

Faculty of Law

The Regulation of International Navigation through the Northern Sea Route

Russian Legislation and International Law

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Table of Contents

1. Introduction.....	3
1.1. Object and limitations of the thesis	3
1.2. Legal sources and method	6
1.3. Structure of the thesis	8
2. The Northern Sea Route – A Brief Overview and Characteristics	10
2.1. Introduction	10
2.2. Geographical scope and significant features	10
2.3. Russian Arctic Seas as a part of the NSR.....	12
2.4. Russian Arctic Straits	14
2.5. Russian Arctic Ports	16
3. Russian Arctic Waters –different views.	18
3.1. Brief history of the exploration and development of Russian Arctic Waters.....	18
3.1.1. Discovery and exploration of the Northeast Passage from 11 th century to Pre-Soviet period	19
3.1.2. Soviet era of NSR development.....	21
3.1.3. NSR in the 21 st Century	23
3.2. Views of Legal Scholars on the Russian Arctic Waters and its Legal Regulation.....	25
3.3. Soviet Legislation and State practice.....	30
3.3.1. Period until 1982.....	30
3.3.2. Period after 1982	35
3.3.3. State Practice	36
4. Current Russian Legislation on the NSR and Possible Non-compliance with International Law	40
4.1. The Russian legal Framework of the current legal regime on the NSR	40
4.2. An assessment of the Russian legal regime on the NSR: Shortcomings, Contradictions and possible future scenarios.....	41
4.2.1. Article 234 of UNCLOS	41
4.2.2. Prior Notification and Authorization.....	43
4.2.3. CDEM	46
4.2.4. Fees for Services	47
4.2.5. NSR: Transits Straddling Between EEZ and High Seas	48
5. Conclusion.....	49
6. Bibliography.....	52

1. Introduction

1.1. Object and limitations of the thesis

The Arctic and its natural resources such as hydrocarbons, waters-ways, and living marine resources have an increasing value for commercial use in today's world resulting from geopolitical, socio-economic, technological, industrial and climate-change factors. In light of this situation, the XXI century is often called as a "Century of the Arctic".¹

The Northern Sea Route (thereafter NSR), is a "national transportation route of the USSR,"² or "historically developed national transport communication line of the Russian Federation"³ as is reflected in historical Soviet and now Russian legislation. This waterway has played a crucial role in opening up the Arctic for transport and commercial opportunities.

In recent years, the important role of the NSR in the Arctic paradigm is rapidly increasing for the international shipping industry, international trade, economics of many states. By and large, it was effected by political changes governing its use and information through history. This is evident by contrasting its period of closed access for sailing by foreign flagged vessels in the times of the Soviet Union (thereafter USSR) to its opening for international navigation after the collapse of the USSR. A famous speech by the then *General Secretary of the Communist Party of the Soviet Union*, Mikhail Gorbachev, in Murmansk on 1st October in 1987 had a great impact on international cooperation between Arctic States and opening the NSR to foreign flagged vessels.⁴

¹ http://russiancouncil.ru/inner/?id_4=909#top

² 1990 regulations for Navigation on the seaways of the Northern Sea Route, paragraph 1.2.

³ 2012 Federal Law on amendments to specific legislative acts of the Russian Federation related to governmental regulation of merchant shipping in the water area of the Northern Sea Route, clause 2.

⁴ Gorbachev, M., *The Speech in Murmansk at the ceremonial meeting on the occasion of the presentation of the Order of Lenin and the Gold Star Medal to the city of Murmansk*, October 1, 1987 (Novosti Press Agency: Moscow, 1987), pp. 23-31. (accessed on 07.06.2014 and available at

At the same time, the special significance of the NSR fosters a challenging geopolitical and legal situation in the Arctic Region, as strategic interests of various states regarding transit and commercial use of the NSR often collide. This is due, in a large part, economic attractiveness, benefits and profits for shipping of goods and cargo delivery via the NSR in comparison with the traditional sea lines of communication- Suez and Panama Canals. The NSR, in contradiction to the waterways mentioned above, shortens the distance in sailing from Europe to Asia, allowing ship owners, carriers and customers to reduce costs on distance, waiting time and a freight rates.

Ice-melting processes make the use of Arctic waters and especially navigation in the ice-free areas more accessible. This opens the challenge of jurisdiction in determining the necessity of proper regulation over navigation by the Arctic coastal states as key players in the Arctic Region. Increased regulations should be enacted for the purposes of protection of the marine environment and the prevention of pollution from different sources, as well as to ensure the safety of ships and seafarers. Nowadays, the most pressing threat in the Arctic is that of potential oil spills which could occur due to active oil and gas projects and shipping of hydrocarbon materials on the Arctic continental shelf or in Arctic waters.

As the main Arctic maritime artery for Russia, the NSR plays an increasingly important role not only for Russian national, geopolitical, strategic and commercial interests, but also for international maritime industry and shipping, international trade economics business. The Russian Federation is the one of five Arctic coastal states alongside USA, Canada, Norway, Denmark with Arctic marine territories. Of these five, Russia is the biggest in its territory and richest in its natural resources. It has, under its sovereignty, maritime zones that can be characterized as extensive water spaces (i.e. Russian Arctic Straits and Russian Arctic Seas) that when linked together, form a unique transport waterway; the Northern Sea Route. Russia, as the successor state of Soviet Union, inherited certain rights and responsibilities in accordance with the principle of succession by the States in international law including right of sovereignty over numerous territories and waters, including that of the NSR.⁵

<http://www.lecerclepolaire.com/en/documentation-uk/news-a-views-uk/454-meeting-with-the-former-president-mikhail-gorbachev>)

⁵ Law of the Russian Soviet Federated Socialist Republic on 25 December 1991 On the Change of Name of the State Russian Soviet Federated Socialist Republic.

There are many different aspects regarding the NSR, including: geographical, historical, economic, political, legal, insurance, and many other issues.

The objectives of this paper are to: examine and clarify the legal framework regarding the regulation of international navigation on the NSR; determine and analyze policy and national legislation of the Russian Federation and its development since Soviet times; identify the international legal basis (grounding) on which the position of the Russian Federation is based that support its unilateral regulation of international navigation on the NSR, and last but not least analyze and assess this regulation with compliance or possible incongruence with the applicable international law, especially the International Law of the Sea.

This paper will begin by providing a brief overview of geographical features of the main Arctic Seas and Arctic Straits of the NSR to provide the reader an essential foundation for understanding the NSR as a complex system. The paper will then give a short historical overview of discovery and exploration of Arctic waters of the NSR, as necessary for discussion in further chapters of historical title over the Arctic waters of the NSR by the USSR and then Russian Federation, segueing into a comparative view of Canada's control over the Northwest Passage and scholarly debate over legal conundrums.

From there, the main research focus will be elucidated on the examination of the legal framework regarding regulation of international navigation in the waters of the NSR by the Russian Federation as well as requirements imposed by the Russian Federation on foreign vessels for transit through the NSR. The activities of Russia will then be assessed as to evaluate congruence and compliance with UNCLOS.

Special attention will be paid to Article 234 of the United Nations Convention on the Law of the Sea (thereafter UNCLOS) and assessment of its interpretation, application and compliance with it by the Russian Federation as a party of the Convention in Russian national legislation. In addition, Canadian and Norwegian state practice regarding the Canadian Northwest Passage and Norwegian Indreleia waterway will be discussed as examples for claiming sovereignty and exercising jurisdiction over waterways by the respective coastal state.

The topic of jurisdiction and control over NSR waterways is relevant because the legal status and legislative regulation of navigation in the Straits of the NSR is currently debated in the international arena. Although the shipping industry has largely accepted and complied with Russian imposed rules and control in the NSR in order to utilize this waterway for commercial business continuity, there are competing points of view as to whether creeping coastal state jurisdiction by the Russian Federation over the NSR is congruent to international law and legal principles.

1.2. Legal sources and method

To carry out this research properly, various sources of law, in particular sources of international law contained in Article 38 of the Statute of the International Court of Justice will be used.⁶ These include international conventions and agreements, international custom and general principles of law. Subsidiary sources, will also be used, specifically judicial decisions and the publications of the most highly qualified authors and scholars.

The International conventions that the Soviet Union and then Russian Federation are parties to, relevant to this research, are namely the United Nations Convention on the Territorial Sea and the Contiguous Zone⁷, *Vienna Convention on the Law of Treaties*⁸, and *United Nations Convention on the Law of the Sea*⁹ (UNCLOS). These will be examined as the main international legal frameworks regarding the exercise of jurisdiction on the NSR and its waterways.

General international law and UNCLOS provide an international legal regime for straits used for international navigation. UNCLOS contains an essential legal provision- Article 234 on “Ice –covered areas” that serves as an international legal basis for Arctic coastal

⁶ Statute of the International Court of Justice, Signed on 26 June 1945 in San-Francisco. Entered into force 24 October 1945. Available at <http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0>. [Accessed on 20.06.2014]

⁷ United Nations Convention on the Territorial Sea and the Contiguous Zone, done at Geneva, 29 April 1958. Published in United Nations *Treaties Series*, vol. 516, No.7477.

⁸Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969. Published in United Nations *Treaties Series*, vol. 1155, No. 18232.

⁹ United Nations Convention on the Law of the Sea, Signed on 10 December 1982 in Montego Bay. Entered into force 16 November 1994. Published in United Nations, *Treaty Series*, vol. 1833.

states such as Canada and Russian Federation, can rely on regarding the unilateral exercise of their jurisdiction over the Arctic Waters that form Canada's Northwest Passage and Russia's Northern Sea Route, as well as other waters. This will be further discussed in section 4.2.1.

Furthermore, overview and assessment of legislation regulating international navigation on the NSR beginning from the Soviet period and later reflected in the legislation of the Russian Federation will be discussed. In particular, the paper will mention regulations, guidance, recommendations for navigation on the NSR including government provisions on the ice-breaker pilotage and Construction, Design, Engineering and Manning (CDEM) standards for vessels adopted in the period from 1990-1996 alongside the 1998 Russian Federal Law on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation,¹⁰ 1998 Federal law on the exclusive economic zone of the Russian Federation,¹¹ 1995 Federal Law on natural monopolies,¹² 1999 Merchant Shipping Code of the Russian Federation, 2012 Federal Law on amendments to specific legislative acts of the Russian Federation related to governmental regulation of merchant shipping in the water area of the Northern Sea Route.

From a legal reasoning and superiority perspective, it should be stressed to the reader in evaluating Russian Laws and other legal acts adopted in the Russian Federation, that such laws shall not contradict the Constitution of the Russian Federation.¹³ Moreover, the universally-recognized norms of international law and international treaties and agreements of the Russian Federation is a component part of its legal system. If an international treaty or agreement of the Russian Federation provide other rules than those

¹⁰ Federal Act dated July 31, 1998 N 155-Ф3 On Internal Sea Waters, Territorial Sea and Adjacent Zone of the Russian Federation (Collection of Laws of the Russian Federation, 1998). Available in English at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_TS.pdf [Visited on 20.07.2014]

¹¹ Federal Act dated December 17, 1998 N 191-Ф3 On the exclusive economic zone of the Russian Federation. (Collection of Laws of the Russian Federation, 1998). Available in English at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_EZ.pdf [Visited on 20.07.2014]

¹² Federal Law dated August 17, 1998 N 147-Ф3 on natural monopolies (Collection of Laws of the Russian Federation, 1998) Available in Russian at http://www.consultant.ru/document/cons_doc_LAW_133349/ [Visited on 20.07.2014]

¹³ The Constitution of the Russian Federation was adopted at National Voting on 12 December 1993. Published in Rossiiskaya Gazeta newspaper on 25 December 1993. Article 15 (1).

envisaged by law, the rules of the international agreement shall be applied and domestic law be modified to fit the new international standard.¹⁴

The above mentioned legal sources have been treated throughout this paper using the following methods: descriptive, analytical and method of comparative legal analysis. The challenges for this specific research revolve around the comparative approach between US/European and Russian legal scholarly and diplomatic debate. In particular, researching from various codices, in multiple languages, legal formats, and political structures in international and domestic archives made information extraction and synthesis a potential obstacle. However, the information was assessed and analyzed critically, as presented in the following report.

1.3. Structure of the thesis

The thesis is divided into four main chapters. The first chapter is the introduction.

The second chapter provides a general overview and description of geographical features of the NSR as a transport artery that includes primarily Seas and Straits of the Russian Arctic alongside with the biggest Russian Siberian rivers. Added emphasis will be placed on the distinction between the concepts of the NSR and the North-East passage. Furthermore, information about main ports along the NSR is briefly presented.

The third chapter will elucidate a brief history of the Arctic exploration and discoveries of Arctic waters, the contribution of explorers not only the Russian (and Soviet) but also foreign research.

Different points of view in International Law among outstanding publicists of the Soviet Union and later Russia alongside western scholarly views regarding the exercise of jurisdiction over the Arctic waters, will be presented. This will focus, in particular, on jurisdiction over the Straits of Russian Arctic that are the core of controversy and regulation of foreign vessels navigating on the NSR. In addition, this chapter will shed a light on the extensive Soviet legal framework regarding the enshrinement of rights on the

¹⁴ *Ibid.* Article 15 (4).

regulation over the NSR by the USSR domestic law thus allowing the Soviet Union to exercise jurisdiction over the waters consisting the NSR. Soviet legal regulation on access to the NSR and requirements for foreign vessels will be presented alongside contemporary rules of the Russian Federation.

Here state practice will also be mentioned, specifically the USA state practice on navigation in Soviet Arctic waters and overview of the US position regarding the formerly Soviet (now Russian) straits constituting the NSR, and alleged freedom of navigation through such.

The fourth chapter will discuss the current legal regime over the NSR. This will be comprised of an appraisal of the Soviet and Russian legislation in the light of congruence with International Law regarding the legal status of the NSR and exercising Soviet (now Russian) jurisdiction over it. Moreover, comparative State practice of Canada and Norway alongside the USSR (now Russia) examining unilateral coastal state regulation over sea routes that have been claimed as a national transport waterways will be critically discussed. The paper will end with a summarizing conclusion.

2. The Northern Sea Route –a Brief overview and characteristics

2.1. Introduction

The purpose of this chapter is to provide general information and understanding regarding what the Northern Sea Route (NSR) is and briefly present the main and essential components that constitute the system of NSR waters: Arctic Seas, Arctic Straits, Russian Rivers. These will be explained to describe the geographical scope and peculiarities of the NSR, highlight its brief characteristics that affect navigation in Russian Arctic waters; and mention the main Russian Arctic ports. In addition, a brief historical overview of exploration of Arctic waters by Russian and foreign explorers and scientists will be presented. Last, but not least, interrelation and differences between North East Passage (NEP) and NSR will be highlighted.

It should be also noted that despite the fact that under the jurisdiction of the Russian Federation there are many Seas and Straits in Russian Arctic and High North, not all Russian Arctic Seas and Straits will be discussed in this chapter, only the most important and relevant to the NSR and this paper will be presented below.

2.2. Geographical scope and significant features

The Arctic Ocean lies between two continents - Eurasia and North America. Shores of The Russian Federation are washed by the waters of the Arctic Ocean from the North. Along it lies the Northern Sea Route.

The NSR is the shortest transport maritime seaway connecting the European part of Russia and its Far East. 2012 Russian Federal Law describes the NSR as:

“the water area adjacent to the Northern coast of the Russian Federation, comprising the internal sea waters, the territorial sea, the adjacent zone and the exclusive economic zone of the Russian Federation and confined in the East with the Line of Maritime Demarcation with the United States of America and Cape Dezhnev parallel in Bering Strait, with the meridian of Cape Mys Zhelania to the Novaya Zemlya Archipelago in the West, with the eastern coastline of the Novaya Zemlya Archipelago and the western borders of Matochkin Strait, Kara Strait and Yugorski Shar.”¹⁵

The NSR, it is important to keep in mind, is also the important transcontinental route that has taken an increasingly important role in recent years for the international shipping industry and economics of many states due to various factors, namely saving time and money shipping from Europe to Asia and vice versa.

The NSR is located from Novaya Zemlya in the west (meridian 168 degrees 58 minutes and 37 seconds west) to the Bering Strait in the east (parallel 66 degree north), running along the full stretch of the Russian landmass’ northern coastline.¹⁶ The official position of the Russian government regarding the NSR is reflected in the legal definition of the NSR that was presented above, in block-quote. It seems to be based on the statement that the Northern Sea Route (NSR) is the same as North-East Passage (NEP) and NEP is just a historical name of the NSR. But that is not correct and warrants an in-depth clarification.

The relationship between the NEP and the NSR is that the NSR constitutes the main part of the NEP.¹⁷ The NSR was developed and equipped by authorities in Soviet Union in the early 1930s. The characteristic features of the NSR are that the NSR does not have just one fixed route or track due to the varying ice conditions and need for vessels to be mobile to move around ice floes and other dangers. In fact, this is a main difference in shipping broadly, when compared to car or train transport, where vehicles are fixed to roads or

¹⁵ 2012 Federal Law on amendments to specific legislative acts of the Russian Federation related to governmental regulation of merchant shipping in the water area of the Northern Sea Route, clause 2.

¹⁶ Ostreng, Willy. *The Transportation Passages of the Arctic Ocean and connecting corridors in southern waters*. In: *Shipping in Arctic Waters: A comparison of the Northeast, Northwest and Trans-Polar Passages: A Textbook*. Verlag Berlin Heidelberg, (Springer Praxis Books) 2013.p.11

¹⁷ *ibid.* p.11.

tracks. Conversely, vessels can choose their own course and are not stuck on one path. This was noticed by several researchers such as Ostreng,¹⁸ Brubaker,¹⁹ Kolodkin,²⁰ Bunik.²¹ Furthermore, Kolodkin and Bunik who stressed that one of the essential peculiarities of the Seas and Straits as a main component of the NSR system is that Seas constituting the NSR are closely interrelated with the Straits connecting these Seas. And at the same time a substantial part of the NSR lies within the internal maritime waters, territorial sea, and exclusive economic zone of the Russian Federation.

According to Willi Ostreng there are two approaches that can be applicable in determination of the NSR's status under international law. First, a definition that is reflected in legislation of the Russian Federation that restricts the NSR geographically as the state claim insists NSR is under the jurisdiction of Russia. And second, a functional definition that combines different geographical and geopolitical criteria and that extends the NSR geographically joining extra international waterspaces (in particular the high seas).²²

In both situations, however, the NSR can be characterized as a unique and complex transport system that includes primarily the seas of the Arctic Ocean, the biggest Russian Siberian Rivers and Russian Arctic straits. The waters of Russian Siberian Rivers such as Lena, Ob, Yenisei, Kolyma, Indigirka, Khatanga alongside with the waters of the Kara, Laptev, Barents, East Siberian, Chukchi Seas, and Russian Arctic straits constitute the NSR regardless of legal jurisdiction definition. Each Russian Arctic Sea has its specific characteristics and features which will be briefly presented below.

2.3. Russian Arctic Seas as a part of the NSR

As it was stressed above, the NSR does not simply have a one fixed track. Instead, it includes the waters of the Russian Arctic Seas that wash the coast of the Russian

¹⁸ *ibid.* p.15.

¹⁹ R. Douglas Brubaker, *The Russian Arctic Straits*. Leiden, Martinus Nijhoff Publishers, 2004, p.1.

²⁰ Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: *Marine Policy* vol. 14 (1990) 2, p.164.

²¹ I. V Bunik, *International legal basis for the regulation of navigation in the Northern Sea Route*, Moscow 2007 (Russian version only) - *Международно-правовые основания регулирования Россией судоходства по Северному морскому пути.*, p.4.

²² See *supra* note 16, p.13.

Federation from the North. Each of these Russian Arctic Seas will be briefly described below.

The Barents Sea, in comparison with another Arctic Seas of the NSR system, is quite different due to its ice conditions caused by warm waters of the North Cape current flowing in it²³. Different parts of the Barents Sea have its own peculiarities (in dependence on where the waters flow) affecting the duration of the ice-free water season that will dictate the conditions for navigation. Thus, the western parts of the Barents Sea are accessible for navigation all year round, while the eastern parts of the Barents Sea are only open for navigation is from July to September, and the southern parts are free of ice from only May till June.

The Kara Sea is geographically located between Severnaya Zemlya, Novaya Zemlya and the eastern part of Franz Josef Land. Compared with the Barents Sea, the Kara Sea is more shallow. Most of the Kara Sea is ice-covered during the year which makes it one of the most difficult, closed, and dangerous seas of the NSR. Ice conditions differ from year to year. The Kara Sea is opened for the navigation only from early August to late September or even sometimes until early October. Some years favorable conditions for navigation can arise from late July until mid-October, but with ice-breaker assistance navigation can get a head start, beginning in southern parts of the Sea even earlier, in June.²⁴

Most of the Laptev Sea is ordinarily ice –free and open for navigation throughout August and most or even all of September. At the beginning of the navigational season the most favorable ice conditions are in the eastern part of the Laptev Sea. Douglas Brubaker notices that the more these Arctic Seas lie to the east, the more strict ice conditions. (exception only is the Laptev Sea, that cannot be characterized by its special difficulty).²⁵

The East-Siberian Sea is situated between the New Siberian Islands in the west and Wrangel Island in the East. The special characteristics of this Sea are shallowness, dependence on wind directions for ice conditions during the open period of navigation.

²³ R. Douglas Brubaker, *The Russian Arctic Straits*. Leiden, Martinus Nijhoff Publishers, 2004, p.3.

²⁴ *ibid.*, p.5.

²⁵ R. Douglas Brubaker, *The Russian Arctic Straits*. Leiden, Martinus Nijhoff Publishers, 2004. p.5.

Furthermore, the Eastern part of East-Siberian Sea is one of the most challenging from all the NSR.²⁶

The Chukchi Sea, similarly, is one of the most difficult Seas of the NSR for navigation. The flow of warm waters to the north plays an essential role in the clearing of ice.²⁷ Mostly The Chukchi Sea is free of ice in late August or early September. It is frequently covered by ice beginning in mid-September, therefore has a very short open-season.

The Russian Arctic, High North, and its waters can be characterized by severe and dangerous climate conditions, long and frosty winters with low temperatures, snowfalls, strong winds, floes, period of darkness, pack and drifting ice, icebergs and unique fragile Arctic flora and fauna. All these factors effect navigation in the Arctic making it very challenging, even with the best crews and equipment. Therefore the factors mentioned above should be taken into account by shipowners and ship masters navigating in the Russian Arctic seas.

2.4. Russian Arctic Straits

The main Russian Arctic Straits of the NSR are well-known and can be divided into three groups: the first group- the Straits connecting the Barents and Kara Seas; the second group- the Straits connecting the Kara and Laptev Seas; the third group- the Straits connecting the Laptev and The East Siberian Seas.²⁸ Some additional straits exist, but are mostly unheard of outside of Russia and are rarely used for navigation.²⁹

The first group will include the main Straits of the NSR such as: The Yugorskiy Shar Strait, The Kara Gates Strait, The Matochkin Shar Strait.

The Yugorskiy Shar Strait is usually frozen in winter from and covered by ice until late June. The Kara Sea affects this Strait due to its drifting ice floes. The Yugorskiy Shar Strait does not freeze until December. It is open for navigation beginning mid-July, but if

²⁶ *Ibid.*, p.6.

²⁷ *ibid.*, p.6.

²⁸ *Ibid.*, p.9.

²⁹ *Ibid.*,p.2.

unfavorable scenarios occur in late spring, it can be closed for navigation during the whole summer. Navigation is risky in this strait by virtue of a combination of different factors such as fogginess, poor visibility conditions, strong currents³⁰.

The Kara Gate Strait alongside the Yugorskiy Shar Strait also can be characterized by difficult navigational conditions such as the strong currents, fogs and especially by drifting ice, posing the main hazard for navigation. The Strait is free of ice in August and freezes completely solid in January³¹.

The main features of The Matochkin Shar Strait are that it has variable ice conditions in its distinct parts from East to West. Fogginess affects identification of the dangerous entries to the Strait making transit entry hazardous. Also compactness of ice and its quantity navigational conditions and required CDEM standards of vessel construction to withstand such strong floes³².

The second group of Straits of the NSR contains: The Vil'kitskiy Strait and The Shokal'skiy Strait. Regarding the The Vil'kitskiy Strait, an outstanding researcher D. Brubaker notes that it is the best-marked, well-known and the shortest route between The Kara and The Laptev Sea.³³ The main geographical features of this Strait is the variation and complexity of ice conditions. The Strait is almost always covered by the compact ice, creating heavy summer fogginess with warm air above frozen waters, drifting ice concentration, and variable the wind characteristics³⁴.

Ice conditions of The Shokal'skiy Strait are more challenging in comparison with The Vil'kitskiy Strait due to the icebergs posing a main hazard to navigation. This is combined with the thickness of the ice, which can be challenge for poorly constructed ships to handle, or those trying to transit without icebreaker assistance, demonstrating the danger involved in sailing alone³⁵.

³⁰ R. Douglas Brubaker, *The Russian Arctic Straits*. Leiden, Martinus Nijhoff Publishers, 2004. p.10.

³¹ *ibid.*

³² *ibid.*

³³ *ibid.*,p.11.

³⁴ *ibid.*,p.11.

³⁵ R. Douglas Brubaker, *The Russian Arctic Straits*. Leiden, Martinus Nijhoff Publishers, 2004. p.12.

Finally, the third group of NSR's Straits is represented by the Dmitriy Laptev Strait and The Sannikov Strait. The Dmitriy Laptev Strait is, for the most part of the year, a consolidated ice sheet that can completely block the Strait sometimes even during the whole summer open navigation period. The most favourable ice-free conditions for navigation, however, are generally in August and September. The Dmitriy Laptev Strait begins to freeze sometimes in the end of September or in the beginning of October³⁶.

For The Sannikov Strait, September is the most possible period for navigation. In unfavorable periods of the time The Sannikov Strait can be covered by ice entirely. The process of freezing begins from the early October.³⁷

2.5. Russian Arctic Ports

The main Russian Arctic Ports are: Dikson, Tiksi, Pevek, Dudinka, Amderma, Khatanga, and Murmansk, although others also play an important role for import of fuel, equipment, supply food, forest and export of natural resources, and hydrocarbons delivery. However Port of Dudinka is the only Arctic port in the world that operates year-round. An exception to this is only the temporary suspension of vessel access during a flood, but this is only for a short period of time. Moreover, only the Port of Dudinka until mid-2013 was officially open for entry to foreign vessels on the tracks of the Northern Sea Route³⁸. This was done in accordance by a Government Act of the Russian Federation. Further, in July-August of 2013 the government opened two more ports on the NSR to foreign vessels- Pevek and Sabetta³⁹.

The actual potential of the NSR is that NSR can be used in three forms. First, as an intra-Arctic Route between different places in Arctic. Second, as a destination route between places inside and outside of the Arctic. And third, as a transit route between places in the Pacific and Atlantic Oceans through the Arctic Ocean.⁴⁰

³⁶ *ibid.*p.13.

³⁷*ibid.*p.14.

³⁸ <http://www.proatom.ru/modules.php?name=News&file=print&sid=5127> (Russian version only)[Accessed on 20.06.2014]

³⁹ *ibid.*

⁴⁰ Ostreng, Willy. *The Transportation Passages of the Arctic Ocean and connecting corridors in southern waters*. In: *Shipping in Arctic Waters: A comparison of the Northeast, Northwest and Trans-Polar Passages: A Textbook*. Verlag Berlin Heidelberg,(Springer Praxis Books) 2013.p.11

Thus the NSR plays an important role for industrial life of many Russian regions, delivering and moving supplies, imports, and exports. In particular, the NSR is essential for Russian High North regions and for its food supply (or locally dubbed ‘Northern supply’) to bring provisions to Russian cities, towns, and settlements in the North.⁴¹

⁴¹ A.V. Istomin, *Role of the Northern Sea Route in economic development and development of northern territories*. In: *The Industrial North*. Vol. 6-7 (2007) and available at <http://helion-ltd.ru/rolofsevmorput>

3. Russian Arctic Waters –different views.

3.1. Brief history of the exploration and development of Russian Arctic Waters

This section will elucidate a brief history of the exploration of Russian Arctic Waters constituting the NSR. A brief historical overview is a necessary component of the research. It will serve for better understanding of the doctrinal views and diplomatic statements which refer to historic title as a ground for possessing huge water expanses and exercising state jurisdiction over it.

Russian Arctic waters which constitute the NSR have a long history of discovery, exploration and development. For many centuries, the importance of the North–East Passage has been perceived by many explorers from different states. Studies and expeditions conducted not only by Soviet and Russian explorers, but also scientists from other countries made a substantial contribution in the exploration of the Russian Arctic waters as well.

The aim of expeditions was to find the shortest way between Europe and Asia, explore the area in particular new trade routes or fishing routes despite the harsh climate conditions and learn more about navigation and new opportunities that can be used for the transit, trade, and commerce.

The history of discovery and exploration of the NSR (at that time it was called the Northeast Passage) is possible to divide into several periods. For example, the history of exploration of the NSR was divided into four periods according to working papers of the international multidisciplinary research programme INSROP (International Northern Sea

Route Programme) that was carried out between June 1993-March 1999.⁴² The aim of INSROP was constructing a knowledge base platform for long-term planning and decision making by public and private sectors regarding the use of the NSR.⁴³

INSROP presented a history of the NSR divided into four periods, which will be elucidated and explained below. The first period reflects the history of the Northern Sea Route from the middle of the 16th century until 1743. And it mostly devoted to the exploration and mapping. Also attention was paid to the British and Dutch expeditions alongside with the Russian two Kamchatka expeditions in 1725-1743 that were lead by Vitus Bering⁴⁴. The second period of history on the NSR covers 1743 -1850. The third period of history of the NSR includes 1850-1917. And the fourth period presents the time since 1917 to 1990. But there are exist additional chronologies as well. However, in this paper, history of exploration and discovery of the Arctic waters (including NEP, NSR) will be divided into three periods: Pre-Soviet, Soviet, and Post-Soviet developments.

3.1.1. Discovery and exploration of the Northeast Passage from 11th century to Pre-Soviet period

In the beginning, it is important to stress that an essential role in the exploration and discovery of the Russian Arctic waters in 11th -12th centuries was conducted by Pomors – local people from the Pomor land (Russian High North). Pomor people sailed on wooden boats of simple construction despite the harsh weather conditions and whose traditional activities were hunting on seals and fishing. Among the great achievements of the Pomors was a discovery of the islands of Novaya Zemlya, Vaigach during the 12th -13th centuries and the Medvezhy island alongside with Svalbard in the end of the 15th century. Pomors also explored and developed “Mangazeiya seaway” in the 16th -17th centuries.⁴⁵

According to many Russian sources the first person who suggested the idea of use of Northeast Passage between Russia and China was Russian diplomat Dmitry Gerasimov in

⁴² <http://www.fni.no/insrop/>

⁴³ INSROP working paper No 28-1996, IV.1.1. (available at <http://www.arctisearch.com/Historical+and+Current+Uses+of+the+Northern+Sea+Route%3A+Part+I&structure=Transportation+Research>)

⁴⁴ *ibid.*

⁴⁵ <http://www.ikz.ru/siberianway/engl/sevmorput.html>

1525.⁴⁶ But Terence Armstrong argues that “*one of the first to see the potentialities of a route in the far north was Robert Thorne, a Bristol [English] merchant who had lived in Spain.*”⁴⁷ So it remains debatable and leaves room for consideration who was genuinely the first person that put forward the idea about use of the Northeast Passage.

Nonetheless, the history of discovery and exploration of Arctic waters during the 16th century was continued by the famous English and Dutch expeditions that were led by Richard Chancellor and Hugh Willoughby alongside with Arthur Pet and Charles Jackman.⁴⁸ Expeditions were also carried out by the famous Dutchman William Barents, of whom the Barents Sea received its name⁴⁹.

As for Russian explorers in the end of the 16th century, they started regular voyages to Ob river, and even reached the Yenisei River Basin, discovered Siberia and its rivers. In 1648 Semen Dezhnev and Fedot Popov made a voyage and discovered a strait between Asia and America.⁵⁰ This is a great page in the history of the Arctic exploration.

The 17th century can be characterized by the Kamchatka expeditions that were led by Vitus Bering in exploring of the northern coast of Russia. The great discoveries were made in the middle of the 17th century and presented by the names of great Russian explorers Semen Chelyuskin and Khariton Laptev. As a result of all these expeditions, discoveries of islands, rivers, straits occurred and substantial mapping projects began of Russian territories⁵¹.

The famous Russian scientist Mikhail Lomonosov “*put forward and proved the idea of integrated study of Arctic seas and countries for commercial navigation development and for the protection of Russian territories in the Far East.*”⁵²

⁴⁶ *ibid.*

⁴⁷ INSRP working paper No 28-1996, IV.1.1., p.11 (available at <http://www.arctis-search.com/Historical+and+Current+Uses+of+the+Northern+Sea+Route%3A+Part+I&structure=Transportation+Research>)

⁴⁸ <http://www.ikz.ru/siberianway/engl/sevmorput.html>

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² *ibid.*

The transit potential of the NSR, was proven by the voyage of great Finnish-Swedish explorer Nils Nordenskiöld in 1878-1879.⁵³ His voyage on the schooner *VEGA* was carried out from the Atlantic Ocean to Pacific Ocean via the Bering Strait, spending one winter on the way.⁵⁴ Despite the fact that Nordenskiöld considered sailing conditions of the eastern part of the route too challenging for commercial use, his opinion was positive regarding the route between Europe and rivers Ob, Yenisei in the Kara Sea.⁵⁵

In 1899 upon initiative of Russia's famous Admiral Makarov, the first icebreaker in the world was constructed, and named *ERMAK*. This icebreaker was built to provide support for regular navigation in the Kara Sea. It was a start for the next era of icebreaker building and use as a necessary component for NSR development in the 20th century.⁵⁶

In light of the above presented brief history of exploration and discovery of the Arctic waters, and in particular of the Northeast Passage, it is possible to see the great contribution in exploration of Northeast Passage not only by Russian explorers, but also explorers from other countries.

3.1.2. Soviet era of NSR development

The beginning of the 20th Century can be characterized by the continuation of icebreakers construction that started in the 1898. During the 1908-1912 three Russian icebreakers *TAYMYR*, *VAYGACH* and *PETR VELIKY* were built.⁵⁷ Moreover, Russia also purchased four foreign icebreakers.⁵⁸ These vessels could operate in the Arctic despite the ice conditions.

From 1910 until 1915 a Hydrographic Expedition of the Arctic Ocean on the icebreakers *TAYMYR* and *VAYGACH* was conducted. This expedition produced a very detailed

⁵³ *ibid.*

⁵⁴ Ragner, Claes Lykke. *The Northern Sea Route*. 2008. p.2. (Available at <http://www.fni.no/doc&pdf/clr-norden-nsr-en.pdf>)

⁵⁵ *ibid.*

⁵⁶ Marchenko Nataliya. *Northern Sea Route: Modern State and Challenges*. 2014. p.2. Proceedings of the ASME 2014 33rd International Conference on Ocean, Offshore and Arctic Engineering OMAE2014. June 8-13, 2014, San Francisco, California, USA

⁵⁷ *ibid.*

⁵⁸ *ibid.*

hydrographic assessment along the coast northern Russian coastlines that had substantial positive effect on promoting and assisting future navigation.⁵⁹

After the October revolution in 1917, the use of the NEP as an international transit route was decreased due to the fact that access for foreign vessels was restricted.⁶⁰ The next period from 1920 until 1930 can be characterized by The Kara expeditions, construction of port facilities, and industrial development of Russian Arctic areas that was important for the Northern food supply.⁶¹ The role also played a polar drifting stations and hydro meteorological stations also aided in the research of this waterway. During only ten years, from 1923 until 1933 on the coast and islands of the Arctic Ocean 19 radio meteorological polar stations were built.⁶²

Russians put much effort during those years for developing Russian Arctic waters as internal waters. Finally in 1932 the Glavnoe Upravlenie Severnogo Morskogo Puti – GLAVSEVMORPUT [FROM 1971 Northern Sea Route Administration] (hereinafter NSRA) was established. Since that time the name of Northeast Passage began to be replaced by the term, Northern Sea Route, or NSR⁶³.

Also in 1932, an expedition from Arkhangelsk on the icebreaker *ALEXANDER SIBIRYAKOV*, which directed by Professor Schmidt and Captain Voronin was began. Overcoming various challenges, the icebreaker in October reached the Bering Strait. For the first time in the history of the Northern Sea Route sailing from East to West, in full, was accomplished during a single navigation season, without a stop for winter.⁶⁴

During the Second World War the NSR played an essential military role the Soviet fleet and Allied forces as a connection between Northern and Pacific Ocean fleets and for delivery of weapons and supply. The NSR was a main way to provide food, equipment for

⁵⁹ Informational portal IGRAS of the Institute of Geography of the Russian Academy of Science. (Available in Russian at <http://www.igras.ru/index.php?r=21&id=209>)

⁶⁰ Ragner, Claes Lykke. *The Northern Sea Route*. 2008. p.2.(Available at <http://www.fni.no/doc&pdf/clr-norden-nsr-en.pdf>)

⁶¹ *ibid.*

⁶² Informational portal IGRAS of the Institute of Geography of the Russian Academy of Science. (Available in Russian at <http://www.igras.ru/index.php?r=21&id=209>)

⁶³ Ragner, Claes Lykke. *The Northern Sea Route*. 2008. p.2.(Available at <http://www.fni.no/doc&pdf/clr-norden-nsr-en.pdf>)

⁶⁴ <http://www.ikz.ru/siberianway/engl/sevmorput.html>

the northern regions of Russia. At the same time NSR played an essential role for export of timber, metals and other resources. Since 1978, navigation in the western part of the Kara Sea has become possible during all year round.⁶⁵

In the history of the NSR, a special mention should be reserved for the year 1987. In 1987 a record was established concerning cargo turnover of 6.85 million tons⁶⁶, the absolute maximum in full history of the NSR up to the present.

Following Gorbachev's initiative in Murmansk in 1987, the NSR was opened for international navigation on 1 July 1991, several months before the collapse of Soviet Union. After the collapse of the Soviet Union the cargo turnover declined (1.4 million tons -2 million tons).⁶⁷

The 1990s, generally, was a period of recession for the NSR. Infrastructure, port facilities were in dire need of modernization; cargo turnover decreased. All these factors required serious changes in Russian policy regarding the NSR.

3.1.3. NSR in the 21st Century

The period of the early 2000s can be presented as slow growth of cargo turnover on the NSR. Between 2004-2006, 1.2-2 millions of tons was all that passed the NSR⁶⁸. Yet as the economy grew, Russian Oil and gas companies began developing their own ice-breaker fleets and building new icebreakers for the work on oil and gas projects in the Arctic. Russia built its icebreaker *50 LET POBEDY or 50 YEARS OF VICTORY*. Nowadays Russian State organizations provide ice-breaker assistance under the umbrella of the Federal State Unitary Enterprise "Atomflot" and Federal State Unitary Enterprise "Rosmorport."⁶⁹

⁶⁵ Ragner, Claes Lykke. *The Northern Sea Route*. 2008. p.3.(Available at <http://www.fni.no/doc&pdf/clr-norden-nsr-en.pdf>)

⁶⁶ Marchenko Nataliya. *Northern Sea Route: Modern State and Challenges*. 2014. p.3. Proceedings of the ASME 2014 33rd International Conference on Ocean, Offshore and Arctic Engineering OMAE2014. June 8-13, 2014, San Francisco, California, USA

⁶⁷ Ragner, Claes Lykke. *The Northern Sea Route*. 2008. p.3.(Available at <http://www.fni.no/doc&pdf/clr-norden-nsr-en.pdf>)

⁶⁸ Marchenko, Nataliya. *Northern Sea Route: Modern State and Challenges*. 2014. p.4.

⁶⁹ http://www.nsra.ru/en/org_ledokol_provodka/

Renaissance of the NSR arrived in 2010 when navigation of foreign vessels along the NSR with the assistance of Russian and foreign icebreakers was revived. There were several experimental voyages by the large-capacity tanker *BALTIKA* (which had a 100,000-ton capacity) from Murmansk to Ningbo, China; the cargo/passenger ferry *GEORG OTS* from St. Petersburg to Vladivostok; the bulk carrier *NORDIC BARENTS* -one of the first foreign vessels that delivered iron ore from Norway to China through the NSR; and the Swedish icebreaker tug *TOR VIKING* that became the first-ever winter escort along the entire NSR. Russia's nuclear icebreakers *TAYMYR*, *ROSSIYA* and *50 LET POBEDY* assisted these vessels at various stages.⁷⁰

In 2012, the first tanker *REKA OB (OB RIVER)* was chartered by "Gazprom" and navigated the first liquid natural gas (LNG) transport along the NSR. Previously, in October 2012, *REKA OB* safely completed the same voyage in the opposite direction without cargo. These two voyages of the tanker *REKA OB* fully confirmed the technical and commercial viability of the NSR says Natalia Marchenko from UNIS, Svalbard.⁷¹

During the period of 2010-2013 the commercial attractiveness of the NSR was confirmed. The financial benefit for ship owners navigating the NSR compared with the traditional Suez Channel. However, high fees for icebreaking assistance and risks connected with sea ice presence, insufficient search-and-rescue (SAR) became negative factors for international commercial use of the NSR.

In 2013, several essential turning points occurred. First, a Federal Law on amendments to specific legislative acts of the Russian Federation related to governmental regulation of merchant shipping in the water spaces of the Northern Sea Route was signed by Russian President Putin on the 28th of July, 2012. It came into force since the 27th of January 2013.⁷²

⁷⁰ Marchenko, Natalia. *Northern Sea Route: Modern State and Challenges*. 2014. p.4.

⁷¹ *ibid.*

⁷² http://www.nsra.ru/en/zakon_o_smp/

New Rules of navigation in the water area of the Northern Sea Route (replacing an old version of Rules from 1990s) were established by the Ministry of Justice of the Russian Federation on the 12th of April, 2013.⁷³

In March 2013, the Federal State Institution of NSR Administration (NSRA) by the order of the Government of the Russian Federation was established. The main goals of the NSRA are to ensure safety of navigation and protection of the marine environment. Among the main functions of the NSRA: obtaining and considering the submitted applications for vessel transit, the issuing of permissions for the navigation through the NSR; assistance in SAR operations on the NSR; information services and recommendations regarding the organization of navigation or use of icebreaking fleet services, and other functions.⁷⁴

These new achievements reflect Russian national interests and priorities regarding the regulation of the NSR and exercising Russian jurisdiction over it. Furthermore, Russia is interested in increasing international transit through the NSR. For providing this, Russian authorities decreased fees for icebreaking assistance. As it follows from the interview of the deputy head of the Ministry of Emergency Situations of Russia Alexander Chupriyan, 10 SAR centers in the Arctic zone of the Russian Federation will be opened during the next 5 years⁷⁵. In 2013, SAR Center was opened in Naryan-Mar (Nenets Autonomous Region), in September 2014 SAR Center will be opened in Arkhangelsk.⁷⁶ Hopefully all these steps of Russian authorities will strengthen international use of the NSR for cargo transit.

3.2. Views of Legal Scholars on the Russian Arctic Waters and its Legal Regulation

Unilateral coastal state legal regulation and exercise of jurisdiction and sovereignty over Russian Arctic waters, specifically Russian Arctic Straits, for foreign vessels is the core of controversy between the Soviet/Russian and western Academic experts and States. Different controversial positions between experts exist, which will be presented below.

⁷³ Rules on navigation in the water area of the Northern Sea Route dated January 17, 2013. Approved by the order № 7 of the Ministry of Transport of Russia. Available in English at http://www.arctic-liaison.com/docs/nsr/legislation/20130425185806en-Rules_unof.pdf [Visited on 20.07.2014]

⁷⁴ http://www.nsra.ru/en/cei_funktsii/

⁷⁵ <http://www.yamal.org/obshchestvo/bezopasnost/item/4350-arkticheskie-tsentry-mchs-rossii-sformiruyut-za-pyat-let> (Russian version only)

⁷⁶ *Ibid.*

From the analysis of the Soviet, Russian, and western beliefs of the scholars, it is possible to render two main approaches regarding the legal status of the Arctic waters and applicable legal regime for its regulation.

The foundation of the first approach is a concept of internalization of the Arctic and Arctic waters combined with application of the International Law of the Sea to the Arctic. In this view, there are positions that the legal status and legal regime of Straits of the Russian Arctic should incorporate the regime of the straits used for international navigation or even high seas. This would guarantee that all States (not only Arctic coastal states) but also non-Arctic States should enjoy respectively the right of transit passage or the freedoms of the high –seas in accordance with 1982 UNCLOS – in the NSR. This is traditionally the “western” view, as supported by the USA and major European states⁷⁷.

The second approach is based on the point of view, that only national legislation of the Arctic coastal states such as Canada and Russian Federation is applicable to the Arctic waters under the sovereignty of these States and where they exercise their exclusive jurisdiction on the basis of historic claims. This is the view traditionally supported by the Russian Federation and scholars in Canada who similarly take a protectionist stance toward their Arctic waterways.⁷⁸

The views of many Soviet and Russian experts support Soviet and later Russian exclusive sovereignty of the NSR, its exercising jurisdiction, and control over the Seas and Straits of the Russian Arctic. Experts refer to such various factors as: right of discovery, adjacency of the waters to the land, historic title, western tacit recognition and acceptance, effective occupation, sector principle, and the concept of straight baselines, all of which will be discussed below⁷⁹.

As it was pointed out by Bunik, as a supporter of this Russian approach, the tracks of the NSR almost never were historically used for international navigation because due to the:

⁷⁷ *op.cit* Brubaker.

⁷⁸ Note: Soviet and Russian authors Kolodkin, Bunik; Sokirkin, Peresytkin, Volosov. Canadian author McRay.

⁷⁹ It follows from the analysis of publications of Kolodkin, Bunik.

harsh climate and ice conditions making the region a “closed access” area for many years before modern technology and expertise, of Russia. He also refers to the historical circumstances, those being a contribution of the USSR/Russia in the exploration of the Soviet-Russian Arctic territories and waters, development, equipment of the NSR, Search and Rescue Services for providing safety of navigation; investment of substantial financial resources in exploration and development of the navigation in ice conditions, and also regulation of navigation on the NSR being based only on Soviet legislation.⁸⁰

At the same time Bunik refers to the right of discovery in International law as the one of the essential grounds to exercise powers by the State regarding its territories.⁸¹ Earlier in 1990 Professor Kolodkin also expressed his opinion regarding the rare appearance of foreigners in the Soviet Arctic due to the remoteness of the Soviet Arctic territories and unfriendly severe climate conditions.⁸² Also it was pointed out by Kolodkin that Arctic coastal States may realize their powers according to not only International law but also on the basis of national laws that should reflect the complex history of the Arctic exploration.⁸³ So Kolodkin refers to the history, historic use of Soviet Arctic waters including Soviet straits in the Arctic. But as it was argued by Brubaker, a hole in Kolodkin’s reasoning, or proof of fact, is that he did not provide any specification what are the historic straits of the Soviet Union.⁸⁴

Both Kolodkin and Bunik in their publications mentioned above, stated that many Straits of the Soviet/Russian Arctic overlapped with internal waters (hereafter IW), Territorial sea (thereafter TS) and the Exclusive economic zone (hereinafter EEZ) of the USSR/Russia. So, the main part of the NSR lies within the limits IW, TS and the EEZ of Russia therefore the NSR is under its sovereignty and jurisdiction.

Also these experts assert that the western tacit recognition of Soviet/Russian sovereignty and exercise its jurisdiction in the Arctic and Soviet/Russian Arctic waters existed prior to internationalization and international potential of the Arctic. However, these assertions are

⁸⁰ I. V Bunik, *International legal basis for the regulation of navigation in the Northern Sea Route*, Moscow 2007 (Russian version only) - *Международно-правовые основания регулирования Россией судоходства по Северному морскому пути.*, p.4.

⁸¹ Ibid. p.20.

⁸² Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: *Marine Policy* vol. 14 (1990) 2, p. 158.

⁸³ Ibid. p.159.

⁸⁴ R. Douglas Brubaker, *The Russian Arctic Straits*. Leiden, Martinus Nijhoff Publishers, 2004, p.34.

rather questionable in the late Soviet period (also the time of codification of international law of the sea under UNCLOS) because there is a well-known fact that the USA actively opposed to USSR and its regime in Soviet Arctic waters in modern history. So there is a presence of formal protest by the USA to this status. This was also pointed out by Brubaker,⁸⁵ therefore it's reasonable to agree with his position in this regard. Today, the position of the USA still remains the same, indicating that Soviet, now Russian, Arctic Straits are straits used for international navigation.

Soviet and Russian Doctrine can be characterized by claims on historic title and sector concept over the Arctic waters. However it is frequently criticized and seems vague according to points of views of the western doctrine that will be presented below. In particular, it is said that in relation to the Arctic waters the problem of sovereignty or historic title is less developed than sovereignty or historic title over the land territory. Western experts insist on the position that concept of historic title by Russia over it's waters never was not fully developed, even today.⁸⁶

There are no specific rules developed regarding claims to historic title over Arctic waters and even UNCLOS does not contain such rules in application to the Arctic waters.⁸⁷ Similarly, as a comparative example, D. M. McRae also stressed that regarding the Canadian Northwest Passage, except indigenous people, nobody sailed in the Canadian Arctic waters, therefore due to the absence of claims to use these waters from any states there wasn't need to assert the Canadian sovereignty and exercise of state jurisdiction over these waters.⁸⁸ Is it possible to interpret this statement as evidence of the Canadian rights to claim sovereignty and exercising of state jurisdiction as a coastal state over these Canadian Arctic waters? Perhaps. But at the same time there are no guaranties that later any other State or States will not lay claim to these waters or to freedom of use of these Arctic waters, so, perhaps it's possible to assess the Canadian political position and national legislation as a forward attempt to create a new regime before adoption of the 1958 TSC and 1982 UNCLOS.

⁸⁵ Ibid. p.41

⁸⁶ D. M. McRae, "The Negotiation of Article 234", in *Politics of the Northwest Passage*, ed. F. Griffiths, Kingston: McGill-Queen's University Press, 1987, p. 98.

⁸⁷ Ibid.

⁸⁸ Ibid. p.99.

Douglas Brubaker noted that claim to historic title is a diminishment of general rules for acquisition of sovereignty over water areas. And that there are several strict requirements to such a claim: evidence on exercising jurisdiction over the waters during a long period of time, acquiescence by another States, and presence of the formal protests by another States in their practice regarding this.⁸⁹

Also Brubaker stressed vagueness of the Soviet claims on historic title, in particular he noticed that Russia claimed as a historical straits only the Dmitrii Laptev and the Sannikov Strait, however it was interestingly not specified in Soviet legislation that didn't provide any names or coordinates of these historic straits.⁹⁰

As can be seen from the presented above, there are various opposing views on the legal status of the Arctic waters (including the straits of the Russian Arctic). As it is known, the opinions and teachings of the most highly qualified publicists of the various nations, can be subsidiary means for the determination of rules of law in accordance with Article 38 of the Statute of the International Court of Justice,⁹¹ but the opinions often affects on the adoption of legislation, implementation of various rules of laws at the domestic level. This is crucial, nonetheless, for teaching and advising various governments and shaping national opinions.

Scholarly opinions of the Soviet period prior to the adoption and ratification of the UN Convention on the Law of the Sea 1982, as well as the views of Russian publicists during the period from 1990s to 2014 could be mainly characterized by supporting public policy of the Soviet and post-Soviet periods and its legal regulation over the Soviet/Russian Arctic waters. Moreover, unacceptability of the concept of internalization of the Arctic to Russia is typical for it as well, as references to the historical rights of the sovereignty and exercising jurisdiction by the USSR and then the Russian Federation over the Soviet-Russian Arctic waters are a common theme.

Furthermore, Soviet/Russian doctrine uses a parallel with Canada regarding Canadian exercise of jurisdiction and legislative regulation of the Northwest Passage. There exists opposition to western views in the position of Kolodkin that is supported by other Russian

⁸⁹ R. Douglas Brubaker, *The Russian Arctic Straits*. Leiden, Martinus Nijhoff Publishers, 2004, p.34.

⁹⁰ Ibid.

⁹¹ Statute of the International Court of Justice, OS - 26 June 1945, EIF - 24 October 1945, 1 UNTS xvi.

experts, in stressing that the separate tracks of the Northern Sea Route, at different times of the year may pass in the High Seas.⁹² This is due to changing ice and weather conditions which may force vessels to sail further from the Russian coast, and therefore outside of Russian maritime zones in order to avoid ice floes and other such hazards.

Examining the publications of the Soviet and Russian experts, it's possible to shape an opinion of their doctrinal views reflecting the existing political regime. It is obvious that scholarly opinion in the period of totalitarianism in the Soviet Union had to support the existing legal and political regime. There was no deviation allowed, and criticism of the state line by experts was not permitted. Independent, critical research of the regime during the Soviet period may have been lacking.

But even so, nowadays, examining the opinions, and reading the interviews with many Russian politicians, publicists, lawyers, officials, media and representatives of the maritime, oil and gas industries in the Russian Federation reveal that at all these levels a belief is shared that Russian Arctic waters historically belonged to Russian Federation, and in particular the Northern Sea Route. Certainly, these views are still shaped by historic writings from the Soviet period, but nonetheless do have elements of truth and reflect the current outlook on the situation. Today, within Russia, there is also widespread belief that Soviet and Russian legislation regarding the legal status of the Arctic waters and the NSR complied/s with International Law especially, upholding and utilizing UNCLOS Article 234 'ice-covered areas.'⁹³ This will be assessed in next section.

3.3. Soviet Legislation and State practice

3.3.1. Period until 1982

The enshrinement of the rights of Soviet Union in the Arctic and especially Soviet sovereignty and exercise of jurisdiction over Soviet Arctic waters, over regulation of

⁹² Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.164.

⁹³ See the overview of the Soviet and Russian legislation and assessment of its compliance in the next paragraph and mostly in the next chapters.

navigation for foreign vessels in the Arctic territorial waters and requirements to comply with Soviet legislation will be presented below.

Soviet possession of Arctic territories was a legal formalization for the affiliation of land, archipelagos, islands, and other formations to join and consolidate the Soviet state.⁹⁴ This included the waterways between them. The affiliation of these territories and waters was reflected in the various legal Acts of the Soviet Union and also contained in international multilateral and bilateral treaties on the regulation of the status of each specific territory.⁹⁵

Among the international bilateral treaties confirmed the affiliation by Tsarist Russia's Polar territories, the 1824 Russian-American Convention and 1825 Anglo-Russian Convention are of notable mention. These set the basis for legal normative acts of the Soviet period, presented by the following legal documents.

The first legal document, that defined the legal status of the land and islands in the Russian Arctic zone adjacent to the Arctic coast of Russia was 1916 Special Note of the Ministry of Foreign Affairs that declared regarding the lands and islands in the Arctic Ocean that were discovered from 1913 to 1914 that these lands and islands under the Russian jurisdiction⁹⁶. Furthermore it was stressed that Sovereignty of Russia extended to these discovered lands and islands in the Arctic Ocean since it encompasses a continuation to the north of the continental expanse of Siberia and at the same time due to the fact that joining of these territories to the Imperial Russia has been generally recognized.⁹⁷

Five years later, following the Revolution and transformation from Tsarist Empire to the Soviet Union, the 1921 Decree 'On protection of fish and animal's lands in the Arctic Ocean and the White Sea' adopted by the Soviet of People's Commissariat for Foreign

⁹⁴ Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.158.

⁹⁵ *Ibid.*

⁹⁶ Special Note of the Ministry of Foreign Affairs of Russia 1916 via Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.158

⁹⁷ Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.159.

Affairs of the Russian Soviet State⁹⁸. This document Signed 24 May of the same year, enshrined the extension of the sovereign rights of Russia up to the 12-nautical-mile line of territorial waters, as was customary at that time.⁹⁹

Also the above mentioned Decree established the exact boundary of the coastal waters of the Barents Sea and confirmed Russia's right to the exclusive exploitation of fish and land animals in the White Sea region.¹⁰⁰

The Memorandum of the Council of the People's Commissioners for Foreign Affairs on 4 November 1924 confirmed the provisions of the 1916 Special Note of the Ministry of Foreign Affairs regarding the sovereignty of Russia in respect of all the lands and islands that exist in the northern continuation of the Siberian mainland plateau¹⁰¹. By this Soviet Memorandum it was stressed for all States, their vessels and researchers that territories located in this region are under the sovereignty of the USSR.¹⁰²

At the same time, this legal act referred to compliance with the provisions of the 1867 Treaty between Russia and the United States of America,¹⁰³ which reaffirmed the western boundary on the basis the previous 1825 Convention between Russia and Great Britain that established the limits of Possessions on the North West Coast of America.¹⁰⁴

The following two legal acts of the Soviet Union played an essential role in the line of political discourse for the USSR on the possession Arctic territories and exercising sovereignty over them. By the Decree № 331-12 of the Council of the People's Commissioners on 17 April 1925, Straits such as the Kara Gates, the Ugorskii Shar, the

⁹⁸ Decree 'On protection of fish and animal's lands in the Arctic Ocean and the White Sea' 1921 via Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.159.

⁹⁹ Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.159.

¹⁰⁰ *Ibid.*

¹⁰¹ The Memorandum of the Council of the People's Commissioners for Foreign Affairs of 4 November 1924 via Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.159.

¹⁰² Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.159.

¹⁰³ Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russia to the United States of America, proclaimed June 20, 1867 (viewed on the 20.07.2014 and available at <http://www.explorenorth.com/library/yafeatures/bl-Alaska1867.htm>).

¹⁰⁴ The Convention Between Great Britain and Russia signed on the 28.02.1825 (viewed on the 20.07.2014 and available at <http://explorenorth.com/library/history/bl-ruseng1825.htm>).

Matochkin, the Vilkitskii, the Shokalskii, Straits were declared by the Red Army as territorial waters of the Soviet Union and the waters of the Laptev Strait and the Sannikov Strait were claimed as historically belonging to the Soviet Union.¹⁰⁵

Finally, the Decree of the Presidium of the Central Executive Committee of the USSR on 15 April 1926 declared that ‘lands and islands in the Arctic Ocean both discovered and which maybe discovered in the future northward of European coast to the North Pole between 32 degrees four minutes thirty-five seconds east and one hundred sixty eight degrees forty nine minutes thirty seconds west extending to North Pole’ belong to the Soviet Union as its territory.”¹⁰⁶

This Decree of the Soviet Union, however, raises several questions. First of all, this legal act is silent with regard to waters adjacent to these lands and islands and their legal status. Does it mean that the spatial scope of this Decree is including only the lands and islands? Or was it implicated alongside with the mentioned above lands and islands that waters also included?

On the one hand, it is possible to note that the USSR adopted its legislation regarding sovereignty and exercising jurisdiction over the affiliated Arctic waters and continued the political and legal practice of Canada. Canada was a first State in the Arctic that adopted its legislation from the beginning of 20th Century and continued in 1925, 1926 and later¹⁰⁷.

The main legal acts of Soviet Union in 1960s, 1980s regarding determination any specific waters as historic based on the Statute on the Protection of the State Boundary of the USSR 1960, and the 1982 Law on the State Boundary of the USSR. However, that was criticized by Brubaker that the legal acts of Soviet Union didn’t contain any geographical coordinates, names; so none of the Soviet seas and straits were not specified as historical.¹⁰⁸ But in this regard it’s difficult to agree with Brubaker because geographical

¹⁰⁵ Decree № 331-12 of the Council of the People’s Commissioners on 17 April 1925 via Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.160.

¹⁰⁶ Decree of the Presidium of the Central Executive Committee of the USSR of 15 April 1926 via Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.160.

¹⁰⁷ *Op.cit* McRae

¹⁰⁸ R. Douglas Brubaker, *Environmental Protection of Arctic Waters - Specific Focus the Russian Northern Sea Route*. Doctoral Thesis, University of Stockholm, 2002. p. 225.

names of Soviet seas, straits and historic straits were specified in the Decree № 331-12 of the Council of the People's Commissioners on 17 April 1925.¹⁰⁹

Moreover, it should be highlighted here that the position of Douglas Brubaker with reference to W. Butler is that 'prior to 1960, the straits in the Russian Arctic appear unregulated.'¹¹⁰ On the contrary, the above listed decrees indicate Soviet legislative regulation on the status regarding straits in Russian Arctic began long before 1960. In fact, these older decrees even refer specifically to the concept of straits being considered as 'historic.' Unfortunately, although unsubstantiated, Brubaker and Butler's reference is widely accepted in the Western perspective. Perhaps this is because of lacking research at the time of the perceived 'closed' Soviet system by the West, or as a result of lacking information in English about the Russian/Soviet/Tsarist decrees which factually demonstrate, in contradiction to Brubaker and Butler's claims, that there was indeed regulation in the Russian Arctic prior to 1960, and thus a historic precedent existed.

In 1965, by the Resolution of the Council of Ministers of the USSR, compulsory ice-breaker assisted pilotage for all vessels navigating in the Straits of Kara, Laptev, East-Siberian Sea was established.¹¹¹

On the basis of the 1982 Law on the State Boundary of the USSR, the internal waters were referred to as those waters landward of straight baselines established for calculation of the breadth of the Territorial Sea.¹¹² The official position of the Soviet Union was based on various factors such as; necessity for the coastal state to defend its sovereignty from violations, reasons of economic security including: commercial, trade, fiscal and others; sanitary, ecological, political/security grounds.

There are doctrinal views in this regard that provisions of the international Conventions in particular article 4 of Geneva Convention on Territorial waters and contiguous zone 1958 and Article 7(5) of UNCLOS 1982 provide a legal basis for establishing of baselines for

¹⁰⁹ Kolodkin, *op. cit* 85.

¹¹⁰ R. Douglas Brubaker, *Environmental Protection of Arctic Waters - Specific Focus the Russian Northern Sea Route*. Doctoral Thesis, University of Stockholm, 2002. p. 224.

¹¹¹ R. Douglas Brubaker, *The Russian Arctic Straits*. Leiden, Martinus Nijhoff Publishers, 2004, p.35.

¹¹² Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.161.

calculation the breadth of the Territorial Sea and determine maritime boundary of Internal waters exceeding 24 nautical miles.¹¹³ In addition, due to the time which has passed, it is widely believe in Russian political and academic circles, that these legal grounds are sufficient to render the category of these waters as historic waters.¹¹⁴

It needs to be said that even claims to Historic title sound reasonable in favor of the long continuous period of possession over the Arctic waters, various activities (e.g. research voyages, expeditions and discoveries) that were carried out there by Russia. Nonetheless, this may not be supported internationally, due to the fact that these Conventions do not cement the title of historic waters almost at all. In fact, only Article 7 paragraph 6 of Geneva Convention on Territorial waters and contiguous zone 1958 mentions the concept of 'historic bays'. And how it was presented above the historic title applicable to the waters almost undeveloped in International law, such as those between islands, straits, and around peninsulas.¹¹⁵

3.3.2. Period after 1982

The next step in the attempts of USSR to develop its unilateral regulation over Arctic waters of Soviet Union was the development of a legal act adopted on 26 November 1984, the Edict of the Presidium of the USSR Supreme Soviet on Intensifying the Protection of Nature in the Areas of High North and Waters Adjacent to the Coast of the USSR.¹¹⁶ How this was stressed by Kolodkin, making this Edict important, is that this Edict contained a provision requiring vessels to give notification to the administration at the nearest port about undertaken activities in Arctic waters and a requirement for vessels to ensure compliance with instructions given by the Agencies of the USSR.

¹¹³ Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.160.

¹¹⁴ *Ibid.* p.161.

¹¹⁵ See Chapter 2.

¹¹⁶ *Edict of the Presidium of the USSR Supreme Soviet on Intensifying the Protection of Nature in the Areas of High North and Waters Adjacent to the Coast of the USSR*, 26 November 1984 via Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.163.

Later the regulation of the Soviet EEZ that appeared in the 1980s was based on the Edict on the EEZ of the USSR adopted by the Presidium of the USSR Supreme Soviet on 26 February 1984.¹¹⁷

The Statute on the Protection of Economic Zone of the USSR was adopted on 30 January 1985 and according to this Statute, Soviet officials can take different measures in relation to the vessels in the Soviet Territorial Sea and the EEZ of the USSR.¹¹⁸

According to Kolodkin, in any case these law-making initiatives and claim of the USSR were not precluded by any States, and there were not objections from States side. It was stressed by experts regarding the western tacit recognition on the Soviet legal regime over the Soviet Arctic, Soviet legal regime was formed during the long period of time. Furthermore, it was based not only on International treaties, but also on the Soviet legislation. And moreover Soviet legal regime was characterized by its sovereignty, neither Arctic, nor non-Arctic States claimed officially to any Russian Arctic territories or its waters.¹¹⁹

3.3.3. State Practice

State Practice is the behavior of states with regard to a certain situation. In the case of the Russian Arctic waters it is arguably correct to say that there were no objections from the side of foreign States about any management or control over these regions until the Vilkitskii Strait incident between the USA and USSR in 1960s. No other states protested or objected against Soviet (Russian) Regime regarding the navigation and legal status of the Soviet (Russian) Arctic waters and sovereignty over them. Only the USA argued and expressed its disagreement with the Soviet position and actions. Therefore it is historically accurate to indicate that U.S. state practice in the Russian Arctic Waters, was a trend of disagreement and non-acceptance of the otherwise understood norm.

American use of Russian Arctic Straits includes Vilkitskii Strait incident that is based on the situation in the Laptev Sea that happened with an American Coast Guard vessel

¹¹⁷ *Edict on the EEZ of the USSR adopted by the Presidium of the USSR Supreme Soviet on 26 February 1984* via Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.164.

¹¹⁸ Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.164.

¹¹⁹ *Ibid.* p.159.

USCGG *Northwind* that was carried out an oceanographic research in summertime of 1963 and the situation with *USS Burton Island* in the East-Siberian Sea.¹²⁰ Brubaker gives a detailed overview of the confrontation between the USA and Soviet Union at that period of time not only as reflected via exchange of documents and diplomatic notes between the States concerned, but also as a confrontation between US and Soviet Navies.

Regarding the American vessels that made an attempts to transit through the NEP, Brubaker gives examples and notes that the USCGG *Northwind*, planned to navigate through the Vilkitskii Strait and become the first American vessel to complete a transit of the Northeast Passage. But the Soviet authorities imposed restrictions on this passage and prevented the vessel from making the transit by demanding notification and prior authorization for it. The Soviet Navy and Maritime Administration required the military vessels of the Authorities of the USSR own vessels in territorial waters of the Soviet Union to receive a permission for operations. From the Soviet Union point of view, this should be no different for a foreign vessel as it is for safety and environmental protection benefit of all parties concerned. Attempting and NEP passage would be dangerous, especially for an un-escorted American crew with no experience in these water. Nonetheless, the *Northwind* did not comply with these rules, failed to request authorization, and therefore it was given instructions by Russian authorities to return back.¹²¹ It did.

The following year, in 1966 an American icebreaker *USS Burton Island* violated the Soviet Regulations by not notifying Soviet authorities in advance of navigating in the Chukchi and the Kara Sea.¹²² This again created diplomatic pol-mil friction. Later in summer of 1967 Soviet authorities received notification from the US Department of State regarding a plan to run oceanographic surveys by the American *USCGC Edisto* and the *USCGC East Wind* in waters of the Soviet Union. The Soviet Union declined to acquiesce this request. *The USCGC Edisto* left the waters in obedience with the demand of Soviet Navy to do so, however, *USCGC East Wind* stayed for a month in the Barents and the Kara Seas,¹²³ under heavy protest by the Russian government. The USA opposed regarding such position and actions of the USSR and Soviet navy that were undertaken against its vessels.

¹²⁰ R. Douglas Brubaker, *Environmental Protection of Arctic Waters - Specific Focus the Russian Northern Sea Route*. Doctoral Thesis, University of Stockholm, 2002. p. 226

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ *ibid.*

As stressed by Brubaker, there followed serious confrontations between the USA and Soviet Union that result in to the adoption of 1971 Statute establishing rules of law for navigation in Soviet Arctic waters and therefore requiring ice-breaker assistance, pilotage, navigational and hydrographic services and other that will the Administration on the Northern sea Route –official body in the structure of Ministry of Maritime Fleet, will provide to all transiting vessels¹²⁴.

What is typical, that the Soviet/Russian doctrine supports a practice requiring foreign vessels to navigate Russian Arctic waters with ice-breaker assistance, pilotage due to the ground that most of the Straits are overlapping with internal waters, territorial sea and EEZ of the USSR, dangerous to navigate alone, especially without experience and local knowledge, and also warranted under UNCLOS Article 234 (and its predecessor customs.)¹²⁵

Since the 1960s the USA began to express their official position regarding navigation for foreign vessels in the Soviet Arctic waters, indicating their protest and disagreement on the Soviet policy requiring icebreaker assistance, pilotage, and demanding prior notification and authorization, that in the view of US State department is a violation of Geneva conventions 1958 TSC and 1958 Convention on the Continental Shelf of which both USA and Soviet Union are parties to.

After adoption of UNCLOS (but before its ratification in 1997 by Russian Federation) the USSR continued to develop its national legislation and further provisions regarding the obligatory ice-breaker assistance and pilotage for such a Soviet Straits as Vilkitskii, Shokalskii, Dmitrii Laptev and Sannikov straits. These straits were reflected in 1990 Rules on Navigation on the NSR,¹²⁶ 1998 Federal Act On Internal Sea Waters, Territorial Sea and Contiguous Zone of the Russian Federation,¹²⁷ and 2012 Federal Law on amendments

¹²⁴ *Op.cit* R. Douglas Brubaker, *Environmental Protection of Arctic Waters - Specific Focus the Russian Northern Sea Route* .

¹²⁵ Kolodkin, A.L. and Volosov, M.E., The Legal regime of the Soviet Arctic, in: *Marine Policy* vol. 14 (1990) 2, p.165.

¹²⁶ 1990 Regulations for Navigation on the Seaways of the Northern Sea Route, approved Sept. 14, 1990, 29 IZVESHCHENIIA MOREPLAVATELIAM [NOTICES TO MARINERS]

¹²⁷ Federal Act dated July 31, 1998 N 155-Φ3 On Internal Sea Waters, Territorial Sea and Adjacent Zone of the Russian Federation (Collection of Laws of the Russian Federation, 1998). Available in English at

to specific legislative acts of the Russian Federation related to governmental regulation of merchant shipping in the water area of the Northern Sea Route.¹²⁸

There is a point of view, that a possible future scenario for Russian Arctic straits is that the legal status and legal regime will be changed due to the international transit of foreign vessels. In this situation it will convert the NSR Straits to the straits used for international navigation,¹²⁹ much like the Singapore Straits or Dardanelles, for example. On the one hand, this argument can be supported by the attempts of US vessels to transit through the Russian Arctic waters. However Russia can object to this saying that during almost eighty years of modern transit use, access to the NSR was closed and highly restricted by the Soviet/Russian authorities. During this large time-span, the NSR was used mostly as an internal transportation route especially playing a significant role in a goods, food, industrial materials supply of the Russian High North areas.

Perhaps another option is for the USA to become a party of UNCLOS convention? Because until the period of time for UNCLOS adoption and becoming its party by the USA, there are still will be retained controversies between two States in respect to the legal status and applicable law to the Russian Arctic waters. But it's doubtful that in nearest future the USA will accede to UNCLOS, that confirmed by the American long-standing practice of refraining from incurring liabilities in accordance with the provisions of the UNCLOS.

http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_TS.pdf [Visited on 20.07.2014]

¹²⁸ Federal Law dated July 28, 2012 N 132-Ф3 on amendments to specific legislative acts of the Russian Federation related to governmental regulation of merchant shipping in the water area of the Northern Sea Route. Available in English at http://www.arctic-lia.com/docs/nsr/legislation/federal_law_nsr.pdf [Visited on 20.07.2014]

¹²⁹ R. Douglas Brubaker, *Environmental Protection of Arctic Waters - Specific Focus the Russian Northern Sea Route*. Doctoral Thesis, University of Stockholm, 2002. p. 236.

4. Current Russian Legislation on the NSR and Possible Non-compliance with International Law

4.1. The Russian legal Framework of the current legal regime on the NSR

The current legal framework in respect to the legal status of the NSR and waters that constitute it will be presented in this section. It will begin with legal acts from 1990s to 2014 such as: 1990 Regulations for Navigation on the Seaways of the Northern Sea Route, 1996 Guidance on Navigation Through the Northern Sea Route; 1996 Regulations for Icebreaker and Pilot Guiding of Vessels through the Northern Sea Route and the 1996 Requirements for the Design, Equipment, and Supplies of Vessels Navigating the Northern Sea Route alongside with such Federal Laws as: 1995 Federal Act On Natural Monopolies,¹³⁰ 1998 Federal Act On Internal Sea Waters, Territorial Sea and Adjacent Zone of the Russian Federation,¹³¹ 1998 Federal law On the exclusive economic zone of the Russian Federation,¹³² 1999 Merchant Shipping Code of the Russian Federation,¹³³ 2001 Maritime Doctrine of Russian Federation 2020,¹³⁴ 2008 Russian Federation's Policy for the Arctic to 2020.¹³⁵

The newest, most recently adopted Russian legislation regarding the NSR is based on the 2012 Federal Law on amendments to specific legislative acts of the Russian Federation related to governmental regulation of merchant shipping in the water area of the Northern

¹³⁰ Federal Law dated August 17, 1998 N 147-Φ3 on natural monopolies (Collection of Laws of the Russian Federation, 1998)

¹³¹ Federal Act dated July 31, 1998 N 155-Φ3 On Internal Sea Waters, Territorial Sea and Adjacent Zone of the Russian Federation (Collection of Laws of the Russian Federation, 1998).

¹³² Federal Act dated December 17, 1998 N 191-Φ3 On the exclusive economic zone of the Russian Federation. (Collection of Laws of the Russian Federation, 1998)

¹³³ Merchant Shipping Code of the Russian Federation dated April 30, 1999 N 81-Φ3.

¹³⁴ Maritime Doctrine of Russian Federation 2020 dated July 27, 2001.

¹³⁵ Foundations of the state policy of the Russian Federation in the Arctic for the period to 2020 and beyond. Approved by the President of the Russian Federation Dmitrii Medvedev on 18 September 2008.

Sea Route,¹³⁶ 2013 Rules on navigation in the water area of the Northern Sea Route.¹³⁷ Together, these acts form the legal framework of the current regime on the navigation on the NSR.

4.2. An assessment of the Russian legal regime on the NSR: Shortcomings, Contradictions and possible future scenarios.

As it was presented above the official position of the Russian Federation regarding the legal status, legal regime and exercising jurisdiction over waters constituting the Northern Sea Route is based on the unilateral legislation that according official point of view of the Russian Federation is adopted in accordance with the Article 234 'Ice-covered Areas' of 1982 UNCLOS.

4.2.1. Article 234 of UNCLOS

Article 234 UNCLOS provides for a coastal State 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.¹³⁸ It states:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.¹³⁹

¹³⁶ Federal Law dated July 28, 2012 N 132-Φ3 on amendments to specific legislative acts of the Russian Federation related to governmental regulation of merchant shipping in the water area of the Northern Sea Route.

¹³⁷ Rules on navigation in the water area of the Northern Sea Route dated January 17, 2013. Approved by the order № 7 of the Ministry of Transport of Russia.

¹³⁸ 1982 UNCLOS. Article 234.

¹³⁹ *ibid.*

This provides an international legal ground for the Russian Federation to base its national regulation for the navigation of foreign vessels in Russian maritime zones. However, in the point of view of many international scholars and other states, the application and interpretation of Article 234 of 1982 UNCLOS by the Russian Federation often seems inconsistent to international of the law of the sea and state practice.

In particular, Russian policies on the regulation of navigation in the NSR is criticized for the requirements for payment of fees for icebreaking assistance, mandatory authorization, prior notification, and even formal application for a permit to navigate on the NSR waters.¹⁴⁰

It should be stressed that stringent arctic laws as established by a coastal state justified by Article 234 is obligatory for UNCLOS states parties to obey. However, for States like the USA, which are not UNCLOS state parties, this article is reflected in customary international law. Russian officials and politicians declare that Russian national legislation is compliant with the Article 234 UNCLOS, and that Russian Rules, Regulations and Federal laws are adopted in accordance with UNCLOS.

The Russian Federation and Canada, are both Arctic coastal States that apply legal regime in relation to the NSR and the NWP, respectively, on the basis of the Article 234 UNCLOS and use a broad interpretation of this article. It seems these States in their application of Article 234 of UNCLOS may contradict with other provisions of UNCLOS regarding the fundamental rights of Innocent passage and freedom of navigation enshrined in the Convention.

Regarding the parallel with Canadian NWP and Norwegian waterway *Indreleia*, Russia actively refer to the jurisdiction over these waterways by the States mentioned above. And there is again no consensus due to the different positions of Russian and western experts.

Soviet and Russian experts insist that NSR it's an internal waterway under the jurisdiction of the USSR-Russia because internal waters contain the NSR and it 's proved by the Canadian practice exercising the jurisdiction over the NWP. Regarding the *Indreleia*, ICJ

¹⁴⁰ See R. Douglas Brubaker, *The Russian Arctic Straits*. Leiden, Martinus Nijhoff Publishers, 2004.

in *Anglo-Norwegian fisheries case* stated that it's a artificial navigational route set up by Norway¹⁴¹.

In the light of this decision it's possible to consider the NSR also as an artificial navigational route that was developed by Soviet Union since 1930s. But it's argued by the western experts that disagreed with comparison between NSR, NWP and Indreleia.

Regardless of political affiliation, challenges for entry to Arctic waters, exist not only as a result of the legal regimes in place, but by real geodynamic hazards faced by vessels, such as the harsh climate conditions, remoteness, and fragile and vulnerable Arctic nature and ecology which should not be sacrificed for navigation or commercial purposes. All of the above impose a certain responsibility on Arctic coastal States for the protection and preservation purposes. Therefore such States have to enjoy the special rights or exercise jurisdiction in regulation of access of foreign vessels, various requirements that can be imposing on foreign vessels, and control over its activities to prevent accidents, keep crews safe, and protect the marine environment.¹⁴² In essence, this is what Article 234 seeks to achieve.

Nonetheless, experts stress that article 234 is vague and leaves much room for various interpretation regarding its wording, spatial scope and its application by the states, specifically by Canada and Russian Federation. In particular the wording 'where', 'within the limits of the EEZ', 'due regard to navigation', 'best scientific evidence' raise questions.¹⁴³ Therefore, Canadian and Russian state practice is not traditional in the light of International law or even uniformly understood by supporters or opponents.

4.2.2. Prior Notification and Authorization

Russia has adopted several laws which require prior notification and authorization that some states argue are contrary to the regime of innocent passage and freedom of navigation. These laws will be presented below. For the entrance to navigate on the NSR it

¹⁴¹ *Anglo-Norwegian Fisheries Case*. International Court of Justice, the Hague, ICJ Reports 1951, p. 132

¹⁴² See R. Douglas Brubaker, *The Russian Arctic Straits*. Leiden, Martinus Nijhoff Publishers, 2004.

¹⁴³ *ibid.*

is necessary to apply for and receive permission from the Administration of the Northern Sea Route in accordance with Article 3 1990 Regulations for Navigation on the Seaways of the Northern Sea Route.¹⁴⁴ The same requirement is contained in Article 2 of 2013 Rules on Navigation in the Water Area of the Northern Sea Route.¹⁴⁵ This article establishes the authorization –based order of the navigation in the water Area of the NSR.

The decision of the NSR Administration to a request can be positive (granting permission) or negative (declining).¹⁴⁶ Also vessels granted permission should not enter the water area of the NSR earlier than date stipulated on their permission documents.¹⁴⁷

Regarding the Ice-breaker Assistance, it's possible to interpret that it is indeed a requirement for vessels transiting the NSR to ensure safety of navigation and emergency response in ice covered areas.¹⁴⁸ This is reaffirmed, domestically in Clause 22 of 2013 Rules on Navigation in the Water Area of the Northern Sea Route. These requirements should be considered in the light of 1982 UNCLOS provisions of Article 234, as a extraordinary measure to keep vessels and the environment safe when transiting ice covered areas.

In the maritime zones of a coastal state, foreign vessels enjoying the right of Innocent passage in Territorial Sea on the basis Article 17 and other articles of UNCLOS regulating the innocent passage.¹⁴⁹ As for EEZ, UNCLOS provides various rights for vessels, in particular freedom of navigation.¹⁵⁰

The Russian Federation is a party to UNCLOS, therefore it should be in compliance with such international obligations, and guarantee foreign vessels such rights. Thus argue that internal waters, territorial sea and EEZ of the NSR need to be regulated in compliance with UNCLOS.

¹⁴⁴ 1990 Regulations for navigation on the seaways of the Northern Sea Route.

¹⁴⁵ Rules on navigation in the water area of the Northern Sea Route dated January 17, 2013. Approved by the order № 7 of the Ministry of Transport of Russia.

¹⁴⁶ *ibid.* Clause 11

¹⁴⁷ *ibid.* Clause 13

¹⁴⁸ *ibid.* Clause 22

¹⁴⁹ UNCLOS. Articles 19-26

¹⁵⁰ UNCLOS. Articles 55, 87.

Therefore Russia should provide a right of Innocent passage in Territorial Sea¹⁵¹ and freedom of navigation in the EEZ.¹⁵² In respect to the Straits it depends on recognition of straits of the NSR as straits used for international navigation, or not. If the Straits will continue to be under control and jurisdiction of the state within the limits of the maritime zones of the Russian Federation, the legal regime regarding the international navigation will be based on unilateral Russian legislation.

However even if the Straits of the NSR will be applicable to the regime of straits used for international navigation under UNCLOS it shall not affect the legal status of the waters that form these straits.¹⁵³ And right of transit passage shall be provided¹⁵⁴. At the same time it should be added that coastal State in its Territorial Sea may adopt laws and regulations, in conformity with the UNCLOS provisions and other rules of international law, relating to innocent passage through the territorial sea to ensure the safety of navigation and the regulation of maritime traffic; preservation of the environment of the coastal State and the prevention, reduction and control of pollution; marine scientific research and hydrographic surveys.¹⁵⁵ Such laws and regulations, however, shall not apply to the construction, design, engineering, or manning (CDEM) of foreign ships unless they are giving effect to generally accepted international rules or standards.¹⁵⁶

Therefore some earlier Russian legislative provisions may seem controversial with UNCLOS articles regarding Territorial Sea, EEZ and Straits used for international navigation as some critics say they discriminate along such CDEM lines. However Russian official position as it follows from the statements of politicians and authorities claims Article 234 of UNCLOS is an extraordinary measure to enhance safe navigation in ice covered areas to which Russian laws supplement. In respect of this article, the Russian Federation uses a broad interpretation that better fits to Russian needs than that generally understood in the international community. Russia, it can be argued, applies Article 234 UNCLOS to all Russian Arctic Straits that are within the limits of the Russian EEZ,

¹⁵¹ UNCLOS, article 17

¹⁵² UNCLOS, article 58

¹⁵³ UNCLOS article 34.

¹⁵⁴ UNCLOS, article 38

¹⁵⁵ UNCLOS, article 21(1.)

¹⁵⁶ UNCLOS, article 21(2).

therefore regime for straits used for international navigation cannot be applicable there, at least not simultaneously.

In this regard the interrelationship between UNCLOS provisions regarding Territorial Sea, Straits used for international navigation and EEZ looks problematic as they can not all exist at the same time. By interpreting Article 234 of UNCLOS it is possible to make a conclusion that it should be a balance between two different interests –freedom of navigation and the protection and preservation of the marine environment. That’s why it is possible to interpret a requirement of Russia’s 2013 Rules on Navigation in the Water Area of the Northern Sea Route, mandating prior authorization to and receiving permission from NSR Administration as an infringement of the right enshrined in UNCLOS for freedom of navigation.

4.2.3. CDEM

Another question raised is whether or not regulations made by Russia are discriminatory against CDEM standards (as mentioned above) or if Russia is permitted to make such requirements based on CDEM criteria under Article 234. For the purposes of ensuring safety of navigation of vessels in the water area of the NSR, the requirement to use the ice-breaker assistance seems reasonable because of interrelation between safety of navigation and protection and preservation of the marine environment. If safety of navigation is ensured and provided by the state there are less risks of ecological catastrophe due to oil spills and irreversible impact on the fragile Arctic ecosystems and especially due to the number of previous accidents in Arctic. Therefore requirements in Russian legislation for ice-breaker assistance can arguably be considered reasonable for compliance with UNCLOS obligations provided in Part XII of UNCLOS.¹⁵⁷ At a practical level, this is also true as foreign crews, possibly with no arctic experience, or at least no local experience, would be in grave danger to themselves, their vessel, and the environment, if traveling without icebreaker assistance and/or pilotage.

¹⁵⁷ R. Douglas Brubaker, *Environmental Protection of Arctic Waters - Specific Focus the Russian Northern Sea Route* . Doctoral Thesis, University of Stockholm, 2002. p. 219.

This rule is for the benefit of all, as the Arctic is undoubtedly a hazardous environment. It remains uncertain as to whether Russia banning vessels of low ice class from navigating the NSR will be discriminatory, however it would be very unwise to bring a low ice class vessel into Russian Arctic waters. Luckily, most insurance policies on such vessels include clauses which will prohibit the vessel from entering ice covered waters, preventing Russia or other states from making these decisions. In the NSR transit application package, however, there is a request for ice classification information of the vessel, and Russia can and does take efforts to prevent low ice class commercial vessels from sailing if needed.

4.2.4. Fees for Services

For ice-breaker assistance there is a need to pay a fee on the basis of the 1995 Russian Federal Law on Natural Monopolies.¹⁵⁸ UNCLOS Article 26 (1) states that no fees may be charged upon foreign vessels by reason only of their passage through the territorial sea. And fees may be charged upon a foreign ship passing through the territorial sea as payment only for specific services which were provided for this ship. Fees shall be charged without discrimination¹⁵⁹. In the light of this, on the one hand payment of fees for ice-breaker assistance by foreign vessels in the territorial waters constituting the NSR looks consistent with UNCLOS Article 26, so long as it is applied even, fairly, and does not discriminate.

On another hand, it's questionable whether fees are indeed charged on non-discriminatory basis. The fee rate depends on several factors: the ice class of the vessel, it's capacity, distance of escorting and period of navigation¹⁶⁰. Depending on the unique characteristics for each vessel or voyage, different vessels will pay different fees. This can be possibly viewed as discriminatory even though these fee structures charged are identical for Russian and foreign vessels.

From the position of shipowners, payment of fees which rates are high is an obstruction for international navigation. However, in recent years the NSR fees rates were decreased and therefore the international transit increased. It is now comparable to the Suez Canal or

¹⁵⁸ 1995 Federal Law On Natural Monopolies.

¹⁵⁹ UNCLOS. Article 26 (2)

¹⁶⁰ Rules on navigation in the water area of the Northern Sea Route dated January 17, 2013. Approved by the order № 7 of the Ministry of Transport of Russia. Clause 32.

Panama Canal fee rates which shipowners use without complaint or legal dispute despite varying fee rates for different vessels, cargos, etc.

4.2.5. NSR: Transits Straddling Between EEZ and High Seas

The next very important topic should be taken into account. Some authors argue that if certain tracks of NSR or NSR voyages pass into high seas areas or pockets, the vessel, originally sailing in the NSR is still under the jurisdiction of the USSR (now Russia).¹⁶¹

It seems doubtful that this can be the case in light of part VII UNCLOS and traditional legal regime of the law of the Sea in regards to the freedom of the high seas. Any references to historic title over the parts of the NSR that pass in the high seas is unacceptable today as Russia is a signatory to both the Geneva Convention 1958 and UNCLOS 1982 which have strict definitions of these zones. Freedoms of the high seas in any scenario cannot be restricted.

Russian legislation is silent regarding the location of some waters of NSR in the High-Seas. From definition on the NSR in accordance with 2013 Rules on Navigation in the Water Area of the Northern Sea Route it follows that the NSR is a water area that lies in internal waters, territorial sea, EEZ of the Russian Federation, therefore such a voyage is not possible, or would not be considered an NSR voyage if it strays into the High Seas.¹⁶²

At present, the majority of High Seas areas north of the NSR are too Ice Covered and dangerous to allow normal navigation. In fact, many areas are frozen solid. Thus, no regular navigation is occurring in these zones. However, in the future, as climate change trends continue and polar ice is melting, vessel may indeed move into these waters for transit, fishing, or other activities, at which point this specific legal nuance will have to be evaluated.

¹⁶¹ Kolodkin, A.L. and Volosov, M.E., *The Legal regime of the Soviet Arctic*, in: Marine Policy vol. 14 (1990) 2, p.160.

¹⁶² 2013 Rules on navigation in the water area of the Northern Sea Route. Article 5

5. Conclusion

Russian researchers, politicians, and lawyers typically base their position regarding the historical title over the NSR and its waters being in internal waters, territorial sea, and Exclusive Economic Zone (EEZ) of Russia, on the politico-legal argument that the Northern Sea Route is a historically developed national transport communication artery of the USSR and now the Russian Federation.

Yet there is still no consensus regarding this classification at the international level among different states authorities and academia who have various points of view that the Shokal'skii, Vil'kitskii, Dmitrii Laptev, Sannikov and other Straits of the Russian Arctic (and as a part of the NSR) are straits used for international navigation or even high-seas where other States can enjoy certain freedoms under International Law of the Sea, specifically, navigation.

In particular, the main opponent of the Russian Federation in the international arena is the United States (USA) which insists on the position that Russian Arctic Straits, which constitute the NSR, should have a status of straits used for international navigation and therefore the USA, and other states, could enjoy the right of the non-suspendible innocent passage in accordance with Article 16 (4) of the 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone¹⁶³ and the right of transit passage under part III UNCLOS.

In light of this, the main core of controversy in the international arena lies in designation of the Straits of the Russian Arctic that constitute the NSR and jurisdiction over such Straits by the Russian Federation as a successor of USSR.

¹⁶³ United Nations Convention on the Territorial Sea and the Contiguous Zone, done at Geneva, 29 April 1958. Published in United Nations *Treaties Series*, vol. 516, No.7477.

NSR has a long history and plays an essential role as a national transport and communication link between northern-west and far-eastern regions of the Russian Federation. But for its economic development, improved transport connections and increased goods supply specifically for Russian northern territories, the NSR needs serious investment and development action for improving of its functioning.

There are several challenges that should be overcome by Russia to improve functioning of the NSR. The first challenge is developing the ability to provide year round navigation on the NSR regardless of ice conditions and navigational seasons¹⁶⁴.

The next step, is to increase and renovate the amount of icebreakers and develop an even more modern icebreaking fleet which will enhance the safety of navigation on the NSR. This can and is also being achieved by building additional search and rescue centers in the Russian Arctic.¹⁶⁵

Furthermore, Russian Federation must ensure compliance of its national legislation regulating the NSR to the international law of the Sea. And as a key point to stress, it should specifically be complicit with international obligations regarding the protection and preservation of the marine environment imposed upon the Russian Federation under UNCLOS.

In accordance with this the Maritime Doctrine of the Russian Federation 2020., the main national interests and objectives of Russian national policy are: retention of sovereignty in internal waters, territorial sea of the Russian Federation; protection of the sovereign rights on the Russian continental shelf regarding the exploration and exploitation of its natural resources; as well as exercising jurisdiction and protection of sovereign rights in the Russian EEZ¹⁶⁶.

¹⁶⁴ A.V. Istomin, *Role of the Northern Sea Route in economic development and development of northern territories*. In: *The Industrial North*. Vol. 6-7 (2007) and available at <http://helion-ltd.ru/rolofsevmorput>

¹⁶⁵ *ibid.*

¹⁶⁶ http://www.oceanlaw.org/downloads/arctic/Russian_Maritime_Policy_2020.pdf

At the same time “Foundations of state policy of the Russian Federation in the Arctic for the period to 2020 and beyond” declare that one of the main national interests in the Arctic is the use of the Northern Sea Route as a national unified transport communication of the Russian Federation in the Arctic.¹⁶⁷

The Acts presented above reflect Russian priorities regarding Russian positions in the Arctic and elucidate that the concept of internalization of the Arctic is a challenge to Russian national, geopolitical, and strategic interests.

In conclusion, Western countries are focused on assessing the compliance and conformity of Russian national legislation with International law, especially regarding environmental protection and freedom of navigation in the waters of NSR. But for the Russian Federation, the most crucial issues are geopolitical and strategic factors to ensure control over Russian Arctic waters and Russian positions in the Arctic.

¹⁶⁷ Foundations of the state policy of the Russian Federation in the Arctic for the period to 2020 and beyond. Approved by the President of the Russian Federation Dmitrii Medvedev on 18 September 2008.

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