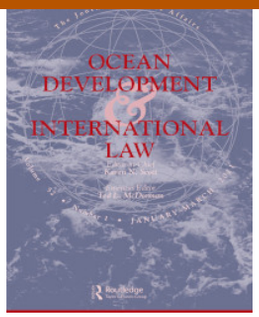

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The Genesis of Article 234 of the UNCLOS

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ABSTRACT

Article 234 is exceptional regarding its wording and placement in the United Nations Convention on the Law of the Sea (UNCLOS), as well as in its historical background. The Arctic provision has given rise to divergent interpretations regarding the conditions for invoking it, the limitations on the authority under Article 234, and its spatial scope of application. It has served as a justification for specific legislation adopted by Canada and Russia that has been opposed by the United States. The article, describes as a "textbook example of finding a compromise in international treaty negotiations," was negotiated directly and privately, among these three states during the Third United Nations Conference on the Law of the Sea (UNCLOS III). This article describes the historical background to Article 234 and sheds new light on the negotiating process that led to the adoption of the provision.

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Introduction

Article 234 of the United Nations Convention on the Law of the Sea (UNCLOS)[1] was negotiated directly and privately, among Canada, the United States, and the USSR, during the Third United Nations Conference on the Law of the Sea (UNCLOS III). It has been described as both a "textbook example of finding a compromise in international treaty negotiations"[2] and a "witch's brew, a caldron of legal uncertainty which could be stirred in favor of either the coastal or shipping state."[3]

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[1] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 3 UNCLOS, Art 234:

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

[2] K. Bartenstein, "The Arctic Exception in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?" (2011) 42 *Ocean Development and International Law* 22, 27.

[3] C. Lamson and D. VanderZwaag, "Arctic Waters: Needs and Options for Canadian-American Cooperation" (1987) 18 *Ocean Development and International Law* 49, 81.

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The clause has served as a justification for specific legislation adopted by Canada[4] and Russia.[5] Other Arctic states might follow suit in the future, although only Denmark (on behalf of Greenland) has indicated an interest in doing so by preparing draft legislation.[6] Norway could potentially apply Article 234 within ice-covered areas adjacent to Svalbard, but this would be problematic because it has not established an exclusive economic zone (EEZ) in this area.[7] For the United States, the lack of accession to UNCLOS could create difficulties for the legislative application of Article 234 off the coasts of Alaska. Nonetheless, the United States has actively responded to Russia's and Canada's interpretation and implementation of Article 234.[8]

Article 234 is exceptional regarding how it came about, as well as its wording and placement in the UNCLOS. The provision allows a coastal state to prescribe and enforce laws and regulations to prevent, reduce, and control vessel-source pollution. Other clauses that address coastal state prescriptive and enforcement jurisdiction to adopt rules and standards to prevent, reduce, and control vessel-source pollution in their maritime zones are located in Sections 5 (Article 211) and 6 (Article 220) of Part XII of the UNCLOS. Article 234, however, is placed in Section 8 on "ice-covered areas."

Unlike the provisions in Section 5 of Part XII, Article 234 does not contain any reference to international standards or a competent international organization, such as the International Maritime Organization (IMO). A review of legislation by the IMO is a critical element of the system of "checks and balances" respecting coastal state jurisdiction over navigation within the law of the sea. The significance of IMO review is not only procedural, as it can also substantively constrain coastal state jurisdiction.[9]

[4] Canada has stated that Article 234 "provides a complete legal justification" in international law for Northern Canada Vessel Traffic Services Zone Regulations (NORDREG). See IMO Doc. MSC 88/11/3, 5 October 2010, para. 5. *Arctic Waters Pollution Prevention Act*, *Revised Statutes of Canada, 1985* (AWPPA), c. A-12.

[5] Rules of Navigation in the Water Area of the Northern Sea Route, approved by the order of the Ministry of Transport of Russia, 17 January 2013, No. 7, registered by the Ministry of Justice, 2 April 2013, No. 28120. In a note handed to the *Arctic Sunrise*, published on the Administration of the Northern Sea Route (ANSR) website, Notification No. 77, 20 September 2013, on file with author, the ANSR stated that the ship was refused a permit on the grounds that there had been a: Violation of the Rules of navigation in the water area of the NSR, adopted and enforced by the Russian Federation in accordance with the article 234 of the United Nations Convention on the Law of the Sea, 1982,—navigation in the water area of the Northern Sea Route from 24.08.2013 to 27.08.2013 without permission of the Northern Sea Route Administration, as well as taken actions in this [sic] creating potentially [sic] threat of marine pollution in the water area of the Northern Sea Route, ice-covered for most part of the year.

[6] See T. Henriksen, "Norway, Denmark (in respect of Greenland) and Iceland" 'in R. C. Beckman, T. Henriksen, K. D. Kraabel et al. (eds.), *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States* (Brill Nijhoff, 2017), 277.

[7] Ibid, 253.

[8] See United States, "Diplomatic Note from the US Embassy, Ottawa, Canada to Department of Foreign Affairs and International Trade of Canada" (18 August 2010), 2009-2017.state.gov/documents/organization/179287.pdf (accessed 27 September 2020), and "Diplomatic Note from the United States to Russia regarding the NSR" (29 May 2015) reproduced in CarrieLyn D. Guymon (ed.), *Digest Of United States Practice In International Law 2015*, 526.

[9] See Secretary-General of the IMO during MEPC 60,

> Decisions made by consensus in this Organization stand good chances to be widely and effectively implemented. For the need and for the sake of succeeding in making decisions by consensus, sometimes it takes considerable time in making decisions, and this has, from time to time, given rise to people criticizing this Organization for being slow and, by implication, inefficient. In this Organization, we dislike taking a vote. Voting is divisive and one would ask what chances of implementation have the technical standards adopted in this Organization if the decision to introduce that standard has been made on a 51 to 49% basis. Sometimes, the decision, if consensus cannot be achieved, will have to be made in accordance with the Organization's well established and well-functioning Rules of Procedure, meaning that decisions are made on a majority basis, which leads to the conclusion that whatever people may think, this is a democratically based Organization.

An IMO review can entail the adoption of a specific measure by a resolution of a committee, such as the Marine Environmental Protection Committee (MEPC) or the Maritime Safety Committee (MSC). Such resolutions are typically adopted by consensus.[10] Instead, the laws and regulations adopted for ice-covered areas are to be nondiscriminatory and have due regard to navigation and to the protection and preservation of the marine environment based on the best available scientific evidence.

Article 234 may give rise to divergent interpretations regarding the conditions for invoking it. The limitation to the powers of Article 234, in particular due regard to navigation, can raise questions. The purpose of this article is not to delve into the Article 234 interpretational challenges,[11] but rather, to describe the historical background to Article 234 and provide new insights regarding the negotiating process that may assist in interpretation of the provision.

Recourse to the preparatory works (*travaux préparatoires*) and the circumstances of the conclusion of a treaty can be used as supplementary means of treaty interpretation.[12] However, this means of interpretation under the 1969 Vienna Convention on the Law of Treaties (VCLT) is largely limited to confirming the meaning resulting from the application of the general rules of interpretation provided for in VCLT Article 31,[13] unless the meaning is "ambiguous or obscure" or leads to a result that is "manifestly absurd or unreasonable."[14] Thus, caution is necessary considering the particular negotiation and drafting technique adopted during UNCLOS III, where, because of the highly politicized setting, most of the negotiations occurred off the record in informal negotiating fora, without full official records reflecting the exchange of positions.

The draft of Article 234 was little discussed on the record at UNCLOS III. The bulk of the negotiations occurred in private bilateral meetings in different constellations among Canada, the United States, and the USSR. In addition to some of the long-available records of UNCLOS III,[15] the *Virginia Commentary*,[16] the Soviet counterpart to the *Virginia Commentary*,[17] and the recollection of the members of

Reproduced in S. Hayer, "Decision-making Processes of ICAO and IMO in Respect of Environmental Regulations," Study for the Committee on Environment, Public Health and Food Safety (ENVI) of the European Parliament (European Union, 2016), 14.

[10] Adoption by consensus is a matter of practice. See Md. Saiful Karim, *Prevention of Pollution of the Marine Environment from Vessels: The Potential and Limits of the International Maritime Organization* (Springer, 2015), 35.

[11] See, among others, M. H. Nordquist, S. Rosenne and A. Yankov (eds.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, (1991) (*Virginia Commentary* Vol. IV); Bartenstein, note 2; and E. Franckx and L. Boone, "Article 234. Ice-covered Areas'in Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea, A Commentary* (C. H. Beck, Hart, Nomos, 2017), 1566–1584.

[12] Vienna Convention on the Law of Treaties adopted 23 May 1969, entered into force 27 January 1980 1155 UNTS 331 1969 VCLT, Art 32.

[13] A. Aust, *Modern Treaty Law and Practice* (2nd ed., Cambridge University Press, 2007), 244–245.

[14] VCLT, Art 32(a) and (b).

[15] Available online at legal.un.org/diplomaticconferences/1973_los/ (accessed 27 September 2020).

[16] Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary Volumes I–VII* (Martinus Nijhoff Publishers, 2011).

[17] A. P. Movchan and A. Yankov (eds.), *Mirovoi Okean I Mezhdunarodnoe Pravo: Osnovy Sovermmennogo Pravoporjadka v Mirovom Okeane [World Ocean and International Law: The Basis for the Modern Legal Order in the World Ocean]* (Vol. 1, Nauka, 1986); *Pravovoi Rezhim Morskikh Pribrezhnykh Prostranstv* [*Legal Regime of Maritime Zone*] (Vol. 2, Nauka, 1987); *Otrkytoe More. Mezhdunarodnye Prolivy. Arkhipelazhnye Vody* [*High Seas. International Straits. Archipelagic Waters*] (Vol. 3, Nauka, 1988); *Zashita I Sokhranenie Morskoy Sredy* [*Protection and Preservation of the Marine Environment*] (Vol. 4, Nauka, 1990).

the delegations to UNCLOS III, this article relies on a new element: declassified diplomatic US cables.[18]

The Pre-UNCLOS III Dawn of Article 234

Introduction to the Interests of the States Involved

The seed for the Arctic clause was planted before UNCLOS III. The 1969 voyage of the *SS Manhattan* highlighted a bilateral disagreement between Canada and the United States regarding the regime of navigation through the Northwest Passage (NWP). It triggered Canada's response of enacting specific legislation, followed by Canada's pursuit to garner international acceptance for its cause. This eventually led to the negotiations of the Arctic clause during UNCLOS III among Canada, the United States, and the USSR.

UNCLOS III was prompted by the desire to "adopt a convention dealing with all matters relating to the law of the sea."[19] The Arctic and the peculiarities of its legal regime were not at the forefront of global attention. For this reason, that the issue of ice-covered areas was left to the states directly created little controversy. The three states had different agendas, but in part, thanks to the multilateral nature of the negotiating environment at UNCLOS III, their interests overlapped sufficiently to reach a special Arctic compromise.

As noted in the preceding, Canada was a *spiritus movens* behind the Article 234 negotiations. Canada's interest relating to navigation at UNCLOS III was twofold.[20] First, it was important for Canada to prevent the recognition of the NWP as a strait used for international navigation that would have entailed the application of a liberal regime of navigation through it. Second, Canada sought international recognition for its 1970 Arctic Waters Pollution Protection Act (AWPPA).[21] Canada's principal objective boiled down to preventing the NWP from "internationalization."[22] In pursuit of these political goals, Canada had, at least since 1969, acted as an important member of the so-called coastal states group.[23] This group was interested in establishing a 12-nm width for the territorial sea and advocated for coastal state jurisdiction to adopt necessary measures respecting marine pollution.

The interests of the Cold War adversaries, the United States and the Soviet Union—major maritime states and naval superpowers—converged in their appreciation of maritime and naval mobility and the general interest of containing the expansion of coastal

[18] In particular, the record of declassified correspondence, available in the US National Archives aad.archives.gov/aad/index.jsp (accessed 27 September 2020). Although these documents were declassified some time ago, they have received little attention in academic writing on Article 234. One exception is J. Kraska, "Governance of Ice-Covered Areas: Rule Construction in the Arctic Ocean" (2014) 45 *Ocean Development and International Law* 260.
[19] UN General Assembly Resolution 3067 (XXVIII), 16 November 1973.
[20] Bartenstein, note 2, 26.
[21] AWPPA, note 4.
[22] See discussion that follows.
[23] See M. R. M'Gonigle and M. W. Zacher, "Canadian Foreign Policy and the Control of Marine Pollution" in B. Johnson and M. W. Zacher (eds.), *Canadian Foreign Policy and the Law of the Sea* (University of British Columbia Press, 1977), 113–115.

state jurisdiction. Although the two states differed on the issue of the acceptable maximum width for the territorial sea,[24] a liberal regime of navigation through international straits was an absolute priority for both.[25] The regime of navigation through straits became one of the key issues for UNCLOS III at an early stage. Other issues, such as the determination of the maximum width of the territorial sea and the emergence of the EEZ, were all conditioned upon an agreement on straits.[26]

Unlike the United States, but similarly to Canada, the USSR was preoccupied with sovereignty-oriented Arctic claims that were, however, not fully articulated. For that reason, the USSR felt it was best not to discuss its claims with other states.[27] When the United States proposed a regional conference on the Arctic, it was met with a lukewarm response from Canada and a resolute rejection by the USSR.[28]

Canada's stance was slightly less apprehensive of the potential engagement of international institutions in the Arctic than the USSR. After all, the crux of Canada's efforts after the adoption of the 1970 AWPPA was to attract international attention to the Arctic and attract support for "special measures."[29]

In any event, the discussions that eventually resulted in Article 234 were mostly fueled by Canada's desire to obtain international recognition of the 1970 AWPPA.

Background to the 1970 AWPPA

The 1970 AWPPA was adopted in response to US interest in a shipping route for oil through the NWP. After the discovery of oil in the area of Prudhoe Bay on Alaska's North Slope in 1968, American oil companies decided to test the feasibility of a maritime route through the NWP to transport the oil by tankers.[30] One test of these plans was the 1969 voyage of the SS *Manhattan* through the NWP—a controversial voyage

[24] The USSR had established a 12-nm belt of territorial waters in 1960. Statute on the Protection of the State Border of the USSR, 5 August 1960, Vedomosti VS RSFSR, 1960, No. 31. The United States submitted "Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries to the Seabed Committee," see A/AC. 138/SC. II/L.4, reproduced in (1971) 10 *International Legal Materials*, 973. This document explains that although the US government adheres to the traditional 3-nm width of the territorial sea, it is prepared to agree to a treaty establishing a 12-nm width, provided there is agreement on the issue of straits.

[25] In 1968, the United States and the USSR intended to address the straits issue bilaterally, having prepared and circulated a draft convention on the breadth of the territorial sea that guaranteed free passage for all ships and aircraft through international straits connecting areas of high seas. See R. D. McConchie and R. S. Reid, "Canadian Foreign Policy and International Straits, " in Johnson and Zacher, note 23, 174.

[26] See D. D. Caron, "The Great Straits Debate: The Conflict, Debate, and Compromise that shaped the Straits Articles on the 1982 United Nations Convention on the Law of the Sea," in D. D. Caron and N. Oral (eds.), *Navigating Straits: Challenges for International Law* (Brill Nijhoff, 2014), 14–15.

[27] In a message from the US Embassy in London to the US Department of State, Secretary of Defense, Secretary of State, "LOS: Regional Pollution Agreement for Arctic, " Confidential message, 3 May 1974, Declassified and released, US Department of State 30 June 2005, aad.archives.gov (accessed 27 September 2020), the US Embassy in London reported to the Department of State, the Secretary of Defense, and the Secretary of State that a change of Soviet attitude has taken place. Specifically, it was reported that the Soviets indicated that they "may be willing to discuss Arctic pollution agreement bilaterally (or possibly multilaterally) with other Arctic States." The report further indicates that the Soviets had previously "refused to enter such discussions on grounds that Soviet Union is sovereign in its Arctic areas."

[28] McConchie and Ried, note 25, 173, footnote 59, highlighted that in response to the US initiative, eight separate proposals for a regional conference were made, all vetoed by the USSR.

[29] According to R. M. M'Gonigle, "Unilateralism and International Law: The Arctic Waters Pollution Prevention Act" (1976) 34 *University of Toronto Faculty of Law Review* 180, 195, the 1970 AWPPA was, from the beginning, intended to stimulate the development of international law.

[30] E. Franckx, *Maritime Claims in the Arctic: Canadian and Russian Perspectives* (Martinus Nijhoff Publishers, 1993), 75.

that led to domestic debates in Canada over ways to protect the waters of the NWP from the unauthorized passage of foreign vessels, including oil tankers. The SS *Manhattan*'s first trip was repeated in 1970. Although the enterprise was successful in the sense that the SS *Manhattan* managed to sail through the NWP, the tanker had to be accompanied by US and Canadian icebreakers, freed from ice numerous times, and the vessel suffered structural damages, such as a punctured hull.[31] These problems not only had a chilling effect on the idea of oil transported by tankers instead of by pipelines, but they also fueled Canadian concerns over the safety of vessel passage through ice-covered waters within its Arctic archipelago.

The question of the legal status of waters within the Canadian Arctic Archipelago was politically sensitive. In 1969, Canada had a territorial sea of 3 nm, and the plan was to send the *SS Manhattan* through the high seas corridor in the NWP. The Canadian Government traditionally had referred to these Arctic waters as "Canadian waters"; however, the legal basis for such a claim had not been formulated.[32] Although the voyage of the *Manhattan* was officially downplayed as not challenging Canadian sovereignty,[33] the domestic reaction first focused on the sovereignty issues rather than on issues of the environment.[34]

When addressing the House of Commons, Prime Minister Trudeau recognized that although the waters within the Canadian Archipelago had always been regarded as "national terrain," there also existed "a contrary view."[35]

The emphasis on the concern for the environment arising from the voyage of the SS *Manhattan* was expressed only a year after the announcement of the intention to navigate through the NWP. On 19 June 1969, Paul St. Pierre, a Liberal Member of Parliament (MP), raised the risk of pollution as a significant implication of the SS *Manhattan* voyage.[36] His argument pointed toward the need for Canada's exercise of sovereignty in these waters in order to secure the protection of the environment. In October 1969, the Canadian government presented its policy, the key of which was the attention given to the environmental aspect of human activity in the Arctic. The Throne Speech of 23 October 1969 was the first pronouncement of the intent to introduce new legislation "setting out the measures necessary to prevent pollution in the Arctic Seas."[37] The focus on the environmental concerns turned out to be a way to

[31] See ibid, 75–78, for a detailed overview of the two voyages, their background, and Canada's response.

[32] Canadian Prime Minister Trudeau reiterated that the declaration of a 100-nm Arctic Waters Pollution Prevention Zone by Canada was not aimed at asserting sovereignty. See Canada, "Canadian Prime Minister's Remarks on the Proposed Legislation, Transcript of Prime Minister Trudeau's Remarks to the Press following the Introduction of Legislation on Arctic Pollution, Territorial Sea and Fishing Zones in the Canadian House of Commons on 8 April 1970," reproduced in (1970) 9 *International Legal Materials* 600, 602. At the same time, Canada extended the width of its territorial sea to 12 NM. However, the waters within the Canadian Arctic Archipelago were still referred to as "Canadian," without specifying what this entails. See Canada, "Canadian Reply to US Government of 16 April 1970, Summary of Canadian Note of April 16, Tabled by the Secretary of State for External Affairs in the House April 17," reproduced in (1970) 9 *International Legal Materials* 607, 613.

[33] M'Gonigle and Zacher, note 23, 109–110.

The *Manhattan* planned to stay on the high seas for the whole voyage, which was consistent with the objective of the voyage, which was to test the commercial feasibility of oil transportation. See S. Lalonde, "Evaluating Canada's Position on the Northwest Passage in Light of Two Possible Sources of International Protection," in Clive H. Schofield, Seokwoo Lee and Moon-Sang Kwon (eds.), *Limits of Maritime Jurisdiction* (Martinus Nijhoff Publishers, 2013), 577.

[34] Ibid.

[35] Ibid, 109, referring to *Can. H.C. Deb.,* 15 May 1969, 8720–21. See also Franckx, note 30, 75.

[36] Ibid, 110.

[37] Ibid, 111–112, referring to *Can. H.C. Deb.,* 23 October 1969, 3.

achieve much of what a claim to sovereignty could do. The upside of such a functional and targeted approach was that it was less controversial than a direct sovereignty claim. It also aligned with growing global sentiments about the environment in general and vessel-source pollution in particular.

The first move taken by Canada to defend its control over the NWP was the adoption of the 1970 AWPPA. As observed by McRae, the choice made by Canada was to take a functional approach to "exercise only the jurisdiction required to achieve the specific and vital purpose of environmental protection."[38] The 1970 AWPPA extended Canada's jurisdiction over foreign vessels to an area of 100 nm from land—an area broader than any acceptable width of the territorial sea. Canada asserted the right to regulate navigation, including the right to prohibit it or regulate matters such as construction, designing, equipment, and crewing standards.[39]

Although in 1970, Canada had yet to formally declare the waters of the NWP as falling under its sovereignty,[40] it undertook a number of actions. In addition to enacting the 1970 AWPPA, Canada extended the width of the territorial sea from 3 nm to 12 nm.[41] At the time, the issue of the maximum width of the territorial sea was not internationally resolved, although a trend had been developing toward the acceptance of a 12-nm width. This issue was settled only with the adoption of the UNCLOS, and after the regime of transit passage was secured as a trade-off.

Canada had good reasons to suspect that the 1970 AWPPA would lead to international protests.[42] To avoid the challenge of potential international litigation, Canada filed a reservation to its acceptance of the compulsory jurisdiction of the International Court of Justice.[43] Prime Minister Trudeau explained the decision, noting that international law had not developed sufficiently to correspond with new realities, and that Canada would help it develop.[44]

Canada's Pursuit of International Acceptance of the 1970 AWPPA Before UNCLOS III

After the adoption of the 1970 AWPPA, but before the commencement of UNCLOS III, Canada sought to convince the rest of the world to support its cause. Canada's

[38] D. McRae, "The Negotiation of Article 234," in F. Griffiths (ed.), *Politics of the Northwest Passage* (McGill-Queen's University Press, 1987), 101.

[39] For an overview of the 1970 AWPPA, see D. McRae and D. J. Goundrey, "Environmental Jurisdiction in Arctic Waters: The Extent of Article 234," (1982) 16 *University of British Columbia Law Review* 197, 205–207.

[40] Bartenstein, note 2, 26, mentions the letter dated 17 December 1973, written by the Bureau of Legal Affairs, reproduced in E. G. Lee, "Canadian Practice in International Law During 1973 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs" (1974) 13 *Canadian Yearbook of International Law* 272, 277–279, as the first official Canadian claim of internal waters.

[41] Lee, note 40, 283.

[42] A. de Mestral, "Article 234 of the United Nations Convention on the Law of the Sea Its Origins and Its Future," in S. Lalonde and T. L. McDorman (eds.), *International Law and Politics of the Arctic Ocean: Essays in Honor of Donat Pharand* (Brill Nijhoff, 2015), 113, refers to "a drawer full of protests" received by Canada in response to the enactment of the 1970 AWPPA.

[43] Canada, "Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice" (7 April 1970) reproduced in (1970) 9 *International Legal Materials* 598, 598–599. The declaration terminated the acceptance of compulsory jurisdiction of the nternational Court of Justice (ICJ) over disputes regarding, inter alia, "the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada." See McRae, note 38, 101.

[44] Trudeau, note 32, 600.

choice was not the obvious one, as it could have attempted to solve the issue as a bilateral matter with the United States, or as a regional matter with other states interested in the Arctic.[45]

The opening for Canada to make its case globally arose in 1970 when the United States proposed the convening of a conference on the Arctic.[46] However, neither Canada nor the USSR was interested in having the issues of territorial or jurisdictional limits in the Arctic discussed at a multilateral conference. Canada, however, indicated some interest in a conference limited to discussing the rules for environmental protection and the safety of navigation in the Arctic waters,[47] with a caveat that it could be done "within the framework of Canada's proposed legislation."[48] It soon became apparent that the regional solution held little promise for success. Canada was anxious not to be outnumbered by major maritime states; the United States was unable to secure support for leading the conference; and the USSR was not interested in discussing the legal status of the Arctic in a multilateral setting.[49] In the end, no regional conference took place.[50]

Canada advocated its interests at the 1972 United Nations Conference on the Human Environment in Stockholm that resulted in the 1972 Stockholm Declaration.[51] Canada participated actively in the conference, and proposed, among other things, the following as a principle:

> A State may exercise special authority in areas of the sea adjacent to its territorial waters where functional controls of a continuing nature are necessary for the effective prevention of pollution which could cause damage or injury to the land or marine environment under its exclusive or sovereign authority.[52]

The conference referred it to both the 1973 IMO Conference (dealing with MARPOL, the International Convention for Prevention of Marine Pollution for Ships) and the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction (Seabed Committee).[53] The latter, established initially as an ad hoc committee to study the questions raised by Ambassador Pardo of Malta concerning the seabed beyond national jurisdiction,[54] served as the Preparatory Committee for UNCLOS III.[55]

Canada submitted its proposal to the Sub-Committee III on Marine Pollution and Research of the Seabed Committee as the 1973 Draft Articles for a Comprehensive Marine Pollution Convention.[56] Canada's 1973 Draft Articles reflected Canada's advocacy for coastal state jurisdiction for environmental protection under "special" circumstances.

[45] McRae, note 38, 102.
[46] See J. Kirton and D. Munton, "The Manhattan Voyages and their Aftermath," in F. Griffiths (ed.), *Politics of the Northwest Passage* (McGill-Queen's University Press, 1987), 94–96.
[47] Ibid, 94–96. M'Gonigle, note 29, 196, argues that Canada supported a regional Arctic treaty, but that the initiative failed owing to the refusal of the USSR to participate.
[48] See Canada's reply to the US proposal, reproduced in McConchie and Ried, note 25, 173, footnote 59.
[49] McRae, note 38, 102, and Kirton and Munton, note 46, 94–96.
[50] McRae, note 38, 102.
[51] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972.
[52] McRae, note 38, 103.
[53] Ibid.
[54] UN General Assembly Resolution 2340 (XII), 18 December 1967.
[55] UN General Assembly Resolution 2750 C (XXV), 17 December 1970.
[56] A/AC.138/SC.III/L.28, Draft Articles for a Comprehensive Marine Pollution Convention, submitted by Canada, 9 March 1973, reproduced in (1973) 12 *International Legal Materials* 564, (Canada's 1973 Draft Articles).

Canada put forward the idea that the obligation to protect and preserve the marine environment is an overarching obligation, which states must satisfy regardless of "internationally agreed measures," if necessary. Article IV of the proposal reads:

> Nothing in this Convention may be interpreted as preventing a State from taking such measures as may be necessary to meet the obligation under Article I within the limits of its national jurisdiction, including environmental protection zones (maximum limits to be determined) (a) pending the establishment and implementation of internationally agreed measures contemplated by this Convention or, (b) following the establishment or implementation of any internationally agreed measures if such measures fail to meet the objectives of this Convention or if other measures are necessary in the light of local geographical and ecological characteristics.[57]

Interestingly, when the USSR submitted its Draft Articles for a Convention on General Principles for the Preservation of the Marine Environment,[58] it did not mention the need for "special" environmental measures. Rather, the USSR emphasized that any rules and standards relating to the prevention of pollution of the marine environment should take into account high seas freedoms. The proposals by Canada and the USSR indicate that they were not on the same page.

Canada was also active during the 1973 IMO Conference on the Prevention of Marine Pollution from Ships, where MARPOL[59] was adopted. The conference was held after the conclusion of the preparatory meetings for UNCLOS III. As such, it had the potential to solve some issues before UNCLOS III and to set the tone for the coming conference.

Canada's initial proposal to the preparatory meeting for the MARPOL Conference in February 1973 closely resembled its proposal submitted a month later to the Seabed Committee. Although Canada failed to obtain sufficient support at the preparatory meeting, the issue of "special measures" resurfaced at the IMO Conference.

At this gathering a possible compromise started to take shape. The compromise solution was favorable to Canada, as it recognized the right of a coastal state to adopt more stringent discharge, as well as design and equipment standards in "waters the particular characteristics of which, in accordance with accepted scientific criteria, render the environment exceptionally vulnerable."

The compromise on draft Article 8 reads as follows:

> (1) Nothing in the present convention shall be construed as derogating from the powers of any Party to the Convention to take more stringent measures, where specific circumstances so warrant, within its jurisdiction, in respect of discharge standards.
>
> (2) A Party shall not, within its jurisdiction, in respect of ships to which the Convention applies other than its own ships, impose additional requirements with regard to ship design and equipment in respect of pollution control. The requirements of this paragraph do not apply to waters the particular characteristics of which, in accordance with accepted scientific criteria, render the environment exceptionally vulnerable.

[57] Ibid.
[58] A/AC.138/SC.III/L.32, Draft Articles for a Convention on General Principles for the Preservation of the Marine Environment, submitted by the USSR, 15 March 1973 (USSR's 1973 Draft Articles).
[59] International Convention for the Prevention of Pollution from Ships as modified by the Protocol of 1978 relating thereto, adopted on 2 November 1973/17 February 1978, entered into force 2 October 1983, 1340 UNTS 62 (MARPOL 73/78).

(3) Parties which adopt special measures in accordance with the present Article shall notify them to the Organization without delay. The Organization shall inform Parties to the Convention about these measures.[60]

The clause was accepted in the committee by a vote of 29–10–8 and was incorporated in the text submitted to the Plenary.[61] From the perspective of the maritime states, the provision expanded coastal state jurisdiction, which could serve as a precedent during UNCLOS III. From the coastal state perspective, the article is a restrictive approach, allowing "special" measures only in an "exceptionally vulnerable" environment. The United States opposed the provision both in the committee and in the Plenary.[62] It would have been in the interest of the USSR to support the article, as it was consistent both with its global maritime interests and its Arctic-specific coastal interests. Canada had informed the USSR that it might request the IMO to declare the Arctic a "special area," presumably under MARPOL. This was unacceptable to the USSR.[63] Nevertheless, the USSR, which had supported the clause in the committee, withdrew its support to the provision in the plenary vote "on last-minute instructions from Moscow."[64] Several other Soviet bloc States also withdrew their support, such that the provision fell short of the two-thirds majority required for inclusion in the MARPOL Convention. The clause nonetheless gained majority support (26–22–14), which indicates that the basic idea of what was to become Article 234 had considerable support. At the same time, the 1973 IMO Conference was dealing with a relatively narrow set of issues when compared with UNCLOS III. As such, the support for ideas in one setting did not easily translate into support for similar ideas in a different setting. The distinction between MARPOL, the product of the 1973 IMO Conference, and UNCLOS is seen in Articles 9(2) and 9(3) of MARPOL.[65]

Canada could not claim full success, given that the principles proposed by Canada referencing "special authority" were not endorsed in the 1972 Stockholm Declaration, and that it was unsuccessful in obtaining support for special measures at the IMO and the Seabed Committee.[66] Nevertheless, these efforts laid the groundwork for a more successful campaign during UNCLOS III.

Negotiations During UNCLOS III

Arctic "Special Areas" as an Example of "Special Areas"

At UNCLOS III, Canada continued advocating for "special areas" with the intent of attracting international support for the 1970 AWPPA. Canada's advocacy was not restricted to the Arctic "special areas," as the latter concept was regarded as an example

[60] The text is reproduced in Lee, note 40, 285, as Article 9, while McRae and Goundrey, note 39, 213, reproduce the text as Article 8, with no reference to paragraph 3.
[61] M'Gonigle and Zacher, note 23, 134.
[62] M. R. M'Gonigle and M. W. Zacher, *Pollution, Politics, and International Law, Tankers at Sea* (University of California Press, 1979), 210.
[63] Ibid, 218.
[64] Ibid.
[65] MARPOL, Article 9(2), stipulates that "Nothing in the present Convention shall prejudice … the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction." Article 9(3) specifies that "jurisdiction" is to be construed in light of the international law in force at the time of application or interpretation of MARPOL.
[66] M'Gonigle and Zacher, note 23, 133.

of "special areas" in which the environment was exceptionally vulnerable. Canada argued that coastal states should be able to address "special" circumstances with "special" measures.

In July 1974, Canada raised the issue of ice-covered waters as one example of "special" circumstances, along with congested traffic situations, shallow or narrow channels, or other situations.[67] On 16 July 1974, the Canadian delegate, Legault, in a more convoluted manner, again raised the issue of "special areas."[68] The intervention emphasized the drawbacks of pursuing a solely "international" approach to vessel-source pollution rules and standard-setting.[69] The spirit of Canada's position was that states need to retain the ability to protect themselves, and for this they cannot rely solely on the IMO. The latter point was conveyed, noting the inherently slow pace of decision making by an international organization such as the IMO when responding to new challenges. The point was that unilateral action is more effective.[70] Canada's view was that such unilateralism would be utilized only when "strictly necessary … in response to particular geographic, navigational or ecological situations, not adequately covered by international rules and standards."[71]

Canada focused on the need for effective regulation of vessel-source pollution in ice-covered areas, and that this did not appear to be adequately achievable by the IMO.

Article 7(3)(b)(ii) of the Draft Articles on a zonal approach to the preservation of the marine environment, cosponsored by Canada and other states and proposed on 31 July 1974, resembled the text submitted for the plenary vote at the 1973 IMO Conference except that it attached further qualification for the adoption of "special measures."

> Where internationally agreed rules and standards are not in existence or are inadequate to meet special circumstances, coastal States may adopt reasonable and non-discriminatory laws and regulations additional to or more stringent than the relevant internationally agreed rules and standards. However, coastal States may apply stricter design and construction standards to vessels navigating in their zones only in respect of waters where such stricter standards are rendered essential by exceptional hazards to navigation or the special vulnerability of the marine environment, in accordance with accepted scientific criteria. States which adopt measures in accordance with this subparagraph shall notify the competent international organization without delay, which shall notify all interested States about these measures.[72]

This approach was met with significant opposition from the maritime states.

At the commencement of UNCLOS III, the USSR did not seem to be as engaged with the issue of "special areas" as Canada. The Soviet approach to the Arctic during the Conference involved mixed messages. The US view was that the Soviets had indicated a willingness to discuss the Arctic with other states.[73] When the US delegation

[67] UN Doc. A/CONF.62/SR.27, Summary Records of Plenary Meetings 27th Plenary Meeting, 3 July 1974, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume I, 95, [19].
[68] UN Doc. A/CONF.62/C.3/SR.4, Summary Records of Meetings of the Third Committee 4th Meeting, 16 July 1974, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume II, 315, [21], [23], and [24].
[69] Ibid.
[70] Ibid, [23].
[71] Ibid, [24].
[72] UN Doc. A/CONF.62/C.3/L.6, Draft Articles on a Zonal Approach to the Preservation of the Marine Environment UN, submitted by Canada, Fiji, Ghana, Guyana, Iceland, India, Iran, New Zealand, Philippines and Spain, 31 July 1974, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume III, 249, 250.
[73] Message from the US Embassy in London to the US Department of State, note 27.

raised the "Arctic pollution question," noting the interest in Canada, and inquired whether there was a possibility to work out an Arctic regime, the Soviet delegation objected. The Soviets indicated that the "Arctic question" was to be "kept out of" UNCLOS III, as it was "not possible to separate land and maritime interests in the Arctic."[74]

Toward the Bifurcation of "Special Areas"

The United States engaged in bilateral consultations with Canada on a range of law of the sea issues. In the correspondence between the US Embassy in Caracas and the US Department of State of 30 August 1974, one can note the first traces of a bilateral agreement between the United States and Canada on the question of an Arctic "special area."[75] The report gives an account of Canada expressing its willingness to confine the "dangerous and vulnerable area concept" to "ice areas."[76] This appears to be the starting point for the strategy to separate the notion of the "special areas" generally from the Arctic. The same correspondence references other issues discussed by the two states. Although there was some agreement on the need for an "international process to review standards," Canada reportedly showed an interest in securing the ability to implement standards immediately pending an international review.[77]

Productive Private Talks Between Canada and the United States, and the Soviet Reaction

Significant progress in bilateral negotiations between Canada and the United States was made in January 1975. The correspondence from the US Embassy in Ottawa to the Department of State of 15 January 1975 gives an account of two days of negotiation on an agreement on the environmental regime for the Arctic and unimpeded transit of straits.[78] During the negotiations, described by Canada's Alan Beesley as the most productive talks with the United States in his 15 years of experience,[79] the parties identified areas of agreement and disagreement.

The areas of agreement included confining the special regime to an area described as ice-covered areas within the economic zone (EEZ) and the territorial sea. The agreement further discussed an exemption for military vessels; no standard setting within the EEZ or international straits, except in ice-covered areas; and Canadian general support for the unimpeded transit in straits used for international navigation.[80] The agreement

[74] Ibid.
[75] Message from the US Embassy in Caracas to the US Department of State, Secretary of State, "LOS Conference—Classified Analysis and Supplement to Final Report on Caracas Session," Confidential message, 30 August 1974, Declassified and Released, US Department of State 30 June 2005, aad.archives.gov (accessed 27 September 2020).
[76] Ibid.
[77] Ibid.
[78] Message from the US Embassy in Ottawa to the US Department of State, Secretary of State, US Mission to the United Nations, "Negotiations with Canadians on Environmental Special Area for Arctic and Transit of International Straits," Confidential message, 15 January 1975, declassified by Margaret P. Grafeld, released US Department of State EO Systematic Review 5 July 2006, aad.archives.gov (accessed 27 September 2020).
[79] Ibid.
[80] Ibid.

would allow for setting aside the issues on the status of the NWP and would avoid reopening the discussions on the definition of a strait used for international navigation.

Another area of agreement, according to the report, was on a "review mechanism extended to all special standards."[81] However, the states disagreed concerning the nature of an "international review mechanism for special standards promulgated by coastal States for ice-covered areas."[82] Canada was willing to accept a "non-binding" review at the IMO and a "binding review by compulsory dispute settlement procedures as to the reasonableness" of special standards. In addition, Canada pushed for the effectiveness of special standards upon promulgation (*ante* review). The United States argued for a binding review by the IMO's MEPC tacit amendment procedure and a review of the effectiveness of special standards after approval (*post* review).[83]

In an April 1975 letter from the US Secretary of State to the US Mission in Geneva, a reference is made to a "non-paper" delivered by the Soviet Minister Counselor Vorontsov to Deputy Assistant Secretary Armitage.[84] The "non-paper," transmitted to both the United States and Canada, notes the Canadian efforts to "legalize" its Arctic regulations at the international level, as well as the US desire that such regulations be subject to an international review by the IMO. According to the report, the Soviet delegation insisted that it would not agree to submit its national rules regulating navigation in the Arctic to the IMO for approval. Further, the Soviet Union indicated that it would object to any attempts to impose upon the LOS Conference any proposal for submitting Arctic state laws on the regulation of navigation and environmental protection for approval or even consideration by the IMO or any other international organization.[85] The "non-paper" further emphasized that any proposals to a similar effect are "completely unacceptable for the USSR," and that "great importance is attached to this question."[86] The language used in the "non-paper" leaves little doubt with regard to the position of the USSR.

In the meantime, the negotiations at UNCLOS III continued, and the Informed Single Negotiating Text (ISNT) of 9 May 1975 included Article 20, which covered the issue of both Arctic and non-Arctic special areas.[87] Paragraph 4 addressed non-Arctic "special areas," where special measures being contemplated were subject to review by an international organization. Paragraph 5 provided that

> Nothing in this Article shall be deemed to affect the establishment by the coastal State of appropriate nondiscriminatory laws and regulations for the protection of the marine environment in areas within the economic zone, where particularly severe climatic conditions create obstructions or exceptional hazards to navigation, and where pollution of the marine environment, according to accepted scientific criteria, could cause major harm to or irreversible disturbance of the ecological balance.

[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Message from the US Secretary of State to the US Mission in Geneva, "LOS: Soviet Approach on Arctic," Confidential message, 23 April 1975, declassified by Margaret P. Grafeld, released US Department of State EO Systematic Review 5 July 2006, aad.archives.gov (accessed 27 September 2020).
[85] Ibid.
[86] Ibid.
[87] UN Doc. A/CONF.62/WP.8/PART III, Informal Single Negotiating Text, Part III, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume IV, 171.

This provision did not acknowledge Canada's commitment to the United States to defer to some, even nonbinding, supervision by the IMO. There is some commonality between Article 20(5) of the 1975 ISNT and Article IV of Canada's 1973 Draft Articles, both of which asserted a peremptory right of a coastal state under specific circumstances to adopt antipollution laws or regulations. The text of the 1975 ISNT, however, more narrowly defined the areas in which the right would arise ("particularly severe climatic conditions"). Nevertheless, the provision was considered too permissive and its wording too vague,[88] with the result that there were numerous proposals for revision.[89]

Soviet–Canadian Joint Proposal and the Reaction of the United States

The dynamics changed when the USSR and Canada presented to the United States their joint proposal in February 1976:

> The coastal state, notwithstanding the other provisions of this convention, has the right to establish non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in areas within the limits of the economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to the protection of the marine environment based on the best available scientific evidence.[90]

This is the earliest publicly available draft of the "Arctic clause." It clearly builds upon earlier negotiations; however, the engagement of the USSR and the resulting shift in the balance of the negotiation power had an impact on the earlier United States–Canada compromise. The 1976 proposal separated ice-covered areas from other "special areas," as had been suggested by the United States. The asserted coastal state right exists "notwithstanding the other provisions of this convention," and thus, explicitly, the right to adopt antipollution laws and regulations in the Arctic was a *lex specialis*. Further, there is no reference to an international review mechanism. It is apparent that after Canada paired with the USSR, they were able to strip any such review from the Arctic pollution provision. It is also noteworthy that the proposal includes minimal limitations on the coastal state's rights, although it introduces the language of "due regard," with such regard required for the protection of the marine environment only. "Navigation" may have been added to the wording after a US intervention.

The joint Canadian/Soviet proposal came as a surprise to the United States, and apparently required a swift response, including the setting up a task force "ASAP" to defeat or modify the proposal.[91] John Norton Moore, who served as US Ambassador and Deputy Special Representative of the President to the Law of the Sea Conference (1973–1976), and thus oversaw the bilateral negotiations on the ice-covered areas with Canada, writes that it

[88] M'Gonigle and Zacher, note 23, 141–142.
[89] Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary Volumes I–VII* (Martinus Nijhoff Publishers, 2011), Vol. IV, 393.
[90] Message from the US Mission Geneva to the US Department of State, Secretary of State, "Canadian/Soviet Proposal on Arctic," Confidential message, 3 February 1976, declassified by Margaret P. Grafeld, Released US Department of State EO Systematic Review 4 May 2006, aad.archives.gov (accessed 27 September 2020).
[91] As suggested in the US cable of 3 February 1976, ibid.

was the United States that stood behind the idea to carve away opposition and offer the Canadians extraordinary authority within ice-covered areas only.[92] He states that at the time he left his position, the language was tougher than "due regard."[93]

It is interesting to observe the evolution of the Soviet approach to the Arctic at UNCLOS III. At first, the USSR showed an ambivalent attitude to Canada's attempts to obtain legitimization for its Arctic legislation. During the 1973 IMO Conference, the USSR had supported Canada in the committee, only to withdraw its support before the vote in the Plenary. One might expect that the USSR would have a similar attitude during UNCLOS III. However, the idea to single out the Arctic appears to have led the USSR to take a proactive approach. It likely did not seem realistic to maintain the position that the future ocean treaty would not apply in the Arctic Ocean. Facing this reality, the USSR joined and bolstered Canada's position with the United States in the negotiations of the Arctic clause and were able to shape the Arctic clause to fit its interests.

Ad Referendum Agreement and the Understanding by the US Delegation

By mid April 1976, the delegations of Canada, the United States, and the USSR had reached *ad referendum* agreement (subject to final approval), predicated on Canada's support for the US position on straits and on the final approval of their respective governments.[94] Just days before the drafting of the Revised Single Negotiating Text (RSNT),[95] the United States awaited a final seal of approval from Canada for the bilateral deal. The fear was that Canada and the USSR would propose the text bilaterally, without support from the United States. This scenario appears to have been possible as the Bulgarian delegate, Yankov, representing a member of the Soviet bloc, as the Chairman of the Third Committee, was responsible for the drafting. As reported by the US delegation,

> Canada would doubtlessly be pleased to have [an] Arctic article put in [the] revised text without final US approval if [the] result were that Canada did not have to support [the] US position on straits.[96]

The United States was on the brink of losing Canada's endorsement on straits after Canada and the USSR linked up and allegedly worked on their own proposal on ice-covered areas.[97] A further cable suggests that as late as 5 May 1976, the United States had not obtained Canada's final approval for the deal.[98] Nevertheless, on 6 May 1976, Article 43, a prototype of Article 234, was included in the 1976 RSNT.[99] One may speculate on whether

[92] J. Norton Moore, "The UNCLOS Negotiations on Ice-covered Areas" in M. H. Nordquist, T. H. Heidar, and J. Norton Moore (eds.), *The Arctic Environment and the Law of the Sea* (Martinus Nijhoff Publishers, 2010), 21.
[93] Ibid, 21–22.
[94] Message from the US Mission to the United Nations (New York) to the US Embassy in Ottawa, the US Department of State, Secretary of State, "LOS: Arctic Pollution Article," Confidential message, 30 April 1976, declassified by Margaret P. Grafeld, Released US Department of State EO Systematic Review 4 May 2006, aad.archives.gov (accessed 27 September 2020).
[95] UN Doc. A/CONF.62/WP.8/PART III, Revised Single Negotiating Text, (part III), *Third United Nations Conference on the Law of the Sea*, Vol. V, 173.
[96] US Confidential message, 30 April 1976, note 94.
[97] Kraska, note 18, 264, states that "The United States had—just barely—boarded the train as it left the station."
[98] Message from the US Department of State to the Secretary of State, US Delegation Secretary, "LOS: Arctic Pollution Article," Secret message, 5 May 1976, declassified by Margaret P. Grafeld, released US Department of State EO Systematic Review 4 May 2006, aad.archives.gov (accessed 27 September 2020).
[99] UNCLOS, Revised Single Negotiating Text, note 95.

the tension days before the first inclusion of the provision on ice-covered areas in the RSNT had any bearing on further concessions made by any of the negotiating states.

An informative source on the understanding that the US delegation attached to the agreed wording is the US "Request for Instructions on an Article on Vessel Pollution Control in the Arctic, of 28 April 1976."[100] This includes the Memorandum for the President.[101] The 1976 US Memorandum, secret at the time of drafting and approved for release in 2003, spells out the background, intricacies, and ramifications of the agreement reached among the three states.

First, it describes clearly the area of application of Article 234, namely, "areas in the Arctic within the economic zone and the territorial sea." The text further specifies the practical implications of such delimitation on the potential geographic scope of application. The 1976 US Memorandum admits that

> the freedom of navigation in the economic zone and the right of innocent passage in the territorial sea would apply in the Arctic subject, of course, to the regulatory and enforcement powers in the Arctic Article, which are complete powers with regard to vessel pollution control.[102]

Second, it recognizes that the US policy to subject the exercise of coastal STate powers to binding review by the IMO had failed, as it was unacceptable to the USSR and Canada owing to, inter alia, their sovereignty claims in the Arctic. Third, the rights of passage in Arctic straits would be subject to the "Arctic Article." Fourth, the military exemption would apply to the "Arctic Article." Fifth, regarding safeguards, the 1976 US Memorandum indicates that the "due regard" clause does not provide specific objective protection for navigational interests in the area. The intention is expressed that the normative standard of the clause could still be changed to read:

> Such laws and regulations shall not have the practical effect of impeding freedom of navigation and shall have due regard for the protection of the marine environment based on the best available scientific evidence.[103]

In the event of a failure to change the text, the 1976 US Memorandum urged that the delegation should be instructed to obtain from Canada and the Soviet Union an understanding that the due regard clause would be interpreted as to "not have the practical effect of impeding freedom of navigation." As the text of Article 234 remained unchanged, it is not clear whether such understanding was ever obtained.

Final Observations

The provision that became Article 234 was incorporated without dissent into the various UNCLOS negotiating texts with only minor editing.

Carving out the notion of "ice-covered areas" from the "special areas" provision was key for the acceptance of Article 234. A general proposition that a state would be able to

[100] The US "Law Of The Sea—Request For Instructions On An Article On Vessel Pollution Control In The Arctic," Secret letter, 28 April 1976, approved for release 27 February 2003, created 14 December 2016, General CIA Records, at: https://www.cia.gov/library/readingroom/document/cia-rdp82s00697r000400170026-0.
[101] Ibid.
[102] Ibid.
[103] Ibid.

unilaterally regulate vessel-source pollution in vast expanses of the EEZ was unlikely to be acceptable to the global community.[104] Limiting unilateral regulation to ice-covered areas suited Canada's goals. For both the United States and the USSR, it was important that the precedent-setting potential of the Arctic clause be limited. The allocation of autonomy in decision making to the coastal state was acceptable to the United States, as well as to other maritime states, as a result of the clear geographical limitation not only where ships were exposed to additional risks but, more importantly, where there had been low interest in unassisted navigation. It was evident that the practical relevance of these areas for traditional commercial shipping was limited and that any commercial activity in the Arctic could only be viable with the participation of the relevant coastal states.

The concessions that Canada and the USSR made during the negotiation of Article 234 were limited to relatively weak safeguards, such as the reference to nondiscrimination, the due regard clause, and the requirement of scientific evidence, in addition to the exemption for state-owned vessels, and the availability of compulsory dispute settlement procedures.

An essential fact that, for obvious reasons, is not reflected in the text is that Article 234 formed part of a larger package deal. The United States appears to have made the most significant concessions as regards Article 234—providing parameters for coastal state jurisdiction in a geographically limited area of the Arctic. This was done, however, as a matter of quid pro quo agreement in exchange for Canadian support for the US position on straits. The United States was satisfied with the compromise reached on the issue of straits, as reflected in the ISNT of the Third Session.[105] The text did not define straits used for international navigation; rather, it described straits to which the section on transit passage would apply as "straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone." The United States was primarily interested in not opening this issue.[106] Canada's initial position was set out in its draft article on a definition of an international strait,[107] where it referred to an international strait as a "natural passage … which … has traditionally been used for international navigation." Eventually, the US support on ice-covered areas led Canada to change its position and endorse the US-supported text.[108]

Furthermore, the agreement on the Arctic clause was reached in a package with other understandings. All three states agreed to fight the linkage between the "Arctic Article" and other "special areas," for instance. This would prevent other states from arguing they should have similar rights in vulnerable areas. For both the United States and the USSR, a concession in the Arctic meant decreased momentum of creeping coastal state jurisdiction over vessel-source pollution in other areas of the world. This was particularly felt when the negotiation on Arctic special areas was severed from the negotiation respecting other special areas, with the latter ending up with much more circumscribed

[104] See Moore, note 92, 20.
[105] Informal Single Negotiating Text (ISNT), note 87.
[106] See, for instance, US Message, note 98, where the US delegate Learson recommends what should be done to convince the Canadian delegate MacEachen to support the United States on straits. This includes an argument that "we cannot take the risk of reopening substantive questions on such a vital issue in order to improve drafting." The US Department of State concurred with proposed action but strengthened the language to be used in discussion with Canadians: "We are not willing to reopen substantive negotiations on the vital straits issue."
[107] UN Doc. A/CONF.62/C.2/L.83, Draft Article on a Definition of an International Strait, submitted by Canada, 26 August 1974, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume III, p. 241.
[108] See Bartenstein, note 2, 27 and McRae, note 38, 111–112.

coastal state powers under Article 211(5) and (6) of UNCLOS. A way to do that was to agree not to make public the "Arctic Article" until late in the UNCLOS process, thus discouraging much discussion on the text. This possibly limited the extent of consultation on the provision. The 1976 US Memorandum reveals that the United States consulted other maritime and Arctic states, of which Denmark, Norway, Japan, and the United Kingdom are explicitly mentioned as supporting the provision.[109]

Article 234 suited the political goals of the Soviet Union, once it became apparent that the USSR could not avoid the question of the Arctic at UNCLOS III. The article did not prejudice freedom of navigation other than in a limited area of the Arctic, and it could work in favor of the Soviet Arctic claims. Moreover, it appears that the lack of an IMO review mechanism was at the behest of the USSR. Canada might have sought recognition for a unilateral right to adopt measures without a review mechanism, but this issue seems not to have been Canada's imperative. Canada was preoccupied with the effectiveness of coastal state measures in the Arctic, but this could also be achieved with, for instance, a nonbinding review at the IMO. For the USSR, the IMO not having any role seems to have been a sine qua non condition for agreement on the Arctic article. In any case, after the USSR joined Canada in the negotiation of Article 234, the language of the negotiation draft clearly shifted toward lesser restrictions on coastal state jurisdiction. Thus, it is evident that without Soviet participation, the Arctic clause would likely not have been as unique as it ended up being.

One should take note that the Soviet 1971 Statute on the NSR Administration[110] bore some resemblance to the Canadian 1970 AWPPA, and that the latter arguably motivated the former. When the USSR joined Canada in favor of a potential bilateral agreement on ice-covered areas, this changed the dynamics of the negotiations between Canada and the United States. The USSR was reported to have given the text of its proposal to UNCLOS III Third Committee Chairman Yankov, pending US approval.[111] While the USSR was not the initiator of Article 234, that the USSR was satisfied with the outcome was indicated by the quick implementation of Article 234 in legislation, at least in a broad sense, with some significant omissions and additions.[112]

Conclusions

Article 234 was the result of a unique compromise, primarily a product of negotiations between the two Cold War protagonists, the United States and the USSR, and Canada, which provided the driving force behind the provision. However, the groundwork for the provision was set prior to the commencement of UNCLOS III.

What the analysis of the origins of Article 234 reveals is that a crucial factor for its acceptability was the geopolitical context surrounding the issue of the internationalization of the Arctic. The lack of clarity concerning the legal status of some waters, and the jurisdictional claims of Canada and, more importantly, of the USSR created an

[109] US letter, April 1976, note 100.
[110] Decree on the Confirmation of the Statute of the Administration of the Northern Sea Route Attached to the Ministry of the Maritime Fleet, 16 September 1971, Sobraniye Postanovleniy Soveta Ministrov SSSR No. 17, 124.
[111] US message, 5 May 1976, note 98.
[112] See Franckx, note 30, 178–179.

environment where any agreement could be perceived as successful. While Canada appeared to be willing, although with great reserve, to negotiate the parameters of an international legal regime for the Arctic with other states, the USSR adamantly refused to negotiate any international rules for the marine Arctic. However, in light of Canada's policy to obtain international recognition for the 1970 AWPPA, the USSR faced difficulty in resisting some international attention on the Arctic during UNCLOS III. An international agreement on the Arctic without the USSR would have been fragile. The USSR decided to join and support Canada, but arguably under the condition that the provision would not prejudice its policy of maintaining full control over the waters adjacent to its Arctic coast. After the USSR joined the Article 234 negotiations, the balance shifted away from the United States, and the price for having the USSR at the table was the dropping of an international review mechanism.

Finally, the analysis of the historical background indicates that some of the interpretational challenges posed by inconsistent language, such as the question of the correct interpretation of the phrase "within the limits of the exclusive zone," were not intentional.[113] The three protagonists reached an unequivocal agreement that Article 234 would apply in the EEZ and the territorial sea, although this agreement was reflected in the text rather poorly.[114] There is, moreover, no trace of a debate about this, and subsequent practice confirms this interpretation.[115]

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[113] In that respect, B. H. Oxman, "Observations on Vessel Release Under the United Nations Convention on the Law of the Sea" (1996) 11 *International Journal of Marine and Coastal Law* 201, 204, in footnote 15, who offers a plausible explanation:

> The political sensitivity of the issue was such that little if any attention was paid to technical drafting questions, including the question of ensuring precise textual harmonization with various other provisions, either from a maritime perspective or (with respect to Art 21(2) for example) from a coastal perspective. Even the clause "within the limits of the Exclusive Economic Zone", which logically should confirm that the special competence over foreign navigation applies both in the exclusive economic zone and in waters landward of the exclusive economic zone, is not drafted as well as the clause "in all waters landward of the outer limits of its Exclusive Economic Zone" that appears in Art 66 on the regulation of fishing for anadromous species, notwithstanding the major roles played by the same three delegations in the negotiation of Art 66.

[114] See, for example, A. Chircop, "The Growth of International Shipping in the Arctic: Is a Regulatory Review Timely?" 24 *International Journal of Marine and Coastal Law* 355, 371, who notes that "the LOS Convention is unambiguous in its intention to restrict its [Article's 234] application to the EEZ."

[115] See United States, US President Clinton, "Message from the President of the United States transmitting United Nations Convention on the Law of the Sea, with Annexes, done at Montego Bay, December 10, 1982 (the Convention) and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, adopted at New York, 28 July 1994 (the Agreement) and signed by the United States, subject to ratification, on 29 July 1994," US Senate, Treaty Document 39, 103d Congress, 2d Session IV (1994), 40, reproduced in T. L. McDorman, "National Measures for the Safety of Navigation in Arctic Waters: NORDREG, Article 234 and Canada," in Myron H. Nordquist, John Norton Moore, Alfred H. A. Soons, et al. (eds.), *The Law of the Sea Convention: US Accession and Globalization* (Brill Nijhoff, 2012) 409: "Pursuant to this Article, a State may enact and enforce non-discriminatory laws and regulations to protect such ice-covered areas that are *within 200 miles of its baselines* established in accordance with the Convention" (emphasis added).