

Legal Implications for the Russian Northern Sea Route and Westward in the Barents Sea

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Abstract

Norway is implementing strict environmental measures for the Barents Sea governing vessels carrying Russian hydrocarbons westward to Europe and the US. Although it is too early to say, the EU and US coastal environmental regimes may also have an effect on the hydrocarbon vessel traffic in the Barents Sea, including port entry requirements in both of these federations for such vessels. In spite of probable Russian membership in World Trade Organisation (WTO) within the near future, the General Agreement on Trade in Services (GATS) regime governing shipping is still under formation and some years will elapse before definite guidelines appear. The EU 'effects doctrine' is not a remote wish but rather a firm characteristic indicating the EU legal position. The EU Commission Competition Directorate has drawn similar conclusions during recent years. Russian or third-country vessels owned by companies controlled by non-EU nationals are however beyond the competition law jurisdiction of the EU, and it would not be expected that any justification of the 1986 Regulation would bring any changes. In this respect, the EU trade in shipping *acquis*, with the exception of charter parties that are covered by the Liners Conferences Agreements, does not receive the same harsh criticism addressed to the similar US legislation listed in the 1996 Blocking Statute.

Key Words

WTO, GATS, environmental measures, effects doctrine, competition law, Liners Conferences Agreements

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Summary

Russia appears to be extending its Northern Sea Route (NSR) regime, based upon LOSC Article 234, ice-covered areas, westward to Kolguev Island in the Pechora Sea. There are certain elements of consistency in the interpretation of existing Arctic law and behaviour of Russia, Canada and the USA. These elements seem to have spurred a process of formation of customary international law regarding the passage of vessels through the Arctic in general, and its international straits in particular. Current navigational provisions are likely to remain the same for some time, despite developments under the LOSC Article 76 defining the continental shelf.

Under Article 234 coastal states have the obligation to adopt and enforce non-discriminatory environmental provisions. Russian provisions are based upon environmental protection and safety, thereby implying that *all* vessels, including Russian, are encompassed. The principles, as stated under the 1990 Rules, are to regulate navigation free from discrimination for navigational safety and to prevent, reduce and control marine pollution caused by the presence of ice. All vessels, regardless of nationality, are subject. However, concerning 'fees for services rendered', there may be questionable compliance with non-discrimination. Vessels navigating the NSR are required to pay for services rendered by the Marine Operation Headquarters and the Northern Sea Route Administration in accordance with the adopted rates. The issue remains whether fees themselves fall outside the scope of 'due regard to navigation'. It may also be questioned whether the current Russian fee rates are required of Russian vessels. Related to Article 234, both Russian and foreign vessels are probably encompassed, especially since that seems to be stated explicitly in the 1990 Rules. Thus, the fees, if justified under Article 234, must apply to all vessels – contrary to previous and probably current Russian practice.

The study of the state practice with respect to passage through the NSR shows that, due to the strategically sensitive geographical situation of the region, there is a continuous risk of disputes, and that practical solutions may be needed to prevent and resolve potential disputes. This may be extrapolated to the Barents Sea as well. Norway is considering measures for the Barents Sea under international law of the sea to include:

- extended limit of territorial sea (20 nm. is possible);
- vessel traffic service (VTS);
- traffic separation schemes (TSS) including position of traffic separation scheme, automatic identification system (AIS) including distribution and coverage through stations (see endnote 14);
- tow-vessels at strategic locations;
- electronic chart display and information system (ECDIS);
- implementation of routing regime;
- contingency management and planning regime including environmental risk analysis and oil-spill contingency assessment;
- places of refuge and beaching;

- measures related to loading and unloading of cargo;
- control of emissions to air;
- management of oily wastes, sewage and garbage including receiving facilities; and;
- ballast-water management.

A Barents Sea management plan is expected in 2006. The Norwegian government is also considering the establishment of a particularly sensitive sea area (PSSA). 'Associated protective measures' from the 10 PSSAs already designated include areas to be avoided, areas for compulsory pilotage, prohibition of discharges including ballast water, prohibition of dumping of most other wastes, installation of receiving facilities, no anchoring, and enhancement of surveillance and monitoring capacities for illegal discharges. Norway could follow suit. However, there are other policy considerations likely to carry considerable weight in the Barents Sea, and the Norwegian government may well decide not to proceed with PSSA designation. Reasons for this could include the balance attempting to be achieved by Norway in the Barents Sea; the legal controversy at all levels regarding PSSA designation; boundary delimitation negotiations with Russia including possible US State Department participation; security concerns with the US, the EU and NATO; the influence that Norwegian shipping, oil and gas, and fishing interests carry; the weight good relations with Russia carries; the Globus II radar at Vardø; possible discrimination of Russian tankers if solely these are used in the initial phases of oil export, sailing 50 nm. to sea (though currently unlikely); the sensitivity bilateralism with Russia carries with it; and the present controversy over Saami property rights in Finnmark under International Labour Organisation Convention 169. Norway may well be able to achieve much the same environmental effects through more rapid and less controversial measures, also under the IMO, but SOLAS. This balance might be examined in more detail seen from a biological perspective.

Looking at Europe, the *Erika* incident in 1999 was the first tanker incident in which the European Commission (EC) took a strong role in proposing changes in the oil-pollution liability and compensation regime. These proposals, which revolve around the limitation rights, channelling of liability and a third-tier fund, may pose a serious threat to the existence of the IMO liability and compensation system. Developments so far have resulted in an increase of geographical scope and coverage, as well as acceleration of measures. Related to criminal sanctions, the EC appears to be moving beyond what the IMO has been attempting to do, due to differences in states' implementation of MARPOL 73/78, particularly related to sanctions for discharges of polluting substances. The scope has been increased, so that not only the shipowner or master of the ship is to be held criminally liable, but also the cargo owner, the classification society or other involved persons. This is applicable in all maritime zones for infringements in accordance with international law, whether these are committed intentionally, recklessly and or through serious negligence. It remains to be seen how these developments will affect the Barents Sea. However, due to port entry requirements for vessels carrying Russian hydrocarbons, the EU and US coastal environmental regimes are likely to have an effect on hydrocarbon vessel traffic in the Barents Sea.

The World Trade Organisation (WTO) impacts trade through the General Agreement on Trade in Services (GATS). GATS pushes trade polices ‘behind the border’ mediating conflicts between contrasting legalities and negotiating political and cultural, as well as economic, issues. WTO has a potential to move beyond laissez-faire and provide support for independent and alternative producers, providers and users. Related to WTO/GATS provisions generally, harmonisation will be required of the Russian NSR navigation fees under the principles of treatment-no-less favourable and national treatment. Further, mandatory restrictions, regulations, taxes, fees and public legislation are required to be harmonised. As part of this, they must be published promptly in accordance with GATS requirements on transparency. Otherwise, once informed, other Members may respond quickly and challenge Russian measures before a WTO Panel. The same may be maintained related to any unequal technical and safety requirements which create unequal conditions of competition. It is thus necessary that any mandatory restrictions, regulations, taxes, fees and public legislation related to access to the Russian Barents Sea and the NSR be made known. It is still, however, too early to come to any further definite conclusions. In spite of probable Russian membership in WTO within the next years, the GATS regime governing shipping is still under formation and will take some years before definite guidelines appear. At the same time, when Russia becomes a Member—and if oil is freighted solely on Russian tankers—these may be discriminated under GATS by being required to sail 50 nm to sea on the way to Europe, should Norway establish a PSSA or sailing routes this far to sea. This may, however, presently be of less concern since various flag vessels are already freighting Russian oil. Due to this ongoing developments EU law consequently will be one of the main focuses, particularly addressing ‘extra territoriality’.

Russia’s accession to the WTO seen through Russian eyes will help to contribute to a more uniform distribution of foreign investments between the economy branches, 50% of which being currently directed to production of natural resources. At present, natural resources comprise 80% of the Russian export, and WTO accession by Russia will contribute to ‘economy diversification’. In order to provide an annual 5%–6% increase in the gross domestic product, Russia will have to attract a significant volume of foreign investments and simultaneously undertake measures to contribute to the return of capital that earlier flowed out from the country. The current developments surrounding Russia’s membership in the WTO include the administrative reform, trimming the number of ministries and implementing legislation, all of which are seen in a positive light through Western eyes.

What is the territorial scope of the *1986 Maritime Service Regulation* (No 4055/86) and the *1986 Maritime Competition Regulation* (No 4056/86)? The focus is on the *jurisdictione ratione terrae* and *ratione personae*—more specifically, whether international law restricts nation-states in governing the conduct of foreign citizens’ activities upon the high seas or even in foreign countries. The cornerstone of this article is the denunciation of double standards in international law. The European Union cannot carry out results that it condemns elsewhere. Since no Liners Conferences

address the Russia oil and gas shipping trade, the *1979 Liner Conferences Regulation* (No 954/79) is not of consequence for this study.

The EU has expressed concern that US legislation – as documented in the *1996 Blocking Statute* (No 2271/96) – over what has been called ‘a most questionable example of US imperialistic behaviour in international jurisdictional conflicts’ also governs EU extraterritorial jurisdiction. Terming the US extra-territorial position as statutes that ‘violate international law’, the EU faces identical international law requirements.

Of course, an unrestricted ‘effects doctrine’ threatens the amicable relations between governments and disturbs the peace of nations. However, neither the EU nor the USA has seemed particularly reluctant to implement unrestricted extraterritorial jurisdiction. One set of the EU provisions on trade in shipping services is designated to the Liners Conferences – regardless of the nationality of the conference members or the location of the conferences, as long as internal effects are apparent in the EU shipping trade market. Also included are conferences whose main office or place of incorporation lies outside the EU, as are foreign ships operating under a Liners Conference, whether or not such ships are owned by non-EU citizens or fly a foreign flag.

Ships registered abroad are excluded from the freedom to provide services according to the *1986 Maritime Service Regulation Article 1 (2)*, if the owner is not a national of a member state. For example, a ship incorporated in Russia is under the EU *acquis* as long as the shipowner is a citizen of an EU member state. This is not without modification: a shipping company incorporated outside the EU is still under the EU shipping *acquis* if it is controlled by nationals of a member state, even if its ships are not registered in the EU.

Russian or third-country ships owned by companies controlled by non-EU nationals are beyond the jurisdiction of the EU. Installing Liners Conferences affecting the northern and eastern part of Russia would, however, incorporate Russian oil and gas charter parties, and thus bring members of this trade under the auspices of Article 81 and 82 of the EU treaty, as implemented in *1986 Maritime Service Regulation*.

The EU – under the Liners Conferences Regimes – fully practises the ‘*effects doctrine*’. However, charter parties negotiated and signed in Russia outside such conferences by Russian inhabitants taking Russian petroleum to EU destinations escape these articles, because no Liners Conferences apply to those Russian harbours that ship Arctic petroleum. Applying the EU legislation to such shipments would require a bilateral EU–Russian agreement justifying the principles of the 1986 regulations. Here a model could be the European Economic Area Agreement (EEA), which requires the associated members of the Union – currently Iceland, Liechtenstein and Norway – to implement fully the EU *inner market acquis*.

1. Introduction – Objectives and Issues

Related to future shipments of Russian oil and liquid natural gas (LNG) westward, the objectives of this report are as follows:

- to analyse the international regimes for environmental protection and safety which may be applied so that the Northern Sea Route (NSR) can achieve separation of oil and LNG tankers and military vessels.
- to analyse WTO /GATS and EU requirements for competition, the establishment of a treatment-no-less-favourable regime under GATS, and trade in services under GATS applicable to NSR oil and LNG tankers; and
- to analyse the environmental and safety requirements applicable to NSR oil and LNG tankers flying the flags of non-member states when docking in an EU or EEA port.

Related to the *first objective*, it may be questioned whether international regimes for environmental protection and safety can be applicable to the NSR and westward. What measures – including traffic lanes, reporting of position, velocity limitations, particularly sensitive sea areas (PSSAs) – would yield optimal safety conditions, including separation of civilian and military vessels? The latter enjoy sovereignty immunity, so it is only the former – civilian vessels – which may be regulated and which will be addressed here.

Additionally, general statements have been made that, should current claims by the Arctic littoral states to the Arctic continental shelf be recognised, there will remain two small ‘doughnut holes’ in the Arctic Ocean, with all countries having extended their regulatory regimes out past 200 nm.¹ This is somewhat misleading, since, in Part VI of the 1982 United Nations Law of the Sea Convention (LOSC),² the continental shelf regime is separate from the navigational regimes represented by LOSC Parts II (territorial sea and contiguous zone), III (international straits), V (exclusive economic zone) and VII (high seas).³ Though certainly inter-related, these regimes have been functioning separately for at least 10 years under other treaties and customary international law. Thus, not only will the current navigational provisions probably remain unchanged for some time, despite developments under the complicated LOSC Article 76 (which defines the continental shelf), but also any navigation associated with developing the continental shelf will remain subject to the international and national provisions already in place.

Separation is also noted in LOSC Article 78. Regimes are already extensive for 85% of the Arctic EEZs (exclusive economic zones), and these marine areas must be crossed by vessels in order to reach the continental shelves lying under the high seas areas. What can be imagined, should future navigation increase for any reason – including developments on the Arctic shelf – may be even greater navigational regulation in the Arctic EEZs, particularly by Norway and Denmark/Greenland. Because the current Arctic navigational regimes are likely to continue to govern for some time and are addressed below, the LOSC Article 76 definition will not be discussed here.

Related to oil and LNG tankers trafficking the NSR and westwards, issues to be dealt with under the *second objective* include clarification of WTO/GATS and EU requirements for competition, the establishment of a treatment-no-less-favourable regime under GATS, and trade in services under GATS. The Russian Federation has been an applicant member state for 10 years but is not yet party to the WTO.⁴ In view of the harsh weather conditions and ice-covered Arctic waters, and related to NSR requirements, how may shipping companies operating in the area be prevented from resorting to sub-standard vessels to counterbalance unequal participation rights? It was determined underway that the WTO/GATS regime would have relevance in the long term, but less so at present. Despite probable Russian membership in the WTO within the next years, it appears that the GATS regime governing shipping is still under formation. Thus the law of the sea and EU law will be in focus here. Since Russia is working towards accession in 2006, an overview of the WTO/GATS regime will also be given, together with Russian views regarding WTO/GATS membership.

Issues to be dealt with under the *third objective* raise several questions. What are the environmental and safety requirements and enforcement jurisdiction applicable to vessels flying the flags of non-member states when docking in EU or EEA member state harbours? Concerning oil and LNG tankers navigating the NSR, does Community shipping law address member states so as to unify domestic legislation versus third-state vessels when these dock in an EU or EEA harbour? In which way does Community law, by unifying port state legislation, help to eliminate 'ports of convenience'? What relation does international law of the sea, including the conventions of the International Maritime Organisation and the LOSC as well as domestic legislation, have to these rules?

Notes

¹ Dr. L. Brigham 'speech' at WWF Arctic Shipping Workshop. Oslo, 9 May 2005.

² 1982 United Nations Convention on the Law of the Sea (LOSC). *United Nations Treaty Series (UNTS)*, reprinted in *International Legal Materials (ILM)*, Vol. 21, (1982), p. 1261. The LOSC entered into force 16 November 1994. For the IMO regime generally, see www.imo.org/.

³ LOSC Parts XI (the Area) and XII (Marine Environmental Protection) will also have application, as will the 1994 Agreement on the Implementation of Part XI of the 1982 Law of the Sea Convention, *ILM*, Vol. 33, 1309 (1994).

⁴ The Working Party on Russian accession was established on 16 June 1993. For the status of negotiations, see www.wto.org/english/thewto_e/acc_e/a1_russie.htm.

2. Issues Under the Law of the Sea¹

2.1 Passage through the NSR: Ice-Covered Areas

The passage through the Northern Sea Route (NSR), north of Russia, has for decades been one of the most contentious legal issues in Soviet/Russian–US relations, with potential implications for the southeastern Barents Sea, the Pechora Sea. The Arctic is an ocean, but the jurisdictional claims of the large Arctic coastal states indicate substantial deviations from application of established law of the sea. Under the 1982 Law of the Sea Convention, the regimes of straits used for international navigation and the passage rights of state vessels seem subordinate to the regime of ice-covered areas. However, such subordination appears unique to the Arctic. According to LOSC Article 234:

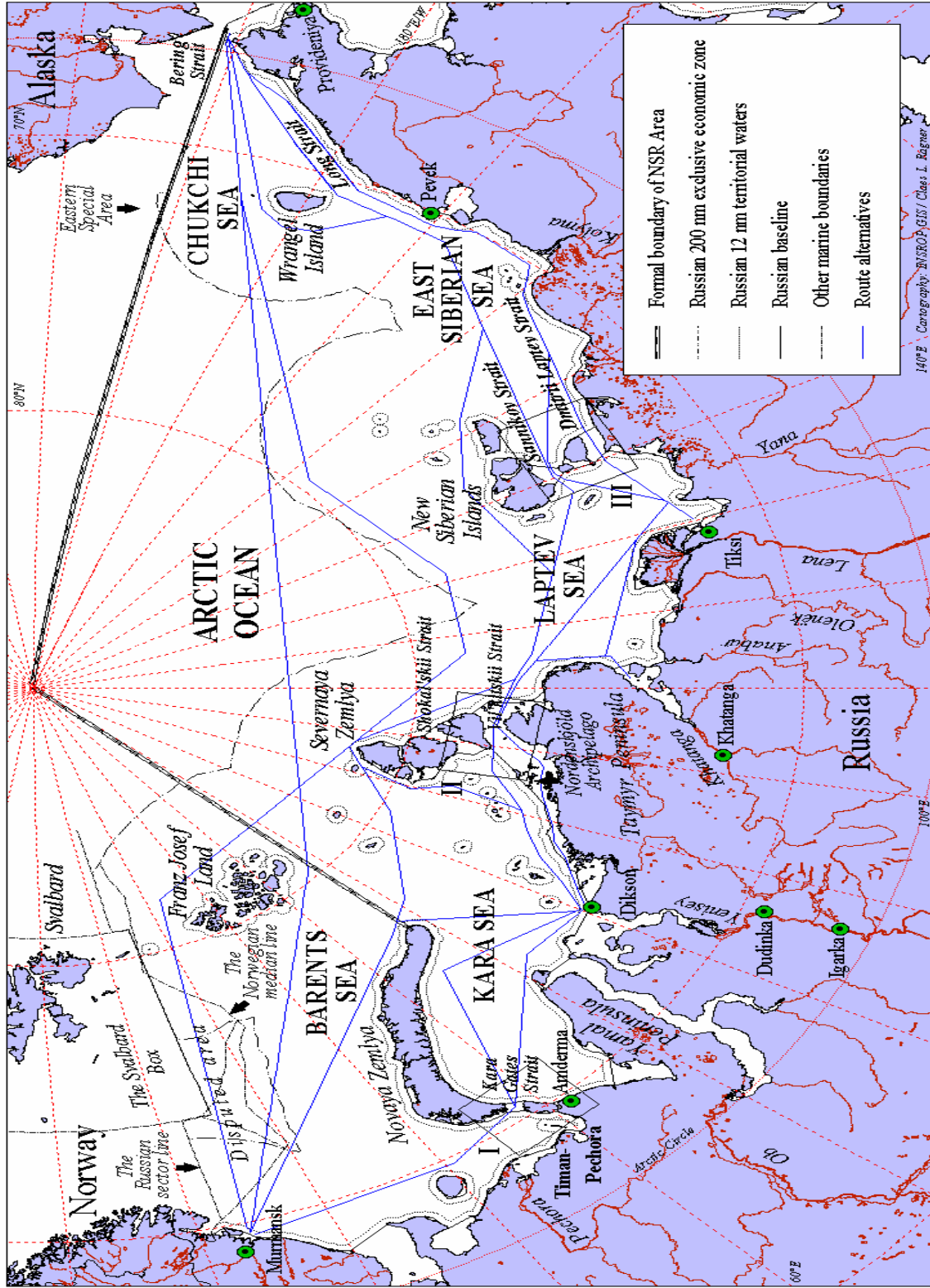
Article 234
Ice-covered areas

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.

Despite significant differences in the practice of the three main actors – Canada, the Russian Federation and the USA – there are certain elements of consistency in their common interpretation of existing law and their behaviour.² These elements seem to have set in motion a process of formation of a specific customary international law with respect to the passage of vessels, including state vessels, through the Arctic area in general and its international straits in particular. This means that Russia enjoys substantial support from the two other large Arctic littoral states, the USA and Canada, for its legal regime regulating Arctic navigation. Norway and Denmark/Greenland have carried out little state practice in this regard. The study of state practice regarding passage through the NSR nevertheless demonstrates that, given the strategically sensitive geographical situation of the region, there is a continuous risk of disputes, and that practical solutions may be needed to prevent and resolve disputes.

One potential problem area may relate to an extended geographical scope. The Barents Sea is the westernmost of the Arctic seas north of Russia, bordered to the west, north and east by Svalbard, Bear, Franz Josef, Novaya Zemlya, and Vaygach Islands, and to the south by the Norwegian and Russian mainland. The area between Kolguev Island and Novaya Zemlya is sometimes called the Pechora Sea, but is considered part of the Barents Sea. Average depth of the Barents Sea is approximately 200m.

Map 1: The Northern Sea Route



Technically – though NSRA Director A. Gorshkovsky has recently claimed otherwise,³ Russia has not considered the Barents Seas as constituting a part of the strict NSR legal regime. Under Article 1.2. of the Rules of Navigation – Regulations for Navigation on the Seaways of the Northern Sea Route (1990 Rules), the entrance to the NSR is maintained to be the western entrances of the Novaya Zemlya straits or to the north of Novaya Zemlya, Mys Zhelaniya, and the Bering Strait.

Disputed areas. The primary problem concerning extension of the Russian Arctic legal regime westward into the Barents Sea relates to the unresolved maritime boundary dispute between Norway and Russia.⁴ This concerns both the boundary to adjacent EEZs of Norway and Russia as well as adjacent continental shelves, which have been agreed upon to run concurrently. The Norwegian median-line claim lies roughly 400 km. northwest of Kolguyev Island in the southeastern Barents Sea, while the Russian claim lies further west, running north following sectors and the Svalbard box.⁵ In-between there is an area of some 155,000 square km.

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

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

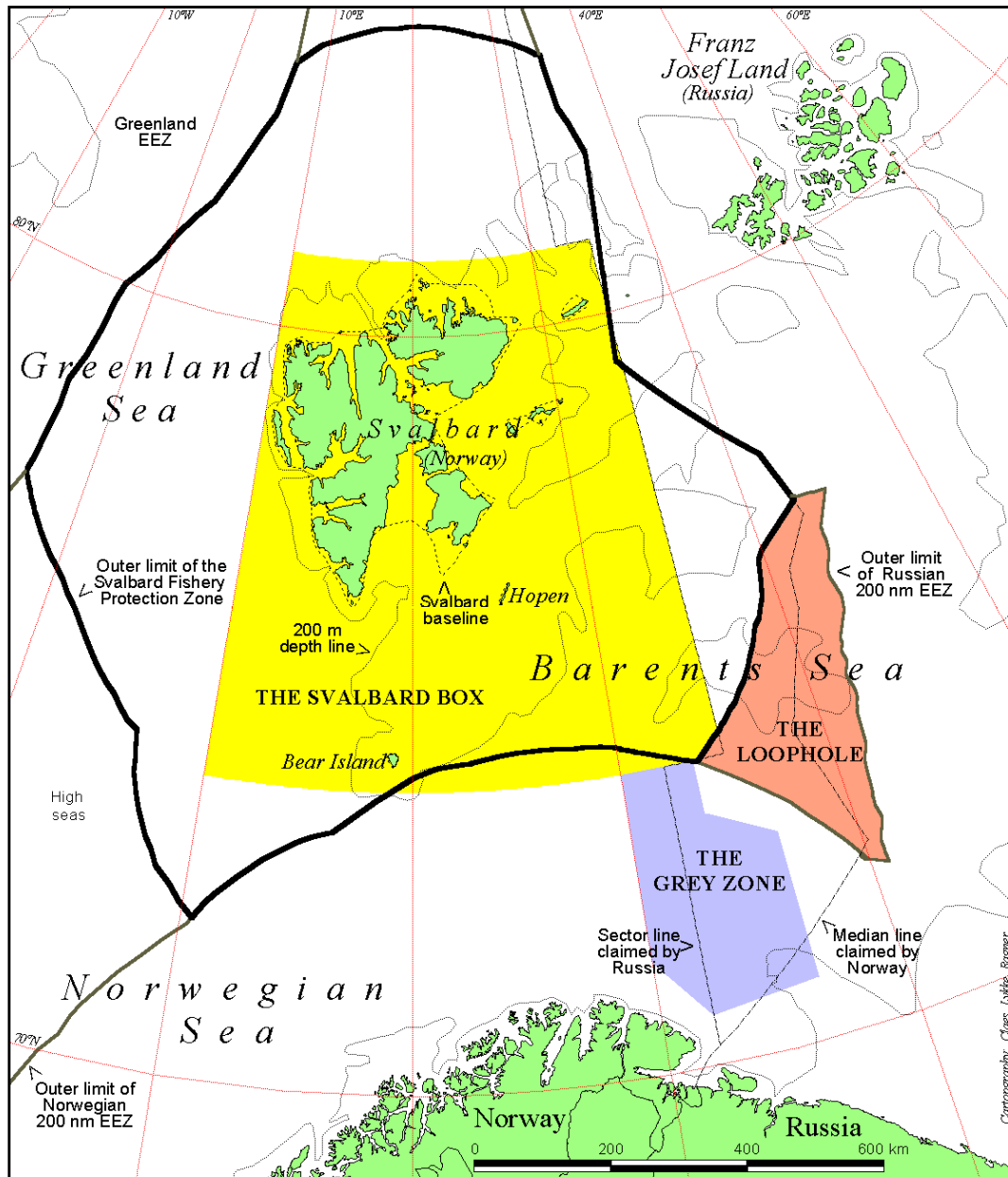
40°E. In some years the extreme southward ice limit may approach the western part of the Murmansk coast as close as 80 nm. (nautical miles).

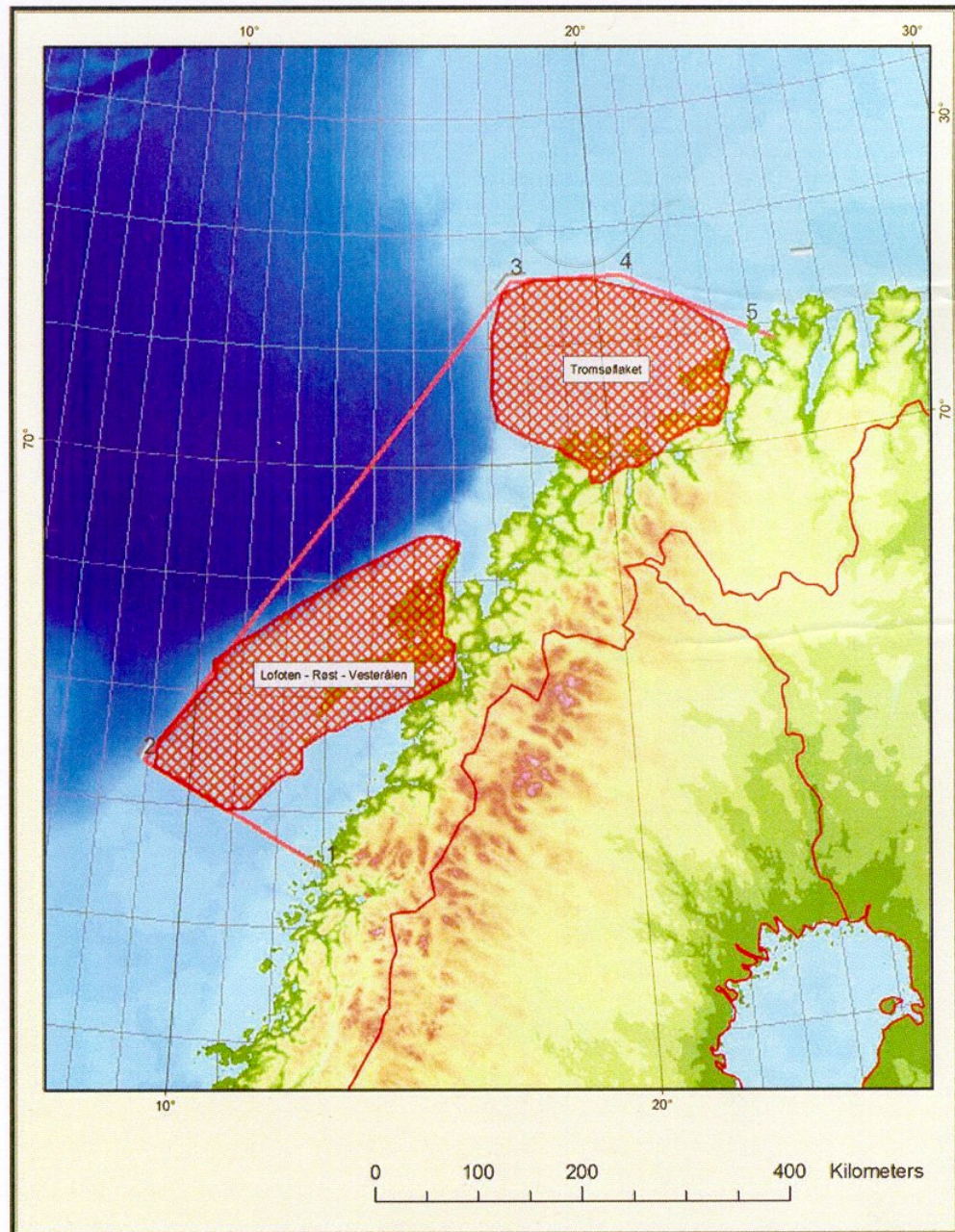
The most favourable month in this respect is September. The mean ice limit then moves northeast from the southeastern coast of Svalbard and intersects 40°E at about 79°30'N, moving east-southeastward to a position about 40 nm. north of Cape Zhelaniya. Navigation to the Franz Josef islands is normally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

Ice movements of the Barents Sea are heavily influenced by winds and sea currents. In the period from February to April, strong southwesterly winds drive the ice in a northeasterly direction, usually making the southern Barents Sea ice-free by May–June. However, ice accumulates on the coast, in the straits linking the Barents and Kara Seas and in shoal waters. Even in early July, ice may be found both north and south of Kolguev Island. It has usually disappeared by mid-July, but may remain in the Gulf of Pechora until August, sometimes affecting the southern straits. Thus, while east of Novaya Zemlya Russia enjoys substantial support for its Arctic legal regime, in the Barents Sea it does not, as long as there is no definite western boundary to either the Russian Arctic regime or the Russian EEZ. Issues may also arise concerning whether the extent of ice cover in the Barents Sea is sufficient for inclusion under Article 234. Practice plays an important role here, and the chances are it may be included – especially if the Russian requirements are carried out within the temporal confines of ice conditions and severe weather, and within the IMO ‘Guidelines’, as noted by Director A. Gorshkovsky. It would be absurd to require a change of ice-strengthened vessels for the Barents Sea, especially in ice-covered waters, due to theoretical considerations of degree of ice coverage. It is doubtful this will take place, especially given the economic considerations present for Russia and Western states governing oil and LNG transport.

Fee practice. Related to ARCOP and this initial phase of harmonisation under GATS/EU requirements for treatment-no-less favourable and equal competition, there may be a problem concerning ‘fees for services rendered’. As set forth in Article 8.4. of the 1990 Rules, there may be questionable compliance with the requirement of non-discrimination. This requires vessels navigating the NSR to pay for services rendered by the Marine Operation Headquarters and the Northern Sea Route Administration (NSRA) in accordance with the adopted rates. In practice it seems improbable that the current Russian fee rate, \$3.33–\$73.02 per ton depending upon cargo, is required of Russian vessels.⁶ The fees, if justified under Article 234, must apply to all vessels, and the likely Russian practice on this point is contrary. There may exist other special Russian domestic requirements as well.

Map 2: Delimitation Issues in the Barents Sea – Svalbard Zone



Map 2a

Area proposed designated as PSSA in northern Norwegian Sea and the Barents Sea, indicated by a red line. Areas given in red hachure are of high environmental vulnerability. Sectors indicated in grey are suggested Traffic Separation Schemes (TSS). From Figure 10.1, Det Norske Veritas, *Report No. 2002-1621*, p. 112. All distances are given in kilometres (km). 1 nm. equals 1.852 km. Thus, 100 km on the chart equals approximately 54 nm.

2.2 Particularly Sensitive Sea Areas and Convention on Biological Diversity

Another legal issue relates to the special environmental measures taken by Norway in the Norwegian Barents Sea. In April 2003, the Norwegian government announced that it was engaged in a process to obtain sections of the Barents Sea designated a PSSA,⁷ although controversy within the government reportedly exists.⁸ This was in response to the increased oil and gas traffic following developments in Northwest Russia: fisheries and the environment are important interests in the Barents Sea and along the North Norwegian coast.⁹

Basically Norway's plans for the Barents Sea appear to include the utilisation of measures from several traditional regimes, independent of a PSSA, or perhaps in conjunction with one.¹⁰ Faced with the increased possibility of a rapid increase of tankers carrying Russian oil to Western markets, Norway is considering measures for the Barents Sea under international law of the sea, to include:

- extended limit of territorial sea (20 nm. is possible);
- vessel traffic service (VTS);
- traffic separation schemes (TSS), including position of traffic separation scheme, automatic identification system (AIS) including distribution and coverage through stations;¹¹
- tow-vessels at strategic locations;
- electronic chart display and information system (ECDIS);
- implementation of routing regime;
- contingency management and planning regime, including environmental risk analysis and oil-spill contingency assessment;
- places of refuge and beaching;
- measures related to loading and unloading of cargo;
- control of emissions to air;
- management of oily wastes, sewage and garbage, including receiving facilities;
- ballast-water management.

A Barents Sea management plan from Norway is expected in 2006, including 'environmental zones. However, to date these have not been defined, and apparently the European Commission (EC) is developing a ecosystem-based management plan including a strategy proposal to be sent to and developed under the Arctic Council.¹² The recent White Paper, *Muligheter og utfordringer i nord (Possibilities and Challenges in the North*, St.meld.nr. 30 [2004–2005]), released by the Norwegian Foreign Ministry, is not very extensive, only 39 pages. It states, in 3.4. 'Protection of the marine environment in the north':

The Government has initiated work with the view to establish a national network of marine protected areas, areas protected under various Norwegian laws. The plans are described more particularly in the Government White Paper, *Clean and rich seas*. (St.meld.nr. 12 [2001–2002], *Rent og rikt hav*). In the Biodiversity Committee's report (NOU 2004:28) it is recommended that the legal basis for the sector overlapping protection in the sea be expanded to encompass the Norwegian economic zone out to 200 nm. from the baselines.

In relation to increased marine transport in North Norway, a question is raised whether Norwegian authorities through the IMO should establish parts of the coastal area outside North Norway as a particularly sensitive sea area (PSSA). This is a proposal that is being evaluated between the affected departments, among other things in connection with the drafting of a comprehensive management plan for the Barents Sea. The central goal for the Government is to establish, as soon as possible, concrete measures that reduce the probability of accidents in the area. A central measure can be sea-lanes outside the territorial boundary in the Norwegian economic zone. Establishment of such lanes is dependent upon recognition in the IMO. This can take place through an individual application or through a combined application with a PSSA application. The Government plans to send a proposal to the IMO governing sea-lanes outside the territorial sea for the section Vardø–Røst. The most strategic procedure in relation to the IMO will be evaluated.¹³

PSSAs are currently 'politically trendy'. A PSSA is defined as 'an area that needs special protection through action by the IMO because of its significance for recognised ecological, socio-economic or scientific reasons and which may be vulnerable to damage by international shipping activities'.¹⁴ Intended areas of protection include such valuable eco-systems as coral reefs, intertidal wetlands and important marine and coastal habitats.¹⁵ Migrating seabirds, dolphins, seals or other marine species as well as feeding grounds for valuable fish stocks are intended to fall within the scope of protection.¹⁶ If any of the above are positioned close to shipping lanes; if they suffer from bad weather or are characterised by narrow passages, shallow depths, submerged reefs, or areas otherwise sensitive to shipping impacts, then these are also intended to fall within the scope of protection.¹⁷ By using a PSSA, IMO member states can gain international recognition of the significance and vulnerability of special areas of their marine environment and obtain IMO approval for special protective measures to counter area-specific threats. The growing size, speed and numbers of vessels navigating national and international waters increase the potential for harm to marine eco-systems. Under PSSAs, vessel-source damage to marine areas which is covered includes

- accidental spills of oil chemicals and other harmful materials;
- operational discharges of garbage, sewage, plastics, oil, chemical residues, air pollutants and ballast water containing alien species;
- physical impacts, such as vessel strikes of marine animals, grounding, anchor damage, shoreline erosion and noise.¹⁸

Up until the late 1990s PSSAs were seldom utilised.¹⁹ Then in 1998 Cuba's Sabana-Camaguey Archipelago was designated, and two PSSAs were formally designated in March 2002. These were marine areas around the Florida Keys and the waters surrounding Colombia's Malpelo Island. The Wadden Sea has recently been PSSA-designated, the first in European waters; a sixth and seventh area off the coast of Peru, Paracas National Reserve, was designated in 2003, and European Waters in 2004.²⁰ Discussions in the IMO surrounding the Baltic Sea, the Canary Islands and the Galapagos Islands have been noted, with complaints raised by several states including Russia and several shipping organisations. 'Associated protective measures' in PSSAs already designated include areas to be avoided, areas for compulsory pilotage, prohibition of discharges including ballast water, prohibition of dumping of most other wastes, installation of receiving facilities, no anchoring, and enhancement of surveillance and monitoring capacities in connection with illegal discharges.

In November 2001 the IMO adopted its revised 2001 Guidelines.²¹ This came largely in response to a series of devastating oil-tanker accidents – involving the *Patmos* in 1985, the *Haven* in 1991, the *Evoikos* in 1997, the *Erika* in 1999, and the *Prestige* in 2002 – where it appeared that existing legal regimes, including MARPOL 73/78,²² were functioning less than optionally.²³ Additionally, new oil pipelines planned from Eastern Europe and Russia to ports in the Barents, the Baltic and the Mediterranean Seas would involve a corresponding increase in oil-tanker traffic in these areas. There has also been a rise in the number of marine *nuclear cargo transports*, over which coastal states have felt they had little control.²⁴ The 2001 Guidelines replaced the 1991 Guidelines for the Designation of Special Areas and Identification of Particularly Sensitive Sea Areas.²⁵ They chiefly update the criteria and clarify the procedures, evidentiary requirements and legal basis for identification and designation of a PSSA. This may promote an increase in the quality and number of PSSA designations. The 2001 Guidelines provide better opportunities for states to protect threatened eco-systems and vulnerable species from shipping impacts, as well as representing a stimulus to minimise the overall impact of shipping on the global marine environment.

An increase of such IMO designations would probably stimulate demand for electronic charts, vessel traffic services, automatic vessel identification systems and other technologies to minimise the impact of shipping on sensitive marine areas and species. Moreover, mariners may become more conscious of taking special care when transiting an area. A coastal state may take a comprehensive approach to the regulation of shipping activities, and a combination of domestic and IMO measures can provide ecosystem-wide protection to areas that may extend beyond the 12-mile territorial sea. Finally, the international attention achieved through PSSA designation can stimulate national and local action to improve the management of other human activities and threats.²⁶

However, there is controversy within the IMO. This relates not to the PSSA regime itself, but to its permissible scope. At IMO's March 2004 session, where the Baltic Sea, the Canary Islands and the Galapagos Islands were under discussion, objections were raised by several states,

among them Russia, Liberia and Panama, and various organisations associated with shipping. Their complaints related to the vagueness of the scope of PSSAs, the extent of ‘associated protective measures’, and the fact that ‘associated protective measures’ may be adopted following the designation of a PSSA. These should probably be considered as complaints more than formal protests. However, related to the Baltic Sea, if a coastal state in the affected region is opposed, then good reasons may exist for not permitting the designation of a PSSA. The EC and the USA are generally positive to PSSAs, though in the Baltic Sea various prominent US experts appear to agree with the Russian view.²⁷

Even newer guidelines are in the offing from IMO, and continued to be under discussion, with both Russia and the USA submitting proposals.²⁸ State parties were to make comments and continue discussions on new guidelines at the MEPC meeting in July 2005. The US delegation appears to play a central role, and it is interested in finding consensus for formal new guidelines *based chiefly upon the US proposal* possibly constructed around the measures taken with respect to the Florida Keys, and submitting a draft to the IMO Assembly shortly thereafter.²⁹ Failing this, the next chance for IMO approval is in 2007. Briefly, the USA-proposed amendments are forwarded with the stated objective to strengthen and clarify the 2001 Guidelines. This is stated to be chiefly through clarification of the criteria for designation, the need for applicants to establish that the identified vulnerability of an area will be addressed by the ‘associated protective measures’ to prevent reduce or eliminate that vulnerability, and the necessity of establishing a legal basis for the ‘associated protective measures’. The sensitive aspects must be present throughout the area, although not the same throughout; and at least one ‘associated protective measure’ must be decided prior to designation, as must various procedural issues, including elimination of ‘designation in principle’ and elimination of the review form being used by the technical group considering proposals for designating PSSAs.

The Russian proposal for amendment appears also to be also forwarded with the objective of establishing clear criteria and procedures for assessment and review of new applications. Russia expresses its support of the shipping industry; it is opposed to the designation and proliferation of large geographical areas, and emphasises respect for state sovereignty.³⁰ Ecological criteria are held to be the highest priority for designation of PSSA areas for protection of the marine environment. In the Russian view, PSSAs can be designated only in exceptional cases in which designation can be shown to be the only tool to provide adequate protection. The concept would apply only in realistically restricted geographical areas where ‘rare, disappearing, etc. ecological systems are concentrated’.³¹ For areas covered by other protective regimes, proof must be supplied, showing that adequate protection cannot be provided. Any proposal to designate a PSSA in an entirely closed or semi-closed sea area should be made on the basis of consensus of the coastal states. Relevant ‘associated protective measures’ in respect of a PSSA must cover the entire PSSA, uniformly and completely. Proper applications must concurrently contain a proposal for at least one ‘associated protective measure’. Upon modification of ‘associated protective measures’ or the PSSA itself, parties must submit a relevant application for consideration by the IMO,

similar to the original application that was submitted for the existing PSSA.

What is meant by the above may be as follows. The Convention on Biological Diversity of 5 June 1992 (CBD)³² governs various biodiversity aspects of the Barents Sea eco-system. It remains to be seen how much implementation of the Convention BD and the Jakarta Mandate on Marine and Coastal Biological Diversity can achieve in practice. The objectives certainly point in the right direction under the five key thematic issues – including the application of appropriate policy instruments and strategies for effective implementation of integrated marine and coastal area management, undertaking direct action to protect the marine environment, and developing guidelines. Information is to be gathered, and provided parties on biological diversity, and sustainable use and ecosystem approaches promoted. Areas beyond the limits of national jurisdiction are also included. Marine and coastal protected areas are to be established, strengthened and managed effectively, including proper monitoring and research. Collaboration, co-operation and harmonisation of initiatives are to be undertaken.

However, the key to international regimes lies in *enforcement*. Here the Barents Sea may experience problems with respect to the CBD. Parties are required under Articles 3 and 4 to generally ensure that activities and processes including shipping under their flags do not cause environmental damage to other states, or to areas beyond national jurisdiction. According to Article 6, parties must develop strategies. However, due to the use of the phrases *as far as possible* and *as appropriate*, used in the centrally relevant articles outlined above containing specific measures, little appears genuinely mandatory, particularly *for parties who may be exercising questionable jurisdictional control*. Non-parties are definitely not bound. In fact it appears possible that the Jakarta Mandate could be argued by such questionable parties to be fulfilling their CBD obligations under this phrase. Viewed in terms of oil and gas tankers, this could include loopholes for flag states promoting (under Article 8) environmentally sound and sustainable development, preventing the introduction of, control or eradication of alien species, and ensuring (under Article 10) sustainable use of components of biological diversity. Further, it might be argued that under this formulation, a loophole exists for flag states requiring environmental impact assessment of proposed projects affecting biological diversity, promoting reciprocal notification, information exchange and consultation on such activities, and examining issues of liability and redress, including restoration and compensation for damage to biological diversity. An interesting issue may involve financial support and incentives to achieve the objectives of the CBD between a rich coastal state such as Norway, and arguably poorer states including Russia and various flag-of-convenience states. They may be able to argue for Norwegian assistance in achieving the above CBD protective measures.

Due to the vagueness of the treaty, whereby not only non-parties and flags of convenience but also other parties may comply less than optimally, much would probably depend upon effective enforcement of the central vessel-source marine pollution treaties, MARPOL 73/78, and SOLAS, the International Convention for the Safety of Life at Sea,³³

associated with LOSC Articles 211, 218 and 220. However, the former has experienced problems regarding flag-state enforcement. SOLAS allows for the relatively quick establishment, accepted by the IMO, of sea-lanes within a state's EEZ – and this might be a way to go, whether in conjunction with or independent of a PSSA. A routing system may encompass mandatory sea-lanes, traffic separation systems and sailing rules in and out of a definite zone, recommended sea-lanes and deepwater lanes as well as precautionary areas to be navigated with special care and through which recommended sea-lanes can be established. Areas to be avoided (ATBA) can also be established, where all vessel traffic or a certain type of vessels are forbidden to sail, because of a particular danger or a particularly sensitive ecological or environmental condition. A routing system can consist of several different of the above in combination. Mandatory or recommended vessel reporting systems are also allowed, subject to application to the IMO. As part of this, an automatic vessel identification (AIS) system of oil tankers is allowed, making reporting and a reporting scheme superfluous. The identification systems should make enforcement easier.

Enforcement problems and the vagueness of the CBD would undoubtedly count in favour of a coastal state like Norway establishing a PSSA, under the proper conditions, since all vessels could be excluded from specific areas. Indeed, PSSA designation may be the only way of protecting biodiversity. The conditions include reasonableness of area size and reasonable and definite 'associated protective measures', as well as that the biological and cultural sensitivities and scientific interests should fall sufficiently within the criteria outlined in IMO guidelines. This is especially so since controversy has continued in the IMO, in Russia and in Norway. Despite complaints regarding the Baltic Sea, Russia itself was early in establishing two areas to be avoided – 'ATBAs'³⁴ – in the Okhotsk Sea, one as early as 1967. The first governs the waters off Cape Terpeniya, Sakhalin,³⁵ as well as an area around the Tjulenia Island, south of Cape Terpeniya.³⁶ Ten years later, the Kuril Strait and Proliv Bussol became a PSSA *avant la lettre*.³⁷ An official from the legal office of the Russian Foreign Ministry noted that Russia is not opposed to specially protected marine areas (SPMAs) including PSSAs, as long as they are *specifically defined* and *reasonably sized geographically* and include corresponding *specific 'associated protective measures'* which are to be established.³⁸ The two *avant la lettre* PSSAs³⁹ established by Russia in the Okhotsk Sea thus are not viewed as contradictory, since they are specifically defined with correspondingly specific 'associated protective measures'. Norway could thus if necessary use an estoppel argument (reciprocity) against Russia with regard to a PSSA in the Barents Sea. Through no official statement from the US State Department has yet been issued, Washington appears somewhat reserved, since all the protective measures can be achieved without the use of a PSSA.⁴⁰

Examination of specific 'associated protective measures' carried out in the other designated PSSAs is interesting, particularly those that have been established for some time in Australia, Cuba and the USA. These already have support under international law, regardless of the guidelines. '*Associated protective measures' in terms of the 10 PSSAs already designated include areas to be avoided, areas for compulsory pilotage, pro-*

hibition of discharges including ballast water, prohibition of dumping of most other wastes, installation of receiving facilities, no anchoring, and enhancement of surveillance and monitoring capacities for illegal discharges. In summer 2004, the number of marine zones within Australia's Great Barrier Reef PSSA was increased from six to nine, with characteristic activities differentiated from thirteen to sixteen. Developed and established PSSAs have extensive management plans for practical implementation of the 'associated protective measures'. For example, the Florida Keys – which appear to have eleven differentiated areas – had a 365-page management plan, renewed every five years. Should a PSSA in the Barents Sea be designated, the 'associated protective measures' and their implementation by Norway might be similar to or perhaps slightly less strict than those taken in the Great Barrier Reef and the Florida Keys (and possibly Cuba's Sabana-Camagüey Archipelago) in order to encounter less resistance from adversarial interests such as shipping.

Under this practice, problems with a Barents Sea PSSA as outlined by Det Norske Veritas (DNV) north of Finnmark down to Lofoten about 50 nm. out to sea may include discrimination issues, both against Russian oil and gas tankers on the way to Europe and possibly Norwegian fishing vessels. All vessels in international shipping are subject to the measures taken by Norway. If Russia becomes a member of the World Trade Organisation (WTO) – which may happen early in 2006 – and oil is freighted solely on Russian tankers, it may be questioned whether these are discriminated under General Agreement in Trade in Services (GATS) by being required to sail 50 nm. to sea on the way to Europe?⁴¹ Although not a problem currently since Russia is only one of 15 flags, albeit the fourth largest, the effect of reflagging Russian-owned vessels to a new Russian international register will have seems uncertain. Will this cause the tankers navigating the Barents Sea to be predominantly Russian? One Russian diplomat indicates that the reasons behind this relate to expediting taxation as well as facilitating the tracking of tanker ownership in case of accidents for liability purposes.⁴² Fishing vessels – though not technically regulated under the PSSA regime which governs international shipping – have in practice been strictly regulated or excluded from approximately 67% of the Australian Great Barrier Reef Marine Park-PSSA, and roughly 50% of large trawlers from the Florida Keys Sanctuary Area-PSSA.⁴³ What is to guarantee that Norway or other States may not establish a coincident 'Marine Park'-PSSA, containing 10 marine zones with 10 differentiated activities? A legal representative for trawler organisations in particular may with reason be concerned, and Norwegian fishery interests generally fear unnecessary regulation of fisheries.⁴⁴ Issues surrounding the Convention on Ballast Water need to be addressed as well, for tankers returning to Murmansk and loading ballast water with possible alien species. Parties undertake to prevent, minimize and ultimately eliminate the transfer of harmful aquatic organisms and pathogens through the control and management of ships' ballast water and sediments.

Also other policy possibilities for the Barents Region – include non-traditional bilateral co-operative agreements between Norway and Russia – are outlined in the report 'Mot Nord'⁴⁵ presented by a panel of experts, as well as the recent Government White Paper, St.meld.nr.30.⁴⁶ Throughout the Cold War era, Norway was reluctant to enter into such agreements

with the more powerful Soviet Union. Good relations with today's Russia must weigh heavily on the Norwegian government. In fact, the latter may well decide not to proceed with PSSA designation. Reasons for this could include the balance Norway is attempting to achieve in the Barents Sea; the legal controversy at all levels regarding PSSA designation; boundary delimitation negotiations with Russia including possible US State Department participation;⁴⁷ security concerns with the US, the EU and NATO; the influence Norwegian shipping oil and gas, and fishing interests carry; the weight good relations with Russia carries; the Globus II radar at Vardø; possible discrimination of Russian tankers – if solely these are used in the initial phases of oil export – sailing 50 nm. to sea; the sensitivity bilateralism with Russia carries with it; and the present controversy over Saami property rights in Finnmark under International Labour Organisation Convention 169.⁴⁸ Oslo may decide to achieve much the same results by means of quicker and less controversial measures.

Norway's plans for the Barents Sea may include the application of measures from several traditional regimes independent of a PSSA, or perhaps in conjunction with this.⁴⁹ The Barents Sea management plan is expected in 2006. These measures certainly seem to be a step in the right direction, with or without the designation of a PSSA.

2.3 EU Law of the Sea – Scope – the Barents Sea

2.3.1 Liability for Vessel-Source Oil Pollution Damage – Scope for Environmental Compensation – the Barents Sea

The civil liability regime for damage arising from vessel-source oil pollution⁵⁰ was the first international liability regime to broaden compensation obligations beyond personal injury and property damage, to encompass environmental harm as well.⁵¹ However, practical progress has been rather sluggish under the present regime, based upon the 1992 Protocols to the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage⁵² (Fund Convention). Since the two littoral states to the Barents Sea – Norway and the Russian Federation – have ratified both these instruments, developments under this regime have high relevance. This is especially so, given the prospects of one Russian oil tanker per week by 2005 to 14–21 tankers per week by 2010 expected along the Norwegian coast,⁵³ as well as the spectre of large tanker accidents like those that have occurred off the coasts of Europe in recent years.

Definitions have been a difficulty under the civil liability regime for oil pollution. As incorporated into the 1992 CLC Protocol, pollution damage is defined as:

- (a) Loss of damage caused outside the vessel by contamination resulting from the escape of discharge from the vessel, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than losses of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.

The costs of preventative measures and further loss or damage caused by preventive measures.⁵⁴

This provision was based upon experience gained under the Fund Convention and was designed to limit environmental claims against ship-owners under the 1992 CLC Protocol and oil receivers under the 1992 Fund Protocol. In practice, national courts in parties to the 1992 Protocols would not be able to find for environmental damage claims in excess of loss of profit and reasonable measures of reinstatement. Claims for environmental damage per se would not be allowed.⁵⁵ ‘Losses of profit’ was agreed to encompass both consequential loss claims and loss of earnings by the owner/users of property contaminated by oil, but also included claims for pure economic loss. This also covers loss of earnings suffered by parties whose actual property has not been damaged, such as coastal hoteliers and fishery businesses. While recognising environmental compensation, the term ‘reasonable measure of reinstatement’ resulted in disputes concerning its application to ecological damage, including issues related to ‘quantification of damage’, the ‘state as an environmental trustee’, and ‘ecological restoration’.

The problem of ‘quantification of damage’ has revolved around a 1980 Resolution No. 3, adopted by the Fund Assembly under which:

the assessment of compensation to be paid by the International Oil Pollution Compensation Fund is not to be made on the basis of an abstract quantification of damage in accordance with theoretical models.⁵⁶

Not recognised by the IOPC Funds have been claims not related to quantifiable economic loss. These include Italy’s claims concerning the *Patmos* spillage in 1985 and the *Haven* spillage in 1991, for respectively 5,000 million lire and 100,000 million lire; and Indonesia’s \$3.2 million claim for the *Evoikos* spillage in 1997. This presents difficulties:

the lack of clear damage assessment standards and compensable value characteristics within the international regime has presented a significant obstacle to the uniform application of environmental compensation rules.⁵⁷

By contrast, the US OPA 1990⁵⁸ permits abstract quantification of non-market environmental damage in accordance with prescribed assessment standards.

The issue concerning the ‘state as guardian of collective interests’ was highlighted in the *Patmos* claim. The Italian courts stated, in accordance with CLC 1969, that the state as a trustee for national or local public bodies has a right of action beyond economic loss. The IOPC Fund has recognised public bodies as legitimate claimants; however, it has not accepted trusteeship claims divorced from quantifiable elements of economic damage. Other cases have included the French claim arising from the 1999 *Erika* incident, when the coast of Brittany was contaminated by heavy fuel oil. France recommended incorporating into the IOPC Fund 1992 Claims Manual a concept of compensation for environmental damage as a violation of state rights over its collective marine assets – but failed, despite the support provided by OPA 1990, which includes owners

and managers in addition to trustees. The claim was judged to fall outside the scope of pollution damage as defined in the 1992 CLC Protocol. The Fund continues to hold that theoretical formulations of public or collective environmental damage would open up liability determination to arbitrary decisions in national courts, thereby possibly hindering private victims in their claims for compensation.

‘Ecological restoration’ was argued by France to be inherent in the international and national developments in environmental liability that demonstrate increasing acceptance of ecological rehabilitation norms. It was argued to be implicit in LOSC Article 235(3) requiring states to assure ‘prompt and adequate compensation in respect of all damage caused by pollution of the marine environment’, as well as appearing in constitutional and legal obligations adopted by Brazil, France, Italy, Spain, the USA and other states. The OPA 1990 also provides support, by allowing compensation restoration for the loss of natural resources and services – and, in allowing the acquisition of equivalent habitats away from the damage site, this goes further in environmental reinstatement than the CLC 1992 Protocol. France, Italy and the EC called for the liability conventions to be amended to allow member states to permit claims for introducing ‘identical’ or ‘equivalent’ ecological attributes in an adjacent marine area, in cases where reinstatement at the damage site might be physically or economically infeasible. To this, the International Tanker Owners Pollution Federation Ltd (ITOPF) argued that the liability conventions were not designed to provide full compensation for environmental damage, and that there existed an ecological risk of introducing new species or engineering new habitat areas, thus upsetting natural recovery processes following most oil spills which degrade post-cleanup residual oil.⁵⁹ In October 2001, a more moderate recommendation was put forward by Australia, Canada, Sweden and the UK, to liberalise the criteria for admissibility of reinstatement costs to include recovery efforts centred on the damaged area. However, also this was not approved by the Fund Assembly, and was not voted upon. Opposition was due chiefly to the positions taken by Japan and Korea, who fear a plethora of speculative environmental claims, and who contribute respectively 21% and 10% to oil-pollution liability claims through payments of their oil receivers. On the other hand, since a majority of parties supported the recommendation, these definitional issues have continued to be politically charged.

The 1999 *Erika* incident caused considerable turbulence in the oil-pollution liability and compensation regime, as the first tanker pollution incident in which the EC assumed a strong role in proposing changes in the regime. These proposals revolve around the limitation rights, channeling of liability and a third-tier fund. Some believe these may pose a serious threat to the existence of the liability and compensation system.⁶⁰ Regarding the first, the EC has argued that limitation rights are too protective and should be broken only in cases of ‘gross negligence’. This finds support from OPA 1990, which marks a significant move away from the limits of liability provided for in the 1992 CLC Protocol.⁶¹ Counter-arguments include that the right of limitations would be rendered very vulnerable; that determining the existence of fault or privity often delays the compensation process, and with more serious consequences; and that differing interpretation of ‘actual fault or privity’ by national

courts would lead to disparities in compensation. It is also argued the 1992 limits under the 1992 Protocols are planned raised by 50.37% by November 2003, unless more than three-fourths of the state parties submit written objections. Regarding the second issue, the EC has argued that by channelling, liability is imposed in a manner that may not adequately reflect the responsibilities of the parties. One counter-argument to this is that holding multiple parties responsible encourages litigation, thus slowing down the compensation process and wasting money on transaction costs. This would damage the negotiated balance under the 1992 Protocols, which includes the prompt and certain compensation to claimants, set against a financially manageable regime with predictable insurance requirements for liability parties. The current level of coverage of \$1 billion, it is argued, is possible only because of the reinsurance given to underwriters by the limitation rights. If the \$1 billion were called upon, there is a real risk it would cease to be available, even at increased cost. Concerning the third issue above, it is argued that a European third-tier fund paid for by cargo owners would upset the balance achieved by the 1992 Protocols between shipowners and oil companies, consequently undermining the regime. For more than the past 10 years, financial sharing has been approximately 50/50 between oil companies and shipowners, with the former rarely involved but paying substantial contributions in major spills through the IOPC fund. Importantly, if forced to contribute to a new purely European oil company-financed fund, European oil companies could put pressure on national governments to move out of the 1992 Fund Protocol, or even move themselves out of European countries, or undertake re-structuring to allow smaller companies to import smaller amounts below the threshold for fund contributions.⁶²

The geographical scope of the liability regime has been expanded from that under the original treaties. As incorporated in the 1992 CLC Protocol and the 1992 Fund Protocol, the geographical scope is defined as applying exclusively:

- (a) to pollution damage caused;
 - (i) in the territory, including the territorial sea, of a Contracting State, and
 - (ii) in the exclusive economic zone of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles (nm.) from the baselines from which the breadth of the territorial sea is measured;
- (b) to preventive measures, wherever taken, to prevent or minimise such damage.⁶³

This expansion beyond the territorial sea, generally consistent with the scope under OPA 1990, may be due to pressures exerted by developing countries against the oil-liability regime, acknowledging their demands to exert greater control over coastal economic resources, especially fish stocks. The expansion follows LOSC norms establishing the rights of coastal states in their EEZs for exploring and exploiting, conserving and

managing natural resources in the waters superjacent to the sea-bed, the sea-bed, and its subsoil, and with regard to other activities for economic exploitation and exploration; and protection and preservation of the marine environment.

The Funds have in practice acknowledged the necessity to meet more demanding clean-up standards in areas associated with important wildlife values and/or tourism. From this, one expert believes:

(W)hile oil spill damage in ecologically sensitive PSSA's has so far not been an issue for the 1992 Fund Executive Committee...the committee is likely to take a more generous view of reasonableness in order to meet stringent environmental reinstatement costs. Were that to be the case the preventive environmental rationale of marine protected areas would at least prompt a sympathetic realignment in the economic compensation system for oil pollution damage, although the high biodiversity value of such areas is likely to expose more acutely the absence of recompense for ecosystem damage per se.⁶⁴

On the high seas, the common areas problem for the oil-pollution liability regime lies in the absence of incentives for actors to mitigate damage not affecting state rights or interests. Under the IOPC Fund 1992 Claims Manual, responses on the high seas to an oil spill qualify for compensation only if they succeed in preventing or reducing pollution damage in the territorial sea or EEZ of a member state. Normally, natural dispersion is relied upon in such incidents; and any adverse consequences would be raised through the national claims systems. One example would be purely economic loss incurred through reduced fish catches in the EEZs of state parties. However, there probably exists a preventative need for the oil-pollution liability regime to cover harm in marine common spaces.

Under the LOSC and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,⁶⁵ states have a right to intervention on the high seas in the case of maritime casualties threatening harmful pollution, and port states have the right to take legal proceedings against vessels illegally discharging oil outside the states' maritime zones, including on the high seas. Port state control, including the Paris Memorandum of Understanding on Port State Control,⁶⁶ has established precedents for the development of transitional accountability for marine pollution, indicating situations where states can take action against polluters for non-national harm. Related to the oil-pollution liability regime, an open question remains concerning its restriction to the marine zones of coastal states.

From this outline, questions may be raised regarding application of the vessel-source oil-pollution liability regime to special regimes relevant for the Barents Sea, marine protected areas and marine common spaces. In addition, perhaps it may be said the contours of ring effects from the US OPA 1990 and EU developments surrounding liability and compensation are beginning to form for the Barents Sea. These regimes may eventually play a strong role in addition to the IMO CLC and Fund Protocols for hydrocarbon traffic in the Barents Sea. They govern the ports of vessel destination and may boost the environmental standards of vessels through entry requirements.

Importantly, related to criminal liability, the EC and the European Parliament (EP) and Canada are currently in the process of developing anti-oil pollution measures governing criminal liability. In the view of one expert, these have the potential to be even more onerous than those under the US OPA1990.⁶⁷ According to the preamble of the public Draft Directive of the European Parliament and of the Council on Ship-Source Pollution and on the Introduction of Sanctions for Infringement of Sanctions – Outcome of Informal Contacts with the European Parliament:⁶⁸

The Council agrees that *finés should not be insurable* and that the issue should be raised in *the relevant international forum*.
[emphasis added]

This has not yet been adopted, although the EC appears to be moving beyond what the IMO has been attempting to do, due to differences in implementation by states of MARPOL 73/78, particularly related to the imposition of sanctions for discharges of polluting substances. The scope has been expanded, holding not only the shipowner or master of the ship criminally liable, but also cargo owner, the classification society or other involved persons. This is applicable in all maritime zones for infringements in accordance with international law, whether committed intentionally, recklessly or through serious negligence. This provision also expands the scope traditionally permitted by LOSC Article 230, which allows for monetary penalties only for violations of national laws or applicable international law in the territorial sea and beyond, except in the case of a wilful and serious act of pollution in the former. However, this draft does not appear to cover discharges into PSSAs and other SPMAs other than those outlined in MARPOL 73/78, the Mediterranean, the Baltic, the Black Sea, the Red Sea and Gulfs area, the Gulf of Aden, the Antarctic area and Northwest European waters (further defined and specified). It would appear relevant to argue that this should govern PSSAs in areas subject to heavy oil tanker traffic, perhaps the Barents Sea. Developments surrounding this Directive and related ones, as well as parallel Canadian legislation and measures, may have ring effects in the area of civil liability and criminal liability.

2.3.2 EU–Western European Waters PSSA and Port Security – Barents Sea

Similarly in the EU, Western European Waters were designated ‘in principle’ at MEPC 49 as a PSSA. MEPC 52 agreed to the final designation of this large PSSA.⁶⁹ At the October 2004 IMO/MEPC meeting, Western European Waters were finally designated, with a new mandatory yet free vessel reporting system as an ‘associated protective measure’ under SOLAS Regulation V/11, with entry into force in June 2005.⁷⁰ NAV had approved a mandatory ship reporting system proposed by Belgium, France, Ireland, Portugal, Spain and the UK to serve as an ‘associated protective measure’ for this area. Other APMs already in place and adopted by the IMO include traffic separation schemes, deep-water routes, areas to be avoided, routing measures, mandatory ship reporting systems, and coastal vessel traffic services (VTS).⁷¹

This PSSA covers the western coasts of the United Kingdom, Ireland, Belgium, France, Spain and Portugal, from the Shetland Islands in the

North to Cape S. Vicente in the South, and the English Channel and its approaches.⁷² The sensitive areas boast a very high species diversity of both macro-fauna and flora, including seabirds. The offshore waters of Ireland contain some of the richest fishing grounds in Europe. Various specially protected areas (SPAs) already exist off the coasts of Ireland, Belgium, Spain and Portugal. Off the coasts of Belgium lie areas known for fishing, and off France there are areas known for great biodiversity and biological wealth. Spain and Portugal enjoy coastlines with areas containing many endemic species of fauna and flora. The marine and shore environments of the Belgian, French, Irish, Portuguese, Spanish and UK coasts, the English Channel and its approaches are particularly vulnerable to the risks of vessel transport. This area is one of the most internationally significant sea routes, due to the number of ships and quantities of dangerous or polluting goods transported. Twenty-five per cent of the world commercial traffic converges on the English Channel, en route to the industrial areas and harbours of northern Europe. Additionally significant cross-channel commercial traffic exists between Ireland and the UK, between Ireland, the UK and the European mainland, and North European traffic bound for Western Atlantic ports. Because of the size of the PSSA and its location and the EU coastal states, future environmental and safety measures concerning international shipping should be noted. This area will undoubtedly be of importance in defining the PSSA regime, also in relation to the Barents Sea.

Along the same lines, the International Ship and Port Facility Security Code (ISPS) as was adopted in the IMO with amendments in SOLAS to increase security measures against terrorism on board vessels and in ports.⁷³ The EU adopted Provisions 725/2004 implementing the IMO provisions, but expanding the scope and requirements for vessels and port terminals; through this, parts of domestic traffic are also encompassed. A new Directive may be adopted in 2005 that expands the scope, especially with respect to facilities handling large quantities of dangerous and polluting cargoes, and located near population centres. Norway is implementing these provisions, both for vessels and ports at a substantial cost, in order to maintain a standard with its major trade partners. These developments should be noted, particularly with respect to the growing EU legislation, as well as the US OPA 1990⁷⁴ and related legislation.

Although the European Court of Justice stated as early as in 1964 that the European Community represents a hybrid conglomerate situated somewhere between a state and an intergovernmental organisation, much controversy still affects the field of the Community's role as an actor under international law.⁷⁵ In particular, problems arise if the Community's member states accede to a multilateral convention dealing with a subject for which they subsequently transfer competence to the Community. A case in point concerns the IMO. Whereas all member states of the Community are IMO members, the European Community itself may at present neither become a member to the IMO (since membership is restricted to states), nor may it accede to the conventions negotiated within the organisation. According to Article 80 of the European Community Treaty, however, the Community holds internal and external competence in respect of shipping. Therefore, member states of the Community are bound to the obligations deriving (directly or indirectly) from their IMO

membership, as well as to the shipping standards enacted by the Community. The question of which obligations enjoy primacy in case of conflicting obligations deriving from international law on the one hand and from European law on the other has not yet been answered.

Should a PSSA in the Barents Sea not be designated, the protective measures and implementation of such taken by the EU, the USA and perhaps Canada could be modelled by Norway (or other states), perhaps with similar or slightly less strict provisions, in order to encounter less resistance from adversarial interests such as shipping. While it remains to be seen how these developments will affect the Barents Sea, the EU and US coastal environmental regimes are likely to have an effect on the hydrocarbon vessel traffic in the Barents Sea, due to ring effects for vessels carrying Russian hydrocarbons.

2.4 Summary

Russia appears to be extending its NSR regime, based upon LOSC Article 234 concerning ice-covered areas, westward to Kolguev Island in the Pechora Sea. Surrounding this regime, there are certain elements of consistency in the common interpretation of existing law and behaviour of the large Arctic littoral states – Russia, Canada and the USA. These elements seem to have spurred a process of formation of a specific customary international law regarding the passage of vessels (including state vessels) through the Arctic area in general, and its international straits in particular. Russia enjoys substantial support from two large Arctic littoral states – the USA and Canada – for its legal regime regulating Arctic navigation. Especially the regime governing commercial vessels appears to have a firm standing. Current navigational provisions are likely to remain the same for some time, despite developments under the complicated LOSC Article 76 defining the continental shelf.

Under LOSC Article 234 coastal states have the obligation to adopt and enforce non-discriminatory environmental provisions. The main thrust of the Russian provisions is based upon environmental protection and safety, thereby apparently implying that *all* vessels, including Russian ones, are encompassed. The principles, as stated under Article 2 of the 1990 Rules,⁷⁶ are to regulate navigation free from discrimination for navigational safety and to prevent, reduce and control marine pollution caused by the presence of ice. All vessels, including state vessels, regardless of nationality, are subject under Articles 1.4. and 2, and the implication of the supporting legislation is the same.

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

question of whether non-discrimination is meant to apply only *among* foreign vessels of different nationalities, or also *between* foreign vessels and Russian vessels. Related to Article 234, both Russian and foreign vessels are probably encompassed, especially since that seems stated explicitly in the 1990 Rules.⁷⁷ Thus, the fees, if justified under Article 234, must apply to all vessels – contrary to previous and probably current Russian practice.

It is difficult to examine specific Arctic state practice on this issue which may be contrary, since it is only Russia which appears to have a blanket fee structure. Under both Canadian and US legislation, passage rights are not dependent upon the payment of fees.⁷⁸ The Russian authorities have indicated a possible relaxation under Articles 8.1.–3. of the 1990 Rules of initial ‘control of navigation’, if the vessels and captains are well-known to them; however, no mention has been made of the issue of fees.⁷⁹

The study of the state practice with respect to passage through the NSR shows that, due to the strategically sensitive geographical situation of the region, there is a continuous risk of disputes, and that practical solutions may be needed to prevent and resolve potential disputes. This may be extrapolated to the Barents Sea as well.

Norway is considering measures for the Barents Sea under the international law of the sea to include:

- extended limit of territorial sea (20 nm. is possible);
- vessel traffic service (VTS);
- traffic separation schemes (TSS) including position of traffic separation scheme, automatic identification system (AIS) including distribution and coverage through stations (see endnote 14);
- tow-vessels at strategic locations;
- electronic chart display and information system (ECDIS);
- implementation of routing regime;
- contingency management and planning regime including environmental risk analysis and oil-spill contingency assessment;
- places of refuge and beaching;
- measures related to loading and unloading of cargo;
- control of emissions to air;
- management of oily wastes, sewage and garbage including receiving facilities; and;
- ballast-water management.

A Barents Sea management plan from Norway is expected in 2006.

The Norwegian government is also giving consideration to the establishment of a PSSA. ‘Associated protective measures’ from the 10 PSSAs

already designated include areas to be avoided, areas for compulsory pilotage, prohibition of discharges including ballast water, prohibition of dumping of most other wastes, installation of receiving facilities, no anchoring, and enhancement of surveillance and monitoring capacities for illegal discharges. Norway could follow suit.

However, there are other policy considerations likely to carry considerable weight in the Barents Sea, and the Norwegian government may well decide not to proceed with PSSA designation. Reasons for this could include the balance Norway is attempting to achieve in the Barents Sea; the legal controversy at all levels regarding PSSA designation; boundary delimitation negotiations with Russia including possible US State Department participation;⁸⁰ security concerns with the US, the EU and NATO; the influence Norwegian shipping oil and gas, and fishing interests carry; the weight good relations with Russia carries; the Globus II radar at Vardø; possible discrimination of Russian tankers – if solely these are used in the initial phases of oil export – sailing 50 nm. to sea; the sensitivity bilateralism with Russia carries with it; and the present controversy over Saami property rights in Finnmark under International Labour Organisation Convention 169. Norway may well be able to achieve much the same through quicker and less controversial measures, also under the IMO, but SOLAS.

The *Erika* incident in 1999 was the first tanker pollution incident in which the EC took a strong role in proposing changes in the oil-pollution liability and compensation regime. These proposals, which revolve around the limitation rights, channelling of liability and a third-tier fund, may pose a serious threat to the existence of the IMO liability and compensation system. Developments so far have resulted in an increase of geographical scope and coverage, as well as acceleration of measures. Related to criminal sanctions, the EC appears to be moving beyond what the IMO has been attempting to do, due to differences in states' implementation of MARPOL 73/78, particularly related to sanctions for discharges of polluting substances. The scope has been increased, so that not only the shipowner or master of the ship is to be held criminally liable, but also cargo owner, the classification society or other involved persons. This is applicable in all maritime zones for infringements in accordance with international law, whether these are committed intentionally, recklessly and or through serious negligence.

It remains to be seen how these developments will affect the Barents Sea. However, it does seem clear that, due to port entry requirements for vessels carrying Russian hydrocarbons, the EU and US coastal environmental regimes are likely to have an effect on hydrocarbon vessel traffic in the Barents Sea.

Notes

¹ This part is prepared by R. Douglas Brubaker, Senior Research Scholar, Fridtjof Nansen Institute, Lysaker, Norway, unless noted otherwise.

² See R. D. Brubaker, *The Russian Arctic Straits – International Straits of the World*, (Leiden: Martinus Nijhoff, 2005), pp.189–95.

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

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

⁵ *Ibid.*, pp. 64 and 66 for maps.

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

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

⁸ See G. Grytås, 'Norge stoppet tankfri sone', (Norway halts tanker-free zone), 'Ingen PSSA-binding for olje og gass' (No PSSA limitation for oil and gass) '– Maks. 40 mil ut', (Maximum 40 miles out). *Fiskeribladet*, 25 November 2003, p. 9, from which the following has been taken.

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

¹⁰ See Det Norske Veritas, Technical Report no. 2002–1621, for the Norwegian Maritime Directorate – *Evaluation of the Norwegian Part of the Barents Sea and the Northern Part of the Norwegian Sea as Particularly Sensitive Sea Area (PSSA)*, (DNV), especially pp. 12, 42–54, 101–14, from which the following has been obtained, unless otherwise noted.

¹¹ Norway and Russia are working to combine this point and the preceding one through establishment of the Barents Vessel Traffic and Information System (VTMIS). This will be partly based on the exchange of AIS data between the authorities, with the traffic control centres in Vardø and Murmansk playing central roles. Throughout 2004 Norwegian authorities engaged in dialogue with tank vessels in international traffic in the Russian Barents Region. The vast majority of these now volunteer the information needed. An AIS has now been installed in all tank vessels, enabling the Norwegian authorities to track them when they are set in motion. Information is also provided on cargoes carried. Norwegian authorities wish to receive notification of hazardous cargoes two

days previous to the entry of such vessels into the Norwegian EEZ. See Bambulyak and B. Frantzen, *Oil transport from the Russian part of the Barents Region* (Svanhovd: Svanhovd Environmental Centre, 2005), p. 64.

¹² See Minister of the Environment K. Hareide's speech, Tromsø, 24 May 2005, <http://odin.dep.no/md/norsk/aktuelt/taler/minister/022051-090060/dok-bn.html>.

¹³ Translation by R. Douglas Brubaker, 3 May 2005.

¹⁴ For developments surrounding PSSAs see K. Gjerde, 'PSSAs: IMO Guidelines', *Sea Technology*, Vol. 43, Part 3, March 2002 (PSSA's), pp. 40–46, from which the following have been obtained unless otherwise noted.

¹⁵ S. Pullen, K. Gjerde, A. Mäkinen, J. Lamp, J. Varas, and A. Tveteraas, 'Particularly Sensitive Sea Areas (PSSA's) in the North-East Atlantic and Baltic', *WWF Briefing*, 2003 (WWF Briefing), p. 1. For further information, contact Stephan Lutter, WWF North-East Atlantic Program, Am Gütpohl 11, D-28757 Bremen, Germany.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ For PSSAs related to the maritime transport of nuclear materials see R. Nadelson, 'After MOX: The Contemporary Shipment of Radioactive Substances in the Law of the Sea' *The International Journal of Marine and Coastal Law* (2000), Vol. 15, pp. 237–44. This is now somewhat dated since the 2001 Guidelines are now in force and several new areas have been recognised. Interestingly, for vessels carrying nuclear materials, coastal states (including Norway) may demand notification and consultation, specific vessel routing, compulsory pilotage, special construction requirements and speed restrictions, and contingency and salvage plans. Since the liability regime is confused and Japan and Russia are not parties, states (including Norway) might more easily demand to know who stands liable for the shipments. A fund for compensation might be negotiated, involving these states and including France and the UK where the reprocessing takes place, if not already phased out in the UK.

¹⁹ See P. Birnie and A. Boyle, *International Law & the Environment*, 2nd ed. (Oxford: Oxford University Press, 2002), p. 276, who note that Australia's Great Barrier Reef was designated by the IMO in 1990 as a 'particular sensitive sea area' within an extended territorial sea where compulsory pilotage is required. However, the US designation of the Florida Keys as an 'area to be avoided' and the prohibition of tankers in this area appeared at that time to be an unilateral act and thus in breach.

²⁰ See www.imo.org/Newsroom/mainframe.asp?topic_id=848&doc_id=4009, and WWF Briefing p. 1.

²¹ Guidelines for Identification and Designation of Particularly Sensitive Sea Areas, IMO Assembly Resolution A.927 (22).

²² See International Convention on the Prevention of Pollution from Vessels, 2 November 1973 (MARPOL 73/78), *United Nations Treaty Series* (UNTS), Vol. 1340 (1983), p. 61, as amended by the Protocol, 1 June 1978; M. Nordquist and K. Simmonds, (eds.), *New Directions in the Law of the Sea ('New Directions')*, (London: Oceana Publications, 1980); Vol. 4 (1975) (MARPOL 73/78), p. 345 and *New Directions* Vol. 10 (1980), p. 32. Also *Yearbook of International Cooperation on Environment and Development 2003/2004 Green Globe Yearbook*, (eds O.S. Stokke and Ø. Thommessen), (London, Earthscan, 2003), pp. 144–46. With Annexes I and II, state parties represented 97% of the world's gross tonnage. Annex I governs oil, Annex II noxious liquid substances, Annex III harmful substances in packaged form, Annex IV sewage, and Annex V garbage.

The air pollution Annex VI is not in force. See www.imo.org. See generally P. Birnie and A. Boyle (ref. in note 22 above), pp. 351–53, 367–69, 373–76, and 290–91 for the following information, unless otherwise noted. The authors believe acceptance of various IMO treaties and consensus surrounding LOSC Part XII indicate a strong measure of *opinio juris*, representing in certain respects an agreed codification of existing principles which have become custom.

²³ See M. Mason, ‘Civil liability for oil pollution damage: examining the evolving scope for environmental compensation in the international regime’, *Marine Policy*, Vol. 27 (2003), pp. 1–13.

²⁴ R. Nadelson, ‘After MOX: The Contemporary Shipment of Radioactive Substances in the Law of the Sea’, pp. 237–44.

²⁵ IMO Assembly Resolutions A.920(17) as modified by Assembly Resolution 885(21). See K. Gjerde, ‘PSSA’s: IMO Guidelines’, *Sea Technology*, Vol. 43, Part 3, March 2002 (PSSAs), pp. 40–46, from which the following has been obtained unless otherwise noted.

²⁶ Future developments may include opportunities for states and the shipping industry to utilise new technologies and vessel design to improve protection of marine eco-systems and species. These can also increase vessel safety and efficiency and return on financial investment. Such new technologies and designs include re-designed engines which minimise air pollution and conserve fuel; propeller re-design, which decreases noise and habitat disturbance; and improved rudder design, which increases manoeuvrability and allows vessels to avoid collisions with vulnerable species.

²⁷ P. Ørebech, Associate Professor, University of Tromsø, School of Fisheries, Tromsø, Norway (interviewed by telephone, 14 December, 2004) notes that it is currently the EC that has legal standing. This is expected to change during 2005, whereupon the European Union (EU) will gain legal standing. Thus, reference will be made to the EC throughout.

²⁸ For Russia, ‘Proposed Amendments to Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas’, MEPC 52/8/1, and for the US, ‘Proposed Amendments to Assembly Resolution A.927(22) to Strengthen and Clarify the Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas’, MEPC 52/8.

²⁹ D. Vidas, Senior Researcher, Fridtjof Nansen Institute, interviewed on 3 November 2004.

³⁰ MEPC 52/89/1 p. 1 citing respectively MEPC 51/8/3, LEG 87/16/1 and MEPC 51/8/4.

³¹ MEPC 52/8/1 p. 3.

³² See respectively www.biodiv.org/convention/articles.asp and www.biodiv.org/biosafety/default2.aspx. The associated Cartagena Protocol on Biosafety to the Convention on Biological Diversity (CBD Protocol) governs biotechnology and will not be covered here.

³³ International Convention for the Safety of Life at Sea (1 November 1974), (SOLAS), *UNTS* Vol. 1184 (1980), p. 2. See P. Birnie and A. Boyle (ref. in note 23 above), p. xxiv for SOLAS Amendments subsequently adopted.

³⁴ ‘Recommendation on Establishing Traffic Separation Schemes and Areas to be Avoided by Ships of Certain Classes’ IMO Resolution A.161(ES.IV)). See G. Peet, ‘Particularly Sensitive Sea Areas – A Documentary History’, *The International Journal of Marine and Coastal Law*, Vol. 9, 471.

³⁵ *Ibid.* IMO Resolution A.284 (VIII).

³⁶ The former was intended for protection of the marine environment, and the latter was a reservation for breeding sea bears and beavers. An attached economic value was also claimed for the latter coastal region. These areas in the Barents Sea along with a French area were the first two PSSAs *avant la lettre*.

³⁷ G. Peet (ref. in note 37 above), pp. 472–73. This area was to be protected by Traffic Separation Schemes and was first proposed in 1977 (NAV XX/10 and adopted in 1978 (MSC XXXVIII)).

³⁸ P. Dzyubenko, Deputy Director, Law Department, Russian Ministry of Foreign Affairs, interviewed on 24 June 2004. There are various kinds of specially protected marine areas, not only PSSAs, including under MARPOL 73/78. See R. Nadelson, 'After MOX: The Contemporary Shipment of Radioactive Substances in the Law of the Sea', 237–44.

³⁹ G. Peet (note 37 above), pp. 472–73.

⁴⁰ J. Ashley Roach, Office of the Legal Adviser, US State Department, telephone interview, 23 February, 2005.

⁴¹ See http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm. It appears only Russian oil tankers are permitted under the current production-sharing agreements Russia has with Norway. The EU production sharing agreements allow other flags, which would seem to allow other flag vessels in the Barents Sea traffic should EU States be involved in this oil production.

⁴² Y. Petrenko, First Secretary, Embassy of the Russian Federation, Oslo, Norway, 'Interview', 7 September, 2005.

⁴³ The large ATBA in the Florida Keys applies to all vessels over 50 meters, and US trawlers in the area are generally shorter. Many Norwegian trawlers on the other hand are over 50 meters and would be excluded.

⁴⁴ P.J. Schei, Director, FNI, 'Interview', 28 June 2005.

⁴⁵ 'Mot Nord! Utfordringer og muligheter i nordområdene' (To the North! Challenges and possibilities in the northern areas) *NOU 2003:32*, pp. 25–6. This is an independent expert group's report and proposals published by the Norwegian Foreign Ministry. Translation by author. See <http://odin.dep.no/ud/norsk/publ/utredninger/NOU/032001-020003/dok-bn.html>.

⁴⁶ <http://odin.dep.no/fkd/norsk/dok/publ/stmeld/047001-040002/dok-bn.html>.

⁴⁷ See <http://www.nytimes.com/2005/10/10/science/10arctic.html>.

⁴⁸ See <http://www.ilo.org/>.

⁴⁹ See DNV, pp. 12, 42–7, 49–54, 101–9, 111, 112–4 from which the following is obtained unless otherwise noted.

⁵⁰ For the associated regime Protection and Indemnity (P & I) Cover for Environmental Damages see E. Gold, *Gard Handbook on P&I Insurance* (Arendal, Norway: Assuranceforening Gard-Gjensidig, 2002), pp. 453–58

⁵¹ M. Mason, 'Civil liability' (ref. note 23 above), p.1; also 1–13 generally, from which the following is taken unless otherwise noted. See also C. Wu, 'Liability and Compensation for Oil Pollution Damage: Some Currents Threats to the International Convention System', *Spill Science & Technology Bulletin*, Vol. 7, Nos. 1–2 (2002) pp. 105–112, for a discussion of current issues particularly raised by the EC, limitation rights, channelling of liability and a third-tier fund.

⁵² See www.iopcfund.org.

⁵³ 'Regjeringen arbeider...' (see note 10 above)

⁵⁴ Article I(6).

⁵⁵ Soviet claims for ecological compensation from the grounding of the *Antonio Gramsci* off Ventspils in the Baltic Sea in 1979 against the shipowner under the CLC 1969 consumed a major part of the shipowners limitation amount, and thus had consequences for the associated Fund Convention, though not a party.

⁵⁶ M. Mason, 'Civil liability' (ref. note 23 above) p. 11, citing FUND/A/ES1/13, London: IOPC Fund, 1980.

⁵⁷ Mason, p. 4.

⁵⁸ United States Oil Pollution Act of 1990 (OPA 1990), 33 *United States Code (USC)* 2701, *Public Law* 101-380, August 18, 1990.

⁵⁹ In the absence of references to marine ecological research in state arguments for compensatory restoration, ITOPF set a scientific case against such.

⁶⁰ See C. Wu (ref. in note 51 above), pp. 109–11, from which the following is taken.

⁶¹ G. Gauci, 'Limitation of liability in maritime law: an anachronism?' *Marine Policy*, Vol. 19, No. 1, (1995), p. 73, and pp. 65–74 generally for further arguments against limitation of liability.

⁶² E. Gold (ref. in note 50 above), p. 414, notes the European Union has already set the basis for an environmental liability regime for Europe to make polluters strictly liable for environmental damage they cause, which appears to take the EU towards a more US-oriented compensation and liability regime. This consequently has serious implications for existing international regimes.

⁶³ Respectively Articles II and 3.

⁶⁴ Mason, 'Civil liability', p. 7.

⁶⁵ International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention Convention), see www.imo.org.

⁶⁶ Paris Memorandum of Understanding on Port State Control, January 26, 1982, (MOU), *ILM* Vol. 21, (1982), p. 1.

⁶⁷ E. Gold, e-mail to author, 27 April 2005.

⁶⁸ Brussels, 17 Feb 2005, Doc. No. 6408/1/05 REV 1 --MAR 21, ENV 73, DROIPEN 11, CODEC 93.

⁶⁹ See <http://imo.amsa.gov.au/public/resolution-titles/res-mepc.html> (subscription) and www.uscg.mil/hq/g-m/mso/docs/MEPC_52_Delegation_Report.doc.

⁷⁰ See MEPC 52/24 p. 47 citing MEPC121(52) and SOLAS Regulation V/11. See MEPC 52/24/Add.1, Annex 10, (Annex 3) for specifics regarding the new mandatory ship reporting system for the Western European PSSA. Detailed descriptions of the characteristics of the maritime traffic, the transport of harmful substances, and the threats from disasters, including a description of the meteorological, oceanographic and geographical conditions are found in MEPC 49/8/1 and MEPC 49/8/1 add.1 and MEPC 49/8/1 Corr.1.

⁷¹ See MEPC 52/24/Add.1, Annex 10, (Annex 2) for specific areas and measures.

⁷² See MEPC 52/24/Add.1, Annex 10 for the following description. See MEPC 49/8/1 for detailed descriptions of the ecological, socio-economic and cultural, scientific and educational criteria of this area.

⁷³ See www.ilo.org/ilolex/english/convdisp1.htm

⁷⁴ United States Oil Pollution Act of 1990 (OPA 1990), 33 *United States Code (USC)* 2701, *Public Law* 101-380, August 18, 1990.

⁷⁵ A. Proelß, University of Tübingen, speech – ‘EC Competence in Respect of Shipping: Is the Community Bound to Obligations Arising from IMO Conventions?’ University of Oslo, 23 November 2005.

⁷⁶ ‘Regulations for Navigation on the Seaways of the Northern Sea Route’, in accordance with the USSR Council of Ministers Decision No. 565 of 1 June 1990 and approved by the USSR Minister of Merchant Marine, 14 September 1990 (1990 Rules). Russian text published in *Izveshcheniya Moreplavatelyam* (Notices to Mariners), No. 29, 18 June 1991; English translation in *Guide to Navigating Through the Northern Sea Route* (St. Petersburg: Head Department of Navigation and Oceanography, Russian Ministry of Defence, 1996), pp. 81–4.

⁷⁷ See R. D. Brubaker, *The Russian Arctic Straits – International Straits of the World*, pp. 55, 80 and 84.

⁷⁸ See Y. Ivanov, A. Ushakov and A. Yakovlev, ‘Russian Administration of the Northern Sea Route – Central or Regional?’, *INSROP Working Paper* No. 106, (1998), IV.2.5’, 19–20.

⁷⁹ A. Ushakov, Deputy Director of the NSRA, interviewed on 24 February 1994, Moscow. Flag states were not indicated as playing any role.

⁸⁰ See www.nytimes.com/2005/10/10/science/10arctic.html.

3. World Trade Organisation (WTO)/ General Agreement Trade Services(GATS)¹

3.1 General²

An overview will be given of the WTO/GATS regime. It was determined underway that this regime would have relevance, but less so currently. It appears that in spite of probable Russian membership in WTO within the next few years, the GATS regime governing shipping is still under formation and will take some years before definite guidelines appear. Russia has yet to become a member of the WTO, though it is desired that accession take place in 2006.

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

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

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

GATS employs the principle of *national treatment*, one of the main thrusts of GATS. An argument has been that the regulation of supply of services is trade related. Its implications are expected to be far reaching. GATS took an expansive view of the range of service sectors that could be exposed to the norms. Supply of a service is defined to include the production, distribution, marketing, sale and delivery of a service. It encompasses all possible modes of service supply, not just the cross-border mode of supply, which is most clearly trade related, but also supply through the presence of national persons and through a commercial presence in the territory of another member country.³ Only the scope of supply through a national presence was limited categorically, being declared only to apply to measures affecting access to employment markets or regarding citizenship or residence. The wide scope of commercial presence was particularly portentous. In extending to the acquisition or maintenance of juridical person, it introduced the issue of foreign direct investment into a multilateral framework.

The impact also depends upon the scope applied to the principle itself. GATS gives broad scope to the principle by adopting a realist test of discrimination. However, the agreements' decentralised, discretionary approach to the making of commitments provides a means to manage its impact. National treatment as market access addressed below is referable to a broad swathe of national measures, but it ultimately only applies in those service sectors which members actually list or 'inscribe' in their individual schedules of commitments. This is unlike NAFTA or the European Treaty. Legally, it is within the individual member's discretion to decide in the negotiating process the extent of its commitments, and the less prescriptive concept of 'norm' may best capture this approach. In these listed sectors, the members have a further option to limit their commitments by listing or 'entering' non-conforming measure. All members chose not to inscribe certain sectors at all. While the commitments can be described as essentially voluntary or discretionary, GATS still has a thrust to it. Where a member decides to submit a services sector, its range of non-conforming measures must be listed as required. In the sectors members did inscribe, they entered both across the board, horizontal, limitations on certain modes of supply and sector-specific limitations. Economic protection might often have been a reason for these reservations, but the limitations also represented a view that certain types of services were not to be treated simply as economic transactions.⁴

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

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

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

This approach is under pressure and suggestions have been made within the WTO that a different approach be taken.⁵ This includes that regardless of whether the national measure does not class the services as like, the onus should remain with the member country to justify its unfavourable treatment. This could be done by demonstrating that the measure was intended to further one of the regulatory objectives for which the agreement allows an exception. The WTO could then query the motive behind the distinction. The member would be required to demonstrate the necessity of the treatment and choose the least trade restrictive way to achieve its regulatory objective. This would further narrow the members' regulatory options. At the same time the GATS listings approach ultimately affords the member discretion. It may retain those measures it thinks are essential to its regulatory objectives.

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

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

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

If the wider scope is the objective of the agreement, then market access has potential to further the neo-liberal program of privatisation and competition. It requires existing markets to be liberalised where regulatory

schemes have restricted participation, such as by licensing a fixed number of entrants or by drawing lines around the participants' spheres of activity. If it applies to non-discriminatory quality limitations, then it requires markets to be created where they have not been permitted, such as when a country places a ban on the sale of certain services or it chooses to provide them by way of a public monopoly supplier. It is concerned with the scope of market activities as well as the conditions of entry into existing markets.

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

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

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

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

The biggest concession GATS makes is in its listing approach. Members have, perhaps to further particular regulatory purposes or to preserve a general regulatory competence, listed non-conforming measures or decided to withhold sectors from the disciplines of the agreement. Sectors are not included by default, by failing to make an express exclusion. Specific commitments have an effect similar to a tariff binding, they are a guarantee to economic operators in other countries that the conditions of entry and operation in the market will not be changed to their disadvantage. Exceptions which remain legitimate include public order, orderly movement of persons over borders, prevention of deceptive or fraudulent practices, quality of professional services, prudential supervision of financial institutions and the collection of services taxes.

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

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

GATS favours free trade over what may be seen as equally valid international concerns. Spillover effects may be caused such as despoliation of a common social or natural environment. This was the issue in the GATT case regarding US restrictions on imports of tuna,⁶ as well as a WTO case examining a US measure against imports of shrimp products where these have been harvested in a manner harmful to sea turtles.⁷ In both cases, the panels found against the measure, seeing them as threats to the multilateral trading system.

The content and strategy of a country's regulatory policy are called into question only if they involve measures that cut across trade norms. At the same time, trade agreements may have an indirect effect in that they smooth the way for those forces which can undermine the competence of national regulation and they set countries on a course of regulatory competition. Governments then have to rely on global markets for regulation to produce the necessary demands for high standards. Mutual recognition as a formalised government to government choice of law principle mediates differences between national legalities. This has some support under GATS, which allows foreigners access to host markets on the strength of their compliance with home country requirements. GATS allows for recognition of standards to be achieved through harmonisation between countries to be based on multilaterally agreed criteria. GATS would be

prepared to allow the observance of accepted international standards to act as an exception to its norms. However some experts fear the same approach will produce a pressure to reduce standards to the lowest common denominator, something which was taken up under the WTO Appellate Body.⁸

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

At the same time, the WTO assumption of the new trade issues carries the potential for it to act as a rival to these organisations. However, GATS could be said to take a different position on issues which have preoccupied organizations such as United Nations Conference on Trade and Development. But the relationships may not be only rivalous. The learning and legitimacy of these conventions may be utilised, while providing in return new sanctions for their non-observance.

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

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

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

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

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

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

The earlier codes of conduct were initiated due to many smaller countries lacking legal jurisdiction and political power to apply controls to the transnationals on their own territory. Even if trade agreements left them space for industry-specific regulation and foreign-investment regulation, they were not in a position to effect performance requirements. They would require co-operation and reinforcement from larger countries where the corporations have their home bases or enjoy their largest markets. Globalisation has increased the competition between countries, however, to offer inducements that attract and retain the transnationals. Global mobility and reflexivity allow the corporations greater opportunities to circumvent the bilateral agreements made with countries that do wish to co-operate.

Some countries have correspondingly adopted criteria by which they attach their jurisdictions to these restrictive practices, such as multiple aspects of the conduct in question or of the persons involved, as a way to establish a nexus with their territory. They do not accept the separate entity conceptualisation of the corporation. However, the idea that the effects or impacts of corporate activity are sufficient to attract jurisdiction, accepted in the US, continues to meet resistance. Where more powerful countries did attempt to give 'extra-territorial' reach to their own unilateral polices, they encountered resentment among the private

firms asked to carry the responsibility abroad. Extra-territoriality also provoked clashes with other governments, which were concerned about guarding their own sovereignty more than competition policy. This produced blocking statutes. This kind of regulation often needs practical support from other jurisdictions if it is actually to enforce the judgements it thinks are appropriate. However, it will not attract support unless its regulatory standards are respected by these other countries.

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

If the international community seeks to negotiate agreements that require countries to give rights to foreign companies, it is almost inevitable that the issue of international co-operation to deal with possible abuses of these rights will also arise.⁹

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

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

In sum it appears as if the WTO is advancing a neo-liberal regulatory reform agenda that has already gained considerable momentum around the world, but it is doing so within a particular institutional and normative framework. The apparently innocuous principles of MFN and national treatment are given fresh meaning when related to the supply of services.

GATS extends their prescriptions further into the substance of local regulatory measures. The norm of market access places the onus on quantitative limitations which do not discriminate against foreign suppliers. This re-regulatory trend would be afforded a more general momentum if the traditional GATT concepts of 'measures affecting trade' and 'nullification or impairment' were expanded again. However the WTO's Appellate Body retreated from giving the concept of 'nullification or impairment' a viable potential. It remains to be seen how accommodating the re-regulatory approach might be to different perspectives. For those concerned about risks associated with open trade and free markets, it raises the issue whether the WTO should be pressed into becoming more politically accountable and take positive responsibility for 'social regulation'. GATS may make allowance for certain national regulatory objectives, but their disciplines restrict members' choice of regulatory strategy. This includes their attitude towards regulation that expresses international concerns such as about the environment, for example. The WTO suggests that such regulation has to be supported by multilateral agreements if it is to gain exemption from its trade norms, but presently the WTO does not feel itself competent to promote such agreements. Depending on how it is conceived, competition law is the kind of regulation which can cut across the norms, which may be seen to further the norms, or which might effectively express some of the international concerns abroad about abuses of power in a globalised economic sphere. While the first is now commonplace and the second is being discussed, it appears the WTO is yet to show the resolve necessary to make the third potential real.

3.2 Specific Considerations¹⁰

Since Russia will likely become a WTO Member in the near future, Northern Sea Route (NSR) transportation will hence fall under WTO jurisdiction.¹¹ If States interested in the NSR take part in the shipping annex to General Agreement on Trade in Services (GATS), then all national legislation on participation that relates to ships transporting along the NSR are restricted by WTO provisions.¹² Most NSR shipments between Europe and all points east in Russia will then be included. The presupposition is that Russia, EU, Norway and other shipping nationals become members of GATS and that Members do not disqualify National Treatment from their scheduled commitments.¹³ Currently, representatives from the US, EU, Brazil, Kenya, Mexico and South Africa will meet in an attempt to put the negotiation of the new WTO international trade agreement back on track.¹⁴

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

Maritime transport services are in principle covered by GATS, but will be fully incorporated as an Annex to the GATS when such is decided by Member States, according to a draft prepared by the Negotiation Group on Maritime Transport Services (NGMTS).¹⁵ From 1 January 1995 and until such a decision is made, commitments scheduled by participants on maritime transport services will enter into force on a most-favoured nation basis. The object of GATS is to limit 'measures by Members affecting trade in services'.¹⁶ The focus is on trade in services, not the services as such, in other words, the execution of services. What is protected is the equal right to offer, ask for, negotiate and conclude service contracts. Private international service contracts and public service procurement are included, and there is no limitation on private contracts.

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

National arrangements that apply only to transiting ships, as is the case with Russia, would no longer be valid. This would include special taxes and charges specified by GATS provisions on National Treatment.¹⁷

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

GATS 'Members' are States or International Organisations.¹⁸ The Member entitled to protection under the GATS provisions depends upon which private legal subjects are offended. Are service suppliers and service consumers among the legal subjects that fall under the legal rights provided by GATS? Whether service-consuming Members are entitled to GATS protection is a question of the origin of the service at issue. In other words, which Member does the phrase 'service...of any other Member' refer to?¹⁹ The text focuses on the service as such, which indicates that a contract is involved. Since trade in services relates to contracts and since contracts represent an *inter partes* relationship, service providers and purchasers must be included. Thus, beneficiary Members are service-supplying or service-consuming Members, or both, depending on which Member is restricting the trade in shipping services. If the

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

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

Flying the flag or having membership of a society qualifies the 'another Member' status according to GATS legislation.²⁰ The service delivered by such a ship or such a person has the origin of that Member. A Member may deny the benefits of this Agreement in the case of maritime transport service. This includes if it establishes the service either is supplied by a vessel registered under the laws of a non-member or of a Member to which the denying Member does not apply the WTO Agreement. This also includes if the service is supplied by a person which operates and/or uses the vessel in whole or in part but which is of a non-member or of a Member to which the denying Member does not apply the WTO Agreement.²¹ This reservation says a Member, even though the ship is flying the flag of another Member, can deny that Member the benefits under GATS if a ship of that Member is operated and/or used in whole or in part by a person who is a habitant of a non-member. The same applies if the ship is flying the flag of a non-member, even though the operator or user is the habitant of another Member.

What is the implication of enjoying legal protection under GATS? To answer this, the benefits which GATS Members acquire must be examined, with special regard to shipping service and treatment-no-less-favourable to the like service and service suppliers. The question is which kind of service is protected under Most-Favoured-Nation (MFN) Treatment and National Treatment?²² The obligation is to accord treatment-no-less-favourable 'to services and service suppliers'. The intention of the GATS provisions is to make it possible for entities, companies, and other of a GATS Member to buy shipping services from a shipping firm of any Member. National legislation which provides special credit facilities to some categories of service suppliers for the purchase of domestic shipping service might be inconsistent with the obligations of that Member under these provisions.

The implementation of GATS means that a specific charter-party is accorded treatment-no-less-favourable. A Member cannot offset unfavourable treatment in one area by more favourable elements of treatment elsewhere. The provision must be oriented towards the product, in other words, the trade in services, for instance a charter-party. All kinds of mandatory restrictions, regulations, taxes and public legislation are included, even such provisions which are not intended to discriminate against foreign services. Russian special taxes for ships transiting the NSR, which do not represent due payment for harbour services, are contrary to these provisions.

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

Import fees must be proportional to the cost of services rendered. According to the drafting history and subsequent practice, the notion 'service rendered' means consular fees, customs fees and statistical fees.²³ As consular fees are related to immigration or work permits, such consular service is not provided for trade in shipping services because crews are not considered to be immigrants. If the transport service is passenger transportation, the cost of passenger customs processing must not be taken into account when evaluating the cost of shipping transportation as such. Neither is that Member entitled to include passenger customs costs when evaluating the cost of service rendered for handling goods through customs.

If the operation of shipping services is subject to internal national taxes, because of various kinds of services provided by port authorities, then such taxes may also be levied on foreign service suppliers if they use the same coastal auxiliary services, or at least if they are dependent upon the preparedness of coastal services (the *de minimis* costs).²⁴ The tax rate should be fixed in relation to the kind of services required and the length of time they are employed, and not in relation to the value of the service afforded.

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

When do charges imposed on the internal handling of shipping transportation have to be subsumed as internal taxes? Such taxation measures must be justified.²⁵ The distinguishing factor is whether the charge imposed on such services is *collected internally*. Collection of charges at the border by customs authorities, port authorities or others might be justified under the National Treatment provision. If the charge affects the internal sale of the shipping, then the charge is to be subsumed under the National Treatment standard regardless of its point of collection.²⁶ Charges collected during transportation or when in harbour are internal and are consequently subject to justification under the National Treatment clause.

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

auxiliary services, or at least if they are dependent upon coastal services being on constant standby.

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

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

New national legislation establishing, for instance, a charge for the administrative handling of foreign shipping transportation through the coastal waters of a Member must be published promptly in accordance with GATS requirements on transparency.²⁷ Once informed, the other Members can respond quickly and challenge the new legislation before a WTO Panel.

A quantitative restriction applied should, according to the MFN principle, not discriminate against shipping services provided by certain, and not other, Members. As regards the National Treatment principle, detailed rules apply.²⁸

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

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

The treatment-no-less-favourable obligation relates to those service suppliers and services known as 'like services'. In the case of shipping, only shipping services qualify as 'like services'. If everything applicable to 'like products' is considered also applicable to 'like service and service suppliers', with particular emphasis on shipping services, then the methods of transportation in question must be more or less the same kind of transport service. The merchandise being transported must also be of the

same kind. For instance, a shipment of oil and transportation of cars are not 'like services'. Cargo shipping and bulk transportation of a chemical or liquid are by no means 'like services'. The problem, therefore, is whether the services qualify as 'like' services without regard to the transportation method involved, for example general goods transportation or container transportation.

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

On this point, justification may be difficult. By analogy to 'like products' practices, even more methods of transportation might qualify as 'like services': tramp-ships and passenger ferries that are also transporting goods might be considered a 'like service' regarding the goods transportation. Another possible variable is whether the ship is operating on the spot-market or fixed routes as a regular steamship liner. As long as the merchandise transported is the same kind of goods, slight differences in transportation method may be of minor significance with respect to 'like services' classification.

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

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

Since charges of any kind qualify as 'measures' under the GATS, handling or processing fees for transportation services must be limited to an amount not exceeding the approximate cost of service rendered. According to the drafting history and subsequent practice, the notion 'service rendered' means consular fees, customs fees and statistical fees.

The notion is purely legal and has nothing to do with service in an economic sense. Domestic 'service' imposed on imported merchandise or service has to be of at least one of the kinds of aforementioned fees.

Different kinds of charges could, by analogy to General Agreement on Tariffs and Trade (GATT),²⁹ not exceed the handling cost of the transportation in question, for example expenses for guiding ships through an ice-covered stretch of the NSR. If the foreign service supplier transports along a short stretch of the entire NSR, then the taxes imposed must be balanced in relation to the service supplier's use of the NSR. The charge should not be related to the value of the service, but to the value of the auxiliary coastal services involved in the shipping-trade services, as defined by the charter-party.

Turning to the question of which Member is competent to invoke GATS provisions, the situation differs from case to case. If the Leyden chemical industry is transporting on its own keel along the NSR to Archangel, and the vessel is registered under EU ROS (European Register of Ships) or the Dutch register, then the Leyden industry is the supplier of the transport service. If Russia make restrictions affecting that trade, then the European Community or the Netherlands qualify, under the status of service supplier, as 'another Member' and may consequently bring the case before the WTO for conciliation.

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

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

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

3.3 Russia's Accession to WTO – the Russian View³⁰

3.3.1 General

On January 1, 1995 the World Trade Organization (WTO) was declared created, replacing GATT (General Agreement on Tariffs and Trade signed in October 1947). The activity of WTO covers 90% of the entire world trade. The aim of the organization is globalization and liberalization of the world market. At present Russia is a candidate for entry.

In 1993, Russia applied for accession to GATT. In compliance with the procedures, a Working Party (WP) on accession came into being. Representatives of the interested GATT countries became the Working Party members. The Mandate of the Working Party (transformed into the Working Party on Russia's WTO accession after the WTO's establishment) consists in studying the trade regime in Russia and working out requirements for Russia's participation in the WTO.

Russia's WTO accession negotiations started in 1995. Negotiations are held in two main directions. One is a serious consideration by the WTO WP of the Russian foreign trade legislation, including its application, for determining its conformity to the WTO's principles and norms. Determination of those terms on which the WTO countries-members will approve Russia's accession to the General Agreement and other WTO Agreements is covered as well.

Working out a Protocol on tariff terms of Russia's accession and the list of obligations under GATS is also an issue. The Protocol on tariff terms will include the obligation of Russia to fix at a mutually agreed level the rates of the customs tariff duties on some goods and decrease taxes on some goods. These directions will determine in sum the terms of Russia's accession to WTO.

In other words, the Government of Russia is heading two important, multi-dimensional and at the same time important negotiations for the country that will lead to strengthened economic positions. Through this the Russian legislation, administrative rules, methods and practice of state regulation of the entire complex of foreign economic relations will achieve the level of the modern world.

Accession to WTO will enable Russia to join the world's developing practice of the legislative and administrative regulation of international economical relations. In other words, this step means Russia's accession to the regulations of movement of goods and services that are effective in the world market. Without this step, the successful realization of progressive economic reforms in the country is hardly possible, while the foreign trade would be carried out under exceptionally difficult conditions for development.

It should, however, be stressed that the terms of accession to the WTO is a compromise worked out in the course of negotiations; a compromise achieved both as a complex of mutual concessions and with mutual often difficult conditions determining them. Russia faces here a complicated task – to determine the national economic interests and priorities, determine the limits of concessions and the terms guaranteeing national economic safety, and to be able to support them in the course of complex negotiations under conditions of economic pressure from western countries. Here, attempts are made to obtain from Russia a unilateral opening in the market, while showing unwillingness to recognize that many industrial branches of Russia possess comparative advantages, primarily large scale and low industry costs, allowing it to export goods with competitive prices that influence the formation of the level of world prices and become one of the price-forming factors in the world market.

It is reasonable to mention further that GATT allows increase of customs duties, application of many types of non-tariff restrictions, and does not prohibit using quotas and licensing, and permits as well the subsidizing of some branches of the economy. All this can be, however, made in the framework and on the basis of some specific, sometimes clearly designated and sometimes more general rules, legal standards and traditions. Therefore, Russia's accession to WTO will not weaken the State capabilities for foreign trade regulation. It will create new legislative terms for protection of the interests of Russian exporters and importers, allow for a more clear balance of common national interests and the interests of separate economic branches, such as producers, and finally open the way to a complicated movement of the country in the external trade area to the practice formed in the world by the middle of the 1990's that serves as a basis for the foreign trade of all countries in the world.

Negotiations on Russia's accession to WTO have a large-scale character. Several dozens of agencies and governmental bodies are involved, requiring organization and coordination of the negotiation process. As early as the initial stage of negotiations, the problem of a clear determination of the balance of Russian national economic interests providing its national economic safety and integrity, and the interests of separate groups of practitioners, producers and consumers of all property forms was obvious.

By accession to WTO, Russia will obtain an opportunity to use all of this mechanism for protecting its foreign trade interests. The need for it for Russian practitioners has perceptibly increased, while in response to a serious opening of its domestic market, Russia did not see in return any action by Western countries. To the contrary, Russia was confronted by the selective barriers overseas for exactly those goods where Russia has comparative advantages in international trade, as well as by unfair competition by some foreign companies in the foreign market and in the domestic market of Russia.

By accession to the WTO, Russia will be obliged to respect a number of obligations contained in the WTO agreements. However, together with the obligations Russia will be also granted rights which will allow protecting the Russian foreign trade interests in the world market and will open the way to the complex process known as 'integration to the world economy'.

At present, there are 67 member countries, including the EU, in the Working Party on Russia's WTO accession. In December 2003 Stefán Jóhannesson, Iceland's Ambassador to the WTO, was appointed as new chairman of the WP involved in the negotiations. Over 58 of the parties are involved in the negotiations on goods market access and more than 30 parties are involved in services market access. Corresponding bilateral agreements will be signed on the basis of the outcome of these negotiations.

In the framework of the accession process, the negotiations are held in four key directions:

- negotiations on the services market access,
- negotiations on access to the goods market,
- agriculture negotiations, and
- negotiations on systemic issues.

3.3.2 Negotiations on the Services Market Access

Negotiations on the services market access are aimed at coordinating positions on the access of foreign services suppliers to the Russian services market. The negotiation process at this stage focuses on the 'sensitive' sectors, including insurance, financial, telecommunication and transport services, the access to which presents a special commercial interest for leading WTO countries.

Insurance is one of the most important components of the country financial system in providing protection for the property of the state and its citizens, and thus cannot be excluded from the process of global economic integration. The main terms of the world integration processes in the insurance area are determined for Russia by two documents. These are the already ratified Agreement on Partnership and Cooperation between Russia and the European Community (EC), and the General Agreement on Trade in Services (GATS), which is mandatory for the WTO members.

Upon careful consideration of the legislative measures applied by foreign insurers for protecting the interests of their national insurance markets, it becomes clear that no fully open insurance markets exist in the world. All EC and WTO country members establish specific requirements of the national insurance for foreign insurers and structures with their participation. The specific terms of access of foreign insurers to the national insurance markets differ depending on the interest of the state in maintaining control of the national insurance system. Due to high social significance, insurance as a branch of the economic activity must be under strict control from the side of the state. Access to the Russian insurance market by foreign insurers without adopting a detailed normative base for their activity in Russia threatens the state with a loss of control of this economic sphere.

In the course of negotiations with the EC, the parties were confronted with a non-coincidence of standpoints, and Russia had to make concessions. Since January 2004, the Russian insurance legislation was brought into conformity with the international insurance law. The quota of participation of foreigners in the total statutory capital of insurers was increased from 15% to 25%. But the European insurance community expects from a Russian government striving for accession to WTO, greater concessions than the increased share in the total capital. At the present time not more than 5% was used from a 15% quota. The EC companies want to gain access to the closed long-term insurance and have legal grounds for such demands.

In Russia the demand for services of life insurance, accumulative and retirement insurance is extremely low. However, western insurers look to the future and consider the Russian market as one of the most prospective markets.

The standpoint of the negotiators on the terms of access of foreigners to the sector of bank and telecommunication services remains the same. The government insists on a 6-year monopoly of 'Rostelecom' for long-distance communication, a 25% share of foreigners in the capital of the Russian banks, and considers the establishment of subsidiaries to the European banks to be unacceptable.

3.3.3 Negotiations on Access to the Goods Market

The main subject of negotiations in this area is setting forth the maximum level of import customs duties, which Russia will have the right to apply following WTO accession, for the entire Goods Nomenclature of Foreign Economic Activity. This contains more than 11,000 positions. At present, the Russian delegation has agreed to more than 80% of the tariff positions. The problematic spheres where the standpoints of the parties still differ include a number of agricultural goods, medicines, furniture, aviation engineering and automobiles. The negotiations are completed with eight countries.

In the framework of bilateral agreements with the EU, the initial level of binding of the customs duties for any customs duty rate is not less than the effective rate at present. During the first year of Russia's accession to WTO, no customs duty rate will decrease compared to the present. The level of customs protection of agriculture will not decrease for any of the basic agricultural commodities, and for some Russia has the right to increase the rate of duties for the transient period.

Improvement of the Russian customs legislation is one of the main conditions for Russia to access the WTO. Representatives of the World Trade Association set up claims relative to the customs cost, transparency of the Customs Code application, restriction of the points of admission of goods at the border and excessive preferences for individual persons. If these problems are not resolved within a relatively short time period, then in compliance with standards under international law, the Customs Code may be amended only upon consent of all 149 partners to the WTO.

3.3.4 Agriculture Negotiations

Negotiations on agricultural issues are an important part of the negotiations on the goods market access. Alongside the tariff aspect, they include a review of the Russian policy towards government support of the agricultural sector and export subsidies of agricultural goods and food products.

The negotiations have an extremely complex character, as the standpoints of the parties differ significantly relative to coordination of the level of government support of agriculture and the right for application of export subsidies permitted to Russia as a WTO member. Now the size of the

state support of the agro-industrial complex stated by the Russian delegation comprises \$9 billion a year. Meanwhile the negotiations started with \$16 billion. The opponents still point out that the government support of agricultural producers in Russia in recent years was not greater than \$1-2 billion and insist on preserving this level.

It is noted that the Aggregated Support Index (ASI) includes only those measures that produce to a great extent the distorting influence on trade and production. These include subsidies of the products of cattle-breeding and plant growing, compensation of part of the costs for purchasing material-technical means, crediting on preferential terms, price support of producers of commodities, and benefits for transportation of agricultural products. In respect of these measures in compliance with the WTO Agreement on Agriculture, obligations exist for binding or fixing the support level and its subsequent by-stage reduction 20% during a six-year transient period from the moment of accession. These are measures of the so-called 'yellow or amber' basket.

The measures not having, or having a minimum distorting impact on trade and agricultural products and not having the objective to maintain prices of producers, are not bound by obligations on the decrease and are referred to as the 'green' basket. These include scientific studies, education, information-advisory services, veterinary and phytosanitary measures, dissemination of market information, improvement of infrastructure, storage of strategic food supplies, regional development programs, insurance of harvest and compensation of damage due to natural disasters, assistance to the structural rearrangement of agricultural production.

The initial level of binding is usually calculated as a mean annual value of the actual costs for the last three representative years, the 'basic period' both at the federal and the regional levels. A similar scheme exists for binding, and then for a by-stage decrease of the export subsidies of agricultural and food products, during a 6-year period by expenditures – by 36% from the originally bound size of subsidies, and by volume – by 21%.

As shown by the results of multilateral consultations and bilateral negotiations, the tension around determination of both the basic period and the volumes of financing the 'yellow basket' still prevails. Despite the fact that in most developed countries there is a gap between the fixed levels of binding of the domestic rural support and the actual expenditures of the states for the development of the agrarian sector, the WTO members criticize during the negotiations the disproportion of the proposed Russian levels of binding of the agricultural support and the current state expenditures in this area. Additional tension in the agriculture negotiations is also related to Russia's standpoint, perhaps insufficiently clarified, in application of sanitary and phytosanitary measures.

In the development of their standpoint, the leading WTO members propose to justify the need for such substantial funds, to use the 'yellow basket' measures for the medium-term perspective based on legislation securing the main provisions on reformation of the Russian agrarian sector. Their main apprehensions are insufficient transparency of the dis-

tribution mechanisms of corresponding budgetary means and of an adequate statistical base for corresponding calculations of support measures, especially at the regional level. However, the Russian standpoint in this area is based on ascertaining the right to use export subsidies after accession to WTO.

Simultaneously, work continues on adapting the agro-producing complex to the terms of Russia's membership in the WTO. This concerns the improvement of the mechanisms, directions and forms, for domestic agricultural support and the development of the normative legal base in the sphere of export subsidies and adequate protection of national manufacturers of commodities.

The key goals at this time are topical discussions of parameters of future obligations of Russia with respect to agriculture. Realization of such an approach is possible provided all interested parties are ready to act pragmatically to look for the outcomes and solution of issues. The Russian side is prepared for compromises, but not at the expense of unilateral concessions concerning the reduced protection of the national agro-industrial complex.

3.3.5 Negotiations on Systemic Issues

Negotiations on systemic issues are aimed at setting forth the measures which Russia is to implement in legislation and its application as a WTO member. The talks are based on the second draft report of the Working Party, which is a major document, setting forth the rights and obligations that Russia will assume based on the outcomes of all negotiations. The WTO countries' requirements in that area can be generally divided into three groups:

- Russian legislation and law-enforcement practice lacks compliance with the WTO regulations. The main concern of WTO members regards certain provisions of the current Russian legislation governing customs, tariff quotas for meat, excessive demands to imported goods, including alcohol and pharmaceuticals, certification and conformity confirmation, procedures in the area of sanitary, veterinary and phytosanitary control, and the system for industrial subsidies. Participants in the negotiations require unconditional fulfillment of all relevant WTO provisions, which is a standard requirement for all acceding countries.
- Russia's application of various regulatory aspects in the sphere of foreign economic activity, which are basically allowed in the WTO, may be stipulated by certain requirements or commitments set forth in the Working Party Report. These requirements are 'subject to negotiations'.
- Requirements which are clearly beyond the scope of WTO commitments (the so-called 'WTO+' requirements). These include linking the agreements on government procurement of civil aircraft and equaling of internal and external prices for energy resources.

Some WP members also attempt to resolve issues of particularly bilateral trade-economic relations beyond the WTO competence in the framework of discussion on systemic issues.

The EC requirements for liberalization of the gas market and a decrease of import duties for aircraft, cars and cancellation of restrictions for the presence of foreign companies in the markets of bank and telecommunication services are the main obstacles for Russia on the way to the WTO. The main components of the EC inquiry on systemic issues were as follows:

- Liberalization of measures of non-tariff regulation from the point of view of the licensing rules, primarily in such areas as: import to Russia of alcohol and pharmaceutical products; export of diamonds and metals of platinum-containing group; and import of communication facilities and cryptographic hardware.
- Bringing the Agreement on Technical Barriers to Trade (TBT) and Agreement on the Application of Sanitary and Phytosanitary (SPS) regimes in Russia in conformity with the WTO regulations, improvement of law enforcement in the indicated spheres, primarily relative to obligatory certification and registration, repeated certification procedures and confirmation of conformity certificates.
- Accession to non-obligatory Agreements on civil aircraft trade, and governmental purchases after being granted the WTO membership.
- Removal of restrictions on foreign investments in various spheres.
- Protection of the intellectual property rights of the European holders.
- Liberalization of the Russian energy market aiming at providing a stable supply to the EC of energy sources from Russia, decreased role of the state, creation of prerequisites for reducing the export cost of Russian gas, including free access to transit using pipeline transport, participation of European companies in construction, and likely in management, of pipeline transport in Russia.

In the course of bilateral negotiations, the parties were able to come to agreement on most issues. Some were transferred to a bilateral format, and the corresponding agreements, including the policy of Russia in the area of pricing and export duties for energy goods, their transportation and transit regime, were fixed in a separate Memorandum of Understanding. For the remaining systemic issues, the formulations were agreed to be included in the Draft Report of the Working Party.

3.3.6 Current Status of the Negotiation Process

In 2004, all measures of the plan were substantially fulfilled, with the adoption and coming into force of the following laws:

- On the grounds of state regulation of foreign trade activity
- On special protection, anti-dumping and compensation measures for import of goods

- On currency regulation and currency control
- On technical regulation
- A package of laws on protection of the intellectual property rights
- New edition of the Customs Code and related legislation

The Customs Code is structured according to the principle of international unification. The document was developed in compliance with the edition of the Kyoto Convention on Harmonization of Customs Procedures adopted in 1999 and the Customs Code of the Russian Federation of 28 May 2003, No. 61-FZ, with amendments of 23 December 2003, 29 June, 20 August, 11 November 2004. A compromise on the issues of sea transportation, work of ecological services and cargo handling was achieved. At the present time, the bills providing for introduction of corrections to a number of legislative acts are being considered in the State Duma. Thus, draft additions to the Customs Code of the Russian Federation, related to custom duties, and the Law 'On customs tariff', related to customs evaluation of goods, are being prepared for consideration in the second reading. Expert examination of the departmental acts and regional legislature is being carried out in order to ensure their conformity with the WTO requirements.

In the framework of the work of the High-Level Group on the Formation of Common Economic Space (CES) of Russia, Byelorussia, Kazakhstan and the Ukraine, a comparative analysis of standpoints of the four countries is carried out on a regular basis at the negotiations of WTO accession. These results are used both for the realization of the concept towards CES formation and for coordination of the WTO accession process by interested parties of the four.

As a result of an intensified negotiation process during 2004, the Russian delegation achieved the final accession stage, where the most complex and problematic issues must be addressed. Discussion of the accession terms with the main trade partners is held practically in an uninterrupted regime. Russia is not planning on joining the WTO on any terms. The potential obligations on all parameters, tariffs, obligations in the agricultural sector, access to the market of services and systemic issues, will be based on the real economic situation of Russia and perspectives for its development. This should provide for the necessary protection of national producers, preserving the adequate competent environment.

Russia will complete the negotiations for accession to the WTO by the end of 2005. This opinion was stated on 13 January 2005 by the Head of the Department of Trade Negotiations of the Russian Ministry of Economic Development and Trade (MEDT), M. Medvedkov. The MEDT representative also noted that the bilateral negotiations could be completed before May 2005. He reminded that Russia has already completed negotiations on both goods and the services with 15 WTO members, the EU considered as one state, of 58 countries that participated in the negotiation process. In addition, according to M. Medvedkov, Russia has practically completed negotiations with six countries and waits for the 'convenient political situation' to sign the resulting protocols. An agreement was achieved with nine countries that they would vote for Russian accession to the WTO without joining the negotiation process, and with seven

countries it was planned to finish the negotiations in the first quarter of 2005. With 15 countries, including the US, Australia and Mexico), the negotiation process is at the active stage and with six countries the negotiations have not been held. The representative of the Russian MEDT did not exclude that Russia '*can technically join the WTO in 2006*'. However, he declared that during the next three to four months, Russia must resolve problems connected with the customs legislation. In particular, the countries that are participants to the negotiation process on Russian accession to WTO, have claims concerning the determination of the cost of goods in customs, transparency of the application of the customs legislation, restriction of the points of admission of goods across the border, and the significant problem of loopholes in the customs regime for individual persons. '*If Russia does not solve these problems in the near future, they may become part of international obligations*', noted M. Medvedkov. Additionally noted was that in such a case, part of the Russian customs legislation will be bound by international standards, and its change becomes possible only with consent of the 149 WTO members.

As declared by the Head of the MEDT, G. Gref, in the framework of the 'government hour' at the Council of the Federation, Russia planned to finish the negotiation process on accession to WTO on goods and services by the middle of 2005, and on systemic issues in autumn 2005. G. Gref stressed that the Russian side would not accelerate or defer Russia's accession to WTO. Following Russia's accession to the WTO, the investment attractiveness of the country will increase, and the direct losses of Russia 'not joining the WTO' comprise \$2.5 to \$3 billion a year due to discriminatory measures against Russia. G. Gref said additionally that the dates would depend on the political will of the key partners of Russia. He noted in particular that so far Russia has not come to an agreement with the key partner, the US. According to G. Gref, '*the end of negotiations will depend much on the political will of the US*'.

The next round of negotiations on Russia's accession to WTO was held on 22 February 2005. The members of the Russian delegation expected that the negotiation process would most likely be completed at the expected ministerial conference in Hong Kong in December 2005. Over more than a 10-year history of negotiations, Russia had time to be thoroughly prepared. At this stage of the process, the formulation of the future obligations of Russia after its accession to WTO is already being worked out. Besides, and this is more important, the opinion of the main negotiators is obviously in favor of Russia.

On 21 February, 2005, President of the United States G.W. Bush declared in his speech in front of the representatives of NATO leadership and the Belgian political elite, that America was ready to support Russia's accession to WTO, on the condition that Moscow would adhere to democratic values. More precisely:

We support Russia's membership to WTO, because the standards of this organization will contribute to the development of freedom and prosperity. We understand that the reforms cannot take place immediately, but we should remind Russia that our Alliance advocates free press, viable opposition, separation of authorities and law leadership. The US and all European countries should consider the democratic reforms as a core of the dialogue with Russia.

Nevertheless there are countries not sharing the American optimism, although as a source close to the Russian delegation presumes, they have not felt the course change. As a rule the countries that have a common past with Russia, oppose Russia. Up to recent times, Georgia for example was categorically against Russia. Last week, Poland declared that it would oppose Russia's accession until the Ukraine becomes a WTO member. Warsaw is afraid that Russia will put obstacles in the way of our nearest neighbor. However, stringent standpoints of some representatives will hardly influence the negotiation process. The political component prevails not only for the American administration. As is known, President of the Russian Federation V. Putin has not once expressed his opinion that the accession of Russia to WTO be as soon as possible.

The *Moscow Times* recently interjected a somewhat negative view along this line.³¹ A growing chorus of experts warns that should Russia stumble now, the quest will only get more difficult, especially if fellow applicant Ukraine succeeds in joining. Y. Afanasyev, Russia's top trade officer at WTO headquarters in Switzerland, spoke as negotiators sat down in Geneva for their latest set of accession talks in late June 2005. *'If we don't [join] before the end of the Doha Round, it will take two, three, four more years'*, referring to the WTO's so-called Doha Round of negotiations on trade policy. *'Much will have to be reconsidered'*. Russia continues the process of conducting bilateral talks with a number of major trade partners, including the US, which must bless Moscow's bid if it is to join before a WTO summit in Hong Kong in January 2006. Talks are hung up on a number of difficult issues, as Washington digs in its heels on disagreements over Russia's closed banking sector and observance of intellectual property rights.

Some experts are also warning of difficulties if Ukraine gets in before Russia. Although the terms for WTO accession are officially kept secret until negotiations are complete, Ukraine is widely believed to have agreed to trade tariffs lower than Russia is ready to accept. That would mean that if Russia, Ukraine, Belarus and Kazakhstan finalize a planned single economic space before WTO talks are over, Moscow could be put at a competitive disadvantage. *'I think that there are dangers if Ukraine gets in before us'*, said former Prime Minister Y. Primakov. Russia could be 'drowned' in cheap goods flowing through Ukraine, Y. Primakov noted. In theory, earlier accession would put Ukraine in a position to make demands for trade concessions as a condition for Moscow's entry.

3.3.7 GATS and Regulation of Transport Services

The world export of commercial services has significantly increased for the last twenty to twenty-five years. GATS defines 12 groups of services: transport, tourism, education, health, etc., and upon accession to WTO, Russia joins GATS automatically. The development of foreign economic activity in national transport and the possibility of its integration with the European and world transport systems concerning the period up to 2005, are related to further improvements of the transportation process, both in international shipments and in domestic transportation. The activity in the sphere of organization-legal relations must provide for the conditions of full rights access of Russian shippers to the world communication lines

and world transport markets. This will require more active participation of Russia in the work of the international organizations, connected with working out and implementing a consistent transport policy and corresponding interstate agreements including bilateral agreements in the transport area.

In the medium-term perspective it is necessary to bring the national legislation on regulation of foreign economic activity into conformity with the international requirements and provide its consistency with the standards, principles and regulations of the WTO. This refers to licensing the activity of natural monopolies, including transport, further liberalization of economic relations, expansion of the most favorable regime, solution of the taxation issues, customs duties and fees, and shipping of transit and foreign economic cargoes. At present, Russia is being prepared for adoption of new bills regulating activity in the area of transport.

The performed analysis of the conformity of the normative documentation in effect, and drafts of the developed legislative base for each of the transport types to the WTO requirements, allow a determination of the provisions that restrict to some extent application of WTO principles regarding the national transport. The international agreements, decisions of the government, Merchant Shipping Code (MSC), Charter of river transport, and also different instructions and regulations of interagency character serve as a legal basis which regulates the relations of cargo owner and carrier in the domestic and foreign sea shipments.

GATS establishes standards and regulations which should provide the terms of access to the markets of services. Unlike the trade of goods, the trade in services is regulated inside the country rather than at the border, but by the corresponding instruments of domestic legislation.

For each type of transport, specific legal standards exist that restrict its activity in the world market. The Hamburg Agreement, in force from 1 November 1992, significantly expanded and specified the rules for cargo shipment and registration of documents. Russia is not a participant to this Agreement. Fulfillment of Hamburg regulations becomes mandatory for national consignors of goods in registration of the agreement of sea shipment with foreign carriers. For charter of Russian ships, the regulations of the Russian Federation Merchant Shipping Code (MSC) of 30 April 1999, No.81-FZ are applied. The shipments of cargoes are also regulated by intergovernmental agreements on sea merchant shipping with the corresponding parties. Participation of Russia in the world market of transport services is difficult in general.

Due to the taxation system in force, much sea tonnage went under more profitable flags. Former Soviet ships pay taxes, although relatively small, to the budgets of other countries, transporting the goods of other countries. To date, ships under the Russian flag transport not more than 6% a year of all cargoes of the Russian foreign trade, while in the Soviet years, this index comprised 84%. This is also an indication of Russia's participation in the exchange of transport services in the world.

Today, based upon official materials, provisions of the draft State Transport Strategy, of the Federal Program 'Upgrading of the transport system of Russia', and statements of the heads of the transport branch, the main direction with respect to development of the transport service market appears to be the development of transit transportation in the territory of Russia. This is quite tempting. Foreign cargo owners in Europe and Asia decide to dispatch their cargoes to Europe/Asia via Russia and pay for transit using the geographical and geopolitical advantage of Russia as a Euro-Asian power and the fact that it is quicker to transport freight across Russia than by ships through the Suez Canal.

For freedom of service transfer, it is necessary to resolve at least three large problems:

- liberalize trade in services,
- achieve mutual recognition of the national quality control of services, and
- harmonize the existing national standards, which is logical in general.

The transport strategy of Russia provides for the formation of a common national system of transport corridors in the territory of the country. It will become a basis for the domestic transport network and simultaneously a connecting link between the European and Asian communication lines.

3.3.8 Bringing Russian Legislation into Conformity with WTO Standards and Regulations

The problem of bringing the legislation of Russia in conformity with the WTO standards and regulations is one of the most important issues at the present time. The greatest number of questions and complaints arises from WTO members in the area of customs administration, standardization, certification and confirmation of conformity, labor and ecological legislation and standards, application of sanitary and phytosanitary standards, standards of state subsidies to industry, financial reporting, practice of application of the intellectual property rights and their protection, and with respect to currency regulation and control.

The norms and standards which are understated with respect to those in the West, for example, concerning salary or expenditures of ecological enterprises, can be interpreted by competitors as dumping. For resolving this issue, the Russian government by its Order of 8 August 2001, No. 1054-r, adopted the 'Plan of measures for bringing the legislation of the Russian Federation in conformity with the WTO standards and regulations'. This work has already been partly carried out, in particular with respect to special Russian legislation in the area of protection of the intellectual property rights in compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights, which is in force in the WTO.

Along with the traditional problems concerning the trade regime and tariffs, the issues surrounding the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) turned out to be most compli-

cated. The Agreement aims at making purchase and use of the results of inventors and rationalisers, writers, artists, actors and other artists orderly and more civilized in the entire world. As Article 7 sets forth concerning the aims of the Agreement:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

In the area of international cooperation, a complex of activities have been undertaken in the following directions:

- Creation of legal prerequisites in the area of intellectual property for Russia's accession to the WTO;
- Integration of the national system of Russia to the world process of harmonization of the corresponding national systems in the World Intellectual Property Organisation (WIPO) framework;
- Expansion and organization of cooperation with patent agencies of the world's countries and international organizations with the aim to use international experience and decrease cost in addressing similar problems.

In the first, Rospatent has prepared and submitted to the WTO Secretariat the materials characterizing the state and perspectives of the development of the regime of commercial law for intellectual property in Russia, as well as the main provisions for improving the legislation in this area. Rospatent also provided for participation of specialists in the consultative meetings with representatives of Japan, the EU, the US, and Canada, and also in the next session of the Working Party on Russia's accession to WTO.

In the framework here, work aiming at achieving the level of protection of intellectual property in Russia corresponding to the level of protection in the European Community was also performed. In particular, for realization of the Agreement on Partnership and Cooperation between the EC and Russia, proposals were prepared to comply with Article 54 and Annex 10 to this Agreement concerning the patent right, trademarks and designation of the places of goods origin, copyright and adjoining rights and the databases.

In addition, Rospatent contributed to the joint drafting of texts of future international agreements developed within the framework of WIPO, including principles of additional protection of databases, protection of domain designations in the Internet network, and licensing of trademarks. In the framework of this second direction, the work was aimed at simplifying the procedure of patenting Russian intellectual property abroad and provision of favorable conditions for their protection. In particular, Rospatent actively participated in the revision and improvement of the earlier signed agreements and working instructions. Further revision and improvement of international classifications used both in the state expert

examination of industrial property and in industry and economic activities in Russia was performed with participation of Russian specialists.

In the third direction, cooperation with lead foreign patent agencies and international organizations, work was continued under the earlier signed agreements. New agreements were also signed aimed at obtaining both financial and scientific-methodological assistance for Rospatent and the scientific-industrial communities of Russia. This is primarily the Program of Cooperation between the Russian Federation and WIPO. The program envisages holding joint international forums and seminars in the area of protection of the intellectual property rights for staff of different ministries and agencies, connection of Rospatent and other interested organizations of Russia to the WIPO Global Information Network, joint preparation of different methodological and instruction materials, trial period of Russian specialists abroad, and consultative assistance to the Russian side at joining different international agreements.

Cooperation with another large international partner, the European Patent Office (EPO), was continued. With the financial support of this office, the International Workshop on Licensing was held at Rospatent for a wide range of specialists from industry as well as patent attorneys from the main regions of the country. The workshop aimed to transfer and disseminate experience in the area of licensing of intellectual property in Russia and abroad. In order to decrease currency expenditures for archive acquisition of foreign patent documentation and further expansion of the international documentary exchange, draft new agreements on the exchange of patent documentation with agencies of a number of foreign countries were developed and sent to these foreign agencies.

3.3.9 Energy Package of Issues

For Russia, adjustment of prices for energy carriers is the most painful requirement from the WTO. The European Union continues to insist on equalizing the world and domestic prices on natural gas in Russia. At the present time, prices for electricity, oil and gas within the country are too low compared to export prices, giving advantages for the national companies in the domestic market and infringement of the interests of foreign exporters of raw materials.

Russian producers of power equipment have proposed that upon accession by Russia to the WTO, import duties for power equipment be increased, while cancelling them for import of component parts. The increased import duties should be introduced for power equipment if its equivalent is produced in Russia. The producers of power equipment have also proposed introducing a requirement for obligatory localization for production of components for power equipment by foreign producers, at not less than 70%. In addition, proposals include demanding that they work in partnership with the Russian producers on the basis of joint ventures.

With respect to the energy package, the Working Party report records the intention of the Russian government to follow a policy aimed at gas delivery to Russian industrial consumers with prices providing compensation

of losses to producers and distributors, and gain of profits during normal commercial activity. This policy does not affect the terms of gas sale to the general population. The export duties for power will be preserved at the existing level. These are the only obligations in the WTO framework, which can be appealed through the WTO procedure of settling disputes in case of their non-fulfillment.

Other obligations of the energy package contained in a bilateral memorandum do not have a character of international obligations and cannot be appealed in court or similar bodies; that is, they are of a purely political character. They concern the intention of the Government to continue realization of the Energy Strategy 2003, also with respect to a rise in gas prices. The corresponding dedicated indexes are 5%–10% less than the Energy Strategy indexes.

Russia's accession to the WTO will contribute to a more uniform distribution of foreign investments between the economy branches, 50% of which are currently directed to production of natural resources. At present, natural resources comprise 80% of the Russian export, and the accession of Russia to the WTO will contribute to 'economy diversification'. To provide an annual 5%–6% increase of the gross domestic product, Russia will have to attract a significant volume of foreign investments and simultaneously undertake measures contributing to the return of capital that previously flowed out of the country.

3.4 Russia's Accession to WTO – GATS: a Western View³²

The current developments surrounding Russia's membership in the WTO include the administrative reform, trimming the number of ministries and implementing legislation undertaken by Russia early in 2004. Russia itself set 2005 as an entry date for WTO membership. The important measures undertaken by Russia are seen in a positive light.

The *bilateral* and *multilateral* negotiations, the latter of which encompass all WTO member States under which Russia will have obligations, have been carried out simultaneously. Russia and Norway have been in total agreement, related to business co-operation, export, customs, quotas, and the services sector including shipping. This is with the exception of the comprehensive production-sharing agreements related to Russian oil and gas, and transport on Russian keel. Domestic Russian rules establish preference for use of Russia's own keels. In May 2004, the EU apparently had essentially resolved this issue furthest with Russia, whereas between Russia and the US, Canada and Norway negotiations continue.³³ The bilateral Russia – EU Agreement gives EU freighters access to Russian freights. The meaning for Norway of WTO's most favourable clause, which also governs within GATS, is not affected. Before Russia becomes a WTO member, this is not an issue, but this can be forwarded upon Russian membership. Norway has no restrictions related to freight to all States and wants the production-sharing agreements cancelled. Norway has under the nearly completed bilateral agreements with Russia attempted to obtain an opening for Norwegian participation in this freight. Russia assures that the production sharing agreements will be phased out when the licensees rights terminate in a five to ten-year period. Thus, Norwegian freighters are placed in a less favourable situation than their competitor, the EU.

The U.N.'s Code of Conduct for Liner Conferences³⁴ which allows non-conference shipping liners to operate in the same market as shipping lines governed by the conference, as far as these agree in principle on free and just completion, does not benefit Norway or Norwegian shipping lines due to non membership in the Liner Conference. The issue of fees can be discussed since this is a difficult question of discretion. Other States also utilise fees. Generally many restrictions may be continued.

The status of the negotiations dealing with maritime transport under GATS is not finally negotiated yet due to the breakdown of negotiations on services in the Uruguay Round. The group for shipping, including the initiators such as Norway, are positive to reactivation of the group and have on going informal talks. It is a Norwegian goal that these talks can be taken up again under the on going Doha round. A timetable has not yet been established for when this will take place. Russian preference for use of its own ships and EU ships will not be affected in the near future by new WTO measures as seen above.

Generally, shipping is a protected industry in many States and these could attempt to obtain resolutions for maritime transport as a part of the general negotiations in GATS. Maritime transport is important for Norway, and Norwegian positions correspond much with Norwegian shipowners interests. Norway is against systems with line (division) agreements and cargo (division) agreements, but will not fully accept liberalisation of trade, with cabotage as an example. Subsidies are in principle relevant to GATS, some lie within the OECD, but the discussions have not been particularly related to this issue.

'Grand packages' resolutions can be imagined, since GATS regulating one service area may also take liberalisation measures in other areas. However, it remains too early in the GATS process to say anything about tradeoffs. Rather than shipping gaining a faster resolution under negotiations than the other service areas, shipping has fallen behind in negotiations, and was not negotiated separately in the last round. Norway is working to make sure that it does not fall out. This includes the premiss that international shipping shall be free. Thus shipping does not lead in liberalising trade in services. Cabotage measures that open all routes for international competition have not been promoted, since these are inclusive as in the Uruguay Round.

3.5 Conclusions

Related to the WTO/GATS provisions generally, harmonisation will obviously be required of the Russian NSR navigation fees under the principles of treatment-no-less favourable and national treatment. Further, mandatory restrictions, regulations, taxes, fees and public legislation are required to be harmonised under the principles noted. As part of this, they must be published promptly in accordance with GATS requirements on transparency. Otherwise, once informed, other Members may respond quickly and challenge Russian measures before a WTO Panel. The same may be maintained related to any unequal technical and safety requirements which create unequal conditions of competition.

From the above it is thus necessary that any mandatory restrictions, regulations, taxes, fees and public legislation related to access to the Russian Barents Sea and the NSR be made known.

As regards GATS competition and safety law, it is still too early to come to any definite conclusions. It appears, however, that in spite of probable Russian membership in WTO within the next years, the GATS regime governing shipping is still under formation and will take some years before definite guidelines appear. At the same time, when Russia becomes a member of the WTO, and if oil is freighted solely on Russian tankers, these may be discriminated against under GATS by being required to sail 50 nm. to sea on the way to Europe, should Norway establish a PSSA or sailing routes this far to sea. This appears, however, to be of less concern since various flag vessels are already freighting oil. Due to these ongoing developments, EU law consequently will be one of the main focuses here, particularly focusing on extra territoriality.

Notes

¹ This part is prepared by Dr. R. D. Brubaker, P. Ørebech, Associate Professor University of Tromsø, School of Fisheries, Tromsø, Norway and Dr. Igor V. Stepanov, Leading Research Scientist, Department of Ship Performance in Ice, Arctic and Antarctic Research Institute, St. Petersburg, Russia unless noted otherwise.

² The following is adapted from C. Arup, *The New World Trade Organization Agreements – Globalizing Law Through Services and Intellectual Property*, (Cambridge, Cambridge University Press, 2000), pp. 12–3, 57–9, 61–3, 69, 74, 76–9, 83–92, 102–5, 108–17 and prepared by R. D. Brubaker unless otherwise noted.

³ GATS Article I:2 defines services as the supply of a service by one or other of four modes of service supply. These are, (a) supply from the territory of one member into the territory of another member; (b) supply in the territory of one member to the service consumer of any other member; (c) supply by a service supplier of one member, through commercial presence in the territory of any other member; and (d) supply by a service supplier of one member, through the presence of natural persons of a member in the territory of any other member.

⁴ Professional services and communications services were among these.

⁵ A. Mattoo, 'National Treatment in the GATS – Corner Stone or Pandora's Box', *Journal of World Trade*, Vol. 31(19 (1997), 107.

⁶ See GATT Panel report, United States – Restrictions on Imports of Tuna DS 29, *International Legal Materials* Vol. 33, (1994), p. 839. See also *International Legal Materials* Vol. 30 (1991), p. 1594.

⁷ See United States – Import Prohibition of Certain Shrimp and Shrimp Products – complaint by India, Malaysia, Pakistan and Thailand, WT/DS58, adopted 13 February, 1998, *International Legal Materials* Vol. 37, (1998), p. 834.

⁸ See Appellate Body Report, European Communities – Measure Affecting Meat and Meat Products (Hormones) – complaint by the United States, WT/DS26, adopted 13 February 1998.

⁹ See Ruggiero, The Fourteenth Paul-Heni Spaak Lecture, Harvard University; WTO Press Release PRESS/25, 16 October 1995.

¹⁰ The following is obtained from P. Ørebech, *The Participation Rights under the World Trade Organization General Agreement on Trade in Services (GATS)*:

The Case of International Northern Sea Route Shipping Transportation Services, (Oslo, INSRÖP Working Paper No. 67, 1996) particularly pp. i–vi, unless noted otherwise.

¹¹ The Russian accession may now be in its final stage, see www.wto.org/english/news_e/spmm_e/spmm56_e.htm.

¹² The exact status and substance of this Annex needs to be ascertained, since P. Ørebech addressed these issues approximately six years ago.

¹³ GATS Article XVII:1.

¹⁴ See ‘WTO-fremstøt uten Norge’, *Aftenposten* 18 april, 2004.

¹⁵ P. Ørebech, ‘E-mail with author’ 17 March 2003 notes GATS and shipping were recently drafted in the WTO and liberalisation is now initiated.

¹⁶ GATS Article I:1.

¹⁷ See below.

¹⁸ See WTO Agreement Article XI:1 concerning the status of the European Communities according to GATT 1947.

¹⁹ GATS Articles II and XVII.

²⁰ See the notion of ‘by a person of that other Member’.

²¹ GATS Article XXVII(b).

²² Respectively GATS Articles II and XVII.

²³ GATS Article II:2(c) and Article VIII:1(a).

²⁴ The Member is competent to impose internal national taxes under GATS Article VI.

²⁵ GATS Article VII.

²⁶ GATS Article XVII.

²⁷ GATS Article III.

²⁸ GATS Article XVI.

²⁹ GATT Article VIII:1(a).

³⁰ This Section is prepared by Dr. Igor V. Stepanov jointly with Anna Savitskaja (AARI) and edited by R.D. Brubaker, unless noted otherwise. All WTO sectors will be presented, since they are interrelated with respect to ongoing negotiations. Abbreviations used in this section include the following,

ASI	Aggregated Support Index
CES	Common Economic Space
EPO	European Patent Office
EC	European Community
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GN FEA	Goods Nomenclature of Foreign Economic Activity
MEDT	Ministry of Economic Development and Trade
MSC	Merchant Shipping Code

RF	Russian Federation
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	Agreement on Technical Barriers to Trade
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WIPO	World Intellectual Property Organization
WP	Working Party
WTO	World Trade Organization

³¹ See www.moscowtimes.ru/stories/2005/06/23/001.html.

³² This Section is prepared by R.D. Brubaker, 'Telephonic Interview B. Johansen', Chief Negotiator – Ambassador in World Trade Organisation Affairs, Norwegian Foreign Ministry, Oslo, 5 May, 2004. A new interview was carried out by Peter Ørebech and Douglas Brubaker with Ambassador O. Johansen and Erik Andreas Underland at the Norwegian Foreign Ministry, Oslo, Norway, 7 July 2004.

³³ EFTA also negotiates bilaterally with Russia.

³⁴ See www.admiraltylawguide.com/conven/liner1974.html

4. EU Law¹

The aim of this chapter is to display the EU-Russia *oil and gas transportation market* under an internationally recognized EU trade in shipping services legal regime. Are EU regulations valid irrespective of the place of negotiation, contract, acquisition, management or the citizenship or incorporation of the subject addressed? *In casu*, what is the territorial scope of the 1986 Maritime Service Regulation (No 4055/86), the 1986 Maritime Competition Regulation (No 4056/86) concerning the application of the EC treaty competition Articles 85-86 to maritime transport and the 1979 Liner Conferences Regulation, also called the ‘Brussels package’ (No 954/79)? In sorting out the EU legitimate extraterritorial aspirations under international law I take advantage of the EU position to the US legislation – labeled the Helms-Burton and the ILSA laws – as condemned in the 1996 Blocking statute. Failing double standards under international law, the EU is stuck with its position taken in the 1996 statute.

The design of this chapter is as follows: After the introductory remarks (Section 4.1) the topic (Section 4.2) is whether states in their territory possess residual rights, *i.e.* whether other states’ competencies in foreign territories are restricted to competencies explicitly handed over to the international societies of states? Section 4.3 considers some substantial aspects of the law of trade in shipping service. Section 4.4 deals with the EU legislative position as visible under textual and contextual interpretation. Section 4.5 relates to the specific solutions under Liners Conferences. In Section 4.6 this position is confronted by the European Court of Justice case law. In Section 4.7 the focus is on the EU comprehension of international law limitations to national jurisdiction *ratione territoriae* as related to the USA trade embargo provisions (*the blocking statute*). Section 4.8 compares the EU position to the US blocked provisions with the EU self inducted limits to its own statutes. Finally, Section 4.9 presents the summary and conclusions.

4.1 Presentation

Since the proposal for an international competition law² is in a deadlock,³ the aim of this article is to display the EU-Russian *oil and gas transportation market* under the legal regime of the European Union trade in shipping services, irrespective of whether or not the subject addressed is a foreign citizen or is even located in foreign countries. In focus is the international law limit to national jurisdiction *ratione terrae* and *ratione personae* and I pay no special attention to the material law of trade in shipping services.⁴ Or said otherwise, whether the EU promotes the one or another substantial system is not targeted in this work.⁵ In sorting out the accurate norms I trust the principle of reciprocity: No double standards find their place in international law. The EU cannot carry out results that receive its condemnation elsewhere.

It is predicted that the border-crossing activity of shipping trade might cause conflict of laws. The Council Regulation (EEC) No 4056/86 of 22 December 1986, laying down detailed rules for the application of Articles 85 and 86 (now 81 and 82) of the Treaty on maritime transport (*1986 Maritime Competition Regulation*)⁶ Article 9, predicts extraterritorial jur-

isdiction. Clearly, the condition for the EU to enjoy undoubted extraterritorial powers are that rights of other nations are not infringed.

Significant is whether the territorial scope of the *EU trade in shipping services acquis* – with whatever components it may carry⁷ – is valid law in the Russian-EU trade in shipping services market. Clearly this activity is under the auspices of the Council Regulation (EEC) No 4055/86 of 22 December 1986, applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (*1986 Maritime Service Regulation*)⁸ Article 1 (4)(b) – third-country traffic: the carriage of passengers or goods by sea between the ports of a Member State and ports or off-shore installations of a third country. To what extent is the Russian Arctic oil and gas transportation under the extraterritorial effects of EU shipping trade *acquis*?⁹

The *1986 Maritime Service Regulation*, the preamble, states that ‘non-conference shipping liners should not be prevented from operating as long as they adhere to the principle of fair competition on a commercial basis’. See also Council Regulation (EEC) No 4056/86 of 22 December 1986, laying down detailed rules for the application of Articles 85 and 86 (now 81 and 82) of the Treaty to maritime transport, the preamble.¹⁰ ‘Whereas the rules on competition form part of the Treaty’s general provisions which also apply to maritime transport’ (Section 4). Thus foreign competitors in the EU shipping markets do hinder neither treaty nor subsidiary provisions from becoming effective. Ultimately the territorial reach of the EU competition law in general does influence upon the position on maritime transport services.

Shipping traders that convey goods, *in casu* liquid natural gas (LNG), in identical geographical areas like the Russia-EU transit, are normally substitutable and do belong to the *same services market*.¹¹ The definition of the ‘outer boundaries’ of ‘a market’ and ‘reasonable interchangeability’ is not targeted here.¹² The EU position is to streamline all participants under one equal competition setting. This is, however, not the case if the exporting country – *in casu* Russia – does retain transportation for domestic carriers only.¹³ The EU peak solution is that Russia voluntarily adapts to the EU *shipping trade acquis*. Since this undoubtedly is out of the question, we must look for alternatives.

One explanation to the extensive geographic reach of the EU *acquis* is the EU principle of ‘*l’effets utile*’¹⁴: its implications and not its purpose dictate the validity.¹⁵ A supplementing element is the EU dogma of the ‘wide interpretation’, *i.e.* that EU competency should be judged with regard to the basic general objectives of the organization of the market and less in terms of the literal meaning of the enabling words.¹⁶ Thus the EU competition *acquis* rules activities abroad by foreigners that directly or indirectly affect the European inner market conditions. Such an interpretative method incorporates a wide range of transactions that teleological-oriented legal systems would defer. The EU *shipping services acquis* may become effective to the Russian Arctic transportation either by unilateral extraterritorial implementation or by bilateral agreements¹⁷ giving access to the EU trade in shipping regulations.¹⁸ As indicated in the EU – Russia bilateral agreement Article 38, the latter solution is not an option: ‘each

Party may regulate the conditions of cross-border supply of services into its territory'. The legislative competency belongs to Russia.¹⁹ It is thus questionable whether this bilateral agreement excludes the EU from any extraterritorial effects of the EU *competition acquis*. See *i.a. the position taken by some Finnish applicants in 1988*: 'it is only the rules on competition contained in the Free Trade Agreement between the Community and Finland that may be applied to their conduct, to the exclusion of Article 85 of the EEC Treaty',²⁰ a position rejected by the court.

Alternatively, national states may refrain from compelling legislation, leaving it open to trade partners to opt for the EU maritime regulations, if preferred. Freedom of contract urges a declaratory position of national legislation,²¹ which is also the case according to international trade law.²²

In this chapter the unilateral extraterritorial influences of EU legislation upon trade in petroleum-related shipping services in Russia is scrutinized.²³ To what extent should international traders abide by the EU *shipping trade acquis*? The territorial scope of the EU trade in shipping services regulations seemingly restrains international traders.²⁴

4.2 Extraterritorial Jurisdiction – the 'Effects Doctrine'. An introduction

Extraterritorial effects of domestic law are under the auspices of international law,²⁵ and its cornerstone of '*effects doctrine*' (also named the principle of objective territoriality). This doctrine relies on unilateral actions to what should be observed as conflicts of law issues.²⁶ As made clear by the ECJ in the Ahlström-case, 'the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law'.²⁷

The 'subject of extraterritoriality in general, and the use of the *effects doctrine* in particular, remains controversial in international public law'.²⁸ Clearly there is a delicate balancing here that needs careful consideration both in prescription and justification.²⁹ My effort here is to clarify its territorial scope within trade in shipping services, *in casu* in relation to the Russian Arctic oil and gas shipping trade. Trade in services is part of competition law, and in analyzing the subject I take advantage of general competition law insight. Since textual limitations to EU shipping regulations are regularly absent, state practice is basic to understanding the outer boundaries of the EU shipping trade provisions.

Does domestic law install geographic limitations to national legislative competency? Do the national state principles of 'sovereignty' install jurisdictional territorial exclusivity? This was the position of the foreign pulp industries in relation to the extraterritoriality of EC Treaty Article 81: the 'Commission has infringed Canada's sovereignty and thus breached the principle of international comity'.³⁰ I do, however, not follow this thread, since comity balancing does not provide an effective solution to the problems of extraterritorial jurisdiction.³¹ Traditional legal theory seems to find comfort in the *territoriality principle*, allowing for 'creeping jurisdiction' within the frames of *personality principle*.³² So does the EU under the *1986 Maritime Service Regulation*. '[T]he provi-

sions of this Regulation should also apply to nationals of the Member States established outside the Community *and* to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation'.³³ According to the second alternative, 'it is not necessary for such a national to have his ships registered in a Member State'.³⁴ This indicates that a foreign vessel, whatever flag it is flying, is under the EU *shipping trade acquis* provided that the owner is a national of a member state to the EU. This is not debatable.

However, incidents should be specified. One situation considers citizens' own breach of domestic law that undoubtedly falls under the national competency abroad. More complicated is the situation of infringement caused by foreigners abroad having domestic effects. Under the '*effects doctrine*', the USA has for 50 years practiced the validity of domestic law to foreigners operating abroad – provided that their action generates internal implications.³⁵ Is this position universally recognized?

Do we find traces of an evolving *principle of extraterritoriality*³⁶ beyond humanitarian actions,³⁷ *in casu* within trade in services? Does the EU practice an '*effects doctrine*' within the area of shipping trade irrespectively of place for signing shipping contracts or shipping activity?

4.2.1 Sovereignty versus Extraterritoriality

Clearly all national legislation should be interpreted under the framework of general principles of international law and customary international law. Historically, the limitation to extraterritorial action is founded in general principles of international law, *i.e.* the concept of 'states', subsequently in the axiom of sovereignty ('Landeshoheit') and the principle of non-intervention that was codified by the *1648 Constitutio Westphalia*.³⁸ This was the first agreement ever that monopolized power for a specific territory to a recognized government. The customary sovereignty dogma that served its purpose strictly for three centuries is codified in the 1948 UN Charter art. 1(2), *c.f.* the General Assembly Resolution 2625/70 On principles of international law on friendly relations and co-operation among states in accordance with UN Charter, see paragraph 1: Each nation enjoys self-determination, territorial integrity and political independence. Thus 'state' is inevitably tied to exclusivity in power, whether legislation, surveillance or justification.

The historic platform indicates that 'sovereignty' is a two-sided coin, which, besides the monopoly of state power within its territory *also prohibits* third states from the performance of extraterritorial legislative activity. Extraterritorially valid legislation provides explicit entitlement. Another argument that has been launched is that the '*effects doctrine*' breaches 'the principle of international comity'.

The European Court of Justice has rejected that the extraterritorial effects of EU law are contradictory to the rules of public international law, *in casu* 'international comity'.³⁹

4.2.2 *Autonomy – Unfriendly Trends*

Since the early 20th century, international public law recognized domestic regulation of cross-border damage. A good illustration is the Turkey – France *Lotus-case*,⁴⁰ justifying the use of Turkish Penal Code on a collision between a French and Turkish vessel outside the Turkish territorial waters. Since no rules prohibited Turkey from criminal prosecution on the high seas against activities causing damage to Turkish *territoire flottant*, the court of the League of Nations⁴¹ took – *obiter dictum* – the position that Turkey was entitled to arrest the French skipper. In the same direction, the *Trail Smelter* Arbitration Court that took the position that US liability rules addressed a Canadian producer of pollution of sulfur dioxide affecting US territory during the years 1925–1937.⁴² According to customary international law, the *personality principle*, focusing both on the active (lawbreaker) and the passive status (victim), is supplementing the principle of territory. It suffices that the latter is citizen or permanent resident in the ruling state.⁴³ Some limitations do, however, exist due to international agreements and membership in international agencies.⁴⁴

The later modification to the national state sovereignty seems to reflect two movements. One is a number of human rights' treaties.⁴⁵ Another is the free trade development that started with the European Economic Community (EEC) of 1957⁴⁶ and continued under the umbrella of the World Trade Organization (WTO). National states exclusive autonomy has deteriorated due to the principles of supra-nationality and *universality*. It is in this landscape that the evolving *principle of extraterritoriality* finds its place.⁴⁷

Having opened the gate of departure is one thing, to conquer the entire world is something else. While the *effects doctrine* installs competency *ratione terrae*, it does not put the 'doctrine practices state' in charge of the justification of the other states' domestic legislation. For instance the USA '*act-of-state doctrine*'⁴⁸ is blocking every attempt to examine the legality of acts carried out by a foreign sovereign within its own territory.⁴⁹ Since its *ratio decidendi* is the general principle of international law not to 'imperil the amicable relations between governments and vex the peace of nations',⁵⁰ the EU is in no other position with regard to its legislation *ratione terrae*.

What will appear on the road ahead, is open to rather loose speculation. Will the unilateralist track of autonomy over a foreign territory prevail, or will bilateralism take its place? It has been suggested that the *effects doctrine* gives implications that are too wide. Thus one should delimit between 'negative' and 'positive effects within the state'. Only the latter instances are illegal under foreign jurisdiction and should activate a state's competency under the *effects doctrine* requirements.⁵¹ US legal theory does, however, not support such delimitation.⁵² According to the *Skiriotes v Florida Case*, the US 'is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries'.⁵³ As made clear in the *Strassheim v Daily Case*, the US position is that citizenship is no prerequisite to extraterritoriality. A lawbreaker is under national US jurisdiction 'although he never had set foot in the State until after the fraud was complete'. Also

private law conflicts rule in the same direction. *Watson v Employers Liability* acknowledged the extraterritoriality of a national US legislation in a case involving two non-citizen parties to a contract that was negotiated and issued outside the regulating state. Regardless of that fact the contract was still under national state jurisdiction, as long as it affected one of its citizens.⁵⁴

Surely national sovereignty differs within sectors of society. Beyond human rights, within trade and services, a similar development is shortcoming. Trade in services is simply no *jus cogens* principle of international law. Free trade in services is only binding upon states that are members of covenants implying such principle upon the parties. With the exception of inhabitants living abroad and legal persons that are incorporated in the prescribing state, a *principle of extraterritorial effect of domestic law* conflicting with third countries' national sovereignty principle seems to fail recognition.

In the continuation, our interest is concentrated on the reach *jurisdictione ratione territorae* of the EU *competition acquis*. The EU's ability to act unilaterally received a major boost when the effect doctrine became part of EU law as a consequence of the Court of First Instance (CFI) judgment in the (1999) *Gencor-Lonrho Case*.⁵⁵

4.3 Framing the Substantial Law of Trade in Shipping Services

Though my effort here is to uncover the group of *ratione personae connected to the ratione territorae* within which the 1986 provisions works, we need – in short – to confront a few substantial issues that supposedly will bring better understanding of the 1986 trade in shipping services law. I highlight that this is a peripheral topic, not only because of its out-of-target-focus, but also due to the announced termination of the provisions on Liners Conferences.⁵⁶ Thus the substantial content of the shipping law should not be given broad attention.

It should be observed that trade in shipping services at present is only slightly liberalized: Line Conferences and domestic law systems still rule many shipping trades. In the continuation, a short glimpse into the EU-regulated Line Conferences trade will be given.⁵⁷

4.3.1 A Common Transportation Policy

Shipping belongs to the EU common transportation policy as stated in the preamble (fifth recital) of the 1986 Maritime Regulation Statute.⁵⁸ 'Whereas in accordance with Article 61 of the Treaty, freedom to provide services in the field of maritime transport is to be governed by the provisions of the Title relating to transport';⁵⁹ and is thus excluded from the Draft Service Directive.⁶⁰ Amendments will soon take place, since deregulation of the Liners conferences system is under consideration.⁶¹ The EU enjoys exclusive competency to regulate international transportation to and from the area of a Member State and through the national territories (See also the Constitution Article III-236(2)(a)).

Shipping service is a trade in services issue. Hence the EC Treaty principles of freedom of trade in services do apply to the shipping industry (The Constitution Article III-144 to 150). As with the EU technical provisions,⁶² the EU provisions on free trade in services do – at least partially – target shipping between the EU and third countries. Before analyzing the extraterritorial issues, some information is needed on competency issues *in casu* Member States legislative competency (Section A) and the Liner Conferences Code (Section B) in the search for limitations or interpretation principles to the EU law (Section C).

4.3.2 *The EU Shipping Services: Legislative Observations*

Why should the EU shipping trade legislation rule in the EU-Russia petroleum trade? Domestic regulations and the comprehensive system of Liners Conferences place heavy restrictions on international competition on shipping trade. From an EU perspective, limited access to freight is counterproductive to world trade, and is thus neither in the interest of the world trade nor in the interest of developing countries. ‘Whereas the Member States affirm their commitment to a freely competitive environment as being an essential feature of the dry and liquid bulk trades and are convinced that the introduction of cargo sharing in these trades will have a serious effect on the trading interests of all countries by substantially increasing transportation costs’.⁶³

The EU declares that ‘the application of this principle [freedom to provide services in the field of maritime transport] within the Community is also a necessary condition for effectively pursuing, in relation to development countries, a policy aiming at safeguarding the continuing application of commercial principles in shipping’.⁶⁴ Accordingly, the EU trade in shipping services provisions is *ideally* applicable to all shipping companies regardless of nationality.

In practice this results from the EU Liners conferences regulations that attribute legal subjectivity to ‘Liners Conferences’ as such. As indicated in the continuation, the EU trade in shipping services provisions are applicable without respect to the nationality of the conferences members and the location of the conferences.⁶⁵

The EU anticipation that free competition would serve international shipping and subsequently the societies of states is not unanimously accepted. In practice, Line Conferences and domestic trade restrictive systems still rule many of the shipping markets. And the EU position seems somewhat dubious. The EU admits that the United Nations Code of Conduct for Liner Conferences⁶⁶ under some circumstances deserves support. ‘Whereas the Community fully endorses Resolution No 2 ... which states that in the interests of sound development of liner shipping services, non-conference shipping liners should not be prevented from operating as long as they adhere to the principle of fair competition on a commercial basis’.⁶⁷

In the living fabric of life, a de-regulated shipping trade is still no reality, which indicates that the EU only halfheartedly abandons the Liners Conferences. This position seems to gain support not only among developing

countries, but also from a ship-owner's perspective. 'Given the existing excess capacity ... the carriers maintain that stability can be achieved only by regulating the utilization of existing capacity, in order to allow them to increase freight rate levels'.⁶⁸ As indicated in the continuation, several shipping markets are more or less thoroughly regulated.⁶⁹ This activity is ruled by the United Nations Code of Conduct for Liner Conferences.

The solution for newly independent African States was not 'free trade in shipping services', but a justified access to existing Liner Conferences and the benefit from a 'fair' cargo-sharing system. This claim was acknowledged at the Third and Fourth Lomé Conventions and the 1974 United Nations Conference for Trade and Development (UNCTAD), a code of conduct for liner conferences (UNCTAD code).⁷⁰

Is the *acquis* on trade in Shipping Services – due to obvious extraterritorial effects of Russian trade in service provisions that rule out also freights to EU ports – applicable in Russian petroleum trade? Lacking a clear prejudicate on the EU competition law,⁷¹ the analysis is made in light of the EU condemnation of four USA instances of *lex extra territoriae* as *contra legem*. These are displayed in the Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (*1996 The Blocking statute*).⁷² The denounced USA provisions do at the same time illustrate the EU comprehension of the 'valid extraterritorial reach' (or substantial content of the '*effects doctrine*') under international law. The EU law geographic reach should separate from the reach of the predictable *illegal* extraterritoriality of US domestic law (see Section 6B). The issue of interest is whether the EU balances its own legislative trade-in-services-power accordingly?

This line of argument relies upon the fact that 'double standards' fail to be recognized. Due to the EU ambivalence to the '*effects doctrine*',⁷³ the exact EU position is not clear, it is in progress, *i.e.* a *de scententia ferenda* standing, which also characterizes this work.

The potential market for Russian gas and oil transportation is 'forbidden land' for most western shipping services. Replacing domestic Russian legislation with EC rules on free trade in services results in the lifting of prohibitions floating from line-agreements, cabotage, national flag preferences, fleet subsidies, re-flagging restrictions, ownership restrictions and more indirectly on crewing requirements, domestic technical provisions, etc. The 'bottom-line' for the EU provisions is to encourage equal and just competition, not only within the EU but also in trading with third countries that compete for the charter-parties. The objective as stated in the *1986 Maritime Service Regulation Article* is to phase out provisions that reserve freights for vessels flying the national flag. See *1(4)* that identify intra community shipping services (litra a) with third-country traffic (litra b), the latter of which include 'the carriage of passengers or goods by sea between the ports of a Member State and ports or off-shore installations of a third country'.

Russia is not yet a WTO member, but even if membership succeeds, the lack of any General Agreement on Trade in Services (GATS) that relates to shipping and any international treaty on competition law will remain critical for a possible Russian adaptation to free trade principles. Since Russia will remain a non-EU Member, our interest is in the EU extraterritorial influences upon ships sailing in international and Russian arctic waters. The EU position is that foreign restriction – hereunder also Russian – on the freedom to provide maritime transport services ‘may have harmful effects on Community trades as a whole’.⁷⁴ Thus the EU considers that the international law ‘*effects doctrine*’ – at least to some extent – is applicable.

Three options seem possible. Either it is a question of direct applicability of the EU *acquis*, that its validity is a product of bilateral EU-Russia arrangements, or that oil and gas contracting parties – in the charter parties – agree upon the installation of EU shipping services provisions as the working standard between the parties.

4.3.3 Does the EU – Russia Bilateral Agreement Exclude Extraterritorial Effects?

The EU – in its market regulation efforts – may act within the frames of the bilateral EU-Russia agreement.⁷⁵ Does this agreement exclude the EU from giving extraterritorial effects to its *shipping services acquis*? The objective of the agreement is to ‘create the necessary conditions for the future establishment of a free trade area between the Community and Russia covering substantially all trade in goods between them, as well as conditions for bringing about freedom of establishment of companies, of cross-border trade in services and of capital movements’ (Article 1). The cross-border supply of services is regulated in Article 38, stating that ‘For the sectors listed in Annex 5, each Party may regulate the conditions of cross-border supply of services into its territory. In so far as these regulations are of general application they shall be administered in a reasonable, objective and impartial manner’ (paragraph 1). This relates to the national treatment clause under GATT Article III. As stated in Article 39 (1)(c) *in fine*: Each Party shall grant, *inter alia*, a treatment no less favorable than that accorded to a Party’s own vessels. Thus discrimination on national grounds are prohibited. Article 39 obliges the Parties with regard to maritime transport, to undertake to apply ‘the principle of unrestricted access to the international market and traffic on a commercial basis’. However, Liners Conferences under the United Nations Convention Code of Conduct should be respected. In addition, non-conference lines ‘shall be free to operate in competition with a conference as long as they adhere to the principle of fair competition on a commercial basis’ (paragraph 1 *litra a*).

For the EU–Russian mutual trade, any cargo sharing provisions of bilateral agreements between any Member State and the former USSR (paragraph 2 *litra a*) shall be abandoned. It is also prohibited to introduce new cargo sharing arrangements within dry and liquid bulk and liner trade (*litra b*).

Article 39 (2)(c) obliges the EU and Russia to abolish, upon entry into force of this Agreement, all unilateral measures, administrative, technical and other obstacles which could constitute a disguised restriction or have discriminatory effects on the free supply of services in international maritime transport.

While the agreement institutes substantial barriers to the Member States shipping trade prescription, we find no regulations *jurisdictione ratione terrae*. No partnership provisions delimit possible extraterritorial effects of the Member States legislation. Thus we are fully under the delimitation floating from ‘general principles of international law as recognized by civilized nations’ or ‘international custom, as evidence of a general practice accepted as law’ (The 1945 Statute of the International Court of Justice, Article 38 (1)(b) and (c)). Lacking any firm practice or recognized principle of law, we are experiencing a situation *de scententia ferenda*, which should be solved on the merits of the case. Whether extraterritoriality is within the limits of national jurisdiction, depends upon very basic parameters under the concept of sovereignty. Do states enjoy all powers that are not explicitly withdrawn? These are the residual rights. Or does the opposite apply: states’ competency within foreign territories needs explicit entitlement?

There is no general answer to this question. Thus we need to examine the EU extraterritoriality practice (see Section 4-5) as recognized by the international society of states, which speaks for it self.

4.3.4 Other International Frames to the EU Trade in Shipping Services

The EU and its Member States are members to the 1974 United Nations Conference for Trade and Development (UNCTAD) and the code of conduct for liner conferences (UNCTAD code)⁷⁶ that establish Liner Conferences as an international commitment. The Council Regulation (EEC) No 954/79 of 15 May 1979 concerning the Member States ratification of, or their accession to, the United Nations Convention on a code of Conduct for liner Conferences (*1979 Liner Conferences Regulation*)⁷⁷ request the EU Member States to implement UNCTAD code provisions into national law. The common position thus allows Member States to gain competitive access to that part of cargo liner shipping which is not covered by commitments to national shipping lines of third countries under the United Nations Convention on a Code of Conduct for Liner Conferences.

This instrument says that – whenever a liner conference is initiated – the end destinations to the transport shall enjoy a just portion of the trade. This provision must lead to the application by the conferences of the 40:40:20 sharing rule. Forty per cent of the conference cargo to the home traders at each end of a given bilateral route and the balance (20%) to the shipping companies of third countries that are members of the same conference or enjoy a free agent status. According to the 1979 provisions, all Member States enjoy equal access to Liner Conferences participation. This means *in concreto*, that the national lines at each end of a given shipping route are to have equal shares of the cargoes carried by the con-

ference operating on that route, non-conference lines being allocated a significant share of that trade, on the order of 20%. Thus ship-owners that opt for a free competition agenda are also granted some space in the shipping services community.

In quite a few instances the Liner Conferences cause disturbances to the EU *competition acquis*. Decisions by the conferences often constitute agreements, which contravene Article 85 of the EEC Treaty,⁷⁸ and sometimes their practices infringe Article 82.⁷⁹ Thus the Liner Conferences⁸⁰ prescribe limited access, reduced capacity and minimum prizes to transportation markets. The shipping companies⁸¹ shall comply with the obligations of Member States under the *1979 Liner Conferences Regulation*. In short, this provision secures that Member States preserve equal and non-discriminatory access to Member States shipping within that part of cargo liner agreements not covered by commitments to national shipping lines of third countries.

Not only should the EU *trade in shipping services acquis* be read within the framework of Liners Conferences Code, it also purports interpretative understanding to the EU shipping aquis:

The link between the adoption of Regulation (EEC) No 4056/86 and possible ratification or accession to the Unctad Code of Conduct is made quite clear in the third recital to Council Regulation (EEC) No 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences and the third recital to Regulation (EEC) No 4056/86. In the Commission's view the Code is an important factor to be borne in mind in interpreting the concept of an exempted liner conference under Community law.⁸²

4.3.5 The EU Member States Domestic Shipping Regulations

Whether the EU is stripped of some of its international power due to non-transferred Member States competency, is considered in this section. Do Member States enjoy any power under the EU shipping trade regulations?

Shipping service is part of the transportation provisions,⁸³ which means that the arena is under the 'common transport policy'. According to the 2004 Constitutional Convention Article 14, transportation belongs to the area of shared competencies, which indicates that the EU transportation *acquis* is *lex superior* to Member States legislation. As most areas of shipping trade are expressly handed over to the EU, the domestic prescription arena is limited to the delegated power. As indicated in the 2004 Constitution Article III-237, Member States enjoy no prescriptive rights in *lacunae*, but are fully dependent upon a possible EU delegation. Thus Member States law regulations are more or less ruled out.

Obviously, Member States occasionally ignore the EU supremacy. Belgium breached the freight sharing agreements under Liner Conference agreement as implemented by EU in 1979.⁸⁴ Contradictory to EU law, Spain has repeatedly banned cabotage in its territory.⁸⁵ At present most Member States seem to have phased out domestic provisions.

From a competition perspective, Member States' unilateral regulations are – contradictory to the private arrangement of Liner Conferences – a non-problem. The Commission announced in October 2004 the abandonment of shipping trade restrictions, which supposedly will gain support in the newly elected *collegium* (in function 2005).⁸⁶

4.4 The Extraterritorial Reach of EU Shipping Provisions (1) – The EU position

The main goal in this section is to indicate whether the EU shipping *acquis* restricts it self to areas of the EU Member states only. My hypothesis is that the EU prescribes its solutions to areas far beyond the territories of its Member States.

4.4.1 A Starting Point: Unrestricted Extraterritorial Application

1. Under the Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (The Trans-Atlantic Agreement – TAA) the provision's geographic reach is defined as follows. 'The TAA ... covers eastbound and westbound shipping routes between (i) on the one hand, ports in Europe situated in latitudes from Bayonne, France, to the North Cape, Norway (except non-Baltic ports in Russia ... and (ii) on the other hand, ports in the 48 contiguous States of the United States and the District of Columbia and points in the United States via the said ports'.⁸⁷ The Northern Sea Route to Russian Arctic ports is unlike the Baltic ports, not included. Neither Canada, Norway, Russia nor the USA are within EU territory, but are none the less included in the provisions of this Commission Decision.
2. The extraterritoriality of the EU law is supplemented by excessive *jurisdictione ratione personae*. Non-EU incorporated shipping companies – such as Chinese, Japanese, Korean, Mexican and those from the US are under the influence of this EU decision.⁸⁸ Thus, for instance, the EU directs a Japanese shipping company sailing between St.Petersburg and Boston. The EU position is well stated in the preamble of the Council Regulation (EC) No 3051/95 of 8 December 1995 on the safety management of roll-on/roll-off passenger ferries (ro-ro ferries):

Whereas the safety of ships is the primary responsibility of flag States; whereas Member States can ensure compliance with adequate safety management rules by ferries flying their flag and companies operating them; whereas the only way to ensure the safety of all ro-ro ferries, irrespective of their flag, operating or wishing to operate on a regular service from their ports is for the Member States to require effective compliance with safety rules as a condition for operating on a regular service from their ports (15th recital)

Thus no foreign company will be licensed to embark from an EU port without living up to the EU safety rules. Clearly the EU deems vessels flying foreign flags that operate on a regular service from their ports, under the auspices of the EU competition laws.

3. The Commission Decision 94/980/EC does address foreign companies and private persons – both beneficiaries and restrained. It is stated that the ‘undertakings to which this Decision is addressed’ are required to refrain from any agreement or concerted practice in relation to ‘price-fixing and capacity [reduction]’ (Article 1 cf. Article 4). This obligation relates to beneficiaries, many of which are citizens of other states, or incorporated in countries outside the EU.

The undertakings to which this Decision is addressed are hereby required, within a period of two months of the date of notification of this Decision, to inform customers with whom they have concluded service contracts and other contractual relations in the context of the TAA that such customers are entitled, if they so wish, to renegotiate the terms of those contracts or to terminate them forthwith (Article 5).

We here experience that the EU annuls contracts that are concluded between foreigners abroad provided that the shipper in question embarks on a regular basis, from one of the ports of the EU. This is not a single illustration, as several Liners Conferences do address instances or persons having extraterritorial ties.

Extraterritorial application is common knowledge also outside of the competition law! See for instance the Council Regulation (EC) No 3051/95 of 8 December 1995 on the safety management of roll-on/roll-off passenger ferries (ro-ro ferries) Article 3. ‘The Regulation shall apply to all companies operating at least one ro-ro ferry to or from a port of a Member State of the Community on a regular service regardless of its flag’. Likewise, the solution under the EU Council Directive 1999/35/EC of 29th April 1999 (ferries surveillance provisions) addresses the same RO-RO ferries ‘regardless of its flag’ (Article 3). Here a rather inventive concept of ‘hosting state’ (article 4 and 5) is introduced, and foreign flag states are under the scrutiny of EU hosting states, ‘whether the requirements of this directive is fulfilled’.

The geographic application is directed by the concept of ‘the sea’ as defined in the Council Directive 98/18/EC of 17th March 1998, Article 4 on safety rules and standards for passenger ships. As indicated in paragraph 1 in this section, areas beyond the ‘EU waters’ are included.

4.4.2 A Hostile Reaction? A Norwegian View Regarding the EU Position

Due to the Norwegian membership in the European Economic Area (EEA) agreement, all inner-market provisions should, according to the EEA Agreement Articles 102-104 procedures, be incorporated into domestic Norwegian Law. Norway is accordingly obliged to closely examine the EU legal position.

Nevertheless, Norway is obliged – if the EEA committee so decides – to incorporate the EU provisions ‘lock, stock and barrel’,⁸⁹ Norway is occasionally reluctant to fully follow the EU position on extraterritoriality. In

this paragraph I will present the Norwegian reaction to the EU Council Directive 1999/35/EC of 29th April 1999 (see section A).

The incorporation of the Directive 1999/35/EC resulted in an amendment of the Norwegian Merchant Shipping Act of 24 June 1994 § 486a, related to maritime incidents with RO-RO ferries and express passengers boats. While the text of the EU Council Directive 1999/35/EC reads: 'This directive relates to all RO-RO ferries ... touring to and from a Member State port, irrespective of which flag it is flying', the Norwegian provision reads as follows: 'This provision relates to RO-RO ferries ... registered in an EEA state and touring to and from an EEA port'. As verified, these two prescriptions are far from identical. Norway refrains from implying domestic law against a ship that is flying a foreign (non-EEA) flag, a qualification that is not part of the EU acquis.

The Norwegian view towards the EU position is justified in the following way: The EU provisions on coastal states' competency to cause an inquiry to be held on marine casualties, reaches far beyond what is entitled in international law.⁹⁰ Since we – within the framework of the EEA agreement – are forced to abandon the ancient international law principle of flag state jurisdiction, Norway decided not to introduce the EU 'host state' principle to ships from countries outside of the EEA. The Norwegian position is thus that the national power over a ship flying a foreign flag thus requires a bilateral agreement like the EEA agreement. Consequently, ships flying the Canadian, Japanese Liberian, Russian, Panamanian etc. flag are in Norway – as opposed to the EU – excluded from coastal state jurisdiction when in Norwegian waters.

Norway claims that her position is according to the 1982 UNCLOS Article 2 and the International Maritime Organization (IMO) Code for the Investigation of Marine Casualties and Incidents. Accordingly, the Norwegian position is that the identical EU provisions are contradictory to international law.

4.5 The Extraterritorial Reach of EU Shipping Provisions (2) Liners Conferences

The reach of domestic law beyond its borders is ultimately a sovereignty principle question: Does customary law or general principles of *international law* designate national states to imply legislative rights and obligations *ratione territorae* beyond its borders? If yes, the question is whether the state in action – *in casu* the EU – actually has taken advantage of such an excessive competency. The focus is then switched from international to domestic law.

The main objective of this section is to investigate the geographic reach of the EU competition law with a special emphasis on trade in shipping services. I anticipate a positive outcome of the international law discussion on whether states may prescribe conditions of economic life outside its own territory.

The EU has challenged several instances of limited shipping competition as implemented by Liners Conferences.⁹¹ Among these are the Trans-

Atlantic Agreement (TAA) of 31 August 1992, Associated Central West Africa Lines (Cewal), Continent West Africa Conference (Cowac), United Kingdom West Africa Lines Joint Service (Ukwal) and Mediterranean West Africa Conference (Mewac). We also find some rather loose arrangements, for instance the Association of Independent West African Shipping Interests (Aiwasi), that are informal associations representing independent shipping interests in the EU. Since none of these regulate the EU–Russian tank and LNG shipping market, I do not include details here.

This paragraph scrutinizes the extraterritoriality of the EU decisions related to these competition-limiting agreements.

4.5.1 Introduction to the Trans-Atlantic Agreement (TAA) of 31 August 1992

At present the EU has a tolerance for private market regulations within the frames of the EC Treaty Articles 81 and 82. Several agreements mentioned above are acknowledged and found legitimate according to the EU competition rules. The EU has scrutinized the TAA⁹² and Cewal, Cowac and Ukwal agreements.⁹³ I will use the Trans-Atlantic Agreement as an example here.

1. *Jurisdictione ratione materiae* are Line Conferences ship-owners private regulations of trade. In some instances Line Conferences negotiate prices, limiting capacity etc. with the non-conference companies (outsiders).

Conferences are binding neither on states nor on non-member ship-owners. In some instances, states consider Line Conferences valid despite their restrictions to competition,⁹⁴ which in practice result in state force behind the regulations.⁹⁵

The free competition shipping trade market is what remains beyond Line Conferences and domestic law arrangements that are unilaterally applied. The following should be observed:

The purpose of the Capacity Management Programme (CMP) under Liners Conference is to limit the supply of transport on the market without reducing the real available capacity of ship-owners. All the parties to the Line Conference are obliged to participate in the programme. Thus, ship-owners have agreed not to utilize a substantial part of their available capacity.⁹⁶

The Line Conference provides that its members may discuss and unanimously agree to subjects relating to the specific market regulated by the conference, such as prices, conditions and capacity of carriage.⁹⁷ The chief aim of these agreements is to achieve stability in the trade. Basic issues are the fixation of tariff rates and service contracts that all parties are obliged to follow. If one party considers lowering the rate, the secretariat must be notified quite a few days in advance, which informs the other members.⁹⁸ A ‘Rate Committee’ monitors the application of the objectives of the agreement concerning the tariffs.

Service contracts concluded by the members of a Liners Conference must conform to certain rules. One is that no contracts may

last longer than one year; all contracts must terminate on or before 31 December of the relevant year. Another is that no contracts may be signed for annual volumes less than some specified number of containers.

Important is also the financial guarantee saying that each party must take a deposit of a relatively high amount of money, used as a guarantee for potential fines. The Line Conference Secretariat or another neutral body should monitor the parties' compliance to the agreement. The Secretariat may impose heavy fines if necessary in the event of non-compliance with the provisions of the Liners Conference.

2. The basic provision *ratione personae* is Article 3 of Regulation No 4056/86 which provides that 'agreements, decisions and concerted practices of all or part of the members of one or more liner conferences' are under the auspices of the EU. The addressee of the provision is the member of the conferences, not the conference as such. Since lots of foreign shipping companies are members of the TAA,⁹⁹ these entities incorporated abroad are under the auspices of the EU *shipping acquis*.

4.5.2 *The EU Commission Practice (1) – the EC Treaty Article 81 basis*

1. Liners Conferences may suffer difficulties in relation to Article 81 (1) of the EC Treaty. The object and effect of such agreements is to share markets and limit the supply of services, within the meaning of Article 81 (1) (b) and (c), by regulating access to the port according to whether or not a shipping company is a member of a particular conference. Article 81 may affect arrangements on slot and space charters, on equipment exchange, price agreements on port activities (as referred to in the ECJ case in note 27 above), price agreements on maritime transport and capacity non-utilization agreements for maritime transport. Even price fixation indirectly connected to shipping arrangements is regulated, for instance price agreements on inland transport.

An effect on trade between Member States may result from the price agreements within the Liners Conference. Whether it is *indirect* does not exclude Article 81(1) from coming into effect. If the Line Conference covers all the shipping services in a geographic area and the conditions of competition for those services are reasonably homogeneous, then the services concerned should be considered as *a market* within the meaning of Article 81 of the EC Treaty.

A price-fixing agreement respecting maritime transport is covered by Article 81 (1) (a). Liner shipping companies are like free agents, undertakings within the meaning of Article 81 (1) of the Treaty. The conference membership does not bring immunity to the members. In particular, they allow the members of the conferences to restrict competition between themselves with regard to tariffs, freight rates and general transport conditions. One question is however whether the restrictive practices of the conferences must be

capable of *affecting* trade between Member States or that a significant potential effect on intra-Community trade is required to fall within the scope of Article 81.¹⁰⁰ According to the text, the potential intra-community effect is sufficient: ‘*may affect* trade between Member States’. It is sufficient that the antagonistic agreement, decision or practice ‘have as their ...effect the prevention, restriction or distortion of competition within the internal market’.¹⁰¹ Here the ‘*effects doctrine*’ is codified.

Transport rates fixed by Liners Conferences can account for a substantial part of the final price of goods transported by members of the agreement. A change in the price charged for the transport of an article being exported from a Member State may affect the competitiveness of that article in its destination market, and thus urge exporters to look for new departure ports in other EU Member States. Similarly, a change in the price that is charged for the transport of an imported article might affect the competitiveness of that article compared to competing goods originating in other Member States. Consequently, the fixing of prices for the transport of goods is enough in itself to affect the competitiveness of goods that are to be exported or imported.¹⁰²

Liners Conferences that contradict Article 81 may still continue to exist due to the deviation clause of Article 81(3). Regardless of that the EU may decide not to prohibit the agreement but instead propose that Conferences ‘continue to be protected from Commission fines by the notification, in accordance with Regulation (EEC) No 4056/86, but otherwise continue their activities pursuant to the agreement at their own risk’. When this is the case, the EU is ‘free to reconsider its position in the light of the circumstances at the relevant time’.¹⁰³

2. The question at stake is whether the location of Liners Conferences – the main office, headquarter or place of decision-making – is important in relation to Article 81.

As indicated below, the extraterritorial implications of shipping trade is built into the EU competition law. At first glance the *acquis communautaire* seems to limit its reach to the EU territories: ‘The Treaty establishing the Constitution shall apply to the European territories for whose external relations a Member State is responsible’.¹⁰⁴ Thus – as part of the constitution – the competition laws should not exceed the frames of the constitution. As the new constitution is said to terminate neither secondary law nor case law developed by the ECJ,¹⁰⁵ territoriality issues should be understood as developed by secondary law and interpreted by the court. The constitutional treaty does not make any change to this.

As indicated earlier in this Section EU competition law in its reach, relates to restrictive practices that ‘*may affect* trade between Member States’. It is sufficient that the antagonistic agreements, decisions or practices ‘have as their ...*effect* the prevention, restriction or distortion of competition within the internal market’.¹⁰⁶ The effects should be at least visible, perhaps significant.¹⁰⁷

While the effects – that involved the passive part, the consumers – are manifest *within* the EU, there is no similar claim in relation to the location of the active part, the offender. Does the competition law result from the principle of universality, an unlimited legislative competency *jurisdiction razione terrae*? The answer textually and contextually spoken, is that *competition acquis* fails to limit the EU competency in a geographical sense. Thus, as far as it is internationally feasible, the EU may support a rather aggressive ‘effects theory’. Consequently, EU may use its discretionary power according to the *1986 Maritime shipping regulation Article 7* to catch a rather extensive group of foreigners.

One more thing should be said before opening the box of practical adaptation. What kind of activity triggers the Article 81? The notions used are ‘all agreements... decisions... and concerted practice’. Clearly, no text hinders competition agencies from the application of Article 81 to transactions that take place outside the EU.

This being the case, the remaining puzzle is to figure out whether agencies are restrained from fully take advantage of the competencies (See this Section, paragraph 4.5.3 – 4.5.4)

4.5.3 The EU Commission Practice (2) – the EC Treaty Article 82

As a starting point, EC Treaty Article 82 prohibits as incompatible with the common market any abuse by one or more undertakings of a dominant position within the common market, or in a substantial part of it, insofar as such abuse may affect trade between Member States. The applicability of Article 82 to shipping conferences is made clear by the Council Regulation (EEC) No 4056/86 of 22 December 1986, laying down detailed rules for the application of Articles 85 and 86 (now 81 and 82) of the Treaty to maritime transport.¹⁰⁸ Article 8 deals with the abuse of a dominant position by shipping conferences, which in fact is confirmed by the European Court of First Instance.¹⁰⁹ This includes agreements between economically independent entities that enable economic links producing a joint dominant position to the disadvantage of other operators on the same market.

The fact that Liner Conferences activities are an authorized exemption *en bloc* does not prevent the application of Article 82 to the activities of the conference.¹¹⁰ First of all, it obviously may be debated whether agreements really are ‘conferences’. Often price agreements seek to disguise as a conference what is really an agreement with outsiders, independent shippers that wish to maintain price flexibility. Such agreements do not benefit from the block exemption granted to conventional conferences.

Secondly the Liners Conferences should be judged by their practice. Like individuals these entities may, as undertakings within the meaning of Article 82, happen to abuse their joint dominant position.¹¹¹

In some instances transportation is a task of economic interest to the society at large, and the use of competition rules would ruin the important public task. Commodities are needed in a specific place and no one will offer transportation at a compatible price. This fact does not ruin the use

of competition rules. According to article 82(2) ‘Undertakings entrusted with the operation of services of general economic interest... shall be subject to the rules ... on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them’. Since exceptions to the main rules are interpreted strictly, or said otherwise, that the main rules are interpreted in their most extensive meaning, few services seem to escape ordinary market laws. In one instance of air transportation service, the ECJ verified that Article 82(2) only applies if the undertaking has actually been entrusted by an act or statute of the public authority with a task of general economic interest.¹¹² The preconditions are cumulative, there should be an act and the assignment must include contribution to the common interest. In a later case, the ECJ held that the operation of air routes that are not commercially viable constitutes such a service.¹¹³ Thus, keeping up shipping lines to outposts with little density would qualify for the Article 82(2) exception. Since this seems inapplicable to the Russian trade in oil and gas, we do not need to pursue this track any further.

Just for curiosity, a case slightly connected with shipping trade: The ECJ states that ‘it does not appear ... that dock work is of general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities or, even if it were, that the application of the rules of the Treaty, in particular those relating to competition and freedom of movement, would be such as to obstruct the performance of such tasks’.¹¹⁴

4.5.4 The EU Commission Practice (3) – the Liners Conferences

The EU found that Cewal, Cowac, Ukwal and TAA conferences established fixed prices for maritime transport that limited the need for capacity. Conferences also hindered members from operating as an independent company in the activity of the other conferences. Thus, Liner Conferences constituted illegal agreements between undertakings within the meaning of Article 81 (earlier 85) of the EEC Treaty.¹¹⁵

A vital question is whether the Commission decisions are binding upon the Liner Conferences without respect to the location of its member’s incorporation, citizenship or habitation? In that case, the EU shipping trade legislation has extraterritorial effects.

Among the members of the TAA are shipowners incorporated in the non-EU Member States of Korea, Mexico, Switzerland and the USA. The other three conferences include members from Angola, Benin, Gabon, Cameroon, Côte-d’Ivoire, Ghana, Nigeria, Norway, Senegal, Togo and Zaire. Are foreign shipowners exempt from a possible EU criticism?

Investigating this issue, we should consider the prerequisites of the competition concerns within the EU. What kind of EU-internal implication is required to initiate the EU shipping competition law? Before going into greater detail we need a short introduction to the main points of competition law.

Similar to the Article 81 discussion, the issue of interest is here whether the location of Liners Conferences is relevant for the application of that provision. As regards the active subject – the offender – it should be stated that his *dominant position* ‘may affect trade between Member States’. It is sufficient that the position held have a possibility for negative implications on the trade.

As with the Article 81 discussion, the effects are manifest *within* the EU, but with no matching claim in relation to the location of the active part, the offender. Thus we experience also here an unlimited competency *jurisdiction ratione terrae*, a discretionary power that the Council may use according to the *1986 Maritime shipping regulation Article 7*.

The Article 82 triggers by the presence of a dominant position. Whether it is caused by unfair purchase or selling prices or competition, production quotas, market limitations, market discrimination or other dominating draws, is of minor interest as the list mentioned is only illustrative.

Thus the remaining puzzle is to figure out whether agencies do fully take advantage of the competencies (See this Section, paragraph 4.5.7).

4.5.5 The EU Commission Practice (3) – the Regulation (EEC) No 4056/86¹¹⁶

Article 3 of Regulation (EEC) No 4056/86 grants *block exemption* to the agreements of members of one or more ‘Liner Conferences’ having as their objective the fixing of rates and conditions of carriage and one or more of the objectives listed at points (a) to (e) of that provision. Article 1 (3) (b) of the Regulation defines a liner conference as ‘a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate on uniform or common freight rates and any other agreed conditions with respect to the provision of liner services’ The block exemption suspends all competition provisions under Article 81.

The agreements in question between the members of the conferences do not constitute technical agreements within the meaning of Article 2 of Regulation (EEC) No 4056/86, as they are aimed solely at commercial objectives and are therefore captured by Article 81(1) of the Treaty. Liners Conferences are as a starting point under the derogation regime of Article 3 of Regulation (EEC) No 4056/86. However, not all price agreements do meet the *exemption criteria* for conferences set out in Article 3. It should be stressed that the qualification criteria are that the agreement objective is the fixation of common or uniform prices between conferences. Agreements that are between conference and non-conference lines that aim at limiting the competition of the latter fall outside the scope of the exemption provided for by Article 3. Since jurisdiction *ratione terrae* is the scope here, I do not go into further detail.

4.5.6 *The EU Commission Practice (4) – Extraterritorial Implications*

As indicated earlier (Section 4.5.3), it is sufficient that the position, agreement, decision or practice of ‘EU competition law in its reach, relates to restrictive practices that “*may affect* trade between Member States”’. As indicated the offender is under no limitation *jurisdiction ratione terrae*.

The remaining puzzle is thus to figure out whether agencies are restrained from fully taking advantage of the competencies mainly because the frames of international law are not considered. In Section 4.6 I examine the ECJ understanding of the limitations to competition law in general. In Section 4.7 the EU comprehension of American prescribed territoriality is scrutinized. Since double standards are out of the question, the EU provisions should face similar blocking solutions.

Coming to the conclusion, we find that *competition acquis* not only fails to limit the EU competency in a geographical sense, it explicitly addresses foreigners in non-EU territories. Thus, as far as it is internationally feasible, the EU supports a rather aggressive ‘*effects doctrine*’. Consequently, the EU discretionary power under the *1986 Maritime shipping regulation Article 7* applies to a rather extensive group of foreigners.

4.6 *Effects Doctrine – as Illustrated by Case Law*

Does the European Court of Justice acknowledge that EU competition laws generate extraterritorial effects? Since no prejudicate exists as to whether the ‘*effects doctrine*’ finds its place under trade in services, a careful examination of EU competition law in general is needed.

Both codified and case law illustrate the fact that the EU Treaties do not prevent the application of EU law outside of EU-territory. The purpose of this section is to illustrate *the EU self-image* of its extraterritorial competency. EU law is only indirectly related to international law.¹¹⁷ EU law has several provisions that deal with extraterritorial application.¹¹⁸ One provision is EC Treaty Article 49(2), which states that services provisions may be extended to ‘nationals of a third country who provide services and who are established within the Community’.¹¹⁹ In the same respect, Article 60(2) entitles Member States, ‘for serious political reasons and on grounds of urgency, [to] take unilateral measures against a third country with regard to capital movements and payments’.¹²⁰

The extraterritorial application of EU law is, however, not limited to instances explicitly mentioned. Extended effects may also follow from an implicit reading of EU law. This is clearly the case under competition law, exemplified in particular¹²¹ by the *Dyestuff* case¹²² and *Euro-emballage* case.¹²³ I will first look at the oldest case related to EC Treaty Article 81(1) – the *Dyestuff* case, where jurisdiction was upheld over concerted trade practices:

The applicant, whose registered office is outside the Community, argues that the Commission is not empowered to impose fines on it by reason merely of the effects produced in the Common Market

by actions which it is alleged to have taken outside the Community.

Since a concerted practice is involved, it is first necessary to ascertain whether the conduct of the applicant has had effects within the Common Market.¹²⁴

...

The applicant objects that this conduct is to be imputed to its subsidiaries and not to itself. The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.¹²⁵

In effect the Telex messages relating to the 1964 increase, which the applicant sent to its subsidiaries in the Common Market, gave the addressees orders as to the prices which they were to charge and the other conditions of sale which they were to apply in dealing with their customers.

In the absence of evidence to the contrary, it must be assumed that on the occasion of the increases of 1965 and 1967 the applicant acted in a similar fashion in its relations with its subsidiaries established in the Common Market.

In these circumstances the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition.

It was in fact the applicant undertaking which brought the concerted practice into being within the Common Market.

The submission as to lack of jurisdiction raised by the applicant must therefore be declared to be unfounded.¹²⁶

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

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

The applicants argue that according to the general principles of international law, Continental, as an enterprise with its registered office outside the Common Market, is neither within the administrative competence of the Commission nor under the jurisdiction of the Court of Justice. The Commission, it is argued, therefore has no competence to promulgate the contested decision with regard to Continental and to direct to it the instruction contained in Article 2 of that decision. Moreover, the illegal behaviour against which the Commission was proceeding, should not be directly attributed to Continental, but to Europemballage.

The applicants cannot dispute that Europemballage, founded on 20 February 1970, is a subsidiary of Continental. The circumstance that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company. This is true in those cases particularly where the subsidiary company does not determine its market behaviour autonomously, but in essentials follows directives of the parent company.

It is certain that Continental caused Europemballage to make a take-over bid to the shareholders of TDV in the Netherlands and made the necessary means available for this. On 8 April 1970 Europemballage took up the shares and debentures in TDV offered up to that point. Thus this transaction, on the basis of which the Commission made the contested decision, is to be attributed not only to Europemballage, but also and first and foremost to Continental. Community law is applicable to such an acquisition, which influences market conditions within the Community. The circumstance that Continental does not have its registered office within the territory of one of the Member States is not sufficient to exclude it from the application of Community law.

The plea of lack of competence must therefore be dismissed.¹²⁷

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

Professor R.Y. Jennings, who consulted for International Chemical Industries (ICI) Inc., expressed concern over whether EEC practice was in accordance with international law. 'The contemporary practice of States is vigorously opposed to ...the extraterritorial enforcement of anti-trust laws is not something which can be applied in one direction only'.¹²⁸ However, the international law argument had little influence on the ECJ. The lack of reciprocal application did not ruin the validity of domestic law. One way of interpreting the Court's position is that the EU, as a sovereign entity, may prescribe the geographical application of its own law as far and as long as international law does not explicitly bar it from doing so.¹²⁹

The 1988 Ahlström case was related to concerted practices between undertakings established in non-member countries that affected selling prices to purchasers established in the Community.¹³⁰ The foreign sellers claimed that the Commission, by imposing fines on them, has infringed the home countries' sovereignty and thus breached the principle of international comity.¹³¹

Even more extensive use of the EU competition acquis is illustrated by the *Gencor Case*. Here Gencor Ltd., a company incorporated under South African law, established in Johannesburg, was by its purchase of an English company, Lonrho Plc ('Lonrho'), creating a lawbreaking dominant position (EC Regulation No 4064/89). The company applied for the annulment of Commission Decision 97/26/EC of 24 April 1996, declar-

ing a concentration to be incompatible with the common market and the functioning of the EEA Agreement.¹³²

It was stated that the Regulation No 4064/89 ‘does not require, in order for a concentration to be regarded as having a Community dimension and, accordingly, for it to fall within the scope of that Regulation, that the undertakings in question must be established within the Community or that the production activities covered by the concentration must be carried out in Community territory’. The application of this regulation ‘is justified under public international law when it is foreseeable that a proposed concentration between undertakings established outside the Community will have an immediate and substantial effect within the Community’.¹³³

as regards the consistency of that approach with public international law, the German Government states that both the conflict rule contained in the Regulation and its application in the present case fulfil the criteria arising from the ‘effects doctrine’, otherwise known as the principle of objective territoriality. The achievement by each of the two undertakings involved in the concentration of a turnover within the Community of at least ECU 250 million constitutes a sufficient connecting factor. Furthermore, the facts referred to by the Commission in its analysis of the impact of the concentration on the EEA confirm that the extraterritorial application of the Regulation is consistent with international law.¹³⁴

Thus the ‘*effects doctrine*’ is no remote desire but a firm characteristic to the EU law position.¹³⁵ The EU Commission Competition Directorate draws similar conclusion during the latest years. Here it is sufficient to mention the merger between foreign companies like Boeing/McDonald Douglas,¹³⁶ Exxon/Mobile,¹³⁷ General Electric/Honeywell¹³⁸ and AT&T.¹³⁹ The EU jurisdiction to the concentration were in all cases acknowledged by the involved companies.

With this background setting, my focus in Section 4.7 is the ‘zero double standards principle’ as scrutinized through the EU ‘blocking statutes’ related to the USA embargo legislation. Section 4.8 is a round up on the consequences of the EU position on the extraterritorial reach of the USA embargo provisions related to the EU – Russia effects of shipping services codification.

4.7 Extraterritorial Reach the American Way – as Seen through ‘EU Goggles’

A view of common understanding seems to be that the USA–EU disagreement on WTO matters is rooted in differences regarding domicile law extraterritorial reach.¹⁴⁰ Perhaps as this study will uncover, a difference in view to the ‘*effects doctrine*’ is not that great? The answer to this question is found by comparing the shipping trade provisions of 1986 with the 1996 Blocking statute.¹⁴¹

As stated, international law denounces ‘double standards’. All subjects of the international societies of states face equal rights and duties. The EU cannot sustain positions that are not allowed others. *In casu*, the EU

cannot on one hand characterize the USA statutes as illegal and on the other simultaneously follow identical legal provisions *jurisdictione ratione territoriae*.

The purpose of this section is to portray the EU position to the USA extraterritorial regulations that are said to *violate and impede international law*. The issue at stake is how far the 1996 EU *non-compliance order* to EU subjects in relation to the US provisions, do reach.¹⁴² Since I am not debating what jurists have characterized as a most questionable example of USA imperialistic behavior in international jurisdictional conflicts,¹⁴³ it is not my purpose to scrutinize the US system of extra-territoriality.¹⁴⁴ Indirectly one could perhaps say that an EU practice similar to the US depicts the 1996 Blocking Statute as nothing but window dressing.

4.7.1 Presenting the Cases

Four instances of foreign law are said to violate international law in relation to its extra-territorial application. All four originate in the USA.¹⁴⁵ EU predicts that the listed instances of US acts or regulations are contradictory to international law. Thus the legal consequences of these provisions are 'null and void' *vis-à-vis* EU subjects:

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

The *non-compliance order* does also relate to US justification or public decisions:

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

In all cases referred to in the Annex to the 1996 The Blocking statute,¹⁴⁶ the EU subjects affected should engage in international trade or the movement of capital and related commercial activities between the Community and third countries. The group of persons affected according to EU interpretation, are EU legal subjects defined as:

1. any natural person being a resident in the Community and a national of a Member State,
2. any legal person incorporated within the Community,
3. any natural or legal person of the Member States established outside the Community or shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation
4. any other natural person being a resident in the Community, unless that person is in the country of which he is a national,

5. any other natural person within the Community, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity (1996 regulation Article 11 and 1986 regulation Article 1 (2)).

As indicated, this listing includes natural and juridical persons. It covers persons that are residents, incorporated, or present within the EU. Being a resident in the EU means being legally established in the EU for a period of at least six months within the 12-month period immediately prior to the date on which, under this Regulation, an obligation arises or a right is exercised.¹⁴⁷

4.7.2 1992 and 1996 USA Democracy Acts Related to Cuba¹⁴⁸

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

The EU proposes that the prohibition to the loading or unloading of such freight from a vessel in any place in the USA or to enter an USA port with such *contrabands* on board contradicts international law. This is also the position of many jurists.¹⁴⁹

The USA further refuses to import any goods or services originating in Cuba or to import into Cuba goods or services originating in the USA. The US provisions do also impede financial dealings involving Cuba, hereunder trafficking, which is the notion of ‘use, sale, transfer, control, management and other activities to the benefit of a person’.

The EU lists damages that apparently are contradictory to international law, as follows: ‘Legal proceedings in the USA, based upon liability already accruing, against EU citizens or companies involved in trafficking, leading to judgements/decisions to pay compensation to the USA party. Refusal of entry into the USA for persons involved in trafficking, including the spouses, minor children and agents thereof’ (The 1996 The Blocking statute, the Annex, Acts paragraph 2 *in fine*). Thus the US policy towards Cuba reaches out to whatever person irrespective of his citizenship place of incorporation or nationality.

4.7.3 1996 USA Sanctions Act Related to Iran and Libya¹⁵⁰

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

Due to the UN-established Libya trade sanctions, the situation is different from the Cuban Acts.¹⁵¹ The prediction that this USA investment ban is contradictory to international law is more dubious.¹⁵² The EU proposes that ‘measures taken by the US President to limit imports into USA or procurement to USA’ are contrary to the UN embargo on Libya, and thus problematic. In the same direction a possible ‘prohibition of designation as primary dealer or as repository of USA Government funds, denial of access to loans from USA financial institutions, export restrictions by USA, or refusal of assistance by EXIM-Bank’ (The 1996 The Blocking statute, the Annex, Acts paragraph 3).¹⁵³

4.7.4 The Analysis

The main objective is to figure out the group of persons and their geographic location addressed by the USA embargo-provisions listed in the 1996-regulation. The focus of interest is in the extraterritorial effects of the USA ban on third state persons in relation to their activity on Cuba, Iran and Libya. The US standards are compared with the extraterritorial application of the EU 1986 Maritime Service Regulation. The EU perception on the *null and void*, USA acts and statutes indicates the simultaneous reach of the extraterritorial effects of the EU law. Does the USA limit its extraterritorial power to citizens or residents of the USA?

The US cases

The objective of this paragraph is to uncover the geographic frames of USA provisions. The provisions differ between contraband of Cuban origin and illegal investment that is related to all three of the countries Cuba, Iran and Libya. The EU anticipates that the USA provisions are illegal under international law. The following seven instances of embargo on trade are considered below. These include:

1. loading or unloading Cuban freight from a vessel in any place in the USA or entering a USA port,
2. ban on export to the USA for any goods or services of Cuban origin or containing materials or goods originating in Cuba. One kind of merchandise that is especially mentioned is sugar. Re-exporting sugar to the USA that originates in Cuba or importing into the USA

- sugar products without assurance that those products are not products of Cuba, is prohibited,
3. to import into Cuba goods or services originating in the USA,
 4. dealing in merchandise that is or has been located in or transported from or through Cuba
 5. freezing Cuban assets abroad,
 6. the blocking of financial dealings involving Cuba. One such financial transaction is ‘trafficking’ which involves the ‘use, sale, transfer, control, management and other activities to the benefit of a person’.
 7. investment in the Iranian and Libyan oil industry. There is no total ban, just a roof of USD 40 million during a period of 12 months to the benefit of Iran or Libya in developing their petroleum resources.

The puzzle is whether these prohibitions affect persons not citizens or residents of the USA, beyond their own territory. Clearly, the EU has a case if US provisions interfere with the basic principles of third states exclusive jurisdiction over its territory, also including ‘*territoire flottant*’ – the vessels flying its flag. USA legal scientists are definite here: ‘A nation-state has jurisdiction to prescribe and enforce its laws throughout the territory subject to its sovereignty. It also has jurisdiction beyond its boundaries over its nationals and over ships and aircraft flying its flag’.¹⁵⁴

Hence the USA balances on the edge of well recognized international law when directing foreign citizens operating abroad. This position is controversial, see the smokers in the ‘streets-of-Paris-discussion’.¹⁵⁵ Perhaps less controversial is the ‘*effects doctrine*’, that at least pinpoint trespassers whose activity evolve implications within prescribing states territory.

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

4.7.4.1 Ad 1: The Port State Issue

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

In this case Port State jurisdiction is at task.¹⁵⁶ As a starting point, codified solutions to the port States competency is found under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) Article 218(1). Here the port State is responsible for undertaking investigations and instituting proceedings respecting any discharge – in violation of applicable international rules and standards – from a vessel being voluntarily within the port of the enforcing state, regarding all kinds of incidents having occurred outside internal waters, territorial sea or EEZ.

The Article 218 that relates to pollution only, does not however exhaust the Port State jurisdiction for other purposes than environmental issues and in relation to vessels embarking to a port for the purpose of loading or unloading. Port State competency apart from environmental issues, is thus entirely under the customary international law regime. In relation to the USA, the customary law regime is in fact the only legal source, due to the non-ratification to the 1982 UNCLOS.¹⁵⁷

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

The Anglo-American practice presupposes, however, that Port State jurisdiction over foreign ships in native ports is complete. Being complete, international agreements may only reduce Port States exclusive autonomy. As a matter of comity, however, the Port State may refrain from intervening unless there are harmful effects upon the coastal community. This is not a legally binding provision, since the Port State has exclusive competence to define the precise limits of its jurisdiction and to decide whether external effects have occurred or not.¹⁵⁸ Obviously there are few international provisions limiting Port State jurisdiction over cargo launched by a foreign vessel when entering a foreign port.

According to international customary law, coastal States do at present exercise full and unlimited jurisdiction over foreign merchant vessels in their ports. A ship intentionally docking in a foreign harbour must comply with Port State legislation. In brief, the Port State jurisdiction over requirements for the goods and the handling of goods, either while in a harbour or prior to entering a harbour, is the most complete.¹⁵⁹ I therefore conclude that contraband on illegal products is reserved for the USA as Port State.

The final question is whether the EU enjoys any bilateral or multilateral rights to the use of USA harbour facilities without concern of merchandise. The unrestricted right to harbour facilities is common in most trade agreements.¹⁶⁰ One such possibility is the General Agreement in Tariffs and Trade (GATT) that bans direct import restrictions. Since both the EU and the USA are members of the 1994 WTO agreement, all kinds of technical barriers to trade are abandoned between these parties. However, it is products of EU origin that enjoy protection, not the EU based activity as such without respect to product origin. Since Cuba is not a member of the WTO, and no Cuba-USA bilateral agreement exists, then Cuban products, despite that the carrier is flying the flag of one EU Member State, do not enjoy protection under the WTO-agreement. The situation is then entirely under the auspices of customary international law.

4.7.4.2 Ad 2 and 4: Cuban Goods or Services: Ban on Export to the USA

This is a ban on export to the USA for any goods or services of Cuban origin or containing materials or goods originating in Cuba. Clearly, products entirely assembled in Cuba are illegal merchandise in the USA. The ban reaches further, however. An issue of interest is whether foreign EU producers may include Cuban components without ruining the EU origin. This issue is regulated by the ban on export to the USA ‘for any goods or services of Cuban origin or containing materials or goods originating in Cuba’. The concept of ‘or containing’ prescribes a product that embodies even minor ingredients of Cuban origin. In reality this is an USA ban on *EU manufactories located in EU* against incorporating whatever component preferred, even if Cuban produced. Let’s say ‘Swedish mustard’ includes sugar originating in Cuba. Is such a product contraband in the USA? Is the USA entitled to direct legal subjects incorporated in countries beyond US territories?

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

The answer is partly dependent upon whether residual rights belong to national states? As indicated (in Section 4.4.1?) national states enjoy exclusive autonomy on own territory. Thus foreign states are without competency in the same area.

4.7.4.3 Ad 3: Import into Cuba from the USA

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

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

If the location of the contract is in the USA, its domestic legislation is clearly valid. If contracts are signed abroad, and the seller is incorporated in the USA, domestic US provisions are – according to principle of personality – binding upon the selling party. Say that the EU buyer despite the contract clause, does export the US-merchandise to Cuba. Is the re-exportation a breach under the realm of US law? Neither territorial nor personality principles are suitable here. However the place of *detrimental effects* is of relevance, see for instance the – already debated – cases under competition law, the *Dyestuff* case,¹⁶¹ *Euroemballage* case¹⁶² and the *Imperial Chemical Industries (ICI) Case*.¹⁶³ Since the EU – against opposition from the well known international law professor and later ICJ judge Mr. Jennings – successfully claimed that external activity generating *internal detrimental effects*, is within the realm of domestic legislation, the EU cannot deny the validity of similar US effects to EU-incorporated businesses.

The fact that a legal person is fully incorporated outside of the USA cannot according to the EU extraterritorial approach invalidate the USA legislation. Surely these provisions cannot be applied in one direction only.¹⁶⁴ The EU international law doctrine is perhaps even more expansive than the US doctrine. Thus the EU is without strong arguments for objecting to the extraterritorial enforcement of the USA contraband trade laws.

4.7.4.4 Ad 5 and 6: Cuban Assets Abroad and Financial Dealings Involving Cuba

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

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

The EU designates that the extraterritoriality of USA legislation is non-applicable international law. Failing the EU recognition, the EU itself cannot imply similar extraterritorial solutions.

4.7.4.5 Ad 7: Investment in the Iranian and Libyan Oil Industry

There is no total ban, just a roof of USD 40 million during a period of 12 months for the benefit of Iran or Libya in developing their petroleum resources. Such a ban addressed entirely to US-citizens or residents is unproblematic according to the personality principle, and in this manner,

no breach of international law. It is problematic however, if this US provision is applied to EU subjects as well.

The nature of the US reactions, whether they be import limitation into USA or procurement to USA, prohibition of designation as repository of USA Government funds, denial of access to loans from USA financial institutions, or export restrictions by USA, is of lesser interest in this connection. Here the sole interest is in the *ratione materiae* and *ratione terrae*.

The legal subjects accountable for adapting to the EU countermeasures – that is identical to the group of addressees to the USA embargo provisions – should be compared with the group of *jurisdictione ratione personae* of non-member countries to the EU, *in casu* Norway. The comparative study raises the following question: How does Norway receive the two UN resolutions of Libya? And which embargo measures are allowed under Norwegian domestic legislation?¹⁶⁵ Are these addressees identical in USA and EU provisions?

4.7.5 Conclusion

The USA refuses in any of the above-discussed cases, to limit its competency *extra territoriae* and *extra personae*. One can say that the USA is taking advantage of the ‘*effects doctrine*’ to its fullest content.

Ban on investment in the Iranian and Libyan oil industry involves financial transactions from all over the globe, the EU included. A similar burden is placed upon EU investors when buying Cuban assets abroad and regarding financial dealings involving Cuba. The place for the economic transactions involves all countries, including money not earned, stored, invested, banked, and transmitted in or from the USA. In fact, the EU financial centers and transactions in the EU are ruled by the USA legislation. According to the EU blocking statutes, such implications are contrary to international law.

Further import into Cuba from the USA, in the meaning of exportation of USA merchandised products, is banned. All legal subjects are addressed, irrespective of place of incorporation, nationality or citizenship.

In the *ratione personae* sense we see that limitations exist neither to the incorporation of firms nor to the citizenship of physical persons. Thus EU subjects are banned from export to the USA of goods or services of Cuban origin or containing materials originating in Cuba either directly or through third countries. This includes any merchandise that in its production history has been located in or transported from or through Cuba to end up in the USA. EU subjects that abuse the ‘freezing [of] Cuban assets’, or ‘going into financial dealings with Cuba’, are also under the USA embargo provisions.

The US extra-territorial application of its laws, regulations and other legislative instruments ‘violate international law’.¹⁶⁶ Thus the EU condemns that ‘judgment of a court or tribunal or decision of an administrative authority located outside the Community giving effect... to the

laws specified in the Annex or to actions based thereon or resulting therefrom, shall be recognized or be enforceable in any manner'.¹⁶⁷

In the continuation the EU trade in shipping services legislation is interpreted in light of the position taken by EU in the 1996 Blocking statutes regarding the US extraterritoriality principles. Since international law bans double standards, the EU shipping trade provisions should be interpreted in the narrowest sense. What consequences will this make to the justification of the EU provisions on shipping trade?

4.8 The Extraterritorial Reach of EU Shipping Trade Provisions

This section investigates the Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (*1986 Maritime Service Regulation*).¹⁶⁸ The following question is whether the EU, despite its position regarding the USA embargo provisions, advocates the abandoned principles of territorial reach, as implied in the 1996 blocking statute.

This regulation incorporates basic shipping service provisions like Council Regulation (EEC) No 4058/86 concerning co-ordinated action to safeguard free access to cargoes in ocean trades (*1986 Ocean Trade Regulation*).¹⁶⁹ It also refers to Council Regulation (EEC) No 954/79 (3) providing competitive access to that part of cargo liner shipping which is not covered by commitments to national shipping lines of third countries under the United Nations Convention on a Code of Conduct for Liner Conferences. In the continuation this is named *1979 Liner Conferences Regulation*.

The connection between the two first regulations deviates from *1986 Maritime Service Regulation, Article 5(2)*. In cases where a third country seeks to impose cargo sharing arrangements on Member States in liquid or dry bulk trades, the Council shall take the appropriate action in accordance with Regulation (EEC) No 4058/86 concerning coordinated action to safeguard free access to cargoes in ocean trades. In short, that the EU provides for liner conferences agreements not only between one particular Member State and the third country, but between that third country and all the EU Member States.

Regulation of Liner Conferences is connected to the two others as instructed in *1986 Maritime Service Regulation, Article 4 (1)(a)*. Existing cargo-sharing arrangements not phased out in accordance with Article 3 shall be adjusted in accordance with Community legislation and United Nations Code of Conduct for Liner Conferences. Thus Community liner shipping companies that are regulated under UN Liner Conferences Code shall comply with this Code and with the obligations of Member States under Regulation (EEC) No 954/79. In short, that Member States preserve, within conferences competitive access to that part of cargo liner shipping which is not covered by commitments to national shipping lines of third countries under the United Nations Convention on a Code of Conduct for Liner Conferences, when ratified by Member States.

All these three provisions are – in relation to competition – closely related to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of (now) Articles 81 and 82 (earlier 85 and 86) of the Treaty to maritime transport.¹⁷⁰

I start with the *1986 Maritime Service Regulation* read in connection with the competition adaptive regulation No 4056/86, then consider the provisions of the 1986 Ocean Trade Regulation and end up with the *1979 Liner Conferences Regulation*. These regulations are in turn seen in comparison with the EU attitude toward the effects of the USA extraterritorial regulations. While the main issues are the legal reach *ratione personae* and *ratione territoriae*, I am also giving some attention to the material issues.

4.8.1 The Living Fabric of Life

Whether the EU *shipping trade acquis* is valid for the EU-Russia oil and gas transportation market depends upon the circumstances. The situation differs according to whether petroleum exploitation and extraction is controlled by EU incorporated firms, charter parties are closed between persons of whom at least one is situated in the EU, transporter is flying a Member States flag or is inhabiting or registered in the EU. The place of contract seems however to be of minor importance. Obviously the place of drilling operations, buoy loading, pipelines, storage, transit etc. activity is indifferent in relation to issues of shipping trade contracts. Other drilling-related conditions seem also detached from the market in trade in shipping services.

4.8.2 Taking Extraterritoriality Seriously – a Legislative Momentum

Since sovereignty-dogma is still strong in international law,¹⁷¹ it is a serious task to have domestic laws implemented in foreign countries. Not only by the ambition of continuous prosperous relations and the recoil from the reciprocity burdens that infiltrate the international societies of states, but also due to heavy burdens to the subjects confused by a multitude of systems of overlapping jurisdiction. Not surprisingly perhaps, are national states throughout the world developing extraterritorial overlapping jurisdiction and thus adapting to the USA and (sometimes) EU rather aggressive practice of extraterritoriality.¹⁷² Thus for instance the South Africa-recognized merger between two multinational companies happened to fail approval in the EU.¹⁷³

The 1986 Maritime Service Regulation prescribes the shipping trade not only in EU harbours and waters, but also when on the high seas and in foreign territories. The puzzle is whether extraterritorial implications are fully under national control, or whether they are somewhat limited. Does the ‘effect doctrine’ as interpreted by leading international trade countries, illustrate the limitations to the geographical reach of the EU competition law?

As a starting point one may say that the EU legislative competency is limited because neither all nationals nor vessels are under the influence of the EU shipping *acquis*. Of course natives and incorporated companies of

the Member States are under the trade in shipping services provisions. The 1986 regulation does apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and under these subjects control, provided that their vessels are registered in a Member State.

Sometime ships flying non-member states flag may qualify for domicile state jurisdiction, if the genuine link between owner and the registry of the Flag State is lacking.¹⁷⁴ *In casu* a Domicile State enjoys jurisdiction in relation to legal consequences not covered by the Flag State over natives of EU Member States regardless of their ships being re-flagged to a State-of-Convenience registry.¹⁷⁵

The provisions of 1986 (Sections 4.8.3 and 4.8.4) read in connection with the 1996 The Blocking statute define the geographical reach of the EU law.¹⁷⁶

4.8.3 1986 Maritime Service Regulation

One question is whether *1986 Maritime Service Regulation* excludes any subjects at all. Are foreigners competing for charter parties in the tank- or LNG market to and from the EU and Russia all subject to this regulation? Further puzzles are whether these provisions institute rights or obligations and whether provisions address all persons having the required nationality or just persons of special mentioned categories.

As a starting point, a person that delivers shipping services to national residents within its domestic market is subject to the 1986 regulation. This is not explicitly stated, but follows indirectly from Article 1(1).

Under the same paragraph, *the second case* relates to trade in services across Member States boundaries: *i.e.* 'nationals of Member States who are established in a Member State other than that of the person for whom the services are intended'. Thus the service provider may offer his services irrespective of his domicile or citizenship. The place of business, headquarters or main office is not of interest; the EU is an 'inner market' without any limitations to habitation, citizenship, business-location, main office, daughter company, subdivisions and affiliates etc. The service provider and consumer may trade across Member State borders and still be subject to the 1986 regulation.

A third instance (listed in Article 1(2) first alternative) relates to nationals of the Member States established outside the Community. The extra-territorial habitation or place of business of those persons do not disqualify the 1986 regulation if their vessels are registered in that Member State in accordance with its legislation. Thus the ship must fly the flag of a Member State. For instance a Danish ship owner that lives in Norway and whose ship flies the Danish flag.

A fourth example (listed in Article 1(2) second alternative) relates to legal persons, *in casu* shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are regis-

tered in that Member State in accordance with its legislation. Here flying the flag is crucial.

What is the status for foreigners living abroad, for instance Russians, living in Russia? The EU *shipping acquis* do not address these persons. However the Council may incorporate such physical or juridical persons according to Article 7. The Council is empowered to extend the provisions of the 1986 Regulation ‘to nationals of a third country who provide maritime transport services and are established in the Community’. The critical point is whether the foreign service-provider is ‘established’ in the EU. Since this notion is not defined in the 1986 Regulation, the ordinary wording as practiced elsewhere in the *acquis communautaire*, should be considered.

There are *three* qualifications here: *First* that the foreigner is established, *secondly* that he provides marine transport services and *thirdly* that this activity takes place ‘in the Community’. Let us then consider the groups of foreigners that qualify as established in the EU. I take up the last mentioned question first, the geographic dimension.

‘In the Community’ – Interpretative Notes (1)

Article 7 shall read within the frames of the *1986 Maritime Service Regulation*. The critical point is what is meant by ‘provide maritime transport services ... in the Community’. In the title of the regulation the following wording is used: ‘between Member States and between Member States and third countries’, and when defining the geographic areas Article 1(4) divides activities into (a) intra-Community shipping services and (b) third-country traffic. ‘In the Community’ is not used anywhere. Is there reason to believe that the legislator’s intention in using this concept was to reduce the ordinary reach of the 1986 provision? I think not. In the preamble, third recital, the following expression is used: ‘Whereas the application of this principle *within the Community* is also a necessary condition for effectively pursuing, in relation to third countries, a policy aiming at safeguarding the continuing application of commercial principles in shipping’ (*italics added*). Here ‘within the Community’ is utilized to focus not only on the intra-Community shipping but also on shipping activities involving third countries. I thus conclude that Article 7 calls for a geographic area that is identical to the 1986 regulation.

Thus transportation to and from the EU and Russia is within the scope of the extension paragraph of Article 7 *if the Council so decides*. Oil and gas transport is no exception.

Who Qualifies as ‘Shippers’? – Interpretative Notes (2)

The second qualification relates to a *marine transport services provider*, as formulated in Article 7: ‘nationals of a third country who provide maritime transport services’. This person is also named ‘shipper’ without any modification: ‘...the freedom to provide maritime transport services for shippers established in their own country, in other Member States or in the third countries’ (the preamble, 9th recital).

I reckon that this concept is broader than just ship owners and shipping companies. A shipper is a person that offers and delivers transportation services whether he is ship-owner, broker agent or other service provider whose task is to rent and sell cargo space. Thus I take it for granted that all categories are included. This means that a foreigner – for instance a Russian – who sells transportation in the EU-Russian tank market (and otherwise falls within the ambit of paragraph i. and iii) is under the auspices of EU law *if the Council so decides*.

Claiming that someone is providing transport services does of course indicate that a charter party is closed between the foreign service-provider and the freight owner. Whether the document is signed at one or another location is irrelevant.

Persons outside the scope of Article 7 are those that acquire transportation services, and of course industries that depend upon transportation to exchange their products.

‘Established’ – Interpretative Notes (3)

I then turn to the first qualification: that the foreign service-provider is ‘established’. Provided that the Council decides to expand the scope of the 1986 regulation, should the foreigner thus inhabit the EU or, if a legal person, the company be incorporated in one of the EU Member States?

The notion ‘established’ used in Article 7 obviously reads in the context of Article 8 targeting ‘the provisions of the Treaty relating to right of establishment’. This is nothing else than one of the four freedoms, the right to set up a business in one of the EU Member States. So in the delineation of this concept we need to visit the EC Treaty Article 81 and 82.¹⁷⁷

- A person is established as self-employed if he is allowed to take up and pursue activities according to his profession and within formal qualifications documented. For instance a Russian citizen is setting up as freight-broker in for instance Hamburg. There is no reference to domicile or residency. He thus may live elsewhere. From his base in Germany he is offering shipment from *i.a.* the oilfields of Kitkutsk.
- Companies or firms are established in the EU if properly incorporated according to Member States company law and having their registered office, central administration or principal place of business here. The critical point is the incorporation and the home office. There is no requirement that owners inhabit the EU or have obtained EU citizenship. As an illustration: A Russian living in Murmansk is incorporating his shipping company in Hamburg. Here the company offers freight from Russian oilfields.

In these two cases the EU *shipping acquis* rules the shipping company. It is not required that the business owners reside in a Member State. When established, the foreigner has the right to conduct business within the realm, but suffers no obligation to reside in the EU. However – since incorporation rules are still under the auspices of Member States, such

requirements may exist in some of the Member States legislation. Since foreigners that conduct business normally will prefer to dwell in the vicinity of the workplace, I see no reason to pursue this issue further here.

4.8.4 The 1986 Liners Conferences Regulations

Which are the subjects addressed by the 1986 Liners Conference provisions?

Article 18(1) of Regulation No 4056/86 provides that ‘in carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into *undertakings* and *associations of undertakings*’ (italics added). Clearly ‘Liners Conferences’ are associations of undertakings within the meaning of Article 18. Thus, such conferences are considered legal subjects.

One illustration is the MEWAC-case. Here the commission stated that MEWAC (Mediterranean Europe West Africa Conference) ‘is an association of undertakings within the meaning of Article 18 of Regulation (EEC) No 4056/86’.¹⁷⁸

While the MEWAC Liners Conference is situated in the EU, members of the conference are often incorporated beyond the EU borders, some of which are state owned companies abroad. Due to its membership the EU competition laws do indirectly frame foreign companies. This is the viewpoint of the EU commission in the so-called CEWAL case:

Taking such factors into account, the Commission concludes that Cewal has a dominant position within the meaning of Article 86 on the group of shipping routes it operates between northern Europe and Zaire. This dominant position is held jointly by the members of Cewal given that they are linked to each other by the conference agreement, which creates very close economic links between them, as evidenced, for example, by the existence of a common scale of freight rates.¹⁷⁹

While the EU regulation addresses Liners Conferences as such, the EU Commission emphasizes that shipping companies in common hold the dominant position. Clearly, shipping companies incorporated in third countries without respect to the nationality of shareholders or flag of vessels, are under the auspices of the EU-law.¹⁸⁰ Hence, the EU Liners Conferences regulation does enjoy fully extraterritorial effects.

4.9 Persons Subject to Shipping Trade *acquis*. Conclusion

Foreigners abroad are – as a starting point – excluded from the realm of the 1986 EU *shipping acquis*. The Council may however – within specific frames – extend the *jurisdictione ratione personae* of the provision according to Article 7. Accordingly a few limitations exist in relation to the extraterritorial reach of the *trade in shipping services acquis*, *in casu* foreign companies incorporated outside the EU that conduct business in the EU.

Clearly inhabitants, citizens, incorporated firms and foreigners established within the EU are all subject to the EU trade in shipping services law. The nationality of the ship used in transportation is irrelevant to the outcome. There is no requirement that the vessel flies the flag of one of the Member States. Thus, a Hamburg-based broker that rented space on a Russian-owned vessel and leased or sold space on board this vessel is – for the transportation implied – covered by the 1986 regulations.

Natural persons contracting abroad are included if they are citizens of a Member State. Legal persons conducting business abroad but incorporated in a Member State are covered by the 1986 regulation. In the latter case it is, however, a prerequisite that the vessels are registered in that Member State in accordance with its legislation

Concluding the matter, the 1986 regulation does not fully implement the ‘*effects doctrine*’ irrespective of the territory in which the market-disturbing events took place. But not much remains. We find that the 1986 shipping regulation omits a charter party made in Russia by a Russian inhabitant taking Russian petroleum from non-Baltic ports to destinations in the EU. The reverse solution here requires either a new Liners Conference including the Russia petroleum shipping trade or a bilateral EU-Russia agreement justifying principles of the 1986 regulations, or at least does not exclude the extraterritorial effects of EU *competition acquis*. Thus – considering the absence of double standards in international law – the criticism that the EU so strongly addresses to the USA should be returned.

Notes

¹ This Section is prepared by Senior Research Scholar Peter Ørebech unless otherwise noted.

² See WTO Doc. WT/WGTCP/2 of December 8th 1998, Doc. WT/WGTCP/3 of October 11th 1999 and Doc. WT/WGTCP/4 of November 30th 2000.

³ Harry First. The Vitamins Case: Cartel Prosecutions and The Coming of International Competition Law, 68 Antitrust Legal Journal (2001) p. 711 ff., at 727–33 which still is the US-position under the ongoing Doha-round, see Kerrin M. Vautier. International Approaches to Competition Law: Government Cooperation for Business Competition in Yang-Ching Chao & al. International and Comparative Competition Law and Politics (2001) p. 199.

⁴ I am pursuing a study into the universal track of unilaterally applying the EU shipping trade services provisions to activity in the Russian Arctic.

⁵ See Commission of the European Communities. White chapter on the review of Regulation 4056/86, applying the EC competition rules to maritime transport COM (2004) 675 final of October 13th 2004.

⁶ See OJ No L 378, 31. 12. 1986, p. 4.

⁷ For issues like cabotage and beneficiaries to EU maritime rights see R.R. Churchill. European Community Law and the Nationality of Ships and Crews. European Transport Law, Journal of Law and Economics vol.26, no 5 (1991) p. 591, at p. 606–08.

⁸ Official Journal L 378, 31/12/1986 p. 1–3.

⁹ The fact that trade in services is under the auspice of Russian law do not corrupt the EU law application. Overlapping international law competencies is a fact. On the Russian legislation see the November 6th 1992 Governmental Decree # 854 “On Licensing and quoting of the export and import of goods, works, service on the territory of the Russian Federation and the Russian Federation Decree of November 2nd 1993 # 1102 ‘On Measures on the liberalization of foreign economic activity’. The equal access to navigation in Arctic Russian water is secured in the 1991 ‘Regulation for Navigation on the seaways of the Northern sea Route’. See A.I. Frolov, M.S. Khanin & I.N. Mikina: Some Aspects of Foreign Trade Regime of the Russian Federation and Co-operation in the field of international Shipping (INSROP Working chapter # 105, 1998, Japan, Norway & Russia).

¹⁰ See OJ No L 378, 31. 12. 1986, p. 4.

¹¹ A definition of the shipping market is deliberated in Commission Decision of 19 October 1994 (94/980/EC) relating to a proceeding pursuant to Article 81 of the EC Treaty, see *litra (b) Geographical analysis of the service*, at paragraph 59. O. J. L 376, 31/12/1994 p. 1–56.

¹² See however Richard A. Posner. *Antitrust Law*, (Chicago University Press 2001) p. 142–158.

¹³ The Russia legislation on petroleum transportation is not part of this project.

¹⁴ The principle of *i’effet utile* holds even remote consequences as relevant.

¹⁵ See as an illustration, Opinion of Advocate General Mischo delivered on 10 June 1999 Case C-184/97 Commission of the European Communities v Federal Republic of Germany paragraph 62: ‘the principle of *effet utile* (the principle of effectiveness) ... means determining the most effective way of implementing Community law’. Or from the ‘bottom up’ perspective: that the national regulations ‘do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)’, see *Delena Wells Case C-201/02* [2004] ECR p. I–723, paragraph 67.

¹⁶ See the *Rey Soda Case 23/75* [1975] ECR p. 1279, paragraph 14.

¹⁷ The modern form of extraterritoriality have a bilateral background, see Treaty ports & extraterritoriality in 1920s China general discussion and table of contents by Philip R. Abbey, First uploaded February 1, 1997 – Revised and uploaded April 9, 2005, at www.geocities.com/treatyport01/TREATY01.html#EXTRA: ‘By the beginning of the 20th Century, eighteen nations had treaties with China that established consular court jurisdiction over their nationals. These nations; Austria-Hungary, Belgium, Brazil, Denmark, France, Germany, Great Britain, Italy, Japan, Mexico, Netherlands, Norway, Peru, Portugal, Russia, Spain, Sweden, and the United States were highly jealous of these special rights. This situation lead to much discord as a modernizing China began to assert its self in the family of nations’.

¹⁸ See Agreement on Partnership and Cooperation establishing a Partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, Article 38 (1). Official Journal L 327, 28/11/1997 p. 3–69.

¹⁹ According to the Agreement Article 1 the Partnership between EU and Russia the objectives of the Partnership are ...to ‘bringing about freedom of establishment of companies, of cross-border trade in services and of capital movements’.

²⁰ See *Ahlström Osakeyhtiö et al. v EC Commission*, Cases 89, 104, 114, 116, 117 & 125 to 129/85.ECR [1988] p. 5193, at paragraph 9.

²¹ This is not a newly invented possibility, it reaches back to the 13th January 1987 Soviet Union legislation on equity joint enterprises to be formed with partners from Western countries on the territory of the Soviet Union, See W.E. Butler, Joint ventures and the Soviet Arctic, *Marine Policy* March 1990 p. 169, at p. 175.

²² See the 1980 Vienna UN Convention on International Contracts on trade in goods.

²³ I thus follow the ‘Commission’s third track’, see Leigh Davison & Debra Johnson: Multilateralism, bilateralism and unilateralism: a critical commentary on the EU’s triple-track approach to the international dimension of competition policy. *European Business Review* Vol.14, no 1 (2002) pp 7–19 at p. 13–17.

²⁴ One cannot say that the foreign companies by its Liners Conferences membership solely has acquiesced with the EU extraterritorial application of the *EU acquis*, and thus is under the auspices of the EU law.

²⁵ See the ice-breaking *Lotus-case PCIJ 1927 S. A # 10* recognizing Turkish criminal prosecution to acts beyond the territory that had detrimental effects on a Turkish *territoire flottant*. As stated by Stanley D. Metzger: The ‘effects’ doctrine of jurisdiction (*American Journal of International Law*, 1967 p. 1015, at p. 1016, the extraterritoriality of domestic law is not ‘limited to certain types of effects’.

²⁶ See on the one hand, E. Iacobucci. The Interdependence of Trade and Competition Policies. *World Competition* 21, 2 (1997) p. 5–21 that argue the unilateralist position as the appropriate means for solving international competition disputes. On the other hand J. Basedow. *Weltkartellrecht: Anschläge und Ziele, Methoden und Grenzen der internationalen Vereinheitlichung des Rechts der Wettbewerbsbeschränkungen, Beiträge zum ausländischen und internationalen Privatrecht* (Tübingen 1998) who advocates the multilateralist track.

²⁷ See *Ahlström Osakeyhtiö et al. v EC Commission*, Cases 89, 104, 114, 116, 117 & 125 to 129/85.ECR [1988] p. 5193, at paragraph 18.

²⁸ Leigh Davison & Debra Johnson: Multilateralism, bilateralism and unilateralism: a critical commentary on the EU’s triple-track approach to the international dimension of competition policy. *European Business Review* Vol.14, no 1 (2002) pp 7–19 at p.13.

²⁹ David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 *YALEJ. INT’L L.* 185, 205 (1984).

³⁰ See *Ahlström Osakeyhtiö et al. v EC Commission*, Cases 89, 104, 114, 116, 117 & 125 to 129/85.ECR [1988] p. 5193, at paragraph 8.

³¹ *Muse Footnote 176*: ‘First, it is a political, not a legal, solution. Comity balancing leaves the effects principle intact as a basis of jurisdiction: it merely states that the court, having jurisdiction, should use its jurisdictional power wisely by answering the additional question of whether it should exercise such jurisdiction, based on a consideration of the legitimate concerns of foreign countries. Balancing thus operates as a political rather than a legal concept’.

³² For instance L.F. Damrosch, L. Henkin, R.C. Pugh, O. Schachter & H. Smit: *International Law, Cases and Materials* (West Group 2001).

³³ Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, the preamble. *Official Journal L* 378, 31/12/1986 p. 1.

³⁴ R.R. Churchill. European Community Law and the Nationality of Ships and Crews. *European Transport Law, Journal of Law and Economics* vol.26, no 5 (1991) p. 591, at p. 608.

³⁵ See the so-called ALCOA-case, *US vs. Aluminum Co* (148 F. 2d 416, 2d Cir. 1945) at 443: It was – said the court – ‘settled law [that] any state may impose liabilities, even upon persons not within its borders which the statute reprehends’.

³⁶ This is not identical to of *principle of universality*.

³⁷ Within human rights some observers have anticipated that a universal jurisdiction is underway. Jonathan I. Charney. *Universal International Law*, 87 *A.J.I.L.* 529 (1993), Antti Korkeakivi. ‘Consequences of “Higher” International Law: Evaluating Crimes of State and Erga Omnes’, 2 *J. Int’l Legal Stud.* 81 (1996). A modified 1823 *US Monroe Doctrine* seems to legitimization of intervention, See Donald Marquand Dozer (ed.). *The Monroe Doctrine. Its Modern Significance* (Alfred A. Knopf, New York 1965) with further references, who advocate supra-national intervention, to the benefit of human rights. Further the Clinton administration’s Richard C. Holbrooke said that (*Changing Our Ways: America and the New World*, Carnegie Endowment for International Peace National Commission, Washington, DC: Carnegie Endowment for International Peace, 1992 p. 51): ‘A new principle of international relations is arising: the destruction or displacement of groups of people within states justifies international intervention. A new balance must be struck between traditional sovereignty and the world community’s interest in human rights’.

³⁸ The ‘first truly European settlement in history’. See G. Pagès. *The Thirty Years War 1618-1648* (Harper & Row, New York 1970) p. 228, c.f. Section IX.

³⁹ *A. Ahlström Osakeyhtiö and others v Commission*. Judgment of the Court of 27 September 1988, Joined cases 89, 104, 114, 116, 117 and 125 to 129/85 [1988] ECR p. 5193, at paragraph 22–23. See also Gencor

⁴⁰ *PCIJ 1927 S. A # 10*.

⁴¹ The Permanent Court of International Justice – PCIJ.

⁴² *Int. Arbitration Awards 1911, 1941*.

⁴³ See as illustration the 1963 Convention on offences on board aircraft, art. 4A b) and the 1997 Convention for the suppression of terrorist bombings, Art. 6.

⁴⁴ I.a 1948 Universal Declaration on human rights, Article 30, c.f. the 1966 UN Covenant on Civil and Political Rights Article 1.3.

⁴⁵ E.g. the 1948 American Declaration of Rights and Duties of Man, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1989 Convention on the Rights of the Child and the 1996 European Social Charter under the Council of Europe

⁴⁶ See the 1957 Treaty of Rome.

⁴⁷ See i.a. Daniel A. Farber. *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 *Stan.L.Rev.* 1247 (1996) and Karl M. Meessen, *Extraterritorial Jurisdiction in Theory and Practice* (London 1996) with further references

⁴⁸ See Stanley D. Metzger. *Act of State Doctrine Refined: The Sabbatino Case* (1964) *SUP.CT.REV.* p. 223.

⁴⁹ *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964), at p. 423.

⁵⁰ See *Oetjen v Central Leather Co.*, 246 US 297, at p. 304 (1918).

⁵¹ See John M. Raymond. A New Look at the Jurisdiction in ALCOA, 61 AJIL p. 558 (1967).

⁵² See Stanley D. Metzger. The *effects doctrine* of jurisdiction, 61 AJIL p. 1015 (1967).

⁵³ 313 U.S. 69 (1941) at p. 73.

⁵⁴ 348 U.S. 66 (1954) at 67.

⁵⁵ Case T-102/96 Gencor Ltd v EC commission [1999].

⁵⁶ See Commission of the European Communities COM(2004) 675 final: White chapter on the review of regulation 4056/86, applying the EC competition rules to maritime transport (Brussels, 13.10.2004). For a comment see Financial Times October 12th 2004.

⁵⁷ It is not my intention to analyze the provisions of the Convention on a Code of Conduct for Liner Conferences, UN Treaty Series, (Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations) Vol 1334 I. Nos. 22379-22388 (1983). The convention came into force 6 October 1983. Russia as successor to the international obligations and rights of the Soviet Union is from 28 June 1978 member to the convention.

⁵⁸ Official Journal L 378, 31/12/1986 p. 1–3.

⁵⁹ Which is also the case under the signed and not yet ratified Constitution Article III-245(2).

⁶⁰ Transport service is excluded ‘to the extent that they are regulated under the common transport policy’. See Wouter Gekiere: Towards a European Directive on services in the Internal Market: Analysing the legal repercussions of the draft Services Directive and its Impact on National Services Regulation (Research report to the European Parliament, Leuven, 24 September 2004) p. 1.

⁶¹ Financial Times, October 12th 2004 reports that the EU Commission white chapter proposal is scheduled to terminate the 1986 exceptions to the free trade in shipping services.

⁶² Peter Orebech, *The Northern Sea Route: Conditions For Sailing According To European Community Legislation With A Special Emphasis On Port State Jurisdiction* (Fridtjof Nansen Institute 1995) (shorter version published in European Transport Law, Journal of Law and Economics, Vol. XXXI No 3–1996 p. 313 ff.).

⁶³ See the 1986 Maritime Service Regulation, the preamble, 6th recital.

⁶⁴ Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, the preamble. Official Journal L 378, 31/12/1986 p. 1.

⁶⁵ Commission Decision of 17 December 1992 imposing a fine pursuant to Article 19 of Council Regulation (EEC) No 4056/86 (IV/32.447) *Official Journal L 20, 28/01/1993 p. 6–9*.

⁶⁶ UN Treaty Series, (Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations) Vol 1334 I. Nos. 22379–22388 (1983).

⁶⁷ 1986 Maritime Shipping Regulation, preamble 7th recital.

⁶⁸ 94/980/EC: Commission Decision of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty, Part II (2) paragraph 8.

⁶⁹ Among which is Trans-Atlantic Agreement (TAA), Associated Central West Africa Lines (Cewal) Continent West Africa Conference (Cowac), United Kingdom West Africa Lines Joint Service (Ukwal) and Mediterranean West Africa Conference (Mewac)

⁷⁰ The Unctad Code refers to traditional liner conferences and their most common practices, c.f. Lawrence Juda. *The Unctad Liner Code: United States Maritime Policy at the Crossroads*, Westview Press Inc., Boulder, Colorado, 1983, p. 15.

⁷¹ Hwang Lee: *Influencing a Global Agenda: Implications of the Modernization of European Competition Law for the WTO*. *Erasmus Law & Economics Review* (Vol. 1, no 2 June 2004) p. 119: ‘... the highest court appears to consciously avoid answering this question’.

⁷² Official Journal L 309, 29/11/1996 p. 1–6.

⁷³ As illustrated by repetitive clashes between Competition Directorate decisions and the opinion of the European Court of Justice (ECJ). See also Richard Whish. *Competition Law* (4th ed. 2000) at p. 399–400.

⁷⁴ *Op.cit.*

⁷⁵ See Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, Official Journal L 327, 28/11/1997 p. 3–69.

⁷⁶ Excepted is the bulk trade that is not covered by the UNCTAD code.

⁷⁷ See OJ No L 121, 17. 5. 1979, p. 1 ff. For discrepancies in the liner conference’s definition in this Regulation related to that in the Code of Conduct, see Article 1 (3) (b) of the Regulation and the Code of Conduct, Annex I.

⁷⁸ See i.a. 93/82/EEC: Commission Decision of 23 December 1992 relating to a proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450: Cewal) of the EEC Treaty

⁷⁹ See as illustration the Commission Decision 92/262/EEC of 1 April 1992 (between France and 11 West and Central African States) in OJ No L 134, 18. 5. 1992, p. 1.

⁸⁰ To the notion, see Commission's Fifteenth Report on Competition Policy (1985), point 34, p. 45.

⁸¹ Transporters that agree upon a regulated market.

⁸² 94/980/EC: Commission Decision of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty paragraph 319.

⁸³ 2004 Constitutional Treaty Article III-31 (1).

⁸⁴ The Commission initiated a proceeding against Belgium for its failure (according to a bilateral Zaire – Belgium agreement of 1 January 1987) to comply with Article 169 [now Article 85] of the EEC Treaty to ensure that this Member State meets the obligations incumbent upon it pursuant to Council Regulation (EEC) No 4055/86 of 22 December 1986. OJ No L 378, 31.12.1986, p. 1).

⁸⁵ An illustration is 93/125/EEC: Commission Decision of 17 February 1993 on Spain’s request for adoption by the Commission of safeguard measures under Article 5 of Regulation (EEC) No 3577/92 against applying the principle of free-

dom to provide services to maritime transport within Member States (maritime cabotage). O. J. L 49, 27/02/1993 p. 88–89. See also 93/396/EEC: Commission Decision of 13 July 1993 on Spain's request for adoption by the Commission of a prolongation of safeguard measures pursuant to Article 5 of Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage). O.J. L 173, 16/07/1993 p. 33–35.

⁸⁶ Financial Times, October 12th 2004.

⁸⁷ Official Journal L 376, 31/12/1994 p.1–56 at Part I, paragraph (7).

⁸⁸ See Official Journal L 376, 31/12/1994 p. 1–56, at Part I, paragraph (1)-(6).

⁸⁹ See Judge McNair, in the *1950 Advisory opinion on Namibia*: 'International law recruited ... many of its rules and institutions from private systems of law... The way in which international law borrows from the source is not by means of importing private law institutions "lock, stock and barrel" ... [T]he true view ... is to regard any features or terminology which are reminiscent of the rules ... of private law as an indication of policy or principle rather than as directly importing these rules and institutions' (1950 ICJR 148).

⁹⁰ Ot.prp.nr. 65 (1999–2000) Om lov om endring i lov 24.juni 1994 nr. 39 om sjøfarten [amendment to the Norwegian Merchant Shipping Act] (sjøloven) gjennomføring av artikkel 12 i rådsdirektiv 1999/35/EF p. 12 column 1.

⁹¹ Clearly not all private arrangements between ship owners and independent shippers qualify as Liners Conferences and thus benefit from exception from the unregulated requirement claim in EC treaty article 81. Agreements that are effectively independent is a price-fixing agreement that is not a 'conference' within the meaning of Article 1 of Regulation (EEC) No 4056/86, and is thus not exempted by Article 3 of the Regulation. See 94/980/EC: Commission Decision of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.446 – Trans-Atlantic Agreement) Official Journal L 376, 31/12/1994 p. 1–56, at paragraph 357–58.

⁹² Trans-Atlantic Agreement of 31 August 1992.

⁹³ See 93/82/EEC: Commission Decision of 23 December 1992 relating to a proceeding pursuant to Articles 85 (Cewal, Cowac and Ukwal) and 86 (Cewal) of the EEC Treaty, O.J. L 34, 10/02/1993 p. 20–43.

⁹⁴ See for instance 94/980/EC: Commission Decision of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty. O.J. L 376, 31/12/1994 p. 1–56.

⁹⁵ The Trans Atlantic Agreement Members submitted an application on 28 August 1992, pursuant to Article 12 (1) of Regulation (EEC) No 4056/86.

⁹⁶ See *i.a.* Trans-Atlantic Agreement of 31 August 1992, Article 18 that stipulates up to 25 %.

⁹⁷ See *i.a.* Trans-Atlantic Agreement of 31 August 1992 (date of effect) Article 5 to 8.

⁹⁸ Trans-Atlantic Agreement Article 13, that settle 10 days as the period.

⁹⁹ Like the South Korean Hanjin Shipping Co. Ltd, Cho Yang Shipping Co. Ltd and Hyundai Merchant Marine Co. Ltd, The Mediterranean Shipping Co. SA, established in Geneva (Switzerland), the Sea-Land Service Inc., established in Jersey City, New Jersey (United States of America), Neptune Orient Lines Ltd, established in Singapore, Nippon Yusen Kaisha, established in Tokyo (Japan)

and the Mexican companies Transportación Marítima Mexicana SA de CV and Tecomar SA de CV.

¹⁰⁰ See Court of Justice in Case C-41/90, Hoefner and Elser v. Macrotron [1991] ECR I, p. 1979 paragraphs 32 and 33 and the Court of First Instance in Case T-65/89, BPB Industries and British Gypsum v. Commission, [1993] ECR II, p. 389, paragraph 134.

¹⁰¹ So also under the 2004 Constitutional Treaty Article III-50.

¹⁰² ECJ in Case 136/86, BNIC v. Aubert, [1987] ECR, p. 4789, paragraph 18.

¹⁰³ Commission letter of 30 January 1992 to the Trans Atlantic Agreement secretariat.

¹⁰⁴ The 2004 Constitutional Convention Article IV-4 (4).

¹⁰⁵ The 2004 Constitutional Convention Article IV-3: 'shall succeed to all the rights and obligations ... which arose before the entry into force of the Treaty... by virtue of previous ... acts... The provisions of the acts ... shall remain in force... The case law of the Court of Justice ... shall be maintained as a source of interpretation of Union law'.

¹⁰⁶ So also under the 2004 Constitutional Treaty Article III-50.

¹⁰⁷ Since the answer to this question is indifferent in relation to the externality issues, I do not consider the *de lege lata* situation here. See however the Court of Justice in Case C-41/90, Hoefner and Elser v. Macrotron [1991] ECR I, p. 1979 paragraphs 32 and 33 and the Court of First Instance in Case T-65/89, BPB Industries and British Gypsum v. Commission, [1993] ECR II, p. 389, paragraph 134.

¹⁰⁸ See OJ No L 378, 31. 12. 1986, p. 4.

¹⁰⁹ See esp. Cases T-68, T-77 and T-78/89, Verre Plat, Judgment of 10 March 1992, paragraph 359

¹¹⁰ Case T-51/89, Tetra Pak v. Commission, [1990] ECR II-309, paragraphs 25, 29 and 30.

¹¹¹ Such an illustration is 93/82/EEC: Commission Decision of 23 December 1992 relating to a proceeding pursuant to Articles 85 (Cewal, Cowac and Ukwal) and 86 (Cewal) of the EEC Treaty.

¹¹² The BRT-II case 127/73 [1974] ECR, p. 313.

¹¹³ Case C-66/86 Ahmed Saeed Flugreisen [1989] ECR, p. 803.

¹¹⁴ Case C-179/90 Merci convenzionali porto di Genova [1991] ECR I, p. 5889.

¹¹⁵ See 93/82/EEC: Commission Decision of 23 December 1992 relating to a proceeding pursuant to Articles 85. O J L 34, 10/02/1993 p. 20–43, at paragraph 33 and 94/980/EC: Commission Decision of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty. O J L 376, 31/12/1994 p. 1–56, at paragraph 313.

¹¹⁶ Official Journal L 378, 31/12/1986 p. 4–13.

¹¹⁷ For a general approach on extraterritoriality effects see, e.g., Lori Fishler Damrosch et al., *International Law: Cases and Materials* 1134 (4th ed. 2001). For the EU competition law see Michael Waelbroeck and Aldi Frigani, *European Competition Law* in J. Megret *Commentary*, vol.IV (1999) at p. 86–88.

¹¹⁸ For a discussion on the EU extraterritorial influences under ship technicalities requirement, see Peter Orebech, *The Northern Sea Route: Conditions For Sailing*

According To European Community Legislation With A Special Emphasis On Port State Jurisdiction (Fridtjof Nansen Institute 1995) (shorter version published in European Transport Law, Journal of Law and Economics, Vol. XXXI No 3–1996 p. 313 ff.) and Peter Orebech, The Northern Sea Route: Conditions For Participation According To WTO Legislation – With A Special Emphasis On The Non-Discriminatory Treatment Principles Of Most-Favored-Nation- And National Treatment Clauses Under The General Agreement On Trade In Services (Fridtjof Nansen Institute 1996).

¹¹⁹ Treaty Establishing the European Community, Mar. 25, 1957, art. 60(2), available at http://europa.eu.int/eur-lex/en/search/search_treaties.html. For more on the interpretation of this provision, see Peter Orebech & Douglas Brubaker, Implications of GATS/EU Law for The Russian Northern Sea Route and Russian Barents Sea. [hereinafter the EU ARCOP Project]

¹²⁰ Treaty Establishing the European Community, Mar. 25, 1957, art. 60(2), available at http://europa.eu.int/eur-lex/en/search/search_treaties.html.

¹²¹ Of other decisions see the Beguelin Case 22/71, 1971 ECR 949 and the Commercial Solvents Case 6-7/73, 1974 ECR 223.

¹²² Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619.

¹²³ Case 6/72, Europemballage Corp. & Continental Can Co. v. Commission, 1973 E.C.R. 215.

¹²⁴ Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 661–62 paragraph 125–26.

¹²⁵ *Id.* at 662 paragraph 131–32.

¹²⁶ *Id.* at 663 paragraph 138–42.

¹²⁷ Case 6/72, Europemballage Corp. & Continental Can Co. v. Commission, [1973] E.C.R. 215, 241–42 paragraphs 14–17.

¹²⁸ Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, [1972] E.C.R. 619, 625.

¹²⁹ Which is similar to Danish Law, c.f. the Professor Alf Ross' position in the 'Smoking in the streets of Paris' debate on Danish *jurisdictione ratione terrae*. See Alf Ross, Constitutional law § 18 (Nyt nordisk forlag, København 1966); Torsten Gihl, Public International law in Outline § 136 (Stockholm 1956). *But see* Max Sørensen, Juristen ['The Lawyer'] Legal periodical, Copenhagen 443 (1959); Torkel Opsahl, A Modern Constitution under Scrutiny 282, 289 (Tidsskrift for Retsvidenskab [J. Legal Science], Oslo 1962). [Translation is by the author].

¹³⁰ A. Ahlström Osakeyhtiö and others v Commission. Judgment of the Court of 27 September 1988, Joined cases 89, 104, 114, 116, 117 and 125 to 129/85 [1988] ECR p. 5193.

¹³¹ L.C. paragraph 8.

¹³² The EU Commission Case No IV/M.619 – Gencor/Lonrho, OJ 1997 L 11, p. 30.

¹³³ Case T-102/96 Gencor Ltd v EC commission [1999] paragraph 2–3.

¹³⁴ *Op.cit.* paragraph 74.

¹³⁵ The Court of First Instance (CFI) in the 1999 Gencor Case T-102/96, [1999] ECR 753 paragraph 74 confirms this. However as Richard Whish, Competition Law (4th ed. 2000) at p. 399–400 states we still fail to find any ECJ explicit confirmation of the 'effects doctrine' as such.

¹³⁶ 1997.

¹³⁷ 1999.

¹³⁸ 2001.

¹³⁹ Financial Times September 29th 2004. The legal issue that was decided against the Commission was of a procedural character, blocking the commission from taking a stand if the merger is reversed, which was here the case.

¹⁴⁰ Hwang Lee: Influencing a Global Agenda: Implications of the Modernization of European Competition Law for the WTO. *Erasmus Law & Economics Review* (Vol. 1, no 2 June 2004) p. 119: 'The potential differences between jurisdictional reach play an important role in the disagreement between the US and the EC in WTO discussions'.

¹⁴¹ Council Regulation (EC) No 2271/96 of 22 November 1996, Official Journal L 309, 29/11/1996 p. 1–6.

¹⁴² Council Regulation (EC) No 2271/96 of 22 November 1996, Official Journal L 309, 29/11/1996 p. 1–6.

¹⁴³ See M.A.A. Warner. Restrictive Trade Practices and the Extraterritorial Application of US Antitrust and Trade Legislation. *Northwestern Journal of International Law & Business*, 19,2 (1999) p. 330–63 and J. Basedow. *Weltkartellrecht: Anschläge und Ziele, Methoden und Grenzen der internationalen Vereinheitlichung des Rechts der Wettbewerbsbeschränkungen, Beiträge zum ausländischen und internationalen Privatrecht* (Tübingen 1998), p. 63 with further references.

¹⁴⁴ Within competition law the following cases are basic: *United States v. American Tobacco Co*, 211 US 106 (1911), *ALCOA-case, United States vs. Aluminum Co* (148 F. 2d 416, 2d Cir. 1945), 416 at 443–444, *Continental Ore Co, v Union Carbide*, 370 US 690, 704 (1962), *Interamerican Refining Corporation v Texaco Maracaibo* 307 F/Supp. 1291 (D.Del. 1970) and the *Hartford Fire Insurance Case, US* (1993)

¹⁴⁵ See respectively National Defense Authorization Act for Fiscal Year 1993, Title XVII 'Cuban Democracy Act 1992', sections 1704 and 1706, Cuban Liberty and Democratic Solidarity Act of 1996 and Iran and Libya Sanctions Act of 1996. Code of Federal Regulations) Section V Part 515 – Cuban Assets Control Regulations, subpart B (Prohibitions), E (Licenses, Authorizations and Statements of Licensing Policy) and G (Penalties).

¹⁴⁶ Council Regulation (EC) No 2271/96 of 22 November 1996, Official Journal L 309, 29/11/1996 p. 1–6.

¹⁴⁷ 1996 Regulation note 4.

¹⁴⁸ See *National Defense Authorization Act for Fiscal Year 1993 Title XVII Cuban Democracy Act 1992*, sections 1704 and 1706. The consolidated requirements are found in Title I of the *Cuban Liberty and Democratic Solidarity Act of 1996*.

¹⁴⁹ *Robert L. Muse*. A public international law critique of the extraterritorial jurisdiction of the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996). *The George Washington Journal of International Law and Economics*. Washington: 1996/1997. Vol.30, Iss. 2/3; pg. 207.

¹⁵⁰ After the USA and the EU on September 27th and 29th 2004 lifted all sanctions on Libya this discussion is entirely of theoretic interest.

¹⁵¹ UN Resolutions 748 (1992) and 883 (1993) of the Security Council.

¹⁵² See the EU implementation of these resolutions in Council Regulation (EC) No 3274/93, OJ No L 295, 30. 11. 1993, p. 1.

¹⁵³ No 2271/96.

¹⁵⁴ Joseph J. Kalo et al. *Coastal and Ocean Law* (American Casebook Series, West Group 2002) p. 308.

¹⁵⁵ *Supra* note 53.

¹⁵⁶ For a comprehensive discussion, see George C. Kasoulides: *Port State Control and Jurisdiction. Evolution of the Port State Regime* (Martinus Nijhoff Publishers 1993).

¹⁵⁷ The USA recognizes UNCLOS as expressing valid customary law (with the exception of Part IX – the Area), see the *US position, 1976 Digest of US Practice in International Law p.345: All issues governed by 1982 UNCLOS is International Customary Law, with the exception of the Seabed Regime (Part IX + art.82)*.

¹⁵⁸ See Peter Orebech, *The Northern Sea Route: Conditions For Sailing According To European Community Legislation With A Special Emphasis On Port State Jurisdiction* (Fridtjof Nansen Institute 1995) (shorter version published in *European Transport Law, Journal of Law and Economics*, Vol. XXXI No 3–1996 p. 313 ff.).

¹⁵⁹ For a more comprehensive analysis, see Peter Orebech, *The Northern Sea Route: Conditions For Sailing According To European Community Legislation With A Special Emphasis On Port State Jurisdiction* (Fridtjof Nansen Institute 1995) p. 18 ff. A short version is published in *European Transport Law – Journal of Law and Economics* (vol. XXXI No 3–1996 p. 313 ff).

¹⁶⁰ See for instance the 1960 European Free Trade Agreement (EFTA) and the 1992 European Economic Area Agreement, Protocol 9 Article 5.

¹⁶¹ Case 48/69, *Imperial Chem. Indus. Ltd. v. Commission*, 1972 E.C.R. 619.

¹⁶² Case 6/72, *Europemballage Corp. & Continental Can Co. v. Commission*, 1973 E.C.R. 215.

¹⁶³ Case 48/69, *Imperial Chem. Indus. Ltd. v. Commission*, 1972 E.C.R. 619, 661–62 paragraph 125–26.

¹⁶⁴ Case 8/69, *Imperial Chem. Indus. Ltd. v. Commission*, 1972 E.C.R. 619, 625.

¹⁶⁵ See the Norway Act on the implementation of UN Iran sanctions of June 6th 1980

¹⁶⁶ The EC council 1996 blocking statute, the preamble, 7th recital.

¹⁶⁷ L.c. Article 4.

¹⁶⁸ Official Journal L 378, 31/12/1986 p. 1–3.

¹⁶⁹ OJ No. C 255, 13. October 1986, p. 169.

¹⁷⁰ See OJ No L 378, 31. 12. 1986, p. 4.

¹⁷¹ The 1948 UN Charter art. 1(2), c.f. the General Assembly Resolution 2625/70.

¹⁷² See Hwang Lee: *Influencing a Global Agenda: Implications of the Modernization of European Competition Law for the WTO*. *Erasmus Law & Economics Review* (Vol. 1, no 2 June 2004) p. 120.

¹⁷³ See Gencor

¹⁷⁴ For the Law of the Sea issues see Peter Orebech: Hva kan gjøres med priatfiskerne? En rettslig og rettspolitisk gjennomgang av norsk domisilstatsjurisdiksjon på det åpne hav. [What to do with the fishing pirates? A legal and legislative analysis of Norwegian Domicile Jurisdiction on the High Seas] (Retfaerd, Nordic Journal of Law, Copenhagen 2001) p. 47, at p.61 ff.

¹⁷⁵ Peter Orebech, *supra* note 42, at p. 71.

¹⁷⁶ No 2271/96.

¹⁷⁷ Under the 2004 Treaty establishing a Constitution for Europe establishment provisions is in Article III-22 to III-28.

¹⁷⁸ Commission Decision of 17 December 1992 imposing a fine pursuant to Article 19 of Council Regulation (EEC) No 4056/86 (IV/32.447) *Official Journal L 20*, 28/01/1993 p. 6–9, at paragraph 7.

¹⁷⁹ (61)

¹⁸⁰ Among the MEWAC companies that are not incorporated in the EU are Cameroon Shipping Lines (Camship), Compagnie Béninoise de Navigation Maritime (Cobenam), Compagnie Maritime Zaïroise (CMZ), Nigerian National Shipping Line Ltd (NNSL), Compagnie Sénégalaise de Navigation Maritime (Cosenam).

