

## ARTICLE

Access Control: Freedom of the Seas in the Arctic and the  
Russian Northern Sea Route Regime

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### Abstract

Russia is the quintessential Arctic State, controlling most of the resources, territory and military power in the High North. Still, there is very little understanding of Russia's approach to international law in the region, and in particular, the governing regime of the Northern Sea Route, which has the potential to transform global shipping. As the melting of Arctic sea ice accelerates, access to the region is increasing. Commercial use of the Northern Sea Route, instead of the Suez Canal, reduces shipping time and distance between Northwestern Europe and Northeast Asia by a third, making the Northern Sea Route an attractive alternative to maritime shippers as navigation along the route becomes more feasible. Despite its commercial potential, however, vessels transiting the Northern Sea Route are subject to a comprehensive Russian regulatory regime, provisions of which limit navigational rights and freedoms in a manner that may be incompatible with international law.

Ensuring freedom of the seas globally has long been a central component of U.S. national security policy, and preserving freedom of the seas is a key objective of the U.S. National Strategy for the Arctic Region. Conversely, recent Russian policy pronouncements concerning the Arctic advocate for greater State control over the Northern Sea Route. The diminishing sea ice in the Arctic creates a sense of urgency for States to resolve long-standing disputes over navigational rights and freedoms in the region. This article analyzes the compatibility of the Northern Sea Route regulatory regime with various international law regimes, namely the law of the sea as reflected in the United Nations Convention on the Law of the Sea and the International Convention for the Safety of Life at Sea. After some brief introductory comments, Part II discusses the legal framework governing the Arctic, with emphasis on freedom of the seas. Part III discusses U.S. strategic policy in the Arctic, to provide context for the freedom of seas interests potentially impacted. Part IV analyzes the compatibility of the relevant Northern Sea Route regulations with the law of the sea, and also provides an overview of Russian Arctic, maritime, and national security policies that relate to the Northern Sea Route regulations. Part V discusses recent amendments to the Russian Merchant Shipping Code that may impact international shipping along the Northern Sea Route. Part VI discusses State practice regulating Arctic waters and the growing number of foreign-flagged commercial vessel transits across the Northern Sea Route pursuant to the Northern Sea Route regulatory regime and assesses the potential legal risks associated with State acquiescence to that regime. Finally, Part VII offers recommendations on a way forward to preserve the equities of both the United States and Russia, who share a history of Arctic collaboration and freedom of the seas advocacy.

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## I. Introduction

Although much of the attention in the Arctic surrounds the potential for natural resource exploitation, preserving freedom of the seas—the rights and freedoms all States enjoy to operate ships and aircraft in the maritime domain<sup>1</sup>—may become the most important strategic issue in the region. Access to the Arctic is rapidly increasing. The region is warming at an alarming rate, leading to widespread melting of Arctic sea ice and glaciers.<sup>2</sup> These environmental trends are only expected to continue,<sup>3</sup> and as the extent and thickness of Arctic sea ice diminishes ships will be able to navigate Arctic waters for longer periods of time, particularly on the Northern Sea Route, the seasonally ice-covered maritime shipping route along the northern coast of Russia from the Barents Sea to the Bering Strait.<sup>4</sup> This could upend international shipping, with global implications for commerce and maritime security.

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<sup>1</sup> For purposes of this article, the term “freedom of the seas” is used to collectively refer to the rights and freedoms that ships and aircraft—including warships and military aircraft—enjoy globally on, under, and over the seas in accordance with the law of the sea. When appropriate, specific rights—such as the “right of innocent passage” and the “right of transit passage”—as well as specific freedoms—such as the “freedom of overflight”—will be referenced directly. Historically, the term “freedom of navigation” has also been used to collectively refer to the aforementioned rights and freedoms.

<sup>2</sup> ARCTIC MONITORING AND ASSESSMENT PROGRAMME, SNOW, WATER, ICE AND PERMAFROST (SWIP) IN THE ARCTIC: SUMMARY FOR POLICY-MAKERS 3–4 (2017), <https://www.amap.no/documents/doc/Snow-Water-Ice-and-Permafrost.-Summary-for-Policy-makers/1532> [<https://perma.cc/F4AE-BL92>] [hereinafter SWIP SUMMARY FOR POLICY-MAKERS] (“Arctic temperatures are rising faster than the global average. The Arctic was warmer from 2011 to 2015 than at any time since instrumental records began in around 1900, and has been warming more than twice as rapidly as the world as a whole for the past 50 years.”); J. Richter-Menge, J.E. Overland, J. T. Mathis & E. Osborne, *Executive Summary*, in ARCTIC REPORT CARD 2017 (J. Richter-Menge, J. E. Overland, J. T. Mathis & E. Osborne eds., 2017), [ftp://ftp.oar.noaa.gov/arctic/documents/ArcticReportCard\\_full\\_report2017.pdf](ftp://ftp.oar.noaa.gov/arctic/documents/ArcticReportCard_full_report2017.pdf) (“While modulated by natural variability in regional and seasonal fluctuations, this ‘new normal’ is characterized by Arctic air temperatures that are warming at double the rate of the global temperature increase. Accordingly, there are pronounced decade-long declines in the extent and volume of the sea ice cover, the extent and duration of the winter snow cover, and the mass of the Greenland Ice Sheet and Arctic glaciers.”); see generally *Arctic Sea Ice News and Analysis*, NSIDC (May 6, 2018), <http://nsidc.org/arcticseaicenews/> [<https://perma.cc/M3K6-ULHD>] (updating Arctic sea ice extent daily and comparing with historical trends).

<sup>3</sup> SWIP SUMMARY FOR POLICY-MAKERS, *supra* note 2, at 5.

<sup>4</sup> SUSAN JOY HASSOL, IMPACTS OF A WARMING ARCTIC: ARCTIC CLIMATE IMPACT ASSESSMENT 83 (2004), <https://www.amap.no/documents/doc/impacts-of-a-warming-arctic-2004/786> (“The navigation season is often defined as the number of days per year in which there are navigable conditions, generally meaning less than 50% sea ice concentration. The navigation season for the Northern Sea Route is projected to increase from the current 20-30 days per year to 90-100 days by 2080. Passage is feasible for ships with ice-breaking capability in seas with up to 75% sea-ice concentration, suggesting a navigation season of approximately 150 days a year for those vessels by 2080.”); see also generally Yevgeny Aksenov et al., *On the Future Navigability of Arctic Sea Routes: High-Resolution Projections of the Arctic Ocean and Sea Ice*, 75 MARINE POL. 300 (2017).

Commercial use of the Northern Sea Route, instead of the Suez Canal, reduces shipping time and distance between northwestern Europe and northeast Asia by approximately a third, making the Northern Sea Route an attractive alternative for maritime shippers as navigation along the route becomes more feasible.<sup>5</sup> The tremendous commercial potential of the maritime shipping route is not speculative. In August of 2017, the ice-strengthened liquefied natural gas tanker *Christophe de Margerie* made history by becoming the first commercial ship to transit the Northern Sea Route without icebreaker escort, and did so in record time. The *Christophe de Margerie* completed her voyage from Hammerfast, Norway, to Boryeong, South Korea, in just nineteen days, concluding her transit through the Northern Sea Route as part of that journey in only six and a half days.<sup>6</sup> This momentous voyage sparked renewed interest in the Northern Sea Route not only as a future, but also a present-day, global shipping corridor. While it may still be some time before climate change causes the waters off of Russia's Arctic coast to "resemble the Baltic Sea" where ice-strengthened ships can operate year round,<sup>7</sup> some analysts predict that approximately two-thirds of all trade presently transported through the Suez Canal could ultimately be rerouted over the shorter Northern Sea Route.<sup>8</sup> Despite its commercial potential, however, vessels transiting the Northern Sea Route are subject to a comprehensive Russian regulatory regime, provisions of which limit freedom of the seas and may be incompatible with international law.

Russian regulation over the Northern Sea Route is not new. The Russian Federation, and the Soviet Union (U.S.S.R.) before it, has regulated navigation in the Northern Sea Route for years.<sup>9</sup> Many of the policies motivating these regulations, it could be argued, genuinely serve to protect Russia's legitimate

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<sup>5</sup> EDDY BEKKERS, JOSEPH F. FRANCOIS & HUGO ROJAS-ROMAGOSA, MELTING ICE CAPS AND THE ECONOMIC IMPACT OF OPENING THE NORTHERN SEA ROUTE 8–11 (2015), <https://www.cpb.nl/sites/default/files/publicaties/download/cpb-discussion-paper-307-melting-ice-caps-and-economic-impact-opening-northern-sea-route.pdf> [<https://perma.cc/F959-5PCT>].

<sup>6</sup> Russell Goldman, *Russian Tanker Completes Arctic Passage Without Aid of Icebreakers*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/world/europe/russia-tanker-christophe-de-margerie.html>; Jethro Mullen, *Tanker Becomes First to Cross Arctic Without Icebreaker*, CNN MONEY (Sept. 11, 2017), <http://money.cnn.com/2017/08/25/news/arctic-ice-tanker-ship/index.html> [<https://perma.cc/FTZ8-LH5C>]; Patrick Barkham, *Russian Tanker Sails Through Arctic Without Icebreakers for First Time*, GUARDIAN (Aug. 24, 2017), <https://www.theguardian.com/environment/2017/aug/24/russian-tanker-sails-arctic-without-icebreaker-first-time> [<https://perma.cc/EU2E-HYQ9>].

<sup>7</sup> MICHAEL BYERS, INTERNATIONAL LAW AND THE ARCTIC 129 (2013).

<sup>8</sup> BEKKERS, FRANCOIS & ROJAS-ROMAGOSA, *supra* note 5, at 5; *but see* MALTE HUMPERT, ARCTIC INST., CTR. FOR CIRCUMPOLAR SEC. STUDIES, ARCTIC SHIPPING: AN ANALYSIS OF THE 2013 NORTHERN SEA ROUTE SEASON 11 (2014), <http://www.thearcticinstitute.org/wp-content/uploads/2014/10/Arctic-Shipping-Analysis-of-the-2013-NSR-Season.pdf> [<https://perma.cc/P6VH-7AFN>] (arguing that the Northern Sea Route will likely remain a "niche trade route" as opposed to a true global maritime transportation corridor).

<sup>9</sup> For a historical overview of Russian regulation in the Arctic, *see generally* Eric Franckx, *The Legal Regime of Navigation in the Russian Arctic*, 18 J. TRANSNAT'L L. & POL'Y 327 (2009).

interest in preserving the marine environment along its northern border.<sup>10</sup> Notwithstanding this valid environmental concern, legitimate coastal State interests must be balanced against the threat of “creeping jurisdiction,” attempts by coastal States to extend their sovereignty and jurisdictional reach over the maritime domain in a manner inconsistent with the law of the sea, unlawfully impeding freedom of the seas.<sup>11</sup> Several provisions of Russia’s Northern Sea Route regulations appear to do just that. Of primary concern is a provision requiring all foreign-flagged ships to request “permission” to enter the waters of the Northern Sea Route from the Northern Sea Route Administration (NSRA)—a Russian governmental entity responsible for overseeing navigation along the Northern Sea Route, at least as of the time of this writing. Other provisions, inconsistent with international law, impose mandatory safety of navigation standards on vessel operations—such as ships’ routing measures—prior to those regulations being reviewed and adopted by the International Maritime Organization (IMO).<sup>12</sup> Recent amendments to the Russian Merchant Shipping Code arguably banning certain foreign-flagged shipments of oil, natural gas, and coal through the Northern Sea Route beyond permissible maritime cabotage restrictions<sup>13</sup> raise renewed concerns over the extent to which Russia may use domestic law to control access to the Northern Sea Route in a manner inconsistent with the law of the sea.

Ensuring freedom of the seas globally has long been a central component of U.S. national security policy,<sup>14</sup> and preserving freedom of the seas is a key

<sup>10</sup> See Dremluiga Roman, *Legal Regulation of Navigation through the Northern Sea Route*, 2 CHINA OCEANS L. REV. 139, 150 (2013).

<sup>11</sup> John D. Negroponte, *Who Will Protect Freedom of the Seas?*, 86 U.S. DEP’T STATE BULL. 41–43 (1986); Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT’L L. 830, 840–43, 850–51 (2006).

<sup>12</sup> Rules of Navigation on the Water Area of the Northern Sea Route §§ II.3, II.4, II.10, Annex 1, approved by the Ministry of Transport of Russia, Jan. 17, 2013 (Russ.), [http://www.arcticlio.com/docs/nsr/legislation/20130425185806en-Rules\\_unof.pdf](http://www.arcticlio.com/docs/nsr/legislation/20130425185806en-Rules_unof.pdf) [<https://perma.cc/W99K-WVE7>]. [<https://perma.cc/CMB2-DKA4>] [hereinafter Rules of Navigation].

<sup>13</sup> Soren Pico, *Shipowners Prepared to Bring Russian Shipping Law Before the EU*, SHIPPINGWATCH (Feb. 12, 2018), <https://shippingwatch.com/carriers/article10300617.ece> (“A new Russian shipping law that is being seen as a de facto export bank on the Northern Sea Route for ships not sailing under Russian flag, has raised concern at Danish Shipping. As such, the industry association has, in relation to an official meeting between Denmark and Russia, sent a series of questions to the Russian authorities in order to get clarification about the consequences of the new rules.”); Atle Staalesen, *Russian Legislators Ban Foreign Shipments of Oil, Natural Gas and Coal Along Northern Sea Route*, INDEP. BARENTS OBSERVER (Dec. 26, 2017), <https://thebarentsobserver.com/en/arctic/2017/12/russian-legislators-ban-foreign-shipments-oil-natural-gas-and-coal-along-northern-sea> [<https://perma.cc/ZS5C-NR69>]; Atle Staalesen, *New Restrictions Coming Up in Russian Arctic Shipping*, INDEP. BARENTS OBSERVER (Mar. 28, 2018), <https://thebarentsobserver.com/en/industry-and-energy/2018/03/new-restrictions-coming-russian-arctic-shipping> [<https://perma.cc/6AWT-7AZN>].

<sup>14</sup> U.S. DEP’T OF DEF., FREEDOM OF NAVIGATION PROGRAM (2017), <https://policy.defense.gov/Portals/11/DoD%20FON%20Program%20Summary%2016.pdf?ver=2017-03-03-141350-380> [<https://perma.cc/3X47-5QKA>] (“Since the founding of the nation, the United States has asserted a vital national interest in preserving the freedom of the seas and necessarily called upon its military forces to preserve that interest. . . . As history shows, this U.S.

objective of the U.S. National Strategy for the Arctic Region.<sup>15</sup> Reflecting these goals, on May 29, 2015, the U.S. Department of State sent a pointed diplomatic note to the Russian Federation conveying “support for the navigational safety and environmental protection objectives” in the NSRA regulatory scheme, while expressing concern over those provisions that were “inconsistent with important law of the sea principles related to navigation rights and freedoms,” particularly the requirement that foreign-flagged vessels obtain permission from Russia to enter and transit the Northern Sea Route.<sup>16</sup> The NSRA regulatory regime, however, remains unchanged. Commercial vessels from a number of flag States are complying with the Russian permission-based regime, presumably as a business decision and not as flag State acceptance of the regime, nonetheless highlighting an important question as to whether a new legal norm is taking shape in the Arctic, one that could potentially impact freedom of the seas.

The issue is not academic. The diminishing sea ice creates a sense of urgency for Arctic States to resolve long-standing disputes over navigational rights and freedoms in the region.<sup>17</sup> This article analyzes the compatibility of the NSRA regulatory regime with various international law regimes, namely the law of the sea as reflected in the United Nations Convention on the Law of the Sea (UNCLOS) and the International Convention for the Safety of Life at Sea (SOLAS). Part II briefly discusses the legal framework governing the Arctic, with emphasis on freedom of the seas. Part III discusses U.S. strategic policy in the Arctic, to provide context for the freedom of seas interests potentially impacted by Russian regulations. Part IV analyzes the compatibility of the relevant NSRA regulations with the law of the sea and provides an overview of Russian Arctic, maritime, and national security policies that relate to the NSRA regulations. Part V discusses recent amendments to the Russian Merchant Shipping Code that may impact international shipping along the Northern Sea Route. Part VI discusses State practice regulating Arctic waters and the growing number of foreign-flagged commercial vessel transits across the Northern Sea Route pursuant to the NSRA regulatory regime, and assesses the potential legal risks associated with State acquiescence to that regime. Finally, Part VII recommends a way forward to preserve the equities of both the United States and Russia, who share a history of Arctic collaboration and freedom of the seas advocacy.

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national interest and policy for preserving the freedom of the seas are long-standing in nature and global in scope.”); *see also* J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS* 6–8 (3d ed. 2012).

<sup>15</sup> THE WHITE HOUSE, *NATIONAL STRATEGY FOR THE ARCTIC REGION* 6–7 (2013), [https://obamawhitehouse.archives.gov/sites/default/files/docs/nat\\_arctic\\_strategy.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/nat_arctic_strategy.pdf) [<https://perma.cc/YV6C-PL4D>].

<sup>16</sup> Diplomatic Note from the Government of the United States to the Government of the Russian Federation regarding the Northern Sea Route Regulatory Scheme, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 2015, at 526–28 (CarrieLyn D. Guymon, Off. of Legal Advisor, U.S. Dep’t of State ed. 2015).

<sup>17</sup> For a discussion on a number of longstanding maritime disputes in the Arctic, see Erik Franckx, *Should the Law Governing Maritime Areas in the Arctic Adapt to Changing Climatic Circumstances?*, 41 *CAL. W. INT’L. L.J.* 397 (2011).

## II. Legal Framework Governing the Arctic Ocean

### A. The Ilulissat Declaration

Unlike Antarctica, which is largely administered by a specific treaty system,<sup>18</sup> no distinct international legal regime applies to the Arctic region. Rather, the international law of the sea applies to the region, which is primarily a maritime domain. Though there are several legal instruments applicable to the Arctic Ocean,<sup>19</sup> UNCLOS provides the primary governing legal regime, particularly as it relates to freedom of the seas. Commitment to this framework was confirmed by the coastal Arctic States—Canada, Denmark (Greenland), Norway, Russia, and the United States—with the signing of the Ilulissat Declaration.<sup>20</sup> Through the Declaration, the coastal Arctic States agreed that the law of the sea<sup>21</sup> provides an appropriate legal framework for governing the Arctic Ocean.<sup>22</sup> These States saw no need for a new comprehensive international legal regime.<sup>23</sup>

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<sup>18</sup> Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71. For a general discussion on the Antarctic treaty system, see FRANK G. KLOTZ, *AMERICA ON THE ICE: ANTARCTIC POLICY ISSUES* 35–79 (1990); for a discussion on the Antarctic treaty system and the law of the sea, see Karen Scott & David Vanderzwaag, *Polar Oceans and the Law of the Sea*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 741–45 (Donald R. Rothwell et al. eds., 2015).

<sup>19</sup> These include the International Convention for the Prevention of Pollution from Ships (MARPOL), as amended; the International Convention for the Safety of Life at Sea (SOLAS), as amended; the Convention on Standards of Training, Certification and Watchkeeping of Seafarers (STCW Convention); the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS); the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; and the Convention on Oil Pollution, Preparedness, Response and Cooperation. For a discussion of the Arctic legal regime, see Donald R. Rothwell, *International Law and Arctic Shipping*, 22 MICH. ST. INT'L L. REV. 67, 75–78 (2013).

<sup>20</sup> Ilulissat Declaration, May 28, 2008, 48 I.L.M. 362, [http://www.oceanlaw.org/downloads/arctic/Ilulissat\\_Declaration.pdf](http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf) [https://perma.cc/859R-J7SP].

<sup>21</sup> *Id.* at 1. Though the Declaration does not make a specific reference to UNCLOS, it is presumed that this omission was done “in order to accommodate the United States,” the only littoral Arctic State that is not a party to the Convention. See Donald R. Rothwell, *The Law of the Sea and Arctic Governance*, 107 AM. SOC'Y INT'L L. PROC. 272, 274 (2013).

<sup>22</sup> In particular, the Declaration states that “the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims.” Ilulissat Declaration, *supra* note 20, at 1.

<sup>23</sup> *Id.* at 2. In May 2018, the coastal Arctic States met in Ilulissat, Greenland, to celebrate the ten-year anniversary of the Ilulissat Declaration and reconfirm their commitment to it. Marc Jacobsen, *Ilulissat Declaration's 10-year Anniversary*, HIGH NORTH NEWS (May 23, 2018), <http://www.highnorthnews.com/ilulissat-declarations-10-year-anniversary/>.



B. *Freedom of the Seas as Reflected in the United Nations Convention on the Law of the Sea*

The United Nations Convention on the Law of the Sea ensures stability in oceans governance by dividing the oceans space into various maritime zones within which distinct freedoms, rights, and obligations attach. This division serves to manage expectations as to both the permissible uses of the oceans and the permissible scope of coastal State authority within the respective zones.<sup>24</sup> It also provides a “check” against “out-of-control national claims” in the oceans space.<sup>25</sup> Though the United States has yet to accede to UNCLOS, it considers the treaty provisions governing navigation and overflight in the various maritime zones as reflecting customary international law, and therefore binding on all States.<sup>26</sup> As such, the United States “recognize[s] the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal States.”<sup>27</sup>

Every maritime zone is measured from the baseline, normally the low-water line along the coast.<sup>28</sup> Waters landward of the baseline are internal waters under the sovereign control of the coastal State, as is the superjacent airspace.<sup>29</sup> Generally, foreign-flagged vessels and aircraft may not enter or overfly another State’s internal waters without permission.<sup>30</sup> Waters seaward of the baseline, up to

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<sup>24</sup> John Norton Moore, *Navigational Freedom: The Most Critical Common Heritage*, 93 INT’L L. STUD. 251, 253–56 (2017).

<sup>25</sup> *Id.* at 253.

<sup>26</sup> UNCLOS has been in force since 1994. In October of 1994, in accordance with Article II, Section 2, of the U.S. Constitution, President Bill Clinton transmitted the treaty to the U.S. Senate for advice and consent. Although the Senate Committee on Foreign Relations voted in favor of submitting the treaty to a full vote in 2004 and 2007, a full vote of the Senate has yet to occur. See U.S. DEP. OF STATE, LAW OF THE SEA CONVENTION TIMELINE (2018), <https://www.state.gov/e/oes/lawofthesea/timeline/index.htm> [<https://perma.cc/KM2L-ZJHV>]. U.S. policy on UNCLOS is reflected in a 1983 statement by President Ronald Reagan. See United States Oceans Policy, Statement by the President, 1 PUB. PAPERS 378 (Mar. 10, 1983), <https://www.state.gov/documents/organization/143224.pdf> [<https://perma.cc/RT8K-UPTP>] [hereinafter Oceans Policy Statement].

<sup>27</sup> Oceans Policy Statement, *supra* note 26.

<sup>28</sup> United Nations Convention on the Law of the Sea art. 5, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. UNCLOS permits the employment of “straight baselines”—baselines drawn by joining “appropriate points”—if specific geographic criteria are met, for example where the coastline is deeply indented and cut into or if there are fringing islands along the coastline. *Id.* art. 7. Additionally, UNCLOS has special provisions for the drawing of baselines for reefs, river mouths, bays, harbor works, roadsteads and low-tide elevations. *Id.* arts. 6, 9–13.

<sup>29</sup> *Id.* arts. 2, 8(1); U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 2.5.1 (2017) [hereinafter COMMANDER’S HANDBOOK].

<sup>30</sup> Ships may enter another State’s internal waters without permission when necessary as a result of distress or force majeure. Additionally, where the establishment of a straight baseline has the effect of enclosing as internal waters areas of sea previously considered territorial seas or high seas, a right of innocent passage exists in those waters and ships do not need permission to enter. UNCLOS, *supra* note 28, arts. 2, 8, 18; COMMANDER’S HANDBOOK, *supra* note 29, at § 2.5.1.

twelve nautical miles, constitute a coastal State's territorial sea, where the coastal State enjoys sovereignty over the water, seabed, subsoil and superjacent airspace, subject to the navigational rights of innocent passage, transit passage, and archipelagic sea lanes passage.<sup>31</sup>

Foreign-flagged vessels, including warships, exercising the right of innocent passage may traverse a coastal State's territorial sea, or proceed to or from its internal waters, without the coastal State's permission, so long as the passage is "continuous and expeditious,"<sup>32</sup> is not "prejudicial to the peace, good order or security" of the coastal State, and is in conformity with the Convention and other rules of international law.<sup>33</sup> Submarines engaged in innocent passage must navigate on the surface,<sup>34</sup> however, and aircraft do not have a corresponding right of overflight in the territorial sea without coastal State permission.<sup>35</sup> A coastal State may not suspend the right of innocent passage unless "essential" for national security, and may do so only temporarily in specified areas after providing appropriate notice.<sup>36</sup> Similarly, a coastal State may not impose any regulations on foreign ships that "have the practical effect of denying or impairing" the right of innocent passage.<sup>37</sup>

If a coastal State's territorial sea overlaps a strait used for international navigation, such as the Strait of Gibraltar or the Strait of Hormuz, foreign vessels and aircraft, including warships and military aircraft, may engage in "continuous and expeditious" transit through the strait in their "normal mode" of operation—including submerged transit by submarines—without the coastal State's permission.<sup>38</sup> This right of transit passage may not be suspended by the coastal State, and a coastal State may not impose any regulations on foreign ships that have the effect of "denying, hampering, or impairing" the right of transit passage.<sup>39</sup>

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<sup>31</sup> UNCLOS, *supra* note 28, arts. 2, 3, 17, 38, 52, 53.

<sup>32</sup> *Id.* arts. 17, 18.

<sup>33</sup> *Id.* art. 19.

<sup>34</sup> *Id.* art. 20.

<sup>35</sup> *Id.* art. 2; 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 156–57 (Satya N. Nandan & Shabtai Rosenne eds., 1993) [hereinafter UNCLOS COMMENTARY VOLUME 2] ("The Secretariat of ICAO [International Civil Aviation Organization] has pointed out that no such right of innocent passage through the airspace above the territorial sea is recognized for aircraft; passage through such airspace is subject to the same regime as flight over the territory of the State and is governed by the 1944 Convention on International Civil Aviation (the Chicago Convention) in the case of nonscheduled international air service, by the 1944 International Air Services Transit Agreement in the case of transit by scheduled international air services, or in accordance with article 6 of the Chicago Convention by a bilateral agreement or under a special permission.")

<sup>36</sup> UNCLOS, *supra* note 28, art. 25.

<sup>37</sup> *Id.* art. 24.

<sup>38</sup> *Id.* arts. 38, 39.

<sup>39</sup> *Id.* arts. 42, 44.

Freedom of the seas is even greater seaward of the territorial sea, where the high seas freedoms of navigation, overflight, and other internationally lawful uses of the sea apply to all ships and aircraft.<sup>40</sup> Seaward of the territorial sea, a coastal State lacks full sovereignty, having instead only limited sovereign rights and certain limited subject matter jurisdiction in its contiguous zone and exclusive economic zone (EEZ).<sup>41</sup> A coastal State may enforce customs, fiscal, immigration, and sanitation laws in its contiguous zone.<sup>42</sup> In its EEZ, a coastal State may exercise limited rights related to natural resources and limited jurisdiction regarding artificial structures, marine scientific research, and the protection and preservation of the marine environment, but any such exercise of these limited rights or jurisdiction must have “due regard” to the rights and duties of other States.<sup>43</sup> Vessels and aircraft do not need coastal State permission to navigate waters or overfly airspace in either the contiguous zone or the EEZ.<sup>44</sup>

As it pertains specifically to the Arctic and other “ice covered areas,” Article 234 of UNCLOS affords coastal States the right to enforce domestic laws for the “prevention, reduction, and control of marine pollution from vessels” within their EEZ, if certain environmental criteria are met.<sup>45</sup> There must exist “severe climatic conditions” and the presence of ice for most of the year that creates “obstructions or exceptional hazards to navigation,” and pollution to the marine environment in the EEZ must have the potential to “cause major harm to or an irreversible disturbance of the ecological balance.”<sup>46</sup> Any coastal State law prescribed pursuant to this limited authority, however, must have “due regard” to navigation.<sup>47</sup>

### III. Freedom of the Seas and U.S. Arctic Strategy

Preserving freedoms of the seas is vital for both maritime security and global economic development. The United States is a maritime power and responds to contingencies around the globe. Without access to the sea and air space that the freedom of the seas provides, the United States’ ability to maintain a forward presence and accomplish a range of military and humanitarian assistance missions would be compromised.<sup>48</sup> Put simply, the United States

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<sup>40</sup> UNCLOS, *supra* note 28, arts. 58, 87. The freedom to lay submarine cables and pipelines also applies beyond the territorial sea.

<sup>41</sup> A coastal State’s contiguous zone may extend up to 24 nautical miles from its baseline. *Id.* art. 33(2). A coastal State’s exclusive economic zone may extend up to 200 nautical miles from its baseline. *Id.* art. 57.

<sup>42</sup> *Id.* art. 33.

<sup>43</sup> *Id.* art. 56.

<sup>44</sup> *Id.* arts. 58, 87; COMMANDER’S HANDBOOK, *supra* note 29, at § 2.6.

<sup>45</sup> UNCLOS, *supra* note 28, art. 234.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Dennis Mandsager, *The U.S. Freedom of Navigation Program: Policy, Procedure, and Future*, in *THE LAW OF MILITARY OPERATIONS: LIBER AMICORUM* PROFESSOR JACK GRUNAWALT 113, 116 (Michael N. Schmitt ed., 1998); see also ROACH & SMITH, *supra* note 14, at 3–4, 8–9.

“requires maritime mobility,”<sup>49</sup> and as the extent of Arctic sea ice continues to diminish,<sup>50</sup> and the region becomes more accessible, Arctic sea spaces may become increasingly significant strategic corridors for U.S. mobility and power projection, including in times of crisis.

Freedom of the seas is also “of the utmost importance in protecting global trade, one of the core mechanisms for global economic growth.”<sup>51</sup> Preserving open access to the seas for the purpose of facilitating international commerce has always been a central theme in the development of the law of the sea,<sup>52</sup> and for good cause. The oceans have long been the highways of international commerce and communication. Over eighty percent of the world’s goods are transported across the oceans,<sup>53</sup> and U.S. national security and economic development are “inextricably linked” to maritime trade.<sup>54</sup> This requires maritime shipping routes

<sup>49</sup> ROACH & SMITH, *supra* note 14, at 8.

<sup>50</sup> Maria-José Viñas, *Sea Ice Extent Sinks to Record Lows at Both Poles*, NASA (Mar. 22, 2017), <https://www.nasa.gov/feature/goddard/2017/sea-ice-extent-sinks-to-record-lows-at-both-poles> [<https://perma.cc/X89Y-NY62>].

<sup>51</sup> Moore, *supra* note 24, at 258; *see also* Tommy Koh, *Setting the Context: A Globalized World, in* FREEDOM OF NAVIGATION AND GLOBALIZATION 5 (Myron H. Nordquist et al. eds., 2015) (“It is ships, not aircraft, which carry most of our trade in goods. Shipping takes place within a framework of laws and rules. A fundamental value is freedom of navigation. A ship may safely navigate through the territorial area, contiguous zone and the Exclusive Economic Zone of any coastal State and the high seas in order to arrive at its destination. A ship may enter a port, discharge its cargo and leave. Freedom of navigation is the lifeblood of the shipping industry. It is a global public good. It is in the interests of all countries to uphold it. It is in the interest of no country to interfere with the freedom of navigation.”)

<sup>52</sup> HUGO GROTIUS, *MARE LIBERUM* (THE FREE SEAS) 51 (David Armitage ed., Richard Hakluyt trans., Liberty Fund Inc. 2004) (1609), [https://scholar.harvard.edu/files/armitage/files/free\\_sea\\_ebook.pdf](https://scholar.harvard.edu/files/armitage/files/free_sea_ebook.pdf) [<https://perma.cc/2SVZ-GMAC>] (“Therefore, the liberty of trading is agreeable to the primary law of nations which hath a natural and perpetual cause and therefore cannot be taken away and, if it might, yet could it not but by the consent of all nations, so far off is it that any nation, by any means, may justly hinder two nations that are willing to trade between themselves.”); *see also* DONALD R. ROTHWELL & TIM STEPHENS, *THE INTERNATIONAL LAW OF THE SEA* 220–22 (2d ed. 2016) (“The international law of the sea was principally founded on the freedom of the seas, a doctrine that has been critical to the recognition of navigational rights and freedoms in the law of the sea and which has continuing relevance in the twenty-first century. The predominant basis for the recognition of the freedom of the seas has been, and remains, the freedom of trade and commerce across the oceans.”).

<sup>53</sup> UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *REVIEW OF MARINE TRANSPORT 2017*, at 16, UNCTAD/RMT/2017, U.N. Sales No. E.17.II.D.10 (2017), [http://unctad.org/en/PublicationsLibrary/rmt2017\\_en.pdf](http://unctad.org/en/PublicationsLibrary/rmt2017_en.pdf) [<https://perma.cc/9CRS-3CFW>].

<sup>54</sup> U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *A COOPERATIVE STRATEGY FOR 21<sup>ST</sup> CENTURY SEAPOWER* 1–8 (2015), <http://www.navy.mil/local/maritime/150227-CS21R-Final.pdf> [<https://perma.cc/7X5Y-SDF7>]. Ensuring freedom of the seas is not unique to U.S. strategic policy; for example, *see* U.K. MINISTRY OF DEFENCE, *JOINT DOCTRINE PUBLICATION 0-10: UK MARITIME POWER* 16–17 (5th ed. 2017), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/656618/doctrine\\_uk\\_maritime\\_power\\_jdp\\_0\\_10.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/656618/doctrine_uk_maritime_power_jdp_0_10.pdf) [<https://perma.cc/BPD7-7C99>] (“Freedom of navigation is the term given to the rights and freedoms that apply to all forms of transit on, over and under the high seas; it is vital to the security and economic stability of the UK. It facilitates global maritime trade and provides the UK military with the legal landscape that allows it to respond to threats to security and pursue national interests at range from the UK. Freedom of navigation operations

to remain safe and readily accessible, so that vital supplies—including energy—may flow freely and uninterrupted.

In the 1970s, the United States operationalized its long-standing policy on ensuring freedom of the seas, implementing the Freedom of Navigation Program—a joint initiative of the Departments of Defense and State to challenge, both diplomatically and operationally,<sup>55</sup> excessive maritime claims that threaten access to the maritime domain.<sup>56</sup> The significance of preserving freedom of the seas was reemphasized in the 1983 U.S. Oceans Policy, which confirms that the United States “will not . . . acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.”<sup>57</sup> The Freedom of Navigation

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provide an enduring strategic benefit to UK security by protecting the UK’s maritime rights and freedoms, encouraging lawful practice and preventing excessive geographical and/or jurisdictional claims gaining traction in international law. Freedom of navigation operations influence other states’ governments and therefore constitute a form of naval diplomacy; they may be symbolic or coercive. Freedom of navigation operations in peacetime are one means by which maritime forces maintain the freedom of the seas for maritime trade, ensuring that the UNCLOS provisions are respected.”); *see also* HM GOV’T, THE UK NATIONAL STRATEGY FOR MARITIME SECURITY 15–16 (2014),

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/322813/20140623-40221\\_national-maritime-strat-Cm\\_8829\\_accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322813/20140623-40221_national-maritime-strat-Cm_8829_accessible.pdf) [https://perma.cc/GH66-RKZL]

(“Freedom of Navigation (FON) is the term given to the bundle of rights and freedoms that warships, merchant ships, aircraft and submarines enjoy to navigate on, over, and under the world’s seas: it is vital to the security and economic stability of the UK. FON facilitates global maritime trade and provides the UK military with the legal landscape to allow it to respond to threats to security at range. FON rights are set out in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The stability of the UNCLOS regime, and in consequence maritime security, may be fundamentally undermined by excessive claims over sea areas or interferences with navigational rights and freedoms.”); STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE’S REPUBLIC OF CHINA, CHINA’S ARCTIC POLICY § IV.3(1) (2018), [http://www.xinhuanet.com/english/2018-01/26/c\\_136926498\\_4.htm](http://www.xinhuanet.com/english/2018-01/26/c_136926498_4.htm) [https://perma.cc/XWJ7-LWYZ] (“China respects the legislative, enforcement and adjudicatory powers of the Arctic States in the waters subject to their jurisdiction. China maintains that the management of the Arctic shipping routes should be conducted in accordance with treaties including the UNCLOS and general international law and that the freedom of navigation enjoyed by all countries in accordance with the law and their rights to use Arctic shipping routes should be ensured.”).

<sup>55</sup> JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 201–03 (2013). (noting that the U.S. Freedom of Navigation Program uses warships and military aircraft to operationally “assert navigation and overflight rights and freedoms against excessive claims on a worldwide basis” by operating those warships and military aircraft in the contested areas in a manner consistent with international law. These operational assertions were historically referred to as “protest sailings”). In addition to diplomatic and operational efforts, bilateral military-to-military engagements are also a component of the U.S. Freedom of Navigation Program. *Id.*

<sup>56</sup> Mandsager, *supra* note 48, at 113, 118; ROACH & SMITH, *supra* note 14, at 6–9.

<sup>57</sup> Oceans Policy Statement, *supra* note 26; *see also* COMMANDER’S HANDBOOK, *supra* note 29, at § 2.8 (“When States appear to acquiesce in excessive maritime claims and fail to exercise their rights actively in the face of constraints on international navigation and overflight, those claims and constraints may, in time, be considered to have been accepted by the international community as reflecting the practice of States and as binding upon all users of the seas and superjacent airspace. Consequently, it is incumbent upon maritime States to protest diplomatically all excessive claims of coastal States and to exercise their navigation and overflight rights in the face

Program remains an active component of U.S. national security strategy,<sup>58</sup> and the United States challenges excessive maritime claims in every region of the world.<sup>59</sup>

The Arctic has a number of disputed and excessive maritime claims.<sup>60</sup> This creates uncertainty for States and companies operating, or planning to operate, in the region. As such, one of the key objectives of the U.S. National Strategy for the Arctic Region is “preserving all of the rights, freedoms, and uses of the sea and airspace recognized under international law,” to create a stable and secure operating environment.<sup>61</sup> The United States, after all, is “an Arctic Nation” with “broad and fundamental interests” in the region, including security and commercial interests, and maintaining access to the region is essential to support those interests.<sup>62</sup> The Arctic strategy of the U.S. Department of Defense,<sup>63</sup> the

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of such claims. The President’s Oceans Policy Statement makes clear that the United States has accepted this responsibility as a fundamental element of its national policy.”)

<sup>58</sup> THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 41 (2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> [<https://perma.cc/FA9J-AVCX>] (“The United States supports the peaceful resolution of disputes under international law but will use all of its instruments of power to defend U.S. interests and ensure common domains remain free.”); *see also* U.S. DEP’T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 4 (2018), <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf> [<https://perma.cc/YQY2-7ZFD>].

<sup>59</sup> UNDER SEC’Y OF DEF. FOR POLICY, U.S. DEP’T OF DEF., DOD ANNUAL FREEDOM OF NAVIGATION (FON) REPORTS (2017), <http://policy.defense.gov/OUSDP-Offices/FON/> [<https://perma.cc/CD9T-CJAR>].

<sup>60</sup> For a comprehensive discussion, see ROACH & SMITH, *supra* note 14, at 467–97.

<sup>61</sup> NATIONAL STRATEGY FOR THE ARCTIC REGION, *supra* note 15, at 6–7 (“Existing international law provides a comprehensive set of rules governing the rights, freedoms, and uses of the world’s oceans and airspace, including the Arctic. The law recognizes these rights, freedoms, and uses for commercial and military vessels and aircraft. Within this framework, we shall further develop Arctic waterways management regimes, including traffic separation schemes, vessel tracking, and ship routing, in collaboration with partners.”); ARCTIC EXEC. STEERING COMM., EXEC. OFFICE OF THE PRESIDENT, IMPLEMENTATION FRAMEWORK FOR THE NATIONAL STRATEGY FOR THE ARCTIC REGION 9–10 (2016), [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/National%20Strategy%20for%20the%20Arctic%20Region%20Implementation%20Framework%20\(Appendix%20A\)%20Final.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/National%20Strategy%20for%20the%20Arctic%20Region%20Implementation%20Framework%20(Appendix%20A)%20Final.pdf) [<https://perma.cc/D98Y-KPG9>] (“The United States will continue to promote freedom of the seas and global mobility of maritime and aviation interests for all nations in accordance with international law. The United States will promote and conduct such activities in the Arctic region as appropriate . . . The United States will exercise internationally recognized navigation and overflight rights, including transit passage through international straits, innocent passage through territorial seas, and the conduct of routine operations on, over, and under foreign exclusive economic zones, as reflected in the Law of the Sea Convention.”); *see also* Raul (Pete) Pedrozo, *Arctic Climate Change and the U.S. Accession to the United Nations Convention on the Law of the Sea*, 89 INT’L L. STUD. 757, 758–59 (2013) (“The National Strategy [for the Arctic Region] is built on three lines of effort: advance U.S. security interests, pursue responsible Arctic region stewardship, and strengthen international cooperation. One of the key supporting objectives identified in the strategy to advance U.S. security interests is the need to preserve Arctic region freedom of the seas recognized under international law.”).

<sup>62</sup> NATIONAL STRATEGY FOR THE ARCTIC REGION, *supra* note 15, at 2 (quoting NATIONAL STRATEGY FOR THE ARCTIC REGION, MAY 2010).

U.S. Navy,<sup>64</sup> and the U.S. Coast Guard<sup>65</sup> each echo the U.S. National Strategy's prioritization of preserving the freedom of the seas.

The strategic importance of preserving freedom of the seas in the Arctic, including along the Northern Sea Route, could be significant, particularly given the potential impacts on global economic development. A maritime trade route across the Arctic connecting the North Pacific and the North Atlantic "would represent a transformational shift in maritime trade, akin to the opening of the Panama Canal in the early 20th century."<sup>66</sup> Such a route could reduce shipping time and distance between northwestern Europe and northeast Asia by approximately a third, and some economic analysts predict that approximately two-thirds of all trade presently transported through the Suez Canal<sup>67</sup> could ultimately be rerouted over the shorter Northern Sea Route.<sup>68</sup> Through the establishment of its Northern Sea Route regulatory regime, Russia has positioned itself to control access to this increasingly significant maritime trade route.

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<sup>63</sup> See U.S. DEP'T OF DEF., REPORT TO CONGRESS ON STRATEGY TO PROTECT UNITED STATES NATIONAL SECURITY INTERESTS IN THE ARCTIC REGION 10–11 (2016), <https://www.defense.gov/Portals/1/Documents/pubs/2016-Arctic-Strategy-UNCLAS-cleared-for-release.pdf> [<https://perma.cc/DY7X-7H3Q>] ("In support of the U.S. national security interests in preserving all of the rights, freedoms, and uses of the sea and airspace recognized under international law, DoD will preserve the global mobility of U.S. military and civilian vessels and aircraft throughout the Arctic, as in other regions. This includes conducting Freedom of Navigation operations to challenge excessive maritime claims when and where necessary.").

<sup>64</sup> See CHIEF OF NAVAL OPERATIONS, U.S. DEP'T OF THE NAVY, THE UNITED STATES NAVY ARCTIC ROADMAP FOR 2014 TO 2030, at 16 (2014), <http://www.dtic.mil/dtic/tr/fulltext/u2/a595557.pdf> [<https://perma.cc/YU55-K5JR>] ("Access to the global commons and freedom of the seas are a national priority. The Navy will support access for the safe, secure, and free flow of resources and commerce in the Region. Strategic resources and trade routes will be the primary driver for Arctic and non-Arctic nations alike to seek economic prosperity. The Navy will contribute to stability and security as economic activity increases.").

<sup>65</sup> See U.S. COAST GUARD, ARCTIC STRATEGY 29 (2013), [http://www.overview.uscg.mil/Portals/6/Documents/PDF/CG\\_Arctic\\_Strategy.pdf?ver=2016-10-13-122837-990](http://www.overview.uscg.mil/Portals/6/Documents/PDF/CG_Arctic_Strategy.pdf?ver=2016-10-13-122837-990) [<https://perma.cc/EDF8-AAQ6>] ("Consistent with domestic and international law, the U.S. government exercises all lawful claims of sovereignty, sovereign rights, and jurisdiction in the Arctic region. Among these sovereign rights are duties relating to freedom of navigation and overflight. As a military service, the Coast Guard will exercise and assert U.S. sovereignty where necessary, ensuring freedom of navigation and overflight, security of U.S. Arctic waters, and integrity of sovereign borders.").

<sup>66</sup> *Id.* at 20.

<sup>67</sup> In addition to time and cost considerations, transit through the Suez Canal often requires transit through the volatile Bal al Mandeb chokepoint off Yemen, an area where pirate activity is not uncommon.

<sup>68</sup> See BEKKERS, FRANCOIS & ROJAS-ROMAGOSA, *supra* note 5, at 8–11, 28.

#### IV. The NSRA Regulatory Regime and the Law of the Sea

##### A. Russian Arctic Policy and the NSRA

Russia has long viewed itself as “a leading Arctic power,”<sup>69</sup> and justifiably so. Russia encompasses more than half of the Arctic coastline and forty percent of the land above the Arctic Circle. Over forty percent of the regional population is Russian.<sup>70</sup> As of 2015, the largest reserves of natural gas and the ninth largest reserves of crude oil in the world are in Russia; two-thirds of these reserves are in the Russian Arctic.<sup>71</sup> Russian investment in Arctic infrastructure—including icebreakers, ports, roads, railways, and airports—is significant.<sup>72</sup> And of the five littoral Arctic nations, Russia has the largest military presence in the region,<sup>73</sup> with plans to continue developing its regional military capabilities and open new bases.<sup>74</sup> In the view of Russian President Vladimir Putin, the Arctic will “ensure the future” of Russia, and as Russian expansion into the Arctic grows, so too will Russian power.<sup>75</sup> Increased international interest in the region over the past several years has only strengthened Russia’s resolve to bolster its presence,<sup>76</sup> and one of the pillars of Russia’s Arctic strategy is to put into effect (or “implement”) its sovereignty and national interests in the region.<sup>77</sup>

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<sup>69</sup> Osnovy gosudarstvennoĭ politiki Rossiĭskoĭ Federatsii v Arktike na period do 2020 goda i dal’neĭshuiu perspektivu [Principles of State Policy of the Russian Federation in the Arctic until 2020 and Future Perspectives], ROSSIĖSKAIA GAZETA [ROS. GAZ.] Mar. 30, 2009 [hereinafter Principles of State Policy].

<sup>70</sup> See INT’L SEC. ADVISORY BD., U.S. DEP’T OF STATE, REPORT ON ARCTIC POLICY 7 (2016), <https://www.state.gov/documents/organization/262585.pdf> [<https://perma.cc/TNJ7-KGRF>].

<sup>71</sup> See HEATHER A. CONLEY & CAROLINE ROHLOFF, THE NEW ICE CURTAIN: RUSSIA’S STRATEGIC REACH TO THE ARCTIC 23–25 (2015); see also U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEF: RUSSIA (Oct. 2017), [https://www.eia.gov/beta/international/analysis\\_includes/countries\\_long/Russia/russia.pdf](https://www.eia.gov/beta/international/analysis_includes/countries_long/Russia/russia.pdf) [<https://perma.cc/6JFN-SK9M>].

<sup>72</sup> See CONLEY & ROHLOFF, *supra* note 71, at 36–38.

<sup>73</sup> See SIEMON T. WEZEMAN, STOCKHOLM INT’L PEACE RES. INST., MILITARY CAPABILITIES IN THE ARCTIC: A NEW COLD WAR IN THE HIGH NORTH? 22 (2016), <https://www.sipri.org/sites/default/files/Military-capabilities-in-the-Arctic.pdf> [<https://perma.cc/4FBE-73E9>] (discussing the military capabilities and policies of each littoral Arctic nation).

<sup>74</sup> See RONALD O’ROURKE, CONG. RESEARCH SERV., R41153, CHANGES IN THE ARCTIC: BACKGROUND AND ISSUES FOR CONGRESS 61–62 (2017), <https://fas.org/sgp/crs/misc/R41153.pdf> [<https://perma.cc/2Q9G-LDJJ>].

<sup>75</sup> *Direct Line with Vladimir Putin* (RT television broadcast June 15, 2017) (transcript available online at <http://en.kremlin.ru/events/president/news/54790> [<https://perma.cc/9PP7-9ZPC>]).

<sup>76</sup> See Katarzyna Zysk, *Russia Turns North, Again: Interests, Policies and the Search for Coherence*, in *HANDBOOK OF THE POLITICS OF THE ARCTIC* 437, 437 (Leif Christian Jensen & Geir Hønneland eds., 2015).

<sup>77</sup> O Strategii razvitiya Arkticheskoi zony Rossiĭskoĭ Federatsii i obespecheniia natsional’noi bezopasnosti na period do 2020 goda [On the Strategy for the Development of the Arctic Zone of the Russian Federation and the National Security up to 2020], approved by the President of the Russian Federation, Feb. 20, 2013, <http://www.research.kobe-u.ac.jp/gsics-perc/sympo/20160728/documents/Keynote/Russian%20Arctic%20strategy%202013.pdf> [<https://perma.cc/24FV-L6G8>] [hereinafter Development of the Arctic Zone].



Developing the Northern Sea Route as a viable transcontinental shipping route is critical to Russia's plans for expansion into the Arctic.<sup>78</sup> A safe and commercially viable Northern Sea Route provides greater access to the Arctic, vital not just for shipping, but also developing Russia's energy, mining, and fishing sectors. In addition, fees generated by increased use of the Northern Sea Route by foreign-flagged vessels is "seen as a potential source of significant state income" to pay for additional icebreakers and regional infrastructure improvements.<sup>79</sup> With China's inclusion of the Northern Sea Route into its Belt and Road Initiative—a global series of interlinked land and sea transportation corridors<sup>80</sup>—the Northern Sea Route acquired greater importance. Russia could see substantial profits from fees generated by the passage of foreign-flagged vessels through the Northern Sea Route.

Beyond its economic potential, the Northern Sea Route is closely linked to Russia's national identity, and there is "an increasing sense of urgency in Russia to develop and exert sovereignty over the Northern Sea Route and Russia's EEZ," partially due to the increased presence of foreign vessels in the Russian Arctic.<sup>81</sup> Russia's classification of the entire Northern Sea Route as "historical" in legislation and official State doctrine<sup>82</sup> is significant; "historic" waters, if lawfully

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<sup>78</sup> See *id.*; Principles of State Policy, *supra* note 69; The Concept of Foreign Policy of the Russian Federation, approved by the President of the Russian Federation, Nov. 30, 2016, para. 76 [hereinafter Concept of Foreign Policy] [www.mid.ru/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/2542248](http://www.mid.ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2542248).

<sup>79</sup> Zysk, *supra* note 76, at 443.

<sup>80</sup> CHINA NAT'L DEV. AND REFORM COMM'N & CHINA STATE OCEANIC ADMIN., VISION FOR MARITIME COOPERATION UNDER THE BELT AND ROAD INITIATIVE (2017); CHINA'S ARCTIC POLICY, *supra* note 54. See generally, Mia Bennett, *China's Belt and Road Initiative Moves into the Arctic*, 1 AREA DEV. & POL'Y 341 (2017).

<sup>81</sup> CONLEY & ROHLOFF, *supra* note 71, at 83–84. See *Osnovy gosudarstvennoĭ politiki Rossiĭskoi Federatsii v oblasti voenno-morskoĭ deiatel'nosti na period do 2030 goda* [Fundamentals of the State Policy of the Russian Federation in the Field of Naval Operations for the Period until 2030] July 20, 2017, II.24, translated in FUNDAMENTALS OF THE STATE POLICY OF THE RUSSIAN FEDERATION IN THE FIELD OF NAVAL OPERATIONS FOR THE PERIOD UNTIL 2030 (Anna Davis trans. 2017)

[http://dnnlgwick.blob.core.windows.net/portals/0/RMSI\\_RusNavyFundamentalsENG\\_FINAL%20\(1\).pdf?sr=b&si=DNNFileManagerPolicy&sig=i110Z1rxZVzKbB%2BdHJ1CZuTxvwL3N7W34%2FLpksgT1Bs%3D](http://dnnlgwick.blob.core.windows.net/portals/0/RMSI_RusNavyFundamentalsENG_FINAL%20(1).pdf?sr=b&si=DNNFileManagerPolicy&sig=i110Z1rxZVzKbB%2BdHJ1CZuTxvwL3N7W34%2FLpksgT1Bs%3D) [https://perma.cc/VMC9-MNCL] [hereinafter Fundamentals of the State Policy] ("There are existing and emerging new risks and threats to the national security of the Russian Federation on the World Ocean, the main of which are . . . economic, political, international legal, and military pressure against the Russian Federation to reduce efficiency of its maritime activities on the World Ocean, and weaken its control over the Northern Sea Route, which is historically established as a national sea line of communication of the Russian Federation . . .").

<sup>82</sup> See Federal'nyi zakon ot 28 iulia 2012 goda N. 132-FZ o vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiĭskoi Federatsii v chasti gosudarstvennogo regulirovaniia torgovogo moreplavaniia v akvatorii Severnogo morskogo puti [Federal Law of 28 July 2012 No. 132-FZ of the Russian Federation on Amendments to Specific Legislative Acts of the Russian Federation Related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route], SOBRANIE ZAKONODATEL'STVA ROSSIĬSKOĬ FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2012, art. 2 [hereinafter Federal Law No. 132-FZ] ("Navigation in the

established, have the same legal character as “internal waters.”<sup>83</sup> The coastal State has sovereignty over internal waters and the superjacent airspace and may require foreign-flagged vessels and aircraft, including warships and military aircraft, to request permission to enter.<sup>84</sup> There are only two exceptions. First, foreign-flagged vessels or aircraft in distress, or aiding those in distress, may enter internal waters and airspace, without the coastal State’s permission. Second, ships of all States may exercise non-suspendable innocent passage in those areas of internal waters enclosed by adoption of straight baselines by the coastal State, if the enclosed waters were previously high seas or territorial seas.<sup>85</sup>

Though Russia has yet to expressly make an official diplomatic claim that the entirety of the Northern Sea Route—or more specifically, the waters that constitute the area of the Northern Sea Route—has the distinct legal status of “historic waters” or “internal waters,” Russia has, in the past, officially claimed certain Arctic waters as “historic” or “internal.”<sup>86</sup> This includes several international straits along the Northern Sea Route.<sup>87</sup> Beyond naming specific international straits, however, Russian and earlier Soviet statements regarding “historic waters” in the Northern Sea Route have generally lacked definition, both legally and geographically. Rather than expressly claiming the Northern Sea Route as “historic waters” or “internal waters,” Russian domestic legislation and State doctrine rely on unique terminology that may or may not have meaning under international law. Russia’s 1998 Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, for example, describes the Northern Sea Route as “the historical national unified transport line of communication of the Russian Federation in the Arctic.”<sup>88</sup> Such language is ambiguous and calls for greater clarity.

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water area of the Northern Sea Route, the historically emerged national transportation route of the Russian Federation . . . .”); Fundamentals of the State Policy, *supra* note 81, at II.24.

<sup>83</sup> See *Anglo-Norwegian Fisheries Case (U.K. v. Nor.)*, Judgment, 1951 I.C.J. Rep. 117, 130 (Jan. 18); *Continental Shelf (Tunis. v. Libya)*, Judgment, 1982 I.C.J. Rep. 18, ¶¶ 99–100 (Feb. 24); *Land, Island and Maritime Frontier Dispute (El Sal. & Nicar. v. Hond.)*, Judgment, 1992 I.C.J. Rep. 351, ¶¶ 384–87 (Sept. 11).

<sup>84</sup> See UNCLOS, *supra* note 28, arts. 2, 8; COMMANDER’S HANDBOOK, *supra* note 29, at § 2.5.1.

<sup>85</sup> See COMMANDER’S HANDBOOK, *supra* note 29, at §§ 2.5.1, 2.5.2.6, 3.2.1.

<sup>86</sup> See Leonid Tymchenko, *The Northern Sea Route: Russian Management and Jurisdiction over Navigation in Arctic Seas*, in *THE LAW OF THE SEA AND POLAR MARITIME DELIMITATION AND JURISDICTION* 269, 277–81 (Alex G. Oude Elferink & Donald R. Rothwell eds., 2001).

<sup>87</sup> See R. DOUGLAS BRUBAKER, *THE RUSSIAN ARCTIC STRAITS* 34–35 (Gerard J. Mangone ed., 2005); ROACH & SMITH, *supra* note 14, at 53.

<sup>88</sup> Federal’nyĭ zakon ot 31 iulia 1998 N. 155-FZ “O vnutrennikh morskikh vodakh, territorial’nom more i prilozhasheĭ zone Rossiĭskoĭ Federatsii” [Federal Law of 31 July 1998 N. 155-FZ “On the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation”], SOBRANIE ZAKONODATEL’STVA ROSSIĖSKOĖ FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1998, art. 14, translated in 46 LAW OF SEA BULL. 18 (2001), [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS\\_1998\\_Act\\_TS.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_TS.pdf) [<https://perma.cc/2AV9-4MSV>] [hereinafter Federal Act on Internal Waters, Territorial Sea and Contiguous Zone].

Although the term “historic waters” is not defined in treaty law, the generally recognized international standard for a State to establish an “historic waters” claim is for the State to “effectively,” “open[ly],” and “continuously” exercise authority and control over the water area for a “sufficient” time, and for other States to tolerate or acquiesce to this exercise of authority and control.<sup>89</sup> Significantly, the claim needs to be sufficiently open, public, and notorious for States to have adequate notice; States cannot protest an “historic waters” claim of which they lack sufficient notice.<sup>90</sup> As such, States cannot establish an “historic waters” claim if they do not provide an appropriate level of detail about the claim to enable an informed protest. More recent Russian legislation governing the Arctic, namely Federal Law No. 132-FZ (FL 132-FZ), Amendments to Specific Legislative Acts of the Russian Federation Related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route, provides greater definition—certainly geographically and, by extension, legally—than Russia’s prior Northern Sea Route assertions. This legislation arguably could be perceived as an implicit “historic waters” claim to all of the waters that constitute the Northern Sea Route, particularly given that Russia is actively enforcing the “claim.”<sup>91</sup> The precise legal status of the Northern Sea Route, however, remains a controversial issue, despite attempts by Russia to provide greater clarity.

One of the primary mechanisms adopted by Russia to implement its Arctic strategy is to use domestic law to clarify the geographic extent of its “Arctic Zone”<sup>92</sup> and further develop its legal framework and governance structures, including enhanced regulation of shipping along the Northern Sea Route.<sup>93</sup> Through a series of amendments to its Merchant Shipping Code,<sup>94</sup> as well as its

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<sup>89</sup> See *Juridical Regime of Historic Waters including Historic Bays*, [1962] 2 Y.B. Int’l L. Comm’n 13–19, U.N. Doc. A/CN.4/143, [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_143.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf) [<https://perma.cc/WPE3-FUB8>]. See also DONAT PHARAD, CANADA’S ARCTIC WATERS IN INTERNATIONAL LAW 97–105 (1988) (“The basic requirements of an historic title to sea areas are the following: (1) exclusive authority and control over the maritime area claimed, including the expulsion of foreign ships if necessary; (2) long usage or the passage of a long time, the length of the period depending on the circumstances; and (3) acquiescence by foreign States, particularly those clearly affected by the claim.”). See generally CLIVE R. SYMMONS, HISTORIC WATERS IN THE LAW OF THE SEA: A MODERN RE-APPRAISAL 1–6 (2007). With respect to “acquiescence,” the position of the United States is that “an actual showing of acquiescence by foreign states in such a claim is required, as opposed to a mere absence of opposition.” ROACH & SMITH, *supra* note 14, at 35.

<sup>90</sup> See SYMMONS, *supra* note 89, at 139–49.

<sup>91</sup> At least one scholar has argued that actual notification of “historic waters” claims via diplomatic means “may” be an “implicit, if not explicit, international requirement for establishing an historic claim to waters,” *see id.* at 146, but that it “may be sufficient, *in appropriate circumstances*, for publicity (and so knowledge) of the historic claim to come to other States not *via* an official communication, but through the claimant’s immediate follow-up of an essentially *unannounced* ‘claim’ by open *exercise of relevant jurisdiction* in the claimed waters,” *id.* at 147.

<sup>92</sup> See Principles of State Policy, *supra* note 69, § IV.9.

<sup>93</sup> Development of the Arctic Zone, *supra* note 77, § IV.24.

<sup>94</sup> КОДЕКС ТОРГОВОГО МОРЕПЛАВАНИЯ РОССИЙСКОЙ ФЕДЕРАЦИИ [KTM RF] [Code of Merchant Shipping] art. 18 (Russ.) [hereinafter Code of Merchant Shipping].

domestic laws on maritime zones<sup>95</sup> and monopolies,<sup>96</sup> FL 132-FZ established the jurisdictional and regulatory framework Russia now uses to define and govern the Northern Sea Route.<sup>97</sup> Significantly, FL 132-FZ added a clause to the Russian Federation's Merchant Shipping Code defining the "area of the Northern Sea Route" as:

[A] water area adjoining the northern coast of the Russian Federation, including internal sea waters, territorial sea, contiguous zone and exclusive economic zone of the Russian Federation, and limited in the East by the line delimitating the sea areas with the United States of America and by the parallel of the Dezhnev Cape in the Bering Strait; in the West, by the meridian of the Cape Zhelanie to the Novaya Zemlya archipelago, by the east coastline of the Novaya Zemlya archipelago and the western limits of the Matochkin Shar, Kara Gates, Yugorski Shar Straits.<sup>98</sup>

This definition of the "water area" of the Northern Sea Route is expansive and, notably, includes portions of the Russian exclusive economic zone. At least one Russian legal scholar has defended the breadth of this definition by arguing that due to shifting ice and weather conditions the Northern Sea Route "does not have a constant or fixed track line" and is an "indivisible transportation system."<sup>99</sup> In other words, there is no singular permanent "route" along the Northern Sea Route. Instead, the "route" varies based on conditions. Therefore, it is argued, the most expansive scope of what constitutes the "area" of the Northern Sea Route must apply at all times.<sup>100</sup> Though such a definition may help streamline Russian governance over the Northern Sea Route,<sup>101</sup> any rules applicable in this water area must still be compatible with international law, as discussed below.

Equally important, FL 132-FZ also amended the Merchant Shipping Code to charge the Northern Sea Route Administration (NSRA), a Russian federal

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<sup>95</sup> Federal Act on Internal Waters, Territorial Sea and Contiguous Zone, *supra* note 88, art. 14.

<sup>96</sup> Federal'nyi zakon ot 17 avgusta 1995 N. 147-FZ o estestvennikh monopoliiakh [Federal Law of 17 August 1995 N. 147-FZ on Natural Monopolies], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1995.

<sup>97</sup> Federal Law No. 132-FZ, *supra* note 82, art. 3. For a discussion of the Russian legislative process leading to the development of the Northern Sea Route amendments, see Jan Jakub Solski, *New Developments in Russian Regulation of Navigation on the Northern Sea Route*, 4 ARCTIC REV. L. & POL. 90 (2013).

<sup>98</sup> Federal Law No. 132-FZ, *supra* note 82, art. 3.3. Article 3.3 of Federal Law No. 132-FZ added a new Article 5.1 to the Merchant Shipping Code, defining the "area" of the Northern Sea Route.

<sup>99</sup> Viatcheslav V. Gavrilov, *Legal Status of the Northern Sea Route and Legislation of the Russian Federation*, 46 OCEAN DEV. & INT'L L. 256, 257-60 (2015) ("It is important to note that the NSR is an indivisible transportation system whose legal regime does not differ depending on the areas of its passing.").

<sup>100</sup> *Id.*

<sup>101</sup> For an interpretation of the 2013 NSRA Rules as more transparent, clearly understandable, and permissive than Russia's 1991 regulations governing the Northern Sea Route, see Zhang Xia et al., *From Mandatory Icebreaker Guiding to a Permission Regime: Changes to the New Russian Legislation of the Northern Sea Route*, 25 ADVANCES IN POLAR SCI. 138 (2014).

agency, with overseeing and administering navigation along the Northern Sea Route, including reviewing applications from shipowners for transit “permits,” and the power to approve such permits.<sup>102</sup> Finally, the amendments in FL 132-FZ direct the NSRA to enforce navigation rules for the area of the Northern Sea Route, in order to ensure safety of navigation and promote the prevention and reduction of vessel-borne pollution into the marine environment.<sup>103</sup> These rules—formally titled the “Rules of Navigation on the Water Area of the Northern Sea Route”<sup>104</sup> (hereinafter “NSRA Navigation Rules” or “Rules”)—have been in effect since 2013.

International law recognizes the right of coastal States to enact certain laws and regulations in their territorial sea, contiguous zone, and EEZ,<sup>105</sup> and Russia has a legitimate interest in ensuring the Northern Sea Route is a safe maritime corridor where adverse impacts to its marine and coastal environment are minimized. The Arctic is undeniably a treacherous region for vessels to operate. Given the remoteness of the region, the capability to adequately respond to emergencies, including collisions and environmental pollution, is limited at best. A major oil spill similar in scope to the *Exxon Valdez* incident off the coast of Alaska in 1989 would have catastrophic consequences for the environment in the Arctic. In that sense, the underlying navigational safety and environmental protection objectives of the NSRA Navigation Rules appear to have some justification. Indeed, many legal experts have noted that given the inhospitable nature of the region, “more demanding” rules for navigation and environmental protection are warranted in the Arctic.<sup>106</sup> However, other scholars have raised questions about the permissiveness of the breadth and scope of the NSRA Navigation Rules, as well as their compatibility with international law. At least one scholar has gone so far as to argue that through the NSRA Navigation Rules, and its excessive maritime claims that pre-date the Rules, the Russian Federation has attempted to “assert control over waters that would typically be considered

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<sup>102</sup> Federal Law No. 132-FZ, *supra* note 82, art. 3.3. As of the time of this writing, the Northern Sea Route Administration is still responsible for overseeing and administering navigation along the Northern Sea Route. This may change. Russia is considering proposed legislation to transfer some, or all, of the Northern Sea Route Administration’s responsibilities to Rosatom, a State owned corporation. Malte Humpert, *Russia to Reorganize Northern Sea Route Competencies*, HIGH NORTH NEWS (Nov. 10, 2017), <http://www.highnorthnews.com/russia-to-reorganize-northern-sea-route-competencies/> [<https://perma.cc/6VGG-XARB>]; Charles Digges, *Rosatom’s Northern Sea Route Legislation Ignites Arguments*, BELLONA (May 3, 2018), <http://bellona.org/news/arctic/russian-nuclear-icebreakers-fleet/2018-05-rosatoms-northern-sea-route-legislation-ignites-arguments> [<https://perma.cc/6NLT-B9F9>].

<sup>103</sup> Federal Law No. 132-FZ, *supra* note 82, art. 3.3.

<sup>104</sup> Rules of Navigation, *supra* note 12.

<sup>105</sup> See discussion *supra* Part II.B.

<sup>106</sup> See Aldo Chirco, *The Growth of International Shipping in the Arctic: Is a Regulatory Review Timely?*, 24 INT’L J. MARINE & COASTAL L. 355, 355–61 (2009) (“Safe and environmentally acceptable commercial navigation in the Arctic requires rules, standards and ‘best practices’ more demanding than for marine regions considered less hazardous to navigate and possessing the appropriate infrastructure. Clearly a high navigation standard is appropriate for Arctic navigation.”).

either as high seas, and therefore open for international navigation under international law, or as territorial waters and therefore subject to innocent passage regimes.”<sup>107</sup> The next Section examines the breadth and scope of several provisions of the NSRA Navigation Rules, as well as their compatibility with the international law of the sea.

### B. *The NSRA Navigation Rules*

#### 1. Requirement to request permission to enter the Northern Sea Route

The NSRA Navigation Rules prohibit all ships from entering the “water area” of the Northern Sea Route—which by definition includes significant portions of the Russian Arctic territorial seas and EEZ—without first obtaining express permission from the NSRA.<sup>108</sup> Per the Rules, ship owners, their representatives, or the master of the ship must submit an application to the NSRA requesting “permission” to navigate the water area of the Northern Sea Route.<sup>109</sup> To be considered for entry, applications for permits must be submitted no later than fifteen working days before the date the ship intends to enter the water area of the Northern Sea Route,<sup>110</sup> and must contain, among other items, a description of the ship’s intended navigational route within the Northern Sea Route.<sup>111</sup> Applications must also include confirmation that the ship owner ensures compliance with the NSRA Navigation Rules.<sup>112</sup> In the event that the NSRA grants a permit application, that decision will be communicated to the applicant, along with a determination by the NSRA whether the applicant’s ship will require icebreaker assistance during its transit, as well as a determination by the NSRA specifically where within the water area of the Northern Sea Route such icebreaking service will be required.<sup>113</sup>

As the NSRA Navigation Rules apply within portions of the Russian territorial sea, including Russian waters that form part of straits used for international navigation, requiring ships to request permission to enter and navigate the water area of the Northern Sea Route directly conflicts with the rights of innocent passage and transit passage.<sup>114</sup> Under international law, ships—including warships—engaged in either innocent passage or transit passage do not require coastal State permission to do so. While coastal States may adopt laws relating to innocent passage and transit passage—such as for the safety of navigation, the regulation of maritime traffic, and for the prevention, reduction,

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<sup>107</sup> Lincoln E. Flake, *Forecasting Conflict in the Arctic: The Historical Context of Russia’s Security Intentions*, 28 J. SLAVIC MIL. STUD. 72, 74 (2015); see Pedrozo, *supra* note 61, at 771.

<sup>108</sup> Rules of Navigation, *supra* note 12, § II.

<sup>109</sup> *Id.* § II.3.

<sup>110</sup> *Id.* § II.6.

<sup>111</sup> *Id.* § II.4, Annex 1.8.

<sup>112</sup> *Id.* § II.3.

<sup>113</sup> *Id.* § II.10.

<sup>114</sup> See discussion *supra* Part II.B.

and control of pollution—such laws may not have the practical effect of denying or impairing the rights of innocent passage or transit passage.<sup>115</sup> Similarly, as applied to the Russian EEZ within the area of the Northern Sea Route, requiring ships to request permission conflicts with the freedoms and rights provided for under Articles 58 and 87 of UNCLOS, including the freedom of navigation.<sup>116</sup> Unlike the territorial sea, coastal States do not enjoy “sovereignty” over the EEZ, but rather specified and limited natural resource-related “sovereign rights”<sup>117</sup> and limited subject-matter jurisdiction.<sup>118</sup> Beyond those limited rights, high seas freedoms apply.<sup>119</sup> Any exercise of coastal State rights or jurisdiction in the EEZ must ensure “due regard” for those freedoms and must be “compatible with” UNCLOS.<sup>120</sup> There is debate, particularly as it relates to the Arctic, whether UNCLOS provides a legal justification for coastal States to enforce laws on foreign-flagged vessels that deny, or even impair, the aforementioned rights of innocent and transit passage in the territorial sea, or high seas freedoms in the EEZ. Proponents of such expanded coastal State authority—including Russia—look to Article 234<sup>121</sup> for support.<sup>122</sup>

Although Article 234 of UNCLOS affords coastal States the right to enforce laws for the prevention, reduction, and control of marine pollution from vessels in “ice covered areas” of its EEZ, this right is not absolute. This right implies no claim to sovereignty over the waters of the EEZ.<sup>123</sup> This right is also

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<sup>115</sup> UNCLOS, *supra* note 28, arts. 21, 24, 38, 42, 44; COMMANDER’S HANDBOOK, *supra* note 29, at § 2.5.

<sup>116</sup> UNCLOS, *supra* note 28, arts. 58, 87; COMMANDER’S HANDBOOK, *supra* note 29, at § 2.6. These high seas freedoms are made applicable to the EEZ by Article 58.

<sup>117</sup> This distinction between the terms “sovereign rights” in Article 56 and “sovereignty” in Article 2 of UNCLOS is intentional. It reflects the intent of the drafters of UNCLOS to clearly distinguish the limited competency of coastal states in the exclusive economic zone from the broader authority they enjoy in the territorial sea. UNCLOS COMMENTARY VOLUME 2, *supra* note 35. For further discussion of this distinction, see KRASKA & PEDROZO, *supra* note 55, at 233–40.

<sup>118</sup> UNCLOS, *supra* note 28, art. 56.

<sup>119</sup> *Id.* arts. 58, 87.

<sup>120</sup> *Id.* art. 56.

<sup>121</sup> See *supra* Part II.B. Pursuant to Article 234, “[c]oastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.” UNCLOS, *supra* note 28, art. 234.

<sup>122</sup> Roman, *supra* note 10, at 142–43; Solski, *supra* note 97, at 94–110.

<sup>123</sup> UNCLOS draws a specific distinction between the term “right” in Article 234 and the term “sovereign rights” in Article 56. Article 234 makes no mention of “sovereignty” or even “sovereign rights.” 4 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 398 (Shabtai Rosenne & Alexandor Yankov eds., 1991) [hereinafter UNCLOS COMMENTARY VOLUME 4] (“Article 234 address problems of navigation and ecology in ice covered areas within the limits of the exclusive economic zones of coastal States, such as those found in the Arctic. It has no implications for any claims to sovereignty or other aspects of jurisdiction in any polar or

confined to areas within the coastal State's EEZ where "particularly severe climate" and the presence of ice "for most of the year" create obstructions or exceptional hazards to navigation where pollution of the marine environment could cause major harm to the ecological balance. In other words, coastal States may not avail themselves of the right provided under Article 234 based on the mere presence of ice alone. Nevertheless, one could reasonably argue that the natural conditions along the Northern Sea Route presently satisfy the criteria for Article 234 to apply. In addition to the presence of sea ice, vessels transiting the Northern Sea Route are advised of persistent fog, low air temperatures, strong winds, and snowstorms that threaten safe navigation.<sup>124</sup> Ironically, however, the same climate change that is allowing the Northern Sea Route to become more commercially viable may also affect Russia's ability to rely on Article 234 in the future.<sup>125</sup>

Additionally, the Article 234 right pertains only to laws "for the prevention, reduction and control of marine pollution from vessels." Though not directly related to the prevention, reduction, or control of vessel-borne marine pollution, it could be argued that the NSRA rule requiring ships to request permission to enter the Northern Sea Route has at least some general nexus to preventing marine pollution, even if the mechanism for doing so is extreme. Given the hazardous nature of operating in Arctic waters, there may be certain regulatory measures that—though generally considered "safety" measures—could have a vessel-borne pollution prevention purpose.<sup>126</sup> For example, requiring a vessel to have qualified officers experienced in polar water navigation on board could have both pollution prevention and safety purposes.<sup>127</sup> Further, the more limited access vessels have to a particular area, presumably, the less likely it is that they—particularly sub-standard vessels—will cause adverse environmental effects within that area. In this respect, the NSRA rule requiring a permit to enter

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subpolar regions of the world." For further discussion of this distinction, see James Kraska, *Governance of Ice-Covered Areas: Rule Construction in the Arctic Ocean*, 45 OCEAN DEV. & INT'L L. 260, 266 (2014) ("The provision [Article 234] only grants coastal state authority over vessel source pollution, and does not include remits of special sovereignty or sovereign rights, or interests in national security, customs regulations, or law enforcement jurisdiction to the coastal state.").

<sup>124</sup> AM. BUREAU OF SHIPPING, NAVIGATING THE NORTHERN SEA ROUTE: STATUS AND GUIDANCE 5–7 (2014), [https://ww2.eagle.org/content/dam/eagle/advisories-and-debriefs/ABS\\_NSR\\_Advisory.pdf](https://ww2.eagle.org/content/dam/eagle/advisories-and-debriefs/ABS_NSR_Advisory.pdf) [<https://perma.cc/9VY9-FKK2>].

<sup>125</sup> For a discussion of the risk in relying on Article 234 in light of changing geographic conditions, see Diplomatic Note, *supra* note 16; see also Franckx, *supra* note 17, at 410.

<sup>126</sup> Chircop, *supra* note 106, at 371 ("The laws and regulations enacted pursuant to this provision [Article 234] must be non-discriminatory. There must be due regard for navigation. The purpose of such regulations is for the prevention, reduction and control of pollution, but this raises a question as to whether such regulations must necessarily be limited to pollution-related purposes, or whether they could also be for safety purposes. . . . In practice, situations will occur in a polar context where it will likely be difficult to distinguish between pollution and safety regulation. A large measure of safety regulation is essential to prevent incidents or casualties which could have a detrimental impact on the marine environment.").

<sup>127</sup> *Id.*



provides the NSRA a mechanism to “filter out” vessels that fail to meet the NSRA’s regulatory criteria for admission; criteria that, seemingly, have a legitimate safety and environmental protection nexus. That said, the NSRA permitting rule itself has only a generalized, and tenuous, connection to the prevention, reduction, and control of vessel-borne pollution. At best, the information submitted by a foreign-flagged vessel in its permit application could arguably assist the NSRA in identifying “at risk” vessels; it is debatable whether the utility of this as a vessel-borne pollution control measure justifies requiring foreign-flagged vessels to request permission to enter the Northern Sea Route, particularly those vessels engaged in innocent passage, transit passage, or exercising high seas freedom of navigation in the EEZ. Legitimate coastal State interests in and of themselves do not justify coastal States in prohibiting foreign-flagged vessels from exercising navigational rights and freedoms, even in “ice covered areas.” This much was made clear in the language of Article 234, requiring any coastal State exercise of its “right” under Article 234 to have “due regard to navigation.”

The requirement that any coastal State laws adopted under Article 234 have “due regard for navigation” was included in the text to protect freedom of the seas.<sup>128</sup> Prior to UNCLOS, coastal States had no sovereignty or authority over foreign-flagged vessels seaward of their territorial sea. These waters were considered “high seas,” where the vessels and aircraft of all States enjoyed unimpeded and unqualified freedom of the seas. Article 234 represents a negotiated compromise between the legitimate interest of coastal States in preventing vessel-borne pollution balanced against the legitimate interest in preserving for all States the freedom of the seas that existed prior to UNCLOS.<sup>129</sup> An early proposal made during the UNCLOS negotiations, for enhanced coastal State authority to control vessel-source pollution in ecologically vulnerable areas, was silent with respect to freedom of the seas; it focused instead on the geographic and environmental conditions appropriate to justify enhanced coastal State authority. That proposal was not adopted.<sup>130</sup> Ultimately, express language incorporating freedom of navigation was included in the negotiating text of the Convention. This was largely the result of direct negotiations between Canada, the U.S.S.R., and the United States—who, despite their competing interests,<sup>131</sup> attempted to strike a balance between coastal State and freedom of the seas

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<sup>128</sup> UNCLOS COMMENTARY VOLUME 4, *supra* note 123, at 397; *see also* John Norton Moore, *The UNCLOS Negotiations on Ice-Covered Areas*, in *CHANGES IN THE ARCTIC ENVIRONMENT AND THE LAW OF THE SEA* 21–22 (Myron H. Nordquist et al. eds., 2010).

<sup>129</sup> UNCLOS COMMENTARY VOLUME 4, *supra* note 123, at 393 (“The general objective of the article is to balance the interests of the coastal State in ice-covered areas within the limits of its exclusive economic zone with the general interests of international navigation.”).

<sup>130</sup> *Id.* at 393–95.

<sup>131</sup> Franckx describes the interests in the Arctic of Canada, the former Soviet Union, and the United States at the time Article 234 was being negotiated as “totally opposing interests” that resulted in long-standing problems of textual interpretation. Franckx, *supra* note 17, at 415.

equities.<sup>132</sup> The final language of Article 234 was drafted to ensure that any exercise of the coastal State right pursuant to the Article “shall” have “due regard” to both navigation and the protection of the marine environment.<sup>133</sup>

Though Article 234 ultimately requires a balance between marine environmental protection and freedom of the seas, tensions continue to exist over how that balance tilts. Resolving those tensions is made challenging by Article 234’s “textual ambiguity,” which arguably raises more questions than answers as to the permissible scope of coastal State laws in ice covered areas.<sup>134</sup> This has been a point of frustration for scholars for years, and Article 234 has been referred to as “probably the most ambiguous, if not controversial, clause in the entire treaty,”<sup>135</sup> and “a witch’s brew, a caldron [sic] of legal uncertainty which could be stirred in favor of either the coastal or shipping state.”<sup>136</sup> Given the vagueness of “key phrases” in Article 234, such as “due regard,” subsequent State practice may play a larger role in understanding the permissible scope of Article 234 than the commentaries or negotiating history.<sup>137</sup> Moreover, as subsequent State practice develops, so too may the permissible scope of Article 234.<sup>138</sup> As discussed in Part VI, this could potentially lead to a gradual degradation of freedom of the seas in Arctic waters.

Textual ambiguities notwithstanding, even under the broadest interpretation of coastal State authority conferred by Article 234, “due regard to navigation” still acts as an important limitation on the coastal State’s regulatory competence.<sup>139</sup> Though “due regard” is not defined in UNCLOS, some scholars suggest that the term should be understood to mean “reasonable regard,” and that coastal States enacting laws and regulations pursuant to Article 234 must have

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<sup>132</sup> See UNCLOS COMMENTARY VOLUME 4, *supra* note 123, at 393–98. For a discussion on how the U.S. interpretation of Article 234 may actually be counterproductive to U.S. regional interests and inhibit the U.S. from fully exercising its own authority and jurisdiction in the Arctic, see Stanley P. Fields, *Article 234 of the United Nations Convention on the Law of the Sea: The Overlooked Linchpin for Achieving Safety and Security in the U.S. Arctic?*, 7 HARV. NAT’L SEC. J. 55 (2016).

<sup>133</sup> UNCLOS, *supra* note 28, art. 234.

<sup>134</sup> See BRUBAKER, *supra* note 87, at 44–45; Kraska, *supra* note 123, at 267 (“As UNCLOS III drew to a close, the rather ambiguous provision on ice-covered areas seemed to raise more questions than it answered. A 1981 study initiated by the UN General Assembly prepared for the secretary-general, for example, indicated that environmental governance of ice-covered areas was a regulatory function shared between the flag state and, in the EZZ, the coastal state. The precise division of responsibility between them, however, was not explained.”).

<sup>135</sup> Franckx, *supra* note 17, at 415 (quoting Cynthia Lamson, *Arctic Shipping, Marine Safety and Environmental Protection*, 11 MARINE POL’Y 3, 4 (1987)).

<sup>136</sup> *Id.* (quoting Cynthia Lamson & David VanderZwaag, *Arctic Water: Needs and Options for Canadian-American Cooperation*, 18 OCEAN DEV. & INT’L L. 49, 81 (1987)).

<sup>137</sup> BRUBAKER, *supra* note 87, at 51.

<sup>138</sup> *Id.* at 46–54.

<sup>139</sup> D. M. McRae & D. J. Goundrey, *Environmental Jurisdiction in Arctic Waters: The Extent of Article 234*, 16 U. BRIT. COLUM. L. REV. 197, 220 (1982).

“reasonable regard for navigation.”<sup>140</sup> Other scholars suggest that the “due regard” requirement means coastal State regulations may not “hamper navigation” unless necessary.<sup>141</sup>

At a minimum, it would be unreasonable—and unlawful—for a coastal State to expressly prohibit navigation in ice-covered areas entirely, no matter how fragile the eco-system or how hazardous the waters.<sup>142</sup> The text of Article 234 itself contemplates that navigation will occur in “ice covered areas.”<sup>143</sup> The Commentary makes clear that the “due regard” requirement was included in the text to “safeguard” the freedom of navigation.<sup>144</sup> There is no legal authority to support an argument that Article 234 authorizes coastal States to expressly prohibit foreign-flagged vessels from navigating in “ice covered areas.”<sup>145</sup>

It would be equally unreasonable—and unlawful—for a coastal State to regulate navigation in ice-covered areas in a manner that constitutes a *de facto* prohibition. Article 234 does not authorize coastal States to prohibit navigation of foreign-flagged vessels in form or fact. Though subject to certain constraints, freedom of navigation still applies within Arctic waters;<sup>146</sup> Article 234 “does not give the coastal state *carte blanche*” to regulate navigation.<sup>147</sup> This is not to say that marine environmental protection equities are wholly subservient to navigational equities; they are not.<sup>148</sup> As the Commentary states, there must be a

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<sup>140</sup> *Id.* at 221; see also BRUBAKER, *supra* note 87, at 56 (“Black’s Law Dictionary defines due regard’ and ‘due’: the first meaning, ‘(J)ust; proper, regular: lawful: sufficient: reasonable . . .’: and the second, ‘(C)onsideration is a degree appropriate to demands of the particular case’. Coastal states thus must likely give reasonable consideration to navigation when enacting and enforcing laws implementing Article 234.”). For a recent proposal that language in the IMO Polar Code regarding “voyage planning” could provide appropriate contours to the meaning of “due regard” in Article 234, see Laura C. Williams, *An Ocean Between Us: The Implications of Inconsistencies Between the Navigational Laws of Coastal Arctic Council Nations and the United Nations Convention on the Law of the Sea for Arctic Navigation*, 70 VAND. L. REV. 379 (2017).

<sup>141</sup> Lee Clark, *Canada’s Oversight of Arctic Shipping: The Need for Reform*, 33 TUL. MAR. L.J. 79, 90 (2008).

<sup>142</sup> McRae & Goundrey, *supra* note 139, at 221. (“At the very least the provision implies that some navigation will take place; a coastal state could not, therefore, prohibit all navigation in ice-covered areas claiming it was having due regard to navigation.”).

<sup>143</sup> UNCLOS, *supra* note 28, art. 234.

<sup>144</sup> UNCLOS COMMENTARY VOLUME 4, *supra* note 123, at 397.

<sup>145</sup> For a summation of Russian academic arguments supporting control over navigation in the Northern Sea Route, see Gavrilov, *supra* note 99. See also Taisaku Ikeshima, *Preliminary Issues on the Northern Sea Route under the Law of the Sea*, 3 TRANSCOMM. 307, 310 (2016) (“Gavrilov and other authors justify Russia’s control in terms of three factors: (1) the history of the development of the Russian NSR as ‘internal waters’; (2) Arctic coastal states’ rights and duties under Article 234 of UNCLOS; and (3) the fact that the integrity and indivisibility of the NSR requires current treatment, which is based on the unique physical and natural conditions of the maritime areas in the Arctic Ocean.”).

<sup>146</sup> Rothwell, *supra* note 19, at 78–79.

<sup>147</sup> Franckx, *supra* note 17, at 424.

<sup>148</sup> McRae & Goundrey, *supra* note 139, at 221 (“It would be going too far to suggest that the coastal state must have due regard to the usual rules relating to navigation within the economic zone, for this would reintroduce the standards from which Article 234 purports to derogate.”).

“balance” between coastal State interests and “the general interests of international navigation.”<sup>149</sup> If foreign-flagged vessels must request express permission from the NSRA to even enter the water area of the Northern Sea Route as the default, then that requirement of the NSRA Navigation Rules appears to resemble a *de facto* prohibition against navigation, to which exceptions may be granted by the NSRA based on the contents of the foreign-flagged ship’s application for entry. Such a prohibitive framework does not balance interests and cannot be understood to have “due”—or reasonable—regard to navigation. As such, Russia may be overreaching by relying on Article 234 as the international legal basis for its domestic regulation requiring foreign-flagged vessels to request permission to enter the water areas of the Northern Sea Route.

## 2. Unilaterally adopted safety of navigation regulations

By its terms, the NSRA regulatory regime is an “authorization-based order” for ship navigation.<sup>150</sup> This “authorization-based order” begins by requiring foreign-flagged vessels to request authorization (“permission”) to enter and navigate the Northern Sea Route. It continues by making approval of such requests contingent upon a vessel submitting to the NSRA a description of the route it intends to navigate through the Northern Sea Route that the NSRA is willing to authorize. The NSRA Navigation Rules also impose additional reporting requirements on vessels entering and transiting through the Northern Sea Route. Though practical safety measures, the manner in which these regulations were adopted by the NSRA may be inconsistent with international law.

The NSRA Navigation Rules require a ship owner, or their representative, to submit to the NSRA a description of the navigational route the ship plans to take in the water area of the Northern Sea Route, as part of the request (“application”) to the NSRA for permission to enter into and navigate within the water area of the Northern Sea Route.<sup>151</sup> In the event the application is authorized, the NSRA will include in its notification back to the ship owner the “route of navigation” the ship must use when operating in the water area of the Northern Sea Route.<sup>152</sup> Though the Navigation Rules do not specify what factors will lead to the denial of an application,<sup>153</sup> one can argue that, by requiring a ship to provide its intended navigational route through the Northern Sea Route, the NSRA is conditioning its approval of the application on, *inter alia*, the submission of a route of navigation the NSRA finds acceptable. If not a *de jure* mandatory

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<sup>149</sup> UNCLOS COMMENTARY VOLUME 4, *supra* note 123, at 393.

<sup>150</sup> Rules of Navigation, *supra* note 12, § II.2. (“In the water area of the Northern Sea Route the authorization-based order of the navigation of ships is in force.”).

<sup>151</sup> *Id.* §§ II.3, II.4, Annex I.8.

<sup>152</sup> *Id.* § II.10.

<sup>153</sup> The Navigation Rules note that if an application is denied then the applicant will be notified by the NSRA (“or by a substituting person”) of the “reason of the refusal to grant the permission.” *See id.* § II.11.

ships' routeing<sup>154</sup> system, this is a *de facto* mandatory ships' routeing system, neither of which, it could be argued, may be established without first submitting the measure to the International Maritime Organization (IMO) for review and adoption.<sup>155</sup>

Similarly, the NSRA Navigation Rules also impose mandatory reporting requirements on all ships approaching, entering, and leaving the Northern Sea Route.<sup>156</sup> Ships must notify the NSRA of their intent and position both seventy-two hours and twenty-four hours prior to entry into the Northern Sea Route, as well as when actually entering the water area.<sup>157</sup> Additionally, ships must report, *inter alia*, their destination, type and amount of cargo, and number of crew and passengers.<sup>158</sup> SOLAS requires ship reporting systems that are mandatory for all ships to be submitted to the IMO for review and adoption.<sup>159</sup> The NSRA Navigation Rules do not comply with this requirement.

Ships' routeing systems and ship reporting systems can be invaluable tools in ensuring the safety of navigation, particularly in areas with known navigational hazards, such as the Arctic. However, the requirement that ships' routeing and ship reporting systems be submitted to the IMO before being made mandatory is

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<sup>154</sup> "Ships' routeing" is the practice of establishing "predetermined routes" for ships to follow, primarily for safety reasons. Ships' routeing can take many forms, including traffic separation schemes, the establishment of designated sea lanes for ships to follow in congested areas to ensure the safe and steady flow of maritime traffic. *See Ships' Routeing*, INT'L MAR. ORG., <http://www.imo.org/en/OurWork/Safety/Navigation/Pages/ShipsRouteing.aspx> (last visited Nov. 3, 2017) [<https://perma.cc/892J-YTA8>].

<sup>155</sup> *See* International Convention for the Safety of Life at Sea, Annex, ch. V, reg. 10(2), Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 278 [hereinafter SOLAS]. SOLAS establishes minimum safety standards for the construction, maintenance, equipping and operation of merchant vessels. Chapter V of SOLAS specifically addresses navigational considerations, including measures coastal states party to SOLAS may adopt to "contribute to safety of life at sea, safety and efficiency of navigation and/or protection of the marine environment." *See id.*, Annex, ch. V, regs. 10–12. These measures include the establishment of ships' routeing systems, ship reporting systems, and vessel traffic services; *see* Pedrozo, *supra* note 61, at 769–70 ("Russia's NSR regulations . . . were unilaterally adopted without IMO approval. However, mandatory ship routing, mandatory ship reporting and mandatory vessel traffic services (VTS) that apply beyond the 12-nm territorial sea of the coastal State must be submitted to and approved by the IMO under SOLAS Chapter V."). *But see* Chircop, *supra* note 106, at 372 ("Article 234 does not require these States to request and receive IMO approval for their regulations. . . . In practice, and as shipping in the Arctic increases, [however] purely unilateral approaches to standard-setting for shipping in the region is not advisable or even sufficient to protect the marine environment. High seas areas remain where shipping is guided by IMO, not coastal State standards. . . . Furthermore, international shipping navigating through the territorial seas of Arctic coastal States may not be subject to Article 234 standards which are inconsistent with IMO standards, because the regime of innocent passage will still apply. Ditto for straits used for international navigation and the right of transit passage.").

<sup>156</sup> *See* Rules of Navigation, *supra* note 12, § II.14–II.20.

<sup>157</sup> *See id.* §§ II.14, II.15, II.17–II.19.

<sup>158</sup> *See id.* § II.14.

<sup>159</sup> *See* SOLAS, *supra* note 155, Annex, ch. V, reg. 11. For a discussion of international law considerations applicable to States considering ships' routeing and ships reporting systems, *see* KRASKA & PEDROZO, *supra* note 55, 137–41.

not arbitrary. The IMO “is recognized as the only international body for developing guidelines, criteria and regulations on an international level” for ships’ routing and ship reporting systems.<sup>160</sup> It has the requisite expertise to evaluate proposed coastal State ships’ routing and ship reporting regulations, disseminate those regulations to other countries party to SOLAS for comment, and collate those comments for review prior to adoption. IMO review helps ensure that such regulations are consistent with international law<sup>161</sup> and do not prejudice the right of transit passage through international straits.<sup>162</sup> Russia has yet to submit its mandatory ships’ routing and ship reporting system regulations for the Northern Sea Route to the IMO for review and comment.<sup>163</sup>

In signing the Ilulissat Declaration, each of the five littoral Arctic nations made a commitment to collaborate and work through the IMO on existing measures and any new measures for navigational safety and the prevention of vessel-borne pollution in the Arctic. The adoption, and recent entry into force, of the International Code for Ships Operating in Polar Waters exemplifies that shared commitment.<sup>164</sup> Moreover, Russia and the United States recently demonstrated that shared commitment bilaterally by submitting a joint proposal to the IMO for ships’ routing and ship reporting measures in the Bering Sea and the Bering Strait, where the two States expect to see a steady increase in vessel traffic. The proposed measures are designed to enhance vessel safety and efficiency of navigation, to reduce the risk of vessel-borne pollution, and can be a model for future regional cooperation.<sup>165</sup> Though there may be utility to the NSRA’s navigational standards, the Arctic must remain a region of cooperation. States should not—or, more to the point, lawfully cannot—unilaterally make

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<sup>160</sup> See SOLAS, *supra* note 155, Annex, ch. V, regs. 10(2), 11(2).

<sup>161</sup> See SOLAS, *supra* note 155, Annex, ch. V, regs. 10(9), 11(8). All ships’ routing systems and ship reporting systems must be consistent with international law, including UNCLOS. *See id.*

<sup>162</sup> *Id.* regs. 10(10), 11(9). Ships’ routing systems and ship reporting systems must not prejudice transit passage or archipelagic sea lane passage.

<sup>163</sup> Diplomatic Note, *supra* note 16, at 527–28 (“Moreover, the provisions in the scheme to use routes prescribed by the Northern Sea Route Administration, use [Russian] icebreakers and [Russian] ice pilots, and abide by other related measures, particularly in straits used for international navigation, are measures that must be approved and adopted by the IMO. . . . The United States would welcome the opportunity to work with the Russian Federation and with others at the IMO to favorably consider and adopt an appropriate proposal.”).

<sup>164</sup> See Ilulissat Declaration, *supra* note 20 (“We will take steps in accordance with international law both nationally and in cooperation among the five states and other interested parties to ensure the protection and preservation of the fragile marine environment of the Arctic Ocean. In this regard we intend to work together including through the International Maritime Organization to strengthen existing measures and develop new measures to improve the safety of maritime navigation and prevent or reduce the risk of ship-based pollution in the Arctic Ocean.”); Int’l Maritime Org. [IMO], International Code for Ships Operating in Polar Waters, MEPC 68/21/Add.1, Annex 10 (May 15, 2015).

<sup>165</sup> Int’l Maritime Org. [IMO], NCSR 5/3/7, *Establishment of Two-way Routes and Precautionary Areas in the Bering Sea and Bering Strait, Submitted by the Russian Federation and the United States* (Nov. 17, 2017), [https://www.navcen.uscg.gov/pdf/IMO/NCSR\\_5\\_3\\_7.pdf](https://www.navcen.uscg.gov/pdf/IMO/NCSR_5_3_7.pdf) [https://perma.cc/KCJ8-BSZD].

safety of navigation regulations such as ships' routing and ship reporting systems *mandatory* for all vessels.

### 3. Absence of exemption for sovereign immune vessels

Of some concern is not only what the NSRA Navigation Rules expressly include, but also what they do not; namely, an express exemption for sovereign immune vessels. This omission may not be inadvertent, as draft Russian legislation proposed "an authorization procedure" for foreign warships to enter the Northern Sea Route and "prohibited" foreign aircraft from flying above it.<sup>166</sup> This proposed prohibition did not make it into the NSRA Navigation Rules; instead, the Rules are silent on the issue of sovereign immune vessels and—at least on their face—apply equally to all vessels. Given the context of Russian doctrine on the Arctic and the maritime domain, the lack of an express exemption in the NSRA Navigation Rules for sovereign immune vessels demands clarification.

One of the fundamental principles of the law of the sea is sovereign immunity, the freedom that warships and other government ships operated for non-commercial purposes enjoy from coastal State jurisdiction and interference.<sup>167</sup> In fact, it has been argued that "[i]f there is anything that is clear from the legislative record" of UNCLOS, "it is that one of the primary motivations of the major maritime powers in negotiating a new Convention was to protect the broadest possible freedom to conduct military activities at sea."<sup>168</sup>

Vessels entitled to sovereign immunity enjoy its protections wherever they are located.<sup>169</sup> Even within a coastal State's territorial sea and internal waters,

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<sup>166</sup> See Alexander S. Skaridov, *Northern Sea Route: Legal Issues and Current Transportation Practice*, in CHANGES IN THE ARCTIC ENVIRONMENT AND THE LAW OF THE SEA, *supra* note 128, at 283, 301 ("The main purpose of this draft law is to confirm and clarify the status and legal treatment of the NSR as well as to set guidelines for marine pollution abatement. According to the draft law . . . [m]ilitary vessels as well as ships in governmental service will be allowed to run through the NSR only after getting a special diplomatic permit."); see also Franckx, *supra* note 9, at 341–42 ("[A] draft law was submitted to the State Duma in 1998, entitled "On the Arctic Zone of the Russian Federation," which would have consolidated Russian sovereignty over its Arctic waters by relying once again on the sector theory. This draft, however, did not succeed, for Russian scholars have recently argued that it has been replaced by a new draft law on Northern Sea Route. According to these authors, one of which participated in the actual preparation of this piece of draft legislation, the new draft law provides for an authorization procedure for foreign warships . . . . Above the Northern Sea Route over-flight by foreign planes would be prohibited, whereas the conduct of hydrographical surveys in that zone would be strictly regulated." (citing A. L. KOLODKIN, MIROVOĬ OKEAN, MEZHDUNARODNO-PRAVOVOĬ REZHIM, OSNOVNĬE PROBLEMI [THE WORLD OCEAN, INTERNATIONAL LEGAL REGIME, BASIC PROBLEMS] 269 (2007)).

<sup>167</sup> See UNCLOS, *supra* note 28, arts. 32, 58(2), 95–96, 236.

<sup>168</sup> Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 831–32 (1984); see also Ted L. McDorman, *Sovereign Immune Vessels: Immunities, Responsibilities and Exemptions*, in JURISDICTION OVER SHIPS: POST-UNCLOS DEVELOPMENTS IN THE LAW OF THE SEA 82, 91 (Henrick Ringborn ed., 2015).

<sup>169</sup> UNCLOS, *supra* note 28, arts. 32, 58, 95–96, 236.

sovereign immune vessels may not be searched, inspected, arrested, or seized by coastal State authorities during peacetime. In addition, sovereign immune vessels cannot be required by a coastal State to disclose crew lists or cargo manifests.<sup>170</sup> Though a sovereign immune vessel's freedom from coastal State regulation within the territorial sea is not absolute, both the scope of activities that can be regulated and the ability of the coastal State to enforce such regulations are limited.<sup>171</sup>

The fact that the NSRA Navigation Rules do not have an express exemption for sovereign immune vessels does not, in any way, impact the protections enjoyed by foreign warships and other sovereign immune vessels pursuant to international law, even when operating in the Northern Sea Route. However, when read in the context of the Russia's official State doctrine regarding the Arctic, with its emphasis on implementing national systems of "control" over the region<sup>172</sup> and multiple references to the Northern Sea Route as "historical" Russian waters, as well as Russia's increasing military presence in the Arctic region,<sup>173</sup> the lack of an express exemption for sovereign immune vessels

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<sup>170</sup> See *id.* arts. 32, 95–96, 236. For a discussion of sovereign immunity and the international status of warships, see *COMMANDER'S HANDBOOK*, *supra* note 29, § 2.1–2.2 (noting that sovereign immune vessels are also exempt from foreign taxes and cannot be required to fly the flag of the host nation in port or while transiting the territorial sea).

<sup>171</sup> See, e.g., *UNCLOS*, *supra* note 28, art. 30. For a discussion of certain obligations of sovereign immune vessels, see *COMMANDER'S HANDBOOK*, *supra* note 29, § 2.1–2.2 (noting that though sovereign immune vessels must comply with coastal State quarantine restrictions and health, sewage and traffic control regulations, a coastal State's recourse for non-compliance is to order the sovereign immune vessel to depart the territorial sea and protest the non-compliance diplomatically).

<sup>172</sup> See Principles of State Policy, *supra* note 69, § IV.8.b; see also Ukaz prezidenta Rossiiskoi Federatsii of 12 maia 2009 N. 537 "O strategii natsional'noi bezopasnosti Rossiiskoi Federatsii do 2020 goda", [Decree of the President of the Russian Federation of 12 May 2009 N. 537 "On the National Security Strategy of the Russian Federation to 2020"], *ROSSIISKAIA GAZETA* [ROS. GAZ.] May 12, 2009, § II.12 ("Under conditions of competition for resources, it is not excluded that arising problems may be resolved using military force. . . ."); *but see* JORGEN STAUN, *INST. FOR STRATEGY, ROYAL DANISH DEF. COLL., RUSSIA'S STRATEGY IN THE ARCTIC* 8 (2015), [https://pure.fak.dk/ws/files/7120599/Russias\\_Strategy\\_in\\_the\\_Arctic.pdf](https://pure.fak.dk/ws/files/7120599/Russias_Strategy_in_the_Arctic.pdf) [<https://perma.cc/2SMV-67CJ>] (arguing that there is a "duality" in Russia's political approach to the Arctic: "One [sic] the one hand, there is an [international relations (IR)] track, which is strongly patriotic and partially coloured by romantic nationalist rhetoric, which deals with Russia's solitary approach and Russian balance of power and is permeated with notions such as 'conquest,' 'exploring,' 'Russia's greatness,' 'struggle' and 'sovereignty'. . . . On the other hand, there is an IR liberalism track, which aspires to accommodate to international law and negotiation, resulting from a desire for market economic modernization and optimization of Russia and Russian companies . . .").

<sup>173</sup> Viewed in isolation, it is difficult to draw conclusions about Russian military activity—in and of itself—along the Northern Sea Route. Recent Russian military activity in the Arctic is a complex and nuanced development. Some commentators suggest this development is provocative. See Andrew Osborn, *Putin's Russia in Biggest Arctic Military Push Since Soviet Fall*, *REUTERS* (Jan. 31, 2017), <http://www.reuters.com/article/us-russia-arctic-insight-idUSKBN15E0W0> [<https://perma.cc/S86Q-LLV6>] ("Under President Vladimir Putin, Moscow is rushing to re-open abandoned Soviet military, air and radar bases on remote Arctic islands and to build new ones, as it pushes ahead with a claim to almost half a million square miles of the Arctic."); Paul Sonne, *Russia's Military Sophistication in the Arctic Sends Echoes of the Cold War*, *WALL ST. J.* (Oct. 4,



in the NSRA Navigation Rules is concerning. Its absence raises questions as to the extent Russia may intend to influence the operations of vessels, including sovereign immune vessels, in the Northern Sea Route.

National interests must be balanced with international legal requirements. It is only natural for State doctrine to emphasize national interests. U.S. regional policy for the Arctic is not unlike Russian policy in that respect. It is also worth noting that Russian State doctrine repeatedly encourages international cooperation in the Arctic, promoting peaceful uses of Arctic spaces and resources. Nevertheless, Russia's Arctic Strategy also addresses the "necessary" task of optimizing a system of "comprehensive control" in its Arctic Zone, including a new border zone control system, to ensure the military security and territorial integrity of the Russian Arctic.<sup>174</sup> This system of "comprehensive control" includes "controls over the maritime surface" and "strengthening state control over commercial activities" in the Russian Arctic.<sup>175</sup> Similarly, Russia's 2013 Development Strategy for the Arctic also addresses the need to "improve" Russian "control" over the "air space and surface" to ensure the military security and territorial integrity of the Russian Arctic.<sup>176</sup> Implementing domestic laws

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2016), <https://www.wsj.com/articles/russia-upgrades-military-prowess-in-arctic-1475624748>; Robbie Gramer, *Here's What Russia's Military Build-Up in the Arctic Looks Like*, FOREIGN POL'Y (Jan. 25, 2017), <http://foreignpolicy.com/2017/01/25/heres-what-russias-military-build-up-in-the-arctic-looks-like-trump-oil-military-high-north-infographic-map/> [<https://perma.cc/MG4N-5YFY>] ("The numbers don't lie. In recent years, Russia unveiled a new Arctic command, four new Arctic brigade teams, 14 new operational airfields, 16 deepwater ports, and 40 icebreakers with an additional 11 in development."). Other commentators argue that Russia is acting rationally in the region to develop the assets and infrastructure necessary to protect its sovereign interests. See STEPHANIE PEZARD ET AL., RAND CORP., MAINTAINING ARCTIC COOPERATION WITH RUSSIA: PLANNING FOR REGIONAL CHANGE IN THE FAR NORTH 7–17 (2017) ("Russia—like any other state—places a high value on territorial security and seeks to deter, and prepare for, both state and nonstate threats against its strategic infrastructure, whether military or economic."); Pavel Devyatkin, *Russia's Arctic Strategy: Maritime Shipping*, ARCTIC INST. (Feb. 27, 2018), <https://www.thearcticinstitute.org/russias-arctic-strategy-maritime-shipping-part-iv/> [<https://perma.cc/MS65-AQXC>] ("In anticipation of greater interest in energy extraction and increased international shipping traffic, Russia has sought to modernize its military and civilian units and infrastructures. Russia's security programs are pragmatic as they aim to maintain control over the region while simultaneously cooperating with other Arctic states' via military drills and SAR collaborations, often for civilian purposes."). Finally, some argue that Russia's military presence in the Arctic is the product of both geopolitical and economic motivations. See Dmitri Trenin, *The Revival of the Russian Military: How Moscow Reloaded*, FOREIGN AFFAIRS 27–28 (May/June 2016) ("Moscow is looking to the Arctic, where the hastening retreat of sea ice is exposing rich energy deposits and making commercial navigation more viable. The Arctic littoral countries, all of which are NATO members except for Russia, are competing for access to resources there; Russia, for its part, hopes to extend its exclusive economic zone in the Arctic Ocean so that it can lay claim to valuable mineral deposits and protect the Northern Sea Route, a passage for maritime traffic between Europe and Asia that winds along the Siberian coast. To bolster its position in the High North, Russia is activating some of the military bases there that were abandoned after the collapse of the Soviet Union. It is also building six new military installations in the region.").

<sup>174</sup> See Principles of State Policy, *supra* note 69, § IV.8.b.

<sup>175</sup> See *id.*

<sup>176</sup> Development of the Arctic Zone, *supra* note 77.

clarifying the geographic extent of Russia's Arctic Zone, such as FL No. 132-FZ, which defines "the area" of the Northern Sea Route, is seen as one of the primary means to promote Russia's Arctic Strategy and provide for Russian national security.<sup>177</sup>

Russia's 2015 Maritime Doctrine also provides some insights on the extent of influence Russia may attempt to exert over vessels, including sovereign immune vessels, in the Northern Sea Route. Though Russia considers "freedom in the high seas" a national interest and ensuring "freedom in the open ocean" a national goal, the primary national interest of its Maritime Doctrine is the "inviolability of Russian Federation sovereignty" over its internal waters, territorial seas, seafloor, and superadjacent airspace.<sup>178</sup> To ensure sustainable development and strengthen its national security, the Maritime Doctrine encourages national research into "the limitation and control of merchant shipping" under "various legal regimes."<sup>179</sup> As regards to the Arctic specifically, an objective of the Maritime Doctrine is the "restriction of foreign naval activities" in designated areas and zones of the Russian Arctic through agreements with "leading maritime powers."<sup>180</sup>

At the same time, Russia's Arctic Strategy and Maritime Doctrine are much broader than the above discussion may suggest; both policies speak also to goals and priorities the United States shares, such as navigational safety, environmental protectionism, regional economic development, creating opportunities for indigenous peoples, and developing greater search and rescue capabilities. Additionally, it is expected that any State policy for a region of which that State is a part will prioritize its own security, including the integrity of its borders. Nevertheless, the language of recent Russian doctrine addressing the Arctic, namely the July 2017 "Fundamentals of the State Policy of the Russian Federation in the Field of Naval Operations for the Period Until 2030," suggests that references in Russian doctrine to "control" over the Russian Arctic are not benign. The Policy is openly critical of perceived "aspirations" of foreign governments—including the United States—to "gain control" of the Arctic Ocean, and efforts to "weaken [Russia's] control over the Northern Sea Route,"

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<sup>177</sup> See Principles of State Policy, *supra* note 69, § IV.9. For a discussion on how an analysis of the domestic law of Arctic nations may provide insights into their internal governance and regional priorities, see Edward T. Canuel, *The Four Arctic Law Pillars: A Legal Framework*, 46 GEO. J. INT'L L. 735, 745 ("Each Arctic state's domestic law must be considered when reviewing the reach and breadth of Arctic law. Domestic law trends offer deeper insights into how law converges with and is shaped by social, economic and political factors. Domestic law evidences the legal issues most relevant for each Arctic state and provides a guidepost for diverse investors, affected citizens, and various constituencies."); for further discussion, see *id.* at 745–57.

<sup>178</sup> MARITIME DOCTRINE OF THE RUSSIAN FEDERATION 2015, §§ II.5, II.7 (Anna Davis trans., Russ. Maritime Stud. Inst., U.S. Naval War Coll. 2015) (2015) [http://dnnlgwick.blob.core.windows.net/portals/0/Maritime%20Doctrine%20TransENGrus\\_FINAL.pdf?sr=b&si=DNNFileManagerPolicy&sig=j0ZtC1bqls8iaELlorBvNweGEwh5jekh4QsZcFgxtpM%3D](http://dnnlgwick.blob.core.windows.net/portals/0/Maritime%20Doctrine%20TransENGrus_FINAL.pdf?sr=b&si=DNNFileManagerPolicy&sig=j0ZtC1bqls8iaELlorBvNweGEwh5jekh4QsZcFgxtpM%3D) [https://perma.cc/BNH3-HBXY].

<sup>179</sup> See *id.* §§ III.33–36.

<sup>180</sup> See *id.* §§ III.59–61.

which the Policy refers to as Russia's "historically established" and "national" sea line of communication.<sup>181</sup> To counter this, two of the primary objectives of the Policy are to "provide control over operations within sea lines of communication," and increase the "effectiveness" of its maritime borders by "securing sovereign rights and jurisdiction" in the EEZ (and continental shelf).<sup>182</sup> Though it is difficult to ascertain genuine intent from policy alone, when analyzed in its totality, Russian State doctrine suggests a move toward establishing greater control over the Northern Sea Route—whether proactively or in reaction to perceived threats—including greater control over the operations of foreign-flagged vessels, both commercial and sovereign immune. The precise nature and extent of that "control," however, remains to be seen.

Despite Russia's strong policy pronouncements, however, there is no legal basis for applying the NSRA Navigation Rules to sovereign immune vessels under UNCLOS. Article 234 authorizes limited regulatory and enforcement measures directed at vessel pollution control within a coastal State's exclusive economic zone if certain environmental conditions exist.<sup>183</sup> Article 236, however, expressly exempts sovereign immune vessels (and aircraft) from any provision in UNCLOS "regarding the protection and preservation of the marine environment," including Article 234.<sup>184</sup> As such, any argument that the provisions of the NSRA Navigation Rules apply to sovereign immune vessels lacks basis in international law. It remains to be seen, however, whether Russia would make this claim, particularly if it classifies the entire "water area" of the Northern Sea Route expressly as "historic waters."

The unfortunate irony is that, historically, the United States and Russia have worked together to reduce ambiguity about their respective interpretations of the international law of the sea, in particular as to its applicability to warships and military activities. This is best evidenced in the 1989 "Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage."<sup>185</sup> In the Joint Statement, both nations committed to "harmonize their internal laws, regulations and practices" with UNCLOS.<sup>186</sup> If this commitment is still shared, then it appears reasonable to assume that the NSRA could not intend the Navigation Rules to apply to sovereign immune vessels. An internal law or regulation regarding the protection and preservation of the marine environment that applies to sovereign immune vessels would be

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<sup>181</sup> See Fundamentals of State Policy, *supra* note 81, §§ II.20–24.

<sup>182</sup> See *id.* § III.29.

<sup>183</sup> See UNCLOS, *supra* note 28, art. 234.

<sup>184</sup> See *id.* art. 236; see also Moore, *supra* note 128, at 22 ("Article 236, which appears later in the Convention, is there deliberately to make it clear that it is an overlay on 234.").

<sup>185</sup> Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, U.S.-U.S.S.R., Sept. 23, 1989, 28 I.L.M. 1444, <https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1989-USA-USSR-Joint-Statement-with-Attached-Uniform-Interpretation-of-Rules-of-International-Law-Governing-Innocent-Passage.doc> [<https://perma.cc/3EG8-SEJD>].

<sup>186</sup> *Id.*

inconsistent with UNCLOS. Nevertheless, in 2015, the U.S. Department of State requested clarification on this issue.<sup>187</sup> The Russian Federation has yet to substantively respond to this request.

#### V. Recent Amendments to the Russian Merchant Shipping Code

In addition to specific provisions of the NSRA Navigation Rules, recent amendments to Russia's Merchant Shipping Code also raise questions about the extent to which Russia may use domestic law to control access to the Northern Sea Route, arguably in a manner inconsistent with the law of the sea. On December 29, 2017, Russia amended its Merchant Shipping Code to restrict foreign-flagged vessels from transporting certain cargoes along the Northern Sea Route.<sup>188</sup> Specifically, Article 4 of the Merchant Shipping Code, as amended, would limit Northern Sea Route shipping of oil, natural gas (including liquefied natural gas), gas condensate, and coal extracted within Russian territory exclusively to Russian-flagged vessels. Only shipping companies with contractual agreements with Russia specifically authorizing them to use foreign-flagged vessels to transport such cargo will be exempt.<sup>189</sup> Scheduled to enter into force on December 30, 2018, the amendment has already generated concern among shipping industry trade associations, namely Danish Shipping, which is seeking clarification from the Russian Ministry of Transport on the scope of the proposed ban—such as whether the ban is limited to coastwise trade or also applies to international shipments of the aforementioned cargoes.<sup>190</sup>

Though it may provide Russia with better oversight of shipping in its Arctic waters, particularly the shipping of certain hazardous cargoes, a proposed ban on international foreign-flagged vessel shipments through the Northern Sea Route—again, defined by FL 132-FZ to include Russia's EEZ—would be inconsistent with the right of innocent passage, the right of transit passage, and high seas freedom of navigation. Though certain coastal State laws related to, *inter alia*, safety of navigation, pollution prevention, reduction and control, and, significantly, customs regulations may be applied to foreign-flagged vessels engaged in innocent passage and transit passage, such laws must be consistent with UNCLOS and other rules of international law.<sup>191</sup> Such laws shall not have the practical effect of denying or impairing the rights of innocent passage or transit passage.<sup>192</sup> Similarly, given the geographic extent of the area of the Northern Sea Route, a proposed ban on international foreign-flagged shipments would exceed the limited authority accorded coastal States in their EEZ, and

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<sup>187</sup> See Diplomatic Note, *supra* note 16.

<sup>188</sup> Code of Merchant Shipping, *supra* note 94, art. 4; see President of Russia, Amendments to Merchant Shipping Code of Russia, Dec. 29, 2017, en.kremlin.ru/acts/news/56546.

<sup>189</sup> Merchant Shipping Code, art. 4.

<sup>190</sup> See Pico, *supra* note 13.

<sup>191</sup> See UNCLOS, *supra* note 28, arts. 21, 24, 42, 44.

<sup>192</sup> See discussion *supra* Part II.B.

would fail to show “due regard” to States exercising their high seas freedom of navigation.<sup>193</sup>

Additionally, coastal States are prohibited from adopting any laws that discriminate “in form or fact” against vessels “of any State” or against vessels “carrying cargoes to, from or on behalf of any State” engaged in innocent passage.<sup>194</sup> Similar protection extends to vessels engaged in transit passage.<sup>195</sup> Even the enhanced authority under Article 234 for coastal States to adopt laws in “ice-covered areas” for the “prevention, reduction and control of pollution” makes clear that any such laws must be “non-discriminatory.”<sup>196</sup>

To be clear, it is generally accepted that a coastal State may require foreign-flagged commercial vessels to comply with certain of its domestic laws as a “condition of entry” to its ports. Moreover, maritime cabotage laws are generally considered lawful and have been adopted by a number of coastal States, including the United States.<sup>197</sup> Though such measures are viewed by some as unnecessarily protectionist, they have the potential to support domestic shipbuilding industries and ensure an adequate supply of domestic merchant marines. Russia has additional equities. As the coastal State directly adjacent to the Northern Sea Route, Russia would be the “first responder” to any adverse incident, such as a grounding, involving a foreign-flagged cargo vessel carrying hazardous cargo. Depending on the scope of the incident, the level of response required could range from routine, such as icebreaking, to extraordinary, such as spill response or search and rescue. As a flag-State, Russia has greater jurisdiction and control over the manning and conditions of the vessels flying its flag than it

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<sup>193</sup> See UNLCOS, *supra* note 28, arts. 56, 87.

<sup>194</sup> *Id.* art. 24.

<sup>195</sup> *Id.* art. 42. Though similar, it is unclear whether the protections in Article 24 and Article 42 are identical. The text of Article 24 prohibits coastal States from applying discriminatory laws “against” foreign-flagged vessels, whereas the text of Article 42 prohibits discriminatory laws “among” foreign-flagged vessels. Ultimately, however, this distinction may have “little relevance in practice.” Coastal States are prohibited from adopting laws that have the practical effect of denying, hampering or impairing the right of transit passage. *Id.* art. 42. Coastal States are also prohibited from hampering or suspending transit passage. *Id.* art. 44. See UNCLOS COMMENTARY VOLUME 2, *supra* note 35, at 376–77.

<sup>196</sup> See UNCLOS, *supra* note 28, art. 234; see also UNCLOS COMMENTARY VOLUME 2, *supra* note 35, at 396–97 (“In the context of article 234, and in light of article 227, it would appear to embrace not only the absence of discrimination between foreign vessels of different nationalities, but also discrimination between foreign vessels and vessels of the nationality of the coastal State concerned.”).

<sup>197</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 512 rep. n. 3 (1987). For a historical discussion of the various bases port States use for imposing conditions of entry on foreign-flagged vessels, see William D. Baumgartner & John T. Oliver, *Conditions on Entry Foreign-Flag Vessels into US Ports to Promote Maritime Security*, 84 INT’L. L. STUD. 33 (2008); The United States has adopted maritime cabotage laws for the transportation of goods between points in the United States. Generally, these laws, commonly known as the “Jones Act,” require that the transshipment of goods between U.S. destinations be limited to U.S.-flagged vessels. 46 U.S.C. § 55102 (2016); 19 C.F.R. 4.80 (2018).

would over foreign-flagged vessels.<sup>198</sup> Such equities, however, would not justify discriminatory treatment of foreign-flagged vessels that would effectively negate crucial rights and freedoms preserved in the law of the sea.<sup>199</sup> Hopefully, these concerns will prove unfounded, and Russia will clarify the scope of the proposed ban before it goes into effect.

## VI. State Practice and Potential Impacts of the NSRA Regulatory Regime on Freedom of the Seas

Despite containing several controversial—arguably, legally unsupportable—provisions, Russia’s regulatory regime in the Northern Sea Route remains in effect. Few States have openly protested the regime while a growing number of foreign-flagged commercial vessels are complying with its terms. This highlights an important question as to whether a new legal norm is taking shape in the Arctic, one that could potentially undermine and minimize freedom of the seas. As previously discussed, given the ambiguity of certain key phrases in the text of Article 234, and a corresponding lack of clarification in the Convention’s Commentary and negotiating history, the practice of States may end up determining the scope of Article 234.<sup>200</sup> The practice of major Arctic powers in particular—namely Russia, the United States, and Canada, the “drafters” of Article 234—is significant in this respect.<sup>201</sup> State practice is relevant in two ways: first, to determine whether States have accepted Russia’s interpretation of Article 234 of UNCLOS as a treaty provision; and second, to determine whether Russia’s practice has crystallized into a new legal norm.

### A. Acceptance of Russian Interpretation of Article 234 as a Treaty Provision

There is growing evidence that some States, particularly Canada, accept Russia’s interpretation of the scope of Article 234, specifically that it permits a coastal State to require foreign-flagged vessels to request permission to enter its territorial sea and EEZ. As a treaty, UNCLOS must be interpreted in good faith in

<sup>198</sup> See UNCLOS, *supra* note 28, art. 94.

<sup>199</sup> See Inga Denezh, *Russia Plans to Shut its Northern Sea Route to Foreign Vessels*, ASIA TIMES (Nov. 22, 2017), <http://www.atimes.com/article/russia-plans-shut-northern-sea-route-foreign-vessels/> [https://perma.cc/XDB9-S2GV] (“Monopolizing the Northern Sea Route also has international risks. . . . ‘Not all countries agree that Russia has the right to exclusive jurisdiction over the Northern Sea Route,’ [Artyom Lukin, Associate Professor of International Relations at the Far Eastern Federal University] added. However, he noted that Russia is de-facto controlling the Northern Sea Route and ‘if Moscow wants to provide ships with the Russian flag exclusive rights, it is unlikely that anyone will be able to effectively prevent it.’”).

<sup>200</sup> See BRUBAKER, *supra* note 87, at 33, 45–54 (“Customary international law appears to be in the process of formation for the Arctic waters, which will define the contours of a specific regime for ice-covered areas and will encompass the regime for international straits and the rights of passage for State vessels. [UNCLOS] Article 234 and State practice in the application of that convention also plays a role in fashioning the Arctic regime.”).

<sup>201</sup> See *id.* at 46.

accordance with the ordinary meaning of its terms, its context,<sup>202</sup> and in light of its object and purpose.<sup>203</sup> The object and purpose of UNCLOS, as articulated in the preamble, are to establish a legal regime for the seas and oceans that promotes both its utilization and conservation, with due regard to State sovereignty, so as to contribute to a just and equitable international economic order accounting for the interests and needs of mankind as a whole.<sup>204</sup> Though this language highlights the balance UNCLOS was designed to achieve between use and preservation of the seas, as well as between coastal State rights and freedom of the seas, it is not instructive on how best to interpret Article 234. It can be used to support either a restrictive or liberal reading.

Further frustrating matters, there are no subsequent agreements between the UNCLOS signatories as to the scope of Article 234.<sup>205</sup> Given the textual ambiguity of Article 234, which is not adequately clarified by the Treaty's commentaries, State practice subsequent to UNCLOS may be the most useful means of determining how States interpret the scope of Article 234. Canada's subsequent State practice in this regard is particularly instructive.

Since 2010, Canada—like Russia—has enforced domestic regulations requiring foreign-flagged vessels to request permission (obtain “clearance”) to enter its waters in the Arctic, including its territorial sea and exclusive economic zone. These regulations, the Northern Canada Vessel Traffic Services Zone Regulations (NORDREGs) enabled by the 2001 Canada Shipping Act, are mandatory for foreign-flagged vessels and were enacted by Canada pursuant to Article 234.<sup>206</sup> In addition to requiring clearance prior to entry,<sup>207</sup> the NORDREGs mandate the use of vessel traffic services and ship reporting systems. Vessels intending to enter the NORDREG Zone must submit to a designated Canadian Marine Communications and Traffic Services Centre a “sailing plan report” prior to entry, which must include, *inter alia*, the vessel's destination, intended route, and a description of its cargo.<sup>208</sup> Vessels must also

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<sup>202</sup> For purposes of interpreting a treaty, context “shall comprise, in addition to the text, its preamble, and annexes, certain agreements and instruments made by parties at the conclusion of the treaty.” Vienna Convention on the Law of Treaties art. 31(2), May 23, 1969, 1155 U.N.T.S. 331.

<sup>203</sup> *See id.* art. 31.

<sup>204</sup> *See* UNCLOS, *supra* note 28, pmbl.

<sup>205</sup> Any subsequent agreements between the parties, or State practice in the application of the treaty which establishes agreement between the parties, may also be taken into account when interpreting treaty provisions. In the case of textual ambiguity that cannot be resolved through these means, supplementary means of interpretation, such as the preparatory work of the treaty, may also be utilized. *See* Vienna Convention, *supra* note 202, arts. 31(3), 32.

<sup>206</sup> *See* Northern Canada Vessel Traffic Services Zone Regulations, SOR/2010-127 (Can.), <http://laws-lois.justice.gc.ca/PDF/SOR-2010-127.pdf> [<https://perma.cc/CJV2-SS28>] [hereinafter NORDREG]; Canada Shipping Act, S.C. 2001, c 26 (Can.), <http://laws-lois.justice.gc.ca/PDF/C-10.15.pdf> [<https://perma.cc/BQ42-ECYU>]; Shipping Safety Control Zones Order, C.R.C., c 356 (Can.), [http://laws-lois.justice.gc.ca/PDF/C.R.C.,\\_c.\\_356.pdf](http://laws-lois.justice.gc.ca/PDF/C.R.C.,_c._356.pdf) [<https://perma.cc/BSC4-K76Q>].

<sup>207</sup> *See* Canada Shipping Act, *supra* note 206, § 126.

<sup>208</sup> *See* NORDREG, *supra* note 206, § 6.

report their position immediately after entering the NORDREG Zone, daily while underway within the Zone, immediately upon exiting the Zone, and any time the vessel deviates from its sailing plan report.<sup>209</sup> Similar to the NSRA Navigation Rules, these NORDREG navigational standards were made mandatory without prior IMO review and adoption, and do not provide an express exemption for sovereign immune vessels.

Based on Canada's State practice in regulating its waters in the Arctic, there is convincing evidence Canada not only accepts but shares Russia's interpretation of Article 234, at least with respect to the authority of a coastal State to implement a permission-based regulatory regime for foreign-flagged vessels. Canadian practice in unilaterally implementing mandatory safety of navigation standards—such as ship reporting systems—for foreign-flagged vessels operating in their territorial sea and EEZ, without prior review and adoption by the IMO, is also consistent with Russia's interpretation of Article 234. Though the NORDREGs have drawn some diplomatic protest, notably from the United States,<sup>210</sup> the regime remains and foreign-flagged commercial vessels from several nations continue to comply with its terms. This highlights a second potential issue. Express acceptance of Russia's (and Canada's) interpretation of Article 234 is not necessary to establish a binding legal norm regarding permission-based regulatory regimes in the Arctic if States fail to timely object to that interpretation diplomatically and, arguably, operationally as well.

### B. Crystallization of Russian Practice as a New Legal Norm

The customary practice of States is generally recognized as one of the primary sources of international law.<sup>211</sup> To crystallize into a binding legal norm, however, the "practice" must be constant and uniform over time.<sup>212</sup> The requisite

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<sup>209</sup> See *id.* §§ 7–9.

<sup>210</sup> See Diplomatic Note from the U.S. Embassy in Ottawa to the Department of Foreign Affairs and International Trade of Canada Regarding NORDREG (Aug. 18, 2010), <https://www.state.gov/documents/organization/179287.pdf> [<https://perma.cc/F7UR-QBBZ>] (“Among our concerns, the NORDREGs purport to require Canadian permission for foreign flagged vessels to enter and transit certain areas that are within Canada’s claimed exclusive economic zone and territorial sea . . . . Additionally, the NORDREGs do not provide express exemptions for sovereign immune vessels . . . . In our view, measures like those contained in NORDREGs should be proposed to and adopted by the IMO to provide a solid legal foundation and broad international acceptance.”).

<sup>211</sup> See Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. The other two primary sources of law are “international conventions” (treaties) and “the general principles of law recognized by civilized nations.” See *id.*; see also International Law Association, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000 [hereinafter Statement of Principles]; HERSCH LAUTERPACHT, 1 INTERNATIONAL LAW 61 (Elihu Lauterpacht ed., 1970).

<sup>212</sup> See North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 74 (Feb. 20); Asylum Case (Col. v. Peru), Judgment, 1950 I.C.J. Rep. 266, 276–77 (Nov. 20); see also Statement of Principles, *supra* note 211, at 8; LAUTERPACHT, *supra* note 210, at 61;



duration of the practice has never been specifically quantified; binding customary rules can develop quickly, as in the cases of national sovereignty over air space and of the continental shelf regime.<sup>213</sup> What is material is the extent, uniformity (that is, consistency of State behavior), and representativeness of the practice.<sup>214</sup> In this regard, it has been argued that the number of States participating in the practice is not dispositive; additional consideration should be given to which States participate. Those States “whose interests are specially affected” by the practice will have particular significance in whether the practice develops into a binding legal rule.<sup>215</sup>

The practice must also be accepted as law by other States; they must subjectively consider themselves legally bound to conform to the State practice. This sense of legal obligation is referred to in international law as *opinio juris sive necessitates*, or simply *opinio juris*.<sup>216</sup> Although there is “broad agreement” among jurists and the courts that *opinio juris* is an “essential element” of customary international law, there is considerable debate on what constitutes the existence of *opinio juris*.<sup>217</sup> Some scholars argue that there needs to be some expression of consent—which can come in a variety of forms—from a State that

BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 6 (2010).

<sup>213</sup> See Statement of Principles, *supra* note 211, at 20.

<sup>214</sup> See *id.* at 20–26; see also Erik Franckx, *The New U.S.S.R. Legislation of Pollution Prevention in the Exclusive Economic Zone*, 1 INT’L J. ESTUARINE & COASTAL L. 158–59 (1986) (“The likelihood that different states will enact similar municipal legislation, enabling a customary rule to become crystallized, is enhanced if those states have a common point of reference [for example, UNCLOS].”).

<sup>215</sup> North Sea Continental Shelf Case, 1969 I.C.J. at ¶ 73; Statement of Principles, *supra* note 211, at 26. See also Franckx, *supra* note 214, at 154, 158 (“[G]reat powers will have more influence than others on the formation of customary rule . . . .”); see also BRUBAKER, *supra* note 87, at 46 (“The practices of Russia and the United States are especially important sources of customary international law due to their status as great powers.”). The doctrine of “specially affected states,” however, is not universally held, particularly outside of the context of law of the sea matters. See Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to US Comments*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 473, 481–82 (“The statement of the International Court of Justice in respect to the need for the practice of ‘specially affected’ states to be included was made in the context of the law of the sea – and in particular in order to determine whether a rule in a (not widely ratified) treaty had become part of customary international law. Given the specific nature of many rules of humanitarian law, it cannot be taken for granted that the same considerations should automatically apply.”).

<sup>216</sup> North Sea Continental Shelf Case, 1969 I.C.J. at ¶ 77; Continental Shelf Case (Libya v. Malta), 1985 I.C.J. Rep. 13, ¶ 27; see Statute of the International Court of Justice, *supra* note 211, art. 38(1). See also LAUTERPACHT, *supra* note 211, at 61 (“[T]wo elements are decisive for the ascertainment of international custom: the first is constancy and uniformity of practice; the second is that that practice must be followed under the impulse of a sense of obligation, *opinio necessitates*.”); LEPARD, *supra* note 212, at 6.

<sup>217</sup> See LEPARD, *supra* note 212, at 20; see also LAUTERPACHT, *supra* note 211, at 64 (“It would thus appear that the accurate approach to the question of international custom in this respect is neither insistence on the element of legal obligation nor abandonment of the requirement of any element whatsoever of obligation accompanying the practice in question. There must be some sentiment of obligation—not necessarily and not primarily of a legal nature and not necessarily accompanied by an apprehension of sanction in case of non-compliance.”).

they consider themselves to be bound by the practice at issue.<sup>218</sup> Conversely, others argue that *opinio juris*—the “subjective element”—can be inferred from State practice alone; in other words, if a State is uniformly complying with a practice, then that may be sufficient evidence that they believe themselves legally obligated to comply.<sup>219</sup> Significantly, for purposes of the present analysis, “some writers appear to favor creating a presumption that states accept as lawful practices to which they do not object.”<sup>220</sup> Admittedly, this is not the majority view. After all, “abstinence from protest may be motivated by a variety of political considerations.”<sup>221</sup> However, the act of acquiescence by a State may at least be some evidence of *opinio juris* if the acquiescence suggests a recognition that the practice is (or should be) justified under current law.<sup>222</sup>

There is legal risk to acquiescence. To mitigate this risk, States must actively and persistently object to practices by other States that attempt to derogate from accepted rules of law. Failure to timely do so may prevent the non-objecting State from later claiming exemption from the objectionable State practice, resulting in “tacit acceptance” of the practice.<sup>223</sup> There is debate regarding whether protest must be supported by action in order for a State to preserve its legal objection. Notwithstanding this debate, actions by States “are an indication of national resolve and an affirmative effort to influence the formation of international law . . . . Action by deed . . . promotes the formation of law consistent with the action and deeds may be necessary in some circumstances to

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<sup>218</sup> See Statement of Principles, *supra* note 211, at 38 (“For some authorities, often called voluntarists, the key to customary law is not belief (*opinio juris*) but will. For them, sovereignty means that States can only be bound by legal obligations if they consent. Such consent can be given expressly and in writing, by means of a treaty; or informally and often implicitly, in the form of customary law.”).

<sup>219</sup> See LEPARD, *supra* note 212, at 20–25.

<sup>220</sup> *Id.* at 188. See also KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 47 (1993) (“If a state does not react openly against a certain practice, especially when a reaction may be expected, the presumption arises that it acquiesces in that practice or at least is indifferent to it, that is, is not opposed to the practice giving rise to a new rule of customary international law.”); BRUBAKER, *supra* note 87, at 46 (“Some argue that if States claim something is law and other States do not protest or otherwise challenge it, a new rule will become customary law though all the States may realise a change is made from the earlier rules.”).

<sup>221</sup> See LEPARD, *supra* note 212, at 188.

<sup>222</sup> See *id.* at 188–89; see also Raphael Walden, *Customary International Law: A Jurisprudential Analysis*, 13 ISR. L. REV. 86, 102 (1978) (“An act of acquiescence which consists merely in a weak State’s bowing to the inevitable in the face of aggressive behavior on the part of a more powerful one will not give rise to a rule of customary law. But if the act of acquiescence involves the recognition that the claim is justified, either is existing law or *de lege ferenda*, then this means that the rules justifying the claim and giving rise to the obligation to accede to it are seen as legal standards, and in that case the act of acquiescence will necessarily be accompanied by *opinio juris*.”).

<sup>223</sup> See, e.g., *Delimitation of the Maritime Boundary in Gulf of Maine Area (Can. v. U.S.)*, Judgment, 1984 I.C.J. Rep. 246, ¶¶ 235–41 (Oct. 12); see also Statement of Principles, *supra* note 211, at 27; ROACH & SMITH, *supra* note 14, at 9 (“The failure to make a timely protest in circumstances when it reasonably could have been expected to do so may constitute tacit acceptance of the claim.”).

slow erosion in customary legal practice.”<sup>224</sup> One such “circumstance” where action by the objecting State may be necessary is in the maritime domain, as avoiding waters subjected to an excessive claim that a State needs to navigate, or could expect to navigate, “gives both practical and legal effect to the excessive claim.”<sup>225</sup>

Russia has, in the past, “claimed Western acquiescence” to excessive maritime claims in the Arctic, particularly as it relates to several international straits along the Northern Sea Route that Russia claims as internal or territorial waters.<sup>226</sup> Pursuant to the Russian view, a failure to object could arguably be acceptance. Though it has yet to occur, Russia may also claim Western acquiescence to its NSRA regulatory regime—or provisions of it—in the same manner they claimed acquiescence to its Arctic straits regime. Maritime powers, such as the United States, must be vigilant in protesting excessive claims and preserving their freedom of navigational rights.

To that end, the United States is one of few major maritime powers to formally lodge a diplomatic protest with Russia over the lawfulness of the NSRA Navigation Rules or portions thereof.<sup>227</sup> However, the United States has not conducted a freedom of navigation operation in the Northern Sea Route (at least not openly and on the surface) in over fifty years. No State has sent a sovereign immune vessel through the Northern Sea Route without first requesting permission from the NSRA since the Navigation Rules became effective. Conversely, foreign-flagged shipping traffic along the Northern Sea Route continues. In 2016, the NSRA issued 718 permits for the Northern Sea Route; twenty percent of those permits were issued to foreign-flagged commercial vessels.<sup>228</sup> This is a notable increase over previous years, when permit

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<sup>224</sup> ROACH & SMITH, *supra* note 14, at 12 (quoting David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 964, 969 (1986)); *see also* John C. Hitt, Jr., *Oceans Law and Superpower Relations: The Bumping of the Yorktown and the Caron in the Black Sea*, 29 VA. J. INT’L L. 713, 731–36 (1989).

<sup>225</sup> *See id.* at 12–13; *see also* COMMANDER’S HANDBOOK, *supra* note 29, § 2.8 (“When States appear to acquiesce in excessive maritime claims and fail to exercise their rights actively in the face of constraints on international navigation and overflight, those claims and constraints may, in time, be considered to have been accepted by the international community as reflecting the practice of States and as binding upon all users of the sea and superadjacent airspace. Consequently, it is incumbent upon maritime States to protest diplomatically all excessive maritime claims of coastal States and to exercise their navigation and overflight rights in the face of such claims.”).

<sup>226</sup> BRUBAKER, *supra* note 87, at 41 (“Few, if any, other Western States have lodged protests to the Russian [straits] regime, apparently neither the United Kingdom, Norway, nor France, nor the European Union. Submerged passages by these States in the Russian Arctic are largely unknown. Thus, while the Russian claim concerning Western acquiescence to its [straits] regime is substantially correct, the United States has definitely protested and acquiescence may not be assumed.”).

<sup>227</sup> *See* Diplomatic Note, *supra* note 16.

<sup>228</sup> *See* Malte Humpert, *Shipping Traffic on Northern Sea Route Grows by 30 Percent*, HIGH NORTH NEWS (Jan. 23, 2017), <http://www.highnorthnews.com/shipping-traffic-on-northern-sea-route-grows-by-30-percent/> [<https://perma.cc/9P92-9R7J>]; *see also* Malte Humpert, *Shipping*

applications where primarily from Russian operators.<sup>229</sup> Equally notable is the diversity of foreign-flagged vessels requesting, and being issued, permits to enter and navigate in the Northern Sea Route. In 2016, the NSRA issued permits to foreign-flagged commercial vessels from twenty-seven States, including Belgium, China, Denmark, Finland, Hong Kong, Ireland, Italy, Malta, Norway, Portugal, Singapore, and the United Kingdom.<sup>230</sup> Several of the vessel registries for these States are not open registries—or “flags of convenience”—but rather involved vessel registries with a reputation for responsible maritime governance. The extent to which any of the aforementioned flag-State Administrations condoned or approved commercial vessel compliance with the NSRA regulatory scheme is beyond the scope of the present analysis, but could arguably be evidence of *opinio juris* or acquiescence, particularly if there is evidence that States condoned filing the requests out of a sense of legal obligation.

Ultimately, as it relates to the formation of binding customary international law, the conduct of foreign-flagged commercial vessels *alone* is very difficult to attribute to their respective flag State Administrations. Pragmatically, however, it may not matter—particularly to Russia—what the official positions of foreign States are on the NSRA regulatory scheme if vessels flagged to those States are nevertheless abiding by its terms. Compliance is compliance, and compliance is exactly what is occurring. The conduct of States, conversely, is critical. States that fail to exercise freedom of the seas in contested maritime areas, such as the Northern Sea Route, enjoy those rights and freedoms only in a theoretical sense, and that failure may impact the formation of customary international law.

## VII. Conclusion

The NSRA regulatory regime is a cause for concern, but not alarm. Certainly, there is much in the NSRA Navigation Rules to be concerned about, particularly as they relate to the freedom of the seas. Several provisions of the Rules—such as the provision requiring foreign-flagged vessels to request permission to enter and transit the Northern Sea Route, and provisions imposing mandatory safety of navigation standards prior to the review of those standards by the IMO—are inconsistent with the law of the sea and adversely impact freedom

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*Traffic on Northern Sea Route Grows by 40 Percent*, HIGH NORTH NEWS (Dec. 19, 2017), <http://www.highnorthnews.com/shipping-traffic-on-northern-sea-route-grows-by-40-percent/> [<https://perma.cc/C3RL-BDGZ>] (“As of November 15 [2017] more than 300 different vessels have operated on the route conducting more than 1800 voyages to and from 94 destinations along the route. This compares to 1705 voyages during all of 2016, according to the NSR Information Office run by the Center for High North Logistics. The vast majority of vessels, as in previous years, operated under Russian flag, with 75 vessels flying foreign flags. Interestingly, transit traffic was dominated by foreign carriers, with only 6 out of 24 being Russian.”). For statistics on transit traffic through the Northern Sea Route, see *Transit Statistics*, CTR. FOR HIGH NORTH LOGISTICS INFO. OFFICE, [http://www.arctic-lho.com/nsr\\_transits](http://www.arctic-lho.com/nsr_transits) (last visited May 31, 2018) [<https://perma.cc/3MVM-8U6U>].

<sup>229</sup> Humpert, *30 Percent*, *supra* note 228.

<sup>230</sup> *See id.*

of the seas. Other aspects of the NSRA Navigation Rules—such as the absence of an express exemption for sovereign immune vessels—need to be clarified. Notwithstanding these concerns, Russia is a vital partner of the United States in the Arctic and has been for some time;<sup>231</sup> any issues the United States has with the NSRA Navigation Rules can, and almost certainly will, be resolved peacefully.

In addition to a history of Arctic partnership, the United States and Russia also share a rich history of military-to-military engagements, including the management of mutual expectations on military activities on the seas and in the airspace above.<sup>232</sup> Moreover, the U.S.S.R. was a key partner of the United States in ensuring that freedom of the seas equities were ultimately preserved in UNCLOS.<sup>233</sup> There is common ground between the two nations and multiple forums—including the Arctic Council, the Arctic Coast Guard Forum, and the Arctic Security Forces Roundtable—for continued discussion and expanded collaboration. The United States should leverage those forums to seek clarification on the issue of sovereign immune vessels in the Northern Sea Route and encourage Russia to issue a clear and unambiguous statement as to their legal classification of the Northern Sea Route and submit the mandatory safety of navigation measures in the NSRA Navigation Rules to the IMO for review and adoption. By utilizing the IMO process, Russia would achieve international recognition of its mandatory safety of navigation measures that would have lasting effect beyond the temporary authority of Article 234, which essentially terminates when the regulated area is no longer “ice covered.” Naturally, the United States would significantly bolster its credibility on this issue, and other law of the sea matters, by acceding to UNCLOS.<sup>234</sup>

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<sup>231</sup> The United States and the Russian Federation are members of the Arctic Council and signatories to the following agreements: Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, May 12, 2011, T.I.A.S. No. 13,119; Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, May 15, 2013, T.I.A.S. No. 16,325; and the Agreement on Enhancing International Arctic Scientific Cooperation, May 11, 2017, <https://www.state.gov/documents/organization/271057.pdf> [<https://perma.cc/6F8F-KX9P>]. The United States and the Russian Federation also have a long and successful history of jointly managing safety and security issues in the Bering Straits.

<sup>232</sup> Agreements that facilitate U.S. and Russian military-to-military engagement include the Agreement Between the Government of The United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas, May 25, 1972, 23 U.S.T. 1168; the Agreement on the Prevention of Dangerous Military Activities, U.S.-U.S.S.R., June 12, 1989, T.I.A.S. No. 11485; and the Treaty on Open Skies, Mar. 24, 1992, S. TREATY DOC. NO. 102-37 (1992).

<sup>233</sup> See CENT. INTELLIGENCE AGENCY, SOVIET POLICY ON LAW OF THE SEA 1–3 (1979) (declassified in part), <https://www.cia.gov/library/readingroom/docs/CIA-RDP08C01297R000500010007-1.pdf> [<https://perma.cc/8N3V-6N7K>] (“UNCLOS III has coincided with the emergence of the Soviet Union as a major maritime power. . . . [I]t has come on as one of the stronger proponents of retaining the traditional high seas rights of navigation.”).

<sup>234</sup> The Council on Foreign Relations recently convened an Independent Task Force (ITF) to evaluate present and future challenges for the United States in the Arctic. One of the primary findings in the ITF’s Final Report is that “by failing to ratify the UNCLOS treaty, the U.S. Senate has undermined the nation’s ability to advance its interests in the Arctic to the fullest extent.” In

Concurrent with diplomatic and military-to-military engagement efforts to resolve the legal uncertainty and ambiguities surrounding the NSRA Navigation Rules, it is imperative that the United States accelerate the development of multi-mission, polar-capable surface assets and support infrastructure necessary to safely and effectively protect U.S. interests in the Arctic, including freedom of the seas. The ugly truth is that the United States lacks the requisite surface capabilities to operate in the harsh Arctic environment. The U.S. Coast Guard has only one heavy and one medium polar icebreaker in its fleet, both of which are past their thirty-year service lives. Government and private sector experts alike agree that this is woefully inadequate to protect U.S. interests in the region, which include not just ensuring access to the global commons, but also search and rescue, maritime law enforcement, pollution response, living marine resource conservation, and maritime domain awareness, among others.<sup>235</sup> In addition to polar icebreakers, the United States does not possess polar-capable, ice-strengthened patrol vessels, multi-mission platforms capable of operating safely and effectively under the most challenging conditions. Put simply, the United States cannot protect its interests in the Arctic if it is not present in the Arctic, and currently the U.S. is only marginally present in the region.

The Arctic has proven itself a region of open dialogue and cooperation, and must remain so. Should diplomacy and engagement not resolve the legal uncertainty and ambiguity surrounding the NSRA Navigation Rules, however, and an appropriate environment exist for the safe exercise of navigational rights and freedoms along the Northern Sea Route, it may be prudent for the United States to consider operationalizing its protests to excessive claims in the Arctic. Such exercise, however, cannot single out Russia. Consideration should be given to Canada's Arctic waters as well; certain provisions of the Canadian NORDREGs are similarly controversial as analogous provisions of the NSRA Navigation Rules.<sup>236</sup> States conducting freedom of navigation operations must be intellectually honest, particularly if conducting operations in a region, such as the Arctic, with multiple States making similar excessive maritime claims. Though geopolitics plays a role in the conduct of many peaceful military operations,

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turn, one of the primary recommendations of the Final Report is that the U.S. Senate ratify UNCLOS. COUNCIL ON FOREIGN RELATIONS, ARCTIC IMPERATIVES: REINFORCING U.S. STRATEGY ON AMERICA'S FOURTH COAST 13–14 (2017), [https://cfrd8-files.cfr.org/sites/default/files/pdf/2017/02/TFR75\\_Arctic.pdf](https://cfrd8-files.cfr.org/sites/default/files/pdf/2017/02/TFR75_Arctic.pdf) [<https://perma.cc/DVF3-VAJJ>].

<sup>235</sup> NAT'L ACAD. OF SCIENCES, ACQUISITION AND OPERATION OF POLAR ICEBREAKERS: FULFILLING THE NATION'S NEEDS 11–24 (2017), <https://www.nap.edu/read/24834/chapter/3> [<https://perma.cc/X34B-43LF>] (“Failure to recapitalize the nation’s polar icebreaking capability will leave USCG unable to maintain an active and influential presence or to meet current and projected mission demands in the polar regions.”); HERITAGE FOUND., ISSUE BRIEF: THE COAST GUARD NEEDS SIX NEW ICEBREAKERS TO PROTECT U.S. INTERESTS IN THE ARCTIC AND ANTARCTIC 3 (2018), [https://www.heritage.org/sites/default/files/2018-04/IB4834\\_0.pdf](https://www.heritage.org/sites/default/files/2018-04/IB4834_0.pdf) [<https://perma.cc/F6MA-3QSR>] (“The Coast Guard requires a fleet of new polar-class icebreakers to defend America’s security and economic interests in the Polar Regions. Icebreakers are crucial for meeting the separate challenges of operations in the Arctic and Antarctic, and the current fleet is not capable of meeting those challenges effectively.”).

<sup>236</sup> See discussion *supra* Part VI.

freedom of navigation operations must ultimately be based on principle and the law, not the status of the actors. To do otherwise could be counterproductive. Despite its tremendous potential, however, it may be years before the Northern Sea Route becomes a global shipping channel that foreign-flagged vessels routinely transit through. Nevertheless, there is legal risk to acquiescence, and that risk grows with time. Freedom of the seas and maritime mobility in the region are too strategically important for the United States to sit on its rights indefinitely.