

## ARCTIC SOVEREIGNTY OVER THE NORTHERN SEA ROUTE: THE UNITED STATES VS THE RUSSIAN FEDERATION

Marsha Qitara<sup>1</sup>

### Abstract

*This paper mainly discusses the legal status of straits contained within the Northern Sea Route ('NSR'). It is necessary to affirm the legal status to determine the type of navigation. Currently, one State that is in contention to Russian Federation's ('Russia') authority over the NSR is the United States ('US'), their main argument relates to the straits being of international water character and as such should not be part of Russia's authority. In any case, Russia still asserts that even the straits contained within the NSR is part of their internal waters arguing on a historical basis and Article 234 of the United Nations Convention on Law of the Sea ('UNCLOS'). The pressing urgency also comes from the climate change that is rapidly decreasing the ice caps in the Arctic in the recent years, consequently, this opens avenues for international navigations through the NSR. Following the current understanding of the Arctic sovereignty, this prompt both challenges and opportunities for Russia and could lead to the resolving of conflict between Russia and the US.*

### Intisari

*Artikel ini utamanya membahas status hukum selat-selat yang terdapat di dalam Rute Laut Utara ('NSR'). Status hukum perlu ditegaskan untuk menentukan jenis navigasi. Saat ini, salah satu negara yang memperdebatkan otoritas Federasi Rusia ('Rusia') atas NSR adalah Amerika Serikat ('AS'), argumen utama mereka berkaitan dengan selat-selat tersebut yang bersifat perairan internasional dan dengan demikian tidak boleh menjadi bagian dari otoritas Rusia. Bagaimanapun, Rusia masih menegaskan bahwa selat-selat yang terdapat di dalam NSR merupakan bagian dari perairan internal mereka dengan berargumen berdasarkan sejarah dan Pasal 234 Konvensi Perserikatan Bangsa-Bangsa tentang Hukum Laut ('UNCLOS'). Urgensi yang mendesak juga datang dari perubahan iklim yang dengan cepat mengurangi lapisan es di Kutub Utara dalam beberapa tahun terakhir, akibatnya, hal ini membuka jalan bagi pelayaran internasional melalui NSR. Mengikuti pemahaman saat ini tentang kedaulatan Arktik, hal ini mendorong tantangan dan peluang bagi Rusia dan dapat mengarah pada penyelesaian konflik antara Rusia dan AS.*

*Keywords: NSR, US, Russia, Straits, Navigation.*

*Kata Kunci : NSR, US, Russia, Selat, Navigasi.*

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<sup>1</sup>Class of 2019, Bachelor of Law from the International Law Department, Faculty of Law of University Gadjah Mada.

## I. INTRODUCTION

The Northern Sea Route ('NSR') is defined as "a water area adjacent to the northern coast of the Russian Federation that comprises the internal sea waters, the territorial sea, the contiguous zone and the exclusive economic zone of the Russian Federation and is bounded on the east by a maritime demarcation line with the United States of America and by the parallel of the Cape Dezhnev in the Bering Strait, on the west, by the meridian of the Cape Zhelaniya to the Novaya Zemlya Archipelago, by the eastern coastline of the Novaya Zemlya Archipelago and by the western boundaries of the Matochkin Shar, Kara Gate and Yugorsky Shar Straits."<sup>2</sup>

It is also considered as a 'short cut' between the continents of Asia and Europe, specifically, it serves as a shipping lane between the Atlantic Ocean and the Pacific Ocean along the coast of Siberia and the Far East surpassing five Arctic Seas including the Barents Sea, the Kara Sea, the Laptev Sea, the East Siberian Sea and the Chukchi Sea.<sup>3</sup> What must be noted, is that as an effect of climate change, the arctic region has melted and the route became 'ice-free' for certain periods of the year<sup>4</sup> that becomes favorable to new alternative routes for global shipments. Evidently, the route reduced the distance between Asia and Europe as much as 40% compared to the distance through Suez Canal.<sup>5</sup>

To this end, the legal status of the area within the NSR has been disputed by the United States ('US') against the Russian Federation ('Russia'). Consequently, this have negatively impacted the bilateral treaties relations between the two States since 1960. The reasoning behind this is *prima facie* the US believes that the aforementioned straits are not part of the territorial waters, rather they should be part of the sea where freedom of navigation shall apply as it is part of international waters. Conversely, Russia have claimed that straits within the NSR is in fact part of territorial waters and

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<sup>2</sup> Viatcheslav V. Gavrilov, "Legal Status of the Northern Sea Route and Legislation of the Russian Federation: A Note," *Ocean Development and International Law* 46, no. 3 (2015): 256–63, <https://doi.org/10.1080/00908320.2015.1054746>.

<sup>3</sup> "NORTHERN SEA ROUTE - Arctic Bulk," accessed June 11, 2022, [http://www.arcticbulk.com/article/186/NORTHERN\\_SEA\\_ROUTE](http://www.arcticbulk.com/article/186/NORTHERN_SEA_ROUTE).

<sup>4</sup> "Northern Sea Route," accessed June 11, 2022, <https://www.nautinst.org/resource-library/technical-library/ice/guidance/northern-sea-rooute.html>.

<sup>5</sup> Andrey Todorov, "The Russia-USA Legal Dispute over the Straits of the Northern Sea Route and Similar Case of the Northwest Passage," *Arctic and North* 29, no. 29 (2017): 74–89, <https://doi.org/10.17238/issn2221-2698.2017.29.74>.

thus, shall be a “national transport communication” subject to domestic laws and base this fact on historical grounds.<sup>6</sup>

In order to assess these claims from both States, the United Nations Conventions on the Law of the Sea (‘UNCLOS’). As to briefly interpret Russia’s point of view, it affirms that it has sovereignty over the NSR including the internal waters and territorial sea of Russia based on Article 5 and Article 234 of UNCLOS.<sup>7</sup> The question arises when the subject will be focused on the straits and whether they are part of the high seas or international waters which will mean that Russia does not have *de facto* sovereignty rights over the NSR. With that line of thought, the USA have claimed that the Arctic should be of “global commons” meaning that no State should claim sovereign rights over the area; for instance, the USA does not ratify the UNCLOS and as such is strong on their stance when stating that the NSR shall be part of international waters without any prejudice over national laws.<sup>8</sup>

Similarly, the European Union (‘EU’) has also shared the same line of thought as the USA, citing that the Arctic should be considered part of the International Waters. However, they ironically deviated their position when Denmark have claimed part of the Arctic as theirs and defies the previous Statement. As such, the EU’s current position is not known as they still agree with the USA as their official stance, but their member has also claimed part of the Arctic waters with their knowledge.<sup>9</sup> To settle such disputes of territory, sovereignty claims that extends beyond the 200-230 nautical miles (nm) of the baseline or commonly known the EEZ could be referred to and shall be submitted to the United Nations Continental Shelf Commission.

Theoretically, for Russia to ascertain their claims of sovereignty over the NSR as well as the straits that are being disputed, they must prove that the threshold of historical waters under Article 234 of the UNCLOS are met which can be presented in twofold: (1) for a considerable *length* of time, the it have *exclusively exercised* its authority over the maritime area in question and (2) the existence of acquiescence which means that

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<sup>6</sup> Todorov.

<sup>7</sup> Dmitry Makarov et al., “Development Prospects and Importance of the Northern Sea Route,” *X International Scientific Siberian Transport Forum – TransSiberia 2022* 63 (January 1, 2022): 1114–20, <https://doi.org/10.1016/j.trpro.2022.06.114>.

<sup>8</sup> “Territorial Disputes over the Northern Sea Route - Leadership and Democracy Lab - Western University,” accessed June 13, 2022, [https://www.democracylab.uwo.ca/Archives/2018\\_2019\\_research/shipping\\_in\\_the\\_arctic/territorial\\_disputes\\_over\\_the\\_northern\\_sea\\_route\\_.html](https://www.democracylab.uwo.ca/Archives/2018_2019_research/shipping_in_the_arctic/territorial_disputes_over_the_northern_sea_route_.html).

<sup>9</sup> *ibid.*

the Coastal States must prove that the authority is *accepted* by other countries, *especially* those that is directly affected by it.<sup>10</sup>

Furthermore, the subject in question – straits need also to be proven prior to the discussion of sovereignty; this is discussed by the International Court of Justice (‘ICJ’) in the *Corfu case*<sup>11</sup>, which cited that a strait can be classified as such when it has been proven to have these two cumulative requirements: (1) geographical requirement; which means that the strait must connect two parts of the high seas and (2) functional requirement; the strait must be used for international navigation (which will also consider the volume traffic).

Moreover, UNCLOS have also categorized straits into five different categories: (1) Article 37; straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ – this will be governed by the use of transit passage, (2) Article 45(1)(b); straits connecting one part of the high seas/EEZ and the territorial sea of a foreign state – this will be governed by the non suspendable innocent passage, (3) Article 35(c); straits regulated in whole or in part by international conventions, (4) Article 45(1)(a); straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ where the strait is formed by an island of a state bordering a state and its mainland – this is governed by non suspendable innocent passage, (5) Article 53(4); straits through archipelagic waters – this will be governed by the archipelagic sea lanes passage. This can then determine if the straits in NSR is eligible for innocent passage or even freedom of navigation.<sup>12</sup>

## **II. HISTORY OF THE CLAIMS**

### **a. Russia**

As Russia’s main claim of the NSR is through its’ historical context by citing historical waters of Article 234, it is important to assess the evidence on their claims.<sup>13</sup> Following the sector theory which determines the sovereignty over sectors in the earth’s surface

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<sup>10</sup> Christopher R. Rossi, “The Northern Sea Route and the Seaward Extension of Uti Possidetis (Juris),” *Nordic Journal of International Law* 83, no. 4 (2014): 476–508, <https://doi.org/10.1163/15718107-08304004>.

<sup>11</sup> *Corfu Channel Case* (U.K./Albania), 1949 *ICJ Reports* p. 28.

<sup>12</sup> Xiaoxu Shi and Xiaoqi Sun, “Research on Innocent Passage System of Territorial Sea” 319, no. Ichssr (2019): 425–30, <https://doi.org/10.2991/ichssr-19.2019.81>.

<sup>13</sup> Leilei Zou and Shuolin Huang, “A Comparative Study of the Administration of the Canadian Northwest Passage and the Russian Northern Sea Route,” in *Asian Countries and the Arctic Future* (WORLD SCIENTIFIC, 2014), 121–41, [https://doi.org/10.1142/9789814644181\\_0008](https://doi.org/10.1142/9789814644181_0008).

measured in meridians of longitude, Russia or rather the Union of Soviet Socialist Republic ('USSR') at the time applied this to that of the Arctics.<sup>14</sup>

The sector theory itself has two thresholds: (1) a base line along the Arctic Circle through territory sorting under uncontested jurisdiction of a regional state and (2) two sides define meridian longitude extending from the North Pole south to the most easterly and westerly points of the Arctic Circle within the State, this is considered as ambiguous since the first interpretation revolves around a specific version of the contiguity principle and the second one discusses the means of sovereignty claims such as effective occupation when it comes to delimiting geographical areas.<sup>15</sup>

On 15 April 1926, the USSR adopted a decree based on the sector theory declaring all lands and islands situated in the Arctic Ocean as theirs except for islands that are already regarded in the sovereignty of other countries such as archipelago of Svalbard.<sup>16</sup> The intention behind this is to safeguard the economic and national interest of the USSR. In the coming years of 1926 and 1950 respectively, the USSR expanded their sector by claiming open ice-infested waters. At the end of that year, 43% of the Arctic Ocean including a significant part of the Central Arctic Basin.<sup>17</sup>

Furthermore, in 1951, the ICJ has affirmed in the *Anglo-Norwegian Fish Case*,<sup>18</sup> that all waters enclosed by straight baselines, including those where a historic title has been established has the status of internal waters. However, in the 1960s, 1970s, and 1980s, lawyers of the USSR view that all Arctic states were entitled to their own sector in the Arctic Ocean, but they specified which features are essentially *claimed* by a coastal state in line with what was permitted by UNCLOS and the understanding of the sector theory.<sup>19</sup>

## **b. USA**

The change in perspective since the 1960s exhibited by the Soviet lawyers prompted other States, specifically the USA to challenge the legality of the decree and overall, the sector theory. In 1962 – 1968, the USA Government started to dispatch USA Coast

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<sup>14</sup> "ARCTIS | Northern Sea Route and Jurisdictional Controversy," accessed June 13, 2022, <http://www.arctis-search.com/Northern+Sea+Route+and+Jurisdictional+Controversy>; First Voyages, "History of the Northern Sea Route," *Remote Sensing of Sea Ice in the Northern Sea Route 1222* (2006): 1–23, [https://doi.org/10.1007/978-3-540-48840-8\\_1](https://doi.org/10.1007/978-3-540-48840-8_1).

<sup>15</sup> *Ibid.*

<sup>16</sup> ARCTIS | Northern Sea Route and Jurisdictional Controversy' (n 12).

<sup>17</sup> Leonid Timtchenko, "The Legal Status of the Northern Sea Route," *Polar Record* 30, no. 174 (1994): 193–200, <https://doi.org/10.1017/S0032247400024256>.

<sup>18</sup> Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. Reports 133.

<sup>19</sup> Timtchenko, "The Legal Status of the Northern Sea Route."

Guard vessels *Edisto and East wind* to conduct “hydrographic research” in what international law regarded as high seas in the Chukchi, East Siberian, Laptev, Kara and Barents Seas that was designed to accurately categorize the high seas status of these waters.<sup>20</sup>

In retrospect, this became the start of the conflict between the two States as the USSR consider the vessels as warships and asserted that the Laptev and Sannikov straits were not to be navigated as it is part of their internal waters on the basis of history since the vessel did not navigate through those straits but in 1966, it was still considered as a threat that they publicly declare them as having an “unfriendly nature.”<sup>21</sup> The same year, the USSR made a policy to deter the North Atlantic Treaty Organization (‘NATO’) naval forces to be removed from the Arctic and the Military Publishing House of the Ministry of Defense of the USSR published “A Manual of International Maritime Law” that reinstated their sovereignty by stating that the sovereign rights extends not only through the effective economic, organizational and scientific research of the polar seas and islands but also the special geographical and climatic conditions of the region.<sup>22</sup>

Two decades later, it must be noted, the sector principle has never been officially rejected, reaffirmed, or reconsidered but since the establishment of UNCLOS in 1982, it has certainly collapsed. Moreover, in the year 1985 the USSR’s navy published the “International Law of Sea Manual” that states two contradicting sentences. In the first one it mentions that the Arctic Sector converging at the North Pole should *not* constitute State boundaries. However, in the next sentence it provides that the *special character* and importance of the Arctic seas for the coastal States give grounds to consider the polar sectors as zones of their economic and defense interests and to use appropriate meridians for delimitations.<sup>23</sup>

For instance, an expert on International Maritime Law in the year 1992 has provided his views by saying that “Even today, it could be argued that some doubt remains in relation to the sector concept. It may suffice to draw attention to the curious inclusion in the annex of issue 1 of the 1986 Soviet Notices to Mariners entitled ‘Legal Acts and Regulations of the USSR State Organs on Questions of Navigation’ – a reprint of the 1926 Decree; this inclusion in a maritime law context is somehow unusual and even

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<sup>20</sup> *Ibid.*

<sup>21</sup> Blunden, Margaret. "Geopolitics and the northern sea route." *International affairs* 88, no. 1 (2012): 115-129.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

inappropriate, unless it is indicative of the fact that the sector still serves a *purpose* of the Soviet maritime law.<sup>24</sup>

### **III. CURRENT POSITION**

#### **a. Russia**

##### **i. Current Situation**

As mentioned previously, the ice is rapidly decreasing in the arctic due to global warming and in addition, the infrastructure and technological problems in Russia are also resolved, both these factors have increased the commercial attractiveness of the NSR that is evident from the 799 permits issued by the NSR administration as part of their domestic laws. Furthermore, the Russian government is asked to grow the size of cargo traffic up to 80 million tons by 2024 as per the Executive Order on National Goals and Strategic Objectives of the Russian Federation through to 2024.<sup>25</sup> This is not seen as a challenge because as the ice cleared out, both the NSR and the Northwest Passage ('NWP') is considered to be of geopolitical interest and have increased 103% in 2020 ever since 2017 and reached 31.5 million tons in 2019.<sup>26</sup>

Even if the majority of that number belongs to Russia's own vessels, the NSR have been attracting more attention from foreign ships especially the Asian region, *inter alia* shipping companies from China, Japan, and South Korea for their trade purposes with Europe. Over time, seeing that the passage is more efficient compared to the Suez Canal, it is expected that European States to follow the same trend.<sup>27</sup>

The benefits of the NSR could be seen from the oil spill that happened in back in 2021, where the 400 meters, 200 tone container, the *Ever Given* obstructed the Suez Canal at 6 kilometers north from its southern entrance. This vessel is owned by the Japanese shipping firm "SHOEI-KISEN KAISHA, Ltd.," a subsidiary of "Imabari Shipbuilding Co., Ltd that resulted in a \$500 million compensation to the Suez Canal authorities causing up to \$10 billion global cost highlighting the economic benefits of the NSR.<sup>28</sup>

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<sup>24</sup> Timtchenko, "The Legal Status of the Northern Sea Route."

<sup>25</sup> "The President Signed Executive Order On National Goals and Strategic Objectives of the Russian Federation through to 2024 • President of Russia," accessed June 13, 2022, <http://en.kremlin.ru/acts/news/57425>.

<sup>26</sup> "Permissions for Navigation in the Water Area of the Northern Sea Route," accessed June 13, 2022, [http://www.nsra.ru/en/rassmotrenie\\_zayavleniy/razresheniya.html?year=2019](http://www.nsra.ru/en/rassmotrenie_zayavleniy/razresheniya.html?year=2019).

<sup>27</sup> Viatcheslav Gavrilov, "Russian Legislation on the Northern Sea Route Navigation: Scope and Trends," *Polar Journal* 10, no. 2 (2020): 273–84, <https://doi.org/10.1080/2154896X.2020.1801032>.

<sup>28</sup> Sakiko Hataya and Michael C. Huang, "The Opportunity and Challenges of the Northern Sea Route ( NSR ) after the Suez Obstruction of 2021" 56743556, no. 22 (2021): 1–13; "The-Largest-Oil-Spill-Event-Detected-near-the-Entrance-of-the-Suez-Canal," n.d.; Alexei Bambulyak and Sören Ehlers, "Oil Spill Damage: A Collision Scenario and Financial Liability Estimations for the Northern Sea Route Area," *Ship Technology Research* 0, no. 0 (2020): 148–64, <https://doi.org/10.1080/09377255.2020.1786932>.

Within this time, an alternative route such as NSR has garnered significant attention as it is labelled as the most optimal in “risk diversification” and the most prominent option for “realization.” In any case, utilizing the NSR will be a mutual benefit to Russia and other States. As mentioned above, it decreases the navigation distance by as much as 40%, additionally, it will be a good opportunity for a development opportunity when it comes to the natural resource of mining in the Siberian and Russian Far East regions.<sup>29</sup>

## **ii. for Arctic Sovereignty**

### **1. UNCLOS**

Prior to discussing about the relevant legal provisions that applies, it is important to affirm the claim that NSR is in *de facto* Russia’s sovereign rights. With that in mind, citing the discussion above two legal questions must be answered: (1) whether Russia have fulfilled the historical claim over the NSR through Article 234 of UNCLOS; and (2) what is the categorization of the straits being disputed?

To answer the first question, we must bear in mind first the verbatim of the Article which provides that:

*“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”*

Here, it must be noted that the Article is under Section 8 entitled ‘Ice-Covered Areas,’ but this shall not be a point of conflict as the verbatim states the domestic laws shall protect the marine environments in cases of *severe climatic conditions* and pollution in addition to any obstructions or exceptional hazards that could be caused due to navigation. In this instance, Russia is in line with the Article 234 of UNCLOS.

Going beyond the *prima facie* understanding, the two thresholds that have been mentioned above to assert historical basis of Article 234 is (1) for a considerable *length* of time, the it have *exclusively exercised* its authority over the maritime area in question and (2) the existence of acquiescence which means that the Coastal States

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<sup>29</sup> *Ibid.*

must prove that the authority is *accepted* by other countries, *especially* those that is directly affected by it.<sup>30</sup> To analyze this, first, it can be noted from the history that Russia or as it is known before the USSR have claim sovereignty over the NSR since 1926, which makes it a considerable amount of time to claim that it has exclusively exercised its authority over the maritime area in question. Second, when it comes to acquiescence, it could be noted that not all States are in favor of this arrangement seeing that the US is against this and as well as the official stance of the EU as of now. Therefore, the eligibility of Russia to claim the NSR over historical grounds is up for debate.

Proceeding to the discussion of the strait, a twofold requirement is also present, namely: first, Geographical Requirement (location of the strait) and second, Functional Requirement (it's purpose as a passage for trading link).<sup>31</sup> *In Casu*, the geographical requirement is clearly met as the Matochkin Shar, Kara Gate, Yugorsky Shar is between the high seas of the Arctic Ocean. Moreover, the functional requirement is also met seeing the current data of the NSR, States from Asia such as Japan, South Korea, China and Singapore and seeing that it is an efficient and feasible alternative route, its functionality will only increase.<sup>32</sup>

After establishing that the straits are legally accurate in accordance with the above mentioned threshold, it can now be categorized as one of the straits mentioned in UNCLOS, the importance of this is to know the type of navigation. As the geographical requirement that is met is between two of the high seas, it will be in line with Article 37 of UNCLOS stating strait connecting one part of the high seas with another that grants transit passage. This will mean that even if Russia claims sovereignty over the NSR, the specific straits will *not* be part of their domestic laws as freedom of navigation applies.

## **2. Russian Federal Legislation**

Moving to the point of the current applicable domestic laws that Russia provides, it currently still holds sovereignty over the NSR and have provided Federal Laws to regulate navigation. The original regulation is called the 1999 Merchant Shipping Code of the Russian Federation ('**MSC**') which is added to the Federal Law Number 132-FZ ('**FL No. 132-FZ**'), the former laid down the certainty of their sovereignty by defining

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<sup>30</sup> Rossi, "The Northern Sea Route and the Seaward Extension of *Uti Possidetis* (Juris)."

<sup>31</sup> "ARCTIS | The Northeast Passage and Northern Sea Route 2," accessed June 14, 2022, <http://www.arctis-search.com/The+Northeast+Passage+and+Northern+Sea+Route+2>; Alexander Vylegzhanin et al., "Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law," *Polar Journal* 10, no. 2 (2020): 285–302, <https://doi.org/10.1080/2154896X.2020.1844404>.

<sup>32</sup> "ARCTIS | The Northeast Passage and Northern Sea Route 2"; Vylegzhanin et al., "Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law."

the NSR as a “historically developed national transport communication with legally determined boundaries of its water areas.” The latter amended Article 5.1 of the MSC by establishing the NSR Administration (‘NSRA’) – a federal state institution responsible for compliance in *inter alia* issuing permits and icebreaker assistance.<sup>33</sup>

In January of 2013, a special rule was approved by the Ministry of Transport of the Russian Federation (‘**2013 Rules**’) replacing the Rules of Navigation on the Seaways of the Northern Sea Route of 1990 (‘**1990 Rules**’). There are key differences that was made based on the global trends such as: (1) Waiting period for granting permissions, (2) Submission of Applications, and (3) Icebreaker assistance. The first point correlates to the period after submitting application for the permit, in the 1990 Rules, the waiting period is four months while in the 2013 Rules it is reduced to 25 working days. The second point deals with the submission of applications where in the 1990 Rules requires the application to be submitted through a telegraph with an additional NSRA inspection of the vessel, the 2013 Rules only requires the application to be submitted electronically via the internet with no inspection from the NSRA. The third point discusses the need of an ‘escort’ when operating an icebreaker; the 1990 Rules, some parts of the NSR requires an escort at all times while the 2013 Rules support independent navigation by allowing icebreakers to be operated without assistance in line with the ice class of a ship.<sup>34</sup>

## **b. USA**

### **i. Present Situation**

What must be noted is the different interpretations that cause the dispute between the two States lies in the legal status of *some parts* of the NSR. For instance, in 1965, the USA believes that as far as the Dmitry Laptev and Sannikov Straits are concerned, it does not believe that there is any basis for the claim that these waters could be claimed on historical grounds. Even if the USA are “sympathetic with efforts which have been made by the USSR in developing the Northern Seaway Route and appreciates the importance of this waterway to the Soviet’s interests, it cannot admit that these factors have an effect of changing the status of the waters of the route under international law.”<sup>35</sup>

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<sup>33</sup> Gavrilov, “Russian Legislation on the Northern Sea Route Navigation: Scope and Trends”; Björn Gunnarsson and Arild Moe, “Ten Years of International Shipping on the Northern Sea Route: Trends and Challenges,” *Arctic Review on Law and Politics* 12 (2021): 4–30, <https://doi.org/10.23865/arctic.v12.2614>.

<sup>34</sup> *Ibid.*

<sup>35</sup> Vylegzhanin et al., “Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law.”

As of the year 2019, USA is still firm on its grounds by stating that parts of the Northern Sea Route are in fact part of international waters. USA officials have spoken and disputed Russia's stance on this matter especially their claim that the USA naval vessels have threatened them when the vessels are sent to practice their right for Freedom of Navigation ('FON') Operation.<sup>36</sup> This was voiced out by USA Secretary of the Navy, Richard Spencer, stating "having some ships make the transit in the Arctic. Freedom of Navigation should be applied up there." This statement was supported and echoed by General Curtis Scaparrotti, former Supreme Allied Commander in Europe which agrees and further suggested that a FON Operation should be aimed at Russia. Furthermore, former Secretary of State Mike Pompeo have stated that "we're concerned about Russia's claim over the international waters of the Northern Sea Route."<sup>37</sup> Subsequently, The Department of Defense unclassified June 2019 Arctic Strategy prompted that the USA interests in the Arctic includes "ensuring freedom of navigation and overflight" hinting that Russia is in fact the threat in the Arctic.<sup>38</sup>

Regardless, up to this point even USA scholars such as Professor Andrew Serdy, a maritime law expert at the University of Southampton stated that as much of the route is within Russia's internal waters, international law will be in support of that; he added and explained that the USA arguing that a series of straits in the bounds of the NSR is used for international navigation by interpreting 'used' as 'usable' contrary to other States, this led them to believe that a different regime shall apply, supposedly one that is more favorable to navigation in the law of the sea.<sup>39</sup> However, since the passage have not been as functional to other States other than Russia and even then, other States still accepts Russia's authorization, there is no 'special regime' that applies, giving Russia the right to control the territory in accordance with international law.<sup>40</sup>

## ii. The Bering Strait Region

The Bering strait region ('BSR') is a perfect example to outline the current approach that the USA have with the straits in the NSR. Here, the BSR have managed to put USA and Russia in the same side as both their interest is to assure the safe and sustainable

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<sup>36</sup> N S Lipunov, "THE INTERNATIONAL DIMENSION OF THE NORTHERN SEA ROUTE," 2021.

<sup>37</sup> *Ibid.*

<sup>38</sup> Kristian Atland, "The Introduction, Adoption and Implementation of Russia's 'Northern Strategic Bastion' Concept, 1992–1999," *International Journal of Phytoremediation* 20, no. 4 (2007): 499–528, <https://doi.org/10.1080/13518040701703047>; "Now Is Not the Time for a FONOP in the Arctic - War on the Rocks," accessed June 14, 2022, <https://warontherocks.com/2019/10/now-is-not-the-time-for-a-fonop-in-the-arctic/>.

<sup>39</sup> "Northern Sea Route Makes Russia and China New Polar Powers," accessed June 14, 2022, <https://www.raconteur.net/global-business/usa/northern-sea-route/>; Andrey Todorov, "Dire Straits of the Russian Arctic: Options and Challenges for a Potential US FONOP in the Northern Sea Route," *Marine Policy* 139 (May 1, 2022): 105020, <https://doi.org/10.1016/J.MARPOL.2022.105020>.

<sup>40</sup> *Ibid.*

use of the BSR. Geographically, the BSR in itself is the only narrow international gateway and passage between the Arctic and the Pacific oceans with 47 nautical miles wide and in its narrowest point separates Russia and USA by two nautical miles between Big Diomedes and Little Diomedes islands. Though there are no binding instruments that defines the BSR, it is home to not only an abundance of marine life but also the habitat of Chukchi, Inuit, and Siberian Yupik tribes inherent of their culture, language, and identity.<sup>41</sup> To reiterate, though their interest to protect the ecosystem and indigenous people might be similar, the USA still disagrees on the part of the legal status of NSR waters and the requirement of Russian authorities to commence FON.<sup>42</sup> However, in UNCLOS there has never been a categorization of abstract FON that USA is currently implying there is only concrete FON regulated in Article 87 of UNCLOS, nevertheless, the USA does not ratify UNCLOS so it could be given the benefit of the doubt. This reflects that current bilateral cooperation between the two State does not address these issues and shall be renewed.<sup>43</sup>

To elaborate, in 2015, the USA have sought clarifications on whether or not the NSR extends into and through the BSR as it is mentioned in Article 5.1 of the MSC. To this end, Russia and USA agrees that the BSR is a strait *used for international navigation* but deviate clearly on the NSR's status bringing back the argument of historical relevance. The USA continues to reiterate that the NSR contain straits used for international navigation and as such, the regulations posed by Russia for the NSR is an infringement of FON within the EEZ, right of innocent passage in the territorial sea, and the right of transit passage through straits used for international navigation.<sup>44</sup> The USA Department of State have formally objected the aspects to the 2013 Rules citing that it is inconsistent with international law by stating the reasoning above and the lack of any express exemption for sovereign immune vessels.<sup>45</sup> Despite this, the USA still showed support for the navigational safety and environmental protection objectives of the NSR scheme and acknowledge that Russia have cited Article 234 UNCLOS as a basis but disagreed that the regulations set is in line with the article.<sup>46</sup>

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<sup>41</sup> Julie Raymond-Yakoubian and Raychelle Daniel, "An Indigenous Approach to Ocean Planning and Policy in the Bering Strait Region of Alaska," *Marine Policy* 97 (November 1, 2018): 101–8, <https://doi.org/10.1016/j.marpol.2018.08.028>.

<sup>42</sup> Paul Arthur Berkman, Alexander N. Vylegzhanin, and Oran R. Young, "Governing the Bering Strait Region: Current Status, Emerging Issues and Future Options," *Ocean Development & International Law* 47, no. 2 (April 2, 2016): 186–217, <https://doi.org/10.1080/00908320.2016.1159091>.

<sup>43</sup> Betsy Baker and Global Fellow, "Beyond the Northern Sea Route : Enhancing Russian-United States Cooperation in the Bering Strait Region," no. 8 (2021); Vylegzhanin et al., "Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law."

<sup>44</sup> Vylegzhanin et al., "Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law."

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

#### **IV. CHALLENGES AND OPPORTUNITIES**

Before the effects of climate change inclusive of global warming that resulted in a dangerous rate of melting ice caps in the Arctic, navigation through the Northern Polar Region such as the NWP and NSR are done in specific seasons, usually from July to September as the ice melts per the season and make way for vessels to pass through; by October the ice caps start to reform making it impossible for navigation.<sup>47</sup> The silver lining from this impact is that the NWP and NSR has been more accessible in the last five years and is used and considered as an alternative

shipping route seeing that it is more efficient compared to the Suez Canal; in specifics, the NSR has been functional and utilized by Asian States mentioned above such as China, Singapore, Japan and South Korea when they are trading with European States.<sup>48</sup>

With the increase of shipping companies to utilize the route, seen as a ramification of geopolitical interest, it is important to outline the challenges that Russia may face as they are currently holding the authority over the area and opportunities that they might gain.

##### **a. Challenges**

###### **i. National Security**

The first challenge will undoubtedly be the maintenance of national maritime security of Russia. Like other Arctic States, opening navigation to this extent may pose a greater threat to the State as the interest and aspiration of the other States passing through might not be limited to trade and is conclusively unpredictable. By giving them access as well as examples of technologies that could be of safe use in these areas (i.e., icebreakers and ice strengthened vessels), it may be utilized in a non-good faith manner and instead presses the urgency to protect the State.<sup>49</sup> This hostile international environment could purported by the East-West tensions with a 'build up' in military presence of foreign states in the area increasing the potential of conflict.<sup>50</sup>

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<sup>47</sup> Motohisa ABE and Natsuhiko OTSUKA, "Northern Sea Route (NSR) as a Major Transport Route: Opportunities and Challenges," *Asian Transport Studies* 5, no. 4 (2019): 617–34.

<sup>48</sup> Vylegzhanin et al., "Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law."

<sup>49</sup> Emmaline Hill, Marc LaNore, and Simon Véronneau, "Northern Sea Route: An Overview of Transportation Risks, Safety, and Security," *Journal of Transportation Security* 8, no. 3–4 (2015): 69–78, <https://doi.org/10.1007/s12198-015-0158-6>; Irina Akimova, "Northern Sea Route as the Main Driver for the Arctic Development :," 2018.

<sup>50</sup> Arild Moe, "A New Russian Policy for the Northern Sea Route? State Interests, Key Stakeholders and Economic Opportunities in Changing Times," *Polar Journal* 10, no. 2 (2020): 209–27, <https://doi.org/10.1080/2154896X.2020.1799611>.

Furthermore, we must bear in mind that some States, particularly the US is against the sovereignty that Russia is currently possessing; as such, in allowing innocent passage or even accepting FON, this may be used to the counterparts' advantage in conducting a FONOP and declaring that Russia *de jure* does not have the sovereignty that they claim to have. With this in mind, it is suggested that Arctic States such as Russia develop a better patrol strategy to prevent such threats to realize in terms of their maritime security.<sup>51</sup>

## ii. Technology and Mapping

To start, it is clear that the safe navigation in the Arctics is a challenge in itself because of the rapidly changing landscapes of the ice which results in: (1) the global positioning system is limited by satellite coverage, (2) magnetic compasses will lose its' north point, and (3) gyrocompass is not accurate.<sup>52</sup> That said, the lack of conventional icebreakers in addition to the challenges that arise for navigational technology prompts dangerous routes and may cause safety of vessels that choose to travel through complimentary to the need of regulations by a State as standardized by Article 234 of UNCLOS.<sup>53</sup>

## iii. Infrastructure

An adequate port infrastructure is important when dealing with types of vessels that is going to navigate through the NSR. As of now, there are seven principal Arctic seaport along the NSR including Amderma, Dikson, Khatanga, Tiksi, Pevek and Mys Shmidta.<sup>54</sup> The requirement is usually twofold: (1) safety of the vessel and (2) environmental protection, in line with Article 234 of UNCLOS. Presently, the ports in the NSR area, specifically in the Bering strait does not support vessel traffic and does not meet the requirement of search and rescue operation standardized by the USA. Alaskan Senator, Begich have affirmed in 2015 that ports “do not have adequate staging, support and disaster response facilities in the Bering Strait area,” but they are currently developing infrastructure and simplifying port clearance by partnering with private industry in order to assure shipping safety and consequently, security and economic development in the region.<sup>55</sup>

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<sup>51</sup> Hill, LaNore, and Véronneau, “Northern Sea Route: An Overview of Transportation Risks, Safety, and Security.”

<sup>52</sup> Hill, LaNore, and Véronneau; Taedong Lee and Hyun Jung Kim, “Barriers of Voyaging on the Northern Sea Route: A Perspective from Shipping Companies,” *Marine Policy* 62 (2015): 264–70, <https://doi.org/10.1016/j.marpol.2015.09.006>.

<sup>53</sup> Sodhi, Devinder S. *Northern Sea Route Reconnaissance Study: A Summary of Icebreaking Technology*. Vol. 95. No. 17. DIANE Publishing, 1995.

<sup>54</sup> ABE and OTSUKA, “Northern Sea Route (NSR) as a Major Transport Route: Opportunities and Challenges”; Hill, LaNore, and Véronneau, “Northern Sea Route: An Overview of Transportation Risks, Safety, and Security.”

<sup>55</sup> *Ibid.*

## **b. Opportunities**

### **iv. Economy**

As stated briefly above, Russia is planning to economically develop the Arctic areas and it has been an emphasis for the past year in the top political leadership. Evidently, the concrete example would be the 2013 Rules reflecting the strategy and this is echoed in March 2020 in the 'Foundation for state policy of the Russian Federation in the Arctic for the period until 2035.'<sup>56</sup> In specifics, the plan is strategized to increase investment in icebreaker and infrastructure as well as targeting the transport of 80 million tons of cargo on the NSR by 2024 which will greatly benefit Russia's economy.<sup>57</sup>

### **v. International Cooperation**

In relation with the economic benefits, partnership with not only private industries but also other States will surely be a benefit in the political sphere of Russia. To illustrate, with China, they have established a partnership where China becomes the biggest beneficiary when it comes to the NSR. This started with the XI 5-years plan back in 2006 – 2010 regarding a special scientific research program in the area and presently, 5% - 15% of the Chinese International cargos passes through the NSR, specifically containers.<sup>58</sup> The reason behind this is that China plan an initiative called 'The Polar Silk Road' to integrate three major economic centers: North America, East Asia and Western Europe through the use of navigable Arctic Circle and their routes.<sup>59</sup> Their partnership is usually in form of joint ventures for Russian companies and research centers. Existing agreements is evident from the Rosneft and CNPC agreement to develop Zapando-Prinovozemelnii field in the Barets Sea, South-Russkiy and Medinsko-Varandeiskiy field in the Pechora Sea.<sup>60</sup> This is a precedent that could be set with other States as well to help develop the infrastructure and overall navigation in the NSR.<sup>61</sup>

## **V. CONCLUSION**

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<sup>56</sup> Moe (n 38); VP Fedorov and others, 'The Northern Sea Route: Problems and Prospects of Development of Transport Route in the Arctic' (2020) 434 IOP Conference Series: Earth and Environmental Science.

<sup>57</sup> Moe, "A New Russian Policy for the Northern Sea Route? State Interests, Key Stakeholders and Economic Opportunities in Changing Times"; V. P. Fedorov et al., "The Northern Sea Route: Problems and Prospects of Development of Transport Route in the Arctic," *IOP Conference Series: Earth and Environmental Science* 434, no. 1 (2020), <https://doi.org/10.1088/1755-1315/434/1/012007>.

<sup>58</sup> Akimova, "Northern Sea Route as the Main Driver for the Arctic Development :"

<sup>59</sup> Tianming, Gao, and Vasilii Erokhin. "China-Russia collaboration in shipping and marine engineering as one of the key factors of secure navigation along the NSR." *China's Arctic Engagement* 9 (2021): 234.

<sup>60</sup> Akimova.

<sup>61</sup> D. F. Skripnuk et al., "The Northern Sea Route: Is There Any Chance to Become the International Transport Corridor?," *IOP Conference Series: Earth and Environmental Science* 434, no. 1 (2020), <https://doi.org/10.1088/1755-1315/434/1/012016>.

To summarize, there is still a clear line of debate on the legal status of the NSR especially between Russia and USA. Their main concern is the straits that is contained within the NSR and whether or not those straits would be part of international waters as opposed to internal waters that will be under the authority of Russia. This determination will also affect the type of navigation that is allowed within the straits – either transit passage, innocent passage, or FON.

In due regard, it can be seen that Russia have continuously stand firm on the basis that they sovereignty over the NSR citing historical relevance within Article 234 of UNCLOS as the reasoning. Even if this is true seeing from their history, the two threshold that is made by the *Corfu Case* was not satisfied specifically the acquiescence requirement. In any case, the strait falls under Article 37 of UNCLOS which permits transit passage in line with the current practices that Russia is doing.

In relation to the acquiescence, USA is currently the only State that has officially and explicitly declared its objection to the legal status of NSR. This was made clear especially when discussing the BSR. As a matter of fact, geographically the BSR still falls between Russia and the USA and even Russia agrees that the specific strait shall be of international water status, but they refuse to affirm this as this would weaken their position on the legal status of the NSR itself.

Regardless of this debate, the NSR has proven an increase in its functionality, mainly because of the melting ice caps caused by the rapid rate of increased temperature due to global warming. In recent years, the seasons of navigation do not seek much importance and an increase in States passing through the NSR is evident. This poses challenges and opportunities for Russia to overcome and seek. Particularly the challenges that was and will be faced includes the matter of maritime security, arctic navigation, and port infrastructure; while the opportunities that should be looked forward to is the increase in economy and international cooperation that will hopefully be a solution to the challenges. As of now, the most prominent example is their partnership with China seeing that agreements have been made and joint ventures are set up to help Russia's companies and research center to counter the current challenges and hopefully be a precedent for conflicting States.

## **VI. RECOMMENDATIONS**

### **a. Recommendations**

#### **i. Settling conflict with USA through Negotiations**

After an analysis of the BSR, it could be clearly seen that Russia and the USA shared similar interest as well, namely, that they agree a regulation should be made especially in the BSR to protect marine life in line with Article 234 UNCLOS as well as the

indigenous people. Though theoretically, sovereignty claims over the legal status of the sea could be referred to the United Nations Continental Shelf Commission, seeing that they do have similar interest in mind, they could conduct a more effective dispute settlement through negotiation primarily discussing the legal status and a future of international cooperation.

**ii. Draft Amendments of the Current Federal Legislation**

As Russia has amended their Federal Legislation before, it could be concluded that they are open to the dynamic changes that is inherent in international law. With the Executive Orders providing plans to welcome more international navigations through the NSR, it is important to update the current legislations to adapt to that change and assure that the challenges such as maritime security could be prevented and regulated thoroughly.

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