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Shipping in the World's Northernmost Ocean

- Legal Disputes & Controversies in the Arctic Sea Routes & the Legal
Impact of an Future Internationalization

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Summary

The Arctic is one of the most severe and least developed international regions in the world. Despite arrangements such as the Arctic Environmental Protection Strategy and its successor the Arctic Council, there is no existing viable multi-lateral Arctic body. *Pari passu*, earth's climate change, primarily due to an increase of carbon dioxide in the atmosphere, is rapidly re-forming the Arctic. The Arctic Climate Impact Assessment has concluded that the ice coverage in the region for 2010 is roughly equivalent of 50 percent of the coverage in the 1950's. This decline of sea ice is progressively opening new opportunities for commercial activity in the region, such as Arctic marine transport traversing the "Arctic-shortcut" instead of the traditional sea-lanes through the Suez Canal. In addition, estimations by the United States Geological Survey states that the Arctic region could hold as much as 25 percent of the earth's undiscovered oil and gas resources. Both the 2008 Illulissat Declaration and the 2010 Chelsea ministerial meeting reaffirmed the five Arctic coastal States' firm commitments to the Law of the Sea. However, this thesis shows that the regulation of Arctic marine transport is comprised of an intricate multi-layered framework, which is not sufficiently tailored for the unique characteristics of the region. It is concluded that the Arctic sea routes are a highly complicated phenomena, since there are several complex legal disputes and controversies.

The first conclusion is that the legal disputes and controversies in the Arctic sea routes, which materially constrain Arctic marine transport, are:

- Internal waters in the NWP due to Canada's straight baselines based under customary law;
- "Creeping jurisdiction" in the NSR;
- Increase of Arctic sovereignty through Article 234 and the provision's ambiguity towards the transit passage regime;
- Ambiguity regarding different interpretations of the transit passage regime and the international strait provision.

Moreover, it is concluded that the legal disputes and controversies in the three examined Arctic sea routes bear several commonalities, differences and similarities. Overall it is concluded that the Arctic approach and legal development by Soviet, its successor Russia, and Canada are shaped mainly through foreign actions, such as the epic voyage of S/S Manhattan in 1969. Further, several legal scholars of respective Government or Duma have argued for expanding Arctic sovereignty, by, for example the sector theory, the "ice-is-land-theory" (*mare liberum-res communis*), historic title as a basis for internal waters, etc. However, contrariwise when analyzing State practice it becomes evident that both States have been reluctant to espouse such far-fetched legal arguments. In addition, it becomes evident that there is a lack of official statements and clarification from the Arctic coastal states. Unfortunately, this has given scholars free hand of interpretation - creating a diverse and ambiguous doctrinal view of the legal status of the Arctic. However, it is shown that both States has adopted a more functionalistic, step-by-step approach towards the Arctic. The reason seems to be, in general, that these legal disputes and controversies are largely irrelevant for the stakeholders of the Arctic, other than of

those who have an academic interest since the Arctic sea routes are not yet commercially viable. This lack of clarification and State practice could be intentional, since the thesis shows that both States has succeeded in increasing their respective Arctic sovereignty and jurisdiction. Nevertheless, the thesis also concludes that without icebreaker and ice-forecasting support, both States effectively nationalized their respective sea routes many years ago. Furthermore, it is concluded that the Transpolar Sea Route in a legal perspective strongly differs from the Northern Sea Route and the Northwest Passage, since this sea route is out of reach for any Arctic state's jurisdiction.

The second purpose of the thesis analyzes the legal consequences of a possible internationalization of the sea routes. It is concluded that, given the commercial incentives and current downward trend in record lows of sea ice extent, it is not far-fetched to anticipate a future with drastically increased commercial Arctic marine transport - leading to internationalization. Given this, different straits in the Northern Sea Route and the Northwest Passage will become international straits in accordance with the interpretation of the *Corfu Channel* case due to a lack of definition in the 1958 Territorial Sea Convention and the 1982 UNCLOS.

Lastly, it is concluded that there is a general ambiguity on how to address the international strait provision and the transit passage regime. The spatial scope of Article 234 and its relationship to the transit passage right is emphasized. In conjunction to this, several sub-questions are examined, such as the question of whether or not the transit passage regime "trumps" Article 234 or vice versa. In addition, it is also concluded that an internationalization of the Northern Sea Route and the Northwest Passage would lead to the applicability of the transit passage regime. The pattern of several legal disputes and controversies would then shift radically.

Acknowledgements

First and foremost I am highly honored to been given the chance to compose my Master's thesis in such an amusing area. It is my hopefully purpose that this thesis will be seen as a modest contribution to the academic debate over the Arctic's legal status in the presence of rapidly changing dynamics in the world's northernmost area, exploiting both opportunities and challenges.

I would like to express my sincere gratitude to Professor Proshanto K. Mukherjee and Dr. Abhinayan Basu Bal at the now, deplorably, disused Master's Programme in Maritime Law at Lund University.

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Abbreviations

AARI	Arctic and Antarctic Research Institute
AC	Arctic Council
ACIA	Arctic Climate Impact Assessment
AEPS	Arctic Environmental Protection Strategy
AMAP	Arctic Monitoring Assessment Program
AMSA	Arctic Marine Shipping Assessment
ATS	Antarctic Treaty System
AWPPA	Arctic Water Pollution Prevention Act
CARA	Circum-Arctic Resource Appraisal
CASA	Canadian Arctic Shipping Assessment
CLCS	Commission on the Limits of the Continental Shelf
DNV	Det Norske Veritas
EC	European Community
EEZ	Exclusive Economic Zone
EROI	Energy Return on Investment
EU	European Union
ICJ	International Court of Justice
IMO	International Maritime Organization
MARPOL	International Convention on the Prevention of Pollution from Ships 1973/78
NEP	The Northeast Passage
NM	Nautical Miles
NORDREG	Arctic Canada Traffic System
NSR	The Northern Sea Route
NWP	The Northwest Passage
SAML	Soviet Association of Maritime Law
SOLAS	International Convention on Safety of Life at Sea, 1974
Soviet	The Soviet Union
TSR	The Transpolar Sea Route
U.S.	The United States of America
UN	United Nations
UNCLOS	1982 United Nations Convention on the Law of the Sea
USGS	United States Geological Survey
USSR	Union of Soviet Socialist Republics

1 General Introduction

The introductory pages aim to provide the reader with an overview of the subject matter and structure of this thesis. The purpose section presents the narrow core and focus of the thesis; legal disputes and controversies in the Arctic shipping routes and the legal impact of a future internationalization. It is worth noting that this thesis is written for academics and/or professionals with some basic Maritime Law knowledge and an understanding of the multidisciplinary complexity of the Arctic region.

1.1 Background

As of today the Arctic is one of the most severe and least developed international regions in the world. Prior to the Second World War only struggling northern indigenous populations could survive by the greatest of efforts. However, by the end of the Second World War technological advances allowed southerners to set foot and survive in the region. Unfortunately, the onset of the Cold War ended any opportunity for development of an international cooperative regime. By the ending of the Cold War there have been some development of international institutions and cooperation arrangements such as the Arctic Environmental Protection Strategy (hereinafter, “AEPS”) and its successor the Arctic Council (hereinafter, “AC”). Notwithstanding that organizations like these have had some success, there is today no existing viable multi-lateral Arctic body. Instead, the existing regime is described as “an immature, fragmented and stunted region-system.”¹ In conjunction with earth’s climate change, which is due primarily to an increase of carbon dioxide in the atmosphere, the Arctic Climate Impact Assessment (hereinafter, “ACIA”) has catalogued the range of impingements currently re-shaping the Arctic in a report.² The report states that the current decline of sea ice is moving “with a magnitude unprecedented over the past 1,450 years.”³ Further it concluded that 2010’s Arctic ice coverage is 1,4 million square kilometers less than in 2006 and roughly a 50 percent decrease in comparison to the 1950’s.⁴

Despite the ecological challenges, the current decline of sea ice is progressively opening new opportunities for commercial vessels traversing the “Arctic-shortcut” from Europe to the Pacific with ensuing economic and environmental benefits. In addition, the feasibility of taking commercial advantage of the Arctic’s opulence in exploitable resources is becoming highly attractive. Estimations according to a study by the United States Geological Survey (hereinafter, “USGS”) suggests that the Arctic could contain as much as 25% of the earth’s undiscovered oil and gas resources.⁵

In light of these potential drivers for increased commercial Arctic marine transport, it is remarkable that no effective legal instruments have been implemented to cope with the rapidly changing dynamics of the Arctic. Both the 2008 Illulissat Declaration and the

¹ Rob Huebert, ‘Cooperation or Conflict in the Arctic’ in Myron H. Nordquist, John Norton Moore, and
² ACIA, *Impacts of a Warming Arctic: Arctic Climate Impact Assessment* (Cambridge University Press, 2004).

³ *Ibid*, p. 12.

⁴ *Ibid*, p. 13.

⁵ USGS, *Circum-Arctic Resource Appraisal; Estimations of Undiscovered Oil and Gas North of the Arctic Circle* (U.S. Geological Survey Fact Sheet 3049, 2008).

2010 Chelsea ministerial meeting reaffirmed the five Arctic coastal State's firm commitment to the Law of the Sea.⁶ However, Arctic marine transport comprises an intricate multi-layered framework which is not sufficiently tailored for the unique characteristics of the region. It has become evident for the international community that developing profitable commercial waterways using the different Arctic sea routes are a highly complicated phenomena, since they are tinged by several complex *legal disputes and controversies* for Arctic marine transport.

1.2 Purpose

The primary purpose of this thesis is examining and analyzing legal disputes and controversies in light of an increase⁷ in commercial Arctic marine transport along the different sea routes. The sea routes relevant to this thesis are the Northern Sea Route (hereinafter, "NSR"), the Northwest Passage (hereinafter, "NWP"), and the Trans Polar Sea Route (hereinafter, "TSR").

The primary purpose can be divided into two elements:

- First, the legal disputes and controversies associated to commercial Arctic marine transport will be examined and analyzed. The focus in this section (Chapter 4) is to examine the origin of each dispute or controversy, and examine how it affects Arctic marine transport. The overall question is:
 - Which are the legal disputes and controversies in the Arctic sea routes that materially constrain Arctic marine transport? What are their origins?
- Secondly, the commonalities, differences and similarities of the legal disputes and controversies, as presented above, will be analyzed by a descriptive analysis through a comparative method. The overall question is:
 - What are the commonalities, differences and similarities of the legal disputes and controversies in the Arctic sea routes previously presented and what conclusions can be made of this in a wider scope?

The secondary purpose, originating from the first, is to analyze the legal consequences of a future internationalization in the three Arctic sea routes and how it will affect the previously presented disputes and controversies. The two questions are hereby:

- What right of passage would apply after an internationalization in the NSR, the NWP, and the TSR?
- What would the legal consequences be of the presented legal disputes and controversies if the transit passage regime would apply?

⁶ The five coastal states bordering the Arctic Ocean are Canada, Denmark, Norway, the Russian Federation and the United States of America.

⁷ See Chapter 2.

1.3 Method and Material

This essay is a descriptive study of *de lege lata* in combination with an analytical comparative analysis of *de lege ferenda*.⁸ The method used is a combination of the legal dogmatic approach⁹ with emphasis on the jurisprudential method.¹⁰ By using a range of different sources such as legal instruments, international and national legislation and applying and analyzing different facts including *inter alia* state practice, geography and different scholars interpretation of customary law to such legislation the subject matter is examined. In addition, a comparative method is applied when analyzing commonalities, differences and similarities of the legal disputes and controversies.

The comparative part in this thesis is based on the comparative method as relevant to international law, national legislation and historical legislation. In addition, other aspects such as economic incentives and historical traditions are, although not strictly of legal relevance, influential to some extent and must therefore be taken into account.¹¹ The aim of the comparative analysis is to recognize similarities, differences and commonalities and use this data to draw conclusions in a wider scope, related to a future possible internationalization in the Arctic sea routes.

Although legal doctrine dealing with legal disputes and controversies related to the Arctic sea routes is of a highly limited amount the author's ambition has been to use a qualitative (contrary to quantitative) approach towards available legal doctrine. This approach has been used when utilizing other sources as well in order to retain a critical approach to the relevant sources of law.

The development and approach to legal disputes and controversies in the Arctic dissent amongst the Arctic states, the non-Arctic states and international organizations such as the European Union (hereinafter, "EU"). Each entity upholds shoulder on differential approaches to science, economic interests and Arctic history, which is important to emphasize for the reader. The ambition has been to capture and analyze these differential approaches in order to present a (as much as possible) vivid analyze in the analytical and subjective parts of the thesis.

1.4 Structure

Following this general introduction for the thesis, Chapter 2 aims to provide the reader with a general overview of the driving forces behind the new commercial Arctic, with emphasis on the three Arctic sea routes (the NSR, the NWP, and the TSR). In addition, some unique aspects of the sea routes geography will be presented. The purpose of this chapter is to serve the reader with crucial non-legal background. This is necessary in order to understand the characteristics and complexity of the later on presented legal

⁸ Michael Bogdan, *Komparativ rättskunskap* (1st edn, Nordstedts Juridik Stockholm, 2003) p. 23-24.

⁹ The legal dogmatic approach is applied when discussing and describing the current legal position of different legal disputes and controversies, such as, *inter alia* existing legislation and outdated legislation in combination with state practice and customary law.

¹⁰ Claes Sandgren, *Rättsvetenskap för uppsatsförfattare* (2nd edn, Nordstedts Juridik Stockholm, 2007) p. 38.

¹¹ *Ibid*, p. 38 – 41.

disputes and controversies, as well as provide an understanding of the incitements for a possible internationalization of the sea routes.

Chapter 3 serves the reader with the relevant legal governance and framework. Emphasis is on the law of the sea due to the Arctic geography and nature of marine Arctic transport. The subchapters in this Chapter are all formed to correlate with the later on presented legal disputes and controversies in Chapter 4, and will work as tools to understand the complex nature of the actual disputes and controversies presented in the following chapter.

Chapter 4 is the core of this thesis and will solely focus on the actual legal disputes and controversies in the Arctic sea routes. The chapter is structured by dividing the legal disputes and controversies into the three shipping sea routes – the NSR, the NWP, and the TSR. Due to the volume and range of the disputes and controversies, analyzing will be presented throughout the chapter to facilitate for the reader the outcome and conclusion of the disputes and controversies in the next coming chapter.

Chapter 5 contains the comparative part of the essay, where the reader will be provided with a descriptive analyze through a comparative method by presenting similarities, differences and commonalities of the legal disputes and controversies presented in the previous chapter. In addition, this chapter will also serve as the end-conclusion for some disputes and controversies, which have proven to not constitute a major constraint for Arctic marine transport. Conclusions and findings drawn in Chapter 5 will serve as the basis when analyzing the secondarily purpose in the next coming chapter.

Chapter 6 constitutes the secondarily purpose of the thesis as well as the general conclusion correlating to the purpose. In this chapter the question regarding legal consequences of a future internationalization in the NSR, the NWP, and the TSR will be presented. Based on what has been concluded and stated in the previous chapters, this data will be used to form the general conclusion, ending the thesis.

1.5 Delimitation

1.5.1 Subjects for Discussion

The Arctic mainly consists of the Arctic Ocean encircled by Canada, Russia, the United States, Denmark (Greenland) and Norway. Trying to cover all legal disputes and controversies associated to marine Arctic transport within such an extensive area would break the boundaries of any graduate thesis. Therefore, several legal disputes and controversies have been excluded in order to make room for a more ample and in depth analysis.

It is worth noting that this is not a multi-faced interdisciplinary study to outline and elaborate on the whole range of key issues and factors related to legal disputes and controversies in the Arctic sea routes. However, it should be emphasized that in this particular subject geostrategic considerations, economic and political power have a major impact and will most likely be a determining factor for future commercial Arctic marine transportation. Hence, the following areas below are not dealt with irrespective of their importance.

- Legal disputes and controversies associated to the *Arctic continental shelf*, such as the question if the entire Arctic Ocean could be subject to domestic legislation on the account of the common heritage principle (*res communis*).¹² Further, jurisdictional authority over the continental shelf and hydrocarbon exploitation as primarily regulated through the 1982 UNCLOS, Article 76 will not further be commented, despite its importance and affect on Arctic marine transport.
- There are at present several *unsolved delimitation lines* in the NSR and the NWP. For an example, the on-going discussion between Canada and the U.S. regarding the maritime boundary of the Beaufort Sea can be mentioned. Despite its importance and influence on Arctic marine transport, these disputes will no be further commented. Mainly due to its political character.
- Legal disputes and controversies related to the *Arctic fishing industry* will not be examined even though, as later stated in the thesis, this is an important resource and constitutes a driving factor behind the new accessible commercial Arctic.
- Legal disputes and controversies associated to *territorial land claims* will not be further commented, such as the dispute over the small uninhabitable rock known as Hans Island, even though the settlement will have a widespread affect on the borders in this important area for Arctic marine transport.
- Of great importance are the *commercial conditions* of the Arctic sea routes, such as icebreaker fees, infrastructure etc. Irrespective of these crucial factors for Arctic marine transportation, no attention will be given to these conditions. In addition, no commercial outlook will be provided.

1.5.2 Defining the Arctic

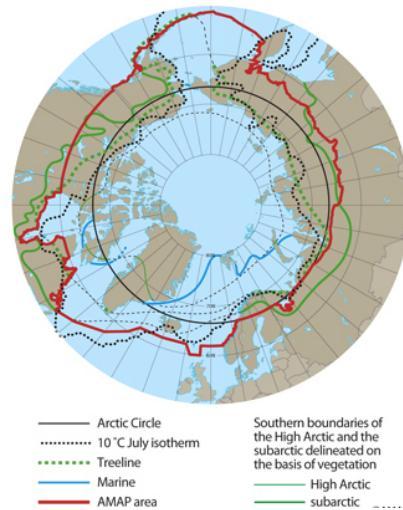
As of today there is no generally acknowledged geographic or legal definition or delineation of the Arctic region.¹³ The subject cannot be addressed here in detail, although it is sufficient to state that none of the following definitions have achieved common approval or acceptance.¹⁴ However, they are all used extensively depending on interest or purpose.

Figure 1
Definitions of the Arctic Region

¹² This question is thoroughly discussed by several scholars, for an example, see Ron Macnab, 'Complications in Delimiting the Outer Continental Shelf' in Myron H. Nordquist, John Norton Moore, and Tomas H. Heidar, *Changes In the Arctic Environment and the Law of the Sea* (Martinus Nijhoff Publishers, 2010) p. 493.

¹³ Willy Østreng, *Shipping in Arctic Waters: A Comparison of the Northeast, Northwest and Transpolar Passages* (Springer & Praxis Publishing, 2013) p. 3.

¹⁴ Eva Carina Helena Keskitalo, *Negotiating the Arctic: The Construction of an International Region* (Taylor & Francis Books, 2004) p. 11.



Source: ACIA, supra note 2.

The oldest and most common definition is the Arctic Circle, drawn by an imaginary line on the parallel of latitude located at 66° 33' 44" (or 66.5622°) encircling an area north of the equator of roughly 8 percent of the world's surface.¹⁵ This definition is based on solar radiation. However, as seen in Figure 1 the Arctic Circle-definition does not include Arctic sub-regions such as the Bering Strait, the White Sea, or the southern part of Greenland and the Hudson Bay. Therefore this definition has been subject to criticism.¹⁶ As stated by one scholar: "these areas are as Arctic in natural conditions as most of the areas situated north of the Circle."¹⁷ As a reaction of this criticism the noted Canadian researcher M. Dunbar launched a more modern subjective approach, elaborating with definitions based on their physical presence of the Arctic region.¹⁸ Several definitions in line with M. Dunbar's subjective approach have been suggested, such as the *10 degree C July Isotherm*, the *marine boundary between cool and warm waters*, the *tree line*, the *continuous permafrost*, etc., see Figure 1.

However, despite applications of alternative criteria it is not sufficient to include all polar characteristic areas to a single concept, or definition, defined as the Arctic. As one scholar put it: "the differences in aerial extension between the various definitions amounts to thousands of square kilometers".¹⁹

A new approach was taken by the Arctic Monitoring Assessment Program (hereinafter, "AMAP") of the Arctic Council (hereinafter, "AC"). The approach was multilateral and took into account all areas of science. The definition was later provided as guidelines where the Arctic according to the AMAP definition covered roughly around 33,4 million square kilometers of which 60 percent is Arctic waters with a latitudinal area between 60°N and the Arctic Circle definition. Østregren states that:

The AMAP applies multiple scientific political and pragmatic criteria that have been blended together to reach consensus across sectors and between the states. However, the ambiguity and flexibility of this definition causes overlaps with

¹⁵ Østregren, *supra note 13*, p. 3.

¹⁶ *Ibid*, p. 4.

¹⁷ *Ibid*, pp. 4 – 5.

¹⁸ Eva Carina Helena Keskitalo, *supra note 14*, p. 12.

¹⁹ *Ibid*, p. 4.

Sub-Arctic, which in principle should be the transition zone between the Arctic proper and temperature zone.²⁰

The AMAP definition has been adopted by the Arctic Marine Shipping Assessment (hereinafter, “AMSA”) as well as the Canadian Arctic Shipping Assessment (hereinafter, “CASA”) although the two entities could not reach a degree of acceptance for the delineation of the Arctic. This is still an on-going debate tinged by uncertainty and ambiguity.

Arctic waters

In 2002 the International Maritime Organization (hereinafter, “IMO”) published Guidelines for Ships Operating in the Arctic Ice-covered waters (hereinafter, “IMO Guidelines”) in an attempt to define Arctic Waters.²¹ This definition differs from the previous definitions. The IMO Guidelines define Arctic waters solely on sea ice concentrations, i.e. just one polar characteristic. Section G-3.2 paragraph 2 states that “sea ice concentrations of 1/10 coverage or greater ... and which pose a structural risk to ships ... are Arctic in character.”²² However, the IMO Guidelines provides no method to determine this concentration. Which is a weakness, bearing the geography of the area in mind. In addition, no time-criterion was presented. The geographical application for Arctic waters in the IMO Guidelines is defined in Section G-3.2, which reads:

Arctic waters means those waters which are located north of a line extending from latitude 58°00'.0 N, longitude 042°00'.0 W to latitude 64°37'.0 N, longitude 035°27'.0 W and thence by a rhumb line to latitude 67°03'.9 N, longitude 026°33'.4 W and thence by a rhumb line to Sørkapp, Jan Mayen and by the southern shore of Jan Mayen to the Island of Bjørnøya and thence by a great circle line from the Island of Bjørnøya to Cap Kanin Nos and thence by the northern shore of the Asian continent eastward to the Bering Strait and thence from the Bering Strait westward to latitude 60° N as far as Il'pyskiy and following the 60th North parallel eastward as far as and including Etolin Strait and thence by the northern shore of the North American continent as far south as latitude 60° N and thence eastward along parallel of latitude 60° N, to longitude 56°37'.1 W and thence to the latitude 58°00'.0 N, longitude 042°00'.0 W

However, the IMO definition may be re-defined. Such tendencies were evident during the 54th meeting of the IMO Sub-Committee on Ship Design and Equipment²³ in the on-going process of developing a mandatory International Code of Safety for Ships in Polar Waters²⁴ (hereinafter, “Polar Code”). It was stated that: “ while noting that such definitions might have to be revisited once the Code is further developed ... proposes definitions of Arctic and Antarctic waters based on the physical and biological characteristics of these environments.”²⁵

²⁰ Østreng, *supra* note 13, p. 5.

²¹ IMO Guidelines, *Guidelines for ships operating in Arctic ice-covered waters* (IMO Doc. SC/Circ.1056 MEPC/Circ.399, 23 December 2002)

²² *Ibid*, G-3.2.2.

²³ IMO Sub-Committee on Ship Design & Equipment, *Report to the Safety Committee* (54th session, Agenda Item 23, DE 54/23 17 November 2010)

²⁴ See Chapter 3.1.1.2 regarding the on-going process of developing a mandatory Polar Code.

²⁵ IMO Sub-Committee on Ship Design & Equipment, *supra* note 48, p.22.

To summarize, each definition of the Arctic region are only partially satisfactory, depending on the governing interest or purpose. It must be emphasized, the importance of the chosen definition for the outcome of the legal dispute or controversy at hand. It is outside the scope of this thesis to analyze these different definitions. As for this thesis the Arctic will be defined according to the IMO definition. This is due to its pragmatic operational nature and its consideration of Arctic marine transport.

2 The New Accessible & Commercial Arctic

This chapter focuses on the driving forces behind the new accessible and commercial Arctic. In addition, some basic information of the three Arctic sea routes' unique geographic features and legal definitions is provided. In order to understand the characteristics and complexity of the legal disputes and controversies it is important to bear in mind the specific character and changing dynamics of the Arctic sea routes and their distant position on the world map. However, this is not fully addressed due to the boundaries of this thesis. Hence the reader is notified that this chapter is limited to only correlate with the legal disputes and controversies presented later on in the thesis.

2.1 Climate Change

The scientific causes and the process of climate change are not addressed here in detail. It is sufficient to state that reduced Arctic sea ice and other particular consequences in the Arctic is a palpable sign of climate change around the globe. Record lows of the Arctic sea ice extent in 2007 and 2012 “underscore robust downward trends in ice extent and thickness observed since 1979.”²⁶ In a recent study with focus on the ice-covered Arctic Ocean the authors state that throughout human history natural climatic variability has caused interannual fluctuations in sea ice extent. Although, the authors state that the current decline of sea ice is moving “with a magnitude unprecedented over the past 1,450 years.”²⁷ Several other scholars’ climate model simulations reveals a universal academic concur²⁸ of a proceeding sea ice decline in the Arctic passim the 21st century, with predictions of ice-free conditions under a short span of time during summer, starting as early as 2030 in some predictions.²⁹ The ACIA’s research report ‘Impacts of Warming Arctic’, has stated that 2010’s Arctic ice covers 1,4 million square kilometers less than in 2006. Going back even further, 2010’s Arctic ice cover is roughly equivalent to 50 per cent of the coverage in the 1950’s.³⁰

²⁶ Scott R. Stephenson, ‘Projected 21st-Century Changes to Arctic Marine Access’ (2013) 1(1) Springer <<http://www.sscnet.ucla.edu/geog/downloads/297/556.pdf>> accessed 22 July 2013, p. 1.

²⁷ *Ibid*, p. 2.

²⁸ See for an example Zhang X. and J. E. Walsh, ‘Towards a seasonally ice-covered Arctic Ocean: Scenarios from the IPCC AR4 model simulations’ (2006) 19(9) J. Climate <<http://dx.doi.org/10.1175/JCLI3767.1>> accessed 22 July 2013, pp. 2 – 3., and Stephen J. Vavrus, ‘Twenty-First-Century Arctic Climate Change in CCSM4’ (2012) 25(8) J. Climate <<http://dx.doi.org/10.1175/JCLI-D-11-00220.1>> accessed 22 July 2013, p. 1.

²⁹ Stephenson, *supra* note 26, p. 3.

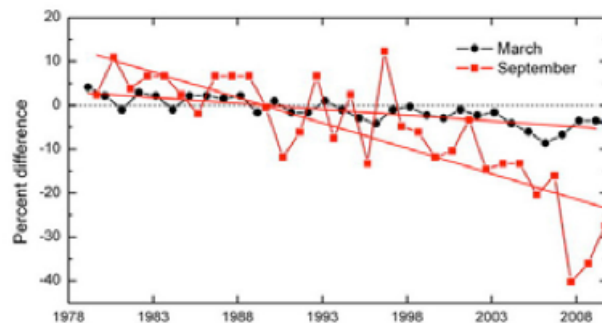
³⁰ ACIA, *supra* note 2, p. 13.

2.2 Major Commercial Interests

2.2.1 Commercial Marine Transportation

As stated above, during the ending decades of the 20th century and the beginning of the 21st century, the Arctic has experienced a rapid temperature increase.³¹ Consequently, in a research study by the Arctic Institute the authors state that: “the effects of global warming may transform the Polar region from an inaccessible frozen desert into a seasonally navigable ocean.”³²

Figure 2.1
Summer and winter development of sea ice extent in the Arctic between 1979-2010



Source: DNV Research and Innovation, *supra* note 31.

The decrease of the Arctic sea ice is clearly shown in a commercial perspective. In the summer of 2011, 33 ships carrying 850,000 tons of cargo navigated the NSR, a record in total cargo freighted for the time.³³ The advantages of traversing the three Arctic sea routes are overwhelming, both with respect to distance and time advantages compared to the Suez and Panama Canals. According to a recent study of future Arctic marine transport, the distance savings when navigating the Arctic transportation passages “can be as high as 40 percent compared to the traditional shipping lanes via the Suez Canal.”³⁴ For example, the distance between Yokohama in Japan and Hamburg in Germany is 6 600 Nautical Miles (hereinafter, “NM”) when traversing the NSR in compared to the traditional 11 400 NM through the Suez Canal.³⁵ The difference amounts to an approximated 42 percent reduction in freight distance.³⁶

Figure 2.2
Transportation Routes between the Atlantic and Pacific Ocean

³¹ See Chapter 2.1, and Lars Ingolf Eide, ‘Shipping Across the Arctic Ocean: A Feasible Option in 2030-2050 as a Result of Global Warming?’ (2010) 0(4) DNV Research and Innovation <http://www.dnv.com/binaries/shipping%20across%20the%20arctic%20ocean%20position%20paper_tcm4-434419.pdf> accessed 27 July 2013, p. 4.

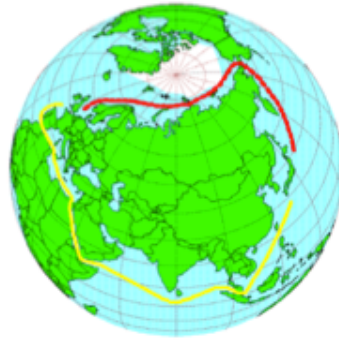
³² Malte Humpert & Andreas Raspotnik, ‘The Future of Arctic Shipping’ (*The Arctic Institute: Center for Circumpolar Security Studies* 11 October 2012) <<http://www.thearcticinstitute.org/2012/10/the-future-of-arctic-shipping.html>> accessed 13 August 2013. The Arctic Institute is an interdisciplinary, independent think tank focused on Arctic policy issues with staff including specialists in Arctic climate science, geopolitics, law, oil and gas, and media. The Arctic Institute is not directly affiliated with any government entity, corporation or civil-society organization, see more at <http://www.thearcticinstitute.org>.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Willy Østreg, *Shipping in Arctic Waters* (Ocean Futures & Centre for High North Logistics 2010) p. 42.

³⁶ *Ibid.*



Source: The Arctic Institute, supra note 32.

However, even if there are several advantages of traversing the three Arctic sea routes, Arctic marine transport will always be associated with higher hazard levels compared to the traditional routes. The challenging conditions of the Arctic include extreme cold, prolonged periods of darkness in the winter, extreme remoteness, severely low temperatures, difficulty of predicting weather forecasts and the environmental consequences due to the Arctic's fragile ecosystem. Combined, these factors will need comprehensive and rigorous risk management for commercial shipping. Det Norske Veritas (hereinafter, "DNV") has carefully analyzed these challenges for increased shipping and states "part-year Arctic transit may be economically attractive for container traffic ... between 2030 and 2050."³⁷

2.2.2 Undiscovered Conventional Oil and Gas Resources

In May 2008 the US Geological Survey (hereinafter, "USGS") completed an estimation of possible future additions to the world oil and gas reserves in all areas north of the Arctic Circle.³⁸ The study, the Circum-Arctic Resource Appraisal (hereinafter, "CARA"), is geological and includes all volumes of sedimentary rock in the Arctic. The area north of the Arctic Circle (66.56° north latitude) is roughly six percent of the Earth's surface.³⁹ CARA's quantitative assessments were completed only in geological areas that "have at least a 10-percent chance of one or more significant oil or gas accumulations." Further, it was stated that: "The study included only those resources believed to be recoverable using existing technology, but with the important assumptions for offshore areas that the resources would be recoverable even in the presence of permanent sea ice and oceanic water depth."⁴⁰

The study concluded that the area north of the Arctic Circle has an estimated 90 billion barrels of undiscovered, technically recoverable oil; 1,670 trillion cubic feet of technically recoverable natural gas; and 44 billion barrels of technically recoverable natural gas liquids in 25 geologically defined areas thought to have potential for

³⁷ Lars Ingolf Eide, *supra* note 31, p. 19.

³⁸ USGS, *supra* note 5.

³⁹ Brenda S. Pierce, 'US Geological Survey Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas in the Highest Northern Latitudes' in Myron H. Nordquist, John Norton Moore, and Tomas H. Heidar (eds), *Changes In the Arctic Environment and the Law of the Sea* (Martinus Nijhoff Publishers, 2010) p. 535.

⁴⁰ USGS, *supra* note 5.

petroleum. In summary, these resources account for about 22 percent of the undiscovered, technically recoverable gas and oil resources in the world.⁴¹ The study further stated that the Arctic continental shelves “may constitute the geographically largest unexplored prospective area for petroleum remaining on Earth.”⁴²

However, the study emphasized that no economic consideration were included in the estimations. It is important to note that without reference to costs of exploration and development the Energy return on investment⁴³ (hereinafter, “EROI”) is impossible to calculate. It should also be noted that nonconventional resources, such as coal bed methane, gas hydrate, oil shale, and tar sand, were explicitly excluded from the CARA study.⁴⁴

2.2.3 Other Resources

Fisheries

Until recent years, fishing was the dominant part of the Arctic economy. Whilst the European countries mostly practice large-scale deep-sea fishing in the Barents Sea and outside the coast of Norway and Greenland, indigenous Arctic populations practice small-scale coastal fishing. The total fisheries’ catches in the Arctic Ocean is estimated to 950,000 tonnes from 1950 to 2006, where 770,000 tonnes being Russia solely.⁴⁵ As different models suggests that ocean temperature increase, fish species are very likely to migrate north - leading to an estimated increase of catch potential in higher latitudes by 20 percent.⁴⁶

Mining

As the Arctic evolves due to climate change, mineral deposits like nickel, copper, wolfram, gold, silver, manganese, chromium and titanium are becoming more accessible than before. The estimated value of the Arctic’s minerals totals roughly around US \$1.5-2 trillion.⁴⁷

Tourism

Tourism in the Arctic began in the 1970s and has developed rapidly in recent years. In 2007 around 2.5 million tourists visited the Arctic region.⁴⁸

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Energy return on investment (EROI) is a physical measure of scarcity where the ratio of the energy delivered by process of the energy used directly and indirectly in the process, see more at: http://energy-reality.org/wp-content/uploads/2013/05/09_Energy-Return-on-Investment_R1_012913.pdf.

⁴⁴ USGS, *supra note 5*.

⁴⁵ Alex Williams, ‘The Future of Arctic Enterprise: Long-term Outlook and Implications’ (2010) 1(1) Smith School of Enterprise and the Environment University of Oxford, p. 12. <https://cmsdata.iucn.org/downloads/ssee_arctic_forecasting_study_november_2011.pdf> accessed 13 August 2013.

⁴⁶ *Ibid.*, p. 13.

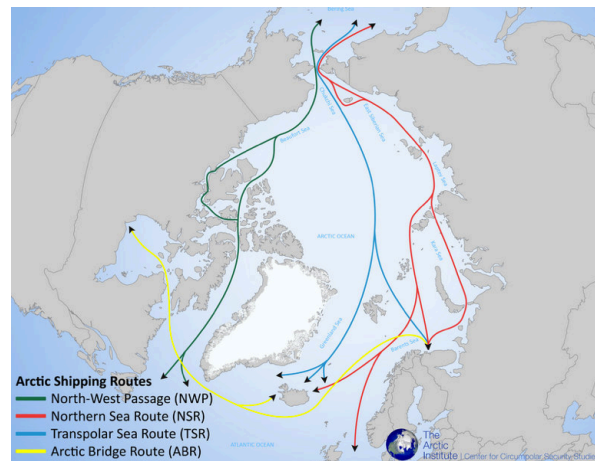
⁴⁷ Irina Burakova, ‘Development of Arctic Areas to Bring Trillions of Dollars of Profit to Russia’ *PRAVDA.Ru* (Moscow, 21 April 2005) <<http://english.pravda.ru/russia/economics/21-04-2005/8102-arctic-0/#>> accessed 23 November 2013.

⁴⁸ Alex Williams, *supra note 45*, p. 14.

2.3 The Arctic Sea Routes

The NSR and the NWP are often in doctrine anticipated to be coastal sea-lanes while the TSR is expected to include a mid-ocean route, in some cases crossing the North Pole. This perception is misleading. Arctic marine transport navigating the three Arctic sea routes is far more complex due to the massive presence of sea ice. According to Østreg, large amounts of sea ice in the sea routes forces vessels to follow different uncharted channels depending on the vessel's characteristics.⁴⁹

Figure 2.3
Arctic Shipping Routes in the Arctic



Source: The Arctic Institute, *supra* note 32.

Østreg states that: “each of them is more like a broad transportation corridor stretching out in the north-south direction, containing several alternative navigational channels and fairly huge expanses of ice-infested waters.”⁵⁰

2.3.1 The Northern Sea Route

The Russian scholar Timtchenko has translated the Soviet Encyclopedic Dictionary's definition of the NSR. According to this translation the NSR is “a major navigation route along the northern coast of the USSR. The chief Soviet artery in the Arctic, it passes through the seas of the Arctic Ocean ... linking the ports of the European part of the USSR and Soviet Far East and the mouths of navigable Siberian rivers and forming a unified nationwide transportation system.”⁵¹ The geographic nature of the interpretation of the definition needs to be emphasized, since this sea route is often referred to as the Northeast Passage (hereinafter, “NEP”) in western literature although they are not identical.⁵²

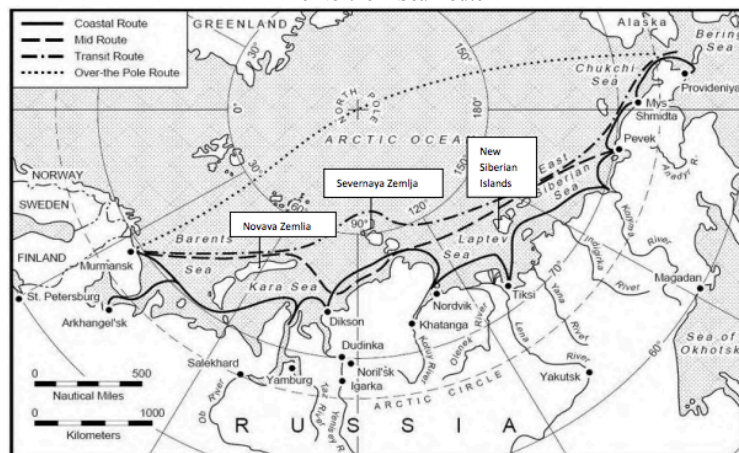
⁴⁹ Willy Østreg, *supra* note 35, p. 13.

⁵⁰ *Ibid.*

⁵¹ Leonid Timtchenko, ‘The Northern Sea Route: Russian Management and Jurisdiction Over Navigation in Arctic Seas’ in Alex G. Oude Elferink & Donald R. Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff Publishers & Kluwer Law International, 2001) p. 270.

⁵² *Ibid.*, pp. 271 – 273.

Figure 2.4
The Northern Sea Route



Source: http://www.ihp.int/mtg_docs/rhc/ArHC/ArHC2/ARHC2-04C_Marine_Traffic_in_the_Arctic_2011.pdf

The Northeast Passage or the Northern Sea Route?

There are several definitions of the NSR in the legal doctrine. Western literature often mentions the NEP when in fact referring to the NSR. It is important to note that the NSR and the NEP is not the same route in a legal perspective. According to Østreng, the NSR is a part of the NEP.⁵³ Timtchenko endorses Østreng's view, noting that: "the NSR which connects the northwest areas of Russia with the Bering Strait, is actually a part of the much longer Northeast Passage."⁵⁴ Russian scholars Kolodkin and Volosov go even further, stating that: "The Northern Sea Route (NSR) is a rather complicated communication organism ... the NSR is the major national sea route ... accordingly, the Northeast Passage means an aggregate of seaways which ... pass outside Russian waters and are not the Northern Sea Route seaways."⁵⁵ However, several scholars, including Timtchenko, have dismissed this interpretation as too wide, stating that: "it is hardly possible to agree with the Russian authors."⁵⁶ Clearly though, the NEP and the NSR are not the same passages, although some conformity amongst scholars suggests that the latter is only a part of the NEP - composing approximately 90 percent of the sea route.⁵⁷ Depending on the different definitions of the Arctic as discussed in Chapter 1.5.2, these interpretations may be the subject for change.

Definitions of the Northern Sea Route

There are several definitions of the NSR besides the official one. Østreng claims that there are two approaches that should be applied when determining the coordinates of the NSR. He notes that: "An *official* definition as found in Russian laws and regulations, and an *unofficial* Russian functional definition based on a mixture of organizational, operational and geopolitical criteria."⁵⁸ In addition, several other scholars have presented various definitions of the NSR although the response seems to have been made in a low-

⁵³ Willy Østreng, 'The Northern Sea Route: A New Era in Soviet Policy?' (1991) 22(3) *Ocean Development & International Law*, p. 260.
<<http://www.tandfonline.com/doi/abs/10.1080/00908329109545958#preview>> accessed 28 February 2014.
⁵⁴ Leonid Timtchenko, *supra* note 51, p. 271.
⁵⁵ A.L. Kolodkin, V. Y. Markov and A.P. Ushakov, 'Legal Regime of Navigation in the Russian Arctic' (1997) (3)1 *Inrop Working Paper*, pp. 34 – 35.
⁵⁶ Leonid Timtchenko, *supra* note 51, pp. 270 – 273.
⁵⁷ Willy Østreng, *supra* note 13, p. 18.
⁵⁸ Willy Østreng, *supra* note 35, p. 12.

key fashion within the international maritime law community.⁵⁹

Kolodkin's and Volosov's perspective has gained recognition among several scholars and will mark the basis for the unofficial functional definition in this thesis.⁶⁰

Unlike the majority of other transport routes, both land and sea, the Northern Sea Route has no single fixed route. ... the route may vary by great distances in latitude from year to year ... it may skirt the north of the Novaia Zemlia and Severnaia Zemlia archipelagos, bypassing the straits separating those and other land formations from the continental territory of the USSR. But under any circumstances a significant part of the Northern Sea Route lies within the Soviet economic zone, or the territorial and even internal waters of the USSR.⁶¹

The latest official definition of the NSR was adopted through the 1990 Decree "On Measures for Securing the Implementation of the Edict of the Presidium of the USSR Supreme Soviet of 26 November 1984 'On Strengthening of the Protection of Nature in the Extreme North and Marine Areas Adjacent to the Northern Coast of the USSR' ", in the 'Regulations for Navigation on the Seaways of the Northern Sea Route'⁶² which through Article 1(2) reads as follows:

The Northern Sea Route – national transportation route of the USSR, which is situated within the inland waters, territorial sea (territorial waters), or exclusive economic zone adjoining the USSR northern coast, and includes seaways suitable for guiding ships in ice. The extreme points of which *in the west* are the western entrances to the Novaya Zemlya straits and the meridian running from Mys Zhelaniya northward. And in the east, in the Bering Strait, by the parallel 66°N and the meridian 168°58'37"W."⁶³

2.3.2 The Northwest Passage

The Archipelago of the NWP is the largest in the world and consists of a myriad of labyrinth-shaped vegetation, mainly constituted by islands and headlands separated from the mainland. Starting in the west from the Beaufort Sea, the archipelago stretches to the Baffin Bay in the east, covering a distance of roughly 2,400 km. The northern point, Ellesmere Island, is around 900 km from the geographic North Pole, while the southern border is 60 degrees north latitude. According to a report by the Arctic Marine Shipping Assessment (hereinafter, "AMSA"), this triangular area is around 2.1 million km²; roughly the size of Greenland.⁶⁴

⁵⁹ See especially Leonid Tymchenko, *supra note 51*, pp. 269 – 274 for a thoroughly review of different interpretations/definitions of the NSR.

⁶⁰ See for an example Leonid Tymchenko, *supra note 51*, p. 272 and Willy Østreng, *supra note 13*, p. 18.

⁶¹ A. L. Kolodkin and M. E. Volosov, 'The Legal Regime of the Soviet Arctic: Major Issues' (1990) 14 *Marine Policy*, pp. 159 – 160.

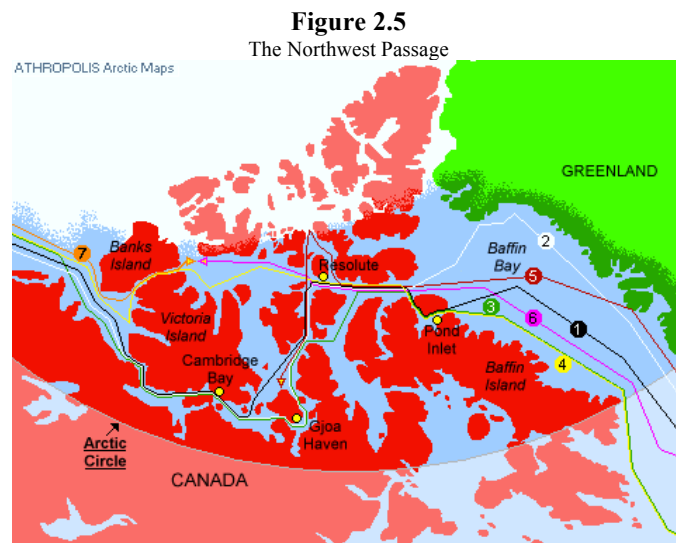
⁶² Cited through Leonid Tymchenko, *supra note 51*, p. 271 due to Russian legislation without translation, see also Willy Østreng, *supra note 13*, pp. 18 – 20.

⁶³ *Ibid*, see also the unofficial translation of the 'Regulations for Navigation on the Seaways of the Northern Sea Route' at: <http://www.arctic-liaison.com/docs/nsr/legislation/Rules_of_navigation_on_the_seaways_of_the_Northern_Sea_Route.pdf>

⁶⁴ Arctic Council, Protection of the Arctic Marine Environment (PAME), *Arctic Marine Shipping Assessment 2009 Report* (2nd pr. 2009) p. 19. <<http://library.arcticportal.org/id/eprint/1400>> accessed 12 October 2013.

The Archipelago consists of 73 major settled islands and 18,114 smaller ones.⁶⁵ Including small islets and rocks in the area, the Archipelago consist of roughly 36,000 smaller bits or islands above sea level, making the area one of the most complex geographies on earth for arctic marine transport.⁶⁶ The NWP is in a similar way structured like the NSR - a transport corridor where there is no single, permanent channel for vessels to strictly follow due to massive presence of sea ice.

The Archipelago consists of five different routes or passages of which three are considered to be suitable for regular navigation due to the highly variation of sea ice conditions.⁶⁷ As seen in the Figure 2.5, these three routes are the: (i) The M'Clure strait, (ii) the Prince of Wales strait and (iii) the Peel Sound.



Source: http://www.enr.gov.nt.ca/_live/pages/wpPages/soe_human_activities.aspx

Sea ice conditions in the NWP are complex for commercial shipping since the minimum sea-ice extent in the eastern regions and western regions are highly volatile as a result of its unique geography.⁶⁸ The shortest and deepest route through the NWP is the M'Clure strait, with an average depth of 400m.⁶⁹ However, the strait is also the most difficult and dangerous passage due to exceptional ice conditions, such as old and solid multi-year ice, resulting in possible delays or damages to regular and ice-strengthened ships. This risk is always present, even during the 10-15 days known as the favorable shipping season.⁷⁰ As an alternative route, the Prince of Wales strait is a more accessible route, avoiding the exceptional harsh ice-conditions in the M'Clure Strait. However, this strait is bordered by fluctuations in depth variety with less than 20 meters in some parts, making it non-accessible for some vessels.⁷¹ The third route that is seen as navigable by mariners in the NWP is the Peel Sound. However, the Peel Sound is restricted to vessels with a maximum of 10 m draughts.⁷²

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, p. 20.

⁶⁷ *Ibid.*, p. 21.

⁶⁸ Willy Østreng, *supra* note 35, p. 22.

⁶⁹ *Ibid.*, p. 23.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, pp. 23 – 24.

⁷² *Ibid.*

2.3.3 The Transpolar Sea Route

The TSR is the central part of the Arctic Ocean and represents a “direct route” for trans-Arctic marine transport. The sea route is positioned outside the geographical reach of any national jurisdiction in international waters where the freedom of navigation applies.⁷³

Figure 2.6
The Transpolar Sea Route



Source: <http://neven1.typepad.com/blog/2011/06/across-the-north-pole.html>

The TSR has no draft limitations, narrow straits or complex archipelago – instead the main obstacle is the multi-year ice present for most of the Arctic-shipping season.⁷⁴ Given the harsh environment for Arctic marine transport in the TSR no commercial vessel has yet crossed the central Arctic Ocean (the TSR).⁷⁵ The TSR implies both intra-Arctic, destination-Arctic and transiting purposes, where marine transport can use the sea route to also enter waters of the NSR or the NWP. Therefore it can be subject to domestic legislation, or by accessing and entering the Bering and Fram Straits, only be subject to the high seas regime. Some scholars suggests that it is not unreasonable that it may take another 20 – 40 years before any type of commercial shipping conditions through the TSR will prove attractive enough for shipping companies.⁷⁶

The definition of the TSR in this thesis will include the Central Arctic Basin, roughly covering 4.7 million km² in area, and all water expanses beyond the 12 NM territorial seas. Given this definition, jurisdictional rights and obligations from 188 NM measured from the Arctic coastal State’s territorial sea is, as later discussed, mixed (see Chapter 3.1.1.1).

⁷³ See 1982 United Nations Convention on the Law of the Sea (hereinafter, “UNCLOS”), Part VII. See also Chapter 3.1.1.1 for a thoroughly discussion of the high seas regime.

⁷⁴ Malte Humpert & Andreas Raspotnik, ‘The future of Arctic Shipping Along the Transarctic Sea Route’ in Lassi Heininen (eds), *Arctic Yearbook 2012* (Northern Research Forum 2012) p. 283. <<http://www.arcticyearbook.com>> accessed 12 February 2014.

⁷⁵ Willy Østreng, *supra* note 35, p. 32.

⁷⁶ Lars Ingolf Eide, *supra* note 31, pp. 14 – 15.

3 Legal Framework in the Arctic

This chapter will focus on the relevant legal governance and framework for the next chapter's legal disputes and controversies. The aim is to provide the reader with the necessary basic tools to understand the more complex nature of what will be discussed in the forthcoming chapters. Emphasis is on the law of the sea due to the Arctic's geography and the nature of commercial Arctic marine transport. In order to allocate space for a more thoroughly and narrow analyze on the later on presented matters, the reader is noted that extensive reference is conducted throughout the thesis to the sub-chapters in this part.

3.1 International Law of Interest

3.1.1 The Law of the Sea

The law of the sea is a body of customs, treaties and international agreements. It relates to matters of state sovereignty, jurisdiction and rights over waters, the seabed, its subsoil, and the airspace above the sea.

Sources of Law

International law is seen as the “product of the voluntary subscription of States to rules of law.”⁷⁷ The statement is reflected in Article 38 of the Statute of the International Court of Justice (hereinafter, “ICJ”), which legislates the ICJ to decide to such disputes as are submitted to it. The ICJ's decision shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilised nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

When determining the sources of the law of the sea the 1982 United Convention on the Law of the Sea (hereinafter, “UNCLOS”) importance needs to be recognized.⁷⁸ It came into force on November 16, 1994; more than ten years after it was concluded. The international treaty was the result of more than nine years of negotiations.⁷⁹ The entry into force represents an outstanding achievement of international law being hailed as “the modern constitution of the oceans”⁸⁰ with its 320 Articles and 9 annexes. In addition to this multilateral treaty, the law of the sea is fundamentally a part of the general discipline

⁷⁷ R. R. Churchill and A. V. Lowe, *The Law of the Sea* (2nd edn, Manchester University Press 1988) p. 4.

⁷⁸ United Nations, Convention on the Law of the Sea, 10 Dec. 10, 1982, United Nations Treaty Series Vol. 1833, No. 31363, p. 397. Available at

<http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf> accessed 21 July 2013.

⁷⁹ Richards Barnes, ‘The Law of the Sea: Progress and Prospects’ in David Freestone, Richard Barnes and David M Ong (eds) *The Law of the Sea* (Oxford University Press, 2006) p. 1.

⁸⁰ *Ibid.*

of international law, consisting mostly of relevant customary law, bilateral as well as multilateral.⁸¹

For issues not codified in the UNCLOS or for states not parties to the UNCLOS, the second source of law is comprised of the four multilateral Geneva Conventions from 1958.⁸² In addition, several other treaties and conventions deals with various aspects of the law of the sea, such as the 1973 Convention on the Prevention of Pollution from Ships and Protocol 1978 (hereinafter, “MARPOL”)⁸³ and the International Convention for the Safety of Life at Sea (hereinafter, “SOLAS”)⁸⁴. It needs to be noted that rules concerning interpretation, conclusion, termination and suspension of treaties are set out in the 1969 Vienna Convention on the Law of Treaties.⁸⁵

In case a state is not a party to the Geneva Conventions, international customary law (such as expressed in Article 38 of the Statute of the ICJ) is governing.⁸⁶ The concept of the Exclusive Economic Zone (hereinafter, “EEZ”) is an expression of customary law now codified in UNCLOS. According to Churchill and Lowe, Orthodox legal theory requires proof of two elements when establishing existence of a rule of customary law:

First, a general and consistent practice adopted by States. This practice need not be universally adopted, and in assessing its generality special weight will be given to the practice of States most directly concerned – for example, the practice of coastal States in the case of claims to maritime zones, or of the major shipping States in claims to jurisdiction over merchant ships. The second element is the so-called *opinion juris* – the conviction that the practice is one which is either required or allowed by international customary law.⁸⁷

Further, the authors state that customary law is in principle binding for all States.⁸⁸ However, this general rule has two major exemptions. First, States who persistently objects to an emerging rule of customary law “will not be bound by that rule.”⁸⁹ This was confirmed by the ICJ in the *Anglo-Norwegian Fisheries* case.⁹⁰ The second exemption is:

⁸¹ Martin Dixon, *Textbook on International Law*, (7th edn, Oxford University Press, 2013) p. 217.

⁸² *Ibid*, p. 218. See also the 1928 Geneva Convention on the Territorial Sea and Contiguous Zone, on the Continental Shelf, on the High Seas, and on the Fishing and Conservation of Living Resources of the High Seas, available at < <http://legal.un.org/avl/ha/gclos/gclos.html>> accessed 23 July 2013.

⁸³ United Nations Treaty Series, Volume 1340, No. 22484, p. 61 Available at <<https://treaties.un.org/doc/Publication/UNTS/Volume%201340/volume-1340-I-22484-English.pdf>> accessed 23 July 2013.

⁸⁴ United Nations Treaty Series, Volume 1148, No. 18961, p. 2. Available at <<https://treaties.un.org/doc/Publication/UNTS/Volume%201522/volume-1522-A-18961-English.pdf>> accessed 23 July 2013.

⁸⁵ The 1969 Vienna Convention on the Law of Treaties codified and added customary law on the subject of rules concerning conclusion, interpretation etc. of treaties. See United Nations, *Vienna Convention on the Law of Treaties*, 23 May, 1969, United Nations, Treaty Series, Vol. 1155, p. 331. For further reading of the Convention, see Richards Barnes, *supra note 79*, p. 5.

⁸⁶ Martin Dixon, *supra note 81*, p. 219.

⁸⁷ R. R. Churchill and A. V. Lowe, *supra note 77*, pp. 5- 6.

⁸⁸ Churchill and Lowe state: “Customary international law is, in principle, binding upon all States.

However, the essential role of consent in the formation of customary law has two important consequences as this general principle is concerned”, see R. R. Churchill and A. V. Lowe, *supra note 77*, pp. 6 – 7.

⁸⁹ R. R. Churchill and A. V. Lowe, *supra note 77*, p. 7.

⁹⁰ R. R. Churchill and A. V. Lowe state: “the United Kingdom failed to prove sufficient generality in the practice of adopting a ten-mile limit to establish it as a rule of customary law“, see R. R. Churchill and A. V. Lowe, *The Law of the Sea* (2nd edn, Manchester University Press 1988) p. 7., see also *Anglo-Norwegian Fisheries*, ICJ Reports, 1951, p. 116; 18 ILR.

The determinative role of the consent as the basis of obligation in customary law is that it is unnecessary to have recourse to the general practice of States in order to create a presumption that a particular State is bound by a rule if it can be proved that that State has in fact consented to that rule.⁹¹

3.1.1.1 Maritime Zones

Territorial Sea (& the Right of Innocent Passage)

Article 1 of the 1958 Territorial Sea Convention defines the territorial sea as “the sovereignty of a state extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as territorial sea.”⁹² In addition, Article 2 of UNCLOS provides archipelagic State’s: “Sovereignty ... and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.”⁹³ Sovereignty over the territorial sea implies an exclusive maritime border not exceeding 12 NM width of water exclusively controlled (and fully legislative) by the coastal state.⁹⁴ The sovereignty also extends to the air space, bed and subsoil. Nevertheless, a restriction of the sovereignty of the coastal state is the right for other nation’s vessels right for innocent passage through the territorial sea (compared to the coastal state’s internal waters which are fully within the unrestricted jurisdiction of the coastal state).⁹⁵ The right of foreign marine transport (in comparison with warships) to pass unhindered through the territorial sea of a coast is an old accepted principle in customary maritime law, despite sovereignty of the coastal state.⁹⁶ Article 17 of UNCLOS states the principle: “ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.” Although it should be noted that the term “innocent” is somewhat blurred in the doctrine and open to contrary interpretation.⁹⁷ In addition, the right of innocent passage in territorial waters is in certain situations restricted.⁹⁸

Straight Baselines

The traditional principle in customary internal law when defining the width of the territorial sea is by measuring from the low-water mark around the coasts of the state. This principle was reiterated in Article 3 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, and Article 5 of UNCLOS. However, special rules has evolved when geography of a state’s coast will be such as to cause problems when applying the traditional principle, such as when coastlines are deeply indented, numerous islands running parallel to coasts, or where existing bays are cutting into

⁹¹ *Ibid*, p. 7.

⁹² United Nations Treaty Series, Volume 516, No. 7477, p. 205.

⁹³ United Nations Treaty Series, Vol. 1833, No. 31363, p. 400.

⁹⁴ UNCLOS, Article 3, which state: “Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance with this Convention“. As of 2009, 137 states claimed a 12 nm territorial sea out of a total 150 states with proclaimed territorial sea limits. Compliance with Article 3 of the UNCLOS is 94 percent, indicating a very high level of acceptance and adherence to the current 12 nm limit of the territorial sea. See more at, <http://www.un.org/depts/los/reference_files/oceansday10_oxman.pdf> accessed 23 July 2013.

⁹⁵ Internal waters, such as harbours, lakes or rivers, are waters to be found on the landward side of the baselines from which the width of the territorial and other zones is measured, see Article 8, UNCLOS. Internal waters are classed as belonging to the land territory of the coastal state, they differ from the territorial sea since there exists no right of innocent passage.

⁹⁶ Malcolm N. Shaw, *International Law* (1st supp, 6th edn, Cambridge University Press 2008) p. 570.

⁹⁷ R. R. Churchill and A. V. Lowe, *supra* note 77, p. 82.

⁹⁸ Such as the right of exercising criminal jurisdiction over other state-flagged vessels, see UNCLOS, Article 27 – 28.

coastlines. These peculiar problems was raised in the *Anglo-Norwegian Fisheries* case⁹⁹ where the ICJ noted that the normal method of drawing baselines that are parallel to the coast (the *tracé parallèle*) was not applicable. This was due to the fact that it would “necessitate complex geographical geometrical constructions in view of extreme indentations of the coastline and the existence of the series of islands fringing the coasts.”¹⁰⁰ Instead the Court raised the concept of straight baselines as a valid principle of international law applicable to special geographic conditions with certain criteria for determining the applicability.¹⁰¹ These criteria was later codified and expanded in Article 4 of the Geneva Convention on the Territorial Sea from 1958 (hereinafter “Territorial Sea Convention”). The ICJ clarified in the *Qatar v. Bahrain* case that:

The method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. Such conditions are primarily that either the coastline is deeply intended and cut into, or that there is a fringe of islands along the coast in its immediate vicinity.¹⁰²

The Court also emphasized that even though a state considers itself as a multiple-island state or is *de facto* an archipelago there is no incentives for deviating from the normal rules of determination of baselines, unless relevant conditions are met.¹⁰³

Historic Internal Waters & Bays

Article 7 of the Territorial Sea Convention and Article 10 of UNCLOS does not apply to historic bays. Nevertheless, the status of historic bays has been directly referred to in early codifications of the law of the sea.¹⁰⁴ Both the Territorial Sea Convention as well as UNCLOS specifically exclude historic bays from the regime of jurisdictional bays, resulting in that the legal status of historic bays are based on customary law.¹⁰⁵

Historic bays need to be distinguished from the concept of historic internal waters, which the ICJ noted in the *Anglo-Norwegian Fisheries* case by stating: “waters that are treated as internal waters but which would not have that character were it not for the existence of an historic title”.¹⁰⁶ In the *Land, Island and Maritime Frontier Dispute* the Court endorsed a new view by observing that the regime of an historic bay in the gulf of Fonseca was *sui generis*, declaring that each historic bay may have its own distinctive legal regime.¹⁰⁷

In 1962 a study of the juridical regime governing historic waters, including historic bays, was published by the United Nations (hereinafter, “UN”). In the study a general criterion for establishing a historic title was concluded. It identified that a State “may validly claim title to a bay on historic grounds if it can show that it has for a considerable period of

⁹⁹ *Anglo-Norwegian Fisheries*, ICJ Reports, *supra* note 90, see especially p. 186.

¹⁰⁰ Malcolm N. Shaw, *supra* note 96, p. 560.

¹⁰¹ For further reading, Malcolm N. Shaw, *supra* note 96, pp. 560 – 561.

¹⁰² *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, ICJ Reports, 2001, pp. 44 – 461 ILR.

¹⁰³ Malcolm N. Shaw, *supra* note 96, p. 562.

¹⁰⁴ Donald R. Rothwell & Tim Stephens, *The International Law of the Sea* (1st supp, 2th edn, Hart Publishing 2010) pp. 48 – 49.

¹⁰⁵ *Ibid.*

¹⁰⁶ ICJ Reports, *supra* note 99, p. 91.

¹⁰⁷ Donald R. Rothwell & Tim Stephens, *supra* note 104, p. 48. See also *Land, Island and Maritime Frontier Dispute*, ICJ Reports, 1992, pp. 151 - 384 ILR.

time claimed the bay as internal waters and effectively exercised its authority therein, and that during this time the claim has received the acquiescence of other States”¹⁰⁸. However, the study has not led to any international legislative action, and therefore (as previously noted) customary law governs the position regarding historic bays.

Two principal issues are associated with the term historic bays. Firstly, the definition of the certain criteria is vague whether an area can be defined as an historic bay. The ICJ confirmed in the *Land, Island and Maritime Frontier Dispute* that the gulf of Fonseca is a historic bay, due to the joint sovereignty exercised by El Salvador, Honduras, and Nicaragua.¹⁰⁹ The ICJ states that what has been defined as “pluri-State bay” is to be regarded as historic bays.¹¹⁰

Further, the American Branch of International Law Association in 2003 proposed that the term historic bay:

Means a bay over which a coastal State has publicly claimed and exercised jurisdiction, and this jurisdiction has been accepted by other States. Historic bays need not meet requirements prescribed in the definition of ‘bay’ in the Convention, Article 10 (2)¹¹¹

In addition, the authors stated that: “this definition appears to follow the United States position.”¹¹²

The second issue regards the delimitation of historic bays. The ICJ considered this issue in the *Case Concerning the Land, Island and Maritime Frontier Dispute*. It noted that a normal geographical closing line for the waters of the gulf of Fonseca between the two natural entrance points into the gulf had been something that the three coastal states “had recognized in their practice”.¹¹³ To conclude, the ruling from the ICJ means that a closing line for historic bays which reflects general principles of international law, as well as customary law, in its delimitation has legitimacy as long as other states has accepted the delimitation.¹¹⁴ The decision is some what confirmed by the controversial claim of Libya to the gulf of Sidra,¹¹⁵ where protests from several states, including the U.S., the United Kingdom and Soviet has according to Churchill and Lowe resulted in “that the Gulf of Sidra is not an historic bay.”¹¹⁶

The Exclusive Economic Zone

¹⁰⁸ R. R. Churchill & A. V. Lowe, *supra note 77*, pp. 36 – 37.

¹⁰⁹ Donald R. Rothwell & Tim Stephens, *supra note 104*, p. 48, See also *Land, Island and Maritime Frontier Dispute*, ICJ Reports, *supra note 107*, p. 187.

¹¹⁰ *Ibid.*

¹¹¹ George K Walker & John E Noyes, ‘Definitions for the 1982 Law of the Sea Convention – Part II’ (2003) 33 California Western International Law Journal 191, p. 265.

¹¹² *Ibid.*, p. 265.

¹¹³ *Land, Island and Maritime Frontier Dispute*, ICJ Reports, *supra note 107*, p. 88.

¹¹⁴ For further reading, see R. R. Churchill & A. V. Lowe, *supra note 77*, pp. 36 – 37.

¹¹⁵ Libya claimed in 1973 the Gulf of Sidra to be regarded as an historic bay and drew a closing line of 296 miles in length, for further reading, see R. R. Churchill & A. V. Lowe, *supra note 77*, pp. 37 – 39.

¹¹⁶ *Ibid.*, p. 38.

The EEZ has developed out of earlier, more tentative claims, mainly relating to fishing zones.¹¹⁷ Established by UNCLOS Article 56, coastal state in their EEZ has *inter alia*:

- (a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and its subsoil and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
- (b) jurisdiction with regard to (i) the architecture and use of artificial islands, installations and structures (ii) marine scientific research; (iii) the protection and preservation of the marine environment.¹¹⁸

The rights span up to a distance of 200 nm.¹¹⁹ The EEZ combines characteristics of the territorial sea and the high seas, but cannot be assimilated into either. It is a *sui generis* zone with its own distinctive regime, in the legal doctrine being described as an “amalgam, or ‘multifunctional zone ... which coastal states enjoy sovereign rights ... to economic resources, and ... environmental protection.’”¹²⁰ In comparison to the territorial sea, coastal State’s EEZ do not have a plenary and *ipso jure* entitlement to sovereignty.¹²¹ In addition, other states are not entitled to unfettered freedoms like the high seas, even though they enjoy the freedom to navigate, over flight, lay submarine cables “and other internationally lawful uses of the sea related to these freedoms, such as associated with the operation of ships”.¹²² A wide variety of states have in the two last decades claimed an EEZ of 200 NM.¹²³ This, a large number of states claiming a 200 NM EEZ, should indicate the existence of the EEZ-concept as customary law. Which has been emphasized by the ICJ in the *Libya/Malta Continental Shelf* case, asserting that: “the institution of the exclusive economic zone ... is shown by the practice of states to have become a part of customary law.”¹²⁴

The High Seas

The essence of the freedom of the high seas is that no state may acquire sovereignty over parts of them.¹²⁵ However, the high seas is a subject to the operation of the doctrines of recognition, acquiescence and prescription, which may be subject for state’s sovereignty, as emphasized in the *Anglo-Norwegian Fisheries* case.¹²⁶ The origin of the high seas was defined in the 1958 Geneva Convention on the High Seas, Article 1, stating that all parts of the sea that are not included in the territorial sea or in internal waters of a State represents the high seas. This reflected the present customary international law.¹²⁷

¹¹⁷ Donald R. Rothwell & Tim Stephens, *supra* note 104, p. 82.

¹¹⁸ UNCLOS, Part XIII, especially Article 61 – 69. For further reading, see R. R. Churchill & A. V. Lowe, *supra* note 77, pp. 133 – 146.

¹¹⁹ UNCLOS, Article 56 – 57.

¹²⁰ Donald R. Rothwell & Tim Stephens, *supra* note 104, p. 84.

¹²¹ The EEZ is in accordance with UNCLOS, Article 57 established as a claimable maritime zone, for further reading, see Donald R. Rothwell & Tim Stephens, *supra* note 104, p. 85.

¹²² UNCLOS, Article 58.

¹²³ The Hydrographic Department of the Royal Navy noted the 1 January 2008 that 126 states and territories had proclaimed a 200 nm economic zone, see <<http://www.ukho.gov.uk/ProductsandServices/MartimeSafety/AnnualNm/12.pdf>> accessed 23 October 2013, p. 8.

¹²⁴ *Libya/Malta Continental Shelf*, ICJ Reports, 1985, p. 33 - 81 ILR.

¹²⁵ See the 1958 High Seas Convention, Article 2 & UNCLOS, Article 89.

¹²⁶ R. R. Churchill & A. V. Lowe, *supra* note 77, p. 167, see also *Anglo-Norwegian Fisheries*, ICJ Reports, *supra* note 90, p. 118.

¹²⁷ Malcolm N. Shaw, *supra* note 96, p. 609.

However, progressive development of State's actions lead to re-defining the high seas in UNCLOS, now including "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state."¹²⁸ Article 87 of UNCLOS provides that the high seas are open to all states, whether coastal or land-locked. Freedom of the high seas "is exercised under conditions laid down by this Convention and by other rules of international law."¹²⁹ It includes *inter alia* freedom of navigation, over flight, laying of submarine cables and pipelines, constructing artificial islands, fishing and scientific research.¹³⁰ Such freedoms are to be exercised with due regard for the interests of other states, as stated in the *Nuclear Tests* case and Article 88 of UNCLOS.¹³¹ Article 89 provides that: "no state may validly purport to subject any part of the high seas to its sovereignty." In general, the high seas should be regarded as *res communis*-area. Regarding jurisdiction on the high seas, it was concluded in the *Lotus* case¹³² that the basic principle relating to jurisdiction on the high seas is that the flag state alone may exercise such rights over the vessel.¹³³ However, the exclusivity of flag-state jurisdiction is a subject to multiple exceptions.¹³⁴

*International Straits & Transit Right*¹³⁵

Article 37 of UNCLOS established a new right of transit passage to straits used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive zone. This transit right reaffirms that the legal status of the waters of the strait in question is unaffected by the provisions dealing with the passage.¹³⁶ The right of transit passage involves the exercise of the freedom of navigation as well as over flight solely for the purpose of continuous and expeditious transit of the strait and does not preclude passage through the strait to enter or leave a state bordering that strait.¹³⁷ However, there are three exceptions to the right of transit passage.¹³⁸ In addition, it is unclear whether the right of transit passage has reached the status of customary law.¹³⁹

Regarding innocent passage in international straits, Article 16(4) of the Convention on the Territorial Sea declares that:

¹²⁸ *Ibid.*

¹²⁹ UNCLOS, Article 87.

¹³⁰ *Ibid.*

¹³¹ *Nuclear Tests*, ICJ Reports 1974, pp. 253 - 457; 57 ILR, p. 350.

¹³² *Lotus*, PCIJ, Series A, No.10, 1927, p. 25; 4 AD, p. 153.

¹³³ However, it needs to be noted that there are several exceptions to this general rule, such as jurisdiction regarding warships and ships owned or operated by States, see more in Malcolm N. Shaw, *supra note* 96, p. 614, and R. R. Churchill & A. V. Lowe, *supra note* 77, p. 168.

¹³⁴ Malcolm N. Shaw, *supra note* 96, p. 614.

¹³⁵ See Chapter 4 & 6 for a more thoroughly discussion regarding the definition of an international strait and the transit passage. See also, Malcolm N. Shaw, *supra note* 96, p. 575.

¹³⁶ UNCLOS, Article 34 – 35.

¹³⁷ UNCLOS, Article 38.

¹³⁸ The three exceptions for the right of transit passage in UNCLOS are: Article 36 - routes existing through straits through the high seas or economic zone of similar navigational convenience. Article 38 (1) - straits formed by an island of a state bordering the strait and its mainland, where there exists seaward of the island a route through the high seas or economic zone of similar navigational convenience. Article 45 - straits connecting an area of high seas or economic zone with the territorial sea of a third state. For further reading, see R. R. Churchill & A. V. Lowe, *supra note* 77, p. 91.

¹³⁹ Malcolm N. Shaw, *supra note* 96, p. 577.

There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of high seas or the territorial sea of a foreign state.

The provision needs to be read in conjunction with the ICJ judgment in the *Corfu Channel* case as well as Article 45 of UNCLOS stating that: “the regime of innocent passage ... shall apply in straits used for international navigation ... there shall be no suspension of innocent passage through such straits”. Clearly, Article 45 of UNCLOS states that the regime of innocent passage will apply with regard to straits used for international navigation excluded from the transit passage provisions by Article 38(1) and to international straits between a part of the high seas or EEZ and the territorial sea of a foreign state.

It should also be noted that the Court in the case emphasized the situation regarding warships by stating that: “States in time of peace have a right to send their warships through straits used for international navigation ... without the previous authorization of a coastal state ... provided that the passage is innocent.”¹⁴⁰

3.1.1.2 “The Arctic Clause”¹⁴¹

Article 234 of UNCLOS is a somewhat controversial¹⁴² provision granting coastal states special regulatory powers and enforcement rights in ice-covered waters “for the prevention, reduction and control of marine pollution from vessels“ within a 200 NM limit.¹⁴³ The article reads as follows:

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.

In order to understand the underlying impulsion of the development of Article 234, it is crucial to understand the legal controversies and disputes in 1970’s between the U.S., Canada and the Soviet (as thoroughly analyzed in Chapter 4). The Canadian scholar Huebert has expressed that Article 234 provided Canada and Russia with a way of “which it could extend its jurisdiction over its Arctic waters in a manner that would avoid a diplomatic conflict.”¹⁴⁴ Canada’s opinion¹⁴⁵ is that Article 234 provides international

¹⁴⁰ *Corfu Channel*, ICJ Reports, 1949, p. 4; 16 AD, p. 161, see also R. R. Churchill & A. V. Lowe, *supra* note 77, pp. 91 – 93 regarding the peculiar situation with warships and transit right.

¹⁴¹ Article 234 was negotiated into the 1982 UNCLOS by Canada and has been hailed as the “Arctic Clause” due to its special jurisdictional characteristics; see more at <<http://www.dfo-mpo.gc.ca/oceans/canadasoceans-oceansducanada/marinezones-zonesmarines-eng.htm>> accessed 23 July 2013.

¹⁴² Article 234 has been the subject for severe controversy in several matters, see Chapter 6 for an example.

¹⁴³ UNCLOS, Article 234.

¹⁴⁴ Rob Huebert, ‘Article 234 and Marine Pollution Jurisdiction in the Arctic’ in Alex G. Oude Elferink & Donald R. Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff Publishers & Kluwer Law International, 2001) p. 251.

acceptance to the Arctic Waters Pollution Prevention Act (hereinafter, “AWPPA”).¹⁴⁶ However, it needs to be emphasized that Canada legislated more stringent environmental regulations previous of the incorporation of Article 234. The preamble to the Act reads as follows:

Navigation in coastal waters within Canadian jurisdiction north of latitude 60°N is governed by the Arctic Shipping Pollution Prevention Regulations (ASPPR), under the Arctic Waters Pollution Prevention Act. The ASPPR deal with the construction of ships ... Arctic Pollution Prevention Certificates ... All vessels above 100 tons that navigate Canadian Arctic waters must comply with these regulations, including reporting requirements.

The former Soviet Government (and now Russia’s) opinion is that Article 234 is a justification¹⁴⁷ for strengthening control over its northern waters through the Regulations for Navigation on the Seaways of the Northern Sea Route. Soviet legislated more stringent environmental regulations after the incorporation of Article 234. The preamble to the Act reads as follows:

Ensuring safe navigation and preventing, reducing ... from vessels since the specifically severe climatic conditions that exists in the Arctic Regions and the presence of ice during the most part of the year bring about obstacles, or increased danger, to navigation while pollution of sea or the Northern Coast of the USSR might cause great harm to the ecological balance or ... inflict damage ... of the North peoples.¹⁴⁸

In addition to the two legislative acts, the IMO is currently endeavoring to operationalize Article 234 through the on-going development of a mandatory Polar Code.¹⁴⁹ The now on-place voluntary Polar Guidelines¹⁵⁰ is solely based on Article 234, as stated in the preamble of the code:

The need to develop safety and pollution control guidelines specific to polar operations has been recognized by several of the Administrations principally affected, [...] classification societies, by international organizations concerned with the polar environment, and by the United Nations itself. Clause 234 of the Law of the Sea Convention [...] gives Coastal States with ice-covered areas the right [...]¹⁵¹

¹⁴⁵ According to Eric Franckx, *Maritime Claims in the Arctic: Canadian and Russian Perspectives* (Martinus Nijhoff Publishers & Kluwer Law International, 1993) p. 96.

¹⁴⁶ Act to Prevent Pollution of Areas of the Arctic Waters Adjacent to the Mainland and Islands of the Canadian Arctic of 26 June 1970 ((1970) 9 ILM 543), available at <<http://www.tc.gc.ca/eng/marinesafety/debs-arctic-acts-regulations-awppa-494.htm>> accessed 17 October 2013.

¹⁴⁷ Rob Huebert, *supra note* 144, p. 257.

¹⁴⁸ USSR Council of Ministers Decision No. 565 of 1 June, USSR Minister of Merchant Marine, ‘*Rules of Navigation: Regulations for Navigation on the Seaways of the Northern Sea Route*’ (1990), available in English at: <<http://www.morflot.ru/about/semvorput/en/rulesofnavigation.doc>> accessed 8 October 2013. See also Rob Huebert, *supra note* 144, pp. 257 – 259.

¹⁴⁹ See Chapter 1.5.2 for more information regarding the Polar Code.

¹⁵⁰ See Chapter 1.5.2 for more information regarding the Polar Guidelines.

¹⁵¹ IMO Guidelines, *Guidelines for ships operating in Arctic ice-covered waters* (IMO Doc. SC/Circ.1056 MEPC/Circ.399, 23 December 2002) pp. 3 – 4, available at <<http://www.imo.org/Publications/Documents/Attachments/Pages%20from%20E190E.pdf>> accessed 3 January 2014.

The overall purpose of the Polar Code and Polar Guidelines is to harmonize commercial Arctic marine transport, and it is expected that the binding legal instrument [the Polar Code] will be in place around 2015-2016.¹⁵²

3.1.2 Sea Ice's Undefined Legal Status

In 1972 the Russian scholar Olenicoff described the Arctic Ocean as a vast and unique body of water, differing significantly from the rest of the ocean with the following words:

Like the face of an alien planet, it stretches across the top of the world, its waters held captive by an ever-present mask of ice. It is the only ocean in the world that can be crossed on foot, but no man has ever dared to do so. Scores of ships have been mercilessly crushed by its guardian icefields, the same paradoxical masses of ice that benevolently provide island-size floating platforms for scientific research stations. Stirred slowly by storms winds and sea currents, this perpetually shifting jigsaw of drifting ice crumbles and merges, expands and contracts, like a restless, breathing beast.¹⁵³

Olenicoff's impressionistic description of the Arctic's permanent sea ice describes the difficulties when discussing its legal status. Hence, international law defining sea ice in its assorted forms remains incomplete and unclear.¹⁵⁴ Due to the complexity of the matter, two different schools, or theories, of law has developed. Østreng has labeled these two theories as the ice-is-water theory and the ice-is-land theory.¹⁵⁵

The ice-is-water theory (mare liberum-res communis)

According to Østreng, the ice-is-water theory recognizes that sea ice could be used for human purposes, and in some cases be the subject of occupation. However, due to sea ice's constantly changing nature the prerequisites in international law for a permanent sovereign structure is not fulfilled, concluding that sea ice could never be an object of sovereign possession.¹⁵⁶ According to Cinelli, the main weakness of considering *glaciers firma* equal *terra firma*, "lay in the fact that the *glaciers* could not, by their nature, be *firma*."¹⁵⁷ This is in line with Østreng's view, stating that: "it is illogical to claim national sovereignty over an object that could melt and disappear from the face of the Earth. Ice is waters and will never be anything but water."¹⁵⁸

The ice-is-land theory (glaciers firma as terra firma-res nullius)

Supporters of this theory claims that ice bears no resemblance to water. Instead, ice composes a solid substance which *inter alia* can be occupied and settled on by indigenous people for generations, perform as navigational barriers for vessels, and definite limits.

¹⁵² According to Rob Huebert, *supra note* 144, p. 266. However, it should be noted that the date has been postponed several times.

¹⁵³ S. M. Olenicoff, *Territorial Waters in the Arctic: The Soviet Position* (R-907-ARPA - Rand Publications, 1972) p. 3.

¹⁵⁴ Christopher C. Joyner, 'The Status of Ice in International Law' in Alex G. Oude Elferink & Donald R. Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff Publishers & Kluwer Law International, 2001) p. 23.

¹⁵⁵ Willy Østreng, *supra note* 13, p. 258.

¹⁵⁶ *Ibid.*

¹⁵⁷ Claudia Cinelli, 'The Law of the Sea and the Arctic Ocean' (2010) Vol. 2 *Arctic Review on Law and Politics*, p. 8. Available at <http://site.uit.no/arcticreview/files/2012/11/AR2011-1_Cinelli.pdf> accessed 15 October 2013.

¹⁵⁸ Willy Østreng, *supra note* 13, p. 258.

Ice can therefore not be subject for laws evolved for a liquid substance, instead it should subsist as territory.¹⁵⁹ According to Timtchenko, the theory derives mainly from Soviet legal scholars since the NSR is covered by ice for about 10 months a year.¹⁶⁰ Dunlap states that the academic reaction to the Russian scholar Martens rejection of equating ice with dry land in 1905 was the starting point for the ice-is-land theory supporters. Mainly these supporters argued that sea ice in the Arctic Ocean, and in particular the NSR are “inseparable from the land and should serve as the baselines for measuring the territorial sea.”¹⁶¹ However, Timtchenko reports that recent Soviet and Russian jurists seems to be in compliance with Martens position.¹⁶²

3.2 The Sector Theory

In 1925 Canada claimed sovereignty over all islands situated between the Canadian mainland and the North Pole without formal requirements to acquisition of territory set out by international and customary law.¹⁶³ Instead the claimed sovereignty was drawn by meridians of longitude and measured over a sector of the earth’s surface.¹⁶⁴ The concept came to be known as the Sector Theory. This concept was soon adopted by the Soviet, who as the only Arctic State formally declared its claim to Arctic sovereignty in a 1926 Decree,¹⁶⁵ which reads as follows:

All lands islands situated in the Arctic to the North, between the coastline of the USSR and the North Pole, both already discovered and those which may be discovered in the future, which at the time of the publication of the present decree are not recognized by the government of the USSR as the territory of any foreign State are hereby declared territory of the Union ... between the meridian 32°4’35’’ longitude ... and the meridian 168°49’30’’ longitude.¹⁶⁶

The fact that the Decree exclusively refers to *lands and islands* has adversarial been the starting point for a number of Soviet legal scholars claiming that the Decree also covers maritime territory according to Churchill.¹⁶⁷ So is the case with Lakhtine’s interpretation in ‘Prava na severnye polyarnye prostranstva’ (Rights over the Arctic Regions) published in 1928, which according to Timtchenko was the first scholar who interpreted the Decree

¹⁵⁹ A similar view is also expressed by Christopher C. Joyner, *supra note* 154, p. 30 and Claudia Cinelli, *supra note* 157, pp. 8 – 10. See also Willy Østreng, *supra note* 13, pp. 258 – 259.

¹⁶⁰ Leonid Tymchenko, *supra note* 51, p. 277.

¹⁶¹ William V. Dunlap, ‘Transit Passage in the Russian Arctic Straits’ (1996) Vol. 1 Nr. 7 *Maritime Briefing*, p. 37. Available at <<https://www.dur.ac.uk/ibru/.../download/?id=230.pdf>> accessed 15 October 2013.

¹⁶² Leonid Tymchenko, *supra note* 51, p. 277.

¹⁶³ Robin R. Churchill, ‘Claims to Maritime Zones in the Arctic’ in Alex G. Oude Elferink & Donald R. Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff Publishers & Kluwer Law International, 2001) p. 121.

¹⁶⁴ Ivan L. Head, ‘Canadian Claims to Territorial Sovereignty in the Arctic Regions’ (1963) Vol. 9 *McGill Law Journal*, p. 4. Available at <<http://www.lawjournal.mcgill.ca/userfiles/other/131472-head.pdf>> accessed 15 October 2013.

¹⁶⁵ In the Decree of the Presidium of the Central Executive Committee of the USSR On the Proclamation of Lands and Islands Located in the Northern Arctic Ocean as Territory of the USSR of 15 April 1926, see Leonid Tymchenko, *supra note* 54, pp. 276 – 278 due to lack of official English translation.

¹⁶⁶ Cited through Robin R. Churchill, *supra note* 163, pp. 121 – 122 & Leonid Tymchenko, *supra note* 51, pp. 276 – 278 due to lack of an official English translation.

¹⁶⁷ *Ibid.*, p. 122.

to include marine areas.¹⁶⁸ Later, the noted Russian scholar Korovin modified Lakhtine's interpretation. According to Tymchenko, Korovin's interpretation "insisted that the term lands and islands has to include also ice blocks and surrounding seas."¹⁶⁹ A likewise view is expressed by Nossova, who states "a broad reading of this Decree was favored ... "islands and lands" as used in the Decree were considered to mean not only the continental land."¹⁷⁰ However, there is no evidence of state practice that the Soviet or Russian government have relied, or endorsed, these scholars' interpretations.¹⁷¹ Although, as discussed later, the sector theory has been relied on when delineating maritime boundaries in the Arctic.¹⁷²

The sector theory's legitimacy, function and applicability are interpreted in two different theories, which adds to the theory's ambiguity in light of international law.¹⁷³ First, the theory can be regarded as a modified version of the *contiguity principle* i.e., existing rights to claim sovereignty over areas with the foundation of propinquity of the claimant state to certain territories. The sector theory in this interpretation would provide each Arctic state complete jurisdiction covering all range of activities occurring as pie-shaped wedges bounded on the east and west by meridians of longitude merging at the North Pole.¹⁷⁴

Second, the theory's legitimacy can be regarded as a legal instrument of delineating Arctic expanses subject for sovereignty claims, such as *effective occupation*. Østreng states that given this interpretation "the sector idea may be unobjectionable, if other elements in the situation are satisfactory."¹⁷⁵

In addition, several other theories have tried to incorporate the sector theory in international law, such as the British international lawyer, M. F. Lindley - trying to link the sector theory to the hinterland theories.¹⁷⁶ Nevertheless, these theories have never won any significant recognition.¹⁷⁷

The sector theory has not reached acceptance in international or customary law, although the Decree, and Russian legal scholars' interpretations, has not been seriously challenged by other States.¹⁷⁸ In addition, the sector theory has been used for delimitation.¹⁷⁹ As Østreng notes: "this implies that the claim is regarded as a practical means of delimitation an area of sovereignty."¹⁸⁰ Although it is ambiguous what legal impact this infers since the

¹⁶⁸ Leonid Tymchenko, 'The Russian Sectoral Concept: Past and Present' (1997) Vol. 50 *Arctic*, pp. 29 – 32. Available at <<http://pubs.aina.ucalgary.ca/arctic/Arctic50-1-29.pdf>> accessed 23 October 2013.

¹⁶⁹ *Ibid.*, p. 30.

¹⁷⁰ Irina Nossova, 'Russia's International Legal Claims in its Adjacent Seas: the Realm of Sea as Extension of Sovereignty' (PhD thesis, University of Tartu 2013) p. 19.

¹⁷¹ Robin R. Churchill, *supra* note 163, p. 122.

¹⁷² On September 15, 2010, the foreign ministers of Norway and Russia signed a treaty on maritime delimitation and cooperation in the Barents Sea as well as the Arctic Ocean; the "2010 Agreement", see Chapter 4.1.4.2.

¹⁷³ Willy Østreng, *supra* note 13, p. 254.

¹⁷⁴ *Ibid.* Dunlap also expresses a similar opinion, see William V. Dunlap, *supra* note 161, p. 36.

¹⁷⁵ Willy Østreng, *supra* note 13, p. 254

¹⁷⁶ For further reading, see Pier Horensma, *The Soviet Arctic* (1st edn, Routledge Publishing, 1991) pp. 586 – 592.

¹⁷⁷ According to Pier Horensma, *Ibid.*, p. 586.

¹⁷⁸ Willy Østreng, *supra* note 13, p. 255.

¹⁷⁹ See Chapter 4.1.4.2

¹⁸⁰ *Ibid.*

theory itself has been expressly rejected by the U.S., Denmark and Norway, among other states.¹⁸¹ In addition to the sector theory in the NSR, Canada has also previously invoked the theory in negotiations with the U.S. concerning the Beaufort Sea maritime boundary, as well as the Nunavut Boundary in the Inuvialuet Land Claim.¹⁸² However, by a speech held in August 2006 the Canadian Prime Minister definitely illustrated the Canadian abandonment from claiming Arctic sovereignty through the sector theory with the following words:

I am here today to make it absolutely clear that there is no question about Canada's Arctic border. ... All along the border, our jurisdiction extends outward 200 miles into the surrounding seas ... No more. And no less.¹⁸³

¹⁸¹ Robin R. Churchill, *supra note* 163, p. 123.

¹⁸² *Ibid*, pp. 123 – 124.

¹⁸³ Stephen Harper, Canada's Prime Minister, Speech on Securing Canadian Sovereignty in the Arctic (August 12, 2006) available at: <<http://byers.typepad.com/arctic/2009/03/securing-canadian-sovereignty-in-the-arctic.html>> accessed 15 July 2013.

4 Legal Disputes & Controversies

The previous chapter aimed to provide the reader with the necessary basic tools to understand the more complex nature of what will be discussed in the approaching chapters. This chapter will provide the reader with the core of the thesis and will solely focus on the actual legal disputes and controversies in the Arctic sea routes. The chapter is structured by dividing the legal disputes and controversies into the three Arctic sea routes examined. Due to the volume and range of the disputes and controversies, analyzing will be presented throughout this chapter to facilitate the outcome and conclusions in the more subjective forthcoming chapters.

4.1 The Northern Sea Route

4.1.1 Shipping in the High Seas of the Arctic – Subject to Russian Jurisdiction?

As discussed in Chapter 2.3, the NSR is comprised by a multi series of temporary channels where marine Arctic transport are forced to use the channel that provides the best ice and navigational conditions. Further, Chapter 2.3.1 concluded that there is two definitions of the NSR, an official definition as found in Russian laws and regulations, and an unofficial definition, based on a functional approach of organizational and geopolitical criteria.

In 1990 the Head Department of Navigation and Oceanography of the Soviet Ministry of Defence published the Decree ‘Regulations for Navigation on the Seaways of the Northern Sea Route’.¹⁸⁴ According to the Decree, the new regulations where composed in accordance with the Soviet Council of Ministers Decision No. 565 of 1 June 1990, as well as “with due regard to the relevant provisions of the Soviet legislation and rules of international law.”¹⁸⁵ Article 1.2 of the Decree reads as follows:

The Northern Sea Route – national transportation route of the USSR, which is situated within the inland waters, territorial sea (territorial waters), or exclusive economic zone adjoining the USSR northern coast, and includes seaways suitable for guiding ships in ice. The extreme points ... are the western Novaya Zemlya straits ... and in the east, the Bering Strait.¹⁸⁶

According to the Decree, the official Russian definition of the NSR is a; - (i) *coastal route* consisting of internal as well as territorial waters of the Russian Federation, or - (ii) a *high latitudinal route* situated inside the Russian 200 NM EEZ boundaries, or - (iii) a combined route consisting of (i) and (ii). This definition implies that shipping in the high latitudinal route of the NSR would be a subject for Russian jurisdiction, despite its obvious violation of the high seas regime (see Chapter 2.3.1).

¹⁸⁴ Izveshcheniya moreplavatelym, (29) MO SSSR, GUNiO (1991), cited through Leonid Tymchenko, *supra* note 54, p. 285, due to lack of an official English translation.

¹⁸⁵ *Ibid.*

¹⁸⁶ Cited through Eric Franckx, ‘The Legal Regime of Navigation in the Russian Arctic’ (2010) 18(2) *J. of Transnational Law & Policy*, pp. 336 – 337, due to lack of an official English translation. Available at <http://www.law.fsu.edu/journals/transnational/vol18_2/franckx.pdf> accessed 18 October 2013.

The Russian definition of the NSR has been subject to criticism amongst several maritime law scholars.¹⁸⁷ In order to provide an extended explanation of the confusing definition, prominent Soviet/Russian lawyers, A. L. Kolodkin, former President of the Soviet Association of Maritime Law (hereinafter, “SAML”), and Dr. M. E. Volosov, former Chief Secretary of the Executive Committee of the SAML published an article in the leading journal of ocean policy studies. It provided a point of view, which has won some recognition in the international maritime law community.¹⁸⁸

Kolodkin and Volosov argued that Arctic States are obtruded with a special responsibility for preserving the Arctic ecosystem as well as its natural resources and therefore “the States of the region must possess certain privileges and prerogatives, above all with respect to regulating the access of users, including foreign users, and also with respect to comprehensive control over all types of activity carried on in the region.”¹⁸⁹

In summary, Kolodkin and Volosov claimed that, when discussing the legal status of the NSR, the certain characteristics and hydrographical factors of the region needs to be taken into account. Østreng’s interpretation of Kolodkin and Volosov’s article is of a similar view.¹⁹⁰ Clearly, Kolodkin and Volosov wanted to create a sense that the NSR has certain special privileges due to its unique characteristics.

Further, Kolodkin and Volosov states that: “the Arctic states may realize their powers in the region not only in accordance with international law, but also on the basis of national norms reflecting the complex history of Arctic exploitation.”¹⁹¹

In conjunction with what has been cited above, the following statement in the article is highly provoking;

But under any circumstances a significant part of the Northern Sea Route lies within the Soviet economic zone, or the territorial and even the internal waters of the USSR. The integral nature of the Northern Sea Route as a transport route is not affected by the fact that individual portions of it, at one time or another, may pass outside of the aforesaid boundaries where the USSR exercises its sovereign rights or sovereignty in full (i.e. it may pass into the high seas). This fact is supplemented by factors of an historical order. The contribution of the Russian and Soviet State to not merely the study, exploration and outfitting of the Northern Sea Route as a transport route, but also the entire polar region where continental and island territories of the Arctic belonging to the USSR are situated, is well known and internationally recognized. There is thus an aggregate of legal and other material circumstances which enable the Northern Sea Route to be relegated to the category of national transport routes.¹⁹²

Followed by;

Having regard to this, one must conclude that the regulation of the navigation along the Northern Sea Route is the prerogative of the USSR as the coastal

¹⁸⁷ Willy Østreng, *supra note* 13, p. 211.

¹⁸⁸ A. L. Kolodkin & M. E. Volosov, ‘The Legal Regime of the Soviet Arctic: Major Issues’ 14(2) *Marine Policy* <<http://www.sciencedirect.com/science/article/pii/0308597X9090103X>> accessed 11 October 2013.

¹⁸⁹ *Ibid*, pp. 159 – 160.

¹⁹⁰ Willy Østreng, *supra note* 13, p. 259.

¹⁹¹ A. L. Kolodkin & M. E. Volosov, *supra note* 188, p. 161.

¹⁹² *Ibid*, p. 161.

State on this route.¹⁹³

Kolodkin and Volosov confirms that a part of the NSR positions outside the EEZ in *de facto* international waters, although *pari passu* claims that in case a vessels traverses seaways undisputedly under Russian jurisdiction, the NSR stretches “beyond its own economic zones in high latitudes.”¹⁹⁴ In conclusion, Kolodkin and Volosov implies that all feasible Arctic sea routes south of the North Pole and across the North Pole, could be subject to Russian jurisdiction as a part of the NSR, with the prerequisite of the vessel previously traversed Russian coastal waters.

Østreng, at the time the President of the Norwegian Scientific Academy for Polar Research, goes further and states that “in cases when the convoys are forced by sea ice to enter the high sea, prominent Soviet ocean law experts have claimed that the navigation lanes used are national and under full Russian control and jurisdiction.”¹⁹⁵

Kolodkin and Volosov’s interpretation of the definition has recently gained recognition in a Russian-Norwegian study published in 2007, confirming that voyages along the NSR are achieved by “coastal, marine, high-latitude and near-pole routes“ (see Figure 2.4), where “the fourth route, which is 700 miles shorter than the coastal route, passes the large circle across the geographical North Pole.”¹⁹⁶ However, the study states that: “the most important factor appears to be ... zones with the easiest ice conditions, regardless of whether they are encountered on coastal or high-latitude routes.”¹⁹⁷

Nevertheless, when defining the NSR in Chapter 2.3.1 and in conjunction with the law of the sea, it is clear that the near-pole routes do not necessary involve Russian internal waters, territorial waters, or the EEZ.

It needs to be noted that the Russian-Norwegian report in 2007 was written in co-operation with the Arctic and Antarctic Research Institute (hereinafter, “AARI”) of the Federal Service for Hydrometeorology and Environmental Monitoring of the Russian Federation. The Federal Service is one of the oldest and largest Russian research institutes in the field of comprehensive studies of the Polar Regions and has a significant role in Russia’s state affairs.

In addition to Kolodkin and Volosov’s reasoning, other Soviet/Russian scholars have argued for “extended geographical interpretations”¹⁹⁸ of the NSR beyond the EEZ. According to Østreng, this approach of arguing has its foundation in the 1990 Decree, which contain the Russian concept of “marine areas adjacent.”¹⁹⁹ It is unclear in Russian legislation whether this concept applies beyond the Russian EEZ or not. However, this reasoning has not reached any significant recognition in the maritime law community, but has added to the ambiguousness.

¹⁹³ *Ibid*, pp. 161 – 163.

¹⁹⁴ *Ibid*, p. 162.

¹⁹⁵ Willy Østreng, ‘Shipping and Resources in the Arctic Ocean: A Hemispheric Perspective’ (2012) 1(1) *2012 Arctic Yearbook*, p. 3. Available at <<http://arcticyearbook.com/index.php/articles/12-shipping-and-resources-in-the-arctic-ocean-a-hemispheric-perspective>> accessed 12 February 2014.

¹⁹⁶ Ola M. Johanssen, *Remote Sensing of Sea Ice in the Northern Sea Route: Studies and Applications* (Spring-Praxis Publishing 2007) p. 21.

¹⁹⁷ *Ibid*, p. 23.

¹⁹⁸ *Ibid*, p. 261.

¹⁹⁹ *Ibid*.

Nevertheless, as Østreng notes, Kolodkin and Volosov's (and in some regard other scholars) interpretation of the NSR overlaps with the TSR and "covers huge expanses of the high seas that according to the UN Convention on the Law of the Sea 1982 (UNCLOS) is open to all nations and where ships are subject to flag state jurisdiction."²⁰⁰ This interpretation creates a sort of "creeping jurisdiction" in the NSR with undefined boundaries. Read in conjunction with the legal regime of the high seas (Chapter 2.3.1), it becomes obvious that this "creeping jurisdiction" is a palpable violation of the governing legal framework.

4.1.2 The Right of Innocent Passage in the Northern Sea Route

As noted in Chapter 3, the NSR is subject to the regime and principles of the Geneva Conventions on the Law of the Sea and UNCLOS, including sea expanses of the Soviet/Russian Arctic. However, certain special features have to be considered when discussing the concept of innocent passage in the NSR. Soviet and Russian state practice suggests that no right of innocent passage applies in its internal waters. This is a result of straight baselines as defined in the 1985 Decree. The Decree covered several archipelagos in the Soviet/Russian maritime Arctic.

Kolodkin and Volosov claims that:

Can one consider that the right of innocent passage through Soviet territorial waters in the Arctic, in instances where those waters include the Northern Sea Route, operates as has been established in the said conventions without any limitations? The answer is no, for certain additional factors operate here.²⁰¹

To summarize, Kolodkin and Volosov argues for certain special limits of innocent passage due mainly to two factors. Firstly, the NSR as a whole, irrespective of whether it passes through territorial waters, should be relegated to the category of national transport routes. The *Norwegian Indreleia* is such a route that encloses the entire route through straight baselines.²⁰² This route has been confirmed by the ICJ in its judgment of 18 December 1951 in the *Anglo-Norwegian fisheries* case, as well as in Norwegian legislation.²⁰³ The ICJ ruled that the entire sea route from Varangersfjorden to Porangersfjorden, irrespective of whether or not parts are within internal or territorial waters was exploited and equipped exclusively by Norway. Therefore it is under the complete control and administration of Norway.²⁰⁴ The ICJ ruled the *Norwegian Indreleia* to be "not a strait at all, but rather a navigational route prepared as such by

²⁰⁰ Willy Østreng, *supra* note 195, p. 5.

²⁰¹ A. L. Kolodkin & M. E. Volosov, *supra* note 186, p. 166.

²⁰² See Chapter 5 and *Anglo-Norwegian Fisheries*, ICJ Reports, *supra* note 90, pp. 130 – 132. For further reading, see William V. Dunlap, *supra* note 161, pp. 40 – 42. Regarding the jurisdiction concerning straight baselines, see Chapter 3.1.1.

²⁰³ R. R. Churchill & A. V. Lowe, *supra* note 77, p. 167, see also *Anglo-Norwegian Fisheries*, ICJ Reports, *supra* note 90, p. 118.

²⁰⁴ The ICJ drew attention to two conditions: first the knowledge of other States about such claims; and second the absence of negative reactions on the part of other States. Further, the ICJ gave a positive reply to the question of whether areas were sufficiently connected to the land so as to be under the sovereignty of the coastal state.

means of artificial aids to navigation provided by Norway.²⁰⁵ According to Kolodkin and Volosov, the positive reply of the ICJ towards Norway in the *Anglo-Norwegian fisheries* case means that the prerequisites for a national transport route are “fully applicable to the USSR.”²⁰⁶

The second factor proposed by Kolodkin and Volosov for limiting the right of innocent passage in the NSR is the enclosure of a number of Arctic areas by baselines drawn in accordance with the Decree of the Soviet Council of Ministers of 15 January 1985. Thereby a number of sea expanses around groups of islands, straits and other expanses have been linked with the mainland.²⁰⁷ As discussed in Chapter 3.1.1.1 regarding straight baselines, the legal consequence of the delimitation is that areas enclosed by baselines have become internal seawaters. This means that, in accordance with the general rule, the passage and navigation of foreign vessels therein is possible only with the authorization of the coastal State. In accordance with Article 5(2) of the Territorial Sea Convention, the enclosure of internal waters by straight baselines towards areas that previously was considered to be the high seas or territorial waters, would be a withdrawal of the right of innocent passage. However, Article 8(2) of UNCLOS establishes the same principle of preserving the right of innocent passage under the aforesaid method of calculating baselines, based on certain circumstances that are analyzed in Chapter 5.2. Due to this circumstances in a number of coastal areas including straits, it would seem that, the right of innocent passage in the NSR could be considered operative after the straight baselines have been drawn.

Kolodkin and Volosov objects by stating that:

It follows from the interpretation of an analogous decision taken by Canada on 15 September 1985, which entered in force on 1 January 1986, on the baselines drawn around waters in the Northwest, including the Northwest Passage, that there never was a right of innocent passage in those waters (although as is well known American ships passed through those waters several times, the last being the *Polar Sea* in 1985).²⁰⁸

Followed by:

The approach of Canada, in our view, corresponds also to the approach of the USSR, the more so since foreign ships have not passed through Soviet waters.²⁰⁹

Kolodkin and Volosov correctly observes that Canada in 1985 objected to the traversing of the U.S. Coast Guard vessel *Polar Sea* in the NWP on the grounds that it was internal waters and the right of innocent passage did not exist (which Soviet publicly supported).²¹⁰ However, as Dunlap notes - Canada has never ratified the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, therefore the Canadian claims in the NWP is established by customary law.²¹¹ Soviet/Russia who ratified the convention are therefore bound by Article 5(2) of the Convention, which “retains the

²⁰⁵ *Anglo-Norwegian Fisheries*, ICJ Reports, supra note 90, p. 132.

²⁰⁶ A. L. Kolodkin & M. E. Volosov, supra note 188, p. 166.

²⁰⁷ *Ibid.* See also Chapter 2.3.1 regarding the Decree of the USSR Council of Ministers of 15 January 1985.

²⁰⁸ A. L. Kolodkin & M. E. Volosov, supra note 188, p.167.

²⁰⁹ *Ibid.*

²¹⁰ William V. Dunlap, supra note 161, p. 40.

²¹¹ *Ibid.*

right of innocent passage through waters enclosed by straight baselines but previously considered to be high seas or territorial sea.²¹²

4.1.3 “Arctic Ocean is Russian Territory”

In the late summer of 2007 two privately funded Russian submarines planted a Russian titanium-flag under the North Pole on the Lomonosov Ridge at a depth of 4,300 meters.²¹³ On board the record-breaking dive were Dr. Arthur Chilingarov, a famous polar researcher, Doctor of Geography, and a hero of Soviet. During the dive, Chilingarov was the previous Deputy chairman of the State Duma, and in addition a close friend and associate to President Vladimir Putin.²¹⁴

Directly after the successfully dive – during the time Chilingarov, furthermore, was the Head of the Russian scientific program for the International Polar Year of 2007 – Chilingarov claimed that the purpose of the expedition was to prove that the “Arctic Ocean is Russian territory”, and “has always been Russian.”²¹⁵ The statement in conjunction with Chilingarov’s influence in Russian politics, close connection with Vladimir Putin and prominence in Arctic science, made a large echo across the world. Canadian foreign minister, Peter McKay stated, “This isn’t the 15th century. You can’t go around the world and just plant flags and say: ‘We’re claiming this territory’.”²¹⁶ Canada as well as Denmark claims the Lomonosov Ridge as part of their respective continental shelves, both States’ objecting to the claimed importance of planting the flag. However, Article 77(3) of UNCLOS clearly states that: “The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or any express proclamation.”

Due to massive speculation of a rising cold war flourishing in the media, Chilingarov was forced to tone down his previous statements, claiming that “I am all for international cooperation in the Arctic.”²¹⁷ In addition, Russian Foreign Minister Sergej Lavrov has stated that the flag planting was not an official act of the Russian State, and underscores that “Russia strictly abides by the norms and principles of international law and is firmly determined to act within existing international agreements and mechanisms.”²¹⁸

²¹² *Ibid*, p. 40 – 41.

²¹³ Tom Parfitt, ‘Russia Plants Flag on the North Pole Seabed’ *The Guardian* (Moscow, 2 August 2007) <<http://www.theguardian.com/world/2007/aug/02/russia.arctic>> accessed 21 July 2013.

²¹⁴ Yuri Plutenko, ‘Arthur Chilingarov: Russia’s Arctic Explorer’ *The Moscow News* (Moscow, 17 July 2008) <<http://themoscownews.com/proetcontra/20080717/55338262.html>> accessed 21 July 2013.

²¹⁵ Felix Lüth & Marc Sonntag, ‘Who Owns the Arctic? A Stocktaking of Territorial Disputes’ *The Global Journal* (6 March 2012) <<http://theglobaljournal.net/article/view/628/>> accessed 21 August 2013.

²¹⁶ *Ibid*.

²¹⁷ Yuri Plutenko, *supra note* 214.

²¹⁸ Willy Østreng, *supra note* 13, p. 261.

4.1.4 Legal Disputes & Controversies Associated with the Sector Theory

4.1.4.1 The Russian Sector Theory – Still Alive?

On 1 October 1987 in Murmansk, Soviet leader Mikhail Sergeyevich Gorbachev held a speech devoted to disputes in the Arctic region with different proposals for regional security and cooperation. He stated that:

Depending on the evolution of the normalization of international relations ... we could open the Northern Sea Route for foreign shipping subject to the use of our icebreaker pilotage.²¹⁹

This was a real breakthrough in the Soviet approach to the Arctic region, despite that the speech did not touch on the Soviet sector theory directly. However, the legal impact of Gorbachev's Murmansk speech should not be underestimated. The speech influenced the process of redefining and grabbing a new approach to the sector theory among Soviet state bodies and lawyers of the Soviet Durma. Despite radical political changes in the Soviet during the mid 1980's (the *perestroika*) the position on the Arctic, and in particular the sector theory, still remained unclear.

Franckx claims that doubts concerning the Russian sector theory's legal validation and official position is evident from the Annex to Issue 1 of the '1986 Notices to Mariners'.²²⁰ He states that the "inclusion of the sector degree in a maritime law context is somewhat unusual and even inappropriate, unless ... the sector still serves a purpose in Soviet maritime law."²²¹

The inclusion of the sector theory in the '1986 Notices to Mariners' is also commented by Timtchenko, who notes that "The main idea of publishing the 1926 Decree in the Annex to Issue 1 of the Notices to Mariners of 1986 was to focus attention on this circumstance - in other words, to defend Soviet national interests in the territorial waters of the Arctic islands ... the lack of clarity in Soviet policy; even today, after the collapse of the USSR, the official position of its successor – the Russian Federation – relating to the sector concept is still not clear."²²²

However, the real turnover was when R. Vartanov, A. Roginko, and V. Kolossov of the Russian Duma contended that the concept of a Russian sector theory in the Arctic as a foundation for territorial claims was obsolete when the ratification of the 1982 UNCLOS occurred.²²³

Incidents outside the Kola Peninsula in 1992 and 1993 involving Russian and American submarines confirmed the Russian Government's new approach. Russia did not refer to

²¹⁹ Speech 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. Due to lack of English translation cited through Eric Franckx, *supra* note 184, p. 336.

²²⁰ See Chapter 2.3.1.

²²¹ Eric Franckx, *supra* note 186, p. 336.

²²² Leonid Tymchenko, *supra* note 51, pp. 276.

²²³ R. Vartanov, A. Roginko & V. Kolossov, *Russian Security Policy 1945-96: The Role of the Arctic, The Environment and the NSR* (Springer Netherlands Publishers 1999) pp. 53 – 54.

the sector theory when responding to the incidents.²²⁴ In addition, the letter from V. Mikhaylichenko (who at the time was the Chief of the Administration of the NSR) to the Master of the Greenpeace vessel *Solo* traversing the NSR in 1992 indicates the new approach as well:

We would like to draw your attention to the fact that the Regulations for Navigating on the Seaways of the Northern Sea Route were officially published in Notices to Mariners No. 29 on July 13, 1991. To obtain permission for the navigation of your vessel *Solo* along the seaways of the Northern Sea Route, you had to send a request to the Administration ... You would have obtained the permission for navigating along the Northern Sea Route, the date, the area of navigation, and the conditions of the ice pilotage after the expert examination of your vessel to define her correspondence to the Requirements for the Design, Equipment, and Supply of Vessels Navigating the Northern Sea Route.²²⁵

There was no reference to the sector theory or the 1926 Decree in the letter.

However, according to Østreng, there are still Russian scholars arguing that the Soviet/Russian sector theory “should be defined as an integral part of Russia with a vertex at the North Pole.”²²⁶ Mostly by referring to what Lakhtine stated in ‘*Prava na severnyye polyarnye prostranstva*’ (Rights over the Arctic Regions) in 1928 (see Chapter 3.2).

Østreng states that the legal uncertainties and overall confused position by Russia, and Russian scholars, in relation to the sector theory and the NSR “is what other scholars have labeled *creative ambiguity*, feeling it to be deliberate and planned.”²²⁷

After ratifying UNCLOS and departing from the Marxist-Leninist theory, this “creative ambiguity” has taken different directions becoming more in line with international law and accepted principles. An example of this was when Klimenko in 1987 argued that it is only those islands and archipelagos within the Soviet sector theory’s limits that belongs to the coastal state’s territory, despite the applicability of UNCLOS.²²⁸ Timtchenko (and several other Russian scholars) objected to Klimenko’s interpretation by claiming that: “the legal regime of the sea expenses is instead determined by the norms and principles of the law of the sea, which may be modified according to the special conditions of the region”.²²⁹ In addition, western scholars like Østreng comments Klimenko’s theory as a return to the foundation of the 1926 Decree, noting that:

If one takes into account the characteristics of the Northern polar ocean and the juridical position of the circumpolar countries, one has to conclude that it is difficult to apply the high sea regime to these waters, and it is necessary to

²²⁴ Leonid Timtchenko, *supra* note 168, p. 33. For further reading regarding the incidents outside the Kola Peninsula, see Willy Østreng, *supra* note 13, pp. 260 – 262.

²²⁵ See Leonid Timtchenko, *supra* note 168, pp. 32 – 34 for the letter in whole.

²²⁶ Willy Østreng, *supra* note 13, p. 257.

²²⁷ *Ibid.*

²²⁸ B. M. Klimenko, ‘Pravovoy rezhim Arktiki’ (The Legal Regime of the Arctic), cited through Leonid Timtchenko, *supra* note 168, p. 31 due to lack of English translation. See also Willy Østreng, *supra* note 13, p. 258.

²²⁹ Leonid Timtchenko, *supra* note 168, p. 31.

apply some sort of restricted sovereignty of the polar states within their respective gravitation sectors.²³⁰

In 1988 the Russian scholar V. Kulebyakin developed and modified Klimenko's theory by reference to UNCLOS, Article 234 and partly citing the Russian scholar Korovin's interpretation of the 1926 Decree (see Chapter 3.2).²³¹ In brief, Kulebyakin argued that coastal states with sector claims have sovereignty rights over Arctic sea expanses, irrespective of land or sea territory. This is due to its unique ecological characteristics, and therefore not comparable to other sea expanses. According to Kulebyakin, Article 234 would grant Arctic coastal States with these sovereignty rights. As discussed in Chapter 3.1.1.2, Article 234 entitles States in ice-covered waters to adopt and enforce non-discriminatory laws and regulations.²³² Kulebyakin's interpretation is similar to what Kolodkin and Volosov stated regarding the "creeping jurisdiction" in Chapter 4.1.1.

However, despite the fact that Article 234 entitles extensive authority to coastal States in ice-covered waters, Kulebyakin's argumentation and interpretation has been subject to criticism amongst several scholars within the international maritime law community.²³³ Timtchenko notes that:

It is doubtful that this article and CLOS as a whole contain legal grounds for the Sectoral concept. Kulebyakin's arguments probably reflect the inertia of the old style of thinking rather than the real trends in the development of Soviet legal science.²³⁴

Timtchenko's view is also supported by Østreng, who claims that: "most international lawyers would probably agree with Leonid Timtchenko."²³⁵

In 1988 Canada's leading scholar on the international law of the Arctic, Dr. Pharand, conducted extensive research on the sector theory. By researching and analyzing all different aspects of the theory; its origin, boundary treaties, customary law, and contiguity as the foundation for the sector theory Pharand's conclusion was that:

The 1825 and 1867 boundary treaties cannot serve as a legal basis for the sector theory ... Contiguity is incapable of serving as a legal basis for the sector theory ... the sector theory has not developed as a principle of customary law. This theory has no validity in international law for the acquisition of title, not even for land areas.²³⁶

4.1.4.2 Soviet and Russian State Practice of Especial Interest

Despite different doctrinal views regarding the NSR, it should be noted that the Soviet never officially has laid any territorial claims beyond its national jurisdiction based on the

²³⁰ Willy Østreng, *supra note 35*, p. 209.

²³¹ Chapter 3.2, see also Leonid Timtchenko, *supra note 168*, pp. 31 – 32, see also Willy Østreng, *supra note 35*, p. 209.

²³² *Ibid.*

²³³ Among others, see Willy Østreng, *supra note 35*, p. 209 and Leonid Timtchenko, *supra note 168*, p. 31. See also Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit* (Taylor & Francis 2007) p. 10.

²³⁴ Leonid Timtchenko, *supra note 168*, p. 31.

²³⁵ Willy Østreng, *supra note 35*, p. 209

²³⁶ Donat Pharand, *Canada's Arctic Waters in International Law* (Cambridge University Press 1988) pp. 91 – 92.

sector theory.²³⁷ The 1926 Decree ‘On the Proclamation of Lands and Islands Located in the Northern Arctic Ocean as Territory of the USSR’ only targeted areas of land and disregarded the waters of the Soviet sector.²³⁸ In addition, the Soviet sectors littoral limits were never officially proclaimed as Soviet boundaries.²³⁹ This is illustrated by the response to U.S. military warships entering Soviet sectoral areas in 1957, 1963 – 65, and 1967.²⁴⁰

In the mid-1960’s the U.S. Navy and Coast Guard conducted several hydrographic research voyages in the high seas of Chukchi, East Siberian, Laptev, Kara and Barents Seas (see Figure 2.4). The research has latter been described as to challenge the legality of the Sector principle and to force Soviet to stress for revealing its position.²⁴¹ Initially the Soviet did not respond to the U.S. activity. However, in 1964 the USS *Burton Island* undertook hydro- and oceanographic research in the Laptev and Sannikov straits of the East Siberian Sea. Soviet responded by declaring an aide-memoire dated 21 July 1964 declaring that the Dmitri Laptev and Sanikov straits historically belong to Soviet. The straits could not be trans-navigated, as they were historically part of Soviet’s internal waters. The U.S. responded with the following message:

Dmitrii, Laptev and Sannikov Straits ... the United States is not aware of any basis for a claim to these waters on historic grounds even assuming that the doctrine of historic waters in international law can be applied to international straits.²⁴²

The response by the U.S. confirms the possibility of applying a historic waters title to international straits, although clearly stating that the U.S. did not consider the Dmitrii Laptev and Sannikov straits to have the title of historic waters. However, the U.S. position, claiming that the Dmitrii Laptev and Sannikov were international straits is disputed, as it is clearly that the straits don’t meet the ‘functional criteria’ (see Chapter 3.1.1.1 and Chapter 4.2.3) of an international strait.²⁴³ In 1967 the U.S. Coast Guard vessels *Edisto* and *Eastwind* assayed to traverse the Vil’kitskii strait (see Figure 2.4) when navigating the NSR. The Soviet Ministry of Foreign Affairs refused to grant passage for the vessels on grounds that the Vil’kitskii strait was territorial waters of the Soviet. This was claimed to be in accordance with Soviet’s reservation to the Territorial Sea Convention, as well as the 1960 Statue on the on the Protection of the State Boundary of the USSR.²⁴⁴ The U.S. Coast Guard vessels did not pass the strait.

It is worth noting the widely discrepancies between the Soviet doctrinal view in comparison to state practice. As evident, state practice has sufficiently been in compliance with international law. In addition, incidents with U.S. government vessels clearly show the Soviet’s intention and clarification of the legality regarding the sector theory. In fact, state

²³⁷ Leonid Timtchenko, *supra note* 168, p. 32.

²³⁸ Leonid Tymchenko, *supra note* 51, p. 279.

²³⁹ *Ibid.*

²⁴⁰ Leonid Timtchenko, *supra note* 168, p. 32.

²⁴¹ Willy Østreng, *supra note* 35, p. 207.

²⁴² United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, ‘United States Responses to Excessive National Maritime Claims’ (No. 112 *Limits in the Seas*) p. 16.

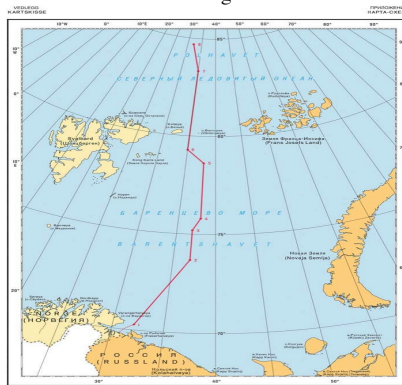
²⁴³ See Chapter 6.

²⁴⁴ See Chapter 3.2 and Leonid Tymchenko, *supra note* 51, pp. 278 – 281.

practice clearly shows that Soviet authorities have been consistent, despite legal uncertainties and different Soviet doctrinal views of the Soviet sector theory.²⁴⁵

In negotiations between the Soviet and Norway, the relationship between the sector theory and UNCLOS was examined. Starting in 1974, negotiations concerning the delimitation of the Barents Sea including the continental shelf and the EEZ involved the sector theory. In total, the disputed maritime area roughly amounted to 155,000 km² in the Barents Sea and another 20,000 square kilometers in the Arctic Ocean.²⁴⁶ Soviet argued for the recognition of the sector theory as a result of the unique characteristics of the area (i.e., geographic, geological, demographic, strategic, and climatic factors). It was also claimed that the sector theory “had gained such an administrative prescriptive title in Soviet practice that it carried a special psychological and political significance.”²⁴⁷ According to Russia, this justified a boundary line coinciding with the meridian of longitude 32° 04' 35" E (“the Russian sector line”). The Russian sector line was taken into account in the delimited maritime area governed by the Svalbard Treaty in 1920.²⁴⁸ Norway favored the 1982 UNCLOS default rule: a boundary line following the median line between the two respective coasts.²⁴⁹

Figure 4.1
The 2010 Agreement



Source: http://www.regjeringen.no/upload/UD/Vedlegg/Folkerett/100914_Kartskisse_final.pdf

Finally, on September 15, 2010, the foreign ministers of Norway and Russia signed a treaty on maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean. The “2010 Agreement” ended nearly four decades of extensive negotiations.²⁵⁰ The

²⁴⁵ For a more thoroughly discussion regarding Soviet/Russian state practice on the NSR, see Leonid Timtchenko, *supra note* 168, pp. 29 – 34.

²⁴⁶ Thilo Neumann, ‘Norway and Russia Agree on Maritime Boundary in the Barents Sea and the Arctic Ocean’ *American Society of International Law* (10 November 2010) <<http://www.asil.org/insights/volume/14/issue/34/norway-and-russia-agree-maritime-boundary-barents-sea-and-arctic-ocean>> accessed 21 August 2013.

²⁴⁷ Per Tresselt, ‘Norsk-sovjetiske forhandlinger om avgrensning av kontinentalsokler og økonomiske soner’ (No. 2 *Internasjonal Politik* 1988) p. 75.

²⁴⁸ Treaty Concerning the Archipelago of Spitsbergen (the Svalbard Treaty), February 9, 1920, 43 Stat. 1892, 2 L.N.T.S. 7, available at <http://www.sysselmannen.no/The_Svalbard_Treaty_9ssFy.pdf.file> accessed 12 Mars 2014. The Svalbard Treaty recognizes Norway’s absolute sovereignty of the Arctic Archipelago over Spitsbergen (i.e. Svalbard) by defining all islands situated between the 10° and 35° E and 74° and 81° N to be under Norwegian control and sovereignty.

²⁴⁹ Per Tresselt, *supra note* 247, p. 76.

²⁵⁰ Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, Norway-Russia, Sept. 15, 2010, L.N.T.S.

agreement, “desiring to maintain and strengthen the good neighborly relations”,²⁵¹ defines a single maritime boundary by dividing the two Arctic State’s continental shelves and EEZ’s in the Barents Sea and the Arctic Ocean.

According to Timtchenko, the Russian ratification of UNCLOS “constitute a definite shift in the marine policy for the USSR towards the recognition of the common principles of the law of the sea.”²⁵² The agreement concerning ‘Uniform Interpretation of the Rules of International Law Governing Innocent Passage’ signed on 23 September 1989 between the Soviet and the U.S. endorses this “definite shift” as well. Several scholars have stated that the agreement confirmed Soviet’s recognition of generally acknowledged international maritime law principles as applicable to the NSR.²⁵³ However, as evident above and latter discussed in the forthcoming chapters, Russia’s position and attitude towards the Arctic and the sector theory is still rather unclear.²⁵⁴

4.2 The Northwest Passage

4.2.1 Canada’s Historic Internal Waters

In 1973 Canada declared “what is probably the most precise statement on the status and legal basis of the waters” concerning the NWP.²⁵⁵ By a letter from the Canadian Bureau of Legal Affairs on the question of historic bays and waters in the Arctic Archipelago – Canada claimed the waters in the NWP to constitute historic internal waters.²⁵⁶ The letter declared that: “Canadian Arctic Archipelago are internal waters of Canada, on historical basis, although they have not been declared as such in any treaty or by any legislation.”²⁵⁷

Later, in May 1975, Secretary of State for External Affairs Allan MacEachen announced a similar statement, emphasizing the non-applicable transit passage regime in the NWP.

*Canada’s Northwest Passage is not used for international navigation and since Arctic waters are considered by Canada as being internal waters, the régime of transit passage does not apply to the Arctic.*²⁵⁸

Not leaving any doubts of Canada’s position (all waters of the NWP’s Archipelago are Canadian historical internal waters) was the adoption of an Order-in-Council, establishing

14 available at <http://www.regjeringen.no/upload/UD/Vedlegg/Folkerett/avtale_engelsk.pdf> accessed 21 June 2013.

²⁵¹ *Ibid.* pp. 1 – 2.

²⁵² Leonid Tymchenko, *supra note* 51, p. 282. A similar view is stated by Willy Østreng, *supra note* 35, p. 262

²⁵³ Leonid Tymchenko, *supra note* 51, p. 282.

²⁵⁴ As concluded in Chapter 5 & 6, see also Leonid Timtchenko, *supra note* 168, pp. 31 – 35 and Willy Østreng, *supra note* 35, p. 267.

²⁵⁵ Donat Pharand, *The Northwest Passage: Arctic Straits* (Martinus Nijhoff Publishers, 1984) p. 88.

²⁵⁶ Donat Pharand, *Canada’s Arctic Waters in International Law* (Cambridge University Press, 1988), p. 112.

²⁵⁷ Canada, Department of External Affairs, ‘Letter dated 17 December 1973’ (17 December 1973), reprinted in Vol. 12 *Canadian Yearbook of International Law* 1974, p. 279.

²⁵⁸ Allan MacEachen, Minister of External Affairs, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and National Defence*, 22 May 1975 (30th Parliament, 1st Session, 1975, Issue No. 24, p. 6.

straight baselines around the outer perimeter of the Archipelago in September 1985.²⁵⁹ The purpose was to identify the outer limit of Canada's claimed historic internal waters. In conjunction with this, Secretary of State for External Affairs, Joe Clark stated:

*These baselines define the outer limit of Canada's historic internal waters. Canada's territorial waters extend 12 miles seaward off the baselines.*²⁶⁰

It needs to be noted that there were previous government statements prior to the letter in 1973. However, these statements have not gotten any widespread attention.²⁶¹ According to Pharand, it was after the voyage of the U.S.-flagged *S/S Manhattan* in 1969 the Canadian position was formed and articulated, mainly constituting that the NWP is comprised of internal waters.²⁶² In 1970 the embassy of Canada communicated the following message to the U.S. Department of State as a response to the voyage:

*With respect to the waters of the Arctic Archipelago, the position of Canada has always been that these waters are regarded as Canadian ... the Canadian Government cannot accept any suggestion that Canadian waters should be internationalized.*²⁶³

The U.S. has continuously declined and rejected Canada's position after the embassy's message in 1970.²⁶⁴ In 1986 an official letter from the U.S. State Department stated that:

*The United States position is that there is no basis in international law to support the Canadian claim. The United States cannot accept the Canadian claim because to do so would constitute acceptance of full Canadian control of the Northwest Passage and would terminate US navigation rights through the Passage under international law.*²⁶⁵

The European Community (hereinafter, "EC") responded as well to Canada's claim of Arctic waters being historic internal waters. The British High Commission Note of 1986 reflects EC's position, stating that:

The Member States acknowledge that elements other than purely geographical ones may be relevant for purposes of drawing baselines in particular circumstances but are not satisfied that the present baselines are justified in general. Moreover, the Member

²⁵⁹ Canada, Territorial Sea Geographical Coordinates (Area 7) Order, *Canada Gazette* Part II, Vol. 119, SOR/85-872, 10 September 1985, pp. 3996 – 4002.

²⁶⁰ Statement in the House of Commons by Secretary of State for External Affairs, Joe Clark, Canada, House of Commons, Debates, 6462-6464, 10 September, 1985. Reprinted in Dep't. of External Affairs, Statement Series 85/49.

²⁶¹ For further reading of previous official statements by Canada regarding the NWP, see Ted L. McDorman, 'The Northwest Passage: International Law, Politics and Cooperation' in Myron H. Nordquist, John Norton Moore, and Tomas H. Heidar (eds), *Changes in the Arctic Environment and the Law of the Sea* (Martinus Nijhoff Publishers 2010) pp. 227 – 241.

²⁶² Donat Pharand, *supra note* 255, p. 88.

²⁶³ Canada, 'Note No. 105 from the Embassy of Canada to the United States Department of State', 16 April 1970, in *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States)*, *International Court of Justice Pleadings, Oral Arguments, Documents*, Annex 8 to Reply of the United States, p. 534 reprinted in Ted L. McDorman, *supra note* 261, p. 232.

²⁶⁴ See Ted L. McDorman, *supra note* 261, pp. 228 – 231.

²⁶⁵ United States, 'Letter from J.W. Dyer, Acting Assistant Secretary of State, Legislative and Intergovernmental Affairs to Senator C. Mc. Mathias, Jr.', 25 February 1986, in J. A. Roach and R. W. Smith (eds.), *United States Responses to Excessive Maritime Claims* (2nd edn, Martinus Nijhoff Publishers 1996), p. 118.

*States cannot recognize the validity of a historic title as justification for the baselines drawn in accordance with the order.*²⁶⁶

When trying to determine the legal arguments of the two different opinions above, the natural starting point is what the ICJ stated in 1982 by the judgment of the *Tunisia-Libya Continental Shelf Case*.²⁶⁷ The Court stated that neither UNCLOS nor the Convention on the Territorial Sea provided any guidance when historic waters exist, instead the position is governed by customary law.²⁶⁸ The Court stated that:

*It is clearly the case that, basically, the notion of historic rights or waters and that of the continental shelf are governed by distinct legal régimes in customary international law.*²⁶⁹

As discussed in Chapter 3.1.1.1, UNCLOS I requested by a resolution to the UN for a study with the purpose of determining the juridical regime of historic waters and historic bays.²⁷⁰ The UN Secretariat published such a study in 1962, outlining three criteria for assessing historic internal waters. It reads as follows:

In determining whether or not a title to “historic waters” exists, there are three factors which have to be taken into consideration, namely,

- (i) The authority exercised over the area by the State claiming it as “historic waters”;*
- (ii) The continuity of such exercise of authority;*
- (iii) The attitude of foreign States.*

First, effective exercise of sovereignty over the area by the claiming State is a necessary requirement for title to the areas as “historic waters” of that State. Secondly, such exercise of sovereignty must have continued during a considerable time so as to developed into a usage. Thirdly, the attitude of foreign States to the activities of the claiming State in the area must have been such that it can be characterized as an attitude of general toleration.

*The burden of proof of title to “historic waters” is on the State claiming such title, in the sense that, if the State is unable to prove to the satisfaction of whoever has to decide the matter that the requirements necessary for the title have been fulfilled, its claim to the title will be disallowed.*²⁷¹

Despite the study, it is important to emphasize that it has not lead to any international legislative action, therefore the position is, as expressed by the ICJ, governed by customary international law. However, The United States Supreme Court has applied the studies criteria regarding historic waters in numerous internal U.S. Cases on historic waters, such as *US v. Louisiana* (1969) and *US v. Alaska* (1975).²⁷² According to Churchill and Lowe, the ruling by the ICJ in the *Land, Island and Maritime Frontier Dispute*²⁷³ asserts that the UN Secretariat study’s criteria for historic bays “were

²⁶⁶ British High Commission, Note No. 90/86, 9 July 1986 reprinted in J. A. Roach and R. W. Smith, *supra* note 262, p. 121.

²⁶⁷ *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamhuriya)*, ICJ Reports, 1982, p. 100; 18 ILR

²⁶⁸ For further reading, see Ted L. McDorman, *supra* note 261, p. 233.

²⁶⁹ ICJ reports, *supra* note 264, p. 74.

²⁷⁰ UNCLOS I, *Official Records*, Vol. II, p. 145.

²⁷¹ *Juridical Regime of Historic Waters, Including Historic Bays*, UN Secretariat, U.N. Doc. A/CN.4/143, 9 March 1962.

²⁷² R. R. Churchill and A. V. Lowe, *supra* note 77, p. 37.

²⁷³ See Chapter 3.1.1.1 for further reading of the judgment by the ICJ.

implicitly accepted by the international Court.”²⁷⁴ However, this is not confirmed by case law.²⁷⁵ It is important to note that circumstances and factors when evaluating historic waters in the legal doctrine are largely different than the actual application of the vague and undetermined customary law to a specific situation. The process is difficult and still rather unclear.²⁷⁶ As Simmons states:

The supposed international legal rules are in any event vague and difficult to apply in practice because the basic requirements for proving historic title to waters derived from international customary law ... the supposed three rules – formal claim, continuous and effective exercise of relevant jurisdiction, and international acquiescence ... received the imprimatur of approval in the international legal context ... but unfortunately, the ICJ’s reference ... for historic waters ... merely muddies the already unclear rules at customary law relating to historic bays.²⁷⁷

McDorman has also commented the study, he notes that: “there is a uncertainty whether each of the three criteria must be met independently or whether what is involved is more of a balancing of the factors “. ²⁷⁸ In conclusion, it can be stated that the international legal rules governing historic waters are vague and undetermined with no case law to rely on.

4.2.2 Straight Baselines as a Basis for Internal Waters

Canada adopted legislation for the establishment of straight baselines in September 1985. As concluded in Chapter 3.1.1.1, a State can draw straight baselines including bays and island to “simplify” the coastline, stipulating the waters on the landward side to become internal waters.²⁷⁹ Since Canada during the time²⁸⁰ was not a party to the Territorial Sea Convention nor UNCLOS, the establishment of straight baselines was based on customary law, as mainly interpreted by, and in pursuant to, the *Anglo-Norwegian Fisheries* case of 1951.²⁸¹ In the case, the ICJ formulated three criteria for drawing straight baselines:

- (1) the general direction of the coast,
- (2) the close link between land and sea, and
- (3) certain economic interests evidenced by long usage²⁸²

Criteria (1), and (2) are mandatory whilst criteria (3) is optional.²⁸³ The three criteria were later legislated (without any modification) into Article 4 of the Territorial Sea Convention and Article 7 of UNCLOS.

²⁷⁴ R. R. Churchill and A. V. Lowe, *supra* note 77, p. 38.

²⁷⁵ *Ibid.*

²⁷⁶ Clive. R. Simmons, *Historic Waters in the Law of the Sea: A Modern Re-appraisal* (Martinus Nijhoff Publishers, 2008), pp. 285 – 287.

²⁷⁷ *Ibid.*, p. 286.

²⁷⁸ Ted L. McDorman, *supra* note 261, p. 234.

²⁷⁹ See Chapter 3.1.1.1 for jurisdictional rights and obligation regarding internal waters.

²⁸⁰ Donat Pharand, *supra* note 233, p. 58.

²⁸¹ *Ibid.* See also *Anglo-Norwegian Fisheries*, ICJ Reports, *supra* note 90, p. 129.

²⁸² *Ibid.*, pp. 17 – 18. See also *Anglo-Norwegian Fisheries*, ICJ Reports, *supra* note 90, p. 132.

²⁸³ *Ibid.*, p. 17.

Quickly after Canada's proclamation of drawing straight baselines in the NWP, two formal protests by letter were received. The first from the U.S., stating that:

On September 10, 1985, the Government of Canada claimed all the waters among the Arctic islands as internal waters, and drew straight baselines around the Arctic islands to establish its claim. The United States position is that there is no basis in international law to support the Canadian claim.²⁸⁴

The second letter came from the member states of the EC, through the British High Commission stating that "The member States acknowledges that elements other than purely geographical ones may be relevant for purposes of drawing baselines in particular circumstances but are not satisfied that the present baselines are justified in general."²⁸⁵

Despite the formal protest by the U.S. and the EC, Canada's straight baselines are widely acknowledged among scholars and States. Based under customary law, the Canadian claim is well substantiated.²⁸⁶ According to Pharand, the drawn straight baselines meet the compulsory first criteria (1) as stated by the ICJ in the *Anglo-Norwegian Fisheries* case - the general direction of the coast. The second criteria, (2) the close link between the land and sea is also fulfilled. In addition, the third criteria, (3) certain economic interests evidenced by long usage is supported by the fact that historical regional interests and needs of the Canadian Inuit.²⁸⁷

Pharand's profound research and analysis of Canada's straight baselines has strong international recognition among the maritime law community.²⁸⁸ In a review on his research on straight baselines and its application to Canada's Arctic Archipelago (NWP), Pharand concludes that:

1. The straight baseline system is not an exception to the general low-water mark rule along the coast to measure the breath of territorial sea, but rather the application of that general rule to a specific case.
2. The straight baseline system may be used where a coast is bordered by an archipelago such as the skjaergaard under customary law, whereas under conventional law the use of that system is limited to a fringe of islands.
3. The Canadian Arctic Archipelago qualifies for the use of straight baselines under customary law, but it also might qualify under conventional law.
4. The straight baselines drawn along the edge of the Archipelago meet the compulsory criteria of the general direction of the coast and the close link between the land and the sea. In addition, the validity of baselines across Lancaster Sound and Amundsen Gulf is supported by the historic regional interests and needs of the Inuit.
5. There is no maximum length for straight baselines, but it appears obvious that Canada made an effort to restrict the baselines to whatever lengths resulted from the normal application of the relevant criteria.

²⁸⁴ Cited through Suzanne Lalonde & Ronald St. J. Macdonald, 'Donat Pharand: The Arctic Scholar' in D. M. McRae (eds), *The Canadian Yearbook of International Law – Annuaire canadien de droit international* (Vol. 44, University of British Columbia Press, 2006) p. 68.

²⁸⁵ *Ibid.*

²⁸⁶ Donat Pharand, *supra note 233*, pp. 58 – 59, Ted L. McDorman, *supra note 261*, p. 234, Willy Østreng, *supra note 35*, pp. 236 – 238, and Suzanne Lalonde & Ronald St. J. Macdonald, *supra note 284*, pp. 69 – 71.

²⁸⁷ Donat Pharand, *supra note 233*, p. 56.

²⁸⁸ For an example, see Suzanne Lalonde & Ronald St. J. Macdonald, *supra note 284*, pp. 66 – 72.

6. The international validity of the straight baselines is further supported by a consolidation of title to the waters of the Archipelago generally and those of Amundsen Gulf, Lancaster Sound, and Barrow Strait in particular.
7. The Waters enclosed by straight baselines have the status of internal waters.²⁸⁹

4.2.3 NWP – a Strait Used for International Navigation?

As noted above, in 1969 the US-flagged oil tanker *S/S Manhattan* traversed the NWP from east to west without seeking Canada's permission. The voyage clearly indicated the U.S. perspective that the NWP is a strait used for international navigation when defining its international legal status.²⁹⁰ Prior to the voyage, the NWP had been traversed by government vessels such as the U.S. nuclear powered submarines *Seadragon* in 1960 and *Skate* in 1962.²⁹¹ However, the *S/S Manhattan's* unique mission was to determine the feasibility of year-round navigation for commercial marine Arctic transport in the NWP. Moreover, the voyage constituted a U.S. statement regarding concerns of navigational rights in key water effects, sprung out of a newly desire from several coastal states (including Canada) to push the traditional three NM territorial sea to twelve NM.²⁹² The U.S. publically asserted its position in a very clear way, declaring that: "We cannot accept the assertion of a Canadian claim that the Arctic waters are internal waters of Canada ... Such acceptance would jeopardize the freedom of navigation essential for United States naval activities worldwide."²⁹³

At the Third UN Conference on the Law of the Sea in the 1970's the subject of passage through straits positioned the major naval Powers on one side and coastal States controlling narrow straits on the other side.²⁹⁴ Negotiations on the strait regime lead to acceptance of the new concept of transit passage - strongly pushed for by the U.S.²⁹⁵ During the conference, the U.S. "made clear its view that the Northwest Passage was a strait used for international navigation through which a right of transit passage existed."²⁹⁶ This statement has been repeated several times, for a more modern example, see the 1994 commentary on UNCLOS sent by President Clinton to the U.S Senate.²⁹⁷

Canada however has been immovable in their position that "Canada's Northwest Passage is not used for international navigation and since Arctic waters are considered by Canada as being internal waters, the régime of transit passage does not apply to the Arctic", as stated by the Secretary of State for External Affairs, Allan MacEachen in May 1975.²⁹⁸ In

²⁸⁹ Donat Pharand, *supra note* 233, p. 28.

²⁹⁰ Ned Rozell, 'A Supertanker voyage through the Northwest Passage' *Alaska Science Forum* (Fairbanks, 5 September 2013) <<http://www.gi.alaska.edu/AlaskaScienceForum/article/supertanker-voyage-through-northwest-passage>> accessed 13 October 2013.

²⁹¹ Donat Pharand, *supra note* 255, p. 46.

²⁹² Ted L. McDorman, *supra note* 261, p. 253.

²⁹³ U.S. Department of State, *Foreign Relations, 1969-1976*. Vol. E-1, *Documents on Global Issues, 1969-1972*.

²⁹⁴ The United Nations Convention on the Law of the Sea, 'A Historical Perspective' (*Division for Ocean Affairs and the Law of the Sea*, 1998) Available at: <http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm> accessed 14 October 2013.

²⁹⁵ See Chapter 3.1.1.1 & Chapter 6 regarding the transit regime.

²⁹⁶ Clive R. Symmons, *supra note* 276, p. 291.

²⁹⁷ United States, "Commentary on the Convention on the Law of the Sea," *supra note* 263, p. 18.

²⁹⁸ Allan MacEachen, *supra note* 258, p. 6.

addition, during the negotiations at the third UN Conference on the Law of the Sea, Allan MacEachen, now Foreign Minister, repeatedly stated that the NWP was comprised by internal waters of Canada and the concept of transit regime did not apply.²⁹⁹ The EC publicly disagreed with the Canadian viewpoint, but at the same time did not publicly support the U.S. perspective (strait used for international navigation where transit passage rights exists).³⁰⁰ It should be noted that no other State has officially endorsed the U.S. perspective.³⁰¹

However, the Third UN Conference on the Law of the Sea managed to agree on a legal regime regarding “straits used for international navigation”. Unfortunately, no definition of such a strait was agreed upon.³⁰² Article 34 of UNCLOS reads as follows:

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

As discussed in Chapter 3.1.1.1, since UNCLOS do not read out the requirements of use to transform, for an example, the *M’Clure Strait* (see Figure 2.5) into an international strait, customary law needs to be depended on, mainly as interpreted and practiced in the *Corfu Channel* case of 1949.³⁰³

In the case the ICJ ruled out two criteria for an international straight: *geographic* and *functional*. The geographic criteria is fulfilled when there is an “overlap of territorial waters in the natural passage between land joining two parts of the high seas (or EEZ) or one part of the high seas (or EEZ) with the territorial sea of a foreign state.”³⁰⁴ According to Pharand, the geographic criteria is fulfilled in the NWP.³⁰⁵ Of more crucial factor is the functional criteria, which concerns the required degree of use for international navigation. As previously noted, there are no provisions to fall back on in neither the Territorial Sea Convention nor UNCLOS, therefore the functional criteria is relied upon customary law. Considering the *Corfu Channel* Case, Pharand concludes that: “before a straight may be considered international, proof must be adduced that it has a history as a useful route for international maritime traffic.”³⁰⁶ This interpretation is also in line with the view declared by the ICJ in the *Anglo-Norwegian Fisheries* Case, stating that: “any legal strait to which a special regime as regards navigation applies under international law because the strait is substantially used by shipping proceeding from one part of the high seas to another.”³⁰⁷ In order for the functional criteria to be fulfilled the sufficiency of the use is determined by

²⁹⁹ Suzanne Lalonde, *Increased Traffic through Canadian Arctic Waters: Canada’s State of Readiness* (University of British Columbia Press, 2002) p. 76.

³⁰⁰ Ted L. McDorman, *supra* note 261, p. 236.

³⁰¹ *Ibid.*

³⁰² See Chapter 3.1.1.1 & Chapter 6 for more information regarding a “strait used for international navigation”, see also UNCLOS, Article 34 – 35.

³⁰³ *Corfu Channel*, ICJ Reports, *supra* note 140.

³⁰⁴ *Ibid.*

³⁰⁵ Donat Pharand, *supra* note 255, p. 36.

³⁰⁶ *Ibid.*, p. 35.

³⁰⁷ *Anglo-Norwegian Fisheries*, ICJ Reports, *supra* note 90, p. 143. See also Donat Pharand, *supra* note 255, pp. 35 – 36 for further reading of the ICJ’s two criteria to the NWP.

two factors: the number of transits and the plethora of flags represented. This interpretation is in line with several Arctic scholars.³⁰⁸ Pharand has summarized and classified all transits passages in the NWP from 1902 to 2005 and states that “it is evident that the Northwest Passage has not had a history as a useful route for international maritime traffic.”³⁰⁹ However, scholars like Østreng has expressed that due to climate change in the Arctic foreign commercial Arctic marine transport most likely will increase, leading to a possibility of sufficient traffic to redefine the prerequisites of the functional criteria.³¹⁰ This future scenario is elaborated with in Chapter 6.

Nevertheless, the U.S. perspective is unequivocal though; “a straight used for international navigation” covers all straits that are capable of being used for international navigation.³¹¹ This implicitly argues on the existence of the functional criteria. However, the key wording from the *Corfu Channel* case is:

It may be asked whether the test [whether a waterway is an international strait] is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait [Corfu Channel] is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and Adriatic Seas. It has nevertheless been a useful route for maritime traffic.³¹²

Clearly not favorable in the U.S. point of view.

4.2.4 The Right of Innocent Passage in the NWP

As previously noted in Chapter 4.2.2, the waters of the NWP are very likely to be regarded as internal waters due to the enclosure by straight baselines in 1985. In concise, there are three main reasons for the fact that the right of innocent passage not applies in the NWP. First, the waters enclosed by straight baselines were ensued through, and in accordance with, customary law since Canada not being a party to the Territorial Sea Convention. Second, the innocent passage provision, Article 5(2), of the Convention had not been developed to customary law by state practice in 1958.³¹³ Third, Canada ratified UNCLOS in 2003, approximately 20 years after the enclosure by straight baselines in the NWP being binding according to customary law. As noted in Chapter 3.1.1.1, Article 8(2) of UNCLOS states that:

Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

³⁰⁸ Donat Pharand, *supra note* 255, p. 35.

³⁰⁹ *Ibid*, p. 42.

³¹⁰ Willy Østreng, *supra note* 35, p. 218.

³¹¹ James Kraska, ‘The Law of the Sea Convention and the Northwest Passage’ (Vol. 22, *International Journal of Marine and Coastal Law*, 2007), p. 275.

³¹² *Corfu Channel*, ICJ Reports, *supra note* 140, p. 28.

³¹³ According to Pharand, state practice was “lacking the necessary general acceptance and uniformity”, see Donat Pharand, *supra note* 255, p. 43.

Due to the extensive time elapse between the enclosure of straight baselines and Canada's ratification of UNCLOS, it is evident that the waters had obtained the status of internal waters. The UNCLOS cannot apply retroactively.³¹⁴ In conclusion, it can be firmly stated that the NWP is not subject to the right of innocent passage regime for foreign commercial marine transport.

4.2.5 Agree to Disagree – the 1988 Agreement

The implementation of the 1988 Canada–United States Arctic Cooperation Agreement, which covers the transit of U.S. icebreakers, has been fairly satisfactory.³¹⁵ A request for permission and prior authorization has taken place for each of the five transits conducted in the NWP since 1988. However, there are two important shortcomings in the agreement which must be remedied: first, it applies only to icebreakers; and second, it contains an implied, but very clear, refusal by the U.S. to recognize Canada's claim. No commercial US-flagged vessel has traversed the NWP claiming waters are under the legal regime of a strait used for international navigation.³¹⁶ The agreement contains a notwithstanding clause, stating that: "Nothing in this agreement of cooperative endeavor between Arctic neighbors and friends nor any practice thereunder affects the respective positions of the Governments of the United States and of Canada on the Law of the Sea in this or other maritime areas or their respective positions regarding third parties."³¹⁷

As of January 2009, George W. Bush issued a presidential directive symbolizing the traditional U.S. position:

*The Northwest Passage is a strait used for international navigation, and the Northern Sea Route [north of Russia] includes straits used for international navigation; the regime of transit passage applies to passage through those straits. Preserving the rights and duties relating to navigation and over flight in the Arctic region supports our ability to exercise these rights throughout the world, including through strategic straits.*³¹⁸

The successful implementation of the agreement can be the inclusion of Article 234. This provision constitutes a definitive shift of the U.S. policy towards the Canadian environmental protection zone (AWPPA), as seen in the commentary of the negotiations of the 1982 UNCLOS.³¹⁹ The U.S. stated, (and accepted) that Article 234 being part of international customary law and is now in support for Canada's Arctic Waters legislation.³²⁰

³¹⁴ *Ibid.*

³¹⁵ Agreement between Canada and the United States on Arctic Cooperation, executed in Ottawa, 11 January 1988, entered into force 11 January 1988, *Canada Treaty Series* 1988/29 and *T.I.A.S.* 1565. Available at: <<https://treaties.un.org/doc/publication/unts/volume%201852/volume-1852-i-31529-english.pdf>>

³¹⁶ Ted L. McDorman, *supra note* 261, p. 245.

³¹⁷ Agreement between Canada and the United States on Arctic Cooperation, *supra note* 315, Article 4, p. 3.

³¹⁸ Cited through Michael Byers, 'Time to Negotiate the Northwest Passage with the United States' (2011) 1(1) Policy Options <<http://www.irpp.org/en/po/the-new-normal-majority-government/time-to-negotiate-the-northwest-passage-with-the-united-states/>> accessed 21 January 2014.

³¹⁹ United States, 'Commentary – The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI' Attached to Message from the President of the United States transmitting the United Nations Convention on the Law of the Sea, with Annexes, Montego Bay, 10 December 1982 and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December, 1982, U.S. Senate Treaty Document 39, 103rd Congress, 2nd Session IV (1994), at pp. 18 – 19. Partly reprinted in Ted L. McDorman, *supra note* 261, pp. 230 – 232.

³²⁰ Ted L. McDorman, *supra note* 261, p. 245.

In addition, the U.S. has recognized that Canadian standards and requirements of the AWPPA are applicable to U.S. commercial vessels.³²¹ In 2009, Canada extended the AWPPA zone to 200 NM.³²²

4.3 The Transpolar Sea Route

The TSR, unlike the NWP and the NSR, has a special status as the only Arctic sea route outside any Arctic State's territorial jurisdiction. As previously discussed in Chapter 2.3.3, the TSR's distance of approximately 2,100 NM³²³ characterize the TSR to be the shortest of the three Arctic sea routes. Unlike the NSR and NWP (which are considered coastal routes), the TSR represent a mid-ocean route across, or near, the North Pole.

The TSR comprises limited jurisdictional controversies and uncertainties. According to a research report by the European Parliament, it is not unlikely that commercial Arctic marine transport will focus on traversing the TSR to avoid complications stemming from national jurisdiction in the NSR and the NWP.³²⁴ Situated outside the geographical reach of any Arctic coastal State, marine transport on the TSR is subject for the high seas regime (see Chapter 3.1.1.1.). However, given particular interpretations by Russian scholars, the TSR might be affected for what has been labeled as "creeping jurisdiction" from the NSR (see Chapter 4.1.1).

Nonetheless, Arctic marine transport in the TSR is subject for the legal framework as described in Chapter 3. In addition, other Conventions apply as well, such as IMO's two main treaties, SOLAS 1974 and MARPOL 1973/1978. Moreover, the COLREG 1972, London Convention 1972 and STCW Convention 1978/1995 are also applicable, to mention a few.³²⁵

³²¹ United States, Department of State, 'United States Response Responses to Excessive Maritime Claims' *Limits in the Seas* (No. 112, 1992) p. 73. See also Ted L. McDorman, *supra note* 258, p. 246.

³²² Ted L. McDorman, *supra note* 261, p. 245.

³²³ Malte Humpert & Andreas Raspotnik, *supra note* 32, p. 289.

³²⁴ Arild Moe & Øystein Jensen, Directorate-General For External Policies, 'Opening of New Arctic Shipping Routes' (2010) *European Parliament Policy Department* (EXPO/B/AFET/FWC/2009-01/Lot 2/03, PE. 433.792) p. 5.

³²⁵ International Convention for the Safety of Life at Sea (SOLAS), United Nations Treaty Series, Volume 1148, No. 18961, p. 2. International Convention for the Prevention of Pollution from Ships 1973 and Protocol 1978 (MARPOL), United Nations Treaty Series, Volume 1340, No. 22484, p. 61. Convention on the International Regulations for Preventing Collisions at Sea (COLREG), United Nations Treaty Series, Volume 1050, No. 15824, p. 18. The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), United Nations Treaty Series, Volume 1361, No. 23001, p. 3. See also Chapter 3.

5 Comparative Analysis

In this Chapter the reader will be presented with a comparative analysis of the Arctic marine transport related legal disputes and controversies in the three Arctic sea routes. The reader should here also note that it is important to bear in mind that all disputes and controversies are interrelated. Focus of this chapter is to identify and analyze similarities, differences, and commonalities. In addition, the author's own analysis will be presented. Consequently the Chapter will serve as an end-conclusion for some disputes and controversies.

5.1 Commonalities

Subject to Applicable Law

Firstly, it needs to be emphasized from the outset that marine transport conducted on the NSR, NWP, and TSR in the Arctic Ocean are subject to an intricate multi-layered framework. The 1982 UNCLOS is the most prominent, followed by the 1958 Territorial Sea Convention and the substantive standards and obligations incorporated in several IMO instruments (see Chapter 3 & 4.3). This jurisdictional framework sets out the basic rights and obligations for the Arctic coastal states, as well as jurisdiction over vessels' traversing the Arctic sea routes. In addition, the voluntary Polar Guidelines might soon be developed into a mandatory International Code of Safety for Ships in Polar Waters.³²⁶ Depending on a vessel's geographic position in either the NSR or the NWP as situated in the Arctic basin, the vessel will also be subject for coastal state's national jurisdiction.

The New Accessible Arctic

Without further commenting the scientific process of climate change, it has been concluded previously in Chapter 2.2.1 that today's Arctic ice coverage is less than 1,4 million km² than in 2006.³²⁷ Going back even further, the Arctic Climate Impact Assessment states that today's ice coverage is roughly at a 50 percent decrease compared to the 1950's ice coverage.³²⁸ From a factual viewpoint, the thawing of Arctic ice coverage has enabled a previously inaccessible maritime area for excavation of hydrocarbons and other resources. It has also exposed new shipping routes decreasing the distance between the three most industrialized and developed continents on Earth.³²⁹ In addition, new technologies for vessels and drilling structures can easier cope with the Arctic's harsh environment. The new accessible Arctic affects all three Arctic shipping routes within the scope of this thesis.

Different Geographic Definitions of the Arctic

As concluded in Chapter 1.5.2, there are different geographic definitions for the term "Arctic", since neither the Arctic nor the Arctic Ocean has a definitive or obvious extent. Since no single definition exists of what is meant by the Arctic, definitions are varied

³²⁶ See Chapter 3.1.1.2 for further reading.

³²⁷ Alexander Proelss & Till Müller, 'The Legal Regime of the Arctic Ocean' (2008) Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Research paper 1/2008, p. 653. <http://www.hjil.de/68_2008/68_2008_3_a_651_688.pdf> accessed 21 July 2013.

³²⁸ ACIA, *supra note 2*, p. 12.

³²⁹ See Chapter 2.2.

according to the field of interest from which the Arctic is being viewed, with each sub-category comprised of even more varied definitions.³³⁰ Different geographic definitions of the Arctic affect the three sea routes within the scope of this thesis, although the consequences are strongly tinged by ambiguity and vague predictions in the legal doctrine. Therefore this commonality cannot be further commented.

5.2 Similarities

Increase of Arctic Sovereignty Through Article 234

As discussed in Chapter 3.1.1.2, Article 234 of UNCLOS allows coastal states to enact rules and regulations to protect ice-covered waters within their EEZ. The NSR and the NWP both share the same strengthening of control over their respective sea routes through domestic legislation with its legal foundation in Article 234. The TSR stands outside of its scope. In the NSR the Russian legislation ‘Regulations for Navigation of the Seaways of the Northern Sea Route’, clearly states it has taken its justification from Article 234 by stating that:

Purposes of ensuring safe navigation and preventing ... from vessels since the specifically severe climatic conditions that exists in the Arctic Regions and the presence of ice³³¹

As well as in the NWP by Canada’s preamble to the AWPPA. Stating:

Canada’s responsibility ... of the peculiar ecological balance that now exists in the water, ice and land areas of the Canadian arctic³³²

However, it is important to note, that Canada established its AWPPA before Article 234 came into force. According to Franckx, Canada’s opinion is that “ the article now gives international acceptance to the AWPPA.”³³³ In comparison to the NSR, Canada in the NWP was the pusher for Article 234’s enactment during the third Law of the Sea Conference.³³⁴ This distinction between the NSR and the NWP is worth highlighting.

Nevertheless, the end-result is similar. The strengthening of Arctic-control in the NSR and the NWP is clearly manifested by the traversing of the NSR in 1992 by the French vessel *L’Astrolabe*. The Finish vessels in 1997, *Uikku* and *Lunni*, made a similar voyage in the NWP. Through Article 234, Canadian and Russian domestic legislation required the traversing vessels to be in compliance with the AWPPA and ‘Regulations for Navigation of the Seaways of the Northern Sea Route’. All the vessels’ owners agreed to be in compliance with these regulations.³³⁵

The U.S. has objected to Canada’s AWPPA in the 1970’s, but there seems to be a lack of formal objection/protests against the Russian ‘Regulations for Navigation of the Seaways of the Northern Sea Route’. This confirms the “U.S. policy shift” (see Chapter 4.2.5) of

³³⁰ See Chapter 1.5.2. For further reading, see also Erik Franckx, *supra note* 145, pp. 8 – 11.

³³¹ Cited through Rob Huebert, *supra note* 144, pp. 257 – 259 due to lack of English translation.

³³² Act to Prevent Pollution of Areas of the Arctic Waters Adjacent to the Mainland and Islands of the Canadian Arctic, *supra note* 146, p. 1.

³³³ Erik Franckx, *supra note* 145, p. 96.

³³⁴ *Ibid.*

³³⁵ Rob Huebert, *supra note* 144, p. 263. See also Chapter 4.1.

measures to be made for marine environmental protection, as stated by the U.S. during the third UN Conference on the Law of the Sea.

The U.S. has avoided making a formal statement of its interpretation on Article 234.³³⁶ It is unclear whether the U.S. reluctance to formally state a position is *de facto* an acceptance of the provision as a part of customary law or not, although some authors has suggested so.³³⁷ The closest is a clarification on the U.S. position regarding transit passage in conjunction with Article 234 that was stated in the commentary to the third UN Conference on the Law of the Sea, which read: “Article 234 does not fundamentally affect transit passages rights through an international straight.”³³⁸ It should be noted that UNCLOS does not clarify whether or not transit passage prevails over Article 234 or vice versa. This question is elaborated with in the forthcoming chapter. As concluded in Chapter 3.1.1.2, Article 234 is a controversial establishment with several ambiguities, such as the provisions legal definitions of “ice-covered passage” and “most of the year”.³³⁹ This ambiguity affects Arctic marine transport in the NSR, the NWP, and in some extent the TSR. Given the driving forces behind the new accessible and commercial Arctic as provided in Chapter 2.2, there is an on-going process by the IMO to operationalize Article 234 through the mandatory Polar Code. The aim is to clarify and to reach consensus regarding rules and regulations in the Arctic for commercial vessels. However, the relevance and scope of the instrument is still uncertain since it is not yet legally binding. It is expected to enter into force by 2014-2016.³⁴⁰ The Polar Code will ensure that the same set of standards, regulations, and rules will apply to Arctic shipping along the NSR, the NWP and the TSR.

It is worth noting that the implementation of a mandatory Polar Code based on Article 234, in order to harmonize Arctic shipping, will in some ways contradict with the Canadian AWPPA and the Russian ‘Regulation for Navigation of the Seaways of the Northern Sea Route’. Despite the Polar Codes uncertain legal range, it will most certainly imply a jurisdictional decrease of Arctic sovereignty in the NSR and the NWP. Slightly controversial since the “Arctic exception clause” original purpose was “to provide the Canadian Government with international support ... of its northern waters and to bolster its claim of sovereignty over the Northwest Passage.”³⁴¹

The Undefined Legal Status of Sea ice

As concluded in Chapter 3.1.2, Østreng and Cinelli claims there are two theories; the ice-is-water theory (*mare liberum-res communis*), and the ice-is-land theory (*glacies firma as terra firma-res nullius*). In summary, it can be concluded that the dispute of the undefined legal status of sea ice is applicable to the NSR, the NWP and in some extent the TSR (depending on which sub-theory of the “ice-is-land theory” is applied). However, as of today the legal status of sea ice does not seem to be central for maritime law scholars. The definitive doctrinal shift internationally was the statement from the Russian scholar Martens in 1905 (see Chapter 3.1.2). The Russian legal expert on the NSR, Timtchenko,

³³⁶ *Ibid*, p. 257.

³³⁷ *Ibid*. A similar conclusion is also expressed by Erik Franckx, *supra note* 145, p. 125.

³³⁸ United States, *supra note* 319, p. 18. See also Rob Huebert, *supra note* 144, p. 258 and Chapter 4 & 6 of the Russian and Canadian perspective regarding the transit passage regime.

³³⁹ See Chapter 3.1.1.2 for the full reading of Article 234. See (for an example) Rob Huebert, *supra note* 144, p. 263 and Willy Østreng, *supra note* 13, p. 267 regarding the ambiguity of Article 234.

³⁴⁰ See Chapter, 3.1.1.2.

³⁴¹ According to the Canadian scholar Rob Huebert, *supra note* 144, p. 249.

has reported that Martens opinion on the legal status of sea ice “is typical of more recent Soviet and Russian jurists.”³⁴² The author of this thesis is of the opinion that the “ice-is-land theory” is too farfetched, mainly due to considering *glacies firma* equal *terra firma* is illogical since *glacies* by nature are not *firma*. Therefore this dispute will not be further analyzed.

5.3 Differences

Innocent Right of Passage

As stated in Chapter 4.1.2, innocent passage in the NSR was previously non-applicable due to legislation and state practice exerted by the Soviet/Russia. Nevertheless, the ratification of UNCLOS constituted a definitive shift of the maritime approach for Soviet and was a recognition of the concept and principles of the Law of the Sea. The signing of the treaty, ‘Uniform Interpretation of the Rules of International Law Governing Innocent Passage’ (a.k.a. the “Jackson Hole Agreement”), between Soviet and the U.S. in 1989 confirms Soviet’s acceptance of the principles of innocent passage.³⁴³ However, for those straits enclosed by straight baselines drawn pursuant to Article 7 of UNCLOS, or Article 4 of the Territorial Sea Convention the application of the right to innocent of passage is more complex. Parts of the sea previously regarded as internal waters are, according to Article 8, UNCLOS, and Article 5 of the Territorial Sea Convention, not subject to innocent or transit passage rights. Waters previously not regarded as internal waters are therefore subject to the right of innocent passage according to Article 8(2) UNCLOS, and Article 5(2) of the Territorial Sea Convention.

As discussed in Chapter 3.1.1.1, defining the previous (and in some regard their present) legal status of straits, which now have been enclosed by straight baselines, is difficult and subject to much ambiguity in the legal doctrine.³⁴⁴ One must first ascertain how those waters were regarded prior to the establishment of straight baselines. For the NSR, it is crucial to look at the sector theory, the “ice-is-land theory” (*mare liberum-res communis*), the doctrine of historic waters, Soviet and Russian state practice, and the question if the NSR could be regarded as a national transportation route, such as the *Norwegian Indreleia*.³⁴⁵ This is in line with the opinion of the Soviet/Russian scholars Kolodkin and Volosov, who stated “can one consider the right of innocent passage through Soviet territorial waters ... the answer is no, for certain additional factors operate here.”³⁴⁶ (See Chapter 4.1.2).

These factors have been analyzed along with their legal validity in the context of international law. To summarize, it is clear that there is no strong argument that straits in the NSR were regarded as internal waters previous of their enclosure by straight baselines in 1985.³⁴⁷

³⁴² Leonid Timtchenko, *supra* note 51, p. 277.

³⁴³ Union of Soviet Socialist Republics – United States, ‘Joint Statement with attached Uniform Interpretation of Rules of International Law Governing Innocent Passage’ Jackson Hole, Wyoming, September 23, 1989, 28 I.L.M 1444 (1989). For further reading of the Agreement, see Chapter 4.1.4.2.

³⁴⁴ William V. Dunlap, *supra* note 161, p. 35.

³⁴⁵ See Chapter 4 for a thoroughly discussion regarding these subjects.

³⁴⁶ A. L. Kolodkin & M. E. Volosov, *supra* note 188, p. 166.

³⁴⁷ This conclusion is in line with what several other scholars has stated, see for an example William V. Dunlap, *supra* note 161, pp. 38 – 46 for a more thoroughly analyze of the subject regarding status of waters in the NSR previous of their enclosure by straight baselines.

Kolodkin and Volosov argue in favor of relegating the NSR as a national transportation route, such as the *Norwegian Indreleia*. However, as seen previously, Soviet/Russia has never officially made such a claim.³⁴⁸ Therefore this argument is irrelevant, irrespective of whether or not the ICJ's ruling in the *Anglo-Norwegian fisheries* case is fully applicable to the NSR (see Chapter 4.1.2). Secondly, Kolodkin and Volosov argues:

It follows from the interpretation of an analogous decision taken by Canada on 15 September 1985, which entered in force on 1 January 1986, on the baselines drawn around waters in the Northwest, including the Northwest Passage, that there never was a right of innocent passage in those waters (although as is well known American ships passed through those waters several times, the last being the *Polar Sea* in 1985).³⁴⁹

Kolodkin and Volosov fails to note that Canada never ratified the Territorial Sea Convention and the fact that Canada based its straight baselines on customary law (Chapter 4.2.2 & 4.2.4). Soviet/Russia ratified the Convention and is therefore bound by Article 5(2).³⁵⁰ This means that Russia in the NSR are bound to respect the innocent passage right for foreign marine transport through waters in the NSR which now are enclosed by straight baselines but previously considered to be high seas or territorial sea.³⁵¹

In the NWP however, the situation is different. As concluded in Chapter 4.2.4, there are three main reasons that the right of innocent passage does not apply in the NWP. Some scholars have suggested that Canada acceding to UNCLOS meaning *de facto* an obligation to abide and respect Article 8(2) (the right of innocent passage). However, as discussed above, the right of the innocent passage regime cannot change an established legal status due to the retroactive effect, although it needs to be noted that there are some uncertainty in the legal doctrine in this regard.³⁵²

In summary, it can be concluded that the unconditional innocent right of passage for foreign marine Arctic transport is in general applicable to the NSR, including strait previously closed by straight baselines. The TSR stands out of the innocent passage regime's scope due to its geographic position. In the NWP, there exists some ambiguity, although most scholars tend to lean on Pharand's interpretation. This interpretation is also the author of this thesis's view. However, given the driving forces behind the new accessible and commercial Arctic as provided in Chapter 2.2 this interpretation may be subject for change, as discussed in Chapter 6.

Historic Title as a Basis for Internal Waters in the Arctic Sea Routes

As concluded in Chapter 4.1.1 and 4.2.1, neither the Territorial Sea Convention nor UNCLOS defines the controversial and ambiguous concept of waters subject to historic title. However, both Conventions confirm (recognizes) the concept's possible application

³⁴⁸ See Chapter 4.1.2 & 4.1.4.2.

³⁴⁹ A. L. Kolodkin & M. E. Volosov, *supra note* 188, p.167.

³⁵⁰ See Chapter 4.1.

³⁵¹ William V. Dunlap, *supra note* 161, p. 42. Franckx reaches the same conclusion, see Erik Franckx, *supra note* 145, p. 185.

³⁵² *Ibid.*

in two situations.³⁵³ Given what has been concluded above, it can be determined that the doctrine of historic waters is subject to customary law, which as discussed in Chapter 3.1.1.1 is vague, controversial and in most cases indeterminate.³⁵⁴

In the NSR neither Soviet nor Russia has ever officially claimed any of the Arctic seas based on the doctrine of historic waters.³⁵⁵ However, neither Soviet nor Russia has openly rejected these claims.³⁵⁶ According to Timtchenko, Soviet legal scholars have argued for such claims as recently as in the 1980's.³⁵⁷ In addition, (as described in Chapter 4.1) the necessary domestic legal framework was provided to espouse such a claim in the future.³⁵⁸ This has added to the ambiguity on the Soviet/Russian position. Irrespective whether or not the doctrine of historic waters could be applicable for waters in the NSR, this cannot be further legally evaluated since no official claim exist.

In comparison to the NSR, the NWP has been subject to claims based on historic title. Canada's first official claim of a historic title as a basis for internal waters was made in 1973. The Bureau of Legal Affairs stated that: "Canada also claims that the waters of the Canadian Arctic Archipelago are internal waters of Canada, on historical basis, although they have not been declared as such in any treaty or by any legislation."³⁵⁹ Most research of Canada's claim to a historic title as a basis for internal waters in the NWP has been conducted by Pharand, who state that "the best definition of historic waters today is the one given by L. J. Bouchez,"³⁶⁰ followed by Pharand's interpretation of those three basic requirements set out by Bouchez: "(i) exclusive exercise of state jurisdiction, (ii) a long lapse of time, and (iii) acquiescence by foreign states."³⁶¹ As discussed in Chapter 4.2.1, Pharand's conclusion reads as follows:

Canada is not in a position to discharge its heavy burden of proof that it has exercised exclusive jurisdiction over the Arctic waters for a sufficiently long period of time and with the acquiescence of foreign states, particularly those primarily affected by its claim.³⁶²

The author of this thesis, mainly due to the following three specific arguments, shares Pharand's opinion. Firstly, the official claim by Canada in 1973, in light of relevant case law (as analyzed in Chapter 4.2), does not fulfill Pharand's second requirement - (ii) the long laps of time. As stated in the *Tunisia/Libya Continental shelf* case by the ICJ: "historic title must enjoy respect and be preserved as they have always been by long

³⁵³ First, the 1982 UNCLOS (Article 10(6)) and the 1958 Territorial Sea Convention (Article 7(6)) specify provisions for the definition of bays and the maximum length of its closing line, see more under each article. Second, both the 1982 UNCLOS (Article 15) and the 1958 Territorial Sea Convention (Article 12(2)) stipulates that the delimitation through a median line rule of the territorial sea between States with opposite or adjacent coasts are not applicable.

³⁵⁴ See Chapter 3.1.1.1, Chapter 4.2.1 and Chapter 4.1.1, especially the *Anglo-Norwegian Fisheries* case of 1951 and the *Tunisia/Libya Continental shelf* case of 1982.

³⁵⁵ Erik Franckx, *supra note* 145, p. 154.

³⁵⁶ Erik Franckx, *supra note* 145, p. 155.

³⁵⁷ Leonid Timtchenko, *supra note* 168, p. 34.

³⁵⁸ Art. 4 of the 1960 'Statute on the Protection of the State Borders', *supra note* 165.

³⁵⁹ Canada, Department of External Affairs, *supra note* 257, p. 279. See also, Donat Pharand, *supra note* 255, p. 112.

³⁶⁰ Donat Pharand, 'The Arctic Waters and the Northwest Passage: A Final Revisit' (2007) Vol. 38 Ocean Development and International Law, p. 7.

³⁶¹ *Ibid.*

³⁶² *Ibid.*, p. 13.

usage.³⁶³ In the *Anglo-Norwegian Fisheries* case the length of usage was roughly 250 years, where the Norwegian government relied upon “the exclusive privilege to fish and hunt whales granted at the end of the 17th century.”³⁶⁴

Secondly, the U.S. as well as the EC directed protests against Canada directly after Canada delineated its claim of historic waters.³⁶⁵ This implies that Pharand’s third requirement - (iii) acquiescence by foreign states, is not fulfilled. The attitude of foreign states towards a claim of historic waters is significantly vital, especially in regards to those whose interests are largely affected.³⁶⁶ This was stated in the *Anglo-Norwegian Fisheries* case, further the Court ruled that: “the general toleration of foreign states with regard to the Norwegian practice is an unchallenged fact.”³⁶⁷ In addition, it took 60 years for the United Kingdom to conduct a formal and definite protest of the Norwegian straight baseline system based on the doctrine of historic waters, which has been noted by several scholars as of particular importance.³⁶⁸ O’Connell has analyzed several international decisions by the ICJ on the subject regarding the attitude of foreign states and states: “a protest, in order to be effective, must be made by all reasonable and lawful means.”³⁶⁹ As seen in Chapter 4.2.1, formal protests by the U.S. and the EC regarding historic title as a basis for internal waters in the NWP is most certainly in line with O’Connell’s interpretation.

Finally, as concluded in Chapter 4.2, the NWP has been traversed by several vessels (mostly U.S.-flagged) without undergoing prior authorization from Canada. Notwithstanding the 1988 Agreement and the express understanding that “nothing in this agreement ... affects the respective positions of the two governments,”³⁷⁰ the Agreement is only subject to icebreakers and is therefore not applicable to commercial Arctic marine transport. As discussed in Chapter 4.2.3, the US-flagged oil tanker *S/S Manhattan* traversed the NWP without seeking Canada’s permission. This means that Pharand’s first requirement - (i) *exclusive exercise of state jurisdiction*, is not fulfilled.

To summarize, the author’s view is therefore that Canada is not entitled to a historic title as basis for internal waters in the NWP, mainly due to the discrepancy between the 1951 *Anglo-Norwegian Fisheries* case and that Canada has not exercised exclusive jurisdiction over the NWP for a satisfactorily extensive period of time. This is in line with Pharand’s opinion and other Arctic scholars.³⁷¹ However, it should be noted that some legal scholars have accepted the historic title argument in the NWP.³⁷² This is significant for what was

³⁶³ *Case Concerning the Continental Shelf (Tunisia/Libya)*, ICJ Reports, *supra note* 267, p. 73. However it needs to be underscored that according to Pharand, the Court did not accept the argument of Tunisia based on historic fishing rights although the Court did not detract from the accuracy of its statement, see more at Donat Pharand, *supra note* 360, pp. 7 – 8.

³⁶⁴ *Anglo-Norwegian Fisheries*, ICJ Reports, *supra note* 90, p. 142. See

³⁶⁵ See Chapter 4.2.1 & 4.2.2.

³⁶⁶ Donat Pharand, *supra note* 360, p. 7.

³⁶⁷ *Anglo-Norwegian Fisheries*, ICJ Reports, *supra note* 90, p. 138.

³⁶⁸ Donat Pharand, *supra note* 360, p. 8.

³⁶⁹ Daniel-Patrick O’Connell, *The International Law of the Sea* (Vol. 1, Clarendon Press Publishers, 1982) pp. 40 – 41.

³⁷⁰ Canada-U.S. Agreement on Arctic Cooperation, *supra note* 315, Article 4. See also Chapter 4.2.6 for more information regarding the 1988 Agreement.

³⁷¹ See for an example, Erik Franckx, *supra note* 145, p. 103, Willy Østreng, *supra note* 13, p. 334, and Suzanne Lalonde, *supra note* 299, pp. 53 – 54.

³⁷² See for an example, Robert R. Roth, ‘Sovereignty and Jurisdiction Over Arctic Waters’ *Alberta Law*

stated above, the doctrine of historic waters is vague, controversial and in most cases indeterminate.³⁷³

To conclude, there has never been an official claim for a historic title as basis for internal waters in the NSR, although there have been preventive domestic legislation aiming to keep this option available. This has led to extensive ambiguity of the Soviet/Russian position. The TSR lies outside any Arctic coastal state's jurisdiction, and has consequently not been subject for a historic title as a basis for internal waters. Canada in the NWP has for several times claimed a historic title starting with the first official declaration in 1973. However, as stated above, Canada is most certainly not entitled to a historic title, mainly due to a lack of proof that Canada has exercised exclusive jurisdiction over the NWP for a satisfactorily extensive period of time.

State Practice

As seen in Chapter 4, state practice in the NSR differs greatly in comparison to the NWP. Canadian state practice conducted in the NWP has been consistent and determined with little ambiguity. The TSR positions outside any Arctic coastal state's jurisdiction, hence no comparison can be conducted in this regard.

State practice on the NSR stands out in comparison to the NWP predominantly by quasi-state practice by lawyers and maritime law experts within the Russia Duma, such as Volosov and Kolodkin who claims that Arctic states "may realize their powers in the region not only in accordance with international law, but also on the basis of national norms" (see Chapter 4.1.1). The fact that the Soviet/Russian Government has not unequivocally rejected these doctrinal claims has evolved to a general ambiguity of the Soviet/Russian approach towards the Arctic and the NSR.³⁷⁴ In addition, necessary domestic legal framework has been legislated by Russia to espouse such far-fetched doctrinal claims, see Chapter 4.1. Chilingarov's statement, "Arctic Ocean is Russian territory", after planting the Russian flag on the North Pole should here be noted, but not further commented.³⁷⁵ The wide distinctions between Soviet/Russian state practice and doctrinal views has led to what other scholars has labeled as "creative ambiguity".³⁷⁶ Some legal observers have suggested that this ambiguity may be intentional.³⁷⁷ However, a more thoroughly discussion in this regard would break the boundaries and scope of this thesis, therefore this will not be further analyzed.

The Sector Theory

As concluded in Chapter 3.2, the speech held by Canadian Prime Minister in August 2006 definitely illustrated the Canadian abandonment from the sector theory:

Review, Vol. 28, 1990, pp. 871 - 872 (as mainly by expressing support for the cogency of the claim based on historic title), and Andrea Charron, 'The Northwest Passage' *International Journal*, Vol. 60, 2005, p. 847.

³⁷³ See Chapter 4.1.2. See also Clive R. Symmons, *supra note 276*, p. 286, who reaches the same conclusion.

³⁷⁴ Erik Franckx, *supra note 145*, p. 156.

³⁷⁵ For further reading regarding Chilingarov's bold action, see Chapter 4.1.3.

³⁷⁶ See Chapter 4.1.1.

³⁷⁷ William V. Dunlap, *supra note 161*, pp. 40 – 42. See also Willy Østreng, *supra note 13*, p. 257, who states that "the uncertainty and confusion involved ... feeling it to be deliberate and planned."

I am here today to make it absolutely clear that there is no question about Canada's Arctic border. ... All along the border, our jurisdiction extends outward 200 miles into the surrounding seas, ... No more. And no less.³⁷⁸

The Soviet/Russian approach in the NSR towards the sector theory is still shaded by some ambiguity (see Chapter 4.1.4). However, it needs to be underscored that neither Soviet nor Russia has never officially claimed waters beyond the limits of their national jurisdiction with basis in the sector theory.³⁷⁹ As concluded in Chapter 4.1.4.2, this is in part confirmed by the response to the U.S. military warships entering the Soviet sector in 1957 – 1967. A modern example is the letter from the Russian Chief of the Administration of the NSR that was addressed to the Master of the Greenpeace vessel *Solo* (Chapter 4.1.4.1). No reference to the sector theory was stated in these responses. However, Soviet never clearly rejected the sector theory either.³⁸⁰ According to Franckx, “this was done intentionally to keep future policy options open.”³⁸¹

As noted in Chapter 4.1.4.2, Soviet/Russia argued in the negotiations for the treaty on maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean (the “2010 Agreement”) towards recognition of the sector theory as a unique result of the area's characteristics; *inter alia*, geographic, geological, demographic, strategic, and climatic factors.³⁸² It is unclear if this implies that the sector theory could be regarded as a hands-on approach for delimitation maritime areas and which legal consequences this implies for the theory itself.³⁸³ It is evident that there are no legal bases in international law to legitimate the sector theory as means to claim territory (see Chapter 3).³⁸⁴ Given the factual background on the sector theory as provided in this thesis, the theory itself has most certainly not developed as a principle of customary law.³⁸⁵

Legal Disputes and Controversies Concerning the International Strait Regime

As discussed in Chapter 4.2.3, Canada is determined in its position that “Canada's Northwest Passage is not used for international navigation and since Arctic waters are considered by Canada as internal waters, the régime of transit passage does not apply.”³⁸⁶ The U.S. has consistently challenged the Canadian position, by the voyage of the US-flagged oil tanker S/S *Manhattan* through the NWP, as well as by stating: “We cannot accept the assertion of a Canadian claim ... such acceptance would jeopardize the freedom of navigation.”³⁸⁷ In addition, the EC has publicly disagreed with the Canadian viewpoint, but at the same time not publicly supported the U.S. perspective (see Chapter 4.2.3). Despite different scholars interpretation³⁸⁸ of the *Corfu Channel* case regarding

³⁷⁸ Stephen Harper, Canada's Prime Minister, *supra note* 183.

³⁷⁹ Leonid Timtchenko, *supra note* 168, p. 31.

³⁸⁰ Erik Franckx, *supra note* 145, p. 152.

³⁸¹ *Ibid.*, p. 153.

³⁸² See Chapter 4.1.4.2.

³⁸³ For further reading on legal consequences of the practical delimitation by the sector theory, see Willy Østreng, *supra note* 13, p. 255.

³⁸⁴ See for an example Article 2 of the 1958 Convention on the High Seas, declaring that “The high seas are open to all nations, no State may validly purport to subject any part of them to its sovereignty.” As thoroughly stating that the true basis of claims will be determined by international law.

³⁸⁵ This conclusion has also been expressed by Pharand, see Donat Pharand, *supra note* 233, pp. 91 – 92.

³⁸⁶ Allan MacEachen, Minister of External Affairs, *supra note* 258, p. 6.

³⁸⁷ U.S. Department of State, *supra note* 293.

³⁸⁸ Pharand states that: “given the control exercised by Canada over those foreign transits, and considering the small number of commercial ships involved, it is evident that the Northwest Passage has not had a

“straits used for international navigation” the U.S. perspective has been unequivocal: “a strait used for international navigation covers all straits that are capable of being used for international navigation.”³⁸⁹ In comparison with the NSR, an identical dispute or controversy is very likely to occur given the driving forces behind the new accessible and commercial Arctic as provided in Chapter 2.2. However, no such dispute has arisen, hitherto mainly due to the major inter-sea straits of the NSR not being subject for international navigation as a result of Soviet and later Russia’s protectionist position of the NSR (see Chapter 4.1.4.2). The TSR lies outside any Arctic coastal state’s jurisdiction hence the sea route is not subject for the international strait regime and consequently no disputes or controversies have arisen in the matter.

useful route for international maritime traffic“, see Donat Pharand, *supra note* 360, p. 42. A similar conclusion is expressed by Willy Østreng, *supra note* 13, pp. 266 – 267. See also Chapter 4.2.3.

³⁸⁹ James Kraska, *supra note* 311, p. 275.

6 Future Internationalization & Concluding Remarks

Moving to the final analytical part of the thesis, this chapter will first discuss the secondary purpose flowing from the first. Subsequently a general conclusion will be presented as well as some concluding remarks. The reader is noted that due to the intricacy and range of the legal disputes and controversies in the preceded chapters the conclusion is comprised to only raise the major points previously encountered.

6.1 Future Internationalization in the Arctic Sea Routes

6.1.1 Possible Internationalization?

As stated in Chapter 2.1, reduced Arctic sea ice is a palpable sign of climate change with breaking record low sea ice extent and thickness in 2012 – emphasizing the downward trend since satellite observations began in 1979.³⁹⁰ This decline is progressively opening new opportunities for commercial activity in the region, such as Arctic marine transport traversing the “Arctic-shortcut” with distance savings as high as 40 percent compared to the traditional sea-lanes through the Suez Canal.³⁹¹ In addition, estimations by the USGS states that the Arctic region could hold as much as 25 percent of the earth’s undiscovered oil and gas resources.³⁹²

Given these commercially driving forces for marine Arctic transport, it is not far-fetched to anticipate a future with drastically increased activity in the three Arctic sea routes. Assumed what has been concluded in Chapter 5, most distinguishing would be the legal consequences if straits of the NSR or the NWP becomes a “strait used for international navigation” (international strait) due to internationalization.³⁹³ The TSR in this regard remains unaffected since it routes outside any national jurisdiction.

As discussed in Chapter 3.1.1.1 and 4.2.3, the threshold in the *Corfu Channel* case for an international strait was pledged rather high, given the interpretation of the two criteria: geographical and functional. However, in the *Eastern Greenland* case³⁹⁴ of 1933 the ICJ recognized that when applying general principles from international law into the Arctic one needs to take into account certain peculiar local conditions, such as the regions distant position on the world map and environment.³⁹⁵ As concluded in Chapter 2.2.1, Arctic marine transport is characterized by harsh conditions, remoteness of the region, absence of alternative routes and environmental consequences due to the Arctic’s fragile ecosystem. This might *de facto* imply a lower threshold for the sufficiency of

³⁹⁰ Scott R. Stephenson, *supra* note 26, p. 2.

³⁹¹ *Ibid.*

³⁹² USGS, *supra* note 5.

³⁹³ See Chapter 3.1.1.1 & Chapter 4.2.3 for more information concerning a “strait used for international navigation”, i.e. an international strait.

³⁹⁴ *Legal Status of Eastern Greenland (Norway v. Denmark)*, (1933) PCIJ Reports, Ser. A/B, No. 53.

³⁹⁵ Donat Pharand, *supra* note 360, p. 44.

international navigation in the NSR and the NWP to become a “strait used for international navigation”. According to Pharand, a pattern of international shipping “developed over relatively few years, might be considered sufficient to make it international.”³⁹⁶ In conclusion, it is quite possible that the NSR and the NWP will transform to international straits due to internationalization.

If various straits in the NSR and the NWP is to be regarded as international straits it becomes evident in light of Chapter 5 that Russia’s and Canada’s Arctic sovereignty to control navigation by foreign Arctic marine transport will decrease. In addition, several legal disputes and controversies dealt with in Chapter 4 will shift pattern fundamentally.

6.1.2 Consequences & Unresolved Issues

What Right of Passage will apply after an Internationalization?

As discussed in Chapter 3.1.1.1, UNCLOS, Part III, Section 2 established a new regime for vessels navigating straits used for international navigation, the “transit passage right”.³⁹⁷ Some peculiar remarks needs to be highlighted of the new right in regards to the NSR and the NWP.

Firstly, the transit passage regime is according to Article 38(1) applicable to:

Straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall no be impeded

The adjective “all” needs to be emphasized, as it confirms that the entirety of vessels (including submarines) as well as aircrafts are subject for transit passage, and makes no distinction whether these are commercial or military. As Pharand notes;

Including submarines in their normal mode of navigation. Unlike in the exercise of the right of innocent passage through the territorial sea where submarines have to surface, they may remain submerged for transit passage.³⁹⁸

Pharand’s interpretation of submerged submarines is confirmed by several official declarations during the third UN Conference on the Law of the Sea.³⁹⁹ In addition, other scholars, such as O’Connell, state that: “submarines are by definition underwater vehicles, submerged passage is ‘normal mode’ of operation.”⁴⁰⁰

Secondly, Article 44 declares that: “States bordering straits shall not hamper transit passage ... there shall be no suspension of transit passage.”⁴⁰¹ Given what has been concluded in Chapter 4 and 5, this provision indicates a definitive jurisdictional decrease in the NSR and the NWP, as discussed below.

Thirdly, there are no criteria of innocence to fulfill according to Article 39(1), although

³⁹⁶ *Ibid.*

³⁹⁷ See UNCLOS, Article 37 – 44 . See also Chapter 3.1.1.1.

³⁹⁸ Donat Pharand, *supra note* 360, p. 45.

³⁹⁹ *Ibid.*

⁴⁰⁰ Daniel-Patrick O’Connell, *supra note* 369, p. 333.

⁴⁰¹ The 1982 UNCLOS, Article 44, the Article in full reads as follows: ”States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.“

vessels and aircrafts need to:

- (a) proceed without delay through or over the strait;
- (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (c) refrain from any other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;
- (d) comply with other relevant provisions of this Part.

As concluded in Chapter 4.2.3, it is evident that the NWP fulfills the prerequisites for the geographical criteria of an international strait. However, the criteria's application towards the NSR (in general) is tinged by some ambiguity due its complex geography. Dunlap has conducted extensive research on the subject in the research study 'Transit Passage in the Russian Arctic Straits' where the author concluded:

Of the 43 straits considered, how many may become subject to transit passage if Russia succeeds in opening its Arctic waters to international shipping? On the assumption that they all will be "used for international navigation" within the meaning of article 37, there are five conditions any one of which may disqualify a strait from the transit-passage regime or from the entire regime for international straits.⁴⁰²

Dunlap line up five exemptions which may disqualify a strait from the transit passage regime, or the prerequisites for an international strait: (i) Not connecting two parts of the high seas or EEZ, (ii) Being in internal waters (other than those newly enclosed), (iii) A through route of similar convenience in the high seas or EEZ, (iiii) A seaward route of similar convenience through the high seas or EEZ, (iiiii) Being subject to a long-standing international convention.⁴⁰³

In conclusion, Dunlap states that: "there are strong arguments that none of the five exemptions removes any of the 43 straits from the overall regime of international straits or from the transit-passage regime."⁴⁰⁴

To summarize, it is evident from this brief analysis that given the geographical criteria the transit passage regime's geographical prerequisites are fulfilled. Although there are some ambiguity on its application towards the NSR. The second criteria, functional, are of a more complex nature and several sub-questions and unresolved issues needs to be addressed here.

Firstly, at what point will vessel or aircraft traffic be sufficient to justify a transit passage right in the NWP and the NSR according to the functional criteria? As concluded in Chapter 4.2.3, for the new regime to be applicable in the NWP and the NSR they must be applied to "straits which are used for international navigation", according to Article 37 of UNCLOS. The phrase derives from customary law, mainly as interpreted in the *Corfu Channel* case.⁴⁰⁵ Surprisingly there is a lack of interest and discussion of the extent on the verb "used" (functional criteria) in the legal doctrine, which given its importance should

⁴⁰² William V. Dunlap, *supra* note 161, p. 53.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ See Chapter 4.2.3 & Chapter 3.1.1.1.

be addressed more thoroughly. Dunlap claims that:

On one level, it would not be unreasonable to assert that any foreign vessel engaged in international navigation would be entitled to transit, under the new regime, any strait through which another foreign vessel has already passed.⁴⁰⁶

In Dunlap's interpretation, the NSR and the NWP would already be subject for the new regime (in regards to the functional criteria) solely due to the *l' Astrolabe* traversing the NSR (Chapter 5.2), or the *S/S Manhattan* traversing the NWP (Chapter 4.2.3).

As discussed in Chapter 4.2.3, Pharand is of another opinion, claiming that: "it is evident that the Northwest Passage has not had a useful history as a useful route for international maritime traffic."⁴⁰⁷

The U.S. perspective has been that the functional criteria include potential or future use (see Chapter 4.2.3). However, this has been considered to be non-acceptable among the great majority of scholars due to its excessively broad interpretation.⁴⁰⁸

It is interesting to note that according to most scholars, including Pharand, the transit passage regime's functional criteria does not appear to correlate only to vessels or aircrafts previously invited by the coastal state. In conjunction with Article 37 of UNCLOS and official declarations⁴⁰⁹ drawn at the third UN Conference on the Law of the Sea some scholars has suggested that there seems to be a legal possibility of "bootstrapping" a strait in the NSR or the NWP into the transit passage regime, merely by transiting it.⁴¹⁰ For example, a U.S. uninvited submarine for either one (Dunlap's interpretation), or several times (Pharand's interpretation).

Given that the transit passage regime will govern due to internationalization in the straits of the NSR and the NWP, previously as well as on-going legal disputes and controversies will shift pattern fundamentally. Most distinguishing would be the Canadian jurisdictional decrease over foreign Arctic marine transport. Mostly due to its enclosed internal waters by straight baselines, where no right of innocent passage exist (as concluded in Chapter 4.2.4).

Authority over Vessels Exercising Transit Passage Right

Vessels traversing the seaways of the NSR and the NWP under the transit passage regime are subject for authority from the bordering state by Article 42 and 233 of UNCLOS.

Article 42 states that:

Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits.

⁴⁰⁶ William V. Dunlap, *supra* note 161, p. 53.

⁴⁰⁷ Donat Pharand, *supra* note 360, p. 42.

⁴⁰⁸ Laura Boone, 'International Regulation of Polar Shipping' in Erik J. Molenaar, Alex G. Oude Elferink and Donald R. Rothwell (eds), *The Law of the Sea and the Polar Regions: Interactions between Global and Regional Regimes* (Martinus Nijhoff Publishers, 2013) p. 209.

⁴⁰⁹ See Donat Pharand, *supra* note 360, p. 45 for further reading regarding official declarations made during the Conference.

⁴¹⁰ See for an example L. M. Alexander, 'Exceptions to the Transit Passage Regime: Straits with Routes of Similar Convenience' (1987) Vol. 18 *Ocean Development and International Law*, p. 490. See also Donat Pharand, *supra* note 360, p. 45 & William V. Dunlap, *supra* note 161, p. 53.

The provision gives bordering states the right to regulate safety of navigation and maritime traffic, sea-lanes and separation schemes, prevention and reduction of pollution, and prevention of illegal fishing.⁴¹¹ Article 233 stipulates enforcement powers to the coastal state in case of violation a board a foreign vessel.⁴¹²

However, the relationship between the two provisions and the transit passage regime needs to be emphasized. Article 233 states that: “nothing in sections 5, 6 and 7 affects the legal regime of straits used for international navigation.” Pharand has emphasized this relationship, he states:

Two limitations on the authority of the bordering state must here be underlined. First, its regulatory powers under paragraphs (a) and (b) of Article 42 are limited to giving affect to applicable international regulations. Second, its enforcement powers under Article 233 ... are restricted to cases where a foreign ship has committed a violation.⁴¹³

As noted in Chapter 3.1.2, Article 234 grants coastal states a special regulatory power and enforcement rights in ice-covered waters. The provision’s application is not excluded from “straits used for international navigation”, as compared to Article 42 and 233. In conclusion, Article 42 and 233 provides bordering states with limited authority when vessels are exercising the transit passage right.

The Possible Forthcoming Regime of Transit Passage and Article 234

As concluded in Chapter 5, Article 234 has been subject for extensive ambiguity. So is also the case when analyzing the provision’s relationship towards the transit passage regime. Firstly, it is unclear whether Article 234 trounces the regime of transit passage or vice versa. Since UNCLOS or customary law gives no guidance in the subject matter, the question has been subject for much ambiguity in the legal doctrine. In addition, several scholars’ interpretation of case law and opinions are heavily diverged. Due to such diverse opinions, Pharand has suggested that:

Since there are no so-called, ‘travaux préparatoires’, paramount weight should

⁴¹¹ UNCLOS, Article 42 reads as follows: ”1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following: (a) the safety of navigation and the regulation of maritime traffic, as provided in article 41; (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait; (c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear; (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits. 2. Such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section. 3. States bordering straits shall give due publicity to all such laws and regulations. 4. Foreign ships exercising the right of transit passage shall comply with such laws and regulations. 5. The flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits.“

⁴¹² UNCLOS, Article 233 reads as follows: “Nothing in sections 5, 6 and 7 affects the legal regime of straits used for international navigation. However, if a foreign ship other than those referred to in section 10 has committed a violation of the laws and regulations referred to in article 42, paragraph 1(a) and (b), causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures and if so shall respect *mutatis mutandis* the provisions of this section.”

⁴¹³ Donat Pharand, *supra note* 360, pp. 46 – 47.

be given to the opinion of negotiators of the Article. Only they are able to speak of the true intent behind the words and their special meaning, if any.⁴¹⁴

Unfortunately for this thesis, there is no such information available. However, given the analyzed state practice in Chapter 5.3, one could for certain assure that Russia in the NSR and Canada in the NWP will be of the opposite view and interpretation than the U.S. and the EC, as well as other States who could benefit from navigational freedom for commercial Arctic marine transport.

It is interesting to note however that predictions according to a recent study by DNV (see Chapter 2.2.1), the ice-free time of the Arctic's main transportation routes will increase from roughly 30 days in 2011 to more than 120 around in 2060. The study in conjunction with the wording of Article 234, such as "in ice-covered areas" and "most of the year" is highly interesting, although unclear. Several sub-questions arise in this matter, such as what level of ice cover is required? Will even partial ice cover be sufficient? What exactly is "most of the year", and so on. These types of uncertainties regarding Article 234 are still unresolved, although one can conclude that a decrease of ice-coverage in certain areas of the NSR and the NWP implies that the increase of Arctic sovereignty through Article 234 (as concluded in Chapter 5.2) might not be so trustable in light of the rapidly changing dynamics of the Arctic region due to climate change.

6.2 General Conclusion and Ending Remarks

Since conclusions as well as summaries have been made throughout the preceding chapters (due to the large amount of legal disputes and controversies) this conclusion will only briefly summarize the major points of the most important elements encountered.

The first question related to the primary purpose was:

- Which are the legal disputes and controversies in the Arctic sea routes that materially constrain Arctic marine transport? What are their origins?

Firstly, it has been concluded that there are several legal disputes and controversies in the Arctic sea routes which directly or indirectly could constrain Arctic marine transport. However, given the conclusions drawn in Chapter 4 and 5 it becomes evident that the following legal disputes and controversies materially constrain Arctic marine transport:

- Internal waters in the NWP due to Canada's straight baselines based under customary law (Chapter 4.2.2)
- "Creeping Jurisdiction" in the NSR (Chapter 4.1.1)
- Increase of Arctic sovereignty through Article 234 and the provision's ambiguity towards the transit passage regime (Chapter 5.2)
- Ambiguity regarding different interpretations of the transit passage regime and the international strait provision (Chapter 5.3 and 6)

⁴¹⁴ *Ibid.*, p. 46.

In summary, both the NSR and the NWP are tinged by several legal disputes, controversies, and ambiguity. In addition, neither Russia nor Canada is actively promoting international usage of their respective sea routes which combined is a major limiting factor for commercial Arctic marine transport according to a recent research study by the European Parliament's Committee on Foreign Affairs.⁴¹⁵ In contrast to the NSR and the NWP, the TSR positions outside any Arctic State's jurisdiction and is therefore almost free from legal disputes and controversies.⁴¹⁶ It is possible that marine transportation companies will focus on the possibility of traversing the TSR instead of the NSR and the NWP, avoiding disputes and controversies stemming from domestic law and far-fetched interpretations of international law.⁴¹⁷ A more thoroughly analyze on this is outside the scope of this thesis though, such as the question on how these disputes and controversies affects commercial marine transport. However, despite disputes and controversies in the NSR and the NWP, all three Arctic sea routes have the potential to transform commercial shipping into the 21st century, the outcome how this will play out remains to be seen though.

The second question related to the primary purpose was:

- What are the commonalities, differences and similarities of the legal disputes and controversies in the Arctic sea routes previously presented and what conclusions can be made of this in a wider scope?

Chapter 5 comprised a descriptive analyze through a comparative method where the aim was to analyze commonalities, differences and similarities of the legal disputes and controversies.

In a wider scope than previously applied in Chapter 5, two general conclusions can here be drawn. Firstly, the Arctic approach and legal development by Soviet/Russia and Canada seems to be shaped mainly through foreign actions, primarily conducted by the U.S.⁴¹⁸ For an example, the voyage in the NWP by the S/S *Manhattan* without permission can be mentioned, where Canada responded by enacting more stringent pollution legislation (AWPPA).⁴¹⁹ A similar situation was the U.S. coast guard activity in the NSR during 1959-1965, where Soviet responded by claiming that foreign vessels are forced to obtain an official permission for icebreaker and ice-forecasting support, as well as a general permission to traverse the NSR.⁴²⁰ As one author has observed: "the difficulty of negotiating ice passage without icebreaker and ice-forecasting support, the Soviet Union effectively nationalized the route years ago."⁴²¹ In practice, the cited has fallen out to be somewhat correct, since no icebreaker, or commercial vessel, has accomplished the crossing without approval from Moscow.⁴²² The *Polar Sea* incident in 1985 should here

⁴¹⁵ Arild Moe & Øystein Jensen, Directorate-General For External Policies, *supra note* 324, pp. 13 – 15.

⁴¹⁶ Depending on the interpretation concerning the "creeping jurisdiction" in the NSR, this may involve the TSR, see Chapter 4.1.1.

⁴¹⁷ Arild Moe & Øystein Jensen reaches the same conclusion see, Directorate-General For External Policies, *supra note* 324, p. 15.

⁴¹⁸ Franckx reaches a similar conclusion, see Erik Franckx, *supra note* 145, p. 295.

⁴¹⁹ See Chapter 4.2.1 & Chapter 3.1.1.2.

⁴²⁰ See Chapter 4.1.4.1.

⁴²¹ William V. Dunlap, *supra note* 161, p. 55.

⁴²² Erik Franckx, *supra note* 145, p. 294.

also be noted, since Canada after the incident reacted by drawing straight baselines around its Archipelago, see Chapter 4.1.2 and Chapter 4.2.2. It should be noted that the U.S. and Canada has exchanged diplomatic correspondence previous of all actions on a “agree to disagree”-basis of the legal divergence regarding the NWP (see for an example Chapter 4.2.5 concerning the 1988 Agreement).

Secondly, Russia and its predecessor in the NSR as well as Canada in the NWP (although in a much smaller regard) has from the start been provided by legal scholars of respective Government or Duma with a broad variety of different legal arguments for Arctic sovereignty, such as the sector theory, the “ice-is-land-theory” (*glacies firma as terra firma-res nullius*), historic title, exaggerated interpretation of Article 234 etc. The main goal among these scholars seems to have been to provide the two respective States with basis for partial or all-embracing claims on maritime expanses in the Arctic. However, it has been clearly demonstrated that the Canadian Government and the Soviet/Russian Duma have not correlated with these scholars’ interpretations and theories, since state practice shows that both States has been very reluctant to espouse such far-fetched legal arguments. Contrary, maybe as a result of the first observation in this conclusion, it has been shown that both States has adopted a more functionalistic, step-by-step approach towards the legal status of the Arctic.

As concluded above, both States have succeeded in increasing their Arctic sovereignty of their respective sea route. However, some discrepancies between the two State’s Arctic approach in obtaining this jurisdictional increase needs to be noted. Canada in the NWP has been labeled as the more “aggressive” State in comparison to Soviet and especially Russia in the NSR, as an example the AWPPA legislation in 1970 can be mentioned where Canada, according to Franckx, “did not mind coming very close to the limit of what was tolerated by international law, sometimes even trespassing it.”⁴²³ Given the present ambiguity surrounding Article 234 of UNCLOS and its “express” incorporation into international law (due to diplomatic pressure from Canada), the author of this thesis reaches the same conclusion as Franckx. In comparison to Soviet, it was (contrary to Canada) only after the incorporation of Article 234 Soviet adopted its edict on the protection of Arctic environment in the NSR (see Chapter 3.1.1.2).

The final conclusion in the second question related to the primary purpose is that the main theme of the examined legal disputes and controversies is the lack of official statements by coastal states bordering the sea routes. In several disputes the legal position is unclear in international law, which given the lack of official statements has given scholar’s divergence of interpretation a considerable weight in determining the legal status of the Arctic sea routes. This ambiguity could be intentional, such as neither Soviet or Russia openly rejects maritime expanse claims by prominent Soviet/Russian scholars within the Duma – i.e. keeping the option available for the future (see Chapter 5.3). However, the author of this thesis is of the opinion that this theory is to academically problematizing the reality. A more modest and unpretentious explanation would be that the lack of official statements is due to that these disputes and controversies are widely irrelevant for the stakeholders of the Arctic, especially Soviet/Russia since the NSR is not yet commercially viable given its current impassible waterways without ice-breaker and ice-forecasting support from the Russian Government.⁴²⁴ Given the Arctic’s unique

⁴²³ *Ibid*, p. 295.

⁴²⁴ See more at Chapter 2.2.1.

characteristics and navigational environment for marine Arctic transport, the NSR is already nationalized in this practical regard. This applies to the NWP as well. However, as concluded in Chapter 2, this may be the subject for change since climate change is rapidly re-forming the region.

The secondary purpose, originating from the first, was to analyze the legal consequences of a future internationalization in the three Arctic sea routes and how it will affect the previously presented disputes and controversies. The first of the two questions here was:

- What right of passage would apply after an internationalization in the NSR, the NWP, and the TSR?

Firstly, it was concluded that given the commercially driving forces for marine Arctic transport it is not far-fetched to anticipate a future with drastically increased activity in the three Arctic sea routes. In light of what has been concluded in Chapter 5, most distinguishing would be the legal consequences if the NSR or the NWP becomes a “strait used for international navigation” (international strait) due to internationalization.⁴²⁵ It was further concluded that the TSR in this regard remains unaffected, since it routes outside any national jurisdiction. If straits in the NSR and the NWP become internationalized the right of transit passage will govern.

However, as concluded in Chapter 3.1.1.1 and 4.2.3, the threshold in the *Corfu Channel* case for an international strait was pledged rather high, given the interpretation of the two criteria: geographical and functional. Due to a lack of a more thorough definition on a “strait used for international navigation” than provided in UNCLOS Article 34 – 45 (see Chapter 3.1.1.1), the legal position is uncertain. The geographic criteria as set out in Article 37 is met in the NWP and probably the NSR, although there remains ambiguity in this regard (see Chapter 6.1.2). Consequently, it still remains ambiguity on the interpretation of the *Corfu Channel* case, predominantly concerning the functional criteria. In addition, it is possible that Russia and Canada will take adequate preventive measures for an internationalization of straits in their respective sea routes, such as *inter alia* making NORDREG⁴²⁶ mandatory as one author has suggested.⁴²⁷

The final question from the secondary purpose, originating from the first, was:

- What would the legal consequences be of the presented legal disputes and controversies if the transit passage regime would apply?

Firstly, it is unclear whether Article 234 trounces the regime of transit passage or vice versa. Since UNCLOS or customary law gives no guidance in the subject matter, the question has been subject for much ambiguity. Unfortunately for this thesis, the question has not been able to be further analyzed in lack of legal sources and doctrine. However, given the analyzed state practice in Chapter 5.3, one could for certain assure that Russia

⁴²⁵ See Chapter 3.1.1.1 & Chapter 4.2.3 regarding a “strait used for international navigation”, i.e. international strait.

⁴²⁶ The Northern Canada Vessel Traffic Services Zone establishes the Vessel Traffic Reporting Arctic Canada Traffic Zones (NORDREG), which implements requirements for Arctic marine transport to report information prior to entering and operating within Canada’s northern waters. See more at: <http://www.ccg-gcc.gc.ca/eng/MCTS/Vtr_Arctic_Canada> accessed 21 July 2013.

⁴²⁷ Donat Pharand, *supra note* 360, p. 59.

in the NSR and Canada in the NWP will be of the opposite view and interpretation than the U.S. and the EC, as well as other States who could benefit from navigational freedom for commercial Arctic marine transport. In addition, ambiguity regarding the wording of Article 234 should also be noted, such as “in ice-covered areas” and “most of the year”. Several legal issues remains in this matter, for an example, what level of ice cover is required for the provision to be applicable? Given the rapidly changing dynamics of the Arctic region, this provision might not be so trustable in the future.

Secondly, the NSR and the NWP are affected in dissimilar ways if the transit passage regime would govern. Primarily the decrease of jurisdictional sovereignty due to the innocent passage regime needs to be emphasized. As concluded by the author in Chapter 5, innocent passage applies in general for the waters of the NSR. Waters of the NWP are strictly internal waters due to Canada’s straight baselines based under customary law (see Chapter 4.2.4) and therefore foreign Arctic marine transport is not entitled to the right of innocent passage. Given this, Canada in comparison to Russia would see a stronger decrease of jurisdictional Arctic sovereignty and control. The difference concerning bordering state’s authority and marine transport’s “innocence” when entitled to the innocent passage right in comparison to the transit passage regime should also be noted here. In addition, if the transit passage regime would govern straits of the NSR and the NWP, new legal questions would emerge as well.

In conclusion, the main theme of the secondary purpose goes hand in hand with the general conclusions of the first purpose. There has been, and still is, a lack of official statements of the coastal states in the Arctic and other major stakeholders, such as the IMO. Given the uncertain legal position of the Arctic and different scholars interpretations this has lead to a general ambiguity on how to approach, for an example, the transit passage regime. Especially the spatial scope of Article 234 and whether the regime prevails over the transit passage regime or vice versa should be emphasized. The author of this thesis is of the opinion that the underlying reason is that these questions are largely irrelevant for others than of academic interest, since the Arctic sea routes are not yet commercially viable. However, given the rapidly changing dynamics of the Arctic and the regions opulence of economic opportunities it is not far-fetched to anticipate a future with drastically increased Arctic marine transport. In reference to this, it is evident that any legal gaps creating legal disputes and controversies in the Arctic sea routes needs to be thoroughly addressed and sealed.

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