THE RUSSIAN ARCTIC STRAITS

INTERNATIONAL STRAITS OF THE WORLD

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THE RUSSIAN ARCTIC STRAITS

R. Douglas Brubaker

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FOREWORD

This is the fourteenth book in the series *International Straits of the World*, organized and edited at the Graduate College of Marine Studies of the University of Delaware. It is of special interest because the first book of the series, published in 1978, was entitled *The Northeast Arctic Passage*, a study written by the distinguished scholar Dr. William E. Butler.

Twenty-six years have past since the publication of that pioneering study. At the time negotiations over a new convention for the law of the sea had been proceeding languidly toward the resolution of many issues of maritime boundaries, access and exploitation of marine resources, environmental degradation, and the settlement of disputes. Crucial to the signature of the convention by the great maritime States was a rule to allow free sea and air passage through key chokepoints of the ocean that might be subjected to coastal State jurisdiction as territorial seas widened from three to twelve nautical miles.

In 1982 the UN Law of the Sea Convention was signed (since ratified by more than 140 States) with explicit provisions in Articles 37–44 for transit passage through international straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. Generally there is to be no interference by coastal States with the expedient passage of all vessels through a designated corridor. During the later negotiations of the text of the convention, however, more attention was paid to environmental considerations in the uses of sea. In consequence, a special Section 8, Article 234, provided that coastal States had the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction, and control of marine pollution in ice-covered areas within the limits of the exclusive economic zone. This might include ice-covered straits.

Dr. Brubaker in this book has addressed the status of law and State practice in the Russian Arctic straits, particularly since the legal issues involved have been contentious between Moscow and Washington. First he has described the Northern Sea Route, which could provide a shorter commercial sea passage between Western Europe and Asia, carefully identifying each of the straits and the ports along the way. Not only has he examined the Russian legislation and evidence of State practice for its ice-covered areas, but he has also compared the legislation and State practice of the United States and Canada. In essence, there seems to be emerging a customary international law for the passage of vessels through the Arctic area in general and particularly for international straits. Due to the risks inherent in the geographic and strategic position of the Russian Arctic, Dr. Brubaker recommends some steps that might be taken to reduce international conflict over this sensitive region.

This study originated from an academic dissertation for a Doctoral Degree in Juridical Science in the Department of Law, Stockholm University. It seemed to me that Dr. Brubaker had made a rather long but unique analysis of the Russian Arctic Straits,

which was backed by extraordinary research. His notes indicate his use of original documents and a wide ranging literature as well as personal communications. After several months of editing, I believe his work will be a distinguished contribution to policy analysis for the Russian Arctic Straits.

The series on international straits of the world was launched with a grant from the Rockefeller Foundation. Although the funds for the project were exhausted many years ago, I still wish to thank the Foundation for its initial encouragement and largesse in facilitating these studies of the straits of the world. Few geographic features of our planet are so vital to commerce and international security. My gratitude also goes out to Annebeth Rosenboom at Martinus Nijhoff, the publisher, and to my secretary, Jacqueline Bijansky, who suffered with me innumerable amounts of edited pages on her computer.

Newark, Delaware, 21 June 2004 Gerard J. Mangone

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Finally, I would like to express my gratitude to my wife, Ellen Flognfeldt, and daughters, Andrea Flognfeldt Brubaker and Ingrid Flognfeldt Brubaker for their support, encouragement, assistance and vivacity.

The responsibility for the views expressed in this work as well as for any mistakes is mine alone.

The book is an updated and revised version of reports produced as the result of project work performed under the auspices of the International Northern Sea Route Programme (INSROP). INSROP was a comprehensive, international, multidisciplinary research programme (1993–98) designed to investigate the possibilities for international commercial navigation through the Northeast Passage. The programme was based on a mutual agreement for research co-operation between three principal partners: Ship & Ocean Foundation (SOF), Japan; Central Marine Research & Design Institute (CNIIMF), Russia; and the Fridtjof Nansen Institute (FNI), Norway. The INSROP Secretariat was located at the Fridtjof Nansen Institute. The author would like to thank the sponsors of INSROP: The Nippon Foundation/Ship & Ocean Foundation, the Russian Federation, the Research Council of Norway, the Royal Norwegian Ministry of Foreign Affairs, the Royal Norwegian Ministry of the Environment, the Royal Norwegian Ministry of Industry and Trade, the Norwegian Industrial and Regional Development Fund, Norsk Hydro, Norwegian Shipowners' Association, Kværner, Phillips Petroleum Company Norway and the Fridtjof Nansen Institute for their support.

27 May 2004 R. Douglas Brubaker

LIST OF MAPS AND TABLES

CHAPTER 1

SEAS AND STRAITS OF THE RUSSIAN ARCTIC WATERS[1]

Several countries have been interested in the opening of an Arctic sea route north of Russia, which would greatly reduce shipping distances between the ports of Europe, Asia, and North America.[2] Because of modern technology it may be possible to reduce commercial shipping expenses and increase revenues by a transit of the Northern Sea Route.[3] Likely cargoes would include bulk and containerised cargo, comprising fertilisers, fabricated metals, agricultural and forest products, shipped between Northwest Europe and the Far East, and the U.S. and Canadian West Coast.

This vision, however, may be unrealistic due to the extreme ice and weather conditions in the eastern section of the Northern Sea Route (NSR), making the long term economics unprofitable, though climate change may be a moderating factor.[4] Only regional use to and from Russian Arctic destinations appear realistic in the short term. Hydrocarbons, oil, and condensates have been shipped regionally between Northwest Russia, Timan Pechora, Yamalo–Nenets and the Yenisey basin.[5]

The main problems involving transport along the Northern Sea Route include the cost of insurance, the cost of new vessel design technology, and both an operational and political risk factor. A major concern also relates to the effects such a route may have on the Arctic environment,[6] which has been a subject of much study.[7] Furthermore, during the Cold War the Arctic was known for its political sensitivity, being strategically important to both the Soviet Union and the United States. As a consequence there is still considerable controversy over the precise legal status of the Russian Arctic route.[8] Though Russian and Soviet vessels have traversed these waters rather frequently, the passage of foreign vessels has been mostly exceptional.[9]

Latvian, Finnish, and German oil tankers have sailed from the port of Arkhangel'sk to the ports of Amderma, Dudinka, Khatanga, Tiksi and Yana.[10] During these voyages nearly all traditional maritime zones are traversed, including internal waters, the territorial sea, and the exclusive economic zone.[11] The Kara Gates and Vil'kitskii Straits and other straits are also traversed, and depending upon ice conditions the passages may even include the high seas.[12] Thus, in contrast to most transport routes there is not a single fixed course. The presence of ice affects not only the geographic placement of the route but the legal regimes as well. These peculiarities will be presented in Chapter 2, including a somewhat broader defined Northeast Passage. But first a brief description

of the geographical characteristics of the Russian Arctic waters and the Northern Sea Route is needed.

Geographical Characteristics[13]

Most of the main straits dividing the five seas are well-known in existing literature; others are relatively unknown outside Russia.[14] Their description is based both upon an investigation of Russian charts used for navigation by Russian vessels along the Northern Sea Route[15] and the literature. The overview is not a complete list of all the straits along the route, but rather a presentation of all straits from the Norwegian boundary to the Bering Strait which are mentioned by name. Although many of the straits are situated close to the shore and may thus not normally be used for navigation, the important question is whether it would be possible to use the actual strait for navigation at all, both in fact and in law.

Russian Arctic ports will also be briefly described as well as sailing directions chiefly to indicate which routes are to be preferred in given situations. For more detailed information, reference can be made to the Russian *Guide to Navigation through the Northern Sea Route*.[16]

Most texts with transliterations of Russian words contain a confusing variety of translations, transliterations, and interpretations.[17] The English spelling of the Russian names thus often varies somewhat dependent upon source. The style in this book has depended on the source to preserve accuracy. Russian names for islands and straits have been translated into English where they have an obvious and clear meaning, and there already is a tradition for using their English translations.[18] For the straits, their Russian transliterations have been given in parentheses when they are mentioned for the first time in the text. In order to facilitate recognition of the Russian words, the common transliteration standard is used rather than the linguistic one.[19]

Seas of the Northern Sea Route

The waters north of the Russian mainland are subdivided into five divisions, or seas, by peninsulas and archipelagos constituting an extension of the Eurasian continent towards the North Pole. In the west a continuation of the Ural Mountains produces the Novaya Zemlya archipelago, and further to north-west the Franz Josef and Svalbard archipelagos, which comprise the eastern boundaries of the Barents Sea (*Barentsevo more*). To the east of these archipelagos lies the Kara Sea (*Karskoye more*), which stretches eastwards towards the Severnaya Zemlya archipelago, a prolongation of the Taimyr Peninsula. The ocean area between Severnaya Zemlya and the New Siberian Islands (*Novosibirskiye Ostrova*) is called the Laptev Sea (*More Laptevykh*), while further to the east Wrangel Island separates the East Siberian Sea (*Vostochno-Sibirskoye more*) from the Chukchi Sea (*Chukhotskoye more*).

The region as a whole is characterised by harsh climatic conditions, including a long and cold winter with constant winds and snowstorms, and a summertime with frequent fogs and subsequent reduced visibility. Only from mid-July to mid-September

does the temperature rise sufficiently to melt ice and provide a navigable channel along the central and eastern Eurasian coast. Further west larger ocean areas are navigable for somewhat longer periods.

Wind speeds are lower and gales less frequent in the Laptev and East Siberian Seas than in the Barents and Kara Seas. The entire area is usually very overcast particularly in summer. Cloud covers tend to be heavier near the edge of floating ice than near the coast. Visibility is additionally affected by the polar night. Winter areas north of 75°N are completely dark at mid-day. South of that latitude twilight conditions prevail. Even in conditions with sufficient light the snow cover produces a lack of contrast which aggravates the task of distinguishing and identifying objects.

Most of the precipitation occurs in the period from July to September, with August usually being the month with the maximum amount. Precipitation is lowest from December to April, and the Laptev and East Siberian Seas enjoy a lower amount than the other seas along the route. Most precipitation is in the form of snow. During the summer it is common for rain and snow to alternate along the coast.

Barents Sea

The Barents Sea is the westernmost of the Arctic seas north of Russia. It is bordered to the west, north, and east by the Svalbard, Bear, Franz Josef, Novaya Zemlya, and Vaygach Islands, and to the south by the Norwegian and Russian mainland. Technically the sea is not considered by the Russians to constitute a part of the Northern Sea Route, which they maintain begins at the western entrances of the Novaya Zemlya straits or to the north of Novaya Zemlya.[20]

The area between Kolguev Island and Novaya Zemlya is sometimes called the Pechora Sea, but this is considered to be part of the Barents Sea. There are few islands in the Barents Sea, Kolguev Island being the largest. From the Norwegian mainland to Spitzbergen, the largest island in the Svalbard archipelago, the only island occurring is the small Bear Island (*Bjørnøya* in Norwegian; *ostrov Medvezh'iy* in Russian).[21] The average depth of the Barents Sea is approximately 200 meters.

Ice conditions in the Barents Sea differ from the other Arctic seas due to the warm waters of the North Cape current flowing in as a branch of the North Atlantic current along the Norwegian coast. Most ice in the Barents Sea is of local origin; ice movement out of the sea or into it from the polar basin or the Kara Sea appears to be modest. The ice is nearly always less than one year old and is relatively thin. The western parts of the Barents Sea from North Cape to Svalbard are navigable all the year round. Its eastern parts are usually free of ice up to 75°N by mid-June. By early July the entire western coast of Novaya Zemlya is ice-free, and then the entire Barents Sea south of a line joining South Cape (the southernmost point on Spitzbergen) and Cape Zhelaniya on Novaya Zemlya is navigable.

In some years with favorable ice conditions navigation along the western coast of Novaya Zemlya has been possible as early as February, however April is usually the worst month for navigation as far as ice conditions are concerned. The mean limit of

non-navigable ice then extends from off the south-western coast of Svalbard to Bear Island, south-east of which the limit runs eastward to about 40°E longitude and 73°30'N latitude. The limit then continues south-eastward, crossing the 70th parallel at about 44°E, thereafter curving down to the Cape Svyatoy Nos off the Murmansk coast at about 40°E. In some years the extreme southward ice limit may approach the western part of the Murmansk coast as close as 80 nautical miles.[22]

The most favorable month is September when the mean ice limit moves to the north-east from the south-eastern coast of Svalbard and intersects 40°E at about 79°30'N, moving east-south-eastward to a position about 40 nautical miles north of Cape Zhelaniya. Navigation to the Franz Josef islands is normally possible in July and August, and on occasion also in June. Although many of the channels and fjords are permanently ice-bound, the larger ones are free of ice at some period each season. In October new ice usually starts to form in the shallower areas of the Barents Sea, including the southern coasts of Svalbard, the south-eastern shores of Franz Josef Land, off the coast of Novaya Zemlya, and in the Gulf of Pechora. By November the western coast of Novaya Zemlya is enclosed by ice, and much of the sea north of 75°N is frozen by December. The mean ice limits then gradually extend southward until the March–April conditions are re-established.

The ice movements of the Barents Sea are to a large extent influenced by winds and sea currents. In the period from February to April strong south-westerly winds drive the ice in a north-eastern direction, and as a result the southern Barents Sea is usually ice-free in May–June. However, ice accumulates on the coast, in the straits linking the Barents and Kara Seas and in shoal waters. As late as in early July ice may be found both north and south of Kolguev Island. It has usually disappeared by mid-July but may remain in the Gulf of Pechora until August, sometimes affecting the southern straits.

Kara Sea

The Kara Sea is located between Novaya Zemlya, the eastward side of Franz Josef Land, and the Severnaya Zemlya archipelago. It differs from the Barents Sea in several respects. There are thousands of islands in the Kara Sea, and it is shallower with depths averaging 90 meters, and 40% of its total area is less than 50 meters deep.

The climate of the Kara Sea alters between that of the Barents Sea and the polar seas further to the east. Its south-western parts experience nearly twice as many days of temperatures above zero as its north-eastern parts, but also have highly variable wind and snowstorms. There is less ice in the western parts,[23] but the incidence of fog is higher. The circulation of the Kara Sea is strongly influenced by the summer outflow from the Ob' and Yenisey Rivers. The considerable outflow of fresh river waters into the sea appears to affect three surface currents. The westernmost flows from the Ob' delta north-eastward towards Novaya Zemlya, continues southward along the eastern coast of the archipelago, and then completes the circle by moving northward as the Yamal Current along the Yamal Peninsula. The central current flows

directly northward into the Arctic Ocean, and the easternmost current moves in a north-easterly direction and then towards Vil'kitskiy Strait and the New Siberian Islands, flowing into the Laptev Sea. Kara Sea water also enters the Laptev Sea via the Shokal'skiy Strait along its eastern coast.

Much of the Kara Sea is ice-covered throughout the year, and ice may be encountered at any time during the navigational season. Ice conditions vary extensively from year to year, and it is thus difficult to give directions. In some years the northern parts are more favorable for navigation, while in others the southern straits are to be preferred. On an average, the entire Kara Sea is open to navigation from early August to late September or even early October. In the most favorable years the season runs from late July to mid-October. With ice-breaker assistance the southern Kara Sea is navigable in June. The worst conditions for navigation occur in the vicinity of the Nordenskjöld Archipelago, where heavy concentrations of ice between the islands may persist during the entire season. When this happens, vessels are required to hold to the inner route along the coast.

Laptev Sea

The Laptev Sea is situated between the Taymyr Peninsula and Severnaya Zemlya in the west and the New Siberian Islands in the east. Its average depth is 578 meters, but 53% of the seabed has depths of less than 50 meters. The continental shelf of the Laptev Sea has depths varying from 10 to 40 meters. It is traversed by five large and deep submarine valleys.

A cold current carrying large icebergs from the Arctic Ocean flows south-eastward down the eastern coasts of Severnaya Zemlya, moves southward along the eastern coast of the Taimyr Peninsula towards the Khatanga estuary, where it is joined by the Lena and Khatanga Rivers along the coast. Thereafter, it flows north-eastward and divides, part of it moving northward up the western coast of the New Siberian Islands, and part of it flowing into the East Siberian Sea.

Ice conditions in the Laptev Sea are not as difficult as in the other polar seas. Much of the sea is usually ice-free and open for navigation during August and most or all of September. During this period ice from the Arctic Ocean is often encountered in the north-western part. The sea begins to freeze in late September or early October and is frozen over by November. In winter the entire coastal region and southern part of the sea is ice-covered. The substantial outflow of river waters in the spring causes belts of open water to appear early, and these are of great importance for navigation in the area. Ice conditions are usually more favorable in the eastern part at the beginning of the navigational season. The worst areas are the eastern approaches to the Vil'kitskiy Strait and around the New Siberian Islands.

East Siberian Sea

The East Siberian Sea is located between the New Siberian Islands in the west and Wrangel Island in the east. It is an extremely shallow sea having depths of less than

40 meters. It is one of the flattest areas of comparable size on the earth. There are several groups of islands in the sea.

Depressions moving in from the south-east make winters less severe and thaws more frequent than in the Laptev Sea. The western part from the New Siberian Islands to the Kolyma River is practically ice-free in summer, whereas in the eastern region over to Wrangel Island, ice is almost always present. The thaw usually starts in May with ice breaking up in the Kolyma River delta and western area of the sea in early July. By mid-November the entire sea is normally frozen again. During the navigational season ice conditions depend on wind directions. Offshore winds may open a path close to the shore, thus making navigation possible. However, the eastern part of the East Siberian Sea is one of the most difficult passages of the entire Northern Sea Route.

Chukchi Sea

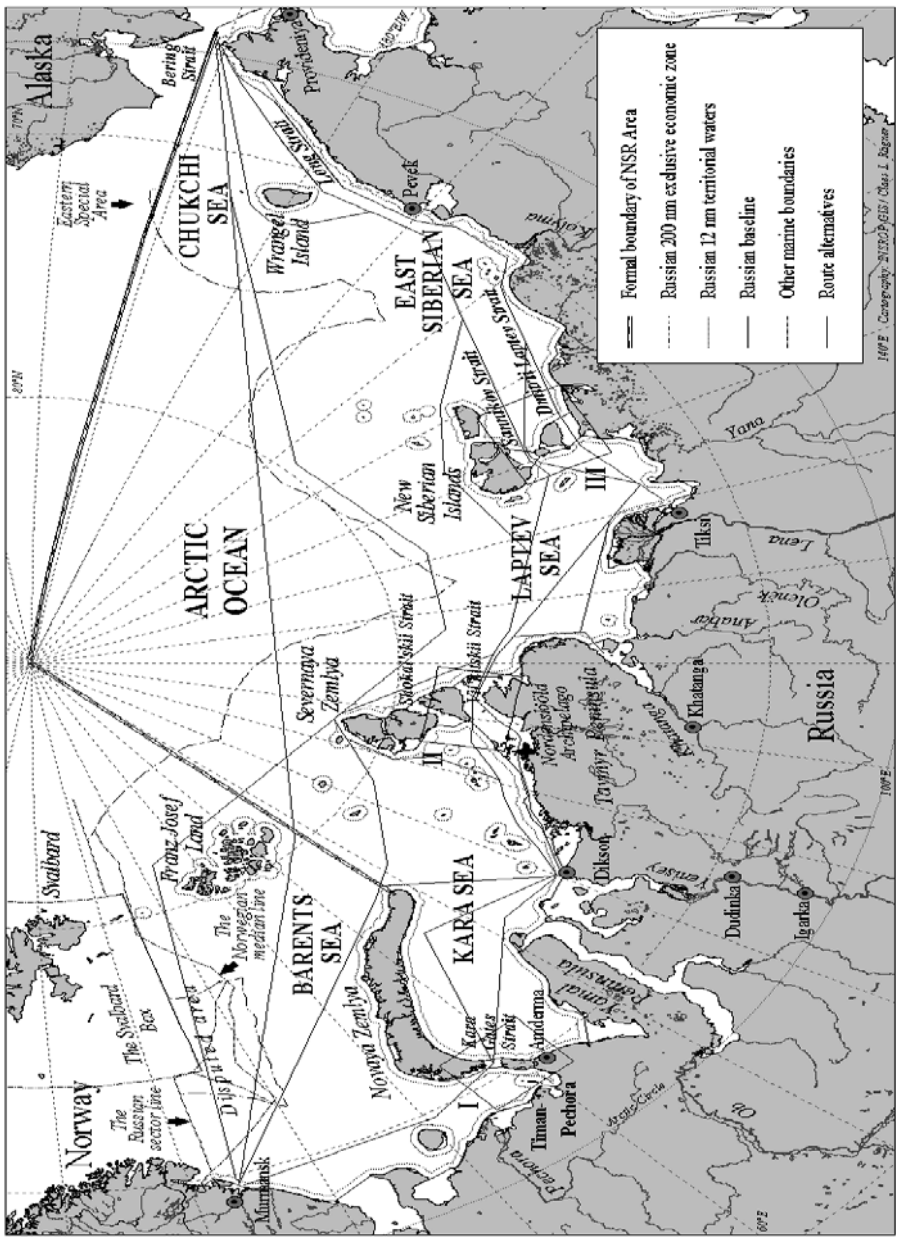
The Chukchi Sea borders both Russian and U.S. coasts. It lies within a line drawn between Cape Krigugon in Asia and Cape York in Alaska with its westward boundary following a line drawn between Cape Yakun on the north-eastern Siberian coast and Cape Blossom on Wrangel Island. To the east, its boundary follows the meridian passing through Point Barrow, Alaska.

In early July the ice immediately north of the Bering Strait begins to clear as the pack ice breaks off from the shore ice and moves northward. The Chukchi Sea is mainly free of ice to about the 70th parallel in late August or early September. There are however substantial annual variations. The main factor in the clearing of ice is the flow of warmer water northward through the Bering Strait. After mid-September, the ice extends rapidly southward, and by mid-October, the entire Chukchi Sea is usually ice-bound. In most years the Chukchi Sea is one of the more difficult passages of the route.

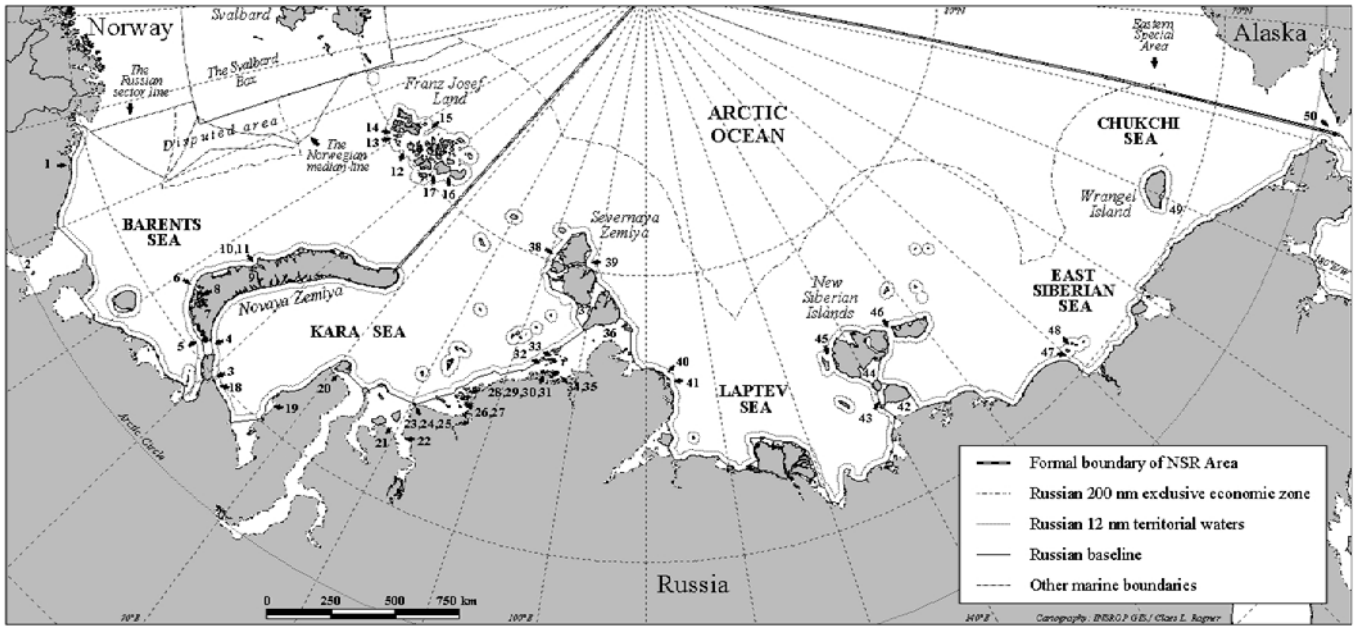
Though interest in traversing the Northern Sea Route has existed over several centuries, it is only recently that the possibility exists, both technologically and politically, for foreign vessels to navigate these remote and harsh regions. Due to varying ice and climatic conditions there is not one fixed route, but several, crossing the Barents (Novaya Zemlya straits), Kara, Laptev, East Siberian and Chukchi Seas, which are shown in Map 1. These seas are characterised by more stringent ice conditions the further eastward they lie, although the Laptev Sea is an exception.

The Main Straits of the Northern Sea Route

The five seas that can provide passage through the Northern Sea Route – Barents, Kara, Laptev, East Siberian and Chukchi – are linked by straits. Each of these narrows has its own geographical characteristics that can affect the transit of vessels.



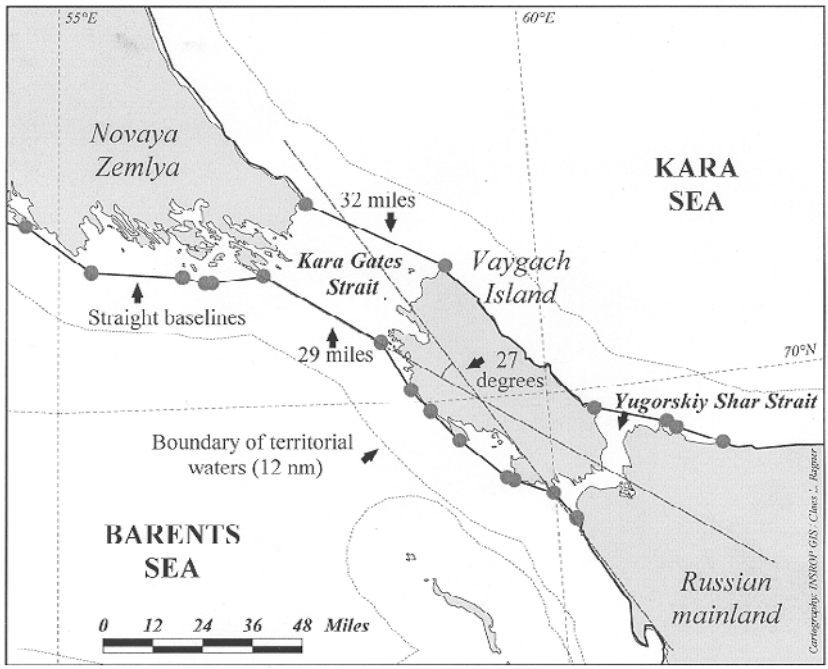
Map 1. The Northern Sea Route[24]



1 = Kil'din Strait; 2 = Gorlo Strait; 3 = Yugorskii Shar Strait; 4 = Kara Gates Strait; 5 = Nikol'skii Shar Strait; 6 = Kostin Shar Strait; 7 = Shirokii Strait; 8 = Uzkii Strait; 9 = Matochkin Shar Strait; 10 = Krotov Strait; 11 = Kazakov Strait; 12 = De-Bruyn Strait; 13 = Meyers Strait; 14 = Nightingale Strait; 15 = British Canal Strait; 16 = Markham Strait; 17 = Austrian Strait; 18 = Morozov Strait; 19 = Sharapov Shar Strait; 20 = Malygin Strait; 21 = Ovtsyn Strait; 22 = Krestovskii Strait; 23 = Vega Strait; 24 = Lena Strait; 25 = Preven Strait; 26 = Dubravin Strait; 27 = Glubokii Strait; 28 = Fram Strait; 29 = Sverdrup Strait; 30 = Zaria Strait; 31 = Palander Strait; 32 = Matisen Strait; 33 = Lenin Strait; 34 = Toros Strait; 35 = Vostochnyi Strait; 36 = Vil'kitskii Strait; 37 = Shokal'skii Strait; 38 = Yungshturm Strait; 39 = Red Army Strait; 40 = Maud Strait; 41 = Murmanets Strait; 42 = Dmitrii Laptev Strait; 43 = Eterikan Strait; 44 = Sannikov Strait; 45 = Zaria Strait; 46 = Blagoveshchensk Strait; 47 = Kolyma Strait; 48 = Melekhov Strait; 49 = Long Strait; 50 = Bering Strait
NOTE: The maritime boundaries in the Barents and Chukchi Seas are noted. However, they are not the focus of this work, and may differ slightly from actual charts.

The original map was received from A. Yakovlev, under INSROP Geographic information is taken from W. Butler, "The Legal Regime of Soviet Marine Areas" The Soviet Maritime Arctic, ed. Lawson W. Brigham, p. 217; W. Butler, Northeast Arctic Passage, pp. 4, 18-21, 28-29, 33 and 39 ,and W. Butler, USSR Development Law, C.3. pp. 27, 38, 42. Cross reference was made to Arctic Atlas, pp. 20-21, 102, and 104-105, and the Russian Charts noted in Appendix VI.

Map 2. Straits of the Russian Arctic



NOTE: The angles were measured directly on the Russian charts and may differ slightly here.

Map 3. Kara Gates Strait

Straits Connecting the Barents and Kara Seas

There are three straits connecting the Barents and Kara Seas, the Yugorskiy Shar Strait (*proliv Yugorskiy Shar*), the Kara Gates Strait (*Karskiye Vorota*), and Matochkin Shar Strait (*proliv Matochkin Shar*). While the former two create passages to the south and north of the Vaygach Island, located between Novaya Zemlya and the mainland, the latter divides the long Novaya Zemlya archipelago into two main islands.

The Yugorskiy Shar Strait, which is between 21 and 22 nautical miles long, has a least width of 1.5 nautical miles[25] and a least width of its fairway of 0.9 nautical miles, separates the Vaigach Island from the mainland. There are several shoals in the strait, but in the fairway there is a minimum depth of 13.4 meters. Anchorage is possible in almost any part of the strait despite occasionally strong tidal streams, but ice from the Kara Sea can be driven quickly into the strait by northerly winds. The strait is well marked by leading lines and beacons, and the channel is buoyed, although ice has been known to carry buoys away.

The strait usually freezes solid in winter and is not clear of ice until late July. Unless Kara Sea ice drifts into the strait during the summer, the strait often does not freeze over until December. If, however, the strait is blocked with Kara Sea ice when freez-

ing starts in the autumn, the entire strait may be ice-bound by late October. Navigation has been possible as early as mid-June, but in a bad season the strait may be blocked throughout the summer.

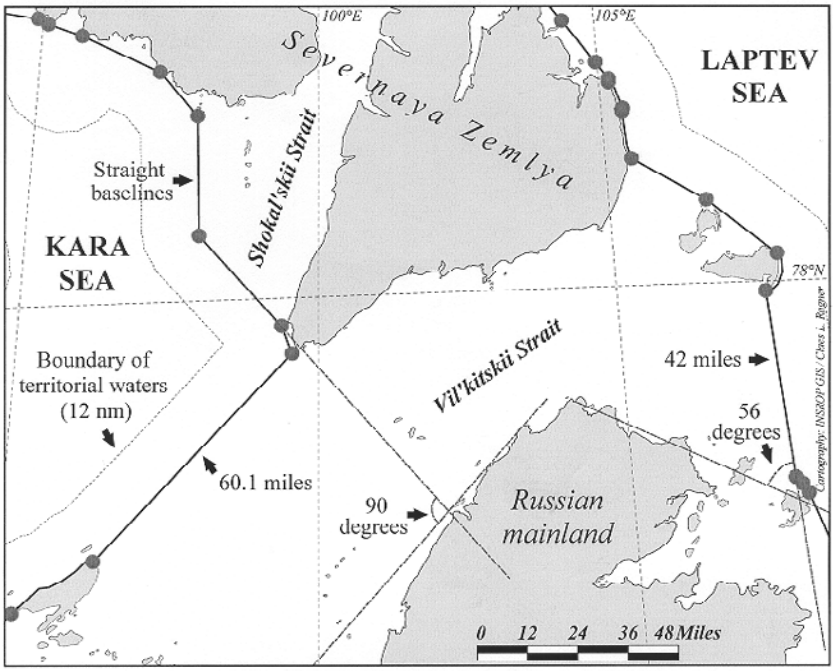
Navigation through the Yugorskiy Shar Strait is risky because of strong and uncertain currents as well as poor visibility due to frequent fogs. The most difficult part for navigation is the western entrance of the strait from the Varneka Bay to Cape Stvornyy.

The Kara Gates Strait separates Vaygach Island from Novaya Zemlya. It is approximately 21 nautical miles long,[26] and has a least width of 22 nautical miles.[27] The least depth of the strait is 15 meters. The north-eastern entrance contains a large number of islands and islets and thus constitutes the most difficult part for navigation. The strait is not well marked, and according to the *Guide to Navigation through the Northern Sea Route* navigation in the strait is difficult due to strong currents, frequent fogs, the presence of drifting ice, and several other navigational hazards.[28] It is impossible to anchor in the strait because of its great depths and the difficulty of navigating the skerries along the more shallow approaches to the shores.

The strait does not freeze solid except in particularly hard winters; even then it freezes only for a brief period. However, ice can be encountered in the strait all year round, and in winter, it is covered with drifting ice. Ice conditions during the navigational season depend primarily on conditions in the south-western Kara Sea and the eastern coast of Novaya Zemlya. With wind coming from the north and east, ice quickly moves into the strait and occasionally forms a wall off its north-eastern entrance. At the opening of the navigational season, considerable amounts of ice frequently pass through the strait into the Barents Sea, part of it working its way westward along the Novaya Zemlya coast. In a normal winter the strait fills with pack ice, though an open channel remains in its central part. The ice usually breaks up in late June and disappears by early August. Brash ice appears towards the end of October, pack ice by mid-November, fast ice about late November, and complete freezing, if it occurs, in January.

The Matochkin Shar Strait divides Novaya Zemlya into two parts about 155 nautical miles from its southern extremity. The strait is about 55 nautical miles long, passing through high and rugged mountains. With a minimum width less than one-half a nautical mile and an average width of one nautical mile, it is the narrowest of the Novaya Zemlya straits. The western part of the strait contains a large number of reefs, banks, and shallows and has a minimum depth of 12 meters. The eastern part is deep and fjord-like.

When ice conditions are favorable, vessels of any size can transit the strait, but both entrances may be difficult to identify in fog since the strait lies between mountains of uniform appearance. Ice conditions differ substantially between the eastern and western parts. The appearance of ice in the western part during the navigational season is exceptional, whereas its presence in the eastern part depends wholly upon ice in the Kara Sea. Whenever ice is accumulated off the eastern coasts of Novaya Zemlya, it will be driven by easterly winds into the Matochkin Shar Strait by the westward tidal stream. Occasionally the ice will close the eastern entrance and a considerable



NOTE: The angles were measured directly on the Russian charts and may differ slightly here.

Map 4. Vil'kitskii Strait

part of the strait itself for as long as the wind continues. Once the wind changes to westerly, however, the strait is quickly cleared. In winter the entire strait freezes over except for favorable years when there may be open water in the narrows. Navigation depends on the quantity and compactness of the ice. A vessel proceeding in the strait against the tidal stream, will receive heavy blows from the ice, but if the tidal stream runs against the wind, the ice will be loosened. The steep shores of the strait facilitate navigation in ice because a vessel may closely approach them.

Straits Connecting the Kara and Laptev Seas

The Vil'kitskiy Strait (*proliv Vil'kitskogo*) is the southernmost of the straits linking the Kara and Laptev Seas, passing eastward between the Taymyr Peninsula on the mainland and the southern side of Bolshevik Island. This is the shortest, best-marked and best-known route from the Kara to Laptev Sea, about 60 nautical miles long and with a minimum width of 29 nautical miles, although the latter figure is somewhat unclear.[29] The depths vary from 40 to 230 meters. In the southern parts of the strait there are some shoals with depths from six to eight meters.

The strait freezes solid in winter and on rare occasions remains obstructed by ice throughout the navigational season. Offshore winds may, however, cause temporary stretches of open water near the coast. Ice conditions in the strait itself and its approaches are very complex and changeable even within a day. The strait is practically never free from compact ice. The drift of ice and its concentration in different sectors of the strait depend on the direction and strength of the wind. Fog is heavy in the area during summer.[30] The southern part of the strait close to the Taymyr Peninsula is preferred for navigation.

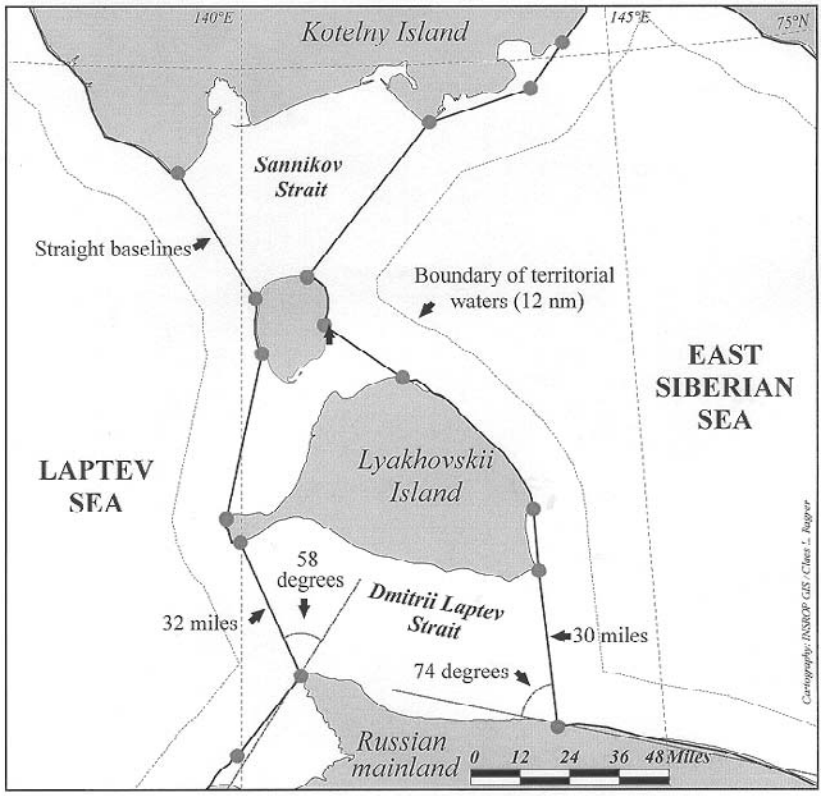
The Shokal'skiy Strait (*proliv Shokal'skogo*), about 80 nautical miles long and with a least width of 10.5 nautical miles in its central part, is a typical deep-water strait with steep coasts surrounding it. Its least depth is 102 meters, and there are no navigation dangers in its middle sector.

Ice conditions here are more complex than in the Vil'kitskiy Strait, and they are aggravated by large icebergs hazardous to navigation. On the approach to the strait from the Laptev Sea, there is almost always fast ice from the Taymyr ice massif present.[31] Ice is usually thick along the eastern coast of Severnaya Zemlya and the Taymyr Peninsula even up to mid-September and in some instances is a serious impediment to navigation. On the western side of the strait itself, a glacier extends and forms an ice tongue about 2.5 nautical miles wide.

The Red Army and Yungshturm Straits (*proliv Krasnoy Armii* and *proliv Yungshturma*) are two straits practically never used for transit navigation due to difficult ice conditions. The Red Army Strait is about 80 nautical miles long. Its south-western part is 7–10 nautical miles wide but narrows in the central area to about 1.5 nautical miles. The Yungshturm Strait is 30 nautical miles long, 12 nautical miles wide at its western entrance, but narrows to about three nautical miles. There are numerous islets in these straits as well as glaciers descending to them, making navigation quite difficult.

Straits Connecting the Laptev and East Siberian Seas

The Dmitriy Laptev Strait (*proliv Dmitriya Lapteva*) is the southernmost of the channels connecting the Laptev and East Siberian Seas, separating the Bol'shoy Lyakhovskiy Island from the mainland. The strait is about 70 nautical miles long[32] and has a least width of 27 nautical miles,[33] passage being limited to vessels drawing not more than 3.3 meters by shoal waters in its eastern approach. There are several shoals with a depth of 10 meters in the middle of the strait, the least depth of the fairway being 10–11 meters. The strait is navigable for vessels with a draught of up to nine meters. Banks and shallows lie close to the recommended course. V. Bondarenko notes that the strait is normally not used by loaded vessels.[34] Vessels passing from west to east are instructed to keep between 73°N and the five-fathom line on the western side of the strait to avoid shoals. The eastern approach is difficult because the fairway passes out of sight of the land between shoals extending northward from the mainland and eastward from Bol'shoy Lyakhovskiy Island.



Map 5. Dmitrii Laptev Strait

According to V. Michailichenko and A. Yakovlev, ice conditions in the strait are quite complex.[35] For a large part of the year the strait has a consolidated ice sheet, blocking it sometimes for the entire navigational period. Usually, however, the strait is ice-free in August and September. The strait begins to freeze at the beginning of October, sometimes at the end of September, and at the beginning of November it is covered with compact landfast ice.

The Sannikov Strait (*proliv Sannikova*) is located between Kolel'nyy and Malyy Lyakhovskiy Islands. It is about 217 nautical miles long and has a least width of 31 nautical miles. There are several shoals with a depth of less than nine meters, but its fairway has a minimum depth of 14 meters.[36] Vessels of any draft may use the strait. It is often used even when ordinary under-keel clearance cannot be obtained and consequently the speed has to be reduced in parts of the channel. Passage from west to east is fairly uncomplicated, but transit in the opposite direction is sometimes made

difficult by fluctuating water levels caused by prevailing offshore winds. A sloping coastline on the New Siberian Islands makes it difficult to discover land both visually and on radar.

The most favorable navigation conditions in the strait are in September. Freeze-up begins in early October, and the definitive freezing occurs in the second half of that month. From late October to mid-July, steady landfast ice remains in the strait. The break-up of landfast ice occurs on average around 20 July, being accelerated in the period of strong eastern winds which favor ice clearance of the strait. Winds from the west usually bring much ice from the Laptev Sea into the strait. The dates of final clearing depend on ice conditions in the western part of the East Siberian Sea, which vary between early August and late September. In unfavorable years the strait is not entirely clear of ice.

Passage from the East Siberian Sea to the Chukchi Sea

These two easternmost seas along the Northern Sea Route are linked by the Long Strait (*proliv Longa*), situated between the Chukchi Peninsula on the Siberian mainland and Wrangel Island. About 75 nautical miles wide,[37] it is the widest strait along the route. The relief of the bottom is fairly uniform with prevailing depths of 40–50 meters. There are, however, shoals with a depth varying down to 17 meters in the western part of the strait.

Ice conditions in the strait are very severe, depending largely on the state and position of the Wrangel and Ionskiy ice massifs. The edge of ice in the Long Strait almost invariably forms a curve reaching from the mainland right up to the island. Vessels encountering an ice field pressed against the mainland coast are advised therefore not to attempt to pass northward of it, as it will almost certainly extend the entire width of the strait. In such cases vessels are instructed to seek an inshore lead, sounding continuously to avoid shallow depths. In favorable years the strait clears from compact ice, whereas drifting ice continues to present a navigational hazard for vessels. The speed of the drifting ice motion in the strait is especially high.

In sum, the straits described above are the main straits connecting the seas along the Northern Sea Route, and are those which may be expected to be used by vessel traffic. Their width and depth conditions vary greatly with the least widths shown in Table 1. All are ice-covered or characterised by drift ice for many months of the year.

Russian Arctic Ports[38]

There is still only one seaport on the Northern Sea Route that is permanently open to calls of foreign vessels: the old timber port of Igarka. In the vicinity there are a few more ports with the same status: Murmansk, Arkhangelsk, Kandalaksha, Onega, Mezen and Naryan-Mar, which are on the Barents and White Sea coasts, and Provideniya on the Bering Sea coast. In addition, Russian authorities have been issu-

ing annual government orders in which an increasing number of Arctic ports and points have been made accessible for the duration of one sailing season. For the 1997 sailing season, 48 ports/points were temporarily opened, and for the 1998 sailing season, all these plus another 23 ports were opened.[39] Most of these 71 ports/points are small, including many polar stations, meteorological stations, and indigenous settlements. Most of them receive fuel deliveries from the foreign tankers operating on the Northern Sea Route.

Port of Dikson

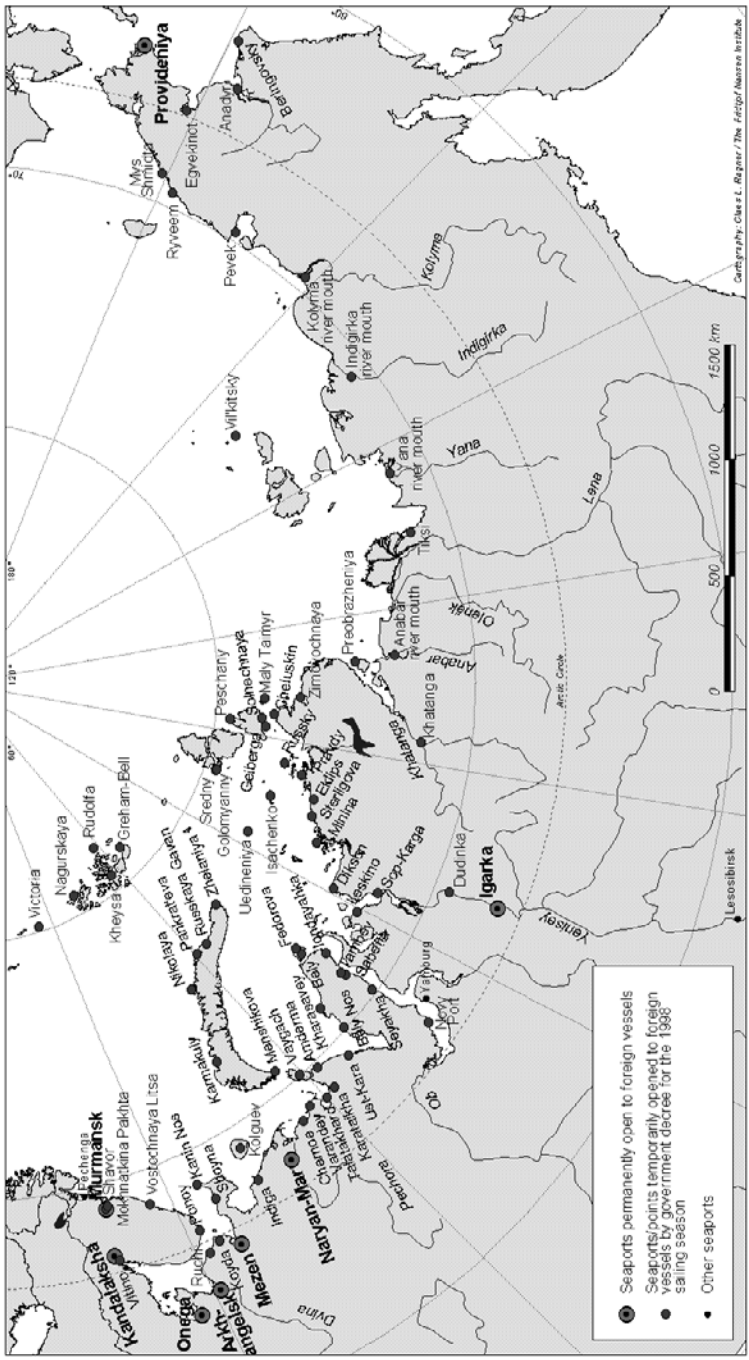
The first of four main ports along the Northern Sea Route is the port of Dikson in the south-eastern sector of the Kara Sea, close to the entrance of the Yenisey Gulf, south of the Sverdrup, Arctic Institute, and Izvestiy TsIK Islands. The port does not offer any pilot service, as the entrance to the port via the Preven Strait is safe in any weather and at any degree of visibility. The internal roadstead is approximately 15 meters deep. The main wharfs can serve vessels with a draught of up to 11 meters. Mooring is provided by roadstead tug-boats. Among the port facilities there are repair shops capable of conducting minor repair work. During summer navigation port authorities usually have at their disposal a rescue boat, and a party capable of performing underwater emergency repairs The port is within the administration of the Murmansk Marine Steamship Line, and the headquarters of marine operations of the western sector of the Arctic are located here.

Table 1. Main Straits Connecting the Seas along the Northern Sea Route[40]

Strait	*Least Width*	*Location*
Yugorskiy Shar Strait	1.5 nautical miles	Barents–Kara Sea
Kara Gates Strait	24.3 nautical miles	Barents–Kara Sea
Matochkin Shar Strait	0.5 nautical miles	Barents–Kara Sea
Vil'kitskiy Strait	29.7 nautical miles	Kara–Laptev Sea
Shokal'skiy Strait	10.5 nautical miles	Kara–Laptev Sea
Red Army Strait	1.5 nautical miles	Kara–Laptev Sea
Yungshturm Strait	3 nautical miles	Kara–Laptev Sea
Dmitriy Laptev Strait	27.1 nautical miles	Laptev–East Siberian Sea
Sannikov Strait	30 nautical miles	Laptev–East Siberian Sea
Long Strait	79.0 nautical miles	East Siberian–Chukchi Sea
Bering Strait	46.0 nautical miles	Chukchi–Bering Sea

Port of Tiksi

The port of Tiksi is situated in Tiksi Bay of the Laptev Sea. There is a natural channel leading to the port, navigable for vessels with a draught of up to five meters. After



Map 6. NSR Seaports and Points Open to Foreign Vessels

completing the planned work of deepening the channel and constructing new wharfs, the port can serve vessels with a draught of up to 9–10 meters. When entering, vessels should be guided by special port regulations. Mooring of the vessels is provided by roadstead tug-boats. The mechanical workshop can provide minor vessel-repair work, and in the navigational period rescue and emergency repairs are provided by the rescue boat, and examination of the hull and underwater work are provided by diving teams. The port is under the jurisdiction of the Republic of Sakha (Yakytiya) and is the base for marine operations in the central Arctic sector.

Port of Pevek

The port of Pevek is located on the eastern coast of the Chaunsk Gulf of the East Siberian Sea. One can enter the port from either north or south, depending on ice conditions and wind direction. The port can handle vessels with a draught of up to 10 meters. Pilotage is provided upon request. Mooring is provided by roadstead tug-boats, and underwater repairs can be carried out by diving teams. The port is under the administration of the Far Eastern Shipping Company and is the base of the headquarters of marine operations in the eastern sector of the Russian Arctic.

Port of Dudinka

The port of Dudinka lies on the eastern bank of the Yenisey River at a distance of some 230 nautical miles from the river mouth. The port can handle vessels with a draught of up to 11.5 meters. It is connected by railway with the town of Noril'sk. Due to the port's considerable distance from the Northern Sea Route transit routes, it cannot be recommended as an emergency port of call for foreign vessels.

The Northern Sea Route Administration has proposed that the four ports described above, which are along the Northern Sea Route, should be opened to foreign vessels. Under present Russian legislation, however, they may be entered only for emergencies and upon reporting to and following instructions of the administration of the nearest port. The ports of Murmansk, Arkhangel'sk, Kandalaksha, Onega, Mezen', Naryan-Mar, and Igarka, which lie at both ends of the route, have been open to foreign vessels.

Routes from the Barents Sea to the Bering Strait

The Russian chart 'Overview of the Traditional (Coastal) and High-latitudinal Courses along the Northern Sea Route'[41] presents four different routes from the eastern Barents Sea to the Bering Strait. One is 'traditional' along the coast (*traditsionnyy/pribrezhnyy*), one 'central' (*tsentral'nyy*), one 'high-latitudinal' (*vysokoshirotnyy*), and one 'close-to-the-pole' (*okolopolyusnyy*). The distances of these alternative routes are indicated in Table 2.

Table 2. Distances of the Four Routes from the Eastern Barents Sea to the Bering Strait

Route	*Distance*
'Traditional'	3500 nautical miles
'Central'	3340 nautical miles
'High-latitudinal'	2890 nautical miles
'Close-to-the-pole'	2700 nautical miles

The 'close-to-the-pole' route obstructs surface vessels by ice. The 'high-latitudinal' course in most instances is also blocked by ice, although at least parts of this route are occasionally used for navigation. In the west this route starts from the north of Franz Josef Land, descends to the northern tip of Severnaya Zemlya, runs in a south-easterly direction well off the eastern shore of Taymyr Peninsula, turns north-eastward again to pass north of the New Siberian Islands, then gradually descends south-eastward north of Wrangel Island towards the Bering Strait.

The 'central' route sets off in a north-easterly direction from the Kara Gates Strait. North of White Island it turns south-eastward towards Dikson and from there passes well off the Minin Skerries and east of the Arctic Institute Islands in the direction of the Sergey Kirov Islands. Having passed to the south of the latter, the route runs north of the Nordenskjöld Archipelago and south of the Heiberg Islands through the Vil'kitskiy Strait. Further eastward it descends towards the New Siberian Islands and passes through the Sannikov Strait. From there it goes well off the Siberian mainland and the Medvezh'i Islands towards the town of Pevek and further through the Long Strait to the Bering Strait.

The 'traditional/coastal' route also sets off from the Kara Gates Strait towards Dikson. In this stretch of the sea it departs from the 'central' route by going closer to White Island. It does not, however, prescribe transit of the Malygin or Gydanskiy Straits. From Dikson it follows close to the coastline outside the Minin Skerries towards the Nordenskjöld Archipelago, where it traverses the Matisen Strait. On the other side of the Vil'kitskiy Strait the route descends in a south-eastward direction, avoiding the islands and straits off the eastern coastline of Taymyr Peninsula. From the Dmitriy Laptev Strait it follows the Siberian mainland, traversing the Kolymskaya Strait between the Medvezh'i Islands and the mainland. In its last stretch towards the Bering Strait the 'traditional' route sticks close to the coastline.

Navigation through the Northern Sea Route

Vessels transiting the Northern Sea Route proceed according to sailing directions. Some of the straits are normally used for navigation, but under certain conditions alternatives may be sought. The existing literature on this issue has been compared to the Russian *Guide to Navigation through the Northern Sea Route*.

From the Barents Sea to the Kara Sea

Vessels transiting the Northern Sea Route proceed from Murmansk towards Novaya Zemlya, passing north of Kolguev Island. In approaching Novaya Zemlya it is necessary to ascertain from local radio stations or ice-breakers which strait is clear of ice. In recent years Matochkin Shar Strait has no longer been an alternative for commercial navigation due to radioactive contamination. Concerning the choice between the two southern alternatives, recommendations are not uniform. V. Bondarenko states that the Kara Gates Strait is preferable, especially for larger vessels. This view seems to be supported by V. Michailichenko and A. Yakovlev who state that the Kara Gates Strait is a deep-water strait which is navigable for all types of vessels.[42] W. Butler maintains that Yugorskiy Shar Strait is to be preferred since to the east, ice in the Kara Sea, if present, is usually weaker and more passable here.[43] The *Guide to Navigation through the Northern Sea Route* states that in June and July the optimum route passes most frequently through Proliv Karskiye Vorota and Proliv Yugorskiy Shar, and in September and October around Mys Zhelaniya, the northern tip of Novaya Zemlya.[44] In August the two above variants are equally probable.[45] The choice between the Kara Gates and Yugorskiy Shar Straits, however, is stated in the official navigation guide to be the Kara Gates Strait, which 'is the main shipping channel connecting Barents Sea and Kara Sea'.[46] The probability of the use of these alternative routes is shown in Table 3.

Table 3. Probability of Use of Alternative Routes from the Barents Sea to the Kara Sea[47]

Month	*Through Kara Gates Strait or Yugorskiy Shar Strait*	*Around Novaya Zemlya*
June	80%	20%
July	65%	35%
August	60%	40%
September	45%	55%
October	20%	80%

Kara Sea

Due to its physical and geographical conditions, the Kara Sea is the most difficult of the seas in the Russian Arctic for navigation. A range of factors make its passage unfavorable. Among these are the almost constant presence of ice; a great number of shoals, and numerous areas with limited depths. There are few sheltered anchorages and the weather conditions do not allow executing astronomical and visual position fixing. The functioning of gyroscopic and magnetic compasses is unreliable and knowledge of the currents is insufficient. All these factors as well as the comparatively early freezing of the river estuaries make transit of the Kara Sea difficult.

The Kara Sea is placed under the responsibility of the West Arctic Region Marine Operations Headquarters, 'Western Headquarters', located in Dikson. All vessels bound for any point of destination in the Kara Sea or in transit through the sea must notify the headquarters immediately following departure from the last port of call in the Barents Sea or the White Sea. Thereafter the vessels must strictly follow all instructions issued by the headquarters. Only vessels with an ice classification are admitted for independent navigation in the Kara Sea ice.

The choice of routes in the south-western part of the Kara Sea, from the Kara Gates or Yugorskiy Shar Straits to Belyy Island is determined by the position of the Novozemel'skiy ice massif. At the beginning of the navigational season, vessels usually pass east of the southern spur of this massif and, less often, west of it. If the ice massif is pressed by eastward winds to Novaya Zemlya, navigation with the assistance of ice-breakers becomes possible from mid-June. Navigation without icebreaker assistance from the Kara Gates and Yugorskiy Shar Straits to Dikson Island normally becomes possible from 25–30 June.

From Dikson Island to the entrance of the Laptev Sea vessels usually navigate in a coastal strip up to 100 nautical miles wide, within which three main routes referred to as 'coastal' (*pribrezhnyy*), 'offshore' (*moristyy*) and 'northern' (*severnyy*) are recommended. At almost any point the chosen route may be changed to another should ice or other conditions demand.

The 'coastal' route is mostly used after the first ice is broken and ice is driven offshore by winds. It runs along the seaward edge of the Minin Skerries, either to the north or south of the Scott and Nansen Islands, passes the Ringnes, Kravkov, Belukh Islands and further through the Nordenskjöld Archipelago. It usually then runs through the Matisen Strait, though sometimes the Lenin Strait is used, between Ostrovok ('Little Island') Lishniy and Firnley Islands, and passing closer to the southern shore of the Vil'kitskiy Strait, runs into the Laptev Sea. Navigation along this course is rather difficult as it leads through an area of irregular depths and a rocky bottom. Position fixing conditions are good throughout, but possibilities of manoeuvre in case of ice pressure are limited.

The 'offshore' route leads north of the Scott and Nansen Islands, the Yermak Bank, and the Russkiy Island into the Vil'kitskiy Strait between the Firnley and Heiberg Islands, passing clear of the coastal dangers but within the area of coverage by radio beacons of medium range.

The 'northern' route leads east or west of the Arctic Institute Islands and the Izvestiy TsIK Islands, then north of the Sergey Kirov Islands up to the turn near Voronin Island into the Vil'kitskiy Strait.

From the Kara Sea to the Laptev Sea

Following the description above, the Vil'kitskiy Strait is the obvious choice when navigating from the Kara to the Laptev Sea. V. Bondarenko has noted that the Shokal'skiy

Strait is only used on extremely rare occasions, and the Red Army and Yungshturm Straits are practically not used at all.[48] The *Guide for Navigation through the Northern Sea Route* indicates that the Vil'kitskiy Strait is used in 95–100% of the passages.[49] Passage around the northern tip of Severnaya Zemlya may on occasion be feasible, primarily at the beginning of the navigational season. The probable use of these alternative routes is shown in Table 4.

Table 4. Probability of Use of Alternative Routes from the Kara Sea to the Laptev Sea[50]

Month	*Through the Vil'kitskiy Strait*	*Around Severnaya Zemlya*
June	95%	5%
July	100%	0%
August	100%	0%
September	100%	0%
October	100%	0%

Laptev Sea

The optimum route in the Laptev Sea in the vicinity of the New Siberian Islands changes considerably, dependent upon the season. Prior to the intensive rotting of ice of the Taymyr ice massif, the optimum route passes along the southern periphery of this massif. In August and September the route passes through the massif, and in July either variant is equally probable.

Table 5. Probability of Use of Alternative Routes along the Laptev Sea[51]

Month	*Through Taymyrskiy ice massif*	*Along the southern periphery of Taymyrskiy ice massif*
June	10%	90%
July	65%	35%
August	65%	35%
September	90%	10%
October	85%	15%

In the eastern part of the Vil'kitskiy Strait, vessels normally set a course directly towards the Sannikov Strait. If the Dmitriy Laptev Strait is to be used instead, course is changed in the vicinity of Stolbovoy Island. The probability of use of these alternative routes is shown in Table 5.

From the Laptev to the East Siberian Sea

Although both the Dmitriy Laptev Strait and the Sannikov Strait may be used for navigation, the latter seems to be preferable on most occasions where ice conditions are reportedly more favorable. *The Guide to Navigation through the Northern Sea Route* estimates that the Sannikov Strait is used with a probability from 50–85% in the period from August to October.[52] In June and July however the optimum route is to pass north of the New Siberian Islands.[53] The probability of use of these alternative routes is shown in Table 6.

Table 6. Probability of Use of Alternative Routes from the Laptev Sea to the East Siberian Sea[54]

Month:	*North of the New Siberian Islands*	*Through the Sannikov Strait*
June	100%	0%
July	100%	0%
August	50%	50%
September	15%	85%
October	30%	70%

From the East Siberian Sea to the Chukchi Sea

From the Dmitriy Laptev Strait to the Kolyma River, the coast of the East Siberian Sea consists of swamped tundra extending for 550 nautical miles. Nearly the entire length is fringed by a broad shoal. The recommended routes in this area pass out of sight of the coastline since the approach to the shore is difficult even for very small vessels.

From the Kolyma River to Chaynsk Gulf, the coast is mountainous, the characteristic features being a large number of pillar-like rocks of different sizes and forms on the slopes of elevations. Ice conditions along the coast in the period of navigation are diverse. Due to the significant inflow of water to the Indigirka, Alazeya, and Kolyma Rivers, their estuaries clear of ice earlier than in other coastal areas.

In the easternmost part of the Northern Sea Route, the optimum passage is relatively stable and lies along the landfast ice border. Following the landfast fracturing, the route passes along the coast of the Chukchi Peninsula (*Chukhotskiy poluostrov*). The probability of use of these alternative routes is shown in Table 7.

Summary

Four different passages through the Northern Sea Route exist from the eastern Barents Sea to the Bering Strait, one 'traditional' along the coast, one 'central', one 'high-latitudinal' and one 'close-to-the-pole'. From the Barents Sea to the Kara Sea the

Table 7. Probability of Use of Alternative Routes from the East Siberian Sea to the Chukchi Sea[55]

Month	*Along the southern shore of Wrangel Island*	*Along the coast of Chukchi Peninsula*
June	5%	95%
July	20%	80%
August	20%	80%
September	10%	90%
October	20%	80%

probability of use of the Kara Gates or Yugorskiy Shar Straits compared to navigating north of Novaya Zemlya is on the average approximately even, (1:1), depending upon the month. Routes through the Kara Sea vary due to this sea being the most difficult to navigate because of its physical and geographical conditions. From the Kara Sea to the Laptev Sea, the probability of use of the Vil'kitskiy Strait is roughly (1:0), regardless of month. Through the Laptev Sea, the probability of navigating through the Taymyrskiy ice massif or along the southern periphery is on the average about even (1:1), depending upon the month. From the Laptev Sea to the East Siberian Sea, passing northward of the New Siberian Islands related to the Sannikov Strait, is on the average approximately (1.5:1), depending on the month. Through the East Siberian Sea and the Chukchi Seas, the probability of use of the route along the coast of the Chukchi Peninsula is on the average slightly over (5:1), regardless of month.

CHAPTER 2

LEGAL ISSUES FOR PASSAGE IN THE NORTHERN SEA ROUTE

International Regimes

Passage through the Northern Sea Route is not only constrained by the severe physical conditions of winds, currents, and ice, but also by legal issues. Under various international conventions, such matters as the status of ice-covered areas as well as transit through territorial waters and straits have been regulated. In addition Russia has its own statute and policies regarding the Arctic waters that must be taken into account. By no means is there universal agreement on the legal status of the waters through which vessels must navigate from the Barents to the Bering Sea.

Ice-Covered Areas[56]

'Ice-covered areas', the exact interpretative scope of which is controversial, as a regime, is limited to icy marine polar regions, chiefly of the Northern Hemisphere.[57] Article 234 of the 1982 U.N. Law of the Sea Convention (LOSC) governing ice-covered areas appears alone in its own section entitled 'ice-covered areas' and is itself entitled 'ice-covered areas', apparently indicating a special regime with particular rules. Russian Arctic jurisdiction, as well as Canadian Arctic jurisdiction, has been based on this legal cornerstone.[58]

Article 234
Ice-covered areas

> 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.

This right, which is unilateral, encompasses not only stricter standards for vessel discharges and safety,[59] but also stricter design, construction, equipment and manning standards. These usually must be adopted by the coastal State when, 'acting through the competent international organisation or diplomatic conference'.[60]

Issues surrounding Article 234 include, pending ratification of the LOSC by the United States and Denmark/Greenland, its status under customary international law,[61] its intended scope, and the interrelation between the article and the LOSC international straits regime. Different interpretations are possible of terms in the article, such as 'where', 'due regard to navigation', 'within the limits of the exclusive economic zone', 'environmental protection based upon sound scientific evidence' and 'non discriminatory'. Is Article 234 limited to circumstances when ice actually exists? Does 'due regard to navigation' mean that the limits of Article 234 are those exercised in the territorial sea or whether they broadly apply 'within the limits' of the exclusive economic zone, including the territorial sea, straits and internal waters? Additionally, the role of 'best available scientific evidence' upon which coastal State laws are to be based is unclear, as is whether Article 234 is meant to be enacted and enforced *among* foreign vessels of different nationalities, or also *between* foreign vessels and coastal State vessels. Because of these questions, Article 234 is considered by some to be highly ambiguous and controversial.[62] However, with respect to Russian Arctic waters, both the U.S. State Department and the Russian Foreign Ministry maintain that they are satisfied with the formulation.[63]

International Straits

A clear legal definition of the term, '*strait*' is wanting.[64] In its common meaning a strait has been identified as, 'a comparatively narrow passageway connecting two large bodies of water'.[65] Passage rights for vessels through straits depend upon whether the strait is used for international navigation. If it is not, passage rights depend upon whether the waters of the strait can be classified as high seas, territorial sea, or internal waters. If the territorial seas of opposite States do not overlap within a strait, the same freedom of navigation exists in the remaining channel as through any other part of the high seas. If the territorial seas overlap, then foreign vessels enjoy only the right of innocent passage. If the waters are internal waters, then passage is dependent upon coastal State permission.

For straits used for international navigation, innocent passage cannot be suspended according to the *Corfu Channel Case*.[66] The International Court of Justice (ICJ) held in 1949 that for a strait to be considered a legal international strait, two criteria have to be met, one geographic and one functional.[67] The geographic criterion is present whenever there is an overlap of territorial waters in the natural passage between adjacent land masses joining two parts of the high seas. The general rule for the functional criterion is that actual use is required through a strait with a history as a useful but not essential route for international maritime traffic. Sufficiency of use is deter-

mined by a substantial number of transits and flags, although the location of the strait and other circumstances might make a lower number acceptable.

Dichotomies, however, exist in the functional criterion of 'use'. Sound arguments can be made for basing 'used for international navigation' upon a potential use of the strait in the future. Sufficiency of use may be indicated by markedly fewer numbers of transit and flags for isolated and special areas such as the Arctic. Coastal States may unilaterally determine that a vessel's passage is not innocent and suspend passage, though the strait is considered international. This rather indefinite regime was substantially incorporated into Article 16(4) of the 1958 Convention on the Territorial Sea and the Contiguous Zone (1958 TSC).[68]

LOSC Part III was an attempt to clarify the international straits regime, but the results have been mixed. Under LOSC Part III 'transit passage' exists through straits used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone, subject to several conditions.[69] Transit passage is defined in Article 38:

> . . .
>
> 2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

All vessels, State and commercial, as well as submarines and aircraft enjoy the right.[70] Aircraft do not enjoy a right of innocent passage over the territorial sea, and submarines must navigate on the surface of the territorial sea with the flag showing, though submarines generally practice transit submerged through the strait.[71] Conditions for transit passage include that vessels taking advantage of this right must not delay nor use or threaten force against coastal States and also must not engage in activities other than those normal to a continuous and expeditious transit except when made necessary by *force majeure* or distress.[72] Vessels must also comply with generally accepted international regulations including the International Maritime Organisation (IMO) conventions governing pollution control, safety, crewing standards and routing.[73] Any activities conducted by vessels outside of these limits may result in the vessels being denied transit passage.[74]

There is little support, however, for maintaining that the coastal State has a right to interfere for security reasons, except with respect to self defence in extreme situations.[75] Enforcement rights for coastal States against violations by vessels in transit passage are unclear, though there is agreement that these may be carried out in coastal States' ports.[76] The position of the LOSC Part III regime in relation to customary international law is important in judging whether broader rights may be maintained

as international law applicable to the Russian Arctic. The major naval sea powers are in favour of transit passage, including Russia, the United States and the United Kingdom.[77] Nevertheless, authors disagree whether transit passage consistent with LOSC Part III has become customary international law.[78]

Passage of State Vessels in the Maritime Zones

LOSC and the 1958 TSC provisions set forth the components of innocent passage for all vessels to include a right to navigate through foreign territorial seas as long as the passage does not prejudice the peace, good order or security of the coastal State.[79] Navigation cannot include threats or use of force, weapon exercises, acts of propaganda, surveillance, launching and landing aircraft or military devices, smuggling, wilful and serious pollution, fishing, research or survey activities, interference with coastal State communications, facilities or installations, and any other activity not directly related to passage.[80] State practice, however, indicates that notification and prior authorisation for the passage of foreign warships through the territorial sea may deviate to some degree from the LOSC and 1958 TSC regimes. A significant number and perhaps a majority of States practice prior authorisation for the passage of warships,[81] indicating the continuation of a dispute which has persevered over much of the 20th century.[82]

LOSC Articles 58 and 87 regulate free navigation in the exclusive economic zone and high seas, subject in the former to due regard for rights and duties of the coastal State and in the latter for the interests and rights of other States. Navigation is traditionally free on the high seas.[83] Article 236 appears in its own LOSC Section entitled, 'Sovereign Immunity', and it with the same title states:

> The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to 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. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

Although the interpretation of the terms of Article 234 is unclear, the scope of application of Article 234 with respect to the traditional exercise of innocent passage and free navigation by *warships and other State vessels* is moderately clear through Article 236. However, whether notification and prior authorisation for the passage of foreign warships and other State vessels in innocent passage may be required is unclear. There is some clarifying precedent provided by the Black Sea incident in which an American warship was confronted by a Soviet warship. Thereafter the Soviet Union and the United States issued a: Joint Statement with Attached Uniform Interpretation of Rules

of International Law Governing Innocent Passage.[84] The Soviet Union then amended its legislation governing innocent passage in its territorial sea to be more in line with generally accepted international standards.[85] The American Secretary of State stated in a separate letter that, while reserving its rights, the United States had no intention of conducting innocent passage with its warships in the Black Sea.[86] The same has not been guaranteed for the Russian Arctic.

Legal Issues Relative to Russian Arctic Waters

Juxtaposed to these traditional yet controversial law of the sea regimes are five rather diffuse views concerning jurisdictional issues related to Russian Arctic waters.[87] They represent the positions taken at various times by Russia and by the main opponent to the Russian regime in the Arctic, the United States.

One view states that the Northern Sea Route governs shipping north of Russia, between the Novaya Zemlya straits or Mys Zhelaniya and the Bering Strait. The route is to be used solely by Russian vessels or vessels under charter to Russian agencies with special permission. The broad scope of Russian jurisdiction is explained to be due to the difficulty of access and the fragile Arctic ecology. These concerns are said to necessitate certain State privileges and prerogatives unlike those of the international legal regimes governing oceans in other parts of the world. Regulating user access and controlling the types of activities in the route are required.

A second related view maintains that Arctic States realise their powers in the region not only in accordance with international law, but also on the basis of national norms reflecting the complex history of Arctic exploitation. To the Russians the Northern Sea Route is a national transport route under full Russian control and jurisdiction. Though not exactly clear what this implies the legal basis appears to be a combination of customary international law and historic title. It is claimed that other interested States have acquiesced to Russian and Soviet practice in the Arctic. It is further asserted that this view has been strengthened during the post-war period and therefore, the possibility exists to consider seriously opening the Northern Sea Route. Requests are made to the West to refrain from accentuating jurisdictional differences, due to the economic gains possibly attained by using the route in competition with the potentially unstable Suez Canal.

A third view also sees the Northern Sea Route as national, but avoids the issue of coastal State jurisdiction over the high seas by maintaining that vessels navigating the route have never made use of the high seas and are unlikely to do so. Thus there is no need to rely on historical and other material circumstances since the route runs exclusively through the Russian exclusive economic zone, territorial sea, and internal waters. Over the exclusive economic zone and territorial sea Russia has the right under Article 234 to regulate shipping unilaterally in ice-covered areas for the prevention, reduction, and control of marine pollution. This includes directing vessel design, construction, manning, and equipment standards as well as discharges and navigational practices.

A fourth view distinguishes between the Northern Sea Route as defined above and the Northeast Passage, both which are said to be governed by overlapping but not identical legal rules and jurisdiction.[88] The passage is defined as a sea-link between the Atlantic and Pacific Oceans via the Barents, Kara, Laptev, East Siberian and Chukchi Seas, and through the Bering Strait, all of which is to be navigated without assistance from the coastal State, Russia. In this view, the route is governed solely by the Russian regime, while the passage is governed by customary international law, international treaties, and coastal State legislation consistent with international law. Use of the Northeast Passage in balancing coastal State and international interests may depend upon the physical characteristics of the vessel under Arctic conditions and appropriate insurance and compensation arrangements. Related to this view, different Western legal experts believe that Russia may in the future be willing to permit a more lenient practice of 'innocent passage' through its territorial waters.

Finally, a fifth view extends the fourth by focusing on the Northeast Passage and following exclusively traditional law of the sea.[89] This view maintains that the right of free navigation exists along the passage through the high seas, including the Russian exclusive economic zone, that innocent passage exists through the territorial sea, and that the regime of transit passage would apply to any international straits. This last view runs counter to those views noted concerning the Northern Sea Route. It is conceivable that some States would completely disregard the existence of the route and rely solely upon the passage as defined, without any acknowledgement of overlapping jurisdiction and rules.

The position of Russia appears to be a combination of the first, second, and third views.[90] All three are represented in the governing Russian legislation, displaying what has been described as 'creative ambiguity'.[91] The fifth view is followed by the Russian Navy in the world's oceans.[92]

Article 234 has been indicated by the Soviet Union and Russia to be the basis of its domestic Arctic legislation, including the Regulations for Navigation on the Seaways of the Northern Sea Route[93] (1990 Rules) and supporting legislation, which are applicable to *all* vessels. No explanation is given concerning the contradiction with this regime and Article 236, which provides sovereign immunity for State vessels, though claims are made that history and prerogatives require regulating access. Concerning the international use of the Russian Arctic straits, Russia claims that there has been virtually no foreign usage.[94] Regarding rights of passage for State vessels, Russia has disclosed that a few foreign military voyages were made both in breach of and consistent with its regime. Specific information has not been provided. Russian practice seems substantially supported by Canadian practice, including the Arctic Waters Pollution Prevention Act[95] and supporting legislation. This act extended Canadian jurisdiction out to 100 nautical miles from the nearest Canadian baseline (except near Greenland) and governs *all* vessels. Article 234 has also been indicated by Canada to be the basis of its Arctic legislation, but no explanation has been given concerning the discrepancy with that article and Article 236.[96]

The position of the United States is contradictory. The fourth and fifth views appear to be those maintained by Washington, though in its own Arctic coastal State legislation the United States may practice a regime similar to the third view. The United States has formally protested the Russian and Canadian Arctic regimes as violations of international law.[97] Specifically the United States has objected to the Russian provisions governing straight baselines, straits, the territorial sea, and historic waters.[98] It has also objected to Canadian provisions governing straight baselines, straits, the territorial sea, and ice-covered areas.[99] The United States claims innocent passage through foreign territorial seas as well as transit passage through international straits and free navigation in foreign exclusive economic zones.[100] Washington maintains potential use rather than actual use brings the Russian and Canadian Arctic straits within the criterion for an international strait.[101] Little clarification is given concerning the interrelation of its claims with Article 234,[102] though the United States likely is interested in submerged transit through international straits.[103]

Sovereignty immunity consistent with Article 236 is maintained directly by Washington with regard to the Canadian regime and implicitly with regard to the Russian.[104] At the same time Washington has indicated that the LOSC confirms existing maritime law and practice, with the exception of the deep sea mining regime, and that it will recognise those rights and interests consistent with the LOSC, including Part XII.[105] Following the *Exxon Valdez* accident in Alaskan waters in 1989, the United States adopted the Oil Pollution Act of 1990,[106] in many respects similar to the Russian and Canadian legislation, that also govern Alaskan waters. It is thus not clear how traditional American claims relate to passage through maritime zones in ice-covered areas.[107]

Regarding rights of passage for State vessels, the United States has disclosed a few surface military voyages that it made, particularly in the mid 1960's in Russian Arctic waters. American submarines have sailed under the Russian Arctic waters, but no specific passages have been indicated. Passage under the surface in the exclusive economic zone is not unique, given the general international rules and the Article 236 exception for sovereign immunity. However, the legal situation for the Russian Arctic straits and territorial sea is less clear. Though submerged passage has been practised under both the LOSC and the 1958 TSC regimes for international straits, it has not been completely clear whether such passage is permitted subject to notification and/or authorisation. It is also unclear whether the traditional rule that submarines that sail on the surface in the territorial sea must show their flag[108] can be followed in Arctic ice-covered waters, especially with an ice-breaker leading the way as required by Russia.

In summary, there are indefinite limits to the international regimes of ice-covered areas, international straits, and the right of passage by State vessels. This concerns as well their interrelation. With regard to the Northern Sea Route and the Northeast Passage, Russia and the United States have varying interpretations of the applicable regimes and possibly exploit the ambiguities. Generally their views are in opposition to one another, but on some points they are consistent. Canadian Arctic practice appears to support Russian practice.

CHAPTER 3

INTERNATIONAL LAW AND A RUSSIAN ARCTIC WATERS REGIME

The Arctic is an ocean and therefore ostensibly governed by traditional law of the sea regimes. The jurisdictional claims put forward by the large Arctic coastal States, however, indicate substantial deviation from the application of traditional regimes. Due to the particular characteristics of the Arctic, including the presence of ice and severe climatic conditions, the regimes for the use of international straits and the passage of State vessels are encroached by rules for the ice-covered areas, to an extent unprecedented and unknown in other parts of the world. The United States as a maritime power ostensibly allows divergence from the regimes for the use of international straits and the rights of passage for State vessels nowhere else as it allows in the Arctic straits, exclusive economic zones, and territorial seas. Moreover, there seems to be no other State protests to this divergence.

Customary and Conventional Law

Customary international law appears to be in the process of formation for the Arctic waters, which will define the contours of a specific regime for ice-covered areas, and will encompass the regime for international straits and the rights of passage for State vessels. LOSC Article 234 and State practice in the application of that convention also plays a role in fashioning the Arctic regime. This is particularly so given the ratification by Canada of the LOSC, and developments in the United States towards the same goal.

Russian Arctic waters have been the focus of this book, since the issues are more clearly presented by the polarisation of the Russian and the United States positions. Canadian Arctic waters have also been referred to due to the support offered by parallel yet less polarised developments. The Arctic waters of Norway and Greenland/Denmark have not been addressed due to the negligible practice by these Arctic littoral States related to the relevant legal issues.[109]

The formation of an Arctic regime under customary international law will necessarily define the rights and duties of Russia as a coastal State and the rights and duties of foreign flag States associated with the Northern Sea Route and the Northeast Passage. As all maritime zones seem capable of being traversed by both these routes,

the formation of an Arctic regime relates to the jurisdiction Russia is able to exercise in these zones over its security, economy, and environment. It also relates to the rights the United States is able to exercise in these same zones, principally its security requirements.

Before examining the regime of ice-covered areas, the use of international straits, and the rights of passage for State vessels in international law, as well as limitations on claims to historic title and the acquisition of rights associated with State vessel research, need to be examined.

Limitations

Historic Title

A claim to historic waters is one in derogation of general rules for acquiring maritime sovereignty.[110] It involves stringent requirements of proof of the exercise of exclusive authority for a long period of time over the waters in question. Such authority must have been acquiesced in by foreign States, especially those affected, and the claim must be judged in the light of any formal protest in the practice of States, particularly those States in the region.[111]

Only the Dmitrii Laptev and Sannikov straits have been specifically claimed as historic by Russia.[112] Though Article 4 of the 1960 Statute on the Protection of the State Boundary of the U.S.S.R.[113] (1960 Statute) states, '(I)nternal sea waters of the U.S.S.R. shall include: . . . (c) waters of bays, inlets, coves, and estuaries, seas and straits, historically belonging to the U.S.S.R.', no names or co-ordinates are otherwise specified. The Soviet Notes to Mariners of August 1965 required compulsory pilotage for vessels navigating the Vil'kitskii and the Shokal'skii Straits, and the same was required for the Dmitrii Laptev and Sannikov Straits in 1972.[114]

The historic claim has been supported by P. Barabolia, a Russian expert in law of the sea and a Soviet delegate to law of the sea conferences, writing in 1971, 1972 and 1974.[115] Article 6 of the 1983 Law on the State Boundary of the U.S.S.R.[116] (1983 Statute) retains the 1960 Statute Article 4 provision for 'seas and straits, historically belonging to the U.S.S.R.' but does not specify any historical straits or seas. Article 6 also adds as Soviet internal waters, '(1) sea waters on the landward side of straight baselines adopted to compute the breadth of the territorial waters (territorial sea) of the U.S.S.R.' and '(5) waters of rivers, lakes and other waters whose shores belong to the U.S.S.R.' A. Kolodkin, writing in 1990, skirted the issue of historic Arctic straits 'adjacent to the coast of the U.S.S.R.', through claiming broadly that 'the entire history of Arctic exploration knows only extremely rare individual instances of passage through them by non-Russian ships'.[117] A. Kolodkin did not rely on the theory of historic straits in an interview in 1994.[118] On the other hand, the *Legal Regime of Navigation in the Russian Arctic*,[119] provided a somewhat more informative picture of historic use of the Russian Arctic and the concept of historic use including straits. But it retreated

from specifying any particular straits as historic. Compulsory ice-breaker assisted pilotage, however, was introduced by the Resolution of the U.S.S.R. Council of Ministers of 27 April 1965 for all vessels in straits connecting the Kara, Laptev, and East-Siberian Seas (Karskie Vorota, of the Red Army, Vil'kitskii, Shokal'skii, Dmitrii Laptev and Sannikov) which must be considered in line with international law and Arctic practice.[120] Under the 1993 Law of the State Boundary of the Russian Federation,[121] 'historic straits' has been retained by Article 5(2),[122] and Article 4(1) of the Federal Act on internal maritime waters, territorial sea and contiguous zone of the Russian Federation.[123]

At the same time the *Legal Regime of Navigation in the Russian Arctic* itself notes certain foreign use in these areas.[124] Western authors, T. Armstrong as well as J. Nielsen, have indicated a more extensive use, especially in the Western Soviet Arctic.[125] The Soviets have vaguely claimed under historic theories the polar seas as internal waters. In practice, however, U.S. vessels were allowed in the polar seas in the early and mid 1960's, and both the U.S.C.G.C. *Storis* and the U.S.C.G.C. *Glacier* provided support to geological studies in the Chukchi Sea, including the Soviet section in 1969 and 1970 respectively.[126] The difference between the Vil'kitskii Straits and other straits claimed as historic waters, and the polar seas, all of which have been claimed as internal waters, appears questionable.[127] In sum, the Arctic straits and seas have not been regarded in practice as internal waters, despite the claims made for historic title.

In addition to occasional foreign use of Russian Arctic waters, the lack of definite claims of historic title, with the exception of the Dmitrii Laptev and Sannikov Straits, would seem to result in inadequate legal support for utilising this doctrine. This is especially true when compared to similar claims made in the Canadian Arctic. One prominent expert discounted the historic waters claim entirely, noting the equivocal or inconsistent claims by Canada constituted an admission that the waters could not be considered internal waters.[128] Even with respect to the Dmitrii Laptev and Sannikov Straits, unless Russia can provide substantial evidence indicating an exclusive exercise of authority for a long period of time, the claims seem flimsy, especially without any U.S. acquiescence.[129]

Further requests by INSROP have been made to A. Kolodkin for specific material substantiating claims by Russia to 'historic straits', but only the information noted above has been forthcoming.[130] The historic waters claim as a basis for a legal regime for the Russian Arctic waters seems unlikely. Russia, of course, may provide more extensive historical material substantiating its claims in the future.

Marine Research by State Vessels

Marine research in the Arctic probably continues rather extensively by military forces due to this area's location between Russia and the United States, with their strategic deployment of submarines.[131] For marine research, including military activities in a foreign exclusive economic zone,[132] LOSC Article 301 requires that States refrain from the threat or use of force against the territorial integrity or political independence of

any State inconsistent with principles of international law embodied in the Charter of the United Nations. LOSC Article 58(2), governing the rights and duties of States in a foreign exclusive economic zone, provides for the applicability of Article 88, reserving the high seas for peaceful uses, presumably in the sense of Article 301. Article 246(3) provides that civilian marine scientific research in a foreign exclusive economic zone is to be exclusively for peaceful purposes. However, in the LOSC neither 'peaceful purposes' nor 'marine scientific research' themselves are defined. From State practice it is difficult to interpret 'peaceful purposes' as excluding all military activities in foreign exclusive economic zones.[133] Determining which types of military activities are permitted, however, is controversial.

While navigation is free under Article 58(1), other activities such as exercises, arms testing, and the installation of military devices are controversial due to the phrasing of Article 58(1), 'other internationally lawful uses of the sea related to these freedoms . . .'.[134] Article 58(3) requiring due regard for the rights and duties of the coastal State, conceivably could limit military activities to navigation only. More uncertainty arises because the boundary between marine scientific research governed by Article 246 and subject to the consent of the coastal State, and military intelligence activities, is unclear. Although oceanography, marine biology, fisheries research, scientific ocean drilling and coring, and geological and geophysical scientific surveying may be included in the former, research obtaining information concerning foreign governments, vessels and nationals, hydrographic surveys, and military activities including surveys, prospecting and exploration, may be excluded.

Some view foreign military subsea installations and devices as doubtfully constituting an internationally lawful use, while others see military monitoring devices as an instrument of international peace and security, and only the deployment of arms as a potential threat to a coastal State. State practice, particularly that of the Soviet Union and the United States, has not been restrictive, with monitoring conducted within foreign territorial seas and probably within internal waters.[135]

Although that marine research performed by the military,[136] undoubtedly is carried out in the Arctic and the legal issues are unsettled and controversial, the regime is substantially not Arctic specific. The rights of passage of State vessels outlined above are Arctic specific. The issues relevant to research of a military nature carried out in the Sea of Japan directed towards Vladivostok and in the Cascadia Basin directed towards Puget Sound are substantially the same as those relevant to research carried out in the Kara and Pechora Seas directed towards the Kola Peninsula. An exception may be research related to the placement of polynias, ice-free pockets, allowing submarines easy surfacing possibilities.[137] The resolution of the issues concerning marine research in the Arctic by the military will contribute to and follow the resolution of issues concerning military research in general, since little difference exists.

Indreleia *and the* Anglo–Norwegian Fisheries Case[138]

'(V)irtually all the straits of the Soviet part of the Arctic . . .' have been claimed by Russians as similar to the regime of straits in internal waters expressed in the *Anglo-Norwegian Fisheries Case* on the status of the Norwegian *Indreleia*.[139] Both the *Corfu Channel Case* and the *Anglo–Norwegian Fisheries Case*, however, confused this issue.[140]

The arguments of Russia based on the *Anglo–Norwegian Fisheries Case* are questionable. One of the main points relied upon by the Soviets in the Vil'kitskii Straits Incident was the authorisation requirement for warships navigating in the territorial seas, including the Arctic straits.[141] It would thus seem difficult to retract this classification for that of internal waters in spite of any similarity between the Russian Arctic straits and the Norwegian *Indreleia*. Also a question remains about the difference between the straits and the polar seas. The Arctic straits and seas were not regarded in practice as internal waters.[142] A. Kolodkin has argued that the *Indreleia*'s status as a strait was considered internal waters by the ICJ.[143] In fact, the court stated in the *Anglo–Norwegian Fisheries Case* that the *Indreleia* was not a strait but a navigational route set up by Norway with artificial navigational aids.[144] The *Indreleia* geographically resembles an inland passage rather than a strait due to its proximity to mainland Norway, something difficult to maintain for many of the Russian Arctic straits.[145] A. Kolodkin has also equated the Russian Arctic straits, the Canadian Arctic straits, and the Norwegian *Indreleia*, all as Arctic straits.[146] Although Canada designated its Northwest Passage as internal waters, this is controversial and not accepted either by the United States or the European Union.[147]

State practice of LOSC, Part III does not indicate internal waters in international straits to be a problem area, except for short periods of time, since there appears to be little precedent for considering such straits as internal waters when subject to transit passage.[148] Australia in 1988, and the United States, Japan, Spain (for the European Union) and the Federal Republic of Germany in 1989 protested the closure of the Sundra and Lombok straits by Indonesia for a short period of time, which were reopened.[149] Thus, should the United States position regarding transit passage through the Russian Arctic straits eventually dominate, it seems Russia enjoys little support for claiming internal waters in international straits. P. Barabolia has noted this point, though not applied to Russian straits.[150]

Route of Similar Convenience – Messina Exception

The argument applying the so-called Messina exception to the Russian Arctic straits,[151] also has little legal weight. A. Kolodkin has claimed that there exists, 'seawards of the islands which are separated by these straits from the mainland, or between these islands, expanses of high seas no less convenient for navigation'.[152] Article 38(1) of LOSC Part III governs this exception for international straits where an island lies off the coast of a State less than 24 miles. As long as there is a route of 'similar convenience' through the high seas or exclusive economic zone on the seaward side of the

island, with respect to navigational and hydrographic characteristics, non suspendible innocent passage applies in the strait on the landward side.[153] 'Similar convenience' means equally suitable and probably includes such factors as time, distance, safety, state of sea, visibility, depth of waters and ease of fixing a vessel's position.[154]

Using a broad interpretation of Article 38(1) and taking into account relevant geographical and other circumstances relating to a route of similar convenience, most of the Russian Arctic straits are probably excluded. The exception applies to the strait of Messina between Italy and Sicily as well as the Pemba Channel between the coast of Tanzania and Pemba Island. Sicily is an island of substantial size, but the Russian Arctic island groups are considerably larger. Compared to Sicily, the respective differences in size range from roughly 4.7 times larger for Novaya Zemlya; 2.7 times larger for Severnaya Zemlya; and 1.7 times larger for the New Siberian Islands.[155] Also, since most of the Russian channels consisting of the high seas or exclusive economic zone are claimed under the Russian legislation as internal waters enclosed by baselines,[156] any route of similar convenience implies navigating northward of the entire island group. In addition to greater distances, this suggests greater difficulties in safety and ease of fixing a position at these high latitudes, though admittedly ice conditions may be less severe in some years.[157]

Most of the Russian islands exist in groups, and where single islands occur, the majority are more than 24 miles off the mainland coast. The exception under Article 38(1) would seem to have doubtful application where any possible channels consisting of high seas or exclusive economic zone, such as through the Kara Gates Strait, could be claimed as internal waters. The route which consequently must go north of Novaya Zemlya clearly lacks similar convenience.

Straits Connecting the High Seas or a Foreign Territorial Sea

Another Russian argument relates to straits connecting the high seas and the territorial sea of a foreign State. It has possible relevance here since the presence of this element in the 1958 TSC, Article 16(4), and its implicit presence in LOSC Articles 37 and 38 could possibly apply to the Russian Arctic straits.[158]

The presence of a 'dead end' foreign territorial sea has probably never been considered the sole condition to govern either the 1958 TSC or the 1982 LOSC international straits regime. The 1958 Convention Article 16(4) states explicitly, international straits connecting the high seas or a foreign territorial sea. The 1982 Convention Article 37 and 38 set forth only the condition of geographical connection of high seas and/or exclusive economic zone, and Article 45 describes international straits as connecting the high seas or an exclusive economic zone and the foreign territorial sea.

The strait of Tiran was the reason behind the passage of Article 16(4).[159] Israel and Egypt have declared that passage to lie within the LOSC regime subject to 'free navigation',[160] but this is an exceptional case. A look at the straits which the United States views as international, subject to transit passage, indicates that the majority of them

connect high seas or economic zones of two or more States, not ending in a foreign territorial sea.[161]

The Russian Arctic straits, which do not end in a foreign territorial sea, are not the exceptional case but the general to which both the 1958 and the 1982 international straits regimes may apply, ultimately depending upon international use.

Claims Affecting the Legal Regime of Arctic Waters

Sector Principle

Use of the sector principle for Arctic delimitation, claiming maritime areas lying between specific meridians up to the North Pole,[162] was essentially denied by A. Kolodkin some years ago, with prominent support provided by the former head of the Russian Duma Committee on International Affairs.[163] Vague claims appear from time to time, especially by nationalist groups in Russia.[164] Developments surrounding the Article 234 variation of the sector principle in the Arctic economic zones will be addressed in Chapter 5.

Indigenous Rights

Though presently under development,[165] both internationally and in Russia, indigenous rights are not considered presently to exert enough legal or political influence to affect to any great extent the law of the sea regimes in the Russian Arctic waters. M. Volosov indicated that until the early 1990's neither he nor A. Kolodkin had considered indigenous rights with respect to Arctic navigation.[166] Furthermore all five Arctic littoral States maintain the same high priority for their Arctic security as during the Cold War, though at a reduced level,[167] although controversy continues between asserted indigenous needs and interests, and the responses of the central governments.[168]

Straight Baselines

Controversy over the straight baselines in the Russian Arctic is minimal. This is due to substantial compliance by Russia with the necessary elements established under the *Anglo–Norwegian Fisheries Case*, as practised by States.[169] Most importantly, the ratio of land to water enclosed by the straight baselines is essentially the same as that of the *Anglo–Norwegian Fisheries Case*. In addition, long distances of the Russian Arctic coastline are used as baselines, and many of the islands are fringing. A substantial number of States have deviated from the *Anglo–Norwegian Fisheries Case* in establishing straight baselines more than Russia's Arctic straight baselines. Questions, therefore, have not been raised related to Article 234, its interrelation with LOSC Part III, and rights of passage for State vessels.

Overflight

Although *overflight* is an integral part of LOSC Part III and is one of the reasons for the negotiation of this regime, and has been the U.S. view,[170] it has little bearing on the Article 234 ice-covered areas regime. Foreign commercial airlines presently fly over Siberia itself, not needing to justify transit passage over the Arctic straits such as Kara Gates, Vil'kitskii, and Dmitrii Laptev, claimed by Russia as internal waters.[171] It is difficult to obtain information regarding military flights, but probably overflight is not practised by the U.S. or other North Atlantic Treaty Organisation[172] (NATO) aircraft over the Russian Arctic straits. Overflight of the Russian Arctic straits by NATO aircraft has never been referred to or even mentioned by the Russian military.[173] Even were overflight practised, as it may have been by the United States over the Canadian Arctic straits,[174] it would have disputable value in establishing rights for vessel transit passage. Both modes of transport, though theoretically transiting straits, are too different to establish a relevant practice.

Scandinavian Interests, Russian Law and Western Acquiescence

Scandinavia

Little activity in the Arctic has been seen indicating special interest by Greenland–Denmark and Norway in the regimes for ice-covered areas, international straits, and rights of passage for State vessels. No claims appear to have been forwarded by these States, implementing the ice-covered areas regime by declarations, or by any prescription or enforcement. Thus, the Arctic policy of these States follows traditional provisions. Letters sent to both the Danish and the Norwegian Foreign Ministries inquiring whether domestic legislation has been adopted and enforced consistent with LOSC Article 234 received negative responses.[175] Only a few sporadic activities by Norway may be related to the Arctic regimes, which will be discussed where relevant. For Scandinavia also, customary international law for the Arctic is in the process of formation, together with interpretations of the application of the LOSC, involving the ice-covered areas regime, the international straits regime, and the regime for rights of passage of State vessels.

Russian Law

International agreements entered into, decrees and edicts passed and declarations made by the Soviet Union with relevance to the Arctic seem to have been adopted by Russia without reservation.[176] At the same time new laws have been drafted and adopted by Russia, which may introduce some changes to past practices.

To judge Russian law with regard to the Arctic is not easy. One expert of the Soviet and Russian legal systems has stated,

> the importance of Soviet legislation and diplomatic documents for an understanding of the Soviet approach to the law of the sea is difficult to exaggerate.[177]

Untraditional by Western standards, evidence of the law included formulations in Soviet textbooks and treatises correlated with Soviet diplomatic positions in UNCLOS I, politically significant newspaper articles printed on inside pages at or near the bottom, newspaper articles signed 'Observer' under pseudonyms or unsigned, and articles written by leading authorities, 'meteoric' prominent authorities, or under institutional auspices.[178] In light of these variables,

> (A) well informed analyst should know much about the intellectual history of the Communist movement, Marxist–Leninist ideology and its transmutations, the protocol of Soviet media, the history of Soviet politics, and foreign policy, the structure and operation of the Soviet legal system, and international law.[179]

The use of this evidence continues at least to a moderate degree for Russia,[180] which includes legislation and articles received through INSROP from the Russian government, newspaper articles and similar utilised by Western legal experts well acquainted with the Russian legal system, and Internet addresses since approximately 1997.[181] Reliance for sources has also been placed on interviews with Russian participants in that program, which have been carried out in both English or translated Russian.

Western Acquiescence

Russia has claimed Western acquiescence to its jurisdictional claims in the Arctic.[182] Instead the United States issued diplomatic statements indicating that the Russian Arctic straits were subject to free passage or non-suspendible innocent passage in the Vil'kitskii Straits Incident in the 1960's, which were then updated in 1992 and 1994.[183] It is likely the United States occasionally navigates its submarines through a few of the Russian Arctic straits. At the same time Washington has *not* sailed any State surface vessels in violation of the Russian regime. In the Vil'kitskii Straits Incident, the Russian Arctic straits were not entered. Few, if any, other Western States have lodged protests to the Russian regime, apparently neither the United Kingdom, Norway, nor France, nor the European Union.[184] Submerged passages by these States in the Russian Arctic are largely unknown.[185] Thus, while the Russian claim concerning Western acquiescence to its regime is substantially correct, the United States has definitely protested and acquiescence may not be assumed.

CHAPTER 4

LAW OF THE SEA CONVENTION ARTICLE 234 AND OTHER REGIMES

Article 234 and Ice-Covered Areas

Article 234 of the 1982 Law of the Sea Convention (LOSC) governing marine environmental protection in ice-covered areas, is the modern cornerstone under international law on which Russian Arctic jurisdiction is based.[186] The article, however, is not free from controversy, both under international law and with respect to Russian practice.[187]

Early international negotiations leading to Article 234 dealt with the terms 'specially vulnerable areas' and 'ice-covered areas'.[188] Standards for the former were required to be subject to review by the International Maritime Consultative Organisation (IMCO), (later the IMO) although the United States desired the same for ice-covered areas, this was unacceptable by both the Soviet Union and Canada. At the 1973 IMCO Conference on the Prevention of Pollution from Vessels, proposals were forwarded by both the maritime powers and coastal States concerning the term 'special measures'.[189] Two competing positions were included in the Informal Single Negotiating Text (ISNT) Article 20(5) of the Third U.N. Conference on the Law of the Sea (UNCLOS III).[190]

The change in position from the IMCO drafts to ISNT Article 20(5) were as follows.[191] Coastal States regulations stricter than international regulations were allowed only in special cases, such as when higher standards were essential due to 'exceptional hazards to navigation' created by 'severe climatic conditions', and where marine pollution, 'according to accepted scientific criteria', would result in 'major harm to or irreversible disturbance of the ecological balance' due to the special vulnerability of the marine environment. For the maritime powers, the area where unilateral coastal State measures were allowed was enlarged from the territorial sea to areas of the exclusive economic zone where 'the particular characteristics . . . render the environment exceptionally vulnerable'.

Different tracks of negotiation then emerged. Bilateral consultations took place between the Soviet Union, the United States, and Canada, while multilateral consultations during UNCLOS III took place in an Informal Group of Juridical Experts, known as the 'Evensen Group'.[192] The Evensen Group submitted a proposal to replace the ISNT provision, the main difference being a clear definition of the geographic

scope in the article.[193] Coastal states, moreover, had to consult concerned States and provisions for special areas were to be 'applicable' by the competent international organisations. Certain specifics were also provided concerning the interrelation between environmental and navigational interests.

Informal negotiations continued in 1976. An 'Outline of Issues' submitted distinguished between 'special areas' and 'critical areas' in the economic zone, mentioning for the first time ice related problems. This again required a clear definition of the areas involved.[194]

Following further informal negotiations, the entire draft article was separated from what became Article 211.[195] It became Article 43 in a special Section 9, 'Ice-covered areas', in the Revised Single Negotiating Text (RSNT).[196]

The RSNT was included without change in the Informal Composite Negotiating Text (ICNT) as Article 235,[197] and then was renumbered to Article 234 with small drafting changes made in later revisions.[198] The terms negotiated between the Soviet Union, the United States, and Canada were incorporated directly without opposition into the various UNCLOS III texts following l976.[199] It became LOSC Article 234 adopted in 1982.

Although it is possible to argue that the concessions made on the part of the coastal States were not met by corresponding concessions on the part of the maritime States,[200] it seems difficult to completely agree. The exclusive economic zone is large and where much if not all navigation takes place. The maritime States were concerned that coastal States would have a unilateral right to establish stricter standards than those established internationally for vaguely defined marine areas, which could result in a 'patchwork quilt' of navigation standards.[201] The rights of free passage or innocent passage have special economic importance attached to them, which could be impaired. The maritime powers also made various concessions in allowing the stricter coastal State measures for special coastal areas in the exclusive economic zone, albeit made applicable by the IMO, as well as allowing the unilateral coastal State measures, albeit restricted to ice-covered areas. Many of the maritime powers are also coastal States and subject to the same threats of marine pollution indicated by the coastal State group. Consequently they balanced their policies.

It is difficult to know exactly what took place in the negotiations between the Soviet Union, the United States, and Canada over ice-covered areas. One view is that 'price for the 'Arctic exception' was the depreciation of the wider claim to a right of the coastal state to enact its own standards in non-Arctic exceptionally vulnerable areas of the economic zone'.[202] This meant that the United States would allow unilaterally adopted coastal State environmental provisions for ice-covered areas, vaguely defined, in exchange for Canadian acquiescence to the LOSC international straits regime advanced by Washington. The Soviet Union likely benefited from both positions. It achieved transit passage for its navy, and at the same time gained Canadian support for and diminished United States opposition to its extensive claims over Arctic waters.

The maritime interests as exemplified by the United States, the coastal State inter-

ests as exemplified by Canada, and both those interests as exemplified by the Soviet Union were modified during the negotiations. Thus, the key phrases of the article were characterised by textual ambiguity in order to accommodate the transformation of the diverse positions.

Other Marine Environmental Regimes

Although it seems unlikely that Russia and Canada will change their Arctic coastal State practice and although Denmark–Greenland and Norway have yet to implement Article 234, the practice of the United States as an Arctic coastal State may change. Relevant U.S. environmental legislation has been scrutinised by the Supreme Court and may be changed by the Congress, so that the laws may be altered in scope.[203] If this happens and Washington continues not to ratify the LOSC, then the United States could argue that the traditional marine environmental regimes still apply, with a narrow interpretation of Article 234.[204] To the extent Article 234 would not be applicable, LOSC Articles 211 and 218–220 with supportive conventions or customary international law with supportive conventions would apply.

The LOSC environmental regime governing vessel-source pollution is subject to ratification of the LOSC by the various interested States. It appears doubtful due to State practice that the entire Part XII related to vessel-source pollution has become customary international law in spite of the role played by MARPOL 73/78.[205] Part XII is a vast subject and has been addressed extensively elsewhere.[206] Though complicated interpretative questions might be raised concerning specific terms in the legislative histories of the relevant articles, it is beyond the scope of the work to do so. The Russian Arctic legislation and enforcement measures are tailored around the ice-covered areas regime and hence are naturally far in excess of LOSC Articles 211, 218–220 and MARPOL 73/78. Additionally, since portions of Part XII have not yet been applied, this choice is felt justified.

Should Article 234 and the Articles 211, 218–220 regimes not apply, innocent passage under LOSC Part II, Section 3 and the 1958 TSC Part I, Section III, and free navigation under Articles 2 and 24 of the 1958 Convention on the High Seas[207] and LOSC Articles 87 and 94, would apply together with normative provisions from MARPOL 73/78 forming customary international law. Under these conventions, with the exception of enforcement measures taken by the flag State, few possibilities for environmental protection exist beyond the territorial sea, which is where most vessel-source pollution takes place.[208]

LOSC Article 234 was negotiated early in UNCLOS III chiefly by the Soviet Union, the United States, and Canada with little interest or opposition shown by other States. Due to the different interests of these Arctic littoral States, the text of the article is ambiguous. Because of this, as well as domestic American developments, possibly LOSC Articles 211, 218–220 and customary international law, with supporting conventions, may apply.

Applicable Customary International Law

State practice relates to the possible passage of Article 234 and the other potentially applicable regimes into customary international law. State practice is also significant in the implementation and interpretation of Article 234 and the other potentially applicable regimes under Article 31(3)(b) of the Vienna Convention on the Law of Treaties.[209]

The practices of Russia and the United States are especially important sources of customary international law due to their status as great powers.[210] Despite changes in the modern international society, including the creation of the United Nations which advanced the position of smaller States, the most important States in the formation of customary international law are generally those which have the greatest share and interests in universal practice.[211] This also is true in respect to *opinio juris*, since the acceptance of a consensus on how the law evolves by the great powers frequently has a decisive effect.[212] Opposition of one powerful State to an alleged rule of customary law rarely prevents the rule.[213] Conversely, if a majority of small States were allowed to completely form a rule, 'insuperable difficulties' would arise, due to complex questions involving majority size, equality, and evaluation of size, including factors such as military power, economic power, population or geographic area.[214] Generally, the balance lies with the great States.[215]

Russian and the U.S. practice, though not completely determinative, play a significant role in revealing the status of Article 234 and the Articles 211, 218–220 – MARPOL 73/78 regimes, under customary international law as well as clarifying international straits regimes, including submerged passage. The same may be said of the implementation of these regimes through Article 31(3)(b) of the Vienna Convention.[216]

Opinio Juris *and the International Court of Justice*

The practice of Russia, the United States, and Canada combined with 'acknowledgement as law'[217] may indicate the existence of customary law under Article 38(1) of the Statute of the International Court of Justice.[218] There is some doubt whether *opinio juris* may be interpreted to mean that something is already law before it can become law, and arguments are made that it is what States say and not what they purportedly believe which is of importance.[219] Some argue that if States claim something is law and other States do not protest or otherwise challenge it, a new rule will become customary law though all the States may realise a change is made from the earlier rules.[220] *Opinio juris* is difficult to ascertain, define and establish because it is rather odd to give a psychological characterisation of 'acceptance' or 'acknowledgement' to a State, and hence the problem may essentially concern the burden of proof.[221]

Dealing with this problem the ICJ appears to have developed two approaches, acknowledging law as 'constant and uniform usage practised by the States in question' under the *Asylum Case*.[222] Here the ICJ relies upon the nature of the legal issues,

the state of the law that is a primary point of contention, and the discretion of the Court.[223] The less rigorous yet majority approach assumes *opinio juris* to be evidenced from State practice, consensus in literature, or the decisions of the ICJ or other international tribunals.[224] This approach was followed in the *Gulf of Maine Case*,[225] which gave as evidence State practice with respect to the delimitation of the continental shelf. The minority opinion also took this approach in the *North Sea Continental Shelf Cases*[226] and the *Continental Shelf (Tunisia/Libya) Case*.[227] In dissent in the *North Sea Continental Shelf Cases*, Judge Sørensen said,

> . . . the conclusion may therefore safely be drawn that as a result of a continuous process over a quarter of a century, the rules embodied in the Geneva Convention on the Continental Shelf have now attained the status of generally accepted rules of international law.[228]

Judge Sørensen cited Sir H. Lauterpacht's statement that,

> . . . it would appear that the accurate principle on the subject consists in regarding all uniform conduct of Governments (or, in appropriate cases, abstention therefrom) as evidencing the *opinio necessitatis juris* except when it is shown that the conduct in question was not accompanied by any such intention.[229]

Judge Lachs, in his dissent in the *North Sea Continental Shelf Cases*, noted,

> All this leads to the conclusion that the principles and rules enshrined in the Convention, and in particular the equidistance rule, have been accepted not only by those States which are parties to the Convention on the Continental Shelf, but also by those which have subsequently followed it in agreements, or in their legislation, or have acquiesced in it when faced with legislative acts of other States affecting them. This can be viewed as evidence of a practice widespread enough to satisfy the criteria for a general rule of law.[230]

The second approach, requiring 'more positive evidence of the recognition of the validity of the rules in question in the practice of States', has been followed in a 'significant minority of cases'.[231] This is the test applied by the Permanent Court of International Justice (PCIJ) in the *Lotus Case* and by the ICJ in the *North Sea Continental Shelf Cases* and the *Case of Nicaragua v. United States (Merits)*.[232] In the *Lotus Case* the PCIJ held,

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognised themselves as being obliged to do so; for only if such abstention were based on their being conscious of a duty to abstain would it be possible to speak of an international custom.[233]

The ICJ in the *North Sea Continental Shelf Cases* quoted verbatim this statement as support for its decision,

> The essential point in this connection – and it seems necessary to stress it – is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*; – for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.[234]

In the *Case of Nicaragua v. United States (Merits)* the ICJ held the same, referring specifically to the *North Sea Continental Shelf Cases*,

> In considering the instances of the conduct above described, the Court has to emphasise that, as was observed in the North Sea Continental Shelf Cases, for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by the *opinio juris sive necessitatis*.[235]

Russia, the United States, and Canada have acknowledged the LOSC vessel-source environmental provisions as law, Article 234 relates to their domestic legislation.[236] The more vigorous approach used by the ICJ showing *opinio juris* seems satisfied, for the implementation of the practice into their domestic legislation indicates that the States involved regard the action as obligatory and not merely permissive.[237] Additionally, *opinio juris* appears substantially evidenced by the Russian, United States, and Canadian statements or articulations of the rule upon which the State practice is based.[238] The State practice is performed together with or consists of statements that something is law.[239] However, for the regimes, LOSC Part XII, Articles 211, 218–220 and LOSC Part III, constant and uniform usage practised by the States in question may be lacking.[240] Therefore *opinio juris* may not be shown, even under the majority yet less vigorous approach, where *opinio juris* is assumed to be evidenced from State practice. This seems even more questionable concerning submerged passage of State vessels through international straits.[241] The *Corfu Channel Case* and the 1958 TSC Article 16(4) international straits regime, though controversial, became customary international law, through a constant and uniform usage and the assumption of *opinio juris*.[242] This may be more questionable, however, for submerged passage of State vessels through international straits.[243]

Setting Norms for a Rule of Law

The normative requirement of customary international law was addressed by the ICJ in the *North Sea Continental Shelf Cases*,

> the provision concerned should, at all events potentially, be of fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.[244]

Moreover, the peculiar nature of 1958 TSC Article 6 was seen by the ICJ to be contrary to various other 1958 TSC articles, when it ruled that,

> it is a legitimate inference that it (Article 6) was considered to have a different and less fundamental status and not, like those Articles, to reflect pre-existing or emergent customary law.[245]

Thus, to be norm-setting, a rule must establish a law of general applicability and not merely expediently settle issues between particular States.[246]

This requirement is of particular relevance here, since certain standards, both international and domestic, may be merely technical rules regulating Arctic navigation. Examples include design, construction, equipment, manning, discharge, and safety standards. Similarities do exist between the standards developed over the past twenty-five years by Russia, the United States, and Canada which implement international standards.[247] In addition an international conference of representatives from the Coast Guards and Sea Transport Ministries of the Arctic littoral States and other interested States met regularly over several years with the specific goal of producing a harmonised code for ice navigation.[248] Thus, while singular, ice navigation requirements may be considered as technical rules merely settling issues, collectively there appears to have been continuous progress in the development of similar rules peculiar for navigation in the Arctic region. Should these rules not be of a fundamentally norm-creating character, they have the potential for evolving as a basis for a rule of law in the Arctic.

General or Local Customary Law

Is a general or local customary law being formed to govern the Arctic waters? Although, 'a general practice accepted as law' is referred to under Article 38(1)(b) of the ICJ Statute, 'custom and uniform usage, accepted as law' applied locally was allowed by the ICJ as an interpretation under the *Asylum Case*.[249] Columbia relied, against Peru, upon an alleged regional or local custom peculiar to Latin American States.[250] The Arctic has five littoral States. In the *Right of Passage over Indian Territory Case*,[251] a local custom was found to exist between just two States.

Practice may thus be formed locally, regionally, or bilaterally, which may extend or be different from general customary law for those concerned. General customary law, however, is most important and cited frequently.[252] Since local customary law is the exception, its existence must be strictly proved.[253] *Opinio juris* is thus not to be presumed, and clear assent may be required, or *opinio juris* may merge into the principle of acquiescence.[254]

Thus for the Arctic it may be possible with the proper showing of *opinio juris* to

maintain that a special regional environmental regime is under development by the three large Arctic coastal States based upon the Arctic's special climatic, geographic, and political nature. Of particular importance is the principle of State acquiescence in these developments.

General customary law seems to be governing the Arctic. The only States so far exhibiting much interest in the Arctic legal regime have been the littoral States. Of these only Russia, the United States, and Canada have been active participants.[255] Due to a lack of engagement by other States, a general practice accepted as law is being developed for this region.

This emerging customary law may be opposable to other States. The concept of opposability is described as 'a limited external legal effect of the measures taken by a State or an international organisation', and addresses situations were relevant law is lacking, emerging or undergoing change.[256] The dynamics of international relations may reveal gaps in international law, and adhering to the old rules may not meet the requirements and interests of today's international community.[257] Certain unilateral measures take on characteristics of opposability in order to fill gaps in the law in light of a perceived need to protect the general interests of the international community.[258] Components of opposability may consist of effectiveness and legitimacy.[259] Unilateral measures must be effective in order to be opposable, and likewise must be supported by legitimacy; the measures must conform to a sense of equity and the general interest of the international community rather than to special interests.[260] Good faith in the conduct of the parties may also be important as the subjective standard in considering whether measures may be considered opposable.

Opposability has been addressed under several cases,[261] including the *Anglo-Norwegian Fisheries Case* where the alleged rule would not have been 'opposable' to Norway.[262] Thus, if a State persistently objects to an emerging rule of customary law, as a matter of strict law it will not be bound.[263]

The primary function of proof of a general practice accepted as law is to create a presumption that all States, whether or not they have contributed to that practice, are bound by the resultant rule.[264] In practice, however, it appears difficult for States to hold out against a rule accepted by the majority of other States. The pressure for conformity is likely to prove invincible over time.[265] As regards the Arctic, there appears to be no divergent practice of other States and no persistent objection to the practice of Arctic States. It is therefore probable that an emergent customary rule will be opposable universally.

Some States may claim that the customary rule is regional and not universal. A State removed from the Arctic may want to carry out transit passage in one of the Arctic straits bordering Russia. How far can the ice-covered areas regime as customary law be opposable on non-actors in the area? From the history surrounding Article 234 in UNCLOS III and the State practice of Russia, the United States, and Canada by national legislation, political statements, and enforcement of their claims in the area, the regime which has developed so far may be considered as regional custom-

ary law. Since other States during 25 years or more, either due to lack of interest or lack of technical capabilities, have apparently acquiesced in the development of the regime based on the practice and interpretation of riparian States, and since they have not opposed its development formally and publicly, the regime could be opposable on all States.

Subsequent State Practice and Application to Treaties

In the negotiations of the Vienna Convention, there were opposing schools regarding treaty interpretation. Some delegates maintained the *travaux préparatoires*, including the intention of the parties, should place the treaty text and the *travaux préparatoires* on the same level. Others held to the 'textual approach', placing the text first, with the *travaux préparatoires* taken into account only as a supplementary and secondary means.[266] Disadvantages of the textual approach include that it does not emphasise sufficiently the role of policy.[267] Additionally, 'clear' or 'ordinary' meaning is understood differently, and the parties may have intended that a term be specially understood but failed to make this clear in the text.[268] Disadvantages of the 'intentions' school include that the dispute in many cases has arisen because the parties had no thoughts on the matter or none were common.[269]

These approaches are not absolutely separate from one another. Theories of treaty interpretation are normally believed to consist of elements of all three.[270] Taken separately, however, they do emphasise different aspects of treaty interpretation. All are capable of producing the same result or extremely different results.[271] It was chiefly the textual approach which was adopted by the Vienna Conference, though it was somewhat modified by the intentions approach allowed under Article 31(1) of the Convention.[272]

Given that key phrases of Article 234 are characterised by vagueness, the original negotiations, carried out in the 1970's and early 1980's, may do little towards clarifying the issues. Since the negotiations between Russia, the United States, and Canada about the article have been closed, State practice, including actual navigation in ice-covered areas, may be more revealing.

Subsequent practice of the parties to a treaty may operate as a tacit or implicit modification of the terms of the treaty.[273] Some scholars, however, maintain that if practice runs counter to the treaty, it may terminate it, but practice may not be used to amend the treaty unless accepted unanimously.[274] Article 31(3)(b) requires specifically that State practice in the application of the treaty, which establishes the agreement of the parties regarding its interpretation, should be taken into account.[275] Both the LOSC ice-covered areas and the international straits regimes were negotiated with Washington and Moscow playing central and often complementary roles.[276] The provisions of both regimes indicate a consensus.[277] Both Russia and the United States exercise transit passage. Russia has ratified the LOSC and the United States has considered the pertinent articles as customary law, or indicated its acknowledgement of these regimes.[278]

With more than 144 State parties to the LOSC, the acknowledgement of both regimes has been generally established. However, in the Arctic most states, including some Arctic states, have not been engaged in the interrelation between the ice-covered areas regime and the international straits regime, including submerged passage through international straits.

Express agreement exists, therefore, which allows the use of Arctic State practice in application of the LOSC to establish the agreement of the parties regarding the further interpretation of these regimes. Additionally implied agreement exists which supports the use of State practice in treaty interpretation.[279] This is not an unknown phenomenon in international law. For example, provisions from the High Seas Convention allowing freedom to fish beyond the territorial seas within 200 miles of coastal States were obviously amended by subsequent State practice. Parties to the Convention not only tolerated 200-mile exclusive fisheries zones, but established such claims themselves.[280]

Included in State practice under Article 31(3), demonstrating the understanding of all the parties are estoppel and acquiescence.[281] In *Competence of the I.L.O. with respect to Agricultural Labour Case*,[282] in situations where it indicates an acknowledgement of obligations through State practice the Permanent Court of International Justice denied an escape from obligations through a later narrow interpretation of treaty provisions. In the *Anglo–Iranian Oil Co. Case*[283] the ICJ held acquiescence in the practice of one State by other States in a situation where they have or can be thought of as having knowledge, can, lacking protest, establish the common interpretation of the parties.

State acts and declarations must be carefully examined in light of the surrounding circumstances. Claims appearing on the statute book may never have been enforced or may not be capable of being enforced under international law.[284] A distinction may be made between State declarations and State action evidenced by enforcement of claims.[285] Declarations without enforcement of some kind have been held to not make customary law, and this could be argued also relevant for treaty interpretation.[286] Nevertheless, under the *North Sea Continental Shelf Cases*[287] and the *Fisheries Jurisdiction Case*[288] statements of a legal position have been recognised as being of value, and the existence of customary law has been concluded on the basis of claims alone, independent of enforcement.[289]

Although enforcement is definite evidence of State practice, the weight of opinion in the doctrine of international law tends to hold that State practice does not comprise only the enforcement of claims but may also include declarative actions.[290] Both the Russian and American non-implemented claims which follow may be viewed as State practice under international law.

Status of Article 234 and Other Regimes under Customary Law

The status of Article 234 under customary law is controversial but perhaps less so than that of the more traditional Part XII regime for the protection of the environment from vessel-source pollution. The United States has acknowledged that it will

recognise those rights and interests consistent with the LOSC concerning a State's jurisdiction and responsibility for the environment. The American position would thus seemingly support Article 234 as customary law through its acceptance of Part XII as customary international law.[291] At the same time the United States has claimed both the Russian and the Canadian Arctic straits as subject to the international straits regime and has made little attempt to clarify the interrelation between the two regimes.[292] Soviet and Russian legislation governing vessel-source pollution in the Arctic has followed closely Article 234, and Canadian legislation has been much the same.[293] If a common legal 'point of reference' is provided, such as Article 234, there may be a greater possibility for different States legislating similar rules and hence developing customary law. Although the Scandinavian States have not implemented Article 234, with the exception of Denmark/Greenland they have ratified the LOSC.

The relationship between the Antarctic marine area and the LOSC is controversial. Some views have maintained that omission of the issue in UNCLOS III was intentional. Others believe that lacking an express provision, the LOSC articles apply to claimant States as coastal States.[294] Perhaps more important, no Antarctic claimant State which could be classified an 'Antarctic coastal State' appears to have enacted legislation implementing Article 234.[295] Only Argentina has enacted legislation which might vaguely hold its options open regarding Article 234 and Antarctic waters.[296]

Those States exercising jurisdiction over the largest marine areas in the Arctic support Article 234 most strongly and have in fact negotiated the article. Implementing legislation substantially similar to Article 234 was adopted by Canada in 1970, by the Soviet Union in 1984, and by the United States in 1990. All this would point towards Article 234 having become customary international law. For a provision to have passed into customary international law, however, it must be norm-setting. Due to the unclear U.S. practice as well as varying interpretations of Article 234,[297] *theoretically* it seems questionable the article may represent customary international law. Whether it is normative, practised, and acknowledged as law is not yet completely clear. Additionally, it may be arguable whether the Part XII regime has become customary law, and since Article 234 is within this part, its status is also questionable.

Nevertheless, though Arctic littoral State practice and acknowledgement as law may encompass non-normative *technical rules*, collectively they may give substance to Article 234, the broad contours of which for the prescriptive and enforcement jurisdiction of coastal States may be norm-setting. Should U.S. practice remain stable, Article 234 may become customary international law.[298]

The United States views LOSC Part XII as customary law, and the Soviet Union has incorporated large parts of this regime into its domestic legislation. However, although the establishment of the exclusive economic zone has without doubt become customary international law,[299] only a small number of States appear to have extended their jurisdiction over vessel-source pollution in this zone.[300] This indicates that the LOSC provisions governing vessel-source pollution in the exclusive economic zone have probably not yet become customary law. On the other hand, the norm-setting

provisions from MARPOL 73/78 and other IMO pollution and safety conventions have enjoyed a high rate of ratification, especially by States that represent large vessel tonnage, and are in the process of becoming customary law.[301] Authors differ widely on this issue;[302] however, almost all have addressed LOSC Part XII in their works.[303]

Even though LOSC vessel-source environmental provisions including Article 234 probably cannot be said to have become customary law, the interpretative possibilities of Article 234 must still be addressed. Talks on issues related to Article 234 have occurred bilaterally between Russia, the United States, and Canada, coupled to their anticipated ratification of the LOSC.[304] In spite of the diversity of interpretations of Article 234, until recently supported by divergent State practice, circumstances may be changing, with more consistent practice following a broad interpretation of the article.

Interpretations of Article 234

Interpretative issues surrounding the terms of the text of Article 234 include questions about an expansive or narrow scope of application.[305] These include interpretation of the terms, 'where', 'non discrimination', 'due regard to navigation', 'within the limits of the exclusive economic zone' and 'environmental protection based upon sound scientific evidence'. Exceptions are also provided under Article 236, which gives immunity to State vessels.

Under Article 234 the coastal State is given unilateral jurisdiction to enact and enforce stricter environmental legislation governing vessel-source pollution in ice-covered areas, than other internationally established rules. Not only are stricter discharge and safety standards encompassed, but also stricter design, construction, equipment and manning standards. The latter usually must be adopted by the coastal State, when 'acting through the competent international organisation or diplomatic conference'.[306] This concession made to shipping interests, designed to correlate coastal State rules with international provisions established through the IMO, was to prevent widely varying regulations from State to State. Since Article 234 is silent on this matter, greater unilateral jurisdiction seems to be permitted Arctic coastal States than that 'generally accepted', 'applicable' and established internationally through the IMO, over specifically defined maritime areas.[307]

A restrictive interpretation of Article 234 is possible in which the term 'where' may be implicitly understood as 'when'.[308] Though not the primary meaning of 'where', this unquestionably represents a sound secondary meaning.[309] Under this interpretation strict unilateral measures may be taken only *when* problems arise from severe climatic conditions and the presence of ice gives rise to obstructions or exceptional navigational hazards, and *when* marine pollution could cause major harm to or irreversible disturbance of the ecological balance. Special legislation and enforcement are necessary only when severe conditions exist. This interpretation would be a 'special situation' remedy more consistent with the Articles 211, 218–220 regime sought by

flag State interests in the UNCLOS III negotiations. Problems of interpretation also surround the term, 'ice-covered areas'. Little clarification is given in the LOSC other than that which appears in Article 234 itself, requiring the 'presence of ice' . . . 'for most of the year' . . . 'create(ing) obstructions or exceptional hazards to navigation . . .'.[310] This could mean ice-coverage lasting many months, but, one expert notes if the areas need to be one-half or more ice-covered for eight months a year, most of the Siberian seas would be excluded.[311]

The LOSC context of Article 234 is odd as the only article in Section 8. Moreover, the remaining Sections 9, 10 and 11 in Part XII also contain single articles. They all appear to be a final collection of odd issues to govern, ice-covered areas, responsibility and liability, sovereign immunity, and State obligations under other conventions.

Russian and Canadian practices seem to be based upon a broad interpretation of Article 234, while the U.S. position though unclear, initially may have been in line with the narrow interpretation.[312] During negotiations of the article, 'particularly severe climatic conditions' was upgraded with little comment to 'the presence of ice covering such areas for most of the year'. Russia and Canada contain little in their legislation indicating a temporal 'special situation' limitation of their Arctic regimes. The United States, though initially favouring diminished coastal State rights governing navigation, apparently has not forwarded a claim favouring a narrow interpretation utilising 'when'. Subsequent U.S. declarations have on the contrary indicated the opposite.[313] The U.S. State Department has denied knowledge of a utilisation of the term 'when' in the article.[314]

Thus, the textual meaning of Article 234 probably follows the broad interpretation, in which 'where' has been interpreted in its primary meaning. Though the narrow interpretation is possible, favouring a seasonal ice variation, no such claim has put forward even by the United States, the one State with the greatest interests in doing so. Few authors address the issue.

Non-discrimination

A question may be raised whether 'non discriminatory laws and regulations' under Article 234 were meant to be enacted and enforced *among* foreign vessels of different nationalities, or also *between* foreign vessels and Russian vessels. No clarification is given by the text of the article itself, however the context may provide some assistance.[315]

Comparing Article 234 to LOSC provisions containing the term 'non discrimination' Article 24(1)(b), Article 25(3), Article 42(2), Article 52((2) and Article 227; Articles 25(3), 42(2) and 52(2) use the preposition 'among' following 'non discrimination', while Articles 24(1)(b) and 227 use 'against'.[316] Article 234 uses neither. The wording of Articles 24(1)(b) and 227 implies that discrimination is not allowed against the vessels of any other State as compared to the domestic vessels, *meaning all*. This seems to be a deliberate choice of terms, since over half the Articles use 'among' implying that discrimination is not allowed *among foreign vessels only*. If viewed in 'clusters' those arti-

cles using 'among' deal chiefly with temporary non discriminatory suspension of innocent passage in specified areas. Those two articles governing a strengthening of normal passage rights apply to all vessels, Article 24(1)(b) through a requirement of non discriminatory non hampering, Article 227 through safeguards to be applied in a non discriminatory manner. Running counter to these clusters is Article 42(2) dealing with non hampering of transit passage. However, this may well be irrelevant as long as transit passage through international straits is not hampered, which is one of the chief elements of this right, since there questionably can be maintained to be discrimination whether in form or fact.[317]

Article 234 likely is a member of the 'against' cluster, since it strengthens normal passage rights in relation to the environmental provisions, albeit in special adverse conditions. The adoption and enforcement of non-discriminatory laws and regulations were probably meant to be interpreted in a non discriminatory manner 'against' *all vessels*, the coastal State's flag vessels and vessels of any other State. It belongs to the same LOSC Part XII as Article 227,[318] but more importantly it was not intended to suspend passage rights but rather to allow passage subject to the environmental conditions. That due regard must be taken to navigation is required specifically. All indications are that this interpretation also appears supported by the State practice of those States practising Article 234, including Russia, with the notable exception of Russian fees for navigational services rendered, though this may be changing.[319] The term 'non-discriminatory' appeared early in UNCLOS III, though not in all the State proposals.[320] Few authors address the issue.[321]

Navigation and the Exclusive Economic Zone

The terms 'due regard to navigation' and 'within the limits of the exclusive economic zone' must be examined together for their interpretation. 'Due regard to navigation' is one of the explicit conditions under Article 234 which limits a coastal State from unilaterally adopting and enforcing vessel standards governing discharge, safety, and design, as well as equipment, crewing, and construction for navigation in ice-covered areas. The limits are unclear. *Black's Law Dictionary* defines 'due regard' and 'due': the first meaning, '(J)ust; proper, regular; lawful; sufficient; reasonable . . .'; and the second, '(C)onsideration in a degree appropriate to demands of the particular case'.[322] Coastal States thus must likely give reasonable consideration to navigation when enacting and enforcing laws implementing Article 234.

One possible interpretation of 'due regard to navigation' is that freedom of navigation and innocent passage are preserved under traditional law of the sea.[323] With this it is unlikely that a coastal State would be able to enact more comprehensive provisions than those with respect to the territorial sea.[324] Limits are explicit that Article 234 is to apply within the coastal State's exclusive economic zone, possibly not including the territorial sea. Article 234 states 'exclusive economic zone', and the definition found in Article 55 limits the exclusive economic zone to the 'area beyond and adja-

cent to the territorial sea'.[325] What then is the relation between 'due regard to navigation' governing the territorial sea and 'due regard to navigation' governing the exclusive economic zone? Since a coastal State would not exercise greater rights in its exclusive economic zone than in its territorial sea, the jurisdictional limits under Article 234 would consist of those limits exercised in the territorial sea.[326] Those limits are defined in Article 24. The coastal State, therefore, would not be able to impose environmental standards on foreign vessels in the exclusive economic zone, impairing or denying innocent passage or discriminating against any vessels, including those carrying cargo to, from, or on behalf of any State.[327] Passage could be suspended only temporarily under Articles 19 and 25.

While a convincing legal argument, it may not be the correct interpretation. A counter argument may be made that 'due regard to navigation' under Article 234 is probably not the 'due regard to navigation' taken into account normally. Article 234 was clearly adopted to change coastal State rights, due to the extreme climate conditions. Article 234 could be seen as broadly applying 'within the limits' of the exclusive economic zone which may include the territorial sea, straits, and internal waters.[328] Though this interpretation probably expands the ordinary meaning of 'within the limits of the exclusive economic zone', as well as is contrary to Article 55, it would allow the coastal State to apply its own discharge and safety, design, equipment, crewing and construction standards the full 200 miles from the coastal baselines. This interpretation may be supported by Articles 64, 66 and 67, which apply to fisheries, and govern, 'all waters landward of the outer limits of (its) exclusive economic zone . . .'.[329]

Which of the two interpretations is correct, is difficult to ascertain. Due to the original design of Article 234, as well as the subsequent closed negotiations and no evidence of substantial changes in practice, the intention of the article remains unclear.

Another possible interpretation has been suggested by one scholar. Whether or not the area of application of Article 234 is widely or narrowly defined, the permissibility of restriction on navigation may have to vary according to the status and circumstances of the waters in question.[330] This view seems more vague and may overlap the narrow interpretation of Article 234 regarding the term 'when'. Furthermore, making passage rights dependent upon changeable circumstances, such as ice and weather, seems unreasonable.[331]

The Russian and the U.S. marine environmental legislation apply to the full 200 miles measured from their coastal baselines, and the Canadian Arctic law applies to at least 100 miles from its baselines.[332] Thus, 'due regard to navigation' considered in light of practice, exceeds the limits that a coastal State may apply in its territorial sea under Article 24 and appears to follow a special interpretation of the term where under navigation is permitted, but strictly regulated. It may suggest that a standard of reasonableness that is dependent upon the circumstances may be used,[333] considering the difficult circumstances. 'Due regard to navigation' appeared first in the RSNT Article 43 with little explanation given. Few authors address this issue.

The coastal State will also pay a 'due regard to . . . protection and preservation of

the marine environment based on the best available scientific evidence', in its regulations, under Article 234. This provision was likely meant to balance 'due regard to navigation'.[334] An Arctic coastal State, therefore, could probably without difficulty defend its all-encompassing environmental provisions under this unclear, broad expression, especially considering the broad 'precautionary principle' utilised in international environmental law.[335] It appears such evidence may be used in dispute settlement procedures.[336]

Russian Practice

For clarity an overview will be presented of the relevant national statutes, proclamations and international agreements, and practice supporting the broad interpretation of Article 234. Specific provisions will be discussed in Chapter 5 in relation to the international regimes and the formation of customary law.

The comprehensive Russian regime for Arctic environmental protection has been described as follows,

> (S)uch a regime, seemingly tough at first glance, should not be accepted as limitation of the freedom of navigation for it is aimed at the preservation and development of the Arctic unique ecological systems, protection of its environment from pollution and artificial destruction which is the duty of an Arctic-rim state and for which it is liable before the world community and the generations to come.[337]

This protection has been ensured by extensive legislation adopted under the Soviet Union and new legislation adopted by Russia. Some of the latter has not been translated. The legislation consists of the following: Statute on the Protection of the State Boundary of the U.S.S.R.,[338] Statute on the Administration of the NSR,[339] 1968 Merchant Shipping Code of the U.S.S.R. and the 1973 U.S.S.R. Statute on State Maritime Pilots,[340] 1983 Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters and Internal Waters and Ports of the U.S.S.R.,[341] 1982 Statute, Resolution by the U.S.S.R. Council of Ministers with the Soviet–U.S. Accord on the Question of Innocent Passage of Vessels, including Warships, through Territorial Waters Attached,[342] 28 February 1984 Edict 'On the Economic Zone of the U.S.S.R',[343] 26 November 1984 Edict on Intensifying Nature Protection in Areas of the Far North and Marine Areas Adjacent to the Northern Coast of the U.S.S.R.,[344] 1985 'Statute on the Protection of the Economic Zone of the U.S.S.R.',[345] 1985 'Statute on the Protection and Preservation of the Marine Environment in the Economic Zone of the U.S.S.R.',[346] *Notice to Mariners*, 1st ed., 1985, 'System for Navigating Vessels in the Vil'kitskii, Shokal'skii, Dmitrii Laptev and Sannikov Straits',[347] the Decree of 1 June 1990, 'On Measures for Securing the Implementation of the Edict of the Presidium of the U.S.S.R. Supreme Soviet of 26 November 1984 'On Intensifying Nature Protection in Areas of the Extreme North and Marine Areas Adjacent to the Northern Coast of the U.S.S.R.'',[348] Decree of the Presidium of the U.S.S.R. Supreme Soviet of 12 November 1984, 'On the Procedure

for Applying Articles 19 and 21 of the Edict 'On the Economic Zone of the U.S.S.R.",[349] Regulations for Navigation on the Seaways of the NSR,[350] the Law of the Russian Federation On the State Frontier of the Russian Federation, 1 April 1993,[351] Requirements for the Design, Equipment and Supply of Vessels Navigating the NSR,[352] 1 June 1993 General Regulations for Navigation and Anchoring of Vessels at Sea Ports and at the Approaches Thereto,[353] Law on the Russian Federation's Internal Sea Waters, Territorial Sea and Contiguous Zone, of 31 July 1998,[354] Federal Act on the Exclusive Economic Zone of the Russian Federation of 2 December 1998,[355] and Russian Federation Government Decree N. 1102 dated October 2nd 1999, On Navigation and Sojourning Regulations of foreign military ships and other state-owned vessels, exploited for non-commercial purposes, in territorial sea, inland sea waters, on naval bases, at military ship station points and sea harbours of Russian Federation.[356] A plethora of other environmental legislation of unknown scope has been adopted with possible relevant application to Russian Arctic waters.[357]

Straight baselines in the Russian Arctic were established under the Decree of 15 January 1985 for the Territorial Sea, Exclusive Economic Zone, and Continental Shelf of the U.S.S.R.,[358] enclosing among other areas the three large Arctic island groups including the key straits. For clarity a brief description follows.

> *Novaya Zemlya.* Three straits are enclosed by baselines, the largest being the Kara Gates Strait, least width 22 miles, with baselines 29 miles long at the western entrance and 32 miles long at the eastern entrance.
>
> *Severnaya Zemlya.* Straight baselines enclose four straits. The main strait Vil'kitskii, least width 29 miles, is divided by islands, and is enclosed in the west by a 60.1 miles long baseline drawn from Bolshevik Island north of the strait to islands north of the mainland. The main baseline at the eastern entrance of Vil'kitskii is 42 miles long. The Shokal'ski Strait, least width 10.5 miles is enclosed at the western entrance by 27.2 and 26.8 miles long baselines, and in the east by a 27 miles long baseline.
>
> *Novosibirskiye Ostrova.* Straight baselines enclose the Sannikov, Eterikan and Dmitrii Laptev Straits. Across the Sannikov, least width 31 miles, the baseline is 36 miles long in the west and 44 miles long in the east. Across the Dmitrii Laptev, least width 27 miles, the baseline is 32 miles long in the west and 30 miles long in east.[359]

Several incidents occurred between the Soviet Union and the United States in the mid 1960's involving Russian Arctic waters and straits.[360] Because of ice, rather than navigating north of Novaya Zemlya and Severnaya Zemlya as planned, the U.S. Coast Guard icebreakers *Edisto* and *East Wind* entered the Kara Sea and proceeded towards the Vil'kitskii Straits. No transits were carried out, but statements forwarded in these incidents were presented by the U.S. State Department as a statement of the American position.[361]

A bilateral U.S.S.R.–U.S. Joint Statement, governing innocent passage entered into force 23 September 1989.

Russia's interpretation of Article 234 appears to be broad, governing all vessels.[362] Interested States seem to be substantially complying with the regime, including the United States with both its surface State and commercial vessels.[363] Though somewhat unlikely, it cannot, however, be excluded that over time Russia may 'soften' its position regarding passage in the exclusive economic zone, subject to a 'harmonised' Article 234, innocent passage in the Arctic territorial sea, and transit passage through its Arctic straits.[364]

Canadian Practice

The Canadian Arctic Waters Pollution Prevention Act,[365] adopted in 1970, extended Canadian jurisdiction over marine pollution prevention north of 60 degrees further north to a zone 100 miles from the baseline from which the territorial sea is measured.[366] Within this zone Canada claims the authority to regulate all shipping, including complete prohibition from the entire area or part thereof, and to prescribe and enforce standards governing design, construction, manning, discharge, and safety. The zone appears to indicate one restrictive interpretation made by Canada of Article 234, by its continued provision for application of the regime 100 miles from the baselines rather than the full 200 miles.

The Arctic Shipping Pollution Prevention Regulations,[367] implement the 1970 act, providing detailed design, construction, and operation standards. In 1985 Canada established straight baselines around the perimeter of its archipelago in the Arctic, which enclose the Arctic straits.[368] In conjunction with this a comprehensive statement was made by the Canadian government asserting complete control over the Northwest Passage possibly intended as historical internal waters made by then Secretary of State for External Affairs, J. Clark, in the House of Commons,

> (C)anada's Sovereignty in the Arctic is indivisible. It embraces land, sea, and ice. It extends without interruption to the seaward-facing coasts of the Arctic Islands. These Islands are joined and not divided by the waters between them. They are bridged for most of the year by ice. From time immemorial Canada's Inuit people have used and occupied the ice as they have used and occupied the land.[369]

Maps indicate that much of the marine area north of 60 degrees North is ice-covered for many months of the year,[370] though changes may be occurring.[371] Those areas which are less ice-covered east in the Davis Strait are characterised by substantial sea ice of one eighth or greater concentration.[372]

The Canadian–U.S. Agreement requires navigation by U.S. ice-breakers within waters claimed by Canada to be internal to be undertaken only with the consent of the Canadian government. At the same time the U.S. reserves its position regarding jurisdictional issues. Notably not addressed are passages by U.S. submarines or commercial vessels, implying either that these do not require consent or that other pro-

visions govern.[373] The agreement followed some incidents which occurred in the mid 1980's similar to the Vil'kitskii Straits Incident in the Russian Arctic. In 1985 the U.S. Coast Guard Cutter, *Polar Sea*, passed through the Canadian archipelago, claimed as internal waters, without Washington requesting permission from Ottawa. The vessel had two Canadian Coast Guard Captains on board and was accompanied by another U.S. Coast Guard vessel, *John A. MacDonald*. Canadians complained over the issue of sovereignty. In 1988 Washington requested permission for the U.S. Coast Guard Cutter, *Polar Star*, to transit the Northwest Passage and gave assurances regarding compliance with the 1970 Arctic Waters Pollution Prevention Act and liability for pollution damage. Canada consented. A Canadian Coast Guard officer was on board, and the vessel was escorted by the *John A. MacDonald*. No Canadian public outcry occurred. NATO agreements governing various U.S. military transits through the Northwest Passage may exist, but their extent is unknown.[374]

Finally, upon accession to MARPOL 73/78 on 16 November 1992, Canada declared in relevant part,

> (a) The Government of Canada considers that it has the right in accordance with international law to adopt and enforce special non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered waters where particularly severe climatic conditions and the presence of ice covering such waters 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.
> (b) Consequently, Canada considers that its accession in . . . (MARPOL 73/78) is without prejudice to such Canadian laws and regulations as are now or may in the future be established in respect of arctic waters within or adjacent to Canada.[375]

The Canadian Department of Foreign Affairs and International Trade has noted that the Russian vessel *Kapitan Khlebnikov* made tourist cruises through the Canadian Arctic in 1993 and 1994, that in recent years two to three cruise vessels on the average have entered Canadian Arctic waters, and all have sailed in compliance with the 1970 Arctic Waters Pollution Prevention Act and related legislation.[376]

Canada's interpretation of Article 234 through the implementation of its provisions appears to be broad. Interested States seem in practice to be substantially complying with the regime, which includes both U.S. public and commercial vessels in surface navigation.

U.S. Practice

The American position is not clear in spite of its history of opposition to the Russian and Canadian Arctic regimes with its claims for navigational freedom. Several incidents have taken place between Russian and U.S. submarines, including at least one made public off Kol'skii Bay in the Russian territorial sea near the Kola Peninsula.[377]

The Russian Navy maintained that some 25 collisions occurred between Russian and U.S. submarines from 1968 to 1992, with nine incidents occurring, 'in Russian Navy training ranges near Russian shores'.[378] The U.S. Secretary of Defence at the time of the incident near Kol'skii Bay noted that the United States had a number of subs operating in the area,

> . . . It is an important part of our security, and I don't have any reason to believe there's a fundamental problem here that requires any change in our policies.[379]

The U.S. Navy may exercise its Freedom of Navigation Program (FON) in the Russian Arctic, possibly through various straits, although where, when, and to what degree, is not known.[380] Submarine operations appear to be consistent with the U.S. position on Article 234, which, presumably exempts submarines from application under Article 236 on sovereign immunity and under the international straits regime of LOSC.[381] Washington has formally protested the Russian Arctic regime as a violation of international law[382] and has claimed traditional innocent passage through foreign territorial seas, free navigation in foreign exclusive economic zones, and transit passage through and under international straits.[383]

It seems likely that the United States has navigated, and that Russia may have occasionally navigated nuclear submarines in the Canadian archipelago.[384] The Canadian enclosure of its archipelago as well as application of the 1970 Arctic Waters Pollution Prevention Act to the straits has been protested by the United States.[385] On 18 November 1993, Washington filed with the IMO its understanding of the scope of the Canadian declaration related to MARPOL 73/78, in relevant part,

> The Government of the United States . . . considers that Canada may enact and enforce only those laws and regulations in respect of foreign shipping in arctic waters that are within 200 nautical miles from the baselines . . . as determined in accordance with international law:
>
> – that have due regard to navigation and the protection and preservation of the marine environment based upon the best available scientific evidence in arctic waters, and
> – that are otherwise consistent with international law, including articles 234 and 236 and other relevant provisions of the . . . (LOSC).[386]

At the same time Washington accepted that its commercial vessels were subject to the 1970 Arctic Waters Pollution Prevention Act.[387]

As a coastal State, the United States has supported LOSC Part XII on protection and preservation of the marine environment as customary law. Article 234 was presumably included in the Presidential Declaration, which could cast into doubt the American claim for the LOSC Part III international straits regime as governing Arctic waters. Furthermore, the declaration may have been supported by American coastal State legislation.

Following the *Exxon Valdez* catastrophic oil spill near Alaska, environmental legislation was adopted by both the Federal and state governments. The Federal Oil Pollution Act (OPA 1990) and the Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act of 1990[388] apply to waters over which the United States has jurisdiction, including internal waters, the territorial sea and the exclusive economic zone, and also in the Arctic. It is not known whether foreign powers have claimed passage rights in these waters, but the U.S. State Department notes that freedom of navigation may be at odds with U.S. 'environmental protection in off-shore waters'.[389] Other applicable U.S. legislation in its complex regime includes the Comprehensive Environmental Response, Compensation and Liability Act, and the Federal Water Pollution Control Act.[390]

Application of OPA 1990 is restricted to the exclusive economic zone, and to 'navigable waters' which is vaguely defined as, 'the waters of the United States, including the territorial sea'.[391] Any limitation of geographic scope to that less than the exclusive economic zone appears to be regulated mainly on an Article-by-Article basis, however the two terms often appear concurrently.

Under OPA 1990 liability is strict and limited, and imposed upon each responsible party, and covers removal costs and damages for discharges of oil from vessels and facilities, *in navigable waters*, onto adjoining shorelines or *into waters within the entire U.S. exclusive economic zone.*[392] A Party responsible for any vessel over 300 gross tons . . . using any place subject to the jurisdiction of the U.S.; or any vessel using the waters of the exclusive economic zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States; shall establish and maintain . . . evidence of financial responsibility sufficient to meet the maximum amount of liability . . .[393] Any vessel not carrying evidence of financial responsibility may be denied entry . . . to any place in the United States, or to the navigable waters, or any vessel may be detained, at the place, that, upon request, does not produce the evidence of required financial responsibility required . . .[394] Any vessel found in the navigable waters not carrying the necessary evidence of financial responsibility, shall be subject to seizure . . . and forfeiture . . .[395] Limits on liability generally do not include limitations regarding geographic scope.[396]

OPA 1990 establishes double hull requirements for tank vessels, when operating on the waters subject to the jurisdiction of the U.S., including the exclusive economic zone.[397] Periodic gauging of plating thickness of commercial vessels and overfill and tank level or pressure monitoring devices are also required.[398] U.S. manning standards or international equivalents must be met by foreign tankers or entry into the U.S. is prohibited until correction is made.[399] Washington may evaluate areas of navigable waters and the exclusive economic zone to determine whether they should be designated as zones where the movement of tankers should be limited or prohibited.[400]

The U.S. legislation does not mention 'ice-covered waters' yet deals specifically with the Alaskan Prince William Sound and Cook Inlet.[401] According to Arctic maps these areas may be ice-free all year, though parts may be ice-covered part of the year.[402] Especially the Cook Inlet, but also the Prince William Sound, appear broad enough

to imply that application of these provisions may take place in the ice-covered exclusive economic zone.[403] Upon certain conditions tankers that have spilled large quantities of oil are prohibited from entering the navigable waters of the Prince William Sound.[404] Special pilotage or escort requirements are also required for the Prince William Sound.[405]

OPA 1990 would generally appear to have full application in the zones indicated in the Arctic. Though areas of Alaska are mentioned specifically, application is not excluded for other parts of the Arctic exclusive economic zone or navigable waters. The legislation thus appears to implement several elements of LOSC Article 234, including standards for discharge and safety, design, construction, equipment and crewing.[406] Central provisions are clearly applicable in the exclusive economic zone.

In addition, it seems possible that a broad interpretation might be made of the term 'navigable waters'. This term, where mentioned, might normally restrict application to the U.S. internal waters and territorial sea. This appears to be the ordinary meaning, especially since the term 'exclusive economic zone' is not specifically mentioned in the same subsection, yet is specifically defined in the same Article.

Under the Presidential Proclamation the United States acknowledged that a State's jurisdiction and responsibility over environmental control were almost identical to LOSC provisions, which would likely include the definitions of these separate maritime zones. Various OPA 1990 provisions are clearly applicable within the exclusive economic zone, while the U.S.C.G. appears not to have actively enforced OPA 1990 in the Arctic exclusive economic zone, specifically for foreign vessels.[407] All of these may indicate that a distinction is made between U.S. 'navigable waters' and the exclusive economic zone.

Possibly opposing this, however, is that the term 'navigable waters' is defined as, 'including the territorial sea'. It may be questioned why OPA 1990 did not merely utilise the terms 'internal waters' and 'territorial sea'. 'Navigable waters' may also be argued not only to include U.S. internal waters and the territorial sea, but also perhaps other U.S. zones further seaward. This interpretation may be supported by the U.S. claims that the LOSC environmental provisions are to be regarded as customary law. If the U.S. recognises as customary law the LOSC Part XII environmental regime including the extensive coastal State prescriptive and enforcement jurisdiction in foreign exclusive economic zones, it seems likely that the U.S. as a coastal State would have extensive implementing legislation of its own with respect to its own exclusive economic zone.

The U.S. has staunchly supported and advanced freedom of navigation, yet it accepts LOSC Part XII with its restrictions on complete freedom of navigation. Part XII allows restrictions within 188 miles beyond the territorial sea, an area previously considered high seas for navigation. Thus the United States recognises that the environmental benefits within this area are necessary and that negotiated limits to free navigation are acceptable. Since OPA 1990 is the central U.S. environmental legislation governing vessel-source pollution, it may be reasonable that through the term 'navigable

waters', OPA 1990 may be completely applicable in parts of, or possibly in the entire U.S. exclusive economic zone. Restricting application of those provisions in OPA 1990 using 'navigable waters' to the U.S. internal waters and territorial sea may be inconsistent. Under Part XII U.S. vessels are restricted from the complete freedom of navigation enjoyed previously 188 miles seaward of the outer limit of the territorial sea in foreign exclusive economic zones, while allowing foreign States the environmental benefits provided by Part XII. By interpreting 'navigable waters' narrowly, the United States might then be deprived of the same environmental benefits in its own exclusive economic zone. Thus, even for OPA 1990 provisions not explicitly applicable in the U.S. exclusive economic zone, the term 'navigable waters' through its vagueness appears to open the way for application of the entire OPA 1990 to the entire U.S. exclusive economic zone, if consistent with Part XII.

American practice may be developing along these lines, although probably inconsistent with LOSC Part XII. In 1999 the U.S. Coast Guard and other federal agencies were allowed to enforce U.S. environmental law and board foreign ships up to 24 nautical miles from the coast.[408] This was twice the distance allowed under LOSC Article 3, as well as under generally accepted rules concerning the breadth for the territorial sea. The order apparently applied within the entire U.S. exclusive economic zone, not just specific areas such as the Arctic. Normally, measures within the contiguous zone under LOSC Article 33 are restricted to preventing infringement of a State's customs, fiscal, immigration or sanitary laws. Although there may be a possible extension of coastal State rights in the contiguous zone due to the exclusive economic zone,[409] it probably does not include environmental jurisdiction, since this is governed under Part XII. Additionally, a former U.S. Coast Guard Ice-breaker Captain as well as a former Chief of the Strategic Planning Staff at Coast Guard Headquarters in Washington, D.C. noted that should vessel traffic increase in U.S. Arctic waters, the Coast Guard would probably take measures similar to those taken by the Canadian Coast Guard.[410] Whether this action would include the U.S. exclusive economic zone was not discussed.

In sum, the United States, through OPA 1990, the Monitoring Act, and other legislation, as a coastal State may broadly interpret Article 234. Though neither the elements of Article 234 nor the article itself are mentioned in the legislation, the provisions appear in many ways to be similar to the Arctic provisions of Russia and Canada, despite U.S. declarations to the contrary.

Practice by Other States

Other than the United States, no States have been found objecting officially to the Russian Arctic regime, including the straits enclosed by straight baselines, or because of navigating vessels in Russian Arctic waters at variance with the Russian provisions.[411] The European Union, in addition to the United States, has protested the Canadian enclosure of its archipelago by straight baselines and its subsequent classification as

internal waters.[412] The United Kingdom has reserved its rights related to the AWPPA.[413]

Besides the unilateral practices indicated that give substance to Article 234, all the Arctic littoral States have been involved in various bilateral and multilateral Arctic environmental agreements characterised by varying degrees of obligation. Some are Arctic specific, most are global or regional with application to the Arctic or parts thereof.[414] Most do not appear to have relevance to Article 234, since they approach law of the sea in a traditional manner. However, three of the most interesting in relation to Article 234 have been the Draft Code on the Harmonisation of Polar Ship Rules,[415] the Declaration on Arctic Military Environmental Co-operation between Russia, the United States, and Norway,[416] the Rovaniemi Declaration and the Arctic Environmental Protection Strategy,[417] including the Arctic Council.

Taking the Draft Code first, the National Maritime Organisations and Coast Guards of the Arctic littoral States and other interested States, the classification societies and the IMO have been drafting provisions governing polar shipping.[418] These encompass vessel design, construction, crewing, and equipment technology, however, they are specified to be 'harmonised' and have been submitted to the IMO for adoption.[419] The Canadian Coast Guard has played a leading role, but the U.S. Coast Guard and Russian NSRA and CNIIMF have also been represented;[420] so perhaps the Draft Code may contribute to the substantive evolution of Article 234. Through international co-operation the Draft Code seems to be evolving more along traditional processes associated with 'generally accepted' international standards, rather than the unilaterally adopted and enforced standards usually associated with Article 234. Whether it will be adopted by the IMO and ratified by States remains to be seen.

In September 1996 the Russian Ministry of Defence, the U.S. Department of Defence and the Norwegian Ministry of Defence entered into AMEC, governing Arctic environmental measures concerning radioactive pollution.[421] It was originally annulled and then revised, resulting in the present agreement, which is still being discussed.[422] AMEC was utilised by the Norwegian military in the dispute with Russia over passages made by *Sverdrup II* in the Kara Sea.[423] In 1998 a linkage was made between AMEC and the Agreement between the United States of America and the Russian Federation Concerning the Safe and Secure Transportation, Storage and Destruction of Weapons and the Prevention of Weapons Proliferation, with Implementing Agreements[424] as a mechanism to assist Russia in complying with its arms reduction commitments under START-I and possibly START-II.[425] Though AMEC has been largely dormant due to little funding and little interest shown by Russia and the United States, the linkage with the Co-operative Threat Reduction Umbrella Agreement attempted to introduce change, since large amounts of funding were for a time available under the U.S. defence budget.[426] The relation this agreement plays to Arctic environmental and navigational issues, however, remains to be seen as most activity appears to be restricted to land.

The Rovaniemi Process established in June 1991 is a multinational process defining co-operation in the Arctic along environmental lines and sustainable development.[427]

Various working groups were initiated under the Arctic Environmental Protection Strategy (AEPS), including Arctic Monitoring and Assessment (AMAP), Protection of the Arctic Marine Environment (PAME), Emergency Prevention, Preparedness and Response in the Arctic (EPPR), Conservation of Flora and Fauna (CAFF), as well as Sustainable Development Programme (SDP) (also dealing with Environmental Impact Assessment (EIA)).[428]

Senior Arctic affairs officials provide direction and coherence to the subgroups and conduct preparatory work for the Ministerial Meetings. Three international indigenous organisations (IPO's), the Inuit Circumpolar Conference, the Saami Council and the Association of Aboriginal Peoples of the North, Siberia and the Far East of the Russian Federation (RAIPON) have been given access to the AEPS, while the environmental NGO's have only limited access. There has existed a shortage of funding, but a circumpolar political body for the Arctic has been established, the Arctic Council, which operates by consensus. It is made up of the five Arctic littoral States in addition to Iceland, Finland, and Sweden, with one additional delegation representing the Arctic indigenous peoples and another the Arctic territorial governments. Goals of the Arctic Council include increasing the political impetus behind the Rovaniemi Process. In addition to environmental protection, matters dealt with include economic development, resource utilisation, trade, transportation and communication, the health and welfare of Northern residents and tourism.[429] The environmental and navigational issues related to Russian, American, and Canadian practice under Article 234, however, have not yet been addressed in these forums,[430] though non mandatory Arctic offshore oil and gas guidelines concerning environmental protection have been endorsed.

In sum legal arguments exist supporting under Article 234 both broad and narrow interpretations of the terms, 'where', 'non discrimination', 'due regard to navigation', and 'within the limits of the exclusive economic zone'. Russian, American, and Canadian practice appears to follow a broad interpretation, the only exception is American practice as a maritime military power.

Interpretations of Other Marine Environmental Regimes

Certain LOSC Articles and the 1958 Territorial Sea Convention

In the event the Article 234 regime is not applicable, then the LOSC Part XII legal regime for the protection of the environment against vessel-source pollution, with supportive conventions, customary international law, and the 1958 TSC regime with its supportive conventions, would apply. Additionally the regimes for special areas and enclosed or semi-enclosed seas under respectively LOSC Articles 211(6), MARPOL 73/78 Annexes I, II and V; and particularly sensitive sea areas (PSSA's); and LOSC Articles 122 and 123 could have possible application for the Arctic.

An exception to the regime is sovereign immunity. However, under Article 30 of

the LOSC, a warship may be required to leave the territorial sea immediately for non compliance of a coastal State's regulations governing in its territorial sea. This includes rules related to marine pollution and innocent passage.

Under Article 211(2) flag States may prescribe legislation for their vessels wherever located and are required to adopt environmental provisions that, 'at least have the same effect as that of generally accepted international rules and standards . . .'. Though vague, 'generally accepted' includes MARPOL 73/78 and other IMO pollution and safety conventions widely accepted, and thus flag States may be required to prescribe the rules of conventions to which they are not parties.[431] For State vessels the flag State under LOSC Article 31 must bear responsibility for damage caused in violation of national rules, other LOSC provisions, and other international rules dealing with passage through the territorial sea. Coastal States under Articles 21(2) and 211(4) in the territorial sea may prescribe environmental provisions for foreign vessels in innocent passage,[432] including design, construction, equipment, and manning standards, but only if they give effect to generally accepted international rules or standards, understood to be MARPOL 73/78.[433] These rules must be non discriminatory under Article 24(1)(b), publicised under Articles 21(3) and 211(3), and not hamper innocent passage under Articles 24(1)(a) and 211(4). Compliance is required by foreign vessels under Article 21(4) with generally accepted international rules related to safety of navigation under Article 21(1)(a) and the environment under Article 21(1)(f). Fees are allowed only for specific services rendered for the vessel concerned, and not by reason of passage through the territorial sea under Article 25. For sea lanes and traffic separation schemes the coastal State must take into account IMO recommendations and other concerns under Article 22(3)(a) and (c). Special areas in the territorial sea are allowed to be established under Article 25(3) in which navigation may be suspended or restricted temporarily for security reasons.

Under Article 19(2)(h) only acts of wilful and serious pollution contrary to the LOSC may be considered as non innocent passage against which the coastal State may take necessary steps. Submarines must traffic on the surface in the territorial sea under Article 20. In the exclusive economic zone coastal States under Article 211(5) may prescribe environmental legislation which conforms and gives effect to generally accepted international rules and standards. Port States under Article 211(3) may make the observance of special environmental standards a condition of entry for foreign vessels, which must be publicised, as well as notification sent to the IMO.

Enforcement jurisdiction for flag States is increased under Article 217 wherein it is mandatory to enforce violations of 'applicable' international environmental provisions with respect to their vessels wherever located. Flag States must provide for *effective* enforcement of these rules under Article 217(1), including penalties of sufficient severity to prevent violations under Article 217(8), prohibit their vessels from sailing until they comply with the rules under Article 217(2), ensure their vessels carry the proper certificates required by these rules under Article 217(3), periodically inspect their vessels and investigate alleged violations and institute proceedings where appropriate under Article 217(4).[434]

Where another State requests in written form investigation into an alleged violation, under Article 217(6) the flag State must investigate and institute proceedings if appropriate. The requesting State and the IMO under Article 217(7) must be informed of the outcome and such information be made available to all States. Coastal and especially port State enforcement jurisdiction has also been expanded under Articles 219 and 220. When a vessel is at a port or offshore terminal, under Article 219 the port State may prevent the vessel from sailing, if it is in violation of applicable international rules and standards relating to seaworthiness and it threatens the marine environment.

A coastal State, where there are *clear grounds* for believing a vessel navigating in its territorial sea, has *illegally* discharged there, may without prejudice to relevant provisions governing innocent passage, under Article 220(2) inspect the vessel, and where the evidence permits and subject to the safeguards, may take legal proceedings including detention.[435] A coastal State, where there are *clear grounds* for believing a vessel navigating in its exclusive economic zone or territorial sea has illegally discharged in that exclusive economic zone, may under Article 220(3) require the vessel to give information regarding its identity, port of registry, its land and next port of call, and other relevant information necessary to determine whether a violation has occurred.[436] A coastal State, where there are *clear grounds* for believing a vessel navigating in its exclusive economic zone or territorial sea has illegally released a *substantial discharge* causing or threatening significant marine pollution in that exclusive economic zone, may under Article 220(5) physically inspect the vessel, if the vessel has refused to give information or the information given is manifestly incorrect and the circumstances justify such inspection.[437] A coastal State, where there is *clear objective evidence* a vessel navigating in its exclusive economic zone or territorial sea has illegally released a discharge causing major damage or threat of *major damage* to the coastline or related interests or to any resources in these marine areas, may in accordance with the safeguards, and evidence permitting, institute legal proceedings including detention.[438] The detained vessel must be allowed under Article 220(7) to proceed if bonding or other appropriate financial security has been assured through IMO procedures or otherwise agreed, and the coastal State is bound by such procedures. These coastal State provisions set forth in Article 220(3)–(7) apply as well to national laws and regulations adopted by a coastal State with respect to special areas established in its exclusive economic zone under Article 211(6). In addition to that noted under Articles 220(1) and 218(2) regarding institution of procedures for violations in the territorial sea or the exclusive economic zone, under Article 218(1) port States are allowed, when a vessel is voluntarily within a port or at an offshore terminal, to investigate, and evidence permitting, to take proceedings against that vessel for any illegal discharge *outside* that State's internal waters, territorial sea or exclusive economic zone.[439] This extensive enforcement power is limited under Article 218(2), however, for illegal discharges in the internal waters, territorial seas or exclusive economic zones of other States, only if requested by those States, the flag State, or a State damaged or threatened by damage, or if its own maritime zones are threatened. The port State must as far as practicable under Article 218(3) comply with requests for investigations of vessels, voluntarily within its ports or offshore

terminals, from any State governing illegal discharges occurring in its internal waters, territorial seas or exclusive economic zones, or for investigations from flag States governing illegal discharges anywhere. Under Article 218(4) records of the investigation must be transmitted upon request to the flag State or the coastal State, and any proceedings instituted by the port State, in accordance with the safeguards, must be suspended upon request by the coastal State, when the violation has occurred within the coastal State's internal waters, territorial sea or exclusive economic zone. Under Article 221 coastal States also have enforcement powers over pollution on the high seas in case of maritime casualties, vessel collisions and strandings, which allow a coastal State beyond the territorial sea to take and enforce measures to protect its coastline or related interests from pollution or threats of such with expected major harmful consequences.

MARPOL 73/78

MARPOL 73/78 regulates discharges from vessels of pollution from oil, hazardous chemicals, packaged harmful substances, sewage, garbage, and air pollution in Annexes I, II, III, IV, V and VI, all in force except VI.[440] Enforcement of these provisions involves the co-operation of coastal States, port states and flag States through certification, inspection, and reporting. MARPOL 73/78 makes more stringent enforcement by flag States obligatory, which must act appropriately when receiving reports of suspected violations.[441] Though MARPOL 73/78 relies chiefly upon flag State regulation, a possibility is left open for extending the jurisdiction of coastal and port States through Articles 4(2) and 9(3).[442] Seen together with the LOSC developments regarding coastal State jurisdiction in the exclusive economic zone, the way also appears open for coastal State enforcement of MARPOL 73/78, however this is not required.[443]

A flag State is required to bring proceedings against its vessels suspected of convention violations when there is sufficient evidence under MARPOL 73/78 Articles 4(1) and 6(4). A coastal State is obliged to prescribe MARPOL 73/78 provisions for foreign vessels, but traditionally only for the territorial sea and internal waters. The coastal State is obliged to either take legal proceedings itself in cases where there exists evidence of violations or forward to the flag State such information. The IMO must be notified of the enforcement taken under Articles 4(3), 6(4) and 11. A coastal State is also permitted to arrest and bring proceedings for violations of its environmental legislation committed in its territorial sea by foreign vessels. The coastal State may either take enforcement measures, or forward information concerning the incident to the flag State. Under Articles 5(2), 6 and 7 port authorities may carry out an inspection, and if deficiencies are found, detain a vessel until these are repaired sufficiently to warrant not taking legal proceedings.[444] Where a violation of MARPOL 73/78 has taken place, the flag State must be informed, which must then take legal proceedings if sufficient evidence of a violation exists.

Practice of Marine Pollution Conventions

The emergence of a strongly expressed obligation for States to protect the marine environment was evidenced by LOSC Articles 192–5 and multilateral agreements including MARPOL 73/78.[445] This was based upon the consensus expressed in UNCLOS III and the degree of acceptance found in MARPOL 73/78. The LOSC regime for innocent passage relating to the prevention, reduction and control of pollution has likely become customary international law. Nevertheless, in spite of the many coastal States claims for an exclusive economic zone, few States appear to have adopted specific legislation governing pollution, and fewer still have provided for port State jurisdiction there.[446] A few have pollution legislation likely exceeding the LOSC provisions.[447] Likewise few coastal States have availed themselves of LOSC enforcement possibilities, and 'it is doubtful whether Article 220 . . . has had any significant effect so far'.[448]

Port State practice appears to have remained within MARPOL 73/78, while LOSC Article 218 may have remained *lex ferenda*.[449] The extension under LOSC of coastal and port State jurisdiction probably has not had much impact on pollution prevention, reduction and control. Though practice may have become somewhat 'greener' in the last years, it is unlikely that dramatic changes have occurred. For flag State jurisdiction, Article 211 makes MARPOL 73/78 a mandatory minimum. Article 217 seems to demand what MARPOL 73/78 already requires, and flag State regulation under LOSC is hence in accordance with existing conventional and customary law, though not necessarily completely applicable to non-parties of the convention.

MARPOL 73/78 has played a significant role in Western Europe and North America,[450] but vessels registered in or flying the flag of developing countries have not been so stringently controlled.[451] Flag States, including flags of convenience, have generally avoided enforcing conventional provisions. Reporting to the IMO of enforcement by flag States under MARPOL 73/78 has not been observed, and the IMO appears not to have been interested in pressing the matter.

The mediocre record of enforcement by flag States is the crux of the problem. Most of marine pollution takes place beyond a foreign territorial sea. Surveillance and monitoring of vessels at sea, which are necessary for reports to be delivered under MARPOL 73/78, are difficult to be carried out by other than developed coastal States, since it is only these which have the necessary funding for navies, coast guards and aircraft. In addition, the inadequate enforcement jurisdiction exercised by most coastal States in their exclusive economic zones, results in prosecutions remaining with the flag State for discharges in such waters. While there has been extensive referral of violations to flag States by port and coastal States, subsequent action has been reported infrequently and there is no reliable measure of flag State prosecutions or successes under MARPOL 73/78.[452]

In sum, the LOSC Part XII legal regime for the protection of the environment against vessel-source pollution attempted to balance interests between flag and coastal States. The LOSC provisions, however, extending coastal and port State jurisdiction

have been somewhat ineffective due to a lack of State practice. Some commentators have noted,

> (P)erhaps the most positive element of Part XII . . . is its elevation of international conventions such as MARPOL to the status of international standards within a global regime applicable potentially to all states.[453]

Russian practice seems an exception to this international restraint, implementing in many respects provisions from the LOSC regime. U.S. practice also seems an exception internationally, with provisions applying in the exclusive economic zone, yet being chiefly oriented towards liability.

MARPOL 73/78 Annexes I and II, 1974 SOLAS, and other IMO conventions have led to some control of marine pollution, though there remain significant problems surrounding enforcement. Thus, State practice seems to continue to follow the customary rules that coastal States regulate pollution within their internal waters and territorial seas and that flag States regulate beyond these zones.

For pre UNCLOS III rules, Articles 24 and 25 of the 1958 Geneva's High Seas Convention vaguely required States to prevent oil pollution from vessels, pipelines, sea-bed operations, and pollution from radioactive substances. The 1954 London Convention for Prevention of Pollution of the Sea by Oil (OILPOL)[454] was to be taken into account, as well as standards and regulations which may be formulated by the competent international organisations.

Under customary international law a flag State could prescribe pollution standards for its vessels wherever located. Under the 1958 TSC Article 15 and customary law a coastal State could prescribe environmental legislation for foreign vessels in its territorial sea as long as innocent passage was not hampered. Environmental or safety violations during passage by a vessel were not considered to prejudice a coastal State so as to result in loss of innocent passage. Fees were allowed only for specific services including pilotage if non-discriminatory under Article 18(1). Under Article 16(3) special areas in the territorial sea were allowed to be established in which navigation could be temporarily suspended or restricted for security reasons. Submarines had to navigate on the surface in the territorial sea with the flag showing under Article 14(6).

OILPOL Articles III and IV, required flag States to apply their pollution standards, but coastal States were not obliged to prescribe provisions for foreign vessels in its territorial sea and internal waters, to take legal proceedings itself, or to forward information to the flag State. However port States under customary law, could prescribe environmental legislation for foreign vessels and make the observance of such or international conventions a condition for entry, as well as enforce OILPOL in port.[455] Enforcement jurisdiction by a flag State was virtually unlimited except for arresting its own vessels in another State's territorial sea or port. The IMO had to be notified of any enforcement taken under OILPOL Articles X(2) and XII. The 1958 TSC Article 19 and customary law allowed a coastal State only to arrest and bring pro-

ceedings for violations of its environmental legislation committed in its territorial sea by foreign vessels or forward information concerning an incident to the flag State.[456]

In practice since the 1958 Geneva conventions were so vague about marine pollution, it has been suggested that,

> states enjoyed substantial freedom to pollute the oceans, moderated only by the vague principle that high seas freedoms must be exercised with reasonable regard for the rights of others.[457]

Although OILPOL strengthened the regime somewhat, disorder remained. Flag States, including flags of convenience, generally avoided enforcing conventional provisions. Reporting to the IMO of enforcement by flag States under OILPOL was not observed.

In sum the rules on marine pollution adopted prior to UNCLOS III may best be characterised by substantial State freedom for flag States, subject only to the vague principle (a) that high seas freedoms must be exercised with reasonable regard for the rights of others and (b) that coastal States might prescribe environmental provisions for their territorial seas, limited by the requirement of non hampering of innocent passage. Enforcement measures could be conducted, but since the arrest of vessels in passage in the territorial sea could be dangerous to navigation, arrests were rarely carried out.

Regional Co-operation and Special Areas

Though the regulation of vessel-source pollution is probably best dealt with on a global level,[458] a look at a map of the Arctic discloses an ice-covered ocean surrounded by large land masses. Consequently, provisions for regions, special areas due to the ice under LOSC Article 211(6) and provisions from MARPOL 73/78 Annexes I, II and V, and PSSA's, and enclosed or semi-enclosed seas under LOSC Articles 122 and 123, must be examined.

Regional Co-operation

Regional environmental co-operation among States appears to be developing along broader lines than ecological, and can include political, geographical proximity, and other common interests.[459] This co-operation in the Arctic has led to regime formation related to the LOSC. Although LOSC Articles 197, and 211(2) (4) and (5) require that regional rules be 'no less effective' for vessel-source pollution than 'generally accepted' international rules, accommodation has been made for more flexibility concerning special conditions of seas with diverse ecological and oceanographic characteristics.[460] For special areas, although various State practice in the Arctic seems to be solidly implanted within the IMO consultation and adoption procedures,[461] the plain meaning of the text of Article 211(6) may be substantially breached by unilateral Russian, U.S., and Canadian coastal State practice.[462] The same argument would seem

even more relevant concerning the IMO designated PSSA's.[463] For semi-enclosed seas, though various problems may exist for the Arctic to qualify geographically, if it does, State practice does seem to be taking place within the plain meaning of the text of Articles 122 and 123. These require only co-operation and an endeavour to co-ordinate implementation. Articles 122 and 123, however, appear to have developed with most attention to land-based pollution sources.[464]

Special Areas, Enclosed, and Semi-Enclosed Seas

Under LOSC Article 211 States are required to adopt international environmental rules and standards, with regional co-operation allowed. Where international rules and standards adopted through the IMO, in this case MARPOL 73/78, are considered inadequate to provide sufficient protection for special areas of the exclusive economic zone, States under Article 211(6) may adopt rules implementing international rules, standards or practices the IMO has made 'applicable' to special areas.[465] States may also adopt additional rules of its own. Prescriptions of design, construction, manning, or equipment standards, however, are not allowed, other than those 'generally accepted'. Consultation with and approval by the IMO are required along with an interim period of 15 months prior to the rules entry into force.

Rules for special areas for oil appear under MARPOL 73/78, Annex I, Regulations 1(10) and 10, for hazardous chemicals under Annex II, Regulations 1(7), 5(7–9) and 8(1–9), and for garbage under Annex V, Regulations 1(3) and 5. Under these Annexes special area is defined as an area, 'where for recognised technical reasons in relation to its oceanographic and ecological condition and to the particular character of its traffic, the adoption of special mandatory methods for the prevention of sea pollution by oil, noxious liquid substances, or garbage is required'. The North Sea and North West European Waters, the Mediterranean, the Black Sea, the Baltic, the Red Sea and the Persian Gulf, the Gulf of Aden, and the Antarctic have been established as special areas.[466] The discharge standards are either lower than usual or not permitted at all, based on vessel movement and ejection rates. Thus coastal State provisions allowed under Article 211(6) must be substantially similar to the MARPOL 73/78 annexes and rules for special areas or must be adopted in consultation with and approval by the IMO, in which case they must follow 'generally accepted' design, construction, manning or equipment standards.[467]

Valuable ecosystems such as coral reefs, intertidal wetlands and important marine and coastal habitats are intended areas of protection of PSSA's. Migrating seabirds, dolphins, seals or other marine species as well as feeding grounds for valuable fish stocks are intended to fall within the scope of protection. If any of the above are positioned close to shipping lanes, suffer from bad weather, are characterised by narrow passages, shallow depths, submerged reefs, or areas otherwise sensitive to shipping impacts, these are also intended to be within the scope of protection. Until the late 1990's PSSA's were seldom utilised, however, in 1998 Cuba's Sabana Camague Archipelago was designated, and two new PSSA's were formally designated in March

2002. These were marine areas around the Florida Keys and the waters surrounding Colombia's Malpelo Island. The Wadden Sea is the most recently PSSA designated and the first in Europe waters, and a sixth area off the coast of Peru recently designated.[468] Other States are considering PSSA proposals. In response to recent oil and gas developments in Northwest Russia, the Norwegian government announced April 2003 that it was engaged in a process to obtain sections of the Barents Sea designated a PSSA, though controversy within the government reportedly exists.[469]

LOSC Article 122 defines enclosed or semi-enclosed seas as 'a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States'.[470] Article 123 declares that States bordering an enclosed or semi-enclosed sea should co-operate in the exercise of their rights and the performance of their duties under LOSC. They must endeavour, under Article 123(b), directly or through an appropriate regional organisation, to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment.[471] If the Arctic is considered a semi-enclosed sea, the LOSC requirements would appear to be mandatory for the Arctic coastal States to co-operate and attempt to establish joint agreements to protect and preserve the Arctic environment.

In practice special areas are established in the Middle East, Northern and Southern Europe, and the Americas. Many States are involved, both as coastal States and flag States. With regard to the Arctic, in the early 1990's Russia delivered a proposal to the IMO to initiate a process to attain special area status for the Arctic, presumably under MARPOL 73/78 Annexes I and V and possibly II, but no action has yet been taken on this initiative.[472] Little literature exists about additional State practice. There seems to have been a decline of pollution, yet there have been few reports, continued discharges, and lack of reception facilities.

The conventional practice of some 60 States in the Baltic, the Mediterranean, the Red Sea, the Persian Gulf, and the Caribbean, seems to indicate that a semi-enclosed sea is about 90% surrounded by land.[473] Though the Arctic Ocean has been described as geographically semi-enclosed, compared to normal definitions, the Arctic Ocean would be excluded. Additional LOSC Article 122 also requires 'a narrow outlet' to another sea or ocean, seemingly excluding the Arctic due to the open outlets of the Greenland, Norwegian, and Bering seas. An informal understanding may also have existed among the UNCLOS III delegates to keep the Arctic separate from the semi-enclosed rules.[474] The more stringent LOSC provisions for 'semi-enclosed sea' could probably not be applied to the Arctic, although, the last phrase of Article 122 allows the semi-enclosed sea to, 'consist(ing) entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States'.[475] The North Sea has been included by some authors, and the Arctic might likewise qualify.[476] Although the large central area of the Arctic remains high seas,[477] it is incontestable that a substantial part also consists of the territorial seas and exclusive economic zones of the five Arctic littoral States.

In sum it remains to be seen if there is a role to be played in the Arctic for either

regimes under Article 211(6) related to special areas or particularly sensitive sea areas. Chances are there is not.[478] The same could probably be maintained for the MARPOL 73/78 special areas. Though there is a need for stricter discharge regulation on the high seas, which Article 234 does not govern, and there may exist precedent from the Antarctic as a special area, politically there is resistance. The United States would probably not be in favour of this development.[479] Coastal State practice in the Arctic additionally appears to be developing contrary to these concepts.

Whether the Arctic Ocean may be considered semi-enclosed or not may be analysed, but regardless State practice in the Arctic seems to be proceeding within the requirements of Articles 122 and 123. This as well as the Harmonisation Conference, and the Rovaniemi Process, and the Arctic Council, which have included the Arctic littoral States, seem to satisfy the rather vague requirements that the States should cooperate in the exercise of their rights and duties under the LOSC. This would also apply to co-ordinating the implementation of rights and duties related to environmental measures. State practice, moreover, probably receives support from the LOSC regional seas regimes, especially those governing the North Sea, the Baltic, and the Mediterranean.

Conclusions

Unclear U.S. practice, as well as varying interpretations of Article 234, on ice-covered areas makes it difficult theoretically to maintain that this article is the expression of customary international law. The substance of the article is not yet clear, and it does not appear to be normative, practised, and acknowledged as law. It also seems doubtful that the entire LOSC Part XII legal regime for the protection of the environment against vessel-source pollution has become customary law. The establishment of the exclusive economic zone, however, has undoubtedly become customary law. The United States views Part XII protection and preservation of the marine environment as customary law, and the Soviet Union–Russia has incorporated large sections of Part XII into domestic legislation. Nevertheless, only a small number of States appear to have extended their jurisdiction over vessel-source pollution in the exclusive economic zone, which would seem to argue against Articles 211, 218–220 having become customary law. On the other hand, norm-setting provisions of MARPOL 73/78, SOLAS and other IMO pollution and safety conventions enjoying a high rate of ratification by States representing the major world tonnage would appear to have become customary law.

Concerning the interpretation of Article 234, the broad interpretation is probably the literal one. It seems safe to maintain that 'due regard to navigation' permits vessels to navigate in ice-covered waters and that coastal States may not prescribe or enforce more stringent provisions in the exclusive economic zone than in the territorial sea. Moreover, such provisions may not discriminate between coastal State and foreign vessels, and the term 'ice-covered' is not confined temporally. Limits greater than these probably cannot be more clearly defined, as they are based chiefly upon

the limited legislative history of the negotiations between Russia and Canada, which supported a broad interpretation of Article 234, and the United States, which supported a variation of a narrow interpretation. Other States have remained neutral.

Taking a stand on a textual interpretation of Article 234, however, may be only an academic exercise. State practice must be examined due to the pending ratification of the LOSC by the United States, as well as to indicate the interpretation of Article 234 followed by Russia and Canada. Russian and Canadian legislation appears to support a broader interpretation and in various ways, including its application to State vessels, extend it. Article 234 additionally may be used by Russia and Canada for reasons other than environmental protection, including security and sovereignty claims.[480] The American position, however, is the key, and it is likely that Washington is holding its options open, as indicated by the obscure and contradictory positions it takes under postures of both a maritime power and an environmentally concerned coastal State.

All of the main negotiators of Article 234 are in effect practising some form of a broad interpretation of Article 234 for surface passage. For the Arctic, despite the lack of practice by Denmark–Greenland and Norway, contours appear to be taking shape, with a broad interpretation of Article 234 for commercial surface passage on the way to becoming customary international law.

LOSC Articles 211, 218–220 regarding an environmental regime for vessel-source pollution has likely achieved a balance of interests between flag and coastal States. The provisions extending port and coastal State jurisdiction, however, have been loosely implemented. Russia is an exception to the international restraint, as well as the U.S. with its regime based upon liability.

International conventions, such as MARPOL 73/78 may be raised through Part XII to the status of international standards. MARPOL 73/78 Annexes I and II and other IMO and ILO Conventions have led to some control of marine pollution by developed European and North American States, though there remain significant problems of enforcement.

Rules adopted prior to UNCLOS III may best be characterised as permitting substantial State freedom to pollute for flag States and prescription and enforcement measures for coastal States in their territorial seas. The former is limited by the vague principle that high seas freedoms must be exercised with reasonable regard for the rights of others, and the latter by a requirement of non-hampering of innocent passage. State practice seems to have followed the traditional customary rule that coastal States can regulate pollution within their territorial seas, and that flag States are responsible beyond the territorial seas, in spite of some movement by developed States towards the LOSC–MARPOL 73/78 regime.

Finally, for special areas it remains to be seen if there is a role to be played in the Arctic for the regimes of special areas or PSSA's within ice-covered areas. However, there probably is not. Regardless whether the Arctic Ocean may be considered semi-enclosed or not, practice seems to be proceeding within the regiments of LOSC Articles 122 and 123.

CHAPTER 5

STATE PRACTICE AND ARTICLE 234

Theoretically Articles 234 and 211, 218–220 of the U.N. Law of the Sea Convention (LOSC) may doubtfully be considered to have become customary international law. However, the LOSC is in force and ratified by Russia, Canada and Norway, and an international regime for the Russian Arctic waters, therefore, must include an analysis of State practice, under all three regimes including rules adopted prior to UNCLOS III and MARPOL 73/78.

Compliance of Russian Practice with Article 234

One scholar has noted that when the Russian practice is examined in relation to the international regimes, a virtual Pandora's box is opened.[481] LOSC Article 234 limits unilateral regulation by a coastal State to be non discriminatory in adoption and enforcement, within the limits of the exclusive economic zone, and in the presence of ice covering in such areas for most of the year. Due regard must be paid to navigation and protection and preservation of the marine environment based on the best available scientific evidence. Transgressions are evident in Russian practice. Issues appearing to arise from a comparison between the comprehensive Russian legislation with its enforcement and Article 234 encompass the following key terms: mandatory notification and authorisation, possible application on the high seas, five forms of leading in ice, fees, liability, discharge and safety standards, reporting, inspection if deemed necessary, stopping, detention and arrest, suspension if deemed necessary, removal for violations, criminal liability, design, equipment, manning and construction standards, special areas, and application to State vessels.[482]

The two concepts, marine casualties and hot pursuit, though included under the Russian Arctic environmental provisions as enforcement measures for violations, are nevertheless applicable concurrently with the Article 234 regime, the Article 211, 218–220 regime and the pre LOSC rules.[483]

Application to State Vessels

Application of the Russian regime to State vessels, similar to the Canadian regime,[484] on almost all points appears to be *in excess* of LOSC Article 236 and general international

provisions related to sovereign immunity,[485] as well as U.S. practice as a coastal State.[486] Specifically, the Russian rules governing ice-covered areas are stated to apply to *all* vessels, including State and military. This is set forth in Articles 1.4., 2 and 7.4. of the 1990 Rules[487] regarding the compulsory leading of vessels, in official declarations,[488] as well as in provisions implementing Article 234, Article 14 of the 1984 Economic Edict, Article 3 of the 1984 Environmental Edict, and Article 32 of the 1998 Economic Zone Act, where no statement is made limiting application.[489] For vessels enjoying sovereign immunity, navigation in the ordinary sense is thus either greatly restricted or prohibited.[490] Application seems even more implausible in the case of submarines, which are required similar to State surface vessels, to submit to the 1990 Rules Article 7.4., including being led through various straits and 'in other regions' as determined by officials from the Marine Operations Headquarters (MOH).

Consistent requirements possibly include the notification and authorisation for passage of State vessels in the territorial sea. A not insignificant number of States appear to consider the passage of warships in a foreign territorial sea as *a priori* not innocent.[491] Article 14 of the 1998 Law requires all vessels navigating the Northern Sea Route, implied within the territorial sea, to sail in compliance with Russian law and regulations as well as ratified international treaties. The 1999 Decree governing foreign State vessels, under Article 12 requires these while navigating and sojourning in the territorial sea with the intention of entering internal waters to use piloting and in case of need ice-breaking services. Under Article 72, as well as Article 9(1) of the 1998 law, 'ice floating or ice conditions threatening ship safety' is considered an emergency situation allowing such vessels entry into the territorial sea or inland waters. No explanation is given regarding the relation to the provisions applying in the exclusive economic zone, and this remains unclear. Additionally Article 4 of the 1999 Decree, Article 13(3) of the 1998 Law, Article 9(e) of the 1993 State Border Act and supporting legislation, specifically requiring submarines to travel on the surface in the territorial sea, appears consistent with LOSC Article 20.[492] However, the presence of ice would seem to make the practice of this coastal State right and the flag State obligation of special legal interest.

Non-Discriminatory Adoption and Enforcement

The main thrust of the Russian provisions is based upon environmental protection and safety, thereby seemingly implying that all vessels, including Russian, are encompassed. The principles are stated under Article 2 of the 1990 Rules to be to regulate navigation free from discrimination for navigational safety and to prevent, reduce and control marine pollution caused by the presence of ice. All vessels regardless of nationality are subject under Articles 1.4. and 2, and with the exception of Article 32 of the 1998 Economic Zone Act and other legislation directly implementing Article 234, where 'non-discriminatory' falls out, the implication of the supporting legislation is the same. Articles 13 and 14 of the 1999 Decree, as well as Article 13(6) of the 1998

Law, specify that foreign State vessels navigating the territorial sea are not subject to taxation but may be subject to non-discriminatory fees only collected for services rendered. No relation to the above rules is indicated. However concerning 'fees for services rendered', set forth in Article 8.4. of the 1990 Rules, there may be a questionable compliance with non discrimination.[493] In application it seems improbable that the current Russian fee rate, of $3.33 per ton to $73.02 per ton depending upon cargo, is required of the Russian vessels.[494] Does non discrimination mean only *among* foreign vessels of different nationalities or *between* foreign and Russian vessels? Article 234 provides that coastal States have the right to enforce 'non discriminatory' laws. Thus, fees probably apply to all vessels, and Russian practice on this point may be contrary to Article 234.

Passage rights under both Canadian and U.S. legislation are not dependent upon the payment of fees.[495] The Russian authorities have indicated a possible relaxation under Articles 8.1.–.3. of the 1990 Rules of initial 'control of navigation', if the vessels and captains are familiar to NSRA officials, but the issue of fees has not been discussed.[496]

Criminal Liability

LOSC Article 230(1) allows only monetary sanctions for violations of domestic environmental legislation or international environmental provisions by foreign vessels beyond the territorial sea. Article 230(2) makes an equivalent limitation for the territorial sea, with the exception of cases involving wilful and serious acts of pollution.

Criminal liability may arise for violations of Russian environmental provisions governing the exclusive economic zone under Article 40 of the 1998 Economic Zone Act and Articles 19 and 20 of the 1984 Economic Edict. Both the 1984 Procedure Edict,[497] and the 1985 Protection Statute do not provide any clarification. Under the latter, agencies responsible for protecting the economic zone when necessary shall transmit materials for bringing guilty persons to responsibility under Article 5(2).[498] Under Article 40 of the 1998 Economic Zone Act and Article 14 of the 1984 Environmental Edict persons who are guilty of violations bear criminal and other responsibility. While fines appear relevant to environmental violations associated with ice-covered areas under Article 36 of the former legislation prosecution is clearly allowed and under Article 14(4) of the latter, if these violations 'by their character entail legal criminal responsibility, they may be attached to fines. Some limitation may be provided by Article 11(h) of the 1990 Decree, which limits penalties for pollution violations in the Arctic to fines. These may be imposed by the plenipotentiary officials in the established manner for violations consistent with Article 14(2) of the 1984 Environmental Edict, implemented by the 1990 Decree.[499] This paragraph also refers solely to fines, and not criminal liability, which is set forth by Article 14(4). This passage may not be meant as a limitation, but as a specification for the enforcement agencies. Further Article 39 of the 1998 Economic Zone Act specifies release of foreign ships and personnel upon

posting of financial security. For violations of use and conservation of living resources foreign nationals are not subject to imprisonment possibly implying the same for environmental violations.

Article 11 of the 1990 Decree states that the Border Guards of the Committee on State Security of the U.S.S.R. have the same rights as the plenipotentiary officials, except that of imposing fines. For environmental violations Article 30 of the 1993 State Border Act appears to maintain the same. Some clarification seems provided under Article 252 of the 1996 Penal Code of the Russian Federation, whereby criminal liability arises for 'marine pollution owing to violation of the rules regulating . . . discharge of substances and material harmful to human health and marine life from vessels . . .'.[500] Article 40 of the 1998 Law appears to maintain the same. Fines may be imposed, and prison terms of 2 to 5 years added for such acts causing substantial harm. Fines and confiscation of equipment as well may be imposed under Article 57 of the 1984 RSFSR Code on Administrative Offences for pollution and littering of the waters.[501] The above would thus apparently allow criminal responsibility to attach, which is in clear excess of LOSC Article 230(1) and 230(2), that only specifies criminal responsibility in cases of wilful and serious acts of pollution in the territorial sea.

If the Russian provisions, however, are considered in relation to the complicated American practice as a coastal State, criminal liability may fall within somewhat similar limits set by the United States for commercial vessels carrying oil in the exclusive economic zone. Under both the Russian and the American provisions, several of the fines are referred to as civil penalties, yet appear close to the imprisonment penalty. Under OPA 1990 §§ 4301, 4302, and 4303 upon certain conditions fines of up to but not exceeding $125,000 are allowed and/or imprisonment for up to five years for discharges of oil and/or a hazardous substance.[502] Further, under the Alaskan legislation, the criminal penalties may be up to one year imprisonment and up to $5,000 in fine for spills less than 10,000 barrels and up to five years imprisonment and up to $50,000 in fine for spills greater than 10,000 barrels.[503] Supporting federal legislation indicates that penalties for the discharge of oil or hazardous substances into navigable waters, contiguous zone or adjoining shorelines, harmful to human health or the welfare of the United States, may result in fines of not more than $10,000 or imprisonment for not more than one year.[504]

Thus, though limits indicated by LOSC Article 230 are apparently exceeded by the Russian provisions with regards to criminal liability, practice in the Arctic related to commercial surface passages may be developing toward allowing criminal liability within parts of the exclusive economic zone, confirmed by legislation and the practice of both the United States and Canada.

Due Regard to Navigation

One of the express conditions with which coastal States must comply is 'due regard to navigation'. This term, however, is indefinite, and the condition 'within . . . the exclu-

sive economic zone' must be considered concurrently. Several views exist regarding the composite meaning. Broad coastal State jurisdiction in the exclusive economic zone, limited only by the right of other States to navigate, seems to be the one most plausible. it is this view which will be used in comparison to Russian practice. It is also obvious that most if not all of the key terms characterising the Russian provisions exceed traditional notions of innocent passage if applicable in the exclusive economic zone under a narrow view. A vague interpretation involving navigational restrictions dependent upon the status and circumstances of the waters, reasonably determined, seems also exceeded at least to the same extent that Arctic State practice in general is exceeded. Requiring the leading of a submarine through a non ice-covered Russian exclusive economic zone is an example. Regional Arctic State practice would seem to define 'reasonableness' in restricting navigation. In circumstances when the least restrictive maritime zone where the coastal State has jurisdiction, the exclusive economic zone, is ice-covered, this view and regional practice may be parallel.[505]

The concepts of 'due regard to navigation' and 'within . . . the exclusive economic zone' are in the process of formation through Arctic State practice, of which the Russian practice is a part of that formulation. A comparison of a specific regime with a developing general regime of which the specific regime is a part would appear to be partially circular, but the Russian provisions appear to exceed even this broad interpretation. This is chiefly because navigation in several instances under the Russian provisions may not be permitted altogether. Moreover, should the Russian provisions exceed the broad interpretation of Article 234, the other two interpretations are without question exceeded. For foreign State vessels, navigation in the ordinary sense is either greatly restricted or prohibited under Russian practice.

Safety of navigation as a goal has been added to environmental considerations under Article 14 of the 1984 Economic Edict and Article 3 of the 1984 Environmental Edict, but not Article 32 of the 1998 Economic Zone Act.[506] Additionally, where coastal States have special rights including the establishment and enforcement of discharge and more stringent design, equipment, construction and crewing standards, the requirement for coastal State provisions to have 'due regard to navigation and the protection and preservation of the marine environment . . .' has been dropped. This appears however in Article 32 of the 1998 Economic Zone Act with natural resources added. Rather than using 'major harm to or irreversible disturbance of ecological balance', which appears in Article 32, Article 2 of the 1990 Rules adds that pollution of the sea and the Soviet Northern Coast, may cause 'irreparable ecological damage', as well as harm 'the interests and well-being of the Northern peoples'. Notification and a request for leading and implicit authorisation in compliance with the 1996 Navigation Guide is required under Article 3 of the 1990 Rules. Design, equipment, construction and manning standards must satisfy special requirements under Article 4 of the 1990 Rules as well as under relevant parts of the 1996 Design Requirements.

Though contrary to the traditional LOSC Articles 17 and Article 58 guaranteeing respectively innocent passage in the territorial sea and navigation in the exclusive eco-

nomic zone, passage may be permitted under the broad meaning of 'due regard to navigation . . .' in Article 234.[507] Leading, including reporting, especially in ice-bound straits under Article 7.4. of the 1990 Rules seems reasonable and clearly gives substance to the prevention, reduction, and control of marine pollution. However considering the vague words in Article 7.4, allowing mandatory prescription by MOH officials of five different types of leading in other regions,[508] as well as in a time period Northern Sea Route Administration and MOH officials can decide under Article 7.1, and the special technical requirements under Article 4, it is possible that navigation could be completely prohibited. Additionally, the open-ended prohibition of navigation without pilotage or other escort, the establishment of closed areas, if not temporary, and the officially determined time periods *with other measures* to prevent, reduce and control marine pollution, all under Article 3 of the 1984 Environmental Edict, Articles 3 and 7 of the 1990 Rules, Article 32 of the 1998 Economic Zone Act and Articles 15 and 16 of the 1999 Decree, bring into doubt whether navigation is allowed.[509] Whether 'due regard to navigation . . .' has been taken into account seems arguable.

Fees for services are mandatory under Article 8.4. of the 1990 Rules, raising also the question of meaning with respect to 'due regard to navigation . . .'. States may not hamper innocent passage, or levy charges upon innocent passage under LOSC Article 26 and 1958 TSC Article 18(1) *unless* special services are rendered.[510] This is set forth in Article 13(6) of the 1998 Law. Articles 12, 13 and 14 of the 1999 Decree appear somewhat consistent with this if the intention of the State vessel is to enter internal waters. Special services include pilotage or rescue services, but fees, if required, may not be levied in a discriminatory manner. For navigation in the exclusive economic zone, requiring fees is contrary to LOSC Articles 58 and 211(4) related to freedom of navigation. This is subject only to environmental provisions giving effect to and conforming to generally accepted international rules and standards. Aside from the possible discriminatory application noted, arguments may be made parallel to those concerning innocent passage that Russian fees may be necessary for 'protection . . . of the marine environment . . .', since pilotage and rescue services are included, though in the exclusive economic zone. The most convincing counter-argument is that under the innocent passage regime, fees are allowed only on *a case-by-case basis* and not by reason of passage through the territorial sea. It would be inconsistent to allow expanded coastal State rights regarding obligatory fees for passage through an ice-covered Arctic exclusive economic zone. Along these lines, services for civilian ice-breakers and ice-strengthened vessels, for which fees could be charged, would not be required if a relatively ice free season occurred. This argument relates only to the issue of fees and not that of coastal State jurisdiction, which would not be dependent upon the changing ice conditions. Mandatory 'blanket' fees consequently may prohibit navigation and are probably in excess of the broad interpretation of 'due regard to navigation . . .'.

Finally casting some doubt upon the seriousness of the stated objective of Arctic environmental protection, Article 6 of the 1984 Environmental Edict requires an environmental impact statement, but not for vessel traffic.[511] It appears only Article 32 of the 1998 Economic Zone Act includes 'protection . . . of the marine environment . . .'

under Article 234, and an initial environmental impact statement may now be required for this important source of pollution in ice-covered areas.[512] Article 27 specifically requires a 'State environmental assessment'.

In spite of the excesses of the Russian provisions to the expansive interpretation of Article 234, perhaps most interesting is a comparison with the U.S. practice. If the provisions are considered in relation to U.S. legislation as a coastal State, nearly *all* of the Russian rules seem within similar limits set by the United States for commercial vessels carrying oil. This congruence also appears supported by Canadian practice. For commercial vessels it is only the Russian *fees* and *ice-breaker-assisted pilotage* and *ice-breaker leading* which clearly seem to exceed the U.S. provisions.[513] Regarding fees, the State practice of the United States and Canada is consistent with the traditional position of permitting only charges for specific services rendered. The Russian provisions Articles 1.4. and 2 of the 1990 Rules governing State vessels clearly exceed the scope of the U.S. provisions.

Admittedly, in various instances the terms in the comparison are not directly parallel, yet still appear to be generally similar. The Russian 'notification' and 'authorisation' under Article 3 of the 1990 Rules and supporting legislation appear to be more formal and administrative than those found under OPA 1990 §§ 1016 and 4106. However, the Americans definitely have procedures for determining *authorised passage* upon a showing of sufficient evidence of financial security and a compliance with manning standards.[514] Non compliance with the required evidence showing financial responsibility may result in denial of clearance, denial of entry into the U.S. or its navigable waters, detention at the place where the lack of evidence is discovered, and seizure and forfeiture within U.S. navigable waters. For non compliance with equivalent American or international manning standards, vessels may be prevented from entering the U.S. Other less direct comparisons include the U.S. design, equipment and construction standards, including double hulls, under OPA 1990 §§ 4109, 4110, and 4115, which though unilaterally adopted, may now be in compliance with MARPOL 73/78.

The Russian standards are Arctic specific and were established unilaterally.[515] Discharge standards for the United States under OPA 90 § 1002(a) and (b) are governed through liability for oil damages and removal costs in the navigable waters and the exclusive economic zone, as well as on the shoreline.[516] For Russia under Article 40 of the 1998 Economic Zone Act, Articles 19(3), and 21 of the 1984 Economic Edict and Article 11 of the 1984 Environmental Edict, the standards are not limited to oil but are also governed by liability for general damages in the exclusive economic zone, with discharges totally prohibited in areas 'adjacent to the northern coast'.[517] Lesser forms of leading than by ice-breakers, such as by radio, aircraft, and pilots, addressed in the Russian 1990 Rules Article 7.4., may have counterparts in the U.S. OPA 1990 § 4116 and the Monitoring Act. For specific Arctic waters possibly including the exclusive economic zone, the Prince William Sound and its approaches, pilotage and some escort is required as well as oil tanker oversight and monitoring, though the latter is advisory.[518] Oil tanker oversight and monitoring also applies subject to the same condi-

tions, for the Cook Inlet. For Russia stricter crewing and training standards are permitted under Article 3 of the Environmental Edict. Vessels must satisfy special crewing requirements for navigating in ice as described in the Design Requirements, under Article 4 of the 1990 Decree and Article 4 of the 1990 Rules. For the United States, manning, training, qualifications and watchkeeping standards for foreign tankers under OPA 1990 § 4106 are required to be at least equivalent to U.S. law or international standards accepted by the United States. For Russia, safety considerations though not appearing in Article 32 of the 1998 Economic Zone Act are stated in Article 14 of the 1984 Economic Edict to give the competent State agencies the power to unilaterally establish and enforce comprehensive rules to protect ice-covered areas. For the United States, no limitation on liability is allowed under OPA 1990 § 1002 for oil discharges in navigable waters, the exclusive economic zone or the shoreline is applicable when there is a violation of federal safety, construction or operational regulations.[519]

In spite of some inconsistencies and different approaches, both Russia and the United States as well as Canada appear to have unilaterally established a remarkably similar class of standards, applicable or potentially applicable in the Arctic exclusive economic zones or substantial parts of it. Although the theoretical limits of 'due regard to navigation . . .' seem sound, littoral Arctic State practice related to surface passage has developed more in favour of coastal State jurisdiction and control.

Presence of Ice

The meaning of the term 'ice-covered' has been unclear, though 'particularly severe climatic conditions' and 'the presence of ice covering such areas for most of the year' are probably required. The latter requirement has been dropped from the Russian Article 14 of the 1984 Economic Edict and Articles 2 and 3 of the 1984 Environmental Edict, though included in Article 32 of the 1998 Economic Zone Act. Only the broader terms, 'ice-covered and special areas' and 'severe climatic conditions and ice dangerous to shipping' appear in the former. The term 'ice' is not specifically addressed in the 1990 Decree. Articles 2, 4, 6, 7, and 11 of the 1990 Rules mention the 'presence of ice', 'ice conditions', and 'ice-breaking'. N. Koroleva, V. Markov and A. Ushakov have defined 'ice-covered areas' as the Arctic seas, covered by ice 'for most of the year' with an average ice cover for six months or more.[520]

Given the vague definition of where Article 234 is to apply *within* the exclusive economic zone, perhaps it is not surprising that the Russian legislation has been vague and contradictory about limiting its application to the 200-mile exclusive economic zone. Articles 3 and 17 of the 1984 Environmental Edict, as well as the title of the Edict itself, indicate that 'marine areas adjacent to the northern coast' are to be included, arguably encompassing also the high seas.[521] All of the articles of the 1990 Decree, except for Article 13, contain the phrase 'marine areas adjacent', and official claims have been made that the Northern Sea Route may fall outside the economic zone.[522] Additionally, due to the vagueness regarding leading, not only in four specific

straits but 'in other regions' as well under Article 7.4. of the 1990 Rules, leading may be required anywhere in the exclusive economic zone, and on the high seas, if understood as 'marine areas adjacent'.[523]

Nevertheless, Article 12 of the 1990 Decree specifies that Article 3 of the 1984 Environmental Edict, after 1 June 1990, is to be applied to marine areas adjacent to the Soviet northern coast *within the Soviet economic zone*, and also is applied to the Northern Sea Route and adjacent areas. Additionally Article 1.2. of the 1990 Rules provides that the Northern Sea Route, 'is situated *within* . . . inland seas, territorial sea (territorial waters) *or* exclusive economic zone adjacent to the USSR Northern Coast and includes seaways suitable for leading vessels in ice . . .'.[524] Definite east and west limitations are given as the northern Mys Zhelaniya of Novaya Zemlya and meridian 168 degrees, 58 minutes, 37 seconds W in the Bering Strait. Article 18 of the 1984 Environmental Edict, includes the phrase, 'marine areas adjacent' but also refers to other legislation, including the 1984 Economic Edict, which specifies the economic zone in its title.[525] Article 32 of the 1998 Economic Zone Act restricts application to within the limits of the exclusive economic zone.

The United States appears to be less opposed to a broad interpretation of ice-covered areas within the exclusive economic zone, as claimed by Russia and Canada, with the possible exception of ice-covered straits. However, the U.S. practice under OPA 1990 and supporting legislation, including in the Arctic, has been clearly limited to the U.S. exclusive economic zone.[526] Beyond 200 miles from the coastal baselines, the legal status of the seas, even in the Arctic, is high seas. Vague Russian provisions and claims receive little support from Arctic State practice or customary international law.

Liability and Compensation

LOSC Article 235(3) requires States to co-operate in implementing and further developing international law relating to responsibility, liability, compensation, and dispute settlement. Where appropriate, compulsory insurance or compensation funds are to be established. Russia is a party to the 1969 Convention on Civil Liability (CLC) and the 1971 International Fund for Oil Pollution Damage (Fund),[527] and was a party to the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP),[528] prior to its termination. Under Article VII of the CLC the owner of a vessel registered with a State party and carrying over 2,000 tons of oil cargo is required to carry insurance or other security covering maximum liability. A certificate must be issued by the flag State verifying this financial security, which must be carried on board the vessel.[529] The CLC certificate is of prime importance to Western insurers as far as oil is concerned.[530]

Under Russian regulations on liability there is some confusion. Liability exists for serious damages caused by oil pollution and hazardous and harmful substances, but compensation has been 'virtually non-existent' due to inflation.[531] Under the 1981

Indemnification Decree,[532] a vessel-owner must compensate for pollution damage, but in amounts not exceeding 120 roubles per registered tonne and 12.5 million roubles per single polluting incident. A mandatory certificate of due financial security with respect to the civil liability of the owner for damage inflicted is required under Article 5 of the 1990 Rules, without which navigation of the Northern Sea Route is not permitted. At the same time there appears to be little compliance with CLC and Fund requirements concerning quantifiable environmental damages.[533] Under additional Russian provisions conditions for insurance coverage appear to be determined unilaterally by State officials. These include Articles 19 and 20 of the 1984 Economic Edict and Article 39 of the 1998 Economic Zone Act, 'reasonable bond or other security'; Article 3(3) of the Implementation Decree, 'offender refuses to voluntarily compensate the damage caused'; Article 22 of the 1985 Protection Statute, 'posting reasonable bond or other security, or after paying the amounts subject to payment'; Article 16 of the 1984 Environmental Edict, 'not relieve the offender from compensating for the damage he caused'; and Article 4 of the 1990 Decree, 'owners . . . must enter into a contract of insurance to cover civil liability for damage . . . or have other financial securities' . . . 'the acceptability of such insurance or other financial security is determined by the (NSRA)'. In fact, the Russian certificate of insurance or other financial security of civil liability for environmental damage caused by oil pollution required to be carried on board may be 'irrelevant for the purposes of Western insurance for the NSR'.[534]

The requirement of bonds under Article 39 of the 1998 Economic Zone Act, Article 19 of the 1984 Economic Edict and Article 22 of the 1985 Protection Statute, and reporting, under Article 19 of the 1984 Economic Edict, appear consistent with LOSC Articles 220(7) and 231.[535] These requirements are reiterated in Article 15(2) of the 1984 Environmental Edict, reporting to the flag State of arrest or detention and immediate release upon posting bond or other; in Article 11(*g*) of the 1990 Decree, reporting concerning violations, detentions and seizures; and in Article 4 of the 1990 Decree together with the Article 5 of the 1990 Rules, possessing a certificate of financial security.

There appears to be an ongoing process of harmonisation with the international regimes.[536] Drafts have been approved by the Russian government and submitted to the State Duma governing liability and indemnification for damage caused by oil pollution and carriage of hazardous and noxious substances.[537] It is intended to take into account the CLC, the 1976 Protocol and the 1992 Protocol, and the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.[538] Few details have been provided and concern remains regarding the adequacy of compensation limits for pollution damage in Arctic waters.[539]

The U.S. OPA 1990 was unilaterally adopted, and Washington has never ratified the CLC and Fund and the Protocols of 1992,[540] although Congress has acknowledged that it is in America's best interest to participate in an international oil pollution lia-

bility and compensation regime that is at least as effective as federal and state laws.[541] The OPA 1990 requires sufficient guarantee to meet a maximum amount of liability,[542] and the restrictions on vessels not carrying such evidence have been noted.[543] No limitation of liability to the established limits under the OPA 1990 is allowed if the incident was caused through gross negligence or wilful misconduct or through a violation of the Federal safety, construction or operation provisions.[544]

Enforcement

The Russian provisions governing ice-covered areas require inspection if deemed necessary, stopping, detention and arrest, suspension if deemed necessary, and removal for violations. This is under respectively Article 15 (through Article 14) of the 1984 Economic Edict, Articles 3 and 15 of the 1984 Environmental Edict, Article 11 of the 1990 Decree, Articles 6, 9 and 10 of the 1990 Rules, as well as Article 36 of the 1998 Economic Zone Act and Articles 20 and 22 of the 1999 Decree. Indications are that application is strict.[545] Recent legislation related to enforcement will be addressed in this section and earlier provisions below.[546] The recent provisions are somewhat more Arctic specific. However, the boundaries are not completely clear, and until recently many of the same provisions implemented the Article 234 regime, the LOSC Articles 218–220 regime, and to a degree the pre LOSC regime.[547] Some cross references thus appear in those sections dealing with enforcement under the different international regimes.

As applied to ice-covered areas various measures may probably be argued justified under 'due regard to navigation . . .', especially if they appear *reasonable* given the circumstances. The question may be raised, nevertheless, whether the enforcement of provisions permitting navigation only in special instances, much of which appears dependent upon official discretion, may be a nearly complete prohibition of navigation.

The entire 1990 Decree was adopted with the main purpose of implementing environmental legislation governing the extreme north and adjacent maritime areas. Only Article 15, incorporating Article 14 of the 1984 Economic Edict, as well as Article 32 of the 1998 Economic Zone Act are stated to be Arctic specific. Although the title 1984 Environmental Edict would appear Arctic specific, only Articles 3 and 15 have direct relevance. Therefore Article 11 of the 1990 Decree as well as Articles 6, 9 and 10 of the 1990 Rules appear to be central to Arctic enforcement. The more recent Article 28 of the 1998 Economic Zone Act notes only that environmental control and investigation are carried out under procedures established under Russian law and implementing applicable international or Russian law.

Plenipotentiary officials have the right to 'stop and inspect' under Article 11(a) for purposes provided for by Articles 14 and 15 of the 1984 Environmental Edict, as well as Article 36(iii) and (iv) of the 1998 Economic Zone Act which include violations of routing and violations causing material damages. This seems consistent with 'due regard to navigation . . .' under Article 234.[548] Vessels navigating in violation of established

rules may be detained and conveyed to open ports under both Article 11(e)[549] and Article 36(iv) and (v), the latter 'if there are sufficient grounds'. 'Stop and inspect' is elaborated upon under Article 6 of the 1990 Rules wherein such measures may be initiated when deemed necessary by the Northern Sea Route Administration. This encompasses a determination regarding, unfavourable ice, navigational, hydrographic, weather, and other conditions which might endanger a vessel, or a threat of marine pollution to the northern coast. Inspections may encompass certifications of compliance with special requirements, cargo documents, and under Article 6.3, 'depending upon particular circumstances', the 'vessel's condition, . . . equipment, facilities . . . navigation instruments, and readiness and ability to fulfil requirements concerning prevention of marine pollution'.[550]

At the same time, in contrast, vessels may be detained under Article 11(e)(2) of the 1990 Decree, illegally *discharging* polluting substances in marine areas *adjacent* to the northern coast. This is subject to 'clear and objective evidence', and a threat of major damage to the coastline, related interests, resources in the territorial sea, or economic zone.[551] The passage, 'the continental shelf of the USSR' where damaged resources may be located is added.[552] However, Article 11(f), similar to Article 11(e)(1), may prevail over the conditions set forth in Article 11(e)(2). Under this paragraph, offenders of the legislation may be detained, conveyed to an open port, and their gear, instruments and other objects and documents as well as any illegal extractions seized. No conditions are listed. Broad provisions of Article 6 of the 1990 Rules support these actions. Article 11(g) and Article 36(v) of the 1998 Economic Zone Act requires reports of violations, detentions and seizures.[553] The relation between the sub paragraphs of Article 11 is thus unclear and the relation between Article 11 and Article 15 of the 1984 Economic Edict together with Articles 32 and 36 of the 1998 Economic Zone Act, is also unclear, though the intention may be that Article 11 would prevail over the more general Articles, being more Arctic specific.

Navigation may be *suspended* in specific sections of the Northern Sea Route under Article 9 of the 1990 Rules, 'where an obvious necessity of environmental protection or safe navigation dictates' for the period that the circumstances exist. This may arguably be allowable under 'due regard to navigation . . .' called for under Article 234.[554]

The Russian provisions dealing with *removal* also appear to expand upon previous provisions in favour of coastal State jurisdiction. Vessels violating navigational requirements along the Northern Sea Route under Article 5 of the 1990 Decree and Article 10 of the 1990 Rules, especially related to notification and permission for transit and technical requirements, may be ordered to leave respectively the adjacent areas and the Northern Sea Route. This may strain 'due regard to navigation . . .' under Article 234 since the removal of vessels could questionably be argued to favour 'due regard to navigation . . .'. It seems even more strained to argue that environmental protection is taken into account by removing vessels deficient in special Arctic requirements to the Arctic high seas. The real reason for removal may be due to security consid-

erations. The requirements for notification and authorisation of passage and the expulsion of military vessels for non-innocent passage, applied to the exclusive economic zone, seem to be the object of these provisions.[555]

In spite of apparent Russian excesses with the Article 234 regime, a comparison of the Russian regime with the enforcement measures taken by the United States and Canada is significant. As seen under the U.S. OPA 1990 § 1016(a) and (b), denial of clearance, denial of entry into the U.S. or U.S. navigable waters, detention at the place where lack of evidence is discovered, and seizure and forfeiture within U.S. navigable waters may result from a lack of evidence of financial security.[556] In practice the OPA 1990 may be enforced in the Arctic contingency zone, a part of the exclusive economic zone, as well as in the non Arctic contingency zone. The possibility exists for other zones to be designed to allow these measures to be taken even further out in the exclusive economic zone.[557] Whether the current U.S. practice will continue is not known, given the contradictory nature of OPA 1990 with U.S. navigational policy. Thus, the U.S. enforcement provisions appear briefer than the Russian, but due to their inherent vagueness and the possibility for additional measures, they may in fact be more comprehensive.

'Due regard to navigation . . .' seems even more strained by the U.S. OPA 1990 § 1016, which is non-Arctic specific and apparently lacks differentiation regarding a showing of evidence and the degree of pollution damage required under the LOSC Articles 218–220 regime. The Russian provisions, especially the older Article 15 of the 1984 Economic Edict, applied through Article 14 to ice-covered areas, contain the same conditions of application as the LOSC Articles 218–220 regime.[558] Even if the comprehensive Arctic specific Article 11 of the 1990 Decree is solely governing, it seems reasonably parallel to OPA 1990 § 1016 allowing requests for information, inspection, arrest, detention, suspension of passage, seizure and forfeiture. It also appears to be reasonably parallel to the Canadian rules for information, inspection and suspension of passage. Although Russian removal of vessels is not directly supported, it may receive indirect support from the U.S. restriction of access to its navigable waters for vessels in questionable condition. Both Russian and American rules seem to indicate the same disregard for protection of the marine environment under Article 234.[559] Russia expels such vessels to ice-covered high seas while the United States drives them further in its exclusive economic zone.

Special Areas

Russian legislation, both Arctic specific and non-specific, unilaterally establishes discharge norms and navigational practices; design, construction, crewing and equipment standards; sea lanes, reporting, and suspension in special areas. Though arguably permissible, as 'due regard to navigation . . .', the meaning of unilaterally adopted rules for special areas within the Arctic, itself a special ice-covered area, seems less than clear.

The establishment by the U.S.S.R. Supreme Soviet of specially protected territories,

including marine areas, is allowed under Article 1 as well as the Preamble of the 1984 Environmental Edict. Special measures for navigational practices and vessel traffic in the exclusive economic zone may be established for special areas by the U.S.S.R. Council of Ministers under Article 4 of the 1985 Environmental Statute to prevent vessel-source pollution. This is also permitted under Article 33 of the 1998 Economic Zone Act. Various Soviet Ministries and organs led by the Ministry of Merchant Marine may draft navigational rules based upon safety and environmental concerns for the special areas governed under Articles 1 and 2 of the 1990 Decree and Article 3 of the 1984 Environmental Edict.[560] In addition ice-covered areas under Article 3 of the 1984 Environmental Edict may be closed to navigation for indefinite time periods or be made subject to special navigational rules established under articles 3 and 12 of the 1990 Decree. Specific norms or lists of discharged substances are not mentioned for special areas in the 1984 Environmental Edict, the 1985 Environmental Statute, the 1990 Decree, or the 1990 Rules, though Article 11 of the 1984 Environmental Edict indicates that the discharge of wastes, materials, and articles is completely prohibited.

The 1996 Design Requirements supplement Article 4 of the 1990 Rules in spelling out technical requirements for vessels. These appear to have been completely based upon the Russian provisions for ice-covered areas that implement Article 234. Additional design, construction, crewing, and equipment rules could likely be developed for special areas in the Arctic, amplifying the effects of Article 234. An exclusion of navigation however, could result, for special requirements would undoubtedly close designated areas for substantially all vessels. Under Articles 15 and 16 of the 1999 Decree and Article 15 of the 1998 Law special areas may be established in the territorial sea to protect the environment and State interests in which navigation by foreign vessels including State may be permanently forbidden. The relation these rules have to the provisions for special areas above is unclear.

Sea lanes are mentioned in the Russian environmental legislation only in relation to special areas and the territorial sea. For the Arctic they may probably be permitted under Article 234. Neither Article 4(1) and (2) of the 1984 Environmental Edict, Article 3 of the 1990 Decree, Article 13(6) of the 1998 Law, nor Article 33 of the 1998 Economic Zone Act include procedures through the IMO, though under the latter compliance is required with international procedures and treaties. Some analogy to sea lanes may be made to leading and routing along the Northern Sea Route under Articles 7 and 8 of the 1990 Rules, as well as the 1996 Navigation Guide.[561] Under Articles 33 and 34 of the 1999 Decree and Articles 12 and 13 of the 1998 Law foreign State vessels realising peaceful navigation in the territorial sea must use sea routes and navigation separation schemes where established or required. The relation these rules have to the above rules is not clear. The Navigational Directions give recommended routes along the Northern Sea Route through the four Arctic seas, but add that the choice of route is carried out by the MOH.[562]

Though the status of special areas within ice-covered areas is unclear, both Canadian

and American practices appear to support the Russian practice for special areas. The U.S. OPA 1990 and the U.S. 1990 Monitoring Act provide for special areas in the Arctic, the Prince William Sound and the Cook Inlet, which are governed by comprehensive rules, though navigation may not be completely suspended.[563]

Appraisal

In spite of the indefinite limits inherent in Article 234, it would seem difficult to maintain that the unilaterally adopted Russian 1990 Rules and other supporting legislation and practice are excessive, in spite of their creative ambiguity. The Russian regime has substantial support from the extensive and unilaterally adopted U.S. coastal State regime, with respect to the Arctic. The OPA 1990 includes requirements for commercial vessels for discharge and safety, design, construction, equipment and crewing standards, civil liability, criminal liability, reporting, compliance with official orders, licensing of pilots, the possibility for monitoring and tracking of vessel movements, and directed radio communications. An indirect form for authorisation and notification appears to exist. Non-compliance with showing financial responsibility may result in denial of clearance, denial of entry into the U.S. or U.S. navigable waters, detention at the place of inspection, with seizure and forfeiture. By denying entry, a form of removal may exist. Special areas of sorts also appear possible.

Substantial support appears also provided by Canada's 1970 Arctic Waters Pollution Prevention Act, the 1978 Arctic Waters Pollution Prevention Regulations, the 1978 Arctic Shipping Pollution Prevention Regulations, and the Arctic Traffic System Rules. They provide for notification and authorisation (Canada's certificate with defacto compliance), civil liability, criminal liability, discharge and safety standards, reporting, suspension if deemed necessary, design, equipment, construction, and operation standards. They also include special areas, presumed plans for compulsory pilotage, inspection, manning (Canada's plans for training), detention (mandatory participation in clean up), removal (implied in Canada's prohibition of navigation), and the application to State vessels. Stopping and arrest, as well as enforcement through the Arctic Pollution Prevention Certificate, the Pollution Prevention Officer and the courts for compensation claims, can be strict since Canadian Arctic environmental measures are rigorous.

Six points of the Russian Arctic regime, however, in comparison with the U.S. and Canadian regimes seem controversial. They are vague geographic application including the high seas, the application to State vessels, mandatory fees, ice-breaker assisted pilotage, ice-breaker leading, and special areas.

The weakest point is probably the attempt by Russia to claim, however vaguely, that its rules have application on the high seas beyond 200 miles from the coastal baselines. This has little support either from Arctic State practice or from conventional or customary international law. Also, the Russian claim of application for its regime to *all* vessels, including State vessels, appears to be very weak. Though various Russian provisions of the 1999 Decree governing State vessels in the territorial

sea may be consistent with innocent passage under international law, their relation to all vessels in the Arctic exclusive economic zone, remains unclear. It might be implicitly understood that the rules except State vessels in the exclusive economic zone, but the comprehensiveness of the regime as well as apparent Russian practice, makes that proposition difficult to maintain. In addition recommended routes apparently become mandatory at the discretion of the Marine Operations Headquarters. Though supported by Canadian practice, it is contrary to American practice and has little support under conventional or customary international law. Though U.S. submarines may have navigated contrary to the Russian regime, on the *surface* this rule appears not to have been tested to any substantial degree.[564]

Weak but probably less so is the Russian requirement for fees for passage along the Northern Sea Route. Though acceptable under LOSC Article 26 as payment for specific services rendered for passage through the territorial sea and possibly acceptable under Article 234 as scientifically sound for environmental protection, they must be non-discriminatory and in payment for specific services. The Russian provisions are probably discriminatory in their operation.

The Russian requirements for ice-breaker-assisted pilotage, ice-breaker leading and closed special areas may receive greater acceptance among States. If compared to the U.S. practice, these requirements may be excessive. However, they seem to be reasonably consistent with Canadian practice that requires either a Canadian ice-pilot be on board, or that a Canadian Coast Guard Officer be on board and the vessel be accompanied by a Canadian ice-breaker. Specific geographic areas may be closed for all shipping except Class 10 icebreakers. In addition, though the Russian requirements may not be precisely the same as the Canadian, they might be justified as part of a sound environmental policy as required under Article 234.

These conclusions may be less severe than those reached by one expert who noted,

> 'the Soviet government has very carefully expanded its Arctic jurisdiction over the years, without ever outright defying existing international law rules',
>
> '(B)y following this step-by-step approach the U.S.S.R. nevertheless constantly pushed these rules toward greater coastal state jurisdiction in the area, always situating its own position, as it were, one step beyond what was prescribed by international law', and
>
> 'the Soviet Union may well have been running out of time in clarifying the exact legal status of its northern waters'.[565]

Russia may be straining existing international law, but for most of its comprehensive regime it seems well supported by the American and Canadian regimes. To the extent this consistent practice is norm-setting, it may indicate a process of formation of customary law governing the Arctic, pending ratification of the LOSC by Washington. Russia and Canada will probably continue their practices and may indicate State practice in interpreting Article 234 consistent with Article 31(3)(b) of the Vienna Convention.

Whether the current U.S. practice will continue is uncertain, given the contradictory nature of OPA 1990. Due to the present substantial accord apparently existing in Arctic State practice, however, as well as the interest of the U.S. Coast Guard in emulating Canadian measures, the United States would probably continue an Arctic specific navigational regime independent of the fate of OPA 1990. Measures under OPA 1990, including Alaska, are probably easiest to justify in the Arctic due precisely to Article 234.

Compliance of Russian Practice with the LOSC Legal Regime

Compliance of the Russian regime with the LOSC legal regime for the protection of the environment against vessel-source pollution, Articles 211, 218–220 with its incorporation of MARPOL 73/78 has been lacking in some respects.[566] Obvious contradictions between the extensive Arctic State practice presented and the international provisions will be mentioned, but not examined in depth. Contradictions between the Russian practice in the *non Arctic* maritime zones and LOSC Articles 211 and 218–220 may augment contrary Russian Arctic practice in relation to the LOSC navigational regime. The same may be true in comparing Russian practice and pre LOSC rules.

The contentious points characterising the Russian provisions are the same, all of which have been unilaterally adopted and enforced.[567] When compared to Articles 211 and 218–220, application to State vessels, application including the high seas, criminal liability, fees, and design, construction, equipment and crewing standards, all appear to be in contradiction. This is based respectively upon Article 236, sovereign immunity; Articles 211, 218–220, coastal State prescription and enforcement rights restricted to the territorial sea and exclusive economic zone unless requested; Article 230, monetary penalties except in the case of wilful and serious acts of pollution in the territorial sea; Article 26(2), non discriminatory charges for specific services rendered a foreign vessel exercising innocent passage; and Articles 21(2), and 211(4) and (5) non application to the design, construction, manning or equipment standards of foreign vessels exercising innocent passage, or navigation in the exclusive economic zone, unless 'generally accepted'.[568] Russian restrictions on the latter two points are understood also to have application in the exclusive economic zone. In addition to their being inconsistent with Article 211, it would be illogical to allow even stricter coastal State regulation than that allowed in the territorial sea.[569] Arctic State practice, however, seems to support unilaterally prescribed design, construction, equipment and crewing standards, and probably criminal liability as well. The remaining issues appear to be more nuanced.

Prescriptive Jurisdiction

The description of pollution violations under Article 19(3) and (5) of the 1984 Economic Edict and Articles 4 and 30 of the 1998 Economic Zone Act, which include illegal

discharges of mixtures containing more than established norms from vessels into the economic zone, seems consistent with the LOSC Article 1(4) definition of pollution.[570] It is unclear though whether the term 'established norms' indicates the generally accepted international rules and standards required under Article 211(2) and (5), or established Soviet/Russian norms. The presumption is the latter, though Article 12 of the 1984 Economic Edict adds 'international treaties of the USSR' to Soviet environmental legislation under which environmental measures are to be carried out.

Under Article 2(2) of the 1985 Environmental Statute, the lists of substances and mixtures prohibited discharged, as well as the maximum allowable concentrations of mixtures permitted to be discharged, are determined by several Soviet ministries. They are published in *Notice to Mariners*. Article (2) of the 1984 Procedure Edict elucidates violations under Article 19 for which administrative and criminal responsibility entail. But it does not address 'established norms', nor does it mention 'generally accepted' norms. Despite specifying protection of nature in the Arctic, the 1984 Environmental Edict does not give a clear definition of pollution and notes only in Article 1 that special navigational requirements are to be decreed. Since Article 3 governs ice-covered areas, presumably Article 1 governs non ice-covered areas in the Far North, but with unilateral measures as under Article 234. Article 11 governing both *non* ice-covered and ice-covered areas prohibits the discharge of sewage not purified up to the 'established norms', as well as the discharge of wastes, materials, and articles. Article 18 broadly refers back to other Soviet legislation for questions not covered in the present instrument. The 1990 Decree does not specify either a definition of pollution or the term 'established norms', but does distinguish the agencies involved in ensuring the protection of nature in the Arctic. The 1990 Rules assist somewhat by specifying in Article 1.5. that special technical and operation rates and standards are set forth in the 1996 Design Requirements and 1995 Navigation Rules. Article 30 of the 1998 Economic Zone Act states merely international rules and standards are to be taken into account.

From these rather vague provisions applied to the Arctic, 'established norms' appears to be determined by Russian officials rather than at least effecting internationally 'generally accepted' standards. The discharge of wastes, materials, and articles may be completely prohibited, including non ice-covered areas in the Far North. Any closer specification of norms, such as the meaning of 'wastes', is not given, though the implication is that they are found in *Notice to Mariners*. 'Harmful substance' is defined in Article 4 of the 1998 Economic Zone Act as causing hazards and harm and subject to control under international treaties to which Russia is a party. Consequently, though not completely conclusive, indications are that the Russian standards are probably contrary to Article 211(2) and (5) of the 1982 Law of the Sea Convention.

A request for leading is required under Article 3 of the 1990 Rules. The rules for pilotage and ice-breaking services if needed in the territorial sea for State vessels entering internal waters under Article 12 of the 1999 Decree and the need to navigate along sea routes if established or required under Articles 33 and 34, as well as Article

13(5) of the 1998 Law amount to a requirement for notification and permission for navigation along the Northern Sea Route in the Russian Arctic territorial sea and exclusive economic zone. Excepting the practice of various coastal States for military vessels, this appears to be contrary to LOSC Articles 17 and 58 guaranteeing innocent passage in the territorial sea and freedom of navigation in the exclusive economic zone.

Leading, under Article 7 of the 1990 Rules, together with the mandatory notification and permission, may be argued to resemble a required use of sea lanes established for navigational safety.[571] Sea lanes are allowed under LOSC Article 22 in the territorial sea, and Article 211(1) in the exclusive economic zone to further safety. Nevertheless, under Article 22(3)(a) the coastal State must take into account recommendations from the IMO in the establishment of the sea lanes, and under Article 211(1) must act through the IMO or a general diplomatic conference. This has likely not been done by Russia.

Mandatory notification of pollution incidents to the NSRA under Article 12 of the 1990 Rules seems substantially the same as LOSC Article 211(7), though the Russian rules require only notification of any fact of pollution and not discharges or probability of discharges under Article 211(7).

In spite of Russian transgressions to the LOSC Article 211, 218–220 regime, substantially similar provisions to the Russian rules appear to have also been unilaterally adopted by the United States and Canada. There are the implied U.S. discharge and safety standards under OPA 1990 §§ 1002 and 1004(c)(1),[572] a form for notification and authorisation under OPA 1990 §§ 1016(a) and (b),[573] leading, except ice-breaker-assisted pilotage and ice-breaker leading, under OPA 1990 § 4116 and the Monitoring Act.[574] Reporting of incidents are required under the Federal Water Pollution Control Act.[575] Thus, the Russian provisions governing prescription would likely receive American and Canadian support, with the exception of the provisions for ice-breaker-assisted pilotage and ice-breaker leading. Even these may be supported by Canadian practice.

Enforcement

The LOSC enforcement regime is strict, requiring compliance with the complex Articles 118–220. Article 15 of the 1984 Economic Edict is one of the central Russian provisions and refers to enforcement of violations of Article 12, prevention, reduction and control of marine pollution in relation to activities in the economic zone; Article 13, special areas; and Article 14, ice-covered areas. Differences between the Russian provisions and Articles 218–220 appear to fall chiefly in favour of increased coastal State jurisdiction.[576] Specifically, Article 15 governs vessels navigating in territorial waters or the economic zone which have committed violations 'in this zone'. Approximating Article 220(2) for enforcement in the territorial sea, where there exists 'clear grounds' for violations of domestic provisions adopted in accordance with LOSC provisions or

'applicable' international rules and standards, physical inspection may follow and upon sufficient evidence, institution of proceedings, including arrest.

It is unclear, however, whether the domestic provisions of the 1984 Economic Edict which may be violated, are consistent with the LOSC provisions. Discrepancies likely exist between 1984 Economic Edict Article 14 and LOSC Article 234. Though 1984 Economic Edict Article 12 may correspond with LOSC Article 194(1),[577] Article 13, on special areas may deviate.[578] Since environmental violations for ice-covered areas and non ice-covered areas may differ, enforcement under 1984 Economic Edict Article 15 necessarily is at variance with LOSC Articles 218–220 even though 'clear grounds' may exist. This is also supported by enforcement under Article 15 of the 1984 Environmental Edict, which appears inconsistent with LOSC Article 234, Article 211(6) as well as Article 220(3–8). Under Article 15 reference is made to enforcement of violations under Article 14, which in turn refers in relevant part to Article 3 (ice-covered areas), and Article 4(1) and (2) (sea lanes in special areas), and 'of the rules promulgated on the basis thereof . . .'. Since Article 3 likely differs from Article 234, therefore subsequent enforcement must also necessarily differ. In special areas, since Article 4(1) and (2) of the 1984 Economic Edict may differ from LOSC Article 211(6), enforcement necessarily differs.

The wording of Article 15 of the 1984 Economic Edict, includes the passage 'in this zone'. It is unclear whether its application encompasses the territorial sea consistent with Article 220(2) or the exclusive economic zone similar to Article 220(3), though the plain meaning, context, and title would seem to imply the latter. Article 4(a) of the Protection Statute also uses, 'in that zone'. Dealing exclusively with the economic zone, it would apparently support the latter interpretation. This enforcement regime, however, is likely applicable in the territorial sea, for it would be illogical for the coastal State to exercise more rights within the exclusive economic zone than in the territorial sea.[579]

For violations in the territorial sea little appears in Article 15 of the 1984 Economic Edict concerning innocent passage. LOSC Article 220(2) permits coastal State enforcement for pollution violations, subject to the rights of innocent passage and requiring 'clear grounds' that a violation has taken place. Furthermore, except for cases of wilful and serious pollution under LOSC Article 19(h), it seems doubtful that under customary law the coastal State would take any enforcement action except in its ports.[580] It is apparently this case, where a State has unrestricted enforcement jurisdiction, in which Article 15 would seem most consistent with Article 220(2). On the other hand, to initiate an inspection, Article 15 requires 'clear grounds', a large polluting discharge or threat of such, and refusal of the vessel to provide information. 'Clear and objective evidence', or a major polluting discharge or threat of such, are required for the initiation of proceedings. Article 220(2) requires 'clear grounds' subject to innocent passage, and where the evidence so warrants allows the initiation of proceedings, without a mandatory request for information or major polluting discharge. The apparent *lower* threshold under Article 220(2) for physical inspection of the vessel and initiation of

proceedings seemingly runs counter to the more usual excessive Russian enforcement jurisdiction.[581]

For violations in the exclusive economic zone, Article 15(2) of the 1984 Economic Edict apparently leaves open the kind of information required to establish whether a violation has occurred, whereas LOSC Article 220(3) specifies vessel identity, port of registry, last and next port of call, and other relevant information. Article 12 of the 1985 Protection Statute does specify verification of vessel papers, navigational documents, and documents about the crew, passengers, and cargo. With the exception of documents about passengers,[582] the objects allowed to be inspected would seem to fall within requirements under LOSC Article 220(3). For inspection of a vessel to take place or the institution of proceedings, the prerequisite under Article 220(3) in conjunction with Article 220(5) and (6) that 'the circumstances of the case justify such inspection' or institution of proceedings, does *not* appear in the 1984 Economic Edict Article 15(2), contributing incrementally to increased coastal State jurisdiction. Nor does it appear under Article 4(a) and (e) of the 1985 Protection Statute.[583] Otherwise Article 4(a) seems consistent with Article 220(3), which requires 'clear grounds' for requesting the necessary information to establish whether a pollution violation was committed in the economic zone. Mention of the territorial sea is noticeably absent.

For physical inspection to be undertaken, neither Article 15(2) nor Article 4(a) of the 1985 Protection Statute state that the 'circumstances of the case' must justify such inspection though the other conditions under LOSC Article 220(5) seem provided for. This include 'clear grounds', 'matters relating to the violation', 'a substantial discharge causing or threatening significant pollution', and a refusal to give the necessary information or providing manifestly wrong information.[584] Under both Article 15(2) and Article 220(6) the initiation of proceedings, including arrest, is allowed where there exists 'clear and objective evidence' of violations or threats of such in the exclusive economic zone. Under Article 4(e) of the 1985 Protection Statute, vessels in violation of established rules may be detained, and vessels navigating in the economic zone may be detained when there is 'clear and objective evidence' of violations which led to major damage or threat to the coastline, related interests, or resources in the territorial sea. Such vessels must be delivered to one of the open ports with the offender taken into custody under Article 4(i) and (h). 'Implements, equipment, instruments and other articles and documents' may be seized under Article 4(d). Under a broad interpretation of the term 'equipment', vessels may be included.[585] These provisions seem consistent with LOSC Article 220(6), with the exception that the condition 'that the evidence so warrants' is lacking.[586]

Article 15(4) of the 1984 Economic Edict lacks 'voluntarily within a port' from LOSC Article 220(1) implying that force may be used to bring the vessel to port. In addition Article 15 does not provide for a flag State pre-emption, which LOSC Articles 220(1), (2) and (6) require, nor for the suspension of coastal State proceedings within six months of a flag State instituting proceedings, consistent with Article 228 for violations in the exclusive economic zone.[587] The search, arrest and hearing procedures

mentioned for environmental violations under Article 15(1)–(5) may also apply for violations of domestic safety provisions under Article 12. The same holds true for Article 13 of the 1984 Economic Edict and Article 4 of the 1985 Protection Statute, which allow the State to establish special measures including navigation practices for special areas in its exclusive economic zone without IMO consultation.

When Arctic State practice is compared, the Russian provisions display at least some similarity to the LOSC Article 218–220 regime. On the other hand, requests for information and inspections under the U.S. OPA 1990 are scarcely mentioned.[588] Moreover, the LOSC conditions for initiating proceedings, including arrest, under Article 220 which are 'clear grounds', 'clear objective evidence', 'substantial discharge', or 'discharge causing major damage', are apparently lacking because the U.S. regime is based upon liability. The same may be said for 'suspension'. Though under OPA 1990 § 1016(b)(2) 'detain at that place' for a violation may include detention of a vessel 'voluntarily in port' consistent with LOSC Article 220(1), this seems far from clear. The implication is to include a vessel within the exclusive economic zone. Similar to the Russian rules this may indicate that force may be used.

Removal in the Russian rules is not directly supported by U.S. practice, but the U.S. restriction of access to the U.S. or its navigable waters gives some effect to 'removal'. Concerning application of the LOSC Article 218–220 regime in the Arctic, Russian enforcement measures thus regarding requests for information, inspection, arrest, detention, suspension of passage, and seizure seem to receive ample support from American and Canadian enforcement measures, with the exceptions noted.

Special Areas

Special delineated areas with particular anti pollution measures may be established in the exclusive economic zone by the Soviet Council of Ministers under Article 13 of the 1984 Economic Edict supported by Article (4) of the 1985 Environmental Statute. This is reiterated in Article 33 of the 1998 Economic Zone Act. These measures use much of the same language as LOSC Article 211(6). Significantly lacking, however, is the specific procedure for consultations and adoption of measures through the IMO with other concerned States. Article 33 notes generally compliance with the necessary international procedures and ratified treaties is required. The practice of this requirement is unclear. While LOSC Article 211(6) limits coastal State provisions in these areas to discharge standards or navigational practices, and requires design, equipment, manning and construction standards to be 'generally accepted', the Russian rules fail to mention the limits. Apparently the areas may be unilaterally closed despite vessel compliance with discharge or navigational practices and design, equipment, manning, and construction. Unless the Russian technical rules are in substantial compliance with the Polar Code drafted by the Harmonisation Conference, reviewed and eventually adopted by the IMO, and recognised by the negotiating States, they cannot be claimed to be 'generally accepted'. Special areas may be established in the territorial sea under

Articles 15 and 16 of the 1999 Decree where the navigation of foreign State vessels may be permanently forbidden. This is in excess of LOSC Article 25 allowing only a temporary suspension of innocent passage for security reasons.

Sea lanes are mentioned in Article 4(1) and (2) of the 1984 Environmental Edict and Article 3 of the 1990 Decree regarding the unilateral establishment in Arctic special areas, as well as Article 13(5) of the 1998 Law for the territorial sea in compliance with international procedures and treaties. LOSC Article 211(6) allows the establishment of sea lanes in special areas if adopted through the IMO, through mandatory consultations, communication, determination and implementation of international rules, and standards as made 'applicable' for special areas under Article 211(6)(a). LOSC Article 22 allows the prescription of sea lanes if the coastal State takes into account IMO recommendations, but in the Arctic seas the Russian MOH appears to decide the route.

The extensive Russian enforcement legislation noted which is also applicable to special areas seems to be inconsistent with LOSC Article 220(8), enforcement in special areas.

Article 4 of 1984 Environmental Edict requiring notification of vessel entry into special areas to the authorities appears to be in substantial compliance with LOSC Article 220(7) requiring notification of incidents to the coast State whose interests may be affected by discharges or the probability of discharges. Publication requirements under Article 13 of the 1984 Economic Edict, Article 4 of the 1984 Environmental Edict Articles 2(2) and 4 of the 1985 Environmental Statute, Articles 2 and 3 of the 1990 Decree, and Article 1 of the 1990 Rules appear consistent with LOSC Article 211(6)(b). Russian enforcement measures against foreign State vessels including regarding use of sea lanes under Articles 33 and 34 of the 1999 Decree and Articles 12 and 13 of the 1998 Law has been noted. These seem consistent with LOSC Article 30 allowing removal from the territorial sea. The enforcement of sea lanes, however, which may not have taken into account IMO recommendations may be questioned.

The practice of Canada especially and American practice partially provide substantial support to the Russian provisions for special areas in the Arctic despite transgressions of the Russian provisions with the LOSC Articles 211, 218–220 regime.

Appraisal

Much the same may probably be stated as maintained above related to the Article 234 regime. Despite excesses by the unilaterally adopted Russian Arctic environmental provisions compared to LOSC Articles 211, 218–220,[589] only reporting of pollution incident and information seem consistent. Nevertheless, the Russian regime is substantially supported by the American and Canadian Arctic regimes. Though various of the Russian provisions governing State vessels in the territorial sea may be consistent with innocent passage under international law, the relation these have to the provisions governing all vessels in the Arctic exclusive economic zone remains unclear.

Recommended routes apparently are mandatory according to Marine Operations Headquarters discretion. In the application possibly including the high seas, application to State vessels, mandatory fees, ice-breaker assisted pilotage, ice-breaker leading and special areas inconsistency may exist, but the latter three of these practices seem to be supported by the Canadian regime.

This conclusion may not be surprising since Russia has expressly based its Arctic regime upon Article 234. With universal ratification of the LOSC, Articles 211, 218–220 and MARPOL 73/78 may govern North American and European coastal States. Perhaps the United States, an opponent to the Russian and Canadian Arctic regimes, may fall back to LOSC and MARPOL environmental regime in the Arctic, including through eventual amendments to the OPA 1990. Additionally, a version of the Russian technical rules may become 'generally accepted' through the Harmonisation Conference and the IMO. Should the Polar Code ultimately be adopted by the IMO and the Russian provisions harmonised accordingly, the design, equipment, manning and construction requirements may be generally accepted. The mandatory leading requirements could be generally accepted as well, since use of such may be implied in these technical norms.

Compliance of Russian Practice With Pre UNCLOS III Rules

Under pre UNCLOS III rules, a coastal State may prescribe environmental and navigational legislation governing its territorial sea as long as innocent passage is not hampered. Enforcement is permitted for violations committed by foreign vessels, by arresting and bringing proceedings. Under MARPOL 73/78 the provisions are the same as above, but with a restrictive interpretation regarding jurisdiction under Articles 4(2) and 9(3) restricting enforcement to a coastal State's territorial sea and internal waters. Port States may under MARPOL 73/78 carry out inspections, and may detain a vessel until repaired sufficiently to not constitute a threat to the environment.

The extensive Russian rules outlined above are *in excess* for all maritime zones with the exception of internal waters. These also are in contention regarding the straits.[590] Free navigation is the rule for the high seas and exclusive economic zone. In the territorial sea mandatory notification and authorisation for the passage of State vessels is controversial.[591] For commercial vessels this may however arguably be required for reasons of safety under LOSC Article 21 and 1958 TSC Article 15(2) in ice-covered waters. The unilaterally legislated design, equipment, manning and construction standards are not 'generally accepted' as required under LOSC Article 21(2) and as implied under 1958 TSC Article 17. Pilotage may be required and charged, to further safety of navigation and prevent pollution, only when necessary and also applied to Russian vessels, and include possibly shore-based pilotage, as well as fees. Russian enforcement measures including inspection, arrest, detention, suspension, removal and other proceedings may be justified on a case-by-case basis, but under pre UNCLOS III rules are practised almost exclusively in State ports. When *acts* of wilful and serious pollu-

tion under LOSC Article 19(2)(h) occur, then the more stringent enforcement measures may be applicable. Special areas in the territorial sea appear not temporary as required under LOSC Article 25(3) and 1958 TSC Article 16(3). Thus, with the exception of the Russian provisions for notification and authorisation, shore-based pilotage, and enforcement measures in cases of wilful and serious pollution, all the requirements likely hamper innocent passage under LOSC Article 24(1) and 1958 TSC Article 15(1).

In addition the Russian provisions likely exceed the right of innocent passage under the U.S.S.R.–U.S. Joint Statement, the purpose of which was to clarify innocent passage in the absence of sea lanes. Article 5 requires that vessels must comply with coastal State regulations adopted in accordance with LOSC Articles 21–23 and 25, including using sea lanes and traffic separation schemes in the territorial sea. Innocent passage is stated to exist where sea lanes and separation schemes are not established. Under Article 6 coastal State regulations must in practice not result in a deprivation or violation of the right of innocent passage under LOSC Article 24. Arctic sea lanes including in the straits are not specifically set forth in the Russian legislation. This is possibly because they may be seen as an admission of the nature of those waters as being territorial subject to innocent passage, or an exclusive economic zone subject to 'generally accepted' pollution and safety measures, or high seas channels, subject to free navigation. An issue similar to that existing for the Black Sea *prior to* the U.S.S.R.–U.S. Joint Statement thus continues for the Russian Arctic territorial sea, including in the straits if considered non-international. The requirements probably hamper, deny or impair innocent passage as understood under both the LOSC and 1958 TSC provisions.[592] The 1999 Decree and 1998 Law through the provisions noted specifies this right somewhat, however, in relation to the Arctic the problem remains. In addition to the unclear relation to the other governing rules, recommended routes apparently become mandatory according to MOH discretion.

In spite of the non compliance between the Russian provisions and practice and the pre UNCLOS III rules, the Russian Arctic regime appears to be substantially supported by U.S. and Canadian Arctic regimes. Despite the increased implementation of the LOSC Article 211, 218–220 regime by European and North American States, as well as ratification of the LOSC, it may be this pre LOSC regime which is that most globally representative of the law presently governing navigation and the marine environment. The U.S. may attempt to fall back to this regime in the Arctic, including through eventual amendments to the OPA 1990, however, this seems a less likely alternative due to the U.S. support given to the Article 211, 218–220 regime.

The Arctic navigational practice of the U.S. and other States will now be addressed.

Navigational Practice in Russian Arctic Waters

Through its declarations and its navigation of submarines, the United States officially opposes the Russian regime in its Arctic waters. Though the United Kingdom and France may be navigating their submarines in the Russian Arctic, there is little record

of them.[593] Norwegian practice may play a role.[594] No official Norwegian protest to the Russian Arctic regime has been lodged. The Norwegian vessel H.U. *Sverdrup II*, however, sailed and carried out marine research on the surface in the Kara Sea. It is unclear how many voyages have been made, yet there may be as many as six, some affiliated with the U.S. Navy.[595]

Norwegian Experience

In the summer of 1995 the Norwegian State vessel, *Sverdrup II* carried out marine research on the surface of the Kara Sea in the exclusive economic zone, the territorial sea, and possibly internal waters though not the straits. It was examining possible leakage from dumped Russian nuclear reactors.[596] Coring samples were also taken from the continental shelf.

Prior to the voyage, the Norwegian Foreign Ministry did not request permission to navigate in the Russian exclusive economic zone but rather informed the Russian Foreign Ministry about the voyage. During the voyage, no attempts appear to have been made by the Russian government to enforce the Russian legislation governing its Arctic waters. A. Ushakov announced on 17 April 1996 that the voyage had been discussed in a Russian Governmental Committee for Northern Areas, which strongly opposed such voyages occurring again. It was indicated that a protest might be delivered to the Norwegian government in spite of the improved relations indicated by the visit to Norway by President Yeltsin in March 1995. On 17 June 1996, A. Ushakov delivered a letter to INSROP signed by the Director of the NSRA, V. Mikhailichenko, wherein a protest was made to the 1995 voyage by *Sverdrup II*. This letter, also sent to the Norwegian Defence Research Establishment (NDRE),[597] stated the M/V 'Sverdrup' under supervision of FFI on 16 September 1995, violated the 1990 Rules concerning notification, special requirements and leading, inspection and permission to navigate.[598] Additionally noted was that separate permission was required from the Russian Foreign Ministry to carry out research in the Russian Arctic. Another voyage by *Sverdrup II* occurred in August 1996[599] when it again navigated in the Kara Sea. This was claimed to have passed without incident.[600]

The two known voyages of *Sverdrup II* were claimed to have been permitted under AMEC, and the letter sent to the NDRE by the NSRA to be in contradiction with the official policy of the Russian Ministry of Defence and Ministry of Foreign Affairs.[601] A short time later, however, a formal protest was delivered by the Russian Foreign Ministry to the Norwegian Foreign Ministry concerning the 1995 passage. It is not known whether further protests were made by the Russian Foreign Ministry, or whether further passages were made by *Sverdrup II*. The Norwegian Ministry of Defence appeared to claim that the voyages were regulated by AMEC and that dissension existed between the Russian Ministry of Defence, the Russian Foreign Ministry and NSRA.[602] The Norwegian Foreign Ministry, however, apparently discounted this.[603] At the same time

V. Peresypkin reported that some 55 vessels of differing nationalities had requested permission to navigate in Russian Arctic waters in 1995, which was granted.

American Experience

The United States probably navigates its submarines occasionally in Russian Arctic waters, in accordance with traditional law of the sea norms.[604] In spite of the Vil'kitskii Straits Incident in the mid 1960's and the few surface voyages through the Canadian Arctic in the mid 1980's, the American protests to the Russian regime seem to have been declarative in nature. They have been directed chiefly against the enclosure of Russian and Canadian Arctic straits by straight baselines and the application of the Russian and Canadian regimes to State vessels. The U.S. claims, lacking enforcement, would seem to be starkly discredited by American practice as a coastal State through its OPA 1990 and supporting legislation. The *Sverdrup II* voyages, if authorisation was lacking, likely strike the Russian regime at one of its weakest points, application to State vessels, as substantive protests by Norway and the United States. Other States appear to be navigating in compliance with the Russian Arctic regime, though it is not known how many of the 55 passages in 1995 have been made by State vessels. On the other hand, if Russian authorisation was given for the passages by *Sverdrup II*, Norway and the United States would be complying with the Russian regime. Where State vessels are specifically exempt from environmental measures under Article 236 for navigating in the Russian exclusive economic zone, and even permitted to carry out various military research activities,[605] entering into an agreement ensuring rights States already have, entirely or partially, would appear to be in compliance with the Russian regime.

For commercial vessels based upon U.S. practice in the Canadian Arctic, U.S. participation in the Harmonisation Conference, and the 1990 OPA, all implementing Article 234 to a degree, Washington will probably require its vessels to comply with the Russian regime. This would likely include requirements for five forms of leading, special areas, and probably fees, but with the exception of any application to the high seas. Should the Northern Sea Route become economically feasible, however, the discriminatory and blanket Russian fees may come under American scrutiny. So far it appears that the known commercial vessels of Finnish, Latvian, and German flag are all navigating in compliance with the Russian regime.[606]

A broad interpretation of Article 234, therefore, is *probably being practised* through *substantial compliance* with and support for the Russian regime by *surface traffic* of both commercial vessels and State vessels, in spite of U.S. declarations to the contrary. Application to State vessels and application on the high seas are not included, and fees may be questionable. Should compliance continue, it would appear difficult to argue that customary international law is not in the process of formation for the Arctic for surface navigation. That coastal States may legislate and enforce comprehensive

Arctic environmental standards for surface navigation in the exclusive economic zone and the territorial sea, would seem to be norm-setting and consistent with the *North Sea Continental Shelf Cases*.

The occasional traffic by foreign submarines under the surface, held secret by all States, are probably legally indecisive. Unless coastal State knowledge of a voyage takes place, no opportunity occurs to lodge a protest. However, since the passage of submarines has apparently been an aberration in law of the sea, it may not hinder the formation of customary law.

Arctic Navigational Practice – Traditional Regimes

Although there is non compliance between the Russian Arctic regime and the LOSC Articles 211, and 218–220 and pre UNCLOS III regimes, there appears to be substantial compliance by flag States with the Russian regime by their surface vessels. It would seem difficult to argue that customary law is not in the process of formation for the Arctic. Compliance with the Russian regime appears in marked contrast to the more established LOSC Part XII legal regime for the protection of the environment against vessel-source pollution, developing in Europe and North America.

As a maritime power the United States has declared a position consistent with Articles 211 and 218–220. It is a party to most of the IMO conventions, with the exception of those related to liability, and Washington has declared LOSC Part XII to be considered as customary law. Through a narrow interpretation of Article 234, the United States could claim the Articles 211 and 218–220 regime to predominate in all cases but those characterised by exceptional ice and weather conditions. However, it has not done so. With the exception of its declarations and passages by American submarines, it has apparently navigated in compliance with the Russian regime. The U.S. State Department appears to have even held the question open regarding the relation between the Article 234 and international straits regimes.

Secret passages by submarines and military research vessels would seem to have questionable legal effect, due to the lack of any opportunity for the coastal State to protest. The Arctic littoral States, Norway, Denmark/Greenland and Canada, as well as other northern European States presumably follow Articles 211, and 218–220. Canada, Norway, Finland, Sweden and Germany have ratified the LOSC, and all are parties to most of the IMO conventions.[607] All could claim directly the Article 211, 218–220 as the regime for the Arctic, even under a narrow interpretation of Article 234, but they have apparently not done so. Their vessels that have navigated Russian Arctic waters seem to have done so in substantial compliance with the Russian regime.

There is non compliance between the Russian regime and the pre UNCLOS III rules, while there appears to be substantial compliance by flag States with the Russian regime concerning their surface vessels. The result of this is perhaps even clearer. Customary international law is in the process of formation for the Arctic. Flag State compliance with the Russian regime appears to be in even more marked contrast to

the more established and traditional pre UNCLOS III rules followed around the world. All flag States could claim the pre UNCLOS III regime in the Arctic, even under a narrow interpretation of Article 234, but apparently have not done so and those in Russian Arctic waters rather seem to have navigated in compliance with the Russian regime.

Conclusions

The key terms characterising the Russian Arctic regime are mandatory notification and authorisation, possible application on the high seas, five forms of leading, fees, liability, discharge and safety standards, reporting, inspection if deemed necessary, stopping, detention and arrest, suspension if deemed necessary, removal for violations, criminal liability, design, equipment, manning and construction standards, special areas, and application to State vessels. Examining these, first in relation to the three possible international regimes governing vessel-source pollution in Russian Arctic waters, Article 234; Articles 211, 218–220 and MARPOL 73/78; and pre LOSC rules; and then in relation to State practice, the following is found.

For the ice-covered areas regime, in spite of the inherent vague formulation of Article 234, it would be difficult to maintain that the Russian regime has been excessive despite its ambiguity. The Russian regime finds support not only from the Canadian regime, but also from that of the United States as a coastal State. In addition, all three States have participated in environmental co-operation in the Rovaniemi Process, including the Arctic Council at the Ministerial level, and have participated in the Harmonisation Conference at the Coast Guard level. The United States has most consistently opposed the Russian Arctic regime through State Department and Navy declarations as well as passages likely carried out by submarines. The declarations have followed traditional positions of law of the sea taken by maritime powers. The submerged passages have been only vaguely substantiated. All surface passages, however, appear to have been carried out in compliance with the Russian regime. No other States have clearly opposed the Russian regime, though there may have been military surface passages made by Norway without Russian consent, and military submerged passages made by the United Kingdom and France without Russian consent.

Six terms characterising the Russian Arctic regime, may be contentious: possible application on the high seas, application to State vessels, mandatory fees, ice-breaker assisted pilotage, ice-breaker leading and special areas. Three of these terms appear, however, unclear: ice-breaker assisted pilotage, ice-breaker leading, and special areas. Although, probably in excess of U.S. practice as a coastal State, they find support in Canadian practice. In relation to Article 234, therefore, only three terms are likely truly contentious, possible application on the high seas, application to State vessels, and fees.

For the LOSC Article 211, 218–220 regime provisions under the unilaterally adopted Russian regime governing within the exclusive economic zone have neither the same

effect as 'generally accepted' international provisions nor are in accord with 'applicable' international provisions. In addition, the Russian regime lacks various elements in prescriptive and enforcement measures under the international regime, or they are in direct conflict with it. The result favours increased Russian coastal State competence. Only the reporting of pollution incidents and information requested seem consistent with the international regime.

Opposition to the Russian regime has been shown by U.S. declarations and navigational practices. Washington may attempt to fall back to the Article 211, 218–220 regime in the Arctic, though indications seem otherwise. At the same time should the Polar Code from the Harmonisation Conference be eventually adopted by the IMO and the Russian provisions were harmonised accordingly, the design, equipment, manning, and construction requirements may be generally accepted. The mandatory leading requirements could be generally accepted as well, since their use may be implied in technical norms. The Russian regime finds substantial support from the United States and Canadian regimes. The possible application to the high seas, application to State vessels, and the mandatory fees appear clearly inconsistent.

For the traditional environmental regime under pre UNCLOS III rules the Russian regime appears to be in excess for all maritime zones with the exception of internal waters. Even these may be in contention for the straits. The high seas and the exclusive economic zone are considered high seas under this regime with a right to free navigation. For the territorial sea, with the exception of the Russian provisions for notification and authorisation, shore-based pilotage, and inspection, arrest, detention, suspension, removal and other proceedings in cases of wilful and serious pollution; all the requirements probably hamper innocent passage including for State vessels and are in excess. When acts of wilful and serious pollution occur, then the various enforcement measures may be justified, but only on a case-by-case basis. Opposition to the Russian regime is provided by the U.S. declarations and navigational practices. At the same time, most of the key terms of the Russian regime likely are supported by the Arctic regimes of the U.S. and Canada in their exclusive economic zones. Only application to the high seas, application to State vessels and mandatory fees appear clearly inconsistent. Justification is provided by international rules for sovereign immunity, and by customary law regarding freedom of the high seas and 1958 TSC Article 18 and LOSC Article 26(2), non discriminatory fees for services rendered. Support for the Russian regime governing the exclusive economic zone is solely found from the Arctic regimes of the U.S. and Canada.

From the above, of the three international regimes with which comparisons were carried out, it is Article 234 which appears to be closest to legal reality. The largely consistent regimes of these large Arctic littoral States appear to indicate a process of formation of customary law that will determine the substance of Article 234. Following ratification of the LOSC by States including the United States, the practices will likely continue and would indicate subsequent State practice in interpreting Article 234 consistent with Article 31(3)(b) of the Vienna Convention.

The exact substance of Article 234, being determined by domestic regimes, is still to some extent unclear. This is due not only to the ambiguity of the American position, but also due to the developments still taking place related to Arctic jurisdiction. Talks continued until several years ago between Moscow and Washington.[608] They also took place between Canada and the United States,[609] though in what form or with what scope of issues is not known.

Foreign navigations, mostly consistent with, but a few contrary to the Russian regime have been noted. It may still be difficult to argue that the United States acknowledges as law a broad interpretation of Article 234, given its declarations and likely occasional submerged transits which would support a solid narrow interpretation. It additionally hesitates to directly quote Article 234 in its relevant legislation. It seems doubtful that any other State is interested or will be able to successfully play the role of strictly favouring traditional freedom of navigation in the Arctic.

Washington does not appear to be uneasy in playing a double role in the Arctic. On the surface of water it supports a comprehensive, international regime for the protection of the environment from vessel-source pollution. Under the surface it navigates its submarines, apparently at times independent of law of the sea, supported by substantially unenforced 40-year-old declarations and with little clarification. The United States may continue to follow this ambiguous policy. Although there could be amendments to OPA 1990, Alaskan legislation possibly based upon voluntary compliance may be allowed to remain, determining or interpreting Article 234. Over time, however, it would seem that such practice, without a more decisive demarcation of the traditional freedom of navigation, may amount to acquiescence in and tacit acknowledgement as the Article 234 regime as law, broadly interpreted.

One of the main theoretical obstructions to the Article 234 ice-covered areas regime has been the international straits regimes, which are addressed in the next chapter.

CHAPTER 6

THE INTERNATIONAL STRAITS REGIME

To understand the international straits regime with its relation to Article 234 and its application in the Arctic, a definition of the term 'strait' is important. The relevant sources give little assistance. The *Corfu Channel Case* made little attempt to define the term, and although 1958 TSC Article 16(4) dealt with passage through international straits, no definition was given. Likewise, none of the LOSC Articles 34–45 dealing with international straits have defined the term. Most authors, when not referring to specific examples of straits, such as Gibraltar, Hormuz, Dover, Lombok, Malacca–Singapore and Bab el Mandeb, seem to assume a common definition.[610] A common definition is found in *Webster's Seventh New Collegiate Dictionary*,[611] which defines 'strait' as, 'a comparatively narrow passageway connecting two large bodies of water . . .', which will be used here.[612]

The absence of a precise definition may primarily be due to that it is the legal *status* of waters making up the strait and their navigational use, rather than any legal definition which governs States' rights.[613] Thus, to determine the jurisdictional regime under international law, the geographical features of the straits must be analysed, together with the legal status of the waters in the straits determined by the regimes of the high seas, the exclusive economic zone, the territorial sea and internal waters. But it is precisely the navigational use of these traditional maritime zones within the special geographic area known as a strait that is in dispute.

Historic Background and Key Issues

Both the *Corfu Channel Case*, as well as the incorporation of its criteria into 1958 TSC Article 16(4), have been noted.[614] International dissatisfaction with Article 16(4), the growing numbers of claims for a 12 mile territorial sea, and the threatened unilateral regulation of straits enclosed in territorial waters of coastal States, as well as other marine resource issues, prompted the U.N. General Assembly to approve UNCLOS III to begin in 1973.[615]

The 'Private Working Group on Straits Used for International Navigation' (or the 'Fiji/U.K. Group') was formed during UNCLOS III to conduct informal consultations, which assisted in drafting central proposals which were then submitted to the negotiations.[616] In these the negotiated provisions governing international straits retained the

same form from the ISNT in 1975 to the LOSC provisions in 1982, except for minor amendments and drafting changes.[617] It provided the new rule of 'transit passage', a channel through a strait deemed international for all ships and aircraft, as long as passage was continuous and expeditious without any threat or use of force against the coastal State.

The status of the straits in the Russian Arctic have been viewed differently, ranging from existing solely under Russian jurisdiction, to being governed by LOSC Part III. If the straits are completely subject to national jurisdiction, they may be considered as Russian internal waters where permission is needed to navigate. Under the Soviet and Russian interpretation of the term 'international use', evidenced in Soviet declarations in the Vil'kitskii Straits Incident, its Arctic straits are not considered subject to transit passage under the LOSC regime or non suspendible innocent passage under 1958 TSC Article 16(4). The Russian navigational provisions require all vessels, State as well as non State, to utilise ice-breaker or pilotage services in the Vil'kitskii, Shokal'skii and the Sannikov and Dmitrii Laptev Straits, as well as leading in the others. From the U.S. declarations in the Vil'kitskii Straits Incident, published by the State Department, either high seas passage or transit passage under LOSC Part III, and the non suspendible innocent passage under 1958 TSC Article 16(4), may apply. This would include the straits of the Kara Sea, the Dmitrii Laptev, the Sannikov, and the Vil'kitskii Straits, as well as generally other Russian Arctic straits. A central issue is whether these straits may be considered international.[618] It is solely the United States which has consistently objected to the Russian Arctic straits regime set forth by Moscow. Another central issue is the extent to which the Article 234 regime appears limited by the international straits regimes.

Geographic Description

The descriptions of straits of the Northern Sea Route[619] appearing in William Butler, *Northeast Arctic Passage*, give a somewhat unusual picture.[620] While clearly indicating the key straits, the more peripheral straits appear randomly listed, causing some uncertainty whether they may be stated as, 'essential to transit the Northeast Arctic Passage'.[621] Four straits are mentioned which exist in the vicinity of a small island near land, while a not insubstantial number of other similar passages exist.[622] Other straits, the Petukhovskii Shar in the Kara Sea and Inei Strait in the Minin Skerries,[623] were not found on the Russian Charts Nos. Those straits listed are chosen from, 'pilot books issued for general use by American and British oceanographic authorities, as presented to western mariners who may have occasion to frequent the region'.[624] Although the meaning is not completely clear, the Russian Arctic was effectively closed for roughly eighty years, the result seems to be that more peripheral straits which may have relevance to the Northern Sea Route fail to be listed. Since sailing directions, including comprehensive geographical descriptions, for the Northern Sea Route were only received through INSROP several years ago, and it is not yet definitely known which of the periph-

eral straits may be utilised, at the same time Butler's information has been used, for its very valuable contribution. Since the peripheral straits are almost exclusively enclosed by the Russian straight baselines, the legal conclusions reached would not be substantially affected. However, the number of deeper small straits may be somewhat greater than that noted, possibly allowing the potential for submerged passage to a slightly greater extent.

Regimes under Customary International Law

One of the main issues surrounding the LOSC Part III regime is its position under customary law. Both the ICJ in the *Corfu Channel Case* and 1958 TSC Article 16(4) clarify this issue. At the outset there were problems surrounding a right to non-suspendible innocent passage in international straits,[625] but though controversial, 1958 TSC Article 16(4) was easily adopted. However, broad discretion by coastal States was unacceptable to the maritime powers, especially in view of the increasing numbers of claims for 12 mile territorial seas,[626] and the effect of the 1958 TSC on the international straits regime may not have been as great as might be imagined. 46 States ratified the 1958 TSC, approximately one-half of the number attending UNCLOS I.[627] The list of ratifying parties indicates many maritime States, but a substantial number of States bordering straits were absent, including China, Cyprus, Greece, Indonesia, Morocco, Philippines, and Yemen. It was these latter straits States, with the addition of Spain, Malaysia, Fiji, and Malta, which became further disgruntled and were instrumental in forwarding proposals for change.[628]

At the same time non-suspendible innocent passage has been practised by the leading maritime powers and acquiesced in sufficiently by the coastal States to consider the regime as having become customary law.[629] Questions still remain concerning its universal application. Subsequent State practice and *opinio juris* play an important clarifying role.

Transit Passage

Following UNCLOS III, several of the major maritime powers claimed transit passage had become customary law, or was so already prior to the negotiations.[630] The U.S. State Department published its views on the applicability of transit passage to certain straits viewed international.[631] These included but are not limited to the Aaland Strait, the Oresund and The Belts, the Strait of Magellan and Beagle Channel, the Strait of Hormuz, the Bab el Mandeb, Gibraltar, the Northeast Passage, the Northwest Passage, and the Strait of Tiran. The Indonesian Straits may also be added.[632] Additionally, W. Schachte, U.S. Navy and J. Moore, who headed the U.S. Delegation for navigational and security matters to UNCLOS III publicly made supportive statements.[633]

In U.S. practice, however, there are some inconsistencies.[634] The Restatement of

Foreign Relations Law of the U.S. states the consensus on the straits issue in the UNCLOS III, together with the consistent practices of States, establishes the LOSC provisions as customary law, but gives no sources. In addition L. Ratiner, Deputy Head of the U.S. Delegation to UNCLOS III at the final 1982 session, declared in Hearings on Law of the Sea Negotiations before the House Committee on Merchant Marine and Fisheries, the United States had no such right of passage through straits based on customary law. Rather it had a right to pass on the high seas together with a recognition of the three mile territorial sea limit, which was understood to be anomalous, anachronistic and not sustainable in international law. Further the U.S. took arrangements to obfuscate these issues.

Russian practice appears similar, though perhaps less demonstratively asserted. The Soviet Navy, regularly navigated through major straits in a manner probably intended to correspond with transit passage.[635] The international straits regime was most important to the Northern Fleet based at Severomorsk on the Kola Peninsula, the strongest of the Soviet fleets.[636] Geographically the Arctic was the only area where Soviet warships could reach open sea without having to navigate through straits under adverse foreign influence.[637] Vessel deployments included routes from Vladivostok to the South China Seas, Vietnam, South Yemen, the Indian Ocean, Ethiopia, and the Mediterranean; and from Kaliningrad and Sevastopol to the Atlantic and the Mediterranean.[638] The straits likely traversed would therefore roughly correspond to those listed above for the United States, particularly the Indonesian Straits and Gibraltar. Vessel deployments from the Russian Federation will likely continue these movements, though to a lesser extent. P. Barabolia has claimed the formation of customary norms for such straits,[639] and due to the adoption of the 12 mile territorial sea by many States, he advocated transit passage, due to its importance to shipping and the avoidance of conflict.[640]

Other maritime powers have practised transit passage, or what is intended to correspond to transit passage, through the major international straits, including France, the United Kingdom, and the Federal Republic of Germany.[641] In addition treaty provisions and State declarations are claimed to provide support to transit passage having become customary law.[642]

Is the above State practice sufficient to support the claim by the maritime powers the right of transit passage has become customary law? Although various straits States have ratified the LOSC and could be said to be in favour of transit passage, on the present state of facts the right of transit passage has probably not yet become customary law. It may be close to doing so, but the claim appears presently to fail on several points.

State Practice, Norm Setting and Opinio Juris

Given the controversy in UNCLOS III over transit passage,[643] the most important point concerns the *practice and intention* of the coastal States and 'lesser' maritime States.

A very widespread and representative participation of States in the 'norm setting' practice is required, though it need not be universal nor consist of absolute conformity.[644] The major maritime powers are strongly represented through their claims and exercise of transit passage. However, it appears questionable that participation in exercising transit passage has been either widespread or representative, unless it can be shown that the majority of coastal States and maritime States have been in agreement with the rule. In addition, due to the requirements of *opinio juris*, any non-participation by States in the rule under formation should be analysed to see whether it consists of protest to the rule, acquiescence, lack of interest, lack of action consistent with international rules, or breach of customary law.

Some States have granted a right of transit passage, such as the United Kingdom and France in the Straits of Dover,[645] while Japan has skirted the issue in five of its straits by limiting the breadth of the territorial sea to three miles, leaving a high seas channel.[646] The Statement Relating to Article 233 of the Draft Convention on the Law of the Sea in its Application to the Straits of Malacca and Singapore,[647] in which transit passage plays a central role, was negotiated between Malaysia, Singapore and Indonesia, and the major user States, namely, France, the United Kingdom, the United States, Japan, Australia, and the Federal Republic of Germany. All these except the U.S. had ratified the LOSC by mid 2004.[648]

Some States have granted rights of passage through special agreements which are not inconsistent with LOSC provisions, and hence allow application of transit passage since there are no contrary rules with application under Article 35(c).[649] The United Kingdom and France in 1904 for Egypt and Morocco, and Argentina and Chile in 1881 and 1984 have agreed to 'free navigation' or 'free passage' through respectively the Straits of Gibraltar and the Straits of Magellan, which could arguably be interpreted to allow the LOSC Part III regime to apply.[650] The Swedish–Danish 1857 Treaty of Copenhagen regulating the Sound or Belts, and the Swedish–Finnish 1921 Convention on the Non-Fortification and Neutrality of the Aaland Islands and 1940 Agreement on Demilitarisation of the Aaland Islands has been maintained by these States to fall under Article 35(c).[651] However, related to Part III concerning the Baltic Straits, only enforcement jurisdiction may be immune, not legislative competence; and for the Aaland Islands, aside from constraints upon warships, Part III may be only slightly affected.[652] Certain Soviet authors viewed the 1921 Agreement between Sweden and Finland not to justify the inclusion of the Södra-Kvarken Strait under the Article 35(c) exception.[653]

The 1936 Montreux Convention regarding the Regime of the Straits[654] regulates the Bosphorus and Dardanelles Straits. Part III enforcement jurisdiction falls under Article 35(c), though possibly not coastal State prescriptive jurisdiction since this issue is not mentioned specifically.[655] Merchant vessels are given freedom of transit and navigation, and certain specified light warships in daylight hours are given passage rights upon prior notification to Turkey. The littoral States of the Black Sea enjoy wider rights. However, in 1976 the Soviet Union sent the aircraft carrier *Kïev* and in 1991

the *Admiral Flota SSSR Kuznetzov* See Vesselsthrough the Turkish Straits, even though these are expressly excluded.[656] Although it appears a fictional characterisation of the vessel was claimed in order to ensure 'compliance', certain conditions for passage may be in the process of changing.[657]

From the above it appears rights associated with the Part III regime have been practised with little conflict only in those straits which have been or remain subject to British, French, or Japanese jurisdiction. Possibly the same may be maintained for those straits subject to Chilean or Argentine jurisdiction. Otherwise, it appears that the maritime powers have had to claim and negotiate with the coastal States the right to exercise transit passage and have also at times claimed this right through straits which are claimed subject to the exception under Article 35(c). The United States has considered it necessary to publish documents substantiating its claims under Part III for 12 straits. For other straits, the acceptance of transit passage by coastal States seems less pronounced.

No reservations or exceptions may be made to the LOSC under Article 309 upon ratification or accession, unless expressly permitted by the specific articles. The Part III regime is silent on this matter. States are, permitted, however, under Article 310 to make declarations or statements when signing, ratifying, or acceding to the LOSC, provided these do not exclude or modify the legal effect of the LOSC provisions in application. States bordering straits which have made declarations or other statements in UNCLOS III or under Article 310 are listed.

Cyprus, Kuwait, and Fiji,[658] all having ratified the LOSC, presumably favour transit passage. The same may be maintained for those States above that have entered into special agreements. However, it appears difficult to maintain that a clear majority of States bordering an international strait believe the right of transit passage has become customary international law. States persistently objecting have been Spain[659] and, from the UNCLOS III 'straits debate', those which favoured solely innocent passage in international straits, namely, Albania, China, Iran, Peru, and the United Arab Emirates.[660] These States were often outspoken in their objection to the right of transit passage, although China and Spain have ratified the LOSC.[661]

States supporting transit passage through statements made at UNCLOS III or elsewhere, have included Cape Verde, Mongolia, Bulgaria, India, Australia, Belgium, Guyana, Israel, Bahrain, New Zealand, Hungary, Liberia, Sudan, Iraq, Turkey, Germany, France, Malaysia, and Morocco.[662]

This results roughly in four coastal States opposed to transit passage and at least 47 small and large sea powers and coastal States in favour of *some form* of transit passage. On this count, less than *one-tenth* of interested States appear to be strongly opposed. However, of those States favouring transit passage either through ratification of the LOSC, declarations or other means, various do not allow application of this right unequivocally in their own straits.

Some doubt may therefore be cast on the total acceptance of the right to transit passage, by Canada, Denmark, Egypt, Oman, Finland, Philippines, Sweden, the Soviet Union–Russia, Greece, Yemen, Yugoslavia, Tanzania, Guinea,[663] and possibly

Argentina, Chile, Rumania, Sao Tome, and Principe, Nigeria and Indonesia.[664] If this group is subtracted from the group favouring transit passage and added to the group against, over *one-half* of interested States would appear to not completely accept, or oppose, the unlimited exercise of transit passage.

Since the required widespread and representative participation in the 'norm setting' practice need not be universal nor consist of absolute conformity, State practice may come close to meeting the criteria. This appears particularly true as there has been substantial movement towards the transit passage regime by States such as Egypt, Fiji, and Kuwait, and less so by Morocco, Oman, Yemen, and Argentina, all of which originally strongly objected. If, however, the practice of the more ambivalent States is taken, a substantial number have not yet given their unequivocal support. A moderate number of claims from these States have been contested by the United States, and the composite reserve of these States affects not a few straits globally. A widespread and representative participation thus appears lacking in State practice. Although there is movement towards the formation of customary law, reciprocity seems to be lacking.[665]

Augmenting this is the fact that the discernment of transit passage by a coastal State is difficult. What might be considered as coastal State acquiescence, might be its unawareness. For surface vessels it would be difficult for a coastal State to distinguish innocent passage from transit passage, and for submarines most passages would occur covertly.[666] Thus, with regard to coastal State protest, acquiescence, lack of interest, or lack of action consistent with international rules concerning transit passage, any doubt should arguably fall on the side of the protest. While it may be argued that allies of the flag State have acquiesced in or accepted transit passage in their straits, it could likewise be argued that non-allies should be accorded a protest or at least a lack of action, consistent with non-suspendible innocent passage, unless shown otherwise. Given the unclear legal status of transit passage and difficulty in discerning such, the status quo regime should govern.

Thus, the statement by L. Ratiner noted appears to continue to be an essentially correct statement of the law. This status may also be reflected in a statement made by the U.S. State Department in which it was indicated that should the United States face coastal State legislation and enforcement measures in excess of its view of allowable rights associated with transit passage, it would simply ignore these as it already had done concerning Spain and Italy.[667]

A leading argument forwarded in favour of transit passage having become customary law is that since 'all vessels and aircraft enjoy the right of transit passage' under Article 38(1), this applies even to non parties to the LOSC, and in this manner third States have acquired a right under customary law.[668] A counter argument has been that for such to be valid, under Article 36(1) of the Vienna Convention it must have been intended by the drafters of the LOSC. This is not readily apparent in the UNCLOS III negotiations. A second argument asserts several of the UNCLOS III delegates, including those from the United States and the United Kingdom, claimed the right of transit passage existed prior to UNCLOS III.[669] However, the United States

as well as other States had also made statements indicating they considered the right to be a new concept.[670] A final argument reasons that LOSC navigational provisions represent a consensus among participating States as to what State practice is or should be. A counter argument indicated by Iran, has been that consensus relates to the provisions as parts of the LOSC rather than of customary law.[671] In brief, most legal scholars have rejected passage of the Part III regime into customary law, though there is some evidence of a trend in this direction.[672]

Thus, it must be concluded both elements of customary law are probably lacking for the right of transit passage to have become customary international law. Since a substantial number of interested States have either actively protested or collectively cast doubt on the existence of such a right, and several might have made more specific protests had they known the right was being exercised, this indicates in addition to insufficient State practice, insufficient belief transit passage is acknowledged as law.[673] Although the passage of this right into customary international law presently is doubtful, the law is in a state of flux.[674]

This raises a question regarding the passage into customary law of a related LOSC provision, Article 233.

Limitations to Coastal State Enforcement

Article 233 is a safeguard with respect to transit passage through straits used for international navigation, allowing coastal states to take some action for violations of its laws and damaging the environment. Since it is doubtful that the LOSC Part III regime has yet become customary law, the same would probably hold true for Article 233. At the same time this article must also be viewed as a part of the LOSC environmental regime, parts of which may be said to have become customary law, though which parts remains controversial. Views range from those claiming *few* of the LOSC provisions have passed to those declaring *all* the provisions, Articles 192 to 237, are reflections of established principles of customary law.[675] The vagueness of Article 233 and the problems of interpretation surrounding 'appropriate enforcement measures', would seem to weigh against it being considered 'norm setting'.

However, in contrast to above, several of the 'ambivalent' group of States might practice some form of this enforcement in their straits. In addition to taking a restrictive view of passage rights, they logically might take appropriate enforcement measures for cases causing or threatening major damage to the environment. Also, following the restrictive view, they could maintain this enforcement to be in accordance with international law. The Russian and U.S. regimes are no exception. In UNCLOS III, environmental protection, reduction and control was a major concern voiced by the coastal States.[676] At the same time the maritime powers would probably be estopped from denying this provision as having become customary law, in so far as Article 233 is clearly part of the transit passage regime, which these States have strongly espoused as a package. Thus, the 'ambivalent' group would be more clearly attached to the

'pro-transit-passage' group as regards Article 233. In terms of numbers, roughly less than *one-tenth* of interested States would seemingly be opposed to this provision becoming customary law.

The passage of Article 233 into customary law, however, probably falls on other grounds. As specifically noted in Article 233, nothing in the Part XII Legislative, Enforcement, or Safeguards Parts, is to affect the international straits regime. Furthermore, it is only for violation of the specific rules allowed to a coastal State to adopt under Articles 42(1)(a) and (b), which the State is allowed to enforce under Article 233, when major damage to the marine environment is caused or threatened. Thus, the international straits regime seems clearly dominant.[677] It appears doubtful the composite practice and acknowledgement of the 'ambivalent' group argues for transit passage having become customary law. In spite of probable domestic environmental provisions resembling those of Article 233, it would appear difficult for States to argue Article 233 has become customary international law when lacking the passage of the more dominant and interrelated Part III regime.

Straits Used for International Navigation

The decision in the *Corfu Channel Case* carried considerable weight as reflecting the position of international straits under customary law, especially as the ICJ gave some definition of 'international straits'. 'Used for international navigation', incorporated into 1958 TSC Article 16(4) and LOSC Articles 34 and 37, would seemingly bear the same meaning, unless indicated otherwise. UNCLOS I considered whether in interpreting the ICJ's 'international use', the term 'normally used' should be added, but this was rejected.[678] This would have narrowed the meaning of 'international use', thus giving coastal States more control over straits or areas of straits *not* normally used for international navigation. The maritime powers did not want coastal States to subjectively determine whether certain straits were 'normally used' and if not be subject to increased control. The definition of 'international' was not an issue at UNCLOS III.[679]

Actual Use or Future Use

An interpretation of 'used for international navigation' probably implies an actual use. Theoretically, however, 'used' is a past participle, which is descriptive, similar to an adjective, and implies all tenses. Thus, the meaning could be 'was used', 'has been used', 'is used', or 'will be used'. Additionally, the scope of necessary use is unclear in all respects.

The ICJ noted in the *Corfu Channel Case*[680] that of the 2884 vessels which traversed the Channel from 1 April 1936 to 31 December 1937, many small vessels were included, and this number from seven different countries was high. An argument may be made with regard to use that the necessary contours of amount of traffic, the number of flags, and the time span, are provided.

The Russian position appears traditional. International straits are defined to link two high seas or two parts of the same high sea, which for an extended historical period have served as a route for international navigation.[681] These straits may be considered distinct because navigational freedom has been historically consolidated regardless of the breadth of the strait. P. Barabolia's statement in 1972 has been noted. In another article written in 1974 a similar position on the term 'international' was indicated.[682] Other prominent Russians appear vaguely to tend towards the same view, noting international shipping lanes relate to factors of non coastal State flag ships and the volume of traffic, as well as the possibility for 'unrestricted foreign navigation' under 1958 TSC Article 16(4) and LOSC Articles 37 and 38.[683] Although direct expression of the Russian position regarding international use appears less clearly stated than for the United States, logically Russia may be expected to follow these declared positions. Claims for potential international use, however beneficial to a naval and marine commercial power, may undermine Russian claims governing the Arctic straits.[684]

The United States argues 'future use' should be included in the interpretation, not merely 'actual use' of international straits, thus increasing access by maritime powers.[685] 'Used for international navigation' may be construed to include past, present, or future use.[686] Future use is included since at any historical period it is dependent on vagaries of world commerce, access to alternative routes, the development of marine technology, and various other factors, many extraneous to the world of navigation.[687] The term 'international navigation' may include meanings involving the volume of traffic through a strait destined for two or more States, the flags flown by transit vessels, the destinations of cargo, or the passage of any 'floating means' flying a different flag than the coastal State or bound to or from a non coastal State port. Thus, vessels navigating with the coastal State flag to or from a foreign port, and foreign flag vessels chartered by the coastal State and freighting exclusively for the strait State, would be included as 'varieties of international navigation'. 'Straits used for international navigation' are thus argued to include,

> . . . any strait previously used, presently used, or capable of being used in future by any floating means for navigation between a port strait and a foreign destination or for navigation between two or more destinations outside the strait State.[688]

At the same time most States will probably follow the traditional position. Part III, though supported by the maritime powers, constitutes a departure from customary law with insufficient evidence of developing into customary law. Defining 'international' based upon a potential use of straits would be even more tenuous. In fact, the only State discovered forwarding such a claim is the United States Most of the authors who address the question follow the Russian position.[689]

Limits of Coastal State Prescription

The prescriptive limitations of 1958 TSC Article 16(4) have been alluded to above. The issues that need interpretation with respect to determining non-innocent passage

include, 'prejudicial . . . to the security' in 1958 TSC Article 14(4); breach of coastal State health, customs and immigration rules; and breach of coastal State notification provisions by warships.[690] If the prescriptive limitations of 1958 TSC Article 16(4) are used as a basis for comparison with the Russian practice, in spite of these issues, some general conclusions may be drawn.[691] Since these questions however led to a new international straits regime, though presently not customary law, more extensive conclusions will not be attempted. Where the regime is applicable, it is likely accepted with its faults and regulated locally through individual coastal State legislation. Legal scholars have dealt extensively with this subject.[692] In addition, to determine the prescriptive confines of Article 16(4), the general issue concerns the meaning of innocent passage, especially for State vessels, and below related to submarines.[693]

Transit Passage and Innocent Passage

A characterisation has been made of LOSC Part III as complicated.[694] Since the Russian legislation governing its Arctic straits concentrates chiefly on environmental protection and navigational safety, it is hoped to clarify somewhat the acceptable limits under Part III related to these components in order to ascertain whether the Russian practice falls within the scope.[695] The 'international' character of the Russian Arctic straits will be hypothetically assumed in order to address the LOSC provisions. This possibility does exist since the United States supports this view. If the straits do not become 'international', however, clearly the Russian regime for its straits including internal waters and territorial sea is better justified.

Under Article 38(2) transit passage must be 'continuous and expeditious'. Under Articles 39(1)(d), 41(7) and 42(4) vessels must comply with other relevant provisions of Part III, including national provisions appropriately established. However, the scope of these rights and duties remains unclear, with several interpretations being possible. That transit passage is not exercised and hence subject to 'the other applicable provisions of the Convention' under Article 38(3), including *innocent passage* if it were not continuous and expeditious, under Article 38(2), or not without delay under Article 39(1)(a), seems relatively clear.[696] This has importance since the coastal State could within its discretion deny passage for lack of innocence. However, whether non-compliance with other Part III requirements represented by Articles 39(1)(d), 41(7), and 42(4) would be subject to a 'reduction' to innocent passage under Article 38(3) is less clear.[697] The text of Article 38(3) does not elucidate this. An argument against the reduction for infractions of international and national provisions, is that Article 45, which deals specifically with innocent passage, does not mention Article 38(3). Additionally, cases may be imagined which involve minor infractions of Articles 39, 41 and 42 and the respective national provisions, where it doubtfully could be maintained the result would be loss of transit passage. A vessel transiting a strait at a much reduced yet arguably safe velocity borders upon delay and abnormal mode of transit, yet it seems questionable such would permit the coastal State to take measures against it consistent

with innocent or even non-innocent passage. If permitted, Part III, which was derived through difficult negotiations, would probably be rendered pointless, and in the extreme may approximate the 1958 TSC Article 16(4) regime with its element of coastal State discretion.

A textual reading of Article 39(1) implies any non-compliance would render the passage non-transit. '(S)hips and aircraft, while exercising the right of transit passage, shall . . .'. If the vessels and aircraft 'do not . . .', then there is no exercise. An additional argument includes Article 19(2)(a), regulating innocent passage regarding threat or use of force and resulting in non-innocent passage, has nearly identical wording as Article 39(1)(b). This implies non-transit passage. Although a strict textual reading of the other articles regulating transit passage in Part III, Section 2, would also apparently support the interpretation involving an Article 38(3) 'reduction' where if a 'reduction' is permitted, then for what infractions?

A further question may be raised in relation to Article 39(2)(a) and (b). The duty of compliance by the vessel curiously appears more strict than the requirement for innocent passage under Article 19(2)(h), concerning acts of wilful and serious pollution contrary to the LOSC.[698] The difference apparently is that the vessels must comply under the former with 'generally accepted' environmental regulations, procedures and practices, while under the latter any activity less than 'wilful and serious pollution' contrary to the LOSC is deemed compliance.[699] A violation of the 'generally accepted' provisions could shift transit passage to innocent passage under Article 38(3), and the vessel could then proceed without problems under the innocent passage regime. This would be as long as the violation was not an 'act of wilful and serious pollution' or an act so unsafe as to threaten the good order of the State.

Additionally, under Article 42(2), the coastal State has competence to adopt legislation as long as it does not discriminate, deny, hamper, or impair passage, and this competence is more restricted for transit passage than for innocent passage. Regarding oil and wastes discharges, Article 42(1)(b) provides a coastal State may adopt laws regulating transit passage giving effect to 'applicable' international provisions. Under Article 21(1)(f) the coastal State related to innocent passage may legislate environmental provisions in conformity with the LOSC and international law. Concerning safety Article 42(1)(a) incorporating Article 41 states the coastal States may legislate in conformity with 'generally accepted' international regulations and following the proper procedure. Under Article 21(1)(a) the same conformity as required above applies. The difference appears to be that for transit passage only international discharge or safety standards may be implemented, while coastal State competence to regulate innocent passage appears need only to be in conformity with the LOSC and international law. Coastal State competence to prescribe environmental and safety provisions would increase with the utilisation of the innocent passage regime, while paradoxically a vessel's duty to comply with the adopted provisions decreases with the same regime.

The problem probably arises from the vagueness of the text covering the specifics regarding force, safety, and pollution to which vessel compliance is required. The reality of passage is so complicated that many nuances are probably allowed within the

broad boundaries set by these LOSC provisions. The Article 38(3) reduction is likely meant most reasonably to apply solely to violation of those major elements of transit passage set forth in Articles 38(2) and 39(1(a), (b), and (c). Violation of the Part III Section 2, Articles 39(2) and (3), 40, 41 and 42(1(a) and (b) must be major environmental or safety infractions, before a reduction to innocent passage is allowed. Practically this may be especially true as transit passage is difficult to discern from innocent passage. What this means is that only threatening, abnormal, non-continuous, and non-expeditious transit or major pollution and safety incidents are likely to be noticed by the coastal State. In the absence of such 'activity' the only remedy for the coastal State in disputes over transit passage would be to resolve the matter through diplomatic channels and dispute settlement procedures, or national rules consistent with international standards.[700]

Based upon the statements made by representatives of the U.S. State Department considering transit passage as a close approximation of free passage, as well as the diplomatic statements of Spain and Italy, not unexpectedly Washington appears to take a restrictive view concerning coastal State prescription.[701] The U.S. State Department has maintained that under Article 39(1) transit passage may not be suspended by the coastal State for any purpose.[702] Russia's position appears less clear, though it strongly supports transit passage and apparently practices it in much the same manner as the United States and other maritime powers.[703] As, previously noted, the *Kiev* in 1976 and the *Admiral Flota SSSR Kuznetzov* in 1991 navigated the Turkish Straits in contravention of the Montreux Convention, indicating that Russia on occasion would ignore coastal State jurisdiction. Additionally, several maritime powers including the United States, negotiated the Malacca Agreement defining enforcement measures in straits, and any provisions in excess would likely be ignored by Washington as well as by Moscow. The Article 38(3) reduction for these powerful States could be meaningless.

The UNCLOS III negotiations of Article 38(3) reveals some dissent, but most States supported the present text.[704] Possibilities for subjective interpretations by coastal States were permitted only to a minor degree, although legal scholars have been divided on this issue.[705]

The textual meaning supporting the reduction from transit passage to innocent passage solely for major infractions will likely prevail. Briefly, if a vessel in an international strait is not exercising transit passage, then it is subject to LOSC provisions other than those in Part III, including the innocent passage regime.

International Environmental Provisions

Looking at the term 'comply' in the Part III environmental and safety provisions, a question arises about the relationship between Article 39(2) and Article 42(1)(a) and (b). Compliance by foreign vessels is required under Articles 41(7) and 42(4), while Article 39 enumerates the duties of vessels in transit passage. Does coastal State competence to establish environmental and safety provisions under Article 42(1)(a) and (b)

add anything to the basic obligation of vessels in transit passage to comply with generally accepted environmental and safety provisions and practices under Article 39(2)(a) and (b)?[706] If so, what are the consequences? This point arose in the dispute between Spain and the United States over Gibraltar.[707]

Interpretations

One of the main issues in the environmental provisions is that Article 39(2)(b) is somewhat *broader* than Article 42(1)(b). Compliance is required of vessels with 'generally accepted' international environmental regulations, procedures, and practices. The coastal State has jurisdiction to adopt laws and regulations giving effect to 'applicable international regulations' covering discharges of oil, oily wastes, and other noxious substances. No convention or IMO procedures are specifically mentioned similar to the safety provisions, the International Regulations for Preventing Collisions at Sea'.[708] Prescriptive jurisdiction has been narrowed to not include as permitted under Article 39(2)(b) and perhaps customary law,[709] 'generally accepted' provisions, 'generally accepted' procedures and practices, and any of those dealing with 'generally accepted' design, construction manning or equipment standards.

A plain meaning of 'applicable' from Article 42(1) would seemingly refer to provisions of treaties between the flag State and the coastal State and possibly customary law, which implies a higher degree of acceptance.[710] This relates to oil, oily wastes, and noxious substances. A plain meaning of 'generally accepted' from Article 39(2)(b) as well as including procedures and practices and provisions, may also imply less formal legal measures.[711] In addition, the article seems to govern general pollution from vessels. A look at the evolution of the two terms indicates that both were addressed in the Third Committee, which dealt with pollution, rather than the Second Committee.[712] 'Applicable' is consistently used in the enforcement provisions of relevance to vessel-source pollution, Articles 217–220, while 'generally accepted' is consistently used in the prescriptive provision of relevance, Article 211.

Applicable

'Applicable international rules and standards' are to be established through the competent international organisation or by a diplomatic conference, related to the prevention, reduction, and control of marine pollution.[713] '(T)o establish' may include both 'to ascertain' and 'to draft', which thus may imply that both customary law and treaties are to be included.[714] What international treaties are intended under Article 42(1)(b) is somewhat unclear, though it is probably safe to say at least MARPOL 73/78 provisions are included together with Annexes I and II.

The U.S. State Department's view has been that the coastal State does not have the right to require transiting vessels to comply with treaties to which the flag State is not a party.[715] Since the United States and Russia are parties to MARPOL 73/78, they would presumably allow application of its rules by coastal States over their flag vessels in international straits. The Russian view on Article 42(1)(b) has not been stated

clearly. However, due to its strong support of the international straits regime, it seems doubtful that Russia would allow strait States to enforce treaty provisions to which it is not a party against its vessels.

At the same time both Russia and the United States, in their own coastal State *non-Arctic* environmental provisions, probably exhibit excesses to this State practice.[716] The U.S.'s OPA 1990 and supporting legislation, governing passage within the American exclusive economic zone, give the government competence in excess of the Articles 211, 218–220 and the MARPOL 73/78 regime as well as Article 230. Excessive points include unilaterally adopted requirements for mandatory notification and authorisation, civil liability, criminal liability, design, equipment, construction and crewing standards. Broader enforcement measures may include denial of clearance, denial of entry into a portion of the U.S. exclusive economic zone, detention where lack of financial evidence is discovered, and seizure and forfeiture within a portion of the exclusive economic zone. Some discharge and safety standards, even if consistent with MARPOL 73/78, may result in liability for oil damages and removal costs in the exclusive economic zone.

Various Russian provisions may be in compliance with the Articles 211, 218–220 and the MARPOL 73/78 regime, as well as Article 230. But others are not, including unilaterally established discharge and design, equipment, manning and construction standards and special areas, civil liability, criminal liability, and broader enforcement rights. Force may be used to bring a vessel suspected of a violation to port, as well as the enforcement of unilaterally established discharge norms and special areas.

The Russian and U.S. provisions govern the waters in their own straits, which thus cast in doubt on the meaning of 'applicable'. For Russia the Kuril Straits in the Okhotsk Sea are at issue. The 'Etorofu Strait' ('Friza Strait') specifically was a point of conflict between Moscow and Washington in late 1984, and passage through the Golovnina Strait was disputed in mid-1986.[717] For both the United States claimed transit passage, and the Soviet Union innocent passage. Moscow claimed the fourth Kuril strait as the only strait used for international navigation.[718] The Korea, Tsugaru and Soya Straits, as well as the Tartar Strait, all are subject to restricted access.[719] For the United States the straits subject to OPA 1990 and supporting legislation may include the Inland Waterway along North and South Carolina to Florida and the Alexander Archipelago in southern Alaska. It is not known whether foreign maritime powers have claimed transit passage, but the U.S. State Department statement has been noted that freedom of navigation may be at odds with U.S. environmental protection in off-shore waters.

State practice related to Article 42(1)(b) may consequently be questioned when the practice of the two largest maritime powers appears contradictory. Prescribing MARPOL 73/78 standards for international straits under Article 42(1)(b) is reasonable due to its being an IMO convention. The parties to MARPOL 72/78 represent a high rate of international tonnage, and the legislative history of Article 42(1)(b) supports this. That the United States and Russia as coastal States exceed these limits causes confusion.

Under Article 220, the requirement for establishment of 'applicable rules and standards' through an 'international organisation or general diplomatic conference' does not appear, though it did in earlier drafts.[720] The omission seems intentional as no further action was taken by the Third Committee to restore the phrase.[721] The effect is that localised arrangements accepted by the flag States may be possible as long as the provisions are consistent with the LOSC. For these to be 'applicable', however, there would have to be some outside acceptance under the general rules of international law.[722] The omission may be important, although it is not the intention to analyse Article 220, since Article 233 is the parallel enforcement article governing international straits.[723] Any possibility for local rules under Article 220 might have relevance for the same under Article 233 and Part III.[724]

The term 'applicable international regulations' in Article 42(1)(b) originated under the U.K. proposal and was substantially supported by the Fiji/U.K. Group.[725] The text was substantially incorporated in the ISNT,[726] with the qualification regarding establishment missing here as in Article 220. Later attempts occurred to construct Article 42(1)(b) more parallel to 'generally accepted' in Article 39(2)(b), but were not accepted, though it appears roughly 45% of the States were in favour.[727]

What this may indicate is that 'applicable international regulations' seems intended to have the same meaning throughout the LOSC, though the specific provisions would vary. At the same time, since the qualification regarding establishment was not addressed in Article 42(1)(b), it seems to allow for the possibility of localised arrangements accepted by the flag State similar to Article 220.[728] The use of 'applicable' in Article 42(1)(b), further, is somewhat curious since the articles from which the term arose dealt primarily with enforcement. The difference in language used between the *prescriptive* articles and *enforcement* articles is not unexpected.[729] The former deals with adoption of national rules and provides that the 'internationally agreed rules' shall be taken into account, or the national rules shall at least have the same effect as that of the 'generally accepted international rules'.[730] The latter however is more definite, referring chiefly to the enforcement of national laws and regulations and the implementation and ensuring compliance of 'applicable international rules and standards'.[731] Article 42(1)(b), however, deals chiefly with prescription, the adoption of provisions related to transit passage, though it also deals with implementation, 'giving effect to the applicable international rules'. It seems essentially a prescriptive article governing vessel-source pollution, using a formulation that is followed by the enforcement articles governing the same. Even its parallel, Article 42(1)(a) incorporating Article 41 dealing with safety, sea lanes, and traffic schemes, follows the traditional prescriptive formulation, 'generally accepted international regulations'. The difference possibly was due to the novelty of environmental provisions and the strictness with which the maritime powers guarded transit passage.[732] Legal scholars generally support the view that MARPOL 73/78 has been included as 'applicable', possibly with closely related customary law.[733]

Generally Acceptable

The meaning of 'generally accepted' in Article 39(2)(b) is also not clear, though its ordinary meaning would be broader than 'applicable' due to the indefiniteness of the adverb 'generally'. Article 39 does not give any guidance. Provisions from LOSC Part XII as well as Article 21(2) related to innocent passage may give some assistance. Under these articles, the 'generally accepted international rules and standards' are those established through 'the competent international organisation or general diplomatic conference',[734] which is the same for 'applicable' international rules.

The expressed American practice is that 'generally accepted' is interpreted to encompass instruments and to be applicable to vessels whose flag States are not parties, which the United States does not accept with respect to international straits.[735] There have apparently been no other conflicts published other than with Spain and the United States as a coastal State and user State, though Italy and Canada have regulated their straits under environmental justifications.[736] The expressed Russian practice probably approximates the American position, and the position of the Russian advisors noted. Many of the same straits are navigated under transit passage. The State practice of the other maritime powers is likely similar.[737] Though protests may have been made by coastal States for non-compliance by vessels of 'generally accepted' provisions under Article 39(2)(b), Russia and other maritime powers apparently have continued to navigate much the same as the United States.

The phrase 'generally accepted' was largely undefined and loosely drafted; the terms 'generally accepted', 'internationally agreed', and 'any' were all utilised for Part XII in UNCLOS III.[738] 'The phrase appeared for the first time in the ISNT, disappeared in the RSNT, but following both informal and formal negotiations reappeared in the ICNT.[739] Both conventional and customary norms were apparently intended. The legislative history surrounding Article 21(2) also indicates a non-specification of the term. A proposal containing the same clarification as in Article 211 regarding 'establishment' was not accepted.[740]

From the above, 'generally accepted' norms to which vessels must comply under Article 39(2)(b), though vague, would seem to include (a) international conventions with wide acceptance adopted under the IMO, (b) normative provisions of not-in-force conventions, (c) supplementary instruments and judgements, and (d) normal navigational procedures and practices.[741]

Differences

'Applicable' and 'generally accepted', would in theory have different meanings since two distinct terms were clearly chosen. 'Generally accepted' would seem to encompass 'applicable' provisions that may be found to enjoy general acceptance, any rules of customary law, as well as any generally accepted treaty provisions.[742] The difference seems chiefly to be in subsidiary or related instruments and decisions, procedures and practices normally followed by mariners, and unsigned conventions widely supported.[743] However, in practice and for most of the scholars who have addressed the problem,

it is not clear that the fields of application are different. The specific provisions common to both are those of MARPOL 73/78, Annexes I and II, with parties representing 96.41% of world shipping tonnage. Thus, the term 'applicable' of Article 42(1)(b) would not seem to have much relevance regarding oil and hazardous chemicals. 'Generally accepted' international rules and standards under MARPOL 73/78 prohibit discharges of oil within 50 miles and hazardous chemicals within 12 miles of the coast, which would include straits subject to transit passage.[744] Most authors come to the same conclusion.[745] Other IMO environmental conventions with parties representing a high percentage of the world tonnage may also probably be included if interpreted as regulating the discharge of oil, oily wastes, and other noxious substances in the strait.[746]

This appears to be an orderly international regime except for the unilateral practices of the United States and Russia with their domestic environmental legislation applied to the exclusive economic zone, including straits. In contrast to the United Kingdom, France and Japan, taking measures to ensure transit passage in their own straits, both Washington and Moscow appear to exceed the limits set by Articles 39(2)(b) and 42(1)(b) incorporating MARPOL 73/78 Annex I and Annex II (Russia) under the terms 'generally accepted' and 'applicable'.

Thus the distinction between 'applicable' and 'generally accepted' has been blurred. Moreover, rather than practising the common denominator, Articles 39(2)(b) and 42(1)(b) and MARPOL 73/78, as well as the Part XII regime governing vessel-source pollution, the world's two largest maritime powers have tended to erode the internationally agreed environmental standards.

International Safety Provisions

'Generally accepted' appearing in Articles 41, 42(1)(a) and 39(2)(a) has probably the same meaning as under Article 39(2)(b). The textual differences appear to be 'generally accepted international regulations, procedures and practices . . .', including the International Regulations for Preventing Collisions at Sea under Article 39(2)(a), is different from the 'generally accepted international regulations' related solely to sea lanes and traffic separation schemes in Article 41(3). The procedures outlined for consultation and adoption outlined in Articles 41(4) and (5) are also different. Though both have the same meaning related to sea lanes and traffic schemes, the requirements for vessel compliance are broader. Compliance includes, under Article 39(2)(a), generally accepted international safety standards, while under Article 41(3) straits States are specifically restricted to designating sea lanes and traffic schemes. The limitations seem clear. In both, the IMO is given a central position, and the one instrument actually listed under Article 39(2)(a) is an IMO convention. Moreover, 'the competent international organisation' with respect to the establishment requirement in Article 41(4) is acknowledged to be the IMO.[747]

State practice supports a restrictive view on coastal State competence to prescribe

safety provisions other than sea lanes and traffic separation schemes. The United States has supported a restrictive view, allowing only sea lanes and traffic separation schemes under Articles 41 and 42.[748] Conflicts between the United States and Spain, the Soviet Union, Iran, Yemen Arab Republic, Chile, Italy, Sweden and Denmark in carrying out the FON program were based on issues other than safety provisions.[749] Russian practice, continuing Soviet practice, probably supports the U.S. position, as does the practice of the other maritime powers.[750] No direct conflicts on this point between maritime States and coastal States have been found.[751] Coastal State competence with respect to safety provisions, however, has been slightly enlarged through the Malacca Agreement, though espoused under Article 233 on safeguards for straits used in international navigation.[752]

At the same time both Russia and the United States have given themselves increased coastal State competence. In addition to that noted related to environmental violations criminal liability may be raised as safety related. No limitation of liability to established limits is allowed by the United States if the incident is caused through a violation of Federal safety, construction, or operational provisions. Since construction and operational standards unilaterally adopted have probably been in excess of international environmental standards, the possibility exists that the unilaterally adopted safety standards are also in excess. Additional points include the unilaterally adopted requirements for civil liability and broader enforcement measures. For Russia the procedures for search, arrest and hearing may also apply to violations of related unilaterally established safety provisions. Navigational practices, including unilaterally adopted discharge and design, equipment, manning and construction norms may be regulated in special areas that have been unilaterally established in the exclusive economic zone. The use of force to bring a vessel under suspicion to port is also included, as is civil liability.

Thus, State practice appears confused regarding 'generally accepted' safety provisions under Articles 41 and 42(1)(a), though possibly less so for Article 39(2)(a). Logically, a strait State may adopt in its legislation not only appropriate sea lanes and traffic separation schemes in accordance with Articles 41 and 42(1)(a), but also the other IMO and ILO safety conventions where the parties represent a high percentage of world tonnage – so long as the provisions do not apply solely to straits. Such safety standards would be applicable to vessels in the straits under Article 39(2)(a), even if their flag States were not parties, since the normative provisions have probably become customary international law.

At UNCLOS III Malaysia and Spain attempted to enlarge the list of activities which strait States could prescribe under Articles 41 and 42(1)(a), paralleling Article 21, but their proposal was not accepted.[753] They also included sea lanes and equated vessel compliance required under Article 39 with environmental and safety provisions established by the coastal State. It seems illogical that vessels are required to comply with other safety conventions where parties represent most of the world's tonnage and that these regulations can be implemented in coastal legislation for the territorial seas, but

not in international straits.[754] Constricted straits probably have a greater risk for accidents. Restrictions upon the straits States seems contrary to the spirit of international safety conventions. From the standpoint of conflict resolution the implementation of these conventions into coastal legislation would likely facilitate transit passage rather than limit it. Relevant provisions have been already adopted by the IMO, they are beneficial in constricted marine areas and they make few exceptions for international straits. A clear avenue for redress for violations in the courts of the port strait States would aid compliance from both sides rather than making international claims through diplomatic channels.[755] There would be more stability in an international regime already accepted,[756] but this view has the support of only a minority of legal scholars.[757]

Limits of Coastal State Enforcement

Breaches of the 1958 TSC Article 16(4) regime by non-State vessels have probably been enforced by coastal States by exclusion and arrest. Breaches by State vessels have probably been enforced through suspension of passage and expulsion, similar to enforcement for non-innocent passage in the territorial sea.[758] At the same time enforcement may also include limiting the number of foreign vessels within the strait at any one time, prohibiting passage during darkness, as well as making international claims through diplomatic channels.[759]

Transit Passage

The scope of coastal State enforcement under the Part III regime of transit passage is also unclear. The provisions were deliberately drafted so in order to facilitate the balancing of coastal and flag State interests.[760] The LOSC is silent on the coastal State power of enforcement, and in those articles which do suggest it enforcement, broad interpretations may be made. Possibilities range from discrimination against all foreign vessels to no discrimination, as well as expulsion from the strait to no suspension of transit passage, even for major violations of international and domestic law. No attempt was made to define what 'appropriate enforcement measures' may be taken by the straits States, nor to show any explicit relation between Article 233 and Articles 42(1)(2) and (4) and 44. Although the interpretation of Article 233 in conjunction with Articles 41, 42 and 44 seems clear for the Straits of Malacca and Singapore, for other straits extrapolation may be doubtful lacking prior negotiations or State practice. These issues have special relevance, since strict enforcement measures enjoy a high profile in the Russian provisions governing the Arctic straits.

An argument may be made that in spite of the silence of the LOSC related to enforcement, under Article 42(4) vessels must comply with coastal State provisions adopted within the legislative competence allowed under Article 42(1).[761] Due to the silence, the enforcement provisions governing innocent passage in the territorial sea accordingly apply under Article 34, where the good order of the territorial sea or

coastal State is disturbed, or the flag State requests assistance. The application of Article 233 is excepted under which enforcement is to be exercised only where major damage to the marine environment is caused or threatened.

A contrary argument may be made that Article 233 limits enforcement to cases of 'causing or threatening major damage to the marine environment' and that little else is allowed, even under Article 34.[762] Furthermore, Article 233 by its own terms requires the environmental provisions not affect the international straits regime. Cases associated with Article 233 may be considered exceptional, since enforcement measures in a strait may cause hazards as well as would be contrary to Articles 42(2) and 44.[763] If this latter interpretation is followed, coastal State provisions could be enforced only against foreign vessels when they entered that State's ports. Nothing is directly stated in Articles 42(2) and (4) regarding Article 233, though Article 233 contains a cross reference to Article 42(1)(a) and (b).

Based on the above, the texts seem to support the interpretation favouring strict transit passage with little possibility for coastal State enforcement. Article 42(2) requires non-discrimination in form or fact *among* foreign vessels. Compliance with coastal State provisions has again been required under Article 42(4). Articles 42(2) and 44 are emphatic that transit passage shall be neither hampered nor suspended. By their textual force and placement, in relation to Articles 233 and 42(1)(a) and (b), Articles 42(2) and 44 dominate enforcement possibilities. 'Appropriate enforcement measures' would not seem to include any suspension of transit passage nor discrimination in form or fact, denial, hampering, or impairing from Article 42(2), though definitions of the terms are not specified. Article 42(5) is one of the few more specific provisions, indicating clearly that little more than international claims against the flag State through diplomatic channels would be available as an enforcement measure.

The question may be raised whether discrimination under Article 42(2) is allowed between domestic and foreign vessels but not among foreign vessels.[764] Over half the relevant articles use 'among', however, what the term means in the context of Part III may be of little relevance. The transit passage regime regulates the rights and duties of foreign vessels in passage with respect to the coastal State. That non-discrimination among vessels is required only augments support for non-interference with transit passage. The coastal State may not discriminate among the foreign vessels in enforcement. That a coastal State may enforce regulations for its own vessels more strictly or loosely is not allowed to affect the transit passage regime. The texts are either silent or vague on this matter, and actual State practice of Articles 34, 42(2) and (4), 44 and 233 may be indicative of their interpretation.

State Practice

A very restrictive interpretation appears to have been taken by the maritime powers whereby transit passage seems nearly unassailable under Articles 42(2) and 44 and any enforcement measures under Article 233 taken only in extreme cases. The practice of

Russia and the United States has been confused with claims of competence on various points to enforce their national laws for violations involving polluting activities and which appear even in excess of Articles 218–220 and 230. The enforcement power has been exercised in their territorial seas and exclusive economic zones, including these waters in their straits. It is probable that Moscow and Washington will enforce these provisions strictly.[765]

One clarifying factor surrounding enforcement has been the negotiation of the Malacca Agreement, which related specifically to under-keel-clearance which was to be included in the traffic separation schemes provided for by LOSC Article 41. A provision requiring at least 3.5 meters under-keel clearance during passage through the Straits of Malacca and Singapore was adopted by the IMCO, which was considered a minimum.[766] Any violation of the resolution was stated to be a violation within the meaning of Article 233. In addition appropriate enforcement measures under Article 233 were stated to include preventing a non-State vessel which is violating the mandatory under-keel-clearance from proceeding further. This specifically does not constitute denial, hampering, impairing, or suspension of the right of transit passage in breach of Articles 42(2) or 44. The Malacca Agreement notes that straits States may take appropriate enforcement measures against vessels violating the rules referred to in Article 42(1)(a) and (b), but while doing so must observe the Part XII Section 7 safeguards. The IMO has additionally recommended safety measures, including velocity restrictions, reporting by vessels of their position and the use of pilots in the Straits of Malacca, the Baltic Straits, the Torres Strait, Ushant, the Great Belt, Off Finisterre, and the Strait of Gibraltar.[767]

Thus, a marked stiffening of Article 233 has occurred with appropriate enforcement measures enumerated. Exception has been taken to the dominant Articles 42(2) and 44, though related only to under-keel-clearance. For the recommended measures, however, resistance by user States might prevail over coastal States through claims of expanded enforcement jurisdiction, though this may be changing.[768] Other appropriate enforcement measures may be reached through negotiation, depending upon the user and coastal States involved and the particular geographic and traffic conditions of the strait. Could subsequent practice in one strait be claimed applicable to other straits? It seems possible that if negotiations were conducted between the users and the coastal States, and the IMO were directly involved, that enforcement measures might be transferred.

Legislative History

Article 233 requires an actual or threatened major environmental disaster by a foreign commercial vessel.[769] The Soviet Union originally submitted, in addition to draft articles on straits, draft articles to the Third Committee concerning marine pollution in straits.[770] On the basis of these Article 233 was negotiated, though little was specified regarding appropriate enforcement measures.[771] Some idea of what was not accepted

can be deduced from the proposals forwarded by Spain, which several times pressed for deletion or changes.[772] These proposals failed to gain sufficient support or were withdrawn,[773] and the rejection of expanding coastal State enforcement jurisdiction seemed to indicate that a restrictive interpretation of Article 233 to be the better one.

Article 34 does not define its application in relation to Article 233, nor does its legislative history clarify greatly, though this provision was subject to much negotiation.[774] Reference to the Part II innocent passage regime is noticeably absent. Article 34 appears to have arisen through proposals made by Spain that sovereignty of straits States, exercised in accordance with these and other international provisions, extends to straits which are part of the territorial sea, regardless of whether they are used for international navigation.[775] The Fiji/U.K. Group proposed changes that the regime of passage must not in other respects affect the status of waters, provided elsewhere in the treaty, forming such straits, nor of the seabed, subsoil, and superjacent airspace,[776] and the RSNT remained much the same.[777] The legislative history would thus probably shift the enforcement possibilities under Article 34 away from the use of the general rules for the territorial sea including innocent passage.

The legislative history of Articles 42(2) and (4) and 44 also indicate interpretations favouring strict transit passage with little enforcement possibilities for straits States.[778] As regards non-discrimination, Article 42(2), unlike Article 24(1)(b), does not mention 'cargoes', possibly to specifically emphasise non-discrimination, in form or in fact, either overt or covert.[779] In the early stages of the negotiations Article 44 was chiefly opposed by the same States noted supporting non-suspendible innocent passage, but these met with little success.[780] The Fiji/U.K. Group followed the U.K. text which substantially became the RSNT and the ICNT.[781]

The views of legal scholars have been divided, expressing an impressive breadth of interpretative possibilities of Articles 34, 41, 42 and 233. These range from allowing broad coastal State rights,[782] to permitting only very restrictive coastal States rights,[783] with several authors calling for moderation.[784]

Ice-Covered Areas and the International Straits Regimes

The main question for the Arctic and the international strait regimes is the role played by Article 234. This includes issues of temporal or spatial application, navigational exclusion, and foreign and domestic discrimination. Virtually free transit passage or broad non-suspendible innocent passage seem antithetical to Article 234, where ice-covered straits and entrances could conceivably be completely closed under certain conditions by the coastal State. Neither Article 234 nor the international straits regimes nor any other LOSC or 1958 TSC provisions provide clarification regarding the interrelation.

It may be assumed 1958 TSC Article 16(4) has become customary international law, where as it is theoretically doubtful that Article 234 has become customary law. The non-suspendible innocent passage regime, therefore, seems most acceptable. However

1958 TSC Part I Section III and LOSC Part II Section 3, regarding innocent passage have also become customary international law. Both prescribe that a coastal State may prevent passage prejudicial to the peace, good order, or security of the coastal State. Although it might be argued environmental and safety violations might be prejudicial to the coastal State, the legislative history of innocent passage under 1958 TSC indicates otherwise. Under LOSC Article 19(2)(h), only acts of wilful and serious pollution contrary to LOSC provisions may be considered to be prejudicial to peace, good order, or security. Additionally, though discretion is left to the individual coastal States, such evaluation is intended under both the 1958 TSC and the LOSC to be practised on a case-by-case basis. Thus, non-suspendible innocent passage as confirmed in the *Corfu Channel Case* and in 1958 TSC Article 16(4) would seem the rule.

At the same time navigating through Arctic straits under 1958 TSC Article 16(4) with little attempt to comply with a coastal State's environmental regime for ice-covered areas would probably be considered reckless and threaten an act of wilful and serious pollution. This would give an Arctic strait State reason to prescribe and enforce measures preventing this threat, including temporary suspension of passage, due to non-innocence. Hence, due to the potential risk, the ice-covered areas regime may possibly in practice be considered the superior rule governing the territorial sea. Under this regime, on high seas zones through the straits, there would be no exercise of jurisdiction. State practice indicates a clear dominance of the ice-covered areas regime over the 1958 TSC Article 16(4) regime.[785]

LOSC International Straits Regime

The Part III regime should probably be interpreted strictly in favour of user States over States bordering straits. This would argue in favour of the Part III regime as superior to Article 234 in ice-covered straits.[786] At the same time, theoretically the textual meanings of Articles 233 and 234 may indicate domination.[787] Article 234 could be interpreted as a *lex specialis* excluding the transit passage regime from ice-covered straits when defined as international. Further Article 234, the sister as well as neighbour of Article 233, taken in its context in the different Sections under Part XII may also support the view of deliberate exclusion. Article 234 was placed in its own Section 8, following Article 233, in Section 7, the latter which specifically refers to Sections 5, 6 and 7 and precludes them from influencing the international straits regime. Section 8 is not mentioned in Article 233, implying that the only article in Section 8, Article 234, is independent. Due to this placement, the arguments related to the status of Article 233 as a safeguard subordinate to the international straits regime may not apply to Article 234.

Under the broad interpretation of Article 234, assuming the intention was to separate the two regimes, in Arctic straits deemed international, the coastal State would only be required to provide for 'due regard to navigation . . .' in its laws and regulations.[788] Under the narrow interpretation of Article 234, when measures are taken by

the strait State only when problems arise due to particularly severe climatic conditions, the same duty would hold for the coastal State. In the absence of these conditions, which may be a substantial period of time,[789] the normal provisions of the international straits regime, Part III, and of the environmental regime, Part XII, related to straits, Sections 5, 6, and 7 including Article 233 would likely govern. The effective difference lies in whether there would be extensive or minimal unilateral coastal State jurisdiction.

The Article 234 placement was deliberate. Possibly there was a mistaken exclusion in Article 233 of a reference to Article 234. This seems likely considering the emphasis placed upon flag State rights in relation to the coastal State rights that was exhibited in the negotiations of both the Part III and the Article 234 regimes. Another possibility is that this point was deliberately not mentioned due to the controversy. Provisions comprising the international straits and the ice-covered areas regimes are characterised by vagueness. The relationship between the two articles seems deliberately vague.

Arguing against this, however, is the proximity of the two articles. Article 234 follows Article 233, a provision which attempts to regulate the relation between the international straits regime and the Part XII regime. It may be questioned whether the ice-covered areas regime with even more consequences for the international straits regime would have been left deliberately vague. If the two articles were not so closely positioned, such an argument might be plausible, but here the contrast seems too evident. This may likely point to either a mistaken omission or the intention to have the two regimes separate. The substantive negotiations of Article 234 were conducted directly by Canada, the Soviet Union and the United States, and the results were incorporated at an early stage into the LOSC. The other States remained largely neutral. Given the separateness of the negotiations of the two articles, they indeed may not be compatible.

A minor issue relates to the possible creation of artificial waterways by ice-breaking, which would result in geographic straits or sea lanes, and their relation to the international straits regime. One of the recognised characteristics of a geographic strait is that it must be natural and not be artificial, though a strait and a canal might have geographic similarities in connecting two parts of the high seas.[790] Though the international provisions governing the navigation of international straits and international rivers appear in several ways similar, they are not applicable to canals, which are under national jurisdiction.[791] Nothing is directly stated in the LOSC regarding artificial sea lanes established through ice-covered straits. These would however arguably be governed by Articles 41 and 42(1)(a) as sea lanes for passage through international straits, with the same issues that have been discussed above.

State Practice

The State practice of the Soviet Union–Russia and Canada both give extensive prescriptive and enforcement jurisdiction to the coastal State under Article 234, including the Arctic straits.[792] Several Russian provisions substantially follow the text of Article 234 directly incorporating the jurisdictional rights into domestic legislation. The Canadian legislation with its zone of 60 degrees North and 100 miles from the baselines encloses all Arctic straits. Within this as well as within the enclosed archipelagic waters, claims have been made for the regulation of all vessels, including the prohibition of shipping and the prescription and enforcement of environmental standards. The Canadian declaration upon accession to MARPOL 73/78 claimed its Arctic provisions were justified under Article 234.

The U.S. position is especially unclear concerning the interrelation between the ice-covered areas and the international straits regimes. U.S. Navy vessels regularly utilise transit passage through most of the major straits of the world.[793] Washington has declared that both the Russian Northeast and Canadian Northwest Passages as well as their approaches to be international straits regulated by transit passage. The United States has consistently protested the Russian and Canadian legislation as an unlawful interference with navigational rights and freedoms.[794] Transit passage has been strongly asserted for the passage of submarines through ice-covered straits.[795]

The United States may adhere to an Article 234 regime applicable to foreign vessels through Article 42(1)(b), claimed as *parallel* yet not hampering transit passage.[796] The 1990 OPA and supporting legislation governing the Alaskan ice-covered exclusive economic zone exhibits substantial similarities to the Canadian and Russian legislation. Although perhaps difficult to justify under international law elsewhere in the U.S. exclusive economic zone, these provisions can probably be asserted more easily for the Arctic under Article 234. The inherent contradiction has not been addressed by either the U.S. Navy nor the State Department in relation to the Northern Sea Route, the Northwest Passage, or Alaskan waters. The State Department has noted that U.S. commercial vessels are considered subject to the Canadian legislation,[797] although it has protested the legislation. But Washington maintains the question is still open as to whether Article 234 applies to the Northwest Passage as an international strait.[798] Finally, in spite of the U.S. declarations and protests, surface passages by both American State and commercial vessels appear to have been carried out substantially in compliance with the Russian regime for close to 40 years and with the Canadian regime for over 15 years.[799]

Legislative History

The legislative history does not clarify the interrelation of these regimes to any substantial degree. It thus seems safe to maintain that given the domestic legislation adopted by the Soviet Union and Canada since 1970, which retained the Arctic straits

under strict national control, it seems doubtful they would have negotiated Article 234 only to have it made conditional on the exercise of transit passage. At the same time both Canada and the Soviet Union supported Part III, as did the United States. This would indicate either Washington agreed to the dominance of the Article 234 regime, which seems unlikely given its clear position in relation to Article 233,[800] or the issue of interrelation was left deliberately open and vague. Both sides seem to have effectively reserved their positions, with neither being required to delve more deeply into the sensitive jurisdictional issues. With regard to water ways, the use of the terms 'artificial channels' or 'sea lanes' failed to gain noticeable support in UNCLOS I.[801]

Most scholars have not discussed the interrelation between the ice-covered areas and the international straits regimes, and those who have either view Article 234 as dominant,[802] fail to take a position,[803] avoid the issue and concentrate on transit management,[804] or revert to innocent passage.[805] Most authors have not treated 'sea lanes' related to 'straits' as an issue.[806]

Conclusions

The right to non-suspendible innocent passage through international straits as enunciated in the ICJ judgement in the *Corfu Channel Case* as well as in 1958 TSC Article 16(4) is considered to have become customary law. Yet questions remain with respect to its universality and its application to the passage of warships in the territorial sea in general and through international straits in particular. It appears doubtful the LOSC Part III regime has become customary international law. This is due to the State practice of a moderate number of States which have given support to Part III, yet exempt straits under their own jurisdiction from the application of transit passage. Additionally, Article 233 seems meant as a coherent part of the Part III regime. Lacking passage of Part III into customary law, it appears doubtful Article 233 has become customary law.

The phrase 'used for international navigation' from the *Corfu Channel Case* was incorporated into 1958 TSC Article 16(4) and LOSC Articles 34 and 37. Nowhere, however, in the 1958 TSC or the LOSC has further elaboration been provided. Questions may be raised about interpretations of the terms 'use' and 'international', but it appears doubtful that an international straits regime can be based upon potential use. Most scholars support this view. Even when the United States has ratified the LOSC, the stalemate regarding 'international' is likely to continue since the LOSC provisions did not change anything regarding the interpretation of the term.

The prescriptive limitations of 1958 TSC Article 16(4) were ambiguous, especially what was 'prejudicial to the security' of the coastal State. Since these vagaries led to a new international straits regime, little analysis of Article 16(4) is necessary. Where the regime is still applicable, it is probably accepted with its faults and regulated locally through individual coastal State domestic legislation. In addition, in determining the prescriptive confines of Article 16(4), the more general issue relates to the meaning of

innocent passage, especially for State vessels. Since the Russian Arctic straits may become international and transit passage may be customary law in the future, the Part III provisions covering prescriptive and enforcement jurisdiction are what must be addressed.

Despite a textual reading of LOSC Articles 38, 39, 41 and 42 and the attractiveness of environmentally friendly interpretations, transit passage may not in any way be suspended nor hampered by the coastal State. This includes under Article 38(3), differences between 'generally accepted' and 'applicable', or the expansion of navigational safety to include the other safety conventions. These restrictive interpretations are based upon the State practice of the maritime powers which claim and exercise transit passage, which may be largely indiscernible to coastal States, as well as the legislative history. Most scholars support this position.

Though foreign vessels are required to comply with 'generally accepted' international regulations, procedures and practice for safety at sea and for the prevention, reduction and control of vessel pollution, compliance with coastal States' legislation is less strict, only limited to national regulations adopted through the IMO related to sea lanes and traffic separation schemes and the national implementation of MARPOL 73/78 Annexes I and II. Little more may be adopted by the coastal States, unless separately negotiated with the maritime States as was done in the Malacca Agreement.

The situation has been confused, however, by the coastal State practice of the two major maritime powers, Russia and the United States with regards to their own territorial seas and exclusive economic zones. Both have adopted expanded environmental and safety provisions, which on particular points appear in excess of LOSC and other international regimes applicable to their own straits. This could create a situation whereby coastal States prescribe similar provisions for international straits and estop these powers from navigating in violation of them. This might include their own environmental and safety requirements regulating mandatory notification and authorisation, criminal and civil liabilities, and design, equipment, construction, crewing, and safety standards, and special areas. For violation of these standards expanded enforcement provisions might be adopted regulating entry, detention, seizure, and forfeiture. At the same time it seems likely the maritime powers will continue to exercise transit passage and ignore inconsistent coastal State environmental and safety provisions.

For enforcement jurisdiction under 1958 TSC Article 16(4) the same ambiguity exists as for the prescriptive jurisdiction. Other vagaries include whether breach of coastal State health, customs and immigration provisions render the passage non-innocent, and whether lack of notification render the passage of warships non-innocent.

The Part III regime enforcement jurisdiction is even more confused than prescriptive jurisdiction. An interpretation of Articles 34, 42(2), (4) and (5), 44 and 233 favouring the user States is probably the better one, despite logically solid textual interpretations of these articles favouring coastal States. Transit passage dominates through the terms 'non hampering', 'impairment', 'denial' or 'suspension', even in spite of violation of domestic laws and regulations of the strait State. The only allowable exception would

apparently be under Article 233 where 'appropriate measures' may be taken for violations causing major environmental damages or threats of such, however, this would chiefly include only enforcement in ports. This view is based upon the State practice of the maritime powers exercising transit passage, as well as the legislative history of these articles. At the same time the call by some scholars to moderate the extreme positions of both user and coastal States should be kept in mind. Despite real interpretative problems, the Part III regime following long negotiations probably best corresponds to navigational interests, since it represents a step towards finding compromises within a difficult legal area.

Due to the non uniform environmental and safety practices of both Russia and the United States, as well as the precedent-setting Malacca Agreement, it would appear to be to the coastal States' advantage to attempt to negotiate a similar or an even more extensive agreement with the user States and have the provisions adopted by the IMO. Such specific agreements appear to be a stable development in an otherwise controversial area. It could thus likely be expected that strait State detention of vessels for breaches of environmental and safety navigation requirements, including under-keel-clearance, velocity limits, reporting of position and pilotage, without a corresponding breach of Articles 42(2) or 44, would become increasingly common.

Regarding the interrelation between Article 234 and 1958 TSC Article 16(4) the ice-covered areas regime is possibly the dominant rule in the territorial sea. Under 1958 TSC Part I Section III and LOSC Part II Section 3, which have likely become customary international law, a coastal State may prevent passage which is not innocent. Under LOSC Article 19(2)(h) passage is considered to be prejudicial to the peace, good order or security of the coastal State if the vessel engages in any act of wilful and serious pollution. Navigating through the Arctic straits under 1958 TSC Article 16(4) with little attempt to comply with a coastal State's environmental regime could probably be termed reckless and threatening an act of wilful and serious pollution. This would arguably give an Arctic coastal State reason to prescribe and enforce measures preventing this threat, including temporary suspension. On high seas zones through the straits there would be no exercise of jurisdiction.

Regarding the interrelation between the Article 234 and the Part III regimes, theoretically it appears probable that the international straits regime would dominate. Developments in State practice, however, indicate that a curiously divided regime may be emerging for Arctic ice-covered straits wherein the traditional rule appears applied only for submerged transit. Surface passages, both State and commercial, seem to indicate a practice favouring dominance of the ice-covered areas regime. Thus, a special variation of the international straits regime may be developing for Arctic ice-covered areas, with passage rights based upon the type of vessel and possibly political motivation. Such practice would be in contrast to not only Part III, but also to the more historical 1958 TSC Article 16(4) and the *Corfu Channel Case*.[807] This subject will be further examined in the following two chapters.

CHAPTER 7

STATE PRACTICE IN THE RUSSIAN ARCTIC STRAITS

It seems doubtful that LOSC Part III has become customary international law.[808] If the Russian Arctic straits were not considered international,[809] then there would be justification for Russia both to legislate and enforce its domestic legislation over its Arctic straits, subject to the extent allowed under traditional law of the sea. Theoretically, innocent passage under 1958 TSC Part I Section III and LOSC Part II Section 3 would be the rule in the territorial sea of the Russian Arctic straits should the claim to historic title fail,[810] and provided 1958 TSC Article 5(2) and LOSC Article 8(2) would apply.[811] Broader limits may be applicable under LOSC Articles 211, 218–220, or 234, but it also appears theoretically doubtful that these Articles of Part XII have become customary law.

If the Russian Arctic straits were considered international, there would be justification for Russia to legislate and enforce its legislation subject to the extent allowed under 1958 TSC Article 16(4). At the same time the establishment of a Soviet 12-mile territorial sea, though controversial in 1960 and possibly in 1982, has now developed into firm customary law.[812] Consequently, the present situation in the Russian Arctic straits appears to the United States to be precisely that feared by the maritime powers before UNCLOS III, namely a 12-mile territorial sea encompassing straits that previously contained high sea lanes.

An examination of the Russian Arctic waters reveals that of the roughly 58 straits, only nine have widths greater than six miles but less than 24 miles.[813] The majority of other straits range under six miles in width. The Kara Gate, possibly the Vil'kitskii, the Dmitrii Laptev and the Sannikov, the Blagoveshchensk, the Long, and the Gorlo Straits (White Sea) all could have high sea channels even with a 12 mile territorial sea. The nine straits wider than six miles but narrower than 24 miles include the British Canal, the De-Bryyn, and the Nightingale (Franz Josef Land), the Orlovskaia Salma (White Sea), the Ovistyn (Kara Sea), possibly the Vil'kitskii and the Shokal'skii, the Murmanets (Laptev Sea), and the Zaria (separating the Laptev and the East Siberian Seas).[814] However, the Vil'kitskii and the Shokal'skii Straits and the straits in Franz Josef Land are most important because of their water depth, though the others may be used irregularly depending upon the ice conditions.[815]

The U.S. State Department published in 1992 and 1994 statements made in the

Vil'kitskii Straits Incident in the mid 1960's, but there has been a lack of current specific claims for transit passage through these Arctic straits.[816] However, Washington reserved its rights for waters, 'whose status it regards as dependent on the principles of international law and not decrees of the coastal state', which would appear to allow a demand for the right of transit passage through the Russian Arctic straits if shown to be international.[817] Other official statements can be interpreted to maintain such a claim.[818]

If certain straits in the Russian Arctic waters were international prior to Russian ratification of the LOSC, the indefinite 1958 TSC Article 16(4) regime applied, with suspension of innocent passage based upon the coastal State appraisal of threats to its peace, good order or security under 1958 TSC Part I Section III. Correspondingly, there was no right to submerged passage through territorial waters of the straits, something which is of special importance here.[819] At the same time the notification and authorisation requirement for warships under the Soviet reservation to 1958 TSC Article 23 may have not applied, due to the U.S.S.R.–U.S. Joint Statement, wherein innocent passage not subject to notification and authorisation was confirmed. But Russia has ratified the LOSC, and the Part III regime must be considered in relation to the Russian Arctic straits, taking account of the non-customary status of Part III.[820]

Russian Position on International Use

Pre-1982 Legislation

Prior to 1960, the straits in the Russian Arctic appear largely unregulated.[821] Although much exists in Soviet doctrine claiming extensive national jurisdiction over the Arctic seas and straits, especially under theories of historic waters and closed seas, little legislation or other evidence of State practice appears to be available.[822]

The 1960 Statute was first adopted, setting forth historic straits, and requiring previous authorisation for warships, for innocent passage through the Soviet territorial sea.[823] In 1965 the Soviet Ministry of the Maritime Fleet required escort or pilotage for all vessels in the Vil'kitskii and Shokal'skii Straits and later made the same requirement for the Sannikov and Dmitrii Laptev Straits.[824] In 1966 a Soviet naval manual for international law was published stating,

> The Dmitrii Laptev and Sannikov straits are regarded as belonging to the Soviet Union historically. They have never been used for international navigation, and in view of specific natural conditions and frequent ice jams, the legal status of these straits is sharply distinguished from all other straits being used for international navigation.[825]

Shortly following the adoption of the 1960 Statute, the Vil'kitskii Straits Incident illustrated Soviet practice of these provisions concurrent with 1958 TSC Part I Section

III. Legal authority was apparently based upon the requirement of previous authorisation for innocent passage for warships through Soviet territorial seas, and the various events comprise to date the major confrontation over the Russian Arctic straits. These resulted in declarations which clearly indicated the respective positions of the Soviet Union and the United States.[826]

In the summer of 1963 the U.S. carried out oceanographic research with the U.S. Coast Guard vessel *USCGC Northwind* (WAGB-382) in the Laptev Sea and in the summer of 1964 in the East Siberian Sea with the *USS Burton Island* (AGB-1).[827] On July 21, 1964, the Soviet Ministry of Foreign Affairs delivered to the American Embassy Moscow a *aide memoire* setting forth the Soviet position regarding the *Burton Island* voyage,[828] to which Washington replied in on June 22, 1965.[829]

The *Northwind* navigated in the area from July to September 1965. The vessel had planned on navigating through the Vil'kitskii Strait, which had never before been transited by an American vessel to complete the Northeast Passage.[830] The vessel was closely surveilled by Soviet vessels and eventually ordered not to attempt the passage with strong Soviet diplomatic pressure threatening to go 'all the way'.[831] The *Northwind* also rounded the tip of Severnaya Zemlya since ice conditions were favourable. It could have completed a transit of the Northeast Passage without navigating through the disputed Vil'kitskii Strait, however, it was instructed to return.[832]

On October 27, 1965 the Soviet Union protested in a note[833] to which the United States replied.[834] In 1966 the U.S. vessels *Burton Island* and the *Atka* visited respectively the Chukchi and the Kara Seas, the former resulting in a comment by a Soviet Ministry of Merchant Fleet official expressing displeasure.[835]

The U.S. notified the Soviet government through a diplomatic note dated August 14, 1967 of a planned Arctic circumnavigation with oceanographic surveys conducted in international waters by the *USCGC Edisto* and the *USCGC East Wind*. This route would take the vessels north of Novaya Zemlya and Severnaya Zemlya into the Laptev and East Siberian Seas. The United States advised the Soviet government of the planned route in a note dated August 14, 1967.[836]

Because of ice, however, the vessels entered the Karsky Sea and proceeded towards the Vil'kitskii Straits. The change was notified to the Soviet government by Note No. 340 delivered by the U.S. Embassy August 24, 1967,[837] to which the Soviet Union responded negatively on August 25, 1967.[838] On August 28, 1967 the Chief of the American Section at the Soviet Ministry of Foreign Affairs made an oral *demarche* on the American Deputy Chief of Mission emphasising this position, as reported in a cable to the Department of State.[839] The United States responded in a telegram delivered 7:30 p.m. local time, August 30, 1967 to the Soviet Ministry of Foreign Affairs, Moscow, strongly protesting the Soviet position.[840] Though the *Edisto* left the area, the *Eastwind* remained in the Kara and Barents Seas for another month.[841]

The Russian Navy claimed that the confrontations were more widespread than indicated by the U.S. State Department.[842] Moscow also maintained that some 19 voyages may have been made by U.S. ice-breakers between 1962 and 1970 along the

Northern Sea Route, including navigations through territorial sea and internal waters.

Following these confrontations, comprehensive requirements for navigation in the Soviet Arctic were subsequently established by the Soviet Union under a 1971 Statute.[843] Under Article 2, vessels on the lanes of the Northern Sea Route and on the lanes of adjacent areas were to be provided by the NSRA with icebreaker escort, pilotage, navigational and hydrographic services, and assistance if in distress.[844] Vessel position and other information was required to be transmitted at regular periods under Article 3.[845] The administration officials had the right to visit vessels planning voyages to check their sea and ice worthiness under Article 6, and passage could be denied should these be found lacking.[846] Ice-breaker escort, pilotage, and navigation could be suspended due to ice, navigational problems, weather or pollution. Penalties could be imposed and criminal prosecution initiated should criminal liability arise.

In 1971 P. Barabolia published an article entitled, 'Peculiarities of the Legal Regime of the NSR and the Major Straits of the Arctic Seas Adjacent to the Coast of the U.S.S.R.'[847] Territorial waters were stated to make up the majority of straits comprising the Northern Sea Route, with the exception of the Dmitrii Laptev and Sannikov Straits, which were claimed as historic. Passage through the straits between the Barents and the Kara Seas, though not requiring compulsory ice-breaking pilotage, required authorisation for foreign naval vessels, based upon a claim that the route was a national Soviet 'water artery'. Ice-breaker escort and pilotage were claimed as compulsory between meridians 98 and 108, governing the straits between the Kara and the Laptev Seas, including the Vil'kitskii as well as the Shokal'skii Straits. Baselines were also claimed to be established in the area of the New Siberian Islands, though it was unclear where since the appropriate co-ordinates were never disclosed.

Post-1982 Legislation

Even following 1982, legislation adopted by the Soviet Union and Russia dealing specifically with Arctic straits appears scarce.[848] However, the extensive navigational and environmental provisions applying to the exclusive economic zone, and where relevant, the territorial sea, are also claimed to govern the Arctic straits. Those straits lying between islands far offshore and between these islands and the mainland still may be claimed governed by the provisions for the exclusive economic zone if not the territorial sea, since all are encompassed by the former zone, and small island groups in addition by the latter.

Compulsory ice-breaker assisted pilotage is required for all vessels in the Vil'kitskii, Shokal'skii, Sannikov and Dmitrii Laptev Straits under Articles 1.4 and 7.4. of the 1990 Rules.[849] The other Russian Arctic straits may as well be included in the requirement for one of five different types of leading at the discretion of the authorities since as seen under Article 1.2. the route is defined to transverse not only the inland seas and territorial sea but also the exclusive economic zone.

Supplementary legislation has included compulsory ice-breaking convoying and

pilotage in these four specified straits under Article X of the 1985 Straits Rules, set forth again in Article 14 of the 1998 Law. This supplements Article 3 of the 1984 Environmental Edict, Article 14 of the 1984 Economic Edict and Article 32 of the 1998 Economic Zone Act prohibiting navigation in the absence of compliance with the specified conditions.[850] These provisions are applicable to all vessels regardless of flag, and in areas where compulsory pilotage is dictated, no vessel including foreign warships has the right to navigate without a State marine pilot or without complying with these standards under Articles 1 and 15 of the 1983 Statute. Article 5 of the 1983 Rules as well as Articles 5 and 12 of the 1999 Decree within the territorial sea additionally requires warships to observe both navigation and other rules, including pilotage and ice-breaking services, which are to be used where compulsory. The Soviet Union also enacted a Resolution with the U.S.S.R.–U.S. Joint Statement attached, a few days before the statement was ratified.[851] It amended the controversial Article 12(1) of the 1983 Rules regarding warships, ending the requirement for innocent passage in navigation through sea lanes and exclusive traffic separation schemes.[852] Articles 12 and 13 of the 1998 Law appear consistent with innocent passage recognised under international law including the use of published sea lanes, however allow permanent suspension of innocent passage in specific areas for security reasons, which could include the Arctic straits. The scope of the right, moreover, remains unclear under Articles 5 and 9 of 1993 State Border Act which generally prohibits other actions for foreign vessels in the territorial sea not permitted under Russian provisions except if provided for under ratified international treaties.

Various of these provisions may cause a dilemma. The entire Northern Sea Route has been claimed to be under strict national control, possibly to include the high seas. But the requirement for pilotage for State vessels in the Vil'kitskii, Shokal'skii, Dmitrii Laptev and Sannikov Straits under the 1985 Straits Rules and 1990 Rules and the requirement for pilotage specifically applicable for warships in these straits through Article 5 of 1983 Rules, Article 12 of the 1999 Decree and implied in Article 14 of the 1998 Law seem to acknowledge the right of such vessels to navigate in these waters.[853] The Vil'kitskii, Shokal'skii, Dmitrii Laptev and Sannikov Straits may be claimed as historic as well as the route itself under Article 14 of the 1998 Law.

Enforcement of these provisions within the internal waters and the territorial sea which may include the Arctic straits appears very strict under Article 30(3) of the 1993 State Border Act. Vessels generally may be stopped, inspected and detained and conveyed to the nearest port an undefined period. Articles 30(18) and 35 specifies following warning weapons may be used in response to force or where the violation cannot be stopped or violators detained by other means. Article 30(19) specifies stop and inspection and hot pursuit following warning outside the limits of the contiguous zone if a vessel violates generally recognised principles and norms of international law. Removal or detention is allowed failing vessel compliance. Criminal or administrative liability may be raised under Article 43. Article 19 of the 1998 Law specifies warships may be required to leave the territorial sea for violations of Russian rules, and disputes settled diplomatically.

A. Kolodkin expanded on the above legislation, emphasising strict coastal State sovereignty and jurisdictional control over the Russian Arctic straits whether they consist of internal waters, the territorial sea, or the exclusive economic zone.[854] Similar to the Norwegian *Indreleia*, virtually all the straits of the Soviet part of the Arctic including the Vil'kitskii, Shokal'skii, Dmitrii Laptev and Sannikov Straits connecting the Kara, Laptev and East Siberian Seas, can be claimed under a predetermined legal regime wholly dependent on the will of the U.S.S.R. This precludes uncontrolled use by foreign vessels, be it transit or innocent passage. Arguments by A. Kolodkin offered in support of these views include lack of international use, the Article 234 regime, and the existence of high seas routes no less convenient for navigation. Thus, it was maintained that penetration into any of those straits may constitute a violation of Soviet sovereign rights with respect to the economic zone or of Soviet sovereignty with respect to territorial and internal waters.[855]

Other regimes were also noted to have application to the straits as internal waters, necessitated by factors including, 'the need for the coastal country to protect its sovereignty against any infringements on its defence . . .' as well as the State's political, ecological, sanitary and economic security.[856] Further, since the Northern Sea Route falls under complete sovereignty or jurisdiction of the Soviet Union, a number of important major consequences for foreign navigation, including the entry of warships into Soviet Arctic internal waters, is possible only under conditions established by the 1983 Statute and the 1983 Rules. In the territorial sea foreign warships and non-military vessels in principle can exercise innocent passage, limited, however, by the conditions set forth above and considerations for safety and the environment. In the exclusive economic zone warships and non-military vessels have the right to exercise freedom of navigation within a belt 188 miles seaward of the territorial sea, subject to the same conditions where relevant, as well as safety and environmental considerations.[857]

American Position on International Use

The U.S. declarations in the Vil'kitskii Straits Incident set forth its claim that the Russian Arctic straits were international.[858] No other States have officially objected to the Russian regime or navigated in these waters at variance with the Russian provisions. Most States appear uninterested so that the U.S. position is the sole evidence concerning State practice.

When the United States recognised a three mile territorial sea, it held that all the Russian Arctic straits greater than six miles contained a high seas channel. Transit passage thereafter was seen as continuing the rights already enjoyed in these channels prior to the recognition of a valid 12 mile territorial sea.[859] For the Russian Arctic this would include the Kara Gates, possibly the Vil'kitskii, the Dmitrii Laptev, the Sannikov, the Blagoveshchensk, the Long, and the Gorlo Straits, all having high sea channels, even following the expansion to a 12 miles territorial sea. Also included are those nine other straits with widths between 12 and 24 miles, possibly the Vil'kitskii

and the Shokal'skii, the British Canal, the De-Bruyn, the Nightingale, the Ovistyn, the Zaria, the Orlovskaia Salma, the Nightingale and the Murmanets Straits.

For those straits with a width of six miles or less, which is the majority, the transit passage regime has been argued to apply based upon LOSC Part III.[860] Ice has been seen as presenting no problem.[861] The U.S. argument concerning potential use in determining straits as international may be of particular relevance since it encompasses commercial development.[862]

The vagaries of world commerce, access to alternative routes, the development of technology, and other factors, including climate change, may affect Arctic law of the sea.[863] The possibility for the Russian Arctic straits to be navigated by some form of international traffic thus cannot be excluded.[864] It could then be questioned whether a regime envisioned for non-international straits would still govern, especially should the traffic approach dimensions of other international straits, allowing for Arctic conditions. This point is considered important enough that one legal scholar has noted that a pattern of international shipping through the Northwest Passage in Canada, developed over relatively few years, might be held sufficient to make it international.[865] Further, whether the present Canadian measures, including the Arctic environmental legislation, the Canadian Arctic Traffic System Rules, ice-breaking services, surveillance overflights, a naval presence and the Canadian–U.S. Agreement, as well as LOSC Article 234, would be sufficient to prevent defining the Northwest Passage as international, is believed debatable.[866] Legal scholars who have addressed this issue are divided.[867]

Given the divergent Russian and American positions regarding an international strait, the actual foreign use of the Russian Arctic Straits could be compared to the criteria set forth in the *Corfu Channel Case*, which was divided into surface use and submerged use based upon obtainable information.

Foreign Use of Russian Arctic Straits

The *Corfu Channel Case* and subsequently 1958 TSC Article 16(4) and LOSC Articles 34 to 45 set forth criteria of a substantial number of foreign transits and flags and a record as a useful route for international traffic to make a strait international. Infrequent transit is not enough, although lower numbers of vessels for isolated areas may be sufficient.

It may be questioned whether use of the numerical criteria of the *Corfu Channel Case* for comparison is justified, since the United States may be argued to be introducing new transit criteria. However, a comparison using a specific number of foreign flags and passages could be defensible since Washington follows an expansive interpretation of the term 'international'. The *Corfu Channel Case* probably has contributed to 'legal consistency', if not legal precedent, including the characteristic numerical values.[868]

Record of Use

Concerning foreign use of the Russian Arctic straits, one author has noted that in the 1920's the element of danger in navigating these waters ceased to play an important role and voyages became increasingly routine.[869] In 1921 four out of five British and Norwegian merchant vessels under charter by the Soviet Union navigated to the river Ob; from 1927 to 1929 about half the vessels in these waters navigated to the Ob and the Yenisey; in 1932, 25 out of 28 vessels navigated to the Yenisey.[870] Some eight vessels took the Kara Sea Route up to 1929, and 26 vessels took that route after 1929, and in two years some 45 'freighters were employed'.[871] From 1933 to 1938 traffic from the west to the Lena River, through the Kara Gates, Yugorskii Shar, or Malygin Straits and Vil'kitskii or Shokal'skii Straits varied from two to five per year with a rough average of four per year.[872] Traffic from the east to the Kolyma River through the Long Strait from the year 1911 to 1931 varied from one to two passages a year with an average of one per year.[873] Traffic to and from the Ob and Yenisey for the years 1920 to 1929 varied from ten to one passage per year with a rough average of five per year.[874]

During the war years 1942 to 1945 between 23 and 34 voyages were made each year along the Northern Sea Route delivering lend-lease goods from the U.S. West Coast.[875] These included Liberty vessels, themselves lend-lease goods, all the vessels being manned by Russian crews to lessen the likelihood of being attacked by Japan in the Pacific. If this is broken down into passages through the respective straits navigating from the east, from 12 to 14 voyages per year took place with an average of 13 voyages per year through the Long Strait alone. Through the Long, Dmitrii Laptev or Sannikov Straits from 23 to 29 voyages per year were made with an average of 27 voyages per year. Through the Vil'kitskii or Shokal'skii Straits voyages varied from two to four per year with an average of three per year. Finally through the straits of the Kara Sea Route there was only one voyage. These numbers must be doubled to take into account the round trip, though in 1945 some of the vessels returned to Arkhangel'sk and Murmansk rather than to Vladivostok. Though import of supplies from America was a major operation, there also appears to have been a large movement of other freight. Information is scarce, but the Kara Sea was probably serviced by Soviet shipping as before, and coastal traffic between the large rivers continued. Presumably there was also some Soviet naval activity.

In 1989 the Soviet vessel *Tiksi* was chartered by foreign cargo owners for freighting metal from Germany. It traversed the Northern Sea Route and arrived in Chiba, Japan, 4 August 1989.[876] Four vessels of the same ice class as the *Tiksi*, as well as the *Kapitan Sviridov*, traversed the route to Japan and China from July to October 1990, with the *Noril'sk* and *Kola* returning east to west. In 1991 the French *L'Astrolabe*, was permitted to navigate a length of the route west to east with two Russian ice-pilots and ice-breaker assistance.[877] The German yacht *Dagmar Aaen* was permitted to navigate on the Pechora River from Naryan–Mar to Igarka on the Yenisei on condition that it navigated in open water only.[878] The *Lunni*, a Finnish tanker, was issued a per-

mit for passage along the route, but the trip was cancelled due to unavailable cargo.[879] In addition, in 1991 seven east and four west passages were made through the Northern Sea Route by Russian vessels carrying Western cargoes, and a tourist vessel partially transited the route.[880] The Russian icebreaker *Sovietskii Soiuz* navigated the route with foreign tourists in 1992, including two trips to the North Pole.[881] Finally, roughly 10 of the 16 Russian vessels transiting the route in 1993 carried foreign cargo to foreign ports.[882] Though no foreign vessels transited the Northern Sea Route in either 1993 or 1994, some 25 regional passages were made by Latvian, Finnish, and German tankers in 1993, and 22 by Latvian and Finnish tankers in 1994. Various vessels navigated from Arkhangel'sk to Franz Josef Land and Novaya Zemlya, and the ports of Amderma, Dudinka, Hatanga, Tiksi and Yana were discharge points. Foreign ownership of vessels in these waters is expected to continue to a degree due to Russia's economic difficulties,[883] though Russian ownership is increasing.[884]

In sum in the late l880's, 1920's and 1930's the vessels were chiefly Norwegian sealers and British and Norwegian merchant vessels. In the mid 1990's the tankers were chiefly Latvian and Finnish, chartered by the Russian government. The general maritime rule is that regulations of the flag State continue to apply to the vessel while under charter.[885] There were chiefly two foreign flags early in use through the Russian Arctic straits, the Norwegian through the Kara Gates and Yugorskii Shar, and the Norwegian and British, under charter by the Soviet Union. During World War II, lend-lease was in operation under which the American vessels were under the Soviet flag and therefore were questionably international. In the mid 1990's there were chiefly two foreign flags, Latvian and Finnish, chartered by Russia.

Although the numerical analysis is incomplete, it seems clear that the areas and periods of time most affected by foreign voyages along the Northern Sea Route were the Kara Sea Route in the late 1800's with roughly 20 round trip passages per year at odd years. In the 1930's the Kara Sea Route was transited by charters, with roughly a total of 66 round trip passages per year. The lend-lease voyages in the 1940's accounted for roughly 54 round trip passages through the Long and Dmitrii Laptev or Sannikov Straits. In the mid 1990's there were only a few entirely foreign voyages, but roughly 24 foreign charters made regional round trip passages, the majority presumably through the Kara Gates, the Yugorski Shar, the Vil'kitskii and Shokol'ski Straits. This seems rather a different picture than that presented by A. Kolodkin, who noted that the Russian Arctic straits could not be considered used for international navigation because, 'the entire Arctic history has known only single cases of passage through these waters by non Russian vessels'.[886]

At the same time taking into account traditional criteria from the *Corfu Channel Case* and adjusting for isolated areas, this activity or lack thereof, clustered in the periods the late l800's to the 1930's and then the 1990's, would seem to speak for itself in terms of representing an international navigational route. The number of independent flags in the *Corfu Channel Case*[887] was seven, and the number of vessels navigating was approximately 1650 per year. For the Russian Arctic straits it appears only the use of foreign Norwegian and British vessels under charter, the use of American lend lease

vessels during World War II, and the use of Finnish and Latvian oil tankers as far east as the Yana in the mid 1990's, approach a substantial number of transits. Lately, there has been only a few foreign commercial vessels navigating these straits, and no known foreign surface warships.[888] Possibly there has been an occasional American or perhaps British or French submarine in these waters. The number of foreign flags transiting the straits may be five, which would appear sufficient. However, few fully independent foreign voyages actually took place, and then only in the years before 1917 and following 1990.

Utilising the U.S.'s expanded definition of 'international', the application of that term to the key straits still seems questionable. Using the most optimistic estimates, together with the assumptions that all the charters and lend leases could be considered foreign, the numbers involved represent under 3% of the number of passages through the Corfu Channel per year. Even for remote areas, such as the Russian Arctic, the numbers seem too few to justify the passages as international. In spite of the low numbers, the chartered and lend lease passages, in addition to earlier passages, occurring roughly between 55 to 85 years ago, might have established international use through the chief straits traversed had they continued into the 1990's. They did not, however, and such international traffic as it may have existed in the broad sense of the word, would seemingly fall into the category of infrequent transits.

Using the foreign destination of vessels and cargoes in defining 'international', the number of passages might come within range of the criteria in the *Corfu Channel Case*. In the 1920's and 1930's, grain, timber, flax, hemp, fibre and bristle from the Siberian towns were the principal exports, while machinery, chemicals and partly finished manufactured goods from western European ports were the principal imports.[889] However during this period there appear to be only 60 passages per year through the relevant straits, and this would hardly compare with the *Corfu Channel Case*, even taking into account Arctic remoteness. Following 1992 there were various cargoes transferred through the Northern Sea Route from Europe and Asia, presumably in round trips. For 1993 these numbered 16 and presumably number about the same for following years.[890] In addition, any passages by State vessels headed to and from a foreign destination through the route could be counted.

This comparison seems to indicate that foreign passages have been of a completely different type and order from those of the *Corfu Channel Case*. Purely foreign owned and foreign operated vessels have been significantly lacking. Although it is not unusual today to have a wide diversity of foreign interests in a cargo vessel,[891] the Soviet–Russian Arctic traffic has always been dominant. In considering the Russian Arctic straits as international based upon this use, reliance is necessarily based upon any element indicating foreignness. To also rely upon any occasional passage of the Russian and Soviet Navy navigating to foreign destinations through the Arctic straits would be artificial.[892] Navies always navigate from their internal waters including straits, often to foreign ports, without any change of status of the flag State's internal waters. This traffic would with difficulty indicate an actual foreign use of the Russian Arctic straits

and would exclude the Russian Arctic straits from an international status. Most legal scholars clearly favour the traditional *Corfu Channel Case* approach, relying on actual use.

In spite of this conclusion, the possibility for the Russian Arctic straits to develop in the future into international straits through an increase of foreign traffic cannot be excluded.[893]

Limits of Prescriptive and Enforcement Jurisdiction

Should the Russian Arctic straits be considered international, prescriptive and enforcement jurisdiction as evidenced in specific Russian practice exceeds the limits set by either the LOSC Part III or the 1958 TSC Article 16(4) regimes, and to a lesser extent the LOSC and 1958 TSC innocent passage regimes. U.S. practice, including its own coastal State legislation, also exceeds the same regimes. Though it appears doubtful that the Article 234 regime through theoretical interpretations would supersede the LOSC and 1958 TSC international straits regimes, the practice of the U.S. as an Arctic coastal State apparently counters these traditional law of the sea regimes. American practice, together with the Canadian practice, largely support the Russian practice, including domestic legislation adopted in accordance with Article 234.

Western scholars have not specifically addressed the jurisdictional issues surrounding the Russian Arctic straits to any great extent.[894] Russian authors have dealt specifically with jurisdictional issues, but seem primarily to follow the State position.[895]

Russian Position

The Russian position seems vulnerable despite the plethora of claims asserting the Russian Arctic straits as internal waters. Though the interrelation of the Article 234 regime with the international straits regimes remains unclear, it seems unlikely that Washington will retreat on its claim that LOSC Part III is the appropriate regime. Presently, the claim that the Russian Arctic straits are not international appears more reasonable. However, should international trade evolve, allowing the straits to be considered international, the Russian claims to maintain the straits as internal waters would then appear to rest squarely upon the doctrine of historic title due to innocent passage under 1958 TSC Article 5(2) and LOSC Article 8(2).[896] Because of the possibility for the Russian Arctic straits becoming international, three scenarios under international law must be analysed.

Surface Passage of State and Commercial Vessels – LOSC Part III

Russian and American practice with regard to international straits around the world likely demonstrates that Article 234, on which the Russian Arctic regime is based, does not completely dominate the LOSC Part III regime. In the absence of special

agreements and in spite of the ice, the normal jurisdictional limits traditionally related to 'generally accepted' and 'applicable' environmental and safety provisions apply. This means that Russia with justification may prescribe discharge provisions as strict as, but not stricter than, 'applicable international regulations' of MARPOL 73/78 Annexes I and II with which the vessels from all States would have to comply.

These provisions, however, may not deal with the design, construction, manning, or equipment of foreign vessels in excess of the other rules. In the absence of special agreement, no measures may probably be taken by Russia for violations of domestic provisions relating to the environment and safety, other than proceedings taken at a later time in a Russian port. Anything otherwise would likely hamper, impair, deny or suspend transit passage in violation of Articles 42(2) and 44. For warships or other State vessels entitled to sovereign immunity under Article 236, the only requirement is that these vessels act consistently with LOSC environmental provisions so far as is reasonable and practicable without impairing their operations or operational capabilities. This is likely too weak and vague for Russia to require warships to submit to leading and ice-breaker convoying.[897] Redress for violations must be had through diplomatic channels under Articles 42(5), 235 and 304, which govern responsibility and liability for loss or damage. There is no right for Russia to require a warship to leave a strait similar to that in Article 30 in relation to the territorial sea as long as it exercises transit passage. Environmental violations involving major damage or threats of such under Article 233 have been seen as exceptional; enforcement in a strait creates hazards and was probably not contemplated under Article 42(2).

Since the maritime powers consider transit passage close to passage on the high seas, requirements under Article 42(2) may be expected to be even more zealously guarded than the similar requirement under Article 24 for non-hampering of innocent passage. It seems therefore doubtful that an implied right to detain vessels exists for environmental violations under Article 233 in excess of that allowed under Articles 218–220 and the Section 7 Safeguards. There could be a precedent for Russia under the Malacca Agreement and IMO Recommendations to adopt requirements through the IMO and with interested flag States regarding under-keel-clearance, velocity limits, reporting of position, and pilotage without violating Articles 42(2) and 44. These rules could likely be enforced, including the prevention of passage to avert major environmental damage or the threat of such. Where high seas channels or routes of similar convenience of the exclusive economic zone exist, as in the Kara Gates, possibly the Vil'kitskii, the Dmitrii Laptev, the Sannikov, the Blagoveshchensk and the Long Straits, free navigation would be the rule.

Although regional Arctic developments associated with a harmonised Article 234 regime for ice-covered areas may be argued, as by the United States, applicable through Article 42(1)(b), parallel yet not hampering transit passage, this position may be untenable. It would seem difficult to argue that any Arctic developments surrounding Article 234 could be considered to be 'applicable international regulations'. Not only would the traditional MARPOL 73/78 and relevant Annexes be exceeded, but also the process of formation of Arctic customary international law would with difficulty be

considered 'applicable'. The IMO or a general diplomatic conference must be involved in the process of development of such provisions under the LOSC.

The Code of the Harmonisation Conference has been delivered to the IMO. Of the characteristics indicating similarity between the Russian, U.S. and Canadian regimes, only design, equipment, construction, and possibly manning standards are governed by the Code. At the same time, as noted, Article 42(1)(b) does not specifically include the establishment requirement related to the IMO or international conference. This may indicate that localised arrangements accepted by flag States may be permitted, as long as the provisions are consistent with the LOSC, which the implementation of Article 234 generally appears to be. To be 'applicable', some outside acceptance additionally may be necessary. But, in the face of apparent indifference shown by States to developments under Article 234, perhaps this requirement has been met. While conceivably indicating a new development, as far as is known other States have not yet responded. With regard to submerged transit passage, environmental regulation under Article 42(1)(b) through Article 234 would appear difficult.[898]

From the above, it may be concluded that all the unilaterally adopted Russian environmental and safety requirements in relation to the Russian Arctic straits probably exceed the limits under Article 42(1)(a) and (b) incorporating MARPOL 73/78 and sea lanes and traffic schemes for international straits. They also deny, impair, hamper or suspend transit passage under Articles 42(2) and 44, and the enforcement measures are in excess of Article 233. Criminal liability is also in excess of Article 230. This statement is subject to the recent developments noted for seven straits concerning velocity limits, reporting of position and pilotage, but these coastal State restraints are still not widespread and are associated with the IMO. They do not greatly affect the above conclusions.

Specifically, the Russian requirements include those in the 1990 Rules governing all vessels for five forms for pilotage under Article 7.4., notification and authorisation under Article 3, fees under Article 8.4., inspection if deemed necessary under Article 6, liability certificates under Article 5, suspension if deemed necessary and removal for violations of vessels under Articles 9 and 10.

Excesses include the possibility for criminal liability under Articles 36, 39 and 40 of the 1998 Economic Zone Act as well as Article 43 of the 1993 State Border Act and Article 40 of the 1998 Law. Article 32 of the 1998 Economic Zone Act and Article 5 and 12 of the 1999 Decree require as well navigation, approaching internal waters, when in need, with compulsory pilotage and ice-breaking services, the latter for warships in the territorial sea. Excesses also include in the 1984 Environmental Edict the imposition of fines and prison terms for illegal discharges or for a failure to take necessary measures to prevent such in the territorial sea under Article 1–1; prohibition of navigation without pilotage or other escort, or without compliance with special construction, equipment and crewing provisions in adjacent coastal areas with dangerous and severe climatic conditions and ice, under Article 3.[899] There is a provision for criminal responsibility for violations of Article 3, under Article 14.

Though unclear the prospect for unilaterally adopted environmental and safety standards appear possible under Articles 32 and 33 of the 1998 Law and the statements made by A. Kolodkin, which state such must be in accordance with Russian law, and ratified international treaties. In the 1990 Decree under Article 1, excesses include the possibility for these environmental provisions to be applicable within and beyond the exclusive economic zone, including high seas zones through the straits by use of 'adjacent to the northern coast', also indicated in Articles 3 and 17 of the 1984 Environmental Edict.[900] Offenders may be detained, conveyed to port and equipment seized under Article 11(f) of the 1990 Decree with no conditions listed under Article 11(a), and stopped and inspected for purposes provided for by Articles 14 and 15 of the 1984 Environmental Edict. This includes violations of routing and violations causing material damage. Article 36(iii), (iv) and (v) of the 1998 Economic Zone Act as well as Articles 30 and 35 of the 1993 State Border Act within the territorial sea appear to support this. Article 11(e) of the 1990 Decree allows detention and conveyance to open port upon various conditions. The relation these rules have to each other as well as to Article 32 of the 1998 Economic Zone Act, protection of ice-covered areas, Article 15 of the 1984 Economic Edict, enforcement, and Article 14 of the 1998 Law, navigation along the NSR, is unclear.

Excesses in the 1993 State Border Act under Article 9(e) include requirements for foreign warships to exercise innocent passage in conformity with Russian legislation.[901] Foreign warships and other vessels in innocent passage must proceed along established sea routes or traffic separation schemes, or where absent, follow recommended courses according to Article 9. Foreign warships in the absence of other rules must receive permission under Article 25 from the authorities to enter Russian internal waters and ports, which would encompass all Arctic straits enclosed by straight baselines. Though various provisions under the 1999 Decree, governing State vessels in the territorial sea, and the 1998 Law governing all vessels in the territorial sea, may be consistent with innocent passage, the relation these have to the provisions governing all vessels in the Arctic straits and exclusive economic zone remains unclear. Recommended routes apparently are mandatory according to MOH discretion. In addition the scope of innocent passage remains unclear under Articles 5 and 9 of the 1993 State Border Act and Articles 12 and 13 of the 1998 Law. Under the latter passage may be permanently suspended for security reasons in specific areas.

In the 1985 Protection Statute, authorisation for stopping, inspection, detention, and arrest in the exclusive economic zone for violations of the authorisation requirement or established Russian rules is in excess under Articles 4(a) and 4(e). In the 1985 Straits Rules compulsory ice-breaking convoying and pilotage are also in excess under Article X. Further excesses in the 1984 Economic Edict, Article 15, supported by Article 15 of the 1984 Environmental Edict, include authorisation for request for information and inspection upon clear grounds and arrest and detention for illegal discharges, illegal operation in special areas, and illegal discharges and operation in ice-covered areas where there exists clear and objective evidence. In the older 1983 Statute require-

ments for foreign warships include excesses such as navigating with a State marine pilot and mandatory compliance with these standards under Articles 1 and 15. Warships must observe navigational and other rules under Article 5 of the 1983 Rules and must use pilotage and ice-breaking services where compulsory. In the 1985 Environmental Statute, Article 4, excesses include authorisation of special measures, including navigational practices and vessel traffic, to be established in special areas by the USSR Council of Ministers to prevent vessel-source pollution. Pilotage and ice-breaking services are required for warships in those areas where this is compulsory under Article 5, and both notification and authorisation are required under Articles 14 and 15. Other Russian legislation, including the 1994 Environmental Decree and the 1995 Continental Decree are not expected to greatly alter the scope of those provisions presented here.

Perhaps even more comprehensive are the provisions from the unilaterally adopted and enforced U.S. Oil Pollution Act 1990 and its supporting legislation, which also govern its Arctic straits.[902] Since the American are the main opponent of both the Russian and Canadian Arctic regimes governing the straits, the requirements established by Washington, if consistent with these regimes, would arguably set the stage for the formulation of a regional practice that would regulate ice-covered straits.

The OPA 1990 provisions for commercial vessels carrying oil appear clearly in excess of sea lanes or traffic schemes under LOSC Article 42(1)(a) and (b), and also deny, impair, hamper, or suspend transit passage under Articles 42(2) and 44. The discharge standards under OPA 1990 § 1002(a), and design, construction and equipment standards, such as double hulls, under §§ 4109, 4110 and 4115, may be in compliance with MARPOL 73/78 and other IMO conventions which the United States has ratified. However, the central civil liability provisions §§ 1016(a) and (b) and 1004(a), are not, and they have not been adopted through IMO consultation. No limitation of liability to the established limits is allowed if an incident is caused through a violation of the Federal provisions for safety, construction or operation, under § 1004(c)(1).

Though it may be argued that reporting and compliance with official orders, and that possibly the monitoring and tracking of vessel movements and radio communications are traffic schemes consistent with Article 42(1)(a), these have been developed or are being developed unilaterally for special areas, notably, the Alaskan Prince William Sound and the Cook Inlet regions, under §§ 5001–5007 and the Monitoring Act. The same may be maintained for crewing standards and pilot training based on U.S. law which is clearly dominant under § 4106. A form for notification and authorisation is in excess under § 1016(a) and (b). The enforcement measures, lacking financial security, denial of clearance, denial of entry into the U.S. or U.S. navigable waters, detention at the place where lack of evidence is discovered, and seizure and forfeiture within U.S. navigable waters, under § 1016(a) and (b), are all in excess of LOSC Article 233. These actions are not restricted to ports and may be taken in the straits. Enforcement of the excessive prescriptive provisions including requiring evidence of financial responsibility would also be in excess. Criminal liability under 33

USC 1321(3), (4) and (5) is in excess of Article 230. All these conditions appear to have been exacerbated by Alaska adopting additional requirements or imposing or determining civil or criminal fines or penalties,[903] though compliance may be voluntary.

From the above, if a regional practice is being established for the Arctic waters, including the straits, nearly all of the Russian requirements would seem to fall within similar limits established by the Americans for commercial vessels carrying oil. Only mandatory fees, application to State vessels, possible application of the rules to the high seas, ice-breaker assisted pilotage, ice-breaker leading and special areas exceed the U.S. practice.[904] The latter three find support in the Canadian practice. They also find support in the substantially compliant navigational practice of foreign States with the Russian regime. They could be plausibly justified under Article 234 as having 'due regard to navigation . . .'.

The submissions made discount the effect the regional Arctic practice may have on the traditional international straits regimes related to submarines on which both Russia and the United States are especially dependent. Although it could be argued that State vessels, including submarines, are exempt from regional Arctic provisions under Articles 234 and 236, the U.S. State Department and the U.S. Navy have apparently held this view only to a minor extent.

Surface Passage of State and Commercial Vessels – 1958 TSC

All the Russian requirements probably exceed the non-suspendible innocent passage regime of the *Corfu Channel Case* and 1958 TSC Article 16(4). This scenario is necessary due not only to non ratification of the LOSC by a few States, notable the United States, but also due to the reluctance of various States to recognise transit passage through straits under their own jurisdiction. At the same time the Part III regime is that emphasised since it practised by the maritime powers, especially the United States and Russia.

The 1958 TSC Article 16(4) regime has become customary international law, therefore binding Canada. Though Article 234 may apply for the territorial sea, on high seas zones, including the exclusive economic zone, through straits, there can be no exercise of jurisdiction. It might be argued that Part XII environmental provisions are applicable in any parts of the straits comprised of the exclusive economic zone. This is due to Russia having ratified the LOSC and parts of Part XII having become customary international law. This regime, however, with its extensive prescription and enforcement measures would probably not be applicable in straits subject to 1958 TSC Article 16(4).

Although Article 16(4) has traditionally been applied to straits consisting of the territorial sea, suspension of innocent passage could likely be argued for the exclusive economic zone as well. It would be incongruous to allow lesser rights of passage than non-suspendible passage for a maritime zone further to sea than the territorial sea. Russian environmental and safety provisions governing all vessels have a clear appli-

cation to the exclusive economic zone and possibly to the high seas. Even for the territorial sea, 1958 TSC Part I Section III and LOSC Part II Section 3 imply that an environmental determination is to be made on a case-by-case basis, which may raise some questions regarding the comprehensive, blanket Russian environmental and safety provisions.

The Russian rules encompassing State vessels and leading to expulsion would likely not qualify under 1958 TSC Articles 16 and 23 and LOSC Articles 25 and 30. Under these articles, warships may be requested to comply with a State's regulations related to innocent passage and failing this, they may be required on a case-by-case basis to leave a State's territorial sea. Redress for loss or damage might then be had through diplomatic channels. State vessels are immune. As long as there is no breach of innocent passage, mere passage in breach of the comprehensive Russian regime would not be a violation.

The Arctic practice of Russia, the United States, and Canada likely indicates the formation of a regime which goes far to prevail over 1958 TSC Article 16(4) and the *Corfu Channel Case*. These developments clearly appear to strengthen the status of Article 234 as customary international law along the lines indicated above and pending the ratification of the LOSC by Washington. Thus, though this non-suspendible innocent passage alternative might theoretically be appropriate, it is in a state of major alteration. A legal stalemate probably best describes the situation for the Arctic. Neither the new nor the old rule has a majority of supporters, and there may exist 'a network of special relations based on opposability, acquiescence, and historical title'.[905] For the United States this stalemate may continue to within itself.

Surface Passage of State and Commercial Vessels – Non-International Straits

Assuming the Russian Arctic straits are not international, but subject to 1958 TSC Article 5(2) and LOSC Article 8(2) and assuming that historic title fails, the Russian requirements probably exceed the traditional innocent passage regimes of both 1958 TSC Part I Section III and LOSC Part II Section 3, as well as traditional free navigation. Theoretically, it appears doubtful that Article 234 has become customary international law, although it may apply in the territorial sea. For Russia and other parties, LOSC Part XII would apply. It is arguable, however, whether all provisions of Part XII that are applicable in the territorial sea and the exclusive economic zone have become customary international law. Part XII has been acknowledged by the United States as customary law. Thus, the traditional provisions of the 1958 TSC and the LOSC regimes relevant to internal waters, territorial waters, and high seas likely apply to non-parties of the LOSC.

The Russian legislation by imposing the environmental and safety requirements on all foreign vessels interferes with innocent passage and has a practical effect of denying, impairing, or hampering the right of innocent passage through territorial waters in violation of 1958 TSC Article 15(1) and LOSC Articles 24(1)(a) and 211(4). The

prescription of such provisions may be implicit under 1958 TSC Article 17 and is explicit under LOSC Article 21. But the unilaterally adopted Russian requirements could doubtfully be argued not to hamper innocent passage. In addition 'freedom of navigation' has been compromised under Article 2 of the Convention on the High Seas, and LOSC Articles 87 and 194(4) for those straits containing high seas channels.

Part XII on protection and preservation of the marine environment may be applicable in the exclusive economic zone for both Russia and the United States and other parties to the LOSC. However, most of the Russian requirements could doubtfully be argued to confine themselves to the 'generally accepted' and 'applicable' limits indicated for Articles 211, 218–220, 230 and 236, which govern prescription, enforcement, penalties, and sovereign immunity. In addition, the Russian provisions unilaterally deal with design, construction, manning and equipment standards and hence are in excess. Should a specific passage by a warship be shown to be prejudicial to the peace, good order or security of Russia, then measures might be taken by Moscow on a case-by-case basis to require the warship to leave the territorial waters. Redress for loss or damage might then be had through diplomatic channels.

At present the 'non-international straits' alternative seems probably the closest to the actual legal status of the Russian Arctic straits, since it is uncertain whether Russian historic title can replace and fill the hiatus caused 1958 TSC Article 5(2) and LOSC Article 8(2). Similar assurances by the U.S. regarding navigation in the Black Sea following adoption of the U.S.S.R.–U.S. Joint Statement have not been given for the Russian Arctic. The weak U.S. declarations on its view of Russian Arctic jurisdiction have left unclear Washington's motive in not transferring a 'Black Sea Incident' where it upheld its warship's rights, northward. This could apply to the Kara Gates, Vil'kitskii, Shokal'skii, Sannikov and Dmitrii Laptev Straits. In any case, the present status must be a sensitive issue for Russia since it stands in a legally vulnerable position, especially regarding State vessels.

At the same time regional developments concerning Arctic littoral State practice under Article 234 counter the traditional rules governing innocent and free passage as well as passage subject to Part XII. For this alternative, Russian practice could likely be justified under the developing ice-covered area regime for all requirements concerning commercial vessels, except mandatory fees, application to State vessels, possible application on the high seas, ice-breaker assisted pilotage, ice-breaker leading, and special areas. The latter three are in an even stronger position. State vessels, absent agreements to the contrary, would continue to be subject to the traditional LOSC and 1958 TSC provisions governing innocent passage through the territorial sea, due to immunity under Article 236 and customary international law.

U.S. Position

The U.S. position regarding prescription and enforcement jurisdiction in the Russian Arctic straits has been characterised by its traditional stance on international straits.

At the same time it has acknowledged Part XII as customary international law, including presumably Article 234, without clarifying the contradiction nor the consequent application of OPA 1990. Washington thus appears to be campaigning for the LOSC Part III scenario to govern the largely unused Russian Arctic straits, despite its own practice. With the exception of the surface passages by *Sverdrup II* with U.S. personnel on board and the Vil'kitskii Straits Incident in the mid-1960's, there appears to have been no known U.S. surface traffic navigating without compliance with the Russian regime. For these straits the unilateral practice by the U.S. claiming transit passage solely consistent with its interpretation of Part III, not supported by its own domestic legislation appears to be in excess of the Part III regime.

However, since both the international status of the Russian Arctic straits as well as the customary status of the Part III regime may change, the U.S. position may become tenable in a relatively short period of time. The United States may be attempting to prevent the formation of a precedent for other far more important straits, while ensuring occasional transit passage for its submarines.[906] Additionally, Washington may be attempting to strengthen the passage of the LOSC Part III and the Part XII provisions into customary law. This seems to be with the understanding that with the exception of straits within U.S. territorial waters, the international straits regime would prevail interpreted to the benefit of user States.

America thus apparently plays the role of a persistent objector to Russia's and Canada's claims for dominance of the Article 234 regime over the Part III regime.[907] But do U.S. diplomatic statements from the mid-1960's, published additionally in 1992 and 1994, successfully support Washington's claim to a transit passage regime in the Russian Arctic? They probably do.

American surface traffic in the Russian Arctic since the 1960's has been insubstantial. In contrast, with the exception of the Northwest Passage, the U.S. has practised transit passage with both military and commercial vessels in the majority of other straits claimed as international.[908] In the Russian Arctic straits, U.S. practice appears supported only by the declarations claiming transit passage and possibly by an occasional clandestine submerged transit.

State declarations are viewed by doctrinal authority to establish State practice, but such declarations must be carefully examined. It seems unquestionable that Washington intends its declarations to be legal. They have been consistent with the U.S. position throughout the entire negotiations of the Part III regime. But the question arises whether America may eventually be required to assert its position with actual passages, or else accept the Russian and Canadian positions. Given the difficulties of submerged passage in the majority of the Russian Arctic straits, the moderation of U.S. submerged traffic following dissolution of the Soviet Union, the current harmonisation of polar surface ship rules and the operation of the OPA 1990 in the U.S. ice-covered waters, the chief element lacking in the U.S. position is actual passages through the straits.

In the *Nuclear Test Cases*,[909] the ICJ maintained that a declaration made by a State

with the intent to be legally bound will have the effect of creating legal obligations. The U.S. State Department when explaining its FON Program has noted that diplomatic correspondence is sufficient to forward a State's position as a persistent objector. Nevertheless, action by deeds that promote the formation of consistent law may at times be necessary to slow the erosion in customary legal practice.[910]

Clearly Washington would strengthen its legal position were it to navigate its State surface vessels through the Russian Arctic straits. This has been carried out in the Canadian Arctic by the *U.S.C.G. Polar Sea* in 1985 and the *U.S.C.G. Polar Star* in 1988.[911] However, this probably is not legally required. Similar to the Norwegian opposition in the *Anglo-Norwegian Fisheries Case*,[912] Washington appears to have consistently objected to the Soviet/Russian and Canadian regimes for the Arctic straits. It has thus likely rebutted a possible presumption of acceptance for dominance of the Article 234 regime over the Part III regime. The United States may also receive some support for its declarations from clandestine submarine traffic, similar to its practice in other international straits, and buttressed by the Article 236 sovereign immunity exception. However this may be questionable since there has been no opportunity for Russian protest under the circumstances.

It seems debatable whether other less powerful States would have followed the same policy as the United States, displaying such striking contradictions. Though domestic politics in America may account for these differences, theoretically a constant and uniform practice is required for the development of customary international law, according to the *Asylum Case*.[913] Other States in a similar position would probably have to provide more evidence of persistent objections in order to rebut a presumption of consent to the Article 234 regime prevailing over the international straits regime. This would probably be similar for subsequent practice in the application of a treaty which establishes the parties' understanding regarding its interpretation.

States, such as Denmark and Norway, have Arctic territories but exercise less power, while the United Kingdom and France have no adjacent Antarctic territories but exercise power. Only Russia comes close to paralleling the U.S. position with respect to both naval power and Arctic contiguity. Russia arguably is less interested in the U.S. Arctic straits, than America is in the Russian straits, since the Canadian Arctic straits have been the most strategically interesting.[914] Less powerful coastal States have difficulty to counter the U.S. position. In spite of an absence of 'action by deed' by the United States on the surface through the Russian Arctic straits, the U.S. position seems unassailable. One legal scholar believes that Russian and Canadian 'creeping jurisdiction' under Article 234 will be especially difficult for the Americans to counter.[915] Yet Washington seems to be more than holding its own through its own coastal State 'creeping jurisdiction' while carrying out business as usual under the Arctic surface.

The U.S. position may change, however, with respect to one issue. Since American State vessels have apparently not navigated on the surface of the Russian Arctic straits without permission, it seems unlikely they will choose to do so now, though under the claims made by the U.S. State Department and the Navy the way would be clear.

Passages by U.S. commercial vessels may be more problematic. Presently there are few flags trafficking the Northern Sea Route. However, under the broad interpretation of the term 'international' practised by the United States, Russia may argue that through compliance by American and other vessels with Russian provisions governing straits, that these States are in fact acquiescing to the Russian regime.[916] This could mean acquiescence to dominance of the ice-covered areas regime over the Part III regime. What role this more divergent practice would play with regard to U.S. declarations and submarine navigations could be questioned.

At the same time, this situation may also be viewed not as contradictory but rather as supplementary. The United States could reserve its rights and claim that it practices transit passage through international straits, and only navigates in accordance with the Russian regime for the sake of the Arctic environment. It might be argued by Washington, as it does with regard to Canada, that consultations can be carried out wherein international environmental standards are under development, with the jurisdictional issues not being affected.[917] This appears to be the direction of the recent U.S. claim that the Article 234 regime is applicable to foreign vessels through Article 42(1)(b), parallel but not hampering transit passage. Using this device the comprehensive Russian regime might even favour U.S claims, since Washington would not have to challenge with its own flag, while any foreign cargoes and crews navigating to foreign destinations might be argued to support the U.S. position regarding international straits. This presently seems a more or less stable policy for Washington, and will probably be continued as long as economically feasible activities remain at a low level. The occasional submerged military passages appear not to be substantially affected, while the political gains are probably greater than challenging and upsetting any Russian economic gains and moves towards democratisation. This American policy appears to draw a very fine line, however, and probably would not be practised by less powerful States due to the possibility of providing a precedent with regards to jurisdictional issues.

Should navigation through the Northern Sea Route become economically viable, the United States may be placed in a more difficult position. American commercial interests may require freer access than that allowed under the Russian regime. But that would be a future scenario when Arctic technology and climate change would make it possible to navigate on the high seas closer to the North Pole, through, under or over the ice.[918] The option does exist, however, for America, Russia, and Canada, to negotiate an agreement covering the passage of commercial surface vessels through ice-covered straits under the Article 234 and the Part III regimes, without violation of Articles 42(2), 44 and 233, taking as a starting point the Malacca Agreement and IMO Recommendations.

The 1958 TSC international straits and the LOSC – 1958 TSC non-international straits scenarios will not play a large role in the U.S. position on the Russian Arctic straits. This is in spite of the probable application of the 1958 TSC non-international straits scenario as the most sound in representing the present legal status of the Russian Arctic straits.

For these regimes it appears clear U.S. practice is in excess of the articles. Non-suspendible innocent passage under 1958 TSC Article 16(4) and the *Corfu Channel Case*, innocent passage under LOSC Article 19, and 1958 TSC Articles 14 and 16 have not been claimed in U.S. declarations, but rather transit passage. Submerged passage has rarely been moved to the surface and may be consistent with 1958 TSC Article 16(4). But it is clearly inconsistent with LOSC Article 20 and 1958 TSC Article 14(6) requiring surface passage. It appears doubtful that Russia or Canada will be able to limit American user rights based upon these regimes, which Washington views as antiquated no matter how legally solid they may be.

Conclusions

The Russian position regarding its Arctic straits related to surface passage, though supported by the probably non-passage of the LOSC Part III regime into customary law, appears vulnerable. Legally the Russian Arctic straits, presently not being international, would support the Russian regime. The number of foreign surface vessels, charters, cargoes, or destinations falls well below *Corfu Channel Case* criteria even related to remote areas, and as far as is known all recent commercial shipments with foreign elements have been made in strict compliance with the Russian regime. With the exception of the Vil'kitskii Straits Incident in the mid 1960's involving U.S.C.G. and Navy vessels in the Laptev, East Siberian, and Kara Seas in which the straits were not entered, though somewhat unclear, U.S. State vessels have not navigated on the surface along the Northern Sea Route without complying with the Russian regime. The voyages of the Norwegian *Sverdrup II* in the Kara Sea appear to be the exception, though the straits were not entered, and the connection with the U.S. Navy is ambiguous.

At the same time the American position that the straits may become international seems logically valid. Should world trade develop so that shipping routes are used through straits previously not used for international navigation, pressures on the coastal State could lead to a more liberal application of passage rights than innocent passage through the territorial sea.[919] Thus, should the Northern Sea Route become commercially viable, the United States can probably expect increased support for its arguments for 'potential use' as evidence for 'used for international navigation'. This could induce Washington and other governments to test the Russian regime by navigating their own State or chartered ice-breakers and ice-strengthened commercial vessels consistent with Part III through the relevant Russian Arctic straits in contravention of the Russian regime. This seems unlikely on a strictly military level, because U.S. submarines may be already navigating, occasionally, the Russian Arctic straits. Additionally, Washington may feel a need for supporting and not challenging the new Russian democracy. From the above, it is concluded that historical title to the Russian Arctic straits becomes crucial in order for Russia to continue with its claims for internal waters. This is due to 1958 TSC Article 5(2) and LOSC Article 8(2).

The legal situation is not static but rather appears to represent a dynamic legal

flux, with regard to the limits of prescriptive and enforcement jurisdiction governing the Russian Arctic straits in ice-covered areas. Three scenarios have thus been considered: LOSC transit passage, 1958 TSC non-suspendible innocent passage, and a non-international straits LOSC and 1958 TSC alternative. Yet, in addition to increased State ratification of the LOSC, the Part III regime may in the not-too-distant future become customary law and the Russian Arctic straits may be subject to increased international use, broadly interpreted. This means that analysis of LOSC transit passage should be emphasised.

Addressing the three scenarios, the Russian regime probably exceeds all three, with its requirements for mandatory notification and authorisation, possible application on the high seas, five forms of leading, fees, liability, discharge and safety standards, reporting, inspection if deemed necessary, stopping, detention and arrest, suspension if deemed necessary, removal for violations, criminal liability, design, equipment, manning and construction standards, special areas, and application to State vessels.

For the *first* scenario, Russia with justification under Article 42(1)(a) and (b) may prescribe provisions as strict as, but not stricter than, 'applicable international regulations' of MARPOL 73/78 Annexes I and II and 'generally accepted' sea lanes and traffic schemes for international straits with which the vessels from all States would have to comply. Under Article 233 'appropriate measures' may be taken for environmental violations or threats of such involving major damages, but this probably includes only enforcement in ports. State vessels enjoy sovereign immunity under Article 236. Anything otherwise would likely hamper, impair, deny or suspend transit passage in violation of Articles 42(2) and 44. Although regional Arctic developments associated with an Article 234 regime may be 'applicable' through Article 42(1)(b), parallel yet not hampering transit passage, this might play a minor role. It would seem difficult to argue that Arctic developments could be called 'applicable international regulations'. At the same time localised arrangements accepted by flag States may be permitted as long as the provisions were consistent with the LOSC and have some outside acceptance. Article 234 appears to satisfy both.

For the *second* scenario, necessary to examine theoretically though it is Part III which is practised by the maritime powers, Article 234 may apply for the territorial sea due to the potential risk. On high seas zones including the exclusive economic zone through the straits, there can be no exercise of jurisdiction. Part XII might be argued as applicable in any parts of the straits comprised of the exclusive economic zone, but this regime would likely not be applicable in straits subject to 1958 TSC Article 16(4). Although Article 16(4) is traditionally applicable over the territorial sea parts of the straits, non hampering or suspension of innocent passage can be argued for the exclusive economic zone as well, due to the incongruity of allowing lesser rights of passage for a maritime zone further to sea. For the territorial sea 1958 TSC Part I Section III and LOSC Part II Section 3 imply that an environmental determination is to be made on a case-by-case basis. Under 1958 TSC Articles 16 and 23 and LOSC Articles 25 and 30, warships may be requested to comply with a State's regulations related to innocent passage and, failing this, be required on a case-by-case basis to leave a State's

territorial sea. Redress for loss or damage might then be had through diplomatic channels.

For the *third* scenario, the traditional innocent passage regimes of both 1958 TSC Part I Section III and LOSC Part II Section 3, as well as traditional free navigation would apply for non-parties to the LOSC. Theoretically, it appears doubtful that Article 234 has become customary international law, although it may apply in the territorial sea. For Russia and other parties to the LOSC, Part XII would apply, and for the United States it would apply due to its regime acknowledgement. This includes requirements for adhering to 'generally accepted' and 'applicable' limits indicated under Articles 211, 218–220, 230 and 236. Relevant for non LOSC parties, it is arguable whether all of Part XII applicable in the territorial sea and the exclusive economic zone has become customary international law. Though increased coastal State jurisdiction is allowed within this scenario, possibly allowing more stringent requirements in territorial waters considered dangerous to navigation, anything in excess of 1958 TSC Part I Section III and LOSC Part II Section 3 would interfere with and have a practical effect of denying, impairing, or hampering the right of innocent passage. This would be in violation of 1958 TSC Article 15(1) and LOSC Articles 24(1)(a) and 211(4). In addition, 'freedom of navigation' applies under Article 2 of the 1958 Convention on the High Seas, and LOSC Articles 87 and 194(4) for those straits containing high seas channels. The same requirements for warships govern as above for the territorial sea.

In spite of the excesses of the Russian regime, the most striking developments relate to the United States regime. If the Russian requirements are considered in relation to the U.S. regime as a coastal State, almost all of the Russian requirements seem to fall within the limits set by Washington, especially for commercial surface vessels. Only mandatory fees, application to State vessels, possible application on the high seas, ice-breaker assisted pilotage, ice-breaker leading and special areas appear to exceed U.S. practice. The three last requirements, moreover, find support in Canadian practice, as well as in the substantially compliant navigational practice of foreign States on the surface, as well as under the Article 234, requirement for 'due regard to navigation . . .'.

Since the regional Arctic developments are juxtaposed on the three possible traditional scenarios under international law of the sea, the legal situation pertaining to jurisdiction governing the Russian Arctic straits appears especially unclear, especially since the United States claims unequivocally the Part III alternative to apply. Declarations under international law need not be enforced to be relevant, and the claims made by America as the world's leading maritime power carry much legal weight.

Since accordance between the domestic Arctic regimes appears particularly close with regard to commercial surface vessels, developments in the Arctic seem to indicate that, contrary to the *Corfu Channel Case*, it appears to be the type of vessel which determines the rights of passage through the Arctic straits. Before a complete answer, however, can be provided on whether the international straits regimes function as limitations to the Article 234 regime, the rights of passage by State vessels, focused upon submerged passage through Arctic straits, will be addressed.

CHAPTER 8

RIGHTS OF PASSAGE BY STATE VESSELS

LOSC AND 1958 TSC

Under LOSC Article 236, State vessels are not subject to the environmental provisions of either Part III or Part XII of the convention, but their status on safety provisions is unclear. Safety provisions were not expressly included as part of the Article 236 exception. An argument may be made that environmentally related safety provisions are likely implied in Article 234 to prevent, reduce, and control marine pollution in ice-covered areas. Yet it is difficult to maintain that such safety provisions are not similarly implied in Article 236 with the same exclusion of State vessels as in the environmental provisions. State vessels probably are not subject to the Article 234 regime and are only subject to Part III Articles 41 and 42(1)(a), which allow coastal States to establish sea lanes and traffic separation schemes in international straits.

Also under Article 236, States must ensure, while not impairing operations, their State vessels act in a consistent manner, as far as is reasonable and practicable with LOSC provisions. This would apparently include environmental and safety rules. This requirement may be considered rather vague, but maritime powers in practice probably respect it.[920] With regard to Article 234, there appears to be little State practice indicating surface passages by State vessels through ice-covered areas. Although this is one of the weakest elements of the Russian regime, it seems not to have been challenged by the United States or other States.[921] With the exception of the few surface passages carried out by *Sverdrup II* in the mid 1990's, the few American passages in the Vil'kitskii Straits Incident in the mid 1960's, and the few American passages through the Northwest Passage in the latter 1980's, all possible adverse navigation by foreign State vessels in Arctic waters appears to have been carried out by submarines. Thus, in spite of the interpretative questions which can be raised, State practice apparently indicates very little adverse activity by foreign States navigating State surface vessels through Arctic ice-covered waters.

In sum, the right of passage of State vessels on the surface appears to be a clear limitation to the Article 234 regime. However, this is no different from general international provisions relating to sovereign immunity. Any Russian regulation of such State vessels would appear to be in clear breach of the convention.

Due to the little navigation by foreign State surface vessels in ice-covered waters,

the focus will be foreign submerged navigation. The right of passage of State vessels under the surface would also seem to be a clear limitation to the Article 234 regime, which is, not unusual, given the Article 236 exception and the international provisions for sovereign immunity. Any Russian regulation of such State vessels would also appear to be in clear breach of the convention.

Nevertheless, the legal situation for ice-covered straits is not clear. Under both the LOSC and the 1958 TSC international straits regimes it is not obvious whether submerged passage would be permitted without notification and/or authorisation. For territorial waters both the LOSC and the 1958 TSC regimes for innocent passage require surface passage for submarines with the flag showing, but what is the rule for ice-covered territorial seas? Notification and authorisation and the other Russian requirements have been claimed to encompass submerged passage, including in the Russian Arctic straits, even though ice-covered. Given the lack of clarity on this issue and the divergent Russian and U.S. practice, an analysis of the rights of submerged passage by State vessels must be based upon the information available with extrapolations. The following analysis will examine submerged passages carried out by Russia and the United States.

Historic Background

The *Corfu Channel Case*, 1958 TSC 16(4) relating to submerged passage, and 1958 TSC Article 14(6) requiring submarines to travel on the surface with flag showing, clouded the legal rules. Though submerged traffic was not specified in the *Corfu Channel Case*, it can be argued that it was intended to include submarines in the term 'warship', since the decision closely followed World War II with its extensive use of submarines. The ICJ in 1949 certainly was aware of such passage, and likely included it in their decision, since at that time there existed no international treaty indicating otherwise. Article 16(4) incorporated *Corfu Channel Case* criteria, but Article 14(6) introduced a contradiction, as well as a condition on passage of warships, since it may be interpreted to require surface passage in the territorial sea of international straits. The natural interpretation of the text of these articles together would support surface passage in territorial waters, including international straits, though submerged passage also seems reasonable. Little clarification is given by either of these articles or other provisions.

Negotiations surrounding Article 16(4) appear not to address directly the issue of surface passage through international straits. The legislative history of Article 14(6) indicates only brief discussion. The Soviet Union and the United States never entered these discussions, and Denmark seems to be the only State which stated that it interpreted Article 14(6) as requiring submarines to travel on the surface in straits, chiefly for safety purposes.[922] Submerged traffic through straits may have been part of the controversy surrounding notification and authorisation, although submerged traffic and specific notification and authorisation through the territorial waters of straits or their entrances was apparently not directly discussed.

Due to the strategic role submarines play in the global balance of power, the passage of submarines through straits used for international navigation was of major importance in the negotiation of transit passage in UNCLOS III.[923] The development of Article 39(1)(c), requiring that a vessel in transit passage must refrain from activities other than those incident to their normal modes of continuous and expeditious transit, indicates that although amendments were proposed opposing 'normal modes', they were not accepted.[924] 'Normal modes' appears in the U.K. proposal to the second session of UNCLOS III in 1974, without any definition.[925] The term was included in the proposal from the Fiji/U.K. Group. In the ISNT, Article 39, 'normal modes of continuous and expeditious transit', subject only to *force majeure* or distress appeared.[926] RSNT Article 38(1) remained substantially the same,[927] and ICNT Article 39 repeated RSNT Article 38.[928]

Interpretative Issues

Somewhat incongruously, considering its importance, but probably because of controversy, submerged passage is not directly addressed in LOSC Part III. It is addressed, however, in Article 20 of Part II, requiring that in the territorial sea submarines must navigate on the surface with flag showing. Article 39(1)(c) implies that submarines, which have a normal submerged mode, may also travel submerged through international straits under the regime of transit passage. This may be contrast to 1958 TSC Article 16(4) and the *Corfu Channel Case*, theoretically subject to 1958 TSC Article 14(6). Any implied requirement of authorisation for submerged passage under Article 39(1)(c) could be supported by an express prohibition of submerged passage under the above provisions. However, a rather ambivalent State practice has emerged during the development of the 12 mile territorial sea regime to which both the Soviet Union and the United States were substantial contributors. Submarines had most likely travelled submerged through the territorial waters of international straits, including the entrances, contrary to 1958 TSC Article 14(6).[929]

Article 31 of the Vienna Convention requires a strict textual interpretation. Since submerged passage was not specifically included, it might be that under Article 38(2), rights of transit passage, did not include freedom of submerged transit through territorial waters in straits.[930] Textual interpretation may even be unavoidable due to the absence of a formal record of LOSC. Prior practice may be difficult to argue since Article 31(3)(b) of the Vienna Convention permits only subsequent practice.

These arguments notwithstanding, a strict textual interpretation may also be argued to give a skewed picture, whereas the contemporary interpretations and communications among (UNCLOS III) delegates might provide a more correct perspective.[931] The U.K. and Soviet proposals to Part III contained freedom of navigation and overflight through straits, which if reasonably construed, embrace submerged passage, while the comments made by Sri Lanka, Egypt, Peru and Spain to the U.K. proposal specifically disputed the right.[932] The failure to achieve enough support from other

delegations by these States would apparently indicate that the proposal was understood to encompass submerged passage.

Prescriptive and Enforcement Jurisdiction

Limits of the Coastal State

That which was stated above concerning limits of prescription and enforcement jurisdiction of the international straits regimes as well as relation with the ice-covered areas regime equally applies. Modern State practice gives substance to both 1958 TSC Articles 14(6) and 16(4) and LOSC Articles 39, 41, 42(1)(a) and (b), and Article 233, with regard to submerged passage. Little more is likely gained from further textual interpretations and analysis of legislative histories.

The naval powers, America and Russia, as well as the United Kingdom, France, and China, are interested in submerged passage through straits in order to maintain secrecy due to a deterrence institutionalisation as their mutual strategic posture.[933] 'Normal mode' for a submarine under Article 39(1)(c) is clearly interpreted by them to mean 'submerged' transit passage. Other arguments favouring submerged passage through international straits are that coastal State security is ensured the less others know the whereabouts of a transiting submarine,[934] and that navigational hazards may be increased by the low profile of a submarine on the surface which makes it difficult to be seen.[935] Further, the environmental danger that the submarine poses to the coastal State may increase, not decrease, with its visibility on the surface, since it becomes a better target for nuclear or conventional attack, with the possibility of secondary nuclear explosions or radiation.

Not a few coastal States on the other hand have been opposed to submerged passage, due to their interest in detecting and preventing force, threats of force, clandestine activities, and unauthorised research or survey activities on their shores, all of which are possibilities represented by the submarine.[936] At the same time the rights for coastal States are probably severely limited by a user-friendly interpretation of Part III Articles 41, 42(1)(a) and (b), 233, the 'generally accepted' international provisions under Article 39(2), and the activities prohibited in transit under Article 39(1).[937] It is always possible that powerful coastal States with the capability of developing advanced monitoring equipment, could choose to exploit the lack of clarity of Articles 38(2) and 39(1)(c), as well as 1958 TSC Articles 14(6) and 16(4) and the *Corfu Channel Case*, and could demand notification, surface passage, or authorisation for submerged passage through international straits. Arguments for this position might find support from the Russian and American environmental and safety legislation and enforcement measures that govern their own territorial seas and exclusive economic zones, which would include various straits claimed as international.

State Practice

Although it might be possible to arrive at either totally submerged passage or totally surface passage in the territorial sea, including the territorial sea waters in the strait, it is most unlikely submarines from the maritime powers will navigate on the surface. Most submarines probably due to stealth stay submerged through international straits and their entrances.[938] The maritime powers navigate their submarines submerged through international straits in what is intended to be transit passage, probably much of it surreptitious.[939] It is strategically illogical to expect a submarine will travel submerged on the high seas, surface in the territorial sea entrance to an international strait, and then submerge again for travelling through the strait.[940] Another unlikely scenario is for the submarine to dodge around complicated configurations of the territorial sea in the strait entrance merely to remain submerged in the exclusive economic zone on the way to the strait. It is likely any regime established by the coastal State to require surface transit under vagaries of Articles 38(2) and 39(1)(c), as well as 1958 TSC Articles 14(6) and 16(4), would be ignored by the maritime powers.

It appears doubtful, however, that the right to transit passage has become customary international law due to ambiguous coastal State practice, including acts of Russia and America. Moreover, concerning submerged transit passage, questions could be raised about the notoriety and the possibility of protest, because these requisite elements of prescriptive rights appear non-existent since submerged passage often occurs undetected.[941]

1958 TSC Article 16(4) and Submerged Passage

The position of the United States appears complex in relation to non-suspendible innocent passage, submerged, and 1958 TSC Article 14(6), surface passage. In the 1970's U.S. policy with respect to international straits included maintenance of the efficacy and credibility of its second strike nuclear capability through strategic nuclear ballistic missile submarines (SSBN's), which required avoidance of detection and maximum manoeuvrability.[942] This policy required submerged passage totally, with the consequence of probable contraventions of Article 14(6). The transit passage regime became especially crucial after territorial sea enlargement to 12 miles by coastal States, which became accepted as customary international law. In the face of these developments the United States probably negotiated secret agreements with coastal States, ensuring submerged passage, subject to notification through the straits America viewed as crucial to its foreign policy. These straits States included Spain and Indonesia, bordering respectively the Strait of Gibraltar and the Indonesian Straits.[943] With the introduction of the Trident I submarine around 1980, these straits may have become less vital to the United States, since the submarines could generally target the Soviet Union from the Atlantic or the Pacific.[944]

The Soviet Union in the 1970's was also interested in non-restricted passage through

international straits in order to carry out surveillance of U.S. SSBN transits through straits entering the Indian Ocean and the Mediterranean, as well as to show the flag for political reasons.[945] The Soviet Union thus supported and probably practised submerged passage through international straits in contravention of Article 14(6). The other maritime powers likely followed suit as soon as they had a submarine fleet.

In spite of these legal inconsistencies, it seems safe to say that if the issue of submerged passage through international straits was seen as a problem, it appears to have been kept quiet. Though Washington purportedly entered bilateral agreements, in times of crisis, clandestine passages were probably carried out. This surmise is based upon the U.S. need for secrecy, the lagging development of surveillance equipment especially relevant for coastal developing States, and the U.S. position that restrictive regimes would be ignored. The supposition is likely even more true with regard to the Soviet Union. The U.S.S.R., in spite of a low number of submarines on patrol in the Indian Ocean, also had a need for secrecy due to its surveillance activities, and it probably did not have the benefit of bilateral agreements.[946]

LOSC Article 39(1)(c) and Submerged Passage

In spite of the different interpretative possibilities of Article 39(1)(c), whether 'normal mode' permits submerged transit passage or not, the policies of Washington and Moscow have clearly supported such passage.

U.S. Military Doctrine

Based upon a U.S. national military strategy paper in 1992, four principles were stated necessary to cope with the world's security situation after the dissolution of the Soviet Union: namely strategic deterrence and defence, forward presence, crisis response and reconstitution.[947] Vital to the implementation of this strategy, submerged passage and overflight were seen as 'the key tenet of U.S. oceans policy'.[948] In December 2001 the government completed the Nuclear Posture Review and in September 2002 and December 2002 the National Security Strategy and the National Security Strategy to Combat Weapons of Mass Destruction.[949] These strategic documents indicate that nuclear weapons may likely be used for purposes other than deterrence including first use of nuclear weapons in a pre-emptive attack. A distinction also may be lacking between nuclear and non nuclear strike which may raise issues of compliance with international law.

America needs the sea to project military power onto the opponent.[950] During the Cold War, NATO in Western Europe was required to maintain non-atomic balanced collective forces, since if it failed to take a strong conventional military posture, the Soviet Union could have been able to exploit an eventual nuclear stalemate, and invade with the Red Army.[951] The importance of a forward defence with ground forces required a U.S. Navy strategy ensuring the safe delivery of transatlantic reinforcements and resupplies. Though there have been arms reductions in recent years, the U.S.

military tends to be conservative.[952] '(M)ilitary capabilities take years to acquire; intent can change overnight', and few analysts doubt that the Russian political situation tends to be unstable and may be more antagonistic in the future.[953]

Under the strategic deterrence and defence policies carried out during the Cold War the U.S. Navy believed that it needed approximately 100 nuclear attack submarines (SSN's) to enter the patrol areas of Russian SSBN's[954] and to destroy a significant number of the approximately 60 submarines of Yankee, Delta and Typhoon classes.[956] The patrol areas included chiefly the deep Arctic Marginal Ice Zone[955] (MIZ) and polynias of the central Arctic Basin, and the Greenland–Iceland–United Kingdom gap (GIUK).[957]

Presently, two SSN's (with 11 to sustain deployment) may be enough to carry out surveillance and potential control missions in the Russian SSBN patrol areas year-round.[958] Under the forward presence principle, a minimum of eight SSN's, including pre-deployment training, with approximately 46 to sustain deployment, may have to be continuously at sea.[959] Thus, 10 to 11 U.S. SSN's may be continuously deployed, and at least two and possibly three U.S. SSN's may be presently in year-round surveillance operations in the Russian SSBN's patrol areas, including the deep Arctic MIZ and polynias of the central Arctic Basin.[960] The U.S. plans to keep 14 of its SSBN's in service.[961]

This American strategy will likely prevail as long as the Russian SSBN's continue operations and naval arms continue to be excluded from disarmament negotiations between America and Russia. It seems likely that a fifth generation submarine is planned.[962] Thus, though the United States may have negotiated secret bilateral agreements with States bordering crucial straits that allow free passage for its submarines, it probably favours the Part III regime since it avoids setting precedent, is more stable, and political and military power need not be used to safeguard U.S. interests.[963]

Russian Military Doctrine

Modern Russian strategy concerning world stability in various respects has been similar to that of America.[964] Russia needs the sea to project military power onto the opponent, even though Russia in addition is a land-based power.[965] During the Cold War, in addition to the submerged Arctic passages, the Soviets appear to have been interested in transit passage in order to limit U.S. influence in the Indian Ocean, and to carry out their surveillance of the U.S. SSBN's.[966] Deployment of Russian surface vessels for political reasons also included checking the growth of the Chinese naval and commercial interests.[967]

At the same time, the Soviet Union's position was also somewhat different from that of the United States. With respect to the Gibraltar, Indonesian, Malacca, and Singapore Straits, the Soviet Union was probably not able to enter bilateral agreements with the coastal States, which were less friendly than to America.[968] These straits, especially Gibraltar and the Indonesian, were viewed as essential for large scale deploy-

ment to the Soviet Far East in the event of conflicts with China, which would have eliminated use of the Trans-Siberian Railway. Thus Soviet interest in transit passage, in addition to ensuring free passage for its growing commercial fleet, may have been due to the fact that application of coastal State restrictions would have had more of an adverse impact on Soviet strategic mobility than on that of the United States.[969]

Lately, stability has been seen by Russia to be more difficult in the new multi-polar world than in the bi-polar Cold War era due to the possibility of a variety of small cold wars, as well as economic rivalry between the leading powers.[970] In 2000 Russia updated its major policy statements regarding foreign policy, national security and military affairs indicating overt reliance on its nuclear forces.[971] The National Security Concept sets forth that Russia in the face of Western dominance and unilateralness and being unable to respond appropriately to a threat using conventional weapons, is forced to rely increasingly on its nuclear forces to achieve deterrence.[972] This requires that these weapons remain in a state of high combat readiness. The Military Doctrine is purportedly defensive, however, it presupposes the use of every possible means of warfare including the use of nuclear weapons in defense, possibly in a first strike.[973] These are seen as a credible factor in deterring aggression and maintaining strategic stability. Russia accordingly reserves the right to use nuclear weapons in response to the use of weapons of mass destruction against its territory and its allies, as well as in response to a large scale conventional attack. The Foreign Policy Concept of the Russian Federation notes Russia's limited resources, NATO's expansion and NATO's new strategic concept permitting force operations outside of member States without the sanction of the U.N. Security Council.[974] These are stated not to coincide with Russia's security interests and occasionally to directly contradict them. Only through dialogue between Russia and the U.S. may resolution of issues of limitations and reduction of strategic material weapons be achieved.

Russia continues to invest in research and engineering of submarines, constructing a fourth generation that was deployed in 2000, while designing a fifth generation with advanced technology.[975] However, economic problems that forced a smaller SSBN fleet and safety concerns following the Kursk sinking led to decreases in the SSBN patrols from 37 in 1991 to zero in 2002.[976] Patrols of SSN's and cruise missile submarines (SSGN's) declined from 18 patrols in 1991 to three in 2002.[977] Russian activities seem presently increasing including long range plans for a fleet of 12 SSBN's, and work on the fifth generation as a class scheduled to begin in 2010.[978] Work on a new submarine launched intercontinental missile was initiated in 2002 and 40 new sea launched ballistic missiles were ordered in 2001, the first in a decade. Tests were carried out in 2004 with hypersound-speed, high precision, missiles weapons systems that can adjust their altitude and course as they travel.[979]

Russia also has sought co-operation and regulation with America and other NATO States to prevent submarine incidents, and develop measures for a democratisation of the military.[980] In spite of confidence building measures, a Russian Admiral notes,

> (T)he problem is the almost total absence of progress in achieving agreements toward confidence measures on the seas and the corresponding transformation of naval strategies.[981]

Nevertheless various contacts and talks have taken place between the Russian and American navies, though in what format and with what results is unknown.[982] U.S.–Russian international relations continue to be uneven but stable.[983]

Legal scholars are divided concerning the criteria for innocent passage in international straits according to the *Corfu Channel Case*, with much the same division regarding surface or submerged passage, though few address the issues directly.[984] They also vary considerably concerning rights to submerged navigation under Part III, especially within the American community. U.S. Senator B. Goldwater sent a letter July 26, 1976 to U.S. experts, requesting views on their interpretation of Part III in the informal negotiating texts due to its importance for U.S. strategic considerations.[985] The contrasting positions indicated not only the interpretative possibilities but also the importance given to Part III. The views forwarded by W.M. Reisman and W. Burke illustrated the division respectively between the strict 'textual' school of treaty interpretation[986] and the 'intention of the parties' school.[987] The textual interpretation made by W.M. Reisman concerning the legal invalidity of an implicit agreement at an international conference to challenge the LOSC, which would support expanded coastal State jurisdiction, appears more legally sound. Yet, this view has not been supported. Submerged transit passage is being practised by the maritime powers and is supported by doctrinal authority.[988] While some U.S. authors follow the W. Burke position, a clear majority of non-U.S. authors follow W. Burke in spite of the interpretative difficulties.

Foreign Submerged Passage and the Russian Arctic Straits

The Arctic, including specific parts of the Russian Arctic, was one of the most sensitive geographic areas in the world during the Cold War, due to its location between America and the Soviet Union and their strategic submarine deployment there.[989] Following the collapse of the Soviet Union that sensitivity has been greatly reduced. But, the U.S. Department of Defence, continues to regard Arctic waters as central to U.S. strategic military interests that include global freedom of navigation and regional submarine and anti-submarine warfare operations.[990] The dispute central to this discussion has been reflected in the Russian Arctic straits where Russia requires passage by submarines to take place on the surface in the territorial sea and through key straits, showing the flag and using ice-breaker assistance. U.S. practice seems to be almost the same as in other global straits claimed to be international.

Russian Practice

With respect to the Russian Arctic straits, submerged passage is the issue where the Russian and American practice diverges most. Any conditions required for submerged passage in the Russian regime would be in addition to those required for passage of State vessels. Despite the fact that the Russian regime addresses the issue of passage of warships in internal waters, the territorial sea, and the exclusive economic zone, little is directly stated concerning submerged passage.

LOSC Part III

Taking the same scenarios as above it appears doubtful Article 234 can supersede LOSC Part III due to the actual Russian and American practice globally. This includes the right of submerged passage as the 'normal mode' for submarines under Article 39(1)(c). This would be subject only to limited environmental and safety requirements imposed by the coastal State represented by Articles 41, 42(1)(a) and (b), 233, and 'generally accepted' international provisions under Article 39(2), and non-transit elements under Article 39(1). Anything otherwise would be in breach of Articles 42(2) and 44.

To be consistent with Article 236, submarines would only have to abide by LOSC environmental and related safety provisions so far as is reasonable and practicable without impairing their operations or operational capabilities. Redress for loss or damage from submarines must be had by coastal States through diplomatic channels under Articles 42(5), 235 and 304. There is no right for Russia to require a warship to leave a strait, similar to that in Article 30 in relation to the territorial sea, as long as the warship exercises transit passage.

Russia probably is estopped in requiring surface passage through the waters of its Arctic straits subject to innocent passage due to its own practice of submerged passage through straits globally. Where there exist high seas channels or routes of similar convenience of the exclusive economic zone as in the Kara Gates, possibly the Vil'kitskii, the Dmitrii Laptev, the Sannikov, the Blagoveshchensk and the Long Straits, free navigation would be the rule.

A harmonised Article 234 regime may be argued as applicable through Article 42(1)(b), parallel yet not hampering transit passage. Submerged transit passage would appear to fall outside the scope of these provisions. It is questionable that the ice-covered areas regime may be maintained to be 'applicable international regulations'. In addition there seems to be questionable regional development requiring submarines to navigate on the surface showing the flag, in ice-covered territorial seas, including straits. The American claims and the navigation of U.S. ships clearly do not envision any encroachment on submerged transit passage or submerged navigation in general by the ice-covered areas regime.

The objectives of both Article 42(1)(b) and Article 234, as well as of the Russian

regime itself,[991] calling for the prevention, reduction, and control of pollution, seem also compromised by the Russian requirements for surface passage for submarines, even considering the possibility for leading. Additionally, though Russian environmental and safety concerns are undoubtedly genuine in many respects, coastal State security perceived by Russia, not environmental protection, is likely the objective behind the Russian regime.[992] Russia may also be estopped to claim surface passage and pilotage as environmental and safety requirements for submarines in the exclusive economic zone, because of its own practice globally.

All the Russian requirements probably exceed LOSC Part III. In addition to those shown above for State surface vessels, specifically they include surface transit for submarines in the territorial sea while showing the flag, if needed with ice-breaking services concerning passage approaching internal waters, under Articles 4, 5 and 12 of the 1999 Decree, Article 13(3) of the 1998 Law and Article 9(e) of the 1993 State Border Act (deleted), and requirements for 'ice-breaker assisted pilotage' for any vessel in the Vil'kitskii, Shokal'skii, Sannikov and Dmitrii Laptev Straits under Articles 1.4. and 7.4. of the 1990 Rules and Article 14 of the 1998 Law. Additionally various forms of compulsory leading required under Articles 3.2. and 7.4. of the 1990 Rules are likely in excess.[993] This also includes non military submarines and other possible submerged means of transport. Other straits may be included as well dependent upon the discretion of the NSRA due to the definition of the Northern Sea Route under Article 1.2 of the 1990 Rules and Article 14 of the 1998 Law.

Older provisions in excess of Part III include requirements for compulsory ice-breaking conveying and pilotage in the four specific straits under Article X of the 1985 Straits Rules; requirements for surface passage of submarines in the territorial sea, internal waters and ports under Article 3 of the 1983 Rules, for pilotage and ice-breaking services where compulsory under Article 5, and for compulsory notification and authorisation under Articles 14 and 15; requirements for navigation by submarines on the surface and flying their own flag and with pilotage where compulsory under Article 13 of the 1982 Statute; and violation committed when submerged passage is carried out in Soviet waters, where 'waters' are defined as the territorial sea and internal waters, under Article 20 of the 1982 Statute.

Enforcement measures would be in excess including anti submarine defence and possible use of arms by the Russia Navy in internal waters, territorial sea and beyond if the border were illegally crossed, under Articles 32 and 35 of the 1993 State Border Act.[994] These all hamper, impair, deny and suspend submerged transit passage under LOSC Articles 42(2) and 44.

Submerged passage appears to be the only mode practised in the Russian Arctic straits by the United States, which has been consistent with its claims. Thus the Part III regime in the Arctic remains anything but clear, and the situation seems strained under this scenario. Tension is great regarding submerged passage, since it is exclusively military and with warships immune under Article 236 and customary law. Washington has indicated it will ignore attempts to limit its practice of transit passage. But Russia

is a powerful coastal State able to develop sophisticated state-of-the-art monitoring equipment. Given the level of compliance apparently practised on the surface under both the Russian and Canadian Arctic regimes, as well as the latitude of coastal State measures arguably allowed under Part III in the W.M. Reisman view, it is possible that Russia could enforce its regime to the fullest extent should it deem it strategically and politically expedient to do so.

1958 TSC

The Russian requirements probably exceed the non-suspendible innocent passage regime of the *Corfu Channel Case* and 1958 TSC 16(4), related to submerged passage. The Russian requirements for surface passage, under Articles 4, 5 and 12 of the 1999 Decree, Article 13(3) of the 1998 Law and Article 9(e) of the 1993 State Border Act (deleted) and supporting legislation, as well as implied under Articles 1.4. and 7.4., as well as 1.2. and 3.2. of the 1990 Rules and Article 14 of the 1998 Law, are ostensibly permitted under 1958 TSC Article 14(6). However, due to the probable Soviet – Russian transgression of Article 14(6), Russia may be estopped from requiring surface passage through the territorial waters of its Arctic straits and entrances. In addition, requiring surface passage for submarines may be contrary to the underlying foundation of the Russian regime, preventing, reducing, and controlling marine pollution, and safety. The environmental and safety requirements both hamper and suspend innocent passage contrary to 1958 TSC Articles 15 and 16(4). Where there exist high seas channels, free navigation would be the rule. This is arguably subject to conditions of environmentally sound navigation in the exclusive economic zone under elements of LOSC Part XII which might be considered as customary international law, and supported by the Russian ratification of the LOSC. Part XII, however, with its extensive prescription and enforcement measures may not be applicable in straits subject to 1958 TSC Article 16(4) without hampering or suspending innocent passage, including some parts comprising the exclusive economic zone.

Little support is afforded to the Russian regime by the regional Arctic ice-covered areas practice for surface vessels. Submerged passage has been consistent with the traditional regime for international straits. The situation seems strained under this scenario.

Non-International Straits

Assuming the Russian Arctic straits, covered by territorial waters or having a high seas channel, cannot be considered international, the Russian requirements exceed the innocent passage regimes of both the 1958 TSC and the LOSC as well as environmentally sound navigation under LOSC Part XII. Moscow, however, may enjoy a stronger position with respect to its territorial sea in non-international straits. It is this scenario which may most closely approximate the present legal situation with the 1958 TSC and the LOSC innocent passage regimes and elements of the Part XII regime

governing. The 1958 TSC and LOSC limitations related to coastal State prescription and enforcement jurisdiction apply.

The unilaterally adopted Russian environmental and safety provisions hamper innocent passage under 1958 TSC Article 15 and LOSC Article 24. Where channels of high seas exist in the straits, traditional free navigation would be the rule, subject to the same Part XII conditions governing the exclusive economic zone, but also where the unilaterally adopted Russian regime fails for the reasons given above.

In addition the same estoppel argument may apply to non-international straits with territorial waters. Based upon the global practice related to strategic considerations, it appears probable that the Soviet Union–Russia navigated its submarines submerged in the entrances of international straits consisting of the territorial sea. If so, it seems unlikely the Soviet Union–Russia would have changed its clandestine submerged passages if its submarines had entered a non-international strait consisting of territorial waters through which passage was deemed necessary. Thus, Russia may be estopped from demanding that submarines travel on the surface through the territorial waters of its Arctic straits, even if considered non-international.[995] Any such requirement may as well be contrary to the underlying intent of the Russian regime, the prevention, reduction and control of marine pollution, and safety. In this scenario the situation, though traditional, appears inconsistent with the regional regime developing for the surface under Article 234, resulting in tension and instability.

Protests by Russia

Only a few public Soviet protests appear to have been made in support of its Arctic regime. This was in the 1960's against the U.S. and in relation to surface passage. It is not known what success rate Russia has had in detecting foreign submarines transiting its waters claimed as internal, nor what policy Russia would follow should detection be made.[996] The detection of submarines is admittedly difficult, and even when detected SSN's are difficult to track. 'The best of the world's ASW (antisubmarine warfare) forces are, for the most part, unable to find submarines', and even if they do, 'few if any nations possess the means to place the U.S. SSN at risk'.[997] Some detection has been indicated, and it cannot be excluded that the Soviet Union–Russia has installed underwater surveillance devices in its main Arctic straits.[998] The lack of Russian protest may imply either non-detection or acquiescence. It may also mean that a silent protest has been conducted solely between the foreign ministries or that a political or diplomatic decision has been made to remain silent.

During the Cold War the issue of unauthorised submerged passage was perhaps too sensitive for either the Soviet Union or the United States to mention, with both possibly desiring to continue the 'cold' and avoid escalation into a 'hot' conflict through an incident in a sensitive area. Conceivably it was and continues to be to Russia's advantage not to indicate to the West how much it can detect, especially if the Arctic straits are navigated only occasionally. More recently it also may have been to both

States' advantage to avoid incidents in order to assist the fledgling Russian democracy. Legally, a non-acknowledgement of any U.S. submerged transits could be to the Russian advantage. If Russia either does not acknowledge submerged passages or does not detect them, it may be easier to claim that the majority of other States are acquiescing to the Russian regime.[999] Russian silence to U.S. submerged passages in the Arctic could be beneficial to both States in other world straits with a controversial legal status.[1000] Too much attention to the Arctic may direct unwanted attention to those straits where both Russian and American submarines have been passing unnoticed.

Still, to a degree, the Russians do protest. All vessels have been claimed to be governed by their strict provisions. In addition, 'protest' may be suggested through the Russian SSN's patrols against the U.S. SSN's, and by detection devices possibly placed in the deeper straits. The Russians would also like to establish an agreement with the Americans under which submarine traffic could be regulated.[1001] At a minimum it would seem difficult to maintain there was acquiescence by Russia to the occasional U.S. submerged navigation claimed as transit passage.

U.S. Practice

U.S. practice regarding submerged passage has already been noted, but on this background, however, there exist practical limitations to clandestine submerged passage through the Russian Arctic straits. If a minimum depth of 22 meters is required for U.S. SSN's, discounting the effects of ice, which are considerable, many of the Russian Arctic straits would be eliminated.[1002] For those connecting two Arctic seas, those with the necessary depth include the Kara Gates Strait (deep), the Vil'kitskii and Shokal'skii Straits (respectively 120 meters and deep), and the Long Strait (46 meters).[1003] Straits within an Arctic sea with the necessary depth include only Kil'din Strait (deep) in the Barents Sea; the Orlovskaia Salma, Gorlo and Vostochnaia Solovetskaia Salma Straits (respectively 22 meters, 36 meters, and 44 meters) of the White Sea; the Krotov and Kazakov Straits (respectively deep and deep) along Novaya Zemlya; the British Canal, Austrian, Markham, Nightingale, Meyers and De-Bruyn Straits (respectively, 60 meters, 24 meters, 160 meters, 48 meters, 74 meters, and 110 meters) of the Franz Josef Islands; the Krestovskii Strait (24 meters) of the Kara Sea; the Dubravin Strait (22 meters) in the Minin Skerries; the Fram Strait (32 meters) near Nansen Island, the Palander Strait (42 meters) near Bonevyi Island; the Vostochnyi Strait (38 meters) in the Kara Sea, and the Matisen Strait (52 meters) in the Nordenskjöld Archipelago.

If a comfortable minimum depth of operation for the U.S. SSN approximates the 33 meter figure, then roughly an additional 22% of these straits would be impassable, and some of the others might be questionably navigable. Taking ice-cover into account roughly 15 meters clearance under ice ridges is required, and ice ridges may protrude nearly 15 meters under the surface.[1004] Thus, roughly 30 meters should be subtracted from the straits listed above if used when the straits are ice-covered, which can be for substantially long periods.[1005] If this is done, approximately 45% of the above straits

are impassable for the SSN's. Of those key straits connecting two Arctic seas, only the Kara Gates Strait, and the Vil'kitskii and Shokal'skii Straits are navigable.[1006] Those qualifying in Arctic seas include only the Kil'din Strait, the Vostochnaia Solovetskaia Salma Strait, the Krotov and Kazakov Straits, the Markham, Meyers and De-Bruyn Straits, the Palander Strait, and the Matisen Strait, and some of these would be questionably navigable. This does not take into account icebergs, which may protrude much more deeply below the surface, as much as 100 meters,[1007] or the 'suction effect' on a hull moving close to the bottom.[1008]

The U.S. Navy has decommissioned its last Sturgeon class submarine, the only class that could operate in shallow ice-covered seas,[1009] and in recent years pleas for smaller submarines have been ignored by the U.S. Congress. Utilisation of the Russian Arctic straits by Russian submarines may also be limited. The ASW submarines are considered to approximate the size of the American SSN's.[1010] A necessary depth of operation under the ice for the large Russian SSBN's, the Typhoon class, is a minimum of 68 meters, with a transit depth of 100 meters being comfortable.[1011] An older American SSBN, the *USS Sargo*, navigated submerged in the ice-covered Bering and Chukchi Seas with an average depth of 80 meters. Thus, taking a minimum depth figure of approximately 73 meters, several more of the Arctic straits listed above are impassable, roughly 60% of them would be eliminated. Looking at the key straits connecting the Arctic seas, only the Kara Gates Strait, and the Vil'kitskii and Shokal'skii Straits are navigable by the SSBN's. Of the others only the Kil'din, the Krotov, Kazakov, Markham and De-Bruyn may also be navigable.

Due to strategic considerations, including areas of operation, operational depth and icebergs, not only the Russian Arctic straits may be largely unusable by both Russian and U.S. submarines, but also large areas of the Russian Arctic seas.[1012] In shallow waters sonar range is drastically reduced to only a few nautical miles. The U.S. SSN's would have difficulty in locating the Soviet SSBN's, and the Soviet ASW submarines would have trouble finding the U.S. SSN's.[1013] At least one expert, however, considers the Siberian coastal zone to be a SSBN operational area,[1014] as well as a militarised surveillance and monitoring area for detecting and counteracting bomber and missile attacks across the Arctic Ocean.[1015]

The focus of the U.S. Navy has more recently been upon shallow waters and shallow water sensory technology.[1016] Consequently, a new nuclear version of the *U.S.S. Albacore* or an unmanned mini-sub may be in use or under development,[1017] though this is impossible to confirm. One nuclear submarine captain has noted that the U.S. submarine force is second to none in ability to operate in shallow waters, and American submarines can be expected in any waters where it can 'wedge its way in and out again . . .'.[1018] It seems reasonable to assume the United States has a continued interest in occasionally acquiring information regarding the effectiveness of their submarine systems, as well as monitoring any Russian military activity in the Siberian coastal areas. Since most of the Russian Siberian rivers are also navigable, they could be exposed to U.S. submarine navigations, although perhaps limited by the extremely

shallow depths at the river mouths.[1019] Only the Yenisei, Ob and Khatangski, with rough depths at their entrances of respectively, seven to 10 meters, 10 to 13 meters, and 17 to 20 meters could possibly qualify for penetration by very small and quiet submarines, assuming that sandbars have not built up.[1020]

An occasional penetration by U.S. SSN's, possibly with AUV's (autonomous underwater vehicles) or AUS's (autonomous underwater submarines) of the deeper Arctic straits, with a corresponding presence of Russian ASW submarines cannot be totally excluded.[1021] Whether the safe bastions for the Russian SSBN's include the shallow, partially ice-covered Arctic seas or not, the safest and therefore the highest concentration of SSBN stations would be under the ice in the GIUK gap or deep areas of the MIZ and polynias of the central Arctic Basin.[1022] The U.S. SSN's would follow these, and the majority of both U.S. and Russian submerged transits of Russian Arctic straits should probably be viewed in relation to these areas. Accordingly, the safest Russian submerged routes from the Kola Peninsula to and from these areas would appear to be to largely avoid the Russian Arctic straits and remain in the depths of the Barents Sea, between Bear Island and Northern Norway and between Franz Josef Land and Novaya Zemlya.[1023]

The safest route for U.S. submarines towards the same areas would appear to be through the Bering Strait or Canadian Arctic waters.[1024] Since the Kara Gates, the Vil'kitskii and the Shokal'skii Straits are deep enough and SSBN stations could be placed in the Barents, Kara and the Laptev Seas, as well as in more Arctic shallow waters, passages of the Russian SSBN's and ASW's and the U.S. SSN's through these straits could occur. The deeper channels of the Franz Josef Islands, the British Canal, Austrian, Markham, Nightingale, Meyers and De-Bruyn Straits, could also carry some traffic to and from the Arctic Ocean.

International Legal Regimes

Periodic and chiefly clandestine submerged transits would doubtfully appear to fulfil the 'international use' criteria of the *Corfu Channel Case*. Since submarine traffic was not distinguished in the *Corfu Channel Case*, the same elements regarding international use would govern as with surface traffic.

There may be approximately two U.S. SSN's shadowing Russian SSBN's in the entire Arctic at any one time. Even during the Cold War, any of the approximately 10 or 11 U.S. SSN's that were operating in the entire Arctic, or any of the U.K. and French SSN's, could not have made more than an occasional submerged transit through the navigable Soviet Arctic straits. Such transits are risky, not only militarily and politically, but physically as well, with the approximate clearances for submergence as noted. Even if these 10 or 11 submarines did transit the navigable straits, the number probably does not represent a substantial number of transits of different flags and does not indicate a useful route for international traffic, even for a remote area. Cumulative submerged transits with surface transits likely represent approximately the

same order of magnitude as for surface transits.[1025] Perhaps most convincing, however, is that submerged transits of the straits cannot be documented to any great extent to the international community and therefore cannot be said to evidence a history of a useful route for international navigation. To base any argument of the Russian Arctic straits as international upon such use seems artificial.

The inference that can be drawn is that the occasional U.S. submerged passages, as well as any possibly carried out by the United Kingdom and France through the Russian Arctic straits likely conflict with the LOSC Part III and 1958 TSC Article 16(4) international straits regimes because of the present status of these straits. These foreign submerged passages are as well probably in conflict with the 1958 TSC and LOSC innocent passage regimes that govern the territorial sea, where submarines in surface passage must show their flag, though this may be unrealistic in ice- covered seas. Foreign submerged passages through channels comprised of the high seas or the exclusive economic zone would not be in conflict with those regimes. The occasional submerged transits are likely as well substantially in conflict with the Russian 1990 Rules, Articles 1.4., 3.2. and 7.4., and associated legislation including Articles 4, 5 and 12 of the 1999 Decree, Articles 13(3) and 14 of the 1998 Law, Article 9(e) of the 1993 State Border Act (deleted), as well as older legislation. These rules require navigating on the surface with the flag showing, using ice-breaking if needed for passage approaching internal waters. They also require navigating on the surface with flag showing, reporting and using ice-breaker assisted pilotage for the Vil'kitskii and Shokal'skii Straits, probably the Kara Gates Straits, and possibly the straits in Franz Josef Land. This also results in tension and instability.

Conclusions

The conclusions include the same but are in addition to those arrived at in Chapter 7. The United States, Russia and other maritime powers navigate their submarines as well as other State vessels in their 'normal modes' through international straits in what is intended to be an exercise of transit passage. The legislative history as well as doctrinal authority seem to support the right to transit submerged. It seems doubtful this practice will change, especially given the strategic policies of these States, and Washington has stated that it has ignored and will ignore attempts to limit its exercise of transit rights under LOSC Part III.

At the same time submerged passage through international straits under Part III is not without controversy. Should Part III become customary international law, and universal ratification of the LOSC occur, within the latitude of coastal State activities allowed, it may be expected that States bordering international straits might expand their jurisdiction. This possibility finds support from the Russian and American environmental and safety legislation and enforcement within their own exclusive economic zones, including straits. The outcome in law is not completely clear. Powerful straits States with the necessary surveillance technology could utilise expansive jurisdictional

arguments and demand notification, surface passage or authorisation for submerged passage through international straits.

The Russian regime for submerged passage in its Arctic straits exceeds all three scenarios, the regimes of LOSC transit passage, 1958 TSC non-suspendible innocent passage, and passage through non-international straits. It has specific requirements for surface transit for submarines in the territorial sea while showing the flag, ice-breaker assisted pilotage required for any vessel, including submarines, in the Vil'kitskii, Shokal'skii, Sannikov and Dmitrii Laptev Straits, and various forms of compulsory leading along the Northern Sea Route, likely including other straits. Arctic straits in Franz Josef Land may be included as well.

In relation to LOSC Part III, these requirements probably hamper and suspend transit passage. Russia is likely estopped in requiring surface passage through the waters of its Arctic straits, subject at least to innocent passage under 1958 TSC Article 5(2) and LOSC Article 8(2), due to the Soviet–Russian submerged passage that it has practised through straits globally. Where there exist high seas channels or routes of similar convenience of the exclusive economic zone as in the Kara Gates, possibly the Vil'kitskii, the Dmitrii Laptev, the Sannikov, the Blagoveshchensk and the Long Straits, freedom of navigation has been compromised.

Regional developments associated with Article 234 would seem to play a minor role. In addition to the probable dominance of LOSC Part III, though a harmonised Article 234 regime may be argued as applicable through Article 42(1)(b), submerged transit passage would seem to fall outside the scope. It could be questioned whether the ice-covered areas regime could be maintained to be 'applicable international regulations'. There seems to be questionable regional development requiring submarines to navigate on the surface in ice-covered territorial seas, including straits, showing the flag. The U.S. claims and its voyages clearly do not envision any encroachment of submerged transit passage or general submerged navigation by the ice-covered areas regime. The environmental objectives of both Article 42(1)(b) and Article 234, as well as of the Russian regime itself, seem compromised by Russian requirements for surface passage for submarines. Coastal State security, not environmental protection and safety, may indicate the reason behind the Russian requirements. Finally, Russia may also be estopped in any claims for surface passage in its exclusive economic zone.

In relation to the *Corfu Channel Case* and 1958 TSC Article 16(4) regime, Russian requirements probably hamper and suspend non-suspendible innocent passage. For waters subject to innocent passage the same estoppel argument as above likely applies. Requiring surface passage for submarines may also be contrary to the underlying foundation of the Russian regime, environmental protection and safety. Where there exist high seas channels, free navigation would be the rule. Part XII governing the exclusive economic zone would likely not be applicable in straits subject to non suspendible innocent passage, due to hampering and suspending innocent passage, including also the exclusive economic zone. Little support appears afforded to the Russian regime by the developing regional Arctic ice-covered areas regime for surface vessels. The

occasional submerged passage would be consistent with this traditional regime for international straits.

For passage through non-international 1958 TSC and LOSC straits, the 1958 TSC and LOSC limitations related to coastal State prescription and enforcement jurisdiction related to innocent passage and free navigation apply to non-parties to the LOSC. Part XII applies in the exclusive economic zone for parties to the LOSC and the United States. Russia may be estopped in demanding surface passage for submarines in international straits, although its position is stronger with respect to the territorial sea covering non-international straits.

The unilaterally adopted Russian environmental and safety requirements probably hamper innocent passage and are in conflict with traditional free navigation or the conditions of LOSC Part XII. The same estoppel argument as above likely applies to non-international straits with territorial waters. Should specific submerged passages be shown to be prejudicial to the peace, good order or security of Russia, then measures could be taken by Russia to require the submarines to leave the territorial waters. Redress for loss or damage from submarines might then be had through diplomatic channels.

In practice very few statements appear to have been issued by Russia protesting U.S. or other foreign submerged passages. Either U.S. submarines are not transiting submerged those few Russian Arctic straits clearly navigable, or the submarines are transiting and the passages are not detected by Russia, or the transits have been detected, but Russia is not protesting publicly. The first possibility seems unlikely, based upon the discussion above, but the second and third possibilities seem probable. Despite the lack of protests by Russia, at the minimum it would appear difficult to maintain there has been an acquiescence to the occasional U.S. submerged navigation claimed transit passage. The expansive Russian Arctic regime applying to all vessels, the patrol of Russian SSN's against the U.S. SSN's, and the possible Russian detection devices placed in the deeper straits, all provide 'protests' to a degree.

That the Russian Arctic straits are not international seems presently the more solid view due to the low number of foreign transits, which view favours the Russian Arctic regime. Submerged navigation by the United States, claimed to be transit passage, thus would seem to be in excess of the same scenarios, even though surface transit may be unrealistic in ice. But submerged passages through channels comprised of a high seas zone or the exclusive economic zone by U.S. submarines would not be in conflict.

As long as the increased numbers of foreign surface vessels continue to navigate in compliance with the Russian regime, though submarines from the United States and possibly the United Kingdom and France do not, it seems difficult to see how the regional Arctic regime will change in spite of its asymmetry. The official American declarations and occasional submarine traffic through the Russian Arctic straits may counter the trend on the surface, though both of these may not be so theoretically solid. Over time the acceptability of the U.S. declarations would seem to carry less

weight unless reinforced by unequivocal State practice. This asymmetry, which is likely to increase due to developments on the surface, results in international tension and instability.

A curious Arctic regime appears to be emerging, which indicates the interrelation between the regimes for ice-covered areas, international straits, and rights of passage of State vessels. Several tracks of State practice appear to have developed. In answer to whether the international straits regimes function as limitations to the Article 234 regime, on one end the Article 234 regime does not appear to be encroached by the international straits regimes. On the other end, Article 234 appears to be subordinate to the international straits regimes.

For commercial vessels on the surface, the Article 234 regime appears to have precedence over the Part III regime. Commercial vessels, especially tankers, are regulated by all three Arctic coastal States, including passage in their ice-covered straits. There exists extensive Arctic coastal State legislation, enforcement measures, as well as substantial compliance in commercial passage by the interested flag States. Moreover, the United States requires that its commercial vessels comply with the Canadian regime. The only opposition to the Article 234 regime is found in the U.S. declarations. Definite passages by American flagships consistent with the American declarations would strengthen this U.S. position.

For State vessels, Washington appears to remain steadfast in its claims for the dominance of the LOSC Part III regime. State vessels are exempt from the Article 234 regime under Article 236. An important difference between the Russian, Canadian, and the U.S. coastal State regimes is that State vessels are regulated only under the Canadian and Russian regimes. Such regulation finds little support from the U.S. regime or under international law.

In addition, the United States does not rely only on Article 236 and international law, but rather makes direct claims for transit passage in ice-covered straits by U.S. Navy or U.S. Coast Guard vessels. Nevertheless, in actual passages, it appears that U.S. State vessels on the surface substantially comply with the Russian and Canadian regimes, and they have done so for some time. Except for the earlier occurrences previously mentioned, U.S. vessels appear not to have navigated either the Russian or the Canadian Arctic without the consent of the respective governments.[1026]

For State vessels on the surface, therefore, the Article 234 regime based upon Article 236 and international law, as well as the U.S. declarations, doubtfully appears to be the dominant. Since there seems to be little or no American navigation on the surface supporting its declarations, the application of the international straits regime over the ice-covered areas regime for State vessels seems to be based chiefly upon Article 236 and international law. It appears rather odd that the United States prefers not to openly promote both the dominance of the international straits regime as well as sovereign immunity for its surface State vessels over the Article 234 regime, given its FON demand for innocent passage in the late 1980's in the Black Sea.

If the type of vessels passing through ice-covered straits is further categorised, more

tracks of State practice appear. If the passage of submerged State vessels is examined, the international straits regime appears to be clearly the most dominant. Submerged passage is argued to be the 'normal mode' of operation for submarines, invoking Article 39(1)(c), and such passage is claimed to be exercised in the Arctic under the U.S. Navy's FON with passage likely though occasional through certain of the Arctic straits.

Interest in passages by submerged commercial vessels has been mentioned periodically as a possibility in INSROP. The issues which might be raised regarding the dominance of the Article 234 or the Part III regimes for foreign vessels of this type would appear to be especially pointed, due to the lack of immunity, the difficulties of surface passage for submarines in ice as required by Russia, and the U.S. view of transit passage consisting of passage under the ice. However, passages by submerged commercial vessels have not yet materialised.

CHAPTER 9

GENERAL CONCLUSIONS

The Arctic is an ocean, but the jurisdictional claims of the large coastal States in the Arctic indicate a substantial deviation from the application of traditional law of the sea. The traditionally dominant legal regimes for international straits and passage of State vessels seem very subordinate to the LOSC regime for ice-covered areas, indeed, to an extent unprecedented and unknown in other parts of the world. The United States as a maritime power appears to allow divergence from these traditional regimes nowhere else as much as it does in the Arctic. In addition, there appears to be little State protest about this wide divergence.

It would be difficult to maintain that Russian practice has been in excess of the Article 234 regime for ice-covered areas, despite its inherent vague formulation. Russian practice finds support not only from Canadian practice but also from that of U.S. practice as a coastal State. There has been an apparent absence of practice by Norway and Greenland/Denmark related to the relevant legal issues. All three large Arctic States participate in the Rovaniemi Process, including the Arctic Council at the ministerial level, and have participated in the Harmonisation Conference at the Coast Guard level. The United States as a maritime power has most consistently opposed the Russian Arctic regime through declarations made by the State Department and the Navy and by passages of submarines very likely made, although occasionally and only vaguely substantiated. The Vil'kitskii Straits Incident in the mid 1960's involving passages by U.S. Coast Guard and U.S. Navy surface vessels in the Laptev, East Siberian, and Kara Seas were carried out prior to the Russian implementation of the Article 234 regime. However, the United States has used declarations associated with these passages to demonstrate its present position, which follows traditional positions under the law of the sea taken by maritime powers.

All surface passages through the Northern Sea Route appear to have been carried out in compliance with the Russian regime. Only the Americans have clearly opposed the Russian regime, though Norway may have made unauthorised military surface passages and both the United Kingdom and France may have made unauthorised submerged passages. None of the latter voyages has been confirmed.

The consistent practice of the large Arctic littoral States would appear to indicate the formation of customary law prior to their ratification of LOSC. Following ratification, their practice, likely to continue due to the time it had existed, would also seem to

indicate an interpretation of Article 234 that would utilise subsequent State practice in the application of the convention, following the norm of Article 31(3)(b) of the Vienna Convention.

The exact substance of Article 234 as determined by the national regimes, however, is still somewhat unclear. This is due not only to the ambiguity of the U.S. position, but also to the developments still taking place, including talks of unknown form or scope between the States. Foreign navigations, chiefly consistent with but sometimes contrary to the Russian regime, have been carried out. Also, it may still be difficult to argue that the United States has acknowledged as law a broad interpretation of Article 234, given its declarations and its likely occasional, submerged transits, which support a narrow interpretation. Washington has hesitated to refer to Article 234 in its own national regime.

The international straits regimes are theoretically one of the main obstructions to the application of the Article 234 regime. The Malacca Agreement and IMO recommendations have strengthened its role somewhat, perhaps allowing more stringent measures to be taken by coastal States with regard to minimum under-keel-clearance, velocity limitations, reporting of their position, and pilotage.

Concerning the theoretical balance between the ice-covered Article 234 regime and 1958 TSC Article 16(4), with the extent of the potential risk, the ice-covered areas regime may be considered dominant for the territorial sea. On high seas zones there could be no exercise of jurisdiction. Regarding the balance between Article 234 and the international straits LOSC Part III regimes, probably the international straits regime would dominate theoretically.

Developments in State practice, however, indicate that a curious divided regime appears to be emerging for Arctic ice-covered straits wherein the traditional regime applies only for submerged transit. Surface passages, of both State and commercial vessels, appear to indicate a practice favouring the ice-covered areas regime. Therefore, for Arctic ice-covered straits that are potentially international, in spite of U.S. claims for transit passage, State practice appears to indicate it may be the type of vessel and possibly political motivation that will determine jurisdictional rights. This is in contrast not only to LOSC Part III, but also the historical 1958 TSC Article 16(4) and the *Corfu Channel Case*.

Whether or not the international straits regimes may be said to function as limitations to the Article 234 regime, the issue of the rights of passage by State vessels remains. This question in Russian Arctic waters has been the major cause of contention between Moscow and Washington. State vessels clearly are not subject to the Article 234 regime due to Article 236 and other international provisions governing sovereign immunity. But State vessels are likely subject to the safety rules regarding sea lanes and traffic separation schemes in international straits. Sovereign immunity, although one of the weakest points in the Russian regime, has apparently not been challenged in surface passage by the United States or other States. Such rights of passage are a clear limitation to the Article 234 regime, the same limitation which State

vessels generally command. For the same reasons, the rights of passage of State vessels under the surface within the exclusive economic zone are a clear limitation to the Article 234 regime. Any Russian regulation of such passage within its Arctic exclusive economic zone would be a breach of international law.

In spite of this, the legal situation for submerged passage through straits remains unclear. Under both the LOSC and the 1958 TSC international straits regimes it has not been absolutely clear whether submerged passage is permitted subject to notification and/or authorisation. Nevertheless, the major maritime powers have practised submerged transit passage internationally, which appears supported by legislative history as well as doctrinal authority.

The Russian regime governing its Arctic straits related to submerged passage is in excess of international law because its requirements probably hamper and suspend transit passage, and deny non-suspendible innocent passage, as well as deny and suspend innocent passage. They are also in conflict with traditional free navigation as conditioned by LOSC Part XII. Russia is likely estopped from requiring surface passage for submarines through its Arctic straits, subject at least to innocent passage under 1958 TSC Article 5(2) and LOSC Article 8(2), due to its own submerged passage that has been practised through straits globally.

That the Russian Arctic straits are not international seems for the present the more reasonable status due to the low number of foreign transits either on the surface or submerged. That status favours the Russian regime, particularly those parts implementing elements of the innocent passage regime and the Part XII regime for protection and preservation of the maritime environment. Submerged U.S. navigations claimed as transit passage would thus be a contradiction, although submerged passages through channels of the high seas or the exclusive economic zone would not be in conflict.

Thus, in answer to the question whether the international straits regimes and the right of passage of State vessels function as limitations to the Article 234 regime, it would seem that they theoretically do and that they would be the dominant regimes. Looking at Arctic State practice, however, it appears that the reverse is true. For surface transits, it is the ice-covered areas regime which dominates and restricts the traditional international straits regime and partially the rights of passage of State vessels. Only the occasional, secret submerged passages by U.S. submarines through the Russian Arctic straits and some 40-year old U.S. declarations, provide some vestige of support for these important international regimes.

Because of these developments a State practice appears to be taking place indicating the formation of customary international law to govern the navigation of surface commercial vessels in the Arctic. *Opinio juris* following the standard of the *North Sea Continental Shelf Cases* is shown by the measures clearly adopted as law by all three Arctic States as well as the declarative statements made, intended as legal positions under international law. Due to a seemingly lack of interest by other States, general customary international law, not local, is that which is probably developing. Additionally,

an interpretation is likely being established of Article 234 that would govern navigation of surface commercial vessels in the Arctic, utilising subsequent State practice in the application of the LOSC for parties.

The end result thus points towards a unique major encroachment by the Arctic regime of the international straits regimes, much in excess of that occurring under the Malacca Agreement, but without correspondingly denying, hampering, or impairing transit passage or denying non suspendible innocent passage. Such will probably be less precedent-setting and transferable due to the restrictive area of application. Transfer, if it does occur, will likely be restricted to areas surrounding Antarctica, though States bordering straits may attempt to use the Arctic regime to argue for further expansion of the precedent established under the Malacca Agreement. This will likely be met with limited success, depending upon the importance of the role played by the specific international strait with regard to security and commerce. All Arctic littoral States will probably benefit environmentally due to the development of a stricter regime.

These conclusions may give rise to a wonder over the degree of controversy and mystification surrounding the Arctic. Though undoubtedly all international legal disputes have been characterised by a certain amount of disorder, particularly given their time in history, for the Russian Arctic this seems inordinate. Can this sensitivity be explained chiefly due to the security issues associated with submerged passage?

Due to the shallowness of large portions of the Russian Arctic seas and the majority of the Russian Arctic straits, the military strategic value of the Northern Sea Route appears to be low as a link between the Russian Northern and Pacific fleets, or as a station area for SSBN's, or as a militarised area for surveillance.[1027] In terms of perceptions, however, the route has had a long history of being overrated, which also affects the legal regimes, in the excesses that have been shown. Because of the asymmetry, the security-political as well as the legal situation appears inherently unstable. Why does the United States accept as well as practice the Article 234 regime for Arctic surface waters, but excludes submerged passage for Arctic seas, in which it is difficult and even dangerous to navigate? Why does Russia attempt to secure legally its Arctic straits as internal waters, most largely unusable to itself, and why does the United States claim but rarely enforces transit passage through such straits of minor 'indispensability'?

For Russia the answers likely lie in a belief that its regime for ice-covered areas within its exclusive economic zone and internal waters of its Arctic straits will provide benefits concerning national security and environmental protection.[1028] A Cold War view probably continues to influence policy and assumes that Russian security will be enhanced by practically closing the Arctic straits and strictly controlling the exclusive economic zone. At least Moscow would send an international message that Russia was exercising tight security.

For the United States the answers likely lie in a belief that its declarations and occasional submarine transit through the Russian Arctic straits provide evidence of American deterrence and surveillance measures. The Russian Arctic waters themselves may not be of great importance. One reason lying behind U.S. policy may be that freedom of

navigation globally is of supreme importance to the U.S. fleet, and deviations cannot be allowed. Rapid global mobility must be sustained and protected, even in largely unusable straits. Another reason may relate to future use. The future importance of different avenues of the oceans cannot be fully envisaged at present.[1029] In a world where military capabilities take years to construct but where political intentions may change overnight, the prudent course would be not to surrender any maritime routes if at all avoidable.[1030]

Washington's policy may be that research is needed by U.S. SSN's in the moderately deep portions of the Northern Sea Route to find feasible SSBN rescue areas in the event of war. A U.S. SSBN followed by Russian SSN's might possibly find refuge along the route and wait for rescue from its own SSN's if it knew the underwater terrain. For very deep areas, however, this refuge would seem limited due to the extreme water pressures. Finally, the U.S. Navy may consider it unnecessary to consider national policies conflicting with its own views of the law of the sea. Such an attitude may reflect the visits made by Navy vessels possibly carrying nuclear weapons to ports of its NATO allies where nuclear weapons are prohibited.[1031] Subsequent opposition has been met by official statements that the United States and the port State neither confirm nor deny the presence of nuclear weapons.[1032]

Thus, most of the reasons lying behind the overrated security perceptions of the Northern Sea Route, including the expansive legal positions taken by the States concerned, probably relate to global macro strategic interests in regions far removed from the route itself. These areas probably include the Strait of Gibraltar, the Indonesian Straits, the Indian Ocean and the Greenland-Iceland-United Kingdom gap, as well as the Barents Sea and the marginal ice zone and polynias of the Central Arctic Basin.[1033]

For the legal regime governing Russian Arctic waters the situation may be less than desirable in spite of the developments noted. The situation reflects much the same conflicts and polarisation that existed within the international straits negotiations prior to the agreement on LOSC Part III, namely, how to achieve nearly free user State passage consistent with the rights of coastal States over internal waters or territorial seas. This may in the extreme lead to a stalemate in the Arctic in the formation of customary law and interpretation of LOSC provisions. Although the number of States involved is few, the degree of disagreement appears considerable. Moreover, some strait States that appear reserved in permitting transit passage in their waters perhaps feel threatened. The inherently unstable legal situation has been made even more sensitive by the complicated U.S. coastal State regime, which exhibits similarities to the Russian and Canadian regimes.

All of these elements may work against the establishment of a stable order despite the development of customary international law, the interpretations of Article 234, the complete ratification of the LOSC, and co-operation on Arctic environmental protection and safety. It is conceivable that a more conservative Russia might decide that it would be in its interest not only to disclose collisions between Russian and U.S. submarines in the Russian Arctic territorial sea, but also to disclose U.S. submerged transits through navigable Arctic straits that are claimed as internal waters. Moscow

might enforce its provisions governing internal waters and choose one of the interpretations under Article 39(1)(b), notably, a threat of force, as a reason for actively denying transit. This would result in a subsequent increase in world tension, precisely the situation that LOSC Part III was designed to alleviate. J. Moore in the negotiations of Part III, stated,

> A principal goal of the Law of the Sea Conference must be to agree on a regime which will minimize the possibilities of conflict among nations, conflicts which may arise because of uncertainties as to legal rights and responsibilities. In view of the importance of straits used for international navigation, any regime for such straits which depended upon a set of criteria that could be subjectively interpreted by straits states would sow the seeds of future conflict and undercut a major goal of the Conference.[1034]

E. Brüel, on the other hand, expressed the fears of the coastal States with the examples of Turkey and Denmark, in relation to force exerted by Great Powers,

> . . . the possession of straits contains a risk for the littoral state, especially if it misjudges its privileges, based on international law, as Denmark learnt to its detriment in l801 and in l807. It is, therefore, of the greatest importance, in particular to weak states having coasts adjacent to international straits, that not the slightest doubt exists as to what these privileges are.[1035]

It seems also relevant to quote W. Reisman and J. Baker,

> The low-level of regulation in many strategic modes is lamentable because it does not serve world order. A state actor that refrains from some theretofore licit practices may contribute, by its own abstinence to the formation and installation of a more appropriate norm. The implementation of this recommendation requires that lawyers who have the necessary background, but who are not in the direct chain of command, have an opportunity to submit their written views, which become part of the record.[1036]

With this in mind the following recommendations are made.

In the new millennium, already troubled, with the aim of increasing global order and reducing tension, it is recommended that the U.S. State Department and the Russian Foreign Ministry take the initiative, in conjunction with the Canadian Ministry of External Affairs, to convene a conference with the express goal of negotiating a legal regime for the Arctic focusing on the environment and navigational safety.[1037] The Nordic States, the Arctic Council and the Harmonisation Conference Members should also be included in relevant capacities, due respectively to their Arctic territories and/or shipbuilding industries, their interest in the region, and their experience.

The negotiated regime would likely aid in providing clearer substance to Article 234. The object would be, with greater determination and in less time, to resolve those issues exhibiting most dissension associated with this regime. To add weight to

the positive developments taking place in the Arctic in the face of possibilities for reversion to Cold War stances would be the primary objective. With regard to Russia, these issues might include the possible application of the Russian regime to the high seas, application to State vessels, mandatory and discriminatory fees, and the relationship of the international straits regime. With regard to the United States, these issues might include a clarification of the overall American regime with respect to its declarations and its coastal State acts as well as clarification of its view of a parallel, non-hampering, 'applicable' ice-covered areas regime, permitted under Article 42(1)(b).

The sensitive issue of submerged passage need not be addressed. Precedent for this rather unusual suggestion may be found in the Prevention of Incidents Agreement from the Cold War, where under negotiations it was agreed not to include incidents involving submarines on the proposed agenda.[1038] Nevertheless, since submerged transit is probably the most central and disputed issue, some may consider it necessary to deal with it. A solution requiring notification and authorisation prior to submerged transit is a possible compromise within the interpretative possibilities of Article 39(1)(c). Additionally, a bilateral agreement allowing submerged passage based upon privilege rather than right is also a possibility. The latter, however, might make the forming of precedent difficult in other parts of the world, which is one of the concerns likely to affect U.S. Arctic policy.

Strongly countering these views, however, is the apparent necessity for both Russia and the U.S. to maintain secrecy surrounding submerged passages due to deterrence as their mutual strategic position. The trading away of rights associated with transit passage may be unwise. Former U.S. Secretary of State, George Schultz, denied the acceptability of a bilateral agreement relevant to these issues with Canada, a U.S. ally. This position still applies since the U.S. Department of Defence continues to regard Arctic waters as playing a central role in U.S. strategic military interests,[1039] and it seems even more doubtful that a similar agreement would be concluded with Russia. Thus, judging from the U.S. claims concerning the Russian Arctic straits, as well as the Canadian waters, it is unrealistic to expect that Washington would accept either of the compromises governing submerged passage.

Nevertheless, the Declaration on Arctic Military Environmental Co-operation between Russia, the United States and Norway, which for a time was linked to the Co-operative Threat Reduction Act under Start II, may influence Russian and U.S. naval activities in a more environmentally positive spirit. Russia and America carried on a form for bilateral talks likely encompassing the contentious issues surrounding the Arctic straits, to which both States had apparently positive attitudes. Washington confirmed that these talks took place but, similar to Russia, did not view them as negotiations.[1040] They were apparently discontinued a number of years ago.[1041] Some form of talks also have taken place between the U.S. and the Russian Navies at the level of captains on law of the sea matters, and the Russian Navy has proposed a joint seminar on law of the sea.[1042] Washington and Ottawa have also carried on talks encompassing the issues surrounding the Canadian Arctic straits.[1043]

In sum, there already exists substantial accordance between the Russian, the American,

and the Canadian coastal State regimes. This could provide a good groundwork for negotiating an Arctic regime. If delegates to the Harmonisation Conference were included, the experience of the participants, including ice-breaker captains, would assist, and the process could be associated with the IMO. The IMO Guidelines also provide a good groundwork for negotiations. Participation of the Arctic Council would be helpful by providing a political platform already in place and by forwarding to some degree the necessary presence of Arctic indigenous peoples, especially the Russian. Results arrived at under the Malacca Agreement, an important precedent, along with the IMO recommendations for straits, would be highly relevant and should be included.

In conjunction with this process, it might also be advantageous for Russia, the United States, Canada and other States to go further and negotiate a related agreement, around Article 236 for immunity of State surface vessels in ice-covered waters, including the Arctic straits. These vessels have been the largest contributor to vessel-source pollution in the Arctic. State surface vessels may be agreed to be made subject to the vague condition of compliance set forth under Article 236, with Article 234 as a minimum. It might be thus agreed that States would issue directives that military and other State surface vessels, in situations where their operations and operational capabilities are not impaired and if practical and reasonable, comply with the new negotiated Arctic regime. State surface vessels thus would technically be required to comply with much the same standards as commercial surface vessels, but they could disregard these rules when and if operationally necessary.

Under these proposals the Arctic littoral States, Russia, the United States and Canada, as well as Denmark/Greenland and Norway would take a cautious step forward towards establishing standard environmental and safety requirements in the Arctic for military and other State surface vessels. At the same time Russia, the United States and other States as maritime powers would retain their necessary freedom of navigation. Through these proposals, the necessary balancing of interests by the U.S. Navy might be influenced in a more environmentally protective direction, and the Russian Navy might also be influenced to restrain its activities to those closer in line with the theoretical basis for the Russian Arctic regime.

From these suggestions world order and stability might be incrementally increased, and both environmental and safety benefits might result. Resolving the Arctic environmental and safety issues closely related to the jurisdictional issues seems a more satisfactory and stable solution over time than accepting an asymmetrical regime containing the ever-present possibility for physical 'testing' of the Russian regime, represented by the U.S. Freedom of Navigation program. As a member of the U.S. Navy noted, when arguing for U.S. ratification of the LOSC, negotiated agreements are much more stable in the long run than 'unilateral assertions of rights premised on the process of claim and counterclaim of customary international law'.[1044]

Since much of the jurisdictional disputes over the Russian Arctic ice-covered waters and straits reflect security issues, there would be a limit to the results that negotiations could bring about. This applies as well to the Canadian Arctic. As long as Russia

and the United States are the world's leading military maritime powers, with the possibility of destroying one another, the passage of submarines in the Arctic will be shrouded in secrecy and a lack of regulation. The above modest suggestions to advance global stability with environmental and safety measures may be helpful in future international relations.

APPENDIX 1

SECTION 8. ICE-COVERED AREAS

Article 234
Ice-covered areas

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.

APPENDIX II

RUSSIAN CHARTS OF THE RUSSIAN ARCTIC SEAS

No.	*Scale*	*Area/year of publishing*
600	1:750 000	North Cape – Cape Kanin (1990)
601	1:750 000	The White Sea (1984)
650	1:750 000	Cape Orlov – Terskiy Tolstyy – Kara Gates Strait (1986)
695	1:250 000	Cape Oroliv – Kara Gates Strait – Yugorskiy Shar Strait (1987)
696	1:1 mill.	Novaya Zemlya (1988)
697	1:700 000	Eastern Novaya Zemlya – Dikson Island (1986)
698	1:200 000	Yenisey Gulf – Golchikha – Dikson Port (1989)
945	1:100 000	Yenisey River (six separate map sheets) (1984–86)
947	1:2 mill.	The Barents Sea (1990)
948	1:700 000	Dikson Port – Russkiy Island (1991)
949	1:700 000	Russkiy Island – Peter Island (1991)
950	1:200 000	Vil'kitskiy Strait (1991)
951	1:700 000	Anabarskiy Gulf – Tiksi – Buorkhaya Gulf (1991)
952	1:700 000	Buorkhaya Gulf – Ingirka River Delta (1991)
953	1:500 000	Sannikov Strait – Dmitriy Laptev Strait (1991)
954	1:700 000	Ingirka River Delta – Shalaurov Island (1991)
955	1:700 000	Shalaurov Island – Cape Golovniya – Point Hope, Alaska (1991)
1085	1:2 mill.	Bering Sea – Bering Strait (1978)
1089	1:50 000	Provideniya Bay (1979)

Transit voyages of Murmansk Shipping Company vessels through the NSR in 1993

N	*Name of vessel*	*Port (country) of loading*	*Country of discharge*	*Cargo, tons*	*Dates of entry and leaving NSR*	*Dates of start loading, loading, trip, unloading and ballast trip*
1	Kandalaksha	Murmansk	China	14775	25.04–23.05	15.04–31.08
2	Mikhail Kutyzov	Sweden	Japan	11964		
		Finland	Japan	5925	04.11–16.01	20.09–16.12
3	Yury Dolgorykiy	Murmansk	China	17812	06.07–21.07	14.06–19.09
4	Kapitan Sviridov	China	Holland	10498	13.08–21.08	30.06–10.09
			Spain	6741		
5	Kapitan Sviridov	Latvia	Japan	17434	08.10–18.10	01.09–13.11
6	Kapitan Botchek	China	England	7009	18.08–04.09	05.07–25.09

Appendix 2

Table (*cont.*)

N	*Name of vessel*	*Port (country) of loading*	*Country of discharge*	*Cargo, tons*	*Dates of entry and leaving NSR*	*Dates of start loading, loading, trip, unloading and ballast trip*
7	Tim Back	Latvia	Holland	4822	24.08–03.09	31.06–06.09
			Spain	17600		
8	Tim Back	China	Holland	16705	15.11–25.11	06.10–10.12
9	Kyzma Minin	China	England	12720	18.09–04.10	06.08–08.11
10	Mikhail Strekalovskiy	Murmansk	Thailand	17180	05.09–14.09	09.08–09.10
11	Ivan Bogun	China	Holland	16658	13.09–22.09	16.08–06.10
12	Kapitan Nazaryev	Finland	Japan	13333	10.09–18.09	16.08–20.10
13	Kapitan Chyhchin	China	Germany	5312	08.10–18.10	16.08–20.10
			Holland	3800		
			England	4633		
14	Kapitan Kudlay	Murmansk	Japan	16563	05.11–22.11	
15	Kapitan Vakula	Murmansk	Japan	17080	06.11–19.12	
16	Yury Dolgorykiy			14357	27.10–11.11	
			Total for 1993:	256600		

Ship type	*Ship owner*	*No. vessels*	*No. voyages*	*Tons cargo*	*Ports of loading*	*Ports of discharge*
			1993			
Tankers	Latvia (Arctic Shipping Service):	7 (Samburg, Rundele, Taganrog, Kashira, Ronagi, Aleisk, Leninsk-Kusnezkiy)	18	204826	Arkhangelsk	Frantz-Iosef Land, Novaya Zemlya Amderma, Dudinka,
	Germany	1 (Ledo Stern) 1 (Lunni)	7			Hatanga, Tiksi, Yana
	Finland					
Refer 'Amoda'	Latvia	1 (Atmoda)	Several	20062	Murmansk	Dudinka (Norilsk)

Table (*cont.*)

Ship type	*Ship owner*	*No. vessels*	*No. voyages*	*Tons cargo*	*Ports of loading*	*Ports of discharge*
			1994			
Tankers	Latvia Finland	5 2 (Lunni, Uiku)	22	173100	Arkhangelsk	Frantz-Iosef Land, Novaya Zemlya, Amderma, Dudinka, Hatanga, Tiksi, Yana
Refer 'Atmoda'	Latvia	2 (Atmoda)	Several	More than 20000	Arkhangelsk, Murmansk	Dudinka (Norilsk)

Note: There were no transit foreign vessels voyages through NSR both 1993 and 1994.

NOTES

[1] The term 'Russian Arctic waters' has been used throughout this work to denote the geographic marine area north of the Russian Arctic coast. No legal implications are intended, since legal rights and duties of coastal States and flag States are those which are examined. No better term was found for this area, however it must be noted that the United Nations Convention on the Law of the Sea itself abounds with such dichotomies, including the term 'straits', 'bays', 'continental shelf', and 'archipelagic waters' where the legal meaning differs from the geographic meaning. United Nations Convention on the Law of the Sea (LOSC). *United Nations Treaty Series* (*UNTS*), Vol. 1833, p. 397, reprinted in *International Legal Materials* (*ILM*), Vol. 21, (1982), p. 1261. The LOSC came into force 16 November 1994.

[2] See generally A. Arikainen, A. Jørgensen-Dahl, and W. Østreng, 'Political/Military and Legal Factors of Actual and Potential Significance to the Use of the NSR', *The Northern Sea Route Project Pilot Studies Report*, (FNI, December 1991).

[3] See generally T. Ramsland and S. Hedels, 'The NSR Transit Study (Part IV): The Economics of the NSR. A Feasibility Study of the Northern Sea Route as an Alternative to the International Shipping Market' *INSROP Working Paper*, No. 59, (1996), III.5.5. T. Ramsland was the Norwegian co-ordinator for INSROP Sub-program III, Economic Aspects, and was Lt. Cmdr. in the Norwegian Navy. He is Plan Officer, Strategic Section, Norwegian Navy, Oslo and previously worked as co-ordinator at the Centre for Research Economics and Business Administration, Bergen.

[4] See R. Huebert, 'Climate Change and Canadian Sovereignty in the Northwest Passage', *Canadian Journal of Policy Research (ISUMA)*, Vol. 2, Nr. 4, (2000), 86. See also <http://www.arctic.gov/publications.htm>.

[5] See Map 1, *The Northern Sea Route*.

[6] See A. Roginko, 'Environmental Protection in the Soviet Arctic Seas', (ed. L. Brigham), *The Soviet Maritime Arctic*, (London, Belhaven Press, 1991), pp. 63–82.

[7] This was addressed in INSROP Sub-program II, Environmental Aspects, which was a large scale strategic assessment of potential environmental impacts of navigation and related developmental activities on the NSR. The study was organised around implementation of a Dynamic Environmental Atlas, the Environmental Safety of the Vessel and Navigation and Environmental Impact Assessments.

[8] W. Østreng, 'The Northern Sea Route: A New Era in Soviet Policy', *Ocean Development and International Law*, Vol. 22, (1991), 271–5.

[9] T. Armstrong, *The Northern Sea Route, Soviet Exploitation of the North East Passage*, Doctoral Thesis, (Cambridge, Cambridge University Press, 1952), pp. 18–9. See also N. Matyushenko, 'The Northern Sea Route: Challenge and Reality', *International Challenges*, Vol. 12, (1992), 61–3.

[10] See Map 6.

[11] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', *Marine Policy*, Vol. 14, (1990), 164. Professor A. Kolodkin has represented the Soviet Union and Russia in International Maritime Organisation (IMO) Conferences, and as Chairman of the Russian International Maritime Law Association and Vice President of the International Maritime Committee, appeared to act in practice as legal advisor in law of the sea matters to the Russian Government. This status was claimed by E. Nikitina, Dr., Senior Research Fellow, 'Interview', 18 March 1993, a former assistant to A. Kolodkin and now with the Institute of World Economy and International Relations, Russian Academy of Sciences. A prominent legal expert on Russia, W. Butler, 'Correspondence – INSROP Secretariat', 18 January 1994, noted that elucidation of the normative basis for the Russian legal position in the Arctic lay with A. Kolodkin, who should be requested to explain the matter. A. Kolodkin, 'Interview', 25 February 1994, himself discounted his role as official. Though not completely clear it is considered a mistake to regard A. Kolodkin's statements merely on the level of other doctrine, and lacking any intermediate status, they will thus be given weight as official. This is considered necessary given the non traditionality by Western standards of

Russian legal sources, addressed in Chapter 3. Since A. Kolodkin recently was elected Judge on the International Law of the Sea Tribunal, following 31 August 1996 this status would no longer be valid related to Russian jurisdictional claims in law of the sea, due to issues involving conflict of interest. See similar discussion in Chapter 3 related to P. Barabolia, where W. Butler cautions restraint. Providing support to arguments for official status P. Barabolia 'Speech', Russian – American Seminar – The United Nations and the Law of the Sea Development, Moscow, 23–6 August 1994 decried attacks against A. Kolodkin by members of V. Zhirinovskiy's Liberal Democratic Party of Russia (LDPR) in the Justice Committee of the Duma, 'which was on the way to making Russia the laughing stock of the world in law of the sea'. These attacks were demanded made public not only in law journals but also the major newspapers. Other evidence of the Russian legal position at the same time will be provided.

[12] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 164.

[13] The description is obtained and adapted from G. Hønneland, 'Navigating the Straits of the Northern Sea Route', *INSROP Working Paper*, No. 81, (1997), IV.1.2., 1–37. G. Hønneland, a Senior Research Fellow at the Fridtjof Nansen Institute specialising in international politics of the European North, formerly served as lieutenant and Russian interpreter in the Norwegian Coast Guard operating in the Barents Sea. The presentation is structured around W. Butler, *Northeast Arctic Passage*, (Alphen aan den Rijn, Sijthoff & Noordhoff International Publishers, 1978) pp. 5–41.

[14] An overview is given in R. Douglas Brubaker, Doctoral Dissertation (Stockholm, Stockholm Universitet, 2002), Appendix VI of the relatively unknown and more peripheral straits. For more extensive maps of the straits see, Maps 2, 3, 4 and 5.

[15] See Appendix II for an overview of the charts used. *Atlas Arktiki* (Arctic Atlas), (Moscow, The Head Department of Geodesy and Cartography of the USSR Council of Ministers, 1985) was also consulted.

[16] *Guide to Navigation through the Northern Sea Route* (*Rukovodstvo dlya skvoznogo plavaniya sudov po severnomu morskomu puti*), (St. Petersburg, Head Department of Navigation and Oceanography, Ministry of Defence of the Russian Federation, 1996).

[17] See G. Hønneland, 'Navigating the Straits', 2. V. Michailichenko and A. Yakovlev, 'Guide to Navigation through the NSR', INSROP Discussion Paper (1994), (unpublished, on file with author) e.g., refer to the main passage from the Barents to the Kara Sea as *Karskiye Vorota Strait* (i.e. partly a transliteration, partly a translation of the Russian words), while W. Butler, *Northeast Arctic Passage*, p. 19, calls it the *Kara Gates Strait* (i.e. a literal translation of the Russian name of the strait). V. Michailichenko was Director of the Northern Sea Route Administration (NSRA), Department of Maritime Transport, The Russian Federation Ministry of Transport, and former Captain on ice-breakers navigating the NSR. A. Yakovlev is a Rtd. Admiral in the Russian Navy, Dr. at the Institute for System Studies, Russian Academy of Sciences, and was INSROP Project Leader.

[18] *Ostrova Arkticheskogo Instituta*, e.g., will be referred to as the *Arctic Institute Islands*, and *Peter Strait* and *Nightingale Strait* will be used instead of *proliv Petra* and *proliv Naytingeyl*, respectively. G. Hønneland, 'Navigating the Straits', 2.

[19] Ibid. This presents a problem in rendering the Russian 'short-i', common at the end of adjectives and names. In such instances, *-yy* is used in endings – to indicate the presence of a 'short-i' – instead of the more common variant with just one *y*, such as in *Grozny*. In addition for the sake of consistency, *y* will be used for 'short-i' also in words where the latter's rendering by *i* is common in English. E.g. *Taymyr* will be used instead of *Taimyr*. Neither is in effect completely correct, as English does not contain an adequate substitute for 'short-i'.

[20] See Chapter 2, where it is noted the NSR regime has been extended westward to Kolguev Island.

[21] Bear Island, situated approximately midway between North Cape on the Norwegian mainland and South Cape on Spitzbergen, belongs to the Svalbard archipelago.

[22] The term 'miles' will be synonymous with 'nautical miles'.

[23] The counter-clockwise current in the south-western Kara Sea also brings ice into that part especially in summer when the current is strongest.

[24] The distances of these alternative routes are indicated in Table 2.

[25] This is according to the Russian Navy, Department of Navigation and Oceanography (GUNIO). A. Yakovlev, 'Correspondence', 10 April 1997.
[26] According to W. Butler, *Northeast Arctic Passage*, p. 19, it is 17.5 nautical miles long.
[27] This is 24.3 nautical miles according to GUNIO.
[28] *Guide to Navigation through the Northern Sea Route*, pp. 95–6. W. Butler, *Northeast Arctic Passage*, p. 19 notes navigation is not risky due to the depth and width of the fairway.
[29] This is 29.2 nautical miles according to GUNIO. According to W. Butler, *Northeast Arctic Passage*, p. 39, this is 22 nautical miles, which seems more in line with the Soviet claims presented in Chapter 7.
[30] W. Butler, *Northeast Arctic Passage*, p. 29 notes it is illustrative of the fog conditions that although the strait was explored and transited at least as early as 1878–79, only in 1913 was land discovered to the north of it.
[31] The term *ice massif* refers to a 'concentration of sea ice covering hundreds of square kilometres which is found in the same region every summer'. D. Barnett, 'Sea Ice Distribution in the Soviet Arctic', *The Soviet Maritime Arctic*, p. 49.
[32] This is 63 nautical miles according to W. Butler, *Northeast Arctic Passage*, p. 33.
[33] This is 27.1 nautical miles according to GUNIO.
[34] V. Bondarenko, 'The Northern Sea Route', INSROP Discussion Paper, (1995). Unpublished, on file with author. V. Bondarenko was formerly Captain on ice-breakers navigating the NSR.
[35] V. Michailichenko and A. Yakovlev, 'Guide to Navigation through the NSR', 6.
[36] W. Butler, *Northeast Arctic Passage*, p. 33 notes the fairway has depths from seven to 15 meters.
[37] This is 79.0 nautical miles according to GUNIO.
[38] This section is based upon C.L. Ragner, 'Northern Sea Route Cargo Flows and Intrastructure – Present State and Future Potential', *FNI Report* 13/2000, pp. 76–89. See Map 6, obtained from ibid. p. 78; and Michailichenko and A. Yakovlev, 'Guide to Navigation through the NSR'.
[39] *Pravitel'stvo Rossiyskoy Federatsii Rasporyazheniye No. 958–r.* (Government Order of the Russian Federation No. 958–r) 17 July 1998.
[40] This is incorporating the Russian data noted from GUNIO. The Bering Strait is noted by GUNIO to be 46.0 nautical miles.
[41] *Skhema traditsionnogo (pribrezhnogo) i vysokoshirotnykh marshrutov severnogo morskogo puti.*
[42] V. Bondarenko, 'The Northern Sea Route', and V. Michailichenko and A. Yakovlev, 'Guide to Navigation through the NSR'.
[43] W. Butler *Northeast Arctic Passage*, pp. 18–9.
[44] *Guide to Navigation through the Northern Sea Route*, p. 63.
[45] Ibid. According to W. Butler, *Northeast Arctic Passage*, p. 18, the route around Mys Zhelaniya is used only in years when the Yugorskiy Shar, Kara Gates and Matochkin Shar Straits are all obstructed.
[46] *Guide to Navigation through the Northern Sea Route*, p. 95.
[47] Ibid. p. 65. Probability values are given for the first 10 days of the month.
[48] V. Bondarenko, 'The Northern Sea Route'.
[49] *Guide to Navigation through the Northern Sea Route*, p. 63.
[50] Ibid. p. 65. Probability values are given for the first 10 days of the month.
[51] Ibid. p. 65. Probability values are given for the first 10 days of the month.
[52] Ibid. p. 64.
[53] Ibid.
[54] Ibid. p. 65. Probability values are given for the first 10 days of the month.
[55] Ibid. p. 65. Probability values are given for the first 10 days of the month.

Chapter 2

[56] See for LOSC Part XII, Section 8.

[57] M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *United Nations Convention on the Law of the Sea 1982 – A Commentary*, Center for Oceans Law and Policy, University of Virginia, (Dordrecht, Martinus Nijhoff, 1991), Vol. IV, p. 393.

[58] Ibid., A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 160–3 and D. Pharand, *Canada's Arctic Waters in International Law*, (Cambridge, Cambridge University Press, 1988), pp. 236–7.

[59] Environmentally related safety standards are added in the sense that these norms help prevent accidental discharges of pollutants in ice-covered areas. Routing is a central measure in LOSC Part XII Article 211, safety measures are parallel to environmental measures under LOSC Part III Articles 39, 41 and 42, and they are closely related to environmental measures in general under IMO and International Labour Organisation (ILO) conventions.

[60] Article 211(5).

[61] The LOSC presently is ratified by Russia, Norway and Canada, but not by the U.S. and Denmark–Greenland. Norway ratified the LOSC 21 June 1996, Russia ratified 12 March 1997 and Canada ratified on 6 November 2003. Though not strictly Arctic littoral States, Sweden and Finland also ratified the LOSC at the same time as Norway. Iceland ratified 24 June 1985. The U.S. has held hearings, generally positive, in the Senate regarding accession to the LOSC and ratification of the Agreement on the Implementation of Part XI of the 1982 Law of the Sea Convention, 28 July 1994, *ILM*, Vol. 33, (1994), p. 1309, in force 28 July 1996. See <http://www.state.gov/g/oes/rls/rm/2003/25572.htm>.

[62] C. Lamson, 'Arctic Shipping, Marine Safety and Environmental Protection', *Marine Policy*, Vol. 11, (1978), 3–4.

[63] J.A. Roach, Captain, JAGC, U.S. Navy (Rtd.), Office of the Legal Advisor, U.S. Department of State (L/OES) and R. Smith, Dr., Office of Ocean Affairs, U.S. State Department, 'Interview', 27 June, 1994. P. Dzyubenko, Legal Office of the Russian Foreign Ministry, 'Speech – The legal regime of Arctic: New tendencies', Russian–American Seminar, 23–6 August 1994.

[64] R. Churchill and A. Lowe, *The Law of the Sea*, (3rd ed.) (Manchester, Manchester University Press, 1999), p. 102 note, "Strait' is not a term of art, and it is not defined in any of the conventions produced by the United Nations Conferences on the Law of the Sea . . . It is the legal status of the waters constituting the strait and their use by international shipping, rather than any definition of 'strait' as such, that determines the rights of coastal and flag States'.

[65] *Merriam-Webster's Seventh New Collegiate Dictionary*, (Springfield, G. & C. Merriam Company, 1972), p. 866. R. Churchill and A. Lowe, *Law of the Sea*, p. 102 note '. . . a narrow natural passage or arm of water connecting two larger bodies of water'.

[66] International Court of Justice (ICJ) Reports, (1949), p. 1.

[67] Ibid. pp. 28–9. See generally D. Pharand, *Canada's Arctic Waters*, pp. 216–23.

[68] Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, *UNTS*, Vol. 516, (1964), (1958 TSC), p. 206.

[69] Article 38(2).

[70] Article 38(1).

[71] Respectively Article 20 and Article 39(1)(c). R. Churchill and A. Lowe, *Law of the Sea*, p. 110.

[72] Article 39(1)(a)–(c).

[73] Article 39(1)(d) and (2)(a) and (b).

[74] Article 38(3).

[75] R. Churchill and A. Lowe, *Law of the Sea*, p. 107. Ibid. also note the somewhat wider rights to take counter-measures admitted by the ICJ in *Case of Nicaragua v. USA*, ICJ Reports, (1986) pp. 102–4 and 110–11.

[76] Article 233. R. Churchill and A. Lowe, *Law of the Sea*, pp. 108–9.

[77] R. Churchill and A. Lowe, *Law of the Sea*, pp. 110–3, M. Leifer, *Malacca, Singapore, and Indonesia – International Straits of the World*, (Alphen aan den Rijn, Sijthoff & Noordhoff, 1978), pp. 164–168, 170,

and H. Caminos, 'The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea', *Recueil Des Cours – Collected Courses of the Hague Academy of International Law*, Vol. 205, (1987), 209.

[78] I. Brownlie, *Principles of International Law*, (5th ed.) (Oxford, Clarendon Press, 1998), p. 280 and R. Churchill and A. Lowe, *Law of the Sea*, p. 113 are contra though noting some evidence of a trend exists; D. O'Connell, *The International Law of the Sea*, (Oxford, Clarendon Press 1982), Vol. I, p. 331 and S. Nandan and D. Anderson, 'Straits Used for International Navigation: A commentary on Part III of the United Nations Convention on the Law of the Sea 1982', *British Yearbook of International Law*, Vol. 60, (1989), 170 believe transit passage to have become customary international law.

[79] LOSC Articles 17, 18 and 19(1), and 1958 TSC Articles 14(1), (2) and (4).

[80] LOSC Article 19(2)(a–l).

[81] See I. Brownlie, *Principles*, p. 194, and S. Jin, 'The question of innocent passage of warships, After UNCLOS III', *Marine Policy*, Vol. 13, (1989), 66.

[82] R. Churchill and A. Lowe, *Law of the Sea*, pp. 88–92. The U.S. and the Soviet Union have apparently switched their positions on this issue. See also I. Brownlie, *Principles*, pp. 194–5.

[83] R. Churchill and A. Lowe, *Law of the Sea*, pp. 204–5.

[84] Union of Soviet Socialist Republics – United States: Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, 23 September 1989, (U.S.S.R.–U.S. Joint Statement), *ILM*, Vol. 28, (1989), p. 1444.

[85] E. Franckx, *Maritime Claims in the Arctic – Canadian and Russian Perspectives*, (London, Martinus Nijhoff Publishers, 1993), pp. 164–6.

[86] Ibid. pp. 187–8.

[87] See A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163–8 and A. Arikainen, A. Jørgensen-Dahl, and W. Østreng, 'Political/Military and Legal Factors' 25–6, 239–43.

[88] W. Butler, 'Joint ventures and the Soviet Arctic', *Marine Policy*, Vol. 14, (1990), 174.

[89] R.D. Brubaker, 'International Law and Russian Arctic Waters', *International Challenges*, Vol. 12, (1992), 97–9 and E. Mäkinen, 'The Future of the Northern Sea Route', in H. Simonsen, (ed.), *Proceedings from The Northern Sea Route Expert Meeting*, Tromsø, (13–14 October, 1992), (Finnish and Norwegian Foreign Ministries and FNI), p. 39.

[90] See A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163–8.

[91] E. Franckx, *Maritime Arctic Claims*, p. 193.

[92] R. Churchill and A. Lowe, *Law of the Sea*, p. 110.

[93] 'Regulations for Navigation on the Seaways of the Northern Sea Route', in accordance with the U.S.S.R. Council of Ministers Decision No. 565 of 1 June 1990 and approved by the U.S.S.R. Minister of Merchant Marine, 14 September 1990. Russian text published in *Izveshcheniya Moreplavatelyam* (Notices to Mariners), No. 29, 18 June 1991; English translation published in *Guide to Navigating Through the Northern Sea Route*, pp. 81–4.

[94] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163.

[95] Arctic Waters Pollution Prevention Act, Revised Statutes of Canada, (RSC), 1985, Chapter A-12, as amended.

[96] The U.S. and Canada have entered the Agreement on Arctic Co-operation, 11 January 1988, Canada–United States, (Canadian–U.S. Agreement), *ILM*, Vol. 28, (1989), p. 142. This co-ordinates research and facilitates icebreaker navigation off their Arctic coasts, however both States reserve their rights. See J.A. Roach and R. Smith, *International Law Studies – Excessive Maritime Claims*, (Newport, U.S. Naval War College, 1994), Vol. 66, pp. 212–3.

[97] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 45, 48, 200–7 and 207–15.

[98] Ibid. pp. 48, 200–7.

[99] Ibid. pp. 45, 207–15.

[100] See generally W. Schachte Jr., 'International Straits and Navigational Freedoms', *Remarks Prepared for Presentation to the 26th Law of the Sea Institute Annual Conference*, Genoa, (June 22–6, 1992). Rear Admiral W. Schachte, now retired, was with the Judge Advocate General's Corps, U.S. Navy, Department of

Defence Representative for Ocean Policy Affairs. Ibid. 3, notes these specific remarks represent the views of the U.S. His speech contained a caveat that it reflects only his personal views, but when questioned by the author on this status, he was not hesitant to add that it accurately reflects U.S. official policy. See Chapter 4. W. Schachte, 'Interview', Malmø, 8 August, 1991, noted that he was a member of the U.S. Delegation to the final sessions of UNCLOS III. Thus, his statements will be taken as official, dependent upon his direct indication of such or when he admits parallel viewpoints.

[101] W. Schachte, 'International Straits and Navigational Freedoms', 14 and J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 182.

[102] J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 227 footnote 79 note that the issue of the interrelation of the Article 234 regime with the international straits regime is not clarified with respect to the Canadian Arctic straits.

[103] W. Schachte, 'International Straits and Navigational Freedoms', 18–9.

[104] J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 227 footnote 79.

[105] Presidential Proclamation No. 5030, 48 *Federal Register* 10, (March 1, 1983), 605. Codified at 3 *Code of Federal Rules* Section 5030. See also *ILM*, Vol. 22, (1983), p. 465. See M. Belsky, 'Management of Large Marine Ecosystems: Developing a New Rule of Customary International Law', *San Diego Law Review*, Vol. 22, (1985), 748 and 753. See R. Churchill and A. Lowe, *Law of the Sea*, pp. 236–8 for developments surrounding the Agreement on the Implementation of Part XI of the LOSC.

[106] United States Oil Pollution Act of 1990 (OPA 1990), 33 *United States Code (USC)* 2701, *Public Law*, 101–380, Title I, 104 Statute 484, August 18, 1990.

[107] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 48 and 58, 200–207.

[108] LOSC Article 20 and 1958 TSC Article 14(6).

Chapter 3

[109] See 'Scandinavia's Interest' below.

[110] See D. Pharand, *Canada's Arctic Waters*, pp. 97–105.

[111] Ibid.

[112] J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 201. The Decree for the Territorial Sea, Exclusive Economic Zone and Continental Shelf of the U.S.S.R. Off the Mainland and Islands of the Northern Arctic Ocean, the Baltic Sea and the Black Sea of 15 January 1985, W. Butler, *The U.S.S.R., Eastern Europe and the Development of the Law of the Sea*, (Compilation, Edition, Translation and Annotation, W. Butler), (London, Oceana Publications Inc., 1983–7), C.3., (1985 Baseline Decree), pp. 21–61. A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 160–1, indicate that historic claims are as well asserted for the White Sea, Gulf of Cheshskaia, Gulf of Pechorskii; Gulf of Baidarskaia, Obskii Inlets and the Enisei Inlets.

[113] Statute on the Protection of the State Boundary of the U.S.S.R., adopted August 5, 1960, reprinted in R. Churchill and M. Nordquist (eds.), *New Directions in the Law of the Sea*, (*New Directions*), Vol. I, (London, Oceana Publications 1973), p. 30.

[114] E. Franckx, *Maritime Arctic Claims*, pp. 156 and 208, footnote 176.

[115] See respectively P. Barabolia in E. Franckx, *Maritime Arctic Claims*, pp. 173 and 217, footnote 316, as well as P. Barabolia in W. Butler, *Northeast Arctic Passage*, pp. 140 and 168, footnote 24 where only the Dmitrii Laptev and Sannikov Straits are claimed historic. P. Barabolia's status appears similar to that of A. Kolodkin above, though now retired. W. Butler, *Northeast Arctic Passage*, pp. 142–3, considers P. Barabolia's views important due to the direct bearing on the Arctic straits. Ibid. notes however it would be inappropriate to accept P. Barabolia's status as official related either to the Soviet draft articles submitted to the Law of the Sea Conference or the draft articles formulated in the Composite Single Negotiating Text (CSNT). W. Butler enjoys considerable experience dealing with the Soviet and Russian legal system, however, P. Barabolia freely discusses serving as a member of the Soviet delegation to UNCLOS III. P. Barabolia, 'Speech–U.N. and the Development of the Law of the Sea (Historic

review)', Russian – American Seminar, 23–6 August 1994. Though not completely clear it is considered a mistake to regard P. Barabolia's statements merely on the level of other doctrine, and lacking any intermediate status, they will thus be given weight as official. This is considered necessary due to the non traditionalism by Western standards of Russian legal sources addressed below. E. Franckx, *Maritime Arctic Claims*, p. 165, appears to support this view. At the same time other evidence of the Russian legal position will be provided.

[116] Law on the State Boundary of the U.S.S.R. 24 November 1982, (1982 Statute), *ILM*, Vol. 22, (1983), p. 1055. See also W. Butler, *U.S.S.R. Development Law*, C.1. This apparently is replaced by the 1993 State Border Act, below, but will be listed here due to inconsistencies.

[117] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163.

[118] A. Kolodkin, 'Interview', 25 February 1994.

[119] N. Koroleva, V. Markov and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, (Moscow, State Research and Project Development Institute of Merchant Marine (Soyuzmorniiproekt) – Association of International Maritime Law, 1995), (in English), pp. 60–76, 81–3, 83–6. Since A. Kolodkin is Deputy Director of 'Soyuzmorniiproekt', and has written the Introduction, ibid. p. 59; N. Koroleva and V. Markov were affiliated with 'Soyuzmorniiproekt'; and A. Ushakov was Deputy Director of the NSR Administration (NSRA); *Legal Regime of Navigation in the Russian Arctic* will be considered official. N. Koroleva, V. Markov and A. Ushakov all appear to have worked closely with A. Kolodkin; N. Koroleva and V. Markov prepared legislation relevant to Arctic law of the sea to be considered for adoption by the Duma; and all attended and participated in A. Kolodkin, 'Interview', 25 February 1994. A. Ushakov, 'Interview', 20 March 1995, confirmed that N. Koroleva had been a close aide to A. Kolodkin.

[120] N. Koroleva, V. Markov and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 86.

[121] Law of the State Boundary of the Russian Federation, 1993, (1993 State Border Act), obtained from A. Yakovlev, Russian – American Seminar, 23–6 August 1994.

[122] See N. Koroleva, V. Markov and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 82.

[123] See Chapter 4. Article 5(2) is now deleted.

[124] N. Koroleva, V. Markov and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, pp. 60–76.

[125] T. Armstrong, *The NSR*, Appendices I, II, III and V. See generally J. Nielsen, 'Historical and Current Uses of the NSR – Part III, The Period 1855–1917', *INSROP Working Paper*, No. 61, (1996), II.1.1., 1–88.

[126] E. Franckx, *Maritime Arctic Claims*, pp. 162, 211 footnote 230.

[127] Ibid.

[128] D. Pharand, *Canada's Arctic Waters*, pp. 121–5.

[129] J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 202.

[130] See N. Koroleva, V. Markov and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, pp. 60–74.

[131] J. Brooke, 'Do We Really Need a Third Seawolf', *U.S. Naval Institute Proceedings*, (December 1994), 9–10. See also W. Østreng, 'Military Security – The Stumbling Block of Arctic Navigation?', (1994), 3, 15–17. Unpublished, on file with the author; and see W.M. Reisman, 'The Regime of Straits and National Security: An Appraisal of International Lawmaking', *American Journal of International Law*, Vol. 74, (1980), 52–3, 69. See Chapter 5 for voyages carried out by the Norwegian surface vessel, *Sverdrup II*.

[132] See generally S. Mahmoudi, 'Foreign Military Activities in the Swedish Economic Zone', *The International Journal of Marine and Coastal Law*, Vol. 11(3), (1996), 365, 374–7, 381–2. 'Military marine research' is difficult to define due to vague or lack of relevant definitions in the LOSC. A. Yakovlev, 'Interview', Russian–American Seminar, 23–6 August, 1994, indicated concern by the Russian Navy with U.S. Arctic research. J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 203 note in the Vil'kitskii Straits Incident the U.S. took core samplings north of Novaya Zemlya and east of Zemlya Frantsa Iosita and also west of Severnaya Zemlya, to be delivered to the World Data Centre System from which the Soviet Union could obtain the data. 'Vil'kitskii Straits Incident', will be used to indicate the related challenges by U.S. State vessels in the mid 1960's to Soviet jurisdiction in the Arctic.

[133] B. Vukas, 'Peaceful Uses of the Sea, Denuclearization and Disarmament', in R. Dupuy and D. Vignes (eds.), *A Handbook on the New Law of the Sea*, (Dordrecht, Martinus Nijhoff Publishers, 1991), p. 1238.

[134] This assumes for the Arctic that Article 234 jurisdiction is negated due to sovereign immunity for State vessels under Article 236.

[135] W. Østreng, 'The geo-strategic conditions of deterrence in the Barents Sea', *The Soviet Maritime Arctic*, pp. 204–5; R. Churchill, and A. Lowe, *Law of the Sea*, p. 91; and *Aftenposten*, 13 December 1995, p. 3. Admiral Jerofejev of the Russian Navy maintained that Russia now has dispensed with this practice. See also E. Franckx, *Maritime Arctic Claims*, pp. 28 and 54.

[136] This is defined at the minimum as the monitoring of a foreign coastal State.

[137] For a general discussion of sea ice distribution in Russian Arctic waters, see D. Barnett, 'Sea ice distribution in the Soviet Arctic', *The Soviet Maritime Arctic*, pp. 47–62.

[138] ICJ Reports, (1951), p. 116.

[139] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163, 166.

[140] See C. Waldock, 'The *Anglo–Norwegian Fisheries Case*', *British Yearbook of International Law*, (1951) Vol. 28, 158–9. The author notes the *Corfu Channel Case* itself shows the discrepancy in the Court's reasoning, '(T)he south channel lies between the Greek island of Corfu and the mainland of Greece and is largely enclosed by the long tongue of the island running parallel to the mainland shore. Yet, under previous notions of the law of inland waters, to hold these waters to be inland waters would directly conflict with the Court's principle in the *Corfu Channel Case*.' Ibid. concludes hoping that the *Corfu Channel Case* will prevail, 'even if this means recognising a right of innocent passage through inland waters in certain circumstances'. D. O'Connell, *International Law of the Sea*, Vol. 1, (2nd ed.), (London, Clarendon Press, 1970) p. 495, notes that the *Corfu Channel Case* did not establish a customary law right of passage through the territorial sea but merely an exceptional right of passage through straits either in the territorial sea or inland waters. K. Koh, *Straits in International Navigation – Contemporary Issues*, (London, Oceana Publications, 1982) p. 35 answers, '(I)t is not quite accurate to include this "exceptional right" in straits that are "inland waters" as the case itself relates to straits that are in territorial waters'. See also I. Brownlie, *Principles*, p. 278.

[141] See generally J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 200–7.

[142] See E. Franckx, *Maritime Arctic Claims*, pp. 161–2.

[143] A. Kolodkin, and M. Volosov, 'The legal regime of the Soviet Arctic', 163 and 166.

[144] ICJ Reports (1951), p. 132.

[145] See K. Koh, *Straits*, p. 14.

[146] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163.

[147] 'United States Responses to Excessive National Maritime Claims', *Limits in the Seas*, No. 112, (Washington D.C., United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, March 9, 1992), pp. 71–2. J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 67, 88, footnote 57 note the European Union position and cite the British High Commission Note No. 90/86 of July 9, 1986, reported in American Embassy Paris telegram 33625, July 24, 1986.

[148] D. O'Connell, *The International Law of the Sea*, p. 385. Ibid. notes, however, that that does not prevent such constituting, 'fictitious bays, especially when linked with bays properly so-called', with essential characteristics as internal waters. See also J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 177, 179; and W. Schachte, Jr., 'International Straits and Navigational Freedoms', 14–7 and 27.

[149] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 218–9, and 228.

[150] P. Barabolia in W. Butler, *Northeast Arctic Passage*, pp. 140–2. The author notes straits with internal waters, including those leading to internal seas and in coastal reefs, are regulated without exception by coastal State legislation. A possible exception exists for straits with internal waters that for an extended period have served as international navigational routes which would be subject to transit passage. However none are listed including Russian, and most of such internal waters are believed to lie away from international routes, leading to ports.

[151] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163.

[152] Ibid.

[153] See R. Churchill and A. Lowe, *Law of the Sea*, p. 105.

[154] S. Nandan and D. Anderson, 'Straits Used for International Navigation', 177.

[155] *The Times, Concise Atlas of the World*, (Edinburgh, Times Newspapers Limited, 1973), pp. 50–1, 82.
[156] See Chapter 4.
[157] T. Jørgensen, 'Synoptic Ice Characteristics of the NSR', *International Challenges*, Vol. 12, (1992), 68–74.
[158] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163.
[159] R. Churchill, and A. Lowe, *Law of the Sea*, p. 104.
[160] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 219–21.
[161] Ibid. pp. 182–222. These include the Aaland, Bab el Mandev, Bosphorous and Dardanelles, Gibraltar, Hormuz, Kuril, Magellan, Malacca and Singapore, Messina, Northeast and Northwest Passages, Öresund and the Belts, Sunda and Lombok, Tiran and the U.K. Straits.
[162] See D. Pharand, *Canada's Arctic Waters*, pp. 64–7 (Soviet Union) and pp. 46–64 (Canada).
[163] A. Kolodkin, and M. Volosov, 'The legal regime of the Soviet Arctic', 158–63 and W. Østreng, F. Griffiths, R. Vartanov, A. Roginko and V. Kolossov, (ed. W. Østreng) *National Security and International Co-operation in the Arctic – The Case of the NSR*', (Dordrecht, Kluwer Academic Publishers, 1999), p. 72. The retreat by Russia from use of this principle was also noted by E. Nikitina, 'Interview', 18 March 1993.
[164] W. Østreng, F. Griffiths, R. Vartanov, A. Roginko and V. Kolossov, *National Security*, pp. 70–2. See however, N. Koroleva, V. Markov and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 92 who note, '(A)s far as polar sectors are concerned, the lines determining their lateral limits, are not state frontiers. However, the special nature and significance of the Arctic seas for the coastal state give grounds to regard the polar sectors as zones of their economic and defence interests, and to use the corresponding meridians for delimitation of exclusive economic zones and national continental shelves in this area as provided for by the 1982 Convention'.
[165] See S. Anaya, *Indigenous Peoples in International Law*, (Oxford, Oxford University Press, 1996).
[166] M. Volosov, 'Interview', Central Marine Research & Design Institute (CNIIMF), St. Petersburg, March 1993. N. Koroleva ordered from the author Norwegian legislation addressing the Saami approximately the same time.
[167] W. Østreng, F. Griffiths, R. Vartanov, A. Roginko and V. Kolossov, *National Security*, 221–37. The Norwegian newspaper *Aftenposten*, 23 November 1997, p. 9 in a short notice, 'Russian submarines continue in the Arctic', notes that a Russian Admiral is cool to an announced withdrawal of American submarines from the Arctic. 'A propaganda ploy to demonstrate the U.S. desire for peace', was his comment to Interfax on the 22 November 1997. (Translation by author). U.S. withdrawal of its Arctic submarines has been denied by both J.A. Roach, 'Correspondence', 1 December 1997 as well as A. Yakovlev, 'Correspondence', 2 December 1997.
[168] W. Østreng, F. Griffiths, R. Vartanov, A. Roginko and V. Kolossov, *National Security*, 264–5. The Russian authors note, 'Their ("indigenous peoples") natural environment is being undermined, traditional lifestyles destroyed, they are totally deprived when facing the authorities, the military and the oil industry, and it is difficult to guarantee their survival in the coming decades'. Parentheses added. See G. Osherenko, D. Schindler, A. Pika and D. Bogoyavlensky, 'The NSR and Native Peoples – Lessons from the 20th Century for the 21st', *INSROP Working Paper*, No. 93, (1997), IV.4.1., 1–2, and 51–66 for recommendations.
[169] See R.D. Brubaker, 'The Legal Status of the Russian Baselines in the Arctic', *Ocean Development and International Law*, Vol. 30, (1999), 191–233.
[170] W. Schachte, 'International Straits and Navigational Freedoms', 19.
[171] See 'Air Transport Agreement between the Government of the United States of America and the Government of the Russian Federation', 14 January 1994; and 'Technical Agreement between the Department of Transportation of the United States of America and the Ministry of Transport of the Russian Federation', 14 January 1994. Obtained from Chief of Office, R. Reis, Aviation Program & Policy Office, United States Department of State, Washington, D.C.
[172] North Atlantic Treaty Organisation, April 4 1949, (NATO), *UNTS*, Vol. 34, (1949), p. 243.
[173] A. Yakovlev, 'Interview' 25 February, 1994, and 'Interviews', Russian – American Seminar, 23–6 August 1994. See R.D. Brubaker and W. Østreng, 'The Northern Sea Route Regime – Exquisite Superpower

Subterfuge?' *Ocean Development and International Law*, Vol. 30, (1999), 299–331, who indicate the Northern Sea Route has little genuine military strategic value for either Russia or the U.S. due to depth and ice conditions. Additionally, satellite surveillance probably accomplishes most of that previously performed by aircraft.

174 Letter of Review, 30 July 1997, R.D. Brubaker, 'Straits in the Russian Arctic', *Ocean Development and International Law*, Vol. 32, (2001), 263–87.

175 R. Fife, Director General of the Legal Department, Norwegian Ministry of Foreign Affairs, 'Telephonic Interview', 3 March 2004, noted the importance of Article 234 for the protection of fragile ecosystems in ice-covered areas. Norway follows closely developments relating to the application and interpretation of this provision, but has not as yet defined the full potential of non-discriminatory measures that may be introduced, *inter alia* on the basis of the best available scientific evidence. The rules pertaining to ice-covered areas are viewed as not affecting other principles and rules of the international law of the sea although, as *lex specialis*, they prevail over the general rules contained in LOSC Article 211(5) and (6) and Article 220(3–6). Hitherto, the need for such particular environmental measures north of Svalbard has not been viewed as acute. D. Mjååland, Assistant Director, Norwegian Foreign Ministry, 'Telephonic Interview', 13 September 1994. N. Koch, Embassy Advisor, Royal Danish Embassy Oslo, 'Correspondence', 4 October 1994.

176 A. Kolodkin, 'Interview – Northern Sea Route Expert Meeting', 13 October 1992, Tromsø, indicated in accordance with the Decree of the Supreme Soviet of the Russian Federation dated 12 December 1991, on the Ratification of the Commonwealth Agreement (8 December 1991), all laws enacted by the Supreme Soviet of the U.S.S.R. are in force within the Russian Federation. Russia will adopt all Soviet Arctic legislation as long as it is not contradictory to the Russian Constitution. This is confirmed by G. Danilenko, Director, Centre for International Law, Institute of State and Law, Russian Academy of Sciences 'The New Russian Constitution and International Law', *American Journal of International Law*, Vol. 88, (1994), 456–7, citing Articles 125(2) and 106 of the Constitution of the Russian Federation (1993). These allow review of treaties both ratified and non ratified and in force and not in force by the Constitutional Court. The Constitution appears in Rossiiskaya Gazeta, (in Russian), 25 December 1993, and is translated in *Constitutions of the Countries of the World*, Vol. 16, (eds. A. Blaustein & H. Gisbert 1993), p. 3. It is assumed the same policy governs other evidence of State practice as well.

177 W. Butler, *The Soviet Union and the Law of the Sea*, (London, Johns Hopkins Press, 1971), p. 14.

178 Ibid. p. 15 notes that especially the unsigned editorials reflected the views of the Soviet leadership. 'S. Borisov' writing 'particularly cogent' critiques of ICJ decisions in the Soviet legal journal *Sovetskoe gosudarstvo i pravo*, was a *nom de plume* of the Soviet Judge on the ICJ, S. Krylov. Ibid. p. 14 notes however Soviet authors '. . . can give an exaggerated impression of Soviet disaffection with existing world order. It is therefore essential to ascertain whether Soviet doctrine corresponds to legislation in force and state practice.' See also E. Franckx, *Maritime Arctic Claims*, p. 295 who notes that the legal scholars of the Soviet Union (and Canada as well) provided the governments 'right from the start' with a large range of legal arguments on which the governments could base their 'partial or all-embracing' maritime Arctic claims. During the early period of marine expansion however the Soviet government (and the Canadian) were reluctant to utilise such radical arguments.

179 W. Butler, *The Soviet Union and the Law of the Sea*, pp. 14–6.

180 Though W. Butler, *The Soviet Union and the Law of the Sea* may be somewhat dated, the present author's experience with regards to Russia has been somewhat similar, including difficulty in obtaining an overview, even over newly adopted legislation listed on Internet. See Chapter 4.

181 <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/RUS.htm>. See <http://www.garant.ru>, <http://www.pravo.drd.ru> and <http://www.sea-law.ru> (in Russian) with subscription. It is also possible to contact <gov@garant.ru>.

182 A. Kolodkin, and M. Volosov, 'The legal regime of the Soviet Arctic', 166.

183 See Chapter 7, J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 200–207 and *Limits in the Seas*, No. 112, pp. 6, 16, 68, 71.

[184] A. Kolodkin, 'Interview', 25 February 1994; R. Churchill, 'Telephonic Interview', 16 June 1994, Oslo, regarding the U.K. and the E.U.; D. Mjååland, 'Telephonic Interview', May 1994, Oslo, regarding Norway; and Officials of the French Defence and Foreign Ministries, 'Unanswered Questions', INSROP Meeting, Paris, November 1993.

[185] See W.M. Reisman, 'The Regime of Straits and National Security', 52–3, 69; V. Aleksin, Rear Admiral, Russian Navy, 'We Are Ready When You Are', *U.S. Naval Institute Proceedings*, (March 1993), 54–7; G. Galdorisi, Captain, U.S. Navy, 'Who Needs the Law of the Sea?', ibid.; (July 1993), 72; C. Carlson, Lt. USNR, 'How Many SSN's Do We Need?', ibid., 49–50; J. Brooke, 'Do We Really Need a Third Seawolf' Chapter 4, 9; and W. Østreng, 'Stumbling Block', 3, 15–7.

Chapter 4

[186] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 160–3.

[187] W. Butler, 'Joint ventures and the Soviet Arctic', 174 notes '(T)he relationship among the capacities of a vessel, the rights of passage under international law, ice, and coastal State interests in averting pollution or mishap is a dimension of international law that deserves more serious consideration'.

[188] The following information is obtained from D. McRae, 'The Negotiation of Article 234', in (ed. F. Griffiths), *Politics of the Northwest Passage*, (Kingston, McGill-Queens University Press, 1987), pp. 102–10, and M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, pp. 392–6, unless noted otherwise.

[189] See the proposals by Greece, Netherlands, Norway, Sweden and the U.K. as maritime powers in IMCO Doc. MP/CONF/C.1/W.P. 36. See the proposals by Australia, Brazil, Canada, Ghana, Iceland, Indonesia, Iran, Ireland, New Zealand, Philippines, Spain, Uruguay, and Trinidad and Tobago as coastal States in IMCO Doc. MP/CONF/C.1/W.P. 35.

[190] *Official Records of the Third United Nations Conference on the Law of the Sea, (Official Records)*, Vol. IV, p. 174, A/CONF.62/WP.8/Part III, (ISNT), (1975), Article 20(5). '(N)othing in this Article shall be deemed to affect the establishment by the coastal State of appropriate non-discriminatory 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'.

[191] See D. McRae and D. Goundrey, 'Environmental Jurisdiction in Arctic Waters. The extent of Article 234', *University of British Columbia Law Review*, Vol. 16, (1982), 213–4.

[192] M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, p. xiv. Ibid. p. 393 implies that the former negotiations were trilateral. D. McRae, 'The Negotiation of Article 234', 108 indicates that they were bilateral between Canada and the other two major Arctic States.

[193] Preservation of the Marine Environment (March 1976, mimeo.), Article 20, Paragraph 5, reproduced in R. Platzöder, (ed.) *Third United Nations Conference on the Law of the Sea: Documents*, Vol. XI, pp. 530–1. Emphasis removed. 'Where international rules and standards are inadequate to meet special circumstances and where the coastal State has reasonable grounds for believing that a particular, clearly defined area of its economic zone is an area where, for recognised technical reasons in relation to its oceanographic and ecological conditions, as well as its utilisation or the protection of its resources, and the particular character of its traffic, the adoption of special mandatory measures for the prevention of pollution from vessels is required, the coastal state may for that area, after appropriate consultation with any other countries concerned, establish laws and regulations for the prevention, reduction and control of pollution from vessels, implementing such rules and standards as have been made applicable by the competent international organisation for other "special areas".'

[194] Outline of Issues (1976, mimeo.), Section I, item 2(b)(i) (Chairman, Informal Meetings), reproduced in R. Platzöder, *Documents*, Vol. X, p. 449. In relevant part, 'Right of coastal States to establish, on the

basis of scientific criteria, non-discriminatory national laws and regulations more stringent than international rules and standards to protect vulnerable areas where ice creates obstructions or exceptional hazards to navigation'.

[195] The predecessor to Article 211, dealing with 'special measures', applied more broadly to special areas of the economic zone, was narrower in scope, and the measures adopted were subject to review by the IMCO.

[196] *Official Records*, Vol. V, p. 180, A/CONF.62/WP.8/Rev.1/Part III (RSNT, 1976), Article 43. 'Coastal States have the right to establish 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 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 of the marine environment based on the best available scientific evidence'.

[197] *Official Records*, Vol. VIII, p. 40, A/CONF.62/WP.10 (ICNT, 1977), Article 235. The term, 'exclusive' was added to 'economic zone'.

[198] A/CONF.62/WP.10/Rev.1 (ICNT, Rev.1, 1979, mimeo.), Article 234, reproduced in R. Platzöder, *Documents*, Vol. I, p. 477; and A/CONF.62/WP.10/Rev. (ICNT, Rev., 1980, mimeo.), Article 234, reproduced in R. Platzöder, *Documents*, Vol. II, p. 105.

[199] See D. McRae, 'The Negotiation of Article 234', 108 who notes most States had little knowledge or appreciation of the problems involved, and supported whatever could be worked out by those States directly affected.

[200] D. McRae and D. Goundrey, 'Article 234', 213–4.

[201] Ibid., 211.

[202] D. McRae, 'The Negotiation of Article 234', 109.

[203] The U.S. Supreme Court in *U.S. v. Locke*, 529 U.S. 89, 120 S.Ct. 1135 (2000) held that several of Washington's laws unilaterally regulating oil tankers in state waters were pre-empted by U.S. Federal legislation. Ibid. 1145, however, refrains from applying the supremacy of international treaties and relies instead on the pre-emptive effect of the Federal statutes. Given the Court's restraint in applying international treaties which the U.S. has ratified, the Court would probably be even less likely to apply international treaties which the U.S. has not ratified, yet made declarations, such as the LOSC. Washington state responded by making its program voluntary, while Maine responded by making revisions. E. Gold, 'Marine Pollution Liability After "Exxon Valdez"; The U.S. "All-Or-Nothing" Lottery!' *Journal of Maritime Law and Commerce*, Vol. 22, (1991), 433–4 indicates the U.S. institutions supporting IMO solutions and opposed to Congressional adoption of OPA 1990 included President G. Bush, the U.S. State Department, the United States Coast Guard (U.S.C.G.) and the Maritime Law Association of the U.S.

[204] See below.

[205] International Convention on the Prevention of Pollution from Vessels, 2 November 1973, *UNTS*, Vol. 1340, (1983), p. 61, as amended by the Protocol, 1 June 1978, *New Directions*, Vol. IV, (1975) (MA POL 73/78), p. 345 and M. Nordquist and K. Simmonds, (eds.), *New Directions in the Law of the Sea*, (London, Oceana Publications, 1980), Vol. X, (1980), p. 32. With Annexes I and II State Parties represented 97% of the world's gross tonnage. This includes as Parties the U.S., Russia, Canada, Norway and Denmark/Greenland. See *Yearbook of International Co-operation on Environment and Development 2003/2004 Green Globe Yearbook*, (eds. O.S. Stokke and Ø. Thommessen), (London, Earthscan Publications Ltd, 2003), pp. 144–6.

[206] See P. Birnie and A. Boyle, *International Law & the Environment*, (2nd ed.) (Oxford, Oxford University Press, 2002), pp. 359–77; R. Churchill and A. Lowe, *Law of the Sea*, pp. 328–9, 338–42, 346–52; and generally E. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, (Utrecht, Utrechts Instituut voor Rechtswetenschappelijk Onderzoek, 1998); and K. Hakapää, *Marine Pollution in International Law – Material Obligations and Jurisdiction*, (Helsinki, Suomalainen Tiedeakatemia, 1981).

[207] Convention on the High Seas, of 29 April 1958, (High Seas Convention), *UNTS*, Vol. 450, (1963), p. 11.

[208] R. Churchill and A. Lowe, *Law of the Sea*, pp. 344–6. It is noted flag States generally have failed to take proper enforcement action.

[209] Convention on the Law of Treaties, 23 May 1969, (Vienna Convention), *UNTS*, Vol. 1115, (1978), p. 331.

[210] See W. Butler, 'Anglo-Soviet Links and the Law of the Sea', W. Butler, (ed.), *The Law of the Sea and International Shipping – Anglo-Soviet Post-UNCLOS Perspectives*, (New York, Ocean Publications Inc. 1985), p. v., who notes, '(S)oviet interpretations and applications of the 1982 UNCLOS will have an impact far beyond the States mostly associated with her; within the Convention framework, Soviet State practice in all its forms will be the benchmark for dozens of other Countries who have ratified or will ratify the Convention'. E. Franckx, 'The New U.S.S.R. Legislation on Pollution Prevention in the Exclusive Economic Zone', *International Journal of Estuarine and Coastal Law*, Vol. 1, (1986), 158–9 notes, 'great powers will have more influence than others on the formation of customary rule', which as leading maritime States are, 'in a position to disrupt the desired stability of expectations by military, economic or political means'.

[211] K. Wolfke, *Custom in Present International Law*, (Dordrecht, Martinus Nijhoff Publishers, 1993), pp. 78–9. See also M. Akehurst, *A Modern Introduction to International Law*, (6th edition) (London, Unwin Hyman, 1987), p. 31.

[212] See K. Wolfke, *Custom*, pp. 78–9 and R. Churchill and A. Lowe, *Law of the Sea*, pp. 232–8.

[213] M. Akehurst, *A Modern Introduction*, p. 31.

[214] Ibid.

[215] C. de Visscher, *Theory and Reality in Public International Law*, (Princeton, Princeton University Press, 1957), p. 155, notes, '(A)mong the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way . . . Their role, which was always decisive in the formation of customary international law, is to confer upon usages that degree of effectiveness without which the legal conviction, condition of general assent, would find no sufficient basis in social reality'. H. Lauterpacht, *British Yearbook of International Law*, Vol. 27, (1950), 394, notes '(I)n a matter closely related to the principle of the freedom of the sea the conduct of the two principal maritime Powers – such as Great Britain and the United States – is of special importance . . . generally these two states inaugurated the development and their initiative was treated as authoritative almost as a matter of course from the outset'. However, W. Butler, 'The Legal Regime of Soviet Marine Areas', *The Soviet Maritime Arctic*, p. 223 commenting the U.S.S.R.–U.S. Joint Statement states, '(H)ow influential a Joint Statement by 2 powerful maritime nations, only one of them a signatory to the 1982 LOS, will be as an interpretation of that Convention must await the practices of other states which are parties to the 1982 LOS'.

[216] See below.

[217] See L. Henkin, R. Pugh, O. Schachter, H. Smit, *International Law – Cases and Materials*, (St. Paul, West Publishing Co. 1980), p. 36; R. Churchill and A. Lowe, *Law of the Sea*, p. 7; K. Hakapää, *Marine Pollution*, p. 130; and I. Brownlie, *Principles*, pp. 5 and 7.

[218] Statute of the International Court of Justice, *United Kingdom Treaty Series*, 1946, p. 67.

[219] D. Harris, *Cases and Materials on International Law*, (4th ed.), (London, Sweet & Maxwell, 1991), p. 42 suggests in the early formation of the rule it might be more correct to view the States putting forth an 'offer' for other States to accept or reject rather than an acknowledgement of a binding rule. I. Brownlie, *Principles*, p. 11, notes, '(S)ince delict cannot be justified by an allegation of a desire to change the law, the question of *opinio juris* arises in a special form and in the early stages of change can amount to little more than a plea of good faith'.

[220] I. Brownlie, *Principles*, pp. 10–1 and M. Akehurst, *A Modern Introduction*, p. 29.

[221] I. Brownlie, *Principles*, p. 7. Judge Tanaka in his dissenting opinion in the *North Sea Continental Shelf Cases*, ICJ Reports (1969), p. 176, stated, '. . . it is extremely difficult to get evidence of its (*opinio juris*) existence in concrete cases. This factor, relating to international motivation and being of a psychological nature, cannot be ascertained very easily, particularly when diverse legislative and executive organs of

a government participate in an internal process of decision-making in respect of ratification or other State acts'. Parentheses added.

[222] ICJ Reports (1950), pp. 276–7. Italics added.

[223] I. Brownlie, *Principles*, p. 7.

[224] Ibid., D. Harris, *Cases and Materials*, p. 42 and L. Henkin, R. Pugh, O. Schachter, H. Smit, *Cases and Materials*, p. 65.

[225] ICJ Reports (1984), pp. 293–4.

[226] Ibid. (1969), pp. 154–257.

[227] Ibid. (1982), p. 18.

[228] ICJ Reports (1969), p. 247. There were six dissents against eleven. Convention on the Continental Shelf, Done at Geneva on 29 April 1958, *UNTS*, Vol. 499, (1964), p. 312.

[229] H. Lauterpacht, *The Development of International Law by the International Court*, (London, Stevens, 1958), p. 380.

[230] ICJ Reports (1969), pp. 228–31. Footnotes omitted. The passage, '(M)uch uncertainty and contradiction' is taken from the *Asylum Case*, ICJ Reports (1959), p. 277.

[231] I. Brownlie, *Principles*, p. 7. See also D. Harris, *Cases and Materials*, p. 42 and L. Henkin, R. Pugh, O. Schachter, H. Smit, *Cases and Materials*, p. 65.

[232] ICJ Reports (1986), p. 14.

[233] PCIJ Reports, Ser. A, No. 10, p. 28.

[234] ICJ Reports (1969), pp. 44–5. I. Brownlie, *Principles*, pp. 8–9, citing ICJ Reports (1969), pp. 28, 32–41, notes this decision may not completely indicate that it negates the presumption that general practice raises a presumption of *opinio juris*. The ICJ rejected the practice concerning the equidistance – special circumstances method of delimiting the continental shelf as being merely experimental prior to the 1958 TSC's coming into force. Additionally following this the equidistance principle in Article 6 was not of a norm creating nature, the 1958 TSC had been in force for only three years. However seen as a total, the ICJ is 'hostile to the presumption as to *opinio juris*'.

[235] ICJ Reports (1986), pp. 108–9.

[236] See Chapter 2 and below. It may be mentioned in this context though less important now for Russia due to the its ratification of LOSC that Russia may continue to follow the Soviet view concerning the contractual nature of international law. Under this any customary rules likely would have to be viewed as an implied contract in order for it to be bound. See generally R. Müllerson, 'Agora: New Thinking by Soviet Scholars, Sources of International Law: New Tendencies in Soviet Thinking', *American Journal of International Law*, Vol. 83, (1989), 494, M. Akehurst, *A Modern Introduction*, pp. 31–2, L. Henkin, R. Pugh, O. Schachter, H. Smit, *Cases and Materials*, pp. 68–9 and D. Harris, *Cases and Materials*, pp. 21–2.

[237] M. Akehurst, *A Modern Introduction*, p. 30.

[238] L. Henkin, R. Pugh, O. Schachter, H. Smit, *Cases and Materials*, p. 65. See also M. Akehurst, 'Custom as a Source of International Law', *British Yearbook of International Law*, Vol. 47, (1974–5), 31, and A. D'Amato, *The Concept of Custom in International Law* (Ithaca, Cornell University Press, 1971), p. 24.

[239] Ibid.

[240] See below and Chapter 6.

[241] See Chapter 8.

[242] R. Churchill and A. Lowe, *Law of the Sea*, pp. 102–4.

[243] See Chapter 8.

[244] ICJ Reports, (1969), pp. 41–2.

[245] Ibid., pp. 39–40. Parentheses added.

[246] R. Churchill and A. Lowe, *Law of the Sea*, pp. 7–8. See also I. Shearer, *Starke's International Law*, (London, Butterworths, 1994), p. 36, K. Wolfke, *Custom*, pp. 18–9, and R. Jennings and A. Watts (eds.) *Oppenheim's International Law*, (Essex, Longman Group UK Limited, 1993), p. 29.

[247] See below.

[248] Ibid.

[249] ICJ Reports (1950), p. 266.

[250] Ibid. p. 276. The ICJ noted, '(T)he Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State'. See the *U.S. National in Morocco Case*, ICJ Reports (1952), pp. 199–200 and I. Brownlie, *Principles*, p. 9. A. D'Amato, *The Concept of Custom*, pp. 246–63 notes to the contrary local customary rules are true tactic agreements requiring acceptance by all States bound by them.

[251] ICJ Reports (1960), pp. 40, 43. The ICJ noted, '(T)he Court, therefore, concludes that, with regard to private persons, civil officials and goods in general there existed during the British and post British periods a constant and uniform practice allowing free passage between Daman and the enclaves. This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime . . . which occurred when India became independent, the Court is . . . satisfied that that practice was accepted as law by the parties and has given rise to a right and a correlative obligation . . . As regards armed forces, armed police and arms and ammunition, the position is different . . . The practice that was established shows that, with regard to these categories, it was well understood that passage could take place only by permission of the British authorities. This situation continued during the post-British period'.

[252] D. Harris, *Cases and Materials*, p. 27, I. Shearer, *Starke's*, p. 34, K. Wolfke, *Custom*, p. 88 and L. Henkin, R. Pugh, O. Schachter, and H. Smit, *Cases and Materials*, pp. 53–9.

[253] R. Jennings and A. Watts, *Oppenheim's*, p. 30, K. Wolfke, *Custom*, p. 90, and I. Brownlie, *Principles*, p. 11.

[254] I. Brownlie, *Principles*, p. 10. See R. Jennings and A. Watts, *Oppenheim's*, p. 30 who believe clear assent is required. K. Wolfke, *Custom*, p. 90 believes for particular customary rules, similar to the general, the presumption of binding force on States not participating in the formation of the rules may not be excluded if their membership is warranted in a group. The author notes other basis for groups include political, ethnic, and economic.

[255] See below.

[256] S. Murase, 'Unilateral Measures and The Concept of Opposability in International Law – Might and Right in International Relations', *Thesaurus Acroasium* (Athens, Sakkoulas Publications, 1999), Vol. 27, 406–7.

[257] Ibid. 414.

[258] Ibid. R. Churchill and A. Lowe, *Law of the Sea*, p. 198, commenting the equidistance principle note even if the divergent practice of other States is great and practice insufficient to establish a rule of law of general application, the principle of opposability is likely to secure the utilisation of a principle as a starting point for similar measures in other areas.

[259] S. Murase, 'Unilateral Measures', 412–3.

[260] Ibid.

[261] See ibid. 407–29 for further discussion.

[262] ICJ Reports, (1951), p. 131. The ICJ noted, '(I)n any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast'.

[263] R. Churchill and A. Lowe, *Law of the Sea*, p. 8.

[264] Ibid. p. 9.

[265] Ibid.

[266] I. Brownlie, *Principles*, p. 632. The author notes that jurisprudence of the ICJ support the 'textual approach', as do the International Law Commission and the Institute of International Law. D. Harris, *Cases and Materials*, pp. 774–5 notes that the U.S. argued in the Conference negotiations for the 'intention of the parties' approach, while France and Great Britain argued for the 'textual approach'. See also L. Henkin, R. Pugh, O. Schachter, H. Smit, *Cases and Materials*, pp. 622–8.

[267] I. Brownlie, *Principles*, p. 637. M. Akehurst, *A Modern Introduction*, p. 203 notes the textual method does not always provide a clear answer, since treaties are often drafted with less than precise and technical language, either deliberately or because politicians sometimes draft the treaties. See also W. Reisman

and J. Baker, *Regulating Covert Action – Practices, Contexts and Polices of Covert Coercion Abroad in International and American Law*, (New Haven, Yale University Press, 1992), pp. 141–2. The authors argue, '(I)n determining what is lawful under international law, it is important to use contextual and consequential methods of inquiry rather than methods of textual and logical derivation . . . First, international law is structurally different from developed domestic systems and perforce uses a different method for assessing lawfulness . . . Second, not everything that is permitted in international law should be automatically deemed permissible in particular cases. One should not pretend that the defects of international law are a virtue'.

[268] See D. Harris, *Cases and Materials*, p. 767.

[269] Ibid. I. Brownlie, *Principles*, p. 637 and D. Harris, *Cases and Materials*, p. 766–7 note yet a third school, the 'teleological approach', allows the Court to determine what the objects and purposes of the treaty are, and then to resolve any ambiguity by bringing 'the substance 'necessary' to give effect to the purposes of the treaty'. With this there is always a danger of 'spilling over' into judicial legislation, and thus not constituting interpretation, but rather amendment of a treaty to make it conform to what the judge believes is its true purposes. I. Brownlie, *Principles*, p. 637, notes, 'a judicial implementation of purposes in a fashion not contemplated in fact by the parties' thus may be allowed. To make the issue dependent upon intentions, 'involves either an abortive search or an artificial construction that does not in fact represent their intentions'. See also M. Akehurst, *A Modern Introduction*, pp. 203–4.

[270] See D. Harris, *Cases and Materials*, p. 766 and M. Akehurst, *A Modern Introduction*, p. 203.

[271] D. Harris, *Cases and Materials*, p. 766. However it is added that the differences may, when analysed be found to be more of emphasis and methodology than principle.

[272] I. Brownlie, *Principles*, p. 632, and D. Harris, *Cases and Materials*, p. 770.

[273] R. Churchill and A. Lowe, *Law of the Sea*, p. 460 and I. Sinclair, *The Vienna Convention on the Law of Treaties*, (2nd. ed.), (Manchester, Manchester University Press, 1984), p. 138.

[274] M. Akehurst, *A Modern Introduction*, pp. 204–5.

[275] Subsequent practice itself has some ranking over the *travaux préparatories* which under Article 32 and as adopted at the Conference are meant to be a supplementary means of interpretation. See I. Brownlie, *Principles*, pp. 632–36; and D. Harris, *Cases and Materials*, pp. 774–5. I. Sinclair, *The Vienna Convention*, p. 138, notes Article 31(3)(b) does not cover subsequent practice in general, but only a specific form, concordant subsequent practice common to all the parties. Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation within the meaning of Article 32.

[276] See generally S. Nandan and D. Anderson, 'Straits Used for International Navigation', 159–209; and D. McRae, 'The Negotiation of Article 234', 98–114.

[277] Ibid. and R. Churchill and A. Lowe, *Law of the Sea*, p. 112.

[278] The U.S. acknowledged in Presidential Proclamation No. 5030 that a State's jurisdiction and responsibility over environmental control, as well as the natural resources and conservation, in the exclusive economic zone are almost identical to LOSC provisions, and the U.S. 'will recognise those rights and interests consistent with the LOSC'. The U.S. has claimed transit passage is not a change in the law but a continuation of high sea freedoms previously exercised in areas accepted now as 12 mile territorial seas. This is not dealt with further here, due to the U.S.'s own acceptance of the 12 mile territorial sea. Presidential Proclamation No. 5928, 54 *Federal Register*, No. 5, (January 9, 1989), 777. See also W. Schachte Jr. and J. Bernhardt, 'International Straits and Navigational Freedoms', *Virginia Journal of International Law*, Vol. 33, (1993), 530–1. Ibid. 527 notes, 'The views represented . . . reflect those of the United States Executive Branch's Policy Co-ordinating Committee on the Law of the Sea'.

[279] I. Brownlie, *Principles*, p. 635.

[280] See generally R. Churchill and A. Lowe, *Law of the Sea*, pp. 284–9.

[281] See L. Henkin, R. Pugh, O. Schachter, H. Smit, *Cases and Materials*, pp. 630–1. I. Sinclair, *The Vienna Convention*, pp. 137–8. I. Brownlie, *Principles*, p. 635. D. Harris, *Cases and Materials*, p. 771.

[282] PCIJ Reports, Series B, No. 2, (1922), pp. 39–40.

[283] ICJ Reports (1952), p. 107.

[284] R. Churchill and A. Lowe, *Law of the Sea*, pp. 11–2 and D. Harris, *Cases and Materials*, p. 772.

[285] K. Wolfke, *Custom*, p. 41.

[286] Judge Read in dissent in the *Anglo-Norwegian Fisheries Case*, ICJ Reports (1951), p. 191, held '(C)ustomary international law is the generalization of the practice of States. This cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships. Such claims may be important as starting points, which, if not challenged, may ripen into historic title in the course of time. The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration'. See K. Wolfke, *Custom*, p. 42.

[287] ICJ Reports (1969), p. 43. The ICJ held, '(T)he Court must now consider whether State practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement . . . some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the l958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle – in the majority of the cases by agreement, in a few others unilaterally – or else the delimitation was foreshadowed but has not yet been carried out'. See also M. Akehurst, *A Modern Introduction*, pp. 28, 32–42.

[288] ICJ Reports (1974), pp. 47, 56–8, 81–8, 119–120, 135 and 161. M. Akehurst, *A Modern Introduction*, p. 28 footnote 4, notes that 10 of the 14 judges presumed the existence of customary rules from claims in the absence of enforcement measures, while the remaining four judges did not deal with the issue.

[289] The Judgement in the *Case of Nicaragua v. USA*, (Merits) ICJ Reports, (1986) pp. 99–108 relies extensively upon U.N. General Assembly Resolutions as practice. See also D. Harris, *Cases and Materials*, pp. 28 and 61–2 and M. Akehurst, A *Modern Introduction*, pp. 28–9.

[290] M. Akehurst, *A Modern Introduction*, pp. 28, 32–42 and R. Jennings and A. Watts (eds.) *Oppenheim's*, pp. 26–7. I. Shearer, *Starke's*, pp. 32–3 notes that both conduct and statements are on the same footing, but there must be a recurrence or repetition of the acts which give birth to the customary rule. L. Henkin, R. Pugh, O. Schachter, and H. Smit, *Cases and Materials*, pp. 36 and 53 note, '(I)f deeds and not words were to count as protests, would this not exacerbate international relations?' See also I. Brownlie, *Principles*, p. 5.

[291] W. Schachte, Jr., 'Speech – The Value of the 1982 U.N. Convention on the Law of the Sea – Preserving our Freedoms and Protecting the Environment', Conference of the Law of the Sea Institute, Malmø, (8 August 1991), 15 noted, '(T)he United States believes that the 1982 LOSC Convention reflects customary international law for protecting and preserving the marine environment'. W. Schachte, 'Interview', Malmø, 8 August, 1991, noted that in spite of the disclaimer, this speech was cleared by U.S. government officials and accurately reflected U.S. policy.

[292] See below and Chapters 5 and 6.

[293] See below and Chapter 5.

[294] D. Vidas, 'Antarctic Treaty System and the law of the sea: a new dimension introduced by the Protocol,' (eds. O.S. Stokke and D. Vidas), *Governing the Antarctic: the effectiveness and legitimacy of the Antarctic Treaty System*, (Cambridge, Cambridge University Press, 1996), pp. 65–6.

Those endorsing the former view include S. Müler, 'The Impact of UNCLOS III on the Antarctic Regime', *Antarctic Challenge*, Vol. 1. (R. Wolfrum ed.), (Berlin, Duncker und Humblot, 1984), p. 174; G. Triggs, 'The Antarctic Treaty System: some jurisdiction problems', (ed. G. Triggs), *The Antarctic Treaty regime; law, environment and resources*, (Cambridge, Cambridge University Press, 1987), p. 92; E. Sahurie, *The International Law of Antarctica*, (Dordrecht, Martinus Nijhoff Publishers, 1991), p. 442; S. Amerisinghe, *UNGA Document A/PV.* 2380, the President of UNCLOS III speaking as Representative of Sri Lanka at the 30th session of the General Assembly, pp. 13–6; M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, p. 393; J. Kindt, 'A Regime for Ice-Covered Areas: The Antarctic and Issues Involving Resource Exploitation and the Environment', (eds. C. Joyner and S. Chopra), *The Antarctic Legal Regime*, (Dordrecht, Martinus Nijhoff Publishers, 1988), pp. 187–215; and D. Rothwell, *The Polar Regions and the Development of International Law*, (Cambridge, Cambridge University Press, 1996), p. 294.

Those supporting the latter view include F. Orrego Vicuña, 'The Law of the Sea and the Antarctic Treaty System: New Approaches to Offshore Jurisdiction', (C. Joyner and S. Chopra eds.), *The Antarctic Legal Regime*, p. 101; C. Joyner, *Antarctica and the Law of the Sea*, (Dordrecht, Martinus Nijhoff, 1992), pp. 157–8; and the U.N. Secretary-General, U.N. Doc. A/41/722, 17 November 1986, p. 29.

[295] R.D. Brubaker, 'Correspondence – the Foreign and Commonwealth Office of the United Kingdom', 5 October 1994. The U.K. has no plans to extend it to the British Antarctic Territory. The Foreign Ministries of Australia, Chile, France, and New Zealand, failed to respond.

[296] R.D. Brubaker, 'Correspondence – the Ministry of Foreign Affairs of Argentina', 29 September 1994. The Law of Maritime Space, Official Bulletin Number 25.278 of 5 December 1991 Article 1(3) states, 'In regards to the Antarctic Argentine Zone, of which Argentine has sovereign rights, the basic lines will be established by a subsequent Law'. At the same time Chile used the precautionary principle and Article 234 to ban transport of ultrahazardous radioactive materials from its exclusive economic zone. See J. Van Dyke, 'Sea Transport of Ultrahazardous Radioactive Materials', *Ocean Development and International Law*, Vol. 33, pp. 88 and 102, footnote 134.

The Antarctic Treaty Consultative Meeting also placed the Conference on the Harmonisation of Polar Ship Rules on their agenda. V. Santos-Pedro, Regional Director – Transport Canada, 'Interview', 3 March 1998. See below for clarification of Article 234 as an 'Arctic' article.

[297] See below.

[298] This seems particularly so should Norway and Denmark/Greenland begin the process of implementing Article 234 domestically.

[299] R. Churchill and A. Lowe, *Law of the Sea*, p. 161.

[300] See below. P. Birnie and A. Boyle, *International Law & the Environment*, p. 373. See also R. Churchill and A. Lowe, *The Law of the Sea*, pp. 351–3.

[301] See Chapter 6 for IMO and International Labour Organisation (ILO) Conventions. Discussion is related to the term 'generally accepted', which may have a somewhat lower evidentiary requirement than customary law. K. Hakapää, *Marine Pollution*, pp. 119–21.

[302] M. Belsky, 'Developing a New Rule of Customary International Law', 751–3 notes that LOSC codifies marine pollution control and protection, but that much controversy exists as to whether LOSC non sea bed provisions have become part of customary law. J. Kindt, 'International Environmental Law and Policy; An Overview of Transboundary Pollution', *San Diego Law Review*, Vol. 23, (1986), 600–1 argues that *all* the LOSC transnational pollution Articles 192 to 237 are reflections of established principles of customary law. P. Birnie and A. Boyle, *International Law & the Environment*, pp. 351–3, view the widespread acceptance of the basic treaties on pollution from vessels including MARPOL 73/78 as well as the LOSC articles on the marine environment to likely express principles of customary law. R. Churchill and A. Lowe, *Law of the Sea*, pp. 161–2 note it is doubtful LOSC provisions related to jurisdiction over pollution have passed or are likely quickly to pass into customary law. C. Wang, 'A Review of the Enforcement Regime for Vessel-Source Oil Pollution Control', *Ocean Development and International Law*, Vol. 16, (1986), 305–6 concludes that the different LOSC provisions including Part XII might be either international law, customary international law, customary international practice or merely hollow words, previous to the entry into force of the LOSC.

[303] See R. Churchill and A. Lowe, *Law of the Sea*, pp. 346–53, and generally K. Hakapää, *Marine Pollution*, pp. 25–31, 116–23, 173–7, 183–99, 202–7, 241–6, 271–2.

[304] G. Geipel, Director of Research and Programs, Hudson Institute, Indianapolis, 'Interview', FNI, Oslo, June 1993. R. Smith, 'Interview', U.S. State Department, Washington D.C., 27 June 1994. A. Kolodkin 'Interview', Soyuzmorniiproekt, Moscow, 25 February 1994. E. Gold, 'Interview', Oslo, 23 June 1994. P. Edelman, Attorney, Kreindler & Kreindler, New York, 'Interview'; S. Allen, Assistant Director, Law of the Sea Institute, University of Hawaii, Honolulu, 'Interview'; and A. Yakovlev, 'Interview'; Russian – American Seminar, 23–6 August, 1994. See below.

[305] B. Oxman, 'Interview – Conference Order of the Oceans at the Turn of the Century', 7 August 1998, Oslo, notes the original drafting of Article 234 was not well designed and subsequent comments and changes related to interpretative issues were permitted only to an insignificant degree. Issues related to

Article 234 at an early point were raised to the highest political level through talks conducted between U.S. President R. Nixon and Canadian Prime Minister P. Trudeau.

[306] LOSC Article 211(5). See A. Boyle, 'Remarks – legal regimes of the Arctic', *American Society of International Law Proceedings*, Vol. 82, (1988), p. 328.

[307] Articles 211(4), (5), (6) and Article 220.

[308] D. McRae and D. Goundrey, 'Article 234', 215–22.

[309] *Merriam-Webster's Seventh New Collegiate Dictionary*, (Springfield, G. & C. Merriam Company, 1972), p. 1015. Ibid. lists for 'where', '1a; at, in, or to what place . . . b; at, *in* , or to *what situation*, position, direction, *circumstances*, or respect . . .' Italics added.

[310] Parentheses added.

[311] E. Franckx, *Maritime Arctic Claims*, p. 96.

[312] See below and Chapter 5. See also J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 200–7, W. Schachte, 'International Straits and Navigational Freedoms', 18–9, *Limits in the Seas*, No. 112, pp. 68–71, and E. Franckx, *Maritime Arctic Claims*, p. 293.

[313] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 207 and 211 footnote 79 note that though the U.S. has protested the Canadian legislation as an unlawful interference with navigational rights and freedoms, it consults Canada 'in the development of standards and operation procedures to facilitate commercial navigation in the Arctic', and considers U.S. commercial vessels to be subject to the law. See below. The same may have been true regarding the U.S. response to the Russian rules, considering the U.S. – Russian discussions. Additionally, the U.S. State Department has indicated generally the U.S. position in relation to Russia, could be 'extrapolated'. J.A. Roach, 'Interview – 1995 Joint Conference, The American Society of International Law and Nederlandse Vereniging voor International Recht', The Hague, 13 July 1995.

[314] J.A. Roach, 'Interview', U.S. State Department, Washington D.C., 27 June 1994.

[315] See generally M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, pp. 226, 232, 376–7, 462; and M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, pp. 345–7, 396–7.

[316] Article 24(1)(b) deals with non hampering of innocent passage through discriminatory practice in form or fact, Article 25(3) with temporary non discriminatory suspension of innocent passage in the territorial sea, Article 42(2) with non hampering of transit passage through discriminatory practice in form or fact, and Article 52(2) with temporary non discriminatory suspension of innocent passage in archipelagic waters. Article 227, in Part XII Section 7, Safeguards, states that States shall not discriminate in form or fact against foreign vessels.

[317] See Chapter 6.

[318] R. Churchill and A. Lowe, *Law of the Sea*, p. 350 note possibly as an oversight in drafting, the Safeguards Section 7 does not apply to Article 234 in Section 8.

[319] See Chapter 5.

[320] See M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, pp. 394–5.

[321] A. Boyle, 'Remarks', 327 notes, '(I)f this wording ('non discriminatory', 'for the prevention, reduction and control of pollution', and have 'due regard for navigation') preserves intact rights of freedom of navigation or innocent passage in Arctic waters, then it will not allow for the prohibition or extended control of passage that national laws seem to contemplate'. Parentheses added.

[322] *Black's Law Dictionary*, Fifth Edition, (St. Paul, West Publishing Co. 1979), pp. 448 and 450. No case law is listed. See however D. McRae and D. Goundrey, 'Article 234' 220–1.

[323] A. Boyle, 'Remarks', p. 327.

[324] D. McRae and D. Goundrey, 'Article 234', 221. A. von der Essen, 'The Arctic and Antarctic Regions', *A Handbook on the Law of the Sea*, (eds. R. Dupuy and D. Vignes), (Dordrecht: Kluwer, 1991), pp. 525–7.

[325] See A. Boyle, 'Remarks', p. 327.

[326] Ibid. See also W. Westermeyer and V. Goyal, 'Jurisdiction and Management of Arctic Marine Transportation', *Arctic*, Vol. 39 (December 1986), 338.

[327] Ibid.

[328] A. Boyle, 'Remarks', p. 328, R. Churchill and A. Lowe, *Law of the Sea*, p. 348 and D. Pharand, *Canada's Arctic Waters*, p. 237.

[329] See M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, p. 397 who believe the choice of words to be deliberate. Parentheses added.

[330] A. Boyle, 'Remarks', p. 328.

[331] N. Koroleva, V. Markov and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 75.

[332] See below and Chapter 5.

[333] D. McRae and D. Goundrey, 'Article 234', 220–1.

[334] 'Due regard to . . .' seems to be implicit in the passage.

[335] See E. Hey, The precautionary approach – Implications of the revision of the Oslo and Paris Conventions, *Marine Policy*, Vol. 15, (1991), 244. The definition from the Preamble of the Declaration of the Second International Conference on the Protection of the North Sea in 1987 states, '(A)ccepting that, in order to protect the North Sea from possible damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear evidence . . .' See also P. Birnie and A. Boyle, *International Law & the Environment*, pp. 115–21.

[336] M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, pp. 396 and 398.

[337] N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 97.

[338] Statute on the Protection of the State Boundary of the U.S.S.R., *New Directions*, Vol. I, (1973), adopted August 5, 1960, (1960 Statute) p. 30. The Soviet Union ratified the 1958 TSC on October 20, 1960 shortly thereafter.

[339] Statute on the Administration of the NSR, (1971 Statute), 16 September 1971, translation by W. Butler, *ILM*, Vol. 11, (1972), p. 645.

[340] W. Butler, *Northeast Arctic Passage*, pp. 95 and 162 footnotes 7 and 8 respectively. The former is translated in *The Merchant Shipping Code of the USSR*, (September 17, 1968), (eds. W. Butler and J. Quigley), (Baltimore, The Johns Hopkins Press, 1970), p. 63. See also E. Franckx, *Maritime Arctic Claims*, pp. 180, 219 footnote 381.

[341] Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters and Internal Waters and Ports of the U.S.S.R., 28 April 1983 (1983 Rules), W. Butler, *U.S.S.R. Development Law*, C.2. p. 1. The 1983 Rules replaced the 1960 Rules.

[342] E. Franckx, *Maritime Arctic Claims*, pp. 167, 186, 222, footnote 413 citing Resolution of 20 September, 1989 No. 759 concerning the Soviet-U.S. Accord on the Question of Innocent Passage of Vessels, including Warships, through Territorial Waters. See also E. Franckx, 'Innocent passage of warships, Recent developments in U.S.–Soviet relations', *Marine Policy*, Vol. 14, (1990), 490.

[343] On the Economic Zone of the U.S.S.R., W. Butler, *U.S.S.R. Development Law*, F.2., p. 1 (1984 Economic Edict). E. Franckx, *Maritime Arctic Claims*, pp. 178, 218 footnote 355 notes the importance of this legislation with the U.S.S.R. as the first major maritime power to enact such legislation, and the importance of this as a formative element of customary international law.

[344] 26 November 1984 Edict on Intensifying Nature Protection in Areas of the Far North and Marine Areas Adjacent to the Northern Coast of the U.S.S.R., W. Butler, *U.S.S.R. Development Law*, J.4, p. 1, (1984 Environmental Edict). E. Franckx, *Maritime Arctic Claims*, pp. 179–80 views the Decree of 16 September 1971, 'On Confirmation of the Statute of the Administration of the NSR', attached to the Ministry of the Maritime Fleet (1971 Statute) with its environmental provisions to be the predecessor of the 1984 Environmental Edict. For translation of Statute on the Administration of the NSR, (1971 Statute), see W. Butler, *ILM*, Vol. 11, (1972), p. 645.

[345] Statute on the Protection of the Economic Zone of the U.S.S.R., a Section of the 1984 Economic Edict, 30 January 1985, W. Butler, *U.S.S.R. Development Law*, F.2., p. 23, (1985 Protection Statute). E. Franckx, 'U.S.S.R. Pollution Prevention', 176–81 lists this as 'Decree of the Council of Ministers of the U.S.S.R., 30 January 1986, On Confirmation of the Statute on the Safeguarding of the Economic Zone of the U.S.S.R. (1985)'. See also A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163.

[346] Statute on the Protection and Preservation of the Marine Environment in the Economic Zone of the U.S.S.R., W. Butler, *U.S.S.R. Development Law*, F.3., 15 July 1985, p. 1, (1985 Environmental Statute).

[347] E. Franckx, *Maritime Arctic Claims* pp. 180 and 219, footnote 378. The author cites System for Navigating Vessels in the Vil'kitskii, Shokal'skii, Dmitrii Laptev and Sannikov Straits, (1985 Straits Rules), as reprinted in *Izveshcheniia moreplavateliam*, (St. Petersburg, published by the Head Department of Navigation and Oceanography U.S.S.R. Ministry of Defence, 1986), (in Russian) 1 Annex, p. 189. The Russian *Izveshcheniia moreplavateliam* will be noted as *Notice to Mariners* in the text.

[348] Decree of the Council of Ministers of the U.S.S.R., 1 June 1990, 'On Measures of Securing the Implementation of the Edict of the Presidium of the U.S.S.R. Supreme Soviet of 26 November 1984 'On Intensifying Nature Protection in Areas of the Extreme North and Marine Areas Adjacent to the Northern Coast of the U.S.S.R.'. Unofficial translation appears as an Appendix to E. Franckx, 'Nature Protection in the Arctic: A New Soviet Legislative Initiative', *International Journal of Estuarine and Coastal Law*, Vol. 6, (1991), 377–83, (1990 Decree).

[349] Decree of the Presidium of the U.S.S.R. Supreme Soviet of 12 November 1984, 'On the Procedure for Applying Articles 19 and 21 of the Edict 'On the Economic Zone of the U.S.S.R.', W. Butler, *U.S.S.R. Development Law*, F.2. (1984 Procedure Edict), p. 17. See also A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 162–3.

[350] Regulations for Navigation on the Seaways of the NSR, 14 September 1990 (1990 Rules), *Izveshcheniia Moreplavateliam*, (St. Petersburg, published by the Head Department of Navigation and Oceanography U.S.S.R. Ministry of Defence, 18 June 1991) No. 29, (in Russian). English version received from V. Michailichenko, Director NSRA, Tromsø, October 1991. *Guide to Navigating through the Northern Sea Route* (St. Petersburg, Head Department of Navigation and Oceanography, Russian Ministry of Defence, 1996), (in English), pp. 81–4. Also available with minor deviations in *International Challenges*, Vol. 12, (1992), 121–6.

[351] Law of the Russian Federation On the State Frontier of the Russian Federation, 1 April 1993, obtained from A. Yakovlev, Russian–American Seminar, 26 August, 1995, (1993 State Border Act), unofficial translation by Dr. A. Livanova, University of St. Petersburg, St. Petersburg. This presumably replaces the 1982 Statute, W. Butler, *U.S.S.R. Development Law*, C.1. <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/RUS.htm>.

[352] Requirements for the Design, Equipment and Supply of Vessels Navigating the NSR, 13 July 1996, Appendix p. 317, (1996 Design Requirements), *Guide to Navigation through the NSR*, 13 July 1996, (Head Department of Navigation and Oceanography of the Ministry of Defence of the Russian Federation, St. Petersburg, 1996), (1996 Navigation Guide), received (in Russian) from V. Peresypkin, CNIIMF, St. Petersburg, Russia, 17 April 1996, (in English), 2 December 1996. N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 97 note that these may be controversial.

[353] General Regulations for Navigation and Anchoring of Vessels at Sea Ports and at the Approaches Thereto, 1 June 1993, A. Yakovlev, 'Correspondence', March 1995, (1993 Port Navigation). See also N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 95. This appears to have relevance to ice-breaker assisted pilotage required under the 1990 Rules and supporting legislation.

[354] Law on the Russian Federation's Internal Sea Waters, Territorial Sea and Contiguous Zone, 31 July 1998 (1998 Law). A. Ushakov, 'Correspondence', 10 August 1998. See <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/RUS.htm>.

[355] Federal Act on the Exclusive Economic Zone of the Russian Federation of 2 December 1998 (1998 Economic Zone Act). See <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/RUS.htm>. The 1998 Economic Zone Act presumably replaces the 1984 Economic Edict in part. The latter is included however due to its more extensive provisions related especially to enforcement. The 1998 Economic Zone Act stipulates relevant matters not governed by itself are regulated by other applicable federal laws.

[356] Russian Federation Government Decree No. 1102 dated October 2nd 1999, On Navigation and Sojourning Regulations of foreign military ships and other state-owned vessels, exploited for non-commercial purposes,

in territorial sea, inland sea waters, on naval bases, at military ship station points and sea harbours of Russian Federation (1999 Decree). See <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/RUS.htm>.

[357] A. Yakovlev, 'Correspondence', February 1998 appears to limit application related to the NSR to the older Soviet legislation listed and to the following statutes: 1996 Navigation Guide, (No. 4151); 1993 State Border Act, (No. 4370–1); Regulations for Ice-breaker Leading of Vessels through the NSR, Section of 1996 Navigation Guide; Provisional Regulations for Issuing Permission to Organise Scientific Research, Expeditions and Tourism in the Regions Adjoining the Northern Coasts of the U.S.S.R., Decree, 15 July 1991 (No. 400); 'On Intensification of the Control over the Forming of Means for the Maintenance and Operation of Ice-breakers and Other Capital Assets Serving the NSR, 27 July 1996, (No. 57); 1996 Design Requirements; Regulations for the Insurance of Shipowners' Civil Liability, 1996; 'On Issuing Permits for Calling of Foreign Cargo Vessels at Arctic Ports and Stations, 16 June 1997, (No. 847–r); Rates of Fees and Duties in the Sea Ports of the RF, 4 August 1995; Customs Code of the Russian Federation, 18 June 1993, (No. 5221–1), Amendments 19 June and 27 December 1995. N. Matyushenko, Deputy Director, Russian Ministry of Transport, 'Comments – Northern Sea Route Regime', Arctic Operational Platform (ARCOP) Workshop, Helsinki, 25 March 2003, notes new rules are being drafted extending the regime into the Barents Sea to govern developments related to oil production and shipment. G. Semanov, CNIIMF, 'E-mails,' 24 September 2003 and 8 January 2004 indicates the western boundary of the extended regime will be Kolguev Island and that the rules are submitted to the government for consideration. V. Evenko, Russian Maritime Register, 'New Ice Rules of the Maritime Register', ARCOP Workshop, Helsinki, 25 March 2003, indicates current ice classifications and requirements. See also I. Miklina, 'The Legal Regime of Navigation in the Russian Arctic- Summary', ARCOP Workshop, Helsinki 25 March 2003 and A. Skaridov, 'The Russian approach to ROE (Rules of Engagement),' *Marine Policy*, Vol. 28, 2004, 23 footnote 2. Parentheses added. It is believed the contours of the Russian regime are adequately presented by that legislation mentioned. Other Statutes, however, which may have relevance to the implementation of Article 234 are listed in R.D. Brubaker, Doctoral Dissertation, pp. 105–6, footnote 184, and A. Kolodkin, O. Kulistikova, and E. Mokhova, 'Matters of Responsibility for Mariner Pollution under the Legislation of the Russian Federation, (Review of the Main Legislative Acts)', *INSROP Working Paper*, No. 88, (1997), IV.3.1., 12.

[358] Decree of 15 January 1985 for the Territorial Sea, Exclusive Economic Zone and Continental Shelf of the U.S.S.R. Off the Mainland and Islands of the Northern Arctic Ocean, the Baltic Sea and the Black Sea, W. Butler, *U.S.S.R. Development Law*, 1987, C.3., (1985 Baseline Decree), pp. 21–61. See J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 48 and *U.S. Limits* No. 112, p. 24.

[359] See Chapter 1 and Russian Chart No. 696, Kara Gates Strait; Chart No. 949 Vil'kitskii Strait; and No. 952 Dmitrii Laptev Strait; scale, 1:700,000 unless otherwise noted. See also *Atlas of the Straight Baselines*, (eds. T. Scovazzi, G. Francalanci, D. Romano, S. Mongardini) (Milano, Giuffré, 1989), pp. 203–6, scale 1:2,000,000.

[360] See Chapter 7.

[361] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 200–7. In the 1964 exchange of notes the Kara Gates straits were already claimed as Soviet territorial waters. See also E. Franckx, *Maritime Arctic Claims*, pp. 157 and 209 footnote 182 who notes no U.S. vessel navigated close to these straits.

[362] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 162 note the consistency of Soviet–Russian provisions with Article 234. B. Oxman and A. Kolodkin, *Stability in the Law of the Sea, Beyond Confrontation – International Law for the Post-Cold War Era*, L. Damrosch, G. Danilenko, and R. Müllerson (eds.), (Boulder, Westview Press, 1995), p. 174, is contrary, noting State vessels enjoy sovereign immunity.

[363] The only exception found are the voyages of the Norwegian State vessel *Sverdrup II* in conjunction with the U.S. Navy. See Chapter 5.

[364] W. Butler, 'The Legal Regime of Soviet Arctic Marine Areas', *The Soviet Maritime Arctic*, pp. 231–3 notes a generally more flexible attitude started by President M. Gorbachev in 1987. A. Ushakov, 'Interview', 25 February, 1994 indicated that application of the technical sailing rules would become almost auto-

matic if the NSRA 'knew' the foreign vessel and Captain. An American research vessel was processed in this manner for navigation in the Chukchi Sea in 1993, while at the same time a Canadian vessel was rejected.

[365] Arctic Waters Pollution Prevention Act, Revised Statutes of Canada, (RSC) chapter 2, section A-12, (AWPPA). See also *ILM*, Vol. 9, (1970), p. 598.

[366] P. Birnie and A. Boyle, *International Law & the Environment*, pp. 374 and 398 endnote 132. See generally D. McRae and D. Goundrey, 'Article 234', 205–7 and D. McRae, 'The Negotiation of Article 234', 100–2. A. Chircop, H. Kindred, P. Saunders and D. VanderZwaag, 'Legislating for Integrated Marine Management: Canada's Proposed Oceans Act of 1996,' *Canadian Yearbook of International Law*, Vol. 33, 1995, pp. 311–2 note that An Act Respecting the Oceans of Canada, 18 December 1996, CSC c. 31, in force 1997, extended the Canadian exclusive economic zone to 200 miles but did not amend the definition of 'Arctic Waters' thereby in the Arctic leaving the AWPPA and supporting legislation effective to 100 miles, and the non Arctic Canadian Environmental Protection Act, RSC 1985 (4th Supp.), c. 16, the Fisheries Act, RSC 1985, c. F-14; Canada Shipping Act, RSC 1985, c. S-9 and supporting legislation governing from 100 miles to 200 miles. E. Franckx, *Maritime Arctic Claims*, p. 97 notes Canada established a 200 miles fisheries zone in the Arctic on 24 February 1977. A. Saunders, Deputy Director, Canadian Department of Foreign Affairs and International Trade, 'E-mail', 5 March 2004, notes that Canada extended jurisdiction to 200 nautical miles in the Arctic 1 March 1977. For the Arctic legislation see also E. Gold, *Handbook on Marine Pollution*, pp. 81–2; and D. Torrens, 'Marine Insurance of the NSR – Pilot Study', *INSROP Working Paper*, No. 1, (1994), IV.3.3., 52–7, and 164–6.

[367] Arctic Shipping Pollution Prevention Regulations, Consolidated Regulations of Canada, (CRC c) 1978, chapter 356, as amended, (ASPPR). See also E. Gold, *Gard Handbook on Marine Pollution*, (2nd ed.) (Arendal, Assuranceforeningen Gard, 1998), p. 130 who notes the Canada-Arctic Traffic System Rules (NORDREG). R. Huebert, 'Climate Change and Canadian Sovereignty', 92 notes that requiring mandatory registration under NORDREG was considered, should ship traffic increase through ice reduction, but no further action has been taken.

[368] Order in Council P.C. 1985–2739, September 10, 1985. J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 45, 207 and 227 footnote 79.

[369] R. Huebert, 'Climate Change', 88. Ibid. cites External Affairs Canada, Statements and Speeches, 'Policy on Canadian Sovereignty' (September 10, 1985). E. Gold, *Gard Handbook on P&I Insurance*, (Arendal, Assuranceforeningen Gard, 2002), p. 503 notes the 2001, An Act respecting Marine Liability and the Validation By-Laws and Regulations S.C., c. 6. See Chapter 5. E. Molenaar, *Coastal State Jurisdiction*, pp. 177–9, 537–8 lists additional non Arctic specific legislation including oil and hazardous chemicals provisions. This is found at <http://canada.justice.gc.ca/>.

[370] *Polar Regions, Atlas*, (Washington D.C., Central Intelligence Agency, Reprinted 1981), p. 12. See also *The Times Atlas of the Oceans*, (London, Times Books Limited, 1983), p. 63.

[371] See R. Huebert, 'New Challenges to Canadian Arctic Security and Sovereignty,' *The Canadian North: Embracing Change*, (Montreal, Centre for Research and Information, 2002), pp. 30–2.

[372] A more specific description is found in D. Pharand, *Canada's Arctic Waters*, pp. 188–201 which notes that in the east, freeze up in North Baffin Bay begins in mid September, moves along the Baffin Island coast during October and ends up as an unmoving ice cover as far as the Labrador Sea during the winter, with average thickness greater than one meter. The pylon in Smith Sound expands southward during June, opening the entrance to Lancaster Sound usually by the end of June. Generally these easternmost waters are ice-covered between eight and nine months a year. In the west in the Beaufort Sea the ice-covered period is approximately the same, though sometimes due to variations in the polar pack ice and the fast coastal ice, it may be possible to navigate into the Amundsen Gulf without seeing ice from late July to early September. Freeze up in the Beaufort Sea generally occurs at the beginning of October but may not take place until early November if the polar ice pack is far offshore.

[373] For analysis of the Canadian–U.S. Agreement see E. Franckx, *Maritime Arctic Claims*, pp. 89, 262–4. The author notes that the objective was to prevent crises similar to that surrounding passage of the U.S.C.G.C. *Polar Sea*. R. Hage, Director Legal Operations, Canadian Department of Foreign Affairs and International

Trade, 'Telefax', 1 November 1994, noted a total of only three voyages were made under the Canadian–U.S. Agreement by U.S.C.G. ice-breakers, to deliver supplies to the air base in Thule. In 1991 by agreement Canadian vessels took over the task.

[374] J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 214. The Canadian Secretary of State for External Affairs, J. Clark, is quoted. U.S. Secretary of State G. Schultz noted in a joint press conference following signature of the Canadian–U.S. Agreement, in response to a question whether the U.S. would recognise Canada's claim to Arctic waters, if U.S. military vessels and submarines were given free access to Canadian Arctic waters in times of crises, 'the answer to your question is no'. See R. Huebert, 'Canadian Arctic Security and Sovereignty' 31, for recent developments including the creation by the U.S. of the Northern Command in October 2002 with anticipated Canadian participation.

[375] See J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 261–2 and 269 footnotes 37 and 39; and 207 and 227, footnotes 78 and 79.

[376] R. Hage, 'Telefax', 1 November 1994.

[377] E. Franckx, *Maritime Arctic Claims*, pp. 28 and 54 footnote 214. Ibid. pp. 17, 27–8, 34, 75, 86, 146, 262 does not address the issues surrounding submerged passages to a great extent, noting only that its exclusive military and thus secret character, as well as the fact that these underwater voyages are invisible to the public eye, precludes any in depth research. The author does note however a fairly extensive U.S. and Soviet practice of navigating their submarines in the Arctic, concentrating on the U.S. activities in the Canadian Arctic.

[378] V. Aleksin, 'We Are Ready When You Are', March 1993, 56. Some additional voyages were also claimed made by submarines in areas adjacent to the NSR and in territorial waters. A. Yakovlev, 'Correspondence', 20 March 1995. A. Yakovlev, 'Correspondence' 6 February 1998, quoting A. Smolovskiy, 'NATO Expansions and the Arctic', *Morskoy Sbornik*, No. 6, 1996, 16–9, notes that following the collapse of the Soviet Union, 'US army's group including submarines navigating in the Arctic, increased its intensity and extended operating (exploration) areas which covered the economic zone, Russian territorial waters and regions of Russian Navy bases'.

[379] E. Franckx, *Maritime Arctic Claims*, pp. 28 and 54 footnote 214.

[380] D. Mandsager, Captain Judge Advocate Generals Corps, (JAGC), U.S. Navy, Staff Judge Advocate, U.S. Commander-in-Chief, Pacific, (USCINCPAC) (JO6) Camp H.M. Smith, Hawaii, 'Interview', Russian–American Seminar, 23–6 August, 1994, indicated the U.S. navigates the Arctic under its Freedom of Navigation Program. D. Mandsager, 'Speech – United States FON', Russian – American Seminar, 24 August, 1994, did not deal directly with the Arctic. J.A. Roach and A. Smith, *Excessive Maritime Claims*, p. 48 note that U.S. assertions have not been conducted against the straight baselines enclosing the Russian Arctic straits. *U.S. Limits,* No. 112, pp. 1 and 2 notes that FON consists both of operations and diplomatic efforts, to discourage State claims the U.S. views as inconsistent with customary law as reflected in the LOSC, and to demonstrate U.S. resolve to protect freedom of navigation and overflight. More than 110 protests have been filed on the diplomatic level since FON began in 1979, and 35 to 40 operational assertions have been exercised each year during the same period. Ibid. notes most of the U.S. actions do not 'receive State scrutiny'. See also J.A. Roach and A. Smith, *Excessive Maritime Claims*, pp. 3–6. G. Galdorisi, 'Who Needs the Law of the Sea?' 73, notes that since the excessive maritime claims are made by the full community of States, the U.S. efforts under FON are enormous including political costs and military risks.

[381] W. Schachte Jr., 'International Straits and Navigational Freedoms', 18–9, notes, 'transit passage prevails ice-covered or not' since submarines sail under the ice and airplanes over. J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 214 and 227, footnote 79, note '(A)rticle 234, however, does not specifically deal with straits; thus it leaves open the issue whether or not the Northwest Passage constitutes a strait used for international navigation'. See also *U.S. Limits,* No. 112, pp. 68–73.

[382] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 48, 200–7.

[383] See generally W. Schachte Jr., 'International Straits and Navigational Freedoms'.

[384] W. Østreng, 'Stumbling Block', 3, 15, 17. E. Franckx, *Maritime Arctic Claims*, p. 101 cites Soviet Foreign Minister E. Shevardnadze in late 1989 that Soviet submarines did not use the Canadian Arctic waters.

[385] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 45, 207–15. The U.S. claims Canada's Northwest Passage is a strait used for international navigation subject to transit passage, but is probably opposed to Russian submarines exercising this right. See T. McDorman, 'In the Wake of the "Polar Sea",' *Marine Policy*, Vol. 10, (October 1986), 253. The author notes the Soviet Union supported the Canadian claim and did not overtly navigate the passage.

[386] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 261–2 and 269 footnotes 37 and 39. Parentheses added.

[387] Ibid. pp. 207, 227, footnote 79.

[388] Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act, (Monitoring Act), 33 *USC* 2732, *Public Law*, 101–380, August 18, 1990.

[389] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 262 and 264. Y. Ivanov, A. Ushakov and A. Yakovlev, 'Russian Administration of the Northern Sea Route – Central or Regional?', *INSROP Working Paper*, No. 106, (1998), IV.2.5., 19–20 claim there is no commercial foreign traffic in U.S. Arctic waters.

[390] Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 *USC* 9601–9675 (1995), 1948 Federal Water Pollution Control Act (FWPCA), 33 *USC* 1251 and 1321, *Public Law*, 106–73, as amended. See E. Gold, *Gard Handbook on Marine Pollution*, pp. 148 and 152–175 and E. Gold, *Gard Handbook on P&I Insurance*, 437–8 for a general listing of Federal and state legislation governing marine pollution. This includes the Deepwater Ports Act, 33 *USC* 1401–1445 (2001); 1980 Act to Prevent Pollution from Ships, *Public Law*, 96–478, 94 Statute 2297; 1973 TransAlaska Pipeline Authorisation Act, 43 *USC* 1651–1656, (1986); 1972 Port and Tanker Safety Act, *Public Law*, 95–474, 92 Statute 1471; Refuse Act – Rivers and Harbours, Act of 1899 Ch. 425, 15, 16, 19, 20, 30 Statute 1152; 1953 Outer Continental Shelf Lands Act, 43 *USC* 1331–1343, as amended by *Public Law*, 95–372, 92 Statute 629; and 1972 Marine Protection, Research and Sanctuaries Act, 33 *USC* 1401–1445 (2001). E. Gold, *Gard Handbook on Marine Pollution*, p. 163 notes that although a vessel has successfully satisfied all U.S. Federal requirements and liabilities, state regulations remain which are at least as strict as and often stricter than the Federal provisions. Ibid. 441 notes OPA 1990 and its voluminous implementing regulations are extremely complex. J.A. Roach, 'Container and Port Security: A Bilateral Perspective,' *International Journal of Marine and Coastal Law*, Vol. 18, 354–61 gives an overview of recent U.S. legislation to secure ports.

[391] Respectively OPA 1990 § 1001(8) and (21). The exclusive economic zone is defined as, 'the zone established by Presidential Proclamation No. 5030, including the ocean waters . . . referred to as "eastern special areas" in . . . the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990'. See Figure 1.

[392] Ibid. § 1002(a). Italics added. Oil is defined to include petroleum, fuel oil, sludge, oil refuse and oily wastes, but not hazardous substances defined under the CERCLA. E. Gold, *Gard Handbook on Marine Pollution*, p. 154.

[393] Ibid. § 1016(a)(1) and (2).

[394] Ibid. § 1016(b)(2).

[395] Ibid. § 1016(b)(3).

[396] Ibid. § 1004. See however § 1004(c)(3) for outer continental shelf facilities.

[397] Ibid. § 4115.

[398] Respectively, ibid. §§ 4115, 4109 and 4110.

[399] Ibid. § 4106(a).

[400] Ibid. § 4111(b)(7).

[401] See Title V §§ 5001–5007.

[402] *Polar Regions Atlas*, p. 12.

[403] R. Churchill and A. Lowe, *Law of the Sea*, p. 35 note that the U.S. continues not to establish straight baselines along the coast of Alaska.

[404] OPA 1990 §§ 5002(b)(2) and 5007.

[405] Ibid. § 4111(b)(7).

[406] Ibid. § 4106, § 4109, § 4110, § 4115 and § 4116.

[407] E. Gold, 'Interview' Oslo, 23 June 1994. See also Y. Ivanov, A. Ushakov and A. Yakovlev, 'Russian Administration of the Northern Sea Route', 19–20.

[408] 'U.S. Doubles Offshore Control Zone', *International Herald Tribune*, 4–5 September 1999, p. 3. The article notes that enforcement of drug trafficking, immigration and fishing provisions are also included in the U.S. measures.

[409] See R. Churchill and A. Lowe, *Law of the Sea*, pp. 132–40 concerning possible extension of rights in the contiguous zone due to the exclusive economic zone, but without the mention of environmental jurisdiction.

[410] L. Brigham, Former Commanding Officer of the *USCGC Polar Sea* and formerly the Chief of the Strategic Planning Staff at Coast Guard Headquarters, Washington D.C., 'Interview – INSROP Symposium – 1995, Tokyo', 4 October 1995.

[411] A. Kolodkin, 'Interview', 25 February 1995; R. Churchill, 'Telephonic Interview', 16 June 1994 regarding the U.K. and the E.U.; D. Mjaaland, Assistant Director General, the Norwegian Foreign Ministry, 'Telephonic Interview', May 1994 regarding Norway; and unanswered question to Officials of the French Defence and Foreign Ministries, INSROP Meeting, Paris, November 1993. Of the relevant literature only E. Franckx, *Maritime Arctic Claims*, pp. 192, 224 footnote 471 appears to state otherwise, yet refers only to the U.S. protests.

[412] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 67 and 88 footnote 57. The authors cite British High Commission Note No. 90/86 of July 9, 1986, reported in American Embassy Paris telegram 33625, July 24, 1986.

[413] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 207 and 227 footnote 79.

[414] See *Global Conventions Having an Influence on the Arctic Environment*, United Nations Environmental Programme (UNEP), (Arendal, Grid Arendal, 1996), pp. 1–97; and *Regional Conventions having an Influence on the Arctic Environment*, UNEP, (Arendal, Grid Arendal, 1996), pp. 1–82 for the global and regional conventions that also govern the Arctic or parts thereof.

[415] Obtained at the Conference for the Harmonisation of Polar Ship Rules, (Harmonisation Conference), Göteburg, November 23–25, 1994.

[416] Declaration on Arctic Military Environmental Co-operation between Russia, U.S.A. and Norway, (AMEC) 7 April 1997. Obtained from the Norwegian Department of Defence, (in Norwegian).

[417] Rovaniemi Declaration and the Arctic Environmental Protection Strategy, 14 June 1991, *ILM*, Vol. 30, (1991), p. 1624.

[418] Other interested States included various Antarctic claimant States. States periodically present represented by their National Maritime Organisations or Coast Guards include Australia, Norway, Finland, Denmark, Russia, Sweden, Canada and the U.S. Other States periodically present with representatives for a classification society, vessels register, or other include, Chile (IMO), Argentina, U.K., Germany, Japan, France, Poland, Korea, China, and Italy. L. Brigham, 'Interview – Harmonisation Conference Göteburg', 24 November 1994, noted that some U.S. funding was provided.

[419] N. Kjerstad, Captain, Møre and Romsdal Maritime College, Consultant to the Norwegian Maritime Directorate 'Interview – Harmonisation Conference Ålesund', 11 October 1994. L. Brigham, 'Telephonic Interview', 7 September 1998. See generally International Law Association – Committee on Coastal State Jurisdiction Relating to Marine Pollution, Final Report London Conference (2000), Rapporteur E. Franckx, Assistant Rapporteur E. Molenaar, pp. 26–31 regarding Article 234, and continuing developments under the IMO regarding the Draft Code. Besides likely limitation of the Draft Code to the Arctic, issues on which work continues include non mandatory status, restriction to technical concerns, and review of notification requirements. The conclusion is made '(T)he precise field of application of Art. 234, isolated as it is from the other articles of Part XII, remains fraught with difficulty. It is certain that it cannot operate beyond the EEZ and that at present its field of application is confined to the Arctic. It is the only exception to the requirement of the conformity of national law and regulations relating to vessel-source pollution to GAIRS. Even the procedure provided in Art. 211 (6) does not apply. Nevertheless, the 'due regard' notion, combined with the particular history of this article and

the fact that Art. 234 remains subject to the system of compulsory dispute settlement, result in the fact that navigational considerations remain a non-negligible factor in the equation. The guidelines for ships operating in ice-covered waters, as presently developed by IMO, might well prove an important element in the future application of this article. These guidelines, moreover, have been recently focused exclusively on the Arctic. In broad terms, navigational rights and freedoms are not totally excluded from ice-covered areas but may be effectively restricted by coastal state measures taken under Art. 234'.

[420] Harmonisation Conference Göteburg, November 23–25, 1994.

[421] See generally S. Sawhill, 'Cleaning-up the Arctic's Cold War Legacy: Nuclear Waste and Arctic Military Environmental Co-operation', *Co-operation and Conflict*, Vol. 35, March 2000, 5–36.

[422] T. Ramsland, 'Interview', 12 May 1996. The revised agreement, 'Declaration on Arctic military environmental co-operation between Russia, U.S.A. and Norway', was obtained from the Norwegian Ministry of Defence, 7 April, 1997. It appears negotiations continue; a draft AMEC current to 27 July 1999 was obtained from the Norwegian Ministry of Defence.

[423] See Chapter 5.

[424] Agreement between the United States of America and the Russian Federation Concerning the Safe and Secure Transportation, Storage and Destruction of Weapons and the Prevention of Weapons Proliferation, with Implementing Agreements, (17 June 1992), *Treaties and Other International Acts Series*, (*TIAS*) 7025 (1992), (CTR Umbrella Agreement), (domestic U.S. legislation, Nunn-Lugar CTR). The abbreviation is for the U.S. legislators and the Co-operative Threat Reduction Act of 1993, November 30, 1993, 22 *USC* 5951, Title XII of *Public Law* 103–160.

[425] Treaty between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms, 31 July 1991, *The United Nations Disarmament Yearbook*, Vol. 16, (New York, Office for Disarmament Affairs, 1992) Appendix II, (START I), pp. 450–76; and Treaty between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms, 3 January 1993, *The United Nations Disarmament Yearbook*, Vol. 18, (New York, Centre for Disarmament Affairs, 1994), Appendix II, (START II), pp. 314–38. Following the U.S. announcement in December 2001 of its intention to withdraw from the 1972 Anti-Ballistic Missile Treaty, Russia stated that it would not implement START II cutting the U.S. and Russian nuclear arsenals. Treaty on the Limitation of Anti-Ballistic Missile Systems,' May 26, 1972, *UNTS*, Vol. 944, Nr. 13446, (ABM Treaty), 13. In May 2003 Russia and the U.S. entered the Strategic Offensive Reductions Treaty or Moscow Treaty to reduce operation deployments of strategic nuclear warheads to 1,700–2,200 by 2012. Treaty between the United States of America and the Russian Federation on Strategic Offensive Reductions, (SORT), <http://www.whitehouse.gov/news/releases/2002/05/20020524–3.html>, and <http://usinfo.state.gov/topical/pol/arms/02052441.htm>. See R. Gottemoeller, 'Nuclear Necessity in Putin's Russia', *Arms Control Today*, <http://www.armscontrol.org/act2004_04/Gottemoeller.asp 4>.

[426] Funding linkage lasted for a year, while the liability coverage continues.

[427] See D. Scrivener, 'Environmental Co-operation in the Arctic: From Strategy to Council', *Security Policy Library No. 1/1996*, The Norwegian Atlantic Committee, 1–31, and G. Semanov, 'Report – Proposals for environmental safety of the Arctic and sub-Arctic seas', (St. Petersburg, CNIIMF, Nov. 2003), pp. 77–86, from which this information is obtained. See also D. Caron, 'Toward an Arctic Environmental Regime', *Ocean Development and International Law*, Vol. 24, (1993), 377–92.

[428] This was changed to a working group developing an Arctic Sustainable Development Initiative (ASDI).

[429] Sustainable development is to be the overriding principle in the Arctic Council's work.

[430] D. Scrivener, 'Speech – The Rovaniemi Process and the New Arctic Council', FNI, Oslo, 18 April 1996.

[431] P. Birnie and A. Boyle, *International Law & the Environment*, pp. 257, 265 and 267; and R. Churchill and A. Lowe, *Law of the Sea*, p. 347.

[432] R. Churchill and A. Lowe, *Law of the Sea*, pp. 86–7 and 95 note that the LOSC Part II Section 3 regime including provisions related to the prevention, reduction and control of pollution has likely become customary international law.

[433] P. Birnie and A. Boyle, *International Law & the Environment*, pp. 352–3 and R. Churchill and A. Lowe, *Law of the Sea*, p. 347. The International Convention for the Safety of Life at Sea, (1 November 1974), (SOLAS), *UNTS*, Vol. 1184, (1980), p. 2 may likely be included as well, though it will not be addressed extensively here. See P. Birnie and A. Boyle, *International Law & the Environment*, p. xxiv for overview of SOLAS Amendments subsequently adopted.

[434] Emphasis added.

[435] Emphasis added. 'Illegal' in Article 220(2) is defined as a violation of 'laws and regulations of that State adopted in accordance with this convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels'.

[436] Emphasis added. 'Illegal' in Article 220(3) is defined as a violation of 'applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards'.

[437] Emphasis added. 'Illegal' in Article 200(5) has the same definition as under Article 220(3).

[438] Emphasis added. 'Illegal' in Article 220(6) has the same definition as under Article 220(3).

[439] Emphasis added. 'Illegal' is defined in Article 218(1) and (2) (3) as a violation of 'applicable international rules and standards established through the IMO or general diplomatic conference'. This includes the high seas area where there have been no claims of pre-emption under Articles 218(4) or 228.

[440] See R. Churchill and A. Lowe, *Law of the Sea*, pp. 339–42 and P. Birnie and A. Boyle, *International Law & the Environment*, pp. 362–70 for a brief description of MARPOL 73/78's discharge and operational provisions.

[441] Under Article 4 violations of MARPOL 73/78 requirements must be prohibited and sanctions established under the laws of the flag State for vessels anywhere. If notice is given and the evidence sufficient that an alleged violation has occurred, proceedings are obligatory.

[442] Article 4(2) states, '(A)ny violation of the requirements of the present Convention within the jurisdiction of any party to the Convention shall be prohibited and sanctions shall be established therefor under the law of that party'. Article 9(3) states that jurisdiction 'shall be construed in light of international law in force at the time of application or interpretation of the present Convention'.

[443] P. Birnie and A. Boyle, *International Law & the Environment*, p. 366 note, '(T)he important point here is simply that MARPOL itself does not prevent the extension of jurisdiction beyond the territorial sea, but neither does it authorise or compel such action'.

[444] In addition the Paris Memorandum of Understanding on Port State Control, January 26, 1982, (MOU), *ILM*, Vol. 21, (1982), p. 1, also applies for relevant port States implementing LOSC Article 211 and 218–220. Under this 17 Western European States and Canada co-operate in a program of vessel inspection. This has as a goal to ensure that each port State inspects at least 25% of foreign vessels visiting its ports annually for compliance with MARPOL 73/78, SOLAS and other IMO treaties and rules. See P. Birnie and A. Boyle, *International Law & the Environment*, p. 365–6 for other regional MOU's of varying effectiveness.

[445] See generally P. Birnie and A. Boyle, *International Law & the Environment*, pp. 351–3, 367–9, 373–6, and 290–1 for the following information unless otherwise noted. The authors believe acceptance of various IMO treaties and consensus surrounding LOSC Part XII indicate a strong measure of *opinio juris* and represents in certain respects an agreed codification of existing principles which have become custom.

[446] P. Birnie and A. Boyle, *International Law & the Environment*, pp. 373, 398 endnote 124 note that States whose legislation for the exclusive economic zone extends to pollution from vessels or provides for the adoption of necessary regulations, include Russia, Rumania, Bulgaria, Malaysia, Sweden, Antigua, St. Kitts, St. Lucia, and the Ukraine. Ibid. state the U.S. has not legislated to control vessel-source pollution beyond the territorial sea, with which the present author disagrees. See also R. Churchill and A. Lowe, *Law of the Sea*, pp. 351–3.

[447] P. Birnie and A. Boyle, *International Law & the Environment*, p. 373. See also E. Molenaar, *Coastal State Jurisdiction*, pp. 363–82.

[448] Ibid. p. 376. E. Molenaar, *Coastal State Jurisdiction*, pp. 389–98 lists a small number of States.

[449] R. Churchill and A. Lowe, *Law of the Sea*, pp. 352–3. P. Birnie and A. Boyle, *International Law & the Environment*, p. 376 and 398 endnote 144 believe Article 218 to have become customary international law.

[450] However, the largest number of vessels detained in MOU ports are not oil tankers, but dry cargo and bulk carriers, which are less environmentally important.

[451] P. Birnie and A. Boyle, *International Law & the Environment*, pp. 367–9.

[452] Other deficiencies under MARPOL 73/78 include lack of port State reception facilities, inadequate training of crews in MARPOL requirements, and equipment malfunction. At the same time operational marine pollution has definitely declined. Det Norske Veritas, 'Norwegian Maritime Directorate – Evaluation of the Norwegian Part of the Barents Sea and the Northern Part of the Norwegian Sea as Particular Sensitive Sea Area,' *Report No. 2002–1621*, p. 105 notes reception facilities are lacking in both Norway and Russia (undocumented) with respect to the Barents Sea. The Norwegian government has decided that such are to be established in the near future.

[453] P. Birnie and A. Boyle, *International Law & the Environment*, p. 390.

[454] International Convention for Prevention of Pollution of the Sea by Oil, 12 May 1954, *UNTS*, Vol. 327, (1959), (OILPOL), p. 3. See also *ILM*, Vol. 9, (1970), p. 1, as amended in 1962 and 1969.

[455] R. Churchill and A. Lowe, *Law of the Sea*, p. 345. Ibid. note that a State will have to ensure such legislation and conditions are not discriminatory.

[456] Ibid. pp. 253–4.

[457] P. Birnie and A. Boyle, *International Law & the Environment*, pp. 351 and 369. The authors add that this is not contradicted by either OILPOL, which did not entirely prohibit discharges of oil at sea, or the International Atomic Energy Agency's (IAEA) provisions, which permitted disposal of low-level radioactive waste. See also R. Churchill and A. Lowe, *Law of the Sea*, p. 346.

[458] P. Birnie and A. Boyle, *International Law & the Environment*, p. 355.

[459] Ibid. pp. 354. This is evidenced by agreements including the UNEP treaties, however UNEP will not be addressed here due to its rather varied development. See ibid. pp. 358–9. See also R. Churchill and A. Lowe, *Law of the Sea*, pp. 357–8.

[460] P. Birnie and A. Boyle, *International Law & the Environment*, pp. 354–9. The authors add that these agreements facilitate and make more effective co-operation in monitoring, supervision and enforcement, though the regional agreements for the North Sea, the Baltic and the Mediterranean appear most successful due to their intergovernmental supervisory institutions. Most of these regional treaties substantially conform to LOSC Part XII provisions, including vessel-source pollution, indicating implementation of these provisions at a regional level as well as the status of Part XII under international law.

[461] See above for developments under the Harmonisation Conference, and for the misdirected Russian application under MARPOL 73/78 to declare the Arctic a special area.

[462] See Chapter 5.

[463] A PSSA is defined as, 'an area that needs special protection through action by the IMO because of its significance for recognised ecological, socio-economic or scientific reasons and which may be vulnerable to damage by international shipping activities'. See 'Guidelines for Identification and Designation of Particularly Sensitive Sea Areas' IMO Assembly Resolution A.927 (22), (2001 Guidelines), Annex 2.

[464] P. Birnie and A. Boyle, *International Law & the Environment*, p. 354.

[465] R. Churchill and A. Lowe, *Law of the Sea*, p. 348. 2001 Guidelines Annex 1 set forth guidelines for the designation of special areas under MARPOL 73/78.

[466] P. Birnie and A. Boyle, *International Law & the Environment*, p. 363.

Special areas, under MARPOL 73/78 Annex I permit no oil discharge from vessels. Areas include Antarctica, the Baltic, the Mediterranean and the North Seas.

Special areas under MARPOL 73/78 Annex II set forth stricter rules on tank washing and discharges of wastes. Areas include Antarctica, the Black and the Baltic Seas.

Special areas under MARPOL 73/78 Annex V set forth stricter rules on discharges of garbage. Areas include the Mediterranean, the Baltic and the North Seas.

Special areas under MARPOL 73/78 Annex VI, set forth a upper limit on the sulphur content in vessels bunker oil (1.5%). Areas include the Baltic and the North Seas.

See R. Nadelson, 'After MOX: The Contemporary Shipment of Radioactive Substances in the Law of the Sea', *International Journal of Marine and Coastal Law*, 232 footnote 239 for an overview of protection regimes.

[467] P. Birnie and A. Boyle, *International Law & the Environment*, p. 374 view Article 211(6) as little more than a re-enactment of the MARPOL 73/78 special area provisions designed for enclosed or semi-enclosed seas. No additional unilateral jurisdiction is given coastal States for environmental measures. R. Nadelson, 'After MOX', 232, footnote 236 believes the contrary, with MARPOL 73/78 special areas including whole regions of the seas and being more specific in its requirements.

[468] See K. Gjerde, 'PSSA's: IMO Guidelines,' *Sea Technology*, Vol. 43, Part 3, March 2002, (PSSA's), 40–6 and S. Pullen, K. Gjerde, A. Mäkinen, J Lamp, J. Varas, and A. Tveteraas, 'Particularly Sensitive Sea Areas (PSSA's) in the North-East Atlantic and Baltic,' *WWF Briefing*, 2003 (WWW Briefing), p. 1. S. Lutter, WWF North-East Atlantic Programme, Am Gütpohl 11, D-28757 Bremen, Germany. World Wildlife Foundation (WWF).

[469] See <http://www.odin.dep.no/md/norsk/tema/svalbard/arkiv/022051–070087/index-dok000–b-n-a.html> (in Norwegian) and G. Grytås, 'Norge stoppet tankfri sone,' (Norway stopped a tanker free zone), *Fiskeribladet*, 25 November 3003, s. 9.

[470] B. Vukas, 'United Nations Convention on the Law of the Sea and the polar marine environment', (ed. D. Vidas), *Protecting the polar marine environment*, (Cambridge, Cambridge University Press) p. 40, notes that this loose definition excludes in fact only the world's three major oceans. Three characteristics were essential for the adoption of special rules for enclosed or semi-enclosed seas, 'a) the complexity of navigation in these seas due to their small surface and poor connection with other seas; b) the growing danger from all types of pollution because of their small size and poor interchange of their waters with adjacent seas; c) the necessity of taking specific precautionary measures in relation to the management, conservation and exploitation of the living resources of such seas, as they are endangered by their natural characteristics and pollution'.

[471] Article 123(d) also calls for States to invite, as appropriate, other interested States or international organisations to co-operate.

[472] V. Michailichenko, 'Interview', Harmonisation Conference, Göteborg, November 24, 1994; and K. Grensemann, 'Interview', Leader of German Delegation to IMO, Harmonisation Conference, Ålesund, November 20, 1995. See also N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 75 who note the possibility of declaring the Arctic an 'especially sensitive area'.

[473] J. Harders, 'Seminar Proceedings – The Arctic Ocean: Environmental Protection and Circumpolar Cooperation – An Assessment and a Proposal for a Legal Regime', *Energy Law*, (1986), 524–5. See also P. Birnie and A. Boyle, *International Law & the Environment*, pp. 354 and 363.

[474] J. Harders, 'The Arctic Ocean' 524–5.

[475] Parentheses added.

[476] P. Birnie and A. Boyle, *International Law & the Environment*, pp. 354–5.

[477] B. Vukas, 'Interview', FNI Oslo, 2–4 November 1997, expressed the view that due to the large central area of the Arctic consisting of high seas, the Arctic may fall outside the definition.

[478] B. Vukas, 'United Nations Convention on the Law of the sea', p. 40 notes in comparison to Article 211(6), 'it remains to be seen what are the additional, specific elements given in Article 234 in respect of such areas which are ice-covered'.

[479] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 261–2.

[480] See generally D. McRae, 'Negotiation of Article 234', 110–4, E. Franckx *Maritime Arctic Claims*, pp. 101–7 and 190–5, and W. Østreng, F. Griffiths, R. Vartanov, A. Roginko and V. Kolossov, *National Security*, 62–6. Ibid. 70 note, '(T)he military component was still accorded primary priority, (following Gorbachev's Murmansk speech), due to the pre-existing tradition and the enduring political power structure' and this policy continues. Parentheses added. R. Huebert, 'U.S., Canada in Power Struggle over Arctic Waters,' <http://www.cnsnews.com/ViewPrint.asp?Page=\Pentagon\archive\200208-

PEN20020812a.html> notes July 2002 the Canadian military held an exercise in the Far North to assert Canadian claims over Arctic waters to counter increased U.S. interest in the area due to the thinning of the ice.

Chapter 5

[481] E. Franckx, *Maritime Arctic Claims*, p. 192. The author compared Russian legislation to the hypothetical case of the circumnavigation of a U.S. icebreaker. Ibid. pp. 33–4 and 193, 226 footnote 479, referring to A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 167, notes succinctly that the policy of the U.S.S.R. to use environmental arguments to restrict foreign shipping in the Soviet Arctic is presumptuous at best considering the poor Soviet environmental record. See also W. Østreng, F. Griffiths, R. Vartanov, A. Roginko, and V. Kolossov, *National Security*, 63 and 89 who note doubtful compliance by the Soviet fleet with strict environmental regulation, and Soviet contribution to about one-half the vessel-source pollution in the Arctic in 1990.

[482] See Chapter 4 for full citations to the legislation noted. The individual articles will be referred to for clarity.

[483] See E. Franckx, 'USSR Pollution Prevention', 168–9 who notes hot pursuit under Article 18 of the 1984 Economic Edict elaborated by Articles 9, 10 and 11 of the 1985 Protection Statute is generally consistent with LOSC Article 111. Ibid. notes marine casualties addressed by Article 17 of the 1984 Economic Edict elaborated by Article 7 of the 1985 Environmental Statute, is generally consistent with LOSC Article 221 and the Intervention Convention, though lacking the same strict definition of 'marine casualty'.

[484] AWPPA s. 12. E. Franckx, *Maritime Arctic Claims*, pp. 87, 122, footnote 217 notes exemptions may have been granted under s. 12(2).

[485] R. Churchill and A. Lowe, *Law of the Sea*, p. 351. Provision for sovereignty immunity is also found in other environmental conventions, including Article 3(3) of MARPOL 73/78. The U.S. objected to application of the Russian and Canadian legislation as purporting to interfere with sovereign immune vessels. J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 200–7, 207–15. See also *Limits in the Seas*, No. 112, pp. 61–74.

[486] Application to State vessels is neither stated nor implied in OPA 1990, the Monitoring Act and supporting legislation.

[487] The 1990 Rules deal ostensibly with the NSR, however due to the expansive geographic scope of the NSR, the 1990 Rules would seem to enjoy equal application as the more general Decrees and Edicts.

[488] See Chapter 4.

[489] See W. Butler, *Northeast Arctic Passage*, pp. 86, 94–6, 160, 161 footnote 5, 162 footnotes 7 and 8; and A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 160 and 163, 166–7.

[490] E. Franckx, *Maritime Arctic Claims*, pp. 193–5, notes the U.S. may well have been tempted to test the applicability of the Russian regime on this issue especially in relation to the high seas.

[491] See J. Shao, 'The question of innocent passage of warships, After UNCLOS III', *Marine Policy*, Vol. 13, (Jan. 1989), 66. The author notes some form for notification and authorisation is accepted in approximately one-third of coastal State jurisdictions. See also R. Churchill and A. Lowe, *Law of the Sea*, pp. 88–91.

[492] See R.D. Brubaker, 'Straits in the Russian Arctic', *Ocean Development and International Law*, Vol. 32, (2001), 272–6. Article 9(e) with ensuing paragraph of the 1993 State Border Act appears to be deleted in the present edition.

[493] Apart from the question of non discrimination the issue remains whether fees themselves fall outside the scope of 'due regard to navigation'. See below.

[494] This is substantiated by T. Ramsland, 'Interview', 20 May 1996. N. Matyushenko, Director of the International Co-operation Department, Russian Ministry of Transport, Arctic Operation Platform (ARCOP), European Commission, Workshops Helsinki 25–27 March 2003, 'Speech – Role of the Marine Transportation of Energy Resources for the Export from the Russian Arctic' notes the current freight

costs. Escorting tank ships is $15.02 per ton. Differentiation of flag vessels was not mentioned. See also B. Frantzen and A. Bambulyak, 'Oljetransport fra den russiske delen av Barentsregionen' (Oil transport from the Russian Barents Sea), Barentssekretariatet – Svanhovdmiljøsenter, (1 juli 2003), <http://www.barsek.no>; and 'Conference – International Energy Policy, the Arctic and the Law of the Sea', St. Petersburg, 23–26 June 2004, <http://www.oceanlaw.ru>. It is expected within several years that 15% to 20% of U.S. oil import will go through Murmansk.

[495] See below. See also Y. Ivanov, A. Ushakov and A. Yakovlev, 'Russian Administration of the NSR', 19–20.

[496] A. Ushakov, 'Interview', 24 February 1994, Moscow. Flag State was not indicated to play any role.

[497] The 1984 Procedure Decree, does not elaborate regarding criminal responsibility, though it deals with the implementation of fines and compensation for damages.

[498] See E. Franckx, 'USSR Pollution Prevention' 170 for further elaboration.

[499] The authorities include the State Committee for Nature Protection, the Ministry of Fisheries, the NSRA, and the Border Guards of the Committee on State Security.

[500] A. Kolodkin, O. Kulistikova, and E. Mokhova, 'Matters of Responsibility for Mariner Pollution' 10–2. Ibid. 12–3 also note Article 85 of the 1991 RSFSR Law On Environmental Protection, under which criminal liability may arise for general ecological offences causing harm.

[501] A. Kolodkin, O. Kulistikova, and E. Mokhova, 'Matters of Responsibility for Mariner Pollution' 15–6. Supporting legislation includes in addition to Article 19 of the 1984 Economic Edict, Articles 36 and 40 of the 1998 Economic Zone Act, Article 84 of the 1991 RSFSR Law and Article 6(b) of the 1971 Statute.

[502] OPA 1990 § 4302 (c) in addition governs felonies. The present U.S. penalties are likely even stricter. E. Gold, *Gard Handbook on P&I Insurance*, p. 445 and E. Gold, *Handbook on Marine Pollution*, pp. 157–8, notes criminal penalties include fines up to $500,000 for an organisation and $250,000 and imprisonment of up to five years for an individual who fails to report a spill. Mandatory civil penalties include $25,000/day for violation or $1000/barrel discharge. If the discharge is a result of gross negligence or wilful misconduct the civil penalty is not less than $100,000 and not more than $3000/barrel. Failure to remove oil or comply with a government order may result in $25,000/day. E. Gold, *Gard Handbook on P&I Insurance*, p. 438 notes U.S. government officials will consider criminal prosecution in relatively small pollution incidents and that the Department of Justice and the Federal Bureau of Investigation have begun to become involved in criminal investigations of larger spills. Unlike most other crimes, proof of intent is not required, and a strict liability crime appears to have been created. State authorities administer and enforce the various state rules, often stricter than OPA 1990 including Alaska requirements for non-tank vessels.

[503] See E. Gold, *Gard Handbook on Marine Pollution*, p. 166.

[504] 33 USC, 1321(3), (4), (5). See E. Gold, *Gard Handbook on Marine Pollution*, pp. 130, 182 and 194. For Canada, criminal liability for violations of environmental provisions in the Arctic zone may be raised resulting in fines and/or imprisonment. R. Huebert, 'Climate Change and Canadian Sovereignty', 92 notes Canada is generally downgrading activities to assert its Arctic regime.

[505] The contiguous zone, where the coastal States have limited powers for the enforcement of customs, fiscal, sanitary and immigration laws, is not addressed since it is irrelevant to the jurisdictional issues raised. See R. Churchill and A. Lowe, *Law of the Sea*, p. 132.

[506] As noted, however, environmentally related safety standards are viewed by the author to be relevant and legitimately included under Article 234, in that they help prevent accidental discharges in ice-covered areas.

[507] 'Due regard to navigation . . .' will be used below to signify 'due regard to navigation', 'within . . . the exclusive economic zone' and 'protection and preservation of the marine environment . . .' of Article 234.

[508] The leading includes leading along recommended routes up to a certain geographical point (shore-based pilotage); aircraft-assisted leading; conventional pilotage; ice-breaker leading; and ice-breaker-assisted pilotage (ice-breaker leading a vessel with a pilot on board the latter).

[509] See below for Russian enforcement measures.

[510] R. Churchill and A. Lowe, *Law of the Sea*, p. 95.

[511] Construction or renovation of enterprises, other installations, artificial islands, various installations and structures at sea, pollution centres and cable installations are addressed.

[512] The development of Environmental Impact Statements was continually addressed under INSROP. K. Moe, ARCOP Workshops, Helsinki 25–27 March 2003, 'Speech – Environmental Impact Statements and Environmental Risk Analysis' and G. Semanov, ARCOP Workshops, Helsinki 25–27 March 2003, 'Speech – Russian Oil Spill Contingency Planning', note the need for ongoing developments.

[513] The two latter activities may also be carried out by Canada. E. Franckx, *Maritime Arctic Claims*, pp. 261–4 notes in the Northwest Passage a Canadian ice pilot was on board the Russian *Kapitan Khlebnikov* in 1992, and a Canadian Coast Guard Officer on board the U.S.C.G.C. *Polar Sea* in 1988. As well, the C.C.G.S. *John A. MacDonald* accompanied the latter. R. Huebert, 'Climate Change and Canadian Sovereignty', 92 notes Canada's ice-breaker fleet is heavily tasked and is ageing, and there are no plans to build new icebreakers in the immediate future.

[514] See ASPPR, Schedule VIII s. 12 for the Canadian Arctic Pollution Prevention Certificate which is obligatory in practice. Under OPA 1990 § 1004(a) liability and removal costs for tankers are limited to the greater of $1,200/gross tons or $10,000,000 for vessels greater than 3,000 gross tons; the greater of $1,200/gross tons or $2,000,000 for vessels less than 3,000 gross tons; and for vessels, the greater of $600/gross tons or $500,000. E. Gold, *Gard Handbook on P&I Insurance*, p. 444 notes the U.S. President is given authority to adjust these limitation amounts every three years to reflect inflation. Ibid. p. 445 notes these limitation provisions are largely ineffective. In most casualties it will be relatively simple to show there has been a violation of some regulation given the very extensive number of applicable Federal regulations. The author also notes various state provisions and the application of such to be even harsher.

[515] See for example 1996 Design Requirements, Appendix, 1995 Navigation p. 324 where it is noted the Russian ice classes UL, L1, L2 and L3 resemble respectively the Canadian classes A, B, C and D, covered in the Canadian ASPPR, Schedule VIII. See V. Evenko, ARCOP Workshops, Helsinki 25–27 March 2003, 'Speech – New Ice Rules Issued by the Russian Maritime Register of Shipping', pp. 5 and 8–9 for new ice-vessel classifications and equivalencies. Reference to these Russian design, construction, and equipment standards appears in Articles 4 and 6 of the 1990 Rules and Article 2 of the 1990 Decree.

[516] Damages include those to natural resources, real or personal property, subsistence use, revenues, profits and earning capacity and public services. See M. Mason, 'Civil liability for oil pollution damage: examining the evolving scope for environmental compensation in the international regime,' *Marine Policy*, Vol. 27, (2003), 1–13 regarding the progressive practice of the OPA 1990 related to damages.

[517] Canada under AWPPA s. 2 and 4 completely bans discharges in its 100 mile zone.

[518] In practice Canada has required escort and pilotage for the U.S. and Russian vessels in the Northwest Passage and has had plans for year round surveillance and control of shipping, compulsory pilotage and training. See D. Pharand, *Canada's Arctic Waters*, pp. 240–1. R. Huebert, 'Climate Change and Canadian Sovereignty', 92 notes Canada's deployment of naval assets to northern waters ended in 1990, overflights will soon be totally eliminated and recently acquired submarines do not have the capability to operate in the Arctic. Northern inhabitants who travel on snowmobiles, Ranger Patrols, monitor the Arctic. R. Huebert, 'New Challenges to Canadian Arctic Security and Sovereignty,' *The CRIC Papers* (Quebec, Centre for Research and Information on Canada, 2002), p. 35 notes satellites have been successful in monitoring ice conditions.

[519] Under the Canadian ASPPR, Schedule VIII the sixteen 'safety control zones' are the basis upon which detailed vessel design, construction and navigation standards may be governed.

[520] N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 74.

[521] E. Franckx, *Maritime Arctic Claims*, pp. 179, 219 footnote 366.

[522] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 164–5 and N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 74. See also E. Franckx, *Maritime Arctic Claims*, pp. 188–9.

[523] This is augmented by the mandatory nature of the measures to be taken by the authorities, who 'shall prescribe' rather than 'may'.

[524] The 1990 Rules Article 1.2. appearing in the 1996 Navigation Guide p. 81 uses 'adjoining' for 'adjacent' and 'guiding' for 'leading'. A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163 note contradictorily that on the high seas freedom of navigation is exercised without those limitations as established within the economic zone connected to environmental protection. In the water column superjacent to the continental shelf, freedom of navigation is preserved since these waters are the high seas.

[525] See E. Franckx, *Maritime Arctic Claims*, pp. 179, 219 footnote 366 who notes the contradiction.

[526] The Canadian AWPPA and supporting legislation as noted is limited to 100 miles from the baselines.

[527] International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969, (CLC), *New Directions*, Vol. II, (1973), p. 602; International Convention on the Establishment of an International Fund for Oil Pollution Damage 18 December 1971, (Fund Convention), *New Directions*, Vol. II, (1973), p. 611. Protocol of 1992 to Amend the CLC, in force 1996 with 91 State parties, 1 June 2003. Protocol of 1992 to Amend the Fund Convention, in force 1996 with 85 State parties, 1 June 2003. Both Protocols of 1992 obtained from the Oil Pollution Compensation Fund, 4 Albert Embankment, London SE1 7SR, 18 October, 1996. Russia is a party to the 1992 CLC Protocol and the 1992 Fund Protocol. See <http://www.imo.org>.

[528] Tanker Owners' Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP), October 1969, *ILM*, Vol. 8, (1969), p. 497. This played an important role where the damaging vessel's flag State was not a party to CLC and Fund but where the vessel was a party to TOVALOP. See D. Torrens, 'Marine Insurance', 157–8. TOVALOP and Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution, (CRISTAL), April 1971, *ILM*, Vol. 10, (1971), p. 137, covering cargo, were terminated 20 February 1997. 'Ocean Orbit', *Newsletter*, p. 5.

[529] Certificate of Insurance or Other Financial Security in Respect of Civil Liability for Oil Pollution Damage. Annex to the CLC.

[530] D. Torrens, 'Marine Insurance', 32–3.

[531] A. Kolodkin, O. Kulistikova, and E. Mokhova, 'Matters of Responsibility for Mariner Pollution', 5.

[532] W. Butler, *USSR Development Law*, 'Edict on the Amounts of Compensation by Ship-owners for Losses Caused by Pollution of the Sea by Oil and Other Substances Harmful for the Life of People and for Living Resources of the Sea' 13 March 1981, J.3, p. 1.

[533] T. Scovazzi, Professor, Review of A. Kolodkin, O. Kulistikova, and E. Mokhova, 'Matters of Responsibility for Mariner Pollution' 25–6. T. Scovazzi notes additionally, 'the present Russian legislation (which is based on the former Soviet legislation) presents serious deficiencies'. See also E. Brown, 'International Oil Pollution Compensation Fund: An Analytical Report on Fund Practice', in W. Butler, *USSR Development Law*, J.6, p. 1, regarding difficulties on this point to the Fund in its very first case raised by the Soviet Union from the *Antonio Gramsci* grounding.

[534] D. Torrens, 'Marine Insurance', 33. E. Gold, 'Interview', 3 October 1995, indicates that Western insurance companies are generally sceptical to insuring vessels and cargo on the NSR due to the belief that both Russia and the Arctic are high risk areas.

[535] See E. Franckx, 'USSR Pollution Prevention' 170. These articles require release of detained vessels upon a showing of proper security and reporting to the flag State of measures taken.

[536] See A. Kolodkin, O. Kulistikova, and E. Mokhova, 'Matters of Responsibility for Mariner Pollution' 6–9, from which the following information is obtained. See also R.D. Brubaker, ARCOP Workshops Helsinki 25–27 March 2003, 'Speech – Marine Insurance related to the Russian Northern Sea Route and Russian Barents Sea', for continuing developments with bringing Russian maritime law and marine insurance law in accordance to international maritime conventions. E. Gold, 'Interview', 26 June 1997 indicates positive developments which include the delivery of professional and competitive bids by Moscow maritime insurance firms as well as the preference by the London insurance market for Russian crews due to their reliability.

[537] Draft of the Russian Federation Merchant Shipping Code, May 1997. A. Gorshkovsky, Director NSRA,

ARCOP Workshops, Helsinki, 25–27 March 2003, 'Speech – Rules to be Followed on the Northern Sea Route', notes a law was adopted in 1999. E. Gold, 'E-mail to author,' 22 March 2003 notes a draft implementing the international maritime conventions was to be adopted soon.

[538] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 3 May 1996 (HNS), *ILM*, Vol. 25, (1986), p. 1415 (not in force). Russia is one of three ratifying parties. See <http://www.imo.org/home.asp?topic_id=673>.

[539] E. Gold, 'E-mail to author,' 22 March 2003.

[540] T. Wagner, 'The Oil Pollution Act of 1990: An Analysis', *Journal of Maritime Law and Commerce*, Vol. 21, No. 4, 1990, 573.

[541] OPA 1990 § 3001. P. Edelman, 'The Oil Pollution Act of 1990', *Pace Environmental Law Review*, Vol. 8, (1990), 12 notes however that the OPA 1990 was enacted with full knowledge that it made adherence to the CLC and Fund plus Protocols impossible.

[542] OPA 1990 § 1016(a). Under OPA 1990 § 1004(a) liability and removal costs for tankers are limited to the greater of $1,200/gross ton or $10,000,000 for vessels greater than 3,000 gross tons; the greater of $1,200/gross ton or $2,000,000 for vessels less than 3,000 gross tons; and for over vessels, the greater of $600/gross ton or $500,000. OPA 1990 § 1004(c)(2) adds the right is lost if the responsible party fails or refuses to report the incident, to provide reasonable co-operation and assistance to responsible officials, or to comply with a governmental order. See E. Gold, *Gard Handbook on Marine Pollution*, pp. 156–7. E. Gold, *Gard Handbook on P&I Insurance*, p. 444 notes the U.S. President is given authority to adjust these limitation amounts every three years to reflect inflation. Ibid. p. 445 notes these limitation provisions are largely ineffective. In most casualties it will be relatively simple to show there has been a violation of some regulation given the very extensive number of applicable Federal regulations. The author also notes various state provisions and the application of such to be even harsher.

[543] Ibid. § 1016(b). The Canadian Arctic Waters Pollution Prevention Regulations, CRC (1978), c. 354, as amended, s. 12, (AWPRR) requires that financial responsibility corresponding to potential liability must be established to the satisfaction of Department of Transport prior to navigation. Strict yet limited liability is imposed on both vessel and cargo owners for illegal environmental pollution damage and costs of a government ordered clean up. AWPPA s. 6(1) and AWPPR s. 15. This would generally amount to 133 SDR's/gross ton with a ceiling of 14,000,000 SDR's (approximately $18,670,000), whichever is lesser. D. Torrens, 'Marine Insurance', 54 footnote 80 made a distinction that since Canada ratified the CLC, this with corresponding limits applies to all Convention vessels north of 60 degrees N, while AWPPA provisions applied to non Convention vessels. An Arctic Pollution Prevention Certificate must be applied for and obtained prior to navigation, giving evidence that the vessel has met the necessary standards. CRC (1978), c. 354 as amended, s. 12. Although the certificate is optional, in practice insurers require it, and a mandatory requirement of compliance with the standards mentioned is achieved de facto. D. Torrens, 'Marine Insurance', 56. Canada adopted the An Act respecting Marine Liability, and to validate certain By-Laws and Regulations, Statutes Canada, c. 6. which entered into force 8 August 2001. This attempts to draw all liability regimes into a single national statue and simplify the complex international liability regimes, while remaining consistent with the international regimes. It also increased limits and established procedures for updating. See E. Gold, *Gard Handbook on P&I Insurance*, pp. 357, 503–05.

[544] OPA 1990 § 1004(c)(1).

[545] A. Ushakov, 'Interview', 25 February 1994.

[546] See discussion of enforcement and special areas below. See also Chapter 7.

[547] See E. Franckx, 'USSR Pollution Prevention', 164–71. The author gives a comprehensive comparison of the older Russian provisions with Articles 211, 218–220 from which the following with respect to Article 234 in relevant part was obtained, unless noted otherwise.

[548] This is not subject to 'clear grounds', or any of the other conditions enumerated above under Article 220(2), (3) and (5), nor inspection safeguards set forth in Article 226.

[549] This is not subject to 'clear grounds' or 'clear objective evidence' or any other conditions enumerated under Articles 220(2) and 220(6).

[550] 'Depending upon particular circumstances' would seem to approximate 'if the circumstances of the case justify such inspection', of Article 220(5), and if viewed together, the Russian legislation appears to substantially comply with Article 220(5). Otherwise Article 6 may allow an open ended inspection satisfying few of the other Article 220(3), (5) and (6) conditions.

[551] This seems similar to Article 220(6).

[552] This is in comparison to 'Subject to Section 7, provided that the evidence so warrants . . .' under Article 220(6) which is omitted.

[553] This as a possible correction factor may allow compliance with Article 231, notification to the flag State and other States concerned. The possibility for compliance with Article 228, flag State pre-emption and suspension of proceedings is not addressed however.

[554] See below for discussion of special areas under the Russian provisions respectively with respect to Articles 234 and 211(6).

[555] Since under traditional regimes for the territorial sea and the exclusive economic zone, notification and authorisation are inconsistent, so may be any measures to remove vessels for violation of such. The same may be maintained concerning the Russian technical rules, which are unilaterally adopted, and not generally accepted, and therefore generally also removal for violation of such may be contrary. LOSC Articles 218–220 do not mention removal as a remedy; Article 219 requires that port States as far as practicable prevent unseaworthy vessels from sailing until repaired in conjunction with bonding under Articles 220(7), 226 and 231.

[556] The Canadian enforcement measures appear less comprehensive than the Russian and the U.S., though rigorously utilised. See E. Gold, *Gard Handbook on Marine Pollution*, pp. 45, 128–30 and E. Gold, *Handbook on Marine Pollution*, p. 82. Under ASPPR, Schedule VIII enforcement is also based around a certificate but which shows compliance with both technical and potential liability standards. It is necessary for navigation, and under ASPPR Schedule s. 15 and AWPPA s. 15(3) vessels may be inspected and denied navigation if requirements are not met or there is a danger of discharge. Under AWPPR s. 12, financial responsibility for potential liability must be shown or navigation denied. More comprehensive surveillance and control of foreign shipping may have been planned. Few of the conditions for showing evidence concerning the amount of pollution damage appear in the provisions.

[557] See E. Gold, *Gard Handbook on Marine Pollution*, pp. 148, 152–3 and 175–6. The U.S.C.G. and the Environmental Protection Agency (EPA) administer the Federal Acts and the state authorities the state legislation. The U.S.C.G. is empowered to inspect vessels and oil record books and to arrest violators, and issues a frequently updated set of rules, including the *Federal Register* and *Marine Safety Newsletter* and *Oil Pollution Act of 1990 – Update*.

[558] These include 'clear grounds' or 'clear objective evidence'; and 'substantial discharge causing or threatening significant pollution', or 'discharge causing major damage or threat of major damage'.

[559] The Canadian AWPPA s. 15(3) appears to prevent such vessels from navigating. The Russian and the U.S. provisions as well as disregard LOSC Article 219 requiring repairs before navigation.

[560] While Article 9 of the 1990 Rules uses some of the same language of Article 211(6), significantly lacking is the procedure providing for consultations through the IMO with other States concerned, and IMO adoption. In the territorial sea temporary suspension of navigation is allowed under LOSC Article 25 for security reasons, and under Article 19(2)(h) acts of wilful and serious pollution. Article 9 of the 1990 Rules which allows navigation to be suspended in specific sections of the NSR, in addition to being more vague, is also 'before the fact'. Hence suspension in the territorial sea in specific areas under Article 9 is also deemed to be in excess of LOSC Articles 19(2)(h) and 25.

[561] See below.

[562] Navigational Directions in 1996 Navigation Guide pp. 90–262, specifically pp. 90, 146 and 166.

[563] The Canadian ASPPR, Schedule VIII provides for sixteen zones which restricts navigation for all vessels not complying with its class 1–10 icebreaker and A-E ice strengthened vessels classifications throughout the year.

[564] See below for surface passages made by the Norwegian State vessel *Sverdrup II*.

[565] E. Franckx, *Maritime Arctic Claims*, pp. 192 and 195.

[566] The incorporation of MARPOL 73/78 into this regime is presumed and will not be directly stated henceforth.

[567] The extensive Russian enforcement legislation, which is also applicable to special areas through Article 13 of the 1984 Economic Edict, Article 3 of the Environmental Edict, Article 11 of the 1990 Decree, Article 36 of the 1998 Economic Zone Act, and Articles 20 and 22 of the 1999 Decree, necessarily is in excess of Article 234 to the extent noted.

[568] For the design, construction, manning or equipment standards this may be so even though the environmental discharge and safety standards may comply with Article 211 incorporating MARPOL 73/78. There may however be some movement in this direction under the Polar Code drafted by the Harmonisation Conference now within the IMO.

[569] R. Churchill and A. Lowe, *Law of the Sea*, p. 348.

[570] Marine pollution is defined under this article as, 'the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance of marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities'.

[571] A. Kolodkin 'Interview', 25 February 1994 indicated a similarity between the two.

[572] See Canada's AWPPA s. 2 and 4 for a complete ban.

[573] See ASPPR, Schedule VIII s. 12 for the Canadian obligatory pollution prevention certificate.

[574] Canada has required escort and pilotage for vessels in the Northwest Passage. More comprehensive plans of regulation appear not to have been realised.

[575] The Canadian counterpart is AWPPA s. 5.

[576] See E. Franckx, 'USSR Pollution Prevention', 164–171 for a comprehensive comparison from which the following was obtained, unless otherwise noted.

[577] Ibid., 162.

[578] See below.

[579] This is the view taken by N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 75.

[580] See R. Churchill and A. Lowe, *Law of the Sea*, p. 351 and P. Birnie and A. Boyle, *International Law & the Environment*, p. 372.

[581] E. Franckx, 'USSR Pollution Prevention', 166, 170–1 does not mention this point.

[582] Ibid. 166 views the omission of the statement, 'that evidence so warrants' the institution of proceedings, in Article 15 as noteworthy, whereas it may be already understood under the passage, 'clear and objective evidence' of both Article 12 and Article 220(6).

[583] See E. Franckx, 'USSR Pollution Prevention' 166.

[584] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic' 163 note under the 1984 Procedure Edict the authorities are allowed all measures required by the circumstances to prevent violations and to detain offenders.

[585] The 1984 Procedure Decree Article 8 also allows the border guard to seize 'implements, equipment, instruments and other articles and documents', of violators of Article 19, including the environmental provisions, and use whatever measures are necessary. This is reiterated by A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic' 162.

[586] '(T)hat the evidence so warrants' may be understood in 'clear and objective evidence' in Article 15.

[587] Under Article 228 flag State pre-emption and suspension of proceedings are not required under cases of major pollution damage or repeated flag State dereliction.

[588] See above for Canadian practice.

[589] The excesses of non Arctic specific legislation with the general regime have been noted as well.

[590] See Chapter 7.

[591] Though not pre UNCLOS III rules, the LOSC regime for innocent passage related to the prevention, reduction and control of pollution has likely become customary international law, and these provisions will be referred to in addition to those under the 1958 TSC. Reference will also be made to the

U.S.S.R. – U.S. Joint Statement where these issues were one of the most controversial between the Soviet Union and the U.S. See E. Franckx, *Maritime Arctic Claims*, p. 181.

592 A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic' 166 note directly the limitations on the right of innocent passage. E. Franckx, *Maritime Arctic Claims*, pp. 186–7, notes rather succinctly, '(I)n fact, it would appear rather awkward for this country, (Russia) especially in the light of the factual circumstances which made the Soviet Union change its positions (with regards to sea lanes), to make a new, albeit somewhat more restricted, exception by excluding the Arctic coast from the field of application of this newly agreed principle'. Parentheses added.

593 W.M. Reisman, 'The Regime of Straits and National Security' 52–3, 69 and 74, and W. Østreng, 'Stumbling Block', 3, 15–7 note generally some activity.

594 The following information is obtained from an INSROP Joint Research Council (JRC) meeting at FNI, Oslo, 17 April 1996, in which interviews were carried out with A. Ushakov (A. Ushakov 'Interview', 17 April 1996); T. Ramsland (T. Ramsland 'Interview', 17 April 1996); and V. Peresypkin (V. Peresypkin 'Interview', 17 April 1996). The latter is the Director of CNIIMF. Information is also obtained from *EPOCA-95 Cruise Report,* (Washington D.C., Naval Research Laboratory, February 13, 1996), (Kara Sea Cruise Report).

595 T. Ramsland, 'Interview', 17 April 1996.

596 *EPOCA-95 Cruise Report*, p. E-1 indicates samples were collected, 'near the sites of the dumped reactors' in Abrosimov, Stepovoy, Tsivolka and Techeniya Bays, which may indicate internal waters were entered. T. Ramsland, 'Interview', 17 April 1996 indicates that *Sverdrup II* is used both on hydrographic research and military research through the exchange of equipment, though on this voyage it was considered military. *EPOCA-95 Cruise Report*, p. E-1 notes that *Sverdrup II* is affiliated with the Norwegian Defence Research Establishment (NDRE), and the report itself appears with a U.S. Navy letterhead. The personnel included a Norwegian captain and crew as well as a military officer, six scientists and engineers from the NDRE, several Americans affiliated with the U.S. Naval Research Laboratory, and a chemical oceanographer from the IAEA – Marine Environment Laboratory. 50 Russian researchers of unknown origin were invited but refused the invitation. T. Ramsland, 'Interview' 12 May 1996 noted that in summer 1995, the Commander of Military Forces in Northern Norway permitted on two occasions mixed Russian and Norwegian crews on Norwegian vessels to carry out seismic investigations on the Norwegian shelf.

597 In the letter, for NDRE the Russians used the Norwegian abbreviation, (FFI) from 'Forsvarets Forskningsinstitutt'.

598 Requirements for passage were specifically stated to be, 1) Name of vessel, flag, port of registry, vessel owner (full name and full address); 2) Gross/net tonnage reg. T; 3) Main dimensions (length, breadth, draft), output of main engines, propeller (construction, material), speed, year of build; 4) Ice class and classification society, date of last examination; 4.1) Construction of bow (ice knife or bulb-bow); 5) Expected time of sailing through the NSR; 6) Presence of certificate of insurance or other financial security in respect of civil liability for environmental pollution damage; 7) Aim of sailing (commercial voyage, tourism, scientific research, etc.). Igarka was noted to be the only port open for entry of foreign vessels.

599 T. Ramsland, 'Interview' 12 May 1996.

600 T. Ramsland, 'Interview' 10 October 1996.

601 Ibid.

602 T. Ramsland, 'Interview', 28 August 1996.

603 Ibid.

604 See Chapter 8.

605 See generally S. Mahmoudi, 'Foreign Military Activities' 365–86.

606 See Appendix II. Tables obtained from A. Ushakov, INSROP Joint Research Council Meeting, March 1995, Oslo.

607 See H. Bergesen and G. Parmann, *Green Globe Yearbook*, pp. 140–1. Denmark does make a reservation with respect to Greenland and MARPOL 73/78.

608 J.A. Roach, 'Correspondence', 15 February 1999. V. Peresypkin, 'Correspondence', 24 February 1999.

[609] E. Gold, 'Interview', 23 June 1994. J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 207, 227, footnote 79. J.A. Roach, 'Correspondence', 15 February 1999 notes no further developments.

Chapter 6

[610] R. Churchill and A. Lowe, *Law of the Sea*, p. 102. See generally D. O'Connell, *The International Law of the Sea*, pp. 312, 314–5. An exception is E. Brüel, *International Straits, A Treatise on International Law*, (London, Sweet and Maxwell, 1947), Vol. 1, pp. 15–6, who traces the etymology of the term (in Danish) one definition of which emanates from the same Latin term noted used for the English definition.

[611] *Webster's Seventh New Collegiate Dictionary*, (Springfield, G. & C. Merriam Company, 1972), p. 866.

[612] The archaic meaning is defined as, 'a narrow space or passage', and 'strait' (adj.) derives from Middle English, from Old French *estreit*, and from Latin *strictus* the past participle of *stringere*, to bind tight.

[613] R. Churchill and A. Lowe, *Law of the Sea*, p. 102.

[617] ICJ Reports (1949), p. 28. The ICJ, limiting its decision to the specific case of straits, stated, '(I)t is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace'. Ibid. p. 30 noted, '(I)n these circumstances, it is unnecessary to consider the more general question, much debated by the parties, whether States under international law have a right to send warships in time of peace through territorial waters not included in a strait'.

[615] The following is obtained from *The Law of the Sea, Straits Used for International Navigation, Legislative History of Part III of the United Nations Convention on the Law of the Sea*, Vols. I and II, Division of Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, (U.N. LOSC – Straits) unless otherwise noted. See also K. Koh, *Straits*, pp. 99–171; M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, pp. 279–93; and W. Burke, 'Submerged Passage through Straits: Interpretations of the Proposed Law of the Sea Treaty Text', *Washington Law Review*, Vol. 52, (1977), 195–200.

[616] Various proposals were submitted, with that from the United Kingdom, 'Draft Articles on the Territorial Sea and Straits'; *Official Records*, Vol. III, p. 143, Document A/CONF.62/C.2/L.3 (3 July 1974) (U.K. Draft) playing a central role due to its balance. See K. Koh, *Straits*, p. 143.

[617] K. Koh, *Straits*, p. 197. Ibid. p. 143 indicates States in favour of permitting transit passage in certain straits included, Algeria, Bulgaria, Canada, Cuba, Czechoslovakia, Denmark, Finland, German Democratic Republic, Ghana, Hungary, Iceland, India, Iraq, Israel, Italy, Liberia, Mongolia, Nigeria, Poland, Singapore, Sri Lanka, Sweden, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, and the United States. States in favour of limiting passage to innocent passage through international straits included, Albania, Argentina, China, Egypt, Fiji, Iran, Kuwait, Morocco, Oman, Peru, Spain, United Republic of Tanzania, and Yemen. See also D. McRae, 'The Negotiation of Article 234', 109.

[618] This may be subject to the enclosure of the Arctic straits by straight baselines and the historical claims which as noted will not be addressed.

[619] See Chapter 1 and Appendix II. The original map providing the basis for the maps was received from A. Yakovlev under INSROP. Geographic information in the following is obtained from W. Butler, 'The Legal Regime of Soviet Marine Areas', *The Soviet Maritime Arctic*, p. 217; W. Butler, *Northeast Arctic Passage*, pp. 4, 18–21, 28–9, 33 and 39 and W. Butler, *USSR Development Law*, C. 3. pp. 27, 38, 42. Cross reference was made to *Arctic Atlas*, (in Russian), pp. 20–1, 102, and 104–5, and Russian Charts Nos. 601, 650, 696, 697, 948, 949, 951, 952, 954, 955, (in Russian) covering consecutively the areas the White Sea to the northern Bering Strait. *Atlas of the Straight Baselines*, pp. 203–6, and Admiralty Maps, covering the North Cape to the Bering Strait, London, Published at the Admiralty, 16th July 1948 under the Superintendence of Rear Admiral A.G.N. Wyatt, C.B. Hydrographer, Republished 19th April 1985, were also utilised. See also E. Franckx, *Maritime Arctic Claims*, p. 181.

[620] W. Butler, *Northeast Arctic Passage*, pp. 5–41.

[621] Ibid. p. 38.

[622] See Nansen Island in the Nordenskjöld Archipelago near which are the Fram, the Sverdrup, the Zaria and the Palander Straits. The Nordenskjöld Archipelago contains approximately 70 islands and includes those straits listed. W. Butler, *Northeast Arctic Passage*, pp. 27–8 and 41 describes the Minin Skerries as an extensive archipelago.

[623] Ibid. pp. 25, 27 and 40–1.

[624] Ibid. p. 38.

[625] See I. Brownlie, *Principles*, p. 279. Ibid. notes, 'the controversy at the First Law of the Sea Conference as to the passage of warships was overall and extended to territorial seas both in straits and in ordinary circumstances . . . (T)hus the interpretation of Article 16(4) of the Territorial Sea Convention turns on the main issue, viz., what types of vessel qualify for innocent passage'. See also K. Koh, Straits, pp. 39–40. D. O'Connell, *The International Law of the Sea*, p. 327 notes a channel for transit has always existed in wartime, 'even if its extent is restricted, and even if the quality of the right of transit may have been degraded to equivalence with innocent passage'.

[626] K. Koh, *Straits*, pp. 39–40. Ibid. p. 27 cites to the contrary D. O'Connell, *The Influence of Law on Sea Power*, (Manchester, Manchester University Press, 1975), p. 97, concerning over 130 straits which cease to be high seas, '(T)he statistics are a little misleading, because many of these straits are dubiously "international" . . . and indeed find themselves in the list only because of assiduous cartographical scrutiny on the part of those who seek to produce arresting figures'.

[627] See P. De Cesari, L. Migliorini, T. Scovazzi, N. Tavazzani, T. Treves, F. Trombetta-Panigadi, (eds.) *Index of Multilateral Treaties on the Law of the Sea*, (Milano, Dott. A. Giuffrè Ediore, 1985), p. 119. UNCLOS I was attended by 86 States. *Official Records I*, Vol. II, pp. xiii–xxvi.

[628] See generally K. Koh, *Straits*, pp. 99–127 who notes the controversial issue of the breadth of the territorial sea as well. D. O'Connell, *The International Law of the Sea*, p. 24 views the failure to achieve broad 1958 TSC ratification related to political changes in the 1960's. E. Brown, *Passage through the Territorial Sea, Straits Used for International Navigation and Archipelagos*, (London, University College, 1974), p. 32, notes in UNCLOS III the opportunity, '. . . to remove any remaining doubts on . . . the applicability of the conventional rules on innocent passage through straits to warships'.

[629] R. Churchill and A. Lowe, *Law of the Sea*, pp. 102–4. See also I. Brownlie, *Principles*, p. 280, K. Koh *Straits*, pp. 38–9 and S. Nandan and D. Anderson, 'Straits Used for International Navigation', 161.

[630] U.S. Presidential Proclamation No. 5928 declares, 'In accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea, within the territorial sea of the United States, . . . the ships and aircraft of all countries enjoy the right of transit passage through international straits'. See statements by the Soviet delegate to UNCLOS III, *Official Records*, Vol. I, p. 68; the U.K., ibid., Vol. II, pp. 125–6. (For opposite statement however see ibid., Vol. I, p. 112); and the U.S. ibid., Vol. II, p. 139. See also D. O'Connell, *The International Law of the Sea*, p. 327.

[631] See *Limits in the Seas*, No. 112, pp. 61–74. Ibid. pp. 63–73, gives specific references to U.S. Aide Memories or Diplomatic Notes. The preface states, '(T)his paper reflects the position of the United States towards excessive claims by coastal States which are inconsistent with international law'. R. Smith and J.A. Roach, *Excessive Maritime Claims*, pp. xi and 177–229 make no such qualification, and J. Strasser, Rear Admiral, U.S. Navy, President, Naval War College, states in the Foreword, '(T)he opinions expressed in this volume are those of the authors and are not necessarily those of the United States Navy nor of the Naval War College'. Ibid. p. xi. See H. Caminos, *The Legal Regime of Straits*, pp. 206–7 for additional U.S. statements and passages supporting transit passage, including Gibraltar during the April 1986 U.S. action against Libya, and the Strait of Hormuz during the latter part of the 1980's.

[632] M. Leifer, *International Straits of the World*, pp. 161–2 notes the straits of Malacca and Singapore have relevance to the U.S. 'only of principle', and concessions to Indonesian and Malaysian claims might set a precedent for submerged passage elsewhere, especially in the Indonesian Straits. The latter are deeper and crucial to passage of U.S. submarines to and from the Indian Ocean.

[633] W. Schachte, 'International Straits and Navigational Freedoms', 16–7 notes '. . . it is the unequivocal

United States position that transit passage is customary international law which the provisions of the LOS Convention reflect'. Ibid. 3 notes his remarks are to be taken as the official U.S. position. J. Moore, 'The Regime of Straits and the Third United Nations Conference on the Law of the Sea', *American Journal of International Law*, Vol. 74, (1980), 115–6 and 121, notes '. . . if UNCLOS is creating custom concerning a 12 mile limit, it is simultaneously creating custom for transit passage of straits, as these issues have been linked at every stage of the negotiation'. J. Moore served as a U.S. Ambassador to UNCLOS III and Chairman of the National Security Council Interagency Task Force on the Law of the Sea. Ibid. 77 and 102. A disclaimer appears that responsibility for the views expressed is solely that of the author. Since the article was written following negotiations and in response to the W.M. Reisman article below attacking U.S. negotiators in UNCLOS III, it seems difficult to separate J. Moore's roles. His arguments are based precisely upon his 'inside' participation in official negotiations as the U.S. representative. Though his status is unclear, in this article J. Moore presents arguments probably parallel to the U.S. position and appears to represent official status similar to P. Barabolia and A. Kolodkin. See also *Official Records*, Vol. XVII, pp. 116–7 for a U.S. statement in plenary, and D. Pharand, *Canada's Arctic Waters*, pp. 233–4.

634 The following is obtained from W. Burke, *International Law of the Sea*, 'Documents and Notes', (7th ed.), (Seattle, University of Washington 1987), Chapters I. p. 90 and II pp. 144–5, unless otherwise noted. Ibid. notes the U.S. position is based upon relevant past practice characterised by a three mile territorial sea with a high seas corridor through any straits wider than six miles with free passage, surface or submerged and free overflight. Transit passage with a 12 mile territorial sea is 'nothing new' and 'business as usual'. W. Burke's status is perhaps more clear. Though an expert to the U.S. Delegation to UNCLOS III, in addition to his non leadership he publishes statements detrimental to the U.S. position. He appears to take a more independent position generally consistent with that of a law professor, and will not be considered to have official status.

635 R. Churchill and A. Lowe, *Law of the Sea*, pp. 110–3. M. Leifer, *International Straits of the World*, p. 170. H. Caminos, *The Legal Regime of Straits*, p. 209.

636 H. Bergesen, A. Moe, and W. Østreng, *Soviet Oil and Security Interests in the Barents Sea*, (London, Frances Pinter, 1987), p. 63.

637 Ibid. The authors note new warships were first stationed with the Northern Fleet, and thereafter with the other fleets at Vladivostok (Pacific Fleet), Kaliningrad (Baltic Fleet), Sevastopol (Black Sea Fleet), and Baku (Caspian Fleet).

638 See *Militær-Balansen*, Den internasjonale institutt for strategiske studier, (Oslo, Norske Atlanterhavskomité, 1989–90), (in Norwegian) s. 46–9.

639 P. Barabolia, in W. Butler, *Northeast Arctic Passage*, pp. 142–3 notes, '(I)t also is important to emphasise that in respect of such straits customary norms of law have been formed over the centuries providing for the complete and unlimited freedom of navigation through them of vessels of all countries of the world'.

640 Ibid. See also A. Kolodkin, and M. Volosov, 'The legal regime of the Soviet Arctic', 163, who view transit passage as customary international law.

641 R. Churchill and A. Lowe, *Law of the Sea*, pp. 110–3.

642 See J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 180 who list the practice of 14 various States.

643 See below.

644 *North Sea Continental Shelf Cases*, ICJ Reports (1969) p. 42. See also I. Brownlie, *Principles*, p. 6.

645 See R. Churchill and A. Lowe, *Law of the Sea*, pp. 114–5, J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 180–1 and J. Moore, 'The Regime of Straits', 80.

646 V. Kisselev and P. Savaskov, 'International Regime of Straits and the U.N. Convention on the Law of the Sea', *Soviet Yearbook of Maritime Law*, (Moscow, Soviet Association of Maritime Law, State Research and Project Development Institute of Merchant Marine (Soyuzmorniiproject), 1988), 9 and 16. A. Kolodkin was Editor in Chief of the Yearbook and has continued in parallel positions in the Russian counterparts. See also J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 180–1 and J. Moore, 'The Regime of Straits', 80.

[647] Statement Relating to Article 233 of the Draft Convention on the Law of the Sea in its Application to the Straits of Malacca and Singapore, *Official Records*, Vol. XVI, pp. 250–3. Document A/CONF.62/L.145 (1982), Annex and Adds. 1–8, (Malacca Agreement). The Soviet Union is noticeably absent from the Malacca Agreement, though K. Koh *Straits*, p. 160 notes it was also involved in negotiations with the U.S. and the three strait States.

[648] See <http://www.un.org/Depts/los/stat2los.txt>.

[649] See R. Churchill and A. Lowe, *Law of the Sea*, pp. 114–5.

[650] Ibid. Note however the former may be concerned only with neutralisation of the shore and not with passage. See Article 10 of the Treaty of Peace and Friendship between Argentina and Chile, 29 November1984, *ILM*, Vol. 24, (1985), p. 13. J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 194 and 226, footnote 60 indicate the U.S. and other States consider the Magellan Strait subject to free navigation and believe this reaffirmed by both Argentina and Chile. Argentina however was originally in favour of permitting only innocent passage in international straits. See K. Koh *Straits*, p. 143. The Chilean statements in UNCLOS III and declaration upon signing may argue for a restrictive meaning of the geographic Straits of Magellan. See *Official Records*, Vol. XVI, p. 258, Document A/CONF.62/WS/19; *Official Records*, Vol. XVII, p. 67; and *The Law of the Sea: Status of the United Nations Convention on the Law of the Sea*, (United Nations Publication, Sales No. E.85.V.5), (U.N. Status), p. 14.

[651] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 182–3 and 222.

[652] R. Churchill and A. Lowe, *Law of the Sea*, p. 114.

[653] V. Kisselev and P. Savaskov, 'International Regime of Straits', 12. Ibid. note even though special agreements were concluded for straits in the Baltic and Black Seas and others including the Straits of Magellan, the regime is no different from regular free passage especially for merchant vessels.

[654] Convention regarding the Regime of the Straits, 20 July 1936, (Montreux Convention). Obtained through the Embassy of the Republic of Turkey, Oslo, 26 May, 1994.

[655] R. Churchill and A. Lowe, *Law of the Sea*, pp. 115.

[656] Ibid.

[657] Ibid. This was partially confirmed by Y. Inan, Professor, Bilkent University, 'Speech – Turkish Straits', and V. Kotliar, Diplomat, Russian Ministry of Foreign Affairs, 'Speech – Black Sea Straits', Conference – International Legal Issues of the World Ocean, 2–6 November 1998, Moscow.

[658] *Multilateral Treaties Deposited with the Secretary-General*, ST/LEG/SER.E711, Sales No. E.93.V.11. (New York, United Nations Publication, Status 31 December 1992), p. 770 (Kuwait). *Official Records*, Vol. XVII, p. 43, (Fiji). These states as well as Cyprus were originally in favour of innocent passage. See K. Koh *Straits*, p. 143.

[659] Upon signature of the LOSC, Spain declared, '4. With regard to Article 42 . . . the provisions of paragraph 1(b) do not prevent it from issuing, in accordance with international law, laws and regulations giving effect to generally accepted international regulations . . . 6. It interprets the provisions of Article 221 as not depriving the coastal State of a strait used for international navigation of its powers, recognised by international law, to intervene in the case of the casualties referred to in that article. 7 . . . Article 233 must be interpreted, in any case, in conjunction with the provisions of Article 34'. U.N. Status No. E.85.V.5, p. 25. See also *Official Records*, Vol. XVII, pp. 36 and 90, and J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 185–9.

[660] The issues posed by the straits was discussed in the debate on international straits by the Second Committee from 22 to 25 July 1974, appearing in *Official Records*, Vol. II pp. 123–42, (Straits Debate). See K. Koh, *Straits*, p. 143 for Albania, China and Peru. For Iran see *Official Records*, Vol. XVII, p. 106, U.N. Status No. E.85.V.5. pp. 17–18, and J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 189–91. For the United Arab Emirates see, *Official Records*, Vol. XVII, p. 23.

[661] China ratified the LOSC on 7 June 1996, and Spain on 15 January 1997. See <http://www.un.org/Depts/los/stat2los.txt>.

[662] Cape Verde, *Official Records*, Vol. XVII, p. 36; Bulgaria, ibid. p. 29; India, ibid. p. 38; Australia, ibid. p. 44; Belgium, ibid. p. 64; Guyana, ibid. p. 67; Israel, ibid., p. 84; Bahrain, ibid. p. 88; New Zealand, ibid., p. 89; Hungary, ibid. p. 92; Liberia, ibid. p. 96; Sudan, ibid. pp. 113–4; Iraq, ibid. p. 60; Turkey,

ibid. pp. 78, 226 and 240, Document A/CONF.62./WS/34 and Document A/CONF.62./WS/37 and Add.1 and 2; France, ibid., p. 86; Malaysia stated in the plenary meeting, '. . . Malaysia particularly welcomes those provisions in the Convention which seek to ensure the safety of navigation as well as the protection of the marine environment . . . together with Indonesia and Singapore . . . sharing the Straits of Malacca, we have reached a common understanding with major user States . . . on measures that coastal States may adopt in accordance with the relevant provisions of the Convention', ibid., p. 118; Morocco, ibid. p. 32. See above for earlier contrary positions for the latter two.

663 See J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 177 to 229 for U.S. claims to transit passage through straits controlled by Canada, pp. 207–15; Denmark, pp. 215–8; Egypt, pp. 219–21; Finland, p. 183; the Soviet Union, pp. 191–4 and 200–7; Sweden, p. 183; and Yemen Arab Republic, pp. 183–4. See also Canada, *U.S. Limits*, No. 112, pp. 71–2. Canada stated in plenary meeting, '(Parties to the Convention) will . . . be able to take advantage of the new provisions on transit passage through international straits. They offer a major inducement to maritime States especially to sign and ratify the Convention'. *Official Records*, Vol. XVII, p. 15; Egypt, LOSC Declarations No. E.93.V.11, p. 767, *Official Records*, Vol. XVII, p. 18, and ibid., Vol. II p. 131. See debate with U.S. in which Egypt, originally in favour of innocent passage through international straits, proposed prior authorisation or notification and verification of submarines through straits, ibid.; Oman, LOSC Declarations No. E.93.V.11, p. 771, U.N. Status No. E.85.V.5. p. 22, Oman originally was in favour of innocent passage, see K. Koh, *Straits*, p. 143; Finland, U.N. Status No. E.85.V.5. p. 14, *Official Records*, Vol. XVII, pp. 42–3; Philippines, U.N. Status No. E.85.V.5. pp. 22–3 and LOSC Declarations No. E.93.V.11, p. 771, *Official Records*, Vol. XVII, p. 69, Eight Nation Proposal; Sweden, U.N. Status No. E.85.V.5. p. 26, *Official Records*, Vol. XVII, p. 54; Soviet Union, *U.S. Limits*, No. 112, pp. 68–71 and A. Kolodkin, and M. Volosov, 'The legal regime of the Soviet Arctic', 163; Greece, U.N. Status No. E.85.V.5. p. 17, *Official Records*, Vol. XVII, p. 110; Yemen, U.N. Status No. E.85.V.5, p. 29, Yemen was in favour of innocent passage, see Eight Nation Proposal, K. Koh, *Straits*, p. 143; Yugoslavia, LOSC Declarations, No. E.93.V.11, p. 775, *Official Records*, Vol. XVII, p. 68; Tanzania, ibid., p. 51. Tanzania was in favour of innocent passage. See K. Koh, *Straits*, p. 143; Guinea, LOSC Declarations, No. E.93.V.11, p. 769. This group would now likely contain China and Spain.

664 Argentina was originally in favour of innocent passage, see K. Koh, *Straits*, p. 143; U.N. Status No. E.85.V.5., pp. 13–14. *Official Records*, Vol. XVII, p. 67, and Treaty of Peace and Friendship between Argentina and Chile, 29 November1984, *ILM*, Vol. 24, (1985), p. 13; Rumania, LOSC Declarations No. E.93.V.11 p. 772; Sao Tome and Principe, LOSC Declarations No. E.93.V.11, p. 772; Nigeria, *Official Records*, Vol. XVII, pp. 95 and 230–2 Document A/CONF.62/WS/36. Indonesia has ratified the LOSC, however in 1988 closed the Sunda and Lombok Straits, through which the U.S. claims transit passage, for naval exercises. U.N. Speech p. 6 paragraph 9, footnote 2, J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 218–9.

665 See I. Brownlie, *Principles*, p. 280 who notes, '(N)o doubt state relations in this field may evolve to some extent on the basis of recognition of transit rights and reciprocity'.

666 R. Churchill and A. Lowe, *Law of the Sea*, pp. 112–3. See Chapter 8 for probable lack of Russian detection of U.S. submarines in Russian internal waters.

667 J.A. Roach, 'Interview', 27 June 1994. H. Caminos, *The Legal Regime of Straits*, p. 207 notes a State may not act in support of a right which has not yet evolved into a customary international norm, especially when such State practice is founded on attitudes of power politics against the will of coastal States.

668 Arguments are obtained from R. Churchill and A. Lowe, *Law of the Sea*, pp. 110–3 unless noted otherwise.

669 In the plenary meeting the U.S. stated, '. . . long-standing international practice bears out the right of all States to transit straits used for international navigation . . . Moreover, these rights are well established in international law'. *Official Records*, Vol. XVII, p. 244. See also ibid. pp. 116–7. The U.K. stated, '. . . the concept of transit passage through straits connecting two parts of the high seas . . . corresponded to what his delegation believed to be the best international practice at that time'. *Official Records*, Vol. II, pp. 125–6.

670 See Sweden, *Official Records*, Vol. I, p. 76. Denmark, ibid., Vol. II, p. 124; the Soviet Union, ibid. pp.

126–7; and the U.S. in the 1972 Sessions, SBC, Subcommittee II, Summary Records of the 24th to the 32nd meetings (A/AC.138/SC.II/SR.24–32), 29th meeting pp. 74–5. R. Churchill and A. Lowe, *Law of the Sea*, p. 112 believe the balance of opinion against the existence of such a customary rule.

671 Iran declared upon signature to the LOSC and in the plenary meeting, '(I)t is . . . the understanding of . . . Iran that: 1) Notwithstanding the intended character of the Convention being one of general application and of law making nature, certain of its provisions are merely product of *quid pro quo* which do not necessarily purport to codify the existing customs or established usage . . . regarded as having an obligatory character . . . it seems natural and in harmony with Article 34 of the 1969 Vienna Convention . . . only States parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein. The above considerations pertain specifically (but not exclusively) to . . . (t)he right of transit passage through straits used for international navigation (Part III, Section 2, Article 38)'. Respectively U.N. Status No. E.85.V.5. pp. 17–8 and *Official Records*, Vol. XVII, p. 106.

672 I. Brownlie, *Principles*, p. 280 notes the LOSC provisions are a 'substantial departure' from customary law, and they 'in principle . . . could be confirmed as customary law by state practice independently of the Convention, and there is some evidence of a trend in this direction, supported by the practice of France, the United States and the United Kingdom'. R. Churchill and A. Lowe, *Law of the Sea*, p. 113, note 'a general right of transit passage may not yet have become established in customary international law'. See also W.M. Reisman, 'The Regime of Straits and National Security' 76, H. Caminos, *The Legal Regime of Straits*, p. 231, D. Pharand, *Canada's Arctic Waters*, pp. 233–4, K. Koh, *Straits*, p. 171, W. Burke, *International Law of the Sea*, p. 90, and V. Kisselev and P. Savaskov, 'International Regime of Straits', 10 and 15. V. Bordunov, 'The right of transit passage under the 1982 Convention', *Marine Policy*, Vol. 12, (1988), 219 and 230, and K. Hakapää, *Marine Pollution in International Law*, p. 202 are vague on the issue. In contrast see D. O'Connell, *The International Law of the Sea*, p. 331. S. Nandan and D. Anderson, 'Straits Used for International Navigation' 170 noted Part III will influence the practice of states even prior to the entry into force of the LOSC, since the regime achieved consensus and represented negotiated solutions.

673 This as is required under the ICJ's majority approach concerning *opinio juris*. The right clearly fails under the even more stringent approach for showing *opinio juris*.

674 I. Brownlie, *Principles*, p. 280.

675 Respectively R. Churchill and A. Lowe, *Law of the Sea*, pp. 169, and 351–3; and J. Kindt, 'International Environmental Law and Policy', 600–1.

676 See below.

677 See below.

678 Information regarding UNCLOS is obtained from *Official Records I*, Vol. III, pp. 79, 93–6, 100, and 210; and Vol. II, p. 65; unless otherwise noted. See also *International Law Commission Yearbook*, (*ILC Yrbk*), Vol. 2, (1956), 273 and ibid. Vol. 1, (1955), 260. The final vote was 31:30:10 in favour of deletion. Although the vote also included the sensitive issue of access to a foreign port, from the result and discussion carried out by the Soviet Union, India, United Arab Republic and Indonesia as well as Spain, Turkey, Chile, Iran, Malaya, and Morocco, there was a clear belief by several straits States that navigational rights through international straits should be narrowed. The entire draft article leading to Article 16(4) was eventually passed 62:1:9.

679 See below. See also M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, pp. 279–93. Canada, Chile and Norway were interested in defining 'international straits'. *Official Records*, Vol. III, p. 241, Document A/CONF.62/C.2/L.83 (1974) and 'Aide Memoire' of Canada, Chile and Norway, reproduced in R. Platzöder, *Documents*, Vol. IV, pp. 223–4. However, the U.K. proposal used the same formulation as the *Corfu Channel Case*. *Official Records*, Vol. III, p. 185, Document A/CONF.62/C.2/L.3 (1974).

680 ICJ Reports (1949) pp. 28–9. For Judge Azeuedo's dissent see ibid. pp. 106–7. Additionally noted were a large number of vessels which navigated the Strait without stopping at Corfu and hence were not counted, the periodic navigation of vessels from at least three States, and the regular usage by the British Navy for over 80 years, as well as usage by other States' navies.

[681] P. Barabolia in W. Butler, *Northeast Arctic Passage*, pp. 142–3.

[682] P. Barabolia in W. Butler, *Northeast Arctic Passage*, pp. 142–3 notes these straits are, 'part of the World Ocean which up to now has belonged to all mankind . . . one can say that by virtue of centuries of tradition customary norms of law have been formed and developed consolidating the freedom of navigation in such straits as a generally recognised norm of international law'.

[683] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163.

[684] A. Kolodkin, 'Interview', NSR Expert Meeting, 13 October, 1992, Tromsø, strongly discounted any possibility for the definition 'international' governing the Russian Arctic straits. See Chapter 7.

[685] J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 182. *U.S. Limits*, No. 112, pp. 68–72 and W. Schachte, 'International Straits and Navigational Freedoms' 14. J. Moore, 'The Regime of Straits' 112, notes the controversy is not settled by UNCLOS III.

[686] W. Butler, *Northeast Arctic Passage*, p. 135 notes, 'a strait may have been used on one or more occasions for international navigation, may now be being so used, or may be capable of such use in the future'. The following arguments are obtained from ibid. pp. 135–7 and 139 unless otherwise noted. Since these appear to be the U.S. position most eloquently expressed, the author's arguments though not official are presented in their entirety.

[687] The Arctic straits are taken as an example, where the closure of the Suez Canal revived interest in passage which only recently became possible through developments in Arctic vessel design, ice-breaking methods, polar environmental knowledge, and weather forecasting.

[688] Ibid. p. 136. Ibid. p. 139 notes further, '(T)hat a functional criterion is desirable for striking a balance on the issue of passage through straits between the concerns of the coastal State and the concerns of the international community would seem to meet general acceptance . . . there seems little reason to confine the scope . . . to a class of straits used *at present* to some definable extent for international navigation to the exclusion of straits whose use in this regard may alter dramatically as patterns of commerce, in the broad sense, and marine technology develop'.

[689] General information on Soviet authors may be obtained from ibid. pp. 139–43, 168, including A. Zhudro who notes straits linking the high seas and having significance as world routes must have been so used for a 'prolonged period' to be international. See V. Kisselev and P. Savaskov, 'International Regime of Straits', 10, V. Bordunov, 'The right of transit passage', 220 and R. Churchill and A. Lowe, *Law of the Sea*, p. 103. K. Koh, *Straits*, pp. 20 and 65 considers a rather *low degree* of utility characterised by the *Corfu Channel Case* is sufficient, basing this upon the dissent of Judge Azevedo, noting the Malacca and Singapore Straits with 3,000 to 4,000 vessels passing *monthly*. Ibid. p. 14 notes passage may be possible in ice-bound straits though the question of consequent international use is unanswered. D. Pharand, *Canada's Arctic Waters*, pp. 217–21 notes while degree of use is indefinite, actual use has to be considerable. While a substantial number of transits and flags is mandatory, strait location and other relevant circumstances might allow lower numbers. See also D. O'Connell, *The International Law of the Sea*, pp. 314 and 328, and K. Hakapää, *Marine Pollution*, p. 201. H. Caminos, *The Legal Regime of Straits*, pp. 128–9 notes the amount of use lies between strict utility and potential utility, and some degree of use suffices.

[690] K. Koh, *Straits*, pp. 38–47. Ibid. p. 47 notes these ambiguities are compounded in narrow, congested straits along with new threats related to security and pollution emanating from new types of vessels.

[691] See Chapter 7.

[692] In addition to K. Koh, *Straits*, pp. 38–47, see R. Churchill and A. Lowe, *Law of the Sea*, pp. 102–4, M. Leifer, *International Straits of the World*, pp. 86–95, W.M. Reisman, 'The Regime of Straits and National Security', 58–65, W. Burke, 'Submerged Passage through Straits' 193–7 and H. Caminos, *The Legal Regime of Straits*, pp. 39–57.

[693] See Chapter 8. Also see R. Churchill and A. Lowe, *Law of the Sea*, pp. 81–100 for discussion of innocent passage under the 1958 TSC and the LOSC regimes.

[694] V. Kisselev and P. Savaskov, 'International Regime of Straits', 13 note '(S)ome provisions of the 1982 Convention are formulated in such a complex and ambiguous manner that in a number of cases they allow of an interpretation almost directly opposite to the one intended'.

[695] See Chapter 7.

[696] See R. Churchill and A. Lowe, *Law of the Sea*, p. 107.

[697] See H. Caminos, *The Legal Regime of Straits*, pp. 144–6 for the following arguments unless noted otherwise.

[698] See K. Hakapää, *Marine Pollution*, pp. 196 and 204.

[699] Article 19 does not specifically list any unsafe activities as being a violation of innocent passage.

[700] R. Churchill and A. Lowe, *Law of the Sea*, p. 107 believe in extreme cases of threat coastal State action to completely deny passage for lack of innocence might be justifiable on the basis of the right to self-defence.

[701] See J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 177–9, 185–9 and 197–200; and W. Schachte, 'International Straits and Navigational Freedoms', 17.

[702] J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 178. J. Moore, 'The Regime of Straits', 91 interprets Article 38(3) as clearly implying, 'activities which are an exercise of the right of transit are not subject to the other provisions of this convention'.

[703] R. Churchill and A. Lowe, *Law of the Sea*, p. 110.

[704] There were several attempts by Malaysia, Spain and Morocco to expand coastal State jurisdiction that transit passage would be subject not only to LOSC provisions but 'to other rules of international law'. These proposals were rejected. See *Official Records*, Vol. VIII, p. 10, Document A/CONF.62/WP.10.10 (ICNT, 1977), Article 38. Malaysia (1976, mimeo.) Article 37 (RSNT II), Reproduced in R. Platzöder, *Documents*, Vol. IV, p. 396; Morocco (1976, mimeo.), Article 37 (RSNT II), Reproduced in R. Platzöder, *Documents*, Vol. IV, p. 399; Spain (1977, mimeo.) Article 37 (RSNT II, Reproduced in R. Platzöder, *Documents*, Vol. IV, p. 393; C.2/Informal Meetings 14 (1978, mimeo.), Article 38 (Spain). Reproduced in R. Platzöder, *Documents*, Vol. V, p. 6; C.2./Informal Meetings/22B (1978, mimeo.), Article 38 (Morocco), Reproduced in R. Platzöder, *Documents*, Vol. V, p. 30.

[705] R. Churchill and A. Lowe, *Law of the Sea*, p. 107 note any *activity* threatening the coastal State under Article 38(3) would bring the passage under the innocent passage regime. 'Activity' includes obligations to refrain from actions listed in Articles 39(1), (2) and (3), but not non-compliance with Articles 39(2) and (3), 40, 41, and 42(1)(a) and (b). See also D. O'Connell, *The International Law of the Sea*, p. 330 and W. Burke, 'Submerged Passage through Straits', 211. K. Hakapää, *Marine Pollution*, pp. 203–4 notes only an infringement of the elements of transit passage would affect the status of the vessels or aircraft. If the safety or environmental violation were so serious it amounted to 'non-innocent' behaviour, passage could be totally prohibited. W.M. Reisman, 'The Regime of Straits and National Security', 67–71, believes due to inherent ambiguity the coastal State could insist on compliance with safety provisions including Article 39(1)(d), or cancel transit passage. K. Koh, *Straits*, pp. 149–50, 152–3, 156 notes, 'wilful and serious pollution' contrary to Article 39(2)(b) would still be 'continuous and expeditious transit' under Article 38(2), whereas not 'proceeding without delay' under Article 39(1)(a) would not be 'continuous' under Article 38(2). Article 38(3) is seen limited to where a vessel does not leave strait waters, and innocent passage is the proper mode. See also V. Kisselev and P. Savaskov, 'International Regime of Straits', 13–4; V. Bordunov, 'The right of transit passage', 225; S. Nandan and D. Anderson, 'Straits Used for International Navigation' 182, 184–5, 189 and 192; M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, p. 330; I. Brownlie, *Principles*, p. 280; and D. Pharand, *Canada's Arctic Waters* p. 231. H. Caminos, *The Legal Regime of Straits*, pp. 144–6 concludes if Article 38(3) is interpreted to allow coastal States to classify passage as either 'transit' or 'non-transit', the result could be a major erosion of the right.

[706] K. Hakapää, *Marine Pollution*, pp. 204–5 notes if there is no difference, the provisions of Article 42 might be redundant. Whenever a vessel violated the coastal State regulations, it may also violate the basic conditions of transit passage and thus be deprived of the *right* of such passage.

[707] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 185–9, 224, footnote 49.

[708] Convention on the International Regulations for Preventing Collisions at Sea, 20 October 1972, (Collisions Convention), *New Directions*, Vol. IV, p. 245 with State parties representing 97.30% of the world's gross tonnage, 31 May 2003. See <http://www.imo.org/Conventions/mainframe.asp?topic_id=247>. See this reference for corresponding statistics for IMO conventions noted below.

[709] See I. Brownlie, *Principles*, pp. 279–80.
[710] K. Hakapää, *Marine Pollution*, p. 205. The author believes customary law to be included.
[711] Ibid.
[712] See generally M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, pp. 214–302.
[713] 'Applicable' itself seems to have been directly discussed only related to Article 213. It appeared in the RSNT, later in the ICNT, as well as a memorandum and two reports. Respectively, *Official Records*, Vol. VIII, p. 37 Document A/CONF.62/WP.10 (ICNT, 1977), Article 214; Document A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.) Reproduced in R. Platzöder, *Documents*, Vol. I, p. 469; *Official Records*, Vol. VI, p. 104, Formal Report of Chairman Document A/CONF.62/L.18, pp. 140–1. Memorandum of the President to the Conference, Document A/CONF.62/WP.10/Add.1 (1977), *Official Records*, Vol. VIII, p. 69. The Chairman of the Third Committee noted incorporation of 'applicable' in the ICNT left intact the structure of the compromise on the question of vessel-source pollution. It was recommended deleted, but this was not followed. *Official Records*, Vol. XII, p. 103, Document A/CONF.62/L.40 Section XXVI; and *Official Records*, Vol. XIII, p. 96 Document A/CONF.62/L.56 (1980), Annex B, Section XXVI.
[714] *Merriam-Webster's Seventh New Collegiate Dictionary*, p. 284 states: '1: to make firm or stable; 2: to institute (as a law) permanently by enactment or agreement . . . 7: to put beyond doubt: prove . . .'.
[715] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 185–9, 224, footnote 49. J. Moore, 'The Regime of Straits', 105 notes design, construction, equipment and manning standards are not included.
[716] As seen the Arctic specific coastal State provisions of both are even more comprehensive.
[717] See J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 191–4, and 224–5, footnotes 55 and 56.
[718] Ibid.
[719] H. Caminos, *The Legal Regime of Straits*, p. 208.
[720] *Official Records*, Vol. IV, pp. 174–6; Articles 20(1) and (2) and 28(1), Document A/CONF.62 WP.8/PART III (ISNT, 1975).
[721] M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, p. 302.
[722] Ibid.
[723] Ibid. p. 298.
[724] See below.
[725] *Official Records*, Vol. II, p. 125; Private Group on Straits (1975), (mimeo). Article 4, reproduced in R. Platzöder, *Documents*, Vol. IV, p. 196.
[726] *Official Records*, Vol. IV, p. 158 (Chairman, Second Committee) Document A/CONF.62/WP.8/PART II(ISNT, 1975) Article 41.
[727] Spain, C.2/Informal Meeting 14 (1978, mimeo.), Article 42, reproduced in R. Platzöder, *Documents*, Vol. V, p. 8; English Language Group ELGDCC/6 (1981, mimeo.), DC/PART III (Article 42) (1981, mimeo) CG/WP.4 (1981, mimeo.). For objections from the Chinese Language Group see DC/PART III, (Article 42) (1981, mimeo.) p. 2. See M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, p. 374. See also *Official Records*, Vol. XVI, pp. 93 and 223, (Spain) Document A/CONF.62/L.109 (1982), Article 42(1)(b). The proposal achieved a 60:29:51 result, and failed to meet a 2/3 majority present and voting requirement. *Official Records*, Vol. XVI, p. 133. Document A/CONF.62/30/Rev.3 (1981, mimeo.) reproduced in R. Platzöder, *Documents*, Vol. XIII, p. 489.
[728] See M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, p. 302.
[729] Ibid. p. 220. The terms were addressed under Articles 207 and 213.
[730] See Articles 207 and 211.
[731] See Articles 213 and 217. Articles 217(1) and 220(4) also deal with prescription requiring adoption by a State to implement and to ensure compliance.
[732] M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, p. 375, note '(A)though the words 'giving effect to' would seem to allow for some measure of interpretative discretion, States bordering straits are not free to adopt regulations that are substantially different from or more stringent than the applicable international standards'.
[733] See ibid. pp. 215–6, 220 who note it would seem to imply more than mere non-binding recommen-

dations, and would include well-ratified treaties or widespread acceptance in State practice. S. Nandan and D. Anderson, 'Straits Used for International Navigation' 191 list MARPOL 73. K. Hakapää, *Marine Pollution*, pp. 132 and 205 refers to treaties in their relation to their parties as well as to customary law. V. Kisselev and P. Savaskov, 'International Regime of Straits', 14, I. Brownlie, *Principles*, p. 280, W. Burke, 'Submerged Passage through Straits', 212 and V. Bordunov, 'The right of transit passage', 224–5 note strongly restricted State legislative competence. W.M. Reisman, 'The Regime of Straits and National Security', 69–70 is contrary noting the possibility for a broad coastal State applicative competence under Article 42. D. O'Connell, *The International Law of the Sea*, p. 331 believes only treaties qualify. R. Churchill and A. Lowe, *Law of the Sea*, pp. 107–8 note only internationally agreed standards may be applied. H. Caminos, *The Legal Regime of Straits*, p. 169 approximates 'applicable' with 'generally accepted'. D. Pharand, *Canada's Arctic Waters*, pp. 233, 238 does not address the issue.

[734] See Article 211(1) and (5). Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, p. 202 note 'generally accepted rules and standards' relating to design, construction, manning or equipment of foreign ships will be those established through the IMO. M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, p. 202 note 'general' used in 'general diplomatic conference' is meant to be open to universal participation such as the U.N. See generally ibid. pp. 201–3.

[735] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 179 and 187–9.

[736] Ibid. pp. 177–222; (Italy) ibid. pp. 197–200; (Canada) ibid. pp. 207–15. J. Moore, 'The Regime of Straits', 108 notes the U.S. position is supported by the failure of Spain and Morocco in UNCLOS III to gain acceptance for broadened strait State competence under Articles 39 and 42.

[737] See R. Churchill and A. Lowe, *Law of the Sea*, p. 110.

[738] See *Official Records*, Vol. IV, p. 210, Document A/CONF.62/C.3/L.24 (1975), Article 3(1) to (5), Canada; Document A/CONF.138/ SC.III/L.40 (1973, mimeo.), Article IV(b) and (c) U.S.; and A/AC.138/SC.IIIL.52/Add.1, Annex 1 (WG.2/Paper No. 15, Section III, Alternatives B and C, and Section IV, Alternative B), reproduced in SBC Report, 28 *GAOR* (1973), Supp. No. 21 (A/9021), Vol. 1, (SBC Report) 1973, pp. 91, 95, 98 (Chairman, WG.2). See M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, pp. 176–99. See also *Official Records*, Vol. IV, p. 210, Document A/CONF.62/C.3/L.24 (1975), Article 3(1) to (5), Belgium, Bulgaria, Denmark, German Democratic Republic, Federal Republic of Germany, Greece, Netherlands, Poland and U.K.; Ibid. p. 212, Soviet Union, Document A/CONF.62/C.3/L.25 (1975), Article 2.

[739] Respectively, *Official Records*, Vol. IV, p. 174, Document A/CONF.62/WP.8/Part III, (ISNT, 1975), Part I, Article 20, (Chairman, Third Committee); *Official Records*, Vol. V, p. 176, Document A/CONF.62/WP.8/Rev.1/Part III (RSNT, 1976), Article 21, (Chairman, Third Committee); and *Official Records*, Vol. VIII, p. 37, Document A/CONF.62/WP.10 (ICNT, 1977), Article 212. The ICNT formulations continue through ICNT/Rev.2 to the final Draft Convention. Respectively, Document A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980, mimeo.), Article 211. Reproduced in R. Platzöder, *Documents*, Vol. II, pp. 96–7; *Official Records*, Vol. XV, p. 209, Document A/CONF.62/L.78 (Draft Convention, 1981), Article 211.

[740] United States (1977, mimeo.), Article 20 (RSNT II), reproduced in R. Platzöder, *Documents*, Vol. IV, p. 392. The IMO Secretariat views the IMO as 'the only global institution with the mandate in this area, and all existing rules and standards on the design, construction, equipment and manning of vessels have in fact been established in or by IMO'. Study by the IMO Secretariat, Doc. LEG/MISC/I (1986, mimeo.) (20), reproduced in U.N. Office for Ocean Affairs and the Law of the Sea, *Annual Review of Ocean Affairs: Law and Policy, Main Documents* (AROA) (1985–7), p. 128.

[741] S. Nandan and D. Anderson, 'Straits Used for International Navigation' 185.

[742] See K. Hakapää, *Marine Pollution*, p. 205 who notes a vessel in transit passage might commit a breach of an 'applicable' treaty provision between the coastal State and the flag State effected through national legislation, and at the same time not violate any 'generally accepted' international provision.

[743] S. Nandan and D. Anderson, 'Straits Used for International Navigation' 185.

[744] K. Hakapää, *Marine Pollution*, p. 205 wrote in 1981 regarding oil using OILPOL. Ibid. p. 132 footnote 12 noted State parties represent some 90% of the world's tanker tonnage which could be equated with

'generally accepted international rules and standards . . .'

[745] See S. Nandan and D. Anderson, 'Straits Used for International Navigation' 185. Ibid. believe 'generally accepted' encompasses several marine environmental conventions, MARPOL 73/78, as well as other international rules and standards properly adopted. K. Hakapää, *Marine Pollution*, pp. 119–21 believes 'generally accepted' implies somewhat less State support than that required for the formation of customary law, otherwise the distinction would disappear, and there should be sizeable support among the affected maritime states. M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, pp. 202 and 204; M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, p. 344; R. Churchill and A. Lowe, *Law of the Sea*, pp. 107–8; and V. Bordunov, 'The right of transit passage', 222–3 equate 'generally accepted' with IMO environmental and safety conventions. See generally H. Caminos, *The Legal Regime of Straits*, pp. 168–9 and I. Brownlie, *Principles*, p. 280. D. O'Connell, *The International Law of the Sea*, pp. 330–1 views compliance by vessels with 'applicable' international environmental provisions required under Article 42(4). D. Pharand, *Canada's Arctic Waters*, p. 231 views Article 39 limitations including compliance not changing 'free passage'. W.M. Reisman, 'The Regime of Straits and National Security', 70–1 takes a broad non-distinguishing view with excessive coastal State competence possible. W. Burke, 'Submerged Passage through Straits', 210 takes a narrower non-distinguishing view relying on a non-hampering or suspension of transit passage.

[746] If considered together with MARPOL 73/78, the 1992 Protocol to the CLC could likely be included, with State parties representing 91.29% of the world's gross tonnage. See below for IMO safety conventions arguably included.

[747] R. Churchill and A. Lowe, *Law of the Sea*, p. 108 and M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, p. 344.

[748] J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 178. J. Moore, 'The Regime of Straits', 99 and 108 takes a restrictive interpretation noting only Article 42 gives coastal State competence, and the list is exhaustive. See also W. Schachte, 'International Straits and Navigational Freedoms', 17.

[749] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 177–222.

[750] See P. Barabolia, in W. Butler, *Northeast Arctic Passage*, pp. 142–3, and R. Churchill and A. Lowe, *Law of the Sea*, p. 110.

[751] R. Smith, 'Interview', 27 June 1994 noted the Part III regime was functioning in practice with few conflicts.

[752] See below.

[753] *Official Records*, Vol. VIII, p. 11, Document A/CONF.62/WP.10 ICNT, Article 42 (Spain) (1977), Spain (1977, mimeo.), Article 40 (1), (5) and 6 (RSNT II), reproduced in R. Platzöder, *Documents*, Vol. IV, p. 395; Malaysia (1976, mimeo.), Article 40 (1), reproduced in R. Platzöder, *Documents*, Vol. IV, p. 397. See M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, pp. 369–74 for an overview.

[754] These include respectively, International Convention for the Safety of Life at Sea, (1 November 1974), (SOLAS), *ILM*, Vol. 14, (1975), p. 959 with 1978 Protocol, *ILM*, Vol. 17, (1978), p. 579, State parties representing respectively 98.49% and 94.64% of the world's gross tonnage. R. Churchill and A. Lowe, *Law of the Sea*, pp. 268–9 note amendments to SOLAS, 1994, make it possible to introduce mandatory vessel reporting systems, five of which were adopted by the IMO in 1996. International Convention on Load Lines (1966) *UNTS*, Vol. 640 (1968), (Loadlines Convention), p. 133, State parties representing 98.46% of the world's gross tonnage. International Convention on the Standards of Training, Certification and Watchkeeping for Seafarers 1 December 1978, (STCWS), *UKTS*, Vol. 1984, p. 50, State parties representing 98.47% of the world's gross tonnage. Convention on the International Maritime Satellite Organisation, 3 September 1976, (INMARSAT C), *UKTS*, Vol. 1979, p. 94, with State parties representing 92.30%; and Operating Agreement on the International Maritime Satellite Organisation, 3 September 1976, (INMARSAT OA), *ILM*, Vol. 15, (1976), p. 233, State parties representing 91.28% of the world's gross tonnage. International Convention on Tonnage Measurement of Ships, 23 June 1969, *UKTS*, Vol. 1982, p. 50, State parties representing 98.20% of the world's gross tonnage. For ILO Conventions see R.D. Brubaker, *Marine Pollution and International Law – Principles and Practice*, (London,

Belhaven Press 1993), pp. 129–34.

[755] R. Churchill and A. Lowe, *Law of the Sea*, pp. 107–8.

[756] There would likely occur fewer incidents arising from coastal States prescribing provisions in excess and user State's vessels navigating in excess, of these international norms. What was likely intended in UNCLOS III was to avoid coastal States implementing 'generally accepted' international provisions *solely* in the straits, thus increasing coastal State competence.

[757] K. Koh, *Straits*, p. 157, H. Caminos, *The Legal Regime of Straits*, pp. 168–9, I. Brownlie, *Principles*, p. 278, D. O'Connell, *The International Law of the Sea*, p. 330, D. Pharand, *Canada's Arctic Waters*, p. 231 and W. Burke, 'Submerged Passage through Straits' 208, limit coastal State competence to establishing sea lanes and traffic separation schemes. S. Nandan and D. Anderson, 'Straits Used for International Navigation' 190–1, 195 note international adopted schemes may be made applicable to all vessels in transit passage, however, a strait State may not hamper or suspend transit passage without exception. M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, pp. 343–4, 375, 388–9 are emphatic Article 42(1)(a) to (d) is exhaustive, noting however Articles 39, 40 and 233 include the Malacca Agreement. Under Article 39(2)(a) compliance is required with all international rules considered 'generally accepted'. The authors find specific safety requirements, for which compliance is required under Article 39(1)(c), includes the use of sonar, radar and depth finding devices if 'normally' used in navigation through constricted areas or if safety or other conditions require. Also included are measures related to velocity, course variations to take into account tide, currents, weather and hazards, and other 'normal' activities depending upon the characteristics of the vessel, as well as navigational and hydrographical characteristics of the straits. V. Kisselev and P. Savaskov, 'International Regime of Straits' 14 interpret permissible safety provisions as applicable international provisions similar to the environmental. R. Churchill and A. Lowe, *Law of the Sea*, pp. 107–8 favour allowing adoption of international safety standards. See also W.M. Reisman, 'The Regime of Straits and National Security' 70–1.

[758] See R. Churchill and A. Lowe, *Law of the Sea*, pp. 87–92. The authors note the 'untidy' situation.

[759] Ibid. pp. 103 and 108. These measures are viewed as not breaching 'non-suspendible innocent passage'.

[760] R. Churchill, 'Telephonic Interview', 14 June 1994. See generally S. Nandan and D. Anderson, 'Straits Used for International Navigation' 159–204.

[761] See R. Churchill and A. Lowe, *Law of the Sea*, pp. 108–9.

[762] Ibid. and S. Nandan and D. Anderson, 'Straits Used for International Navigation' 192.

[763] Ibid.

[764] See M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, pp. 376–7.

[765] E. Gold *Handbook*, pp. 87–8 and E. Gold, *Gard Handbook on Marine Pollution*, p. 175. A. Ushakov, 'Interview', Moscow, 25 February 1994.

[766] See K. Koh, *Straits*, pp. 89–94 and Appendix B for Inter-Governmental Maritime Consultative Organisation (IMCO) Assembly Resolution A.375(X), 14 November 1977, *Assembly, Tenth Session, Resolutions and Other Decisions*, 117 (London, 1978). Annex V contains 'Rules for Vessels Navigating through the Straits of Malacca and Singapore'. K. Koh, *Straits*, p. 160 notes Malaysia forwarded this clearance.

[767] R. Churchill and A. Lowe, *Law of the Sea*, p. 268.

[768] The Spain – U.S. exchange has been noted surrounding Article 42(1)(b), probably also implying enforcement measures under Article 233.

[769] For a summary see M. Nordquist, S. Rosenne, A. Yankov, and N. Grandy, *Commentary*, Vol. IV, pp. 382–91.

[770] *Official Records*, Vol. IV, pp. 88 and 212, Document A/CONF.62/C.3/L.25. (1975). The Soviet delegate noted, 'Such a rule would complicate the position of vessels passing through straits but was essential in order to reach agreement concerning the regime of straits'.

[771] *Official Records*, Vol. VIII, p. 40, (ICNT 1977) Document A/CONF.62/WP.10, Article 234.

[772] *Official Records*, Vol. XVI, p. 223, Document A/CONF.62/L.109, (1982). 'Legal regime of straits' was to be replaced by 'regime of passage through straits' to bring Article 233 into line with Article 34, under which the regime of passage did not affect the legal status of waters forming such straits. *Official*

Records, Vol. XVI, p. 93. For other proposals see M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, pp. 386–8.

[773] For the formal Amendment which was withdrawn, see *Official Records*, Vol. XIV, p. 223 (Spain), Document A/CONF.62/L.109; and ibid. p. 132.

[774] For a summary see M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, pp. 295–8.

[775] *Official Records*, Vol. III, p. 188, Document A/CONF.62/C.2/l.6 (1974), Article 3. Proposals from the East Block were included that the provisions were not to affect the sovereign rights of straits States. Respectively, *Official Records*, Vol. III, p. 117, Document A/CONF.62/L.8/Rev.1 (1974), Annex II, Appendix I (Document A/CONF.62/C.2/WP.1), Provision 61, (Main Trends); ibid. p. 189, Document A/CONF.62/C.2/L.11 (1974) Article 1(3)(b).

[776] Private Group on Straits (1975), (mimeo.), Article 9. Reproduced in R. Platzöder, *Documents*, Vol. IV, p. 197. See also ibid. and *Official Records*, Vol. IV, p. 157, Document A/CONF.62/WP.8/PART II (ISNT, 1975) (Chairman, Second Committee), and Spain (1976, mimeo.), Article 34 (ISNT II), reproduced in R. Platzöder, *Documents*, Vol. IV, p. 274, for other changes incorporated into the ISNT and rejection of proposals from Spain.

[777] *Official Records*, Vol. V, p. 158 (Chairman, Second Committee), Document A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976) Article 33. Various proposals were submitted similar to that of Spain, but none were accepted. Respectively, Malaysia (1976, mimeo.), Article 33(2). (RSNT II), reproduced in R. Platzöder, *Documents*, Vol. IV, p. 396; Morocco (1976), mimeo.), Article 33(2) (RSNT II), reproduced in R. Platzöder, *Documents*, Vol. IV, p. 399; Spain (1977, mimeo.), Article 33(2) (RSNT II), reproduced in R. Platzöder, *Documents*, Vol. IV, p. 393; Spain, C.2/Informal Meeting/422 (1978, mimeo.), Article 34, reproduced in R. Platzöder, *Documents*, Vol. V, p. 6 and Morocco, C.2/Informal Meeting/22 (1978, mimeo.) Article 34(2), reproduced in R. Platzöder, *Documents*, Vol. V, p. 30; *Official Records*, Vol. VIII, p. 10, Document A/CONF.62/WP.10 (ICNT, 1977) Article 34 and *Official Records*, Vol. XV, p. 181, Document A/CONF.62/L.78 (Draft Convention, 1981), Article 34.

[778] For a summary, see M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, pp. 367–75 and 384–8.

[779] Ibid. p. 371. A proposal by Malaysia, Morocco, Oman and Yemen attempted to add, 'against vessels carrying cargoes or passengers to, from and on behalf of any particular State . . .' which was dropped. *Official Records*, Vol. III, p. 192, Document A/CONF.62/C.2/L.16 (1974) Article 22 (3); Ibid. p. 117 Document A/CONF.62/L.8/Rev.1 (1974), Annex II, Appendix I (Document A/CONF.62/C.2/WP.1), Provisions 62, 63 and 65 (Rapporteur-General) (Main Trends); Yemen (1976, mimeo.), third Article (6), reproduced in R. Platzöder, *Documents*, Vol. IV, pp. 267–8; *Official Records*, Vol. V, p. 159, Document A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976), Article 40, (Chairman, Second Committee).

[780] *Official Records*, Vol. III, pp. 107, 115–7, Document A/CONF.62/L.8/Rev.1 (1974), Annex II, Appendix I, Document A/CONF.62/C.2/WP.1), Provision 54(2) and (3), and Provision 60, (Rapporteur-general) (Main Trends). Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain, Yemen, Fiji, Malta and Oman. Respectively, A/AC.138/SC.II/L.18, Article 5(4), reproduced in SBC Report 1973, Vol. 3, p. 5; A/AC.138/SC.II/L.42 and Corr. 1, Article 4(2), reproduced in SBC Report 1973, Vol. 3, p. 94; A/AC.138/SC.II/L.28, Article 36(2), Article 37(1), and Article 38, reproduced in SBC Report 1973, Vol. 3, p. 50; *Official Records*, Vol. III, p. 194, Document A/CONF.62/C.2/L.16 (1974), Article 21 and Article 23; ibid. p. 197, Document A/CONF.62/C.2/L.19 (1974), Article 4(2). Later this view was forwarded chiefly by Oman, Yemen, Spain, Greece, and Morocco. (1975, mimeo.), Article 4(6) and (7), reproduced in R. Platzöder, *Documents*, Vol. IV, pp. 267–8; (1976, mimeo.), Article 45, reproduced in R. Platzöder, *Documents*, Vol. IV, p. 280; (1976, mimeo,), Article 43 (ISNT II, reproduced in R. Platzöder, *Documents*, Vol. IV, p. 282; *Official Records*, Vol. V, p. 160, Document A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976) Article 42; (1977, mimeo.), Article 42 (RSNT II), reproduced in R. Platzöder, *Documents*, Vol. IV, p. 395; and C.2/Informal Meeting/4 (1978, mimeo.), Article 44, reproduced in R. Platzöder, *Documents*, Vol. V, p. 9; C.2/Informal Meeting/22 (1978, mimeo.), 'Three additional articles', reproduced in R. Platzöder, *Documents*, Vol. V, p. 33.

[781] *Official Records*, Vol. VIII, p. 11; Document A/CONF.62/WP.10 (ICNT, 1977), Article 44.

[782] See R. Churchill and A. Lowe, *Law of the Sea*, pp. 108–9, W. Burke, 'Submerged Passage through Straits', 211, W.M. Reisman, 'The Regime of Straits and National Security', 69–70 and K. Hakapää, *Marine Pollution*, pp. 195–7, 204–6. The latter argues specific measures range from a request for information to detention. In practice the less severe measures taken for breach of coastal State regulations may cause more of a monetary hardship due to the time lost, than the vessel merely being required to leave and remain outside the territorial sea.

[783] M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, pp. 298–9, 301, 377 and 391 note in no circumstances can coastal States suspend or limit the right of transit passage. Section 7 Safeguards are important. Article 233 is applicable only in maritime zones subject to the sovereignty or the jurisdiction of the coastal States, and 'major damage' is interpreted to approximate the *Amoco Cadiz* incident. Under Articles 42(2) and 44 the jurisdiction provided is prescriptive only. Vessels exercising transit passage are not capable of being 'inspected, arrested, detained, seized, refused passage or subjected to other forms of control' that would impair the right. See also S. Nandan and D. Anderson, 'Straits Used for International Navigation' 172, 192–3, I. Brownlie, *Principles*, p. 280, D. Pharand, *Canada's Arctic Waters*, p. 231 and D. O'Connell, *The International Law of the Sea*, pp. 330–1. The latter, ibid. p. 994 views 'appropriate enforcement measures' as those possible in the territorial sea.

[784] V. Kisselev and P. Savaskov, 'International Regime of Straits' 14–7 follow the Nordquist, et al. view of Article 42, based upon treaty interpretation, preparatory documents, positions of States at UNCLOS III and authors including Russian. V. Bordunov, 'The right of transit passage', 223–4 is similar. However, V. Kisselev and P. Savaskov note the possibility for interpretations similar to R. Churchill and A. Lowe above. They call for *moderation of extreme positions* both from maritime States and coastal States, believing despite real problems, the LOSC regime best corresponds to State's navigational interests. K. Koh, *Straits*, pp. 156–63 believes similar to the Nordquist et al. view for breaches, even those resulting in non-transit passage, States cannot hamper or suspend transit passage. With respect to Article 233, non-compliance with the domestic rule and 'an odds-on possibility major damage is likely to occur' is viewed as the test. There are several approaches, however, and in the absence of specific international agreements or IMO rules, it would be difficult to invoke Article 233, unless the breach is major and effected by a vessel carrying hazardous cargoes. The author conditions coastal State control upon *reasonableness*, balancing coastal State environmental loss against flag State loss, including the vessel, the cargo and any liability. H. Caminos, *The Legal Regime of Straits*, pp. 171–7 takes a broad view of 'appropriate enforcement measures'. The coastal State is cautioned to weigh the seriousness of the damage or threatened damage against the reasonableness of the enforcement measures undertaken and to act proportionately and non-arbitrarily.

[785] See Chapter 7.

[786] See W. Dunlap, 'Transit Passage in the Russian Arctic Straits', *Maritime Briefing*, Vol. 1 (1996), 19.

[787] See generally D. McRae and D. Goundrey, 'Article 234', 197–228, and D. McRae, 'The Negotiation of Article 234' 98–114. See D. Pharand, *The Northwest Passage: Arctic Straits*, (Martinus Nijhoff Publishers, 1984), pp. 119–20 for the following unless otherwise noted.

[788] As noted the broad interpretation of Article 234 is likely the correct one concerning commercial surface traffic, however, the ramifications of both broad and narrow interpretations will be specified.

[789] See E. Franckx, *Maritime Arctic Claims*, p. 96.

[790] The definition of strait by *Webster's Seventh New Collegiate Dictionary*, p. 866 above might well include a canal.

[791] See R. Baxter, *The Law of International Waterways – With Particular Regard to Interoceanic Canals*, (Cambridge, Harvard University Press, 1964), pp. 11, 71–91, 308–9. Both the geographic and the legal distinctions should be kept in mind, since canals, such as the Panama and the Suez, in fact are often in *competition* with the straits including those in the Russian Arctic.

[792] See Chapters 7 and 8. Article 234 is only one of several theories under which claims over the straits are made.

[793] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 177–229.

[794] Ibid. pp. 200–7, 207–15. See also *Limits in the Seas*, No. 112, pp. 61–74.

[795] W. Schachte, 'International Straits and Navigational Freedoms', 18–9.

[796] B. Oxman and J.A. Roach, 'Comments – Panel 4, Interaction with Polar Regions, Conference Order of the Oceans at the Turn of the Century', Oslo, 9 August, 1998.

[797] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 207 and 227, footnote 79.

[798] Ibid. pp. 261, 227 footnote 79, and 269 footnote 38.

[799] J. Moore, 'The Regime of Straits', 91–5, 105–6, 109 and 112, while following a markedly transit passage stance notes the Arctic strait controversy may have been deferred by Articles 234, 236 and 296, allowing for the possibility of coastal State environmental jurisdiction over non State vessels in ice-covered straits.

[800] See J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 214 for the statement noted by U.S. Secretary of State G. Schultz regarding the Canadian Arctic. W.M. Reisman, 'The Regime of Straits and National Security' 75 is, however, sceptical to the predictability shown by U.S. negotiators in granting concessions in Part III. See Chapter 8.

[801] 'Artificial channels', not addressed by the *Corfu Channel Case*, was raised by Chile, however the point was later dropped. See *Official Records I*, Vol. II, pp. 79, 93–4, 96, 100, 220, 224–6, Document A/CONF.13/C.1/L51, Document A/CONF.13/C.1/L.56; and ibid., Vol. III, p. 224, Document A/CONF.13/C.1/l.47 and Document A/CONF.13/C.1/L.51. Discussion of 'sea lanes' arose several times including in relation to the Norwegian *Indreleia* and the Northern Sea Route. *International Law Commission Yearbook*, Vol. 1, (1955), 151. The *Indreleia* was argued not a strait but rather a 'shipping lane' to be used only upon 'the co-operation of the Norwegian authorities'. This was parallel to the route used in the Soviet Arctic from the White Sea to the Siberian rivers, dependent wholly upon assistance from Soviet pilots and icebreakers. The Netherlands proposed amendments to the draft Article 16(4) replacing 'straits' with 'sea lanes', to effect a compromise for dropping the term 'normally'. The addition of 'sea lanes', supported by Denmark, Chile and Indonesia, was argued to accomplish the same, since the coastal State could thus define more precisely where international navigation was to occur. The legal validity of the term was questioned, however, since it did not constitute a legal term and had never been defined in international law. It was subsequently deleted from the Dutch proposal with the support of the Soviet delegate.

[802] M. Nordquist, S. Rosenne, A. Yankov, and N. Grundy, *Commentary*, Vol. IV, p. 393 vaguely give dominance to the ice-covered areas regime. Article 233 which by its terms does not apply to Section 8, would imply Section 8, ice-covered areas would apply to those straits which were ice-covered. D. Pharand, *The Northwest Passage: Arctic Straits*, pp. 119–20, D. Pharand, 'The Northwest Passage in International Law', *The Canadian Yearbook of International Law*, Vol. 17, (1979), 123, and D. Pharand, *Canada's Arctic Waters*, pp. 235–8, has been noted. D. Pharand, 'Correspondence', 31 May 1996 notes Section 8 constitutes a special and autonomous section. K. Hakapää, *Marine Pollution in International Law*, p. 258 notes neither innocent passage in the territorial sea nor freedom of navigation within the exclusive economic zone is to apply in ice-covered areas, excluding also transit passage from potentially international Arctic straits. D. McRae, 'The Negotiation of Article 234', 109–10 notes the ice-covered areas regime is not included in Part XII subject to Part III, and the ice-covered areas regime clearly encompasses the Northwest Passage. Thus, Part III is to have no application to the Canadian Arctic.

[803] D. McRae and D. Goundrey, 'Article 234', 220–2, 228 note the 'Arctic exception' was placed in a Section not made expressly subject to Part III. This is assumed not to have been an oversight. Part III is argued irrelevant concerning the broad interpretation of Article 234. Due regard to navigation imposes an obligation to act reasonably when applying Article 234, following limits set by the territorial sea regime. This thus detracts from the normally applicable international rules employed in the exclusive economic zone. Part III provisions applicable to straits in the territorial sea would not be relevant in determining limits of reasonableness of application of Article 234. Differences between Article 234's broad and narrow interpretations may be slight, except for international straits. For a broad interpretation, besides taking due regard to navigation and guaranteeing environmental measures were based upon the best available scientific evidence, the coastal State need not be constrained by other interna-

tional provisions applicable to the exclusive economic zone. For the narrow interpretation, Part III including Article 233, would apply unless the conditions specified by Article 234 were present, necessitating the special measures and enforcement. Ibid. conclude State practice and *opinio juris* will determine the issue. However, if the narrow interpretation is adopted internationally and the generally accepted provisions are shown inadequate for Arctic coastal States' environmental protection (Article 233 conditions in international straits), unilateral claims of internal waters will be the result. A. Boyle, 'Remarks', 327–8, notes the greater potential for conflict. Due to ambiguity regarding the interrelation issue caused by Article 233, the straits issue is believed always relevant to interpretation of Article 234, with the meaning of due regard to navigation crucial. A narrow definition of the area of application is important, the permissibility of restriction on navigation under Article 234 having to vary according to the status and circumstance of the waters in question. Due regard implies a standard of reasonableness dependent on circumstances. Beyond this, it is uncertain how far subordination of freedom of navigation to environmental protection is allowed, due to an incomplete consensus among the Arctic States.

[804] E. Franckx, *Maritime Arctic Claims*, pp. 96, 262–3, 265–8 and 297–307 notes the possible interpretations of Article 234 as well as the unclear relationship with Part III. However most emphasis is placed on the practice of the Canadian–U.S. Agreement of 1988, which leaves the legal complexities and the general problem of surface navigation untouched. A similarly vague agreement for Russian waters is concluded possible. See also W. Westermeyer and V. Goyal, 'Jurisdiction and Management of Arctic Marine Transportation', 345–7 (Canada), D. Rothwell and S. Kaye, 'Law of the sea and the polar regions', *Marine Policy*, Vol. 18, (1994), 48, (Russia) and D. Rothwell, 'The Canadian-U.S. Northwest Passage Dispute: A Reassessment', *Cornell International Law Journal*, Vol. 26, (1993), 369–70. The Russian authors do not address the Arctic straits issue, nor the issue of regime interrelation. A. Roginko and M. LaMourie, 'Emerging marine environmental protection strategies for the Arctic', 268–9 and 275 admit a close relationship exists between environmental factors and Russian and U.S. strategic military objectives, but do not deal with regime interrelation. While favouring management alternatives they follow the broad interpretation of Article 234 and thus likely view this regime as dominant.

[805] T. McDorman, 'In the Wake of the "Polar Sea": Canadian Jurisdiction and the Northwest Passage', *Les Cahiers de Droit*, Vol. 27, (1986), 635–45 notes findings of State practice and policy, especially that of the U.S., are of particular interest. U.S. interests include navigational freedom, possible economic benefits related to free passage, a fear of a possible precedent damaging a policy of unimpeded vessel mobility, and a maintenance of ideological concerns supporting a non restraint of policy. The position necessarily would support rights of transit passage for Russian submarines in the Canadian Arctic, which the U.S. is definitely not interested in. (P. Robinson, former U.S. Ambassador to Canada, 'Northwest Passage not for Soviets, U.S. envoy feels', *Toronto Globe and Mail*, 2 August 1985). The U.S. prefers to keep the issue conveniently quiet, and Canada is unlikely to raise a confrontation on the jurisdictional issue. The Northwest Passage is concluded to be neither internal waters as claimed by Canada, nor an international strait as claimed by the U.S., but rather a part of Canada's territorial sea subject to the undisputed right of innocent passage. The U.S. was seen unlikely to enter a bilateral agreement, similar to the Canadian–U.S. Agreement of 1988, due to the possibility for precedent being established.

[806] D. O'Connell, *The International Law of the Sea*, p. 315, notes while 'sea lanes' designated in all straits necessary for international navigation would have brought together the distinction between straits linking two parts of the high seas and straits leading to internal waters, it would reintroduce the distinction between 'indispensability' and 'usage', which under the *Corfu Channel Case* was eliminated.

[807] Little legal grounds exist for the use of 'artificial channels' or 'sea lanes', for tracks created through ice-breaking. The subject of ice-breaking is only part of the larger issue dealing with coastal State jurisdiction exerted over Arctic ice-covered areas.

Chapter 7

[808] Ratification of the LOSC by Russia firmly attaches application of Part III to the Russian Arctic straits for all parties to the Convention subject to the exceptions noted below.

[809] See below.

[810] As noted it appears questionable whether the exceptional arguments concerning the *Indreleia*, the Messina exception or the lack of a foreign territorial sea applied to the Northern Sea Route would succeed.

[811] Due to the exception for innocent passage allowed in areas enclosed by straight baselines not previously considered internal waters under 1958 TSC Article 5(2) and LOSC Article 8(2) it seems probable under these conditions innocent passage would govern in the Russian Arctic straits. See below for Soviet statements made during the Vil'kitskii Straits Incident which probably indicate these waters were considered territorial sea, or historic waters for the Dmitri Laptev and Sannikov Straits. LOSC Article 8(2) may not be applicable due to problems of non-retroactivity following Russian ratification of the LOSC.

[812] I. Brownlie, *Principles*, pp. 185–6 and R. Churchill and A. Lowe, *Law of the Sea*, pp. 79–80. See Proclamation No. 5928, 54 *Federal Register* 777 (1989) and J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 93 for U.S. adoption of the 12 mile limit. For Soviet legislation see Article 3 of the 1960 Statute and Article 5 of the 1982 Statute, and for Russia see Article 5(3) of the 1993 State Border Act.

[813] See Chapter 1 and W. Butler, *Northeast Arctic Passage*, pp. 39–41.

[814] The Gorlo Straits, British Canal, De-Bryyn, Nightingale, and the Orlovskaia Salma are not technically part of the Northern Sea Route but are included due to their Arctic location and their inclusion in a consistent Russian State practice. As well it seems possible the straits in Franz Josef Land could be navigated in conjunction with the Northern Sea Route dependent upon ice conditions.

[815] See below.

[816] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 200–7 and *U.S. Limits*, No. 112, pp. 68–72. Direct claims are made for the same through the Northwest Passage and other straits. See J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 177–229 and *U.S. Limits*, No. 112, pp. 61–73. Nowhere else do U.S. claims for passage rights through straits appear so ambiguous and muted and out-of-date.

[817] J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 202 and *U.S. Limits*, No. 112, p. 69.

[818] J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 182 and *U.S. Limits*, No. 112, p. 63 state, '(T)he United States position on navigation through international straits and its response to excessive claims can best be illustrated by looking at particular international straits. The following examples however, do not include all straits the United States considers subject to the transit passage regime'. This position seems as well supported by the U.S. State Department statement that the U.S. will ignore provisions it believes exceed its interpretation of Part III. J.A. Roach, 'Interview', 27 June 1994, discussing the Russian Arctic straits. See also W. Schachte, 'International Straits and Navigational Freedoms', 18–9.

[819] See Chapter 8.

[820] See R. Churchill and A. Lowe, *Law of the Sea*, pp. 104–16, 328–32 and 338–55, and I. Brownlie, *Principles*, pp. 279–80.

[821] See Chapter 4 for complete titles and references of the legislation listed. The following information is obtained from W. Butler, *Northeast Arctic Passage*, pp. 86, 94–6, 139–43, footnotes 24–40, 160, 161 footnote 5, 162 footnotes 7 and 8, unless otherwise noted.

[822] This doctrine will be addressed only to a minor extent. For an overview see W. Butler, *Northeast Arctic Passage*, pp. 71–91; W. Butler, *The Soviet Union and the Law of the Sea*, pp. 33–40, 104–5 and 117–33; D. Pharand, *Canada's Arctic Waters*, pp. 107–10, and E. Franckx, *Maritime Arctic Claims*, pp. 145 to 228.

[823] Article 4 of the 1960 Statute stated in relevant part, 'Internal sea waters of the U.S.S.R. shall include: (c) waters of bays, inlets, coves and estuaries, *seas and straits, historically belonging* to the U.S.S.R.' Italics added. No straits are specified. W. Butler, *The Soviet Union and the Law of the Sea*, p. 114 footnote 44 notes this caused no reaction from other States.

[824] W. Butler, *Northeast Arctic Passage*, pp. 122 and 160 footnote 78, 166 footnote 78 identifies these requirements as the only Soviet legislation expressly naming any of the Arctic straits. Ibid. p. 94 notes the establishment and boundaries of such zones are announced in *Izveshcheniia moreplavateliam* and in the daily

press. See also W. Butler and J. Quigley, *The Merchant Shipping Code of the USSR*, p. 63. E. Franckx, *Maritime Arctic Claims*, p. 156 footnote 176 notes the Dmitrii Laptev and Sannikov were not included until 1972. A. Kolodkin, 'Sea Areas of the Arctic, Adjacent to the Coast of Russia: Status and Regime – INSROP Draft', 28 July 1998, claims the 'Kara Strait' and the 'Red Army Strait' were also included within the requirement. Unpublished, on file with author.

[825] P. Barabolia et al. in W. Butler, *Northeast Arctic Passage*, pp. 86 and 160 footnote 79.

[826] Documents and explanations regarding the expulsion of U.S. Naval and U.S. Coast Guard research vessels in the Soviet Arctic are obtained from J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 200–7, *U.S. Limits*, No. 112, pp. 6, 16, 68–71 and W. Butler, *Northeast Arctic Passage*, pp. 86, 122–3, 125–6 and 166 unless noted otherwise. See also E. Franckx, *Maritime Arctic Claims*, pp. 146–51.

[827] E. Franckx, *Maritime Arctic Claims*, p. 148 notes the Chukchi Sea and eastern East Siberian Sea were navigated a year earlier by the *USCGC Northwind* and the *USS Burton Island* both carrying out scientific programs. Ibid. pp. 161, 210 footnote 219 notes the *Northwind* navigated the Sannikov Strait in 1963, and ibid. pp. 146, 205 footnotes 99–105 also notes other possible pre-1960 voyages by U.S. submarines, including the *USS Skate* which entered 'the Soviet sector'.

[828] *Aide memoire* from the Soviet Ministry of Foreign Affairs to American Embassy Moscow, dated July 21, 1964, American Embassy Moscow telegram 17002, July 21, 1964, in part:

> '. . . The Northern seaway route is situated near the Arctic coast of the USSR. This route, quite distant from international seaways, has been used and is used only by ships belonging to the Soviet Union or chartered in the name of the Northern Seaways, the opening up, equipping, and servicing of which the Soviet side for a period of decades has spent significant funds, and it is considered an important national line of communication of the USSR. It should be noted that the seas, through which the northern seaway route passes, are noted for quite difficult ice and navigational conditions. Mishaps of foreign ships in this line of communications could create for the USSR as well as for a bordering state, a series of complicated problems. Therefore the Soviet Union is especially interested in all that deals with the functioning of the given route.
>
> It should also be kept in mind that the northern seaway route at some points goes through Soviet territorial and internal waters. Specifically, this concerns all straits running west and east in the Karsky Sea, inasmuch as they are overlapped two-fold by Soviet territorial waters, as well as by the Dmitry, Laptev and Sannikov Straits, which unite the Laptev and Eastern Siberian Seas and belong historically to the Soviet Union. Not one of these stated straits, as is known, serves for international navigation. Thus over the waters of these straits the statute for the protection of the state borders of the USSR fully applies, in accordance with which foreign military ships will pass through territorial and enter internal sea waters of the USSR after advance permission of the Government of the USSR, in accordance with stipulated regulations for visiting Foreign Military ships of territorial and internal sea waters of the USSR published in "Navigation Notifications" (Izvesticheniyakh Moreplavatelyan). In accordance with these regulations the agreement for entry of foreign military vessels is requested through the Ministry of Foreign Affairs USSR not later than 30 days before the proposed entry.
>
> Although the notification of the proposed sailing of the American ice-breaker Burton Island was not received in the fixed period, the Soviet side in this specific case, is ready, as an exception, to give permission for the passing of the vessel Burton Island through the territorial and internal waters of the USSR in the aforementioned Arctic Straits. In this regard it should not be forgotten that the American vessel will fulfil requirements, called for by the regulations for foreign military ships, visiting territorial and internal maritime waters of the USSR and specifically Article 16 of the cited regulations. At the same time the need is emphasised for the strict observance in the future of all instructions of regulations for foreign military vessels visiting territorial and internal maritime waters of the USSR'.

[829] American Embassy, Moscow *aide memoire* dated June 22, 1965, State Department File No. POL 33 R in part:

'While the United States is sympathetic with efforts which have been made by the Soviet Union in developing the Northern Seaway Route and appreciates the importance of this waterway to Soviet interests, nevertheless, it cannot admit that these factors have the effect of changing the status of the waters of the route under international law. With respect to the straits of the Karsky Sea described as overlapped by Soviet territorial waters it must be pointed out that there is a right of innocent passage of all ships through straits used for international navigation between two parts of the high seas and that this right cannot be suspended. This is clear from the provisions of the Convention on the Territorial Sea and the Contiguous Zone adopted at Geneva in 1958 to which both the United States and the Soviet Union are parties. In the case of straits comprising high seas as well as territorial waters there is of course an unlimited right of navigation in the high seas areas . . .

For the reasons indicated the United States must reaffirm its reservation of its rights and those of its nationals in the waters in question whose status it regards as dependent on the principles of international law and not decrees of the coastal state'.

The Soviet side, in an *aide memoire* to American Embassy Moscow on July 26, 1965, confirmed its position contained in its *aide memoire* of July 21, 1964, American Embassy Moscow telegram 18098, July 26, 1964.

[830] E. Franckx, *Maritime Arctic Claims*, p. 148 notes scientific research in the Barents and Kara Seas by the *Northwind* and not the transit plan was that what was presented to the Soviets. The supplementary itinerary however included a change of East Coast operational command to a West Coast command in Alaska upon departure from the Kara Sea, indicating a transit objective.

[831] *U.S. Limits*, No. 112, p. 148. See also E. Franckx, *Maritime Arctic Claims*, p. 157.

[832] E. Franckx, *Maritime Arctic Claims*, p. 150. Ibid. pp. 162, 211 footnote 225 notes in spite of the political tension between the respective governments, cordial exchanges took place between the crews of the Soviet destroyer and the *Northwind*. In addition the Soviets did not hamper the scientific work.

[833] Soviet Ministry of Foreign Affairs Note 45/USA dated Oct. 27, 1965 to American Embassy Moscow, American Embassy Moscow telegram 23048, Oct. 28, 1965, in part:

'. . . As is well known, bottom and sub-oceanic area of the Kara Sea, being in geological respect the direct continuation of the continental part of the USSR, constitutes continental shelf which, pursuant to the 1958 Geneva Convention on the Continental Shelf, is subject to the sovereign rights of the USSR. Said Convention, to which both the USSR and the USA are parties, provides in Article 5, paragraph 8, that agreement of the littoral State is required for exploration of the continental shelf.

Conduct of the above-mentioned explorations of the USSR continental shelf in the Kara Sea, without agreement thereto having been obtained from competent USSR authorities, constituted a violation of the 1958 Continental Shelf Convention.

The Ministry protests against the unlawful conduct by the American ice-breaker of exploration of the Soviet continental shelf in the Kara Sea and expects that the Government of the United States will take the necessary steps to prevent similar actions'.

[834] American Embassy Moscow Note delivered in Nov. 1965 pursuant to State telegram 14083, Nov. 26, 1965, File POL 33–6 US-USSR.

'The Ministry's note referring to the voyage of the United States Coast Guard (ice-breaker) *Northwind* in the Kara Sea during July to September of this year charges that the vessel carried on explorations of the seabed of the continental shelf without obtaining the permission required by paragraph 8, Article 5 of the Convention on the Continental Shelf adopted at Geneva in 1958 to which both the United States and the Union of Soviet Socialist Republics are parties.

The Ministry is misinformed. During its voyage of oceanographic exploration in the area the *Northwind* did take a number of core samplings of the seabed. A few of these samplings were taken in the deep which parallels Novaya Zemlya on the east and a more extensive sampling of the sea bottom was done in the deep water north of Novaya Zemlya and east of Zemlya Frantsa Iosifa and also in the deep water west of Severnaya Zemlya. The data collected during this operation will

be made available to the Union of Soviet Socialist Republics through the World Data Center System. There was no exploration of the continental shelf in the Kara Sea.

In view of the foregoing the Ministry's protest is rejected as without foundation in fact'.

[835] E. Franckx, *Maritime Arctic Claims*, p. 150.

[836] Department of State Note dated Aug. 14, 1967 to the Soviet Embassy in Washington, State Department File No. SCI 31 US.

'The Department of State wishes to advise the Embassy of the Union of Soviet Socialist Republics that two United States oceanographic icebreakers will, as in previous years, undertake regular survey operations in the Arctic Ocean in the summer of 1967.

The US Coast Guard icebreakers *Edisto* and *Eastwind* will conduct oceanographic research surveys from approximately August 10 to September 21. From a point south of Greenland, the ships will proceed eastward on a track running north of Novaya Zemlya and Severnaya Zemlya into the Laptov Sea, the East Siberian Sea and through the Canadian Archipelago before returning to the United States.

As in previous oceanographic surveys of this sort the operations will be conducted entirely in international waters'.

[837] E. Franckx, *Maritime Arctic Claims*, p. 150. The Note states in part:

'This squadron will . . . make a peaceful and innocent passage through the straits of Vil'kitskii, adhering to the centre line as closely as possible, and making no deviation or delay . . . '

[838] Soviet Ministry of Foreign Affairs *aide memoire* to American Embassy Moscow dated August 24, 1967, American Embassy Moscow telegram 754, August 25, 1967.

'By its *aide memoire* of August 16, 1967, US Department of State informed the USSR Embassy in Washington of Arctic circumnavigation by US Coast Guard icebreakers "*Edisto*" and "*East Wind*" stating that they would proceed eastward along (a) route north of Navaya Zemlya and Severnaya Zemlya.

However, according to information of competent Soviet authorities, above mentioned American icebreakers have entered the Karsky Sea and are proceeding in the direction of Vilkitsky Straits, which are territorial waters of the USSR.

In this connection, the Ministry recalls to the Embassy that navigation by any foreign naval vessel through the Straits of Karsky Sea, as well as through Dmitry Leptev and Sannikov Straits, is subject to the Statute on the Protection of the USSR Borders, under which foreign naval vessels shall pass through territorial and internal sea waters of the USSR with prior permission by the Government of the USSR to be requested 30 days in advance of passage contemplated. The position of the Soviet Government on this question was set forth in detail in USSR MFA's *aide memoirs* of July 2, 1964 and July 26, 1965'.

[839] American Embassy Moscow telegram 811 August 28, 1967, State Department File SCI 31 US:

'Soviet Maritime Fleet had today received communication from U.S. Coast Guard icebreaker "*Edisto*" in which the Commanding Officer informed Soviet authorities that "*Edisto*" and "Eastwind" had encountered ice preventing passage to north of Severnaya Zemlya and therefore proposed to effect innocent passage through Vilkitsky straits on or about August 31. Communication from U.S. Coast Guard icebreaker also stated that Soviet Ministry of Foreign Affairs had been advised of proposed transit of straits.

Kornienko said that he felt it necessary to remove any misunderstanding which might exist in this matter. He said that Ministry of Foreign Affairs had not been advised of proposed passage of U.S. icebreakers through straits since notification thirty days in advance of attempted passage through Soviet territorial waters, as is required by pertinent Soviet regulations, had not been received.'

W. Butler, *Northeast Arctic Passage*, p. 123 notes the Soviet view of the legal status of the strait was reaffirmed on 28 August 1967 in a routine message to the vessels from the U.S.S.R. Ministry of the Maritime Fleet, in part:

'. . . Vil'kitskii Straits are within USSR territorial waters. Therefore sailing of any foreign navy vessels in the straits is subject to regulations of safety of USSR frontiers. For passing the straits according to the above regulations, military ships must obtain preliminary permission of USSR Government through diplomatic channels one month before expected date of passage'.

[840] State Department telegram 029187, August 30, 1967, State Department File SCI 31 US; American Embassy Moscow telegram 841 Aug. 30, 1967, in part:

'The Embassy of the United States of America refers to the *aide-memoire* of August 24 of the Ministry of Foreign Affairs of the Union of Soviet Socialist Republics and to the statement by the Ministry's authorized representative on August 28, and, on instructions, strongly protests the position taken by the Soviet Government with regard to the peaceful circumnavigation of the Arctic by the United States Coast Guard icebreakers "*Edisto*" and "Eastwind".

As the Ministry is aware, the circumnavigation by the "*Edisto*" and "Eastwind" was undertaken as a part of regular scientific research operations in the Arctic Ocean. The Department of State, as a matter of courtesy, informed the Soviet Government of these operations. Owing to unusually severe ice conditions the icebreakers failed in their efforts to pass north of Severnaya Zemlya and, accordingly, on August 24 Embassy informed the Ministry by note that the vessels would find it necessary to pass through Vilkitsky straits in order to continue their voyage. Rather than facilitating the accomplishment of this peaceful voyage, the Ministry in its *aide-memoire* of August 24 and particularly in the oral statement of its authorized representative on August 28 has taken the unwarranted position that the proposed passage of the "*Edisto*" and "Eastwind" would be in violation of Soviet regulations, raising the possibility of action by the Soviet Government to detain the vessels or otherwise interfere with their movement.

These statements and actions of the Soviet Government have created a situation which has left the United States Government with no other feasible course but to cancel the planned circumnavigation. In doing so, however, the United States Government wishes to point out that the Soviet Government bears full responsibility for denying to United States vessels their rights under international law, for frustrating this scientific endeavor and for depriving the international scientific community of research data of considerable significance.

. . . Furthermore, the Statute on Protection of the USSR State Borders, cited in the Ministry's *aide-memoire* of August 24, cannot have the effect of changing the status of waters under international law and the rights of foreign ships with respect to them. These rights are set forth clearly in the Convention on the Territorial Sea and the Contiguous Zone of April 29, 1958, to which the Soviet Union is a party. The United States Government wishes to remind the Soviet Government, as it has on previous occasions, that there is a right of innocent passage for all ships, warships included, through straits used for international navigation between two parts of the high seas, whether or not, as in the case of the Vilkitsky Straits, they are described by the Soviet Government as being overlapped by territorial waters, and that there is an unlimited right of navigation in the high seas areas of straits comprising both high seas and territorial seas.

Moreover, since the Ministry in its *aide-memoire* of August 24 has referred to the Dmitry Laptev and Sannikov Straits, although they are not involved in the present case, the United States Government wishes to reiterate its position, stated most recently in its *aide-memoire* of June 22, 1965, that it is not aware of any basis for the Soviet claims to these waters.

The United States Government wishes to emphasize that it regards the conduct of the Soviet Government in frustrating this scientific expedition as contrary both to international law and to the spirit of international scientific cooperation to which the Soviet Government has frequently professed its support. Actions such as these cannot help but hinder the cause of developing international understanding and the improvement of relations between our two countries'.

[841] E. Franckx, *Maritime Arctic Claims*, p. 150. The author also notes the *Staten Island* made a cruise to the East Siberian Sea in the same year.

[842] A. Yakovlev, 'Correspondence', 20 March 1995, notes, '(A)s american icebreakers did not adhere the

permitting order for passage along the NSR every time the operations were effectid, as a rule, by one Soviet vessel tracking the US icebreaker and individual operational flights of a reconnaissance air vessels' (sic).

[843] The NSRA, at that time subordinate to the U.S.S.R. Ministry of the Maritime Fleet, was established under the 1971 Statute to ensure navigational safety and promote navigational rules, and published in *Izveshcheniia moreplavateliam*. A similar body, the Chief Administration of the NSR had been created in 1932, but eventually became absorbed into the Ministry of the Maritime Fleet. See E. Franckx, *Maritime Arctic Claims*, pp. 160, 180 and 210 footnote 205 and A. Arikainen, 'Management of the NSR: States and Problems of Development', *The Soviet Maritime Arctic*, pp. 140–2.

[844] Specific pilot services were covered by Chapter V of the 1968 Merchant Shipping Code of the U.S.S.R. and the 1973 U.S.S.R. Statute on State Maritime Pilots. Under the latter where compulsory pilotage is required, vessels could not navigate without a State marine pilot.

[845] Article 3(b) required the NSRA specifically to 'establish, proceeding from considerations of ensuring the safety of navigation, areas of compulsory icebreaker escort or pilotage of all vessels and determine their conditions', and generally to issue rules, instructions and navigational directions and requirements for supplying and equipping vessels to further safety and environmental concerns.

[846] E. Franckx, *Maritime Arctic Claims*, p. 160 notes it was unclear whether such supervision could be exercised outside the territorial seas and whether it in fact had been exercised.

[847] See ibid. pp. 173, 217, footnotes 316–21. The author notes the article was a 'rather rare phenomenon in Soviet legal literature'. In the two other articles from 1972 and 1974 P. Barabolia in W. Butler, *Northeast Arctic Passage*, pp. 142–3 does not mention the Arctic straits, and W. Butler concludes with disapproval that the polar straits would apparently not constitute 'straits used for international navigation'.

[848] See Chapter 4 for complete titles and references of the legislation listed. The following is obtained from E. Franckx, *Maritime Arctic Claims*, pp. 173, 180–1, 206 footnote 115, 217 footnotes 313–14, 322–3, 219 footnotes 378–82 and 267–8, unless otherwise indicated. Ibid. pp. 176–90 in his comprehensive work including Soviet and Russian legislation does not include legislation related to the Arctic straits. W. Butler, *USSR Development Law*, p. iii indicates in 1987 a Chapter D 'Straits' to be issued in further releases, yet which was not forthcoming.

[849] Article 7.4. of the 1990 Rules specifies particular marine areas requiring ice-breaker assisted pilotage which presents a more stringent requirement than that required previously under the 1971 Statute Article 3(b), 'icebreaker *or* pilotage'. Article 1.4. states vessel means any ship or craft regardless of nationality.

[850] See Chapter 5.

[851] Resolution of 20 September 1989 No. 759 Concerning the Soviet-U.S. Accord on the Question of Innocent Passage of Vessels, including Warships, through Territorial Waters. See E. Franckx, 'Innocent passage of warships – Recent developments in U.S.–Soviet relations' *Marine Policy*, Vol. 14, 490. See also ibid. generally 484–90.

[852] Amended Article 12(1) of the 1983 Rules states, 'Foreign warships in innocent passage through territorial waters (the territorial sea) of the USSR for the purpose of traversing the territorial waters (the territorial sea) of the USSR without entering into internal waters or calling at ports of the USSR, use sea lanes or traffic separation schemes in those areas where they are designated or prescribed'. The original Article 12(1) stated, 'The innocent passage of foreign warships through the territorial waters (territorial sea) of the USSR for the purpose of traversing the territorial waters (territorial sea) of the USSR without entering internal waters and ports of the USSR shall be permitted along routes ordinarily used for international navigation: in the Baltic Sea: according to the traffic separation systems in the area of the Kypu Peninsula (Hiiumaa Island) and in the area of the Porkkala Lighthouse; in the Sea of Okhotsk: according to the traffic separation schemes in the areas of Cape Aniva (Sakhalin Island) and the fourth Kurile strait (Paramushir and Makarushi Islands); in the Sea of Japan: according to the traffic separation system in the area of Cape Kril'on (Sakhalin Island)'. See E. Franckx, *Maritime Arctic Claims*, pp. 167, 213 footnote 255.

[853] See E. Franckx, *Maritime Arctic Claims*, pp. 180–1.

[854] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 160–3, 165–7. B. Oxman and A. Kolodkin, *Stability in the Law of the Sea*, *Beyond Confrontation*, p. 174, note Article 234 governs straits while State vessels enjoy sovereign immunity.

[855] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163. That none of the straits connect high seas with territorial waters of foreign States, claimed necessary under 1958 TSC Article 16(4) and LOSC Articles 37 and 38 is also argued relevant. See Chapter 3.

[856] Ibid. 160. Claims for historic waters are nearly dropped, though they were subscribed to earlier governing the Sannikov and Vil'kitskii Straits as well as the Cheshskii, Kol'skii and Pechorskii Bays. See E. Franckx, *Maritime Arctic Claims*, pp. 173, 217 footnote 313, citing A. Kolodkin, 'International Law of the Sea' (ed. D. Tunkin), *International Law*, (Moscow, Izdatel'stvo Iuridicheskaia Literatura, 1982) (in Russian), p. 415. A. Kolodkin, 'Interview', 25 February 1994, appeared to use the historic claim vaguely only to negate 1958 TSC Article 5(2) and LOSC Article 8(2).

[857] N. Koroleva, V. Markov and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, pp. 82–6 note '(T)he above mentioned circumstances testify to the lawfulness of extending to practically all straits of the Arctic's Russian part of a special legal regime excluding their uncontrolled uses by foreign vessels, regardless of whether this is a transit or innocent passage, as is allowed by the 1958 Convention on the High Seas and the 1982 U.N. Convention on the Law of the Sea with regard to straits used for international navigation'.

[858] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 200–7 and *U.S. Limits*, No. 112, pp. 68–71.

[859] J.A. Roach and R. Smith, 'Interview', 27 June 1994. See also W. Schachte, 'International Straits and Navigational Freedoms', 6–7 who adds the transit passage regime is crucial to the maintenance of world peace and order regardless of the breadth of the strait.

[860] J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 177.

[861] W. Schachte, 'International Straits and Navigational Freedoms', 18–9.

[862] See J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 112, *U.S. Limits*, No. 112, pp. 69, 71 and W. Schachte, 'International Straits and Navigational Freedoms', 14.

[863] See 'Proceedings of the Workshop on Sea Ice Extent and the Global Climate System,' Toulouse, France, 15–17 April 2002, *Polar Research*, Vol. 22, No. 1, p. 1, Sea ice extent is noted decreased 10–15% since the 1950's. See also 'Isen i Arktis Smelter', (The ice in the Arctic is melting) *Aftenposten*, 14 August 2003, s. 52. The Nansen Center in Bergen which led the Arctic Ice Cover Simulation Experiment notes a 4% decrease per 10 years with 6% to 8% since 1978.

[864] See T. Ramsland and S. Hedels, 'The NSR Transit Study (Part IV): The Economics of the NSR. A Feasibility Study of the Northern Sea Route as an Alternative to the International Shipping Market', *INSROP Working Paper*, No. 59, (1996), III.5.2., 44.

[865] D. Pharand, *Canada's Arctic Waters*, p. 230. See also ibid. pp. 234–43. The author's statement is based upon factors such as the remoteness, difficulties of navigation and the absence of alternative routes establish a sufficient threshold in accordance with the *Corfu Channel Case*. 'Local conditions', is seen to have been recognised by the PCIJ in the *Eastern Greenland Case*, Denmark v. Norway, (1933), P.C.I.J. Rep., Ser. A/B, No. 53.

[866] D. Pharand, *Canada's Arctic Waters*, p. 241. Canadian services include information concerning hydrography, oceanography, ice properties, ice distribution and movements, meteorology, as well as dredging and customs services. The author proposes preventative measures to include compulsory vessel traffic systems, heavy icebreakers for year round surveillance and control, compulsory pilotage, specific navigational aids and services, and submarine detection capabilities.

[867] The Canadian Arctic straits are included to provide a broader range of doctrine. The Canadian straits were not subject to 1958 TSC Article 5(2) and LOSC Article 8(2), until the ratification by Canada of the LOSC. Authors supporting that the Arctic straits are non international include R. Churchill and G. Ulfstein, *Marine Management in Disputed Areas, The Case of the Barents Sea*, (London, Routledge, 1992), p. 18; D. Pharand, *Canada's Arctic Waters*, p. 241; A. Movchan, 'The Legal Regime of Navigation in the Arctic, Problems of Soviet–Canadian Co-operation', *From Coexistence to Co-operation*, p. 169; and N. Howson, 'Breaking the Ice: The Canadian–American Dispute over the Arctic's Northwest Passage',

Columbia Journal of Transnational Law, (1988), Vol. 26, 369–70. D. McRae and D. Goundrey, 'Article 234', 220 avoid the issue through Article 234 domination. D. McRae 'The Negotiation of Article 234', 110 views the Northwest Passage excepted from Part III through Article 234. Those believing the issue unclear include E. Franckx, *Maritime Arctic Claims*, p. 193; A. Boyle, 'Remarks', 327–8; and D. Rothwell and S. Kaye, 'Law of the Sea and the Polar Regions', 53. D. Rothwell, 'The Canadian–U.S. Northwest Passage Dispute: A Reassessment', 357, believes the determination to be extremely difficult. T. McDorman, 'In the Wake of the "Polar Sea": Canadian Jurisdiction and the Northwest Passage', 636 views the Northwest Passage subject to undisputed innocent passage. W. Westermeyer and V. Goyal, 'Jurisdiction and Management of Arctic Marine Transportation', 347 note at some point freedom of navigation dominates. W. Butler, *Northeast Arctic Passage*, p. 136 argues Soviet State practice indicates recognition of its Arctic straits as international. Ibid. notes only the Yungshturm, Eterikan and possibly the Red Army Strait have not been used for international navigation. H. Caminos, *The Legal Regime of Straits*, pp. 208–9 notes the possibility of four major Russian Arctic straits being considered international.

[868] I. Brownlie, *Principles*, p. 21 notes, '(S)trictly speaking, the Court does not observe a doctrine of precedent, but strives nevertheless to maintain judicial consistency', and precedent is strictly followed in the Court's legal procedure.

[869] See T. Armstrong, *The NSR*, pp. 18–20, 49–50 and Appendices I, II, III and IV from which the following information is obtained unless noted otherwise. For a history of early use of the Kara Sea Route in the late 1800's and early 1900's see T. Armstrong, *The NSR*, pp. 1–18 and generally T. Armstrong, 'Historical and Current Use of the NSR', *INSROP Working Paper*, No. 28, (1996), IV.1.1. E. Franckx, *Maritime Arctic Claims*, p. 175 notes several of the Arctic straits were not used in practice until the 1930's when the NSRA was established.

[870] Although it is unclear whether the numbers are voyages per year or several voyages per vessel, indications are that it is the former. Thus either two more vessels were chartered or two vessels made repeat voyages. See T. Armstrong, *The NSR*, p. 21. J. Nielsen, 'Historical and Current Uses of the Northern Sea Route', 19–24 indicates as early as 1868 18 Norwegian vessels operated in the Kara Sea hunting seals, and there were possibly nine more from other States. In the 1870's as many as 80 to 90 Norwegian sealers operated in the Kara Sea navigating through the Kara Gates Straits and the Iugorskij Shar, with only a tenth of that number of Russian sealers present. During the 1870's, 1880's and 1890's the numbers were less, averaging around 20 vessels at odd years.

[871] T. Armstrong, *The NSR*, p. 20.

[872] In 1937 only three arrived out of 10 which set out, and these three returned eastward instead of westwards. If round trips were included in this period approximately four to 10 passages were made per year through the Vil'kitskii or Shokal'skii Straits and the same number through the Kara Gates, Yugorskii or Malygin Straits.

[873] Passages varied from six to nine a year for 1932 to 1936 with an average of *six per year*. For 1935 one vessel came from and returned to the west and in 1936 there were three vessels on a west to east transit and two on a east to west transit. Thus, presumably the Kara Gates, Yugorskii, or Malygin Straits and Vil'kitskii or Shokal'skii Straits and Dmitrii Laptev or Sannikov Straits were navigated. For the other years presumably round trips were made, and the numbers are doubled for passages through the Long Strait.

[874] From 1930 to 1939 passages varied from 16 to 46 per year with a rough average of *33 per year* with three years unknown. Passages through the Kara Gates, Yugorskii, or Malygin Straits were presumably double this number due to round trips made, plus the four to 10 passages made related to the Lena River and the four made related to Kolyma River.

[875] The German vessel *Komet* was assisted by Soviet icebreakers and navigated the entire NSR in 1940. See Y. Ivanov and A. Ushakov, 'The NSR–Now Open', *International Challenges*, Vol. 12, (1992), 18.

[876] The following information is taken from N. Matyushenko, 'The NSR: Challenge and Reality', 61–3 unless otherwise noted. The author, who was President of Murmansk Shipping Company, recommended that Russian vessels be chartered due to the lack of foreign vessels 'with adequate ice-strengthening capable of safely navigating in convoy through the Russian maritime Arctic.'

[877] See Y. Ivanov and A. Ushakov, 'The NSR–Now Open', 18, who mention that the voyage which was for exploration and publicity purposes lasted 12 days. The vessel entered the Yenisei River and navigated to Igarka.

[878] Ibid. This voyage which lasted six days was under the control of an ice pilot.

[879] Ibid.

[880] E. Franckx, *Maritime Arctic Claims*, p. 267 mentions as well passage by a tourist vessel the same year over the North Pole from Murmansk to Provideniia.

[881] Ibid. p. 268. The author also notes permission was received during this time from the Russian Foreign Ministry for a Norwegian vessel to carry out research work in the Russian exclusive economic zone south of Franz Josef Land.

[882] See Appendix II. Tables obtained from A. Ushakov, INSROP Joint Research Council Meeting, March 1995, Oslo.

[883] T. Ramsland, 'Developments in Energy and Shipping in Northern Russia', May 1995, p. 7. Unpublished, on file with the Norwegian School of Business and Sociology, Bergen.

[884] See Y. Ivanov, 'Arctic Transportation System of Export of Oil from the Northwest Russia', *CNIIMF Report*, 8 December, 2003. Obtained through the Barents EuroArctic Region Secretariat, Tromsø. Ibid. p. 43 lists cargo turnover in northwest Russia for 2002 and 2003 for the main ports, Murmansk, Kandalaksha, Vitino and Arkhangel'sk, ranging from .9 million tons to 10.9 million tons.

[885] See *Black's Law Dictionary*, (5th ed.), (St. Paul, West Publishing Co., 1979), p. 214.

[886] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163. See also N. Koroleva, V. Markov and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, pp. 82–5.

[887] ICJ Reports (1949), pp. 28–9.

[888] Little recent information has been received from either Russian or U.S. authorities concerning surface transit of the Russian Arctic straits by U.S. or other State vessels.

[889] T. Armstrong, *The NSR*, pp. 12–3 and 21–2. From 1928 exports exceeded imports regularly by a large margin. Export of fur was attempted, but transport was more economical over land and by air.

[890] Y. Ivanov, A. Ushakov and A. Yakovlev, 'Current Use of the Northern Sea Route', *INSROP Working Paper*, No. 96, (1998), IV.1.1., 28 note that up to 10 foreign tankers, Latvian and Finnish, were rented for oil supply in the Russian Arctic. These were placed under authority of the Russian–Finnish Company, *Arctic Shipping Service*.

[891] J. Curtis, 'Vessel Source Oil Pollution and MARPOL 73/78: An International Success Story?' *Environmental Law*, Vol. 15, (1985), 680, quotes Shell International Petroleum Co., '(A) vessel may strand on the high seas and cause pollution in two neighbouring States . . . She may be owned say, by a Liberian company, bareboat chartered to a Bermudan company, managed by an English company, time chartered to a Greek company and voyage chartered to an American company. Her cargo may have been sold during the voyage by the American company to a Japanese one. The officers may be English and the crew, Indian. The international nature of shipping business creates such diversity of interests, with potential conflicts of law and jurisdiction, daily'.

[892] A. Yakovlev, O. Kossov and A. Ushakov, 'Political Aspects of International Shipping along the Northern Sea Route' INSROP Discussion Paper, (1994), 10–11 and 43 indicate on an average 10 warships annually were moved to enforce the Northern and Pacific fleets by way of the NSR. Unpublished, on file with author. Ibid. note while in route, every third warship had to be repaired due to damage, and non-manoeuvrable ice conditions forced the vessels of every fifth naval transfer to spend the winter.

[893] T. Ramsland and S. Hedels, ' The Economics of the NSR', 44.

[894] Those who have include W. Butler, *Northeast Arctic Passage*, A. Boyle, 'Remarks', E. Franckx, *Maritime Arctic Claims* and D. Pharand, *Canada's Arctic Waters*, to whom reference will be made where relevant.

[895] For comprehensive references to Soviet and Russian authors see W. Butler, *Northeast Arctic Passage*, pp. 71–91; W. Butler, *The Soviet Union and the Law of the Sea*, (1971), pp. 33–40, 104–5 and 117–33; D. Pharand, *Canada's Arctic Waters*, pp. 107–10 and E. Franckx, *Maritime Arctic Claims*, pp. 145–227.

[896] See D. Pharand, *Canada's Arctic Waters*, p. 228 and A. Boyle, 'Remarks', p. 327.

[897] The immunity exception has even broader application under customary law and includes the IMO con-

ventional provisions. See R. Churchill and A. Lowe, *Law of the Sea*, p. 351 and P. Birnie and A. Boyle, *International Law & the Environment*, p. 149.

[898] See Chapter 8.

[899] Article 3 as well includes other measures serving the safety of navigation and prevention, reduction and control of marine environmental pollution which may include discharge standards. Article II totally prohibits discharges.

[900] As seen this term is used in 12 of the 13 Articles of the 1990 Decree.

[901] As noted Article 9(e) with ensuing paragraph of the 1993 State Border Act appears to be deleted in the present edition.

[902] See Chapter 5 for the similar Canadian provisions and measures governing in the Arctic including its straits.

[903] E. Gold, *Gard Handbook on Marine Pollution*, pp. 157–8 and 175.

[904] As seen the Russian practice may also exceed Article 234 on various points.

[905] I. Brownlie, *Principles*, p. 11.

[906] See R.D. Brubaker and W. Østreng, 'The Military Impact on Regime Formation for the Northern Sea Route', *Order for the Oceans at the Turn of the Century*, (Dordrecht, Kluwer Law International, 1999), pp. 289–90. See also R.D. Brubaker and W. Østreng, 'Exquisite Superpower Subterfuge', 299–331, and W. Schachte, 'International Straits and Navigational Freedoms', 18–9.

[907] R. Churchill and A. Lowe, *Law of the Sea*, pp. 8–10.

[908] See J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 177–229 and R. Churchill and A. Lowe, *Law of the Sea*, p. 110.

[909] ICJ Reports (1974), p. 457.

[910] J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 4, 7, footnote 11. The authors cite D. Colson, 'How Persistent Must the Persistent Objector Be?' *Washington Law Review*, Vol. 61, (1986), 969. D. Colson is also a State Department Official.

[911] The latter was done in compliance with the Canada – U.S. Agreement.

[912] ICJ Reports (1951), p. 131.

[913] ICJ Reports (1950), pp. 276–7.

[914] See T. McDorman, 'In the Wake of the "Polar Sea",' 635–45.

[915] E. Franckx, *Maritime Arctic Claims*, pp. 296–7.

[916] See A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 166.

[917] See J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 227, footnote 79. The U.S. could put forward this argument to the IMO, the Harmonisation Conference and the Arctic Council, although whether it has done so is not known.

[918] E. Mäkinen, 'The Future of NSR Traffic', (ed. H. Simonsen), *Proceedings from The NSR Expert Meeting*, (Lysaker, FNI, 1993), pp. 31–42; and P. Fuhs, 'Marco Polo in the 21st Century', *Proceedings from The NSR Expert Meeting*, pp. 73–81.

[919] D. O'Connell, *The International Law of the Sea*, p. 385. Both the 1958 TSC Article 16(4) and the Part III regimes are claimed to be restricted to the territorial sea, yet should internal waters be claimed in international straits, transit passage seems to prevail.

Chapter 8

[920] B. Oxman and J.A. Roach, 'Comments', 9 August 1998.

[921] See E. Franckx, *Arctic Maritime Claims*, p. 193.

[922] *Official Records I*, Vol. III, pp. 111–2. The main discussion centred on regime applicability to commercial submarines. This article was adopted without comment 68:0:2.

[923] W. Burke, 'Submerged Passage through Straits' 199. G. Galdorisi, 'Who Needs the Law of the Sea?' 72 notes, '. . . submerged transit of international straits permits Trident submarines to roam the seas unimpeded and undetected.'

[924] The term 'normal modes' may be interpreted to encompass submerged passage.

[925] *Official Records*, Vol. III, p. 186, A/CONF.62/C.2/L.3., Chapter III, Article 2. *Official Records*, Vol. II, p. 125. The East Block proposal did not include the term but indicated that warships could not engage in exercises, gunfire, weapons use, launch or landing of aircraft, hydrographical work or similar acts unrelated to the transit. *Official Records*, Vol. III, p. 190, A/CONF.62/C.2/L.11 (1974), Article 1(2)(a).

[926] Respectively, Article 2 (Private Group on Straits), reproduced in R. Platzöder, *Documents*, Vol. IV, pp. 194–5 and *Official Records*, Vol. IV, p. 159 A/CONF.62/WP.8/Part II (ISNT, 1975, Article 39, (Chairman, Second Committee).

[927] *Official Records*, Vol. V, p. 159, A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976), Article 38(3), (Chairman, Second Committee). The amendments proposed included the Greek that submarines and other underwater vehicles in transit must navigate on the surface and show their flags unless permitted otherwise by the coastal State. Article 39(3) (ISNT II) (Greece), reproduced in R. Platzöder, *Documents*, Vol. IV, p. 282. The Spanish proposal was in favor of innocent passage, rejecting transit passage including submerged, Article 39(3), (Spain), reproduced in R. Platzöder, *Documents*, Vol. IV, pp. 276–7. Both of these gained little support.

[928] Morocco and Spain submitted proposals in 1976, 1977 and 1978 favoring innocent passage but similarly did not gain support. Respectively, Article 38, (RSNT II) (Morocco), reproduced in R. Platzöder, *Documents*, Vol. IV, pp. 399–400; C.2/Informal Meeting/22 (1978), Article 39(2) and (3) (Morocco), reproduced in R. Platzöder, *Documents*, Vol. V, pp. 31–2; Article 38 (RSNT II) (Spain) reproduced in R. Platzöder, *Documents*, Vol. IV, p. 393–4; C.2/Informal Meeting/4(1978), Article 39 (Spain), reproduced in R. Platzöder *Documents*, Vol. V, pp. 7–8; *Official Records*, Vol. XV, p. 181, A/CONF.62/L.78 (Draft Convention), 1981, Article 39.

[929] See below.

[930] W.M. Reisman, 'The Regime of Straits and National Security', 48, 52–4, 62–4, 66–7, 69–75, represents this view.

[931] W. Burke, 'Submerged Passage through Straits', 202. Ibid. 197–8, 202–16, 219–20, represents this view.

[932] Ibid. 205–6.

[933] W.M. Reisman, 'The Regime of Straits and National Security', 52–3, 69. See also J. Moore, 'The Regime of Straits', 78–85 unless noted otherwise. W. Odom, *The Collapse of the Soviet Military*, (London, Yale University Press, 1998), pp. 65–87 to the contrary believes that the Soviet military was preparing for a nuclear war, and deterrence was a Western creation.

[934] W.M. Reisman, 'The Regime of Straits and National Security', 69 believes a coastal State's demand for surface transit is based either on a misunderstanding of the situation or from a desire to increase its competence to augment power with respect to the transiting State.

[935] H. Robertson, 'Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea', *Virginia Journal of International Law*, Vol. 20, (1980), 844–5. Ibid. notes that it is as well difficult for the submarine to see and avoid other vessels.

[936] K. Koh, *Straits*, pp. 153–5.

[937] I. Brownlie, *Principles*, p. 280.

[938] R. Churchill and A. Lowe, *Law of the Sea*, p. 110.

[939] Ibid. and W.M. Reisman, 'The Regime of Straits and National Security', 52–3. See also J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 178, W. Schachte, 'International Straits and Navigational Freedoms', 18–9, J. Moore, 'The Regime of Straits', 120–1, P. Barabolia in W. Butler, *Northeast Arctic Passage*, p. 143 and A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163.

[940] W. Schachte, 'International Straits and Navigational Freedoms', 14–5 notes the U.S. claims transit passage also in entrances to international straits, viewed as subject to submerged passage.

[941] W.M. Reisman, 'The Regime of Straits and National Security', 53. See however N. Friedman, 'Submarines Adapt', *U.S. Naval Institute Proceedings*, (November 1994), 72 who notes that 'very nearly the best current underwater detection technology could be universally available within a decade'.

[942] M. Leifer, *International Straits of the World*, pp. 162–3.

[943] Ibid. Indonesia in a declaration regarding its archipelago stated that irrespective of the archipelago's status under international law, submerged passage was prohibited.

[944] Ibid.

[945] Ibid. pp. 168–73.

[946] See below. M. Leifer, *International Straits of the World*, p. 171 notes in 1976 and early 1977 three Soviet submarines were on location in the Indian Ocean, though the following June 1977 there was only one. S. Sontag, C. Drew and A. Drew, *Blind Man's Bluff – The Untold Story of American Submarine Espionage*, (New York, Public Affairs, 1998), pp. 158–83, 198, 209–58, note that from the 1970's onward the U.S. navigated its submarines on intelligence missions generally in the territorial seas and at times the internal waters of the Soviet Union It seems likely the Soviet Union did the same, and that these same waters of other States were entered as well by submarines of both the U.S. and the Soviet Union.

[947] *National Security Strategy of the United States* (The White House, U.S. Government Printing Office, 1992), p. 1.

[948] G. Galdorisi, 'Who Needs the Law of the Sea?' 72. W.M. Reisman, 'The Regime of Straits and National Security', 52–3, 69 notes, '(I)n deterrence theory, detection of the submarine is as systematically dangerous as would be an anti-ballistic missile system to protect cities: "The deployment of ABM . . . systems to protect urban areas was prohibited by the SALT I agreements . . . such systems impede the ability of ballistic missiles to attack urban areas and hence erode the counter-value role of these missiles. Similarly, an ASW system designed to attack missile-carrying submarines could threaten the second-strike capability of these submarines, and would thus be as undesirable as an urban ABM system: both . . . undermine the credibility of deterrence as a viable strategic posture. The institutionalisation of deterrence as the mutual strategic posture of the Soviet Union and the United States (and . . . France, Britain and China) appears to proscribe any military operation that could threaten the stability of strategic weapon systems on which the credibility of deterrence is based" . . . These conclusions will not be accepted by American or Soviet strategists who view strategic forces as being not only deterrent, but also as war fighting; they will obviously desire to threaten the second-strike capabilities of the adversary . . .'. The author quotes, 'Anti submarine Warfare', *World Armaments and Disarmament*, (Stockholm, Stockholm International Peace Research Institute Yearbook, 1974), p. 304. See also J. Moore, 'The Regime of Straits', 78–85 and M. Leifer, *International Straits*, pp. 160–73. Interim Agreement between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, 26 May, 1972 (SALT I), *New Directions*, Vol. I, p. 296.

[949] The first of these has yet to be released by the Department of Defence in an unclassified version. The latter two are found respectively at <http://usinfo.state.gov/topical/pol/terror/secstrat.htm> and <http://usinfo.state.gov/journals/itps/1202/ijpe/ijpe1202.htm>. See generally C. Levin and J. Reed, Senators, 'Towards a More Responsible Nuclear Non Proliferation Strategy', *Arms Control Today*, Vol. 34, No. 1, January/February, and W. Huntley, 'Unthinking the Unthinkable: U.S. Nuclear Policy and Asymmetric Threats', *Strategic Insights*, Vol. III, Issue 2 (February 2004).

[950] J. Breemer, 'Naval Strategy Is Dead', *U.S. Naval Institute Proceedings*, (February 1994), 50–3. Russia may be the only State with the ability to totally destroy the U.S. C. Carlson, Lt. USNR, 'How Many SSN's Do We Need?', ibid., (July 1993), 49–50. The U.S. and Russia currently possess 96% of the world's total inventory of 30,000 nuclear weapons. B. Blair, 'Rouge States: Nuclear Red-Herrings', *Center for Defence Information (CDI)*. See <http://www.cdi.org/blair/russia-targeting.cfm>.

[951] J. Breemer, 'Naval Strategy Is Dead', 52.

[952] SORT limits the U.S. and Russia to between 1,700 and 2,200 deployed nuclear weapons by 2012. It places no new limits on the number of weapons either country can maintain in storage.

[953] C. Carlson, 'How Many SSN's Do We Need?', 49–50. J. Patton Jr., 'ASW Is Back', *U.S. Naval Institute Proceedings*, (February 2004), 55, notes U.S. concerns presently focus on the ability of smaller States to deny access to their littorals with a few submarines or mines. N. Friedman, 'Submarines Adapt', 72 notes, '(A)lmost certainly the world will become more, rather than less, unstable'. D. DeYoung, 'Sea Power is Grand Strategy', *U.S. Naval Institute Proceedings*, (November 1994), 76 notes, 'the nuclear capabilities maintained by Russia, as well as by several former Soviet republics, will continue to be deterred

by the U.S. sea-based missile force . . . Should a hostile authoritarian regime return in Russia, the sea-based missile force will provide continued deterrence without the immediate need to reconstitute the other two legs of the triad' (ground forces and land-based air forces). Parentheses added.

954 Information is obtained from J. Brooke, 'Do We *Really* Need a Third *Seawolf*?', *U.S. Naval Institute Proceedings*, (December 1994), 10 unless otherwise noted. Dr. Brooke is Director, Strategic Assessment, Pacific Defence Analysts in San Diego, and previously was on active duty in the U.S. Navy. Ibid. notes, '(A)s the likelihood for chemical/biological/nuclear warfare increases, minimising the exposure of on scene U.S. or allied forces through the application of stealth technology is essential. Technology openly available for advanced manned and unmanned delivery systems is translating into faster, longer range, lower altitude, more lethal weapon systems. Historical ground and naval safe stand-off distances will be forced farther and farther from the crisis centre. Rapid, real time, on scene information collection, covertly obtained will be paramount to successful crisis management. Logistical support during crises will be at a premium, and may not exist at all. Pre-emptive strike, against the means to launch weapons rather than against the weapons, will be a necessary combat option. Surprise will be the crucial element in future strike operations'.

955 C. Carlson, 'How Many SSN's Do We Need?', 52. Ibid. 49 believes the SSN class of U.S. submarines to carry enough missiles to quickly debilitate a State's military infrastructure, take down most of its vital command-and-control facilities, knock out a significant share of its power-generating capability, conduct surveillance and put special operating forces ashore. At the same time it is able to operate independently in a hostile environment and survive to complete its mission. J. Morton, 'Interview – Vice Admiral Owens, Still a Priority', *U.S. Naval Institute Proceedings*, (March 1993), 126, notes control potential is directed against the Chinese and the Indian submarines in addition to the Russian. Vice Admiral Owens was the Deputy CNO for Resources, Warfare, Requirements and Assessment (N8) at the Pentagon.

956 This is defined as the area in the Arctic of interrelation between ice and open water. See R. Boyle and W. Lyon, 'Arctic ASW: Have We Lost?' *U.S. Naval Institute Proceedings*, (June 1998), 31–2.

957 R.D. Brubaker and W. Østreng, 'Exquisite Superpower Subterfuge?' 309–10.

958 C. Carlson, 'How Many SSN's Do We Need?', 52.

959 Ibid.

960 T. Ramsland, 'Interview', 12 June 1996, FNI, Oslo, indicated that the Kara Sea may be used as a deployment area for the Russian Typhoon SSBN's which lie soundless on the bottom. Since as noted the Kara Sea is generally shallow, this may include the deeper trench lying east of Novaya Zemlya. R.D. Brubaker and W. Østreng, 'Exquisite Superpower Subterfuge?' 307 question this since the trough may provide little protection from Western submarine forces due to the limited geographic areas involved.

961 P. Webster, 'Just Like Old Times', *Bulletin of Atomic Scientists*, July/August 2003, 35.

962 J. Patton Jr., 'ASW Is Back', 56. See J. Butler, R. Admiral, 'Building Submarines for Tomorrow', U.S. Naval Institute Proceedings, June 2004, 51–4 for the new Virginia class attack submarine already under construction.

963 M. Leifer, *International Straits*, pp. 164–8. With regard to the Indonesian Straits this provides for U.S. requirements of reactive deployment.

964 Information is obtained from V. Aleksin, 'We Are Ready When You Are', 54–7, unless otherwise noted.

965 J. Breemer, 'Naval Strategy Is Dead', 50–3. See also C. Carlson, 'How Many SSN's Do We Need?', 49–50.

966 See K. Koh, *Straits*, pp. 68–9, who notes a Soviet sea route ran from the Black or Baltic Seas to Vladivostok and Nakhodka. The Soviet Union was as well political allies with India.

967 Ibid.

968 M. Leifer, *International Straits*, pp. 168–73.

969 Ibid. p. 173.

970 Some 9 to 10 States may have or probably will have nuclear weapons, and 20 will have the means to deliver them.

971 See G. Arbman and C. Thornton, *Russia's Tactical Nuclear Weapons Part I: Background and Policy Issues*, (Stockholm, Swedish Defence Research Agency, 2003), pp. 26, 29, 30–1, 33, 38 and 48.

[972] National Security Concept of the Russian Federation, Decree No. 24 of the President of the Russian Federation 10 January 2000.

[973] Russian Federation Military Doctrine, Approved by Russian Federation Presidential Edict of 21 April 2000, 22 April 2000, pp. 5–6.

[974] The Foreign Policy Concept of the Russian Federation, Approved by the President of the Russian Federation, V. Putin, 28 June 2000, Russian Ministry of Foreign Affairs.

[975] J. Brooke, 'Do We *Really* Need a Third *Seawolf* ', 8. See 'NRDC Nuclear Notebook', *Bulletin of the Atomic Scientists*, Vol. 59, July/August 2003, ('NRDC Nuclear Notebook'), 71–2 which notes Russia maintains 14 operational SSBN's. A new Borey class SSBN is hoped commissioned by the Russian Navy in 2005 to 2007. E. Franckx, *Maritime Arctic Claims*, p. 54 footnote 214 notes that in a speech by President B. Yeltsin in 1992 Russian plans included halting the construction of submarines within three years. See also A. Preston, 'World Navies in Review', *U.S. Naval Institute Proceedings*, (March 1995), 107–8.

[976] 'NRDC Nuclear Notebook,' 71–2.

[977] Ibid.

[978] See P. Webster, 'Just Like Old Times', 35.

[979] N. Sokov, 'Military Exercises in Russia, Naval Deterrence Failures Compensated by Strategic Rocket Success', Monterey Institute of International Studies, <http://cns.miis.edu/pubs/week/040224.htm>.

[980] A. Yakovlev, 'Interview' 27 August, 1994 and A. Yakovlev, 'Correspondence', 2 December 1994, proposed a law of the sea seminar including both the U.S. and Russian Navies. See E. Franckx, *Maritime Arctic Claims*, pp. 28 and 54 footnote 214. V. Aleksin, 'We Are Ready When You Are', 56, notes '(M)uch more broad and constructive participation is necessary from naval specialists and experts at the official level as well as in the work of non-official international conferences, symposia, and seminars'.

[981] V. Aleksin, 'We Are Ready When You Are', 55. Ibid. notes that provision is made for activating ties at all levels; extending measures encouraging openness regarding doctrines and operational activities; elaboration of enlarged schedules of exchange and liaison; and exchanging views on problems of developing appropriate relations between civil and military structures in democratic societies. Agreements including the Union of Soviet Socialist Republics – United States Agreement on the Prevention of Incidents On and Over the High Seas and START II were seen to provide a basis. An Agreement between the Government of the United States and the Government of the Soviet Socialist Republics on the Prevention of Incidents on and over the High Seas, 25 May 1972, (Prevention of Incidents Agreement), *UNTS*, Vol. 852 (1972), p. 151, Protocol to the Agreement, 22 May 1973.

[982] U.S. Department of the Navy, Office of the Judge Advocate General, 'Correspondence', October 19, 1994. J.A. Roach and R. Smith, 'Interview', 27 June 1994; B. Combs, Commander U.S. Navy, and L. Sim, Royal Navy Commander, 'The Russians Are Here', *U.S. Naval Institute Proceedings*, (March 1995), 68–9; A. Yakovlev 'Interview', 25 August 1994; P. Edelman, New York Attorney, 'Interview', and S. Allen, Deputy Director, Law of the Sea Institute, University of Hawaii, Honolulu, 'Interview', at Russian – American Seminar on Law of the Sea, Moscow, 24 August 1994.

[983] Michael Wines, 'What's behind Russia's stand,' *New York Times*, March 7, 2003, p. 1 notes in relation to the Iraq question before the U.N. Security Council that the U.S. was due a comeuppance by Russia afters years of steamrollering over Russian objections on international issues. These include the NATO air war against Yugoslavia, the junking of the 1972 ABM Treaty, the NATO expansion and the basic tenets of the Moscow Treaty (SORT) which Russia grudgingly signed. Parentheses added.

[984] H. Caminos, *The Legal Regime of Straits*, p. 58 notes with the advent of the nuclear powered submarines in the early 1960's prior notification or surface navigation increased the submarine's vulnerability and thus affected the global strategic balance. 1958 TSC Article 14(6) was thus seen as a cause for superpower dissatisfaction.

[985] H. Robertson, 'Passage Through International Straits' 844–5. The author notes of those receiving the letter, Professors Bilder, Burke, Henkin, MacChesney, Nanda, and Riesenfeld interpreted the text as clearly including a right of submerged passage, while Professors Knight, Muys, Reisman and Rubin considered that the text did not unambiguously include such a right. Professors Falk, Gordon and Butte did not easily fit into either category.

[986] A 'strict textual' interpretation, if carried out with little consideration taken to the context of the conference, may misrepresent the provisions and hence have questionable relevance to reality. See I. Brownlie, *Principles*, p. 637 and D. Harris, *Cases and Materials*, p. 767. W.M. Reisman, 'The Regime of Straits and National Security', 48, 52–4, 62–4, 66–7, 69–75 argues the right of submerged passage is not excluded but at the same time is not clear. The provisions, due to ambiguity, neither establish as a secure right, nor insulate transit passage from coastal States' discretionary powers to qualify passage as 'non-transit' and hence subject to exclusion. Problems arise, from the absence of an express right in a context of other provisions inconsistent with an implied right, and from the enhanced competence of the coastal State to characterise any passage below, on or above the surface as violating conditions of 'transit' and to reduce it to innocent passage which may be suspended. The Vienna Convention requires a strict textual interpretation, and since submerged passage is not specifically included, it must be induced that 'freedom of navigation' does not include freedom of submerged transit through territorial waters in straits. Under Article 39(1)(c) 'normal' may be interpreted depending upon the context, legal and factual. The flag State and coastal State could determine what is normal passage for submarines transiting straits. Factual questions may affect normality, such as type of channel, density of traffic, safety factors, nature of the mission and rules of passage. A vessel could carry out activities normally associated with modes of continuous and expeditious transit, even though such would otherwise be forbidden in transit passage. Sonar for example may be used for intelligence gathering, but though a vessel may not gather intelligence in transit passage, it need not suspend sonar when transiting straits if it is used in continuous and expeditious transit. To explain these issues the U.S. delegation to UNCLOS III argued it was a common understanding submerged passage in transit was permitted. See below. Ibid. 75 concludes succinctly, 'an undocumented 'understanding' among all or most of the more than 150 delegations at UNCLOS is preposterous . . . the asymmetry in our willingness to accept understandings in matters vital to us but to concede explicit provisions in matters vital to others is more than disquieting'.

[987] Interpretation utilising 'intentions of the parties', may tend towards a reduction to personal observations by those who attended. See D. Harris, *Cases and Materials*, p. 767 and M. Akehurst, *A Modern Introduction*, pp. 203–4. This is particularly so since the LOSC records have their status weakened even further, than under Article 32 of the Vienna Convention, due to their unofficial status. See W. Burke, 'Submerged Passage through Straits', 202–3, W.M. Reisman, 'The Regime of Straits and National Security', 56 and J. Moore, 'The Regime of Straits', 89. W. Burke, 'Submerged Passage through Straits', 197–8, 202–16, 219–20 argues the LOSC provisions provide submarines in certain straits with the right to pass submerged. The author however indicates a preference for including a corresponding duty to report and receive prior authorisation for submerged transit. Central to the informal sessions of the Second Committee in 1976 was a 'rule of silence' whereby the delegates agreed not to talk about an article if they were essentially in agreement with the ISNT text. This may be interpreted as not lending support to amendments, which was the case with the majority of the articles in the RSNT, including the provisions on transit, innocent and archipelagic passage. Ibid. 202 believes a strict textual interpretation gives a wrong picture, whereas 'contemporary interpretations and communications among the delegates' provides a correct perspective, and 'satisfactory indications of the views of various parties' exist, which provide guidance 'concerning the expectations they sought to project'. The most relevant observations concern comments made by the opponents whereby they specifically disputed the right but failed to achieve support. Since the ISNT and the RSNT retained the same provisions as the U.K. proposal, in light of the 'rules of silence', and a statement by the Second Committee Chairman to provide an acceptable basis for negotiation for most of the delegations, the inclusion of submerged passage is argued demonstrated. Though Article 39(1)(c) does not authorise submerged passage through 'normal mode', the use of the term indicates in itself different modes of transit are envisioned, and only certain activities are permitted regardless of the mode. That a coastal State would evaluate 'normal mode' for every case depending upon type of vessel, weather, current, and other highly variable factors is unreasonable, considering this was regarded as a critical, sensitive and even dangerous issue. The reasonable interpretation is that the flag State chooses the mode of transit, Article 38 enjoins a vessel in whatever mode from engaging

in any activities not incident to that mode. See J. Moore, 'The Regime of Straits', 77–121 for concise support of the W. Burke position.

[988] S. Nandan and D. Anderson, 'Straits Used for International Navigation', 184, R. Churchill and A. Lowe, *Law of the Sea*, p. 109, H. Caminos, *The Legal Regime of Straits*, pp. 153–8, and M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. II, pp. 342–3 follow the W. Burke position, based on the opposition of Spain, Greece and Morocco in the legislative history which was rejected. The latter note although a list of appropriate incidental activities is not given for the term 'normal', an appropriate test is believed to be those 'reasonable under the circumstances', including the use of radar, sonar, etc. See also D. Pharand, 'The Northwest Passage in International Law', 122–3. D. Pharand, 'Canadian Yearbook', 124 guarantees coastal State control over the straits regime, but notes two exceptions, Article 236 and 'normal mode' of transit for submarines with specific application for the Northwest Passage. K. Hakapää, *Marine Pollution*, p. 203 supports the W. Burke position but notes the existence of the W.M. Reisman view. V. Bordunov, 'The right of transit passage', 223 notes normal mode of continuous and expeditious transit is seen to be in accordance with Article 41 regarding use of sea lanes and traffic separation schemes to be observed by vessels of any type. Since the Collisions Convention is directly addressed under Article 39(2)(a), submerged passage is seen as being clearly permitted. K. Koh, *Straits*, pp. 153–5 notes arguments in favour of submerged passage include, passage is not restricted to the surface as it is under innocent passage; the normal mode of passage of submarines is submerged which is not inconsistent with Article 39(1)(c); submerged passage is implicit in 'freedom of navigation'; used in Article 38(2) and in the high seas regime Article 87(a); strait States may adopt safety and environmental rules under Article 42(1) which may require submarines to navigate on the surface in difficult areas, which does not detract from the general rule; and duties are created but no corresponding rights are given. Arguments against include Article 39(1)(b) requires vessels to refrain from force or the threat of force and Article 40 prohibits research or survey activities without prior authorisation, and control during submerged passage is difficult. Ibid. concludes that submerged passage is within the scope of the transit passage regime although the answer is not clear.

[989] J. Brooke, 'Do We *Really* Need a Third *Seawolf*', 9–10. R.D. Brubaker and W. Østreng, 'Exquisite Superpower Subterfuge?' 301–10, believe the Barents Sea to be a chief deployment area. See also W. Østreng, 'Stumbling Block' 3, 15–17.

[990] W. Østreng, F. Griffiths, R. Vartanov, A. Roginko and V. Kolossov, '*National Security*', 194–5.

[991] See for example Article 2 of the 1990 Rules, 'Principles, Object, and Goals of Regulation'. See also A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 163–7.

[992] See A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic' 160 and R.D. Brubaker and W. Østreng, 'Exquisite Superpower Subterfuge?' 323–4.

[993] The same argumentation concerns the straits in Franz Josef Land. As noted, though lying outside the definition of the NSR under Article 1.2 of the 1990 Rules, and hence outside the specific scope of the 1990 Rules, these straits may be encompassed by the less specific provisions including Articles 4, 5 and 12 of the 1999 Decree, Articles 13(3) of the 1998 Law, Article 9(e) (deleted) of the 1993 State Border Act, Articles 1, 3 and 15 of the 1984 Environmental Edict and Article 5 of the 1983 Rules. These require pilotage or compliance with special construction, equipment and crewing standards, also for warships.

[994] See also A. Skaridov, 'The Russian approach to ROE', 19.

[995] See M. Leifer, *International Straits*, pp. 168–73, regarding Soviet passage in the Indonesian Straits lacking a bilateral agreement with Indonesia, similar to that secretly negotiated by the U.S.

[996] See W.M. Reisman, 'The Regime of Straits and National Security', 53 footnote 13, where spiralling rounds of counter-counter measures in underwater surveillance systems are discussed. W. Burke, 'Submerged Passage' 220 believes undetected passage improbable.

[997] P. Peppe, 'Submarines in the Littorals', *U.S. Naval Institute Proceedings*, (July 1993), 46–7. Parentheses added. Ibid. notes the British Navy in the Falklands War against Argentina, 'expended hundreds of antisubmarine weapons, dedicated many vessels and aircraft, and literally refused to move its armada into an optimal littoral war-fighting position – thanks to the presence of one enemy diesel submarine'.

[998] Canada apparently continued to install underwater surveillance devices in its main Arctic straits. V. Santos-Pedro, 'Interview', 23 November 1994. Also noted was that Canada did not purchase nuclear submarines as formerly planned. W. Østreng, 'Stumbling Block', 16 notes that Canadian sub service perimeter surveillance covering particularly the channels connecting the Arctic Ocean to Baffin Bay and Baffin Bay to the Atlantic, 'once installed would present a formidable barrier to unobserved Soviet SSBN penetration'. F. Griffiths, 'The Northwest Passage in Transit', *Order of the Oceans*, pp. 249, 251–3 believes the contrary based on a May 1998 governmental statement.

[999] A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 166, state, '(T)here are no objections on the part of foreign States and even the Western doctrine of international law recognises the lawfulness of the actions of the USSR. This confirms the well-founded basis of the USSR's claims to special rights to regulate navigation in the sea expanses within whose limits the Northern Sea Route passes, including the territorial sea and economic zone'.

[1000] This could include in relation to LOSC Article 35(c), 'long standing treaty', or Article 37, 'used for international navigation'.

[1001] W. Østreng, 'Stumbling Block', 17 discusses a bilateral agreement between Canada and the U.S. allowing the strict Canadian Arctic regime which excludes the passage of Russian submarines, yet permits the passage of U.S. submarines based upon privilege rather than a right, to be a possibility. This is apparently discounted by J.A. Roach and R. Smith, *Excessive Maritime Claims*, p. 214.

[1002] This rough figure is obtained from extrapolation of W. Østreng, 'The geo-strategic conditions of deterrence in the Barents Sea', *The Soviet Maritime Arctic*, pp. 204–5 who notes U.S. SSN's have operated undetected in the mouth of the White Sea as well as within the harbour in Vladivostok; as well as W. Butler, *Northeast Arctic Passage*, p. 15 who notes the least depth of the Orlovskaia Salma Strait in the mouth of the White Sea is approximately 22 meters. The channels in the Orlovskaia Salma Strait and Gorlo Strait into the White Sea are approximately 22 to 36 meters minimum depth. R. Castberg, 'Interview', FNI, Oslo, 15 March 1995, concerning Vladivostok, citing *Morskie Porty Dal'nevostochnogo Poberezh'ya Rossiyskoy Federatsii*, (Harbours on the Far Eastern Coast of the Russian Federation), (Moscow, Mortekhinformreklama, 1993), (in Russian) reports the average depth alongside the trading and fishing docks to be approximately 11 meters. The military harbour lies across the channel and is assumed to be approximately the same. H. Payne, 'The *Albacore*: Back to the Future', *U.S. Naval Institute Proceedings*, (April 1993), 105, notes both the *Seawolf* (SSN-21) and the improved *Los Angeles* (SSN-688) class submarines are more than 117 meters long and 18 meters from keel to top of sail. The water in the Persian Gulf ranges from 17 and 20 meters to 100 meters deep in which at least the *Topeka* (SSN-754) operated during the Gulf War in 1991. Ibid. notes, '(I)s it possible that our smallest submarines are longer than the depth of water in which they may operate in the future?'

[1003] The depths are duplicated here in parentheses for clarity. 'Deep' is used where no figure has been given.

[1004] W. Østreng, 'The geo-strategic conditions of deterrence', *The Soviet Maritime Arctic*, p. 211.

[1005] See D. Barnett, 'Sea ice distribution in the Soviet Arctic', *The Soviet Maritime Arctic*, pp. 47–62; and T. Jørgensen, 'Synoptic Ice Characteristics of the NSR', 68–74.

[1006] The Kara Gates seldom freezes solidly and even in hard winters for only brief periods.

[1007] W. Østreng, 'The NSR: A New Era in Soviet Policy?' *Ocean Development and International Law*, Vol. 22, (1991), 266.

[1008] H. Payne, 'The *Albacore*: Back to the Future', 106 puts the downward force for the improved *Los Angeles* (688) class to be approximately five thousand pounds when operating within 5.5 meters of the seabed at five knots, and a maximum 10,000 pounds close to the bottom. See also, H. Payne, 'The Albacore Advantage', *U.S. Naval Institute Proceedings*, (July 1993), 59.

[1009] R. Boyle and W. Lyon, 'Have We Lost?' 34.

[1010] H. Payne, 'The *Albacore*: Back to the Future', 105 notes the small Russian diesel electric 'Kilo's' are 16.6 meters high and 73.3 meters long. N. Friedman, 'Submarines Adapt', 71 lists the Soviet ASW submarines as the *Victor, Victor III, Sierra* (first launched in 1983) and *Akula* (first launched in 1984).

[1011] W. Østreng, 'The geostrategic conditions of deterrence', *The Soviet Maritime Arctic*, p. 211.

[1012] W. Østreng, 'The NSR: A New Era', 267 notes with the possible exception of certain areas of the Laptev Sea, the seas north of the Soviet Union are largely unsuitable as bastions for SSBN's. See also R.D. Brubaker and W. Østreng, 'Exquisite Superpower Subterfuge?' 305–7 who note it is only the Novaya Zemlya trough and five troughs in the Laptev Sea which possibly qualify.

[1013] W. Østreng, 'The geostrategic conditions of deterrence', *The Soviet Maritime Arctic*, p. 204.

[1014] G. Lindsay, *Strategic Stability in the Arctic*, Adelphi Papers, 241 (London, Brassey's for International Institute for Strategic Studies, 1989), pp. 73–4. See also M. Gorenflo, Commander U.S. Navy, *U.S. Naval Institute Proceedings*, (November 1999), 19–20, and S. Sontag, C. Drew and A. Drew, *Blind Man's Bluff*, p. 233.

[1015] W. Østreng, 'Stumbling Block', 3, 7 and 8.

[1016] J. Morton, 'Interview with Vice Admiral Owens', 134. The technology is to lead to improved acoustic and non acoustic sensing systems and advanced high speed computational data fusing techniques. See also generally P. Peppe, 'Submarines in the Littorals', 46–8; H. Hemond, 'Why Not Design the Best?', *U.S. Naval Institute Proceedings*, (July 1993), 55–7; H. Payne, 'The *Albacore* Advantage', 59–62, and M. Poirier, 'Sea Control and Regional Warfare', ibid., (July 1993), 63–70.

[1017] H. Payne, 'The *Albacore*: Back to the Future', 106 notes that the *Albacore* was less than 13 meters high, nine meters in diameter and 68 meters long. From 1953 it was the world's fastest and most manoeuvrable submarine, matched presently only by the Russian *Alfa* and possibly *Akulu* class boats. See also H. Hemond, 'Why Not Design the Best?', 55–7 and H. Payne, 'The *Albacore* Advantage', 59–62. N. Friedman, 'Submarines Adapt', 71–2 notes that the new SSN-21 class has two-thirds the displacement of the earlier *Los Angeles* SSN's. The author notes that the envisioned *Centurion*, the new SSN (NSSN), may have a displacement of seven thousand tons, and have modular versions, including SSKN (sea control and maritime surveillance), SSFN (special operations); SSCN (command-control and electronic warfare); SSMN (mine warfare and mine countermeasures); SSLN (attacking land targets with missiles); SSTN (theatre ballistic missiles); and SSBN. See W. Houley, Rear Admiral, U.S. Navy, '2015', ibid., (October 1993), 50 who describes a visionary operation by a SSN using Autonomous Underwater Vehicles (AUV's) or Autonomous Underwater Submarines (AUS) for intelligence operations. See also J. Morton, 'Interview with Vice Admiral Owens', 125, who discusses intelligence gathering using sophisticated distant sensors and towed arrays.

[1018] P. Peppe, 'Submarines in the Littorals', 47. Ibid. notes further, '(I)n the past 20 years the attack submarine force has amassed more than 14,000 submarine days conducting submerged, real-world contingency operations and training exercises in water less than 600 feet deep'. W. Holland, 'Diesel Boats Again?' ibid., (June 1996), 13 substantiates this.

[1019] R. Boyle and W. Lyon, 'Have We Lost?' 34. Another limitation relates to buoyancy problems in the low salinity water at the mouths.

[1020] Russian Charts Nos. 951, 600, 948, 949, 951, 952, and 954.

[1021] This seems substantiated by V. Aleksin, 'We Are Ready When You Are', 56, A. Yakovlev, 'Correspondence', 20 March 1995, A. Yakovlev, 'Correspondence' 6 February 1998, the statement made by the U.S. Secretary of Defence in E. Franckx, *Maritime Arctic Claims*, pp. 28 and 54 footnote 214, as well as the documented presence of a U.S. SSN near Kol'skii Bay in E. Franckx, *Maritime Arctic Claims*, pp. 28 and 54 footnote 214, and S. Sontag, C. Drew and A. Drew, *Blind Man's Bluff*, pp. 158–83, 198, 209–58.

[1022] R.D. Brubaker and W. Østreng, 'Exquisite Superpower Subterfuge?', 9–13.

[1023] W. Østreng, 'The geostrategic conditions of deterrence', *The Soviet Maritime Arctic*, pp. 211–2. The frequency of icebergs occurring in the latter area however may be substantial.

[1024] S. Sontag, C. Drew and A. Drew, *Blind Man's Bluff*, p. 216.

[1025] The degree of use, submerged passage viewed together with surface passage, covering most of the 20th century, tends towards 4% of the use noted under the *Corfu Channel Case*.

[1026] Only passages by *Sverdrup II* have been mentioned by the then Director of the NSRA V. Michailichenko, and Deputy Director A. Ushakov.

Chapter 9

[1027] R.D. Brubaker and W. Østreng, 'Exquisite Superpower Subterfuge?' 332–3.

[1028] See A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic', 159–60, 162–3.

[1029] See W.M. Reisman, 'The Regime of Straits and National Security', 60 footnote 29 and M. Leifer, International Straits, pp. 161–2.

[1030] W.M. Reisman, 'The Regime of Straits and National Security', 60 footnote 29. The author notes in response that straits unrelated to 'lifelines' or military objectives may be factored out of the national security equation, '(T)his type of extrapolation represents the most primitive form of policy analysis and should be eschewed. The relative importance of different avenues of the oceans in the future will depend on technics, contexts, and needs which cannot be envisaged now. It should be clear that the prudent course is not to surrender any of these maritime highways if it can be avoided. Where they must be sacrificed, it is foolish to persuade ourselves of their triviality, since it induces us to concede them for less and less'.

[1031] J. Barton, Professor of Law, Stanford University, 'Interview', 30 June, 1998. Ibid. notes the U.S. Navy considers it unnecessary to enter domestic politics, including environmental standpoints contrary to its practice.

[1032] See N. Gleditsch and S. Lodgaard, *Krigsstaten Norge*, (Oslo, Pax Forlag A/S, 1970), (in Norwegian), s. 37, 120–1, 151–3.

[1033] R.D. Brubaker and W. Østreng, 'Exquisite Superpower Subterfuge?' 332–3. W. Østreng, 'Interview', 13 January 2004, notes Russia, being also an Asiatic State, though likely not having the present capacity to patrol submarines in the Indian Ocean as did the Soviet Union, will probably do so in 10 to 15 years given that present economic developments continue.

[1034] J. Moore, 'The Regime of Straits', 94. See also ibid. 102.

[1035] E. Brüel, International Straits, p. 31. See also ibid. pp. 30–5.

[1036] W.M. Reisman and J. Baker, *Regulating Covert Action*, pp. 141–2.

[1037] This proposal is supported by both D. Pharand, Emeritus Professor, 'Jurisdiction Governing the Straits in Russian Arctic Waters', Reviews – INSROP Working Paper No. 52, (1996); and T. Scovazzi, Professor, 'Report of the International Evaluation Committee – INSROP', Scott Polar Research Institute, University of Cambridge, (26 April 1996), p. 32.

[1038] D. Winkler, 'When Russia Invaded Disneyland', *U.S. Naval Institute Proceedings*, (May 1997), 79.

[1039] W. Østreng, F. Griffiths, R. Vartanov, A. Roginko and V. Kolossov, *National Security*, 194–5.

[1040] R. Smith, 'Interview', 27 June 1994. A. Kolodkin, 'Interview', 25 February 1994.

[1041] A. Kolodkin, 'Telephonic Interview', 19 January 2004. J.A. Roach, 'Telephonic Interview', 20 January 2004.

[1042] P. Edelman, 'Interview', S. Allen, 'Interview', and A. Yakovlev, 'Interview', August 23–6, 1994. J.A. Roach, 'Correspondence', 15 February 1999 notes that exchanges have taken place including a Russian Captain at the U.S. Naval War College for a number of years.

[1043] E. Gold, 'Interview', 23 June 1994. J.A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 207, 227, footnote 79. J.A. Roach, 'Telephonic Interview', 20 January 2004 notes no further developments.

[1044] G. Galdorisi, 'Who Needs the Law of the Sea?' 74.