



5.3 INTERNATIONAL LAW AND NATIONAL STRATEGY: ANTI-ACCESS AND AREA DENIAL

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My focus will be the relationship between international politics and international law in the Arctic. It was Mark Twain who said

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that eventually all political disputes become legal disputes, and that could not be truer than in the Arctic. The legal template that we will look to when attempting to resolve the legal disputes in the Arctic is the Law of the Sea Convention. [1]

According to the intelligence community, the major takeaways for *Global Trends 2025* [2] in the Arctic are these. First, small-scale conflict is possible, but it is unlikely that we will have major armed conflict. What is most interesting, in my view, is that China, Korea, Japan, and other exporting countries in Asia stand to benefit the most from changes in the Arctic. None of these countries is an Arctic nation, at least not yet. However, China has asserted that the true Arctic countries have to make way for China, that the Arctic countries have to expect that China and other countries have legitimate interests in the Arctic. After all, the Arctic is just another ocean.

Well, how will these Asian countries capitalize on the Arctic as a resource? The first area will be the energy and mineral resources that are going to be made available in the Arctic. The second area will be the transportation routes—the sea lines of communication—that will open up, at least for part of the year, if not more so as we go through mid-century.

With regard to energy, Russia stands to gain the most from an export position, but China is also hoping to develop energy in the Arctic. We also need to keep Greenland in mind. Although Greenland is currently a dependency of Denmark, it probably will not be 20 years from now. Greenland is on a road toward independence. Greenland has a population of about 55,000 people, is three times the size of Texas, and is loaded with natural resources. China is already making movements toward talking with Greenland and expressing their interest in funding development in order to lock down Arctic resources in that area.

No matter where they get them from, all of those resources will have to leave the area because they are not going to be used there, and they will go through one of these sea lines of communication. I would suggest the Northern Sea route, the Northeast Passage, the

Northwest Passage, or the Bering Strait, and the last one is one that we often forget about.

So let's look closely at some of these routes. The Northern Sea route runs along the northern periphery of Siberia. Most people do not realize that you could fit the entire United States, including Alaska, into this immense area. It drains three river systems, on par with the Mississippi River, that flow north into the Arctic Ocean, providing transportation routes from all of the development in the Russian interior to the Arctic Ocean. So in 20, 30, 50 years, the Arctic is likely to be a major focus of development for the Russian state.

There are four primary straits along the Northern Sea route that the United States and other countries claim are "straits used for international navigation" under the Law of the Sea Convention. All of the straits, whether they are greater than 24 nautical miles wide or more narrow than that, connect one part of the high seas to another part of the high seas and therefore meet the definition of an international strait in the Law of the Sea Convention. Despite this, Russia has closed off all four and claims those straits as internal waters, just like we would say the Great Salt Lake in Utah or the Newport Harbor in Newport, Rhode Island, is an internal water. Russia purports to close those off to international shipping unless the shipping complies with Russian laws and takes on Russian pilots and complies with other Russian security requirements.

Russia is really the superpower in the Arctic; 76% of the fresh water that flows into the Arctic Ocean comes from Russia. Russia occupies 74% of the land territory in the Arctic. Perhaps more importantly, two-thirds of the oil and gas in the Arctic are Russian and the U.S. Geological Survey says that 13% of the world's undiscovered, but technically recoverable, oil and about 30% of its undiscovered recoverable gas is located in the Arctic, and Russia controls two-thirds of those resources. Russia also has, depending on how you count it, between two-thirds and 95% of the population that lives in the Arctic. So Russia is really the Arctic superpower (Figure 1).

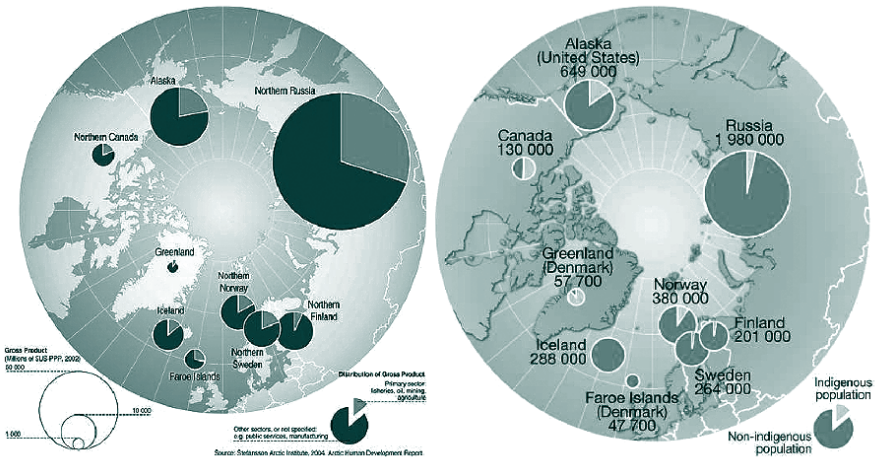


Figure 1. Russia: Arctic Superpower I

Just one other example to underscore this point, the large pie chart on the right-hand side of Figure 2 shows the entire circumpolar economy; the Russian portion is shown in the darkest shade. Russia controls about two-thirds of the economic activity that

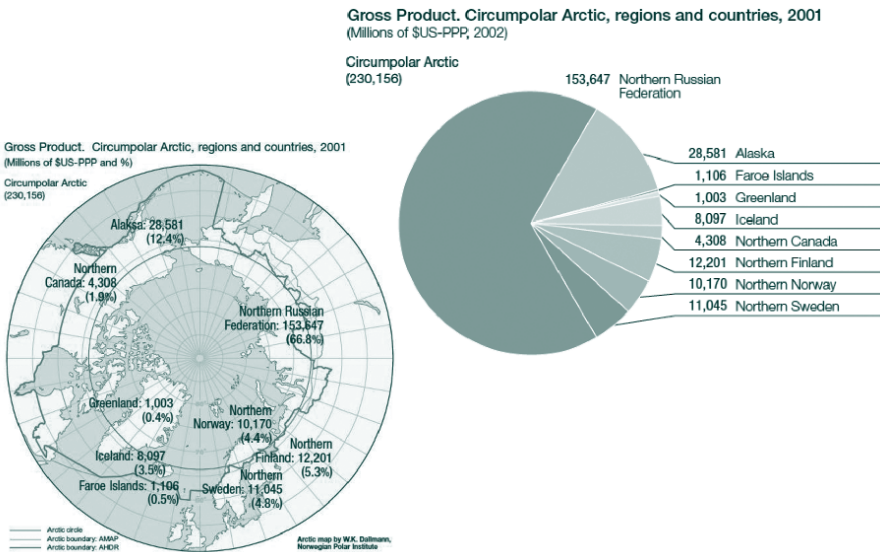


Figure 2. Russia: Arctic Superpower II

occurs in the Arctic. By comparison, the United States through Alaska controls about 12%, Canada has 2%, Iceland has 3%, Finland has 5%, and Sweden has 5%. This almost overbearing Russian presence makes some countries nervous.

Figure 3 depicts the Northern Sea route and the Northeast Passage, which is the European end of the route. Russia has instituted a variety of regulations, which they continue to strengthen. Specific topics covered by these regulations include the following:

- Notification—4 months
- Construction, design, equipment, and manning standards
- Route management
- Position reports twice daily
- Financial security for civil liability
- Transit fees (beyond costs of services rendered)
- Discriminatory fees (Article 277)

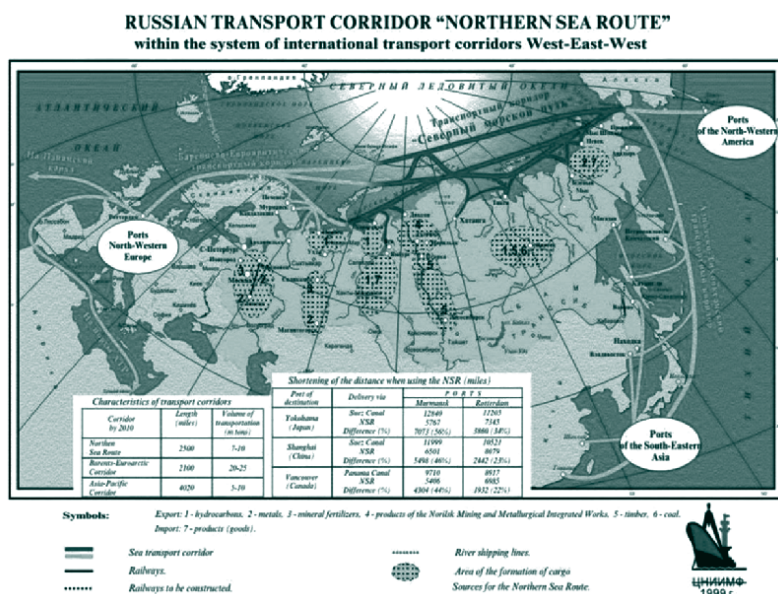


Figure 3. Northern Sea Route

Russia claims to have authority for doing so under Article 234 of the Law of the Sea Convention, which allows coastal states with ice-covered areas to be able to prescribe and enforce rules over those areas. The problem is none of that has been defined. That is, lawyers disagree on virtually every word of the description that I just gave of Article 234 including, for example, what is an ice-covered area. Is it ice covered 200 days a year, 365 days a year? Does it have to be multi-year ice? Can it be fresh ice? Can it just be ice-infested waters? Is it ice covered if it just has big chunks and it is still dangerous to transit through?

All of these issues have yet to be resolved. Russia is working to legitimize its view of Article 234, which is rather restrictive. Russia currently requires 4 months prior notification to transit. It also includes a number of construction, design, equipping, and manning standards, which is really the appropriate domain for the International Maritime Organization (IMO).

In fact, that is why we have an IMO: It is the United Nations specialized agency to develop construction, design, equipping, and manning standards so that we have universal standards and ships can go anywhere on the globe. If one country says you have to paint your ship purple, then a purple ship is only going to be good for one country. If you have different requirements for diesel emissions and ice strength levels, then it is going to be a problem. Russia has also imposed requirements for route management, mandatory position reports, and financial security for liability. That is, just for the privilege of going through the area, you have to have some sort of insurance that says that, if something happens, you have the money to pay. They then include transit fees that are beyond the cost of the services rendered. So it is sort of a geographic fee; they are discriminating against vessels from other countries. All of this is going to come to a head with regard to environmental regulation.

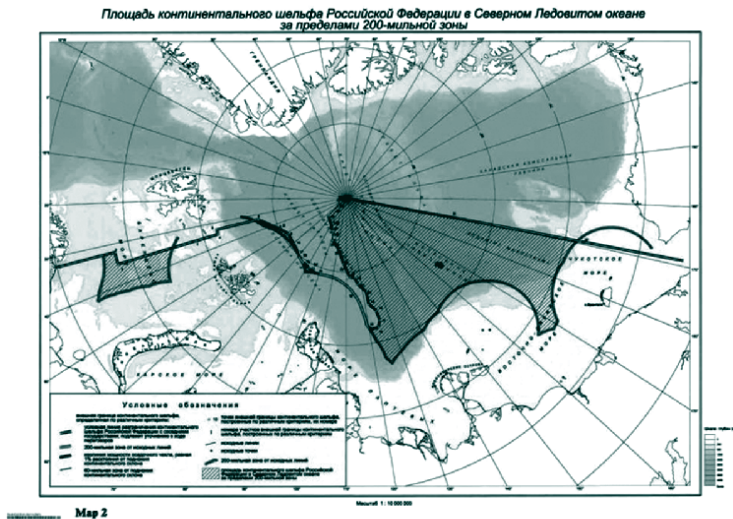
The seemingly ubiquitous Russian presence in the Arctic is making Canada extremely nervous. Canada thinks about the Arctic much more than the United States does. It is a national issue in Canada. In fact, it is a presidential issue in Canada. All of the politicians run on Canadian Arctic sovereignty. It is interesting though, because most Canadians have never been to the Arctic.

Now Russia's dominance is making the Canadians nervous. In the upper image of Figure 4 you will see Russia's claim before the commission on the limits of the continental shelf. The highlighted area is the area in which Russia claims to have sovereign rights to the resources of the seabed. They are not claiming the water column, but the resources of the seabed under text in Article 76 of the Law of the Sea Convention that says that states can claim sovereign rights to those resources—oil, gas, and minerals. They can claim exclusive sovereign rights to those resources so long as the seabed is a natural prolongation of the continent. Russia bases their claim on the fact that the Lamona soft ridge goes out to the North Pole.

Despite the fact that Canada is sitting on more natural gas and oil than it could possibly use in 200 years, Canada is concerned. They care very deeply about this claim and there is a sense of threat as a result. Magnifying that concern is the fact that Russian strategic reconnaissance aircraft occasionally fly close to, or actually enter, the Canadian air defense identification zone; these areas are shown in the lower image of Figure 4. The Russians suspended such flights for 15 years but then resumed the patrols in 2007.

On the left side of Figure 5 you have the Canada air region under the International Convention on International Civil Aviation. [3] That is the region that Canada has authority to control, to conduct air traffic control over civil aircraft, not military aircraft. In the upper right are the distant early warning radar sites, and on the lower left are the four Canadian fighter jet bases that scramble to respond to Russian flights. In the lower right you see the Alaska and Canadian Air Defense Identification Zones (ADIZs).

What is an ADIZ? The problem with an ADIZ is that the countries that make them, including at times the United States, sometimes hold the view that this is sovereign airspace. But it is not. It is international airspace and a country can declare anything they want. We can call it whatever we want and Canada can call it whatever they want, but it is international airspace and Russia has a right to fly reconnaissance aircraft there just like any other country has that right, exactly the same right that the United States enjoys in other areas of the world.



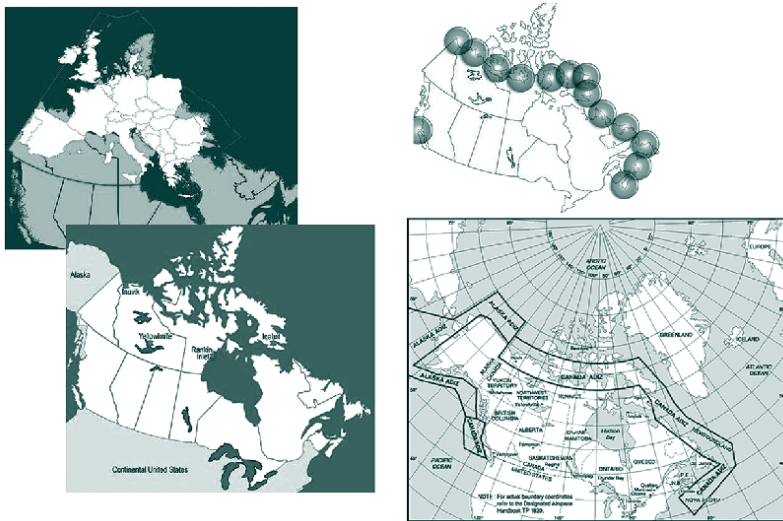


Figure 5. Canadian Air Defense

As part of the North Atlantic Treaty Organization (NATO), we fly closer to Russia than Russia is flying to us when they enter this ADIZ. Nevertheless, this has created a big issue in Ottawa. Canada has asked Russia not to fly in international airspace near its ADIZ and, if they do so, then they should give prior notification. So there is a defensive mindset—let's build a wall to protect us from the Russians.

Russia	Canada
<ul style="list-style-type: none"> • Guide to Navigation through the Northern Sea Route", 1996 • Regulations for Navigation on the Seaways of the Northern Sea Route, 1991 • Regulations for Icebreaker Assisted Pilotage of Vessels on the NSR, 1996 • Requirements for Design, Equipment, and Supply of Vessels Navigating the NSR, 1996 	<ul style="list-style-type: none"> • Arctic Waters Pollution Prevention Act (1970) <ul style="list-style-type: none"> – Arctic Waters Pollution Prevention Regulations – Arctic Shipping Pollution Prevention Regulations • Canada Shipping Act (2001) • Ice Navigation in Canadian Waters (CCG)

Figure 6. Comparison of Russian and Canadian Shipping Laws in the Arctic

Now let's look at the regulations side by side for both Russia and Canada in the Arctic (Figure 6). I mentioned that Russia is strengthening their rules. Canada is doing the same thing. Is it a coincidence that in 2010 both Russia and Canada have decided to strengthen their rules to keep out foreign powers, to keep out vessels and aircraft of foreign countries? It is not an accident. They have actually been collaborating because they are the only two countries that will accept each other's excessive claims.

Canada would prefer that the United States accept Canadian excessive maritime claims because then Canada would be able to leverage American power in order to keep out not just Russian ships, but also the Asian ships that are going to be coming in 20, 30, or 40 years. So far, however, the United States has not accepted Canada's claim. Why won't the United States recognize Canadian excessive maritime claims? Because it serves as a precedent in international law, and if we recognize their claims then we would have to recognize Brazil's and Iran's and Oman's, and pretty soon the freedom of the seas would become the seas that are not free.

So what is Canada doing? Well, they are doubling down with their unilateral strategy in cooperation with Russia. They are spending about \$2 billion on six Arctic patrol vessels with helicopters. They are strengthening their rules this year; they are going beyond already excessive baselines. They are going out to 200 miles to enforce rules under Article 234 regarding ice-covered areas. They are using a fairly liberal definition of ice-covered areas in that they are arguing that if they are near ice-covered areas or within 200 miles of ice-covered areas then Canada can still assert jurisdiction and control.

Why are they doing this now? I would suggest that it has to do with National Security Presidential Directive 66/Homeland Security Presidential Directive 25 (NSPD-66/HSPD-25), *Arctic Region Policy*, which was signed on January 9, 2009. [4] NSPD-66 says explicitly that the Northern Sea route and the Northwest Passage are straits used for international navigation, signaling that the United States is not going to walk back from 50 years of freedom of navigation and freedom of overflight and thereby reminding our neighbors that,

although we are cousins with Canada and we are on very friendly terms with Russia, we have this disagreement.

Let's look more closely at the Canadian strait baseline claims (Figure 7). Canada claims that it has the right to close off a large portion of the North American Arctic that it calls the Canadian archipelago. An archipelago is a term in the Law of the Sea Convention that is reserved for wholly island nations that meet a specific criterion of land-to-water ratio of 1:10. Canada, as a continental power, is not entitled to claim archipelagic status such as the Bahamas or the Philippines or Indonesia and draw straight baselines around all of those islands and claim what is inside as internal waters, but Canada has done so.

This has been the result of a number of *démarches* and sort of back and forth over the last 40 years or so between Canada and the United States. Canada has a sense of urgency about it because we have already mentioned that, in international law, state practice acquires a sense of customary binding nature.

So, for Canada it is considered an urgent matter to lock down the legal status of the Northwest Passage, e.g., to gain international legitimacy and recognition for this wall around the Canadian archipelago before the ships start to come. It is a lot easier to try to get the United States on board than it will be for other countries that are not Arctic countries and show up later. The possibility of

- Request for consent for state vessels 4-12 months advance
- Report to NORDREG on entry into zone and 1x /day (1600 UTC)
- Required 96-hour advance notice (Marine Security Regulations)



Figure 7. Canadian Arctic Waters

referring the issue to the permanent Joint Board of Defense has been rejected by Canada as a point of discussion.

This is a satellite photograph of the Northwest Passage, which actually consists of between five to seven routes through the Arctic region. It is about 100 nautical miles wide at its widest point and up to 2000 meters deep. This is not like a canal; this is not the St. Lawrence Seaway. These are the equivalent Canadian rules for transit through the Northwest Passage—prior notification, something that the United States has long rejected. If you remember the Black Sea bumping incident, the United States refused to give the Soviet Union prior notification to enter the 12-nautical-mile territorial sea. Well, this is asking for prior notification to enter passageways that are 100 nautical miles wide.

With regard to mandatory ship reporting, Figure 8 shows Canadian and Russian rules side by side. The Canadians designate a shipping safety control zone and they have divided different areas of responsibility. Overall, these are freedom-of-navigation rules in Russia and Canada. Both countries require that you take on board one of their licensed pilots. Some countries, Saudi Arabia for example in the case of Iran, have claimed that this is a sort of

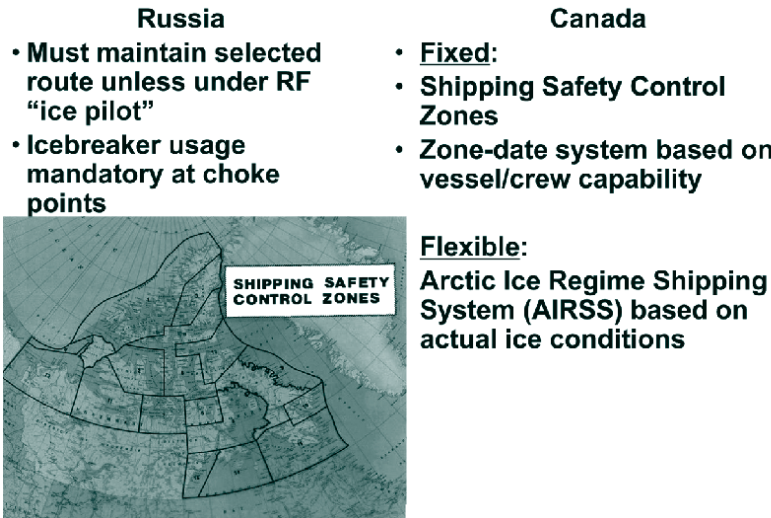


Figure 8. Russian and Canadian Freedom of Navigation

moneymaking scheme because pilotage is very expensive. I do not think it is about that; I think it is much more about gaining a psychological sense of security.

Put yourself in the place of Canada—you have had an immensely powerful neighbor guarding your southern border and you have had an inaccessible northern border, and suddenly now you have the prospect that this is going to become the Panama Canal of the north.

Figure 9 shows annual traffic flow, by ship type, through the Northwest Passage from 1906 through 2006. Interestingly, traffic using the Northern Sea route actually dipped after the fall of the Soviet Union, but now foreign traffic, as we just learned with two German ships last summer, has begun to enter into the Northern Sea route. Russia is preparing the Northern Sea route as a national waterway for international use under their terms.

From a liability perspective, both countries maintain what we would call the authority to conduct search and seizure (Figure 10). That is, they want to have authority to enforce criminal sanctions and also civil liability throughout these passageways.

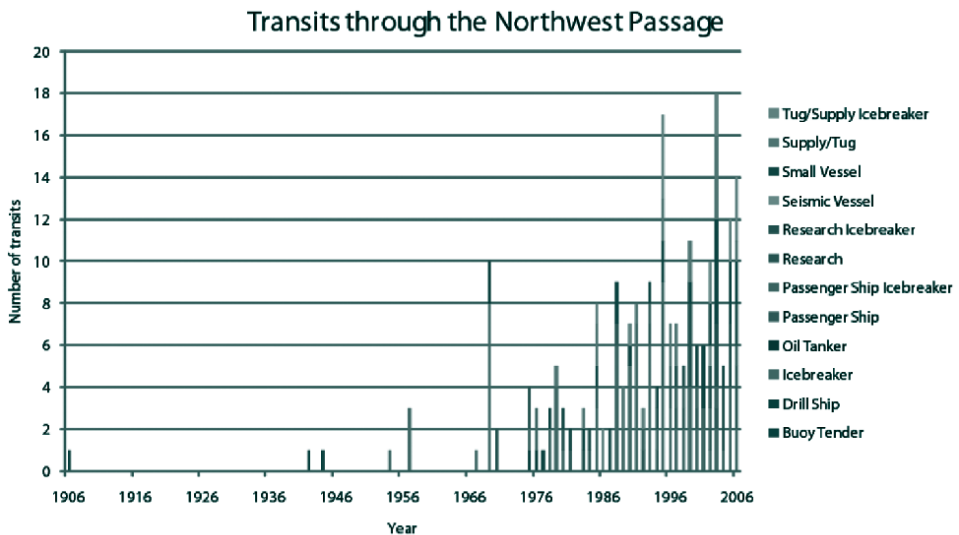


Figure 9. Northwest Passage Annual Traffic Flow

Russia	Canada
<ul style="list-style-type: none">• Demonstration of civil liability protection required• Mandatory inspection prior to use of NSR• Spot inspections any time	<ul style="list-style-type: none">• Compliance with Marine Liability Act (Based on the Civil Liability Convention)• Vessels subject to Port State Control• Spot inspections any time

Figure 10. Comparison of Russian and Canadian Liability Regulations

On crewing, both countries require pilots or ice navigators, which is the same thing (Figure 11). Both countries have environmental regulations that are more stringent than those provided under the Marine Pollution Convention—the broad, multilateral MARPOL 73/78—which was negotiated through the International Maritime Organization and has nearly universal acceptance. [5] The unilateral regulations instituted by both countries affect construction, design, equipping, and manning for transit through these areas.

All of this leads one to wonder what really is going on here. First of all, we know that between 80% and 90% of marine

Russia	Canada
<ul style="list-style-type: none">• Two ice pilots required• Ship crew must be able to maintain three watch system• Master must have 15 days NSR ice experience• Master maintains ultimate control despite ice pilots and directions from shore command	<ul style="list-style-type: none">• Certified ice navigator required:• (1) a tanker, at all times, and• (2) ships, other than a tanker, as detailed in Schedule VIII of the ASPPRs• Ice navigator must be qualified master or person in charge of deck watch for at least 50 days, with at least 30 days in Arctic waters• Master maintains ultimate control despite ice pilots and directions from shore command

Figure 11. Comparison of Russian and Canadian Crewing Regulations

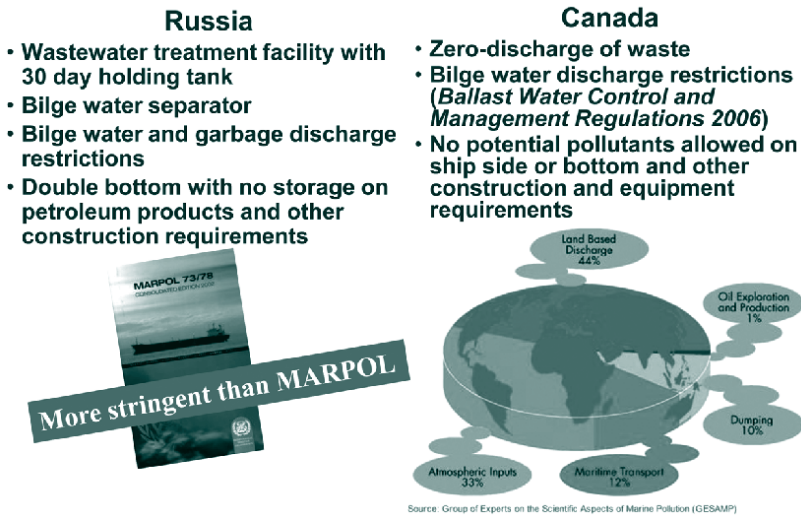


Figure 12. Comparison of Russian and Canadian Pollution Regulations

pollution is not caused by vessels; it is runoff from adjacent land areas (Figure 12). It comes from industry, it comes from mines, it comes from farms. But it is a lot easier to shift that cost onto foreign vessels coming through rather than having to go to your own industry and your own politicians and your own labor unions and your own people and ask them to tighten the belt.

In conclusion, I think China is already looking at this area as a domain for sea lines of communication. What you have with Russia and with Canada is an asymmetry of motivation. Both of those countries have great stakes—emotional, economic, political, and military—in the Arctic. Those stakes eclipse the relative lack of interest of the United States, and I think that is what is driving circumpolar politics.

As a final point, I do not think that the United States should replicate what Canada and Russia are doing. The model I would prefer is that of Norway. Norway is involved in the Arctic, but has taken a common-sense approach that balances environmental regulation with a very robust economic and natural resource

development program. I think Norway just about gets it right, and that is what I would recommend for the United States.

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