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The law of the sea challenges pertaining to the regulation of navigational rights and freedoms on the Northern Sea Route: Russia's excessive maritime claims

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1 Introduction

In recent years, the phenomenon of climate change has resulted in increased accessibility to Arctic regions, hence facilitating a range of activities, including commercial shipping.[1] The Central Arctic has experienced lighter ice conditions, specifically due to the rapid decline of sea ice in the Arctic Ocean[2], thus opening the possibility of discussing previously inaccessible sea routes, such as the Northern Sea Route (hereinafter "NSR").

The NSR, situated along the Russian Federation's coastline, is the eastern segment of the Northeast Passage.[3] This maritime route links the European Union countries with the Far East, traversing the coastal regions of the Scandinavian Peninsula, as well as the European and Asian territories of Russia, extending further through the Bering Strait, ultimately reaching the Pacific Ocean.[4] Even though until recently the NSR for the best part of the year was characterised by harsh ice conditions, now it holds a significant potential for development and offers the prospect of year-round shipping between major ports in Asia and Northern Europe.[5]

It is asserted by the fact that in August 2021, the NSR saw its longest period of 88 consecutive days without ice, but the shipping season in 2023 is currently one of the longest on record, further highlighting the trend of prolonged navigability along the NSR.[6] Furthermore, it is worth noting that the NSR has a reduced distance of around 40% (10 instead of 19 days) when compared to the Suez Canal route and a 60% reduction when compared to the alternative

[1] M. Jacobsson, "What Challenges Lie Ahead for Maritime Law?" in *Maritime Law in Motion* (Cham: Springer International Publishing, 2020), p. 267, accessed September 12, 2023, https://doi.org/10.1007/978-3-030-31749-2_13.

[2] National Snow and Ice Data Centre. "Arctic Sea Ice News and Analysis," available on: https://nsidc.org/arcticseaicenews/. Accessed November 2, 2023.

[3] T. Pastusiak, "Introduction," in *The Northern Sea Route as a Shipping Lane* (Cham: Springer International Publishing, 2016), pp. 14-19, accessed September 13, 2023, https://doi-org.ezproxy.uio.no/10.1007/978-3-319-41834-6_1.

[4] *Ibid.*

[5] Björn Gunnarsson and Arild Moe, "Ten Years of International Shipping on the Northern Sea Route: Trends and Challenges," *Arctic Review on Law and Politics* Vol. 12 (2021): pp. 5-6, accessed November 10, 2023, https://doi.org/10.23865/arctic.v12.2614.

[6] Bojan Lepic, "Milestones Reached along the Increasingly Busy Northern Sea Route," *Splash247* (September 18, 2023), available on: https://splash247.com/milestones-reached-along-the-increasingly-busy-northern-sea-route/. Accessed October 15, 2023.

route across the African Cape Horn.[7] Thus, the NSR has the potential to generate significant economic advantages for global shipping companies, as it is anticipated that the expenses associated with transporting containerized cargo via the NSR are either comparable to or lower than those incurred through the Suez Canal- reduction in travel time achieved by utilising the NSR can result in cost savings of up to $500,000 per individual voyage.[8]

The NSR's significance for international shipping is highlighted by a recent milestone event: in September 2023, bulk carrier Gingo became the first capsize ship to sail the route.[9] It took the bulker 13 days from Murmansk to China to carry 164,600 tonnes of iron ore concentrate – the largest cargo to cross the NSR.[10]

Against this backdrop, it is crucial to comprehend the intricate international and national legal framework that regulates the NSR, given the diverse viewpoints and approaches in both Russian and international academic literature when it comes to various legal aspects related to the NSR that deserve careful analysis, as outlined below.

The major uncertainty pertaining to the NSR revolves around the divergent understanding of its legal standing within the framework of international maritime law as outlined in the 1982 United Nations Convention on the Law of the Sea[11] (hereinafter "UNCLOS"). In this context, the main focus is on both broad and narrow interpretations, as well as whether or not the relevant UNCLOS provisions apply fully or partially to the water areas of the NSR.

Thus, the primary concern pertains to the international legal perspective of the NSR, which encompasses marine zones with distinct legal statuses, including internal waters, territorial

[7] Jerome Verny and Christophe Grigentin, "Container shipping on the Northern Sea Route," *International Journal of Production Economics* 122 (2009): pp. 107-117, accessed October 16, 2023, https://doi.org/10.1016/j.ijpe.2009.03.018.

[8] Den Norske Atlanterhavskomite. *The Northern Sea Route's Role in the System of International Transport Corridors*, p. 3. Available on: https://s3.eu-north-1.amazonaws.com/atlanterhavskomiteen/images/documents/FN-2-2008-The-Northern-Sea_Route%E2%80%99s-Role-in-the-System-of-International-Transport-Corridors.pdf. Accessed October 10, 2023.

[9] Lepic, *supra* note 6.

[10] *Ibid.*

[11] UN General Assembly, *Convention on the Law of the Sea (UNCLOS)*, Montego Bay, 10 December 1982, *United Nations Treaty Series*, vol. 1833, No. 31363, available on: https://treaties.un.org/doc/Publication/UNTS/Volume%201833/volume-1833-A-31363-English.pdf. Accessed October 5, 2023.

waters, and the exclusive economic zone (hereinafter "EEZ") of Russia as reflected in the relevant Russian legislation governing the NSR.[12] However, while UNCLOS preserves the right of innocent passage in the territorial waters[13] and freedom of navigation in the EEZ and high seas[14], as well as specifies Coastal State jurisdictional powers in each specific maritime zone, Russia considers the NSR as a unified/indivisible transportation route.[15] Irrespective of the maritime zones falling within Russia's sovereignty or jurisdiction, the legal framework governing navigation on the NSR remains consistent along its full extent, pertaining to the permitting process for vessel passage, irrespective of the flag under which they operate.[16]

The legal justification for Russia's authority in this matter is derived from UNCLOS Article 234[17], which grants Russia broader jurisdiction to adopt and enforce laws and regulations within the limits of the EEZ with the aim of environmental protection.[18] Consequently, the second concern pertains to Russia's recognition and execution of its expanded enforcement and legislative authority under Article 234, which surpasses the rights granted to other Coastal States in non-Arctic regions, allowing Russia unilaterally to implement more stringent shipping standards and regulations on the NSR.[19]

The final issue to consider is that Russian legal doctrine recognises Russia to exercise authority over the NSR not solely based on international law but rather through a combination of treaty and customary rules of law, as well as the application of national legislation that

[12] FL No. 81-FZ "Merchant Shipping Code of the Russian Federation", dated 30 April 1999, as amended 21 April 2023. Article 5.1 (para. 1). Available on: https://www.consultant.ru/document/cons_doc_LAW_22916/6082a63e586c9895cba9c7b98c7541a106d93efd/.
[13] UNCLOS, *supra* note 11, Article 17.
[14] *Ibid.,* Article 58, 87.
[15] Viatcheslav Gavrilov, "Legal Status of the Northern Sea Route and Legislation of the Russian Federation: A Note," *Ocean Development and International Law* 46 (3) (2015): pp. 256–263, accessed November 1, 2023, https://doi.org/10.1080/00908320.2015.1054746.
[16] *Ibid.*
[17] UNCLOS, *supra* note 11, Article 234.
[18] Susanah Stoessel, Elizabeth Tedsen, Sandra Cavalieri, and Arne Riedel, "Environmental Governance in the Marine Arctic," in *Arctic Marine Governance* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2014), pp. 49-51, accessed September 20, 2023, https://doi-org.ezproxy.uio.no/10.1007/978-3-642-38595-7_3.
[19] E.J Molenaar, "Status and Reform of International Arctic Shipping Law," in *Arctic Marine Governance* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2014), pp. 130, 137-140, accessed September 20, 2023, https://doi-org.ezproxy.uio.no/10.1007/978-3-642-38595-7_6.

reflects the intricate history of Arctic exploitation.[20] The Russian legislation demonstrates a form of "creative ambiguity" or "dualistic approach" in its treatment of the NSR, considering it as a historical route falling under complete Russian sovereignty, based on the doctrine of historical internal waters.[21]

The aforementioned issues have sparked discussions regarding the extent to which Russia's legal position concerning the NSR can be definitively considered justified in accordance with the principles of the law of the seas outlined in UNCLOS. Additionally, there are debates surrounding whether Russia's domestic legislation pertaining to the NSR conflicts with international maritime law and can be characterised as excessive, discriminatory, and not tailored to meet the needs of international shipping.

1.1 Research questions

Based on the observations outlined earlier, the master thesis will address the subsequent research questions to conduct a thorough and comprehensive analysis:

1) How does the UNCLOS legal framework address the status and legal regime of maritime zones, and what implications does this have for navigational rights and freedoms?
2) What is the significance and potential ramifications of UNCLOS Article 234 in the context of international maritime law and the regulation of navigational rights and freedoms?
3) Do the jurisdictional entitlements of Russia and the domestic legal framework of the NSR adhere to UNCLOS and Article 234, and does it impact navigational rights and freedoms?

[20] R. Douglas Brubaker, *The Russian Arctic Straits* (Leiden, The Netherlands: Brill | Nijhoff, 2005), pp. 28-31, accessed September 26, 2023, https://search-ebscohost-com.ezproxy.uio.no/login.aspx?direct=true&db=nlebk&AN=173750&site=ehost-live&scope=site.

[21] Tatiana Sorokina and William G. Phalen, "Legal Problems of the Northern Sea Route Exploitation: Brief Analysis of the Legislation of the Russian Federation," in *International Marine Economy* (Leiden, The Netherlands: Brill | Nijhoff, 2017), pp. 104, 114-115, accessed September 24, 2023, https://doi-org.ezproxy.uio.no/10.1163/9789004323445_004.

4) To what extent does Russia's claim of historic waters over the NSR align with the criteria established in the South China Sea Arbitration, and what are the impacts of this assessment on Russia's legal standing on the NSR?

1.2 Methodology and Limitations

To examine the research questions, the basic methodological technique employed in this study is doctrinal legal research that involves the utilisation of textual analysis and statutory interpretation. Special attention is paid to general UNCLOS maritime zone delimitation and enforcement provisions, as well as Article 234. Additionally, it entails a focused examination of the Russian legal framework governing the NSR. The objective of this approach is to comprehend the purpose, scope, and significance of certain provisions, employing canons of statutory construction and legal principles as guiding tools for the process of interpretation. Specifically, in the interpretation of UNCLOS, the methodology involves utilizing canons like the "ordinary meaning of terms" rule, "contextual and teleological interpretation", "object and purpose" analysis, etc.[22]

In terms of the interpretational analysis of general maritime zone delimitation provisions, there exists a widespread agreement within the legal community concerning the distinct legislative and enforcement jurisdictional powers, rights, and obligations of Coastal States, as well as unambiguous allocation of navigational rights and freedoms within each particular maritime zone, as stipulated in UNCLOS. When it comes to the Arctic and the application of Article 234, it continues to present challenges in terms of interpretation and understanding. The intricate nature of the Article, the absence of legally binding court rulings that might provide necessary clarifications, and the differing practises among Arctic Coastal States further contribute to the complexity of studying this topic.

When concerning Russian law pertaining to the NSR, the methodology involves literal interpretation of the words in the relevant legal texts, teleological interpretation analysing

[22] United Nations, *Vienna Convention on the Law of Treaties (VCTL)*, Vienna, 23 May 1969, *United Nations Treaty Series*, vol. 1155, p. 331, Article 31, 32. Available on: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

laws based on their purpose and intent, as well as historical interpretation considering the evolution of certain legal acts.

In terms of Russian legislation regarding the NSR, it can be observed that Russian law is characterised by its "abundance": confusing "ladders of legal acts" that often refer to, elucidate, or modify one another, resulting in a complex framework that poses difficulties in identifying the starting and ending points. Furthermore, the NSR legislative framework can be categorised as an example of dualistic approaches, characterised by the presence of varying terminology in comparable legal acts that often seems to be used without an object or purpose but just for "cosmetic purposes", as well as a constant pattern of shifting perspectives among Russian/Soviet legislators in the course of history.

It is important to acknowledge that access to legal documents related to Russia's legislative framework for the NSR, especially historical data, as well as scholarly publications on this subject, particularly those written by Russian scholars and published in Russian sources, whether in physical or online databases, was found to be limited. The accessibility of a substantial fraction of the documents to the public may have potentially constrained the scope of the analysis.

Equally significant is the utilisation of comparative legal and legal harmony analysis that helps to examine the extent to which Russian domestic law pertaining to the NSR conforms, deviates, or requires alignment with UNCLOS legal framework, with particular focus on the analysis of Russia's jurisdictional powers and navigational rights/freedoms of foreign merchant ships in the Arctic. It is widely recognised that Russia is a signatory to the UNCLOS, so voluntarily consenting to the process of "internationalising" its domestic maritime legislation. The current trend in NSR legislation indicates a growing alignment with international maritime law, if not considering certain nationalistic postures and "creeping jurisdictional" tendencies, as witnessed in Russian legal doctrine. For this purpose, the research touches upon the discussion of how Russia incorporates and harmonises UNCLOS legal norms and principles, as well as how these are enforced within the Russian legal context.

Moreover, case law analysis and testing of legal precedents aim to examine *The Republic of Philippines v. The People's Republic of China* (hereinafter "South China Sea Arbitration")[23] for evaluating Russia's historic waters claim over the NSR. The legal significance of this specific case cannot be overstated, as it stands as the only case in the 21st century that pertains to the matter of historic waters and holds considerable importance in establishing a precedent for future court rulings or arbitration decisions. This is particularly relevant due to the anticipated effects of climate change in the Arctic region and the potential limitations on the applicability of Article 234 to Arctic spaces. In light of these circumstances, Russia may seek to employ the historic waters approach to justify and protect its complete sovereignty over the NSR. Therefore, considering the non-treaty basis of the historic waters doctrine and the lack of a universally accepted definition of historic waters in international law, it is crucial to utilise the standards and criteria specified in the South China Sea Arbitration. Nevertheless, it is important to acknowledge that the assessment of Russia's assertion of historical internal waters claim over the NSR required a considerable amount of subjective analysis and interpretation.

Finally, the theoretical framework of this study is established through a comprehensive review of relevant legal literature pertaining to the determination of the legal status and the analysis of regulation of navigation in the NSR waters. This literature includes works by prominent Russian scholars such as A.N. Vylegzhanin, V.V. Gavrilov, P.A. Gudev, and other authors, as well as contributions from international scholars such as Jan Jakub Solski, Erik Molenaar, Douglas Brubaker, and others. Examination of scholarly works, particularly those authored by scholars from Russia in comparison to their, for example, US or UK counterparts, revealed the presence of intrinsic biases and viewpoints. Evaluating these works for impartiality and independence posed a limitation. Furthermore, a notable lack of available resources pertaining to the topics under investigation, particularly a dearth of legal examination and evaluation of the regulatory framework for prior authorization regime in the NSR, posed a significant limitation as well.

[23] *The Republic of Philippines v. The People's Republic of China* (South China Sea Arbitration), Permanent Court of Arbitration, Award in Case No. 2013–19, 12 July 2016.

The regulatory framework governing this work is based on international treaties such as UNCLOS, judicial decisions of the Permanent Court of Arbitration and International Court of Justice (hereinafter "ICJ") such as *United Kingdom v. Norway*[24] (hereinafter "Fisheries Case") and *Mauritius v. United Kingdom*[25] (hereinafter "Chagos Arbitration"), as well as Russian domestic legal acts such as 2020 NSR Navigational Rules[26]. Such a methodological approach serves to offer a more comprehensive framework and diverse viewpoints regarding the subjects being examined.

1.3 Thesis structure

The thesis commences by examining the legislative and enforcement jurisdictional powers possessed by Coastal States and proceeds to establish the navigational rights and freedoms assigned by UNCLOS in each specific maritime zone. Subsequently, the third Chapter delves into the interpretation of the specific provisions of UNCLOS Article 234 in relation to the research objectives and provides a comprehensive overview of the Russian legal framework for the NSR. Moreover, Chapter 4 provides an examination of whether additional enforcement and legislative powers are granted to Russia under Article 234, as well as whether the legal framework of the NSR in relation to navigation, particularly focusing on the prior authorization regime, complies with this provision. Additionally, the Chapter explores the possibility of the NSR's legal regime disregarding and not adhering to the navigational rights and freedoms protected by UNCLOS. Chapter 5 examines an alternate customary international law approach based on the doctrine of historic waters, that Russia employs to justify unilateral authority over the NSR and international navigation inside it. This Chapter offers a concise examination of the historical progression of doctrine, followed by an evaluation of Russia's historic waters claim in light of the pertinent criteria delineated in the South China Sea Arbitration. Finally, a conclusion is formulated in Chapter 6.

[24] *United Kingdom v. Norway* (Fisheries case), Merits, International Court of Justice Judgment, ICJ Rep 116, ICGJ 196, 18th December 1951.
[25] *Mauritius v. United Kingdom* (Chagos Marine Protected Area Arbitration), Permanent Court of Arbitration, Award in Case No. 2011–03, 18 March 2015.
[26] Decree of the Government of the Russian Federation No. 1487 "On approval of the Rules of navigation in the waters of the Northern Sea Route", dated 18 September 2020, as amended 1 September 2023. Available on: https://www.consultant.ru/document/cons_doc_LAW_362718/6801bb4b205f6a33dee02718211e57d1b8d3aaf5/#dst100008.

2 Coastal State jurisdiction as defined by UNCLOS: emphasis on navigational rights and freedoms

2.1 Introductory remarks

The maritime spaces of the World Ocean are conventionally divided into three classifications: maritime zones that are considered an inherent component of the Coastal State territory and fall under their sovereignty (internal waters and territorial sea), maritime zones that are not part of the Coastal State territory but are under their jurisdiction (contiguous zone, EEZ), and maritime zones that are not under the sovereignty or jurisdiction of any state (high seas).[27]

The classification of maritime zones as established by UNCLOS does not include any exceptions for specific regions, including the Arctic.[28] The Arctic Ocean encompasses various categories of maritime spaces, and as such, the Arctic Coastal States hold a substantial role in the regulation of shipping activities within this region.[29] However, these states do not possess a complete monopoly or exclusive rights over the entirety of the Arctic, as non-Arctic states also possess rights and responsibilities there.[30]

For this purpose, UNCLOS aims to establish a delicate equilibrium between the two fundamental principles of maritime law: navigational rights and freedoms and the jurisdiction of Coastal States.[31] However, as will be apparent in the subsequent sections, the establishment of this equilibrium in the Arctic is not as robust as it is in other geographical areas. The issue concerning the jurisdictional boundaries of Coastal States and their potential impact on the

[27] Brian J. Van Pay, "National Maritime Claims In The Arctic," in *Changes in the Arctic Environment and the Law of the Sea* (Leiden, The Netherlands: Brill | Nijhoff, 2010), pp. 62-65, accessed September 25, 2023, https://doi-org.ezproxy.uio.no/10.1163/ej.9789004177567.i-594.17.

[28] Erik J. Molenaar, "The Arctic, the Arctic Council, and the Law of the Sea," in *Governance of Arctic Shipping* (Leiden, The Netherlands: Brill | Nijhoff, 2017), pp. 25, 34-35, accessed September 28, 2023, https://doi-org.ezproxy.uio.no/10.1163/9789004339385_003.

[29] Marc Jacobsen and Jeppe Strandsbjerg, "Desecuritization As Displacement of Controversy: Geopolitics, Law and Sovereign Rights in the Arctic," *Politik* 20 (3) (2017): pp. 15-16, 22-23, accessed October 2, 2023, https://doi.org/10.7146/politik.v20i3.97151.

[30] Ilulissat Declaration (2008). Arctic Ocean Conference, Ilulissat, Grønland. 27-29 May, available on: https://arcticportal.org/images/stories/pdf/Ilulissat-declaration.pdf. Accessed October 3, 2023.

[31] Robert Beckman, "UNCLOS Dispute Settlement Regime and Arctic Legal Issues," in *Challenges of the Changing Arctic* (Leiden, The Netherlands: Brill | Nijhoff, 2016), pp. 583-586, accessed September 30, 2023, https://doi-org.ezproxy.uio.no/10.1163/9789004314252_026.

infringement of navigational rights and freedoms of other States has been a topic of increasing interest.

2.2 Coastal State jurisdiction in internal waters and navigational rights of foreign merchant ships

Internal waters are part of the water area on the landward side of the baseline of the territorial sea of the Coastal State.[32] As the name suggests, internal waters are waters enclosed within the territory of the Coastal States, where the Coastal States exercise their full sovereign rights as recognised by international law.[33] Full sovereignty implies the supreme power of the Coastal States – independence in external affairs and supremacy in internal affairs.[34]

Considering jurisdiction, under public international law it generally refers to the legal competence of Coastal States to affect the conduct of others through prescriptive (regulatory or "law-making") and enforcement measures.[35] Under the UNCLOS framework, prescriptive jurisdiction refers to the authority vested in Coastal States to prescribe laws and regulations pertaining to activities conducted within their marine zones.[36] Thus, Article 2(1) of UNCLOS acknowledges the Coastal State unrestricted legislative competence within internal waters[37] - each state possesses the power to establish conditions for navigation, pilotage, fishing, and other activities that are binding for all domestic and foreign vessels.[38] Respectively, there is no requirement to acknowledge the right of innocent passage of foreign ships and the subsequent navigational freedoms, unless there are specific circumstances that warrant an

[32] UNCLOS, *supra* note 11, Article 8.
[33] E.K. Mbiah, "Coastal, Flag and Port State Jurisdictions: Powers and Other Considerations Under UNCLOS," in *Maritime Law in Motion* (Cham: Springer International Publishing, 2020), p. 497, accessed September 30, 2023, https://doi-org.ezproxy.uio.no/10.1007/978-3-030-31749-2_23.
[34] Jacobsen, *supra* note 29, pp. 23-24.
[35] Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2006), pp. 35-40, accessed September 29, 2023, https://doi.org/10.1007/3-540-33192-1.
[36] *Ibid.*
[37] UNCLOS, *supra* note 11, Article 2(1).
[38] The Fridtjof Nansen Institute. *FNI Report 3/2006 on Coastal State Jurisdiction and Vessel Source Pollution*, pp. 15-18. Available on: https://www.fni.no/getfile.php/131705-1469868985/Filer/Publikasjoner/FNI-R0306.pdf. Accessed October 13, 2023.

exception.[39] This implies that foreign vessels can only access the internal waters of the Coastal States upon obtaining their consent, and any state possesses the prerogative to entirely prohibit the entry of foreign vessels into its internal waters.[40]

Enforcement jurisdiction pertains to the power to enforce rules and initiate legal proceedings through adjudication in courts or by the competent administrative bodies of a State.[41] So, the Coastal States may not only prescribe laws but also enforce them by executive or adjudicative means against foreign merchant ships as well as the crew members, passengers, and goods aboard.[42] In instances of non-compliance, the Coastal States retain the prerogative to conduct inspections on vessels operating within their internal waters[43], as well as possess the authority to detain vessels that are found to be in contravention of said laws, and may impose penalties, fines, or sanctions upon the vessels or individuals involved.[44]

Nevertheless, the exercise of jurisdiction in internal waters is not unlimited and is subject to limitations imposed by international law. Coastal States as a corollary, also have a duty not to allow their internal waters to be used for acts impairing the rights of other States[45], as reinforced by the "checks and balances" framework outlined in Article 211(1,3).[46] This framework necessitates that the laws and regulations implemented by Coastal States to protect the environment and prevent pollution from vessels be communicated to competent international maritime organization (hereinafter "IMO") and should align with generally applicable international rules and standards (hereinafter "GAIRAS") enshrined in IMO conventions.[47]

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[39] James Kraska, "The Regimes of the Law of the Sea," in *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (Oxford Academic, 2011), p. 114, accessed October 1, 2023, https://doi.org/10.1093/acprof:oso/9780199773381.003.0003.
[40] *Ibid.*
[41] Yang, *supra* note 35.
[42] Anne Bardin, "Coastal State's Jurisdiction over Foreign Vessels," *Pace International Law Review* 14 (1) (2002): pp. 30-31, accessed September 20, 2023, https://doi.org/10.58948/2331-3536.1188.
[43] UNCLOS, *supra* note 11, Article 220(1), 226, 218.
[44] *Ibid.*
[45] Yang, *supra* note 35, pp. 47-48.
[46] UNCLOS, *supra* note 11, Article 211(1,3).
[47] Myron H. Nordquist, Satya N. Nandan, and James Kraska, eds, *UNCLOS 1982 Commentary* (Leiden, The Netherlands: Brill | Nijhoff, 2012), pp. 802, 806, 844-845, accessed October 2, 2023, https://doi-org.ezproxy.uio.no/10.1163/9789004215627.

2.3 Coastal State jurisdiction in territorial waters and navigational rights of foreign merchant ships

The Coastal State sovereignty extends to the territorial waters – the maritime zone beyond their land territory and internal waters to that adjacent belt of sea measured from the baselines to a maximum of 12 nautical miles.[48] Despite significant similarities, there exist notable distinctions between the legal framework governing territorial waters and that of internal waters. This disparity arises from the voluntary concession of sovereignty by Coastal States, who, in the pursuit of international cooperation and facilitation of merchant shipping, have acknowledged the entitlement of foreign vessels to engage in innocent passage through their territorial waters.[49] The legal framework governing the territorial waters is a result of reconciling two distinct principles: the sovereignty of the Coastal State and the navigational rights of all other States.[50] Thus, it would be inaccurate to assert that the Coastal States possess "full sovereignty" to the same extent as in internal waters, as the acknowledgment of the right of innocent passage imposes substantial limitations on the Coastal State jurisdiction over foreign vessels transiting through the territorial sea.[51]

Nevertheless, the right of innocent passage is, on no account, absolute. Rather than being a complete freedom, it can be seen as a residual aspect of the principle of freedom of navigation in the territorial sea.[52] This right must be exercised in accordance with the rules of international law, primarily outlined in UNCLOS, as well as any national laws and regulations established by the Coastal States.[53]

Under UNCLOS Article 18, foreign merchant ships in the territorial waters have a duty to passage "continuously and expeditiously", "without entering internal waters", or "external

[48] UNCLOS, *supra* note 11, Article 2,3.
[49] UNCLOS, *supra* note 11, Article 17.
Kraska, *supra* note 39, pp. 116-117.
[50] Henrik Ringbom, eds, *Jurisdiction over Ships* (Leiden, The Netherlands: Brill | Nijhoff, 2015), pp. 174, 177-178, accessed September 4, 2023, https://doi-org.ezproxy.uio.no/10.1163/9789004303508.
[51] Mbiah, *supra* note 33, pp. 498-499.
[52] Manu Kumar, "Analysis of Innocent Passage in the Territorial Sea under the Law of the Sea Regime 1982," *European Environmental Law Review* 21 (6) (2012): pp. 306–315, accessed October 26, 2023, https://doi.org/10.54648/eelr2012024.
[53] Rüdiger Wolfrum, "Freedom Of Navigation: New Challenges," in *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Leiden, The Netherlands: Brill | Nijhoff, 2009), pp. 82-84, accessed October 3, 2023, https://doi-org.ezproxy.uio.no/10.1163/ej.9789004173590.i-624.31.

port facilities", except in the case of certain specified constellations.[54] In addition, foreign merchant ships have obligation when exercising the right of innocent passage, which entails their submission to the legal framework established by the Coastal State.[55] The "broadness of prescriptive jurisdiction" of Coastal States is evident in UNCLOS Article 21, which outlines a comprehensive set of points (a-h) that delineate the areas in which the Coastal States have the authority to establish laws and regulations pertaining to innocent passage.[56]

UNCLOS Articles 21(1)(f) and 211(4) grant the right to Coastal States to prescribe stricter national standards for "the prevention, reduction, and control of marine pollution from foreign vessels" in innocent passage.[57] However, the authority of Coastal States to establish laws and regulations pertaining to environmental protection is not without limitations.[58] UNCLOS provides for two restrictions in that regard: 1) Coastal States have a duty not to hamper the right of innocent passage of foreign ships;[59] 2) laws and regulations giving effect to stricter construction, design, equipment and manning (hereinafter "CDEM") standards are only permitted to the extent they give effect to GAIRAS;[60] The significance of the latter aspect cannot be overstated when it comes to the execution of IMO treaty instruments, and any national regulations that impose stricter prerequisites may potentially contravene the provisions governing innocent passage as stipulated by UNCLOS.[61]

In contrast to the legal framework governing internal waters, which requires the prescriptive jurisdiction of the Coastal State on the management of marine pollution to be subject to oversight by the IMO, such an obligation is absent within internal waters.[62] It seems to deviate from UNCLOS intended objective of granting the Coastal States varying (diminishing) degree of authority to govern navigation for the purpose of preventing ship-source pollution as the

[54] UNCLOS, *supra* note 11, Article 18(1,2).
[55] Yang, *supra* note 35, pp. 173-174.
UNCLOS, *supra* note 11, Article 21(4).
[56] UNCLOS, *supra* note 11, Article 21.
[57] *Ibid.,* Article 21(1)(f), 211(4).
[58] Wolfrum, *supra* note 53, p. 84.
[59] UNCLOS, *supra* note 11, Article 24(1).
[60] Nordquist, eds., *supra* note 47, p. 814.
[61] Fabio Spadi, "Navigation in Marine Protected Areas: National and International Law," *Ocean Development and International Law* 31 (3) (2000): pp. 289-291, accessed November 4, 2023, https://doi.org/10.1080/009083200413172.
[62] UNCLOS, *supra* note 11, Article 211(4).

ship moves further away from the shore, contingent upon the specific maritime zone in question.[63] Nevertheless, the absence of this provision appears to be counterbalanced by the principle that Coastal State laws shall not impede the right of innocent passage.

For this purpose, UNCLOS offers a "test," which stipulates that hampering innocent passage in territorial waters is permissible only when the actions of the foreign ship align with activities that would render the passage non-innocent as outlined in paragraph 2 of Article 19[64], or when there is a severe violation of the Coastal State laws and regulations as stated in Article 21(1) (a-l)[65]. In practical terms, this suggests that the Coastal States do not possess the unilateral authority to determine whether to allow or deny passage in territorial waters, contrasting to, for example, the lawful implementation of an authorization and permit system that governs the entry of foreign vessels into internal waters.[66]

Speaking about Coastal State enforcement jurisdiction: firstly, if the passage is rendered non-innocent pursuant to one of the criteria outlined in UNCLOS Article 19(2), Coastal State authorities acknowledge their "full scale" enforcement jurisdiction with regard to ships in non-innocent passage[67], thus being empowered to "take the necessary steps", including the possibility to suspend or decline admission, or even exclude the vessel from their territorial waters.[68] For example, in the context of vessel-source pollution, enforcement is allowed only where the ship commits an "act of wilful and serious pollution".[69] The competence of enforcement is generally unrestricted if it adheres to international law and is subject to limitations of proportionality, necessity, prohibition of abuse of rights, and non-discrimination.[70] However, this example implies that the Coastal State's threshold for enforcement is relatively stringent.

Secondly, if the threshold is not met, Coastal State enforcement powers are restricted to conducting physical inspections, initiating legal actions and detaining vessels only when there

[63] Nordquist, eds., *supra* note 47, p. 756.
[64] UNCLOS, *supra* note 11, Article 19.
[65] *Ibid.,* Article 21(1).
[66] Spadi, *supra* note 61, pp. 290-291.
[67] FNI, *supra* note 38, p. 25.
[68] UNCLOS, *supra* note 11, Article 25(1).
[69] *Ibid.,* Article 19(2)(h).
[70] Yang, *supra* note 35, pp. 184, 196-198.

are "clear grounds of believing" that the vessel has contravened national or international standards on vessel-source pollution.[71]

2.4 Coastal State jurisdiction in EEZ and navigational freedoms of foreign merchant ships

The EEZ is an area beyond and adjacent to the territorial waters that shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial waters is measured.[72] The EEZ is distinct from both the notion of sovereignty prevailing in the territorial and internal waters and the principle of freedom that defines the high seas.[73] Rather, the legal framework governing the EEZ is established by the allocation and equitable distribution of rights between the Coastal State and other states, as outlined in UNCLOS.[74]

The key UNCLOS provisions regarding the sovereign rights, obligations, and jurisdiction of Coastal States in the EEZ are Articles 56 and 58.[75] The first paragraph of Article 56 provides that in the EEZ, the Coastal States have sovereign rights that are primarily aimed at ensuring conditions for conducting economic activities, such as the exploration and exploitation of marine resources (limitation *ratione materiae*).[76] In this context, it is important to differentiate the notion of sovereign rights from territorial sovereignty, which implies complete autonomy and independence. Jurisdictional powers of Coastal States are more limited within the EEZ, as they do not enjoy sovereignty but only certain sovereign rights.

It should be noted that, pursuant to UNCLOS Art. 56(1)(b)(iii), Coastal States have jurisdiction over "protection and preservation of the marine environment".[77] Nevertheless, their prescriptive jurisdiction is limited, as Coastal States are only permitted to enact laws and

[71] UNCLOS, *supra* note 11, Article 220(2).
[72] *Ibid.,* Article 55, 57.
[73] Gemma Andreone, "The Exclusive Economic Zone," in *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015), pp. 162-166.
[74] *Ibid.,* pp. 165-166.
[75] UNCLOS, *supra* note 11, Article 56, 58.
[76] *Ibid.,* Article 56.
[77] *Ibid.*

regulations that comply with GAIRAS and are subject to IMO oversight.[78] This provision guarantees that national legislation will not exceed or contradict international standards.

In line with UNCLOS Article 58 within the EEZ, other States possess freedoms akin to those of the high seas.[79] Nevertheless, free navigation in the EEZ is not a right that a state may exercise without considering the interests of other states (due regard obligation). In essence, it can be inferred that when a state exercises its right to free navigation, it incurs a responsibility towards other states that are also using this right or other lawful freedoms of the seas.[80] Thus, freedom of navigation can be classified as not an absolute under UNCLOS. It is broader in scope than the right of innocent passage in the territorial waters but deemed more conditional than the freedom of navigation in the high seas.[81] In contrast to the high seas, the freedom of navigation in the EEZ can be categorised as subject to the Coastal State jurisdiction.[82]

In essence, it can be stated that when a merchant ship is lawfully traversing the EEZ and adhering to the laws established by the Coastal States in accordance with UNCLOS Article 56, such as those pertaining to the protection and preservation of the marine environment, it is expected that Coastal States should refrain from impeding or obstructing the exercise of freedom of navigation by requiring notification or seeking permission or consent from the Coastal State.[83] It is argued that the imposition of stringent regulations on navigation within the EEZ for environmental purposes is in direct violation of international law, unless the exception specified in UNCLOS Article 211(6) is applied.[84]

Moreover, Coastal State enforcement jurisdiction within the EEZ is limited. Coastal States are entitled to require information from ships only when "clear grounds"[85] indicate that

[78] *Ibid.,* Article 211(5).
Nordquist, eds., *supra* note 47, p. 814.
[79] UNCLOS, *supra* note 11, Article 58.
[80] Thuy Van Tran, *Freedom of Navigation in the Exclusive Economic Zone: An EU Approach* (Cambridge: Cambridge Scholars Publishing, 2022), pp. 2-3.
[81] *Ibid.*
[82] Yoshifumi Tanaka, "Navigational Rights and Freedoms," in *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015), p. 554.
[83] Pete Pedrozo, "Maintaining Freedom of Navigation and Overflight in the Exclusive Economic Zone and on the High Seas," *Indonesian Journal of International Law* 17 (4) (2020): pp. 479-480, accessed October 19, 2023, https://doi.org/10.17304/ijil.vol17.4.796.
[84] Spadi, *supra* note 61, pp. 296-297.
[85] UNCLOS, *supra* note 11, Article 220(3).

international or national rules and standards for the prevention, reduction, and control of pollution from vessels have been violated.[86] Physical inspections are only permitted when "clear grounds" indicate that such violations resulted in "a substantial discharge" or threatened "significant pollution of the marine environment"[87], and when the vessel did not provide the Coastal State requested information or the information given "manifestly" differs.[88] Institution of proceedings or detention of vessels is only permitted if "clear objective evidence"[89] shows that such violations caused or threatened to cause "major damage to the coastline or related interests of the Coastal State".[90]

[86] Ringbom, *supra* note 50, pp. 222-224.
[87] UNCLOS, *supra* note 11, Article 220(5).
[88] Ringbom, *supra* note 50, pp. 222-224.
[89] UNCLOS, *supra* note 11, Article 220(6).
[90] Ringbom, *supra* note 50, pp. 222-224.

3 UNCLOS Article 234 as Arctic *lex-specialis*: still susceptible to interpretational complexities?

3.1 Introductory remarks

The Arctic Ocean represents a specific case with unique features from the point of view of legal regulation.[91] It is acknowledged by the fact that UNCLOS includes the only relevant provision, Article 234, specifically applicable to the Artic regions[92], granting the Arctic Coastal States (Russia, Norway, Denmark, USA and Canada[93]) an authority to adopt and enforce special laws and regulations for the prevention, reduction, and control of marine pollution from vessels in ice-covered areas.[94] This article holds significant importance as it serves as a fundamental pillar upon which Arctic Coastal States, such as Russia, rely to assert their jurisdiction and validate their sovereign control over Arctic maritime areas, specifically in the case of Russia's authority over the NSR.[95] Thus, to lay a solid groundwork for future research and gain a comprehensive understanding of the international legal framework pertaining to the NSR, it is imperative to comprehend the fundamental essence and extent of Article 234.

3.2 Scope of UNCLOS Article 234: Interpretation

3.2.1 Due regard to navigation

Article 234 grants Arctic Coastal States a distinctive advantage by conferring upon them the authority to unilaterally establish and enforce more stringent environmental regulations than

[91] C. Pelaudeix, C. Humrich, eds., "Global Conventions and Regional Cooperation: The Multifaceted Dynamics of Arctic Governance," in *Global Arctic* (Cham: Springer International Publishing, 2022), pp. 447-449, accessed October 5, 2023, https://doi-org.ezproxy.uio.no/10.1007/978-3-030-81253-9_23.
[92] Armand de Mestral, "Article 234 of the United Nations Convention on the Law of the Sea: Its Origins and Its Future," in *International Law and Politics of the Arctic Ocean* (Leiden, The Netherlands: Brill | Nijhoff, 2015), pp. 111-113, accessed September 17, 2023, https://doi-org.ezproxy.uio.no/10.1163/9789004284593_006.
[93] Ilulissat, *supra* note 30.
[94] UNCLOS, *supra* note 11, Article 234.
[95] Viatcheslav Gavrilov, Roman Dremliuga, and Rustambek Nurimbetov, "Article 234 of the 1982 United Nations Convention on the Law of the Sea and Reduction of Ice Cover in the Arctic Ocean," *Marine Policy* 106 (103518) (2019): pp. 1-4, accessed October 30, 2023, https://doi.org/10.1016/j.marpol.2019.103518.

those prescribed by internationally recognised norms; however, this prerogative is contingent upon the fulfilment of specific conditions.[96] One of such conditions is to have "due regard to navigation"[97], which appears to be one of the few explicit limits on the power granted to the Coastal States. However, what exactly this limitation implies is unclear and entails different interpretations.[98] The primary rationale for this is that Article 234 lacks reference to GAIRAS and IMO, which seems to undermine the crucial aspect of "checks and balances" in relation to Coastal State jurisdiction over navigation, among other matters.[99]

Interpreting the "due regard" notion literally- in good faith and according to its ordinary meaning[100], Black's Law Dictionary defines it as "just, proper, regular, lawful, sufficient, reasonable".[101] Understanding the implications of the term "reasonable" and the associated requirements of "reasonableness" can be a challenging task. Nevertheless, it can be argued that it necessitates Coastal States effectively address the dual objectives of safeguarding navigational rights and freedoms as well as ensuring the preservation of the marine environment while carefully striking a suitable equilibrium between these two.[102] According to Bartenstein's perspective, measures implemented by Coastal States in accordance with Article 234 should be reasonable to the needs (common good) of international shipping.[103]

Despite the lack of explicit clarification in Article 234 regarding the specific navigational regime it pertains to, whether it be internal waters, territorial waters, or EEZ, the prevailing consensus among legal scholars, including Jan Jakub Solski and Douglas Brubaker, is to interpret the phrase "due regard to navigation" as encompassing both the freedom of

[96] Alexander Vylegzhanin, Ivan Bunik, Ekaterina Torkunova, and Elena Kienko, "Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law," *The Polar Journal* 10 (2) (2020): p. 294, accessed October 30, 2023, https://doi.org/10.1080/2154896x.2020.1844404.
[97] UNCLOS, *supra* note 11, Article 234.
[98] D. M. McRae, D. J. Goundrey, "Environmental Jurisdiction in Arctic Waters: The Extent of Article 234," *Univeristy of British Columbia Law Review* 16, no. 2 (1982): pp. 220-222, accessed October 30, 2023, available on: Hein Online.
[99] UNCLOS, *supra* note 11, Article 234.
[100] VCTL, *supra* note 22, Article 31(1).
[101] Black's Law Dictionary, available on: https://thelawdictionary.org/. Accessed October 25, 2023.
[102] Jan Jakub Solski, "The 'Due Regard' of Article 234 of UNCLOS: Lessons from Regulating Innocent Passage in the Territorial Sea," *Ocean Development and International Law* 52 (4) (2021): pp. 400-401, accessed October 29, 2023, https://doi.org/10.1080/00908320.2021.1991866.
[103] Kristin Bartenstein, "The 'Arctic Exception' in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?" *Ocean Development and International Law* 42 (1–2) (2011): pp. 41-42, accessed November 1, 2023, https://doi.org/10.1080/00908320.2011.542104.

navigation protected in the EEZ and innocent passage protected in territorial seas.[104] (see the interpretation of the notion "within the EEZ" below).

Further support for the interpretation can be derived from the drafters' intentions during the formulation of Article 234 and the surrounding circumstances of its finalisation.[105] Notably, the "Memorandum to the President" dated 28 April 1976 holds significant relevance in this regard and clarifies that:

> *Freedom of navigation in the EEZ and innocent passage in the territorial sea would apply in the Arctic (...)*[106] and *(...) due regard clause does not provide specific objective protection for navigational interests in the Arctic (...) so an understanding must be obtained from the Arctic nations that "due regard to navigation" in fact will be applied in such a way as not to have the practical effect of impeding freedom of navigation.*[107]

Regrettably, it remains uncertain if such comprehension was ever achieved. However, it is evident that the objective was to protect the rights and freedoms of navigation "incorporated" in Article 234, in full conformity with the general navigational provisions of UNCLOS, against random and excessive control exerted by Coastal States.

3.2.2 Within the limits of the EEZ

Article 234 incorporates a notion of "within the limits of the EEZ" that serves as a territorial scope of application of the Article. Firstly, in terms of literary interpretation[108], the phrase "within a limit" can be seen as ascribing the conventional meaning of "to a certain or limited extent" and "only when talking about reasonable or normal situations"[109], as defined by

[104] Brubaker, *supra* note 20, pp. 55-57.
Solski, *supra* note 102, pp. 403-404.
[105] VCTL, *supra* note 22, Article 32.
[106] Department of State Washington. *Law Of The Sea—Request For Instructions On An Article On Vessel Pollution Control In The Arctic (Secret Letter),* p. 4, para. A. Available on: https://www.cia.gov/readingroom/docs/CIA-RDP82S00697R000400170026-0.pdf. Accessed November 2, 2023.
[107] *Ibid.,* p. 4, para. F.
[108] VCTL, *supra* note 22, Article 31(1).
[109] Collins Dictionary, available on: https://www.collinsdictionary.com/dictionary/english/within-limits. Accessed October 25, 2023.

Collins dictionary. Furthermore, according to Black's Law Dictionary, the term "limit" is defined as the "prescribed boundary of scope, be it authority, power, privilege, or right."[110] If the phrase "within the limits" is interpreted as meaning " to a limited extent or conventionally prescribed boundary of the EEZ," it can be stated that it pertains to the internal boundaries of the EEZ, excluding the territorial waters. This conclusion could be substantiated by examining the context of Article 55 of UNCLOS, which provides a clear definition of the EEZ as "a zone beyond and adjacent to the territorial sea."[111] The theory of "EEZ inner limits" is endorsed by various legal academics, including Goundrey and McRae, who argue that the scope of Article 234 is restricted to the EEZ and does not confer equal rights to Coastal States in the territorial waters.[112]

It is important to acknowledge that within the framework of UNCLOS, there is a lack of provisions that employ the phrase "within the limits" in a similar manner. Additionally, the terminology used to define the spatial extent of various provisions throughout UNCLOS is not entirely uniform. Considering the inherent qualities of ambiguity associated with the expression, it may be beneficial to consider additional methods of interpretation, such as examining the preparation work and the contextual factors surrounding UNCLOS finalisation.[113]

Even though the initial negotiations over Article 234 involving the USSR, US, and Canada throughout the 1970s and early 1980s, were conducted in a confidential manner[114], there are a few publicly accessible papers, such as the "Letter of Submittal to the US President" dated 23 September 1994, that might shed light on this matter. The letter provides endorsement for the theory of "EEZ outer limits," asserting that:

[110] Black's Law Dictionary, *supra* note 101.
[111] UNCLOS, *supra* note 11, Article 55.
[112] McRae, *supra* note 98, pp. 219-223.
[113] VCTL, *supra* note 22, Article 32.
[114] Brubaker, *supra* note 20, p. 51.

Pursuant to this article (234), a State may enact and enforce non-discriminatory laws and regulations to protect such ice-covered areas that are within 200 miles of its baselines established in accordance with the Convention.[115]

This assertion is further corroborated by Oxman, who argues that the territorial application of Article 234 aligns with the territorial application of Article 66 which reads "(…) in all waters landward of the outer limits of its EEZ".[116] He further elaborates that this provision lends support to the theory regarding the determination of the outer limits of the EEZ, as negotiations for Article 66 involved the same three delegations, namely the USSR, Canada, and the US, who presumably had similar intentions regarding the territorial scope as those expressed in Article 234.[117]

Most relevant legal scholars, including Pharand and Brubaker, express confidence in the accuracy of this interpretation. They firmly believe that the language used in Article 234 is specifically aimed at confining its applicability to the outer limits of the EEZ, including territorial waters in the Article's scope.[118] This interpretation does not permit the deduction of the illogical conclusion that the jurisdiction of Coastal States in ice-covered regions is wider within the EEZ compared to the territorial waters.[119]

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[115] Senate. *Message from the President of the US transmitting UNCLOS,* p. 40. Available on: https://www.foreign.senate.gov/imo/media/doc/treaty_103-39.pdf. Accessed November 2, 2023.
[116] Bernard H. Oxman, "Observations on Vessel Release under the United Nations Convention on the Law of the Sea," *International Journal of Marine and Coastal Law* 11, no. 2 (1996): pp. 204-205, accessed November 1, 2023, available on: Hein Online.
[117] *Ibid.*
[118] Donat Pharand, "The Arctic Waters and the Northwest Passage: A Final Revisit," *Ocean Development and International Law* 38 (1–2) (2007): pp. 47-48, accessed September 15, 2023, https://doi.org/10.1080/00908320601071314.
Douglas R. Brubaker, "Regulation of Navigation and Vessel-Source Pollution in the Northern Sea Route: Article 234 and State Practice," in *Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention* (Cambridge: Cambridge University Press, 2000), p. 227, accessed October 13, 2023, doi:10.1017/CBO9780511494635.012.
[119] Lilly Weidemann, "International Governance of the Arctic Marine Environment," in *International Governance of the Arctic Marine Environment* (Cham: Springer International Publishing, 2014), p. 80, accessed September 30, 2023, https://doi-org.ezproxy.uio.no/10.1007/978-3-319-04471-2_3.

3.3 The legislative framework of Russia with regards to the NSR

To date, the implementation of legislation specifically grounded in UNCLOS Article 234 has been observed solely in Canada and Russia.[120] Based on the Russian legal doctrine and the perspectives of various Russian scholars, it can be observed that the historical Soviet and subsequent Russian approaches to legislation and enforcement pertaining to Arctic navigation, as well as its geographical extent, are presently consolidated within a comprehensive legal framework governing the NSR.[121]

At the time of the study, the NSR's legal framework is comprised of three fundamental components:

1) FL No. 155-FZ, "On Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation," dated 31 July 1998, as amended 05.12.2022.[122]
2) FL No. 81-FZ, "Merchant Shipping Code of the Russian Federation," dated 30 April 1999, as amended 21.05.2023.[123] (hereinafter "Merchant Shipping Code").
3) Decree of the Government of the Russian Federation No. 1487, "On approval of the Rules of navigation in the waters of the Northern Sea Route," dated 18 September 2020, as amended 01.09.2023.[124] (hereinafter "2020 Navigational Rules").

Article 14 of the FL No. 155-FZ stipulates that:

> *Navigation in the water areas of the NSR, the historically established national transport communication line of the Russian Federation shall be carried out according to generally recognised principles and norms of international law, international treaties of*

[120] Jacques Hartmann, "Regulating Shipping in the Arctic Ocean: An Analysis of State Practice," *Ocean Development and International Law* 49 (3) (2018): pp. 283–284, accessed November 5, 2023, https://doi.org/10.1080/00908320.2018.1479352.
[121] Roman Dremliuga, Kristin Bartenstein, and Natalia Prisekina, "Regulation of Arctic Shipping in Canada and Russia," *Arctic review on law and politics* 13 (2022): pp. 338-346, accessed November 8, 2023, https://doi.org/10.23865/arctic.v13.3229.
[122] FL No. 155-FZ, "On Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation," dated 31 July 1998, as amended 5 December 2022. Available on: https://www.consultant.ru/document/cons_doc_LAW_19643/.
[123] FL No. 81-FZ, *supra* note 12.
[124] Decree No. 1487, *supra* note 26.

> *the Russian Federation, the present Federal Law, other federal laws and other normative legal acts issued in accordance with them.*[125]

The rhetoric employed in this Federal Law and Russian legal doctrine as such, in addition to the reliance on UNCLOS as an international treaty to which Russia is a party, appears to make an ambiguous allusion to customary international law. Specifically, it references the notion of possessing a "historical title" to the NSR as a justification for ownership, as historical titles are recognised as one of the justifications for territorial rights.[126] The scholarly literature authored by Russian academics affirms that the NSR is considered an "indivisible, national transport route".[127] This legal approach is based on the principle of *uti possidetis* or *uti possidetis sic possidetis*, which can be understood: "As you possess, so shall you possess."[128] (See further discussion in Section 5)

The Article includes a mention of "other federal laws," with the most significant being the Merchant Shipping Code. According to Article 5.1, the geographical scope of NSR is established as:

> *The water area adjacent to the northern coast of the Russian Federation, covering internal sea waters, the territorial sea, the contiguous zone and the exclusive economic zone of the Russian Federation (...)*[129]

According to Dremliuga and Prisekina, it can be argued that Russia's alignment of the outer boundary of the NSR with that of the EEZ suggests that the country views Article 234 as the foundation for its domestic navigation rules.[130]

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[125] FL No. 155-FZ, *supra* note 122, Article 14.
[126] Damir K. Bekyashev, Kamil A. Bekyashev, "The Trends in the Development of the Legal Regime of the Northern Sea Route," *Vestnik of Saint Petersburg University Law* 12 (2) (2021): p. 279, accessed November 3, 2023, https://doi.org/10.21638/spbu14.2021.203.
[127] Gavrilov, *supra* note 15, pp. 256-260.
[128] Christopher R. Rossi, "The Northern Sea Route and the Seaward Extension of Uti Possidetis (Juris)," *Nordic Journal of International Law* 83, 4 (2014): pp. 487-489, accessed October 23, 2023, https://doi-org.ezproxy.uio.no/10.1163/15718107-08304004.
[129] FL No. 81-FZ, *supra* note 12, Article 5.1.
[130] Dremliuga, *supra* note 121, p. 342.

Furthermore, Article 5.1(2) makes a specific mention of the 2020 Navigational Rules.[131] The explanatory note accompanying the earlier 2012 Navigational Rules affirms that the rules specifically reference Article 234, thereby indicating:

> *The available Rules of Navigation on the Northern Sea Route (...) are consistent with the requirements of Clause 234 of the UNCLOS (...)*[132]

To facilitate the study endeavour, it is important to undertake an investigation pertaining to Section 2 of the 2020 Navigational Rules. The following provisions hold significant relevance:

1) The organization of navigation of vessels in the water areas of the NSR is carried out by the State Atomic Energy Corporation Rosatom (hereinafter "Rosatom");[133]
2) Foreign-flagged ships are subject to a mandatory system of prior notification and authorization before entering the water areas of the NSR. Vessels without a permit from Russian authorities have no right to enter the NSR;[134]
3) The permit is granted provided the vessel complies with the relevant requirements on safety of navigation and pollution prevention. Rosatom reserves the unilateral right to suspend or deny the issuance of the permit;[135] (This is not a mere formality, as applications were rejected in more than 100 cases between 2018 and 2023.)[136]

The review described above posits that Russia recognises its comprehensive authority and control over the NSR, particularly in terms of unilaterally regulating navigation. Despite the presence of considerable uncertainty regarding the extent to which Article 234 permits

[131] FL No. 81-FZ, *supra* note 12, Article 5.1(2).
[132] Explanatory note to the draft federal law, *"On the introduction of changes in some legal acts of the Russian Federation in the area of state regulations of commercial shipping in the water areas of the Northern Sea Route,"* para. 1. Available on: https://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=PRJ&n=90009&dst=100001#mT1scwTxe8FUszi1.
[133] Decree No. 1487, *supra* note 26, para. 2.
[134] *Ibid.,* para. 3.
[135] *Ibid.,* para. 10, 11.
[136] Northern Sea Route Administration. "Urgent information: Non-compliant vessels," available on: http://www.nsra.ru/en/rassmotrenie_zayavleniy/otkazu.html?year=2013. Accessed November 1, 2023.

Coastal States to restrict the freedom of navigation and right of innocent passage[137], Russian NSR legislation suggests that Russia adopts a broad (*de-maximis)* interpretation of Article 234, which seems to grant Russia extensive authority to regulate shipping in a manner akin to the regulation of internal waters, thereby granting Russia full sovereignty over navigation and the unilateral discretion to permit or deny passage to vessels.[138] It can be asserted that the official stance of the Russian government under the 2020 Navigational Rules is that the "entire" NSR is subject to the same legal framework and same jurisdictional powers as in Russia's internal waters, regardless of the specific maritime zone in which a vessel is located on the NSR and regardless of the passage rights and freedoms it is entitled to exercise under the general navigational provisions of the UNCLOS.[139]

[137] Hartmann, *supra* note 120, p. 282.
[138] Donald McRae, "Arctic sovereignty? What is at stake?" *Behind the Headlines*, vol. 64, no. 1, (2007): pp. 17-19, accessed October 27, 2023, link.gale.com/apps/doc/A158959250/AONE?u=oslo&sid=bookmark-AONE&xid=62a23215.
[139] Gavrilov, *supra* note 15.

4 Does Russia have enhanced jurisdictional authority under Article 234 to regulate navigation on the NSR? Examination of Russian legislation

4.1 Navigational rights and freedoms granted to the merchant ships on the NSR: Russia's abusive implementation of Article 234?

Russia has incorporated the provisions of maritime zone delimitation into its domestic maritime law, aligning them in full resemblance with UNCLOS. Russian legislation clearly defines the status and legal framework governing Russia's internal waters, territorial waters, and the EEZ, outlining the rights of Russia and other states[140], including the codification of the right of innocent passage[141] and freedom of navigation[142] within each specific maritime zone.

The regulation of Arctic waters, like other regions of the world's oceans, is undeniably governed by UNCLOS, consequently serving as the basis for the establishment of the legal framework pertaining to the NSR.[143] The primary inquiry at hand pertains to the unresolved matter of whether Article 234 permits Russia to surpass its jurisdictional powers as delineated by the UNCLOS within each distinct maritime zone, along the NSR.

Article 234 is commonly regarded as a provision focused on environmental protection, primarily due to its placement in Part 12 of UNCLOS, which pertains to the protection and preservation of the marine environment.[144] Given the fact that Article 234 stands out as the sole provision included in Section 8 of UNCLOS, it would be incorrect to consider it an entirely autonomous. Thus it shall be read in concert with other UNCLOS provisions, as asserted by the fact that: "States are then enjoined individually and collectively to take all measures consistent with this Convention that are necessary to prevent, reduce, and control

[140] FL No. 191-FZ, "On the Exclusive Economic Zone of the Russian Federation", dated 17 December 1998. Available on: https://www.consultant.ru/document/cons_doc_LAW_21357/.
FL No. 155-FZ, *supra* note 122.
[141] FL No. 155-FZ, *supra* note 122, Article 10, 11.
[142] FL No. 191-FZ, *supra* note 140, Article 6.
[143] Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge: Cambridge University Press, 2012), pp. 305-306, accessed November 2, 2023, doi:10.1017/CBO9780511844478.
[144] UNCLOS, *supra* note 11, Part 12.

pollution of the marine environment from any source (…)" and "(…) shall endeavour to harmonize their policies in this connection"[145], as well as States shall "(...) refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention"[146].

As it was established in Section 3.2.2, Russia is entitled to legislate within Article 234's scope, only in Russia's territorial waters and EEZ. The analysis of Coastal State jurisdictional powers within the EEZ and territorial waters outlined in Sections 2.3 and 2.4, is found to be in sharp contrast to the broad legislative powers outlined in Article 234. Within these zones encompassed by the NSR, Russia is empowered to unilaterally prescribe more stringent CDEM standards and granted unilateral legislative authority to address matters concerning the preservation of the marine environment and vessel-source pollution, containing more stringent standards than GAIRAS, and not being subject to pre-approval or review by the IMO.[147]

The lack of these safeguards and constraints on Russia's legislative jurisdiction opens a "pandora box", allowing Russia to "legitimately" expand its jurisdictional powers over all the marine zones covered by the NSR, which could be seen as a favourable outcome for Russia. It goes against the primary objective of the UNCLOS, that intends to settle the dispute of Coastal States over-extending maritime claims by granting them jurisdictional authority to legislate within the framework of GAIRAS.[148] Such a deficiency in Article 234 has led to Russia's practice of "creeping jurisdiction,"[149] with distinct features of "sovereignty", which extends beyond the territorial waters encompassed by the NSR to include the EEZ.

However, recently there has been an observable progression on this matter, specifically a transition from a unilateral to a more global approach, as well as a shift from a broad to a more limited interpretation of Article 234. In 2017, the IMO developed the International Code

[145] *Ibid.,* Article 194(1).
[146] *Ibid.,* Article 194(4).
[147] Myron H. Nordquist, Rosenne Shabtai, Alexander Yankov and Neal R. Grandy, *United Nations Convention on the Law of the Sea: 1982: A Commentary. Volume IV Articles 192 to 278 Final Act Annex Vi* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1991), pp. 395-397.
[148] Aldo Chircop, "Jurisdiction over Ice-Covered Areas and the Polar Code: An Emerging Symbiotic Relationship?" *The Journal of International Maritime Law* 22 (2016): pp. 281-282, accessed October 20, 2023, available on: Academia.edu.
[149] Ringbom, *supra* note 50, pp. 14, 249-250, 276-277.

of Safety for Ships Operating in Polar Waters (hereinafter "Polar Code"), establishing obligatory regulations on the design, construction, equipment, and operations of ships navigating in the polar regions.[150] The primary rationale for this assertion is that the Polar Code can be seen as being a component of the GAIRAS framework.[151]

On the one hand, Russia continues to adhere to its "creeping jurisdiction" strategy, arguing that Article 234 remains crucial as it offers additional measures for Russian actions. Russia asserts that the Polar Code has limitations and is inadequate in ensuring the safety of navigation and protection of the marine environment[152], because it does not cover all vessels (only vessels under relevant conventions as SOLAS, MARPOL, STCW)[153] traversing the NSR, thus implementing specific regulations that apply to all vessels and the requirements necessary to obtain a navigation permit. (See discussion further).

On the other hand, certain Russian academics view the implementation of the Polar Code as a significant advancement in moving away from Russia's broad interpretation of Article 234, arguing that it is a great step towards reducing Russia's ability to unilaterally engage in environmental conservation efforts while subjecting Russia's legislation to GAIRAS and IMO supervision.[154]

The latter perspective is deemed more favourable due to its inclination towards interpreting Article 234 by Russia in a manner that prioritises the preservation of the "common good of international shipping", while aiming to enhance the safety, predictability, and efficiency of international shipping activities along the NSR while safeguarding the distinctive ecology of

[150] IMO. *International Code for Ships Operating in Polar Waters (Polar Code).* Available on: https://www.imo.org/en/ourwork/safety/pages/polar-code.aspx. Accessed October 12, 2023.
[151] Øystein Jensen, "The International Code for Ships Operating in Polar Waters: Finalization, Adoption and Law of the Sea Implications," *Arctic Review on Law and Politics* 7, no. 1 (2016): pp. 71–75, accessed October 17, 2023, https://www.jstor.org/stable/48710410.
[152] Viktoriya Nikitina, "The Arctic, Russia and Coercion of Navigation," *Arctic Yearbook* (2021): p. 9, accessed October 27, 2023, available on: https://arcticyearbook.com/arctic-yearbook/2021/2021-scholarly-papers/376-the-arctic-russia-and-coercion-of-navigation.
[153] IMO, *supra* note 150.
[154] Anna Viktorovna Kotlova, *French international legal doctrine on the status of the Arctic (PHD),* Moscow, 2019: pp. 70-72, accessed October 12, 2023, available on MGIMO website: https://mgimo.ru/upload/diss/2019/ehac-ran-red-kotlova.pdf.

the polar region.[155] The implementation of a standardised worldwide framework is expected to facilitate the achievement of the objective to establish the NSR as a highly competitive global transportation market.[156]

Based on the analysis above, it appears that Article 234 has the potential to disrupt the equilibrium established by UNCLOS - between navigation and pollution prevention, potentially favouring the latter to a significant extent.[157] Nevertheless, there are legal scholars who contend that Russia, in accordance with Article 234, should confine its laws and regulations solely to addressing the prevention, reduction, and control of marine pollution, and Russia's jurisdiction should be limited to regulating solely vessel-source pollution[158], not extending to any additional rights in terms of navigation regulation.

This view is supported by the inclusion of the "due regard to navigation" provision that acts as a limitation to Russia's jurisdiction with respect to control over navigation on the NSR. (See discussion in Section 3.2.1). Not in vain Permanent Court of Arbitration in Chagos Arbitration interpreted "due regard" obligation as:

> *(...) the ordinary meaning of "due regard" calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. (...) The Convention does not impose a uniform obligation to avoid any impairment of Mauritius' rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance (...)*[159]

[155] Jiayu Bai, "The IMO Polar Code: The Emerging Rules of Arctic Shipping Governance," *The International Journal of Marine and Coastal Law* 30, 4 (2015): pp. 680, accessed November 1, 2023, https://doi-org.ezproxy.uio.no/10.1163/15718085-12341376.
[156] Anna Davis and Ryan Vest, "Foundations of the Russian Federation State Policy in the Arctic for the Period up to 2035," *RMSI Research* (5) (2020): pp. 4-8, 14, accessed November 3, 2023, available on: https://digital-commons.usnwc.edu/rmsi_research/5.
[157] Chircop, *supra* note 148, pp. 278-281.
[158] Peter Luttmann, "Ice-Covered Areas under the Law of the Sea Convention: How Extensive are Canada's Coastal State Powers in the Arctic?" *Ocean Yearbook Online* 29, 1 (2015): p. 96, accessed October 4, 2023, https://doi-org.ezproxy.uio.no/10.1163/22116001-02901006.
[159] Chagos Marine Protected Area Arbitration, *supra* note 25, para. 519.

It can be argued that the concept of "due regard" entails that Russia should demonstrate respect and preserve the rights of innocent passage in territorial waters and freedom of navigation in the EEZ contained by the NSR. In this context, it is imperative for Russia to adhere to the overarching navigational principles outlined in UNCLOS. (See Section 2.3 in respect to territorial waters and Section 2.4 in respect to the EEZ).

From this standpoint, the Russian legislation that allows for the adoption of the unified legal regime of the NSR in terms of navigation and imposes restrictions on navigation to ensure safety and environmental protection, triggering Article 234[160], is argued to be incongruous with UNCLOS. A similar argument can be made about the consolidation of various maritime zone regimes present on the NSR into a unified framework of internal waters, which entails Russia's exercise of extensive jurisdictional authority. (See discussion in Section 3.3). Russia's purported "creeping jurisdictional" or "sovereignty" ambitions under the guise of Article 234, appear to lack substantial support in UNCLOS.

In terms of Russia's jurisdiction for enforcement, Article 234 does not grant any supplementary enforcement powers pertaining to laws on environmental protection and vessel source pollution in ice-covered regions (NSR). Therefore, the enforcement powers of Russia are constrained to the requirements outlined in the general enforcement provisions of the UNCLOS. (See Section 2.3 in respect to Russia's enforcement powers in territorial waters and Section 2.4 in respect to the EEZ). It is well asserted by the Permanent Court of Arbitration in the *Kingdom of the Netherlands v. Russian Federation* (Arctic Sunrise Arbitration), concerning the Dutch vessel entered the EEZ of Russia encompassed in the NSR without permission.[161] Tribunal held that:

> *(...) it is not satisfied that the boarding, seizure, and detention of the Arctic Sunrise by Russia on 19 September 2013 constituted enforcement measures taken by Russia pursuant to its laws and regulations adopted in accordance with Article 234 of the Convention (...)*[162] and *(...) these measures did not constitute a lawful exercise of*

[160] Nikitina, *supra* note 152, p. 9.
[161] *Kingdom of the Netherlands v. Russian Federation* (Arctic Sunrise Arbitration), Permanent Court of Arbitration, Award in Case No. 2014–02, 10 July 2017.
[162] *Ibid.,* para. 296.

Russia's enforcement rights as a coastal State under Articles 220 or 234 of the Convention.[163]

It is not feasible to express dissent with the statement made by the Dutch Minister in this regard: "Article 234 (…) is no license to inhibit the freedom of navigation without restrictions."[164]

In conclusion, there is a grain of truth in Huebert's and Lackenbauer's assertion regarding the evolving nature of international shipping and the potential impact of climate change on the NSR which states that the Arctic should not be regarded as an exceptional region but rather as one that is gradually aligning with other areas of the World Ocean.[165]

4.2 Does Article 234 allow NSR's prior authorisation regime?

According to Article 234, Russia has implemented the 2020 Navigational Rules. They, inter alia, subject navigation through the NSR to an obligatory prior notification and authorization system and require ships and their crews to adhere to specific requirements.[166] Rules are purportedly formulated with the intention of ensuring that vessels operating within this region adhere to safety and environmental standards.[167]

Although there are instances where the Coastal State prior authorization regime is legally recognized, such as entering a State's internal waters, UNCLOS does not provide an evaluation of the legality of Russia's implementation of a permitting regime for the passage of merchant vessels, either in the territorial sea or the EEZ.[168] There is a prevailing consensus among commentators that the imposition of prior authorization as a condition for the exercise

[163] *Ibid.,* para. 297.
[164] Ringbom, *supra* note 50, pp. 209-210.
[165] P.Whitney Lackenbauer and Rob Huebert, eds., "An Important International Crossroads," in *(Re)Conceptualizing Arctic Security* (Centre for Military, Security and Strategic Studies, University of Calgary, 2017), pp. iv-xii, available on: Academia.edu.
[166] Decree No. 1487, *supra* note 26, Article 5.1.
[167] *Ibid.*
[168] Jan Jakub Solski, "Northern Sea Route Permit Scheme: Does Article 234 of UNCLOS Allow Prior Authorization?" *Ocean Yearbook Online* 35, 1 (2021): p. 443, accessed October 4, 2023, https://doi-org.ezproxy.uio.no/10.1163/22116001_03501014.

of rights and freedoms of navigation is incongruent with the UNCLOS.[169] This perspective is substantiated by a joint statement issued by the US and the USSR, as well as resolutions put forth by the Senate Foreign Relations Committee[170], which assert that according to UNCLOS:

> *All ships (...) enjoy the right of innocent passage in the territorial waters, for which neither prior notification nor authorization is required.*[171]

On signature and upon ratification of UNCLOS, Italy and Netherlands expressed the same opinion.[172]

Regarding the prior authorization procedure in the EEZ, Roach arrives at a singularly proposed result:

> *(...) as reflected in the UNCLOS, ships of all States, regardless of cargo, have the freedom to navigate in the EEZ of other states as well as on the high seas without prior permission or notification.*[173]

The requirement of obtaining prior authorization for ships entering the NSR by Russia can be attributed to Russia's belief that Article 234, as a *lex specialis*, allows it. The enduring inquiry is whether Article 234 confers authorization on Russia to arrive at such a determination.

According to American legal doctrine, the imposition of unilateral requirements by Coastal States for prior notification and authorization to pass territorial waters and the EEZ is deemed unjustified and fails to satisfy Article 234's "due regard to navigation" requirement.[174] It is further highlighted that he improper interpretation and implementation of Article 234 by

[169] Kentaro Wani, "Navigational Rights and the Coastal State's Jurisdiction in the Northern Sea Route," in *Peaceful Maritime Engagement in East Asia and the Pacific Region* (Leiden, The Netherlands: Brill | Nijhoff, 2022), pp. 268-269, accessed September 14, 2023, https://doi-org.ezproxy.uio.no/10.1163/9789004518629_018.
[170] J. Ashley Roach, *Excessive Maritime Claims* (Leiden, The Netherlands: Brill | Nijhoff, 2021), pp. 240-243, accessed October 1, 2023, https://doi-org.ezproxy.uio.no/10.1163/9789004443532.
[171] *Ibid.*
[172] *Ibid.,* p. 263.
[173] *Ibid.,* pp. 472-477.
[174] *Ibid.,* pp. 596-598.

Russia can be characterised as a deceptive practice, as its claims and asserted rights are not in accordance with UNCLOS and are used to justify "creeping jurisdictional behaviour".[175]

Fahey also asserts that Russia shall not necessitate prior authorization for accessing ice-covered regions of the NSR, and if foreign-flagged vessels are obligated to seek explicit permission from Rosatom by default, this requirement seems to resemble a *de facto* prohibition on navigation.[176] Nevertheless, Bartenstein states that prior authorization is a highly effective method of taking preventive action, thus contending that such a broad interpretation of Article 234 falls within the ambit of "due regard to navigation" obligation.[177]

Due to the varying perspectives offered by legal scholars on this matter, to gain insight into the objectives of the prior authorization regime implemented on the NSR and its compatibility with UNCLOS, particularly Article 234, it is instructive to examine the 2020 Navigational Rules.

Paragraph 5 of the Rules provides a comprehensive enumeration (a-k) of the specific documents that are required to be provided by the vessel to Rosatom to request permission for entry into the NSR.[178] Firstly, the issuance of a permit is contingent upon the formal submission of all requisite information regarding the vessel and voyage, as outlined in Appendix No. 1, which comprises 27 sub-points.[179] Several types of information need to be mentioned:

1) Port (place) of departure of the vessel;
2) Port (place) of destination of the vessel;
3) Planned number of crew members and passengers on board the ship, etc.[180]

[175] *Ibid.*
[176] Sean Fahey, "Access Control: Freedom of the Seas in the Arctic and the Russian Northern Sea Route Regime," *Harvard National Security Journal* 9, no. 2 (2018): pp. 180-181, accessed November 24, 2023, available on: Hein Online.
[177] Kristin Bartenstein, "Navigating the Arctic: The Canadian NORDREG, the International Polar Code and Regional Cooperation," *German Yearbook of International Law* 54 (2011): pp. 103-106.
[178] Decree No. 1487, *supra* note 26, para. 5.
[179] *Ibid.,* para. 5, "Appendix No. 1 to the Rules for Navigation in the Northern Sea Route."
[180] *Ibid.*

It seems that the aforementioned information does not have a significant impact on the decision-making process for granting or rejecting permission to navigate in the NSR. Furthermore, it appears that Russia is not receiving any valuable information pertaining to the scope of Article 234, which specifically addresses marine preservation and the prevention of pollution caused by vessels. The legitimacy of Russia's ability to demand the provision of such formalistic rather than practical information within the scope of its prescriptive powers, as outlined in Article 234, is subject to scrutiny.

Secondly, the act of navigation, as an exercise of a right or freedom, is initially considered to be legitimate unless there exists substantiating evidence indicating otherwise.[181] Under the prior authorization regime, the burden of proof is shifted to the ship and consequently to the Flag State, as it requires the vessel to adhere to substantive standards and have the required certificates on board.[182] So, to say it another way, the Flag State must prove to Rosatom that the ship can lawfully enter the NSR. Paragraph 5 of the Rules stipulates that the vessel is obligated to provide the polar navigation vessel certificate (Polar Certificate) as well as the classification certificate, among other required certificates, amounting to a total of five.[183]

The requirement in question appears to be incongruous with the UNCLOS, as UNCLOS prohibits the practice of "pre-emptive" verification of whether vessels engaged in innocent passage within territorial waters, as well as those exercising the freedom of navigation within the EEZ, possess the requisite documentation on board.[184] The responsibility to ensure that a vessel carries relevant documents on board does not lie with Russia as a Coastal State, but rather with the Flag State.[185]

In relation to the authority of enforcement, it is exclusively the Flag State that guarantees the proper surveying and certification of vessels.[186] Moreover, within the framework of "checks and balances", it is the Port State Control that is acknowledged as having a crucial function in ensuring adherence to regulations pertaining to the surveying and certification of

[181] Solski, *supra* note 168, pp. 464-465.
[182] *Ibid.*
[183] Decree No. 1487, *supra* note 26, para. 5.
[184] Solski, *supra* note 168, pp. 464-465.
[185] UNCLOS, *supra* note 11, Article 94.
[186] *Ibid.,* Article 217(3).

vessels.[187]Thus, Russia's purported authority to verify the presence of required documentation on a ship on an ordinary basis extends outside Russia's jurisdiction as per the general enforcement provisions of the UNCLOS. (See Section 2.3 in respect to Russia's enforcement powers in territorial waters and Section 2.4 in respect to the EEZ).

It might also be argued that the efficacy or need for prior authorization in mitigating vessel-source pollution has diminished with the implementation of the Polar Code.[188] The compelling nature of the argument advocating for Russia's close control over vessel navigation in the NSR was persuasive prior to the adoption of enforceable international rules and standards.[189] Nevertheless, given the present circumstances, the requirement for the vessel to provide the Polar Certificate to Rosatom appears to be an outdated practice.

Finally, the fundamental inquiry revolves around whether the prior authorisation regime is primarily driven by a genuine commitment to safeguarding navigation safety and the Arctic environment as outlined in Article 234, or if it serves as a mere guise for Russia's nationalistic displays and geopolitical manoeuvring.[190] Currently, it seems that Russia perceives the requirement to grant foreign vessels the right of innocent passage in territorial sea and freedom of navigation in the EEZ contained by the NSR as a substantial constraint on its sovereignty[191] and a possible risk to its national security[192]. The reasoning is understandable: as the regulatory framework provided by UNCLOS is insufficient to effectively address the issue of prior authorization regime, due to the inherent ambiguity and flexibility of Article 234, Russia utilises it to advance its diverse constituencies and interests, thereby consolidating them in the translation of power to exert control over the NSR.[193]

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[187] *Ibid.,* Article 218.
[188] Solski, *supra* note 168, p. 469.
[189] *Ibid.*
[190] Michael A. Becker, "Russia and the Arctic: Opportunities for Engagement within the Existing Legal Framework," *American University International Law Review* 25, no. 2 (2010): pp. 242-243, accessed October 6, 2023, available on: Hein Online.
[191] Nikitina, *supra* note 152, p. 11.
[192] Elizabeth Buchanan, "The overhaul of Russian strategic planning for the Arctic Zone to 2035: Document Review," *Russian Studies Series 3/20* (2020), accessed October 30, 2023, available on Nato Defence College website: https://www.ndc.nato.int/research/research.php?icode=641#_edn1.
[193] Timo Koivurova, "The Actions of the Arctic States Respecting the Continental Shelf: A Reflective Essay," *Ocean Development & International Law*, 42:3 (2011): pp. 221-222, accessed November 7, 2023, DOI: 10.1080/00908320.2011.592470.

The examination of Russia's pertinent practice does not support the assertion that prior authorization is adequately effective in achieving the goals of Article 234, hence negating the apparent conflict with navigational rights and freedoms. Neither Russia's stance is reconcilable with the applicable articles of UNCLOS, since it continues to put onerous requirements on commercial shipping that are increasingly counterproductive in terms of fostering the international viability of the NSR. Therefore, it might be argued that a mere notification scheme lacking authorization or other compliance mechanisms may present a more favourable alternative to the existing Russian approach.[194]

[194] Solski, *supra* note 168, p. 472.

5 The South China Sea Arbitration: Stimulating a renewed concern over the legitimacy of Russia's historic internal waters claim?

5.1 Introductory remarks

The Russian legal doctrine regarding the legal status of the NSR can be seen as having two main aspects. First, it emphasizes the exercise of Russian jurisdiction over the NSR in accordance with Article 234. Second, it relies on customary international law, asserting Russia's sovereign jurisdiction over the NSR and treating it as historic waters (internal waters).[195] The latter alternative perspective could potentially serve as a "backbone" option, apart from UNCLOS Article 234[196], enabling Russia to lawfully assert control over international navigation through the imposition of a prior authorization regime and treat the NSR as an integral transportation route under Russian ownership, subject to a unified legal regime. The extent to which Russia's establishment of the legal framework for the NSR employs either the first approach, the second approach, or a combination of both remains unclear in practical terms.

However, this second perspective is extensively supported by Russian international law scholars, who present the NSR as a straightforward case of complete sovereignty.[197] Nevertheless, Russian law's NSR reference as a "historically developed national transport line of communication of the Russian Federation,"[198] makes it uncertain whether the aim of this clause is to invoke any additional sovereign rights over the NSR or just assuage nationalistic sentiments.[199]

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[195] A. N. Vylegzhanin, V.P. Nazarov, and I.V. Bunik, "Northern Sea Route: towards solution of political and legal problems," *Vestnik Rossijskoj akademii nauk* 90 (12) (2020): pp. 1106, 1108-1109, accessed October 3, 2023, DOI: 10.31857/S0869587320120270.

[196] Ringbom, *supra* note 50, p. 196.

[197] P.A. Gudev, "The Northern Sea Route: problems of national status legitimization under international law. Part I," *Arktika i Sever [Arctic and North]* no. 40 (2020): p. 117, 127, accessed October 2, 2023, DOI: 10.37482/issn2221-2698.2020.40.

[198] FL No. 155-FZ, *supra* note 122, Article 14.

[199] Jan Jacub Solski, "The Northern Sea Route in the 2010s: Development and Implementation of Relevant Law," *Arctic Review on Law and Politics*, 11 (2020): p. 389, accessed on September 29, 2023, https://doi.org/10.23865/arctic.v11.2374.

Clarifying the validity of Russia's historic claim over the NSR would be highly beneficial, given the fact that Russia's claim might be used to support an alternative interpretation in the future, especially if the applicability of Article 234 is questioned because of climate change.[200]

5.2 Development of the historic waters doctrine

The doctrine of historic waters has its origins in the doctrine of historic bays, which emerged in the 19th century to safeguard large bays closely connected to a country's land area and considered part of their national territory.[201] As rules relating to the delimitation of maritime zones developed, the idea of claiming bays based on a historic title was extended to other areas of the sea adjacent to the coast.[202] However, the doctrine lacks a universally accepted definition in international law recognized by all states and is often referred to as "historic title," "historic rights," or "historic internal waters."[203] In the lack of a formally established definition of historic waters, it becomes imperative to depend on customary international law and the viewpoints of legal experts and judicial bodies.

In 1951, the ICJ in the Fisheries Case defined historic waters as those treated as internal waters but not having the same character without an historic title.[204] The ICJ observed that historical titles are established by prolonged and continuous usage, which is made feasible when other governments refrain from consistent objections regarding such titles.[205] The ICJ further stated that an essential prerequisite for a state to expand the jurisdiction of internal waters to historical maritime areas is the significant proximity of those maritime areas to the

[200] Gavrilov, *supra* note 95, p. 5.
[201] Donat Pharand, "The Basic Characteristics of Historic Waters," in *Canada's Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988), p. 91, accessed October 18, 2023, doi:10.1017/CBO9780511565458.010.
[202] *Ibid.*
[203] Clive R. Symmons, *Historic Waters in the Law of the Sea* (Leiden, The Netherlands: Brill | Nijhoff, 2008), pp. 1-5, accessed November 10, 2023, https://doi.org/10.1163/ej.9789004163508.i-322.6.
[204] Fisheries case, *supra* note 24, p. 130.
[205] *Ibid.,* pp. 130-131.

territory of the respective state.[206] Thus, the ICJ asserted that there is an equivalence between historic waters and internal waters. This discovery suggests that the designation of internal waters signifies the Coastal State full sovereignty, granting the maritime region referred to as "historic" the same legal standing as internal waters. It presupposes that the Coastal States are no longer obligated to acknowledge the innocent passage of foreign vessels within their historic internal waters.[207] While the Coastal States have the option to allow such innocent passage, they are not legally bound to do so. If this occurs, the foreign vessel is then engaging in a privilege bestowed by the Coastal States as opposed to a right acknowledged by the international community.[208]

In 1957, the UN Secretariat prepared a memorandum on "Historic Bays"[209], further clarifying the concept of historic waters. It stated that claims for historic rights/titles were not limited to bays but could also be applied to the various areas capable of being comprised in the maritime domain of the State.[210] This aligned with the ICJ ruling in the Fisheries Case that historic titles could apply to all forms of maritime territory- in the modern sense of understanding, including territorial waters and the EEZ.[211]

In 1962, the UN Secretariat prepared a memorandum on "Juridical Regime of Historic Waters"[212], deeming the term historic waters equivalent to historic titles.[213] The memorandum explained that historic waters would be considered internal waters or territorial waters if: "(…) the sovereignty exercised over them in the course of the development of the historic title was sovereignty as over internal waters or territorial waters."[214] The memorandum analysed the formation of historic title as a process of acquiring a historic right[215] and provided a three-

[206] *Ibid.,* p. 133.
[207] Symmons, *supra* note 203, pp. 39-41, 64.
[208] *Ibid.*
[209] United Nations, *Historic Bays: Memorandum by the Secretariat of the United Nations (Doc: A/CONF.13/1).* Geneva, Switzerland 24 February to 27 April 1958, *Extract from the Official Records of the United Nations Conference on the Law of the Sea, Volume I (Preparatory Documents)*. Available on: https://legal.un.org/diplomaticconferences/1958_los/docs/english/vol_1/a_conf13_1.pdf.
[210] *Ibid.,* para. 8, 63, 104, 109.
[211] Symmons, *supra* note 203, pp. 63-67.
[212] United Nations, *Juridical Regime of Historic waters including historic bays - Study prepared by the Secretariat (Doc: A/CN.4/143).* 9 March 1962, *Extract from the Yearbook of the International Law Commission:- 1962 ,vol. II.* Available on: https://legal.un.org/ilc/documentation/english/a_cn4_143.pdf.
[213] *Ibid.,* para. 33, 34, etc.
[214] *Ibid.,* para. 167.
[215] *Ibid.,* paras. 80-148.

factor test to determine if a title to historic waters exists[216]:

1) The authority exercised over the area by the State claiming it as historic waters;
2) The continuity of such exercise of authority;
3) The attitude of foreign States.[217]

The test holds importance as it served as the foundation for the ruling issued by the Permanent Court of Arbitration (hereinafter "Tribunal") in the South China Sea Arbitration. The award pertained to the examination of historic rights and the origin of maritime entitlements in the South China Sea and the legality of certain actions taken by China in the South China Sea, which the Philippines claimed to be in breach of the UNCLOS.[218]

5.3 Russia's NSR historic waters claim's test against overarching criteria from the South China Sea Arbitration

The outcome of the South China Sea Arbitration directly pertains to a legal matter that holds importance for Russia's longstanding assertion of historic claim over the NSR, as both Russia, in the Arctic, and China, in the South China Sea, assert their claims of sovereignty over marine zones based on historic rights. This Section analyses Russia's historical assertion of title to the NSR in relation to the ruling, evaluating it based on three overarching criteria: effective exercise of jurisdiction, passage of time, and acquiescence by foreign states.[219]

[216] Christopher Mirasola, "Historic Waters and Ancient Title: Outdated Doctrines for Establishing Maritime Sovereignty and Jurisdiction," *Journal of Maritime Law and Commerce* 47, no. 1 (2016): pp. 56-59, accessed November 13, 2023, available on: Hein Online.
[217] Ted L.Mcdorman, eds., "Notes On The Historic Waters Regime And The Bay Of Fundy," in *The Future of Ocean Regime-Building* (Leiden, The Netherlands: Brill | Nijhoff, 2009), pp. 718-719, accessed October 29, 2023, https://doi-org.ezproxy.uio.no/10.1163/ej.9789004172678.i-786.173.
[218] S. Jayakumar, Tommy Koh, Robert Beckman, Tara Davenport, and Hao Duy Phan, "The South China Sea Arbitration: laying the groundwork," in *The South China Sea Arbitration* (Edward Elgar Publishing, 2018), pp. 1-17, accessed November 7, 2023, https://doi-org.ezproxy.uio.no/10.4337/9781788116275.00008.
[219] South China Sea Arbitration, *supra* note 23, para. 222.
United Nations, *supra* note 212, paras. 80–148, 185.

5.3.1 Russia's claim v. China's Claim: comparison

The Tribunal codified China's historic waters claim as follows:

> *China has indisputable sovereignty over the South China Sea Islands and the adjacent waters. China' s sovereignty and relevant rights in the South China Sea, formed in the long historical course, are upheld by successive Chinese governments, reaffirmed by China' s domestic laws on many occasions, and protected under international law including the UNCLOS.*[220]

It is noteworthy that by substituting the terms "China" with "Russia" and "South China Sea" with "NSR", one can observe a striking resemblance to Russia's historical assertion over the NSR, as articulated in Russian legal doctrine and scholarly literature.

Although court decisions have recognised the concept of historic waters, there is a lack of specific definition or reference to historic waters in any of the conventions, including UNCLOS.[221] Historic title claims are noteworthy due to their capacity to establish rights and duties that extend beyond the scope of the UNCLOS.[222] The assertion is made by a multitude of legal specialists[223], as well as the Tribunal itself[224].

During the analysis of China's historic claim, the Tribunal made a distinction between two concepts: "historic rights" and "historic title" claims. The phrase "historic title" is employed to clearly denote historical sovereignty over land or marine areas, whilst "historic rights" is a broader and more encompassing term.[225] The Tribunal's determination that China's rights over

[220] South China Sea Arbitration, *supra* note 23, para. 61.
[221] Mirasola, *supra* note 216, pp. 49-51.
[222] Wu Shicun, and Keyuan Zou, *Arbitration Concerning the South China Sea: Philippines versus China* (London, England: Routledge, 2016), pp. 138-143, accessed November 2, 2023, https://doi.org/10.4324/9781315567488.
[223] Clive R. Symmons, *"Historic Rights and the 'Nine-Dash Line' in Relation to UNCLOS in the Light of the Award in the Philippines v. China Arbitration (2016) concerning the Supposed Historic Claims of China in the South China Sea: What now Remains of the Doctrine?"*, p. 3, available on: https://cil.nus.edu.sg/wp-content/uploads/2017/01/Session-2-on-Historic-Rights-Clive-Symmons-Paper.pdf.
Mirasola, *supra* note 216, p. 69.
[224] South China Sea Arbitration, *supra* note 23, paras. 218-229.
[225] *Ibid.,* para. 222.

resources fell within the category of "historic rights falling short of sovereignty"[226] suggests that Russia's possible claim is unlikely to fit within the same category. Instead, Russia's claim appears to be more excessive and leans towards a historic title claim. From a rational perspective, one could make the argument that if China's assertion of historic rights, which does not amount to full sovereignty, were to be restricted according to specific criteria[227], then Russia's claim of historic title, which includes complete sovereignty, might require an even greater burden of proof than that of historic rights. Is Russia well equipped to effectively confront the challenge?

5.3.2 Effective exercise of jurisdiction

It is crucial to assess the extent to which Russia meets the criterion of "effective exercise of jurisdiction" over the NSR. The Tribunal asserted that the extent of a claim to historical rights or title is contingent upon the extent of the actions undertaken in the exercise of said claimed rights or title.[228] To establish its exclusive authority over the area in question, Russia is required to present compelling evidence that substantiates its historical record of activities in the NSR, thereby asserting exceptional rights over navigation.[229] Additionally, Russia must demonstrate that it has undertaken all requisite measures to establish and sustain its exclusive jurisdiction in the region.[230]

Firstly, insufficient will be the evidence that solely indicates extensive Russian navigation on the NSR.[231] Therefore, the swift conclusions made by Gudev, Melnikov, Morgunov and Zhuravleva regarding Russia's achievements in the Arctic, specifically in terms of the discovery and development of Arctic spaces, and the assertion that the right of discovery alone is enough to extend the sovereignty of the Russian State to these spaces[232], appear to

[226] *Ibid.,* para. 226.
[227] *Ibid.,* para. 225, 265.
[228] *Ibid.,* para. 226.
[229] *Ibid.,* para. 268.
[230] Krittika Singh, and Timo Koivurova, "The South China Sea Award: Prompting a Revived Interest in the Validity of Canada's Historic Internal Waters Claim?", *The Yearbook of Polar Law Online* 10, 1 (2019): pp. 394-395, accessed November 10, 2023, https://doi.org/10.1163/22116427_010010017.
[231] South China Sea Arbitration, *supra* note 23, para. 270.
[232] Gudev, *supra* note 197, pp. 117-118.

lack validity. The assertion that the historical origins of the NSR can be traced back to the initial expeditions of the Cossacks in the 16th - 17th centuries and its subsequent development throughout the periods of the Russian Empire and the Soviet Union,[233] appears to hold limited relevance in establishing the historical legitimacy of the NSR; mere assertions of sovereignty lack adequacy.[234]

Secondly, there is a requirement for Russia to consistently exert authority (sovereignty) over the NSR to legitimately assert it as historic waters. A jurisdiction that possesses a narrower range of powers than sovereignty is insufficient.[235] Moreover, actions through which Russia openly demonstrates its intention to exert power over NSR shall originate from the Russian State or its respective organs and be public in nature.[236] After conducting an analysis of the Soviet legislation, it might seem that the criteria cannot be met. The piecemeal nature of Russian/Soviet legislation on the NSR and the inconsistent comments made by the Soviet/Russian leadership contribute to the perceived "legal ambiguity" surrounding this matter,[237] as discussed below.

In the early 1960s, the Soviet authorities officially claimed ownership on historical grounds of several straits and seas on the NSR, including the Viklitsky, Shokalsky, Dmitry Laptev, and Sannikov straits, as well as the Kara, East Siberian, Chukchi, and Laptev seas.[238] Further, Article 6(4) of the Law "On the State Border of the USSR" defined Soviet internal waters as "the waters of bays, estuaries, seas, and straits that historically belonged to the USSR."[239] Thus, the Government supported the state's right under international law to classify not just

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B. Morgunov, I. Zhuravleva, B. Melnikov, "The Prospects of Evolution of the Baseline Systems in the Arctic," *Water* 13, 1082 (2021): pp. 12-14, accessed November 6, 2023, https://doi.org/10.3390/w13081082.
[233] Morgunov, *supra* note 232.
[234] Yehuda Z. Blum, "The Requirements for the Formation of an Historic Title and Its Constituent Elements," in *Historic Titles in International Law* (Dordrecht: Springer Netherlands, 1965), pp. 117-118, accessed November 8, 2023, https://doi.org/10.1007/978-94-015-0699-1_4.
United Nations, *supra* note 209, para. 167.
[235] United Nations, *supra* note 212, paras. 85-87.
[236] *Ibid.,* paras. 89–97.
[237] Helge Blakkisrud, "Governing the Arctic: The Russian State Commission for Arctic Development and the Forging of a New Domestic Arctic Policy Agenda," *Arctic Review on Law and Politics*, Vol. 10 (2019): p. 195, accessed November 4, 2023, http://dx.doi.org/10.23865/arctic.v10.1929.
[238] Rossi, *supra* note 128, pp. 481-482, 500-502.
[239] USSR Law "On the State Border of the USSR", dated 24 November 1982, *Gazette of the USSR Armed Forces, No. 48*, Article 6. Available on: https://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=ESU&n=1534#HZ3MkwTCmRDymqCw.

particular bays but also other maritime spaces (seas and straits) in the Russian Arctic as historical (internal) waters. However, in 1984 and 1985, the Council of Ministers of the USSR adopted resolutions that declared the Kara Sea, Laptev Sea, and East Siberian Sea not internal waters of the USSR on historical grounds; only the White Sea, Czech, and Baydaratskaya Bays were considered USSR internal waters[240], contrary to the Soviet international legal doctrine of the time.[241] The Vilkitsky, Sannikov, Shokalsky Dmitry Laptev straits, which connect the Kara Sea to the Laptev Sea, also left the USSR's internal waters.[242]

Equally significant is the observation that the exercise of jurisdiction over the NSR by the Soviet/Russian government can be classified as *de-facto* before the implementation of Federal Law No. 155-FZ of July 31, 1998[243], as evidenced by an analysis of the historical evolution of NSR legal frameworks. In this normative legislative act, the legal regime of the "entire" NSR was *de jure* established for the first time in Soviet and Russian legislation, specifically addressing (encompassing) internal waters, territorial waters, and the EEZ of Russia, and for the first time, the official recognition of the "entire" NSR's historic title was documented by legislative means.[244] The absence of explicit recognition or emphasis on sovereignty over the NSR in Russian/Soviet legislation and statements made by Russian authorities before 1998 raises inquiries.[245] As an example, in 1966, the Ministry of Defence of the USSR released a publication titled "A Manual of International Maritime Law", asserting that the USSR's sovereign rights in the Arctic were derived from its highly productive economic, organisational, and scientific research endeavours in the development of the NSR, including historical discoveries and explorations of the polar seas and islands by Russian navigators.[246] Nevertheless, the document failed to provide a clear definition of the exact nature and scope of the sovereign rights being referred to.[247]

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[240] Resolution of the Council of Ministers of the USSR, dated 7 February 1984, available on: https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1984_Declaration.pdf.
[241] Gudev, *supra* note 197, pp. 122, 124, 126-127, 133.
[242] Resolution of the Council of Ministers of the USSR, dated 15 January 1985. Available on: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1985_Declaration.pdf.
[243] FL No. 155-FZ, *supra* note 122, Article 14.
[244] Bekyashev, *supra* note 126, pp. 278-279.
[245] Blakkisrud, *supra* note 237, pp. 195-196.
[246] Military Publishing Home of the Ministry of Defence of the USSR. *Manual of International Maritime Law,* p. 273. Available on: https://apps.dtic.mil/sti/tr/pdf/AD0668381.pdf.
[247] Willy Østreng, "The Northern Sea Route and Jurisdictional Controversy," *Ocean Futures* (2010), available on:http://www.arctis-search.com/tiki-index.php?page=Northern+Sea+Route+and+Jurisdictional+Controversy#32.

Thirdly, Russia's sovereignty must be effectively exercised and demonstrated through actions rather than mere declarations.[248] For instance, as proposed by Bouchez, one way to demonstrate the effectiveness of intentions would be to prevent foreign ships from entering the waters that Russia claims as historic waters.[249] It would be imperative to demonstrate that Russia has historically endeavoured to ban or limit the sailing of vessels from other nations and that these nations have consented to such limitations.[250]

The initiation of the opening of the NSR for international shipping was undertaken by the Ministry of Maritime Fleet in 1967.[251] Later, the concept of international shipping on the NSR was revitalised by the Murmansk efforts of 1987, and subsequently, the NSR was formally made accessible for international shipping in 1991.[252] These measures and policies by the Soviet/Russian governments, in their literal and logical interpretation, cannot be characterised as "preventing foreign vessels from accessing the NSR." Instead, their objective was to facilitate international shipping activities.

5.3.3 Passage of time

While examining Russia's historic claim through the lens of the "passage of time criteria," it becomes evident that reaching a definitive and unambiguous conclusion is exceedingly challenging. According to the Tribunal's ruling, it is necessary for Russia to have consistently exercised its sovereignty over the NSR for a considerable time.[253] What is the definition of "considerable time"? The specific duration required to achieve sufficiently extensive usage cannot be specified in a general or theoretical sense.[254] Determining the appropriate duration for the emergence of usage remains a subjective assessment, given the specific circumstances

[248] South China Sea Arbitration, *supra* note 23, para. 270.
[249] Leo J. Bouchez, *The regime of bays in international law* (Leyden: A. W. Sythoff, 1963), p. 249.
[250] South China Sea Arbitration, *supra* note 23, para. 270.
[251] Irina Andreevna Akimova, *Environmental risks of transporting international transit cargo along the Northern Sea Route (Master Thesis),* Saint Petersburg, 2016: pp. 47-48, accessed November 24, 2023, available on: http://elib.rshu.ru/files_books/pdf/rid_44ae048fc0c34c899a0d1c8e1df0bbd6.pdf.
[252] *Ibid.,* pp. 36-37.
[253] South China Sea Arbitration, *supra* note 23, para. 275.
[254] Donat Pharand, "Reqirements of Historic Waters," in *Canada's Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988), p. 98, accessed November 9, 2023, doi:10.1017/CBO9780511565458.011.

of the case, of whether the passage of time has resulted in the establishment of a customary practise.[255]

In the case of Russia, it becomes challenging to determine the precise starting point for measuring the effectiveness of Russia's sovereignty over the NSR. From which point in time should the count begin, from early historical voyages in the 16-17th centuries, from the regular use of the NSR by the USSR/Russia since the early 1930s for transporting goods, supplies, fuel, and equipment to remote areas in the Russian Arctic mainland and islands[256] or from the opening of the NSR for international shipping in 1967/1991?

Nevertheless, according to scholarly sources that present a discussion on this matter, the historical claim becomes a reality, and the passage of time commences once the *de jure* exercise of sovereignty is established.[257] Consequently, it is plausible to propose that the commencement of the Russian historic claim may be traced back to the year 1998. (See Section 5.3.2 above). From this standpoint, it is improbable to assert that a time span slightly over 20 years is adequate to substantiate a historic claim, considering its relatively brief duration from the perspective of international law.

5.3.4 Acquiescence by foreign states

According to the UN Memorandum on "Historic Waters", to analyse the criteria of "acquiescence by foreign states" it should be understood:

1) what kind of opposition would prevent the historic title from emerging;
2) how widespread in terms of the number of opposing States must the opposition be;
3) when must the opposition occur;[258]

[255] United Nations, *supra* note 212, paras. 101–105.
[256] Gunnarsson, *supra* note 5, pp. 8-9.
[257] Singh, *supra* note 230, p. 398.
[258] United Nations, *supra* note 212, para. 112.

The Memorandum quotes Fitzmaurice:

> *Apart from the ordinary case of a diplomatic protest, or a proposal for reference to adjudication, the same effect could be achieved by a public statement denying the prescribing country's right, by resistance to the enforcement of the claim, or by counter-action of some kind.*[259]

In this regard, it is vital to highlight that the legal status of Arctic waters, and the NSR in particular, was a subject of active dispute between the US and the USSR. Worth highlighting is the incident that took place in the mid-twentieth century within the waters of the NSR that resulted in the exchange of diplomatic notes between the US and the USSR.[260] Specifically, in 1963, the American icebreaker "Northwind" conducted exploration activities in the Laptev Sea without obtaining prior permission from Soviet authorities, and in the subsequent summer, the ship "Burton Island" explored the East Siberian Sea.[261] In diplomatic notes sent to the USSR, the US expressed its position that there is no valid legal basis for treating a significant portion of the NSR maritime areas as internal waters on historic grounds.[262]

Additionally, it is worth mentioning an incident from 1967 when the US intended to navigate two icebreakers through the entire NSR, but the USSR denied permission.[263] This denial prompted a protest from the US, as it perceived the denial as a violation of the right of innocent passage through territorial seas.[264]

Thus, the opposition activities undertaken by the US counteract the criteria of "acquiescence or silent agreement by foreign states" in relation to the NSR historic claim. However, it remains challenging to definitively determine if the US opposition alone is sufficient to address the claim. Is there a necessity for a broader and more extensive resistance with a

[259] *Ibid.,* para. 114.
[260] Vylegzhanin, *supra* note 195, p. 1112.
[261] Andrey A. Todorov, "The Russia-USA legal dispute over the straits of the Northern Sea Route and similar case of the Northwest Passage," *Arktika i Sever [Arctic and North]* no. 29 (2017): pp. 75-76, accessed September 4, 2023, DOI:10.17238/issn2221-2698.2017.29.74.
[262] Bureau of Oceans and International Environmental and Scientific Affairs. *Limits in the Seas: United States Responses to Excessive National Maritime Claims,* No. 112, (March 9, 1992): pp. 20-21, 71-73, available on: https://www.state.gov/wp-content/uploads/2019/12/LIS-112.pdf. Accessed November 2, 2023.
[263] *Ibid.,* pp. 72-73.
[264] *Ibid.*

minimum of two or three additional states?[265] Has the objection to the NSR's legal framework been effectively expressed prior to the establishment of the NSR's historic title by Russia?[266] It remains unclear and is contingent upon the specific circumstances of the case and a thorough examination of the relevant evidence.

Upon careful analysis of the Russian historic internal waters claim using the criteria outlined by the Tribunal, it appears challenging for Russia to substantiate a strong case for the historic internal waters claim. The exercise of sovereignty over the NSR seems to lack effectiveness and substantial duration. Furthermore, the US has shown its opposition to Russia's claim, as evidenced by the occurrence of protests. From this perspective, the drawbacks associated with Russia's assertion of NSR as historic internal waterways exceed the beneficial actions taken in support of this claim.

5.4 Interplay between Russia's historic waters claim and UNCLOS

In conclusion, the Tribunal presented another compelling argument that lends further credence to the results presented above and offers elucidation on the legitimacy of Russia's historical entitlements over the NSR. Particularly noteworthy are the Tribunal's findings about the interdependence between historic waters claims and the UNCLOS.

Tribunal stated that:

> *(...) the system of maritime zones created by the Convention was intended to be comprehensive and to cover any area of sea (...) The same intention for the Convention to provide a complete basis for the rights and duties of the States Parties is apparent in the Preamble, which notes the intention to settle "all issues relating to the law of the sea" and emphasises the desirability of establishing "a legal order for the seas" (...) no reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.*[267]

[265] United Nations, *supra* note 212, para. 118.
[266] *Ibid.,* para. 121.
[267] *Ibid.,* para. 245.

Based on the aforementioned, it is probable that the Tribunal would arrive at a similar determination concerning Russia's claim as it did with China's claim. Russia's purported assertion of historic "sovereignty" and historic rights over navigation appears to be inconsistent with UNCLOS [268], as UNCLOS effectively and thoroughly covers the rights of other states (including navigational rights and freedoms) in relation to each maritime zone, hence eliminating any possibility of asserting historic rights.[269] It is noteworthy that Russia's claim potentially surpasses the boundaries of its maritime zones as defined by UNCLOS[270] and exceeds the geographic and substantive limits of Russia's maritime entitlements under the Convention. Russia's accession to the UNCLOS automatically "(…) reflected a commitment to bring incompatible historical claims into alignment with its provisions (...)".[271] It can be inferred that the legal framework governing the NSR should align with UNCLOS in its entirety.

Thus, the NSR cannot be considered a unified regime of the Russian internal waters, and the prior authorization regime, together with the claim of full control over international navigation on the NSR, justified as an act of "Russian sovereignty" under the notion of historic waters, is deemed to be not only unlawful but also inconsistent with UNCLOS.

This conclusion is substantiated by scholarly literature. According to Ingrid Handeland, "(…) the historic title-claim cannot be taken into consideration in the NSR (…)"[272], Jan Jacub Solski suggests that "(...) Russia's current historic waters claims within the NSR are relatively circumspect (...)"[273], Blum asserts that the doctrine of historic waters has been overtaken by the current international law of the sea regime, considering it "(...) as relics of an older and by now largely obsolete regime (...)".[274]

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[268] *Ibid.,* para. 262.
[269] *Ibid.,* para. 246.
[270] *Ibid.,* para. 246.
[271] *Ibid.,* para. 262.
[272] Ingrid Handeland, "Navigational Rights for Warships in the Northwest and Northeast Passages," *Arctic Review on Law and Politics*, Vol. 13 (2022): p. 151, accessed November 15, 2023, http://dx.doi.org/10.23865/arctic.v13.3383.
[273] Solski, *supra* note 199, p. 389.
[274] Yehuda Z. Blum, "The Gulf of Sidra Incident," in *Will "Justice" Bring Peace?* (Leiden, The Netherlands: Brill | Nijhoff, 2016): p. 383, accessed November 25, 2023, https://doi-org.ezproxy.uio.no/10.1163/9789004233959_025.

6 Conclusion

Based on the conducted research, it is possible to derive the following findings.

The analysis revealed that UNCLOS clearly codifies the legislative and enforcement powers of Coastal States within each specific maritime zone, with these powers diminishing proportionally as one moves further away from the coast. Furthermore, the convention grants foreign merchant ships the right of innocent passage within territorial waters and the freedom of navigation within the EEZ. The observation has been made that UNCLOS maintains an equilibrium between the rights and freedoms of navigation and the jurisdiction of Coastal States.

Nevertheless, in the Arctic, the equilibrium appeared to be increasingly tilted in favour of the Coastal State jurisdiction. The primary rationale for this is the absence of a consensus within the legal community over the appropriate way to interpret and apply Article 234. The study addressed this matter by conducting a comparative analysis of several interpretational methodologies and determining the "most accurate" one.

Firstly, it was determined that Article 234 cannot be regarded as an independent provision within UNCLOS framework. Instead, it should be read in conjunction with general maritime zone delimitation, navigational, and enforcement provisions. Secondly, it was established that the Article's territorial scope encompasses not only the EEZ but also the territorial waters. Thirdly, it was concluded that Article confers upon Coastal States the unilateral legislative jurisdiction in terms of environmental protection and vessel source pollution that does not encompass the authority to regulate navigational rights and freedoms. The concept of "due regard to navigation," which acts as the primary limitation on the legislative jurisdiction, has been determined to encompass both the duty to preserve the right of innocent passage in territorial waters and the freedom of navigation in the EEZ. The study revealed that this *de-minimis* interpretation was perceived as more advantageous in terms of emphasising the preservation of the "common good of international shipping."

Regarding Russia, it has been discovered that the country capitalises on the legal ambiguity resulting from the interpretation of Article 234. This allows Russia to "justify" its legislative framework for the NSR by employing the reading of the article that best serves its interests. In contrast to the suggested Article 234's *de-minimis* interpretation, it was seen that Russia employed its *de-maximis* interpretation. A comprehensive examination of the Russian NSR's legislation has revealed that Russia explicitly recognises its complete sovereignty over the NSR.

The present analysis determined that the way Russia interprets Article 234 can be deemed excessive. It was observed that Article 234 does not permit the conversion of unilateral legislative jurisdiction for environmental protection and vessel source pollution into complete sovereignty. Furthermore, both Article 234 and UNCLOS do not permit Russia to lawfully merge three distinct legal frameworks, namely those governing internal waters, territorial waters, and the EEZ, into a single framework governing internal waters. Finally, Russia's legislative actions, which unilaterally restrict the right of innocent passage and freedom of navigation in the territorial waters and EEZ encompassed within the NSR, were found incompatible with UNCLOS.

In order to provide a more comprehensive analysis on this matter, a thorough examination was conducted to analyse the prior authorisation regime placed on the NSR through the 2020 Navigational Rules. Initially, it has been determined that according to the UNCLOS, foreign merchant vessels are not required to get permission or consent from Coastal States to utilise their navigational rights and freedoms, both within territorial waters and the EEZ. Moreover, it has been concluded that the requirement for vessels to provide specific certificates and documentation to Russian authorities to obtain permission to enter the NSR poses significant difficulties in aligning with Article 234's environmental protection objective. Furthermore, the aforementioned requirement, which places the burden of proof on the vessel (Flag State), was found to be inconsistent with the UNCLOS, as UNCLOS explicitly prohibits the practice of "pre-emptive" verification of whether vessels engaged in innocent passage or exercising the freedom of navigation have the necessary documentation on board. The importance of the NSR's prior authorization regime in attaining Article 234 goals has been shown to be limited,

while continuing to impose burdensome constraints on commercial shipping that appeared to be counterproductive to the NSR's international viability.

Finally, the study clearly demonstrated the presence of dualistic approaches within the legislation pertaining to the NSR. It has been established that in addition to legislating based on Article 234, Russian legal doctrine seeks to apply customary international law, specifically the doctrine of historical waters, as a “backbone option” to substantiate Russia's claim of sovereignty over the NSR.

The existence of the institution of “historical waters” has been affirmed by the doctrine of international law. Despite the fact that the doctrine lacks a formal treaty basis, the classification of a water area (maritime zone) as internal waters of the Coastal State, the establishment of a historic title, and the right to assert sovereignty over such areas were found to require the presence of three essential criteria: the effective exercise of jurisdiction, the passage of time, and the acquiescence of foreign states.

The current research examined Russia's historic waters claim over the NSR in light of the aforementioned criteria as well as the Tribunal’s reasoning in the South China Sea Arbitration. The findings indicated that Russia's claim is unlikely to meet any of the criteria. Even under optimal circumstances for Russia, the fulfilment of one or a few conditions will still be insufficient to substantiate the claim. Moreover, the Tribunal's observations led to the conclusion that Russia's historic waters claim over the NSR holds little relevance. This is due to the fact that Russia, by becoming a party to the UNCLOS, has effectively renounced any potential claims to historic waters, aligning itself with the provisions outlined in the UNCLOS.

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