Ice-Covered Areas under the Law of the Sea Convention: How Extensive are Canada's Coastal State Powers in the Arctic?*

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I. Introduction

In 1970, Canada passed the Arctic Waters Pollution Prevention Act,1 landmark legislation designed to protect its ice-covered waters. Over the ensuing years, Canada added various regulations and measures to complement the Act and carry its purpose into effect. The Act and accompanying measures received a mixed reaction globally, with the United States in particular challenging their validity under international law. Thus, in the wake of and while establishing this controversial Arctic waters regime, Canada endeavored at successive Law of the Sea Conferences to give it international legitimacy.2 The culmination of these efforts was the inclusion of “Section 8 – Ice-Covered Areas” in Part XII of the 1982 United Nations Convention on the Law of the Sea (LOS Convention). That section contains only one article, Article 234.

The question posed in this article is, did Canada achieve its aim? In other words, does Canada's regulatory scheme for protecting Arctic waters operate

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* Editors' Note. – This article was the winning entry in the 2014 Ocean Yearbook Student Paper Competition.
† I wish to thank Professor Aldo Chircop for making this subject area both engaging and challenging, and for his personal encouragement. In particular, he deserves credit for the insight expressed in this article that the wording of Article 234 of the Law of the Sea Convention represents only a snapshot of conditions as they existed in Arctic waters at the time of the Article's drafting, and that the Arctic is an area of dynamic change (See “The Textual Parameters of Article 234: Geographic, Climatic and Temporal Limits” and the concluding paragraph).

1 Arctic Waters Pollution Prevention Act, RSC 1985, c A-12 [AWPPA].
within the parameters of Article 234 of the LOS Convention? To answer this question, this article first analyses the scope of Article 234, in light of its text and context. Second, it summarizes Canada’s Arctic waters regime, noting any inconsistencies with Article 234. Finally, suggestions regarding how Canada might best protect its Arctic waters in the future, via Article 234 or otherwise are offered.

II. Article 234

A. The Contextual Parameters of Article 234

1. Historical Context

Prior to the Third United Nations Conference on the Law of the Sea, efforts had failed to draft a comprehensive treaty that would form a ‘constitution’ for the world’s oceans. The primary obstacle to agreement was the tension between, on the one hand, traditional maritime powers such as the United States and the United Kingdom who desired to preserve navigational freedoms, and on the other hand, coastal States who were keen to assert greater influence over the waters off their shores, both to enhance security and to safeguard resources and the marine environment.3

Within this setting, there was a push by coastal States to expand their territorial seas beyond the formerly accepted limit of three nautical miles (NM).4 By the time Canada had declared a 12 NM territorial sea in 1970, there was evidence of customary State practice justifying the extension.5 By contrast, maritime powers were fighting to maintain freedom of navigation and overflight in and above important navigation routes such as straits.6 It was in this environment that States negotiated and drafted the LOS Convention, ultimately reaching a compromise entailing a careful balance “between coastal state authority and global freedom of navigation.”7

So, for example, while under the Convention coastal States enjoy significant powers within the 12 NM limit of their territorial sea, the rights do not

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5 Pharand, n. 2 above, p. 42.
6 For example, the North Corfu Channel; Pharand, n. 2 above, pp. 30–42.
7 Kraska, n. 3 above, p. 269.