

Article 234 of UNCLOS and the Arctic Prerogative for an Ice-covered Area*Kamrul Hossain*

Article 234 of the UN Convention on the Law of the Sea (UNCLOS) provides an exception to the rules generally applicable to states' Exclusive Economic Zone (EEZ). The Article applies up to the limit of the EEZ, or 200 nautical miles from the coastline of a coastal state. Technically, a state's EEZ is measured from the point marking the 12-nautical-mile limit of its territorial sea, whereby the outer limit of the zone is 188 nautical miles from the outer limit of the territorial sea. A coastal state enjoys full sovereignty in its territorial seas. However, the exercise of sovereign rights by coastal states in their EEZs is limited to resource extraction, management of natural resources and economic exploitation. According to Article 60 of the UNCLOS, coastal states are entitled to regulate certain activities in their EEZs in connection with, for example, marine environmental protection, conservation of living resources and construction of artificial islands or structures. In doing so, however, the coastal states must pay due regard to the rights of other states to enjoy certain entitlements, including freedom of navigation.

While such primary provisions generally apply to ice-covered EEZs much as they do to all others, Article 234 offers special prerogatives to coastal states, one being a right to regulate the zone with additional and stricter measures. A marine area with ice present for most of the year may cause sensitive and severe climatic conditions which can obstruct navigation or expose vessels to exceptional and unpredictable hazards. In fact, the unique features prevailing in ice-covered marine areas entail heightened risks. Accordingly, states may implement stricter measures to prevent, reduce and control marine pollution from vessels so that no major harm or irreversible disturbance to the ecological balance will occur. However, to adopt and enforce stricter regulations, coastal states have to satisfy two criteria. First, no restrictions on navigation should be put in place without explicit justifications, supported by best available scientific evidence, that the marine environment is at risk. Second, the regulations must be non-discriminatory, meaning that they have to apply equally to all vessels.

The reference to “ice-covered areas” in Article 234 does not make specific mention of the Arctic. However, the Arctic was manifestly ice-covered during the time when the UNCLOS was signed (1982). Even today, most of the Arctic Ocean is ice-covered for most of the year. What is more, the Arctic is characterized by harsh climatic conditions, with these including extreme low temperatures during the long winter months, a long period of darkness, unpredictable weather and climatic conditions, alteration of sea-ice dynamics and a change in the historical variability of the climate. These conditions render the Arctic marine area a risk-prone region exposing vessels to extraordinary hazards with the potential to cause irreversible damage and disturbance to the marine environment and its ecological balance. Hence, the term “ice-covered areas” in Article 234 can be seen as capturing the situation prevailing in the Arctic maritime zones.

Given the increase in navigation now that the Arctic sea routes have been open during the summer months, the applicability of Article 234 has become a particularly salient issue. The two most important sea routes in the Arctic are the Northwest Passage (NP) and the Northern Sea Route (NSR). While the NP consists of frozen water bodies claimed by Canada as its internal waters (through historic title), the NSR includes both territorial seas and Exclusive Economic Zones (EEZs). These routes qualify as “ice-covered areas”, whereby coastal states may impose stricter regulations governing their use under Article 234. The focal coastal states in this case are Canada and the Russian Federation, for the NP and NSR, respectively, and they have explicitly invoked Article 234.

However, UNCLOS does not provide detailed guidance on what those special measures might be. The coastal states enjoy a fair amount of discretion regarding how they implement Article 234. This being the case, national regulations preventing, minimizing and controlling pollution from ships very often apply to a state’s EEZ. The regulations also frequently contain provisions concerning the safety of navigation. Special and stricter measures enacted and invoked by Russia inform vessel operators how and when to seek permission for navigation through the NSR, the detailed requirements concerning the documentation needed and restrictions on entering and sailing through the route. Ships are not allowed on the NSR if they do not meet the requirements indicated in the regulation. Of importance here is the requirement that

operators engage icebreaker services, a measure imposed and to be undertaken by dint of Article 234.

For example, Russia's regulation not only requires the use of its icebreakers specifically, but also imposes fees for the use of the services along the length of the NSR. The particular regulation is an exceptional measure adopted as a result of national application of Article 234. However, determining the fee for and extent of the services rendered as well as the risk to the environment is complex, and will probably be a contentious issue in the future as use of the route increases. Currently, ships have to pay the fees whether they use the icebreaker services offered by Russia or not. In other words, operators pay the fees for their mere presence in the NSR. This would spark yet another dispute concerning the legal status of the route as an "ice-covered area". Article 234 refers to "ice covering ... for most of the year". The phrase "most of the year" would qualify the NSR as an "ice-covered area" despite its being ice-free for some of the year, a period argued to be less than six months. In sum, despite the questions that may be raised in the future, the Arctic marine areas possess the legal status of "ice-covered" areas within their EEZs; accordingly, the coastal states enjoy a prerogative whereby they may adopt and enforce such stricter and restrictive regulations as may be necessary for the protection of marine environment and its ecological balance.

For more on this, read...

Cowan E and Others, 'Global governance in Arctic waters – new times. new stressors. catching up with pharmaceuticals' [2022] *The Polar Journal* 1

