Research of Legal Status and Navigation Regime of Arctic Shipping Lanes

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Faculty of Law
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60 ECTS thesis submitted in partial fulfillment of the degree of Master of Arts in Polar Law (MA)

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Akureyri, March 2016
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Abstract

As the thawing of the sea ice within the Arctic Ocean, the Arctic is facing tremendous changes, including environment, economy, industry, culture and many other areas. As the sea ice decreasing, the Arctic region is becoming a “new world” opening its gate to the whole world. The most obvious aspect is about Arctic shipping issues. The Arctic Ocean is locating on special geographical point which closely connecting the Atlantic Ocean and Pacific Ocean. Furthermore, the Arctic Ocean has shorter shipping lanes between Asia and Europe compared to the traditional way. Just because of this, the ice-free sea areas make the Arctic shipping lanes becoming available and even frequently used. Considering the great demand of trade between continents, the Arctic passage will play an important role in the near future.

Because of the unique environment conditions, ships using Arctic passage should rely on the assistance of coastal States. Like the shipping canal and ice-breaker leading. Also the Arctic environment and other aspects are closely linked with coastal States. There are 5 coastal States around the Arctic Ocean. Russia and Canada have the longest coastal lines around Arctic Ocean. In this article, researches are mainly surrounding these two States and the legal documents of these two States will be regarded as important basis.

The attitudes of Canada and Russia toward the Northwest-passage and Northern Sea Route are very important. It possibly impacts the shipping activities in the Arctic Ocean. More than that, how the domestic regulation will be extended to apply on foreign ships is also relating question.

The Northwest-passage and Northern Sea Route could be considered as straits used for international navigation. It prefers to apply international navigation institution in Arctic Ocean. Therefore, they need to apply transit passing right or other rights in the Arctic shipping lanes according to the international laws.
In this article, at first, I will introduce basic information of Arctic shipping lanes. And then current legislation situations of coastal States will follow behind. The legislation situations are mainly reflected from legal documents of Canada and Russia.

The main question of the article is whether the Arctic shipping lanes could be considered as straits used for international navigation. I will focus on the definition of strait used for international navigation and its application conditions. After that, I try to analysis the two claims from Canada and Russia. Try to analysis whether these two claims are reasonable. The main basis is definition and criteria of the international strait and also international law. And then I try to give an appropriate solution.

The significance of this topic is the ambiguous legal status and navigation regime of Arctic shipping lanes hindered the development of Arctic passing and global business rising. The Arctic region becomes hot and hot. The development of the Arctic region is now standing on the crisscross. The Arctic shipping lanes issues like a match striking in the dark. It will make the Arctic attractive and glare.
Contents

Acronyms / Abbreviations ........................................................................................................... I

Table of Treaties ........................................................................................................................ II

1. The basic information about Arctic shipping lanes ................................................................. 1

   1.1 The general situation about Arctic shipping lanes ......................................................... 2
     1.1.1 The background of Northwest Passage ................................................................. 3
     1.1.2 The background of Northern Sea Route ................................................................. 7
   1.2 The main focuses on Arctic passage ................................................................................. 11

2. The current legislation status about foreign vessels using Arctic shipping lanes .................. 13

   2.1 The Canadian legislation and Arctic policy ................................................................. 16
     2.1.1 The initial requirement claiming by Canada ......................................................... 16
     2.1.2 Introduction about the Sector Theory .................................................................. 17
     2.1.3 Arctic Waters Pollution Prevention Act ............................................................... 18
     2.1.4 Agreement between the Government of Canada and the Government of the United
         States of America on Arctic Cooperation ............................................................... 23
     2.1.5 Northern Canada Vessel Traffic Reporting Arctic Canada Traffic Zone
         (NORDREG) ............................................................................................................. 28
     2.1.6 Assessment of Canadian Arctic legislation ......................................................... 35
   2.2 The Russian legislation and Arctic policy ....................................................................... 37
     2.2.1 The former period claims of Russia about the high north .................................. 37
     2.2.2 The USSR period ................................................................................................. 38
     2.2.3 The post-Soviet Period ......................................................................................... 40
     2.2.4 Russian Federation Federal Law on Amendments 2012 ...................................... 41
     2.2.5 Rules of Navigation on the Water Area of the Northern Sea Route ................. 45
   2.3 The other policies or attitudes of interest States or organizations ................................. 51
     2.3.1 The attitude of U.S. on Arctic shipping lanes ....................................................... 51
     2.3.2 The attitude of European Union on Arctic shipping lanes .................................. 52
     2.3.3. The Asian States and Arctic shipping lanes ......................................................... 54
     2.3.4 The attitudes of Canada and Russian Federation toward each other ................. 55
2.3.5 The Arctic Council description on Arctic shipping .......................... 56

3. The Arctic shipping lanes and historical water ............................... 58

3.1 The constituents of “historical waters” and “historic” title .................. 58
3.2 The legitimacy of the “historical waters” claims of Canada and Russia ...... 64

4. Whether Arctic shipping lanes are International Strait? ..................... 68

4.1 The basic institution on International Strait ..................................... 68
4.1.2 The Corfu Channel Case ............................................................. 73
4.1.3 The straits institution of Convention on the Territorial Sea and the
Contiguous Zone ................................................................................. 78
4.1.4 The institution of International Straits established by United Nations
Convention on the Law of the Sea ....................................................... 81
4.2 Whether the Arctic shipping lanes could be considered as International
Straits? ................................................................................................. 96
4.2.1 How to define certain strait as International Straits? ................. 96
4.2.2 Whether Northwest Passage could be regarded as International Straits
................................................................................................................ 100
4.2.3 Whether Northern Sea Route could be regarded as International Straits
................................................................................................................ 102
4.3 Summary ......................................................................................... 103

5. The Arctic shipping lanes and the straight baseline of coastal States ...... 106

5.1 Background ...................................................................................... 107
5.2 Why States keen to drawing straight baseline? -- The advantages of the
straight baseline .................................................................................. 109
5.3 The legal basis from international law about straight base line .......... 113
5.4 The Canada base line regulation ...................................................... 118
5.4.1 Whether the Canadian base lines completed with the geographical
criteria of the Fishery Case ................................................................. 120
5.4.2 Whether the Canadian straight line exposed to the oppositions or
negations from other States .................................................................. 128
5.5 The legitimacy of Russian straight baselines ...................................... 131
5.6 Brief summary .................................................................................. 140

6. The future of the Arctic shipping and feasible alternative to the Arctic .... 144

6.1 How to eliminate the environment issues concerned by the Arctic coastal
States .................................................................................................... 145
6.1.1 What are the environment issues concerned by the Arctic coastal States ................................................................. 146
6.1.2 Solutions about eliminate the worries of the coastal States .......... 149
6.2 How to eliminate the national strategic interests concerned by the Arctic coastal States ................................................................. 155
6.3 The backsides of the protection mechanism ............................................. 157

7. Conclusion ....................................................................................... 159

7.1 Current passing regimes are not clear and not suitable for the Arctic ...... 159
7.2 The Arctic shipping lanes could be considered as strait used for international navigation ................................................................. 160
7.3 The straight baseline claims made by coast States are not tenable .......... 162
7.4 New changes are needed for the Arctic and also for the shipping lanes .... 164

References ......................................................................................... 166
## Acronyms / Abbreviations

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AWPPA</td>
<td>The Canadian Arctic Water Pollution Prevention Act</td>
</tr>
<tr>
<td>IMO</td>
<td>International Maritime Organization</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>NSR</td>
<td>Northern Sea Route</td>
</tr>
<tr>
<td>NORDREG</td>
<td>Northern Canada Vessel Traffic Reporting Arctic Canada Traffic Zone</td>
</tr>
<tr>
<td>Fishery Case</td>
<td>Case of International Court of Justice Anglo-Norwegian Fisheries United Kingdom vs. Norway</td>
</tr>
<tr>
<td>Contiguous Zone Treaty</td>
<td>Convention on the Territorial Sea and the Contiguous Zone</td>
</tr>
<tr>
<td>Polar Code</td>
<td>International Code for Ships Operating in Polar Waters</td>
</tr>
</tbody>
</table>
Table of Treaties

Convention on the Territorial Sea and the Contiguous Zone
Antarctic Treaty and related agreements
The Ilulissat Declaration
International Convention for the Safety of Life at Sea
1. The basic information about Arctic shipping lanes

The Arctic Ocean is located on the north of the earth. Normally, people think the Arctic is a totally frozen world, cold, isolate and spiritless. In recent decades, it all changed. The Arctic Ocean stands at the threshold of significant changes. Climate change is causing the normally frigid Arctic region to melt at an alarming rate.\(^1\) The trend of melting sea ice will make that the Arctic Ocean become an available shipping area which difficult to navigating in the former time. Considering the special location of Arctic Ocean, the new shipping lanes in the Arctic Ocean could connect the Atlantic Ocean and Pacific Ocean. It will be a great change for the global economy. Especially for current economy which mainly relies on shipping between the North America, Europe and Asia countries. Concerning that the Arctic shipping is the burgeoning issue, the institutions about the Arctic shipping lanes like administration or regulation may not complete and perfect. More than that, there are still some divergences between certain states on Arctic shipping issues need to be settled. Anyway, the Arctic shipping is a hot topic for this or next decade. Nowadays, the navigation issues in the Arctic Circle are attracting more and more researchers around the whole world to study on it.

The divergence or could be called controversies about Arctic shipping lanes could be simply divided into three phrases. It is like a recycle process, calmness-tension-calm down-tension again. In the former time, Arctic Ocean is still an undiscovered world. There is no divergence to using Arctic Ocean as ships navigation by pathfinders. After the World War II, especially Former Soviet Union and Canada expand claiming the sovereignty in the Arctic, the divergences were raised by other interest countries. United

\(^1\) Mcinnis D. Climate Change in the Arctic: Is Bowdoin's Mascot Headed for a Meltdown?[J]. Bowdoin Magazine, 2005(2)
States had appealed some conflicts with these two countries about the transit freedom in the Arctic Ocean. After 1980s, the divergences about Arctic shipping seemingly came into quiet. But the standpoints of conflict countries are still preserved by themselves. More than that, Russian Federation and Canada are strengthening control to Arctic area by domestic legislations and practice measures. For example, Canada enacted Arctic Waters Pollution Prevention Act (1970). Former Soviet Union enacted Regulations for Navigation on the Seaways of the Northern Sea Route (1990). Because of the sea ice melting, the divergences about Arctic transition are going to re-emerge and more countries will be involved.

1.1 The general situation about Arctic shipping lanes

The Arctic Ocean, at 14.056 million km², is the smallest of the world’s five oceans. It is mostly an enclosed sea that has limited exchange of deep water with other oceans. Compared to the Mediterranean Sea, the Arctic has a much greater exchange of water, and it is more than 5.6 times larger. The Arctic shipping lanes means the water connections linking the Arctic and the Pacific and Atlantic Oceans via the Arctic. The Arctic shipping lanes contain two main shipping lanes, Northwest Passage and Northern Sea Route. The navigation of Arctic shipping lanes depends on the environmental conditions, the policies of the coastal countries and the ice-break technology. The first two elements are crucial facts in terms of economic transport.

Receding sea ice is opening the Northern Sea Route and Northwest Passage for shipping. In 2011 the Northern Sea Route was open for five months. More than 30 ships passed through, including Russian gas tankers and Nordic iron ore carriers (Helmholtz Association 2012, Macalister 2012). In September 2012 the icebreaker Xue Long, or Snow Dragon, became the first Chinese vessel to complete the route (NZweek 2012). The Northern Sea Route is a substantially shorter passage (35-60 per cent savings in

---

2 Arctic Marine Geography, Climate and Sea Ice, Arctic Marine shipping Assessment 2009 Report, Arctic Council
distance) for shipping between northern European ports and those of the Far East and Alaska than routes through the Suez or Panama Canals.\(^3\) The voyage Yong Sheng of China Ocean Shipping (Group) Company (COSCO) arrives in Rotterdam, the Netherlands, on Sept. 10, 2013. It is the first time a Chinese merchant vessel completed its journey over the slowly melting Northern Sea Route, which was 9 days and 2,800 nautical miles less than the conventional routes transiting the Strait of Malacca and the Suez Canal. There is one hypothetical shipping lane in the Arctic Ocean is Transpolar Sea Route. The Transpolar Sea Route would use the central part of the Arctic to link the most directly the Strait of Bering and the Atlantic Ocean of Murmansk. This route is at this point hypothetical as it involves ice-free conditions that are not yet observed.\(^4\) The Transpolar Sea Route is out of the Northwest Passage and the Northern Sea Route and far from the coast lines of Canada and Russia. In some point of view, Canada and Russia strictly control the Arctic shipping area. Other interest countries have to spend more attention to the Transpolar Sea Route. Now the Transpolar Sea Route is the hypothetical level, but it stands a good chance to become a suitable shipping lane in the future. If that happens, the Transpolar Sea Route will bring pressures to the current institutions about Arctic shipping. The Transpolar Sea Route may become a point of penetration about forming a new institution which accepted by international society.

1.1.1 The background of Northwest Passage

The Northwest Passage is a sea route through the Arctic Ocean, along the northern coast of North America via waterways through the Canadian Arctic Archipelago, connecting the Atlantic and Pacific Oceans. The various islands of the archipelago are separated from one another and the Canadian mainland by a series of Arctic waterways collectively known as the Northwest Passages or Northwestern Passages. The Parliament of Canada renamed these waterways the “Canadian Northwest Passage” in

---

\(^3\) UNEP Year Book (2013), Page 27.
motion M-387 passed unanimously 2 December 2009.\(^5\)

The Northwest Passage is the name given to the various marine routes between the Atlantic and Pacific oceans along the northern coast of North America that span the Canadian Arctic Archipelago.\(^6\) The Canadian Arctic Archipelago stretches longitudinally about 1900 kilometers from mainland Canada to the northern tip of Ellesmere Island. From west to east, it covers a distance of about 2400 kilometers from Banks Island (west side) to Baffin Island (east side). The size of this roughly triangular area, including land and ocean, is approximately 2.1 million km\(^2\). As mentioned previously, it comprises approximately 36000 islands, making it one of the most complex geographies on Earth. The area is sparsely populated along the coastline.\(^7\)

The passage was first successfully navigated by Roald Amundsen, aboard his vessel Gjöa. He entered the passage through Baffin Bay in 1903; passing by way of Franklin's route, south of Victoria Island, he completed the passage in 1906. The next successful trip was a 28-month journey made from west to east by Henry Larsen in his ship St. Roch, 1940–42; the return trip took 86 days. Afterward, many vessels, including United States submarines, navigated the Northwest Passage.\(^8\)

There are 5 recognized routes or passages, with variations, through the Archipelago.\(^9\) The details of these five routes which contain 2 branched lanes are based on the *Arctic Marine Shipping Assessment 2009 Report* from Arctic Council.

### Form 1.1\(^{10}\)

<table>
<thead>
<tr>
<th>Route</th>
<th>Routing (East to west)</th>
<th>Of Note</th>
</tr>
</thead>
</table>


\(^6\) Arctic Marine Geography, Climate and Sea Ice, Arctic Marine shipping Assessment 2009 Report, Arctic Council

\(^7\) Arctic Marine Geography, Climate and Sea Ice, Arctic Marine shipping Assessment 2009 Report, Arctic Council

\(^8\) Kingston, Thomas (1979). *A History of Scandinavia: Norway, Sweden, Denmark, Finland, and Iceland*.

\(^9\) Arctic Marine Geography, Climate and Sea Ice, Arctic Marine shipping Assessment 2009 Report, Arctic Council

\(^10\) Based on *Arctic Marine Geography, Climate and Sea Ice, Arctic Marine shipping Assessment 2009 Report, Arctic Council*, but changed a little bit for this Chapter.
<table>
<thead>
<tr>
<th>Route</th>
<th>Description</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Lancaster Sound - Barrow Strait-Viscount Melville Sound – Prince of Wales Strait – Amundsen Gulf</td>
<td>Suitable for deep draft navigation; the route followed by St. Roch in 1944 on westerly transit and the SS Manhattan in 1969.</td>
</tr>
<tr>
<td>2</td>
<td>Same as 1 but substitute M’Clure Strait for Prince of Wales Strait and Amundsen Gulf Collectively Lancaster Sound – Barrow Strait – Viscount Melville Sound is known as Parry Channel</td>
<td>SS Manhattan attempted this route in 1969 but was turned back. Russian icebreaker Kapitan Klebnikov succeeded in a passage in 2001. In September 2007 was clear of Arctic pack ice for a limited time since satellite photos have been available; there was more ice in 2008.</td>
</tr>
<tr>
<td>3A</td>
<td>Lancaster Sound – Barrow Strait – Peel Sound – Franklin Strait – Larsen Sound – Victoria Strait – Queen Maud Gulf – Dease Strait – Coronation Gulf – Dolphin and Union Strait – Amundsen Gulf</td>
<td>Of the 3A, 3B and 4 routes, this is considered the best option but with a draft limit of 10 m.</td>
</tr>
<tr>
<td>3B</td>
<td>A variation of 3A. Rather than following Victoria Strait on the west side of King William Island, the route passes to the east of the island following James Ross Strait – Rae Strait – Simpson Strait</td>
<td>The route of Roald Amundsen. Also route of the MS Explorer, in 1984, the first cruise ship to navigate the Northwest Passage.</td>
</tr>
<tr>
<td>4</td>
<td>Similar to 3A. Rather than following Peel Sound on the west side of Somerset Island, the route passes to the east of the island through Prince Regent Inlet and Bellot Strait</td>
<td>Route of St. Roch in 1940-42 on easterly transit.</td>
</tr>
<tr>
<td>5</td>
<td>Hudson Strait – Foxe Channel – Foxe Basin – Fury and Hecla Strait – Gulf</td>
<td>Not generally considered a viable commercial passage</td>
</tr>
</tbody>
</table>
of Boothia – Bellot Strait – remainder via routes 3A, 3B or 4 for moderate to deep draft ships.

The picture of these 5 routes sees below, Picture 1.1

![Flora of the Canadian Arctic Archipelago](http://nature.ca/en/research-collections/research-projects/flora-canadian-arctic-archipelago,2014-10-19)

**Annotation:**

1, Lancaster Sound; 2, Barrow Strait; 3, Viscount Melville Sound; 4, Prince of Wales Strait; 5, Peel Sound; 6, Franklin Strait; 7, Larsen Sound; 8, Victoria Strait; 9, Queen Maud Gulf; 10, Dease Strait; 11, Coronation Gulf; 12, Dolphin and Union Strait; 13, James Ross Strait; 14, Rae Strait; 15, Rasmussen Gulf; 16, Simpson Strait; 17, Prince Regent Inlet; 18, Bellot Strait; 19, Foxe Channel; 20, Furry and Hecla Strait; 21, Gulf of Boothia.

All passages have common eastern and western approaches. In general, the operating season is short – from late July to mid-October – depending on

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the route and year. Of the various passages, routes 1 and 2 are considered deep water ones, while the others have limiting shoals and rocks restricting the draft of vessels to less than 10 meters.\textsuperscript{12}

\subsection*{1.1.2 The background of Northern Sea Route}

One point need to be mentioned that the Northeast Passage and Northern Sea Route are two different conceptions. The Northeast Passage could be regarded as the set of sea routes from northwest Europe around North Cape (Norway) and along the north coast of Eurasia and Siberia through the Bering Strait to Pacific. The establishment of the Northern Sea Route as a separate part of the Northeast Passage was decided by the Council of People’s Commissars of the Union of Soviet Socialist Republics on 17 December 1932, which marks the beginning of the Northern Sea Route as an administered, legal entity under full Soviet jurisdiction and control.\textsuperscript{13} The Northern Sea Route is the part of Northeast Passage, according to the definitions in the current time. The definition of Northeast Passage had accepted by international world. But the definition of Northern Sea Route haven’t reached consensus. So far, there are more than one definitions about Northern Sea Route given by different scholars. It is the support of divergences existing about the Arctic shipping lanes.

Two approaches are often applied to determine the co-ordinates of the Northern Sea Route: An \textit{official definition} as found in Russian laws and regulations, and \textit{an unofficial Russian functional definition} based on a mixture of organizational, operational and geopolitical criteria. The former restricts the route geographically to Arctic waters claimed to be national and under the exclusive national jurisdiction of the Russian Federation, whilst the latter extends it geographically to include additional expanses of international waters in the Atlantic and Pacific Oceans.\textsuperscript{14} According to \textit{Regulations for Navigation on the Seaways of the Northern Sea Route},

\begin{thebibliography}{9}
\bibitem{12} Arctic Marine Geography, Climate and Sea Ice, Arctic Marine shipping Assessment 2009 Report, Arctic Council
\bibitem{13} Peresypkin, Yakovlev (2008), p. 4
\end{thebibliography}
Article 1.2, The Northern Sea Route – national transportation route of the USSR, which is situated within the inland waters, territorial sea (territorial waters), or exclusive economic zone adjoining the USSR northern coast, and includes seaways suitable for guiding ships in ice, the extreme points of which in the west are the western entrances to the Novaya Zemlya straits and the meridian running from Mys Zhelaniya northward, and in the east, in the Bering Strait, by the parallel 66°N and the meridian 168°58′37″W.\(^\text{15}\)

Also the Arctic Marine Shipping Assessment 2009 Report (AMSA 2009 Report) gives a definition on Northern Sea Route. The Northern Sea Route is defined in Russian Federation law as a set of marine routes from Kara Gate (south of Novaya Zemlya) in the west to the Bering Strait in the east. Several of the routes are along the coast, making use of the main straits through the islands of the Russian Arctic; other potential routes run north of the island groups.\(^\text{16}\)

More than that, scholars have other various opinions.

William Elliott Butler said, “The Northern Sea Route commonly comprehends the sea route from Leningrad to Vladivostok used by Soviet merchant shipping. It is in a sense a domestic transport concept closely linked to serving the economic requirements of northern Siberia and the Far East and has functioned officially under that name since 1932.”\(^\text{17}\)

Kolodkin and Volosove said, “Unlike the majority of other transport routes, both land and sea, the Northern Sea Route has no single fixed route. While retaining a general direction in longitude, the route may vary by great distances in latitude from year to year and often within a single navigation period. Thus, it may skirt the north of the Novaia Zemlia and Severnaia Zemlia archipelagos, bypassing the straits separating those and other land formations from the continental territory of the USSR. But under any circumstances a significant part of the Northern Route lies within the Soviet

\(^{15}\) Regulations for Navigation on the Seaways of the Northern Sea Route, 1990, Article 1.2
\(^{16}\) Arctic Marine Geography, Climate and Sea Ice, Arctic Marine shipping Assessment 2009 Report, Arctic Council
\(^{17}\) William Elliott Butler, Northeast Arctic Passage, Sijthoff & Noordhoff International Publisher BV (1978), Page 42
economic zone, or the territorial and even internal waters of the USSR.”

According to the definitions given by USSR and Russia, Northern Sea Route is a “domestic shipping lane” and used for “domestic transport”. However, the most important point of Russian’s definition is the limitation of the Northern Sea Route only mentioned about west and east directions. That description makes the Northern Sea Route extent from the main land of Russia to the North Pole. Stand on the Russian side, the Northern Sea Route is the “domestic shipping lane”. That means all shipping lanes crossing this water area could be considered within the control of Russia Federation. Actually, in 2012 Russia passed The Russian Federation Federal Law on Amendments to Special Legislative Acts of the Russian Federation Related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route. In this Amendment Russian Federation added the conception of Northern Sea Route water area (See Chapter 2). In fact most of the divergences are surrounding the Northern Sea Route and relating issues.

There are three lines in the Northern Sea Route. From West to East,

Line B: Kara Strait - Plavnikovyye Islands north – Arkticheskiy Institut Islands - Kirov Islands – Nordenskiold Archipelago north - Vilkitsky Strait – New Siberian Islands – Sannikov Strait – De Long Strait – Bering Strait

High latitude line: Franz Josef Land Islands – Severnaya Zemlya north - New Siberian Islands north – Wrangel Island north – Bering Strait

In the current time, the high latitude line is limited by sea ice. The most used lines could see in Picture 1.2.

Picture 1.2

---

The importance of Northern Sea Route is its perfect location. Compared to Suez Canal, the navigating distance between Asia and Europe can save almost 50%.

Form 1.2

<table>
<thead>
<tr>
<th>Port of destination</th>
<th>Delivery via</th>
<th>Ports (Miles)</th>
<th>Murmansk</th>
<th>Rotterdam</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Suez Canal</td>
<td>12840</td>
<td>11205</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NSR</td>
<td>5767</td>
<td>7345</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Difference (%)</td>
<td>7073(56%)</td>
<td>3860(34%)</td>
</tr>
<tr>
<td>Yokohama (Japan)</td>
<td></td>
<td>Suez Canal</td>
<td>11999</td>
<td>10521</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NSR</td>
<td>6501</td>
<td>8079</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Difference (%)</td>
<td>5498(46%)</td>
<td>2442(23%)</td>
</tr>
<tr>
<td>Shanghai (China)</td>
<td></td>
<td>Suez Canal</td>
<td>9710</td>
<td>8917</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NSR</td>
<td>5406</td>
<td>6985</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Difference (%)</td>
<td>4304(44%)</td>
<td>1932(22%)</td>
</tr>
<tr>
<td>Vancouver (Canada)</td>
<td>Panana Canal</td>
<td>9710</td>
<td>8917</td>
<td></td>
</tr>
<tr>
<td></td>
<td>NSR</td>
<td>5406</td>
<td>6985</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Difference (%)</td>
<td>4304(44%)</td>
<td>1932(22%)</td>
<td></td>
</tr>
</tbody>
</table>

Same to the Northwest Passage, Northern Sea Route have to face the block of sea ice. As the climate change continuing, the merchant ships could pass Northern Sea Route without icebreakers in summer time. In 2009, two German merchant ships have traversed the Northeast Passage from South Korea along Russia's Arctic coast to Siberia. That navigation did not have Russian icebreaker leading. There has been a tenfold increase in the number of vessels using Northern Sea Route during the 2010-2012. In 2012, there are 46 vessels have sailed the route, compared to 34 in 2011 and only four

---

The total cargo transported on the Northern Sea Route in 2012 is 1261545 tons – a 53 percent increase from 2011, when 820 789 tons was shipped on the route.21

Concerning the prosperous trend of Northern Sea Route, the relating issues will be mentioned again, especially in the current period that the economy still mainly rely on shipping transport. The two main coast countries, Canada and Russia, willing to strength control of Arctic shipping lanes. Other interest countries request using Arctic shipping lanes to bring more profit. Under this situation, a suitable or acceptable for different countries is urgent need.

1.2 The main focuses on Arctic passage

Because of the unique geographical location, Arctic shipping lanes have great advantages in international trade transportation. It is a natural thing that relating countries are going to grasp the interests. Arctic shipping lanes are more than economic value. Shipping navigation even human activities could bring serious consequence in the Arctic. Air pollution, noise and the negative impacts by shipping routes to marine sea animals, all these impacts may greatly change the environment in the Arctic. The maritime activities bring risks into the Arctic where peaceful and tranquil. Also the Arctic has significant strategic importance to circle Arctic countries. It is understandable that relating countries do their possible to seize their own interests. All in all, the Arctic could not be ignored to every country for the future development. In this background, different countries have different interests. Different countries are going to seize their unilateral profits. So it is easily happen that divergences even conflicts surrounding and obstruct the development of certain area. In the Arctic, the resource of divergences is the disharmony of the growing demand of transport request, environmental protection and the strategic developments of different countries. In the current time, there is no perfect institution could solve all these problems and also the Arctic region is still remote for human, so the Arctic area is a new stage which full of chances and challenges in the future.

Specifically, the divergences about current institutions of Arctic shipping lines mainly reflect in two parts.

The first part is the relationship between Arctic shipping lanes and International Strait. This topic could be considered as the question that whether the shipping lanes qualify as straits under UNCLOS? The Arctic shipping lanes are mainly located the sea area close to Canada and Russia. These two countries included Northwest Passage and Northern Sea Route as their domestic shipping lanes. These implements are based on the interests and sovereignty demands. If the Northwest Passage and Northern Sea Route are considered as domestic shipping lanes then these shipping lanes are not used for international transport. The result of this consideration is that the Northwest Passage and Northern Sea Route could not apply the transit institutions which provided in United Nations Convention on the Law of the Sea. It will make the institutions of Arctic shipping become more complex. More detail content will be provided in Chapter 4.

The second part is about whether the straight baseline claims raised by coast States negatively impact the navigation freedom within Arctic shipping lanes. On September 10, 1985, the Government of Canada claimed all the waters among its Arctic islands as internal waters, and drew straight baselines around its Arctic islands to establish its claim. And such official claim got into effective January 1, 1986. For this movement, the Canada government put the Arctic waters which it claimed for years inside of the straight baseline and made such area become the internal water of Canada. On February 7, 1984, the Soviet Council of Ministers declared a system of straight baselines for the Soviet east coast, including its coasts facing the Pacific Ocean, Sea of Japan, Sea of Okhotsk, and Bering Sea. By a January 15, 1985, Declaration by the Council of Ministers the Soviet Union claimed straight baselines off its continental coasts and islands of the Arctic Ocean, and off its coasts on the Baltic and Black Seas. Legislation establishing the status of internal sea waters, territorial sea and contiguous zone outside the Russian Federation is stated in Federal Act on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation of 17 July

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1998. The departure point of determining the outer limit of these waters is baseline, described in such Act as the low water line along the Russian coast. In places where the coastline is deeply indented and cut into, a straight baseline is drawn joining islands, reefs and rocks, as well as across a bay when the breadth does not exceed 24 nautical miles. The result of these policies is included the approaching straits in the Arctic shipping lanes among the internal water of Canada and Russia. According to the current institutions, internal waters do not have transit freedom to foreign ships. These enactments are able to strength the control of the Arctic shipping lanes and surrounding sea areas. The divergences about whether the legal conditions are fulfilled to apply straight base line in the Northwest Passage and Northern Sea Route. More specific content about this topic, please see Chapter 5.

2. The current legislation status about foreign vessels using Arctic shipping lanes

Introduction

All the Arctic coastal States are the most important participants about the Arctic issues. So does the Arctic shipping issues. The basic elements of the Arctic shipping issues are every coastal States and other foreign States which their vessels passing through the Arctic shipping lanes. Because of the unique geographic location of the Arctic shipping lanes, connecting the Atlantic Ocean and Pacific Ocean; indirectly connecting the two main continents, the Arctic shipping lanes is becoming an international issue. All activities or measures made by each coastal State could cause the greatly changes of the whole region even world. So it is crucial to figure out the attitudes, policies, legislation and attitudes of all the coastal States and other
interests States towards the Arctic shipping lanes.

In terms of the coastal States, the Arctic shipping lanes have to be under control and be administrated by themselves for mainly two aspects. One hand, most of parts of Arctic shipping lanes are located within the territorial seas or other kinds of administrative water areas like EEZ of coastal States. That means that these parts of Arctic shipping lanes are within the scope of sovereignty control, especially Canada and Russia. According to these situations, the institutions, administrations or policies of these coastal States are the standards for navigation of ships. So the regulations and administrations of coastal States about Arctic shipping lanes are crucial aspects for various interest States. Clarify the legislations status or processes about Arctic shipping of coastal States and also the reflections of other interest States are contribute to digging out the deep reasons of divergences in the Arctic. Moreover, studying on the institutions or administrations of coastal States are helpful on establishing a suitable institution in Arctic shipping and reaching a win-win result. Anyway, the practice of states has always played an important role in the evolution of international law.23

On the other hand, most of the Arctic shipping lanes close to the coastal water areas of the coastal States. The coastal States are affected directly by the prosperous of maritime industry, both positive and negative. Put aside of the sovereignty demands, it is reasonable the coastal States enacting some regulations to protect their own environment or other interests. Also due to the unique navigation environment and remote location, navigating within the Arctic Ocean is high risk even dangerous without the assistance of coastal States. The maritime activities in the Arctic Circle may give irreparable risks to the coastal States once accidents happen.

Admittedly, the coastal States have sufficient reasons to paying such attention to the Arctic shipping issues. The marine Arctic is unique and important to the whole world. Due to the special environment conditions of Arctic, the environment of Arctic is very vulnerable and super complex. Every simple change may cause a great deterioration in the Arctic. There

are so many activities like carbon emission issues, the mage usage of the fossil fuel and frequent maritime shipping. It is under a system and mutual effect to each. So it is hard to clarify that which impact could cause the irreversible results. The protection of Arctic environment must implement with a view of systematic and global cooperation. An oil spill can, of course, be environmentally disastrous wherever it occurs, but the effects of an oil spill in the Arctic would undoubtedly be more serious than elsewhere because the regenerative capacity of life forms generally in Arctic conditions is much lower than it is in more temperate areas. Oil which is absorbed by the ice will be released slowly over time. However, the toxicity of oil survives; hence oil spilled in the Arctic may continue to release toxins into the marine environment for many years. Many places in the world had already suffered by the accidental results of maritime transportation. The maritime environments of these places need long time to repristination. These disastrous consequences are unacceptable to the Arctic Ocean. In 1978, an environmental assessment panel examining the risks of drilling for oil in Lancaster Sound reported: “[A] comprehensive understanding of the fate of spilled oil has yet to be achieved, even for tanker spills....In the case of Arctic waters, understanding of oil-ice-water interactions is in its infancy.” The oil spill is deadly for the environment of Arctic region, according to the statement of World Wild Fund for Nature (WWF). There is no proven effective method for containing and cleaning up an oil spill in icy water. The difficult conditions of the Arctic, and its distance from where response capacity is stationed mean it can take days or weeks to respond to a spill, even during ice-free periods. The Arctic is characterized by a short productive season, low temperatures, and limited sunlight. As a result, it can take many decades for Arctic regions to recover from habitat disruption, tundra disturbance and oil spills. Offshore oil exploration, drilling and production can disturb the fish and animals that are cornerstones of the subsistence and cultural livelihoods of Indigenous peoples in the Arctic. Arctic fisheries, providing both food and economic

24 J. Sprague, Aquatic Resources in the Canadian North: Knowledge, Dangers and Research Needs, in Arctic Alternatives (1973), Page 171
26 R. Ramseier, Oil on Ice, Environment (1974), Page 7
value far beyond the Arctic, are also at risk.\textsuperscript{28}

The environment of coastal water areas is important for coastal States because the negative impacts of coastal water environmental degradations are directly act on the coastal States. So the coastal States enacting more restrict regulations than the normal water area in the Arctic is worthy and need to be respected. To say the least, the maritime transportation may cause other negative impacts to the environment than pollution following accidents. The initial effect of tanker traffic in the Arctic is physical disturbances. It will be interference with mammals (particularly polar bears and seals) living on the ice through which the ships will move. There may also be harm to other forms of marine life as a result of the tremendous noise that the ships will generate.\textsuperscript{29} Frequent passage may also affect the rate of formation and breakup of ice, visibility, the nutritional balances of the water through which the ships churn, and migration patterns.\textsuperscript{30}

In the practice, coastal States paid lots of attention on environmental protection in the Arctic. Almost all coastal States of the Arctic Ocean have regulations about limit maritime transportation in the Arctic based on environmental protection demands. The most topical example of this kind of legislation is Canada’s Arctic Water Pollution Prevention Act (AWPPA).

\section*{2.1 The Canadian legislation and Arctic policy}

\subsection*{2.1.1 The initial requirement claiming by Canada}

In the nineteenth century Canada acquired initial right to the Arctic territories from Great Britain – in 1870 when the former territories of the Hudson’s Bay Company were transferred to Canada, and in 1880 when all other British territorial rights in the Arctic, including the known islands in the archipelago, were handed over. The official Canadian position to the

\textsuperscript{28} WWF, http://wwf.panda.org/what_we_do/where_we_work/arctic/what_we_do/oil_gas/, 2015-1-6
\textsuperscript{29} D. M. McRea, D. J. Goundrey, Environmental Jurisdiction in Arctic Waters: The Extent of Article 234, U. B. G. Law Review (1982), Page 200
region at that time was made apparent by an order-in-council of 1882 which recommended that “no steps be taken with the view of legislating for the good government of the country until some influx of population or other circumstance shall occur to make such provision more imperative than it would at present seem to be.” At that time, the Canadian requirement of Arctic just stays on the territorial claiming on lands and archipelagos in the Arctic.

### 2.1.2 Introduction about the Sector Theory

By the middle of the 20th century, the Canadian claim to the Arctic lands and islands of the archipelago had become generally recognized by other Arctic states. In addition, there was little protest to the Canadian claim that the waters of Hudson Bay and Hudson Strait were Canadian waters by “inline historic title in accordance with universally accepted international law doctrine applying to historic bays.” The Sector Theory has the distinction of being a uniquely Canadian theory. It is a simple and straight-forward claim that each State with a continental coastline automatically falls heir to all the territory lying between its coastline and the North Pole. The first official indication of this theory by a Canadian governmental agency was in 1904 when the Department of the Interior published a map showing the boundaries of Canada. In 1946, the sector theory was explained by Lester B. Pearson, then Canadian ambassador to the United States, to provide a basis for a claim not only to the land within the sector, but to the frozen sea as well.

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31 Dominion Order In Council, P.C. No. 1839 (Sept. 23, 1882), cited in Smith, “Historical Outlines,” supra, note4, Page 6
33 Ivan Head, "Canadian Claims to Territorial Sovereignty in the Arctic Regions" (1963) 9 McGill L. J. 200, Page 219
statement of May 15, 1969, concerning the question of Canadian sovereignty over the inland waters of the archipelago, Mr. Trudeau quoted from a 1958 statement by a Conservative Minister of Northern Affairs, the Honourable Alvin Hamilton: “The area to the north of Canada, including the islands and the water between the islands and areas beyond, are looked upon as our own, and there is no doubt in the minds of this government, nor do I think was there in the minds of former governments of Canada, that this is national terrain.” The Sector Theory has never been subjected to judgment by an international court. Among the other Arctic States, Norway and U.S have flatly denied the existence of any such theory. The majority of international lawyers also reject the sector theory, and many think that an international tribunal’s verdict on its validity would most certainly be in the negative. As the development of the international research on the Law of the Sea, Canada did not mention the sector theory. The sector theory was gradually substituted by the strait base line claims applying on the Canadian Arctic archipelagos.

2.1.3 Arctic Waters Pollution Prevention Act

The Arctic Waters Pollution Prevention Act (AWPPA) is a Canadian legal document which must be mentioned. To clarify the significance of AWPPA to Arctic transportation, the Manhattan event is a good start.

The Manhattan, an U.S cargo ship, set sail in August of 1969 with 126 on board for the 4400 miles journey. Of key importance and significance were the escorting icebreakers accompanying the Manhattan, especially the Canadian icebreakers John A. MacDonald and later the Louis S. St. Laurent. The Manhattan became the first commercial ship to break through the Northwest Passage. The Manhattan event brought extensive discussions in Canada about the sovereignty and control of Arctic. Mr. Sharp, the

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Secretary of State for External Affairs of Canada, attempted to dampen the nationalistic uproar over the Manhattan voyage by stating that “no one, be he Arctic expert, international jurist or government spokesman, could allege that the Northwest Passage is already an international strait under international law.” Once again the key issue was evaded, as the United States was claiming that the water of Passage beyond the three-mile territorial limit were part of the high seas. Since at that time Canada claimed only a three-mile territorial sea, the question of whether the Northwest Passage was or was not an international strait was irrelevant if the Manhattan were able to force its way through M’Clure Strait; it would only traverse Canadian territorial waters if it had to navigate the narrow Prince of Wales Strait. In this event, Canada had an unfavorable negotiation with United States. United States insisted the freedom of transit claim and did not abandon this core interest values. Canada changed their way to reasserting the original position. Canada responded by promulgating the Arctic Waters Pollution Prevention Act, unilaterally asserting its right as a coastal state to protect the shores of its mainland and its claimed Arctic territories form the potentially destructive effects of marine pollution. Not surprisingly, the United States government protested the Canadian action, condemning it, among other things, as a dangerous precedent for unilateralism which might be cited by other nations as justification for their own less meritorious claims over maritime areas. AWPPA was approved unanimously by the Canadian House of Commons, indicating general approval by the Canadian people in the face of strong United States objections. The AWPPA asserted Canada’s jurisdiction to unilaterally regulate all shipping in zones within 100 nautical miles of its Arctic coasts in order to guard against pollution of the region’s coastal and marine resources.

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40 Robert S. Reid, The Canadian Claim to Sovereignty over the Water of the Arctic, The Canadian Yearbook of International Law (1974), Page 120
The enacting of AWPPA is like a milestone. AWPPA deals with pollution arising from shipping, from land-based installations, and from commercial activities. After the AWPPA, Canada changed its emphasis of Arctic policy from simply claiming sovereignty to concerning environmental protection form. This form is using the environmental protection as entry point and taking measures to achieve the substantial control. Because of the environmental protection issues are closely relating to the coastal States and the coastal States should respond to the surrounding environment. So it is reasonable and acceptable also irrefutable that coastal States using environmental protection as the ground to taking measures to control the areas nearby. States use environmental protection as the reason to implement series measures for achieving the result of practical control of certain region. It is a very wisdom measure to choose this way. Overall, the coastal States found a good method using good reason to insist their claiming. Faced the strongly oppose of Arctic sovereignty claim, Canada can not achieve its ambition with ease. However, emphasizing the environmental protection and enacting relating regulation brings better administration method and also more restrict control of Arctic. Compared the former thinking of limited sovereignty claiming, it is approximately the same result of obtain the sovereignty with limited. Provisions of AWPPA apply to “Arctic waters” which are defined as waters in both a liquid and a frozen state “adjacent thereto lying north of the sixtyeth parallel of north latitude, the natural resources of whose subjacent submarine areas Her Majesty in right of Canada has the right to dispose of or exploit, whether the waters so described or those adjacent waters are in a frozen or liquid state, but does not include inland waters.”

The most controversial parts of AWPPA were provisions about “deposit of waters”. AWPPA prohibits, and prescribes penalties for, the deposit of “water” in Arctic waters or on the islands or mainland under conditions which may cause such waste to enter the Arctic waters, and further requires that any deposit of waste or danger thereof be reported.

The article 4 (1) of AWPPA:

“4. (1) Except as authorized by regulations made under this section, no person or ship shall deposit or permit the deposit of waste of any type in the arctic waters or in any place on the mainland or islands of the Canadian arctic under any conditions where the waste or any other waste that results

43 Arctic Waters Pollution Prevention Act, Section 3, Application of Act, Article 3 (1)
from the deposit of the waste may enter the arctic waters.”

The article 5 of AWPPA:

“5. (1) Any person who,

(a) has deposited waste in contravention of subsection 4(1), or
(b) carries on any undertaking on the mainland or islands of the Canadian arctic or in the arctic waters that, by reason of any accident or other occurrence, is in danger of causing any deposit of waste described in that subsection otherwise than of a type, in a quantity and under conditions prescribed by regulations made under section 4,

shall forthwith report the deposit of waste or the accident or other occurrence to a pollution prevention officer at such location and in such manner as may be prescribed by the Governor in Council.

(2) The master of any ship that has deposited waste in contravention of subsection 4(1), or that is in distress and for that reason is in danger of causing any deposit of waste described in that subsection otherwise than of a type, in a quantity and under conditions prescribed by regulations made under section 4, shall forthwith report the deposit of waste or the condition of distress to a pollution prevention officer at such location and in such manner as may be prescribed by the Governor in Council.”

More than that, in article 11 of AWPPA there is also have a controversial concept prescribed as “shipping safety control zone”. In the article 12 of AWPPA, there are very detail requirements applicable to vessels navigating within “shipping safety control zone”. It prohibited any ship from entering any zone unless it meets the prescribed regulations. Such regulations may related to hull and fuel tank construction, navigational aids, safety equipment, qualification of personnel, time and route of passage, icebreaker escort, and so forth. In the article 14 and 15 of AWPPA, it further provides for the appointment of “pollution prevention officers” having broad powers, including authority both to board ships within a shipping safety control zone for inspection purposes, and to order ships in or near a safety control zone to remain outside it if the officers suspect that the ships do not comply with the standards applicable within the zone.44 This provision gave the Canadian officials real powers. In this terms of view, the administration which based on AWPPA had the same result or sometimes better than claiming the Arctic sovereignties on lands and waters. In general,

44 Detail see article 15 of Arctic Waters Pollution Prevention Act.
international law prohibits any state from purporting to subject any part of the high seas to its sovereignty, or from interfering with the exercise of freedom of navigation by ships sailing under other states’ flags on the high seas.\textsuperscript{45} It is clearly regulated in the article 89 “No State may validly purport to subject any part of the high seas to its sovereignty” and article 90 “Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas” of the UNCLOS. However, international law does recognize a limited exception of these principles in the concept of the “contiguous zone,” which permits a coastal state to exercise jurisdiction for certain purposes in areas of the high seas lying somewhat outside its territorial sea. In fact, Canada justified AWPPA as being within the scope of this contiguous zone exception.\textsuperscript{46} But the problem was according to the international law in that day, the contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.\textsuperscript{47} But AWPPA said that the Arctic water covered and extend 100 miles.

Such restrict regulation definitely aroused the objection from other interests States. The Canadian Government was well aware that AWPPA might raise foreign-relations problems, particularly with the United States\textsuperscript{48}. The United States asked the Canadian government to defer making its proposed legislation effective until an international agreement was reached. However, in the event that the Canadian government was unwilling to make this concession, the United States urged that the issue be voluntarily submitted to the International Court of Justice. But the Canadian government in turn, promptly rejected the American position and suggestions.\textsuperscript{49} Canada tended to choose the international negotiation to deal with these relating problems. Canadian government viewed its own unilateral action as a positive contribution to the development of such rules since it is a well-established

\textsuperscript{47} Territorial Sea Convention, Paragraph 2 of article 24
principle that customary international law is developed by state practice.\textsuperscript{50} As the raising and applying of the conception of Exclusive Economic Zone, solving the focus of debate, the conflicts and disputes about AWPPA seems to have subsided. The concept of EEZ could be another solution to this problem. The breadth of EEZ in the UNCLOS is “not extend beyond 200 nautical miles”. Moreover, there are several provisions protecting the rights and resources of coastal States. The article 234 is the perfect example for such purpose. The article 234, the UNCLOS regulated the coastal States in the ice covered areas have right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution within the limits of the exclusive economic zone. In this term of view, after the concept of EEZ, the function of AWPPA was greatly reduced.

2.1.4 Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation

First of all, the Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation is just a bilateral agreement. It is not a legal document. It is valid just between the both side of contracting parties, Canada and United States. But the practice of this agreement is the part of institutions of Canadian Arctic regulations. Also it has vital significance to comprehending the Canadian Arctic policies. Same as the AWPPA, the agreement between Canada and United States cooperation on Arctic had a trigger event as well. This trigger event is “Polar Sea controversy”.

On August 1, 1985, without consulting Canada, the Polar Sea left Thule, Greenland to traverse the Arctic's Northwest Passage to Point Barrow, Alaska. The vessel, Polar Sea is a United States Coast Guard Heavy Icebreaker, one of the two largest polar icebreakers (at that time) in the world outside of the Soviet fleet, entered Alaskan waters ten days later, after facing six feet thick ice sheets which slowed the 60,000 horsepower

ship to a meager two knots.\textsuperscript{51} The Canadian announcement noted that although the United States had “made known that it does not share Canada’s view regarding the status of these waters, it [had] assured the Government of Canada that the purpose of the voyage [was] solely operational... [and] ... without prejudice to the position of either State regarding the Northwest Passage.”\textsuperscript{52} In addition, the statement declared that the \textit{Polar Sea} complied “with standards substantially equivalent to those prescribed under Canadian regulations” as required by the Canadian Arctic Waters Pollution Prevention Act, that Canadian observers would be on board, and that Canadian military aircraft would monitor the progress of the vessel.\textsuperscript{53} On September 10, 1985, Joe Clark, Canada’s Minister of External Affairs, rose in the House of Commons to propose actions designed to reinforce Canada’s claim to the waters of the Arctic archipelago, while simultaneously emphasizing Canadian willingness to bring the dispute before the International Court of Justice. Declaring that “the policy of this government is to exercise Canada’s full sovereignty in and over the waters of the Arctic archipelago,"\textsuperscript{54} More than that, Canada began to implement the \textit{Polar 8 project} willing to build the largest icebreaker to guard the Arctic sovereignty.\textsuperscript{55} It was obviously influenced the relationship between Canada and United States. At that time, Canada needed United States at least did not oppose the Canadian position. United States played an important role in the Arctic even in the whole world. The United States were in the decisive position to the Arctic issues. So Canada did not want to stand on the other side of United States. On the other hands, United States needed Canada as well. At that time, the Soviet Union was still the most powerful states and leading the other side of the world. The competition between United States

\textsuperscript{51} Nicholas C. Howson, Breaking the Ice: The Canadian-American Dispute over the Arctic’s Northwest Passage, 26 Colum. J. Transnat’l L. (1987), Page 339
\textsuperscript{52} Oil Stirs Concern Over Northwest Passage Jurisdiction, N.Y. Times, Mar. 15, 1969, at 12, col. 1. See infra text accompanying notes Page 61-62
\textsuperscript{53} Nicholas C. Howson, Breaking the Ice: The Canadian-American Dispute over the Arctic’s Northwest Passage, 26 Colum. J. Transnat’l L. (1987), Page 340
\textsuperscript{54} Statement of Minister of External Affairs Joe Clark, in the House of Commons, Sept. 10, 1985, at I [hereinafter Clark Statement]. (Copy on file with the Columbia Journal of Transnational Law, courtesy of Canadian Consulate, New York.) This statement was originally delivered in the Canadian Parliament. See CAN. H.C., DEBATES, Sept. 10, 1985, at 6464. Also in Nicholas C. Howson, Breaking the Ice: The Canadian-American Dispute over the Arctic’s Northwest Passage, 26 Colum. J. Transnat’l L. (1987), Page 341
\textsuperscript{55} http://www.canada.com/globaltv/ontario/story.html?id=e49e29ee-3434-44c0-ba6b-00ef25297090&k=37964, 2014-11-6
and Soviet Union was still intense. Canada and United States are neighbors and steady friends. United States did not willing to see the situation that inconsistent with Canada. So United States had demand of adequate solutions on the conflict between Canada. After the *Polar Sea* controversy, Canada and United States started to negotiate each other. Finally, on the January 11, 1988 Ottawa, they were reached the Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation.

The Agreement has only five provisions. Among of them, article 3 and article 4 are the essential provisions. In the article 3 indicated the reason and necessary of signing such agreement:56 “In recognition of the close and friendly relations between their two States, the uniqueness of ice-covered maritime areas, the opportunity to increase their knowledge of the marine environment of the Arctic through research conducted during icebreaker voyages, and their shared interest in safe, effective icebreaker navigation off their Arctic coasts.” Obviously both Canada and United States realized that the importance of cooperation between such Arctic neighbors and States with so many common interests. Also in this article it allocated the duties of both States: “undertake to facilitate navigation by their icebreakers in their respective Arctic waters and to develop cooperative procedures for this purpose...agree to take advantage of their icebreaker navigation to develop and share research information, in accordance with generally accepted principles of international law, in order to advance their understanding of the marine environment of the area”. The last item also the most important thing in this article is “The Government of the United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada.”

First of all, both Canada and U.S. were dependent on the cooperation of the other in order to protect their respective national interests. This agreement was definitely the result of compromise of both sides. To Canada, although this result did not get the approval of United States about Canadian Arctic sovereignty claims, but Canada got the other profits. First gain of Canada was all navigation by U.S. icebreakers within Canadian Arctic waters will

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56 Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation Article 3
be undertaken with the consent of Canada. That means U.S. has duty to asking for permit or at least informing about the icebreaker navigation information. Agreeing to this provision imply that the government of U.S. had made compromise that admitted the actual control rights to the Canadian claiming waters which including the Northern Passage. Also this measure could calm down the uproar of Canada citizens. It more likes a compensatory measure.

In article 4\textsuperscript{57}, Canada and United States limited the applying situations of this bilateral agreement: “Noting in this agreement of cooperative endeavour between Arctic neighbours and friends nor any practice thereunder affects the respective positions of the Governments of the United States and of Canada on the Law of the Sea in this or other maritime areas or their respective positions regarding third parties.”

In terms of U.S, this kind of procedure seems impact the freedom of transportation which the most concern interest of U.S. But the article 4 of the agreement shows that nothing in this agreement could change the respective position of U.S. So the procedure provided in the agreement was just a practice measure and did not cause the legal effects. This agreement was just valid between Canada and United States. It was not legally binding for other States. For the political view, U.S. never admit the sovereignty and the restrict control of Northwest Passage, also the freedom of transit through Northwest Passage need to be respect. If without this agreement, Canada will not gets the application or information about the icebreaker of U.S navigating through Northwest Passage. In this event called “1985 Polar Sea Controversy” Canadian government faced the tremendous pressure on domestic public. If the problem could not be properly solved, the actions of U.S. might provoke up the Canadian government taking compulsory measures and then it will bring the negative impact on the relationship between Canada and U.S. If U.S. government submitted the controversy to the International Court of Justice, then it had to face with the cost of political, jurisdictions and strategy lost. To continue to stand aloof from Canadian governmental concerns and to simply proceed with future Northwest Passage transit would not only fail to secure American goals, but

\textsuperscript{57} Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation Article 4
might actually have the negative effect of making them harder eventually to realize.\textsuperscript{58} So the U.S. government walking into the agreement was the result of prudential consideration and interests balance. Not surprisingly, the official public response from Ottawa and Washington was tailored to emphasize these different perspectives.\textsuperscript{59} The agreement provides that future United States icebreaker passages will no longer be potentially embarrassing or threatening to the political health of the ruling party in Ottawa. This point is confirmed by the fact that since the signing of the agreement in January 1988 three United States government icebreakers have been in transit through the Northwest Passage, all of which have gone virtually unnoticed in Canada.\textsuperscript{60}

Although this agreement is the win-win or mutually satisfactory result, it is still ambiguous to some extent. In the article 3 of the agreement it said: “research conducted during icebreaker voyages, and their shared interest in safe, effective icebreaker navigation off their Arctic coasts: …The Government of Canada and the Government of the United States agree to take advantage of their icebreaker navigation to develop and share research information, in accordance with generally accepted principles of international law, in order to advance their understanding of the marine environment of the area;”. This provision has a legal loophole inside or could be called “playing on words”. Does it mean that if the U.S. government asking its icebreakers passing through the Northwest Passage with scientific and research purpose, Canada should allow or permit such application? If the U.S. icebreakers planning to passing through the Northwest Passage for other reasons than scientific and research purpose, does it need the consent of Canadian government? Only according to this agreement, my personal opinion is U.S. icebreakers do not need to undertake the consent of Canadian government. So far, there is no such situation appeal but the leaking hole still potential exists.

The first U.S. request for passage occurred unexpectedly less than one year

later in October 1988, when the Polar Star became trapped in an early surge of polar ice off the north coast of Alaska. Unable to return westward via the Bering Sea to Seattle, it sought transit through the Northwest Passage. Ottawa granted permission under the Arctic Cooperation Agreement.\(^{61}\)

The 1988 agreement represents a pause rather than an end to the Northwest Passage dispute as military, economic, and environmental pressures increase in the entire region. Continued creative diplomacy and joint efforts will be necessary to avoid future problems. The “cooperative procedures” called for in the agreement might profitably include the development of a Canadian-American Northwest Passage Coast Guard Patrol, which would give the United States an opportunity to effectively extend its visible maritime defense through the passage and at the same time further relieve Canada of the necessity to incur new defense expenditures.\(^{62}\)

### 2.1.5 Northern Canada Vessel Traffic Reporting Arctic Canada Traffic Zone (NORDREG)

The *Canada’s Northern Strategy: Our North, Our Heritage, Our Future* \(^{63}\) identified four “pillars” (priority areas): exercising sovereignty, promoting economic and social development, protecting the environment, and improving and devolving governance.\(^{64}\) It is need to give a brief introduction about the pillar that “exercising sovereignty”. The other three pillars are not the focus of this article. To exercise traditional sovereignty, Canada must monitor what is happening in its Arctic and enforce its authority over its Arctic land, sea, and air.

Northern Canada Vessel Traffic Reporting Arctic Canada Traffic Zone (NORDREG) is the detail and compulsory regulation of Canada which Canada mainly depending on it in the recent 5 years. Since the system was

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\(^{61}\) Philip J. Briggs, *The Polar Sea Voyage and the Northwest Passage Dispute*, Armed Forces and Society (1990), 16 (3), Page 448


\(^{63}\) Published under the authority of the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, 2009

implemented in 1977, NORDREG had been voluntary. However ships entering the Northwest Passage had a strong motivation to report to the Coast Guard as they were provided services, free of charge, such as ice information, ice routing, icebreaker assistance, and search and rescue. In fact it was quite successful, with Coast Guard and Transport Canada officials estimating that 98% of vessels entering Canadian Arctic waters notified the government of their presence.65

The legal basis of NORDREG could be possible considered as the article 234 of the UNCLOS. But the article 234 limited the applicable range which limited the relating regulation within the EEZ of coastal States. Also, the regulation implemented by the coastal States should be non discrimination and the laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence. The NORDREG regime was not satisfying the limitation from the article 234 of the UNCLOS.

The area of the NORDREG including: the waters of James Bay; the waters of the Koksoak River from Ungava Bay to Kuujjuaq; the waters of Feuilles Bay from UngavaBay to Tasiujaq; the waters of Baker Lake and the waters of the Moose River from James Bay to Moosonee.66 The vessels which needed to report are following types: 300 gross tonnage or more; engaged in towing or pushing another vessel, if the combined gross tonnage of the vessel and the vessel being towed or pushed is 500 gross tonnage or more; and carrying as cargo a pollutant or dangerous goods, or that are engaged in towing or pushing a vessel that is carrying as cargo a pollutant or dangerous goods.67 Masters operating vessels within the NORDREG zone are required to submit four different types of reports:

(a) “SP”, in the case of a sailing plan report;
(b) “PR”, in the case of a position report;
(c) “FR”, in the case of a final report;

66 NORDREG, 2010, article 2
67 NORDREG, 2010, article 3
(d) “DR”, in the case of a deviation report.68

The sailing plan (SP) report must be provided,
(a) when a vessel is about to enter the NORDREG Zone;
(b) more than one hour but not more than two hours before a vessel departs from a berth within the NORDREG Zone, unless the vessel is moving to another berth in the same port; and
(c) immediately before a vessel gets underway within the NORDREG Zone, if the vessel
(i) has been stranded,
(ii) has stopped as a result of a breakdown in the main propulsion or steering system, or
(iii) has been involved in a collision.69

The position report (PR) must be provided,
(a) immediately after a vessel enters the NORDREG Zone; and
(b) daily at 1600 Coordinated Universal Time (UTC), if a vessel is underway within the NORDREG Zone, unless the information required by regulation 19-1, Long-range identification and tracking of ships, of Chapter V of SOLAS (Convention for the Safety of Life at Sea), is being transmitted in accordance with that regulation.
Also the PR must also be provided as soon as feasible after a vessel’s master becomes aware of any of the following, if the vessel is within or about to enter the NORDREG Zone:
(a) another vessel in apparent difficulty;
(b) any obstruction to navigation;
(c) an aid to navigation that is not functioning properly or is damaged, out of position or missing;
(d) any ice or weather conditions that are hazardous to safe navigation; and
(e) a pollutant in the water.70

The final report (FR) must be provided
(a) on the arrival of a vessel at a berth within the NORDREG Zone; and

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68 NORDREG 2010, article 5 (1)
69 NORDREG 2010, article 6 (1)
70 NORDREG 2010, article 7 (1)(2)
(b) immediately before a vessel exits the NORDREG Zone.  

The deviation report (DR) must be provided when

(a) a vessel’s position varies significantly from the position that was expected based on the sailing plan report; or

(b) a vessel’s intended voyage changes from the sailing plan report.

These four different types of reports will help the Canadian government grasping the exact status of foreign vessels within the Northwest Passage as much as possible.

The NORDREG is a very detail and strict regulation about Arctic transportation. It is questionable that whether the activities of Canadian government suspected obstructing the freedom of innocent passage. It is need to briefly discuss and requiring certain procedures before implementing such heavy duty measures. Surprisingly, this regulation is unilateral activity. Fisheries Minister Gail Shea gave the reason of this unilateral action was “With mandatory reporting, the Canadian Coast Guard will be able to promote the safe navigation of vessels, keep watch on vessels carrying pollutants, fuel oil and dangerous goods, and respond quickly in the event of an accident,” For my personal review, this explanation is reasonable and hardly refute. According to the article 2 of NORDREG the out range of the traffic services zone same as the EEZ out range. That will cause the situation which the foreign vessels need to follow the report regulations when they were navigating into the Canadian EEZ.

According to the purposes and the specific regulations, the NORDREG could be regarded as Vessel Traffic Services (VTS). The NORDREG is created for enhancing the safety of vessels, crew and passengers, and safeguarding the unique and fragile Arctic marine environment. The Regulations are designed to ensure that the most effective services are available to accommodate current and future levels of marine traffic. VTS is governed by SOLAS Chapter V Regulation 12 together with the Guidelines for Vessel Traffic Services adopted by the International

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71 NORDREG 2010, article 8 (1)
72 NORDREG 2010, article 9 (1)
73 Canadian Coast Guard, [http://www.ccg-gcc.gc.ca/eng/MCTS/Vts_Arctic_Canada](http://www.ccg-gcc.gc.ca/eng/MCTS/Vts_Arctic_Canada), 2015-1-7
Maritime Organization on 27 November 1997 which read: “Vessel traffic service (VTS) - a service implemented by a Competent Authority, designed to improve the safety and efficiency of vessel traffic and to protect the environment. The service should have the capability to interact with the traffic and to respond to traffic situations developing in the VTS area.” Vessel traffic services were recognised by the revised SOLAS Chapter V on Safety of Navigation, regulation 12 (SOLAS 74, V/12), adopted in December 2000 and entered into force on 1 July 2002.74

United States as the country that attaches great importance to the freedom of maritime transportation had to express its position about NORDREG. On March 19, 2010 the Embassy of the United States of America submitted a document to Canadian government about NORDREG also showed its questions about the regulations. “We wish to take this opportunity to express our concerns that the new regulations appear to be inconsistent with international law, including UNCLOS Article 234.”75

But that situation will inconsistent or kind of violent the rules of United Nations Convention on the Law of the Sea (UNCLOS after mentioned). The first question was about the NORDREG violent the navigation freedom rights in EEZ. While article 234 of the UNCLOS allows Coastal States to adopt and enforce certain laws and regulations in ice-covered areas within the limits of the exclusive economic zone, these laws and regulations must be for the prevention, reduction and control of marine pollution from vessels and have “due regard to navigation.” The general objective of the article 234 is to balance the interests of the coastal state in the specified ice-covered area with the general interest of international navigation, stated in the “due regard to navigation” reference. The United States does not believe that requiring permission to transit these areas meets the obligation set forth in article 234 of having due regard to navigation.

Second question was about that the article 234 of UNCLOS should be non-discriminatory. “The proposed regulations rely on Canada's Shipping Control Act, which exempts vessels chartered to the Canadian Forces.

However, it appears neither the Shipping Control Act nor the proposed regulations contain a provision for similarly-situated foreign vessels. This would be discriminatory, in contravention of UNCLOS Article 234.  

The third one is about NORDREG did not appear to provide an exemption for all sovereign immune vessels. However, UNCLOS article 236 specifies that article 234 is among those provisions of the Convention that “do not apply” to sovereign immune vessels. In fact, to this point of query there was a statement in the submission document from Canada to IMO. The statement is said that: “Pursuant to article 236 of the UNCLOS, States, whose vessels have sovereign immunity from the provisions of this Convention regarding the protection and preservation of the marine environment, shall ensure that such vessels act in a manner consistent, so far as is reasonable and practicable, with the Convention. As such, sovereign immune vessels are requested to voluntarily comply with NORDREG for safety of navigation and environmental protection.” This statement could be regarded as the official explanation of Canada and also the respond for the query of NORDREG in such problem.

Fourth, according to the UNCLOS article 234, laws and regulations adopted must be based on the “best available scientific evidence.” United States rose up query about whether the best available scientific evidence was already confirmed before NORDREG adopted. More than that, United States query about the traffic services zone under the limit of UNCLOS describes “ice-covered areas,” namely those areas covered by ice for “most of the year.” The purpose of this part, United States wanted to eliminate the qualification of NORDREG using article 234.

Finally, because of the measures enacted by Canada causing conflicts, so according to the UNCOLS section about settlement of disputes, United States emphasize that the usual process for ensuring safety of navigation and prevention of pollution from ships is to establish such measures at the

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International Maritime Organization (IMO). United States implicitly express its dissatisfaction attitude to the Canadian unilateral action. At last, the United States also reiterates its longstanding view that the Northwest Passage constitutes a strait used for international navigation. At a minimum, a measure such as the NORDREG Zone Regulations for an international strait would need to be proposed and adopted at the IMO.

The United States mainly criticize that NORDREG was a compulsory regulation made by unilateral activity. The reporting system had conflict the requirement of SOLAS part 5. In the Chapter V, Regulation 12 (3), it reads: “The use of VTS may only be made mandatory in sea areas within the territorial seas of a coastal State.” The Canadian government responded the United States by submit a report to IMO. Canada asserted that it was not obligated to submit the NORDREG system to the IMO for approval. Canada thought coastal state can adopt and enforce within its 200 nautical mile zone laws containing more stringent standards than the existing internationally accepted rules and it is a unilateral right of the coastal state and not subject to pre-approval or review by IMO. Canadian government further explained: The article 211 (5) of UNCLOS clearly mentioned that: “Coastal States may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.” But the article 234 of UNCOLS is a separated provision. It is not under the system about dealing with the pollution of maritime environment. So it is unique and just applies on the “ice cover regions”. So far, the uncertain status of NORDREG zone is still no agreement settled.

In terms of the disputes between Canada and United States about whether the NORDREG consistent under the article 234 of the UNCLOS, the dispute settlement of the UNCLOS could be a possible solution about such problem. Before the final result of the legal status of NORDREG, the interim measures could solve or subside the disputes temporarily.

The Northwest Passage now still covered by Canadian administration. Although many States argued the international strait legal status to Northwest Passage, Canada government has not accepted it. Canada government treats the Northwest Passage as its internal water, but it does not oppose that Northwest Passage could be used for international navigation. It does not mean Canada government protects the freedom right of transport within Northwest Passage. The restrict control of Northwest Passage brings positive significance about environmental protection within Arctic. On the other hands, the report measures substantially increased the cost of vessels using the Northwest Passage. Many types of reports need to be submitted frequently, report system and other control measures obviously got negative influences on freedom rights of transportation. Besides that, the bilateral agreement between Canada and U.S. gave the U.S. vessels better status than other foreign vessels. It also provoked other argument for non discriminatory regulations which required on article 234 of UNCLOS. As the increasing demand of using Northwest Passage for international trade, the conflict of between Canada and other interest States will revive in the near future.

2.1.6 Assessment of Canadian Arctic legislation

Canada always attaches great importance to and also devoted to strength the control of the Arctic. As mentioned above, the Canadian government implements series of strict regulations to administrate the Arctic. Reviewing the changes of Canadian Arctic legislations and policies, from the initial requirement, sector theory to AWPPA and NORDREG, the conversion of the legal logic is the most notable aspect. The change is from to contesting the sovereignty accepted by international world switch to using the environmental protection as a reason to implement the substantial measures in order to achieving the practical control of its Arctic region. It will gain the objections from international public if simply claiming that the
Northwest Passage or other water areas as the internal water of Canada and exclude the applying of transit passage or other international transportation principle. In spite of Canada never opposed that the Northwest Passage used for international navigation, the only condition beyond is the foreign vessels need to comply with the rules from Canadian domestic law. After the AWPPA, the Canadian government focuses on the Arctic environmental protection and using it as a reason to implement series powerful measures. Such measures are very strict but also reasonable and fair. Although Canadian government does not abandon the sovereignty claims but the focus of practical implementations express such conversion. The objections from the international world are against the strict regulations not point to the sovereignty claiming itself; despite they have approximately the same effect.

In addition, at the former period, the Canadian government simply claiming the sovereignty rights by using sector theory to the Arctic region. Such activities were reasonable for seeking to maximum the interests of domestic. In this period, Canada was resulted in the situation that international objection on its Arctic policy. After while, the cooperation and activities under the bilateral even multilateral framework became the mainstream of the international world. Most of the important international conflicts and widely relating issues were solved or under the progress of settlement by bilateral and multilateral efforts. But according to the AWPPA and NORDREG, Canada is still taking the unilateral measures to consolidate the administration on the Arctic. That is the main reason why United States does not consistent with Canada in the Arctic shipping lanes issue. The United States is the biggest States of maritime industries. It may create conflicts if every coastal States enacting unilateral regulations to deal with the widely interference issues. Actually, the United States opposes the unilateral activities rather than the AWPPA or NORDREG themselves and that is the reason why United States reached an agreement with Canadian government. But the problem is it may perfectly solve the conflicts between Canada and United States in the current time. As the development of the maritime industry and other emerging countries, it may happen that more and more countries put pressures on Canada on Arctic shipping lanes. At that time, reaching agreement with all countries will not afford the solving problems. So the legal status of the Northwest Passage or other Arctic
shipping lanes locating close to Canada are not decided by NORDREG or other domestic regulation but the coming institution made by multilateral negotiations and international efforts.

2.2 The Russian legislation and Arctic policy

2.2.1 The former period claims of Russia about the high north

As European colonial powers expanded their empires and trading routes into East Asia in the 16th Century, the search for alternative, shorter seaways to Asia began in earnest. Several expeditions – mainly organized by Great Britain and the Netherlands – were sent out to the Russian Arctic in search of a route they had named the Northeast Passage. These expeditions managed to map much of the western part of the Northeast Passage, but were all either wrecked or forced to return by the difficult ice conditions. Thus, it was not until 1879 that the Northeast Passage was “conquered”, when the Finnish-Swedish explorer Adolf Erik Nordenskiöld reached the Bering Strait onboard the steamer Vega, after having carried out a full passage from Europe, spending one winter along the way. Nordenskiöld considered the sailing conditions along the eastern part of the route to be too difficult for commercial usage. On the other hand, he was much more optimistic about the prospects for a trade route between Europe and the estuaries of the great Ob and Yenisey rivers in the Kara Sea. Nordenskiöld’s predictions proved to be accurate. While no one attempted to use the Northeast Passage for trade with Asia, from around the time of Nordenskiöld’s transit, sporadic trade voyages started on what became known as the Kara Sea Route. Norwegian sealers also started coming to the Kara Sea around this time, making considerable contributions to opening up the area for commercial navigation.86

2.2.2 The USSR period

The relevance of the Northeast Passage as an international transit waterway further diminished after the Russian Revolution in 1917, after which access to the Russian Arctic became restricted for non-Soviet vessels. The Soviets, however, made efforts to further develop the Kara Sea Route, first in the 1920s when the route was used to transport food during an outbreak of famine in Northern Russia. To the Soviet Union, the Northern Sea Route also had a military role. The route also played an important wartime role in transporting armaments and supplying the Arctic regions. After the war, the route became an integrated part of Soviet Cold War strategic plans, which also explains why the route was kept firmly closed to foreign vessels.

A first initiative to open up the Russian Arctic to foreign navigation was made by the then Soviet Minister of Merchant Marine, Viktor Bekayev, on March 28, 1967. Some Soviet scholars had argued that the so-called “sector decree,” which claims that all lands and islands, both those already discovered and those still to be discovered, in the Soviet sector belong to the USSR, also included ice blocks and surrounding seas. In view of this argument, the importance of this first attempt to open up the Northern Sea Route at the beginning of the 1967 shipping season, during the hey days of the Cold War, should not be underestimated. However, this first offer was never actually taken up by foreign shippers, as it appears to have been tacitly withdrawn in the wake of the Suez Canal crisis.

90 Some Soviet scholars had argued that the so-called “sector decree.” which claims that all lands and islands, both those already discovered and those still to be discovered, in the Soviet sector belong to the USSR, also included ice blocks and surrounding seas. In view of this argument, the importance of this first attempt to open up the Northern Sea Route at the beginning of the 1967 shipping season. Also in Franckx Erik, The Legal Regime of Navigations in the Russian Arctic, J. of Transnational Law & Policy (2009), Vol 18.2, Page 328
Apparently, the Soviet authorities did not want to offend their Arab allies by appearing to provide an alternative route to the Suez Canal.  

Northern Sea Route activity was at its peak in 1987, but as the Soviet system started to crumble, it soon became difficult for the state to uphold the high level of subsidies that was required to maintain most activities in the Arctic, and Northern Sea Route cargo volumes diminished. Simultaneously, as part of policies to open up the Soviet Union, President Mikhail Gorbachev in 1987 proposed to give foreign vessels access to the Northern Sea Route. This initiative eventually resulted in the formal opening of the Northern Sea Route to non-Soviet vessels on 1 July 1991, only a few months before the Soviet Union was dissolved. For the First Time the Northern Sea Route Opened for Foreign Shipping,” had confirmed the adoption of the “Regulations for Navigation on the Seaways of the Northern Sea Route” which would become operational on June 1, 1991. The article 1 (4) of Regulations for Navigation on the Seaways of the Northern Sea Route clearly provided that “Vessel – any ship, or other craft regardless of her nationality.” This provision showed that the Northern Sea Route could be used for international transportation. But it did not mean that USSR admitted the freedom rights of transit in Northern Sea Route changed the its position toward Northern Sea Route as a domestic shipping lanes. The article 3 of Regulations for Navigation on the Seaways of the Northern Sea Route said that: “The Owner, or Master of a vessel intending to navigate through the Northern Sea Route shall submit to the Administration (Marine Operations Headquarters) a notification and a request for guiding through the Northern Sea Route in compliance with form and deadlines … and to guarantee the payment for the icebreakers assistance.” Also article 11 clarified the liability principle: “The Administration and the Marine Operations Headquarters shall not be liable for damage inflicted on a vessel, or property on board, by guiding in ice conditions unless it is proved they are culpable for the damage inflicted.” This regulation showed the attitude of USSR toward Northern Sea Route

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92 Terence Armstrong, The Northern Sea Route in 1968-70, 12 INTER-NORD 118 (1972), Page 119
that it allowed Northern Sea Route using for international transport but foreign vessels need under control by USSR authority and comply the regulations or administration of USSR. It is obvious that USSR did not treat the Northern Sea Route as international strait and deny the foreign vessels having freedom transit rights within Northern Sea Route.

2.2.3 The post-Soviet Period

The Russian Federation mostly inherited the institutions of Northern Sea Route from USSR. The current legal regime of Arctic marine shipping in the Northern Sea Route is still based on these same 1990 Regulations.95

The Russian Federation promulgated Guide to Navigation through the Northern Sea Route in 1996. It gave more detail instrument as the supplement of 1990 Regulations. This guide, which is a very sizeable document of more than 300 pages, has been prepared by the Russian side under the International Northern Sea Route Programme.96 It consists of three main parts. In the first part, a general overview is provided both of the geographical and navigation conditions, which runs for eight pages, and of the hydro-meteorological conditions, which runs for seventy-four pages including many maps and graphics.97 The second, and most substantial, part of the 1996 Guide to Navigating consists of a detailed navigational description of the Kara, Laptev, East Siberian, and Chuckchi Seas with their straits and islands. This part extends for 195 pages and ends with a fifty seven page listing of aids to navigation, including floating, radio and lighted aids.98 The document concludes with a third part, which consists of a sixty-five page reference section where the practice of ice navigation is addressed under different conditions, with or without the assistance of icebreakers, followed by a short, two page section on salvage and rescue support.99

95 Franckx Erik, The Legal Regime of Navigations in the Russian Arctic, J. of Transnational Law & Policy (2009), Vol 18.2, Page 330
96 Franckx Erik, The Legal Regime of Navigations in the Russian Arctic, J. of Transnational Law & Policy (2009), Vol 18.2, Page 336
97 Franckx Erik, The Legal Regime of Navigations in the Russian Arctic, J. of Transnational Law & Policy (2009), Vol 18.2, Page 337
98 Franckx Erik, The Legal Regime of Navigations in the Russian Arctic, J. of Transnational Law & Policy (2009), Vol 18.2, Page 337
99 Franckx Erik, The Legal Regime of Navigations in the Russian Arctic, J. of Transnational
2.2.4 Russian Federation Federal Law on Amendments 2012

The full name of the federal law amendments is “The Russian Federation Federal Law on Amendments to Special Legislative Acts of the Russian Federation Related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route”. This amendment was adopted by the State Duma on July 3, 2012 and approved by the Council of Federation on July 18, 2012. The president of the Russian Federation V. Putin signed this amendment on July 28, 2012. This amendment included 4 Clauses, because this amendment is so important so I provide these 4 Clauses below.

Clause 1:
“Icebreaker assistance to vessels, ice pilotage channeling for vessels in the water area of the Northern Sea Route” Here the Russian Federation government brought the concept of “water area” into the Federal Law on Natural Monopolies.

Clause 2:
Clause 14 of the Federal Law dated July 31, 1998 N 155-ФЗ On Internal Sea Waters, Territorial Sea and Adjacent Zone of the Russian Federation to be formulated as follows:
"Clause 14. Navigation in the water area of the Northern Sea Route Navigation in the water area of the Northern Sea Route, the historically emerged national transportation route of the Russian Federation, shall be performed according to the commonly accepted principles and norms of the international law, international agreements of the Russian Federation, this Federal Law, other Federal Laws and other regulatory legal documents issued in relation with the above”.

The draft introduced by the Government for evaluation by the Duma, and which was approved after the first reading, did not include such reference. Moreover, just days before the second reading, the text prepared by the working group under the State Duma Committee for Transport, which

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100 All Clauses from “The Russian Federation Federal Law on Amendments to Special Legislative Acts of the Russian Federation Related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route”
included several proposed amendments, was published along with charts listing specific amendments recommended for adoption, as well as a separate list of amendments which were recommended for rejection. ¹⁰¹

**Clause 3:**
To amend the Merchant Marine Code of the Russian Federation as follows:
1) Paragraph Five, Clause 2 after the word “pilotage” to be complemented with “, ice pilotage”;
2) in Item 4, Clause 5:
   a) in Paragraph One the word “lines” to be replaced with the word “water areas”;
   b) in Paragraph Two the words “on the lines” to be replaced with the words “in the water area”;
3) to add Clause 5.1 with the contents as follows:
   "Clause 5.1. Navigation in the water area of the Northern Sea Route
   (1). “The water area of the Northern Sea Route shall be considered as the water area adjacent to the Northern coast of the Russian Federation, comprising the internal sea waters, the territorial sea, the adjacent zone and the exclusive economic zone of the Russian Federation …”
   (2). The navigation rules in the Northern Sea Route water area approved by the executive body authorized by the Government of the Russian Federation shall be applied to ensure safe navigation as well as to prevent, minimize and control the sea environment pollution by vessels, and contain organization procedures for navigation, rules of icebreaker support for vessels, rules of ice pilotage channeling support, rules of vessels pilotage on the lines, regulations of navigation and hydrographic and hydro-meteorological support for navigation, rules of radio communication during navigation and also other regulations related to organization of navigation in the water area of the Northern Sea Route.

The third paragraph is very notable provision. This provision is one of the most important changes in the amendment. The Russian Federation established the Northern Sea Route Administration as the authority to administrate the issues of Northern Sea Route and clarify the duties. There is inappropriate to set an authority but the power of permit procedure. The

permit procedure contains: “permits for navigation in the water area of the Northern Sea Route, review of such applications and issuance of permits for navigation in the water area of the Northern Sea Route”. This is the explicit position of Russian Federation that the Northern Sea Route is a domestic shipping lane belongs to Russia.

In the paragraph 4, it reads: “Permits for navigation in the water area of the Northern Sea Route … are issued if the vessel complies with the requirements related to navigation safety and marine environment protection from pollution by vessels (associated with the water area of the Northern Sea Route) and the rules of navigation in the water area of the Northern Sea Route as established by international agreements of the Russian Federation, the law of the Russian Federation, … and submits the documents to confirm insurance required by international agreements of the Russian Federation, the law of the Russian Federation, or other financial security of civil liability against damage caused by pollution or other damage caused by the vessel.”

In the paragraph 5 of the amendment, it also regulated the fee of navigation for foreign vessels. “The amount of payment for icebreaker support and ice pilotage channeling in the water area of the Northern Sea Route shall be determined according to the Natural Monopolies Law of the Russian Federation considering the vessels’ tonnage, the vessel’s ice class, the distance of channeling, and navigation period.
The payment for icebreaker support and ice pilotage channeling in the water area of the Northern Sea Route shall be effected based on the amount of services actually delivered.”

The Clause 4 is about the effective date which is coming into effect on expiration of one hundred and eighty days after the date of its official publication.

For the convenience of read, the important words of clauses were marked on above. According to the Clause 4 this amendment had already come into force on January 28, 2013. The Russian Federation government gave an explanatory note to clarify the reasons of issuing this amendment102.

102 Explanatory Note to the Draft of Federal Law “On Introduction of Changes to Some
According to this explanation document the amendment issued in order to address safety issues of shipping in the water area of the Northern Sea Route. “The provisions of the draft law are aimed at coordination of the available management system of the Northern Sea Route and the doctrine of the Russian Federation approved by the President of the Russian Federation as related to the support of the national interests in the Arctic.” Also: “The reforms in Russia in the beginning of 1990s introduced significant changes to the management system of the Northern Sea Route and arrangement of ice pilotage of the vessels through the Northern Sea Route…. In order to manage the navigation through the Northern Sea Route (including shipping of the international vessels) by the federal executive authority empowered by the Government of the Russian Federation the Rules of navigation in the water area of the Northern Sea Route shall be developed.” Same with Canada government, Russian Federation government also quoted article 234 of UNCLOS as its justification: “The UN Convention on the Law of the Sea of 1982 empowered the coastal states to adopt and provide observance of the non-discriminatory laws and regulations in the regions within the exclusive economic zone covered with ice for the most of the year…The draft law (means the amendment) is appealed for specification of the legal status and borders of the water area of the Northern Sea Route as well as the status of the Administration of the Northern Sea Route to be established as the federal state enterprise. It is necessary to determine the federal executive authorities responsible for assurance of navigation safety and prevention of pollution of the Arctic marine environment from the vessels, including pilotage of the vessels through the recommended routes, in the water area of the Northern Sea Route as well as ice-breaker pilotage and ice pilotage of the vessels in the water area of the Northern Sea Route, within the federal legislation by introducing changes to the relevant federal laws.”

The Russian Federation was strengthening the control to the Northern Sea Route by issuing Federal law amendment. The most important amend is adding the conception of “Northern Sea Route water area”. Actually, the

Northern Sea Route is a collection concept of shipping lanes. It contains many different lanes. So in the former time, it may a little difficult to identify that whether foreign vessels used Northern Sea Route when they were navigating in the water areas which have distance between the coastal lines of Russian Federation. For example, foreign vessels navigating within the EEZ of high north area of Russia were hardly confirmed that they were using Northern Sea Route. If foreign vessels did not use Northern Sea Route, according to the former Federal law the authority of Russia could not supervise or administrate those vessels. This amendment filled such hole of imperfection. Russian Federation raised the all “Northern Sea Route water area” under the control of authority. The final influence is all foreign vessels should submit applications to the authority of Russian Federal and then get the permission, after vessels shall use and navigate within the Northern Sea Route. This situation is more like the measure taken by Canadian government. The key point of Canadian and Russia measure is adopting restrict institution in the Northern Sea Route and Northwest Passage as the reason of pollution protection. The difference is Russian Federation has higher degree. The following result is negatively impact the freedom transportation rights. Although article 234 of UNCLOS has special regulation applying on ice-cover area, the action of Russian Federation which implement such restrict regulation in the whole Northern Sea Route water area is still worth to discuss.

2.2.5 Rules of Navigation on the Water Area of the Northern Sea Route

To better implement the amendment of 2012, Russian Federation promulgated Rules of Navigation in the Northern Sea Route Water Area on 17 January 2013. This rules document became the detail legal reference for the navigating vessels in Northern Sea Route Water Area after 2012 amendment. This rule “establish the order of the organization of navigation of ships, the icebreaker assistance, the ice pilotage of ships, the track assistance of ships, provision on the navigational-hydrographic and hydrometeorological support of the navigation of ships, the radio communication of the navigation of ships, requirements to ships in relation to the safety of navigation and protection of the marine environment against the pollution from ships and other provisions relative to the organization of
the navigation of ships in the water area of the Northern Sea Route.\textsuperscript{103}

No surprise, this rule included the reporting system about foreign vessels as well as Canadian NORDREG. Moreover, the procedures of report system are more complex than Canadian. At first, management of the navigation of ships in the water areas of the Northern Sea Route is realized by the Northern Sea Route Administration.\textsuperscript{104} Granting permission for the navigation of ship in the water area of the Northern Sea Route is effected by the Northern Sea Route Administration on the basis of application of shipowner, representative of shipowner or ship master with the indication of full denomination and (if any) of identification number of the International Maritime Organization, family name, first name, patronymic (if any) of the applicant, contact phone, fax, e-mail address for a physical person. The application should contain the confirmation that shipowner ensures the compliance of ship with the present Rules prior to the entering of ship into the water area of the Northern Sea Route.\textsuperscript{105} This compulsory confirmation is the extra control of authority. Also it could prove some important issues as evidence when conflicts happen. The application with the documents is to be sent to the e-mail indicated in the contact information on the official site of the Northern Sea Route Administration in Internet not earlier than 120 calendar days and not later than 15 working days before the intended date of the entering of ship into the water area of the Northern Sea Route.\textsuperscript{106} The Northern Sea Route Administration considers the application within 10 working days since its reception for consideration.\textsuperscript{107} In case of the decision of the Northern Sea Route Administration to refuse permission for ship to navigate in the water area of the Northern Sea Route, a notification is to be sent by e-mail to the applicant signed by the head of the NORTHERN SEA ROUTE Administration (or by a substituting person) with the indication of reasons of the refusal to grant the permission.\textsuperscript{108} Here is another tricky place that the rules do not clearly explain in what situation the application might be refused in advance.

\textsuperscript{103} Rules of Navigation on the Water Area of the Northern Sea Route, Item 1
\textsuperscript{104} Rules of Navigation on the Water Area of the Northern Sea Route, Item 2
\textsuperscript{105} Rules of Navigation on the Water Area of the Northern Sea Route, Item 3
\textsuperscript{106} Rules of Navigation on the Water Area of the Northern Sea Route, Item 6
\textsuperscript{107} Rules of Navigation on the Water Area of the Northern Sea Route, Item 9
\textsuperscript{108} Rules of Navigation on the Water Area of the Northern Sea Route, Item 11
Ship which was granted permission should not enter the water area of the Northern Sea Route earlier than on the date of the beginning of the term of validity of the permission and should leave the water area of the Northern Sea Route not later than on the date of the end of the term of validity of the permission. If ship can not leave the Northern Sea Route water area before the expire of the validity of the permission shipmaster immediately informs the Northern Sea Route Administration about that indicating the reasons of the violation of the requirements of the first paragraph of present item and acts according to the Northern Sea Route Administration instructions.  

The rules have a complex report procedure to make sure foreign vessels under the supervision of Russian authority as accurate as possible. When ship moves towards the water area of the Northern Sea Route from the west, 72 hours before approaching meridian 33° E (hereinafter referred to as Western boundary) and when ship moves towards the water area of the Northern Sea Route from the east, 72 hours before approaching parallel 62° N and/or meridian 169° W (hereinafter referred to as Eastern boundary) or immediately after the departure from sea port (if the navigational period of ship after the departure from sea port to the Western or to the Eastern boundary is less than 72 hours) ship master informs the NORTHERN SEA ROUTE Administration about the planned time of arrival of ship to the Western or Eastern boundary accordingly as well as sends the following information: name, IMO number, port/place of destination, maximum operating draft, type and amount of cargo carried, presence, amount in metric t and class of dangerous cargo carried of ship; also fuel capacity in metric t at the moment of report, fresh water capacity subject to the replenishment by fresh water from the ship’s distilling plant (if any) at the moment of report (number of days is specified when ship can move without the replenishment of fresh water), subsistence reserve and other types of the ship’s supply at the moment of report (number of days is specified when ship can move without replenishment of provision and of other types of supply), number of crew members and passengers and information on the malfunction of ship’s machinery and/or of maintenance facilities (if any).  

Moreover, 24 hours before approaching the Western or Eastern boundary

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109 Rules of Navigation on the Water Area of the Northern Sea Route, Item 13
110 Rules of Navigation on the Water Area of the Northern Sea Route, Item 14
ship master notifies again the Northern Sea Route Administration of the planned time of the arrival of ship to the appropriate boundary. At the departure of ship from a sea port of the Russian Federation situated in the water area of the Northern Sea Route ship master immediately informs the Northern Sea Route Administration of the time of departure as well as sends the information in compliance with above mentioned. Both entering and already into the Western or Eastern boundary ship master informs the NSR Administration of the planned time and actual time of the entrance of ship into the water area of the Northern Sea Route, geographical coordinates, track and speed of ship at the moment of report. After the completion of navigation in the water area of the Northern Sea Route on leaving the water area of the Northern Sea Route ship master informs the Northern Sea Route Administration of the actual time of leaving the water area of the Northern Sea Route, geographical coordinates, track and speed of ship at the moment of report.

All above shows the situation that the Russian Federation established a complex and cumbersome procedures to administrate the foreign vessels using Northern Sea Route. For example, if a ship willing to cross the Northern Sea Route, it needs 4 times to report its situation to the Northern Sea Route Administration. The time point of these 4 reports are 72 hours before approaching the boundary of Northern Sea Route water area, 24 hours before approaching the boundary, while entering (the planned time and actual time of entering the area could be considered as one time because of the short time interval) the Northern Sea Route water area and also the time that leaving the Northern Sea Route. Not finish, when ship moves on seaways in the water area of the Northern Sea Route after crossing the Western or Eastern boundary and before leaving the water area of the Northern Sea Route once a day at 12.00 of Moscow time ship master sends to the Northern Sea Route Administration. The report should include 17 terms of information which are: name of ship and her IMO number, geographical coordinates of ship (latitude and longitude), planned time of the ship leaving the water area of the Northern Sea Route or planned time of the arrival of ship to the seaport situated in the water area of the Northern

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111 Rules of Navigation on the Water Area of the Northern Sea Route, Item 15
112 Rules of Navigation on the Water Area of the Northern Sea Route, Item 16
113 Rules of Navigation on the Water Area of the Northern Sea Route, Item 18, 19
114 Rules of Navigation on the Water Area of the Northern Sea Route, Item 20
Sea Route, route of ship with an accuracy of one degree, speed of ship in knots with an accuracy of one knot, type of ice, thickness of ice in meters and concentration of ice in points, temperature of ambient air and also outside water in centigrade degrees with an accuracy of one degree, direction of wind with an accuracy of 10 degrees, speed of wind with an accuracy of one meter per second, visibility in nautical miles with an accuracy of one mile, during the movement of ship in open water – height of waves in meters with an accuracy of one meter, amount of fuel and fresh water aboard in metric tons, information on accident with a crew member, passenger or ship (if any), information on the detected malfunction or lack of navigational equipment (if any) and other information regarding safety of navigation and protection of the marine environment against pollution from ships (if any).\textsuperscript{115} At Last, in case of the detection of pollution of the environment ship master immediately informs about that the Northern Sea Route Administration.

Compared to the Canadian Arctic administration institution, Russian institution is more focus on icebreaker assistance regime. In the third part of the 2013 Rules, Russian Federation used 11 items to express its icebreaker assistance regime and other detail regulations. In the 21 item of 2013 Rules it was clearly express that “Icebreaker assistance is rendered by the icebreakers authorized to navigate under the State flag of the Russian Federation.” This provision was derived from Article 15 of the Federal Law dared April 30, 1999, “Code of commercial navigation of the Russian Federation”. This is the compulsory icebreaker assistance regime. It is more like a compulsory service for foreign ships. The reason of compulsory icebreaker assistance explained by Russian Federation was located the Item 22 of the 2013 Rules. Icebreaker assistance involves ensuring safety of navigation of ship in the water area of the Northern Sea Route the ship being in the zone covered by radio communication with icebreaker on channel 16 of very high frequency, namely the ice reconnaissance by icebreaker making channels in ice, formation of a group of ships and allocation of ships following the icebreaker/icebreakers, sailing of ship through the channel behind icebreaker in tow, without towing in the independent mode or within a group of ships.\textsuperscript{116} In compliance with item 5

\textsuperscript{115} Rules of Navigation on the Water Area of the Northern Sea Route, Item 42
\textsuperscript{116} Rules of Navigation on the Water Area of the Northern Sea Route, Item 22
of article 5 of Code of commercial navigation of the Russian Federation the
fee rate of the icebreaker assistance of ship in the water area of the Northern
Sea Route is determined according to the legislation of the Russian
Federation about natural monopolies taking into account the capacity of
ship, ice class of ship, distance of the escorting and period of navigation.\textsuperscript{117}
This provision also is one of the reasons about international criticisms on
the high expense of compulsory icebreaker assistance. The fee of icebreaker
assistance is determined by unilateral criteria. Point and time of the
beginning and end of the icebreaker assistance of ship are agreed by
shipowner with the organization rendering service of the icebreaker
assistance in the water area of the Northern Sea Route.\textsuperscript{118} The ice convoy is
under control of master of the icebreaker rendering the icebreaker assistance
of ships.\textsuperscript{119}

There is other things worth to mention that in annex 2 of 2013 Rules Russia
offered a very detail and specific document which is criteria of the
admission of ships to the Northern Sea Route in compliance with category
of their ice strengthening. It regulated that different category of ice
strengthen ships have different navigating period of the year. This criterion
is useful and efficient on ice cover environmental protection also accord
with the international law.

All in all, as the biggest Arctic States, Russian Federation established a
specific and strict supervision system and administration institution.
Compared to Canadian supervision system, Russia have more firm attitude
to the status of Arctic water. It has more complex and strict measures to
control foreign vessels navigating within the Arctic. The result of such strict
control is the negative influence on freedom rights of transportation in the
Arctic Ocean. Compared to the Northwest Passage, Northern Sea Route is
more wide and more attractive to the cross Arctic shipping. In the near
future, the debate about navigating freedom and navigating control might
become the eye-catching topic.

\textsuperscript{117} Rules of Navigation on the Water Area of the Northern Sea Route, Item 24
\textsuperscript{118} Rules of Navigation on the Water Area of the Northern Sea Route, Item 25
\textsuperscript{119} Rules of Navigation on the Water Area of the Northern Sea Route, Item 27
2.3 The other policies or attitudes of interest
States or organizations

No doubt that Russia and Canada are the two biggest States around the Arctic Circle. But Arctic has 5 coastal States. Every coastal State has the same important status and has the same rights about Arctic issues. After the Arctic Council established in 1996, international organizations became more and more powerful and accountable. So besides Russia and Canada, other Arctic coastal States and international organizations about Arctic issues may greatly impact the Arctic transportation issues. For the Canada government and Russian Federation using the environmental protection as the reason of applying the strict domestic regulation, the Arctic coastal States and international organizations have their interests and also policies about it. It is a regional environmental topic and it is profitable aspect for coast States. Moreover, because of the unique and special geographic location of the Arctic shipping lanes, the Arctic shipping lanes must be the aspect with big significance for international trade and globalization procedure. Naturally, Arctic transportation issues attract attentions from neighbor States. Every coastal State might express its attitude based on its own interest.

2.3.1 The attitude of U.S. on Arctic shipping lanes

The attitude of United States is consistent towards Arctic shipping lanes. The U.S. position is the Arctic shipping lanes is international shipping lanes and foreign vessels have freedom rights of transit. On January 9, 2009 United States published National Security Presidential Directive and Homeland Security Presidential Directive. The main topic of this document was about the United States’ policies of Arctic. “The United States exercises authority in accordance with lawful claims of United States sovereignty, sovereign rights, and jurisdiction in the Arctic region, including sovereignty within the territorial sea, sovereign rights and jurisdiction within the United States exclusive economic zone and on the continental shelf, and appropriate control in the United States contiguous zone.”

In this document, there were some parts about Arctic shipping lanes: “Freedom of the seas is a top national priority. The Northwest Passage is a strait used for international navigation, and the Northern Sea Route includes straits used for international navigation; the regime of transit passage applies to passage through those straits. Preserving the rights and duties relating to navigation and overflight in the Arctic region supports our ability to exercise these rights throughout the world, including through strategic straits.”\(^{121}\) To be noticed, part of the Northwest Passage located under the territorial sea of U.S. Alaska. So the position of U.S. could be presumed also applying on the shipping lanes in the U.S. territorial waters.

From now, the position of United States is not changed. The suggestion of United States to deal with the conflicts of Arctic transportation is according to the framework of UNCLOS, like transit right and innocent passage right, and other international law and using bilateral measures. Because of the U.S. is the most competitive country in the world on ocean transportation, its overemphasized the values of transit freedom met the oppositions from the States like Canada and Russian Federation.

### 2.3.2 The attitude of European Union on Arctic shipping lanes

The rapidity of change in the Arctic provides a strong rationale for the EU’s commitment to environmental protection and the fight against climate change. It also calls for increased EU investment in climate change research in the Arctic, as a basis for further global and regional action.\(^{122}\) The European Union has an important role to play in supporting this successful co-operation and in helping to meet the challenges that now confront the region. The European Union is the world’s strongest proponent of greater international efforts to fight climate change, through the development of alternative energy sources, resource efficiency and climate change research.


It has three (Denmark, Norway, Finland, Swedish and with Iceland potentially four) Arctic Council states amongst its members. The European Union is also a major destination of resources and goods from the Arctic region. Many of its policies and regulations therefore have implications for Arctic stakeholders. The European Union wants to engage more with Arctic partners to increase its awareness of their concerns and to address common challenges in a collaborative manner.\footnote{European Commission & High Representative if the European Union for Foreign Affairs and Security Policy. Joint Communication the European Parliament and the Council: Developing a European Union Policy towards the Arctic Region: Progress since 2008 and next steps, Brussels, 26.6.2012}

On the December 8, 2009 at the 2985\textsuperscript{th} Foreign Affirms council meeting in Brussels, the Council of the European Union promulgated the Council conclusions on Arctic issues. It had clarified provisions to show the position of European Union on Arctic shipping lanes. “The Council considers that an EU policy on Arctic issues should be based on: …The United Nations Convention on the Law of the Sea (UNCLOS) and other relevant international instruments; …Maintaining the Arctic as an area of peace and stability and highlighting the need for responsible, sustainable and cautious action in view of new possibilities for transport, natural resource extraction and other entrepreneurial activities linked to melting sea ice and other climate change effects…The Council believes that the EU should actively seek consensus approaches to relevant Arctic issues through cooperation also with Arctic states and/or territories outside the EU, Canada, Greenland, Iceland, Norway, the Russian Federation and the United States, as well as with other relevant actors with Arctic interests…With respect to the gradual opening, in the years to come, of trans-oceanic Arctic routes for shipping and navigation, the Council reiterates the rights and obligations for flag, port and coastal states provided for in international law, including UNCLOS, in relation to freedom of navigation, the right of innocent passage and transit passage, and will monitor their observance.” \footnote{Council of The European Union, Council conclusions on Arctic issues, 2009-12-8}

Nowadays, the European Union has its own foreign and security policy, enabling it to speak – and act – as one in world affairs. In an international and globalised world the 28 States that are members of the EU have greater weight and influence when they act together as the European Union rather
than 28 individual players.

2.3.3. The Asian States and Arctic shipping lanes

Shipping companies in China and Japan said they would start a regular service to carry Siberian natural gas across the Arctic Ocean to East Asia, showing how Asian demand for the fuel is reshaping global shipping routes. After a lengthy courtship, China and India formalized their relationship with the Arctic Council in May 2013 by gaining admission as official observer states. In the months since, both countries have been actively seeking influence with the Council’s permanent members to further establish footholds in a region certain to emerge as a central arena of 21st century geopolitics, scientific research and commerce.

Initial estimates suggest the current 40-day, 22,000-kilometer voyage from northern Europe to East Asia (routed through the Suez Canal and Strait of Malacca) could be transformed into a 30-day, 15,000-kilometer trip via the Northern Sea Route. That potential reduction, coupled with the ongoing security risks surrounding overreliance on shipping via the Suez Canal and Gulf of Aden, is leading Japanese and South Korean commercial interests to bet on the gradual emergence of the Northern Sea Route as a valuable alternative, and to position their investments accordingly. Mere months after gaining an observer seat at the Arctic Council, for example, Japan’s Asahi Kasei Chemicals Corp. performed a test run of the Northern Sea Route, importing 80,000 tons of oil products from Norway. South Korea, meanwhile, advanced plans late last year to assist Russia in upgrading port infrastructure along its northern coast in preparation for a time – possibly as early as 2050, according to a recent University of California Los Angeles study – when seasonal sea-ice coverage will have declined to such an extent that ships transiting the Northern Sea Route may not need ice-breaking escorts during the months of June, July, August and September.

Well positioned to capitalize upon the commercial benefits that increased

Arctic shipping may provide, Japan and South Korea are hopeful that the Northern Sea Route will become increasingly safe and accessible in the medium to long terms. For Singapore, however, the prospect of expanding Arctic shipping has entirely different implications. With the rise of maritime traffic above the Arctic Circle, a growing number of international shipping interests may choose to bypass the Strait of Malacca, the congested maritime transit corridor connecting the Indian and Pacific oceans that Singapore has anchored for centuries.

Since gaining an observer seat at the Arctic Council last May, Singapore has been using its position primarily to gain insights from permanent Council members about the emerging outlook for increased Arctic shipping. Singapore’s position as the critical maritime crossroads connecting European and Asian markets brought this small city-state enormous wealth and outsized geopolitical influence, making it a top global hub for oil refining, finance and ship repair. It is also one of the most active seaports in the world. Increasingly busy with each year, between 2005 and 2012, the total cargo volume passing through Singapore rose 27 percent, from 423,267,600 tonnes to 538,012,100 tonnes.\textsuperscript{127} Despite such impressive growth in recent maritime traffic, the long-term rise of the Northern Sea Route as a commercial maritime corridor might threaten shipping’s role as key sector of the Singaporean also other Asian States’ economy.

Asia States will be the biggest gainer of Arctic shipping lanes in the future. For the development of States like China, India and Malaysia, the maritime shipping activities will be propeller to the international trade in such countries. Moreover, the Asian developed countries like Japan and South Korea also need the efficient Arctic shipping lanes to relieve the pressures of energy and promote the international trade. In terms of the Arctic shipping lanes, the Asia States are within the same community of interests. In this background and added the relatively far location, the freedom of navigation must be the value which Asian States most concerned.

\textbf{2.3.4 The attitudes of Canada and Russian Federation toward each other}

On 6 August of 1985, while Polar Sea voyage just occurred, Evgeni Pozdnyakov of the Soviet embassy in Ottawa said that “his Government supported Canada’s position that the Northwest Passage is Canadian internal waters just as the Soviet Union believes that the Northeast Passage belongs to them.” He added that Soviet ships would probably not attempt the Northwest Passage “in the foreseeable future because it is easier and cheaper for Soviet ships to use the Northeast Passage to go from west to east.”128 After that, there is no evidence of any prior or subsequent statements of support by the Soviet Union or Russia for Canada’s position, nor any evidence of Canadian statements in the reverse. Although these two biggest Arctic States applying almost the same method of administration, but from now no recognitions reaches from each other States.

2.3.5 The Arctic Council description on Arctic shipping

The governance of shipping activities in the Arctic might be described as a complicated mosaic. The Law of the Sea, as reflected in 1982 United Nations Convention on the Law of the Sea, sets out the legal framework for the regulation of shipping according to maritime zones of jurisdiction. Other international agreements address specific elements of shipping such as marine pollution prevention standards, ship safety, seafarer rights and qualifications and liability and compensation for spills.129 Also in this report, it mentioned that Canada and Russian Federation have adopted special national legislation for shipping within their EEZ. This report gives UNCLOS very high assessment: “The Law of the Sea, as reflected in UNCLOS, has struck a balance among the powers of coastal states, flag states and port states to exercise jurisdiction and control over shipping. The jurisdictional status of some Arctic waters, in particular internal waters and straits used (or potential used) for international navigation, remains controversial and could give rise to future disputes concerning the exercise of national jurisdiction over international navigation through those

129 Governance of Arctic Shipping, Arctic Marine Shipping Assessment 2009 Report, Arctic Council, Page 50
waters."\textsuperscript{130}

\textsuperscript{130} Governance of Arctic Shipping, Arctic Marine Shipping Assessment 2009 Report, Arctic Council, Page 51
3. The Arctic shipping lanes and historical water

Both Canada and Russia claim “historic” title to waters within the Arctic shipping lanes. Canada claimed that waters within the Canadian Arctic archipelago were historical waters of Canada. Russia used “historical straits” as a reason to claim historical waters within Arctic shipping lanes as well. The historical water is an academic concept as there is no clear legal basis in general international law or treaties. It is not rare that many States using “historical water” or “historical” title. The recognitions of historical waters have implications for the status of certain waters. If waters was classified as “historic” they could come under the sovereignty of claiming State and recognized as internal waters. So the “historic water” claims are very useful methods to changing legal status of certain water areas. The historical water claims of Canada and Russia consequently may have major implications for international navigation through whole or parts of the Arctic shipping lanes.

In this chapter, the main question to be discussed is whether Canada and Russia’s historical waters claims are legitimate. The main opinion is negative because the sovereignties of both Canada and Russia are not substantially involved in the Arctic Ocean in the historical period. In the historical period, indigenous people were mainly used Arctic Ocean as “land” but not water.

First, the conditions for claiming historical waters are presented before assessing their claims of Canada and Russia.

3.1 The constituents of “historical waters” and “historic” title
First of all, there is no explicit definition in the international law of “historical water” or other phrases including “historic” titles like “historic bay”. The relating concept mentioned by international law is the adjective “historic” used for describing the relating rights of bays or waters in the Convention on the Territorial Sea and Contiguous Zone (Contiguous Convention thereafter) and the UNCLOS. In the Contiguous Convention, article 7 mentioned the exclusive use of “historic bay”. Also “historical title” in the article 12 of the Contiguous Zone which read: “… shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.” In the UNCLOS, article 10, 15 and 298 have relating description about “historic” concept. Beside that, international laws are silence on this concept. The Contiguous Convention is the most relating international and widely influences convention about “historical title” or other “historical rights”. Even it is specifically used in the many international treaties and conventions but there is also no clear definition on the “historical title” or other similar phrases.

The historic waters currently used as an academic word or specifically an excuse for exceptional claims in the maritime field. Both Canada and Russia use “historical waters” or other similar concept as one of the reasons of the claims to rights in the Arctic water. Canada claims that the Arctic waters of the Northwest Passage constitute internal waters under historic title, and thus fall under full Canadian sovereignty.\(^\text{131}\) The first clear statement of the Canadian position to that effect was made in 1973 by the Bureau of Legal Affairs and read as: “Canada also claims that the waters of the Canadian Arctic Archipelago are internal waters of Canada, on a historical basis, although they have not been declared as such in any treaty or by any legislation.”\(^\text{132}\) Russian Federation was using “historically belong”\(^\text{133}\) as the supports of their territorial claims.

Although there is no official and wide accepted definition about “historical”

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\(^\text{131}\) Robert Dufresne, Controversial Canadian Claims Over Arctic Waters and Maritime Zones, Law and Government Division, January 2008, Page 2
\(^\text{133}\) Article 4, Federal Act on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation
relating concepts, United Nations issued a report on these questions (hereafter Historical waters report) in the preparation of the work of the International Law Commission on the law of the sea.134 In 1967, the 19th session of the International Law Commission began to discuss the “historical waters” and “historical bay” topics. Many of its members doubted whether the time had yet come to proceed actively with these topics. Both concepts were of considerable scope and raised some political problems. There were concerns that, and to undertake either of them at the present time might seriously delay the completion of work on the important topics already under study, on which several resolutions of the General Assembly had recommended that the Commission should continue its work.135 One of the lesser problems which, at least in a preliminary way, should be clarified is the terminological question arising from the use in theory and practice rather indiscriminately of the terms “historic bays” and “historic waters”. These two terms are obviously not synonymous; the latter term has a wider scope, as is also apparent from the expression used in the resolutions of the Conference on the Law of the Sea and the General Assembly, namely, “historic waters, including historic bays”.136

According to the Historical waters report, there were two main factors which be considered important for defining historical waters. One important factor was the controversial status of the international legal rules relating to the delimitation of the maritime territory of the State. Without taking a position regarding the question whether or not there ever was a generally accepted maximum width of the territorial sea or a maximum breadth of the opening of bays, it can safely be said that these questions through the ages were enveloped in controversy and therefore appeared to both lawyers and laymen as subject to doubt.137 In these circumstances it was natural that States laid claim to and exercised jurisdiction over such areas of the sea adjacent to their coasts as they considered being vital to their security or to their economy. The second important factor in the development of the

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134 Juridical Regime of Historic Waters including Historical Bays – Study prepared by the Secretariat, Yearbook of the International Law Commission 1962, Vol. II.
concept and theory of “historic waters” was the attempts, official and unofficial, to substitute for the controversial and doubtful international law relating to the delimitation of territorial waters a set of clear cut, generally acceptable, written rules on the subject.\textsuperscript{138} The proposed rules would stand a better chance of being accepted if they included a clause excepting from its regulations waters to which a State had a historic title. As a consequence, the proposed codifications dealing with the delimitation of territorial waters generally contained such clauses in varying formulations. The concept of “historic waters” came to be considered as an indispensable concept without which the task of establishing simple and general rules for the delimitation of maritime areas could not be carried out.

The Historic waters report stipulated four criteria: The \textit{first} criterion is a requirement of the claimant state to exercise of authority over the relevant area. The exercise of authority requirement is further specified, regarding the scope of the authority exercised, acts by which the authority is exercised and the effectiveness of authority exercised. As to the scope of authority exercised, it implies that the claimant state is required to exercise exclusive authority, or sovereignty. An authority more limited in scope than sovereignty would not be sufficient to form a basis for a title to such waters.”\textsuperscript{139}

The \textit{second} criterion is continuity of the exercise of authority. It could by described as usage of certain waters. This requirement means that the exercise of sovereignty must have continued for a considerable time; indeed it must have developed into a usage.

The \textit{third} criterion is the position of other states to the exercise of sovereignty within this area. In another words, whether the claim have accepted by other States. Have there been explicit protests or other conflicts between the claimant State and other States over the area. The acquiescence of other States is required for the emergence of an historic title.

The \textit{fourth} criterion is whether the coastal State has vital interests in the area claimed. The claim must be justified on the basis of economic necessity,

\textsuperscript{138} \textit{Id}
\textsuperscript{139} Yearbook of the International Law Commission 1962, Vol. II, Page 13
national security, vital interest or a similar ground. However, the criterion is problematic. It is hard to identify that what qualifies as vital interests. Considering different history and social situations and customs in different countries, the “vital interests” is hard to affirm and regulated. Although this element is important aspect, it still ambiguous and can not be used as reference to contrast between different States or even regions.

The Canadian expert Donat Pharand is the chief proponent of the theory of historic waters. Pharand states that two basic requirements must be met for waters to be considered historical internal waters. First, the coastal state must exercise an effective control over the maritime area being claimed to the exclusion of all other states from that area. Such control must be exercised for a “considerable” period, but “the degree of time will depend considerably on the activities of other states, particularly those directly affected.” “The exercise of sovereignty must also be so notorious, that knowledge on the part of interested states may be imputed.” Second, there must be acquiescence by foreign states, particularly those affected by the claim in question: “A general toleration or the absence of protest on the part of foreign states is sufficient to create historic title.” Pharand further states that a proponent state can buttress its claim by demonstrating the existence of its vital interests in the historic waters, based upon geography, economics, and national security; but, the burden of proving historic title rests with the littoral state making the claim.

In summary, the concept of “historic waters” has its root in the historic fact that States through the ages claimed and maintained sovereignty over maritime areas which they considered vital to them without paying much attention to divergent and changing opinions about what general international law might prescribe with respect to the delimitation of the territorial sea. This fact had to be taken into consideration when attempts

140 Donat Pharand, The Law of the Sea of the Arctic with Special Reference to Canada[R], ARCTIC INST OF NORTH AMERICA WASHINGTON DC, 1973, Page 106
141 Id, Page 108
142 Id
143 Id, Page 110
144 Id, Page 112-113
were made to codify the rules of international law in this field, to reduce the sometimes obscure and contested rules of customary law to clear and generally acceptable written rules. It was felt that States could not be expected to accept rules which would deprive them of considerable maritime areas over which they had hitherto had sovereignty.

The most important issue of the historical waters is the legal status of such waters is hard to identify. The historical waters could hardly be considered as the internal waters or territorial seas of the coastal States since the legal status of itself need to be settled. This is the crucial question need to be answered about the historical waters. In the Juridical Regime of Historic Waters including Historical Bays report, there offered: “If allowance is made for this problem of terminology, the dominant opinion, as gathered from the statements assembled in the memorandum, seems to be that "historic bays" the coasts of which belong to a single State are internal waters. This was to be expected, for it is generally agreed that the waters inside the closing line of a bay are internal waters and that the territorial sea begins outside that line.”

The sovereignty exercised can be either sovereignty as over internal waters or sovereignty as over the territorial sea. In principle, the scope of the historic title emerging from the continued exercise of sovereignty should not be wider in scope than the scope of the sovereignty actually exercised. If the claiming State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea, the area would be territorial sea. For instance if the claimant State allowed the innocent passage of foreign ships through the waters claimed, it could not acquire an historic title to these waters as internal waters, only as territorial sea.

All in all, historical waters would be internal waters or territorial sea according to whether the sovereignty exercised over them in the course of the development of the historic title was sovereignty as over internal waters or sovereignty as over the territorial sea. So it is insufficient that historical waters could be regarded as internal waters or territorial seas. In another words, even if certain water area is regarded as historical waters of coastal

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State, it does not committee that such area could be regarded as the internal waters or under sovereignty of such coastal State. The “historical water” and “internal water” are two separate conceptions. So it is weak for using “historical waters” as the basis of claiming any exceptional water regime of coastal States.

3.2 The legitimacy of the “historical waters” claims of Canada and Russia

In terms of Canada, the Canadian government claimed historical water in Canadian Arctic archipelagos where part of the Northwest Passage. The reference of concluding the validity of historic claims is the criterions from Juridical Regime of Historic Waters including Historical Bays report.

The first criterion is exercise of authority over the area claimed. To this point, Canada officially claimed the historical water on Canadian Arctic archipelagos in 1973. The first clear statement of the Canadian position to that effect was made in 1973 by the Bureau of Legal Affairs and read as follows: “Canada also claims that the waters of the Canadian Arctic Archipelago are internal waters of Canada, on a historical basis, although they have not been declared as such in any treaty or by any legislation.”

In terms of such situation, the first criterion could be considered as complete.

The second criterion is continuity of the exercise of authority which could by concluded as usage of certain historical waters. Such exercise of authority must have continued for a considerable time; indeed it must have developed into a usage. Concerned to assert sovereignty over northern territories, Canada in 1922 began an annual patrol to the eastern Arctic to establish and maintain police posts. Although these activities had no legal validity, it was still an official administration measures. Considering the government of Canada implementing coast guard to patrol such waters, the second criterion also could be constrainedly considered as complete.

The third criterion is the attitude of foreign states. This element refers to whether there were explicit oppositions or other conflicts between claiming States and other States. If there was no opposition or other conflict, then this criterion could be considered as complete. Canada had trouble in this criterion. On the 10th of September, 1985 the Minister of Foreign Affairs, Joe Clark, made what would become the last significant formal Government of Canada statement in relation to the nature of its claims over the waters of the Arctic Archipelago. Clark declared that the Government of Canada would “exercise full sovereignty in and on the waters of the Arctic Archipelago and this applies to the airspace above as well.”\textsuperscript{149} The United States did not agree with Canada that these waters were now to be considered internal, particularly since international straits were involved. The U.S. position with regard to the Canadian claim was addressed in a February 26, 1986, letter from James W. Dyer, Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs, to Senator Charles Mathias, Jr. (R. Maryland) which stated, in part\textsuperscript{150}: “The United States position is that there is no basis in international law to support the Canadian claim. The United States cannot accept the Canadian claim because to do so would constitute acceptance of full Canadian control of the Northwest Passage and would terminate U.S. navigation rights through the Passage under international law.”\textsuperscript{151} Before that, in 1969, an American company sent an ice-strengthened super-tanker the SS Manhattan through the Northwest Passage. The voyage was designed to test whether the route could be used to transport Alaskan oil to the Atlantic. The U.S. government dispatched the Coastguard icebreaker to accompany the vessel and made a point of not seeking permission anyway.\textsuperscript{152} It was a practical action respond. The Member States of the European Community (EC) also commented on Canada’s Arctic straight baseline system in part as follows: “The validity of the baselines with regard to other states depends upon the relevant principles of international law applicable in this case, including the principle that the drawing of baselines must not depart to any appreciable

\textsuperscript{149} Canada, House of Commons, Debates, Vol. 5, at 6463 (September 10, 1985)
\textsuperscript{150} United States, Department of State, Office of Ocean Affairs, Smith R W, Roach J A. United States Responses to Excessive National Maritime Claims[M]. US Department of State, Office of Ocean Affairs, 1992, Page 29
\textsuperscript{151} Id
\textsuperscript{152} Pullen & H. Ian MacDonald, S.S. Manhatten’s Northwest Passage Voyage—Observations by Canada’s Representative (Feb. 12, 1970)
extent from the general direction of the coast. The Member States acknowledge that elements other than purely geographical ones may be relevant for purposes of drawing baselines in particular circumstances but are not satisfied that the present baselines are justified in general. Moreover, the Member States cannot recognize the validity of a historic title as justification for the baselines drawn in accordance with the order." The Member States of the EC cannot therefore in general acknowledge the legality of these baselines and accordingly reserve the exercise of their rights in the waters concerned according to international law. According to this, the third criterion is hardly being considered as complete.

Move to the Northeast Passage. On July 21, 1964, the Soviet Union presented an aide-memoire to the United States regarding this survey in which it was claimed “the Dmitry, Laptev and Sannikov Straits, which unite the Laptev and Eastern-Siberian Seas...belong historically to the Soviet Union.” It does not need too much analysis that the first criterion is complete.

Secondly, USSR established more than one rule to regulate the navigation issues in Northern Sea Route, for example, Regulations for Navigation on the Seaway of the Northern Sea Route which approved by the USSR Minister of Merchant Marine 14 September 1990. Russia adopted stricter regime in the Northern Sea Route compared to Canada and Northwest Passage. In this point of view, Russia has advantage on the second criterion.

To the third criterion, United States was opposite to the historic claim of USSR on Dmitry, Laptev and Sannikov Straits, said “So far as the Dmitry, Laptev and Sannikov Straits are concerned, the United States is not aware of any basis for a claim to these waters on historic grounds even assuming that the doctrine of historic waters in international law can be applied to international straits." The third criterion is also hardly being considered as complete. But it has to say compared to Canada rejected by both United States and EU, Russia has advantage on the third aspect as well.

153 Id
154 Id
155 United States Aide-memoire to the Soviet union dated June 22, 1965
All in all, both for the situation of opposition from other States, the historical water claims from Canada and Russia were defective and not tenable. It is unacceptable of the historical claims both Northeast Passage and Northwest Passage. And both of these two passages are accord with the definition of international straight which offered by article 7 of the UNCLOS. So the conclusion in Chapter 3 is still alive that Northeast Passage and Northwest Passage could be considered as Strait used for international navigation so called International Straits.
4. Whether Arctic shipping lanes are International Strait?

According to the chapter 2, it can get conclusion that the different attitudes towards Arctic shipping lanes, both Northwest Passage and Northern Sea Route, are mainly focus on two values. The one value is the freedom rights of transit should not be impacted by governmental control for environmental protection. The other value is the freedom rights of transit should make a concession to environmental protection measures. These two different values reflected on different strategies on national legislation. Most of the Arctic coastal countries pay more attention on governmental control out of environmental protection, for example Canada and Russian Federation. Other side, countries emphasizing freedom rights of transit could be approximately divided into two situations. The first situation is countries with well developed shipping industry, like United States. The second situation is countries outside of the Arctic Circle and using Arctic shipping lanes could save great distance, time and cost, for example Japan and China. This value conflict embody on two different attitudes toward the status of Arctic shipping lanes, whether the passing straits of Arctic shipping lanes or parts of the Arctic shipping lanes could be regarded as international straits. If these passing straits could be regarded as international straits then they will apply the transit passage institution which established by UNCLOS. If not, then these straits will apply other institutions like innocent passage or obey the domestic regulations of coastal countries. Different conclusions cause great different situations for relating countries even the whole world. To figure out this specific question, it is necessary to comprehend the basic institution about international strait.

4.1 The basic institution on International
**Strait**

“Strait” generally refers to a naturally formed, narrow, typically navigable waterway that connects two larger bodies of water. It most commonly refers to a channel of water that lies between two land masses, but it may also refer to a navigable channel through a body of water that is otherwise not navigable, for example because it is too shallow, or because it contains an un navigable reef or archipelago. The most important aspect of strait is navigable attribute. Due to the complex geographic environment and political or economical reasons, different straits have various significances for their locations.

In fact, “International Straits” is not a precise conception. The accurate name is “straits used for international navigation”. Using “International Straits” rather than “straits used for international navigation” is in order to facilitate the presentation. So far, there is no perfect and mature standard to distinguish whether certain strait could be regarded as International Strait.

### 4.1.1 The early stage about International Strait

Freedom of navigation is one of the oldest and most recognized principles in the legal regime governing ocean space. It may safely be said that – since it was enshrined in the chapter ‘De mare liberum’ (‘On the freedom of the sea’) in the treatise – actually it was a legal opinion – of Hugo Grotius ‘De iure praedae’ of 1609 – this principle constitutes one of the pillars of the law of the sea and was at the origins of modern international law. Amongst other things, he stated that the sea was the fundamental avenue for communication and cooperation among States and therefore such avenue should be free and not controlled by one State – in his time, this would have been Spain or Portugal. He further argued that a resource or an area which could be used by all without deterioration or depletion should not be monopolized by one State but should be open to all. And finally he argued that a State could only claim an area which it was able to administer and control effectively, emphasizing that no State could control the sea

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156 Cram101 Textbook Review, Physical Geography: Great Systems and Global Environments, Chapter 10, Strait
permanently and effectively. In Grotius theory, the navigation freedom was the most concerned value. At Grotius time, there was no concept of territorial seas. In some point of view, the navigation freedom was even beyond the status of territorial sea. As the development of international law, states sovereignties covered the territorial waters then creating potential conflicts between coastal states sovereignties and freedom of navigation.

The substantial relationship between coastal states and strait navigation was start from the establishment of territorial sea institution. From the eighteenth century until the mid twentieth century, the territorial waters of the British Empire, the United States, France and many other nations were three nautical miles (5.6 km) wide. Originally, this was the length of a cannon shot, hence the portion of an ocean that a sovereign state could defend from shore. However, Iceland claimed two nautical miles (3.7 km), Norway and Sweden claimed four nautical miles (7.4 km), and Spain claimed 6 nautical miles (11 km; 6.9 mi) during this period. During incidents such as nuclear weapons testing and fisheries disputes some nations arbitrarily extended their maritime claims to as much as fifty or even two hundred nautical miles. Since the late 20th century the "12 mile limit" has become almost universally accepted. The United Kingdom extended its territorial waters from three to twelve nautical miles (22 km) in 1987. The straits navigation institution was shelved in this confusion.

In the former time, the strait navigation institution was mostly based on treaties or agreements. At that time, there were few maritime power forces. So agreements between those powerful countries sufficiently disposed the straits navigation issues. Take some important straits for instance.

(1). Turkish Strait
The Turkish Straits are a series of waterways in Turkey connecting the Aegean Sea (and hence the Mediterranean Sea) to the Black Sea. Historically, empires that exercised control over the Turkish Straits eventually sought dominance over the Black Sea. This included the Byzantine and Ottoman Empires, both having accomplished this. For

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158 Yearbook of the International Law Commission (1949), Page 43
example, the main aim of the Ottoman Sultan, Yildirim Bayezid, in constructing the Gelibolu Dockyard in 1390 was to take control of the Strait of Istanbul (Bosphorus) and the Strait of Canakkale (Dardanelles), and thus keep the sea routes leading to Istanbul and the Black Sea under his dominance. In order to fulfill his ambition he introduced a system of ship inspection for ships seeking passage through the Istanbul Strait, denying permission of passage when he deemed it to be appropriate. Furthermore, Beyazid’s intention to conquer Istanbul was demonstrated by his decision to construct the Anatolian Fortification (Anadolu Hisari). Less than a century later, Mehmed the Conqueror would construct the Rumeli Fortification (Rumeli Hisari) as a prelude to his historical conquest of Istanbul. This was to give the Ottomans dominance over both sides of the Istanbul Strait. After the conquest of Istanbul, they then directed their attention towards the Black Sea. From then on, the right of passage through the Istanbul Strait was to be subject to the permission of the Ottoman Empire. Nonetheless, as the colonies of Venice and Genoa still existed at the time, vessels flying their respective flags were allowed passage into the Black Sea through the Istanbul Strait for a period of time; but once the Ottoman Empire succeeded in subjecting all of the Black Sea under its control following the capture of Kili and Akkirman (1484) during the reign of Bayezid II, the Ottoman Empire prohibited the passage of all foreign flagged vessels into the Black Sea. Consequently, completely isolated from foreign trade during the 16th century, the Black Sea became an inland sea and preserved this status until the signing of Kaynarca Treaty in 1774.159 After the Kaynarca Treaty was signed, Russia obtained the right of navigation in the Black Sea for its own ships; this procedure was applied to other countries as well. During this period, Russian merchants engaged in trade in the Black Sea in two ways: Beginning in 1743 and until the Kaynarca Treaty dated 1774; they could trade only by engaging Ottoman flagged ships. However, after 1774 they were allowed to navigate through the Istanbul Strait on Russian flagged ships.160

Free passage for all countries through the straits was made possible with the

159 Nilufer Oral and Bayram Ozturk, The Turkish Straits, Maritime Safety, Legal and Environmental Aspects (2006), Page 6
Edirne Peace Treaty, and thus, the Black Sea which had been a “Turkish lake” and then a Russian-Ottoman Sea, gained international status.\textsuperscript{161} The first time that the passage of war ships through the straits came into question in treaties was when Russia offered assistance to the Ottoman Empire upon the French invasion of Egypt. However, the Ottoman Empire permitted Russian war ships passage rights through the Istanbul Straits only during the war. This right of passage of Russian war ships was only peculiar to the period of war.\textsuperscript{162} When war broke out between the Ottoman Empire and Russia in 1806, this time England offered assistance and an agreement was concluded in Kal’â-I Sultaniye in 1809. According to this agreement, if France attacked Ottoman territory then the British armada was entitled to protect the Ottoman coast up to the Black Sea.\textsuperscript{163} However, the British armada could only pass the Canakkale Strait and proceed only to the entrance of Istanbul. After that, there was another event changed the Turkish Strait. The rebellion by the Ottoman governor who controlled Egypt, Mehmet Ali Pasha, pushed the Ottoman Empire into closer relations with Russia. The signing of the Hunkar Iskelesi Treaty in 1833 granted Russian ships passage rights through the Turkish Strait, including a requirement for the closure of the straits to the ships of all countries in the case of war.\textsuperscript{164} However, this agreement did not last long. Britain and France strongly opposed such an agreement and consequently, upon the rebellion of the governor of Egypt again, western countries interfered in order to get closer to the Ottoman Empire and thwart the influence of Russia on the Ottoman Government. As a result of this, the question of the Turkish Strait became part of international principles of law. According to the London Treaty of 1841, the Turkish Strait were to be kept closed to the war ships of all the countries in times of peace, allowing the passage only small war ships of allied countries but only with the permission of a special firmans.\textsuperscript{165}

In 1853, the Ottoman Empire and Russia broke into war and Britain

\textsuperscript{161} Cemal Tukin, Osmanli Imparatorlugu Devrinde Bogazlar Meselesi, Istanbul (1947), Page 131
\textsuperscript{162} Tukin, Question of the Straits, Page 65-107
\textsuperscript{163} Nilufer Oral and Bayram Ozturk, The Turkish Straits, Maritime Safety, Legal and Environmental Aspects (2006), Page 13
\textsuperscript{164} Enver Ziya Karal, Ottoman History, Ankara (1970), Page 134-139
\textsuperscript{165} Nilufer Oral and Bayram Ozturk, The Turkish Straits, Maritime Safety, Legal and Environmental Aspects (2006), Page 14
together with France took part into the war by sending their armada to this Black Sea. Britain and France supported the Ottoman Empire. After the war, as the most important result, both sides of the war signed Paris Treaty in 1856. Regulations about the Turkish Strait were accepted and the principle of an objective legal regime for the Black Sea was introduced. Thus, the Black Sea was to be open to merchant ships but closed to war ships. Moreover, the Ottoman government and Russia were prohibited from having dockyards or navies in the Black Sea. This was later changed with the London Agreement in 1871 wherein Russia was given the right to keep a navy in the Black Sea, and the war ships of allied countries were allowed to use the Turkish Strait in times of peace.

Compared to the Turkish Strait, Danish Straits had different history about navigation issues of foreign vessels. The Danish straits are the three channels connecting the Baltic Sea to the North Sea through the Kattegat and Skagerrak. The three main passages are Great Belt, Little Belt and Øresund. Øresund was more commonly known in English as the Sound. In the Copenhagen Convention on the Sound and the Belts signed by the European shopping nations on 14 March 1857, Denmark obtained an indemnity corresponding to an annual income capitalized to the current value from the signatory states. As a result the dues were discontinued after 1857. The largest contributor to the indemnities was Great Britain, closely followed by Russia, each paying about a third of the total. This indicates that, as in the past, a non-littoral state had been the leading user of the straits. For hundreds of years it had been the Netherlands and in the nineteenth century it was Great Britain. More than that, a special straits convention between the United States and Denmark was also signed in Washington in April, 1857. For a compensation of $393 million, Denmark allowed American ships free passage “in perpetuity”. Since 1857 no other multilateral treaties or conventions have been concluded regarding the Baltic Straits. However, the Treaty of Versailles in Article 195 reiterated the right of “free passage into the Baltic to all nations”.

4.1.2 The Corfu Channel Case

166 Enver Ziya Karal, Ottoman History, Ankara (1970), Page 244
On May 15th. 1946 the British warships passed through the Channel without the approval of the Albanian government and were shot at. The British Government immediately protested to the Albanian Government. The British Government decided not to resort to the traditional response and, instead, denounced the attack as a deliberate and outrageous breach of international law and maritime custom, and demanded an immediate and public apology and an assurance that the persons responsible would be punished. The Albanian Government's reply made false claims about the behavior of the two British warships, assumed that foreign warships had no right to pass through an international strait part of which was included in territorial waters, and added that the ships would not have been fired upon if they had been recognised as British ships. Further notes were exchanged by the two governments between May and August 1946. Albania asserted that foreign warships had no right of passage through her territorial waters without her authorization. In a note delivered on 2 August 1946, the British Government stated that it did not recognise any right on the part of a territorial power to demand the fulfillment of conditions before entry was permitted into a recognised international channel. Britain could not therefore agree to give prior notification of passage through the Corfu Channel and warned that if in the future British ships were fired on in the channel, fire would be returned. It was clearly showing that Britain government regarded the Corfu Channel as “International Channel”. Also the Britain thought that there was not necessary to get permits when foreign vessels even war ships navigating through the “International Channel”. But a major dispute developed and deteriorated sharply in late October 1946 when two other British warships were mined in the North Corfu Strait with heavy loss of life.

On October 22nd, 1946, a squadron of British warships (two cruisers and

169 Diplomatic relations between the two nations were suspended following the incident on 15 May 1946: Parl Debates(Commons) vol 424, 1 July 1946, cols 1763-1765
two destroyers), left the port of Corfu and proceeded northward through a channel previously swept for mines in the North Corfu Strait. Both destroyers were struck by mine and were heavily damaged. The explosions killed 44 officers and men. Another 42 sailors were injured. On this occasion, the Albanian shore batteries did not open fire, but an Albanian Navy vessel appeared in the vicinity flying the Albanian ensign and a white flag. After the explosions of October 22nd, the United Kingdom Government sent a note to the Albanian Government, in which it announced its intention to sweep the Corfu Channel shortly. The Albanian reply, which was received in London on October 31st, stated that the Albanian Government would not give its consent to this unless the operation in question took place outside Albanian territorial waters. Meanwhile, at the United Kingdom Government's request, the International Central Mine Clearance Board decided, in a resolution of November 1st, 1946, that there should be a further sweep of the Channel, subject to Albania's consent. The United Kingdom Government having informed the Albanian Government, in a communication of November 10th, that the proposed sweep would take place on November 12th, the Albanian Government replied on the 11th, protesting against this “unilateral decision of His Majesty’s Government”. It said it did not consider it inconvenient that the British fleet should undertake the sweeping of the channel of navigation, but added that, before sweeping was carried out, it considered it indispensable to decide what area of the sea should be deemed to constitute this channel, and proposed the establishment of a Mixed Commission for the purpose. It ended by saying that any sweeping undertaken without the consent of the Albanian Government outside the channel thus constituted, i.e., inside Albanian territorial waters where foreign warships have no reason to sail, could only be considered as a deliberate violation of Albanian territory and sovereignty. Albania made it clear that any sweeping undertaken without its consent inside Albanian territorial waters where foreign warships had no reason to sail could only be considered a deliberate violation of Albanian

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territory and sovereignty. Here shows that the attitude of Albania
government. Other than the Britain government, Albania did not regard the
Corfu Channel as an international strait or international channel. It is nature
that Albanian government rejected the Britain war ships navigating within
the Corfu Channel. In some point of view, it is similar to the attitudes of the
two sides of countries toward Arctic shipping lane. Neither side gives up
their position.

On 18 February 1947, the United Kingdom Ambassador to the United
Nations presented the United Kingdom case against Albania to the Security
Council.\(^{173}\) Then, on 9 April 1947, with the Soviets and Poland abstaining,
the Security Council, by eight votes to nil, recommended that the dispute
should be submitted to the ICJ.\(^{174}\) This is the first case after the ICJ found
in 1945.

In the final judgment, ICJ provided clear attitude towards the international
straits navigation issues. ICJ responded the contention claiming by Albania
government about the United Kingdom violated its sovereignty by sending
the war ships through Corfu Strait without the previous authorization of the
Albanian Government. As the respond of this contention, the ICJ express its
opinion, said: “It is generally recognized and in accordance with
international custom that States in time of peace have a right to send their
war ships through straits used for international navigation between two
parts of the high seas without the previous authorization of a coastal State,
provided that the passage is innocent. Unless otherwise prescribed in an
international convention, there is no right for a coastal States to prohibit
such passage through straits in time of peace.”\(^{175}\)

In my view, there are three points worth to pay more attention. The first one
is ICJ considered it is “generally recognized” and “in accordance with
international custom” that foreign ships could navigating through the
international straits. That could be comprehended as if a strait be recognized
as international strait then its navigation function should be accepted and

\(^{173}\) Laurence W. Maher, Half Light Between War and Peace: Herbert Vere Evatt, The Rule of
International Law, and The Corfu Channel Case, Australia Journal of Legal History,
\(^{174}\) Same above
\(^{175}\) The ICJ Judgment of 9 April 1949 (merits), Page 28
protected. The second is states could send ships even war ships through international straits without permit. The third one is the coastal states do not have right to prohibit such passage through international straits. That could comprehended that within the international straits, the sovereignty need to make sacrifice to the foreign vessels navigation as long as for innocent purpose.

After while, the Albanian Government denied that Corfu Channel belongs to the class of international high ways through which a right of passage exists, on the grounds that it is only of secondary importance and not even a necessary route between two parts of the high seas, and that it is used almost exclusively for local traffic to and from the ports of Corfu and Saranda.176

The ICJ also made a straight answer. It may be asked whether the test is to be found in the volume of traffic passing through the Corfu Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas.177 In addition, the United Kingdom government submitted some evidences showing that the Corfu Channel had been frequently used for international navigation. One fact of particular importance is that the North Corfu Channel constitutes a frontier between Albania and Greece, that a part of it is wholly within the territorial waters of these States, and that the Corfu Strait is of special importance to Greece by reason of the traffic to and from the port of Corfu. “Having regard to these various considerations, the Court has arrived at the conclusion that the North Corfu Channel should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace.”178 On the other hand, it is a fact that the two coastal States did not maintain normal relations, that Greece had made territorial claims precisely with regard to a part of

176 The Judgment of 9 April 1949 (merits), Page 28
177 The Judgment of 9 April 1949 (merits), Page 29
178 The Judgment of 9 April 1949 (merits), Page 29
Albanian territory bordering on the Channel, that Greece had declared that she considered herself technically in a state of war with Albania, and that Albania, invoking the danger of Greek incursions. “The Court is of opinion that Albania, in view of these exceptional circumstances, would have been justified in issuing regulations in respect of the passage of warships through the Strait, but not in prohibiting such passage or in subjecting it to the requirement of special authorization.”

This is the first clear criteria about International Straits. It could conclude that one strait need to become an International Strait need two conditions. The first condition is the geographical situation of certain strait as connecting two parts of the high seas. The other condition is the fact of the strait that being used for international navigation. In another words, if a strait possessed these two conditions, then such strait could be considered as international strait. This judgment of ICJ provided a very explicit basis under international strait institution. Have to say that the judgment of ICJ summarized the former international practices and international customaries. It was also laid the foundation before the United Nations Conference on the Law of the Sea. The criteria rose in Corfu Channel case greatly impacted the institution about International Straits.

4.1.3 The straits institution of Convention on the Territorial Sea and the Contiguous Zone

In 1956, the International Law Commission was submit to the General Assembly, at its eleventh session, a set of draft rules relating to the law of the sea. The text was included the provisional articles adopted by the Commission concerning the high seas, the territorial sea, the continental shelf, contiguous zones and the conservation of the living resources of the high seas. The International Law Commission did not specifically discuss the navigation issues about international straits. At the fourth session of International Law Commission conference in 1952, the Commission considered certain aspects of the regime of the territorial sea on the basis of a report by the special rapporteur. The straits navigation issues were covered by territorial sea passage issues as affiliated topics. Due

179 Yearbook of the International Law Commission 1956, Volume II, Page 1
to the great significance of the ICJ Corfu Channel case, the International Law Commission did not miss this problem. In the draft of Convention on the Territorial Sea and the Contiguous Zone, the article 17, paragraph 4 said: “There must be no suspension of the innocent passage of foreign ships through straits normally used for international navigation between two parts of the high seas.”\(^{180}\) It is worthy to notice that in this draft the Commission described the straits as “normally used for international navigation”. For this change, the International Law Commission gave the commentary that “The expression ‘straits normally used for international navigation between two parts of the high seas’ was suggested by the decision of the International Court of Justice in the Corfu Channel Case. The Commission, however, was of the opinion that it would be in conformity with the Court’s decision to insert the word ‘normally’ before the word ‘used’”\(^{181}\). But in the final document of the Contiguous Zone Convention, it is not include the word “normally”.

As the Convention on the Territorial Sea and the Contiguous Zone was published, there is the first legal document formally regulated the international straits issues. The question of passage through straits assumed greater importance for the maritime states. In its final form, article 16, paragraph 4, of the 1958 Convention on the Territorial Sea and the Contiguous Zone reads: “There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.” Compared to the former draft, the final provision deleted the word “normally” and amplified the applicable conditions. Using “between one part of the high seas and another part of the high seas or the territorial sea of a foreign State” instead of “between two parts of the high seas”, this change indicates ILC did not restrict the apply of international strait. If the straits are limited as connecting the two parts of the high seas then eligible straits are within handful amount. If so that ILC was not necessary to make a specific provision to regulate this issue. According to this change made by ILC, it could be comprehended that the ILC trends to protect the value of

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\(^{180}\) Report of the ILC Covering the Work of Its Eighth Session (A/3159), II Yearbook of ILC 1956, Page 253

\(^{181}\) Report of the ILC Covering the Work of Its Eighth Session (A/3159), II Yearbook of ILC 1956, Page 273
navigation rather than the coastal states sovereignties.

With the breadth of the territorial sea left unresolved by the first and second conference of United Nations on the Law of the Sea, an increasing number of States adopted territorial seas of 12 nautical miles or more. With a territorial sea of three nautical miles, only a few straits used for international navigation were within the territorial sea of coastal States and accordingly were subject to the right of nonsuspendable innocent passage. As a result, the waters in many of these straits became part of the claimed territorial seas of States bordering them. It is very difficult to balance the international navigation and coastal states sovereign claims. In fact, the word “innocent” has already indicated the position of protecting the coastal states. All in all, the innocent passage by foreign vessels within the contiguous zone even territorial seas could not cause substantially impact to the coastal states. In the peace time, there is not so much situation to causing tension or warfare activities. It could be regarded as threaten by coastal states but it will not deny or bring other negative influence on coastal states sovereignties. Also, the security requirement must be protected to every state. But this requirement need limited and demarcation line. There is no absolute security environment to states. It is like two hedgehogs lean on each, they need some distance to pretend to be injured. It is reasonable if there is no substantially harm to the coastal states protecting maritime navigation more than coastal states sovereignties.

Maintenance of the freedoms of navigation and of overflight through and over straits used for international navigation was not only a matter of interest to maritime States. It was also of concern to many States whose international sea-borne trade has to pass through such straits, to flag States with large merchant marines, to States bordering enclosed or semi-enclosed seas, and to large island States in both the Atlantic and the Pacific oceans. Many of these States both bordered straits and were important user States. The major maritime States considered that their economic wellbeing and security - particularly in relation to the deployment, and pursuit, of submarines carrying strategic nuclear missiles - depend upon continuing

guarantees of passage through international straits such as Dover, Gibraltar, Hormuz, Bab el Mandeb and Malacca.\(^{183}\)

The regulations of straits navigation the Contiguous Zone are not in high legal hierarchy. The article 25 of the Convention on the Territorial Sea and the Contiguous Zone said: “The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them.” The attitude of Contiguous Zone which greatly respecting the freedom between states reaching treaties or agreements was obviously impacted the UNCLOS 1982.

**4.1.4 The institution of International Straits established by United Nations Convention on the Law of the Sea**

The United Nations Convention on the Law of the Sea (UNCLOS), also called the Law of the Sea Convention or the Law of the Sea treaty, is the international agreement that resulted from the third United Nations Conference on the Law of the Sea (UNCLOS III), which took place between 1973 and 1982. The Law of the Sea Convention defines the rights and responsibilities of nations with respect to their use of the world's oceans, establishing guidelines for businesses, the environment, and the management of marine natural resources.

**The historical perspective**

In 1945, President Harry S Truman, responding in part to pressure from domestic oil interests, unilaterally extended United States jurisdiction over all natural resources on that nation's continental shelf - oil, gas, minerals, etc. This was the first major challenge to the freedom-of-the-seas doctrine. Other nations soon followed suit. In October 1946, Argentina claimed its shelf and the epicontinental sea above it. Chile and Peru in 1947, and Ecuador in 1950, asserted sovereign rights over a 200-mile zone, hoping thereby to limit the access of distant-water fishing fleets and to control the

depletion of fish stocks in their adjacent seas. Soon after the Second World War, Egypt, Ethiopia, Saudi Arabia, Libya, Venezuela and some Eastern European countries laid claim to a 12-mile territorial sea, thus clearly departing from the traditional three-mile limit. Later, the archipelagic nation of Indonesia asserted the right to dominion over the water that separated its 13,000 islands. The Philippines did likewise. In 1970, Canada asserted the right to regulate navigation in an area extending for 100 miles from its shores in order to protect Arctic water against pollution.\footnote{184} Also other reasons or values (like environmental, fishing or offshore exploration activities) need to be concerned about oceans and seas.

The Conference was convened in New York in 1973. It ended nine years later with the adoption in 1982 of a constitution for the seas - the United Nations Convention on the Law of the Sea. During those nine years, shuttling back and forth between New York and Geneva, representatives of more than 160 sovereign States sat down and discussed the issues, bargained and traded national rights and obligations in the course of the marathon negotiations that produced the Convention.\footnote{185}

The discussion about Straits navigation institution

On the initiative of the representative of the Government of Malta, the General Assembly considered at its twenty-second session, in 1967, an item entitled “Examination of the question of the reservation exclusively for peaceful purposes of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind”. By resolution 2340 (XXII) of 18 December 1967, the Assembly established an Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, consisting of thirty-six Member States. The Ad Hoc Committee held three sessions during 1968, and presented its study (A/7230) to the General Assembly at its twenty-third session, in 1968. While having carried out a comprehensive study of the

\footnote{185}{Same above}
various aspects of the item within the limits of the time available, the Ad Hoc Committee recognized the need for further study, and made suggestions for this purpose. Having considered the report, the General Assembly adopted on 21 December 1968 resolution 2467 A (XXIII), by which it decided to establish a Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, consisting of forty-two Member States.  

In fact, there were some discussions about international straits in the Sea-bed Committee conference. There were mainly three opinions on the institution which should be applying on the international straits.

The first opinion was claiming by United States, United Kingdom and Soviet Union. This opinion asserted that the freedom of navigation and flyover rights need to be protected in the straits used for international navigation. In 1971, when the negotiations leading to the development of a new treaty on the law of the sea were in their earliest stages, the head of the U.S. delegation declared that freedom of passage through international straits was an essential element of any agreement that would be accepted to the United States. Despite occasional criticism that this characterization of the position is overstated, it has remained a cornerstone of the U.S. negotiating position in the Seabed Committee and the Third United Nations Conference on the Law of the Sea. At the time when U.S. representative to the Seabed Committee, Stevenson introduced draft articles on the breadth of the territorial sea, passage through straits and fisheries. The first article provided that each State should have the right to establish the breadth of its territorial sea at a maximum of twelve miles. And, if it chose to accept a lesser breadth, should have the right to a contiguous exclusive fisheries zone in the remaining portion of the twelve miles zone. The article 2 was a good document to provide the U.S. opinion on international straits institution. It said:

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“1. In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State, all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas. Coastal States may designate corridors suitable for transit by all ships and aircraft through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors, so far as ships are concerned, shall include such channels.”

The Soviet draft articles on the straits closely reflected the U.S. straits position. The Soviet proposal, consisting of one article on ships and one on aircraft, was more specific than U.S. plan. The Soviet proposal differed from the U.S. proposal in only one major substantive area. It limited the definition of straits used for international navigation to include only those that joined two parts of the high seas. The one thing need to be notice was in its draft only mentioned ships which no distinction between war ships and normal ships. Although the Soviet support of “free transit” gave weight to the argument by less powerful States that this was an issue of concern principally to the super powers. Soviet support for the essential elements of the U.S. position hinted at but not previously formalized removed at least one potentially formidable obstacle.

The second opinion about the institution applying on the straits used for international navigation was provided by some developing countries like China, Indonesia. Their position was applying innocent passage rules on the international straits. Despite the efforts of the U.S. and the Soviet Union to present what they considered to be a balanced approach to the straits question, many of the States bordering straits were undeterred neither from their stance nor to recognize more than innocent passage through their

territorial sea, including straits. During the last two sessions of the Seabed Committee in 1973, the United States and the Soviet Union were challenged by numerous draft proposals from States bordering straits. These States hoped that their proposals, and not those of the super powers, would serve as draft text for the third conference of United Nations Conference on the Law of the Sea in December 1973.\textsuperscript{192}

In general, most of the States bordering straits expressed great suspicion over the motives of the United States and the Soviet Union, and believed that a regime of “free transit” would necessarily entail a loss of sovereignty and a threat to the coastal State’s national security. These attitudes were expressed from the outset of the Seabed Committee meetings.\textsuperscript{193}

China showed its position towards such issue: “Straits within the territorial seas of coastal states, should administrated by coastal states no matter whether been generally used for international navigation. The foreign vessels shall navigating in such straits for peaceful purpose, also follow the relating rules and regulations of coastal states. The foreign war ships need the permits issued by coastal authority in advance after that the war ships could using the straits locating within the territorial seas of coastal states.”\textsuperscript{194}

Malaysia also had the similar position, the Malaysian delegate stated: “Subject to the right of innocent passage, my country would like to have the unfettered right to ensure that nothing happens in this area which affects the safety or the territorial integrity of my country.”\textsuperscript{195}

The Indonesian delegate was equally vehement about the passage of warships: “We submit that the interest of the coastal State can only be absolutely guaranteed to be free from the harmful effects of the passage of foreign warships if … an absolute guarantee can be given that no accidental encounters with other warships of an unfriendly nature or an accidental

\textsuperscript{192} Caminos Hugo, The Legal Regime of Straits, Cambridge University Press, Page 73
\textsuperscript{193} Caminos Hugo, The Legal Regime of Straits, Cambridge University Press, Page 74
\textsuperscript{194} 《我国代表团出席联合国有关文件集》, 人民出版社，1972，Page 211 (Original in Chinese)
\textsuperscript{195} Statement of the Malaysian Delegate, Summary Records of the Sea-Bed Committee, Sub-Committee II, UN doc. A/AC. 138/SC. II/SR.4-23 (1971)
discharge of weapons will take place during the course of such passage … We think that no such guarantee can be given … This is why we cannot accept the concept of ‘corridors of free passage’ through the territorial sea which could deprive the coastal State of any say over an event of vital importance to its security and the well-being of its people.”

The third opinion was regulating the specific conditions about navigation. The representative states were Cyprus, Greece and Yemen. Their main position mostly surrounded: “Regulation of navigation should establish a satisfactory balance between the particular interests of coastal States and the general interest of international maritime navigation. This is best achieved through the principle of innocent passage. The regulation should contribute both to the security of coastal States and the safety of international maritime navigation. This can be achieved by the reasonable and adequate exercise by the coastal State of its right to regulate navigation through its territorial sea, since the purpose of the regulation is not to prevent or hamper passage but to facilitate it without causing any adverse effects to the coastal States.”

In 1973, the “List of Subjects and Issues relating to the Law of the Sea” adopted by the Seabed Committee included item 4: Straits used for international navigation 4.1 Innocent Passage, 4.2 Other Related Matters including the Question of the Right of Transit.

The List of Subjects and Issues was, in effect, the substantive agenda for the Third Conference and the inclusion of a separate item about straits marked a significant development. This is the first time that the international straits issues were independently became a topic on the Law of the Sea. In the Seabed Committee, the views were pressed that there was no separate body of law about straits and that the rules about innocent passage through the territorial sea applied to them. However, those views did not prevail: the predominant opinion was that the question of passage through straits used for international navigation should be treated separately from that of

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198 Report the General Assembly, A/8721, Page 5
passage through the territorial sea. It is that opinion, based on customary law and the needs of the contemporary situation.\textsuperscript{199} For this situation means the international straits navigation issues needed to apply a special institution. The beneficial owners of this situation were the super powers and powerful maritime states.

There were two states have to be mentioned: Fiji and United Kingdom. At the conference, equivalent and competitive proposals were arose which would have given expression to these two different approaches. Supporting the approach of separate treatment for straits, the UK put forward a set of draft articles in two pars, one on territorial sea and the other on straits.\textsuperscript{200} More than that, Bulgaria and other states rose other separate proposals on the international straits. The proposals of United Kingdom on the international strait put forward the conception of the right of transit passage which first claiming in this conference that was different as the freedom of navigation and overflight. It was an extensive right. In fact, such transit passage had been claimed by the U.S. in 1971 and the Soviet Union in 1972. This is a great significant proposal to the institution of international straits. The other important proposal was stated by Fiji. Fiji arose that submarines might pass in straits under water, thereby accepting a distinction between the territorial sea in general and straits – a distinction which formed the basis for later compromise between the Fijian and British proposal.\textsuperscript{201} The Fijian proposals also dealt in detail with the question of the legislative powers of straits States. The two different approaches, as well as the Fijian proposals, were reflected in the document entitled “main trends”, published by the Second Committee in 1974.

Informal consultations had been held in 1974. The United Kingdom and Fiji negotiated with each other about the questions they respected to writing into the final documents. In 1975, it was decided after further consultation to create a group of delegations from the different regional groups under the joint chairmanship of Nandan (Fiji) and Dudgeon (United Kingdom). The

\textsuperscript{199} David Anderson, Modern Law of the Sea: Selected Essays, Martinus Nijhoff Publishers (2008), Page 120
\textsuperscript{200} UN doc, A/CONF. 62/C.2.L. 3. Some amendments were proposed by Denmark and Finland
\textsuperscript{201} David Anderson, Modern Law of the Sea: Selected Essays, Martinus Nijhoff Publishers (2008), Page 121
working group was called “Private Working Group on Straits used for International Navigation” or “the Fiji and United Kingdom Group”. The first meeting on 25 March 1975 was attended by 14 delegations: Argentina, Bahrain, Denmark, Ethiopia, Fiji, Iceland, Italy, Kenya, Lebanon, Nigeria, Singapore, United Kingdom, United Arab Emirates and Venezuela. The aim of the meeting was being to continue to seek accommodation between the proposals of Fiji and the United Kingdom on the international straits institutions, in order the reach the subtle balance point between the bordering straits states and powerful maritime states. In the end of this meeting, the participants of the Fiji and United Kingdom group agreed that there should be a regime for international straits navigation which was separate from the regime of innocent passage applicable to the territorial sea in general. The members of the Group then proceeded to discuss the nature of the regime for straits during seven subsequent meeting ending on 18 April 1975. Between these two meetings, individual members of the Group held detailed informal discussions with many interested delegations outside the Group. In particular, in view of the link with the question of archipelagic states, close contacts were maintained with Indonesia an Malaysia: at the same time, major maritime powers such as the Soviet Union, the United States, France, Japan were consulted, as well as straits states such as Morocco.

On 30 April 1975, the Co-Chairmen of Fiji and United Kingdom working group circulated to all delegations the set of draft articles which resulted from the Group’s work and which represented what they described as a “broad consensus” of the members. The Chairman of the Second Committee took account for the Group’s work in preparing his Informal Single Negotiating Text (ISNT). After some modifications were made by other states’ proposals, most of the results were brought into the Revised Single Negotiating Text (RSNT). After that, the basic institution about straits used for international navigation was not change. As the forming of the Informal Composite Negotiation Text (ICNT), the negotiation about the institution of international straits which involved many states and cost many years finally end. The provisions about straits used for international

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navigation in the ICNT were finally became the third part of UNCLOS.

According to such discussions before the UNCLOS published, it was clear that a regime for international straits navigation which was separate from the regime of innocent passage applicable to the territorial sea in general is necessary. Also this necessary had already accepted by international world in the procedure of negotiation mentioned above. The straits used for international navigation indeed have their unique characters. Looking back to the procedure of negotiation, to apply the separated institution on the straits used for international navigation is closer to the balance point between the bordering straits states and powerful maritime states compared to applying the same institution with territorial seas. All in all, the straits used for international navigation or called international straits are unique and special international maritime issue. This issue has great significance to global trading, international cargo transportation or other activities which hugely change the world. So it is reasonable and very necessary to apply separate regime on the international straits.

The Part III of the UNCLOS

The name of the third part of the UNCLOS is Straits Used for International Navigation. There are three sections in the third part which are General Provisions, Transit Passage and Innocent Passage. It is mainly contains two regimes of navigation transit passage and innocent passage from article 34 to article 45. The third part of the UNCLOS is the most important regulations on straits used for international navigation. And also it is the main legal basis about dealing with the conflicts on such problems.

Article 34, as part of the general or introductory provisions of Part III, affirms that the regime of passage through straits used for international navigation established in Part III does not "in other respects" affect the legal status of the waters forming such a strait. The sovereignty of the State bordering the strait in its territorial sea is “exercised subject to this Part and to other rules of international law.” Article 34 recognizes and confirms that the legal status of the waters forming such straits, including their

204 Article 34, UNCLOS
airspace, seabed and subsoil, is not otherwise affected. This was an essential element in the balance that was reached in Part III. Article 34 stresses further that the sovereignty and jurisdiction of States bordering straits, and the rights and duties of States using the straits for passage, are exercised subject to the provisions of this Part and to other rules of international law.

Article 36 originated in a 1974 United Kingdom proposal as mentioned above, later incorporated in the Main Trends. In 1975, it became the basis for the Draft Articles of the Private Group on Straits, but “equally suitable” had been substituted by “similar convenience”. This was reproduced in the 1975 ISNT with the addition of the exclusive economic zone. Subsequent amendments to article 36 were made during the 1976 session, when Bulgaria suggested adding the phrase “with respect to its navigational and hydrographical characteristics”. This interpretative amendment was reflected in the revised text. Article 36 of the UNCLOS adds that “in such routes, the other relevant Parts of this Convention, including the provisions regarding the freedom of navigation and overflight, apply”. This was added much later, during the 11th session, but it finds its source in a Yugoslav proposal of 1978 that was subsequently repeated and modified.205 The article 36 applies when the narrowest width of a strait exceeds the breath of the territorial sea of the bordering States or the combined breadths of the territorial seas of the bordering States, so that a band of high seas or EEZ runs through the straits. If that corridor is of “similar convenience” to the route passing through the territorial sea portions of the strait, then the normal regime of innocent passage under Part II will apply in the territorial sea, and the provisions in article 58 and article 87 of the UNCLOS respecting freedoms of navigation and overflight will continue to apply within the corridor. The freedom of the navigating and overflight apply even though the high seas or EEZ corridor is not of similar convenience, but then transit passage or non-suspendable passage under Part III will apply within the territorial sea.206

Article 36 poses certain interpretation issues. Firstly, article 36 mentioned a route through the high seas or EEZ. The presumption is that article 36

205 Hugo Caminos, Vincent P. Cogliati-Bantz, The Legal Regime of Straits: Contemporary Challenges and Solutions, Cambridge University Press, Page 42
applies to the case of a continuous band of high seas or EEZ within a strait and that territorial sea widening up to a band or successive bands of high seas or EEZ routes constitute a strait (or possibly a succession of straits) within the scope of Part III. Secondly, it is also need to be mentioned that the article 38 can cause the same situation as well. The situation envisaged by article 36 covers not only straits that are naturally wide enough to accommodate a corridor of high seas or EEZ but also narrow straits of less than 24 nautical miles in width where the coastal States has not claimed a 12 miles territorial sea or, if there several States bordering the straits, where one of them has claimed a territorial sea of less than 12 nautical miles.

The most important provision in the UNCLOS about straits used for international navigation is the article 37. It is about which strait could be considered as straits used for international navigation. Actually, the definition of the straits used for international navigation is always in controversies. The article 37 offers a definition but still not end the disputes on the international straits. The article 37 said the international straits or straits used for international navigation as: “straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.” The definition as contained in the original U.K. transit passage proposal has been broadened to include the concept of an exclusive economic zone which evolved during the Conference. Although a discussion of that concept is beyond the scope of this article, a brief comment is necessary to place the modification in context. There are little changes in the UNCLOS provisions compared to the 1958 Convention on the Territorial Sea and the Contiguous Zone. The article 16, paragraph 4, of the Contiguous Zone Convention: “There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.” The final UNCLOS provision expended the applying conditions of international straits, the limitation expended from “one part of the high seas and another part of the high seas or the territorial sea” to “one part of the high seas or an exclusive economic zone.”

207 Hugo Caminos, Vincent P. Cogliati-Bantz, The Legal Regime of Straits: Contemporary Challenges and Solutions, Cambridge University Press, Page 43
208 Article 37, UNCLOS
economic zone and another part of the high seas or an exclusive economic zone”. It seems more rigorous than before. But it still ambiguous and not enough consummate. The key point of the article 37 is to distinguish or definite whether certain strait could be considered as an international straits or straits used for international navigation. But there is a problem obstructing such function. The problem is how to comprehend the word “used”. The word “used” is a very ambiguous statement and could be explained in different meanings. Is it means the function of the straits is for international navigation or in the former time some vessels used certain straits for international navigation? If means in the former time the straits had already used for international navigation, then one time is sufficient to consider certain straits as international strait or need a number of international navigations? For example, did the Polar Sea and Manhattan made the Northwest Passage become the straits used for international navigation? So the article 37 is not perfectly solved the controversies on the criteria about international straits.

Although the third part of UNCLOS did not offer an accuracy concept about international straits, the transit passage institution which established in the article 38 is one of the most important rules about UNCLOS. As the specific institution only applied on the straits used for international straits, the establishment of transit passage has great significance on the special status of international straits. The article 38 specifically regulated the situations of transit passage. First of all, “all ships and aircraft enjoy the right of transit passage which shall not be impeded”. This is one of the differences between transit passage and innocent passage that whether aircrafts have right to pass though. The article 44 has clear provision reads: “States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.”209 The other difference is about the situation that submarines which submarines could pass though the international straits under the surface of the water. The third difference is in the straits used for international navigation “shall not be impeded”. That is the implement protecting the value of navigation of international straits.

209 Article 44, UNCLOS
In addition, the article 38 also regulated the activity of transit passage itself. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.\(^\text{210}\) The transit passage is under the condition of “for the purpose of continuous and expeditious transit”. This condition is aim to protect the interests of bordering States. Obviously, both vessels and aircrafts shall pass through it is a disoperation for the bordering States and the limitation of transit passage condition could be considered as the compensation. The coastal States provide the foreign vessels with conveniences of navigation as the cost taking risks of impacting sovereignty. It is nature that the foreign vessels need to obeying laws and other regulation to minimize such risks of harming sovereignty.

The third part of the UNCLOS tried to regulate all international straits but it still has imperfection. First, the concept “straits used for international navigation” is a tortuous description. Which strait could be considered as a “strait used for international navigation”? The condition or limitation of the “straits used for international navigation” is absent. As mentioned above, there will be various results by various comprehended the meaning of the word “used”. On the second, the article 36 of UNCLOS regulated: “This Part (The third part of UNCLOS) does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics”\(^\text{211}\) More than that, the article 38 also regulated: “if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.” Under these regulations, straits which their breath over 24 nautical miles or less than 24 nautical

\(^{210}\) Article 38, UNCLOS  
\(^{211}\) Article 36, UNCLOS
miles but the coastal States did not claiming the 12 nautical miles territorial seas can not apply the transit passage. The former case applies, for instance, to about 60 straits that were found to have narrowest breadths of greater than 24 nautical miles and thus possessed high seas or EEZ corridors through them.\textsuperscript{212} The latter case is illustrated by Japan’s reduced territorial sea, which is 3 nautical miles wide in the Soya Strait between Japan and Russia, the Tsugaru Strait between the Japanese island of Honshu and Hokkaido, the Osumi Strait between the islands of Kyushu and the Ryu-Kyu islands, and the Eastern and Western channels of the Korea Strait. In the other part of the earth, the six miles territorial sea currently claimed by Greece in the Aegean Sea has the effect of transforming parts of the area into Greece in the Aegean Sea has the effect of transforming parts of the area into Greek territorial sea. There, the right of transit passage applies pursuant to Part III in straits used for international navigation.\textsuperscript{213}

Additionally, article 38 only expressly covers the case of a strait formed by one island and the mainland. This would exclude a strait formed by a group or chain of islands and the mainland, but the combination of issues is apparent if one island exists seaward of the group of islands. The question may also be asked whether article 38 only applies to the case of an “island” and a “mainland” or also to the case of multi-island States.\textsuperscript{214}

There are also somehow ambiguous descriptions both in article 36 and article 38. Both article 36 and article 38 read: “similar convenience with respect to navigational and hydrographical characteristics”. It is necessary to be clarified that what “similar convenience” is in specifically. There are many factors need to be considered to comprehended those articles, like navigation time, navigation distance, safety situations, depth of water and also other environmental situations. If it does have a high sea route within certain strait but the high sea route is dangerous and difficult to passing through, then such high sea route can not be considered under the regulation of article 36 or article 38.

\textsuperscript{212} Hugo Caminos, Vincent P. Cogliati-Bantz, The Legal Regime of Straits: Contemporary Challenges and Solutions, Cambridge University Press, Page 43
\textsuperscript{213} Hugo Caminos, Vincent P. Cogliati-Bantz, The Legal Regime of Straits: Contemporary Challenges and Solutions, Cambridge University Press, Page 44
\textsuperscript{214} Hugo Caminos, Vincent P. Cogliati-Bantz, The Legal Regime of Straits: Contemporary Challenges and Solutions, Cambridge University Press, Page 49
Otherwise, “similar convenience with respect to navigational and hydrographical characteristics” may cause the different results in terms of different kinds of vessels or aircrafts. For example, to the same shipping lane, vessels with high technology devices will easier to passing through such certain shipping lanes. And such shipping lane could be considered as convenience of passing. To the same, whether allocated radar devices is another example for this problem. In this point of view, the institution of transit passage is becoming complex and also prone to controversies.

Besides those, the article 39 is about the duties of ships and aircraft during transit passage. The article 40 is about the research and survey activities issues when passing through the straits used for international navigation.

The article 41 is about the specific rules of sea lanes and traffic separation schemes in straits used for international navigation. The provision 4 read: “Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them.” In this provision, the “competent international organization” currently refers to IMO. And the bordering States need to refer the proposals to the competent international organization “with a view to their adoption”. It shows that the relating issues about straits used for international navigation are supervised or multiple decided by the bordering States and international world.

The article 42 is about laws and regulations of States bordering straits relating to transit passage. The article 43 is about navigational and safety aids and other improvements and the prevention, reduction and control of pollution. And the last, article 44 emphasized the duties of States bordering straits. It said that “States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.” This article shows the attitude of the United Nations to the value orientation which is prefer the navigation
interests of foreign vessels rather than the sovereignty interests of the bordering States.

4.2 Whether the Arctic shipping lanes could be considered as International Straits?

All above is the introduction of the institution from UNCLOS about the straits used for international navigation. But after analysis about all the provisions, actually, there is not a specific and clear definition about straits used for international straits which the substantial objection called international straits in this thesis. In spite of such ambiguous situation, it is still greatly worthy. In fact, the international straits which called straits used for international navigation in the UNCLOS is just referring to the certain water routes. So according to the provisions of UNCLOS, the international straits do not have to be narrow and slim. In this point of view, the Arctic shipping lanes entitle enjoy the status of International Straits. Because the only ambiguous definition within the UNCLOS is article 37 which said: “straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone”. The Arctic shipping lanes are fully under such limitation which “used for international navigation” and “between one part of the high sea and another part of the high sea”. So the shipping lanes in the Arctic could be considered as International Straits. And foreign vessels shall enjoy the transit passage right when passing through the Arctic shipping lanes like Northern Sea Route and Northwest Passage. The specific reasons are coming below

4.2.1 How to definite certain strait as International Straits?

The most authority regulation on International Straits which formally called straits used for international navigation is the UNCLOS. The article 37 of UNCLOS said: “straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone”. From this article alone, both Northwest Passage and Northern Sea Route are compliance with these two
conditions. The situations allocated in article 36 and article 38 are the exception of application of the transit passage. Considering the actual situation of environment in the Arctic, it is a very difficult test to find “similar convenience with respect to navigational and hydrographical characteristics” shipping lanes further leaving the coastal lines of the bordering States. Because of the ice frozen waters, choosing the shipping lanes far from the coast will bring dangerous and difficult. Also it will add the rescuers’ difficulty when accidents happen. In addition, there is no definition limiting that the strait mush between the lands, the land and ice also could form strait or other kinds of water channel. In this point, the article 36 and article 38 are not hinder the status of International strait applying on the Arctic shipping lanes.

Except for the UNCLOS, there are also some other institution about the navigation rules of straits. The paragraph (c) of article 35 of the UNCLSO read: “Nothing in this Part affects the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.” As mentioned above, this provision is derived from the article 25 of Convention on the Territorial Sea and the Contiguous Zone read: “The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them.” But neither UNCLOS nor Contiguous Convention provided an explicit definition about what is “long-standing international conventions in force”. But the most important thing is in the article 35 the legal objection is conventions. In the Contiguous Convention, the object of legal regulation points to the conventions or other international agreements. In any wise, the unilateral legislations could not be regarded as applicable exception of the UNCLOS.

The regulation about International Straits has the process of from customary law to the international statute law. But from the Corfu Case, the international straits have two main factors to distinguish. The first one is geographic criterion which international straits must connect one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. The geographic criterion is the basis of institution of International straits. Only such certain straits possess the great value of navigation and passing through. Because of the unique and special
geographic character which provided the great convenience to maritime shipping, international straits need to be protected. The geographic criterion is the most basic element and also the most important factor of International Straits. The second is function criterion. Straits which located connecting the two parts of high seas or EEZ should used for international navigation and then become International Straits. All of the conventions or agreements about International Straits emphasized the function criterion. As mentioned before, the function criterion which used for international navigation is not complete. It is ambiguous and need to be clarified. Because it is one of the most important issues about the definition of International Straits so it is worthy to spend some words on the function criterion.

As mentioned above, the Contiguous Convention did not use the word “generally” to limit the applicable issue of international straits. So superficially, the times of navigation through the straits are not the prerequisites of the determination of international straits. But the articles of international conventions or agreements are still ambiguous and also need further explanations. Superficially, the description in the Contiguous Convention and UNCLOS “used for international navigation” has two potential meanings which are “actual use” and “potential use” of international navigation. It may cause different two results which are the straits formerly used for international navigation and the other situation is the straits were not used for international navigation in the past but they are potentially used for international navigation in the future. In the Corfu Case, ICJ reasoning that: “The fact of its being used for international navigation … It has nevertheless been a useful route for international maritime traffic.” In this statement, the international straits are referring to the straits actual used for international navigation. But when goes on the Contiguous Convention and the UNCLOS, the provision said: “used for international navigation”. According to these two conventions, the international straits do not need have to actually be used for international navigation in the past.

Despite this argument for “potential use,” a thorough review of the drafting history of all innocent passage relating clauses in the Geneva Convention

215 1949 ICJ Rep. 4, Page 28
provides strong evidence that the drafters had “actual use” in mind.\textsuperscript{216} The deletion of the word “normally” was one effect of a bundle of amendments. Of that bundle, delegates were more concerned about the controversial phrase creating international straits between the high seas and the territorial sea of a foreign State. The question of including or deleting the word “normally” was lost in the resulting debate. However, one of the amendments’ sponsors did assure the Committee that “normally” had been dropped because it was considered that the article “should apply to sea lanes actually used by international navigation.”\textsuperscript{217} This view is in accord with not only a common sense understanding of what constitutes an “international strait,” but also an objective understanding of the past tense “used” appearing in both statutory formulations and the two part approach evident in the Corfu Case holding. “Actual use” appears to be the more tenable requirement for qualification as an “international strait”\textsuperscript{218}.

The statement in the Contiguous Convention and the UNCLOS are just mentioned the current statues without any extra limitation of straits. The only condition which clearly allocated in the conventions is just used for international navigation. So the function criterion of distinguish whether certain strait is International Strait is no need to consider the passing situations in the past time. If the passing situations of certain straits in the time of disputes were used for international navigation and the geographic criterion was completed, then such straits could be considered as International Straits according to the UNCLOS.

The conclusion about the statues of Arctic shipping lanes is quite clear. The Arctic shipping lanes, both Northwest Passage and Northern Sea Route, are connecting the two parts of high seas. So at first the geographic criterion is completed. In addition, it was already mentioned above that the fact of Northwest Passage and Northern Sea Route used for international navigation. Moreover, the straits are not limited by their physical appearances. Straits do not have to be narrow and slim. Also the water

\textsuperscript{218} Howson N C. Breaking the Ice: The Canadian-American Dispute over the Arctic's Northwest Passage[J]. Colum. J. Transnat'l L., 1987, 26: 337.
between the Ice and the land or Ices could be defined as strait as well as the water between lands. No exception of articles blocked the application of Arctic shipping lanes become the International Straits. So in the end, the Arctic shipping lanes, both Northwest Passage and Northern Sea Route, are entitled to become the International Straits which currently named “straits used for international navigation”.

For the differences between the Northwest Passage and Northern Sea Route, it is necessary to splitting in the further analysis for the various situations.

4.2.2 Whether Northwest Passage could be regarded as International Straits

The Northwest Passage is fully located within the water of Canadian Arctic archipelago. It was already introduced in the Chapter 1 that the Northwest Passage contains more than one route depending on which between different passing straits. Because of all these passing straits are located within the Canadian Arctic archipelago, so it is no choice that foreign vessels using Northwest Passage have to into the territorial water of Canada.

1. The geographic criterion
The Northwest Passage is a sea route through the Arctic Ocean, along the northern coast of North America via waterways through the Canadian Arctic Archipelago, connecting the Atlantic and Pacific Oceans. According to the geographic criterion of international straits, the Northwest Passage fully completed. It is simple and objective fact. So it is no need to spend much more time on this issue.

2. The function criterion

In this problem, there are two opposite view on it. First view is about that the Northwest Passage does not meet the function criterion of international straits. There are many Canadian experts hold this view. Dr. Donat Pharand, the leading world legal authority on the Canadian Arctic, has examined the

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219 Arctic Council, Arctic Marine Shipping Assessment 2009 Report
several options that might be available to support Canada’s jurisdictional claims over Arctic waters. And also he tried to prove that the Northwest Passage is not the International Straits. The main opinion of Dr. Donat Pharand is most of the navigation activities were made by Canadian vessels and the left foreign navigations were under the control and permissions of Canadian authority. He thought those kinds of navigation could not be considered as actually use but potentially use. The qualification of international straits should consider the amounts of navigation vessels and the flag States. Some of the experts also claim that the amount of known traffic through the Northwest Passage has been insignificant, although promises of mineral wealth in the Arctic had led observers to speculate on the possibilities of increased traffic. All in all, the main claims of the experts who viewing that the Northwest Passage is not the international straits are the function criterion not only need to care about the times of international navigations but also need to account the flag states and the nationalities of foreign vessels.

Actually, the negative view has the biggest backside is there is no official international convention or agreement regulated the time limit of the definition of international straits. Neither IJC nor UNCLOS regulated a specific number which the certain strait have to complete and then entitle to become international straits. This view is just academic opinion but no international laws support it.

In the second opinion, strictly according to the UNCLOS and other international conventions, the Northwest Passage should be considered as international straits. Though at present both the rarity of surface voyages and the difficulty of navigation through the ice bound waters keep international maritime navigation away from the Northwest Passage, technological advancement will soon complement geographic potential. Indeed, to a certain extent, this has already occurred with rapid advances in submarine technology. Under either “actual” or “potential” use standards, the Northwest Passage is likely to become a far more compelling case for

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220 Mainly from Donat Pharand, Canada’s Arctic Waters in International Law, Cambridge University Press, 1988, Page 224-227
the status of an “international straits.” The trend of globalization of Northwest Passage is overwhelming. It is conflict the policies and strategies of Canada. So how to stop the steps of globalization of Northwest Passage is becoming a hot topic of Canada. The agreement between Canada and United States, AWPPA and NORDERG report system which introduced in the Chapter 2 are the part of the whole activities of Canada.

### 4.2.3 Whether Northern Sea Route could be regarded as International Straits

Northern Sea Route is a shipping lane officially defined by Russian legislation from the Kara Sea to the Pacific Ocean specifically running along the Russian Arctic coast from Kara Gates strait between the Barents Sea and the Kara Sea, along Siberia, to the Bering Strait. The Northern Sea Route is the part of Northeast Passage. The Northern Sea Route connected the one part of high seas and one part of EEZ. So in terms of geographic criterion, the Northern Sea Route is completed with such standard. As the same with the Northwest Passage, the status of Northern Sea Route had two opposite opinions as well. These two opinions are mainly focus on the function criterion of International Straits.

Many Russian experts thought the Northern Sea Route is not the international strait because the Northern Sea Route is the historical waters of Russia. The most extensive attempt to develop a classification of straits in Soviet doctrinal literature is by P. D. Barabolia, who identified five types: 1) straits leading to internal seas or bays and constituting internal waters of the coastal states (he would include the Gorlo Strait in the White Sea as within this category); 2) historic straits; 3) archipelago straits; 4) straits leading to closed seas; 5) international straits. The Russian experts’ position appears traditional and to generally follow these contours. International Straits are defined to link two high seas or two parts of the same high sea and for an extended historical period have served as a route for international navigation. Theses straits are distinct because navigational freedom has been historically consolidated regardless of breadth of the strait.

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Barabolia noted in 1972, “It also is important to emphasize that in respect of international straits customary norms of law have been formed over the centuries providing for the complete and unlimited freedom of navigation through them of vessels of all countries of the world.”

It is easy to point out that the Russian experts concentrated on the historic of navigation. Their views are mainly about the international straits need long navigation history and widely accepted by the international world. Also same with the Canadian view, the times of navigation through the straits is one of the factors of defining international straits. Their opinion shows that it had to achieve a certain number of navigations then it could be considered as international straits.

But this view is not convincing because the situation that Northern Sea Route be able to taking international navigation for climate change is just happened in the recent time. So for the Northern Sea Route was just available for international navigation recently, demanding the historic navigation practice seems a little harsh and unreasonable. In the end, the view of these Russian experts was just as basis supporting the governmental position toward Northern Sea Route. There is no international legal document support such view as well as the Canadian view toward Northwest Passage. The international laws are just requiring two main criterions geographic criterion and function criterion. If certain strait completed these two important criterions then it shall be considered as international strait. In terms of Northern Sea Route, there are only two questions need to be answer. The first is does the Northern Sea Route complete the geographic criterion of international straits? The second question is about does the Northern Sea Route used for international navigation? Both these two questions get the positive answer. So the conclusion is clear that the Northern Sea Route could be considered as International Straits.

4.3 Summary

“Strait” generally refers to a naturally formed, narrow, typically navigable waterway that connects two larger bodies of water. Mostly, straits refer to the water channel between lands. But the water between Ice and land also could be considered as straits. Moreover, there is no physic limitation about the shapes of straits. Straits do not have to be narrow and slim. The Arctic shipping lanes are not in the normal shape of straits. But in the macroscopically view, the Arctic could be regarded as a straits which connecting the Atlantic Ocean and Pacific Ocean. International Straits is referring to the straits used for international navigation. The institution regulating the International Straits regime was derived from the Corfu Case and established by Contiguous Convention after a series of processes. In the current time, the most important legal convention about International Straits is UNCLOS. The third part of the UNCLOS established the transit passage regime for the International straits. The third part of the UNCLOS is the most important and authority basis of International Straits. According to the article 37 of the UNCLOS, the straits need to complete two criterions which geographic criterion and function criterion. The geographic criterion is the straits have to connect or between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. The function criterion is the straits should used for international navigation. The conflicting point of whether the Arctic shipping lanes are international straits is about the divergence on the function criterion. Both Canadian experts and Russian experts rose that the Northwest Passage and Northern Sea Route are not international straits because the function criterion is not completed. It is understandable that due to the special environmental conditions of Arctic Ocean, the maritime activities within the Arctic may cause great lose to the coastal States. Also the resources and other important issues like indigenous people rights force the coastal States paying more attention to control and supervised the foreign activities in the Arctic. The Canadian experts claiming that the number of vessels passing through the Northwest Passage is too low to recognizing the fact of used for international navigation. Moreover, many of the nationalities of the vessels passing through the Northwest Passage are Canada. So the Canadian experts denied the status of international straits for the Northwest Passage. The Russian experts not only used the same reason of Canadian denying the international straits status of Northern Sea Route but also claimed that the historic navigation in the Northern Sea Route was
too short and it is not widely accepted by international world that the Northern Sea Route used for international navigation. Actually, these views are not sufficient convincing. The provision of the UNCLOS is simple and clear that only two criterions need to be completed. So the views of Canada and Russia are not supported by the UNCLOS. The article 37 of the UNCLOS is ambiguous and need to be further improved, but in the current time the UNCLOS is the standard and the most important basis. It is possible that the UNCLOS amended the article 37 and add more limits about the definition of International Straits in the future. But before it happens, the recognize procedure of International Straits only need to complete the two criterion. So the Arctic shipping lanes, both Northwest Passage and Northern Sea Route, could be regarded as International Straits.
5. The Arctic shipping lanes and the straight baseline of coastal States

The normal base from which to measure the breadth of the territorial sea is the low water line along the coast. Thus, the outer border of the territorial sea will normally follow the sinuosity of the coast. However, in certain limited circumstances, determined primarily on the basis of geographical criterion, a littoral state may employ an alternative method of measurement known as the straight baseline system.

As mentioned in chapter 3, the Arctic shipping lanes could be considered as International Straits because both Northwest Passage and Northern Sea Route complete the criterions of international law. It might be unacceptable to Canada and Russia. It would mean that foreign vessel enjoy a right of transit passage within such straits. Canada and Russia would have limited jurisdiction to regulate this passage both for environmental protection and administration purposes.

The status of Arctic shipping lanes may influence the Arctic national policies and strategies of Canada and Russia. Since they claim sovereignty over all or parts of the Arctic shipping lanes they are required to provide some legal bases for such claims. One of the possible legal basis is the drawing of straight baselines to include Arctic shipping lanes and thus making them part of their internal waters.

Establishing the legal status of Arctic shipping lanes determines the right of foreign vessels to navigate through Arctic shipping lanes and the jurisdiction of the coastal States. It makes a difference whether there is a right of transit passage, right of innocent passage or whether their

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225 UNCLOS, article 5
navigation is fully subjected to the national legislation of the coastal State. To figure out this questions that which regime will be applied depending on the legal status of the Arctic shipping lanes.

Straight baseline system is an exceptional legal regime of international law. But this exceptional regime could influence on the legal status of the Arctic shipping lanes. The main task of this chapter is analysis both Canada and Russia straight baseline claims and then tries to conclude the validity of these claims. The reference of this analysis is the article 7 of UNCLOS and using 1951 Norwegian Fisheries Case as supplement. The main work is using criterions of UNCLOS and Norwegian Fisheries Case to estimate whether straight baseline claims valid or not.

5.1 Background

The straight baseline system is an important concept of law of the sea which regulated in the Contiguous Convention and the UNCLOS. It used for “where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity”\(^\text{226}\). Also straight baselines may be drawn between points on the outer edge of the indented coast, or on the outer edge of the fringe of islands.\(^\text{227}\) The territorial sea is then measured from these straight baselines. One of the ultimate effect of employing this system (besides delimiting the territorial sea) is the creation of internal waters consisting of those waters lying landward of the straight baselines. Under the traditional rules of internal waters, no right of innocent passage would exist; however, as will be seen, this rule has been modified by convention (Paragraph 2, article 8 of the UNCLOS).\(^\text{228}\)

As pack ice continues to melt in the Arctic, the legal dispute over the Arctic shipping lanes both Northwest Passage and Northern Sea Route becomes increasingly important. Whether this area should be considered Canadian internal waters or straits used for international navigation will greatly affect

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\(^{226}\) Article 7, UNCLOS

\(^{227}\) Id

the environment, commercial shipping traffic and strategic mobility. As sea ice continues to melt, Canada’s legal claims to internal waters becomes subject to increased scrutiny and are increasingly perceived as inadequate. On September 10, 1985, the Government of Canada claimed all the waters among its Arctic islands as internal waters, and drew straight baselines around its Arctic islands to establish its claim.\textsuperscript{229} And such official claim got into effective January 1, 1986. For this movement, the Canada government put the Arctic waters which it claimed for years inside of the straight baseline and made such area become the internal water of Canada.

On February 7, 1984, the Soviet Council of Ministers declared a system of straight baselines for the Soviet east coast, including its coasts facing the Pacific Ocean, Sea of Japan, Sea of Okhotsk, and Bering Sea.\textsuperscript{230} By a January 15, 1985, Declaration by the Council of Ministers the Soviet Union claimed straight baselines off its continental coasts and islands of the Arctic Ocean, and off its coasts on the Baltic and Black Seas. Legislation establishing the status of internal waters, territorial sea and contiguous zone outside the Russian Federation is stated in \textit{Federal Act on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation} of 17 July 1998. The departure point of determining the outer limit of these waters is baseline, described in such Act as the low water line along the Russian coast. In places where the coastline is deeply indented and cut into, a straight baseline is drawn joining islands, reefs and rocks, as well as across a bay when the breadth does not exceed 24 nautical miles. When belonging “historically” to the Russian Federation, a straight baseline can also be drawn when the mouths of the bay are broader than 24 nautical miles.

The main legal focus of the Arctic shipping lanes and straight base line claims of the coastal States could be divided into two questions. The first thing need to be clear is what criterions should be completed for certain State establishing straight baselines? The second is what are the reasons raised by Canada and Russia to support their straight base line claims? And it is also need to be estimated whether they are convincing. This chapter is

\textsuperscript{229} Byers M. International law and the Arctic[M]. Cambridge University Press, 2013, Page 133
\textsuperscript{230} 4604 U.S.S.R. Declaration
going to analysis the legal problem surrounding such two main questions and tries to find a reasonable conclusion. Before start analysis the main two questions, there is another problem need to be clarified at first which is why States keen to drawing straight baseline.

5.2 Why States keen to drawing straight baseline?

-- The advantages of the straight baseline

As analysis on previous chapter, the Arctic shipping lanes could be considered as international strait. So the transit passage regime should be applied on the Northwest Passage and Northern Sea Route. But the article 35 said that “Nothing in this Part affects any areas of internal waters within a strait”\(^{231}\). Although there was other paragraph said that “drawing straight baselines do not affect or remove the right of transit passage within an area becoming internal waters”. The key point is the legal status of the Arctic shipping lanes are not clearly regulated or settled by firm treaties and conventions. The legal status of the Arctic shipping lanes is still suspended. In addition, coastal States have significance influence on the Arctic shipping lanes. So in some point of view drawing straight baseline could make certain waters become internal waters and then exclude the using of transit passage regime. This is one of reasons of coast States claiming straight baseline. There are still many other reasons of drawing straight baseline and also amount of advantages followed.

In fact, except for Canada and Russia Federal, there are many other States applying straight base line on their coast. Drawing straight baseline or attempting to draw straight baseline were a very common event for the international world. Many countries have or had straight baseline regime, like Norway, Vietnam, Iceland and China. The result of drawn straight base line was making the water within the straight base line become the internal water and also amplifying the territorial seas, etc. Why such results were so attractive for States, especially for the Arctic States? What will change if the straight baseline regime finally adopted by Canada and Russia Federal on

\(^{231}\) Article 35, UNCLOS
Northwest Passage and Northern Sea Route?

Many coastal States are interested in straight baseline mostly based on two considerations. The first consideration was about the unique environment of the Arctic and thus more protection measures are needed in the Arctic. The unique environment of the Arctic is the primary cause and the requirement of protection measures is the immediate cause. To implement more and stronger protection measures the powerful control of certain water areas are needed from coastal States.

The Arctic region is a unique and fundamental component in the world ecosystem. As Bloomfield points out that the Arctic is the climate-maker for much of the world.\textsuperscript{232} Thus, negative environmental alteration in the Arctic entails not only microcosmic, but also macrocosmic consequences. This region, like other temperate regions, has experienced relatively negligible exposure to the environmental consequences of industrial and commercial development. Nevertheless, commercial activity is recently taking place and by all accounts is projected to increase at a relatively intensive rate, thus increasing the potential for environmental damage. Indeed, the recent catastrophe in Prince William Sound of Alaska amply underscores this point. While the disaster did not occur within the Arctic Region, it is demonstrative of the potential environmental danger associated with opening the Northwest Passage to large scale tanker navigation.\textsuperscript{233} Also it had been said for thousand times that the potential impact on the regional environment, which might result from increased shipping activity. Pointing on this issue the Canadian expert points out that tanker tracks may hinder natural migrations of various indigenous land mammals, and that certain sea mammals would experience a higher mortality rate as a result of tanker disturbance of sea ice platforms used for breeding.\textsuperscript{234}

However, the most preoccupying environmental fear is of gross pollution from a major oil spill in the Arctic water. Many scientists believe that the Arctic area is a relatively fragile environment and that oil spills in this area

\textsuperscript{233} Kettunen P A. Status of the Northwest Passage under International Law, The[J]. Det. CL Rev., 1990: Page 939
would have a more damaging effect on regional marine life, compared to that in more temperate zone.\textsuperscript{235} The factors cited in support of the fragility of Arctic ecosystems are: (1) the lower rate of oil decomposition in cold waters; (2) the relatively low reproduction rates of Arctic organisms and correspondingly low population recovery rates; and (3) the low diversity of Arctic organisms and their low tolerance to environmental fluctuations.\textsuperscript{236} These three factors might cause irreversible damage in the Arctic region. As mentioned on the previous chapters that the result of such damage need the coast States to burden. In another words, the coast States of the Arctic region will be the direct victims for the environmental negative impact. As the shipment increasing in the Northwest Passage and Northern Sea Route, owing to the climate change and the sea ice melting within the Arctic, the risks of oil spill and other oil pollution will increase as followed. So for the coast States, especially for the long coastal line States like Canada and Russia Federal, it is reasonable to strength the protection of such region. Drawing straight base line could meet the demand and accord with the national interests. After drawing the straight base line, the water within the baseline will be considered as internal water. There was more restrict regime applied on the internal water. The transit passage and innocent passage would not adopt in the internal water. The shipment within such water will under control of the coast States. More than that, the straight base line likely amplified the range of territorial sea. It is also benefit for coast States government to protect the environment.

The second reason was political strategy factor. In the former time, the Arctic Circle was the high tension area for its vital location which between the two super power States Soviet Union and the United States. This geographical factor motivated joint American-Canadian construction and maintenance of the Distant Early Warning radar station system in the Canadian Arctic for the purposes of detecting Soviet military overflight. Further strategic considerations led to American-Canadian cooperation in the development of the North American-Aerospace Defence Command, a long range bomber interceptor system.\textsuperscript{237} After the collapse of the Soviet Union, the Arctic was still a highly strategic interest area. The military

\textsuperscript{235} Bloomfield L P. The Arctic: last unmanaged frontier[J]. Foreign Affairs, 1981, Page 101
\textsuperscript{236} Donat Pharand, Legault L H. The Northwest Passage: Arctic Straits[M]. Martinus Nijhoff Publishers, 1984, Page 130
\textsuperscript{237} Bloomfield L P, The Arctic: last unmanaged frontier[J]. Foreign Affairs, 1981, Page 91
activities like submarine navigation were frequently happen within the Arctic. Canada's overriding concern with regard to the region is to assure its jurisdictional control over the waters of the archipelago. In the past few decades, the Canadian government has gone further and claimed actual sovereignty over these waters, as mentioned before the AWPPA and other efforts. The Canadian position with regard to wider claims over the waters of the Canadian Arctic Archipelago conflicts with the foreign policies of relating States like United States.

The Northwest Passage and Northern Sea Route are shorter shipping lanes connecting the two big oceans. The shipment of these Arctic shipping lanes will greatly increased in few decades. In addition, the Northwest Passage and Northern Sea Route are likely to be recognized as the straits used for international navigation. If the transit passage regime applied on the Arctic shipping lanes, at that time, thousands of wheels will navigate close to the coast of Canada and Russia, even war ships. It is even more serious about Canada. The Northwest Passage crosses through between the Canadian main land and the Canadian Arctic archipelago. Indeed, it is a big problem that the long international shipping lane crossing through the two parts of Canada with thousands of wheels. It is a national serious security issue.

Drawing straight base line could meet the demand and accord with the national interests. After drawing the straight base line, the water within the baseline will be considered as internal water. There was more restrict regime applied on the internal water. Indeed, the article 8 of the UNCLOS regulated that “Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.” But it should be clarified that there was no explicit and widely accepted passing regime adopted in the Arctic shipping lanes. The passing regime of the Arctic shipping lanes is still in divergence. This situation gives one reason to exclude the application of transit passage in the Arctic shipping lanes. Considering such conditions, the transit passage and innocent passage would not adopt in the internal water. The shipment within such water will under control of the coast States. More than that, the

238 Article 8 (2), UNCLOS
straight base line likely amplified the range of territorial sea. This will be obviously strength the control of such region. And then it was great beneficial for the security of the coast States.

The most essential principle of these two considerations is the same, strict control will bring safety.

It is the time coming back to see the two main question of this chapter. The first question is what is the legal basis which accepted by international law about straight base line? The second is what are the evidences raised by Canada and Russia supporting to their straight base line claims?

5.3 The legal basis from international law about straight base line

The government of the coastal State needs appropriate reasons or evidences to apply straight base line regime. The reasons and evidences not only need to support the straight base line claims but also should accord with the international law and accepted by international world. As the 1958 Geneva Convention and the UNCLOS superseded and codified the criteria enunciated in the Fishery Case, the criteria will be discussed mainly on the basis of the wording in those two conventions. Reference will be made to the Fishery Case where further clarification is needed.

There are also specific regulations in the UNCLOS about the straight base line. Article 7 of the 1982 United Nations Convention on the Law of the Sea, which is similar to article 4 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, allows a country to employ straight baselines only in certain geographical situations. Paragraph 1 of this article is the paramount paragraph: “In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.” More than that, the article 8 of the UNCLOS limited the range of article 7. The article 8 read: “Where the establishment of a straight
baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.” In addition, the article 47 of the UNCLOS which about the archipelagic baseline also has some relating provisions about the base line regime.

However, the regime of straight baseline derived from 1951 Norwegian Fisheries Case. Better understand about Fisheries Case and its spirit will help better understand about Straight baseline regime.

As the same methodology used in this article, before the analysis works, the brief introduction of the sources of the straight baseline regime is necessary. The first guidelines for drawing straight baselines arose out of one of the most famous and contentious cases in international law: the 1951 Fisheries Case. In this case, the United Kingdom and Norway contested access to fisheries off the Norwegian coast. Because of the Fishery Case having great impact on the international straight base line regime, so the brief introduction of such case will make the article more logical.

The historical facts laid before the Court establish that as the result of complaints from the King of Denmark and of Norway, at the beginning of the seventeenth century, British fishermen refrained from fishing in Norwegian coastal waters for a long period, from 1616-1618 until 1906. In 1906 a few British fishing vessels appeared off the coasts of Eastern Finnmark. From 1908 onwards they returned in greater numbers. These were trawlers equipped with improved and powerful gear. The local population became perturbed, and measures were taken by the Norwegian Government with a view to specifying the limits within which fishing was prohibited to foreigners.239 Norway had attempted to claim ocean areas through some creative cartography: by drawing “straight baselines” from points along its rugged coastline and asserting that the enclosed areas in between the deep fjords were exclusive Norwegian fisheries.

The United Kingdom Government concedes that Norway is entitled to

claim as internal waters all the waters of fjords and sounds which fall within the conception of a bay as defined in international law whether the closing line of the indentation is more or less than ten sea miles long. But the United Kingdom Government concedes this only on the basis of historic title; it must therefore be taken that that Government has not abandoned its contention that the ten-mile rule is to be regarded as a rule of international law. But the crucial fact was Norway always opposed any attempt to apply it to the Norwegian coast.

The governments of United Kingdom and Norway did not get any consensus after negotiations. In the 28 September of 1949, the both sides of dispute submitted the Fishery Case to ICJ. The result of the ICJ about Fishery Case supported the claims of Norway. The ICJ found that “… neither the method employed for the delimitation by the Decree, nor the lines themselves fixed by the said Decree, are contrary to international law; the first finding is adopted by ten votes to two, and the second by eight votes to four.” In the end, the conclusion is “By a Decree of July 12th. 1935, the Norwegian Government had, in the northern part of the country (north of the Arctic Circle) delimited the zone in which the fisheries were reserved to its own nationals.”

The reasons of the ICJ for the judgment are based on the following parts. This first reason is about geographical facts. The ICJ affirmed that the land configuration stretches out into the sea and what really constitutes the Norwegian coastline is the outer line of the land formations viewed as a whole.

Secondly, about the maximum length for straight base lines problems which queried by United Kingdom, the judgment of the ICJ did not support such question. The reason of ICJ read: “Although certain States have adopted the ten miles rule for the closing lines of bay, others have adopted a different length: consequently the ten miles rule has not acquired the authority of a

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240 Sum up according to the ICJ official documents, http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=ukn&case=5&k=a6, 2015-1-17
242 Id
243 Id
general rule of international law, neither in respect of bays nor the waters separating in the islands of an archipelago. Furthermore, the ten miles rule is inapplicable as against Norway inasmuch as she has always opposed its application to the Norwegian coast.” In such reason, it proved that certain rule could not as the basis of international criteria before it acquired the authority of a general rule of international law.

In the third, the waters within the straight base lines should closely dependent upon the land domain and also the base lines must not depart to any appreciable extent from the general direction of the coast. In addition, the judgment of ICJ further provided that it may be necessary to have regard to certain economic interests peculiar to a region when their reality and importance are clearly evidenced by a long usage. About this part of reason, the closely link to the main coast land was become one of the basic condition of straight base line in current international law.

Last but not least, the ICJ judgment notes that a Norwegian Decree of 1812, as well as a number of subsequent texts show that the method of straight lines, imposed by geography, has been established in the Norwegian system and consolidated by a constant and sufficiently long practice. The application of this system encountered no opposition from other States. Even the United Kingdom did not contest it for many years: it was only in 1933 that the United Kingdom made a formal and definite protest. This is the most important reason of the judgment. It showed that the general toleration of the international community could become a reason of legality defense for certain regime of one States.

It is important to note that, in the Fishery Case, in discussing the history of Norway's peculiar system of territorial sea delimitation, the court did not consider the historical factor as an independent basis for establishing the validity of Norway's application of the straight baseline system. As Evensen points out, "The historical factor was, together with the geographical, economic and other factors, considered as evidence of the important needs and realities lying behind the Norwegian claims, and was thus only one of

244 Id
245 Id
246 Same above
many factors to be taken into account in applying the general principles of international law to a particular case.”

In summary, the conditions which affirmed by the ICJ in the judgment of Fishery Case were in two aspect. This first one is geographical criteria which the straight base line points should be viewed as a whole with the main land and also the water should have closely link with the main land. Also the drawing of base lines must not depart to any appreciable extent from the general direction of the coast. The second is certain the oppositions or negations from other States may impact the legal authority of certain rules. Vice versa, the general toleration of the international world could be the authority resources of certain rules.

The judgments of ICJ could be considered as source of international law. The judgment of the Fishery Case is the important reference of affirming whether certain area entitles to apply straight baseline. The legal regime of straight base lines is derived from the principles enunciated in the Anglo-Norwegian Fisheries case. These principles were basically codified, refined, and clarified in the subsequent 1958 Geneva Convention. The major addition to the straight base line system which this Convention provided was the maintenance of the right of non-suspensive innocent passage within newly enclosed internal waters where such waters form part of an international strait. The relating provisions of the UNCLOS are accord with the reasons of the ICJ judgment as well. So, in the other words, the main criteria of legal basis of straight base line regime were established by ICJ judgment plus the regulations in the UNCLOS relating provisions.

The UNCLOS is the most important reference on law of the seas current time. The regulations of the UNCLOS about straight base line are mainly in several certain articles. The article 7 is the most important provision about straight baseline. There are also many criterions need to be clarified. The first criterion is about geographic condition that “the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its

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immediate vicinity”249 The second is about method of drawing straight baseline that “must not depart to any appreciable extent from the general direction of the coast”250. The third one is about legal character of waters within straight baseline which said “the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters”251. Only these three criterions all completed, certain straight baseline will be considered as legally. More than that, article 7 also has a save clause “account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.”252 This provision fully considered the complicacy of global geography. Its fundamental purpose is offering a legal authority to certain special coastal line which necessarily needs to apply straight baseline regime. But this save clause also not enough precise. This provision left a lot of space for coastal States to explain what is “peculiar to the region concerned” or “reality and the importance”.

Expect the article 7; article 8 which mentioned in the beginning of the chapter, there are still relating articles need to be focus. The provisions in the part IV which about archipelagic States are also very important of the straight base line regime. The provisions about archipelagic States showed that the value choice between the States protection and the navigation freedom. In the UNCLOS, the wider right of non-suspensive transit passage applies. But these provisions within the UNCLOS were mainly described the conditions of drawing straight base line in general. So the criteria formed within the Anglo- Norwegian Fisheries case were the necessary supplement. To evaluate the specific case like whether Canada capable applying the straight base line regime within its Arctic archipelago, the criteria from the judgment of ICJ and provisions of UNCLOS are the most important reference.

5.4 The Canada base line regulation

249 Article 7 (1), UNCLOS
250 Article 7 (3), UNCLOS
251 Id
252 Article 7 (5), UNCLOS
The jurisdictional controversy relating to the Northwest Passage is the Canadian straight baseline and thus what constitutes Canadian internal waters. This has been challenged by United States expressing the opinion that these waters fall under the regime of international strait.

The first official claim of these internal waters was, as indicated earlier, made in 1973, more precisely by stating that the waters of the Canadian Arctic Archipelago are internal waters of Canada on historical title.\(^{253}\) Straight baselines around the Archipelago were made official in a statement of 10 September 1985, effective as of 1 January 1986, indicating that “these baselines define the outer limit of Canada’s historical internal waters.

Protests to the straight baseline method used by Canada came from the United States in February 1986 stating as its position that “there is no basis in international law for the Canadian claim.”\(^{254}\) Protest also came from the European Community in July 1986 stating that “the Member states cannot recognize the validity of a historic title as justification for the baseline.”\(^{255}\)

Canadian authorities have, as indicated, referred to two legal bases in support of its internal waters. One is by virtue of historic title, which enables a state to supersede purely geographical conditions in claiming sovereignty and thus preventing the application of rules and regulations that would otherwise be binding. The other legal base is by virtue of the fact that their internal waters are on the landward side of the baseline drawn in 1985. It has been argued that the historic title argument does not fulfill the requirements neither of Canada having exercised exclusive jurisdiction over the actual waters for a sufficiently long period nor of the need of acquiescence from foreign states.\(^{256}\) As for the other argument namely the actual drawing of straight baselines in 1985, it is argued that these lines are in consistence with international maritime law laid down in UNCLOS III as the archipelago meets the criteria of being sufficiently closely linked to the land and also that it does not depart to any appreciable extent from the

\(^{254}\) Canada State Department File No. P86 0019-8641
\(^{255}\) Via the British High Commission Note no. 90/86
\(^{256}\) Donat Pharand (2007), The Arctic Waters and the Northwest Passage: A Final Revisit, in Ocean Development and International Law, 2007, 38:3 Page 69
general direction of the coastline. The Canadian argument is that the baseline also met the criteria of customary international law in 1985.\textsuperscript{257}

As mentioned above, to figure out whether Canada capable applying the straight base line regime within its Arctic archipelago, the criteria from the judgment of ICJ and provisions of UNCLOS are the most important reference. But the legal basis of Canadian straight base line regime was according to the international customary law rather than based on the provisions of the UNCLOS. Donat Pharand gave the reasons of why Canada using international customary law as the legal basis. He said “Since it was not a party to the 1958 Territorial Sea Convention or the 1982 Law of the Sea Convention (which did not enter into force until November 16, 1994), Canada proceeded under the customary law rules applied by the International Court in the Fisheries case of 1951.”\textsuperscript{258} From his reasoning, the “customary law rules” meant the judgment of the ICJ. Considering that the judgment of Fishery case greatly impacted the straight base line regime in the global level, Canada using this judgment as legal basis was merely acceptable in context. So following, the criteria of the judgment which mentioned above will be used as the main basis to analysis the straight base line claims on the Arctic archipelago of Canada. It could get conclusion after compared all these criteria verbatim.

\textbf{5.4.1 Whether the Canadian base lines completed with the geographical criteria of the Fishery Case}

First of all, the article 7 of the UNCLOS should be checked. The first paragraph regulated that “the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity”\textsuperscript{259} About the first criterion, Canada seems hardly completed. Because the Canadian Arctic archipelago is consisted by several islands which widely spread rather than “a fringe of islands”.

\begin{flushright}
\textsuperscript{259} UNCLOS, article 7
\end{flushright}
Secondly, the following criterion said that “the presence of a delta and other natural conditions the coastline is highly unstable”\textsuperscript{260}. Apparently, the situation of Canadian Arctic archipelago is neither delta nor coastline highly unstable.

Thirdly and very important criterion is that “drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters”\textsuperscript{261}. This criterion is very typical. Many important regulations about straight baseline were described by very ambiguous words. That will leading to different explanations from one regulation. The third criterion is the best example. What exactly is “general direction of the coast”? One of the comprehensions is the direction of mainland. To this point of view, the Canadian Arctic archipelago can not complete. The other comprehension is the direction of lands. In this point of view, the west side of the archipelago seems arranged on the same direction, so Canadian Arctic archipelago could be considered as complete the third criterion. Another problem, “sufficiently closely linked to the land domain” also very ambiguous and hard to distinguish. Without more specific limitation, it is hardly used as reference for determine straight baseline regime.

As mentioned, the Fishery Case is also very important supplement of straight baseline regime. According to the Fishery Case, the first matter need to notice is the geographic situation. The crucial point of the first matter is whether the Arctic archipelago of Canada could view as a whole together with the main land of Canada. In the judgment of the Fishery Case, the ICJ describing the coast of Norway used the words like “Mountainous”, “configuration stretches out into the sea”, “very broken by fjords and bays” and “dotted with countless islands, islets and reefs”\textsuperscript{262}.

The geographic of Arctic Archipelago of Canada is complicated. All of the

\textsuperscript{260} Id
\textsuperscript{261} Id
Archipelago, except for the southern tip of Baffin Island, lies north of the Arctic circle, and constitutes the northern coastal zone of Canada. The base of the Archipelago stretches some 3,000 kilometers along the mainland coast and the tip of Ellesmere Island is less than 900 kilometers from the geographic North Pole. The Archipelago is one of the largest in the world and consists of a labyrinth of islands and headlands of various sizes and shapes. There are 73 major islands of more than 50 square miles in area, and some 18,114 smaller ones. The very large islands are Baffin, Devon, and Ellesmere on the east side of the Archipelago, and Victoria, Banks, and Melville on the west. Virtually all of the land formations are mountainous in character.263

The first geographic criterion that must be satisfied to determine the validity of the employment of straight baselines around the Canadian Arctic Archipelago is that coastline must be either “deeply indented and cut into” or there must be a “fringe of islands along the coast in its immediate vicinity…”264 The first alternative is not applicable in the case of the Canadian Arctic Archipelago,265.

It is better to understand the logic of Pharand’s assertion in his other words: “Of course, the applicability of straight baselines could not rest solely on the rules relating to coastal archipelagos incorporated in the Territorial Sea Convention, but would depend in part on comparable rules applicable to oceanic archipelago’s…”266 He thus appears to acknowledge that the Canadian Arctic archipelago cannot satisfy the primary geographical criteria and instead relies on the rules applicable to oceanic archipelagos. It is apparent that Pharand was relying on the legal regime now applicable to oceanic archipelagos, wherein straight baselines may be drawn around the outer edge of the islands composing the archipelagic state. However, those rules are available only to a state constituted wholly by one or more archipelagos.267 And according to that situation, it has no bearing on the

264 Contiguous Convention, Article 4 (1) and UNCLOS, Article 7 (1)
265 Byrne, Canada and the Legal Status of Ocean Space in the Canadian Arctic Archipelago, 28 U. ToRoNro FAC. L. REV. 1, 8 (1971)
266 Donat Pharand, The Law of the Sea of the Arctic with Special Reference to Canada[R]. ARCTIC INST OF NORTH AMERICA WASHINGTON DC, 1973, Page 94
267 According to UNCLOS, Article 46 (a)
Canadian situation.

A very critical situation was that, the Amundsen Gulf was too wide to fill within the straight base line from mainland to the Arctic archipelago. The Amundsen Gulf was 150km wide which approximately 81 nautical miles. Moreover, several straits within the Canadian Arctic archipelago were wider than 24 nautical miles. The opposition of Canadian Arctic straight base line drawing was supported by the official attitudes of United States. The United States position is that there is no basis in international law to support the Canadian claim. The United States cannot accept the Canadian claim because to do so would constitute acceptance of full Canadian control of the Northwest Passage and would terminate U.S. navigation rights through the Passage under international law.268

Actually, the initial basis of the Canadian government using to support its claims was not tenable. Donat Pharand used the sentence in the report of the ICJ about Fishery Case which read that “the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast;” as the basis269, trying to express that if the Arctic archipelago of Canada has the similar coast then the geographical criteria would be completed. But the ICJ report had further statement following such method of straight base line, in another words, there were other conditions need to be completed. The full text statement of the ICJ report read: “the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.”270

The Canadian experts like Donat Pharand were not objectively interpreting the sentence of the ICJ. They partly choose the reasoning conclusions which

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268 United States Responses to Excessive National Maritime Claims, Limits in the Sea, No 112, March 9, 1992, Page 29
advantage for their claims as the basis. So in this point of view, the Canada claims for drawing straight base line could not complete the criteria of geographic in the Fishery Case. Their assertion could hardly be seen as perfect. First, regardless of whether it is a coastal archipelago, it surely is not a “fringe of islands along the coast or in its immediate vicinity.” ICJ gave an example of Finnmark coast line and it has big different between Canada Arctic Archipelago. Also Canada Archipelago is not islands along the coast but islands heaped beside the coast. Second, the geographical difference between the Canadian Arctic Archipelago and the Norwegian skjaergaard was very manifest: The skjaergaard lies immediately off the coast of Norway, and follows the direction of the Norwegian coast. As the court in the Fishery Case stated, the skjaergaard was “in truth but an extension of the Norwegian mainland.” It is also not complete the criterion of article 7 of the UNCLOS. Because the first paragraph of article 7 is derived from Fisheries Cases. As mentioned above, the same cannot be said in reference to the Canadian Archipelago. Because it is a massive triangular configuration composed of islands lying off the mainland that stretch far north and do not follow the general east-west direction of the Canadian coast. The direction of Canada mainland is east-west and the west side of Canadian Arctic archipelago is almost north-south direction. It is necessary to say that the legal regime of straight baselines is an exceptional regime and the new legal regime of oceanic archipelagos is even more exceptional. Thus, analogies to this super-exceptional regime would seem inappropriate. But the most important thing is exceptional regime should have a confirm standard. If not so, then every State shall claim for exceptional regime for its national interests. So the analogies have positive significances on straight baseline issues.

The second part of the geographical criteria was whether the water had closely link with the main land. It had already mentioned that the Amundsen Gulf also M’Clure Strait were too wide to be considered as a whole together with mainland. Amundsen Gulf is approximately 250 mi (400 km) in length and about 93 mi (150 km) across where it meets the Beaufort Sea. M’Clure Strait is 90km. This was just for the physical

point of view. Furthermore, in the high north region especially the Canadian Arctic archipelago, there was no closely linked “water”. As mentioned above, in the former time the indigenous people could hardly distinguish that where was the water and where was the land. They were all firmly frozen under the thick ice cover. Therefore, it was difficult to conclude that there were closely linked water between the Canadian Arctic archipelago and the main land of Canada. So the second part of the geographical criteria was hardly to be considered as completed.

The third part of the geographical criteria was whether the drawing of the base line departs to any appreciable extent from the general direction of the coast. Admittedly, such criteria were a very flexible concept. Even the report of the ICJ about Fishery Case had relating words that: “Such a coast, viewed as a whole, calls for the application of a different method; that is, the method of base line which, within reasonable limits, may depart from the physical line of the coast.”273 Applying this criterion, the Court refuted the objection of the United Kingdom that the line across Lopphavet basin did not respect the general direction of the coast, because it was located 19 miles from the nearest point of land. The Court’s answer was that “the divergence between the base-line and the land formation is not such that it is a distortion of the general direction of the Norwegian coast.”274 For such flexible criteria, it would allow States more leeway about drawing the straight base line. The crucial problem was how to distinguish or measure the extent of certain straight base line. The statement in the ICJ report was read: “In order properly to apply the rule, regard must be had for the relation between the deviation complained of an what, according to the terms of the rule, must be regarded as the general direction of the coast.”275 According to the Picture 5.1, the Amundsen Gulf obviously separated the mainland of Canada and Banks Island also Victoria Island. That was “appreciable extent from the general direction of the coast.”

It could be seen on map, the Arctic archipelago of Canada did closely and fused each other and easily to be viewed as a whole. The islands and

275 Same above
peninsulas of the whole Archipelago are fused together by ice formations most of the year, to the point where ice and land areas often become indistinguishable. The unity of the Archipelago itself is derived from the interpenetration of land formations and sea areas, and this close relationship is reinforced by the presence of ice most of the year. But the key point is the Arctic archipelago of Canada could be viewed as a whole by itself. Only the archipelago could be viewed as a whole, not with Canadian mainland together. It could be described that the Arctic Archipelago was one whole part and the Canadian mainland was another whole. The government of Canada could draw the straight base lines surround its Arctic archipelago itself but can not draw the straight base lines connecting the mainland and the Arctic archipelago.

The coast line of north mainland of Canada which including Alaska was East-West direction. The Canadian Arctic archipelago was extending to the north.

Picture 5.1\textsuperscript{276}

One fact need to be clarified that the coastline of Canada was refer to the coast line of mainland Canada. The out range of the Arctic archipelago could not be considered as the coast line of Canada. It was just the out border of the archipelago. Suzanne Lalonde is a professor of international law at the Law Faculty of the University of Montreal. She raised the opinion that “the inherent ambiguity of the word “coast” may entitle Canada to claim the seaward coast of the islands as the relevant coastline.”277 This argument has also been raised by Pharand: “What really constitutes the Canadian coastline is the outer line of the archipelago, and the straight baselines follow such an outer line”278

That opinion was inappropriate and unacceptable. In asserting that the north coast of Canada is actually the outer edge of the archipelago, Pharand and other experts effectively take the Canadian Arctic archipelago out of the

geographical context of the legal regime of straight base line. The “coastline” would be neither “Indented or cut into” as that term is normally understood (a coast with inlets, bay and consequent severe headlands, but composed entirely of land, such as is the case with portions of the Norwegian coast), nor a “fringe of island along the coast in its immediate vicinity, as there would be no islands to constitute a ‘fringe’. “ \(^{279}\) Such assertion defies common sense and practice. It is impossible to find any statements made by Canadian governmental representatives, or otherwise, that refer to the archipelago as a “coast”. \(^{280}\) Such references always speak of the “archipelago island”, or the “archipelagic waters” but never the “archipelagic coast”. While it is true that the ICJ judgment and even the UNCLOS allow for a liberal application of the straight base line drawing, but it does not mean that the few general geographic criteria contained therein may be disregarded. \(^{281}\) Accordingly, the geographical criteria situation of the Arctic archipelago of Canada could not support the straight base line claim raised by Canadian government. There is, then, very little geographical similarity between the skjaergaard and the Canadian Arctic archipelago. Furthermore, the fact that the Canadian Arctic archipelago constitutes a “visual unity with the rest of Canada” has no bearing on the issue of whether the first compulsory geographical criterion is satisfied.

### 5.4.2 Whether the Canadian straight line exposed to the oppositions or negations from other States

From the historical perspective, the development of the international law, many times, was promoted by legal practices or certain legal matters all around the world. And international customary laws were composed by each and every one legal practices and legal matters which after long time usage. That proved that the international customary law also had great significances for defining whether certain rules or legal practices could be used as the supports to becoming general international law. Obviously, the rules of general international law had big efficacy on Law of the Sea. And that efficacy may impact the legal status of water areas or other regions, like

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\(^{281}\) Id
the situation in the Fishery Case and also the same about the Canadian Arctic Archipelago.

As mentioned many times before, the activity that drawing straight base line surrounding the Arctic Archipelago of Canada faced obvious opposition from other States and international world. The quarrel over the legal status of the Northwest Passage stands in some contrast to the other Arctic disputes involving Canada because of the wide array of interested parties. However, though Canadian Arctic governance measures have in the past been the object of protests by other states and recent European Union (EU) policy documents have emphasized freedom of navigation in the Arctic routes, only the United States has publicly asserted that the Northwest Passage is a strait used for international navigation. A number of reasons explain the long-standing stalemate over the Northwest Passage: decades of public pronouncements reiterating the official Canadian and U.S. positions have severely limited the two governments’ political margins of manoeuvre. Ambiguities in the legal regime, including the very definition of an international strait, have also allowed both states to craft solid, reasonable, and persuasive arguments.

Have to say that, the United States appears to have consistently protested against regulations or limitations imposed on the transit regime of straits around the world, whether such straits involve internal waters or not. But the activities and claims of U.S. could be as one of the evidence of the opposition from the international world. In the conclusion, the Canadian’s drawing straight base line in the high north area which mostly Canadian Arctic Archipelago can not full filled the criteria of Fishery Case. So the Canadian straight base line received the certain the oppositions or negations from other States. So it would impact the legal authority of certain rules. Vice versa, the general toleration of the international world could be the authority resources of certain rules. But the Canada government did not make it.

According to all these things above, the previous conclusion is the

283 Id
Canadian’s straight base line claim was invalid according to the criteria of the Fishery Case. In another point, the UNCLOS is the most important reference of the world about the law of the sea issues. The relating provisions about the straight base line within the UNCLOS are the fatal element. As mentioned before, the article 7 of the UNCLOS is the key of determining the legal status of certain straight base line claim. To the Canadian situation, the closest provisions of the article 7 are paragraph 3 and paragraph 5.

Actually, the paragraph 3 and paragraph 5 of the article 7 of the UNCLOS are talking about the criteria which already mentioned in the Fishery Case. On the earth, the paragraph 3 was mean to “general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.” The issue about whether the Canadian Arctic Archipelago was the extension of general direction of the coast had already been discussed. The Canadian Arctic Archipelago could not be seen as the natural general extension of the coast land. For the other issue about whether the sea areas or could be called the water areas lying within the lines were sufficiently closely linked to the land domain to be subject to the regime of internal water. It also had already mentioned that the Amundsen Gulf also M’Clure Strait were too wide to be considered as a whole together with mainland. The whole Canadian Arctic Archipelago could be considered as a whole and closely linked each other. But the Archipelago could not be considered as a whole with the mainland of the Canada. This is the key point of the geographical situation of Canadian Arctic Archipelago. So the conclusion is the Canadian’s straight base line claim invalid according to the provision located on the article 7 of the UNCLOS.

All in all, the Canadian Arctic archipelago was hardly regarded as a whole of the main land. According to the criteria from the Fishery Case and the Contiguous Convention and also the UNCLOS, the straight base line drawn by Canadian government which enclosing the whole Canadian Arctic archipelago was inconsistence of international law. It was can not be regarded as internal water within the archipelago. There still have territorial sea and water within such area. In the other words, at least, the

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284 UNCLOS, article 7
non-suspensive innocent passage should still working on such area.

5.5 The legitimacy of Russian straight baselines

As mentioned on the first part, the Russian Federation passed the *Federal Act on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation* on 17 July 1998. In this Federal Act, the article 1(2) has a provision said: “The internal maritime waters include the waters of: … The bays, inlets, firths, estuaries, seas and straits whose mouths are broader than 24 nautical miles, and which have historically belonged to the Russian Federation,” The departure point of determining the outer limit of these waters is baseline, described in such Act as the low water line along the Russian coast. In places where the coastline is deeply indented and cut into, a straight baseline is drawn joining islands, reefs and rocks, as well as across a bay when the breadth does not exceed 24 nautical miles. When belonging “historically” to the Russian Federation, a straight baseline can also be drawn when the mouths of the bay are broader than 24 nautical miles. Considering the Northern Sea Route was less geographical complicated compared to the Northwest Passage, the main disputes were focusing on the status and criteria of some straits like Kara Gate Strait; Vil’kitskii Strait and Dmitrii Laptev Strait, etc.

As the same procedure, the status of the straight baseline drawn by Russian Federation government was determined by the same criteria which mainly coming from the UNCLOS and Contiguous Convention and incorporating the Norwegian Fishery Case. Russia had ratified the 1982 Convention. So the criteria developed under the Norwegian Fishery Case, Contiguous Convention article 4, and 1982 Convention article 7 will be considered. But the specific criteria will accord the Norwegian Fishery Case as the same with the analysis work stated above about the Northwest Passage.

In summary, the conditions which affirmed by the ICJ in the judgment of Fishery Case and also article7 of the UNCLOS were in two aspect. This first one is geographical criteria which the straight base line points should be viewed as a whole with the main land and also the water should have closely link with the main land. Also the drawing of base lines must not
depart to any appreciable extent from the general direction of the coast. The second is certain the oppositions or negations from other States may impact the legal authority of certain rules. Vice versa, the general toleration of the international world could be the authority resources of certain rules.

At the beginning, the first geographical criteria is about whether the straight base line drawn by Russian Federation government following the character of “deeply indented and cut into” and “bordered by an archipelago such as the ‘skjærgaard’”. The ICJ specified that the expression is intended to indicate a coast similar to eastern Finnmark. The geographical situation about Finnmark could be seen at Picture 5.2. This would not be compromised for cases involving small land areas with small narrow indentations; the coast would still be deeply indented and cut into, though less grandiosely than the Norwegian coast. As mentioned above, the main arguments about the straight base line within the Northern Sea Route were focus on these three straits which are Kara Gate Strait; Vil’kitskii Strait and Dmitrii Laptev Strait. The geographical situations of these straits were hardly descried as “deeply indented and cut into” and “bordered by an archipelago such as the ‘skjærgaard’”. It was because such islands were too big to be base points for drawing straight baseline. The details could be seen at Picture 5.3; Picture 5.4 and Picture 5.5. According to the picture, there were big different of geographical situation between the Finnmark and Kara Gate Strait; Vil’kitskii Strait and Dmitrii Laptev Strait. So considering such situation, the first geographical criteria of the drawing straight base line was inconformity.

Picture 5.2

It seems relatively clear that Novaya Zemlya does not consist of traditional fringing islands lying in the close vicinity along the coast. It was made up chiefly of three large main islands which hardly form a unity with the mainland, nor do they form a screen which masks a large proportion of the coast from the sea. The initial base points from which the base lines enclosing the islands originate are situated on a relatively smooth coast, where the low water line is used as the normal base line.


This group of islands dividing the Kara Sea and the Laptev Sea stretches the arguments raised for the straight base lines to be acceptable under international law. Along parts of the coast, there also exist fringing islands under the traditional sense, small and in the relative vicinity of the coast, and either forming a unity with the coast or a screen masking a significant proportion of the coast from the sea. These small islands have been enclosed by the Russian straight base lines, from which the initial base line in the west surrounding Severnaya Zemlya originates. In the east the initial straight base line originates from a basepoint on a smooth coast where the low-water mark is used. These islands consist generally of four large islands, hardly forming a unity with the coast or forming a screen masking a large proportion of the coast from the sea. Though lying approximately the same distance from the mainland as Novaya Zemlya, the angle of deviation with the general direction of the coast is much greater. On the western side, the angle is approximately 90 degrees; on the eastern side, approximately 56 degrees. Even on more complete charts, Severnaya Zemlya cannot be said to curve around to lie parallel to the coastline.\textsuperscript{288} Only for point on the first geographical criteria, the straight base line drawn beside the Vil’kitskii Strait could be said as less convinced.

\textsuperscript{288} Brubaker R D. The legal status of the Russian baselines in the Arctic[J]. Ocean Development & International Law, 1999, 30(3): 212
This group of islands dividing the Laptev Sea and the East Siberian Sea also stretches the arguments made for the base lines to be acceptable under international law, perhaps more so even than for Severnaya Zemlya. Again, it seems difficult to maintain that these islands may be bound by straight base lines for several reasons. The Novosibirsk Islands consist of four islands, two of which are Kotélny and Faddeyévski Islands connected by a glacier, the so-called Bundé Land. They lie approximately the same distance from the mainland as Novaya Zemlya or Severnaya Zemlya, but, similar to the latter, hardly form a unity with the coast or form a screen masking a large proportion of the coast for the sea. The angle of deviation with the general direction of the coast is approximately 58 degrees in the west and some 74 degrees in the east. The direction of the islands continues almost perpendicular to the mainland, Kotélny and Faddeyévski Islands and Bundé

Land lying at greater distance from Bol’shoy Lyakhovskiy Island than the islands comprising Novaya Zemlya and Severnaya Zemlya. For these situations, the Dmitrii Laptev Strait part of straight base line was failed on the first geographical criteria as well.

After discussing the first geographical criteria of drawing straight base line, the second criteria would be compared. The second geographical criterion was “the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.” Actually, it was very hard to find a standard to check whether certain straight base line was “appreciable extent from the general direction of the coast”. Here was used a recapitulative and ambiguous word “general direction”. There was no extra information to clarify which kinds of base line drawing could be considered followed the “general direction” and also the specific condition about such limitation. Neither mentioned nor implied by any of these sources, calculations have been carried out indicating that with the exception of one straight baseline and the initiating and terminating baseline segments, the Norwegian straight baselines at issue in the Anglo-Norwegian Fisheries Case did not deviate more than 15 degrees from the general direction of the coast. But this was just an unofficial number and do not have legal force. The use of such a standard is probably not warranted. There were several disputes about the straight base line drawing issues around the whole world. One of the biggest central point of those straight base line disputes was whether certain straight base line departing to any appreciable extent from the general direction of the coast. So it was implied that such “general direction” criteria was hard to determine. Due to the divergent state practice establishing straight baselines departing an appreciable extent from the general direction of the coast, not much more discussion than this will be presented. But in these three Russian straits, only the Vil’kitskii Strait has obvious depart of the general direction. To sum up, the Northern Sea Route straight base line was less controversial than the Northwest Passage part. About the second criteria, it could be considered as completed, constrainedly.

The third criteria were “certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters.” This criterion is also characterized by vagueness along similar lines as “general direction of the coast,” but some main features can be discerned. From the ICJ’s judgment about Norwegian Fishery Case, it seems that the linkage is to be similar to that used in the determination of the rules relating to bays, liberally applied to coasts geographically as unusual as Norway’s. Although this seems fairly uncomplicated, variations in application have included nonproximity of internal waters to islands or promontories and demands for evidence of practice over time and intensity of use. As the same problem of the second criteria, it was hard to quantification that could clearly distinguished which situation could be regarded as closely linked with the main land and which situation could not be regarded as so. As mentioned above, in the former time the indigenous people could hardly distinguish that where was the water and where was the land. They were all firmly frozen under the thick ice cover. People could not know where lands are and where waters are. So to judge whether there were closely link to the mainland is difficult. Therefore, it was difficult to conclude that there was closely linked water between the straits within the Northern Sea Route.

The forth consideration value was that “certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.” This criterion contains two basic elements. The first one is the evidence about certain economic interests peculiar to a region should be clear. In other words, it is necessary for evidences to prove certain economic interests were important and reality of certain region. The second element was the evidences which could prove such interests were used for long time or period. One more thing need to be mentioned, the evidences about such issues should be used, as the original description “usage”, for a long time. That logically implied that the evidences should be accepted or no explicitly oppose by international world or interests relating States. Only if such evidences accepted by the international world or interests relating States, then such evidences could be able to using for long or by a long usage. In the Russian straits situation, there was no protest or other opposition about the important and reality status economic interests about

292 Id
such region. The United States raised the protest on the straight base line drawing issues. It was not pointing on the economic interests issues.

In this criteria, it was faced the same problem of the previous three criteria. It was the ambiguous words and it was hard to quantification that could clearly distinguished which situation could be regarded as closely linked with the main land and which situation could not be regarded as so. Under such circumstance, there was no standard to determine the status of certain criteria, the States practice will be the key point. In the other words, the straight base line drawing regime is still developing and there are many imperfections exist.

In addition to these main criteria, there are others relevant to this work appearing in the Contiguous Convention article 4 and the UNCLOS article 7, and these will now be briefly presented. They include the instances involving low tide elevations which located on the Contiguous Convention article 4(3) and the UNCLOS article 7(4); foreign territorial seas which located on the Contiguous Convention article 4(5) and the UNCLOS article 7(6); due publicity of baselines which located on the Contiguous Convention article 4(6) and the UNCLOS article 16; deltas which located on the UNCLOS article 7(2); and reefs lying off islands which mentioned on the UNCLOS article 6.

Under the Contiguous Convention article 4(3) and the UNCLOS article 7(4), straight baselines must not be drawn to and from low-tide elevations, unless lighthouses or similar installations that are permanently above sea level have been built upon them. A “low-tide elevation” is defined in Contiguous Convention article 11 and 1982 Convention Article 13(1) as “a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide” within the territorial sea of the mainland or an island, with artificial structures such as oil platforms being excluded.293 These provisions were to limit using these in some how been called as “drying rocks” as base points to drawing base line, which in turn was probably to prevent drawing baselines too far seaward away from the coast.

293 O'Connell D P, Shearer I A, The international law of the sea[M], Oxford University Press, USA, 1984, Page 210
direction, thus reinforcing the “general direction of the coast” criterion.  

“Similar installations” can be towers or buildings warning navigators of low-tide elevations yet without serving any specific purpose connected with navigation. They can also include beacons, fognhorns, and radar reflectors visible at all tides.  

The UNCLOS article 7(4) also makes an exception for instances where the drawing of baselines to and from such elevations without lighthouses or similar installations has received general international recognition, which allows the use of such rocks, as was explicitly done in the Anglo-Norwegian Fisheries Case for fixing the baselines over Lopphavet.  

From the trend of the state practice, this condition has elicited minor compliance. Variations in application of this provision may include the use of the UNCLOS article 7(4) exceptions, international recognition. States may use low-tide elevations to establish baselines and announce after a few years that due to the complete absence or low level of state protest, such base points are internationally recognized.  

In addition, under the Contiguous Convention article 4(3) and the UNCLOS article 7(4), the way is open for states to construct just only a small tower on the so called drying rock or a reef with a light, horn, or radar reflector, without regard to the proximity of navigational routes. Other variations include initial and final base points not connected to the low-water line, abstract arbitrarily selected base points, reefs lying off the mainland, and mock lighthouses.  

Under the Contiguous Convention article 4(5) and the UNCLOS article 7(6), straight base lines may not be applied to cut off foreign territorial seas from the high seas or an exclusive economic zone. This pertains to the situation where a smaller state is embedded within a larger state, or where small islands belonging to one state lie close to the coast of another state. A boundary extension is not permitted while reserving servitudes for the

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296 Id, Page 103  
cut-off state as under the Contiguous Convention article 5(2) and the UNCLOS article 8(2). This criterion, though seemingly clear, also has been ignored by various states.  

All these above show that the criteria established by international law or treaty or convention even typical cases might not very efficient to arranging the straight base line issues. The biggest problem was the ambiguous words. The unclear language might cause the negative impact on distinguishing whether certain straight base line drawing attempt consistence with the international law. The spirit of the international law is hard to find a perfect and confirm regulation to manifest. The result of such situation possibly like the coastal States drawing straight base line for their interests and the big countries of ocean protest such attempting. Both side of them seem followed the international law and could find the references within international laws. The arguments will last long until one side of the dispute making a compromise for various reasons.

5.6 Brief summary

According to all analysis above, the primary conclusion about the straight baseline issue in the Arctic region could be summarized as four factors as followed.

At first, the coastal States like Canada and Russia drawing straight baseline for two main reasons. The one is the environmental consideration. The unique environment of the Arctic was very vulnerable. Small impact might cause the irreversible result to the ecosystem of the Arctic. The human activities mostly shipment activities within the Arctic might cause the negative impact on the animals and other environmental sensitive species. However, the most preoccupying environmental fear is of gross pollution from a major oil spill in the Arctic water. Because of the unique sensitive environment situation, the Arctic will be more difficult to recover from the oil spill or other oil pollution than the other regions. The pollution and degradation of the environment might bring great lose of the coastal States.

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So the coastal States willing to strength the protection of the environment. Drawing straight base line possibly help coastal States to achieve such aim. The other one reason is about political strategy consideration. The Northwest Passage and Northern Sea Route are shorter shipping lanes connecting the two big oceans. The shipment of these Arctic shipping lanes will greatly increased in few decades. If the transit passage regime applied on the Arctic shipping lanes, at that time, thousands of wheels will navigate close to the coast of Canada and Russia, even war ships. This situation was hard to accept for most of the States in the world. Especially, the Arctic shipping lanes were long distance and Northwest Passage located on the middle of the Canadian mainland and the Canadian Arctic archipelago. Drawing straight base line could make the water within the straight base line becoming the internal water. This will help the coast States controlling over such water. And further defence the national security strategy.

Secondly, the widely accepted legal references about straight baseline were Contiguous Convention and the UNCLOS. The relating provisions about straight baseline were derived from the Anglo-Norwegian Fisheries Case. The Norwegian Fisheries Case offered four criterions about the straight base line and all inherited by Contiguous Convention and the UNCLOS. The four criterions were as followed. 1. Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the “skjærgaard”. 2. The drawing of base-lines must not depart to any appreciable extent from the general direction of the coast. 3. Certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. 4. Certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage. These criterions were appropriate but not enough precise. The description language might cause divergences. The result of such ambiguous language was different States explaining these criterions from their different positions. Considering the geographical situations were various around the world, indeed, it is hard to find a universally applicable standard about straight baseline. The international regime about straight baseline has a lot of room for improvement in the near future.

The third factor is the claim of Canadian government about straight base
line drawing was not tenable. This conclusion was based on the Contiguous Convention and the UNCLOS, also referenced by the criterions coming from the Anglo-Norwegian Fisheries Case. The procedures of the analysis were all stated above. The reasons of the conclusion that the Canadian straight base line claim was not tenable were based on following situations.

For the geographical criteria, the Canadian Arctic Archipelago is that coastline neither “deeply indented” nor “cut into” from the mainland of Canada. “The Canadian Arctic Archipelago can hardly be described as a ‘fringe of islands along the coast in its immediate vicinity,’ despite considerations of geographical scales…” Moreover, in the former time the indigenous people could hardly distinguish that where was the water and where was the land. They were all firmly frozen under the thick ice cover. Therefore, it was difficult to conclude that there were closely linked water between the Canadian Arctic archipelago and the main land of Canada. Further more, according to the Picture 5.1, the direction of the coast is not consensus with the direction of the Canadian Arctic archipelago. The number 3 and number 4 criterions of the Fisheries Case were in ambiguous language. In the Canadian case, the waters between within the Canadian Arctic archipelago could considered closely linked to the mainland. But the number 4 criterion was not considered as completed. As stated above, the element was the evidences which mentioned above should be used for long time or period. And there was another implied element that the evidences should be accepted by international world or interests relating States. The relating States such as United States raised the protest on the straight base line drawing issues. So the fourth criterion was not completed. All in all, the Canadian straight base line claim just completed one imperfection descript criterion. It is hardly to considering the Canadian straight base line claim valid for the realistic situations. So the Canadian straight base line could not be widely accepted by the international world.

The fourth factor is the claim of Russia Federation government about straight base line drawing was not tenable. Different from the Canadian Arctic archipelago, the straight base line issues within the Northern Sea Route mainly focusing on the three straits which Kara Gate Strait; Vil’kitskii Strait and Dmitrii Laptev Strait. This conclusion was also based

300 Byrne J. Canada and the legal status of ocean space in the Canadian Arctic archipelago[J]. Fac. L. Rev., 1970, 28:8
on the Contiguous Convention and the UNCLOS, also referenced by the criterions coming from the Anglo-Norwegian Fisheries Case. The main reasons are followed. For the geographic criteria, according the picture 5.2; 5.3; 5.4; 5.5, these there straits can hardly be seen as the same as the Finnmark. The direction of the straits islands was different from the coast direction. The last two criterions faced the same problem which ambiguous language makes various explanations in different States. Whether the water or certain economic interests within the straight baseline closely linked to the mainland greatly affected by the official statement and attitude. Further more, there was no punishment or adverse consequences if States drawing straight baseline beyond the international law. For this case, the straight baseline of Russia Federation was not tenable. Because the situation which waters and certain economic interests closely linked with the mainland were difficult to recognize.

Here is an important thing that nothing could do but protest when States claiming their straight baseline. Especially in the Arctic, due to the uncertain environment situation, the foreign vessels will take high risks to navigating through the Arctic shipping lanes. So that in the Arctic region, especially Canada and Russia Federal, the straight baseline regime would mostly applied once the government officially raised. All these showed that the coast States in the Arctic Circle have fatal influences on the Arctic relating issues. At the same, the fatal influences of the coast States will definitely play on the Arctic shipping issues. And nowadays, the Arctic shipping issues seems meeting the bottleneck which the conflict of the great demand from the outside and the national interests from the inside. What the strong power will bring to the Arctic in the future? What is the breaking point of the Arctic shipping issues? The next chapter will focus on these and surrounding questions.
6. The future of the Arctic shipping and feasible alternative to the Arctic

As mentioned, the coastal States of within the Arctic region have great influences on the Arctic issues, especially States like United States; Canada and the Russian Federation. These “big three” control most of the coastline of the Arctic Ocean. Their policies and attitudes could greatly impact on the Arctic relating issues, especially Arctic shipping issue. It is undeniable that coastal States are playing an important role in the Arctic shipping issues. As the rapid climate changing, the environment of the Arctic Circle will be inevitably changed as well. As the two sides of a coin, those changes may bring opportunities and also challenges. There had a divergence about the future of Arctic shipping standing in front of the coastal States. The divergence is somehow a dilemma that “when faced the wave of modern civilization, embrace it and become one part of it or keep specificity and free from the great convenience brought by modern development”.

In terms of the coastal States, as mentioned in the previous chapters, negative voices were always exist about the open of the Arctic shipping lanes considering about environment, security and national strategic reasons. For the non-Arctic States or in other words the “outside” States like China, South Korea, Japan and India, etc, they had great demand on opening the Arctic shipping lanes freely. However it now seems that the demand of opening the Arctic shipping lanes will persist and even increase. One of the most important situations was the Arctic shipping was indeed saving much more time and distance between East Asia and Europe compared to the traditional shipping lanes. The demand from the “outside” States was reasonable and the consideration of the coastal States was reasonable the same. If both side firmly entrenched their positions, it will be a regrettable thing. After all, if the adverse consequences do not happen, the convenient Arctic shipping lanes will bring great advantage to the international world by promoting global trading and globalization. So the key to solving the
divergences between the coastal States and the “outside” States was furthest avoid the adverse consequences and protect the harmony between the interests of the coastal States and the normal navigations. In this chapter, the main idea of the possible solutions will focus on eliminating the worries from the Arctic coastal States. As mentioned on the chapter 4, the main reasons of the coastal States worried about the Arctic shipping lanes were focus on two factors which environment and national strategic interests.

6.1 How to eliminate the environment issues concerned by the Arctic coastal States

The Arctic region is a unique and fundamental component in the world ecosystem. This region, like other temperate regions, has experienced relatively negligible exposure to the environmental consequences of industrial and commercial development. Nevertheless, commercial activity is recently taking place and by all accounts is projected to increase at a relatively intensive rate, thus increasing the potential for environmental damage. Also it had been said for thousand times that the potential impact on the regional environment, which might result from increased shipping activity. Pointing on this issue the Canadian expert points out that tanker tracks may hinder natural migrations of various indigenous land mammals, and that certain sea mammals would experience a higher mortality rate as a result of tanker disturbance of sea ice platforms used for breeding.301

The article 234 of the UNCLOS will be a useful tool for Arctic navigation issues in the future. It is the only legally binding article of the UNCLOS recognizing the special vulnerability of the Arctic environment. The article 234 clearly provided that: “Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone”

As mentioned on the previous chapters that the result of such damage need

the coastal States to burden. In another words, the coastal States of the Arctic region will be the direct victims for the environmental negative impact. The opening of the Arctic shipping lanes will bring various environmental problems and other kinds of environmental issues which may cause negative impact on the Arctic environment. These environment issues were one of the biggest obstacles of the opening of the Arctic shipping lanes. How to eliminate the environment issues brought by the coming navigations and concerned by the coastal States were the main question should be solved in this section.

6.1.1 What are the environment issues concerned by the Arctic coastal States

Before dealing with the question about how to eliminate the environment issues concerned by the coastal States, it is necessary to figure out what are the environment issues concerned by the coastal States. It is better and easier to find the solutions if all problems are listed. However, as mentioned before, the most preoccupying environmental fear is of gross pollution from a major oil spill in the Arctic water. Most of the oil spill accidents were caused by oil vessels and offshore drilling platform. Both these two high risk objects could threaten the Arctic. Many scientists believe that the Arctic area is a relatively fragile environment and that oil spills in this area would have a more damaging effect on regional marine life, compared to that in more temperate zone.\textsuperscript{302} The factors cited in support of the fragility of Arctic ecosystems are: (1) the lower rate of oil decomposition in cold waters; (2) the relatively low reproduction rates of Arctic organisms and correspondingly low population recovery rates; and (3) the low diversity of Arctic organisms and their low tolerance to environmental fluctuations.\textsuperscript{303} These three factors might cause irreversible damage in the Arctic region. So these show that the oil spill and pollution issues were the first ranking environmental problem which the coastal States should care the most. As the shipment increasing in the Northwest Passage and Northern Sea Route, owing to the climate change and the sea

\footnotesize{\textsuperscript{302} Bloomfield L P. The Arctic: last unmanaged frontier[J]. Foreign Affairs, 1981, Page 101
\textsuperscript{303} Donat Pharand, Legault L H. The Northwest Passage: Arctic Straits[M]. Martinus Nijhoff Publishers, 1984, Page 130}
ice melting within the Arctic, the risks of oil spill and other oil pollution will increase as followed.

There were more than one environmental problems concerned by the coastal States. The other bringing environmental problem should be concerned by the coastal States was the air pollutions. Even though early Arctic explorers had noticed atmospheric haze and dirty deposits on the snow\textsuperscript{304}, the remote Arctic atmosphere was long believed to be extremely clean. As the opening of the Arctic shipping lanes, great number of the vessels will navigating within the Arctic region and of course will bring mounts of waste gas and other off gas might aggravate air pollutions. Models predict that summer sea ice may completely disappear by 2040\textsuperscript{305}. This is caused by global increases in long-lived greenhouse gases, whose effects are enhanced in the Arctic through feedback mechanisms such as the sea-ice albedo feedback. The result may achieve in advance if the Arctic shipping lanes take into use. If the sea ice within the Arctic greatly changed, it will bring the enormous impact on the ecosystem of the Arctic. It may cause a battery of questions like eco-environmental retrogression, indigenous people life style, infrastructure issues and social insurance issues. So the air pollution problem also might be concerned by the coastal States.

Closely linked with the air pollution problems, the impacts made by navigations on sea mammals and other animals also eco-environmental situations is a very matter of concern for the coastal States. As mentioned that the pollution gas might cause the sea ice retrogression, it will be a disaster of some kinds of species which heavily rely on the sea ice for breeding. The most representative animal is polar bear. The polar bear can not survive without the sea ice.

One of the problems brought by shipping navigations is noise. The environmental impact of the noise is mainly on the Arctic animals including sea mammals. The noises pollutions are not only exist within the air but also powerful under the water. Sound travels much faster and much further in the water than in the air, and many sea creatures have highly sensitive

\textsuperscript{304} Nordensköld A E. Nordensköld on the inland ice of Greenland[J]. Science, 1883: Page 732
\textsuperscript{305} Holland M M, Bitz C M, Tremblay B. Future abrupt reductions in the summer Arctic sea ice[J]. Geophysical Research Letters, 2006, Page 33
hearing systems built to perceive sounds at great distances. It’s hard to comprehend the biological impacts of this exponential increase in industrial noise in the sea, but there is ample evidence to suggest that it is damaging life and habitat for countless marine animals. A seismic air gun is a device that is used to search for and monitor oil and gas deposits hidden beneath the Ocean floor. The guns are towed in arrays across large areas of the ocean, shooting high-pressure impulses down towards the sea floor. The acoustical impulse hits the bottom and sinks into the earth structures below. When these sounds bounce back up towards the surface the data is collected by hydrophones in water microphones and fed to recording instruments for analysis. Of course the engine noise generated by large vessels is having a major impact on marine animals as well. The bulk of the noise comes from the ship’s hull, the propellers and radiated noise from hull-mounted equipment. These sounds are capable of masking animal communication signals, disrupting breeding in whales, causing stampedes in walruses and even effecting the respiration of humpback whales. As the open of the Arctic shipping lanes, the noise pollution will become more serious in this region.

Moreover, the shipping navigation is one of the negative environmental impacts itself. There were many ship strikes happened in the past. Many species of whales and dolphins are vulnerable to collisions with vessels. Most reports of collisions involve large whales but collisions with smaller species also occur. Collisions with large vessels often either go unnoticed or unreported, particularly for the smaller species. Animals can be injured or killed; and vessels can sustain damage. Serious or even fatal injuries to passengers have occurred involving hydrofoil ferries, whale watching vessels and recreational craft. The ship strikes were both threaten whale species and also vessels. It not only might cause the damage of whales or other results like changing the migration routes but also serious result like the damage of vessels which may lead to the oil spill or other toxic spill accidents.

To sum up, the environment issues concerned by the coastal States concluded these problems as followed. 1. Oil spill and other toxic spill. 2. Air pollution. 3. Noises pollution. 4. Ship strikes. Every problem might lead to the irreversible results. In fact, these environmental problems are the
most obvious in the current time. There might be also many implicit and decussate problems exist. But the problems which mentioned above are the basis. The obstacles of opening the Arctic shipping lanes will obviously decreased if these problems solved.

6.1.2 Solutions about eliminate the worries of the coastal States

Various environmental problems listed above, it is acceptable for the coastal States took measures to deal with. The measures taken by coastal States in current time mostly focus on protecting their domestic interests. It is nature and every State will do the same thing. The drawing straight base line was a perfect example.

As stated before, the coastal States of the Arctic region will be the direct victims for the environmental negative impact. So for the coastal States, especially for the long coastal line States like Canada and Russia Federal, it is reasonable to strength the protection of such region. Drawing straight base line could meet the demand and accord with the national interests. After drawing the straight base line, the water within the baseline will be considered as internal water. There was more restrict regime applied on the internal water. The transit passage and innocent passage would not adopt in the internal water. The shipment within such water will under control of the coastal States. More than that, the straight base line likely amplified the range of territorial sea. It is also benefit for coastal States government to protect the environment.

The straight base line drawing activities perfectly showed the thinking of the coastal States. Coastal States have to consider what the best is for national interests. For the Canada and Russia, the best measure in the current situation was strength control of the Northwest Passage and Northern Sea Route. To amplify the responsibilities of the foreign vessels and make foreign vessels under control of the coastal States, in this way protect the national interests of the coastal States. This was clearly showed in the straight base line events. The measures taken by coastal States to protect national interests still stay on the level that by limit the number of foreign vessels and strengthen supervision. In the deep sight, the coastal States hold the negative attitude on the opening of the Arctic shipping lanes.
In the very soon future, the Arctic will march into a new era. New thinking and new horizon are needed for the Arctic shipping issue in the future.

The mainstay of such conclusion is the international demands of using Arctic shipping will no doubt endure for the long term. With the development of the Asia economy and trade, the transnational economic activities are increasing as followed. As the trend of globalization, the transnational and international trade will become common and frequent. In the current level of technology the shipping transportation is the heaviest relied on by the transnational and international trade. The railway and air transportation are subject to the limit carrying capacity. The shipping transportation has its advantages like big carrying and low price, especially apparent for the long distance and transcontinental transportation. All in all, the development of Asia economy and under the background of globalization plus the great dependence on the shipping transportation in the transnational and international trade, the demand of using Arctic shipping lanes will long term exist and even stronger.

Considering that the trend of opening the Arctic shipping lanes as the navigation passage was hardly change in current situation, to the coastal States, more open minds and positive attitudes are needed for the opening of the Arctic shipping lanes. As stated above, the best way for the Arctic issues was international participation and cooperation. The Arctic is a unique and very important region of the earth. The importance of the Arctic is reflected in global climate, global ecosystem, biodiversity and other aspects. All these matters are very important to all humans. Developing the Arctic as well as opening the Arctic shipping lanes is used for service to all humanity. But if the cost is other matters which closely connected with all humanity as well, then it is not worth the efforts. So protecting the Arctic including protecting the environment and other relating issues is the precondition of developing of the Arctic. As the same principle in the Arctic shipping lanes issue, the striving direction is as far as possible to protect the environment of the Arctic and improve the mechanism of protection. Using this way to eliminate the worries from the coastal States is easier acceptable and accord with global interests.

The concrete measures could be regarded as two administrative levels. The
first level is strengthening the power of Arctic Council or establishing a powerful and efficient entire organization. Anyway, the Arctic needs a powerful and efficient entire organization to take charge with various Arctic affairs. The powerful and efficient entire organization should take over everything control about Arctic environmental protection. Currently, Arctic region has many good regulations or treaties. But the implement of such regulations is still rely on conscientious and good faith of relating States. This organization need to be an international participation and cooperation, with the power to determine the issues relating to the Arctic. Such organization will be composed by various States and professionals. It could establish on the basis of the Arctic Council involving all the member States and observer States. It is easier to integrate resources of different relating States and take advantage of each States. This is the best way to protecting the Arctic environment which many States cooperate to taking measures for Arctic protection. The strength of international cooperation must far bigger than single State and even regional cooperation. The good news is now the Arctic Council is working on this.

The second level is under the first level. It could be regarded as functional departments as the supplement of the first level. The second level includes two concrete measures which are establishing an entire and international participation fund and found a repaid respond rescue and emergency processing action group. The details of these two levels will be discussed as follow.

At first, to establish the powerful and efficient entire organization is the most important measure for solving conflicts between coastal States and “outside” States. It is the core of Arctic protection mechanism which advocated in this article that international participation and cooperation. The organization is composed by different States including the coastal States, “user” States of the Arctic shipping lanes or other Arctic relating States. The structure of this organization could refer to the United Nations Security Council. The organization could apart into three kinds of membership which are permanent members (Russia, Canada, Denmark, Norway and United States these five Arctic coastal States), non-permanent member (elected on a regional basis to serve two-year terms) and normal members. The rules of discussion could refer to the UN Security Council as
well.

The member States are encouraged to contribute resources to the organization. It is used for protecting the Arctic environment and avoiding and processing emergency situations. The resources include capital, technology, professional, vessels and other equipments. Considering the various development levels, different States could contribute what they really good at. For example, Japan gives more advice about technology and South Korea could offer more advice on shipbuilding technology. The responsibilities of such organization are coordination and distribution of the resources including capital and professionals contributed from different States to achieve efficiency maximizing and then protect the Arctic environment as far as possible. This is the final destination of the protection mechanism.

The reason why a powerful and efficient entire organization is needed is only such organization has ability to manage the international protection mechanism. The protection mechanism which leded by the entire organization include following steps.

The first step is setting transit expenses to vessels passing through the Arctic shipping lanes. According to the previous chapters, the Arctic shipping lanes could be considered as composed by straits used for international navigation or called international straits. In addition, for the unique location, the Arctic shipping lanes will attract a lot of vessels. Using Arctic shipping lanes could save much time and distance, so setting up transit expenses is acceptable and reasonable. As the same situations of the important straits and cannels, Suez Cannel had very expensive passing fee as well. Certainly, the specific price should fully consider the cost of vessels. It should make sure that using Arctic shipping lanes is profitable and protecting the attractiveness to the navigation States and companies. The capitals from the transit expenses should administrated by the organization rather than by certain State. The capitals received from passing vessels mostly put into the special fund which will discuss later.

The second step is regulating the standard of the vessels which are able to using Arctic shipping lanes. It is like rule maker and create entrance
standards. The standards are including construction standard and petrol and noise standards. According to the worries of the coastal States, setting a restrict standards of vessels is helpful for decreasing the risks of oil spill and air also noise pollutions. Moreover, the seamanship of the crews should also be regulated by the organization as well. These factors could be seen as the supplement of the IMO Polar Code.

The third step is establishing rapid respond rescue action group even a united army. Also for the special environmental situation of the Arctic, the oil spill accident or other high risk accidents are needed to be processed rapidly and efficiently. So the rapid respond rescue action group which composed by professionals and experienced crew is necessary. The action group should be found in different locations so that could ensure rapid respond and do the right thing when faced with emergency situations on the first time. The rescue staff could include professionals, experts, experienced crew and even soldiers. The structure is similar to the example of the UN Peacekeeping Force.

The fourth step is collecting environmental data and publishing official survey results and guide to actions. Also this step was on the list of Arctic Council and be taken in progress. The environmental data is coming from different member States. After the official conclusion, all member States should follow the guide and organization’s advices. One of the advantages of unitive data analysis and result release is that the final decision is made based on both macroscopic and microcosmic levels. It could get more scientific conclusions in wider area. This measure is used for environment monitoring and tracking. There are more scientific decisions could be made based on multinational data.

Another very important part of the protection mechanism is entire and international participation fund which mentioned above paragraphs. This fund is used for offering financial support to the Arctic administration organization. It could use special foundation format and even regional bank format like establishing “Arctic development bank”. The capital sources mainly from the transit expenses of the Arctic shipping lanes plus member States donation and other environmental organizations donation. The fund should under the supervision of the organization. This fund should be used
for protecting the Arctic environment which including sea mammal protection, indigenous people social welfare and also the cost of oil spill accident rescue actions and other all kinds of relating expend.

Last but not least, Polar Code probably will enter into force 1 January 2017. Currently, there were regulations in the polar regions like SOLAS, MARPOL, AFS, STCW (Standards of Training, Certification and Watchkeeping), etc. Polar Code is standing on current regulations as the newest agreement to protecting the Arctic. It has many specific chapters on ship situations, safety, life-saving, emergency control and other very important aspects. Polar Code will greatly facilitate the Arctic shipping in the future. But have to recognize that there are still challenges following. First of all, the environmental situation is uncertain next few years. That will make the perspective of Polar Code uncertain as well. Secondly, various opinions on additional situation, both political and environmental development, also need to be settled as followed. Thirdly, the application problem about existing vessels needs to be clarified. And the last, how to committee the force of Polar Code or how to deal with the violation acts is very important and necessarily to be answer.

All in all, the environmental issues in the Arctic are the maters relating to all mankind. International participation and cooperation is the best way to protect the Arctic environment in the new ear. International cooperation could integrate various resources from different States and take advantage of each States. This will greatly contribute to the efficiency maximizing.

The protection mechanism which offered above could largely eliminate the worries about the environment from the coastal States and also take care of the Arctic shipping lanes’ “user” States. For the first concern, the organization regulated the construction and crew level standards plus the rules of Polar code could minimize the risk of oil spill accidents. In addition, the rapid respond action group will minimize the damage of the oil spill. Secondly, the air and noise pollution could be controlled by the organization using restrict standards of petrol or other clean energy and engine. Thirdly, ship strike indeed hardly to avoid, but the special fund could help coastal States to protecting and artificial breeding. All these measures are minimize the cost of opening the Arctic shipping lanes and largely eliminate the
environmental concerned of coastal States.

6.2 How to eliminate the national strategic interests concerned by the Arctic coastal States

As the same situation of the environmental concern, it is necessary to figure out what the national strategic interests include at first.

The Arctic’s potential economic bounty has prompted the littoral states to update security strategies for the region. In fact, the biggest concern of the coastal States is focusing on the military aspect. The other aspects of the national strategic interests mostly based on State’s national interests and it is hard to interfere. So to eliminate the national strategic interests concerned by the Arctic coastal States, how to deal with the military security issue is the essential determinant. Considering most of the shipping lanes are located closely to the coast line of coastal States, the military security issue does largely bothered the coastal States. As the opening of the Arctic shipping lanes, the issue about warships navigation will become a heated discussion topic. Especially for Canada, main part of the Northwest Passage is between the Canada mainland and Canadian Arctic Archipelago.

Admittedly, the worries about warships navigation issue or generally called military security issue are very difficult totally eliminated. But the pressures of military security could be relieved in a different way. The military forces of all States are used for defending their national interests. So in current modern international society, it is only interest conflictions between States will make certain State threatened by military force from other States. In fact the worries of certain State about military security are on the basis of interest conflictions with other States. Have to emphasizing that there are various reasons lead to interest conflictions between States like economy, resources and even locations. In some regions military security had already became an event and some regions are still in potential. So it could claim that the worries of military security will permanently exist. Since the military security issue could not be solved perfectly, it will be welcomed by every State if the worries could be relieved albeit not great amount.
The protection mechanism which mentioned above also could play a positive role for relieving the worries about military security issue of coastal States. The most important part of the protection mechanism is the powerful entire administration organization for relieving the worries. The powerful organization have great significances to the security issues of the coastal States, 4 main reasons are followed.

Above all, the regional positively situation is the Arctic coastal States possessing similar interests and position to the Arctic issues. This background will make it easier that solving the interests confliction between the coastal States. All disagreements can and should be settled peacefully in the Arctic. Russia and Norway resolved a decades-old maritime border dispute in the Barents Sea in 2010, which diplomats cite as a model for Arctic diplomacy.

Firstly, the organization is a good platform for communication and settlement of the conflicts between coastal States and even with outside States. Moreover, the organization also could provide its opinion which based on wider and higher sight of the whole Arctic for the both sides of controversy.

Secondly, Russia is the only non-NATO coastal State in the Arctic. But the national strategic military arrangement of Russia was very worth to attention. In addition, Russia is the biggest coastal States of the Arctic and it has the longest coast line plus most of the Northern Sea Route closely locating to the Russian coast. Even though Russia is the only non-NATO States, Russia still could make a loud voice about the Arctic issues. The organization is able to gather the entire coastal States using extra way to settle disputes. Also because of Russia is the biggest coastal State. Russia should care its Arctic interests more than the other coastal States. So Russia will be willing to choice the organization as a platform of settlement and it is suitable for its national interests. In that way, Russia and NATO States will in peaceful coexistence.

Thirdly, the entire and the same powerful regional organization is a kind of constraint and a moderator for dispute between coastal States. For the
organization is fully represent the Arctic interests, so the solutions offered by the organization will be better for the coastal States and more suitable for the Arctic region.

Fourthly, the organization could make the States in the Arctic region as an interest community. The multiple States community will largely enhanced the comprehensive strength. It has great significance on the Arctic faced with military threaten from outside States. Thereby, the organization could better maintenance of regional security.

To sum up, the national strategic aspect concern of the Arctic coastal States is most focusing on military security issue. The military security issue is based on various reasons, so it will exist forever. To eliminating the worries of the coastal States about military security issue is impossible but we can relieve the worrier in different way. The organization which the core part of the protection mechanism has positively significances on this job.

6.3 The backsides of the protection mechanism

As mentioned above, the protection mechanism could largely eliminate the environmental worries from the coastal States by decreasing the risks of environmental damage and accidents. And it could relieve the national strategic worries by making a better communication platform for disputes settlement and enhance comprehensive strength for maintain regional security situation. But the mechanism is not perfect.

The biggest problems are mainly focusing on two aspects. The first one is the punishments execution mechanism absence. The second one is that due to the different situation of different areas decisions might not easy to pass by various States.

About the first problem, it is the common problem faced by most of international organizations and treaties. There is no right beyond the sovereignty of one State. So that makes there is no efficient punishment execution mechanism to put on default State. Even the organization is powerful and running as a decision maker, but it still not eligible to
executing punishment on certain State. Other indirection punishments like economic sanctions may cause negative impact on the Arctic region as well. So the punishments execution mechanism absence is a big problem for the protection mechanism.

For the second problem, it is on the basis of highly respecting on the Arctic and the coastal States. The organization is devoted to well protect the Arctic environment and interests of coastal States. So it is nature that coastal States are in dominant position and have a louder voice on Arctic issues. But the Arctic issues are complex and diversity. Interest conflicts are always happen and might more frequent on regional developing phase. Every coastal State has great influences on the Arctic issues and every coastal State has its various interests. Proposals might be stuck if divergences are big enough. If the organization can not well working then there is no point for the aim of the organization. But the good point is the organization still could be used as platform of communication and disputes settlement.

At last, the protection mechanism could largely relieve the worries of coastal States on the Arctic shipping lanes. Actually the opening of the Arctic shipping lanes is a great opportunity for the Arctic region as well. The Arctic needs a beautiful future and this calls for the joint efforts of every State of the world.
7. Conclusion

In current time, there were 4 kinds of passage regimes for vessels navigating at sea. These 4 regimes are freedom passage at high seas, transit passage at straits used for international navigation, innocent passage at EEZ and territorial seas of States, observing the national regulations at internal waters of States. The main focus of this article is trying to clarify which passage regime should be applied on the Arctic shipping lanes. It is necessary that fully considering the customary, history and other relating aspects of the Arctic shipping lanes and Arctic region before reaching conclusion. The Arctic is a unique region of the world. The uniqueness are expressing in many ways like climate, isolate location, fauna and flora and so on. There is no place which has similar navigation situations like the Arctic. So the general regulations about ships navigation may not perfectly suitable for the Arctic. That makes that a specific regulation is needed to applying on the unique Arctic.

7.1 Current passing regimes are not clear and not suitable for the Arctic

So far, there is still no extra passing regime applied in the Arctic but 4 basic regimes. In addition, as the global climate rapidly changed, the climate of the Arctic was greatly changed as well. The increasing temperature makes the speed of the sea ice melting in the Arctic faster. That makes the Arctic accessible for vessels navigating in few mouth of a year. It is foreseeable that the Arctic will become a very important area of international navigation. It is ever more need for a suitable passing regime in the Arctic to deal with increasing navigation issues. But current time, the passing regime development is already falling behind the development of the Arctic shipping and other recently emerging industries. The general international laws regulations can not perfectly protect the interests of coast States. The
result of this situation is coast States willing to apply specific regulations on territorial seas and other waters. Canada and Russia are typical examples about this result.

Most of the Northwest Passage is between the mainland and Arctic archipelago of Canada. It is long distance shipping lanes. But in macroscopic sight the Northwest Passage even the whole Arctic Ocean could be considered as a strait connecting Pacific Ocean and Atlantic Ocean. There are different opinions about the legal status of the Northwest Passage in the international world. Some States claim the Northwest Passage could be considered as straights used for international navigation. The other thinking which claimed by Canada is the Northwest Passage is not a strait used for international navigation. To consolidate this claim, Canadian government using AWPPA and NORDREG as tools try to setting more restricts limitations on foreign vessels. But the problem is that both AWPPA and NORDREG are unilateral legal document and not accord with international laws. Theoretically, Canadian unilateral legal documents are not legally binding to the other States. But considering the special navigation situations, foreign vessels mostly comply with them. It is the same about Northern Sea Route and Russia. The Russian Federation was using concept of “water area” as tool to make the Northern Sea Route fully controlled by Federation government. The Federal Law on Amendments 2012 consolidates the Russian position.

Both Canada and Russia were trying to use national legal documents making the Arctic shipping lanes controlled by them. This shows even more the absence of suitable regime and institution for the Arctic and for the Arctic shipping lanes. It is because of the absence of suitable passing institution plus the unilateral actions taken by coast States that the Arctic shipping lanes are full of divergences and disputes. The main controversy objections are focusing on two questions. The first one is “whether the Arctic shipping lanes could be considered as strait used for international navigation?” The second one is “whether the straight baseline claimed by coast States are legally tenable?”

7.2 The Arctic shipping lanes could be
considered as strait used for international navigation

In current time, there are only few international conventions and other international legal documents mentioned the issue about strait used for international navigation or called as international straits. The most important references about international straits are the UNCLOS and Contiguous Convention. But in these two conventions, there are only general description provisions and no specific regulations about what kinds of straits could be considered as international straits. There are only two conditions about international straits; the first one is geographical condition which is “between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone”\(^{306}\), the second one is “used for international navigation”\(^{307}\). About these two conditions especially for the second condition, there are different explanations to analysis what this condition exactly express. Two main explanations are that “the straits should be already used for international navigation” and “straits potentially used for or have ability to be used for international navigation”. In terms of both these two explanations, the Arctic shipping lanes accord with the conditions. So according to the international law in current time, the Arctic shipping lanes entitle to be considered as straits used for international navigation. The transit passage regime should be applied according to the UNCLOS provisions.

In practical respect, the attitudes of coast States toward coast straits would have great influences. This situation is even more serious in the Arctic shipping lanes. It is not possible for foreign vessels passing the Arctic shipping lanes without the permission and help of coast States in current situation of the technology development. So in practice, foreign vessels using the Arctic shipping lanes have to follow the regulations of coast States. But have to emphasizing that, for the legal perspective, the legal status of the Arctic shipping lanes is strait used for international navigation. This will not become a problem in the future as the sea ice melting and navigation

\(^{306}\) Article 37, UNCLOS
\(^{307}\) Id
technology development. The specific regulations about standards of navigation vessels like Polar Code or other domestic regulations were based on article 234 of the UNCLOS and sovereignties of coast States. These were nothing business on legal character of Arctic shipping lanes. The legal character of Arctic shipping lanes is strait used for international navigation.

7.3 The straight baseline claims made by coast States are not tenable

In the international laws point of view, the Arctic shipping lanes are international straits, so transit passage regime should be applied according to the UNCLOS. The foreign vessels could enjoy more freedom of passing through. This is on the contrary to the interests of coast States. The article 35 (a) of the UNCLOS regulating that: “Nothing in this Part affects any areas of internal waters within a strait”\(^{308}\). According to this provision, both Canada and Russia claimed their straight baseline plan. The waters within straight baseline will become internal water of coast States and then the transit passage regime will be excluded. But the article 35 has exception about this situation which read: “except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such”\(^{309}\). Now the question was convert to whether the straight baseline claims made by coast States are legally tenable and exclude the use of transit passage regime.

The reasons used by both Canada and Russia to strength the control of their coast waters was the waters within straight baseline could be considered as closely linked, both economy and environmental concerns, waters of them. First of all, there is no explicit description in the international law named “historical water” or other phrases like “historically belong”. The only concepts accepted by international law is the adjective “historic” and “historical title” used for describing the relating rights of bay in the article 7 and article 12 of the Contiguous Convention. Although there is no official

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\(^{308}\) Article 35, UNCLOS

\(^{309}\) Id
and wide accepted definition about “historical” relating concepts, United Nations International Law Commission published a report about these question. There are 4 elements of title to “historical waters”. The first element is exercise of authority over the area claimed. The second element is continuity of the exercise of authority which could by concluded as usage of certain historical waters. The third element is the attitude of foreign states. The fourth element is whether there are vital interests of the coastal States in the area claimed. The third element was not completed because of the opposition of other States like U.S. So the historical water reason was defective. And the fourth element is very hard to affirm. So these were not enough for applying straight baseline regime.

There are many provisions of conventions about the drawing of straight baseline, for example the UNCLOS and Contiguous Convention. But these are all general regulations and no specific standards to determine which situations could draw straight baseline. There is a perfect example that the ICJ 1951 Norwegian Fisheries Case. It will be used as references to analysis the standards of straight baseline. The conditions which affirmed by the ICJ in the judgment of Fishery Case were in two aspect. This first one is geographical criteria which the straight base line points should be viewed as a whole with the main land and also the water should have closely link with the main land. Also the drawing of base lines must not depart to any appreciable extent from the general direction of the coast. The second is certain the oppositions or negations from other States may impact the legal authority of certain rules. Vice versa, the general toleration of the international world could be the authority resources of certain rules. In addition, ICJ gave a perfect example about what kind of geographic situation entitle to drawing straight baseline. The perfect example is Finnmark in Norway.

Actually, the provisions of the UNCLOS and Contiguous Convention plus the criterions offered by ICJ, all this standards are not accurate enough. For example, one of the criterions is “must not depart to any appreciable extent from the general direction of the coast”. But there was no extra information about what is “general direction”. The ambiguous language expressions lead to the divergences situation that different States hold different explanations. Fortunately, ICJ gave an example; according to that, both
Canada and Russia claims about straight baseline are hardly convinced. So the straight baseline claims made by Canada and Russia are not tenable.

7.4 New changes are needed for the Arctic and also for the shipping lanes

As the conclusion have made that the straight baseline claims of coast States are not tenable, the legal status of the Arctic shipping lanes is confirmed. The Arctic shipping lanes could be considered as international straits and should apply transit passage on them. This result may not a perfect ending for the coast States. And it is already mentioned that the influences of coast States about the Arctic shipping lanes are great. Although theoretically speaking on current international law basis the Arctic shipping lanes should apply transit passage regime. But for the peaceful development of the Arctic region, the interests of coast States should be largely considered as well. After all, in practical respect, the Arctic shipping lanes won’t play its prescribed role without the cooperation of coast States.

It is a trend that the Arctic shipping lanes are used for international trade in the very close future. The demands of using the Arctic shipping lanes from the world will be long-term exist. Actually, the opening of the Arctic shipping lanes is a golden opportunity for the coast States and the Arctic region. If well dealing with all relating issues, the opening of the Arctic shipping lanes will bring great economic prosperity to the Arctic region. So coast States are better to embrace such trend and try to decrease the potential negative results.

The worries of coast States are mainly focusing on environment and national strategy aspects. To eliminate these two aspects worries, new changes is needed for protecting interests of coast States and balance the interests of international world. Currently the article 234 of the UNCLOS and also Polar Code in very close future are useful regimes to balance the interest of coastal States and environmental protection. The new changes are including powerful and efficient entire organization which gathered
coast States and other relating States; a specific fund which exclusively used for protection of the Arctic and other surrounding measures. It is the core of Arctic protection mechanism which advocated in this article that international participation and cooperation. The organization is composed by different States including the coast States, “user” States of the Arctic shipping lanes or other Arctic relating States. The organization is established for protecting the Arctic environment and avoiding and processing emergency situations. The final destination of the protection mechanism is to achieve efficiency maximizing and then protect the Arctic environment and balance the interests of various States as far as possible. In terms of national strategy worries, the organization also has positive foundation. Firstly, the organization is a good platform for communication and settlement of the conflicts. Second, the entire and the same powerful regional organization is a kind of constraint and a moderator for dispute between coast States. Last but not least, the organization could make the States in the Arctic region as an interest community. The multiple States community will largely enhanced the comprehensive strength. Last, the strong powerful organization has ability to taking various measures to guarantee the implement of document decisions.

Certainly, like every coin has two sides, the new protection mechanism has backsides as well. The biggest problem is that it is hard to reach consensus because various situations in different States. But the new protection mechanism could still play a positive role on the Arctic shipping lanes issues and also the Arctic issues. The new protection mechanism is used for achieving peaceful development of the Arctic shipping lanes and facilitating the globalization. Also the Arctic States and Arctic region could more closely connect to the international world and achieve the long-term developments. Anyway, the Arctic should and deserve a bright future.
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