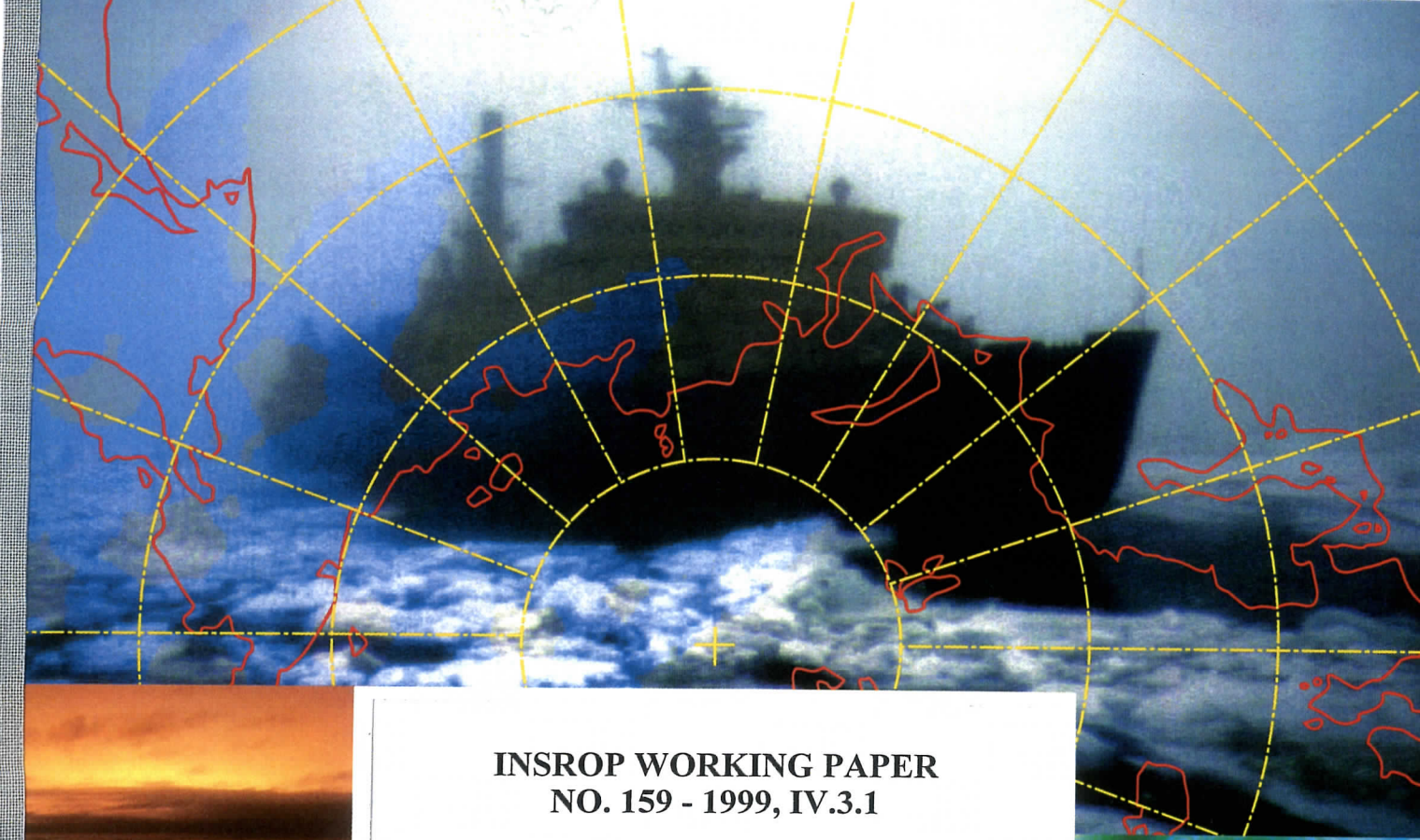

INSROP WORKING PAPER NO. 159 - 1999, IV.3.1

International Law and Russian Arctic Waters: Passage by State Vessels and Concluding Remarks.

By R. Douglas Brubaker

INSROP International Northern Sea Route Programme

Central Marine Research & Design Institute, Russia

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Project IV.3.1: International Law and Russian Arctic Waters

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Title: **International Law and Russian Arctic Waters: Passage by State Vessels and Concluding Remarks.**

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

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.

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TABLE OF CONTENTS

10. Rights of Passage by State Vessels - Limitations to the Article 234 Regime? 1
10.1. Background 1
10.1.1. Focus on Submerged Passage through Arctic Straits 1
10.1.2. Historic Framework 2
10.1.3. Issues 3
10.2. Prescriptive and Enforcement Jurisdiction 4
10.2.1. Rights and Duties, Non suspendable Innocent Passage - Transit Passage - Limits of Coastal State Prescription and Enforcement 4
10.2.2. State Practice 5
10.2.2.1. Submerged Passage - Non-Suspendable Innocent Passage 6
10.2.2.2. Submerged Passage - "Normal Modes of Continuous and Expeditious Transit" 6
10.2.3. Conclusions 9
10.3. Foreign Submerged Passage through the Russian Arctic Straits 10
10.3.1. The Russian Position 10
10.3.1.1. Submerged Passage - LOSC Part III 10
10.3.1.2. Submerged Passage - TSC Article 16(4) 11
10.3.1.3. Submerged Passage - Non-International Straits Regimes 12
10.3.1.4. Quiet Protest 13
10.3.2. U.S. Practice 14
10.3.2.1. Stealth - Limitations 14
10.3.2.2. Submerged Passage - International Regimes 16
10.4. Conclusions 17

11. A Rule of Customary Law is in the Process of Formation 21
11.1. Purpose 21
11.2. Scope of Article 234 and Other Regimes 21
11.3. Article 234 - The New Sector Principle? - Practice in Russian Arctic Waters Compared to the International Regimes 23
11.4. The International Straits Regime - A Limitation Device? 25
11.5. The International Straits Regime - Limitations to the Article 234 Regime? 27
11.6. Rights of Passage by State Vessels - Limitations to the Article 234 Regime? 29
11.7. Conclusions 31
11.7.1. Superpower Subterfuge 33
11.7.2. An Asymmetrical Legal Regime 34
11.7.3. Recommendations 35

10. Rights of Passage by State Vessels - Limitations to the Article 234 Regime?

10.1. Background

10.1.1. Focus on Submerged Passage through Arctic Straits

The objective of this Chapter is to examine the effect of the LOSC Article 234 regime generally on the rights of passage by State vessels. Though under LOSC Article 236 State vessels are not subject to the environmental protection provisions of either LOSC Part III or Part XII, the same cannot be said concerning *safety provisions*. Safety provisions are *not expressly included* as part of the Article 236 exception. As seen an argument may be made that safety provisions are implied in Article 234, to prevent, reduce and control marine pollution in ice-covered areas, to which State vessels would be subject. It is indisputable that marine safety and environmental regimes are closely related.[1] However under this argument, it would be difficult to argue that the safety provisions were not implied in Article 236 with the same exclusion of State vessels as for the environmental provisions. This is supported by the "plain meaning of the text," since it lacks these terms. State vessels thus seem not to be subject to the Article 234 regime as such and only to LOSC Part III Articles 41 and 42(1)(a), regarding sea lanes and traffic separation schemes in international straits. However the rather vague requirement under Article 236, second paragraph, would apply for State vessels including environmental protection under Article 234. States shall ensure by measures not impairing operations of State vessels that such act in a consistent manner, as far as is reasonable and practicable, with LOSC provisions. Though this requirement may be considered rather weak, maritime powers in practice may generally respect it.[2] In relation to Article 234, however, there is little State practice indicating surface passages of State vessels through ice-covered areas. This point, although constituting one of the weakest in the Russian Arctic regime which encompasses surface passages for State vessels, is not being actively challenged by the U.S. or other Western powers.[3] With the exception of the few unusual surface passages carried out in the mid 1990's by the Norwegian vessel *Sverdrup* II, the few U.S. passages through the Northwest Passage in the latter 1980's, and the Vil'kitskii Incidents in the mid 1960's, all possible navigation by foreign State vessels in these waters is carried out by military submarines. Thus, in spite of the interpretative questions which could be raised, State practice indicates a very restrictive activity by foreign States sailing State surface vessels through Arctic ice-covered waters.

The answer to the question posed above is thus that the rights of passage of State vessels on the surface are a clear limitation to the Article 234 regime. However, this is the same limitation found in general international provisions relating to sovereign immunity,[4] and found also in other environmental conventions including MARPOL 73/78, under Article 3(3). Any Russian regulation of such vessels in its Arctic exclusive economic zone is thus in clear breach.

Due to the restrictive navigation by foreign States sailing surface vessels through Arctic ice-covered waters, the focus will be directed specifically towards foreign submerged passages. Here also rights of passage of State vessels under the surface in the exclusive

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[1]D. Brubaker, *Marine Pollution*, pp. 133 -5.

[2]B. Oxman and A. Roach, 'Comments,' 9 August, 1998.

[3]E. Franckx, *Arctic Maritime Claims*, p. 193.

[4]R. Churchill and A. Lowe, *Law of the Sea*, p. 260.

economic zone are a clear limitation to the Article 234 regime, but not unusual given the general international provisions and the Article 236 exception for sovereign immunity. Any Russian regulation of such vessels in its Arctic exclusive economic zone is in clear breach.

In spite of this the legal situation for the straits is more unclear. Generally, under both the TSC and the LOSC international straits regimes it has not been completely clear whether submerged passage was permitted subject to notification and/or authorisation. For territorial waters both the TSC and the LOSC regimes for innocent passage require surface passage for submarines with the flag showing. What are the implications of this for ice-covered territorial seas? Notification and authorisation for submerged passage is claimed required for the Russian Arctic straits even though ice-covered. Because of the general unclearness and the divergent Russian and U.S. practice, attention here will be directed towards the rights of submerged passage by State vessels through the Russian Arctic straits. Analysis will be based upon the information available, and extrapolations made accordingly.[5] As part of this informational problem, focus will also be directed chiefly towards submerged passages carried out by Russia and the U.S. Where submerged passages by other maritime powers in the Russian Arctic are found, they will be referred to, but generally they were few.

10.1.2. Historic Framework

A unclearness arose between the non-suspendable innocent passage regime of the *Corfu Channel Case* and TSC 16(4) related to submerged passage, and TSC Article 14(6) requiring submarines to travel on the surface with flag showing. Though submerged traffic was not specified in the *Corfu Channel Case*, an argument exists that it was intended included in the term "warship", since the decision closely followed World War II with its extensive submarine use. The ICJ in 1949 most certainly was well aware of such use, and arguably included it in their decision, since at that time there existed no international treaty indicating the contrary. TSC Article 16(4) incorporated *Corfu Channel* criteria. At the same time TSC Article 14(6) required submarines to navigate on the surface of the territorial sea showing their flag. This introduced the contradiction, since TSC Article 14(6) may be interpreted to require the same in territorial sea of international straits, which imposes a condition of passage on submarines as warships in international straits. The natural interpretation of the text of these Articles together would seemingly support surface passage while in territorial waters including in the international straits, though either interpretation seems reasonable. Little assistance is given by either of these Articles or surrounding TSC Articles.

Negotiations surrounding TSC Article 16(4) did not address directly the issue of surface passage through international straits. The legislative history of TSC Article 14(6) indicates only brief discussion. The Soviet Union and the U.S. never entered these discussions, and Denmark was the only State which publicly stated it interpreted this Article as requiring submarines to travel on the surface in straits for reasons including safety.[6] The main discussion centred on regime applicability to commercial submarines. The legislative history of TSC indicates submerged traffic through straits may have been part of the notification and authorisation controversy, although submarine traffic and specific notification and authorisation through the territorial waters of straits or their entrances was not directly discussed.

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[5]Few experts deal with the issue due to its highly secretive nature and consequent lack of information.

[6]*Official Records* Vol. 3, pp. 111-112, paragraph 29.

Due to the strategic role submarines played in the global balance of power, the passage of submarines through straits used for international navigation was of major importance in the negotiation of transit passage in UNCLOS III.[7] The development of LOSC Article 39(1)(c) indicates that although amendments were proposed opposing "normal mode," they were not accepted. "Normal mode" appears in the U.K. proposal to the second session of UNCLOS in 1974, without any definition.[8] The East Block proposal did not include the term but indicated that warships could not engage in exercises, gunfire, weapons use, launch or landing of aircraft, hydrographical work or similar acts unrelated to the transit.[9] The term was included in the proposal from the Fiji/U.K. Group and then the ISNT, Article 39, "normal modes of continuous and expeditious transit," subject only to *force majeure* or distress.[10] Various amendments were proposed in opposition, including the Greek proposition that submarines and other underwater vehicles in transit must navigate on the surface and show their flags unless permitted otherwise by the coastal State.[11] The Spanish proposal was largely in favour of traditional innocent passage rules and rejecting transit passage, including submerged,[12] but both of these proposals lacked support, and RSNT Article 38(1) remained substantially the same.[13] Morocco and Spain submitted proposals in 1976, 1977 and 1978 favouring innocent passage rather than transit passage but did not gain support, and ICNT Article 39 repeated RSNT Article 38.[14]

10.1.3. Issues

Somewhat incongruously considering its importance, submerged passage is not directly addressed in the LOSC Part III, though it is in Article 20 of the LOSC innocent passage regime, requiring surface passage with flag showing. Under LOSC Article 39(1)(c), a vessel must in transit passage "refrain from activities other than those incident to their *normal* modes of continuous and expeditious transit..." This implies that submarines, which have a normal submerged mode, may also travel submerged through international straits, which may be in contrast to TSC Article 16(4) and the *Corfu Channel Case,* theoretically subject to TSC Article 14(6). The implication for a requirement of authorisation for submerged passage under LOSC Article 39(1)(c) may be enhanced by an express prohibition of submerged passage under these provisions noted. Either interpretation, submerged or non submerged passage, seems reasonable. However, a somewhat ambivalent State practice has emerged during the development of the twelve mile territorial sea to which the Soviet Union and the U.S. have been substantial contributors. This is that submarines travel submerged through the territorial waters of international straits, including the entrances, contrary to TSC Article 14(6).

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[7]W. Burke, 'Submerged Passage through Straits' 199.

[8]*Official Records* Vol. 3, 183, 186, A/CONF.62/C.2/L.3., Article 2. The U.K. delegate explained that vessels and aircraft must not engage in any activities other than those which were part of their normal passage. *Official Records* Vol. 2, 125, para. 22.

[9]Ibid. Vol., 3, 189, 190, A/CONF.62/C.2/L.11 (1974), Article 1(2)(a).

[10]Respectively R. Platzöder (ed.) *Third United Nations Conference on the Law of the Sea: Documents*, Vol., 4, 194, Article 2 (Private Group on Straits); *Official Records* Vol. 4, 151, 159 A/CONF.62/WP.8 Part II (ISNT, 1975, Article 39, (Chairman, Second Committee).

[11]R. Platzöder, *Documents*, Vol. 4, 282, Article 39 (ISNT II) para. 3, (Greece).

[12]Reproduced in ibid. Vol. 4, 274, 276, Article 39 para. 3, (Spain).

[13]*Official Records* Vol. 5, 151, 159, A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976), Article 38(3), (Chairman, Second Committee).

[14]Respectively, R. Platzöder, *Documents*, 399, Vol. 4, Article 38, (RSNT II) (Morocco), R. Platzöder, *Documents*, Vol. 5, 30, 31, C.2/Informal Meeting/22 (1978), Article 39, paras. 2 and 3 (Morocco); R. Platzöder, *Documents*, Vol. 4, 393, Article 38 (RSNT II) (Spain), R. Platzöder Vol. 5, 6, 7, C.2/Informal Meeting/4(1978), Article 39 (Spain); *Official Records* Vol. 15, 172, 181, A/CONF.62/L.78 (Draft Convention), 1981, Article 39.

Article 31 of the Vienna Convention requires a strict textual interpretation, and since submerged passage is not specifically included, it may be argued that "freedom of navigation" under LOSC Article 38(2), rights of transit passage, does not include freedom of submerged transit through territorial waters in straits. Textual interpretation may be *unavoidable* due to the absence of a formal record of LOSC, and prior practice may be difficult to argue since Article 31(3)(b) permits only subsequent practice. These arguments notwithstanding, a strict textual interpretation may also be argued to give a wrong picture, whereas "contemporary interpretations and communications among the (UNCLOS III) delegates," may provide a more correct perspective. The U.K. and Soviet proposals to LOSC Part III contained freedom of navigation and overflight through straits, which if reasonably construed embrace submerged passage. Moreover the comments made by Sri Lanka, Egypt, Peru and Spain to the U.K. proposal specifically disputed the right. Failing to achieve enough support logically indicates the understanding that the proposal was generally understood to encompass submerged passage.

10.2. Prescriptive and Enforcement Jurisdiction

10.2.1. Rights and Duties, Non suspendable Innocent Passage - Transit Passage - Limits of Coastal State Prescription and Enforcement

Upon this background, that which was stated generally above regarding limits of prescription and enforcement jurisdiction of the international straits regimes, as well as the interrelation with the ice-covered areas regime, apply here. Submerged passage comprises a special part of the general regime. Additionally, since modern State practice defines both the TSC Articles 14 and 16 and LOSC Article 39(1)(c) related to submerged passage, it is submitted little more is to be gained from further textual interpretations and analysis of legislative histories.

The *naval powers* including the U.S., Russia, and presumably the U.K., France and China are generally interested in submerged passage through straits in order to maintain secrecy due to deterrence institutionalisation as their mutual strategic posture.[15] "Normal mode" under Article 39(1)(c) is clearly interpreted to mean "submerged" transit passage. Other arguments favouring submerged passage through straits include that navigational hazards may be caused by the low profile of a submarine on the surface which makes it difficult to be seen,[16] and coastal State security is ensured since submarines need not approach the coastal State for its missiles to reach targets. Further, the environmental danger the submarine poses to the coastal State is argued increased not decreased with its visibility on the surface, since it becomes a better target for nuclear or conventional attack with the possibility of secondary nuclear explosions or radiation.

Not few *Coastal States* on the other hand have been opposed to submerged passage, due to their interest in detecting and preventing force, threats of force, clandestine activities, and unauthorised research or survey activities on their shores, all of which are possibilities represented by the submarine.[17] At the same time in addition to that noted regarding

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[15]W. Reisman, 'The Regime of Straits and National Security,' 52-3, 69.

[16]H. Robertson, 'Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea,' *Virginia Journal of International Law*, Vol. 20, No. 4, 844-5.

[17]K. Koh, *Straits Contemporary Issues*, pp. 153-5.

requirements for surface passage of submarines, rights for coastal States may be "severely" limited to those represented by a strict interpretation of LOSC Part III Articles 41, 42(1)(a) and (b), 233, "generally accepted" international provisions under Article 39(2) and non-transit elements under Article 39(1).[18] Thus, the coastal State may implement international environmental and safety standards. Theoretically, however, it seems possible that powerful coastal States with the capability of developing advanced monitoring equipment, may choose to utilise a strict textual interpretation of Articles 38(2) and 39(1)(c), and demand notification, surface passage or authorisation for submerged passage through international straits. This possibility finds support from the Russian and U.S. environmental and safety legislation and enforcement governing their respective territorial seas and exclusive economic zones, including straits potentially international. Coastal States enjoy broader jurisdiction under the non suspendable innocent passage regime of TSC Article 16(4) and the *Corfu Channel Case*, as well as innocent passage under TSC Article 14(4). "Prejudicial...to the security" in TSC Article 14(4) has been interpreted broader by coastal States than flag States in determining non-innocent passage; breach or not of coastal State health, customs and immigration rules rendering the passage non-innocent; and breach or not of coastal State notification rules rendering the passage of warships non-innocent. It is likely this regime, if claimed by coastal States, would be ignored by the maritime powers.

10.2.2. State Practice

From the above the likely possibilities would thus be either totally submerged passage during the passage or totally surface passage in the territorial sea, including the territorial sea waters in the strait. It is however unlikely that submarines from the maritime powers will choose to travel on the surface. In practice most submarines due to stealth probably choose to stay submerged through international straits and their entrances.[19] Internationally, the U.S. and Russia as well as the U.K., France and China sail their submarines submerged through international straits in what is intended to be transit passage, probably much of it surreptitious.[20] Additionally it is illogical to expect a submarine will travel submerged on the high seas, surface in the territorial sea entrance to a international strait, and then submerge again for travelling through the high seas channel in a strait as one example. Another unlikely scenario is that where the submarine is required to dodge around complicated configurations of the territorial sea in the strait entrance just to remain submerged in the exclusive economic zone on the way to the strait.[21]

At the same time it is doubtful the right to transit passage has become customary international law due to the ambiguous coastal State practice, including that of Russia and the U.S., which have legislated and enforced extensive environmental and safety provisions governing straits potentially international. In addition notoriety and the possibility for protest, requisite elements of prescriptive rights, are virtually non existent concerning submerged passage which often occurs undetected.[22]

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[18]See I. Brownlie, *Principles*, p. 284. Nearly all authors follow this view.

[19]R. Churchill and A. Lowe, *Law of the Sea*, p. 94.

[20]Ibid. W. Reisman, 'The Regime of Straits and National Security,' 52-3.

[21]W. Schachte, 'International Straits,' 14-5 notes that the U.S. claims transit passage also in entrances to international straits, seen as subject to submerged passage, to avoid such problems.

[22]W. Reisman, 'The Regime of Straits and National Security,' 53.

10.2.2.1. Submerged Passage - Non-Suspendable Innocent Passage

The position of the U.S. is complex in relation to TSC Article 14(6). In the late 1970's the U.S. policy with respect to the straits in Southeast Asia and Gibraltar included the maintenance of the efficacy and credibility of its second strike nuclear capability through strategic nuclear ballistic missile submarines (SSBN's) which required avoidance of detection and maximum manoeuvrability.[23] The latter required submerged passage and resulted in a contravention of Article 14(6). The transit passage regime, which the U.S. was instrumental in negotiating, became especially crucial due to the enlargement by coastal States of the territorial seas to twelve miles, which became accepted as customary international law. In the face of these developments the U.S. negotiated *secret agreements* with the coastal States for submerged passage subject to notification through the straits the U.S. saw as crucial to its foreign policy. Chiefly these States included Spain and Indonesia, bordering respectively the Strait of Gibraltar and the Indonesian Straits.[24] With the introduction of the Trident I submarine around 1980 both straits may have become less vital to the U.S. since it could target the Soviet Union from the Atlantic or the Pacific.[25]

The Soviet Union following the mid 1960's was interested in non restricted passage through international straits, in order to show the flag for political reasons, and for surveillance of the U.S. SSBN transits through straits entering the Indian Ocean and the Mediterranean.[26] The Soviet Union thus supported and most likely practised submerged non-suspendable innocent passage, in contravention of Article 14(6), and submerged transit passage similar to the U.S. The other maritime powers also probably followed suit when they obtained a submarine fleet.

In spite of these legal inconsistencies it seems safe to say that whether or not the issue of submerged passage through international straits was seen as a large problem, it was kept quiet. Though the U.S. purportedly entered bilateral agreements allowing submerged passage when notified to the coastal State, it seems reasonable to imagine that in times of crisis, clandestine passages may have been carried out as well. This is based upon the U.S. need for secrecy, the general lagging development of surveillance equipment especially relevant for developing coastal States, and the U.S. position that restrictive regimes would be ignored. This supposition carries even greater weight regarding the Soviet Union. The U.S.S.R., in spite of a probable low number of submarines on patrol in the Indian Ocean, also had a need for secrecy due to its surveillance activities, and it did not have the benefit of bilateral agreements allowing submerged passage upon notification.[27]

10.2.2.2. Submerged Passage - "Normal Modes of Continuous and Expeditious Transit"

In spite of the different possibilities of interpretation both for and against LOSC Article 39(1)(c), "normal modes of continuous and expeditious transit" permitting submerged transit passage, the policies of the U.S. and Russia have been to exercise such passage.

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[23]See M. Leifer, *International Straits of the World* pp. 162-3.

[24]Ibid.

[25]Ibid.

[26]Ibid. 168-73.

[27]Ibid. 171 notes in 1976 and the first half of 1977 three Soviet submarines were on location in the Indian Ocean, though the following June 1977 there was only one.

The New U.S. Military Doctrine. Based upon a U.S. 1992 National Military Strategy, following dissolution of the Soviet Union, four principles are stated necessary to cope with the world's security situation: strategic deterrence and defence, forward presence, crisis response and reconstitution.[28] Vital to implementation of this strategy, submerged passage and overflight are seen as "the key tenet of U.S. oceans policy."[29] The U.S. is a power which needs the sea to project military power onto the opponent.[30] During the Cold War, NATO in Western Europe was required to maintain non-atomic balanced collective forces since if it failed to retain a strong conventional posture, the Soviet Union may have been able to exploit an eventual nuclear stalemate and invade with the Red Army.[31] The importance of forward defence with ground forces required a U.S. Navy strategy to ensure the safe delivery of transatlantic reinforcements and resupplies. Presently, in terms of numbers though there have been arms reductions, the U.S. military remains conservative. "(M)ilitary capabilities take years to acquire; intent can change overnight," and few question that the Russian political situation is unstable and may develop in a more antagonistic direction in the future.[32] Under strategic deterrence and defence policies during the Cold War the U.S. Navy considered it needed approximately one hundred nuclear attack submarines (SSN's) to enter the patrol areas of Russian SSBN's,[33] to destroy a significant number of the approximately sixty Yankee, Delta and Typhoon classes.[34] The patrol areas included chiefly the deep Arctic Marginal Ice Zone[35] (MIZ) and polynias of the central Arctic Basin and the Greenland-Iceland-United Kingdom gap (GIUK).[36] Presently, two (with eleven to sustain deployment) may be enough to carry out surveillance and potential control missions in the Russian SSBN patrol areas year around.[37] Under the forward presence principle a minimum of eight SSN's, including pre-deployment training, with approximately forty six SSN's to sustain deployment may have to be continuously at sea.[38] Thus ten to eleven U.S. SSN's are continuously deployed, and at least two and possibly three U.S. SSN's are presently in year-round surveillance operations in the Russian SSBN's patrol areas, including in the deep Arctic MIZ and polynias of the central Arctic Basin.[39] This American strategy will prevail as long as the Russian SSBN's continue operation, and naval arms continue to be excluded from disarmament negotiations between these States. Thus, though the U.S. may have negotiated secret bilateral agreements with States bordering crucial straits allowing free passage for its submarines, it likely favours the LOSC Part III regime since it avoids setting precedent, it is more stable and political and military power would not have to be used to safeguard U.S. interests.[40] It seems likely that a fifth generation submarine is planned.

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[28]*National Security Strategy of the United States* (The White House, U.S. Government Printing Office, 1992), p. 1.

[29]G. Galdorisi, 'Who Needs the Law of the Sea?' 72. W. Reisman, 'The Regime of Straits and National Security,' 52-3, 69.

[30]J. Breemer, 'Naval Strategy Is Dead,' *Naval Institute Proceedings*, February 1994, 50-3.

[31]Ibid. 52.

[32]N. Friedman, 'Submarines Adapt,' 72.

[33]Information is obtained from J. Brooke, 'Do We *Really* Need a Third *Seawolf*', *Naval Institute Proceedings*, December 1994, 10 unless otherwise noted.

[34]C. Carlson, 'How many SSN's Do We Need?,' 52.

[35]This is defined as the area in the Arctic of interrelation between ice and open water. See R. Boyle and W. Lyon, 'Arctic ASW: Have We Lost?' *Naval Institute Proceedings*, June 1998, 31-2.

[36]D. Brubaker and W. Østreng, 'The Northern Sea Route Regime - Exquisite Superpower Subterfuge?' accepted for publication by *Ocean Development and International Law*, 18 September, 1998, 10-1.

[37]C. Carlson, 'How many SSN's Do We Need?,' 52.

[38]Ibid.

[39]T. Ramsland, 'Interview,' 12 June 1996 at FNI, Oslo, indicated that the Kara Sea was used as a deployment area for the Russian Typhoon SSBN's which lay soundless on the bottom.

[40]M. Leifer, *International Straits*, pp. 164-8.

The Russian Military Doctrine. It is probable that modern Russian views and practice concerning world stability in various respects are similar to those of the U.S.[41] Russia needs the sea to project military power onto the opponent, similar to the U.S., while Russia in addition is a land-based power.[42] During the Cold War, in addition to the submerged Arctic passages mentioned, the Soviets were interested in transit passage in order to limit American influence in the Indian Ocean, including surveillance of the U.S. SSBN's.[43] Deployment of its surface vessels for political reasons also include checking the growth of the Chinese naval and commercial interests.[44] At the same time the Soviet Union's position was different from that of the U.S. With respect to the Gibraltar, Indonesian, Malacca and Singapore straits the Soviet Union was not able to enter bilateral agreements with the coastal States which were less friendly.[45] These straits, especially the Gibraltar and Indonesian, were seen as essential for large scale deployment to the Soviet Far East in the event of conflicts with China which eliminated use of the Trans-Siberian railway. The Soviet interest in transit passage, in addition to ensuring free passage for its growing commercial fleet, may have been due to the fact that application of coastal State restrictions would have had more of an adverse impact on Soviet strategic mobility than on that of the U.S.[46] Lately, stability is seen by Russia to be more treacherous in the new multi-polar world than in the bi-polar Cold war era due to the presence of a variety of small cold wars as well as economic rivalry between the leading powers. Russia continues to invest in research and engineering of submarines, constructing a fourth generation deployable by 2000, while designing a fifth generation with advanced technology.[47] Russia also desires to enter a form of co-operation and regulation with the U.S. and other NATO States, including preventing submarine incidents as well as developing measures for democratisation of the military.[48] In spite of a series of confidence building measures, "(T)he problem is the almost total absence of progress in achieving agreements toward confidence measures on the seas and the corresponding transformation of naval strategies."[49] The 1972 Agreement on the Prevention of Incidents On and Over the High Seas, the 17 June 1992 Charter on Russian American Partnership and Friendship and START II are seen to provide a basis for the desired co-operation.[50] At the same time various contacts and talks continue between the Russian and U.S. Navies.[51]

Authors are divided concerning the criteria for innocent passage in international straits used in the *Corfu Channel Case*, implying much the same division regarding surface or submerged passage for submarines, though few address it directly.[52] Concerning LOSC Part

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[41]Information is obtained from V. Aleksin, 'We Are Ready When You Are,' 54-7, unless otherwise noted.

[42]J. Breemer, 'Naval Strategy Is Dead,' *Naval Institute Proceedings*, February 1994, 50-3.

[43]See K. Koh, 'Straits,' pp. 68-9, who notes a Soviet sea route ran from the Black or Baltic Seas to Vladivostok and Nakhodka.

[44]Ibid.

[45]M. Leifer, *International Straits,* 168-73.

[46]Ibid. 173.

[47]J. Brooke, 'Do We *Really* Need a Third *Seawolf*', 8.

[48]A. Yakovlev, 'Interview' 27 August, 1994 and A. Yakovlev, 'Correspondence,' 2 December 1994, proposed a law of the sea seminar including both the U.S. and Russian Navies.

[49]V. Aleksin, 'We Are Ready When You Are,' 55.

[50]1972 *Treaties and Other International Acts Series* 9379, (TIAS) and June 17 1993, *TIAS.*

[51]U.S. Department of the Navy, Office of the Judge Advocate General, 'Correspondence,' October 19, 1994. J. Roach and R. Smith, 'Interview,' 27 June 1994.

[52]H. Caminos, 'The Legal Regime of Straits,' p. 58 notes that with the advent of the nuclear powered submarines in the early 1960's prior notification or surface navigation increased the submarine's vulnerability and thus affected the global strategic balance.

III on this issue authors vary considerably, especially within the U.S. Senator B. Goldwater sent a letter July 26, 1976 to U.S. experts, requesting interpretation of the straits provisions in the informal negotiating texts due to the importance to U.S. strategic considerations.[53] The contrasting positions will be illustrated, not only to indicate the interpretative possibilities but also the importance given to LOSC Part III. The views forwarded by W. Reisman and W. Burke illustrate the classical division between strict "textual" interpretation[54] and "intention of the parties" interpretation.[55] It is submitted the textual interpretation made by W. Reisman concerning the legal invalidity of an implicit agreement at an international conference to challenge the LOSC, which would support expanded coastal State jurisdiction, is the more legally sound, *yet this has not predominated.* Submerged transit passage is being practised by the maritime powers and is supported by a majority of authors.[56] While a number of U.S. authors follow the W. Burke position, a clear majority of non-U.S. authors follow W. Burke in spite of the interpretative difficulties.

10.2.3. Conclusions

Within the latitude of coastal State activities arguably allowed under the W. Reisman interpretation related to submerged passage through international straits, it is to be expected that coastal States would expand their jurisdiction. This is especially likely given the Russian and U.S. environmental and safety legislation and enforcement in their respective exclusive economic zones. At the same time Russia, the U.S. and other maritime powers sail international straits in what is intended to be an exercise of transit passage, including submerged, and the legislative history as well as the majority of legal authors support this right. It seems doubtful this will change, especially given the security policies of these States, as well as the U.S. statement that it has ignored and will ignore attempts to limit this right. What this means for the future is unclear, but it may imply that powerful coastal States may utilise arguments such as those forwarded by W. Reisman and demand notification, surface passage or authorisation for submerged passage through international straits.

The dispute central to the discussion above is reflected in the Russian Arctic straits where the Russia as a coastal State requires submarine passage on the surface in the territorial sea and the straits showing the flag with ice-breaker assistance. The presumed U.S. practice is the same as through other straits claimed international, submerged.

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[53]H. Robertson, 'Passage Through International Straits' 844-5.

[54]A "strict textual" interpretation, if carried out with little consideration taken to the context of the conference, may misrepresent the provisions and hence have questionable relevance to reality. I. Brownlie, *Principles*, p. 632 and D. Harris, *Cases and Materials*, p. 767. See generally W. Reisman, 'The Regime of Straits and National Security,' 48, 52-4, 62-4, 66-7, 69-75 claims that the right of submerged passage is not excluded but at the same time is not clear under LOSC Part III.

[55]Interpretation utilising "intentions of the Parties," may tend towards a reduction to personal observations by those who attended. D. Harris, *Cases and Materials*, p. 767 and M. Akehurst, *A Modern Introduction*, pp. 203-4. This is especially so since the LOSC "records" have their status weakened even further, than under Article 32 of the Vienna Convention, due to their unofficial status. R. Churchill and A. Lowe, *Law of the Sea*, p. 340. See generally W. Burke, 'Submerged Passage through Straits,' 197-8, 202-16, 219-20 who believes the LOSC provisions provide submarines in certain straits with the right to pass submerged, however indicates a preference for including a corresponding duty to report and receive prior authorisation for submerged transit.

[56]See for example S. Nandan and D. Anderson, 'Straits Used for International Navigation,' 184 and M. Nordquist, S. Rosenne, S. Nandan, and N. Grandy, *Commentary*, Vol. 2, pp. 342-3 who follow the same view based upon the context and the negotiating history.

10.3. Foreign Submerged Passage through the Russian Arctic Straits

The Arctic and specific parts of the Russian Arctic during the Cold War was one of the most sensitive geographic areas in the world due to its location between the U.S. and the Soviet Union, and these States' strategic submarine deployment in this area.[57] Following the collapse of the Soviet Union the sensitivity has been greatly reduced, however the U.S. Department of Defence, "the biggest player" of all, continues to regard Arctic waters as central in U.S. strategic military interests both in global freedom of navigation and regional submarine and anti-submarine warfare operations.[58]

10.3.1. The Russian Position

From the above with respect to the Russian Arctic straits submerged passage is that area in which the Russian and U.S. practice diverges most. Any conditions for submerged passage in the Russian legislation would be in addition to those generally required for passage of State vessels. However, despite the fact that Russian legislation addresses the issue of passage of warships generally in internal waters, the territorial sea and the exclusive economic zone, little is directly stated concerning submerged passage.

10.3.1.1. Submerged Passage - LOSC Part III

Taking the same scenarios as above, Article 234 is doubtfully dominant to LOSC Part III due to the Russian and U.S. practice globally; transit passage is the rule. This includes the right of submerged passage as the "normal mode" under Article 39(1)(c), which would only be subject to the limited requirements imposed by the coastal State represented by Articles 41, 42(1)(a) and (b), 233, and "generally accepted" international provisions under Article 39(2) and non-transit elements under Article 39(1). Redress for loss or damage from submarines must be had through diplomatic channels under Articles 42(5), 235 and 304 covering responsibility and liability. Where there exist high seas channels or routes of similar convenience of the exclusive economic zone as in the Kara Gates, the Dmitrii Laptev, the Sannikov, the Blagoveshchensk and the Long Straits, free navigation would be the rule. Although regional Arctic developments associated with a harmonised Article 234 regime may be argued applicable through LOSC Article 42(1)(b), parallel yet not hampering transit passage,[59] this would play a minor role. Submerged passage would fall outside the scope of this provision. Pollution prevention, reduction and control are antithetical to requirements for surface passage of submarines in ice-covered straits. The reason is coastal State *security*, which, though Russian environmental and safety concerns are undoubtedly genuine in some respects, may indicate the major reason for the Russian legislation.[60] Additionally, Russia may be argued estopped to claim surface passage and general pilotage for submarines due to the Soviet - Russian submerged practice through straits globally. Finally, the U.S. claims and practice clearly do not envision encroachment of submerged transit passage by the ice-covered areas regime.

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[57]J. Brooke, 'Do We *Really* Need a Third *Seawolf*', 9-10 and D. Brubaker and W. Østreng, 'The Northern Sea Route Regime - Exquisite Superpower Subterfuge?' 2-11, believe the Barents Sea to be a chief deployment area of submarines, but the Novaya Zemlya 'trough' may also be included.

[58]F. Griffiths, 'Environment in the U.S. Discourse on Security: The Case of the Missing Arctic Waters,' in (W. Østreng ed.), F. Griffiths, R. Vartanov, A. Roginko, V. Kolossov, W. Østreng, *National Security and International Environmental Co-operation in the Arctic - the Case of the Northern Sea Route*, *INSROP Working Paper*, No. 83 - 1997, IV.2.1. p. 212.

[59]B. Oxman and A. Roach, 'Comments.'

[60]D. Brubaker and W. Østreng, 'The Northern Sea Route Regime - Exquisite Superpower Subterfuge?' 24-5.

Therefore, all the general Russian environmental requirements are in excess of LOSC Part III. Specifically this includes surface transit for submarines in the territorial sea while showing the flag under Article 9(e) of the 1993 Statute,[61] and "ice-breaker assisted pilotage" required for warships, submarines, in the Vil'kitskii, Shokal'skii, Sannikov and Dmitrii Laptev straits under Article 7.4. of the 1991 Rules. These hamper and suspend submerged transit passage under LOSC Articles 42(2) and 44. Additionally various forms of compulsory leading generally required under Articles 3.2. and 7.4. are in excess.[62]

Contrary to surface passage above, submerged passage appears to be that mode solely practised in the Russian Arctic straits *traditionally*, at least occasionally, by the U.S. consistent with its claims. This means that the LOSC Part III regime in the Arctic remains anything but clear, even considering the developments concerning surface passage. It seems safe to say however that the situation is strained under this scenario, and tension is even greater regarding submerged passage, since it is exclusively military and immune under Article 236 and customary law. The U.S. has indicated it will ignore attempts to limit the right of transit passage. Russia is a powerful coastal State able to develop sophisticated state-of-the-art monitoring equipment. Given the compliance level achieved on the surface for the Russian and Canadian regimes, as well as the latitude of coastal State measures arguably allowed under LOSC Part III represented by the W. Reisman view, a possibility exists for Russia to enforce its domestic legislation to the fullest extent should it deem it expedient to do so.

10.3.1.2. Submerged Passage - TSC Article 16(4)

The Russian regime also exceeds the non-suspendable innocent passage regime of the *Corfu Channel Case* and TSC 16(4), related to submerged passage. Here the Russian requirements for surface passage, under Article 9(e) of the 1993 Statute and supporting legislation, as well as implied under Articles 1.2. and 7.4. of the 1991 Rules, are ostensibly permitted under TSC Article 14(6). However ambiguity arises between the *Corfu Channel Case* and TSC Article 16(4) related to submerged passage and TSC Article 14(6). Due to the probable Soviet - Russian transgression mentioned of TSC Article 14(6), it is maintained Russia is estopped to require surface passage through the territorial waters of its Arctic straits and entrances. Where there exist high seas channels, free navigation would be the rule. This is arguably subject to conditions of environmentally sound navigation in the exclusive economic zone under parts of LOSC Part XII, which may be considered to have become customary international law and supported by the Russian ratification of the LOSC. However even if parts of LOSC Part XII may be argued customary law, prescriptive and enforcement measures must respectively be consistent with "generally accepted" and "applicable" international rules and standards. The Russian provisions are adopted unilaterally and deal with design, construction, manning and equipment standards and hence are in excess of this regime. In addition requiring surface passage for submarines may be argued contrary to the underlying foundation of the Russian regime, control and safety.[63]

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[61]This also includes non military submarines and other submerged means of transport. The same may be said concerning submerged passage in the territorial sea and internal waters, addressed in supporting legislation.

[62]The same argumentation concerns the straits in Franz Josef Land. Though lying outside the definition of the NSR of Article 1.2. and hence outside the specific scope of the 1991 Rules, these straits may be encompassed by the less specific Articles 1, 3 and 15 of the 1984 Environmental Edict and Article 5 of the 1983 Rules, which require pilotage or compliance with special construction, equipment and crewing standards, also for warships.

[63]See Article 2 of the 1991 Rules entitled, 'Principles, Object, and Goals of Regulation.'

Hence, all the Russian requirements exceed the *Corfu Channel Case* and TSC Article 16(4) regime, since the pollution and safety requirements hamper suspend innocent passage contrary to TSC Articles 15 and 16(4). No support is afforded the Russian regime by the developing local Arctic ice-covered regime regarding surface vessels. Submerged passage that is taking place would be consistent with the traditional regime as developed. State vessels would be exempt due to sovereign immunity under customary international law. If, however, the passage while submerged could be shown on a *case-by-case basis*, to be prejudicial to the peace, good order or security of Russia, then measures could be taken to require the submarines to leave the territorial waters under Article 10 of the 1991 Rules and supporting legislation and consistent with TSC Article 16(1). Redress for loss or damage from submarines must be had through diplomatic channels. The situation is also strained under this scenario

10.3.1.3. Submerged Passage - Non-International Straits Regimes

Assuming the Russian Arctic straits, covered by territorial waters or having a high seas channel, cannot be considered international, the Russian regime exceeds the innocent passage regimes of both the TSC and the LOSC, as well as environmentally sound navigation under more general parts of LOSC Part XII. Russia may be argued estopped to demand surface passage for submarines in international straits, however it may enjoy a stronger position with respect to the territorial sea covering non-international straits. It is this scenario which may most closely approximate the present legal situation with the TSC and the LOSC innocent passage regime and possibly parts of the LOSC Part XII regime governing. The TSC and LOSC limitations related to coastal State prescription and enforcement jurisdiction apply. The unilaterally adopted Russian provisions fail. Environmental and safety provisions hamper innocent passage under TSC Article 15 and LOSC Article 24. Where channels of high seas exist in the straits, traditional free navigation would be the rule. This also is possibly subject to the same LOSC Part XII conditions, but also where the unilaterally adopted Russian regime fails. In addition the same estoppel argument arguably applies for non-international straits with territorial waters. Based upon the global practice shown it is probable that the Soviet Union - Russia sailed its submarines submerged in the entrances of international straits consisting of territorial waters due to the requirements of Soviet strategy. If so, it is unlikely that the Soviet Union - Russia would have changed its clandestine submerged passage if its submarines encountered a non-international strait consisting of territorial waters through which passage was necessary. Thus for this scenario also it is maintained that due to the probable practice in other straits of the world Russia is estopped to demand that submarines travel on the surface through the territorial waters of its Arctic straits even if deemed non-international.[64] This requirement is also contrary to the underlying basis of the Russian provisions, prevention, reduction and control of marine pollution and safety. As indicated, should specific submerged passages be shown to be prejudicial to the peace, good order or security of Russia, then measures might be taken to require the submarines to leave the territorial waters, consistent with TSC Article 16(1) and LOSC Article 19(2). Redress for loss or damage from submarines might then be had through diplomatic channels. Even for this scenario, presently the most relevant, the legal situation though traditional is inconsistent with the regional regime developing for the surface under Article 234. This results in tension and instability.

[64]See M. Leifer, *International Straits*, 168-73, regarding Soviet passage in the Indonesian straits lacking a bilateral agreement with Indonesia, similar to that secretly negotiated by the U.S.

10.3.1.4. Quiet Protest

Only a few public Soviet protests have been made in support of their Arctic regime, and this was in the 1960's against the U.S. and ostensibly in relation to surface passage.[65] It is not known what success rate Russia has had in detecting foreign submarines transiting within those waters claimed as internal nor what policy Russia takes should detection be made.[66] Detection of submarines is admittedly difficult, and even when detected SSN's are difficult to track. "The best of the world's ASW forces are, for the most part, unable to find submarines," and even if they do, "few if any nations possess the means to place the U.S. SSN at risk."[67] However, some detection is indicated, and it cannot be excluded that the Soviet Union - Russia has installed underwater surveillance devices in its main Arctic straits.[68] Lack of Russian protest implies non detection or acquiescence, but this may also include a "silent" protest conducted solely between the foreign ministries, or a political or diplomatic decision to remain silent.

During the Cold War the issue of unauthorised submerged passage was perhaps too sensitive for either the Soviet Union or the U.S. to mention, with both possibly desiring to continue "cold" and avoid escalation into anything "hot" through an incident in a sensitive area. Conceivably it was and continues to be to the Russians' advantage not to indicate to the West how much it can detect, especially if the transits were only occasional. During the recent Russian period it might be to both States' advantage to avoid any incidents in order to assist the fledgling Russian democracy. Legally, non acknowledgement of known U.S. submerged transits through the Arctic straits might also be to the Russian advantage. In order for the U.S. FON program to support the U.S. position regarding law of the sea issues, the activities must be known not only to the coastal State but also to the world community. If the Russians either do not acknowledge the submerged passages or do not detect them, it is arguably easier to claim that the majority of other States are acquiescing to the Russian regime.[69] Russian silence to U.S. submerged passages in the Arctic might also be beneficial to both States regarding other world straits with controversial legal status.[70] Too much attention in the Arctic may direct unwanted attention to those straits where both Russian and U.S. submarines otherwise pass unnoticed. At the same time it is unquestionable that through the expansive regime noted the Russians do protest to a degree, since all vessels are encompassed by the strict rules. In addition, through detection devices possibly placed in the deeper straits, and Russian AWA submarines patrolling against the U.S. SSN's, arguably "protests" are provided to U.S. submerged activities. The Russians would also like an agreement with the U.S. whereby submarine traffic would be regulated.[71] At the minimum it would be difficult to maintain there was an acquiescence by Russia to the occasional U.S. submerged navigation claimed transit passage.

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[65]The Canadians similarly protested in the 1980's. A. Roach and R. Smith, *Excessive Maritime Claims*, pp. 207-15.

[66]See W. Reisman, 'The Regime of Straits and National Security,' 53, footnote 13 where spiralling rounds of counter-counter measures in under water surveillance systems are discussed.

[67]P. Peppe, 'Submarines in the Littorals,' *Naval Institute Proceedings*, July 1993, 46-7.

[68]Canada continues to install underwater surveillance devices in its main Arctic straits. V. Santos-Pedro, Director vessel Safety Northern, Canadian Coast Guard, 'Interview,' 23 November 1994.

[69]See A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic,' 166.

[70]This could include controversial in relation to LOSC Article 35(c), "long standing treaty," or Article 37, "used for international navigation."

[71]A. Yakovlev, 'Interview,' 25 August, 1994.

10.3.2. U.S. Practice

10.3.2.1. Stealth - Limitations

The general U.S. practice regarding submerged passage has been noted. On the background of the U.S. operations, however, there exist convincing practical limitations to clandestine submerged passage through the Russian Arctic straits. If the minimum depth of sixty six feet for the U.S. SSN's is taken discounting the effects of ice, which are considerable, many of the Russian Arctic straits are eliminated.[72] For those connecting two Arctic seas, previously from the approximate minimum depth figures,[73] those with the necessary depth include only the Kara Gates Strait (deep) connecting the Barents and the Kara Seas, the Vil'kitskii and Shokal'skii Straits (respectively three hundred sixty feet and deep) connecting the Kara and the Laptev Seas, and the Long Strait (one hundred thirty eight feet) connecting the East Siberian and Chukchi Seas. Straits within an Arctic sea with the necessary depth include only Kil'din Strait (deep) in the Barents Sea; the Orlovskaia Salma, Gorlo and Vostochnaia Solovetskaia Salma Straits (respectively sixty six feet, one hundred eight feet, and one hundred thirty two feet) of the White Sea; the Krotov and Kazakov Straits (respectively deep and deep) along Novaya Zemlya; the British Canal, Austrian, Markham, Nightingale, Meyers and De-Bruyn Straits (respectively, one hundred eighty feet, seventy two feet, four hundred eighty feet, one hundred forty four feet, two hundred twenty two feet, and three hundred thirty feet) of the Franz Josef Islands; the Krestovskii Strait (seventy two feet) of the Kara Sea; the Dubravin Strait (sixty six feet) in the Minin Skerries; the Fram Strait (ninety six feet) near Nansen Island, the Palander Strait (one hundred twenty six feet) near Bonevyi Island; the Vostochnyi Strait (one hundred fourteen feet) in the Kara Sea, and the Matisen Strait (one hundred fifty six feet) in the Nordenskjöld Archipelago. If a comfortable minimum depth of operation for the U.S. SSN approximates the one hundred feet figure then roughly an additional 22% of these straits would be impassable, and even some of those remaining might be questionably passable.

Taking ice-cover into account roughly fifteen meters (forty five feet) clearance under ice ridges is required with ice ridges protruding roughly fifteen meters (forty five feet) under the surface.[74] Thus roughly ninety feet should be subtracted from the straits listed above if used when the straits are ice-covered, which can be substantially long periods.[75] If this is done, roughly 45% of the above straits are impassable for the SSN's. Of those key straits connecting two Arctic seas, only the *Kara Gates Strait*, and the *Vil'kitskii* and *Shokal'skii Straits* are passable.[76] Those qualifying in Arctic Seas include only the Kil'din Strait, the Vostochnaia Solovetskaia Salma Strait, the Krotov and Kazakov Straits, the Markham, Meyers and De-Bruyn Straits, the Palander Strait, and the Matisen Strait, and some of these would be questionably navigable. This does not take into account icebergs, which may protrude much

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[72]This rough figure is obtained from extrapolation of W. Østreng, 'The geostrategic conditions of deterrence in the Barents Sea,' *The Soviet Maritime Arctic*, pp. 204-5 who notes that U.S. SSN's have operated undetected in the mouth of the White Sea as well as the harbour in Vladivostok; as well as W. Butler, *Northeast Arctic Passage*, p. 15 who notes that the least depth of the Orlovskaia Salma Strait in the mouth of the White Sea is approximately sixty six feet. The channels in the Orlovskaia Salma Strait and Gorlo Strait into the White Sea are approximately sixty six to one hundred eight feet minimum depth. H. Payne, 'The *Albacore*: Back to the Future', *Naval Institute Proceedings*, April 1993, 105, notes both the *Seawolf* (SSN-21) and the improved *Los Angeles* (SSN-688) class submarines are more than three hundred fifty feet long and fifty five feet from keel to top of sail.

[73]"Deep" is used where no figure has been given.

[74]W. Østreng, 'The geostrategic conditions of deterrence,' p. 211.

[75]See generally D. Barnett, 'Sea ice distribution in the Soviet Arctic,' *The Soviet Maritime Arctic*, pp. 47-62.

[76]The Kara Gates seldom freezes solidly and even in hard winters for only brief periods.

more deeply below the surface, as much as one hundred meters (three hundred twenty five feet),[77] or the "suction effect" on a hull moving close to the bottom.[78]

The U.S. Navy on its part recently decommissioned its last Sturgeon class submarine, the only class that, "can operate in shallow ice-covered seas,"[79] and in recent years pleas for smaller submarines have been ignored by the U.S. Congress.

Utilisation of the Russian Arctic straits by the Russian submarines may also be limited. The ASW submarines are considered to approximate the size of the U.S. SSN's.[80] A necessary depth of operation for the large Russian SSBN's, the Typhoon, under the ice is a minimum of sixty eight meters (two hundred twenty one feet) with a transit depth of one hundre meters (three hundred twenty five feet) being comfortable.[81] An older American SSBN, the *USS Sargo*, sailed submerged in the ice-covered Bering and Chukchi Seas with an average depth of eighty meters (two hundred sixty feet). Thus, taking a minimum depth figure of approximately two hundred twenty feet, even more of the above Arctic straits are impassable, roughly 60% being eliminated. Looking at the key straits connecting the Arctic seas, only the Kara Gates Strait, and the Vil'kitskii and Shokal'skii Straits are passable by the SSBN's. For the others only the Kil'din, the Krotov, Kazakov, Markham and De-Bruyn remain.

Due to strategic considerations including areas of operation, operational depth and icebergs, it is not only the Russian Arctic straits which may be largely unusable by both Russian and U.S. submarines, large areas of the Russian Arctic seas may also be included. One expert notes, "...with the possible exception of certain areas of the Laptev Sea, the marginal seas north of the Soviet Union are, by and large, unsuitable as bastions for SSBN's."[82] On the other hand in shallow waters sonar range is drastically reduced to only a few nautical miles, and both the U.S. SSN's would have difficulties locating the Soviet SSBN's, and the Soviet ASW submarines would have trouble finding the U.S. SSN's.[83] At least one expert considers the Siberian coastal zone to be an SSBN operational area,[84] as well as a militarised surveillance and monitoring area for detecting and counteracting bomber and missile attacks across the Arctic Ocean.[85]

It is undisputed that the focus of the U.S. Navy is now towards shallow waters and shallow water sensory technology.[86] Consequently a new nuclear version of the U.S.S. *Albacore* or a unmanned mini sub may possibly be in use or under development,[87] though this is impossible to confirm. One nuclear submarine captain notes that the U.S. submarine force is second to none in ability to operate in shallow waters, and U.S. submarines can be expected in any

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[77]W. Østreng, 'The NSR: A New Era in Soviet Policy?' *Ocean Development and International Law*, Vol. 22, 266.

[78]H. Payne, 'The *Albacore* Advantage,' 106.

[79]R. Boyle and W. Lyon, 'Have We Lost?' 34.

[80]H. Payne, 'The *Albacore* Advantage,' 105 notes the small Russian diesel electric "Kilo's" are 50 feet high and 220 feet long.

[81]W. Østreng, 'The geostrategic conditions of deterrence,' p. 211.

[82]W. Østreng, 'The NSR: A New Era,' 267.

[83]W. Østreng, 'The geostrategic conditions of deterrence,' p. 204.

[84]G. Lindsay, *Strategic Stability in the Arctic*, Adelphi Papers, No. 241 (London, Brassey's for International Institute for Strategic Studies, 1989), pp. 73-4.

[85]W. Østreng, 'Stumbling Block,' 3, 7 and 8.

[86]See generally P. Peppe, 'Submarines in the Littorals,' 46-8.

[87]H. Payne, 'The *Albacore*: Back to the Future', 106-107.

waters where it can "wedge its way in and out again..."[88] It seems reasonable to assume that the U.S. has continued interest in occasionally acquiring information regarding the effectiveness of their submarine systems, as well as monitoring any Russian military activity in the Siberian coastal areas. Since most of the Russian Siberian rivers are also navigable, these also may be U.S. submarine operational areas, though perhaps marginal due to the extremely shallow depths chiefly at the mouths.[89] It appears only the Yenisei, Ob and Khatangski with rough depths at the entrances of respectively, 20 to 30 feet, 30 to 40 feet and 50 to 60 feet which theoretically qualify for very small and quiet submarines, given sandbars have not built up further across the entrances.[90] Thus due to the possibility of interesting surveillance and monitoring areas along the Siberian coast, the occasional penetration of U.S. SSN's probably with AUV's or AUS's of the deeper Arctic straits, with corresponding presence of Russian ASW submarines cannot be totally excluded.[91]

Whether the safe bastions for the Russian SSBN's include the shallow partially ice-covered Arctic seas or not, the safest and therefor highest concentration of SSBN stations is undoubtedly under the ice in the GIUK gap or deep areas of the MIZ and polynias of the central Arctic Basin.[92] The U.S. SSN's would follow these, and therefore the majority of both U.S. and Russian submerged transits of Russian Arctic straits should probably be seen in relation to this area. Accordingly, the safest Russian submerged routes from the Kola Peninsula to and from these areas would be to largely *avoid* the Russian Arctic straits and remain in the depths of the Barents Sea, between Bear Island and Northern Norway and between Franz Josef Land and Novaya Zemlya.[93] The safest route for U.S. submarines towards the same areas may be through the Bering Strait or Canadian Arctic waters. Since the *Kara Gates*, the *Vil'kitskii* and the *Shokal'skii Straits* are deep enough and conceivably SSBN stations can occur in the Barents, Kara and the Laptev Seas, as well as in more Arctic shallow waters, passage of the Russian SSBN's and ASW's and the U.S. SSN's may occur. The deeper channels of the Franz Josef Islands, the British Canal, Austrian, Markham, Nightingale, Meyers and De-Bruyn Straits, may also have some traffic for passage to and from the Arctic Ocean.

10.3.2.2. Submerged Passage - International Regimes

As regards "international use" periodic and chiefly clandestine submerged transits doubtfully fulfil the criteria of the *Corfu Channel Case*. Since submarine traffic was not distinguished in the *Corfu Channel Case*, the same elements regarding 'internationality' govern as with surface traffic. There may be approximately two U.S. SSN's shadowing Russian SSBN's in the entire Arctic at any one time. Even during the Cold War any of the approximately ten or eleven U.S. SSN's operating in the entire Arctic at any one time, or the U.K. and French SSN's, could not have made more than occasional submerged transits through the navigable Soviet Arctic straits. Such transits are risky, not only militarily and politically, but physically as well, the approximate clearances having been noted. Even if these ten or eleven submarines at any one time did transit those Soviet Arctic straits passable, the numbers still do not represent a substantial number of transits, of flags represented and a

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[88]P. Peppe, 'Submarines in the Littorals,' 47.

[89]R. Boyle and W. Lyon, 'Have We Lost?' 34.

[90]Russian Charts Nos. 951, 600, 948, 949, 951, 952, and 954.

[91]This is substantiated by V. Aleksin, 'We Are Ready When You Are,' 54-7.

[92]D. Brubaker and W. Østreng, 'Exquisite Superpower Subterfuge?', 9-13.

[93]W. Østreng, 'The geostrategic conditions of deterrence,' pp. 211-2.

useful route for international traffic, even for remote areas. This is for the same reasons as for surface traffic. Submerged transit in the cumulative with surface transits still probably represents approximately the same order of magnitude as for surface transits.[94] Perhaps most convincing however, is that submerged transits cannot be documented to any great extent to the international community, and therefore can hardly be said to contribute to showing a history as a useful route for international navigation. Similar to surface passages it is submitted that to base any argumentation for 'internationality' of the Russian Arctic straits upon such use is artificial.

The inference that thus may be drawn is that the occasional U.S. submerged passages, as well as those possibly carried out by the U.K. and France, through the Russian Arctic straits, are presently in conflict with the LOSC Part III and TSC Article 16(4) international straits regimes. These foreign submerged passages are as well in conflict with the TSC and LOSC innocent passage regimes governing the territorial sea, where surface passage is required showing the flag, though this is unrealistic in ice. Foreign submerged passages through channels comprised of the high seas or the exclusive economic zone would not be in conflict. These occasional submerged transits are as well substantially in conflict with the Russian 1991 Rules Articles 3 and 7, and associated legislation including Article 9(e) of the 1993 Statute. These require sailing on the surface with flag showing, reporting and compulsory ice-breaker assisted pilotage for the Vil'kitskii and Shokal'skii and probably the Kara Gates Straits and possibly the straits in Franz Josef Land. This also results in tension and instability.

10.4. Conclusions

The general conclusions are similar to those in Chapter 7. The Russian regime governing its Arctic straits related to submerged passage exceeds all three scenarios, LOSC transit passage, TSC non-suspendable innocent passage and passage through non-international straits. These include mandatory notification, 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, and design, equipment, manning and construction standards and special areas and application to State vessels.

In addition to these, specifically this concerns requirements for surface transit for submarines in the territorial sea while showing the flag, "ice-breaker assisted pilotage" required for warships, including submarines, in the Vil'kitskii, Shokal'skii, Sannikov and Dmitrii Laptev straits, and various forms of compulsory leading along the NSR including other straits. Arctic straits in Franz Josef Land may be included as well. In relation to LOSC Part III and TSC Article 16(4) these requirements hamper and suspend transit passage and non-suspendable innocent passage. Russia may be argued estopped to claim surface passage and general pilotage for submarines in its territorial sea due to the Soviet - Russian submerged practice through straits globally. Where there exist high seas channels or routes of similar convenience of the exclusive economic zone as in the Kara Gates, the Dmitrii Laptev, the Sannikov, the Blagoveshchensk and the Long Straits, freedom of navigation is compromised. Regional developments associated with Article 234 or a possible application of LOSC Part XII would play a minor role. For straits comprised of ice-covered areas of the exclusive economic zone Russia may likewise be argued estopped to claim surface passage and pilotage

[94]The degree of use, submerged passage seen together with surface passage, covering most of the 20th century, creeps towards 4% of the use noted under the *Corfu Channel Case*.

for submarines due to its submerged practice. Additionally, the U.S. claims and practice clearly do not envision encroachment of transit passage by LOSC Part XII, though Article 234 may now be claimed applicable through Article 42(1(b). For the non suspendable innocent passage regime, for high seas channels, even if LOSC Part XII may be argued customary international law supported by the Russian ratification of the LOSC, prescriptive and enforcement measures must respectively be consistent with "generally accepted" and "applicable" international rules and standards. The Russian provisions are adopted unilaterally and include design, construction, manning and equipment standards. For passage through non-international TSC and LOSC straits, the TSC and LOSC limitations related to coastal State prescription and enforcement jurisdiction related to innocent passage and LOSC Part XII apply. The expansive unilaterally adopted Russian provisions fail. The environmental and safety provisions hamper innocent passage and do not reflect "generally accepted" and "applicable" international rules and standards. Where channels of high seas exist in the straits, traditional free navigation would be the rule. This also is possibly subject to the LOSC Part XII conditions, but also where the unilaterally adopted Russian regime fails. In addition a similar estoppel argument may apply for non-international straits and include the territorial waters and exclusive economic zone. Based upon the practice shown it is probable that the Soviet Union - Russia sailed submerged through the entrances of international straits consisting of territorial waters due to deterrence institutionalisation. It is unlikely that it would have changed its clandestine submerged passage if its submarines encountered a non-international strait consisting of territorial waters through which passage were necessary. Thus Russia may be argued estopped to demand that foreign submarines travel on the surface through the territorial waters and exclusive economic zone of its Arctic straits even if deemed non-international. These requirements are also contrary to the basis of the Russian regime, environmental control and safety.

In practice very few statements have been issued by Russia protesting U.S. or other foreign submerged passages. From this it seems possible that either the U.S. is not transiting submerged those few Russian Arctic straits clearly navigable, the U.S. is transiting and the passages are not detected by Russia, or the U.S. is transiting and is detected at times, but Russia is not protesting publicly. The first possibility seems unlikely based upon the discussion above. The second and third possibilities seem the more probable. At the same time despite the lack of public protests by Russia, at the minimum it would be difficult to maintain there was an acquiescence to the occasional U.S. submerged navigation claimed transit passage. This is due to the expansive Russian Arctic regime applying to all vessels, possible detection devices placed in the deeper straits, and Russian AWA submarines patrolling against the U.S. SSN's, arguably providing "protests" to a degree.

"Non internationality" of the Russian Arctic straits is presently the more solid view due to the low number of foreign transits. Support thus falls in favour of the Russian Arctic regime. Submerged navigation by the U.S., claimed transit passage, exceeds the same scenarios, even though unrealistic in ice. U.S. submerged passages through channels comprised of channels of the high seas or the exclusive economic zone would not be in conflict.

Thus, as long as the increased numbers of foreign surface vessels continue to sail in compliance with the Russian regime, though submarines from the U.S. and possibly the U.K. and France do not, it seems difficult to see how the regional Arctic regime will change in spite of its asymmetry. The official U.S. declarations and occasional submarine traffic through the Russian Arctic straits may counter the trend on the surface, though both of these may not be so theoretically solid. Over time the acceptability of the U.S. declarations may carry less

weight unless reinforced by unequivocal State practice. The asymmetry, which is likely to increase due to developments on the surface, results in tension and instability.

From the above, a curious Arctic regime emerges indicating the interrelation between the regimes for ice-covered areas and international straits, wherein several tracks may have occurred in the development of State practice. Taking commercial vessels on the surface, the Article 234 regime would appear to dominate over the LOSC Part III regime. These vessels, especially tankers, are regulated by all three Arctic coastal States, including in their ice-covered straits, and the submission 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. While legally legitimate, definite passages clearly would strengthen the U.S. position.

For State vessels the U.S. remains steadfast in its claims for the dominance of the international straits regime. State ships are exempt from the Article 234 regime under Article 236. An important difference between the Russian, Canadian and the U.S. coastal State practice is that State vessels are regulated only under the former two and thus find little support from the U.S. coastal 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 vessels. However it appears that in passages the U.S. State vessels on the surface 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 the earlier incidents previously mentioned, the U.S. vessels have not navigated either the Canadian or the Russian Arctic without the consent of the respective governments.[95] Thus for State vessels on the surface the Article 234 regime doubtfully is the dominant, based upon Article 236 in addition to the U.S. declarations. Since there is little or no navigation by the U.S. supporting its declarations, the application and hence dominance of the international straits regime over the ice-covered areas regime for these vessels seems to be based chiefly upon Article 236 and international law. It is odd that the U.S. for its surface State vessels prefers not to openly forward both the dominance of the international straits regime, as well as sovereign immunity, over the Article 234 regime, given its FON demand for innocent passage in the late 1980's in the Black Sea.

If the type of vessels passing through ice-covered straits is further categorised, even more tracks appear. If the passage of submerged State 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 invoking Article 39(1)(c), and is claimed to be exercised in the Arctic in the U.S. Navy's FON program, including possibly through certain of the Arctic straits.

Thus, from this practice it appears that a curious spectrum of right of passage based on *type of vessel* is developing for Arctic ice-covered straits that are potentially international. For the passage of commercial vessels, especially tankers, the Article 234 regime clearly dominates over the LOSC Part III regime, based upon the Russian, Canadian and U.S. coastal State legislation. For the U.S. the practice is not uniform but clearly contains elements in this direction. In addition the U.S. requires its commercial vessels to respect the Canadian Arctic

[95]Only passages by *Sverdrup II* have ever been mentioned by the Director of the NSRA V. Michailichenko, and Deputy Director A. Ushakov.

legislation in spite of jurisdictional protests. For submerged passage the LOSC Part III regime clearly dominates over the ice-covered areas regime. This type is presently exclusively State vessels, which also enjoys sovereign immunity. In addition submerged passages support the U.S. declarations for transit passage. For surface passage by State 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 under LOSC Article 236 and international law, against which Article 234 and Russian and Canadian coastal State regulations stand very weak. Should the U.S. decide to navigate State vessels on the surface through ice-covered straits under the LOSC Part III regime, the way certainly stands open. For the latter no passages of this nature are taking place. However, since the LOSC Part III regime stands strongest for submerged passage, the way seems certainly open for passages of this nature also.

11. A Rule of Customary Law is in the Process of Formation

11.1. Purpose

The Arctic is an ocean, but the jurisdictional claims forwarded by the large coastal States in the Arctic Ocean indicate substantial deviation from the application of traditional regimes. Specifically, the regimes for international straits and passage of State vessels are encroached by another, the LOSC ice-covered regime, to an extent unprecedented and unknown in other parts of the world. The U.S. as a maritime power allows divergence from the regimes for international straits and rights of passage for State vessels nowhere else as it does in Arctic straits, exclusive economic zones and territorial seas. There is lacking as well general State protest to the divergence.

The hypothesis to be proven thus is that customary international law presently is in the process of formation for the Arctic, defining the contours of an Arctic specific regime for ice-covered areas. This encompasses the regimes for international straits and rights of passage for State vessels.

Russian Arctic waters are the chief focus since the issues are more clearly presented due to Russian and U.S. polarisation. This includes not only legal issues, but also security aspects determined by these powers. Canadian Arctic waters are also included due to the support offered by parallel yet less polarised developments. The Arctic waters of Norway and Greenland/Denmark are not addressed due to the absence of practice by these Arctic littoral States related to the relevant legal issues.

11.2. Scope of Article 234 and Other Regimes

Article 234, due to the unclear U.S. practice as well as the varying interpretations, questionably may be said to represent customary international law. The substance of the Article is not yet clear which could be considered to be normative, practised and acknowledged as law. It is also doubtful that the general LOSC Part XII vessel-source regime has become customary international law. Although establishment of the exclusive economic zone has undoubtedly become customary law, and the U.S. views Part XII as customary law and the Soviet Union incorporated large parts of Part XII into domestic legislation; only a small number of States have extended their jurisdiction over vessel-source pollution in the exclusive economic zone. This argues against Articles 211, 218-220 governing vessel-source pollution in the exclusive economic zone having become customary law. However, norm-setting provisions of MARPOL 73/78 and other IMO pollution and safety conventions enjoying a high rate of ratification by States representing world tonnage have likely become customary law.

Looking at the issues surrounding Article 234, including expansive and restrictive interpretations, it is difficult to determine which construction is the one intended, though the broad interpretation is probably the literal one. It seems safe to maintain that concerning "due regard to navigation," foreign vessels may navigate in ice-covered waters in a coastal State's exclusive economic zone. Coastal States may not prescribe or enforce more stringent provisions governing the exclusive economic zone than those governing the territorial sea. To do so would be contrary to all previously adopted and enforced international environmental regimes. The provisions may not discriminate between Russian and foreign vessels. The term "ice-covered" is not confined temporally. Limits more precise than these may not be more

clearly defined. This allegation is based chiefly upon the legislative history of the negotiations between Russia and Canada, which supported the broad interpretation, and the U.S. which supported a variation of the narrow interpretation. Generally, other States were neutral. This also is supported by that doctrine which has examined the issues.

However, taking a stand on the textual interpretation of Article 234 may be solely an academic exercise. Practice in the Arctic must be examined due to the continued non ratification of the LOSC by the major Arctic littoral States, the U.S. and Canada. It will as well indicate the interpretation of Article 234 given by Russia. The Russian and Canadian legislation support the broad interpretation and in some ways extend it , including through application to State vessels. Article 234 additionally appears to be used by Russia and Canada for reasons other than environmental protection, including perceived security benefits and jurisdictional gains. The position of the U.S. is the key however, and it is probable that the U.S. is holding its options open. This is indicated by the obscure and contradictory positions it takes under postures denoting both a maritime power and a environmentally concerned coastal State.

The specific standards of Article 234 could questionably be maintained to be "norm-setting." However they indicate that all of the main negotiators of Article 234, Russia, Canada and the U.S., are in effect practising some form of a broad interpretation of Article 234 *related to surface passage*. It may thus be argued that coastal State prescription and enforcement of environmental standards governing surface passage in general ice-covered waters is norm-setting. Therefore for the Arctic it is submitted that the contours are taking shape, and a broad interpretation of Article 234 related to commercial passage on the surface in the exclusive economic zones is in the process of becoming customary international law. This becomes clear as discussed below. Russian practice is specifically compared to the elements of Article 234 and the resulting compliance commented, and the Russian practice is also specifically compared to U.S. and Canadian coastal practice, as well as to the navigational practice of the U.S. and other States in Russian Arctic waters, and resulting compliance commented.

The general environmental regime governing vessel-source pollution represented by LOSC Articles 211, 218-220 has achieved a balance of interest between flag and coastal States. However the provisions extending port and coastal State jurisdiction are doubtfully effective due to a general lack of practice. International conventions such as MARPOL 73/78 may be raised through Part XII to the status of international standards. The practice by Russia and the U.S. are exceptions to this trend, though the U.S. practice is based upon liability, arguably applying in the exclusive economic zone. MARPOL 73/78 Annexes I and II, and other IMO and ILO Conventions have led to some control of maritime pollution by developed European and North American States, though there remain significant problems related to enforcement. This was expanded upon where Russian practice was generally compared to the LOSC Articles 211, 218-220 and MARPOL 73/78 regime and resulting compliance commented. As indicated below the Russian practice is also compared to the U.S. and Canadian coastal practice, as well as to the navigational practice of the U.S. and other States in Russian Arctic waters.

General customary international law related to environmental protection may best be characterised as permitting substantial State freedom to pollute for flag States and rights of prescription and enforcement for coastal States in their territorial seas. The latter is limited by a requirement of non-hampering of innocent passage, as well as an obligation to exercise

reasonable regard concerning the rights of others. More specific provisions may have become customary law however based upon negotiation and agreement. These include general obligations under LOSC Articles 192-5 to take measures to protect and preserve the environment and to ensure that activities under State jurisdiction do not cause damage to other States, as well as MARPOL 78/78. At the same time, taking into account some movement by developed States towards this LOSC - MARPOL 73/78 regime, general practice seems chiefly to follow traditional customary rules that coastal States regulate pollution within their territorial seas, and flag States regulate outside of these zones. Russian practice was generally compared with the customary law - MARPOL 73/78 regime and resulting compliance commented. The Russian practice is compared to the U.S. and Canadian coastal practice, as well as to the navigational practice of the U.S. and other States in Russian Arctic waters.

Finally, whether or not the Arctic Ocean may be considered semi-enclosed, practice in the Arctic seems to be proceeding within the requirements of LOSC Articles 122 and 123 governing enclosed or semi-enclosed seas. This includes developments related to the Harmonisation Conference and the Rovaniemi Process, including the Arctic Council. This practice, by States including the Arctic littoral States, would likely satisfy sufficiently the rather vague requirements that States should co-operate in the exercise of their rights and duties under LOSC, as well as endeavour to co-ordinate the implementation of their rights and duties. For special areas under Article 211(6) it remains to be seen if there is a role to be played in the Arctic for particularly sensitive areas within the Article 234 regime for ice-covered areas. Much the same could probably be maintained for the MARPOL 73/78 special areas.

11.3. Article 234 - The New Sector Principle? - Practice in Russian Arctic Waters Compared to the International Regimes

The key terms characterising the Russian provisions are mandatory notification and authorisation, possible high seas application, 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 State vessels. Examining these in relation to the three possible international regimes governing vessel-source pollution in Russian Arctic waters, Article 234 (ice-covered areas); Articles 211, 218-220 and MARPOL 73/78 (general LOSC vessel-source pollution regime); and customary international law and MARPOL 73/78 (traditional vessel-source pollution regime); the following is found in relation to practice.

For the 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. 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 Harmonisation Conference at the Coast Guard level. It is the U.S. as a maritime power which has most consistently opposed the Russian regime for Arctic waters, through declarations by the U.S. State Department and the U.S. Navy, and through military submerged passages. The Vil'kitskii Straits Incidents in the mid 1960's involving passages of U.S. Coast Guard and U.S. Navy vessels in the Laptev, East Siberian, and Kara Seas were carried out prior to Russian implementation of the Article 234 regime. The U.S. uses the same declarations made in these incidents to forward its present position, and these declarations

follow positions taken by maritime powers under traditional law of the sea. The submerged passages are only vaguely substantiated. All non State surface passages appear to have been made in compliance with the Russian regime. No other States have been found clearly opposing the Russian regime. There have been several military surface passages made by Norway in the Kara Sea with *Sverdrup II* in the Kara Sea in the mid 1990's though Norway has not protested the Russian regime. Military submerged passages may be carried out by the U.K. and France as well. These, however, remain even less confirmed than the U.S. passages. Upon this basis, it may thus be maintained that of the descriptive terms, *six* are contentious: vague geographic application including the high seas, application to State vessels, mandatory fees, ice-breaker assisted pilotage, ice-breaker leading and special areas. Application to the high seas finds support neither from the Canadian and the U.S. practice, nor from customary international and conventional law. Application to State vessels finds neither support from the U.S. practice nor customary international nor conventional law. Mandatory fees, though arguably scientifically sound for environmental protection under Article 234, are blanket and probably discriminatory in fact. The contentiousness of the remaining three terms are less clear. Ice-breaker assisted pilotage, ice-breaker leading and special areas, though in excess of the U.S. practice as a coastal State, find support in the Canadian practice as a coastal State. The latter has included either requiring an ice-pilot onboard or requiring a Canadian Coast Guard Officer onboard together with the accompaniment of a Canadian ice-breaker. Specific geographic areas may be closed for all shipping except Class 10 icebreakers. These terms also enjoy support from the navigational practice of foreign States which as far as is known is in substantial compliance with the Russian regime. Additionally, both Russian and Canadian requirements could plausibly be argued justified under Article 234 as part of a sound environmental protection policy having due regard to navigation.

For the general LOSC Article 211, 218-220 and MARPOL 73/78 environmental regime, 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 regime lacks various components generally with regards to prescriptive and enforcement measures under this international regime, and various may even be in direct conflict with it. The result leans chiefly in the favour of increased Russian coastal State competence. Of the key terms only reporting of pollution incidents and information requested generally seem consistent. Opposition to the Russian regime is provided by the U.S. declarations and navigational practice. The possibility exists that the U.S. may attempt to fall back to this Article 211, 218-220 and MARPOL 73/78 regime in the Arctic, through an eventual repeal of the OPA 1990. At the same time the Russian terms may become "generally accepted" through the Harmonisation Conference which has delivered its code to the IMO. Should this be adopted by the IMO and the Russian provisions harmonised accordingly, the design, equipment, manning and construction requirements may arguably become "generally accepted." The mandatory leading requirements may also become "generally accepted" as well, since use of such may be implied in these technical norms. As it is, the Russian regime finds substantial support in the U.S. and Canadian Arctic practice. It is only geographic application including the high seas, application to State vessels, mandatory fees, ice-breaker assisted pilotage, ice-breaker leading and special areas which are inconsistent. The three latter are supported by Canadian practice as well as foreign navigational practice.

For the traditional environmental regime under customary international 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. 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. Mandatory notification and authorisation for the passage of State vessels is controversial, though accepted in roughly one-third of coastal State jurisdictions. When acts of wilful and serious pollution occur, then the various enforcement measures may be justified, but only on a case-by-case basis. At the same time due to the Arctic practice of the U.S. and Canada in their exclusive economic zones *most* of the key terms of the Russian provisions find support. The same arguments govern, however justification is provided by customary international law (freedom of the high seas, sovereignty immunity) and 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 provided solely from the Arctic practice of the U.S. and Canada.

Generally, the consistent practice by these large Arctic littoral States indicates a process of formation of firm customary law pending LOSC ratification by these States. Following LOSC ratification, this practice, which will likely continue due to the time it has already existed, also indicates a subsequent practice in interpreting Article 234 consistent with Article 31(3)(b) of the Vienna Convention. The exact scope of the substance of Article 234 indicated by the domestic provisions however is still unclear. This is due not only to the ambiguity of the U.S. position, but also the continued developments still taking place concerning Arctic jurisdiction. Talks continue between Russia, the U.S. and Canada, though in what form or for what scope of issues is not known. Concerning the U.S. position it would still be difficult to argue that the U.S. is acknowledging as law a broad interpretation of Article 234, given that its declarations and possible submerged transits follow a solid narrow interpretation. The U.S. hesitancy may be mentioned as well to directly refer to Article 234 in its legislation. It is expected these developments will continue. It is doubtful any State will be able successfully to play the opponent role in the Arctic strictly favouring traditional shipping interests similar to that played by the U.S. prior to the adoption of OPA 1990. There may be challenges in the future within the U.S. itself to OPA 1990, causing a change of policy back to the traditional position favouring shipping. Whether this would affect the Arctic however is unclear. The U.S. does not appear to be uneasy playing a double role in Arctic law of the sea. On the surface it supports a comprehensive, international vessel-source environmental regime. Under the surface it navigates its submarines, supported by substantially non-enforced 30 year-old declarations, and seemingly at times independent of law of the sea. It may continue to practice this double role, despite possible internal legal developments including repeal of the Federal OPA 1990, and allow Alaskan legislation to remain in force, implementing or interpreting Article 234.

11.4. The International Straits Regime - A Limitation Device?

With regards to customary international law non-suspendable innocent passage through international straits from the *Corfu Channel Case* and TSC Article 16(4) has become firm customary law. Yet questions remain involving its universality encompassing the passage of warships in territorial seas, both in straits and ordinarily. It has been found based chiefly upon practice that it is doubtful that the LOSC transit passage regime has passed into customary international law. This is due to the State practice of a moderate number of States which give support to the LOSC Part III regime, yet which except the application of transit passage in straits under their own jurisdiction. Additionally, it was found that Article 233 is meant as a

coherent part of the LOSC international straits regime, and lacking passage of this regime into customary law, it is doubtful it could be argued that Article 233 itself has passed.

"Used for international navigation" from the *Corfu Channel Case* was incorporated into TSC Article 16(4) and LOSC Articles 34 and 37, and thus would bear the same meaning. This would be unless indicated otherwise by TSC and LOSC provisions. These however provide no further elaboration. Questions may be however raised around the interpretations of "use" and "international." Should international commerce result in increased passages of a strait, should not the legal status of the strait also be able to change to reflect this use? Though a attractive argument, nonetheless it has been found based upon State practice that it is doubtful that "internationality" of the international straits regime may be based upon potential use. Even should the U.S., which appears to be the exclusive proponent for potential use, ratify the LOSC, the controversy regarding "internationality" is likely to continue. The LOSC provisions do not introduce changes relevant to interpretation of the term "international straits."

The prescriptive limitations of TSC Article 16(4) may be characterised by ambiguity, especially surrounding the passage "prejudicial...to the security" of the coastal State. Since these vagaries resulted in negotiations which produced a new international straits regime, it is submitted no further analysis of Article 16(4) is necessary. State practice is in the process of proceeded beyond this regime. Where it is applicable, it is accepted with its faults and regulated locally through individual coastal State legislation. In addition in determining the prescriptive confines of Article 16(4), the more general issue concerns the meaning of innocent passage, especially for State vessels, and a not insignificant number of States consider the passage of warships *a priori* not innocent. Since the Russian Arctic straits may become international and LOSC Part III customary law, as well as taking into account increased LOSC ratification, the LOSC provisions governing prescriptive and enforcement jurisdiction must be viewed. Here it was found that it is doubtful the Article 38(3) "reduction" to innocent passage would apply generally. It would apply solely to violation of the most major elements of transit passage under Articles 38(2) and 39(1), continuous and expeditious transit without delay, without force or threat of force and with normal modes. Further, it was found that despite theoretical differences with respect to environmental and safety provisions, "applicable" under Article 42 indicates coastal State competence is limited to MARPOL 73/78 provisions, and "general acceptable" of Articles 41 and 42 indicates coastal State competence is limited to traffic schemes and sea lanes. Vessel compliance under Article 39(2) with environmental and safety provisions is somewhat broader and includes all international regulations, procedures and practices considered "generally accepted." At the same time due to the State practice of Russia and the U.S. as coastal States with respect to their domestic environmental and environmentally related safety provisions, which far exceed MARPOL 73/78 and safety traffic schemes and sea lanes, the legal situation is confused.

For enforcement jurisdiction under TSC Article 16(4) the same ambiguity existed as for prescriptive jurisdiction involving the meaning of the passage "prejudicial...to the security" of the coastal State. Other vagaries included whether breach of coastal State health, customs and immigration provisions rendered the passage non-innocent; and whether lack of notification rendered the passage of warships non-innocent. Practice has proceeded however beyond this regime. Enforcement jurisdiction under LOSC Part III was found to be in an even more confusing state than that of prescriptive jurisdiction under LOSC Part III. Theoretically, coastal State competence is very limited, being required not to hamper, impair, deny or suspend transit under Articles 42(2) and 44. This includes violations of domestic laws and

regulations. An exception is allowed under Article 233 wherein "appropriate measures" may be taken for environmental violations causing major damage or threats of such, however this chiefly allows enforcement measures taken only in ports. The Malacca Agreement has modified this somewhat allowing more stringent measures to be taken with regard to minimum under-keel-clearance without causing a corresponding breach of Article 233. However, similar to that found regarding prescriptive jurisdiction, the excessive State practice of Russia and the U.S. as coastal States in inspecting, arresting, seizing and removing vessels for violations of the extensive domestic environmental and environmentally related safety provisions confuses the legal situation.

Regarding the interrelation between the Article 234 regime and TSC Article 16(4) it was found the ice-covered areas regime is clearly the dominant for the territorial sea. In the territorial sea under TSC Article 16(1) and LOSC Article 19, both of which have likely become customary international law, a coastal State may prevent passage which is not innocent. Under LOSC Article 19(2)(h) passage is considered to be prejudicial to the peace, good order or security of the coastal State if the vessel engages in any act of wilful and serious pollution. Navigating through Arctic straits under TSC Article 16(4) with no attempt to comply with a coastal State's environmental regime may likely be termed reckless and threatening to cause wilful and serious pollution. This would arguably give an Arctic coastal State reason to prescribe and enforce measures preventing this threat, including temporary suspension, if not complete suspension, due to non-innocence. On high seas zones through the straits there could be no suspension. Regarding the interrelation between the Article 234 regime and the LOSC Part III regime, it was found theoretically that it was probable that the international straits regime would dominate. However developments in practice indicate that a divided regional regime is emerging wherein the traditional dominance of the international straits regime is practised only for submerged transit. Surface passages, both State and commercial, indicate a practice favouring dominance of the ice-covered areas regime. This split regime is likely practised by both Russia and the U.S. under "normal mode" of Article 39(1)(c), due to the importance of submerged passages through international straits in each State's strategic deterrence strategy.

11.5. The International Straits Regime - Limitations to the Article 234 Regime?

Applying the theoretical conclusions arrived at previously to the Russian Arctic straits, it was found that the Russian position related to surface passage, though supported by the present non-passage of the LOSC Part III regime into customary law, is vulnerable. Legally, "non-internationality" of the Russian Arctic straits is presently the more solid view, thus supporting the Russian regime. The number of foreign surface vessels, charters, cargoes, or destinations fall well below criteria from the *Corfu Channel Case*, even for remote areas. As far as is known all recent commercial shipments with foreign elements have made been in strict compliance with the Russian 1991 Rules and associated legislation. With the exception of the Vil'kitskii Straits Incidents in which the straits were not entered, as far as is known the U.S. has not navigated State surface vessels along the NSR without complying with the Russian regime. It could do so under its declared position. The voyages of the Norwegian *Sverdrup II* in the Kara Sea may be mentioned as well, since there was an ambiguous affiliation with the U.S. Navy., however the straits were not entered.

At the same time the U.S. position that the straits may become international is logically sound, though not supported by State practice. It seems difficult to maintain, that should world trade develop such that shipping routes begin to run through straits previously not

useful to international navigation, that pressures would not develop on the coastal State to allow more liberal application of passage rights than innocent passage through its territorial sea. In support of this argument there is little history of straits being treated as inland waters when subject to transit passage. Thus should the NSR become commercially viable, the U.S. can probably expect increased support for its arguments for "potential use" evidencing "used for international navigation." This may induce the U.S. and others to "test" the Russian regime and navigate their own State or chartered ice-breakers and ice-strengthened commercial vessels as transit passage through the relevant Russian Arctic straits in contravention of the 1991 Rules and supporting legislation. This seems unlikely to involve military vessels, though theoretically possible, both because the U.S., is already navigating the military vessels it desires occasionally through the Russian Arctic straits, the submarine; and perhaps because of international policies involved with supporting the movement towards democracy in Russia.

Thus, it is possible that in addition to increased ratification of the LOSC, the LOSC Part III regime may in the not-too-distant future enter customary law and the Russian Arctic straits be subject to increased international use, broadly interpreted. From the above, historical title to the Russian Arctic straits therefore becomes crucial for Russia to continue with its claims for internal waters governing these areas. This is due to the TSC Article 5(2) and LOSC Article 8(2) exceptions, allowing innocent passage in waters enclosed by straight baselines, previously considered territorial waters, both of which Russia has accepted through its ratification of both treaties.

Because the legal situation is not static but rather represents the present stage in a dynamic legal flux, when considering the limits of prescriptive and enforcement jurisdiction over the Russian Arctic straits in ice-covered areas, it was thus necessary to consider three scenarios. These include a LOSC transit passage alternative, a TSC non-suspendable innocent passage alternative and a non-international strait LOSC and TSC alternative. Addressing the three scenarios it was found that the Russian 1991 Rules and supporting legislation exceed *all* three. Increased coastal State jurisdiction is allowed within the TSC non-international scenario, possibly allowing more stringent requirements in territorial waters considered dangerous. However the most striking developments relate to the U.S.'s domestic OPA 1990 and Clear Waters Act. If the Russian rules are considered in relation to the U.S. legislation as a coastal State, almost *all* of the key descriptive terms fall within the limits set by the U.S. for commercial vessels. However, the Russian provisions still exceed for all three scenarios the international limits governing passage of State vessels.

For commercial vessels it is only the fees and ice-breaker-assisted pilotage and ice-breaker leading which exceed the U.S. provisions. Since these regional Arctic developments are juxtaposed on the three traditional international legal scenarios, the legal situation pertaining to jurisdiction governing the Russian Arctic straits is very confused. This is especially so, since the U.S. as a maritime power claims unequivocally the first, the LOSC Part III, to apply. Since declarations under international law need not be enforced to apply in the majority view, these claims made by the U.S. as the world's leading maritime power do carry much legal weight.

Rights of passage by State vessels in Russian Arctic waters is the element of most dissension between Russia and the U.S., especially related to submerged transit through the Russian Arctic straits.

11.6. Rights of Passage by State Vessels - Limitations to the Article 234 Regime?

Due to LOSC Article 236 governing sovereign immunity State vessels clearly are not to be subject to the Article 234 regime, but are subject to the safety provisions LOSC Part III Articles 41 and 42(1)(a) regarding sea lanes and traffic separation schemes in international straits. In relation to Article 234, this point, although enjoying one of the weakest positions in the Russian Arctic regime due to its regulation of State vessels is not being actively challenged by the U.S. or other Western powers. A very restrictive practice exists by foreign States navigating State surface vessels through Arctic ice-covered waters. Thus the rights of passage of State vessels on the surface are a clear limitation to the Article 234 regime, however, this is the same limitation found in general international legal rules relating to sovereign immunity.

Due to this restrictive surface navigation by foreign States, the focus was thus directed specifically towards foreign submerged navigation. Here also, for the same reasons, rights of passage of foreign State vessels under the surface in the exclusive economic zone are a clear limitation to the Article 234 regime. Any Russian regulation of such vessels in its Arctic exclusive economic zone is in clear breach.

In spite of this the legal situation for submerged passage through straits is more unclear. Under both the TSC and the LOSC international straits regimes it has not been completely clear whether submerged passage was permitted subject to notification and/or authorisation. Because of the general unclearness and the divergent Russian and U.S. practice, attention was directed towards the rights of submerged passage by foreign State vessels through the Russian Arctic *straits*. Where submerged passages by other maritime powers than Russia and the U.S. in the Russian Arctic are found, they are referred to, but generally they were few.

Upon this background the general conclusions reached are similar to those in the previous Section. Concerning Russian practice the regime governing its Arctic straits related to submerged passage exceeds all three scenarios, LOSC transit passage, the TSC non-suspendable innocent passage and passage through non-international LOSC and TSC straits. In addition to those excesses indicated above, specifically this concerns requirements for surface transit for submarines in the territorial sea while showing the flag, "ice-breaker assisted pilotage" required for submarines as warships in the Vil'kitskii, Shokal'skii, Sannikov and Dmitrii Laptev straits, and various forms of compulsory leading along the NSR including other straits. These requirements hamper and suspend transit passage and non-suspendable innocent passage. Where there exist high seas channels or routes of similar convenience of the exclusive economic zone as in the Kara Gates, the Dmitrii Laptev, the Sannikov, the Blagoveshchensk and the Long Straits, freedom of navigation is compromised. Regional Arctic developments associated with Article 234 or a possible application of LOSC Part XII would play a minor role. For straits comprised of ice-covered areas of the exclusive economic zone Russia may be argued estopped to claim surface passage and pilotage for submarines due to its submerged practice through straits globally. Additionally, the U.S. claims and practice clearly do not envision encroachment of transit passage by LOSC Part XII. For the non-suspendable innocent passage regime even if LOSC Part XII may be argued customary international law supported by the Russian ratification of the LOSC, prescriptive and enforcement measures must respectively be consistent with "generally accepted" and "applicable" international rules and standards. The Russian provisions are adopted unilaterally and include design, construction, manning and equipment standards. For passage through non-international straits, the TSC and LOSC limitations related to coastal State prescription

and enforcement jurisdiction related to innocent passage and LOSC Part XII apply. Here the expansive unilaterally adopted Russian regime fails. The environmental and safety provisions hamper innocent passage and do not reflect "generally accepted" and "applicable" international rules and standards. Where channels of high seas exist in the straits, traditional free navigation would be the rule. This also is possibly subject to the LOSC Part XII conditions, but also where the unilaterally adopted Russian regime fails. In addition a similar estoppel argument may apply for non-international straits with an exclusive economic zone. This may include the territorial waters. Based upon the global practice shown it is probable that the Soviet Union - Russia navigated submerged through the entrances of international straits consisting of territorial waters due to deterrence institutionalisation. If so, it is unlikely that the Soviet Union - Russia would have changed its clandestine submerged policy if its submarines encountered a non-international strait consisting of territorial waters through which passage were necessary. Thus it is submitted that due to a probable practice in other straits of the world Russia may be estopped to demand that foreign submarines travel on the surface through the territorial waters of its Arctic straits, even if deemed non-international. These Russian requirements are contrary to the underlying basis of the Russian Arctic regime, environmental protection and safety.

Very few statements have been issued by Russia protesting or otherwise denoting U.S. or other foreign submerged passages. From this it seems possible that either the U.S. is not transiting submerged those few Russian Arctic straits clearly navigable, the U.S. is transiting occasionally and the passages are not detected by Russia, or the U.S. is transiting occasionally and is detected, but Russia is not protesting publicly. The first possibility seems unlikely based upon the U.S.'s strategic deterrence strategy, and the second and third possibilities seem the more probable. At the same time despite the lack of protests by Russia, it would be difficult to maintain there was an acquiescence to the occasional U.S. submerged navigation claimed transit passage. This is due to the expansive Russian Arctic regime also applying to State vessels, detection devices possibly placed in the deeper straits, and Russian AWA submarines patrolling against the U.S. SSN's, arguably providing "protests" to a degree.

Concerning U.S. practice, due to the present "non-internationality" of the Russian Arctic straits support thus falls in favour of the Russian Arctic regime. The U.S. submerged navigation, claimed transit passage, exceeds the same scenarios, even though unrealistic on the surface in ice. U.S. submerged passages through channels comprised of channels of the high seas or the exclusive economic zone would not be in conflict. U.S. declarations and submerged transit are weak means to forward and support its claims. State declarations without enforcement may be sufficient to form customary international law, however over time it seems difficult not to envision their acceptability being weakened unless reinforced by actual passages. The few submarine transits may supplement the claims, but these secret transits are unknown to the world community, if not to Russia, and are probably effectively protested against by Russia.

From the above as long as the increased numbers of foreign surface vessels continue to navigate in compliance with the Russian regime, though submarines from the U.S. and possibly the U.K. and France do not, it is difficult to see how the developing regional Arctic regime will change in spite of its legal asymmetry. Over time the acceptability of the U.S. declarations may carry less weight unless reinforced by unequivocal practice. Because of this, asymmetry is likely to increase also due to developments related to surface commercial transit. The results in tension and instability.

11.7. Conclusions

It is theoretically doubtful that LOSC Article 234, allowing a coastal State to unilaterally take special prescriptive and enforcement environmental measures in ice-covered areas its exclusive economic zone would dominate the LOSC Part III regime. That seems however in fact to be what is occurring in the Arctic concerning the practice implementing Article 234 of the three large Arctic littoral States, Russia, the U.S. and Canada. Of the key terms characterising the Russian regime mandatory notification and authorisation, possible high seas application, 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 State vessels, *three* are strongly contentious. These are vague geographic application including the high seas,. application to State vessels and mandatory fees.

This development is chiefly due to the coastal State environmental legislation of the U.S., the only opponent found to the Russian Arctic regime, the OPA 1990 and the 1990 Monitoring Act. These if applied in the Arctic have similar though somewhat vaguer requirements than the Russian and Canadian regimes for all but the three contentions characteristics. The compliance on the surface by the U.S. commercial navigations in the Russian Arctic and the Canadian Arctic supports the implementation. Even should the OPA 1990 and associated legislation eventually be overruled in the U. S. Supreme Court, the time of application may be in excess of 10 years. Even more important, Alaska is enabled to partially enact its own legislation and the U.S. Coast Guard is planing to take similar measures in the Arctic as the Canadians. Thus, though OPA 1990 may be overruled in different respects, it seems likely in the Arctic it has the best chance of surviving due largely to the ramifications of the *Exxon Valdez* accident, the original catalyst behind OPA 1990 itself. Because of these developments a practice is taking place providing an interpretation of Article 234 governing surface commercial vessels in the Arctic under Article 31(3)(b) of the Vienna Convention. This is for States Parties of the LOSC including Russia. Practice is also taking place indicating the formation of customary law governing the Arctic provided by the U.S. and Canada. Proof of the *opinio juris* element is provided also under the more vigorous requirement under the *North Sea Continental Shelf Cases* by the measures clearly adopted as law by both States as well as the declarative statements made intended as a legal positions under international law.

As applied to the Russian Arctic straits this practice governing surface commercial vessels might indicate as maintained by the Russians an acquiescence by the U.S. of the Russian national regime and hence non-internationality of the straits. The U.S. claims state however differently. These made approximately 30 years ago without enforcement may become weaker given the navigational practice. If the chief U.S. consideration concerning straits along the NSR is to avoid creeping coastal State jurisdiction over international straits in other parts of the world, then perhaps the declarations are enough to preserve both the U.S.'s position regarding transit for submarines and interest in environmental protection. However the declarations may not oppose the development of the Article 234 regime for the surface also for the straits, given the present questionable 'internationality' of these straits, even considering their remoteness.

This may however also be maintained should the straits be considered international. Presently, however lacking Russian political initiative to divert cargoes from the Black and

Baltic Seas to the NSR,[96] it is doubtful that major economic advances will be made, which require immediately dealing with discordant jurisdictional issues. As such the slow but steady development of a customary rule giving substance to Article 234 is likely to continue. At the same time increased periodic foreign surface passages and number of flags in the Russian Arctic may contribute incrementally towards internationalisation of the straits. However in spite of this the U.S. has recently stated that the official U.S. position may allow full development of Article 234 under Article 42(1)(b) without disturbing transit rights. Arctic straits would then likely remain governed by the strict Russian regime the same as for the Russian Arctic waters in general, and it is doubtful the U.S. would attempt to reserve its navigational rights such as was done under the Canadian - U.S. Agreement. Russia would likely not be under pressure to allow greater freedom of navigation. Foreign commercial surface passage would likely be carried out in full compliance with the Russian regime without affecting transit rights internationally elsewhere.

Passage by the military and other State vessels is not expected to change since they are covered by the U.S. declarations for LOSC transit passage. Especially the occasional transit by U.S. submarines is expected to continue through the Russian Arctic straits as well as the Canadian, due to U.S. strategic policies. Russia and Canada may continue with claims for jurisdiction over military vessels under Article 234 in spite of Article 236 immunity due to their security concerns, which the U.S. will directly ignore for submerged transits. It is doubtful surface transits by the U.S. will be navigated without complying with the domestic Russian, and Canadian legislation, if navigated at all. The position has been reserved through the U.S. declarations and such navigational protest may probably not be of any value as long as the submarines navigate. Russia may likely continue to claim compliance with its regime, indicating acknowledgement of Russian Arctic jurisdiction, perhaps through the doctrine of implied if not explicit agreement. The Article 234 regime is therefore clearly limited in theory by rights of passage by State vessels. In practice however for surface navigation there is little limitation due to the limited foreign navigation carried out by State vessels. Foreign submerged navigation follows the theoretical direction.

Thus, the special Arctic regime gradually developing both under customary international law and the parallel interpretation of Article 234 through subsequent State practice, is more comprehensive than that seen by one expert, who envisions an Arctic transit management regime with continued non-resolution of the jurisdictional issues regarding the Arctic straits.[97] The developing Arctic regime will define Article 234, the substance of which may prove to be considerably different than any of the theoretical interpretations noted. Denmark/Greenland and Norway are not expected to object to these developments defining the substance of Article 234 for the Arctic, since they have not as yet demanded either coastal State rights or shipping rights under this regime. The provisions will be international not unilateral, and only surface commercial vessels will be technically covered. Military surface vessels may be directed by their flag State to comply with the regime if it does not interfere with their operations or operational capabilities. Submarines are the rogue element in this regime, though this position under international law of the sea is not unusual and is supported by precedent. The rules will define specific "international" design, equipment, construction and crewing standards for commercial vessels navigating in ice-covered areas including international straits. The violation of these rules may most likely be enforced strictly as is

[96]T. Ramsland and S. Hedels, 'A Feasibility Study', p. 44 and T. Ramsland, H. Olufsen, S. Hedels, P. Vik, 'Maritime Logistic Preferences for Scandinavian Exporters - A Feasibility Study of the NSR as an Alternative to the International shipping Market,' INSROP Discussion Paper, 1996, (on file with FNI), pp. 38-9.

[97]E. Franckx, *Maritime Arctic Claims*, pp. 302-7.

presently done by Russia, the U.S. and Canada, including inspection, expulsion or seizure and possible criminal liability. Thus, a major segment may be removed from LOSC Part III without corresponding violation of Articles 38(1), 39(2), 41, 42(1)(a) and (b), 42(2), 44 and 233, much *in excess* of that under the Malacca Agreement. In addition the *Corfu Channel Case* is likely contradicted since passage rights are clearly determined by type of vessel; submarines may navigate under unlimited transit passage. Thus, though theoretically improbable, in practice it is the Article 234 regime which is the limitation device to LOSC Part III and not the opposite. At the same time such rules arguably will be less precedent setting and transferable due to the restrictive area of application of Article 234, ice-covered areas, even if interpreted broadly. Transfer if it does occur will be restricted to areas surrounding Antarctica, though States bordering other straits may attempt to use this regime, likely with limited success, in argumentation for further expansion of the precedent established by the Malacca Agreement. All Arctic littoral States will benefit environmentally due to the formation of a stricter regime allowing special "international" design, equipment, construction and crewing standards for commercial vessels. These may be in the process of becoming "generally accepted" through the examination of the Harmonisation Code by the IMO. These development may also aid the establishment under MARPOL 73/79 through the IMO of the Arctic as a special area concerning more stringent discharge standards.[98] Due to the substantive clarification of Article 234, Russia and Canada may be less able to forward jurisdictional claims under its auspices, and this may be the reason why the U.S. supports this process.

From the above developments it may be questioned why there appears so much mystification surrounding the Arctic legal regime? Though undoubtedly all international legal disputes are characterised by a certain amount of disorder, for the Russian Arctic this seems inordinate. Is this due completely to the security issues associated with submerged passage in this area?

11.7.1. Superpower Subterfuge

Due to shallowness of large portions of the Russian Arctic seas and the majority of the Russian Arctic straits, the military strategic value of the NSR is likely low as a link between the Russian Northern and Pacific Fleets, as a station area for SSBN's and as a militarised surveillance area.[99] In terms of perceptions the NSR however has a long history of consistent over-rating which also effects the legal regimes represented by the excesses shown of both the Russian regime and the U.S. claims. Because of the asymmetry the security-political as well as legal situation is inherently unstable. It may be questioned, what lies behind such controversy? Why does the U.S. accept as well as ostensibly practice the Article 234 environmental regime for Arctic surface waters, but claims submerged passages exempt for Arctic seas in which it is difficult and even dangerous to navigate? Why does Russia attempt to legally secure straits as internal waters most largely unusable to itself, and the U.S. claims but rarely enforces transit passage through such straits of minor 'indispensability'?

Russia forwards its regime for ice-covered areas in its exclusive economic zone and of internal waters for its Arctic straits because of assumed concerns for security and

[98]See D. Brubaker, *Maritime Pollution*, pp. 125-7.

[99]See D. Brubaker and W. Østreng, 'The Northern Sea Route Regime - Exquisite Superpower Subterfuge?'

environmental control.[100] A Cold War assumption probably continues that Russian security is bettered by closing the straits. At least a picture is provided internationally of tighter security.

The reasons behind the U.S. official declarations for transit passage and occasional submarine transit through these Arctic straits are generally clear, U.S. deterrence and surveillance measures. However Russian Arctic waters are generally of less importance. The answers lying behind U.S. policy include probably that freedom of navigation globally is of supreme consideration to the U.S. military, and deviations will simply not be permitted. Rapid global mobility is being cared for and protected even with respect to largely unusable straits. Another reason for the U.S. concerns future use. The relative importance of different avenues of the oceans in the future will depend on technics, contexts, and needs which cannot be envisaged now.[101] In a world where military capabilities take years to construct, but where political intentions can change overnight, the prudent course is not to surrender any of these maritime routes if at all avoidable. It may also be envisioned that research is occasionally being carried out by U.S. SSN's in the deeper portions of the NSR to find possible SSBN rescue areas in the event of war. An U.S. SSBN followed by Russian SSN's could find refuge along the NSR and wait for rescue from its own SSN's if it knows the underwater terrain. Finally, the U.S. Navy may consider it unnecessary to delve into policies conflicting with its views of law of the sea. This may be argued parallel to visits made by U.S. Navy vessels possibly carrying nuclear weapons to ports of NATO allies prohibiting such,[102] and opposition is met by official statements that the U.S. or the port State neither confirms nor denies the presence of such nuclear weapons.[103]

Thus, from the above most of the reasons behind the overrated military security perceptions concerning the NSR including the expansive legal positions, relate to global macro strategic interests in regions far removed from the NSR itself. These include the Gibraltar Straits, the Indonesian Straits, the Indian Ocean, and the GIUK gap, as well as the Barents Sea and MIZ and polynias of the Central Arctic Basin.[104]

11.7.2. An Asymmetrical Legal Regime

For the legal regime governing generally the Russian Arctic waters and rights of passage of State vessels and specifically the straits, the situation is less than desirable in spite of the developments noted. This is because it reflects the same conflicts previously existing within the international straits regime - polarisation. Here the polarisation is between the U.S. claims as a user State for nearly free passage and the Russian claims as a coastal strait State for rights consistent with internal waters. It may even tend towards that noted by one expert regarding a near stalemate in the formation of customary law, but more localised to fewer States and more points of dissension.[105]

This status, inherently unstable due to the legal distance between the claims, and therefore sensitive, is made even more sensitive by the complicated U.S. coastal State legislation which

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[100]See A. Kolodkin and M. Volosov, 'The legal regime of the Soviet Arctic,' 159-60, 162, 163.

[101]W. Reisman, 'The Regime of Straits,' 60 footnote 29. M. Leifer, *International Straits*, pp. 161-2 notes the straits of Malacca and Singapore have relevance to the U.S. "only of principle."

[102]J. Barton, Professor of Law, Stanford University, 'Interview,' 30 June, 1998.

[103]See generally N. Gleditsch and S. Lodgaard, *Krigsstaten Norge*, (Oslo, Pax Forlag A/S, 1970), (in Norwegian), pp. 37, 120-1, 151-3.

[104]D. Brubaker and W. Østreng, 'Exquisite Superpower Subterfuge?'

[105]M. Akehurst, *A Modern Introduction*, p. 31.

has similarities to the Russian and Canadian. The issue of submerged passage in a geographic area still perceived as sensitive compounds the sensitivity. All of these elements work against the establishment of a stable world order, despite the development of customary international law and the moderate profile of co-operative developments surrounding Arctic environmental protection and safety.[106] It is conceivable a more conservative Russia may decide it would be in its interest not only to disclose collisions between Russian and U.S. submarines in the Russian territorial sea, but also to disclose U.S. submerged transits through navigable Arctic straits claimed internal waters. It may decide to enforce its provisions governing internal waters, and choose one of the possible interpretations under LOSC Article 39(1)(b), threats of force, as a reason for actively denying transit. This would result in a subsequent increase in world tension,[107] and was exactly the situation the LOSC Part III regime was designed to alleviate. The U.S. Representative to UNCLOS III J. Moore noted in 1973,[108]

> "A principal goal of the Law of the Sea Conference must be to agree on a regime which will minimize the possibilities of conflict among nations, conflicts which may arise because of uncertainties as to legal rights and responsibilities. In view of the importance of straits used for international navigation, any regime for such straits which depended upon a set of criteria that could be subjectively interpreted by straits states would sow the seeds of future conflict and undercut a major goal of the Conference."

The expert E. Brüel on the other hand notes the fears of the coastal States with notable examples, Turkey and Denmark, and force exerted by the Great Powers,[109]

> "...(T)he possession of straits contains a risk for the littoral state, especially if it misjudges its privileges, based on international law, as Denmark learnt to its detriment in 1801 and in 1807. It is, therefore of the greatest importance, in particular to weak states having coasts adjacent to international straits, that not the slightest doubt exists as to what these privileges are."

In this connection it is deemed relevant to again quote W. Reisman and J. Baker, [110]

> "The law-level of regulation in many strategic modes is lamentable because it does not serve world order. A state actor that refrains from some theretofore licit practices may contribute, by its own abstinence to the formation and installation of a more appropriate norm...(T)he implementation of this recommendation requires that lawyers who have the necessary background, but who are not in the direct chain of command, have an opportunity to submit their written views, which become part of the record."

With this in mind the following recommendations are made.

11.7.3. Recommendations

With the aim of increasing world order and reducing tension the U.S. State Department and the Russian Foreign Ministry should take the initiative in conjunction with the Canadian Ministry of External Affairs, to convene a conference with the express goal of negotiating a concrete legal regime for the Arctic focusing on the environment and navigational safety.[111] The Scandinavian States and Finland and the Arctic Council, the Working Group on Harmonization of Polar Ship Rules should also be included due to respectively their Arctic

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[106]E. Franckx *Maritime Arctic Claims*, pp. 245-70, and 298-302.

[107]W. Reisman, 'The Regime of Straits and National Security,' 48, 52-4, 62-4, 66-7, 69-75.

[108]J. Moore, 'The Regime of Straits,' 94 and 102.

[109]E. Brüel, *International Straits*, pp. 31-5.

[110]W. Reisman and J. Baker, *Regulating Covert Action*, pp. 141-2.

[111]This proposal is supported by both Emeritus Professor D. Pharand, an Arctic expert, in his review of 'Jurisdiction governing the Straits in Russian Arctic Waters,' *INSROP Working Paper* No. 52, IV.3.1., 31 May 1996; and Professor T. Scovazzi a law of the sea expert in INSROP, Report of the International Evaluation Committee, Scott Polar Research Institute, University of Cambridge 26 April 1996, p. 32.

territories and/or shipbuilding industries as well as experience in drafting environmental instruments.

The negotiated regime would aid in furthering the development under customary international law through providing clearer substance to Article 234 ice-covered areas and encompass straits. The object would be to resolve those issues exhibiting most dissension associated with Article 234.[112] In relation to Russia these include the possible application of the Russian regime to the high seas, application to State vessels, mandatory and discriminatory fees, and interrelation with the international straits regime. In relation to Canada issues include, ice-breaker-assisted pilotage, ice-breaker leading and special areas which exceed the U.S. provisions but support the Russian regime.[113] In relation to the U.S. issues include clarification of U.S. practice between its declarations and coastal State legislation, as well as clarification of its recent view of a parallel non-hampering ice-covered areas regime permitted under LOSC Article 42(1)(b), coastal State regulation giving effect to applicable international rules against oil pollution in straits.

The sensitive issue of submarine passage need not be addressed. Precedent for this may be found in negotiation of, "An Agreement between the Government of the United States and the Government of the Soviet Socialist Republics on the Prevention of Incidents on the High Seas and the Air Space above Them" where it was agreed not to include submarines on the proposed agenda.[114] Since submerged transit is the most central and disputed issue here, though probably practised only occasionally, some generally consider it necessary to address; a solution concerning notification and authorisation prior to submerged transit is a possible compromise within the interpretative possibilities of LOSC Article 39(1)(c).[115] Additionally, a bilateral agreement allowing submarine passage based upon privilege rather than right is also a possibility.[116] This would make the forming of precedent difficult in other parts of the world, one of the concerns seen to affect U.S. Arctic policy. Strongly countering these however is the extreme necessity noted for both Russia and the U.S. to maintain secrecy due to deterrence institutionalisation as their mutual strategic posture.[117] Additionally, is the belief that the trading away of any rights of transit passage may be unwise. In response to the argument that straits unrelated to 'lifelines' or military objectives may be factored out of the national security equation, one expert notes, [118]

> "This type of extrapolation represents the most primitive form of policy analysis and should be eschewed. The relative importance of different avenues of the oceans in the future will depend on technics, contexts, and needs which cannot be envisaged now. It should be clear that the prudent course is not to surrender any of these maritime highways if it can be avoided. Where they must be sacrificed, it is foolish to persuade ourselves of their triviality, since it induces us to concede them for less and less."

U.S. Secretary of State G. Schultz denied the acceptability of a bilateral agreement with Canada, an U.S. ally,[119] and it is even more doubtful a similar agreement would be entered

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[112]The enumeration which follows is felt to answer D. Pharand's question presented in the review requesting the main components of such an agreement. To go further may be difficult due to the negotiative nature inherent in the proposal.

[113]Application to State vessels, though relevant to the Canadian regime, is incorporated with the Russian issues due to its weak position under LOSC Article 236 and customary international law.

[114] See D. Winkler, "When Russia Invaded Disneyland," *Naval Institute Proceedings*, (May 1997), 79.

[115]W. Burke, 'Submerged Passage through Straits,' 220.

[116]W. Østreng, 'Stumbling Blocks,' 17-9.

[117]See W. Reisman, 'The Regime of Straits and National Security,' 52-3, 69.

[118]Ibid. p. 60.

[119]R. Smith and A. Roach, *Excessive Maritime Claims*, pp. 214, 228 footnote 86.

with Russia. Thus, judging from the U.S. claims made concerning the Russian Arctic straits, as well as the Canadian, it is unrealistic to expect that the U.S. would enter either of the compromises.

At the same time Russian naval activities at sea, and also those of the U.S., might be influenced in a more environmentally positive light, building upon the trilateral military agreement, "Declaration on Arctic Military Environmental Co-operation between Russia, U.S.A .and Norway," which has recently been linked to the Co-operative Threat Resolution Programme under Start II. Russia and the U.S. have already been carrying on some form of bilateral talks including the contentious Arctic straits regime, to which the U.S. is positive.[120] The U.S. State Department confirms talks take place, but does not, similar to the Russian Legal Advisor, view the talks as negotiations.[121] Some form of talks also take place between the U.S. Navy and the Russian Navy at the level of Captain on law of the sea matters, and the Russian Navy has proposed a joint law of the sea seminar.[122] The U.S. and Canada as well carry on some form of talks surrounding the Canadian Arctic straits.[123]

In support of negotiations there already is substantial correspondence between the Russian 1991 Rules and supporting legislation, the U.S. OPA 1990 and supporting legislation and the Canadian AWPPA and supporting legislation with the exceptions noted. If the Working Group on Harmonization of Polar Ship Rules is included in negotiations, the experience of the delegates including ice-breaker Captains will assist, and the process is already included within the auspices of the IMO. The negotiations will then be placed on the level of Foreign Ministries, rather than Coast Guard or Sea Transport Ministries. Participation of the Arctic Council would lend support through providing a political platform already in place. Results arrived at under the Malacca Agreement, an important precedent regarding minimum under-keel-clearance through international straits would be highly relevant here and should be included as well. Sea lanes in the Arctic straits might be prescribed if felt beneficial in spite of variable ice conditions, since internationally they are very prevalent.[124]

Besides resolving Arctic law of the sea issues it may also be advantageous for Russia, the U.S., Canada and the other States mentioned to go further and negotiate an agreement around the LOSC Article 236 immunity also governing State surface vessels in ice-covered waters including through the Russian (and Canadian) Arctic straits. It is this source which has been the largest contributor to vessel-source maritime pollution in the Arctic. State surface vessels may be made subject to the vague condition of compliance set forth under Article 236 with Article 234 at a minimum, if operational capabilities are not impaired and if "reasonable and practical." This might be linked to developments taking place under the Conference for Harmonization of Polar Ship Rules, which has already delivered its code to the IMO.[125] It could for example be agreed that States would issue directives that military and other pubic surface vessels, comply with the new environmental and safety provisions based upon the Russian, the U.S. as well as the Canadian domestic legislation. This would be in situations

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[120]G. Geipel, 'Interview,' Hudson Institute, Indianapolis, Indiana, U.S. in Oslo, Norway, June 1993.

[121]R. Smith, 'Interview,' U.S. State Department, Office of Ocean Affairs, Washington D.C., U.S., 27 June 1994. A. Kolodkin, 'Interview,' 25 February 1994.

[122]Interviews conducted respectively with P. Edelman, Attorney at Law, New York, U.S., and S. Allen, Assistant Director Law of the Sea Institute, University of Hawaii, Honolulu, U.S.; and A. Yakovlev, August 23-26, 1994.

[123]E. Gold, 'Interview,' 23 June 1994.

[124]R. Churchill and A. Lowe, *The Law of the Sea*, p. 241.

[125]A. Kolodkin 'Interview,' 25 February, 1994 indicated a favourable attitude towards bilateral agreements between Russia and other States to facilitate Arctic shipping..

where their operations and operational capabilities are not impaired, and in conjunction with the code from the Polar Harmonization Conference, so far as is practical and reasonable. It may thus be agreed that State surface vessels would technically be required to comply with much the same liability, design, construction, manning and equipment and discharge standards as commercial surface vessels, but be able to disregard these when and if operationally necessary. At the same time, discharges, under-keel-clearance, velocity would be highly relevant though not compulsory.

From these recommendations the Arctic littoral States, Russia, the U.S. and Canada, as well as Denmark/Greenland and Norway would achieve a step towards standard environmental requirements in the Arctic for military and other State surface vessels in spite of their immunity. At the same time the Russia and the U.S. as a maritime powers would retain freedom of navigation, since if the environmental requirements were too constraining, it may always be claimed operational freedom was necessary and compliance dispensed with. Since the U.S. OPA 1990 is in some respects stricter than the Russian provisions, with arguable application in the entire U.S. exclusive economic zone, the necessary balancing of interests by the U.S. Navy might be influenced in a more environmentally optimistic direction. The Russian Navy might also be influenced to restrain its activities to those closer in line with the theoretical basis for the Russian rules.[126]

World order may be incrementally increased and environmental benefits may be achieved through these recommendations. It is maintained resolving the Arctic environmental issues closely tied to the jurisdictional issues is a more satisfactory and stable solution over time than accepting an asymmetrical regime, or physically "testing" the Russian regime similar to the U.S. FON program. 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."[127] Since much of the jurisdictional disputes over the Russian Arctic ice-covered waters and straits reflect security issues however, a natural limit occurs to the results which negotiations are going to resolve. This applies as well to Canadian Arctic ice-covered waters. As long as Russia and the U.S. are the world's leading military maritime powers, with the possibility of destroying one another, the passage of submarines in the Arctic is going to be shrouded in secrecy and non-regulation. These modest proposed gains in stability and environmental measures, are all that probably may be hoped for at this time.

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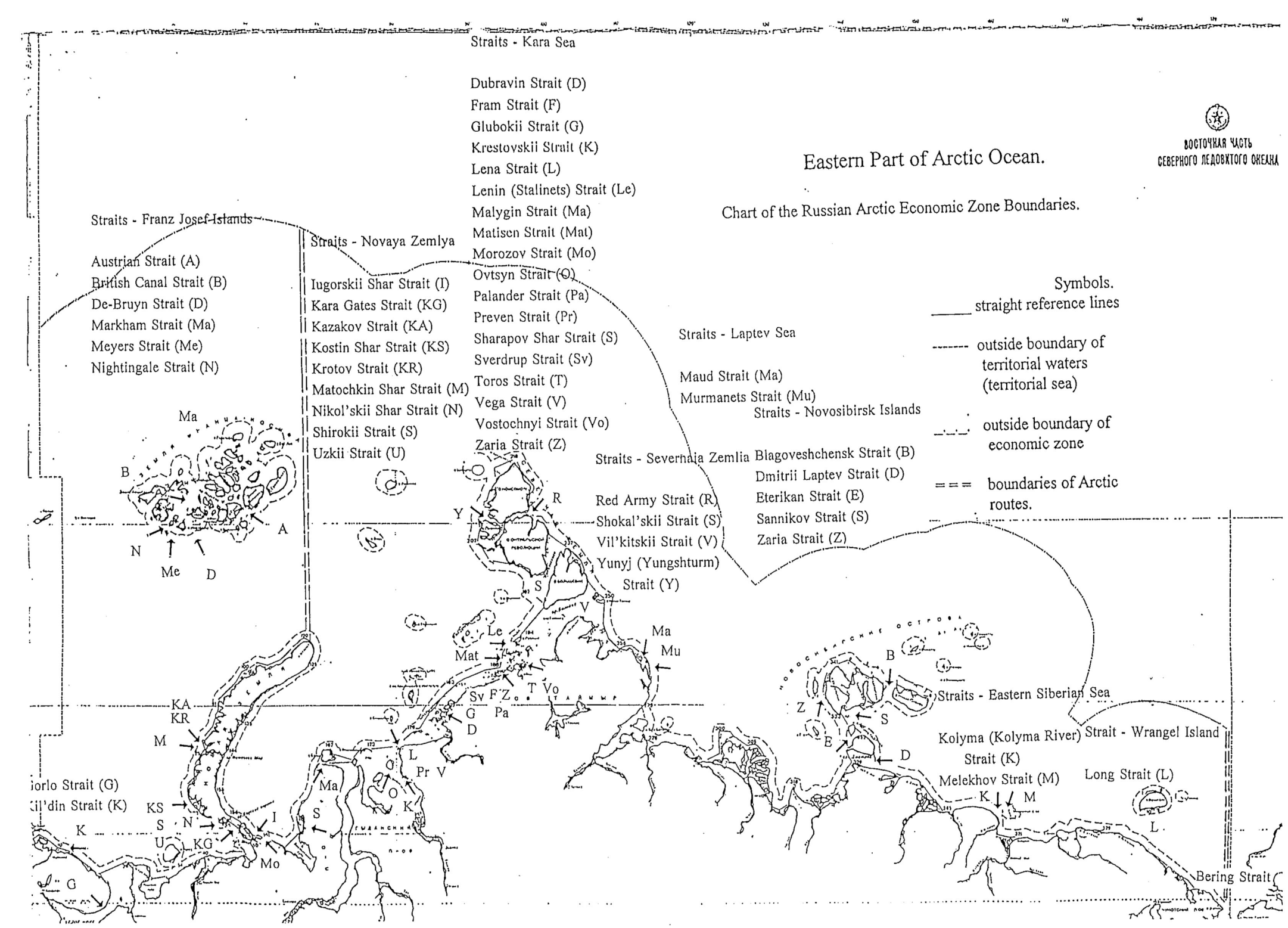
[126]See E. Franckx *Maritime Arctic Claims*, pp. 193, 226.

[127]G. Galdorisi, Captain, U.S. Navy, "Who Needs the Law of the Sea?", *Naval Institute Proceedings*, (July 1993), 74.


Straits - Kara Sea
Dubravin Strait (D)
Fram Strait (F)
Glubokii Strait (G)
Krestovskii Strait (K)
Lena Strait (L)
Lenin (Stalinets) Strait (Le)
Malygin Strait (Ma)
Matisen Strait (Mat)
Morozov Strait (Mo)
Ovtsyn Strait (O)
Palander Strait (Pa)
Preven Strait (Pr)
Sharapov Shar Strait (S)
Sverdrup Strait (Sv)
Toros Strait (T)
Vega Strait (V)
Vostochnyi Strait (Vo)
Zaria Strait (Z)
Eastern Part of Arctic Ocean.
Chart of the Russian Arctic Economic Zone Boundaries.
ВОСТОЧНАЯ ЧАСТЬ СЕВЕРНОГО ЛЕДОВИТОГО ОКЕАНА
Straits - Franz Josef Islands
Austrian Strait (A)
British Canal Strait (B)
De-Bruyn Strait (D)
Markham Strait (Ma)
Meyers Strait (Me)
Nightingale Strait (N)
Straits - Novaya Zemlya
Iugorskii Shar Strait (I)
Kara Gates Strait (KG)
Kazakov Strait (KA)
Kostin Shar Strait (KS)
Krotov Strait (KR)
Matochkin Shar Strait (M)
Nikol'skii Shar Strait (N)
Shirokii Strait (S)
Uzkii Strait (U)
Straits - Laptev Sea
Maud Strait (Ma)
Murmanets Strait (Mu)
Straits - Novosibirsk Islands
Straits - Severnaia Zemlia
Blagoveshchensk Strait (B)
Dmitrii Laptev Strait (D)
Eterikan Strait (E)
Sannikov Strait (S)
Zaria Strait (Z)
Red Army Strait (R)
Shokal'skii Strait (S)
Vil'kitskii Strait (V)
Yunyj (Yungshturm) Strait (Y)
Straits - Eastern Siberian Sea
Kolyma (Kolyma River) Strait (K)
Melekhov Strait (M)
Strait - Wrangel Island
Long Strait (L)
Bering Strait
Symbols.
straight reference lines
outside boundary of territorial waters (territorial sea)
outside boundary of economic zone
boundaries of Arctic routes.

Review of INSROP report by Douglas Brubaker

Dear Mr. Ragner:

As I had already written my review of Chapter 10 before you sent me Chapter 11, my brief report covers those chapters in two separate parts.

Chapter 10. Right of Passage by State Vessels

On the substance, I find this chapter absolutely first class. It is very well researched, the analysis is sound (although there is occasionally room for a slightly different opinion, which is perfectly normal) and the conclusions are well supported by the analysis. I have no recommendation for improvement.

On the form, the text could stand considerable editing not only to facilitate reading but to improve its clarity. The difficulty results mainly from defects in the construction of sentences, the grammar and the spelling. In particular, the author should correct two words which are unavoidably used very often: **suspendable** (not suspendible), **practice** (not practise, when it is the noun and not the verb, as "State practice").

I would also make two additional suggestions to improve the form and the ready understanding of the text. The first is to insert a map showing the relevant Russian straits discussed at pages 20 to 23. The second is to shorten some of the many long footnotes, particularly 67, 68 and 69. Surely, some of their content could be transferred to the text itself.

Chapter 11. Conclusions

This being a chapter of conclusions, its merits rest essentially on the analysis and discussions contained in previous chapters. From my recollection of those chapters, the conclusions appear quite sound. They could be made stronger, however, if the author were to insert the occasional reference to previous sections and chapters where the reader could find the evidence in support of the conclusions.

I might add that I find excellent the suggestion of an eventual agreement between Arctic States relating to the right of passage of ships, including warships (by the way, what is the status of US icebreakers?). I believe that the suggestion could be improved by proposing in more specific terms what would be the main components of such an agreement.

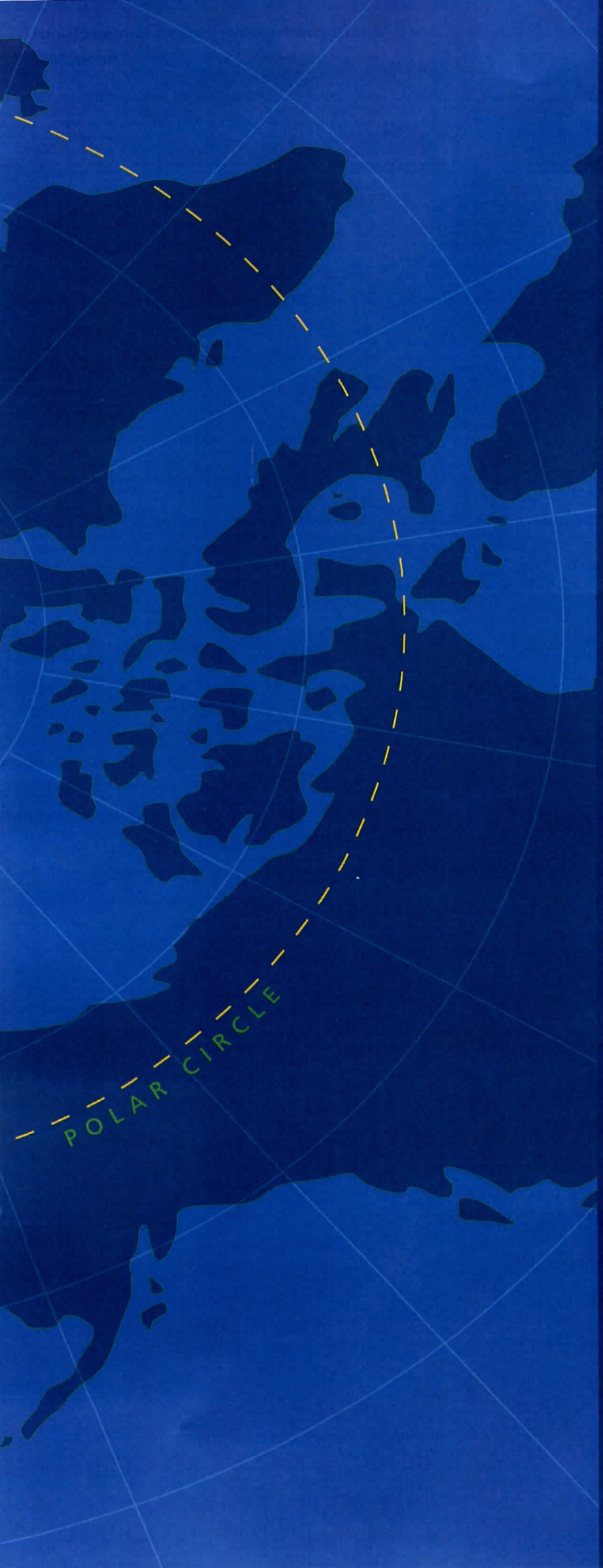
On the form, my comments on chapter 10 about the advisability of editing apply equally to chapter 11. I hope the author will not mind my making those suggestions on the form. I do believe it has considerable importance. As one of my professors in Paris

used to say: "Finalement, la forme c'est le fond qui fait surface; donc, il n'y a pas beaucoup de différence entre les deux."

Considering the urgency, I have made this brief review as quickly as possible and I hope it reaches you in time.

Yours sincerely,

Donat Pharand



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 Nippon 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.