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PIERRE THÉVENIN

Soviet and Russian Approach to the Law of the Sea: Liberalism and Local Resistance

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TABLE OF ACRONYMS

- ABNJ: Areas Beyond National Jurisdiction.
- BBNJ: Biodiversity Beyond National Jurisdiction.
- CLCS: Commission on the Limits of the Continental Shelf.
- CTSCZ: (1958) Convention on the Territorial Sea and Contiguous Zone.
- EIA: Environmental Impact Assessment.
- EEZ: Exclusive Economic Zone.
- LOSC: Law of the Sea Convention.
- MGR: Marine Genetic Resources.
- MGIMO: Moskovskiĭ Gosudarstvennyĭ Institut Mezhdunarodnykh Otnosheniia, translated as Moscow State Institute of International Relations.
- MPA: Marine Protected Areas.
- NM: nautical miles.
- NSR: Northern Sea Route.
- UNCLOS III: Third United Nations Conference on the Law of the Sea.
- USA: United States of America.
- USSR: Union of Soviet Socialist Republics.

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III. Thévenin, P. Back to the USSR: The Consequences of the 1965 Soviet Decree №331-112 'On the Procedure for Navigation of Foreign Ships in the Straits Along the Track of the Northern Sea Route' on Today's Navigation Through the Russian Arctic Straits. – Ocean Development and International Law. Forthcoming.

IV. Thévenin, P. The Caspian Sea Convention: New Status but Old Divisions? – 44 Review of Central and East European Law 2019.

INTRODUCTION

A) Object of the Study

The object of this PhD thesis is to analyse the particularities of Soviet and Russian approaches to the law of the sea. More precisely, it seeks to elucidate how the law of the sea is used and understood by contemporary Russia and how it was understood by its State-predecessor, the Soviet Union. Three general overarching questions will guide this study. Does Russian exceptionalism exist in this field of law and, if so, why? How can it be characterized? Does the contemporary Russian approach differ from the Soviet understanding and use of the law of the sea?

These questions are not new in the field of international law,[1] but their importance has been revived by the ongoing war in Ukraine.[2] Understanding the rationale for and anticipating Russia's action at sea has become more important than ever. Furthermore, in recent years, through its actions and declarations Russia has asserted its commitment to the tenets of the law of the sea, while at the same time locally contravening them. Russia's recent actions in the Arctic are a case in point. On the one hand, Russia's 2021 updated submission to the Commission on the Limits of Continental Shelf (CLCS) demonstrates its adherence to the Law of the Sea Convention (LOSC), while on the other its permit-based system for regulating navigation along the Northern Sea Route[3] (NSR*)* as well as its straight baselines system is controversial from the perspective of international law.[4] This apparent contradiction warrants the overarching research questions outlined above.

This study will focus on the law of the sea and on the study of the institutes and concepts defined in the Law of the Sea Convention (LOSC).[5] It will start in 1967 when the idea was born to draft the LOSC and end in 2022, when this study is submitted for defence. Maritime law, the equivalent of the law of the sea in private international law, will therefore be excluded from the scope of this thesis.

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1 See generally: Lauri Mälksoo. Russian Approaches to International Law, 3rd Edn. Oxford: Oxford University Press 2015, p 1. These questions, applied to various regions of the world, underpin Anthea Roberts' recent book: A. Roberts. Is International Law International?. Oxford: Oxford University Press 2017.

2 ERR News. Riigikogu condemns Russian aggression at extraordinary sitting. 24 February 2022 available online at: https://news.err.ee/1608510077/riigikogu-condemns-russian-aggression-at-extraordinary-sitting.

3 Office of the Legal Adviser (USA). Digest of United States Practice of International Law, 2015, p 526.

4 Robert Smith. Straight Baselines: USSR – 107 Limits in the Sea 1987; J. Ashley Roach, Robert W. Smith. Straight Baselines: The Need for a Universally Applied Norm. – 31 Ocean Development and International Law 2000, p 61; J. A. Roach and R. W. Smith, Excessive Maritime Claims 3rd Edn. Leiden: Martinus/Nijhoff 2012, p 312.

5 United Nations Convention on the Law of the Sea. Montego Bay. 10 December 1982, e.i.f 16 November 1994 [LOSC].

B) Literature Review

1. General Studies on Soviet and Russian Law of the Sea

Soviet and Russian law of the sea has been amply and thoroughly researched. From the existing literature, two existing streams of research need to be distinguished. The first stream deals with Soviet and Russian law of the sea in its globality, focusing on zones and concepts to analyse how the Soviet and Russian State and related doctrine understand and use them. In this stream, the work by William E. Butler is foundational.

His monograph "The Soviet Union and the Law of the Sea" is both the first and the most comprehensive study in English analysing the USSR's approach to the law of the sea.[6] He examined both State practice and doctrinal development from the late tsarist period until the late 1960s. Additionally, Butler analysed all the main institutes of the law of the sea existing at the time. For instance, he paid considerable attention to the legal regime of the territorial sea,[7] including the right of innocent passage,[8] as well as to the issue of the continental shelf.[9]

Of crucial significance for the present thesis are Butler's concluding remarks. At the end of his monographs, one of Butler's concluding reflections pertained to the evolution of the Soviet Union's approach to the law of the sea. He noted that from 1917 until 1948 or so, the USSR's approach to the law of the sea did not depart from that of non-socialist States, barring some references to international custom to contest unauthorized exercise of the right of innocent passage by warships.[10] Butler explained that this lack of specificity was due to the fact that the Soviet Union did not possess sufficient fleets to adopt a different approach but also that it was too reliant on foreign trade to do so.[11] However, according to Butler's observations, with the advent of the Cold War until the 1960s, the Soviet Union developed a more assertive approach revolving around protection of its coastal maritime expanses. This shift coincided, firstly, with the publication of doctrinal writings critical of the right of innocent passage and, secondly, with the

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6 William Elliott Butler. The Soviet Union and the Law of the Sea. Baltimore: Johns Hopkins Press 1971. N.B. France de Hartingh, conducted similar research in 1960, in French: France de Hartingh, Les Conceptions Soviétiques du Droit International de la Mer. Paris: Librairie Générale de Droit et de Jurisprudence 1960. However, given the important changes that took place in both Soviet Law and Soviet doctrine in the 1960s, this monograph rapidly became outdated. Butler's findings and conclusions better resisted the test of time. This is why Hartingh's book is not used as a point of reference. Butler also wrote a case study on Soviet territorial waters in 1967. Nonetheless, his main findings are reproduced and summarized in his 1971 monograph. See: William Butler. The Law of Soviet Territorial Waters: A Case Study of Maritime Legislation and Practice. London/New York: Frederick A. Praeger 1967.

7 Butler 1971 *op. cit.* note 6, pp 17–104.

8 *Ibid*, pp 51–70.

9 *Ibid*, pp 134–151.

10 *Ibid*, pp 198–199.

11 *Ibid,* p 199.

development of the doctrines of historic waters and closed seas.[12] As Butler notes, this change was prompted by Moscow's "obsession with encirclement and national security",[13] but also by the still deficient Soviet navy, as well as merchant and fishing fleets.[14] Finally, Butler wondered whether the changes he was witnessing as he was writing his monograph – which were geared towards asserting and enjoying the various freedoms of the high seas – were indicative of a new period in the Soviet approach to the law of the sea. Benefiting from hindsight, history and the opening of various archives, this thesis will answer that question.

Although other authors have tried to conduct similar exercises, Butler's monograph remains the yardstick for – as well as the bedrock of – all historical and legal studies of the Soviet and Russian approach to the law of the sea. That is why this thesis, like other studies in the field, will follow in Butler's footsteps and build on his findings. Tellingly, as will be more thoroughly explained in the section on methodology, drawing inspiration from Butler, this thesis defines the Soviet and Russian approach to the law of the sea, as a combination of both State practice and doctrine. Furthermore, it will endeavour to prolong Butler's study, which ended at the threshold of the 1970s and the early days of the LOSC negotiations. The thesis will start its examination of the Soviet and Russian approach to the law of the sea from 1967, when the LOSC negotiations started and end in 2022, with submission of this thesis. In this way, it will be able to account for the changes brought about by the LOSC negotiations.

In the first stream of literature are also found Grzybowski[15] and Solodovnikoff,[16] who have tried to emulate Butler's comprehensiveness in their analyses of the Soviet law of the sea. Like Butler himself, these authors tried to explain the development and specifics of the Soviet law of the sea. However, they encountered the same obstacle. They did not analyse the changes brought by the LOSC to Soviet State practice. Furthermore, their handling of Soviet doctrine is lacking compared to the work realized by Butler. Lastly, their work is mainly descriptive. They neither analyse nor try to explain, from an exterior perspective, the evolution of Soviet doctrine and State practice. Since then, no equivalent work has been published. In 2017, the Russian scholar Vasiliy Gutsulyak published a monograph entitled "International Maritime Law from the Russian Perspective". However, he does not offer an analysis of Russian approaches to the law of the sea. Rather, the book is a manual of maritime law and of the law of the sea.[17]

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[12] *Ibid.*

[13] *Ibid*, p 200.

[14] *Ibid,* 199.

[15] Kazimierz Grzybowski. Soviet Public International Law: Doctrines and Diplomatic Practice. Leiden/ Durham, N. C.: A. W. Sijthoff/Rule of Law Press, 1970.

[16] Pierre Solodovnikoff. La navigation maritime dans la doctrine et la pratique soviétiques: Étude de Droit International Public. Paris: Librairie Générale de droit et de jurisprudence 1980.

[17] Vasiliy Gutsulyak. International Maritime Law from the Russian Perspective. Irvine, CA: Universal Publishers, 2017.

2. Literature on Specific Regional or Conceptual Aspects of Soviet and Russian Law of the Sea

The second stream of research deals with specific aspects of the Soviet and Russian approach to the law of the sea, either focusing on a specific issue or a specific region, or both. This stream of literature is more abundant than the previous one. The reason behind this disparity is explained by the great degree of continuity that exists between Soviet and Russian approaches to the law of the sea. It is much more difficult to justify writing monographs about Soviet and Russian law of the sea in general when little has fundamentally changed since Butler wrote his 1971 monograph. That explains why only incremental developments – either local or topical – have been examined by the literature.

2.1. Literature on the Arctic

Tellingly, research on the Arctic constitutes a large part of this second research stream. The predominance of the Arctic reflects Russian activity in the region as well as the fundamental differences that exist between Western and Russian scholars surrounding the understanding of the legal regime regulating the Arctic. Of note is the work by Butler regarding the status and regime of the Arctic straits and Northern Sea Route (NSR) during the Soviet period. In this monograph he also assessed the then existing theories about the Arctic developed by Soviet scholars to justify Soviet sovereignty over it.[18] More recently, Erik Franckx has assessed Russian claims to the Arctic in a comparative perspective associating them with Canadian claims.[19] In 2005, Richard Brubaker conducted an exceptionally thorough analysis of the legal status of the Russian Arctic straits under both the 1958 Convention on the Territorial Sea and Contiguous Zone (CTSCZ) and under the United Nations Convention on the Law of the Sea (LOSC).[20] Jan Solski recently furthered this work by analysing the drafting history of the LOSC's Article 234[21] using American archives,[22] as well as the meaning of 'due regard for navigation and protection of the environment'.[23] Solski, like Franckx

[18] W. E. Butler. Northeast Arctic Passage Leiden: Sijthoff and Noordhoff 1978.

[19] Erik Franckx. Maritime claims in the Arctic: Canadian and Russian perspectives Leiden: Martinus Nijhoff Publishers, 1993.

[20] D. Brubaker. The Russian Arctic Straits. Leiden: Brill 2005; Franckx. Non-Soviet Shipping in the Northeast Passage, and the Legal Status of Proliv Vil'kitskogo – 24 Polar Record 1988.

[21] LOSC *op. cit.* note 5, Art. 234

[22] Jan Solski. The Genesis of Article 234 UNCLOS. – 52 Ocean Development & International Law 2021. Regarding the history of Art. 234, a reading of Justin Nankiwell's thesis is also important, see: J. Nankiwell. Arctic Legal Tides: The Politics of International Law in the Northwest Passage. PhD Thesis. Vancouver: University of British Columbia 2010.

[23] Jan Solski, The 'Due Regard' of Article 234 of UNCLOS: Lessons From Regulating Innocent Passage in the Territorial Sea. – 52 Ocean Development & International Law 2021.

before him,[24] has also extensively analysed the evolution of the NSR regulations[25] as well as other legislative developments pertaining to Arctic navigation.[26] Using archival research, part of the present thesis will contribute to clarifying existing navigational rights in the Arctic and the consequences for Russian State practice and doctrinal positions on the Arctic navigational regime.

Comparatively, the issue of Russia's Arctic continental shelf has been less studied in the literature. On this issue, Franckx is the first to have identified the existence of a debate within Russian scholarship.[27] This thesis, benefiting from the opportunity provided by Russia's recent submission to the CLCS, will further Franckx's work on Russia's doctrinal debate pertaining to the Arctic continental shelf.

2.2. Literature on Maritime Borders and Specific Seas

The maritime borders of the Soviet Union and the Russian Federation have also been a topic of particular interest for the literature. In 1994, Alex Oude Elferink published a monograph dedicated to analysis of Russia's maritime borders. This stands out amongst other works dedicated to Soviet and Russian maritime borders. Indeed, it is the only study that analyses all the maritime borders of the Soviet Union and the Russian Federation, with a view to inferring conclusions from these observations. Oude Elferink's study is particularly noteworthy as it takes into account, firstly, the USSR's legislation on maritime boundary delimitation; secondly, Soviet doctrinal writings on this question; and thirdly the making of almost all of Russia's specific border agreements existing at the time of writing this thesis.[28]

Oude Elferink's conclusions are twofold. On the one hand, the Soviet Union and Russia did not favour one delimitation method, resorting to both equidistance and special circumstances in different cases.[29] This attitude was also reflected in

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[24] Erik Franckx. The Legal Regime of Navigation in the Russian Arctic. – 18 Journal of Transnational Law and Policy 2009; Erik Franckx, The Shape of Things to Come: The Russian Federation and the Northern Sea Route in 2011. – 5 The Yearbook of Polar Law Online 2013.

[25] J. Solski. Russia. in R. C. Beckman *et al.* (*eds*), Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States. Leiden: Brill 2017; J. Solski, New Developments in Russian Regulation of Navigation on the Northern Sea Route. – 4 Arctic Review on Law and Politics 2013. J. Solski. The Northern Sea Route in the 2010s: Development and Implementation of Relevant Law. – 11 Arctic Review on Law and Politics 2020; J. Solski. Northern Sea Route Permit Scheme: Does Article 234 of UNCLOS Allow Prior Authorization?. – 35 Ocean Yearbook Online 2021.

[26] Jan Solski. New Russian Legislative Approaches and Navigational Rights within the Northern Sea Route. – 12 The Yearbook of Polar Law Online 2020, p 228.

[27] Erik Franckx. UNCLOS and the Arctic? – 4 Revue Belge de Droit International 2014, pp 166–177.

[28] A. G. Oude Elferink The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation, Leiden: Martinus Nijhoff 1994.

[29] *Ibid,* p 365.

the Soviet Union's position during the Third United Nations Conference on the Law of the Sea (UNCLOS III), where it chose not to commit to one or the other method.[30] According to Oude Elferink, during the Conference the only distinctive Soviet position on the matter was taken to ensure that maritime boundary delimitation would fall outside the scope of compulsory dispute settlement mechanisms.[31] Furthermore, Oude Elferink noted that Soviet and Russian practice on maritime delimitation had evolved hand in hand with developments brought about by negotiation of the LOSC, as agreements negotiated after the signing of the Convention reflect.[32] On the other hand, Oude Elferink underlined the Soviet inclination to establish joint regimes,[33] a practice which continued after the author concluded his work.[34]

Since Oude Elferink published his monograph, several articles have analysed agreements negotiated by Russia pertaining to its maritime borders such as those in the Baltic,[35] the Black Sea,[36] the Barents Sea[37] or the Caspian.[38]

Adjacent to the issue of maritime borders is the problem of the practice and understanding of the law of the sea in particular seas. On that topic, in 2013, Irina Nossova published a doctoral thesis where she analysed Russia's practice of the law of the sea in four adjacent seas – the Arctic Ocean, the Baltic, the Black Sea and the Caspian – through the lenses of two concepts: 'Great Power' and sovereignty.[39] Her conclusion echoed somewhat the conclusion reached by Oude Elferink. In particular, she underlined that Russia's practice of the law of the sea

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30 *Ibid,* p 330.

31 *Ibid.*

32 *Ibid,* pp 327 and 336–365.

33 *Ibid*, p 369.

34 See e.g.: Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean. Murmansk. 15 September 2010, e.i.f 7 July 2011 [2010 Barents Sea Treaty]; Convention on the Legal Status of the Caspian Sea. Aktau. 12 August 2018. [Aktau Convention]

35 Alexander Lott. The Estonian-Russian Territorial Sea Boundary Delimitation in the Gulf of Finland. 32 The International Journal of Marine and Coastal Law 2017.

36 Alessandro Ranieri. Il Regime Giuridico dell'Area Azov-Kerch. [The Legal Regime of the Azov-Kerch Region] – II Il Diritto Maritimo [Maritime Law] 2015.

37 Tore Henriksen and Geir Ulfstein. Maritime Delimitation in the Arctic: The Barents Sea Treaty. 42 Ocean Development & International Law 2011. Two years before Oude Elferink's work, Robin Churchill and Geir Ulfstein published an outstandingly thorough monograph on the Barents Sea border area. See: R. Churchill and G. Ulfstein. Marine Management in Disputed Areas: The Case of the Barents Sea. London: Routledge 1992.

38 B. Janusz-Pawletta. The Legal Status of the Caspian Sea. New York: Springer 2015; E. Karataeva, The Convention on the Legal Status of the Caspian Sea: The Final Answer or an Interim Solution to the Caspian Question? – 35 The International Journal of Marine and Coastal Law 2020.

39 Irina Nossova. Russia's International Legal Claims in its Adjacent Seas: The Realm of the Sea as an Extension of Sovereignty, PhD diss. Tartu: University of Tartu Press 2013.

was not unified but varied from sea to sea.[40] However, according to Nossova, Russia's approach to the law of the sea is guided by an extensive interpretation of sovereignty used in an attempt to gain absolute control over natural resources.[41] Her conclusions cannot be dismissed. Nevertheless, they could further benefit from a historical perspective, which the present thesis will provide.

In a similar vein, Alexander Lott used the 2007 case of the closure of the Estonian-Finnish Vironia commercial ferry line to analyse Russia's practice of the right of innocent passage in the Baltic Sea.[42] He concluded that Russia sometimes reverted to Soviet practice that existed prior to the 1988 Black Sea incidents and the signing of the Uniform Interpretation on the Rules of International Law governing Innocent Passage (Uniform Interpretation) in 1989.[43] He observed that this reversion to a restrictive practice of the right of innocent passage was used to reach short-lived geopolitical interests and respond to actions in the Baltic States.[44] Finally, Lott noticed that this practice occurred not only in the Baltic Sea but could also be observed in the Black Sea as evidenced by the 2018 Kerch Strait incident, where Russian coastguards arrested three Ukrainian ships and their crews.[45]

Over the past few years following the rendering of the Annex VII arbitral tribunal award on preliminary objections in the Dispute Concerning Coastal State Rights in the Black Sea, the Sea of Azov and the Kerch Strait,[46] and the 2018 Kerch Strait incidents,[47] much attention has been devoted to the status and regime applicable to the Sea of Azov and the Kerch Strait. Numerous scholarly publications have been devoted to this issue, analysing it from the perspective of the LOSC[48]

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40 *Ibid,* p 161.

41 *Ibid,* pp 161–164.

42 Alexander Lott. The (In)Applicability of the Right of Innocent Passage in the Gulf of Finland – Russia's Return to a Mare Clausum?– 36 The International Journal of Marine and Coastal Law 2021.

43 United States and USSR. Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage. Jackson Hole (WY) 23 September 1989. [Uniform Interpretation]

44 Lott *op. cit.* note 42, pp 260–262.

45 *Ibid*, p 261.

46 PCA Case No. 2017-06, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation*) [*Coastal State Rights* case], *Award Concerning the Preliminary Objections of the Russian Federation,* 21 February 2020. [Award on Preliminary Objections]

47 BBC News. Russia-Ukraine Tensions Rise after Kerch Strait Ship Capture. 26 November 2018 available online at: https://www.bbc.com/news/world-europe-46340283.

48 Valentin Schatz. The Status of Crimea and the Sea of Azov as a Jurisdictional Hurdle in Ukraine v. Russia: A Comment on the Unclos Annex VII Arbitral Tribunal's Award Concerning Preliminary Objections. – 46 Review of Central and East European Law 2021; V. Schatz and D. Koval. Russia's Annexation of Crimea and the Passage of Ships Through Kerch Strait: A Law of the Sea Perspective. – 50 Ocean Development & International Law 2019; Nilufer Oral. Ukraine v. The Russian Federation: Navigating Conflict over Sovereignty under UNCLOS. –

or by comparing the positions maintained by Ukraine and Russia.[49] This thesis will take into account these recent findings and analyse whether they are indicative of a change in the Russian approach to the law of the sea.

2.3. Literature on Soviet and Russian Legislation and Institutes in the Field of the Law of the Sea

Scholarly literature on Soviet and Russian legislation and other instruments pertaining to the law of the sea is not a topic having attracted great scientific interest outside Russia since the 1990s. The only exception is legislation pertaining to the NSR, for polar navigation is becoming all the more feasible as climate change progresses.[50]

This relative lack of interest is due to the fact that, overall, Soviet and Russian legislation implement(ed) the LOSC and did or do not significantly diverge from the Convention text,[51] although as the 1985 decree on the establishment of straight baselines shows, exceptions to this statement do exist.[52] In addition, since the signing of the LOSC, the law of the sea has become increasingly complex. This complexity has been reflected in Soviet and Russian legislation, which with time tends to become longer. Analysing such intricate pieces of legislation on their own has become void of scientific interest. Furthermore, if before the advent of internet publishing translating Soviet laws was an exercise in fundamental research which could later benefit comparatists and other practitioners, the fact that those laws are relatively easily found and translated online dulls the significance of that activity. In addition, the United Nations Division for Ocean Affairs and the Law of the Sea conducts this activity and publishes on current legal developments in its "Law of the Sea Bulletin".[53]

Nevertheless, Franckx's articles on updates to Soviet law need mentioning. In his articles about environmental protection,[54] marine scientific research in the

97 International Law Studies 2021; Stephen Lewis. Russia's Continued Aggression Against Ukraine: Illegal Actions in the Kerch Strait and Sea of Azov. – 164 The RUSI Journal 2019.

[49] Alexander Lott, The Passage Regimes of the Kerch Strait—To Each Their Own? – 52 Ocean Development & International Law 2021.

[50] See e.g. Solski 2013 *op. cit*. note 25; Solski, 2017 *op. cit.* note 25; Solski, 2020 *op. cit.* note 25; Solski 2021 *op. cit.* note 25. and Franckx *op. cit.* note 24.

[51] See e.g.: Oude Elferink *op. cit.* note 28, pp 133–151, on aspects of laws pertaining to maritime boundary delimitation.

[52] Smith, *op. cit.,* note 4; Roach and Smith, *op. cit.,* note 4, p 61.

[53] See e.g.: United Nations Division for Ocean Affairs and the Law of the Sea. – 102 Law of the Sea Bulletin 2022, pp 12–35.

[54] Erik Franckx. The New USSR Legislation on Pollution Prevention in the Exclusive Economic Zone. – 1 International Journal of Estuarine and Coastal Law 1986; E Franckx. Nature Protection in the Arctic: A New Soviet Legislative Initiative. – 6 International Journal of Estuarine and Coastal Law 1991.

Exclusive Economic Zone (EEZ),[55] and fisheries,[56] he examined new Soviet legislation in light of the requirements prescribed by the LOSC. On some occasions, Franckx put in context the position the Soviet Union maintained during negotiations of the LOSC, which allowed him to gauge the evolution of the Soviet position.[57]

Prompted by incidents taking place in the Soviet territorial sea, Franckx also published two articles on the right of innocent passage where he analysed Soviet doctrinal and legislative changes regarding the right of innocent passage.[58] He pointed out that even though substantial changes took place in Soviet doctrine and that the USSR maintained a liberal interpretation of the right of innocent passage during UNCLOS III, in practice Moscow still imposed requirements to prevent foreign vessels and warships from enjoying this right in the Soviet territorial sea.[59] Those articles were published before the issuance in 1989 by the United States and the USSR of the Uniform Interpretation on innocent passage.[60]

From this point onward, Soviet and Russian legislation and practice of the right of innocent passage conform more closely with the norms contained in the LOSC,[61] except for recent deviations identified by Lott.[62] Tellingly, after 1990 hardly any article has been published regarding this issue.[63]

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[55] Erik Franckx, Marine Scientific Research and the New USSR Legislation on the Economic Zone. – 4 International Journal of Estuarine and Coastal Law 1986; Erik Franckx, The Soviet Union Adapts Its Legislation on the Conduct of Marine Scientific Research in the USSR Economic Zone. – 5 International Journal of Estuarine and Coastal Law 1990.

[56] Erik Franckx. New Soviet Fishery Regulations Concerning the EEZ. – 11 Marine Policy 1987.

[57] Erik Franckx, *op. cit.* note 55, pp 370–374; Franckx, *op. cit.* note 56, pp 126–127.

[58] Franckx, The U.S.S.R. Position on the Innocent Passage of Warships Through Foreign Territorial Waters. – 18 Journal of Maritime Law and Commerce 1987; Erik Franckx. Further Steps in the Clarification of the Soviet Position on the Innocent Passage of Foreign Warships Through Its Territorial Waters. – 19 Georgia Journal of International Law and Comparative Law 1989.

[59] Franckx 1987, *op. cit.* note 58, pp 61–63.

[60] Uniform Interpretation *op. cit.* note 43.

[61] Federal′nyï zakon № 155-FZ. O Vnutrennikh Morskikh Vodakh, Territorial′nom More i Prilezhashcheï Zone Rossiïskoï Federatsii [Federal Law № 155-FZ. On the Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation]. 31 July1998, Art.14 [Federal Law № 155-FZ]; Postanovlenie Pravitel′stva Rossiïskoï Federatsii № 1102. O Pravilakh Plavaniia i Prebyvaniia Inostrannykh Voennykh Korableï i Drugikh Gosudarstvennykh Sudov, Ekspluatiruemykh v Nekommercheskikh Tseliakh, v Territorial′nom More, vo Vnutrennikh Morskikh Vodakh, na Voenno-Morskikh Bazakh, v Punktakh Bazirovaniia Voennykh Korableï i Morskikh Portakh Rossiïskoï Federatsii. [Russian Federation Government Decree № 1102 On the Navigation and Sojourn of Foreign Warships and Other Government Ships Operated for Non-Commercial Purposes in the Territorial Sea, Internal Sea Waters, in Naval Bases, in Warship Stationing Points and the Sea Ports of the Russian Federation]. 02 October1999.

[62] Lott, *op. cit.,* note 42.

[63] Lawrence Juda. Innocent Passage by Warships in the Territorial Seas of the Soviet Union: Changing Doctrine. – Ocean Development and International Law 1990; Lott, *op. cit.,* note 42.

This thesis will complement Franckx's work and further the observations he made in the articles mentioned above and examine whether Russian doctrine and State practice have evolved in terms of these issues. Examining national legislation is important in order to establish whether Moscow deviates from the established universal norm. In turn, the existence of deviations from the LOSC as well as lack thereof may indicate a change in Russia's approach to the law of the sea. Furthermore, from a comparative perspective, given the fact that Russia is one of the world's major maritime powers, analysing its legislation and comparing it to China's or to the BRICS's, may prove useful in helping to discover how non-Western industrialized countries are using their national legislation to modify the LOSC from within, without directly challenging the symbol that is the LOSC. Placed within the wider research agenda of comparative international law, this present thesis will prove useful in establishing whether regional and/or non-Western approaches to international law of the sea exist.

3. Position of this Thesis *vis-à-vis* the Existing Literature

Besides the remarks in the above sections, this thesis aims to continue and develop further the literature reviewed there. Following Butler and Oude Elferink, this thesis intends to study Soviet and Russian law of the sea in its totality to make continuities and changes apparent and explain them. It will also rely on historical research to provide context to Russia's current action at sea and put that action in perspective. Finally, as the existing literature shows: geography should be considered as the Soviet and Russian approach to the law of the sea varies in different seas.

Research conducted in this way is warranted, for the world has changed between 1967 – when the idea of drafting the LOSC appeared – and 2022. The Soviet Union has collapsed and consequently Moscow has lost part of its access to the World Ocean, especially in the Baltic and the Black Sea. It must now manage relations with its new neighbours. Furthermore, Moscow's relations with the West have evolved, not to mention that Russia must face the effect of climate change in the Arctic and the legal changes it may bring about.

In the light of these observations, it is reasonable to assume that Russia's approach to the law of the sea may have changed by comparison with the Soviet approach. Analysing these changes is therefore warranted. In turn, whether and how Russia's approach has evolved is justified in terms of correctly assessing and interpreting the significance of Moscow's actions at sea.

To do so, this thesis will rely on the partial results obtained by scholars, including the present author, when analysing aspects of the Russian and Soviet approach to the law of the sea. The thesis will then piece those results together in order to infer conclusions on the principles and motives underpinning the Soviet and Russian approach to the law of the sea since 1967, when the LOSC was conceived.

4. Value of this Research

Interest in conducting such an analysis of the Soviet and Russian approach to the law of the sea is multiple. Firstly, a work of this kind has not been realized since Butler's study in 1971.

Secondly, each of the articles assembled in this thesis has produced new knowledge and enriched the field. The first article, analysing the Soviet Union's actions during the LOSC negotiations, has opened one of the black boxes existing in the law of the sea: analysis of the Convention from the perspective of States rather than from the perspective of the instrument itself.[64] This work has demonstrated the efforts invested by the USSR and other maritime powers to try and shape the LOSC in a way that best suited their interests. This research has proved essential to understanding both why the USSR and Russia have seldom deviated from the norms prescribed in the LOSC and why such a high degree of continuity is present in Soviet and Russian law of the sea.

The second and third articles confirm the importance of the Arctic and the particular place it has held in Soviet and Russian law of the sea. Building on Erik Franckx's findings, the second article on the recent Russian submission has highlighted how legal doctrine on the Arctic has evolved through time and explained the rationale as well as the stakes behind Russia's defence of the concept of Arctic sectors.[65] The analysis presented also allows the reader to better understand the significance of the 2021 Russian submission to the Commission on the Limits of the Continental Shelf for the future of Russian scholarship on the Arctic.

Thanks to the original archival finding on which it is based, the third article has contributed to clarification of Russia's navigational regime applicable to the Arctic. Namely, it proves the existence of warships' right of innocent passage through most of the Arctic straits, examines how that right could be enjoyed and calls into question the soundness of some customary arguments brought forth by Russian scholarship to justify Russia's control over Arctic navigation.[66]

As other articles analysing the 2018 Convention on the Status of the Caspian Sea have since been published,[67] the novel character of the fourth article presented

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[64] Pierre Thévenin. A Liberal Maritime Power as Any Other? The Soviet Union during the Negotiations of the Law of the Sea Convention. – 52 Ocean Development & International Law 2021. [Liberal Maritime Power]

[65] Pierre Thévenin. Requiem for a Sector? Russia's Updated Arctic Submission to the CLCS and its Effect on Russian Doctrinal Debate about the Arctic Legal Regime. 36 Ocean Yearbook 2022. [Requiem for a Sector].

[66] Pierre Thévenin Back to the USSR: The consequences of the 1965 Soviet decree №331-112 'On the Procedure for Navigation of Foreign Ships in the Straits Along the Track of the Northern Sea Route' on today's navigation through the Russian Arctic Straits. – Ocean Development and International Law Forthcoming. [Back to the USSR].

[67] Karataeva *op. cit*., note 38; Il′ia S. Rozhkov. Konventsiia o pravovom statuse Kaspiiskogo moria: pervye itogi [Convention on the Legal Status of the Caspian Sea, First Conclusions], – Problemy Postsovetskogo Prostranstva [Post-Soviet Issues] 2021.

in this thesis has already faded somewhat.[68] Nevertheless, it confirms Oude Elferink's finding of the Soviet and Russian proclivity towards creation of joint regimes. Indeed, with regulation of access to the Caspian for ships flying a third State's flag and of sharing the seabed's riches, the 2018 Caspian Sea Convention in essence created a joint regime between the five coastal States bordering it.

Lastly, on a more practical level, it is the author's hope that the argument developed in the next section will prove of use for States, including Estonia, and other actors involved in maritime affairs to help understand and anticipate Russia's actions at sea so as to be best prepared for the various challenges these actions may pose. The author also appreciates that academic research on the law of the sea and the Soviet Union at the University of Tartu builds on the legacies of Professor Abner Uustal[69] and Doctor Artur Taska,[70] who were both active researchers during the Cold War.

C) Research Task and Central Postulates

1. Research Task

Russia defines itself[71] and is considered by foreign States as a continuation State of the USSR.[72] Therefore, the central task undertaken in the present thesis is an analysis of continuity. Building on results obtained by the scholars reviewed above, this thesis attempts to understand the principles and ideas underpinning the Soviet and Russian approach to the law of the sea. This scientific enterprise endeavours to elucidate whether the formal declared legal continuity between Russia and the USSR also exists on a substantive level as far as concerns understanding legal concepts and use of legal norms.

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[68] Pierre Thévenin. The Caspian Sea Convention: New Status but Old Divisions? – 44 Review of Central and East European Law 2019. [Caspian Sea Convention]

[69] A. Taska. Die Grenzen Des Küstenmeeres Estlands. Doctoral Thesis (1952), University of Kiel. Published in Lund in 1974. See also: Taska A. Rahvusvaheline Õigus. Lund: s.n 1977.

[70] A. Uustal. Mezhdunarodno-Pravoi Rezhim Territorial'nykh vod [International Legal Regime of Internal Waters]. Tartu: Tartu State University Press 1958; A. Uustal, Rahvusvaheline õigus V: Rahvusvaheline mere- ja ilmaruumiõigus. Tartu: Tartu State University Press 1977; See also: A. Uustal. Rahvusvaheline Õigus. Tallinn Eesti Raamat 1984.

[71] Federal'nyi Zakon №101-FZ O Mezhdunarodnykh Dogovorakh Rossiiskoi Federatsii [Federal Law №101-FZ on International Treaties of the Russian Federation] 15 July 1995, Art. 1.3. Russian scholarship also adopts this point of view although Russian scholars do not discuss it expressly. See e.g.: D.K Bekyashev and K.A Bekyashev. Tendentsii Razvitiia Pravovogo Rezhima Severnogo Morskogo Puti [Tendencies of Development of the Northern Sea Route Legal Regime]. – 12/2 Vestnik SPbGU. Pravo [Saint Petersburg State University Journal. Law] 2021, p 285.

[72] Ineta Ziemele. Is the Distinction between State Continuity and State Succession Reality or Fiction?. – 1 Baltic Yearbook of International Law 2001, pp 194–202.

The central research task analysed in this work is twofold. Firstly, it is to determine whether there are particularities in the Russian understanding and practice of the law of the sea compared to the mainstream understanding of the law of the sea that exists in the English-speaking West as symbolized by the Virginia Commentaries on the LOSC.[73] Secondly, it is to analyse if and how the Russian approach to the law of the sea differs from the Soviet approach.

The argument asserted in this thesis is that the Soviet and Russian approach to the law of the sea was and is liberal during international negotiations which are conceptual and ageographical. This is attested to by the Soviet and Russian attitude during international negotiations, Soviet and Russian implementation of the LOSC, and Soviet and Russian reception of the LOSC in its doctrine. This liberalism is justified by the fact that since the mid 1960s the USSR and Russia have become a maritime power. This status has once again been reaffirmed in the 2022 Maritime Doctrine of the Russian Federation.[74] The norms and principles contained in the LOSC, which it helped shape and develop, still correspond to its interests, which are preservation of high seas freedoms and the absence of a strong centralized authority controlling State activities at sea.

However, this Soviet and Russian approach is not entirely consistent. Regionally, in seas that it considers historically its own, Moscow circumvents the LOSC and asserts a revisionist view of the law of the sea to retain control over these maritime expanses. Russian revisionism is symbolized by resort to historical discourses by either the Russian State or doctrine to explain why the LOSC does not apply in a particular region and construct exceptional regimes applying instead. This has especially been the case in the Arctic and more recently in the Sea of Azov. This inconsistency is further reinforced by Moscow's tendency to create joint regimes at its maritime borders.

Before going further, it needs to be clearly stated that the notion of liberalism employed in the present thesis is to be understood in a Grotian sense in the context of the debate between *mare liberum* and *mare clausum* that has shaped the law of the sea for the past 400 years or so.[75] Here liberalism is used to mean advocating for the freedoms of the high seas and for free access to the ocean and its riches. This notion stands in opposition to the idea that States are sovereign upon large maritime expanses of the sea bordering their coasts, as was advocated by several Latin American States in the middle of the 20th century.[76] Furthermore, the notion of liberalism should not be understood in a normative way to mean

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[73] See generally: United Nations Convention on the Law of the Sea 1982: A Commentary. Nordquist *et al.* (eds). Dordrecht/Boston/London: Martinus Nijhoff 1985–2011.

[74] Morskaya Doktrina Rossiïskoï Federatsii [Maritime Doctrine of the Russian Federation]. Moscow. 31 July 2022, paras 7–8. [2022 Maritime Doctrine]

[75] On this debate see Tulio Treves. Historical Development of the Law of the Sea, in The Oxford Handbook of the Law of the Sea. Rothwell *et al.* (eds). Oxford: Oxford University Press 2015, pp 3–6.

[76] See e.g: Treves *op. cit.* note 75, pp 10–13.

that Russia supports a politically liberal agenda at sea. The present author does not attempt to make this argument, nor does he support it.

2. Central Postulates

Based on the literature review in previous sections, the following hypotheses will be issued. These will guide the research, as the present thesis will attempt to validate or invalidate. At this point, their veracity is important.

Following Butler's concluding observations, it will be posited that:

1) After it became a maritime power, in the middle of the 1960s, the Soviet Union advocated for a liberal approach to the law of the sea.

And since the Russian Federation considers itself a continuation State of the Soviet Union, the second hypothesis will be the following:

2) The Soviet Union and Russia share the same approach to the law of the sea.

Keeping in mind that the law of the sea is a branch of law anchored in geography, the third hypothesis will be:

3) The Soviet and Russian approach to the law of the sea is consistent in every region of the world, as well as during international negotiations which try to be universal and ageographical.

D) Research Methodology

To tackle the research task and check the veracity of each postulate, the following method will be developed.

1. The Notion of Approach

Although intuitively understood, the notion of approach requires further definition. In this thesis, the term will be used to mean a combination of both State practice and national academic doctrine.[77]

Combining the study of State practice as well as doctrine is especially relevant as doctrine tends to explain and justify State practice or even promote future positions. Even though the Russian academic landscape has evolved since the publication of Butler's monograph, reading Russian doctrine – like reading Soviet scholarship during the Cold War – equates to reading the State's mind to some extent. To support this position, the words of the late Oleg Khlestov – who long

[77] Butler *op. cit.* note 6, p 4.

served as the Director of the Russian Ministry of Foreign Affairs international treaties department – come to mind. In Khlestov's opinion: "International legal doctrine is closely connected with the foreign policy doctrine of the State, its foreign policy, and usually reflects the goals and tasks that the latter pursues in the international arena".[78] Furthermore, he added that "[t]The Russian doctrine of international law is progressive. In many ways, it corresponds to the official positions of our country."[79] Even though the correlation between the two is not perfect, it possesses predictive qualities.[80] The presence of debate within scholarship is not problematic. Rather, it seems to be indicative of a future crossroads lying ahead, where the State will have to make a choice to adapt its practice or not.

Furthermore, the idea that reading doctrine may help predict State action is not without sociological justification. Stemming from Pierre-Louis Six's research into the role of the Moscow State Institute of International Relations (RU: Moskovskiĭ Gosudarstvennyĭ Institut Mezhdunarodnykh Otnosheniia – MGIMO) and its alumni network during the Cold War,[81] it is not illogical to suppose that jurists as diplomats and civil servants working in the field of the law of the sea tend to share a similar training and thus world view. This conclusion is further reinforced by the fact that, in the Soviet Union and Russia, the walls separating the civil service and academia have been porous. A case in point demonstrating this assertion is the career of Roman Kolodkin, who is active as an academic and is simultaneously serving as a judge on the bench of the International Tribunal for the Law of the Sea.[82] Not to mention the fact that law-of-the-sea scholars are often consulted to inform State decisions before they are taken. For instance, Soviet academic jurists participated in the LOSC negotiations.[83] Similarly, the expert scientific council of the Russian Federation's maritime college, whose role is to guide Russia's maritime policy, comprises prominent scholars.[84] Reading one to enlighten the other therefore seems amply warranted.

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78 Mälksoo *op. cit.* note 1, p 80 quoting O.N. Khlestov, Rossiiskaya doktrina mezhdunarodnoga prava [Russian doctrine of International Law], 3 Evraziiskii juridicheskii zhurnal [Eurasian Juridical Journal] 2013, p 19.

79 *Ibid*, quoting the same source at p 22.

80 Butler *op. cit*. note 6, p 5.

81 Pierre-Louis Six. The Party Nobility Cold War and the Shaping of an Identity at the Moscow State Institute of International Relations (1943–1991). PhD Thesis. Florence: European University Institute, 2017.

82 International Tribunal for the Law of the Sea. Judge Roman A. Kolodkin (biographical note). Available at: https://www.itlos.org/en/main/the-tribunal/members/judge-roman-a-kolodkin/.

83 See e.g: Central Intelligence Agency. BGI-LOS 75-6 Law of the Sea Country Study: USSR 1975, pp 26–30.

84 Thévenin, Requiem for a Sector, *op. cit.* note 65, pp 499–500.

2. Thematic Scope of the Research

As briefly mentioned, in the first section of this thesis, the study will not consider maritime law, instruments signed under the auspices of the International Maritime Organization, or technical issues related to fisheries, marine scientific research and marine environmental protection.

The reason behind this choice is simple. These matters are too technical to prove of interest for this research, which aims to analyse the principles underpinning the Soviet and Russian approach to the law of the sea. Their high degree of technicality prevents the emergence of any political debate that could provide valuable information as to the Soviet and Russian approach to the Law of the Sea, which could be found elsewhere.

Furthermore, given the space limitations inherent to a doctoral thesis, it is impossible to focus on all aspects of the law of the sea. Therefore, each article collected in this thesis will aim to analyse a salient point of the Soviet and Russian law of the sea. The focus will be placed on the main maritime zones, the territorial sea, the EEZ, as well as the continental shelf. Navigational issues, such as navigation through straits, as well as problems relating to the exploitation of living and nonliving resources, will also be touched upon. In contrast, issues relating to marine scientific research, marine environmental protection as well as the technical elements of fishing regulations and anti-pollution measures will not be analysed. Indeed, these highly technical norms do not betray a specific understanding of the law of the sea.

Rather, this thesis focuses on the LOSC, the zones it regulates, as well as navigational and maritime boundary-related issues. Regarding the LOSC: besides its content, also examined are its negotiations, its interpretation, and its implementation.

3. Historical and Geographical Scope of this Research

The research in this thesis will start in 1967 and end in 2022. The choice of that date to start this research coincides with the start of the LOSC negotiations. Given the tectonic significance of that convention for the field of the law of the sea, there is no better starting point for research into the Soviet and Russian approach to the law of the sea. The research ends in 2022, when the thesis was deposited for defence.

In order to assess local variations of the Soviet and Russian approach to the law of the sea, this research does not limit itself to analysis of the approach to the law of the sea that the USSR and Russia showed the world, nor to implementation of the provisions of the LOSC in their national legislation. In common with Oude Elferink and other scholars, this thesis considers the Soviet and Russian approach in various regions.

However, not all regions are treated equally. The Arctic holds a prominent place in this thesis, which reflects the specificity of that ocean in the Soviet and

Russian approach. At the other end of the spectrum, the Pacific has not received the same degree of attention, which also reflects its place in Russian scholarship and State practice.

4. Research Methods

This doctoral thesis has been produced using the historical method. Indeed, analysis of the specifics of Russia's approach to the law of the sea demands that it be placed back into its historical context, to understand how and why this approach came to be in the first place. This in turn requires analysis of the Soviet approach to the law of the sea, which – again in turn – necessitates conducting historical research.

Within the framework offered by the historical method, several epistemological tools were used to gain knowledge and acquire the necessary evidence to produce the articles submitted for defence as well as this compendium as a whole.

The first article on the Soviet role during the LOSC negotiations[85] required archival research, as did the fourth on warships' right of innocent passage through the Russian Arctic straits.[86] The first article required an inquiry into what the USSR really did during the law of the sea negotiations. As no pre-existing account existed in the literature, one had to be composed and published.[87] The third article demanded that a piece of Soviet legislation be found in order to know its content. Albeit mentioned in passing in Soviet and Russian literature, no accurate description of this document existed. Therefore, archival research was required to locate and analyse it.[88]

The second article on the effects of the 2021 Russian submission to the CLCS on Russian doctrinal debate about the concept of the Arctic sector demanded genealogical research,[89] as did the fourth on the 2018 Caspian Sea Convention.[90] To write the second article, the history and evolution of the concept of the Arctic sector had to be retraced and described to contextualize the significance of the latest Russian submission to the CLCS. Regarding the fourth article, a similar method had to be applied in order to be able to gauge the significance of the recent Caspian Sea Convention.

Before going further, it needs to be underlined that, overall, this thesis is a piece of qualitative legal research. Indeed, it examines the Soviet and Russian approach to the law of the sea through systematic analysis of both its practice and doctrine, but also focuses on doctrinal aspects such as the evolution of legal concepts used in the law of the sea. Although statistical data was used in the first

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85 Thévenin Liberal Maritime Power *op. cit.* note 64.

86 Thévenin Back to the USSR *op. cit.* note 66.

87 Thévenin Liberal Maritime Power *op. cit.* note 64.

88 Thévenin Caspian Sea Convention *op. cit*. note 68.

89 Thévenin Requiem for a Sector *op. cit*. note 65.

90 Thévenin Caspian Sea Convention op. cit. note 68.

article to prove and illustrate the Soviet Union's transformation into a maritime power, this use of the quantitative method was marginal.[91]

5. Sources

The primary sources used in this thesis are mandated by our definition of approach as well as by our research task. Soviet and Russian doctrine has been considered as a primary source, since for the purpose of our study it constitutes an historical testimony of value. It forms a trace of the ideas and issues interesting the Soviet and Russian scholar at a given time, which is as valuable as a declaration of a Soviet diplomat during the LOSC negotiations, a law, or a draft regulation which constitutes traces of State practice.

5.1. Doctrine

Regarding Soviet and Russian doctrine, monographs and articles written by Soviet and Russian scholars between 1967 and 2022 about the issues mentioned in the second subsection of this part have been considered a primary source. Soviet and Russian literature and its debate have greatly guided the articles the author has previously written as well as the one he did not.

Not all Soviet and Russian authors were considered. Selection filters have been put in place. To be considered and analysed the author had to be at least a PhD candidate. Furthermore, they needed to have published at least one substantial analytical publication or to be quoted by an author meeting those criteria. Thus, PhD candidates having published *referats* were excluded from consideration. Institutional affiliations have not been taken into consideration in the selection process. As the second article will show, they were taken into consideration during the analysis, when relevant.[92]

Scholarly writings which are often absent from Western libraries were either obtained from research trips to the Russian State Library,[93] acquired from the online libraries Nauka Prava[94] and Cyberleninka.[95] or otherwise acquired on the website of the publisher or by contacting the publishing house.

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[91] Thévenin Liberal Maritime Power *op. cit.* note 64, pp 196–199.

[92] Thévenin, Requiem for a Sector, *op. cit.* note 65, pp 499–500, 514–515.

[93] Two research trips were carried out there. One was conducted between January and April 2020. Unfortunately, it was impeded by the Covid-19 pandemic. The second was conducted between September and December 2021.

[94] Elektronnaia Biblioteka 'Nauka Prava' [Digital Library Nauka Prava], available at: https://naukaprava.ru/

[95] Nauchnaia Elektronnaia Biblioteka 'KiberLeninka' [Scientific Digital Library Cyber-Leninka] available at: https://cyberleninka.ru/

5.2. State Practice

Regarding State practice a multitude of sources were used in order to take into consideration its various facets and expressions.

5.2.1. *Travaux Préparatoires* and Archival Sources

To establish the positions maintained by the USSR during the LOSC negotiations, the *travaux préparatoires* of the convention have been analysed.[96] French diplomatic archives have been used to confirm the information obtained from the *travaux préparatoires* as well as to know the actions led by the USSR between the negotiating sessions.[97]

Several reasons justify this specific choice of the French archives. Firstly, they were relatively easy and cheap to access compared to the American or English ones. Secondly, the present author was familiar with French diplomatic archives thanks to previous research projects. Thirdly, given the relatively good relations between the USSR and France during the Cold War, the author is certain of the quality and trustworthiness of the documents he could find in the French archives. In addition, the author was conscious of the bias that might have resulted from a French civil servant writing archival documents. Therefore, the author could interpret these documents with ease.

Lastly, regarding the negotiations of the LOSC, it is important to note that access to the archives of the Russian Ministry of Foreign Affairs was requested in November 2019 with a view to a trip in late January 2020 but access was denied.

5.2.2. Treaties, Laws and Regulations

Soviet and Russian treaties, laws and regulations were used to gauge implementation of the LOSC as well as their deviation from it.

The treaties concluded by the Soviet Union and Russia were found using the Russian Ministry of Foreign Affairs' dedicated database.[98] Russian laws were

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[96] The travaux préparatoires were accessed through the dedicated UN portal: UN Codification Division. Diplomatic Conferences: Third United Nations Conference on the Law of the Sea, available at: https://legal.un.org/diplomaticconferences/1973_los/

[97] Three trips were conducted to the French Diplomatic Archives. The first was in 2019, the second in July 2020 and the third in December 2020. Three trips were required as some documents needed to be vetted in order to be declassified prior to consultation. Due to the pandemic, the process took longer due to shortage of personnel to consult the documents. Furthermore, due to the pandemic, access to the archives was limited.

[98] Ministerstvo Inocstrannykh Del. Mnogostoronnye Dogovory [Ministry of Foreign Affairs [Of the Russian Federation]. Multilateral Agreements], available at: https://www.mid.ru/ru/foreign_policy/international_contracts/international_contracts/multilateral_contract/ and Ministerstvo Inocstrannykh Del. Dvukhstoronnye Dogovory [Ministry of Foreign Affairs [Of the Russian Federation]. Bilateral Agreements], available at: https://www.mid.ru/ru/foreign_policy/international_contracts/international_contracts/2_contract/.

acquired through the official portal of the Russian Federation,[99] while Soviet laws were acquired from books and manuals, as well open online databases of Soviet law, with the exception of the 1965 Soviet decree №331-112 'On the Procedure for Navigation of Foreign Ships in the Straits Along the Track of the Northern Sea Route', analysed in the third article.[100] This text was acquired at the State Archives of the Russian Federation in Moscow in December 2021.

The draft regulations mentioned in the third article were consulted on the Russian database gathering all legislative projects.[101] Alas, since the beginning of March 2022, this website is not accessible outside of Russia without using a virtual private network.

5.2.3. Other International Documents Attesting to Russia's State Practice

In addition, this thesis takes into account official documents such as submissions to the CLCS,[102] as well as memorandums and evidence volumes sent by Russia and Ukraine[103] to the Annex VII arbitral tribunal regarding the Coastal Rights case.[104] These documents represent the latest expression of Russian State practice and understanding of the law of the sea.

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[99] Ofitsial'nyi Internet-Portal Pravovoï Informatsii [Official Internet Portal of Legal Information], available at: http://pravo.gov.ru/.

[100] Sovet Ministrov SSSR. Postanovlenie № 331-112 'O poriadke plavaniia inostrannykh sudov v prolivakh po trasse Severnogo Morskovo Puti' [USSR Ministers' Council Decree № 331-112 'On the Procedure for Navigation of Foreign Ships in the Straits along the Course of the Northern Sea Route'], 27 April 1965. in Gosudarstvennoï Arkhiv Rossiïskoï Federatsii [State Archives of the Russian Federation], fond 5446 (sch), opis 106 (sch), delo 1438, list 238. [Postanovlenie № 331-112] On file with the author. Annexed to this thesis.

[101] Ofitsial'nyi Saït dlia Razmeshchenia Informatsii o Podgotovke Normativnykh Pravovykh Aktov [Official Site for the Diffusion of Information on the Preparation of Normative Legal Acts], https://regulation.gov.ru/. Access to this website has been unreliable. Since March 2022, access to this website outside Russia has been impossible.

[102] Russian Federation. Addendum to the Partial Revised Submission of the Russian Federation to the Commission on the Limits of the Continental Shelf in Respect of the Continental Shelf in the Area of the Lomonosov Ridge, Alpha Ridge, Mendeleev Rise, Amundsen and Makarov Basins, and the Canadian Basin. New York. 2021; Russian Federation. Addendum to the Partial Revised Submission of the Russian Federation to the Commission on the Limits of the Continental Shelf in Respect of the Continental Shelf in the Area of the Gakkel Ridge, Nansen and Amundsen Basins. New York. 2021. [Russia's 2021 submission]

[103] *Coastal State Rights* case, *op. cit*. note 46, Award on Preliminary Objections.

[104] *Coastal State Rights* case, *Preliminary Objections of the Russian Federation – Volume I (Preliminary Objections of the Russian Federation)* and *Volume II (Exhibits),* 19 May 2018; *Written Observations and Submissions of Ukraine – Volume I (Written Observations and Submissions of Ukraine) and Volume II (Exhibits)*, 27 November 2018; *Reply of the Russian Federation to the Written Observations and Submissions of Ukraine on Jurisdiction – Volume I (Reply of the Russian Federation to the Written Observations and Submissions of Ukraine on Jurisdiction) and Volume II (Exhibits)*, 28 January 2019; *Rejoinder of Ukraine on Jurisdiction – Volume I (Rejoinder of Ukraine on Jurisdiction) and Volume II (Exhibits),* 28 March 2019.

Finally, this thesis will analyse the positions maintained by Russia during negotiations for the international legally binding instrument on Biodiversity Beyond National Jurisdiction (BBNJ agreement): analytical summaries of the sessions produced by the International Institute for Sustainable Development (IISD)'s Earth Negotiations Bulletin.[105]

E) Structure of this Thesis

This thesis is built around the central postulates mentioned earlier. The first axis is built around the first article on the role of the USSR during the LOSC negotiations. It demonstrates the Soviet Union's and Russia's liberal approach to the law of the sea. The first article will be complemented by observations regarding Soviet doctrinal reception of the LOSC, and Soviet implementation of the LOSC. Continuities between Soviet and Russian doctrines are also highlighted. Finally, the positions miantained by Russia during the negotiations for the BBNJ agreement are analysed. Attention to Russia's attitude during these negotiations is warranted as they are set to become the contemporary equivalent of UNCLOS III. Positions taken by States during these negotiations provide useful insights to understanding how they approach the law of the sea.

The second axis will be built around the second and third articles, both dedicated to the Arctic. This demonstrates Russia's local use of history and historical arguments to deviate from the LOSC in order to reinforce its sovereignty over seas that it traditionally considers as Soviet or Russian. These two articles are complemented by observations regarding the Sea of Azov, where Russia is also developing historical arguments to justify circumventing the LOSC, and the Baltic Sea, which stands as an exception. For the moment, Russia is not developing historical claims over this body of water. The Sea of Okhotsk, which is recently coming back to the fore of doctrinal debates, is also examined. This second axis shows that the Soviet and Russian approach to the law of the sea, despite being generally liberal, especially during international ageographical negotiations, is not without contradictions. Local exceptions and particular claims do exist, as indeed this axis shows.

The third and last axis of this thesis is built around the fourth article on the 2018 Caspian Sea Convention. It analyses the Soviet and Russian proclivity towards creation of joint regimes. Providing examples from the Barents Sea as well as the Pacific Ocean, and the Black Sea prior to 2014, this axis will prove that joint regimes reflect the dual nature of the Soviet and Russian approach demonstrated in the previous sections. With joint regimes, Russia both guarantees

[105] The reports are by the International Institute for Sustainable Development. See International Institute for Sustainable Development. Earth Negotiations Bulletins, available at: https://enb.iisd.org/negotiations/conservation-and-sustainable-use-marine-biological-diversity-beyond-areas-national.

its access to the riches of the sea, while at the same time retaining control over navigation in the area.

The observations which will complement the published articles represent important elements for this thesis to demonstrate continuity between the Soviet and Russian approach to the law of the sea, as well as its specific nature.

F) Solutions to the Research Tasks

1. Evidence of Liberalism in the Soviet and Russian Approach to the Law of the Sea

The thesis that the Soviet and Russian approach to the law of the sea is underpinned by the Grotian liberal ideal is demonstrated by Soviet and Russian actions during both the LOSC negotiations and the BBNJ negotiations. As subsections 1 and 3 underline, on both these occasions Moscow asserted propositions aimed at both preserving its freedom of action and limiting the scope and powers of centralized regulatory institutions. These positions were reminiscent of the defence of high seas freedom brought forth by Grotius in *Mare Liberum.*[106] By contrast, they stand at odds with the theses of John Selden, who in *Mare Clausum* argued that the sea should be placed under the dominion of the coastal State for it is the property of that State. Consequently, Selden also argued that that coastal State had the right to control navigation and other activities in that sea.[107]

Subsection 2 demonstrates that, between those two events, the Soviet and Russian approach to the law of the sea did not change. Indeed, both Soviet and Russian legislation implementing the LOSC generally followed the norm of the Convention, despite the existence of some divergences. Further reinforcing this idea is the fact that both Soviet and Russian doctrine have placed the LOSC at the centre of their analyses.

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[106] Hugo Grotius. The Free Sea (trans. Richard Hakluyt). New York: Liberty Fund 2004. Treves, *op. cit.* note 75, pp 3–6.

[107] R. Lesaffer. Mare clausum (The Closure of the Sea or The Ownership of the Sea) 1635 John Selden (1584–1654) in The Formation and Transmission of Western Legal Culture; 150 Books that Made the Law in the Age of Printing. S. Dauchy, G. Martyn, A. Musson, H. Pihlajamäki, & A. Wijffels (eds) New York: Springer 2017, pp 190–194.

1.1. 'A Liberal Maritime Power Like Any Other? The Soviet Union during the Negotiations for the Law of the Sea Convention'[108]

This first article is a fundamental building block of our research. It proves, as also Butler previously concluded,[109] that from 1965 and through the transformation of its fishing and merchant fleets, but also its navy, the USSR became a maritime power.[110]

This metamorphosis meant that it became crucial for the Soviet Union to assert the freedoms of the high seas against attempts by developing States to extend coastal State jurisdiction. Tellingly, in the summer of 1967, the USSR sent a project for a convention to the United States and other Western States to fix the maximal breadth of the territorial sea at 12 NM, in an effort to stop attempts by Third World countries to extend their jurisdiction over large expanses of water.[111] In November 1967, the USSR and the Western maritime powers supported the creation of the Ad-Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction following a memorable speech Malta's Arvid Pardo to pursue the same goal.[112]

From 1970 until the end of the Third United Nations Conference on the Law of the Sea (UNCLOS III), Moscow closely collaborated with France, the United Kingdom, the United States and Japan within the so-called Group of Five.[113] The goal of this group was to impose a liberal vision of the law of the sea, according to which the breadth of the territorial sea was limited to 12 NM, freedom of navigation safeguarded, and exploitation of the deep seabed freely accessible and exploitable by States or their companies.[114] Once again, it needs to be emphasized that the notion of liberalism should not be positively loaded. The vision of the law of the sea that the Group of Five sought to impose was the one that best suited their interests as great maritime powers. This vision revolved around the freedom of the high seas, hence use of the adjective 'liberal' to qualify it. There is nothing inherently positive or negative about this vision of the law of the sea.

Even though the Group of Five had to compromise, such as in the case of the EEZ,[115] it still managed to secure most of its objectives. The maximal breadth of the territorial sea was limited to 12 NM, the right of transit passage through straits used for international navigation was safeguarded, and eventually the State obtained the right to directly exploit the deep seabed.[116]

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[108] Thévenin Liberal Maritime Power *op. cit*., note 64.

[109] Butler *op. cit*., note 6, pp 200–201.

[110] Thévenin *op. cit*., note 64, pp 197–201.

[111] *Ibid,* p 205 footnotes 73 and 74.

[112] *Ibid,* p 204.

[113] *Ibid,* p 206.

[114] *Ibid*, pp 206–210.

[115] *Ibid,* pp 216–218.

[116] *Ibid,* pp 211–215, 218–222.

On an individual level, during the LOSC negotiations, to maintain and prove the validity of its positions the USSR employed liberal arguments akin to those developed by economists of the 18th and 19th centuries. In a nutshell, Soviet argumentation revolved around the idea that freedom of navigation but also free access to the deep seabed's resources led to development and wealth.[117] In contrast, extensive coastal State jurisdiction over maritime expanses and centralized control over the deep seabed led to economic backwardness.[118]

1.2. Implementation and Reception of the LOSC

1.2.1. Soviet and Russian Legislation Implementing the LOSC

1.2.1.1. Legislation Implementing the LOSC

Following the signing of the LOSC, the USSR implemented it to a large extent in its national legislation.

Tellingly, as early as 1976 the USSR created an EEZ[119] which it confirmed in 1984,[120] even though Moscow was initially opposed to such a zone. It also concluded a series of bilateral agreements with other States to fish the remainder of the total allowable catch, which would not be caught by the coastal State.[121] Its

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[117] *Ibid,* pp 212–216, 219, 221–222.

[118] *Ibid,* pp 212–216.

[119] Prezidium Verkhovnogo Soveta SSSR [USSR Supreme Council Presidium]. Ukaz O Vremennykh Merakh po Sokhraneniiu Zhivykh Resursov i Regulirovaniiu Rybolovstva v Morskikh Raïonakh, Prilegaiushchikh k Poberezh'iu SSSR [Decree on Temporary Measures for the Conservation of Living Resources and Regulation of Fishing in the Maritime Areas Adjacent to the Coast of the USSR]. 10 December 1976, reproduced in 50 Vedomosti Verkhovnogo Soveta SSSR [USSR Supreme Council Gazette] 1976; Prezidium Verkhovnogo Soveta SSSR [USSR Supreme Council Presidium]. Postanovlenie № 5414-IX O Poriadke Primeneniia Stat'i 7 Ukaza Prezidiuma Verkhovnogo Soveta SSSR "O Vremennykh Merakh po Sokhraneniiu Zhivykh Resursov i Regulirovaniiu Rybolovstva v Morskikh Raionakh, Prilegaiushchikh k Poberezh'iu SSSR [Decree №5414-IX On the Procedure for Application of Article 7 of the Decree on Temporary Measures for the Conservation of Living Resources and Regulation of Fishing in the Maritime Areas Adjacent to the Coast of the USSR]. 2 March 1977. Reproduced in 13 Vedomosti Verkhovnogo Soveta SSSR [USSR Supreme Council Gazette] 1977.

[120] Prezidium Verkhovnogo Soveta SSSR [USSR Supreme Council Presidium] Ukaz № 10864-X Ob Ekonomicheskoï Zone SSSR [Decree № 10864-X On the Economic Zone of the USSR]. 28 February 1984. Reproduced in 9 (2239) Vedomosti Verkhovnogo Soveta SSSR [USSR Supreme Council Gazette] 1984, pp 174–180.

[121] See e.g: reproduced in Sbornik Dvukhstoronnikh Soglashennii SSSR po Voprosam Rybnogo Khoziaistva i Rybokhoistvennykh issledovanii [Collected Bilateral Agreements of the USSR on Questions of Fisheries and Research on Fisheries] Moscow: VNIRO 1987: Soglashenie mezhdu Pravitel'stvom Soiusa Sovetskikh Sotsialisticheskikh Respublik i Pravitel'stom Narodnoi Respubliki Bolgarii o Rybolobstve v Raionax Barentseva Moria, prilegaiushikh k poberezh'iu SSSR [Agreement Between the Government of the USSR and the Government of the People's Republic of Bulgaria on Fishing in the Areas of the Barents Sea adjacent to the Coast of the USSR], 3 October 1978, Art. 1 p 30; – Soglashenie mezhdu Pravitel'stvom

legislation regarding the deep seabed,[122] marine scientific research[123] and marine environmental protection[124] were also in accordance with the LOSC.

In the case of the continental shelf, the USSR did not require a change to its laws from 1968,[125] for the LOSC by default grants each State a continental shelf of 200 NM. Coastal States need not declare a continental shelf to possess and exercise exclusive sovereign rights over one.[126]

Soiusa Sovetskikh Sotsialisticheskikh Respublik i Pravitel'stom Koreiskoi Narodno-Democraticheskoi Respubliki o Sotrudnichestve v Oblasti Rybnogo Khoziaistva [Agreement between the Government of the USSR and the Government of the Democratic People's Republic of Korea on Cooperation in the Sphere of Fisheries], Pyongyang, 6 May 1987 Art. 4, p 107; 31DJ/181.3.M3, Lettre de M.V. Kamentsev, a/s Accord de Pêche Franco-Soviétique (Échange de Lettres) [Letter from M.V. Kamentsev on the Franco-Soviet Fishing Agreement (Exchange of Letters)]. Paris. 22 November 1980; 31DJ/181.3.M3, Lettre de N.I. Lysenko, a/s Accord de Pêche Franco-Soviétique (Échange de Lettres) [Letter from M.V. Lysenko on the Franco-Soviet Fishing Agreement (Exchange of Letters)]. Paris, 3 July 1985; [French Diplomatic Archives]; Soglashenie Mezhdu Pravitel'stvom Soiusa Sovetskikh Sotsialisticheskikh Respublik i Pravitel'stom Kanady o Vsaimnykh Otnosheniiakh v Oblasti Pybolostva [Agreement between the Government of the USSR and the Government of Canada on Reciprocal Relations in the Field of Fisheries]. Moscow. 1 May 1984, Arts 2 and 4 available at: https://mddoc.mid.ru/api/ia/download/?uuid=2c773ffc-e87f-40f1-8749-d708cfcd987c; Soglashenie mezhdu Pravitel'stvom Soiusa Sovetskikh Sotsialisticheskikh Respublik i Pravitel'stom Soedinennykh Shtatov Ameriki v Oblasti Rybnogo Khoziaistva [Agreement between the Government of the USSR and the Government of the United States of America in the Field of Fisheries]. Moscow. 31 May 1988, Arts 2 and 4, available at: https://mddoc.mid.ru/api/ia/download/?uuid=425d524e-784e-4c05-bebc-f9c1f9d6e2e8

[122] See: LOSC, *op. cit.* note 5, Arts 76 and 77. Prezidium Verkhovnogo Soveta SSSR [USSR Supreme Council Presidium]. O Vremennykh Merakh po Regulirovaniiu Deïiatel'nosti Sovetskikh Predpriiatii po Razvedke i Razpabotke Mineral'nykh Resursov Raïonov Morskogo Dna za Predelami Kontinental'nogo Shel'fa [On Temporary Measures regarding Regulation of the Activities of Soviet Enterprises in the Exploration and Exploitation of Mineral Resources of the Seabed Beyond National Jurisdiction].17 April.1982.

[123] Franckx *op. cit.* note 53, pp 378–383, at pp 384–390, where Franckx reproduces the relevant Soviet legislation passed until 1986. See the relevant excerpts of the Soviet Law on the EEZ *op. cit.* note 106, p 384; Decree of the Council of Ministers of the USSR of 19 December 1985, On Confirmation of the Statute on the Manner of Conduct of Marine Scientific Research in the Economic Zone of the USSR, at pp 385–390. See also E. Franckx. The USSR Adapts Its Legislation on the Conduct on Marine Scientific Research in the USSR Economic Zone. – 5 International Journal of Estuarine and Coastal Law 1990, pp 406–408.

[124] Prezidium Verkhovnogo Soveta SSSR [USSR Supreme Council Presidium]. Ukaz № 1398-XI Ob Usilenii Okhrany Prirody v Raïonakh Kraïnego Severa i Morskikh Raïonakh, Prilegaiushchikh k Severnomu Poberezh′iu SSSR [Decree № 1398-XI On Reinforcement of the Protection of Nature in the Areas of the Far North and Maritime Areas adjacent to the Northern Coast of the USSR]. 26 November 1984.

[125] Prezidium Verkhovnogo Soveta SSSR [USSR Supreme Council Presidium] Ukaz O Kontinental'nom Shel'fe Soiuza SSR [Decree On the Continental Shelf of the USSR]. 6 February 1968.

[126] LOSC, *op. cit.* note 5, Arts 76.1 and 77.3.

Similarly, except for the issue of the right of innocent passage, the Soviet Union did not need to greatly modify its legislation as it decreed a territorial sea of 12 NM before the negotiations of the LOSC.[127]

Despite its growing length and complexity, Russian legislation follows in the footsteps of Soviet legislation and does not significantly depart from the LOSC.[128] This overarching adhesion to the LOSC is explained by the fact that since the negotiations of the LOSC, the Soviet Union and Russia have upheld a liberal approach to the law of the sea, for as maritime powers it was and is in their interests to do so.

Russian regulation of the NSR has been criticized by States and scholars. However, for the time being, given the presence of ice in the Arctic, Article 234 of the LOSC[129] applies, it therefore seems to generally be in line with the Convention. This is especially the case after amendments in 2013 which rendered the permit-based system more transparent[130] and lowered the fees that ships had to pay for passage.[131] Furthermore, the NSR rules do not apply to warships and other government ships as was the case under the 1990 rules.[132] However, objections can still be raised regarding the mandatory use of a Russian-flagged icebreaker, which can be construed as a limitation imposed on freedom of navigation.[133]

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[127] Zakon SSSR O Gosudarstvennoï Granitse SSSR [Law of the USSR of 24.11.1982 on the State Border of the USSR] 24 November 1982 [1982 Law on the State Border] read in conjunction with Prezidium Verkhovnogo Soveta SSSR [USSR Supreme Council Presidium]. Ukaz Ob Utverzhdenii Polozheniia Ob Okhrane Gosudarstvennoï Granitsy Soiuza SSR [Decree On Confirmation of the Regulation on Protection of the State Border]. 5 August 1960. [1960 Decree on Protection of the State Border].

[128] Federal′nyï zakon № 155-FZ O vnutrennikh morskikh vodakh, territorial′nom more i prilezhashcheï zone Rossiïskoï Federatsii [Federal Law № 155-FZ On the Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation]. 31 July 1998 in 31 Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Collected Legislation of the Russian Federation] 1998, p 3833, [Federal Law № 155-FZ] ; Federal′nyï zakon № 191-FZ Ob Ekonomicheskoi Zone Rossiiskoi Federatsii [Federal Law № 191-FZ on the Economic Zone of the Russian Federation]. 17 December 1998 in 51 Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Collected Legislation of the Russian Federation] 1998, p 6273; Federal′nyï zakon № 187-FZ O Kontinental'nom Shel'fe Rossiiskoi Federatsii [Federal Law № 187-FZ On the Continental Shelf of the Russian Federation]. 30 November 1995 in 49 Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Collected Legislation of the Russian Federation] 1995, p 4694; Federal′nyï zakon № 33-FZ Ob Osobo Okhranyaemykh Prirodnykh Territoriiakh [Federal Law № 33-FZ On Particularly Protected Natural Territories] 14 March 1995 in 12 Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Collected Legislation of the Russian Federation] 1995, p 1024, Art. 22.4.g.

[129] LOSC, *op. cit.* note 5, Art. 234.

[130] Solski 2020 *op. cit.* note 25, pp 391–395, although in recent years a roll-back can be observed, as information regarding violations of the rules ceased to be published in 2018, *Ibid* p 399.

[131] *Ibid*, pp 395–397.

[132] *Ibid,* p 390.

[133] *Ibid,* p 400.

1.2.1.2. Elements of Divergence: Warships' Right of Innocent Passage

Nevertheless, general implementation of the LOSC by the USSR and Russia in their national legislation does not mean that divergences did not and do not exist.

Most notably, after 1982 Soviet legislation regarding the issue of warships' right of innocent passage through the territorial sea diverged from the LOSC as well as from the position maintained by the Soviet delegation during UNCLOS III. Until 1989 and the signing of the Uniform Interpretation of the Rules of International Law Governing Innocent Passage, it was – as Franckx also underlined – unclear where and how warships could exercise the right of innocent passage in the Soviet Union's territorial sea.[134] Since then the position of the USSR and Russia on the right of warships to exercise innocent passage in their territorial sea has conformed with the rules of the LOSC.[135]

Furthermore, despite the 2021 incident involving HMS Defender[136] as well as a draft project presented in 2019 proposing revision of the 1999 Rules "On the Navigation and Sojourn of Foreign Warships and Other Government Ships Operated for Non-Commercial Purposes in the Territorial Sea, Internal Sea Waters, in Naval Bases, in Warship Stationing Points and the Sea Ports of the Russian Federation",[137] for the moment Russia still abides by the LOSC regarding innocent passage of warships.[138]

In the case of HMS Defender, the British warship passed through the territorial sea off the Crimean coast that Russia annexed in 2014. At the time of passage,

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[134] Franckx *op. cit*. note 58, pp 43–47.

[135] See Uniform Interpretation *op. cit*. note 43.

[136] BBC News (Online). HMS Defender: Russian jets and ships shadow British warship 23 June 2021, available at: https://www.bbc.com/news/world-europe-57583363

[137] [Project] Postanovlenie Pravitel′stva Rosiïskoï Federatsii №_____ 'O Vnesenii Izmeneniĭ v Pravila Plavaniia i Prebyvaniia Inostrannykh Voennykh Korableĭ i Drugikh Gosudarstvennykh Sudov, Ekspluatiruemykh v Nekommercheskikh Tseliakh, v Territorial′nom More, vo Vnutrennikh Morskikh Vodakh, na Voenno-Morskikh Bazakh, v Punktakh Bazirovaniia Voennykh Korableĭ i Morskikh Portakh Rossiïskoï Federatsii' [Russian Federation Government Decree №_____ 'On the Insertion of Changes in the Rules of Navigation and Sojourn of Foreign Warships and Other Government Ships Operated for Non-Commercial Purposes in the Territorial Sea, Internal Sea Waters, in Naval Bases, in Warship Stationing Points and the Sea Ports of the Russian Federation'] [2019 Changes to the Rules of Navigation and Sojourn of Foreign Warships]. [no date, originally planned for publication in] 2019, available at: https://regulation.gov.ru/projects#npa=89000.

[138] Postanovlenie Pravitel′stva Rossiïskoï Federatsii № 1102 'O Pravilakh Plavaniia i Prebyvaniia Inostrannykh Voennykh Korableĭ i Drugikh Gosudarstvennykh Sudov, Ekspluatiruemykh v Nekommercheskikh Tseliakh, v Territorial′nom More, vo Vnutrennikh Morskikh Vodakh, na Voenno-Morskikh Bazakh, v Punktakh Bazirovaniia Voennykh Korableĭ i Morskikh Portakh Rossiïskoï Federatsii' [Russian Federation Government Decree № 1102 'On the Navigation and Sojourn of Foreign Warships and Other Government Ships Operated for Non-Commercial Purposes in the Territorial Sea, Internal Sea Waters, in Naval Bases, in Warship Stationing Points and the Sea Ports of the Russian Federation'], 2 October 1999 in 42 Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Collected Legislation of the Russian Federation] 1999, p 5030, parts I and II. [1999 Rules].

the Russian authorities had issued an official notice to mariners[139] informing them of the closure of part of the Crimean territorial sea, following the requirement of Article 25 paragraph 3 of the LOSC.[140] However, the United Kingdom considers the annexation of Crimea by Russia as unlawful. Therefore, from a British perspective, the territorial sea located off the Crimean Peninsula is still Ukrainian. Consequently, the United Kingdom ignored the notice to mariners issued by the Russian authorities and HMS Defender proceeded with its passage, thus creating the June 2021 incident. However, even though it involves elements of law of the sea, this incident did not stem from a change in the Russian appreciation of the right of innocent passage for warships. Rather, it was caused by Russia's illegal annexation of Crimea in 2014.

Nonetheless, given the current level of tension between Russia and the West, enjoying the right of innocent passage for warships in Russia's territorial sea may become in the near future increasingly difficult in practice, although this right is recognized in Russian law.

Tellingly, a recent legislative project to amend the Federal Law № 155 on the Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation proposes that the suspension of innocent passage could be communicated to foreign warships via radio-communication.[141] It is highly doubtful that this new inclusion in the Russian law would be in accordance with Article 25.3 of the LOSC requirement of 'due publication' for a suspension to take effect.[142] Indeed, the Convention's negotiators included the obligation to publish notification of the suspension of innocent passage in order to prevent arbitrary suspension of this right by coastal States.[143] If adopted, this proposed amendment, although subtle, would effectively sign the death of the right of innocent passage in the Russian territorial sea. From the explanatory note enclosed with the draft law, it clearly

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[139] Directorate of Navigation and Oceanography of the Russian Federation Ministry of Defence. Notice to Mariners Bulletin 18/21. 1 May 2021, p 2, available at: https://structure.mil.ru/files/morf/military/files/ENGV_2118.pdf . The notification is available in the Russian version of the notice to mariners at pp 26–27, available at: https://structure.mil.ru/files/morf/military/files/NM_2118-1.pdf

[140] LOSC, *op. cit.* note 5, art 25.3. This article states: "The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published."

[141] [Draft] Federal'nyi Zakon O Vnesenii Izmeneniĭ v Federal'nyi Zakon O Vnutrennikh Morskikh Vodakh, Territorial'nom More i Prilezhashcheĭ Zone Rossiĭskoĭ Federatsii [Federal Law 'On the Insertion of Changes in the Federal Law On the Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation']. Moscow. 04 August 2022, available at: https://sozd.duma.gov.ru/bill/176880-8#bh_histras [2022 Draft Law №176880-8], para.1. read in conjunction with Federal Law № 155-FZ, *op.cit.* note 128, Art. 12.

[142] LOSC, *op. cit.* note 5, art 25.3 quoted at *supra* note 140.

[143] United Nations Convention on the Law of the Sea 1982: A Commentary, Volume II. Satya Nandand *et al.* (eds). Dordrecht/Boston/London: Martinus Nijhoff 1993, p 233 para. 25.8.f.

appears that the intent of the Russian drafters was to give Moscow a versatile tool to suspend the right of innocent passage of foreign warships in a targeted manner.[144]

This draft proposal is currently being reviewed by the State Duma and moves through the procedural hurdles rather quickly.[145] When this amendment enters into force, it will *de facto* signal Russia's denunciation of the 1989 Uniform Interpretation on the rules of innocent passage. However, Moscow would need to officially clarify its position in order not to be placed in an awkward position vis-à-vis the Uniform Interpretation it is currently bound by. In addition, Moscow should anticipate strong reactions from Western States traditionally attached to navigational rights and freedoms.

Moreover, to increase control over warships exercising their right of innocent passage, Moscow could perhaps consider such passage as a dangerous military activity threatening its security. This possibility is substantiated by Russia's treaty practice where dangerous military activities are defined as:

> "Actions of personnel of the Armed Forces of the Parties in proximity to one another, in peacetime, either unintentionally or due to force majeure, that may result in human or material damage or loss or that create tensions in the relations between the Parties."[146]

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[144] Poiasnitel′naia Zapiska k Proektu Federal′nogo Zakona 'O Vnesenii Izmenenіï v Federal′nyї zakon O Vnutrennikh Morskikh Vodakh, Territorial′nom More i Prilezhashcheĭ Zone Rossiĭskoї Federatsii' [Explanatory Note to the Federal Law 'On the Insertion of Changes in the Federal Law On the Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation']. Moscow. 04 August 2022, p 2 available at: https://sozd.duma.gov.ru/bill/176880-8#bh_histras. The author of this note explains that transmitting notices of suspension of the right of innocent passage via radio will allow Russia to *operationally* stop the passage of foreign warships through the territorial sea and internal waters. The goal of this amendment is to create an authorization-based regime of passage through the NSR. The use of the word 'operationally' denotes the intention to give Russian authorities discretion and latitude to suspend the right of innocent passage. It is important to note that even though the author mentions the creation of an authorization-based regime in the NSR, the geographical scope of application of the Federal Law № 155-FZ's Article 12 is not restricted to the Arctic. It applies to the Russian territorial sea in general. See: Federal Law № 155-FZ, *op.cit.* note 128, Art. 12. Should this change be implemented, it will weaken the warships' right of innocent passage throughout the Russian territorial sea, and not only in the Arctic.

[145] Gosudarstvennaia Duma. Zakonoproekt № 176880-8 'O Vnesenii Izmenenіï v Federal'nyi Zakon O Vnutrennikh Morskikh Vodakh, Territorial'nom More i Prilezhashcheĭ Zone Rossiĭskoї Federatsii [Draft Law № 176880-8 'On the Insertion of Changes in the Federal Law On the Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation']. available at: https://sozd.duma.gov.ru/bill/176880-8#bh_histras.

[146] Agreement Between the Government of the Russian Federation and the Government of the Republic of Korea on the Prevention of Dangerous Military Activities. Moscow 11 November 2002, Art.1.1.

Such an understanding of 'dangerous military activities' is neither new nor an isolated occurrence in Russia's treaty practice.[147] Furthermore, it was reiterated by Russia in 2021 in its treaty projects on security guarantees between Russia and the United States[148] and the North Atlantic Treaty Organization.[149]

Stemming from these elements of definition, Russia may interpret any innocent passage of foreign warships through its territorial sea without advance

[147] See: Soglashenie mezhdu Pravitel′stvom Soiuza Sovetskikh Sotsialisticheskikh Respublik i Pravitel′stvom Kanady o Predotvrashchenii Opasnoï Voennoï Deiatel′nosti [Agreement between the Government of the Union of Soviet Socialist Republics and the Government of Canada on the Prevention of Dangerous Military Activities]. Ottawa. 10 May 1991, Art. 1. a; Soglashenie Mezhdu Pravitel′stvom Soiuza Sovetskikh Sotsialisticheskikh Respublik i Pravitel′stvom Grecheskoï Respubliki o Predotvrashchenii Opasnoï Voennoï Deiatel′nosti [Agreement between the Government of the Union of Soviet Socialist Republics and the Government of the Greek Republic on the Prevention of Dangerous Military Activities]. Moscow. 23 July 1991, Art. 1. a; Protokol Mezhdu Pravitel'stvom Rossiïskoï Federatsii i Pravitel′stvom Grecheskoï Respubliki o Dogovorno-Pravovoï Osnove Dvukhstoronnikh Otnosheniï [Protocol between the Government of the Russian Federation and the Government of the Greek Republic on the Legal Foundation of Bilateral Relations]. 13 December 1995, Art. 1 read in conjunction with Annex 1.12 ; Soglashenie Mezhdu Pravitel′stvom Rossiïskoï Federatsii i Pravitel′stvom Cheshskoï Respubliki o Predotvrashchenii Opasnoï Voennoï Deiatel′nosti [Agreement between the Government of the Russian Federation and the Government of the Czech Republic on the Prevention of Dangerous Military Activities]. Prague. 9 October 2001, Art. 1.2; Soglashenie Mezhdu Pravitel′stvom Rossiïskoï Federatsii i Pravitel′stvom Koreïskoï Narodno-Democraticheskoï Respubliki o Predotvrashchenii Opasnoï Voennoï Deiatel′nosti [Agreement between the Government of the Russian Federation and the Government of the Democratic People's Republic of Korea on the Prevention of Dangerous Military Activities] Pyongyang. 12 November 2015 Art. 1.5. For a discussion on military operations see: A.S. Skaridov, Voennaia i pravookhranitel′naia deiatel′nost′ v kontekste primeneniia vooruzhennykh sil dlia okhrany gosudarstvennoï granitsy na more [Military and Law Enforcement Activities in the Context of the Use of Armed Forces for Protection of the State Border at Sea]. – 2(5) Okeanskii Menedzhment [Ocean Management] 2019, pp 15, 26–27. Interestingly, the agreement between the United States and the USSR on the prevention of dangerous military activities does not contain such a definition. In this earlier agreement, these activities are more precisely defined using a closed list. Furthermore, the definition does not mention the creation of tensions. See: Agreement Between the Union of Soviet Socialist Republics and the United States on the Prevention of Dangerous Military Activities. Moscow. 12 June 1989 e.i.f. 1 January 1990.

[148] [Draft] Treaty between The United States of America and the Russian Federation on Security Guarantees, no place of signature no date, published on the website of the Russian Ministry of Foreign Affairs on 17 December 2021, Art. 5, available at: https://mid.ru/ru/foreign_policy/rso/nato/1790818/?lang=en.

[149] [Draft] Agreement on measures to ensure the security of the Russian Federation and member States of the North Atlantic Treaty Organization, no place of signature, published on the website of the Russian Ministry of Foreign Affairs on 17 December 2021, Art.1 paras 3 and 4, available at: https://mid.ru/ru/foreign_policy/rso/nato/1790803/?lang=en&clear_cache=Y.

notification as a threat to its security[150] and argue that under the LOSC this type of passage is not considered innocent.[151]

If Russia is to consider the passage of warships in its territorial sea as a dangerous military activity, and therefore a threat to its security, it could impose additional requirements on warships sailing through its territorial sea, for under Article 19.2.a of the LOSC such passage is not considered innocent.[152]

However, should Russia choose to interpret innocent passage of warships through its territorial sea in this way, it also will have to clarify its position to avoid any hiatus between the Uniform Interpretation. If Russia does not clarify its position, States wishing to exercise the right of innocent passage will be able to argue that Russia's denial of passage contradicts its previously contracted obligation.

1.2.1.3. Elements of Divergence: Internal Waters

Regarding Soviet internal waters, the straight baseline system established in 1985[153] has been called into question,[154] for its interpretation of Article 7.1 of the LOSC is lax and was not in accordance with the text of the convention. Indeed, according to the LOSC, in order to draw straight baselines, the profile of the coastline must be "deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity".[155] Russia's 2021 update of its straight baselines will not quench these criticisms, as the course of the recently adopted baselines is similar to the Soviet one.[156]

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[150] Although, according to the second agreed statement annexed to the Soviet-American agreement on the prevention of dangerous military activities, this notion should not be used in such a manner as to hinder warships' right of innocent passage. See: Union of Soviet Socialist Republics-United States: Agreement on the Prevention of Dangerous Military Activities, *op. cit*. note 142, at 895.

[151] LOSC *op. cit.* note 5, Art. 19.2.a.

[152] LOSC, *op. cit.* note 5, 19.2.

[153] Decree of the USSR Council of Ministers of January 15, 1985, which stipulates the 'List of Geographical Coordinates of Points that Determine the Position of Baselines to Measure the Width of Territorial Waters, Economic Zones and the Continental Shelf of the USSR*,* in Office for Ocean Affairs and the Law of the Sea. Baselines: National Legislation with Illustrative Maps (E/89/V.10*)*. New York. 1989, pp 315–370. [Decree of the USSR Council of Ministers of January 15, 1985.]

[154] Roach 2012 *op. cit.* note 4, p 312.

[155] LOSC, *op. cit.* note 5, Art. 7.1.

[156] Postanovlenie Pravitel′stva Rossiĭskoĭ Federatsii № 1959 Ob Utverzhdenii Perechnia Geograficheskikh Koordinat Tochek, Opredeliaiushchikh Polozhenie Iskhodnykh Liniĭ, ot Kotorykh Otmeriaetsia Shirina Territorial′nogo Moria Rossiĭskoĭ Federatsii, Prilezhashcheĭ Zony Rossiĭskoĭ Federatsii u Materikovogo Poberezh′ia i Ostrovov Rossiĭskoĭ Federatsii v Severnom Ledovitom Okeane, i o Priznanii Nedeĭstvuiushchim na Territorii Rossiĭskoĭ Federatsii Razdela "Severnyĭ Ledovityĭ Okean" Perechnia Geograficheskikh Koordinat Tochek, Opredeliaiushchikh Polozhenie Iskhodnykh Liniĭ dlia Otscheta Shiriny Territorial′nykh Vod, Ekonomicheskoĭ Zony i Kontinental′nogo Shel′fa SSSR u Materikovogo Poberezh′ia i Ostrovov Severnogo Ledovitogo Okeana, Baltiĭskogo i Chernogo Moreĭ, Utverzhdennogo Postanov-

The area of internal waters enclosed within the straight baselines has been increased.[157]

Furthermore, despite the signing of the LOSC, which does not recognize the existence of historic waters except for historic bays,[158] Soviet law on the State border seemed to diverge on this issue. It recognized as internal waters 'bays, coves, limans, seas and straits historically belonging to the USSR'.[159] This provision still exists in Russian law.[160]

Nevertheless, the importance of this provision is relative. Historically, it was seldom used by the USSR. In 1957, it claimed the Bay of Peter the Great as a historical bay, which elicited firm protests from Western States and especially Japan as the line used to close the bay was 108 NM long.[161] In 1985, in applying the LOSC provision on historical bays, the USSR claimed "the White Sea south of the line connecting Cape Svyatoy Nos with Cape Kanin Nos, the waters of Cheshskaya/Bay south of the line connecting Cape Mikulkin with Cape Svyatoy/ Nos (Timansky), and the waters of Baidaratskaya Bay south-east of the line connecting Cape Yuribeisalya with Cape Belushy Nos" as part of its internal waters.[162]

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leniem Soveta Ministrov SSSR ot 15 ianvaria 1985 g. № 56-22' [Decree of the Government of the Russian Federation № 1959, 'On Confirmation of the List of Coordinates Determining the Position of the Baselines Measuring the Breadth of the Territorial Sea of the Russian Federation, the Contiguous Zone of the Russian Federation Along the Continental Coastline and Islands of the Russian Federation in the Arctic Ocean, and on the Recognition as Abrogated on the Territory of the Russian Federation the Section 'Arctic Ocean' of the List of Geographical Coordinates of Points Determining the Position of the Baselines Measuring the Breadth of Territorial Waters, Economic Zones and the Continental Shelf of the USSR Along the Continental Coastline and Islands of the Arctic Ocean, Baltic and Black Sea confirmed by Decree of the USSR's Council of Ministers of 15 of January 1985 № 56-22.] 16. November.2021, in 47 Sobranie Zakonodatel'stvo Rossiiskoi Federatsii [Collected Legislation of the Russian Federation] 2021 p 7863 [Postanovlenie № 1959 of 16 November 2021].

[157] Poiasnitel′naia Zapiska k Proektu Postanovleniia Pravitel′stva Rossiĭskoĭ Federatsii 'Ob Utverzhdenii Perechnia Geograficheskikh Koordinat Tochek, Opredeliaiushchikh Polozhenie Iskhodnykh Linii, ot Kotorykh Otmeriaetsia Shirina Territorial′nogo Moria, Prilezhashcheĭ Zony, Iskliuchitel′noĭ Ekonomicheskoĭ Zony i Kontinental′nogo Shel′fa Rossiĭskoĭ Federatsii u Materikovogo Poberezh′ia i Ostrovov Rossiĭskoĭ Federatsii v Severnom Ledovitom Okeane' [Explanatory Note to the Draft Decree of the Government of the Russian Federation 'On Confirmation of the List of Coordinates Determining the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of the Russian Federation along the Continental Coastline of the Russian Federation in the Arctic Ocean']. Moscow. 08 June 2021, p 5, available at: https://regulation.gov.ru/projects#npa=100250

[158] LOSC, *op. cit.* note 5, Art. 10.6.

[159] 1960 Decree on Protection of the State Border *op. cit.* note 127, Art. 4.в Law of the USSR of 24.11.1982 on the State Border of the USSR *op. cit*. note 127, Art. 6.4.

[160] Federal Law № 155-FZ *op. cit.* note 128. Art. 1.2.

[161] Butler *op. cit*. note 6,108–111; see also A. A. Kovalev and W. E. Butler (trans), Contemporary Issues of the Law of the Sea: Modern Russian Approaches. The Hague: Eleven 2004, p 9; Roach *op. cit.* note 4 pp 50–51.

[162] Decree of the USSR Council of Ministers of January 15, 1985, *op. cit.* note 148, p 315.

The only use of this provision to claim maritime expanses other than a bay concerned the Straits of Laptev and Sannikov, which were deemed as historically belonging to the USSR in 1965.[163] Since 1985, these straits have been enclosed in the Soviet and Russian system of straight baselines, and are claimed as waters historically belonging to the USSR and Russia. As noted above, the inclusion of these straits within the Soviet and Russian straight baseline systems is not in line with the LOSC[164] and is contested by other States.[165]

1.2.2. Reception of the LOSC in Soviet and Russian Doctrine

1.2.2.1. The LOSC and Soviet Doctrine

The LOSC was quickly accepted and integrated in Soviet doctrinal writings. The relation of Soviet doctrine with the LOSC closely followed that of Soviet diplomats and legislators. This trend is easily explained by the fact that leading Soviet authors took part in the negotiations of the LOSC.[166]

Therefore, the Convention quickly became a central part of the Soviet law of the Sea, although the concept of EEZ was initially called into question.[167] Even before the signing of the Convention, Soviet jurists analysed the effects the LOSC will have on the field. In the last years of UNCLOS III, as well as in the months and years following the signing of the Convention, a plethora of manuals and handbook taught the law of the sea in its light. Manuals often followed the same structure as the LOSC, as well as its contents.[168] The Soviet understanding of the law of the sea did not differ much from the Western understanding.

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[163] Postanovlenie № 331-112, *op. cit.* note 100.

[164] LOSC, *op. cit.* note 5, Art. 7.1.

[165] Roach 2012, *op. cit.* note 4, p 312.

[166] Central Intelligence Agency, *op. cit.* note 83, pp 26–30; P.D. Baraboliia. O Roli Sovetskikh Yuristov v Sviasi s Priniatiem Konventsii OON po Morskomu Pravu [On the Role of Soviet Jurists in the Adoption of the UN Convention on the Law of the Sea]. Sovetskii Ezhegodnik Morskovo Pravo [Soviet Law of the Sea Yearbook] 1982, pp 50–53.

[167] See e.g: A.L. Kolodkin. Mirovoi Okean, Mezhdunarodno-Pravovoï Rezhim Osnovnye Problemy [World Ocean, International Legal Regime: Fundamental Problems]. Moscow: Mezhdunarodnye otnosheniia 1973, pp 28–31; L.V. Speranskaia. Vnutrennie i Territorial'nye Vody [Internal and Territorial Waters]. in Sovremennoe Mezhdunarodnoe Morskoe Pravo: Rezhim Vod i Dna Morskogo Okeana [Contemporary International Law of the Sea: Regime of the Waters and of the Seabed], M.I. Lazarev (ed.). Moscow: Nauka 1974, pp 75–78. At the time when these analyses were written, the legal regime of the EEZ was yet to be defined. Both authors were critical of the EEZ as they were concerned by the potential creation of a 200-NM territorial sea.

[168] See e.g.: Mirovoi Okean and Mezhdunarodnoe Pravo (v 5 tomakh) [World Ocean and International Law (in 5 volumes)], eds A.P. Movchan and A. Yankov, Moscow: Nauka 1986–1991. This five-volume series constitutes the Soviet commentaries on the LOSC. Thanks to the plethora of contributing authors amongst – if not the – most authoritative in Soviet academia, this collective work well represents the positions of Soviet doctrine towards – and its understanding of – the LOSC. See also: S.V. Molodtsov. Mezhdunarodnoe Morskoe Pravo [Inter-

Areas of divergence reflected the politically contentious issues of the time. Soviet doctrine held views regarding the history of the law of the sea and the role the USSR played during the LOSC negotiations.[169] Historiographical chapters were often tainted with ideology and did not correspond to the factual reality. The USSR was often depicted as taking a position in favour of the Third World and as trying to develop mechanisms benefiting mankind by opposing the West, which was depicted as imperialist.[170] As demonstrated in the first article attached to this compendium, this was not the case. The Soviet Union closely collaborated with the Western maritime powers to defeat the propositions asserted by the Third World.[171]

Similarly, Soviet doctrinal writings on warships' right of innocent passage reflected the Soviet legislation these writings tried to justify and explain. In Franckx's analysis, the literature on that topic emphasized the importance of the security of the coastal State, which justifies the limitations imposed on passage of warships,[172] such as specific itineraries through traffic separation schemes.[173] With the signing of the 1989 Uniform Interpretation, the importance of this question subsided, for Soviet and Russian legislation more closely follows the norms contained in the LOSC.

Finally, as will be analysed in the next section on local resistance, the Arctic legal regime was also a specificity of Soviet doctrine, even though in the 1980s the importance of this question slightly subsided compared to the preceding and following decades.

1.2.2.2. The LOSC and Russian Doctrine

In the same vein as Russian legislation, Russian doctrine places itself in the continuity of its Soviet predecessor. Russian jurists did not produce theoretical

national Law of the Sea]. Moscow: Mezhdunarodnye otnosheniia 1987. This book exemplifies a Soviet law of the sea handbook after the signing of the LOSC.

[169] German Gigolaev. The Adoption of the United Nations Convention on the Law of the Sea (1982) and the Soviet Expert Community (based on Soviet Scientific Literature of the 1980s). – 10 Istoriya [History] 2015, para. 6.

[170] E.g.: Y.G Barsegov. Morskaya Politika Sotsialisticheskikh Gosudarstv [Maritime Policy of Socialist States] in Mirovoi Okean: Ekonomika I Politika, Problemy Osvoeniia [World Ocean: Economy and Policy: Problems of Control]. E. M. Primakov (ed.) Moscow: Mycl' 1986, pp 271–278; P.D. Baraboliia, "Vklad cotsiialisticheskikh stran v progressivnoe razvitie mezhdunarodnogo morskogo prava v khode raboty Konferentsii" [Contribution of the Socialist States to the Progressive Development of the law of the sea during the work of the Conference]. in Mirovoï Okean i Mezhdunarodnoe Pravo: Osnovy Sovremennovo Pravoporiadka v Mirovom Okeane [World Ocean and Law of the Sea. Foundations of the Contemporary Legal Order in the World Ocean]. A. P. Movchan, A. Yankov (eds). Moscow: Nauka 1986, pp 126–134.

[171] Thévenin, Liberal Maritime Power *op. cit.* note 64.

[172] Franckx 1989 *op. cit*. note 58, pp 542–554.

[173] *Ibid*, pp 544, 546–547, 549, 551–552.

breaks from their Soviet predecessors. The handbooks written resemble those by Soviet scholarship. The LOSC and its concepts remain central to Russian doctrine.[174] This situation is explained by three main factors.

Firstly, conceptually the law of the sea has not fundamentally evolved, although marine environmental protection has become a more widely examined topic. The LOSC has remained unchanged since its entry into force in 1994. Secondly, Russian legislation in the field of the law of the sea being overwhelmingly in line with international standards, there are not many areas where Russian scholars can show their specifics. As will be examined in the following section, Russian doctrinal particularism is revealed in the treatment of regional issues in the Arctic and the Black Sea. Furthermore, Russia is not challenging the norms contained in the LOSC, except in specific seas it considers historically as its own.[175] Thirdly, Russian academia is still heavily influenced by its Soviet predecessor. A significant proportion of leading Russian juristic experts in the law of the sea were trained and began their career during the Soviet period. Cases in point are Anatoly and Roman Kolodkin, Galina Shinkaretskaya, Kamil Bekyashev, Alexander Vylegzhanin, Vyacheslav Gavrilov, or Alexander Skaridov. Leading jurists having known only post-Soviet Russia are yet to emerge.

Nevertheless, should the war in Ukraine continue for long and the cases before the arbitral tribunals formed under the LOSC's annex VII regarding both coastal

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[174] See e.g: S.V. Vinogradov et alii. Mezhdunarodnoe Morskoe Pravo [International Law of the Sea], in Kurs Mezhdunarodnogo Prava (t. 5) [Course of International (Law vol 5)]. Kudriatsev (ed.). Moscow: Nauka, 1992 pp 5–123; S.V. Molodtsov. Mezhdunarodnoe Morskoe Pravo [International Law of the Sea]. in Mezhdunarodnoe Pravo [International Law]. Yu. M. Kolosov and V.I. Kuznetsov (eds). Moscow: Mezhdunarodnye Otnoshenya 1999, pp 460–502; S.A Gureev, A.N. Vylegzhanin, G.G. Ivanov. Mezhdunardnoe Morskoe Pravo [International Law of the Sea]. Moscow: Iuridicheskaya Literatura 2003; Kovalev, *op. cit.* note 156; K.A. Bekyashev. Mezhdunarodnoe Morskoe Pravo [International Law of the Sea]. in Mezhdunarodnoe Publichoe Pravo [Public International Law]. K.A. Bekyashev (ed.). Moscow: Prospekt 2005, pp 484–558; L.N. Shestakov. Mezhdunarodnoe Morskoe Pravo [International Law of the Sea]. in Mezhdunarodnoe Pravo [International Law]. L.N. Shestakov (ed.) Moscow: Iuridicheskaiia Literatura 2005, pp 351–374; A.S. Skaridov. Morskoe Pravo [Law of the Sea]. Saint-Petersburg: Academus, 2006; A.L. Kolodkin, V.N. Gutsulyak Yu. V. Bobrova. Mirovoi okean: Mezhdunarodno-pravovoi Rezhim. Osnovnye problemy [World Ocean: International Legal Regime. Main Problems]. Moscow: Statut 2007; V.L. Tolstykh, Kurs Mezhdunarodnogo Prava [Course in International Law]. Moscow: Wolters Kluwer. 2009, pp 879–924; S.A. Gureev, I.V. Zenkin, G.G. Ivanov. Mezhdunarodnoe Morskoe Pravo [International Law of the Sea]. Moscow: Norma, 2011; A.N. Vylegzhanin and P.V Savaskov, Mezhdunarodnoe Morskoe Pravo [International Law of the Sea]. in Mezhdunarodnoe Pravo (2 izd) [International Law (2nd Edn.)]. A.N Vylegzhanin (ed.). Moscow: Iurait 2012, pp 729–768; A.S. Skaridov. Morskoe Pravo tom 1: Mezhdunarodnoe Publichnoe Pravo [Maritime Law vol. 1: International Public Law]. Moscow: Iurait, 2017; K.A. Bekyashev. Mezhdunarodnoe Pravo [International Law]. Moscow: Prospekt, 2019, pp 636–733; V.L. Tolstykh. Kurs Mezhdunarodnogo Prava [Course of International Law]. Moscow: Prospekt 2019, pp 594–629.

[175] See Section 2 'Local Resistance and Turn to History'.

States' rights in the Black Sea and Sea of Azov[176] and the detention of three Ukrainian ships and their crews[177] are decided against the Russian Government, new academic productions may come to light in Russian scholarship regarding, for example, the notion of military activity at sea. In turn this could signal a new turn in Russian academia. Tellingly, such an issue was raised in April 2022 during the Second Maritime Forum taking place at the Far Eastern Federal University in Vladivostok.[178]

However, such a change is yet to happen. For the time being, Russian scholarship, like its Soviet predecessor, does not generally challenge the LOSC and its liberal foundational concepts.

1.3. Russian Positions at the BBNJ Agreement Negotiations

1.3.1. Context of the BBNJ Negotiations and Main Issues

The last element corroborating the fact that Russia's approach to the law of the Sea remains generally liberal is an examination of the position Russia maintains at the ongoing negotiations for the BBNJ agreement.

The current BBNJ negotiations, formally established in 2017,[179] are the result of a long process which started in 2004 with the establishment of the Ad Hoc open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.[180] The goal of these negotiations is to fill a regulatory gap: conservation and sustainable use of areas beyond national jurisdiction, which fall outside the LOSC's purview.[181]

Four main axes of negotiations have been agreed upon: management of genetic resources (MGRs), creation of area-based management tools, environmental impact assessments (EIAs) and, finally, design of a capacity-building system allowing the transfer of marine technologies.[182]

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[176] Coastal States Rights case, *op. cit.* note 46.

[177] PCA Case No. 2019-28, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation), Award Concerning the Preliminary Objections of the Russian Federation.* 27 June 2022.

[178] Alexander Skaridov. K voprosu o problemakh voennogo moreplavaniia v usloviiakh vozrosshеï voennoï aktivnosti [On the Question of Military Navigation Issues in Conditions of Growing Military Activity]. Second Vladivostok Maritime Law Forum. 22 April 2022, videorecord available at https://www.youtube.com/watch?v=S8fysK9dD_Y (from 3 hours 46 min 39 seconds).

[179] G.A Res 249 (LXXII). 24 December 2017.

[180] G.A Res 24 (LIX). 17 November 2004, para. 73.

[181] E. Molenaar. Multilateral Creeping Coastal State Jurisdiction and the BBNJ Negotiations. – 36 The International Journal of Marine and Coastal Law 2021, p 8.

[182] G.A Res 249 (LXXII), *op. cit.* note 174, para. 2.

From available reports on the first four substantive negotiating sessions,[183] but also a synthesis of State proposals transmitted by the President of the Conference,[184] it appears that the negotiations have been arduous. For instance, the crucial terms of MGRs and EIAs are yet to be defined. Currently, two concurrent definitions of each term exist.[185]

[183] International Institute for Sustainable Development. Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4–17 September 2018. – 179 Earth Negotiations Bulletin 2018, available at: http://enb.iisd.org/oceans/bbnj/igc1/ (IGC1 Report); International Institute for Sustainable Development. Summary of the Second Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 25 March – 5 April 2019. – 195 Earth Negotiations Bulletin 2019, available at: http://enb.iisd.org/oceans/bbnj/igc2/ (IGC2 Report); International Institute for Sustainable Development. Summary of the Third Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction:19–30 August 2019. – 218 Earth Negotiations Bulletin 2019, available at: http://enb.iisd.org/oceans/bbnj/igc3/ (ICG3 Report); International Institute for Sustainable Development. Summary of the Fourth Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 7–15 March 2022. – 225 Earth Negotiations Bulletin 2022, available at: http://enb.iisd.org/marine-biodiversity-beyond-national-jurisdiction-bbnj-igc4 (ICG4 Report). The ICG4 Report will not be relied upon heavily, as when writing the report, the authors did not attribute specific positions to specific States, unlike in their previous reports.

[184] See: UN Document. Further Revised Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. 30 May 2022, available at: https://www.un.org/bbnj/sites/www.un.org.bbnj/files/igc_5_-_further_revised_draft_text_final.pdf [Further Revised Draft Text]; UN Document. A/CONF.232/2020/3 Revised Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National jurisdiction. 18 November 2019. and the response by States: President of the Conference. Textual Proposals Submitted by Delegations by 20 February 2020, for Consideration at the Fourth Session of the Intergovernmental Conference on an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond national Jurisdiction (the Conference), in Response to the Invitation by the President of the Conference in her Note of 18 November 2019. 15 April 2020, available at: https://www.un.org/bbnj/sites/www.un.org.bbnj/files/textual_proposals_compilation_article-by-article_-_15_april_2020.pdf

[185] UN Document Further Revised Draft Text, *op. cit.* note 184, Arts1.10 and 1.11.

1.3.2. Structure of the Debates

For the purpose of this compendium, analysing the negotiations as process and apparent trends matter more than the results themselves. The BBNJ negotiations follow the same fracture lines as during the negotiations of the LOSC, namely in terms of opposition between developed and developing States.[186]

Regarding the issue of access to MGRs, since the first substantive session developing States have favoured the idea that use of MGRs be regulated by the common heritage of mankind regime,[187] while developed States have consistently opposed that position, arguing that the common heritage of mankind only applies to the Area.[188] Instead, they assert a regime driven by that regulating the high seas.[189] A telling example of this stark divide can be extracted from debates from the third substantive session. Developed States firmly opposed the proposition submitted by the African group that the BBNJ agreement should apply to MGRs accessed in and originating from areas beyond national jurisdiction (ABNJ).[190] In order to avoid a more stringent standard limiting use of MGRs based both on the provenance of those resources and the place where they were collected, developed States proposed to only regulate use of MGRs accessed in ABNJs.[191] In the same vein, developed States are also opposed to any propositions regarding monitoring the use of MGRs[192] which could curtail their freedom to act as they wish. On the other hand, developing States insist on monitoring use of MGRs in order to have some knowledge and therefore a small degree of control over developed States' activities *vis-à-vis* MGRs. This is important for them, as they do not yet possess the necessary technology to exploit MGRs beyond their national jurisdiction and therefore cannot compete with those better developed and equipped to exploit these resources.

Similarly, developed and developing States disagree on the nature and role of institutions created by the future BBNJ agreement to monitor implementation of the treaty by States. This line of fracture is especially salient regarding the scientific and technical body, whose mandate is currently being negotiated. On the one hand, developing States have proposed that the scientific and technical body

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[186] Establishing the make-up of each group taking part in the negotiation would require more extensive research as well as access to informal State discussions. However, for illustrative purposes, based on reports on the substantive negotiating sessions, the main members of the informal group of developed States are: The United States, Japan, (South) Korea, the Russian Federation, and the European Union. Similarly, the informal group of developing States includes: the Group of 77, the African States, the CARICOM States and the various small island States.

[187] ICG1 Report *op. cit.* note 183, at p 3; ICG3 Report *op. cit*. note 183, at pp 6–7.

[188] ICG3 Report *op. cit.* note 183, at p 7.

[189] ICG1 Report *op. cit.* note 183, at p 3. ICG3 Report *op. cit.* note 183, at pp 6–7.

[190] ICG3 Report *op. cit*. note 183, at p 6.

[191] *Ibid*.

[192] ICG1 Report *op. cit.* note 183, at p 6.; ICG2 Report *op. cit.* note 183, at p 4.

should evaluate the validity of EIAs conducted by State parties[193] but also control the mandatory transfer of technologies between State parties.[194] Should these propositions be accepted, this would once again grant developing States, who have more difficulty accessing MSRs and ABNJs, more control over the actions of States who do have access to them. This control would not be direct but exercised through the proxy of the scientific and technical body.

On the other hand, developed States opposed the creation of a scientific and technical body to supervise State actions regarding both establishment of EIAs[195] and transfer of technology.[196] During the third substantive negotiating session, the counterpropositions put forward by developed States were the following: they suggested that the scientific and technical body should play an advisory role[197] and publish guidelines to orient State actions.[198] Furthermore, they emphasized that transfer of technology should be on a voluntary basis.[199]

1.3.3. Russia's Positions During the Debates

Over the course of the debates, Russia has consistently sided with other developed States and advocated for voluntary actions and less centralised control over States' actions regarding BBNJ.

To that end, Russia positioned itself in favour of excluding fish from the definition of MGRs so as not to hamper fisheries, which are already regulated.[200] Moreover, following other developed States, Russia refused to agree that MGRs found beyond national jurisdiction be considered as the common heritage of mankind.[201] Russia also rejected inclusion of an obligation to cooperate in the case where MGRs were found in both ABNJ and areas within national jurisdiction.[202] In addition, as to sharing benefits derived from the exploitation of MGR, Moscow voiced its support for a voluntary system[203] whose scope would only include non-monetary benefits.[204]

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193 ICG2 Report *op. cit.* note 183, at p 10; ICG3, Report *op. cit.* note 183, at p 12.

194 ICG1 Report *op. cit.* note 183, at p12; ICG2 Report *op. cit.* note 183, at p 13; ICG3, Report, note 5, at pp 15–16.

195 ICG2 Report *op. cit.* note 183, at p 10; ICG3 Report *op. cit.* note 183, p 14.

196 ICG1 Report *op. cit.* note 183, at p12; ICG2, Report *op. cit.* note 183, at p 12; ICG3, Report *op. cit.* note 183, at p 16.

197 ICG3, Report *op. cit.* note 183, at p 17.

198 *Ibid.*

199 ICG3 Report *op. cit*. note 183, at p 16.

200 ICG3 Report *op. cit.* note 183, at p 7.

201 ICG3 Report *op. cit.* note 183, at p 7.

202 *Ibid.*

203 ICG1 Report *op. cit*. note 183, at p 5.

204 ICG2 Report *op. cit.* note 183 at p 4

In the same vein, Moscow also doubted the need to create another international body to manage ABNJs.[205] Rather, it favoured using the existing regional institutions to manage ABNJs.[206] Moscow also challenged creation of a global network of MPAs and fishing regulations.[207]

Regarding the issue of EIAs, while supporting reference to the LOSC's Article 206,[208] Russia opposed the creation of both an international-decision-making process to issue authorisation to States to proceed with their activities and a global EIA procedure,[209] preferring to leave the conduct of EIAs to the discretion of States. For Moscow, States themselves are able to evaluate when an EIA is required prior to conducting an activity.[210] In addition, rather than a fixed set of standards regulating EIAs, Russia argued in favour of the inclusion of non-binding guidelines in an annexe to the BBNJ agreement,[211] which States would be able to adopt independently in their national legislation.[212] Furthermore, Russia rejected the idea that EIAs should be mandatory if an activity is already regulated by another international agreement or body.[213]

Concerning the issue of transfer of technology and capacity building, Russia gave its preference to the creation of a voluntary regime[214] and opposed the creation of a review mechanism to ensure implementation of State obligations regarding transfer of technology and capacity building.[215] Russia also rejected creation of a fund financing capacity building.[216] Additionally, Moscow did not favour the idea that intellectual property rights be regulated by the future BBNJ agreement.[217]

Finally, Russia did not favour creation of a scientific and technical body under the Conference of Parties reviewing and monitoring implementation of the LOSC.[218] It also refused to delegate these functions to the ISA.[219] On the contrary, it preferred cost-effective and non-bureaucratic solutions.[220] Moreover, should a

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[205] ICG1 Report *op. cit.* note 183*,* at p 7; ICG2 Report *op. cit*. note 183*,* at p 4; ICG3 Report *op. cit.* note 183, at p 9.

[206] ICG1 Report *op. cit*. note 183*,* at pp 7–8; ICG2 Report *op. cit.* note 183*,* at pp 6–7; ICG3 Report *op. cit*. note 183, at p 12.

[207] ICG1 Report *op. cit.* note 183*,* at p 5.

[208] *Ibid,* at p 10.

[209] *Ibid,* at p 11.

[210] ICG2 Report *op. cit.* note 183*,* at p 8.

[211] ICG2 Report *op. cit.* note 183, at p 8. ICG3 Report *op. cit.* note 183, at pp 12–13.

[212] ICG2 Report *op. cit.* note 183, at p 9. ICG3 Report *op. cit*. note 183, at p 12.

[213] ICG2 Report *op. cit*. note 183, at p 8.

[214] ICG1 Report *op. cit.* note 183, at p 12; ICG2 Report *op. cit.* note 183, at p 12; ICG3 Report *op. cit*. note 183, at pp 15–16.

[215] ICG1 Report *op. cit.* note 183, at p 14; ICG3 Report *op. cit.* note 183, at p 16.

[216] ICG2 Report *op. cit.* note 183, at p 12.

[217] ICG1 Report *op. cit*. note 183*,* at p 5. ICG2 report *op. cit*. note 183, at p 4.

[218] ICG3 Report *op. cit*. note 183, at p 17.

[219] *Ibid.*

[220] ICG2 Report *op. cit.* note 183, at p 14.

review take place, it should be left to State parties. Furthermore, the Conference of Parties would only issue recommendations to States. [221]

With hindsight, even though the issues are not exactly the same, parallels between the positions maintained by the Soviet Union during the negotiations of the LOSC and by Russia during negotiations for the future BBNJ agreement are striking. Half a century later, the Russian Federation seeks to limit the scope of the BBNJ agreement to preserve its own freedom to exploit the riches of the sea without external supervision.

Despite the partiality of the summary reports analysed, it is possible to conclude that Russia, like the USSR, considers the sea as a treasure trove to be used and exploited. This seems to be the reason why, as a maritime power, Russia, along with Western and other developed nations, still maintains a liberal understanding of the law of the sea during international negotiations.

2. Local Resistance and Turn to History

This section adds further nuances to the previous section and highlights the limits of the Soviet and Russian liberal approach to the law of the sea. These limits concern seas historically considered Russian, in other words the Arctic Ocean and – far more recently – the Sea of Azov. In other regions, such as the Baltic Sea, Moscow can selectively act in contradiction with the LOSC. Nevertheless, it did not build a systematic argument to contest the applicability of the Convention in that sea.

Subsection 1 demonstrates that the Arctic has always been a zone where Moscow sought to assert its control, especially over navigation. Since the negotiations of the LOSC, the Soviet Union and Russia have deployed an equivocal legal policy seeking to control the Arctic maritime expanses while at the same time liberalizing navigation along the NSR and respecting the LOSC. Their doctrine has echoed this dual ambition. Scholars integrated the LOSC into their writings, while at the same time asserting the historical specifics of Arctic navigation.

Yet, over the past 20 years – following Russia's first submission to the CLCS – a new critical school of thought has emerged, seeking to circumvent the LOSC and promoting a customary regime designed to grant Russia exceptional rights in the region. This school of thought claims Russia's sovereignty over both the NSR and the Arctic seabed lying off Russia's coasts. Although it does not represent the whole Russian doctrine, and its position has not been officially endorsed by the Russian government, it nonetheless seems to have become increasingly influential. Indeed, the latest Russian submission to the CLCS represents a validation of the political objective of this critical school of thought: extension of Russia's sovereign rights over the Arctic seabed.

[221] ICG3 Report *op. cit*. note 183, at p 17.

Finally, it is important to note that this critical school of thought is leading the defence of Russia's legal exceptionalism in the Arctic, while for the moment maintaining a careful ambiguity, sending signals asserting Russia's sovereignty and control over the Arctic, while at the same time adhering to the LOSC.

As will be shown in subsection 2, the situation is different in the Sea of Azov. Contestation of the applicability of the LOSC is more recent and dates back to the late 2010s, when judicial proceedings began before the Annex VII arbitral tribunal deciding the *Coastal State Rights* case between Ukraine and Russia.[222]

In the case of the Sea of Azov, the Russian State is the main advocate of the existence of an exceptional regime proving that the LOSC does not apply. Furthermore, given the existence of a case before the Annex VII arbitral tribunal, Moscow cannot afford to take equivocal positions. Therefore, the Russian State holds clear positions about the Sea of Azov. It uses historical arguments to prove that the Sea of Azov constitutes shared internal waters and is thus excluded from the scope of the LOSC.

If doctrine is active in promoting the existence of an exceptional legal regime in the Arctic, concerning the Sea of Azov doctrine follows in the footsteps of the State.

To conclude, the absence of historical arguments being used to contest the applicability of the LOSC in the Baltic Sea seems to prove that the Soviet and Russian turn to history to justify the existence of exceptional regimes is nevertheless limited.

2.1. The Arctic Exception

2.1.1. Soviet and Russian Arctic Legal Policy: From Assertion of Control to Controlled Liberalization

If during the first half of the 20th century the emphasis of Soviet Arctic legal policy was on asserting sovereignty over lands and islands located in the Arctic Ocean,[223] in the second half of the century the focus shifted towards control over navigation.

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[222] *Coastal State Rights* case, *op. cit.* note 46.

[223] Thévenin, *op. cit.* note 65, pp 479–483. See especially note 18 on the 1916 Russian Ministry of Foreign Affairs' note reproduced in A.N. Vylegzhanin *et alii*. Arkticheskii Region: Problemy Mezhdunarodnogo Sotrudnichestva (Tom 3: Primenenie Pravovye Istochniki) [Arctic Regions: Problems of International Cooperation (Volume 3: Applicable Legal Sources)]. Moscow: Rossiïskiĭ sovet po mezhdunarodnym delam Aspekt Press 2013, p 140 [Vylegzhanin, 2013]; and translated in P.A. Berkman, A.N. Vylegzhanin, O.R. Young. Baseline of Russian Arctic Law. 109 New York: Springer 2019, p 109 [Vylegzhanin, 2019]. Captain Vil'kitski discovered General Vil'kitski island, Severnaya Zemlya (known in 1916 as Nicholas II Land), Little Taymyr Island (known in 1916 as Tsarevich Alexey Island), Starokadomskyi island and Zhokhov Island (known in 1916 as Novopashennyi Island). The 1926 Soviet Union Central Executive Committee Decree declared Soviet Sovereignty over these islands as well as those yet to be discovered located north of the Soviet Coastline, Prezidium Tsentral′nogo Ispolnitel′nogo Komiteta SSSR [Central Executive Committee of the USSR Presidium]. Postanovlenie ob ob"iavlenii

In the 1960s, in the context of the Cold War, the United States began to assertively contest Soviet sovereignty over the Arctic seas bordering its coast.[224] To that end, the United States organized several voyages to conduct oceanic surveys of those seas, to which the USSR objected.

Most famously, in July 1964 the Soviet Union contested the legality of the USS Burton Island's planned voyage across the straits of Laptev and Sannikov.[225] To that end, it sent an *aide-mémoire* to the American Embassy in Moscow. The Soviet document emphasized that the United States vessel failed to ask for permission from the Soviet authorities at least 30 days before crossing the straits. Therefore, according to the Soviet Union this passage was unlawful.[226]

A few months following the incident, to reinforce its legal standing, in 1965 the Soviet Union passed a secret decree imposing mandatory permission for foreign warships wishing to cross the straits along the course of the NSR.[227] In addition, it imposed mandatory icebreaker and pilot escort to pass through the Vil'kitsky and Shokal'skii Straits, arguing that a mandatory escort was designed to ensure safety of navigation.[228]

In 1967, the Soviet Union transmitted a complaint regarding the planned transit of US Coastguard icebreakers *Edisto* and *East Wind* through the Vil'kitsky Strait. The Soviet authorities reminded the United States of the necessity to follow the procedure laid down in the 1960 law on the Protection of the State Border as they had already indicated in their 1964 *aide-mémoire*.[229] Interestingly, however, the Soviet authorities made no reference to the 1965 decree.

During the negotiations of the LOSC, the ambiguities of the Soviet positions reflected the special place the Arctic held in the mind of the Soviet authorities. The ambiguity of the Soviet position was threefold.

One the one hand, as seen in the previous section, during the LOSC negotiations the USSR maintained freedom of navigation through straits used for international navigation and the right of innocent passage through the territorial sea. Yet, for security reasons it was wary about the possibility of American war-

territorieï Soiuza SSR Zemel′ i Ostrovov, Raspolozhennykh v Severnom Ledovitom Okeane, 15 April 1926. [Central Executive Committee of the USSR Presidium, Decree On the Proclamation of Lands and Islands Located in The Arctic Ocean as Territory of the USSR], in Dokumenty vneshneï politiki SSSR (T. 9) [USSR Foreign Policy Documents (Vol. 9)]. Moscow: Gosizdat polit. literatury, 1964, p 228. Translated in Vylegzhanin 2019, *op.cit.* note 223, p 216.

224 Erik Franckx, *op. cit.* note *20*. pp 269–270.

225 Roach et al., *op. cit.* note 4, at pp 312–313, Brubaker, *op. cit.* note 20, p 258.

226 The *aide mémoire* is reproduced in Roach et al., *op. cit.* note 4, pp 312–313, Brubaker, *op. cit.* note 20, p 258 note 828.

227 Postanovlenie № 331-112, *op. cit.* note 100, para. 1. The straits concerned by this decree were: the straits of Kara's Gates, Yugorskiy Shar, Matochkin Shar, Vil'kitsky, Shokal'skii and the Red Army, as well as the straits of Dmitry Laptev and Sannikov.

228 Postanovlenie № 331-112, *op. cit.* note 100, paras. 2 and 3.

229 Roach, *op. cit.* note 4, p 315.

ships sailing through the NSR and the Arctic straits.[230] At the same time, the USSR was also willing to see its domestic laws regarding the Arctic enshrined in the LOSC.[231]

Eventually, the USSR found a way to solve this dilemma. The current drafting of LOSC Article 234 indicates that eventually the USSR chose the extended coastal State prerogative in the Arctic over its fear of seeing foreign warships sail through the NSR. In 1985, with the inclusion of the Arctic straits within the Soviet straight baseline system, Moscow found a way to assuage its security concerns.[232] Indeed, the right of innocent passage does not normally extend to internal waters.[233] To deny the right of transit passage through the Arctic straits, the USSR could argue that the NSR did not constitute an international shipping route. Indeed, the first ship to sail through the NSR since the 1960s incidents was the French research vessel *Astrolabe* in 1993.[234]

Before going further, precision needs to be added regarding the right of innocent passage through the Arctic straits. Theoretically, as demonstrated in the third article, the enclosure of Arctic straits within straight baselines[235] would not have deprived foreign warships of the right of innocent passage through most of them. The 1965 decree №331-112 had defined the Straits of Kara's Gates, Yugorskiy Shar, Matochkin Shar, Vil'kitsky, Shokal'skii and of the Red Army as the territorial sea of the USSR.[236] Under Article 5.2 of the 1958 CTSCZ and Article 8.2 of the LOSC, a right of innocent passage exists in internal waters which were not considered as such prior to their enclosure by straight baselines.[237] Only in the Straits of Laptev and Sannikov would a right of innocent passage not have existed, as they were considered to be historic waters of the Soviet Union[238] since at least 1965, which means that they were considered as internal waters of

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230 Nankiwell, *op. cit.* note 22, pp 341–342.

231 Solski, *op. cit.* note 22 p 15.

232 USSR Council of Ministers Decree of January 15, 1985 *op. cit.* note 153, pp 315–345.

233 LOSC, *op. cit.* note 5, Art. 17.

234 Franckx 2009, *op. cit.* note 23, p 329.

235 For the sake of scientific discussion, it will be assumed that they were legally drawn. Although for critics of the legality of these baselines see note 4 and discussion in part F. 1.2.1.3, pp 33–34, note 153–156.

236 Postanovlenie № 331-112, *op. cit.* note 100, para. 1.

237 Convention on the Territorial Sea and Contiguous Zone. Geneva. 29 April 1958 e.i.f 10 September 1964, art. 5.2 "Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters." [CTSCZ]; LOSC, *op. cit.* note 5, art. 8.2 is almost identical and states that "Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters."

238 Postanovlenie № 331-112, *op. cit.* note 100, para. 1.

the USSR.[239] However, given the fact that until recently the 1965 decree remained classified, this argument could not be used against the USSR. Nevertheless, it could be used today by foreign States to claim that their warships have the right to sail through the Arctic straits except the Straits of Laptev and Sannikov, under Article 5.2 of the CSTZ and Article 8.2 of the LOSC.

Since the signing of the LOSC, Soviet and Russian State practice has been based on the LOSC, and largely in conformity with the LOSC. In 1984, it established Marine Protected Areas (MPAs) to protect the marine environment.[240] Those MPAs still exist today.[241] Regarding the issue of the extended continental shelf, regardless of the validity and chances of success, over the last two decades Russia has thrice proven its adhesion to the LOSC.[242]

Furthermore, despite the controversial nature of their NSR regulations, since 1990 the USSR and the Russian Federation have made Article 234 of the LOSC the cornerstone of their legal argument.[243] Even though those NSR regulations have been thoroughly discussed and critiqued,[244] their various modifications as well as the clarification and increasingly transparent permission scheme put in place by the NSR administration aimed at attracting foreign navigation in order to realize the liberal economic policy planned by the government of the Russian Federation, which strives to transform the NSR into an international shipping route open all year round on which development of the Arctic Region will be built.[245]

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[239] 1960 Decree on the Protection of the State Border, *op. cit* note 127 Art. 4.v.; 1982 Law on the State Border, *op. cit* note 127, Art. 6.4.

[240] Franckx, *op. cit.* note 54, p 379; Ukaz ob Usilenii Okhrany Prirody v Raïonakh Kraïnego Severa i Morskikh Raïonakh, Prilegauishchikh k severnomy pobereg'iu SSSR, *op. cit.* note 124, Art.1.

[241] Federal′nyï zakon № 33-FZ Ob Osobo Okhranyaemykh Prirodnykh Territoriiakh, *op.cit.* note 128, Art. 22.4.g. The Russian MPAs can be visualized at: Marine Conservation Institute. Marine Protection Atlas: Russia. Available at: https://mpatlas.org/countries/RUS/map.

[242] United Nations Division for Ocean Affairs and the Law of the Sea. 15 *Law of the Sea Information Circular* 2002*,* pp 49–57; Russian Federation. Partial Revised Submission of the Russian Federation to the Commission on the Limits of the Continental Shelf in Respect of the Continental Shelf of the Russian Federation in the Arctic Ocean. New York. 2015; Addendum to the Partial Revised Submission of the Russian Federation to the Commission on the Limits of the Continental Shelf in Respect of the Continental Shelf in the Area of the Lomonosov Ridge, Alpha Ridge, Mendeleev Rise, Amundsen and Makarov Basins, and the Canadian Basin. *op. cit.* note 102; Addendum to the Partial Revised Submission of the Russian Federation to the Commission on the Limits of the Continental Shelf in Respect of the Continental Shelf in the Area of the Gakkel Ridge, Nansen and Amundsen Basins. New York. *op. cit.* note 102.

[243] E.g: Franckx 2009, *op. cit.* note 24, p 332. Solski, 2013 *op. cit.* note 25, pp 96–98.

[244] See e.g.: Digest of United States Practice of International Law, *op. cit*. note 3, p 526 as well as notes 19 to 26 of this compendium referring to the considerable works realized by E. Franckx, D. Brubaker, and J. Solski on the topic.

[245] Morskaia Doktrina Rosiïskoï Federatsii [Maritime Doctrine of The Russian Federation]. Moscow. 26 June 2015, para. 20.i [2015 Maritime Doctrine]; Strategiia Pazvitiia Arkticheskoï Zony Rossiïskoï Federatsii i Obespecheniia Natsional'noï Besopasnosti na Period do 2035

Yet at the same time, while encouraging shipping through the NSR, Russia also wants to retain control over the passage and traffic[246] in a region that it considers vital for its security.[247] The 2022 Maritime doctrine did not mellow these paradoxical ambitions, but rather affirmed them.

Tellingly, the NSR has never ceased to be considered as a historically developed national transportation route of the Russian Federation.[248] Since 2012, an amendment has opened the door to the existence of a customary regime regulating passage. In the past few years, since the company Rosatom has been put in charge of administering the NSR, transparency regarding the issuance and denial of permits to sail through the route has slightly diminished.[249] Moreover, since November 2021, as a result of an update to the 1985 Soviet straight baseline system, Russia now claims extended areas of internal waters in the Arctic.[250] Following publication of the 2022 Russian Maritime Doctrine, Moscow has once again emphasized the vital strategic importance of the Northern Sea Route and affirmed its intention to control the passage of foreign warships.[251] Furthermore, one of its objectives is to consolidate the status of the Arctic strait as historic waters of the Russian Federation.[252]

It is important to note that the Russian Duma has already taken steps to reinforce control over warships sailing through the NSR. A draft law aiming to modify article 14 of the Federal Law №-155 'On the Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation' has already passed the first stages of the law-making process and is currently being examined by Russian

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[Strategy for Development of the Arctic Zone of the Russian Federation and Provision of National Security for the Period up to 2035]. Moscow, 26 November 2020, para. 31.e; 2022 Maritime Doctrine, *op. cit* note 74, paras 37.4 and 50.4.

246 2015 Maritime Doctrine, *op. cit.* note 245 para 59; 2022 Maritime Doctrine, *op. cit.* note 74, paras 50.5 and 50.6.

247 Osnovy Gosudarstvennoï Politiki Rossiïskoï Federatsii v Oblasti Voenno-Morskoï Deiatel'nosti na period do 2030 [Fundamentals of the State Policy of the Russian Federation in the Field of Naval Operations to 2030]. Moscow, 20 July 2017, para. 27.a; 2022 Maritime Doctrine, *op. cit.* note 74, para. 2.

248 Federal Law № 155-FZ, *op. cit.* note 61, art 14. N.B This idea has never disappeared from the Law since its initial drafting in 1998.

249 Solski 2020, *op. cit.* note 25, p 399. Kodeks Torgovogo Moreplavaniia Rossiïskoï Federatsii [Code of Commercial Navigation of the Russian Federation], 31 March 1999 (version of 2020), Art. 5^1 para. 2.1; Pravila Plavaniia v Akvatorii Severnogo Morskogo Puti. Moscow, 18 September 2020, para. 2. On 21 June 2022, the prerogative of Rosatom in the NSR was confirmed and extended. See: Federal'nyi Zakon №184-FZ O Vnesenii izmenenïï v Stat'iu 5^1 Kodeksa Torgovogo Moreplavaniia Rossiïskoï Federatsii i Federal'nyi Zakon O Gosudarstvennoï Korporatsii po Atomnoï Energii Rosatom [Federal Law №184-FZ On Changes to Article 5^1 of the Code of Commercial Navigation of the Russian Federation and the Federal Law on the State Corporation for Atomic Energy Rosatom]. 28 June 2022 Arts 1 and 2.

250 Postanovlenie № 1959 of 16 November 2021, *op. cit.* note 156.

251 Maritime doctrine 2022, *op. cit.* note 74, para. 50.2.

252 Maritime doctrine 2022, *op. cit.* note 74, para. 50.5.

deputies.[253] The vote to send the draft law to the second reading is scheduled on 26 September 2022.[254] This proposal imposes that warships obtain permission to sail through the internal waters of the Russian Federation at least 90 days prior to their trip. Futhermore, applicants must provide a detailed itinerary.[255] In addition, Russian authorities would have the right to suspend the permission, even after the voyage has begun.[256] Interestingly, the number of foreign warships sailing through the internal waters of the NSR will also be capped to a single vessel.[257] At last, warships and submarine will be required to sail above water.[258]

Furthermore, the proposed changes to the 1998 Law № -155 is legally sounder than the 2019 draft amendment of the 1999 Rules. Indeed, while the 2019 draft intended to regulate warships' right of innocent passage through the NSR more tightly regardless of LOSC Article 236,[259] in a manner that was neither in line with the LOSC nor the 1989 Uniform interpretation;[260] the most recent proposal intends to control navigation of foreign warships through internal waters, where the State is sovereign, and the right of innocent passage does not usually exist.[261] Thus, should this most recent proposal be adopted, foreign States would have fewer legal grounds to contest it. However, practically speaking although the geographical scope of the 2022 proposal is more limited than the one of the 2019 project, its effect would be similar. Indeed, the Arctic Straits, which are considered internal waters since 1985, are choke points for the crossing of the NSR.[262]

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[253] Draft Law №176880-8, *op. cit*. note 141, para. 2.

[254] Gosudarstvennaia Duma. Zakonoproekt № 176880-8 'O Vnesenii Izmenenii v Federal'nyi Zakon O Vnutrennikh Morskikh Vodakh, Territorial'nom More i Prilezhashcheĭ Zone Rossiĭskoĭ Federatsii, *op. cit*. note 145.

[255] Draft Law №176880-8, *op. cit*. note 141, para. 2.1.

[256] *Ibid,* para.2.6.

[257] *Ibid,* para. 2.3.

[258] *Ibid,* para. 2.4.

[259] 2019 Changes to the Rules of Navigation and Sojourn of Foreign Warships, *op. cit.* note 137; Poiasnitel′naia Zapiska k Proektu Postanovleniia Pravitel′stva Rossiĭskoĭ Federatsii O Vnesenii Izmenenii v Pravila Plavaniia i Prebyvaniia Inostrannykh Voennykh Korableĭ i Drugikh Gosudarstvennykh Sudov, Ekspluatiruemykh v Nekommercheskikh Tseliakh, v Territorial′nom More, vo Vnutrennikh Morskikh Vodakh, na Voenno-Morskikh Bazakh, v Punktakh Bazirovaniia Voennykh Korableĭ i Morskikh Portakh Rossiĭskoĭ Federatsii" [Explanatory Note to Russian Federation Governmental Decree of ____ №_____ 'On the Insertion of Changes in the Rules of Navigation and Sojourn of Foreign Warships and Other Government Ships Operated for Non-Commercial Purposes in the Territorial Sea, Internal Sea Waters, in Naval Bases, in Warship Stationing Points and the Sea Ports of the Russian Federation']. Moscow. 01 March 2019 at p 2.

[260] LOSC, *op. cit.* note 5, Art. 24 read in conjunction with Uniform Interpretation, *op.cit.* note 43, para.2. Those provisions forbid the coastal state from establishing an authorization-based regime for ships wishing to enjoy their right of innocent passage.

[261] LOSC, *op. cit.* note 5, Arts. 2.1 and 8.2.

[262] Decree of the USSR Council of Ministers of January 15, 1985*, op. cit.* note 153, pp 315–343.

As Jan Solski underlined, should this new draft amendment be adopted, the existence historic titles or lack thereof will prove instrumental in the potential diplomatic exchanges involving Russia and the West, especially the United States.[263]

By comparison with the draft legislative project from 2019, which remains to be adopted and has stayed in legislative limbo for more than three years, the most recent proposal seems to pass the initial procedural stages much more quickly so far. For this reason, its rapid adoption and entry into force are more credible. Not to mention the fact that the recent publication of the 2022 Maritime Doctrine and the tensions between Russian and the West provide a unique opportunity for this draft amendment to be adopted.

In addition, regarding the Arctic seabed, the 2021 Russian submission, which claims a wider extended continental shelf than ever before, is to be understood in this ambiguous context, where Moscow seeks to extend the scope of its right while adhering to the rules of the LOSC.

2.1.2. The Role of Soviet and Russian Doctrine

As highlighted in the second and third articles submitted for defence, Soviet doctrine has attempted to explain, justify, and provide arguments for the State's actions in the Arctic. This is evidenced by the development of Soviet Arctic doctrine, which paralleled the USSR's actions and concerns.

In the first half of the 20th century, Soviet doctrine developed the sector theory, which aimed to demonstrate Soviet sovereignty over land and islands off the USSR's Arctic coasts.[264] In the second half of the 20th century, the focus of scholarship shifted to navigational rights[265] to support contestation of Moscow's sovereignty over the NSR. To that end, in addition to the sector theory, Soviet doctrine added to its arsenal the concept of bay-type seas[266] and started to argue for the existence of an Arctic customary regime based on a historical presence in the region to justify the Soviet Union's extended rights over Arctic maritime expanses. [267]

Since 1982, while conserving their unique point of view regarding the status of the NSR and the Arctic straits, Soviet and Russian doctrine has integrated the LOSC and its provisions in their reasoning.[268]

To justify Moscow's control over navigation in the NSR, Soviet and Russian scholars relied on Article 234. Furthermore, relying on the LOSC they contested application both of the right of innocent passage and of the right of transit passage

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[263] J. Solski. New Draft Law on the Russian Arctic Straits – Putin' Money Where the Mouth is?. The NCLOS Blog. 15 September 2022, pp 5–6.

[264] Thévenin, *op. cit.* note 65, pp 478–483.

[265] *Ibid,* p 484.

[266] Thévenin, *op. cit*. note 65, pp 484–489.

[267] *Ibid.*

[268] *Ibid,* pp 489–494.

through the Arctic straits. On the one hand it is argued that the straits were considered as internal waters of the Soviet Union and Russian Federation, as affirmed by the 1985 decree.[269] On the other, it was argued that the Arctic straits did not amount to straits used for international navigation for lack of foreign ship traffic.[270] However, it is worth emphasizing that this last argument is less often used. Some Russian scholars are beginning to admit the possible existence of a right of transit passage through some Russian Arctic straits.[271]

Interestingly, for the past twenty years or so, a new doctrinal current has emerged in Russian doctrine. Under the impulse of Alexander Vylegzhanin, this new critical school of thought challenges the applicability of the LOSC to the Arctic.[272] Its main goal was to challenge Russia's initial submission to the CLCS in 2001,[273] which it considered as an historical mistake. In the opinion of these

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[269] See e.g.: A. L. Kolodkin and M. E. Volosov. The Legal Regime of the Soviet Arctic: Major Issues. – 14 Marine Policy 1990, pp 163–167; Molodtsov in Kolosov and Kuznetsov, *op. cit.* note 174, at p 509–510; Yu.G. Barsegov. Status Arktiki Prava Rossii [The Status of the Arctic and the Rights of Russia] in Arktika: Interecy Rossii i Mezhdunarodnye Uslovia Ikh Realizatsii [The Arctic: Russia's Interest and the International Conditions for their Realization] I.M. Mogilevkin (ed.) Moscow: Nauka 2002, pp 28–29; Kovalev, *op. cit.* note 161, pp 8–9; M.E. Volosov. Mezhdu-Pravovoï Status i Rezhim Arktiki [International Legal Status and Regime of the Arctic] in Bekyashev, 2005, *op. cit.* note 174, at p 472; I.V. Bunik, Mezhdunarodno-Pravovye Osnovaniia Regulirovaniia Rossiei Sudokhodstva po Severnomu Morskomu Puti [International Legal Foundations of Regulation by Russia of Navigation along the Northern Sea Route]. Cand. Diss. Moscow: MGIMO 2007, pp 97, 104; V.V. Gavrilov, Pravovoï Status Severnogo Morskogo Puti Rossiiskoï Federatsii. – 2 Zhurnal Rossiïskogo Pravo [Journal of Russian Law] 2015, p 250; A.N. Vylegzhanin and I.P. Dudykina. Iskhodnye Linii v Arktike: Primenimoe Mezhdunarodnoe Pravo [Baselines in the Arctic: Applicable International Law] Moscow: MGIMO 2018, p 105; A.N. Vylegzhanin, V.P. Nazorov, I.V. Bunik. Severnyi Morskoi Put': K Resheniiu Politiko-Pravovykh Problem [Northern Sea Route: On the Resolution of Politico-Legal Problems]. – 90 Vestnik Rossiiskoi Akademii Nauk [Russian Academy of Sciences Bulletin] 2020, pp 1105, 1110; I.S. Zhudro, T.V. Rednikova. Arktika: Ustoïchivoe Razvitie Regiona i Obespechenie Natsional′noï Bezopasnosti [Arctic: Sustainable Development of the Region and Guarantee of National Security]. – 3 Gosudarstvo i Pravo [State and Law] 2022, p 133; G.G. Shinkaretskaia, T.V Rednikova. Sootnoshenie Prav i Interesov Pripoliarnykh i Drugikh Gosudarstv v Ispol′zovanii Arkticheskogo Regiona [Correlation of the Rights and Interests of Polar and Other States in Use of the Arctic Region]. – 1 Pravo i Politika [Law and Politics] 2022, p 18.

[270] A.L. Kolodkin, V.I. Markov and A.P Ushakov. Legal Regime of Navigation in the Russian Arctic. – 94 INSROP 1997, p 23; Molodtsov in Kolossov, 1999, *op. cit.* note 174, at 510; Barsegov, *op. cit*. note 269, pp 27–28; I.N. Mikhina. Mezhdunarodno-Pravovoï Rezhim Morskikh Prostranstv Arktiki [International Legal Regime of The Arctic Maritime Expanses]. Cand. Diss. Moscow Soiuzmorniiproekt, 2003, at 159–160; Volosov in Bekyashev, *op. cit.* note 174, at 471; Bunik, *op. cit.* note 269, p 25; Gavrilov, *op. cit.* note 269, at 154.

[271] Bekyashev and Bekyashev, op. cit. note 71, p 285.

[272] Thévenin Requiem, *op. cit.* note 65, pp 501–506.

[273] Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, Law of the Sea Information Circular no.15, *op. cit.* note 242, 49–57; Alexander Vylegzhanin, O Vozmozhnosti Sokhraneniia v Kachestve Kontinental'nogo Sel'fa Rossiïskoï Raïon 'A' v Peredelakh Rossiïskogo Arcticheskogo Sektora, Utrachivaemogo Soglasono Prestavleniiu ('zaiavke')

scholars, with this document Moscow self-limited its own right to the Arctic seabed and sought to correct it.[274]

The thesis of this critical school of thought rests upon the argument that the LOSC does not apply to the Arctic,[275] or in some rare cases is *lex specialis*.[276] Rather, in its place exists a customary regime, which has been built over centuries by Russia.[277] In addition, to build this customary regime, this critical school of thought has revived and updated the concept of the Arctic sector to include the continental shelf within its scope.[278] Such a theory, built following this line, allowed them to revendicate a wider extended continental shelf than the 2001 Russian submission to the CLCS initially claimed.[279] Although the Russian government did not officially endorse the critical school of thought's position, with its 2021 amended submission it realized their political objective: to claim a wider extended continental shelf and more precisely part of the perceived Soviet Arctic sector that the 2001 submission relinquished.[280]

In addition to these doctrinal positions regarding the Arctic seabed, critical scholars also contend that the same Arctic customary regime grants Russia sovereignty over the NSR and therefore the right to control navigation.[281] Nevertheless, within Russian doctrine these positions are less controversial than their positions regarding the extended continental shelf, for they follow the same historical arguments that have existed in Soviet and Russian scholarship since the 1950s and that are shared by numerous Russian scholars.[282] However, the

Rossii 2001 goda (Nauchno-Ekspertnyï Memorandum [Novaia Redaktsiia] [On The Possibility to Conserve Zone A, Lost According to the Russian 2001 Submission, As the Russian Federation's Continental Shelf Within the Limits of the Russian Arctic Sector (Expert Report) [New Edition]]. Moscow: SOPS 2012.

274 Thévenin Requiem *op. cit*. note 65, pp 495–497.

275 *Ibid,* pp 501–506.

276 In some articles, some critical scholars have admitted that the LOSC applied to the Arctic. See e.g.: Vylegzhanin et al. Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law. – 10 The Polar Journal 2020, pp 286, 294, 300; Zhudro and Rednikova, *op. cit.* note 269*,* p 132. However, it is important to note that in most articles critical scholars contest the applicability of the LOSC.

277 *Ibid,* pp 506–509.

278 *Ibid,* pp 509–513.

279 United Nations Division for Ocean Affairs and the Law of the Sea, 15 Law of the Sea Information Circular 2002, *op. cit.* note 237, pp 49–57 read in conjunction with Russia's 2021 submission, *op. cit.* note 102 and read in conjunction with International Boundaries Research Unit, Russia's evolving Central Arctic Ocean submission, April 2021, Available at: https://www.dur.ac.uk/resources/ibru/resources/Arctic%20Maps%202021/Map5IBRUArcticmap07-04-21RussiasevolvingsubmissionintheCAO.pdf.

280 Thévenin Requiem *op. cit.* note 65 pp 523–525.

281 E.g: Vylegzhanin *et al., op. cit.* note 276.

282 Thévenin Requiem *op. cit.* note 65 pp 484–489; Thévenin Back to the USSR, *op. cit.* note 66, pp 5, 9, 11.

emphasis they place on history and international custom is more pronounced than other scholars.

Even though this school of thought does not reflect the whole of Russian doctrine interested in the Arctic,[283] and even though the Russian State has never officially endorsed the theses maintained by this school of thought, it seems quite influential. Firstly, the majority of its proponents are working in MGIMO, one of the most influential Russian universities in terms of international law. Furthermore, its members are also in positions to influence Russian policy, either of the presidential administration or of the Scientific Council of the Russian Federation's Maritime College.[284] Secondly, as the 2021 submission might suggest, the political objective of this critical school of thought may align with the vision of the Russian government as primus inter pares in the Arctic.[285]

Lastly, in a context where climate change renders application of article 234 all the more delicate, the theses of the critical school of thought, which propose to circumvent the LOSC, may in the future seem increasingly appealing for the Russian State. This observation is further strengthened by rising tensions between the West and Russia since the beginning of the war in Ukraine and publication of the 2022 Maritime Doctrine.

2.1.3. Existence of an Arctic Customary Regime on the Seabed: 'Requiem for a Sector? Russia's Updated Arctic Submission to the CLCS and its Effect on Russian Doctrinal Debate about the Arctic Legal Regime'[286]

Regarding the extended continental shelf, as proven in the second article submitted for defence, the customary regime built by critical scholars is founded upon both the existence of Russia's historic rights in the Arctic[287] as well as a revival and modernization of the concept of Arctic sectors, so that it encompasses the seabed, over which it grants Russia sovereign rights.[288]

Critical scholars use Russia's long-standing presence in the Arctic region to argue that Moscow's sovereignty extended upon the Arctic seas and seabed lying off its coasts. Furthermore, they extrapolate the meaning – of the 1825 Convention Concerning the Limits of Their Respective Possessions on the Northwest Coast of America and the Navigation of the Pacific Ocean and of the 1867 Treaty of Cession of Alaska by the Russian Empire to the United States – to prove that the concept of the Arctic sector was created by Russia and other Arctic States in the late 19th century.[289] Critical scholars further extrapolate the meaning of decla-

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[283] Thévenin Requiem *op. cit.* note 65 pp 514–523.

[284] *Ibid,* pp 499–500.

[285] M. Laruelle. Russian Nationalism: Imaginaries, Doctrines, and Political Battlefields (1st Ed.). London/New York: Routledge 2018, pp 37–38, 47–50.

[286] Thévenin *op. cit*. note 65.

[287] *Ibid,* pp 507–509.

[288] *Ibid,* pp 509–513.

[289] *Ibid,* p 509.

rations and laws passed in the early 20th century to prove acceptance of the concept of Arctic sectors. The same method is used to prove that the Soviet Union did support the existence of Arctic sectors, and that Russia still does.

For instance, Ivan Zhudro argues that the 1984 Soviet decree 'On Intensifying Nature Protection in Areas of the Extreme North and Maritime Areas Adjacent to the Coast of the USSR' demonstrates that official endorsement of the concept of the Arctic sector for the Soviet Union did extend its jurisdiction regarding maritime environmental protection over the whole extent of the Soviet Arctic sector.[290] It is also argued that the 1990 Agreement between the United States and the USSR on the Maritime Boundary and the 2011 Agreement on Cooperation on Aeronautical Maritime Search and Rescue in the Arctic are evidence of the current existence and recognition of Arctic Sectors.[291]

As other Russian scholars have argued,[292] the existence of the Arctic sector is more than dubious. Express support has never been found but only tenuously inferred from documents whose object was never recognition of Arctic sectors. Even the 2021 Russian submission to the CLCS, although it satisfies the political aspirations of critical scholars, affirms Russia's adhesion to the LOSC, a convention whose use in the Arctic this school of thought is trying to prove is obsolete.

Therefore, it is possible to conclude that an Arctic customary regime granting Russia rights over the seabed additional to those provided by the LOSC does not exist.

2.1.4. Existence of an Arctic Customary Regime Regarding Navigation Through the Arctic Straits and the NSR: 'Back to the USSR: The Consequences of the 1965 Soviet Decree №331-112 "On the Procedure for Navigation of Foreign Ships in the Straits Along the Track of the Northern Sea Route" for Today's Navigation through the Russian Arctic Straits.'[293]

The idea that the NSR and the Arctic straits constitute historic internal waters of the USSR and Russia has been widespread in Soviet and Russian doctrine since the 1950s.[294] This thesis is not particular to critical scholars,[295] although they tend to assert ultramaximalist views in that regard.[296] Moreover, this claim has been quite openly endorsed by the Russian State, in its 2022 Maritime Doctrine.[297]

The main argument supporting this thesis is that since at least the XVIIth century Russia has passed legislation governing the Arctic and navigation

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290 *Ibid,* p 510.

291 *Ibid,* p 511.

292 *Ibid*, pp 521–523.

293 Thévenin Back to the USSR, *op. cit.* note 66.

294 Ibid, p 5. read in conjunction with Thévenin *op. cit*. note 65, pp 484–489.

295 Thévenin Back to the USSR, *op. cit.* note 66, pp 9–11.

296 See e.g: Vylegzhanin *et al., op. cit.* note 276.

297 Maritime Doctrine 2022, *op. cit.* note 74, para. 50.5.

through the NSR.[298] Furthermore, navigation through the NSR is and would have been impossible without the efforts of the Russian and Soviet State and work-force, who have developed the infrastructure rendering navigation possible. Moreover, passage through the Arctic straits and the NSR have historically only been used by Russian seamen.[299] Lastly, Russian sovereignty over the NSR and the Arctic was never contested by foreign States.[300] For these reasons, Soviet and Russian scholars have maintained that Moscow has a customary right to regulate passage through the NSR and Arctic straits.

With the finding of the 1965 Soviet decree №331-112 'On the Procedure for Navigation of Foreign Ships in the Straits Along the Track of the Northern Sea Route', the third article submitted for defence demonstrates that no such customary regime exists. Indeed, the decree defines the straits of Kara's Gates, Yugorskiy Shar, Matochkin Shar, Vil'kitsky, Shokal'skii and of the Red Army as territorial sea of the USSR. Only the Straits of Laptev and Sannikov were considered as historically belonging to the USSR.[301]

The finding of this document means that at least from 1965 until 1985, when it drew straight baselines around Arctic straits, Moscow did not consider that most of the Arctic straits were part of its internal waters. In turn, it follows that between those years a customary regime granting the Arctic straits and the NSR as a whole the status of historic waters cannot have existed due to lack of consistent practice.[302] Consequently, the arguments used by Russian doctrine to prove that according to international custom the Arctic straits constitute historic waters of the Russian Federation cannot be true.

This finding also casts doubt on the possibility to realize the goals set out in the 2022 Maritime Doctrine. Due to the existence of this piece of legislation, it will be difficult to control foreign military navigation through the NSR and maintain that the Arctic straits constitute historic waters of the Russian Federation.[303]

Even if the most recent draft amendment to the Federal Law № -155 discussed above is passed, it will not change the fact that foreign States could use the 1965 decree in conjunction with Article 8.2 of the LOSC to claim that a right of innocent passage exists through the majority of the Arctic Straits.[304] In turn, it

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[298] Thévenin Back to the USSR, *op. cit.* note 66, p 10.

[299] *Supra* note 265, Thévenin Back to the USSR, *op. cit.* note 66, p 10.

[300] Thévenin Back to the USSR, *op. cit.* note 66, p 10.

[301] Postanovlenie Sovet Ministrov SSSR № 331-112, para. 1. The status of the Laptev and Sannikov Straits was already asserted in 1964 in an *aide mémoire* from the Soviet authorities to the American Embassy in Moscow. The *aide mémoire* is reproduced in Roach et al., *op. cit.* note 4, pp 312–313; Brubaker, *op. cit.* note 20, p 258.

[302] Thévenin Back to the USSR, *op. cit. note 66,* pp 11–12.

[303] 2022 Maritime Doctrine, *op. cit.* note 74, Arts 50.5 and 50.6.

[304] LOSC, *op. cit.* note 5, art. 8.2. The Article states: "Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as

would mean that the 2022 draft amendment would not apply, for it does not regulate innocent passage through the territorial sea but only passage through internal waters. Instead, as underlined in the third article presented for defence, the 1999 Rules as modified to be in accordance with the LOSC and Uniform Interpretation would apply to the innocent passage of warships through the Straits of Kara's Gates, Yugorskiy Shar, Matochkin Shar, Vil'kitsky, Shokal'skii and of the Red Army.[305]

2.2. The Sea of Azov: Birth of a New Exceptionalism?

2.2.1. Sea of Azov: Legal Regime Before the Annexation of Crimea.

2.2.1.1. Soviet Period: The Sea of Azov as Internal Waters of the Soviet Union

In contrast to the Arctic, which has been a region of considerable interest for the Soviet and Russian State as well as scholarship over the past 70 years, the Sea of Azov came to the fore of debate only recently, after Russia's annexation of Crimea.

Indeed, during the Soviet period, the Sea of Azov was only bordered by the USSR, which as early as 1925 declared the Sea of Azov to be part of its internal waters. [306] In 1957, in a memorandum prepared by the United Nations before the first Conference on the Law of the Sea, the Sea of Azov is considered as a historic bay and learned publicists of the period considered the Sea of Azov as either territorial sea or internal waters of the USSR.[307] In 1985, after it signed the LOSC, the USSR drew straight baselines to close the Sea of Azov.[308] This status as well as well as the baselines closing the Sea of Azov were never contested by foreign States.[309] Furthermore, given the location of the Sea of Azov, which is an enclosed sea linked to the Black Sea only through the Kerch strait, it did not present a

internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters."

[305] Thévenin Back to the USSR, *op. cit.* note 66, pp 18–20.

[306] Evidence RU-2: General Instructions for interaction of the USSR authorities with foreign military and merchant ships in peacetime, approved by Order of the Revolutionary Military Council of the USSR No. 641. 22 June 1925. Art. 2. in *Coastal State Rights case, Preliminary objections of the Russian Federation – Volume II: Exhibits, op. cit.* note 104.

[307] Secretariat of the United Nations, Historic Bays: Memorandum by the Secretariat of the United Nations (Document A/CONF.13/1). New York. 1957, para. 12.

[308] Decree of the USSR Council of Ministers of January 15, 1985*, op. cit.* note 148, p 354. The line is drawn between basepoints 35 and 36.

[309] A. Vysotskiĭ, V. Tsemko. Chernomorsko-Azovskiĭ Basseĭn: Pravovye Voprosy Ispol′zovaniia Prostranstva i Resursov [Black Sea – Azov Basin: Legal Issues of Space and Resources]. Kiev: Naukova Dumka 1991, p 13; Kovalev *op. cit.* note 156, p 156; A.S. Surzhin. Mezhdunarodno-Pravovoi Rezhim Chernogo Moria (Vkliuchaia Azovo-Kerchenskyiu Akvatoriu i Chernomorskie Prolivy) [International Legal Regime of the Black Sea (Including the Azov-Kerch Basin and Black Sea straits)]. Cand. diss. Moscow: RUDN University, 2010, pp 187–189.

major interest for international shipping for it is a dead end only leading to then Soviet ports.

Similarly, when discussed by scholarship, the Sea of Azov was pointed out as internal waters of the Soviet Union.[310] The issue of the straits of the Bosphorus and Dardanelles captured more attention from scholars than the Sea of Azov and the Kerch Strait for they were of critical importance for the USSR to access the Mediterranean Sea and Atlantic Ocean.[311]

2.2.1.2. Post-Soviet Period from 1991 Until 2014: Between Ambiguous Cooperation and Fluctuating Tensions

The collapse of the Soviet Union in 1991 changed the situation of the Sea of Azov. It became shared by Russia and Ukraine. As highlighted by the current judicial proceedings of the *Coastal State Rights* case, the legal regime applicable to the Sea of Azov since 1991 is disputed and rather difficult to establish, even after the entry into force of the 2003 Treaty on Cooperation in the Use of the Sea of Azov and Kerch Strait. The crux of the matter revolves around the following question: after the collapse of the Soviet Union, did the Sea of Azov retain its status as historic waters, or did it start to be governed by the LOSC? [312] This issue is important for determining the regime applicable not only to the Sea of Azov itself but also to the Kerch Strait.

Indeed, since the collapse of the USSR and ratification of the LOSC by both Russia and Ukraine, it can be argued that the Kerch Strait has become used for international navigation.[313] The volume of ship traffic, including foreign-flagged ships, satisfies the functional requirements that straits must meet in order to be considered used for international navigation.[314] The regime applicable to the

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[310] See e.g.: A.L. Kolodkin. Vnutrennie Morskie Vody [Internal Sea Waters]. in Mezhdunarodnoe Pravo [International Law]. G.I. Tunkin (ed.). Moscow: Iuridicheskaia Literatura 1982, p 415; Vysotskii and Tsemko *op. cit.* note 309, pp 51–55.

[311] Tellingly, Vysotskii's and Tsemko's monograph *op. cit.* note 309 is the only monograph analysing legal issues linked to the Sea of Azov and Kerch Strait. Other works analysing the Black Sea straits only focus on the issue of the Bosphorus and Dardanelles. See e.g.: P.D. Barabolia., L.A. Ivanashchenko, D.N. Kolesnik. Mezhdunarodno-Pravovoï Rezhim Vazhneïshikh Prolivov i Kanalov [International Legal Regime of the Most Important Straits and Canals]. Moscow: Iuridicheskaia Literatura 1965, pp 7–34; Molodstov, *op.cit.* note 168, pp 186–190, 207–212. This lack of analysis is explained by the fact that in international law of the sea the focus is on straits used for international navigation.

[312] *Coastal State Rights* case, *op. cit.46*.

[313] In the mid-2000s, according to Kolodkin and his colleagues, a few thousand ships including foreign flagged ships crossed the Kerch Strait each year. See: Kolodkin *et al.* op. cit. note 174, p 131.

[314] S. N. Nandan and D.H Anderson. Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982.¬ 60 British Yearbook of International Law 1990, pp 167–169, especially important is the passage at p 169: "Use which is recent or novel, as well as use in the more remote past, may be taken

Kerch Strait depends on the status of the Sea of Azov. If the Sea of Azov is governed by the LOSC, then either a non-suspensible right of innocent passage[315] or a right of transit passage[316] can be enjoyed by foreign ships sailing through the Kerch Strait. If the Sea of Azov is considered historic internal waters of both Ukraine and Russia – therefore falling outside the purview of the LOSC –[317] then no such rights would exist.[318] Passage through the Kerch Strait would therefore only be regulated by rules established by Russia and Ukraine.

This question of the Sea of Azov legal regime is difficult to answer, for during their negotiations regarding the status of this very same sea and in their exchanges of *notes verbales* Russia and Ukraine either adopted equivocal positions or accepted ambiguity. From the available evidence provided to the Annex VII arbitral tribunal, it is possible to find elements asserting that the Sea of Azov and Kerch Strait were considered as both historical internal waters and regulated by the LOSC.[319] Tellingly, even after the signing in 2003 of the Treaty on Co-operation in the Use of the Sea of Azov and Kerch Strait, which declared the Sea of Azov historic internal waters of both Russia and Ukraine,[320] the countries continued their negotiations on delimitation of the Sea of Azov.[321]

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into account. Use does not have to be regular or to reach any predetermined level. It may be civil or military, or both, so long as the military use does not threaten the coastal State."

315 If the Sea of Azov is defined as comprising territorial seas of both Russia and Ukraine, then Art. 45.1.b read in conjunction with Art 45.2 of the LOSC will apply. Art. 41.5.b states that: "The regime of innocent passage, in accordance with Part II, section 3, shall apply in straits used for international navigation […] (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.", while Art. 45.2 provides that: "There shall be no suspension of innocent passage through such straits." See LOSC, *op. cit.* note 5, Arts 41.5.b and 45.2

316 If part of the EEZ of Ukraine and/or Russia exists in the Sea of Azov, then Art. 37 LOSC applies and ships are entitled to enjoy the right of transit passage. See LOSC, *op. cit.* note 5, Art. 37 read in conjunction with Arts 38 and 39. Functionally, the right of transit passage and the non-suspensible right of innocent passage are very similar, with only minor differences. For instance, should Art.45.1.b apply then aircraft would not be able to fly through the Kerch strait and submarines would need to sail above water.

317 LOSC, *op. cit.* note 5, Art. 2.1. stating that: "The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."

318 See: LOSC, *op. cit.* note 5 Arts 37 and 45.1.b. This point has been the source of discussion in Russian doctrine. See: Kolodkin *et al. op. cit.* note 174, p 132 and Alexander Skaridov. The Sea of Azov and the Kerch Straits. in Navigating Straits Challenges for International Law (D. Caron and N. Oral (eds)) Leiden: Brill 2014, pp 235–236.

319 *Coastal State Rights* case, *op. cit.* note 104, Exhibits provided by both Russia and Ukraine.

320 Dogovor Mezhdu Rossiiskoi Federatsiei i Ukraïnoi o sotrudnichestve v ispol′zovanii Azovskogo Moria i Kerchenskogo proliva. Kerch. 24 December 2003 e.i.f 23. 04.2004, Art 1. [2003 Sea of Azov and Kerch Strait Treaty or the Sea of Azov Treaty]

321 Evidence RU-77:*Notes Verbales* from the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-410-96, 17 January 2007, and No. 72/22- 410-3380, 6 November 2007, pp 1–2 in *Coastal State Rights* case, *Preliminary Objections of the Russian Federation – Volume II (Exhibits);* Evidence UA-531: Minutes of

Over the period analysed in this section from 1991 until 2014, Russia has continuously insisted that the Sea of Azov and Kerch Strait constituted historic internal waters.[322] To that effect, Russia contested the drawing of straight baselines by Ukraine.[323] Yet, even after signing the 2003 Sea of Azov and Kerch Strait Treaty, following increased tensions stemming from the construction of a dam linking the Kraï of Krasnodar to the Tulza Spit,[324] Russia agreed to discuss the delimitation of Sea of Azov with Ukraine.[325] This begs the question: is delimitation compatible with the regime of internal waters which supposes that the coastal State enjoys full sovereignty over them?[326] From the available documents,

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the Seventeenth Meeting of the Delegations of the Russian Federation and Ukraine to Discuss Issues Pertaining to the Sea of Azov and the Kerch Strait (29–30 January 2004); pp 1–2; Evidence UA-533: Minutes of the Fifth Meeting of the Sub-Commission on Issues of the Azov-Kerch Settlement of the Sub-Committee for International Cooperation of the Ukrainian-Russian Interstate Commission and the Thirty-Sixth Meeting of the Delegation of Ukraine on Delimitation of the Azov and Black Seas, as well as the Kerch Strait, and the Delegation of the Russian Federation on Delimitation of the Azov and Black Seas, as well as Settlement of Issues Related to the Kerch Strait (2–3 March 2011). p 1; UA-95: Joint Declaration of the Presidents of Ukraine and the Russian Federation on the Delimitation of the Maritime Boundaries of the Azov and Black Seas and the Kerch Strait (12 July 2012) in *Coastal State Rights* case, *Written Observations and Submissions of Ukraine on Jurisdiction – Volume II Exhibits, op. cit.* note 104.

[322] Evidence RU-16: Working Minutes of the Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, No. 426/2dsng, 14 August 1996, para. 4; Evidence RU-17: Minutes of the Second Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, 6 May 1997, pp 1–2. Evidence RU-62 *Note Verbale* from the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 2378/2dsng, 30 March 1998; Evidence RU-67: Minutes of the 12th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit Maritime Areas in the Black Sea, 19 April 2001 (excerpts), p 2; Evidence RU-70: Letter from the President of Ukraine Leonid Kuchma to the President of the Russian Federation Vladimir Putin, transmitted by *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 5211/13-011-268-2001, 13 August 2001 in *Coastal State Rights* case, *Preliminary Objections of the Russian Federation – Volume II (Exhibits), op. cit.* note 104.

[323] Evidence RU-75: *Note Verbale* from the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine No. 6437/2dsng, 8 August 2002, pp 1–2 in *Coastal State Rights* case, *Preliminary Objections of the Russian Federation – Volume II (Exhibits), op. cit.* note 104.

[324] A.S. Skaridov, 2006, *op. cit.* note 174, pp 131–132; Evidence UA-523: Note Verbale from the Ministry of Foreign Affairs of Ukraine, No. 72/22-401/-3661 (30 September 2003); Evidence UA-524: *Note Verbale* from the Ministry of Foreign Affairs of Ukraine, No. 72/22-410-3743 (4 October 2003) in *Coastal State Rights* case, *Written Observations and Submissions of Ukraine on Jurisdiction – Volume II Exhibits, op. cit.* note 104.

[325] Evidence UA-531, *op. cit.* note 321, pp 1–2; Evidence UA-533 *op. cit.* note 321, p 1.

[326] LOSC, *op. cit.* note 5, Art. 2.1 read in conjunction with Art. 8.2 which recognizes the right of innocent passage for foreign ships in internal waters that were not previously considered as such prior to the establishment of straight baselines.

the Russian authorities seem to have considered that it was not, hence their reluctance to delimit the Sea of Azov.[327]

On the other hand, Ukraine's position has been somewhat more complex. From 4 November 1991, Ukraine established straight baselines in the Sea of Azov,[328] whose coordinates it communicated to the United Nations Secretary General.[329] This communication indicates that at that point Ukraine did not consider the Sea of Azov as internal waters. Rather, it considered the LOSC or at least its zones applicable to the Sea of Azov and Kerch Strait, even though it had not at that time ratified the Convention.[330]

Yet at the same time in parallel, during negotiations with Russia Ukraine supported the idea that the Sea of Azov ought to be considered internal waters of both States.[331] However, in Ukraine's view, as evidenced by the draft treaty that Kyiv submitted to Moscow in 1995, it appears that the internal waters ought not

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[327] See e.g.: Evidence RU-68: Letter from the President of the Russian Federation Vladimir Putin to the President of Ukraine Leonid Kuchma, 9 July 2001 in *Coastal State Rights* case, *Preliminary Objections of the Russian Federation – Volume II (Exhibits), op. cit.* note 104.

[328] Statute of Ukraine concerning the State frontier, 4 November 1991, Art 3.2 read in conjunction with Arts 5 and 6.2 in United Nations Division for Ocean Affairs and the Law of the Sea. – 25 Law of the Sea Bulletin 1994, pp 85–93.

[329] United Nations Division for Ocean Affairs and the Law of the Sea. List of geographical coordinates of points defining the baselines for measuring the breadth of the territorial sea, the exclusive economic zone and the continental shelf in the Sea of Azov in United Nations Division for Ocean Affairs and the Law of the Sea. – 36 Law of the Sea Bulletin 1998, pp 49–52.

[330] Ukraine ratified the LOSC on 26 July 1999. See: United Nations Division for Ocean Affairs and the Law of the Sea. Chronological lists of ratifications of, accessions and successions to the Convention and related Agreements. New York. consolidated on 13 May 2022 available at: https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm.

[331] Evidence RU-15: Draft Treaty between Ukraine and the Russian Federation on the Legal Status of the Sea of Azov and Navigation in its Water Area, Annex to *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 12/42-994, 19 October 1995, Art.1, p 3; Evidence RU-16 Working Minutes of the Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, No. 426/2dsng, 14 August 1996, para. 4, p 3; Evidence RU-63: Minutes of the 6th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit Maritime Areas in the Black Sea, 28 January 2000, p 1; Evidence RU-65: Minutes of the 7th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit Maritime Areas in the Black Sea, 12 May 2000 (excerpts), p 1; Evidence RU-69 Draft Declaration by the Presidents of Ukraine and Russia on defining the legal status of the Sea of Azov and the Kerch Strait and delimiting maritime areas in the Black Sea, transmitted by *Note Verbale* from the Ministry of Foreign Affairs of Ukraine to the Embassy of the Russian Federation in Ukraine No. 21/20-410-1228, 6 August 2001, p 2; RU-73: Minutes of the 13th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit Maritime Areas in the Black Sea, 9 October 2001 (excerpts), p 2, *Coastal State Rights* case, *Preliminary Objections of the Russian Federation – Volume II (Exhibits), op. cit.* note 104.

to be shared, but rather strictly delimited.[332] That position is supported by the fact that requests for delimitation of the Sea of Azov were voiced both before and after the signing of the 2003 Treaty.[333] These few facts seem to indicate that from

[332] Evidence RU-15: Draft Treaty between Ukraine and the Russian Federation on the Legal Status of the Sea of Azov and Navigation in its Water Area, Annex to *Note Verbale* from the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 12/42-994, 19 October 1995, Art.1, p 3 read in conjunction with Arts 2 and 3 p 4 in the *Coastal State Rights* case, *Preliminary Objections of the Russian Federation – Volume II (Exhibits), op. cit.* note 104. In fact, navigational rights in the internal waters of the other party were granted only to merchant ships. According to this draft, warships could enter the internal waters of the other Party only if they had received prior permission. See *Ibid,* Arts 4 and 5.

[333] Evidence RU-16 Working Minutes of the Session of the Sub-Commission on Border Issues of the Mixed Russian-Ukrainian Commission on Cooperation, No. 426/2dsng, 14 August 1996, para. 4, p 3; Evidence RU-63: Minutes of the 6th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit Maritime Areas in the Black Sea, 28 January 2000, pp 1–2; Evidence RU-65: Minutes of the 7th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit Maritime Areas in the Black Sea, 12 May 2000 (excerpts), pp 1–2; Evidence RU 67: Minutes of the 12th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit Maritime Areas in the Black Sea, 19 April 2001 (excerpts), pp 1–2; Evidence RU-68: Letter from the President of the Russian Federation Vladimir Putin to the President of Ukraine Leonid Kuchma, 9 July 2001; Evidence RU-69 Draft Declaration by the Presidents of Ukraine and Russia on defining the legal status of the Sea of Azov and the Kerch Strait and delimiting maritime areas in the Black Sea, transmitted by *Note Verbale* from the Ministry of Foreign Affairs of Ukraine to the Embassy of the Russian Federation in Ukraine No. 21/20-410-1228, 6 August 2001, pp 2–3; Evidence RU-71: Draft Declaration by the Presidents of Ukraine and Russia on defining the legal status of the Sea of Azov and the Kerch Strait and delimiting maritime areas in the Black Sea, transmitted by *Note Verbale* from the Ministry of Foreign Affairs of Ukraine to the Embassy of the Russian Federation in Ukraine No. 21/20-410-1453, 31 August 2001, pp 1–2; RU-73: Minutes of the 13th Meeting of the Delegations of the Russian Federation and Ukraine to Determine the Legal Status of the Sea of Azov and the Kerch Strait and to Delimit Maritime Areas in the Black Sea, 9 October 2001 (excerpts), p 2; Draft Treaty between Ukraine and the Russian Federation on the Ukraine-Russia State Border in the Sea of Azov, transmitted by *Note Verbale* from the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-410-831, 16 February 2004 (excerpts), pp 2–4; *Notes Verbales* from the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-410-96, 17 January 2007, and No. 72/22-410-3380, 6 November 2007, p 2 in the *Coastal State Rights* case, *Preliminary Objections of the Russian Federation – Volume II (Exhibits), op. cit.* note 104*;* Evidence UA-514: Minutes of the Fifteenth Meeting of the Delegations of Ukraine and the Russian Federation on the Issues of Delimitation (the Position of the Ukrainian Side) and Determination of Legal Status (the Position of the Russian Side) of the Sea of Azov and the Kerch Strait (16–17 December 2002), p 8; Evidence UA-95: Joint Declaration by the Presidents of Ukraine and the Russian Federation on the Delimitation of Maritime Boundaries of the Azov and Black Seas and the Kerch Strait (12 July 2012), p 3; UA- 521: Minutes of the Seventeenth Meeting of the Delegations of the Russian Federation and Ukraine to Discuss Issues Pertaining to the Sea of Azov and Kerch Strait (29–30 January 2004), p 1; Minutes of the Fifth Meeting of the Sub-Commission

the Ukrainian perspective the 2003 Treaty was being considered as transitory until an agreement on delimitation could be found.

Regarding incidents of navigation in the Kerch Strait, in at least two *notes verbales* from 2002, Ukraine referred to the LOSC Articles 41 and 19 to contest the legality of Russian-flagged vessels' actions.[334] These notes indicate that at least at the time of their writing, Ukraine considered the LOSC applicable to the Kerch Strait and Sea of Azov. More precisely, on these occasions it seems that it considered the Sea of Azov to comprise at least a territorial sea or even an EEZ.

According to Skaridov, in 2007 the negotiations regarding the Sea of Azov came to an unfruitful halt, the parties only issuing a joint declaration emphasizing the need to reach an agreement in the future.[335] In 2013, following the arrest of a Ukrainian fishing vessel by a Russian coastguard vessel, Moscow and Kyiv once again resumed negotiations regarding delimitation of the Sea of Azov.[336]

From the above observations, it seems that until 2014 Russia and Ukraine had different understandings of the legal status of the Sea of Azov and the Kerch Strait. Russia viewed the Sea of Azov and Kerch Strait – as provided by the 2003 Treaty – as shared internal waters, the delimitation of which might have been construed as a tool to manage this shared area, but not a way to carve out a new status for the Sea of Azov. On the other hand, although its positions were more ambiguous, Ukraine seems to have been expecting the Sea of Azov legal regime to evolve.

Regarding Russian doctrine, the issue of the Sea of Azov and the Kerch Strait prior to conclusion of the 2003 Treaty is seldom analysed. Kovalev considered that the Sea of Azov constituted a closed sea under the LOSC. As such, under Article 123, those States have the obligation to cooperate to exercise the rights granted to them.[337] However, Kovalev was reserved on the status of the Sea of Azov, which he did not consider would automatically inherit the status of internal waters that it was granted during Soviet times. Rather, Kovalev underlined that

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on the Issues of the Azov Kerch Settlement of the Sub-Committee for International Co-operation of the Ukrainian-Russian Interstate Commission and the Thirty-Sixth Meeting of the Delegation of Ukraine on Delimitation of the Azov and Black Seas, as well as the Kerch Strait, and the Delegation of the Russian Federation on Delimitation of the Azov and Black Seas, as well as Settlement of Issues Related to the Kerch Strait (2–3 March 2011), p 1 in the *Coastal State Rights* case, *Written Observations and Submissions of Ukraine on Jurisdiction – Volume II Exhibits, op. cit*. note 104.

[334] Evidence UA-515: *Note Verbale* from the Ministry of Foreign Affairs of Ukraine, No. 21/20-410-747 (24 May 2001), pp 4–5; Evidence UA-516: *Note Verbale* from the Ministry of Foreign Affairs of Ukraine, No. 72/22-446- 2110 (15 September 2002), pp 3–4 in the *Coastal State Rights* case, *Written Observations and Submissions of Ukraine on Jurisdiction – Volume II Exhibits, op. cit*. note 104.

[335] Skaridov. *op. cit.* note 318, p 223.

[336] *Ibid*, p 235.

[337] Kovalev *op. cit.* note 161, p 155.

Ukraine and Russia needed to negotiate to ascertain the legal regime applicable to these maritime expanses.[338]

After the conclusion of the 2003 agreement, several Russian scholars underlined the problems of the status of the Sea of Azov and its consequences for the passage regime applicable to the Kerch Strait.

In 2004, Vladimir Korzun took positions that were probably very close to those maintained by Russia during its bilateral negotiations with Ukraine. He contended that, despite the collapse of the Soviet Union, the Sea of Azov still constituted historic waters, which since 1991 were merely shared by the Russian Federation and Ukraine.[339] To justify his position, Korzun argued that when the USSR collapsed both countries inherited the Sea of Azov, which constituted historic waters. He added that neither Ukraine nor Russia had the right to modify the limits of the territory they received following the fall of the Soviet Union. Therefore, since boundaries did not exist in the Sea of Azov during the Soviet period, neither Moscow nor Kyiv could draw any. Korzun's argument is not entirely convincing. If it is true that fundamental changes in circumstances cannot be used as an argument to terminate a treaty establishing a boundary,[340] this interdiction does not apply to national law or – in the case of the Sea of Azov – lack thereof. In theory, there is no obstacle that would prevent States from drawing a maritime boundary where in the past there was none. Nevertheless, with his argument Korzun justified Moscow's positions during the negotiations with Ukraine as well as the legality of the 2003 Treaty,[341] which imposes limits to navigation on foreign merchant and military ships sailing through the Kerch Strait.[342]

Other scholars held a more reserved position regarding the status of the Sea of Azov and thus the legal regime applicable to the Kerch Strait. Anatoly Kolodkin, Vasily Gutsuliak and Yulia Bobrovna questioned whether the right of innocent passage under Article 8.2 of the LOSC may apply to the Sea of Azov, as it was declared shared historic internal waters only after the entry into force of the LOSC.[343] When making this assertion, these authors seem to recognize that, at least for a time, the Sea of Azov may not have been considered as internal waters in 1991. One advantage of this position is that it took into consideration

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338 *Ibid,* p 156.

339 V.A Korzun. Konfliktnoe Ispol'sovanie Morskikh Priberzhnikh Zon Rossii v XXI Veke. [Confluctual Use of Russia's Maritime Coastal Zones in the 21st Century] Moscow: Ekonomika 2004, p 111.

340 Vienna Convention on the Law of Treaties. Vienna. 23 May 1969. e.i.f. 27 January 1980. Art. 62.2.a. [1969 Vienna Convention]

341 Korzun *op. cit.* note 339, pp 110–111.

342 2003 Sea of Azov and Kerch Strait Treaty, *op. cit.* note 320, Arts 2.2 and 2.3. According to Art. 2.2, foreign merchant vessels can cross the Kerch Strait only to sail to or from Ukrainian or Russian ports. Art. 2.3 provides that foreign warships can only sail through the straits if they were authorized or invited in a port of either the Russian Federation or Ukraine.

343 Kolodkin *et al. op. cit.* note 174, p 132.

Ukraine's drawing of baselines in the early 1990s and 2000s. However, they consider that since 2003 the regime on internal waters governs the Sea of Azov.[344]

Regarding the Kerch Strait, Kolodkin and his colleagues consider that this constitutes a strait used for international navigation. As briefly mentioned earlier, they underline in their work that the Kerch Strait meets the functional criteria set by the *Corfu* case, for at the time of writing the Kerch Strait was crossed by several thousands ships a year, including foreign ones.[345] Nevertheless, despite the internationality of the strait, they also considered that it led to internal waters. Therefore, they did not consider that it fell within the scope of Article 45.1.b of the LOSC. Thus, rather than the non-suspensible right of innocent passage, a classic suspensible right of innocent passage existed through the Kerch Strait.[346]

On the same issue, Alexander Skaridov shared the position of Kolodkin and his colleagues. The only difference was that Skaridov considered that Article 45.1.b of the LOSC was applicable, and therefore that innocent passage through the Kerch Strait ought to be non-suspensible. In a chapter published in 2014 and written before the annexation of Crimea, Skaridov contended that defining the Sea of Azov and the Kerch Strait as historic internal waters of both Ukraine and Russia was legally unfounded.[347] He based his thesis on interpretation of the 2003 Treaty, whose first article states – in Skaridov's opinion – that the Sea of Azov and the Kerch Strait 'appear to be' historic internal waters of the Russian Federation and Ukraine.[348] According to Skaridov, this wording does not constitute a legal definition but a mere descriptive and declarative statement.[349] As a result, he asserted that the LOSC applied to the Sea of Azov and that the regime passage applicable to the Kerch Strait was that of transit passage.[350]

Although original, Skaridov's argument is not entirely convincing as it hinges upon the use of one of the less common meanings of the verb 'iavliat'sia (являться)'.[351] It is debatable whether Skaridov's interpretation of Article 1 of the 2003 Sea of Azov and Kerch Strait Treaty follows the ordinary meaning of

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344 *Ibid,* p 130.

345 *Ibid,* p 131.

346 Kolodkin *et al. op. cit.* note 174, p 132.

347 Skaridov *op. cit.* note 318, p 235.

348 *Ibid,* p 234.

349 *Ibid.*

350 *Ibid,* p 235.

351 'Iavliat'sia', Bolshoi Tolkovyi slovar' [Great Dictionary of Definitions] (ed. Kuznetsov) Moscow: Norint 1998, available online at: http://www.gramota.ru/slovari/info/bts/. Although the legal team representing Ukraine at the Annex VII arbitral proceeding agrees with Skaridov's assessement, it provided a certified translation of the verb iavliat'sia in which it is translated as 'to constitute'. In the *Coastal State Rights* case, *Written Observations and Submissions of Ukraine on Jurisdiction, op. cit.* note 103 paras 80–81 read in conjunction with Evidence UA-526: Lingvo, Translation of "являться" (2014) in the *Coastal State Rights* case, Written Observation and Submissions of Ukraine on Jurisdiction*. Volume 2 – Exhibits, op. cit.* note 104.

the word as prescribed by the 1969 Vienna Convention.[352] Tellingly, he is the only Russian scholar to have held this point of view prior to 2014.

Finally, in 2010 Surzhnin analysed the Sea of Azov and Kerch Strait through the prism of historic bays. He contended that the Sea of Azov fell into that category defined by the LOSC.[353] In his opinion, the collapse of the USSR did not affect the nature of the sea as a historic bay. As such, Ukraine and Russia could regulate navigation in that Sea and through the Kerch Strait as they pleased. In his opinion, the main issue concerned delimitation of the Sea of Azov for the LOSC does not lay down rules for delimiting internal waters between two countries.[354]

In 2013, Doroshenko complemented Surzhnin's analysis. She retraced the history of the Sea of Azov and concluded that since the end of the 18th century Russia was governing the land bordering it.[355] Based on this historical use, she claimed the Sea of Azov acquired the status of historic sea and historic bay. The emergence of two riparian States along its coast since 1991 did not change its status. Furthermore, Doroshenko argued that because this historical status was built over centuries, neither Russia nor Ukraine could unilaterally change it.[356]

2.2.2. The Sea of Azov: Legal Regime After the Annexation of Crimea: Historic Internal Waters not Covered by the LOSC

After the annexation of Crimea, Russia began to act as the coastal State over the maritime expanses off the coasts of the peninsula, including the Kerch Strait. In September 2016, Ukraine instituted arbitral proceedings against Russia under Annex VII of the LOSC.[357] Ukraine demanded that the Tribunal recognize its sovereign rights over the maritime expanses adjacent to Crimea, recognize Russia's unlawful acts regarding these expanses and order Russia to refrain from activities that violate Ukrainian sovereign rights in areas of the Black and Sea of Azov where Russia did not challenge Kyiv's sovereignty prior 2014.[358] Furthermore, *vis-à-vis* the Kerch Strait, Ukraine requested the Tribunal to adjudge that Russia could not hinder Ukrainian traffic through the straits, or lay cables, build

[352] 1969 Vienna Convention, *op. cit.* 340, Art. 31.1. Art 31.1 states that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[353] Surzhin *op. cit.* note 309, pp 188–191,

[354] *Ibid,* pp 196–197.

[355] V.A. Doroshenko. Aktual'nye Pravoye Problemy Azovo-Kerchenskoï Akvatorii [Current Legal Problems of the Azov-Kerch Basin]. – 6 Probely v Rossiïskom Zakonodatel'stve [Gaps in Russian Law] 2013, pp 345–346.

[356] *Ibid*, pp 346–347.

[357] *Coastal States Rights* case. Award on preliminary objections. *op. cit.* note 46. para 8.

[358] *Ibid,* at para 9 points a–e.

bridges, pipelines, or other constructions through and across the strait without Ukraine's consent.[359]

The memorandums that Russia sent to the Arbitral Tribunal constitute the best and most detailed explanation of Moscow's position *vis-à-vis* the Sea of Azov. In this case Russia claims that the Arbitral Tribunal is not competent to decide the claims brought forth by Ukraine, for the Sea of Azov and Kerch Strait fall outside of the scope of the LOSC. Indeed, Russia claims that the Sea of Azov and Kerch Strait constitute internal waters.[360] Furthermore, it is claimed that the Sea of Azov has acquired a historic title.[361]

To support these positions, the Russian Federation insists that during the Soviet period the Sea of Azov constituted internal waters. Furthermore, this claim has never been challenged by foreign States.[362] In addition, Moscow underscores that the fall of the Soviet Union did not modify the status of the Sea of Azov, which remained internal waters of both Russia and Ukraine.[363] To prove that Ukraine also agreed with this legal classification of the Sea of Azov, Russia provided minutes of their bilateral negotiations as well as joint statements proving that Kyiv approved and even requested classification of the Sea of Azov as internal waters.[364] In addition, Russia emphasized that this classification of the Sea of Azov had been enshrined in a legal instrument: the 2003 Sea of Azov and Kerch Strait Treaty.[365] As briefly presented in the previous subsection, this representation of history oversimplifies the reality of the negotiations that took place between Ukraine and Russia for the best part of two decades since the collapse of the Soviet Union. Furthermore, to support its theses, the Russian legal team extracted the most advantageous elements in each document but at times neglected to consider the document in its totality.

Regarding the claim of historic waters, Moscow argues that this status was acquired following the signing of the 2003 Sea of Azov and Kerch Strait Treaty and issuance of the Ukrainian and Russian joint declaration.[366] Russia argues that other States did not call into question this classification of the Sea of Azov and

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[359] *Ibid,* at para 9 points f–j.

[360] *Coastal States Rights* Case. *Preliminary Objections of the Russian Federation (Volume I), op. cit.* note 104, paras 67–70.

[361] *Ibid,* paras. 99–105.

[362] *Ibid,* paras 73–75.

[363] *Ibid,* paras 91, 94–95.

[364] *Ibid,* paras. 96–98. *Coastal Rights* Case. *Reply of the Russian Federation to Written Observations and Submissions of Ukraine on Jurisdiction (Volume I), op. cit.* note 104, pp 86–93.

[365] *Coastal Rights* Case. *Preliminary Objections of the Russian Federation (Volume I), op. cit.* note 104, para. 96; *Reply of the Russian Federation to Written Observations and Submissions of Ukraine on Jurisdiction (Volume I), op. cit.* note 104, paras 94–102.

[366] *Coastal Rights* Case. *Preliminary Objections of the Russian Federation (Volume I), op. cit.* note 104, para. 99; *Reply of the Russian Federation to Written Observations and Submissions of Ukraine on Jurisdiction (Volume I), op. cit.* note 104, paras 119–121.

the Kerch Strait when it was made public.[367] As an auxiliary argument cementing the historic status of the Sea of Azov, Moscow claims that this sea constitutes an historic bay. To support its position, it relies on the 1957 UN memorandum on historic bays, where the Sea of Azov is referred to as such a bay.[368] However, this argument seems weak, for the Soviet Union has never made a claim to that effect. When the Sea of Azov was declared internal waters in 1925, and when it was was enclosed behind straight baselines together with the Kerch Strait, no mention was made about its status as an historic bay.

Due to the status as internal waters of both the Sea of Azov and the Kerch Strait, Russia maintains that the Annex VII arbitral tribunal lacks the necessary competence to decide the matter brought by Ukraine. Indeed, the LOSC does not regulate States' activities in their internal waters.[369] Additionally, according to Moscow, because the Kerch Strait leads to internal waters, the LOSC does not regulate it for it is not a strait used for international navigation.[370] As seen in the previous subsection, this understanding of the Kerch Strait legal regime was challenged by Russian scholars until 2014.

Following the annexation of Crimea, the issue of the Sea of Azov, when discussed, is analysed through the prism of the 2003 Sea of Azov and Kerch Strait Treaty, whose applicability is not called into question but rather admitted as a given. At the same time, Russian doctrine does not seem to develop conceptual innovations in order to further strengthen or go beyond the positions presented by Russia before the Annex VII arbitral tribunal, [371] as can be witnessed in relation to the Arctic for instance.

For example, in 2018 Pavel Gudev restated the arguments developed by the Russian legal team in the arbitral proceedings arguing that the 2003 Sea of Azov Treaty constituted a unique instrument regulating navigation in the Sea of Azov

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[367] *Coastal Rights* Case. *Preliminary Objections of the Russian Federation (Volume I), op. cit.* note 104, para. 100.

[368] *Ibid,* 101–102.

[369] *Ibid,*117–128.

[370] *Ibid,* 117, 129–131.

[371] See e.g.: Skaridov, 2017, *op.cit.* note 174, pp 105–106; Tolstykh 2019, *op. cit.* note 174, pp 617–618, Tolsthykh simply notes that since the annexation of Crimea, the situation in the Sea of Azov is more advantageous for Russia as it controls both straits. A.M. Skrynnik. Mezhdunarodnoe i Rossiïskoe Morskoe Pravo 3 izd [International and Russian Law of the Sea 3rd Edn.]. Rostov-on-Don: Mini-Taïp 2019, 107. In the short space he devotes to the Sea of Azov, Skrynnik repeats the theses developed by Russia before the Annex VII arbitral tribunal. However, he presents them as authoritative statements. It is worth noticing that recent and reputable monographs and chapters of handbooks on the law of the sea tend to avoid the issue of the Sea of Azov altogether. See e.g. the handbook of the Russian Diplomatic Academy of the Russian Ministry of Foreign Affairs: Yu. S. Romashev. Mezhdunarodnoe Morskoe Pravo [International Law of the Sea]. In Mezhdunarodnoe Pravo [International Law]. S.A. Egorov (ed.). Moscow: Statut 2016, p 432. Romashev only states that given its geographical location, the Sea of Azov is an enclosed or semi-enclosed sea. Bekyashev 2019, *op. cit.* note 174, p 869. In turn, Bekyashev emphasizes the ecological vulnerability of the Sea of Azov.

and the Kerch Strait.[372] Furthermore, he criticized Ukrainian arguments claiming that the LOSC applies to the Sea of Azov. Those arguments are similar to the argument developed by Russia during the Annex VII arbitral proceedings. Namely, Gudev contested the Ukrainian argument according to which historic bays cannot exist if two or more coastal State share it.[373] Other authors have published similar productions of varying quality to maintain positions similar to Gudev.[374] However, contrary to other Russian scholars, it needs to be underlined that Gudev also recognized Ukrainian grounds to contest the construction of the Kerch Bridge. He argues that the bridge unilaterally limits the rights of Ukraine to freely sail from and to the Sea of Azov. [375]At the same time, Gudev concluded that Russia ought to prevent the application of the LOSC to the Sea of Azov and, if possible, even to the Black Sea.[376]

It is also interesting to underline that in 2016 Skaridov modified his positions and started to argue that the Sea of Azov and the Kerch Strait were governed by the regime applicable to internal waters.[377] Furthermore, he tried to do so without contradicting his earlier positions regarding the non-applicability of the 2003 Treaty.[378] Skaridov argued that the applicability of the Treaty was doubtful given the fundamental change of circumstances brought forth by the annexation of Crimea, even though the Treaty had not been formally denounced.[379] But Skaridov does not use this observation to reach the conclusion that the LOSC is applicable to the Kerch Strait. On the contrary, he argues that passage through the Kerch Strait is predicated upon respect for Russian legislative acts regulating transit through it.[380] Indeed, based on the 2003 Treaty on the Russo-Ukrainian State border read in conjunction with FSB order № 659 annexing Crimea to Russia, Skaridov argued that the Kerch Strait and the Sea of Azov were deemed internal waters.[381] Therefore, the LOSC could not apply to the strait. Finally, he

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372 P.A. Gudev. Novye Riski i Ugrozy Bezopasnosti Rossii v Azovo-Chernomorskom regione [New Risks and Threats to Russia's Security in the Azov-Black Sea Region]. – 2 Puti k miru i bezopasnosti [Path to Peace and Security] 2017, pp 38–40.

373 *Ibid,* pp 40–41.

374 See e.g.: S. S. Zhil'tsov. Politika Rossii v Cherno-Morskom Regione: Itogi i Novye Bizovy [Russia's Policy in the Black Sea Region: Results and New Challenges]. – Problemy Post-sovetskogo Prostanstvo [Post-Soviet Space Issues] 2019*;* D.V. Malyshev. Kerchenskiĭ Krisis and Pravovoï Status Azovskovo Moria [The Kerch Crisis and the Sea of Azov's Legal Status].¬ 2 Postsovetskie Issledovania [Post-Soviet Research] 2019.

375 Gudev *op. cit.* note 372, pp 41–42.

376 *Ibid,* p 44.

377 A. S. Skaridov. Pravovoï Rezhim Azovo-Chernomorskogo Basseĭna i Regional′naia Bezopasnost′ [Legal Regime of the Azov-Black Sea Basin and Regional Security].– 11 Evraziĭskiĭ Iuridicheskiĭ zhurnal [Eurasian Juridical Journal] 2016, pp 265–266.

378 *Ibid,* p 265.

379 *Ibid.*

380 *Ibid,* pp 266.

381 *Ibid,* pp 266–267.

admitted that the situation could change in the future should the two States reach an agreement regarding delimitation of the Sea of Azov.[382]

Skaridov's new argumentation – although understandable given the context of its production – is not the most convincing. Indeed, he assumes that FSB order № 659 is internationally legally valid and applicable, which one cannot agree with considering that the annexation of Crimea was illegal and violated international law and more specifically the 2003 Treaty on the Russo-Ukrainian State border on which Skaridov has built his analysis.

2.3. Baltic Sea: Sporadic Contestation but Lack of Exceptional Regime

If Russia and Russian doctrine seek to prove that the LOSC does not apply and to establish an exceptional regime in the Arctic and in the Sea of Azov, this is not the case in the Baltic Sea.

2.3.1. Soviet Doctrine, the Concept of Closed Seas and the LOSC.

Up until the late 1960s and early 1970s, several Soviet scholars argued that the Baltic Sea constituted a closed sea given the fact that it was only accessible to the Danish Straits linking the Baltic Sea to the North Sea. As such, several Soviet scholars argued that the Baltic Sea ought to be governed by a special legal regime, whereby navigation of warships flying the flag of non-coastal States should be forbidden.[383] To support their point of view, Soviet scholars rely on Swedish and Danish international treaties from the XVIIIth and XIXth centuries, which forbade passage through the Danish Straits for warships of non-Baltic States. They also refer to the fact that in the peace treaties signed with Finland and other Baltic States, the Baltic Sea was defined as a neutral sea.[384]

However, as already underlined by Butler, after 1946 this doctrine was no longer endorsed by the Soviet State.[385] This is further confirmed by the position taken by the USSR during the LOSC negotiations, where Moscow staunchly

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[382] *Ibid,* pp 266.

[383] Butler *op.cit.* note 6, pp 124–125, 128–129; L.A. Ivanashchenko. Mezhdunarodno-Pravovoï Rezhim Zakrytykh Moreï [Closed Seas International Legal Regime] in Voenno-Morskoï Mezhdunarodno-Pravovoï Spravochnik [Naval International Legal Handbook] Barabolia P.D. *et al.* (eds) Moskva: Voennoe Izdatel'stvo Ministerstvo Oborony SSSR 1966, pp 131–132; V.N. Mikhalev and I.E. Tarkhanov. Pravovoi Rezhim Zakrytykh Morei [Closed Seas Legal Regime]. in Mezhdunarodnoe Morskoe Pravo [International Law of the Sea] Barabolia P.D. *et al.* (eds) Leningrad: Voenno-Morskaya Ordenov Lenina I Ushakova Akademiia 1969, pp 138–139.

[384] See e.g.: L.A. Ivanashchenko, *op.cit.* note 383, p 132 referring *inter alia* to Rahuleping Eesti ja Venemaa Vahel. Tartu 12 February 1920, Art.6. available in the Estonian State Archives at: ERA.957.18.4 and online at: https://www.ra.ee/dgs/browser.php?tid=68&iid=110701832602&tbn=1&pgn=2&prc=40&ctr=0&dgr=0&lst=2&img=era0957_018_0000004_00011_t.jpg&hash=79abc5da699aad4a61726f77e40e7646

[385] Butler, *op.cit.* note 6, pp 132–133.

maintained the rights of warships to freely sail through straits used for international navigation.[386]

After the signing of the LOSC, the closed sea doctrine fell into desuetude. The Baltic Sea became considered mainly through the prism of its straits to emphasize that the right of transit passage applied through the Danish Straits. Revealing a paradigm shift in the Soviet approach to the law of the Sea towards liberalism is the criticism voiced against the same historical treaties that were yesterday used to claim that foreign warships could not enter the Baltic Sea. The 1976 Danish decree imposing an authorization-based regime on foreign warships is also called into question. [387]

Even though some authors still point out that the Baltic Sea constitutes an enclosed or semi-enclosed sea under the LOSC, these authors do not attempt to claim the existence of an exceptional regime. Rather, the Baltic Sea example is used to illustrate the issues facing an enclosed or semi-enclosed sea and the need for increased cooperation between coastal States.[388]

Nevertheless, this does not mean that the Baltic Sea is free of tensions or violations of the LOSC. Both the Soviet Union and the Russian Federation have violated the LOSC as exemplified by unlawful incursions into the Swedish territorial sea by Soviet submarines,[389] the arrest of Swedish fishing vessels around Gogland[390] or more recently the denial of innocent passage through its own territorial sea.[391] Those events are not indicative of a systemic contestation of the

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[386] Thévenin Liberal Maritime Power, *op. cit.* note 64, pp 211–215. See also: Ya. Simonides. Poniatie Zamknutykh i Poluzamknutykh Moreï. In Mirovoi Okean i Mezdunarodnoe Pravo: Otkrytoe More, Mezdunarodnye Prolivy. Arkhipelazhnye Vody A.P. Movchan and A. Yankov (eds) Moscow: Nauka 1988, pp 181–182.

[387] See e.g.: E.G. Moiseev. Pravovye Vopropsy Mezhdunarodnoï Besopasnosti Baltiïskogo Moriia i Baltiïskie Prolivy [Legal Issues of Baltic Sea Security and Baltic Straits]. in Mezhdunarodnaia Besopasnost' i Mirovoi Okean. [International Security and World Ocean] L.A. Ivanachshenko and Yu. M. Kolosov (eds) Moscow: Nauka 1982, pp 184–186; V.A Kisilev, P.V. Savas'kov. Pravovoï Rezhim Mezhdunarodnykh Prolivov i Konventsiia OON po Morskomu Pravu. [Legal Regime of International Straits and the UN Convention on the Law of the Sea] – Sovetskii Ezhegodnik Morskogo Prava [Soviet Yearbook of Maritime Law] 1985, pp 31–32; V.D. Bordunov. Pravovoï Rezhim Chernomorskyih, Baltiïskikh prolivov i Magellanova Proliva [Legal Regimes of the Black Sea and Baltic Straits and of the Magellan Strait]. in A.P. Movchan and A. Yankov, *op. cit.* note 386, pp 131–134, especially pp 132–133; Molodtsov *op. cit.* note 168, pp 232–233. This point of view remains the same as maintained today. See: Gureev *et al.* 2003 *op. cit.* note 174, pp 194–195; Skaridov 2006, *op. cit.* note 174, pp 119–121; Gureev, *et al.* 2011, *op cit.* note 174, pp 204–206; Vylegzhanin and Savas'kov, in Vylegzhnanin 2012 *op. cit.* note 174, pp 742–743; Skaridov 2017 *op. cit.* 174, pp 101–103.

[388] See e.g.: Kovalev, *op. cit.* note 161, p 155. Gureev, *et al.* 2011, *op cit.* note 174, p 148; Bekyashev 2019 *op. cit* note 174, pp 666–667.

[389] See e.g.: 31 DJ/60.1.M5/2 : Télégramme 180 de Stockholm. 9 mai 1983; Télégramme 358 de Stockholm. 19 septembre 1983; Télégramme 534 de Stockholm. 22 décembre 1983 [French Diplomatic Archives].

[390] See e.g: 31 DJ/60.1.M5/2 : Télégramme 283 de Stockholm. 23 Avril 1985; Télégramme 836 de Stockholm. 16 décembre 1985 [French Diplomatic Archives].

[391] Lott, *op. cit.* note 42, pp 10–11.

law of the sea and LOSC in the Baltic Sea. As posited by Alexander Lott when analysing the reasons why Russia denied innocent passage to the ships of the Vironia ferry line, those actions are more likely to be short-term responses to geopolitical incidents.[392]

2.3.2. Maritime Boundaries in the Baltic Sea: Evidence of Russia's recognition of Conventional norms

Regarding the Baltic Sea, Soviet and Russian adhesion to conventional norms and lack of systematic contestation can be further witnessed by analysing the methods Moscow used to delimit its maritime border with its neighbours. As Oude Elferink found, Moscow relied on the simple equidistance/median line and to a lesser extent equity[393] rather than trying to influence the delimitation line by claiming the existence of special circumstances such as historic rights.[394] Furthermore, this practice continued after the publication of Oude Elferink's monograph in 1994.[395]

The majority of the maritime boundary delimitation agreements signed by the Soviet Union and the Russian Federation either reference the 1958 Convention on the Territorial Sea and Contiguous Zone,[396] the 1958 Convention on the Continental Shelf,[397] the results achieved during UNCLOS III[398] or the

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[392] *Ibid,* p 17.

[393] Regarding the delimitation of the territorial sea, both the LOSC and the CTSCZ prescribe use of the median/equidistance line method, see: CTSCZ, *op. cit.* note 237, Art 12; LOSC, *op. cit.* note 5, Art. 15. For similar prescriptions regarding the continental shelf see: Convention on the Continental Shelf. Geneva. 29 April 1958 e.i.f. 10 June 1964, Art. 6 [CCS]; LOSC Art. 83. See also LOSC Art. 74 regarding delimitation of the EEZ. Use of the equidistance/median line method should lead to an equitable result. See: International Court of Justice, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands). Award.* 20 February 1969, para. 20.

[394] Oude Elferink, *op. cit.* note 28, pp 167–219.

[395] See e.g.: Lott, *op. cit*. note 35 on the delimitation method used in the case of the bilateral Estonian-Russian territorial sea boundary delimitation in the Gulf of Finland.

[396] Agreement Between the Government of the Republic of Finland and the Government of the Union of Soviet Socialist Republics Concerning the Boundaries of Sea Areas and of the Continental shelf in the Gulf of Finland. Helsinki. 20 May 1965 e.i.f, 25 May 1966, preamble para. 4.

[397] Agreement Between the Government of the Republic of Finland and the Government of the Union of Soviet Socialist Republics Concerning the Boundaries of Sea Areas and of the Continental shelf in the Gulf of Finland. Helsinki. 20 May 1965 e.i.f, 25 May 1966, preamble para. 4; Agreement Between the Government of the Republic of Finland and the Government of the Union of Soviet Socialist Republics Concerning the Boundary of the Continental Shelf Between Finland and the Soviet Union in the North-Eastern Part of the Baltic Sea. Helsinki. 5 May 1967, e.i.f, 15 March 1978, preamble para. 6; Treaty Between the Polish People's Republic and the Union of Soviet Socialist Republics Concerning the Boundary of the Continental Shelf in the Gulf of Gdansk and the South-Eastern Part of the Baltic Sea. Warsaw. 28 August 1969, preamble para. 4.

[398] Agreement Between the Government of the Republic of Finland and the Government of the Union of Soviet Socialist Republics Regarding the Delimitation of the Areas of Finnish

LOSC.[399] This tends to demonstrate that Moscow considers the Baltic Sea to be governed by the universally accepted law of the sea norms, which were successively enshrined by the 1958 Geneva Conventions[400] and the LOSC.

The fact that Russia has not ratified the bilateral territorial sea delimitation agreement with Estonia does not call this conclusion into question. The norms of the LOSC were used. A median line modified by special circumstances was drawn to delimit the territorial sea boundary in Narva Bay and the Gulf of Finland.[401]

Before going further, it needs to be underlined that Finland and Sweden's recent adhesion to NATO might influence Russia's action in the Baltic and lead Moscow to contest the applicability of the LOSC in this sea.

2.4. Sea of Okhotsk: Doctrinal Pipe Dream or Next Exceptional Regime

Before concluding this section, a word needs to be said on recent developments regarding the Sea of Okhotsk, which during the Soviet and post-Soviet period garnered limited attention. Before the signing of the LOSC, the sea was sometimes considered as either a closed sea[402] or as historic internal waters of the USSR,[403] even though the USSR has never made a declaration or passed a law to that effect.

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and Soviet Jurisdiction in the Field of Fishing in the Gulf of Finland and the North-Eastern Part of the Baltic Sea. Moscow. 25 February 1980 e.i.f. 9 July 1980, preamble para. 5.

[399] Agreement Between the Government of the Republic of Finland and the Government of the Union of Soviet Socialist Republics Regarding Delimitation of the Economic Zone, the Fishing Zone and the Continental Shelf in the Gulf of Finland and in the North-Eastern part of the Baltic Sea. Moscow. 5 February 1985, e.i.f. 24 November 1986 preamble para. 5; Treaty Between the Republic of Lithuania and the Russian Federation on Delimitation of the Exclusive Economic Zone and the Continental Shelf in the Baltic Sea. Moscow. 24 October 1997 e.i.f 2 October 2009, preamble para. 5; Agreement Between the Government of the Republic of Lithuania, the Government of the Russian Federation and the Government of the Kingdom of Sweden on the Common Point of Boundaries of the Exclusive Economic Zones and Continental Shelf in the Baltic Sea. Vilnius. 30 November 2005, e.i.f 17 June 2011, preamble para. 3; Eesti Vabariigi ja Vene Föderatsiooni Vaheline Narva ja Soome Lahe Merealade Piiritlemise Leping. Moscow. 18 May 2005, preamble para. 5.

[400] CTSCZ, *op. cit.* note 237; Convention on the Continental Shelf. Geneva, *op. cit.* note 388.

[401] Lott, *op. cit*. note 35, p 502.

[402] Butler, *op. cit*. note 6, pp 126, 128–130; V.A. Konstantinov. Osobennosti Pravovogo Rezhima Okhotskogo Moria [Specifics of the Sea of Okhotsk Legal Regime]. – 3 Moskovskii zhurnal mezhdunarodnogo prava [Moscow Journal of International Law] 1999, pp 128–129. E.g: A.K. Zhudro, Iu. Kh. Dzhavad. Morskoe Pravo [Maritime Law]. Moscow: Transport 1974, p 105. Barabolia, *op. cit.* note 383, p 133.

[403] Konstantinov, *op. cit.* note 402, pp 130–131 See e.g,: G.S. Gorshkov. Osobennosti pravovogo rezhima morskikh prostranstv, prilegaiushchikh k poberezh′iu SSSR na Dal′nem Vostoke. [Specifics of the Legal Regime of Maritime Expanses Adjacent to the Coast of the USSR in the Far East]– 8 Morskoï Sbornik [Maritime Collection] 1967, p 22.

On the contrary, in the early 1990s, to curb uncontrolled in the Okhotsk Sea' high seas enclave known as the Peanut Hole, Russia organized multilateral negotiations involving Japan, Poland, South Korea, the United States and China. It proposed a three-year long moratorium on fishing activities in the Peanut Hole,[404] and signed agreements to that effect.[405] The moratorium imposed on fishing in the Peanut Hole by the Supreme Soviet of the Russian Federation on 16 September 1993 is to be understood as an attempt to curb unregulated fishing and preserve Russia's fishing interests.[406] Russia's military activities in the Peanut Hole at that time are also to be construed as a maneuver to safeguard Moscow's fishing interests rather than an assertion of soevereignty.[407] Such interpretation of these events is corroborated by Russia's proposals during the United Nations' Fisheries Conference, where it pleaded for the cooperative management of fisheries in high seas enclave based on the precautionary principle.[408] These actions indicate that Russia did not consider the Okhotsk Sea as its internal waters.

However, the Okhotsk Sea temporarily came to the fore of the scholarly debate in the mid 2010s, after Russia made an amended submission to the CLCS to extend its continental shelf in the Sea of Okhotsk.[409] This submission complemented a previous one made in 2001.[410] The CLCS gave a positive recommendation to Russia's amended submission.[411]

Despite this positive recommendation, a few publications criticized the Russian submission. Much as critical scholars contended regarding the Arctic continental

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[404] A. G. Oude Elferink. Fisheries in the Sea of Okhotsk High Seas Enclave-The Russian Federation's Attempts at Coastal State Control. – 10 International Journal of Marine and Coastal Law 1995, pp 6–7.

[405] Pravitel'stvo Rossiiskoi Federatsii. Postanovlenie №236 'O podpisanii Soglasheniia mezhdu Pravitel′stvom Rossiĭskoĭ Federatsii i Pravitel′stvom Soedinennykh Shtatov Ameriki v Otnoshenii Sokhraneniia Transgranichnykh Rybnykh Zapasov v Tsentral′noĭ Chasti Okhotskogo Moria' [Russian Federation's Government Decree №236 'On the Signature of the Agreement Between the Government of the Russian Federation and the Government of the Unites States of America in Relation to the Preservation of Transboundary Fishing Stocks in the Central Part of the Okhotsk Sea]. 7 March 1995 in 12 Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Collected Legislation of the Russian Federation] 1995, p 1066.

[406] Oude Elferink, *op. cit* note 404, p 7.

[407] *Ibid,* p 17.

[408] *Ibid,* p 12. For an analysis of Russia's positions and proposal during the United Nations' Fisheries Conference see pp 10–18.

[409] Commission on the Limits of the Continental Shelf. Receipt of the Partial Revised Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf (CLCS.1.REV.2013.LOS). New York. 4 March 2013.

[410] Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs. 15 Law of the Sea Information Circular 2002, *op. cit.* note 242, p 53.

[411] Commission on the Limits of the Continental Shelf. Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Partial Revised Submission made by the Russian Federation in Respect of the Sea of Okhotsk on 28 February 2013. New York. 11 March 2014, paras 31, 34, 40, 42–45.

shelf, Gennady Melkov and Pavel Gudev argued that with this submission Russia limited its own right over the Sea of Okhotsk. Indeed, both scholars considered that the Sea of Okhotsk constituted historic internal waters of the Russian Federation.[412] By comparison, since the signing of the LOSC, the Sea of Okhotsk almost wholly comprises Russian internal waters, territorial sea, continental shelf and EEZ but for the Peanut Hole.

Map 1: Representation of the Peanut Hole (High Seas Enclave) in the Sea of Okhotsk (for illustrative purposes only).[413]

Although Melkov's and Gudev's position is not entirely novel,[414] it is quite rare.[415] Furthermore, the demonstration of their position does not withstand thorough analysis. It relies on the assertion that the Sea of Okhotsk is of special economic and strategic[416] interest for the Russian Federation.[417] Furthermore, it relies on the claim that the Soviet and Russian State as well as doctrine have

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412 G.M. Melkov, K Voprosu o Statuse Pechorskogo i Okhotskogo Moriia [On the Question of the Status of the Pechora Sea and Sea of Okhotsk].– 4 Moskovskiĭ Zhurnal Mezhdunarodnogo Pravo 2014 [Moscow Journal of International Law], p 45; P.A. Gudev. Okhotskoe More: Uspekh ili Ustupka [The Sea of Okhotsk: Success or Concession?]. – 6 Problemy Dalnego Vostoka [Problems of the Far East] 2016, p 99.

413 Gudev*, op. cit.* note 412, p 94.

414 S.V. Molodtsov, V.K. Zilanov, A.N. Vylegzhanin. Anklavy Otkrytogo Moria i Mezhdunarodnoe pravo [High Sea Enclaves and International Law]. – 2 Moskovskiĭ Zhurnal Mezhdunarodnogo Prava [Moscow Journal of International Law] 1993, p 50.

415 See: *Ibid* p 50. Konstantinov, *op.cit*. note 402, pp 128–129.

416 N.B: The strategic interest of the Sea of Okhotsk could further be reinforced by the fact the Russian Federation is using the Sea of Okhotsk as a sanctuary for its nuclear submarines. See; Rossiiskaya Gazeta. Okhotskoe more nazvali rossiĭskoĭ "sviatyneĭ iadernoĭ strategii" [The Sea of Okhotsk Was Named Russia's Nuclear Strategy's Sanctuary]. 24 January 2022, available at: https://rg.ru/2022/01/24/ohotskoe-more-nazvali-rossijskoj-sviatynej-iadernoj-strategii.html.

417 G.M. Melkov. *op. cit.* note 412, pp 45–46; Gudev, *op. cit.* note 412, p 99.

always maintained that this particular sea was considered as historic waters despite lack of evidence.[418] Melkov – to explain the lack of official declaration regarding the status of the Sea of Okhotsk as internal waters – asserted that the USSR refrained from making its claim official for fear of both giving foreign States the possibility to contest it and attracting foreign fishing fleets in that area.[419]

More recently, in April 2022, during the Second Vladivostok Maritime Forum, Vyacheslav Gavrilov – director of the Far Eastern Federal University's Law School and director of its international law department[420] – tackled the issue in an interesting new light. He dedicated his paper to the possibility for the Russian Federation to claim historic rights in the Sea of Okhotsk, the extent of which remains unclear.[421]

By his own admission, for the time being he underlined that this would not sustain thorough analysis for the Soviet Union and Russia have never made such a claim in the past. Therefore, such a claim would lack the necessary historical continuity to be considered as valid. He further emphasized that Russia's official actions in this sea were in total adhesion to the LOSC.[422]

Nevertheless, he encouraged Russian scholars to conduct research and publish on this topic and advised the Russian government to develop a policy and pass laws designed to assert its historic rights over the Sea of Okhotsk.[423] Interestingly, his proposition was not rooted in the past and in the contestation of the current status quo, unlike Melkov's and Gudev's articles. On the contrary, it was turned towards the future. His proposition was to develop research and a policy

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[418] Both authors quote the work by A.N. Vylegzhanin *et al.* Mezhdunarodno-Pravovaia Kvalifikatsiia Morskikh Raïonov v Kachestve Istoricheskikh Vod (Teoriia i Praktika Gosudarstv) [International Legal Qualification of Maritime Expanses as Historic Waters (Theory and State Practice)]. Moscow: MGIMO – Universitet 2012. This monograph does not really support Gudev's and Melkov's claim. Vylegzhanin's work mentions the Sea of Okhotsk only once, to declare that in Soviet doctrine this sea was considered as historic waters. No evidence is given to support this assertion. See: Melkov, *op. cit.* note 412, p 45; Gudev, *op.cit.* note 412, p 99.

[419] Melkov, *op. cit.* note 412, p 46.

[420] Far Eastern Federal University. Vyacheslav Vyacheslavovich Gavrilov (biographical note), available online at: https://www.dvfu.ru/Academic_Council/the-composition-of-the-academic-council/gavrilov-vyacheslav-vyacheslavovich/.

[421] V. V. Gavrilov. Pravovoï Status Okhotskogo Moria: Istoriia i Sovremennost′ [Legal Regime of the Sea of Okhotsk: History and Contemporaneity]. Second Vladivostok Maritime Law Forum. 22 April 2022. videorecord available at https://www.youtube.com/watch?v=S8fysK9dD_Y, from: 1h 18min 40 sec to 1h 18min 50sec; from 1h 20min 40 sec to 1h 21 min 05 sec. See from 1h 24 min 00 sec – 1h 24 min 35 sec, Gavrilov considers that claiming historic rights over the Sea of Okhotsk can take multiple forms, from declaring the sea to be internal waters of the Russian Federation to claiming limited rights. Furthermore, he underlines that claiming historic rights does not necessarily entail claiming full sovereignty over a maritime expanse.

[422] *Ibid,* from 1h 19 min 09 sec to 1h 20 min 38 sec; from 1h 24 min 36 sec to 1h 27min 00 sec; from 1 hour 27 min 28 sec to 1h 27 min 40 sec.

[423] *Ibid,* from 1h 20 min 40 sec to 1h 21 min 05 sec, from 1h 28 min 20 sec – 1h 30 min 15 sec.

recommendation for Russia to claim historic rights over the Sea of Okhotsk in the future.[424]

It is slightly too soon to tell whether Gavrilov's research agenda and policy advice will be followed. Nevertheless, his intervention deserves to be noted for several reasons. Firstly, the Russian Federation – in the most recent iteration of its maritime doctrine – identified the Sea of Okhotsk as a vitally important maritime area for the defence of Russia's national interests. [425] Secondly, Gavrilov is well known within the Russian community of international legal scholars and legal experts. The quality of his analyses is recognized, and he frequently publishes in English and engages with English-speaking academia.[426] Thirdly, Gavrilov placed his intervention in the wider context of the war in Ukraine and the extreme tension between Moscow and the Western world. His idea is designed to accompany Russia's pivot towards Asia, which Gavrilov considers ineluctable.[427] If so, Gavrilov's proposal may prefigure a turning point in Russia's approach to the law of the sea, following which theories and positions more closely resembling China's will be developed. Fourthly, his position regarding historic rights, inspired by China's position during the South China Sea case,[428] is quite remarkable. Indeed, Gavrilov contends that historic rights are a living institution that can be developed today for future use.[429] This dynamic understanding of historic rights constitutes a conceptual break, for traditionally in contemporary international law historic rights are static.[430] One can prove their existence, through historical research; however, it is not generally assumed that new ones can be created. Although Gavrilov's position is not likely to gather wide support – especially outside of Russian legal scholarship – it nevertheless offers Russia a tool to assert its sovereignty over new maritime expanses and contest the LOSC should it desire to do so in the future.

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424 *Ibid.*

425 2022 Maritime Doctrine, *op. cit.* note 74, para. 14.4.

426 E.g: Gavrilov was recently invited to be a guest editor for the Arctic Review on Law and Politics. Viatcheslav Gavrilov, David L. VanderZwaag and Susan J. Rolston. Introduction: Responding to a Changing Arctic Ocean: Canadian and Russian Experiences and Challenges. – 13 Arctic Review on Law and Politics 2022.

427 Gavrilov, *op. cit.* note 421, from 1h 16 min 50 sec – 1h 17 min 05 sec.

428 *Ibid,* from 1h 23 min 38 sec to 1h 24 min 00 sec.

429 *Ibid*, from 1h 24 min 00 sec – 1h 24 min 35 sec.

430 E.g: International Court of Justice, *Fisheries Case (United Kingdom v Norway).* 18 December 1951. (quoted by Gavrilov *op. cit.* note 421 from 1h 21 min 54 sec – 1h 22 min 25 sec) United States Supreme Court, *United States of America, Plaintiff, v. State of Alaska*, 545 US 75. (quoted by Gavrilov *op. cit.* note 421, from 1h 22 min 25 sec to 1h 23 min13 sec).

3. Joint Regimes in Maritime Border Regions: Magnifying Glasses of the Soviet and Russian Approach to the Law of the Sea

As Oude Elferink underlined,[431] the Soviet Union and Russia were, and to some extent still are, prone to create joint regimes in disputed maritime zones, where overlapping claims exist between Moscow and its neighbours. These joint regimes reflect the duality of the USSR's and Russia's approach to the law of the sea. With these regimes, Moscow either attempted to safeguard its access to the natural resources contained in the water column and seabed or control foreign navigation including warships.

As will be examined in the first two subsections, the joint regimes – established with Norway in the Barents Sea, and with the United States in the Bering and Chukchi Seas – establish regimes where access to natural resources is shared and sovereign rights are transferred. Those regimes did not establish any limits on navigation by foreign ships. Indeed, the USSR and Russia, given its relations with Washington and Oslo, were not in a position to introduce such limitations. Furthermore, in the Barents Sea as well as in the Bering and Chukchi Seas, the agreement negotiated delimited EEZs, where the LOSC established freedom of navigation.

The joint regime established by the 2003 Azov and Kerch Strait Treaty places emphasis on control of navigation by foreign ships. This is explained by the fact that, in this area, Russia historically deems this sea as its own. Therefore, Moscow has tried to reestablish the legal regime existing during the Soviet period. Furthermore, the Sea of Azov is strategically more important than the Barents Sea and the Bering and Chukchi Seas, as the Sea of Azov gives access to some of Russia's densely populated areas. This will be briefly examined in the third subsection.

The fourth subsection will analyse the joint regime applicable in the Caspian Sea, established by the 2018 Aktau Convention. This regime is the one that best reflects Russia's approach to the law of the sea. Indeed, it secures Moscow's access to the riches of the Caspian seabed while ensuring its control over foreign navigation.

3.1. The Barents Sea Treaties: A Forty-Year-Long Tale

In 2010, the Russian Federation and Norway concluded a treaty between them on Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean.[432] This crowned a maritime boundary delimitation dispute that spanned more than forty years and gradually grew in complexity as the law of the sea was developing.[433]

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[431] Oude Elferink, *op. cit.* note 28, p 369.

[432] 2010 Barents Sea Treaty, *op. cit.* note 34.

[433] T. Henriksen, G. Ulfstein, *op. cit.* note 37, p 1.

3.1.1. Fishing Issues

After delimitation of their territorial sea in 1957,[434] from the mid-1960s Norway and the USSR maintained competing claims regarding the seabed of the Barents Sea. In 1974, both parties started to negotiate in order to delimit the extent of their sovereign rights over the seabed. With the creation of EEZ during UNCLOS III, the dispute became more complex. Indeed, since the mid 1970s – following the declaration of an EEZ by both States – negotiators also needed to delimit overlapping EEZ claims. Formal negotiations on this matter began in 1977.[435] The Barents Sea being a rich fishing ground,[436] the issue quickly became sensitive.[437]

In 1975, Moscow and Oslo established a mixed commission dedicated to the management of fisheries.[438] In 1976, the USSR and Norway further reinforced their cooperation in that field and agreed to manage their EEZ in a coordinated fashion.[439] In January 1978, a provisional agreement was concluded regarding fishing matters in the disputed area of the Barents Sea.[440] This area became known as the Grey Zone.[441] In this Zone, Norway and the USSR agreed to share their sovereign rights. Fishing was authorized to vessels – Soviet, Norwegian, or foreign – holding either a Soviet or Norwegian fishing licence.[442] Furthermore, Moscow and Oslo exercised jurisdiction over fishing vessels holding their fishing

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[434] Agreement between the Royal Norwegian Government and the Government of the Union of Soviet Socialist Republics concerning the sea frontier between Norway and the USSR in the Varangerfjord. Oslo 15 February 1957; Descriptive Protocol relating to the sea frontier between Norway and the Union of Soviet Socialist Republics in the Varangerfjord, demarcated in 1957, Moscow 29 November 1957.

[435] T. Henriksen, G. Ulfstein, *op. cit.* note 37, p 2.

[436] R. Churchill and G. Ulfstein, *op. cit.* note 37, p 79. Geir Hønneland. Norway and Russia: Bargaining Precautionary Fisheries Management in the Barents Sea. – 5 Arctic Review on Law and Politics 2014, p 76.

[437] T. Henriksen, G. Ulfstein, *op.cit.* note 37, p 2.

[438] Agreement between Norway and the USSR on Co-operation in the fishing industry. Moscow: 11 April 1975 e.i.f. 11 April 1975.

[439] Agreement Between Norway and the USSR Concerning Mutual Relations in the Field of Fisheries. Moscow: 15 October 1976 e.i.f. 21 April 1977.

[440] 31DJ/169.2.M4. Provisional Regulations relating to Foreign Fishing and Hunting in an Adjacent Area in the Barents Sea Bordering on the Mainland Coastlines of Norway and the Soviet Union *in* Note 39/EU de Philippe Koenig Ambassadeur de France en Norvège à S.E Monsieur le Ministre des Affaires Étrangères à Paris, direction des affaires économiques et financières, a/s réglementation sur la pêche en mer de Barents. Oslo. 21 January 1978, pp 2–3 [Provisional Regulations]; 31DJ/71.3.M2A. Vremennye Pravila Inostrannogo Rybnogo Promysla v Smezhnom Uchastke Barentseva Moria *attached to* Lettre du Ministère des Affaires Étrangères d'URSS à l'Ambassade France de Moscou. Moscow 30 March 1978, pp 1–3. [Vremennye Pravila] [French Diplomatic Archives]

[441] R. Churchill and G. Ulfstein, *op. cit.* note 37, p 97.

[442] Provisional regulations, *op. cit.* note 440 p 2 para. 2 ; Vremennye Pravila, *op. cit.* note 440, para. 2; Henriksen and Ulfstein *op. cit.* note 37, p 3.

licence.[443] This agreement, initially designed to last a year, was renewed every year until 2010.[444] The Grey Zone agreement of 1978 left an enclave of high seas representing around 25 000 NM,[2] where third States could freely fish.[445] In order to remedy the issue of rapidly depleting fish stocks in this area, caused by Iceland's intensive fishing in the region, in 1999 Moscow, Oslo and Reykjavik signed the tripartite Loophole agreement. According to this agreement, the three States will endeavour to cooperate to ensure conservation of fish stocks.[446] In particular, the parties should jointly establish the total allowable catch for specific species in order to best manage stocks.[447]

Since the entry into force of the 2010 Barents Sea Agreement, the Grey Area has been integrated with the Russian and Norwegian EEZ.[448] However, a special area has been created where east of the delimitation line, beyond the Russian EEZ but within the Norwegian EEZ, Russia is entitled to the same sovereign rights as Norway. In other words, in this special area Norway shares its sovereign right. [449] However, this does not mean that Russia extends its EEZ beyond 200 NM, which would be contrary to the LOSC.[450] In addition, the 2010 Treaty confirmed that fisheries in the Barents must be jointly managed.[451]

3.1.2. Continental Shelf

Regarding delimitation of the continental shelf, negotiations have been much more arduous and slow-moving. Legal disagreement mostly revolved around the nature of the special circumstances used to adjust the provisional median line. In 1979, Moscow proposed creation of a Grey Zone for the continental shelf on the model of what had been done in 1978 regarding fishing issues. Oslo rejected the proposal. Indeed, Norway considered that creating such a zone would equate to

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[443] Provisional regulations *op. cit.* note 440, p 2 para. 3 ; Vremennye Pravila, *op. cit.* note 440, para. 3; Henriksen and Ulfstein *op. cit.* note 37, p 3.

[444] T. Henriksen, G. Ulfstein, *op. cit.* note 37, p 2.

[445] M. Byers. International Law and the Arctic. Cambridge: Cambridge University Press 2013, p 41.

[446] Agreement between the Government of Iceland, the Government of Norway, and the Government of the Russian Federation Concerning Certain Aspects of Cooperation in the Area of Fisheries. Saint Petersburg. 15 May 1999 e.i.f 15 July 1999.

[447] *Ibid,* Art. 4.

[448] Henriksen and Ulfstein *op. cit.* note 37, p 8.

[449] 2010 Barents Sea Treaty, *op. cit.* note 34, Art. 3.1. Michael Byers, echoing Kovalev asked whether such sharing of sovereign rights in the EEZ is in conformity to the LOSC. See: M. Byers, *op. cit.* note 445, p 44. Based on LOSC Art. 311. 3, the present author considers that such an agreement is compatible with the LOSC provided that the rights of third parties are not encroached upon or curtailed.

[450] *Ibid* Art. 3.2.

[451] *Ibid* Art. 4.

relinquishing its sovereign rights over the subsoil in the region.[452] A similar proposal was put forward in 1988 and rejected, most likely for similar reasons.[453] Furthermore, during the 1970s and 1980s, several incidents occurred involving – for instance – exploration vessels in the contested zone, as both parties were trying to determine with precision where lay the oil and gas fields and how best to exploit them.[454] Tellingly, in order to gain an advantage over Norway in this race to the Barents Sea hydrocarbon resources, the USSR tried to acquire prospecting technologies from Western countries such as France and the Netherlands, which refused to provide those technologies to the Soviet Union. Indeed, the main concern was to see French and Dutch Companies with the Soviet Union[455] Moscow even tried to offer foreign oil companies exploitation permits in the Barents Sea's disputed areas. Those offers were also declined.[456]

Yet, despite the slow and difficult negotiating process, Oslo and Moscow concluded two agreements regarding the continental shelf. The first was concluded in 2007 and revised the 1957 boundary agreement,[457] extending the maritime border between Russia and Norway to a distance of 20NM beyond the territorial sea.[458] According to this instrument, should transboundary hydrocarbon deposits extend on both sides of the maritime boundary, then both parties could exploit them. However, the modalities of this joint exploitation had to be negotiated by both parties.[459]

The 2010 Agreement delimited the maritime boundary farther at sea over the remainder of the 200 NM from the baselines.[460] It also refined the model of joint exploitation of transboundary hydrocarbon deposits. Annex II attached to the 2010 Barents Sea Agreement provides a framework to establish a joint ex-

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[452] 31DJ/169.2.M4: Note 123/EU de Pierre Dessaux Ambassadeur de France en Norvège à S.E Monsieur le Ministre des Affaires Étrangères à Paris, direction Europe, a/s consultations norvégo-soviétiques sur la mer des Barents et le Svalbard. Oslo. 3 April 1979, p 2. [French Diplomatic Archives]

[453] Henriksen and Ulfstein *op. cit.* note 37, p 4.

[454] 31DJ/169.2.M4: Télégramme 134. Oslo. 2 May 1983, p 2; Télégramme 142. Oslo. 7 May 1983, pp 2–3; Télégramme 154. Oslo. 20 May 1983, p 2; Télégramme 204. Oslo. 12 July 1985, pp 1–2; Télégramme 205. Oslo. 12 July 1985, pp 1–2; Télégramme 213. Oslo 18 July 1985, p 1; Télégramme 215. Oslo. 18 July 1985, pp 1–2.

[455] 31DJ/169.2.M4: Télégramme 499/502. Moscow. 27 January 1975; Note 436 EU de Pierre de Pimodan, Chargé d'affaires de France a.i, en Norvège à SE M. Ministre des Affaires Étrangère à Paris, direction des Affaires politiques, Sous-direction Europe occidentale, a/s Ouverture des négociations sur la mer de Barentz. Oslo.26 Novembre 1975.

[456] 31DJ/169.2.M4: Télégramme 94. Oslo. 21 May 1981.

[457] Agreement between the Russian Federation and the Kingdom of Norway on Maritime Delimitation in the Varangerfjord area. Moscow 11 July 2007 e.i.f. 9 July 2008 in United Nations Division for Ocean Affairs and the Law of the Sea. – 67 Law of the Sea Bulletin 2008, pp 42–44. [Agreement 2007]

[458] M. Byers, *op. cit.* note 445, p 42.

[459] Agreement 2007, *op. cit.* note 457, Art. 3 at p 43.

[460] 2010 Barents Sea Treaty, *op. cit.* note 34, Art. 1.

ploitation agreement, or – in the words of the drafters – unitization agreement.[461] Finally, Russia's sovereignty over the special area also extended to non-living resources.[462]

3.1.3. Future of the Barents Sea Maritime Boundary Delimitation and Joint Regime

Despite the length and slow pace of the negotiations, the Barents Sea 2010 Agreement as well as the 1978 and 1999 Tripartite Agreement can be considered a success. They created a successful – albeit complex – system thanks to which Norway, Russia and to a lesser extent Iceland can manage important resources. The 1978 Agreement creating the Grey Zone and the 2010 Agreement showed that, despite the existence of tensions, two States could share sovereign rights and coordinate their actions to manage fish resources as well as exploitation of joint hydrocarbon deposits.

On 5 July 2022, the Chairman of the State Duma, Vyacheslav Volodin, cast doubts over the future of the 2010 Barents Sea Agreement, claiming that Russia unfairly ceded to Norway 175 000 km^2 of maritime expanses.[463] This number corresponds to the extent of the previously disputed area that the 2010 agreement delimited. In turn, this disputed area corresponded to the area located between the sector line claimed by the USSR and Russia during the boundary delimitation negotiations, and the median line claimed by Norway.[464] Eventually, the two countries agreed to follow a median line dividing the disputed area in half and Moscow abandoned its idea of using the sector line as a maritime boundary.

The new revisionist claim is to be understood in the context of the war in Ukraine. Indeed, in the days preceding Volodin's declaration Norway refused to let Russian containers be shipped to Svalbard from the port of Tromsø.[465] In this context, Volodin's statement may have been issued to put pressure on Norway. It may also have been directed at the Russian audience, to show that Russia remains strong and does not relinquish sovereignty in the Arctic, an area symbolically and politically important in Russian public discourse.[466]

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461 2010 Barents Sea Treaty, *op. cit.* note 34, Annexe II, Art. 1.

462 2010 Barents Sea Treaty, *op. cit.* note 34, Art. 3.1.

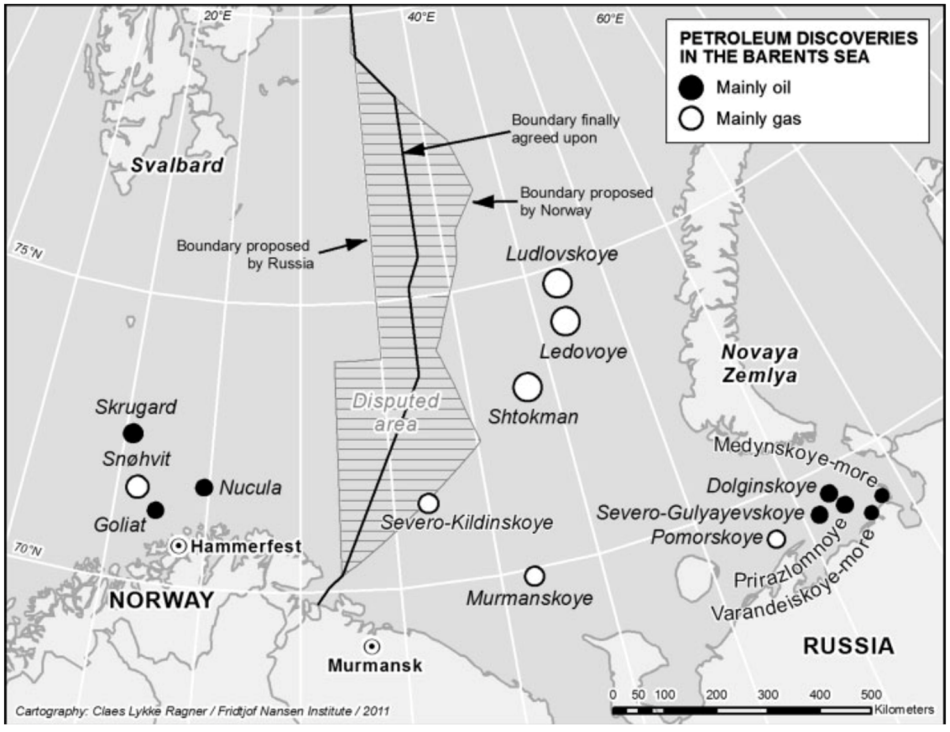
463 Gosudarstevennaia Duma. Predsedatel′ GD poruchil rassmotret′ vopros denonsatsii dogovora s Norvegiei o sotrudnichestve v Barentsevom more i Severnom Ledovitom okeane [Chairman of the State Duma Instructed to Examine the Question of Denunciation of the Treaty with Norway on Cooperation in the Barents Sea and Arctic Ocean]. 5 July 2022, available at: http://duma.gov.ru/news/54858/.

464 Henriksen and Ulfstein *op. cit.* note 37, p 1.

465 Thomas Nilsen. Russia wants Barentsburg food supplies shipped via mainland Norway. The Barents Observer 19 June 2022, available at: https://thebarentsobserver.com/en/arctic/2022/06/stopped-border-russia-wants-food-containers-barentsburg-shipped-mainland-norway.

466 Laruelle, *op. cit*. note 285, pp 37–38, 47–50.

Map 1: Illustration of the Disputed Area[467]



Should this revendication persist in the future, it will signal that Russia is trying to recreate the Soviet Arctic sector, whose existence is maintained by critical scholars, and thus further circumvent the LOSC. As analysed in section 2.1., no such sector exists. Rather it is a doctrinal creation designed for political gains, in other words, to justify Russia's extended sovereignty over the Arctic.

Considering the 2022 Russian Maritime Doctrine, the likelihood of this claim persisting is moderate and should therefore be taken seriously. Indeed, it is in line with Russia's desire to assert its sovereignty over this space. However, renegotiating a treaty would prove very difficult and generate more problems than advantages. Therefore, it is also possible that the threat of denouncing the 2010 Barents Sea Agreement may prove more effective than actually executing that threat.

3.2. The 1990 United States-USSR Agreement: A Joint but Resented Regime

In 1977, both the USSR and the United States had established EEZ. These zones overlapped in the Chukchi Sea and the Bering Sea. Importantly, this part of the Pacific Ocean is rich in fish resources, which necessitated Moscow and

[467] Arild Moe, Daniel Fjætoft, Indra Øverland. Space and Timing: Why was the Barents Sea Delimitation Dispute Resolved in 2010? – 34 Polar Geography 2011, p 146.

Washington delimiting a maritime boundary.[468] Until 1984, the boundary was supposed to only determine fishing zones. However, development of projects designed to exploit hydrocarbons on the American side of the zone to be delimited led the parties to decide to negotiate an all-purpose maritime boundary, i.e. including both living resources contained in the water column as well as non-living resources contained in the seabed and subsoil.[469]

As Oude Elferink underlined, once it was decided during the negotiations that the western part of the boundary described in the 1867 Treaty concerning the Cession of Alaska[470] would be used to form the maritime boundary between the two countries, a significant part of the discussion revolved around the location of that boundary and the means used to draw it. Indeed, from the perspective of contemporary maritime delimitation, the 1867 Treaty lacks precision as the type of maps used to draw the boundary are not specified. Thus, following the Treaty coordinates yields significantly different results depending on the method used to translate the boundary on to a map.[471] To illustrate this point, in 1981, during their negotiations, the United States and the USSR provided two maps on which the boundary described by the 1867 Treaty was depicted, using two different methods. An area of 20 868 NM^2 separated the two lines.[472] Ultimately, Moscow and Washington agreed to divide the areas where the two depictions of the line differed in halves.[473]

Once these technical issues were agreed upon, the USSR argued that it should be compensated for the areas of undisputed areas of EEZ falling on the American side of the delimitation line.[474] Furthermore, it initially advocated for the boundary agreement not to be applicable to the continental shelf beyond 200 NM and for the creation of joint exploitation of the continental shelf in the central areas of the Bering Sea.[475] These last points were, however, later abandoned by the USSR in light of American reticence on the matter and in an effort to secure compensation for the uncontested EEZ areas.[476]

The 1990 Agreement reached by the USSR and the United States is the result of this process. It created special zones East and West of the maritime boundary,

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[468] Oude Elferink, *op. cit.* note 28, p 262.

[469] *Ibid*, p 266.

[470] Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of all the Russias to the United States of America. Washington 30 March 1867, Art. 1.

[471] Oude Elferink, *op. cit.* note 28, pp 256–262, 265–269.

[472] *Ibid,* p 265.

[473] *Ibid*, p269.

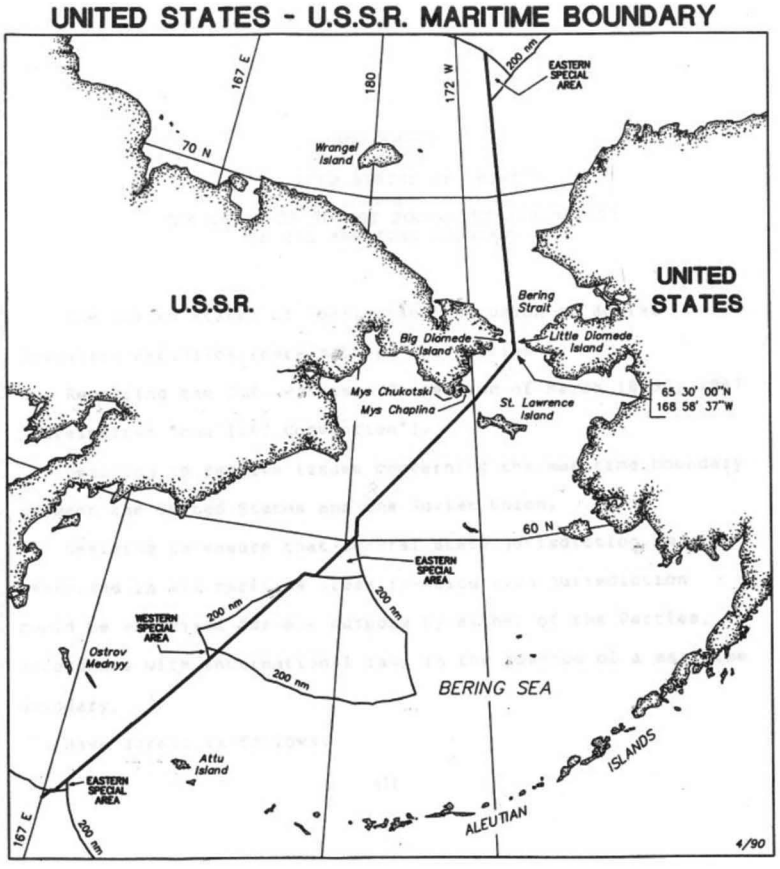
[474] *Ibid.*

[475] *Ibid.*

[476] *Ibid.*

where each State would transfer its sovereign rights to the other.[477] The Soviet Union was entitled to exercise sovereign rights in the western special areas, while the United States was granted sovereign rights over the eastern special area.[478] However, these special areas do not constitute an extension of the Soviet and American EEZs.[479] As one can see, those special areas are similar to that granted to Russia in the Barents Sea.

Map 2: Representation of the Maritime Boundary and Special Areas Established by the 1990 United States-USSR Agreement.[480]



[477] Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary. Washington: 1 June 1990, Art. 3.2, available at https://www.state.gov/wp-content/uploads/2020/02/US_Russia_1990.pdf.

[478] *Ibid,* Art. 3.1.

[479] *Ibid,* Art. 3.3.

[480] *Ibid,* attached to the 1990 Agreement.

However, the USSR and the Russian Federation never ratified the 1990 Agreement, for it is considered too disadvantageous to Russia. To illustrate this point, Kovalev explains that, should an equidistant line have been drawn instead, the United States would not have unfairly been granted 55 000 km^2 of EEZ to the detriment of Russia.[481] As Oude Elferink noticed when writing his monograph, Soviet and Russian scholars laid most of the blame for what is perceived as a grossly disadvantageous agreement on the Ministry of Foreign Affairs.[482] Nevertheless, much to the dismay of Russian scholarship[483] and despite Russia's repeated attempts to revise the Agreement,[484] it is applied on a provisional basis, by agreement between the United States and Moscow when they exchanged notes pending ratification.[485]

3.3. The Sea of Azov Joint Regime: Shared Internal Waters

As already analysed in section 2.2.1.2, after tumultuous negotiations between 2003 and 2014 the Sea of Azov has been governed by a joint regime established by the 2003 Sea of Azov and Kerch Treaty. According to this instrument, the Sea of Azov constituted shared internal waters of both Ukraine and the Russian Federation. In other words, both Kyiv and Moscow could exercise their full sovereignty over these maritime expanses.

Contrary to the joint regimes created in the Barents Sea and the Bering and Chukchi Sea – where the emphasis was put on the sharing of resources or the transfer of sovereign rights, or both – in the Sea of Azov the emphasis was put on shared sovereignty and especially control of foreign navigation, including by military vessels.[486] Three factors explain this difference.

Firstly, the areas to be delimited were of a different nature. During the Soviet period, the Sea of Azov constituted internal waters of the Soviet Union. As we have seen, Moscow wanted to return to that *status quo ante* 1991. Secondly, the restriction placed on navigation by foreign warships in particular is explained by the fact that the Sea of Azov is of greater strategic importance for Russia than either the Barents Sea or the Bering and Chukchi Seas: it leads to densely populated areas bordering the high seas, while people seldom reside on the Arctic

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481 Kovalev op. cit. note 161, pp 67–68.

482 Oude Elferink, *op. cit.* note 28, pp 273–274.

483 Kovalev, *op. cit.* note 161, p 68; B.I Tkachenko. Problemy Morskoï Ekonomicheskoï Granitsy Mezhdu Rossieï i CSHA [Problems of the Economic-Maritime Border Between Russia and the USA]. Vladivostok: Morskoi Gosudarstvennyi Universitet 2008, pp 50–56. Tkachenko emphatically emphasizes the fact that Russia voluntarily limited its sovereign rights in resource-rich areas, which he considers is against the LOSC, *ibid* p 51.

484 Byers, *op. cit.* note 445, p 34.

485 *Ibid*.

486 2003 Sea of Azov and Kerch Strait Treaty, *op.cit.* note 320, Arts 2.2 and 2.3.

Ocean's doorstep. Thirdly, the Sea of Azov's seabed does not bear important natural resources as do the Barents Sea or the Bering and Chukchi Seas.[487]

3.4. The Caspian Sea Convention: New Convention but Old Divisions[488]

On 12 August 2018, the Aktau Convention on the Legal Status of the Caspian Sea was signed by Russia, Kazakhstan, Turkmenistan, Iran, and Azerbaijan, crowning a 27-year-long process.[489]

As analysed in the fourth article submitted for defence, the complex legal regime created to govern the Caspian Sea – which divides the totality of subsoil in sectors belonging to the five coastal States and emulates the LOSC as far as the water column is concerned – validates partial agreements concluded at the end of the 1990s and early 2000s.[490]

From Russia's perspective, although in 1996 it had to abandon its initial idea of establishing a condominium in the Caspian Sea,[491] the Aktau Convention represents perhaps the best joint regime it has ever negotiated so far.

Indeed, it both secures access to the Caspian Sea's natural seabed resources[492] and prevents foreign merchant vessels – but more importantly foreign warships – from sailing in this body of water, as per Russia's wishes since the late 2000s. Furthermore, the Aktau Convention establishes the principle of balance of armament, which was also one of Moscow's requests. [493] To all intents and purposes, this principle guarantees Russia's military supremacy in the Caspian Sea.

In exchange for these security guarantees, Moscow had to concede two trade-offs regarding laying pipelines on the Caspian seabed and participation by foreign companies in oil exploitation projects.[494] Although Russia would have liked to exercise some control over the construction of new pipelines, it eventually had to

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[487] See e.g.: United States Geological Services. Assessment of Undiscovered Oil and Gas Resources of the Azov–Kuban Basin Province, Ukraine and Russia, 2010. June 2011.

[488] Thévenin, Caspian Sea Convention, *op. cit.* note 68. To date the Aktau Convention has been ratified by every Caspian Sea State except Iran. See: Erkinai Ongarova. Current Status of the Convention on the Legal Status of the Caspian Sea. Eurasian Research Institute Bulletin. 2 June 2019, available at: https://eurasian-research.org/wp-content/uploads/2020/07/Weekly-e-bulletin-27-05-2019-02-06-2019-No-213.pdf and also: President of Russia. Law on ratification of Convention on the legal status of the Caspian Sea (communiqué). 1 October 2019, available at: http://www.en.kremlin.ru/catalog/keywords/82/events/61684.

[489] Aktau Convention, *op. cit.* note 34.

[490] Thévenin Caspian Sea Convention, *op. cit.* note 68, pp 446–454.

[491] *Ibid,* p 455.

[492] *Ibid,* pp 456–457.

[493] *Ibid,* pp 458–459.

[494] *Ibid,* pp 460.

yield and accept that only States on whose part of the Caspian seabed the new pipeline would lie could have a say in determining its course.[495]

In conclusion, with the Aktau Convention, the Russian Federation managed to impose its approach to the law of the sea revolving around free access to natural resources and control of foreign navigation, especially of military vessels. The fact that Russia shares the riches of transboundary oil and gas deposits with its neighbours is secondary compared to the importance of access itself.

G) Conclusion

From the evidence above, several conclusions are possible.

1. Validation of the Second Central Postulates: Continuity between the Soviet and Russian Approach to the Law of the Sea

To begin with, it is possible to affirm that the second postulate guiding this thesis is confirmed: the USSR and Russia share the same approach to the law of the sea. This assertion is corroborated by several elements.

Firstly, Russian laws implementing the LOSC do not significantly differ from Soviet ones. Secondly, Russian scholars think about the law of the sea in the same terms and through similar prisms. This is especially evident when observing scholarly writings about the Arctic, where Russian scholars – and especially critical scholars – use the same arguments as their Soviet predecessor to justify Russia's control over the NSR and the Arctic straits. Similarly, critical scholars have revived and modernized the Soviet concept of the Arctic sector to claim an extended area of continental shelf in the Arctic.

Secondly, Russia's positions during the BBNJ negotiations are remarkably reminiscent of those maintained by the Soviet Union during UNCLOS III. Russian attempts to restore the Soviet status quo in the Sea of Azov – which can be observed during the negotiations leading to the signing and ratification of the 2003 Azov and Kerch Strait Treaty and currently in the *Coastal State Rights* case before the Annex VII arbitral tribunal – also points to the fact that Russia still understands and practices the law of the sea in the same way as the Soviet Union. Similarly, Russia's position on the NSR and the Arctic straits has changed little from the Soviet one: Moscow still considers that it has the right to control foreign navigation sailing through this shipping route.

[495] *Ibid.*

2. Reflections on the First and Third Postulates: Extent of Moscow's Liberal Approach and Geographical Consistency

Regarding the first postulate, supposing that the USSR and Russia maintain a liberal approach to the law of the sea, the situation is somewhat more complex. This hypothesis is both validated and contradicted.

In this thesis, the notion of liberalism has been understood in its Grotian sense, and without normative load, so as to mean asserting the freedom of the high seas and free navigation through straits used for international navigation, and in favour of free access to the sea's riches.

During the LOSC negotiations between 1967 and 1982, as well as since the formal beginning of the BBNJ negotiations in 2018, both the USSR's and Russia's approach to the law of the sea has been decidedly liberal. On these two occasions, Moscow has maintained those positions. Moreover, Soviet and Russian legislation have mostly implemented the LOSC, where those principles are enshrined.

However, Soviet and Russian legislation have deviated from the LOSC as to drawing straight baselines and the existence of historic internal waters. However, the most important deviation concerns warships' right of innocent passage. Until 1989 and the issuance of the Uniform Interpretation of the rules governing innocent passage, the Soviet Union required warships to obtain permission before sailing in its territorial sea. From 1989, the Soviet and Russian understanding of warships' right of innocent passage has been in line with the LOSC. At the same time, it must be noted that, as recently as 2019, a draft project was proposed to amend the existing rules for warships sailing through Russian territorial sea. This draft is reminiscent of the requirement existing prior to the issuance of the 1989 Uniform Interpretation, when the Soviet Union imposed strong limitations on warships' right of innocent passage.

These observations lead to the conclusion that the Soviet and Russian approach to the law of the sea is not entirely liberal. More precisely, it is liberal when Moscow takes part in international negotiations when the negotiations are conceptual and non-geographical.

Analysis of the Soviet Union's and Russia's approach to the law in the Arctic, the Sea of Azov and the Baltic Sea confirms the previous observation. Moscow's approach to the law of the sea is not entirely liberal. Indeed, Russia tries to establish exceptional regimes revolving around historical arguments to contest application of the LOSC in seas that it considers historically its own, i.e. the Arctic and the Sea of Azov.

In the Arctic, building on Soviet legal policy as well as on the works of Soviet scholars, Russian doctrine, at the avant-garde of the critical school of thought, seeks to prove the existence of customary regimes that would grant Russia more sovereignty and control over the Arctic than is provided for in the LOSC. A majority among Russian scholarship consider that Moscow has the right to exercise control over navigation through the Arctic straits, which are deemed to have been historic internal waters of the USSR and now are part of Russia's internal waters. Although the third article submitted for defence by the present

author seriously challenges this thesis, the newly published maritime doctrine of the Russian Federation seems to endorse it, as Moscow wishes to further assert its control over navigation by foreign warships along the NSR.

Yet at the same time, in the Arctic paradoxically Russia also promotes a liberal economic policy designed to turn the NSR into one of the busiest international shipping routes.

Regarding the Arctic continental shelf, critical scholars are trying to revive and modernize the Soviet concept of Arctic sector to grant Russia sovereign rights over an extended area of the deep Arctic seabed. Although their positions are not shared by the majority of Russian scholars, critical scholars' claims *de facto* triumphed in 2021, when Russia presented to the CLCS an amended version of its Arctic submission, where it claims an extended continental shelf wider than ever before.

In the Sea of Azov, the Russian State intends to prove to the Annex VII arbitral tribunal that this body of water escapes the LOSC, for it constitutes historic internal waters of both Ukraine and Russia. To do so, Moscow seeks to prove that the Sea of Azov has always been considered as internal waters and that crucially this consideration did not change with the collapse of the Soviet Union. Moscow maintains this position in part at least because it would ensure that it keeps control over the movement of warships through the Kerch Strait and in the Sea of Azov.

In the Baltic Sea, despite some violations of the LOSC, Russia does not attempt to contest application of the Convention, thus confirming that Russia's challenge to the LOSC is circumscribed only to the seas that it considers to be historically its own.

In turn, returning to our first postulate, the attempt to build exceptional regimes proves that in the Arctic and the Sea of Azov Russia places stronger emphasis on control of foreign navigation, especially on navigation of warships. Nevertheless, this does not mean that in these places Moscow's approach to the law of the sea ceases entirely to be liberal. For instance, in the Arctic, Russia tries to attract foreign shipping and extend its continental shelf, so as to be able to enjoy access to larger quantities of resources.

Finally, the difference in the way Moscow approaches the law of the sea in the Arctic, the Sea of Azov and the Baltic disproves our third postulate.

3. Joint regimes: Access to Natural Resources at the Heart of Moscow's Liberal Approach to the Law of the Sea

Analysis of the joint regimes created by the Soviet Union and Russia with their neighbours seems to reveal that access to natural resources lies at the heart of Moscow's liberal approach to the law of the sea. Indeed, this is the only component of the Grotian vision of the law of the sea that the Soviet Union and Russia have never compromised on, and that they always try to obtain even partially – the only exception being the Sea of Azov, given that this sea is not particularly rich in either of these types of resources.

This element is more important than freedom of navigation. Indeed, Moscow's support for freedom of navigation varies in function of the type of ships and of the distance to its coast. As shown by the 2003 Sea of Azov and Kerch Strait Treaty as well as by the Aktau conventions, Moscow does not support warships' freedom of navigation close to its coast. This observation is further confirmed by the Soviet Union's ambiguous relations to warships' rights of innocent passage in the 1980s.

This hiatus concerning warships' navigational rights is also echoed by the 2022 Maritime Doctrine, which on the one hand seeks to limit foreign warships sailing through the NSR,[496] while aiming to deploy naval forces and create naval bases in the Indian Ocean.[497]

In a nutshell, thanks to the analyses conducted in this compendium, it is possible to establish that the Russian and Soviet approach to the law of the sea resembles the LOSC zonal division of maritime expanses. The farther away from its coasts an issue is located, the more liberal Moscow's response to it is likely to be.

4. Tendencies of the Russian Approach to the Law of the Sea

Based on the observations in this thesis, it is possible to anticipate that despite the recent war in Ukraine and the publication of a new maritime doctrine, fundamental changes in the Russian approach to the law of the sea are unlikely to be observed. Rather, a reinforcement of current trends and defining features of the Russian approach to the law of the sea is to be expected.

Although Russia or its scholarship contest the application of the LOSC in the Arctic and in the Sea of Azov, and perhaps tomorrow in the Sea of Okhotsk, Russia is unlikely to challenge the LOSC on a wider scale. Indeed, Russia remains an important maritime power. Therefore, the LOSC still constitutes the best tool to protect its interests around the seas of the world.

Nevertheless, the war in Ukraine and the extreme tensions existing between Moscow and the West will most likely bear adverse effects on warships' navigational rights. As already presented in the 2022 Maritime Doctrine, Moscow wishes to strengthen its control over foreign warships wishing to sail in the Arctic. The draft law amending the Federal Law № 155 currently under examination by the State Duma seems to indicate that this temptation to reassert control over navigation of foreign warships is likely to spill beyond the Arctic. And more importantly, this document signals Russia's intent to return to the status quo ante 1989 and adoption of the Uniform Interpretation as far as the right of innocent passage is concerned. Should this change materialize, it will constitute a significant development as far as the international practice of the right of innocent passage is concerned.

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[496] 2022 Maritime Doctrine, *op. cit.* note 74, para. 50.6.

[497] *Ibid,* para. 59.4.

Moreover, as Skaridov's presentation during the Vladivostok Forum suggested, freedom of navigation of warships in the EEZ may also be curtailed in the future. To do so Russia may rely on the unclear notion of dangerous military activities that exists in seven of its bilateral treaties since the late 1980s. As seen in section F.1.2.2.2, the threshold for a military activity to be dangerous according to these treaties is very low. The perception of a threat by Russia is sufficient for military activity to be deemed dangerous. Following Swedish and Finnish adhesion to NATO, should Russia adopt such a change in the Baltic, it would render movement of warships in the Baltic Sea quite difficult and increase a level of tension that is already high.

This change in the Russian practice of the law of the sea might bear important repercussions for Estonia and other Baltic countries. However, Russia is unlikely to openly challenge the LOSC in the Baltic Sea and attempt to establish the existence of an exceptional regime. There are too many coastal States bordering the Baltic Sea and too many activities taking place therein for Russia to hold this position.

Should Russia follow this course, its legal positions would be weakened, especially in the Sea of Okhotsk, for – as Gavrilov correctly noted – Moscow cannot for the moment claim the Sea of Okhotsk as historic waters for this claim lacks historical consistency.

5. Future Research

One element that has been left insufficiently researched in this thesis is the way in which the Soviet Union and Russia have managed their maritime borders from the perspective of sub-State actors. Indeed, it would be interesting to analyse how Soviet and Russian administrations, such as the Federal Security Services or the fishing authorities, implemented the 1978 Provisional Agreement in the Barents Sea, or how they deal with North Korean fishermen's illegal fishing in the Russian EEZ in the Pacific Ocean. Such an analysis of Russia's maritime borders on a small scale may prove interesting in terms of understanding how Russia's approach to the law of sea is implemented and how everyday users of the sea such as coast guards or fishermen conceive and practice the law of the sea. A similar analysis on Soviet management of borders between 1920 and 1940 has already been conducted by Sabine Dullin.[498] This research helped her understand Soviet use of borders and led her to conclude that borders were zones of exchange and small-scale cooperation. Moreover, the interest of this research is further confirmed by Andreas Østhagen's rencent monograph on the role of coast guards in ocean policy.[499]

[498] S. Dullin. La Frontière Épaisse: Aux Origines Des Politiques Soviétiques, 1920–1940. [The Thick Border: To the Origins of Soviet Policies, 1920–1940] Paris: Éditions EHESS 2014.

[499] A. Østhagen. Coast Guards and Ocean Politics in the Arctic. London/Singapore: Palgrave Macmillan 2020.

Despite the difficulty in accessing sources, such a study on Russia's maritime border management would be interesting to realize. In the future, the results of this study could in turn be used to help improve the governance of the Arctic Ocean, where Russia is an important actor, and where numerous challenges will arrive in the future under the influence of global warming.

SUMMARY IN ESTONIAN

Nõukogude Liidu ja Venemaa käsitus mereõigusest: liberalism ja kohalik vastupanu

Käesoleva doktoritöö eesmärk on analüüsida Nõukogude ja Venemaa mereõiguse käsitust iseloomustavaid tunnuseid. Täpsemalt püütakse selgitada, kuidas mereõigust tänapäeva Venemaal kasutatakse ja mõistetakse ning kuidas seda mõisteti Nõukogude Liidus kui Venemaa õiguseellases riigis. Uurimus järgib kolme läbivat üldist küsimust. Kas selles õigusvaldkonnas esineb Venemaa erandlikkuse idee ja kui esineb, siis miks? Kuidas seda iseloomustada? Kas praegusaja Venemaa käsitus erineb sellest, kuidas mereõigust mõisteti ja kasutati Nõukogude ajal.

Teiste hulgas William Butleri ja Erik Franckxi jälgedes käies püütakse töös analüüsida NSV Liidu ja Venemaa mereõiguse käsitust alates 1967. aastast, kui sündis 1982. aastal teoks saanud idee mereõiguse konventsiooni sõlmimisest, kuni 2022. aastani, mil käesolev töö on esitatud. Enne jätkamist tuleb rõhutada, et töös analüüsitakse üksnes Nõukogude Liidu ja Venemaa käsitust mereõigusest. Selles ei vaadelda Moskva mereõiguse praktika muutumist. Samuti ei käsitleta selles põhjalikumalt merekeskkonna kaitse ja kalandusega seotud tehnilisi arutelusid.

Venemaa mereõiguse käsituse ning selle ja Nõukogude käsituse vahelise võimaliku järjepidevuse analüüsimiseks juhindutakse töös kolmest hüpoteesist.

1) Sellest ajast peale, kui Nõukogude Liit sai 1960. aastate keskel mõjukaks mereriigiks, on ta toetanud liberaalset mereõiguse käsitust.
2) Nõukogude Liidu ja Venemaa käsitus mereõigusest on sama.
3) Nõukogude ja Venemaa mereõiguse käsitus on ühetaoline kõikides maailma piirkondades ning universaalsust ja geograafilist piiritlematust taotlevatel rahvusvahelistel läbirääkimistel.

Nimetatud hüpoteeside kinnitamiseks või ümber lükkamiseks on töös kasutatud ajaloolist meetodit ning sellel on kolm telge, mis põhinevad autori poolt rahvusvahelistes ajakirjades avaldatud artiklitel. Esimese telje aluseks on esimene artikkel, mis käsitleb NSV Liidu rolli mereõiguse konventsiooni läbirääkimistel. Sellest ilmneb Nõukogude Liidu ja Venemaa liberaalne käsitus mereõigusest. Siinkohal on vaja rõhutada, et liberalismi mõistele ei tuleks anda positiivset kõrvaltähendust, vaid seda tuleks tõlgendada Grotiuse arusaama järgi. Sõna „liberaalne“ on kasutatud ainult sel lihtsal põhjusel, et NSV Liidu ja Venemaa mereõiguse käsituse keskmes oli ja on avamerevabaduse põhimõte. Esimest artiklit on täiendatud tähelepanekutega sellest, kuidas mereõiguse konventsiooni on NSV Liidus ja Venemaal rakendatud. Samuti tuuakse välja Nõukogude ja Venemaa doktriinide ühised jooned. Viimaks analüüsitakse Venemaa seisukohti läbirääkimistel väljaspool riikide jurisdiktsiooni olevate alade elurikkuse kaitse lepingu üle.

Tähelepanu pööramine Venemaa hoiakutele nendel läbirääkimistel on põhjendatud, sest nendest on saamas praegusaegne vaste ÜRO kolmandale mereõiguse konverentsile.

Teise telje aluseks on teine ja kolmas artikkel, mis mõlemad on pühendatud Arktika teemale. Selles näidatakse, kuidas Venemaa kasutab lokaalselt ajalugu ja ajaloolisi argumente, et kindlustada mereõiguse konventsioonist kõrvale kaldudes oma suveräänsust meredel, mida ta peab traditsiooniliselt Nõukogude Liidule või Venemaale kuuluvaks. Neid kahte artiklit on täiendatud tähelepanekutega Aasovi mere kohta, kus Venemaa kasutab mereõiguse konventsioonist möödaminekuks samuti ajaloolisi argumente. Käsitletakse ka Läänemerd, mille suhtes Venemaa erandlikult ei ole seni ajalool põhinevaid nõudmisi esitanud. Lisaks vaadeldakse Ohhoota mere küsimust, mis on õpetuslikes aruteludes viimasel ajal taas päevakorda tõusnud. See teine telg näitab, et kuigi Nõukogude Liidu ja Venemaa mereõiguse käsitus on üldiselt liberaalne, eriti rahvusvahelistel geograafiliselt piiritlemata läbirääkimistel, sisaldab see ka vastuolusid. Sellest teljest ilmneb nii kohalike erandite kui ka erinõudmiste olemasolu.

Töö kolmanda ja viimase telje aluseks on neljas artikkel, mis käsitleb 2018. aasta Kaspia mere konventsiooni. Selles analüüsitakse Nõukogude Liidu ja Venemaa kalduvust ühisrežiimide loomisele. Barentsi mere, Vaikse ookeani ja 2014. aasta eelse Musta mere näidete põhjal ilmneb sellest teljest, et ühisrežiimid näitavad eelmistes osades kirjeldatud Nõukogude ja Venemaa käsituse kahetisust. Ühisrežiimidega tagab Venemaa endale ligipääsu merevaradele, säilitades samal ajal kontrolli piirkonnas toimuva meresõidu üle.

1. Liberalismi tunnused Nõukogude Liidu ja Venemaa mereõiguse käsituses

1.1 „Kas liberaalne mereriik nagu iga teine? Nõukogude Liit mereõiguse konventsiooni läbirääkimiste ajal“

Kaitsmisele esitatud esimeses artiklis on Butleri tähelepanekuid kinnitades näidatud, et ajendatuna oma merenduspoliitika põhimõttelisest muudatusest, mis võimaldas tal saada mõjukaks mereriigiks, võttis NSV Liit omaks mereõiguse liberaalse käsituse, mille keskmeks on avamerevabadus ja võitlus rannikuriikide jurisdiktsiooni laiendamise vastu. Vaja on rõhutada, et liberalismi mõistele ei tuleks anda positiivset kõrvaltähendust. See kujutlus mereõigusest, mida viisik soovis kehtestada, vastas kõige paremini nende kui suurte mereriikide huvidele.

On kõnekas, et 1967. aastal saatis NSV Liit ÜROle ja lääneriikidele konventsiooni projekti, mille kohaselt territoriaalmere laiuse ülempiiriks määrati 12 meremiili. Selle eesmärk oli tõkestada kolmanda maailma riikide katseid laiendada oma jurisdiktsiooni suurtele veealadele. 1967. aasta novembris toetasid NSV Liit ja lääne mereriigid mere- ja ookeanipõhja rahumeelse kasutamise uurimise ajutise komitee loomist, kui Malta esindaja Arvid Pardo oli pidanud samal teemal mälestusväärse kõne.

Alates 1970. aastast kuni ÜRO kolmanda mereõiguse konverentsi (UNCLOS III) lõpuni tegi Moskva nn viisikus tihedat koostööd Prantsusmaa, Ühendkuningriigi, Ameerika Ühendriikide ja Jaapaniga. Selle rühma eesmärk oli panna maksvusele mereõiguse liberaalne käsitus, mille kohaselt territoriaalmere laiuse ülempiir on 12 meremiili, meresõiduvabadus on tagatud ning süvamerepõhi on riikidele või nende ettevõtetele vabalt ligipääsetav ja kasutatav.

Kuigi viisik pidi tegema kompromisse, näiteks seoses majandusvööndite loomisega, millele nad algselt tugevalt vastu seisid, õnnestus neil saavutada suurem osa oma eesmärkidest. Territoriaalmere laiuse ülempiiriks kehtestati 12 meremiili, rahvusvaheliseks meresõiduks kasutatavates väinades tagati läbisõiduõigus ning viimaks anti riikidele õigus otse süvamerepõhja kasutada.

Individuaalsel tasandil kasutas NSV Liit mereõiguse konventsiooni läbirääkimistel oma seisukohtade kaitsmiseks ja nende kehtivuse tõestamiseks sarnaseid liberaalseid argumente nagu 18. ja 19. sajandi majandusteadlased. Kokkuvõtlikult oli Nõukogude argumentatsiooni tuumaks idee, et meresõiduvabadus ja ka vaba ligipääs süvamerepõhja loodusvaradele toetab arengut ja jõukuse kasvu. Seevastu rannikuriikide ulatuslik jurisdiktsioon merealade üle ja tsentraliseeritud kontroll süvamerepõhja üle tooks kaasa majandusliku mahajäämuse.

1.2. Mereõiguse konventsiooni rakendamine ja vastuvõtt

Pärast mereõiguse konventsiooni allkirjastamist võtsid NSV Liit ja Venemaa selles suurel määral oma riiklikku õigusesse üle. Samas tuleb toonitada kahte märkimisväärset erandit. Need puudutasid sõjalaevade rahumeelse läbisõidu õigust ja siseveekogusid.

Pärast 1982. aastat kaldusid Nõukogude õigusaktide sätted sõjalaevade rahumeelse territoriaalmerest läbisõidu õiguse kohta kõrvale nii mereõiguse konventsioonist kui ka nendest seisukohtadest, mida Nõukogude delegatsioon UNCLOS III ajal esindas. Nagu ka Franckx on rõhutanud, ei olnud kuni 1989. aastani ja rahumeelset läbisõitu käsitlevate rahvusvahelise õiguse normide ühtse tõlgenduse vastuvõtmiseni selge, kas ja kuidas sõjalaevad saaksid kasutada rahumeelse läbisõidu õigust Nõukogude Liidu territoriaalmeres. Pärast nimetatud aastat on NSV Liidu ja Venemaa seisukoht seoses sõjalaevade rahumeelse läbisõiduga nende territoriaalmerest olnud kooskõlas mereõiguse konventsiooni normidega.

Seni järgib Venemaa endiselt sõjalaevade rahumeelse läbisõidu osas mereõiguse konventsiooni, vaatamata 2021. aasta intsidendile HMS Defenderiga ning eelnõule, milles tehti ettepanek muuta 1999. aasta reegleid välismaiste sõjalaevade ja mitteärilisel eesmärgil kasutatavate muude valitsuse laevade navigatsiooni ja viibimise kohta Vene Föderatsiooni territoriaalmeres, sisemeredes, mereväebaasides, sõjalaevade paiknemispunktides ja meresadamates. Ent kui Venemaa ja lääne vahelised pinged peaksid veelgi süvenema, on võimalik, et Venemaa pöördub sõjalaevade rahumeelse läbisõidu õiguse küsimuses tagasi enne 1989. aastat kasutatud tõlgenduse juurde.

Seoses Nõukogude Liidu sisevetega on kahtluse alla seatud 1985. aastal kehtestatud sirgete lähtejoonte süsteemi, kuna see põhines mereõiguse konventsiooni

artikli 7 lõike 1 lõdval tõlgendusel ja ei olnud kooskõlas konventsiooni tekstiga. Mereõiguse konventsiooni järgi on sirgete lähtejoonte kasutamise eelduseks see, et rannajoon „on tugevasti liigestatud või kui ranniku vahetus naabruses on piki rannikut kulgev saarteahelik“. Venemaa 2021. aastal tehtud sirgete lähtejoonte muudatus ei vaigista seda kriitikat, sest uute lähtejoonte paiknemine sarnaneb nõukogudeaegsega. Sirgete lähtejoontega ümbritsetud sisevete pindala on suurenenud.

Lisaks näis tekkivad lahknevus Nõukogude riigipiiriseaduse ja mereõiguse konventsiooni vahel selles, et konventsioonis ei tunnustata ajalooliste vete, välja arvatud ajalooliste lahtede olemasolu. Nõukogude seaduses tunnistati sisevete lahed, abajad, limaanid, mered ja väinad ajalooliselt NSV Liidule kuuluvaks. See säte on alles ka Venemaa õiguses, kuid selle tähtsust ei tohiks üle hinnata. Ainus kord, kui seda sätet on kasutatud lahest erinevate merealade üle jurisdiktsiooni nõudmiseks, oli seotud Laptevi ja Sannikovi väinadega, mis tunnistati 1965. aastal ajalooliselt NSV Liidule kuuluvaks.

Paljuski sarnaselt sellega, kuidas mereõiguse konventsioon kiiresti Nõukogude ja Venemaa õigusesse üle võeti, aktsepteerisid seda kärmelt ka Nõukogude ja Venemaa akadeemilised juristid. Vaatamata esialgsele kriitikale majandusvööndi mõiste kohta, sai mereõiguse konventsioonist pärast 1982. aastat Nõukogude ja Venemaa õigusteadlaste mereõiguse käsituse kese. Konventsiooni kiiret omaksvõttu ja kasutamist Nõukogude analüüsides seletab asjaolu, et mitmed silmapaistvad Nõukogude õigusteadlased osalesid selle dokumendi üle peetud läbirääkimistel. Venemaa teaduslik käsitlus ei löönud nõukogudeaegsest eelkäijast lahku, vaid jätkas töötamist ja mõtlemist samal suunal. Seda Nõukogude ja Venemaa teaduslike käsitluste suurt järjepidevust saab seletada kolme peamise teguriga.

Esiteks ei ole mereõiguse kontseptsioonis toimunud põhimõttelisi arenguid, kuigi merekeskkonna kaitse on muutunud laiemalt uuritud teemaks. Mereõiguse konventsioon on püsinud alates selle jõustumisest 1994. aastal muutumatuna. Teiseks on Venemaa mereõiguse valdkonna õigusaktid valdavalt kooskõlas rahvusvaheliste normidega ning pole palju kohti, kus Venemaa teadlased saaksid oma eripära näidata. Nagu ilmneb järgmisest jaotisest, avaldub Venemaa õpetuslik partikularism selles, kuidas käsitletakse Arktika ja Musta mere piirkondlikke küsimusi. Lisaks ei vaidlusta Venemaa mereõiguse konventsioonis sisalduvaid norme, välja arvatud konkreetsete merede puhul, mida ta peab ajalooliselt endale kuuluvaks. Kolmandaks valitsevad Venemaa akadeemilisel maastikul veel tugevad Nõukogude perioodi mõjud. Märkimisväärne osa Venemaa juhtivatest mereõiguse spetsialistidest omandas hariduse ja alustas tööd Nõukogude ajal. Nende hulka kuuluvad näiteks Anatoli ja Roman Kolodkin, Galina Šinkaretskaja, Kamil Bekjašev, Aleksandr Võlegžanin, Vjatšeslav Gavrilov ja Aleksandr Skaridov. Ainult nõukogudejärgsel Venemaal elanud juhtivaid õigusteadlasi pole veel esile kerkinud.

1.3. Venemaa seisukohad elurikkuse kaitse lepingu läbirääkimistel

Viimane element, mis kinnitab tõdemust, et Venemaa mereõiguse käsitus on endiselt üldjoontes liberaalne, on riigi seisukoht praegu jätkuvatel läbirääkimistel väljaspool riikide jurisdiktsiooni olevate alade elurikkuse kaitse lepingu üle.

Ametlikult 2017. aastal alanud elurikkuse kaitse lepingu läbirääkimistele eelnes pikk protsess, mis käivitus väljaspool riikide jurisdiktsiooni asuva mere elurikkuse kaitse ja kestliku kasutamise uurimise ajutise mitteametliku töörühma moodustamisega 2004. aastal. Nende läbirääkimiste eesmärk on täita regulatiivne lünk: mereõiguse konventsiooni kohaldamisalast välja jäävate väljaspool riikide jurisdiktsiooni asuvate alade kaitse ja kestlik kasutamine.

Läbirääkimistel on kokku lepitud neljas põhiteljes: geneetiliste ressursside majandamine, piirkondlike majandamivahendite loomine, keskkonnamõju hinnangute koostamine ning meretehnoloogiate siirdamist võimaldava suutlikkuse suurendamise süsteemi kavandamine.

Kõneluste käigus on Venemaa järjepidevalt asunud teiste arenenud riikidega samale seisukohale ning toetanud vabatahtlikke meetmeid ja vähem tsentraliseeritud kontrolli riikide tegevuse üle seoses väljaspool riikide jurisdiktsiooni asuva elurikkusega. Näiteks toetas Venemaa seetõttu kalade välistamist majandatavate geneetiliste ressursside määratlusest, kuna see võiks pärssida kalandust, mis on niigi reguleeritud. Lisaks keeldus Venemaa teiste arenenud riikide eeskujul tunnistamast, et väljaspool riikide jurisdiktsiooni asuvad majandatavad geneetilised ressursid peaksid olema inimkonna ühisvara. Samuti ei olnud ta nõus lisama teksti nõuet teha koostööd olukorras, kus majandatavaid geneetilisi ressursse leidub nii väljaspool riikide jurisdiktsiooni kui ka riikide jurisdiktsiooni all asuvatel aladel. Seoses majandatavate geneetiliste ressursside kasutamisest saadavate hüvedega toetas Moskva vabatahtlikku süsteemi, mis võimaldaks ainult mitterahalisi hüvitisi. Samas vaimus väljendas Moskva kahtlust selle suhtes, kas väljaspool riikide jurisdiktsiooni asuvate alade haldamiseks on vaja luua veel ühte rahvusvahelist organit. Selle asemel toetas ta nende alade haldamiseks olemasolevate piirkondlike institutsioonide kasutamist. Samuti polnud Moskva nõus rahvusvahelise merekaitsealade võrgustiku loomise ja ülemaailmsete kalanduseeskirjade kehtestamisega.

Kuigi Nõukogude Liidu seisukohad mereõiguse konventsiooni läbirääkimistel ja Venemaa vaated tulevase elurikkuse kaitse lepingu kõnelustel ei puuduta päris kattuvaid teemasid, võib tagantjärele näha nende vahel rabavaid sarnasusi. Pool sajandit hiljem püüab Vene Föderatsioon piirata elurikkuse kaitse lepingu kohaldamisala, et säilitada oma vabadus ekspluateerida merevarasid ilma välise järelevalveta. Vaatamata analüüsitud koondaruannete ühepoolsusele võib järeldada, et Venemaa peab sarnaselt NSV Liiduga merd aardekambriks, mida kasutada ja ekspluateerida. See näib olevat põhjus miks Venemaa mereriigina on ühes paadis lääneriikide ja teiste arenenud riikidega, kaitstes rahvusvahelistel läbirääkimistel endiselt liberaalset mereõiguse käsitust.

2. Kohalikud erisused ja ajaloo poole pöördumine

Moskva mereõiguse käsituse liberalismis tuleb siiski eristada peenemaid nüansse. Kuigi Nõukogude Liit ja Venemaa pooldasid ja pooldavad jätkuvalt liberaalset mereõiguse käsitust rahvusvahelistes oludes, on olukord hoopis teistsugune nende merede puhul, mida Moskva peab ajalooliselt endale kuuluvaks. Põhja-Jäämeres ja viimasel ajal ka Aasovi meres püüab Venemaa kehtestada erandlikke tavaõiguse režiime, et minna mööda mereõiguse konventsioonist ning saada nende merealade suhtes täiendavaid õigusi ja suuremat kontrolli. Mõlema piirkonna puhul üritab Moskva ajalooliste argumentidega tõestada, et mereõiguse konventsioon seal ei kehti. Samas piirdub see tingimus ainult nende merealadega. Ei Nõukogude Liit ega Venemaa pole kunagi esitanud sarnaseid väiteid Läänemere ega Ohhoota mere kohta.

Põhja-Jäämere puhul toetab seda erandlikkust Nõukogude ja Venemaa õigusteadus ning Aasovi mere puhul õigustab erandliku režiimi olemasolu Vene riik. Venemaa aktiivsus Aasovi mere küsimuses on seletatav Moskva vajadusega põhjendada oma tegusid VII lisa kohases vahekohtus, mis käsitleb 2016. aastal pärast Krimmi annekteerimist Ukraina poolt algatatud vaidlusasja rannikuriikide õiguste kohta Mustas meres, Aasovi meres ja Kertši väinas.

2.1. Arktika erand

Nagu näitasid 1960. aastatel toimunud Arktika väinade intsidendid, mille ajal Ameerika Ühendriigid ja Nõukogude Liit vaidlesid Kirdeväilal asuvate Arktika väinade läbisõidurežiimi üle, on Põhja-Jäämeri ajalooliselt olnud piirkond, kus Nõukogude Liit ja Venemaa on püüdnud meresõitu enda kontrolli alla võtta. Seda eesmärki on hiljuti korratud 2022. aasta merendusdoktriinis.

Kaitsmisele esitatud teises ja kolmandas artiklis on kirjeldatud, kuidas Nõukogude teadlased on sõnastanud teesid tavaõiguse režiimi kohta, mis olenevalt konkreetsete õigusteadlaste eelistustest peaks kas tagama Moskvale õiguse kontrollida meresõitu Kirdeväilas või andma Venemaale selle üle täieliku suveräänsuse. NSV Liidu lagunemise järel on Venemaa õigusteadlased jäänud samade seisukohtade juurde ning uurinud veelgi põhjalikumalt võimalust, et meresõit läbi Kirdeväila võiks olla reguleeritud tavaõiguse režiimiga.

Nii endiste kui praeguste argumentide kohaselt on Venemaa ja Nõukogude Liit sajandeid Põhja-Jäämerd kontrollinud ja teised riigid on sellega vaikides nõustunud. Lisaks on väidetud, et Kirdeväila võttis kasutusele Nõukogude Liit ja seda poleks võimalik läbida ilma NSV Liidu abita. Samuti on öeldud, et välisriikide lipu all sõitvad laevad pole Kirdeväila kunagi rahvusvaheliseks meresõiduks kasutanud. Need argumendid võimaldasid Nõukogude õigusteadlastel ja võimaldavad tänapäeva Venemaa juristidel järeldada, et Moskval oli õigus kontrollida meresõitu läbi Kirdeväila ja Arktika väinade, sest need olid NSV Liidu siseveed. Kui 1985. aastal vastu võetud seadusega kehtestati Nõukogude lähtejoonte süsteem, mis hõlmas Arktika väinu, hakkasid teadlased oma seisukohtade kaitseks kasutama ka seda seadust.

Selliste argumentidega püütakse väita, et Põhja-Jäämeres ei kehti 1958. aasta territoriaalmere ja selle külgvööndi konventsiooni artikli 5 lõige 2 ega mereõiguse konventsiooni artikli 8 lõige 2, mille kohaselt rahumeelse läbisõidu õigus kehtib ka sellistes sisevetes, mis enne sirgete lähtejoonte tõmbamist sisevete hulka ei kuulunud. Nõukogude ja Vene õigusteadlaste väitel ei saa välisriikide sõjalaevad seetõttu kasutada Kirdeväilal asuvates Artkika väinades rahumeelse läbisõidu õigust. Siinkohal tuleb märkida, et kaubalaevade rahumeelse läbisõidu üle vaidlust ei ole. Mereõiguse konventsiooni artiklis 234, mis käsitleb jääga kaetud alasid, on sätestatud, et rannikuriikidel on õigus kehtestada meresõiduohutuse tagamise eesmärgil kaubalaevade suhtes täiendavaid õigusakte kuni 200 meremiili ulatuses oma rannikust. Seetõttu on Venemaal õigus reguleerida kaubalaevade sõitu läbi Põhja-Jäämere, sõltumata käimas olevatest vaidlustest Venemaa kehtestatud Kirdeväila läbimise reeglite üle.

Ent nagu näidatakse kaitsmisele esitatud kolmandas artiklis, tähendab hiljuti leitud 1965. aasta dekreet nr 331–112, mis käsitleb Kirdeväila väinadest läbisõidu korda, et sellist tavaõiguse režiimi ei saa eksisteerida. Nõukogude Liit määratles 1965. aastal Kara Värava, Jugorski Šari, Matotškin Šari, Vilkitski väina, Šokalski väina ja Punaarmee väina NSV Liidu territoriaalmerena. Seda tehes teatas Moskva, et ta ei pea Arktika väinade tavaõiguse režiimi enda suhtes siduvaks vähemalt 20 aastat: alates 1965. aastast kuni 1985. aastani ja sirgete lähtejoonte kehtestamiseni. Seetõttu ei saa Nõukogude ja Vene teadlaste poolt väidetavat Põhja-Jäämeres meresõitu reguleerivat tavaõiguse režiimi olemas olla, kuna Nõukogude Liidu tegevus ei olnud tava tekkimiseks piisavalt järjepidev. Ent võttes arvesse Vene Föderatsiooni sisstungi Ukrainasse ja 2022. aasta uut merendusdoktriini, ei ole siiski tõenäoline, et Moskva lubaks mõnel sõjalaeval kasutada Venemaa Arktika väinades rahumeelse läbisõidu õigust.

Seoses Arktika merepõhja eriküsimusega on Aleksandr Võlegžanini juhitud kriitiliste õigusteadlaste rühm alates 2001. aastast seadnud kahtluse alla mereõiguse konventsiooni kohaldatavust ning on taastanud ja kaasajastanud 1920. aastatel saarte üle suveräänsuse saamiseks loodud Arktika sektori kontseptsiooni. Selle mõiste abil põhjendavad teadlased Venemaa suveräänsust Arktika merepõhja laiendatud osa üle. See koolkond sündis 2001. aastal pärast Venemaa esimest taotlust ÜRO mandrilava piiride komisjonile. Koolkond väitis, et selle taotlusega piiras Venemaa ise oma õigusi Arktika merepõhjale Barentsi mere, Tšuktši mere ja põhjapooluse vahel. Need teadlased kaitsesid Arktika sektori kontseptsioonile tuginedes arusaama tavaõigusliku režiimi olemasolust, püüdes sellega parandada viga, mis nende hinnangul varem oli tehtud. Sarnaselt Kirdeväila juhtumiga põhjendasid need õigusteadlased oma argumenti Venemaa ajaloolise kohaloluga piirkonnas ning sellega, et teised Põhja-Jäämere ääres asuvad riigid olid Arktika sektori kontseptsiooni tunnustanud. Lisaks eitasid nad mereõiguse konventsiooni kohaldatavust Põhja-Jäämeres. Selle põhjenduseks väitsid nad, et NSV Liit, Ameerika Ühendriigid ja Kanada olid kokku leppinud, et Põhja-Jäämeri ei kuulu mereõiguse konventsiooni kohaldamisalasse. Arhiividokumentide uurimine ei ole seda väidet siiski kinnitanud.

Mainitud kriitilise koolkonna seisukohad erinevad Venemaa õigusteadlase enamiku arvamusest, mille kohaselt mereõiguse konventsioon kehtib ka Arktika merepõhja suhtes. Samas on koolkonna liikmed üsna mõjukad ning kuigi Venemaa valitsus ei ole nende seisukohta ametlikult heaks kiitnud ja lähtub endiselt mereõiguse konventsiooni normidest, on valitsuse poliitiline eesmärk siiski saada enda valdusesse rohkem Arktika merepõhja. Aastal 2021 esitatud Venemaa uues taotluses mandrilava piiride komisjonile soovitakse mandrilava piiride tunnustamist suuremas ulatuses kui kunagi varem. Kui komisjon peaks andma heakskiitva soovituse, on kriitilise koolkonna põhieesmärk saavutatud. Ent kui komisjon peaks tunnistama Venemaa taotluse põhjendamatuks, võib Venemaa valitsus kriitilise koolkonna teesid ametlikult heaks kiita.

2.3. Aasovi meri: kas uue erisuse sünd?

Venemaa väidab, et mereõiguse konventsioon ei ole kohaldatav ka Aasovi meres. Erinevalt Põhja-Jäämerest on tegemist palju hilisema väitega, sest Venemaa hakkas sellega oma tegevust Aasovi meres õigustama alles pärast, seda kui Ukraina oli algatanud 2016. aastal vahekohtumenetluse.

Vaidluses rannikuriikide õiguste kohta Mustas meres, Aasovi meres ja Kertši väinas keerleb põhiküsimus Aasovi mere staatuse ümber. Nõukogude perioodil peeti seda NSV Liidu siseveekoguks. Vahekohus peab aga lahendama järgmise küsimuse: kas sisevee staatus säilis ka pärast 1991. aastat? Kui vastus sellele küsimusele on jaatav, siis mereõiguse konventsioon Aasovi mere suhtes ei kehti, kuna konventsioon ei laiene rannikuriikide suveräänsuse all olevatele sisevetele. Kui vastus küsimusele on eitav, siis peaks mereõiguse konventsioon olema kohaldatav ning seadma piiranguid nii Ukraina kui ka Venemaa tegevusele sellel merealal.

Venemaa väidab, et pärast NSV Liidu lagunemist säilis Aasovi mere kui sisevee staatus. Moskva järgi seisneb ainus Nõukogude Liidu kadumise järel tekkinud erinevus selles, et alates 1991. aastast on Aasovi meri nii Ukraina kui ka Venemaa siseveekogu. Seega mereõiguse konventsiooni selle suhtes ei kohaldata. Seetõttu on Venemaal õigus kontrollida meresõitu läbi Kertši väina ja Aasovi meres. Venemaa kasutab oma seisukohtade põhjendamiseks valikulist tõlgendust 1991. aastal Ukrainaga peetud läbirääkimistest Aasovi mere staatuse ja piiride üle. Venemaa argumentatsiooni põhialus on 2003. aasta koostööleping Aasovi mere ja Kertši väina kasutamise kohta, milles Aasovi meri tunnistati ajalooliselt nii Venemaa kui ka Ukraina siseveekoguks.

Pärast vahekohtule esitatud Ukraina ja Venemaa tõendite läbivaatamist näib, et olukord on tegelikkuses palju mitmetahulisem, kui Venemaa valitsus väidab. Kui vastab tõele, et 2003. aasta kokkuleppe kohaselt on Aasovi meri nii Ukraina kui Venemaa siseveekogu, siis näib, et Ukraina ei käsitanud seda püsiva staatusena, sest ta on korduvalt nõudnud merepiiri paikapanekut.

Nõukogude õigusteadlased ei pööranud Aasovi merele ja Kertši väinale kuigi suurt tähelepanu, sest seda ei läbinud rahvusvahelised kaubateed ja Nõukogude Liidu siseveekoguna ei tekitanud see erilisi õiguslikke probleeme. Enne Krimmi

annekteerimist 2014. aastal ja vahekohtumenetluse algatamist 2016. aastal keerles suurem osa õigusteaduslikest väitlustest selle ümber, millist režiimi tuleks kohaldada Kertši väina suhtes ning kas seal kehtib mereõiguse konventsiooni artikli 45 kohane rahumeelse läbisõidu õigus, mida ei ole lubatud peatada. Pärast Krimmi annekteerimist kordasid Venemaa õigusteadlased vahekohtumenetluse aegseid argumente, kuid ei esitanud uusi põhjendusi.

2.3 Läänemeri ja Ohhoota meri

Kui Põhja-Jäämeres ja Aasovi meres püüab Venemaa kehtestada erandlikke režiime, siis Läänemere ja Ohhoota mere puhul on olukord täiesti teistsugune. Neis meredes ei ürita Moskva mereõiguse konventsioonist kõrvale kalduda, kuigi viimasel ajal on mõned Venemaa õigusteadlased hakanud väitma, et Venemaa peaks taastama oma ajaloolised õigused Ohhoota meres.

Tuleb siiski rõhutada, et isegi kui Venemaa mereõiguse konventsiooni kohaldatavust otseselt ei vaidlusta, ei pruugi ta alati seda konventsiooni järgida. Näiteks Alexander Lott on osutanud, et 2007. aastal pärast pronkssõduri skulptuuri teisaldamise järel lahvatanud pingeid ei lubanud Moskva rahumeelset läbisõitu Eesti lipu all sõitvale laevale Vironia.

Sellegipoolest on tänu neile kahele vastupidisele näitele võimalik kinnitada, et Nõukogude Liidu ja Venemaa vastuseis mereõiguse konventsiooni kohaldamisele on piirdunud Põhja-Jäämere ja Aasovi merega, mida Moskva peab ajalooliselt endale kuuluvaks.

3. Ühisrežiimid merepiiridega piirkondades: Nõukogude ja Venemaa mereõiguse käsituse suurendusklaasid

Doktoritöö kolmanda telje aluseks on kaitsmisele esitatud neljas artikkel, milles analüüsitakse 2018. aasta Kaspia mere konventsiooni. Selles käsitletakse Nõukogude Liidu ja Venemaa käsitust mereõiguse kohaldatavusest oma piiridel naaberriikidega peetavate piiriläbirääkimiste ajal.

Nagu Oude Elferink 1994. aastal märkis, oli Nõukogude Liidul kalduvus luua oma naabritega ühisrežiime. Vene Föderatsioon on seda suundumust jätkanud. Need sageli pärast vaevalisi läbirääkimisi sõlmitud lepinguid on otsekui suurendusklaasid, mis paljastavad Nõukogude ja Venemaa mereõiguse käsituse kõige olulisemad tunnused.

Näib, et juurdepääs merevaradele on olnud Moskva jaoks piiriläbirääkimistel olulisem kui suveräänsuse kindlustamine. Kõnekal kombel on tema loodud Barentsi mere, Beringi mere ja Kaspia mere ühisrežiimides põhirõhk ligipääsul kalavarudele ja süsivesinikumaardlatele.

Suveräänsuse kindlustamine ja meresõidu kontrollimine näivad olevat teisejärgulised teemad, millele on hakatud tähelepanu pöörama suhteliselt hiljuti, eriti Aasovi mere ja Kaspia mere puhul. On iseloomulik, et Venemaa tõstatas selle küsimuse läbirääkimistel Nõukogude Liidust eraldunud riikidega, kuid Nõu-

kogude Liit ja Venemaa ei ole selliseid nõudmisi esitanud läbirääkimistel läänеriikidega (nt Norraga). See ei tähenda siiski, et Moskva ei oleks püüdnud saada läbirääkimiste käigus parimaid võimalikke piire.

Nõukogude Liidu ja Venemaa piirilepingute uurimisest ilmnev põhijäreldus on see, et Moskva on olnud igati valmis tegema naaberriikidega koostööd, kui see näis olevat ainus lahendus, mis tagab raskusteta ligipääsu loodusvaradele.

Kokkuvõte

Alates 1960. aastatel mõjukaks mereriigiks saamisest on Nõukogude Liit ja Venemaa mõlemad esindanud liberaalset mereõiguse käsitust, mille keskmes on avamerevabadus ning vaba juurdepääs merevaradele. Sellest liberalismist annavad tunnistust NSV Liidu ja Venemaa seisukohad rahvusvahelistel konverentsidel, näiteks UNCLOS III ajal ja praegu toimuvatel läbirääkimistel väljaspool riikide jurisdiktsiooni olevate alade elurikkuse kaitse lepingu üle. Lisaks on Nõukogude Liit ja Venemaa üldiselt mereõiguse konventsiooni norme järginud, vaatamata mõningatele küsitavatele otsustele seoses sirgete lähtejoonte tõmbamisega ja rahumeelse läbisõidu õigusega. Sarnaselt on mereõiguse konventsiooni Nõukogude Liidus ja Venemaal tunnustatud ning kasutatud mereõigust käsitlevates õpetuslikes põhjendustes ja analüüsides. Nõukogude ja Venemaa liberaalse käsituse tunnuseid võib leida ka erinevatest ühisrežiimidest, mille Moskva on oma naabritega loonud. Barentsi mere, Beringi mere ja Kaspia mere piirilepingute sõlmimisel on Nõukogude Liidu ja Venemaa põhihuvi olnud saada ligipääs loodusvaradele.

Sellegipoolest oleks liialdus väita, et Nõukogude ja Venemaa käsitus on olnud järjepidevalt liberaalne. Olles analüüsinud erandlikke režiime, mida Venemaa püüab Põhja-Jäämeres ja Aasovi meres kehtestada, saab meie kolmanda postulaadi ümber lükata. Nõukogude Liidu ja Venemaa mereõiguse käsitus ei ole järjekindlalt liberaalne. Kui Moskva peab mõnda merd ajalooliselt endale kuuluvaks, püüab ta seal kehtestada ajaloolistel argumentidel põhinevat erandlikku tavaõiguse režiimi, et kindlustada oma suveräänsust või saada rohkem õigusi kui need, mis mereõiguse konventsiooniga on rannikuriikidele antud.

Lühidalt sarnaneb Venemaa ja Nõukogude käsitus mereõigusest sellega, kuidas merealad on mereõiguse konventsioonis vöönditeks jagatud. Mida kaugemal mingi vöönd rannikust on, seda liberaalsemalt Moskva sellesse tõenäoliselt suhtub.

Käesolevas töös tehtud tähelepanekute põhjal võib eeldada, et Ukraina sõjale ja uue merendusdoktriini avaldamisele vaatamata ei ole põhimõttelised muutused Venemaa mereõiguse käsituses tõenäolised.

Pigem võib oodata Venemaa mereõiguse käsituse seniste suundumuste ja iseloomulike tunnuste kindlustamist. Mereõiguse konventsioon vastab endiselt Vene Föderatsiooni kui mereriigi huvidele. Ent tõenäoliselt hakkavad nii Venemaa valitsus kui ka õiglusteadlaselt tugevamalt kinnitama erandlike režiimide olemasolu nii Põhja-Jäämeres kui ka Aasovi meres. Kui Venemaa peaks otsustama mereõiguse konventsiooni eirata veel mõnes enda naabruses asuvas meres,

siis on see tõenäolisem Ohhoota mere kui Läänemere puhul, sest mitmed õigusteadlased uurivad juba Venemaa ajaloolisi õigusi Ohhoota merele. Läänemere ääres on liiga palju rannikuriike ja seal toimub liiga palju tegevust, et Venemaa saaks otseselt vaidlustada mereõiguse konventsiooni kohaldatavust selles piirkonnas. Sellegipoolest võib eeldada mereõiguse konventsiooni rikkumiste arvu suurenemist. Lisaks näib 2022. aasta merendusdoktriini sisu osutavat soovile pöörduda tagasi 1989. aasta eelse seisu juurde, kui sõjalaevad vajasid Venemaa territoriaalmerest rahumeelseks läbisõiduks luba.

Uurimistöö jätkamisel võib viljakaks suunaks olla analüüsida seda, kuidas Venemaa ja sealsed õiguskaitseametnikud haldavad merepiire ja suhtlevad välisriikide osapooltega. Näiteks oleks huvitav uurida, kuidas lahendavad Venemaa rannavalvurid ebaseadusliku kalapüügi probleeme Põhja-Koreaga piirnevas majandusvööndis.

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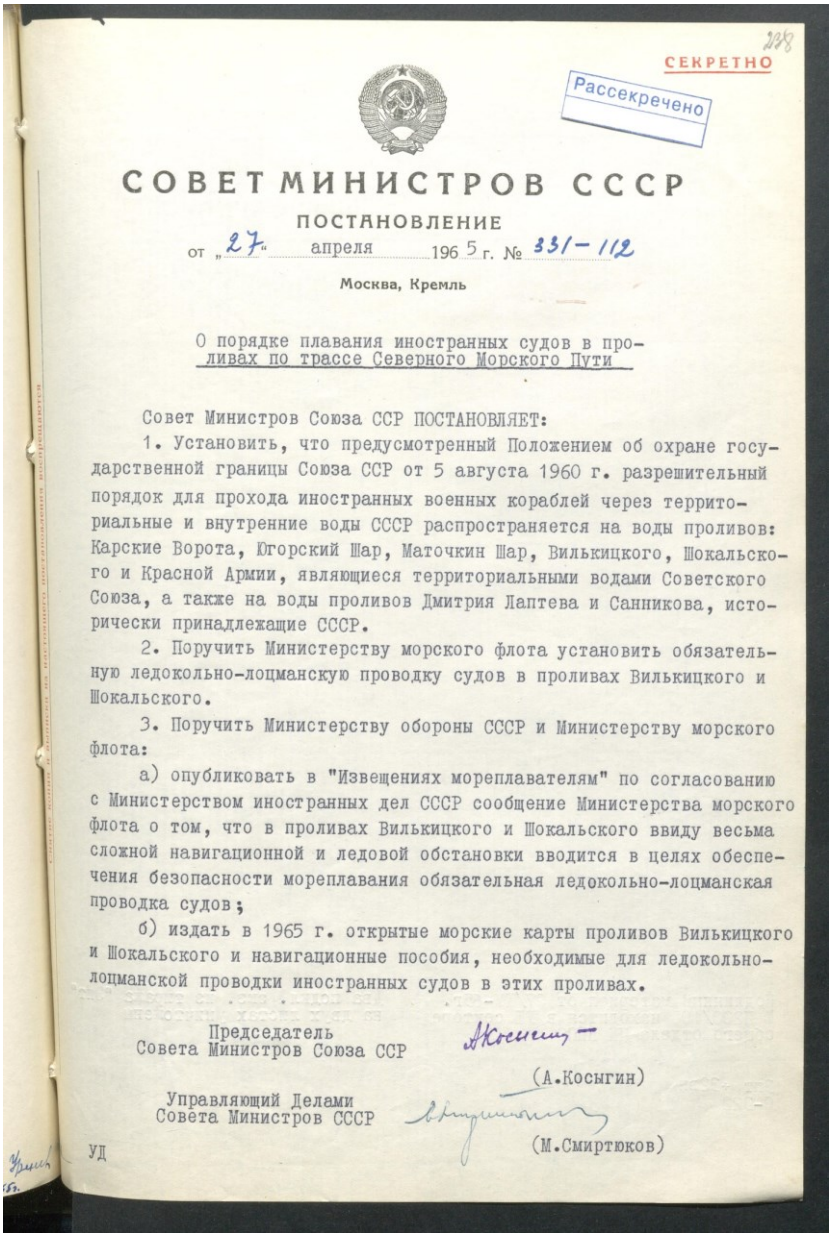

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СЕКРЕТНО

Рассекречено

СОВЕТ МИНИСТРОВ СССР

ПОСТАНОВЛЕНИЕ

от „27" апреля 1965 г. № 331-112

Москва, Кремль

О порядке плавания иностранных судов в проливах по трассе Северного Морского Пути

Совет Министров Союза ССР ПОСТАНОВЛЯЕТ:

1. Установить, что предусмотренный Положением об охране государственной границы Союза ССР от 5 августа 1960 г. разрешительный порядок для прохода иностранных военных кораблей через территориальные и внутренние воды СССР распространяется на воды проливов: Карские Ворота, Югорский Шар, Маточкин Шар, Вилькицкого, Шокальского и Красной Армии, являющиеся территориальными водами Советского Союза, а также на воды проливов Дмитрия Лаптева и Санникова, исторически принадлежащие СССР.

2. Поручить Министерству морского флота установить обязательную ледокольно-лоцманскую проводку судов в проливах Вилькицкого и Шокальского.

3. Поручить Министерству обороны СССР и Министерству морского флота:

а) опубликовать в "Извещениях мореплавателям" по согласованию с Министерством иностранных дел СССР сообщение Министерства морского флота о том, что в проливах Вилькицкого и Шокальского ввиду весьма сложной навигационной и ледовой обстановки вводится в целях обеспечения безопасности мореплавания обязательная ледокольно-лоцманская проводка судов;

б) издать в 1965 г. открытые морские карты проливов Вилькицкого и Шокальского и навигационные пособия, необходимые для ледокольно-лоцманской проводки иностранных судов в этих проливах.

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2023

Thévenin, Pierre (2023). Back to the USSR: The Consequences of the 1965 Soviet Decree №331-112 'On the Procedure for Navigation of Foreign Ships in the Straits Along the Track of the Northern Sea Route' on Today's Navigation Through the Russian Arctic Straits. Ocean Development & International Law [forthcoming].

2022

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2019
Thévenin, Pierre (2019). The Caspian Sea Convention: New Status but Old Divisions? Review of Central and East European Law, 44 (4), 437−463. DOI: https://doi.org/10.1163/15730352-04404001.

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