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LEGAL STATUS OF THE NSR, INTERMEDIATE REPORT FOR THE WORKSHOP 2.2

WP2: Administrative measures

WP2.1: Legal status of the NSR

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DELIVERABLE SUMMARY SHEET

Short Description
The report updates the relevant general development as well as the legal aspects in the area of concern. The boundaries of the Northern Sea Route as well as the applicability of the Article 234 of the 1982 Law of the Sea Convention are discussed more in detail and the IMO PSSA issues are brought up.

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INTERIM REPORT - IMPLICATIONS OF GATS/E.U. LAW AND LAW OF THE SEA FOR THE RUSSIAN NORTHERN SEA ROUTE IN THE BARENTS SEA

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Note: The interim report so far has roughly addressed GATS, E.U. law and law of the sea. During the next periods follow up analysis will be continued as well as extensive editing carried out along with integration of all three areas of law. Comments are welcome.

1. Introduction

Objectives and Issues

Related to future shipments of Russian oil and liquid natural gas (LNG) westward the objectives of this paper are

- to analyse international regimes for environmental protection and safety which may be utilised for the NSR to achieve separation of oil and LNG tankers and military vessels.
- to analyse WTO /GATS and E.U. requirements for competition, the establishment of a treatment-no-less-favourable regime under GATS, and trade in services under GATS applicable to NSR oil and LNG tankers; and
- to analyse the environmental and safety requirements applicable to NSR oil and LNG tankers flying the flag of non-member States when docking in an European Union (E.U.) or European Economic Area (EEA) port;

Issues to be dealt with under the first objective raises the following questions. What are the environmental and safety requirements and enforcement jurisdiction applicable to vessels flying the flag of non-member States when docking in an E.U. or EEA Member State

harbours? Concentrating on oil and LNG tankers navigating the NSR, does Community shipping law address member States so as to unify domestic legislation versus third State vessels, when docking in an E.U. or EEA harbour? In which way does Community law, by unifying port State legislation, contribute to the elimination of 'ports of convenience'? What relation does international law of the sea, including the International Maritime Organisation (IMO) Conventions and the 1982 United Nations Law of the Sea Convention (LOSC)[1] as well as domestic legislation, have to these rules?

Related to oil and LNG tankers trafficking the NSR, issues to be dealt with under the second objective include clarification of WTO/GATS and E.U. requirements for competition, the establishment of a treatment-no-less-favourable regime under GATS, and trade in services under GATS. The Russian Federation is applicant Member State for 10 years and not yet party to the WTO.[2] In view of harsh weather conditions and ice-covered waters, and related to NSR requirements, how may shipping companies be prevented form resorting to sub-standard vessels to counterbalance unequal participation rights?

Related to the third objective questions may be raised whether international regimes for environmental protection and safety may be applicable to the NSR. What measures including traffic lanes, reporting of position, velocity limitations, particularly sensitive sea areas, would result in optimal safety conditions, including separation of civilian and military vessels?

2. Russian State Practice and Law of the Sea

2.1. Passage through the NSR

The passage through Northern Sea Route (NSR), north of Russia, has for decades been one of the most contentious legal issues in Soviet/Russian - U.S. relations. The Arctic is an ocean, but the jurisdictional claims of the large Arctic coastal States indicate substantial deviation from application of established law of the sea. The regimes of straits used for international navigation and passage rights of State vessels seem subordinate to the regime of ice-covered areas under the 1982 Law of the Sea Convention. Such subordination appears though to be unique to the Arctic. Article 234 states the following.

Article234
Ice-covered areas

[1] 1982 United Nations Convention on the Law of the Sea (LOSC). *United Nations Treaty Series* (*UNTS*), reprinted in *International Legal Materials* (*ILM*), Vol. 21, (1982), p. 1261. The LOSC came into force 16 November 1994. For the IMO regime see generally http://www.imo.org/.

[2] The Working Party on Russian accession was established on 16 June 1993. For the status of the negotiations. See http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm

> Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

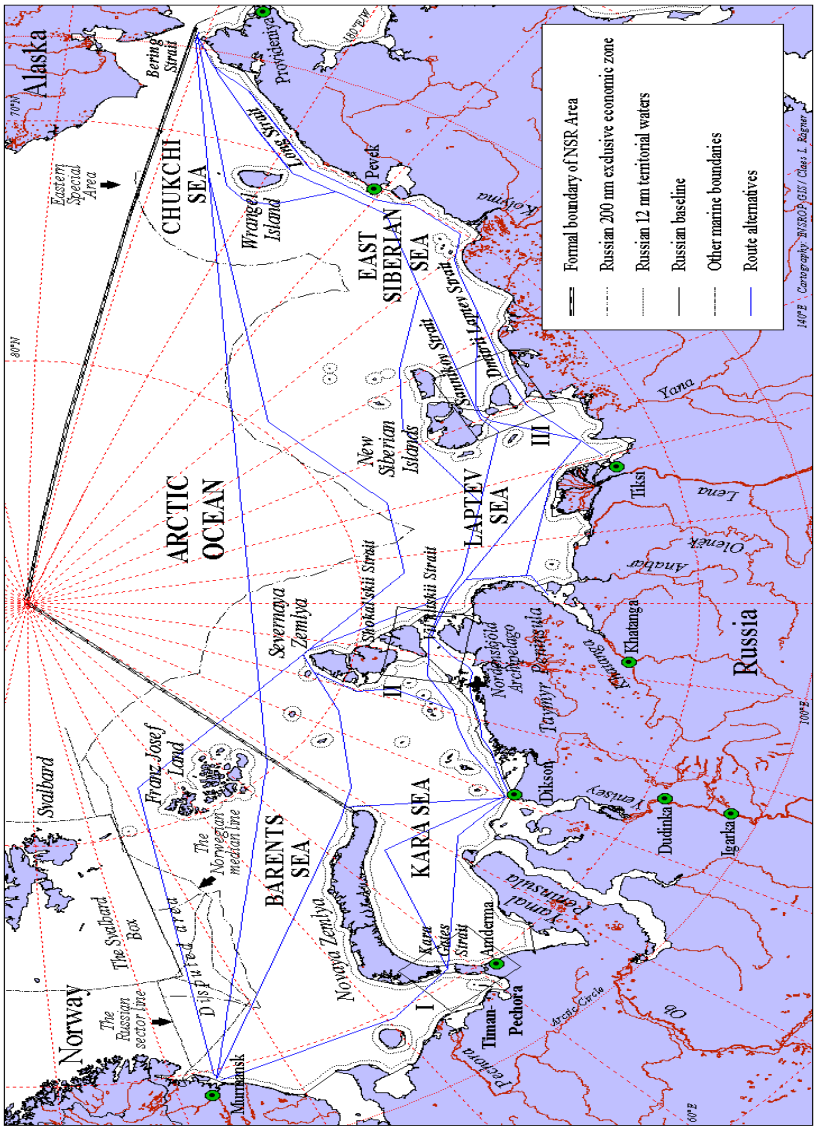
The main finding of such analysis indicates that despite significant differences in the practice of the three main actors, i.e., Canada, Russia and the U.S., there are certain elements of consistency in their common interpretation of existing law and their behaviour. These elements seem to have put in action the process of formation of a specific customary international law with respect to the passage of vessels, including State vessels, through the Arctic area in general and its international straits in particular. *This means that Russia enjoys substantial support from the large Arctic littoral States the U.S. and Canada for its legal regime regulating Arctic navigation.* Norway and Denmark/Greenland have carried out little State practice in this regard. The study of the State practice with respect to passage through NSR nevertheless demonstrates that due to the region's strategically sensitive geographical situation, there is a continuous risk for disputes and may need practical solutions for preventing and resolving potential disputes.

A problem area recently arising may relate to an extended geographical scope. The Barents Sea is the westernmost of the Arctic seas north of Russia. It is bordered to the west, north and east by the Svalbard, Bear, Franz Josef, Novaya Zemlya, and Vaygach Islands, and to the south by the Norwegian and Russian mainland. The area between Kolguev Island and Novaya Zemlya is sometimes called the Pechora Sea, but this is considered to be part of the Barents Sea. The average depth of the Barents Sea is approximately 200 meters. Technically, though recently claimed otherwise by NSRA Director A. Gorshkovsky,[3] the Barents Sea has not been considered by the Russians to constitute a part of the strict NSR legal regime. *The entrance of the NSR is maintained to be the western entrances of the Novaya Zemlya straits or to the north of Novaya Zemlya, Mys Zhelaniya, and the Bering Strait* under Article 1.2. of the Rules of Navigation – Regulations for Navigation on the Seaways of the Northern Sea Route, and other provisions.

Disputed areas. The primary problem concerning the extension of the Russian Arctic legal regime westover into the Barents Sea relates to the unresolved maritime boundary dispute

[3] A. Gorshkovsky, 'Rules To Be Followed on the Northern Sea Route,' p. 1 notes, "(T)he provisions of the "Guide" apply both to the NSR seaway itself (from Novaya Zemlya to the Bering Strait) and to the Barents and Bering Sea areas covered by ice."

Figure 1: The Northern Sea Route



between Norway and Russia.[4] This concerns both the boundary to adjacent exclusive economic zones of Norway and Russia as well as adjacent continental shelves, which have been agreed upon to run concurrently. The Norwegian median line claim lies roughly 400 km. northwest of Kolguyev Island in the southeastern Barents Sea, while the Russian claim lies further west running north following sectors and the Svalbard box.[5] In between lie approximately 155,000 square kilometres.

Thus, though generally under Article 234 Russia may unilaterally prescribe and enforce extensive coastal State jurisdiction in its exclusive economic zone, theoretically including also the Barents Sea, this cannot be exercised in contradiction to Norway. Formal maritime boundary negotiations between these two States have been conducted for close to 30 years, since 1974. A claim by Russia to Article 234 jurisdiction would inject a major new element into these negotiations, and a sharp Norwegian reaction could be expected. Article 234 jurisdiction in the southeastern Barents Sea could be mitigated should Russia define the relevant ice-covered areas for example to be restricted to the Pechora Sea lying eastward of a well-defined line a distance from the Norwegian median line claim, and to be replaced by a definite maritime boundary when that came into being.

Ice conditions. Additional issues may as well arise under Article 234 itself. Since the phrase "ice-covered" is at issue related to the extension of the NSR legal regime westover, it must be noted ice conditions in the Barents Sea differ from the other Arctic seas. This is due to the warm waters of the North Cape current flowing in as a branch of the North Atlantic current along the Norwegian coast. Most ice in the Barents Sea is of local origin; ice movement out of the sea or into it from the polar basin or the Kara Sea appears to be modest. The ice is nearly always less than one year old and is relatively thin. The western parts of the Barents Sea from North Cape to Svalbard are navigable all the year round. Its eastern parts are usually free of ice up to 75°N by mid-June. By early July the entire western coast of Novaya Zemlya is ice-free, and then the entire Barents Sea south of a line joining South Cape (the southernmost point on Spitzbergen) and Cape Zhelaniya on Novaya Zemlya is navigable. In some years with favourable ice conditions navigation along the western coast of Novaya Zemlya has been possible as early as February, however April is usually the worst month for navigation as far as ice conditions are concerned. The mean limit of non-navigable ice then extends from off the south-western coast of Svalbard to Bear Island, south-east of which the limit runs eastward to about 40°E longitude and 73°30'N latitude. The limit then continues south-eastward, crossing the 70th parallel at about 44°E, thereafter curving down to the Cape Svyatoy Nos off the Murmansk coast at about 40°E. In some years the extreme southward ice limit may approach the western part of the Murmansk coast as close as 80 nautical miles.

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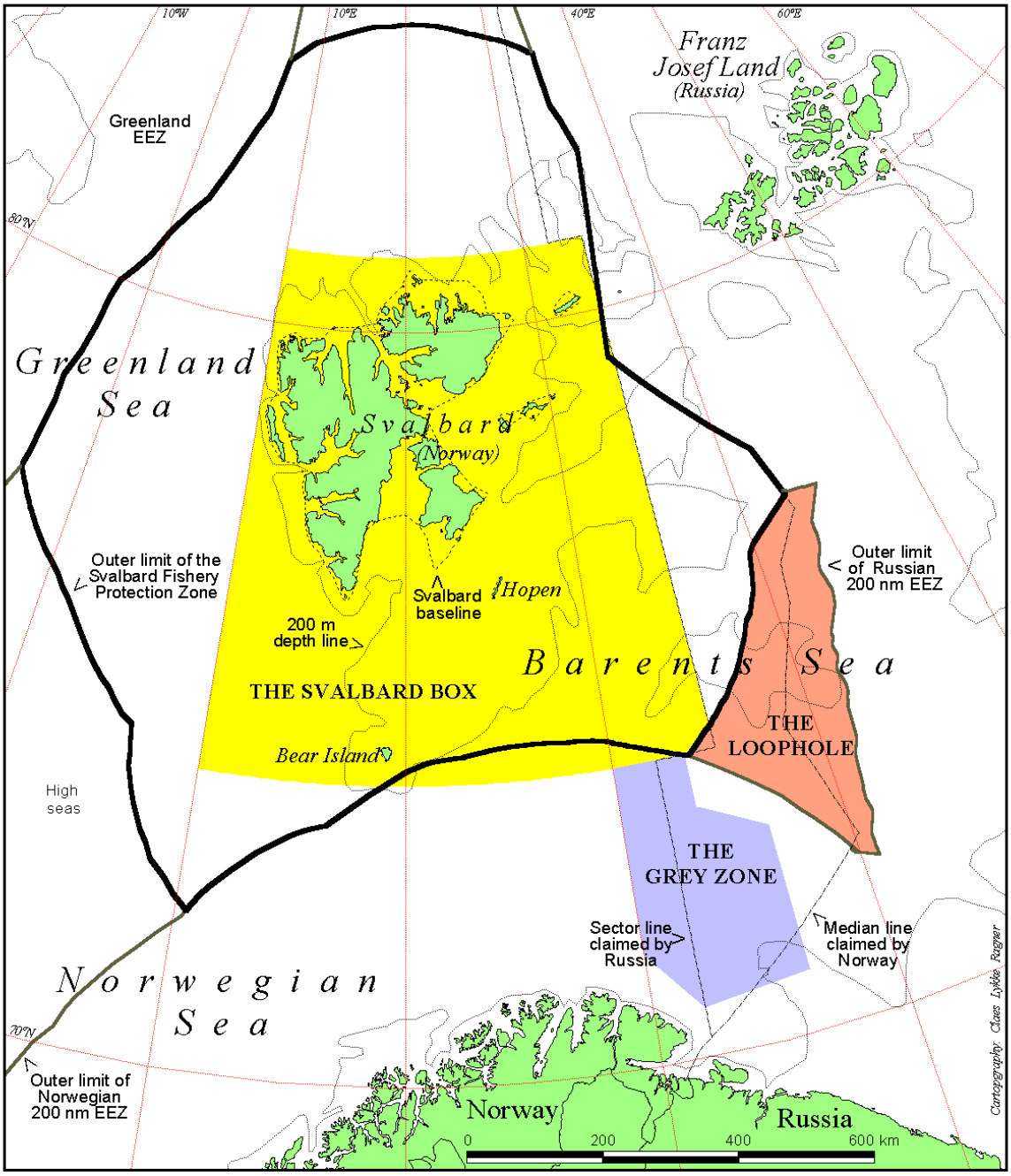
[4] See R. Churchill and G. Ulfstein, *Marine Management in Disputed Areas – The Case of the Barents Sea*, (London, Routledge, 1992), pp. 54-90.

[5] Ibid. p. 64 and 66 for maps.

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

The ice movements of the Barents Sea are to a large extent influenced by winds and sea currents. In the period from February to April strong south-westerly winds drive the ice in a north-eastern direction, and as a result the southern Barents Sea is usually ice-free in May–June. However, ice accumulates on the coast, in the straits linking the Barents and Kara Seas and in shoal waters. As late as in early July ice may be found both north and south of Kolguev Island. It has usually disappeared by mid-July, but may remain in the Gulf of Pechora until August, sometimes affecting the southern straits. Thus, while east of Novaya Zemlya Russia enjoys substantial support for its Arctic legal regime, in the Barents Sea it does not as long as a definite western boundary of either the Russian Arctic regime or the Russian exclusive economic zone is lacking. Additionally issues may arise concerning whether degrees of being ice-covered in the Barents Sea are sufficient to be included under Article 234. Practice plays an important role here, and chances are it may be included. This may be especially so if the Russian requirements are carried out within the temporal confines of ice conditions and severe weather and within the International Maritime Organisation's (IMO)'s "Guidelines" noted by Director A. Gorshkovsky. It would be absurd to require a change of ice-strengthened vessels for the Barents Sea, especially in ice-covered waters, due to theoretical considerations of degree of ice-coverage. It is doubtful this will take place, especially given the economic considerations present for Russia and Western States governing oil and LNG transport.

Fee practice. Related to ARCOP and this initial phase of harmonisation under GATS/E.U. requirements for treatment-no-less favourable and equal competition, there may be a problem



Delimitation Issues in the Barents Sea – Svalbard Zone
Figure 2

concerning 'fees for services rendered'. As set forth in Article 8.4. of the 1990 Rules, there may be questionable compliance with the requirement of non discrimination. This requires vessels navigating the NSR to pay for services rendered by the Marine Operation Headquarters (MOH) and the Northern Sea Route Administration (NSRA) in accordance with the adopted rates. In application it seems improbable that the current Russian fee rate, of $3.33 per ton to $73.02 per ton depending upon cargo, is required of the Russian vessels.[6] Thus, the fees, if justified under Article 234, must apply to all vessels, and the probable Russian practice on this point is contrary. There may exist other special Russian domestic requirements as well.

Another law of the sea issue relates to the special environmental measures taken by Norway in the Barents Sea. The Norwegian government announced April 2003 that it was engaged in a process to obtain sections of the Barents Sea designated a PSSA,[7] though controversy within the government reportedly exists.[8] This was in response to the increased oil and gas traffic following developments in Northwest Russia; fisheries and the environment are important interests in the Barents Sea and along the Northern Norwegian coast.[9] Norway apparently worked actively against the establishment of a PSSA after five E.U. States applied for this status following the *Prestige* catastrophe. In Norway those against the establishment of PSSA's, including the Norwegian Association of Shipowners, argue that a wave of applications can be expected if there are designated too many of these specially protected areas. In addition it is feared that opponents to marine oil exploration and production activities may manipulate this concept to introduce even more restrictions, even though there exists no

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[6] This is substantiated by T. Ramsland, 'Interview', 20 May 1996. N. Matyushenko, Director of the International Co-operation Department, Russian Ministry of Transport, Arctic Operation Platform (ARCOP), European Commission, Workshops Helsinki 25-27 March 2003, 'Speech – Role of the Marine Transportation of Energy Resources for the Export from the Russian Arctic' notes the current freight costs. Escorting tank ships is $15.02 per ton. Differentiation of flag vessels was not mentioned. See also B. Frantzen and A. Bambulyak, 'Oljetransport fra den russiske delen av Barentsregionen' (Oil transport from the Russian Barents Sea), Barentssekretariatet – Svanhovdmiljøsenter, (1 juli 2003), http://www.barsek.no; and 'Conference - International Energy Policy, the Arctic and the Law of the Sea', St. Petersburg, 23-26 June 2004, http://www.oceanlaw.ru. It is expected within several years that 15% to 20% of U.S. oil import will go through Murmansk.

[7] 'Regeringen arbeider for å få etablert deler av Barnentshavet som spesielt miljøfølsomt område (PSSA for skipsfart', (in Norwegian), ('The government is working to establish sections of the Barents Sea as particularly sensitive sea areas for shipping,' Norwegian translation by author), Norwegian Ministry of the Environment, Press Release, 25 April 2003 See http://www.odin.dep.no/md/norsk/tema/svalbard/arkiv/022051-070087/index-dok000-b-n-a.html .

[8] See G. Grytås, 'Norge stoppet tankfri sone,' (Norway stopped a tanker free zone), 'Ingen PSSA-binding for oilje og gass,' (No PSSA limitation for oil and gass) '–Maks. 40 mil ut,' (Maximum 40 miles out). *Fiskeribladet*, 25 November 3003, s. 9 from which the following is taken. CHECK

[9] For the bilateral and multilateral fisheries regimes of which Norway is a member see, http://odin.dep.no/fid/norsk/internasjonalt/ Catch information can be obtained from the International Council for the Exploration of the Sea, (ICES), Co-operative Research Report (yearly), Palægade 2-4, DK-1261 Copenhagen K, Denmark.

basis for such under the 2001 Guidelines.[10] These developments are viewed as negative for Norway, both a shipping and an oil nation, when other alternatives, particularly sea lanes, are available. Sea lanes are recommended by the Norwegian Ship Owners Association to lie about 100 to 200 nautical miles (nm.) out, which would give Norwegian authorities time to act to prevent grounding on the coast in the case of accidents. Nevertheless, the opponents of PSSA's admit Norway will probably obtain a reasonably outlined PSSA designated by the IMO for areas of the Barents Sea.[11]

The sea lanes recommended by the Norwegian Shipping Owners Association likely raises questions under GATS related to competition under the principles of national treatment and market access, should Russian ice-strengthened vessels be used exclusively. The economics of such vessels being required to navigate far to sea in the north on the way to Europe in the south may be questioned and these issues will need clarifying as well when the final decisions are taken. This author has not seen discussion of the issues this placement raises related to discrimination under GATS as well as law of the sea surrounding the economics of Russian oil and gas transport being required to navigate far to sea in the north on the way to Europe in the south. Newer studies indicate on the other hand that projected PSSA's may be designated closer to shore.

At the same time an official from the legal office of the Russian Foreign Ministry noted that Russia is not opposed generally to SPMA's including PSSA's as long as they are specifically defined and reasonably sized geographically and include corresponding specific 'appropriate associated measures' which are to be established.[12] Therefore the two 'avant la lettre'[13] established in the Okhotsk Sea established some 40 years ago are not viewed as contradictory since they are specifically defined with correspondingly specific 'appropriate associated measures'.

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[10] In November 2001 the International Maritime Organisation (IMO) adopted revised "Guidelines for Identification and Designation of Particularly Sensitive Sea Areas" (PSSA's), (2001 Guidelines) IMO Assembly Resolution A.927 (22)). This was likely as a response to a number of devastating oil tanker accidents, involving the Patmos in 1985, the Haven in 1991, the Evoikos in 1997, the Erika in 1999, and the Prestige in 2002, where it appeared that existing legal regimes, including the International Convention on the Prevention of Pollution from Vessels, 2 November 1973, (MARPOL 73/78), United Nations Treaty Series, Vol. 1340, (1983), p. 61; as amended by the Protocol, 1 June 1978, New Directions Vol. IV, (1975) p. 345 and Vol. X, (1980), (MARPOL 73/78) p. 32, were functioning less than optionally. See M. Mason, 'Civil liability for oil pollution damage: examining the evolving scope for environmental compensation in the international regime, Marine Policy, Vol. 27, (2003). There was as well n increased number of marine nuclear cargo transports, over which coastal States felt they had little control. R. Nadelson, 'After MOSC: The Contemporary Shipment of Radioactive Substances in the Law of the Sea, The International Journal of Marine and Coastal Law, Vol. 15, No. 2, (2000), 237-44.

[11] 'Interview with W. Østreng,' Research Director, Norwegian Academy of Sciences, Member of Governmental Commission on the Northern Areas, 20 October, 2003 indicates that coastal areas are already mapped in anticipation of an evaluation.

[12] P. Dzyubenko, Deputy Director, Law Department, Russian Ministry of Foreign Affairs, 'Interview', 24 June 2004.

[13] G. Peet, 'Particularly Sensitive Sea Areas, 472-3.

Delimitation of the continental shelf between Norway and Russia in the Barents Sea is viewed as very important, and the Russian Foreign Ministry reportedly views good prospects for settlement of a boundary. Good co-operation with Norwegian oil companies is therefore anticipated.[14] Russia is likewise very satisfied with the workings of the Joint Fisheries Commission administered by Norway and Russia. This point was apparently offered in support of good co-operation already established with Norway with respect to managing the Barents Sea, which implies a perception of expected good administration of any SPMA's established by Norway. The only requirement demanded is that the areas be specifically defined, reasonably sized and the 'appropriate associated measures' enumerated. At the same time the view from the Russian Ministry of Natural Resources may carry weight in the matter.[15]

Russia is against a PSSA which was designated for the Baltic 'in principle' with 'appropriate associated measures' to be determined two years afterwards for nearly the entire Baltic with the exception of Russian territorial waters.[16] The Foreign Ministry feels that navigation may be restricted without an opportunity being provided for Russia to have a say in the outcome. Freedom of navigation within the exclusive economic zone is viewed as unalienable. The balances achieved in the LOSC are seen as an interdependent package solution. Russia accepted the concept of the exclusive economic zone, but freedom of navigation within this zone is seen as freedom of the high seas. Russia is against attempts by coastal States to protect the ocean environment through more rigid measures, including notification and certification, such as appears to be the general trend in Europe. In spite of various disasters including the *Prestige*, freedom of navigation is viewed supreme. An example occurs with the case of international straits, wherein coastal State measures are forwarded under the safety of navigation flag, yet the result is that transit passage is encroached. Coastal State initiatives go outside the framework and character of the LOSC. SPMA's are distrusted by Russia if established regionally or domestically, since they introduce confusion into law of the sea. All SPMA's must be approved through the IMO which is the authorised international organ. Russia wants to have a say in the designation of SPMA's, but this does not appear in various agreements (probably referring to the numerous areas within the Baltic). PSSA's are seen as unique areas with specific conditions. Russia supported Australia's Great Barrier Reef, and designation of the Galapagos Islands and the Canary Islands. Wide ocean areas including the Baltic claimed by the E.U. are viewed by

[14] P. Dzyubenko, 'Speech – Russian Marine Policy and Energy Resources', International Energy Policy, the Arctic and the Law of the Sea, St. Petersburg, 24 June 2004 (Arctic Conference). No new data on oil findings have entered into the negotiations.

[15] A. Kalinin, Professor, Russian Academy of Humanitarian Science, 'Interview', 24 June 2004, (concurrent with P. Dzyubenko, 'Interview', 24 June 2004), implied that Ministry of Natural Resources may have as much to say in the matter as the Ministry of Foreign Affairs.

[16] P. Dzyubenko, 'Speech – Russian Marine Policy and Energy Resources', Arctic Conference, St. Petersburg, 24 June 2004, from which the following is taken.

Russia to be extreme where the legal consequences are not clear and unpredictable with respect to traditional navigational rights. Some State plans are taking place governing the Black Sea, the Mediterranean Sea and the Northwest Atlantic, including the Baltic and Black Sea Straits where Russia is against the developments. In conclusion if SPMA's are to be established by coastal States, the measures established are required to be international and not regional such as carried out by the E.U. in the Baltic Sea. The Russian view is that the LOSC has to be followed, including the case of international straits, where valid norms are respected.

J. Moore agreed very strongly with the standpoint of the Russian Foreign Ministry and reiterated as moderator for several minutes the importance of respecting traditional navigational rights.[17] Navigational rights were in the LOSC negotiated as a balance in trade for the resources governed by coastal States in the exclusive economic zone. Small erosions of navigational rights appear to be taken by coastal States one at a time including adverse requirements for notification and standards for ship construction in the exclusive economic zone or the territorial sea. Special needs of coastal States including environmental must be processed through the IMO, and not otherwise. This might give a partial indication of the direction of the draft guidelines the U.S. is to present to the IMO Autumn 2004, since J. Moore is one of the central U.S. law of the sea authorities.

3. WTO/GATS

General[18]

Practice is an important variable related to the GATS/E.U. requirements, treatment-no-less favourable and equal competition, as well, and within the limits noted could modify differences between the NSR regime and the Barents Sea regime as related to GATS/E.U. The GATS/E.U. issues in relation to the Russian regime will be developed .

Competition policy represents the re-regulatory initiative most likely to be brought within the interface of the WTO, and is the approach which a neo-liberal regulatory reform agenda is most likely to offer a safeguard against abuses of market power. However the content of the competition policy which the WTO will support is very much unresolved. When governed by the norm, a country remains free to strike its regulatory standards at any level it sees fit, as long as it does the same in effect for foreigners as it does for locals. From this for example a country can choose not to privatise a public service, however, if it does, it

[17] J. Moore, Moderator, Director Center for Ocean Law and Policy, University of Virginia, 'Response to P. Dzyubenko, 'Speech – Russian Marine Policy and Energy Resources' Arctic Conference, 24 June 2004. J. Moore served as a U.S. Ambassador to UNCLOS III and Chairman of the National Security Council Interagency Task Force on the Law of the Sea. In that capacity he headed the U.S. delegation in development of the navigational and security aspects of the Informal Single Negotiating Text (ISNT) and Informal Composite Negotiating Text (ICNT) (28 April 1979) and negotiated the straits Section.

[18] The following is obtained form C. Arup, The New World Trade Organization Agreements – Globalizing Law Through Services and Intellectual Property, Cambridge, Cambridge University Press, 2000), pp. 12-3, 57-9, 61-3, 69, 74, 76-9, 83-92, 102-5, 108-17 unless otherwise noted.

must allow foreign private operators competitive opportunities equivalent to those allowed to locals.

The norm can have profound implications for the content of local regulatory legalities, and the scope is not restricted to solely the economic. Providing a space for locals may be designed to safeguard political independence or cultural identity.

GATS employs the principle of *national treatment* and is one of the main thrusts of GATS. An argument has been that the regulation of supply of services is trade related. It encompassed all possible modes of service supply, not just the cross-border mode of supply, but which foreigners can expect to compete with locals. Its implications are expected to be far reaching. GATS took an expansive view of the range of service sectors that could be exposed to the norms. Supply of a service is defined to include the production, distribution, marketing, sale and delivery of a service. It encompassed all possible modes of service supply, not just the cross-border mode of supply, which is most clearly trade related, but also supply through the presence of national persons and through a commercial presence in the territory of another member country.[19] Only the scope of supply through a national presence was limited categorically, being declared only to apply to measures affecting access to employment markets or regarding citizenship or residence. The wide scope of commercial presence was particularly portentous. In extending to the acquisition or maintenance of juridical person, it introduced the issue of foreign direct investment into a multilateral framework.

The impact also depends upon the scope applied to the principle itself. GATS gives broad scope to the principle by adopting a realist test of discrimination. However, the agreements' decentralised, discretionary approach to the making of commitments provides a means to manage its impact. National treatment as market access addressed below is referable to a broad swathe of national measures, but it ultimately only applies in those service sectors which members actually list or 'inscribe' in their individual schedules of commitments. This is unlike NAFTA or the European Treaty. Legally, it is within the individual member's discretion to decide in the negotiating process the extent of its commitments, and the less prescriptive concept of 'norm' may best capture this approach. In these listed sectors, the members have a further option to limit their commitments by listing or 'entering' non-conforming measure. All members chose not to inscribe certain sectors at all. While the commitments can be described as essentially voluntary or discretionary, GATS still has a thrust to it. Where a member decides to submit a services sector, its range of non-conforming measures must be listed as required. In the sectors members did inscribe, they entered both

[19] GATS Article I:2 defines services as the supply of a service by one or other of four modes of service supply. These are, (a) supply from the territory of one member into the territory of another member; (b) supply in the territory of one member to the service consumer of any other member; (c) supply by a service supplier of one member, through commercial presence in the territory of any other member; and (d) supply by a service supplier of one member, through the presence of natural persons of a member in the territory of any other member.

across the board, horizontal, limitations on certain modes of supply and sector-specific limitations. Economic protection might often have been a reason for these reservations, but the limitations also represented a view that certain types of services were not to be treated simply as economic transactions.[20]

Thus, perhaps, national treatment may be more accurately described as a goal of the agreement rather than an obligation. One can however anticipate situations in which measures will be subjected to the scrutiny of the principle, perhaps through the dispute settlement process. A member might have failed to enter a measure as a limitation on national treatment in a sector it has nonetheless inscribed.

This norm requires that foreign services and service suppliers be accorded no less favourable treatment than is accorded to local counterparts. Formally identical or formally different treatment is considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the member compared to like services or service suppliers of any other member. The jurisprudence of the U.S. and of GATT ahs been taken into account. This means in practice not formal equality but 'facially non-discriminatory treatment, what the treatment means effectively for the competitive relationship between them. The foreigner should enjoy equivalent opportunities to compete. Success is not guaranteed.

From this identical treatment not 'facially' discriminatory, may constitute less favourable treatment. Foreigners may be put at a competitive disadvantage because a more onerous burden is created for them. This relates to in practice that local requirements con on top of requirements met at home. At the same time the host country may have good, non-trade related reasons for imposing requirements on foreigners and locals alike. Extra measures may be need to assert regulatory competence of the foreigner. Differential treatment is not necessarily less favourable treatment. The comparison required is to be made with the treatment accorded 'like' local services or service suppliers.

This approach is under pressure and suggestions made within the WTO that a different approach be taken.[21] This includes that regardless of whether the national measure does not class the services as like, the onus should remain with the member country to justify its unfavourable treatment. This could be done by demonstrating that the measure was intended to further one of the regulatory objectives for which the agreement allows an exception. The WTO could then query the motive behind the distinction. The member would be required to

[20] Professional services and communications services were among these.

[21] A. Mattoo, 'National Treatment in the GATS – Corner Stone or Pandora's Box, *Journal of World Trade*, Vol. 31(19 (1997), 107.

demonstrate the necessity of the treatment and choose the least trade restrictive way to achieve its regulatory objective. This would further narrow the members' regulatory options. AT the same time the GATS listings approach ultimately affords the member discretion. It may retain those measures it thinks are essential to its regulatory objectives.

GATS also under Article XIII declares that its MFN, national treatment and market access articles are not to apply to laws, regulations or requirements governing the procurement by government agencies of services purchased solely for government purposes. Many countries guard these powers extensively. At the same time GATS promises multilateral negotiations on government procurement in services within two years of the date of entry into force of the WTO agreement.

Market access is also a central principle to GATS, perhaps the most important, but its full implications remain to be seen. Within the GATT practice, it is concerned narrowly with restrictions that are placed at the border on the passage of foreign services into domestic markets. Such almost always single out foreigners for discriminatory treatment. Market access thus has much in common with national treatment. But the concept of market access can also be interpreted in a broader sense. If foreigners are to enjoy effective access to domestic markets, non-discriminatory restrictions will have to be lifted. The question can be asked whether market access is confined just to measures preventing entry into national markets from abroad – measures which clearly discriminate against foreigners.

Indications point towards that the GATS norm proposes reductions in this type of regulation. Some regulation restricts the opportunities for both foreigners and locals to enter markets and engage in market activities. The language of GATS is not conclusive. Related to the negotiation of specific commitments, it speaks of 'effective market access', but also of submitting restrictions on 'trade' to the scrutiny of this norm. Intent may be examined by the article enumerating measures that cannot be maintained, once a sector is inscribed and exposed to the disciplines of the agreement. The list includes measures that discriminate against foreigners, placing limits on levels of foreign investment. It extends to measures that may or may not discriminate, restricting the type of entity which may be used to supply the service. It adds measures that clearly affect both local and foreign suppliers, that limit the number, of suppliers permitted to operate in a services market.

If the wider scope is the objective of the agreement, then market access has potential to further the neo-liberal program of privatisation and competition. It requires existing markets to be liberalised where regulatory schemas have restricted participation, such as by licensing a fixed number of entrants or by drawing lines around the participants' spheres of activity. If it applies to non-discriminatory quality limitations, then it requires markets to be created where they have not been permitted, such as because a country places a ban on the sale of certain services or it chooses to provide them by way of a public monopoly supplier. It

is concerned with the scope of market activities as well as the conditions of entry into existing markets.

In rolling back these types of controls, GATS appears to clear the way for private regulation to operate more freely. However, the norm of market access may not remain compatible with the kinds of regulatory relationships constructed by the private sector. it begins to challenge the way governments employ various kinds of regulatory schemes, including competition law, to foster and guide internal domestic arrangements such as export cartels, producer-distributor alliances, merger rationalisations, and research and development consortia. It begins to insist on non-discriminatory enforcement of the law, and should then begin to open up the field to the possibility that the restrictive business practices of the powerful transnational suppliers can be regarded as restrictions on market access.

The way the core norms are expressed will determine whether non-discrimination, market access are compatible with a variety of national legal institutions and practices. *Transparency and form* are the key words, however, the standards are for the benefit of foreign nationals, but are not written as individual personal rights or freedoms. The way they are expressed leaves room for ambiguity, and unless member States have translated them into domestic law, it is difficult for individuals to invoke them directly. Thus the object of GATS is to establish public law or government-to-government obligations. Compliance is achieved by the member States through the WTO's own dispute settlement process. GATS does require members to provide transparency by documenting, translating and publishing the measures they are either required or permitted to maintain. At the same time under GATS member are not required to institute procedures inconsistent with their constitutional structures or the nature of their legal systems.

The flexible degree the agreement allow members room to move, that much of the real substance is constructed sector by sector, in a fluid and ongoing process. Potential for further juridification may take place in several areas. These include the tentative attempts at elaboration of norms within the GATS itself, the availability of prototypes form the experience with other agreements such as the European Treaty, the institution at the WTO of more emphatic disputes settlement procedure, and ultimately the successive rounds of GATS negotiations which have been foreshadowed.

Complaints are allowed under GATS in relation to the general obligations and the specific commitments national treatment and market access. One of the several disputes relating to GATS notified to the WTO involves a non-violation complain.

The biggest concession GATS makes is in its listing approach. Members perhaps to further particular regulatory purposes or to preserve a general regulatory competence have listed non-conforming measures or decided to withhold sectors from the disciplines of the

agreement. Sectors are not include by default, by failing to make an express exclusion. Specific commitments have an effect similar to a tariff binding, they are a guarantee to economic operators in other countries that the conditions of entry and operation in the market will not be changed to their disadvantage. Exceptions which remain legitimate include public order, orderly movement of persons over borders, prevention of deceptive or fraudulent practices, quality of professional services, prudential supervision of financial institutions and the collection of services taxes.

Once a sector is inscribed the listing moves towards becoming a formal obligation. GATS Article XX sets forth that each member set out in a schedule specific commitments it undertakes to market access and national treatment. Where such commitments are undertaken, each schedule must specify, (a) terms, limitations, and conditions on market access, (b) conditions and qualifications on national treatment, (c) undertakings relating to additional commitments, (d) where appropriate, the time frame for implementation of such commitments, and (e) the date of entry into force of such commitments.

At the same time regulation is exposed under GATS to scrutiny to determine whether it is a bona fide exercise of the exception and whether it involves the least interference with trade. The measures may not be a disguised barrier to trade or act as arbitrary or discriminatory can be objectively and technically justified for the purpose, adopt the least trade disruptive solution, and be in proportion to the purpose. There must be balance between free trade and national regulation.

The GATS favours free trade over what may be seen as equally valid international concerns. Spillover effects may be caused such as despoliation of a common social or natural environment. This was the issue in the GATT case U.S. restrictions on imports of tuna,[22] as well as a WTO case examining a UI.-S. measure against imports of shrimp products where these have been harvested in a manner harmful to sea turtles.[23] In both the panels found against the measure, seeing them as threats to the multilateral trading system.

The content and strategy of a country's regulatory policy are called into question only if they involve measures that cut across trade norms. At the same time trade agreements may have an indirect effect in they smooth the way for those forces which can undermine the competence of national regulation and they set countries on a course of regulatory competition. Governments then have to rely on global markets for regulation to produce the necessary demands for high standards. Mutual recognition as a formalised government to

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[22] See GATT Panel report, United States – Restrictions on Imports of Tuna DS 29, reproduced in *International Legal Materials* Vol. 33, (1994), p. 839. See also *International Legal Materials* Vol. 30 (1991), p. 1594.

[23] See United States – Import Prohibition of Certain Shrimp and Shrimp Products – complaint by India, Malaysia, Pakistan and Thailand, WT/DS58, adopted 13 February, 1998, reproduced in *International Legal Materials* Vol. 37, (1998), p. 834.

government choice of law principle mediates differences between national legalities. This has some support under GATS which allow foreigners access to host markets on the strength of their compliance with home country requirements. GATS allows for recognition of standards to be achieved through harmonisation between countries to be based on multilaterally agreed criteria. GATT would be prepared to allow the observance of accepted international standards to act as an exception to its norms. However some experts fear the same approach will produce a pressure to reduce standards to the lowest common denominator, something which was taken up under the WTO Appellate Body.[24]

If progress is to be made on social standards, reform of the constitution of the WTO may be needed. The GATS contains no provisions for a 'cultural exception' such as NAFTRA and the OECD Codes which have provided explicitly for such reservations. Suggestions for this were forwarded by such diverse countries as Canada, Egypt, the European union and India. Sensitivities are perhaps most readily observed by the concerns expressed within various Middle-Eastern and Asian countries. 2whhich sees liberalisation as a new cultural form of imperialism or as neo-colonialism. At the same time France, Canada and Australia have expressed concern about the potential for the U.S. states (media) to dominate their local markets. Reform of dispute settlement process may move into making the WTO more democratic, consistent with an optimistic reading of globalisation. Democratisation seems essential if trade values are to be reconciled with non trade values. New processes may need to be devised to ensure that the most powerful members cannon simply force deals on the rest of the membership. Increased opening may need be made for organisations which cut across perspectives of States, such as indigenous peoples and environmental movements. As it is now, the NGO's do not sit at WTO General Council and Committees unless they are incorporated within national delegations. Some feel that if the WTO were opened to the non-governmental organisations (NGO's) there would be a risk that they were being co-opted, giving credence to the decisions of a body that remained basically inimical to their world views. Because of the uncertain situation, the greatest potential may lie in an open interface with other international institutions, such as the United Nations (U.N.), International Labour Organisation. The WTO Agreements directs the General Council to make appropriate arrangements for effective co-operation with other intergovernmental organisations that have responsibilities related to those of the WTO.

At the same time the WTO assumption of the new trade issues carries the potential for it to act as a rival to these organisations. However GATS could be said to take a different set on issues which have preoccupied such as United Nations conference on Trade and Development). But the relationships may not be only rivalous. The learning and legitimacy of

[24] See Appellate Body Report, European Communities – Measure Affecting Meat and Meat Products (Hormones) – complaint by the Untied states, WT/DS26, adopted 13 February 1998.

these conventions may be utilised, while in return providing new sanctions for their non-observance.

However, co-operation has a long way to go. GATS has little to say about linkages, though it does point members in the direction of multilateral standard setting organisations such as the International Standards Organisation (ISO). Though clearly of relevance GATS gives no support to the codes of conduct on technology transfer and restrictive business practices developed in the United Nations, which WTO may have acquired a responsibility to give material support to these kinds of codes.

International social regulation is becoming more critical and urgent, and competition regulation may be the next item on the neo-liberal regulatory reform agenda. Trade policy experts some of whom are officials to international organisations including the Organisation for Economic Co-operation and Development (OECE) and the WTO itself, as well as academics have given intellectual support. How does competition policy sit with the more established norms of international trade law? Advocates of free trade often say it leads to greater competition. It exposes domestic producers, suppliers, investors and workers to competition from their foreign counterparts. The norm of national treatment translates into a requirement that national legalities maintain equivalence in the opportunities to compete. On this basis a national competition should not be case in such a way that it accords less favourable treatment to foreigners.

Motives behind competition regulation can be difficult to discern. Even-handed application of competition criteria may lead to a similar conclusion as a protectionist policy. The national systems may in their characterisations of competition behaviour. Arguable interpretations make the task difficult for any trade agreement that seeks to discern the motive behind national regulation. In application of competition law the favouritism show to local firms may not be reflected so much in the explicit criteria of the system, as instead buried in the administrative practices of the responsible authorit8es. Not only may legislative criteria be open to varying interpretations, but authorities develop working policies for prioritising offences, granting clearances and accepting undertakings. Trade agreements are extending their scrutiny to these kinds of regulatory legalities by broadening their definitions of the government measures subject to their norms. Even if the rationale of this informal regulatory legality is not to disguise favouritism, transparency, militates against the maintenance of administrative flexibility. It first demands that the authorities publish their policies. If it goes further and requires them to embody their policies in legal rules, it then constrains dramatically the ways in which competition policy is pursued. Competition policy may call for situation specific judgements about the merits of the conduct in order to fit them into the characteristics of the firms being regulated. Transparency may insist that an administrative scheme allow foreigners access to a review of its decisions. If national competition law transgresses the norms of the trade agreement in any of these ways, then it must be brought

within one of the explicit exceptions which the agreement allows. Even then it must meet the disciplines which are applied to the measures which take these exceptions. GATS make some allowance for government measures aimed to deal with practices that restrain competition and hence restrict trade.

Competition law will be assigned a role in expanding *market access*. Equal treatment for foreign sourced products, investments and services is not enough. the norm of market access places pressures on members to make commitments to roll back their non-discriminatory regulation of markets. It applies to regulation that specifically limits foreign participation within sensitive sectors. But it goes further by targeting regulation that, for foreigners and locals alike, places restrictions on market entry and limits the form participation may take.

When industry-specific regulation is phased out, the disciplines of competition policy are applied to sectors that once enjoyed immunities. The pressure is kept on governments to roll back their own measures which provide a protective space for local producers. The trade agreement's concern with market access generates a demand that governments act to open out the private relationships which domestic producers, financiers, distributors and users have struck. At the same time the depth of complain is further evidence of how trade norms are challenging the political, social and cultural foundations of the regulatory controls placed on certain types of market activities. This may reflect powerful national cultural and environmental attitudes. On the whole competition law is more difficult for the injured party to invoke.

With regards to competition policy and transitional business practices, simply rolling back national government impediments to market access does not ensure that real competition will occur. A laisseze-faire approach to liberalisation and privatisation may result in further concentrations of market power. Liberalisation may encourage and spread cartelisation. Competition policy may complement liberalisation where the market has an oligopolistic or monopolistic structure. IN response some experts have called for more balance and a comprehensive approach to multilateral disciplines, which resemble the concerns expressed by third world critics of freer trade and which led to moves within the U.N. for codes of conduct that would apply to the restrictive business practices of transitional corporations. Some advise that equal attention must be paid to transitional corporation's restrictive trade practices, restrictions on the free flow of technology, market-sharing agreements, e5tc. Any equitable multilateral arrangements must then also include acceptance by these transnational corporations and the governments of the developed countries of their own responsibilities.

The earlier codes of conduct were initiated due to many smaller countries lacked legal jurisdiction and political power to apply controls to the transnationals on their own territory. Even if trade agreements left them space for industry specific regulation and foreign

investment regulation, they were not in a position to effect performance requirements. They would require co-operation and reinforcement of larger countries where the corporations made their home bases or enjoyed their biggest markets. Globalisation has increased the competition between countries however to offer inducements that attract and retain the transnationals. Global mobility and reflexivity allow the corporations greater opportunities to circumvent the bilateral agreements made with countries that do wish to co-operate.

Some countries have correspondingly adopted criteria by which they attach the jurisdictions to these restrictive practises, such as multiple aspects of the conduct in question or the persons involved as a way to establish a nexus with their territory. They do not accept the separate entity conceptualisation of the corporation. However, the idea that the effects or impacts of corporate activity are sufficient to attract jurisdiction, accepted in the U.S., continues to meet resistance. Where more powerful countries did attempt to give 'extra-territorial' reach to their own unilateral polices, they encountered, resentment among the private firs asked to carry the responsibility abroad. Extra –territoriality also provoked clashes with other governments which were concerned to guard their own sovereignty over competition policy. This produced blocking statues. This kind of regulation often needs practical support from other jurisdictions if it is actually to enforce the judgements it things are appropriate to make. However, it will not attract support unless its regulatory standards are respected by these other countries.

A different argument for an international code is the need to override these constraints on the efficacy of national regulation. It may be asked where GATS give support to this internationalisation and whether the WTO is prepared to take on a new responsibility for co-ordination. The WTO Director-General has noted,

> 'If the international community seeks to negotiate agreements that require countries to give rights to foreign companies, it is almost inevitable that the issue of international co-operation to deal with possible abuses of these rights will also arise.'[25]

Yet at the same time many member States and NGO's remain sceptical about WTO's preparedness to tackle problems associated with the restrictive business practices of transnational corporations. The issues may go wider than concerns of competition regulation and technology transfer from the North to the South. They also necessarily are composed of inter-cultural dialogue and respect, and new appropriate codes of conduct may be needed supported by the WTO. The new rights of global traders may need matched with the obligations of their global citizenship.

[25] Ruggiero, The Fourteenth Paul-Heni Spaak Lecture, Harvard University; WTO Press Release PRESS/25, 16 October 1995.

GATS also utilises the principle of most favoured nation (MFN) which will be addressed briefly. It is for the benefit of the services and service suppliers of member counties. It differs from national service and market access in that members must multilateralise all measures affecting trade in services, i.e. measures affecting the supply of service. At the same time in actual negotiations over national treatment and market access countries displayed reluctance to make offers without knowing the value of concessions forthcoming from other countries. Provision has been made for member countries to take exemptions from the MFN obligation, simply by listing them. This approach to exemptions allows a member by choosing to make no commitments, to continue to operate exclusively on a bilateral or regional basis. In supporting its norm of MFN, the condition of GATS is that all regional agreement does not raise the overall level of barriers to trade in services for members of the WTO who are outside such an agreement, when it is compared to the level applicable prior to such an agreement. This suggests that greater access can be given to parties to the agreement in the sense of preferential rather than non-discriminatory treatment, but only so long as it is not at the expense of the access which members outside already enjoy. This had in mind such agreements as the European Union and NAFTA.

In sum it appears as if the WTO is advancing a neo-liberal regulatory reform agenda that has already gained considerable momentum around the world., but it is doing so within a particular institutional and normative framework. The apparently innocuous principles of MFN and national treatment are given fresh meaning when related to the supply of services. GATS extend their prescriptions further into the substance of local regulatory measures. The norm of market access places the onus on quantitative limitations which do no discriminate against foreign suppliers. This re-regulatory trend would be afforded a more general momentum if the traditional GATT concepts of ‘measures affecting trade’ and ‘nullification or impairment’ were expanded again. However the WTO’s Appellate Body pulled back from giving the concept of ‘nullification or impairment’ a volatile potential. It remains to be seen how accommodating the re-regulatory approach might be to different perspectives. For those concerned about risks associated with open trade and free markets, it raises the issue whether the WTO should be pressed into becoming more politically accountable and take positive responsibility for ‘social regulation.’ GATS may make allowance for certain national regulatory objectives, but their disciplines restrict members’ choice of regulatory strategy. Their attitude to regulation that expresses international concerns such as about the environment. The WTO suggest such regulation has to be supported by multilateral agreements if it is to gain exemption from its trade norms, but presently the WTO does not feel itself competent to promote such agreements. Depending on how it is conceived competition law is the kind of regulation which can cut across the norms, which may be seen to further the norms, or which might effectively express some of the international concerns abroad about abuses of power in a globalised economic sphere. While the first is now commonplace, the second is being discussed, it appears the WTO is yet to show the resolve to make the third potential real.

Specific Considerations[26]

Since Russia will become a World Trade Organisation (WTO) Member in the near future, NSR transportation will hence fall under WTO jurisdiction.[27] If States interested in the NSR take part in the shipping annex to General Agreement on Trade in Services (GATS), then all national legislation on participation that relates to ships transporting along the NSR are restricted by WTO provisions.[28] Most NSR shipments between Europe and all points east in Russia will then be included. The presupposition is that Russia, E.U., Norway and other shipping nationals become members of GATS and that Members do not disqualify National Treatment from their scheduled commitments.[29] Currently representatives from the U.S. E.U. Brazil, Kenya, Mexico and South Africa will meet in an attempt to put the negotiations of the WTO new international trade agreement back on track.[30]

Under GATS any shipowner from a GATS Member has a right to provide services to consumers in any of the territories of other Members when operating in any of the Members countries. This includes all manner of transportation from regular steamship liners to spot-market operated or chartered vessels. The NSR transportation provisions must be given close attention in view of the harsh weather conditions and ice-covered waters. One crucial task will be to prevent shipping companies from resorting to sub-standard ships in order to counterbalance any unequal participation rights along the NSR.

Maritime transport services are in principle covered by GATS, but will be fully incorporated as an Annex to the GATS when such is decided by Member States, according to a draft prepared by the Negotiation Group on Maritime Transport Services (NGMTS).[31] From 1st January 1995 and until such decision is made, commitments scheduled by participants on maritime transport services will enter into force on a most-favoured nation basis. The object of GATS is to limit "measures by Members affecting trade in services".[32] The focus is on trade in services, not the services as such, in other words, the execution of services. What is protected is the equal right to offer, ask for, negotiate and conclude service contracts. Private

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[26] The following is obtained from P. Ørebech, *The Participation Rights under the World Trade Organization General Agreement on Trade in Services (GATS): The Case of International Northern Sea Route Shipping Transportation Services*, (Oslo, INSROP Working Paper No. 67, 1996) particularly pp. i-vi, unless noted otherwise.

[27] The Russian accession is now in its final stage, http://www.wto.org/english/news_e/spmm_e/spmm56_e.htm

[28] The exact status and substance of this Annex needs ascertained, since P. Ørebech addressed these issues approximately 6 years ago.

[29] GATS Article XVII:1.

[30] See 'WTO-fremstøt uten Norge', *Aftenposten* 18 april, 2004.

[31] P. Ørebech, 'E-mail with author' 17 March 2003 notes GATS and shipping were recently drafted in the WTO and liberalisation is now initiated.

[32] GATS Article I:1.

international service contracts and public service procurement are included, and there is no limitation on private contracts.

The provision of shipping services is a mixture of several components. The transportation service is comprised of persons, including a broker, owner, charterer, operator, contracting parties, crew, and pilots; of technical equipment, including a ship, gear, and auxiliary components; and of external elements including navigation support from the shore, ports, and ports facilities. Shipping transportation sales is comprised of an offer of a "total package" that includes all service components. Consequently, the service of another Member is defined by the vessels register of that other Member, which includes all vessels flying the flag of that Member or owned by a person residing in that other Member. The notion "other Member" refers to another Member than that establishing the measures affecting the trade. This other Member is the subject of the legal protection provided by the GATS provisions. The following implications are evident.

National arrangements that apply only to transiting ships as is the case with Russia, would no longer be valid. This would include special taxes and charges specified by GATS provisions on National Treatment.[33]

The right to conduct trade in services under GATS means to supply a service when situated in one Member State from the territory of that or of any other Member State into the territory of a third Member State or to supply a service in the territory of one Member State to the benefit of consumers in any other Member State. It is presumed that every ship registered under the laws of a GATS Member enjoys the right of equal "conditions of competition" in the territory of any other GATS Member.

GATS "Members" are States or International Organisations.[34] The Member entitled to protection under the GATS provisions depends upon which private legal subjects are offended. Are service suppliers and service consumers among the legal subjects that fall under the legal rights provided by GATS? Whether service-consuming Members are entitled to GATS protection is a question of the origin of the service at issue. In other words, which Member does the phrase "service…of any other Member" refer to?[35] The text focuses on the service as such, which indicates that a contract is involved. Since trade in services relates to contracts and since contracts represent an *inter partes* relationship, service providers and purchasers must be included. Thus, beneficiary Members are service-supplying or service-consuming Members, or both, depending on which Member is restricting the trade in shipping

[33] See Section 3 below.

[34] See WTO Agreement Article XI:1 concerning the status of the European Communities according to GATT 1947.

[35] GATS Articles II and XVII.

services. If the importing Member is the Member making restrictions, then the consumer does not enjoy any GATS legal protection.

In some cases, however, persons who are not parties to the service contract do enjoy GATS protection. For example, a shipowner having a third person operating the ship and therefore not being part of the charter-party affected, might invoke GATS protection if the reason for the Member's restrictions is related to the flag of the vessel and has nothing to do with the operator's status or nationality. Flying that particular flag represents a particular disadvantage, which invokes that Member's competence under GATS.

Flying the flag or having membership of a society qualifies the "another Member" status according to GATS legislation.[36] The service delivered by such a ship or such a person has the origin of that Member. A Member may deny the benefits of this Agreement in the case of maritime transport service if it establishes the service either is supplied by a vessel registered under the laws of a non-member or of a Member to which the denying Member does not apply the WTO Agreement, or by a person which operates and/or uses the vessel in whole or in part but which is of a non-member or of a Member to which the denying Member does not apply the WTO Agreement.[37] This reservation says a Member, even though the ship is flying the flag of another Member, can deny that Member the benefits under GATS if a ship of that Member is operated and/or used in whole or in part by a person who is a habitant of a non-member. The same applies if the ship is flying the flag of a non-member, even though the operator or user is the habitant of another Member.

What is the implication of enjoying legal protection under GATS? To answer this, the benefits which GATS Members acquire must be examined, with special regard to shipping service and treatment-no-less-favourable to the like service and service suppliers. The question is which kind of service is protected under Most-Favoured-Nation (MFN) Treatment and National Treatment?[38] The obligation is to accord treatment-no-less-favourable "to services and service suppliers." The intention of the GATS provisions is to make it possible for entities, companies, and other of a GATS Member to buy shipping services from a shipping firm of any Member. National legislation which provides special credit facilities to some categories of service suppliers for the purchase of domestic shipping service might be inconsistent with the obligations of that Member under these provisions.

The implementation of GATS means that a specific charter-party is accorded treatment-no-less-favourable. A Member cannot offset unfavourable treatment in one area by more favourable elements of treatment elsewhere. The provision must be oriented towards the

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[36] See the notion of "by a person of that other Member".

[37] GATS Article XXVII(b).

[38] Respectively GATS Articles II and XVII.

product, in other words, the trade in services, for instance a charter-party. All kinds of mandatory restrictions, regulations, taxes and public legislation are included, even such provisions which are not intended to discriminate against foreign services. Russian special taxes for ships transiting the NSR, which do not represent due payment for harbour services, are contrary to these provisions.

If a bilateral arrangement establishes domestic measures in favour of a special shipping service conducted by one of the bilateral contracting parties (party A) within the other's (party B) domestic market, it might be argued that such a commitment is an indication of an intent by party B to favour imports from party A. This is only the case if there is evidence of companies from other countries being prevented from establishing themselves in the market of party B on the same terms as party A.

Import fees must be proportional to the cost of services rendered. According to the drafting history and subsequent practise, the notion "service rendered" means consular fees, customs fees and statistical fees.[39] As consular fees are related to immigration or work permits, such consular service is not provided for trade in shipping services because crews are not considered as immigrants. If the transport service is passenger transportation, the cost of passenger customs processing must not be taken into account when evaluating the cost of shipping transportation as such. Neither is that Member entitled to include passenger customs costs when evaluating the cost of service rendered for handling goods through customs.

If the operation of shipping services is subject to internal national taxes, because of various kinds of services provided by port authorities, then such taxes may also be levied on foreign service suppliers if they use the same coastal auxiliary services, or at least if they are dependent upon the preparedness of coastal services (the *de minimis* costs).[40] The tax rate should be fixed in relation to the kind of services required and the length of time they are employed, and not in relation to the value of the service afforded.

Interesting topics are not only direct applied taxes but also pecuniary regulations with similar effects. Hereunder should also be studied whether domestic requirements that have pecuniary implications are included. Are compulsory alterations in traffic-schemes to classify as internal taxes? Should different sailing directions for various ships dependent upon nationality be classified as charges of taxation kind? What if a coastal state provides foreign ships with special equipment?

[39] GATS Article II:2(c) and Article VIII:1(a).

[40] The Member is competent to impose internal national taxes under GATS Article VI.

When do charges imposed on the internal handling of shipping transportation have to be subsumed as internal taxes? Such taxation measures must be justified.[41] The distinguishing factor is whether the charge imposed on such services is *collected internally*. Collection of charges at the border by customs authorities, port authorities or other might be justified under the National Treatment provision. If the charge affects the internal sale of the shipping , then the charge is to be subsumed under the National Treatment standard regardless of its point of collection.[42] Charges collected during transportation or when in harbour are internal and are consequently subject to justification under the National Treatment clause.

If the operation of shipping services is subject to internal national taxes because of standby facilities such as an ice-breaker escort, weather forecast or navigational aids from port authorities, then such taxes may also be levied on foreign service suppliers if they use the same coastal auxiliary services, or at least if they are dependent upon coastal services being on constant standby.

How should fees be calculated? The tax rate should be fixed in relation to the kind of services required and the length of time they are employed, and not in relation to the value of the service afforded. For instance, if in the case of pure transit operations, no port of call is part of the service offered according to the charter-party, then no handling by a Port Authority is required and consequently no Port Authority taxes should be imposed on the services in action. To obtain more accurate data here one needs to classify domestic taxes and charges by investigating purpose and functions with reference to GATS rules, and in cases were services are within the territorial appliance of EC treaty Article 49 (2), whether E.U. law is subscribed to.

If a tax is imposed on shipping services because of the risk of oil pollution, due to for example a substandard hull, then such a tax cannot be imposed on foreign transportation of merchandises other than oil, or if a cargo of oil is carried in a high standard ship with a double hull.

New national legislation establishing, for instance, a charge for the administrative handling of foreign shipping transportation through the coastal waters of a Member must be published promptly in accordance with GATS requirements on transparency.[43] Once informed, the other Members can respond quickly and challenge the new legislation before a WTO Panel.

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[41] GATS Article VII.

[42] GATS Article XVII.

[43] GATS Article III.

A quantitative restriction applied should, according to the MFN principle, not discriminate against shipping services proved by certain, and not other, Members. As regards the National Treatment principle, detailed rules apply.[44]

Special requirements including that foreign shipping services must follow other routes than domestic shipping and call at certain checkpoints, cannot apply, as these measures bring about a disadvantage to foreign shipping industries. The grounds for such unequal treatment are of no significance. It may be maintained, for example, an independent source of records was necessary because the authorities did not have access to the out-of-state producers' shipping records with which to verify information provided by in-State agents on the transportation at issue.

In general, any measure must be justified under the treatment-no-less favourable clause. A quantitative or other restriction applied should therefore not discriminate against shipping services provided by certain, and not other, Members.

The treatment-no-less-favourable obligation relates to those services suppliers and services known as "like services". In the case of shipping, only shipping services qualify as "like services". If everything applicable to "like products" is considered also applicable to "like service and service suppliers", with particular emphasis on shipping services, then the methods of transportation in question must be more or less the same kind of transport service. The merchandise being transported must also be of the same kind. For instance, a shipment of oil and transportation of cars are not "like services". Cargo shipping and bulk transportation of a chemical or liquid are by no means "like services". The problem, therefore, is whether the services qualify as "like" services without regard to the transportation method involved, for example general goods transportation or container transportation.

One important factor of interpretation could be Member practice. Panels have laid emphasis on products that are to be regarded as "like" among all Members. Member practice with respect to the classification of services, for instance in relation to fees, charges or taxes, may be an important variable. Another vital factor is the properties of the transportation, for example, freight transport by special refrigerator vessels and not by ordinary bulk-carriers or cargo ships. A third factor is interchangeability, the possibility of choosing alternative transportation. Since different kinds of transportation can be easily substituted, they ought all to be regarded as "like services".

On this point, justification may be difficult. By analogy to "like products" practices, even more methods of transportation might qualify as "like services"; tramp-ships and passenger ferries that are also transporting goods might be considered a "like service" as

[44] GATS Article XVI.

regards the goods transportation. Another possible variable is whether the ship is operating on the spot-market or fixed routes as a regular steamship liner. As long as the merchandise transported is the same kind of goods, slight differences in transportation method may be of minor significance with respect to "like services" classification.

On the other hand, an identical type of ship or technical shipping equipment is not sufficient reason to be classified a "like service" and thereby bring the principle of treatment-no-less-favourable into consideration. The "product" under consideration is the trade in shipping service, not the ship as such.

To see the more specific implications for NSR transportation, various illustrations of real situations would be appropriate. The transportation is presumed to come under GATS jurisdiction if transportation is made by a vessel flying the flag of any of the GATS Members, or by a person of any GATS Member which supplies the service through the operation of a vessel and/or its use in whole or in part. For example, if the shipowner is Norwegian and the ship is flying the Cypriot flag, chartered by a firm in New York, operated from Gdansk, and the provider is a chemical industry in Leyden and the receiver is a wholesaler in Archangel, then it may be asked which Member enjoys GATS protection? Is it the Member of the beneficiary, or the Member of the provider of a service? The limits and implications will be illustrated by using examples.

Since charges of any kind qualify as "measures" under the GATS, handling or processing fees for transportation services must be limited to an amount not exceeding the approximate cost of service rendered. According to the drafting history and subsequent practice, the notion "service rendered" means consular fees, customs fees and statistical fees. The notion is purely legal and has nothing to do with service in an economic sense. Domestic "service" imposed on imported merchandise or service has to be of at least one of the kinds of aforementioned fees.

Different kinds of charges could, by analogy to General Agreement on Tariffs and Trade (GATT),[45] not exceed the handling cost of the transportation in question, for example expenses for guiding ships through an ice-covered stretch of the NSR. If the foreign service suppler transports along a short stretch of the entire NSR, then the taxes imposed must be balanced in relation to the service supplier's use of the NSR. The charge should not be related to the value of the service, but to the value of the auxiliary coastal services involved in the shipping–trade services, as defined by the charter-party.

Turning to the question of which Member is competent to invoke GATS provision, the situation differs from case to case. If the Leyden chemical industry is transporting on its own

[45] GATT Article VIII:1(a).

keel along the NSR to Archangel, and the vessel is registered under E.U.ROS (European Register of Ships) or the Dutch register, then the Leyden industry is the supplier of the transport service. If Russia make restrictions affecting that trade, then the European Community or the Netherlands qualify, under the status of service supplier, as "another Member" and may consequently bring the case before the WTO for conciliation.

If the Leyden industry buys the transportation services, due to a Cost Insurance Freight (CIF) Contract between Leyden and Archangel, from a U.S. charterer, then the United States is the service-supplying Member, whose status becomes that of "another Member" in relation to the Norwegian or Russian measures restricting the Dutch chemical industry's access to the NSR. If the Gdansk operator is in charge, then Poland is the Member that enjoys the legal interest.

A third case relates to transportation by regular steamship lines. The Leyden industry buys freight, the CIF situation again, and not time-chartered vessels. The contracting parties are, for instance, an American broker who has bought loading capacity from a Polish operator, and the producer of the chemicals. The Russian restrictions affect the service of the American broker, a situation which renders the United Sates a beneficiary under the GATS. The Polish operator is not part of the charter-party but, since that operator is running a regular steamship line, the restrictions affect the Polish enterprise capabilities in such a way as to invoke Polish competence under the GATS.

If the regulation affects this particular shipping service because the vessel is flying the Cypriot flag, then the Cypriot registry is at a particular disadvantage, which invokes Cypriot competency under the GATS.

4. E.U. Safety and Competition Law[46]

Not only GATS – but also European Community or European Union (E.U.) law may be launched against national restrictions to shipping services. E.U. law has extraterritorial effects in the respect of equal competition in the service field. An illustration is EC treaty Article 49(2) stating that services provisions may be extended to "nationals of a third country who provide services and who are established within the Community". Since transportation is part of the services chapter this provision is valid as far as shipping services are provided for within E.U. and ship owners have at least a filial in E.U. That may effect transportation that

[46] Please note that Safety is a part of Competition and will be further developed in the following year. The following is obtained from P. Ørebech, *The Northern Sea Route. Conditions for Sailing according to European Community Legislation – with Special Emphasis on Port State Jurisdiction*, (Oslo, INSROP Working Paper No. 20, 1995) particularly pp. iii-v, unless noted otherwise. (*PØ's Acquis pages will be harmonised in the following year.*)

takes place also outside the E.U. states' areas. This topic requires investigations into E.U. competition law both codified and case law.

Additionally, the E.U., is ambitiously pursuing the goal of bringing substandard ships out of business, including through the "Action Programme" which is promoting such efforts.[47] The emerging Common Community Policy on Safe Seas reflects what is at stake, vitalising the efforts to eliminate substandard ships. This rather strong position on safety is promoting equal rights within shipping industries, and transportation along the southern and northern sea routes.

The issues include what are the safety requirements applicable to ships flying the flag of non-member States when docking in an E.U. or European Economic Area (E.E.A.)[48] Member State harbour. The main issue is to analyse whether Community law addresses Member States so as to unify domestic legislation in relation to third State ships, including substandard ships and those arriving from the NSR, when docking in an E.U. or E.E.A. harbour. In which way does Community law, by unifying port State legislation, contribute to the elimination of "ports of convenience"? Is Community law the "light at the end of the tunnel", the only possible instrument capable of preventing substandard ships from taking charter-parties to and from any of the E.U. or E.E.A. harbours, including ships sailing along the NSR?

The main purpose is to investigate the Community port State legal situation, including legislation as well as enforcement, with special emphasis on classes of legal persons affected. Of course other provisions, domestic and international law, are relevant as well, but will be dealt with only peripherally here.

As seen WTO/GATS and E.U. competition law are relevant in relation to equal participation rights and NSR transport. The connection between competition and safety is unmistakable, since unequal technical and safety requirements create unequal conditions of competition. According to WTO/GATS and E.U. competition law, equal rights are offered to treaty Member States complying with basic legal claims.

The Community environmental and safety legislation is not directed towards vessels when navigating the NSR. The importance of Community law is through the implementation governing all vessels when docking in an E.U. or E.E.A. harbour, including ships arriving from the NSR. E.U. or E.E.A. port States may, under the 1982 Law of the Sea Convention (LOSC) Article 218(1), according to Community Law, be made responsible for undertaking investigations and institute proceedings in respect of any discharge occurring on the NSR, in

[47] See Communication from the Commission – A Common Policy on Safe Seas. February 1993.

[48] E.E.A. Agreement of 2nd May 1992.

violation of applicable international rules and standards, from a vessel voluntarily within the port of the enforcing State. The Community is free to direct member States in any aspect within this framework legislation including surveillance and enforcement. Thus, Community law applies circuitously to all third State vessels, including vessels navigating the NSR, and this includes the technical standard of ships, manning, the handling of goods, waste, equipment, and other the transportation requirements. By this reason and because of its very huge geographical area, which include most waters from the Dardanelles strait to the Norwegian –Russian border, the Community port State position is a strong one.

The underlying concept is that all vessels, ships of non treaty States as well, competing for charter parties to and from the "inner market" of European Community including along the NSR, must adhere at least to generally accepted rules and standards and in various instances to advanced, unilateral Community port State standards. The unique Community position is made possible by this large geographical scope, and by the potential of making compulsory approximate or harmonised legal solutions in all member States in order to avoid "ports of convenience". All ships, sub-standard ships as well, destined for any E.U. or E.E.A. harbour must fulfil the Community's safety requirements.

Since the Community enjoys substantial legislative power over Member States as well as transiting and docking ships with regard to standards including equipment, manning, handling and technical requirements, and limitations under LOSC Article 21(2) are related to ships under innocent passage, advanced unilateral Community provision might, in strict legal terms, be implemented, vis-à-vis foreign ships when docking in an E.U. or E.E.A. harbour. LOSC Article 21(2), prohibits the ports State to regulate the "design, construction, manning or equipment of foreign ships unless they comply with generally accepted international rules or standards". Similar restrictions are stipulated by the IMO conventions, including chiefly MARPOL73/78 and SOLAS. These provisions however may give rise to ambiguity. "Generally accepted international rules or standards" under Article 21(2) may relate to an extra-legal or non-binding technology-based consensus. Therefore IMO resolutions, codes, recommended practice and guidelines, although not legally binding, may entitle the coastal State to regulate standards related to the hull, technical equipment, engine and other of foreign vessels, when it is in transit enjoying the right of innocent passage.

As regards enforcement competence, Community law does not make any explicit requirements, which means Community Member port States have enforcement and surveillance competence existing within the LOSC framework only. The extent of enforcement is a legal question. Viewing the potential related to Community law, the law of the sea framework should be analysed.

Wider studies into law of the sea would be beneficial, especially related to the IMO and LOSC frameworks in relation to unilateral Community legislation and enforcement.

Having made this more clear, the Community might evaluate different options, either the IMO tradition of implementing generally accepted international rules and standards only, or a more U.S. approach, which establishes unilateral requirements exceeding the average of IMO standards. In ARCOPS these issues are carried out rather peripherally but to the extent possible due to the scope indicated.

4.2. The E.U. *acquis* on trade in shipping services and the Russian Arctic marine oil and gas export to E.U. ports and the Russian Arctic marine oil and gas export to E.U.

4.2.1. Introduction

Below we will display the arena of International Arctic and Russian waters under the European Union law regime of trade in shipping services. Do the European Union *Acquis* on Free trade in Shipping Services have extraterritorial effects, *in casu* for the Russian Arctic waters? Excluded are the WTO issues. The The issue for analysis is the E.U. condemnation of international law limitations to E.U. shipping regulations, as made clear by the E.U. justification on four American instances of *lex extra territoriae*. The issue of interest is how E.U. balances its own legislative trade-in-services-competency against international law? A legal source for this investigation is Council Regulation (EC) of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (1996 Third Country Regulation).[49] The objective of this Regulation is to put up "protection against and counteracts the effects of the extra-territorial application of the laws specified in the Annex".

Since 'double standards' fail to find recognition in international law, the E.U. domestic justification of 1996 Third Country Regulation is at the same time illustration to the international law framework of the E.U. extraterritorial reach of its own domestic regulations.

The E.U. states that "Whereas the application of this principle [freedom to provide services in the field of maritime transport] within the Community is also a necessary condition for effectively pursuing, in relation to third countries, a policy aiming at safeguarding the continuing application of commercial principles in shipping".[50] Thus, the E.U. trade in shipping services provisions is ideally applicable to all shipping

[49] Nr. 2271/96.

[50] Council Regulation (EEC) Nr. 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, the preamble.

regardless of nationality. Whether the E.U. free trade principles extend to third countries will be investigated in the continuation.

EC Treaty rules on free trade in services relate to line-agreements, cabotage, the abandonment of national flag preferences, fleet subsidies, reflagging restrictions, ownership restrictions, fair competition and more indirectly on crewing requirements, domestic technical provisions, etc. The "bottom-line" for these provisions is to encourage equal and just competition, which fail if technical and manning provisions differ among shipping companies that compete for the charter-parties.

Since Russia will remain non-E.U. Member our interest is in the E.U. extraterritorial influences upon ships sailing in international and Russian arctic waters. Is E.U. trade in shipping services provisions valid in relation to *charter parties* and *freights* in this area of the world?

4.2.2. The legal questions

While the E.U. technical provisions affects third states vessels that are destined for E.U. ports,[51] the E.U. provisions on free trade in services do have no direct effect for shipping abroad,[52] *in casu* along the Russian Arctic Sea Route – which in its extension is called the International Northern Sea Route. Possible new rules on free trade in Russian shipping services rely upon the WTO membership of the Russian Federation, and a successful outcome of the GATS negotiations.[53]

Quite a few instances of international shipping however – also in the territorial sea of third states – are due to extraterritorial effects of E.U. law.[54] How far reaching is the *jurisdiction ratione territorae* of E.U. law, i.e. whether E.U. provisions on

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[51] P. Orebech, *The Northern Sea Route: Conditions For Sailing According To European Community Legislation With A Special Emphasis On Port State Jurisdiction* (Fritjof Nansen Institute 1995) (shorter version published in Law and Economics, 1995) at p. xxx.

[52] Council Regulation (EEC) Nr. 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (1986 Maritime Service Regulation), see esp. Articles 1 and 2.

[53] P. Orebech, *The Northern Sea Route: Conditions For Participation According To WTO Legislation - With A Special Emphasis On The Non-Discriminatory Treatment Principles Of Most-Favoured-Nation- And National Treatment Clauses Under The General Agreement On Trade In Services* (Fridtjof Nansen Institute 1996) (also in Law and Economics, 1997). Since then the Group on Shipping Trade Issues ceased. Under the Doha Round only informal consultations have taken place. ‚Interview' Head of Department, B. Johansen in the Norwegian Ministry of Foreign Affairs, July 9, 2004.

[54] 1986 Council Regulation, *Supra* note 2, at Article 1(2)(b).

free trade in shipping services apply to Russian Arctic marine oil and gas transportation yet it takes place outside E.U. waters? Does E.U. trade in services provisions and competition laws affect shipping that serves Arctic oil and gas export? *Secondly* focus is on the substantial content of the trade in service provisions. Finally, interest is in Russia-E.U. bilateral agreement, whether E.U. *acquis* in shipping services is agreed arrangements for the Arctic maritime transportation.[55]

Direct as well as indirect implications are studied. *Id est* competitions law limitations to unfair competition, non-discriminatory technical requirements, right to provide services abroad with own employers etc. I do however not investigate the hull, engine and other vessel technical requirements.[56]

4.2.3. One step behind: The 'legal personality' and 'residual rights'[57]

The European Union is a legal entity (see Section A) which according to the Constitutional Treaty Article 3(4), operates under the rule of international law. My perspective is not the international obligations of a recognised state as such, but the E.U. position to these responsibilities. Since "double standards" in international law are out of question,[58] the E.U. thus portrays not only foreign state limitations to domestic regulations, but also the identical barriers to its own regulations and directives.[59]

By figuring out which states enjoy the residual rights, the possessor of unlimited and exclusive jurisdiction is displayed. The owner of such rights enjoys all competencies that are not explicitly transferred to others. This question contains several components: One of the issues is whether residual rights belong to the national states or whether rights not explicitly attributed to the national states remain by the international societies of states? Or said otherwise: Is extraterritorial barriers incorporated in the concept of 'sovereignty' (Section B)? Another issue is whether the E.U. in relation to its Member States enjoys residual rights (Section C)?

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[55] Respectively, provisionally Sections 4, 5 and 6. Harmonise in the final version.

[56] That is investigated in P. Orebech, *The Northern Sea Route: Conditions For Sailing According To European Community Legislation With A Special Emphasis On Port State Jurisdiction* (Fridtjof Nansen Institute 1995) (short version in Law and Economics, 1995).

[57] *Please note that Section 4.2.3. though perhaps theoretical here will be utilised as a reference in further work next year specifically related to shipping.*

[58] For a possible modification see case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 625.

[59] As of the 18th June 2004 Constitutional Treaty Article 32(1) is named European laws and framework laws.

A. The legal personality of E.U.

Already in 1947 the General Agreement of Tariffs and Trade foresaw that trade unions would become commonplace realities, see GATT Article XXIV. The European Economic Community that was established in 1957 is for a period of almost 50 years tacitly and explicitly recognised as counterpart in international agreements.[60] Its legal status is at present time codified in EC Treaty Article 281. Soon the E.U. will achieve identical status, to become the *successor* of EC as clarified in the Constitutional Treaty Article IV-3[61] – just like EC succeeded into Member States pre-membership agreements[62] – in most bilateral or multilateral agreements.[63]

Residual international competencies remain by the Member States, as conceived by the 2004 Constitutional Treaty Article III-228. The number of areas that belong to the Member States are non-topic for this study. The 2004 Constitution Article 12(2), assign to the Union exclusive autonomy in all international agreements as far as these covenants touches upon areas covered by a secondary E.U. provision. Since the E.U. provisions are far-reaching – the E.U. competency goes far beyond the exclusive autonomy of common policies,[64] arguably not many competencies remains by the Member States.

The E.U. – that is soon to become a legal subject, either an international organisation or a state[65] – should institute collaboration with international entities – either international organisations or states.[66] United Nations, Council of Europe, Organisation for Security and Co-operation of Europe (OSCE) and Organisation for

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[60] Internally – between Member States – the groundbreaking event was Case 6/64, Costa v. ENEL, 1964 E.C.R. 585. Externally – towards third states – see as illustration the 1973 EEC – Portugal Free Trade Agreement, in 1982 E.C.R p. 3659 – Kupferberg. See also Case C 268/94, Portuguese Republic v. Council, 1996 E.C.R. I-6177 in relation to the Co-operation Agreement between the European Community and the Republic of India.

[61] EC Treaty Article 281 is terminated under the new Constitutional regime. As non-existent EC no more enjoys legal personality.

[62] As made clear to the new 10 Member States of 1st May 2004: Negotiation on Accession by the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union. Brussels, 3 April 2003 (OR, en) AA 2003, Text of the Final Act, Declaration no. 32 p. 33, seen in connection with the 2004 Act of Accession, Annex VIII, paragraph 5, at p. 2762.

[63] See as illustration Demirel Case Nr. 12/86 against Turkey and the SPI-case Nr. 267-69/81.

[64] For further details see P. Orebech, The E.U. Competence Confusion: Limits, "Extension Mechanism," Split Power, Subsidiarity and "Institutional Clashes." J. TRANSITIONAL L. & POL'Y (vol 13, 2003).

[65] See P. Orebech, 'The 2004 European Union: A Dysfunctional International Organisation to become a Functional Federal State?' (Article under preparation).

[66] See the 18th June 2004 Constitutional Treaty Section III, Part V, Chapter VII (headline) and Articles III-229(1).

Economic Co-operation and Development (OECD) is specially mentioned, but other covenants is also open to the E.U.

Clearly the E.U. abide by the international law, c.f. Articles 3(4) and III-193 that explicitly mention the 1948 UN Charter. Undoubtedly, the E.U. is soon to become a legal subject under international law.

B. A Principle of Extraterritoriality?

Do legislative competency of national state face any geographic limitations at all? Does the national state 'sovereignty' bring about jurisdictional exclusivity in its territory? Traditional legal theory seems to find comfort in the *territorial principle*, allowing for creeping jurisdiction within the frames of *personality principle*.[67] No one but citizens and inhabitants abroad are under the jurisdiction of a Domicile State. Do we find traces of a new *principle of extraterritoriality*[68] *beyond* humanitarian actions? The geographic application of domicile law is a complex puzzle. One division is between national sovereignty allocated by "the high contracting states" to a party, which do leave the beneficiary state to strictly defined jurisdictional rights.[69] Another is the *primeval sovereignty* conquered by tribes in ancient time, and later confirmed by conventional law.[70] One country may possess both sovereignty categories, the primeval rights and rights attributed to national states by international agreements. The latter may limit the number of competencies allocated to the beneficiary.22[71] The answer to the residual rights paradigm relates to the kind of sovereignty. The question is whether 'national states' are entitled to exclusive autonomy by that very fact or whether exclusivity rely upon explicit decision under conventional law? The investigation here is related to the primeval competency ceded to successor states, *in casu* whether extraterritorial competencies floats from the lack of ban on domicile prescriptive rights.

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[67] For instance L.F. Damrosch, L. Henkin, R.C. Pugh, O. Schachter & H. Smit, *International Law, Cases and Materials,* (West Group 2001).

[68] This is not identical to of *principle of universality.*

[69] This is the E.U. basis, see The Constitutional Treaty Article 9(2).

[70] See *i.a.* the 1648 *Constitutio Westphalia as analysed by* G. Pagès. The Thirty Years War 1618-1648 (Harper & Row, New York 1970) p. 228, c.f. Chapter IX.

[71] Norway that is a Kingdom by occupation and conquer of 872 A.C by the King Harald Fairhair, do rule the Islands of Spitsbergen according to international treaty, see the Spitsbergen Treaty of 9th February 1920. The Norwegian competencies are limited according to the treaty text, which gives personal, substantial and territorial barriers. See G. Ulfstein. The Spitzbergen Treaty (Scandinavian University Press 1997).

i. Short introduction

Historically spoken the concept of 'states' created the axiom of sovereignty ("Landeshoheit") and non-intervention. The 1648 Constitutio Westphalia,[72] was the first agreement in history that monopolised power to a recognised government in its territory. The customary sovereignty dogma that served its purpose for more than three centuries is codified in the 1948 UN Charter art. 1(2), c.f. the General Assembly Resolution 2625/70 On principles of international law on friendly relations and co-operation among states in accordance with UN Charter, see paragraph 1: Each nation enjoys self-determination, territorial integrity and political independence. Thus 'state' is inevitably tied to exclusivity in power, whether legislation, surveillance or justification.

The historic platform indicates that 'sovereignty' is a two-sided coin prohibiting third states from intrusion into extraterritorial legislative activity. Provided explicit entitlement, domicile state prescriptions are extraterritorially valid.

ii. The Latest Trends

The *universality principle* has modified the sovereignty position. Most states agree that sovereignty principle do not prevent universally condemned obligations *erga omnes* from coming into effect. The view is that the "Common law of mankind",[73] or "World law"[74] that is based upon common principles found in all systems of law to meet problems of humanitarian, environmental and economic character is *universally valid customary law*. States that fail to incorporate *erga omnes* rules are non-the less under the obligations of these principles.26[75] Since topic is not international universal principles of law, but valid domestic law that works beyond legislators' own territory, focus here is on *domestic legislation that enjoys extraterritorial application*.

Since the early 20th century domestic rules addressing cross border damage, have prospered. It started with the Trial Smelter Case and have lately found its counterpart in the French Yahoo Case. A good illustration is the Turkey – France *Lotus-case*,27[76] justifying the use of Turkish Penal Code on a collision between a

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[72] The "first truly European settlement in history". See G. Pagès. The Thirty Years War 1618-1648 (Harper & Row, New York 1970) p. 228, c.f. Chapter IX.

[73] W. Jenks & W. Friedmann p. 119.

[74] Harold Berman. World Law. Fordham International Law Journal (1995) p. 1617.

[75] *See the Puena erga omnes* that is illustrated by the 1949 Geneva Convention. On the protection of civilian in time of War, Article 33. For a specific exception see the 1982 UN Law of the Sea Convention, Article 92 and 97. For a case law illustration on the breach of international treaties, see the *Namibia(2) Case, 1966 ICJ 6, 45* and the *Actio Popularis Rule.*

[76] PCIJ 1927 S. A # 10.

French and Turkish vessel outside the Turkey territorial waters. Because International law provided no rules that prohibited Turkey from criminal prosecution on the high seas, the international court of the League of Nations[77] took – *obiter dictum* – the position that Turkey was entitled to arrest and prosecute the French skipper according to Turkish law. Thus Turkey was – for areas beyond its own territorial sea – entitled to all powers that was not explicitly withdrawn from it. The residual rights belonged to Turkey. The current prohibition on coastal-, port- or domicile state law on board a foreign ship in the UN 1982 Law of the Sea (UNCLOS), Article 97 confirms the residual rights system of national states, at least in relation to activity on the high seas. Coastal states may regulate activity beyond its own territory, internal water and EEZ with the exception of conventional obligations explicitly withdrawn from coastal state autonomy.

A similar limitation on *civil* procedures is non-existent. According to customary international law the *personality principle*, focusing both on the active (lawbreaker) and the passive status (victim), is supplementing the principle of territory. It suffices that the latter is citizen or permanent resident in the ruling state.[78] Some limitations do however exist due to international agreements and membership in international agencies.[79]

The later modification to the national state sovereignty seems to reflect two movements. One is a number of human rights' treaties.[80] Another is the free trade development that started with the European Economic Community (EEC) of 1957[81] and continued under the umbrella of the World Trade Organisation (WTO). National states exclusive autonomy has deteriorated due to the principles of supra-nationality and *universality.* In this landscape does the evolving *principle of extraterritoriality* find its place?

What will become the road ahead, is due to rather loose speculations. Will monopolised power in the hands of a public centralised body survive? Most possibly national sovereignty differs within sectors of society. Looking into the crystal bowl

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[77] The Permanent Court of International Justice – PCIJ.

[78] See as illustration the 1963 Convention on offences on board aircraft, art. 4A b) and the 1997 Convention for the suppression of terrorist bombings, Art. 6.

[79] I.a 1948 Universal Declaration on human rights, Article 30, c.f. the 1966 UN Covenant on Civil and Political Rights Article 1.3.

[80] E.g. the 1948 American Declaration of Rights and Duties of Man, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1989 Convention on the Rights of the Child and the 1996 European Social Charter under the Council of Europe.

[81] See the 1957 Treaty of Rome.

some observers have anticipated that – as regards the area of human rights – a universal jurisdiction is underway.33[82] A modified 1823 U.S. Monroe Doctrine,34[83] pushing for supra-national intervention, to the benefit of human rights. The fictitious justification of really humanitarian intervention in the 1970s by reason of self-defence (UN Charter Article 51)35[84] is, at the end of the millennium, turned into anticipated legally valid invasion for humanitarian purposes.[85] The 1648 Constitutio Westphalia axiom of sovereignty ("Landeshoheit") and non-intervention initiated by the "first truly European settlement in history"[86] have come under pressure by the modified Monroe Doctrine.

Perhaps the new sovereignty principle now reads 'exclusive autonomy beyond human rights obligations'? U.S. foreign policy do not find humanitarian intervention a remote wish, c.f. a 1992 statement:

> A new principle of international relations is arising: the destruction or displacement of groups of people within states justifies international intervention. A new balance must be struck between traditional sovereignty and the world community's interest in human rights.38[87]

In the former Yugoslavia, this intervention theory comes to life. The NATO air strikes took place without prior U.N. Security Council authorisation, which significantly challenged the established international legal order. The NATO response ranked principles of humanitarian intervention above norms of state sovereignty (according to U.N. Charter Article 2(4): "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state"). Even though NATO practice seems to advocate that a regional organisation rather than the Security Council may be the final arbiter, such a position is heavily debatable. The validity of the NATO actions, a question put before the International Court of Justice in The Hague,39[88] depends upon whether *the danger was*

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[82] J. Charney. Universal International Law, 87 *A.J.I.L.* 529 (1993), Antti Korkeakivi. "Consequences of "Higher" International Law: Evaluating Crimes of State and Erga Omnes," 2 J. Int'l Legal Stud. 81 (1996).

[83] See Donald Marquand Dozer (ed.), *The Monroe Doctrine. Its Modern Significance* (Alfred A. Knopf, New York 1965) with further references.

[84] Such as the 1971 India invasion of Bangladesh and 1979 Tanzania invasion of Uganda, see United Kingdom Foreign Office Policy Document Nr. 18, reprinted in Bertram S. Brown, 'The Evolving Concept of Universal Jurisdiction', *New England Law Review*, Vol. 35 (2001) p. 383 ff., at p. 388.

[85] As was the NATO bombing of Serbia during the 80 days war of 1999. See White House spokesman Joe Lockhart: *NATO's bombing objective is to "stop the killing and achieve a durable peace"* (*The Associated Press,* March 24, 1999).

[86] See G. Pagès. The Thirty Years War 1618-1648 (Harper & Row, New York 1970) p. 228, c.f. Chapter IX.

[87] R. Holbrooke: Changing Our Ways: America and the New World*,* Carnegie Endowment for International Peace National Commission, Washington, DC: Carnegie Endowment for International Peace, 1992 p. 51.

[88] See i.a. ICJ Order of 21 February 2001 Case concerning legality of use of force (Yugoslavia *v.* Belgium). The court has earlier rejected by clear majorities, to give intermediate relief in favour of Yugoslavia: See the

real and immediate and there were no other way to avert the danger (Customary International Right of Self-Preservation). Even though the weakest point for the human rights cause pursued by NATO is the lack of UN express acknowledgement, it is not clear that the non-intervention and sovereignty principle will gain support at the possible Hague proceedings. It might be advocated that the U.N. Charter Article 2(4) are vested in law abiding states only, c.f. *Corfu Channel Case* stating that elementary considerations of humanity are among the general and recognised principles of international law.[89] The UN Charter sovereignty protection requests that UN Member states defend such elementary considerations. Non-law abiding states fail to find protection under the UN Charter. Since Serbia did not defend these basic principles intervention was supposedly not contradictory to the sovereignty principle.

Hence, the proposed recognition of extraterritorial surveillance and enforcement power for humanitarian purposes without respect of person's nationality does also implicate prescriptive power. Supposedly a *principle of extraterritoriality* – which is the universality principle – is here underway. Beyond human rights, for instance within trade and services, a similar development is shortcoming. With the exception of inhabitants living abroad and legal persons that are incorporated in the prescribing state, the principle of extraterritoriality seems to fail recognition.

C. The European Union in its Successor State role

The E.U. that operates on the international plane – as predecessor to its Member States – has gained sovereignty that coincides with the autonomy ceded to it. The transfer includes Member States' present international agreements from the date of accession.[90] But who favours future developed competencies under international law? The formulation "competencies that is not allocated to the Union in the Constitution, remains by the Member States" (The E.U. Constitutional Treaty Article

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International Court of Justice (ICJ) decision of 2 June 1999, requests filed by Yugoslavia against ten NATO member states on April 29, 1999, asking the ICJ to order the NATO members to "cease immediately [their] acts of use of force" and to "refrain from any act of threat or use of force" against Yugoslavia.

[89] ICJ 1949, 22.

[90] See as illustration the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Members of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovakia, the Republic of Slovenia. Concerning the Accession of the Czech Republic etc. Negotiations on Accession by the Czech Republic etc. to the European Union. Brussels, 3 April 2003 (AA2003/TR/en) – hereinafter the Second Accession Treaty of the European Union, or the 2004 Accession Treaty. By referendum – the latest in Latvia, September 20, 2003 – the Treaty is now acknowledged in all Applicant Member States. The Treaty is effective for all Member States by May 1, 2004.

9(2)) characterises the E.U. power vis-à-vis its Member States. An area of law that is not expressively transferred to the E.U. still belongs to the Member States. Strictly interpreted this sentence say that residual rights belong to the Member States. The question is whether the E.U. – within areas transferred – maintains a static position that coincides with the competencies that Member States originally held.42[91] Or is it incorporating a dynamic jurisdictional competency that also embrace new international law development? Do the E.U. possess the pre-accession residual rights position enjoyed by Member States? Seemingly the Constitutional Treaty, neither Article 9(2) nor any other provision, got relevance to this question. The result floats from the substantial content of the accession treaty between the E.U. and its new Member States and the subsequent succession notification (*Aide Memoires)* given by the E.U.. Do the accession treaty address the complete transfer of Member States jurisdiction to the E.U.?

Starting with the latter question the outcome is decided by the predecessor and successor states. If counterparts have determined the latter take-over the international societies of states have limited choice. Provided that the latter state is 'recognised', arrangements on transfer of jurisdictional rights, customs unions, establishment of confederations or federations etc. is 'internal matter' that is beyond the control of other entities under international law.[92]

Coming to the first question, the E.U. – Member States accession treaty – the 'take over' is complete if the accession agreement so devise. In areas of E.U. common policies the E.U. provisions have pre-emptive force both domestically and in foreign relations. Any subsequent developed national state power under international law (*ratione territorae* or *ratione materiae*) belongs to the successor and not the ceding state, *in casu* the E.U..

Increased national state power under international law ("jurisdiction leaps") is illustrated by several 'law of the sea' events.[93] The E.U. competency is as follows: A – in a geographic sense – possible creeping jurisdiction belongs to the successor, not to the ceding state. As made clear by the 1994 and 2004 accession treaties to the European Union, new Member States jurisdiction transfer is complete and ultimate.45[94]

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[91] This is the situation under the European Economic Area (EEA) Agreement of May 2nd 1992 between the E.U. and its Member States and Iceland, Liechtenstein and Norway.

[92] See as illustration the GATT Article XXIV.

[93] See for instance the 1945 Truman Proclamation on the Continental Shelf, the 1983 US proclamation of the Exclusive Economic Zone (EEZ) and the 1999 US proclamation of a 24 n. miles Contiguous Zone.

[94] P. Ørebech, 'The Fisheries Issues of the 2004 Second European Union Accession Treaty: a comparison with the 1994 First Accession Treaty', *International Journal of Marine and Coastal Law*, Vol. 2 (2004), see esp. Chapter IV.7.

Using the 1982 UNCLOS Treaty as illustration, if – after the ten years ban on treaty adjustment terminates 16th November 2004[95] – a geographic extension to the EEZ is considered, an additional area beyond 200 n. miles is under the auspices of the E.U. and not the ceding Member States.

D. The European Union as a non derivative & independent international agent

Additionally the E.U. is the successor of the EC held international rights and obligations whether or not originally deviated from Member States according to Accession treaties, *i.e.* the entire portfolio of covenants that the EC has signed and ratified (The Constitutional Treaty Article IV-3). This includes the following two categories:

First of all agreements that covers areas of 'common policies': Here belong multilateral and bilateral trade agreements concluded between the E.U. and third states, not earlier controlled by Member States. Having conquered *the policy area* from its Member States, the E.U. according to the case law *parallelism principle47*[96] also held the corresponding international law competency within its entire realm. The "take-over" is complete, since the E.U. enjoy exclusive autonomy within the area. One illustration is customs treaties. Another is the bilateral trade agreement, for instance the E.U. –Switzerland Free Trade Agreement.[97]

Secondly, covenants covering areas of shared competency. Here the E.U. as well as Member States may act on the international plane. The E.U. regulation is however *lex superior*. In case of conflicting arrangements, the E.U. and not the Member State treaty is valid. Further is the E.U. not obliged to join efforts with its Member States. The *Development treaty with India*[98] illustrates that areas of shared competency do not give Member States – not even the predecessor state of Portugal – an option to become joint partner in the agreement without the E.U. consensus. However Member States is – due to the shared competency – not prohibited from, on its own, to establishing an additional agreement not in competition but parallel to the E.U. We thus conclude as follows: First, that Member States delegate the complete field of jurisdiction to the E.U., not only technicalities that originally belonged to the

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[95] Ten years after the treaty became effective 16th November 1994.

[96] The E.U. external competency matches the E.U. internal power, see as illustration ECR [1964] 585 *ENEL-case*. Also implied power results in external E.U. competency: Court Opinion ECR [1975] I-1355 *Local Cost Standard*, ECR [1993] I-1061 *ILO-convention*, ECR [1996] I- 6177, *Development treaty with India.*

[97] See S. Breitenmoser, 'Sectoral Agreements Between the EC and Switzerland, Contents and Contexts', 40 CMLR 2003, 1137-86.

[98] ECR [1996] I-6177.

Member States. Post membership elements that floats directly from competencies developed at the international plane belong to the E.U., not to the originally ceding states. Illustration is found in the General Agreement on Trade in Services (GATS) – an area of economic connections that is exclusively controlled by the E.U. The *in spe* WTO Shipping Trade Agreement is fully under the domain of E.U.

Secondly, that the justification of the outer limit of E.U. competencies now finally belong to the European Court of Justice (ECJ).50[99] Thirdly, that few policies are beyond the reach of E.U. One illustration is 'property' that according to EC Treaty Article 295[100] in principle are excluded from the E.U. autonomy.52[101] In areas that fully belong to the E.U. – for instance competition and monetary policies[102] - the E.U. entirely pre-empts Members State legislation, hereunder also spheres not earlier regulated.

4.2.4. The E.U. shipping *acquis* – an outline

Before pursuing the legal details, relevant legal sources should be sorted out.[103] Basic are the EC Treaty, secondary E.U. legislation and E.U. decisions. European Court of Justice (ECJ) case law play a vital role in the interpretation of *acquis commonautaire* as well as filling in the loop holes of law.

A. Treaties and Council Regulations

The main provision on trade in shipping services is Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (1986 Maritime Service Regulation). This regulation incorporate basic shipping service provision like Council Regulation (EEC) Nr. 4058/86 concerning co-ordinated action to safeguard free access to cargoes in ocean trades.[104] It also refer

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[99] This incredible important fact places the ultimate justification competency to the ECJ and not to the constitutional courts of the Member States. Thus we are now longer within the previous confederation, that was defined by the failing competency to self-defining own constitutional rights (German Federal Constitutional Court 1994 CMLR 57). Denmark Supreme Court took the same position, see *Carlsen v. Prime Minster of Denmark*, judgement of 6 April 1994, stating that Danish membership to the E.U. is not contrary to the Danish Constitution § 20(1). For Germany see Gerhard Wegen & Christopher Kuner, *Germany: Federal Constitutional Court Decision Concerning the Maastricht Treaty*, 33 I.L.M. 388 (1994). Thus the E.U. finally got the "kompetenz-kompetenz". For further analysis see P. Ørebech: The 2004 European Union: A Dysfunctional International Organisation to become a Functional Federal State? (under preparation).

[100] When in effect, the entitlement is Constitutional Treaty Article III-331.

[101] There are however heavy restrictions to Member States autonomy here, for the details see P. Ørebech, *The E.U. Competence Confusion: Limits, "Extension Mechanism," Split Power, Subsidiarity and "Institutional Clashes."* J. TRANSITIONAL L. & POL'Y (vol. 13, 2003) Chapter 2,D

[102] Constitutional Treaty Article I-12(1).

[103] See Appendix I for a listing.

[104] OJ No. C 255, 13. October 1986, p. 169.

to Council Regulation (EEC) Nr. 954/79 (3) providing competitive access to that part of cargo liner shipping which is not covered by commitments to national shipping lines of third countries under the United Nations Convention on a Code of Conduct for Liner Conferences.

The freedom to provide services in the field of maritime transport is governed by the provisions of EC treaty Article 51 – the Title relating to transport.[105] Decisions are made by qualified majority vote according to EC treaty Article 80(2).[106] Since transportation policy is an area of shared competency,[107] E.U. law is *lex superior.*[108] Member States legislative competency is limited to the lacunae left open by the E.U.

Like other market freedoms trade in shipping services is under the realm of competition law, see the 1986 Maritime Service Regulation – the preamble: "Whereas the Member States affirm their commitment to a freely competitive environment". Thus EC treaty Article 81-97[109] apply.

The reciprocal reach of foreign law balanced against E.U. law is regulated in Council Regulation (EC) of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (1996 Third Country Regulation).[110] As indicated the first provision expand the geographic application of the E.U. *acquis* while the latter narrows down the third country influence on E.U. registered vessels sailing along foreign coasts.

While free trade in shipping services are related to the European Economic Area – by the EEA Agreement affecting Iceland, Norway and Liechtenstein – the Russia-E.U. connections are under the auspicious of the E.U.-Russia bilateral trade agreement. As indicated (Chapter 6) these agreements do – to some extent – opens up Norwegian and Russian territorial waters to E.U. shipping provisions.

B. Council and Commission Decisions

First of all: none of the resolutions are directly related to the Arctic waters. Its function is interpretative. The function of the E.U. administrative practice is to illustrate the

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[105] EC Treaty Section V, Articles 70-80. The Constitutional Treaty of 18th June 2004 (not yet in effect), Article III-133 f.f.

[106] The Constitutional Treaty of 18th June 2004, Article III-143(2).

[107] *Supra* note 8, Article 13(2).

[108] *Supra* note 8, Article 10(1).

[109] *Supra* note 8, Article III-50 – 58.

[110] Nr. 2271/96.

substantial content of the so-called freedom of trade in shipping services, and as such relevant for this work.

Some individual resolutions deal with foreign shipping relations: Council Decision of 17 September 1987 relating to maritime transport between Italy and Algeria[111] and Council Decision of 27 November 2001 on the association of the overseas countries and territories with the European Community ("Overseas Association Decision").[112]

Some provisions deal with international questions more generally, which affect trade in shipping services more indirectly. C.f. the Council Decision of 22 December 1994 (94/800/EC) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994).

Commission Decision of 23 December 1992 relating to a proceeding pursuant to Articles 85 (Cewal, Cowac & Ukwal)63[113] and 86 (Cewal) of the EEC Treaty,[114] and Commission Decision of 19 October 1994 (94/980/EC) relating to a proceeding pursuant to Article 85 (Trans-Atlantic Agreement) do implement competition rules.

Subsidies that are banned in EC Treaty Article 87 (with exceptions, of course!) is adjudicated and implemented in several individual resolutions related to different Member States. The Commission has several times denounced the Spanish trade practices.[115] Commission Decision of 17 February 1993 on Spain's request for adoption by the Commission of safeguard measures under Article 5 of Regulation (EEC) Nr. 3577/92 against applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage),[116] and the prolongation decision.67[117]

Spanish subsidies programs are frequently under the Commission scrutiny both generally and in relation to individual companies. In the first case see Commission Decision of 19 July 2000 on the State aid implemented by Spain in favour of the maritime transport sector (new maritime public service contract).[118] In the latter

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[111] 87/475/EEC.

[112] 2001/822/EC.

[113] 93/82/EEC.

[114] Now EC treaty Articles 81 and 82 to become Constitutional Treaty of 18 June 2004, Article III-51 and 52.

[115] Which have had detrimental effects on two big Norwegian building contracts within petroleum industry and national defence (new destroyers to the Norwegian Royal Marine).

[116] 93/125/EEC.

[117] 93/396/EEC: Commission Decision of 13 July 1993.

[118] 2001/156/EC.

instance see Commission Decision of 29 November 2000 on the aid scheme implemented by Spain in favour of the shipping company Ferries Golfo de Vizcaya.[119]

Other Member States as well have breached the subsidisation ban. Italy according to Commission Decision of 21 June 2001 on the State aid awarded to the Tirrenia di Navigazione shipping company[120] and Commission decision of 17 July 2002 on the aid scheme implemented in order to reduce the number of single-hull tankers older than 20 years in the Italian tanker fleet.[121] France in one instance according to Commission Decision of 30 October 2001 on the State aid awarded to the Société nationale maritime Corse-Méditerranée (SNCM).[122]

C. The ECJ Case Law

Since E.U. does not recognise "travaux preparatoire" in its justification,[123] too much emphasis should not be placed on the text. To the contrary, the principle of *"l'effet utile"* provide for the superior rank of ECJ case law. *I.e.* that any domestic law that in its *effect* hinders further integration should be narrowly interpreted, whether or not that area of law is under special protection of EC Treaty provisions.74[124] Correspondingly main rules are extended. With this in mind I proceed to the actual cases.

Shipping issues has both within competition, subsidies, manning, transportation and trade in services been tried before the court. Here some important Court of First Instance and European Court of Justice decisions will be displayed. At this stage I do consider neither facts nor legal problems hereunder *ratio decidendi* or *opino juris.* Court of First Instance and European Court of Justice have tried a few hundred shipping trade cases since mid 1990'es. Here I list the most relevant cases.

Within competition law the following cases are relevant:

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[119] 2001/247/EC.

[120] 2001/851/EC.

[121] 2002/868/EC.

[122] 2002/149/EC.

[123] *See* CLAUS GULMANN & KARSTEN HAGEL-SØRENSEN, EC LAW 128 (Copenhagen 1988) and LAURIDS MIKAELSEN, EC COURT OF JUSTICE AND DENMARK 28-9 (Copenhagen 1984). [author's translation].

[124] For more details see P. Orebech, The E.U. Competency Confusion: Limits, "Extension Mechanisms," Split Power, Subsidiarity, and "Institutional Clashes" (Journal of Transnational Law & Policy, 2003).

♦ T-395/94 – Judgement of 28 February 2002, Atlantic Container Line v Commission
♦ T-86/95 – Judgement of 28 February 2002, Compagnie générale maritime and Others v Commission
♦ C-395/96-P Opinion of 29 October 1998, Compagnie Maritime Belge Transports v Commission
♦ T-191/98 & 212-14/98 - Judgement, 30 September 2003, Atlantic Container Line and Others v Commission
♦ T-59/99 - Judgement 11 December 2003, Ventouris v Commission
♦ T-66/99 - Judgement 11 December 2003, Minoan Lines v Commission
♦ C-169/99 – Judgement of 29 March 2001, Portugal v Commission
♦ C-364/99 – Order of 14 December 1999, DSR-Senator Lines v Commission
♦ T-213/00 - Judgement of 19 March 2003, CMA CGM and Others v Commission
♦ C-34/01, C-37 & 38/01 - Opinion of 7 November 2002, Enirisorse

Not unexpectedly a rather comprehensive group of domestic regulation of maritime transportation are among the cases:

♦ C-176/96 - Judgement 11 June 1998, Commission v Belgium
♦ C-266/96 - Judgement 18 June 1998, Corsica Ferries France
♦ C-266/96 - Opinion 22 January 1998, Corsica Ferries France
♦ C-62/98 - Judgement 4 July 2000, Commission v Portugal
♦ C-84/98 - Judgement 4 July 2000, Commission v Portugal
♦ C-170-71/98 - Judgement 1999-09-14, Commission v Belgium
♦ C-70/99 - Opinion 6 March 2001, Commission v Portugal
♦ C-70/99 - Judgement 26 June 2001, Commission v Portugal
♦ C-160/99 – Opinion 30 March 2000, Commission v France
♦ C-160/99 - Judgement 13 July 2000, Commission v France
♦ C-205/99 – Judgement 20 February 2001, Analir and Others
♦ C-430/99 - Opinion 20 September 2001, Sea-Land Service
♦ C-430/99 - Judgement 13 June 2002, Sea-Land Service
♦ C-435/00 - Judgement 14 November 2002, GEHA Naftiliaki and Others
♦ C-435/00, Opinion 9 July 2002 , GEHA Naftiliaki and Others
♦ C-295/00 – Opinion 25 October 2001, Commission v Italy
♦ C-295/00 - Judgement 19 February 2002, Commission v Italy

Several cases are related to national subsidies:

♦ C-15/98- Opinion 13 April 2000, Italy v Commission
♦ C-105/99- Opinion 13 April 2000, Italy v Commission
♦ C-400/99 - Opinion (admissibility)29 March 2001, Italy v Commission
♦ C-400/99 - Judgement 9 October 2001, Italy v Commission
♦ C-53/00 - Opinion 8 May 2001, Ferring
♦ T-116 & 118/01 - Judgement 5 August 2003, P&O European Ferries (Vizcaya) v Commission

The crew and manning issues are closely related to free movement of persons. Some few cases are related to trade in shipping services.

♦ C-62/96 - Judgement 27 November 1997, Commission v Greece
♦ C-163/96 - Judgement 1998-02-12, Raso
♦ C- 47/02 - Opinion of 12 June 2003, Anker and Others

These cases will be analysed in due turn.

4.2.5. The Extraterritorial Reach

The main objective of this chapter is to investigate the geographic reach of the E.U. competition law with a special emphasis on trade in shipping services. The first question is who possess the residual right, the E.U. or the Member States (Section A)? Then comes an introduction to the general extraterritoriality principles of E.U. competition law (Section B). In Section C the focus is on the E.U. comprehension of international law limitations to national jurisdiction *ratione territorae* as interpreted by American trade embargo provisions and the (mainly) 1986 Maritime Service Regulation. The main focus is not on limitations that elevate from neither Law of the Sea nor general principles of international law.

A. Externality – as illustrated by competition law cases

Both codified and case law is illustrative of the fact that the E.U. Treaties do not prevent the application of E.U. law outside of E.U.-territory. The purpose of this Section is to illustrate the E.U. self image on its own extraterritorial competency. Only indirectly focus is on E.U. law that relates to international law.[125] E.U. law has several provisions that deal with extraterritorial application.[126] One provision is EC Treaty Article 49(2),

[125]For a general approach on extraterritoriality effects s*ee, e.g.*, Lori Fishler Damrosch et al., International Law: Cases and Materials 1134 (4th ed. 2001).

which states that services provisions may be extended to "nationals of a third country who provide services and who are established within the Community."[127] In the same respect, Article 60(2) entitles Member States, "for serious political reasons and on grounds of urgency, [to] take unilateral measures against a third country with regard to capital movements and payments."[128]

The extraterritorial application of E.U. law is, however, not limited to instances explicitly mentioned. Extended effects may also follow from an implicit reading of E.U. law. This is clearly the case under competition law, exemplified by the *Dyestuff* case[129] and *Euroemballage* case.[130] I will first look at the oldest case related to EC Treaty Article 81(1) – the *Dyestuff* case, where jurisdiction was upheld over concerted trade practices:

> The applicant, whose registered office is outside the Community, argues that the Commission is not empowered to impose fines on it by reason merely of the effects produced in the Common Market by actions which it is alleged to have taken outside the Community.
> Since a concerted practice is involved, it is first necessary to ascertain whether the conduct of the applicant has had effects within the Common Market.[131]
> …
> The applicant objects that this conduct is to be imputed to its subsidiaries and not to itself.
> The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.[132]
> In effect the Telex messages relating to the 1964 increase, which the applicant sent to its subsidiaries in the Common Market, gave the addressees orders as to the prices which they were to charge and the other conditions of sale which they were to apply in dealing with their customers.
> In the absence of evidence to the contrary, it must be assumed that on the occasion of the increases of 1965 and 1967 the applicant acted in a similar fashion in its relations with its subsidiaries established in the Common Market.
> In these circumstances the formal separation between these companies,

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[126] For a discussion on the E.U. extraterritorial influences under ship technicalities requirement, see P. Ørebech, *The Northern Sea Route: Conditions For Sailing According To European Community Legislation With A Special Emphasis On Port State Jurisdiction* (Fridtjof Nansen Institute 1995) (shorter version published in Law and Economics, 1995) and P. Ørebech, *The Northern Sea Route: Conditions For Participation According To WTO Legislation - With A Special Emphasis On The Non-Discriminatory Treatment Principles Of Most-Favoured-Nation- And National Treatment Clauses Under The General Agreement On Trade In Services* (Fridtjof Nansen Institute 1996) (also published in Law and Economics, 1997).

[127] Treaty Establishing the European Community, Mar. 25, 1957, art. 60(2), *available at* http://europa.eu.int/eur-lex/en/search/search_treaties.html. For more on the interpretation of this provision, see P. Ørebech & Douglas Brubaker, *Implications of GATS/EU Law for The Russian Northern Sea Route and Russian Barents Sea*. [hereinafter the E.U. ARCOP Project]

[128] Treaty Establishing the European Community, Mar. 25, 1957, art. 60(2), *available at* http://europa.eu.int/eur-lex/en/search/search_treaties.html.

[129] Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619.

[130] Case 6/72, Europemballage Corp. & Continental Can Co. v. Commission, 1973 E.C.R. 215.

[131] Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 661-62 paragraph 125-26.

[132] Id. at 662 paragraph 131-32.

> resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition.
> It was in fact the applicant undertaking which brought the concerted practice into being within the Common Market.
> The submission as to lack of jurisdiction raised by the applicant must therefore be declared to be unfounded. 83[133]

Since the parent company, Imperial Chemical Industries Ltd. (ICI), was incorporated in London (which in 1969 was outside the EEC), EC competition law was given direct extraterritorial application. As this case shows, the fines could easily have been addressed to the domestic subsidiaries regardless of the parent company's location. One important aspect of the Court's conclusion was its indifference to the composition of the "concerted practice." The Court's conclusion applied to *any* concerted practice, whether conducted by a single company composed of multiple subsidiaries or by different entities operated by separate legal persons.

The latter case relates to Continental Can Inc., a company that was incorporated in New York. The issue for adjudication was whether a take-over bid submitted by Continental Can was contrary to EC Treaty Article 82 (abuse of dominant position):

> The applicants argue that according to the general principles of international law, Continental, as an enterprise with its registered office outside the Common Market, is neither within the administrative competence of the Commission nor under the jurisdiction of the Court of Justice. The Commission, it is argued, therefore has no competence to promulgate the contested decision with regard to Continental and to direct to it the instruction contained in Article 2 of that decision. Moreover, the illegal behaviour against which the Commission was proceeding, should not be directly attributed to Continental, but to Europemballage.
> The applicants cannot dispute that Europemballage, founded on 20 February 1970, is a subsidiary of Continental. The circumstance that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company. This is true in those cases particularly where the subsidiary company does not determine its market behaviour autonomously, but in essentials follows directives of the parent company.
> It is certain that Continental caused Europemballage to make a take-over bid to the shareholders of TDV in the Netherlands and made the necessary means available for this. On 8 April 1970 Europemballage took up the shares and debentures in TDV offered up to that point. Thus this transaction, on the basis of which the Commission made the contested decision, is to be attributed not only to Europemballage, but also and first and foremost to Continental. Community law is applicable to such an acquisition, which influences market conditions within the Community. The circumstance that Continental does not have its registered office within the territory of one of the Member States is not sufficient to exclude it from the application of Community law.
> The plea of lack of competence must therefore be dismissed.[134]

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[133] Id. at 663 paragraph 138-42.

[134] Case 6/72, Europemballage Corp. & Continental Can Co. v. Commission, 1973 E.C.R. 215, 241-42 paragraphs 14-17.

Again, E.U. competition law had extraterritorial effects. The fact that Continental was fully incorporated outside of E.U. was no obstacle to the application of E.U. law. Compared to the U.S. position, which opts for an explicit congressional decision on the issue of legal extraterritoriality, the E.U. international law doctrine is expansive, non-reciprocal, and case law developed.

Professor R.Y. Jennings, who consulted for International Chemical Industries (ICI) Inc., expressed concern over whether EEC practice was in accordance with international law. "The contemporary practice of States is vigorously opposed to . . . the extraterritorial enforcement of anti-trust laws is not something which can be applied in one direction only."[135] However, the international law argument had little influence on the ECJ. The lack of reciprocal application did not ruin the validity of domestic law. One way of interpreting the Court's position is that the E.U., as a sovereign entity, may prescribe the geographical application of its own law as far and as long as international law does not explicitly bar it from doing so.86[136]

With this background setting, my focus in the continuation is the extraterritorial effects of shipping services codification. But first quick looks at the American embargo provision related to Cuba, Iran and Libya that was denounced by the E.U.

B. Extraterritorial Reach the American Way – as seen through "E.U. goggles" [137]

As stated, "double standards" have no place in international law. All subjects of the international societies of states face equal rights and duties. The E.U. cannot sustain requirements that E.U. claim that others cannot follow. *In casu*, the E.U. cannot on the one hand label the American statutes as illegal and on the other simultaneously follow identical legal provisions.

The purpose of this section is to portray the E.U. position to the American *international law violating and impeding* extraterritorial regulations and how far the 1996 E.U. *non-compliance order* to E.U. subjects in relation to the U.S. provisions, do reach.

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[135] Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 625.

[136] Which is similar to Danish Law, c.f. the Professor Alf Ross' position in the "Smoking in the streets of Paris" debate on Danish *jurisdictione ratione terrae*. *See* Alf Ross, Constitutional law § 18 (Nyt nordisk forlag, København 1966); Torsten Gihl, Public International law in Outline § 136 (Stockholm 1956). *But see* Max Sørensen, Juristen ["The Lawyer"] Legal periodical, Copenhagen 443 (1959); Torkel Opsahl, A Modern Constitution under Scrutiny 282, 289 (Tidsskrift for Retsvidenskap [J. Legal Science], Oslo 1962). [author's translations].

[137] *Please note that Section B. though perhaps theoretical here will be utilised as a reference in further work next year specifically related to shipping. Arguments will be made here that the EU may be estopped from demanding extraterritorial competence when itself has argued against such in cases against the U.S.*

iii. Presenting the cases

Four instances of foreign law are listed as violating international law in relation to extra-territorial application of such laws. All four originate in the American.[138] E.U. predicts that the listed instances of U.S. acts or regulations are contradictory to international law. Thus the legal consequences of these provisions is null and void *vis-à-vis* E.U. subjects:

> "No person referred to in Article 11 shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom" (1996 Third Country Regulation Article 5)

The *non-compliance order* do also relate to U.S. justification or public decisions:

> "No judgement of a court or tribunal and no decision of an administrative authority located outside the Community giving effect, directly or indirectly, to the laws specified in the Annex or to actions based thereon or resulting there from, shall be recognised or be enforceable in any manner (Article 4)

In all cases referred to in the Annex to the1996 Third Country Regulation, the E.U. subjects affected should engage in international trade or the movement of capital and related commercial activities between the Community and third countries. The group of persons affected according to E.U. interpretation, is E.U. legal subjects defined as:

1. any natural person being a resident in the Community and a national of a Member State,
2. any legal person incorporated within the Community,
3. any natural or legal person of the Member States established outside the Community or shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation
4. any other natural person being a resident in the Community, unless that person is in the country of which he is a national,
5. any other natural person within the Community, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity" (1996 regulation Article 11 and 1986 regulation Article 1 (2)).

As indicated, this listing includes natural and juridical persons. It covers persons that are residents, incorporated, or present within the E.U. Being a resident in the E.U. means: being legally established in the E.U. for a period of at least six months within

[138] See respectively National Defence Authorisation Act for Fiscal Year 1993, Title XVII 'Cuban Democracy Act 1992', sections 1704 and 1706, Cuban Liberty and Democratic Solidarity Act of 1996 and Iran and Libya Sanctions Act of 1996. Code of Federal Regulations) Chapter V Part 515 - Cuban Assets Control Regulations, subpart B (Prohibitions), E (Licenses, Authorisations and Statements of Licensing Policy) and G (Penalties).

the 12-month period immediately prior to the date on which, under this Regulation, an obligation arises or a right is exercised.88[139]

a) 1992 and 1996 American Democracy Acts related to Cuba[140]

In relation to the American Cuban Democracy acts of 1992 and 1996 respectively it is stated that all foreigners – hereunder also E.U. companies and natives – should comply with the American economic and financial embargo of Cuba. A breach is considered an offence if E.U. subjects do export to the American any goods or services of Cuban origin or containing materials or goods originating in Cuba either directly or through third countries. Since no modifications occur, this also incorporates merchandise having a rather small portion of Cuban origin in it. A breach is clear if merchandise has been located in or transported from or through Cuba to end up in the American. Sugar originating in Cuba that is being re-exported to the American without notification by the competent national authority of the exporter or importing into the American sugar products without assurance that those products are not products of Cuba, is particularly mentioned. E.U. subjects do also breach U.S. provisions if abusing the "freezing [of] Cuban assets", and if "going into financial dealings with Cuba".

The E.U. propose that the prohibition to the load or unload of such freight from a vessel in any place in the American or to enter an American port with such *contrabande* on board contradicts international law. The American further refuses to import any goods or services originating in Cuba and to import into Cuba goods or services originating in the American.

The U.S. provisions do also impede financial dealings involving Cuba, hereunder trafficking which is the notion of "use, sale, transfer, control, management and other activities to the benefit of a person".

The E.U. lists damages that apparently is contradictory to international law, as follows: "Legal proceedings in the American, based upon liability already accruing, against E.U. citizens or companies involved in trafficking, leading to judgements/decisions to pay compensation to the American party. RefAmericanl of entry into the American for persons
involved in trafficking, including the spouses, minor children and agents thereof" (The 1996 Third Country Regulation, the Annex, Acts paragraph 2 *in fine*).

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[139] 1996 Regulation note 4.

[140] See National Defence Authorisation Act for Fiscal Year 1993 Title XVII Cuban Democracy Act 1992, sections 1704 and 1706. The consolidated requirements are found in Title I of the Cuban Liberty and Democratic Solidarity Act of 1996.

b) 1996 American Sanctions Act related to Iran and Libya

In relation to *1996 American Iran and Libya Sanctions Act* the said improper regulation require compliance with U.S. statutes not to invest in Iran or Libya oil and gas industry any amount greater than USD 40 million in a 12 months time. Investment means entering into a contract for the said development, or the guaranteeing of it, or the profiting therefrom or the purchase of a share of ownership therein. All investments that "directly and significantly" contributes to the enhancement of the Iranian or Libyan ability to develop their petroleum resources is covered by the provision. The notion of investment is covering the entering into oil contracts or the guaranteeing of it, or the profiting therefrom or the purchase of a share of ownership therein.

Due to the UN established Libya trade sanctions the situation is different from the Cuban Acts.[141] The prediction that this American investment ban is contradictory to international law is more dubious.[142] The E.U. propose that "measures taken by the US President to limit imports into American or procurement to American" are contrary to the UN embargo on Libya, and thus problematic. In the same direction a possible "prohibition of designation as primary dealer or as repository of American Government funds, denial of access to loans from American financial institutions, export restrictions by American, or refAmericanl of assistance by EXIM-Bank" (The 1996 Third Country Regulation, the Annex, Acts paragraph 3).92[143]

iv. The analysis

The main objective is to figure out the group of persons and their geographic location addressed by the American embargo-provisions listed in the 1996-regulation. The focus of interest is in the extraterritorial effects of the American ban on third state persons in relation to their activity on Cuba, Iran and Libya. The U.S. standards are compared with the extraterritorial application of the E.U. 1986 Maritime Service Regulation. The E.U. perception on the *null and void*, American acts and statutes indicates the simultaneous reach of the extraterritorial effects of the E.U. law.

The first issue for discussion is the substantial and geographical reach of the American embargo provisions. The second discussion relates to the person held reliable for breaking the American embargo provisions.

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[141] UN Resolutions 748 (1992) and 883 (1993) of the Security Council.

[142] See the E.U. implementation of these resolutions in Council Regulation (EC) Nr. 3274/93, OJ Nr. L 295, 30. 11. 1993, p. 1.

[143] Nr. 2271/96.

a) The jurisdiction ratione materiae and ratione terrae

The objective of this paragraph is to uncover the geographic and substantial frames of American provisions. The provisions differ between contraband of Cuban origin and illegal investment that is related to all three countries Cuba, Iran and Libya. E.U. anticipates that American provisions are illegal. In the continuation the following seven instances of embargo on trade is considered. This includes

1. load or unload Cuban freight from a vessel in any place in the American or to enter a American port,
2. ban on export to the American for any goods or services of Cuban origin or containing materials or goods originating in Cuba. One kind of merchandise that is especially mentioned is sugar. Re-exporting sugar to the American that originate in Cuba or importing into the American sugar products without assurance that those products are not products of Cuba, is prohibited,
3. to import into Cuba goods or services originating in the American,
4. dealing in merchandise that is or has been located in or transported from or through Cuba
5. freezing Cuban assets abroad,
6. the blocking of financial dealings involving Cuba. One such financial transaction is "trafficking" which involve the "use, sale, transfer, control, management and other activities to the benefit of a person".
7. investment into the Iranian and Libyan oil industry. There is no total ban, just roof of USD 40 million during a period of 12 months to the benefit of Iran or Libya developing their petroleum resources.

The puzzle is whether these prohibitions effect persons not citizens or residents of the American, beyond own territory. Clearly, the E.U. got a case if U.S. provisions interfere with the basic principles of third states exclusive jurisdiction over its territory, also including *"territoire flottant"* – the vessels flying its flag. American legal scientists are definite here: "A nation-state has jurisdiction to prescribe and enforce its laws throughout the territory subject to its sovereignty. It also has jurisdiction beyond its boundaries over its nationals and over ships and aircraft flying its flag."[144]

Hence the American balance on the edge of well recognised international law when directing foreign citizens operating abroad. This position is controversial, see the smokers in the "streets-of-Paris-discussion".[145] Important here is the position taken by the American and the E.U. respectively.

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[144] Joseph J. Kalo et al. Coastal and Ocean Law (American Casebook Series, West Group (2002) p. 308.

[145] *Supra* note 53.

With this general background in mind questions comes up whether the American provisions as listed in the numbers are within the frames of international law. I do here follow the chronological order as listed above.

Ad 1: The Port State issue

This is a question on the use of American harbour facilities. The first issue is whether the American prohibition against load or unload of Cuban freight from a vessel in an American
port do challenge international law in general and the E.U. jurisdiction in particular. The puzzle is whether the American is illegally invading the E.U. autonomy over vessels flying its flag.

In this case Port State jurisdiction is at task.[146] As a starting point, codified solutions to the port States competency is found under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) Article 218(1). Here port State is responsible for undertaking investigations and institute proceedings in respect of any discharge - in violation of applicable international rules and standards - from a vessel being voluntarily within the port of the enforcing state, as regards all kinds of incidents occurred outside internal waters, territorial sea or EEZ.

The Article 218 that relates to pollution only does however not exhaust the Port State jurisdiction for other purposes than environmental issues and in relation to vessels embarking to a port for the purpose of loading or unloading. Port State competency apart from environmental issues, is thus entirely under the customary international law regime. In relation to the American the customary law regime is in fact the only legal source, due to the non-ratification to the 1982 UNCLOS.96[147]

Referring to customary international law does however not solve the quiz. The port State legal position has been under discussion for a long time. Legal theory, *the French doctrine*, restricts Port State jurisdiction to shipping activities that have effects such as disturbance of port State navigation, safety and environment. Actions having purely internal effects on the crew and community on board are said to be the exclusive responsibility of the Flag State.

The Anglo-American practice presupposes, however, that Port State jurisdiction

[146] For a comprehensive discussion, see George C. Kasoulides: PORT STATE CONTROL AND JURISDICTION. EVOLUTION OF THE PORT STATE REGIME (Martinus Nijhoff Publishers 1993).

[147] The American recognises UNCLOS as expressing valid customary law (with the exception of Part IX – the Area) see the US position, 1976 Digest of US Practice in International Law, p.345: All issues governed by 198 UNCLOS is International Customary Law, with the exception of the Seabed Regime (Part IX + art.82).

over foreign ships in native ports is complete. Being complete, international agreements only may reduce Port States exclusive autonomy. As a matter of comity, however, the Port State may refrain from intervening unless there are harmful effects upon the coastal community. This is not a legally binding provision, since the Port State has exclusive competence to define the precise limits of its jurisdiction and to decide whether external effects have occurred or not. Obviously there are few, international provisions limiting Port State jurisdiction over foreign vessel's cargo when entering a foreign port.

Today, according to international customary law, coastal States exercise full and unlimited jurisdiction over foreign merchant vessels in their ports. A ship intentionally docking in a foreign harbour must comply with Port State legislation. In brief, the Port State jurisdiction over requirements for the goods and the handling of goods, either while in a harbour or prior to entering a harbour, is the most complete.97[148] I therefore conclude that contraband on illegal products is reserved for the American as Port State.

The final question is whether E.U. enjoys any bilateral or multilateral rights to the use of American harbour facilities without concern of merchandise. This is common in most trade agreements.[149] One such possibility is the General Agreement in Tariffs and Trade (GATT) that ban direct import restrictions, Since both the E.U. and the American is member to the 1994 WTO agreement, all kinds of technical barriers to trade is abandoned between these parties. However, it is products of an E.U. origin that enjoy protection, not the E.U. as such without respect of product origin. Since Cuba is not member of the WTO, and no Cuba-American bilateral agreement exist, Cuban products, despite the carrier is flying the flag of one E.U. Member State, do not enjoy protection under the WTO-agreement. The situation is then entirely under the auspices of customary international law.

Ad 2 & 4: Ban on export to the American for Cuban origin, located or transported merchandise or services under re-exportation by E.U. manufactories located in the E.U.

This is a ban on export to the American for any goods or services of Cuban origin or containing materials or goods originating in Cuba. Clearly, products entirely assembled in Cuba is illegal merchandise in the American. The ban reaches further, however. An issue of interest is whether foreign E.U. producers may include Cuban

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[148] For a more comprehensive analysis, see P. Ørebech, *The Northern Sea Route: Conditions For Sailing According To European Community Legislation With A Special Emphasis On Port State Jurisdiction* (Fridtjof Nansen Institute 1995) p. 18 ff.

[149] See for instance the 1960 European Free Trade Agreement (EFTA) and the 1992 European Economic Area Agreement, Protocol 9 Article 5.

components without ruining the E.U. origin. This issue is regulated by the ban on export to the American "for any goods or services of Cuban origin or containing materials or goods originating in Cuba". The concept of "or containing" prescribes a product that embodies even minor ingredients of Cuban origin. In reality this is an American ban on E.U. manufactories located in E.U. against incorporating whatever component preferred, even if Cuban produced. Let's say Swedish mustard includes sugar originating in Cuba. Is such a product contraband in the American? Is the American entitled to direct legal subjects incorporated in countries beyond U.S. territories?

This question relates to the discussion on the Danish smoking ban in the streets of Paris. Is such a ban valid? Whether national state' regulation require an explicit or at least tacit legal entitlement qualifies the answer. Hereunder lies the question whether national states are – according to the sovereignty paradigm – entitled to everything that is not explicitly prohibited or transferred to others. To become valid, do the American extraterritorial regulations need international recognition?

The answer is partly dependent upon whether residual rights belong to national states? As indicated (in Section A) national states enjoy exclusive autonomy on own territory. Thus foreign states is without competency in the same area.

Ad 3: Import into Cuba from the American

Without respect to nationality of the merchant, import into Cuba of goods or services originating in the American, is banned. Addressed in this paragraph is the American ban on trade in American produced merchandises with Cuba as final market. As it seems, this provision is domestic regulation more than extraterritorial implied U.S. exportation rule. Under no circumstances U.S. producers may sell goods which final destination is Cuba. Thus, trade partners should agree upon the contracting of a Cuban contraband, prohibiting i.a. E.U. trade partners from directly or indirectly to re-exporting US merchandises to Cuba.

The situation of interest here is however not the contract law issues, but the US prescriptions and sanctions that apply to E.U. buyers that despite contract obligations unjustifiably sell U.S. merchandise in Cuba. The situation is as follows: U.S. origin goods are sold to E.U. company, a receiver that ignores the Cuban contraband. The American subsequently prosecutes these infringements. If the Cuban exporting firm is incorporated in the E.U., the U.S. provisions imply extraterritorial effects. The issue of interest is whether such contraband rules are within the frames of international law.

If the location of contract is in the American, its domestic legislation is clearly valid. If contracts are signed abroad, and seller is incorporated in the American, domestic US

provisions are – according to principle of personality – binding upon the selling party. Say that the E.U. buyer despite the contract clause, do export the US-merchandise to Cuba, is the re-exportation a breach under the realm of US-law? Neither territorial nor personality principles are suitable here. However the place of *detrimental effects* is of relevance, see for instance the – already debated – cases under competition law, the *Dyestuff* case,[150] *Euroemballage* case100[151] and the *Imperial Chemical Industries (ICI) Case*.[152] Since the E.U. – against opposition from the well known international law professor and later ICJ judge Mr. Jennings – successfully claimed that external activity generating *internal detrimental effects*, is within the realm of domestic legislation, the E.U. cannot deny the validity of similar U.S. effects to E.U.-incorporated businesses.

The fact that a legal person is fully incorporated outside of the American cannot according to the E.U. extraterritorial approach invalidate the American legislation. Surely these provisions cannot be applied in one direction only.[153] The E.U. international law doctrine is perhaps even more expansive than the U.S. doctrine. Thus the E.U. is without strong arguments for objecting the extraterritorial enforcement of the American contraband trade laws.

Ad 5 & 6: Cuban assets abroad and financial dealings involving Cuba

The American ordered freezing of Cuban assets and the blockage of financial dealings is unlimited, i.e. it involves physical and legal persons without respect of nationality or place of incorporation. The place for the economic transactions is not confined to the American only, but involves all countries.

One such financial transaction is the ban on 'trafficking' in property, formerly owned by U.S. persons also including Cubans who have obtained U.S. citizenship, and expropriated by the Cuban regime. The concept of "trafficking" is broad involving the "use, sale, transfer, control, management and other activities to the benefit of a person". We thus find that no limitations exist on the place of trespassing, for instance an E.U. incorporated firm that in Germany offers a Cuban residence for lease or sale is under the influence of this American legislation.

Ad 7: Investment into the Iranian and Libyan oil industry

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[150] Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619.

[151] Case 6/72, Europemballage Corp. & Continental Can Co. v. Commission, 1973 E.C.R. 215.

[152] Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 661-62 paragraph 125-26.

[153] Case 8/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 625.

There is no total ban, just roof of USD 40 million during a period of 12 months to the benefit of Iran or Libya developing their petroleum resources.

b) The jurisdiction ratione personae

• E.U. subjects that do export to the American any goods or services of Cuban origin or containing materials or goods originating in Cuba either directly or through third countries. This includes any merchandise that in its production history has been located in or transported from or through Cuba to end up in the American.
• E.U. subjects that abuse the "freezing [of] Cuban assets", or is "going into financial dealings with Cuba".

C. The Extraterritorial Reach of Norway Provisions on Iran and Libya

The legal subjects accountable for adapting to the E.U. countermeasures – that is identical to the group of addressees to the American embargo provisions – should be compared with the group of *jurisdictione ratione personae* of non-member countries to the E.U., in casu Norway. The comparative study raises the following question: How does Norway receive the two UN resolutions of Libya? And which embargo measures are allowed under Norwegian domestic legislation?[154] Do the American and E.U. provisions incorporate these groups of addressees identical to those persons?

D. The Extraterritorial Reach of E.U. Provisions on Trade in Shipping Services

The 1986 Maritime Service Regulation of the E.U. regulates shipping trade not only in E.U. harbours and waters, but also when on the high seas and in foreign territories. The E.U. legislative competency is however limited because neither all nationals nor vessels are under the influence of the E.U. shipping *acquis*. Of course natives and incorporated companies of the Member States are under the trade in shipping services provisions. The 1986 regulation do apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and under these subjects control, provided that their vessels are registered in a Member State (see paragraph i).

Sometime ships flying non-member states flag may qualify for domicile state jurisdiction, if the genuine link between owner and the registry of the Flag State is lacking.104[155] *In casu* a Domicile State enjoys jurisdiction in relation to legal

[154] See the Norway Act on the implementation of UN Iran sanctions of June 6th 1980.

consequences not covered by the Flag State over natives of E.U. Member States regardless of their ships being re-flagged to a State-of-Convenience registry.[156]

The provisions of 1986 read in connection with the 1996 Third Country Regulation define the geographical reach of the E.U. law.106[157]

4.2.6. The Substantial Law of Trade in Shipping Services

(not yet analysed).

5. Russian Arctic Fees – An Example

With the relevant WTO/GATS and E.U. provisions outlined, a summary of the issue of NSR navigation fees in the Russian Arctic will be briefly addressed as an example.

Under LOSC Article 234 coastal States have the obligation to adopt and enforce non discriminatory environmental provisions. The main thrust of the Russian provisions is based upon environmental protection and safety, thereby seemingly implying that *all* vessels including Russian are encompassed. The principles are Stated under Article 2 of the 1990 Rules[158] to be to regulate navigation free from discrimination for navigational safety and to prevent, reduce and control marine pollution caused by the presence of ice. All vessels including State regardless of nationality are subject under Articles 1.4. and 2, and the implication of the supporting legislation is the same.

However concerning 'fees for services rendered', set forth in Article 8.4. of the 1990 Rules, there may be questionable compliance with the requirement of non discrimination. Article 8.4. requires vessels navigating the NSR to pay for services rendered by the Marine Operation Headquarters (MOH) and the Northern Sea Route Administration (NSRA) in accordance with the adopted rates. Apart from the question of non discrimination the issue remains whether fees themselves fall outside the scope of 'due regard to navigation' under Article 234. As noted, it seems improbable that the current Russian fee rate, of $3.33 per ton to $73.02 per ton depending upon cargo, is required of the Russian vessels.

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[155] For the Law of the Sea issues see P. Ørebech: Hva kan gjøres med priatfiskerne? En rettslig og rettspolitisk gjennomgang av norsk domisilstatsjurisdiksjon på det åpne hav. [What to do with the fishing pirates? A legal and legislative analysis on Norwegian Domicile Jurisdiction on the High Seas] (Retfaerd, Nordic Journal of Law, Copenhaven 2001) p. 47, at p.61 ff.

[156] P. Ørebech, supra note 42, at p. 71.

[157] Nr. 2271/96.

[158] 'Regulations for Navigation on the Seaways of the Northern Sea Route', in accordance with the U.S.S.R. Council of Ministers Decision No. 565 of 1 June 1990 and approved by the U.S.S.R. Minister of Merchant Marine, 14 September 1990 (1990 Rules). Russian text published in *Izveshcheniya Moreplavatelyam* (Notices to Mariners), No. 29, 18 June 1991; English translation published in *Guide to Navigating Through the Northern Sea Route* (St. Petersburg: Head Department of Navigation and Oceanography, Russian Ministry of Defence, 1996), pp. 81–4.

This raises the issue whether non discrimination is meant only to be *among* foreign vessels of different nationalities, or also *between* foreign vessels and Russian vessels. The better view appears to be upon analysis that related to Article 234, both Russian and foreign vessels are probably encompassed, especially since that is what seems stated explicitly in the 1990 Rules.[159] Thus, the fees, if justified under Article 234, must apply to all vessels, and the probable Russian practice on this point is contrary.

It is difficult to examine specific Arctic State practice on this issue which may be contrary, since it is only Russia which appears to have a blanket fee structure. Passage rights under both the Canadian and the U.S. legislation are not dependent upon the payment of fees.[160] The Russian authorities indicate a possible relaxation under Articles 8.1.–.3. of the 1990 Rules of initial 'control of navigation', if the vessels and captains are familiar, however the issue of fees has not been mentioned.[161]

6. Conclusions

Tentative conclusions include the following. Related to the WTO/GATS and E.U. provisions, there is obvious harmonisation required of the Russian NSR navigation fees under the principles of treatment-no-less favourable and national treatment. Further, mandatory restrictions, regulations, taxes, fees and public legislation are required harmonised under the principles noted. As part of this they must be published promptly in accordance with GATS requirements on transparency. Otherwise, once informed, other Members may respond quickly and challenge Russian measures before a WTO Panel. The same may be maintained as related to any unequal technical and safety requirements which create unequal conditions of competition. Harmonisation must be affected towards Community norms relating to the technical standard of ships, manning, the handling of goods, waste, equipment, and other the transportation requirements, in ports.

From the above it is thus necessary that any mandatory restrictions, regulations, taxes, fees and public legislation related to access to the Russian Barents Sea and the NSR be made known. This applies as well to Russian norms related to the technical standard of ships, manning, the handling of goods, waste, equipment, and other the transportation requirements, related to Community ports.

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[159] See R. D. Brubaker, *Environmental Protection of Arctic Waters – Specific Focus the Russian Northern Sea Route*, (forthcoming, Kluwer Law International, Series - International Straits of the World, The Hague), pp. 69 and 121, 124.

[160] See Y. Ivanov, A. Ushakov and A. Yakovlev, 'Russian Administration of the Northern Sea Route – Central or Regional?', *INSROP Working Paper* No. 106, (1998), IV.2.5.', 19-20.

[161] A. Ushakov, 'Interview', 24 February 1994, Moscow. A. Ushakov is Deputy Director of the NSRA. Flag State was not indicated to play any role.

With regards to the Barents Sea and designation of PSSA's under law of the sea, the Russian Foreign Ministry appears satisfied in its relations generally with Norway including negotiations of a boundary delimitation and the workings of the Joint Fisheries Commission administered by Norway and Russia. A perception of good administration of any PSSA's established by Norway is expected, as well as good co-operation with Norwegian oil companies. The only requirement demanded is that the areas be specifically defined, reasonably sized and the 'appropriate associated measures' enumerated. The view from the Russian Ministry of Natural Resources may however carry weight in the matter. Should controversy in Norway be settled in favour of establishing PSSA's in the Barents Sea, it thus appears as long as these constraints are satisfied, there would be little problem in doing so.

As regards GATS and E.U. competition and safety law, it is still to early to come to any definite conclusions. It appears, however, in spite of probable Russian membership in WTO within the next few years, the GATS regime governing shipping is still under formation and will take some years before definite guidelines appear. Thus the E.U. law will probably be the one of the main focuses of the eventual paper, focusing on extra territoriality.

Appendix I

The relevant E.U. legal sources

A. The provisions

♦ Council Regulation (EEC) Nr. 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries
♦ Council Regulation (EEC) Nr. 3573/90 of 4 December 1990 amending, as a result of German unification, regulation (EEC) Nr. 4055/86 applying the principle of freedom to provide services to maritime transport between member states and between member states and third countries
♦ Council Regulation (EC) Nr. 3051/95 of 8 December 1995 on the safety management of roll-on/roll-off passenger ferries (ro-ro ferries)
♦ Council Regulation (EC) Nr. 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom
♦ Annex 2: Dispute Settlement Understanding

B. The decisions:

♦ 87/475/EEC: Council Decision of 17 September 1987 relating to maritime transport between Italy and Algeria
♦ 93/82/EEC: Commission Decision of 23 December 1992 relating to a proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450: Cewal) of the EEC Treaty
♦ 93/125/EEC: Commission Decision of 17 February 1993 on Spain's request for adoption by the Commission of safeguard measures under Article 5 of Regulation (EEC) Nr. 3577/92 against applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)
♦ 93/396/EEC: Commission Decision of 13 July 1993 on Spain's request for adoption by the Commission of a prolongation of safeguard measures pursuant to Article 5 of Regulation (EEC) Nr. 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)
♦ 94/800/EC: Council Decision of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994)
♦ 94/980/EC: Commission Decision of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.446 - Trans-Atlantic Agreement)
♦ 2001/156/EC: Commission Decision of 19 July 2000 on the State aid implemented by Spain in favour of the maritime transport sector (new maritime

public service contract)
♦ 2001/247/EC: Commission Decision of 29 November 2000 on the aid scheme implemented by Spain in favour of the shipping company Ferries Golfo de Vizcaya
♦ 2001/822/EC: Council Decision of 27 November 2001 on the association of the overseas countries and territories with the European Community ("Overseas Association Decision")
♦ 2001/851/EC: Commission Decision of 21 June 2001 on the State aid awarded to the Tirrenia di Navigazione shipping company by Italy
♦ 2002/149/EC: Commission Decision of 30 October 2001 on the State aid awarded by France to the Société nationale maritime Corse-Méditerranée (SNCM)
♦ 2002/868/EC: Commission decision of 17 July 2002 on the aid scheme implemented by Italy in order to reduce the number of single-hull tankers older than 20 years in the Italian tanker fleet.

C. The case law (1) - competition

♦ C-395/96-P Opinion of 29 October 1998, Compagnie Maritime Belge Transports v Commission
♦ C-364/99 – Order of 14 December 1999, DSR-Senator Lines v Commission
♦ C-169/99 – Judgement of 29 March 2001, Portugal v Commission
♦ T-395/94 – Judgement of 28 February 2002, Atlantic Container Line v Commission
♦ T-86/95 – Judgement of 28 February 2002, Compagnie générale maritime and Others v Commission
♦ T-191/98 & 212-14/98 - Judgement, 30 September 2003, Atlantic Container Line and Others v Commission
♦ T-59/99 - Judgement 11 December 2003, Ventouris v Commission
♦ T-66/99 - Judgement 11 December 2003, Minoan Lines v Commission
♦ T-213/00 - Judgement of 19 March 2003, CMA CGM and Others v Commission
♦ C-34/01, C-37 & 38/01 - Opinion of 7 November 2002, Enirisorse

D. The case law (2) – transportation

♦ C-176/96 - Judgement 11 June 1998, Commission v Belgium
♦ C-266/96 - Judgement 18 June 1998, Corsica Ferries France
♦ C-266/96 - Opinion 22 January 1998, Corsica Ferries France
♦ C-62/98 - Judgement 4 July 2000, Commission v Portugal
♦ C-84/98 - Judgement 4 July 2000, Commission v Portugal
♦ C-170-71/98 - Judgement 1999-09-14, Commission v Belgium
♦ C-70/99 - Opinion 6 March 2001, Commission v Portugal

♦ C-70/99 - Judgement 26 June 2001, Commission v Portugal
♦ C-160/99 – Opinion 30 March 2000, Commission v France
♦ C-160/99 - Judgement 13 July 2000, Commission v France
♦ C-205/99 – Judgement 20 February 2001, Analir and Others
♦ C-430/99 - Opinion 20 September 2001, Sea-Land Service
♦ C-430/99 - Judgement 13 June 2002, Sea-Land Service
♦ C-435/00 - Judgement 14 November 2002, GEHA Naftiliaki and Others
♦ C-435/00, Opinion 9 July 2002 , GEHA Naftiliaki and Others
♦ C-295/00 – Opinion 25 October 2001, Commission v Italy
♦ C-295/00 - Judgement 19 February 2002, Commission v Italy

E. The case law (3) - subsidies

♦ C-15/98- Opinion 13 April 2000, Italy v Commission
♦ C-105/99- Opinion 13 April 2000, Italy v Commission
♦ C-400/99 - Opinion (admissibility)29 March 2001, Italy v Commission
♦ C-400/99 - Judgement 9 October 2001, Italy v Commission
♦ C-53/00 - Opinion 8 May 2001, Ferring
♦ T-116 & 118/01 - Judgement 5 August 2003, P&O European Ferries (Vizcaya) v Commission

F. The case law (4) – free movement of persons

♦ C-62/96 - Judgement 27 November 1997, Commission v Greece
♦ C-163/96 - Judgement 1998-02-12, Raso
♦ C- 47/02 - Opinion of 12 June 2003, Anker and Others

The analysis of these cases is presently under way.