



Embassy of the United States of America

Ottawa, Canada
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Operations & Environmental Programs,
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**Subject: *Canada Gazette*, Part I, Saturday, February 27th, 2010; Vol. 144, No. 9:
proposed Northern Canada Vessel Traffic Services Zone Regulations**

Dear Mr. Turner,

On behalf of the Government of the United States of America, the Embassy wishes to provide comments on the proposed Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) published in the *Canada Gazette* on February 27, 2010.

The United States of America compliments the Government of Canada's continued efforts to provide for the safety of navigation and protection of the marine environment in the Arctic area. As conditions in the Arctic evolve, all Arctic coastal states will need to consider ways to protect and preserve this sensitive region. We note the collaborative efforts we have taken with Canada in this regard.

The notice of proposed regulations states that the proposed regulations are "consistent with international law regarding ice-covered areas." In light of this, the United States understands that Canada considers Article 234 of the Law of the Sea Convention (LOSC), entitled, "Ice-covered areas," to provide an international legal basis for its proposed NORDREG Zone Regulations. That article provides a coastal state with authorities to adopt and enforce certain laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of its exclusive economic zone when certain conditions are met. While we appreciate Canada's stewardship efforts in the Arctic region, we wish to take this opportunity to express our concerns that the new regulations appear to be inconsistent with international law, including LOSC Article 234.

First, the regulatory impact analysis statement accompanying the proposed regulations indicates that Canadian permission would be required for foreign flagged vessels to enter and transit certain areas that are within Canada's claimed exclusive economic zone and territorial sea and that enforcement action could include prosecution. If so, this would be a sweeping infringement of freedom of navigation within the exclusive economic zone

and the right of innocent passage within the territorial sea, both of which are bedrock principles of the law of the sea. While Article 234 of the LOSC allows Coastal States to adopt and enforce certain laws and regulations in ice-covered areas within the limits of the exclusive economic zone, these laws and regulations must be for the prevention, reduction and control of marine pollution from vessels and have "due regard to navigation." The United States does not believe that requiring permission to transit these areas meets the obligation set forth in Article 234 of having due regard to navigation.

Second, under LOSC Article 234, 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 must also be non-discriminatory. The proposed regulations rely on Canada's Shipping Control Act, which exempts vessels chartered to the Canadian Forces. However, it appears neither the Shipping Control Act nor the proposed regulations contain a provision for similarly-situated foreign vessels. This would be discriminatory, in contravention of LOSC Article 234.

Third, while the Shipping Control Act exempts vessels belonging to a foreign military force, the proposed regulations do not appear to provide an exemption for all sovereign immune vessels, including chartered vessels carrying military supplies. However, LOSC Article 236 specifies that Article 234 is among those provisions of the Convention that "do not apply" to sovereign immune vessels.

Fourth, under LOSC Article 234, laws and regulations adopted must be based on the "best available scientific evidence." The Notice of the regulations did not refer to any scientific studies in developing the proposed regulations. The United States is interested to know the scientific evidence that was considered in the development of these proposed regulations. Article 234 is likewise limited to "ice-covered areas," namely those areas covered by ice for "most of the year." Recognizing that the Notice states that "ice levels have recently been observed to be at an all-time low," the United States is likewise interested to know what information has been used to determine how this condition has been met throughout the entire area covered by the NORDREG Zone.

Finally, we note that the usual process for ensuring safety of navigation and prevention of pollution from ships is to establish such measures at the International Maritime Organization (IMO). In this regard, we would like to bring to Canada's attention relevant provisions of the International Convention for the Safety of Life at Sea, in particular Chapter V, Regulations 10 and 11, that require mandatory ship routing and reporting systems to be submitted to the IMO for adoption. We would be interested to learn whether Canada will avail itself of such an approach. The United States would welcome the opportunity to work with Canada and with others at the IMO in this regard.

The United States also reiterates its longstanding view that the Northwest Passage constitutes a strait used for international navigation. At a minimum, a measure such as the NORDREG Zone Regulations for an international strait would need to be proposed and adopted at the IMO.

In conclusion, we wish to emphasize that the United States does not oppose the Government of Canada's voluntary vessel traffic services zone and voluntary provisions for vessel registration and reporting. We likewise do not discount the need for action to protect the sensitive areas of the Arctic.

The United States supports the stewardship goals of the proposed NORDREG Zone Regulations. Such proposals, however, must have a firm international legal foundation and be implemented in a manner consistent with the law of the sea.

Thank you for the opportunity to comment on the proposed regulations. We look forward to our continued collaboration on this and other areas of mutual interest.

Sincerely,

A handwritten signature in black ink, appearing to read 'Eric Benjaminson', written in a cursive style.

Eric Benjaminson
Minister – Counselor, Economic Energy and
Environment Affairs