned – in this case Canada, the USSR and the United States of America”).

94. Chronological Lists, *supra* note 23. For a discussion of the United States’ recognition of and refusal to ratify UNCLOS, see *supra* note 21 and accompanying text.

95. CTR. FOR OCEANS LAW & POLICY, *supra* note 93, at 393 (noting that Canada, the USSR, and the United States directly negotiated UNCLOS Article 234 among themselves).

96. UNCLOS, *supra* note 10, art. 234. Russia and Canada have both enacted legislation regarding Arctic environmental protection and navigation pursuant to Article 234, while the United States has done little more than delineate the bounds of the contiguous zone, territorial sea, and EEZ, and instead relies on policy. Proclamation 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999) (delineating the bounds of the contiguous zone of the United States); Proclamation 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) (delineating the bounds of the territorial sea of the United States); Proclamation 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983) (delineating the bounds of the United States’ EEZ); Rules of Navigation on the Water Area of the Northern Sea Route, *supra* note 92 (Russian legislation regarding navigation in the Arctic); Northern Canada Vessel Traffic Services Zone Regulations, *supra* note 92 (Canadian legislation regarding navigation in the Arctic); THE WHITE HOUSE, *supra* note 92 (outlining the Arctic policy of the United States).

The main difficulty with defining “due regard” is delineating what acceptable and unacceptable limits on navigation look like. Requiring environmental regulations to have “due regard to navigation” seems to indicate that Coastal States must consider navigational rights when crafting environmental protection laws, but stops short of using language requiring environmental laws to comply strictly with all navigational laws. If Russia, Canada, and the United States had intended to draft UNCLOS Article 234 to bar environmental regulations from limiting the freedom of navigation, they could have simply done so by inserting language to that effect—for example, a phrase like “environmental protection laws may not impair navigation.”⁹⁷ However, they chose to use the phrase “due regard,” which implies that those three nations contemplated situations where environmental regulations could at least partially limit navigational rights.⁹⁸ For example, such regulations could potentially include a measure requiring ships to give icebergs or animal breeding grounds a wider berth than usual, while still allowing them innocent passage elsewhere without requiring permission.

On the other hand, though the “due regard” language suggests that environmental regulations may be able to limit navigation in certain circumstances, it also indicates that environmental regulations cannot create a situation in which a nation effectively bans innocent passage through its waters under the guise of protecting the Arctic environment. That “due regard” requirement implies that navigational rights cannot be completely curtailed in favor of environmental protection laws and regulations. Using this understanding of “due regard” and the limitations that phrase places on environmental and navigational laws, the current Arctic navigational laws and policies of Russia and Canada arguably go too far in limiting innocent passage through their respective waters.

A. Russia and Arctic Navigation

Russia has been an aggressive participant in what the media has portrayed as a “race to control the Arctic Circle.”⁹⁹ One motivation for

97. CTR. FOR OCEANS LAW & POLICY, *supra* note 93 (stating that “Article 234 . . . [was] negotiated directly between the States concerned—in this case Canada, the USSR and the United States of America”).

98. UNCLOS, *supra* note 10, art. 234.

99. See, e.g., Parfitt, *supra* note 27 (stating that with the planting of the Russian flag on the seabed of the North Pole, “Russia symbolically staked its claim to billions of dollars worth of oil and gas reserves in the Arctic Ocean” but also noting the “ridicule and scepticism” the gesture prompted among other Arctic Coastal States such as Canada); *Russia Makes Renewed Bid for Contentious Arctic Regions*, *supra* note 28 (describing the gesture as an attempt to get the United

Russia's proactive stance regarding the Arctic is the fact that two of the shipping shortcuts that could open up if Arctic sea ice continues to melt run along its coastline.¹⁰⁰ The first route is the Bering Strait, a portion of the Northwest Passage that cuts between Russia and Alaska.¹⁰¹ The second is the Northern Sea Route, which runs along the northern coast of Russia and which Russia considers to be at least partly made up of internal waters.¹⁰² Both routes are currently too icy to be of much practical use,¹⁰³ but should those routes become ice-free enough to be safely navigable, they could provide a shortcut across the Arctic Ocean that would shave thousands of miles off of shipping routes frequented by many nations today.¹⁰⁴

The current Russian scheme for navigation through the Northern Sea Route was approved by Russia's Ministry of Transport and came into force on January 17, 2013.¹⁰⁵ The official protocol requires all ships passing through Russian waters to submit an application to the Ministry of Transport at least 120 days in advance of the planned voyage.¹⁰⁶ The Ministry of Transport may refuse permission, but should it grant permission for passage through the Northern Sea Route, the applicant will then be informed of both the period of time during which they may traverse the route and the type

Nations to recognize Russia's claim to the Arctic continental shelf, and the rejection of that claim by the other Arctic Coastal States); Ruth Sherlock, *America and Russia Locked in Race to Control the Arctic*, THE TELEGRAPH (Sept. 2, 2015), <http://www.telegraph.co.uk/news/worldnews/northamerica/11840640/America-and-Russia-locked-in-race-control-the-Arctic-Circle.html> [<https://perma.cc/5FE9-A6MR>].

100. *NSR—General Area Description*, N. SEA ROUTE INFO. OFF., http://www.arctic-lio.com/nsr_generalareadescription (last visited Jan. 21, 2016) [<https://perma.cc/4KVQ-3MKX>] (describing the geography of the Northern Sea Route and Russia's view that the Northern Sea Route is comprised of "the internal sea waters, the territorial sea, the adjacent zone and the exclusive economic zone of [Russia]"); *What Is the Northwest Passage?*, GEOLOGY.COM, <http://geology.com/articles/northwest-passage.shtml> (last visited Jan. 21, 2016) [<https://perma.cc/5ACJ-GAS4>] (showing the location of the Northwest Passage, including the Bering Strait).

101. *What Is the Northwest Passage?*, *supra* note 100.

102. *NSR—General Area Description*, *supra* note 100.

103. *See, e.g.*, Haas & Howell, *supra* note 2 (finding that the Arctic ice is, on average, over three meters thick and extremely thick ice formations were common); Brown, *supra* note 4 (stating that Arctic ice melt is opening up the Northwest passage, but noting that the Northern Sea Route will likely not be feasible for winter passage until approximately 2030).

104. Brown, *supra* note 4 (remarking that the opening of northern shipping routes would have the effect of "making the sea routes far shorter" for many countries in the northern hemisphere).

105. *Legislation*, N. SEA ROUTE INFO. OFF., http://www.arctic-lio.com/nsr_legislation (last visited Jan. 21, 2016) [<https://perma.cc/CP9C-9THZ>] (providing background regarding the passage of the most recent Russian Arctic navigation laws relating to the Northern Sea Route).

106. Rules of Navigation on the Water Area of the Northern Sea Route, *supra* note 92, § 6.

of icebreaker escort they must have.¹⁰⁷ Furthermore, ships passing through the Northern Sea Route are charged a fee for the mandatory icebreaker escort,¹⁰⁸ and they must periodically report their location to the Ministry of Transport.¹⁰⁹ The government of Russia reserves the right to turn away ships it thinks are not appropriately equipped for the sea voyage.¹¹⁰

Arguably, Russia's government has been exercising that right inappropriately,¹¹¹ giving rise to concerns about Russia's adherence to the guiding principles of international navigation law as laid out by UNCLOS.¹¹² One relatively recent incident that has led to the accusation of inconsistent, discriminatory application of Russian Arctic navigation laws was the arrest of thirty Greenpeace activists.¹¹³ After a peaceful September 2013 demonstration at a Gazprom oil rig to protest against Russia's oil drilling policy, the thirty activists were arrested, detained, and charged with piracy, while their Netherlands-flagged ship was towed to a port 500 miles away.¹¹⁴ The ship was not released until June 2014, and in August 2015, the Permanent Court of Arbitration, an intergovernmental body dedicated to facilitating

107. *Id.* § 10.6. An icebreaker is a ship that has been specially designed to move efficiently through ice-covered waters, usually by using propulsive power to push the bow of the ship above the ice and then relying on the weight of the ship to break the ice. Lawson W. Brigham, *Icebreaker*, in *ENCYCLOPEDIA OF THE ARCTIC* 917, 919 (Mark Nuttall ed., 2012). An icebreaker escort is an icebreaker or group of icebreakers assigned to accompany a ship passing through a nation's Arctic waters in order to assist with breaking up ice, ensure that the ship is following the nation's navigational and environmental laws, and provide assistance should an emergency arise. *Id.*

108. The fee for icebreaker escorts varies based on the capacity of the ship, the ice class of the ship, the distance for which an escort will be required, and how long the navigation will take. Rules of Navigation on the Water Area of the Northern Sea Route, *supra* note 92, § 24.

109. *Id.* §§ 14–20.

110. *Id.* §§ 11–12.

111. *Russia "Seizes" Greenpeace Ship After Arctic Rig Protest*, BBC NEWS (Sept. 23, 2013), <http://www.bbc.com/news/world-europe-24170129> [<https://perma.cc/5XFK-8U2Q>]; John Vidal, *Arctic 30: Russia Releases Greenpeace Ship*, THE GUARDIAN (June 6, 2014), <http://www.theguardian.com/environment/2014/jun/06/arctic-30-sunrise-russia-to-release-greenpeace-ship> [<https://perma.cc/AWC4-MSKY>].

112. *Foreign Ministry Says That Russia Will Dismiss Greenpeace Ruling*, MOSCOW TIMES (Aug. 25, 2015), <http://www.themoscowtimes.com/news/article/foreign-ministry-says-that-russia-will-dismiss-greenpeace-ruling/528631.html> [<https://perma.cc/32DF-ACNY>]; *Russia Loses Case over Greenpeace Ship*, DEUTSCHE WELLE (Aug. 24, 2015), <http://www.dw.com/en/russia-loses-case-over-greenpeace-ship/a-18669670> [<https://perma.cc/J2TU-22M8>]; *Russia Ordered to Pay Compensation for Seizure of Greenpeace Ship, Activists, Including Australian*, ABC NEWS (Aug. 25, 2015), <http://www.abc.net.au/news/2015-08-25/international-court-orders-russia-pay-compensation-to-activists/6722616> [<https://perma.cc/9U8R-T9ZY>]; *Russia "Seizes" Greenpeace Ship After Arctic Rig Protest*, *supra* note 111.

113. *Russia "Seizes" Greenpeace Ship After Arctic Rig Protest*, *supra* note 111; Vidal, *supra* note 111.

114. *Russia "Seizes" Greenpeace Ship After Arctic Rig Protest*, *supra* note 111; Vidal, *supra* note 111.

international alternative dispute resolution,¹¹⁵ ordered Russia to pay damages for having seized the ship outside its territorial sea.¹¹⁶ Arousing further skepticism regarding Russia's willingness to adhere to the principles of UNCLOS was Russia's reaction to the subsequent suit the Netherlands brought in ITLOS alleging conduct in violation of UNCLOS.¹¹⁷ When ITLOS found that Russia violated UNCLOS by seizing the Greenpeace ship in international waters, and assessed a financial penalty in addition to the penalty imposed by the PCA,¹¹⁸ Russia responded by issuing a statement that they would not abide by the ruling.¹¹⁹ This incident gives rise to grave concerns regarding the compatibility of current Russian Arctic navigation laws with UNCLOS and the right to innocent passage, as well as Russia's willingness to work with other nations in the absence of clear definitions of what "due regard" means.

B. Canada and Arctic Navigation

Canada's framework governing navigation through Canadian Arctic waters consists of the Northern Canada Vessel Traffic Services Zone Regulations ("NORDREG"), and the Arctic Waters Pollution Prevention Act ("AWPPA").¹²⁰ Initially implemented in 1977 as a voluntary set of shipping guidelines, NORDREG became mandatory on July 1, 2010.¹²¹ Like Russia's Arctic navigation scheme, NORDREG requires ships to submit requests for clearance and allows the Canadian government to refuse ships the right of passage through either the territorial sea or the EEZ.¹²² While passing through Canadian waters,

115. PERMANENT CT. ARB., <https://pca-cpa.org/en/home/> (last visited June 20, 2016) [<https://perma.cc/8G33-VAGN>].

116. *Russia Loses Case over Greenpeace Ship*, *supra* note 112; *Russia Ordered to Pay Compensation for Seizure of Greenpeace Ship, Activists, Including Australian*, *supra* note 112.

117. *Foreign Ministry Says That Russia Will Dismiss Greenpeace Ruling*, *supra* note 112; *Russia Loses Case over Greenpeace Ship*, *supra* note 112; *Russia Ordered to Pay Compensation for Seizure of Greenpeace Ship, Activists, Including Australian*, *supra* note 112; *Russia "Seizes" Greenpeace Ship After Arctic Rig Protest*, *supra* note 111.

118. *Foreign Ministry Says That Russia Will Dismiss Greenpeace Ruling*, *supra* note 112; *Russia Loses Case over Greenpeace Ship*, *supra* note 112; *Russia Ordered to Pay Compensation for Seizure of Greenpeace Ship, Activists, Including Australian*, *supra* note 112; *Russia "Seizes" Greenpeace Ship After Arctic Rig Protest*, *supra* note 111.

119. *Foreign Ministry Says That Russia Will Dismiss Greenpeace Ruling*, *supra* note 112; *Russia Loses Case over Greenpeace Ship*, *supra* note 112; *Russia Ordered to Pay Compensation for Seizure of Greenpeace Ship, Activists, Including Australian*, *supra* note 112; *Russia "Seizes" Greenpeace Ship After Arctic Rig Protest*, *supra* note 111.

120. Arctic Waters Pollution Prevention Act (AWPPA), §§ 18–19, R.S.C. 1985, c A-12; Northern Canada Vessel Traffic Services Zone Regulations, *supra* note 92.

121. Northern Canada Vessel Traffic Services Zone Regulations, *supra* note 92.

122. *Id.*

NORDREG requires ships to submit four different types of reports.¹²³ Failure to comply with NORDREG reporting requirements triggers AWPPA, which provides that ships may be prevented from entering Canadian waters if they do not comply with all Canadian regulations.¹²⁴ Furthermore, the penalties under AWPPA are severe in the event a ship enters Canadian waters after being denied or failing to request permission: the ship could be escorted out of Canadian waters and be subject to both civil and criminal liability, as well as be “liable on summary conviction” to fines.¹²⁵

The main objections lodged against the Canadian regulatory scheme come from the United States Secretary of State, which complains that the Canadian government is able to refuse permission to enter the Canadian EEZ or territorial seas and that NORDREG contains no exceptions for sovereign immune vessels.¹²⁶ Sovereign immune vessels are defined by UNCLOS Article 236 as “any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service,” and they are exempted from the UNCLOS Articles relating to the protection and preservation of the marine environment.¹²⁷ Those objections have led to concerns that Canadian laws regarding Arctic navigation, while ostensibly promulgated in accordance with UNCLOS, in fact violate the right of innocent passage and the “due regard” requirements of UNCLOS by allowing Canada to cite environmental concerns and refuse ships passage through Canadian waters.¹²⁸ Additionally, the United States disagrees with Canada on how to classify the portion of the Northwest Passage that runs along the top of

123. The four different types are a sailing plan report, to be submitted when the ship is about to enter the NORDREG zone; a position report, to be submitted immediately upon entrance into Canadian waters and daily for each day the vessel is in Canadian waters; an additional position report, to be submitted as soon as the shipmaster learns of obstructions to navigation, other ships in distress, malfunctioning or missing navigation aids, ice or poor weather conditions, or pollutants in the water; and final reports, to be provided when the ship berths in Canadian waters and immediately before the ship leaves Canadian waters. *Id.* Should the ship’s intended route change, the ship is required to submit an additional deviation report. *Id.*

124. Arctic Waters Pollution Prevention Act (AWPPA), § 15, R.S.C. 1985, c A-12.

125. Arctic Waters Pollution Prevention Act (AWPPA), §§ 18–19, R.S.C. 1985, c A-12; Northern Canada Vessel Traffic Services Zone Regulations, *supra* note 92.

126. Diplomatic Note, U.S. Embassy in Ottawa, Note to the Department of Foreign Affairs and International Trade of Canada Regarding NORDREGs (Aug. 18, 2010), <http://www.state.gov/documents/organization/179287.pdf> [<https://perma.cc/TZX8-9MMP>].

127. UNCLOS, *supra* note 10, art. 236; Diplomatic Note, *supra* note 126.

128. Canada’s ability to refuse ships passage arguably does not provide “due regard” to the navigation of those ships and denies innocent passage to ships, while the lack of exceptions for sovereign immune vessels also refuses those vessels both “due regard for navigation” and innocent passage. UNCLOS, *supra* note 10, art. 236; Diplomatic Note, *supra* note 126.

the North American continent.¹²⁹ Canada maintains that the Northwest Passage is a part of the internal waters of Canada, thus giving it sovereignty over and the ability to restrict access to those waters.¹³⁰ The United States, on the other hand, maintains that the Northwest Passage is not part of the internal waters of Canada at all, but rather is a strait used for international navigation, thereby giving any nation the right of passage.¹³¹ Together, Canada's ability to use AWPPA to deny ships innocent passage through Canadian waters and the contentious definition of the Northwest Passage waters create a national Arctic navigational scheme that is at best questionably aligned with UNCLOS.

C. *The United States and Arctic Navigation*

While the United States is an Arctic Coastal State, it has relatively little Arctic coastline compared to Canada and Russia.¹³² Since the United States is also the only Arctic Coastal State or Arctic Council member that has not ratified UNCLOS, it is the only member not technically bound by the terms of UNCLOS.¹³³ Furthermore, the United States has a less-developed stance on the Arctic than Russia and Canada and relies more on general policy than actual legislation to govern its approach to the Arctic region.¹³⁴ Nevertheless, the United States has expressed serious interest in maintaining its Arctic territorial rights as well as protecting the Arctic environment.¹³⁵ The most recent articulation of the United States' Arctic policy is the May 2013 National Strategy for the Arctic Region.¹³⁶ Promulgated by President Barack Obama, the National Strategy emphasizes the United States' goals of safeguarding national security, protecting the Arctic environment, and strengthening international cooperation.¹³⁷

129. Diplomatic Note, *supra* note 126.

130. UNCLOS, *supra* note 10, art. 25; Michael Byers & Suzanne Lalonde, *Mounting Tension and Melting Ice: Exploring the Legal and Political Future of the Arctic: Who Controls the Northwest Passage?*, 42 VAND. J. TRANSNAT'L L. 1133, 1156–58 (2009).

131. UNCLOS, *supra* note 10, arts. 38, 236; Byers & Lalonde, *supra* note 130, at 1156–58.

132. *Arctic Ocean Map and Bathymetric Chart*, *supra* note 22.

133. Chronological Lists, *supra* note 23.

134. Sameepa Shetty, *America's Arctic Blunder*, ALJAZEERA AMERICA (Sept. 2, 2015), <http://america.aljazeera.com/articles/2015/9/2/arctics-trillions.html> [https://perma.cc/RZ25-BB5H].

135. THE WHITE HOUSE, *supra* note 92.

136. *Id.*

137. In addition to mentioning general promotion of international cooperation in the Arctic, the 2013 National Strategy for the Arctic Region specifically mentions “work[ing] toward U.S. accession to the United Nations Convention on the Law of the Sea.” *Id.* at 2.

The United States' diplomatic interactions with Russia and Canada regarding Arctic navigation have attempted to encourage both countries to bring their policies more in line with the United States' interpretation of UNCLOS—that is, to make their EEZs and territorial seas more easily accessible and to recognize the Northern Sea Route and Northwest Passage as noninternal waters.¹³⁸ As mentioned above, in its interactions with Canada, the United States has maintained that the Northwest Passage is a strait used for international navigation and should therefore be open to transit passage by any ship.¹³⁹ The United States has also accused Canada of promulgating navigational laws that violate the UNCLOS principles of innocent passage and “due regard” for navigation.¹⁴⁰ And while Russia considers the Northern Sea Route to be internal waters, the United States argues that since the Northern Sea Route is an international strait, not an internal body of water, ships should be allowed innocent passage and should not have to request permission.¹⁴¹ The arguments put forward by the United States seem reasonable on their face and look like they would go far towards creating a uniform navigation scheme in the Arctic; however, the United States' refusal to ratify UNCLOS makes its attempts to force its favored interpretation on other countries ring hollow.¹⁴²

D. But Why Do These Inconsistencies Matter?

The regulations promulgated by Arctic Coastal States requiring that ships seek and receive permission before crossing their waters seem to be simply an inconvenience for those wishing to navigate through Arctic waters. In theory, careful planning and communication with the various Coastal States would make satisfying those requirements relatively straightforward. However, Arctic Coastal States having such laws complicates the logistics of Arctic voyages, has the potential to greatly increase the costs of such voyages,¹⁴³ and

138. See, e.g., Diplomatic Note, *supra* note 126 (lauding Canada for environmental Arctic policies while stating that the United States believes Canada should recognize the Northwest Passage as a strait used for international navigation).

139. UNCLOS, *supra* note 10, art. 38; Diplomatic Note, *supra* note 126.

140. UNCLOS, *supra* note 10, art. 38; Diplomatic Note, *supra* note 126.

141. See, e.g., HEATHER A. CONLEY, ARCTIC ECONOMICS IN THE 21ST CENTURY: THE BENEFITS AND COSTS OF COLD 33 (2013) (stating that “[t]he United States and many other countries assert that the Northern Sea Route is an international strait, granting foreign vessels the right of passage without seeking the permission of the coastal state”).

142. Shetty, *supra* note 134 (noting skeptically that the United States is attempting to police other nations' Arctic policies using a treaty that it has not ratified).

143. For example, the fees ships are charged for the mandatory icebreaker escort required to pass through Russian waters increase depending on the weather conditions, number of icebreakers

undermines the existing international navigational framework negotiated and agreed to by the Arctic Council nations, the United Nations, and the IMO.

One of the main problems with Arctic navigation laws that require ships to seek permission before crossing the waters of Coastal States (e.g., the laws of Russia and Canada) is that they are inconsistent with the internationally accepted principles of UNCLOS.¹⁴⁴ There is simply no basis in UNCLOS for Coastal States to promulgate laws restricting access to their EEZs in the ordinary course of events.¹⁴⁵ UNCLOS allows nations to promulgate and enforce laws in the territorial sea to ensure safety of navigation, regulation of traffic, conservation of resources, and environmental preservation, and UNCLOS Article 234 allows nations to adopt and enforce laws and regulations for the prevention, reduction, and control of marine pollution in ice-covered areas within the bounds of their EEZs.¹⁴⁶ Those sections, however, do not give Coastal States the right to issue blanket requirements forcing all ships seeking innocent passage to request permission to enter the Coastal State's waters or the right to issue blanket denials of entry to ships of other nations.¹⁴⁷ Furthermore, despite Article 234's expansion of the authority granted to Coastal States regarding the promulgation and enforcement of marine environmental protection laws,¹⁴⁸ there is still a specific requirement that navigational policies have "due regard" for navigation.¹⁴⁹ There is no language that can logically be construed as permitting Coastal States to abridge the right of navigation enjoyed by foreign ships.¹⁵⁰

needed, type of ship being escorted, etc. Rules of Navigation on the Water Area of the Northern Sea Route, *supra* note 92, § 24.

144. *See supra* Sections II.A, II.B.

145. UNCLOS, *supra* note 10, arts. 56, 234 (stating the rights of the Coastal State to promulgate laws in the EEZ).

146. *Id.* arts. 21, 56, 234.

147. *See id.* arts. 21, 56 (stating the rights of innocent passage through the territorial sea and the rights of the Coastal State in the EEZ). As discussed in Part II, the language of Article 234 implies that conservation of the Arctic environment could potentially provide a basis for nations limiting the right of innocent passage through portions of their waters, but that language does not suggest that nations may use Article 234 to essentially ban all innocent passage.

148. *Compare* UNCLOS, *supra* note 10, art. 234 (allowing countries to promulgate and enforce laws in their EEZs that pertain to protection of the marine environment), *with id.* art. 56 (giving Coastal States the right to exploit the resources of their EEZs and conduct research, but not to prescribe and enforce navigational laws).

149. UNCLOS, *supra* note 10, art. 234.

150. *Id.*

III. TOWARD A UNIFORM FRAMEWORK:
ENABLING INNOCENT PASSAGE AND THE POLAR CODE
AS DELINEATION OF “DUE REGARD” FOR NAVIGATION

Actual application of “due regard” in the real world would likely prohibit Coastal States from denying entry to foreign ships. In order to navigate through the Arctic Ocean in accordance with the impending Polar Code, a shipmaster must take into account safety protocols, current weather conditions, current ice coverage, historical weather conditions and ice conditions, presence of marine mammals, migration paths of mammals, and contingency plans should an accident or foul weather occur.¹⁵¹ Plotting and navigating the ship’s journey is essentially an attempt to create the best balance among safety, weather, and environmental concerns. The right to freedom of passage in the EEZ granted by UNCLOS allows shipmasters to create the best possible balance of all those concerns, rather than the balance that best suits the Coastal State’s desire to have the same jurisdictional rights in the EEZ that they do in the territorial sea. While Article 234 of UNCLOS does allow Coastal States to promulgate and enforce navigational laws in the EEZ,¹⁵² the language requiring “due regard for navigation” implies that Coastal States must still allow ships some opportunity for navigation and that they may not bar ships from passing through either their own territorial waters or their EEZs.¹⁵³

Indeed, Arctic navigation laws and policies that require shipmasters to seek permission from the government before attempting passage, like those of Russia and Canada, do not give “due regard” to navigation because they preclude shipmasters from pursuing routes that may be necessitated by the voyage planning requirements of the

151. Polar Code, *supra* note 5, at pts. I-A ch. 11, I-B ch. 12.

152. UNCLOS, *supra* note 10, at 115–16. For example, a Coastal State could conceivably enact laws requiring ships passing through to avoid specific areas that are especially environmentally fragile, or areas where the presence or passage of a ship could conceivably have a negative impact on indigenous peoples or their culture so long as those laws did not unduly hamper the passage of foreign ships.

153. *See supra* notes 95–97 and accompanying text (discussing whether Arctic navigational laws provide “due regard to navigation”). The implication in the juxtaposition of Article 234 and the other UNCLOS articles regarding the EEZ is that the right of Coastal States to proscribe and enforce navigational laws in the EEZ is limited to environmental laws for the protection of the marine environment. The limitation of Coastal State rights in UNCLOS Part V—the part regarding the EEZ—to the rights of exploring, exploiting, conserving, and managing resources implies that those rights delineate the boundary of Coastal State EEZ rights. This means that Article 234 is an exception, and indicates that navigational laws promulgated by a Coastal State that do not have to do with environmental protection are incompatible with the principles of UNCLOS.

legally binding Polar Code.¹⁵⁴ This places shipmasters in an unenviable position: if they are denied permission to enter a Coastal State's EEZ, but the best route according to the requirements listed in the Polar Code requires passage through that zone, they will have to make a choice—do they calculate a new route and potentially leave themselves vulnerable to liability under the Polar Code,¹⁵⁵ or do they enter the Coastal State's EEZ and potentially leave themselves vulnerable to enforcement actions by the Coastal State? For example, if an American shipmaster determines that their ship should follow a specific path through the Northern Sea Route based on the current state of Arctic sea ice and historical data, but is denied access by the Russian Ministry of Transport, they will be subjected to liability no matter their choice. Following the Polar Code and proceeding through the Northern Sea Route means there is a high probability that the ship will be seized and its crew taken into custody.¹⁵⁶ Choosing a different route that does not follow the Polar Code's voyage planning requirements means that the ship's flag state—here the United States—could impose financial penalties or legal liability should anything go wrong, which, given the unpredictable nature of the Arctic environment, makes this option a significant gamble.¹⁵⁷ Without further clarification on the definition of “due regard” or integration between UNCLOS and the Polar Code, both choices mean potential liability.

Setting aside the difficulties of diplomacy and international negotiation, the stance of the Arctic Coastal States as expressed in the Ilulissat Declaration indicates a strong preference for Coastal State sovereignty and distaste for additional sweeping international measures.¹⁵⁸ Indeed, the terms of the Ilulissat Declaration arguably show that the development of a further comprehensive legal regime regarding Arctic navigation would be anathema to the Coastal States.¹⁵⁹ This indicates that the problem of inconsistency with the

154. Polar Code, *supra* note 5, pts. I-A, ch. 11 & I-B, ch. 12.

155. Because the Polar Code has no enforcement provisions, it is left to the flag states to determine what liability should be assessed for Polar Code violations. As discussed in notes 89–91 and accompanying text, it remains to be seen what exactly that liability will look like.

156. See *supra* notes 113–119 and accompanying text (discussing seizure of ships by Russia).

157. See *supra* notes 59, 90–92 and accompanying text (discussing the unique dangers of the Arctic environment and the Polar Code's enforcement mechanism, respectively).

158. Ilulissat Declaration, *supra* note 26.

159. The statement in the Ilulissat Declaration that the Arctic Coastal States “see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean” is a very clear statement about how the Arctic Coastal States view the prospect of the imposition of further international Arctic navigation law, and suggests that further international law regimes would likely struggle to gain traction. Ilulissat Declaration, *supra* note 26. Granted, the Ilulissat Declaration was released in 2008, before the promulgation of the Polar Code, but because the Polar Code itself was based on preexisting shipping guidelines and because of the perceived or actual

principles of UNCLOS is best solved by negotiation and mutual understanding rather than conferences, conventions, and more legally binding instruments beyond the existing legal framework.

An efficient approach to deciding the authorship and content of Arctic navigational laws would be to use the voyage planning section of the Polar Code as an interpretive lens for the “due regard” requirement in UNCLOS Article 234. This would mean that if an Arctic Coastal State is promulgating new Arctic environmental protection laws pursuant to Article 234, or if an Arctic Coastal State’s Arctic environmental protection law is challenged, the law would be deemed appropriate if it gave ship captains the latitude to comply with all of the Polar Code’s voyage planning requirements, and inappropriate if it did not. Using a preexisting list of legally binding requirements that the IMO has decided are mandatory for safe navigation and by which the Arctic Coastal States have already agreed to be bound eliminates the need for further negotiation regarding requirements or definitions.

Interpreting “due regard” in UNCLOS through the lens of the Polar Code is arguably the exact kind of interpretation that UNCLOS itself suggests: requiring “due regard” for navigational interests could easily be understood to incorporate by reference other binding instruments that deal with navigational issues, such as the Polar Code. Furthermore, other international rules of treaty interpretation support such an interpretation of “due regard.” For example, the Vienna Convention on the Law of Treaties, a treaty concerning the international law on treaties that entered into force in 1980, states in Article 31 that treaties should be interpreted in light of subsequent agreements and practices of the member states.¹⁶⁰ Here, since all of the relevant Arctic Coastal States are party to both UNCLOS and the Polar

weakness of the Code, it may not be perceived by the Arctic Coastal States as an unduly restrictive international Arctic navigational scheme. *See supra* notes 75–77, 90–92 and accompanying text (discussing adoption and enforcement of the Polar Code).

160. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980). The relevant article states that when interpreting international treaties, “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions . . . [and] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” should be taken into account. *Id.* It should be noted that much like with UNCLOS, the United States is a signatory but not a party to the Vienna Convention on the Law of Treaties, although the United States still “considers many of the [Convention’s] provisions . . . to constitute customary international law on the law of treaties.” *Vienna Convention on the Law of Treaties*, U.S. DEP’T OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited June 19, 2016) [<https://perma.cc/2DBC-3K5N>].

Code, “due regard” in UNCLOS Article 234 ought to be interpreted in light of the Polar Code.¹⁶¹

In international law, the parties to treaties are the primary interpreters of what various terms mean.¹⁶² If all Arctic Coastal States were party only to UNCLOS and not the Polar Code, laws such as those passed by Canada and Russia would not be obviously flawed interpretations of Article 234’s “due regard” requirement. The entire setup of UNCLOS (i.e., using a standard instead of a rule in a legal framework with only very weak third party adjudication and interpretation)¹⁶³ is designed to allow party states to interpret the laws themselves, which inevitably leads to self-interested interpretation. However, as the Arctic Coastal States have also made themselves party to the legally binding Polar Code, the national laws promulgated pursuant to UNCLOS are no longer constrained only by each nation’s individual interpretation of what “due regard” should mean. Instead, each nation’s interpretation of “due regard” should now be bound by the Polar Code’s constraints. While negotiating the Polar Code, nations had the opportunity to explicate an appropriate understanding of what responsible voyage planning looks like,¹⁶⁴ which necessarily delineates the bounds of what giving “due regard” to navigational concerns entails. Because international law generally seeks to give effect to negotiations between parties through interpretive rules such as Article 31 of the Vienna Convention on the Law of Treaties,¹⁶⁵ national laws encompassing the self-interested interpretations of “due regard”—while not obviously violative of UNCLOS at the time of promulgation—are no longer appropriate applications of the international legal framework given the entry into force of the legally binding Polar Code.

Using an interpretation of the UNCLOS “due regard” standard that contemplates the Polar Code’s voyage planning requirements means that Coastal States would still be allowed to promulgate their own Arctic laws within the bounds of the new understanding of “due

161. Such an interpretive move has precedent in international law. See, e.g., Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, ¶¶ 170–235, WTO Doc. WT/DS269/AB/R, WT/DS269/AB/R (Sept. 12, 2005) (adopted Sept. 27, 2005) (discussing interpretation of the term “salted” by using other agreements and instruments as context pursuant to Article 31 of the Vienna Convention on the Law of Treaties).

162. Vienna Convention on the Law of Treaties, *supra* note 160, at 340 (stating that “[a] treaty shall be interpreted in good faith” by the parties, taking ordinary meaning and context into consideration).

163. For a brief discussion of the differences between rules and standards, see *supra* note 57.

164. Stephanie Altman, *International Maritime Organization Adopts Polar Code*, TRENDS (ABA Section of Env’t, Energy, and Res., Chi., Ill.), Jan./Feb. 2016, at 13 (noting the “nearly five years of work and negotiation” that went into creating the Polar Code).

165. Vienna Convention on the Law of Treaties, *supra* note 160, at 340.

regard.” Moreover, the international Arctic navigational scheme would be far more uniform than the international system currently in place today. This fine tuning of the international understanding of “due regard” would still allow nations to maintain control over their territorial seas and would only require modification of laws regarding the EEZ. Such a shift in understanding, while it would not necessarily resolve disputes such as that over the Northwest Passage, would still assist individuals navigating the Arctic by providing a more uniform set of navigational laws by which to abide. Having a more uniform set of Arctic navigational laws set in place as soon as possible can only be a positive change for the region, especially if the Arctic sea ice continues to melt rapidly and the Northern Sea Route and Northwest Passage become more viable options for shipping routes.

Indeed, tweaking the current understanding of “due regard” in Article 234 of UNCLOS in light of the Polar Code may provide a simple, realistic path to a uniform international Arctic navigation scheme. Such an updated understanding of “due regard” would protect not only the safety of ships and individuals navigating through Arctic waters, but also the Arctic environment, and would do so without creating an additional legal regime or unduly complicating the existing framework. While UNCLOS certainly contemplates the relationship between navigational laws and protection of marine environments,¹⁶⁶ Article 234’s attempt to create a framework that allows for promulgation of national laws protecting the marine environment while still allowing for navigation falls short. As discussed in Part II, the laws promulgated by various Arctic nations in response to Article 234 have resulted in a legal patchwork that may actually leave the marine environment more vulnerable: the laws promulgated by Canada and Russia require advance planning and approval of ships’ routes, leaving ship captains very little flexibility should environmental concerns arise (e.g., encountering a pod of whales but not being able to deviate from the set course to avoid it). However, while UNCLOS Article 234’s attempt to create a framework protecting both environmental and navigational concerns falls short, the Polar Code does a far better job of integrating environmental and navigational concerns. Rather than using vague terms to describe the outlines of what national Arctic environmental laws should look like, the Polar Code rolls environmental concerns into the Arctic navigation planning process. In terms of environmental protection, this approach is superior because, in addition to providing a concrete list of environmental concerns that must be taken into account,

166. See, e.g., UNCLOS, *supra* note 10, art. 234 (requiring nations to have “due regard” for navigation when promulgating environmental laws).

the Polar Code provides a more explicit outline of responsible navigation through Arctic waters than UNCLOS. As a result, the Polar Code minimizes confusion and makes it more likely that the Arctic navigation and environmental laws of different Arctic States will be consistent with one another.

CONCLUSION

The melting sea ice in the Arctic Circle has triggered much discussion among nations and in the media on the potential accessibility of northern shipping routes,¹⁶⁷ which makes the state of navigational law in the Arctic a pressing consideration. The international legal framework regarding navigation in the Arctic, consisting of UNCLOS and the Polar Code, recognizes the interplay between freedom of navigation and the environment.¹⁶⁸ That existing framework attempts to provide for the protection of the Arctic environment and create uniformity in navigational laws that allows for freedom of navigation while still giving Arctic Coastal States some measure of sovereignty. Despite the best efforts of its creators, however, that current international framework lacks clarity and has led to a collection of Arctic navigational laws promulgated by Coastal States that are inconsistent with UNCLOS and undermine the Polar Code.¹⁶⁹ International use of the Voyage Planning requirements in the Polar Code to determine whether a particular Arctic environmental protection law has “due regard” for navigation consistent with UNCLOS Article 234 would help clarify the international law framework in a way that is easier to conceptualize and enforce.

This definitional scheme would enable more consistent interpretation of the existing innocent passage and EEZ sections of UNCLOS. This could allow standardized Arctic navigation law among all the Arctic States and more efficient shipping, should the northern shipping routes become ice-free enough to allow for navigation. Furthermore, UNCLOS and the Polar Code would together provide an efficient, better-delineated guideline for what polar navigation codes should look like, as well as shape an international legal regime that allows for the protection of the unique—and uniquely fragile—Arctic environment. This would allow Arctic Coastal States the sovereignty to promulgate their own Arctic navigation and environmental protection

167. See, e.g., Dawson, *supra* note 2 (discussing the rising shipping volume in the Arctic); Plumer, *supra* note 2 (discussing new shipping routes). But see generally Haas & Howell, *supra* note 2 (disputing the feasibility of northern shipping routes due to ice thickness).

168. Polar Code, *supra* note 5, at 5; UNCLOS, *supra* note 10, art. 34.

169. See *supra* Part II (analyzing case studies).

laws within the bounds of UNCLOS without jeopardizing the uniformity of the Arctic navigational scheme, thereby making Arctic navigation laws not only consistent among nations but also more mindful of the unique navigational hazards and environmental concerns inherent to the Arctic region.

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