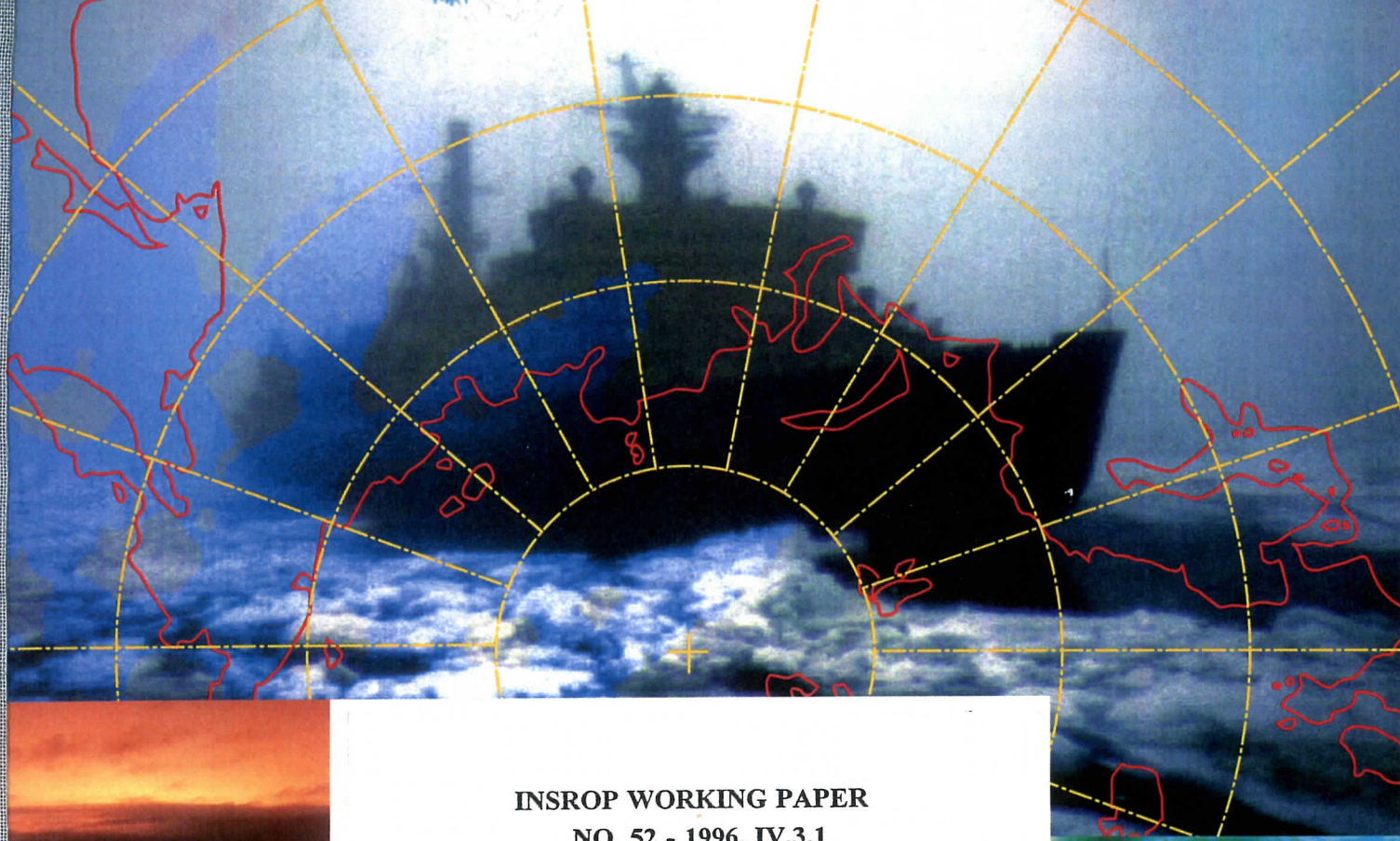

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Jurisdiction Governing the Straits in Russian Arctic Waters

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5. Jurisdiction Governing the Straits in Russian Arctic Waters

5.1. Introduction

As seen in Chapter 4 the Russian Arctic straits are viewed differently ranging from existing under complete Russian jurisdiction to comprising a part of the LOSC international straits regime. In this Chapter the rights involved with vessel passage and coastal State control will be analyzed. First the issues surrounding the international regimes will be set forth in Section 5.2. It was seen in Chapter 4 that the internationality of the Russian Arctic straits, though supporting the Russian position presently, may change. Thus the rights associated with the three scenarios presented in Chapter 4 must be analyzed, the LOSC international straits regime,[1] TSC Article 16(4),[2] and the LOSC and TSC non-international straits. Since the latter consists of the regimes of the territorial sea, exclusive economic zone and internal waters, these will be addressed separately in Chapter 7.

In analysing these scenarios international customary law, in which the *Corfu Channel Case*[3] and TSC Article 16(4) stand central, will play an important part, though this too is in a state of flux. Briefly, the subject of international straits and passage through such is not expanded upon in the TSC, despite the fact that it incorporates criteria from the *Corfu Channel Case*, and there are relatively few ratifying Parties. Though the LOSC entered into force in November 1994, major sea powers including Russia, the U.K. and the U.S. are not bound since they have not ratified, and it remains unclear whether they are likely to do so.[4] The LOSC has nevertheless made a substantial contribution to the development of international custom in this particular regime.[5] The presence of ice in the Arctic and an emerging special regime for ice navigation under the LOSC may also influence the international straits regime. In such a controversial area subsequent State practise will be one of the most important elements of this work. From this it is hoped to be able to advance resolutions to the international issues.

Due to the controversy, doctrine is generally varied, but because of the background it offers, especially related to the international issues, it will be presented rather extensively, though having subsidiary status under Article 38(1)(d) of the Statute of the ICJ.[6] The footnotes, in which doctrine is presented tend, especially in controversial areas, to be rather

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1United Nations Convention on the Law of the Sea, 21 *International Legal Materials*, 1261 (1982) (LOSC) Articles 34-45. See Appendix 4 for Articles governing the LOSC international straits regime. See Appendix 5 for Article 233.

2Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 516 *United Nations Treaty Series* 205 (TSC). See Appendix 4 for TSC Article 16(4).

3*Corfu Channel Case*, ICJ Reports (1949) p. 4.

4See *Ocean Policy News* Vol. XI, No. 4, August 1994 pp. 2-3.

5Churchill, Robin and Alan Lowe, (1988), *The Law of the Sea*, (Churchill), p. 94.

6See Section 2.5.2.

substantial, but due to the extra insight obtained from the expert views, are considered necessary.[7]

The relevant Russian legislation and other evidence of State practise as well as the practise of the main opponent in the area, the U.S. has been set forth in Section 4.3. Using the results obtained from Section 5.2. determinations will be made regarding the soundness of the Russian and American positions under international law regarding the Russian Arctic straits, including which type of passage is allowable and the type of legislative and enforcement jurisdiction which Russia can exercise. Recommendations will be made where possible for the resolution of the jurisdictional issues.

Although overflight is an integral part of the LOSC straits regime is one of the chief reasons for the negotiation of this regime and is included in the U.S. position, it will not be addressed here,[8] chiefly due to the fact that foreign commercial airlines fly over Siberia itself, not needing to justify transit passage through the Russian Arctic straits.[9] Even if overflight were practised it is submitted it would have questionable value in establishing rights for vessel transit passage, and vice versa. Additionally though it is difficult to obtain information regarding military flights, it appears probable that overflight is likewise not practised by the U.S. or other NATO aircraft, undoubtedly due to its military and political sensitivity over the Arctic straits claimed as Russian internal waters.[10] Since vessels are presently being sailed through the Russian Arctic straits, that is what will be the focus here.

With these introductory comments made we will turn to a discussion of the salient international issues of relevance to State practise in the Russian Arctic straits. These include the position of the straits regimes in international customary law, the scope of the prescription and enforcement jurisdiction, the scope of vessel passage rights, the relation between these provisions and that of ice-covered areas, the special case of submerged passage, and other issues including jurisdiction over straits claimed as internal waters.

5.2. Salient International Issues[11]

7Professor Pharand in his review of 31 May 1996 commented upon the length, suggesting transferring some of the contents to the text. This has been done where possible, but for doctrine was retained in the footnotes, allowing the reader to disregard them if desired.

8See Section 5.2.5. and Schachte, Jr., William, L. Rear Admiral, Judge Advocate General's Corps, U.S. Navy Department of Defense Representative for Ocean Policy Affairs, "International Straits and Navigational Freedoms," Remarks prepared for presentation to the 26th Law of the Sea Institute Annual Conference Genoa, Italy, June 22-26, 1992, (Schachte) p. 19.

9See "Air Transport Agreement between the Government of the United States of America and the Government of the Russian Federation, 14 January, 1994; and "Technical Agreement between the department of Transportation of the United States of America and the Ministry of Transport of the Russian Federation," 14 January, 1994. Obtained from Chief of Office, Robert Reis, Aviation Program & Policy Office, United States Department of State, Washington, D.C., U.S.A.

10Overflight of the Russian Arctic straits by NATO aircraft has never been referred to in interviews with Rtd. Admiral Yakovlev, Russian - American Seminar, Moscow, Russia, (Yakovlev interview), 25 February, 1994 and 24-26 August 1994.

11Since the relation the Russian provisions play to the international straits provisions is of chief importance to this work, doctrinal expertise will enjoy a high profile to aid in achieving as much clarity as possible. If the authors' names do not appear, they have not stated an opinion on the given issue.

5.2.1. Introduction

The *Corfu Channel Case* has been noted as well as the incorporation of its criteria with some changes into TSC Article 16(4).[12] International dissatisfaction with TSC Article 16(4), the growing numbers of 12 mile territorial sea claims and threatened unilateral regulation of straits by coastal States, which enjoyed wide discretion under the TSC to determine whether passage was innocent, pressed the straits issue into major focus and prompted, along with the issue of innocent passage, the U.N. General Assembly on 17 December 1970 to vote in favour of holding another conference on the law of the sea in 1973.[13] From this arose the LOSC straits regime.

One of the main problems surrounding the LOSC straits provisions concerns their position under international customary law. The position the *Corfu Channel Case* and TSC Article 16(4) enjoy under international customary law must therefore also be covered and will be addressed first.

5.2.2. Status of the *Corfu Channel Case*, the TSC and LOSC Straits Regime under International Customary Law

5.2.2.1. Non-Suspendible Innocent Passage - *Corfu Channel Case* and TSC Article 16(4)

Though at the outset there was as noted controversy surrounding non-suspendible innocent passage of the international strait regime, TSC Article 16(4) was easily adopted encompassing criteria established in the *Corfu Channel Case*.[14] Under the actual regime however, problems arose.

The TSC provisions were prone to controversy due to their vagueness. The authorization - notification issue for warships in the territorial sea was an important issue characterized by close votes and the reservation to TSC Article 23 by the Soviet Union, because a not insignificant number of States considered the passage of warships *a fortiori* not innocent.[15] Under TSC Article 14(4) as well as traditional international law no specific criteria exist that would indicate when passage is prejudicial to a State's security, and much

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12See Section 4.2.

13The following information is obtained from *The Law of the Sea, Straits Used for International Navigation, Legislative History of Part III of the United Nations Convention on the Law of the Sea*, Vols. I and II, Division of Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, (U.N. LOSC - Straits); and United Nations Convention on the Law of the Sea, reproduced from U.N. Document A/CONF.62/122 of October 7, 1982, 21 *International Legal Materials* 1261 (1982) pp. 1276-1278, unless otherwise noted. For summaries of developments, during both the preparatory years prior to UNCLOS III, and UNCLOS III negotiations which led to the LOSC Articles 34-45, see Koh, K.L., *Straits in International Navigation - Contemporary Issues* (Koh) pp. 99-171; Nordquist, Myron H., *United Nations Convention on the Law of the Sea 1982 - A Commentary*, Centre for Oceans Law and Policy, University of Virginia, Vol II, 1991, (Nordquist II), pp. 279-293; and Burke, William T. "Submerged Passage through Straits: Interpretations of the Proposed Law of the Sea Treaty Text," 52 *Washington Law Review*, (Burke Straits) (1977), pp. 195-200.

14Essentially the only difference is the last passage concerning the territorial sea of a foreign State which is of less relevance for the Russian Arctic. See Sections 4.2.1. and 5.2.6.3.

15See Section 7.NEED. See also Jin, Shao, "The question of innocent passage of warships, After UNCLOS III," *Marine Policy*, January 1989, (Jin), p. 66.

is left to the interpretation of individual States.[16] Controversy surrounds for instance suspension of passage through a strait is not permitted according to Articles 16(3) and (4), but particular vessels may be objected to in respect of particular passages not considered innocent according to Article 16(1).[17] Specifically, "non-suspendible innocent passage" under TSC Article 16(4) due to its vagueness could be considered suspendible by coastal States under TSC Article 14(4) and traditional international law, using a broad discretion in determining the circumstances, for passage prejudicial to their security. Moreover while the law is "not unambiguous", the major straits of the world have been "completely free", so that the right in practise "approximated to high seas passage, rather than to innocent passage."[18] Broad discretion by States bordering the straits was unacceptable to the marine powers especially in view of the increasing numbers of claims for 12 mile territorial seas.[19]

Generally the TSC's effect on the international straits regime may not be as great as might be imagined. Only forty six States ratified the TSC, approximately one-half of the number attending UNCLOS I.[20] A glance at the ratifying Parties indicates many maritime States, but the absence of a substantial number of developing States, including China, Cyprus, Greece, Indonesia, Morocco, Philippines, and Yemen. As will be seen it was these latter "States bordering the strait," with the addition of Spain, Malaysia, Fiji and Malta, which became further disgruntled, and which were instrumental in forwarding proposals for change.[21] Though controversy over the TSC straits regime as well as the lack of a final

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16Koh pp. 39-40. Koh reasons mere technical breaches of Article 17 provisions such as health, customs and immigration regulations are not included as "not threatening the integrity of the State." He notes "the test of innocent passage depends upon the *purpose* of passage," and in terms of international straits this reasoning is in exact contrast to *Corfu Channel*, which uses whether the manner in which the passage was carried out was consistent with the principle of innocent passage.

17Brownlie, Ian, *Principles of Public International Law*, 4th ed., 1990, (Brownlie), p. 283. The author notes further ,"the controversy at the First Law of the Sea Conference as to the passage of warships was overall and extended to territorial seas both in straits and in ordinary circumstances...(T)hus the interpretation of Article 16(4) of the Territorial Sea Convention turns on the main issue, viz., what types of vessel qualify for innocent passage." See Appendix 7 for Articles governing the TSC and LOSC innocent passage regimes.

18O'Connell, D.P., *The International Law of the Sea*, Vols. I and II, 1989, (O'Connell), p. 327. O'Connell notes that a channel for transit has always existed in wartime, "even if the extent is restricted, and even if the quality of the right of transit, "may have been degraded to equivalence with innocent passage."

19Koh pp. 39-40. Ibid. p. 27 notes a contrary view in O'Connell, D.P. *The Influence of Law on Sea Power*, Manchester University Press, Manchester (1975) p. 97,

> "Much has been made of the point that if a twelve-mile territorial sea becomes standard, over 130 straits will cease to be high seas as, on the basis of a three-mile rule, they are presently thought to be. The statistics are a little misleading, because many of these straits are dubiously 'international' in the sense of being habitually used by shipping as required by the principles laid down by the International Court of Justice in the Corfu Channel Case and indeed find themselves in the list only because of assiduous cartographical scrutiny on the part of those who seek to produce arresting figures."

20Australia, Belgium, Bulgaria, Denmark, Dominican Republic, German Democratic Republic, Fiji, Finland, Haiti, White Russia, Israel, Italy, Jamaica, Japan, Yugoslavia, Kenya, Cambodian Republic, Lesotho, Madagascar, Malawi, Malaysia, Malta, Mauritius, Mexico, Netherlands, Nigeria, Portugal, Rumania, Senegal, Sierra Leone, Solomon Islands, Spain, Switzerland, Swaziland, South Africa, Thailand, Tonga, Trinidad and Tobago, Czechoslovakia, Uganda, United Kingdom, Ukraine, Hungary, U.S.A., U.S.S.R. Venezuela. De Cesari, P. et.al. (eds.) *Index of Multilateral Treaties on the Law of the Sea*, Milano, Dott. a. Giuffrè Editore 1985, (De Cesari) p. 119. UNCLOS I which drafted the TSC was attended by eighty six States. *Official Records* (1958), Vol. 2, pp. xiii-xxvi.

21See generally Koh pp. 99-127.

agreement for the breadth of the territorial sea accounted partially for the failure to achieve broad ratification, another explanation may lie in the political changes of the 1960's.[22] Specifically a number of former colonies had become independent States disposed to overthrowing the entire Geneva system regarding it as they did as having been drafted without their consent and against their interests.[23]

This confusion resulted in calls for clarification, "the opportunity should be taken in any reformulation of the law related to passage through straits used for navigation to remove any remaining doubts on...the applicability of the conventional rules on innocent passage through straits to warships."[24]

At the same time the Article 16(4) regime has been practised by the leading maritime powers and acquiesced to by the States bordering straits to a sufficient extent for the regime apparently to have passed into international customary law.[25] Although this could certainly be questioned due to the inherent ambiguities, making it possible to inquire what exactly has passed, State practise has advanced sufficiently beyond this point to make analysis of the point almost irrelevant. The marine powers are claiming and sailing transit passage, and it is to this States bordering the strait are reacting, not to non-suspendible innocent passage. No further analysis of this point will therefore be carried out.[26]

In conclusion though non-suspendible innocent passage through international straits from the *Corfu Channel Case* and TSC Article 16(4) may have passed into customary international law, questions remain involving its universality encompassing the passage of warships in territorial seas, both in straits and ordinarily. As such it is maintained in addition to the LOSC straits regime subsequent State practise and *opinio juris* to play an important clarifying role and must therefore be examined extensively. With this said the LOSC straits regime will be examined.

5.2.2.2. Transit Passage - LOSC International Straits Regime

5.2.2.2.1. Legislative History

22O'Connell p. 24.

23Ibid.

24See Brown, E.D., *Passage through the Territorial Sea, Straits used for International Navigation and Archipelagos*, University College, London, (Brown) p. 32.

25U.S. President Reagan in a Presidential Proclamation 5928, December 27, 1988; *Federal Register*, Vol. 54, No. 5, January 9, 1989, at 777, as well as P.D. Barabolia in Butler, William E., *Northeast Arctic Passage*, (1978), (Barabolia Butler), pp. 142-143 and Kolodkin, A. and M. Volosov, "The legal regime of the Soviet Arctic," *Marine Policy*, March 1990, (Kolodkin) p. 163, support transit passage rather than non-suspendible innocent passage as having passed into international customary law. See Section 5.2.2.2. Churchill p. 89 notes, "the balance of juristic opinion seems to favour the conclusion that customary law accords only a non-suspendible right of innocent passage through them." See also Brownlie p. 284, Koh. pp. 38-39 and Nandan, S. and Anderson D., "Straits Used for International Navigation: A commentary on Part III of the United Nations Convention on the Law of the Sea 1982," *The British Yearbook of International Law* 1989, (Nandan and Anderson) p. 161. Nandan was leader of the Fiji Delegation to UNCLOS III and Rapporteur of the Second Committee. Anderson was a member of the U.K. Delegation to UNCLOS III. The views expressed by their article are stated to be their personal views and not to represent the views of any government or institution with which they are or have been associated.

26Nor will any further doctrine be addressed.

The Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (U.N. Sea Bed Committee) was charged with preparing for the Third Conference on the Law of the Sea (UNCLOS III). In the early 1970's the Soviet Union submitted a proposal on straits used for international navigation to the U.N. Sea Bed Committee.[27] Other important international proposals included those by the U.S.[28] and the "Eight Nations."[29] This was followed a few years later by a key draft from the Soviet Union and the East Block, "Draft Articles on Straits Used for International Navigation Submitted by Bulgaria, Czechoslovakia, the German Democratic Republic, Poland, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics," to the Third United Nations Conference on the Law of the Sea, Second Session.[30]. Key drafts were also submitted by the United Kingdom, "Draft Articles on the Territorial Sea and Straits;[31] and Malaysia, Morocco, Oman and Yemen, "Draft Articles on Navigation through the Territorial Sea, including Straits Used for International Navigation."[32] Developments resulted under UNCLOS III in the "Private Working Group on Straits used for International Navigation" (or the "Fiji/U.K. Group") being formed to conduct informal consultations which resulted in central drafts which were submitted to the negotiations. This group sought "a cross-section of moderate opinion, drawn from all regional groups and including straits States and delegations with a particular interest in sea-borne trade or questions of limits of the territorial sea and EEZ."[33] The first meeting on 25 March 1975 was attended by fourteen delegations with the declared objective "to continue to seek

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27Draft Articles on Straits Used for International Navigation, *Official Records of the General Assembly (Official Records GA), Twenty-seventh Session, Supplement No. 21* (A/8721, Annex III , Chap. 5 (originally issued as UN Doc. A/AC.138/SC.II/L.7, (25 July 1972) (Soviet Proposal).

28"Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries," *Official Records GA, Twenty-sixth Session, Supplement No. 21*,(A/8421), Annex IV, (originally issued as U.N. Doc. A/AC.138/SC.II/L.4 (30 July 1971)), (U.S. Proposal).

29"Draft Articles on Navigation through the Territorial Sea, including Straits Used for International Navigation", *Official Records GA, Twenty-eighth Session, Supplement No. 21* (A/9021), Vol. III, Annex II, Appendix V, Chap. 6 (originally issued as U.N. Doc. A/AC.138/SC.II/L.18), (27 March 1973), (Eight Nation Proposal). The States were Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen. See Koh pp. 120-125 for discussion of proposals from Fiji, "Draft Article relating to Passage through the Territorial Sea" Ibid. Chap. 31 (originally issued as U.N. Doc. A/AC. 138/SC.II/L.42), (19 July 1973); Malta, "Preliminary Draft Articles on the Delimitation of Coastal State Jurisdiction in Ocean Space and on the Rights and Obligations of Coastal States in the Area under Their Jurisdiction," Chap. 17 (originally issued as U.N. Doc. A/AC.138/SC.II/L.28), (July 1973); and the Working Paper from China, "Working Paper on Sea Area within the Limits of National Jurisdiction, Ibid. Chap. 23, (originally issued as U.N. Doc. A/AC.138/SC.II/L.34), (16 July 1973).

30*Official Records of the Third United Nations Conference on the Law of the Sea, (Official Records)*, Vol. III, (United Nations publication, Sales No. E.75.V.5), Document A/CONF.62/C.2/L.11. (17 July 1974). (East Block Draft).

31*Official Records*, United Nations publication, Sales No. E.75.V.5), U.N. Doc.A/CONF.62/C.2/L.3 (3 July 1974) (U.K. Draft). Koh p. 143 sees this proposal as the main one, since "keen interest" was shown by many States and it "...appeared to represent a fair balance of interests between all parties concerned."

32*Official Records*, Sales No. E.75.V.5), U.N. Doc.A/CONF.62/C.2/L.16 (22 July 1974) (Oman Draft). Drafts were also submitted by Spain, "Draft Articles on the Nature and Characteristics of the Territorial Sea, Ibid. U.N. Doc.A/CONF.62/C.2/L.6 (10 July 1974); Denmark and Finland, "Amendment to Document A/CONF.62/C.2, Ibid. U.N. Doc. A/CONF.62/C.2/L.15 (22 July 1974); Nicaragua, "Working Paper on Characteristics of the National Zone," Ibid. U.N. Doc.A/CONF.62/C.2/L.17 (23 July 1974); Fiji, "Draft Articles Relating to Passage through the Territorial Sea," Ibid. U.N. Doc.A/CONF.62/C.2/L.19 (23 July 1974); and Algeria, "Draft Articles on Straits Used for International Navigation, Semi-enclosed Seas," Ibid. U.N. Doc.A/CONF.62/C.2/L.20 (23 July 1974). See Koh p. 131 for other drafts submitted subsequent to debate on straits from 22 July to 25 July 1974.

33Nandan and Anderson p. 163.

accommodation between the proposals of Fiji and the U.K. on straits, in order to achieve a sound balance between the interests of States bordering straits and maritime nations.[34] In negotiations of the international straits regime the U.S. and the Soviet Union were paradoxically enough more allies than adversaries, though the Soviet position as a maritime power was nevertheless more "friendly" to the concerns of the straits States.[35] Basically the Articles on straits have retained the same form from the Informal Single Negotiating Text (ISNT) in 1975 to the LOSC provisions in 1982 except for minor amendments and drafting changes.[36]

5.2.2.2.2. State Practice

Following the UNCLOS III negotiations several of the major maritime powers have claimed that transit passage has become firm international customary law, or was so already prior to the negotiations.[37] As mentioned U.S. President Reagan proclaimed,[38]

> "In accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea, within the territorial sea of the United States,..the ships and aircraft of all countries enjoy the right of transit passage through international straits."

The U.S. State Department lists statements it made to States bordering the strait supporting a right to transit passage through straits and approaches it considers international including but not limited to, the Aaland Strait between Sweden and Finland and the Oresund and The Belts between Sweden and Denmark; the Strait of Magellan and Beagle Channel between Argentina and Chile; the Strait of Hormuz between Iran and Oman; the Bab el Mandeb linking the Red Sea and the Suez Canal with the Gulf of Aden and the Arabian Sea; Gibraltar; the Northeast Passage; the Northwest Passage; and the Strait of Tiran connecting

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34Ibid. The delegations were Argentina, Bahrain, Denmark, Ethiopia, Fiji, Iceland, Italy, Kenya, Lebanon, Nigeria, Singapore, the U.K., United Arab Emirates, Venezuela, and later Australia, Bulgaria and India, ibid.

35Koh p. 107.

36Ibid. p. 197. The problems posed by the straits was fully discussed in the debate on international straits by the Second Committee from 22 to 25 July 1974, appearing in *Official Records* Vols. 1 and 2, (1975) (Straits Debate). Koh p. 143 indicates the following States generally were only in favour of innocent passage through international straits, Albania, Argentina, China, Egypt, Fiji, Iran, Kuwait, Morocco, Oman, Peru, Spain, United Republic of Tanzania, and Yemen. States in favour of transit passage in certain straits included, Algeria, Bulgaria, Canada, Cuba, Czechoslovakia, Denmark, Finland, German Democratic Republic, Ghana, Hungary, Iceland, India, Iraq, Israel, Italy, Liberia, Mongolia, Nigeria, Poland, Singapore, Sri Lanka, Sweden, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, and the United States. As a result of general frustration over the lack of progress in all areas, the Conference Chairman had each Committee Chairman draft a set of articles representing the "trend" in negotiations, resulting in the ISNT. McRae D. "The Negotiation of Article 234" in *Politics of the Northwest Passage*, (Griffiths, F., ed.) Kingston, McGill-Queens University Press (1987), (McRae) p. 98 at 109.

37Arguments were made by various UNCLOS III delegates as well as doctrine that such a right of passage existed even before UNCLOS III negotiations due to general practice. See statements made by the Soviet delegate to UNCLOS III, *Official Records* Vol. I Plenary Meetings, 22 meeting, para. 36; the U.K., ibid., Vol II, Second Committee, 11th meeting paras. 17, 18-23 and 24-26. (For opposite statement however see ibid., Vol. I 29th meeting, para. 35); and U.S. ibid., Vol II, 13th meeting paras 64-68. See also O'Connell p. 327.

38Presidential Proclamation 5928, December 27, 1988; *Federal Register*, Vol. 54, No. 5, January 9, 1989, at 777.

the Gulf of Aqaba with the Red Sea.[39] The Indonesian Straits may also be added.[40] U.S. Rear Admiral Schachte noted, "...it is the unequivocal United States position that transit passage is customary international law which the provisions of the LOS Convention reflect."[41] The U.S. Ambassador to UNCLOS III also noted, "if UNCLOS is creating custom concerning a 12 mile limit, it is simultaneously creating custom for transit passage of straits, as these issues have been linked at every stage of the negotiation."[42]

There are some inconsistencies however in the U.S. practise of claiming straits subject to transit passage based on customary law.[43] The Restatement of Foreign Relations Law of the U.S. states that the consensus on the straits issue in the UNCLOS III together with the

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39See generally United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas*, No. 112, United States Responses to Excessive National Maritime Claims, (*U.S. Limits* No. 112,) pp. 61-74. See respectively pp. 63-73, for specific references to U.S. assertions forwarded in Aide Memories or Diplomatic Notes. The preface of this publication states, "(T)his paper reflects the position of the United States towards excessive claims by coastal States which are inconsistent with international law." Another publication in the same series, *Limits in the Seas*, No. 108, Maritime Boundaries of the World, in the preface states, "(T)his paper does not necessarily represent an official acceptance by the United States government of the limits claimed." See also Smith, Robert W. and J. Ashley Roach (1994), *International Law Studies - Excessive Maritime Claims*, Naval War College, Vol. 66, (Smith and Roach) pp. 177-229, make no such qualification, however Rear Admiral Joseph C. Strasser, U.S. Navy, President, Naval War College, notes in the Foreword, "(T)he opinions expressed in this volume are those of the authors and are not necessarily those of the United States Navy nor of the Naval War College." See also Caminos pp. 206-207 for further U.S. statements and passages supporting transit passage generally and through Gibraltar during the April 1986 U.S. action against Libya, and through the Strait of Hormuz during the latter part of the 1980's.

40Leifer, Michael, *International Straits of the World - Malacca, Singapore, and Indonesia*, 1978, (Leifer), pp. 161-162 notes that the straits of Malacca and Singapore have relevance to the U.S. "only of principle," and any concession to Indonesian and Malaysian claims over these straits might set a precedent for submerged passage elsewhere, especially in the Indonesian straits. The latter are deeper and crucial to passage of U.S. submarines to and from the Indian Ocean.

41Schachte pp. 16-17. Schachte notes on p. 3 that his remarks are to be taken as the official U.S. position on the LOSC navigational articles. See also Pharand, Donat, *Canada's Arctic Waters in International Law*, (Pharand Arctic) pp. 233-234. In addition though none of the marine powers made written declarations related to the LOSC straits regime upon signature, the U.S. in a statement in plenary during the final part of the eleventh session, 6 to 10 December 1982, stated in relevant part, "The United States recognizes that certain aspects of the Convention represent positive accomplishments. Indeed, those parts of the Convention dealing with navigation and overflight and most other provisions of the Convention serve the interests of the international community. Those texts reflect prevailing international practice. They also demonstrate that the Conference believed that it was articulating rules in most areas that reflect the existing state of affairs - a state of affairs that we wished to preserve by enshrining these beneficial and desirable principles in treaty language." *Official Records*, Vol. XVII (192nd meeting, para. 3.)

42Moore, John N., "The Regime of Straits and the Third United Nations Conference on the Law of the sea," *American Journal of International Law*, Vol 74 (Moore) p. 77 at 166 and 121. Moore headed the U.S. delegation in development of the navigational and security aspects of the ISNT and Informal Composite Negotiating Text (ICNT) and negotiated the straits Section. Ibid. p. 102. See also Richardson, Elliot L., "Law of the Sea: Navigation and other Traditional National Security Considerations," *San Diego Law Review*, Vol. 19, p. 553 at 565. Richardson was Head of the U.S. Delegation to UNCLOS III, 1977-1980. Both Moore and Richardson would appear to have similar "semi official" status, if not official, as Barabolia and Kolodkin above. Churchill pp. 93-94 believes that the U.S. regularly sails through the major straits in a manner intended to correspond to transit passage.

43The following is obtained from Burke, William T., *International Law of the Sea*, Documents and Notes, 7th Edition, 1987, University of Washington, School of Law, Seattle, Washington, (Burke Document) I. p. 90 and II pp. 144-145, unless otherwise noted. Burke's status is included here as a non-governmental expert in spite of his work as expert to the U.S. UNCLOS III delegation. This is due not only to his less official status but also his support for rights inconsistent with the U.S. position. See Section 5.2.5.2. Burke Document I. p. 90 notes that this position is based upon the argument that relevant past practise is characterized by a 3 mile territorial sea with a high seas corridor through any straits wider than 6 nautical miles with free passage, surface or submerged and free overflight. Transit passage through these straits though now with a 12 mile territorial sea is described as "nothing new" and "business as usual."

consistent practises of States establishes the LOSC provisions as customary law, but gives no sources. In addition the Deputy Head of the U.S. delegation to UNCLOS III at the final 1982 session, Leigh Ratiner, stated in Hearings on Law of the Sea Negotiations before the House Committee on Merchant Marine and Fisheries, that the U.S. had no such right of passage through straits based on customary law. It was rather a right to pass on the high seas together with a recognition of the 3 mile territorial sea limit which was understood to be anomalous, anachronistic and not sustainable in international law. Further, classified information indicates that the U.S. does not continue to make such passages but rather takes arrangements which obfuscate these issues.

For Russia, the practise is similar though perhaps less demonstratively asserted. The Soviet Navy, a waxing power since the mid 1960's, regularly sail through the major straits in a manner intended to correspond with transit passage.[44] An idea of the importance of the international straits regime to the Russians may be obtained when seen that the Soviet Northern Fleet based at Severomorsk on the Kola Peninsula was probably the most important of its fleets since geographically the Arctic was the only marine area where Soviet warships could reach open sea without having to sail through straits under adverse foreign influence.[45] General ship deployments included routes from Vladivostok, to the Indian Ocean, the South China Seas, Vietnam, South Yemen, Ethiopia and the Mediterranean; and from Kaliningrad and Sevastopol generally to the Atlantic and the Mediterranean.[46] The straits traversed would therefore roughly correspond to those listed above for the U.S. particularly the Indonesian Straits and Gibraltar. Ship deployments from the Russian Federation will continue these movements though to a lesser extent. The Barabolia statement has been noted including, "(I)t is also important to emphasize that in respect of international straits customary norms of law have been formed over the centuries providing for the complete and unlimited freedom of navigation through them of vessels of all countries of the world."[47] Furthermore, due to the adoption by many States of the 12 mile territorial sea, Barabolia advocates transit passage due to its importance to shipping and the avoidance of conflict.[48]

Other maritime powers also practise transit passage or what is intended to correspond to transit passage through the major international straits, including France, the U.K., and the Federal Republic of Germany.[49] In addition treaty provisions and State declarations may provide support for claims that transit passage has entered customary law.[50]

44Churchill pp. 93-94. Leifer p. 170. Caminos p. 209.

45Bergesen, H.S., Arild Moe, and Willy Østreng, *Soviet Oil and Security Interests in the Barents Sea*, (Østreng) p. 63. The authors also note that new warships were first stationed with the Northern Fleet, and thereafter with the other fleets at Vladivostok (Pacific Fleet), Kaliningrad (Baltic Fleet), Sevastopol (Black Sea Fleet), and Baku (Caspian Fleet).

46See *Militær-Balansen*, Den internasjonale institutt for strategiske studier, 1989-1990, Norsk Utgave ved den norske Atlanterhavskomité (Militær-Balansen), s. 46-49.

47See Section 4.2.2. and Barabolia-Butler pp. 142-143.

48Ibid.

49Churchill pp. 93-94.

50The following is obtained from Smith and Roach p. 180 indicating a U.S. position. These include, Article 4 of the Treaty of Delimitation between Venezuela and the Netherlands, March 21, 1978, English translation is set out in Annex 2 to *Limits in the Seas* No. 105, Colombia - Dominican Republic & Netherlands (Netherlands Antilles) - Venezuela:

Is the above State practise and, *opinio juris* sufficient to support the claim by the maritime powers that the right of transit passage has become firm customary law? Despite the fact at least eight States bordering straits have ratified the LOSC and could be said to be in favour of transit passage, on the present state of facts, it is submitted that the right of transit passage has not yet passed into customary law, although it may be close to doing so. Presently the transition of this regime into customary law fails on several points.

5.2.2.2.2.1. Norm Setting - Very Widespread and Representative Participation - *Opinio Juris*

First, the most important point given the controversy in UNCLOS III over transit passage,[51] deals with the *practise and intention* of the States bordering the strait and less prominent maritime States. As seen a very widespread and representative participation of States in the "norm setting" practise is required, though it need not be universal nor consist of absolute conformity.[52] Here the major maritime powers are strongly represented through their claims and transit passages, but the position of the States bordering the strait and the less prominent maritime States is less clear. As such it seems questionable that the participation in practising transit passage is either widespread or representative, unless it can be shown that the majority of States bordering the strait and less prominent maritime States are in agreement with the rule. In addition as seen the general practise must also be accepted as law, *opinio juris*.[53] Any non-participation by States in a rule under formation should be analyzed to see what it consists of, protest to the rule, acquiescence, lack of interest, lack of action consistent with international rules, or breaches of customary law. Although it is beyond the scope of this work to do a far-reaching analysis, it is felt a brief overview will give a rough indication of the status of transit passage. This consists of showing a want of widespread or representative participation as well as a want of legal acknowledge required for transit passage to have passed into customary law.

Maritime Boundaries; Article VI of the Agreement on the Delimitation of Marine and Submarine Areas, April 18, 1990, between Trinidad and Tobago and Venezuela, UN LOS BULL., No. 19, October 1991, at 24; UN LOS: Practise of Archipelagic States 247; Article 7(6) of the 1978 Treaty Between the Independent State of Papua New Guinea and Australia concerning Sovereignty and Maritime Boundaries in the areas between the two countries, including the area known as Torres Strait, and related matters, signed at Sydney, December 18, 1978, 18 *International Legal Materials* 291 (1979), UN LOS: Practise of Archipelagic States 185; Article 5(2) of the 1985 South Pacific Nuclear Free Zone Treaty, 24 *International Legal Materials* 1442 (1985); Article 5(2)(c) of the 1990 Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 1990. S. Treaty Doc. 103-5, at 8; Article 15 A of the Maritime Areas Act, 1982 between Antigua and Barbuda, UN LOS: Practise of Archipelagic States 161; Declaration issued by France and the United Kingdom setting out the governing regime of navigation in the Dover Straits at the time an Agreement was signed on November 2, 1988, establishing a territorial sea boundary in the Straits of Dover, UK White Paper, France No. 1, Cm.557 (1989); FCO Press Release No.100, Nov.2,1988; printed in 59 Brit Y B Int'l L. 524-25(1988); UN LOS BULL., No. 14, Dec. 1989, at 14; UN, Current on Part III of the United Nations Convention on the Law of the Sea 1982, 60 Brit. Y.B. Int'l L. 159, 170 n. 34 (1989); Statement by Deputy Legal Advisor to the British Foreign Office regarding the Straits of Dover, Footnotes omitted. The Malaysia-Indonesia-Singapore statements and addenda may be found in UN Doc. A/CONF.62/L.145, 16 *Official Records* 250-53; Statement by the UN Secretary-General, UN Doc. A/47/512, Nov. 5 1992, para. 23, at 8; and Statement by the Ministry of Foreign Affairs of Thailand, UN GA Doc. A/48/90, Feb 22 1993, *reprinted in* UN LOS BULL., No. 23, June 1993, at 108.

51See Sections 5.2.3. and 5.2.4.

52See Section 2.3.2. As seen some views limit State practise to those claims enforced, however the majority position allows "declarations" to suffice. Both declarations and claims enforced are presented here.

53See Section 2.3.3.

Specifically some States have granted a right of transit passage, such as the U.K. in the Straits of Dover and various others.[54] Japan has skirted the issue in five of its straits by limiting the breadth of the territorial sea to three miles, leaving a high seas channel.[55] In addition the Malacca Agreement[56] in which transit passage plays a central role through the Straits of Malacca and Singapore, was negotiated between the States bordering the strait Malaysia, Singapore and Indonesia, and the major user States, France, the U.K., the U.S., Japan, Australia, and the Federal Republic of Germany. Indonesia, the Federal Republic of Germany and Australia are the States which have ratified the LOSC so far, though the U.K and the U.S. may be in the process of doing so.[57]

Some States have granted rights of passage through special agreements which are not inconsistent with LOSC provisions, and hence allow application of transit passage since there are no contrary rules with application under Article 35(c).[58] The U.K. and France (1904, for Egypt and Morocco), and Argentina and Chile (1881 and 1984) have agreed to "free navigation" or "free passage" through respectively the Straits of Gibraltar and the Straits of Magellan, which can arguably be interpreted to allow the LOSC straits regime to apply.[59] The Swedish-Danish 1857 Treaty of Copenhagen regulating the Sound or Belts, and the Swedish-Finnish 1921 Convention on the Non-Fortification and Neutrality of the

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54Churchill pp. 94-95.

55Kisselev, V.A., P.V. Savaskov, "International Regime of Straits and the UN Convention on the Law of the Sea," *Soviet Yearbook of Maritime Law*", Published by the Soviet Association of Maritime Law, State Research and Project Development Institute of Merchant Marine (Soyuzmorniiproject) 1988, (Kisselev and Savaskov), p. 9. As noted Professor Kolodkin was Chairman of the Association, Vice President of the International Maritime Committee and was also Editor in Chief of the Yearbook. He continues in parallel positions with the Russian counterparts.

56"Statement Relating to Article 233 of the Draft Convention on the Law of the Sea in its Application to the Straits of Malacca and Singapore," *Official Records* 250-51, 251-53. U.N.Doc.A/CONF.62/L.145 (1982), Annex and Adds. 1-8, (Malacca Agreement). See Appendix 5 for text and IMO Resolution. The Soviet Union is noticeably absent, though Koh p. 160 notes that they were also involved in negotiations with the U.S. and the three States bordering straits.

57See Report of the United Nations Secretary-General, *Law of the Sea*, A/50/713, 1 November 1995, p. 6, paragraph 9, footnote 2; and United Nations Law of the Sea, SPLOS/INF/4, 27 February 1996, "Election of the Members of the International Tribunal for the Law of the Sea". Information provided by Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations. Article 3 of the latter indicates that a State in the process of becoming a Party to the LOSC might nominate candidates, and of relevance here, nominations appear for Russia, the U.K. and the U.S. Ratification of the LOSC by Russia would firmly attach application of the LOSC strait regime to the Russian Arctic straits subject to the exceptions noted in Section 5.3.3.

58See generally Churchill pp. 94-96.

59Ibid. notes however the former is arguably concerned only with neutralization of the shore and not with passage at all. Article 10 of the "Treaty of Peace and Friendship" between Argentina and Chile, 24 *International Legal Materials* 11 p. 13, states in relevant part, "...The delimitation agreed upon herein, in no way affects the provisions of the Boundary Treaty of 1881, according to which the Straits of Magellan are perpetually neutralized and freedom of navigation is assured to ships of all flags under the terms of Art.5 of said Treaty. The Argentine Republic assumes the obligation to maintain, at all times and under any circumstances, the right of ships of all flags to navigate expeditiously and without obstacles through its jurisdictional waters towards and away from the Straits of Magellan." Smith and Roach p. 194 and 226, footnote 60 indicates that the U.S. and other States consider the Magellan strait subject to free navigation including a right to overflight and believe this reaffirmed by both Argentina and Chile. However, Argentina was originally in favour of only innocent passage in international straits, see Koh p. 143, and Chilean statements in UNCLOS III and declaration upon signing would seem to argue for a restrictive meaning of the geographic Straits of Magellan. See *Official Records* Vol. XVI, A/CONF.62/WS/19; *Official Records* Vol. XVII, 189th meeting, para. 19; and *The Law of the Sea: Status of the United Nations Convention on the Law of the Sea*, (United Nations publication, Sales No. E.85.V.5) (Status No. E.85.V.5), p. 14.

Aaland Islands and 1940 Agreement on Demilitarization of the Aaland Islands is maintained by these States to fall under Article 35(c).[60] However related to the LOSC concerning the former convention only enforcement jurisdiction may be immune, not legislative competence; and for the latter aside from constraints upon warships, the LOSC regime may be only slightly affected.[61] An article appearing in the *Soviet Yearbook of Maritime Law* views the 1921 Agreement between Sweden and Finland not to justify the inclusion of the Södra-Kvarken Strait under the Article 35(c) exception.[62] The 1936 Montreux Convention[63] regulates the Bosphorus and Dardanelles Straits and enforcement jurisdiction falls under Article 35(c), though possibly not over coastal legislative jurisdiction since as above this issue is not mentioned specifically.[64] Complicated provisions govern, but briefly merchant ships are given freedom of transit and navigation, and certain specified light warships in daylight hours are given passage rights upon prior notification to Turkey. The littoral States of the Black Sea have wider rights. However in 1976 the Soviet Union sent the aircraft carrier *Kiev* through the Turkish Straits, even though these are expressly excluded.[65] Although it appears that a fictional characterization was claimed by the Soviets in order to "comply" with the Convention, some of the limitations may be on the wane.[66]

From this brief overview it seems fair to say that rights to transit passage have be practised with little conflict only for those straits which have been or remain subject to British or Japanese jurisdiction and possibly to Chilean or Argentine. Otherwise it appears that the Great Powers have had to claim and negotiate these rights and have also at times claimed these rights through straits claimed under the Article 35(c) exception. For other straits, acceptance of transit passage by States bordering the strait may be even less pronounced.

Looking at acceptance by States bordering the strait, generally no reservations or exceptions may be made to the LOSC unless expressly permitted by the specific Articles under Article 309. The LOSC straits regime remains silent on this subject, therefore no reservations or exceptions may be made under ratification or accession. Declarations or statements however may be made under Article 310 by States when signing, ratifying or acceding the LOSC, provided that such do not purport to exclude or modify the legal effect of the LOSC provisions in their application to that State. In the following only those States bordering straits making declarations or other statements in UNCLOS III or under Article 310 are listed.

60Smith and Roach pp. 182, 183 and 222. As seen above the U.S. contests this.

61Churchill p. 95.

62Kisselev and Savaskov p. 12. The authors note that even though special agreements were concluded for some straits in the Baltic and Black Seas and others including the Straits of Magellan, especially for merchant ships the regime is no different from regular free passage.

63Kindly submitted by the Embassy of the Republic of Turkey, Oslo, Norway, 26 May, 1994.

64Churchill pp. 94-95.

65Ibid.

66Ibid.

With the exception of the States Cyprus, Kuwait, and Fiji,[67] all LOSC ratifiers presumably favouring transit passage, and those above which have entered into special agreements, it appears difficult to maintain that a clear majority intended that the right of transit passage pass into international customary law. States clearly objecting include Spain;[68] and from the UNCLOS III "straits debate" those which favoured innocent passage only in international straits Albania, China, Iran, Peru, and the United Arab Emirates.[69] These States were often outspoken in their objection to the right of transit passage, and it can questionably be said that as affected States and non-LOSC ratifiers they acquiesced in this right passing into customary law.

On the other hand States supporting transit passage through a statement made at UNCLOS III, or elsewhere, included Cape Verde, Mongolia, Bulgaria, India, Australia, Belgium, Guyana, Israel, Bahrain, New Zealand, Hungary, Liberia, Sudan, Iraq, Turkey, Republic of Germany, France, Malaysia and Morocco.[70]

This results roughly in six States bordering the strait opposed to transit passage, and some forty five, small and large sea powers and States bordering the strait, in favour of *some form* of transit passage. This means roughly *one-eighth* of interested States appear to be strongly opposed. *However* of those States favouring transit passage either through LOSC ratification, declarations or other means, not a few do not allow application of this right unequivocally in their own straits. It is thus submitted some doubt can be cast on the

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67*Multilateral Treaties Deposited with the Secretary-General*, Status as at 31 December 1992, ST/LEG/SER.E711, United Nations Publication, Sales No. E.93.V.11. (LOSC-Declarations), p. 770 (Kuwait). *Official Records* Vol. XVII, 187th meeting, para. 74. (Fiji). These states as well as Cyprus were originally in favour of innocent passage. See 5.2.1. and Koh p. 143.

68Upon signature of the LOSC, Spain declared in relevant part, "4. With regard to Article 42, it considers that the provisions of paragraph 1(b) do not prevent it from issuing, in accordance with international law, laws and regulations giving effect to generally accepted international regulations... 6. It interprets the provisions of Article 221 as not depriving the coastal State of a strait used for international navigation of its powers, recognized by international law, to intervene in the case of the casualties referred to in that article. 7. It considers that Article 233 must be interpreted, in any case, in conjunction with the provisions of Article 34." See Status No. E.85.V.5, p. 25. Spain in the plenary meeting expressed much the same views. *Official Records* Vol. XVII, 186th meeting, para 146, and 190th meeting, para. 101. See also Section 5.2.1., and Smith and Roach pp. 185-189.

69See Koh p. 143. for Albania, China, Peru. For Iran see *Official Records* Vol. XVII, 191st meeting, para 69, Status No. E.85.V.5. pp. 17-18, and Smith and Roach pp. 189-191. For the United Arab Emirates see, *Official Records* Vol. XVII, 185th meeting, para. 170.

70Cape Verde, *Official Records*, Vol. XVII, 186th meeting, para 146; Bulgaria, ibid. para. 66; India, ibid. Vol. XVII, 187th meeting, para 2; Australia, ibid. 187th meeting para. 95; Belgium, ibid. 188th meeting para. 159; Guyana, ibid. 189th meeting para. 19.; Israel, ibid., Vol. XVII, 190th meeting, paras. 19-20, Bahrain, ibid. para. 66; New Zealand, ibid. para. 80; Hungary, ibid. para. 128; Liberia, ibid. para. 179; Sudan, ibid. para. 192; Iraq, Status No. E.85.V.5. p. 19, *Official Records*, Vol. XVII, 188th meeting para. 91; Turkey, ibid. 185th meeting, para. 11, A/CONF.62./WS/37 and Add.1 and 2, and ibid. 189th meeting, para. 171; France, ibid., 190th meeting para. 45 and 47; Malaysia stated in the plenary meeting, "The Convention incorporates also a new concept in relation to straits used of international navigation, namely, the concept of transit passage. Lying, as we do, on one side of the narrow and shallow Straits of Malacca, which is one of the most important and busiest navigational waterways in the world as well as an important source of livelihood for our people, Malaysia particularly welcomes those provisions in the Convention which seek to ensure the safety of navigation as well as the protection of the marine environment. In this respect, together with Indonesia and Singapore, our neighbours sharing the Straits of Malacca, we have reached a common understanding with major user States of the Straits on measures that coastal States may adopt in accordance with the relevant provisions of the Convention, ibid., 192nd meeting, para 3; Morocco, ibid. 186th meeting, para 99-100. For the latter two see Section 5.2.1. for earlier contrary positions.

total acceptance by these States of the right to transit passage. These include Canada, Denmark, Egypt, Oman, Finland, Philippines, Sweden, the Soviet Union, Greece, Yemen, Yugoslavia, Tanzania, Guinea,[71] and possibly Argentina, Chile, Rumania, Sao Tome and Principe, Nigeria and Indonesia.[72] If this group is subtracted from the group favouring transit passage and added to the group against, over *one-half* of interested States would appear not completely to accept, if not oppose, the unlimited exercise of transit passage.

Thus using the most conservative calculations, a minority of mostly States bordering the strait have actively protested the right of transit passage. Since the required widespread and representative participation in the "norm setting" practise need be neither universal nor consist of absolute conformity, general State practise appears to come close to meeting the test. This seems especially true since there has been substantial movement towards the transit passage regime by States such as Egypt, Fiji, and Kuwait, and less so by Morocco, Oman, Yemen and Argentina, all of which originally strongly objected.[73] If however the practise of the more ambivalent States is taken, which it must since their *composite* denial affects not a few straits internationally, a substantial number have not yet unequivocally supported the transit passage regime. As noted a moderate number of claims from these States have been contested by the U.S. Hence it is submitted that the general State practise lacks a widespread and representative participation.

5.2.2.2.2.2. Summary

The lack of acknowledgement as law of the transit passage regime speaks for itself. Though there is movement towards the formation of a customary rule, reciprocity is

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71See Smith and Roach pp. 177 to 229 for U.S. claims to transit passage through straits controlled by Canada, pp. 207-215; Denmark, pp. 215-218; Egypt pp. 219-221; Finland, p. 183; the Soviet Union pp. 191-194 and 200-207; Sweden p. 183; and Yemen Arab Republic pp. 183-184. See also Canada, U.S. Limits pp. 71-72. Canada stated in plenary meeting, "(Parties to the Convention) will...be able to take advantage of the new provisions on transit passage through international straits. They offer a major inducement to maritime States especially to sign and ratify the Convention." *Official Records*, Vol. XVII, 185th meeting, para. 9; Egypt, LOSC Declarations p. 767, *Official Records* Vol. XVII, 185th meeting, para 66., ibid., Vol. II 13th meeting, para. 11, Egypt was originally in favour of innocent passage through international straits. See debate with U.S. in which Egypt forwarded the position of prior authorization or notification and verification of submarines through straits. Ibid. Vol. II, 13th meeting, para. 11.; Oman, LOSC-Declarations p. 771, Status No. E.85.V.5. p. 22, Oman originally was in favour of innocent passage, see Koh p. 143; Finland, Status No. E.85.V.5. p. 14, *Official Records* Vol. XVII, 187th meeting para 67; Philippines, Status No. E.85.V.5. pp. 22-23 and LOSC-Declarations p. 771, *Official Records LOSC* Vol. XVII, 189th meeting para. 52, Eight Nation Proposal, Section 5.2.1.; Sweden, Status No. E.85.V.5. p. 26, *Official Records* Vol. XVII, 187th meeting para. 222; Soviet Union, U.S. Limits pp. 68-71 and Kolodkin p. 163; Greece, Status No. E.85.V.5. p. 17, *Official Records* Vol. XVII, 191st meeting, para 69; Yemen, Status No. E.85.V.5, p. 29, Yemen was in favour of only innocent passage in international straits, see Eight Nation Proposal, Section 5.2.1. and Koh p. 143; Yugoslavia, LOSC-Declarations p. 775, *Official Records*, Vol XVII, 185 meeting, 9th para.; Tanzania, ibid., 185th meeting, para. 183. Tanzania was in favour of innocent passage only in international straits. See Koh p. 143; Guinea, LOSC-Declarations p. 769.

72Argentina was originally in favour of only innocent passage in international straits, see Koh p. 143; Status No. E.85.V.5., pp. 13-14. *Official Records* Vol. XVII, 189th meeting, para. 19, and Treaty of Peace and Friendship between Argentina and Chile, 24 *International Legal Materials* 11, at 13 (1985); Rumania, LOSC Declarations p. 772; Sao Tome and Principe, LOSC-Declarations p. 772; Nigeria, *Official Records LOSC* Vol. XVII, 189th meeting, Document A/CONF.62/WS/36, Annex, 13th, 16th and 20th paras. Indonesia has ratified the LOSC and therefore has accepted transit passage, however in 1988 closed the Sunda and Lombok Straits, through which the U.S. claims transit passage, for naval exercises. U.N. Speech p. 6 paragraph 9, footnote 2 and Smith and Roach pp. 218 and 219.

73See Section 5.2.1.

lacking.[74] This submission is augmented also by the general fact that discernment of transit passage by a coastal strait State can also be difficult. What might be considered as coastal strait State acquiescence, might in fact be unawareness. For surface ships it would be difficult for a coastal strait State to distinguish innocent passage from transit passage, and for submarines most passages would occur unbeknownst to the State bordering the strait.[75] This would mean generally that with regard to State protest, acquiescence, or lack of interest, lack of action consistent with international rules with respect to transit passage doubt should arguably fall on the side of the protest. While it may be argued that allies of the flag State had acquiesced in or accepted transit passage in their straits, it could likewise be argued that non-allied States should be accorded a protest or at least a lack of action, consistent with non-suspendible innocent passage, unless shown otherwise. Given the unclear legal status of transit passage and difficult discernment of such, the status quo regime should arguably govern.

Thus the statement by Deputy Head of the U.S. Delegation to UNCLOS III Leigh Ratiner noted above seems essentially a correct statement on the status of the law, non-passage of the LOSC straits regime into customary law. This status may also be reflected in a statement made by the U.S. State Department in which it was indicated that facing coastal strait State legislation and enforcement measures in excess of the U.S. view of rights enjoyed under transit passage, the U.S. would simply ignore these as it already had done with Spain and Italy.[76]

Arguments forwarded in favour of transit passage having passed into customary law include that since under Article 38(1) "all ships and aircraft enjoy the right of transit passage," this must also include non-Parties to the LOSC, thus suggesting an acquisition of a duty or right under customary law by third States.[77] A counter argument is that for this interpretation to hold in accordance with Article 36(1) of the Vienna Convention on Treaties,[78] it must have been intended by the drafters of the LOSC, and this is not readily apparent in UNCLOS III negotiations. Secondly argued in favour is that several of the delegates, including those from the U.S. and the U.K., claimed that the right of transit

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74See Brownlie p. 284 who notes, "(N)o doubt state relations in this field may evolve to some extent on the basis of recognition of transit rights and reciprocity."

75Churchill pp. 93-94. See Section 5.2.5.2. for probable lack of Russian detection of U.S. submarines in Russian internal waters.

76Interview J. Ashley Roach, Captain, JAGC, U.S. Navy (Ret.), Office of the Legal Advisor, U.S. Department of State (L/OES), and Dr. Robert W. Smith, Office of Oceans Affairs, U.S. Department of State, Washington D.C., U.S., (Roach Interview) or (Smith Interview) 27 June, 1994. Caminos p. 207 notes further that a State may not act in support of a right which has not yet evolved into a customary international norm, especially when such State practise is founded on attitudes of power politics against the will of coastal States.

77Arguments are obtained from Churchill pp. 93-94 unless noted otherwise.

788 *International Legal Materials* 679. Article 36(1) states, "A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides."

passage existed before UNCLOS III.[79] However at least the U.S. as well as others also made statements indicating they considered the right to be a new concept.[80] A final argument in favour consists of reasoning that LOSC navigational provisions represent a consensus among participating States as to what State practise is or should be. This is countered by the argument that the consensus relates to the provisions as parts of the LOSC rather than of customary law, which was pointed out by Iran.[81] The majority of doctrine vaguely follow the view rejecting the passage of the LOSC straits regime into customary law.[82]

Thus it must be concluded that both elements of customary law are lacking for the right of transit passage to have passed into international customary law. Since a substantial number of interested States have either actively protested or collectively cast doubt on the existence of such a right, and several more might have made more specific protests had they known the right was being exercised, this indicates in addition to insufficient State

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79In the plenary meeting the U.S. stated, "...long-standing international practise bears out the right of all States to transit straits used for international navigation...Moreover, these rights are well established in international law. *Official Records*, 189th Plenary Meeting, para 13. See also ibid. 192nd meeting, para. 3. The U.K. stated regarding its draft Articles, "...the concept of transit passage through straits connecting two parts of the high seas...corresponded to what his delegation believed to be the best international practise at that time." *Official Records* Vol. II 11th meeting, paras. 17, 18-23 and 24-26.

80See Sweden, *Official Records* Vol. I, para. 80. Denmark, ibid, Vol. II para. 6-12; the Soviet Union, ibid. 12th meeting, para. 1-5; and in the U.S. in the 1972 Sessions, Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, Subcommittee II, Summary records of the 24th to the 32nd meetings (A/AC.138/SC.II/SR.24-32), 29th meeting pp. 74-75. Churchill p. 93 adds the balance of opinion was against the existence of such a customary rule.

81Iran declared upon signature of the LOSC and in the plenary meeting, "*Declaration of understanding*: "... It is ... the understanding of the Islamic Republic of Iran that: 1) Notwithstanding the intended character of the Convention being one of general application and of law making nature, certain of its provisions are merely product of *quid pro quo* which do not necessarily purport to codify the existing customs or established usage (practice) regarded as having an obligatory character. Therefore, it seems natural and in harmony with Article 34 of the 1969 Vienna Convention on the Law of Treaties, that only States parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein. The above considerations pertain specifically (but not exclusively) to the following: The right of transit passage through straits used for international navigation (Part III, Section 2, Article 38). Respectively Status No. E.85.V.5. pp. 17-18 and *Official Records* Vol. XVII, 191st meeting, para 69.

82Brownlie p. 284 notes that the LOSC provisions are a "substantial departure" from customary law, and while they "in principle...could be confirmed as customary law by State practice..., there is no evidence of a trend in this direction." See also Reisman, W. Michael, "The Regime of Straits and National Security: An Appraisal of International Lawmaking," *The American Journal of International Law*, Vol. 74, (Reisman Straits) p. 76, Caminos, H., "The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea," 205 *Recueil Des Cours* (1987) (Caminos), p. 231, Churchill p. 94, Pharand Arctic pp. 233-234, Koh p. 171 and Burke Documents p. 90, though the latter is vague. Kisselev and Savaskov pp. 10 and 15 note that, "(F)reedom of passage...through international straits which is identical in its content to freedom of navigation on the high seas, has emerged and evolved as a norm of international customary law." The same authors however note regarding the LOSC international straits regime though undesirable, "(I)t appears...only State Parties can enjoy the benefits under the Convention after its entry into force" due to difficulties in application. Bordunov, V.D., "The right of transit passage under the 1982 Convention," *Marine Policy*, July 1988, (Bordunov) p. 219, at 219, 230 and Hakapää, Kari, *Marine Pollution in International Law - Material Obligations and Jurisdiction*, (Hakapää) p. 202 are vague. In contrast O'Connell, D.P. p. 331. argues that the TSC Article 16(4) "may be applicable, unless it can be shown that the Convention has relegated the question of straits to customary law; for other countries, the regime of transit passage will apply, because this approximates to the situation stabilized in customary law by the practise of States. Nandan and Anderson p. 170 note the LOSC straits regime will influence the practise of states even before the LOSC enters into force, since the regime achieved consensus and represents negotiated solutions.

practice, insufficient belief that transit passage is acknowledged as general law.[83] At the same time though the passage of the right of transit passage into international customary law at this time seems doubtful, the law is in a state of flux.[84]

This raises a question regarding the passage into customary law of a related LOSC Article, Article 233. Can it be said that Article 233 has passed into international customary law?

5.2.2.2.3. Limitations to Coastal State Enforcement - LOSC Article 233

Article 233 as its title indicates is a safeguard with respect to transit passage through straits used for international navigation. Hence since it is doubtful that the LOSC regime has yet passed into international customary law, the same would hold true for Article 233. At the same time this Article must also be viewed as a part of the LOSC environmental regime, parts of which can be said to have passed into customary law, though which parts remains controversial.[85] Views range from those stating *very few* of the LOSC provisions have passed, to those declaring *all* the provisions, Articles 192 to 237 are reflections of established principles of customary law.[86] The general vagueness of Article 233 and problems of interpretation related to "appropriate enforcement measures," elaborated upon below would seem to weigh against it being "norm setting."[87] However in considering general State practise and acknowledgment as law an interesting problem presents itself.

In contrast to that seen above, not a few of the "ambivalent" group would arguably practise some form of this provision in their own straits since most in addition to taking a restrictive view of passage rights in their own straits logically take appropriate enforcement measures for cases causing or threatening major damage to the environment. In addition following the restrictive view they would logically acknowledge this enforcement as in accordance with international law. The Russian and U.S. rules are no exception,[88] and in the UNCLOS III negotiations environmental protection, reduction and control was a major concern voiced especially by the States bordering straits.[89] At the same time the maritime powers would be estopped from denying this provision as having passed into customary law since Article 233 is clearly part of the transit passage regime which these States strongly espouse as a package.[90] As such related to the Article 233 issue the "ambivalent" group would logically be more clearly attached to the "pro-transit-passage" group, and in

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83See Section 2.3.3.2. This is required under the ICJ's majority test for *opinio juris*. It goes without saying that the right fails under the even more stringent test for *opinio juris*.

84Brownlie p. 284.

85See Section 9.NEED.

86Respectively Churchill p. 146; and Kindt, "International Environmental Law and Policy; An Overview of Transboundary Pollution, (Law of the Sea Symposium), 23 *San Diego Law Review* 583 (1986) (Kindt) pp. 600-601.

87See Section 5.2.4.2.

88See Section 4.2.1. and 9.NEED.

89See Sections 5.2.3. and 5.2.4. and 9.NEED

90Ibid.

terms of numbers roughly only *one-eighth* of interested States would seemingly be opposed to this provision passing into customary law.

Space does not permit analysis of specific State practise of States including Canada, Denmark, Finland, Sweden and Turkey to confirm this conclusion. However the argument for Article 233 passing into customary law falls on other grounds. When viewed from the environmental perspective the relation Article 233 has to the international strait regime becomes more evident. As noted specifically in LOSC Section 7 Safeguards, nothing in the Legislative Part, Section 5, the Enforcement Part, Section 6, or the Safeguards Part, Section 7 is to affect the international straits regime. Furthermore it is only for violation of the specific rules allowed a State bordering a strait to adopt under Article 42(1)(a) and (b) related to transit passage which the coastal State is allowed to enforce under Article 233 when major damage to the marine environment is caused or threatened. Thus the straits regime seems clearly dominant,[91] and as shown above it is doubtful whether the composite practise and acknowledgement of the "ambivalent" group argues for transit passage having passed into customary law. In spite of probable environmental measures resembling those of Article 233, it would be difficult for States to argue that Article 233 has passed into customary international law lacking the passage of the more dominant and interrelated LOSC straits regime.

5.2.2.3. Conclusions

Briefly, due to the State practise of a moderate number of States which give support to the transit passage regime yet except the application of such in straits under their own jurisdiction it is submitted that it is doubtful that the LOSC straits regime has passed into international customary law. This is supported by the majority of doctrine. It is additionally submitted that Article 233 is meant as a coherent part of the dominant international straits regime, and lacking passage of this regime into international customary law, it is doubtful that it could be argued that Article 233 itself has passed.

With this said the issue of prescriptive jurisdiction over international straits will be addressed.

5.2.3. Prescriptive Jurisdiction[92]

5.2.3.1. Rights and Duties, Non-Suspendible Innocent Passage - Limits of Coastal State Prescription - TSC Article 16(4)

The prescriptive limitations of TSC Article 16(4) have been alluded to briefly above.[93] Since the ambiguity involved was unacceptable to the marine powers, this was one of the reasons for a call for a clarification under UNCLOS III. The issues included the interpretation of "prejudicial ... to the security" in TSC Article 14(4) which is interpreted

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91See Section 5.2.4.2. for more extensive discussion on this point. Most doctrine comes to the same conclusion.

92For a Table constructed by Koh pp. 168-169 showing the main differences between the TSC Article 16(4) and the LOSC international straits regimes see Appendix 5.

93See Section 5.2.2.1.

differently by States bordering straits and flag States in determining non-innocent passage; breach of health, customs and immigration rules of the State bordering the strait rendering or not the passage non-innocent; and lacking notification rendering or not the passage of warships non-innocent.[94] If the prescriptive limitations of TSC Article 16(4) is used as a basis for comparison with the Russian practice, even in spite of these questions, conclusions may be drawn, albeit somewhat general ones.[95] Since additionally these questions however produced a new international straits regime, though not customary law, it is proposed not to attempt to give more extensive answers here. It is submitted first that no further analysis of Article 16(4) is necessary. State practise has already proceeded beyond this point, and where the regime is applicable, it is accepted with its faults and regulated locally through individual coastal State domestic legislation. Doctrine has as well dealt extensively with the subject.[96] Second, in determining the prescriptive confines of Article 16(4) the more general issue concerns the meaning of innocent passage. This will be addressed in Chapter 7.

At the same time a characterization has been made of the LOSC straits regime as follows, "(S)ome provisions of the 1982 Convention are formulated in such a complex and ambiguous manner that in a number of cases they allow of an interpretation almost directly opposite to the one intended."[97] Since the Russian legislation dealing with its Arctic straits concentrates chiefly on navigational *safety* and *environmental protection*, focus must naturally be directed to the issues arising under the corresponding relevant international provisions LOSC Articles 34-45.[98] It is hoped somewhat to clarify the acceptable international limits in order to ascertain whether the Russian practise falls within these. At this point internationality of the Russian Arctic straits will be hypothetically assumed in order to address the LOSC transit passage provisions. As seen this possibility does exist, since the U.S. forwards this view, it is a major sea power and exerts much influence in the formation of international customary law.[99] If the straits do not become international, it goes without saying that the limits set by the Russian territorial seas and internal waters regimes are better justified.

5.2.3.2. Rights and Duties, Transit Passage - Limits of Coastal State Prescription - LOSC Articles 38(2) and (3), 39(1) and (2), 41 and 42(1) and (2)

5.2.3.2.1. Reduction Transit Passage to Innocent Passage - Article 38(3)

Under Article 38(2) generally in an international strait for passage to be transit it must be "continuous and expeditious," and under Article 39(1)(d), 41(7) and 42(4) ships must

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94Koh pp. 38-47. Koh p. 47 notes that these ambiguities are compounded in narrow, congested straits along with new types of threats related to security and pollution emanating from new type of ships.

95See Section 5.3.3.2.2.2.

96In addition to Koh pp. 38-47, see Churchill pp. 87-90, Leifer pp. 86-95, Reisman Straits pp. 58-65 Burke Straits pp. 193-197, Caminos pp. 39-57, to mention but a few.

97Kisselev and Savaskov p. 13.

98See Sections 5.3.3. and 5.3.3.

99See Section 2.3.2. and 4.4.

comply with other relevant provisions of PART III including national provisions appropriately established. The scope of these duties and rights remains unclear however, with several interpretations possible. That transit passage is not exercised and hence subject to "the other applicable provisions of the Convention" under Article 38(3), including necessarily *innocent passage if it is not continuous and expeditious*, under Article 38(2), *or not without delay* under Article 39(1)(a) seems relatively clear.[100] This has importance since the coastal State could within its discretion deny passage for lack of innocence. However whether non-compliance with the other PART III requirements through Articles 39(1)(d), 41(7), and 42(4) would be subject to Article 38(3) reduction to innocent passage is less clear. The text of Article 38(3) does not elucidate this, however an argument against the "reduction" for infractions of international and national provisions is that Article 45 dealing specifically with innocent passage does not mention Article 38(3). Additionally cases can be imagined involving minor infractions of Articles 39, 41 and 42 and the respective national provisions, where it would be doubtful it could be claimed the result would be loss of transit passage. A ship transitting a strait at a much reduced yet arguably safe velocity borders upon delay and abnormal mode of transit, yet it seems questionable such would permit the State bordering the strait to take measures against it consistent with innocent or even non-innocent passage. If allowed, the transit passage regime arrived at through difficult negotiations, would be rendered pointless, as in the extreme it would proximate TSC Article 16(4) with its element of coastal State discretion.

Generally a straightforward reading of Article 39(1) implies that any non-compliance would render the passage non-transit, "(S)hips and aircraft, while exercising the right of transit passage, shall..." This passage is worded in strict obligatory terms indicating that if the ships and aircraft "do not...", then there is no exercise. An additional argument is that Article 19(2)(a), regulating innocent passage, regarding threat or use of force being prejudicial to the good order of the State and resulting in non-innocent passage, has nearly identical wording as Article 39(1)(b). This arguably implies non-transit passage. Although a strict textual reading of the other Articles regulating transit passage in Section 2, would also seemingly support the interpretation involving an Article 38(3) "reduction," this causes problems as illustrated above in the example. If a "reduction" is permitted, then for what infractions.

A further question is raised in relation to Article 39(2)(a) and (b). Although further analysis will be carried out below examining Article 39(2)(a) and (b),[101] the duty of compliance by the ship curiously appears more strict than that required under innocent passage under Article 19(2)(h).[102] The difference is that the ships must comply under the former with "generally accepted" pollution regulations, procedures and practises, and under the latter any activity less than "wilful and serious pollution" contrary to the LOSC is deemed compliance.[103] This might be expected considering the negotiations balancing the

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100See Section 7.NEED for discussion of the Article 19.

101See Section 5.2.3.2.2.

102See Hakapää pp. 196, 204.

103Article 19 does not specifically list any unsafe activities as being a violation of innocent passage. See Section 7.NEED for extensive discussion of innocent passage.

complex issues noted,[104] however, violation of the "generally accepted" provisions would appear to result in a paradox. A violation would arguably shift the transit passage to that of innocent passage under Article 38(3), and the ship could then proceed without problem under the innocent passage regime as long as the violation was not an "act of wilful and serious pollution" or an act so unsafe as to threaten the good order of the State. Additionally under LOSC Article 42(2) the State bordering the strait has competence to adopt legislation as long as it does not discriminate, deny, hamper or impair passage.[105] This competence is more restricted for transit passage than for innocent passage. For the environment, Article 42(1)(b) states that a State bordering the strait may adopt laws regulating transit passage, "...giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances..." Under Article 21(1)(f) the coastal State related to innocent passage may legislate "in conformity with the provisions of the Convention and other rules of international law." For safety Article 42(1)(a) incorporating Article 41 states that the States bordering the strait may legislate in conformity with "generally accepted international regulations" and following the proper procedure. Under Article 21(1)(a) the same conformity as required above applies. The difference appears to be that for transit passage only international discharge or safety standards may be implemented, while coastal State competence to regulate innocent passage is fairly broad.

Thus though expectedly coastal State competence to prescribe safety and environmental provisions increases with the utilization of the innocent passage regime, somewhat unexpectedly a ship's duty generally to comply with the adopted provisions decreases with the same regime. The move moreover from the transit to the innocent passage regime may be effortless under Article 38(3), and the innocent passage regime the more dominant.

The problem here probably arises from the vagueness of the text covering the specifics regarding force, safety, pollution and other to which vessel compliance is required. Specifically the reality of passage is so complicated that many nuances are allowed within the broad boundaries set by these LOSC provisions. As such based on the above it is submitted that the Arctic 38(3) "reduction" is meant most reasonably to apply solely to violation of those major elements of transit passage set forth in Articles 38(2) and 39(1(a), (b), and (c), continuous and expeditious transit, without delay, without force or threat of force and with normal modes unless made necessary by *force majeure* or distress. Violation of the Section 2 Articles 39(2) and (3), 40, 41 and 42(1(a) and (b) must be major safety or environmental infractions before a "reduction" to innocent passage is allowed. This is based upon the logical necessity of preserving the transit right from a carnivorous exception, as well as State practise and *opinio juris*, and the legislative history presented below in relevant part.[106] Practically this may be especially true since as noted transit passage is difficult to discern from innocent passage, and submerged passage is difficult to discern at all.[107] What this may mean generally is that only threatening, abnormal, non-

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104See Section 5.2.1.

105See Section 5.2.3.2.2.

106See Sections 5.2.3.2.2. and 5.2.4.2.

107Churchill p. 95.

continuous and non-expeditious transit or major pollution incidents are *likely to be noticed* by the State bordering the strait. This State, which if a military ally, may have acquiesced in the transit passage regime.

State practise is generally "fuzzy" on this point, though it tends in the direction of the interpretation submitted. Based upon the statements made by representatives from the U.S. State Department noted for transit passage as a close approximation of free passage as well as the diplomatic statements exchanged between the U.S. and Spain and Italy, as expected the U.S. takes a restrictive view of coastal State prescription with regards to Articles 39(2), 41 and 42 and hence necessarily of Article 38(3) "reduction."[108] The U.S. State Department maintains in relation to Article 39(1), that transit passage may not be suspended by the coastal State for any purpose.[109] Russia's position is less clear, though as seen it strongly supports transit passage and practises it in much the same manner as the U.S. and other maritime powers.[110] In addition the Soviet Union sailed the aircraft carrier *Kiev* in 1976 through the Turkish Straits in contravention of the Montreux Convention, indicating that it also on occasion will ignore coastal State jurisdiction.[111] Additionally several maritime powers including the U.S., have negotiated the Malacca Agreement with Indonesia, Singapore and Malaysia defining enforcement measures in straits.[112] Any provisions in excess are likely to be ignored, and the Article 38(3) "reduction" for these would be meaningless. Doctrine is divided on this issue and very diverse.[113]

108See Section 5.2.2.2., Smith and Roach pp. 177-179, 185-189 and 197-200; and Schachte p. 17. See further discussion below in Section 5.2.3.2.2.

109Smith and Roach p. 178. Moore p. 91 interprets Article 38(3) as clearly implying, "activities which are an exercise of the right of transit are not subject to the other provisions of this convention." Richardson p. 565 notes the only limitations on the freedom of navigation are found in Articles 38-42 but does not elaborate.

110See Churchill p. 94.

111Ibid. p. 95.

112See Section 5.2.4.2. for discussion. As seen the user States included France, the U.K., the U.S., Japan, Australia, and the Federal Republic of Germany.

113Churchill p. 91 tends to the interpretation above noting that any *activity* threatening the coastal State under Article 38(3) would bring the passage under the innocent passage regime, which could then be denied for want of innocence. Churchill's interpretation of "activity" in Article 38(3) seemingly however includes obligations to refrain from the activities listed under Articles 39(1), (2) and (3), but not non-compliance with Articles 39(2) and (3), 40, 41, and 42(1)(a) and (b). O'Connell p. 330 and Burke Straits p. 211 make the same distinction. In the absence of such "activity" the only remedy for the coastal strait State would be to resolve the matter through diplomatic channels and dispute settlement procedures, or national rules consistent with international standards since under Articles 42(2) and 44 there is no right to impede passage. Further transit passage cannot be suspended even for security or other reasons under Article 44 though this right can be limited in extreme cases taken under self defense. Hakapää pp. 203-204, goes somewhat further noting that only an infringement of the basic requirements of transit passage would affect the status of the ships or aircraft. However violations of national provisions would not deprive ships of the right of transit, though their passage might be delayed by coastal State enforcement measures. A violation of Article 39(2)(a) or (b), "generally accepted" safety or pollution regulation would, "remain in innocent passage" if the violation were not serious enough to be prejudicial. If the safety or pollution violation were so serious that it amounted to "non-innocent" behaviour, the ship's passage could then be totally prohibited in the strait. Reisman Straits pp. 67-71 believes due to the ambiguity of Articles 37-39 the possibility exists for the coastal strait State to insist on compliance with safety provisions including article 39(1)(d) or cancel transit passage. Koh pp. 149-150, 152-153, 156 notes transit passage is governed solely by Articles 37 to 44 as they apply to transit passage and not by other LOSC provisions, unless otherwise stated. Although the author relates this to the distinctness of the transit and innocent passage regimes, this point may as well have importance related to the distinctness of the transit passage regime related to Articles 233 and 234. See below Sections 5.2.4. and 9.NEED The author emphasizes Article 38, noting that as long as continuous and expeditions transit is observed, non-compliance with

Taking a look at UNCLOS III negotiations of Article 38(3) reveals dissent, but most States supporting the present text. There were several attempts to expand coastal strait State jurisdiction by Malaysia, Spain and Morocco, and to include that transit passage would be subject not only to LOSC provisions but "to other rules of international law", but these proposals were rejected.[114] Possibilities for subjective interpretation by the State bordering the straits were permitted only to a minor degree.[115] It would thus appear generally that the textual meaning supporting the "reduction" from transit passage to innocent passage only for major infractions would prevail. If a ship in a international strait is not exercising transit passage, then the ship is subject to LOSC provisions other than those in PART III regulating transit passage, including the innocent passage regime.

These divergent interpretations having been presented, the LOSC safety and pollution provisions for international straits under Articles 39(2)(a) and (b), 41 and 42(1)(a) and (b) will be addressed next in order to attempt to ascertain their intended scope.

5.2.3.2.2. Vessel Compliance, Sea Lanes, Traffic Separation Schemes and Pollution Provisions - Articles 39(2)(a) and (b), 41 and 42(1)(a) and (b)

Article 39 or 40 need not render the passage a non-transit one." However, "(W)ilful and serious pollution" contrary to Article 39(2)(b) would still be "continuous and expeditious transit" under Article 38(2), whereas not "proceeding without delay" required under Article 39(1)(a) would not be "continuous" under Article 38(2). Only the latter would thus be a breach resulting in non-transit passage. Article 38(3) is seen limited to the situation in a strait where a ship does not leave strait waters, and hence innocent passage is the proper mode. Kisselev and Savaskov pp. 13 and 14 declare that the duties of ships under Article 39 are strictly differentiated from the concept of transit passage, and even violations in which the coastal State has the right of enforcement cannot become a non-transit one. These authors base their distinction upon *purpose* arising under Article 38(2), "solely for the purposes of continuous and expeditions transit." If the purpose of entering was to exercise passage through the strait, then even if a violation is committed in the passage, it cannot become a non-transit one. See also Bordunov p. 225. Nandan and Anderson p. 182, specify "the other LOSC provisions" to include Article 34, other Articles in PART III, as well as Article 2, noting "(I)n other words, if a vessel or aircraft is present in a strait used for international navigation but is not exercising the right of transit passage, then the vessel or aircraft is subject to provisions in the Convention *other than* those in PART III which regulate transit passage." (Italics added). Generally in the discussion of Articles 39, 41 and 42 compliance and respect by ships and aircraft of international and coastal strait State provisions is more or less taken for granted and non-compliance not strongly addressed. Ibid. pp. 184, 185, 189 and 192. Nordquist, Myron H., *United Nations Convention on the Law of the Sea 1982 - A Commentary*, Centre for Oceans Law and Policy, University of Virginia, Vol IV, 1991, (Nordquist IV) p. 330. follows the Nandan and Anderson view verbatim. Brownlie p. 284 does not address the Article 38(3) issue directly but sees the LOSC regime as "(A) severe limitation on the powers of some coastal States...and the coastal State has no power either to hamper or suspend transit passage," implying a restrictive view on the Article's application. Pharand Arctic p. 231 believes transit passage to be essentially free navigation as on the high seas but seems to equate Article 39(1) with Article 39(2) thus avoiding the Article 38(3) issue. Caminos pp. 144-146 lists all the interpretative possibilities of Article 38(3) notes and concludes that if interpreted to allow the coastal States the subjectivity to classify passage as either "transit" or "non-transit", "could result in a major erosion of the right of transit passage."

114VIII *Official Records* 1, 10, A/CONF.62/WP.10.10 (ICNT, 1977), Article 38. Malaysia (1976, mimeo.) Article 37 Revised Single Negotiating Text (RSNT II), Reproduced in Platzöder, R. (ed.), *Third United Nations Conference on the Law of the Sea: Documents*, (Vols. I-XIX), (Platzöder), Vol. VI, p. 396; Morocco (1976, mimeo.), Article 37 (RSNT II, Reproduced in IV Platzöder 399: Spain (1977, mimeo.) Article 37 (RSNT II, Reproduced in IV Platzöder 399; C.2/Informal Meetings 14 (1978, mimeo.), Article 38(Spain). Reproduced in V Platzöder 6; C.2./Informal Meetings/22B (1978, mimeo.), Article 38 (Morocco), Reproduced in V Platzöder 30.

115See Section 5.2.1.

vessel-source pollution, Articles 217, 218 and 220, while "generally accepted" is consistently used in a prescriptive provision, of relevance here, Article 211.[127]

Taking "applicable" first, briefly, from Articles 217 and 218 and 220, "applicable international rules and standards" are to be established through the competent international organization or general diplomatic conference and related to the prevention, reduction and control of marine pollution, however, little more is indicated.[128] The term "establish" can mean both ascertain and draft, thus implying that both customary law and treaties are meant.[129] Under Article 220 the establishment qualification, through international organization or general diplomatic conferences, does not appear, though it did in earlier drafts.[130] The omission may be intentional given these earlier drafts, and the fact that though the omission was apparently indicated related to later drafts no further action was taken by the Third Committee.[131] The effect of this would appear to be that localized arrangements accepted by the flag State may be possible as long as the provisions were consistent with the LOSC. For these to be "applicable" however there would have to be some outside acceptance under the general rules of international law.[132] Although it is not the intention to analyze Article 220 here, the omission is important since Article 233 is the parallel enforcement Article governing international straits.[133] Any possibility for local rules under Article 220 governing maritime zones from internal waters out to the economic zone might have relevance for the same under Article 233 below.

Under the U.K. proposal, where the term originated with respect to Article 42(1)(b) and substantially followed by the Fiji/U.K. Group, it was stated broadly that these regulations were to provide a basis for the States bordering the strait to take appropriate measures to control discharge of oil or other noxious substances into the straits.[134] This text was substantially incorporated in the ISNT.[135] The establishment qualification is missing here

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127See Appendix 9 for full text of these Articles.

128The term itself seems to have been directly discussed only related to Article 213 dealing with enforcement with respect to pollution from land-based sources. Here it appeared in the RSNT, later in the ICNT, as well as a memorandum and two reports. Respectively, VIII *Official Records* 1, 37 *A/CONF.62/WP.10 (ICNT, 1977)*, Article 214; *A/Conf.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.)* Reproduced in Platzöder 375, 469; *VI Official Records* 104, report of the Chairman at the 31st meeting of the Third Committee, para 55 et seq. Formal Report of Chairman at the fifth session (1976) *A/Conf.62/l.18*, paras. 5 et seq., ibid. 139. Memorandum of the President to the Conference, *A/CONF.62/WP.10/Add.1 (1977), VIII Official Records* 65, 69. The Chairman of the Third Committee explained the incorporation of "applicable" in the ICNT left intact the structure of the compromise on the question of vessel source pollution. It also was recommended deleted but this was not followed. *XII Official Records* 95, 103, *A/CONF.62/L.40* Section XXVI; and *XIII Official Records* 94, 96 *A/CONF.62/L.56 (1980)*, Annex B, Section XXVI.

129*Merriam-Webster's Seventh New Collegiate Dictionary*, G.&C. Merriam Company, 1972, p. 284. 1: to make firm or stable; 2: to institute (as a law) permanently by enactment or agreement...7: to put beyond doubt: prove...

130IV *Official Records* para 171, 175, 176; Articles 20(1) and (2) and 28(1), *A/CONF.62 WP.8/PART III (ISNT, 1975)*.

131Nordquist p. 302.

132Ibid.

133Ibid. p. 298.

134II *Official Records* 125, para 123 (1974); Private Group on Straits (1975), mimeo). Article 4, reproduced in IV Platzöder 194, 196.

135IV *Official Records* 152, 158 (Chairman, Second Committee) A/CONF.62/WP.8/PART II(ISNT, 1975) Article 41.

as in Article 220. There were later attempts however to make Article 42(1)(b) more parallel to "generally accepted" in Article 39(2)(b), but these were not accepted.[136] Spain was especially concerned and later submitted a formal proposal replacing "applicable" with "generally acceptable," noting the latter was used in Article 211(2) and included all kinds of waste rather than just oily wastes.[137] Further, "the problem was that the applicability of particular regulations might depend on the flag of the ship concerned, and so it would become impossible to establish an objective regime."[138] The proposal achieved a 60:29:51 result, but failed to meet a 2/3 majority present and voting requirement.[139] From this it appears that roughly 45% of the States were in favour of Spain's proposal.

What this history indicates is that "applicable international regulations" is generally intended to have the same meaning throughout the LOSC, though for different sections, the specific provisions would obviously vary. At the same time the fact that the establishment qualification is not addressed in Article 42(1)(b) seems to allow the possibility for localized arrangements accepted by the flag State similar to Article 220.[140] "Applicable" refers to ratified treaties and probably widespread acceptance in the practise of States. The use in Article 42(1)(b) however is somewhat curious since the Articles from which the term arose deal primarily with enforcement. The difference in language used between the prescriptive Articles and the enforcement Articles is not so unexpected.[141] The former deals with adoption of national rules and provides that a State shall *take into account* the internationally agreed rules (Article 207) or that the national rules shall *at least have the same effect* as that of the generally accepted international rules (Article 211). The latter however is more definite referring chiefly to the *enforcement* of national laws and regulations, and the *implementation* of international rules and standards (Article 213); *ensuring compliance* by flag ships (Article 217), *taking various enforcement* measures when a ship is in violation (Articles 218 and 220).[142] In this case however Article 42(1)(b) deals chiefly with prescription, the *adoption* of provisions related to transit passage though it also deals with implementation, *giving effect* to the international rules. It is essentially a prescriptive Article governing vessel source pollution using a formulation followed by the enforcement Articles governing the same. As seen even its parallel, Article 42(1)(a) incorporating Article 41 dealing with safety, follows the traditional prescriptive formulation, "generally accepted international regulations."

136Spain, C.2/Informal Meeting 14 (1978, mimeo.), Article 42, reproduced in V Platzöder 6,8; English Language Group ELGDCC/6 (1981, mimeo.), DC/PART III (Article 42) (1981, mimeo) CG/WP.4 (1981, mimeo.). Besides objection from the co-ordinators of the Language Group objection was also taken by the Chinese Language Group which thought that there should be no indiscriminate change of "generally accepted" for "applicable" without separate consideration. Change could involve problems of substance. DC/PART III, Article 42 (1981, mimeo.) at 2. See Nordquist II p. 374.

137XVI *Official Records* 223, (Spain) A/CONF.62/L.109 (1982), Article 42, para 1(b).

138Ibid. 93, para. 4 (1982).

139Ibid. 133, paras. 8-9. A/CONF.62/30/Rev.3 (1981, mimeo.) reproduced in XIII Platzöder 489.

140Nordquist IV p. 302.

141Ibid. p. 220. His example deals with the prescriptive Article 207, "internationally agreed rules" and the enforcement Article 213, "applicable international rules".

142Article 217(1) also deals with prescription requiring a flag State to "adopt laws and regulations and take other measures" to implement both the international and national rules. Article 220(4) also refers to the adoption of laws to ensure compliance by flag ships.

What international treaties are intended under Article 42(1)(b) is somewhat unclear, though it is probably safe to say that at least the MARPOL 73/78[143] provisions are included as "applicable" including Annexes I and II which regulate the discharge of oil and hazardous wastes.

Relevant State practise follows the inclusion of MARPOL 73/78 as "applicable international regulations." The U.S. conflict with Spain in the mid 1980's concerned this point.[144] The U.S. State Department's view is that under Article 42 the coastal State does not have the right to require transitting ships to comply with treaties to which its flag State is not a Party. As seen the U.S. and Russia are Parties to MARPOL 73/78, and would thus presumably allow application of these rules by States bordering the strait over their flag ships in international straits such as Gibraltar. The Russian view is not stated clearly related to Article 42(1)(b), however generally due to the strong support shown by the Soviet Union for the international straits regime, it is doubtful Russia would allow States bordering straits to enforce provisions in excess of MARPOL 73//8 against its flag ships. This is especially true if Russia continues to follow the Soviet view concerning the contractual nature of international law.[145]

Russia and the U.S., in their own general coastal State non-Arctic environmental provisions, exhibit excesses on points of general LOSC navigational Articles governing the territorial sea and exclusive economic zones incorporating MARPOL 73/78. The Arctic provisions of both States as coastal States are even more comprehensive.[146]

Briefly there is no Russian provision parallel to Article 211(5) that coastal State environmental provision are consistent with "generally accepted" international provisions, incorporating MARPOL 73/78.[147] The Russian 1984 Economic Edict,[148] Article 13 and the

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143International Convention on the Prevention of Pollution from Ships, 12 *International Legal Materials* 1319, with the 1978 Protocol, 17 *International Legal Materials 546,* (MARPOL 73/78). With these two Annexes 92.74% of the word's gross tonnage is represented, IMO News Nr. 3, 1995, p. V. This includes as Parties the U.S., Russia, Canada, Norway and Denmark/Greenland. See Brubaker, Douglas, *Marine Pollution and International Law - Principles and Practice,* 1993, pp. 122 and 138 footnote 19; and *Green Globe Yearbook,* (ed. Bergesen and Parmann) 1995, pp. 140-141.

144See Smith and Roach pp. 185-189, 224, footnote 49. Moore p. 105 notes design, construction, equipment and manning standards are not included. See also Section 5.2.2.2.

145See Section 2.3.3.3.2. Under this any customary rules would have to be viewed as an implied contract in order for it to be bound.

146See Sections 5.3.3.2., 5.3.3.3., 9.NEED and 9.NEED.

147See Franckx, Erik, "The New USSR Legislation on Pollution Prevention in the Exclusive Economic Zone," *International Journal of Estuarine And Coastal Law,* Vol 1, Nr. 2, June 1986, (Franckx Pollution), pp. 162-171 for an overview of discrepancies from which the main points are taken, unless otherwise noted. See Section 9.NEED. Changes in these positions have not been found in the more recent 1993 Law of the State Boundary of the Russian Federation, (1993 Statute) (unofficial translation by Dr. Alexandra Livanova, University of St. Petersburg) or the Draft "Of Environmental Protection in the Russian Federation," 1994 Environmental Edict.

148The following Russian legislation is obtained from Butler, William E. , *The USSR, Eastern Europe and the Development of the Law of the Sea,* 1987, (Butler Development Law), unless otherwise noted."On the Economic Zone of the U.S.S.R." Butler Development Law F.2. p. 1 (1984 Economic Edict) translation from official text *SP SSSR* (1984), no. 13, item 82.

1985 Protection Statute[149] Article 4 allows the State to establish special measures for special areas in its exclusive economic zone due to environmental concerns including navigational practice. Since no IMO consultation is required, this provision is in excess of LOSC Article 211(6)(a) and 211(6)(c) concerning additional laws.[150] Article 15(1)-(5) of the 1984 Economic Edict also shows disharmony with Article 220(3),(5)(6)). Related to the economic zone for inspection of a ship to take place or the institution of proceedings, the pre requisite that the circumstances of the case justify such inspection or institution of proceedings, does not appear, nor under Article 4(a) and (e) of the Statute on the Protection of the Economic Zone of the USSR, a Section of the 1984 Economic Edict.[151] A ship "voluntarily" within a port from Article 220(1) is also missing from Article 15(4) implying that force may be used. Criminal liability may arise under Articles 19 and 20 of the 1984 Economic Edict for violations of the environmental provisions contrary to Article 230 under which only fines are allowed.[152] In areas where compulsory pilotage is required under Articles 1 and 15 of the 1983 Statute[153] and Article 9 of the 1993 Statute no ship including foreign warships has the right to navigate without a State marine pilot or without complying with Russian navigational and other rules. The requirement supplements Articles 4 and 5 of the 1983 Rules[154] which require warships to observe navigation and other rules, and pilotage (and ice-breaking services) are to be used where compulsory. Pilotage may thus be required in unspecified non-ice-covered areas, and for warships this is in excess of sovereign immunity under Article 236.

The case of the U.S. is also clear with its Oil Pollution Act of 1991 and supporting legislation, governing in the entire economic zone.[155] These provisions also give the U.S. competence beyond "applicable" international provisions, LOSC Articles 211(4) and 230(2), 211(5) and 230(1), and 220(3), (5) and (6), and MARPOL 73/78 Annex I. These specifically involve unilaterally adopted requirements for commercial vessels for design, equipment and crewing standards, civil liability, reporting, compliance with official orders, licensing of pilots, monitoring and tracking of vessel movements, and directed radio communications, and non-compliance can result in denial of clearance, denial of entry into

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149Statute on the Protection of the Economic Zone of the USSR, (1985 Protection Statute), Butler Development Law, F.3. See Section 9.NEED.

150Franckx p. 162 notes that on this point upon (Soviet) LOSC ratification, some harmonization is necessary.

151Statute on the Protection of the Economic Zone of the USSR, a Section of the 1984 Edict "On the Economic Zone of the U.S.S.R" (1984 Economic Edict), Butler Development Law F.2. "Clear grounds" are necessary for pollution inspections. Franckx Pollution pp. 176-181 lists this as "Decree of the Council of Ministers of the USSR, 30 January 1986, *On Confirmation of the Statute on the Safeguarding of the Economic Zone of the USSR* (1985).

152There is an exception under Article 230(2) wherein penalties are not limited under cases of wilful and serious acts of pollution in the territorial sea. Franckx Pollution pp. 169-170 notes that supplementary legislation does not clarify this. See Section 9.NEED.

153Law on the State Boundary of the U.S.S.R., 22 *International Legal Materials* 1055 (1983), (1983 Statute). Entered into force March 1, 1983. See also Butler Development Law C.1.

154"Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters and Internal Waters and Ports of the USSR" (1983 Rules), Butler Development Law C.2. p. 1. The 1983 Rules replace the 1960 Rules.

155United States Oil Pollution Act of 1990 (OPA 1990), 33 United States Code (USC) 270. See Section 9.NEED

U.S. waters, detention, and seizure and forfeiture.[156] Unlimited and strict liability for damages for oil discharges into U.S. navigable waters is also possible.[157]

The Russian and U.S. provisions presumably govern in those waters in their own straits which casts in doubt the meaning of "applicable." For Russia the straits would include the Kuril Straits. The "Etorofu Strait" ("Friza Strait") specifically was a point of conflict between the Soviet Union and the U.S. in late 1984 and the Golovnina Strait in mid-1986.[158] For both straits the U.S. claimed transit passage, and the Russians innocent passage. The Russians claimed the fourth Kuril strait as the only strait used for international navigation.[159] The Korea Straits, Tsugaru Strait and Soya Strait into the Sea of Okhotsk as well as the Tartar Strait all are subject to restricted access.[160] For the U.S. these straits may include the Alexander Archipelago and the Inland Waterway along North and South Carolina to Florida. It is not known whether foreign maritime powers have claimed transit passage in these waters, but the U.S. State Department notes generally that freedom of navigation may be at odds with "(E)nvironmental protection in off-shore waters."[161]

The State practise related to LOSC Article 42(1)(b) can thus be questioned when the State practise of the two largest marine powers is contradictory. It is beyond the scope of this work to view other States' practise on this point, but that prescribing MARPOL 73/78 standards for international straits under Article 42(1)(b) is reasonable due to the MARPOL 73/78 being an IMO convention, the international tonnage represented and the legislative history of Article 42(1)(b). That the U.S. and Russia themselves as coastal States exceed these limits causes confusion. Doctrine generally supports the view that MARPOL 73/78 is included as "applicable" possibly with closely related customary law, though not many address the issue.[162]

156OPA §§ 1001, 1016, 1004, 4106. There also may be a possibility for ensuing criminal liability under supporting U.S. legislation. Speech, Attorney at Law Norman Ronneberg, San Francisco, California, 26 April, 1995, at the Institute for Maritime Law, University of Oslo, Oslo, Norway.

157Ibid.

158See Smith and Roach pp. 191-194, and 224-225, footnotes 55 and 56.

159Ibid.

160Caminos p. 208.

161Ibid. p. 262. Correspondence with Professor Edgar Gold, President Canadian Maritime Association, Halifax, Canada, 3 March, 1996 confirms this.

162Nordquist II pp. 215-216, 220 believes that the general intention in the Third Committee was that "applicable international rules and standards" established through competent international organizations or diplomatic conferences, refer to international rules binding on the State, concerned, whether conventional or customary rules, at the same time as being left deliberately ambiguous. However, "(I)t would seem to imply more than mere non-binding recommendations, and would include well-ratified treaties or widespread acceptance in the practise of States." "Applicable international rules and standards" are seen as those established by the IMO, and "the pertinent international rules and regulations are found in MARPOL 73/78 established by the IMO or have been made by virtue of that Convention." Nandan and Anderson p. 191 believe "applicable international regulations" to be MARPOL 73, which prohibits the discharge of oil, oily wastes and other noxious substances "close to shore and therefore in straits." Hakapää pp. 132 and 205 argues that "applicable international rules and standards" refers to treaties in their relation to their Parties as well as to customary law and lists the International Convention for the Prevention of Pollution of the Sea by Oil, 9 *International Legal Materials* 1, (1954) as amended in 1962 and 1969 (OILPOL). Kisselev and Savaskov p. 14 note, "the coastal State's legislative competence restrictions in respect of ships exercising transit passage are quite considerable," based upon Article 42(1)(b).

5.2.3.2.2.1.2. "Generally Accepted" International Provisions

Addressing the term "generally accepted" in Article 39(2)(b), the meaning also is not clear, though it would appear that its ordinary meaning would be somewhat broader than "applicable", due to the indefiniteness of the adverb "generally". Article 39 does not elucidate, however as noted the Articles from the LOSC pollution regime Part XII as well as Article 21(2) regarding coastal State jurisdiction related to innocent passage give some assistance. Article 211(5) specifies that the "generally accepted international rules and standards" to which coastal State legislation shall conform and give effect to are also those established through "the competent international organization or general diplomatic conference."[163] The specified source is thus the same as for "applicable" international rules. Article 21 states that coastal State provisions if they apply to the design, construction, manning or equipment of foreign ships must give effect to "generally accepted" international rules or standards.

A look at the evolution of "generally accepted" indicates that it was largely undefined and loosely drafted. From the Conference proceedings surrounding Part XII the terms "internationally agreed," "any," and "generally accepted" were all used. Several States submitted working papers or proposals using synonymous terms which resulted in "internationally agreed" standards appearing in a series of alternative texts drafted in Working Group 2 of Sub Committee III.[164] A group of nine European States included "any" international regulations established to the extent that they are not already in existence, while the draft from the Soviet Union included solely "international regulations."[165] Following subsequent informal negotiations "generally accepted" appeared for the first time in the ISNT Part III, disappeared following informal negotiations resulting

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See also Brownlie p. 284. Bordunov pp. 224, 225 notes the coastal State is strictly bound to "applicable" international standards related to oil wastes and noxious chemicals, otherwise implementing legislation is not legally valid, but gives no further elaboration. Reisman Straits pp. 69, 70 sees the possibility for a broad coastal State applicative competence under Article 42. Burke Straits p. 212 believes the competence to be limited by Article 42(2) under which the practical effect must not be a hampering of transit passage. O'Connell p. 331 notes, "applicable" seems to preclude unilateral State action unsupported by conventions. Churchill p. 92 notes that the coastal State may apply only internationally agreed standards in its legislation. Caminos p. 169 approximates "applicable" with "generally accepted" in Article 39(2), both flowing primarily from the IMO. Pharand Arctic pp. 233, 238 does not address the issue relying solely on Article 234 but noting that warships, ice-breakers and submarines are exempt.

163Nordquist IV p. 202 notes that *general* used in "general diplomatic conference" is meant to be open to universal participation such as the U.N. Article 211(1) provides that States acting through the competent international organization or general diplomatic conference shall establish international rules and standards for prevention, reduction and control of marine pollution.

164IV *Official Records* 210, *A/CONF.62/C.3/L.24* (1975), Article 3, paragraphs 1 to 5, Canada; *A/CONF.138/SC.III/L.40* (1973, mimeo.), Article IV, paragraphs (b) and (c) U.S.; and *A/AC.138/SC.IIIL.52/Add.1, Annex 1* (WG.2/Paper No. 15, Section III, Alternatives B and C, and Section IV, Alternative B), reproduced in I SBC Report 1973, at 91, 95 98 (Chairman, WG.2). See Nordquist IV pp. 176-199 for an overview.

165IV *Official Records* 210, *A/CONF.62/C.3/L.24* (1975), Article 3, paragraphs 1 to 5, Belgium, Bulgaria, Denmark, German Democratic Republic, Federal Republic of Germany, Greece, Netherlands, Poland and U.K.; Ibid. 212 Soviet Union *A/CONF.62/C.3/L.25* (1975), Article 2.

in the RSNT, but following both informal and formal negotiations reappeared in the ICNT.[166] Apparently both conventional and customary norms are intended.

Briefly, the legislative history surrounding Article 21(2) also indicates a non-specification of the term. A proposal containing the same clarification set forth by Article 211 regarding "generally accepted" international rules and standards as those established through the competent international organization or general diplomatic conference, was not accepted.[167]

The expressed U.S. State practise as seen against Spain views "generally accepted" as also encompassing and applicable to ships where its flag State is not a Party.[168] There have apparently been no other conflicts between the U.S. as a user State and States bordering the strait of this nature though Italy and Canada have regulated their straits under environmental justification.[169] The expressed Russian practise is less clear though probably generally approximates the U.S. position. Many of the same straits are sailed under transit passage, and the positions of Kolodkin and Barabolia have been noted.[170] The State practise of the other marine powers is probably similar.[171] Though protests may have been made by States bordering the straits for non-compliance by vessels of "generally accepted" provisions under Article 39(2)(b), Russia and other marine powers apparently continue to sail much the same as the U.S. does.[172]

From the above it is submitted that "generally accepted" norms to which vessels must comply under Article 39(2)(b), though vague, would include international conventions with wide acceptance adopted under the IMO, including the normative provisions of not-in-force

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166Respectively, Ibid. 171, 174, *A/CONF.62/WP.8/Part III*, (ISNT, 1975), Part I, Article 20, (Chairman, Third Committee); V *Official Records* 173, 176, *A/CONF.62/WP.8/Rev.1/Part III* (RSNT, 1976), Article 21, (Chairman, Third Committee); and VIII *Official Records* 1, 37, *A/CONF.62/WP.10* (ICNT, 1977), Article 212. See paragraph 5, which deals with the adoption of pollution legislation in special areas following consultation with the IMO which implements international rules and standards or navigational practises *made applicable* through the IMO for special areas. Ibid. Italics added. Here the paragraph is prescriptive yet speaks of implementation with the "applicable" international rules. The ICNT formulations regarding "generally accepted" and "made applicable" continue through ICNT/Rev.2 down to the final Draft Convention. Respectively, *A/CONF.62/WP.10/Rev.2* (ICNT/Rev.2, 1980, mimeo.), Article 211. Reproduced in II Platzöder 3, 96; XV *Official Records* 172, 209, *A/CONF.62/L.78* (Draft Convention, 1981), Article 211.

167United States (1977, mimeo.), Article 20 (RSNT II), reproduced in IV Platzöder 392. The IMO Secretariat sees itself as "the only global institution with the mandate in this area, and all existing rules and standards on the design, construction, equipment and manning of vessels have in fact been established in or by IMO." "Implications of the United Nations Convention on the Law of the Sea, 1982, for the International Maritime Organization, Study by the IMO Secretariat, Doc. LEG/MISC/I (1986, mimeo.) para. 20, reproduced in United Nations Office for Ocean Affairs and the Law of the Sea, *Annual Review of Ocean Affairs: Law and Policy, Main Documents* (AROA) 1985-1987, at 123, 128.

168Smith and Roach pp. 179 and 187-189.

169Ibid. pp. 177-222; Ibid. pp. 197-200, Italy; Ibid. pp. 207-215, Canada. Moore p. 108 notes the failure of Spain and Morocco to gain acceptance of "generally accepted" under Article 39, and supports the U.S. position.

170See Section 5.2.2.2.

171Churchill p. 94.

172See also Section 5.2.1.

conventions, as well as supplementary instruments and judgments, and normally followed sailing procedures and practises.[173]

5.2.3.2.2.1.3. Differences - "Applicable" and "Generally Accepted"

Addressing the difference between "applicable" and "generally accepted", these two terms would in theory have different meanings based upon the fact that two different terms were clearly chosen as seen in legislative history. "Generally accepted" would seemingly encompass "applicable" provisions that may be found to enjoy "general acceptance," any rules of customary law as well as any "generally accepted" treaty provisions.[174] However in practise and in most of the doctrine which addresses the problem it is not clear that the fields of application are so different. The specific provisions common to both terms are those of MARPOL 73/78, Annexes I and II governing the regulation of oil and hazardous chemicals. As noted this represents close to 93% of world shipping tonnage. As even Hakapää notes, the term "applicable" of Article 42(1)(b) would not have much relevance regarding oil, and, it is submitted, hazardous chemicals, since there would seem to exist "generally accepted" international rules and standards under MARPOL 73/78 and Annexes prohibiting discharges of oil within 50 miles and hazardous chemicals within 12 miles of the coast, and hence within straits.[175] Most authors come to much the same result in practise without expounding the "generally accepted" and "applicable" distinction.[176] Other

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173See Nandan and Anderson p. 185.

174See Hakapää p. 205 who notes it is conceivable that a ship in transit passage might commit a breach of an applicable treaty provision between the coastal State and the flag State effected through national legislation, and at the same time not violate any "generally accepted" international provision. The difference seems chiefly to be "subsidiary or related instruments and decisions," "procedures and practises normally followed by mariners," and unsigned conventions widely supported. See Nandan and Anderson p. 185 below.

175Hakapää p. 205 writing in 1981 uses OILPOL and on p. 132 footnote 12 notes that it represents some 90% of the world's tanker tonnage and would therefore "readily seem to set out 'generally accepted international rules and standards..."

176Nandan and Anderson p. 185 believe included are several marine pollution conventions covering marine pollution, specifically MARPOL 73/78 as well as other international rules and standards adopted through the competent international organization or general diplomatic conference. Nordquist II p. 202, 204 and Nordquist IV p. 344 are somewhat more restrictive noting that compliance is required with all international regulations, procedures and practises that can be considered as generally accepted, ie. established through the IMO. Article 211(5) is seen as emphasizing the preeminence of generally accepted international rules and standards, and for the purpose of enforcement the coastal State legislation must conform to and give effect to these "duly established" rules and standards. Churchill p. 92 notes the standards for the IMO pollution (and safety) conventions are included and these would be applicable to ships in the straits even if their flag States were not parties. Hakapää pp. 119-121 questions whether not only conventional norms but also IMO recommendations are included as "generally accepted" under Article 39(2)(b), and based upon the text of Article 211(4) lacking, "*and recommended practises and procedures*," concludes they are not. He also questions whether the provisions of conventions not yet in force yet signed by a considerable number of States should be included, and concludes that only those rules and standards essential to the basic objectives of the treaty and which receive wide enough support could be characterized as norms. Highly technical pollution conventions would probably not qualify. What "generally accepted" means in terms of State support, is found somewhat less than that required for the formation of customary law (otherwise the distinction would disappear) and that there should be "sizable support among the maritime states most affected by their implementation." Bordunov pp. 222, 223 equates "generally accepted" with specific IMO conventions but does not specify. See also Caminos pp. 168, 169. Brownlie p. 284 regarding the disparity of duties owed by transitting ships and coastal State enforcement has been noted. O'Connell pp. 330, 331 sees compliance by ships with "applicable" international pollution provisions required under Article 42(4). Pharand Arctic p. 231 sees the Article 39 limitations including compliance with "generally accepted" international pollution provisions as essentially not changing "free passage" proposed by both the U.S. and the Soviet Union in UNCLOS III. Reisman Straits pp. 70-71, though not

IMO anti-pollution conventions with a high number of Contracting Parties representing a high percentage of the world tonnage also arguably are included if interpreted as regulating the discharge of oil, oily wastes and other noxious substances in the strait.[177]

This seems to be a neat and internationally accepted scheme were it not for the unilateral practise of the U.S. and Russia with respect to various points in their general domestic environmental legislation governing in the exclusive economic zone, including straits. In contrast to several States including the U.K., France and Japan, taking measures to ensure transit passage in their own straits,[178] as seen the U.S. and Russia may undermine their own claims.[179] By demanding in its exclusive economic zone strict and unlimited liability as well as possible criminal liability for damages caused by oil discharges conditioned upon unilaterally adopted construction, operation or safety provisions, it is clear that the U.S. exceeds the limits set by LOSC Article 42(1)(b) and MARPOL 73/78 Annex I, as well as Articles 211(4) and 230(2), 211(5) and 230(1), and 220(3), (5) and (6). Russia through its general legislation for the unilateral establishment of special areas for pollution prevention exceeds the limits set by Article 211(6), lacks a parallel to Article 211(5) requiring "general acceptance", instances for inspection and the institution of proceedings is broader than that allowed under Article 220(3),(5)(6)), the possibility for criminal liability is contrary to Article 230; and compulsory pilotage for warships where required exceeds Article 236. It goes without saying the Russian provisions exceed LOSC Article 42(1)(b) and MARPOL 73/78 Annex I.

Thus the claimed distinction between "applicable" and "generally accepted" becomes even less relevant since the edges are even "fuzzier." Rather than practising the common denominator, LOSC Article 42(1)(b) - MARPOL 73/78, as well as the LOSC navigational provisions) the trend set by the world's two largest maritime powers, especially the U.S., is towards unilateral erosion of the internationally agreed environmental standards.

5.2.3.2.2.2. International Safety Provisions - Interpretations, Legislative History, State Practice

The meaning of "generally accepted" appearing in Articles 41, 42(1)(a) and 39(2)(a) is the same as indicated above in the discussion of environmental provision Article 39(2)(b). The textual differences appear to be that "generally accepted international regulations, procedures and practises...including the International Regulations for Preventing Collisions at Sea" of Article 39(2(a) are different from the "generally accepted international regulations" related solely to sea lanes and traffic separation schemes of Article 41(3), and

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addressing specifically this issue, takes a broad non-distinguishing view of both "generally accepted" and "applicable" with possible excessive coastal State competence. Burke Straits p. 210 takes a narrower non-distinguishing view of both relying heavily on a general non-hampering or suspension of transit passage under Article 44.

177Other environmental conventions arguably included if considered together with MARPOL 73/78 are the International Convention on Civil Liability for Oil Pollution Damage (1969), 9 *International Legal Materials* 45 (CLC), with 86.07% of the world's gross tonnage represented. IMO News No. 4, 1994, p. 11. It is submitted liability standards and other provisions unquestionably affect discharges. See Section 5.2.4.2.2.2. for IMO safety conventions arguably included as well.

178Smith and Roach pp. 180, 181, Kisselev and Savaskov p. 16, and Moore p. 80.

179See Sections 9.NEED and 9.NEED.

the procedures outlined for consultation and adoption by the competent international organization outlined in Articles 41(4) and (5). Though generally both have the same meaning related to sea lanes and traffic separation schemes, requirements for vessel compliance are broader. Compliance includes, under Article 39(2)(a), "generally accepted" international safety standards and the Collisions Convention, while under Article 41(3) coastal States are specifically restricted to designating sea lanes and traffic separation schemes. The limitations seem emphatically clear. In both, the IMO is given a central position to play with respect to the international regulations, procedures and practice. The one convention listed under Article 39(2)(a), the Collisions Convention, is an IMO convention, while "the competent international organization" in Article 41(4) is generally acknowledged to be the IMO.[180]

AT UNCLOS III though Malaysia and Spain attempted to enlarge the list of activities which States bordering the strait could prescribe under Articles 41 and 42(1)(a), paralleling Article 21, this was not accepted.[181] These also included sea lanes, and equated ship compliance under Article 39 with safety and pollution provisions established by the coastal strait State.[182] On the other hand it seems *illogical* that ships are required to comply with other safety conventions and protocols representing most of the world's tonnage including SOLAS, the Loadlines Convention, STCWS, INMARSAT C, and INMARSAT OA 76 and the ILO Conventions, and these or similar at least as effective as, could be implemented in coastal legislation related to the territorial seas, but not to international straits.[183] It is the straits which are constricted and therefore represent a higher risk area for accidents than the territorial sea. Such a restriction arguably is contrary to the spirit of international safety conventions. From a strict conflict resolution viewpoint the implementation of these Conventions into coastal legislation arguably facilitates transit passage rather than limits it. Their provisions are already adopted by the IMO, they are clearly needed in constricted marine areas and they make few exceptions for international straits. Most importantly a clear avenue for redress for violations in the Courts in the port straits State arguably aids compliance from both sides rather than international claims through diplomatic channels. In short there is more stability in an international regime already accepted, with less conflict making incidents arising from coastal States prescribing provisions in excess of these international safety norms and user State's vessels sailing in excess of these international norms. What was perhaps intended in UNCLOS III was to avoid the situation

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180Churchill p. 256. Nordquist II p. 344.

181VIII *Official Records* 1, 11, A/CONF.62/WP.10 ICNT, Article 42 (Spain) (1977), Spain (1977, mimeo.), Article 40, paras. 1, 5 and 6 (RSNT II), reproduced in IV Platzöder 393, 395; Malaysia (1976, mimeo.), Article 40, para. 1, reproduced in IV Platzöder 396, 397. See Nordquist IV pp. 369-374 for an overview.

182See Section 5.2.3.2.2.1. The conflict between the U.S. and Spain has been noted.

183Respectively, International Convention for the Safety of Life at Sea (1974), 14 *International Legal Materials* 959 with 1978 Protocol, 17 *International Legal Materials* 579 with 98.34% of the worlds gross tonnage, see IMO News No. 3:1995, p. V. International Convention on Load Lines (1966) IMO Document, 701 81.01.E (1989), p. 33, with 98.22% of the worlds gross tonnage, see ibid. International Convention on the Standards of Training, Certification and Watchkeeping for Seafarers (1978), IMO Document p. 319, with 94.67% of the world's gross tonnage, see ibid. Convention on the International Maritime Satellite Organization (1976), 15 *International Legal Materials* 1051, with 93.30% INMARSAT C) and 90.24% (INMARSAT OA) of the world's gross tonnage, see ibid. International Convention on Tonnage Measurement of Ships (1969) IMO Document, with 97.04% of the world's gross tonnage, see ibid. For ILO Conventions see Brubaker p. 134.

where the State bordering the strait could implement "generally accepted" international provisions solely in the straits, thus increasing coastal State control.

State practise however supports a restrictive view on coastal State competence to prescribe safety provisions other than sea lanes and traffic separation schemes, continuing the majority position taken during UNCLOS III. The U.S. claims a restrictive view of coastal State competence allowing only sea lanes and traffic separation schemes under Articles 41 and 42.[184] The conflicts the U.S. has had in carrying out its Freedom of Navigation program (FON) with other States bordering straits including Spain, the Soviet Union, Iran, Yemen Arab Republic, Chile, Italy, Sweden and Denmark were based on issues other than the safety provisions.[185] Russian practice, continuing Soviet practise and statements, probably supports the U.S. position as do the other maritime powers.[186] No direct conflicts on this point between maritime States and States bordering the straits have been found.[187] At the same time coastal State competence with respect to the safety provisions has been slightly enlarged through the Malacca Agreement for Malaysia, Indonesia and Singapore, though espoused under Article 233.[188] These include allowable under-keel-clearance requirements.

However as above both the U.S. and Russia give themselves increased coastal State competence on various points including in their straits. Criminal liability for both is possible, similar for pollution violations. For the U.S. no limitation of liability to the established limits under the OPA 1990 is allowed if the incident were caused through a violation of the Federal safety, construction or operation provisions.[189] Since construction and operation standards unilaterally adopted clearly are in excess of international environmental standards, the chance exists the unilaterally adopted safety standards also may be in excess. For Russia the search, arrest and hearing procedures mentioned for environmental violations under Article 15(1)-(5) of the 1984 Economic Edict may also apply for violations of national safety provisions under Article 13 of the same Edict, which as above shows disharmony with LOSC Article 220(3),(5)(6)).[190] Navigational practises can be regulated in special areas unilaterally established under Article 13 of the 1984 Economic Edict. Criminal liability may arise under Articles 19 and 20 of the 1984 Economic Edict for violations to provisions relating to marine pollution, arguably safety rules, contrary to Article 230 under which only fines are allowed. As noted under Article 13 of the 1984 Economic Edict and the 1985 Protection Statute Article 4 allows the State to establish special measures including navigation practises for special areas in its exclusive

184Smith and Roach p. 178. Moore p. 99 in addition takes a restrictive interpretation noting only Article 42 gives coastal State competence, and the list is exhaustive. Ibid. p. 108 also quotes a statement made by Ambassador at Large Richardson, Special Representative of the President for the Law of the Sea Conference, confirming the same. See Schachte p. 17.

185Smith and Roach pp. 177-222.

186See Section 5.2.1., Barabolia statement, Butler pp. 142, 143, and Churchill p. 94.

187Smith Interview, 27 June 1994 notes that the LOSC straits regime is functioning in practise with few conflicts.

188See Section 5.2.4.

189OPA §1004(c)(1). See Section 9.NEED.

190See Sections 9.NEED and 5.2.3.2.2.1.

economic zone, without IMO consultation.[191] Under Articles 1 and 15 of the 1983 Statute[192] and Article 9 of the 1993 Statute pilotage may be required in unspecified non-ice-covered areas, and for warships this is in excess of sovereign immunity under Article 236.

Thus the State practise is confused regarding internationally "generally accepted" safety provisions under Articles 41, 42(1)(a) and less so for Article 39(2)(a) for most of the same reasons enumerated above concerning the environmental provisions. As such it is submitted that *logically* a State bordering a strait may adopt in its legislation, not only appropriate sea lanes and traffic separation schemes in accordance with Articles 41 and 42(1)(a), but also the other IMO and ILO conventions representing a high percentage of the world's tonnage dealing with navigational safety as long as the provisions do not apply solely to the straits. Such safety standards would be applicable to ships in the straits under Article 39(2)(a) even if their flag States were not parties under international customary law.[193] This is "radical" however, and only the minority of doctrine follows this view.[194]

5.2.3.3. Conclusions

What the above indicates is that despite a textual reading of Articles 38, 39, 41 and 42 and the attractiveness as well as soundness of "environmentally friendly" interpretations, transit passage traditionally cannot in any way be suspended nor hampered by coastal State provisions including under Article 38(3), differences between the terms "generally

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191Ibid. and Butler Development Law F.3.

192Law on the State Boundary of the U.S.S.R., 22 *International Legal Materials* 1055 (1983), (1983 Statute). Entered into force March 1, 1983. See also Butler Development Law C.1.

193The normative provisions from those with a high representation of the world's tonnage have probably passed into international customary law.

194Churchill p. 92 favours the interpretation allowing adoption of international safety standards, noting the advantage of implementing such is their direct enforceability. Reisman Straits pp. 70, 71 believes that coastal strait State jurisdiction under Article 41(1) may be expanded and is incompatible with freedom of navigation. Nandan and Anderson pp. 190-191, 195, vaguely note the original U.K. proposal for coastal State prescription was confined to traffic schemes (and oil pollution) but was balanced by the Fiji/U.K. Group with wording similar to Article 42(1). "(I)n effect international adopted schemes for a strait may be made applicable to all ships in transit passage...even if the flag State has not enacted legislation for ships flying its flag." However, "(A) State bordering a strait may not seek to impose legislative requirements which would in effect retard or prevent passage, nor seek to arrest ships in transit..." and "...non-suspension - is a rule to which there are not exceptions..." Nordquist II pp. 343, 344, 375, 388 and 389 is emphatic that the Article 42(1)(a) to (d) list is exhaustive based upon the legislative history showing none of the suggested changes were accepted. He modifies this however noting Articles 39, 40 and 233 address some of these topics including the under-keel-clearance problems from the Malacca Agreement. The duty of foreign ships to comply with the coastal strait State provisions under Article 42(4) is seen to be nearly parallel with the compliance required of ships with other relevant provisions under Article 39(1)(d). Under Article 39(2)(a) however ships are required to comply with all international regulations, procedures and practises considered "generally accepted." This author interestingly finds specific safety requirements for which compliance is required under "normal mode" in Article 39(1)(c), including sonar, radar and depth finding devices if normally used in navigation through constricted areas, or if safety or other conditions require. Also included are velocity, course variations to take into account tide, currents weather and hazards, and "...other 'normal' activities depending upon the characteristics of the transitting ship or aircraft, as well as navigational and hydrographical characteristics of the straits." Koh p. 157 and Caminos pp. 168, 169 limit coastal State competence to establishing sea lanes and traffic separation schemes. Brownlie p. 282, O'Connell p. 330, Pharand Arctic p. 231 and Burke Straits p. 208 are in agreement. Kisselev and Savaskov p. 14 interpret the permissible safety provisions as applicable international provisions similar to the environmental, which are seen as limiting coastal State competence, in addition to the "giving over" designation of sea lanes and traffic septation schemes in a strait to the IMO.

accepted" and "applicable," or the expansion of navigation safety to include the other safety conventions. These restrictive interpretations are based upon the legislative history of these provisions, the State practise of the marine powers claiming and sailing transit passage, largely indiscernible to States bordering the strait, and the majority doctrinal position. Though compliance is required by foreign ships with generally accepted international regulations, procedures and practise for safety at sea and the provision, reduction and control of ship pollution, compliance with States bordering the strait legislation is much less strict. This is limited to national regulations adopted through the IMO related to sea lanes and traffic separation schemes, and national implementation of MARPOL 73/78 Annexes I and II. Nothing more may be adopted by the States bordering the strait.

The situation is confused however by the coastal State practise of the two major marine powers, Russia and the U.S., both of which have expanded environmental and to some degree safety provisions on various points in excess of LOSC and other international limitations. This would seemingly create a situation for States bordering the strait to legislate similar provisions and estop these powers from sailing in violation of them. This might include parallel to the U.S. legislation, strict and unlimited liability as well as criminal liability for damages caused by oil discharges conditioned upon unilaterally adopted construction, operation or safety provisions. Parallel to the Russia legislation this might include the possibility for general criminal liability and inspection, arrest and seizure as well as criminal liability for violations encompassing to a large degree MARPOL 73/74 standards, since these are "applicable." Public ships would however be immune, though included under the Russian legislation, since sovereign immunity is customary law.[195] At the same time it is likely the maritime powers will continue to sail transit passage and ignore as the U.S. if attempted hindered.

The next Section deals with the scope of enforcement jurisdiction of the State bordering the strait. This area is also characterized by confusion and controversy. Since under Articles 41(2) and 44 a State bordering a strait is required not to delay, hamper, impair or suspend transit passage, questions arise as to what enforcement measures, if any, may be taken.

5.2.4. Enforcement Jurisdiction[196]

5.2.4.1. Limits of Coastal State Enforcement - Non-Suspendible Innocent Passage - TSC Article 16(4)

As noted the controversial issues of the TSC Article 16(4) regime included interpretation of "prejudicial ... to the security" in TSC Article 14(4) which is interpreted differently by States bordering straits and flag States in determining non-innocent passage; breach of health, customs and immigration rules of the State bordering the strait rendering or not the passage non-innocent; and lacking notification rendering or not the passage of

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195See Section 7.Need. Therefore for warships or other vessels entitled to sovereign immunity redress must be had through diplomatic channels under Articles 42(5), 235 and 304 covering responsibility and liability.

196For a Table constructed by Koh pp. 168-169 showing the main differences between the TSC Article 16(4) and the LOSC international straits regimes see Appendix 5.

warships non-innocent.[197] Perceived breaches by the States bordering the straits have probably been enforced by exclusion and arrest of non-public ships and suspension and expulsion of warships, similar to enforcement against non-innocent passage in the territorial sea.[198] Enforcement may include however, without breaching "non-suspendible innocent passage," limiting the number of foreign ships within the strait at any one time, or prohibiting passage during darkness, and international claims through diplomatic channels.[199] The general issues of enforcement against non-innocent passage will be addressed in Chapter 7.

5.2.4.2. Limits of Coastal State Enforcement - Transit Passage - LOSC Articles 34, 42(2), (4) and (5), 44 and 233

5.2.4.2.1. Interpretations and Legislative History

The subject of coastal strait State enforcement of the straits provisions is unfortunately also unclear, and the provisions were probably deliberately drafted vaguely in order to facilitate balancing coastal and flag State interests.[200] One problem is that the LOSC is generally silent on coastal State enforcement, and of those Articles which do suggest it, several interpretations can be made which cover a broad spectrum. Possibilities range from discrimination against all foreign ships to no discrimination, and expulsion from the strait to no suspensions of transit passage even for major violations of international and national law. While the interpretation of Article 233 in conjunction with Articles 41, 42 and 44 is clear for the Straits of Malacca and Singapore, for other straits extrapolation of similar interpretations seems doubtful without prior negotiations. These issues have special relevance here since as seen strict enforcement provisions enjoy a high profile in the Soviet and Russian provisions governing the Arctic straits.[201]

Generally an argument can be made that in spite of the LOSC's silence related to enforcement, under Article 42(4) ships must comply with coastal strait State provisions adopted within the legislative competence allowed under Article 42(1).[202] Due to the LOSC's silence, the general enforcement rules governing innocent passage in the territorial sea accordingly apply under Article 34, that is where the good order of the territorial sea or coastal State is disturbed, or the flag State requests assistance. Application of Article 233 is excepted from this under which enforcement is be exercised only where major damage to the marine environment is caused or threatened. A contrary argument may be made however that Article 233 *limits* enforcement to the cases of "causing or threatening major damage to the environment, and little else is allowed, even under Article 34.[203] Furthermore Article 233 by its own terms requires that the environmental provisions not

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197Koh pp. 38-47. See Section 5.2.3.1.

198See Churchill pp. 73-76 noting the "untidy" situation.

199Ibid. pp. 88 and 92.

200Interview Churchill 14 June 1994. See also generally Nandan and Anderson pp. 159-204.

201See Section 4.2.1.

202Churchill pp. 92 and 93.

203Nandan and Anderson p. 192.

affect the straits regime, and actual Article 233 cases can be considered exceptional since enforcement measures in a strait may cause hazards and are contrary to Articles 42(2) and 44.[204] If this latter interpretation is followed, then coastal State laws could hence be enforced generally only against foreign ships when they entered that State's ports. Which interpretation is more correct cannot be ascertained from the respective texts which as noted are either silent or vague. Looking at the respective legislative histories of Articles 34, 42(2) and (4), 44 and 233 indicates the following. The State practise and doctrine will be discussed collectively below.

Starting with the most explicit Article, Article 233, what is clear is that a major environmental disaster caused by a foreign commercial ship is required, but no attempt is made to define what "appropriate enforcement measures" may be taken by the State bordering the strait nor the explicit relation intended to Article 42(1), (2) and (4) and Article 44.[205] The Soviet Union originally submitted in addition to its draft Articles on straits, draft Articles to the Third Committee concerning marine pollution in straits.[206] From this Article 233 was negotiated, though little was specified concerning what "appropriate enforcement measures" should be taken by the coastal strait State entailed.[207] Some general idea of what was not accepted can be deduced by the proposals forwarded by Spain, which several times pressed for deletion or changes of the entire Article.[208] "Legal regime of straits" was to be replaced by "regime of passage through straits" to bring Article 233 into line with Article 34, under which the regime of passage through straits did not affect the legal status of waters forming such straits.[209] These proposals failed however to gain sufficient support or were withdrawn,[210] and the rejections of these proposals for expanding coastal strait State enforcement jurisdiction would seem to indicate the restrictive interpretation of Article 233 to be the better.

Article 34 does not define its application in relation to Article 233, nor does its legislative history to any great degree, though this Article was subject to much negotiation

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204Ibid.

205For a summary of the history of the negotiations surrounding Article 233 see Nordquist IV pp. 382-391.

206See Section 5.2.1. IV *Official Records* 212, U.N. Doc.A/CONF.62/C.3/L.25. (1975). Briefly Article 2(1) stated that coastal States within their territorial seas could establish rules for preventing marine pollution from ships in addition to the international regulations. The rules must take into account the international provisions and not deal with the design, construction, equipment, operation or manning of a foreign ship nor with the transit of foreign ships through straits. Article 3 stated that a flag State must ensure that its ships do not discharge in international straits harmful or toxic substances or mixtures except during situations of *force majeure*. The Soviet delegate noted, "Such a rule would complicate the position of ships passing through straits but was essential in order to reach agreement concerning the regime of straits." Ibid. 88, para. 74.

207VIII *Official Records* 1, 40, (ICNT 1977) U.N. Doc.A/CONF.62/WP.10, Article 234.

208XVI *Official Records* 223, U.N.Doc.A/CONF.62/L.109, (1982). As noted in Section 5.2.3.2.2.1. Spain also proposed an amendment for Article 42(1)(b) strengthening coastal strait State prescriptive jurisdiction.

209Ibid., 93 para. 5. For the other proposals see Nordquist II pp. 386-388.

210For the formal Amendment which was withdrawn, see XVI *Official Records* 223 (Spain), A/CONF.62/L.109; and ibid. p. 132. The Spanish statement made upon signature of the LOSC related to interpretation of Article 233 together with Article 34 was noted in Section 5.2.2.2. It probably intended to rely upon "other rules of international law" to attempt to apply the innocent passage regime.

related to its intended scope.[211] Reference in the Article to the PART II innocent passage regime is noticeably absent. Article 34 appears to have arisen in proposals made by Spain providing that coastal strait State sovereignty, which is exercised in accordance with these provisions and other rules of international law, extends to straits which are part of the territorial sea, whether or not they are used for international navigation.[212] The Main Trends Working Paper included proposals from the East Block Draft that the straits provisions were not to affect the sovereign rights of the coastal States with respect to the surface, the sea-bed and the living and mineral resources of the straits.[213] This was changed by the Fiji/U.K. Group, to the regime of passage through straits must not in other respects affect the status of waters forming such straits, nor of the seabed, subsoil and superjacent airspace, as provided elsewhere in the Convention, and the sovereignty or jurisdiction of the coastal strait State must be exercised subject to the provisions of *this Chapter and other rules of international law.*[214] Prior to incorporation in the ISNT, the first sentence was expanded to include "the exercise by the coastal strait State of its sovereignty or jurisdiction over such waters."[215] This was attempted revised by Spain wherein the sovereignty or jurisdiction of the coastal strait State was to be exercised subject to the LOSC provisions rather than "this part," but this was rejected.[216] The RSNT remained much the same[217] though various proposals were submitted similar to Spain's, but none was accepted.[218] The legislative history would thus decidedly shift the enforcement possibilities of Article 34 away from the use of the general territorial sea rules including innocent passage.

Articles 42(2) and (4) have partially been covered above, however due to the silence related to enforcement jurisdiction, clarification is even less. Nothing is directly stated regarding the relation to Article 233, though Article 233 has a cross reference to Article 42(1)(a) and (b). Based on the above, the texts if anything support the interpretation

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211For a summary of these negotiations see Nordquist II pp. 295-298.

212III *Official Records* 187, 188, A/CONF.62/C.2/l.6 (1974), Article 3.

213Respectively, ibid. 93, 107,117, A/CONF.62/L.8/Rev.1 (1974), Annex II, Appendix I (A/CONF.62/C.2/WP.1), Provision 61, (Main Trends); ibid. 189, A/CONF.62/C.2/L.11 (1974) Article 1, paragraph 3(b).

214Private Group on Straits (1975), mimeo.), Article 9. Reproduced in IV Platzöder 194, 197. the "Fiji/U.K. Group" or "Private Working Group on Straits used for international Navigation" under the Joint chairmanship of Mr. Nandan (Fiji) and Mr. Dudgeon (U.K.) grew out of informal consultations between the U.K. and Fiji with the objective "to continue to seek accommodation between the proposals of Fiji and the U.K. on straits, in order to achieve a sound balance between the interests of States bordering straits and maritime nations." Attendance was by invitation by the Co-Chairmen, delegates included from Argentina, Bahrain, Denmark, Ethiopia, Fiji, Iceland, Italy, Kenya, Lebanon, Nigeria, Singapore, the U.K., United Arab Emirates, Venezuela, Australia, Bulgaria and India. Nandan and Anderson p. 163.

215IV *Official Records* 152, 157, A/CONF.62/WP.8/PART II (ISNT, 1975) (Chairman, Second Committee).

216Spain (1976, mimeo.), Article 34 (ISNT II), reproduced in IV Platzöder 274.

217V *Official Records* 151, 158 (Chairman, Second Committee), A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976) Article 33.

218 Respectively, Malaysia (1976, mimeo.), Article 33, para. 2 (RSNT II), reproduced in IV Platzöder 396; Morocco (1976), mimeo.), Article 33, para. 2 (RSNT II), reproduced in Platzöder 399; Spain (1977, mimeo.), Article 33, para. 2 (RSNT II), reproduced in IV Platzöder 393; Spain, C.2/Informal Meeting/422 (1978, mimeo.), Article 34, reproduced in V Platzöder 6 and Morocco, C.2/Informal Meeting/22 (1978, mimeo.) Article 34, para. 2, reproduced in V Platzöder 30; VIII *Official Records* 1, 10, A/CONF.62/WP.10 (ICNT, 1977) Article 34 and XV *Official Records* 172, 181, A/CONF.62/L.78 (Draft Convention, 1981), Article 34.

favouring strict transit passage with little possibility for coastal strait State enforcement. Article 42(2) requires non-discrimination in form or fact *among* foreign ships, raising the question whether discrimination is allowed with respect to domestic and foreign ships but not among foreign ships themselves. Compliance with coastal State provisions is again required under Article 42(4), and Articles 42(4) and 44 are emphatic that transit passage shall be neither hampered nor suspended. This would seem to imply by their textual force and placement, that in relation to Article 233 and any enforcement possibility under Article 42(1)(a) and (b), that they are thus dominant. Seemingly "appropriate enforcement measures" would not include any "suspension" of transit passage nor "discrimination in form or fact", "denial," "hampering," or "impairing" from Article 42(2), though definitions of the terms are not made specified. Article 42(5) is one of the few more specific provisions spelling out that not much more enforcement measures may be taken against ships violating appropriate international and national provisions yet enjoying sovereign immunity, than international claims through diplomatic channels against the flag State or State of registry. This seems clear in its meaning and non-controversial.

Taking Article 42(2) first, related to discrimination and comparing it to parallel provisions in Article 24(1)(b), Article 25(3), Article 52((2) and Article 227; this Article as well as Articles 25(3) and 52(2) use the preposition "among" while the others use "against."[219] The wording of Articles 24(1)(b) and 227 using "against" implies that discrimination is not allowed against the ships of any other State as compared to the domestic ships. This seems to be a deliberate choice of terms since over half the Articles use "among," however what this means in context to the LOSC straits regime is probably of little relevance.[220] The transit passage regime regulates the rights and duties of foreign ships in passage with respect to the State bordering the strait. That non-discrimination is required between domestic and foreign ships only augments those arguments supporting a non-interference with transit passage. The coastal strait State may only legislate to the extent noted above, and in its enforcement not discriminate among the foreign ships. That it as a flag State may enforce regulations more strictly or loosely, is not allowed to affect the transit passage regime.

A look at the legislative history of Articles 42(2) and (4) and 44 also indicates as above an interpretation favouring strict transit passage with little coastal strait State enforcement possibilities.[221] Related to non-discrimination, unlike Article 24(1)(b), Article 42(2) does not mention "cargoes." This is to specifically emphasize non-discrimination in form or in fact, that is either overt or covert.[222] An early proposal by Malaysia, Morocco, Oman and Yemen attempted to add "against ships carrying cargoes or passengers to, from and on behalf of any particular State..." which was duly dropped.[223] Briefly in the early stages

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219Article 52(2) deals with temporary non-discriminatory suspension of innocent passage in archipelagic waters. Article 227 is a part of the Part XII Section 7 Safeguards dealing with non-discrimination of foreign vessels.

220Nordquist II pp. 376-377.

221For a summary of these negotiations see ibid. pp. 367-375 and 384-388.

222Ibid. p. 371.

223III *Official Records* 192, A/CONF.62/C.2/L.16 (1974) Article 22, paragraph 3; Ibid. 93, 107, 117 A/CONF.62/L.8/Rev.1 (1974), Annex II, Appendix I (A/CONF.62/C.2/WP.1), Provisions 62, 63 and 65 (Rapporteur-general) (Main Trends); Yemen (1976, mimeo.), third Article, para. 6, reproduced in IV Platzöder 267, 268; V *Official*

Article 44 was chiefly opposed by the same States noted previously supporting non-suspendible innocent passage through international straits, Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain, Yemen, Fiji, Malta and Oman.[224] These met with little success.[225] Later this view was forwarded chiefly by Oman, Yemen, Spain, Greece, and Morocco, whereas the Fiji/U.K. Group followed the U.K. text which substantially became the RSNT and the ICNT.[226]

5.2.4.2.2. State Practice

The State practise of Articles 34, 42(2), (4) and (5), 44 and 233 has been noted to a large degree above which chiefly involved prescription of enforcement provisions.[227] Generally from a marine powers view a very restrictive interpretation has been taken whereby transit passage is nearly unassailable with Articles 42(4) and 44 dominating and possible enforcement under Article 233 taken only in extreme cases. However the practise of Russia and the U.S. is confused with competence given themselves on various points to enforce pollution violations in their territorial seas and exclusive economic zones including these waters in their straits, being in excess of Articles 220 and 230 incorporating Article 211. It is assumed that both Russia and the U.S. enforce these provisions strictly.[228] A clarifying factor has been the negotiation of the Malacca Agreement.

This relates specifically to under-keel-clearance which is stated in the Malacca Agreement specifically to be included in the traffic separation schemes provided for by Article 41. A provision requiring at least 3.5. meters under keel clearance during passage through the Straits of Malacca and Singapore was adopted on 14 November 1977 by the predecessor to the IMO.[229] Any violation of the IMO resolution is stated to be violation

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Records 151, ¦59, A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976), Article 40, (Chairman, Second Committee).

224Respectively, A/AC.138/SC.II/L.18, Article 5, paragraph 4, reproduced in III SBC Report 1973, at 3, 5; A/AC.138/SC.II/L.42 and Corr.1, Article 4, paragraph 2, reproduced in III SBC Report 1973, at 91, 94; A/AC.138/SC.II/L.28, Article 36, paragraph 2, Article 37, paragraph 1, and Article 38, reproduced in III SBC Report 1973, at 35, 50; III *Official Records* 192, 194, A/CONF.62/C.2/L.16 (1974), Article 21 and Article 23; III *Official Records* 196, 197, A/CONF.62/C.2/L.19 (1974), Article 4, paragraph 2.

225III *Official Records* 93, 107, 115-117, A/CONF.62/L.8/Rev.1 (1974), Annex II, Appendix I /A/CONF.62/C.2/WP.1), Provision 54, paragraphs 2 and 3, and Provision 60, (Rapporteur-general) (Main Trends).

226(1975, mimeo.), Article 4, paras. 6 and 7, reproduced in IV Platzöder 267, 268;(1976, mimeo.), Article 45, reproduced in IV Platzöder 274, 280; (1976, mimeo,), Article 43 (ISNT II, reproduced in IV Platzöder 282; V *Official Records* 151, 160, A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976) Article 42; (1977, mimeo.), Article 42 (RSNT II), reproduced in IV Platzöder 393, 395 and C.2/Informal Meeting/4 (1978, mimeo.), Article 44, reproduced in V Platzöder 6, 9; C.2/Informal Meeting/22 (1978, mimeo.), "Three additional articles", reproduced in V Platzöder 6, 9; VIII *Official Records* 1, 11; A/CONF.62/WP.10 (ICNT,1977), Article 44.

227See Section 5.2.3.2.

228See Gold, Edgar, *Handbook on Marine Pollution*, (1985), pp. 87-88. This book written prior to adoption of OPA 1990 indicates U.S. and state legislation was complicated, strict and worth examining prior to entering U.S. waters. Interview Alexander Ushakov, Deputy Head, Northern Sea Route Administration, Moscow, Russia, (Ushakov interview), 25 February, 1994.

229IMO Assembly Resolution A.375(X), 14 November 1977, Inter-Governmental Maritime Consultative Organization, *Assembly, Tenth Session, Resolutions and Other Decisions*, at 117 (London, 1978). Annex VI contains "Rules for Vessels Navigating through the Straits of Malacca and Singapore." For amendments see IMO Assembly Resolution A.476(XII), 19 November 1981, IMO, *Assembly, Twelfth session, Resolutions and Other Decisions*, at 158 (London, 1982). Koh p.

within the meaning of Article 233. In addition "appropriate enforcement measures" is stated to include *preventing* a non-public ship from proceeding further which is violating the required under keel clearance, and this specifically does not constitute denial, hampering, impairing or suspension of the right of transit passage in breach of Articles 42(2) or 44. The Malacca Agreement notes that States bordering the strait may take appropriate enforcement measures under Article 233 against ships violating the rules referred to in Article 42(1)(a) and (b), but while doing so must observe Section 7 Part XII safeguards.[230]

Thus a marked stiffening of Article 233 has occurred, though probably only for problems related to under-keel-clearance, which is the only problem area defined, appropriate enforcement measures enumerated, and exception specifically, taken to the dominant Articles 42(2) and 44. For other problem areas, including velocity limits, user State resistance would certainly prevail to general claims of expanded enforcement jurisdiction.[231] Other appropriate measures might be reached through negotiation however depending upon the user and coastal States involved and the particular geographic and traffic conditions of the strait. The question that may be raised is whether such subsequent practise can be claimed applicable for other straits and other parties? It is submitted that they can if negotiations are conducted between the user and the coastal States, and the IMO is directly involved in accordance with Article 41(4). A substantial number of the user States would probably be the same.

It would thus appear that despite a confused practise by the world's two largest maritime powers, some general enforcement is allowed coastal States in specific straits under Article 233 without breach of Articles 42(4) and 44. Further expansion and clarification might occur through other agreements negotiated by several user and coastal States. Doctrine is divided expressing an impressive interpretative breadth of Articles 39,

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160 notes that Malaysia considered this clearance a minimum.

230Further, these Articles do not affect the rights and obligations of States bordering the strait regarding appropriate enforcement measures over ships in the straits but not in transit passage.

231See Section 5.2.4.2.2.1. for the Spanish - U.S. exchange regarding interpretation of Article 42(1)(b) probably also implying enforcement of such under Article 233.

41, 42 and 233 enforcement provisions, ranging from broad coastal State rights[232] to very restrictive,[233] with some calling for moderation.[234]

232Churchill pp. 92-93 as noted is non-committal, discussing both interpretations. Hakapää pp. 195-197, 204-206 argues that silence on the part of the LOSC is not important, since neither the UNCLOS Draft nor the TSC have any express provisions related to enforcement of innocent passage, yet this is implied under the rules requiring compliance by foreign ships. Thus Article 233 is noted to restrict this broad interpretation in the area of pollution, but the author does not go as far as Churchill in possibly limiting the enforcement to this area, noting that "coastal laws and regulations established in accordance with Article 42 might be more 'normally' enforced by the States bordering the strait." Specific enforcement measures range from a request for information to detention. For those situations where non-suspendible innocent passage governs, it is believed if the violation were so serious that it amounted to "non-innocent" passage the coastal strait State could then totally prohibit the ship's passage. If a ship breaches a coastal rule not related to the innocence of passage, it may be liable for a fine or other penalty but cannot be prevented from proceeding, subsequent to satisfying the penalties. If the ship breaches the rules of innocent passage, then it may be subjected to the coastal State enforcement measures but also immediately expelled from the territorial sea. In practise the author notes the less severe measures taken for breach of coastal State regulations would cause more of a monetary hardship due to the time lost than the ship merely being required to leave and remain outside the territorial sea. A suggestion is thus made that non-innocent passage and infringement of coastal regulations should be combined so that the definition of innocent passage would also refer to violations of certain coastal regulations. This would be limited internationally by agreement that the national environmental provisions would relate only to averting "admittedly serious environmental dangers." It is submitted since the enforcement of safety standards often have relevance to the enforcement of the environmental standards, the same arguments might be made here. See also Burke Straits p. 211 and Reisman Straits pp. 69-70.

233Nordquist II pp. 298-299, 301, 377 and 391 is of another mind and sees Article 34(1) and (2) as specifically setting out a separate regime of transit passage for international straits where neither the navigational regime of the territorial sea nor archipelagic waters apply. In no circumstances can States bordering the strait suspend or limit the right of transit passage. The main purpose of the Article is to cover situations where the territorial seas of the States bordering the strait do not extend to the full breadth of the strait, where there will be a corridor through the strait that could be subject to the jurisdiction but not the sovereignty of one or more coastal States. Section 7 Safeguards are important. Article 233 is applicable only in maritime zones subject to the sovereignty or the jurisdiction of the coastal strait State or States, and "major damage" is interpreted to approximate the *Amoco Cadiz* incident. Under Articles 42(2) and 44 the jurisdiction provided is prescriptive only, with ships exercising transit passage not capable of being "inspected, arrested, detained, seized, refused passage or subjected to other forms of control" that would impair the right of transit passage. There is seen nothing in PART III parallel to Article 25(1) under which a coastal State may take measures to prevent non-innocent passage, and the only enforcement open to the State bordering the strait is if the ship enters a coastal State port or otherwise voluntarily accepts coastal State enforcement jurisdiction. Discrimination is seen as to be made against foreign ships but not among them. Brownlie p. 284 agrees noting non-suspension of transit passage under Article 44 and "... the duties owed to the coastal state by ships...are not matched by powers of enforcement vested in the coastal state, except in the case of violations 'causing or threatening to cause major damage to the marine environment to the straits'." See also Pharand Arctic p. 231 and O'Connell pp. 330, 331. Ibid. p. 994 sees "appropriate enforcement measures as those possible in the territorial sea. Article 233 is seen as adequate to cover the LOSC straits regime due to the failure of the Spanish amendment noted above. Nandan and Anderson pp. 172, 192, 193 have a similar view. Article 34(2) is seen as allowing other rules of international law, including other Parts of the LOSC to apply in so far as non-navigational questions may arise, however Article 233 is encompassed. While there was a need to deter ships and to give compensation for damage suffered in the straits, Articles 38(2) and 39(1)(c) are seen as including sufficient safeguards. Arrest in the strait is seen as undermining the right of transit passage, while arrest in a port in the appropriate circumstances is proper. There is no power to require a warship to leave a strait, similar to that in Article 30 for the territorial sea, as long as it exercises transit passage. Enforcement under Article 233 is regarded an exceptional case, due both to hazards involved and the legislative history of the Articles. No exceptions to non-suspendible transit passage is the rule under Article 44.

234Kisselev and Savaskov pp. 14-17 follow the Nordquist II view of Article 42, based upon treaty interpretation, preparatory documents, the positions of States at UNCLOS III and doctrine including Russian. Bordunov pp. 223, 224 is in agreement. However, Kisselev and Savaskov doubt this is the only interpretation. As Hakapää they argue that Part III lacks special enforcement provisions and is not reason enough to claim this right is not recognized by the LOSC since such provisions are also lacking in Part II, and coastal States can take enforcement measures against foreign ships exercising innocent passage. Article 42(2) limitations are seen to refer to passage in general and not to passage of an individual ship which has committed a violation. They expand Churchill's summary that the better and logical interpretation of Article 233 is that it *does not provide* a coastal State with the right of enforcement but *limits* its overall competence in respect of enforcement. This is due to the placement of Article 233 in the Safeguard Section, and such a

5.2.4.3. Conclusions

Thus it is submitted that a interpretation of Articles 34, 42(2), (4) and (5), 44 and 233 favouring the user States is the better despite the logically solid textual interpretations of these Articles favouring States bordering the straits. This would include the dominance of transit passage with non-hampering, impairment, denial or suspension even for violation of domestic laws and regulations. The only allowable exception would be under Article 233 where appropriate measures may be taken for violations causing major environmental damages or threats of such. Appropriate measures would chiefly include only enforcement in ports. This conservative view is based upon the State practise of the marine powers

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broad interpretation fills a gap proceeding from a restrictive interpretation of Article 42 over straits in archipelagic waters, since such are not covered in Article 233. This would leave archipelagic States without any enforcement measures at all over foreign ships exercising archipelagic passage. They however *retreat* and call for *moderation of extreme positions* both from maritime States and States bordering the strait, believing despite real problems of interpretation, the LOSC straits regime best corresponds to State's navigational interests. Generally, Koh p. 156-163 is similar to Nordquist II believing that for breaches, even those resulting in non-transit passage, States cannot hamper or suspend transit passage under Article 44. Though an argument exists that since the passage is not transit, a State could hamper or prevent it, Article 44 does not really deal with the question. Thus despite the "rather equivocal text," in the absence of an express provision, passage which does not comply with transit passage is seen as unpreventable, other remedies being available. Concentration however is placed on interpretative problems of Article 233. Where major pollution damage occurs in the straits and it can be shown to be a violation of the national rules and regulations, no interpretative problems arise. However the fact that a national rule has been breached does not mean that Article 233 may be invoked. The breach may not be "threatening major damage..." the best examples being situations concerning too little under-keel-clearance or excessive vessel velocity, which are not considered as "threatening," unless the ship is carrying a hazardous cargo. However the Malacca Agreement can be regarded as important rules for safe navigation. Non-compliance with the national rule and "an odds-on possibility that major damage is likely to occur" is seen as the test, however, this is only one approach, and in the absence of specific international agreements or IMO rules covering specific straits, it would be difficult to invoke Article 233 unless the breach is major and effected by a ship carrying hazardous cargoes. The length a coastal State can go to enforce breaches of its rules is also unclear, "appropriate enforcement measures" being subject to observation of Section 7 Safeguards. Under Article 220(6), where there is clear objective evidence that a ship in the territorial sea or exclusive economic zone has discharged in violation of national rules consistent with recognized international rules resulting in major damage or threat of such, the coastal State may initiate proceedings including detention. This Article is also subject to the Section 7 Safeguards, and under Article 220(7) if appropriate financial security is provided under appropriate procedures, the ships must be allowed to proceed. These provisions also apply to the special sensitive environmental areas allowed established under Article 211(6). Under Article 233 States may take appropriate enforcement measures against violations of Article 42(1)(a) and (b), but Koh argues the Section 7 Safeguards Articles state nowhere that ships may be detained. Article 226(1)(b) requires even if preliminary investigations indicate a violation of pollution rules, "release shall be made promptly" subject to appropriate security arrangements. Only if the ships present an unreasonable threat to the environment may release be refused or made conditional upon proceeding to the nearest repair yard under Article 226(1)(c). Monetary penalties or civil claims for loss or damage are however clearly within the scope of these provisions under Articles 228 and 229. The placement of Article 233 in the Section 7 Safeguards would thus seem to indicate its character, similar to the view of Nordquist II, as a protection of the international straits regime, the straits regime which hence is meant to dominate. Koh however also sees a possible interpretation as an exception to Article 42(2) as long as the effect of denying, hampering or impairing was reasonable and having regard to navigational safety. Under this possibility a State is allowed to take appropriate enforcement measures and *if so* respect *mutatis mundis* the Section 7 Safeguards. From this if the seriousness of the damage or threats is great enough, a State could deny, hamper or impair passage. Koh conditions this coastal State control upon *reasonableness*, balancing coastal State environmental loss against flag State loss including to the ship, the cargo and any liability. The author notes the major difficulty is to determine whether the breach of a particular rule would necessarily cause major damage, and factors which may be taken into determination are the occurrence of accidents in the particular strait as a result of a breach of a particular rule, and the type of ship and cargo. Caminos pp. 171-177 generally takes a broad view of coastal State "appropriate enforcement measures," under Article 233 with the Malacca Agreement not exceeding the scope of article 42(2), but rather giving a 'common interpretation' "of the way the exception to the general rule was intended to function." The author however cautions the coastal State to "weigh(ing) the seriousness of the damage or threatened damage, against the reasonableness of the enforcement measures undertaken" and act proportionately and non-arbitrarily.

sailing transit passage, as well as the legislative history of these Articles wherein few if any of the proposals by the coastal States related to expanded jurisdiction, were accepted. At the same time the call by some doctrine for moderation from the extreme positions of both user and coastal States should be kept in mind. As noted despite real problems of interpretation the LOSC straits regime after long negotiations probably best corresponds to States' navigational interests, since it represents a step towards finding compromises within a difficult area.[235]

Due to the confused environmental and safety practise of both Russia and the U.S. in their own territorial seas and exclusive economic zones including the straits as well as the precedent-setting Malacca Agreement, it would obviously be to the coastal States' advantage to attempt to get similar IMO rules adopted and a similar agreement or even more extensive one entered with the user States. Such specific agreements may be the direction of the future since it appears to be a stable development in an otherwise controversial legal area. It could thus be expected that coastal State detention of ships for breaches of environmental and safety sailing requirements deemed especially important such as under keel clearance and velocity without a corresponding breach of Article 42(2) or 44 to become increasingly common.

Since from the above, State practise indicates some harmonization resulting in a local Arctic regime including for the straits except concerning submerged passage, which is markedly contrary, this mode will be dealt with in more detail in the next Section.

5.2.5. Submerged Passage[236]

5.2.5.1. Introduction

The passage of submarines through straits used for international navigation were of major importance in the negotiation of transit passage in UNCLOS III, due to the strategic importance submarines played and continue to play in the global balance of power.[237] Because of this as well as the importance that the passage of submarines may play to the Russian Arctic straits regime, this manner of passage will be addressed in a separate Section.

Somewhat incongruously considering its importance, submerged passage is not directly addressed in the LOSC straits provisions, though it is in LOSC Article 20 of the innocent

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235Kisselev and Savaskov p. 17.

236See Sections 4.3.3.2., 5.2.3., 5.2.4.

237Burke Straits p. 199 notes, "The two purposes of special provisions on transit passage of straits are (1) to secure a right for submarines and aircraft to pass respectively, under and over straits which fall within the territorial sea; and (2) to eliminate the competence of the coastal State to characterize passage as non-innocent and, therefore, subject to exclusion." See Captain Galdorisi, George V., U.S. Navy, "Who Needs the Law of the Sea?", *Naval Institute Proceedings*, July 1993, (Galdorisi) p. 72 for a view within the U.S. Navy; "For example, submerged transit of international straits permits Trident submarines to roam the seas unimpeded and undetected. An overflight of oceans and straits ensures U.S. strategic aircraft unrestricted access to international airspace worldwide."

passage regime.[238] As seen under Article 39(1)(c), a ship must in transit passage "refrain from activities other than those incident to their *normal* modes of continuous and expeditious transit...," which may imply that submarines, which have a normal submerged mode, may also travel submerged through international straits. This is in contrast to TSC Article 16(4) and the *Corfu Channel Case* since this regime was subject to TSC Article 14(6), wherein similar to LOSC Article 20 submarines are required to sail on the surface in the territorial sea showing their flag. The implication for an authorization for submerged passage under Article 39(1)(c) may be enhanced by the express prohibition of submerged passage under these other provisions.[239]

Based upon the jurisdictional issues above the outlines of the dispute are thus clear. Briefly the naval powers including the U.S., Russia, and presumably France, the U.K. and China are viewed as interested in submerged passage in order to maintain secrecy due to deterrence institutionalization as their mutual strategic posture.[240] Other arguments forwarded in favour of submerged passage include navigational hazards are argued caused by the low profile of a submarine on the surface which makes it difficult to be seen but also makes it difficult for the submarine to see and avoid other ships.[241] Little coastal State security is argued gained, since submarines need not approach the coastal State for its missiles to reach targets. Further the danger the submarine presents environmentally to the coastal State is argued increased not decreased with its visibility on the surface. It becomes more of a target for nuclear or conventional attack on the surface with the possibility of secondary nuclear explosions or radiation. Coastal States on the other hand are interested in detecting and preventing force, or the threat of force, clandestine activities, and unauthorized research or survey activities.[242]

With a short outline presented behind the maritime powers' practise of submerged passage under LOSC Article 39(1)(c) "normal mode", the legislative history of TSC Article 16(4) and LOSC Article 39(1)(c) will be briefly addressed.

5.2.5.2. Legislative History

Since the issues centre around TSC Articles 14(4) and (6) and 16(1) and (3) in relation to Article 16(4), general innocent passage will be addressed more extensively in Section 7.NEED, including State practice, legislative history and doctrine. At the same time it is submitted little is to be gained from textual interpretations and legislative histories of these

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238Article 20 requires submarines and other underwater vehicles in the territorial sea to navigate on the surface and to show their flag.

239See Section 7.NEED.

240See Reisman Straits pp. 52-53, 69.

241Robertson Jr., Horace B., "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, Nr. 4, (Robertson Straits), pp. 844-845.

242Koh pp. 153-155. Reisman Straits p. 69 notes that a coastal State's demand for surface transit is based either on misunderstanding the situation or from a desire to increase its competence to augment power with respect to the transitting State.

Articles, since more modern subsequent State practise defines both the TSC and the LOSC straits regime related to submerged passage.[243]

Briefly, an unclarity arose between the non-suspendible 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. This seems to be a vestige of the controversial subject related to State security, authorization and notification for innocent passage in the territorial sea, with which UNCLOS I negotiations dealt extensively.[244] Though submarine traffic was not specified in the *Corfu Channel Case* an argument exists that it was intended included in the term "warship", especially since the decision closely followed World War II with its extensive submarine use. In the *Corfu Channel Case* the ICJ in 1949 most surely was well aware of such use, and arguably included it in their decision since at that time there existed no contrary international agreement. At the same time TSC Article 14(6) requires submarines to navigate on the surface of the territorial sea showing their flag. This introduces the contradiction since TSC Article 14(6) can be interpreted to introduce a condition of passage on submarines as warships in international straits. Either interpretation seems reasonable, and no assistance is given either from these Articles or surrounding TSC Articles. The natural interpretation of the text of these Articles together would seemingly support surface passage while in territorial waters including in the international straits.

Negotiations surrounding TSC Article 16(4) did not address directly the issue of surface passage through international straits.[245] 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.[246] The main discussion in fact centred on its applicability to commercial submarines.[247] The legislative history of the TSC indicates this issue may have been part of the notification and authorization controversy, although submarine traffic and specific notification and authorization through the territorial waters of straits or their entrances was not directly discussed.[248]

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. As seen it is however unlikely that submarines from the sea powers will choose to travel on the surface. 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

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243See Section 5.2.5.3.

244See Section 5.2.2.1.

245See Sections 4.2. and 5.2.2.1.

246III *Official Records* Vol. 3, pp. 111-112, paragraph 29.

247This Article was adopted without comment 68:0:2.

248See Section 7.

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.[249] It seems likely that in practise most submarines due to stealth probably choose to stay submerged through international straits and their entrances.[250] Doctrine is 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.[251]

A look at the development of LOSC Article 39(1)(c) indicates generally that although amendments were proposed opposing "normal mode," they were not accepted. Briefly, "normal mode" appears in the U.K. proposal to the second session of UNCLOS in 1974, however lacking a definition.[252] 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.[253] 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.[254] Various amendments were forwarded in opposition, including the Greek proposal that submarines and other underwater vehicles in transit must navigate on the surface and show their flags unless permitted otherwise by the State bordering the strait.[255] The Spanish proposal was largely in favour of traditional innocent passage rules and rejecting transit passage, including submerged,[256] but both of these lacked support, and RSNT Article 38(1) remained substantially the same.[257] Morocco and Spain submitted proposals in 1976, 1977 and 1978 favouring innocent passage rather than transit passage but lacked support, and ICNT Article 39 repeated RSNT Article 38.[258]

249Schachte pp. 14-15 notes that the U.S. claims transit passage also in entrances to international straits, seen as subject to submerged passage, to avoid such problems.

250Churchill p. 94.

251Caminos 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. TSC Article 14(6) was thus a cause for super power dissatisfaction with the innocent passage regime. See Section 5.2.2.1.

252III *Official Records* 183, 186, A/CONF.62/C.2/L.3., Article 2. The U.K. delegate explained that ships and aircraft must not engage in any activities other than those which were part of their normal passage. II *Official Records* 125, para. 22.

253III *Official Records* 189, 190, A/CONF.62/C.2/L.11 (1974), Article 1(2)(a).

254Respectively IV Platzöder 194, Article 2 (Private Group on Straits); IV *Official Records* 151, 159 A/CONF.62/WP.8 Part II (ISNT, 1975, Article 39, (Chairman, Second Committee).

255IV Platzöder 282, Article 39 (ISNT II) para. 3, (Greece).

256Reproduced in IV Platzöder 274, 276, Article 39 para. 3, (Spain).

257V *Official Records* 151, 159, A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976), Article 38(3), (Chairman, Second Committee).

258Respectively, IV Platzöder 399, Article 38, (RSNT II) (Morocco), V Platzöder 30, 31, C.2/Informal Meeting/22 (1978), Article 39, paras. 2 and 3 (Morocco); IV Platzöder, 393, Article 38 (RSNT II) (Spain), V Platzöder 6, 7, C.2/Informal Meeting/4(1978), Article 39 (Spain); XV *Official Records* 172, 181, A/CONF.62/L.78 (Draft Convention), 1981, Article 39.

This dispute is reflected in the Russian Arctic where the provisions of Russia as coastal strait State require submarine passage on the surface showing the flag with ice-breaker assistance, while the presumed U.S. practise is the same as through other international straits, submerged.[259]

With the legislative history of TSC Article 16(4) and LOSC Article 39(1)(c) briefly addressed, the policy will be presented behind the maritime powers' practise of submerged passage under TSC Article 16(4) "non-suspendible innocent passage" and LOSC Article 39(1)(c) "normal mode".

5.2.5.3. State Practice

As noted the U.S. and Russia, and probably 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.[260] The U.S. has indicated it will ignore coastal State provisions and measures it believes exceed its interpretation of the LOSC straits provisions.[261]

At the same time it is doubtful this right has passed into customary international law, due to the ambiguous State practise including that of Russia and the U.S., which as coastal States have legislated and enforced extensive environmental and safety provisions including over straits.[262] Another reason is the absence of a possibility for coastal State protest, especially concerning submarine passage which often occurs undetected.[263]

The TSC regime will be discussed first.

5.2.5.3.1. Submerged Passage - Non-Suspendible Innocent Passage - TSC Article 16(4)

The U.S.'s position generally is complex regarding Article 14(6) mentioned above. It as seen has been instrumental in negotiating the transit passage regime due to its dissatisfaction with coastal State restrictions of non-suspendible innocent passage through international straits. This became especially crucial to the U.S. due to the enlargement of the territorial seas to 12 miles, supported through acceptance of such as customary international law.[264] 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 SSBN's which required avoidance of detection and

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259See Sections 4.3.1., 4.3.2. and 5.2.2.2.

260Smith and Roach p. 178, Schachte pp. 18-19, Moore pp. 120-121, Richardson p. 564, Barabolia-Butler p. 143, Kolodkin p. 163, Churchill p. 94, Reisman Straits pp. 52, 53.

261Roach Interview June 27, 1994.

262See Section 4.3.1., 4.3.2. and 5.2.2.

263Reisman Straits p. 53. See however Friedman, Norman, "Submarines Adapt," *Naval Institute Proceedings*, November 1994, (Friedman) p. 72 who notes that it can be expected that "very nearly the best current underwater detection technology could be universally available within a decade." See Section 5.2.7.1.

264See Section 5.2.1.

maximum maneuverability.[265] The latter required submerged passage and resulted in a possible contravention of Article 14(6). In the face of these developments and as well as the non-acceptance of transit passage claimed as international customary law, the U.S. apparently negotiated *secret agreements* for submerged passage, subject to notification, with the States bordering 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.[266]

As noted the Soviet Union was after the mid 1960's interested in as free passage as possible through international straits, for showing the flag for political reasons, and for surveillance of U.S. SSBN transits through straits entering the Indian Ocean and the Mediterranean.[267] The Soviet Union thus supported and most likely practised after this date submerged non-suspendible innocent passage, and submerged transit passage similar to the U.S. The other marine powers also probably followed suit when they obtained a submarine fleet.

In spite of these legal contortions it seems safe to say that though the issue of submerged passage or not through international straits possibly was not seen as a large problem, it was kept quiet. It appears however the U.S. and the Soviet Union were sailing their submarines submerged so as to remain clandestine through international straits and through territorial seas serving as entrances.[268] This was probably in direct contravention of TSC Article 14(6). Though the U.S. purportedly had entered bilateral agreements where submerged passage through international straits was notified to the coastal State, it seems reasonable to imagine that in times of crisis, various clandestine passages were carried out as well. This supposition is based upon the U.S. need for secrecy, the general lagging development of submarine surveillance equipment, especially relevant for poorer coastal States, and the U.S. State Department statement that restrictive rules would be ignored.[269] This supposition carries even greater weight concerning submerged passage carried out by the Soviet Union through international straits. The Soviet Union in spite of possibly low numbers of submarines on patrol in the Indian Ocean, also had a need for secrecy due to their surveillance activities, they were clearly on location, and they did not have the benefit of bilateral agreements allowing submerged passage with the coastal States.[270]

With this said the LOSC straits regime will be addressed with respect to submerged passage.

265See Leifer pp. 162-163, and Sections 5.2.2.2. and 5.2.5.2.2.

266Ibid. Indonesia in a declaration regarding its archipelago, stated that irrespective of the archipelago's status under international law, that submerged passage was prohibited.

267See Leifer pp. 168-173 and Sections 5.2.2.2. and 5.2.7.2.2.

268See Section 5.2.5.1.

269Ibid. and Section 5.2.2.2.

270Leifer p. 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 Soviet submarine.

5.2.5.3.2. Submerged Passage - "Normal Modes of Continuous and Expeditious Transit" - LOSC Article 39(1)(c)

As seen the dispute surrounds LOSC Article 39(1)(c), "normal modes of continuous and expeditious transit." Although specific interpretations exist both for and against, first the modern policy behind the practise of Russia and the U.S. and presumably other marine powers of Article 39(1)(c) allowing submerged transit passage, will be addressed.

For the U.S. based upon a 1992 National Military Strategy, four principles are stated necessary for the U.S. to cope with the world's security situation following dissolution of the Soviet Union: strategic deterrence and defense, forward presence, crisis response and reconstitution.[271] Freedom of submerged passage and overflight is seen as, "the key tenet of U.S. oceans policy," vital to implementing this national strategy.[272] The U.S. is a power which needs the sea to project military power onto the opponent's land, while Russia is a more land-based power.[273] NATO in Europe had to maintain non-atomic "balanced collective forces, since if it failed to have a strong conventional posture, the Soviet Union could exploit an eventual nuclear stalemate and overrun NATO with the Red Army.[274] The importance of a NATO forward defense with ground forces required a naval strategy to ensure safe delivery of transatlantic reinforcements and resupplies. Though there have been 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 has the possibility to become more anti-U.S. in the future.[275] For

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271*National Security Strategy of the United States* (The White House, U.S. Government Printing Office, 1992), p. 1. Gen. Colin L. Powell, USA, Chairman of the Joint Chiefs of Staff, *The National Military Strategy 1992*, (Washington D.C.; 1992), p. 6. Further Reisman Straits pp. 52-53, 69 notes, "In deterrence theory, detection of the submarine is as systemically dangerous as would be an anti-ballistic missile system to protection sites:

> 'The deployment of ABM (anti-ballistic missile) systems to protect urban areas was prohibited by the SALT I agreements, the reasons being that such systems impede the ability of ballistic missiles to attack urban areas and hence erode the counter-value role of these missiles. Similarly, an ASW [antisubmarine warfare] system designed to attach missile-carrying submarines could threaten the second-strike capability of these submarines, and would thus be as undesirable as an urban ABM system: both ABM and ASW systems undermine the credibility of deterrence as a viable strategic posture. The institutionalization of deterrence as the mutual strategic posture of the Soviet Union and the United States (and presumably also France, Britain and China) appears to proscribe any military operation that could threaten the stability of strategic weapon systems on which the credibility of deterrence is based.', "Anti submarine Warfare," *World Armaments and Disarmament, Stockholm International Peace Research Institute Yearbook*, 1974, at 304.

Additionally, "(T)hese conclusions will not be accepted by American or Soviet strategists who view strategic forces as being not only deterrent, but also as war fighting; they will obviously desire to threaten the second-strike capabilities of the adversary, a sequence with which this article will not deal." See also Leifer, pp. 160-173.

272Galdorisi p. 72.

273Breemer, Jan S., "Naval Strategy Is Dead," *Naval Institute Proceedings*, February 1994, (Breemer) pp. 50-53. Russia is the only State with the ability to totally destroy the U.S. See Lt. Carlson, Christopher P., USNR, "How many SSN's Do We Need?, Ibid., July 1993, (Carlson) pp. 49-50.

274Breemer p. 52.

275Carlson pp. 49 and 50. See also Friedman p. 72 who notes, "(A)lmost certainly the world will become more, rather than less, unstable." DeYoung, Don, "Sea Power is Grand Strategy," *Naval Institute Proceedings*, November 1994, (DeYoung), p. 76 notes that "the nuclear capabilities maintained by Russia, as well as by several former Soviet republics, will continue to be deterred by the U.S. sea-based missile force...Should a hostile authoritarian regime return in Russia, the sea-based missile force will provide continued deterrence without the immediate need to reconstitute the other two legs of the triad (ground forces and land-based air forces). Parentheses added. At the same time ibid. pp. 75 and 77

the U.S., desiring control of the seas, use of the submarine is essential due to its inherent stealth characteristic.[276] Under strategic deterrence and defense policies during the Cold War the U.S. Navy considered it needed approximately 100 nuclear attack submarines (SSN's) to enter the patrol areas of Russian nuclear ballistic missile submarines, chiefly in the Arctic, to destroy a significant number of the approximately sixty Yankee, Delta and Typhoon classes.[277] 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.[278] Under the forward presence principle a minimum of eight SSN's, including pre-deployment training, with 45.6 SSN's to sustain deployment may have to be continuously at sea.[279] 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 under the ice in the Arctic Ocean and the approaches from the Siberian seas.[280] This American interest will prevail as long as the Russian SSBN's continue operation, and naval arms are not part of disarmament negotiations between these States. Thus though the U.S. may have negotiated secret bilateral agreements with States bordering crucial straits allowing transit passage for its submarines, it probably favours the LOSC straits regime since it avoids setting precedent, it is more stable and the U.S. would not have to use its political and military power to safeguard its interests.[281]

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notes that with the demise of the Soviet Union the U.S. can shed the strategies that contained and ultimately defeated that threat, and argues for a strategy of "practical internationalism". This emphasizes bilateral, regional and plurilateral approaches, and is seen to accommodate the two traditional U.S. foreign policy schools, "liberalism's emphasis on collective security arrangements and realpolitik's emphasis on unilateral 'balance of power' politics," thus minimizing the shortcomings of each.

276These points are obtained from Brooke, James R., "Do We *Really* Need a Third *Seawolf*", *Naval Institute Proceedings*, December 1994, (Brooke) p. 9 at 10 unless otherwise noted. Dr. Brook is noted to be Director, Strategic Assessment, Pacific Defense Analysts in San Diego California, U.S. and previously was on active duty in the U.S. Navy. Brooke p. 10 lists the following, "(A)s the likelihood for chemical/biological/nuclear warfare increases, minimizing the exposure of on scene U.S. or allied forces through the application of stealth technology is essential. Technology openly available for advanced manned and unmanned delivery systems is translating into faster, longer range, lower altitude, more lethal weapon systems. Historical ground and naval safe standoff distances will be forced farther and farther from the crisis centre. Rapid, real time, on scene information collection, covertly obtained will be paramount to successful crisis management. Logistical support during crises will be at a premium, and may not exist at all. Preemptive strike, against the means to launch weapons rather than against the weapons, will be a necessary combat option. Surprise will be the crucial element in future strike operations."

277Carlson p. 52. Ibid. p. 49 notes the SSN class of U.S. submarines carry enough missiles to quickly debilitate a State's military infrastructure, take down most of its vital command-and-control facilities, knock out a significant share of its power-generating capability, conduct surveillance and put special operating forces ashore. At the same time it is able to operate independently in a hostile environment and survive to complete its mission. An interview by John F. Morton with Vice Admiral Owens, Deputy CNO for Resources, Warfare, Requirements and Assessment (N8) at the Pentagon, "Still a Priority", *Naval Institute Proceedings*, March 1993, (Morton) pp. 124-129, at 126, notes that control potential is directed against the Chinese and the Indian submarines in addition to the Russian.

278Carlson p. 52.

279Ibid.

280See Section 4.3.3.2.

281Leifer pp. 164-168. With regard to the Indonesian straits this provides for U.S. requirements of reactive deployment.

It seems likely that Russian observations as to world stability in some respects are similar to those of the U.S.[282] 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, as seen including surveillance of the U.S. SSBN's, and deployment of its surface vessels in the Indian Ocean for political reasons including checking the growth of the Chinese naval and commercial interests.[283] The Soviet position was somewhat different than that of the U.S. since with respect to Gibraltar, the Malacca, Singapore and Indonesian straits the Soviet Union was not able to enter bilateral agreements with the coastal States which were less friendly.[284] These straits were also seen as essential for large scale deployment to the Soviet Far East in the event of conflicts with China which cut off the Trans-Siberian railway. Generally the Soviet interest in transit passage may have been that the application of coastal State restrictions would have more of an adverse impact on Soviet strategic mobility than on that of the U.S., and in addition the Soviets were interested in ensuring free passage for their growing commercial fleet.[285] Lately, stability is seen to be possibly more treacherous in the new multipolar world than in the bi-polar Cold war era due to the presence of a variety of small cold wars and economic rivalry between the leading powers. In a few years some ten States will have nuclear weapons, and twenty will have means to deliver them. At the same time the Russians want to bring the U.S. as a sea power under some kind of cooperation and regulation in the name of peace building while continuing investment in research and engineering in submarines, tactical aircraft and space.[286] Generally while there have been a series of confidence building measures between the U.S. and Russian Navies, "(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."[287] 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 the Strategic Arms Reduction Treaty of 3 January 1993 are seen to provide a basis for the desired cooperation.[288] "(M)uch more broad and constructive participation is necessary

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282The following information is taken from Rear Admiral Valery I. Aleksin, Russian Navy, "We Are Ready When You Are," *Naval Institute Proceedings*, March 1993 (Aleksin), pp. 54-57, unless otherwise noted.

283See Koh pp. 68-69, who notes a Soviet sea route ran from the Black or Baltic Seas to Vladivostok and Nakhodka. The Soviet Union were as well political allies with India.

284Leifer pp. 168-173.

285Ibid. p. 173.

286Brooke p. 9. The author notes submarine development continues at two Russian research institutes, and three submarine shipyards are maintained. In spite of economic problems Russia commissioned four submarines in 1993, intended to deliver four new submarines in 1994, is proceeding with construction of a fourth generation submarine, deployable by 2000, and is designing a fifth generation advanced technology submarine. Franckx p. 54 footnote 214 notes to the contrary that in a speech by President Yeltsin in 1992 Russian plans included stopping the construction of submarines within three years. See also Preston, Antony, "World Navies in Review," *Naval Institute Proceedings*, March 1995, pp. 107-108.

287Aleksin p. 55.

288Respectively 1972 *Treaties and Other International Acts Series* (TIAS) 9379 and June 17 1993, TIAS. The START 2 Treaty of 3 January 1993 has not yet been ratified. Aleksin p. 55 notes that the latter provides for activating ties at all levels; extending measures encouraging openness regarding doctrines and operational activities; elaboration of enlarged schedules of exchange and liaison; exchanging views on problems of developing appropriate relations between civil and military structures in democratic societies.

from naval specialists and experts at the official level as well as in the work of nonofficial international conferences, symposia, and seminars."[289] Specifically agreements desired with the U.S. and other NATO countries include, preventing submarine incidents, and the mutual consultations and exchange of experience on the prevention of ship accidents.[290] Value is also placed on cooperation, mutual consultation and regular contact between the Russian Navy press service and the U.S. Navy's office of Chief of Information, to gain experience in democratic procedures for organizing such in the Russian Navy.[291] It appears that despite U.S. Navy reticence some eight different contacts were made between the Russian and U.S. Navies in 1994, and periodic talks between the two Navies of unspecified topics occur at the Captain level.[292]

Doctrine on this issue as might be expected varies considerably, especially within the U.S. Senator Barry Goldwater sent a letter July 26, 1976, requesting interpretation of the straits provisions in the informal negotiating texts due to the importance to U.S. strategic considerations.[293] Due to the expertise shown, the contrasting positions will be illustrated extensively, not only to indicate the interpretative possibilities but also the importance given this regime. The Reisman and Burke views illustrate the classical problem[294]

289Ibid. p. 56 Yakovlev Interview 27 August, 1994, proposed a law of the sea seminar including both the U.S. Navy and the Russian Navy. Letter from Rtd. Admiral A. Yakovlev 2 December 1994 proposed the same.

290See Section 4.3.3.2.2. regarding submarine collisions. Yakovlev Interview 27 August 1994 lists the following proposals by the Russian Navy for limitation:

	Stages	Measures
1.	Formulation and enhancement of confidence-building measures	Agreements on prevention of incidents at sea; creation of a system of notification about major military exercises and manoeuvres; ICBM and SSBN launches; concentrations and redistribution of naval forces and other events.
2.	Limitation of most dangerous naval activity	Prohibition or limitation of naval activity in the zones under SSBN patrol, in production areas, on international routes, including the NSR.
3.	Reduction of *fleet structure* on a collective, bilateral and unilateral basis	Ratification and implementation by Russia and the U.S.A. of the START-2 Treaty, reduction of the naval forces of NATO, the U.S.A., Russia and other countries operating in the Arctic; unilateral reduction by Russia of the naval component of the strategic nuclear forces..

291Aleksin p. 56 notes specifically that greater openness in the Russian armed forces for the government and the people are required. "In this critical moment of the country's life, it is more important now, than ever before, for our public to receive competent, considered, and independent analysis of political decisions, and to express opinion by ballot." Further contacts are also desired between naval veterans, midshipmen, research institutes to build confidence and increase world stability.

292Letter U.S. Department of the Navy, Office of the Judge Advocate General, October 19, 1994. Interview Roach and Smith 27 June 1994; U.S.N. Commander Barry Combs and Royal Navy Commander Les Sim, "The Russians Are Here," *U.S. Naval Proceedings*, March 1995, pp. 68-69; Yakovlev Interview, 25 August 1994; Interview with Attorney at Law, Paul Edelman, New York, New York, U.S. (Edelman Interview), and Assistant Director Scott Allen, Law of the Sea Institute, University of Hawaii, Honolulu, Hawaii, U.S. (Allen Interview), Russian American Seminar on Law of the Sea, Moscow, 24 August 1994.

293Robertson Straits pp. 844-845. The author notes of those receiving the Goldwater letter Professors Bilder, Burke, Henkin, MacChesney, Nanda, and Riesenfeld interpreted the LOSC text as clearly including a right of submerged passage, while Professors Knight, Muys, Reisman and Rubin considered that the text did not unambiguously include such a right. Professors Falk, Gordon and Butte did not easily fit into either category.

294See Section 2.2.2.

between the strict "textual" school of interpretation[295] and the "intention of the parties"

295The problem with a "strict textual" interpretation, which may be kept in mind here, if carried out with little consideration taken to the context of the conference, may misrepresent the provisions and hence have questionable relevance to reality. Reisman Straits pp. 48, 52-54, 62-64, 66-67, 69-75 claims that the right of submerged passage is not excluded but at the same time is not clear under the LOSC regime. The provisions due to ambiguity neither establish as a secure right nor insulate transit passage from coastal States' discretionary powers to qualify passage as 'non-transit' and hence subject to exclusion. Problems arise from the absence of an express right in a context of other provisions inconsistent with an implied right, and the enhanced competence of the coastal State to characterize any passage below, on or above the surface as violating conditions of "transit" and reduce it to innocent passage which may be suspended. It is argued the Vienna Convention requires a strict textual interpretation, and since submerged passage is not specifically included, it must be induced that "freedom of navigation" does not include freedom of submerged transit through territorial waters in straits. This textual interpretation may be *unavoidable* due to the absence of a formal record. See Section 2.2.2. Prior practise is difficult to argue since the Vienna Convention Article 31(3)(b) permits only subsequent practice, and notoriety and the opportunity for protest, requisite elements of prescriptive rights, are virtually non-existent for submerged passage. Even if these rights were applicable to one strait, they would not thereby be applicable to all straits. The LOSC innocent passage regime arguably enlarges coastal State competence from the TSC regime. Rather than a determination of innocence made by the coastal State based solely upon specific acts by a ship occurring during its passage in the territorial sea as under TSC Article 14(4), a determination may be made covering the nature of a ship's cargo, its ports of call, destination, previous history in transit, and linked to the prevailing political relations under LOSC Article 19 and Article 51 of the U.N. Charter. LOSC Article 19(2) may allow the coastal State to characterize passage as non-innocent and hence suspend it, based on activities in violation of principles of international law under the U.N. Charter which may not be a threat or use of force against the coastal State. Since there is lacking central international decisions on such issues, these provisions could result in a significant extension of coastal State jurisdiction over the characterization of innocence of passage, which could have far reaching consequences for the straits regime. The right of innocence of a submarine must be carried out *affirmatively* in order to be assured a characterization of innocence, which under both the TSC and the LOSC straits provisions would require it to surface and show its flag. This would be directly contrary to the Russian and U.S. policies noted. There may be further consequences due to inherent ambiguities in Articles 37, 38 and 45. "Used for international navigation" under Article 37 arguably requires a higher threshold of use than under the *Corfu Channel Case*, which may result in many straits being transformed from enjoying the transit passage regime under Article 38 to the stricter innocent passage regime under Article 45(1). Over time Article 45(1) straits may be deemed vital, and from the problems of the LOSC innocent passage regime, may prove contrary to the security interests of both Russia and the U.S., since submarines would be required to navigate on the surface. The Article 44 requirement for non-suspension of transit passage, is arguably not sufficient. A coastal State may argue that passage violates Article 39(1)(b) and hence is not transit passage, and the State may consequently forbid passage or add conditions such as surface passage. The same argument involving the U.N. Charter applies to transit passage as to innocent passage. Arguments for safety may be made under Article 41(1) requiring surface passage. Other conditions such as "solely for the purpose of continuous and expeditious transit" under Article 38(2) and the possible evaluation by the coastal State of a U.N. Charter violation also results in an equivocal guarantee of passage less than free navigation through the high seas belts enjoyed prior to the 12 mile extension of the territorial sea. Under Article 39(1)(c) "normal" may be interpreted depending upon the context, legal and factual. The flag State and coastal State could determine what is normal passage for submarines transitting straits. In addition factual questions may affect normality, such as type of channel, density of traffic, safety factors, nature of the mission and rules of passage. The plain and natural reading of Article 39(1)(c) emphasizes expeditious transit. The interpretation does not focus on "normal mode," which for the most part is undefined, but rather on the ancillary activities to transit, which in the absence of this provision, would be prohibited by Article 38. Thus a ship could carry out activities normally associated with modes of continuous and expeditious transit, such as sonar, even though such would otherwise be forbidden in transit passage. Sonar may be used for intelligence gathering, but though a ship may not gather intelligence in transit passage, it need not suspend sonar when transitting straits if it is used in continuous and expeditious transit. Additional interpretative problems relate to the coastal State evaluation of the passage in relation to U.N. Charter principles. This would be impossible with submerged passage, which for the most part is undetected, therefore Article 39 arguably is interpreted most coherently if submerged passage is forbidden. To explain these textual problems the U.S. delegation to UNCLOS III argued it was a common understanding that submerged passage in transit was permitted. The status of this understanding is unclear, and no record exists showing its existence. As such the possibility to counter the plain and natural meaning of the LOSC straits provisions are arguably minimal, both under the Vienna Convention Article 31 and in accordance with registration under Article 102 of the U.N. Charter. Reisman Straits p. 75 notes succinctly, an undocumented "understanding" among all or most of the more than 150 delegations at UNCLOS is preposterous..."and the lawyer who would believe it, advise reliance on it, or invoke it before a tribunal would be very naive indeed...(T)he asymmetry in our willingness to accept understandings in matters vital to us but to concede explicit provisions in matters vital to others is more than disquieting."

school of interpretation.[296] It is submitted the Reisman textual interpretation concerning the

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296The problem with the "intentions" interpretation, which should be kept in mind here, is that this approach may tend towards a reduction to personal observations by those who attended, especially since the LOSC "records" referred to have their status weakened even further, than under Article 32 of the Vienna Convention, due to their unofficial status. See Section 2.2.2. and Churchill p. 340, Burke Straits pp. 202-203, Reisman Straits p. 56 and Moore p. 89. Burke Straits pp. 197, 198, 202-216, 219, 220 believes the LOSC provisions provide submarines in certain straits with the right to pass submerged, however indicates his preference for including a corresponding duty to report and receive prior authorization for submerged transit. The author served as an expert on the U.S. delegation to UNCLOS III. Central to the UNCLOS III informal sessions of the Second Committee in 1976 was a "rule of silence" whereby the delegates agreed not to talk about an Article if they were essentially in agreement with the ISNT text. This may be interpreted as not lending support to amendments, which was the case with the majority of the Articles in the RSNT, including the provisions on transit, innocent and archipelagic passage. Burke Straits p. 202 notes a strict textual interpretation gives a wrong picture, whereas "contemporary interpretations and communications among the delegates," provide a correct perspective. "(O)bservers can expect difficulty in identifying the potential commitments embodied in a draft text if observations fail to go below the surface of the terms employed." However "fully adequate legislative histories of all the negotiations" cannot be obtained since they took place informally and lack summary or other public records, but "satisfactory indications of the views of various parties" exist, which provide guidance "concerning the expectations they sought to project." The U.K. and Soviet proposals contained freedom of navigation and overflight, through straits which if reasonably construed embrace submerged passage. The most relevant observations however concern comments made by the opponents, Sri Lanka, Egypt, Peru and Spain to the U.K. proposal and the U.S. response, whereby these specifically disputed the right. See Section 5.2.2.2. Failing to achieve enough support indicates generally the understanding that the proposal was understood to encompass submerged passage. Since the ISNT and the RSNT retained the same provisions as the U.K. proposal, in light of the "rules of silence", and a statement by the Second Committee Chairman to provide an acceptable basis for negotiation for most of the delegations, the inclusion of submerged passage is argued demonstrated. That freedom of navigation is restricted through Article 38(2) is correct, but the phrase "solely for the purpose of continuous and expeditious transit" does not by its terms exclude submerged passage. Nothing in the negotiations indicates that this mode was to be excluded; excluding *inconsistent operations* was what was intended under this Article (italics added). The same applies to the restrictions included in Articles 39, 41 and 42. A submarine can as well as any surface ship comply with requirements of passage without delay, specified sea lanes and traffic separation schemes and with other permissible coastal State provisions. Impermissible coercion under the U.N. Charter is not subservient to freedom of navigation whether on the high seas or international straits. In both areas a ship exercising such would not be shielded by either freedom of navigation or transit passage. Submerged passage does not in itself comprise an impermissible use of force under the U.N. Charter. The context of the passage must be viewed. Without this evaluation a coastal State could unilaterally divest the LOSC straits provisions of any meaning. In addition to the interpretative unreasonableness, nothing in the record suggests this as a plausible interpretation. The meaning intended under Article 44 was that the coastal State can deal with passage only on a case-by-case basis, and under Article 38(3) suspend passage when a ship engages in an activity not an exercise of transit passage including that specified under Article 39(1)(b). This does not mean a general prohibition of transit or a permission for transit upon surfacing, because a coastal State generally cannot suspend transit passage. Safety regulations under Article 41(1) possibly requiring surface transit are argued difficult since prescriptive competence is given to the State bordering the strait subject to the provisions of this Section, and these States cannot then use the regulatory authority gained to qualify a right granted in another rule in the same Section. Requiring surface transit would further violate Article 41(3) which requires non-hampering, denial or impairment of transit passage. Though Article 39(1)(c) does not authorize submerged passage through the passage "normal mode," the use of the passage indicates in itself that different modes of transit are envisioned, and only certain activities permitted regardless of the mode. Under, on or over the water are the only possibilities, and the various interpretations of "normal mode" are made without reference to the UNCLOS III negotiations and purposes. That a coastal State would evaluate "normal mode" for every case depending upon type of ship, weather, current, and other highly variable factors is unreasonable, considering this was *regarded as a highly critical, sensitive and even dangerous issue* in the negotiations. The reasonable interpretation is that the flag State chooses the mode of transit, Article 38 enjoins a vessel in whatever mode from engaging in any activities not incident to that mode. For the submarine the mode may be submerged or on the surface, but the coastal State is not authorized under Article 38 to determine the mode. The argument, under Article 34, that Article 19 requiring surface transit by submarines in the territorial sea may be applicable to the territorial sea in straits is without meaning. Article 45 provides only for innocent passage in straits to which transit passage is inapplicable. Additionally Article 34, which provides that the transit passage regime in ceratin straits shall not in other respects affect the status of the waters forming such straits, loses meaning if transit passage is not substantially different from innocent passage in the territorial sea. The important differences are the rights of submerged passage and overflight without which Article 34 is meaningless since transit passage would hardly have any characteristics differentiating the waters in straits from the territorial sea. Acknowledgement of these rights conversely stresses the importance of preservation under

legal invalidity of an implicit agreement at an international conference to challenge the LOSC, which would support expanded coastal straits State jurisdiction, is the more *legally sound*, yet has not predominated. Submerged transit passage is being practised by the maritime powers and is supported by the majority of doctrine.[297] While a slight majority of U.S. doctrine follow the Burke position, a clear majority of non-U.S. doctrine follow Burke in spite of the interpretative difficulties.

5.2.5.4. Conclusions

Within the latitude of coastal State activities arguably allowed by the Reisman interpretation related to submerged passage, it is to be expected that States bordering the straits would expand the 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 the U.S., Russia and other marine 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 international doctrine 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

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Article 34 of the remaining coastal State authority over internal waters and territorial sea in the straits. That Article 45's innocent passage incorporating Article 19 might be a relevant provision applicable under Article 39(1)(d) to all transit passage, is countered by Article 45 being expressly applicable only in straits to which transit passage is inapplicable. That "normal mode of passage" appears as part of the right of transit passage through archipelagos under Article 53, but not under Article 38 is argued to be textual differences without substantive importance other than possibly mediating differences in negotiating positions. See Moore pp. 77-121 for a concise article supporting Burke Straits.

297Nandan and Anderson p. 184 follow Burke's view, based in the legislative history on the opposition of Spain and Morocco which was rejected. Nordquist II pp. 342-343 follows the same view, based upon the context and the negotiating history, including the rejection of Greece's and Spain's proposals requiring surface transit in the Second Committee. Although a list of appropriate incidental activities is not given for "normal," the author as seen believes that an appropriate test to be those "reasonable under the circumstances," and would include the use of radar, sonar, etc. See also Pharand Yearbook pp. 122-123. Churchill p. 93 supports submerged transit passage, noting that the maritime States transit international straits submerged, and this interpretation is believed supported by the LOSC *travaux préparatories*. Caminos p. 153-158 follows these views for the same reasons, noting, "(I)f anything was understood from the outset of UNCLOS III it was that any new convention acceptable to the major naval powers could not prohibit submerged transit in straits used for international navigation." Bordunov p. 223 notes the confirmation of coastal strait State sovereignty over waters, seabed, and subsoil of an international strait is in no way connected to the passage of submarines, and cites Soviet doctrine claiming the same. Normal mode of continuous and expeditious transit is seen to be in accordance with Article 41 regarding use of sea lanes and traffic separation schemes to be observed by ships of any type, which is due to Article 41(3) under which sea lanes and traffic separation schemes must conform to generally accepted international regulations. Since the Collisions Convention is directly addressed under Article 39(2)(a)), submerged passage is seen as being clearly permitted, limited only by the LOSC provisions covering international straits and the Convention to which adherence is strictly required. Koh pp. 153-155 notes arguments *in favour of* submerged passage include, passage is not restricted to the surface as it is under the innocent passage regime; the normal mode of passage of submarines is submerged which is not inconsistent with Article 39(1)(c); submerged passage is implicit in "freedom of navigation;" used in Article 38(2) and in the high seas regime Article 87(a); States bordering the strait may make safety and anti-pollution rules under Article 42(1) which may require submarines to navigate on the surface in difficult areas, but this does not detract from the general rule; and duties are created but no corresponding rights given. Examples include monitoring by the coastal State to detect clandestine activities in contradiction of Articles 39 and 40. Since freedom of navigation is intended under Article 38(2) a submarine need not surface merely to assist the States bordering the strait in monitoring passage, other devices suffice. The author notes arguments against include that Article 39(1)(b) requires ships to refrain from force or the threat of force and Article 40 prohibits research or survey activities without prior authorization, and control of such during submerged passage is difficult. Koh concludes that the better interpretation is that submerged passage is within the scope of the transit passage regime, although the answer is not completely clear. Hakapää p. 203 appears to support the Burke view but notes the existence of the Reisman view.

limit this right.[298] What this means for the future is unclear, but it may imply that powerful coastal States able to purchase state-of-the-art monitoring equipment may utilize arguments such as Reisman and demand notification, surface passage or authorization for submerged passage through international straits.

Other issues which arose in relation to the international straits regimes will be briefly covered in order to present a complete theoretical base upon which comparison can be made to the Russian Arctic straits.

5.2.6. Other Issues

In addition to the main issues presented above three issues remain relevant to the Russian Arctic straits. These include the issue of straits claimed as internal waters, the Messina exception and straits connecting the highs seas and a foreign territorial sea.

5.2.6.1. Straits Claimed as Internal Waters - Norwegian Navigational Route, *Indreleie*[299] - LOSC Article 35(a)

One issue not addressed in the *Corfu Channel Case* or TSC Article 16(4) is that of straits located in a State's internal waters. LOSC Article 35(a) provides that the Part III straits regime does not affect a State's internal waters except for those enclosed through the establishment of baselines. This issue is relevant since Kolodkin refers to the Norwegian *Indreleie* and includes in such categorisation, "virtually all the straits of the Soviet part of the Arctic including the Vil'kitskii, Shokal'skii, Dmitrii Laptev and Sannikov straits..." in justifying Russian jurisdiction.[300]

Briefly the *Anglo-Norwegian Fisheries Case* decided in 1951 involved the Norwegian enclosure with baselines of the irregular coastline.[301] One of the British contentions was that a legal strait was defined as any geographical strait which connects two portions of the high seas. It was argued Norway was accordingly entitled to claim all the waters of the fjords and sounds characterized as legal straits as territorial waters on historic grounds. This resulted in measurement of the territorial sea following marine belts overlapping with intersections of the natural entrance point of the strait, rather than following the Norwegian baselines established from the low water line of all permanently dry features. The U.K. conceded that the waters between the baselines of the belt of territorial waters and the mainland were internal waters, but contended the waters of the navigational route *Indreleie* were territorial waters. This conferred certain consequences with regard to the determination of the territorial waters at the end of the strait. The ICJ held that the *Indreleie* was distinguished as *not* being a strait, "but rather a navigational route prepared

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298See Section 5.2.2.2.

299Material concerning the *Indreleie* is obtained from the *Anglo-Norwegian Fisheries Case*, ICJ Reports (1951), 116 at pp. 120, 122, 124, 132, 142 unless noted otherwise.

300Kolodkin pp. 163, 166. See Sections 4.3.1., 5.3.3.2.1. and 9.NEED.

301See Sections 1.2.3.2. and 6.2.1.

as such by means of artificial aids to navigation provided by Norway."[302] The Court noted in these circumstances that the *Indreleie* for the purposes of the case was of the same status as other waters included in the "skjærgaard," which were determined to be *internal waters*.

The decision leads to several dilemmas including the mode of passage through the *Indreleie*.[303] For coastal archipelagos there may be conflict between the judgment in the *Corfu Channel* concerning international straits, and the judgment in the *Anglo-Norwegian Fisheries Case* with inland waters enclosed by islands.[304] It might thus be questioned whether TSC Article 16(4) governs where the waters of the strait are claimed as internal waters, examples including the Sunda, Lombok, Balabac and San Bernardino Straits, all important international straits.[305] It would seem not, since the TSC as its name implies would apply only to the territorial sea. Additionally the Articles appearing in Section III, most of which including Article 16, refer directly to the term "territorial sea."[306] A result of this might be if passage through straits is only a consequence of the right of passage through the territorial sea and not an autonomous international regime, then it may be doubtful whether the TSC would apply.[307] If it does not apply, then there are no provisions preventing the suspension of passage for security reasons nor for which right of passage governs.[308]

The LOSC regime is more direct with Article 35(a) subject to the Article 8(2) exception, but still implying the same conflict for straits made up of or containing internal

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302Op.cit. at p. 132.

303Koh pp. 13, 14 questions whether the provision of artificial aids precludes a strait from being regarded as a geographical or legal strait. Artificial aids can include *ice-breaking*. The author however interprets the *Anglo-Norwegian Fisheries Case* to, "not establish that artificial aids will render a geographic strait an artificial passage," arguing the Court restricted its classification of the *Indreleie* for the purposes of this case. Additionally, the *Indreleie*, which penetrates into mainland Norway, geographically may have more resemblance to a inland passage than to a strait. Finally, navigational aids are frequently used in such major straits as the Turkish, Malacca and Singapore Straits, all of which have never been claimed to be artificial waterways. The latter appears to be an especially strong argument given the over 90 different IMO traffic separation schemes complete with artificial aids in place around the world undoubtedly covering various congested straits. See Churchill p. 213.

304See Waldock, C.H.M., "The Anglo-Norwegian Fisheries Case," *British Yearbook of International Law*, 28 (1951) 114, 158-159. The author notes the *Corfu Channel Case* itself shows the discrepancy in the Court's reasoning, "(T)he south channel lies between the Greek island of Corfu and the mainland of Greece and is largely enclosed by the long tongue of the island running parallel to the mainland shore. Yet, under previous notions of the law of inland waters, to hold these waters to be inland waters would directly conflict with the Court's principle in the Corfu Channel Case." Waldock concludes hoping that the *Corfu Channel Case* will prevail, "even if this means recognizing a right of innocent passage through inland waters in certain circumstances." O'Connell, D.P., *International Law*, Vol. 1, 2nd ed., Stevens and Sons, London (1970) p. 495, notes that the *Corfu Channel Case* did not establish a customary law right of passage through the territorial sea but merely an exceptional right of passage through straits either in the territorial sea or inland waters. Koh p. 35 answers "(I)t is not quite accurate to include this 'exceptional right' in straits that are 'inland waters' as the case itself relates to straits that are in territorial waters." See also Brownlie p. 282.

305O'Connell p. 316. These are claimed as internal waters because they belong to a single State and are inside the baseline of the territorial sea.

306Churchill p. 87-90 follows strictly the applicability of the TSC, the *Corfu Channel Case* and the autonomous straits regime to the territorial sea.

307O'Connell p. 316.

308Ibid. The author concludes, "(A) codification which failed to cover the most significant categories of straits could only be pronounced a failure..."

waters. State practise of the LOSC regime however does not indicate this as a problem area, except for short periods of time, since apparently there is little precedent for considering such straits as internal waters when subject to transit passage.[309] Australia in 1988, and the U.S., Japan, Spain (for the European Union) and the Federal Republic of Germany protested in 1989 the closure by Indonesia for a short period of time of the Sundra and Lombok straits, but these were apparently reopened.[310] For those who deal with the issue, most doctrine considers that the rights of transit passage or innocent passage by foreign ships in the territorial sea do not extend to internal waters within the strait.[311]

In conclusion though O'Connell probably is correct in his objection to both the TSC and LOSC straits regime with regard to straits made up of internal waters, State practise has dictated something else. Both straits regimes are claimed to be restricted to the territorial waters and most of such internal waters lie away from international routes. Yet should internal waters be claimed in international straits, transit passage appears to prevail.

5.2.6.2. Route of Similar Convenience - Messina Exception - LOSC Article 38(1)

Article 38(1) contains the so-called Messina exception for cases where an island lies off the coast of a State less than 24 miles.[312] As long as there is an equally suitable route through the high seas or exclusive economic zone on the seaward side of the island with respect to navigational and hydrographical characteristics, non-suspendible innocent passage applies. "Similar convenience" includes such factors as time, distance, safety, state of sea, visibility, depth of waters and ease of fixing a ship's position.[313] This has possible relevance to the Russian Arctic straits, since Kolodkin claims there exists, "seawards of the islands which are separated by these straits from the mainland, or between these islands, expanses of high seas no less convenient for navigation."[314]

Applying the hydrographical characteristics and navigational factors mentioned to the Russian Arctic straits it is maintained the Messina exception LOSC 38(1) has questionable

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309Ibid. p. 385. The author notes however that does not prevent such constituting, "fictitious bays, especially when linked with bays properly so-called," with essential characteristics as internal waters. See also Smith and Roach p. 177, 179; Schachte pp. 14-17, 27; and Moore p. 91. Barabolia Butler pp. 140-142, notes straits with internal waters, including those leading to internal seas and in coastal reefs, are regulated without exception by coastal State legislation. A possible exception exists for straits with internal waters that for an extended period have served as international navigational routes which would be subject to transit passage. However none are listed including the Russian, and most of such internal waters are believed to lie away from international routes, leading to ports, internal waters and coasts of a single State.

310Smith and Roach pp. 218, 219, and 228.

311Caminos p. 129-130 notes that subject to the Article 8(2) exception the internal waters retain the status of internal waters notwithstanding the imposition of the LOSC straits regime. Nordquist II p. 306. Nandan and Anderson pp. 171-173. Hakapää pp. 200, 202. Bordunov p. 221. Pharand Arctic pp. 217, 223. O'Connell p. 330 as noted believes the intent was to deal with bays and similar lying within a strait, overlooked in Article 35(a) is the possibility that waters of the strait would be internal waters altogether, but for the fact that they were within a strait. A presupposition is thus made in the LOSC that the autonomous straits regime requires that the waters be characterized as territorial, but this is not stated explicitly.

312Schachte p. 22.

313Nandan and Anderson p. 177. Nordquist II pp. 313, 314, and 329.

314Kolodkin p. 163.

relevance, and the international aspects of the issue will hence not be developed further.[315]

5.2.6.3. Straits Connecting the High Seas and the Territorial Sea of a Foreign State - TSC Article 16(4), LOSC Articles 37 and 38

Another international issue relates to straits connecting the high seas and the territorial sea of a foreign State. Briefly, as seen this is a part of the TSC Article 16(4) geographic definition of a international strait. It is of possible relevance here since Kolodkin uses its presence in TSC Article 16(4) and implicitly in LOSC Articles 37 and 38 to negate the applicability of these Articles to the Russian Arctic straits.[316]

It is submitted however that this issue is of little relevance to the Russian Arctic straits, since the presence of a "dead end" foreign territorial sea has never been the sole condition for either the TSC or the LOSC international straits regime to govern. Article 16(4) states explicitly straits connecting the highs seas *or* a foreign territorial sea, and LOSC Article 37 and 38 set only a condition of geographical connection of high seas and/or exclusive economic zone. Though the strait of Tiran, the reason behind this passage in Article 16(4)[317] is declared by Israel and Egypt to lie within the LOSC regime subject to "free navigation,"[318] this is an exceptional case. A look at the straits which the U.S. views as international subject to transit passage indicates the majority connect high seas, or economic zones of two or more States, not ending in a foreign territorial sea.[319]

With this said the State practise related to the Russian Arctic straits will be compared to the conclusions derived from the international issues.

5.3. State Practise Related to the Russian Arctic Straits Compared to the International Regimes

5.3.1. Introduction

Initially there was little Russian regulation of the Arctic straits. However from the 1960's, legislation and Soviet practise evidenced in the Vil'kitskii Straits Incidents as well as the other documents indicated a increase in national control. The novel Soviet claim for historic straits and interpretation of the TSC 16(4) term "international strait" were forwarded.[320] Controversial concurrent issues chiefly involved the 12 mile breadth of the

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315See Section 5.3.3.2.1. for specific application of these factors to the Russian Arctic straits.

316Kolodkin p. 163.

317See Churchill p. 89.

318Smith and Roach pp. 219-221.

319Ibid. pp. 182-222. These include the Aaland, Bab el Mandev, Bosphorous and Dardanelles, Gibraltar, Hormuz, Kuril, Magellan, Malacca and Singapore, Messina, Northeast and Northwest Passages, Øresund and the Belts, Sunda and Lombok Tiran and the U.K. straits.

320See Section 4.3.1. and Section 8.NEED.

Soviet territorial sea and the authorization requirement for warships.[321] The role the vague sector principle played was unclear.[322] At the same time the Soviet Arctic appeared in theory not to be hermetically sealed off. High seas channels existed through the key straits only vaguely claimed historic as well as independent of the TSC Article 16(4) regime. An abbreviated form for innocent passage appeared possible in the territorial sea, limited by the warship authorization requirement.[323]

Little changed in the *formal* position of the Soviet Union well into the 1970's.[324] The Soviets had yet to use straight baselines in delimiting their territorial sea though they had enabling legislation since 1971. The authorization procedure for foreign warships passing through the territorial sea remained the same.[325] However extensive Soviet national legislation was adopted in the 1980's and 1990's claiming the waters of the Arctic straits as internal, setting forth pilotage requirements in key straits and also requiring these standards for warships. As seen changes in the international straits regime were also occurring in the late 1970's, with active participation of both the Soviet Union and the U.S. which had effects on the regime of the Arctic straits.[326]

The U.S. practise was also contradictory. Generally, the U.S. continued to refuse to recognize a 12 mile territorial sea, nearly accepted as customary law, with subsequent consequences for passage through straits 24 miles or less in width both international, national and non-international. In spite of the declarations by the U.S. State Department that traditional law of the sea provisions, within the framework of the LOSC, apply in the Arctic, its practise has been less than assertive. All foreign surface ships, both public and commercial, appear to have complied with the domestic Russian provisions with the exceptions of the incidents in the 1960's. It is only submarines chiefly from the U.S. but also from the U.K. and France, which may occasionally transit the Russian Arctic straits, though which are traversed is difficult to say.

Thus the issues presently relate to a strict nationalization of the specific key straits and generally the other Arctic straits under Russian claims for navigational safety and environmental protection. At the same time international developments surrounding transit passage have not only been followed by the Soviet Union and Russia but also promoted except for the majority of its own straits. This contrast is accentuated even more by contradictions appearing within the Soviet legislation.

In the Sections that follow issues arising from State practise in relation to the international issues presented above will be addressed. These include the consequences for

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321See Section 7.NEED

322See Section 1.3.

323See Sections 4.3.1., 7.NEED, 8.NEED and 9.NEED for the Soviet Russian legislation.

324Butler p. 126.

325Butler, William. E., *The Soviet Union and the Law of the Sea*, (1971), (Butler Soviet Law), p. 200. The author notes, "(I)t is impossible to know at this point whether the 1960's should be looked upon as a distinct period of transition in Soviet maritime law or as part of a longer era whose end is still undetermined."

326See Sections 5.2.2., 5.2.3. and 5.2.4. Koh p. 107 notes however the Soviet position as a maritime power was still more "friendly" to the concerns of the States bordering straits.

the Russian Arctic straits of the LOSC's straits provisions status under customary international law, and consequences for the same of the international limits to prescription and enforcement jurisdiction.[327] For the Russian Arctic straits this reduces chiefly to the possibility for a local customary regime for the Arctic practised by Russia, Canada and the U.S. Few if any other States are involved in carrying out a practise and recognition of a straits regime in the Arctic. Even this local regime may be less than clear with some straits possibly subject to this regime, others more questionably so.[328]

This discussion will be organized taking up first the consequences for the Russian Arctic straits of the customary status under international law of the LOSC straits provisions. Conclusions will then be forwarded including recommendations for some resolution of the disputed points.

5.3.2. Consequences for the Russian Arctic Straits of the Customary Status under International Law of the LOSC Straits Regime

It was submitted in Section 5.2.2. that it was doubtful that the LOSC straits regime has passed into international customary law.[329] The effect of this in relation to the Russian Arctic straits is interesting.

Generally since the right of transit passage cannot yet be deemed to have passed into international customary law, if these straits are not considered international,[330] there clearly is justification for Russia both to legislate and enforce its national legislation over its Arctic straits within the international limits allowed under the usual rules governing internal waters, the territorial sea and the exclusive economic zone.[331] Even broader limits may be applicable under LOSC Article 234 based upon Arctic State practice, but it is also doubtful this provision has passed into customary law.[332] If they are deemed international then there is clearly justification for Russia to legislate and enforce up to the limits allowed under Article TSC 16(4), non-suspendible innocent passage.[333] At the same time the establishment of a Soviet 12 mile territorial sea, though controversial in 1960 and possibly in 1982, has now developed into firm international customary law due to the majority of

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327For other disputed points see Chapter 7 for resolution of the issues related to non-tested innocent passage without sea lanes in the Arctic; prior authorization for innocent passage in the territorial sea for entry into internal waters; and denial of innocent passage in internal waters in spite of TSC 5(2) and LOSC 8(2). See Chapter 8 for resolution of historic claims and the Sector Principle. See Chapter 9 for resolution of the expansion of national legislation beyond Article 234's "due regard to navigation and...the marine environment limits," temporal or spatial application,, foreign and national discrimination, and scope of navigational exclusion inherent in Article 234.

328See Section 5.3.1.

329As seen ratification of the LOSC by Russia would firmly attach application of the LOSC strait regime to the Russian Arctic straits subject to the exceptions noted below. See Section 5.2.1.

330See Section 4.3. and 4.4. for discussion of "international use" of the Russian Arctic straits.

331See Section 7.NEED for discussion of TSC Articles 14 and 16 and LOSC Articles 17-26 and 29-32. See Section 9.NEED for discussion of LOSC Articles 211, 218, 219 and 220.

332See Section 9.NEED. See also Section 5.3.3. below for a brief description of Article 234.

333See Section 5.2.2.1. and 5.2.3.1.

States following this rule.[334] Consequently the present situation, under the U.S. view, with respect to the Russian Arctic straits appears to be that feared by the maritime powers including the U.S. and the Soviet Union under UNCLOS III, a 12 mile territorial sea limit without transit passage through various straits previously containing open sea lanes.

Closer examination of the specific straits reveals that of the some fifty eight straits, only ten are directly affected having widths greater than six miles but less than twenty four miles.[335] The majority range under six miles in width. The Kara Gates (separating the Barents and the Kara Seas), the Dmitrii Laptev and Sannikov (separating the Laptev and East Siberian Seas), the Blagoveshchensk (separating the Laptev and East Siberian Seas), the Long (separating the East Siberian and Chukchi Seas), and the Gorlo Straits (White Sea), all theoretically have high sea channels following expansion to the 12 miles territorial sea.[336] Those ten straits affected include the British Canal, the De-Bryyn, and the Nightingale (the Franz Josef Islands), the Orlovskaia Salma (in the White Sea), the Ovistyn (Kara Sea), the Vil'kitskii and the Shokal'skii, (both separating the Kara Sea and the Laptev Sea), the Murmanets (in the Laptev Sea), and the Zaria (separating the Laptev and the East Siberian Seas).[337] It is however the Vil'kitskii, the Shokal'skii and the straits in Franz Josef which have chief importance due mainly to depth, though the others may be used irregularly depending upon the ice conditions.[338]

Interestingly in 1992 and 1994 the U.S. State Department published statements made in the Vil'kitskii Straits incident, but lacking remarkably current specific claims for transit passage through these Arctic straits in the Northeast Passage.[339] This would imply that the statements made by the U.S. from the mid 1960's remain the U.S. position on the Northeast Passage, however, the U.S. also in these statements reserved its rights for waters "whose status it regards as dependent on the principles of international law and not decrees of the coastal state," which would seemingly leave the way open to demand the right of transit

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334See Brownlie p. 189 and Churchill p. 67. The U.S. in 1988 adopted the 12 mile limit. See Proclamation No. 5928, 54 *Federal Register* 777 (1989), and Smith and Roach p. 93. For Soviet legislation see Article 3 of the 1960 Statute and Article 5 of the 1983 Statute, see Section 7.NEED.

335See Butler 39-41. Until an official description of these straits is obtained Butler's figures will be used. Those as seen Russian Charts have been obtained more closely describing the Arctic straits, an official sailing description has not.

336These as noted are claimed internal waters under other theories.

337Butler pp. 39-41. The Gorlo Straits, British Canal, De-Bryyn, Nightingale, Orlovskaia, and Salma are not technically part of the Northern Sea Route but are included due to their Arctic location and their including in a consistent Russian State practice. See Section 4.3.1. for 1991 Rules Article 1.2. It seems as well possible that the straits in Franz Josef could be sailed dependent upon ice conditions.

338See Section 4.3.3.

339See Section 4.3.1., *U.S. Limits* No. 112, pp. 68-72 and Smith and Roach pp. 200-207. Direct claims are made for the same through the Northwest Passage and other straits. *U.S. Limits* No. 112 pp. 61-73, and Smith and Roach pp. 177-229. Nowhere else in fact regarding U.S. claims for passage rights through straits does the wording appear so ambiguous, muted and out of date as it does for the Northeast Passage.

passage for the Russian Arctic straits shown to be international.[340] This is supported by other official statements which could also be interpreted to make such a claim.[341]

Thus it is submitted that the dilemma which internationally caused much concern for the U.S., the Soviet Union, and other marine powers and was as noted one of the key reasons for the UNCLOS III negotiations, continues to be an issue related to the Russian Arctic straits.[342] Thus even if these straits become "international" and pending Russian ratification of the LOSC, the indefinite TSC Article 16(4) regime will apply with possibilities for suspension of innocent passage based upon a coastal State appraisal as to threats of its presence, good order or security under TSC Articles 14(4) and 16(1) and (3). Correspondingly there is no right to submerged passage through territorial waters of the straits, of special importance here. At the same time the warship notification and authorization requirement may not apply under the Soviet reservation to TSC Article 23. This is due to the U.S. - U.S.S.R. Joint Statement,[343] wherein innocent passage without notification and authorization is confirmed. Issues related to the LOSC straits regime however need to be considered in relation to the Russian Arctic straits, in spite of this regime's non-customary status and Russia's pending LOSC ratification. There is tendency towards international acceptance of the LOSC straits regime, especially through the Convention's entry into force and continuing State accession particularly by developed States.[344]

With this said, the issues related to the interface between the prescription and enforcement LOSC Articles and TSC Article 16(4), and the State practise will now be discussed.

5.3.3. Limits of Prescription and Enforcement Jurisdiction over the Russian Arctic - Straits - Ice-covered Areas

5.3.3.1. Introduction

It will be shown in the following Sections considering the problems of interpretation noted, should the Russian Arctic straits be considered international, legislative and enforcement jurisdiction evidenced in Russian legislation and practise generally fall outside the proper limits set by either the LOSC regime or TSC Article 16(4), and to a lesser

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340*U.S. Limits* No. 112 p. 69, and Smith and Roach p. 202.

341Smith and Roach p. 182 and *U.S. Limits* No. 112 p. 63 state, "(T)he United States position on navigation through international straits and its response to excessive claims can best be illustrated by looking at particular international straits. The following examples however, do not include all straits the United States considers subject to the transit passage regime." This position is also supported by the U.S. State Department statement that the U.S. will ignore provisions it believes exceed its interpretation of the LOSC straits provisions. Roach Interview, 27 June, 1994, discussing directly the Russian Arctic straits. It is also supported by the U.S. Navy Statement, Schachte pp. 18-19, ice-covered straits are subject to transit passage for submarines and aircraft. See Section 9.NEED.

342See Section 5.2.1.

343U.S. - U.S.S.R. Joint Statement of Uniform Interpretation of Rules of International Law regulating Innocent Passage, 28 *International Legal Materials* 1444 (1989) (U.S. - U.S.S.R. Joint Statement). See Sections 4.3.1. and 7.NEED.

344In spite of the controversy doctrine address the LOSC straits regime in addition to the anti-pollution regime and have done so for years. See Churchill pp. 90-96, pp. 241-282, and Brownlie pp. 283-284 and 224-225.

extent the LOSC and TSC innocent passage regimes. This however is mollified by the U.S. practise in its own coastal State legislation which also generally falls outside the same regimes. Though it is doubtful the LOSC Article 234 regime would theoretically have dominance over the LOSC international straits regime,[345] the State practise of the U.S. as a coastal State applied in the Arctic arguably counters these traditional regimes, and *supports* the Russian and Canadian domestic legislation adopted under Article 234.[346] Developments indicate that contrary to the *Corfu Channel Case* and international customary law, it is the type of ship which determines the passage, through both international and non-international straits in the Arctic. This includes on the surface commercial ships regulated by national provisions generally consistent with Article 234, surface public ships not sailing or arguably complying with national legislation generally consistent with Article 234, and submarines occasionally sailing consistent with the LOSC international straits regime.

The views of doctrine on the international issues have been noted. Western doctrine has not addressed specifically the jurisdictional limits in the Russian Arctic to any great extent.[347] Russian doctrine as indicated has dealt specifically with jurisdictional issues in the Russian Arctic, but that published recently in the West is believed to forward a State position.[348]

5.3.3.2. The Russian Position

It is submitted the Russian position is vulnerable despite the plethora of regimes claimed for the straits to achieve the desired status of internal waters. The interface of the international straits regime with Article 234 is unclear, but it seems unlikely the U.S. will

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345Professor Pharand in his review of 31 May 1996 is in disagreement, noting that arguments for "dominance" of Article 234 include that it constitutes a special and autonomous section (Section 8 of Part XII), and application of that Section is not excluded for international straits as are other pollution provisions in Sections 5, 6 and 7 (Article 233). These issues are addressed in Section 9.NEED., however arguments for "dominance" of the LOSC international straits regime are based upon the consistent U.S. State practise as a marine power and its position during negotiations of the TSC and LOSC international straits regime. See Section 5.2. Briefly though it is not completely clear what took place in the negotiations between the U.S., Russia and Canada in drafting LOSC Article 234, see Section 9, it seems unlikely that with the strategic interest shown by the U.S. in international straits, it would negotiate away rights of passage even in the Arctic straits. Smith and Roach p. 214 seem to confirm this concerning specifically the Canadian Arctic. U.S. Secretary of State Schultz noted in a joint press conference following signature of the Canadian - U.S. Agreement of 1988 in response to a question whether the U.S. would recognize Canada's claim to Arctic waters if U.S. military vessels and submarines were given free access to Canadian Arctic waters in times of crises, "the answer to your question is no." See Section 9.NEED. On the other hand as seen Reisman is sceptical to the rationality and predictability shown by U.S. negotiators in granting concessions in the international straits regime. See Section 5.2.5.3.2.

346See Section 9.NEED. Briefly Article 234 provides that coastal States have the right to unilaterally adopt and enforce laws and anti-pollution regulations, including design, equipment, construction and crewing and discharge norms, in the exclusive economic zone where particularly severe climatic conditions and ice-coverage for most of the year create navigational obstructions or exceptional hazards, and marine pollution could cause major harm to or irreversible disturbance of the ecological balance. Such provisions must have due regard to navigation and to marine environmental protection and preservation based on the best available scientific evidence.

347Those found include Butler, Boyle, Franckx and Pharand Arctic, to whom reference will be made where relevant.

348See Sections 4.3.1. and 5.2.2.2. See Butler pp. 71-91; Butler Soviet Law pp. 33-40, 104-115 and 117-133; Pharand Arctic pp. 107-110, and Franckx pp. 145 to 228 for comprehensive references to Soviet and Russian doctrine.

retreat on its claim for dominance of the straits regime.[349] Presently the non-internationality of the Russian Arctic straits can legitimately be claimed, thus avoiding the international straits regime, either LOSC transit passage or TSC non-suspendible innocent passage. Transit passage is likewise presently avoided through the doubtful passage of the LOSC straits regime into international customary law, as well as pending Russian LOSC ratification. Both of these however are not static. This would thus bring the Russian claim for the straits as internal waters to rest squarely upon the doctrine of historic title and the TSC Article 5(2) innocent passage exception.[350] As will be seen neither historic title nor the TSC Article 5(2) exception arguably falls in Russia's favour.[351] It is also questionable whether the exceptional arguments concerning the *Indreleie*, the Messina exception or the lack of a foreign territorial sea applied to the Northern Sea Route would succeed. First these issues will be briefly addressed in the next Section.

5.3.3.2.1. *Indreleie*, Messina Exception, and Lack of a Foreign Territorial Sea

It is questionable whether the *Indreleie* legally characterized as internal waters applied to the Northern Sea Route would succeed. As seen Kolodkin relegates to the regime of straits in internal waters, "virtually all the straits of the Soviet part of the Arctic..." likening them to the *Indreleie*.[352] Kolodkin is obviously attempting to place the Russian Arctic straits in the grey area created by the confusion that arose between the *Corfu Channel Case* and the *Anglo-Norwegian Fisheries Case*,[353] however, it is questionable whether these arguments could be supported by the latter. As indicated in the Vil'kitskii Straits Incident one of the main points relied upon by the Soviets was the authorization requirement for warships sailing in the *territorial seas* including the Arctic straits. It would thus seem difficult to retract this classification for that of internal waters in spite of any similarity between the Russian Arctic straits and the Norwegian *Indreleie*. Along similar lines, as seen the Soviets vaguely claimed under historic theories the Arctic straits and polar seas as internal waters under Article 4 of the 1960 Statute and the 1971 Statute.[354] However in practise the Soviets allowed U.S. ships in the polar seas in the early and mid 1960's, and the *U.S.C.G.C. Storis* and the *U.S.C.G.C. Glacier* provided support to geological studies in the Chukchi Sea including the Soviet part in 1969 and 1970 respectively.[355] It could be questioned what the difference is between the Vil'kitskii straits and other straits claimed historic waters, and these seas, all of which are claimed internal waters.[356] These conflicts would arguably support the argument that the Arctic straits and seas were not regarded in

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349See Section 9.NEED:

350This submission is supported by Pharand Arctic p. 228, and Boyle p. 328. Boyle notes further that regarding straits whether or not the area of application of Article 234 is widely or narrowly defined, the permissibility of restriction on navigation may have to vary according to the status and circumstances of the waters in question.

351See Sections 7.NEED and 8.NEED.

352Section 4.3.1. and Kolodkin p. 163, 166.

353See Section 5.2.6.1.

354See Section 4.3.1. and 5.2.6.3.

355Franckx pp. 162, 211 footnote 230.

356Ibid.

practise as internal waters as asserted under historic title as well as the claims made in relation to the *Indreleie*.

Kolodkin also seeks to equate the Russian Arctic straits, the Canadian Arctic straits and the Norwegian *Indreleie* all as Arctic straits. While Canada designated its Northwest Passage as internal waters, this is controversial and accepted neither by the United States nor the European Union.[357] Kolodkin also incorrectly draws a connection between the *Indreleie's* status as a strait and of being relegated to the status of internal waters by the ICJ.[358] The ICJ specifically stated in the *Anglo-Norwegian Fisheries Case* that for the purposes of the case the *Indreleie* is not a strait but a navigational route set up by Norway with artificial navigational aids. Finally the *Indreleie* also geographically may have more resemblance to a inland passage than to a strait due to its penetration into mainland Norway, something difficult to claim for the Russian Arctic straits.[359] On the other hand the *Anglo-Norwegian Fisheries Case* unquestionably provides legal precedent for coastal States regulating passage in straits of some similarity to the *Indreleie* and may provide some precedent for maintaining that the provision of artificial aids disqualify a strait from being regarded as a geographic or legal strait. A positive application of this latter argument concerning "ice-breaking" might seemingly strengthen the Russian claims over icebound straits since they would automatically be precluded from being considered as a geographic or legal strait. However as noted navigational aids are frequently used in straits all over the world including major ones, none of which have ever been maintained to be artificial waterways.[360]

Kolodkin's argument surrounding the Messina exception, applying to the Russian Arctic straits,[361] also doubtfully would succeed. It is submitted that using a broad interpretation taking into account all the relevant geographical and other circumstances relating to a route of similar convenience, most of the Russian Arctic straits fall without. Although the exception applies to the strait of Messina between Italy and Sicily, and the Pemba Channel off the coast of Tanzania, Sicily a single island of substantial size, the Russian island groups are considerably larger.[362] Generally since any channels through the high seas or exclusive economic zone are claimed internal waters enclosed by baselines,[363] any route of similar convenience means sailing northward of the entire island group. In addition to greater distances, this implies greater difficulties to general safety and ease of fixing a

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357*U.S. Limits* No. 112, pp. 71-72. Smith and Roach, pp. 67, 88, footnote 57 note the European Union position and cite the British High Commission Note No. 90/86 of July 9, 1986, reported in American Embassy Paris telegram 33625, July 24, 1986.

358Kolodkin pp. 163, 166.

359Koh. p. 14.

360Section 5.2.8.1. Koh pp. 13-14.

361See Section 5.2.6.2. and Kolodkin p. 163.

362*The Times, Composite Atlas of the World*, Times Newspapers Limited (1973) (Atlas), pp. 50, 51, 82, indicates the respective differences to Sicily range from roughly 4.7. (Novaya Zemlya); 2.7, (Severnaya Zemlya); and 1.7. (Novosibirsik Islands).

363See Sections 5.3.3.2. and 6.2.3.

position at these latitudes, though admittedly ice conditions may be less in some years.[364] Interpreted strictly the Messina exception would seem limited to cases such as Pemba Channel off the coast of Tanzania, which would have little relevance to the Russian Arctic. Most of the Russian islands exist in groups or archipelagos, and where single islands occur, the majority are more than 24 miles off the mainland coast.[365] If this is disregarded, the exception would still have doubtful application, due to the Russian legislation,[366] in which any possible channels consisting of high seas or exclusive economic zone, such as through the Kara Gates Strait, are claimed as internal waters. That the route which consequently must go north of Novaya Zemlya lacks similar convenience fairly speaks for itself.

The argument surrounding the lack of a foreign territorial sea applied to the Russian Arctic straits also would doubtfully succeed.[367] The Russian Arctic straits, not ending in a foreign territorial sea, are not the exceptional case, but the general to which both the TSC and LOSC regimes clearly can apply depending upon use.[368]

Finally a point against the Russian straits regime involves Western acquiescence to the Russian claims.[369] As noted the U.S. released diplomatic statements indicating the Russian Arctic straits were subject to free passage or non-suspendible innocent passage in the Vil'kitskii incidents in the 1960's, updated in 1992 and 1994.[370] As seen the probability also exists that the U.S. occasionally runs its submarines through some of the Russian Arctic straits.[371] On the other hand few if any other Western States seem to have protested the Russian claims, including the U.K., the European Union, Norway and possibly France.[372]

With the exceptional issues addressed the more central issues governing the interface between the Russian straits regime and the international regimes will now be addressed. As above assumptions will be made as to the dynamic status of internationality and passage of the LOSC straits regime into customary law or Russian ratification of the LOSC, in order to indicate the limits which eventually may develop. Three different alternatives will be addressed, the LOSC international straits alternative, the TSC international straits alternative, and the LOSC and TSC non-international straits alternative in relation first to surface passage and then submerged passage.

364See generally Jørgensen, Tore, "Synoptic Ice Characteristics of the Northern Sea Route," *International Challenges*, Vol. 12. nr. 1, 1992, pp. 68-74.

365See Sections 6.2.3. and 6.2.4.

366See Section 4.3.1.

367See Section 5.2.6.3.

368Ibid.

369Kolodkin p. 166.

370See Section 4.3.2., Smith and Roach pp. 200-207 and *U.S. Limits* No. 112, pp. 6, 16, 68, 71. Section 5.3.3.3. for an analysis of the U.S. declarations under international law.

371See Section 4.3.3.2.

372Kolodkin Interview, 25 February, 1995; Robin Churchill, 16 June 1994 regarding the U.K. and the E.U.; Assistant Director General, the Norwegian Foreign Ministry, Dag Mjaaland, May 1994 regarding Norway; and unanswered question to Officials of the French Defense and Foreign Ministries, INSROP Meeting, Paris, November 1993.

5.3.3.2.2. Passage of Public and Commercial Surface Ships

5.3.3.2.2.1. Alternative - LOSC International Straits Regime

Making the assumption that the Russian Arctic straits become international and historic title fails, and the LOSC straits regime international customary law or Russia ratifies the LOSC, Article 234 under which the Russian rules are based, is arguably subordinate to the LOSC straits regime.[373] Even if this latter submission is viewed questionable, the U.S., the world's largest marine power has indicated it will practise such.[374] As such, in the absence of special agreements and in spite of the ice, the normal limits *traditionally* related to "generally accepted" safety and "applicable" pollution provisions apply.[375] Under Article 44, transit passage through international straits probably cannot in any way be suspended nor hampered by coastal State provisions with no exceptions being the rule. Though compliance is required under Article 39(2) by ships with "generally accepted" international regulations, procedures and practises for safety at sea and national regulations adopted through the IMO related to sea lanes and traffic separation schemes (as well as possibly the other "generally accepted" international safety provisions implemented nationally), under Article 41 nothing more extensive than sea lanes and traffic schemes adopted through the IMO may be prescribed by Russia in its Arctic straits without hampering or suspending passage. Compliance is likewise required under Article 39(2) by ships with "generally accepted" international regulations, procedures and practises governing pollution. However pollution provisions adopted by Russia must give effect to "applicable" international provisions covering oil and noxious substances under Article 42. This means Russia with justification may legislate discharge provisions as strict as, but not stricter than, "applicable international regulations" of MARPOL 73/78 Annexes I and II to which the ships from all States would have to comply. The provisions could not however include rules dealing with the design, construction, manning or equipment of foreign ships in excess of MARPOL 73/78 Annexes I and II. Traditionally, in the absence of special agreement no measures may probably be taken by Russia for violations of these national provisions, both covering pollution and safety, than proceedings taken at a later time in a Russian port. Anything otherwise would hamper, impair, deny or suspend transit passage in violation of Articles 42(2) and 44. For warships or other public vessels entitled to sovereign immunity under Article 236, redress must be had through diplomatic channels under Articles 42(5), 235 and 304 covering responsibility and liability for loss or damage caused. There is no right to require a warship to leave a strait, similar to that in Article 30 in relation to the territorial sea, as long as it exercises transit passage. For other vessels arrest in the strait traditionally is seen to undermine the right of transit passage, while arrest in a port in the appropriate circumstances for a violation committed in the strait is proper. Related to pollution, measures under Article 233 traditionally are seen as exceptional, enforcement in a strait creating hazards and not probably being contemplated under Article 42(2). Since for the marine powers transit passage is seen as approximating passage on the high seas, the Article 42(2) requirement against denying, hampering, or impairing transit passage can be

373See Section 9.NEED.

374Ibid.

375See Sections 5.2.3. and 5.2.4. It must be emphasized these conclusions are based upon the traditional view of transit passage practised by Russia, the U.S. and the maritime powers and supported by the majority of doctrine.

expected to be even more zealously guarded than the similar requirement found under Article 24 for non-hampering of innocent passage. Interpreted liberally, it seems therefore doubtful that an implied right to detain ships exists for environmental violations when deemed necessary under Article 233, in excess of that allowed under Articles 218, 220 and 226, if that. The Malacca Agreement was however negotiated allowing for enforcement including denial of passage under Article 233 of a minimum under-keel-clearance of 3.5. meters without a violation of Articles 42(2) and Article 44.[376] Thus there exists precedent for the Russians to adopt design requirements through the IMO and interested shipping States regarding minimum depth, which could be enforced including preventing passage to avert major environmental damage or threat of such.

Thus, for the Russian Arctic straits all the unilaterally adopted Russian anti-pollution and safety requirements[377] *exceed* the LOSC limits under Article 42(1) incorporating MARPOL 73/78 and sea lanes and traffic schemes for international straits.[378] These include specifically pilotage under the 1991 Rules Article 7.4., notification and authorization under Article 3, fees under Article 8.4., inspection when deemed necessary under Article 6, liability certificates under Article 5, suspension when deemed necessary and removal for violations of vessels under Articles 9 and 10.[379] Further excesses include Article X of the compulsory ice-breaking convoying and pilotage;[380] Article 3 of the 1984 Environmental Edict[381] prohibiting navigation without pilotage; or other escort, or without compliance with special *construction, equipment and crewing* provisions in adjacent coastal areas with dangerous and severe climatic conditions and ice;[382] Article 15 of the 1984 Economic Decree, supported by Article 15 of the Environmental Edict, permitting request for information and inspection upon clear grounds and arrest and detention for *illegal discharges, illegal operation in special areas, and illegal discharges and operation in ice-covered areas* where there is clear and objective evidence of such;[383] Article 1-1 of the 1984 Environmental Edict allowing fines and *prison terms* for illegal dumping, but including discharges, or for failure to take necessary measures to prevent such in the

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376See Section 5.2.4.

377See Section 4.3.1.

378These provisions also exceed the Articles 211(4) and 211 (5) regulating respectively the territorial sea and the exclusive economic zone.

379Several of these also exceed Articles 211(4) and 211(5) regulating respectively the territorial sea and the exclusive economic zone. See Section 9.NEED.

380"System for Navigating Ships in the Vil'kitskii, Shokal'skii, Dmitrii Laptev and Sannikov Straits", 1 Annex *International Legal Materials* 189 (1986) (1985 Rules).

381Butler, William E. , "The USSR, Eastern Europe and the Development of the Law of the Sea," 1987, (Butler Development Law), Edict on Intensifying Nature Protection in Areas of the Far North and Marine Areas Adjacent to the Northern Coast of the USSR, (1984 Environmental Edict), Butler Development Law, J.4., p. 1. Franckx p. 180 sees these rules as parallel to the 1972 *Izveshcheniia Moreplavateliam* rules enacted under the 1971 Statute.

382Article 3 as well includes other measures serving the safety of navigation and prevention, reduction and control of marine environmental pollution which may include discharge standards.

383Several of these provisions also exceed the general LOSC inspection and arrest system of Article 220(3) (5) and (6), of which MARPOL 73/78 standards is a part, requiring clear grounds and clear objective evidence before such measures are instigated. See Section 9.NEED and Franckx Pollution pp. 165-167, 170-171.

territorial sea;[384] Article 14 of the 1984 Environmental Edict providing for possible criminal responsibly for violations of its Article 3 fashioned upon LOSC Article 234;[385] Articles 1 and 15 of the 1983 Statute[386] requiring foreign warships to navigate with a State marine pilot or mandatory compliance with these standards; Article 5 of the 1983 Rules[387] requiring warships to observe navigation and other rules, and pilotage and ice-breaking services to be used where compulsory; Articles 4(a) and 4(e) of the Statute on the Protection of the Economic Zone of the USSR a Section of the 1984 Economic Edict[388] permitting stopping, inspection, detention and arrest in the exclusive economic zone for violations of the authorization requirement or established Russian rules; Article 4 of the 1985 Protection Statute allowing special measures including navigational practises and vessel traffic to be established in special areas by the USSR Council of Ministers to prevent vessel-source pollution;[389] Article 3 of the 1983 Rules requiring for *submarines* surface passage in the territorial sea, internal waters and ports, and Article 5 pilotage and ice-breaking services for warships in those areas where this is compulsory, and Articles 14 and 15 compulsory notification and authorization; Article 13 of the 1983 Statute[390] requiring submarines to effectuate innocent passage through territorial waters following the procedure established by the USSR Council of Ministers, including navigating on the surface and flying their own flag; Article 20 of the 1983 Statute Article 20 defining submerged passage in Soviet waters, with "waters" defined to be the territorial sea and internal waters, to be violations; Article 9(e) of the 1993 State Boundary[391] requiring foreign warships to exercise innocent passage in conformity with Russian legislation, including submarines navigating on the surface showing their flags;[392] Article 25 requiring foreign warships in the absence of other

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384In addition to being in excess of Article 42(1)(b) this is also in excess of that allowed under Articles 211(4) and 230(2), which allow only monetary penalties for violations in the territorial sea of national rules or applicable international provisions except for wilful and serious pollution. See Section 9.NEED.

385In addition to being in excess of Article 42(1)(b) this is also in excess of LOSC Article 211(5) and 230(1) allowing only monetary penalties for such violations in the exclusive economic zone. See Section 9.NEED.

386Law on the State Boundary of the U.S.S.R., 22 *International Legal Materials* 1055 (1983), (1983 Statute). Entered into force March 1, 1983. See also Butler Development Law C.1.

387"Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters and Internal Waters and Ports of the USSR" (1983 Rules), Butler Development Law C.2. p. 1. The 1983 Rules replace the 1960 Rules.

388Statute on the Protection of the Economic Zone of the USSR a Section of the 1984 Economic Edict, Butler F.2. This is in excess of Article 233. "Clear grounds" are necessary for pollution inspections arguably within the limits of Articles 230(3), (5) and (6). It appears that these provisions however do not mitigate the search and arrest provisions for safety violations as they do the environmental since safety is not mentioned. See Section 9.NEED.

389Statute on the Protection of the Economic Zone of the USSR, (1985 Protection Statute), Butler Development Law, F.3.

390Law on the State Boundary of the U.S.S.R., 22 *International Legal Materials* 1055 (1983), (1983 Statute). Entered into force March 1, 1983. See also Butler Development Law C.1., p. 1.

391Law of the State Boundary of the Russian Federation, 1993, (1993 Statute), obtained from Rtd. Admiral Yakovlev, Russian - American Seminar, Moscow, 26 August, 1995, Unofficial translation by Dr. Alexandra Livanova, St. Petersburg University, St. Petersburg, Russia. "Historic straits" is noted to have been retained by Article 5(2) of the 1993 Law on the State Boundary. N.D. Koroleva and V. Markov, A. Ushakov, "Legal Regime of Navigation in the Russian Arctic," Moscow 1995, (Koroleva, Markov and Ushakov), pp. 82. English version to be released as a INSROP Working Paper. This contradicts Kolodkin p. 163, and Kolodkin interview 25 February, 1994, where it was indicated that the Russian position was less reliant upon historic use. The 1993 Statute will be discussed more extensively when an official version is obtained.

392The former presumably reiterates the requirement for compulsory pilotage for warships under the 1983 Statute.

rules, to receive permission from the authorities to enter Russian internal waters and ports, and from the above legislation which would include all the Arctic straits; and Article 17 of the 1984 Environmental Edict together with Article 1 of the 1990 Decree[393] which leave the possibility open for these environmental provisions to also be applicable beyond the exclusive economic zone, including high seas zones through the straits, by the terminology, "adjacent to the northern coast."

The new Russian Rules on Internal Waters, the Territorial Sea, the Contiguous Zone, the Economic Zone and the Continental Shelf are still under review,[394] and the Requirements for the Design, Equipment, and Supply of Vessels Navigating the Northern Sea Route (1994 Design Requirements), and Guide to Navigation through the Northern Sea Route (1995 Navigation) are adopted and are to be translated and received soon. These provisions are not expected to greatly alter the scope of those presented here and would exceed the LOSC and MARPOL 73/78 standards.

The 1991 Rules and supporting legislation indicated applies to both commercial and public vessels. For public vessels these requirements interfere with sovereign immunity guaranteed under Article 236 and hence are in excess. Under Article 236 public ships are subject only to the requirement that they act consistently, so far as is reasonable and practicable yet without impairing their operations or operational capabilities, with LOSC environmental provisions, which is too weak and vague to require warships to submit to leading and ice-breaker convoying since their operations and operation capabilities would be impaired. The immunity exception has even broader application under customary law and includes the IMO conventional provisions.[395]

Perhaps even more comprehensive are the unilaterally adopted and partially enforced U.S. OPA 1990 and supporting legislation.[396] Application of OPA 1990 is restricted to "navigable waters" which is vaguely defined as the waters of the United States, besides including the territorial sea could also include the exclusive economic zone.[397] Although difficult to justify elsewhere in the exclusive economic zone, these provisions could be more easily justified for ice-covered areas in the Arctic under Article 234. Since as seen the U.S. is the main opponent to the Russian straits regime, as well as the Canadian, the requirements set by the U.S. in its exclusive economic zone including in the Arctic would arguably set the stage for the formulation of local rules including ice-covered straits. Specifically these include requirements for *commercial* vessels for design, construction,

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393No official translation has to date been received. This translation appears as an Appendix to Franckx, Erik, "Nature Protection in the Arctic: A New Soviet Legislative Initiative, 6 *International Journal of Estuarine and Coastal Law*, 377-383, 1991 (1990 Decree). This term is used in all the Articles of the 1990 Decree.

394Unpublished. The political problems in the Parliament has contributed to the delay, and the expected date of adoption is uncertain. Speech Professor Kolodkin, Russian - American Seminar, Moscow, 25 August, 1994. An Environmental Decree of 1994 has been received from Senior Researcher Elena Nikitina, Russian Academy of Sciences, (in Russian) and will be more extensively discussed when an official translation is received.

395Churchill p. 260. Birnie, Patricia W. and Allan E. and Boyle, *International Law & the Environment*, 1994, (Birnie and Boyle), p. 129.

396See Section 9.NEED.

397OPA §1001(21).

equipment and crewing standards, discharge standards, civil liability, reporting, compliance with official orders, licensing of pilots, monitoring and tracking of vessel movements, and directed radio communications.[398] Non-compliance can result in denial of clearance, denial of entry into U.S. waters, detention and seizure and forfeiture.[399] There also may be a possibility for ensuing criminal liability under supporting U.S. legislation.[400] Special areas of sorts are provided for in the Alaskan Prince William Sound and the Cook Inlet regions.[401] If considered in this manner that local international rules are in the process of being established for the Arctic including the straits, then generally *most of the Russian requirements listed above are clearly within acceptable limits for commercial ships.* It is only *fees* under the 1991 Rules Article 8.4., *obligatory ice-breaker-assisted pilotage and ice-breaker leading* under 1991 Rules Article 7.4. and *possible application to the high seas* under Article 17 of the 1984 Environmental Edict together with Article 1 of the 1990 Decree which generally may exceed the U.S. rules for commercial ships.[402] For *public vessels* the Russian rules including the requirement that submarines navigate on the surface showing their flags in international straits are clearly in excess due both to the Article 236 exception as well as falling outside the application of the U.S. legislation, which does not include public vessels. Similarly the Canadian legislation also generally falls within these local limits for commercial ships but for public ships without the limits.[403] The effect the efforts of the semi-official Working Group on Harmonization of Polar Ship Rules will have on local Arctic rules, with its Code intended for IMO adoption, is still too early to state,[404] however it also generally supports the development of Arctic design, construction, manning and equipment standards under the auspices of LOSC Article 234.[405]

The submissions made discount the effect the local Arctic provisions have on the traditional international straits regime on which both the maritime powers Russia and the U.S. are dependent especially for their submarines.[406] Although the local Arctic provisions

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398OPA §§ 1001, 1016, 1004, 4106.

399Ibid.

400Speech, Attorney at Law Norman Ronneberg, San Francisco, California, 26 April, 1995, at the Institute for Maritime Law, University of Oslo, Oslo, Norway.

40133 USC 2732(b)(2) and (4), and 33 USC 2735.

402The Russian provisions may also exceed Article 234 limits on some points. Article 3 of the 1984 Environmental Edict, supported by Article 14 of the 1984 Economic Edict, where "safety of navigation" has been added to an expanded version of LOSC Article 234 governing ice-covered areas. At the same time the passage "having due regard to navigation" present in Article 234 has been dropped. See Section 9.NEED.

403See Section 9.NEED.

404A Working Group on "Harmonization of Polar Ship Rules" has been working for approximately two years, meeting biannually, with the goal of presenting a draft to the International Maritime Organization (IMO). In addition to insurance companies and maritime engineers, State institutions represented include the Canadian Coast Guard, Finnish National Board of Navigation, Norwegian Maritime Directorate, Polish Register of Shipping, Russian Northern Sea Route Administration and the Russian Register of Shipping, the Swedish Maritime Administration, the U.S. Coast Guard and the American Bureau of Shipping. Minutes of Gothenburg Meeting, 9 March 1995. Interview Retired Captain Lawson W. Brigham, Harmonization of Polar Ship Rules, Gothenburg, 23-25 November 1994. Captain Lawson Brigham was Captain of the *U.S.C.G. Ice-breaker Polar Sea*, and noted that some U.S. funding is provided for this work.

405See Sections 9.NEED and 9.NEED.

406See Section 5.2.5.2.

could be argued excepted for public vessels under Article 234 and 236, including for submarines, it appears that the U.S. State Department and the U.S. Navy choose this course only to a minor extent.[407] It remains to be seen how the divergent U.S. State practise will be resolved.

5.3.3.2.2.2. Alternative - TSC International Straits Regime

Assuming the Russian Arctic straits become international, historic title fails, the LOSC straits regime is not firm international customary law, and there is no ensuring Russian LOSC ratification, theoretically the Russian rules also exceed the non-suspendible innocent passage regime of the *Corfu Channel Case* and TSC Article 16(4).[408] As seen the Soviet Union and the U.S. ratified the TSC, and it can be assumed that the TSC Article 16(4) international straits regime has passed into international customary law, therefore binding Canada, whereas it is doubtful pending LOSC ratification by these States that Article 234 has become customary law.[409] As such the non-suspendible innocent passage regime would predominate. The only limitation allowed would be that of taking steps to prevent passage which was not innocent under TSC Article 16(1),[410] including passage prejudicial to the peace, good order or security of the coastal state. While it might be argued that pollution and safety violations might be prejudicial to the coastal State, Russia, the legislative history of Article 16 indicates otherwise. With the possible exception of passage of nuclear powered ships it was never seriously discussed during UNCLOS I that marine pollution or safety violations prejudiced a State.[411]

If assuming the LOSC innocent passage regime applies in defining non-innocent passage through its possible passage into international customary law,[412] LOSC Articles 17-19 and 23 more clearly define the scope of non-innocence, however they also exclude most polluting activities and all unsafe activities. In addition to a listing of prejudicial activities in Article 19(2), Article 19(2)(h) specifies only acts of wilful and serious pollution contrary to LOSC provision which qualify as non-innocent. Though much is left to the

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407See Sections 4.3.2., 5.2.5.2. and 9.NEED.

408See Section 5.3.3.2.2.1. for a summary of both Russian and U.S. coastal State provisions.

409Sections 5.2.2.1. and 9.NEED.

410As seen in Section 5.2.1. this was one of the most controversial points of the TSC 16(4) regime and one of the reasons for the LOSC transit passage regime being negotiated. See Section 7.NEED for discussion of innocent passage.

411A question was raised by France related to *nuclear powered ships* and the threat of radioactive contamination. III *Official Records*, (1958) pp. 79-80, paragraph 17; Proposal A/CONF.13/C.1/L.6), p. 212. This was discussed in relation to the territorial sea, but if also considered in the context of international straits, directly contradicts the *Corfu Channel Case*, which as noted discounted type of ship related to innocence. The proposal gained some support from South Africa and the Soviet Union as an element of *special circumstances* related to passage prohibition or manner of passage, but the support was eventually dropped on the grounds that the issue was completely new, it was not studied by the ILC, more information was needed from the International Atomic Energy Agency (IAEA), and it was doubtful any useful decision could be taken. Ibid. p. 96 paragraphs 9-10. In a final vote the proposal was defeated 23:16:25. Ibid. p. 100 paragraph 22. A similar argument was forwarded by Yugoslavia related to *nuclear weapons* on warships in the territorial sea but was rejected 33:7:22. Ibid. p. 129, paragraph 1, A/CONF.13/c.1/l.21 and p. 131 para. 31.

412See Churchill pp. 72, 73. The U.S. - U.S.S.R. Joint Statement Article 3 notes that Article 19(2) sets out an exhaustive list of activities rendering passage not innocent. A ship passing through the territorial sea not engaging in these activities is in innocent passage. See Section 7.NEED.

interpretation of individual coastal States, it is clear that most environmental concerns do not amount to risks to peace, good order or security. Such evaluation by the coastal State is obviously intended under both the TSC and the LOSC to be practised on a *case by case* basis, which excludes the unilaterally adopted comprehensive Russian anti-pollution and safety provisions for all ships, including mandatory notification, authorization, field of 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 public ships. As such the non-suspension of innocent passage under the *Corfu Channel Case* and TSC Article 16(4) would dominate. TSC Article 23 and LOSC 30, under which warships may be requested to comply with a State's regulations related to innocent passage and failing this, required to leave a State's territorial sea, would hence not apply in support of the Russian rules. There is no violation and in addition is also intended to be applied by the coastal State on a case-by-case basis.

At the same time the State practise of Russia, the U.S. and Canada in the Arctic indicates a formation of local Arctic rules which go far to override the traditional TSC Article 16(4) and *Corfu Channel Case* regime. These developments and the work of the Working Group on the Harmonization of Polar Ship Rules clearly strengthens the status of Article 234 with respect to international customary law along the lines indicated above, pending ratification of the LOSC by these States. As such though this alternative is that which theoretically may become most appropriate, due both to the non-LOSC ratification of Russia and the U.S. and the non-passage of the LOSC straits regime into customary law, it is in the process of major changes. The statement made describing a legal stalemate thus best fits the situation in the Arctic, neither the new rule nor the old rule has a majority of supporters, and there exists "a network of special relations based on opposability, acquiescence, and historical title."[413] For the U.S. this condition extends even within the State itself.[414]

5.3.3.2.2.3. Alternative - LOSC and TSC Non-International Straits Regimes

Assuming the Russian Arctic straits, covered by territorial waters or having a high seas channel, are *not* international, yet subject to the TSC 5(2) and LOSC 8(2) exception, the 1991 Rules and supporting legislation also exceed the traditional innocent passage regime of both TSC Articles 14-17 and LOSC Articles 17-26, as well as traditional free navigation.[415] As seen it is doubtful that Article 234 has entered into customary international law which is relevant pending LOSC ratification by Russia, the U.S. and Canada. Thus the ordinary provisions of the TSC and the LOSC relevant to internal waters, territorial waters and high seas apply. It is also arguable that the LOSC anti-pollution regime applicable in the exclusive economic zone has not yet entered

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413Brownlie p. 11. See Section 2.3.3.3.

414See Sections 5.2.2.2. and 9.NEED.

415See Section 5.3.3.2.2.1. for a summary of both Russian and U.S. coastal State provisions. See Section 7.NEED for innocent passage regimes. This includes analysis of TSC Article 5(2), LOSC 8(2) and innocent passage. Article 8(2) may not be applicable even upon Russian LOSC ratification due to problems of non-retroactivity.

international customary law.[416] Since LOSC ratification is gaining acceptance however, this regime will also be briefly addressed here.[417]

Briefly compliance by foreign ships is required under TSC Article 17 with coastal State enactments in conformity with the TSC and other international provisions. Fees are allowed only for specific services rendered for the vessel concerned, and not by reason of passage through the territorial sea under TSC Article 18 and LOSC Article 25. Compliance is required by foreign ships under LOSC Article 21(4) with "generally accepted" international rules related to safety of navigation under Article 21(1)(a) and anti-pollution under Article 21(1)(f). The coastal State rules must not apply to design, construction, manning or equipment not internationally accepted under Article 21(2). For sea lanes and traffic separation schemes the coastal State must take into account IMO recommendations and other concerns under Article 22(3)(a) and (c). For commercial ships involved in pollution violations and pollution-related safety violations the LOSC Articles 211 and 218-220 apply. Fees are not allowed except as above under LOSC Article 25. Special areas in the territorial sea are allowed established with suspended or restricted navigation are allowed established temporarily for security reasons under TSC 16(3) and LOSC Article 25(3) and in the exclusive economic zone in conjunction with the IMO under Article 211(6). For public ships the flag State under LOSC Article 31 must bear responsibility for damage caused in violation of national rules, LOSC provisions and other international rules dealing with passage through the territorial sea. As seen marine pollution violations or safety violations during passage by a ship were not considered to prejudice a coastal State so as to result in loss of innocent passage. Submarines must traffic on the surface in the territorial sea under TSC Article 14(6) and LOSC Article 20.

Thus the unilaterally adopted Russian legislation noted above based upon environmental protection and safety also exceeds these traditional limits for both commercial and public vessels. In the territorial sea, and it goes without saying in the exclusive economic zone and high seas, mandatory notification, authorization, field of application, all forms of leading, fees, liability certificates, 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, special areas, and application to public ships, transgress TSC Articles 14-17 and LOSC Articles 17-26 and 211 and 218-220 and 226.[418] The unilaterally legislated design, equipment, manning and construction standards are not "generally accepted" as implied under TSC Article 17 and as required under LOSC Article 21(2) and LOSC 211(5). Though the Russian environmental provisions dealing with inspection, arrest, and detention, may be similar to those allowed under LOSC Articles 211, 218-220, and 226, this is only for suspected violations of "generally accepted" rules, not unilaterally adopted ones. Additionally, safety provisions appear not to be included. Special areas in the territorial sea are not temporary as required under TSC Article 16(3) and LOSC Article 25(3), nor adopted in conjunction with IMO processes under Article 211(6) for those in the exclusive

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416See Section 9.NEED.

417See ibid. for a complete analysis of this regime.

418This may be so even though the environmental discharge and safety standards may comply with Article 211 incorporating MARPOL 73/78.

economic zone. As above for public vessels there exists the additional argument that the provisions interfere with navigational rights, due to sovereign immunity guaranteed under LOSC Article 236 and customary law including the IMO conventions. Mandatory notification and authorization of warships for passage in the territorial sea is accepted in approximately one-third of coastal State jurisdictions.[419] Thus the Russian legislation clearly hampers innocent passage by imposing the requirements mentioned on foreign ships, both public and commercial, having a practical effect of denying, impairing or hampering the right of innocent passage through the territorial waters of the Russian Arctic straits if considered non-international in violation of TSC Article 15(1) and LOSC Articles 24(1)(a) and 211(4). In addition freedom of navigation is compromised under Article 2 of the Convention on the High Seas[420] and LOSC Article 87 and 194(4) for those straits containing high seas channels, possibly subject to those provisions of the LOSC anti pollution regime mentioned applicable in the exclusive economic zone.

In addition the Russian provisions exceed the right of innocent passage under the U.S. - U.S.S.R. Joint Statement. As seen the purpose of the U.S. - U.S.S.R. Joint Statement was to clarify innocent passage in the Soviet territorial sea, in the absence of sea lanes.[421] Article 5 requires that ships exercising innocent passage must comply with coastal State regulations adopted in accordance with LOSC Articles 21-23 and 25, including using sea lanes and traffic separation schemes, however innocent passage is stated to exist where sea lanes and separation schemes are not established. Under Article 6 coastal State regulations must in practise not result in a deprivation or violation of the right of innocent passage under LOSC Article 24.

Arctic sea lanes including those in the straits are not specifically set forth in the Russian legislation, possibly because they may be seen as an admission of the nature of those waters as being territorial subject to innocent passage, or an exclusive economic zone subject to "generally accepted" pollution and safety provisions, or high seas channels, subject to free navigation.[422] An issue similar to that existing for the Black Sea prior to the U.S. - U.S.S.R. Joint Statement thus continues for the Russian Arctic territorial sea including in the straits, if considered non-international, since the requirements mentioned effectively hamper, deny or impair innocent passage as understood under both the TSC and LOSC provisions.[423]

419Jin p. 66.

420Convention on the High Seas of 29 April 1958, 450 *United Nations Treaty Series* 82, (1963).

421As seen in Section 4.3.1. and Section 7.NEED this issue was one of the most controversial between the Soviet Union and the U.S., and Article 12(1) of the 1983 Rules was amended to be consistent with the U.S. - U.S.S.R. Joint Statement following the Black Sea Incident.

422Kolodkin however likens the 1991 Rules Article 7.4 for "leading" to sea lanes. Kolodkin Interview, 25 February 1994.

423Kolodkin p. 166 directly notes the limitations on the right of innocent passage. Franckx pp. 186, 187, notes rather succinctly , "(I)n fact, it would appear rather awkward for this country, (Russia) especially in the light of the factual circumstances which made the Soviet Union change its positions (with regards to sea lanes), to make a new, albeit somewhat more restricted, exception by excluding the Arctic coast from the field of application of this newly agreed principle." (Parentheses added).

At present this final alternative is probably that closest to the actual legal situation since it is questionable whether historic title can replace and fill the hiatus caused by non-applicability of the TSC Article 5(2) and LOSC Article 8(2) exception.[424] The U.S. apparently sent a letter accompanying the U.S. - U.S.S.R. Joint Statement stating that while reserving its rights it had no intention to conduct innocent passage with its warships in the Soviet territorial sea in the Black Sea.[425] The corresponding assurances have apparently not been given for the Russian Arctic including the straits.[426] Given the inherent weakness of the U.S. declarations covering Arctic jurisdiction,[427] it is unclear what the U.S. motivations are in not transferring a "Black Sea Incident" northward, especially through the principal Vil'kitskii, Shokal'skii, Sannikov and Dmitrii Laptev straits. Whatever the U.S. motivations, this is a sensitive issue for the Russians in that they stand in a legally vulnerable position, seen traditionally.

At the same time the local Arctic developments mentioned above under the auspices of Article 234 counter these traditional rules governing innocent and free passage, perhaps to an even greater degree than concerning the international straits regimes.[428] For this alternative the Russian provisions would arguably be justified under the developing Article 234 for all requirements for commercial ships except fees, ice-breaker assisted pilotage and ice-breaker leading and possible application to the high seas due to similarities to the U.S. OPA 1990. Public vessels would, due to immunity under LOSC Article 236 and international customary law, absent agreements to the contrary, continue to be subject to the traditional LOSC or TSC rules governing innocent passage through the territorial sea, indicated above, including however for submarines, passage on the surface with flag showing. This is may be difficult for long periods of the year due to ice.

This brings up the next subject, submerged passage. Due to its strategic importance, inherent sensitivity, and the difficulty for surface passage much of the year, this subject will be addressed separately with respect to prescriptive and enforcement jurisdiction.

5.3.3.2.3. Submerged Passage

As seen submerged passage is that area in which the Russian and U.S. practise with respect to the Russian Arctic straits diverges most. Any conditions for submerged passage come in addition to those generally outlined above for public ships. As seen 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 in straits.[429] Illustrating this problem, for warships, presumably including submarines, it is required somewhat paradoxically that,"ice-breaker assisted pilotage" be provided in the Vil'kitskii, Shokal'skii, Sannikov and Dmitrii Laptev

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424See Sections 6.NEED and 7.NEED.

425Franckx p. 187-188.

426Ibid.

427See Section 4.3.2.

428See Sections 5.3.3.2.2.1. and 5.3.3.2.2.2.

429See Section 4.3.1.

straits under Article 7.4. of the 1991 Rules, and some form of compulsory leading under Articles 1.2. and 7.4. Additionally submarines navigating on the surface, also presumably in ice, must show their flags under Article 9(e) of the 1993 Statute and supporting legislation. The discrepancy here is the same one noted earlier.[430] Russia subscribes to the LOSC transit passage regime in other parts of the world including submerged passage but disallows such in most of the straits under its jurisdiction.[431]

Taking the same scenarios as above, making the assumption that the Russian Arctic straits become international, historic title fails, the LOSC straits regime is customary law or Russia ratifies the LOSC, Article 234 is doubtfully dominant due to the U.S. practice,[432] transit passage is the rule including the right of submerged passage. Traditionally, as above this right would only be subject to the limited requirements imposed by the coastal State represented by LOSC 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).[433] 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 as in the Kara Gates, the Dmitrii Laptev, the Sannikov, the Blagoveshchensk and the Long Straits, free navigation would be the rule. As such all the Russian requirements including mandatory notification, authorization, field of 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, and design, equipment, manning and construction standards, special areas, and application to public ships and surface transit while showing the flag, are in excess of the LOSC international straits regime and hamper and suspend submerged transit passage, under Articles 42(2) and 44. *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.[434] This means as seen that the international straits regime in the Arctic remains anything but clear, even considering the developments concerning surface passage noted above.[435] It seems safe to say however that the situation is strained under this scenario. The U.S. has indicated it will ignore attempts to limit the right of transit passage.[436] Russia is a powerful coastal State and able to develop sophisticated state-of-the-art monitoring equipment. Given the success achieved on the surface for the Russian and Canadian regimes, as well as the latitude of coastal State measures arguably allowed under the LOSC interpretations indicated,[437] a possibility exists for Russia to enforce its domestic legislation

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430See Section 5.2.2.2.

431See Section 5.2.1.

432See Section 5.3.3.2.2.1.

433See Sections 5.2.3. and 5.2.4.

434See Sections 4.3.2., 4.3.3. and 9.NEED.

435See Sections 4.3.3.2. and 5.3.3.2.2.

436Section 5.2.2.2.

437See Section 5.2.5.

to the fullest extent. The tension is accentuated for submerged passage, since it is presently exclusively military and immune under Article 236 and customary law.

Assuming these straits become international and historic title fails, the LOSC straits regime not firm international customary law and there is no Russian LOSC ratification, the all encompassing Russian provisions also exceed the non-suspendible innocent passage regime of the *Corfu Channel Case* and TSC 16(4), related to submerged passage. Here the Russian requirements for surface passage are ostensibly permitted under TSC Article 14(6). However as seen an ambiguity arises between the non-suspendible 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.[438] As noted TSC Article 14(6) can be interpreted to introduce a condition of passage on submarines as warships under Article 16(4) in the territorial waters in international straits. Either interpretation seems reasonable, but a somewhat ambivalent State practise has emerged, during the innovation of the 12 mile territorial sea, to which the Soviet Union and the U.S. have been substantial contributors that submarines travel submerged through the territorial waters of international straits, including the entrances, a practise difficult to justify in view of TSC Article 14(6). Generally under negotiations of Article 14(6) and related Articles little was stated on this issue.[439] Subsequently a State practise developed during this period wherein the marine powers most probably sailed their strategic submarines submerged in breach of Article 14(6).[440] As such, it is maintained Russia is *estopped* to apply the requirement for surface passage through the territorial waters of its Arctic straits and entrances, that it avoided in application of the TSC Article 14(6) in relation to the Article 16(4) - *Corfu Channel* regime. In addition requiring surface passage for submarines under Article 9(e) of the 1993 Statute and supporting legislation, as well as implied in Articles 1.2. and 7.4. of the 1991 Rules may be argued contrary to the underlying foundation of the Russian legislation, safety and anti-pollution. It can hardly be argued that it is safe for submarines to navigate in ice on the surface. The real issue here is coastal State *security*, which, though Russian environmental and safety concerns are undoubtedly genuine in some sectors, probably indicates the major reason for the all- encompassing Russian legislation.[441] As above the domestic Russian requirements listed also exceed the traditional *Corfu Channel Case* and Article 16(4) regimes,[442] since most polluting and non-safe activities were not considered prejudicial to a State's order and hence hamper innocent passage. As for the LOSC straits regime, with submerged passage, no support is afforded the Russian provisions by the developing local Arctic regimes regarding surface vessels. Submerged passage is being conducted consistent with the traditional regimes.[443] This also results in a strained situation under this scenario. Again where high seas channels exist in the straits, free navigation would be the rule. Public vessels would be exempt due to sovereign immunity under customary law. However if the passage while submerged could

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438See Section 5.2.5.2.

439Section 7.NEED.

440See Sections 4.3.3.2. and 5.2.5.2.

441See Section 5.2.5.2. and Kolodkin p. 160.

442See Section 5.3.3.2.2.1.

443Whether the U.S. is exceeding the TSC Article 16(4) regime, however, will be addressed below in Section 5.3.3.3.3.

be shown by Russia *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, consistent with TSC Article 16(1) and Article 10 of the 1991 Rules and supporting legislation. Redress for loss or damage from submarines must be had through diplomatic channels.

Assuming these Russian Arctic straits, covered by territorial waters or having a high seas channel, are *not international* as listed above, and historic title fails, the 1991 Rules and supporting legislation exceed the innocent passage regime of both the TSC and the LOSC as well as traditional free navigation. As seen it is submitted Russia is estopped to demand surface passage for submarines in international straits, however it may enjoy a stronger position with respect to its requirements in the territorial sea covering non-international straits. As noted it is this scenario which may most closely approximate the present legal situation with TSC and possibly LOSC innocent passage regimes governing. Here the same TSC limitations related to coastal State prescription and enforcement jurisdiction apply as above, and it is here the expansive Russian environmental and safety provisions fail. Where high seas channels exist in the straits, traditional free navigation would be the rule. In addition it is submitted the same estoppel argument applies for non-international straits with territorial waters. It has already been shown that due to the requirements of Soviet strategy, it is probable that it sailed its submarines submerged in the entrances of international straits consisting of territorial waters. If this is so, then it is unlikely that the Soviet Union would have changed its clandestine policy if its submarines encountered a non-international strait consisting of territorial waters through which passage were necessary. As such it is maintained that for this scenario also due to the possible Soviet and Russian practise in other straits of the world that Russia is estopped to demand that submarines travel on the surface through the territorial waters of its Arctic straits even if deemed non-international.[444] In addition as above this requirement is contrary to the underlying basis of the Russian provisions. For a submarine to travel on the surface under TSC Article 14(6) and LOSC 20 is an illogical requirement since it hardly can be safe to navigate in ice on the surface. And as above, should the passage while submerged be shown by Russia 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, consistent with TSC Article 16(1) and Article 10 of the 1991 Rules. Redress for loss or damage from submarines must be had through diplomatic channels.

Even for this scenario, presently the most relevant, the legal situation though traditional is inconsistent with the local regime developing for the surface under Article 234. This results in tension and instability. The Russian provisions can doubtfully be justified under international law. This raises the next point. How consistent is the U.S. position with the international straits regimes governing in the scenarios?

5.3.3.3. The U.S. Position

5.3.3.3.1. *Indreleie*, Messina Exception, Lack of a Foreign Territorial Sea

444See Section 5.3.3.3.2. See also Leifer pp. 168-173, regarding Soviet passage in the Indonesian straits lacking a bilateral agreement with Indonesia, similar to that secretly negotiated by the U.S.

results in tension and instability. The Russian provisions can doubtfully be justified under international law. This raises the next point. How consistent is the U.S. position with the international straits regimes governing in the scenarios?

5.3.3.3. The U.S. Position

5.3.3.3.1. *Indreleie*, Messina Exception, Lack of a Foreign Territorial Sea

Since the Russian arguments based upon the *Indreleie*, Messina exception, and the territorial sea of a foreign State are shown above to have questionable application to the Russian Arctic straits, they will not be addressed related to the U.S. position. With regards to the LOSC and TSC scenarios on the other hand interesting ramifications arise.

5.3.3.3.2. Alternative - LOSC International Straits Regime

Briefly, the general U.S. position regarding prescription and enforcement international straits includes the traditional position of the U.S. favouring non-suspendible and unhampered transit passage through international straits with coastal State regulation possible only under LOSC Articles 39(2) and (3), 41, 42 and 233 strictly interpreted, including in the Russian Arctic straits due to its potential for use.[445] In contrast the U.S. publicly has given support to the LOSC environmental provisions as international customary law including presumably Article 234.[446] The contradiction is not clarified nor is application of the U.S.'s OPA 1990 in its own straits including in the Arctic, the U.S. requirement that U.S. commercial ships follow Canadian legislation, nor the U.S. Coast Guard's work with the Conference for the Harmonization of Polar Ship Rules.[447] Thus the U.S. *practise* of the interface between the LOSC straits regime and the Article 234 regime appears divided with the U.S. not only picking and choosing LOSC regimes,[448] but even the application of such, depending upon mode of passage. It also unilaterally ignores interpretations by States bordering the straits of the LOSC straits regime it sees as controversial and sails in accordance with its interpretation.[449] What this means is that the U.S. is campaigning for the LOSC scenario for the Russian Arctic straits in spite of the contradictions in its own practice, most probably to prevent the formation of precedent for other more important straits, as well as to ensure transit passage for its submarines.[450] There has been no known U.S. surface traffic not in compliance with the Russian rules.[451] These unilaterally made choices by the U.S. concerning its sailing practises and domestic legislation are clearly in excess of the LOSC straits regime.

445See Sections 4.3.2., 5.2.3. and 5.2.4.

446See Section 9.NEED.

447See Section 5.2.3.2.2.1. and 9.NEED.

448Interview Willy Østreng, 1 February 1995, Fridtjof Nansen Institute, Oslo, Norway, (Østreng Interview).

449Section 5.2.2.2.

450See Sections 4.2.2., 4.2.3., 5.3.3.2.2.1. and 9.NEED. See also Schachte pp. 18-19.

451See Section 4.3.3.1.

Since both the internationality of the Russian Arctic straits as well as the customary status of the LOSC straits regime or Russia's non-LOSC ratification may change, the U.S. position may become stronger in a relatively short time. As such the U.S. most likely is attempting to strengthen passage of the LOSC transit passage and the environmental provisions into customary law with the understanding the international straits regime broadly construed in favour of the user is dominant, with the exception for straits covered by U.S. territorial waters. It thus plays the role as persistent objector to Russia's and Canada's claims for dominance of Article 234 over the LOSC international straits regime.[452] A main issue thus arises whether the U.S. diplomatic statements from the 1960's in the Vil'kitskii Straits Incidents, also published by the U.S. State Department in 1992, and in 1994 can be considered to successfully support the U.S. claim to the transit passage regime in the Russian Arctic.[453] It is submitted they do.

5.3.3.3.2.1. Diplomatic Statements - Options

As noted the U.S. surface traffic in the Russian Arctic since the 1960's has been insubstantial.[454] In contrast to the majority of other straits claimed international with the exception of the Northwest Passage, the U.S. practises transit, both military and commercial.[455] Thus for the Russian straits the U.S. practise is supported only by the declarations claiming transit passage, and occasional clandestine submerged transit. As seen State declarations lacking enforcement are viewed by the weight of authority to establish State practise, however they must be carefully examined to ascertain that they are meant as legal statements and not political ones.[456] Here it is unquestionable the U.S. intends its declarations on transit rights to be legal. They are consistent with the U.S. position throughout the entire negotiation of the LOSC straits regime.[457] However the question arises, is the U.S. bound eventually to assert is position with surface traffic or else accept the Russian and Canadian positions?[458]

In the *Nuclear Test Cases*,[459] the ICJ maintained that following a declaration a State is legally bound to follow a course of conduct consistent with the declaration. The U.S. State Department when explaining its FON program notes that diplomatic correspondence is sufficient to forward a State's position as a persistent objector, however, "(A)ction by deed...promotes the formation of law consistent with the action and deeds may be

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452See Section 2.3.2.1. and 2.3.3.3.1.

453Respectively *U.S. Limits* No. 112, pp. 68-71 and Smith and Roach pp. 200-207.

454See Section 4.3.3.1.

455See Smith and Roach pp. 177-229, and Churchill p. 94.

456See Section 2.3.2.

457See Sections 5.2.3., 5.2.4. and 5.2.5.

458Given the difficulties of submerged passage in the majority of the Russian Arctic straits during larger periods of the year, the moderation of U.S. submarine traffic due to the dissolution of the Soviet Union, the current harmonization of polar surface ship rules carried out by the National Marine Authorities or Coast Guards of most of the Arctic States, and the operation of the OPA 1990 in the U.S. ice-covered waters, it is submitted this is the *chief* element lacking in the U.S. position with respect to the Russian Arctic straits. See Sections 4.3.3.2., 5.2.3.2.2.1. and 9.NEED.

459See Section 2.3.3.3.1.

necessary in some circumstances to slow erosion in customary legal practice."[460] Clearly the U.S. would strengthen its legal position were it to sail its public surface craft through the Russian Arctic straits it considered international.[461] This has been carried out in the Canadian Arctic by the *U.S.C.G. Ice-breaker Polar Sea* in 1985 and the *U.S.C.G. Ice-breaker Polar Star* in 1988.[462]

However in spite of the obvious strengthening of the claim through enforcement, legally this probably is not required, even taking into account the passage of a substantial period of time. Similar to Norway in the *Anglo-Norwegian Fisheries Case*, the U.S. has consistently objected to any restriction of the Arctic straits it considers international, taken by the Soviet Union or Canada and has seemingly rebutted a possible presumption of acceptance of Article 234 dominance over the LOSC straits regime.[463] It also may receive some support from clandestine submarine traffic, in line with its practise in other international straits and buttressed by the Article 236 sovereign immunity exception. However this is questionable due to the arguable lack of effective opportunity for Russian protest considering the circumstances.[464]

At the same time, it is questionable whether other less powerful States could have followed the same policy displaying such striking contradictions. Theoretically a consistent State practise and *opinio juris* is required in the development of international customary law, including local rules. One author questioned even whether the U.S. - U.S.S.R. Joint Statement, made by the world's two largest naval powers, would serve as an interpretation of the LOSC provisions on innocent passage without the practise of other LOSC State Parties.[465] At the same time it seems difficult for less powerful States bordering straits to counter the U.S. position especially with respect to the passage of clandestine submarines.

As such in spite of a deficiency of "action by deed" on the surface through the Russian Arctic straits and an apparent arrogant exercise of power, it is difficult to see that the U.S. position is otherwise than unassailable. One author believes that Canadian and Russian creeping jurisdiction under Article 234 to be especially difficult for the U.S. to counter.[466] It is submitted that the U.S. is more than holding its own through its "creeping jurisdiction" with regards to the surface jurisdiction while carrying out "business as usual" under the surface. The conclusion is other States could probably not practise similar contradictory claims over a substantial time period. Other States in a similar position would probably have to indicate more evidence of persistent objection to rebut a presumption of consent to the Article 234 regime dominating over the international straits

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460Smith and Roach pp. 4, 7, footnote 11. The authors cite Colson, "How Persistent Must the Persistent Objector Be? 61 *Washington Law Review*, p. 969 (1986), also a State Department Official.

461See Section 2.3.2.

462See Smith and Roach pp. 207-215. The latter was done in compliance with the Canada - U.S. Agreement under which as noted both reserved their respective legal positions. See Section 9.NEED.

463See Sections 2.3.2., 4.3.2. and 9.NEED.

464See Section 4.3.3.2.

465Butler Brigham p. 223. See Section 2.3.2.

466Franckx pp. 296, 298.

regime. Other States either exercise less naval power though having Arctic territories, such as Denmark and Norway (or "adjacent" Antarctic territories, such as Australia, Chile, New Zealand and Argentina), or they exercise naval power but do not have "adjacent" Arctic (or Antarctic) territories, such as the U.K. and France. It is only Russia which comes close to paralleling the U.S. position with respect to naval power and Arctic territories, and it arguably is less interested in the U.S. Arctic straits, than the U.S. is in the Russian.

The unassailability of the U.S. position under the LOSC may change however with respect to one point. Since the U.S. has apparently not sailed surface military or other public craft near the Russian Arctic straits without permission, it seems unlikely it will choose to do so now, though under the claims made by the U.S. State Department and Navy it certainly stands clear. Passages by U.S. commercial ships may be more problematic.

Presently there are few foreign flags trafficking the Northern Sea Route.[467] However under the broad interpretation of "international" practised by the U.S. including not only foreign flags, but also foreign cargoes and crews, travelling to foreign ports on chartered Russian ships,[468] the Russians may argue that the U.S. and other States by their compliance with Russian rules for traffic in straits claimed international by them is in fact acquiescing in Russian jurisdiction.[469] This could indicate acquiescence to dominance of the ice-covered regime over the LOSC international straits regime, and the question could then be asked the weight this State practise has on the U.S. declarations and submarine traffic outlined above.

This situation may however possibly be seen not as contradictory but rather supplementary. The U.S. may reserve it rights and claim that it practises transit through international straits while at the same time in accordance with the Russian regime for the sake of the Arctic environment. It could be argued by the U.S., as it does with Canada, and presumably under the Rovaniemi Process and the Working Group on Harmonization of Polar Ship Rules and the IMO, that consultations are being carried out wherein international environmental standards are being developed, with the jurisdictional issues not being affected.[470] Using this device the strict domestic Russian regime might in fact favour the U.S. since it does not have to challenge with its own flag, while any foreign cargoes and crews sailing to foreign destinations can be argued to support the U.S. position regarding internationality. Thus at present this is a more or less stable policy for the U.S. which will probably be continued as long as economically feasible activities are at a low level. The occasional military passages are not substantially affected, and the political gains are probably greater than challenging and upsetting any Russian economic gains and moves towards democratization. This draws a very *fine line* however, and probably would not be practised by less powerful States due to the precedential value it might provide for jurisdictional issues.

467See Section 4.3.3.1.

468See Section 4.2.2. and 4.3.2.

469See Section 5.3.3.2.1. and Kolodkin p. 166.

470See Sections 5.2.3.2.2.1., 9.NEED. and Smith and Roach p. 227, footnote 79.

Should sailing on the Northern Sea Route become economically viable however, the U.S. may be placed in a more difficult position, since U.S. commercial interests will probably desire freer access than that allowed under the Russian legal regime. This may occur so far in the future that by that time Arctic technology may be such that it would be possible to sail commercially on the high seas closer to the North Pole or under the ice completely.[471] In addition in spite of the strictness of the Russian rules, over time Russia may "soften" its position regarding transit passage through its Arctic straits, innocent passage in the Arctic territorial sea and free passage in the exclusive economic zone subject to the LOSC environmental regime.[472]

The option also exists for the U.S. and Russia, as well as Canada, to negotiate an agreement covering the passage of commercial surface craft through ice-covered straits under the LOSC international straits and ice-covered regimes taking as a starting point the Malacca Agreement wherein increased coastal State regulation is allowed without corresponding violation of Articles 42(2), 44 and 233.[473] The foundation for such negotiations may already be taking place, with the talks noted above as well as bilateral talks between the military.[474]

5.3.3.3.2.2. Summary

What these developments mean concerning Arctic jurisdiction over the Russian Arctic straits is difficult to say. Presently lacking Russian political initiative to divert cargoes from the Black Sea to the Northern Sea Route, it is doubtful that major economic advances will be made which require resolving the jurisdictional issues.[475] As such the stalemate is likely to continue, largely because the U.S. in spite of its lack of activity on the Arctic surface, as a persistent objector, cannot be said to have acknowledged the dominance of Article 234 over the LOSC straits regime as law. At the same time a special regime may be gradually established under the fora noted which will define specific "international" design, equipment, construction and crewing standards for commercial ships sailing in ice-covered areas including international straits. This may go further than that envisioned by one author, a transit management regime with continued unclear jurisdiction over the Arctic straits.[476] These provisions will define Article 234, the substance of which may

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471Speeches delivered by Mäkinen, Eero, "The Future of Northern Sea Route Traffic", and Fuhs, Paul, "Marco Polo in the 21st Century, Tromsø 13-14 October 1992. See also articles by Mäkinen and Fuhs in *Proceedings from The Northern Sea Route Expert Meeting*, (ed. Henning Simonsen), 1993, pp. 31-42 and 73-81.

472Butler Brigham pp. 231-233 notes a generally more flexible attitude started by President Gorbachev in 1987. Ushakov Interview 25 February 1994 that application of the technical sailing rules would become almost automatic if the Administration "knew" the foreign ship and Captain, and an example given of an American research vessel which was processed in this manner for sailing in the Chukchi Sea in 1993.

473See Sections 5.2.2.2. and 5.2.4.2.

474See Section 5.2.5.2.2.

475Ramsland, Trond, Heidi Olufsen, Svein Hedels, Per Ivar Vik, Maritime Logistic Preferences for Scandinavian Exporters - A Feasibility Study of the Northern Sea Route as an Alternative to the International Shipping Market, INSROP Working Paper, No.NEED. 1996, pp. 38, 39.

476Franckx pp. 302-307.

prove to be different than any of the interpretations noted.[477] The rules will be international not unilateral and only surface commercial craft will be covered. The violation of these rules may most likely be enforced strictly as is presently done by the U.S., Russia and Canada, including inspection, expulsion or seizure and possible criminal liability.[478] As such a major segment may be removed from the LOSC international straits regime 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. At the same time such rules arguably will be less precedential and transferable due to Article 234's restrictive area of application, ice-covered areas, even if interpreted broadly. Transfer if it does occur will be to areas surrounding Antarctica, though States bordering other straits may attempt to use this regime in argumentation for further expansion of the precedent established by the Malacca Agreement in safety and anti-pollution provisions. All Arctic coastal States will benefit environmentally due to the formation of a stricter regime allowing special "international" design, equipment, construction and crewing standards for commercial ships. This 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.[479] 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 why the U.S. may support this process.

Passage by the military and other public ships 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.[480] Russia and Canada may continue with claims for Article 234 jurisdiction over military vessels in spite of Article 236 immunity due to their security concerns,[481] which the U.S. will ignore for submerged transits. It is doubtful surface transits by the U.S. will be sailed without complying with the domestic Russian, and Canadian legislation, if sailed at all. The position has been reserved through the U.S. declarations and such protest is probably not worth the effort as long as the submarines can sail.

That the divided practise by the U.S. of Article 234 with regard to the LOSC straits regime is inherently unstable and does little to forward world order will be addressed below in Section 5.4. But first the U.S. position with respect to the TSC international straits scenario and the TSC and LOSC non-international scenario will be briefly addressed.

5.3.3.3.3. Alternatives - TSC International Straits Regime, and LOSC - TSC Non-International Straits Regimes

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477See Section 9.NEED and 9.NEED. Denmark/Greenland and Norway are not expected to object to these developments defining Article 234 for the Arctic. As noted these states have not as yet demanded either coastal strait State rights or shipping rights under Article 234. See Section 9.NEED. and 9.NEED.

478See Sections 4.3.1. and 9.NEED.

479See Brubaker pp. 125-127.

480See Section 4.3.3.2.

481See Sections and 5.3.3.1., 9.NEED and 9.NEED.

The TSC International and the LOSC - TSC Non-International scenarios are not deemed to play too large a role with respect to the U.S. position concerning the Russian Arctic straits. This is in spite of the probable application of the TSC non-international scenario as the most sound in describing the *present* legal status of the Russian Arctic straits.[482]

For these regimes it is clear the U.S. practise is in excess. Non-suspendible innocent passage under TSC Article 16(4) and innocent passage under LOSC Article 19 and TSC Articles 14 and 16 are not claimed in the U.S. declarations, but rather LOSC transit passage. U.S. submerged passage is rarely conducted on the surface and though arguably consistent with TSC Article 16(4),[483] is clearly inconsistent with LOSC Article 20 and TSC Article 14(6).[484] The U.S. is applying the regime it desires. It is doubtful that Russia or Canada will be able to limit user rights based upon these regimes, however legally solid, which the U.S. views as antiquated.

That this dichotomy, also is unstable and does little to forward world order will be addressed below in Section 5.4. The conclusion regarding issues of prescription and enforcement jurisdiction play a large part here and will appear in the final Section 5.4. rather than separate under Section 5.3.

5.4. Conclusions

5.4.1. Summary

In brief it has been found based chiefly upon State practice, and supported by the majority of doctrine that it is doubtful that the LOSC transit passage regime has passed into international customary law nor that internationality of the straits regime can be based upon potential use.[485] Even should both Russia and the U.S. ratify the LOSC the stalemate regarding "internationality" is likely to continue since the LOSC provisions do not change anything regarding interpretation of the term "international straits." As such theoretically innocent passage under TSC Article 14 and 16 is the rule in the Russian Arctic straits should the historic title fail,[486] and under the TSC Article 5(2) and LOSC Article 8(2) exceptions.[487] This may be meaningless however due to the practise of both Russia and the U.S. as coastal States.

Since the straits may become international and the LOSC regime customary law in the not so distant future, the LOSC provisions covering prescriptive and enforcement jurisdiction must be viewed. Here it was found that it is doubtful the Article 38(3)

482See Section 5.3.3.2.2.3. As shown, at the present time internationality of the Russia Arctic straits cannot be claimed and the rules for innocent passage in the territorial sea apply. See Section 4.3. and 4.4.

483See Section 5.3.3.2.2.2.

484See Sections 4.3.3. and 5.2.5.2.

485See Sections 4.3., 4.4. and 5.2.2.

486See Section 7.NEED.

487Ibid.

"reduction" to innocent passage would apply generally.[488] It would apply solely to violation of the most major elements of transit passage in 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" of Article 42 means coastal straits State competence limited to MARPOL 73/78 provisions, and "general acceptable" of Articles 41 and 42 means 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 including all international regulations, procedures and practises considered generally accepted. At the same time due to the State practise of Russia and the U.S. as coastal States with respect to their domestic environmental and environmentally related safety provisions, arguably applicable in the exclusive economic zone and territorial seas, which go far beyond the MARPOL 73/78 and safety traffic schemes and sea lanes, the legal situation is confused.

Enforcement jurisdiction was found to be in an even more confusing state.[489] Theoretically coastal State competence is very limited, required not to hamper, impair, deny or suspend transit even for violations of domestic laws and regulations under Articles 42(2) and 44. An exception is allowed under Article 233 wherein "appropriate measures" may be taken for pollution violations or threats of such, however this chiefly includes only enforcement in ports. The Malacca Agreement has modified this somewhat allowing more stringent measures taken with regard to minimum under-keel-clearance without corresponding violation of Article 233. However as with prescriptive jurisdiction the State practise of Russia and the U.S. as coastal states in inspecting, arresting, seizing and removing ships for violations of the extensive domestic environmental and environmentally related safety provisions in the exclusive economic zone and territorial sea confuses the legal situation.

Regarding the LOSC straits regime and the Article 234 ice regime it was found theoretically that it was probable that the strait regime would dominate over the ice-covered regime.[490] However as above developments in State practise indicate that a curious divided local regime is emerging wherein the traditional dominance is practised only for submerged transit. Surface passages both public and commercial tend towards dominance of the ice-covered regime. This split regime is apparently practised by both Russia and the U.S. argued under Article 39(1)(c) due to the importance of submerged passages through international straits in each State's strategic deterrence strategy. Finally it was found that the *Indreleie*, the Messina exception and territorial sea of a foreign State regimes, though claimed by Russia,[491] had little application. This was based upon contradictions within the ICJ decisions, with application of the rules, as well as the legislative history.

488See Section 5.2.3.

489See Section 5.2.4.

490See Section 9.NEED

491Section 5.2.6.

Applying these findings to the Russian Arctic straits it was found that the Russian position though supported by the present non-passage of the LOSC straits regime into customary law, was vulnerable.[492] Though the use of the straits probably falls well below acceptable standards for internationality, even for isolated ares, this may change, giving weight to the U.S. position for potential use as defining internationality.[493] Thus Russian historical title and negation of the TSC Article 5(2) and LOSC Article 8(2) exceptions become crucial for the Russians to continue with their claims for the straits comprising internal waters.

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, a LOSC transit passage alternative, a TSC non-suspendible innocent passage alternative and a non-international LOSC and TSC alternative.[494] This is because these conclusions arrived at are not static but rather the present stage in a dynamic legal flux. Thus it is possible that the LOSC straits regime will in the not-too-distant future enter customary law and the Russian Arctic straits be subject to increased international use, broadly interpreted.

Addressing the three scenarios it was found that the Russian 1991 Rules and supporting legislation for mandatory notification, authorization, field of application, all forms of leading, fees, liability including criminal, discharge and safety standards, reporting, inspection if deemed necessary, stopping, detention and arrest, suspension if deemed necessary, removal for violations, criminal liability, and design, equipment, manning and construction standards, special areas, and application to public ships are in excess for *all* three.[495] More coastal State control is allowed within the TSC non-international scenario, possibly allowing a few requirements in areas considered dangerous, however the most striking developments surround the U.S.'s domestic OPA 1990 and Clear Waters Act.[496] If the Russian rules are considered in relation to the U.S. legislation as a coastal State, almost *all* of the provisions are arguably within the limits set by the U.S. for commercial ships. The Russian rules still exceed for all three scenarios the international limits set for public vessels, and Russia would be estopped to claim surface passage for submarines.[497].

For commercial ships it is only the fees and ice-breaker-assisted pilotage and i-breaker leading which exceed the U.S. provisions. Since these local Arctic developments are juxtaposed on the three traditional scenarios, the legal situation for jurisdiction over the Russian Arctic straits is very confused, especially since the U.S. as a maritime power claims unequivocally the first, the LOSC alternative to apply.[498] Since declarations under international law in the majority view need not be enforced to apply these claims made by

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492See Section 5.3.1.

493Section 5.3.3.

494Ibid.

495See Section 5.3.3.2.2.

496Ibid. and Section 9.NEED.

497Section 5.3.3.2.3.

498See Section 4.3.2.

the U.S. as the world's leading maritime power do carry much legal weight. This leads to the next Section the consequences of a confused legal regime over the Russian Arctic straits.

5.4.2. Consequences

For the legal regime governing the Russian Arctic straits the situation is less than desirable, since it appears to reflect the same conflicts previously existing within the international straits regime, polarization. Here the polarization 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. The situation resembles that noted by one expert regarding a near stalemate in the formation of customary law, but even more localized to fewer States and more points of dissension.[499]

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 has similarities to the Russian and Canadian, for the territorial sea and probably the exclusive economic zone as well. The issue of submerged passage in a still sensitive geographic area has not been resolved, which also compounds the sensitivity. All these work against the establishment of a stable world order, despite cooperative developments surrounding Arctic environmental protection and safety.[500] It is conceivable a more conservative Russia may decide it would be to their beneficial interest to disclose U.S. submerged transits, 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, with a subsequent sharp increase in world tension.[501] It was exactly this situation the LOSC straits provisions were designed to alleviate.

The U.S. Representative to UNCLOS III Moore noted in 1973,[502]

> "We should be clear, Mr. Chairman, that the community interest at stake in international straits is far more vital than simply the right of innocent passage in the territorial sea. The issue is no less than whether the freedoms of the high seas enjoyed by all nations are to remain meaningful.
>
> 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

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499See Section 2.3.3.3. Akehurst p. 31 notes, (T)he real difficulty comes when the states supporting the change and the states resisting the change are fairly evenly balanced. In this case change is hard and slow, and disagreement and uncertainty may persist for a long time until a new consensus emerges..."

500See Section 5.3.3. and Franckx pp. 245-270, and 298-302.

501Reisman Straits, pp. 48, 52-54, 62-64, 66-67, 69-75.

502Moore pp. 94 and 102.

states would sow the seeds of future conflict and undercut a major goal of the Conference. For these reasons, Mr. Chairman, it is completely inappropriate to approach the problem of transit through straits as though it were simply a problem of passage through the territorial sea which could be dealt with by the doctrine of innocent passage."

On the other hand the expert Brüel notes the fears of the coastal strait States with notable examples, Turkey and Denmark and attempted control by the Great Powers,[503]

"...(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 Reisman,[504]

"(I)n determining what is lawful under international law it is important to use contextual and consequential methods of inquiry rather than methods of textual and logical derivation...First, international law is structurally different from developed domestic systems and perforce uses a different method for assessing lawfulness. Second, not everything that is permitted in international law should be automatically deemed permissible in particular cases. One should not pretend that the *defects* of international law are a virtue. 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 practises 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.

5.4.3. Recommendations

The U.S. State Department and the Russian Foreign Ministry should take the initiative in conjunction with the Canadian Ministry of External Affairs, the Arctic Environmental

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503Brüel, Erik, *International Straits, A Treatise on International Law,* Vol. 1, (Sweet and Maxwell), (Brüel), pp. 31-35. Koh p. 57 (parentheses added) notes, "(S)o far as the Straits (Malacca and Singapore) were concerned other problems began to emerge - problems relating to political, navigation, environmental and economic interests. Indonesia and Malaysia saw that these problems would by and large be solved if they closed the Straits...Of those problems perhaps the navigational and environmental issues were the most pressing."

504Reisman, W. Michael and Jim E. Baker, "Regulating Covert Action" (1992) (Reisman and Baker), pp. 141-142. Italics added.

Protection Strategy,[505] the Working Group on Harmonization of Polar Ships Rules[506] and convene a conference with the express goal of negotiating an Arctic legal regime focusing on the environment and navigational safety.[507] The Scandinavian States and Finland should also be included due to their Arctic territories and/or shipbuilding industries as well as experience in drafting environmental instruments. These provisions would give substance to LOSC Article 234 and encompass all straits in ice-covered areas which is the focus here. As seen there already is substantial correspondence between the U.S. OPA 1990 and supporting legislation, the Russian 1991 Rules and supporting legislation, with the exception of application to public vessels, fees and ice-breaker leading and ice-breaker assisted pilotage. It is submitted the Canadian is also similar with the exception of application to public vessels. If the Working Group on Harmonization of Polar Ship Rules is included, 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. Results arrived at under the Malacca Agreement, an important precedent regarding minimum under-keel-clearance would be highly relevant here and should be included as well. Sea lanes in the straits might be prescribed if felt beneficial in spite of variable ice conditions, since internationally they are very prevalent.[508]

With the further aim of increasing world order it might also be advantageous for the U.S. and Russia to negotiate an agreement around the Article 236 immunity covering use by *public vessels* including in the Russian Arctic straits. The Russian and the U.S. are already reportedly carrying on some form of bilateral talks including the contentious Arctic straits regime, to which the U.S. is positive.[509] The U.S. State Department confirms talks take place, but do not, similar to the Russians, view the talks as negotiations.[510] 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

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505Rovaniemi Declaration and the Arctic Environmental Protection Strategy (AEPS), 30 *International Legal Materials*, 1624, (1991), established in June 1991, is comprised of four main parts: the Arctic Monitoring and Assessment Programme (AMAP); the Programme for Protection of the Arctic Marine Environment (PAME); the Emergency Prevention, Preparedness and Response Programme (EPPR); and the Conservation of Arctic Flora and Fauna Programme (CAFF). See in general Scrivener, David, *Environmental Cooperation in the Arctic: From Strategy to Council*, Security Policy Library No. 1/1996, The Norwegian Atlantic Committee, Oslo, Norway, (Scrivener) for an overview.

506See 5.3.3.2.2.1.

507This proposal is supported both by Professor Pharand, an Arctic expert, in his review of 31 May 1996; and Professor Tullio Scovazzi a law of the sea expert in "International Northern Sea Route Programme (INSROP), Report of the International Evaluation Committee, Scott Polar Research Institute, University of Cambridge 26, April 1996, p. 32.

508Churchill p. 241. Franckx pp. 186-187.

509Interview Dr. Gary Geipel, Hudson Institute, Indianapolis, Indiana, U.S. in Oslo, Norway, (Geipel Interview), June 1993.

510Interview Dr. Robert Smith, U.S. State Department, Office of Ocean Affairs, Washington D.C., U.S., (Smith Interview), 27 June 1994. Kolodkin Interview, 25 February 1994.

sea seminar.[511] The U.S. and Canada as well carry on some form of talks surrounding the Canadian Arctic straits.[512]

Since submerged transit is central here though probably occasional through the Russian Arctic straits, it is worthwhile to first focus on it. The solution concerning notification and authorization prior to submerged transit is a compromise, within the interpretative possibilities of LOSC Article 39(1)(c).[513] Perhaps more realistic is a bilateral agreement allowing submarine passage based upon *privilege* rather than right.[514] This seems feasible, especially since it would make the forming of precedent difficult in other parts of the world, one of the concerns seen to affect U.S. Arctic policy.[515] Countering these however 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 can be factored out of the national security equation, one expert notes,[516]

> "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."

In addition as seen U.S. Secretary of State Schultz denied the acceptability of a bilateral agreement with Canada, an U.S. ally, and it is even more doubtful a similar agreement would be entered into with Russia.[517] Judging from the U.S. claims made covering the Russian Arctic straits as well as the Canadian, it is unrealistic to expect that the U.S. would enter either of the compromises.

511Interviews respectively with Attorney at Law, Paul Edelman, New York, New York, U.S. (Edelman Interview), and Assistant Director Scott Allen, Law of the Sea Institute, University of Hawaii, Honolulu, Hawaii, U.S. (Allen Interview); and Yakovlev Interview August 23-26, 1994.

512Interview with Professor Edgar Gold, President, Canadian Maritime Association, Oslo, Norway, (Gold Interview), 23 June 1994.

513Burke Straits p. 220. Basically the author maintains lacking a convincing showing by the marine power's navies of the necessity of submerged passage for their deterrent policies, submerged transit passage through international straits including those in the Arctic carries with it a corresponding duty to report and receive prior authorization for transit. This is that provided for in the Russian rules.

514Østreng, Willy, "Military Security - The Stumbling Block of Arctic Navigation?", (1994) unpublished article on file with the Fridtjof Nansen Institute, (Østreng Stumbling Block) p. 19. The author addresses a Canadian - U.S. Agreement based upon Article 234 with its special regulatory regime encompassing solely ice-covered areas, which other States without such areas would find difficult basing a claim upon.

515Ibid. and Sections 4.3.3.2. and 5.2.5.2.

516Reisman Straits p. 60 footnote 29. See also Leifer, Michael, *International Straits of the World - Malacca, Singapore, and Indonesia*, 1978, (Leifer), pp. 161-162 who notes that the straits of Malacca and Singapore have relevance to the U.S. "only of principle," and any concession to Indonesian and Malaysian claims over these straits might set a precedent for submerged passage elsewhere, especially in the Indonesian straits. The latter are deeper and crucial to passage of U.S. submarines to and from the Indian Ocean.

517Smith and Roach pp. 214, 228 footnote 86. See Section 5.3.3.1. and 9.NEED.

However in the same vein as the developments taking place under the Conference for Harmonization of Polar Ships Rules, it is possible some assurances may be agreed upon under Article 236.[518] This Article besides containing the sovereign immunity exception for public vessels also contains the requirement though weak, "(S)tates shall ensure...(without) impairing operations or operational capabilities," that public ships (and aircraft) act consistently if "reasonable and practical" with LOSC provisions. It is submitted this can provide an important starting point with regards to negotiating agreements governing the Russian Arctic straits as well as the Canadian.

It could for example be agreed that States would issue directives that military and other pubic ships comply with the new environmental and safety provisions based upon the Russian, the U.S. (and the Canadian) domestic legislation as well as the Polar Harmonization Conference under the auspices of Article 234 whenever practical and reasonable and their operations and operational capabilities are not impaired.

It could thus be agreed that surface public ships would technically be required to comply with much the same liability, design, construction, manning and equipment and discharge standards as commercial surface ships but be able to disregard these if operationally necessary. Submarines need not be specifically mentioned, but need not travel on the surface through ice since their operational capabilities would be impaired as well as such passage would be unreasonable and impracticable. At the same time, discharges, under-keel-clearance, velocity would be highly relevant though not compulsory.

From this the Arctic States Russia, Canada and the U.S. as a coastal State, as well as Denmark/Greenland and Norway would achieve a step towards standard environmental and safety requirements in the Arctic for military and other public vessels in spite of the immunity. At the same time the U.S. as a maritime power would retain its freedom of navigation since it could always claim it needed operational freedom and if necessary dispense with compliance. Since the U.S.'s OPA 1990 is in some respects stricter than the Russian provisions, arguably applying in the entire U.S. exclusive economic zone, the necessary balancing of interests by the U.S. military might be seen in a more environmentally optimistic light than might be first thought. The Russian military might also be influenced to restrain its activities to those lying more in line with the theoretical basis for the Russian rules.[519]

Environmental gains could be achieved through these recommendations. However since much of the jurisdictional disputes over the Russian (and Canadian) Arctic straits reflect security issues, a natural limit occurs which no amount of negotiations is going to resolve. As long as the U.S. and Russia are the world's leading military 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 small proposed gains in safety, environmental measures and world order, are all that probably can be hoped for at this time.

518Professor Kolodkin appears in favour of bilateral agreements between Russia and other States to facilitate shipping. Kolodkin interview, 25 February, 1994.

519See Franckx pp. 193, 226 footnote 479, referring to Kolodkin p. 167.

Appendix 5

LOSC

Article 233
Safeguards with respect to straits used for international navigation

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

"Statement Relating to Article 233 of the Draft Convention on the Law of the Sea in Its Application to the Straits of Malacca and Singapore"[1]

1. Laws and regulations enacted by States bordering the Straits under article 42, paragraph 1(a) of the convention, refer to laws and regulations relating to traffic separation schemes, including the determination of *under keel clearance* for the Straits provided in article 41.

2. Accordingly, a violation of the provision of resolution A.375(X), by the Intern-Governmental Maritime Consultative Organization adopted on 14 November 1977, whereby the vessels referred to therein shall allow for an under keel clearance of at least 3.5 metres during passage through the Straits of Malacca and Singapore, shall be deemed, in view of the peculiar geographic and traffic conditions of the Straits, *to be a violation within the meaning of article 233*. The States bordering the Straits may take appropriate enforcement measures, as provided for in article 233. Such measures may include preventing a vessel violating the required under keel clearance from proceeding. Such action shall not constitute denying, hampering, impairing or suspending the right of transit passage in breach of articles 42, paragraph 2 or 44 of the draft convention.

3. States bordering the Straits may take appropriate enforcement measures in accordance with article 233, against vessels violating the laws and regulations referred to in article 42, paragraph 1 (a) and (b) causing or threatening major damage to the marine environment of the Straits.

4. States bordering the Straits shall, in taking the enforcement measures, *observe the provisions on safeguards* in Section 7, Part XII of the draft convention.

5. Articles 42 and 233 do not affect the rights and obligations of States bordering the Straits regarding appropriate enforcement measures with respect to vessels in the Straits not in transit passage.

6. Nothing in the above understanding is intended to impair:

1"Statement Relating to Article 233 of the Draft Convention on the Law of the Sea in its Application to the Straits of Malacca and Singapore," *Official Records* 250-51, 251-53. U.N.Doc.A/CONF.62/L.145 (1982), Annex and Adds. 1-8, (Malacca Agreement).

(a) the sovereign immunity of ships and the provisions of article 326 as well as the international responsibility of the flag State in accordance with paragraph 5 of article 42;
(b) the duty of the flag State to take appropriate measures to ensure that its ships comply with article 39, without prejudice to the rights of States bordering the Straits under Parts III and XII of the draft convention and the provisions of paragraphs 1, 2, 3 and 4 of this statement.[2]

IMO Resolution - Navigation through the Straits of Malacca and Singapore[3]

The Assembly,

Noting Article 16 (i) of the
Convention on the Inter-Governmental Maritime Consultative Organization concerning the functions of the Assembly,

Being aware of the close relationship between safety of navigation and the prevention of pollution from ships,

Being informed of the decisions and measures taken by the Governments of Indonesia, Malaysia and Singapore concerning the safety of navigation and the protection of the marine environment in the Straits of Malacca and Singapore, given in the Annexes to this Resolution,

Considering Resolution A.378(X) by which the Assembly adopted general provisions on ships' routing,

Having examined the Recommendation by the Maritime Safety Committee at its thirty seventh session,

Adopts the new routing system for the Straits of Malacca and Singapore including traffic separation schemes, deep water routes and rules described in Annexes I to V to this Resolution,

Endorses the necessity that all oil tankers navigating through the Straits shall be adequately covered by relevant insurance and compensation schemes for oil pollution damage, including clear-up costs,

Agrees that the additional and improved aids to navigation listed in Annex VI to this Resolution will represent an important contribution to the safety of navigation of ships using the new routing system,

Invites the governments concerned to advise ships to comply with this Resolution from the appropriate date,

Requests the Secretary-General to advise all concerned of the details of this routing system described in the Annexes to this Resolution and to promulgate the date of entry into force as determined by the governments concerned.

2A/CONF.62/L.145 (1982), Annex and Adds. 1-8, XVI Off-Rec.250-51 (Malaysia), and 251-53 (Indonesia, Singapore, France, U.K., U.S.A., Japan, Australia, and Federal Republic of Germany, respectively). This is an important interpretation of the relevant provisions in relation to under-keel clearance. The text of IMO Assembly resolution A.375(X) of 14 November 1977 reads: Inter-Governmental Maritime Consultative Organization, *Assembly, Tenth Session, Resolutions and Other Decisions*, at 158 (London, 1982).

3IMO Assembly Resolution A.375(X), 14 November 1977, Inter-Governmental Maritime Consultative Organization, *Assembly, Tenth Session, Resolutions and Other Decisions*, at 117 (London, 1978). Annex VI contains "Rules for Vessels Navigating through the Straits of Malacca and Singapore." For amendments see IMO Assembly Resolution A.476(XII), 19 November 1981, IMO, *Assembly, Twelfth session, Resolutions and Other Decisions*, at 158 (London, 1982). Koh p. 160 notes that Malaysia considered this clearance a minimum.

Table 1.[4]

COMPARISON BETWEEN TRANSIT PASSAGE AND INNOCENT PASSAGE REGIMES FOR STRAITS UNDER THE ICNT

TRANSIT PASSAGE Regime	INNOCENT PASSAGE Regime
Meaning of 'transit passage - freedom of navigation and overflight solely for the purpose of continuous and expeditious transit (Art. 38(2)).	**Meaning** of 'innocent passage' - must not be prejudicial to the peace, good order or security of the coastal State. Activities which are considered prejudicial to the peace, good order or security of the coastal state are comprehensively defined (Art. 19). Passage must also be continuous and expeditious (Art.18(2)).
Exceptions where passage need not be continuous and expeditious are when activities other than those incident to the normal modes of transit are rendered necessary by force majeure or distress (Art.39(1)(c)).	**Exceptions** where passage need not be continuous and expeditious - when stopping and anchoring are incidental to navigation, or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress (Art.18(2)).
No suspension of (transit) passage (Art.44).	**No suspension** of (innocent) passage (Art.45(2)).
Cannot hamper (transit) passage (Art.44).	**Cannot hamper** (innocent) passage except in accordance with the Convention (Art.24(1)).
States bordering straits must give appropriate **publicity** to any dangers to navigation or overflight within or over the strait of which they have knowledge (Art.44).	Coastal states must give appropriate **publicity** to any dangers to navigation, of which they have knowledge, within the territorial sea (Art.24(2)).
Ships and aircraft are to enjoy the right of (transit) passage, which cannot be **impeded (Art.38).**	Ships are to enjoy the right of (innocent) passage (Art.17). No mention that this right cannot be 'impeded'. However, coastal States cannot **'hamper'** innocent passage (Art. 24).
Right of overflight (Art. 38(1)).	No right of overflight (no provision permitting)
Ships in transit are required to respect applicable sea lanes and traffic separation schemes duly established (Art.41(7)).	Ships exercising the right of innocent passage are required to use such sea lanes and traffic separation schemes as may be designated or prescribed (Art.22(1)).
Right of states bordering straits to make laws and regulations relating to (transit) passage is more circumscribed (Art.42).	Right of coastal States to make laws and regulations relating to (innocent) passage is more comprehensive (Art.21).

4Koh, Table V, pp. 168-169.

Requirement that States bordering Straits submit proposals on sea lanes and traffic separation schemes to the competent international organisation with a view to their adoption (Art.41(4)).	No requirement that coastal States submit proposals on sea lanes and traffic separation schemes to an external authority - but states must take into account the recommendations of competent international organisations in the designation of sea lanes and the prescription of traffic separation schemes (Art.22).
Cannot make laws and regulations which in their application have the practical effect of denying, hampering or impairing the right of (transit) passage except perhaps under Article 233 (Art.42(2)).	In the application of any laws or regulations made under the Convention the coastal State must not impose requirements on ships which have the practical effect of denying or impairing the right of innocent passage (Art.24(1)(a)).
Appears that submarines and other underwater vehicles may navigate submerged (no provisions prohibiting).	Submarines and other underwater vehicles must navigate on the surface and show their flag (Art.20).
No provision that warships may be required to cease transit passage for non-compliance with the laws and regulations of the coastal State.	Warships may be required to leave the territorial sea for non-compliance with the laws and regulations of the coastal State (Art.30).
During (transit) passage, ships are prohibited from carrying out any research or survey activities without prior authorization of the States ordering straits (Art.40).	Passage considered prejudicial to the peace, good order or security of the coastal State if the ship carries out research or survey activities (Art.19(2)(j))
Absence of provisions on prevention of passage that is non-transit.	Can prevent passage which is not innocent (Art.25(1)).
Any activity which is not an exercise of the right of transit passage remains subject to the other applicable provisions of the Convention.(Art.38(3)).	No counterpart.

APPENDIX

REVIEW BY EMERITUS PROFESSOR DONAT PHARAND

DONAT PHARAND, *Q.C., S.J.D., F.R.S.C.*
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CONSULTANT
International Law, Law of the Sea and Arctic Affairs

31 May 1996

Ms. Elin Dragland
Programme Secretary, INSROP
The Fridtjof Nansen Institute
P.O. Box 326
N-1324 Lysaker
NORWAY

RE: Jurisdiction Governing Straits in Russian Arctic Waters, by Douglas Brubaker

Dear Ms Dragland:

I was out of the country for some five weeks and found your letter and Dr. Brubaker's paper on my return, only a couple of weeks ago.

Unfortunately, I find myself having to give the same opinion I gave on two previous papers, namely that this Paper is not ready to be published as a chapter to a book. The reason is basically one of form, as will be evident from the comments which follow.

General Comment

This is a very well researched paper, it contains a comprehensive and sound analysis of the relevant issues and applicable principles, those principles are appropriately applied and the conclusions follow logically from that application. There is no doubt that the Paper makes a most valuable contribution to existing literature on the subject. However, the form should be improved considerably and a few points of substance could perhaps be polished a little.

The Form

I will limit my comments to three points: the language, the headings and the footnotes.

1) Language: the literary form can stand considerable editing, which should cover construction of sentences (many are aukward and unclear), grammar and spelling. Note in particular the word "suspendible" throughout the text, which should be suspendable.

2) Headings: these could be improved in two ways, so that the Table of Contents would become more meaningful. First, most of the headings

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should contain words of substance, giving the reader (even the one familiar with the subject) an idea of the content, instead of a simple reference to Convention provisions by Article number or to an abbreviated form of Convention titles. Second, a few additional headings in parts without any at all for some 10 to 15 pages would help the reader immensely to follow the main aspects of an issue being discussed.

3) Footnotes: the length of some of the footnotes (up to 2 pages of small print) could be considerably reduced by transferring some of their contents to the text itself. Otherwise, it affects the continuity of the discussion and makes it more difficult for the reader to follow.

The Substance

I have but a few suggestions on what could be called the two sections of the chapter: salient international issues and State Practice.

1) Salient International Issues (pages 4 to 64)

This Section deals basically with the applicable law: prescriptive jurisdiction and enforcement jurisdiction. The analysis would be more complete if it included a very brief and preliminary discussion of the meaning and scope of application of Article 234 on ice-covered areas. In my opinion, this would not constitute an unwarranted overlap with the discussion of that article in the next Section.

I did not notice any reference to a 1989 study on straits of some 230 pages, which I believe is the best and the most comprehensive published since Bruel's two volumes in 1945. I am referring to "The Legal Regime of Straits in the 1982 UN Convention on the Law of the Sea" by Hugo Caminos, in 205 Recueil des Cours 13-245 (1989). I think the author could perhaps find it useful to consult this publication on the law applicable to straits.

2) State Practice

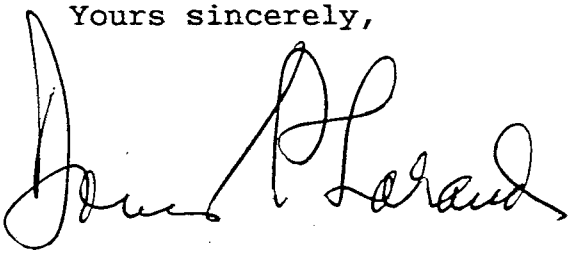
The author might wish to reconsider the statement made at the top of page 69 that "it is doubtful the Article 234 regime would theoretically have dominance over LOSC international straits regime". It has been argued that such "dominance" would exist for at least two reasons: first, Article 234 constitutes a special and autonomous section

(Section 8 of Part XII) and second, the application of that Section is not excluded for international straits as are other pollution provisions contained in Sections 516 and 7 (See Article 233). If the author removes his doubt, it might affect his treatment of the scope of application of Article 234.

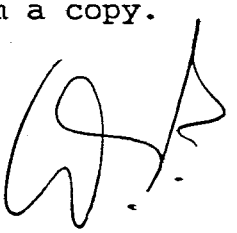
I might add that I fully agree with the Recommendation, at page 95, that a conference be convened to try to agree on a special Arctic legal regime for the protection of the marine environment and the safety of navigation in ice-covered areas.

I hope that the above comments might prove to be of some assistance.

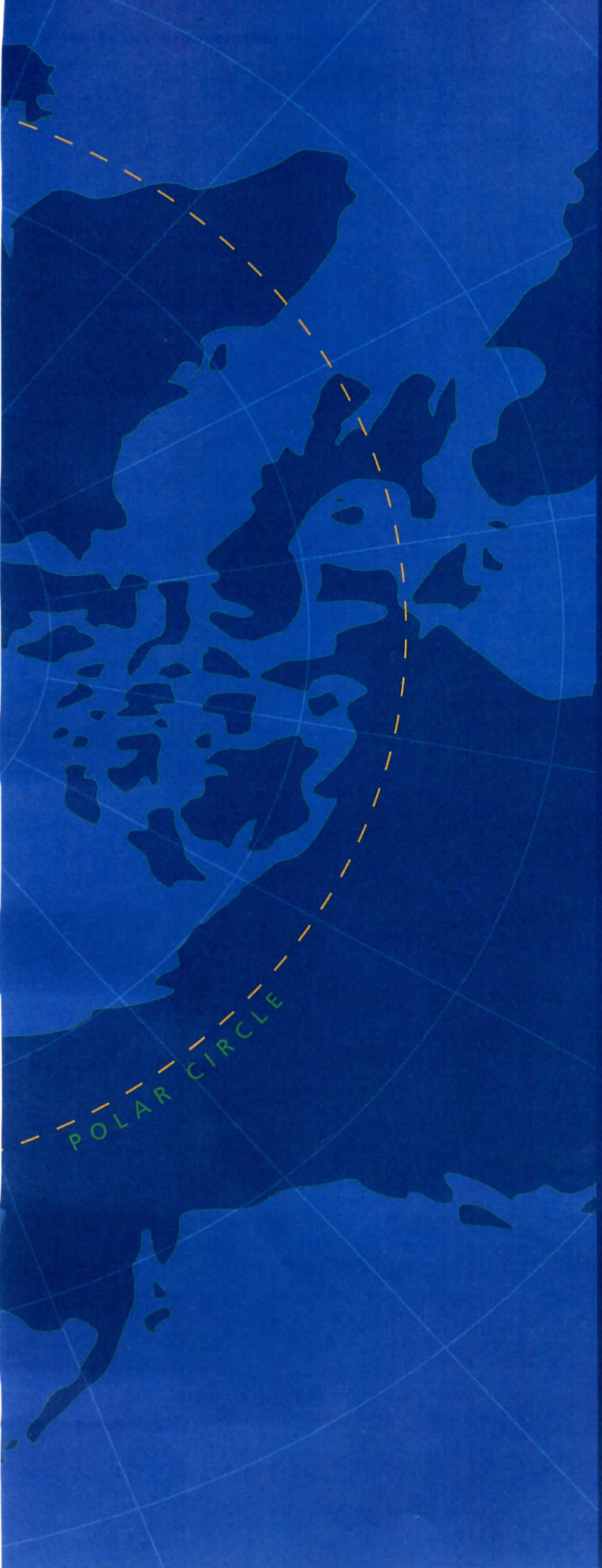
Yours sincerely,



P.S. I have just received Dr. Brubaker's letter dated May 24th, after finishing this report, and I am sending him a copy.



C.C. Dr. Douglas Brubaker



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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.