No Heavy Fuel Oil at Svalbard—A Legal Ban?

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Introduction

“Something” is happening in the Arctic and the attention is intense. The once ice-covered area now offers new shipping routes, cruise tourism, and exploitation of natural resources. However, as always, the coin has two sides and the new possibilities introduce new challenges and dangers. In order to meet those dangers and safeguard the vulnerable nature and ecosystems of the Arctic, coastal States can take protective measures. To this end, Norway has introduced a unilateral ban on transport and use of heavy fuel oil (HFO) in the national parks—and in the territorial sea—of Svalbard. This article addresses the scope and legality of the Norwegian ban under international law.

The Norwegian ban applies to shipping and ships flying the flag of any State. This raises issues in connection with, inter alia, “innocent passage” as defined in the United Nations Convention on the Law of the Sea (UNCLOS). Under UNCLOS, the coastal State has certain rights to adopt national rules and regulations, including those to protect the marine environment. In this light, the Norwegian ban could be acceptable. However, the rights of the coastal State must be exercised in accordance with the right of innocent passage that is enjoyed by ships of all States, and the rules and regulations cannot apply to the design, construction, manning, or equipment unless they are giving effect to generally accepted international rules or standards. These issues will be addressed in this article.

Following the discussion of the Norwegian ban in the light of the right of innocent passage, the “Arctic exception” in UNCLOS Article 234 will be discussed. Article 234 provides for the adoption and enforcement of non-discriminatory

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* The article is written solely in a personal capacity and does not represent the views of the Danish Ministry of Foreign Affairs.


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 (EEZ). Further, there must be particularly severe climatic conditions and ice covering the EEZ for most of the year so as to create obstructions or exceptional hazards to navigation, and pollution of the marine environment in the EEZ could cause major harm to or irreversible disturbance of the ecological balance for Article 234 to apply.

This article also discusses to what extent Article 234 can legitimize the Norwegian ban. It examines whether the geographical scope of Article 234 covers the territorial sea, or if it only applies within the limits of the EEZ. Finally, this article analyzes the interpretation of the requirement for ice cover contained in Article 234.

The article will primarily deal with the unilateral steps taken by Norway in order to secure and protect the marine environment at Svalbard. The work of the Arctic Council and work done under its auspices will be briefly touched upon. International rules and standards related to shipping and the protection of the marine environment are, to a large extent, developed under the UN umbrella and those rules and standards are referred to where appropriate. The main focus is on the Norwegian management of the marine environment at Svalbard, with only a brief discussion of the delicate and debated sovereignty issue—Norway’s right to establish maritime zones, etc.—under the Spitsbergen Treaty.

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3 For example, see the work performed under the Protection of the Arctic Marine Environment Working Group (PAME), available online: <http://www.pame.is/index.php/shortcode/about-us>; the initiative by the United States of America to establish a task force to assess future needs for a regional seas program or other mechanisms as appropriate for increased cooperation in Arctic marine areas adopted in the Iqaluit Declaration (Canada), April 24, 2015, available online: <http://www.arctic-council.org/index.php/en/document-archive/category/604-declaration-sao-report>.


5 For example, the work performed by the International Maritime Organization (IMO).

6 The Spitsbergen Treaty is between Norway, the United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland, the British overseas Dominions, and Sweden concerning Spitsbergen. It was signed in Paris on February 9, 1920.