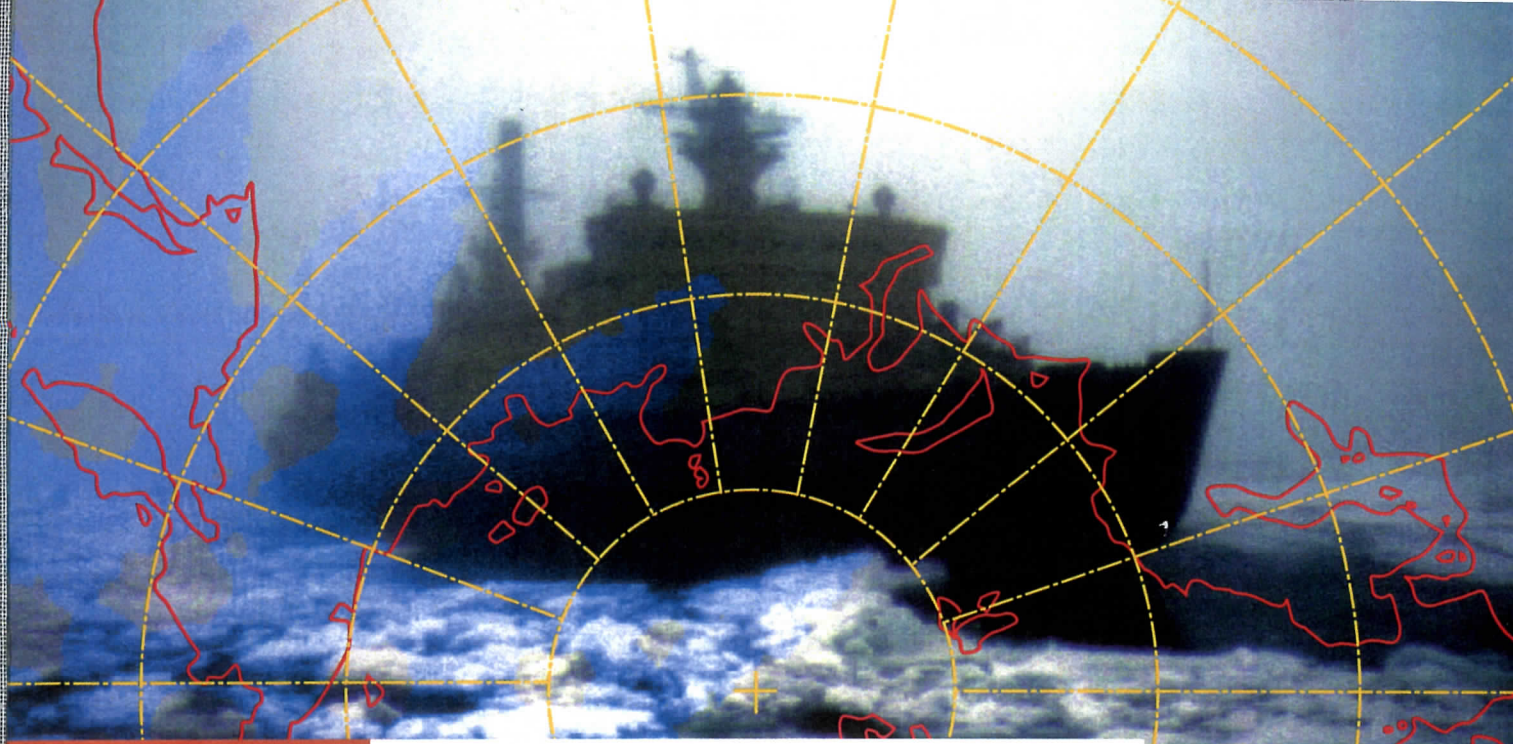


**INSROP WORKING PAPER**
**NO. 79 - 1997, IV.3.1**

# Environmental Regulation in the Russian Arctic

**By R. Douglas Brubaker**

**INSROP International Northern Sea Route Programme**

Central Marine Research & Design Institute, Russia

The Fridtjof Nansen Institute, Norway

Ship and Ocean Foundation, Japan

International Northern Sea Route Programme (INSROP)

Central Marine Research & Design Institute, Russia

The Fridtjof Nansen Institute, Norway

Ship & Ocean Foundation, Japan

# INSROP WORKING PAPER NO. 79-1997

| | |
|---|---|
| Sub-programme IV: | Political, Legal and Strategic Factors |
| Project IV.3.1: | International Law and Russian Arctic Waters |
| Supervisors: | R. Douglas Brubaker and Anatoly Kolodkin |
| **Title:** | **Environmental Regulation in the Russian Arctic** |
| **Author:** | **R. Douglas Brubaker** |
| Address: | The Fridtjof Nansen Institute<br>P.O. Box 326<br>1324 Lysaker<br>NORWAY |
| Date: | 22 May 1997 |
| Reviewed by: | Professor Donat Pharand, University of Ottawa, Canada |

***This Working Paper is at a later stage planned to be published as chapter 9 in a book.***

## *What is an INSROP Working Paper and how to handle it:*

This publication forms part of a Working Paper series from the **International Northern Sea Route Programme - INSROP**. This Working Paper has been evaluated by a reviewer and can be circulated for comments both within and outside the INSROP team, as well as be published in parallel by the researching institution. A Working Paper will in some cases be the final documentation of a technical part of a project, and it can also sometimes be published as part of a more comprehensive INSROP Report. For any comments, please contact the authors of this Working Paper.

## FOREWORD - INSROP WORKING PAPER

INSROP is a five-year multidisciplinary and multilateral research programme, the main phase of which commenced in June 1993. The three principal cooperating partners are **Central Marine Research & Design Institute (CNIIMF)**, St. Petersburg, Russia; **Ship and Ocean Foundation (SOF)**, Tokyo, Japan; and **Fridtjof Nansen Institute (FNI)**, Lysaker, Norway. The INSROP Secretariat is shared between CNIIMF and FNI and is located at FNI.

INSROP is split into four main projects: 1) Natural Conditions and Ice Navigation; 2) Environmental Factors; 3) Trade and Commercial Shipping Aspects of the NSR; and 4) Political, Legal and Strategic Factors. The aim of INSROP is to build up a knowledge base adequate to provide a foundation for long-term planning and decision-making by state agencies as well as private companies etc., for purposes of promoting rational decisionmaking concerning the use of the Northern Sea Route for transit and regional development.

INSROP is a direct result of the normalization of the international situation and the Murmansk initiatives of the former Soviet Union in 1987, when the readiness of the USSR to open the NSR for international shipping was officially declared. The Murmansk Initiatives enabled the continuation, expansion and intensification of traditional collaboration between the states in the Arctic, including safety and efficiency of shipping. Russia, being the successor state to the USSR, supports the Murmansk Initiatives. The initiatives stimulated contact and cooperation between CNIIMF and FNI in 1988 and resulted in a pilot study of the NSR in 1991. In 1992 SOF entered INSROP as a third partner on an equal basis with CNIIMF and FNI.

The complete series of publications may be obtained from the Fridtjof Nansen Institute.

## SPONSORS FOR INSROP

- Nippon Foundation/Ship & Ocean Foundation, Japan
- The Government of the Russian Federation
- The Norwegian Research Council
- The Norwegian Ministry of Foreign Affairs
- The Norwegian Ministry of Industry and Trade
- The Norwegian Ministry of the Environment
- State Industry and Regional Development Fund, Norway
- Norsk Hydro
- Norwegian Federation of Shipowners
- Fridtjof Nansen Institute
- Kværner a.s.
- Phillips Petroleum Company Norway

## PROFESSIONAL ORGANISATIONS PERMANENTLY ATTACHED TO INSROP

- Ship & Ocean Foundation, Japan
- Central Marine Research & Design Institute, Russia
- Fridtjof Nansen Institute, Norway
- National Institute of Polar Research, Japan
- Ship Research Institute, Japan
- Murmansk Shipping Company, Russia
- Northern Sea Route Administration, Russia
- Arctic & Antarctic Research Institute, Russia
- ARTEC, Norway
- Norwegian Polar Research Institute
- Norwegian School of Economics and Business Administration
- SINTEF (Foundation for Scientific and Industrial Research - Civil and Environmental Engineering), Norway.

## PROGRAMME COORDINATORS


- **Yury Ivanov, CNIIMF**
  Kavalergardskaya Str.6
  St. Petersburg 193015, Russia
  Tel: 7 812 271 5633
  Fax: 7 812 274 3864
  Telex: 12 14 58 CNIMF SU
- **Willy Østreng, FNI**
  P.O. Box 326
  N-1324 Lysaker, Norway
  Tel: 47 67 11 19 00
  Fax: 47 67 11 19 10
  E-mail: sentralbord@fni.no
- **Ken-ichi Maruyama, SOF**
  Senpaku Shinko Building
  15-16 Toranomon 1-chome
  Minato-ku, Tokyo 105, Japan
  Tel: 81 3 3502 2371
  Fax: 81 3 3502 2033
  Telex: J 23704

9. Environmental Regulation in the Russian Arctic ..... 1

9.1. Introduction ..... 1

9.2. Salient International Issues ..... 1
9.2.1. Introduction ..... 1
9.2.2. LOSC Article 234 - Ice-Covered Areas ..... 2
9.2.2.1. Introduction ..... 2
9.2.2.2. General Status of Article 234 under International Customary Law ..... 3
9.2.2.3. Interpretative Scope of Article 234 ..... 6
9.2.2.3.1. Expansive - Restrictive Interpretations ..... 6
9.2.2.3.2. "Non discrimination" ..... 7
9.2.2.3.3. "Due Regard to Navigation" - "Within the Limits of the Exclusive Economic Zone" - "Environmental Protection Based upon Sound Scientific Evidence" ..... 8
9.2.2.3.4. Legislative History ..... 10
9.2.2.3.5. Subsequent State Practice ..... 13
9.2.2.3.5.1. Canadian State Practice ..... 13
9.2.2.3.5.2. U.S. State Practice ..... 18
9.2.2.3.5.3. Other State Practice - Conference on the Harmonisation of Polar Ship Rules - Rovaniemi Process ..... 23
9.2.2.3.6. Conclusions ..... 26
9.2.3. Interface - Ice-covered Areas and the LOSC International Straits Regime ..... 28
9.2.3.1. Introduction ..... 28
9.2.3.2. Interpretation ..... 29
9.2.3.3. Legislative History ..... 30
9.2.3.4. State Practice ..... 31
9.2.3.5. Conclusions ..... 36
9.2.4. LOSC Articles 211, 218, 219 and 220 - MARPOL 73/78 ..... 37
9.2.4.1. Introduction ..... 37
9.2.4.2. Status under Customary International Law ..... 38
9.2.4.3. Prescriptive and Enforcement Environmental Standards under LOSC and MARPOL 73/78 ..... 39
9.2.4.4. State Practice of Prescriptive and Enforcement Environmental Standards under LOSC and MARPOL 73/78 ..... 42
9.2.4.4.1. U.S. Practice ..... 44
9.2.4.5. Conclusions ..... 46
9.2.5. Customary International Law - MARPOL 73/78 ..... 47
9.2.5.1. Introduction ..... 47
9.2.5.2. Prescriptive and Enforcement Jurisdiction ..... 47
9.2.5.3. State Practice ..... 49

9.2.5.4. Conclusions ..... 49
9.2.6. LOSC Articles 211(6), 122 and 123 and MARPOL 73/78 Annexes I, II and V - Special Areas, Regional and Closed Seas - Application for the Arctic ..... 50
9.2.6.1. Introduction ..... 50
9.2.6.2. Special Areas, Regional and Closed Seas ..... 50
9.2.6.3. State Practice ..... 51
9.2.6.4. Conclusions ..... 53

9.3. State Practice in the Russian Arctic Waters Compared to the International Regimes ..... 53
9.3.1. Introduction ..... 53
9.3.2. Consequences of the Customary Status under International Law of Article 234 and Articles 211, 218-220 and MARPOL 73/78 ..... 54
9.3.3. The Russian Position ..... 55
9.3.3.1. Introduction ..... 55
9.3.3.2. Soviet - Russian Legislation, Enforcement and Other Practice Related to LOSC Article 234, Articles 211, 218-220, International Customary Law and MARPOL 73/78 ..... 56
9.3.3.2.1. 28 February 1984 Edict "On the Economic Zone of the U.S.S.R." and Supporting Legislation ..... 56
9.3.3.2.2. The 26 November 1984 the Edict on Intensifying Nature Protection in Areas of the Far North and Marine Areas Adjacent to the Northern Coast of the USSR ..... 58
9.3.3.2.3. 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.' ..... 59
9.3.3.2.4. Regulations for Navigation on the Seaways of the Northern Sea Route ..... 61
9.3.3.2.5. Recent Legislation ..... 63
9.3.3.3. Compliance of Russian Practice with LOSC Article 234 ..... 65
9.3.3.3.1. Introduction ..... 65
9.3.3.3.2. "Non Discriminatory Adoption and Enforcement" ..... 65
9.3.3.3.3. Criminal Liability ..... 66
9.3.3.3.4. "Due regard to navigation" - "Within the limits of the exclusive economic zone" - "Protection and preservation of the marine environment based on the best available scientific evidence" ..... 68
9.3.3.3.5. "The presence of ice covering such areas for most of the year" - "Marine areas adjacent to the northern coast" ..... 72
9.3.3.3.6. Liability and Compensation ..... 74
9.3.3.3.7. Special Areas ..... 75

9.3.3.3.8. Conclusions ..... 76
9.3.3.4. Compliance of Russian Practice with LOSC Articles 211, 218-220 and MARPOL 73/78 ..... 78
9.3.3.4.1. Areas of Obvious Non Compliance ..... 78
9.3.3.4.2. Prescriptive Jurisdiction - "Established Norms," "Notification," "Authorisation" and "Leading," "Reporting" of Pollution ..... 79
9.3.3.4.3. Enforcement - "Inspection," "Arrest," "Detention," "Suspension of Passage" and "Removal" ..... 81
9.3.3.4.4. Special Areas ..... 88
9.3.3.4.5. Conclusions ..... 89
9.3.3.5. Compliance of Russian Practice with International Customary Law and MARPOL 73/78 ..... 89
9.3.4. The Arctic Practice with Respect to Navigation of the U.S. and Other States in Russian Arctic Waters ..... 91
9.3.4.1. Introduction ..... 91
9.3.4.1.1. Norwegian Practice ..... 92
9.3.4.2. Declarative and Navigational Practice of the U.S. and Other in Relation to the Russian - LOSC Article 234 Regime ..... 93
9.3.4.3. Declarative and Navigational Practice of the U.S. and Other in Relation to the Russian - LOSC Articles 211, 218-220 and MARPOL 73/78 Regime ..... 95
9.3.4.4. Declarative and Navigational Practice of the U.S. and Other in Relation to the Russian - International Customary Law and MARPOL 73/78 Regime ..... 96

9.4. Conclusions ..... 96
9.4.1. Recommendations ..... 98

Appendix 9

# 9. Environmental Regulation in the Russian Arctic

## 9.1. Introduction

Article 234 under the 1982 United Nations Convention on the Law of the Sea[1] (LOSC) governing environmental protection in ice-covered areas, appears to be the modern cornerstone under international law on which the Russian Arctic jurisdiction is based. However this Article is not free from controversy both under international law and with respect to the Russian practice. In this Section LOSC Article 234 will be analysed, and it might be deemed unnecessary to examine the more traditional environmental regimes governing vessel-source pollution in the exclusive economic zone, the territorial sea and internal waters. However LOSC Articles 211, 218-220, MARPOL 73/78, and international customary law, including Articles 14 and 16 of the Convention on the Territorial Sea and the Contiguous Zone[2] (TSC), and MARPOL 73/78, will also be briefly examined in order to cover the eventuality that Article 234 does not become the governing regime.[3] While it seems unlikely that Russia and Canada will change their Arctic policies, Denmark-Greenland and Norway have yet to act upon the ice-covered regime, it cannot be ruled out that the U.S. legislation or parts thereof will be put under scrutiny either by the U.S. Supreme Court or the U.S. Congress and consequently reduced in scope.[4] If this happens and the U.S. and Russia do not ratify the LOSC, then the traditional navigational regimes may arguably apply. The international issues inherent in these regimes will be examined and likely limits established. Based upon the results, comparisons will then be carried out between the international regimes and the Russian practice. The U.S. and Canadian positions will also be compared, conclusions made and recommendations set forth. First, salient international issues will be addressed.

## 9.2. Salient International Issues

One expert notes generally, "(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."[5] It is hoped that this Section is a step towards that goal.

---

1 United Nations Convention on the Law of the Sea, (LOSC), 21 *International Legal Materials* 1261. In force 16 November 1994. See Appendix 9 for all LOSC Articles referred to in this Chapter.

2 Convention on the Territorial Sea and the Contiguous Zone (TSC), 516 *United Nations Treaty Series* 206. In force 10 September 1964. See Appendix 9 for all TSC Articles referred to in this Chapter.

3 The IMO conventions also play a role here as discussed in Section 5.2.3.2.2.1.3.

4 N. Ronneberg, 'The United States' Oil Pollution Act of 1990,' Attorney at Law, San Francisco, California, U.S., 26 April, 1995, speech at the Institute for Maritime Law, University of Oslo, Oslo, Norway. This process may already be underway. Aftenposten, 'Intertanko frykter USA-dom,' 11 november 1996 notes that the 9th District Federal Court decided in favor of the state Washington against the International Association of Independent Tanker Owners, (Intertanko) that Washington is *justified* in unilaterally regulating international oil tanker traffic. Intertanko is evaluating whether the judgment will be appealed to the U.S. Appellant Court.

5 W. Butler, 'Joint ventures and the Soviet Arctic,' *Marine Policy* 14 (March 1990) 174.

### 9.2.1. Introduction

International issues involving Article 234 include pending ratification of the LOSC by Russia, the U.S. and other littoral States,[6] its general status under international customary law, the intended scope of Article 234, and the interface of Article 234 with the LOSC international straits regime.[7] The same international issues also arise related to LOSC Articles 211, 218-220, environmental protection governing in the territorial sea and the exclusive economic zone under the LOSC, which would apply in the Russian Arctic should Article 234 not. TSC Articles 14 and 16 and free navigation under Article 2 and 24 of the 1958 Convention on the High Seas,[8] would apply should the LOSC regimes not, though, with the exception of the flag State, few possibilities for anti pollution provisions exist. Article 234 will be addressed first.

### 9.2.2. LOSC Article 234 - Ice-Covered Areas

#### 9.2.2.1. Introduction

As indicated Article 234 is one of the cornerstones on which the Russian Arctic jurisdiction is based.[9] Briefly it provides that coastal States have the right to adopt and enforce laws and anti pollution regulations in the exclusive economic zone *where* particularly severe climatic conditions and ice coverage for most of the year create navigational obstructions or exceptional hazards, and marine pollution could cause major harm to or irreversible disturbance of the ecological balance. *Due regard* must be taken to navigation and to marine environmental protection and preservation based on the best available scientific evidence.

Related to the Russian Arctic, both the U.S. State Department and the Russian Foreign Ministry maintain that they are satisfied with the formulation.[10] However different interpretations are possible surrounding the terms, "where," "due regard to navigation," "non discriminatory," "within the limits of the exclusive economic zone," and "environmental protection based upon sound scientific evidence," and some consider Article 234 to be highly ambiguous and controversial.[11] These interpretations will be analysed as to their validity before an evaluation is then made whether the Russian provisions are in accordance as

---

6 Norway is the only Arctic littoral State which is Party to the LOSC. Norway ratified the LOSC 21 June 1996. Though not strictly Arctic littoral States, Sweden and Finland also ratified the LOSC at the same time. Iceland ratified 24 June 1985; so there may be a Scandinavian "block" forming of some influence to the issues noted below, though no definite stance has yet been seen.

7 See Chapters 4 and 5 for discussion of the latter.

8 Convention on the High Seas, 450 *United Nations Treaty Series* 82, 29 April 1958

9 A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic - Major Issues' *Marine Policy*, vol. 14(2), (March 1990), 160-3.

10 J. Roach and R. Smith, 'Interview,' Office of Ocean Affairs, U.S. State Department 27 June, 1994. P. Dzyubenko, 'The legal regime of Arctic: new tendencies,' Legal Office of the Russian Foreign Ministry, Russian - American Seminar, "The United Nations and the Law of the Sea Development," 23-26 August, 1994.

11 C. Lamson, 'Arctic Shipping, Marine Safety and Environmental Protection,' *Marine Policy* vol. 11, (1978), 3-4.

claimed. First however the status of Article 234 under international customary law must be briefly analysed, pending ratification of the LOSC by Russia, the U.S. and Canada.

9.2.2.2. General Status of Article 234 under International Customary Law

Article 234 appears as the sole Article in LOSC PART XII "Protection and Preservation of the Marine Environment," Section VIII, "Ice-Covered Areas." The status of Article 234 under customary law is controversial but perhaps less so than that of the other regimes set forth in this Chapter.[12] Generally as will be seen Soviet legislation currently followed by Russia covering pollution from vessels in the Arctic follows closely if not expands upon this Article.[13] Canada with its Arctic Waters Pollution Prevention Act, does much the same.[14] The U.S. has acknowledged in a Presidential Proclamation that a State's jurisdiction and responsibility over the natural resources, environmental control and conservation in the exclusive economic zone are almost identical to LOSC provisions.[15] The U.S.'s position would thus support Article 234 through its acceptance as international customary law of LOSC PART XII. At the same time as seen the U.S. claims both the Russian and the Canadian Arctic straits as international, and makes no attempt to clarify the interface between the two regimes.[16]

Russian and U.S. State practice may be considered to be an important source of international customary law,[17] due to their status as great powers.[18] If a common legal "point

---

12 As will be seen in Section 9.2.4.2. doctrine is divided regarding the status of the LOSC environmental provisions under international customary law.

13 See Section 9.3.3.2. for discussion. See E. Franckx, 'The New USSR Legislation on Pollution Prevention in the Exclusive Economic Zone,' *International Journal of Estuarine and Coastal Law*, vol. 1, (1986), pp. 156-9. The author notes that the Soviet Union was the first country to legislate national rules covering vessel-source pollution and dumping in its exclusive economic zone following signature of the LOSC.

14 See Section 9.2.2.3.3. for discussion. Arctic Waters Pollution Prevention Act, R.S.C. 1985, c.2 A-12 (AWPPA).

15 See Section 9.2.2.3.3. for discussion. Proclamation No. 5030, 48 *Federal Register* 10, 605 (1983) codified at 3 *Code of Federal Rules* Section 5030. See also 22 *International Legal Materials* 465 (1983). W. Schachte, Rear Admiral, U.S. Navy, 'The Value of the 1982 UN Convention on the Law of the Sea - Preserving our Freedoms and Protecting the Environment,' Conference of the Law of the Sea Institute, Malmø` Sweden, (8 August 1991) 15, noted that, "(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 in spite of the presence of the disclaimer that the views expressed by the author were solely the author's and not necessarily those of the U.S. Navy nor of the U.S. Department of Defense, the speech was cleared by U.S. government officials and accurately reflected U.S. government policy. Admiral Schachte was a member of the U.S. Delegation to the final sessions of UNCLOS III.

16 U.S. Secretary of State Schultz noted in a joint press conference following signature of the 'Agreement on Arctic Cooperation, 11 January 1988, Canada-United States,', *International Legal Materials* vol. 28, p. 142, (1988 Agreement), in response to a question whether the U.S. would recognize 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." W. Schachte, 'Remarks,' 18-9, notes, "transit passage prevails ice covered or not" since submarines sail under the ice and airplanes over. J. Roach and R. Smith *Excessive Maritime Claims*, p. 214. Ibid. p. 227 footnote 79, surprisingly leave the question open noting, "(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, United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas - United States Responses to Excessive National Maritime Claims*, No. 112, (March 9, 1992), pp. 68-73.

17 See Section 1.4.NEED. E. Franckx, *USSR Pollution Prevention*, 156-9. See also W. Butler, 'Anglo-Soviet Links and the Law of the Sea,' *The Law of the Sea and International Shipping - Anglo-Soviet Post-UNCLOS Perspectives*, (W.

of reference" is provided, such as Article 234, there is a higher chance for different States legislating similar rules and hence developing customary law.[19] Canada's implementation would thus aid the passage of Article 234 into international customary law. The Scandinavian States have apparently not implemented Article 234 in the Arctic or the Baltic, which is notable given their generally prominent environmental profile, yet neither is there evidence of any opposition.[20] These States have however recently ratified the LOSC, and Norway may have in view special rules for navigation in ice-covered areas north of Svalbard to assist in the preservation of fisheries.[21]

The relationship between the Antarctic marine area and the LOSC is controversial with some maintaining that UNCLOS III intentionally failed to deal with the issue, and others that lacking an express provision for exclusion that LOSC provisions apply for claimant States as coastal States.[22] Perhaps more important no Antarctic claimant State which could be classified an Antarctic coastal State has enacted legislation implementing Article 234,[23]

---

Butler, ed.) (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."

18 E. Franckx, 'USSR Pollution Prevention,' 158-9, notes, "great powers will have more influence than others on the formation of customary rule," and as leading maritime States which, are "in a position to disrupt the desired stability of expectations by military, economic or political means."

19 Ibid.

20 D. Brubaker, 'Correspondence with the Norwegian Ministry of Foreign Affairs,' 12 September 1994; 'Correspondence with the Danish Ministry of Foreign Affairs,' 4 October 1994; 'Correspondence with the Icelandic Ministry of Foreign Affairs,' 29 September 1994; 'Correspondence with the Swedish Ministry of Foreign Affairs,' 14 September 1994. The Finnish Ministry of Foreign Affairs was contacted 12 September 1994, but failed to respond.

21 Lt. Cdr. T. Ramsland, 'Interview,' Researcher, Norwegian School of Business and Sociology, Bergen, Coordinator INSROP Part III, Economic Aspects, at Fridtjof Nansen Institute, Oslo, 12 June 1996.

22 See D. Vidas, 'The Antarctic Treaty System and the Law of the Sea: A New Dimension Introduced by the 1991 Madrid Protocol,' *International Antarctic Regime Project (IARP)*, (IARP Publication Series, 1993) No. 1, 4-5. 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 1984), p. 174; G. Triggs, 'The Antarctic Treaty System: some jurisdiction problems,' *The Antarctic Treaty regime; law, environment and resources*, (G. Triggs ed.), (Cambridge 1987), p. 92; E. Sahurie, *The International Law of Antarctica*, (New Haven/Dordrecht 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; and M. Nordquist, S. Rosenne, A. Yankov, and N. Grundy, (eds.), *United Nations Convention on the Law of the Sea, A Commentary*, (Martinus Nijhoff Publishers 1991), vol. 4, p. 393; and J. Kindt, 'A regime for Ice-Covered Areas: The Antarctic and Issues Involving Resource Exploitation and the Environment,' *The Antarctic Legal Regime*, (C. Joyner and S. Chopra eds.), (Martinus Nijhoff Publishers 1991), pp. 187-215, who believes that irreconcilable conflict between Antarctic Treaty and LOSC provisions are resolved through the dominance of the Antarctic Treaty. Those supporting the latter view include F. Orrego Vicuña, 'The Law of the Sea and the Antarctic Treaty System: New Approaches to Offshore Jurisdiction,' *The Antarctic Legal regime*, (C. Joyner and S. Chopra eds.), (Dordrecht 1988), p. 101; C. Joyner, *Antarctica and the Law of the Sea*, (Dordrecht, Martinus Nijhoff 1992), p. 157-8; and the U.N. Secretary-General, U.N. Doc. A/41/722, 17 November 1986, p. 29 noted, "(I)t is a global convention applicable to all ocean space. No area of ocean space is excluded. It follows that the Convention must be of significance to the Southern Ocean in the sense that its provisions also apply to that ocean."

23 D. Brubaker, 'Correspondence with the Foreign and Commonwealth Office of the United Kingdom,' 5 October 1994. This Office noted the U.K. has implemented the entire LOSC PART XII though Article 234 has no application around the British coasts which lack ice coverage. The implementing legislation does not apply to dependent territories, and 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, however Australia recently ratified the LOSC. *Law of the Sea Report of the Secretary General*, U.N. Document A/50/713, 1 November 1995, p. 3, footnote 2.

though Argentina has however enacted legislation applicable to its exclusive economic zone which might vaguely hold its options open regarding Article 234 and Antarctic waters.[24]

Thus those States exercising jurisdiction over the largest marine areas in the Arctic are those which support Article 234 most strongly and are those which negotiated the Article.[25] Most other States appeared for the most part neutral on the questions of special provisions for ice-covered areas, having little knowledge or appreciation of the problems involved, and supporting whatever could be worked out by those States directly affected.[26]

All this would *generally* point towards Article 234 possibly having passed into international customary law. However for a provision to have passed into international customary law as seen it must be norm setting.[27] With the unclear U.S. State practice as well as varying interpretations indicated below, Article 234 questionably may be said to establish international law. In addition as addressed below is it also doubtful that the other LOSC pollution articles in Part XII, have entered customary law.[28] Since Article 234 is a portion of this section, its passage is also questionable. Nevertheless, though the Arctic State practice encompasses non normative *technical rules*, these give substance to Article 234, the broad contours of which, for prescriptive and enforcement jurisdiction for coastal States, are norm setting.[29] Should the U.S. practice remain consistent over time, Article 234 will pass into customary law. Additionally, since talks on issues related to Article 234 continue bilaterally between Russia, the U.S. and Canada,[30] and there is a possibility that the industrial States might now ratify the LOSC, the interpretative possibilities of Article 234 and the general anti pollution Articles 211, 218, 219 and 220 and MARPOL 73/78 will be addressed.

Article 234 will be addressed first. As will be seen in spite of the interpretative diversity until recently supported by divergent State practice, circumstances may be changing indicating a more consistent State practice following one of the interpretations.

---

24 D. Brubaker, 'Correspondence with the Ministry of Foreign Affairs of Argentina,' 29 September 1994. The Foreign Ministry noted in response to a question regarding implementation of Article 234 in national legislation that in spite of non ratification by Argentina of the LOSC and the consequent non obligatory nature of this Convention, 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."

25 See D. McRae, 'The Negotiation of Article 234,' *Politics of the Northwest Passage*, (F. Griffiths, ed.) (Kingston, McGill-Queens University Press 1987), pp. 107-10.

26 Ibid. p. 108.

27 See *North Sea Continental Shelf* cases, ICJ Reports, 39. See Section 2.3.3.2.

28 See Section 9.2.4.2.

29 See Section 1.NEED.

30 G. Geipel, 'Interview,' Director of Research and Programs, Hudson Institute, Indianapolis, Indiana, Fridtjof Nansen Institute, Oslo, Norway, June 1993. R. Smith, 'Interview,' U.S. State Department, Office of Ocean Affairs, Washington D.C., U.S., 27 June 1994. A. Kolodkin 'Interview,' State Research and Project Development Institute of Merchant Marine (Soyuzmorniiproekt) - Association of International Maritime Law, Moscow, Russia, 25 February 1994. E. Gold, 'Interview,' President, Canadian Maritime Association, Halifax, Canada, Oslo, Norway, 23 June 1994. P. Edelman, 'Interview' Attorney at Law Kreindler & Kreindler, New York, U.S.; S. Allen, 'Interview' Assistant Director, Law of the Sea Institute, University of Hawaii, Honolulu, Hawaii, U.S.; and A. Yakovlev, Rtd. Admiral, Institute for System Studies, Russian Academy of Sciences; at the Russian - American Seminar on the Law of the Sea, Moscow, Russia, 23-6 August, 1994. See also "Conference for the Harmonization of Polar Ship Rules," Gøteborg, Sweden, November 23-25, 1994 addressed in Section 9.2.2.5.3.

9.2.2.3. Interpretative Scope of Article 234

As noted previously it is deemed necessary to follow the remark concerning the importance of using contextual and consequential methods of inquiry in treaty interpretation rather than methods of textual and logical derivation.[31] Expansive and restrictive possibilities for interpreting Article 234 will be addressed first.

9.2.2.3.1. Expansive - Restrictive Interpretations

Under Article 234 the coastal State is given unilateral jurisdictional powers to enact and enforce stricter environmental legislation covering vessel source pollution than that established internationally over specific defined areas. This encompasses not only stricter discharge standards, but also stricter design, construction, equipment, manning and standards, which usually must be adopted by the coastal State when "acting through the competent international organisation or diplomatic conference."[32] Article 234 is silent on this point implying extensive unilateral jurisdiction is thus permitted coastal States than that "generally accepted" and "applicable" and established internationally through the IMO over specifically defined areas consistent with Articles 211(5), (6) and Article 220.[33].

However, another more restrictive interpretation is possible in which the term, "where" which is understood similarly to "when."[34] Under this interpretation such strict measures could be taken only when problems arise from severe climatic conditions, from the presence of ice giving rise to obstructions or exceptional hazards to navigation, or with marine pollution that could cause major harm to or irreversible disturbance of the ecological balance. The legislation and enforcement must be necessary because of these conditions. Related to this interpretative problems surround the term "ice-covered areas" for which no definition is given in the LOSC. Article 234 does require the "presence of ice"... "for most of the year" which creates hazards or obstructions to navigation. However if a literal interpretation is used, with a criterion of areas being one-half ice covered or more for 8 months a year, most of the Siberian seas are in fact excluded.[35]

No assistance as to which of the different interpretations is correct is given from the text of the Article itself nor from the context, the latter itself being rather odd, since as noted the Article is the only one in its Section. As will be seen the Russian and Canadian practices are

---

31 See W. Reisman and J. Baker, *Regulating Covert Action* (Yale University Press 1992), pp. 141-2. Section 1.NEED.

32 Article 211(5). See A. Boyle, 'Remarks - legal regimes of the Arctic,' *American Society of International Law Proceedings*, vol. 82, p. 328. This normal concession made to the shipping interests is to prevent widely varying coastal regulations.

33 See Section 5.4.4.2. and 5.2.5.2. The normal concession made to shipping interests, direct correlation with international provisions established through the IMO to prevent widely varying coastal regulations, is not present in Article 234.

34 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), 215-22.

35 E. Franckx, *Maritime Claims in the Arctic - Canadian and Russian Perspectives*, (Martinus Nijhoff Publishers 1993), p. 96.

based upon the former, broader, interpretation, while the U.S. position is unclear though initially probably more in line with the second.[36] The legislative history of the Article will be addressed below in an attempt to further define Article 234. First, additional general interpretative problems will be addressed, including those related to "non discrimination," "due regard to navigation," "within the limits of the exclusive economic zone," "environmental protection based upon sound scientific evidence." The meaning of non discrimination will be addressed first.

9.2.2.3.2. "Non discrimination"

A question arises whether "non discriminatory laws and regulations" against pollution under Article 234 is meant to be enacted and enforced *among* foreign ships of different nationalities, or also *between* foreign ships and Russian ships. No clarification is obtained from the text itself.

Comparing Article 234 to parallel 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," while Articles 24(1)(b) and 227 use "against."[37] Article 234 uses neither. The wording of Articles 24(1)(b) and 227 using "against" implies that discrimination is not allowed against the ships of any other State as compared to the domestic ships, 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 ships only. If viewed in "clusters" those using "among" relate chiefly to temporary non discriminatory suspension of innocent passage in specified areas. Those two governing a strengthening of normal passage rights apply to all flags, 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 as indicated this point may well be irrelevant as long as transit passage through international straits is not hampered.[38]

From this Article 234 arguably is a member of the "against" cluster, concerning strengthening normal passage rights in relation to the environmental provisions, albeit in

---

36 J. Roach and R. Smith, *International Law Studies - Excessive Maritime Claims*, (Naval War College 1994), vol. 66, pp. 200-7. W. Schachte, Jr., Rear Admiral, Judge Advocate General's Corps, U.S. Navy Department of Defense Representative for Ocean Policy Affairs, 'International Straits and Navigational Freedoms,' 26th Law of the Sea Institute Annual Conference, Genoa Italy, (June 22-6, 1992), pp. 18-9. Ibid. notes p. 3 that his remarks are to be taken as the official U.S. position on the LOSC navigational articles. Rear Admiral Schachte was as well a member of the U.S. Delegation to the final sessions of UNCLOS III. *Limits in the Seas, No. 112, United States Responses to Excessive National Maritime Claims*, United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, pp. 68-71. E. Franckx, *Maritime Arctic Claims*, p. 293.

37 See generally M. Nordquist, S. Rosenne, S. Nandan, and N. Grundy, *Commentary*, vol. 2, pp. 226, 232, 376-7, 462; and M. Nordquist, S. Rosenne, A. Yankov, and N. Grundy, *Commentary*, vol. 4, pp. 345-7, 396-7. Article 24(1)(b) deals with non hampering of innocent passage through discriminatory practice in form or fact. Article 25(3) deals with temporary non discriminatory suspension of innocent passage in the territorial sea. Article 42(2) deals with non hampering of transit passage through discriminatory practice in form or fact. Article 52(2) deals 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 ships.

38 See Section 5.2.4.2.

special adverse conditions. As such the adoption and enforcement of non discriminatory laws and regulations are probably meant to be interpreted in a non discriminatory manner "against" the coastal State's flag ships and vessels of any other State. It belongs to the same LOSC Part XII as Article 227,[39] but more importantly is not intended to suspend passage rights but rather to allow passage subject to the general environmental conditions. That due regard must be taken to navigation is stated specifically. All indications are that this interpretation also appears supported by the State practice of the States practising Article 234, including Russia, with the exception of fees for services rendered.[40] Few doctrine address the point.[41]

9.2.2.3.3. "Due Regard to Navigation" - "Within the Limits of the Exclusive Economic Zone" - "Environmental Protection Based upon Sound Scientific Evidence"

"Due regard to navigation" is one of the expressed conditions for a coastal State to unilaterally adopt and enforce discharge and design, equipment, crewing and constructions in ice covered areas. What limits are envisioned in Article 234 through the coastal State exercising "due regard to navigation" in ice is unclear, though this indicates that ships are allowed in the area in the first place. "Due regard to navigation" does not appear in Black's Dictionary. "Due regard" and "due" are listed, the former meaning, "(J)ust; proper, regular; lawful; sufficient; reasonable..."; and the latter, "(C)onsideration in a degree appropriate to demands of the particular case."[42] Coastal States thus must give reasonable consideration to navigation when enacting and enforcing laws under Article 234.[43] The term "navigation" in ice-covered areas must therefore be focused upon, and though indicating that some navigation must take place, little else is indicated.

One possible interpretation is that rights of freedom of navigation and innocent passage are preserved.[44] It is argued unlikely that a coastal State would be able to exceed the power to enact such provisions in respect to the territorial sea and thus could not impose requirements on foreign ships which impair or deny the right of innocent passage or discriminate against ships carrying cargo to and from any State.[45] Further, limits are implicit that Article 234 is to apply only within the coastal States' exclusive economic zone. What is then the relation between "due regard to navigation" regarding the territorial sea, a part of the exclusive economic zone to which Article 234 applies? Article 234 is seen being limited to the exclusive economic zone, as stated and in conjunction with the definition found in Article 55,

---

39 R. Churchill and A. Lowe, *The Law of the Sea*, p. 259 notes that possibly as an oversight in drafting the Safeguards Section 7 do not apply to Article 234 in Section 8.

40 See Sections 9.2.2.5.1., 9.2.2.5.2., and 9.3.3.3.1.

41 In addition to the doctrine noted, 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.

42 *Black's Law Dictionary*, Fifth Edition, 1979, pp. 448 and 450. No case law is listed, though D. McRae and D. Goundrey, 'Article 234' 220-1, note a case cited in an earlier edition.

43 Ibid.

44 A. Boyle, 'Remarks,' 327.

45 D. McRae and D. Goundrey,, 'Article 234,' 221.

which limits this zone to the "area beyond and adjacent to the territorial sea."[46] Based upon this and the absurdity of being able to exercise rights in this zone to a greater extent than in the territorial sea, it is argued that the limits of Article 234 consist of the limits exercised in the territorial sea.[47] Thus following Article 24 the coastal State in the exclusive economic zone adjacent to the territorial sea would not be able to impose environmental requirements on foreign ships impairing or denying innocent passage or discriminating against ships carrying cargo to and from any State.[48] Passage could then be suspended only temporarily under LOSC Articles 25 and 19.

While a convincing argument, it is not clear that it is correct. A counter argument exists that Article 234 "due regard" is probably not the "due regard to navigation" taken normally since Article 234 was adopted clearly to change these coastal State rights. This view sees Article 234 as broadly applying "within the limits" of the exclusive economic zone including in the territorial sea, straits and internal waters.[49] Though this interpretation arguably expands the ordinary meaning of the passage "within the limits of the exclusive economic zone" of Article 234, as well as is contrary to the Article 55 definition, it would allow the coastal State to apply its own discharge, design, equipment, crewing and construction the full 200 miles from the baselines.

Perhaps the answer lies somewhere in between, "whether or not its area of application is widely or narrowly defined, the permissibility of restriction on navigation under Article 234 may have to vary according to the status and circumstances of the waters in question."[50] This standard is even vaguer but seems to imply at least partially the narrow interpretation of Article 234,[51] and making passage rights in any way dependent upon changeable circumstances such as ice and weather itself may be unreasonable.

As will be seen below, the Russian and probably the U.S. environmental legislation is applicable the full 200 miles measured from the baselines, and the Canadian 100 miles from the baselines.[52] Thus "due regard to navigation" considered in light of the Arctic State environmental practice may imply a standard of reasonableness dependent upon circumstances,[53] exceeds the usual limits a coastal State may apply in its territorial sea under Article 24 and appears to follow most the different interpretation of "due regard." Navigation is permitted, but strictly regulated.

---

46 A. Boyle, 'Remarks' 327.

47 Ibid. W. Westermeyer and V. Goyal, 'Jurisdiction and Management of Arctic Marine Transportation,' *Arctic*, vol. 39, (December 1986), 346.

48 Ibid.

49 A. Boyle, 'Remarks,' 328. R. Churchill and A. Lowe, *The Law of the Sea*, p. 257. D. Pharand, *Canada's Arctic Waters*, p. 237.

50 A. Boyle, 'Remarks,' 328.

51 See Section 9.2.2.3.1.

52 See Sections 9.2.2.5. and 9.3.3.2. See also Section 5.3.3.2.2.1. concerning the effect the semi official Working Group on Harmonization of Polar Ship Rules will have on local Arctic rules, with its Code intended for IMO adoption, generally supporting the development of Arctic design, construction, manning and equipment standards under the auspices of LOSC Article 234.

53 D. McRae and D. Goundrey, 'Article 234,' 220-1.

"Best available scientific evidence" upon which coastal State laws are to be based under Article 234 implies that such evidence may be used in dispute settlement procedures, though this is somewhat unclear.[54] Other than the doctrine indicated few address these issues.

9.2.2.3.4. Legislative History

Concentrating on using contextual and consequential methods of inquiry, since some form of talks continue between Canada, Russia and the U.S. most probably concerning the scope of Article 234, it is submitted negotiations carried out in the 1970's and early 1980's are less interesting now and do little to clarify. A uniform interpretation obviously was not achieved. For completeness, however, a short summary will be presented of the legislative history of Article 234. Generally early negotiations revolved around the balance between "specially vulnerable areas" and "ice-covered areas."[55] Standards for the former were required to be subject to review by the IMCO (IMO), and though the U.S. desired the same for ice-covered areas, this was unacceptable for the Soviet Union and Canada.

Specifically at the 1973 IMCO Conference on the Prevention of Pollution from Ships and UNCLOS III, proposals were forwarded both from shipping States and coastal States, concerning "special measures."[56] These two competing positions were included in the ISNT Article 20(5),[57]

---

54 M. Nordquist, S. Rosenne, A. Yankov, and N. Grundy, *Commentary*, vol. 4, pp. 396 and 398.

55 The following information is obtained from D. McRae, 'The Negotiation of Article 234,' 102-10, and M. Nordquist, S. Rosenne, A. Yankov, and N. Grundy, *Commentary*, vol. 4, pp. 392-396, unless noted otherwise.

56 Greece, Netherlands, Norway, Sweden and the U.K. as shipping States proposed in IMCO Doc. MP/CONF/C.1/W.P. 36.

"Article 8(1): (1) Nothing in the present Convention shall be construed as derogating from the Power of any Contracting State to take stricter measures within its jurisdiction in respect of discharge standards or as extending the jurisdiction of any Contracting State.

Article 8(2) A: (2) A contracting State shall not within its jurisdiction in respect of ships to which the Convention applies other than its own ships, impose regulations in respect of pollution control regarding ship design, equipment and manning, which are not in accordance with the provisions of the Regulations.

Article 8(2) B: (2) The requirements of sub-paragraph A do not apply to measures in inland water-ways of a contracting state which can be reached by sea-going ships nor to measures taken in accordance with accepted scientific criteria in waters, the particular characteristics of which render the environment exceptionally vulnerable."

Australia, Brazil, Canada, Ghana, Iceland, Indonesia, Iran, Ireland, New Zealand, Philippines, Spain, Uruguay, and Trinidad and Tobago as coastal States responded in IMCO Doc. MP/CONF/C.1/W.P. 35.

"Article 8: (1) Nothing in the present Convention shall be construed as derogating from the Power of any Contracting State to take stricter measures within its jurisdiction in respect of discharge standards.

(2) A contracting State shall not within its jurisdiction impose regulations in respect of pollution control regarding ship design which are not in accordance with the Regulations. The requirements of this paragraph do not apply to waters the particular characteristics of which render the environment exceptionally vulnerable."

57 IV *Official Records* 171, 174, A/CONF.62/WP.8/Part III (ISNT), (1975), Part I, Article 20 paragraph 5, (Chairman, Third Committee). The change in position from the IMCO drafts to the ISNT noted can be characterized as follows. See D. McRae and D. Goundrey, 'Article 234,' 213-14. For the coastal States unilateral regulation stricter than international regulation was allowed only in special cases. These were where those standards were rendered essential by "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 shipping States the area where unilateral coastal State measures could be taken were enlarged from waters within its jurisdiction, (in 1973 meaning the

"(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."

The negotiation pattern noted then emerged, consultations between Canada, the Soviet Union and the U.S., apparently bilaterally, in addition to the multilateral consultations under UNCLOS III, the Informal Group of Juridical Experts, the "Evensen Group."[58]

A proposal was submitted by the Evensen Group, with a prominent criterion that the areas be clearly defined, to replace the ISNT provision stating,[59]

"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'".*

Informal negotiations continued in 1976, and an "Outline of Issues" was submitted distinguishing between "special areas" and "critical areas" in the exclusive economic zone, mentioning for the first time, ice related problems. This again tends towards a clear definition of the areas involved, stating in relevant part,[60]

"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.

Following further informal negotiations the entire draft Article was separated from what became Article 211.[61] This became Article 43 in a special Section 9, "Ice-covered areas", in the RSNT which stated,[62]

---

territorial sea) "the particular characteristics of which render the environment exceptionally vulnerable" to areas of the exclusive economic zone with the characteristics noted.

58 M. Nordquist, S. Rosenne, A. Yankov, and N. Grundy, *Commentary*, vol. 4, p. xiv. Ibid. p. 393 implies that the negotiations were trilateral, while D. McRae, 'The Negotiation of Article 234', 108 indicates that the negotiations were bilateral between Canada and the other two major Arctic States.

59 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. 11, pp. 530-1, (emphasis in original).

60 Outline of Issues (1976, mimeo.), Section I, item 2(b)(i) (Chairman, Informal Meetings on Item 12), reproduced in Platzöder, *Documents*, vol. 10, p. 449.

61 The predecessor to Article 211, dealing with "special measures" applied more broadly to special areas of the economic zone, were narrower in scope and the measures adopted were subject to review by the IMCO.

62 V *Official Records* 173, 180, A/CONF.62/WP.8/Rev.1/Part III (RSNT, 1976), Article 43, (Chairman, Third Committee). The Chairman explained in the introduction to the RSNT that he had revised the ISNT, "in light of all the negotiations conducted, taking into account all the proposals and amendments submitted and results reached" during that session. Ibid. at 174.

"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."

The RSNT text was included without change into the ICNT as Article 235,[63] and then was renumbered to Article 234 and small drafting changes made in later revisions of the ICNT.[64] The terms negotiated between Canada, the Soviet Union and the U.S. were incorporated directly without opposition into the various UNCLOS III texts after 1976, most States being for the most part neutral on the questions of special provisions for ice-covered Arctic areas. It became Article 234 of the LOSC adopted in 1982.

Generally, although it may be argued the concessions made on the part of the coastal States as not being met by corresponding concessions on the part of the shipping States,[65] it is difficult to agree completely with this position. The shipping States were obviously concerned about the coastal States having a unilateral right to establish stricter standards than those established internationally, for vaguely defined marine areas, which could result in a "patchwork quilt" of shipping standards around the world.[66] Freedom of passage or innocent passage are established rights, especially considering the economic importance associated with these. Thus it is submitted that the shipping States did make some concessions in allowing the unilateral coastal State measures albeit restricted to ice covered areas, and the stricter coastal State measures for special coastal areas in the exclusive economic zone, albeit made applicable by the IMO to special areas. The exclusive economic zone is a large area where much if not most shipping takes place. Additionally most of the shipping States are also coastal States themselves and subject to the same threats of marine pollution indicated by the coastal State group.

Related specifically to ice-covered areas, it is difficult to know exactly what took place in the negotiations between the three Arctic States leading to the RSNT. One view is the "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."[67] This probably meant that the U.S. would allow unilateral coastal State environmental provisions for ice-covered areas in exchange for Canadian acquiescence for the LOSC transit passage regime advanced by the U.S. That the "ice-covered areas" still was not especially clear under the interpretations noted but nevertheless was accepted by the U.S. was probably due to the interest in forwarding the adoption of the transit passage regime. The Soviet Union it would appear benefited from both positions, since it achieved the transit passage regime for

63 VIII *Official Records* 1, 40, A/CONF.62/WP.10 (ICNT, 1977), Article 235. "Exclusive" was added to "economic zone".

64 A/CONF.62/WP10/Rev.1 (ICNT,Rev.1, 1979, mimeo.), Article 234, reproduced in R. Platzöder *Documents*, vol. 1, p. 477; and A/CONF.62/WP10/Rev.2 (ICNT,Rev.2, 1980, mimeo.), Article 234, reproduced in R. Platzöder, *Documents*, vol. 2, p. 105.

65 D. McRae and D. Goundrey, 'Article 234,' 213-4.

66 Ibid., 211.

67 D. McRae, 'The Negotiation of Article 234,' 109.

its Navy, and at the same time achieved Canadian support for and diminished U.S. opposition to its extensive claim to full sovereignty over its Arctic waters.

What is clear is that both positions, shipping interests as exemplified at this time by the U.S., coastal State interests as exemplified by Canada, and both by as exemplified by the Soviet Union, changed their views during the negotiations. As such perhaps it is not so strange that vagueness existed in the key phrases of the Article to accommodate the transformation, as well as the divergence of positions. What is also clear is that the legislative history adds little to interpretative clarification of the issues noted. The most important negotiations were closed, and as such State practice must be examined.

A brief account of practice has been indicated above, related to the passage of Article 234 into customary law. Similar to the UNCLOS III negotiations, the State practice of the three main Arctic littoral States, Canada, the U.S. and Russia continues to be most significant, since little appears to be emanating from Denmark/Greenland and Norway. In the next Section more will be said about the Canadian practice including legislation indicating its implementation and hence interpretation of Article 234 under Article 31(3)(6) of the Vienna Convention. The U.S. practice as a coastal State including legislation will briefly be examined in order to attempt to clarify its position. The Russian practice will be examined later in Section 9.3.3. since it in addition to indicating implementation and interpretation of Article 234, will be compared to the particular regime being formed by the Canadian and U.S. practice as well as the traditional international regimes. The Canadian practice will be addressed first.

9.2.2.3.5. Subsequent State Practice

9.2.2.3.5.1. Canadian State Practice

The Canadian Arctic Waters Pollution Prevention Act[68] (AWPPA) in 1970 extended Canadian jurisdiction over marine pollution prevention north of 60 degrees North to a zone 100 miles from the baseline from which the territorial sea is measured.[69] Within this zone Canada generally claims the authority to regulate *all* shipping, including prohibiting shipping from the entire or part of the area and to prescribe and enforce standards covering design, construction, manning and discharges. In 1985 Canada established straight baselines around the perimeter of its archipelago in the Arctic which enclose its Arctic straits.[70] This enclosure as well as application of Article 234 to the straits has been protested against by the U.S.[71] The

68 Arctic Waters Pollution Prevention Act R.S.C 1985, c.2 A-12 (AWPPA).

69 See generally D. McRae and D. Goundrey, 'Article 234,' 205-7; D. McRae, 'The Negotiation of Article 234,' 100-2; E. Gold, *Handbook on Marine Pollution*, (Gard 1985), pp. 81-2; and D. Torrens, 'Marine Insurance of the Northern Sea Route - Pilot Study,' *INSROP Working Paper, No. 1* - (Fridtjof Nansen Institute, 1994), pp. 52-7, and 164-6. E. Franckx, *Maritime Arctic Claims*, p. 97 on the other hand notes Canada established a 200 miles fisheries zone in the Arctic on 24 February 1977.

70 Order in Council P.C. 1985-2739, September 10, 1985. J. Roach and R. Smith, *Excessive Maritime Claims*, p. 45. See Section 6.2.2. for discussion of the Canadian 1985 establishment of baselines under which the Canadians claim all waters enclosed are internal waters.

European Union has protested the Canadian enclosure and subsequent classification as internal waters,[72] while the U.K in 1970 reserved its rights related to the AWPPA.[73] At the same time the U.S. considers that its commercial vessels are subject to the AWPPA.[74]

Specifically, *discharges* of wastes are completely banned,[75] and any spillage or threat of such must be reported immediately to the authorities.[76] The Arctic Shipping Pollution Prevention Regulations,[77] (ASPPR) implement the AWPPA, providing detailed *design, construction and operation standards*. Briefly these provide for *sixteen* safety control zones each of which is governed by specific ship construction and navigational standards, compliance with which must be carried out in order to navigate.[78] Requirements consist of hull strength, power, internal subdivision and stability standards. Classes 1-10 are ice-breakers, classified by the thickness of ice in feet through which they can break continuously at 3 knots, with a Class 10 icebreaker breaking through roughly 10 feet of ice at 3 knots. Classes A-E indicate ice strengthened ships which cannot break ice but can sail through it following an ice breaker. The seasons during which each class is permitted to navigate in each zone are specified, with Class 10 being the only ice breaker allowed to sail during all periods of the year.[79] An Arctic Pollution Prevention Certificate must be applied for and obtained prior to navigation, giving evidence that the ship has met the necessary standards.[80] Although the certificate is optional, in practice insurers require it, and a mandatory requirement of compliance with the standards mentioned is achieved *de facto*.[81] The certificates are valid for one year and may be revoked if inspection indicates that the requirements are not met or there is a danger of illegal discharges.[82] A Pollution Prevention Officer may prohibit navigation of ships believed not complying with the requirements or likely to endanger shipping safety generally, and also may require that ships participate in clean up operations if substantial discharges have occurred or are threatened.[83] Ships carrying more than 453 cubic meters of oil are banned unless even more stringent standards are met.[84] Exceptions are made for oil

---

71 Ibid. The U.S. claims Canada's Northwest Passage a strait used for international navigation subject to transit passage, but opposed to Russian submarines exercising this right. Ibid. pp. 208-215, and T. McDorman, 'In the wake of the Polar Sea,' *Marine Policy*, vol. 10, (October 1986), 253. Ibid. notes the Soviet Union supported the Canadian claim and did not overtly navigate the passage.

72 J. Roach and R. Smith, *Excessive Maritime Claims*, p. 67 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.

73 J. Roach and R. Smith, *Excessive Maritime Claims*, pp. 207 and 227 footnote 79.

74 Ibid.

75 AWPPA s. 2 and 4. Wastes are defined as, "any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of water to an extent that is detrimental to their use by man or by any animal, fish or plant that is useful to man."

76 Ibid. s. 5.

77 Arctic Shipping Pollution Prevention Regulations, C.R.C. 1978, c. 356, amended 14 August 1991, (ASPPR).

78 See D. Torrens 'Marine Insurance,' 58-9.

79 ASPPR, Schedule VIII.

80 Ibid. s. 12.

81 D. Torrens, 'Marine Insurance,' 56.

82 ASPPR Schedule s. 15.

83 AWPPA s. 15(3).

84 ASPPR s. 6.

discharges for *force majeure* situations, as well as minuscule and unavoidable spills.[85] Financial responsibility corresponding to potential liability must be established to the satisfaction of Department of Transport prior to navigation.[86] 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.[87] There may as well be plans involving compulsory vessel traffic system, year round surveillance and control of foreign shipping, compulsory pilotage and training.[88]

The 1988 Agreement between Canada and the U.S.[89] under Article 3 states, "all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada." This holds open the possibility for the passage of U.S. warships through the Arctic straits, if ice breakers, to be subject to the consent of the Canadian government, even though the U.S. under Article 4 reserves its legal position regarding jurisdictional issues. Notably not addressed are U.S. submarines or commercial ships, implying either that their passage does not require consent or other provisions govern.[90] Only three voyages in total were made under the 1988 Agreement by U.S. Coast Guard ice breakers through the Northwest Passage to deliver supplies to the air base in Thule, Greenland, whereupon in 1991 by agreement Canadian ships took over the task.[91] Apparently there also exist NATO agreements covering various U.S. military transits through the Northwest Passage, though to which extent is unknown.[92]

---

85 ASPPR s. 29

86 Arctic Waters Pollution Prevention Regulations, C.R.C. (1978), c. 354, as amended (AWPPR), s. 12.

87 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 $16,800,000), whichever is lesser. D. Torrens *Marine Insurance*, p. 54 footnote 80 makes a distinction that since Canada ratified the International Convention on Civil Liability for Oil Pollution Damage (1969), *International Legal Materials* vol. 9, p. 45, (1970) (CLC), this Convention with corresponding limits applies to all Convention ships north of 60 degrees N, while AWPPA provisions apply to non Convention ships.

88 D. Pharand, *Canada's Arctic Waters*, pp. 240-1.

89 'Agreement on Arctic Cooperation, 11 January 1988, Canada-United States,' *International Legal Materials* (1989), vol. 28, p. 142.

90 In addition under the Canadian - U.S. Agreement which may be terminated at any time within three months notice, these two States generally agree to facilitate ice breaker navigation in the Canadian Arctic waters; to develop and share research information directed towards a better understanding of the marine environment. E. Franckx, *Maritime Arctic Claims*, p. 262 notes that Canada attempted to expand the scope of the agreement to include other types of ships. For a short analysis of the Canadian - U.S. Agreement of 1988 see ibid. pp. 89, 262-264. The author also notes that the practice of this Agreement to prevent crises similar to the U.S.C.G.C. *Polar Sea* incident of 1985 has been successful. This incident briefly involved passage of the *Polar Sea*, though the Canadian archipelago, as seen claimed as internal waters, markedly without the U.S. requesting permission. The ship had two Canadian Coast Guard Captains on board and was accompanied by the C.C.G.S. *John A. MacDonald*, but caused public discontent due to the sovereignty issues. In 1988 the U.S. government requested permission for the U.S.C.G.C. *Polar Star* to transit the Northwest Passage assuring that the AWPPA provisions would be complied with, and liability for pollution damage covered. Canada consented, and a Canadian Coast Guard officer was on board and the ship escorted by the C.C.G.S. *John A. MacDonald*. No public outcry resulted.

91 R. Hage, Director Legal Operations, Canadian Department of Foreign Affairs and International Trade, 'Telefax' (1 November 1994).

92 J. Roach and R. Smith, *Excessive Maritime Claims*, p. 214. A quotation of the Canadian Secretary of State for External Affairs Joe Clark appears. The statement by Secretary of State Schultz has been noted above in Section 9.2.2.2. Ibid. p. 214.

Upon accession to MARPOL 73/78 on 16 November 1992, Canada declared in relevant part,[93]

> Canada made the following declarations based on Article 234 of the 1982 United Nations Convention on the Law of the sea, signed by Canada on December 10, 1982:
> (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 73/789 is without prejudice to such Canadian laws and regulations as are not or may in the future be established in respect of arctic waters within or adjacent to Canada.

A year later on 18 November 1993, the U.S. filed with the IMO its understanding of the scope of the Canadian declarations, in relevant part.[94]

> 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).

The Canadian Department of Foreign Affairs and International Trade notes the Russian vessel, *Kapitan Khlebnikov* made tourist cruises through the Canadian Arctic in 1993 and 1994, in recent years two to three cruise ships on the average have entered Canadian Arctic waters, and all of these have sailed in compliance with the AWPPA and related legislation.[95]

Thus, not unexpectedly it may be seen that Canada claims the above provisions to be in accordance with the Article 234 limits on prescriptive and enforcement jurisdiction. The AWPPA, ASPPR and ASPPR provisions provide for notification and authorisation (Canada's certificate with defacto compliance), liability, discharge and safety standards, reporting, suspension if deemed necessary, design, equipment, construction, and operation standards, special areas, presumed plans for compulsory pilotage, inspection, manning (Canada's plans for training) and detention (mandatory participation in clean up) and removal (implied in Canada's prohibition of navigation), and application to public ships. Stopping and arrest, as well as enforcement through the Arctic Pollution Prevention Certificate, the Pollution Prevention Officer and the Courts for compensation claims, may be strict since one expert notes generally that Canadian environment measures in the Arctic are rigorous,[96] though this is not completely clear.

---

93 Ibid. pp. 261-2 and 269 footnotes 37 and 39, and 207 and 227, footnotes 78 and 79.

94 Ibid. (Parentheses added.)

95 R. Hage, 'Telefax,' (1 November 1994).

96 E. Gold, *Handbook on Marine Pollution*, p. 82.

Generally several maps indicate that much of this marine area north of 60 degrees North is ice-covered for much of the year.[97] Those areas less ice covered in the east in the Davis Strait also are characterised by substantial sea ice of one eighth or greater concentration.[98] A more specific description notes that in the east freeze up in North Baffin Bay begins in mid September, moves along Baffin Island coast during October and ends up as "an unmoving ice cover as far as the Labrador Sea during the winter when the average thickness is greater than one meter.[99] Further the polynya in Smith Sound expands southward during June, opening the entrance to Lancaster Sound usually by the end of June. This would indicate that generally these easternmost waters are ice-covered between 8 and 9 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. Thus 8 to 9 months is held to be "most of the year." Ice "obstructions or exceptional hazards to navigation," and marine pollution which "could cause major harm to or irreversible disturbance of the ecological balance" are arguably *given*, considering Arctic hostility to usual shipping and Arctic environmental sensitivity.

Canada's interpretation of "due regard to navigation" of Article 234 through its provisions is clearly a broad one. The extensive provisions including a certificate evidencing compliance and strict yet limited liability as conditions for sailing, detailed design, construction and operation standards required in the sixteen shipping safety control zones, and no permitted discharges, are definitely in excess of those rights related to innocent passage. Whether they are reasonable under the circumstances, "due regard" being omitted in Canada's declaration above, is arguable, though for greater parts of the year as noted the ice thickness is over 1 meter and perhaps over 2 meters in the centre northern and north-western part of the Canadian Arctic.[100] That these provisions are based upon the "best available scientific evidence," for use in dispute settlement procedures, is also arguable, though also probably not unreasonable considering the 1 meter or more thick ice for extended periods. That they apply to all ships including public is untraditional and unreasonable as well as in contradiction of LOSC sovereign immunity, Article 236. The only restrictive interpretation apparently made by Canada is its application of the provisions 100 miles from the baselines rather than the full 200 under Article 234.

A very broad interpretation is made by Canada of Article 234 on all the elements but one through its practice, and most interested States appear to be complying with the regime, including the U.S. with its surface public ships, though the U.S., the U.K. and the E.U. declare otherwise and reserve their position.[101]

---

97 *Polar Regions, Atlas*, Central Intelligence Agency, Reprinted 1981, (Polar Regions Atlas), p. 12. See also *The Times Atlas of the Oceans*, Times Books, 1983, (Times Atlas), p. 63.

98 Ibid.

99 D. Pharand, *Canada's Arctic Waters*, pp. 188-201. The following information is taken from this source unless otherwise noted.

100 D. Torrens, 'Marine Insurance,' 58-9.

101 See above and Sections 4.3.2. Certain doctrine including Canadian claim that the AWPPA goes beyond the scope of Article 234. See T. McDorman, 'National Legislation and Convention Obligations: Canadian Vessel Source Pollution

With this said the practice of the U.S., the main opponent to both the Russian and the Canadian regimes, will be addressed.

9.2.2.3.5.2. U.S. State Practice

The U.S.'s position is not clear in spite of the history noted of opposing the Russian and Canadian Arctic legislation and international environmental proposals to forward navigational freedom.[102] Briefly, as seen the U.S. Navy runs its operational assertion program (FON) in the Arctic presumably exempting submarines (and aircraft) from Article 234 application under a solid narrow interpretation, as well as Article 236 immunity. A U.S. Presidential Proclamation declared that a State's jurisdiction and responsibility over the natural resources, environmental control 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.[103] A high ranking official of the U.S. Navy also noted publicly, "(T)he United States believes that the 1982 LOS Convention reflects customary international law for protecting and preserving the marine environment."[104] These declarations presumably include Article 234 included in LOSC Part XII, which could cast into doubt the U.S. claim for the LOSC international straits regime governing in the Arctic.[105] Furthermore, the U.S. arguably supported these declarations with coastal State legislation

Following the *Exxon Valdez* catastrophe in 1989 in Alaska various U.S. coastal State environmental legislation was unilaterally adopted on a federal as well as a state level including the central U.S. Oil Pollution Act of 1990 (OPA 1990)[106] and the Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act of 1990 (Monitoring Act).[107] These apply to waters over which the U.S. has jurisdiction, including the territorial sea and arguably the exclusive economic zone, including in the Arctic. If applied in the U.S. exclusive economic zone in Alaskan ice-covered waters, the OPA 1990 *arguably* contains similarities to the Russian and Canadian legislation. It is not known whether foreign maritime powers have claimed passage

---

Law,' *Marine Policy*, vol. 7, (1983), 309; and R. Hildreth, 'Managing Ocean Resources: Canada' *International Journal of Estuarine & Coastal Law*, vol. 6, (1991), 209.

102 See above and Sections 4.3.1. and 4.3.2.

103Proclamation No. 5030, 48 Federal Register 10, 605 (1983) codified at 3 Code of Federal Rules, Section 5030, 22 *International Legal Materials* 465 (1983).

104 W. Schachte, Rear Admiral, U.S. Navy, 'The Value of the 1982 UN Convention on the Law of the Sea - Preserving our Freedoms and Protecting the Environment,' Conference of the Law of the Sea Institute, Malmø` Sweden, (8 August 1991) 15. W. Schachte, 'Interview,' Malmø`, 8 August, 1991, noted in spite of the presence of the disclaimer that the views expressed by the author were solely the author's and not necessarily those of the U.S. Navy nor of the U.S. Department of Defense, the speech was cleared by U.S. government officials and accurately reflected U.S. government policy.

105 See Section 9.2.3. where the interface of the LOSC international straits regime and the Article 234 ice-covered regime is addressed.

106 United States Oil Pollution Act of 1990 (OPA), 33 United States Code (USC) 270.

107 Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act of 1990, (Monitoring Act 1990), 33 USC 2732.

rights in these waters, but the U.S. State Department notes generally that freedom of navigation may be at odds with "environmental protection in off-shore waters."[108]

Application of OPA 1990 is restricted to "navigable waters" which is vaguely defined as, "the waters of the United States, including the territorial sea."[109] The interpretation might normally restrict application to U.S. internal waters and territorial sea, since that appears to be the ordinary meaning, with the term "exclusive economic zone" not being specifically mentioned in this definition, yet being specifically defined in the same Article.[110] In addition it appears that the U.S. Coast Guard is not actively enforcing OPA 1990 in the Arctic exclusive economic zone at this time.[111]

Opposing this restrictive interpretation however are the U.S. claims above that the LOSC environmental provisions are regarded as customary international law. If the U.S. recognises the extensive LOSC Part XII environmental regime including coastal State prescriptive and enforcement jurisdiction in the exclusive economic zone, it seems arguable that the U.S. as a coastal State would have implementing legislation especially with respect to its own exclusive economic zone. Since the OPA 1990 is the main U.S. marine environmental legislation, it seems reasonable to argue that the term "navigable waters" may well open the way for full application of the OPA 1990 in the U.S. exclusive economic zone.[112] As will be seen various provisions are clearly applicable within this zone.

The Act does not mention specifically "ice-covered waters" yet has a section dealing specifically with the Alaskan, Prince William Sound and the Cook Inlet.[113] According to maps of the Arctic these areas are ice free all year, though parts most probably are ice-covered part of the year.[114] Especially the Cook Inlet appears to be broad enough to imply that application of these provisions is to take place in the exclusive economic zone. The provisions interestingly appear to implement several of the elements of LOSC Article 234, including design, construction, equipment and crewing standards. Since similarity of OPA 1990 to other Arctic coastal State legislation is important, the presentation will be somewhat extensive, though brief considering the volume of the Act.

---

108 J. Roach and R. Smith, *Excessive Maritime Claims* p. 262. E. Gold, 'Correspondence,' President, Canadian Maritime Association, Halifax, Canada, 3 March, 1996 confirms this.

109 OPA 1990 '1001(21).

110 Ibid. '1001(8). This is defined as, "the zone established by Presidential Proclamation Numbered 5030, dated March 10, 1983, including the ocean waters of the areas referred to as 'eastern special areas' in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990."

111 E. Gold, 'Interview' Oslo, Norway, 23 June 1994.

112 This seems partially confirmed by L. Brigham, 'Interview ' Former Commanding Officer of the *USCGC Polar Star* and formerly with the Strategic Planning Staff at Coast Guard Headquarters, Washington D.C., U.S., International Northern Sea Route Program (INSROP) Symposium - 1995, Tokyo (4 October, 1995), who noted that should ship traffic increase in U.S. Arctic waters, the U.S. Coast Guard would take measures similar to the Canadian. Whether this included within the U.S. exclusive economic zone was however not indicated.

113 OPA 1990 Title V " 5001-5007.

114 *Polar Regions Atlas*, (Central Intelligence Agency, May 1978), p. 12.

Specifically under the OPA 1990 the liability is strict, imposed upon each responsible party and covers removal costs and damages for *discharges* of oil from ships and facilities in navigable waters, onto adjoining shorelines or into waters within the entire U.S. *exclusive economic zone.*[115] Recoverable damages include natural resources damages, including loss of use and reasonable assessment costs; damages to property, including economic loss; damages for loss of subsistence use of natural resources; net loss of taxes, royalties, rents, fees or shares of net profits, due to damage to property or natural resources; damages for loss of profits or impairment of earning capacity due to damage to property or natural resources; and damages for the net costs of increased public services caused by a discharge of oil.[116] Natural resource damage includes the costs of restoring, rehabilitating or acquiring the equivalent to damaged natural resources, the diminution in value of the resources pending restoration, and reasonable assessment costs.[117] Defences include discharges caused solely by an act of God, act of war or act or omission of a third party, or a combination of these; those responsible must carry the burden of proof.[118] There is no limitation of liability when the incident was caused by the claimant's gross negligence or wilful misconduct.[119] The defences are not available when those responsible refuse, to report an incident, to provide when requested by an official reasonable assistance in connection with removal activities, or to comply with an order issued under the Federal Water Pollution Control Act Amendments (FWPCA)[120] without sufficient cause.[121] Liability and removal costs for *tankers* are limited to $10,000,000 for ships greater than 3,000 gross tons, $2,000,000 for ships less than 3,000 gross tons, or $1,200/gross tons, whichever is *greater*; for other ships $600/gross ton or $500,000, whichever is *greater.*[122] No limitation is applicable if those responsible refuse or fail to report the incident, to provide reasonable assistance requested by an official or to comply with certain FWPCA orders without sufficient cause.[123] No limitation is additionally applicable if the incident was proximately caused by gross negligence or wilful misconduct, or through a violation of a federal safety, construction or operation regulation.[124] Regulation is limited to requiring a showing of financial responsibility sufficient to meet the maximum amount of liability under these provisions.[125] Ships not carrying such evidence may be withheld clearance, denied entry into U.S. waters, detained, and if found within such waters without the necessary evidence, subject to seizure and forfeiture.[126] The OPA 1990 does not implement any international regime, conventions

115 OPA 1990 '1002(a). Italics added.

116 Ibid. ' 1002(b)(2).

117 Ibid. ' 1006(d)(1).

118 Ibid. ' 1003(a). "Third party" is defined narrowly. Ibid. ' '1003(a)(3).

119 Ibid. ' 1003(b).

120 Federal Water Pollution Control Act Amendments (FWPCA), 33 *United States Code* ' 1251 *et seq.*

121 OPA 1990 ' 1003(c).

122 Ibid. ' 1004(a).

123 Ibid. ' 1004(c)(2).

124 Ibid. ' 1004(c)(1).

125 Ibid. ' 1016(a). This Article states, "(1) any vessel...using any place subject to the jurisdiction of the United States; or (2) any vessel using the waters of the exclusive economic zone...destined for a place subject to the jurisdiction of the United States."

126 Ibid. ' 1016(b). This Article states in relevant part, "The Secretary may - (A) deny entry to any vessel to any place in the United States, or to the navigable waters, or (B) detain at the place, any vessel that, upon request, does not produce the evidence of financial responsibility required...(3)...Any vessel subject to the requirements of this section which is found in the navigable waters without the necessary evidence of financial responsibility for the vessel shall be subject to seizure by and forfeiture to the United States."

or protocols, including the CLC and Fund and Protocols of 1992[127] which the U.S. has not ratified, though in Title III Congress acknowledges that it is in the best interest of the U.S. to participate in an international oil pollution liability and compensation regime that is at least as effective as Federal and State laws.[128]

*Manning*, training, qualifications and watchkeeping standards for foreign tankers must be at least equivalent to U.S. law *or* international standards accepted by the U.S., and ships may be prevented entry into the U.S. if it is determined that a State has failed to maintain or enforce the equivalent standards.[129] *Pilotage* and some escort is also required for "approaches to and waters of Prince William Sound"..."navigating waters between 60 degrees 49 minutes North latitude and the Port of Valdez, Alaska."[130]

*Design, construction and equipment standards* are also dictated, and tanker plating thickness specified with periodic gauging of plating thickness on older ships required.[131] Double hulls are required for oil tankers in the U.S. exclusive economic zone subject to various weight and age classifications with the phase out of single hulls starting in 1995 and completed in 2010.[132] Safety devices such as overfill and tank level warning devices and oil pressure monitoring devices are also required.[133] Generally, the need for additional Coast Guard authority to monitor and track ship movements through the Vessel Traffic Service (VTS) is to be studied by the Secretary of

---

127 International Convention on Civil Liability for Oil Pollution damage (1969), (CLC), *International Legal Materials* vol. 9, p. 45; Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage 1969 (not in force), (1984 Civil Liability Protocol), reprinted in *Journal of Maritime Law & Commerce*, vol. 15, pp. 613-622; International Convention on the Establishment of an International Fund for Oil Pollution Damage (1971) (Fund Convention, *International Legal Materials* vol. 11, p. 284; Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (not in force, (1984 Fund Protocol) *Journal of Maritime Law & Commerce*, vol. 15, pp. 623-633. Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage 1969, in force 1996 with 18 State Parties, supersedes 1984 Civil Liability Protocol. Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, in force 1996 with 17 State Parties, supersedes 1984 Fund Protocol. Both Protocols of 1992 as well as information concerning ratification were obtained from the Oil Pollution Compensation Fund, 4 Albert Embankment, London SE1 7SR, 18 October, 1996. Briefly, under the international scheme including the 1984 Protocols crude oil tanker spills would have been covered by initial shipowner liability up to approximately $78 million supplemented by compensation from the Fund up to approximately $260 million. The domestic fund would have been available after this but only after compensation in these amounts had been exceeded. T. Wagner, 'The Oil Pollution Act of 1990: An Analysis,' *Journal of Maritime Law and Commerce*, vol. 21, no. 4, (October), 586. *IMO News* (International Maritime Organization 1996), no. 2, p. 20, and no. 3, p. 3., note this is increased under the 1992 Protocols to approximately $94.3 million supplemented for the Fund up to approximately $307 million. The 1992 Protocols apply additionally to the exclusive economic zone, and allow recovery of expenses for preventive measures even when no oil spill occurs if there was a grave and imminent danger of pollution damage.

128 Respectively, T. Wagner, 'OPA 1990,' 573. OPA 1990 ' 3001. P. Edelman, 'Oil Pollution Act', *Pace Environmental Law Review*, vol. 8, (1990), 12, notes that the OPA 1990 was enacted with full knowledge that it made adherence to the 1984 Protocols impossible.

129 OPA 1990 '4106.

130 Ibid. ' 4116. The pilot may not be a member of the crew and licensed both by the State of Alaska and the Federal Government. Additionally the Coast Guard is to have access to U.S. driving violations for evaluation in issuing, renewing, suspending or revoking mariner licenses. P. Edelman, 'OPA 1990' 19.

131 OPA 1990 ' 4109.

132 Ibid. ' 4115.

133 Ibid. ' 4110.

Transportation,[134] which is also to issue regulations that various ships are required equipped to receive radio marine safety warnings and engage in radio communications with the Coast Guard.[135] The Oil Tanker Environmental Oversight and Monitoring Act of 1990 covering the Prince William Sound and the Cook Inlet provides for oil tanker oversight and monitoring, though the functioning is advisory only and law suits are barred.[136] Tankers spilling more than 1,000,000 gallons of oil after March 22, 1989 are prohibited from operating in the Prince William Sound.[137]

Finally, the OPA 1990 does not pre-empt States or other political subdivisions imposing additional requirements for liability or oil pollution prevention or removal.[138] Additionally it does not prevent the Federal Government or any State or other political subdivision from imposing additional liability or other requirements or imposing or determining civil or criminal fines or penalties for oil spills.[139] While the Federal Courts have exclusive original jurisdiction, State Courts may hear claims for removal costs or damages covered by OPA 1990 and State law.[140]

From this it may be seen that the extensive and unilaterally adopted U.S. coastal State legislation includes requirements for commercial vessels for discharge, design, construction, equipment and crewing standards, civil liability, reporting, compliance with official orders, licensing of pilots, the possibility for monitoring and tracking of vessel movements, and directed radio communications.[141] Non compliance with the required evidence of financial responsibility may result in denial of clearance, denial of entry into U.S. navigable waters, detention and seizure and forfeiture.[142] There also may be a possibility for ensuing criminal liability under supporting U.S. legislation.[143]

It is thus suggested that the U.S. through OPA 1990, as a coastal State takes a broad interpretation of Article 234. Though the elements of Article 234 are not mentioned in OPA 1990 and the Monitoring Act, the U.S. provisions are in many ways similar to the Arctic provisions of Canada and as will be seen Russia, in spite of U.S. declarations to the contrary as a shipping State. On one point geographically the U.S. legislation could even be said to be more expansive than the Canadian legislation, which is restricted to a zone of 100 miles breadth and north of 60 degrees North. The Canadian also does not appear to allow criminal liability while as the U.S. may. "Ice covered" areas are not mentioned in OPA 1990; however as seen from the legislative history of Article 234, the shipping States shun the unilateral

---

134 Ibid. ' 4107 amending the Ports and Waterways Safety Act, 33 U.S.C. 1223.

135 OPA 1990 ' 4118. P. Edelman, 'OPA 1990' 18 notes the National Transportation Safety Board concluded that one of the major causes of the *Exxon Valdez* disaster in the Prince William Sound was the lack of an effectively equipped and adequately manned VTS system.

136 33 USC 2732(b)(2) and (4).

137 33 USC 2735.

138 OPA 1990 ' 1018(a).

139 Ibid. ' 1018(c). P. Edelman, 'OPA 1990,' 15-6 notes since the *Exxon Valdez* incident Alaska has 200 new bills under consideration. Additionally, California and New York have passed stringent new laws including "surprise" tanker inspections, radar control, minimum ship standards for ships entering State waters and tanker free zones.

140 OPA 1990 ' 1017(b)(c).

141 OPA 1990 " 1001, 1016, 1004, 4106.

142 Ibid.

143 N. Ronneberg, 'Speech,' 26 April, 1995.

adoption and enforcement by coastal States of discharge standards, and even more so the design, construction, equipment and crewing standards. International standards must be "generally accepted" and established through the competent international organisation or general diplomatic conference, or "applicable."[144] Since OPA 1990 exceeds internationally agreed standards for liability, design, construction, equipment and crewing, as well as other,[145] it thus is only in the Arctic, under Article 234, which allows unilateral adoption of such, where the U.S. complies. This practice is probably not however what was initially intended by the U.S. as evidenced by the legislative history of Article 234.

Several substantiate this view noting,

"(I)n the final legislative compromise, concern over issues such as states' rights and discharge liability limits swayed an emotional Congress to abandon the long-pursued goal of uniform national and international program for oil spills. In the balance, Congress may have severely compromised America's position with respect to future international safety and environmental conventions."[146]

"(I)n 1971, when Canada promulgated new, extensive Arctic waters pollution legislation unilaterally and stated that it needed to do this as oil pollution was a threat to its sovereign integrity, the U.S. very quickly protested this action and suggested that such measures must be taken internationally through the appropriate international agency. Now, some two decades later the U.S. is going it alone in the face of strong international and national opposition. Is this a lesson in history?"[147]

With this said other State practice of relevance to the Arctic will be addressed.

### 9.2.2.3.5.3. Other State Practice - Conference on the Harmonisation of Polar Ship Rules - Rovaniemi Process

Besides the unilateral practice indicated above giving substance to Article 234, all the Arctic littoral States are involved in various bilateral and multilateral Arctic environmental agreements of varying degrees of obligation. Some are Arctic specific, most are global or regional with application to the Arctic or parts thereof.148 Most do not have relevance to Article 234, since they deal with law of the sea in a traditional manner. But two of the most interesting in relation to Article 234 presently under development are the Conference on the Harmonisation of Polar Ship Rules and the Rovaniemi Process, including the Arctic Council.

---

144 See Section 9.2.4.3. As seen in Section 9.2.2.3.5. the counterpart developed to Article 234 for special areas is Article 211(6) which requires IMO consultation and determination for the establishment of stricter provisions for special areas, and these must implement "applicable" international standards.

145 See Section 9.2.4.3.

146 T. Wagner, 'OPA 1990,' 586.

147E. Gold, 'Marine Pollution Liability After "Exxon Valdez"; The U.S. "All-Or-Nothing" Lottery!"' *Journal of Maritime Law and Commerce*, vol. 22, no. 3, (July-October, 1991), 442.

148 See *Global Conventions having an Influence on the Arctic Environment*,, United Nations Environmental Programme, (Grid Arendal 1996), pp. 1-97; and *Regional Conventions having an Influence on the Arctic Environment*, United Nations Environmental Programme, (Grid Arendal 1996), pp. 1-82 for the global and regional conventions which also govern the Arctic or parts thereof. See Section 9.2.4.4. for those agreements of most relevance to the jurisdictional issues approached traditionally.

Taking the conference first, the maritime organisations and coast guards of the Arctic littoral States and others, the classification societies and the IMO are in a process of drafting provisions covering polar shipping.149 These provisions encompass design, construction, crewing and equipment technology, are specified to be "harmonised," and various national maritime authorities are those doing the drafting, with the goal of submitting a code to the IMO for adoption.150 The U.S. Coast Guard is also represented; so interestingly perhaps these may represent a substantive evolution of Article 234. Through the international co-operation the provisions however are evolving more along the traditional processes associated with "generally accepted" international standards rather than unilaterally adopted and enforced standards permitted under Article 234.151 Whether these will be adopted by the IMO and ratified by States remains to be seen.

The Rovaniemi Process is a multinational process defining co-operation in the Arctic along environmental lines and sustainable development.152 Various working groups exist under the Arctic Environmental Protection Strategy (AEPS) including Arctic Monitoring and Assessment (AMAP), Protection of the Arctic Marine Environment (PAME),153 Emergency Prevention, Preparedness and Response in the Arctic (EPPR), Conservation of Flora and Fauna (CAFF), as well as the Task Force on Sustainable Development and Utilisation (also dealing with Environmental Impact Assessment (EIA)).154 Senior Arctic Affairs Officials (SAO's) 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 (RAPON) have been given access to participate in the AEPS while the environmental NGO's have only limited access. The work generally has been characterised by a shortage of funding, but a circumpolar political body for the Arctic has been proposed and recently come into existence, the Arctic Council. It is made up of the eight Arctic States operating by consensus, with one additional delegation representing the Arctic indigenous peoples and another the Arctic territorial governments. Generally goals of the Council include increasing the political impetus behind the Rovaniemi Process. In addition to environmental protection, matters to be dealt with include economic development, resource utilisation, trade, transportation and communication, the health and welfare of Northern residents and tourism.155 The jurisdictional

149 "Conference for the Harmonization of Polar Ship Rules," Gothenburg, Sweden, November 23-25, 1994. Other interested States along with various Antarctic claimant States are included. Those States at times represented by their National Maritime Organizations or Coast Guards include Australia, Norway, Finland, Denmark, Russia, Sweden, Canada and the U.S. The following at times appear to have had present representatives for a classification society, ships register, or other, Chile (IMO), Argentina, U.K., Germany, Japan, France, Poland, Korea, China, and Italy.

150 Ibid. N. Kjerstad, 'Interview,' Captain, Møre and Romsdal Maritime College, Ålesund, Norway, Consultant to the Norwegian Maritime Directorate, 11 October, 1994. Mr. Kjerstad stated additionally that the Canadian Coast Guard plays a leading role in drafting the rules.

151 See Section 9.2.4.

152 See generally D. Scrivener, David, 'Environmental Cooperation in the Arctic: From Strategy to Council,' *Security Policy Library No. 1/1996*, The Norwegian Atlantic Committee, 1-31 from which this summary is obtained.

153 Ibid. notes that PAME will probably recommend improving existing framework rather than devising any Arctic specific instruments.

154 This is to be changed to a working group developing an Arctic Sustainable Development Initiative (ASDI).

155 Sustainable development is to be the overriding principle in the Arctic Council's work.

issues related to Russian, U.S. and Canadian practice under LOSC Article 234 have however surprisingly not been addressed in these forums.156

Most authors do not address Article 234 as a interpretative problem.157 Those that do vary between supporting a broad interpretation,158 supporting a narrow interpretation,159 not taking a stand,160 and focusing upon management alternatives.161

---

156 D. Scrivener, 'Speech, The Rovaniemi Process and the New Arctic Council,' Fridtjof Nansen Institute, Oslo, Norway, 18 April, 1996.

157 R. Churchill and A. Lowe, *The Law of the Sea*, p. 259, notes only that "curiously" not all the safeguards appearing in Articles 223 to 232 apply to enforcement actions taken by a coastal State in ice-covered areas. P. Birnie, and A. Boyle, *International Law & the Environment*, (Clarendon Press 1992,) p. 279. E. Franckx , *Maritime Arctic Claims*, pp. 95-6 notes that the issues enumerated above are controversial but takes no stand as to the correctness of the different interpretations.

158 D. McRae, (F. Griffiths, ed.) 'The Negotiation of Article 234,' *Politics of the Northwest Passage*, (Kingston, McGill-Queens University Press 1987), pp. 112-4 takes the broad interpretation which he believes embodies international recognition of the exercise of Canadian jurisdiction under its Arctic legislation, however he notes that the issue is still undecided due to the ambiguity of the U.S. position. The author notes that clarification of the U.S. position has not been realized and will be achieved independently of the LOSC by answering whether the U.S. accepts Article 234 as international customary law and whether the U.S. accepts the Canadian legislation as a valid exercise of jurisdiction permitted under Article 234. Further the opportunity for the U.S. to clarify its position was not taken in the U.S. proclamation of a 200 mile exclusive economic zone in March 1983. "Management" regimes are seen as equated with a recognition that the concerned States share jurisdiction over the area. S. Vinogradov, 'Ecological Security in the Arctic: A Regional Approach,' *From Coexistence to Cooperation, International Law and Organization in the Post-Cold War Era*, (ed. McWhinney, Ross, Tunkin, Vereshchetin, eds.) (Martinus Nijhoff, 1991), p. 160 notes the vagueness of Article 234 and its indeterminate status under customary international law, however in spite of this Article 234 allows Arctic States to adopt more stringent navigational regulations and to control unilaterally the design, construction, crew and equipment of foreign vessels. Further nothing precludes these States from further developing their legislation "by assuming more powers on the basis of assertion of their primary responsibility for protection of the Arctic environment." A. Movchan, 'The Legal Regime of Navigation in the Arctic: Problems of Soviet-Canadian Cooperation,' *From Coexistence*, pp. 171-2 and 4 is even more specific in favor of coastal State regulation including "the right of respective control, piloting, ice-breaking etc.," especially if consistent and coordinated among the Arctic States. "Polar ecological zones" are advocated for ice covered areas and argued justified by protection of the environmental interest, the liability of the Arctic States for their activities, large material investments in developing the Arctic sea routes, and ship safety.

159 D. Pharand, *Canada's Arctic Waters*, pp. 237-8 surprisingly supports a version of the narrow interpretation, though he believes Canada's legislation to be validated by Article 234. This is due to the consensus the Article received at UNCLOS III, and he regards it as having passed into international customary law. Pharand's position probably indicates his belief that Canada's most serious legal claim lies under the straight baselines regime, implying that the entire Canadian Arctic archipelago waters becomes internal, not under Article 234. While he does not interpret "where" as "when" or considers the ramifications of areas not being "ice covered" for most of the year, he notes application is "limited to situations where there is a threat to the marine environment." Thus the only ships governed are tankers carrying oil or gas. Not only do submarines and foreign icebreakers classified as warships escape control, but also other icebreakers as well, implying commercial icebreakers carrying other cargoes.

160 D. McRae and D. Goundrey, 'Environmental Jurisdiction in Arctic Waters. The extent of Article 234,' *University of British Columbia Law Review*, vol. 16 nr. 2 (1982), 215-28 in the most extensive interpretative analysis of Article 234 believe that the broad interpretation is the most literal but do not take a final stand. It is not clear that this broad interpretation is what was sought when the "special measures" article was proposed by Canada to the Seabed Committee in 1973. Additionally if one takes a broad interpretation defining the area of application, many of the conditions listed such as severe weather, obstructions and exceptional navigational hazards, and pollution causing major harm or irreversible ecological disturbance, are unnecessary and repetitive. "Ice-covered" area would suffice. On the other hand if compared to Article 234's counter Article 211(6), it is argued obvious under the latter that the conditions specified for designating a "special area" do not define the area for which additional laws may be enacted, but rather establish the purpose for which the provisions may be enacted. Based on the legislative history noted with these two Articles being derived together and then split, as well as the limitation on the laws that can be enacted under Article 211(6), it is argued the implication is that the broad interpretation of Article 234 is that intended.

9.2.2.3.6. Conclusions

From the above it is submitted that it is difficult to determine which interpretation of Article 234 is the one intended, though the broad interpretation is probably the literal one. It seems safe to say that as regards "due regard to navigation" ships may navigate in ice-covered waters, and coastal States may not prescribe or enforce more stringent provisions in the exclusive economic zone than in the territorial sea. To do so would be contrary to all previous adopted and enforced international environmental provisions. Limits greater than these cannot be more clearly defined. This allegation is based mostly upon the legislative history of the negotiating nations, Canada and Russia, which supported the broad interpretation, and the U.S. which supported a variation of the narrow one, other States being neutral. This also seems supported by that doctrine which has closely examined the issues.

Taking a stand on the textual interpretation of Article 234, may however be only an academic exercise. State practice is what is of interest and importance now due to the

---

Regarding "due regard to navigation" in addition to that noted in Section 9.2.2.3.3. a coastal State could not enact and enforce provisions that could not be made applicable in its own territorial sea, except for the international straits regime applicable in the territorial sea. The authors argue that in practice the difference between the narrow and the broad interpretation may be slight. The coastal State could not impose requirements on foreign ships which would impair or deny the right of innocent passage or to discriminate against ships carrying cargo to or from any State. The *difference* for non straits would be if the coastal State considered it necessary to impose design, construction, manning or equipment standards beyond generally accepted international standards. For interface between ice-covered areas and the straits regime see Section 9.2.3.3. A. Boyle, 'Remarks,' 327-8, in addition to that noted above succinctly polarizes the interpretations even further noting that unclarity surrounds Article 234 both to the extent it vindicates Canadian and Soviet Arctic claims and regarding its interface with the straits regime. The author notes under the interpretation regarding application of the Article to only the exclusive economic zone, at least a right of innocent passage in Arctic waters is implied which could then be suspended only temporarily, but yet which is still less than high sea passage. The broad interpretation noted encompassing the whole area within the exclusive economic zone, the territorial sea, straits and as relevant, internal waters, may be inconsistent with Article 55 , yet would be consistent with the Canadian and Russian legislation. However the author sees extending the area of application adds to the difficulty of defining the rights of passage. This is relevant to internal waters due to the exceptional right of innocent passage in areas recently enclosed by straight baselines unless the claim to internal waters can be considered historic. If the right of innocent passage through internal waters applies in the Canadian and Russian Arctic waters, then Article 234 is seen as providing the only possible ground for environmental restrictions on passage. The position of M. Nordquist, S. Rosenne, S. Nandan, and N. Grundy, *Commentary*, vol. 4, pp. 396-398 is in itself confused appearing at times to argue for both interpretations and presenting this as authoritative. The ambiguity of several terms is noted, including "discrimination," "ice-covered," "most of the year" and "best available scientific evidence", as well as discrepancies between translations related to the latter. Supporting the narrow interpretation it is noted that parts of the sea to which Article 234 applies must be a zone with particularly severe climatic conditions, and where ice-coverage for most of the year creates obstructions or exceptional hazards to navigation, and marine pollution could cause major harm to or irreversible disturbance of the ecological balance. Supporting the broad interpretation it is noted "most of the year" is to be interpreted as a general characteristic of the climate and is in relation to ecology and navigation in the region which should be considered. Article 234 is seen as providing the basis for implementing provisions such as the Canadian AWPPA, though it has no implication for sovereignty claims or other aspects of jurisdiction in any of the polar or sub-polar regions.

161 A. Roginko and M. LaMourie, "Emerging marine environmental protection strategies for the Arctic," *Marine Policy*, vol. 16, (July 1992), p. 268-9 concentrate on management alternatives. Limits are noted that some navigation must be allowed as well as the Article 236 public vessel or aircraft exemption and an Arctic Agreement proposed which establishes uniform requirements for design, equipment, crewing, cargo and strict discharge standards, coordination of pilotage services, weather and ice forecasts, limitation of liability, cooperative contingency plans, cooperative crew training, joint use of navigational and rescue satellites, cooperation in design, construction and testing of Arctic vessels, and joint research on the effects of pollution in the Arctic.

continued lack of LOSC ratification by the major Arctic littoral States and the time period between LOSC adoption and coming into force. The Canadian, and as will be seen the Russian legislation support the broader interpretation and in some areas including application to public vessels, extend it. Article 234 arguably is used by Canada and Russia for reasons other than environmental protection, including security and sovereignty claims.[162] At least one Antarctic claimant State as well, Argentina, gives a possible opening for implementation of Article 234 in its legislation.

The position of the U.S. is the key however, and it is probable that the U.S. is holding its options open the best it can. This is indicated by the obscure and contradictory positions it takes under postures of both a shipping State and a environmentally concerned coastal State. As noted the U.S. prescribes and enforces many of the same types of standards following the broad interpretation. While these rules do not specifically relate to ice-covered waters, in specific areas the result is the same. Additionally some ice-covered areas in Alaska are specifically included in the scope.

The specific standards would questionably be "norm setting" as seen above however they indicate that all of the main negotiators of Article 234 are in effect practising some form of a broad interpretation of Article 234 on the surface. It is thus argued coastal State prescription and enforcement of environmental standards on the surface in general ice-covered waters is clearly norm setting. These include general standards for mandatory notification and authorisation, leading, 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 and special areas. Public vessels are not included due to their immunity under LOSC Article 236 and general international rules.[163] The exact scope of the permitted domestic provisions however are still unclear due not only to the ambiguity of the US position, but the continued developments still taking place. As seen talks continue between Canada, Russia and the U.S. concerning Arctic jurisdiction though in what form or scope of issues is not known.

As such in the Arctic, despite the Scandinavian reserve, it is submitted that the contours are taking shape, and a broad interpretation of Article 234 for commercial surface passage is on the way to becoming international customary law. It would still be difficult to argue that the U.S. is *acknowledging* as law a broad interpretation given its declarations and possible submerged transits supporting a solid narrow interpretation, as well as its hesitancy to directly quote Article 234 in its legislation. In the event of LOSC ratification by the major Arctic littoral States, it is submitted that the *same* practice will determine the interpretation given Article 234 under subsequent State practice. It is expected these developments will continue because in the Arctic it seems doubtful any State will be able successfully to play the

---

162 See generally D. McRae, 'Negotiation,' 110-114, and E. Franckx *Maritime Arctic Claims*, pp. 101-7, and 190-5. See R. Vartanov, A. Roginko and V. Kolossov, 'Russian Security Policy 1945-96: The Role of the Arctic, the Environment and the NSR,' *Biopolitics and Security in the Arctic - The Case of the Northern Sea Route*, (ed., W. Østreng) INSROP Discussion Paper NEED., pp. 63-9 and 95. Ibid. p. 65 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" (parantehese added). Ibid. p. 95 note this policy continues.

163 R. Churchill and A. Lowe, *The Law of the Sea*, p. 260.

opponent role strictly favouring traditional shipping interests that the U.S. played up to the adoption of OPA 1990. Whether there may be challenges in the future to OPA 1990 within the U.S. itself, causing a swing towards the traditional position favouring shipping, is another story.[164]

With this said another controversial area alluded to above will be addressed, the interface between the LOSC ice-covered regime and the international straits regime. Expectedly, interpretative problems exist. Although it may have been natural to have included the discussion under either one of these regimes, it was thought best to include it in a separate section. This is due to the importance of the result obtained.

### 9.2.3. Interface - Ice-covered Areas and the LOSC International Straits Regime

#### 9.2.3.1. Introduction

As related specifically to the international straits regime,[165] the main question is the role played by the questions of Article 234 temporal or spatial application, scope of navigational exclusion, and foreign and national discrimination.[166] Obviously the international straits regime characterised by virtually free transit passage is antithetical to Article 234 where ice covered straits and entrances could conceivably be completely closed by the coastal State under the proper conditions. Neither the international straits regime nor Article 234 state anything regarding the interrelation, nor do any other LOSC provisions, and the interface between the two regimes is therefore unclear. Textual interpretation of the interface issue will now be addressed, however brief mention must first be made of "artificial" lanes formed by ice-breaking.

Another minor issue relates to the creation of "artificial" water ways through ice by ice-breaking and its relation if any to the straits regime in ice. Briefly, one of the recognised characteristics of a geographic strait is that it must be occur naturally and not be constructed or "artificial," though a strait and a canal might consist of geographic similarities in connecting two parts of the high seas.[167] Though the international law governing the navigation of international straits and international rivers is similar, it does not include a legal regime for canals, the canal being essentially under national jurisdiction.[168] A point regarding

---

164 N. Ronneberg, 'Speech 26 April, 1995,' indicated the possibility for a challenge to OPA 1990 within the next five years on constitutional grounds that may reach the U.S. Supreme Court. E. Gold, 'All-Or-Nothing' Lottery!,' 433-4 indicates that the powerful institutions supporting IMO solutions and opposed to Congressional adoption of OPA 1990 included President Bush, the U.S. State Department, the U.S. Coast Guard and the Maritime Law Association of the U.S.

165 See Sections 5.2.3., 5.2.4. and 5.2.5.

166 See Section 9.2.2.

167The Webster's definition of strait presented in Section 4.1.1. might well include a canal.

168 See R. Baxter, *The Law of International Waterways - With Particular Regard to Interoceanic Canals*, (Harvard University Press, 1964) pp. 11, 71-91, 308-9. It is important to keep both the geographic and the legal distinctions in mind, since the canals, such as the Panama and the Suez in fact are often in *competition* with the straits including those in the Russian Arctic. Briefly, the law of canals consists of a dedication which consists of a grant of rights to other contracting parties and also third States, followed by the entry into force of norms of customary law. An affirmative duty exists for the operator or supervisor to maintain the canal's navigable condition, provide for

"artificiality" might be raised with respect to *ice breaking* in the Russian Arctic resulting in geographic "straits" or "sea lanes". An analogy might be argued parallel to canal building and maintenance and the legal regimes formed. Little support for this view has been found, but this issue will be briefly addressed for completeness.

9.2.3.2. Interpretation[169]

As seen above it was submitted the international straits regime should be interpreted strictly in favour of user States over coastal States with straits, which would also argue in favour of the international straits regime predominating over Article 234 in ice covered straits. Though treaty interpretation is controversial,[170] theoretically the textual meaning of Articles 233 and 234 as they stand would dominate, and Article 234 would arguably form a *lex specialis* excluding the transit passage regime from ice-covered straits which could be defined international.[171] Further Article 234, the "sister" as well as "neighbour" of Article 233, and their context in the different Sections under Part XII, "Protection and Preservation of the Marine Environment" would also seemingly support the view of deliberate exclusion. Article 234 is placed in its own Section 8, "Ice Covered Areas," following Article 233, in Section 7 "Safeguards," which specifically enumerates the preceding Sections 5, 6 and 7 from influencing the straits regime. Section 8 is not mentioned, implying that the one Article in Section 8, Article 234 is independent of the straits regime. Due to this placement the arguments offered above related to Article 233's status as a safeguard yet subordinate to the international straits regime, arguably do *not* apply to Article 234. The latter is thus argued unaffected by the straits regime's provisions for standards, enforcement and safeguards.

For the broad interpretation of Article 234, assuming that the legislative intention was to separate the regimes, in Arctic straits deemed international the coastal State would only be required to give in its laws and regulations "due regard to navigation" and to base environmental protection and preservation, "on the best available scientific evidence."[172] For the narrow interpretation of Article 234, when such strict measures could be taken by the coastal State only when problems arise from severe climatic conditions, the same would hold when the conditions were such that Article 234 would be triggered, however *lacking this*, which could be a substantial amount of time,[173] the normal rules of the international straits regime, PART III, and of the environmental regime, PART XII, related to straits, Sections 5,

---

improvements, repairs, operation of locks, signals and organization of convoys. For the Panama, Suez and the Kiel Canals generally these rules include a right to nondiscriminatory free navigation by warships and merchant ships from all States in peacetime, which means no unreasonable interference with passage by local defense, police, safety, navigation, customs duties, and sanitation regulations.

169 See generally D. McRae and D. Goundrey, 'Article 234,' 197-228, and D. McRae, 'Negotiation' 98-114.

170 See Section 2.2.2.

171 For description of both broad and narrow interpretations see Section 9.2.2.3.1. For the following see D. Pharand, *The Northwest Passage: Arctic Straits*, (Martinus Nijhoff Publishers, 1984), pp. 119-20.

172 As seen it is submitted in Section 9.2.2.6. that the broad interpretation of Article 234 is the correct one for commercial surface traffic, however for the sake of argument concerning the dominance issue the ramifications of both interpretations will be presented.

173 See E. Franckx, *Maritime Arctic Claims*, p. 96.

6, and 7 including Article 233 would govern. The effective difference is whether there is extensive or minimal unilateral coastal State control.

It is clear from the text that Article 234 was deliberately placed in its own Section. That which seems possible is a mistaken exclusion of a reference to Section 8 in Article 233.[174] This seems especially possible considering the emphasis placed upon shipping rights in relation to the coastal State rights exhibited in the negotiations of both the straits regime and the Article 234 regime.[175] Another possibility however is that this point was deliberately not mentioned due to the controversy. As seen provisions comprising the straits regime and the ice-covered regime are characterised by vagueness, some of the points left deliberately so, and it is thus possible that the relationship between the two was also left deliberately vague. However, arguing against this is the proximity of the two Articles. When Article 234 follows directly the exact Article, Article 233, which attempts to regulate the relation between the straits regime and the environmental regime, it seems suspect to maintain that the ice-covered regime with even more consequences for the straits regime was left deliberately vague. If more "distance" in the LOSC were present between the two Articles, such an argument might be plausible, but here the contrast is arguably too great. This would arguably point either towards a mistake having been made or that the intention was the two regimes would be separate. Possibly countering this however is that the substantive negotiations of Article 234, in contrast to the other LOSC provisions, were conducted directly by Canada, the Soviet Union and the U.S., and the results incorporated at an early stage into the LOSC with other States maintaining a neutral position.[176] As such given the separateness of the negotiations conducted, there might not be as much compatibility between the two Articles as might be expected. It is difficult to arrive at an answer here, and the legislative history and State practice will be referred to in the following Sections.

Nothing is directly stated in the LOSC regarding "artificial" sea lanes established through ice-covered straits. These would however arguably be governed by LOSC articles 41 and 42(1)(a) with IMO adoption for sea lanes in straits considered international.. The same interface issue as above would therefore control.

With this said the legislative history of the interface issue will be addressed.

9.2.3.3. Legislative History

Unfortunately the legislative history does not clarify the matter to any large degree. As seen regarding negotiations surrounding Article 233, due to the strength of the States supporting the shipping interests, an argument might similarly be made that it was intended that the straits regime should be dominant over Article 234. However nothing direct is found supporting this, and it seems safe to maintain that given the national legislation of the Soviet Union and Canada, 1970 and after, indicating their interest in keeping the Arctic straits under strict national control, it is doubtful that they would have negotiated Article 234 only to have

174 See Section 9.2.2.4. and R. Churchill and A. Lowe, *The Law of the* Sea, p. 259.

175 Ibid. and Sections 5.2.3., 5.2.4. and 5.2.5.

176 See Section 9.2.2.3.2.

it made conditional on the exercise of transit passage.[177] At the same time it is clear that both Canada and the Soviet Union supported the LOSC straits regime.[178] The U.S. also clearly supported the LOSC straits regime.[179] This must indicate that either the U.S. agreed to the dominance of the Article 234 regime, which seems unlikely given its clear position seen above in relation to Article 233, or that the issue was left deliberately open and thus vague. This was despite the curious placement of Article 234. Negotiations could thus continue if needed. Both sides thus effectively reserved their positions, with neither being required to delve more deeply into the sensitive jurisdictional issues, which would have necessarily been the case had the interface between the two regimes been more concrete.

The use of the terms "artificial islands or "sea lanes" failed to gain noticeable support in UNCLOS I. "Artificial" channels, not addressed by the *Corfu Channel Case*, was raised by Chile, however the point later was dropped.[180] Discussion of "sea lanes" arose several times including as related to the Norwegian *Indreleia*[181] and the Northern Sea Route.[182] The Netherlands proposed amendments to the draft Article 16(4) replacing "straits" with "sea lanes," apparently to effect a compromise for dropping the term "normally" from the proposed Article, which would have increased the scope of coastal State control over the straits.[183] The legally validity of the term was questioned however since it did not constitute a legal term and had never been defined in international law, and the term was then deleted from the Dutch proposal.[184]

With this said relevant State practice will be briefly examined to attempt to achieve more clarity in the interface issue.

9.2.3.4. State Practice

The State practice by the Soviet Union - Russia will be presented and that of Canada has been presented, and both clearly give extensive prescriptive and enforcement coastal State

177 See Sections 4.3.1., 9.2.2.3.5.1. and 9.3.3.2.

178 See Section 5.2.1. and 5.2.2.2.

179 Ibid.

180 The following information on "artificial channels" and "sea lanes" is taken from *Official Records* (1958) Vol. 2, p. 79, paragraphs 15 and 16; p. 96 paragraph 11; p. 93, paragraphs 7, 8 and 14, paragraphs 9 and 23; p. 94 paragraph 16; p. 96 paragraph 7; p. 100 paragraphs 21 and 30; p. 220, 224-225 A/CONF.13/C.1/L.51; p. 226, A/CONF.13/C.1/L.56; and Vol. 3, p. 224, paragraph 14 and 14, A/CONF.13/C.1/L.47 and A/CONF.13/C.1/L.51; unless otherwise noted. Chile's proposal for the inclusion of the term "and channels" along with "straits" in Article 16(4) was forwarded because artificial channels are "in exactly the same position as straits and deserve(d) special mention."

181 See Sections 1.2.3.2. and 6.2.1.

182 In *ILC Yrbk* (1955), p. 151 paragraphs 31, 35 and 37, it was noted that the *Indreleia* was not a strait but rather a "shipping lane" which could only be used upon "the cooperation of the Norwegian authorities." This was argued to be 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. Straits claimed as internal waters will be covered in Section 7.2.4.1.

183 The addition of "sea lanes," supported by Denmark, Chile and Indonesia, would accomplish the same, since the term was used for international navigation elsewhere than in straits, and the coastal State could thus define more exactly where international navigation was to occur in the straits under its jurisdiction.

184 The Soviet delegate supported deletion of "sea lanes," since no one would know what was meant.

jurisdiction regarding the environment under Article 234, also over the Arctic straits.[185] Several Russian provisions substantially follow the text of Article 234 directly incorporating the jurisdictional rights into national legislation, and Kolodkin notes the consistency of Soviet - Russian provisions with Article 234.[186] The Canadian legislation with its zone of north of 60 degrees North and 100 miles from the baselines encloses all Arctic straits. Within this zone as well as within the enclosed archipelagic waters claims are made to regulate *all* shipping, including prohibiting shipping from the entire or part of the area and to prescribe and enforce standards covering design, construction, manning and discharges. The Canadian declaration upon accession to MARPOL 73/78 claimed its Article provisions justified under Article 234. Norway may be considering special rules for navigation in ice-covered areas to assist in the preservation of fisheries.[187]

The U.S. position is especially unclear regarding the interface issue between straits and ice-covered areas. As noted the U.S. Navy regularly sails its vessels through most of the major straits of the world.[188] The U.S. declares the Northeast Passage and the Northwest Passage as well as their approaches to be international straits regulated by the right of transit passage, and based upon this has consistently protested the Russian and Canadian legislation as unlawful interference with navigational rights and freedoms.[189] Specifically transit passage is strongly argued for submarines under (and aircraft over) ice-covered straits.[190]

At the same time as seen the U.S. passed OPA 1990 and supporting legislation which in Alaskan ice-covered waters in the exclusive economic zone arguably has similarities to the Canadian and Russian legislation through its unilateral requirements for commercial vessels for discharge, design, construction, equipment and crewing standards, civil liability, reporting, compliance with official orders, licensing of pilots, the possibility for monitoring and tracking of vessel movements, and directed radio communications, denial of clearance, denial of entry into U.S. navigable waters, detention and seizure and forfeiture, and possible criminal liability.[191]

The inherent contradiction is not addressed by either the U.S. Navy or the U.S. State Department in relation to the Northern Sea Route, the Northwest Passage or Alaskan waters. Paradoxically, the U.S. State Department notes that U.S. commercial vessels are *subject to*

---

185 See Sections 9.2.2.3.4.1. and 9.3.3.2. As seen Article 234 is only one of several theories under which claims over the straits are forwarded. For negation of elements in the international straits regime itself, see Sections 4.3.1. and 4.3.2. For use of straight baselines by these States to enclose the Arctic islands with ensuing internal waters see Section 6.2.2.1. and 6.2.3. For use of claims of historic waters to establish internal waters covering the straits see Section 7.NEED.

186 A. Kolodkin and M. Volosov, 'Soviet Arctic Legal Regime,' 162.

187 See Section 9.2.2.2.

188 See Section 5.2.1. J. Roach and R. Smith, *Excessive Maritime Claims*, pp. 177-229 note a general U.S. claim for transit passage with a non inclusive listing of the straits the U.S. considers international.

189 Ibid. pp. 200-207, 207-215. See also United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas*, No. 112, United States Responses to Excessive National Maritime Claims, pp. 61-74. The U.S. also objects to application of the Russian and Canadian legislation as purporting to interfere with sovereign immune vessels.

190 W. Schachte, 'Remarks,' 18-9.

191 See Section 9.2.2.5.2.

the Canadian legislation,[192] and in spite of the U.S. protest to the Canadian AWPPA and related legislation directly leave the question open whether Article 234 applies to the Northwest Passage as an international strait.[193] The U.S. Coast Guard's participation in the Conference for the Harmonisation of Polar Ship Rules is also not addressed.[194] Finally in spite of the U.S. declarations and protests, based upon the information received surface passages of both U.S. public and commercial vessels appear for at least the last twenty five years to be carried out in compliance with the Russian and the last ten the Canadian provisions.[195]

The leader of the U.S. Delegation for the negotiations of the LOSC straits regime notes under Article 38(3) the right of transit passage is not subject to other LOSC provisions, and Article 233 shall not affect the international straits regime except for the narrow, specifically enumerated enforcement right.[196] Article 234 would probably be similarly interpreted as subordinate, however also noted is that the Arctic strait controversy may have been *deferred* by Articles 234, 236 and 296, thus apparently allowing the possibility for coastal State environmental jurisdiction over non public ships in ice covered straits.[197]

From this practice a curious regime emerges indicating the interface between the regimes for international straits and ice-covered areas wherein several tracks may have occurred in the development of State practice. Taking commercial ships on the surface, since these vessels, especially tankers, are regulated by all three Arctic coastal States, including in their ice covered straits, the Article 234 ice-covered regime would appear to dominate over the LOSC international straits regime. This is based upon the extensive Arctic coastal State legislation, enforcement and subsequent substantial compliance in passage by interested flag States. Further strengthening this is the U.S. requirement that its commercial vessels comply with the Canadian provisions. The only opposition is found in the U.S. declarations and as seen previously over time these may be weakened.[198]

For public vessels the U.S. remains steadfast in its claims for the dominance of the straits regime.[199] Public ships and aircraft are exempt from the Article 234 regime under Article 236, sovereign immunity, subject only to a vague requirement that such act consistently, so far as is reasonable and practicable with LOSC environmental provisions yet without impairing their operations or operational capabilities. As seen an important difference between the Russian, Canadian and the U.S. coastal State practice is that public ships are regulated only under the former two and therefor finds little support from the U.S. coastal

192 J. Roach and R. Smith, *Excessive Maritime Claims*, pp. 207, 227, footnote 79. It is also noted that the U.S. consults with Canada in the development of standards and operational procedures to facilitate Arctic commercial navigation, with the goal of aiding Canada changing its "unilateral" provisions to internationally agreed standards.

193 Ibid. pp. 261, 227 footnote 79, and 269 footnote 38.

194 Section 9.2.2.3.5.3.

195 See Sections 4.3.1.1.2. and 9.2.2.5.1.

196 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, 91-5, 105-6, 109.

197 Ibid. p. 112.

198 See Section 5.3.3.3.2.1.

199 See Section 5.2.2.2.

State practice or under international law. In addition the U.S. does not rely only on Article 236 and international law but rather makes a direct claim for transit passage in ice-covered straits, with a main focus given to U.S. Navy or Coast Guard ships including surface.[200] However it appears that in passage the U.S. surface public vessels comply with the Russian and Canadian provisions, including the 1988 Agreement between Canada and the U.S., and have done so for some time. Except for some earlier cases mentioned, these have not sailed in either the Canadian or the Russian Arctic without the consent of the respective governments.[201] Thus for public surface vessels the Article 234 regime questionably is the dominant based upon Article 236 in addition to the U.S. declarations. Since as above there is little or no opposition practised supporting the U.S. declarations, the application and hence dominance of the international straits regime over the ice covered areas regime for these vessels seems based chiefly upon Article 236 and international law. It is curious that the U.S. prefers not to openly challenge the issue of straits regime dominance over Article 234 for its surface public vessels given its tests in the late 1980's in the Black Sea.[202]

If the type of ships passing through ice-covered straits is further categorised, even more tracks appear. If the passage of submerged military vessels is examined, the international straits regime is clearly the most dominant. Submerged passage is argued to be the "normal mode of operation" for submarines, and is stated to be run in the Arctic in the U.S. Navy's FON program, including possibly through some of the Arctic straits.[203]

Thus from this practice it appears that a curious spectrum of right of passage based on *type of ship* is developing in Arctic ice covered straits potentially international. For the passage of commercial ships, especially tankers, Article 234 clearly dominates over the LOSC straits regime, based upon the Russian, Canadian and U.S. coastal State legislation. For the U.S. the practice is confused but clearly containing elements in this direction. In addition the U.S. requires its commercial ships to respect the Canadian Arctic legislation in spite of jurisdictional protests. For submerged passage the LOSC straits regime clearly dominates over the ice-covered areas regime. This type is presently exclusively public, which also enjoys sovereign immunity. In addition submerged passages support the U.S. declarations for transit passage. For surface passage by public vessels and submerged passage by commercial vessels the lines are somewhat less clear. The former appears to be practised in compliance with coastal State provisions. However the sovereign immunity of these vessels is well established in LOSC Article 236 and general international law, and Article 234 and Russian and Canadian coastal State regulations stand very weak. Should the U.S. decide to sail public vessels on the surface through ice covered straits under the LOSC straits regime, the way certainly stands open. For the latter no passages of this nature are taking place. However, since the LOSC straits regime stands strongest for submerged passage, the way seems certainly for passages of this nature also.

---

200 Ibid. and Sections 4.3.1.1.2. and 5.3.3.3.

201 See Sections 4.3.1.1.2. and 9.2.2.5.1. Only one transgression, *Sverdrup II* has ever been mentioned in conversations with Head of the Northern Sea Route Administration, Russian Federation Ministry of Transport V. Michailichenko, and Deputy Head Alexander Ushakov. See Section 9.3.2.2.

202 See Section 5.3.3.2.2.3. and E. Franckx, *Maritime Arctic Claims*, pp. 186-7.

203 See Section 4.3.3.2.2.

The absence of the interface issue from most authors' works is noteworthy. Those who do address it including several authors introduced here due to this special focus, fall between the view of Article 234 as dominant,[204] through failing to take a position,[205] to avoiding the issue

204 M. Nordquist, S. Rosenne, A. Yankov, and N. Grundy, *Commentary*, vol. 4, p. 393 appears vaguely to give dominance to ice-covered areas, maintaining that straits and environmental protection which were "politically connected" became separated evidenced by the two Articles 233 and 234. It is noted Article 233 which by its terms does not apply to Section 8, would seem to imply that Section 8, ice-covered areas, would apply to those straits which were ice-covered. D. Pharand, "The Northwest Passage in International Law", *The Canadian Yearbook of International Law*, vol. 8, (1979), 123 and D. Pharand, *The Northwest Passage: Arctic Straits*, pp. 119-120 and D. Pharand, *Canada's Arctic Waters*, pp. 235-8 take the view that Section 8 containing Article 234 would have been listed in Article 233 excluding its application from straits used for international navigation if the parties had so intended. Since it does not, Article 234 is seen to be unaffected by the provisions of standards, enforcement and safeguards and additionally as validating the Canadian AWPPA regarding standard setting and their enforcement, but only with respect to oil or gas tankers. The author doubts foreign ice breakers are covered since they could probably be classified as warships with immunity. The same applies to submarines which can transit submerged. K. Hakapää, *Marine Pollution in International Law - Material Obligations and Jurisdiction*, (Suomalainen Tiedeakatemia 1981), p. 258 notes that 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 possible international Arctic straits. The entry and passage of foreign ships are thus subject to coastal State control regarding their condition and operation. D. McRae, 'The Negotiation of Article 234,' 109-10 writing in 1987, sees the ice-covered regime as bought by Canada in exchange for U.S. proposals for transit passage through international straits. It is argued Canada gave away a wider claim for a coastal State to enact its own standards in non-Arctic exceptionally vulnerable areas of the economic zone which became Article 211(6). See Section 9.2.2.3.4. Since the ice-covered regime is not included in the Sections of LOSC Part XII subject to the international straits regime, and since the ice-covered areas clearly encompass the Northwest Passage, the international straits regime is argued to have no application to the Canadian Arctic. This is argued convenient both for Canada and the U.S. since the Northwest Passage was not mentioned expressly and neither State was hence required to take a position. The result is also argued satisfactory for the Soviet Union since the issue of Arctic straits was essentially removed from the agenda without any attack on the comprehensive Soviet sovereignty over its Arctic waters.

205 D. McRae and D. Goundrey, 'Article 234,' 220-222, 228 separate the two regimes, noting the "Arctic exception" was placed in a Section which was not one of those made expressly subject to the international straits regime. The possibility that the separate Section for Article 234 may have been the result of an oversight is noted, but assumed otherwise, and generally with regard to the broad interpretation of Article 234, the international straits regime is argued irrelevant. The phrase "due regard to navigation" as seen is viewed as imposing 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 and standards employed in the exclusive economic zone. The authors note however that provisions of the international straits regime applicable to straits in the territorial sea would not be relevant in determining the limits of reasonableness of application of Article 234. As such *in practice* the difference between Article 234's broad and narrow interpretation may be slight, except for international straits. For a broad interpretation besides paying "due regard to navigation" and guaranteeing environmental measures were "based upon the best available scientific evidence," the coastal State would not need to be constrained by other international provisions applicable to the exclusive economic zone. For the narrow interpretation the LOSC straits regime including Article 233, would apply unless the conditions specified by Article 234 were present, ice-covered, etc., necessitating the special measures and enforcement. Writing in 1982 the authors conclude that State practice and *opinio juris* will determine the issue. A warning is made if the narrow interpretation is adopted internationally and the "generally accepted" provisions unconnected to the particular characteristics of Arctic waters are shown inadequate for Arctic coastal States to protect their environment (Article 233 conditions in the international straits), the remaining option will be unilateral claims of the Arctic waters as internal waters. A. Boyle, 'Remarks,' 327-8, notes that potential conflict is greater since rights of passage are stronger and pollution jurisdiction of the coastal State is severely restricted. Due to the unclarity regarding the interface issue caused by Article 233, the straits issue is believed always relevant to interpretation of Article 234, and the meaning of "due regard to navigation" crucial. Whether or not the area of application is narrowly defined is viewed important, the permissibility of restriction on navigation under Article 234 may have to vary according to the status and circumstance of the waters in question. "Due regard" is seen as implying a standard of reasonableness dependent on circumstances; beyond this however, it is uncertain how far subordination of freedom of navigation to environmental protection is allowed, there being a incomplete consensus among the Arctic States.

and concentrating on transit management,[206] to reverting to innocent passage.[207] Most authors do not treat the issue of sea lanes.[208]

9.2.3.5. Conclusions

What this reduces to from above is that for Arctic ice-covered areas a special variation of the international straits regime seems to be developing, based upon *type of ship* directly in

---

206 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 the LOSC straits regime, however places most emphasis on the practice of the Canadian - U.S. Agreement of 1988, which is noted to leave the legal complexities and the general problem of surface shipping untouched. The author concludes optimistically that a similarly vague agreement for Russian waters may be the proper route, due to the emphasis on cooperation in transit management rather than jurisdictional obstructions. W. Westermeyer and G. Vinod, *Arctic*, vol. 39, (December 1986), 345-7 also concentrate on management alternatives. The U.S. is seen as not opposing the Canadian construction and equipment standards *when* special hazards apply if not to costly or rigid, however it is believed the U.S. will not give up its opposition to the Canadian 100 mile pollution control zone since its interest in stopping greater limitations to freedom of navigation overtake its environmental interest. D. Rothwell and S. Kaye, "Law of the sea and the polar regions," *Marine Policy*, vol. 18, (1994), 48, state nearly the same regarding the Russian rules for the Northern Sea Route, which if based in environmental protection may possibly have greater validity. Rothwell, Donald, "The Canadian-U.S. Northwest Passage Dispute: A Reassessment," *Cornell International Law Journal*, vol. 26, (1993), 369-70 recommends an Arctic treaty between Canada and the U.S. incorporating the LOSC straits provisions as well as Article 234 but touches little upon the underlying controversies. The Non official Russian doctrine generally do not address the Arctic straits issue not to mention the interface issue. A. Roginko and M. LaMourie, "Emerging marine environmental protection strategies for the Arctic," *Marine Policy*, vol. 16, (July 1992), 268-9, 275 deal with the concept "environmental security" encompassing threats arising from potential for conflict over resource use and environmental practices, admitting that a close relationship exists in the Arctic between environmental factors and strategic military objectives by Russia and the U.S. The authors fail to deal specifically with the interface issue, however while favoring management alternatives follow the broad interpretation and thus view the ice-covered regime as dominant.

207 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 special interest here. Most States are however disinterested in the issue; Norway and Denmark did not protest Article 234. As part of this U.S. resolve regarding passage rights in international straits is cautioned not be underestimated. In addition to an interest in navigational freedom the U.S. is seen as interested (in the Northwest Passage) in possible economic benefits related to free passage, possible precedent damaging to U.S. policy of unimpeded ship mobility, and ideological reasons supporting non restraint of U.S. policy. International navigational rights in straits are believed making little difference militarily given Canadian and U.S. membership in NATO and NORAD. However, the U.S. position necessarily would also support transit passage rights for Russian submarines, something in which the U.S. is definitely not interested, citing the former U.S. Ambassador to Canada, Paul Robinson, "Northwest Passage not for Soviets, U.S. envoy feels", *Toronto Globe and Mail*, 2 August 1985. The author notes the Soviets supported the Canadian claim and hence did not overtly run its submarines in the Canadian Arctic, but if it had, the U.S. ironically would have been more positive to denying innocent (and albeit transit) passage. The U.S. is seen as preferring to keep the issue conveniently quiet, and the Canadians are believed unlikely to confront the U.S. directly on the jurisdictional issue, but rather indirectly. In addition to removing the Canadian reservation withdrawing Arctic jurisdictional issues from compulsory ICJ jurisdiction, the exercise of the different safety and navigational domestic provisions and fees, "technical sovereignty," are seen as improving the Canadian legal position, while not directly confronting the U.S., and to which the U.S. has difficulty in responding. It is concluded that the Northwest Passage consists neither of internal waters as claimed by Canada nor an international strait as claimed by the U.S., but rather as part of Canada's territorial sea subject to the undisputed right of innocent passage. The author in 1986 did not believe the U.S. would enter a bilateral agreement similar to the Canadian - U.S. Agreement of 1988 due to the possible precedent set.

208 D. O'Connell, *The International Law of the Sea*, vol. I, (Clarendon Press, 1989), p. 315, the exception, notes that while the inclusion of open "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 have the effect of reintroducing the distinction between "indispensability" and "usage" which under the *Corfu Channel Case* was eliminated.

contrast not only to the LOSC straits regime but also the more historical TSC Article 16(4) and the *Corfu Channel Case* as well. As noted under TSC Article 16(4) and the *Corfu Channel Case*, though not without controversy as long as the passage of foreign ships, regardless of types, were innocent, the coastal State could not suspend passage.[209] Hence type of ship and political motivation of the passage would be irrelevant as long as the manner of passage were held within these somewhat indistinct guidelines. In the Arctic for ice-covered straits potentially international, in spite of blanket U.S. claims for transit passage, State practice indicates it is precisely the type of ship and possible political motivation which determines the jurisdictional rights.

As seen little legal grounds exist for the use of the terms "artificial channels" or "sea lanes," covering ice breaking. The subject of ice breaking as such is only part of the larger problem dealing with the jurisdiction the coastal State exerts over Arctic ice covered areas.

With this said the jurisdictional limits associated with the usual environmental provisions governing in the exclusive economic zone and the territorial sea will be addressed, LOSC Articles 211, 218, 219 and 220 and MARPOL 73/78; and TSC Articles 14 and 16, MARPOL 73/78 and international customary law. These regimes, which would govern in the event of non applicability of the ice-covered regime, are to provide theoretical contrast.

### 9.2.4. LOSC Articles 211, 218, 219 and 220 - MARPOL 73/78

#### 9.2.4.1. Introduction

In the event the Article 234 regime is not applicable, then the LOSC pollution regime with supportive conventions or the TSC regime with supportive conventions would apply. The former, which will be addressed first, is subject to Russian ratification of the LOSC as well as the various interested flag States, since as will be seen it is doubtful that Part XII has passed into customary international law.[210] The LOSC PART XII is a vast subject and addressed extensively elsewhere.[211] Though interpretative questions might be raised to a greater extent, including regarding specific terms and the legislative histories of the Articles, it is felt beyond the scope of the work to do so. As before State practice is chosen as the primary focus for interpreting these complicated provisions. Since substantial portions appear not yet practised, this choice is felt justified. The status of the LOSC prescription and enforcement pollution standards under international customary law will be addressed first.

---

209 See Section 5.2.2.1.

210 See Section 9.2.4.2.

211 See P. Birnie, and A. Boyle, *International Law & the Environment*, pp. 263-83; R. Churchill and A. Lowe, *The Law of the Sea*, pp. 241-62; generally D. Abecassis and R. Jarashow, *Oil Pollution from Ships*, 2nd ed. , London (1984); generally R. M'Gonigle and M. Zacher, *Pollution, Politics and International Law, Tankers at Sea*, (Berkeley 1979) ; generally E. Gold , *Handbook on Marine Pollution*, Arendal ( 1985); generally K. Hakapää, *Marine Pollution in International Law*; C. Wang, 'A Review of the Enforcement Regime for Vessel-Source Oil Pollution Control,' *Ocean Development and International Law*, (vol. 16 1986), 305;; and D. Brubaker, *Marine Pollution and International Law, Principles and Practice*, (Belhaven Press 1993), pp. 119-36 and 382-90.

9.2.4.2. Status under Customary International Law

As noted U.S. officials have indicated that the U.S. views LOSC PART XII as international customary law, and the Soviet Union incorporated large parts of the LOSC pollution regime into domestic legislation arguably contributing its development into customary law.[212] However, although the establishment of the exclusive economic zone has undoubtedly become part of international customary law, only a small number of States have extended their jurisdiction over pollution from ships in the exclusive economic zone.[213] This argues strongly against the LOSC provisions dealing with pollution in the exclusive economic zone having entered customary law. On the other hand MARPOL 73/78 and the other IMO pollution and safety conventions with a high rate of ratification by world tonnage States have undoubtedly entered customary law.[214] Doctrine varies widely on this issue,[215] but in spite of the controversy, but in spite of the controversy almost all address all of the LOSC pollution provisions in their works.[216]

Thus while it is arguably too optimistic to regard the LOSC pollution provisions governing the exclusive economic zone as custom pending widespread LOSC ratification by developed States, for the LOSC pollution provisions governing the remaining marine zones as well as the IMO and ILO pollution and safety treaties enjoying ratification by a high percentage of the world's tonnage, it is undoubtedly correct to view as custom.

With this said the prescriptive and enforcement environmental standards under the LOSC and MARPOL 73/78 will be examined next.

---

212 See Section 9.2.2.5.2. and 9.3.3.2.1. See Section 5.2.3.2.2.1. for general excesses exhibited by the U.S. and Russian domestic environmental legislation with respect to the LOSC international straits regime.

213 P. Birnie, and A. Boyle, *International Law & the Environment*, pp. 277-8.

214 See Sections 5.2.3.2.2.1. and 5.2.3.2.2.2.

215 M. Belsky, 'Management of Large Marine Ecosystems: Developing a New Rule of Customary International Law,' *San Diego Law Review* vol. 22, (1985), 751-3 notes that LOSC codifies pollution control and protection of the ocean environment including principles that the oceans are the unique responsibility of the world community; all nations share the obligation to assure their continued survival as an international resource; States must take appropriate steps to protect the ocean areas under their sovereignty and cooperate with one another to *protect ocean areas under multiple jurisdiction*; States have both a joint and individual obligation to safeguard the high seas; all States have the obligation to control their citizens to assure protection of the marine environment; and a State can be held internationally responsible for violations by its citizens. emphasis added. The author notes additionally that these provisions are generally accepted by all nations, but there is much controversy as to whether LOSC non sea bed provisions have become part of customary international law. Kindt, 'International Environmental Law and Policy; An Overview of Transboundary Pollution' (Law of Sea Symposium), *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. R. Churchill and A. Lowe, *The Law of the Sea*, p. 146. notes that while the establishment of a State's exclusive economic zone has undoubtedly passed into customary law, it is doubtful LOSC provisions related to jurisdiction over *pollution*, fisheries and research have passed or are likely quickly to pass into customary law. C. Wang, 'A Review of the Enforcement Regime', 305-6 differentiates between international customary law and practice, a draft treaty and an international treaty and concludes that LOSC including Part XII, the environmental protection section, cannot be said not to be international law merely because it has not come into force. The different provisions might be either international law, customary international law, customary international practice or merely hollow words. P. Birnie and A. Boyle, *International Law & the Environment*, pp. 57, 67, view the widespread acceptance of the basic treaties on pollution from ships including MARPOL 73/78 as well as the LOSC articles on the marine environment to express principles of customary law, whether those reflected in prior State practice or subsequently developed.

216 See R. Churchill and A. Lowe, *Law of the Sea*, p. 255-60. ADD

9.2.4.3 Prescriptive and Enforcement Environmental Standards under LOSC and MARPOL 73/78

Briefly under LOSC Article 211(2) flag States may prescribe legislation for their vessels wherever located and are required to adopt pollution rules "at least have the same effect as that of generally accepted international rules and standards..." As seen "generally accepted" though vague most certainly includes MARPOL 73/78 and other IMO pollution and safety conventions widely accepted, and thus the flag State may be required to prescribe rules of conventions to which they are not parties.[217]

Coastal States under LOSC Articles 21(2) and 211(4) in the territorial sea may prescribe pollution provisions for foreign ships in innocent passage including design, construction, equipment and manning standards, but only if they give effect to generally accepted international rules or standards. These are understood to be MARPOL 73/78 and SOLAS[218] standards. These rules must be non discriminatory under LOSC Article 24(1)(b), be publicised under Article 21(3) and 211(3) and not hamper innocent passage (Articles 24(1)(a) and 211(4). In the exclusive economic zone coastal States under Article 211(5) may prescribe pollution 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 pollution standards a condition of entry for foreign ships, 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 pollution provisions with respect to their ships wherever located.[219] 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 ships 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). 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.

---

217 See Sections 5.2.3.2.2.1. and 5.2.3.2.2.2. for a complete list. See also 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. 256.

218 International Convention for the Safety of Life at Sea, 1184 *United Nations Treaty Series* 2, (SOLAS). See P. Birnie and A. Boyle, *International Law & the Environment*, p. xxii for citations to seven SOLAS Amendments adopted since 1981.

219 See Section 5.2.3.2.2.1. for discussion of "applicable" international rules and standards to which a State's ships must comply.

Coastal and especially port State enforcement jurisdiction is expanded under LOSC Articles 219 and 220. When a ship is at a State port or offshore terminal, under Article 219 the State may prevent the ship from sailing if it is in violation of "applicable" international rules and standards relating to seaworthiness and threatens the marine environment. The port States must as far as practicable and in accordance with Section 7 safeguards,[220] take administrative measures to prevent unseaworthy ships for sailing from their ports or offshore terminals. The ship may be permitted to proceed only to the nearest repair yard, and following removal of the causes of the violation, must be permitted to sail immediately. When a ship is voluntarily within a port or an offshore terminal of a coastal State, that port State under Article 220(1) may subject to the safeguards, institute proceedings for violation of its anti pollution laws and regulations adopted in accordance with the LOSC or applicable international rules and standards where such violation has occurred within the State's territorial sea or exclusive economic zone. A coastal State, where there are *clear grounds* for believing that a ship navigating in its territorial sea, has *illegally* discharged in that State's territorial sea, may without prejudice to relevant provisions concerning innocent passage, under Article 220(2) inspect the ship and where the evidence so warrants and subject to the safeguard noted, take legal proceedings including detention.[221] A coastal State where there are *clear grounds* for believing that a ship navigating it its exclusive economic zone or territorial sea has illegally discharged in that State's exclusive economic zone, may under Article 220(3) require the ship to give information covering its identity, port of registry, its land and next port of call and other relevant information required to determine whether a violation has occurred.[222] A coastal State, where there are *clear grounds* for believing that a ship navigating in its exclusive economic zone or territorial sea has illegally released a *substantial discharge* causing or threatening significant marine pollution in that State's exclusive economic zone, may under Article 220(5) physically inspect the ship if the ship has refused to give information or the information given is manifestly incorrect and the circumstances justify such inspection.[223] A coastal State, where there is *clear objective evidence* that a ship 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 of the coastal State or to any resources in that State's territorial sea or

---

220 Briefly the Section 7 safeguards include under Articles 223 through 233 measures to facilitate proceedings including the hearing of witnesses and the admission of evidence, the attendance at such proceedings by IMO officials, the flag state and the pollution State; the exercise of enforcement only by State officials and vessels and aircraft; a duty by States to avoid adverse consequences while exercising enforcement including endangering navigation or the marine environment; a duty not to delay foreign vessels unnecessarily; a duty not to discriminate against foreign ships; a duty to suspend proceedings upon the taking of proceedings by the flag State for the same incident; a prohibition against preclusion of civil proceedings, limitation to monetary penalties only; observance of the rights of the accused in all proceedings which might result in penalties; notification of the flag State and other States concerned of enforcement proceedings and of official reports, and the attachment of liability for unlawful enforcement proceedings or proceedings exceeding those reasonably required.

221 Emphasis added. 'Illegal' in Article 220(2) means 'violated 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.' See Section 5.2.4.2. for the restricted enforcement possibilities for coastal States in international straits under Article 233.

222 Illegal' in Article 220(3) means '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.'

223 'Illegal' in Article 200(5) has the same definition as under Article 220(3).

exclusive economic zone, may in accordance with the safeguards noted and upon sufficient evidence institute legal proceedings including detention of the ship.[224] The detained ship 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 rules set forth in paragraphs (3)-(7) apply as well to national laws and regulations adopted by a coastal State with respect to special areas established by a coastal State in its exclusive economic zone noted above under Article 211(6).

As noted a coastal State may take proceedings under Articles 220(1) and Article 218(2) against a foreign ship in one of its ports which illegally discharged in that State's territorial sea or exclusive economic zone or if the violation occurred outside these areas when it has caused or is likely to cause pollution in its own internal waters, territorial sea or exclusive economic zone. Additionally under Article 218 port States are allowed, when a ship is voluntarily within a port or at an offshore terminal to investigate, and where the evidence so warrants, to take proceedings against that vessel for any illegal discharge *outside* that State's internal waters, territorial sea or exclusive economic zone.[225] This strong enforcement power is limited under 218(2), however, for illegal discharges in the internal waters, territorial seas or exclusive economic zones of other States unless *requested* by those States, the flag State, or a State damaged or threatened by damage. The port State must as far as practicable comply with requests for investigations of ships, voluntarily with its ports or offshore terminals, from any State covering illegal discharges occurring in their internal waters, territorial seas or exclusive economic zones or for investigations from flag States covering illegal discharges occurring 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 noted, must be suspended upon request of 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, ship collisions and strandings, which allows a coastal State beyond the territorial sea to take and enforce measures to protect its coastline or related interests from pollution or the threat thereof with expected major harmful consequences.

An additional exception is provided by Article 236, mentioned previously, giving sovereign immunity for warships, naval auxiliary, other vessels or aircraft owned or operated by a State and used for government non commercial service. However a State must provide, by regulations not impairing operations or operational capabilities of such vessels,' that its vessels or aircraft 'act in a manner consistent, so far as is reasonable and practicable..' with the Convention. For non compliance of a coastal State's regulations governing in its territorial sea including those related to marine pollution and innocent passage, under article 30 a warship may be required to leave the territorial sea immediately.

---

224 'Illegal' in Article 220(6) has the same definition as under Article 220(3).

225 'Illegal' is defined in Article 218(1) and (2) (3) as 'in 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.

Basically MARPOL 73/78 regulates discharges of oil pollution, hazardous chemicals, packaged harmful substances and garbage in respectively Annexes I, II, III and V, but also includes sewage, Annex IV, which in 1996 is not yet in force.[226] Enforcement of these provisions involves co-operation of coastal States, port states and flag States through certification, inspection, and reporting. MARPOL 73/78 makes obligatory more stringent flag State enforcement.[227] The flag State may not adopt a more lenient attitude based upon location of incident; under Article 4 the flag State must act appropriately when receiving reports of suspected violations. Though MARPOL 73/78 relies chiefly upon regulation by flag States, a possibility is left open extending jurisdiction of coastal and port States through Article 4(2) and Article 9(3).[228] Seen together with the LOSC developments of coastal State jurisdiction in the exclusive economic zone noted, the way also appears open for coastal State enforcement of MARPOL 73/78, however this is not required.[229]

With the LOSC and MARPOL 73/78 provisions discussed, the State practice of such will be addressed next.

#### 9.2.4.4. State Practice of Prescriptive and Enforcement Environmental Standards under LOSC and MARPOL 73/78[230]

Emergence of a strongly expressed obligation for States to protect the marine environment is evidenced by LOSC Articles 192-5 and other multilateral agreements including MARPOL 73/78. This is based upon the degree of acceptance found in MARPOL 73/78 and the consensus expressed in UNCLOS III negotiations.[231]

However, as noted, in spite of most coastal States claiming an exclusive economic zone including a broad claim to jurisdiction over pollution under Part XII, *very few* appear to have specific legislation governing pollution, and fewer still have provided for port State

---

226 See R. Churchill and A. Lowe, *The Law of the Sea*, pp. 249-51, P. Birnie, and A. Boyle, *International Law & the Environment*, pp. 267-71, and D. Brubaker, *Marine Pollution and International Law*, pp. 122-9 for a brief description of MARPOL 73/78's discharge and operational provisions. Only a description with respect to jurisdiction will be provided here.

227 Under Article 4 violations of MARPOL 73/78 requirements must be prohibited and sanctions established under the laws of the flag State for ships anywhere. If notice is given and the evidence sufficient that an alleged violation has occurred, proceedings are obligatory.

228 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.'

229 P. Birnie and A. Boyle, *International Law & the Environment*, p. 271 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 authorize or compel such action."

230 Information on State practice is obtained from P. Birnie and A. Boyle, *International Law & the Environment*, pp. 254-7, 271-3, 277-8, 281-2, and 298-9 unless otherwise noted.

231 P. Birnie and A. Boyle, *International Law & the Environment*, pp. 255 believe the entire LOSC Part XII is supported by a strong measure of *opinio juris* and represent in certain respects an agreed codification of existing principles which have become custom.

jurisdiction.[232] Likewise few coastal States have availed themselves of LOSC enforcement possibilities, and "it is doubtful whether in this respect Article 220 of the 1982 UNCLOS has had any significant effect so far."[233] Port State practice appears to have remained within MARPOL 73/78, and "Article 218 remains *lex ferenda.*"[234] Thus the carefully structured extension of coastal and port State jurisdiction doubtfully has had much impact on pollution prevention, reduction and control. Regarding flag State jurisdiction as seen the effect of Article 211 is to make MARPOL 73/78 and other related international standards a mandatory minimum. Article 217 demands what MARPOL 73/78 already requires, and hence flag State regulation under LOSC is in accordance with existing customary and convention law, though not necessarily applicable in all ways to non Parties.

MARPOL 73/78 probably has had significant impact in Western Europe and North America, however vessels registered in or flying the flag of developing countries represent greater deficiencies. The largest number of ships detained in MOU ports[235] were not oil tankers but rather dry cargo and bulk carriers, which are less environmentally important. Surveillance and monitoring of ships at sea which is necessary for reports to be delivered under MARPOL 73/78 may be carried out only by developed coastal States, with the necessary funding for navies, coast guards and aircraft. In addition the restricted enforcement jurisdiction exercised by most coastal States in their exclusive economic zones, means that prosecutions for discharges in such waters remain as under customary international law with the flag State. While there has been extensive referral of violations by port and coastal States, subsequent action by flag States is seldom reported; so there is no reliable measure of flag State prosecutions or success under MARPOL 73/78 in reducing high seas pollution.[236] Thus the general State practice seems chiefly to follow the customary rules that coastal States regulate pollution within their internal waters and territorial seas and flag States outside of these zones, though there may be some movement towards the more progressive LOSC - MARPOL 73/78 regime by developed States.

As noted Russia is one of those States with legislation governing the exclusive economic zone which extends to pollution from ships. This is addressed more specifically below.[237] The U.S. also arguably provides for the same, and this is addressed in the next Section.

---

232 R. Churchill and A. Lowe, *The Law of the Sea*, p. 260. See Section 9.2.4.2. P. Birnie and A. Boyle, *International Law & the Environment*, p. 278 note that States whose legislation for the exclusive economic zone extends to pollution from ships or provides for the adoption of necessary regulations include the USSR, Rumania, New Zealand and Indonesia. For Russia see Section 9.3.3.2. Neither the U.S. nor U.K. are stated to have legislated to control pollution from shipping beyond the territorial sea with which the present author disagrees concerning the U.S. See Sections 9.2.2.3.5.2. and 9.2.4.4.1.

233 Ibid. p. 281. The Soviet Union and Rumania are again listed as exercising these coastal State rights.

234 Ibid. p. 282.

235 Paris Memorandum of Understanding on Port State Control. *International Legal Materials* vol. 21, (1982), p. 1. Fourteen Western European States cooperate in a program of ship inspection which aims to ensure that each participating administration inspects at least 25% of foreign ships visiting its ports annually.

236 Other problem areas for MARPOL 73/78 include lack of port State reception facilities, general inadequate enforcement, inadequate training of crews in MARPOL requirements, and equipment malfunction. At the same time operation pollution has definitely declined.

237 See Section 9.3.3.2.

9.2.4.4.1. U.S. Practice

Briefly under the OPA 1990 the unilaterally adopted and enforced design, construction, equipment and crewing standards for possible application in the U.S. exclusive economic zone generally far exceed the LOSC and MARPOL 73/78 regimes outlined above, being neither "generally accepted" under Article 211 nor "applicable" under Articles 218 and 220.[238] Questions also exist with respect to the discharge standards.

Specifically, taking design and construction standards though the U.S. has a twenty five year history of advocating double bottom tankers, as recently as 1991 it was doubtful these design and construction standards could be said to have been "generally accepted" and established through the competent international organisation or general diplomatic conference, or "applicable." Presently double hulls might be argued to be in accordance with IMO international standards, given the new Regulation 13 F of Annex I of MARPOL 73/78, covering new tankers, which entered into force July 6, 1994.239 The OPA 1990 was adopted in 1990 however, and other amendments making it mandatory for existing tankers to be fitted with double hulls or an equivalent design when they reach the age of 25 years did not come into force until July 6, 1995.240 It is clear that IMO has been consulted with respect to the U.S. provisions, however it is unclear how much the U.S. unilaterally legislated these standards including possibly its exclusive economic zone also in the Arctic, in 1990, at least four to five years before the IMO provision came into force.

The same argument applies to the U.S. crewing and other standards. Theoretically, the only instance the U.S. crewing standards would not prevail is where the U.S. has *accepted* international standards, yet not implemented them into U.S. domestic law. Taking the International Convention on Standards of Training, Certification and Watchkeeping of Seafarers (STEWS), which the U.S. has ratified, correspondence with OPA 1990 may be somewhat tenuous given the Convention was under revision and to be completed during the first half of 1995.[241] Whatever the non compliance between the STEWS and the OPA 1990 may be, the implication is that the unilateral U.S. standards prevail. Similar arguments exist concerning the provisions noted for reporting, compliance with official orders, Coast Guard monitoring and tracking of vessel movements, and Coast Guard directed radio communications and safety equipment. Theoretically it seems possible for a ship to comply with discharge standards under MARPOL 73/78 Annex I, allowing gradual discharge of varieties of oil fifty nautical miles or more from land and still be liable under OPA 1990 should damage to natural resources or property occur. Though laudable from an

238 See respectively Sections 9.2.2.3.5.2. and 9.2.4.3. The U.S. has ratified MARPOL 73/78 including Annexes I, II, III and V.

239 '1991 MARPOL amendments enter into force,' *IMO News*, (International Maritime Organization 1993), No. 2, 1.

240 Ibid.

241 Respectively, International Convention on the Standards of Training, Certification, and Watchkeeping for Seafarers (1978), IMO Publications Catalogue, (*International Maritime Organization* 1994) IMO-938E, 49; 'Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization or its Secretary General Performs Depository or Other Functions as of 31 December 1988,' J2735/Rev.3, (*International Maritime Organization* 1989), 319-330; and *IMO News*, No. 2, 1993 p. 11.

environmental standpoint, the U.S. provisions may indicate questionable compliance with international procedures and provisions.

However the most conspicuous discrepancies between the international and the national provisions involve the compensation and liability provisions. In this area OPA 1990 clearly dominates. LOSC Article 235(3) makes a mandatory though vague requirement that States co-operate in implementing and further developing international law relating to responsibility, liability, compensation and dispute settlement.[242] The U.S. has co-operated in developing but not in implementing this regime. It was the prime proponent behind the 1984 CLC and Fund Protocols and stated during negotiations that it would not accept the CLC or Fund unless the limits were substantially raised.[243] The U.S. successfully negotiated the 1984 Protocols, arguing against States traditionally favouring shipping, that the higher limits could be achieved if based on the aggregated quantity of oil imported in three major contracting States.[244] However, this meant that without ratification by the U.S., which was more or less assured during the Conference, the 1984 Protocols would fail to enter into force.[245] This as seen is essentially what happened, requiring the adoption of the 1992 CLC and Fund Protocols, which recently came into force, while the U.S. adopted OPA 1990 with unlimited liability.[246] Due to lack of implementation of the international regimes developed the unilateral adoption of OPA 1990 by the U.S. is in excess of Article 235(3). Though it is not clear what criminal responsibility entails in accordance with OPA 1990, it also appears in excess of the allowable international limits set by Article 230(1) and (2), where except for wilful and serious acts of pollution in the territorial sea, it is prohibited. Questionable compliance with international procedures and provisions is exacerbated by the fact that the U.S. states, including Alaska, are permitted to impose additional liability or other requirements or impose or determine civil or criminal fines or penalties.

Importantly, it might *also* be argued that the change of U.S. policy was contrary to "general acceptance" and "applicability" required for the adoption and enforcement of

---

242 At the same time Article 304 vaguely states that the LOSC provisions for responsibility and liability are without prejudice to application of existing international rules and the development of further rules covering the same.

243 E. Gold, "All-Or-Nothing' Lottery!," 432-3. For references to Conventions see Section 9.2.2.5.2.

244 E. Gold, "All-Or-Nothing' Lottery!," 432-3. Provisions are as well included providing for a larger geographical scope, simpler amendment procedures and clearer limitation of liability. Ibid. describes the Protocols as "an ideal compromise between shipping States with coastal States which would provide the marine and coastal environment with the best and most realistic compensation and liability schemes available and would also fully compensate for all but the most catastrophic damage," Also noted is the fact that the U.S. delegation to the IMO Conference was congratulated for "a remarkable environmental achievement."

245 Ibid.

246 Ibid. pp. 425, 433 and 434 attributes this to the environmental movement and the States' rights group in the U.S. Congress. Ibid. 443 notes at the same time the OPA was being drafted and adopted, the U.S. in the late 1980's and early 1990's participated centrally in IMO Conferences drafting new conventions on international salvage, oil spill preparedness and response, and liability for the carriage of hazardous and noxious substances at sea, yet none had been ratified by the U.S. by late 1994. D. Brubaker, 'Correspondence' with the IMO Secretariat 10 October 1994. However, *IMO News*, No. 2, 1996, 23 indicates the International Convention on Salvage 1989, *IMO Publications Catalogue*, IMO-450E, 23, and the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990, *IMO Publications Catalogue*, IMO-550E, 30, are now ratified by the U.S. while the new International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996, *IMO Publications Catalogue*, IMO-NEED, is not.

national environmental legislation under Articles 211, 218 and 220. The effectiveness of the liability and compensation regime may determine the extent to which the prescriptive and enforcement provisions prevent, reduce and control marine pollution as required under Articles 211, 218 and 220. A history of damages paid by polluters and compensation received by coastal States has an effect on pollution prevention, reduction and control, and hence an argument may exist that the requirements for "general acceptance" and "applicability" governing the latter may be incorporated into the former.[247]

9.2.4.5. Conclusions

In conclusion the LOSC Part XII environmental regime has largely codified customary and convention law and achieved a balance of interest between flag and coastal States. However the LOSC provisions extending port and coastal State jurisdiction are doubtfully effective due to lack of general State practice. "Perhaps the most positive element of Part 12 of the Convention is its elevation of international conventions such as MARPOL to the status of international standards within a global regime applicable potential to all states.[248] As will be seen the practice by Russia is an exception to this international reserve, implementing in many respects provisions from the LOS regime. The US practice is also an exception internationally, arguably applying in the exclusive economic zone, yet contrary to the LOS regime, being based chiefly upon an orientation towards liability.

MARPOL 73/78 Annexes I and II, 1974 SOLAS and other IMO Conventions have led to some effective control of marine pollution especially be developed States, though there remain in certain areas significant problems related to enforcement. Though extensive referrals of violations by coastal and port States has occurred under MARPOL 73/78, flag State prosecutions or other practice are largely unknown.

Thus the general State practice seems chiefly to follow the traditional customary rules that coastal States regulate pollution within their internal waters and territorial seas, and flag States outside of these zones, though there may be some movement by developed States towards the more progressive LOSC - MARPOL 73/78 regime.

With this said customary international law will be addressed next.

---

247 See E. Gold, 'All-Or-Nothing,' 438, who believes OPA 1990 will prove to be a *detriment* to the marine environment. OPA 1990 allows *unlimited liability*, which is claimed to be uninsurable, and it is argued that only those operators with few assets will be willing to serve the U.S. oil trade. Other arguments offered include an increase in complicated litigation, with the more responsible foreign operators hiring defence lawyers to raise elaborate corporate defences against unlimited liability; more untraceable vessel ownership due to an intricate network of holding companies established for the same reason; higher costs to the consumer due to less spreading of the risk internationally through the U.S. model; withdrawal of the Protection and Indemnity (P&I) Clubs from oil pollution coverage for U.S. waters due to lack of adequate coverage for the possible liability under OPA 1990; and a possible liability insurance market slide.

248 P. Birnie and A. Boyle, *International Law & the Environment*, p. 299.

### 9.2.5. Customary International Law - MARPOL 73/78

#### 9.2.5.1. Introduction

Briefly, the 1958 Geneva Conventions state little regarding marine pollution. For this reason interpretation questions of specific terms and the legislative history of provisions will not be addressed to any great extent, and as above the chief focus will be that of State practice.[249]

#### 9.2.5.2. Prescriptive and Enforcement Jurisdiction

Articles 24 and 25 of the High Seas Convention[250] vaguely require States to prevent oil pollution from ships, pipelines, sea-bed operations and pollution from radioactive substances. OILPOL[251] was to be taken into account as were 'any standards and regulations which may be formulated by the competent international organisations' which would seemingly include the IMO and the International Atomic Energy Agency's (IAEA) provisions on the disposal of radioactive waste.[252] However, States were not required to become Parties or to follow the international standards set.

Specifically, under customary international law a flag State may prescribe pollution standards for its ships wherever located. The regulations for MARPOL 73/78 also consistent with OILPOL Articles III and IV require flag States to apply their pollution standards. Under TSC 15 and custom a coastal State may prescribe pollution legislation it desires for foreign ships in its territorial sea as long as innocent passage is not hampered.[253] Under MARPOL 73/78 a coastal State is obliged to prescribe MARPOL 73/78 provisions for foreign ships, but following a restrictive interpretation regarding jurisdiction under Articles 4(2) and 9(3), restricting regulation to 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. There are no corresponding Articles under OILPOL, though Article XI leaves it open for coastal States to prescribe if they desire. For port States under custom, a State may prescribe pollution legislation for foreign ships and make the observance of such or international conventions a condition of entry.[254]

---

249 See R. Churchill and A. Lowe, *The Law of the Sea*, pp. 253-5,;P. Birnie and A. Boyle, *International Law & the Environment*, pp. 253-4, 274-6; generally D. Abecassis and R. Jarashow, *Oil Pollution from Ships*, 2nd ed. , London (1984); generally R. M'Gonigle and M. Zacher, *Pollution, Politics and International Law, Tankers at Sea*, (Berkeley 1979) ; generally E. Gold , *Handbook on Marine Pollution* , Arendal ( 1985); K. Hakapää, *Marine Pollution in International Law*, pp. 130-47; C. Wang, 'A Review of the Enforcement Regime for Vessel-Source Oil Pollution Control,'*Ocean Development and International Law*, (vol. 16 1986), 305;; and D. Brubaker, *Marine Pollution and International Law, Principles and Practice*, (Belhaven Press 1993), pp. 119-36 and 382-90.

250 Convention on the Territorial Sea and The Contiguous Zone, *United Nations Treaty Series*, vol. 450, (1963), p. 82.

251 1954 London Convention for Prevention of Pollution of the Sea by Oil, 327 *United Nations Treaty Series* 3.

252 For the latter, see generally P. Birnie and A. Boyle, *International Law & the Environment*, pp. 358-67.

253 See Section 7.NEED.

254 R. Churchill and A. Lowe, *The Law of the Sea*, p. 253 note that usually under bilateral treaties of friendship, commerce and navigation, a State will have to ensure such legislation and conditions are not discriminatory.

Enforcement jurisdiction by a flag State is also virtually unlimited, the only restrictions being that the flag State may not arrest its own ships in another State's territorial sea or port. The flag State however may bring proceedings against the ship in its national courts if the shipowner is within the State or the ship returns to State jurisdiction. Under MARPOL 73/78 as above, under Articles 4(1) and 6(4) a flag State is required to bring proceedings against its ships suspected of Convention violations when there is sufficient evidence. OILPOL Article X(2) implies the same. The IMO must be notified of the enforcement taken under MARPOL 73/78 Articles 4(3), 6(4) and 11 and OILPOL Article X(2) and XII. Under TSC Article 19 and custom a coastal State is permitted to enforce violations of its pollution legislation committed in its territorial sea by foreign ships by arresting and bringing proceedings. Under MARPOL 73/78 for a coastal State the provisions are the same as above, but with a restrictive interpretation under Articles 4(2) and 9(3) restricting enforcement to a coastal State's territorial sea and internal waters. The coastal State must either take legal proceedings against a violating ship in its territorial sea, or forward information concerning the incident that has occurred to the flag State. There is nothing corresponding under OILPOL, yet a coastal State may rely upon custom or the TSC to do the same. Port States may exercise enforcement jurisdiction under the MARPOL 73/78 and OILPOL.[255] Under MARPOL 73/78 port authorities may carry out an inspection and if deficiencies are found may detain a ship until repaired sufficiently to not warrant taking legal proceedings. Where there is a violation of MARPOL 73/78, the flag State must be informed which must take legal proceedings if sufficient evidence of a violation exists. Under OILPOL Articles IX(5) and X an oil record book may be inspected and if evidence warrants, a report sent to the flag State which must take legal proceedings.

255 The MOU provisions outlined above also apply for port States here.

9.2.5.3. State Practice

Briefly the 1958 Conventions are so vague that it has succinctly been suggested that under these instruments, 'states enjoyed substantial freedom to pollute the oceans, moderated only by the principle that high seas freedoms must be exercised with reasonable regard for the rights of others.'[256] While OILPOL and MARPOL 73/78 have tightened up the regime somewhat, much laxity remains. Flag States, including flags of convenience, have avoided enforcing conventional provisions. Reporting to the IMO of enforcement by flag States under both MARPOL 73/78 and OILPOL has not been observed, and the IMO appears not to have pressed the matter. The poor track record by flag States compounds the problem since as seen these are the only States which may take any enforcement action outside a foreign territorial sea and this is where most of the pollution takes place. Under the TSC and customary law a coastal State may prescribe and enforce in its territorial sea any pollution provisions including design, equipment, manning and construction, as well as discharge standards, which results in a patchwork of coastal State provisions with which it is impossible for a foreign vessel to realistically comply.

9.2.5.4. Conclusions

This alternative may best be characterised by substantial State freedom, to pollute as it were for flag States and legislate and enforce for coastal States, limited somewhat by an obligation to exercise reasonable regard for the rights of others. More specific rules of international environmental law have probably become custom, however, including LOSC Articles 192-5 and MARPOL 78/78 based upon negotiation and agreement.[257] At the same time as noted the general State practice seems chiefly to follow the traditional customary rules that coastal States regulate pollution within their internal waters and territorial seas, and flag States outside of these zones, though there may be some movement by developed States towards the more progressive LOSC - MARPOL 73/78 regime. Specifically however since arrest of ships in passage in the territorial sea may be dangerous to navigation, it is rarely carried out, and reliance is on port States .

With this said special LOSC and MARPOL 73/78 regimes with possible application for the Arctic will be addressed next.

256 P. Birnie and A. Boyle, *International Law & the Environment*, pp. 254 and 272. The authors add that this is not contradicted by either OILPOL which did not entirely prohibit ships discharges of oil at sea or the IAEA's provisions, which permitted disposal of low-level radioactive waste. See also R. Churchill and A. Lowe, *The Law of the Sea*, pp. 254-5. The following information is obtained from these sources unless otherwise noted.

257 See P. Birnie and A. Boyle, *International Law & the Environment*, p. 254.

### 9.2.6. LOSC Articles 211(6), 122 and 123 and MARPOL 73/78 Annexes I, II and V - Special Areas, Regional and Closed Seas - Application for the Arctic

#### 9.2.6.1. Introduction

A general look at a map of the Arctic discloses an ice-covered sea surrounded by large land masses.[258] Consequently provisions for special areas, due to the ice, under LOSC Article 211(6) and MARPOL 73/78 Annexes I; II and V; and LOSC Articles 122 and 123 for enclosed or semi-enclosed seas must be examined. At the same time as above the questions related to specific terms and the legislative history of provisions will not be addressed to any great extent, and the chief focus will be that of State practice. Benefits may have been gained here, to an extent greater than previously,[259] by delving more deeply into specific interpretative possibilities and related negotiating histories. Especially special areas, but also semi-enclosed seas, seem to be undergoing international development, including in the Arctic.[260] However for the former since generally the State practice in the Arctic seems to be solidly implanted within the IMO consultation and adoption procedures, the plain meaning of the text seems to be substantially followed. For the latter, though some problems exist for consideration of the Arctic qualifying geographically, if it does, State practice also seems to be taking place within the plain meaning of the text, requiring only State co-operation and endeavour to co-ordinate implementation of environmental provisions. Additionally Articles 122 and 123 appear to have developed having most significance for land-based pollution sources.[261]

#### 9.2.6.2. Special Areas, Regional and Closed Seas

Under LOSC Article 211 States are required to adopt *international* environmental rules and standards rather than regional, however *regional* co-operation is also proposed related to vessel source pollution. Specifically, where international rules and standards adopted through the IMO, in this case chiefly MARPOL 73/78, are considered inadequate to provide sufficient protection of *special areas* of the exclusive economic zone, the State under Article 211(6) may adopt rules implementing international rules, standards or practices the IMO has made "applicable" to special areas or adopt rules of its own. For the latter, design, construction, manning or equipment standards, are not allowed other than those "generally accepted." Consultation with and approval from the IMO is required along with a fifteen months interim period prior to entry into force.

Rules for special areas appear under MARPOL 73/78 Annex I Regulations 1(10) and 10, for oil and Annex II Regulations 1(7), 5(7-9) and 8(1-9) hazardous chemicals; and Annex V Regulations 1(3) and 5. Briefly, under Annexes I, II and V a 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

---

258 *The Times, Composite Atlas of the World*, (Times Newspapers Limited 1973), pp. 50-1.

259 See Sections 9.2.4.1. and 9.2.5.1.

260 P. Birnie and A. Boyle, *International Law & the Environment*, pp. 257-63.

261 Ibid. p. 258.

methods for the prevention of sea pollution by oil/noxious liquid substances/garbage is required.' These include the Mediterranean, the Black Sea, the Baltic, the Red Sea and the Persian Gulf, the Gulf of Aden and the Antarctic.[262] The discharge standards to be used are lower than the usual or not permitted at all related to ship movement and discharge rates. Thus the coastal State provisions allowed under Article 211(6) must presumably be substantially similar to the MARPOL 73/78 Annexes I, II and V rules for special areas, or be adopted in consultation with and approval by the IMO and consist of "generally accepted" design, construction, manning or equipment standards.[263]

Under LOSC Articles 122 and 123 regional co-operation is proposed concerning *enclosed or semi-enclosed seas*. Article 122 defines a 'enclosed or semi-enclosed sea' 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." 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. Thus they *shall 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.[264] Thus should the Arctic be considered a semi-enclosed sea, the Arctic coastal States would have close to a *mandatory* duty to co-operate and attempt to establish joint agreements to protect and preserve the Arctic environment.

9.2.6.3. State Practice

Briefly, with respect to special areas, as seen the number is steadily growing with seven MARPOL 73/78 special areas presently and two additional under consideration within the IMO machinery. These include the Middle East, Northern and Southern Europe and the Americas, and many States are necessarily involved, both as coastal States and flag States. This indicates a widespread State acceptance. With regard to the Arctic, Russia delivered a proposal to the IMO to begin the process to attain special area status for the Arctic presumably under Annexes I and V, but no action has yet been taken on this initiative.[265] Not

---

262 Ibid. p. 267. *IMO News* (International Maritime Organization 1991), no. 1, pp. 5 and 16 notes that plans for the Antarctic as a special area under Annexes I and V included that no discharges of oil were to be permitted at all, and contracting Parties, from whose ports ships, depart en route to, or arrive from the Antarctic, are to be required to ensure that reception facilities are promptly provided for sludge, dirty ballast, tank washing water and other oily residues. Garbage is to be retained on aboard. Australia's Great Barrier Reef and the Wider Caribbean were to be considered as possible special areas under Annex V, and guidelines were underway to deal with "Particularly Sensitive Areas." P. Birnie and A. Boyle, *International Law & the Environment*, p. 276 note that Australia's Great Barrier Reef was designated by the IMO in 1990 as a particular sensitive sea area within an extended territorial sea where compulsory pilotage is required.

263 Ibid. p. 279 view Article 211(6) as little more than a re-enactment of MARPOL 73/78 special area provisions designed for enclosed or semi-enclosed seas. No additional unilateral jurisdiction is given coastal States for environmental measures.

264 Emphasis added. Article 123(d) also calls for States to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this Article.

265 V. Michailichenko, 'Interview,' Director of the Northern Sea Route Administration, Department of Maritime Transport, The Russian Federation Ministry of Transport, Conference on Harmonization of Polar Ship Rules, Gøteborg, Sweden, November 24, 1994; and Klaus Grensemann, 'Interview,' Leader of German Delegation to IMO,

much literature exists as to additional State practice, and the general conclusions noted above can only be reiterated, a decline of operational pollution, yet lack of reporting of flag State prosecutions, persistence of operational discharges and lack of reception facilities provided by the coastal States. Much the same may be said regarding the parallel LOSC special areas.

The treaty practice of some sixty States in the Baltic, the Mediterranean, the Red Sea, the Persian Gulf and the Wider Caribbean, indicates that a semi-enclosed sea is to be bordered by land by about 90%.[266] Though the Arctic Ocean has been described as geographically semi-enclosed, compared to this practice the Arctic Ocean would necessarily be excluded. Additional arguments include Article 122 also requires in part "a narrow outlet" to another sea or ocean, seemingly excluding the Arctic due to the open Greenland Sea, the Norwegian Sea and the Bering Sea outlets. An informal understanding also may have existed among the delegates to UNCLOS III to exclude the Arctic from the semi-enclosed rules.[267] Under this understanding it would thus appear that the more stringent LOSC provisions for 'semi-enclosed' sea could probably not be applied to the Arctic. At the same time the latter 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,' under which the Arctic may qualify. At least two experts include the North Sea under this definition.[268] Although a substantial portion of the Arctic remains high seas,[269] it is incontestable that a substantial portion also consists of the territorial seas and exclusive economic zones of the five Arctic littoral States. Which is primary is unclear.

Regional environmental co-operation among States also is generally developing along broader lines than ecological, including political, common interests or geographical proximity, evidenced by agreements including the various United Nations Environmental Programme (UNEP) regional seas treaties.[270] The affect these developments may have on the Arctic is through regime formation in their relation to the LOSC. While Articles 197, and 211(2) (4) and (5) require that the regional rules are no less effective for vessel source pollution than "generally accepted" rules, accommodation is made for more flexibility for special conditions of seas with diverse ecological and oceanographic characteristics to general law of the sea.[271] The fact that most of these regional treaties substantially conform with LOSC PART XII provisions, including vessel source indicate implementation of these provisions at a regional level and the LOSC PART XII's status under international law.

---

Conference on Harmonization of Polar Ship Rules, Ålesund, Norway, 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."

266 J.Harders, 'The Arctic Ocean: Environmental Protection and Circumpolar Coo-operation - An Assessment and a Proposal for a Legal Regime,' Seminar Proceedings, *Energy Law*, (1986), 524-5.

267 Ibid.

268 P. Birnie and A. Boyle, *International Law & the Environment*, p. 258.

269 See GIS Map NEED.

270 P. Birnie and A. Boyle, *International Law & the Environment*, pp. 258-9.

271 Ibid. The authors add that these agreements facilitate and make more effective co-operation in monitoring, supervisions and enforcement, though the regional agreements for the North Sea, the Baltic and the Mediterranean are most successful due to their intergovernmental supervisory institutions, while other UNEP are less so.

#### 9.2.6.4. Conclusions

Whether the Arctic Ocean could be considered semi-enclosed or not could be researched more before definite conclusions are made, but this is considered beyond the scope of the work. This is especially the case since State practice in the Arctic seems regardless to be proceeding within the requirements of Articles 122 and 123. The developments related to the Conference of the Harmonisation of Polar Ship Rules and the Rovaniemi Process, including the Arctic Council have been noted.[272] This extensive practice by States including the Arctic littoral States would seem to sufficiently satisfy the rather vague requirements that they should co-operate in the exercise of their rights and performance of duties under LOSC, as well as endeavour to co-ordinate the implementation of their rights and duties related to environmental measures. Even if it does not, the practice certainly receives support from the LOSC - regional seas regimes, especially those covering the North Sea, the Baltic and the Mediterranean.

With discussion of the salient international issues completed, the relation State practice in Russian Arctic waters plays to the LOSC Article 234 regime, the Article 234 and international straits interface, the standard LOSC and customary law environmental regimes, and the Arctic specific environmental regimes will now be addressed.

## 9.3. State Practice in the Russian Arctic Waters Compared to the International Regimes

### 9.3.1. Introduction

The international regimes represented by LOSC Article 234; the Article 234 and international straits interface; the Part XII Articles 211, 218-220 and MARPOL 73/78; and customary international law and MARPOL 73/78 have been presented above. Now the State practice in Russian Arctic waters, including Russian domestic legislation and enforcement, and the declarations and navigational practices of chiefly the U.S., will be compared with these international regimes.

Briefly, the issues that arise include the consequences of the customary status under international law of Article 234, Articles 211, 218-220 and MARPOL 73/78. In relation to Article 234 the issues include whether there exists expansion of domestic Russian provisions beyond, "non discrimination," "due regard to navigation," "within the limits of the exclusive economic zone," "protection and preservation of the marine environment based on the best available scientific evidence," "the presence of ice covering such areas for most of the year," as well as beyond the permissible limits for criminal liability and civil liability and compensation. In relation to the LOSC Part XII regime the issues that arise include whether there exists expansion of the Russian provisions beyond LOSC Articles 211, 218-220 and MARPOL 73/78 for definition of pollution, notification and permission for navigation, leading, technical rules, control of navigation, fees, "inspection," "arrest," "detention," "suspension of passage," "removal," and "special areas." For the customary international law

272 See Section 9.2.2.5.3.

regime and MARPOL 73/78, issues that arise include whether the Russian provisions hinder innocent passage. Finally, in relation to the above regimes with corresponding issues arises the issue of whether the Russian practice is supported or opposed by the practice of the U.S. and other States.

The first issue that will be addressed below will be the consequences of the customary status under international law of Article 234, Articles 211, 218-220 and MARPOL 73/78. The specific Russian domestic legislation and enforcement will then follow, with subsequent discussion of the issues arising under comparison with the international regimes. The U.S. declarations and sailing practice as well as practice of other States will then be presented with subsequent discussion of support or opposition to the Russian practice. Conclusions and recommendations will then follow.

### 9.3.2. Consequences of the Customary Status under International Law of Article 234 and Articles 211, 218-220 and MARPOL 73/78

As seen it is doubtful due to modest State practice that Articles 234 and 211, 218-220 have passed into international customary law, especially those provisions related to increased coastal and port State jurisdiction.[273] This would necessarily relegate the international environmental regime to be used in the comparison with State practice in the Russian Arctic to international customary law and MARPOL 73/78, etc. However the LOSC is in force, ratification is pending for many of the developed States, including possibly Russia and the U.S., and the legal status is substantially in a state of flux.[274] As indicated MARPOL 73/78, enjoying substantial ratification by the world's tonnage as well as significant impact in Western Europe and North America and closely tied to Part XII, is moving towards practice and acknowledgement in developed States. The effect of the regional environmental conventions as acknowledgement of Part XII has also been noted. Additionally, since all the Arctic littoral States are developed, partially so in the case of Russia, local custom is in the process of formation following Article 234, if not Articles 211, 218-220 and MARPOL 73/78, due to Russian and Canadian practice, partial support in U.S. practice, LOSC ratification by Norway, and the acknowledgement given the entire Part XII by both Russia and the U.S.[275] Additionally as noted nearly all doctrine address Part XII Articles.[276] For these reasons though customary international law undoubtedly presently governs in the Arctic, the ice-covered regime and the traditional Part XII regime carry much weight. Comparisons with specific State practice will thus be carried out for all three international regimes.

The Russian domestic legislation and enforcement relevant to its Arctic waters will now be addressed.

---

273 See Sections 9.2.2.2., 9.2.2.3.5., 9.2.4.2. and 9.2.4.4.

274 See Section 1.NEED.

275 See Sections 9.2.2.2. and 9.2.4.2.

276 See Sections 9.2.2.5.3., 9.2.3.4. and 9.2.4.2.

### 9.3.3. The Russian Position

#### 9.3.3.1. Introduction

The subject of Russian environmental regulation in the Arctic is vast and under change.[277] The recent 1993 Statute,[278] 1994 Environmental Decree,[279] 1995 Law on Continental Shelf of the Russian Federation, and 1996 Law on the Exclusive Economic Zone[280] have been noted.[281] All will be officially translated in conjunction with a INSROP Phase II project led by Professor Kolodkin. However a plethora of environmental acts and statutes have been recently adopted, largely unknown in the West, which also is in the process of collection, translation and analysis, the latter as regards implementation, under INSROP Phase II.[282]

Consequently the laws published in by W. Butler, *The USSR, Eastern Europe and the Development of the Law of the Sea*, (Oceana Publications 1987), are those which will be presently referred to, in addition to clarifying comments obtained from literature published in the West.[283] Updates are provided by N. Koroleva, V. Markov and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, (Soyuzmorniiproekt, Moscow 1995), the first two associates of Professor Kolodkin.[284] It is however not expected that the general scope indicated by the older legislation will be altered to any great degree. If anything, a more conservative position will probably be taken as regards jurisdictional issues.[285]

---

277 W. Butler, 'The Legal Regime of Soviet Marine Areas', *The Soviet Maritime Arctic*, (ed. L. Brigham), (Naval Institute Press, 1991), p. 226 notes that all general relevant Soviet environmental legislation which is vast, is also applicable to the Arctic.

278 Law of the Russian Federation On the State Frontier of the Russian Federation, 1 April 1993, (1993 Statute) (unofficial translation by Dr. Alexandra Livanova, University of St. Petersburg).

279 "Of Environmental Protection in the Russian Federation," received from Senior Researcher Elena Nikitina, Institute of World Economy and International Relations, Russian Academy of Sciences, (in Russian) (Unofficial translation by Dr. Alexandra Livanova, University of St. Petersburg).

280 The former was recently adopted , and the latter is anticipated adopted in 1996. A. Ushakov, 'Interview' 17 April, 1996, Fridtjof Nansen Institute, Oslo, Norway.

281 See Section 4.3.1.2.

282 E. Nikitina, 'Correspondence," 14 January, 1997. See Section 9.3.3.2.5. for a partial overview.

283 These include A. Kolodkin and M. Volosov, 'Soviet Arctic Legal Regime,' 158-68; E. Franckx, *Maritime Arctic Claims*, pp. 168-96; E. Franckx, *USSR Pollution Prevention*, 155-83; E. Franckx, 'Nature Protection in the Arctic - Recent Soviet Legislation,' *International and Comparative Law Quarterly*, vol. 41, (April 1992), 366-86 and W. Butler, 'The Legal Regime of Soviet Marine Areas', (ed. L. Brigham), pp. 226-7.

284 Since N. Koroleva and V. Markov are affiliated with Professor Kolodkin's Institute, the State Research and Project Development Institute of Merchant Marine (Soyuzmorniiproekt), Association of International Maritime Law, they will be considered to be of the same "semi official" status as Kolodkin himself noted in Section 4.2.2. The same applies to A. Ushakov, Deputy Director of the Northern Sea Route Administration.

285 See N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, pp. 86-93 who apparently once again give some weight to the sector principle.

### 9.3.3.2. Soviet - Russian Legislation, Enforcement and Other Practice Related to LOSC Article 234, Articles 211, 218-220, International Customary Law and MARPOL 73/78

The following Russian legislation encompasses regulation of the Arctic marine environment. Kolodkin notes that there are no objections made on the part of foreign States to these provisions.[286] His associates see a general legal regime in the Arctic formed, "under the impact of a number of natural, historical, economic, demographic, military and political factors," secured both through the legal practice of the Arctic rim States and international recognition both expressed and tacit.[287]

#### 9.3.3.2.1. 28 February 1984 Edict "On the Economic Zone of the U.S.S.R." [288] and Supporting Legislation

The 1984 Economic Edict applies generally to the Russian economic zone including the Arctic, while Article 14 directly addresses the Arctic.[289] Specifically Article 14, similar to LOSC Article 234, gives Soviet agencies the power to unilaterally establish rules providing for the prevention, reduction and control of marine pollution and the safety of shipping, ensuring that such rules will be observed in ice-covered and special areas where marine pollution could cause grave harm or irreversible disturbance to the ecological balance. Article 12 states broadly that pollution prevention, reduction and control caused or connected to an activity in the Soviet economic zone, must be carried out in accordance with Soviet legislation and international treaties. The LOSC Article 211(5) requirement that domestic legislation conform and give effect to "generally accepted" international provisions established through the IMO is dropped. Special areas with special measures against pollution may be established under Article 13 of the Economic Edict supported by Article (4) of the 1985 Environmental Statute, using much the same language as LOSC Article 211(6) but dropping IMO consultation and adoption.

Violations defined under Article 19(3) and (5) include illegal drainages in the economic zone from vessels of mixtures containing more than established norms, or other wastes, materials and objects which may cause harm to recreation zones or hinder other lawful uses

---

286 See A. Kolodkin and M. Volosov, 'Soviet Arctic Legal Regime,' 166. See however Section 9.3.4. for the contrary position taken by the U.S.

287 N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 76.

288 W. Butler, *The USSR, Eastern Europe and the Development of the Law of the Sea*, "On the Economic Zone of the U.S.S.R." F.2., p. 1 (1984 Economic Edict). E. Franckx, *Maritime Arctic Claims*, pp. 178, 218 footnote 355 notes the importance of this legislation as the first major maritime power to enact such legislation, the importance of this as a formative element of customary international law which can hardly be overestimated.

289 Article 14 provides specifically, "The competent Soviet organs can determine, in a manner established by the U.S.S.R. legislation, rules for the prevention, reduction and control of pollution of the marine environment, and also for the safety of navigation and can enforce these rules in areas, covered with ice and having particular natural characteristics, where pollution of the marine environment could cause major harm to the ecological balance or disturb it irreversibly." A. Kolodkin and M. Volosov, 'Soviet Arctic Legal Regime,' 162 notes that, "(I)n those areas the said agencies have the right in the event of a violation of Soviet legislation, or respective international regulations by vessels, to demand information concerning the vessel, inspect it and if necessary institute proceedings and detain the offending vessel."

of the sea; and other violations of rules for pollution prevention, reduction and control in the economic zone. Under Article 19(3),(9) and (10) illegal discharges into the economic zone from ships of substances or mixtures of such which could cause damage to leisure zones or interfere with other lawful uses of the sea are punishable by fines. Under Article 20 guilty persons bear administrative responsibility for violations covered by Article 19, "unless such violations entail by their character criminal responsibility in accordance with prevailing legislation..."

Article 15 deals with enforcement of environmental provisions in the territorial sea and economic zone,[290] and roughly parallels LOSC Article 220(3),(5)(6) regarding demands for information and physical inspection to ascertain, where there exists clear grounds, whether a violation of legislation provided for in Articles 12-14 above has occurred in the economic zone. Likewise under Article 15 proceedings may be initiated including arrest, if there exists clear and objective evidence that a discharge leading to major damage or threat of such has occurred in the economic zone in violation of legislation provided for in Articles 12-14. The 1985 Protection Statute[291] elaborates upon seizure and arrest for vessels navigating in the economic zone roughly consistent with Article 220(3), (5) and (6).

Marine casualties and hot pursuit addressed respectively by Article 17 supported by Article 7 of the 1985 Environmental Statute[292], and Article 18 supported by Article 11 of the 1985 Protection Statute, generally follow LOSC Articles 111 and 221 and the Intervention Convention,[293] under which a coastal State may take and enforce proportional protective measures beyond its territorial sea, and pursue violators up to the limit of foreign territorial seas.[294]

290 See Section 5.2.3.2.2.1. where this has been previously but briefly addressed. N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 78.

291 W. Butler, *The USSR, Eastern Europe and the Development of the Law of the Sea*, "Statute on the Protection of the Economic Zone of the USSR," F.2., p. 23, (1985 Protection Statute). E. Franckx, *USSR Pollution Prevention*, 176-181 lists this as "Decree of the Council of Ministers of the USSR, 30 January 1986, *On Confirmation of the Statute on the Safeguarding of the Economic Zone of the USSR* (1985). See also A. Kolodkin and M. Volosov, 'Soviet Arctic Legal Regime,' 163.

292 W. Butler, *The USSR, Eastern Europe and the Development of the Law of the Sea*, "Statute on the Protection and Preservation of the Marine Environment in the Economic Zone of the USSR," 15 July 1985, F.3., p. 1, (1985 Environmental Statute).

293 International Convention Relating to Intervention on the High Seas in the Case of Oil Pollution Casualties (1969), *International Legal Materials* vol. 9, p. 25.

294 See E. Franckx, *USSR Pollution Prevention*, 168-9.

9.3.3.2.2. The 26 November 1984 Edict on Intensifying Nature Protection in Areas of the Far North and Marine Areas Adjacent to the Northern Coast of the USSR[295]

Article 17 of the 1984 Environmental Edict defines the scope of application which is stated to encompass the islands of the Northern Arctic Ocean, its seas, islands of the Bering and Okhotsk Seas and other territories relegated by the USSR Council of Ministers to be areas of the Far North. These vaguely include "marine areas adjacent to the northern coast" including areas around Soviet islands whose state influences the economic well-being of the northern part of the Soviet territory. Conditions and periods for the implementation of these provisions are to be established by the USSR Council of Ministers.

Article 3 expands upon LOSC Article 234 and Article 14 of the 1984 Economic Edict. Under Article 3 the competent Soviet agencies, in "adjacent coastal areas" where severe climatic conditions and ice create dangers for shipping and marine pollution could cause grave or irreversible harm, shall establish special navigational rules for ships and other floating means.[296] These rules shall provide for higher construction requirements, for equipment and supplies, and for the complement and skills of the crew.[297] They shall prohibit navigation without pilotage or other escort, establish closed areas and time periods, as well as set forth other measures to ensure safety and the prevention, reduction and control of marine pollution. They are to be published in *Izveshcheniia moreplavateliam.*[298]

Under the Preamble and Article 1, expanding LOSC Article 211(6), Article 13 of the Economic Edict and Article (4) of the 1985 Environmental Statute, specially protected marine areas and protected zones as well as game preserves, reservations and other protected territories shall be established in order to intensify nature protection, preserve and study natural complexes and ensure the best living and health conditions and satisfy the populace's domestic and cultural requirements, including those of indigenous peoples.[299] Within these special areas under Article 4 navigation may be restricted *to sea lanes* specified by the competent Soviet agencies with notification of such sea lanes to be published in *Izveshcheniia moreplavateliam.*[300] Other means of transport moving along the ice surface must also move in

---

295 W. Butler, *The USSR, Eastern Europe and the Development of the Law of the Sea,* "Edict on Intensifying Nature Protection in Areas of the Far North and Marine areas Adjacent to the Northern Coast of the USSR," J.4., p. 1., (1984 Environmental Edict). E. Franckx, *Maritime Arctic Claims,* p. 179 sees the Decree of 16 September 1971, "On Confirmation of the Statute of the Administration of the Northern Sea Route, 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 Northern Sea Route, (1971 Statute), see W. Butler, *International Legal Materials* vol. 11, p. 645.

296 See N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic,* p. 78.

297 Ibid. p. 75 note that these national regulations as well as discharge standards may be more strict than international ones. The authors also note that though navigation may not be totally prohibited, depending upon meteorological or other conditions, navigation may be temporarily prohibited or limited along sea lanes. Ibid. p. 96. view "due account" as having been taken of current environmental ideas consistent with Article 234.

298 This is translated from Russian to "Notice to Mariners."

299 Article 18 addresses indigenous peoples directly stating that native protection in areas of the Far North and marine areas "adjacent to the northern coast" not provided for by this Edict are governed by Soviet and R.S.F.S.R. legislation on nature protection and by Soviet legislation on the economic zone and continental shelf.

300 A. Kolodkin and M. Volosov, 'Soviet Arctic Legal Regime,' 162 notes that navigation by vessels and other means in these marine areas "may be effectuated only in instances determined by Soviet legislation."

specified routes.[301] The special areas may also be temporarily closed. Forced entry in protected areas is permitted on condition of notifying the nearest Soviet port.

In a vague reference to a environmental impact statement, under Article 2 scientific principles are to be worked out for nature protection, rather than as under Article 234 as elements to be considered before establishing provisions for ice covered areas.[302] Under Article 8 nature protection and the need to restore renewable resources shall be taken into account in determining the technologies to be used. Under Article 9 the creation, operation, use and elimination of artificial islands, installations, and devices in "marine areas adjacent" to the Soviet northern coast as well as the creation of safety zones around them must be carried out upon the authorisation of competent Soviet agencies. Prior to construction of such, a positive environmental impact statement made by the competent Soviet agency is required under Article 6.[303] In marine areas "adjacent to the northern coast" sewage unpurified up to the established norms, as well as wastes, materials, and articles are prohibited discharged under Article 11.

Under Article 15 expanding Article 15 of the 1984 Economic Edict and LOSC Article 220(3), (5) and (6) the competent Soviet agencies have the right to inspect, detain, and arrest vessels for the purposes of suppressing violations of the law including violations of Articles 3, 4, 9, and 11 in relevant part, and ensuring the timely and proper consideration of cases. Nothing is stated concerning degree of evidence required. Under Article 14, supporting Articles 19 and 20 of the 1984 Economic Edict persons who are guilty of violating the 1984 Environmental Edict bear criminal, administrative, and other responsibility. In the event of arrest or detention of a foreign vessel, the respective competent Soviet agencies must immediately inform the flag State of the measures taken and subsequent measures of punishment. The detained vessel and crew must be released immediately upon posting reasonable bond or other security.

9.3.3.2.3. 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.'[304]

The 1990 Decree was adopted to implement the 1984 Environmental Edict as required *generally* under its Article 17. Specific implementation or additional specificity is also required under Article 3 of the 1984 Environmental Edict and Article 14 of 1984 Economic Edict for ice-covered areas; and under Article 4 of the former and Article 13 of the latter for special areas. Implementation and specificity is required under Article 12 of the 1984

---

301 See generally N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, pp. 93-5. The authors note that while a right of innocent passage exists for navigating through ice covered areas, the same right does not exist for transit effected on the ice surface.

302 E. Franckx, *Maritime Arctic Claims*, pp. 178, 218, footnote 359.

303 Ibid. p. 180 notes that following 1988 this became the U.S.S.R. State Committee on the Safeguarding of Nature.

304 No official translation has to date been received. The translation utilized appears as an Appendix to E. Franckx, 'Nature Protection in the Arctic' 377-383, (1990 Decree).

Economic Edict for pollution in the economic zone, and under Article 15 for enforcement. The 1990 Decree will be given a somewhat extensive description since much State control is evidenced by this document.

Under Article 12, expanding LOSC Article 234, starting June 1990 Article 3 of the 1984 Environmental Edict is to be applied to "marine areas adjacent" to the Soviet northern coast within the Soviet economic zone, as well as to the Northern Sea Route and "adjacent areas."[305] Under Article 2 the Soviet Ministry of Merchant Marine was to work out and approve in agreement with interested Soviet ministries and departments and the Council of Ministers of the R.S.F.S.R. navigational rules along the Northern Sea Route and "adjacent areas" and publish these rules in *Izveshcheniia moreplavateliam*. Account was to be made of the requirements of Article 3 of the 1984 Environmental Edict.

Expanding LOSC Article 211(6) under Article 1 game reserves, reservations and other specially protected territories in "marine areas adjacent" to the northern coast are to be established by the Council of Ministers of the U.S.S.R., upon proposal by several Soviet agencies.[306] Under Article 3 in support of Article 4 of the 1984 Environmental Edict, sea corridors, in "marine areas adjacent" to the Soviet northern coast along which ships and other floating means navigate within game preserves, reservations and specially protected territories and their protected zones, are to be established by the Northern Sea Route Administration. This is to be in agreement with ministries and departments under whose jurisdiction those specially protected territories occur, the Soviet Committee on State Security and the Soviet Ministry of Defence.[307] Notification of such sea corridors is to be published in *Izveshcheniia moreplavateliam*.

Under Article 4 along the general lines of LOSC Article 235(2), requiring recourse to liability and compensation relief, and Article 220(7) requiring release of ships upon assurance of financial security, as well as consistent with bonding under Article 14 of the 1984 Environmental Edict, Article 19 of the Economic Edict and Article 22 of the 1985 Protection Statute, the owners of the ships and other floating means moving along the Northern Sea Route and "adjacent areas" must enter into an insurance contract. This is to cover civil liability for marine pollution damage caused, or show other sufficient financial security. Acceptability of such insurance or other financial security is determined by the Northern Sea Route Administration, and evidence of such coverage must be carried on board while transiting the Northern Sea Route.[308]

---

305 Specifically, Article 12 provides, "To enter into effect from 1 June 1990: the provisions 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." as applied to marine areas adjacent to the northern coast of the U.S.S.R., within the economic zone of the U.S.S.R.; the provisions of Article 3 of that Edict as applied to the Northern Sea Route and adjacent areas."

306 These include the State Committee of the U.S.S.R. for Nature Protection and the Council of Ministers of the R.S.F.S.R., in agreement with the Ministries of Merchant Marine, Defense, Fisheries, Geology, the State Committees on Hydrometeorology and on Science and Technology, the Committee on State Security, and Gosplan.

307 Similar rules exist for the establishment of transport routes on the ice surface.

308 The Soviet Ministries of Merchant Marine and of Finances with the participation of the State Committee of the USSR for Nature Protection determine the implementation of such requirements.

Expanding LOSC Article 220(1)-(3), (4)-(8) nature protection under Article 10 in "marine areas adjacent" to the northern Soviet coast is entrusted to agencies of the Soviet State Committee for Nature Protection and of the Soviet Ministry of Fisheries; and along the Northern Sea Route and "adjacent areas" to the Northern Sea Route Administration. These agencies are to co-ordinate their activities. Natural protection in other regions which fall under the 1984 Environmental Edict is carried out in accordance with prevailing legislation by plenipotentiary agencies. Under Article 11 plenipotentiary officials of the Soviet State Committee for Nature Protection and of the Ministry of Fisheries, and officials of the Northern Sea Route Administration for the purposes enumerated in the 1984 Environmental Edict Article 15 (1) have the right in relevant part to: stop and inspect ships and other floating means which navigate in "marine areas adjacent" to the Soviet northern coast;[309] check on ships and documents, detain ships, other floating means and means of transport carrying out navigation in "marine areas adjacent" to the Soviet northern coast, in violation of established rules and convey them to one of the open Soviet ports;[310] detain offenders of the rules for environmental protection in "marine areas adjacent" to the Soviet northern coast and convey them to an open port and seize gear, documents and resources illegally extracted; draw up reports concerning the measures taken above, and impose fines consistent with Article 14(2) of the 1984 Environmental Edict. Under Article 5 the Northern Sea Route Administration may take measures to expel from the Northern Sea Route and "adjacent areas," ships and other floating means which do not meet the navigational requirements of the Northern Sea Route.

9.3.3.2.4. Regulations for Navigation on the Seaways of the Northern Sea Route[311]

Though the 1991 Rules generally follow those issued in 1971, they expand coastal State control. They specify further the 1990 Decree, Articles 3, 4, 14, 15 and 17 of the 1984 Environmental Edict and Article 14 of the 1984 Economic Edict related to pollution control and enforcement in ice covered areas.

The Northern Sea Route is stated explicitly under Article 1 to lie within the USSR's inland seas, territorial seas or exclusive economic zone adjacent to the USSR Northern Coast, limited by western entrances to the Novaya Zemlya Straits and the meridian running north

309 There are similar rules for transport on the icy surface in special areas.

310 Additionally, ships, other floating means and means of transport carrying out navigation in "marine areas adjacent" to the Soviet northern coast may be detained for illegal discharges of polluting substances where there is clear and objective evidence of such violation causing major damage or threats of such to the coastline, to the interest related to the coast or to any resource of the Soviet territorial sea, economic zone or continental shelf.

311 "Regulations for Navigation on the Seaways of the Northern Sea Route, 14 September 1990," *International Challenges*, vol. 12, (1992), pp. 121-6, (1991 Rules). Published in *Izveshcheniia Moreplavateliam*, No. 29 of 18 June 1991, by the Head Department of Navigation and Oceanography USSR Ministry of Defense. English version kindly received from V. Michailichenko Director of Northern Sea Route Administration Tromsø, October 1991. Under Article 8 the controlling authorities under the Administration are divided into two areas; in the West up to meridian 125 degrees East - the West Marine Operations Headquarters at Dixon; and in the East, east of meridian 125 degrees East, the East Marine Operations Headquarters at Pevek. These shall collectively be referred to as the "Administration."

through Mys Zhelaniya, and in the east in the Bering Strait by parallel 66 degrees North and meridian 168 degrees 58 minutes 37 seconds West.[312]

The principles behind the 1991 Rules are stated in Article 2 to be non discriminatory regulation of navigation for safety reasons and for the prevention, reduction and control of marine pollution, caused by the presence of ice.

Under Article 6 regarding enforcement, expanding Article 15 of the 1984 Economic Edict, where unfavourable ice, navigational, hydrographic, weather and other dangerous conditions occur or where a threat exists of polluting the marine environment, an *inspection* may be carried out on a ship during its navigation of the Northern Sea Route by officials of the Northern Sea Route Administration. In the case of a pollution threat other authorised State organs may carry out inspections. The inspections may include examination of vessel documents, cargo documents and in special circumstances, direct examination of the condition of the ship, equipment, facilities, technical navigational instruments, and readiness and ability to fulfil requirements for pollution prevention.

Under Article 7 expanding Article 3 of the 1984 Environmental Edict and Article 14 of the 1984 Economic Edict regarding pilotage, the *leading* of ships is obligatory during the navigational period determined by the Administration. Leading must be *requested* and *permission* given before admission to the Northern Sea Route under Article 3. Under Article 4 ships must satisfy special technical and crewing requirements for navigating in ice set forth in the Requirements for the Design, Equipment and Supply of Vessels Navigating the Northern Sea Route.[313] Ships admitted for leading must keep to assigned routes and carry out orders from Administration headquarters to change the route due to ice conditions or the occurrence of other events affecting safety or threatening the ecology. General routes are specified in the Guide to Navigation through the Northern Sea Route (1995 Navigation) and 1 June 1993 General Regulations for Navigation and Anchoring of Vessels at Sea Ports and at the Approaches Thereto.[314] Radio contact with the Northern Sea Route Operations Headquarters is also required under Article 7. As noted compulsory ice breaker assisted pilotage is required for the Proliv Vil'kitskogo, Proliv Shokal'skogo, Proliv Dmitriya Lapteva

---

312 The Northern Sea Route is however noted by N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 74, "depending upon ice conditions" to run through the areas of the high seas situated beyond this zone. See also A. Kolodkin and M. Volosov, 'Soviet Arctic Legal Regime,' 164-5, who add, "(H)aving regard to this (historical factors), one must conclude that the regulation of navigation along the Northern Sea Route is the prerogative of the USSR as the coastal State of this route." Additionally, "(O)n the high seas *beyond the economic zone*, the freedom of navigation is exercised without those limitations which may be established within the economic zone and which are connected with the protection of the marine environment."

313 'Requirements for the Design, Equipment and Supply of Vessels Navigating the Northern Sea Route' (1994 Design Requirements), Appendix, *Guide to Navigation through the Northern Sea Route,* (Head Department of Navigation and Oceanography of the Ministry of Defence of the Russian Federation, St. Petersburg, 1996), (1995 Navigation), received (in Russian) from V. Peresypkin, Central Marine Research Design Institute, St. Petersburg, Russia, 17 April, 1996, (in English 2 December 1996. See Chapter 3 into which 1995 Navigation has been incorporated. N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 97 note that these may be controversial.

314 1 June 1993 General Regulations for Navigation and Anchoring of Vessels at Sea Ports and at the Approaches Thereto, (1993 Port Navigation), A, Yakovlev, 'Correspondence,' March 1995. This is under order from V. Peresypkin, Central Marine Research Design Institute, St. Petersburg, Russia.

and Proliv Sannikova (straits) for safety considerations.[315] Further leading is required prescribed "in other regions" depending upon the circumstances for safety and navigational ease, including shore-based pilotage,[316] aircraft-assisted leading, conventional pilotage, icebreaker leading; and icebreaker-assisted pilotage. Navigation is to generally be controlled by the Northern Sea Route Administration and the Marine Operations Headquarters under Article 8 which organises leading and supplies navigational information and rescue services. Most interesting is the requirement for payment of *fees* for these mandatory services under Article 8.4. This also gives substance to Article 234 but raises the question of "due regard to navigation."

Under Article 5 a certificate of financial security for liability for pollution damage must be carried on board under Article 5 generally consistent with LOSC Articles 235(2) and 220(7), insurance contract under Article 4 of the 1990 Decree and consistent with bonding under Article 19 of the Economic Edict and Article 22 of the 1985 Protection Statute, and Article 14 of the 1984 Environmental Edict.

Expanding upon special areas with special measures against pollution in excess of LOSC Article 211(6) as well as under Article 13 of the Economic Edict supported by Article (4) of the 1985 Environmental Statute, under Article 9 navigation may be *suspended* in specific sections of the Northern Sea Route "where an obvious necessity of environmental protection or safe navigation dictates so" for the period that the circumstances exist. This is apparently unilaterally determined by officials from the Administration or Marine Operations Headquarters.

Under Article 11 the Administration is not liable for damage caused by leading in ice conditions unless specifically provided for, and under Article 12 ships are required to report any discharges of pollution by that ship or detected by the same.[317]

9.3.3.2.5. Recent Legislation

The following is legislation recently adopted by Russia, but which either has not been received, or if received is in Russian or not officially translated. This work is progressing; so the titles will be indicated and some description given.

The Law of the Russian Soviet Federative Socialist Republic, "On the Protection of the Natural Environment," (1994 Environmental Edict), consisting of four Sections of some 68 Articles of relevance here, deals with increasing State control over exploitation of natural resources related to environmental protection (Section 1), qualitative environmental norms (Section 2), environmental impact statements and other procedures (Section 3) and

315 See Section 5.3.3.2.3. "Ice-breaker-assisted pilotage" is defined as an icebreaker leading a vessel with a pilot being on board the latter.

316 This is defined as leading along recommended routes up to a certain geographical point.

317 A. Roginko and M. LaMourie, 'Emerging marine environmental protection strategies for the Arctic,' *Marine Policy*, vol. 16(4), (July 1992), 271, see these rules as placing special emphasis on providing conditions for Russian ships to observe all provisions of MARPOL 73/78.

implementation of these provisions including sanctions (Section 4). The Russian Federation: Law on the Continental Shelf, 30 November 1995,[318] (1995 Continental Shelf Edict) was adopted and recently translated. Of some relevance here in this Federal Law with eight chapters and forty nine Articles is chapter IV Article 16 dealing with the erection of artificial installations. For safety reasons the installations must not be erected in important sea lanes, 500 meter safety zones must be established and the placement and measures published in *Notice to Mariners*. Article 16 parallels substantially LOSC Articles 60 and 80. The June 1993 Port Navigation has been mentioned and appears to have relevance to ice breaker assisted pilotage required under Article 7.4 of the 1991 Rules and supporting legislation.[319] The 1994 Design Requirements and the 1995 Navigation Guide as noted are intended to supplement Articles 4 and 8 of the 1991 Rules spelling out respectively requirements for vessels and control of navigation. Finally as noted a plethora of statutes and other environmental legislation of unknown scope has been adopted with possible application to Russian Arctic waters.[320]

A closing comment on this comprehensive Russian regime for Arctic environmental protection is made by N. Koroleva, V. Markov, and A. Ushakov,[321]

> "(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."

With the Russian Arctic regime presented, compliance of this regime with the international regimes addressed in Section 9.2. will now be addressed. Comparison with the Article 234 regime will be carried out first.

---

318 The Russian Federation: Law on the Continental Shelf, 30 November 1995, *International Legal Materials*, vol. 35, (1996), p. 1498, (1995 Continental Decree).

319 N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 95.

320 These include but are not limited to, *Law concerning atmospheric air protection*, Russian Federation, 14 June 1992; *Law concerning sanitary and epidemiological welfare of the population; Direction concerning urgent actions to preserve national cultural and natural heritage of the peoples of Russia*, issued by the Supreme Soviet of RF, 26 December 1990; *Decree concerning protection of natural resources, territorial waters, the continental shelf and economic zone of Russian Federation*, Decree No. 926, issued by President of RF, 5 May 1992; *Status of Ministry of Environment Protection and Natural Resources, Russian Federation* adopted by Government of RF, 18 December 1992; *Status of the Council under the President of the Russian Federation for ecological policy with regard to ecology and health protection*, 28 December 1992, No. 828-RP; *Status of the State Expertise for Ecology under the National Committee for Ecology and Nature Use, Russian Federation* adopted by Council of Ministers, RF, 22 June 1991, No. 348; *Status of the national nature reservation of the Russian Federation*. No. 48,18 December 1991, Government of RF; *The procedure of development and approval of ecological standards for emissions and discharges of contaminants into the environment, as well as limits of natural resources use and location of wastes*. No. 545;3 August 1992, Government of RF; *The procedure of determination of payment and the payment limits to be charged for contamination of the environment as well as for placing wastes and other kinds of detrimental effects*, No. 632, 28 August 1992, Government of RF; *Environmental Protection, Resolutions and comments to the law of the Russian Federation*, Published by the Supreme Council of RF, Moscow, Publisher's House "Respublika," 1993; *Law concerning bases for the state control of social and economical development of the North region of the Russian Federation (the national policy general lines with regard to the North Region of Russia)* A Federal law draft, 9 December 1994; *Law concerning particularly preserved areas*, 22 March 1994. These are obtained from, S. Chivilev, M. Gavrilo, N. Isakov, V. Khlebovich, V. Pogrebov, N. Popovich, I.Sverdlov and S. Zubarev, INSROP - Discussion Paper, Project II.5.6., 'Russian Contribution to the INSROP EIA Process,' pp. 5-6, 27 September, 1996.

321 N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 97.

### 9.3.3.3. Compliance of Russian Practice with LOSC Article 234

#### 9.3.3.3.1. Introduction

One expert notes, when the Russian State practice is examined in relation to the international regimes, a virtual Pandora's box is opened.[322] Taking a comparison with LOSC Article 234 first, as seen conditions for unilateral regulation by the coastal State under Article 234 are "non discriminatory adoption and enforcement," "within the limits of the exclusive economic zone," "the presence of ice covering such areas for most of the year," "due regard to navigation" and "protection and preservation of the marine environment based on the best available scientific evidence." Article 234 arguably enjoys a broad scope due to a vague formulation,[323] however in comparison additions and deletions are evident in the Russian practice. Issues arising from the comparison of Article 234 and the comprehensive Russian legislation and enforcement may be described succinctly by the following: mandatory notification and authorisation, possible application on the high seas, all 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 public ships.

The two regimes marine casualties and hot pursuit, though including enforcement of violations of Russian Arctic environmental provisions, run concurrent with the Article 234 regime, the Article 211, 218 and 220 regime and the customary law regime. As such they do not establish a State practice of the ice covered regime and will not be elaborated upon further here.[324]

The condition for non discriminatory adoption and enforcement under Article 234 will be addressed first.

#### 9.3.3.3.2. "Non Discriminatory Adoption and Enforcement"

Under Article 234 coastal States have the right to adopt and enforce non discriminatory environmental provisions. As noted the main thrust of the Russian provisions are

---

322 E. Franckx, *Maritime Arctic Claims*, p. 192. The author compared Russian legislation to the hypothetical case of the circumnavigation of a U.S. icebreaker, but the implications are the same. Ibid. pp. 33-34 and 193 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 environmental record of Soviet navigation in the area. See also R. Vartanov, A. Roginko, and V. Kolosov, 'Biopolitics and Security in the Arctic,' 63 and 82 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.

323 See Section 9.2.2.

324 E. Franckx, *USSR Pollution Prevention*, 168-9 notes hot pursuit under Article 18 of the 1984 Economic Edict elaborated by Articles 9, 10 and 11 of the 1985 Protection Statute to be generally consistent with LOSC Article 111. The author notes marine casualties addressed by Article 17 of the 1984 Economic Decree elaborated by Article 7 of the 1985 Environmental Statute, to be generally consistent with LOSC Article 221 and the Intervention Convention, though lacking the same strict definition of "marine casualty."

environmental protection and safety, thereby necessarily implying that *all* ships including Russian are encompassed. The principles behind the 1991 Rules are stated in Article 2 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. Articles 1.4. and 2 of 1991 Rules note that all ships regardless of nationality are subject. The implication of the supporting legislation is the same. However in the area, fees for services rendered set forth in Article 8.4. of the 1991 Rules, there may be questionable compliance with non discrimination of Article 234.[325] In application it seems improbable that the current fee rate of $4 to $12 per ton depending upon size is required of Russian ships.[326] This raises the question whether non discrimination is meant only to be *among* foreign ships of different nationalities, or also *between* foreign ships and Russian ships. As seen the better view based chiefly upon State practice is that related to Article 234 both Russian and foreign are encompassed, especially since that is what seems stated explicitly in the 1991 Rules. Thus the fees if justified under Article 234 must apply to all vessels, and the probable Russian practice on this point is *contrary*.

It is difficult to examine specific Arctic State practice on this issue, since it is only Russia which has a blanket fee structure.[327] Passage rights under both the Canadian and the U.S. legislation are not dependent upon the payment of fees.[328]

The issue of criminal liability will be addressed next.

#### 9.3.3.3.3. Criminal Liability

As seen previously *criminal liability* may arise under Articles 19 and 20 of the 1984 Economic Edict for violations of environmental provisions governing the exclusive economic zone.[329] In addition to silence from the 1984 Procedure Edict,[330] the 1985 Protection Statute also does not provide any clarification, though Article 5(2) notes that agencies responsible for protecting the economic zone when necessary shall transmit materials for bringing guilty persons to responsibility.[331] In clear support, Article 14 of the 1984 Environmental Edict[332] asserts that persons who are guilty of violations of this Edict bear *criminal* and other

---

325 Apart from the question of non discrimination the issue remains whether fees themselves fall outside the scope of "due regard to navigation." See Section 9.3.3.3.3.

326 This is substantiated by T. Ramsland, 'Interview,' 20 May 1996, Fridtjof Nansen Institute, Oslo, Norway.

327 See Section 9.3.3.2.

328 See Sections 9.2.2.3.5.1. and 9.2.2.3.5.2.

329 See Section 9.3.3.2.1. The 1984 Procedure Edict, does not elaborate further regarding criminal responsibility, though it deals with implementation of the fines and compensation of damages.

330 W. Butler, *The USSR, Eastern Europe and the Development of the Law of the Sea*, "Decree of the Presidium of the USSR 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."'" (1984 Procedure Decree). F.2. p. 17. See also A. Kolodkin and M. Volosov, 'Soviet Arctic Legal Regime,' 162-163.

The 1984 Procedure Edict however under Article 8 allows the border guard to seize violators of Article 19 and use whatever measures are necessary. This seems especially open considering the vagueness of Article (5), "other violations of rules relating to pollution prevention in the economic zone of the USSR.

331 See E. Franckx, *USSR Pollution Prevention*, 170.

332 See Section 9.3.3.2.2.

responsibility. While fines appear relevant to environmental violations associated with ice covered areas, if these violations "by their character" entail criminal responsibility under Soviet law, then this attaches.

Some limitation may be provided by Article 11(h) of the 1990 Decree[333] which limits penalties for pollution violations in the Arctic to fines. Fines may be imposed by the plenipotentiary officials noted in the established manner for violations consistent with Article 14(2) of the 1984 Environmental Edict, which the 1990 Decree implements. This paragraph also refers solely to fines, and not criminal liability, which is set forth by Article 14(4). This passage is probably however meant not as a limitation, but rather as specification of the enforcement agencies. Article 11 continues in the last paragraph 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. Though unclear, it seems probable that criminal liability may still attach under the open-ended Article 14(4) of the 1984 Environmental Edict, violations which "by their character entail criminal responsibility" under prevailing Soviet legislation. The newer enactments may provide some clarification.[334]

The above would seemingly allow criminal responsibility to be raised which is in clear excess of LOSC Article 230(1) which allows only monetary damages for violations by foreign ships of environmental domestic legislation or international provisions. The same could be said in relation to Article 230(2) which allows the equivalent in the territorial sea, with the exception for cases of wilful and serious acts of pollution.

However, if the Russian provisions are considered *generally* in relation to the U.S. legislation as a coastal State, criminal liability under the Russian rules is arguably *within the limits* set by the U.S. which may be applicable to the exclusive economic zone for commercial ships carrying oil.[335] It does not appear that criminal liability in this zone is raised under the Canadian, Danish (Greenland) or Norwegian legislation.[336] Application of the Russian provisions for criminal liability to public vessels is clearly *in excess* of the U.S. provisions, LOSC Article 236, and customary international law related to sovereign immunity.[337]

Thus though the limits indicated by LOSC Article 230 are theoretically exceeded by the Russian provisions for criminal liability, local State practice in the Arctic related to commercial surface passages may be developing otherwise.[338] Despite the absence of such provisions governing the exclusive economic zone by Canada, Denmark - Greenland, and Norway, the possibility for such , if not presence of, by the main opponent to the Russian, as

---

333 See Section 9.3.3.2.3.

334 See Section 9.3.3.2.5.

335 See Section 9.2.2.3.5.2.

336 See Section 9.2.2.3.5.1. and E. Gold, *Handbook on Marine Pollution*, pp. 82, 86, 98, 104, and 107.

337 R. Churchill and A. Lowe, *The Law of the Sea*, p. 260.

338 In addition to being in the process of forming a local customary rule, pending LOSC ratification by these States. This practice also indicates a subsequent State practice in interpreting Article 234 consistent with Article 31(3)(b) of the Vienna Convention on Treaties, *International Legal Materials*, vol. 18, (1969), p. 679.

well as Canadian, regimes, the U.S., would seem to provide unusually strong support favouring this argument.

With this said the issues arising from "due regard to navigation " "within the limits of the exclusive economic zone" and "protection and preservation of the marine environment based on the best available scientific evidence" between the Russian provisions and Article 234 will now be addressed.

9.3.3.3.4. "Due regard to navigation" - "Within the limits of the exclusive economic zone" - "Protection and preservation of the marine environment based on the best available scientific evidence"

"Due regard to navigation" is one of the express conditions with which coastal States must comply when they unilaterally adopt and enforce discharge and design, equipment, crewing and construction standards for ice covered waters in the exclusive economic zone. As seen however this passage is indefinite, and the conditions "environmental protection" and "within the limits of the exclusive economic zone" must be considered concurrently.[339] As also seen several views exist regarding the composite meaning, ranging from navigational rights of the territorial sea being extended to the exclusive economic zone, a standard of reasonableness dependent upon the status and circumstances of the waters in question, and broad coastal State control in the exclusive economic zone limited only by navigation, being permitted.

Though the first view is probably the most legally sound technically, Arctic State practice by Russia, Canada and arguably the U.S. however as noted support the latter.[340] It is thus this standard which will be used in comparison with the Russian provisions since it is the most plausible. Additionally it is obvious that most if not all of the terms characteristic of the Russian provisions far exceed traditional notions of innocent passage if applicable in the exclusive economic zone, though liability and arguably mandatory notification and authorisation may come closest in terms of compliance.[341] The vague standard of reasonableness dependent upon the status and circumstances is also exceeded at least to the same extent that local State practice is exceeded. State practice would seem generally to define reasonableness except for *jus cogens* which is not applicable here.[342] In circumstances when the least restrictive marine zone, the exclusive economic zone, is ice-covered, then this standard and local practice may be parallel. The last expansive view has however unfortunately "fuzzy" contours making a comparison with the Russian provisions somewhat difficult. It is in the process of formation through local Arctic practice, including Russian with which a comparison is to be made. Though a comparison with itself in part is circular, incredibly the Russian provisions exceed even this view, chiefly because navigation in several

339 See Section 9.2.2.3.3.

340 N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 75 consider passage rights dependent upon yearly fluctuations of ice to be unreasonable. See Sections 9.2.2.3.5.1., 9.2.2.3.5.2. and 9.3.3.2. See also A. Boyle, 'Remarks' 327.

341 See respectively Sections 9.3.3.3.1., 9.3.3.3.5. and 9.3.3.4.1.

342 See I. Brownlie, *Principles of Public International Law*, (Fourth Ed., Clarendon Press, Oxford, 1990), pp. 4, and 509-17. See Section 9.3.3.3.4. for Kolodkin's and his associates' view of a reasonable interpretation of "ice-covered."

cases may *not* be permitted. At the same time coastal State control is strengthened. It can be added that should the Russian provisions exceed the expansive view of Article 234, it goes without saying the other two views are exceeded.

Specifically, the scope of the rules governing ice-covered areas is stated to apply to *all* ships, including public and military, set forth by Articles 1.4., 2 and 7.4. of the 1991 Rules regarding compulsory leading, State declarations,[343] and two Articles implementing Article 234, Article 14 of the Economic Edict and Article 3 of the Environmental Decree, where nothing is stated otherwise. For these ships enjoying sovereign immunity navigation in the ordinary sense is thus either greatly restricted or prohibited.

"Safety of navigation" as a goal has been added to environmental considerations under Article 14 of the Economic Edict and Article 3 of the Environmental Decree. Additionally, where coastal States have special rights including the establishment and enforcement of discharge and higher construction, design, equipment and crewing standards,[344] the requirement for coastal State regulations to have "due regard to navigation and environmental protection based upon the best scientific evidence" has been dropped. Article 2 of the 1991 Rules, rather than "major harm to or irreversible disturbance of ecological balance," 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." Article 3 of the 1991 Rules requires notification and a request for leading and implicit authorisation in compliance with the 1995 Navigation Guide. Though definitely contrary to the traditional LOSC Articles 17 and Article 58 guaranteeing respectively innocent passage in the territorial sea and navigation in the exclusive economic zone, such may arguably be permitted under a broad meaning of "due regard to navigation and the protection and preservation of the marine environment..." of Article 234. Leading, including reporting, especially in ice bound straits under Article 7.4. of the 1991 Rules seems reasonable and clearly gives substance to prevent, reduce and control marine pollution. However considering the vague passage in Article 7.4, allowing mandatory prescription of leading in "...other regions" as well as in a time period determined by Northern Sea Route Administration officials under Article 7.1. the possibility exists for navigation to be prohibited. Consequently under chiefly Article 3 of the Environmental Decree and Articles 3 and 7 of the 1991 Rules the open-ended prohibition of navigation without pilotage or other escort, establishment of closed areas, if not temporary, and officially limited time periods *and other measures*, to prevent, reduce and control marine pollution, whether navigation is allowed, let alone takes "due regard to navigation and the marine environment..." is arguable.

Fees for services are mandatory under the 1991 Rules Article 8.4., raising also the question of meaning with respect to "due regard to navigation." States generally may not hamper innocent passage in the territorial sea under TSC Article 15(1) and LOSC Article 24(1), or levy charges upon innocent passage under TSC Article 18(1) and LOSC Article 26, *unless* special services are rendered.[345] Special services include pilotage or rescue services, but fees

343 See Section 7.3.2.1.1. and 7.3.2.1.2.

344 Ibid.

345 See R. Churchill and A. Lowe, *The Law of the Sea*, p. 79.

if levied, may not be levied in a discriminatory manner. Related to navigation in the exclusive economic zone fees are contrary to Articles 58 and 211(4) related to freedom of navigation subject only to pollution provisions giving effect to and conforming to "generally accepted" international rules and standards. Aside from the possible discriminatory application noted above,[346] arguments may however exist parallel to those existing for innocent passage, allowing the Russian fees as a necessity for "the protection and preservation of the marine environment based on the best available scientific evidence," since pilotage and rescue services are included, though it applies to passage through the exclusive economic zone. The most convincing counter argument is however that for the innocent passage regime under Article 26 the fees are allowed only *on a case by case basis* for specific services rendered, and not by reason of passage through the territorial sea. It would thus be inconsistent to allow expanded coastal State rights regarding obligatory fees for passage through an ice-covered Arctic exclusive economic zone. Following this, services for civilian ice-breakers and ice strengthened ships, for which fees could be charged, arguably would not be required if a relatively ice free season occurred such as summer 1995. This argument relates only to the issue of fees and not that of coastal State jurisdiction, which as seen would not be dependent upon the changing ice conditions. Mandatory blanket fees consequently may tends toward prohibiting navigation and are in excess of even an expanded view of "due regard to navigation" giving reasonable consideration to "the protection and preservation of the marine environment..."

Enforcement provisions strictly requiring, chiefly under 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 and Articles 6, 9 and 10 of the 1991 Rules, inspection if deemed necessary, stopping, detention and arrest, suspension if deemed necessary, and removal for violations, apply to ice-covered areas. These will be addressed in more detail below, since until recently much the same provisions also applied to the traditional LOSC Article 211, 218 and 220 regime and customary law regime.[347] There is some compatibility with these and Articles 218 and 220, and therefore the comparison with this basis and any excesses may be clearer. As applied to ice-covered areas the excessive measures however may be argued justified under the "due regard.." and "protection and preservation of the marine environment..." balance, especially if they appear *reasonable* given the circumstances. The question can be raised theoretically nevertheless whether the general enforcement of provisions permitting navigation only in special instances much dependent upon official discretion does not provide the final touch to a near prohibition on navigation.

Finally casting some doubt upon the seriousness of the stated objective of Arctic environmental protection upon which the Russian provisions are based, Article 6 of the 1984 Environmental Edict requires an environmental impact statement but *not* for vessel traffic.[348] Such a statement apparently falls outside the scope possibly due to the focus of Article 3 of the Environmental Edict or Article 4 of the 1991 Rules, where it could arguably be addressed.

---

346 See Section 9.3.3.3.1.

347 See Section 9.3.3.4.2.

348 Only the construction or renovation of enterprises, other installations, artificial islands, various installations and structures at sea, pollution centres and cable installations are addressed.

Since Article 234's environmental protection and preservation based upon solid scientific evidence, however has fallen out, an initial environmental impact statement may also not be included for this important pollution source in ice-covered areas.[349]

Regarding "due regard" balanced by "environmental considerations" in spite of Russian extensions in excess of the expansive view of Article 234, perhaps *most interesting*, if the provisions are considered *generally* in relation to the U.S. legislation as a coastal State, nearly *all* of the Russian rules are arguably within the limits of the U.S. for *commercial ships carrying oil*.[350] For commercial ships it is only the Russian *fees* and *ice-breaker-assisted pilotage* and *ice-breaker leading* which clearly exceed the U.S. provisions.[351] The State practice of the U.S. and Canada is consistent with the traditional position permitting only charges for services rendered. Blanket fees are not included in their legislation.[352] As indicated the Russian provisions Articles 1.4., 2 of the 1991 Rules governing public vessels similar to Canada clearly exceed the scope of the U.S. provisions as well as LOSC Article 236, and customary international law.[353] It is even more implausible in the case of submarines, which as seen under Article 9(e) of the 1993 Statute and other are specifically required to travel on the surface in spite of ice in the territorial sea[354] and generally required as other public vessels to submit to the 1991 Rules Article 7.4. including leading through the named straits and "in other regions" as determined by the officials, ice or not.

Admittedly in various instances the terms in the comparison are not directly parallel. The Russian "notification" and "authorisation" under Article 3 of the 1991 Rules and supporting legislation is more formal and administrative than the U.S. OPA 1990 §§ 1016(a) and (b), but the U.S. definitely has procedures for determining authorised passage upon a showing of sufficient evidence of financial security.[355] Other less direct comparisons include the U.S. design, equipment and construction standards, including double hulls, OPA 1990 §§ 4109, 4110, and 4115, which though unilaterally adopted may now arguably be in compliance with MARPOL 73/78. The Russian standards are Arctic specific and were established unilaterally.[356] Discharge standards for the U.S. under OPA § 1002(a) are governed through liability for oil damages in the exclusive

---

349 The development of Environmental Impact Statements is however the subject of a project in INSROP Phase II and may be covered in the recently adopted legislation noted in Section 9.3.3.2.5.

350 This is supported by the Canadian legislation. For the Russian provisions see Section 9.3.3.1., the U.S. provisions see Section 9.2.2.3.5.2. and the Canadian provisions see 9.2.2.3.5.1.

351 The two latter may also be carried out to a degree by Canada. E. Franckx, *Maritime Arctic Claims*, pp. 261-4 notes that 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.S. *Polar Star* in 1988. As well the C.C.G.S. *John A. MacDonald* accompanied the latter.

352 See Section 9.2.2.3.3.

353 See Section 9.2.2.3.6. E. Franckx, *Maritime Arctic Claims*, p. 193-5, notes the U.S. may very well have been tempted to test the applicability of the Russian regime especially in relation to public vessels and the high seas.

354 See Section 5.3.3.2.2.1.

355 See ASPPR, Schedule VIII s. 12 for the Canadian Arctic Pollution Prevention Certificate which is obligatory in practice.

356 See for example 1994 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. Reference to these Russian design, construction, and equipment standards appears in Article 4 and 6 of the 1991 Rules and Article 2 of the 1990 Decree.

economic zone. For Russia under Article 19(3),(9) and (10) of the Economic Edict and Article 11 of the 1984 Environmental Edict the standards are not limited to oil but are also governed through liability for damages in the exclusive economic zone and even vaguely totally prohibited in areas "adjacent to the northern coast."[357] Lessor forms of leading such as radio, aircraft and conventional pilot addressed in the Russian 1991 Rules Article 7.4. may have counterparts in the U.S. OPA 1990 § 4116 and the Monitoring Act 1990, where for specific Arctic waters pilotage and some escort is required as well as oil tanker oversight and monitoring, though the functioning of the latter is advisory only.[358] For Russia Article 3 of the Russian Environmental Edict allows stricter crewing and training standards, and under Article 4 of the 1990 Decree and Article 4 of the 1991 Rules ships must satisfy special crewing requirements for navigating in ice set forth in the Design Requirements. For the U.S. under OPA 1990 §4106 manning, training, qualifications and watchkeeping standards for foreign tankers appear upon official discretion to be required stricter than international standards. For Russia safety considerations are stated under Article 14 of the Economic Edict, in addition to environmental considerations, to give State agencies the power to unilaterally establish its comprehensive rules. For the U.S. under OPA 1990 § 1004(c)(1) no limitation of liability, its central regime, is applicable if there were a violation of a federal safety, construction or operation regulation.[359]

In spite of these inconsistencies and different approaches seen as a whole however both Russia and the U.S. as well as Canada have unilaterally established a remarkably similar type of standards applicable or potentially applicable in the exclusive economic zone or substantial parts of it.

Thus though the limits indicated establish "due regard to navigation" and "environmental considerations based upon the best scientific evidence" are theoretically sound, State practice in the Arctic related to surface passage has developed even more in favour of coastal State control. In addition to forming a local customary rule, following LOSC ratification by these States, this practice, which will undoubtedly continue due to the time it has already existed, also indicates a subsequent State practice in interpreting Article 234 consistent with Article 31(3)(b) of the Vienna Convention on Treaties.[360]

With this said the scope of geographic application of the Russian provisions will now be addressed.

9.3.3.3.5. "The presence of ice covering such areas for most of the year" - "Marine areas adjacent to the northern coast"

As seen the meaning of the term "ice-covered" has been controversial.[361] Under Article 14 of the Economic Edict and Articles 2 and 3 of the Environmental Decree, "the presence of ice

357 Canada under AWPPA s. 2 and 4 completely bans discharges in its 100 mile zone.

358 As noted in practice Canada has required escort and pilotage for the U.S. and Russian vessels in the Northwest Passage and may have plans for year round surveillance and control of shipping, compulsory pilotage and training. See D. Pharand, *Canada's Arctic Waters*, pp. 240-1.

359 Under ibid. the sixteen "safety control zones" are the basis upon which ship construction and navigation standards are governed.

360 *International Legal Materials* vol. 8, (1969), p. 679.

361 See Section 9.2.2.3.1.

covering such areas for most of the year," from Article 234 has been dropped, and only the broader terms, "ice-covered and special areas" and "severe climatic conditions and ice dangerous to shipping" appear.[362] The term "ice" is not specifically addressed at all in the 1990 Decree, and though mentioned in Articles 2, 4, 6, 7, and 11 of the 1991 Rules only in terms such as "presence of ice", "ice conditions", and "ice-breaking." Professor Kolodkin and his associates distinguish "ice covered areas" to mean the Arctic seas, covered by ice "for most of the year" with an average ice cover for six months or more,[363] though problems of definition are considered by the U.S. to play less of a role.[364]

Given this vague definition of where Article 234 is to apply within the exclusive economic zone, it is not perhaps too surprising that the Russian legislation is vague and contradictory at limiting application to 200 miles. As seen Articles 3 and 17 of the 1984 Environmental Edict, as well as the title of the Edict itself, indicates that "marine areas adjacent to the northern coast" are to be included, arguably encompassing also the high seas.[365] All of the Articles of the 1990 Decree, except one, Article 13, contain the term "marine areas adjacent." Article 1 does not clarify whether these environmental provisions are also applicable beyond the exclusive economic zone, however Article 12 specifies that from 1 June 1990 Article 3 of the 1984 Environmental Edict is applied to "marine areas adjacent" to the Soviet northern coast *within the Soviet economic zone*, and is applied to the Northern Sea Route and "adjacent areas." The Northern Sea Route itself may fall outside the economic zone according to vague claims,[366] however Article 1 of the 1991 Rules states specifically 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 ships in ice..." In addition due to the vagueness of the phrase regarding leading in Article 7.4 of the 1991 Rules, "in other regions" as well as the mandatory nature of the prescription, "shall" rather than "may," leading may be required for the entire passage in any part of the exclusive economic zone. This requirement may also encompass the high seas if understood as an "adjacent area" in the legislation and claim indicated. On the other hand in Article 1 by use of the prepositions "within" and "or" the scope of application may be limited to the exclusive economic zone in spite of the succeeding phase "seaways suitable for leading ships in ice..." 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. This may be supported by Article 18 of the 1984 Environmental Edict, which includes the same phrase, "marine areas adjacent..." but also refers to other legislation including the Economic Edict, which specifies the economic zone in its title.[367]

---

362 See Section 9.3.3.2. for the Russian provisions and Sections 9.2.2.3.5.1. and 9.2.2.3.5.2. for respectively the Canadian and the U.S. provisions.

363 N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 74. Contrast this with E. Franckx, *Maritime Arctic Claims*, pp. 192 and 225 fn. 474 standard of . 5 ice concentration for more than 8 months a year in Section 9.2.2.3.1.

364 J. Roach, 'Interview,' U.S. State Department, Office of Ocean Affairs, Washington D.C., U.S., U.S., 27 June 1994.

365 E. Franckx, *Maritime Arctic Claims*, pp. 179, 219 footnote 366.

366 A. Kolodkin and M. Volosov, 'Soviet Arctic Legal Regime,' 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 and 189.

367 Ibid. pp. 179, 219 footnote 366 notes the contradiction.

Apparently the U.S. is less opposed to a broad interpretation of ice-covered areas within the exclusive economic zone, forwarded by Russia and Canada. However, it is clear that the U.S. practice of the OPA 1990 and supporting legislation is limited to its exclusive economic zone, if there, and the Canadian AWPPA and supporting legislation is limited to 100 miles from the baselines.[368] Thus beyond 200 miles from the baselines, the high seas exits, also in the Arctic, and vague Russian provisions and claims receive little support from local Arctic State practice, or general customary international law.[369] As above in addition to forming a local customary rule, following LOSC ratification by these States, this practice also indicates a subsequent State practice in interpreting Article 234 consistent with Article 31(3)(b) of the Vienna Convention on Treaties.

With this said a comparison of the Russian and international provisions for liability and compensation will now be addressed.

9.3.3.3.6. Liability and Compensation[370]

Briefly, as seen LOSC Article 235(3) makes a mandatory though vague requirement that States co-operate in implementing and further developing international law relating to responsibility, liability, compensation and dispute settlement.[371] Where appropriate compulsory insurance or compensation funds are to be carried out. Russia is a party to both CLC and Fund,[372] and the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution,[373] plays an important role where the damaging ship's flag State is not a Party to CLC and Fund but where the ship is a party to TOVALOP.[374] Under Article VII of the CLC the owner of a ship 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 and which must be carried on board ship.[375] TOVALOP also issues a certificate, and the CLC and TOVALOP certificates are probably those of prime importance to Western insurers as far as oil is concerned.[376]

Under the Russian provisions conditions for insurance coverage appears determined unilaterally by State officials including Articles 19 and 20 of the Economic Edict "reasonable bond or other security;" Article 3(3) of the Implementation Decree "offender refuses to

368 See Section 9.2.2.3.3.

369 R. Churchill and A. Lowe, *The Law of the Sea*, pp. 164-5.

370 See also Section for release upon bonding and other security.

371 See Section 9.2.4.4.1.

372 Status of Conventions, 'Correspondence' IMO, 5 november 1996. Russia is not however a Party to the 1992 CLC Protocol 1992 or the 1992 Fund Protocol.

373 Tanker Owners' Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP), *International Legal Materials*, vol. 8, p. 497.

374 D. Torrens, "Marine Insurance for the Northern Sea Route - Pilot Study," *INSROP Working Paper* IV.3.3., No. 1, 1994, pp. 157-8. The author adds that the cargo is subject to CRISTAL.

375 "Certificate of Insurance or Other Financial Security in Respect of Civil Liability for Oil Pollution Damage. Annex to the CLC.

376 D. Torrens, 'Marine Insurance,' 32-3.

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;" 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 Administration of the Northern Sea Route;" and Article 5 of the 1991 Rules, mandatory "certificate of due financial security with respect to the civil liability of the Owner for damage inflicted..."

These provisions appear generally to indicate a certain compliance with the usual requirements set forth in LOSC Article 235(3), CLC Article VII and TOVALOP. However it is uncertain precisely the amount of international co-operation involved. Presumably the CLC, Fund and TOVALOP schemes would play an important role in the determination of "reasonable security for damage caused" in the Russian provisions, though this has not always been the case.[377] In addition the Russian certificate of insurance or other financial security of civil liability for oil pollution damage may be "irrelevant for the purposes of Western insurance for the NSR."[378] It is submitted presently any Russian certificates issued other than those consistent with the CLC, Fund and TOVALOP would be likewise irrelevant, and compliance with Articles 235 would be dependent upon the same. However there is on-going on harmonisation.[379]

9.3.3.3.7. Special Areas

Both Russian Arctic specific and non specific legislation unilaterally establishing discharge norms and navigational practices; design, construction, crewing and equipment standards; sea lanes, reporting, and suspension in special areas.[380] Though arguably allowable giving effect to Article 234 under the due regard...environmental considerations balance, [381] the meaning of unilaterally adopted rules for special areas within the Arctic, itself a special ice covered area, is less than clear.[382]

Article 1 as well as the Preamble of the 1984 Environmental Edict allow the establishment by the USSR Supreme Soviet of specially protected territories, including marine areas. Articles 1 and 2 of the 1990 Decree note that various Soviet Ministries and organs led by the Ministry of Merchant Marine will, taking into account Article 3 of the 1984 Environmental Edict, unilaterally draft navigational rules based upon safety and environmental concerns for

---

377 See E. Brown, 'International Oil Pollution Compensation Fund: An Analytical Report on Fund Practice,' *Butler Development Law* J.6., p. 1., regarding difficulties to the Fund in its very first case raised by the Soviet Union from the *Antonio Gramsci* grounding.

378 D. Torrens, 'Marine Insurance,' 33. E. Gold, 'Interview,' Project Leader, INSROP Project IV.3.3., 3 October 1995, indicates that Western insurance companies are generally sceptical to insuring ships and cargo on the Northern Sea Route due to the belief that both Russia and the Arctic are high risk areas.

379 Ibid. indicates that Russian insurance interests are working on harmonisation.

380 See Section 9.3.3.4.4.

381 See Section 9.3.3.3.4.

382 As seen in Section 9.2.6.3. the Russians proposed to the IMO that the Arctic be declared a special area under MARPOL 73/78. See Section 5.2.3.2.2. for MARPOL 73/78 norms for special areas.

the special areas governed by this Decree and Edict. On top of this ice covered areas under Article 3 of the 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 1991 Rules, though Article 11 of the 1984 Environmental Edict indicates that the discharge of wastes, materials and articles is completely prohibited. This is unclear however.

The 1994 Design Requirements supplement Article 4 of the 1991 Rules spelling out technical requirements for vessels. These have been completely based upon the Russian provisions denoted governing ice-covered areas implementing Article 234. It seems possible additional design, construction, crewing and equipment rules could be developed for special areas in the Arctic amplifying the effects of Article 234. However exclusion is the word here, and special requirements would undoubtedly close designated areas for substantially all ships.

Sea lanes are mentioned in the Russian environmental legislation only in relation to special areas, and for the Arctic may be supported under Article 234. No procedures for including the IMO are provided under Article 4(1) and (2) of the 1984 Environmental Edict for establishing sea lanes in special areas nor under Article 3 of the 1990 Decree. As mentioned below Articles 7 and 8 of the 1991 Rules, as well as the 1995 Navigation Guide, covering leading and routing along the Northern Sea Route, seem analogous to sea lanes.[383]

The extensive Russian enforcement legislation noted below,[384] which is also applicable to special areas including through Article 13 of the 1984 Economic Edict, Article 3 of the Environmental Edict and Article 11 of the 1990 Decree, necessarily is consistent with Article 234.

Though the relation between special areas within ice-covered areas is unclear, the U.S. practice and especially the Canada practice support the Russian provisions for special areas. The U.S. OPA 1990 Title V " 5001-5007 and the Monitoring Act provide for special areas in the Arctic, the Prince William Sound and the Cook Inlet, which are governed by more comprehensive rules, though navigation cannot be completely suspended.[385]

9.3.3.3.8. Conclusions

In conclusion due to the indefinite limits inherent in Article 234, it would be difficult to maintain even theoretically that the unilaterally adopted Russian 1991 Rules and supporting legislation exceed intended limits, other than for *six points*, in spite of their "creative ambiguity.[386] These are vague geographic application including on the high seas, application

383 See Section 9.3.3.4.1.

384 See Section 9.3.3.4.2.

385 The Canadian ASPPR, Schedule VIII provides for sixteen zones which restricts navigation for all ships not complying with its class 1-10 icebreaker and A-E ice strengthened ships classifications throughout the year.

386 E. Franckx, *Maritime Arctic Claims*, p. 193.

to public vessels, mandatory fees, ice-breaker assisted pilotage, and ice-breaker leading and special areas.

The weakest point is the attempt to claim, however vaguely, that the Russian provisions have application to the high seas outside 200 miles from the baselines, which has no support either from Arctic State practice or from international conventional or customary law. Also very weak is the Russian claim for application of its legislation for *all* vessels, including military, which though supported by the Canadian legislation, is contrary to the U.S. practice and has no support under international law, including both conventional, LOSC Article 236 and customary. Though as seen chiefly U.S. submarines may have sailed in contradiction to the Russian rules, on the *surface* this point appears not to have been tested.[387]

Weak but 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 in payment for specific services rendered and non discriminatory. The Russian provisions are blanket and probably discriminatory in fact.

The Russian requirements for ice-breaker-assisted pilotage, ice-breaker leading and closed special areas are less clear. If compared to the U.S. provisions, these three points are arguably in excess. However, they may be more consistent with Canadian practice which has included either requiring a Canadian ice pilot on board or a Canadian Coast Guard Officer on board together with the accompaniment of a Canadian ice breaker. Specific areas can be closed for all shipping but Class 10 icebreaker. In addition even though the Russian may not be exactly the same as the Canadian, they could quite plausibly be argued justified as part of a sound environmental protection policy as required under Article 234, having due regard to navigation and required through safety considerations.

Thus since the legal substance of Article 234 is still under formation, taken together with the substantially similar Arctic State practice of the U.S. and Canada in the economic zone, it is maintained the unilaterally adopted Russian rules including mandatory notification, authorisation, shore-based pilotage, aircraft assisted leading, conventional pilotage, liability, discharge and safety standards, reporting, criminal liability, design, equipment, manning and construction standards and special areas are not contrary to Arctic State practice. As will be seen the same may also generally be said regarding the Russian enforcement provisions for inspection if deemed necessary, stopping, detention and arrest, suspension if deemed necessary, removal for violations of these non contrary provisions.

The conclusions thus are perhaps milder than that reached by one expert who notes, [388]

---

387 See Section 4.3.3.

388 E. Franckx, *Maritime Arctic Claims*, pp. 192 and 195. Ibid. p. 192 adds, "(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."

"the Soviet government has very carefully expanded its Arctic jurisdiction over the years, without ever outright defying existing international law rules," and "the Soviet Union may well have been running out of time in clarifying the exact legal status of its northern waters."

On the contrary, Russia may be stretching existing international law rules, but it is well supported by a local Arctic State practice for most of its comprehensive provisions. As such to the extent this practice is norm setting, local Arctic customary law is in the process of formation. Following LOSC ratification by these States, as noted this local practice also indicates a subsequent State practice in interpreting Article 234. Whether the current U.S. practice will continue is not known given the contradictory nature of OPA 1990.[389]

With this said compliance of Russian practice with LOSC Articles 211, 218-220 and MARPOL 73/78 will be analysed.

9.3.3.4. Compliance of Russian Practice with LOSC Articles 211, 218-220 and MARPOL 73/78

The comments made regarding liability and compensation are the same for this regime as made as above.[390] A related issue, bonding, will be covered briefly below under enforcement due to its role as a condition for release.[391]

9.3.3.4.1. Areas of Obvious Non Compliance

Compliance of the Russian Arctic practice with LOSC Articles 211, 218-220 and MARPOL 73/78 will be addressed, however the obvious contradictions between the extensive practice presented above[392] and the traditional international provisions will be mentioned, but not examined in depth. Contradictions between the Russian practice in the *non Arctic* marine zones and LOSC Articles 211 and 218-220 will be of special interest, because this general practice will augment the already contrary Russian Arctic practice in relation to the traditional LOSC navigational regime. The same will hold true below where a comparison will be carried out between the Russian practice and international customary law, including MARPOL 73/78 and the IMO conventions.[393]

As above the contentious points characterising the Russian provisions are the same,[394] all of which have been unilaterally adopted and enforced. When compared to LOSC Articles 211 and 218-220, it is obvious that *application to public ships, application to the high seas, criminal liability, fees, and design, construction, equipment and crewing standards,* all are in contradiction. This is based respectively as above upon LOSC Article 236, sovereign immunity; Articles 211, 218-220 incorporating MARPOL 73/78, coastal State prescription and enforcement rights restricted to the territorial sea and exclusive economic zone unless

389 N. Ronneberg, 'Speech' 26 April, 1995.

390 See Section 9.3.3.3.5.

391 See Section 9.3.3.4.3.

392 See Section 9.3.3.3.

393 See Section 9.3.3.5.

394 See Section 9.3.3.3.1.

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 ship exercising innocent passage through the territorial sea; and Articles 21(2), and 211(4) and (5) non application to the design construction, manning or requirement of foreign ships exercising innocent passage or navigation in the exclusive economic zone unless "generally accepted." The latter two are understood to also apply in the exclusive economic zone where in addition to being inconsistent with Article 211, would be illogical to allow such even stricter coastal State regulation than that allowed in the territorial sea.[395] Arctic State practice clearly supports however design construction, equipment and crewing standards, and criminal liability probably as well.

The remaining points are more nuanced however. Prescription under the Russian rules including established norms, notification, authorisation and leading and reporting of pollution will be addressed next.

9.3.3.4.2. Prescriptive Jurisdiction - "Established Norms," "Notification," "Authorisation" and "Leading," "Reporting" of Pollution

Article 19(3) and (5) of the 1984 Economic Edict describing pollution violations which include illegal drainages in the economic zone from vessels of mixtures containing more than *established norms* is generally consistent with the LOSC Article 1(4) definition if related to vessel source pollution. It is unclear though whether the term "established norms" indicates "generally accepted" international rules and standards required in Article 211(2) and (5), or established Soviet norms. The presumption is the latter, though Article 12 of the 1984 Economic Edict adds to Soviet environmental legislation under which environmental measures are to be carried out, "international treaties of the USSR." Probably most significant the 1985 Environmental Statute Article 2(2) elaborates that the lists of substances and mixtures prohibited discharged, as well as maximum allowable concentrations of mixtures permitted discharge, are determined by several Soviet ministries and published in *Izveshcheniia moreplavateliam*. The 1984 Procedure Edict Article (2) is to elucidate what are violations under Article 19 for which administrative and criminal responsibility entails, but does not address "established norms."[396] No mention is made of "generally accepted" norms. The 1984 Environmental Edict, though specifying nature protection in the Arctic, does not give a clear definition of pollution and notes only in Article 1 that special navigational requirements are decreed. Since as seen 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 discharge of sewage not purified up to the "established norms," as well as discharge of wastes, materials and articles. Article 18 broadly refers back to other Soviet legislation for questions not covered in the present convention. The 1990 Decree does not specify either a definition of pollution or the term "established norms", but does distinguish the agencies

395 R. Churchill and A. Lowe, *The Law of the Sea*, p. 257.

396 Article (2) on the other hand brings the definition of pollution even more consistent with LOSC Article 1(4), "causing harm to the health of people, living resources of the sea or recreation zones, or creating impediments for other lawful uses of the sea."

involved in ensuring nature protection in the Arctic.[397] The 1991 Rules assists somewhat in noting in Article 1.5. that special technical and operation rates and standards are set forth in the 1994 Design Requirements and 1995 Navigation.

Thus from these vague provisions applied to the Arctic "established" appears to be Russian rather than "generally accepted," and the discharge of wastes, materials, and articles appears completely prohibited including in non ice-covered areas in the Far North. Any closer specification of norms, such as the meaning of "wastes" is unknown though some may be published in *Izveshcheniia moreplavateliam*. Though not completely conclusive, indications are that the standards indicated are unilaterally determined and hence contrary to Article 211(2) and (5) as well as MARPOL 73/78 which require "generally accepted international rules and standards."

Moving to notification and authorisation as seen Article 3 of the 1991 Rules requires a notification and request for leading through the Northern Sea Route complying in form and time with 1995 Navigation Guide. This is in effect a condition for notification and permission for navigation in the Russian Arctic territorial sea and exclusive economic zone in the sector between Mys Zhelaniya and the Bering Strait. This seen traditionally is directly contrary to LOSC Articles 17 and 58 under which respectively innocent passage is guaranteed foreign States in a coastal State's territorial sea and navigation is guaranteed in the exclusive economic zone. Under the 1991 Rules Article 7, leading, related to the mandatory notification and permission for sailing, resembles a required use of sea lanes established for navigational safety.[398] Sea lanes are allowed under LOSC Article 22 in the territorial sea, and Article 211(1) in the exclusive economic zone. Under Article 22(3)(a) the coastal State must take into account recommendations from the IMO in the establishment of such, and under Article 211(1) must act through the IMO or general diplomatic conference. This has not been done here but rather adopted unilaterally by Russia,[399] and thus seen traditionally, leading is clearly in excess of the Articles 58 and 211 under which foreign States traditionally enjoy the freedom of navigation subject to the conditions noted.

Mandatory notification of pollution incidents to the Administration under Article 12 is substantially the same as Article 211(7), though the Russian rules are arguably narrower, requiring only notification "of any fact of pollution" and not "discharges or probability of discharges"

With this said looking at Arctic State practice the same may be said as noted above.[400] In spite of the striking transgressions noted to the traditional Article 211 and MARPOL 73/78 regime, substantially similar provisions are also unilaterally adopted by the U.S. and Canada.

---

397 These include the State Committee of the U.S.S.R. for Nature Protection, the Ministry of Fisheries of the U.S.S.R., the Administration of the Northern Sea Route of the Ministry of Merchant Marine of the U.S.S.R., and Border Guards of the Committee on State Security of the U.S.S.R.

398 A. Kolodkin 'Interview,' 25 February 1994 indicated a similarity between the two. Sea lanes are specifically allowed established under Article 3 of the 1990 Decree in special areas. See Section 9.3.3.4.5.

399 There may now be some movement in this direction however under the Working Group on Harmonization of Polar Ship Rules, to which Russia is a member, with a Code intended for presentation to the IMO. See Section 5.3.3.2.2.1.

400 See Section 9.3.3.3.3.

This includes the U.S. discharge standards under OPA 1990 § 1002(a),[401] notification and authorisation under OPA 1990 §§ 1016(a) and (b)[402] all leading except icebreaker-assisted pilotage and icebreaker leading under OPA 1990 § 4116 and the Monitoring Act 1990, [403] and the reporting of incidents are required under the FWPCA.[404]. Thus the Russian prescriptive provisions receive U.S. and Canadian support with the exception of icebreaker-assisted pilotage and icebreaker leading, which however receive partial support by Canadian practice.

Since for Russian enforcement until recently little differentiation is made between the general environmental regime for the exclusive economic zone, ice-covered areas and special areas, for clarity the discussion was postponed to the next Section.

9.3.3.4.3. Enforcement - "Inspection," "Arrest," "Detention," "Suspension of Passage" and "Removal"

Russian enforcement jurisdiction is all-encompassing and as noted until recently was similar for the general exclusive economic zone, special areas, and ice-covered areas. Due to its key role in the substantiation of the Russian provisions as well as its strict application,[405] some space will be devoted to this subject. Though the interpretative permutations are many, Arctic State practice brings clarity into this area and supports the Russian provisions.

As seen Article 15 of the Economic Edict is one of the central provisions and refers to enforcement of violations of Article 12, economic zone; Article 13, special areas; Article 14 ice-covered areas. Such measures may be justified under "due regard..." balanced with "environmental protection..." of Article 234.[406] Under the general regime however there is less latitude, and there must be compliance with the complex LOSC Articles 118 and 220. Differences between the Russian and Articles 218 and 220 incorporating MARPOL 73/78 do exist, most of them falling in favour of increased coastal State jurisdiction.[407] Specifically, Article 15 governs ships navigating in Soviet territorial waters or economic zone which have violated "in this zone." If it were meant to approximate Article 220(2) for enforcement in the territorial sea, then where there exits "clear grounds" for violations of domestic provisions adopted in accordance with LOSC provisions or "applicable" international rules and standards, physical inspection and upon sufficient evidence, institution of proceedings including arrest may be carried out. Unclarities include however whether the domestic provisions which may be violated including, Article 12, Article 13, and Article 14 of the Economic Edict are consistent with LOSC provisions. As seen discrepancies exist regarding Article 14, ice-covered areas. Though Article 12 corresponds with LOSC Article 194(1),[408]

---

401 See Canada's AWPPA s. 2 and 4 for a complete ban.

402 See ASPPR, Schedule VIII s. 12 for the Canadian obligatory pollution prevention certificate.

403 Canada has required escort and pilotage for vessels in the Northwest Passage and may have even more comprehensive plans of regulation.

404 The Canadian counterpart is AWPPA s. 5.

405 E. Gold, *Handbook on Marine Pollution*, pp. 88, 101.

406 See Section 9.3.3.3.3.

407 See E. Franckx, *USSR Pollution Prevention*, 164-171 for a comprehensive comparison.

408 See ibid. 162.

Article 13, special areas, clearly deviates.[409] Thus since environmental violations for ice-covered areas and non ice covered areas differ, enforcement of such under Article 15 necessarily is at variance even though "clear grounds" exist. This argument is similarly supported by the enforcement Article 15 of the 1984 Environmental Edict which appears generally inconsistent with LOSC Article 234, Article 211(6) as well as Article 220(3-8). Reference is made as seen to enforcement of violations provided for by Article 14 which in turn refers in relevant part to Article 3 (ice covered areas), Article 4(1) and (2) (sea lanes in special areas), and "of the rules promulgated on the basis thereof..." As seen Article 3 differs from Article 234, and therefore subsequent enforcement of such must also necessarily differ. The same will be seen concerning special areas, Article 4(1) and (2) differing from Article 211(6), with enforcement in such necessarily differing.

Due to the wording of Article 15 of the Economic Edict it is unclear whether the application encompasses the territorial sea consistent with Article 220(2), or the exclusive economic zone similar to Article 220(3), though the title would seem to imply the latter.[410] Article 4(a) of the Protection Statute also using the phase, "in that zone," and dealing exclusively with the economic zone, would apparently support the latter. However this enforcement regime is also arguably applicable in the territorial sea, since otherwise the coastal State could exercise more rights within the exclusive economic zone than the territorial sea.[411]

For violations in the territorial sea nothing appears in Article 15 concerning innocent passage, while Article 220(2) (and MARPOL 73/78 Article 4(2)) permits coastal State enforcement for pollution violations, subject to the rights of innocent passage and "clear grounds" that a violation has taken place. Furthermore, except for cases of wilful and serious pollution under Article 19(h), non innocent passage, under customary law it is doubtful that the coastal State would take any enforcement action except in its ports.[412] It is seemingly in this case, where a State has unrestricted enforcement jurisdiction, that Article 15 would be most consistent with Article 220(2). On the other hand to initiate a inspection Article 15 requires "clear grounds," a large polluting discharge or threat of such and refusal of the ship to provide information. "Clear and objective evidence" or a major polluting discharge or threat of such are required for the initiating 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 information request or major polluting discharge. The *lower* Article 220(2) threshold for physical inspection of the ship and initiating of proceedings apparently runs contrary to the excess Russian enforcement jurisdiction seen below.[413]

---

409 See Section 9.3.3.4.3.

410 See E. Franckx, *USSR Pollution Prevention*, 166, who notes, "...it is impossible to ascertain whether the area where the violation has occurred is restricted to the EEZ, or whether the territorial sea is also included."

411 This is the view taken by N. Koroleva, V. Markov, and A. Ushakov, *Legal Regime of Navigation in the Russian Arctic*, p. 75.

412 See Section 9.2.5.3. R. Churchill and A. Lowe, *The Law of the Sea*, p. 260; and P. Birnie and A. Boyle, *International Law & the Environment*, p. 276.

413 E. Franckx, *USSR Pollution Prevention*, 166, 170-1 does not mention this contrary point.

For violations in the exclusive economic zone Article 15(2) leaves open the kind of information required delivered to establish whether a violation has occurred, whereas Article 220(3) partially specifies ship 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 ship's papers and navigational documents, documents concerning the crew, passengers and cargo. With the exception of documents of passengers, [414] the objects allowed inspected would seem to fall within Article 220(3) requirements for inspections. For inspection of a ship to take place or the institution of proceedings, the prerequisite under Article 220(3) that the circumstances of the case justify such inspection or institution of proceedings, does *not* appear in Article 15(2), contributing incrementally to increased coastal State jurisdiction.[415]

For the next level to come into play, physical inspection, neither Article 15(2) nor Article 4(a) of the 1985 Protection Statute state the circumstances of the case must justify such inspection, though the other Article 220(5) conditions seem provided for including, "clear grounds," matters relating to the violation, a substantial discharge causing or threatening significant pollution, a refusal to give the necessary information or manifestly wrong information is given. Article 6 of the 1991 Rules allows an open ended inspection satisfying few of the Article 220(3), (5) and (6) conditions. Article 6.3. however does specify that inspections may include examination of documents certifying ship compliance with the requirements "for ice navigation", cargo documents, and "*depending upon particular circumstances*, direct examination of the vessel's condition, her equipment, facilities, technical navigational instruments, and readiness and ability to fulfil requirements concerning prevention of marine pollution." "Depending upon particular circumstances" would seem to approximate "if the circumstances of the case justify such inspection," and if viewed together the Russian legislation substantially complies with Article 220(5).

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. This is reiterated under Article 4(e) of the 1985 Protection Statute, vessels in violation of established rules may be detained. Further Article 4(e) clarifies vessels navigating in the economic zone may be detained when there is "clear and objective evidence" of such violation which led to major damage or threat of such to the coastline, related interests or resources in the territorial sea. Such ships must be delivered to one of the open ports under Article 4(h). These passages seem generally consistent with Article 220(6), with the exception that the condition "where the evidence so warrants" is lacking as above and is not addressed by the 1991 Rules.[416]

Article 15(4) lacks "voluntarily within a port" from Article 220(1) implying that force may be used to bring the ship to port. In addition Article 15 does not provide for a flag State

414 Ibid. 166 sees the omission of the statement "that evidence so warrants" the institution of proceedings in Article 15 as noteworthy, whereas it already appears understood under the passage, "clear and objective evidence" of both Article 12 and Article 220(6).

415 Nor does it appear under Article 4(a) and (e) of the Protection Statute. "Clear grounds" are necessary for pollution inspections. See E. Franckx, *USSR Pollution Prevention* 166.

416 Ibid. sees the omission of "that evidence so warrants" in Article 15 as noteworthy, whereas it arguably is inherently understood in "clear and objective evidence" in Article 15 and redundant in Article 220(6).

pre-emption, which Articles 220(1), (2) and (6) require, nor for the suspension of coastal State proceedings within six months of a flag State instituting the same, consistent with Article 228 for violations in the exclusive economic zone. At the same time 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. Article 4(a) of the 1985 Protection Statute is generally consistent with LOSC Article 220(3), requiring clear grounds for requesting necessary information to establish whether a pollution violation was committed in the economic zone, though mention of territorial sea is again noticeably absent. Article 4(a) is otherwise also generally consistent with Article 220(5) and allows detention and inspection of the ship if a violation led to a large discharge which caused significant marine pollution or threat of such, and the ship refused to provide necessary information or the information provided was inconsistent. Under Article 4(i) the offender may be taken into custody and conveyed to an open port, which is generally consistent with Article 220(6) with the exception that "where the evidence so warrants" is lacking. Under Article 4(d) "implements, equipment, instruments and other articles and documents" may be seized, and under a broad interpretation of the term "equipment", seemingly vessels could be included.[417]

Article 11 of the 1990 Decree, also central, expands upon these provisions in favour of increased coastal State jurisdiction. This is to be expected since as noted the entire 1990 Decree is to implement legislation concerning nature protection in the *extreme north* and *adjacent maritime areas*. Only Articles 15 incorporating 14 of the Economic Edict are Arctic specific. While from the title the 1984 Environmental Edict would appear Arctic specific, only Articles 3 and 15 of the 1984 Environmental Edict have direct relevance. Most of the conditions under Article 220, concerning amount of evidence required and degree of pollution are lacking. While arguably consistent with the Article 234 balance, "due regard to navigation" and "environmental protection and preservation scientifically based," Article 11 of the 1990 Decree significantly *exceeds* Article 220(2),(3),(5),(6) and (8). The same may be said for Article 226 providing for inspection safeguards, and if violations bonding, and immediate release, since the way from inspection to arrest under Article 11 appear short.

Under Article 11(a) plenipotentiary officials have the right for purposes provided for by Article 15(1) of the 1984 Environmental Edict, blankly to "stop and inspect" not subject to "clear grounds," or any of the other conditions enumerated above under Article 220(2),(3) and (5). Under Article 11(e) ships navigating (or moving), in violation of established rules, may be detained and conveyed to open Soviet ports, not subject to "clear grounds" or "clear objective evidence" or any other conditions enumerated under Articles 220(2) and 220(6). "Stop and inspect" is expanded upon under Article 6 of the 1991 Rules[418] wherein such measures may be initiated dependent upon the broad discretion of the Administration concerning "unfavourable ice, navigational, hydrographic, weather, and other conditions

417 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.

418 As seen the 1991 Rules deal ostensibly with the Northern Sea Route, however due to the expansive geographic scope of the Northern Sea Route, effectively operating in the entire Russia Arctic except the high seas, the 1991 Rules enjoy equal application as the more general Decrees and Edicts.

which might endanger a ship, or there is a threat of marine pollution of the Soviet Northern Coast. Inspections may include certifications of compliance with special requirements, cargo documents, and "depending upon particular circumstances," the "vessel's condition, ...equipment, facilities, ...navigation instruments, and readiness and ability to fulfil requirements concerning prevention of marine pollution."

Article 11(e)(2) of the 1990 Decree, in contrast, specifies that ships illegally *discharging* polluting substances in marine areas *adjacent* to the Soviet northern coast, subject to "clear and objective evidence," and threat of major damage to the Soviet coastline, related interests, resources in the territorial sea, or economic zone, may be detained, similar to Article 220(6). However "the continental shelf of the USSR" where damaged resources may be located is added, and "subject to Section 7, provided that the evidence so warrants..." is dropped. Reports concerning violations, detentions and seizures are required under Article 11(g), which 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. In contrast Article 11(f), similar to Article (e)(1), may override the conditions set forth in Article (e)(2). Under this paragraph, "offenders of the legislation..." may be detained, conveyed to an open port and gear, instruments and other objects and documents, as well as illegal extractions, seized. No conditions are listed. The override is strengthened also by the broad Article 6 of the 1991 Rules noted above.

The relation between Article 11's sub paragraphs is unclear. It would appear as well that the relation between Article 11 and Article 15 of the Economic Edict is unclear, though the intention probably was that Article 11 would override the more general Article 15, being more recent in time and much more Arctic specific.

Article 9 of the 1991 Rules allows navigation to be *suspended* in specific sections of the Northern Sea Route "where an obvious necessity of environmental protection or safe navigation dictates so" for the period that the circumstances exist. This uses some of the same language of LOSC Article 211(6), and while arguably allowable under the Article 234 balance, "due regard..." and "environmental protection and preservation...," significantly lacking under Article 211(6) is the procedure for special areas for consultations through the IMO with other States concerned, and IMO adoption. The general enforcement provision Article 220 is made applicable to domestic provisions adopted under Article 211(6) special areas under Article 220(8). In addition while Article 211(6) limits coastal State provisions in these areas to discharge standards, requiring design, equipment, manning and constructions standards to be "generally accepted," this is not mentioned in the Russian rules, and the areas may unilaterally be closed despite compliance with discharge and design, equipment, manning and constructions. This is clearly in excess of Article 211(6). In the territorial sea suspension of navigation is allowed under LOSC Article 25 "if such suspension is essential for the protection of its security." As seen above, under LOSC Article 19(2)(h) acts of wilful and serious pollution are deemed prejudicial to the peace, good order or security of the coastal State, for which passage may be deemed non innocent and hence prevented. Article 9 in addition to being more vague is also "before the fact". LOSC Article 19(h) is "after the act."

Hence suspension in the territorial sea is specific areas under article 9 is also deemed to be in excess of LOSC Article 25.

Interestingly, Article 5 of the 1990 Decree and Article 10 of the 1991 Rules, dealing with *removal*, also expand upon previous provisions in favour of coastal State jurisdiction. These provisions note that ships violating navigational requirements along the Northern Sea Route, 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. Since under traditional regimes for innocent passage in the territorial sea and especially navigation in the exclusive economic zone, notification and permission are inconsistent, so are any measures to remove the vessels. The same can be said for the technical rules, which as shown are unilaterally adopted, not "generally accepted," and therefore traditionally also removal would be contrary. Articles 218 and 220 do not state removal as a remedy, in fact Article 219 requires that port States as far as practicable prevent unseaworthy ships from sailing until repaired in conjunction with bonding under Articles 220(7), 226 and 231.

Even if viewed under the Article 234 balance, "due regard..." and "environmental protection and preservation...," the provisions for removal scarcely could be claimed to be in compliance. It questionably could be argued in favour of environmental protection and preservation to remove vessels deficient in special Arctic technical requirements to the Arctic high seas, even if routes are directed. The real reason is security and lack of notification and authorisation, and the expelling of military ships in non-innocent passage from a State's territorial sea, but applicable in the exclusive economic zone, is what this most resembles.

Closely associated with detention, bonding, under Article 19 of the Economic Edict and Article 22 of the 1985 Protection Statute, and reporting under Article 19 of the Economic Edict, are generally consistent with LOSC Articles 220(7) and 231,[419] requiring release of detained ships upon a showing of proper security and reporting to the flag State of measures taken. This is reiterated in Article 15(2) of the 1984 Environmental Edict provision for reporting to the flag State of arrest or detention and immediate release upon posting bond or other, which is supported by the Article 11(g) of the 1990 Decree, reports concerning violations, detentions and seizures, and Article 4 of the 1990 Decree as well as the general Article 5 of the 1991 Rules, certificate of financial security.

In spite of the excesses both with the LOSC Article 218 and 200 regime and the Article 234 regime what is of importance here is a comparison of the Russian enforcement provisions with the U.S. and Canadian practice.

Briefly as noted the U.S. OPA 1990, which with the exception provisions governing the Prince William Sound and the Cook Inlet is *not* Arctic specific, requires a showing by vessels of financial security for maximum liability, and lacking this the vessel may be *withheld clearance, denied entry* into U.S. navigable waters, *detained* and if found within such waters

419 See E. Franckx, *USSR Pollution Prevention* 170.

without the necessary evidence, subject to *seizure* and *forfeiture*.[420] The vague "navigable waters" may include the U.S. exclusive economic zone, though in practice the OPA 1990 is not being enforced in the Arctic economic zone at this time. It is not known specifically if enforcement takes place in the non Arctic economic zone, especially due to the controversial nature of the legislation resulting in at least one lawsuit, but the possibility definitely exists. Thus, the U.S. enforcement provisions are briefer than the Russian, but because of this as well as inherent vagueness may in fact be more comprehensive. The Russian provisions have at least some similarity to the Article 218 and 200 regime. Requests for information and inspections under OPA 1990 § 1016(a) and (b) are scarcely mentioned. The conditions for initiating proceedings including arrest under Article 220(2), (3), (5), (6) "clear grounds" and "clear objective evidence," as well as "substantial discharge" or "discharge causing major damage" are lacking. The same may be said regarding suspension of passage. Though "detain at that place" under OPA 1990 § 1016 (b)(2) may signify a ship "voluntarily in port," required by Article 220(1), this far from clear and similar to the Russian may indicate that force may be used. Removal appears to be the only Russian measure which may not be supported by the U.S. practice. What this means for the Article 218 and 200 regime applied in the Arctic is that the Russian enforcement provisions, for requests for information, inspection, arrest, detention, suspension of passage, seizure receive more than ample support from the U.S. and the Canadian, with the exceptions noted above.[421] Removal is in excess.

For the Article 234 regime the same could be claimed. The "due process..." and "environmental protection and prevention..." balance is stretched even more by the U.S. OPA 1990 § 1016 which is non Arctic specific and lacks all differentiation regarding a showing of evidence and degree of pollution damage. The Russian especially in the older Article 15 of the 1984 Economic Edict applied through Article 14 to ice covered areas contains the general same conditions of application as for the Article 218 and 200 regime. Even if the comprehensive Russian Article 11 of the Arctic specific 1990 Decree is solely governing, it is reasonably parallel to the U.S. OPA 1990 § 1016 concerning requests for information, inspection, arrest, detention, suspension of passage and seizure. It appears reasonably parallel to the Canadian for information, inspection and suspension of passage. Removal is not directly supported, but may receive indirect support from the U.S. restriction of access to U.S. navigable waters of ships in questionable condition. Both indicate the same disregard for "environmental protection and prevention" in the Article 234 balance, as well as disregard for Article 219 requiring repairs before sailing. Russia expels such ships to ice-covered high seas, and the U.S. keeps them out there in the first place.[422] The effect is the same.

---

420 OPA 1990 § 1016(a) and (b). See Section 9.2.2.3.5.2. Briefly, the Canadian enforcement measures are less comprehensive than the Russian and the U.S., though rigorously enforced. See Section 9.2.2.3.5.1. As seen 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 sailing, and under ASPPR Schedule s. 15 and AWPPA s. 15(3) ships 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 be in the offing. Few of the conditions for showing of evidence of amount of pollution damage appear in the provisions.

421 See Section 9.3.3.4.1.

422 The Canadian AWPPA s. 15(3) appears to keep such vessels from sailing.

Special areas will be addressed next.

9.3.3.4.4. Special Areas

In general, special delineated areas with special anti pollution measures may be established by the Soviet Council of Ministers under Article 13 of the Economic Edict supported by Article (4) of the 1985 Environmental Statute, using much the same language as LOSC Article 211(6). Significantly lacking however is the Article 211(6) procedure for consultations and adoption through the IMO with other States concerned. In addition while Article 211(6) limits measures in these areas to discharge standards, requiring design, equipment, manning and construction standards to be "generally accepted," this is not mentioned in the Russian rules. Unless the Russian technical rules are in substantial compliance with the Code planned to be submitted to the IMO by the Working Group on Harmonisation of Polar Ship Rules,[423] and later adopted by the IMO and recognised by the negotiating States, these can not be claimed to be "generally accepted."

As noted sea lanes are mentioned in the Russian environmental legislation only in relation to Arctic special areas and are unilaterally adopted.[424] Article 211(6) allows the establishment of sea lanes in special areas, if adopted through the IMO, including mandatory consultations, communication, determination and implementation of international rules and standards as made "applicable" for special areas under Article 211(6)(a).

The extensive Russian enforcement legislation noted above,[425] which is also applicable to special areas including through Article 13 of the 1984 Economic Edict, necessarily is inconsistent with Article 220(8). All the objections noted for the enforcement provisions apply equally 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 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 1991 Rules appear consistent with Article 211(6)(b).

As seen above the practice of the U.S. and especially Canada give substantial support to the Russian provisions for special areas in the Arctic despite substantial transgressions with the traditional LOSC Articles 211, 218-220, MARPOL 73/78 regime.[426]

423 See Section 5.3.3.2.2.1.

424 See Section 9.3.3.3.6.

425 See Section 9.3.3.4.1.

426 See Section 9.3.3.3.6.

9.3.3.4.5. Conclusions

In conclusion much the same may be stated as maintained above related to the LOSC Article 234 regime.[427] Despite substantial excesses by the unilaterally adopted Russian Arctic environmental provisions with the traditional Articles 211, 218-220, MARPOL 73/78 regime, it is only reporting of pollution incident and information requested which generally seem consistent, the provisions are substantially supported by U.S. and Canadian Arctic practice. The excesses of non Arctic specific legislation with the traditional regime has been noted as well. It is only geographic application including the high seas, application to public vessels, mandatory fees, ice-breaker assisted pilotage, ice-breaking leading and special areas which are inconsistent, and the three latter are supported by Canadian practice.

Though this conclusion may not be too surprising since Russia has expressly based its Arctic legislation upon Article 234, what is noteworthy is that with increased ratification of the LOSC, the traditional LOSC Articles 211, 218-220, MARPOL 73/78 regime is that which may most likely govern, especially for Western coastal States.[428] The possibility exists that the chief opponent, the U.S., may attempt to fall back to this regime even in the Arctic, through an eventual repeal of the OPA 1990.[429] The fact cannot be denied however in the 1990's that it substantially supported through local custom the expanded version of Article 234.

With this said compliance of Russian practice with international customary law and MARPOL 73/78 will now be addressed.

9.3.3.5. Compliance of Russian Practice with International Customary Law and MARPOL 73/78

Briefly as seen under the TSC and customary international law a coastal State may generally prescribe environmental and navigational legislation it desires for foreign ships in its territorial sea as long as innocent passage is not hampered.[430] Under MARPOL 73/78 a coastal State is obliged to prescribe MARPOL 73/78 provisions for foreign ships, but with a restrictive interpretation regarding jurisdiction under Articles 4(2) and 9(3) restricting regulation to a coastal State's territorial sea and internal waters. It is obliged to either take legal proceedings itself in cases where there exists evidence of violations or forward to the flag State such information. States may not legislate so as to hamper (TSC Article 15(1), LOSC Article 24(1)) or charge for innocent passage (TSC Article 18(1), LOSC Article 26). They may charge for specific services including pilotage, but in a non discriminatory manner (TSC Article 18(2), LOSC Article 26(2). A coastal State is permitted to enforce violations of its environmental and navigational legislation committed in its territorial sea by foreign ships by arresting and bringing proceedings. Under MARPOL 73/78 the provisions are the same as

427 See Section 9.3.3.3.7.

428 See Section 9.2.4.5. As noted in Sections 9.2.2.2. Ann 9.2.2.3.3. the U.S. has acknowledged it considered LOSC Part XII international customary law.

429 See Section 9.2.2.3.6.

430 See Section 9.2.5. and R. Churchill and A. Lowe, *The Law of the Sea*, pp. 79-81.

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, which in practice is that most used, may exercise enforcement jurisdiction under the MARPOL 73/78. Port authorities may carry out an inspection and if found wanting detain a ship until repaired sufficiently to not take legal proceedings.

Under customary international law the extensive Russian rules outlined above for mandatory notification and authorisation, possible application on the high seas, all 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 public ships clearly are *in excess* for all maritime zones with the exception of internal waters. As seen even these may be in contention for the straits.[431] Free navigation is the rule for the high seas and exclusive economic zone The most interesting is the territorial sea.[432] As seen above under LOSC Article 19(h) only acts of wilful and serious pollution contrary to the LOSC may be considered as non innocent against which the coastal State may take necessary steps without hampering innocent passage under Article 24. At the same time under Article 21 provisions for navigational safety and environmental protection may be adopted by the coastal State which would enjoy more than usual application in Arctic ice-covered waters. Blanket application of all the rules to public ships and criminal liability for pollution violations have no support under this regime. As seen above the discharge and safety, design, construction, equipment and crewing standards must be "generally accepted" through MARPOL 73/78 and other IMO conventions ratified by the States representing a high percentage of the world's gross tonnage.[433] As seen it is doubtful the Russian requirements qualify since the "established norms" appear established by Russian organs. Notification and authorisation for the passage of public vessels in the territorial sea is controversial, and here may be allowed through contacts by low level naval attachés and officers.[434] For commercial vessels the same is arguably required for reasons of safety in ice-covered waters under LOSC Article 21. Pilotage may also be required and charged under the same to further safety of navigation. However the Russian blanket requirements for all leading except shore-based pilotage, as well as fees, apply when they are arguably not needed, such as during ice free summers, and are probably applied in a discriminatory manner against non Russian ships only.[435] The various Russian enforcement measures including inspection, arrest, detention, suspension, removal and other proceedings may be justified in the territorial sea on a case by case basis, but under this regime are practised almost exclusively in State ports. Enforcement of questionable legislation itself seems questionable. When *acts* of wilful and serious pollution under Article 19(2)(h)occur, then the more stringent enforcement measures are

431 See Section 5.3.3.2.1. and 7.NEED.

432 A more complete discussion appears in Section 7.NEED. The LOSC innocent passage regime has arguably passed into customary international law. See R. Churchill and A. Lowe, *The Law of the Sea*, pp. 79-84.

433 See Section 5.2.3.2.2.1.3.

434 See Section 7.NEED. See also R. Churchill and A. Lowe, *The Law of the Sea*, pp. 75-6.

435 See Sections 9.3.3.3.1. and 9.3.3.3.4.

clearly applicable. The liability certificate is probably irrelevant,[436] and special areas have no support except for temporary closure to navigation under Article 25(3).

Thus 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 hinder innocent passage under TSC Article 15(1) and LOSC Article 24(1) and are in excess.

However, in spite of this substantial non compliance with customary international law, as above the Russian provisions governing the Arctic are substantially supported by U.S. and Canadian Arctic practice. It is only geographic application including the high seas, application to public vessels, mandatory fees, ice-breaker assisted pilotage, ice-breaking leading and special areas which are inconsistent. The three latter enjoy support by the Canadian practice. This also is to be expected due to the Article 234 base for the Russian legislation. However of importance is the fact that despite the mentioned increased movement towards the Article 211, 218-200 and MARPOL regime by European and North American States, as well as general LOSC ratification, it is the traditional customary regime which is that probably most representative of governing law.[437] The possibility also exists that the U.S. may attempt to fall back to this regime in the Arctic, through an eventual repeal of the OPA 1990.[438] This seems less likely than the above alternative due to the U.S. support given to the Article 211, 218-220 and MARPOL 73/78 regime, however the customary law regime is that which is presently most solid. Any moves in this direction as above will be compromised by the fact that in the 1990's the U.S. substantially supported through local custom the expanded version of Article 234.

With this said the relevant Arctic practice of the U.S. and other States with respect to navigation will be now be analysed.

### 9.3.4. The Arctic Practice with Respect to Navigation of the U.S. and Other States in Russian Arctic Waters

#### 9.3.4.1. Introduction

As noted it is only the U.S. through its declarations and submarine navigation which opposes the Russian practice in its Arctic waters to any substantial degree.[439] However, it has recently been discovered that Norwegian practice may also play a role.[440] No official

436 See Section 9.3.3.3.5.

437 See Section 9.2.5.4. As mentioned P. Birnie and A. Boyle, *International Law & the Environment*, pp. 277-8 note that despite the principle of extended coastal state rights beyond the territorial sea is currently a part of international law, only a small number of States have in practice extended their jurisdiction over pollution in the exclusive economic zone.

438 See Section 9.2.2.3.6.

439 See Sections 4.3.2., 4.3.3.2., 5.2.3.2.2.1., 5.2.4.2.2., 5.3.3.3. and 9.2.3.4.

440 The following information was obtained from a INSROP Joint Research Council meeting at Fridtjof Nansen Institute 17 April, 1996, in which interviews were carried out with Deputy Director A. Ushakov (Ushakov Interview 17 April 1996); Lt. Cdr. T. Ramsland (T. Ramsland Interview 17 April 1996); and Director, Central Marine Research & Design

Norwegian protest to the Russian legal regime in the Arctic has been lodged, [441] though apparently during recent Autumns, the ship H.U. *Sverdrup II* has carried out marine research on the *surface* in the Russian exclusive economic zone and possibly the territorial sea. It is unclear how many voyages have been made, and details have been scanty, however as many as a total of six voyages may have been made in the Kara Sea, some affiliated with the U.S. Navy.[442]

9.3.4.1.1. Norwegian Practice

In the summer of 1995 the public Norwegian ship, *Sverdrup II* carried out marine research on the *surface* in the Russian exclusive economic zone and possibly the territorial sea examining the dumped Russian atomic reactors in the Kara Sea with respect to leakage.[443] Coring samples were also taken from the continental shelf. The personnel were reported to include a Norwegian Captain and crew and a military officer, six scientists and engineers from the NDRE, and several Americans affiliated with the U.S. Naval Research Laboratory and a chemical oceanographer from the International Atomic Energy Agency - Marine Environment Laboratory (IAEA-MEL). Fifty Russian researchers of unknown origin were invited to be on board but refused the invitation.[444] Prior to the voyage the Norwegian Foreign Ministry did not request permission to sail in the Russian exclusive economic zone but rather *informed* the Russian Foreign Ministry that it was to be carried out. The Norwegian Ministry of Defence, the U.S. Navy and the Russian Ministry of Defence have entered into a trilateral agreement covering the environmental investigations, annulled it and entered a revised agreement.[445] During the voyages, no attempts by the Russian government were made to enforce domestic legislation in the exclusive economic zone which could result in arrest and detention or suspension and expulsion.[446] Deputy Director A. Ushakov announced in the INSROP Joint Research Committee of 17 April 1996, that the voyage, it is not known which of the six, was discussed in a Russian Government Committee for Northern Areas which was strongly opposed to such occurring again. It was strongly indicated that a Note may be delivered to the Norwegian government in protest in spite of the improved relations indicated by President Yeltsin's recent visit in March 1995. At the same time it was indicated

---

Institute, St. Petersburg, Russia, V. Peresypkin (Peresypkin Interview 17 April 1996). Information is also obtained from *EPOCA-95 Cruise Report*, Naval Research Laboratory, February 13, 1996, Washington, DC, 20375-5320 (Kara Sea Cruise Report).

441 See Sections 4.3.2. and 6.1.

442 T. Ramsland, Interview, 17 April 1996. Ibid. indicates that the *Sverdrup II* is used by the Norwegians both on hydrographic research and military research through the exchange of equipment, though on this trip it was considered military. Kara Sea Cruise Report p. E-1 notes that *Sverdrup II* is affiliated with the Norwegian Defense Research Establishment (NDRF), and the Kara Sea Cruise Report itself appears with a U.S. Navy letterhead.

443 T. Ramsland, 'Interview,' 17 April 1996 indicates that the territorial sea was entered on occasion, though on this voyage at least Kara Sea Cruise Report p. 19 may indicate otherwise.

444 T. Ramsland, 'Interview' 12 May 1996 noted that at approximately the same time, summer 1995, the Commander of Military Forces in Northern Norway, who is the competent official in such cases, permitted mixed Russian and Norwegian crews on Norwegian ships to carry out seismic investigations on the Norwegian shelf on two occasions.

445 Ibid. The revised agreement, "Declaration on Arctic military environmnetal cooperation between Russia, U.S.A .and Norway ," was obtained from the Norwegian Department of Defense, 7 April, 1997.

446 See Section 9.3.3.1.

by Director V. Peresypkin, that some fifty-five ships of differing nationalities requested permission to sail in Russian Arctic waters in 1995, which was granted.

In the INSROP Joint Research Council meeting of 17 June 1996, Deputy Director A. Ushakov delivered a letter to the author, signed by Director of the Northern Sea Route Administration, Captain V. Mikhailichenko, wherein a protest was made to the 1995 *Sverdrup II* voyage,. This letter, also sent to the NDRF,[447] stated the M/V "Sverdrupp" under supervision of the FFI located on 16 September 1995, violated the 1991 Rules concerning notification, special requirements and leading, inspection and permission to sail.[448] Additionally noted was that separate permission from the Russian Foreign Ministry to carry out research in the Russian Arctic was also required. Another voyage by H.U. *Sverdrup II* was planned for August 1996,[449] which apparently passed without incident.[450] Apparently at least the two known voyages of *Sverdrup II* were permitted under the trilateral agreement. The protest sent to NDRI by the Northern Sea Route Administration was therefore contrary to official Russian policy carried out by the Russian Ministries of Defence and Foreign Affairs.[451]

The declarative and navigation practice of the U.S. and other in relation to the Russian - Article 234 regime will now be addressed.

#### 9.3.4.2. Declarative and Navigational Practice of the U.S. and Other in Relation to the Russian - LOSC Article 234 Regime

As noted the U.S. presumably sails its submarines in Russian Arctic waters in accordance with traditional law of the sea norms. In spite of the Vil'kitskii Straits incidents in the mid 1960's and the few voyages through the Canadian Arctic in the mid 1980's the U.S. protests have been essentially declarative in nature and directed chiefly against the enclosure of Russian Arctic straits by straight baselines and application of the Russian environmental regime to public vessels.[452] The somewhat weak U.S. assertions can only be undermined by the U.S. practice as a coastal State indicated above.[453] If authorisation is lacking, the indicated *Sverdrup II* voyages and other strike the Russian regime on one of its weakest points, application to public vessels, as effective substantive protests by Norway and the U.S. Though the Russian practice finds support from the Canadian regime in this respect,[454] there

---

447 In the letter the Russians for NDRF used the Norwegian abbreviation, (FFI) from "Forsvarets Forskningsinstitutt."

448 Specifically stated required were 1) Name of ship, flag, port of registry, shipowner (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.). Also noted was that Igarka is the only port open for entry of foreign ships.

449 T. Ramsland, 'Interview' 12 May 1996.

450 T. Ramsland, 'Interview' 10 October, 1996.

451 Ibid.

452 See Sections 4.3.1., 4.3.2., 4.3.3.2., 5.2.3.2.2.1., 5.2.4.2.2., 5.3.3.3., 9.2.2.3.5.1. and 9.2.3.4.

453 See Section 9.3.4.2.

454 See Section 9.2.2.3.5.1.

has been found no other State attempting to regulate such practice in ice-covered areas contrary to Article 236. As noted other States appear to be sailing in compliance with the Russian regime, though it is not known how many of the fifty-five mentioned from 1995 have been public.[455] On the other hand if Russian authorisation is given to the *Sverdrup II* passages and other, an argument may be raised that Norway and the U.S. are also *complying* with the Russian regime. Where public ships are specifically exempt under Article 236 for navigation in the Russian exclusive economic zone, as well as permitted to carry out various military research activities,[456] entering into an agreement ensuring rights States already have, entirely or partially, is nothing other than compliance with the Russian regime.

Related to commercial ships, based upon the U.S. practice in the Canadian Arctic characterised by compliance with Canadian domestic legislation,[457] U.S. participation in the Conference for Harmonisation of Polar Ship Rules and the U.S.'s own domestic legislation the 1990 OPA, [458] all implementing Article 234 to a degree, it is expected the U.S., with the exception of application to the high seas, will probably require its vessels to follow all the Russian provisions. It appears that the U.S. does not consider that such division in Arctic State coastal and navigational practice to set a detrimental precedent to its practice elsewhere; so it will probably continue doing what it is already doing. [459] Even if the OPA 1990 is repealed, this Arctic specific U.S. practice may continue due to the same. Should the Northern sea Route become economically feasible for U.S. vessels however especially the discriminatory and blanket fees may come under scrutiny. So far however it appears that of the known commercial vessels of Finnish, Latvian and German flag, all are sailing in compliance with the Russian rules.[460]

What this means is that a broad interpretation of Article 234 is being locally practised through substantial compliance with and support for the Russian provisions, in spite of U.S. declarations to the contrary, for surface traffic for both commercial vessels and public vessels. This clearly includes provisions for mandatory notification and authorisation, all 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. Application to public ships and possible application on the high seas are not included. Should compliance continue it would be difficult to argue against the fact that firm particular customary law has been formed for the Arctic. That a coastal State may legislate and enforce comprehensive Arctic standards the contours of which are given by these characteristic terms is norm setting.

The legal effects of occasional submarine traffic under the surface and military research traffic on the surface, *both secret*, are questionable, unless some degree of coastal State

---

455 See Section 9.3.4.2.

456 See Section 7.NEED.

457 See Section 9.2.2.3.5.1.

458 See Section 9.2.2.3.3. The U.S. State Department notes that U.S. coastal State legislation may infringe on the exercise of traditional high seas freedoms of navigation. J. Roach and R. Smith, *Excessive Maritime Claims*, pp. 262 and 264.

459 See Section 5.3.3.3.2.1.

460 See Appendix 4.

knowledge takes place so that it has the opportunity to lodge a protest.[461] Since the passage of submarines has been an aberration in law of the sea before, it may be argued this may not hinder the formation of local customary law.[462]

.With this said the relation between the declarative and navigational practice of the U.S. and other and the Russian - Articles 211, 218-220 and MARPOL 73/78 regime will now be addressed.

### 9.3.4.3. Declarative and Navigational Practice of the U.S. and Other in Relation to the Russian - LOSC Articles 211, 218-220 and MARPOL 73/78 Regime

As indicated there is substantial non compliance between the Russian regime and the Articles 211, 218-220 and MARPOL 73/78 regime while there is substantial compliance by flag States with the Russian regime for surface traffic. The result of this is perhaps clearer than in the previous Section. It would be difficult to argue that firm particular customary law has not been formed for the Arctic due to the same reasons given above but in even more marked contrast to the more established LOSC Part XII environmental regime. This as noted is developing elsewhere around the world, especially in Europe and North America.

More specifically as a marine power the U.S. declares a position consistent with Article 211, 218-220 and MARPOL 73/78. It is a Party to most of the IMO conventions, with the exception of those related to liability, and it has declared the LOSC environmental provisions to be considered customary international law, prior to its ratification of the LOSC.[463] Under this regime, through a narrow interpretation of Article 234 the U.S. *could claim* the LOSC Articles 211, and 218-220 and MARPOL 73/78 regime to predominate in all cases but exceptional ice and weather conditions.[464] It however has not done so, and, with the exception of its declarations and submarine passages, has sailed in compliance with the Russian regime.[465] Secret submarine and military research passages would have questionable legal effect due to the lack of opportunity for the coastal State to protest. The same compliance could probably be maintained for the shipping States and Arctic littoral States, Norway, Denmark/Greenland and Canada and other northern European States. These presumably follow Article 211, 218-220 and MARPOL 73/78; Norway, Finland, Sweden and Germany have ratified the LOSC, and all are Parties to most of the IMO conventions.[466] All could claim the Article 211, 218-220 and MARPOL 73/78 regime in the Arctic, even under a narrow Article 234 interpretation, but have not done so and rather as far as indicated have sailed in compliance with the Russian regime.

---

461 See Section 5.2.5.3.

462 Ibid.

463 See Section 9.2.2.2. and D. Brubaker, *Marine Pollution and International Law*, pp. 122-35, 155-8.

464 See Section 9.2.2 3.1.

465 As noted in Section 9.2.3.4. the U.S. State Department has even held the question open regarding international straits and Article 234. See J. Roach and R. Smith, *Excessive Maritime Claims*, p. 227 footnote 79.

466 See D. Brubaker, *Marine Pollution and International Law*, pp. pp. 122-35, 155-8. Denmark does make a reservation with respect to Greenland in MARPOL 73/78. See also H. Bergesen and G. Parmann (ed.), *Green Globe Yearbook*, (Oxford University Press, 1995), pp. 140-1.

The relation between the declarative and navigational practice of the U.S. and other and the Russian - international customary law and MARPOL 73/78 regime will be briefly addressed next.

#### 9.3.4.4. Declarative and Navigational Practice of the U.S. and Other in Relation to the Russian - International Customary Law and MARPOL 73/78 Regime

Again as indicated there is substantial non compliance between the Russian regime and the international customary law and MARPOL 73/78 regime while there is substantial compliance by flag States with the Russian regime for surface traffic. The result of this is perhaps even clearer than in the previous Section. It would be difficult to argue that firm particular customary law has not been formed for the Arctic due to the same reasons given above but in even more marked contrast to traditional customary law followed around the world. All flag States could claim established international customary law and MARPOL 73/78 regime in the Arctic, even under a narrow Article 234 interpretation, but have not done so and rather have sailed in compliance with the Russian regime.

Conclusions will now be forwarded.

## 9.4. Conclusions

As seen above the key descriptive terms for the Russian provisions are mandatory notification, authorisation, field of application, all forms of leading, fees, liability including criminal, 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 public ships. Examining these first in relation to the three possible international regimes governing vessel-source pollution in Russian Arctic waters, LOSC Article 234 (ice-covered areas); Articles 211, 218-220 and MARPOL 73/78 (general LOSC vessel source pollution regime); and international customary law and MARPOL 73/78 (traditional vessel source pollution regime); in relation to State practice, the following is found.

For the LOSC Article 234 regime for ice-covered areas, due to the inherent vague formulation of Article 234, it would be difficult to maintain that the Russian practice is in excess in spite of its ambiguity. This is because the Russian practice finds support not only from the Canadian practice but also from that of the U.S. as a coastal State. In addition all three States participate in environmental co-operation in the Rovaniemi Process including the Arctic Council at the Ministerial level, and the Conference for the Harmonisation of Polar Ship Rules at the Coast Guard level. It is the U.S. as a sea power which has most consistently opposed the all-encompassing Russian regime, through U.S. State Department and U.S. Navy declarations and submarine passages. The declarations follow traditional law of the sea positions taken by sea powers. The submarine passages are only vaguely substantiated. All surface passages appear to have been made in compliance with the Russian regime. No other States have been found clearly opposing the Russian Arctic regime, though there may have been unauthorised military passages made by Norway (surface passages) and the U.K. and

France (submerged passages), but these are even less confirmed than the U.S. passages. Upon this basis, it may be maintained that of the descriptive terms, *six points* are contentious: vague geographic application including on the high seas, application to public vessels, mandatory fees, ice-breaker assisted pilotage, and ice-breaker leading and special areas. Application on the high seas finds neither support from the Canadian and the U.S. practice, nor from international customary and conventional law. Application to public vessels finds neither support from the U.S. practice nor international customary and conventional law. Mandatory fees, though arguably scientifically sound for environmental protection under Article 234, are blanket and probably discriminatory in fact. The remaining three points are less clear. Ice-breaker assisted pilotage, ice-breaker leading and special areas, though in excess of the U.S. practice, find support in the Canadian practice. This has included either requiring an ice pilot on board or requiring a Canadian Coast Guard Officer on board together with the accompaniment of a Canadian ice breaker. Specific areas can be closed for all shipping except Class 10 icebreakers. Additionally, both Russian and Canadian requirements could plausibly be argued justified under Article 234 as part of a sound environmental protection policy taking due regard to navigation.

For the general LOSC Article 211, 218-220 and MARPOL 73/78 pollution regime, generally the unilaterally adopted Russian provisions governing in the exclusive economic zone have neither the same effect as "generally accepted" international provisions nor are in accord with "applicable" international provisions. This precludes any correlation between these two regimes. In addition the Russian lacks numerous points generally, both with regards to prescriptive and enforcement measures under this international regime, or in direct conflict with it. The result leans mostly in the favour of increased Russia coastal State competence. Of the descriptive key words from above it is only reporting of pollution incidents and information requested which generally seem consistent. Opposition to the Russian regime is the same as above provided by U.S. declarations and navigational practices. The possibility exists that the U.S. may attempt to fall back to this regime in the Arctic, through an eventual repeal of the OPA 1990. At the same time the Russian technical rules may become "generally accepted" through the Conference on Harmonisation of Polar Ship Rules which anticipates sending its code to the IMO. Should these be adopted by the IMO and the Russian provisions are harmonised accordingly, the design, equipment, manning and construction requirements could arguably be "generally accepted." Possibly the mandatory leading requirements could arguably be "generally accepted" as well, since use of such may be implied in these technical norms. As it is, the Russian regime is substantially supported by U.S. and Canadian Arctic practice. It is only geographic application including the high seas, application to public vessels, mandatory fees, ice-breaker assisted pilotage, ice-breaking leading and special areas which are inconsistent, and the three latter as above are supported by Canadian practice.

For the traditional pollution regime under international customary law and MARPOL 73/78, the Russian regime is *in excess* for all maritime zones with the exception of internal waters. Even these may be in contention for the straits and various bays. 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 hinder innocent passage and are in excess. When acts of wilful and serious pollution occur, then the various enforcement measures including inspection, arrest, detention, suspension, removal and other proceedings may be justified, but only on a case-by-case basis. At the same time due to the practice of Canada and the U.S. as Arctic littoral States, similar conclusions may be made as above. *Most* of the key points of the Russian provisions are supported by the Arctic practice of the U.S. and Canada in their exclusive economic zones. The same arguments as above govern, however justification is provided by international customary law (freedom of the high seas, sovereignty immunity), TSC Article 18 (non discriminatory fees for services rendered). These apply in the territorial sea; so support under this regime for the Russian provisions governing the exclusive economic zone is found solely from Arctic State practice of the U.S. and Canada.

### 9.4.1. Recommendations

Recommendations are corresponding to and closely related to those forwarded in Chapter 5. In order to increase world order and reduce tension, a law of the sea conference should be convened, including delegations from the Foreign Ministries of the Arctic littoral States including non littoral Scandinavian States. The object would be to resolve those issues exhibiting most dissension associated with LOSC Article 234. These as seen are the possible application of the Russian regime to the high seas, application to public vessels, mandatory and discriminatory fees, and interface with the international straits regime. Surface passage by public vessels is exempt under Article 236, yet could still be agreed to be made subject to the vague condition of compliance with LOSC environmental provisions, if operational capabilities are not impaired and if "reasonable and practical." The sensitive issue of submarine passage need not be mentioned. At the same time especially Russian military activities at sea, but also the U.S., might be influenced in a more environmentally positive light building upon the trilateral military agreement for the Kara Sea between Russia, Norway and the U.S. It is maintained resolving several of the Arctic environmental issues closely tied to the jurisdictional issues is a more satisfactory and stable solution over time than physically "testing" the Russian regime, similar to the U.S. FON program and possibly other State practice. As a representative from the U.S. Navy notes, 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."[467]

467 G. Galdorisi, Captain, U.S. Navy, "Who Needs the Law of the Sea?", *Naval Institute Proceedings*, (July 1993), 74. The author argues for U.S. ratification of the LOSC.

APPENDIX 9

LOSC - PART IX
ENCLOSED OR SEMI-ENCLOSED SEAS

Article 122
Definition

For the purposes of this Convention, "enclosed or semi-enclosed sea" means 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.

Article 123
Co-operation of States bordering enclosed or semi-enclosed seas

States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention. to this end they shall endeavour, directly or through an appropriate regional organisation:

(a) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea.

(b) to co-ordinate the implementation of their rights an duties with respect to the protection and preservation of the marine environment;

(c) to co-ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area:

(d) to invite, as appropriate, other interested states or international organisations to co-operate with them in furtherance of the provisions of this article.

PART XII
PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT
SECTION 1. GENERAL PROVISIONS

Article 192
General obligation

States have the obligation to protect and preserve the marine environment.

Article 193
Sovereign right of States to exploit their natural resources

States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

Article 194
Measures to prevent, reduce and control pollution of the marine environment

1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonise their policies in this connection.

2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this convention.

3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. these measures shall include, inter alia, those designed to minimise to the fullest possible extent:

...

(b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels,

...

4. In taking measures to prevent, reduce or control pollution of the marine environment, states shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.

5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well a the habitat of depleted, threatened or endangered species and other forms of marine life.

Article 195

Duty not to transfer damage or hazards or transform one type of pollution into another

In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards form one area to another or transform one type of pollution into another.

SECTION 5.
INTERNATIONAL RULES AND NATIONAL LEGISLATION TO PREVENT, REDUCE AND CONTROL POLLUTION OF THE MARINE ENVIRONMENT

Article 211

Pollution from vessels

1. States, acting through the competent international organisation or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routing systems designed to minimise the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary.

2. States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry, such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organisation or general diplomatic conference.

3. States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their offshore terminals shall give due publicity to such requirements and shall communicate them to the competent international organisations. Whenever such requirements are established in identical form by two or more coastal States in an endeavour to harmonise policy, the communication shall indicate which States are participating in such co-operative arrangements. Every State shall require the master of a vessel flying its flag or of its registry, when navigating within the territorial sea of a State participating in such co-operative arrangements, to furnish, upon the request of that State, information as to whether it is proceeding to a State of the same region participating in such co-operative arrangements and, if so, to indicate whether it complies with the port entry requirements of that State. This article is without prejudice to the continued exercise by a vessel of its right of innocent passage or to the application of article 25, paragraph 2.

4. Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right

of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.

5. Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organisation or general diplomatic conference.

6. (a) Where the international rules and standards referred to in paragraph 1 are inadequate to meet special circumstances and coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required 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 coastal States, after appropriate consultations through the competent international organisation with any other States concerned, may, for that area, direct a communication to that organisation, submitting scientific and technical evidence in support and information on necessary reception facilities. Within 12 months after receiving such a communication, the organisation shall determine whether the conditions in that area correspond to the requirements set about above. If the organisation so determines, the coastal States may, for that area, adopt laws and regulations for the prevention, reduction and control of pollution from vessels implementing such international rules and standards or navigational practices as are made applicable, through the organisation, for special areas. These laws and regulations shall not become applicable to foreign vessels until 15 months after the submission of the communication to the organisation.

(b) The coastal States shall publish the limits of any such particular, clearly defined area.

(c) If the coastal States intend to adopt additional laws and regulations for the same area for the prevention, reduction and control of pollution from vessels, they shall, when submitting the aforesaid communication, at the same time notify the organisation thereof. Such additional laws and regulations may relate to discharges or navigational practices but shall not require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards, they shall become applicable to foreign vessels 15 months after the submission of the communication to the organisation, provided that the organisation agrees within 12 months after the submission of the communication.

7. The international rules and standards referred to in this article should include *inter alia* those relating to prompt notification to coastal States, whose coastline or related interests may be affected by incidents, including maritime casualties, which involve discharges or probability of discharges.

...

SECTION 6. ENFORCEMENT

...

Article 217

Enforcement by flag States

1. States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organisation or general diplomatic conference, and with their laws ad regulations adopted in accordance with this Convention for the prevention, reduction and control of pollution of the marine environment from vessels and shall accordingly adopt laws and regulations and take other measures necessary for their implementation. Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where the violation occurs.

2. States shall, in particular, take appropriate measures in order to ensure that vessels flying their flag or of their registry are prohibited from sailing, until they can proceed to sea in compliance with the requirements of the international rules and standards referred to in paragraph 1, including requirements in respect of design, construction, equipment and manning of vessels.

3. States shall ensure that vessels flying their flag or of their registry carry on board certificates required by and issued pursuant to international rules and standards referred to in paragraph 1. States shall ensure that vessels flying their flag are periodically inspected in order to verify that such certificates are in conformity with the actual condition of the

vessels. These certificates shall be accepted by other States as evidence of the condition of the vessels and shall be regarded as having the same force as certificates issued by them, unless there are clear grounds for believing that the condition of the vessel does not correspond substantially with the particulars of the certificates.

4. If a vessel commits a violation of rules and standards established through the competence international organisation or general diplomatic conference, the flag State, without prejudice to articles 218, 220 and 228, shall provide for immediate investigation and where appropriate institute proceedings in respect of the alleged violation irrespective of where the violation occurred or where the pollution caused by such violation has occurred or has been spotted.

5. Flag states conducting an investigation of the violation may request the assistance of any other State whose co-operation could be useful in clarifying the circumstances of the case. States shall endeavour to meet appropriate requests of flag States.

6. States shall, at the written request of any State, investigate any violation alleged to have been committed by vessels flying their flag. if satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, flag States shall without delay institute such proceedings in accordance with their laws.

7. Flag States shall promptly inform the requesting State and the competent international organisation of the action taken and its outcome. Such information shall be available to all States.

8. Penalties provided for by the laws and regulations of States for vessels flying their flag shall be adequate in severity to discourage violations wherever they occur.

Article 218

Enforcement by port States

1. When a vessel is voluntarily within a port or at an offshore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organisation or general diplomatic conference.

2. No proceedings pursuant to paragraph 1 shall be instituted in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another State requested by that State, the flag State, or a State damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of the State instituting the proceedings.

3. When a vessel is voluntarily within a port or at an offshore terminal of a State, that State shall, as far as practicable, comply with requests from any State for investigation of a discharge violation referred to in paragraph 1, believed to have occurred in, caused, or threatened damage to the internal waters, territorial sea or exclusive economic zone of the requesting State. It shall likewise, as far as practicable, comply with requests from the flag State for investigation of such a violation, irrespective of where the violation occurred.

4. The records of the investigation carried out by a port State pursuant to their article shall be transmitted upon request to the flag or to the coastal State. Any proceedings instituted by the port State on the basis of such an investigation may, subject to section 7, be suspended at the request of the coastal State when the violation has occurred within its internal waters, territorial sea or exclusive economic zone. The evidence and records of the case, together with any bond or other financial security posted with the authorities of the port State, shall in that event be transmitted to the coastal State. Such transmittal shall preclude the continuation of proceedings in the port State.

Article 219

Measures relating to seaworthiness of vessels to avoid pollution

Subject to section 7, States which, upon request or on their own initiative, have ascertained that a vessel within one of their ports or at one of their off-shore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing. Such States may permit the vessel to proceed only to the nearest appropriate repair yard, and upon removal of the causes of the violation, shall permit the vessel to continue immediately.

Article 220

Enforcement by coastal States

1. When a vessel is voluntarily within a port or at an offshore terminal of a State, that State may, subject to section 7, institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State.

2. Where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated laws and regulations of that State adopted in accordance with this Convention or applicable international rules and standards for prevention, reduction and control of pollution from vessels, that State, without prejudice to the application of the relevant provisions of Part II, section 3, may undertake physical inspection of the vessel relating to the violation and may, where the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws, subject to the provisions of section 5.

3. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed 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, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.

4. States shall adopt laws and regulations and take other measures so that vessels flying their flag comply with requests for information pursuant to paragraph 3.

5. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.

6. Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.

7. Notwithstanding the provisions of paragraph 6, whenever appropriate procedures have been established, either through the competent international organisation or as otherwise agreed, whereby compliance with requirements for bonding or other appropriate financial security has been assured, the coastal State if bound by such procedures shall allow the vessel to proceed.

8. The provisions of paragraphs 3, 4, 5, 6 and 7 also apply in respect of national laws and regulations adopted pursuant to article 211, paragraph 6.

Article 221

Measures to avoid pollution arising from maritime casualties

1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or thereat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

2. For the purposes of this article, "maritime casualty" means a collision of vessels, stranding or other incident to navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

...

SECTION 7. SAFEGUARDS

...

Article 226

Investigation of foreign vessels

1. (a) States shall not delay a foreign vessel longer than is essential for purposes of the investigations provided for in articles 216, 218 and 220. Any physical inspection of a foreign vessel shall be limited to an examination of such certificates, records or other documents as the vessel ins required to carry by generally accepted international rules and standards or of any similar documents which it is carrying; further physical inspection of the vessel may be undertaken only after such an examination and only when:

(i) there are clear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of these documents:

(ii) the contents of such documents are not sufficient to confirm or verify a suspected violation; or

(iii) the vessel is not carrying valid certificates and records.

(b) If the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other a appropriate financial security.

(c) Without prejudice to applicable international rules and standards relating to the seaworthiness of vessels, the release of a vessel may, whenever it would present an unreasonable threat of damage to the marine environment, be refused or made conditional upon proceeding to the nearest appropriate repair yard. Where release has been refused or made conditional, the flag State of the vessel must be promptly notified, and may seek release of the vessel in accordance with Part XV.

2. States shall co-operate to develop procedures for the avoidance of unnecessary physical inspection of vessels at sea.

Article 227

Non-discrimination with respect to foreign vessels

In exercising their rights and performing their duties under this Part, States shall not discriminate in form or in fact against vessels of any other State.

...

Article 230

Monetary penalties and the observance of recognised rights of the accused

1. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.

2. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a wilful and serious acts of pollution in the territorial sea.

3. In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognised rights of the accused shall be observed.

Article 231

Notification to the flag State and Other States Concerned

States shall promptly notify the flag State and any other state concerned of any measures taken pursuant to section 6 against foreign vessels, and shall submit to the flag State all official reports concerning such measures. However, with respect to violations committed in the territorial sea, the foregoing obligations of the coastal State apply only to such measures as are taken in proceedings. the diplomatic agents or consular officers and where possible the maritime

authority of ht flag State, shall be immediately informed of any such measures taken pursuant to section 6 against foreign vessels.

...

Article 233

Safeguards with respect to straits used for international navigation

Nothing in sections 5, 6 and 7 affects the legal rÛgime of straits used for international navigation. However, if a foreign ship other than those referred to in section 10 has committed a violation of the laws and regulations referred to in article 42, paragraph 1(a) and (b), causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures and if so shall respect mutatis mutandis the provisions of this section.

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 pressure 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.

SECTION 9. RESPONSIBILITY AND LIABILITY

Article 235

Responsibility and Liability

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds."

...

PART XVI

GENERAL PROVISIONS

Article 304

Responsibility and liability for damage

"The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development off further rules regarding responsibility and liability under international law."

THE CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE. DONE AT GENEVA ON 29 APRIL 1958

SECTION III. RIGHT OF INNOCENT PASSAGE
SUB-SECTION A. RULES APPLICABLE TO ALL SHIPS

Article 14

1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

3. Passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.

5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.

6. Submarines are required to navigate on the surface and to show their flag.

Article 15

1. The coastal State must not hamper innocent passage through the territorial sea.

2. The coastal State is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea.

Article 16

1. The coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent.

2. In the case of ships proceeding to internal waters, the coastal State shall also have the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to those waters is subject.

3. Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

4. There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.

Article 17

Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation.

SUB-SECTION B. RULES APPLICABLE TO MERCHANT SHIPS

*Article 18*

1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.

Article *19*

1. The criminal jurisdiction of the coastal State should be not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed on board the ship during its passage, save only in the following cases:

(a) If the consequences of the crime extend to the coastal State; or

(b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or

(c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or

(d) If it is necessary for the suppression of illicit traffic in narcotic drugs.

2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

3. In the cases provided for in paragraphs 1 and 2 of this article, the coastal State shall, if the captain so requests, advise the consular authority of the flag State before taking any steps, and shall facilitate contact between such authority and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

4. In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation.

5. The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

CONVENTION ON THE HIGH SEAS. DONE AT GENEVA, ON 29 APRIL 1958

*Article 2*

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

(1) Freedom of navigation;
(2) Freedom of fishing;
(3) Freedom to lay submarine cables and pipelines;
(4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

....

*Article 24*

Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject.

**DONAT PHARAND**, *Q.C., S.J.D., F.R.S.C.*
Emeritus Professor, University of Ottawa
**CONSULTANT**
International Law, Law of the Sea and Arctic Affairs

1 May 1997

Mr. Douglas Brubaker
Research Scholar and Attorney
The Fridtjof Nansen Institute
P.O. Box 326, N- 1324 Lysaker
NORWAY

Dear Mr. Brubaker:

Re: Environmental Regulation in the Russian Arctic

I was out of town for about three weeks and, unfortunately, could not get to review the Paper until now.

First, let me say how pleased I am that you have succeeded in making arrangements for a new advisor so that you will be able to complete your doctoral thesis.

I have read the Paper with the greatest interest and find it to be a very solid piece of research. Indeed, so far as I can tell, you have left no stone unturned. By way of general comment on substance, I will say that your analysis of those many sources does appear to me to be generally quite sound. Certainly, this is the case for those relating to international law provisions, particularly the one on ice-covered areas. Because of my lack of familiarity with Russian legislation and practice, I am unable to comment with as much confidence on that part of the Paper, but the analysis and opinions expressed do appear to be reliable and warranted.

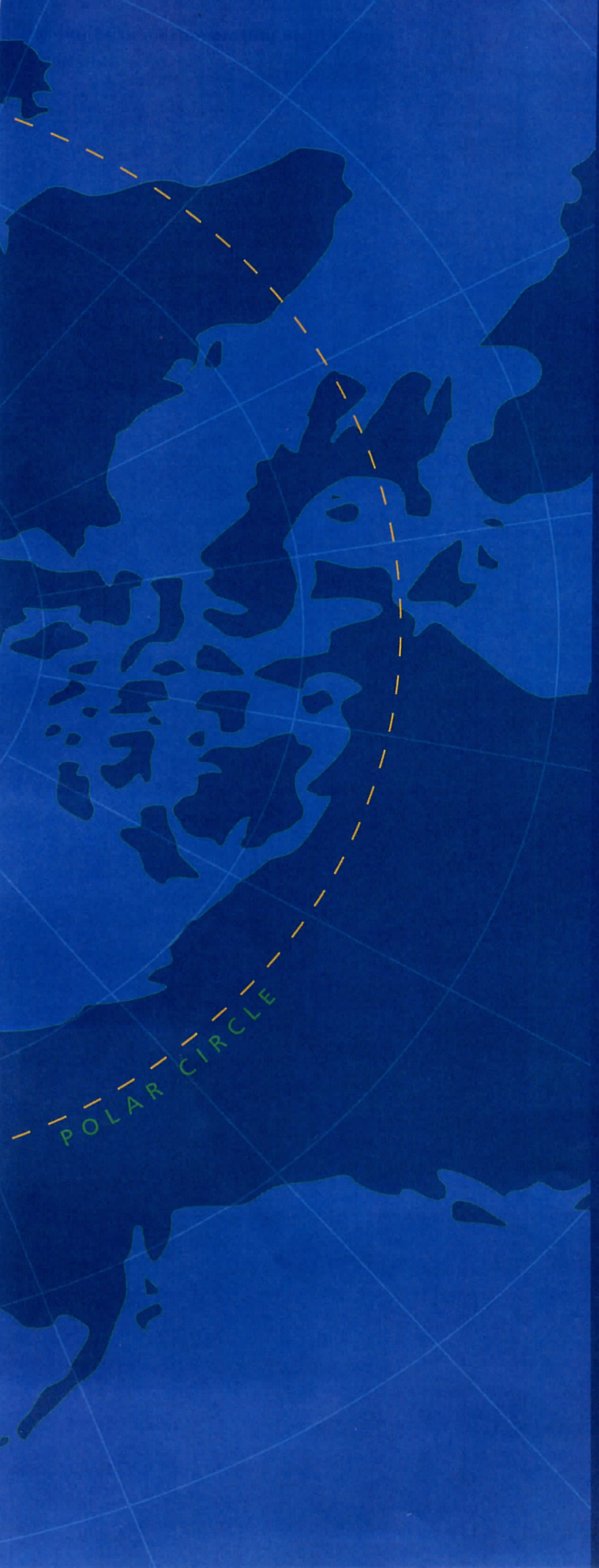
On the form, I would like to make three suggestions: first, add page numbers to the Table of Contents; second, have an editor to polish the English; third, spell out the conclusions in slightly more specific terms at pages 96 to 98.

With respect to your recommendation that "a law of the sea conference should be convened" to discuss Article 234, might I suggest that it would be easier and probably sufficient - at least for the moment - to have the matter discussed by the Arctic Council. It seems to me that the scope of application of Article 234 falls within the ambit of the first purpose of the Council, that is to "promote co-operation

85 Marlborough Ave., Ottawa, Canada K1N 8E8 (613) 563-1167

and co-ordination of action on common Arctic issues, particularly sustainable development and environmental protection" (emphasis added). Although the question of passage of military ships and submarines might come up, the main issue would be the protection of the marine environment. By the way, you might be interested in my little article on an Arctic Council, published in 1992 in la Revue Générale de Droit, where I discuss the Arctic Ocean as a semi-enclosed sea and I take the liberty of enclosing a copy.

Yours sincerely,




**The three main cooperating institutions of INSROP**

**Ship & Ocean Foundation (SOF), Tokyo, Japan.**

SOF was established in 1975 as a non-profit organization to advance modernization and rationalization of Japan's shipbuilding and related industries, and to give assistance to non-profit organizations associated with these industries. SOF is provided with operation funds by the Sasakawa Foundation, the world's largest foundation operated with revenue from motorboat racing. An integral part of SOF, the Tsukuba Institute, carries out experimental research into ocean environment protection and ocean development.

**Central Marine Research & Design Institute (CNIIMF), St. Petersburg, Russia.**

CNIIMF was founded in 1929. The institute's research focus is applied and technological with four main goals: the improvment of merchant fleet efficiency; shipping safety; technical development of the merchant fleet; and design support for future fleet development. CNIIMF was a Russian state institution up to 1993, when it was converted into a stock-holding company.

**The Fridtjof Nansen Institute (FNI), Lysaker, Norway.**

FNI was founded in 1958 and is based at Polhøgda, the home of Fridtjof Nansen, famous Norwegian polar explorer, scientist, humanist and statesman. The institute spesializes in applied social science research, with special focus on international resource and environmental management. In addition to INSROP, the research is organized in six integrated programmes. Typical of FNI research is a multi-disciplinary approach, entailing extensive cooperation with other research institutions both at home and abroad. The INSROP Secretariat is located at FNI.