



**THE FRIDTJOF NANSEN INSTITUTE**

**Foreign Military Research  
in a Coastal State's Maritime Zones –  
Preliminary Analysis**

**By R. Douglas Brubaker**

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<b>Sammendrag/Abstract</b> Indefiniteness is the best characteristic of the law of the sea regimes involving foreign military navigation, activities and research, carried out in a coastal State's maritime zones. Though preliminary results are presented here, over 50 different States forward claims which in some manner probably restrict navigation as regulated under regimes of the Law of the Sea Convention (LOSC), varying in degree. Even more States could likely be found. Foreign military research and activities carried out in a coastal State's exclusive economic zone are essentially unregulated, with the exceptions of overflight rights and the rights, duties and immunities of foreign warships, especially in a coastal State's territorial sea. Those provisions that do appear are characterised by problems of interpretation, and State practice appears diverse, especially by developing States, including the regional powers, Brazil, India, Iran and Pakistan. Civilian marine scientific research (MSR) is regulated to a substantially greater degree, but problems of interpretation exist. State practice appears in greater compliance than with the above regimes. However, again the practice of several developing States and the regional powers Brazil, Russia and Indonesia is divergent. Further study of the actual State practice of the various relevant regimes as it is today regarding foreign military navigation, activities and research, and MSR, may aid in clarification of this as yet evolving area of international law. Controversy appears likely to continue regarding all these regimes in the years to come due to expanded coastal State jurisdiction related to the marine environment, exclusive exploitation of resources and security in the force of strengthened multipolarity and gradual erosion of U.S. naval hegemony. The shift to a non-hegemonic multipolar international system rather than clarifying these regimes under international law may in fact make them more obtuse. The regional naval powers, Russia, China, India, Brazil, Japan, Iran, and Indonesia and the superpower U.S., those with most interest in 'freedom of navigation,' have all as coastal States exhibited practices in excess of these LOSC regimes. It would seem the diverse State practice has a good likelihood of continuing.	
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# Foreign Military Research Conducted in a Coastal State's Maritime Zones – Preliminary Analysis

## 1 Introduction

In many countries the naval forces are responsible for a whole range of maritime security operations including the exercise of sovereignty, law enforcement, safety, environmental protection, resource management, in addition to the traditional practice related to military defence. Therefore, any foreign activity within a State's maritime jurisdictional zones is of interest to the naval forces. What activity is allowed? Where is it allowed? By whom is it allowed? Under what conditions is it allowed? The issue of military research or civilian marine scientific research (MSR) on a military vessel falls in all of the above areas.

Since it is the military that often must deal with situations arising from foreign activities, the law of the sea is of direct importance to them. If nothing else, military forces prefer some form of 'rules of engagement'. If they discover a foreign vessel in their waters engaged in diverse activities, how do they decide which are legitimate? Should they take action or not? In international law, 'doing nothing' might be perceived as tacit recognition of an activity's lawfulness, which may set a precedent. This in retrospect, might not be in a State's interest to allow.

Because many States rely upon the sea for much of their economic security, exemplified by the oil, fisheries and maritime transport industries, maintaining sovereignty, control and oversight over the maritime zones must certainly be a high priority on the national security agenda. In addition, a State's research interests outside of its own maritime zones must be mentioned. Some of these might have obvious defence applications, for example Norwegian surveillance vessels operating outside the Russian territorial sea. Others may be quasi-defence, which would include for example monitoring the nuclear dumping sites in the Barents and Kara Seas. Both of these examples have involved problems between States over jurisdictional issues, and both have resulted in protests.<sup>1</sup> Thus, understanding general State practice concerning these issues may help State officials understand the implication of the different international practices in relation to a State's own activities. This also may assist in determining whether State practice, especially that of the U.S., France, Britain, and possibly Russia, are creating 'new regimes' that affects a State's maritime security interests.<sup>2</sup>

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<sup>1</sup> Official Russian protests were delivered in response to Norway's activities.

<sup>2</sup> C. Pirtle, 'Military Uses of Ocean Space and the Law of the Sea in the New Millennium', *Ocean Development & International Law*, Vol. 31, (2000), 7, notes the U.S maritime power currently consists of 'power projection forces at a level that might be called the 'All-Power Standard', (since) they are larger and more capable than the power projection forces of the rest of the world combined'. The author quotes, R. Barnett, 'Seapower-Littorally', in (ed. C. Hermann), *American*

The *objective* in this project is to analyse the status of foreign military activities and research carried out in a coastal State's maritime zones under international law, through the examination of State practice. Concentration will be focused on clarifying vagaries under law of the sea. This incorporates evolution of a new regime not dealt with explicitly in the 1982 Law of the Sea Convention,<sup>3</sup> and the implementation by States of affiliated, yet not completely relevant regimes under the LOSC. Regimes for MSR and navigation must be addressed since there appear to be few clear boundaries existing between these regimes.

This is complicated by inherent difficulties involving military uses of the oceans spaces. In contrast to developments under law of the sea, generally, new regimes have not been developed in military uses of the seas since the Cold War, and these seem largely to be of symbolic normative value. These partly neglected issues under LOS Convention seem to exist in the interface dictated by strong unilateral national security policies being carried out on the one side and substantial developments in international regimes taking place on the other. Thus, while law of the sea is generally becoming more institutionalised, including through the establishment of the Commissions on the Continental Shelf and the Authority, and the Law of the Sea Tribunal, regarding military activities and research, the development appears to be steered nationally and largely separately. Regimes established during the Cold War with military relevance such as the international straits regime may have been due to parallel interests of the super powers, the U.S.S.R. and the U.S.<sup>4</sup> At the same time, parallel interests are not necessarily the rule, and major military powers fairly often do not have common strategies.<sup>5</sup>

Additionally, difficulties of perception in discerning differences between the practice of MSR, navigation and military research. Coastal States for example may perceive as military research, certain activities claimed MSR or navigation, for example when carried out by a U.S. SSN.<sup>6</sup> This is not so strange when naval strategists during the Cold War themselves claimed, 'oceanography and its contribution to the knowledge of the environment are more important to undersea warfare than to any other warfare area'.<sup>7</sup> Additional perceptual difficulties may arise concerning discerning the roles played by military vessels generally.

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*Defence Annual*, 9 ed., (1994), p. 111. C. Pirtle, 'Military Uses of Ocean Space', 7-8, notes that other States with large navies, Russia, Japan, Australia, Italy and China, are either regional or coastal powers without a global reach capability.

<sup>3</sup> United Nations Convention on the Law of the Sea (LOSC), *International Legal Materials (ILM)*, Vol. 21, (1982), p. 1261. The LOSC was adopted in December 1982 and came into force 16 November 1994. <http://www.un.org/Depts/los/stat2los.txt> notes that as of 27 June 2000 133 States have become Parties. Of the marine powers this includes, China, France, Russia and the U.K. In addition to the 123 Parties Canada, Denmark, Republic of Korea, Luxembourg and Switzerland have indicated their intention to become Part to the LOSC once their internal procedures are completed. Israel has stated it is giving serious consideration to becoming Party. See J. Roach and R. Smith, *United States Responses to Excessive Maritime Claims*, (2<sup>nd</sup> edition), (The Hague, Martinus Nijhoff Publishers, 1996), p. 657.

<sup>4</sup> C. Pirtle, 'Military Uses of Ocean Space', 36.

<sup>5</sup> *Ibid.*

<sup>6</sup> See G. Newton, Chair, U.S. Arctic Research Commission, 'The Science Ice Exercise Program – History, Achievements, and Future of SCICEX', *ARCTIC*, pp. 2-7. See also p. 43.

<sup>7</sup> C. Bishop, 'Oceanography in Naval Warfare', *U.S. Naval Institute Proceedings*, (May, 1959), 82.

Are the vessels merely 'showing their presence' politically or are they involved in military activities more directly related to engagement?

Since the scope of military research is unclear, identifying a spectrum of existent military activities associated with research will be carried out both to attempt to establish clearer boundaries and to give substance to the regime. This first paper will deal with a general overview of the treaty regime and a preliminary analysis of State practice implementing this regime; thus, only preliminary answers will be provided to the questions which follow. The second paper will examine more concisely the treaty regime and address *State practice* extensively through the literature currently available and through interviews with the Ministries of Foreign Affairs and of Defence, as well as the Navies, if possible, of the relevant States. Particular emphasis will be placed on the major approaches taken by countries including the U.S., France, Britain, Russia, Japan, Australia, Italy and China and rising regional powers, Brazil, India Iran and Indonesia.

Upon this background, the overall project goal is through the incorporation of these two preliminary papers in co-operation with other experts to produce a state-of-the-art volume attempting to address four main areas.<sup>8</sup>

1. A complete picture will be given of the written treaty regime regulating the ocean spaces related to military activities.
2. The military strategic practice of states exercised irrespective of the treaty regime will be examined.
3. The relationship between the treaty regime and state practice will be analysed, and
4. Finally the implications addressed related to any subsequent divergent state practice of the treaties governing utilisation of the oceans. Under this, issues of conflict related to civilian utilisation of the oceans will be taken up.

Examples of questions which may be raised under this structure include the following.

- What is the scope of the international treaty regime governing military uses of the oceans spaces?
- What is the scope of state practice governing military uses of the seas?
- What is the relationship between this international treaty regime and this state practice?
- What is the effectiveness of the international treaty regime seen in regards to state practice?
- Can there be found so-called 'silent regimes' or 'gentlemen's agreements', which include norms from state practice and the international treaty regime?

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<sup>8</sup> See *Effective Implementation of the Law of the Sea: Legal and Political Dimensions*, Section 2.3., 'Major 'pending issues' of LOS Convention: military activities and research', submitted as application to the Norwegian Research Fund (NFR) 15 June 2001.

- What are the implications for law of the sea that military uses of the seas may not be included within the distinct institutionalisation taking place in other sectors?
- What are the legal and political implications for law of the sea generally that a specific regime governing military uses of the sea appears not to exist?
- What is the roll of law of the sea treaties related to military uses of the seas in relation to State practice?

## 2 The Legal Basis

### 2.1 Introduction

Though the LOSC regulates MSR in Part XIII, Articles 238 through 265, in application the regime appears practised somewhat inconsistently. The terms ‘marine scientific research’, ‘hydrographic survey’, and ‘survey activities’ are not defined by the LOSC, and various States including State Parties under the LOSC allow applications to carry out research to remain unanswered.<sup>9</sup>

Foreign military research and activities carried out in a coastal State’s exclusive economic zone are essentially unregulated, with the notable exceptions of overflight rights and the rights, duties and immunities of foreign warships, especially in a coastal State’s territorial sea.<sup>10</sup> ‘Military surveys’ are not mentioned in Part XIII. Article 301 generally requires that States refrain from threats or use of force against the territorial integrity or political independence of any State, inconsistent with principles of international law under the U.N. Charter.<sup>11</sup> LOSC Article 58(2) concerning rights and duties of flag States in a exclusive economic zone provides for the applicability of Article 88, reserving the high seas for peaceful uses, seemingly conforming with Article 301.<sup>12</sup> Article 246(3) provides that MSR in the exclusive economic zone must be exclusively for peaceful purposes, but neither ‘peaceful purposes’ nor ‘MSR’ is defined.<sup>13</sup> The boundary between MSR, governed by Article 246 and

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<sup>9</sup> See J. Roach, ‘Marine Scientific Research and the New Law of the Sea’, *Ocean Development & International Law*, Vol. 27 (1996), 65.

<sup>10</sup> C. Pirtle, ‘Military Uses of the Ocean Space’, 9, notes in the LOSC, ‘the absence of specific rules and “black letter law” pertaining to many military uses of ocean space, especially those affecting the operational rights of seaborne forces’. Further, ‘...despite the fact that the security interests of the maritime powers are barely one half-step removed from every word, line, and article in the non-seabed-mining parts of the Convention, military issues were either treated superficially or neglected altogether in UNCLOS III’. Ibid. notes this was intentional, and was bitterly and often contested by coastal States in UNCLOS III.

<sup>11</sup> Article 301 is entitled, Peaceful uses of the seas, and states,

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

<sup>12</sup> Article 58 is entitled, Rights and duties of other States in the exclusive economic zone, and states,

(1) In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

(2) Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are no incompatible with this Part.

(3) In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this convention and other rules of international law in so far as they are not incompatible with this Part.

Article 88 is entitled, Reservation of the high seas for peaceful purposes, and states,

The high seas shall be reserved for peaceful purposes.

<sup>13</sup> Article 246 is entitled Marine scientific research in the exclusive economic zone and on the continental shelf, and states,

subject to the consent of the coastal State, and military intelligence activities, the free exercises of which is contested, is consequently unclear. While marine biology and geological and geophysical surveying may be included in the former, obtaining information concerning foreign governments, vessels and nationals, hydrographic surveys, and military activities may be excluded.<sup>14</sup> While navigation is free in an exclusive economic zone under Article 58(1), exercises, arms testing and the installation of military devices is controversial due to the phrase ‘other internationally lawful uses of the sea related to these freedoms...’<sup>15</sup> Article 58(3) requires flag States operating in a exclusive economic zone to take due regard to the rights and duties of the coastal State, which conceivably could limit military activities to navigation only.

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- (1) Coastal States, in the exercise of their jurisdiction, have the right to regulate, authorise and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this convention.
  - (2) Marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State.
  - (3) Coastal State shall, in normal circumstances, grant their consent for marine scientific research projects by other States or competent international organisations in their exclusive economic zone or on their continental shelf to be carried out in accordance with this Convention exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environmental for the benefit of all mankind. To this end, coastal States shall establish rules and procedures ensuring that such consent will not be delayed or denied unreasonably.
  - (4) For the purposes of applying paragraph 3, normal circumstances may exist in spite of the absence of diplomatic relations between the coastal State and the researching State.
  - (5) Coastal States may however in their discretion withhold their consent to the conduct of a marine scientific research project of another State or competent international organisation in the exclusive economic zone or on the continental shelf of the coastal State if that project;
    - (a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living;
    - (b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;
    - (c) involves the construction, operation or use of artificial islands, installations and structures referred to in articles 60 and 80;
    - (d) contains information communicated pursuant to Article 248 regarding the nature and objectives other project which is inaccurate or if the researching State or competent international organisation has outstanding obligations to the coastal State from a prior research project.
  - (6) Notwithstanding the provisions of Paragraph 5, coastal States may not exercise their discretion to withhold consent under subparagraph (a) of that paragraph in respect of marine scientific research projects to be undertaken in accordance with the provision of this Part on the continental shelf, beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, outside those specific areas which coastal States may at any time publicly designate as areas in which exploitation or detailed exploratory operations focused on those areas are occurring or will occur within a reasonable period of time. Coastal States shall give reasonable notice of the designation of such areas, as well as any modifications thereto, but shall not be obliged to give details of the operations therein.

<sup>14</sup> See generally S. Mahmoudi, ‘Foreign Military Activities in the Swedish Economic Zone’, *International Journal of Marine and Coastal Law*, Vol. 11, (1996), 373-82.

<sup>15</sup> C. Pirtle, ‘Military Uses of Ocean Space’, 8, divides use of the seas for military purposes into ‘movement rights’, an ‘operational rights’. The former includes passage rights such as transit passage, innocent passage, archipelagic sea lanes passage and high seas freedoms of navigation and overflight. The second consists of activities as task force manoeuvring, anchoring, intelligence collection and surveillance, military exercises, ordnance testing and firing, and hydrographic and military surveys. Ibid. 18 notes the U.S. interpretation of ‘other internationally lawful uses of the sea related to these freedoms’ includes these operational activities.

Other relevant conventions include the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water,<sup>16</sup> Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil thereof,<sup>17</sup> U.S.S.R.-U.S. Agreement on the Prevention of Incidents on and over the High seas, (Moscow May 1972) and Protocol,<sup>18</sup> U.S.S.R.-U.S. Interim Agreement on Certain Measures with respect to Limitation of Strategic Offensive Arms,<sup>19</sup> U.S.S.R.-U.S. Treaty on the Limitation of Strategic Offensive Arms,<sup>20</sup> and the U.S.S.R.-UK Agreement concerning the Prevention of Incidents at Sea beyond the Territorial Sea.<sup>21</sup> Under the 1971 Agreement above the seabed is a nuclear free zone beyond the territorial sea. At the same time the laying of foreign cables, including militarily relevant surveillance cables, over coastal States' EEZ's and continental shelves is allowed under the LOS Convention Article 79, while coastal State consent is required under the same Article for the laying of economically relevant foreign pipelines.<sup>22</sup>

Due to these legal vagaries and inconsistencies, State practice would seem decisive. State practice plays a role both in the formation of customary international law and in the interpretation of treaties. It may be difficult to interpret 'peaceful purposes' to exclude all military activities in a State's exclusive economic zone. Monitoring and research or survey activities by vessels are only directly forbidden under Article 19(c) and (j) against a coastal State in its territorial sea.<sup>23</sup> At the same time monitoring, carried out by for example the U.S. and the Soviet Union, cannot be said to have been conservative, being conducted within other States' territorial seas and probably internal waters.<sup>24</sup> Ascertaining what States are practising would not only provide factual clarity but also may likely indicate the direction international law is taking concerning these issues. What is the practice of the world's largest maritime

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<sup>16</sup> Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, (Moscow, 1963), *United Nations Treaty Series*, Vol. 480, p. 43.

<sup>17</sup> Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil thereof, (London, Moscow, and Washington, 1971), *United Kingdom Treaty Series*, Vol. 1973, p. 13.

<sup>18</sup> Protocol (Washington 22 May 1973), *United Nations Treaty Series*, Vol. 852, p. 151, and *United States Treaties and Other International Agreements*, Vol. 24, p. 1063..

<sup>19</sup> U.S.S.R.-U.S. Interim Agreement on Certain Measures with respect to Limitation of Strategic Offensive Arms, (Moscow 1973), *United States Treaties and Other International Agreements*, Vol. 23, p. 3462.

<sup>20</sup> U.S.S.R.-U.S. Treaty on the Limitation of Strategic Offensive Arms (Vienna, 1979, not in force).

<sup>21</sup> U.S.S.R.-UK Agreement concerning the Prevention of Incidents at Sea beyond the Territorial Sea (London 1986), *United Kingdom Treaty Series*, Vol. 5, p. 430.

<sup>22</sup> R. Churchill and A. Lowe, 3<sup>rd</sup> ed. *The Law of the Sea*, (Manchester, Manchester University Press, 1999), p. 174.

<sup>23</sup> Article 19 is entitled, Meaning of innocent passage, and (2) states, Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities,

(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

(j) the carrying out of research or survey activities;

<sup>24</sup> See for example R.D. Brubaker and W. Østreng, 'The Northern Sea Route Regime: Exquisite Superpower Subterfuge?' *Ocean Development and International Law*, Vol. 30, (1999), 313-4, 322-3

powers, also including the U.K., France and China?<sup>25</sup> What spectrum of military activities is carried out by these military powers in coastal States' exclusive economic zones? What are understood to be permitted and non permitted activities, related especially to military research? Where does the boundary run between military research and MSR, when the latter is carried out on military vessels? Have the concerned coastal States protested? Do they believe they have complete knowledge of and control over the research activities carried out?

From consistent State practices it may perhaps be concluded that customary international law is in the process of formation. Similarly, to the extent there might exist relevant provisions under international treaties, interpretation of these provisions may be provided by this subsequent State practice. If either of these is established, this would give States a legal basis to carry out similar activities, should they be deemed relevant, in foreign maritime zones, or to prohibit excessive activities in their own maritime zones.

## 2.2 Justification for Analysis of State Practice

Generally, the subsequent practice of the Parties to a treaty may operate as a tacit or implicit modification of the terms.<sup>26</sup> However views exist that if practice runs counter to a treaty, though it can terminate the treaty, it may not be used to amend it unless it is accepted unanimously.<sup>27</sup> Article 31(3)(b) of the Vienna Convention on the Law of Treaties,<sup>28</sup> requires specifically that State practice in the application of the treaty, which establishes the agreement of the Parties regarding its interpretation, be taken into account together with the context to interpret the treaty.<sup>29</sup> The LOSC was negotiated with the U.S. and the Soviet Union playing central and often complementary roles.<sup>30</sup> The resulting provisions of the LOSC including Part XIII as well as the other Articles related to research necessarily indicate general consensus.<sup>31</sup>

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<sup>25</sup> Research Fellow Cambridge, L. Brigham, Former Commanding Officer of the *USCGC Polar Sea* and formerly with the Strategic Planning Staff at Coast Guard Headquarters, Washington D.C., noted in an interview at FNI 19 November 1999, that there was interest in the U.S. scientific community in carrying out research in the Russian Arctic exclusive economic zone aboard the new ice-breaker *U.S.C.G.C. Healey*.

<sup>26</sup> R. Churchill and A. Lowe, *The Law of the Sea*, 2nd ed. (Manchester, Manchester University Press, 1988), p. 340 and I. Sinclair, 2<sup>nd</sup> ed., *The Vienna Convention on the Law of Treaties*, (Manchester, Manchester University Press, 1984), p. 138. The latter notes '(I)t should of course be stressed that paragraph 3(b) of Article 31 of the Convention does not cover subsequent practice in general, but only a specific form of subsequent practice-this is to say, concordant subsequent practice common to all the parties. Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation within the meaning of Article 32 of the Convention'.

<sup>27</sup> M. Akehurst, *A Modern Introduction*, 6<sup>th</sup> ed. (London, Unwin Hyman, 1987), p. 205. Ibid. p. 204 describes practice over time as acquiring a 'force of its own' with little evidence of the parties' original intentions.

<sup>28</sup> Vienna Convention on the Law of Treaties, 23 May 1969, (Vienna Convention) *United Nations Treaty Series* Vol. 1115, p. 331.

<sup>29</sup> Strictly, subsequent practice itself has some ranking over the *travaux préparatoires* which under Article 32 and as adopted at the Conference are meant to be a supplementary means of interpretation contrary to the U.S. position. See I. Brownlie, *Principles of Public International Law*, 4<sup>th</sup> ed., (Oxford, Clarendon Press 1990), pp. 627-30; and D. Harris, *Cases and Materials on International Law*, 4ed. (London, Sweet and Maxwell, 1991) pp. 774-5.

<sup>30</sup> See generally M. Nordquist, S. Rosenne, A. Yankov and N. Grandy (eds.), *United Nations Convention on the Law of the Sea 1982 - A Commentary*, Centre for Oceans Law and Policy, University of Virginia, (Dordrecht, Martinus Nijhoff, 1991), Vol. IV, pp. 429-38.

<sup>31</sup> Ibid and R. Churchill and A. Lowe, *Law of the Sea*, 2nd ed., p. 93.

Applied to the maritime powers, including Russia, the U.K., France, China and the U.S., these States either have ratified the LOSC or indicated their acknowledgement of Part XIII and the 'research' Articles.<sup>32</sup> With 132 State Parties to the LOSC, acknowledgement of this regime is also generally established. The same could probably be maintained for the LOSC navigational regimes, Parts II (Territorial Sea and Contiguous Zone), Part III (Straits Used for International Navigation), Part V (Exclusive Economic Zone) and Article 234 (ice-covered areas).<sup>33</sup> As applied to the Arctic the interest of most States in the issues surrounding the ice-covered areas regime has not been great. Most States were willing to support whatever could be worked out by those States most directly affected.<sup>34</sup> Following successful negotiation by the Soviet Union, the U.S. and Canada terminating in 1976, Article 234 went undisputed although UNCLOS III, and emerged in the final LOSC adopted in 1982.<sup>35</sup> Thus, it is maintained general express agreement exists which allows the use of State practice in application of the LOSC to establish the agreement of the Parties regarding further interpretation of both LOSC Part XIII and related Articles and Article 234.

To the extent it could be maintained that there is a lack of express agreement, however, it may be argued that implied agreement exists that supports use of State practice in treaty interpretation. Since an agreement may be made by the Parties regarding treaty interpretation, 'it follows also that reference may be made to "subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation"'.<sup>36</sup> This is not a unknown phenomenon in international law of the sea. It would be difficult to maintain that provisions from the 1958 High Seas Convention<sup>37</sup> disallowing freedom to fish beyond the territorial seas within 200 miles of coastal States were not amended by subsequent State practice. Convention Parties not only tolerated, but themselves established 200 mile claims.<sup>38</sup> Thus the focus on State practice in this article is argued supported, if not by express agreement, then by implied agreement.

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<sup>32</sup> See generally J. Roach, 'Marine Scientific Research', 59-72.

<sup>33</sup> See generally M. Nordquist, S. Nandan, S. Rosenne, and N. Grandy, (eds.), *United Nations Convention on the Law of the Sea 1982 - A Commentary*, Centre for Oceans Law and Policy, University of Virginia, (Dordrecht, Martinus Nijhoff, 1991), Vol. II, pp. 51-8 and 491-510; S. Nandan and D. Anderson, 'Straits Used for International Navigation: A commentary on Part III of the United Nations Convention on the Law of the Sea 1982', *British Yearbook of International Law* Vol. 60, (1989), pp. 159-209; and D. McRae, (F. Griffiths, ed.) 'The Negotiation of Article 234', *Politics of the Northwest Passage*, (Kingston, McGill-Queens University Press 1987), pp. 98-114.

Article 234 is entitled, Ice-covered areas and states,

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

<sup>34</sup> See D. McRae, 'The Negotiation of Article 234', p. 108.

<sup>35</sup> *Ibid.* p. 110.

<sup>36</sup> I. Brownlie, *Principles*, p. 629, quoting Fitzmaurice, *British Yearbook of International Law*, Vol. 33, 227-8.

<sup>37</sup> Convention on the High Seas, 29 April 1958, *United Nations Treaty Series*, Vol. 450, (1963), p. 82.

<sup>38</sup> See generally R. Churchill and A. Lowe, *Law of the Sea*, 2nd ed. pp. 227-32.

Included in State practice under Article 31(3) demonstrating the understanding of all the Parties regarding interpretation, are estoppel and acquiescence.<sup>39</sup> There is substantial evidence that State practice is taken into account in situations where it shows an acknowledgement by those States of obligations later attempted avoided through narrow interpretation of treaty provisions.<sup>40</sup> The PCIJ in the *Competence of the I.L.O. with respect to Agricultural Labour Case* held,

‘If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty’.<sup>41</sup>

Acquiescence of one State by other States in a situation where they have or can be thought to have knowledge, may lacking protest establish the common interpretation of the Parties.<sup>42</sup> The ICJ in the *Anglo-Iranian Oil Co. Case* held,

‘This clause...is...a decisive confirmation of the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court.... It is contended that this evidence as to the intention of the Government of Iran should be rejected as inadmissible and that this Iranian law is a purely domestic instrument, unknown to other governments. The law is described as ‘a private document written only in the Persian language which was not communicated to the League or to any of the other States which had made declarations’. The Court is unable to see why it should be prevented from taking this piece of evidence into consideration. The law was published in the Corpus of Iranian law voted and ratified during the period from January 15, 1931, to January 15, 1933. It has thus been available for the examination of other governments during a period of about twenty years. The law was filed for the sole purpose of throwing light on a disputed question of fact, namely, the intention of the Government of Iran at the time when it signed the Declaration’.<sup>43</sup>

The Court will thus place a high burden of alertness on the State Parties concerning domestic legislation, which seems clearly allowed as evidence of treaty interpretation.

At the same time State acts and declarations must be carefully examined in light of the surrounding circumstances. Claims appearing on the statute book may never have been enforced or are not capable of being enforced under international law.<sup>44</sup> A distinction is made between State declarations and State action as evidenced by enforcement of claims,<sup>45</sup> which has been made with respect to custom but is maintained to have the same relevance related to treaty interpretation. Judge Read in dissent in the *Anglo-Norwegian Fisheries Case* held,

‘Customary international law is the generalisation of the practice of States. This cannot be established by citing cases where coastal States have made extensive claims, but have not

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<sup>39</sup> L. Henkin, R. Pugh, O. Schachter, H. Smit, *International Law - Cases and Materials*, (St. Paul, West Publishing Co. 1980), pp. 630-1. I. Sinclair, *The Vienna Convention on the Law of Treaties*, pp. 137-8. I. Brownlie *Principles*, p. 629. See also D. Harris, *Cases and Materials*, p. 771.

<sup>40</sup> *Ibid.*

<sup>41</sup> PCIJ Reports, Series B, No. 2, (1922), pp. 39-40.

<sup>42</sup> *Ibid.*

<sup>43</sup> ICJ Reports (1952) p. 107.

<sup>44</sup> R. Churchill and A. Lowe, *Law of the Sea*, 2nd ed. pp. 9-10. D. Harris, *Cases and Materials* p. 772 notes declarations of understandings and declarations of obligations may involve differences with other State actions in that they may qualify as instruments under Article 31(2)(b) and are factors to be taken into account with probative value when interpreting a convention but are not by themselves conclusive.

<sup>45</sup> K. Wolfke, *Custom in Present International Law*, ((Dordrecht, Martinus Nijhoff Publishers, 1993), p. 41.

maintained their claims by the actual assertion of sovereignty over trespassing foreign vessels. Such claims may be important as starting points, which, if not challenged may ripen into historic title in the course of time. The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign vessel and by maintaining its position in the course of diplomatic negotiation and international arbitration'.<sup>46</sup>

At the same time under the *North Sea Continental Shelf Cases*,<sup>47</sup> and the *Fisheries Jurisdiction Case*<sup>48</sup> mere statements of a legal position have been recognised as being of value, and the existence of customary law was concluded on the basis of claims alone, independent of their enforcement.<sup>49</sup> In the *North Sea Continental Shelf Cases*, the ICJ held,

'The Court must now consider whether State practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement.... Some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle - in the majority of the cases by agreement, in a few others, unilaterally - or else the delimitation was foreshadowed but has not yet been carried out...'<sup>50</sup>

Based upon this background, though enforcement of a claim definitely has its benefits, the weight of authority holds to the view that State practice includes not only enforcement of claims but also declarative actions.<sup>51</sup> Thus general claims made by States which follow may be viewed as State practice under international law.

### 2.3 Navigational Rights in the Territorial Sea and the Exclusive Economic Zone

Due to the absence of specific provisions regulating the operational rights of seaborne forces and the apparent overlapping of regimes, navigational rights of foreign vessels in a coastal State's territorial seas and EEZ's must be examined.

The doctrine of freedom of the high seas as developed by the Western maritime powers since the early 19<sup>th</sup> century includes the following elements.<sup>52</sup>

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<sup>46</sup> ICJ Reports (1951), p. 191. See also K. Wolfke, *Custom*, p. 42.

<sup>47</sup> ICJ Reports (1969), p. 43.

<sup>48</sup> Ibid. (1974), pp. 47, 56-8, 81-8, 119-20, 135 and 161. M. Akehurst, *A Modern Introduction*, p. 28 footnote 4, notes that 10 of the 14 judges presumed the existence of customary rules from claims in the absence of enforcement measures, while the remaining four judges did not deal with the issue.

<sup>49</sup> The Judgement in the *Case of Nicaragua v. U.S.A.*, (Merits) ICJ Reports, (1986) pp. 99-108 relies extensively upon U.N. General Assembly Resolutions as practice. See also D. Harris, *Cases and Materials*, pp. 28 and 61-2 and M. Akehurst, *A Modern Introduction*, pp. 28-9.

<sup>50</sup> ICJ Reports (1969), p. 43.

<sup>51</sup> Ibid. R. Jennings and A. Watts (eds.) *Oppenheim's*, (Essex, Longman Group UK Limited, 1993), pp. 26-7 follows this view. I. Shearer, *Starke's International Law*, (London, Butterworths, 1994) pp. 32-3 notes that both conduct and statements are on the same footing, but there must be a recurrence or repetition of the acts which give birth to the customary rule. L. Henkin, R. Pugh, O. Schachter, and H. Smit, *Cases and Materials*, pp. 36 and 53 note the controversiality and ask, '(I)f deeds and not words were to count as protests, would this not exacerbate international relations?' See also I. Brownlie, *Principles*, p. 5.

<sup>52</sup> C. Pirtle, 'Military Uses of Ocean Space', 19. Ibid. 14, 21 and 29 notes that from a military view the earth's 'seven seas' are one sea covering over 70% of the earth's surface where global mobility and operational flexibility of seaborne forces is to be

- the high seas can be used for any purpose as long as the requirement of ‘reasonableness’ or ‘due regard’ is adhered to;
- all possible uses of the high seas that are not explicitly prohibited in customary or conventional international law are permitted;
- the high seas include all waters located outside the legal limits of territorial seas and archipelagic waters;
- freedoms of navigation and overflight have primacy over any and all other coastal state rights and freedoms in waters outside the narrow historical limits of the territorial sea, especially where international straits are concerned;
- all ships, and especially warships, have an unqualified right of innocent passage through the territorial seas of all States.

LOSOC and provisions under the Convention on the Territorial Sea and the Contiguous Zone,<sup>53</sup> spell out the components of innocent passage for all vessels to include generally a right to navigation through foreign territorial seas as long as it does not prejudice the peace, good order or security of the coastal State.<sup>54</sup> This cannot include threats or use of force,

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safeguarded. Presently, however, ‘no less than two-fifths of the world ocean that was previously “free high seas” have been converted into national maritime zones bounded and organized for the specific purpose of restricting or denying freedom of the seas’. Expanding the territorial sea from 3 nautical miles (nm) to 12 nm increased the area under coastal State sovereignty by 3 million square miles.

<sup>53</sup> Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, (TSC) In force 10 September 1964., *United Nations Treaty Series*, Vol. 516, p. 205.

<sup>54</sup> LOSOC Articles 17, 18 and 19(1), and TSC Articles 14(1), (2) and (4).

LOSOC Article 17 is entitled Right of innocent passage, and states,

Subject to this convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

Article 18 is entitled Meaning of passage, and states

1. Passage means navigation through the territorial sea for the purpose of:
  - (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
  - (b) proceeding to or from internal waters or a call at such roadstead or port facility.
2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

Article 19 is entitled Meaning of innocent passage, and states

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with the Convention and with other rules of international law.
2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
  - ...
  - (j) the carrying out of research or survey activities;
  - ...

TSC Article 14 states,

1. Subject to the provisions of these articles, ships of all states, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

weapon exercises, acts of propaganda, surveillance, launching and landing aircraft or military devices, smuggling, wilful and serious pollution, fishing, *research or survey activities*, interference with coastal State communications or other facilities, and any other activity not directly related to passage.<sup>55</sup> State practice indicates however, that notification and prior authorisation for the passage of foreign warships through the territorial sea may deviate to some degree from the LOSC and TSC provisions. '(A) significant number and perhaps a majority of States practice prior authorisation for the passage of warships...'<sup>56</sup> indicating the continuation of a dispute which has taken place over much of the previous century.<sup>57</sup>

LOSC Articles 58 and 87 regulate generally free navigation in the exclusive economic zone and high seas, subject in the former to due regard to rights and duties of the coastal State under Parts V and XII (environmental protection and preservation) and in the latter to the interests of other States and rights with respect to activities in the Area.<sup>58</sup> Navigation is traditionally free on the high seas.<sup>59</sup> Limiting this, however, in the *Corfu Channel Case*, the ICJ, stated,

'It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace'.<sup>60</sup>

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2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

...

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.

<sup>55</sup> LOSC Article 19(2)(a-1).

<sup>56</sup> I. Brownlie, *Principles*, p 197.

<sup>57</sup> R. Churchill and A. Lowe, *Law of the Sea*, 2nd ed. pp. 74-6. See also I. Brownlie, *Principles*, pp. 197-8.

<sup>58</sup> Article 87 is entitled, Freedom of the high seas and states,

(1) The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law that comprises, *inter alia*, both for coastal and land-locked States,

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (c) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

(2) These freedoms shall be exercised by all States with due regard for the interests of other States in their exercises of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

<sup>59</sup> R. Churchill and A. Lowe, *Law of the Sea*, 2nd ed. pp. 165-6.

<sup>60</sup> ICJ Reports (1949), p. 28. The Court noted, '(In these circumstances, it is unnecessary to consider the more general question, much debated by the Parties, whether States under international law have a right to send warships in time of peace through territorial waters not included in a strait'. *Ibid.* p. 30.

Further limiting traditional free navigation somewhat under LOSC Part III, 'transit passage' is defined as under Article 38, entitled, Right of transit passage,<sup>61</sup>

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

Additionally, the Article 234 regime regulates navigation in ice-covered areas of the exclusive economic zone including unilateral coastal State control over discharge, safety, design, construction, equipment, and crewing standards for vessels. Article 236 gives State vessels sovereign immunity from environmental provisions under the LOSC.<sup>62</sup>

### 2.3.1 State Practice

The State practice appearing below is only that obtained in a preliminary examination due to the modest scope of the project. A more extensive examination may reveal even more excesses to the LOSC navigational regimes, which appears to be occurring in spite of the current trend towards universal ratification of the LOSC.

Generally, the U.S. divides ocean space into just two legal sea spaces, national waters including internal waters, territorial seas, and archipelagic waters; and international waters, which includes everything else.<sup>63</sup> U.S. naval commanders are instructed that 'the existence of an (EEZ) in an area of naval operations need not, of itself, be of operational concern' to them.<sup>64</sup> Within these international waters warships have the freedom to sail without the leave of other states, regardless of their goals, missions objectives or destinations, and the U.S. liberally interprets LOSC Article 95<sup>65</sup> to include task force manoeuvring, weapons tests and rocket experimentation, military exercises, and intelligence collection and surveillance.<sup>66</sup> In U.S. naval strategic planning two *key assumptions* are made, 'sea-based forces are sovereign extensions of the (U.S.), operating in international waters', and '(t)hey are unencumbered by

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<sup>61</sup> Emphasis added.

<sup>62</sup> Article 236 is entitled, Sovereign immunity and states,

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, but the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

<sup>63</sup> C. Pirtle, 'Military Uses of Ocean Space', 20.

<sup>64</sup> Ibid. quoting U.S., Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP, (1995), 2-6.

<sup>65</sup> Article 95 is entitled, Immunity of warships on the high seas, and states,

Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.

<sup>66</sup> C. Pirtle, 'Military Uses of Ocean Space', 20.

the treaties and access agreements that land-based forces normally need to operate overseas'.<sup>67</sup> The U.S. has enforced its claimed rights and freedom of the sea under its Freedom of Navigation Program (FON) against some 35 States at the rate of 30-40 per year.<sup>68</sup>

Russia ratified the LOSC in March 1997 and has incorporated large parts into its legislation of the Part XII environmental provisions governing pollution from vessels in the exclusive economic zone.<sup>69</sup> While the U.S. has not ratified the LOSC, the U.S. has indicated that the LOSC generally confirms existing maritime law and practice, with the exception of deep sea mining,<sup>70</sup> and the U.S. will recognise those rights and interests consistent with LOSC, including the environmental provisions governing in the exclusive economic zone.<sup>71</sup>

The scope with respect to the traditional exercise of innocent passage and free navigation by warships and other State vessels would seem to be clear through Article 236. Whether the notification and prior authorisation for the passage of foreign warships and other public vessels in innocent passage is permissible is however unclear. There is some precedent for clarification provided by the Black Sea Incident subsequent to which, following negotiations, the Soviets entered with the U.S. into a 'Joint Statement' with 'Uniform Interpretation of Rules of International Law Governing Innocent Passage'.<sup>72</sup> Following this the Soviet Union amended its legislation governing innocent passage in its territorial sea to be more in line with generally accepted international standards, under which vessels enjoy passage rights through the territorial seas of all States as long as the navigation is continuous and innocent.<sup>73</sup>

At the same time these States' practice as coastal States in their own exclusive economic zones and territorial seas appears not completely consistent with the LOSC navigational regimes related to other LOSC regimes. The Russian and U.S. national

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<sup>67</sup> Ibid. p. 23, quoting U.S. Department of the Navy, 1997 *Posture Statement*, (1997), 6. C. Pirtle, 'Military Uses of the Ocean Space', 25 believes that 'freedom of the seas' does not guarantee legal access up to States' territorial seas, but rather is dependent upon respect for the power of the U.S. Navy.

<sup>68</sup> Ibid. p. 32.

<sup>69</sup> E. Franckx, 'The New U.S.S.R. Legislation on Pollution Prevention in the exclusive economic zone', *International Journal of Estuarine and Coastal Law*, Vol. 1, (1986) 156-9.

<sup>70</sup> See R. Churchill and A. Lowe, 3<sup>rd</sup> ed. *The Law of the Sea*, pp. 236-8 for developments concerning the deep seabed regime which took place regarding the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, *International Legal Materials*, Vol. 33, p. 1309 (1994), to which many States became parties and at the same time became Parties to the LOSC.

<sup>71</sup> Presidential Proclamation No. 5030, 48 *Fed. Reg.* 10, (1983), p. 605. See also and *International Legal Materials* Vol. 22, (1983) p. 465. See M. Belsky, Martin, 'Management of Large Marine Ecosystems: Developing a New rule of Customary International Law', *San Diego Law Review*, Vol. 22, (1985), 748 and 753.

<sup>72</sup> *International Legal Materials*, Vol. 28, (1989), p. 1444. Basically, on two occasions the U.S. sent U.S. Navy ships in the later 1980's to the Black Sea to test the Soviet regime of innocent passage under which foreign warships were required to follow sea lanes or traffic separation schemes in order to navigate in the Soviet territorial sea. These triggered a strong Soviet reaction. See E. Franckx, *Maritime Claims in the Arctic— Canadian and Russian Perspectives*, (London, Martinus Nijhoff Publishers, 1993) pp. 164-6.

<sup>73</sup> Ibid. See also ibid. pp. 187-188 who notes following the Joint Statement and Uniform Interpretation following the Black Sea Incident, the U.S. Secretary of State stated in a separate letter that while reserving its rights, the U.S. had no intention to conduct innocent passage with its warships in the Soviet territorial sea, in the Black Sea. Nothing is said however regarding the Russian territorial sea in the Arctic subject to the restrictive Russian rules described.

provisions govern waters for example in their own straits, which may cast in doubt the consistency of domestic legislation with LOSC Parts II and V related to Part III. For Russia relevant straits likely include the Kuril Straits. The ‘Etorofu Strait’ (‘Friza Strait’) specifically was a point of conflict between the Soviet Union and the U.S. in late 1984 and the Golovnina Strait in mid-1986.<sup>74</sup> For both the U.S. claimed transit passage, and the Russians innocent passage, while the Russians claimed the fourth Kuril strait as the only strait used for international navigation.<sup>75</sup> The Korea, Tsugaru and Soya Straits into the Sea of Okhotsk as well as the Tartar Strait all are subject to restricted access.<sup>76</sup> For the U.S. the straits subject to its legislation may include the Inland Waterway along North and South Carolina to Florida and the Alexander Archipelago in southern Alaska. It is not known whether foreign maritime powers have claimed transit passage in these waters, but the U.S. State Department has noted that freedom of navigation may be at odds with U.S. environmental protection in off-shore waters including the exclusive economic zone, and not just restricted to straits.<sup>77</sup> Further excesses may be noted regarding the consistency of domestic Russian and U.S. legislation with LOSC Part V related to Part XII and also related to Article 234.<sup>78</sup> The thought may be entertained that the obfuscation may be deliberate to achieve as much jurisdictional control as possible, both through international straits for naval vessels and as coastal States.<sup>79</sup>

Though the U.K. appears to permit transit passage in its straits used for international navigation, in several including Pentland Firth, and between Schilly Isles and Cornwall, it claims non-suspendible innocent passage.<sup>80</sup> France and Italy may limit transit passage due to environmental reasons in the Strait of Bonifacio, though the prohibitions may be only as recommendations to third State’s vessels.<sup>81</sup>

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<sup>74</sup> See J. Roach and R. Smith, *International Law Studies - Excessive Maritime Claims*, (Newport, U.S. Naval War College, 1994), Vol. 66, pp. 191-4, and 224-5, footnotes 55 and 56.

<sup>75</sup> Ibid.

<sup>76</sup> H. Caminos, ‘The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea’, *Recueil Des Cours – Collected Courses of the Hague Academy of International Law*, Vol. 205, (1987), 208.

<sup>77</sup> J. Roach and R. Smith, *Excessive Maritime Claims*, pp. 262. The authors note, ‘Holding the line against the erosion of vital high seas freedoms of navigation and overflight requires oversight over U.S. domestic as well as international considerations. The United States is not only the dominant global maritime power, it also has one of the world’s longest coastlines. As such, *it has maritime interests which may, on occasion, be at odds with the full expression of navigational freedoms.* Environmental protection in off-shore waters, conservation of fisheries beyond the exclusive economic zone..., and enforcement of customs and immigration regulations seaward of the territorial sea and contiguous zone are examples’. Italics added. See also D. Brubaker and W. Østreng, ‘Exquisite Superpower Subterfuge?’, 313.

<sup>78</sup> See generally D. Brubaker, *Environmental Protection of Arctic Waters – Specific Focus the Russian Northern Sea Route*, pp. 88-92 and 79-88, forthcoming.

<sup>79</sup> L. Ratiner, the Deputy Head of the U.S. Delegation to UNCLOS III at the final 1982 session, stated in Hearings on Law of the Sea Negotiations before the House Committee on Merchant Marine and Fisheries, that the U.S. had no such right of transit passage through straits based on customary law. Rather it was a right to pass on the high seas together with a recognition of the three mile territorial sea limit which was understood to be anomalous, anachronistic and not sustainable in international law. Further stated was that the U.S. does not continue to make such passages but rather takes arrangements which obfuscate these issues. See W. Burke, *International Law of the Sea*, ‘Documents and Notes’, 7th Ed., (Seattle, University of Washington 1987), Chapters I. p. 90 and II pp. 144-5.

<sup>80</sup> J. Roach and R. Smith, *United States Responses*, pp. 364-5. It is difficult to know clearly the response by the U.S., however from the information presented, it appears to accept this status.

<sup>81</sup> Ibid. pp. 299-300.

States persistently objecting to transit passage under UNCLOS III included Spain, and those which favoured only innocent passage in international straits were Albania, China, Iran, Peru, and the United Arab Emirates.<sup>82</sup> These States have often been outspoken in their objection to the right of transit passage. In addition of those States favouring transit passage either through LOSC ratification, declarations or other means, various still do not allow application of this right unequivocally in their own straits. Some doubt may therefore probably be cast on the total acceptance by these States of the right to transit passage. These include Canada, Denmark, Egypt, Oman, Finland, Philippines, Sweden, the Soviet Union/Russia, Greece, Yemen, Yugoslavia, Tanzania, Guinea,<sup>83</sup> and possibly Argentina, Chile, Rumania, Sao Tome and Principe, Nigeria and Indonesia.<sup>84</sup> Thus a not insubstantial number of interested States would appear to not completely accept, if not oppose, the unlimited exercise of transit passage, including the maritime powers.

Other coastal States have also made various other excessive claims related to the LOSC regimes regarding their exclusive economic zones restricting navigation to which the U.S. as a maritime power has protested.<sup>85</sup> Generally, this is due likely to views by young

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<sup>82</sup> See generally J. Roach and R. Smith, *United States Responses*, pp. 281-365. See K. Koh, *Straits in International Navigation – Contemporary Issues*, (London, Oceana Publications, 1982) p. 143 for Albania, China, Peru. For Iran see *Official Records* Vol. XVII, p. 106, *U.N. Status* No. E.85.V.5. pp. 17-18. See also J. Roach and R. Smith, *Excessive Maritime Claims*, pp. 189-91. For the United Arab Emirates see, *Official Records* Vol. XVII, p. 23. See D. Brubaker, *Environmental Protection of Arctic Waters – Specific Focus the Russian Northern Sea Route*, pp. 109-11 for more extensive arguments.

<sup>83</sup> See J. Roach and R. Smith, *Excessive Maritime Claims*, pp. 177 to 229 for U.S. claims to transit passage through straits controlled by Canada, pp. 207-15; Denmark, pp. 215-8; Egypt pp. 219-21; Finland, p. 183; the Soviet Union pp. 191-4 and 200-7; Sweden p. 183; and Yemen Arab Republic pp. 183-4. See also Canada, *U.S. Limits* No. 112, pp. 71-2. Canada stated in plenary meeting, '(Parties to the Convention) will...be able to take advantage of the new provisions on transit passage through international straits. They offer a major inducement to maritime States especially to sign and ratify the Convention'. *Official Records*, Vol. XVII, p. 15; Egypt, *LOSC Declarations* No. E.93.V.11, p. 767, *Official Records* Vol. XVII, p. 18, and *ibid.*, Vol. II p. 131. Egypt was originally in favour of innocent passage through international straits. See debate with U.S. in which Egypt forwarded the position of prior authorisation or notification and verification of submarines through straits, *ibid.*; Oman, *LOSC Declarations* No. E.93.V.11, p. 771, *U.N. Status* No. E.85.V.5. p. 22, Oman originally was in favour of innocent passage, see K. Koh, *Straits*, p. 143; Finland, *U.N. Status* No. E.85.V.5. p. 14, *Official Records* Vol. XVII, p. 42-3; Philippines, *U.N. Status* No. E.85.V.5. pp. 22-3 and *LOSC Declarations* No. E.93.V.11, p. 771, *Official Records* Vol. XVII, p. 69, Eight Nation Proposal; Sweden, *U.N. Status* No. E.85.V.5. p. 26, *Official Records* Vol. XVII, p. 54; Soviet Union, *U.S. Limits* No. 112, pp. 68-71 and A. Kolodkin, and M. Volosov, 'Soviet Arctic Legal Regime', 163; Greece, *U.N. Status* No. E.85.V.5. p. 17, *Official Records* Vol. XVII, p. 110; Yemen, *U.N. Status* No. E.85.V.5, p. 29, Yemen was in favour of only innocent passage in international straits, see Eight Nation Proposal, K. Koh, *Straits*, p. 143; Yugoslavia, *LOSC Declarations*, No. E.93.V.11, p. 775, *Official Records*, Vol. XVII, p. 68; Tanzania, *ibid.*, p. 51. Tanzania was in favour of innocent passage only in international straits. See K. Koh, *Straits*, p. 143; Guinea, *LOSC Declarations*, No. E.93.V.11, p. 769.

<sup>84</sup> Argentina was originally in favour of only innocent passage in international straits, see K. Koh, *Straits*, p. 143; *U.N. Status* No. E.85.V.5., pp. 13-14. *Official Records* Vol. XVII, p. 67, and Treaty of Peace and Friendship between Argentina and Chile, 29 November 1984, *ILM*, Vol. 24, (1985), p. 13; Rumania, *LOSC Declarations* No. E.93.V.11 p. 772; Sao Tome and Principe, *LOSC Declarations* No. E.93.V.11, p. 772; Nigeria, *Official Records* Vol. XVII, pp. 95 and 230-2 Document A/CONF.62/WS/36. Indonesia has ratified the LOSC and therefore has accepted transit passage, however in 1988 closed the Sunda and Lombok Straits, through which the U.S. claims transit passage, for naval exercises. *U.N. Speech* p. 6 paragraph 9, footnote 2, J. Roach and R. Smith, *Excessive Maritime Claims*, 218-9.

<sup>85</sup> J. Roach and R. Smith, *United States Responses*, pp. 407-23. *Ibid.* p. 412-3 note that both Italy and Germany have supported the U.S. view regarding navigational rights. Respectively Multilateral Treaties Deposited, pp., 860 and 858. Specifically, Italy when signing the LOSC declared that the, 'coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the coastal State in such zone do not include the right to obtain notification military exercises or manoeuvres or to authorise them'... 'the right of the coastal State to build and to authorise construction, operation and use of installations and structures in the exclusive economic zone and on the continental shelf is limited only to the categories of such installations and structures as listed in Article 60 of the Convention'. *U.N. Law of the Sea Bulletin*, Vol. 25, (1994), p. 31.

States related to freedom of the seas being equated with over fishing, over polluting and over trafficking, and hence not being equitable and immutable.<sup>86</sup> Seen militarily smaller States are concerned that in the name of freedom of the high seas 'naval military activities and manoeuvres, testing of rockets and missiles;...stationing and operations of submarines armed with nuclear missiles; the so-called data-gathering by electronic procedures along the coasts of other countries; and various other questionable activities' are carried out.<sup>87</sup>

Regarding *enforcement activities* Brazil required prior authorisation of any action taken by foreign States in its exclusive economic zone under the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>88</sup> Colombia made a similar claim upon ratification of the same Convention.<sup>89</sup> Costa Rica required *fishing vessels transiting* its exclusive economic zone, but not intending to fish, first to give authorities notification upon entering and leaving and to transit within 48 hours, and recently prior to entry to apply for a permit for passage or navigation.<sup>90</sup> Regarding the *transit of hazardous material* Portugal and Egypt claimed under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, a requirement for notification of all transboundary movements of such wastes across its waters.<sup>91</sup> Colombia, Ecuador, Mexico, Uruguay and Venezuela declared under the same that their rights as coastal States were protected.<sup>92</sup>

Diverse other claims made by States governing the exclusive economic zone which may interfere with navigation, to which the U.S. has protested, include the following.<sup>93</sup> Barbados has claimed the right to extend the application of any of its laws to the exclusive economic zone.<sup>94</sup> Burma has claimed rights and jurisdiction for the construction, maintenance or operation of artificial islands, offshore terminals, installations and other structures and

<sup>86</sup> C. Pirtle, 'Military Uses of the Ocean Space,

<sup>87</sup> Ibid. 28 quoting R. Anand, 'Winds of Change in the Law of the Sea', in (Ed. R. Anand 1980), *Law of the Sea: Caracas and Beyond*, (The Hague, Nijhoff 1980), p. 38.

<sup>88</sup> J. Roach and R. Smith, *United States Responses*, p. 414, quoting U.N. Multilateral Treaties deposited p. 283. J. Roach and R. Smith, *United States Responses*, p. 416 note that the 12 Member States of the European Community protested the declaration by Brazil, made upon signature of the Convention. The authors note that the declaration was not made upon ratification of the Convention. U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *Treaties and Other International Acts Series*, No. *International Legal Materials*, Vol. 28, p. 519.

<sup>89</sup> J. Roach and R. Smith, *United States Responses*, pp. 116-7, quoting U.N. Multilateral Treaties Deposited, p. 283.

<sup>90</sup> J. Roach and R. Smith, *United States Responses*, pp. 417-8, quoting Executive Branch Decree No. 20404-P-MOPT, *La Gaceta, Diario Oficial*, San Jose, Costa Rica May 24, 1991; State Department Translation LS No. 139243; and B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, (Dordrecht, Nijhoff, 1989) pp. 88-9. U.S. fishing vessels not outfitted for fishing were transiting the Panama Canal and the Costa Rican exclusive economic zone on the way to Hawaii, and were seized 97 miles offshore, to which the U.S. protested. J. Roach and R. Smith, *United States Responses*, p. 420, quoting U.N. LOSC BULL., No. 23, June 1993, p. 108, note that Thailand issued a note emphasising the right of all vessels, including fishing vessels, to freedom of navigation in other State's exclusive economic zones, transit passage in international straits, and innocent passage in foreign territorial seas.

<sup>91</sup> J. Roach and R. Smith, *United States Responses*, p. 421, quoting U.N. Multilateral Treaties deposited pp. 938-9.

<sup>92</sup> Ibid. The authors note that Germany, Italy and the U.K. declared that nothing in the Convention requires any notice to or consent of the coastal State for vessels exercising freedom of navigation, *inter alia*, through the exclusive economic zone. Italy protested against the declarations made by Colombia, Ecuador, Mexico, Uruguay and Venezuela.

<sup>93</sup> J. Roach and R. Smith, *United States Responses*, pp. 186-92.

<sup>94</sup> J. Roach and R. Smith, *United States Responses*, p. 186 and U.N. National Legislation on the Exclusive Economic Zone, pp. 40-8.

devices necessary for the exploration of its natural resources or for the convenience of shipping, or for any other purpose.<sup>95</sup> Similar legislation exists for Grenada, Guyana, India, Mauritius, Pakistan and the Seychelles.<sup>96</sup> Similar legislation may exist for Ghana, Madagascar, Tanzania, Ivory Coast, Djibouti, Equatorial Guinea, Gabon, Kenya, Morocco, Sao Tome & Principe,<sup>97</sup> as well as Indonesia, Burma, Philippines and Sri Lanka.<sup>98</sup> Egypt declared in its LOSC ratification that it will exercise its rights in an exclusive economic zone and will take the necessary arrangements to regulate all matters relating to that zone, though it also stated, that it will act consistently with international law having due regard for the rights and duties of other States.<sup>99</sup> Trinidad and Tobago require written permission to establish or use any artificial island, installation or structure in its exclusive economic zone, though at the same time this is to be applied in accordance with principles of international law, including customary international law.<sup>100</sup> This as been explained to be with respect to any artificial island, installation or structure in its exclusive economic zone which may interfere with the exercise of the rights of Trinidad and Tobago in its exclusive economic zone as determined by Trinidad and Tobago.<sup>101</sup> Maldives delimited its exclusive economic zone referring to geographic co-ordinates in the high seas.<sup>102</sup>

Various States allow criminal penalties including imprisonment or the threat of such in their provisions governing the exclusive economic zone. These include Antigua & Barbuda, Bangladesh, Barbados, Burma, Cape Verde, Grenada, Guinea-Bissau, India, Maldives, Mauritius, Nigeria, Nieu, Pakistan, Philippines, Portugal, Senegal, Seychelles, Suriname, Tanzania, Vanuatu, and Yemen, though some 32 may exist in all.<sup>103</sup> This may include Russia, the U.S. and Canada.<sup>104</sup>

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<sup>95</sup> J. Roach and R. Smith, *United States Responses*, p. 187 and U.N. National Legislation on the Exclusive Economic Zone, p. 49.

<sup>96</sup> J. Roach and R. Smith, *United States Responses*, p. 188 quoting respectively U.N. National Legislation on the Exclusive Economic Zone, pp. 116-24, *ibid.* pp. 128-37, *ibid.* 144-9, *ibid.* 183-6, UN, Legislation on the Continental Shelf, 236-9, and *ibid.* pp. 236-9 together with U.N. National Legislation on the Exclusive Economic Zone, pp. 275-9.

<sup>97</sup> J. Roach and R. Smith, *United States Responses*, p. 188 quoting *The Law of the Sea: Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea*, U.N. Sales No. E.94.V.13, (New York, U.N. Division for Ocean Affairs and the Law of the Sea, 1994), p. 36.

<sup>98</sup> J. Roach and R. Smith, *United States Responses*, p. 188 quoting *The Law of the Sea: Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea*, U.N. Sales No. E.94.V.13, (New York, U.N. Division for Ocean Affairs and the Law of the Sea, 1994), p. 71.

<sup>99</sup> J. Roach and R. Smith, *United States Responses*, p. 189 and U.N. Multilateral Treaties Deposited, p. 856.

<sup>100</sup> J. Roach and R. Smith, *United States Responses*, p. 190 and *The Law of the Sea: Current Developments in State Practice*, U.N. Sales No. E.89.V.7, (New York, U.N. Office for Ocean Affairs and the Law of the Sea, 1989), No. II, p. 42.

<sup>101</sup> J. Roach and R. Smith, *United States Responses*, p. 191 and Diplomatic Note No. 743 date July 9, 1987 from the Ministry of external Affairs Port of Spain, reported in American Embassy Port of Spain telegram 01973, June 14, 1987.

<sup>102</sup> J. Roach and R. Smith, *United States Responses*, p. 189 and U.N. Multilateral Treaties Deposited, p. 856.

<sup>103</sup> J. Roach and R. Smith, *United States Responses*, p. 192 quoting generally U.N. National Legislation on the Exclusive Economic Zone, and B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone*, p. 87.

<sup>104</sup> See generally D. Brubaker, *Environmental Protection of Arctic Waters – Specific Focus the Russian Northern Sea Route*, pp. 80-1, forthcoming.

For the Arctic the scope of application of Article 234 regarding navigation is unclear.<sup>105</sup> Russian legislation includes requirements for notification and previous authorisation, leading, and payment of fees for all vessels. Submarines must navigate on the surface. Infractions can generally result in expulsion, or arrest, detention, and confiscation. No explanation is given concerning the contradiction with these provisions and LOSC Article 236, sovereign immunity for public vessels, though claims that history and Arctic State prerogatives require regulating access of users.<sup>106</sup> The Russian practice enjoys support from the Canadian practice and even that of the U.S. as a coastal State. In contrast the U.S. as a maritime power claims transit passage through international straits.<sup>107</sup> Several incidents occurred between the Soviet Union and the U.S. in the mid 1960's involving Russian Arctic waters and straits, claimed at that time as territorial seas.<sup>108</sup> Because of ice, rather than navigating north of Novaya Zemlya and Severnaya Zemlya as planned, the U.S. Coast Guard (U.S.C.G.) icebreakers *Edisto* and *East Wind* entered the Kara Sea and proceeded towards the Vil'kitskii Straits. No transits were carried out, but the statements forwarded in these incidents are presented by the U.S. State Department as a statement of position. Sovereignty immunity under Article 236 is maintained,<sup>109</sup> which would allow traditional innocent passage through foreign territorial seas and free navigation in foreign exclusive economic zones.<sup>110</sup> It is not clear how these claims relate to passage through maritime zones in ice covered areas,<sup>111</sup> and no clarification is given for the contradiction with Article 234, though the U.S. most probably is interested in submarine transit and perhaps aircraft transit through international straits.<sup>112</sup>

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<sup>105</sup> Ibid. pp. 79-88 from which the following is obtained.

<sup>106</sup> A. Kolodkin, and M. Volosov, 'The legal regime of the Soviet Arctic', *Marine Policy*, (March 1990), 163. A. Kolodkin has represented the Soviet Union and Russia in International Maritime Organisation (IMO) Conferences, and as Chairman of the Russian International Maritime Law Association and Vice President of the International Maritime Committee, appeared to act in practice as legal advisor in law of the sea matters to the Russian Government. This status was claimed by E. Nikitina, Dr., Senior Research Fellow, 'Interview', 18 March 1993, a former assistant to A. Kolodkin and now with the Institute of World Economy and International Relations, Russian Academy of Sciences. A prominent legal expert on Russia, W. Butler, 'Correspondence - INSROP Secretariat', 18 January 1994, notes that elucidation of the normative basis for the Russian legal position in the Arctic lay with A. Kolodkin, who should be requested to explain the matter. A. Kolodkin, 'Interview', 25 February 1994, himself discounted his role as official. Though not completely clear it is considered a mistake to regard A. Kolodkin's statements merely on the level of other doctrine, and lacking any intermediate status, will thus be given weight as official. This is considered necessary given generally the non traditionality by Western standards of Russian legal sources. Since A. Kolodkin recently was elected Judge on the International Law of the Sea Tribunal, following 31 August 1996 this status would no longer be valid related to Russian jurisdictional claims in law of the sea, due to issues involving conflict of interest.

<sup>107</sup> J. Roach and R. Smith, *Excessive Maritime Claims*, pp. 200-7.

<sup>108</sup> J. Roach and R. Smith, *Excessive Maritime Claims*, pp. 200-7. In the 1964 exchange of notes the Kara Gates straits were already claimed as Soviet territorial waters. See also E. Franckx, *Maritime Arctic Claims*, pp. 157 and 209 footnote 182 who notes no U.S. vessel navigated close to these straits.

<sup>109</sup> Ibid. p. 227 footnote 79.

<sup>110</sup> See generally W. Schachte Jr., 'International Straits and Navigational Freedoms - Remarks prepared for presentation to the 26th Law of the Sea Institute Annual Conference, Genoa, June 22-6, 1992.

<sup>111</sup> J. Roach and R. Smith, *Excessive Maritime Claims*, pp. 48 and 58, 200-207. Ibid. pp. 227 footnote 79 in fact note that the issue of the LOSC Article 234 interface with international straits regime is unclarified with respect to the Canadian Arctic straits.

<sup>112</sup> W. Schachte 'International Straits', 18-9.

In conclusion, though only preliminary results may be presented, over 50 different States forward claims which in some manner probably restrict navigation as regulated under the LOSC regimes, varying in degree. Numbers themselves are not so important. Even more States could likely be found. What is important is that *with this divergent practice in mind regarding navigation*, it is perhaps not so startling that marine military research in the exclusive economic zone is only vaguely regulated and even only partly known. It may also not be so surprising that regulation of MSC in the exclusive economic zone is practised somewhat unevenly. At least one expert views this tendency as increasing in the future due to coastal State environmental concerns, exclusive capture and exploration of marine resources, and security interests.<sup>113</sup> The U.S. Navy's new focus on littoral operations as well as drastic cutbacks in its material base is likely to amplify this development.<sup>114</sup>

## 2.4 Military Research

Military uses of the exclusive economic zone never became the subject of extensive discussions under UNCLOS III.<sup>115</sup> Though several States, particularly the Latin American, proposed that States should refrain from military activities which could endanger coastal State security, such as naval manoeuvres with firearms exercises, these were rejected by the maritime powers. The latter claimed that carrying out military exercises with peaceful purposes is in accordance with and not contrary to the U.N. Charter and principles of international law. The treaties entered by the military powers forbidding the testing of nuclear weapons and the placement of nuclear weapons and other weapons of mass destruction beyond the territorial sea has been noted. 'Peaceful uses of the ocean space, zones of peace and security' was approved by the Sea-Bed Committee in 1972 for inclusion into UNCLOS III and was discussed in the Plenary Session in 1976. Some States considered 'peaceful uses of the sea' should be included in the LOSC, while others felt that this should be taken up in other fora dealing with disarmament and denuclearisation. This dichotomy continued throughout UNCLOS III and resulted that 'peaceful uses of the sea' appeared in several diverse Articles.

For military research, as a part of military activities in a foreign exclusive economic zone, Article 301 generally requires that States refrain from threat or use of force against any State, inconsistent with the U.N. Charter. This was a compromise balancing the desires of the coastal States to ban military manoeuvres and exercises in the exclusive economic zone and the assertions by the maritime powers that peaceful military activities were not prohibited by international law.<sup>116</sup> The absence of a definition of 'peaceful uses' has given the result of a

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<sup>113</sup> C. Pirtle, 'Military Uses of the Ocean Space', 33-4.

<sup>114</sup> Ibid.

<sup>115</sup> See S. Mahmoudi, 'Foreign Military Activities' 365, 375-9, from which the following is obtained unless otherwise noted.

<sup>116</sup> S. Mahmoudi, 'Foreign Military Activities', 374 notes Article 301 was first meant included in Part V on the exclusive economic zone, but maritime States opposed this on the ground that security matters should not be considered with the exclusive economic zone regime. An alternative was to repeat Article 301 in Article 88 which applies to the exclusive economic zone, but both proposals were rejected on the grounds that Article 301 has general applicability.

spectrum of interpretations. These range from requiring total demilitarisation and banning all military activities, to permitting all military activities as long as they do not amount to the threat or use of force defined in Article 2(4) of the U.N. Charter.<sup>117</sup>

Article 58(2) also relates to ‘peaceful uses’ of the exclusive economic zone. This Article concerns the rights and duties of other States in a foreign exclusive economic zone and provides for the applicability of Article 88 reserving the high seas for peaceful uses, seemingly consistent with Article 301.<sup>118</sup> In addition Article 246(3) relates to ‘peaceful uses’ of the exclusive economic zone. This provides that marine scientific research in the exclusive economic zone is to be exclusively for peaceful purposes, however neither ‘peaceful purposes’ nor ‘marine scientific research’ is clearly defined. Given State practice it may be difficult to interpret ‘peaceful purposes’ to exclude all military activities in a State’s exclusive economic zone.<sup>119</sup> Additionally, this interpretation may be contrary to the concept of the exclusive economic zone and the factors which led the maritime powers to accept this concept. Monitoring by foreign vessels is only directly forbidden against a coastal State in its territorial sea under Article 19(c) and (j). However, whether *all types* of military activities including research are permitted in the exclusive economic zone is controversial.

No definition of military activities is given in the LOSC. Article 298(1)(b)<sup>120</sup> on the basis of its drafting history mentions the phrase however. Military activities are maintained to be activities undertaken either by warships or military aircraft or by government vessels and aircraft engaged in non commercial services, with the goal to increase the readiness for war. The implicit readiness part of the Article allows a broad spectrum of interpretations, which has been argued to include military manoeuvres, arms testing, operating military devices, launching and landing aircraft, intelligence collection and weapons exercises.

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<sup>117</sup> The U.N. Charter appears in the *United Kingdom Treaty Series*, Vol. 1946, p. 67. Article 2(4) of the U.N. Charter states, All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

<sup>118</sup> Article 88 is entitled, Reservation of the high seas for peaceful purposes, and states, The high seas shall be reserved for peaceful purposes.

<sup>119</sup> B. Vukas, ‘Peaceful Uses of the Sea, Denuclearization and Disarmament’, in R. Dupuy and D. Vignes (eds.), *A Handbook on the New Law of the Sea*, (Dordrecht, Martinus Nijhoff Publishers, 1991), p. 1238.

<sup>120</sup> Article 298 is entitled, Optional exceptions to applicability of Section 2, and states,

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under Section 1, declare in writing that it does not accept any one or more of the procedures provided for in Section 2 with respect to one or more of the following categories of disputes:
  - ...
  - (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297(2) or (3).
2. A State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such a declaration to any procedure specified in this Convention.
3. A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this convention as against another State Party, without the consent of that party.

While navigation is free under Article 58(1),<sup>121</sup> additional activities such as military exercises, arms testing and the installation of military devices are controversial due to the phrase, 'other internationally lawful uses of the sea related to these freedoms...' This may have been drafted to break the deadlock on the issue of other military activities than navigation, and it has been used by supporters of both the permissibility or prohibition of foreign military activities, according to their own interpretation.

Those supporting permissibility claim the drafting history and the 'general understanding' in UNCLOS III are evidence of allowing a range of military activities, subject only to the duty under Article 58(3) to have 'due regard to...the coastal State' and the obligation to 'comply with the laws...'<sup>122</sup> In favour of this Peru proposed in 1978 that foreign military vessels and aircraft passing through the exclusive economic zone be required to refrain from engaging in manoeuvres or using weapons without the consent of the coastal State, but this was not adopted.<sup>123</sup>

Those supporting prohibition of military activities claim manoeuvres and exercises are not considered 'an internationally lawful use of the sea' related to freedom of navigation under Article 58(1).<sup>124</sup> Military activities in the exclusive economic zone would cause ultimately damage to living resources, would endanger the security of navigation and MSR and thereby permit the coastal State to invoke the 'due regard' clause in Article 58(3) to demand the suspension of such activities.

Article 58 may have been negotiated with chiefly naval manoeuvres, firing exercises and navigation of submarines on the surface or submerged in mind, while placing installations and devices including on the seabed, may have been less in focus.<sup>125</sup> Focusing on these it may be questioned how the deployment of objects can be related to the freedoms under Article 58(3), and some doubt whether the deployment of foreign military installations and devices can be considered an internationally lawful use of the seas under Article 58(1).<sup>126</sup> Others distinguish between monitoring devices which may serve international peace and security and the deployment of arms which constitute a potential threat to the coastal State.<sup>127</sup>

A distinction may be made concerning the degree installations and structures are under control of the coastal State. Under Article 60(1)(b) and (c) permanent installations and

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<sup>121</sup> For the Arctic Article 234 would be discounted, due to sovereign immunity of warships.

<sup>122</sup> See A. Lowe, 'Some legal problems arising from the use of the seas for military purposes', *Marine Policy*, Vol. 10 (1986), 179.; B. Kwiatkowska, 'Military uses in the EEZ-a reply', *Marine Policy*, Vol. 11, ((1987), 249; B. Vukas, 'Peaceful Uses', p. 1253; and B. Oxman, 'The Regime of Warships under the United Nations Convention on the Law of the Sea', *Virginia Journal of International Law*, Vol. 24, (1984), 832 and 838.

<sup>123</sup> C.2/Informal Meeting/9.

<sup>124</sup> See A. Lowe, 'Rejoinder', *Marine Policy*, Vol. 11, (1987), 251; A. Schreiber, 'The Exclusive Economic Zone: Its Legal Nature and the Problem of Military Uses', F. Orrego Vicuña (ed.), *The Exclusive Economic Zone, A Latin American Perspective*, (Westview Press, 1984), pp. 140-1; and T. Treves, 'Military Installations, Structures, and Devices on the Seabed', *American Journal of International Law*, Vol. 74, (1980), 843.

<sup>125</sup> S. Mahmoudi, 'Foreign Military Activities' 376-7 quoting T. Treves, 'Military Installations', 842.

<sup>126</sup> S. Mahmoudi, 'Foreign Military Activities' 377 quoting A. Lowe, 'Some legal problems', 180.

<sup>127</sup> S. Mahmoudi, 'Foreign Military Activities' 377 quoting A. Schreiber, 'The Exclusive Economic Zone', 141.

structures are under control of the coastal State,<sup>128</sup> while temporary instruments such as buoy markers may arguably fall under Article 58 and not under control of the coastal State. One belief is that where a structure does not cause long term damage to resources and the coastal State is unaware of it, its existence while not discovered cannot be considered as interfering with the exercises of the rights of the coastal State in the exclusive economic zone.<sup>129</sup> Mexico and Kenya proposed in 1974 that the construction, maintenance, deployment and operation of any military installations or devices on or over the continental shelf of another State must be subject to the consent of that State.<sup>130</sup> India later proposed much the same related to the exclusive economic zone.<sup>131</sup> However, the strong reaction by the U.S. led not only to the rejection of these proposals but also to the absence of direct reference to military activities in the negotiating texts and the final convention.<sup>132</sup> An opposite view is that Article 60(1)(c) gives the coastal State the authority to object to the establishment of all installations and structures, permanent or temporary, if they interfere with the exercises of its rights in the zone.<sup>133</sup>

These expansive differences in interpretation may give rise to disputes between those who believe all military activities are covered under article 58(1) and those who consider

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<sup>128</sup> Article 60 is entitled Artificial islands, installations and structures in the exclusive economic zone and states,

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorise and regulate the construction operation and use of:

...

(b) installations and structures for the purposes provided for in Article 56 and other economic purposes;

(c) installations and structures which may interfere with the exercises of the rights of the coastal State in the zone.

<sup>129</sup> S. Mahmoudi, 'Foreign Military Activities' 377 and B. Oxman, 'The Regime of Warships', 844. Article 60(1)(c) may have been the result of a compromise between those who favoured the establishment of coastal State jurisdiction over installations and structures of an economic nature and those who favoured coastal State jurisdiction over all installations and structures.

<sup>130</sup> A/CONF.62/C.2/L.42/Rev.1.

<sup>131</sup> A/CONF.62/C.2/L.82.

<sup>132</sup> R. Churchill and A. Lowe, 3<sup>rd</sup> ed. *The Law of the Sea*, p. 427 note that it might be argued a right to deploy monitoring devices in the exclusive economic zone or on the continental shelf arise by the application or extension by analogy of the freedom to lay submarine cables and pipelines under Articles 58, 79 and 87 subject only to the duties not to interfere with coastal State rights in the zone and to deploy them with due regard to the interests of other uses of the seas.

Article 79 is entitled Submarine cables and pipelines on the continental shelf, and states,

1. All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article.
2. Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.
3. The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.
4. Nothing in this Part affects the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.
5. When laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position. In particular, possibilities for repairing existing cables or pipelines shall not be prejudiced.

<sup>133</sup> S. Mahmoudi, 'Foreign Military Activities' 377 and A. Schreiber, 'The Exclusive Economic Zone', 141.

military activities a residual right subject to Article 59.<sup>134</sup> Some believe distinction should be made between navigation of warships in the exclusive economic zone, one of the high seas freedoms expressly permitted in Article 58(1) and other activities such as naval manoeuvres, placement of devices, establishment of military structures and platforms.<sup>135</sup> The latter are not explicitly mentioned in Article 58(1) as a freedom, and in case of conflict of interests are subject to the procedures contained under Article 59. Similarly, many delegations to UNCLOS III preferred not to make any express statement about military uses of the exclusive economic zone, and 'other uses' was interpreted as a reference to such uses.<sup>136</sup> In the alternative, military activities are deemed clearly governed by Article 58.<sup>137</sup> Article 59 is deemed only to contain a procedural rule for resolving conflicts with respect to those uses which are not covered by Article 56<sup>138</sup> or Article 58. When resolving conflict of interests according to Article 59, whether the activity involved is more similar to the type of activity dealt with in Article 56 or in Article 58 has to be ascertained.<sup>139</sup>

## 2.4.1 State Practice

### 2.4.1.1 Coastal States

As can be surmised, State practice is very important due to the intentional ambiguity

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<sup>134</sup> Article 59 is entitled, Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone, and states,

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arise between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

<sup>135</sup> S. Mahmoudi, 'Foreign Military Activities' 378 and R. Pohl, 'The Exclusive Economic Zone in the Light of Negotiations of the Third United Nations Conference on the Law of the Sea', F. Orrego Vicuña (ed.), *The Exclusive Economic Zone, A Latin American Perspective*, (Westview Press, 1984), p. 55.

<sup>136</sup> S. Mahmoudi, 'Foreign Military Activities' 378 and F. Orrego Vicuña, *The exclusive economic zone, Regime and legal nature under international law*, (Cambridge, Cambridge University, 1989) p. 38

<sup>137</sup> S. Mahmoudi, 'Foreign Military Activities' 378 and B. Kwiatkowska, 'Military uses in the EEZ' 249.

<sup>138</sup> Article 56 is entitled, Rights, jurisdiction and duties of the coastal State in the exclusive economic zone and states,

1. In the exclusive economic zone, the coastal States has:
  - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
  - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
    - (i) the establishment and use of artificial islands, installations and structures;
    - (ii) marine scientific research;
    - (iii) the protection and preservation of the marine environment;
    - (iv) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this convention.
3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.

<sup>139</sup> S. Mahmoudi, 'Foreign Military Activities' 378 and B. Oxman, 'The Regime of Warships', 848.

of Articles 58 and 59 with respect to the question of military activities as residual rights.

‘The only thing that can be said with confidence is that it is most unlikely that the major naval powers will cease from the use of the seas for military exercises and the deployment of such systems, no matter what the Convention might say’,<sup>140</sup>

On the other hand, depending upon the attitude to the exclusive economic zone as a national zone claims have been made that all residual rights fall within the competence of the coastal State. This as seen below has been carried out by States including Cape Verde, Haiti, India, Uruguay, Malaysia and Pakistan, while a few States have declared that they are outside the competence of the coastal State, including Italy, Germany, the Netherlands.<sup>141</sup> Relevant practice includes recent declarations or declarations made in connection with signing, ratification of or accession to the LOSC, as well as statements made during UNCLOS III.

Regarding *military activities in the exclusive economic zone* Brazil claimed under Article 310<sup>142</sup> at the closing plenary session of UNCLOS III,

...it is our understanding the provisions of article 301...apply particularly to the maritime areas under the sovereignty or jurisdiction of the coastal state...we understand that the navigation facilities accorded third world countries within the exclusive economic zone cannot in any way be utilised for activities that imply the threat or use of force against the coastal State...it is Brazil’s understanding that the provisions of the Convention do not authorise other States to carry out military exercises or manoeuvres within the exclusive economic zone, particularly when these activities involve the use of weapons or explosives.<sup>143</sup>

The Brazilian Government understands that the provisions of the Convention do not authorise other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives, in the exclusive economic zone without the consent of the coastal State. The Brazilian Government understands that in accordance with the provisions of the Convention the coastal State has, in the exclusive economic zone...the exclusive right to construct and to authorise and to regulate the construction, operation and use of all kinds of installations and structures, without exception, whatever their nature or purpose.<sup>144</sup>

Following ratification of the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and the Subsoil Thereof,<sup>145</sup> Brazil claimed further that ‘observations’ carried out by other States in its

<sup>140</sup> R. Churchill and A. Lowe, 3<sup>rd</sup> ed. *The Law of the Sea*, p. 428.

<sup>141</sup> See generally *ibid.* p. 427.

<sup>142</sup> Article 310 is entitled, Declarations and statements and states,

Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this convention in the application to that State.

Article 309 is entitled, Reservations and exceptions, and states,

No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.

<sup>143</sup> *Official Records of the Third United Nations Conference on the Law of the Sea, (Official Records)*, Vol. 17, p. 40. See also R. Churchill and A. Lowe, 3<sup>rd</sup> ed. *The Law of the Sea*, (Manchester, Manchester University Press, 1999), p. 410.

<sup>144</sup> *UN Law of the Sea Bulletin*, Vol. 25 (1994), p. 11.

<sup>145</sup> *United Nations Treaty Series*, Vol. 955 p. 115

exclusive economic zone were restricted to those incidental to navigation in accordance with international law.<sup>146</sup> Iran claimed the right to prohibit, relevant to Iran,

'foreign military activities and practices, collection of information and any other activity inconsistent the rights and interests'.<sup>147</sup>

Uruguay claimed, upon signing and ratifying the LOSC,

In the exclusive economic zone, enjoyment of the freedom of international communication in accordance with the way it is defined and in accordance with other relevant provisions of the convention excludes any non peaceful use without the consent of the coastal State for instance, military exercises or other activities which may affect the rights or interests of that state...<sup>148</sup>

Cape Verde declared upon signature and confirmed upon ratification of the LOSC,

In the exclusive economic zone, the enjoyment of the freedoms of international communication, in conformity with its definition and with other relevant provisions of the Convention, excludes any non-peaceful use without the consent of the coastal State, such as exercises with weapons or other activities which may affect the rights or interests of the said state...<sup>149</sup>

India has made a similar declaration regarding both the exclusive economic zone and the continental shelf upon ratification of the LOSC.<sup>150</sup>

The statements made by these coastal States appear to indicate that these States are not allowing the issue of residual rights to be decided consistent with Article 59, but rather are deciding it unilaterally.

Other States adopt or have adopted national legislation broader than that consistent with the LOSC provisions. Sweden adopted the Act on Sweden's Economic Zone of 3 December 1992, and explained views by the responsible minister on military activities at the time of submitting the bill to Parliament. The government did not make any comments on these views, which stated,

Military activities by the flag State in the economic zone of a coastal State are not specifically regulated in Part V of the convention, and the general understanding is that the flag State should enjoy freedom to exercise such activities provided that due regard is paid to the rights of the coastal State in the zone (Art. 58(3)). This freedom is nevertheless balanced by the duty for all Member States which is contained in Article 301...The possibility of exercising military activities in the economic zone of another State is probably a freedom independent of the Law of the Sea Convention. The obligation in Article 301 is, on the other hand, the result of a package deal which made the adoption of the Convention possible. In order to prevent any possible abuse of the said freedom to the detriment of the coastal State, the content of Article 301 should be incorporated in the bill as an international law obligation separate from the Convention.<sup>151</sup>

The government stated with respect to residual rights in its submission to the Riksdag,

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<sup>146</sup> J. Roach and R. Smith, *United States Responses*, p. 412, quoting Brazilian Embassy Note No. 138/88; State Department File No. P93 0052-0811.

<sup>147</sup> J. Roach and R. Smith, *United States Responses*, p. 413, quoting U.N. LOS BULL., No. 24, December 1993, pp. 10-5.

<sup>148</sup> J. Roach and R. Smith, *United States Responses*, pp. 410-11, quoting Multilateral Treaties Deposited with the Secretary General: Status 31 December 1994, U.N. Doc.ST/LEG/SER.E/13, (U.N. Sales No. E.95.V.5, 1995). p. 865.

<sup>149</sup> J. Roach and R. Smith, *United States Responses*, p. 411, quoting U.N. Multilateral Treaties Deposited p. 854.

<sup>150</sup> J. Roach and R. Smith, *United States Responses*, p. 411 quoting U.N. LOS Bull. No. 29, p. 8 (1995).

‘when Sweden transforms an international agreement into a national law, an attempt is made not to go beyond the frame of the agreement...even Norway in her law on economic zone has mentioned in a restrictive manner the areas of applicability of the law. Should it become necessary to expand the Act’s applicability according to the Law of the Sea Convention, I cannot see that the legislative technique used in the present Act should prevent use from such expansion’.<sup>152</sup>

This as well as other statements may indicate a liberal attitude towards the right of flag States, however this is in sharp contrast to Swedish policy regarding other rights clearly attributed to the coastal State.<sup>153</sup> Generally, the U.S. State Department notes a few States have questioned the activities of military survey and hydrographic vessels in their exclusive economic zones, which the U.S. views as not subject to coastal State control, but does not name specific States.<sup>154</sup>

#### 2.4.1.2 *Maritime States*

As noted, the LOSC regimes regardless, it is unlikely the major maritime powers will cease using the seas militarily,<sup>155</sup> and this certainly includes military research. The practice of the U.S. as a maritime power related to military uses of the seas is expansive.<sup>156</sup> The U.S. distinguishes generally hydrographic survey, military activities and military surveys, and research prospecting and exploration from MSR, defining vaguely MSR as those activities undertaken in the ocean and coastal waters to expand scientific knowledge of the marine environment and its processes. This is stated to include oceanography, marine biology, marine chemistry, scientific ocean drilling and coring, geological and geophysical surveying, and other activities with a scientific purpose. The distinction is interesting but confusing, considering the statement noted concerning the importance of knowledge of the marine environment to undersea warfare.<sup>157</sup> The thought may be entertained that the obfuscation may be deliberate similar to the practice of the international straits regime above.

‘Military activities’ are viewed as normal vessel operations such as anchoring, task force manoeuvres, launching and landing of aircraft, military exercises, operating military devices, intelligence collection, weapons exercises, ordnance testing, operations and conducting military surveys.<sup>158</sup> Of these anchoring, launching and landing of aircraft, operating military devices, intelligence collection, exercises, operations and conducting military surveys

<sup>151</sup> S. Mahmoudi, ‘Foreign Military Activities’, 383 quoting Regeringens Proposition 1992/93:54, pp. 91-2.

<sup>152</sup> Ibid. 383, quoting Regeringens Proposition 1992/93:54, p. 37.

<sup>153</sup> S. Mahmoudi, ‘Foreign Military Activities’, 384-5 notes, ‘The provisions on the protection of the marine environment, enforcement jurisdiction and safeguards for the implementation of coastal states’ laws in the said Act are all evidence that Sweden has indeed made an extensive interpretation of her own competence’.

<sup>154</sup> J. Roach and R. Smith, *United States Responses*, p. 449. Subsequent State practice will follow here.

<sup>155</sup> R. Churchill and A. Lowe, 3<sup>rd</sup> ed. *The Law of the Sea*, p. 428.

<sup>156</sup> The following is obtained from J. Roach, ‘Marine Scientific Research’ 60-1 unless noted otherwise.

<sup>157</sup> C. Bishop, ‘Oceanography in Naval Warfare’, 82. This importance is considered to likely continue to this day, in spite of the passage of close to 40 years between the writing of C. Bishop, ‘Oceanography in Naval Warfare’, and J. Roach, ‘Marine Scientific Research’.

<sup>158</sup> J. Roach and R. Smith, *United States Responses*, pp. 407, 427. R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed. p. 427 note that the U.S. deploys monitoring devices such as the U.S. Sonar Surveillance Systems which lie on the continental shelf off the coasts of the U.S., in the North Sea and in the Mediterranean.

are viewed as recognised historic high seas use preserved by Article 58.<sup>159</sup> This is seen as recognised under the LOSC that all States have the right to conduct military activities within the exclusive economic zone, provided that they do so with due regard to the rights of the coastal State and other States. There is no general competence of the coastal State over military activities in the exclusive economic zone, and military survey activities carried out outside foreign territorial seas are seen as not subject to coastal State regulation.<sup>160</sup>

The U.S. views 'hydrographic survey' as the obtaining of information for the making of navigational charts and safety of navigation.<sup>161</sup> It includes determination of several classes of data in coastal or relatively shallow areas. This includes depth of water, configuration and nature of the natural bottom, directions and force of currents, heights and times of tides and water stages, and hazards for navigation for the production of nautical charts of non U.S. waters. It includes similar products to support safety of navigation, such as sailing directions, light lists, and tide manuals both for civil and military use.<sup>162</sup>

'Military surveys' are viewed as activities undertaken in the ocean and coastal waters involving marine data collection, classified or not, for military purposes.<sup>163</sup> These may include oceanographic, marine geological, geophysical, chemical, biological, and acoustic data. Equipment used may include temperature-conductivity-sound velocity sounders, swath bottom mappers, side scan sonars, bottom grab and coring systems, current meters, and profilers. The U.S. believes related to the LOSC there is no language stating or implying that 'military surveys' may be regulated in any manner by coastal States outside their territorial sea or archipelagic waters.<sup>164</sup> 'Military surveys' are viewed as a high seas freedom, and the U.S. reserves the right to engage in 'military surveys' anywhere outside foreign territorial seas and archipelagic waters. Prior notice or request permission are seen as creating an adverse precedent for restrictions on mobility and flexibility of 'military survey' operations. 'Survey activities' is viewed by the U.S. to include hydrographic surveys and military surveys.<sup>165</sup>

## 2.5 Marine Scientific Research<sup>166</sup>

There is no generally agreed upon definition for MSR, although Article 5 of the Continental Shelf Convention<sup>167</sup> and Part XIII of LOSC deal with the question of MSR. Differences

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<sup>159</sup> J. Roach and R. Smith, *United States Responses*, pp. 407 and 427.

<sup>160</sup> Ibid. S. Mahmoudi, 'Foreign Military Activities', 370-1, refers to Article 56 and the absence of such activities listed in relation to rights, jurisdiction and duties of the coastal State in the exclusive economic zone.

<sup>161</sup> J. Roach, 'Marine Scientific Research', 60-1 notes that this is the 'generally accepted modern international interpretation'.

<sup>162</sup> Ibid. notes that coastal, harbour and harbour approach charts and other are published by the U.S. Defence Mapping Agency and made available to all mariners. This is viewed as helping to stimulate trade and commerce and the construction or modernisation of harbour and port facilities, as well as environmental protection.

<sup>163</sup> Ibid. 61 notes that while the means of data collection used in military surveys is often the same or similar to that used in MSR, information from such, regardless of security classification, is intended for use by the military.

<sup>164</sup> J. Roach and R. Smith, *Excessive Maritime Claims*, pp. 248-9.

<sup>165</sup> Subsequent State practice of other maritime powers will be added here.

<sup>166</sup> See J. Roach, 'Marine Scientific Research', 61-72 from which the following is obtained unless noted otherwise.

existed during UNCLOS III along various lines.<sup>168</sup> Developing States generally claimed extensive rights for the coastal State to control MSR in the exclusive economic zone, while developed States claimed freedom of the seas, including MSR, limited only by the management of the living and non living resources. Researching States claimed a distinction between pure research subject to prior notification consistent with Article 5(8) of the Continental Shelf Convention, and applied, resource-related research subject to consent by the coastal State. Developing States claimed a single regime of consent for all types of research. The compromise between the positions became Article 246(5) under which the coastal State should normally give consent, but could withhold it if the research was directly related to exploration and exploitation of natural resources.<sup>169</sup> This is subject to interpretation, and the decision to prohibit foreign scientific research is exempted from the mandatory binding dispute settlement system under Article 297(2).<sup>170</sup> This may indicate that the coastal State prerogative is emphasised.

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<sup>167</sup> 1958 Convention on the Continental Shelf, *United Nations Treaty Series*, Vol. 499, p. 311. Article 5 has no title, and states,

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.
2. Subject to the provisions of paragraphs 1 and 6 of this article, the coastal state is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection.
3. The safety zones referred to in paragraph 2 of this article may extend to a distance of 500 meters around the installations and other devices which have been erected, measured from each point of their outer edge. Ships of all nationalities must respect these safety zones.
4. Such installations and devices, though under the jurisdiction of the coastal state, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.
5. Due notice must be given of the construction of any such installations, and permanent means for giving warning of their presence must be maintained. Any installations which are abandoned or disused must be entirely removed.
6. Neither the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognised sea lanes essential to international navigation.
7. The coastal state is obliged to undertake, in the safety zones, all appropriate measures for the protection of the living resources of the sea from harmful agents.
8. The consent of the coastal state shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless the coastal state shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal State shall have the right, if it so desires, to participate or to be represented in the research, and that in any event the results shall be published.

<sup>168</sup> See S. Mahmoudi, 'Foreign Military Activities' 381-2 from which these introductory comments were obtained.

<sup>169</sup> A/CONF/62/L/18.

<sup>170</sup> Article 297 is entitled Limitations on applicability of Section 2 and (2) states,

- (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with Section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:
  - (i) the exercise by the coastal State of a right or discretion in accordance with Article 246; or
  - (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with Article 253.

### *1958 Conventions*

The 1958 Geneva Conventions on the Law of the Sea regulate loosely surveys and MSR. The Continental Shelf Convention, in addition to that noted recognises coastal State jurisdiction over MSR involving the continental shelf and physically undertaken there, but does not address surveys. The coastal State is normally expected to give consent if the request covers pure scientific research and is submitted by a competent institution. The coastal State has the right to participate or be represented in the research, and the results must be published. The High Seas Convention<sup>171</sup> does not mention specifically MSR or surveys, but MSR is regarded, including under customary international law, as an exercise of the freedom of the high seas. The TSC provides only that the territorial sea and subjacent seabed and subsoil are under sovereignty of the coastal State, with nothing more appearing regarding MSR. It is thus implied that the consent of the coastal State must be obtained for research in and under its territorial sea. The Fishing Convention<sup>172</sup> is silent regarding MSR.

### *LOSC*

Under the LOSC MSR was negotiated in the context of increasing acceptance of a 12 mile territorial sea under coastal State sovereignty, a 200 mile exclusive economic zone and an expanded continental shelf at least 200 miles wide and perhaps wider. Ocean areas were marked in which there was freedom of MSR, together with a consent regime for MSR in the exclusive economic zone and on the subjacent continental shelf. Since 1982 LOSC provisions associated with coastal State rights, have apparently been accepted widely, and may have become customary international law. Others, dealing with coastal State *duties regarding MSR* seem not to have been followed so closely.

The latter generally include the following. Within a territorial sea with the maximum breadth of 12 nautical miles, MSR remains under exclusive control, consent of and with the conditions set by, the coastal State. Lacking compliance with such conditions, the carrying out of research or survey activities makes passage through the territorial sea non innocent under Article 19(2)(j). The coastal State is entitled to enact provisions dealing with the relation between innocent passage and MSR under Article 21(1)(g).<sup>173</sup> For international straits, as well

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- (b) A dispute arising from an allegation by the research State that with respect to a specific project the coastal State is not exercising its rights under Articles 246 and 253 in a manner compatible with this convention shall be submitted, at the request of either party, to conciliation under Annex V, section 2, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in Article 246(6), or of its discretion to withhold consent in accordance with Article 246(5).

<sup>171</sup> 1958 Convention on the High Seas, *United Nations Treaty Series* Vol. 450, (1963), p. 82.

<sup>172</sup> 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, *United Nations Treaty Series* Vol. 459, (1963), p. 285.

<sup>173</sup> Article 21 is entitled, Laws and regulations of the coastal State relating to innocent passage, and states,

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

...

- (g) marine scientific research and hydrographic surveys;

as archipelagic sea lanes, the same holds true since besides passage rights, the legal status of the waters or the exercise by the bordering states of their sovereignty or jurisdiction over such waters, is not affected.<sup>174</sup> The right for coastal States to establish an exclusive economic zone is well acknowledged, and within the exclusive economic zone a coastal State may exercise jurisdiction over MSR. The coastal State may also exercise sovereignty to explore and exploit the natural resources on its continental shelf. Specific regulation of these maritime zones under the LOSC is as follows.

For the territorial sea coastal States have an unqualified right to regulate, authorise and conduct MSR under Article 245,<sup>175</sup> entailing access and the conditions for research. For archipelagic waters, under the sovereignty of the archipelagic State, MSR is subject to the consent of that State. For international straits and archipelagic sea lanes, Part XIII does not directly address these waters; however under Article 40,<sup>176</sup> during transit passage MSR and hydrographic survey vessels may not carry out any research or survey activities without the prior authorisation of the States bordering the straits.

For the exclusive economic zone and the continental shelf coastal States have the right to regulate, authorise and conduct MSR under Article 246. Access by foreign States or competent international organisations to these areas is thus subject to the consent of the coastal State, which is to be exercised in accordance with certain standards and qualifications. Consent may be withheld if the research project is of direct significance for the exploration and exploitation of living or non-living resources, involves drilling or use of explosives or the introduction of harmful substances into the marine environment, or involves the construction, operation and use of artificial islands, installations, or structures. Consent may also be withheld if the sponsor of the research has not provided accurate information or has outstanding obligations with respect to past projects. If requested, the coastal State must specify the reasons for denial in order that the researching State may determine the adjustments required to enable the project to proceed. *Consent of a coastal State may be granted explicitly or implicitly.* States or organisations sponsoring projects are required under

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<sup>174</sup> Articles 34(1) and 54. Article 34 is entitled, Legal status of waters forming straits used for international navigation and states,

1. The régime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.

Article 54 is entitled, Duties of ships and aircraft during their passage, research and survey activities, duties of the archipelagic State and laws and regulations of the archipelagic State relating to archipelagic sea lanes passage, and states, Articles 39, 40, 42 and 44 apply *mutatis mutandis* to archipelagic sea lanes passage.

<sup>175</sup> Article 245 is entitled Marine scientific research in the territorial sea, and states,

Coastal States, in the exercise of their sovereignty, have the exclusive right to regulate, authorise and conduct marine scientific research in their territorial sea. Marine scientific research therein shall be conducted only with the express consent of and under the conditions set forth by the coastal State.

<sup>176</sup> Article 40 is entitled Research and survey activities and states,

During transit passage, foreign ships, including marine scientific research and hydrographic survey ships may not carry out any research or survey activities without the prior authorisation of the States bordering straits.

Article 248<sup>177</sup> to provide the coastal State at least 6 months in advance of the anticipated starting date, a full description of the project. The research activities may be started 6 months following a request for consent, unless within 4 months the coastal State has informed the State or sponsoring organisation that it is denying consent, for one of the reasons set forth in Article 246 or because more information is required. If the coastal State fails to respond to the request for consent within 4 months, consent may be presumed to have been granted under Article 252.<sup>178</sup> Consent may similarly be presumed for a research project undertaken by a competent international organisation, under Article 247.<sup>179</sup> The conditions with which a State or competent sponsoring organisation must comply are set forth by Article 249.<sup>180</sup>

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<sup>177</sup> Article 248 is entitled Duty to provide information to the coastal State and states, States and competent international organisations which intend to undertake marine scientific research in the exclusive economic zone or on the continental shelf of a coastal State shall, not less than six months in advance of the expected starting date of the marine scientific research project, provide that State with a full description of:

- (a) the nature and objectives of the project;
- (b) the method and means to be used, including name, tonnage, type and class of vessels and a description of scientific equipment;
- (c) the precise geographical areas in which the project is to be conducted;
- (d) the expected date of first appearance and final departure of the research vessels, or deployment of the equipment and its removal, as appropriate;
- (e) the name of the sponsoring institution, its director, and the person in charge of the project; and
- (f) the extent to which it is considered that the coastal State should be able to participate or to be represented in the project.

<sup>178</sup> Article 252 is entitled Implied consent, and states,

States or competent international organisations may proceed with a marine scientific research project six months after the date upon which the information required pursuant to Article 248 was provided to the coastal State unless within four months of the receipt of the communication containing such information the coastal State has informed the State or organisation conducting the research that:

- (a) it has withheld its consent under the provisions of Article 246, or
- (b) the information given by that State or competent international organisation regarding the nature or objectives of the project does not conform to the manifestly evident facts; or
- (c) it requires supplementary information relevant to conditions and the information provided for under Articles 248 and 249; or
- (d) outstanding obligations exist with respect to a previous marine scientific research project carried out by that State or organisation, with regard to conditions established in Article 249.

<sup>179</sup> Article 247 is entitled Marine scientific research projects undertaken by or under the auspices of international organisations, and states,

A coastal State which is a member of or has a bilateral agreement with an international organisation, and in whose exclusive economic zone or on whose continental shelf that organisation wants to carry out a marine scientific research project, directly or under its auspices, shall be deemed to have authorised the project to be carried out in conformity with the agreed specifications if that State approved the detailed project when the decision was made by the organisation for the undertaking of the project, or is willing to participate in it, and has not expressed any objection within four months of notification of the project by the organisation to the coastal State.

<sup>180</sup> Article 249 is entitled Duty to comply with certain conditions, and states

1. States and competent international organisations when undertaking marine scientific research in the exclusive economic zone or on the continental shelf of a coastal State shall comply with the following conditions:
  - (a) ensure the right of the coastal State, if it so desires, to participate or be represented in the marine scientific research project, especially on board research vessels and other craft or scientific research installations, when practicable, without payment of any remuneration to the scientists of the coastal State and without obligation to contribute towards the costs of the project;
  - (b) provide the coastal State, at its request, with preliminary reports, as soon as practicable, and with the final results and conclusions after the completion of the research;

Additionally, conditions may be established by the coastal State with respect to research projects falling into a category of activities over which the coastal State may withhold consent, under Article 246. In the exclusive economic zone or on the continental shelf if a State or competent sponsoring organisation fails to comply with such conditions, or if the research is not conducted in accordance with the information initially supplied, Article 253 authorises the coastal State to require suspension of the research activities. If those carrying out the research do not comply within a reasonable time or if the non compliance constitutes a major change in the research, the coastal State may require the activities to stop.

For the high seas and the Area, MSR is considered as a freedom of the high seas. MSR may be conducted under Articles 256<sup>181</sup> and 257<sup>182</sup> freely by any State or competent international organisation in the water column beyond the limits of the exclusive economic zone and in the Area. In the Area this includes the seabed, ocean floor and the subsoil. Research in the Area is to be conducted exclusively for peaceful purposes under Article 143.<sup>183</sup>

For all of the above maritime zones, under Article 263<sup>184</sup> States and competent international organisations are responsible for ensuring that MSR wherever undertaken is

- (c) undertake to provide access for the coastal State, at its request, to all data and samples derived from the marine scientific research project and likewise to furnish it with data which may be copied and samples which may be divided without detriment to their scientific value;
- (d) if requested, provide the coastal State with an assessment of such data, samples and research results or provide assistance in their assessment or interpretation;
- (e) ensure, subject to paragraph 2, that the research results are made internationally available through appropriate national or international channels, as soon as practicable;
- (f) inform the coastal State immediately of any major change in the research programme;
- (g) unless otherwise agreed, remove the scientific research installations or equipment once the research is completed.

2. This Article is without prejudice to the conditions established by the laws and regulations of the coastal State of the exercise of its discretion to grant or withhold consent pursuant to Article 246 (5), including requiring prior agreement for making internationally available the research results of a project of direct significance for the exploration and exploitation of natural resources.

<sup>181</sup> Article 256 is entitled Marine scientific research in the Area, and states,

All States, irrespective of their geographical location, and competent international organisations have the right, in conformity with the provisions of Part XI, to conduct marine scientific research in the Area.

<sup>182</sup> Article 257 is entitled Marine scientific research in the water column beyond the exclusive economic zone, and states,

All States, irrespective of the geographical location, and competent international organisations have the right, in conformity with this Convention, to conduct marine scientific research in the water column beyond the limits of the exclusive economic zone.

<sup>183</sup> Article 143 is entitled Marine scientific research, and states,

(1) Marine scientific research in the Area shall be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole, in accordance with Part XIII.

<sup>184</sup> Article 263 is entitled Responsibility and liability and states,

- (1) States and competent international organisations shall be responsible for ensuring that marine scientific research, whether undertaken by them or on their behalf is conducted in accordance with Convention.
- (2) States and competent international organisations shall be responsible and liable for the measures they take in contravention of this Convention in respect of marine scientific research conducted by other States, their natural or juridical persons or by competent international organisations, and shall provide compensation for damage resulting from such measures.
- (3) States and competent international organisations shall be responsible and liable pursuant to article 235 for damage caused by pollution of the marine environment arising out of marine scientific research undertaken by them or on their behalf.

conducted in accordance with the LOSC. States and organisations are responsible and liable for any measures they take in contravention of the LOSC with respect to research by other States, their natural or juridical persons or by competent international organisations, and must provide compensation for damage resulting from such. States and organisations are liable for environmental damages caused by pollution arising from MSR undertaken by them.<sup>185</sup>

### 2.5.1 State Practice - MSR

Many States appear to be complying with the LOSC MSR regime, and experts note that this practice nearly all of which pre-dates the entry into force of the LOSC leads to the conclusions that coastal State consent for research in the exclusive economic zone and on the continental shelf has become customary international law.<sup>186</sup> This is of decreasing importance due to ratification of the LOSC.

The majority of States claim 'jurisdiction' or 'exclusive jurisdiction' over research, or 'exclusive jurisdiction to authorise, regulate and control scientific research' with little further elaboration.<sup>187</sup> Though not much information is publicly available concerning the consent regime established by coastal States, the U.S. State Department notes that between the years 1983 and 1995 they processed over 1600 requests for U.S. research vessels to conduct MSR in the territorial seas and the exclusive economic zones of 140 States.<sup>188</sup> Of these only 43 were denied, and 148 were cancelled, due largely to the non compliance with the MSR regime by the researchers.

The U.S. policy concerning its own exclusive economic zone is to foster freedom of MSR, and it does not itself claim jurisdiction over MSR.<sup>189</sup> Germany notes in a declaration with its accession to the LOSC that concerning a State's continental shelf and exclusive economic zone, a basic element is the obligation of the coastal State under Article 246(3) to

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<sup>185</sup> Article 235 is entitled Responsibility and liability, and states,

- (1) States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
- (2) States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical person under their jurisdiction.
- (3) With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

<sup>186</sup> R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed. p. 409.

<sup>187</sup> R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed. p. 407.

<sup>188</sup> J. Roach and R. Smith, *United States Responses*, p. 438. R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed., p. 410 indicate that this is one of the few public studies available.

<sup>189</sup> J. Roach and R. Smith, *United States Responses*, p. 437. Appendix I presents President R. Reagan's Ocean Policy Statement found at I Public Papers of the Presidents: Ronald Reagan 1983, pp. 378-9, which declares,

While international law provides for a right of jurisdiction over marine scientific research within such a zone, the proclamation does not assert this right. I have elected not to do so because of the United States interest in encouraging marine scientific research and avoiding any unnecessary burdens. The United States will nevertheless recognise the right of other

grant its consent in normal circumstances.<sup>190</sup> Legislation of Bulgaria, Gabon, Ghana, Iceland, Maldives, Mexico, Portugal, Romania, Senegal and Venezuela appear to broadly mirror the LOSC MSR regime.<sup>191</sup> States which have implemented most fully the LOSC MSR regime include Malaysia, Poland, Russia, Spain and Ukraine.<sup>192</sup>

Despite this apparent compliance with and implementation of the LOSC MSR regime, at the same time coastal States recalcitrant to completely practice the regime appear to include the following:<sup>193</sup> Brazil, Mexico and Russia (LOSC Parties), Chile and Colombia (non LOSC Parties). Some of the discrepancies include the following. Though these are based upon the experience of the U.S. perhaps it is not so unrealistic to expect that many of the same problems exist generally.

- delays in responding to requests for vessel clearances (contra Article 246(3) and the U.N. MSR Guide);<sup>194</sup>
- last minute denial of permission to conduct the research (contra Article 246(3) and the U.N. MSR Guide);
- requiring all data, regardless of format, be provided immediately prior to departure from last port of call (contra Article 249(1)(b));
- requiring the data be provided within a fixed time after leaving the coastal States' waters, rather than following completion of the cruise (contra U.N. MSR Guide);
- requiring copies of data collected in international waters or in waters under another country's jurisdiction (no right under LOSC);
- requiring data to be held in confidence and not placed in the public domain (contra Article 249(1)(e));
- requiring cruise reports to be submitted in other languages than English (LOSC silent, U.N. MSR Guide suggests writing in a language which can be read by scientists of the coastal State);
- requiring more than one observer to be on board ('practicable' under LOSC Article 249(1)(a));

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coastal states to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts, if that jurisdiction is exercised in a manner consistent with international law.

<sup>190</sup> J. Roach and R. Smith, *United States Responses*, p. 436, quoting U.N. Multilateral Treaties Deposited, p. 859.

<sup>191</sup> R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed., p. 408 quoting respectively, *U.N. Law of the Sea*, pp. 51, 107, 134, 161, 172, 217, 221, 229, and 284.

<sup>192</sup> R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed., p. 408 quoting respectively, *U.N. Law of the Sea*, p. 158, *Law of the Sea Bulletin*, Vol. 21, (1992), p. 66, *U.N. Law of the Sea*, pp. 258, 235, and *Law of the Sea Bulletin* Vol. 30, (1996), p. 49.

<sup>193</sup> J. Roach, 'Marine Scientific Research', 65.

<sup>194</sup> U.N. Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea; Marine Scientific Research – A Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (UN Sales No. E.91.V.3) (UN MSR Guide).

- requiring the observer to be on board during non research legs of a voyage (contra Article 249);
- requiring the request for research and port call to be submitted other than through the foreign ministry (contra Article 250);
- failure by the foreign ministry to forward cruise reports to the cognisant organisations (UN MSR Guide suggests also sending a copy directly to the coastal State scientists involved);
- slow or incomplete staffing and co-ordination among interested coastal State bureaucracies (UN MSR Guide indicates the need for the coastal State to have a single office to process applications).

In addition to these, several States such as Côte d'Ivoire, Honduras, Indonesia, Morocco and Tanzania require the explicit consent of the coastal State to be given for research to be carried out in the exclusive economic zone, but little detail is given.<sup>195</sup> Italy may comply with the LOSC regime regarding its continental shelf, not claiming a exclusive economic zone, however it does not include a provision for implied consent.<sup>196</sup> States with legislation clearly diverging from the LOSC MSR regime are Trinidad and Tobago. These require that the results of research done on their continental shelves are their property and may be published only with express consent, that research data and specimens are their property, and that their consent is required for the participation of researchers who are not nationals or nationals of the flag State of the research vessel.<sup>197</sup> Brazil requires authorisation for research to be given only if the research contributes to Brazil's scientific and technological development and derives from contracts with Brazilian institutions.<sup>198</sup>

The U.S. considers MSR to consist of those activities undertaken in the ocean and coastal waters to expand knowledge of the marine environment and its processes. It includes oceanography, marine biology, fisheries research, scientific ocean drilling and coring, geological and geophysical scientific surveying and other activities with a scientific purpose.<sup>199</sup> This would appear to exclude from MSR obtaining information about foreign governments, vessels and nationals.<sup>200</sup> Also probably excluded from MSR would be hydrographic survey, military

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<sup>195</sup> R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed., p. 408 quoting respectively, *U.N. The Law of the Sea: National Legislation, Regulations and Supporting Documents on Marine Scientific Research in Areas under National Jurisdiction* (New York, United Nations, 1989), (Sales No. E.89.V.9, 1989), pp. 81, 133, 138, 177, and *U.N. Law of the Sea Bulletin* Vol. 13, (1989), p. 38.

<sup>196</sup> R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed., p. 409, quoting *U.N. Law of the Sea*, p. 140. The authors note that a number of other States require consent for research activities relating to their continental shelves, probably influenced more by the Convention on the Continental Shelf, 29 April, 1958, UNTS Vol. 499, (1964) p. 311, than the LOSC.

<sup>197</sup> R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed., p. 409 and *U.N. Law of the Sea*, p. 254.

<sup>198</sup> R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed., p. 409, quoting *U.N. Law of the Sea*, p. 42. This is except where Brazilian institutions are disinterested.

<sup>199</sup> J. Roach and R. Smith, *Excessive Maritime Claims*, p. 248 and S. Mahmoudi, S. 'Foreign Military Activities' 380.

<sup>200</sup> S. Mahmoudi, S. 'Foreign Military Activities' 380.

activities, including military survey and prospecting and exploration.<sup>201</sup> Hydrographic survey means here to obtain information for the making of navigational charts and safety of navigation.<sup>202</sup> Determination of one or more of several classes of data in coastal or relatively shallow areas is included – depth of water, configuration and nature of the natural bottoms, directions and force of currents, heights and times of tides and water stages, and hazards for navigation. This is for the production of nautical charts and similar products for safety of navigation. Such activities may however be subject to some elements of the MSR regime, such as prohibition of drilling the continental shelf, using explosives and introduction harmful substances into the marine environment without the consent of the coastal State.<sup>203</sup>

Research at sea often involves emplacement of fixed structures, buoys and other floating objects as well as the use of unmanned submersibles, named ocean data acquisition systems (ODAS). These are dealt with in their own regime.

### 2.5.2 *Research Installations*<sup>204</sup>

Many of the issues surrounding ODAS are dealt with by the LOSC, central of which is Article 258.<sup>205</sup> In the territorial sea and archipelagic waters the deployment and use of research installations and equipment require consent of the coastal State, and the ODAS are themselves under the jurisdiction of this State. In the exclusive economic zone and on the continental shelf the consent of the coastal State is required. Deployment and use of ODAS which can be considered ‘artificial islands, installations and structures’ would be governed by Articles 60 and 80<sup>206</sup> with the corresponding discretionary powers and jurisdiction for the coastal State.<sup>207</sup> No guidance is given regarding the characteristics such as size and permanence that an object must possess to qualify as ‘artificial islands, installations and structures’.

For ODAS which do not have this form, such as buoys and other floating objects and are used for applied research, the coastal State has discretion to refuse their deployment under Article 249(2). For pure research, however, for floating research objects the coastal State should not normally withhold its consent, and the coastal State would normally not enjoy jurisdiction over these afterwards. This is as long as nothing excessive is done by the researching State or competent organisation allowing the coastal State to exercise its rights

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<sup>201</sup> J. Roach and R. Smith, *Excessive Maritime Claims*, 248-9.

<sup>202</sup> *Ibid.*

<sup>203</sup> S. Mahmoudi, S. ‘Foreign Military Activities’ 380.

<sup>204</sup> See R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed., pp. 412-4.

<sup>205</sup> Article 258 is entitled Deployment and use and states,

The deployment and use of any type of scientific research installations or equipment in any area of the marine environment shall be subject to the same conditions as are prescribed in this convention for the conduct of marine scientific research in any such area.

<sup>206</sup> Article 80 is entitled Artificial islands, installations and structures on the continental shelf and states,

Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.

<sup>207</sup> R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed., p. 413 note that the ODAS taking such a form will be subject to the discretionary powers a coastal State enjoys in respect of applied research, regardless of the kind of research which is to be carried out from such installations and equipment.

under Article 253 to suspend or order stoppage of research. While the researching State enjoys jurisdiction similar to flag State jurisdiction, no enforcement jurisdiction exists, and resort must be had to Article 59 for resolving conflicts regarding rights and jurisdiction in the exclusive economic zone.

On the high seas the researching State may deploy any ODAS for research of the water column and superjacent air space or for research of the sea bed and subsoil including the international sea bed area. The researching State enjoys jurisdiction.

Safety zones may be established around ODAS up to 500 meters and flag States must ensure their ships respect such under Article 260.<sup>208</sup> Such areas must not be an obstacle to established international shipping routes under Article 261<sup>209</sup> and bear identification marks and internationally agreed warning signals ensuring safety at sea and safety of air navigation under Article 262.<sup>210</sup> Such objects cannot be considered islands nor can they affect delimitation of maritime zones under Article 259.<sup>211</sup>

A draft convention has been under process by the IMO and the ILO which addressed issues not covered by the LOSC. These include recovery and return of ODAS found under the jurisdiction of a foreign State, liability for unauthorised interference with ODAS, registration of ODAS and safety rules covering ODAS.

### **2.5.3 Dispute Settlement – MSR**

The LOSC MSR regime though lacking in various respects is more explicit than customary international law.<sup>212</sup> LOSC Parties to the Convention are bound by its provisions.

MSR problem areas involve two issues. These are the duty of the coastal State to grant consent in normal circumstances for MSR projects in the exclusive economic zone or on the continental shelf, and the duty to establish rules and procedures ensuring that such consent

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<sup>208</sup> Article 260 is entitled Safety zones and states,

Safety zones of a reasonable breadth not exceeding a distance of 500 metres may be created around scientific research installations in accordance with the relevant provisions of this Convention. All States shall ensure that such safety zones are respected by their vessels.

<sup>209</sup> Article 261 is entitled Non-interference with shipping routes, and states,

The deployment and use of any type of scientific research installations or equipment shall not constitute an obstacle to established international shipping routes.

<sup>210</sup> Article 262 is entitled Identification markings and warning signals, and states,

Installations or equipment referred to in this section shall bear identification markings indicating the State of registry or the international organization to which they belong and shall have adequate internationally agreed warning signals to ensure safety at sea and the safety of air navigation, taking into account rules and standards established by competent international organisations.

<sup>211</sup> Article 259 is entitled Legal status, and states,

The installations or equipment referred to in this section do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

<sup>212</sup> J. Roach, 'Marine Scientific Research', 66 notes that lacking U.S. accession to the LOSC that coastal States can argue they are bound by the LOSC regime while the U.S. is not. The author believes following accession 'would finally place the United States on a level playing field with other countries'.

will not be delayed or denied unreasonably.<sup>213</sup> Various States appear to be recalcitrant in implementing completely the MSR regime consistent with the LOSC, and the researching State has little leverage in requiring compliance. There likewise exists little incentive for such coastal States in changing their laws, regulations or procedures.

Compulsory dispute settlement is available for MSR disputes under Article 297(2). The exceptions to this include that a coastal State may regulate, authorise and conduct MSR in the exclusive economic zone or on the continental shelf under 246(1) and a coastal State may decide to withhold consent for MSR in its exclusive economic zone or on the continental shelf consistent with Article 253.<sup>214</sup> If a dispute is not submitted to these procedures, it must be submitted to 'compulsory conciliation' procedures under Section 2 of Annex V. These are the same as ordinary conciliation procedures under Article 284<sup>215</sup> and Annex V, except that a State may not choose not to participate. If a State defaults, the conciliation commission would proceed with its work, without the co-operation of such State, though how this is to be carried out is not completely clear.<sup>216</sup> Additionally, Article 264<sup>217</sup> appears to oblige Parties with

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<sup>213</sup> J. Roach, 'Marine Scientific Research', 68.

<sup>214</sup> Article 253 is entitled Suspension or cessation of marine scientific research activities and states,

- (1) A coastal State shall have the right to require the suspension of any marine scientific research activities in progress within its exclusive economic zone or on its continental shelf if:
  - (a) the research activities are not being conducted in accordance with the information communicated as provided under Article 248 upon which the consent of the coastal State was based; or
  - (b) the State or competent international organisation conducting the research activities fails to comply with the provisions of Article 249 concerning the rights of the coastal State with respect to the marine scientific research project.
- (2) A coastal State shall have the right to require the cessation of any marine scientific research activities in case of any non-compliance with the provisions of Article 248 which amounts to a major change in the research project or the research activities.
- (3) A coastal State may also require cessation of marine scientific research activities if any of the situations contemplated in paragraph 1 are not rectified within a reasonable period of time.
- (4) Following notification by the coastal State of its decision to order suspension or cessation, States or competent international organisations authorised to conduct marine scientific research activities shall terminate the research activities that are the subject to such a notification.
- (5) An order of suspension under paragraph 1 shall be lifted by the coastal State and the marine scientific research activities allowed to continue once the research State or competent international organization has complied with the conditions required under Articles 248 and 249.

<sup>215</sup> Article 284 is entitled Conciliation, and states,

1. A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, section 1, or another conciliation procedure.
2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure.
3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.
4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.

<sup>216</sup> R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed., p. 155. The authors note that the conciliation commission may not question a State's exercise of discretion to refuse consent but could probably find that the refusal was based upon impermissible grounds.

<sup>217</sup> Article 264 is entitled Settlement of disputes and states,

disputes to use compulsory settlement procedures of Part XV Section 2 for resolution. However, the practical effect may be unclear.<sup>218</sup> Under Article 298(1) Parties may opt out of the compulsory dispute settlement procedures for disputes concerning military activities. For this area the disputing States are only required to reach a settlement by peaceful means.<sup>219</sup> At the same time States are always free to agree to any procedure of dispute resolution they choose, even if they have previously excluded it from compulsory dispute settlement provisions.<sup>220</sup>

Special arbitral tribunals may be established under Annex VIII of the LOSC to deal with particular disputes surrounding MSR. Under this, disputes are limited to those between States and/or international organisations. Briefly, Parties may nominate two experts to a list maintained by the U.N. Intergovernmental Oceanographic Commission. Parties to a dispute may then choose two arbitrators, only one of whom may be a national, for each case, preferably from the appropriate list.<sup>221</sup> The President, a national of a third State, is chosen by agreement, failing which the U.N. Secretary General appoints one, unless the Parties agree upon someone else. Special arbitral tribunals, upon agreement by the Parties, may also be used as fact finding commissions to inquire into and establish the facts in relation to disputes involving MSR. The finding of facts between the Parties are then conclusive, and the Parties may then choose the settlement process desired.

Research activities for which a coastal State may withhold consent include those listed under Article 246(5). While a dispute involving MSR is continuing, interim measures allow the coastal State to suspend the research activities under Article 265,<sup>222</sup> and seize and detain foreign research vessels under Article 292.<sup>223</sup> Under the latter there is no guaranteed right of prompt release for violation of a coastal State's MSR provisions.

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Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with Part XV, Sections 2 and 3.

<sup>218</sup> R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed., p. 454. The authors add that it might be maintained that if a difference arises between Parties, which they agree to pursue in a particular manner, no 'dispute' arises.

<sup>219</sup> *Ibid.* The authors note that surprisingly few States have accepted optional exceptions under Article 298. France and Russia have excepted all three categories of dispute, while Cape Verde exception includes disputes concerning military operations.

<sup>220</sup> R. Churchill and A. Lowe, *Law of the Sea*, 3<sup>rd</sup> ed., p. 456.

<sup>221</sup> *Ibid.* p. 457.

<sup>222</sup> Article 265 is entitled Interim measures, and states,

Pending settlement of a dispute in accordance with Part XV, sections 2 and 3, the State or competent international organization authorised to conduct a marine scientific research project shall not allow research activities to commence or continue without the express consent of the coastal State concerned.

<sup>223</sup> Article 292 is entitled Prompt release of vessels and crews, and states,

(1) Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release for detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under Article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

## 2.6 Certain Preliminary Distinctions between Military Research and MSR

The boundary between military intelligence activities the free exercise of which is contested, and MSR governed by Article 246 and subject to the consent of the coastal State should be attempted to be drawn. While research obtaining information concerning foreign governments, vessels and nationals, hydrographic surveys, and military activities including surveys, prospecting and exploration, may be included in the former, oceanography, marine biology, fisheries research, scientific ocean drilling and coring, and geological and geophysical scientific surveying may be included in the latter. Doctrine supports both restrictive and expansive views concerning the two categories.

Military surveys are considered by the U.S. to be activities in the ocean and coastal waters involving marine data collection for military purposes. Since military surveys are not addressed in the LOSC, the U.S. views them as a high seas freedom which can be exercised anywhere outside foreign territorial seas and archipelagic waters. The distinction the U.S. makes is that MSR, as viewed by the U.S. as noted above, may be regulated by the coastal State, while hydrographic survey and military survey activities are freedoms which the coastal State cannot regulate outside its territorial sea. One argument in support of the U.S. position is that Article 19(2) defines under (j) non innocent passage, as research activities aiming at collecting information to the prejudice of the defence or security of the coastal State. Military information is generally to be held secret and is not for commercial purposes. It is thus distinct from information obtained through MSR, which should be disclosed under Articles 244,<sup>224</sup> 248 and 249. Secrecy is however subjective, and the requirement under Article

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Article 287 is entitled, Choice of procedure, and states,

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
  - a. the International Tribunal for the Law of the Sea established in accordance with Annex VI;
  - b. the International Court of Justice;
  - c. an arbitral tribunal constituted in accordance with annex VII;
  - d. a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.
2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.
3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.
4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.
5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.
6. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.
7. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.

240(a)<sup>225</sup> for carrying out MSR exclusively for peaceful purposes may result in a tendency to call research 'military activities' in order to avoid problems of coastal State consent and publicity.<sup>226</sup>

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8. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

<sup>224</sup> Article 244 is entitled Publication and dissemination of information and knowledge and states,

- (1) States and competent international organisations shall, in accordance with the Convention, make available by publication and dissemination through appropriate channels information on proposed major programmes and their objectives as well as knowledge resulting from marine scientific research.
- (2) For this purpose, States, both individually and in co-operation with other States and with competent international organisations, shall actively promote and flow of scientific data and information and the transfer of knowledge resulting from marine scientific research, especially to developing States, as well as the strengthening of the autonomous marine scientific research capabilities of developing States through, *inter alia*, programmes to provide adequate education and training of their technical and scientific personnel.

<sup>225</sup> Article 240 is entitled General principles for the conduct of marine scientific research,

In the conduct of marine scientific research the following principles shall apply:

- (a) marine scientific research shall be conducted exclusively for peaceful purposes.
- (b) Marine scientific research shall be conducted with appropriate scientific methods and means compatible with this Convention:
- (c) Marine scientific research shall not unjustifiably interfere with other legitimate uses of the sea compatible with this convention and shall be duly respected in the course of such uses:
- (d) Marine scientific research shall be conducted in compliance with all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment.

<sup>226</sup> S. Mahmoudi, 'Foreign Military Activities' 382, notes this may be why the U.S. definition of MSR is restrictive and covers in principle only obtaining information about the natural marine environment of another State. Even this restrictive definition excludes hydrographic survey, since such survey is distinct from MSR under LOSC Articles 19(2)(j), 21(1)(g) and 40. Subsequent State practice will be entered here.

Article 21 is entitled Laws and regulations of the coastal State relating to innocent passage and states,

- (1) The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

(g) marine scientific research and hydrographic surveys;

Article 40 is entitled Research and survey activities and states,

During transit passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorisation of the States bordering straits.



### 3 Conclusions

Indefiniteness is the best characteristic of the law of the sea regimes involving foreign military navigation, activities and research, carried out in a coastal State's maritime zones. Though only preliminary results are presented here, over 50 different States forward claims which in some manner probably restrict navigation as regulated under the LOSC regimes, varying in degree. Even more States could likely be found. Foreign military research and activities carried out in a coastal State's exclusive economic zone are essentially unregulated, with the exceptions of overflight rights and the rights, duties and immunities of foreign warships, especially in a coastal State's territorial sea. Those provisions that do appear are characterised by problems of interpretation, and preliminary results indicate that State practice is diverse, especially by developing States, including the regional powers, Brazil, India, Iran and Pakistan. MSR is regulated to a substantially greater degree, but problems of interpretation exist. Preliminary results indicate that State practice is in greater compliance than with the above regimes. However, again the practice of several developing States and the regional powers Brazil, Russia and Indonesia is divergent. Further study of the actual State practice of the various relevant regimes as it is today regarding foreign military navigation, activities and research, and MSR, may aid in clarification of this as yet evolving area of international law.<sup>227</sup> Certain distinctions which may be made between military research and MSR under the LOSC may be in practice obtuse. The requirement for carrying out MSR exclusive for peaceful purposes may result in a tendency to call research 'military activities' in order to avoid problems of coastal State consent and publicity.

Controversy appears likely to continue regarding all these regimes in the years to come due to expanded coastal State jurisdiction related to the marine environment, exclusive exploitation of resources and security in the force of strengthened multipolarity and gradual erosion of U.S. naval hegemony.<sup>228</sup> The shift to a non hegemonic multipolar international system rather than clarifying these regimes under international law may in fact make them more obtuse. As observed the above regional naval powers, Russia, China, India, Brazil, Japan, Iran and Indonesia and the superpower U.S., those with most interest in 'freedom of navigation', have all as coastal States exhibited practices in excess of these LOSC regimes. It would seem the diverse State practice has a good likelihood of continuing.

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<sup>227</sup> Research at sea often involves emplacement of ODAS, however problems of interpretation under the governing LOSC provisions exist also. A convention has been drafted to attempt to deal with issues including recovery and return, liability, registration and safety rules. Compulsory dispute settlement and conciliation is available for MSR disputes under the LOSC, however the practical effect may be unclear. Parties may opt out for disputes concerning military activities.

<sup>228</sup> C. Pirtle, *Military Uses of Ocean Space*, 34-5.



## Appendix

### **Preliminary – Military activities which might be considered ‘research’<sup>229</sup>**

Surface search radar: Used by all surface ships, military or civilian, for navigational safety. Would not be considered a mapping instrument.

Passive sonar: Used continuously by all submarines and some surface combatants. Cannot be used for mapping, as it is a listening device only. Most effective are ‘tails’ cables about 2 inches in diameter with listening devices which trail behind both surface vessels and submarines. Hull attachments are also used, but for surface vessels are not so effective due to noise and are not situated in the layer. For submarines, hull attachments are more effective since they are in the layer.

Active sonar: Rarely used by submarines and only occasionally by surface combatants. Ineffective for mapping, as sound is directed out, not down.

Fathometer: Used by all surface ships and submarines for navigational safety. When fitted with recording equipment, can be used for mapping. U.S. military vessels so equipped routinely record the bottom profile along their track and submit these records to the Defence Mapping Agency. This activity happens continuously, without regard to the vessel's location, i.e., inside or outside foreign maritime jurisdictions.

Expendable bathythermograph (XBT): Used by sonar-equipped vessels and submarines to determine the temperature-sound-depth profile necessary for calibrating the sonar equipment. These throw-away devices are launched every 4 to 6 hours. The profile is both used by the ship to set the sonar properly, and it is also encoded and transmitted by cable to the Fleet Numerical Oceanographic Centre for long-term trend analysis. These are used wherever the ship finds itself, i.e., inside or outside foreign maritime jurisdictions.

Passive electromagnetic surveillance: These devices are essentially radio-receivers that collect EM data in all bands/frequencies. They are used to analyse EM signals and determine if any are hostile, e.g., the radar homing signal of an incoming missile. They are used continuously, and sometimes even when a vessel is moored in a foreign port.

U.S. warships, when visiting foreign ports or transiting straits, etc., routinely take photographs and prepare long, descriptive cables describing navigational and other information. This is sent back to the Defence Mapping Agency, which is then used to update sailing directions and port guides.

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<sup>229</sup> Steven Sawhill, ‘Interview’, Research Scholar, Former Navigator on the USCGC *Polar Sea*, FNI, 8 March, 2000. This will be supplemented by interviews with Lt. Comdr. T. Ramslund, former INSROP programme leader and submarine captain in the Norwegian Navy. Both of these ‘operational’ individuals are invited to take part in the Military Research Programme.