

**INSROP WORKING PAPER
NO. 57 - 1996, IV.3.1**

**The legal status of straits in Russian Arctic
Waters - "Internationality. (Chapter 4)"**

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INSROP WORKING PAPER NO. 57-1996

Sub-programme IV: Political, Legal and Strategic Factors.

Project IV.3.1: International Law and Russian Arctic Waters

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Title: The legal status of straits in Russian Arctic Waters - "Internationality. (Chapter 4)"

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Date: 11 September 1996.

Reviewed by: Professor Donat Pharand, University of Ottawa, Canada

This Working paper is at a later stage planned to be published as chapter 4 in a book.

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FOREWORD - INSROP WORKING PAPER

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4. The Legal Status of Straits in Russian Arctic Waters - "Internationality"

4.1. Introduction

As seen in Chapter 1 the straits in the Russian Arctic are viewed differently, ranging from existing under complete Russian jurisdiction, to comprising a part of the 1982 United Nations Convention on the Law of the Sea, (LOSC) international straits regime, Articles 34-45.¹ Specifically this means if the straits are subject to complete national jurisdiction, they are seen as Russian internal waters where permission is needed to sail. It will be seen under the Soviet and Russian interpretation of the term "international use", evidenced in Soviet declarations in the Vil'kitskii² Straits incident with the U.S. and others, its Arctic straits are not considered as being subject to transit passage under the LOSC straits regime or non suspendible innocent passage under the 1958 Convention on the Territorial Sea and the Contiguous Zone (TSC) Article 16(4).³ The Russian navigational rules require that military as well as non military ships use icebreaker or pilotage services in the Vil'kitskii, Shokal'skii and the Sannikov and Dmitrii Laptev straits, and leading in the others.

If subject to the LOSC international straits regime Articles 34-45 the Arctic straits would be subject to transit passage, meaning that passage is free from coastal State control as long as it is continuous and expeditious and threats or force are not employed. From the U.S. declarations in the Vil'kitskii incident and others either high seas passage or non suspendible innocent passage is viewed possible through the straits of the Kara Sea and the Dmitrii Laptev, the Sannikov and the Vil'kitskii straits as well as others.⁴

Another possibility is that the straits would be subject to the traditional TSC Article 16(4) international straits regime in which innocent passage can not be suspended by the coastal State. A central issue thus involves interpretation of "international use" and whether these straits can be considered international.⁵ In the following two Chapters a analysis will be carried out attempting to clarify the legal status of the Russian Arctic straits under international law and the type of permissible passage. In carrying this out, first the issues surrounding "internationality" of international straits will be set forth in Section 4.2. This includes whether "actual use" or "future use" inherent in interpreting "internationality" can be construed from the relevant legal sources of the international straits regime, the *Corfu Channel Case*,⁶ TSC Article 16(4) and LOSC Articles 34-45. Following this, relevant Russian legislation and other evidence of State practice will be set

¹United Nations Convention on the Law of the Sea, (LOSC), 21 *International Legal Materials* 1261. In force 16 November 1994. See Appendix 4 for all LOSC Articles referred to in this Section.

²The English spelling of the Russian names varies somewhat dependent upon source. Each style will be followed here to preserve accuracy.

³Convention on the Territorial Sea and the Contiguous Zone (TSC), 516 *United Nations Treaty Series* 206. Done at Geneva, 29 April 1958, in force 10 September 1964. See Section 4.3.1. See Appendix 4 for all TSC Articles referred to in this Section.

⁴See Section 4.3.2.

⁵This is subject to the issues surrounding enclosure of the Arctic straits by straight baselines addressed in Section 6.2.3. and 6.3. and the historical claims addressed in Section 8.NEED.

⁶*Corfu Channel Case*, ICJ Reports (1949) p. 4.

forth in Section 4.3. The practice of the main opponent in the area, the U.S. will also be set forth in Section 4.3. No other State than the U.S. has been found objecting officially to the Russian Arctic straits regime or sailing its vessels in these waters at variance with the Russian provisions. Using the results obtained determinations will be made regarding the solidity of the Russian and American positions under international law and in Section 4.4. conclusions will be drawn regarding internationality.

The salient international issues more broadly associated with passage will be presented in Section 5, including the position of the LOSC straits regime under customary law. This division is considered necessary for clarity due to the complexity of the international straits regime. However when presenting the Russian rules governing the Arctic straits, the provisions in their entirety will be presented in Chapter 4. This is to preserve continuity and because the type of permissible passage dictated by the Russians necessarily indicates their view on "internationality."

A map indicating various Russian Arctic straits appears in Appendix 4.⁷ It was found in the preparation that the lists and descriptions of straits appearing in the central source by William Butler, *Northeast Arctic Passage*, give a somewhat unusual picture.⁸ While clearly indicating the key straits, the more peripheral straits listed appear curiously random, causing some uncertainty whether these are or may become as stated, "essential to transit the Northeast Arctic Passage."⁹ For example, and this is not the only case, four straits are mentioned in the vicinity of a small island near land in an archipelago, while as a whole, a

⁷The original map was received from Rtd. Admiral A. Yakovlev, Institute for System Studies, Russian Academy of Sciences, Moscow, Project Leader under Part IV of the International Northern Sea Route Project (INSROP). Geographic information is taken from Butler, William., "The Legal Regime of Soviet Marine Areas", *The Soviet Maritime Arctic*, ed. Lawson W. Brigham, 1991, (Butler Brigham), p. 217; Butler, William E., *Northeast Arctic Passage*, (1978), (Butler), pp. 4, 18-21, 28-29, 33 and 39 and Butler, William E., *The USSR, Eastern Europe and the Development of the Law of the Sea*, 1987, (Butler Development Law), C.3. pp. 27, 38, 42. Cross reference was made to *Arctic Atlas*, Moscow, 1985, (in Russian), pp. 20-21, 102, and 104-105, and Russian Charts Nos. 601 (White Sea - Poluostrov Kanin); 650 (Poluostrov Kanin - Samoyedov Zemlya - southern Novaya Zemlya); 696 (Novaya Zemlya - Yamal Peninsula); 697 (northern Novaya Zemlya - northern Yamal and Gydanski Peninsulas - Dikson); 948 (Khariton Laptev coast, western coast of Taymyr Peninsula); 949 (Severnaya Zemlya, eastern coast Taymyr Peninsula); 951 (Lyena Delta); 952 (southern Novosibirsk Islands - Yana Delta - Indigirka Delta); 954 (Indigirka Delta - Kolyma Delta); 955 (Wrangel Island - northern Bering Strait) (in Russian) received through INSROP. The latter will be referred to as "Russian Charts No." The scale is 1:700,000 unless otherwise noted. Abbreviated editions of Russian Charts Nos. 696, 949, and 952 are shown in *The Legal Status of the Russian Baselines in the Arctic*, INSROP Working Paper No. 37, Appendix 6, Attachments I, II and III, showing respectively the Kara Gates, Vil'kitskii and the Dmitrii Laptev Straits. The straits Petukhovskii Shar in the Kara Sea and Inei Strait in the Minim Skerries, Butler pp. 25, 27, 40-41 were not found on the Russian Charts Nos. Maps also used include *Atlas of the Straight Baselines*, (Eds. Scovazzi Tullio, Giampiero Francalanci, Daniela Romano, Sergio Mongardini) (1989), (Scovazzi Atlas), pp. 203, 204, 205 and 206, scale 1:2,000,000, and Admiralty Maps, *North Cape to Uyedinyeniya Island and Dikson Harbour to Bering Strait*, scale, 1:2,400,000 at Lat. 71 degrees 30. Principally from the Russian Government Charts to 1897, London. Published at the Admiralty, 16th July 1948 under the Superintendence of Rear Admiral A.G.N. Wyatt, C.B. Hydrographer, Republished 19th April 1985. See also Franckx, Erik, *Maritime Claims in the Arctic - Canadian and Russian Perspectives*, (Franckx) p. 181. Some variations were noted between the various sources, and the Butler Brigham figures chosen due to the author's status and Soviet/Russian experience. See Chapter 3 for a geographical description of the straits. Miles indicate nautical miles.

⁸Butler pp. 5-41.

⁹Ibid. p. 38.

not insubstantial number of other such passages exist.¹⁰ Those straits listed are stated chosen from, "pilot books issued for general use by American and British oceanographic authorities, as presented to western mariners who may have occasion to frequent the region."¹¹ While this meaning is not completely clear, since the Russian Arctic has been effectively closed for seventy odd years following the Russia revolution, the result is that there fail to be listed the more peripheral straits which may have relevance to the Northern Sea Route. Using the Russian sources listed above, a more comprehensive listing of straits with preliminary descriptions of depths and widths is under preparation. Since sailing directions, including comprehensive geographical descriptions, for the Northern Sea Route have yet to be received through the INSROP, it is unknown which of the peripheral straits are definitely used. Prior to completion of the new listing, the Butler listings will be used, since they are incontestably work in the right direction.

The peripheral straits are almost exclusively enclosed by the Russian baselines; so the legal conclusions reached are not substantially affected. However, the number of deeper small straits may be somewhat greater than that indicated, possibly allowing the potential for submerged passage to a slightly greater extent than that indicated.

With these introductory comments made, the definition of "strait" will be discussed.

4.1.1. Definition of "Strait"

For understanding the international straits regime and its application in the Arctic a definition of "strait" is important, however, the *Corfu Channel Case* makes little attempt to define the term. Although TSC Article 16(4) deals with passage through international straits, no definition is given, and likewise none of the LOSC Articles 34-45 dealing with international straits define the term. Most authors, when not referring to specific examples such as Gibraltar, Hormuz, Dover, Lombok, Malacca-Singapore and Bab el Mandeb, assume a common definition.¹² An exception is Brüel who traces the etymology of the term (in Danish) one definition of which emanates from the same Latin term noted below used for the English definition.¹³ A common definition is found in the *Webster's Dictionary*¹⁴ which defines "strait" as, "a comparatively narrow passageway connecting two large bodies of water..." The *archaic* meaning is defined as, "a narrow space or passage." "Strait" (adj.) comes from Middle English, from Old French *estreit*, from Latin *strictus* the past participle of *stringere*, to bind tight. The common non archaic meaning for "strait" is what will be used throughout this work.

¹⁰See Nansen Island in the Nordenskjöld Archipelago in the vicinity of which occur the Fram, the Sverdrup, the Zaria and the Palander Straits. Butler pp. 27-28 and 41 does mention that the Minin Skerries are an extensive archipelago, the Nordenskjöld Archipelago contains some seventy islands and includes those straits listed.

¹¹Ibid.

¹²Churchill, Robin R. and A.V. Lowe, *The Law of the Sea*, 2nd ed. 1988, (Churchill), p. 87. See generally O'Connell, D.P., *The International Law of the Sea*, Vols. I and II, (O'Connell) 1989. The definitions discussed on pp. 312, 314-15 are legal definitions of "international straits" developed in respectively the *Corfu Channel Case* and the TSC.

¹³Brüel, Erik, *International Straits, A Treatise on International Law*, Vol. 1, (Brüel) pp. 15-16.

¹⁴*Webster's Seventh New Collegiate Dictionary*, G. & C. Merriam Company, 1972 p. 866

The lack of precise definition seems primarily due to the fact that it is the legal *status* of waters making up the strait and their use by international shipping rather than any legal definition of "strait" which governs States' rights.¹⁵ Thus, to determine the jurisdictional regime under international law the geographical features of the straits must be analyzed together with the legal status of the waters in the straits afforded by such regimes as the high seas, the exclusive economic zone and the territorial seas and internal waters. This is not so straightforward since it is precisely the navigational use of the usual marine zones within the special geographic area known as a strait which is in dispute.

With this short background presented the issue of "internationality" of international straits will be addressed.

4.2. "Used for International Navigation" - *Corfu Channel Case*, TSC Article 16(4) and LOSC Articles

4.2.1. Introduction

The decision in the *Corfu Channel Case* by the International Court of Justice carried considerable weight at the time as reflecting the position of international straits under international customary law, and it remains today the only international decision giving a definition for "international straits."¹⁶ The ICJ held chiefly in favour of the U.K., limiting its decision to the specific case of straits, stating in its famous passage,¹⁷

"It is, in the opinion of the Court, generally recognised and in accordance with international custom that States in time of peace have a right to send their warships 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 international convention there is no right for a coastal State to prohibit such passage through straits in time of peace."

Though there was initially some controversy, TSC Article 16(4) encompassing Corfu Channel criteria was easily adopted.¹⁸ "Used for international navigation" was incorporated into TSC Article 16(4) and LOSC Part III, Articles 34 and 37, and thus would seemingly bear the same meaning unless indicated otherwise by the TSC and LOSC Articles and definitions. Nowhere however is further elaboration provided, including the *travaux préparatoires* as they exist.¹⁹ Questions which can be raised construing this

¹⁵Churchill p. 87.

¹⁶Ibid. pp. 87-90.

¹⁷Op. cit. p. 28. The Court noted, "(I)n these circumstances, it is unnecessary to consider the more general question, much debated by the authorities, whether States under international law have a right to send warships in time of peace through territorial waters not included in a strait." For this issue related to the Russian Arctic see Section 7.NEED.

¹⁸Essentially the only difference is the last phrase of TSC Article 16(4) concerning the territorial sea of a foreign State which is of less relevance for the Russian Arctic. See Section 5.2.8.3. The controversy surrounded non-suspendible innocent passage. See Section 5.2.4.

¹⁹See Section 4.2.2.

phrase include degree of required use, time of use, place of use, changing use, and the interpretations of "international".

"Actual use" and "Future Use", the criteria encompassing the above questions with relevance to the Russian Arctic straits will be addressed first.

4.2.2. "Actual Use" or "Future Use" - Treaty Interpretation, State Practice and Legislative History

A interpretation of "used for international navigation," from all three sources in the ordinary meaning implies an actual use. The verb "used" is in the past tense, not the future or present, implying that there has to be some form for international traffic already ongoing for the particular regime to be actual. The scope of necessary use however is unclear in all respects.

Briefly the Court noted in the *Corfu Channel Case*²⁰ that of the 2884 ships which traversed the Channel from 1 April 1936 to 31 December 1937 very small ships were included, but that this number from seven different countries was very high. While a general idea is given concerning the numbers involved, the concept containing the above criteria is no clearer than this, though arguments could be made that the contours of the necessary amount of traffic, number of flags, and time span are provided.

The Russian 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.²¹ These straits are distinct because navigational freedom has been historically consolidated regardless of breadth of the strait. 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."²² In another article from 1974 Barabolia expanded upon the term "international." They are "part of the World Ocean which up to now has belonged to all mankind ... one can say that by virtue of centuries of tradition customary norms of law have been formed and developed

20Op. cit. pp. 28-29. For Judge Azevedo's dissent see pp. 106-107. Additionally noted were a large number of ships which sailed through the Strait without stopping at Corfu and hence were not counted, the periodic sailing of ships from at least three States, and regular usage of the Strait by the British Navy for over 80 years, as well as by other States' navies.

21See P.D. Barabolia in Butler pp. 142-143, (Barabolia Butler). Butler considers Barabolia's views important due to the insight afforded and the direct bearing on the Arctic straits. He notes however it would be inappropriate to accept Barabolia's classification as official related either to the Soviet draft articles submitted to the preparatory meetings for the Law of the Sea Conference or the draft articles formulated in the Composite Single Negotiating Text (CSNT). This may be true and Butler has considerable experience dealing with the Soviet and Russian legal system. Yet Barabolia has himself served as a member of the Soviet delegation to UNCLOS III, which he freely discusses, and his official position may not be so independent as claimed by Butler. Speech, Russian - American Law of the Sea Seminar, Moscow, 24 August 1995. Franckx, Erik, *Maritime Claims in the Arctic - Canadian and Russian Perspectives*, (Franckx) p. 165, himself an expert on the Soviet and Russian legal system supports this view. Thus in this work Barabolia's views will be given at least "semi official" weight.

22Butler pp. 142-143.

consolidating the freedom of navigation in such straits as a generally recognized norm of international law."²³ Kolodkin tends vaguely toward the same view, noting international shipping lanes related to factors of non coastal strait State flag and volume of traffic and the possibility for "unrestricted foreign navigation" under TSC Article 16(4) and LOSC Articles 37 and 38.²⁴

Although direct expression of the Russian position regarding international use is not so clearly stated as the U.S. below logically Russia can be expected to follow the positions forwarded by Kolodkin and Barabolia. This may be not due to as in the earlier Soviet period because of support for developing coastal strait States, but rather because of claims for potential international use, though beneficial for a marine naval and commercial power, undermining Russian claims over the Arctic straits.²⁵

The U.S. on the other hand argues that "future use" should be included in the meaning and not just "actual use," thus increasing the maritime powers' access.²⁶ The outlines of this argument are as follows. "Used for international navigation" may be construed to include past, present, or future use; "(A) strait may have been used on one or more occasion for international navigation, may now be being so used, or may be capable of such use in the future."²⁷ Future use is included since at any historical period it, "is dependent on vagaries in patterns of world commerce, access to alternative routes, the

23Ibid.

24Kolodkin, A. and M. Volosov, "The legal regime of the Soviet Arctic," *Marine Policy*, March 1990, (Kolodkin) p. 158 at 163. Kolodkin's position appears comparable to Barabolia's. He has represented the Soviet Union and Russia in International Maritime Organization (IMO) Conferences, and as President to the Russian International Maritime Law Association, presently appears to act in practice as legal advisor in law of the sea matters to the Russian Government. This is substantiated by Senior Researcher Elena Nikitina, 18 March 1993, former assistant to Professor Kolodkin, now with the Institute of World Economy and International Relations, Russian Academy of Sciences. He himself discounts his role as official. Conversation 25 February, 1994. Butler notes in a letter to the Secretariat of the International Northern Sea Route Project, 18 January 1994 that the key to the normative basis for the Russian legal position in the Arctic lay with Professor Kolodkin, who should be requested to clarify the matter. Thus, for this work similar to the views of Barabolia, Kolodkin's statements will be given weight of at least "semi official."

25Kolodkin strongly discounts any possibility for internationality for the Russian Arctic straits. See Section 4.3.1.

26Smith, Robert W. and J. Ashley Roach (1994), *International Law Studies - Excessive Maritime Claims*, Naval War College, Vol. 66, (Smith and Roach) p. 182. The authors are respectively from the U.S. Department of State, Office of Ocean Affairs and Office of the Legal Advisor. Smith and Roach p. xiv. United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas*, No. 112, United States Responses to Excessive National Maritime Claims, (U.S. Limits No. 112), pp. 68-72. Schachte, Jr., William, L. Rear Admiral, Judge Advocate General's Corps, U.S. Navy Department of Defense Representative for Ocean Policy Affairs, "International Straits and Navigational Freedoms," Remarks prepared for presentation to the 26th Law of the Sea Institute Annual Conference Genoa, Italy, June 22-26, 1992, (Schachte), p. 14, who notes, "straits which are used for international navigation signifies all straits which are used or which may be used for navigation, ie. straits which are capable of being used are included." Schachte notes on p. 3 that his remarks are to be taken as the official U.S. position on the LOSC navigational articles. Moore, John N., "The Regime of Straits and the Third United Nations Conference on the Law of the Sea," *American Journal of International Law*, Vol 74 (Moore) p. 112, interestingly notes the controversy is not settled by UNCLOS III. Moore headed the U.S. delegation in development of the navigational and security aspects of the Informal Single Negotiating Text (ISNT) and Informal Comprehensive Negotiating Text (ICNT) and negotiated the straits Section. Ibid. p. 102. Moore would appear to have similar "semi official" status if not official as Barabolia and Kolodkin above. See 4.3.2. and 4.3.3.

27Since Butler's arguments appear to be the U.S. position most eloquently expressed, the author's arguments, though not official, are presented in their entirety. All citations in this Section appear in Butler, William E., *Northeast Arctic Passage*, (1978), (Butler), pp. 135-137 and 139 unless otherwise noted.

development of marine technology, and a host of other factors, very extraneous to the world of navigation."²⁸ The term "international navigation" may include the volume of traffic through a strait destined for two or more States, the flags flown by transit vessels, the destinations of cargo, or the passage of any "floating means" flying a different flag from the coastal strait State or bound to or from a non coastal strait State port. Thus ships sailing with the coastal strait State flag to or from a foreign port, and foreign flag ships chartered by the coastal strait State and freighting exclusively for the strait State, would be included as "varieties of international navigation." "Straits used for international navigation" is thus argued to include "any strait previously used, presently used or capable of being used in future by any floating means for navigation between a port strait and a foreign destination or for navigation between two or more destinations outside the coastal strait State." Answering arguments requiring substantial actual international use, the author notes, "(T)hat a functional criterion is desirable for striking a balance on the issue of passage through straits between the concerns of the coastal State and the concerns of the international community would seem to meet general acceptance.... Here seems little reason to confine the scope to a class of straits used at present to some definable extent for international navigation to the exclusion of straits whose use in this regard may alter drastically as patterns of commerce, in the broad sense and marine technology develop."

Probably most States follow the traditional position since as will be seen the LOSC international straits regime with transit passage itself, though supported by the maritime powers, constitutes a considerable departure from customary law provisions, with little evidence of a trend to become customary law in spite of U.S. declarations.²⁹ Defining internationality of straits based upon a potential use in the future would seem even more tenuous, probably having not being forwarded by any State but the marine powers, and even of these the only State discovered so far doing such is the U.S.

UNCLOS I negotiations drafting TSC 16(4) considered whether in interpreting the Court's "international use", "normally used" should be added, but this was rejected.³⁰ This would have narrowed the meaning of "international use" thus giving the coastal strait State more control over straits or areas of straits *not* normally used for international

²⁸The Arctic straits are taken as an example where the closure of the Suez Canal revived interest in passage which only recently became possible through developments in Arctic ship design, ice breaking methods, polar environmental knowledge, and weather forecasting.

²⁹See Section 5.2.2. and Brownlie, Ian, *Principles of Public International Law*, 4th ed., 1990, (Brownlie) p. 284.

³⁰Information regarding UNCLOS negotiations is taken from *Official Records* (1958), Vol. 3, p. 79, paragraphs 13 and 14; pp. 93-95 paragraphs 9, 16, 23, 27, 30, 31, 37; p. 96 paragraph 5; p. 100, paragraph 21; and p. 210; and Vol. II, p. 65; unless otherwise noted. For Draft Article 17(4) see *ILC Yrbk* 1956, Vol. II p. 273 paragraph (4). *Ibid.* (1955) Vol. 1, p. 260, paragraph 64. Krylov was the member forwarding the proposal. This was rationalized upon on his interpretation of the *Corfu Channel Case* that the ICJ had in mind the large number of small Greek ships which used the channel. *Ibid.* at paragraph 65. In 1956 the ILC decided that it would be in conformity with the *Corfu Channel Case* to insert "normally" before the word "used," because the strait had "been a useful route for international maritime traffic" and navies had regularly used it. *Ibid.* (1956), Vol. II, paragraph (3) p. 273. The final vote was very close, 31:30:10 in favour of deletion. Although the vote also included the sensitive issue of access to a foreign port, from the result and discussion carried out by the Soviet Union, India, United Arab Republic and Indonesia as well as Spain, Turkey, Chile, Iran, Malaya, and Morocco, there was clear belief by several coastal strait States that the navigational rights through international straits should be narrowed in favour of coastal State jurisdiction. On the other hand the entire draft Article leading to Article 16(4) was eventually passed 62:1:9.

navigation. Seen from the maritime powers' point of view, this could open the possibility for the coastal State to subjectively determine whether certain straits were "normally" used and if not be subject to increased State control. During UNCLOS III negotiations of the LOSC straits regime the chief issues raised involved questions of strait State sovereignty or jurisdiction, legal status of the waters and limits of permissible passage, not definitions of "internationality."³¹ Most doctrine which addresses the question follows the Russian position.³²

4.2.3. Conclusions

From this it is seen that nearly all theoretical possibilities are covered, though the majority view supports "actual use." in defining international straits. Although this will be covered more extensively below, interestingly following Butler's interpretation and the U.S. standpoint, most of the Russian Arctic straits would qualify as international straits, under Koh's and Pharand's some might qualify, and under Churchill's, Zhudro's,

³¹See Sections 5.2.4. and 5.2.5. and Nordquist II pp. 279-293. Canada, Chile and Norway were interested in defining "international straits" see III *Official Records* 241, A/CONF.62/C.2/L.83 (1974) and "Aide Memoire" of Canada, Chile and Norway, reproduced in R. Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents* (Platzöder) Vol. IV p. 223, but the U.K. proposal around which the LOSC straits regime was built merely used the same formulation as the *Corfu Channel Case*, "used for international navigation." III *Official Records* 183, 185, A/CONF.62/C.2/L.3 (1974).

³²Doctrine referred to in this work is not listed if it does not deal with the issue. The information on Russian doctrine is obtained from Butler pp. 139-143, 168, unless noted otherwise. Zhudro notes straits linking the high seas and having significance as world routes must have been so used for a "prolonged period" to be international. Kisselev, V.A., P.V. Savaskov, "International Regime of Straits and the UN Convention on the Law of the Sea," *Soviet Yearbook of Maritime Law*, Published by the Soviet Association of Maritime Law, State Research and Project Development Institute of Merchant Marine (Soyuzmorniiproject) 1988, (Kisselev and Savaskov), p. 10 note only that use for the passage of vessels suffices for international use. As noted Professor Kolodkin was Chairman of the Association, Vice President of the International Maritime Committee and was also Editor in Chief of the Yearbook. He continues in parallel positions with the Russian counterparts. Bordunov, V.D., "The right of transit passage under the 1982 Convention," *Marine Policy*, July 1988, (Bordunov) p. 220 does not question international navigation implying actual use; transit passage is seen established in straits where freedom of navigation has been exercised for centuries. Churchill p. 88, notes the Corfu Channel's secondary importance as a sea route and the actual volume of traffic through it are irrelevant to its legal status, although little indication is given what "used for international navigation" means. Koh, K.L., *Straits in International Navigation - Contemporary Issues* (Koh) p. 20 considers that a rather *low degree* of utility characterized by the *Corfu Channel Case* is sufficient," basing his opinion upon the dissent of Judge Azevedo. Ibid. p. 65 possibly considers the degree of utility in the Corfu Channel as light since he is dealing with the Malacca and Singapore straits with 3,000 to 4,000 ships passing *monthly*. Ibid. p. 14 believes however passage may be possible in ice bound straits though the question of consequent internationality is unanswered. Caminos pp. 128-129 agrees noting the amount of use lies between strict utility and potential utility, and some degree of use suffices. Contrary to this Pharand, Donat, *Canada's Arctic Waters in International Law*, (Pharand Arctic) pp. 217, 219 notes that while degree of use is indefinite, actual use has to be considerable, although it might not have to be as extensive as in the *Corfu Channel Case*. This author bases his judgment upon the excess importance of the utility criterion addressed in Brül's writings prior to the *Corfu Channel Case* including such factors as, "number of ships passing through the strait, total tonnage, aggregate value of cargoes, average size of the ship, especially whether they distributed among a greater or smaller number of States - all of which seem to give good guidance, no single factor, however, being decisive..." It is noted that the Court did not include in its judgment the total tonnage and aggregate value of their cargoes. The author puts forth five criteria required for the establishment of an international strait based upon the *Corfu Channel Case*, 1) necessary actual use (as opposed to mere potential use); 2) essentiality not required (the possibility of being an alternative route); 3) a mandatory history as a useful route for international ship traffic (not infrequent transit); 4) sufficiency of use determined by the number of transits and the number of flags represented (though not exclusively); and 5) substantial number of transits and flags, however the location of the strait and other relevant circumstances might render lower numbers sufficient. Pharand Arctic pp. 220-221. See also O'Connell pp. 314 and 328, and Hakapää, Kari, *Marine Pollution in International Law - Material Obligations and Jurisdiction*, (Hakapää) p. 201.

Kisselev's and Savaskov's, Bordunov's and the Soviet and Russian standpoint none qualify.

With this said the actual international use of the Russian Arctic straits will be addressed. As noted the Russian provisions will be presented in this Section for continuity and as necessarily affecting the international use.

4.3. International Use of the Russian Arctic Straits³³

4.3.1. The Russian Position

4.3.1.1. Pre 1982

4.3.1.1.1. Legislation and Other

Prior to 1960, the straits in the Russian Arctic were largely unregulated.³⁴ Although much Soviet doctrine exists claiming extensive national jurisdiction over the Arctic seas and straits, especially under the historic and closed sea theories, until 1960 little legislation or other traditional evidence of State practice was in force.³⁵ That which was in force was confusing and vague.

More substantial was the adoption of legislation starting in 1960. This included the 1960 Statute on the Protection of the State Boundary of the USSR,³⁶ mentioning historic straits and requiring previous authorization of warships for innocent passage through the Soviet territorial sea.³⁷ In 1965 the Soviet Ministry of the Maritime Fleet required icebreaker escort or pilotage for *all* ships in the Vil'kitskii and Shokal'skii straits and later

³³For geographic information see Map Appendix 4.

³⁴For the following information see Butler pp. 86, 94-96, 139-143, footnotes 24-40, 160, 161 footnote 5, 162 footnotes 7 and 8 unless otherwise noted.

³⁵This doctrine will be addressed to a minor extent since in spite of many possible theories the Soviet and Russian Governments did not implement them through State practice. For an overview of the doctrine see Butler pp. 71-91; Butler, William. E., *The Soviet Union and the Law of the Sea*, (1971), (Butler Soviet Law), pp. 33-40, 104-115 and 117-133; Pharand Arctic pp. 107-110, and Franckx pp. 145 to 228.

³⁶Statute on the Protection of the State Boundary of the USSR, *New Directions in the Law of the Sea*, Vol. I, (1973), adopted August 5, 1960, (1960 Statute) at 30. The Soviet Union ratified the TSC on October 20, 1960 shortly thereafter.

³⁷Article 4 of the 1960 Statute stated in relevant part, "Internal sea waters of the U.S.S.R. shall include: (c) waters of bays, inlets, coves, and estuaries, *seas, and straits, historically belonging to the U.S.S.R.*" Italics added. No straits are specified. Butler Soviet Law p. 114 footnote 44 notes that this caused no reaction from other States, no protest or requests for clarification being given. See Section 8.NEED for discussion of previous authorization and Section 8.NEED for discussion of the historic waters doctrine.

made the same requirement for the Sannikov and Dmitrii Laptev straits.³⁸ In 1966 a Soviet naval international law manual was published stating,³⁹

"The Dmitrii Laptev and Sannikov straits are regarded as belonging to the Soviet Union historically. They have never been used for international navigation, and in view of specific natural conditions and frequent ice jams, the legal status of these straits is sharply distinguished from all other straits being used for international navigation."

The Administration of the Northern Sea Route was established in 1971 under the Statute on the Administration of the Northern Sea Route (1971 Statute) to ensure navigational safety and promote navigational rules to be published in *Notice to Mariners*.⁴⁰ Briefly, on the lanes of the Northern Sea Route and *on the lanes of adjacent areas* ships are to be provided by the Administration under Articles 2 with icebreaker escort, pilotage, navigational and hydrographic services and aid ships in distress.⁴¹ Ship position and other information is required under Article 3 transmitted at regular periods, and to further safety and environmental concerns rules, instructions and navigational directions and requirements for supplying and equipping ships may be issued.⁴² Under Article 6 Northern Sea Route Administration officials have the right to visit ships planning voyages on the Northern Sea Route to check their sea and ice worthiness and can deny passage should these be found lacking.⁴³ If necessary icebreaker escort and pilotage and navigation may be suspended due to ice, navigation, weather or pollution. Penalties may be imposed, and criminal prosecution initiated, should criminal liability arise.

38Butler pp. 122 and 160 footnote 78, 166 footnote 78 identifies these requirements as the only Soviet legislation expressly naming any of the Arctic straits and p. 94 notes that the establishment and boundaries of such zones are announced in *Izveshcheniia moreplavateliam* and in the daily press. See also Butler, W.E. and J.B. Quigley, Jr. (transl. and ed.), *The Merchant Shipping Code of the USSR* (1968) 1970, p. 63. Franckx p. 156 footnote 176 notes that the Dmitrii Laptev and Sannikov were not included until 1972.

39Barabolia et.al. in Butler p. 86 and 160 footnote 79.

40The Russian *Izveshcheniia moreplavateliam* will be noted as *Notice to Mariners* in the text. The Administration was under the USSR Ministry of the Maritime Fleet. For translation of Statute on the Administration of the Northern Sea Route, (1971 Statute), see Butler, W.E. in 11 *International Legal Materials* 645. A similar body, the Chief Administration of the Northern Sea Route was created in 1932, but eventually became absorbed into the Ministry of the Maritime Fleet. See Franckx pp. 160, 180 and 210 footnote 205 and Arikainen, A, "Management of the Northern Sea Route: States and Problems of Development," *The Soviet Maritime Arctic* (ed. Lawson W. Brigham), (1991) (Arikainen Brigham) pp. 140-142.

41Specific pilot services are covered by Chapter V of the 1968 Merchant Shipping Code of the USSR and the 1973 USSR Statute on State Maritime Pilots. See Butler pp. 95 and 162 footnotes 7 and 8 respectively. The former is translated in Butler, W.E. and J.B. Quigley, Jr. (trans. and ed.), *The Merchant Shipping Code of the USSR* (1968) (Baltimore: The Johns Hopkins Press, 1970), p.63. See also Franckx pp. 180, 219 footnote 381. Under the latter where compulsory pilotage is required ships cannot navigate without a state marine pilot.

42Article 3(b) requires the Northern Sea Route Administration specifically to "establish, proceeding from considerations of ensuring the safety of navigation, areas of compulsory icebreaker escort or pilotage of all vessels and determine their conditions."

43Franckx p. 160 notes it was unclear whether such supervision could be exercised outside the territorial seas and whether it in fact has been exercised. The author believes these rules to be of special importance but with many lacunae.

Barabolia, published an article 1971, "Peculiarities of the Legal Regime of the Northern Sea Route and the Major Straits of the Arctic Seas Adjacent to the Coast of the U.S.S.R." which due to its subject matter will be presented here.⁴⁴ Territorial waters were generally held to make up the majority of straits comprising the Northern Sea Route with the exception of the Dmitrii Laptev and Sannikov Straits, which are stated to belong historically to the U.S.S.R. Passage through the straits between the Barents and the Kara Seas, though not requiring compulsory ice breaking pilotage required authorization for foreign naval ships, based upon a claim that the Northern Sea Route was a national Soviet "water artery." Icebreaker escort and pilotage were compulsory between meridians 98 and 108, containing the straits between the Kara and the Laptev Seas including the Vil'kitskii as well as the Shokal'skii straits. Baselines were also held to be used in the area of the New Siberian Islands though it was unclear where, since the appropriate coordinates were never disclosed.

Shortly following the adoption of the 1960 Statute the Vil'kitskii Straits incident illustrated Soviet practice of these provisions concurrent with TSC Articles 14, 16(4) and 23.⁴⁵

4.3.1.1.2. Vil'kitskii Straits Incident

Briefly legal authority was chiefly based upon the requirement of previous authorization for innocent passage for warships through Soviet territorial seas. The Vil'kitskii Straits incident resulted in declarations made by both the Soviet and U.S. governments which indicated their position regarding jurisdiction over the Arctic straits. Since the incidents comprise to date the major confrontation between these States and were just recently released more comprehensively by the U.S. State Department, the declarations will be reproduced here.⁴⁶ The confrontations may have been more widespread than indicated by the U.S. State Department however. Rtd. Admiral Anatoly Yakovlev of the Russian Academy of Sciences notes that some nineteen voyages were made by U.S. icebreakers between 1962 and 1970 along the Northern Sea Route including territorial sea and internal waters and were not restricted to the Vil'kitskii Straits incident.⁴⁷

44See Franck pp. 173, 217, footnotes 316-321, who notes the article was a "rather rare phenomenon in Soviet legal literature." In the two other Barabolia articles noted in Section 4.2.2. the polar straits are not mentioned, and Butler p. 143 concludes with disapproval that the polar straits would seemingly not be encompassed by "straits used for international navigation."

45See Appendix 7 for TSC Articles 14 and 23.

46Documents and explanations regarding the expulsion of U.S. Naval and Coast Guard research ships in the Soviet Arctic are obtained from Smith and Roach pp. 200-207, *U.S. Limits*, No. 112, pp. 6, 16, 68-71, and Butler pp. 86, 122-123, 125-126 and 166 unless noted otherwise. See also Franck pp. 146-151.

47Correspondence, 20 March 1995 with Rtd. Admiral Yakovlev, who notes, "(A)s american(sic) icebreakers did not adhere (sic) the permitting order for passage along the NSR every time the operations were effectid(sic), as a rule, by one Soviet vessel tracking the US icebreaker and individual opertional(sic) flights of a reconnaissance aircraft."

In the summer of 1963 the U.S. carried out oceanographic research in the Laptev Sea with the Coastguard ship *USCGC Northwind* (WAGB-382), and in the summer of 1964 in the East Siberian Sea with the *USS Burton Island* (AGB-1).⁴⁸

On July 21, 1964, the Soviet Ministry of Foreign Affairs presented to American Embassy Moscow the following *aide memoire* regarding the *Burton Island* voyage:⁴⁹

The Chief Administration of the Hydro Meteorological Service of the Council of Ministers, USSR received a communication from the Embassy of the USA on the forthcoming Arctic sailing of the US military ice-breaker *Burton Island* and the request to transmit to the ship information on hydrometeorological conditions.

Precise information on the *Burton Island*'s route has not been received from the Embassy. In the event that this ship intends to go by the northern seaway route, then it is necessary it take into consideration the following:

The Northern seaway route is situated near the Arctic coast of the USSR. This route, quite distant from international seaways, has been used and is used only by ships belonging to the Soviet Union or chartered in the name of the Northern Seaways, the opening up, equipping, and servicing of which the Soviet side for a period of decades has spent significant funds, and it is considered an important national line of communication of the USSR. It should be noted that the seas, through which the northern seaway route passes, are noted for quite difficult ice and navigational conditions. Mishaps of foreign ships in this line of communications could create for the USSR as well as for a bordering state, a series of complicated problems. Therefore the Soviet Union is especially interested in all that deals with the functioning of the given route.

It should also be kept in mind that the northern seaway route at some points goes through Soviet territorial and internal waters. Specifically, this concerns all straits running west and east in the Karsky Sea, inasmuch as they are overlapped two-fold by Soviet territorial waters, as well as by the Dmitry, Laptev and Sannikov Straits, which unite the Laptev and Eastern Siberian Seas and belong historically to the Soviet Union. Not one of these stated straits, as is known, serves for international navigation. Thus over the waters of these straits the statute for the protection of the state borders of the USSR fully applies, in accordance with which foreign military ships will pass through territorial and enter internal sea waters of the USSR after advance permission of the Government of the USSR, in accordance with stipulated regulations for visiting Foreign Military ships of territorial and internal sea waters of the USSR published in 'Navigation Notifications' (*Izvesticheniyakh Moreplavatelyan*). In accordance with these regulations the agreement for entry of foreign military vessels is requested through the Ministry of Foreign Affairs USSR not later than 30 days before the proposed entry.

Although the notification of the proposed sailing of the American icebreaker *Burton Island* was not received in the fixed period, the Soviet side in this specific case, is ready, as an exception, to give permission for the passing of the vessel *Burton Island* through the territorial and internal waters of the USSR in the aforementioned Arctic Straits. In this regard it should not be forgotten that the American vessel will fulfil requirements, called for by the regulations for foreign military ships, visiting territorial and internal maritime waters of the USSR and specifically article 16 of the cited regulations. At the same

48Franckx p. 148 notes that the Chukchi Sea and eastern East Siberian Sea were navigated a year earlier in 1962 by the *U.S.C.G.C. Northwind* and the *U.S.S. Burton Island* both carrying out scientific programs. Ibid. pp. 161, 210 footnote 219 notes that the *Northwind* navigated the Sannikov Strait in 1963, and on pp. 146, 205 footnotes 99-105 also notes other possible pre 1960 voyages by U.S. submarines, including the *U.S.S. Skate* which entered "the Soviet sector." Ibid. pp. 148, 205 footnote 106 also notes U.S. drifting ice stations navigating the Soviet sector prior to the early 1960's, though none of them entered the Soviet coastal seas.

49*Aide memoire* from the Soviet Ministry of Foreign Affairs to American Embassy Moscow, dated July 21, 1964, American Embassy Moscow telegram 17002, July 21, 1964.

time the need is emphasised for the strict observance in the future of all instructions of regulations for foreign military vessels visiting territorial and internal maritime waters of the USSR.

Regarding the inquiries of the Embassy on passing to the vessel Burton Island information on the hydrometeorological conditions during its Arctic sailing, the competent Soviet organizations are willing to fulfil this request and transmit the available information. For this, the American side must provide exact data of the schedule and route of the Burton Island, as well as data necessary for the establishment of radio contacts with it.

The U.S. replied in part on June 22 1965:⁵⁰

While the United States is sympathetic with efforts which have been made by the Soviet Union in developing the Northern Seaway Route and appreciates the importance of this waterway to Soviet interests, nevertheless, it cannot admit that these factors have the effect of changing the status of the waters of the route under international law. With respect to the straits of the Karsky Sea described as overlapped by Soviet territorial waters it must be pointed out that there is a right of innocent passage of all ships through straits used for international navigation between two parts of the high seas and that this right cannot be suspended. This is clear from the provisions of the Convention on the Territorial Sea and the Contiguous Zone adopted at Geneva in 1958 to which both the United States and the Soviet Union are parties. In the case of straits comprising high seas as well as territorial waters there is of course an unlimited right of navigation in the high seas areas...

For the reasons indicated the United States must reaffirm its reservation of its rights and those of its nationals in the waters in question whose status it regards as dependent on the principles of international law and not decrees of the coastal state.

The *Northwind* sailed in the area from July to September 1965. The ship planned on sailing through the Vil'kitskii Strait which had never before been done by an American ship to complete a transit of the Northeast Passage.⁵¹ The ship was under close surveillance by Soviet ships, and eventually the ship was ordered not to attempt the passage due to strong Soviet diplomatic pressure threatening to go "all the way."⁵² The *Northwind* also rounded the tip of Severnaya Zemlya since ice conditions were favourable, and it could have completed transit of the Northeast Passage without sailing through the disputed Vil'kitskii Strait, however it was instructed to return.⁵³

On October 27 1965 the Soviet Union protested in a note which read as follows:⁵⁴

⁵⁰American Embassy, Moscow *aide memoire* dated June 22 1965, State Department File No. POL 33 R. The Soviet side, in an *aide memoire* to American Embassy Moscow on July 26 1965, confirmed its position contained in its *aide memoire* of July 21 1964, American Embassy Moscow telegram 18098, July 26, 1964.

⁵¹Franckx p. 148 notes that scientific research in the Barents and Kara Seas by the *Northwind* and not the transit plan was what was presented to the Soviets. The supplementary itinerary presented however included a change of East Coast operational command to a West Coast command in Alaska upon departure from the Kara Sea indicating a transit objective.

⁵²U.S. *Limits* No. 112, p. 148. See also Franckx p. 157.

⁵³Franckx p. 150. Ibid. pp. 162, 211 footnote 225 notes interestingly in spite of the political tension of the respective governments, cordial exchanges between the crews of the Soviet destroyer and the *Northwind*. Also noted is that the Russians did not hamper the scientific work.

⁵⁴Soviet Ministry of Foreign Affairs Note 45/USA dated Oct. 27, 1965 to American Embassy Moscow, American Embassy Moscow telegram 23048, Oct. 28 1965.

According to information of competent Soviet authorities, US Coast Guard icebreaker *Northwind* during its voyage in the Kara Sea in July - September of this year conducted there explorations of sea bottom and suboceanic area. This was also reported in the American press.

As is well known, bottom and suboceanic area of the Kara Sea, being in geological respect the direct continuation of the continental part of the USSR, constitutes continental shelf which, pursuant to the 1958 Geneva Convention on the Continental Shelf, is subject to the sovereign rights of the USSR. Said Convention, to which both the USSR and the USA are parties, provides in article 5, paragraph 8, that agreement of the littoral State is required for exploration of the continental shelf.

Conduct of the above-mentioned explorations of the USSR continental shelf in the Kara Sea, without agreement thereto having been obtained from competent USSR authorities, constituted a violation of the 1958 Continental Shelf Convention.

The Ministry protests against the unlawful conduct by the American icebreaker of exploration of the Soviet continental shelf in the Kara Sea and expects that the Government of the United States will take the necessary steps to prevent similar actions.

The United States replied as follows:⁵⁵

The Ministry's note referring to the voyage of the United States Coast Guard (ice-breaker) *Northwind* in the Kara Sea during July to September of this year charges that the vessel carried on explorations of the seabed of the continental shelf without obtaining the permission required by paragraph 8, Article 5 of the Convention on the Continental Shelf adopted at Geneva in 1958 to which both the United States and the Union of Soviet Socialist Republics are parties.

The Ministry is misinformed. During its voyage of oceanographic exploration in the area the *Northwind* did take a number of core samplings of the seabed. A few of these samplings were taken in the deep which parallels Novaya Zemlya on the east and a more extensive sampling of the sea bottom was done in the deep water north of Novaya Zemlya and east of Zemlya Frantsa Iosifa and also in the deep water west of Severnaya Zemlya. The data collected during this operation will be made available to the Union of Soviet Socialist Republics through the World Data Center System. There was no exploration of the continental shelf in the Kara Sea.

In view of the foregoing the Ministry's protest is rejected as without foundation in fact.

In 1966 the *Burton Island* and the *Atka* visited respectively the Chukchi and the Kara Seas respectively, the former resulting in a public comment by a Ministry of Merchant Fleet official expressing displeasure.⁵⁶

The U.S. notified the Soviet government through a diplomatic note of August 14, 1967 of a planned Arctic circumnavigation with oceanographic surveys conducted in international waters by the *USCGC Edisto* and the *USCGC East Wind*. This route would take the ships north of Novaya Zemlya and Severnaya Zemlya into the Laptev and East Siberian Seas. The United States advised the Soviet government of the planned route in note dated August 14, 1967.⁵⁷

⁵⁵American Embassy Moscow Note delivered in Nov. 1965 pursuant to State telegram 14083, Nov. 26 1965, File POL 33-6 US-USSR.

⁵⁶Franckx p. 150.

⁵⁷Department of State Note dated Aug. 14, 1967 to the Soviet Embassy in Washington, State Department File No. SCI 31 US.

The Department of State wishes to advise the Embassy of the Union of Soviet Socialist Republics that two United States oceanographic icebreakers will, as in previous years, undertake regular survey operations in the Arctic Ocean in the summer of 1967.

The US Coast Guard icebreakers *Edisto* and *Eastwind* will conduct oceanographic research surveys from approximately August 10 to September 21. From a point south of Greenland, the ships will proceed eastward on a track running north of Novaya Zemlya and Severnaya Zemlya into the Laptev Sea, the East Siberian Sea and through the Canadian Archipelago before returning to the United States.

As in previous oceanographic surveys of this sort the operations will be conducted entirely in international waters.

Because of ice however the ships entered the Karsky Sea and proceeded towards the Vil'kitskii Straits. The change was notified to the Soviet government by Note No. 340 delivered by the U.S. Embassy August 24, 1967, stating in part,

This squadron will...make a peaceful and innocent passage through the straits of Vil'kitskii, adhering to the centre line as closely as possible, and making no deviation or delay...⁵⁸

The Soviet Union replied on August 25, 1967 as follows:⁵⁹

By its *aide memoire* of August 16, 1967, US Department of State informed the USSR Embassy in Washington of Arctic circumnavigation by US Coast Guard icebreakers "Edisto" and "East Wind" stating that they would proceed eastward along (a) route north of Navaya Zemlya and Severnaya Zemlya.

However, according to information of competent Soviet authorities, above mentioned American icebreakers have entered the Karsky Sea and are proceeding in the direction of Vilkitsky Straits, which are territorial waters of the USSR.

In this connection, the Ministry recalls to the Embassy that navigation by any foreign naval vessel through the Straits of Karsky Sea, as well as through Dmitry Leptev and Sannikov Straits, is subject to the Statute on the Protection of the USSR Borders, under which foreign naval vessels shall pass through territorial and internal sea waters of the USSR with prior permission by the Government of the USSR to be requested 30 days in advance of passage contemplated. The position of the Soviet Government on this question was set forth in detail in USSR MFA's *aide memoire* of July 2, 1964 and July 26, 1965.

On August 28 1967 the Chief of the American Section Soviet Ministry of Foreign Affairs made an oral *demarche* on the American Deputy Chief of Mission, as reported in a cable to the Department of State:⁶⁰

Soviet Maritime Fleet had today received communication from U.S. Coast Guard icebreaker "Edisto" in which the Commanding Officer informed Soviet authorities that "Edisto" and "Eastwind" had encountered ice preventing passage to north of Severnaya Zemlya and therefore proposed to effect innocent passage through Vilkitsky straits on or about August 31. Communication from U.S. Coast Guard icebreaker stated that Soviet Ministry of Foreign Affairs had been advised of proposed transit of straits.

58Franckx p. 150.

59Soviet Ministry of Foreign Affairs *aide memoire* to American Embassy Moscow dated August 24, 1967, American Embassy Moscow telegram 754, August 25, 1967.

60American Embassy Moscow telegram 811 August 28 1967, State Department File SCI 31 US.

Kornienko said that he felt it necessary to remove any misunderstanding which might exist in this matter. He said that Ministry of Foreign Affairs had not been advised of proposed passage of U.S. icebreakers through straits since notification thirty days in advance of attempted passage through Soviet territorial waters, as is required by pertinent Soviet regulations, had not been received.

Butler notes that this view of the legal status of the strait was reaffirmed on 28 August in a routine message to the ships from the U.S.S.R. Ministry of the Maritime Fleet.⁶¹ Specifically in part,

"Vil'kitskii Straits are within U.S.S.R. territorial waters. Therefore sailing of any foreign navy ships in the straits is subject to regulations of safety of U.S.S.R. frontiers. For passing the straits according to the above regulations, military ships must obtain preliminary permission of U.S.S.R. Government through diplomatic channels one month before expected date of passage."

The United States responded in a note delivered 7:30 pm local time, August 30, 1967 to the Soviet Ministry of Foreign Affairs, Moscow:⁶²

The Embassy of the United States of America refers to the *aide-memoire* of August 24 of the Ministry of Foreign Affairs of the Union of Soviet Socialist Republics and to the statement by the Ministry's authorized representative on August 28, and, on instructions, strongly protests the position taken by the Soviet Government with regard to the peaceful circumnavigation of the Arctic by the United States Coast Guard icebreakers "Edisto" and "Eastwind."

As the Ministry is aware, the circumnavigation by the "Edisto" and "Eastwind" was undertaken as a part of regular scientific research operations in the Arctic Ocean. The Department of State, as a matter of courtesy, informed the Soviet Government of these operations. Owing to unusually severe ice conditions the ice-breakers failed in their efforts to pass north of Severnaya Zemlya and, accordingly, on August 24 Embassy informed the Ministry by note that the vessels would find it necessary to pass through Vilkitsky straits in order to continue their voyage. Rather than facilitating the accomplishment of this peaceful voyage, the Ministry in its *aide-memoire* of August 24 and particularly in the oral statement of its authorized representative on August 28 has taken the unwarranted position that the proposed passage of the *Edisto* and *Eastwind* would be in violation of Soviet regulations, raising the possibility of action by the Soviet Government to detain the vessels or otherwise interfere with their movement.

These statements and actions of the Soviet Government have created a situation which has left the United States Government with no other feasible course but to cancel the planned circumnavigation. In doing so, however, the United States Government wishes to point out that the Soviet Government bears full responsibility for denying to United States vessels their rights under international law, for frustrating this scientific endeavour and for depriving the international scientific community of research data of considerable significance.

...

Furthermore, the Statute on Protection of the USSR State Borders, cited in the Ministry's *aide-memoire* of August 24, cannot have the effect of changing the status of waters under international law and the rights of foreign ships with respect to them. These rights are set forth clearly in the Convention on the Territorial Sea and the Contiguous Zone of April 29, 1958, to which the Soviet Union is a party. The United States Government wishes to remind the Soviet Government, as it has on previous occasions, that there is a right of innocent passage for all ships, warships included, through straits used for

⁶¹Butler p. 123.

⁶²State Department telegram 029187, August 30 1967, State Department File SCI 31 US; American Embassy Moscow telegram 841 Aug. 30, 1967.

international navigation between two parts of the high seas, whether or not, as in the case of the Vilkitsky Straits, they are described by the Soviet Government as being overlapped by territorial waters, and that there is an unlimited right of navigation in the high seas areas of straits comprising both high seas and territorial seas.

Moreover, since the Ministry in its *aide-memoire* of August 24 has referred to the Dmitry Laptev and Sannikov Straits, although they are not involved in the present case, the United States Government wishes to reiterate its position, stated most recently in its *aide-memoire* of June 22, 1965, that it is not aware of any basis for the Soviet claims to these waters.

The United States Government wishes to emphasise that it regards the conduct of the Soviet Government in frustrating this scientific expedition as contrary both to international law and to the spirit of international scientific cooperation to which the Soviet Government has frequently professed its support. Actions such as these cannot help but hinder the cause of developing international understanding and the improvement of relations between our two countries.

On August 31 1967 the State Department spokesman summarized the situation as follows:⁶³

On August 16, the U.S. Coast Guard announced that the 269-foot Coast Guard ice-breakers *Edisto* and *Eastwind* planned an 8,000 mile circumnavigation of the Arctic Ocean conducting scientific research en route. Their itinerary called for them to travel north of the Soviet islands of Novaya Zemlya, Severnaya Zemlya, and the New Siberian Islands.

The planned course was entirely on the high seas and, therefore, the voyage did not require any previous clearance with Soviet authorities. Nevertheless, the Soviet Government was officially informed of these plans just prior to the public announcement.

However, heavy ice conditions made it impossible for the vessels to proceed north of Severnaya Zemlya. On August 24 our Embassy in Moscow notified the Soviet Ministry of Foreign Affairs of this situation and stated it would be necessary for the two vessels to pass through Vilkitsky Straits south of Severnaya Zemlya in order to complete their journey.

In response the Soviet Ministry of Foreign Affairs made a statement to our Embassy that the straits constituted Soviet territorial waters.

On August 28, as a result of a routine message from the icebreakers to the Soviet Ministry of the Maritime Fleet, the Soviet Ministry of Foreign Affairs reaffirmed its declaration of August 24 and made it clear that the Soviet Government would claim that passage of the ships through the Vilkitsky Straits would be a violation of Soviet frontiers.

Under these circumstances the United States considered it advisable to cancel the proposed circumnavigation. The *Edisto* has now been ordered to proceed directly to Baffin Bay, and the *Eastwind* was ordered to remain in the area of the Kara and Barents Seas for about a month to conduct further oceanographic research.

On August 30 our Embassy in Moscow sent a note strongly protesting the Soviet position. The note pointed out that Soviet law cannot have the effect of changing the status of international waters and the rights of foreign ships with respect to them. These rights are set forth clearly in the Convention on the Territorial Sea and the Contiguous Zone of April 29, 1958 to which the Soviet Union is a party.

63Dep't St.Bull., No. 1473, Sept. 18, 1967 at 362.

There is a right of innocent passage for all ships, through straits used for international navigation between two parts of the high seas, whether or not as in the case of the Vilkitsky Straits, they are described by the Soviet Union as being overlapped by territorial waters, and there is an unlimited right of navigation in the high seas of straits comprising both high seas and territorial waters. Clearly, the Soviet Government, by denying to U.S. vessels their rights under international law, has acted to frustrate a useful scientific endeavour and thus to deprive the international scientific community of research data of considerable significance.

Though the *Edisto* left the area, the *Eastwind* remained in the Kara and Barents Seas for another month.⁶⁴

The developments of the Russian position since 1982 will now be presented.

4.3.1.2. Post 1982⁶⁵

Even following 1982 national legislation adopted by the Soviet Union and Russia dealing specifically with Arctic straits is scarce.⁶⁶ However the extensive navigational and environmental provisions applying in the exclusive economic zone, and where relevant the territorial sea, can also be claimed governing the Arctic straits since the majority are claimed as internal waters enclosed by straight baselines.⁶⁷ Those straits lying between islands far offshore and between these islands and the mainland still can be claimed governed by the provisions for the exclusive economic zone if not the territorial sea, since all are encompassed by the former zone, and small island groups in addition by the latter zone.⁶⁸

Briefly, under the Regulations for Navigation on the Seaways of the Northern Sea Route (1991 Rules)⁶⁹ compulsory "ice breaker assisted pilotage" is required under Article 7.4. for *all* ships in the Vil'kitskii, Shokal'skii, Sannikov and Dmitrii Laptev straits.⁷⁰

64Franckx p. 150. The author also notes that the *Staten Island* sailed in the East Siberian Sea during 1967.

65The following information is obtained from Franckx pp. 173, 180, 181, 206, 217, 219, 267, 268, footnotes 115, 313, 314, 322, 323, 378-382 unless otherwise indicated. In accordance with the Decree of the Supreme Soviet of the Russian Federation dated 12 December 1991, on the ratification of the Commonwealth Agreement (8 December 1991), all laws enacted by the Supreme Soviet of the USSR are in force within the Russian Federation. Interview with Professor Kolodkin, Northern Sea Route Expert Meeting, 13 October, 1992, Tromsø, Norway.

66Butler Development Law p. iii indicates in 1987 a Chapter D. "Straits" which is to be issued in further releases. This has yet to be obtained. Franckx pp. 176-190 in his comprehensive work on Soviet and Russian legislation fails to include extensive legislation related to the Arctic straits.

67See Sections 6.2.3., 6.2.4., INSROP Working Paper No. 37; Section 7.NEED, Section 8.NEED and Section 9.NEED for more extensive discussion including respectively baselines, the innocent passage of warships and non warships in the Russian territorial sea, historic use and the environmental provisions. Russian Arctic straits claimed internal waters enclosed by straight baselines and previously under a historic theory are governed by the extensive provisions of the 1983 Law on the State Boundary of the U.S.S.R., 22 *International Legal Materials* 1055 (1983), (1983 Statute). Entered into force March 1, 1983. See also Butler Development Law C.1., p. 1.

68See Map, Appendix 4.

69Regulations for Navigation on the Seaways of the Northern Sea Route, Published by the Head Department of Navigation and Oceanography USSR Ministry of Defence, 1991, *International Challenges* Vol 12, No. 1, 1992 (1991 Rules).

70The 1991 Rules Article 5.4. specify particular marine areas which presents a more stringent requirement than that required previously under the 1971 Statute Article 3(b), which required icebreaker *or* pilotage.

The other Russian Arctic straits could be included as well requiring leading established by the authorities since under Article 1.2. the Northern Sea Route is defined to transverse not only the inland seas, territorial seas but also the exclusive economic zone. For these one of five different types of leading must be prescribed under Article 7.4 and must be requested under Article 3 by all ships intending to navigate the Northern Sea Route. Inspections of ships may be made under Article 6 when deemed necessary by the relevant officials. The other types of leading include under Article 7.4., (1) leading along recommended routes up to a certain geographical point (shore based pilotage), (2) aircraft assisted leading (plane or helicopter), (3) conventional pilotage, (4) ice-breaker leading. Design, equipment, manning and construction standards must satisfy special requirements under Article 4. A certificate of security for liability for pollution damage must be carried on board under Article 5. Navigation may be suspended for environmental protection and navigational safety where necessary under Article 9, and vessels removed for violations of these provisions especially related to notification, authorization and manning. It appears that these rules are strictly enforced.⁷¹

Generally, supplementary legislation includes the 1985 edition of *Notice to Mariners* in which the "System for Navigating Ships in the Vil'kitskii, Shokal'skii, Dmitrii Laptev and Sannikov Straits" was published requiring under Article X compulsory ice-breaking convoying and pilotage in these straits.⁷² This supplements Article 3 of the Edict on Intensifying Nature Protection in Areas of the Far North and Marine areas Adjacent to the Northern Coast of the USSR, (1984 Environmental Edict)⁷³ and Article 14 of the 1984 Edict "On the Economic Zone of the U.S.S.R. (1984 Economic Edict),⁷⁴ in which navigation is prohibited without pilotage or other escort or compliance with special construction, equipment and crewing provisions in adjacent coastal areas with dangerous and severe climatic conditions and ice. The provisions are applicable to *all* ships regardless of flag, and in areas where compulsory pilotage is dictated, under Articles 1 and 15 of the 1983 Statute no ship including foreign warships has the right to navigate without a State marine pilot or without complying with these standards. The requirement supplements Article 5 of the Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters and Internal Waters and Ports of the USSR (1983 Rules)⁷⁵ which requires warships to observe navigation and other rules, and pilotage and ice breaking services are to be used where compulsory. At the same time paradoxically the Soviet Union enacted a Resolution by the U.S.S.R. Council of Ministers with the U.S. - U.S.S.R. Joint Statement attached a few days before the Joint Statement was ratified by

71Interview Deputy Director Alexandr Ushakov, Northern Sea Route Administration, Moscow, 25 February, 1994.

72"System for Navigating Ships in the Vil'kitskii, Shokal'skii, Dmitrii Laptev and Sannikov Straits", 1 Annex *International Legal Materials* 189 (1986) (1985 Rules).

73Butler, William E. , "The USSR, Eastern Europe and the Development of the Law of the Sea," 1987, (Butler Development Law), Edict on Intensifying Nature Protection in Areas of the Far North and Marine areas Adjacent to the Northern Coast of the USSR, (1984 Environmental Edict), Butler Development Law, J.4., p. 1. Franckx p. 180 sees these rules as parallel to the 1972 *Izveshcheniia Moreplavateliam* rules enacted under the 1971 Statute.

74The 1984 Edict "On the Economic Zone of the U.S.S.R (1984 Economic Edict), Butler Development Law F.2.

75"Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters and Internal Waters and Ports of the USSR" (1983 Rules), Butler Development Law C.2. p. 1. The 1983 Rules replace the 1960 Rules.

the U.S. and the Soviet Union,⁷⁶ which amended the controversial 1983 Rules Article 12(1) for warships and did away with the requirement that sea lanes have to be customarily used for international navigation for innocent passage to exist as well as dropped the exclusive list of the traffic separation schemes.⁷⁷ Stopping, inspection, detention and arrest is allowed in the exclusive economic zone and arguably the territorial sea for violations of the authorization requirement or established Russian rules under Articles 4(a) of the Statute on the Protection of the Economic Zone of the USSR a Section of the 1984 Economic Edict.⁷⁸ In the exclusive economic zone under Article 4 of the 1985 Protection Statute special measures including navigational practices and vessel traffic may be established in special areas by the USSR Council of Ministers to prevent vessel-source pollution.⁷⁹

Briefly, submarine passage in the territorial sea and internal waters is specifically addressed in the 1983 Rules Article 1 which includes underwater means of transport, including through the majority of the Arctic straits, since if not claimed as internal waters are claimed territorial seas. The 1983 Rules Article 3 requires for submarines *surface passage* in the territorial sea, internal waters and ports, and requires as seen under Article 5 pilotage and ice breaking services where compulsory, and under Articles 14 and 15 compulsory notification and authorization. This is reiterated in the 1983 Statute Article 13 whereby submarine means of transport must effectuate innocent passage through territorial waters following the procedure established by the USSR Council of Ministers, including navigating on the surface and flying their own flag and including necessarily pilotage where compulsory. Under the 1983 Statute Article 20 submerged passage in Soviet waters, with "waters" defined to be the territorial sea and internal waters, are deemed to be violations. Finally Article 9(e) of the 1993 Law of the State Boundary of the Russian

76Franckx pp. 167, 186, 222, footnote 413 citing Resolution of 20 September, 1989 No. 759 concerning the Soviet-US Accord on the Question of Innocent Passage of Vessels, including Warships, through Territorial Waters. See also Franckx, Erik, "Innocent passage of warships, Recent developments in US - Soviet relations," 14 *Marine Policy* 6, p. 484, at 490.

77Amended Article 12(1) of the 1983 Rules states; "Foreign warships in innocent passage through territorial waters (the territorial sea) of the USSR for the purpose of traversing the territorial waters (the territorial sea) of the USSR without entering into internal waters or calling at ports of the USSR, use sea lanes or traffic separation schemes in those areas where they are designated or prescribed." The original Article 12(1) stated, "The innocent passage of foreign warships through the territorial waters (territorial sea) of the USSR for the purpose of traversing the territorial waters (territorial sea) of the USSR without entering internal waters and ports of the USSR shall be permitted along routes ordinarily used for international navigation: in the Baltic Sea: according to the traffic separation systems in the area of the Kypu Peninsula (Hiiumaa Island) and in the area of the Porkkala Lighthouse; in the Sea of Okhotsk: according to the traffic separation schemes in the areas of Cape Aniva (Sakhalin Island) and the fourth Kurile strait (Paramushir and Makarushi Islands); in the Sea of Japan: according to the traffic separation system in the area of Cape Kril'on (Sakhalin Island)." See Franckx pp. 167, 213 footnote 255. Franckx p. 181 notes the contradiction in the Russian legislation. As seen the entire Northern Sea Route is claimed under strict national control, perhaps even those areas in which the high seas are included. However the requirement for pilots for public vessels in the Vil'kitskii, Shokal'skii, Dmitrii Laptev and Sannikov Straits from 1985 Pilot Rules and 1991 Rules; and the requirement for pilots applicable for warships in the Vil'kitskii, Shokal'skii, Dmitrii Laptev and Sannikov Straits from 1985 Pilot Rules and 1991 Rules in combination with Article 5 of 1983 Rules seems to recognize the right of such ships to sail in these waters in the first place as under traditional law of the sea.

78Statute on the Protection of the Economic Zone of the USSR. a Section of the 1984 Edict "On the Economic Zone of the U.S.S.R (1984 Economic Edict), Butler Development Law F.2. "Clear grounds" are necessary for pollution inspections.

79Statute on the Protection of the Economic Zone of the USSR, (1985 Protection Statute), Butler Development Law, F.3.

Federation, (1993 Statute)⁸⁰ generally requires foreign warships to exercise innocent passage in conformity with Russian legislation, including submarines navigating on the surface showing their flags. This also includes non military submarines and other submerged means of transport. Under Article 9 generally foreign warships and other vessels in innocent passage must proceed along established sea routes or traffic separation schemes, or presumably where absent, follow ordinary recommended course. Under Article 25 foreign warships in the absence of other rules, must receive permission from the authorities to enter Russian internal waters and ports. From the above legislation this would include the majority of Arctic straits. Foreign non military vessels need permission to enter open ports only if required in the flag State for Russian vessels.

New Russian provisions governing internal waters, the territorial sea, and the contiguous zone are still under review, political problems in the Parliament contributing to the delay, and the expected date of adoption uncertain.⁸¹ There have been several new enactments by the Russian Federation which presumably preempt that adopted under the Soviet Union, however none of which yet have received an official translation into English though this is planned as an INSROP Project.⁸² These include the mentioned Law of the Russian Federation On the State Frontier of the Russian Federation, 1 April 1993,⁸³ Draft of Federal Law Of Environmental Protection in the Russian Federation,⁸⁴ 1995 Law on Continental Shelf of the Russian Federation, and 1996 Law on the Exclusive Economic Zone.⁸⁵ Requirements for the Design, Equipment, and Supply of Vessels Navigating the NSR (1994 Design Requirements), and Guide to Navigation through the NSR (1995 Navigation) completed in Russian are expected translated and received in 1996.⁸⁶ Provisions from these Statutes will be discussed when official translations are received.

80Law of the State Boundary of the Russian Federation, 1993, (1993 Statute), obtained from Rtd. Admiral Yakovlev, Russian - American Seminar, Moscow, 26 August, 1995, Unofficial translation by Dr. Alexandra Livanova, St. Petersburg University. "Historic straits" is noted to have been retained by Article 5(2) of the 1993 Law on the State Boundary. N.D. Koroleva and V. Markov, A. Ushakov, "Legal Regime of navigation in the Russian Arctic," Moscow 1995, (Koroleva, Markov and Ushakov), pp. 82. The 1993 Statute will be discussed more extensively when an official version is obtained, since the term appears dropped in Dr. Livanova's translation. This would be more in line with Kolodkin p. 163 and interview with Kolodkin 25 February, 1994, where it was indicated that the Russian position was less reliant upon historic use. Article 6 of the 1983 Statute retains the 1960 Statute Article 4 provision for "seas and straits, historically belonging to the USSR" and continues not to specify any specific historical straits or seas. In relevant part Article 6 also adds as Soviet internal waters, "(1) sea waters on the landward side of straight baselines adopted to compute the breadth of the territorial waters (territorial sea) of the USSR" and "(5) waters of rivers, lakes and other waters whose shores belong to the USSR."

81Speech Professor Kolodkin, Russian - American Seminar, Moscow, 25 February, 1994.

82Interview A. Ushakov 17 April, 1996, Fridtjof Nansen Institute, Oslo, Norway, (Interview Ushakov 17 April 1996). Project plan for INSROP Phase II Project IV.3.1. Professor A. Kolodkin, received from CNIIMF, Fridtjof Nansen Institute, Oslo Norway, 17 June, 1996.

83Law of the Russian Federation On the State Frontier of the Russian Federation, 1 April 1993, (1993 Statute) (unofficial translation by Dr. Alexandra Livanova, University of St. Petersburg). This replaces the Law on the State Boundary of the USSR of 24 November 1982, Butler Development Law C.1.

84"Of Environmental Protection in the Russian Federation," (1994 Environmental Decree). Received from Senior Researcher Elena Nikitina, Russian Academy of Sciences, (in Russian) (Unofficial translation by Dr. Alexandra Livanova, University of St. Petersburg).

85The former was recently adopted but has not yet been received (in Russian), and the latter is anticipated adopted in 1996. Interview A. Ushakov 17 April, 1996, Fridtjof Nansen Institute, Oslo, Norway (Interview Ushakov).

86Correspondence with Rtd. Admiral Yakovlev, March 1995.

Kolodkin confirms and expands upon the above legislation, emphasizing strict coastal State sovereignty and jurisdictional control over all the Arctic straits, comprised of internal waters, territorial seas or high sea lanes.⁸⁷ Specifically the Russian straits are relegated to the internal waters regime, likening to the *Indreleie*, "virtually all the straits of the Soviet part of the Arctic including the Vil'kitskii, Shokal'skii, Dmitrii Laptev and Sannikov straits connecting the Kara, Laptev and East Siberian Seas."⁸⁸ Arguments entail lack of use, overlapping by Soviet internal waters, territorial seas, or the economic zone, Article 234, the existence of high seas no less convenient for navigation, and the fact that none connect high seas with territorial waters of foreign States necessary under TSC Article 16(4) and LOSC Articles 37 and 38. Based upon these, "(P)enetration into any of those straits (Vil'kitskii, Shokal'skii, Dmitrii Laptev and Sannikov)...may constitute "a violation of the sovereign rights of the USSR (with respect to the economic zone) or of its sovereignty (with respect to territorial and internal waters)."⁸⁹ Briefly other regimes are also noted to have general application to the straits in the direction of strict nationalization.⁹⁰ Internal waters are extended under the 1983 Statute and 1984 and 1985 Decrees, necessitated by factors including, "the need for the coastal country to protect its sovereignty against any infringements on its defense..." as well as the State's political, ecological, sanitary and economic security.⁹¹ Straight baselines for the northern Arctic coast around Novaya Zemlya, Severnaya Zemlya and Novosibirskiye Ostrova including across the majority of the Arctic straits, which the U.S. protested.⁹² Consistent with the 1984 Economic Zone Edict,⁹³ obligatory pollution prevention measures are established also encompassing the straits. For violations, information concerning the vessel, including presumably submarines, can be demanded, inspection

87Kolodkin pp. 160-163, 165-167.

88Ibid. Interestingly Krylov at a earlier date noted straits such as the *Indreleie* in internal waters were outside the regime under discussion under Article 16(4) which were relevant to the Northern Sea Route. *ILC Yrbk* (1955), p. 151 paragraphs 37-38. Justifying this Krylov noted that it was possible for ships to sail from the White Sea to the mouths of the great Siberian rivers, but such navigation was entirely dependent upon assistance from Soviet pilots and icebreakers.

89Kolodkin p. 163.

90Specifically the Northern Sea Route due to the distinctive climatic and hydrological factors of the region, variability resulting in the transverse of Soviet internal waters, territorial sea and exclusive zone, and even the high seas, and historical order constitutes an aggregate of legal and material circumstances which enable it to be regulated as a national transport route under the total prerogative of the Soviet Union as coastal State. Historical theories applied specifically to straits are nearly dropped by Kolodkin, though he subscribed to them earlier; the Sannikov and Vil'kitskii Straits as well as the Cheshskii Bay, Kol'skii and Pechorskii Bay, were claimed as historic waters. See Franck pp. 173, 217 footnote 313, citing Kolodkin, A. "International Law of the Sea" (Russian) *International Law*, (Tunkin, D., ed.) Moscow, Izdatel'stvo Iuridicheskaiia Literatura, (1982) (1982 text), p. 415. In his recent article Kolodkin neglects to mention them at all and when questioned in an interview in Moscow 25 February, 1994, he used the historic claim vaguely only to negate the LOSC Article 8(2) and TSC 5(2) innocent passage exception. See Section 7.NEED.

91Decrees of the Council of Ministers, Straight Base Lines Established under the Decree of 7 February 1984 for the Territorial Sea, Exclusive Economic Zone, and Continental Shelf of the USSR off the Mainland and Islands of the Pacific Ocean, the Sea of Japan, the Sea of Okhotsk and the Bering Sea (1984 Baseline Decree); and of 15 January 1985, Straight base Lines established under the Decree of 15 January 1985 for the Territorial Sea, Exclusive economic Zone, and Continental Shelf of the USSR off the mainland and islands of the Northern Arctic Ocean, the Baltic Sea, and the Black Sea, (1985 Baseline Decree). See Butler Development Law C.3. p. 3. and 21 respectively. See Section 6.NEED for discussion of Decrees establishing Arctic baselines.

92Smith and Roach p. 48 and *U.S. Limits* No. 112, p. 24.

93Edict, "On the Economic Zone of the U.S.S.R." adopted 28 February 1984 by the Presidium of the U.S.S.R. Supreme Soviet. Butler Development Law F.2. p. 1 (1984 Economic Zone Edict). See Section 9.Y.3. for discussion.

carried out and if necessary proceedings and detention instituted. Under the 1984 Environmental Edict, navigation of vessels within specially protected areas may be carried out only in instances determined by the Soviet legislation, and under the 1984 Procedure Edict⁹⁴ the authorities are allowed all measures required by the circumstances to prevent violations and to detain offenders. These measures may also be carried out in the territorial sea when the violation occurred in the exclusive economic zone, under the 1985 Protection Statute.⁹⁵ Kolodkin continues, since the Northern Sea Route falls under complete sovereignty or jurisdiction of the USSR, a number of important major consequences for foreign navigation include the entry of warships into Russian Arctic internal waters is possible only under conditions established by the 1983 Statute and the 1983 Rules. In the 12 mile territorial sea foreign warships, presumably including submarines, and non military ships *in principle* can exercise innocent passage, limited however by certain conditions related to the legal theories set forth above, safety and the environment. In the exclusive economic zone warships and non military ships have the right to exercise freedom of navigation within a belt of 188 miles seaward of the 12 mile territorial sea, subject presumably to the same theories. On the high seas freedom of navigation is exercised without those limitations as established within the economic zone connected to environmental protection. In the water column superjacent to the continental shelf, freedom of navigation is preserved since these waters are the high seas.

The same arguments regarding non internationality of the Russian Arctic straits are forwarded by Koroleva, Markov and Ushakov in an article written in 1995 with an Introduction by Professor Kolodkin.⁹⁶ "The above-mentioned circumstances testify to the lawfulness of extending to practically all straits of the Arctic's Russian part of a special legal regime excluding their uncontrolled uses by foreign ships, regardless of whether this is a transit or innocent passage, as is allowed by the 1958 Convention on the High Seas and the 1982 UN Convention on the Law of the Sea with regard to straits used for international navigation."⁹⁷

The U.S. position based chiefly upon the declarations made in the Vil'kitskii Straits Incident and others will now be presented. As noted the declarations in the Vil'kitskii Incident were published in 1992 and again in 1994 as establishing the U.S. position.⁹⁸

4.3.2. The U.S. Position

As noted initially no other States than the U.S. have been found objecting officially to the Russian Arctic straits regime enclosed by straight baselines or sailing its vessels in

94Decree of the Presidium of the USSR Supreme Soviet of 12 November 1984, 'On the Procedure for Applying Articles 19 and 21 of the Edict "On the Economic Zone of the U.S.S.R." (1984 Procedure Edict). See Kolodkin p. 162. See also Butler Development Law F.2. p. 17.

95See Kolodkin p. 163. See also Butler Development Law F.2. p. 23.

96Koroleva, Markov and Ushakov pp. 82-86.

97Ibid. p. 86.

98Smith and Roach pp. 200-207 and *U.S. Limits* No. 112, pp. 68-71.

these waters at variance with the Russian provisions.⁹⁹ This is why solely the U.S. position is presented concerning State practice. There is a possibility that the U.K. and France along with the U.S. have sailed their submarines in these waters, though this is undocumented,¹⁰⁰ and why these States have not protested officially is unknown.¹⁰¹ It is assumed that most States are disinterested.

As will be seen a main concern behind the establishment of the LOSC straits regime was the expansion of the twelve mile territorial sea.¹⁰² From the U.S. standpoint which recognized a three mile territorial sea, all the Russian Arctic straits thus greater than six miles contained a high seas channel. Transit passage from the LOSC straits regime is seen as merely continuing the rights already enjoyed in these channels, before U.S. recognition of a valid twelve mile territorial sea.¹⁰³ For clarity this would thus include in the Russian Arctic the Kara Gates, the Dmitrii Laptev, the Sannikov, the Blagoveshchensk, the Long, and the Gorlo Straits, all having high sea channels even following expansion to the 12 miles territorial sea. Also included are those ten other straits with widths between 12 and 24 miles, the Vil'kitskii and the Shokal'skii, the British Canal, the De-Bruyn, the Nightingale, the Ovistyn, the Zaria, the Orlovskaiia Salma, the Nightingale and the Murmanets Straits. For those six miles or less, which is the majority, the transit passage regime could still be argued to apply based upon the LOSC regime.¹⁰⁴ Ice is seen as no problem, "(I)n the United States' view it is immaterial whether or not ice covers such a strait during most or all of the year, as the right of transit passage, it will be remembered, covers overflight as well as submerged transit."

In addition the argument forwarded by the U.S. concerning potential use in determining internationality is of particular relevance to the Northern Sea Route since it encompasses commercial *development*.¹⁰⁵ Vagaries in patterns of world commerce, access to alternative routes, the development of marine technology, and other factors extraneous to the world of navigation can affect the law of the sea, and specifically the

99Interview with Professor Kolodkin, 25 February, 1995; Senior Lecturer in Law Robin Churchill, 16 June 1994 regarding the U.K. and the E.U.; Assistant Director General, the Norwegian Foreign Ministry, Dag Mjaaland, May 1994 regarding Norway; and unanswered question to Officials of the French Defense and Foreign Ministries, INSROP Meeting, Paris, November 1993. Of the relevant literature it is only Franck pp. 192, 224 footnote 471 who states otherwise, yet refers only to the U.S. protests. See Section 6.2.3 and 6.3.

100Reisman, W. Michael, "The Regime of Straits and National Security: An Appraisal of International Lawmaking," *The American Journal of International Law*, Vol. 74, (Reisman Straits), pp. 52-53, 69. See Section 4.3.3.2.

101Smith and Roach, pp. 67, 88, footnote 57 note the European Union on the other hand has protested the Canadian enclosure by straight baselines of its Arctic straits and subsequent classification as internal waters. The authors cite British High Commission Note No. 90/86 of July 9, 1986, reported in American Embassy Paris telegram 33625, July 24, 1986.

102See Section 5.2.1.

103Interview Roach and Smith, U.S. State Department, Washington D.C., 27 June 1994. See also Schachte pp. 6-7 who adds that the transit passage regime is crucial to the maintenance of world peace and order regardless of the breadth of the strait.

104Smith and Roach p. 177.

105Section 4.2.2. See Smith and Roach p. 112, *U.S. Limits* No. 112, pp. 69, 71; and Schachte p. 14.

Arctic.¹⁰⁶ The possibility for the Russian Arctic straits to be navigated by some form of international traffic does exist. It is conceivable at some point an increase of traffic especially in the Western regions of the Northern Sea Route even if chartered and otherwise controlled by Russia, could approach dimensions of the *Corfu Channel* elements with Arctic conditions allowed. It could then be questioned along the lines of the U.S. argument whether the regime envisioned for non international straits should then still govern. Inherent in the arguments presented by the Russian State, Kolodkin and much of the doctrine noted supporting non internationality of the Russian Arctic straits is that "internationality" is considered *static*.¹⁰⁷

One author considers this point so important that he states, "(A) pattern of international shipping across the (Northwest) Passage, developed over relatively few years, might be held sufficient to make it international."¹⁰⁸ Whether Canadian measures, including pollution prevention legislation, voluntary traffic system (NORDREG), inclusion of Article 234 in the LOSC, ice breaking services, surveillance overflights, a naval presence and the Canadian - U.S. Agreement, are sufficient are debatable.¹⁰⁹ The doctrine which addresses this issue is divided.¹¹⁰

106As an example it is doubtful that the Malacca Agreement would have been negotiated extending the interpretation of Article 233 favourably to the coastal strait States if the Malacca strait had not been such an important transport route. See Section 5.2.5.2.

107See Section 4.2.2.

108Pharand Arctic pp. 230 and 234-243. This statement is based upon a consideration that special factors such as the remoteness of the region, difficulties of navigation, absence of alternative routes established a sufficient threshold in accordance with the criteria established under the *Corfu Channel Case*, and that application of general principles of law to the Arctic regions taking into account "local conditions" has already been generally recognized by the PCIJ in the *Eastern Greenland Case*. Denmark v. Norway, (1933), P.C.I.J. Rep., Ser. A/B, No. 53.

109Ibid. p. 241. Canadian services already provided included hydrography, oceanography, ice properties, ice distribution and movements, meteorology, dredging implementation, and customs services. The author subsequently proposed additional measures to include compulsory vessel traffic system, heavy icebreakers for year round surveillance and control of foreign shipping, compulsory pilotage, specific navigational aids and services, and submarine detection capability. These further include specifically marine navigational aids, ice breaking and escorting, marine search and rescue, marine emergencies/pollution control, marine mobile communications services, ports, harbours and terminals, vessel inspection services, vessel traffic management, marine resupply administration and support, pilotage and training.

110The Canadian Arctic straits are included here to include a broader range of doctrine. Though the Canadian straits are subject differently to TSC Article 5(2) and LOSC Article 8(2), see Section 7.NEED, related to the issue of internationality there exist parallels. See Section 8.NEED for historic use. Those authors supporting non internationality include Churchill, R. and G. Ulfstein, *Marine Management in Disputed Areas, The Case of the Barents Sea*, 1992, (Churchill - Ulfstein), p. 18; Pharand Arctic p. 241; Movchan, A., "The Legal Regime of Navigation in the Arctic, Problems of Soviet - Canadian Cooperation, *From Coexistence to Cooperation - International Law and Organization in the Post-Cold War Era*, (Ed. McWhinney, Ross, Tunkin and Vereshchetin), (1991) (Movchan) p. 169; and Howson, N. "Breaking the Ice: The Canadian - American Dispute over the Arctic's Northwest Passage," *Columbia Journal of International Law*, Vol 18, (Howson) pp. 369-370. Those believing the issue unclear include Franck p. 193; Boyle, Alan, "Remarks on the Legal Regime of the Arctic," American Society of International Law, 82 Annual Meeting Proceedings, Washington D.C. 20-23 April, 1988, Vol 82, (Boyle), pp. 327-328; Rothwell, Donald, "The Canadian - U.S. Northwest Passage Dispute: A Reassessment," *Cornell International Law Journal*, Vol., 26, (Rothwell), p. 357, who believes the determination to be extremely difficult; and Roth, D. and Kaye, Stuart, "Law of the Sea and the Polar Regions," *Marine Policy*, 1994, Vol. 18, (Roth and Kaye) p. 53. McDorman, Ted, "In the Wake of the 'Polar Sea': Canadian Jurisdiction and the Northwest Passage, 27 *Les Cahiers de Droit*, (1986) (McDorman) p. 636 sees the Northwest Passage as not being an international strait but part of Canada's territorial sea subject to undisputed innocent passage. McRae D. "The Negotiation of Article 234" in *Politics of the Northwest Passage*, (Griffiths, F., ed.) Kingston, McGill-Queens University Press (1987) (McRae) p. 110 sees the Northwest Passage excepted from the international straits regime

From these divergent positions it is necessary to view the actual foreign use of the Russian Arctic Straits with respect to the criteria set forth in the *Corfu Channel Case*. This will be presented in the following Sections and be divided into surface use and submerged use. Conclusions will then follow.

4.3.3. Actual Foreign Use

4.3.3.1. Surface Use

As seen in the *Corfu Channel Case* and subsequently TSC Article 16(4) and LOSC Articles 34 to 45 requirements are set forth including a not insubstantial number of transits and of flags represented, and a history as a useful route for international ship traffic.¹¹¹ Infrequent transit is not enough, although lower numbers for isolated areas might be sufficient.

It might be questioned whether use of the *Corfu Channel Case* numerical criteria as a comparison here is justified since the U.S. is introducing new criteria. It is felt however that the comparison of the number of flags and passages is justifiable since the expansion deals with interpreting "international" an element defined in that case. The *Corfu Channel Case* without question has contributed to "legal consistency" if not legal precedent including the characteristic numerical values.¹¹²

Concerning foreign use of the Northern Sea Route through the Russian Arctic straits Professor Armstrong notes generally that in the 1920's the element of danger in sailing these areas ceased to play an important role and voyages became increasingly routine.¹¹³ "In 1921 four out of five ships went to the Ob; in 1927, 1928 and 1929 about half the total

through Article 234, not requiring the U.S. to make a formal exception to this regime. Westermeyer, Wm. and Goyal, Vinod, "Jurisdiction and Management of Arctic Marine Transportation, *Arctic*, (1986), Vol, 39, Westermeyer and Goyal, p. 347 note the U.S. may allow a narrow interpretation of Article 234 to except the international straits regime, but "(A)t some point the interest of the United States in holding the line on greater limitations to the freedom of navigation overtakes its interest in the protection of the environment." McRae, D.M., and D.J. Goundrey, "Environmental Jurisdiction in Arctic Waters. The extent of Article 234," *University of British Columbia Law Review*, Vol. 16, Nr. 2, (1982) (McRae and Goundrey), p. 220 avoid the issue of internationality believing Article 234 to override the international straits regime. See Section 5.2.6. for interface of Article 234 and the international straits regime. Butler p. 136 argues that Soviet State practice indicates recognition of its Arctic straits as international, and notes that only the Yungshturn, Eterikan and possibly the Red Army Strait have not been used for international navigation. Caminos pp. 208-209 is vaguely positive to the possibility of four major Russian Arctic straits being considered international.

¹¹¹See Section 4.2.

¹¹²See Section 2.5.1.

¹¹³Armstrong, Terence, *The Northern Sea Route, Soviet Exploitation of the North East Passage*, Scott Polar Research Institute, 1952, (Armstrong), pp. 18-19. See Appendix 4 for Tables I-IV which were obtained from Armstrong Appendices I, II, III and V. Tables V and VI were obtained from Deputy Director Ushakov, Northern Sea Route Administration, March 1995. For a history of early use of the Kara Sea Route in the late 1800's and early 1900's see Armstrong pp. 1-18. Armstrong, Terence, *INSROP Working Paper* "Historical and Current Use of the Northern Sea Route", No. 28 - 1996, IV.1.1. Franckx p. 175 notes that various of the Arctic straits were not used in practice until the 1930's when the Chief Administration of the Northern Sea Route was established.

number of ships went to each river; in 1932 25 out of 28 ships went to the Yenisey.¹¹⁴ Some eight ships were involved in the Kara Sea Route up to 1929, twenty six ships after 1929, and in two years some forty five "freighters were employed."¹¹⁵ Table III indicates from the years 1933 to 1938 traffic from the west to the Lena River, through the Kara Gates, Yugorskii Shar, or Malygin Straits and Vil'kitskii or Shokal'skii Straits varied from two to five per year with a rough average of *four per year*.¹¹⁶ Table II indicates for traffic from the East to the Kolyma River through the Long Strait from the year 1911 to 1936 that passages varied from one to two a year for 1911 to 1931 with an average of *one per year*.¹¹⁷ Table I indicates for traffic to and from the Ob and Yenisey that for the years 1920 to 1929 shipments varied from ten to one per year with a rough average of *five per year*.¹¹⁸

Table IV indicates that during the war years 1942 to 1945 between twenty three and thirty four voyages were made each year along the Northern Sea Route delivering lend-lease goods from the U.S. West Coast.¹¹⁹ These included Liberty ships, themselves lend lease goods, and all the ships were manned by Russian crews to lessen the likelihood of their being attacked by Japan in the Pacific.¹²⁰ If Table IV is broken down into passages through the respective straits coming from the east, it can be seen that from twelve to fourteen voyages per year took place with an average of *thirteen voyages per year* through the Long Strait alone. Through the Long, Dmitrii Laptev or Sannikov Straits from twenty three to twenty nine voyages per year were made with an average of *twenty seven voyages per year*. Through the Vil'kitskii or Shokal'skii Straits voyages varied from two to four per year with an average of *three per year*. Finally through the

114Although it is somewhat unclear whether the numbers indicated are voyages per year or several voyages per ship, indications are that it was the former. Thus either two more ships were chartered or two ships made repeat voyages. Ibid. p. 21. Interview with Professor Jens Petter Nielsen, University of Tromsø, indicates that as early as 1868 not less than eighteen Norwegian ships operated in the Kara Sea hunting seals, and there were possibly nine more from other States. In the 1870's as many as *eighty to ninety* Norwegian sealers operated in the Kara Sea travelling through and back the Kara Gates Straits and the Yugorskij Shar quite independently of Russian control and with only a tenth of Russian sealers present. During the 1870's, 1880's and 1890's the numbers were less averaging around twenty ships at odd years. More specific information will be published as an *INSROP Working Paper* Project IV.1.1.

115Ibid. p. 20.

116In 1937 only three arrived out of ten which set out and these three returned eastward instead of westwards. If round trips were included in this period approximately four to ten passages were made per year through the Vil'kitskii or Shokal'skii Straits and the same number through the Kara Gates, Yugorskii or Malygin Straits.

117Passages varied from six to nine a year for 1932 to 1936 with an average of *six per year*. The table notes that for 1935 one ship came from and returned to the west and in 1936 there were three ships on a west to east through passage and two on a east to west through trip. Thus presumably the Kara Gates, Yugorskii, or Malygin Straits and Vil'kitskii or Shokal'skii Straits and Dmitrii Laptev or Sannikov Straits were sailed. For the other years presumably round trips were made and the numbers are doubled for passages through the Long Strait.

118From 1930 to 1939 shipments varied from sixteen to forty six per year with a rough average of *thirty three per year* with three years unknown. Passages through the Kara Gates, Yugorskii, or Malygin Straits were presumably double this number due to round trips made, plus the four to ten passages made related to the Lena River and the four made related to Kolyma River.

119.The German ship *Komet* was assisted by Soviet icebreakers and sailed the entire Northern Sea Route in 1940. Ivanov, Y., and Ushakov A., "The Northern Sea Route - Now Open", *International Challenges*, Vol. 12, Nr. 1, (Ivanov and Ushakov), p. 15 at 18.

120Armstrong p. 49.

straits of the Kara Sea Route there was only one voyage. These numbers must be doubled to take into account the round trip, though Professor Armstrong notes that in 1945 some of the ships returned to Arkhangel'sk and Murmansk rather than to Vladivostok.¹²¹ At the same time though import of supplies from the U.S. was a major operation, there appears otherwise a large movement of freight resulting in an 80% increase in turnover.¹²² Information is scarce however but probably the Kara Sea was serviced by Soviet shipping as before and coastwise traffic between the large rivers was continued.¹²³

Modernly the Soviet ship *Tiksi*, was chartered by foreign cargo owners in the summer of 1989, traversed the Northern Sea Route from Germany and arrived in Chiba, Japan 4 August 1989 where it delivered its metal cargo.¹²⁴ Four ships of the same special ice class as the *Tiksi* as well as the *Kapitan Sviridov* traversed the Route to Japan and China in the period July to October 1990, with the *Norilsk* and *Kola* returning east to west. In 1991 the French *L'Astrolabe*, was "permitted to navigate the entire length of the Northern Sea Route..." west to east with two Russian ice pilots and icebreaker assistance.¹²⁵ The German yacht *Dagmar Aaen* was permitted to sail on the Pechora River from Naryan - Mar to Igarka on the Yenisei, contingent on that it sailed in open water only.¹²⁶ The *Lunni* a Finnish tanker was issued a permit for passage along the Northern Sea Route, but the trip was cancelled due to unavailable cargo.¹²⁷ In addition in 1991 seven east and four west transits were made by Russian ships carrying Western cargoes, and a tourist ship partially transitted the Northern Sea Route.¹²⁸ The Russian icebreaker *Sovietskii Soiuz* was scheduled to sail along the Northern Sea Route with foreign tourists summer 1992 as well as two trips to the North Pole.¹²⁹ From Tables V and VI it can be seen that roughly ten of the sixteen Russian ships transitting the Northern Sea Route in 1993 carried foreign cargo to foreign ports. Though no foreign vessels transitted the Northern sea Route in either 1993 or 1994, some *twenty five* regional transits were made by Latvian, Finnish and German tankers in 1993, and twenty two by Latvian and Finnish tankers in 1994. Though some of these sailed from Archangel to Franz Josef Land and Novaya Zemlya, the ports of Amderma, Dudinka, Hatanga, Tiksi and Yana were also discharge

121Ibid.

122Ibid. pp. 49-50.

123Ibid. Presumably there was also Soviet naval activity though presently information is scarce.

124The following information is taken from Matyushenko, N., "The Northern Sea Route: Challenge and Reality," *International Challenges* (Matyushenko), (1992), pp. 61-63 unless otherwise noted. The author, who is the President of Murmansk Shipping company, recommends that Russian ships be chartered for the voyage due to the lack of foreign merchant ships "with adequate ice-strengthening capable of safely navigating in convoy through the Russian maritime Arctic."

125See Ivanov and Ushakov p. 18, who mention that the voyage, which was only for exploration and publicity purposes lasted 12 days. The ship entered the Yenisei River and sailed to Igarka.

126Ibid. This voyage lasting 6 days was under the control of an ice pilot.

127Ibid.

128Franckx p. 267 mentions as well a tourist trip the same year over the North Pole from Murmansk to Provideniia.

129Ibid. p. 268 also notes that during this season the Norwegians received permission for the first time from the Russian Foreign Ministry to carry out research work with a Norwegian ship and helicopter in the Russian exclusive economic zone south of Franz Josef Land.

points. Foreign ownership of tanker tonnage is expected to continue due to Russia's economic difficulties.¹³⁰

Thus in the late 1880's, 1920's and 1930's the ships were chiefly Norwegian sealers and British and Norwegian merchant ships, and in the mid 1990's the tankers were chiefly Latvian and Finnish, chartered by the Soviet and Russian government. Under a charter, generally a contract is entered into wherein a person takes over the use of the whole of a ship belonging to another.¹³¹ The general rule is that the flag State regulations apply. Thus the facts indicate that there were chiefly two foreign flags early in use through these straits, the Norwegian through the Kara Gates and Yugorskii, and the Norwegian and British though not independently, but under a charter with the Soviet Union as a coastal strait State. During World War II years lend-lease was in operation under which the ships were under the Soviet flag and therefore were questionably international. In the mid 1990's there are chiefly two foreign flags under charter with the coastal strait State, Russia.

Although the numerical analysis is incomplete, from the above it is clear that the areas and periods of time most characterized by foreign involvement on the Northern Sea Route were the Kara Sea Route in the late 1800's with roughly *twenty round passages per year* at odd years, the Kara Sea Route with charters in the 1930's with roughly *sixty six round trip passages per year*, and the lend-lease voyages in the 1940's with roughly *fifty four round trip passages* through the Long and Dmitrii Laptev or Sannikov Straits. In the mid 1990's there were few full foreign transits but roughly *twenty four foreign charters with regional round trip transits*, the majority presumably through the Kara Gates, the Yugorski Shar, the Vil'kitskii and Shohol'ski Straits. This is quite a different picture than that presented by Professor Kolodkin and his associates, who note that the Russian Arctic straits cannot be considered used for international navigation because, "the entire Arctic history knows but single cases of passage through these waters of non Russian vessels."¹³²

At the same time taking into account traditional *Corfu Channel* criteria, the number of independent flags, *seven*, and ships sailing, approximately *1933* per year,¹³³ and adjusting for isolated areas such as the Arctic, it is submitted that this activity or lack thereof, clustering in the periods the late 1800's to the 1930's and then the 1990's speaks for itself in terms of representing an international navigational route. It is in fact only the use of foreign ships under charters, chiefly Norwegian and British through the straits separating the Kara and Barents Sea to the Rivers Ob and Yenisei after 1920, the use of American lend lease ships during World War II, and the use of Finnish and Latvian oil tankers as far east as Yana in the mid 1990's, which possibly approaches substantiality. Lately there has been only a smattering of foreign commercial ships sailing the Arctic straits, no foreign surface warships and probably an occasional U.S., British or French

130Ramsl nd, T., *Developments in Energy and Shipping in Northern Russia*, May 1995, p. 7. Unpublished, on file with Central Research Institute in Economics and Business Administration, Bergen, Norway.

131*Black's Law Dictionary*, Fifth Edition, 1979, p. 214.

132Koroleva, Markov and Ushakov pp. 82-83, 84-85. Kolodkin p. 163.

133As noted in Section 5.2.3.1. there were 2884 passages in a period of 18 months.

submarine.¹³⁴ The number of foreign flags, roughly five, would be sufficient. However, few fully independent foreign voyages actually took place, and then only in the years before the 1917 Revolution and after 1990.

Even using the U.S.'s, expanded criteria in defining "international," including foreign charters, "internationality" of the key straits would still seem questionable. Using the most optimistic estimates together with the assumptions that all the charters and lend leases were considered foreign, the numbers involved represent under 3% of the number of passages through the Corfu Channel per year. It is submitted that even for remote areas such as the Russian Arctic that the numbers are too few to justify calling the transits "international." In spite of the low numbers the chartered and lend lease passages, in addition to earlier transits, occurring roughly forty to seventy five years ago, might have established international use through the chief straits traversed, had they continued into the 1990's. They did not however, and such international traffic as it may have existed in the broad sense of the word, would seemingly fall into the category "infrequent transit".

Using foreign destination of ship and cargo defining "international," the numbers of passages might also come within range of *Corfu Channel* passages. In the 1920's and 1930's grain, timber, flax, hemp, fibre and bristle from the Siberian towns were the principal exports, and machinery, chemicals and partly finished manufactured goods from western European ports including London were the principal imports.¹³⁵ However as seen during this period there were still only some sixty passages per year through the relevant straits, and as above this hardly compares with number of passages from the *Corfu Channel Case* with due account made for Arctic remoteness. After 1992 there were various cargoes transferred through the Northern Sea Route from Europe and Asia, presumably round trip. For 1993 these number sixteen and presumably number roughly the same in 1994 and 1995.¹³⁶ In addition under this argumentation any military passages headed to and from a foreign destination through the Northern Sea Route might be counted, though these figures are difficult to obtain.

What this comparison seems to indicate is that foreign passages were of a completely different type and order from that characteristic of the *Corfu Channel Case*, itself characterized by a conservative traffic compared to the Malacca Straits. Purely foreign owned and foreign operated vessels are significantly lacking. While it is not unusual in

134Little information has to date been received from either Russian or U.S. authorities concerning transit of the Russian Arctic straits by U.S. public ships including warships, since the Vil'kitskii incidents other than the general correspondence received from Rtd. Admiral Yakovlev noted in Section 4.3.1.1.2. Deputy Director Ushakov of the Northern Sea Route Administration indicated in a interview on 25 February, 1994 that permission had be granted for a U.S. research vessel, but not a Canadian, to operate in the Chukchi Sea. It is not known whether this sailed through the Russian Arctic straits. In addition the *U.S.C.G. Polar Sea*, and the *C.C.G.S. Louis S. St. Laurent* traversed the North Pole in 1994 but not the Russian Arctic straits.

135Armstrong p. 21-22. From 1928 exports exceeded imports regularly and by a large margin. The author notes that export of fur was attempted, but transport was more economical over land and by air. Ibid. p. 12-13 notes that occasional small consignments of graphite as well as butter were exported periodically by the Norwegian, Jonas Lied.

136These figures have not yet been obtained from the Northern Sea Route Administration.

recent years for there to be a wide diversity of interests in one typical cargo ship,¹³⁷ the Russians in this traffic have always enjoyed a significant presence. Consequently in interpreting the Russian Arctic straits as "international" based upon the use outlined, it is submitted an expansion is made of the term to the point of *artificiality*. Reliance is necessarily based upon any element remotely foreign. In addition including the transit of the Soviet and Russian Navy sailing to eventual foreign destinations through the Arctic straits would also seem artificial. Navies always sail from their internal waters, often to foreign ports, without any change of status of flag State internal waters. It is thus difficult to maintain that such amount of this type of traffic would indicate an actual foreign use of these Arctic straits as a international navigational route. Doctrine clearly favours the traditional *Corfu Channel Case* approach relying on actual use, which as shown would exclude from international status the Russian Arctic straits.¹³⁸

In spite of the general lack of actual use, a use must be addressed more thoroughly, namely submerged passage. This is not entirely due to the numbers that might be added to the above analysis which would probably not play too significant a role. Submerged passage however also plays an important role related to the jurisdictional issues discussed in Section 5.¹³⁹ Since it is a use however it will be discussed in this Chapter in the following Section.

4.3.3.2. Actual Foreign Submerged Use

4.3.3.2.1. Introduction

The Arctic during the Cold War was one of the most sensitive geographic areas due to its location between the super powers, the U.S. and the Soviet Union, and these States' strategic submarine deployment in this area.¹⁴⁰ Briefly the U.S. and the Soviet Union were interested in submerged passage in order to maintain secrecy due to deterrence

137Curtis, Jeff B., "Vessel Source Oil Pollution and MARPOL 73/78: An International Success Story?" *Environmental Law*, Vol, 15, 1985 (Curtis) p. 680, quotes the legal advisor to Shell International Petroleum Co., "(A) ship may strand on the high seas and cause pollution in two neighbouring States...She may be owned say, by a Liberian company, bareboat chartered to a Bermudian company, managed by an English company, time chartered to a Greek company and voyage chartered to an American company. Her cargo may have been sold during the voyage by the American company to a Japanese one. The officers may be English and the crew, Indian. The international nature of shipping business creates such diversity of interests, with potential conflicts of law and jurisdiction, daily."

138See Section 4.2.2.

139See Section 5.3.4. Pharand Yearbook p. 124 places most weight on Article 234 guaranteeing coastal State control even over the straits regime, but notes two exceptions, Article 236 and "normal mode" of transit for submarines with specific application for the Northwest Passage. The former as seen effectively exempts the public vessels and aircraft, including military, from Article 234, and the latter, submarines, which could travel submerged in the Northwest Passage, since it is its 'normal mode' of navigation under these regimes.

140Brooke, James R., "Do We Really Need a Third *Seawolf*", *Naval Institute Proceedings*, December 1994, (Brooke) pp. 9-10. Dr. Brooke is Director, Strategic Assessment, Pacific Defense Analysts in San Diego California, U.S. and previously was on active duty in the U.S. Navy. See also Østreng, Willy, "Military Security - The Stumbling Block of Arctic Navigation?", (1994) unpublished article on file with the Fridtjof Nansen Institute, (Østreng Stumbling Block), pp. 3, 15-17. As noted it seems possible as well that submarines other than the U.S. such as British and French traverse the Arctic areas mentioned.

institutionalization as their mutual strategic posture.¹⁴¹ Following the collapse of the Soviet Union the sensitivity has been greatly reduced, however estimates indicate that up to 20% of the U.S. nuclear attack submarines (SSN's) continue to monitor Russian nuclear ballistic missile submarines (SSBN's) in Arctic waters.¹⁴²

In addition both States continue with research and development of submarines including a fifth generation.¹⁴³

4.3.3.2.2. U.S. Stealth - Limitations

Though it is possible, though unlikely, that submerged navigational error has occurred, incidents have taken place between the U.S. and Russian submarines including at least one made public off Kol'skii Bay in the Russian territorial sea near the Kola Peninsula.¹⁴⁴ The Russian Navy maintains that nearly twenty-five collisions have in fact occurred between Russian and U.S. submarines during the period 1968 to 1992 with nine incidents occurring, "in Russian Navy training ranges near Russian shores."¹⁴⁵ At the same time the U.S. Minister of Defense at the time of the incident near Kol'skii Bay noted, "(W)e have a number of subs operating out there...It is an important part of our security, and I don't have any reason to believe there's a fundamental problem here that requires any change in our policies."¹⁴⁶ The U.S. Navy may as well operate its Freedom of Navigation (FON) Program in the Russian Arctic, possibly through various straits, although where, when and to what degree is not known.¹⁴⁷ Both types of operations

141Reisman Straits pp. 52-53, 69. See Section 5.2.7.

142See Section 5.2.7.2. Rear Admiral Valery I. Aleksin, Russian Navy, "We Are Ready When You Are," *Naval Institute Proceedings*, March 1993 (Aleksin), pp. 54-57; Brooke p. 9; Captain Galdorisi, George V., U.S. Navy, "Who Needs the Law of the Sea?", *Ibid*; July 1993, (Galdorisi) p. 72; Lt. Carlson, Christopher P., USNR, "How Many SSN's Do We Need?", *Ibid*, July 1993, (Carlson), pp. 49-50. See generally *National Security Strategy of the United States*, (The White House, U.S. Government Printing Office, 1992) p. 1; and Gen. Colin L. Powell, USA, Chairman of the Fourth Chiefs of Staff, *The National Military Strategy 1992*, (Washington D.C. 1992), p. 6.

143Brooke p. 9; Carlson pp. 49 and 50; and DeYoung, Don, "Sea Power is Grand Strategy," *Naval Institute Proceedings*, November 1994, (DeYoung), p. 76.

144Franckx pp. 28 and 54 footnote 214. Franckx pp. 17, 27-28, 34, 75, 86, 146, 262 does not address the issue to a great extent, noting only that, "its exclusive military (and thus secret) character, as well as the fact that these underwater journeys are invisible to the public eye, precludes any in depth research on this specific topic." The author does note however a fairly extensive U.S. and Soviet practice of sailing their submarines in the Arctic, concentrating on the U.S. submarines in the Canadian Arctic.

145Aleksin p. 56. Some additional voyages were also claimed made by submarines in areas adjacent to the Northern Sea Route and in territorial waters. Correspondence, 20 March 1995 with Rtd. Admiral Yakovlev.

146Franckx pp. 28 and 54 footnote 214.

147Interview, Captain Dennis Mandsager, JAGC, U.S. Navy, Staff Judge Advocate, USCINCPAC (JO6) Camp H.M. Smith, Hawaii, USA at the Russian American Seminar on the Law of the Sea, Moscow, August 23-26, 1994, (Mandsager Interview), indicated the U.S. sails the Arctic under its Freedom of Navigation (FON) Program. Captain Mandsager held a speech on the United States FON program though not dealing directly with the Arctic. Smith and Roach p. 48 note on the other hand that assertions have not been conducted against the baselines enclosing the Russian Arctic straits. *U.S. Limits* No. 112 pp. 1 and 2 notes that FON consists of both the operational program and diplomatic efforts both to discourage State claims the U.S. views as inconsistent with international customary law as reflected in the LOSC and to demonstrate U.S. resolve to protect freedom of navigation and overflight. More than 110 protests have been filed on the diplomatic level since FON began in 1979, and thirty five to forty operational assertions have been exercised per year during the same period. Most of the U.S. actions do not "receive public scrutiny." *Ibid*. See also Smith and Roach pp.

joined or separate, would be consistent with the U.S. interpretation and position on the international straits regime presented in Chapter 5.¹⁴⁸

On the background of the U.S. operations, however, there exist convincing practical limitations to clandestine submarine passage through the Russian Arctic straits. If the minimum depth of sixty six feet for the U.S. SSN's is taken discounting the affects of ice, which as will be seen are considerable, many of the Russian Arctic straits are eliminated.¹⁴⁹ For those connecting two Arctic seas, as seen previously from the approximate minimum depth figures,¹⁵⁰ those with the necessary depth include only the Kara Gates Strait (deep) connecting the Barents and the Kara Seas, the Vil'kitskii and Shokal'skii Straits (respectively 360 feet and deep) connecting the Kara and the Laptev Seas, and the Long Strait (138 feet) connecting the East Siberian and Chukchi Seas. Straits within an Arctic sea with the necessary depth include only Kil'din Strait (deep) in the Barents Sea; the Orlovskaiia Salma, Gorlo and Vostochnaia Solovetskaia Salma Straits (respectively 66 feet, 108 feet, and 132 feet) of the White Sea; the Krotov and Kazakov Straits (respectively deep and deep) along Novaya Zemlya; the British Canal, Austrian, Markham, Nightingale, Meyers and De-Bruyn Straits (respectively, 180 feet, 72 feet, 480 feet, 144 feet, 222 feet, and 330 feet) of the Franz Josef Islands; the Krestovskii Strait (72 feet) of the Kara Sea; the Dubravin Strait (66 feet) in the Minin Skerries; the Fram Strait (96 feet) near Nansen Island, the Palander Strait (126 feet) near Bonevyi Island; the Vostochnyi Strait (114 feet) in the Kara Sea, and the Matisen Strait (156 feet) in the Nordenskjöld Archipelago. If a comfortable minimum depth of operation for the U.S. SSN approximates the 100 feet figure then roughly an additional 22% of these straits would be impassable, and even some of those remaining might be questionably passable.

Taking ice cover into account roughly fifteen meters (forty five feet) clearance under ice ridges is required with ice ridges protruding roughly fifteen meters (forty five feet)

3-6. Captain Galdorisi, George V., U.S. Navy, "Who Needs the Law of the Sea?", *Naval Institute Proceedings*, July 1993, (Galdorisi) pp. 71-74, at 73, notes that since the excessive maritime claims are made by the full community of States, the U.S. efforts under FON are enormous including political costs and military risks, arguing that U.S. ratification of the LOSC would be a more beneficial way to proceed.

148See Sections 5.2.4., 5.2.5. and 5.2.6. It seems certain that the U.S. and conceivably Russia run their nuclear submarines in the Canadian archipelago at least occasionally. Østreng *Stumbling Block* pp. 3, 15, 17. Franckx p. 101 cites Foreign Minister Shevardnadze that Soviet submarines did not use the Canadian Arctic waters.

149This rough figure is obtained from extrapolation of Østreng, Willy, "The geo strategic conditions of deterrence in the Barents Sea," in *The Soviet Maritime Arctic* (ed. Lawson W. Brigham), (1991) (Østreng-Brigham), p. 201 at 204-205 that U.S. SSN's have operated undetected in the mouth of the White Sea as well as the harbour in Vladivostok, Russia, as well as Butler p. 15 that the least depth of the Orlovskaiia Salma Strait in the mouth of the White Sea is approximately 66 feet. As seen in Section 3.NEED the channels in the Orlovskaiia Salma Strait and Gorlo Strait into the White Sea are approximately 66 to 108 feet minimum depth. *Harbours on the Far Eastern Coast of the Russian Federation*, Moscow, 1993, (in Russian) reports that the average depth right alongside the trading and fishing docks to be approximately 33 feet. The military harbour lies across the channel and is assumed to be approximately the same. Translation and interview, Rune Castberg, Fridtjof Nansen Institute, 15 March 1995. Payne III, Henry E., "The *Albacore*: Back to the Future", *Naval Institute Proceedings*, April 1993, pp. 105, notes both the *Seawolf* (SSN-21) and the improved *Los Angeles* (SSN-688) class submarines are more than 350 feet long and 55 feet from keel to top of sail. The water in the Persian Gulf ranges from 50 and 60 feet to 300 feet deep in which at least the *Topeka* (SSN-754) operated during the Gulf War. *Ibid.* questions, "Is it possible that our smallest submarines are longer than the depth of water in which they may operate in the future?"

150See Section 3.NEED. The depths are duplicated here in parentheses for clarity. "Deep" is used where no figure has been given.

under the surface.¹⁵¹ Thus roughly ninety feet should be subtracted from the straits listed above if used when the straits are ice covered, which can be substantially long periods.¹⁵² If this is done, roughly 45% of the above straits are impassable for the SSN's. Of those key straits connecting two Arctic seas, only the *Kara Gates Strait*, and the *Vil'kitskii* and *Shokal'skii Straits* are passable. Those qualifying in Arctic Seas include only the Kil'din Strait, the Vostochnaia Solovetskaia Salma Strait, the Krotov and Kazakov Straits, the Markham, Meyers and De-Bruyn Straits, the Palander Strait, and the Matisen Strait, and some of these would be questionably navigable. This does not take into account icebergs which may protrude much more deeply below the surface, as much as 100 meters (325 feet),¹⁵³ nor the "suction effect" on a hull moving close to the bottom.¹⁵⁴

Even use of the Russian Arctic straits by the Russian submarines may be limited. The ASW (antisubmarine warfare) submarines are considered to approximate the figures related to the U.S. SSN's above.¹⁵⁵ A necessary depth of operation for the large Russian SSBN's under the ice is a minimum of 68 meters (221 feet) with a transit depth of 100 meters (325 feet) being comfortable.¹⁵⁶ The older American SSBN *USS Sargo* sailed submerged in the ice covered Bering and Chukchi Seas with an average depth of 80 meters (260 feet). Taking the minimum depth figure of approximately 220 feet, even more of the above straits are impassable, roughly 60% falling out. Looking at the key straits connecting the Arctic seas, only the Kara Gates Strait, and the Vil'kitskii and Shokal'skii Straits are passable by the SSBN's. For the others only the Kil'din, the Krotov, Kazakov, Markham and De-Bruyn remain.

Due to strategic considerations including areas of operation, operational depth and icebergs, it is not only the Russian Arctic straits which may be largely unusable by both Russian and U.S. submarines, large areas of the Russian Arctic seas may also be included. One author notes, "...with the possible exception of certain areas of the Laptev Sea, the marginal seas north of the Soviet Union are, by and large, unsuitable as bastions for SSBNs."¹⁵⁷ On the other hand in shallow waters sonar range is drastically reduced to only a few nautical miles, and both the U.S. SSN's would have difficulties finding the Soviet SSBN's, and the Soviet ASW submarines would have trouble finding the U.S.

151Østreng Brigham p. 211.

152See generally Barnett, Don, "Sea ice distribution in the Soviet Arctic," *The Soviet Maritime Arctic*, (Ed. Lawson W. Brigham), (Barnett-Brigham) pp. 47-62; and Jørgensen, Tore S., "Synoptic Ice Characteristics of the Northern Sea Route," *International Challenges*, Vol. 12, No. 1, (Jørgensen), pp. 68-74.

153Østreng, Willy, "The Northern Sea Route: A New Era in Soviet Policy?" *Ocean Development and International Law*, Vol. 22, (Østreng Ocean Policy), p. 259, at 266.

154Payne III p. 106 puts the downward force for the improved *Los Angeles* (688) class to be approximately 5,000 pounds when operating within sixteen to seventeen feet of the seabed at five knots, and a maximum 10,000 pounds close to the bottom.

155Payne III p. 105 notes the small Russian diesel electric "Kilo's" are 50 feet high and 220 feet long.

156Østreng Brigham p. 211.

157Østreng Ocean Policy at 267.

SSN's.¹⁵⁸ At least one expert considers the Siberian coastal area to be an SSBN operational area,¹⁵⁹ and it also functions as a militarized surveillance and monitoring area for detecting and counteracting bomber and missile attacks across the Arctic Ocean.¹⁶⁰

Perhaps most important to depth considerations the U.S. focus is now towards shallow waters and shallow water sensory technology,¹⁶¹ and a new nuclear version of the U.S.S. *Albacore* or a unmanned mini sub may be in use or under development.¹⁶² One nuclear submarine captain notes that the U.S. submarine force is second to none in ability to operate in shallow waters, and the U.S. submarines can be expected in any waters where it can "wedge its way in and out again..."¹⁶³ It seems reasonable to assume that the U.S. has continued interest in occasionally acquiring information regarding the effectiveness of their submarine systems as well as monitoring any Russian military activity in the Siberian coastal areas. Since most of the Russian Siberian rivers are also navigable, these also have the possibility of being U.S. submarine operational areas though perhaps marginal due to the extremely shallow depths chiefly at the entrances. It appears only the Yenisei, Ob and Khatangski with rough depths at the entrances of respectively, 20 to 30 feet, 30 to 40 feet and 50 to 60 feet which theoretically qualify for very small and quiet submarines, given sandbars have not built up further across the entrances.¹⁶⁴ Thus due to the possibility of interesting surveillance and monitoring areas

158Østreng Brigham p. 204. Friedman, Norman, "Submarines Adapt," *Naval Institute Proceedings*, November 1994, (Friedman) p. 71 lists the Soviet ASW submarines as the *Victor*, *Victor III*, *Sierra* (first launched in 1983) and *Akula* (first launched in 1984).

159Lindsay, G., *Strategic Stability in the Arctic*, Adelphi Papers, No. 241 (London: Brassey's for International Institute for Strategic Studies, (1989), pp. 73-74.

160Østreng *Stumbling Blocks* pp. 3, 7 and 8.

161Interview by John F. Morton with Vice Admiral Owens, Deputy CNO for Resources, Warfare, Requirements and Assessment (N8) at the Pentagon, "Still a Priority", *Naval Institute Proceedings*, March 1993, (Morton) p. 134. The technology is to lead to improved acoustic and non acoustic sensing systems and advanced high speed computational data fusing techniques. See also generally Peppe, LCDR P. Kevin, "Submarines in the Littorals," *ibid.* July 1993 pp. 46-48 (Peppe); Payne III, Hemond, Harold C., "Why Not Design the Best?," *ibid.*, July 1993, (Hemond) pp. 55-57; Payne III, Henry E., "The *Albacore* Advantage", *ibid.*, July 1993, (Payne III-II), pp. 59-62, and LCDR Poirier, Michael, USN, "Sea Control and Regional Warfare, *ibid.*, July 1993, pp. 63-70.

162Payne III pp. 106-107 notes that the *Albacore* is less than 40 feet high, 27 feet in diameter and 205 feet long. The old version from 1953 was the world's fastest and most maneuverable submarine, matched presently only by the Russian *Alfa* and possibly *Akulu* class boats. See also Hemond pp. 55-57 and Payne III-II pp. 59-62. Norman p. 71 notes that the new SSN-21 class has two-thirds the displacement of the earlier *Los Angeles* SSN's. Friedman p. 72 notes that the envisioned *Centurion*, the new SSN (NSSN), may have a displacement of 7000 tons, and have modular versions, including SSKN (sea control and maritime surveillance), SSFN (special operations); SSCN (command-control and electronic warfare); SSMN mine warfare and mine countermeasures); SSLN (attacking land targets with missiles); SSTN (theatre ballistic missiles); and SSBN. See Rear Admiral W. P. Houley, U.S. Navy, "2015", *ibid* October 1993, p. 50 who describes a visionary operation by a SSN using Autonomous Underwater Vehicles (AUV's) or Autonomous Underwater Submarines (AUS) for intelligence operations. See also Morton pp. 124-129, at 125, who discusses intelligence gathering using sophisticated distant sensors and towed arrays.

163Peppe p. 47. Further, "(I)n the past 20 years the attack submarine force has amassed more than 14,000 submarine days conducting submerged, real-world contingency operations and training exercises in water less than 600 feet deep." Rear Admiral W.J. Holland, *Naval Institute Proceedings*, June 1996, (Holland) p. 13 substantiates this.

164See Russian Charts Nos. 951, 600, 948, 949, 951, 952, and 954; and Charts, "North Cape to Utedinyéniya Island Including the Barents and Kara Seas" and "North Coast of Siberia, Dikson Harbour to Bering Strait".

along the Siberian coast, the occasional penetration of U.S. SSN's probably with AUV's or AUS's of the deeper Arctic Straits with corresponding presence of Russian ASW submarines cannot be totally excluded.¹⁶⁵

Whether the safe bastions for the Russian SSBN include the shallow partially ice-covered Arctic seas or not, the safest and therefore highest concentration of SSBN stations is undoubtedly under the ice in the Arctic Ocean. The U.S. SSN's would follow these, and therefore the majority of both U.S. and Russian submarine transits of Russian Arctic straits should probably be seen in relation to this area. As such the safest Russian submarine routes to and from the Arctic Ocean would seem to be to largely *avoid* the Arctic straits and keep to depths of the Barents Sea, between Bear Island and Northern Norway and between Franz Josef Land and Novaya Zemlya, even though the frequency of icebergs in the latter can be great.¹⁶⁶ The safest route for U.S. submarines towards the same area would seem to be through the Canadian Arctic. However, since the *Kara Gates*, the *Vil'kitskii* and the *Shokal'skii Straits* are deep enough and there conceivably are SSBN stations in the Barents, Kara and the Laptev Seas, as well as possibly in more shallow waters, passage of the Russian SSBN submarines and the ASW's, as well as the U.S. SSN's, cannot be ruled out. The deeper channels of the Franz Josef Islands, the British Canal, Austrian, Markham, Nightingale, Meyers and De-Bruyn Straits, *may* also have some traffic for passage to and from the Arctic Ocean.¹⁶⁷

The inference that may be made is that occasional submerged transits by the U.S. and possibly the U.K. and France are substantially in conflict with the Russian 1991 Rules Articles 3 and 7, and associated legislation including Article 9(e) of the 1993 Statute.¹⁶⁸ Briefly these require sailing on the surface with flag showing, reporting and compulsory ice breaker assisted pilotage for the *Vil'kitskii* and *Shokal'skii* and probably the *Kara Gates Straits*.¹⁶⁹ From this it seems either the U.S. is not transitting submerged those Russian Arctic straits clearable navigable, the U.S. is transitting and the passages are not detected, or the U.S. is transitting and is detected at times but Russia is not protesting publicly. The first possibility seems unlikely based upon the discussion above, and the second and third possibilities seem the more probable.

Since Russian countermeasures are a form of protest, these will be discussed in the next Section.

4.3.3.2.3. Russian Countermeasures

¹⁶⁵This seems substantiated by the Aleksin, Yakovlev and U.S. Defense Minister's statements above as well as by the recent documented presence of a U.S. SSN in front of Kol'skii Bay.

¹⁶⁶Østreng Brigham pp. 211, 212.

¹⁶⁷As seen from Article 1 of the 1991 Rules these latter straits lie outside the definition of the Northern Sea Route and fall outside the specific scope of the 1991 Rules. However they would be encompassed by the less specific Articles 1, 3 and 15 of the 1984 Environmental Edict and Article 5 of the 1983 Rules, which require pilotage or compliance with special construction, equipment and crewing standards even for warships. See Section 4.3.1.2.

¹⁶⁸Section 4.3.1.2.

¹⁶⁹The latter as noted can probably be included governed by 1991 Rules Articles 1.2. and 7.4. in which leading established by the authorities is required for passage in the Russian exclusive economic zone. See Section 4.3.1.2.

It is assumed that the Soviet Union - Russia have installed underwater surveillance devices in its main Arctic straits.¹⁷⁰ It is not known what success rate these States have in detecting foreign submarines transiting within those waters claimed as internal nor what policy Russia takes should detection be made.¹⁷¹ It appears that only few public protests have been made by the Soviets in the 1960's in the face of U.S. passages and ostensibly that dealt with surface passage.¹⁷² Detection is admittedly difficult, and even when detected the SSN's are difficult to track. One author notes, "(T)he best of the world's ASW forces are, for the most part, unable to find submarines, and even if they do, "few if any nations possess the means to place the U.S. SSN at risk."¹⁷³ Therefore possibility number two seems the most probable. However possibility three also is probable, since some detection is indicated by two Russian Admirals. This brings up a point regarding lack of Russian public protest. This implies acquiescence but may also include a "silent" protest conducted solely between the Russian Foreign Ministry and the U.S. State Department.

During the Cold War the issue of unauthorized submerged passage was perhaps too touchy for either side to mention, with both possibly desiring to continue with "cold" and avoid escalation into anything "hot" through an incident in a sensitive area. Additionally it was possibly to the Russians' advantage not to indicate to the West how much it could detect, especially if the transit were only occasional. During the recent Russian period it might be to both sides' advantage to avoid any incidents in order to assist the fledgling Russian democracy. Legally, non acknowledgement by the Russians of known U.S. submarine transits through the Arctic straits might also be to their advantage. In order for the U.S. FON program, if this does encompass Arctic submerged passage, to define law of the sea along the lines desired by the U.S., the activities must be known not only to the coastal strait State but also to the world community. If the Russians either do not acknowledge the submarine passages or do not detect them, it is arguably easier for them to adhere to their Arctic regime and claim that the majority of other States are acquiescing to it.¹⁷⁴ Silence to American submerged passage in the Arctic might also be beneficial

170Canada continues to install underwater surveillance devices in its main Arctic straits. Interview, 23 November 1994 Director V. M. Santos-Pedro, Ship Safety Northern, Canadian Coast Guard. Canada did not purchase nuclear submarines as formerly planned. Østreng *Stumbling Blocks* p. 16 notes that Canadian sub service perimeter surveillance covering particularly the channels connecting the Arctic Ocean to Baffin Bay and Baffin Bay to the Atlantic "once installed would present a formidable barrier to unobserved Soviet SSBN penetration."

171See Reisman p. 53, footnote 13 where spiralling rounds of counter-counter measures in under water surveillance systems are discussed. Burke, William T. "Submerged Passage through Straits: Interpretations of the Proposed Law of the Sea Treaty Text," 52 *Washington Law Review*, (Burke) (1977), pp. 194, 220 is of another opinion believing undetected passage improbable.

172See Sections 4.3.1. and 5.2.6.3. The Canadians similarly protested in the 1980's. *Ibid.*

173Peppe pp. 46-47. The author notes that the British Navy in the Falklands War against Argentina, "expended hundreds of antisubmarine weapons, dedicated many ships and aircraft, and literally refused to move its armada into an optimal littoral war-fighting position - thanks to the presence of one enemy diesel submarine."

174See Kolodkin p. 166, "(T)here are no objections on the part of foreign States and even the Western doctrine of international law recognizes the lawfulness of the actions of the USSR. This confirms the well-founded basis of the USSR's claim to special rights to regulate navigation in the sea expanses within whose limits the Northern Sea Route passes, including the territorial sea and economic zone."

regarding the other world straits with controversial legal status.¹⁷⁵ Too much attention in the Arctic may direct unwanted attention to those areas where both Russian and American submarines otherwise pass unnoticed. At the same time it is unquestionable that through the legislation cited above the Russians do protest to the degree possible since all warships are included as encompassed by the strict rules requiring notice, authorization, surface passage, and pilotage. In addition the probable submarine detection devices in the key straits, and Russian AWA submarines patrolling against the U.S. SSN's, arguably "protest" against the U.S. activities. In addition it appears the Russians would like an agreement with the U.S. whereby submarine traffic would be regulated.¹⁷⁶

With such a stance, though not protested publicly, it would be difficult to maintain that there was an acquiescence by Russia of the occasional U.S. practice of transit passage through straits claimed international.

4.3.3.2.4. Summary

In relation to "international use" which is in question, such probable periodic and chiefly clandestine submerged transits doubtfully fulfil the *Corfu Channel Case* criteria.¹⁷⁷ Though submarine traffic was not specified in the *Corfu Channel Case*, the judges in 1949 most surely were well aware of such use following World War II, and did not distinguish it in their decision using the term "warship."¹⁷⁸ As such the same elements regarding internationality as with surface traffic govern. There may be approximately two U.S. SSN's shadowing Russian SSBN's in the entire Arctic at any one time.¹⁷⁹ Even during the Cold War any of the approximately ten or eleven U.S. SSN's operating in the entire Arctic at any one time, or the U.K. and French SSN's, could not have made more than occasional submerged transits through the navigable Soviet Arctic straits. Such transits are risky, not only militarily and politically, but existentially as well, the approximate clearances having been noted. In addition if the SSN's were transiting undetected the key Arctic straits, close to the Soviet mainland and military bases, to such a degree that the use was not insubstantial, it seems unlikely that the Russian threat would have been feared by the U.S. as much as it was to justify the measures indicated and expenditures taken for the SSN operations.¹⁸⁰ Also even if these ten or eleven submarines at any one time did transit those Soviet Arctic straits passable, the numbers

175This could include LOSC Article 35(c), "long standing treaty," or Article 37, "used for international navigation."

176Interview Rtd. Admiral A. Yakovlev, Institute for System Studies, Russian Academy of Sciences, Russian American Seminar on Law of the Sea, Moscow, 25 August, 1994. A bilateral agreement between Canada and the U.S. under the auspices of Article 234 allowing the strict Canadian domestic regulation which excludes the passage of Russian submarines within the Northwest Passage, but permits the passage of U.S. submarines based upon privilege rather than a right is a possibility. Østreng Stumbling Block p. 17.

177See Section 5.2.2.2. for a corollary point regarding general lack of opportunity by coastal State for protest due to lack of detection.

178Regarding passage there is potential conflict with TSC Article 14(6) wherein submarines are required to sail on the surface in the territorial sea and may imply a long standing violation of Article 14(6) by sea powers at least in the approaches to the straits. See Sections 5.2.7. and Section 7.NEED. See Schachte pp. 7, 14, 15 regarding approaches.

179Section 5.2.7.2.

180See Section 5.2.7.2.

still do not represent a not insubstantial number of transits, even for remote areas, of flags represented, and a history as a useful route for international ship traffic, for the same reasons given for surface traffic.¹⁸¹ Submerged transit still probably represents approximately the same order of surface transits, even in the cumulative with surface transits.¹⁸² Perhaps most convincing of all however, these transits were secret to the international community, they cannot be documented to any great extent, and therefore can hardly be said to contribute to showing a history as a useful route for international ship traffic. As with surface passages it is submitted that to base any argumentation for internationality of the Russian Arctic straits upon such use seems artificial.

4.4. Conclusions

Legally the position of "non internationality" of the Russian Arctic straits is presently the more solid, thus supporting the Russian regime. The number of foreign surface ships, charters, cargoes, or destinations fall well below *Corfu Channel Case* criteria even for remote areas, and as far as is known all recent commercial shipments with foreign elements have made been in strict compliance with the Russian 1991 Rules and associated legislation.¹⁸³ The U.S. has not sailed surface warships along the Northern Sea Route before 1970, though it might under its declared position, nor has it sailed other public ships such as Coast Guard icebreakers or research ships after 1970 without following the Russian legislation.¹⁸⁴

At the same time the U.S. position that the straits can become international is logically sound. It seems difficult to maintain that should world trade develop such that shipping routes begin to run through straits previously not useful to international navigation that pressures would not develop on the coastal State for more liberal application of passage rights than innocent passage through its territorial sea.¹⁸⁵ Thus should in the future the Northern Sea Route become commercially viable, the U.S. can probably expect increased support from at least the sea powers for its arguments for "potential use" evidencing "used for international navigation." If this route became important enough economically, then perhaps this may even induce the U.S. and others interested to "test" the Russian regime and sail their own or chartered ice breakers and ice strengthened commercial vessels through relevant Russian Arctic straits in contravention of the 1991 Rules and supporting legislation. This seems unlikely to happen on the military plane, though theoretically possible, both because the U.S. and possibly the U.K. and France, are already sailing the military vessels they desire in the Russian Arctic waters including the straits, the submarine; and perhaps because of the international politics involved with supporting the tendencies towards democracy in the Russian Republic.

¹⁸¹See Section 4.3.3.1.

¹⁸²The degree of use, submerged passage seen together with surface passage covering most of the 20th century, creeps towards 4% of the *Corfu Channel Case* use.

¹⁸³See Sections 4.2.2.1. and 4.2.2.3.

¹⁸⁴Correspondence, Rtd. Admiral Yakovlev 20 March 1995.

¹⁸⁵O'Connell p. 385 notes there is little history of straits being treated as inland waters when subject to transit passage. Both the TSC and the LOSC straits regimes are claimed to be restricted to the territorial waters, yet should internal waters be claimed in international straits, transit passage seems to prevail.

It seems safe to say that the effect of increased periodic foreign surface passages can contribute incrementally towards internationalization of these straits. At the same time as long as the increased numbers of surface vessels continue to sail in compliance with the 1991 Rules and associated Russian legislation, though the U.S. submarines do not, it seems difficult to see how the legal regime will change in spite of its apparent asymmetry. In spite of increased foreign surface use and number of flags the straits will remain under strict Russian control though Russia would be pressured.¹⁸⁶

Should this situation arise it can be expected however the U.S. and other interested sea powers will probably reserve their navigational rights such as was done under the Canadian - U.S. Agreement.¹⁸⁷ It will be seen that it is doubtful that Article 234, allowing a coastal State to unilaterally take special measures in ice covered areas its exclusive economic zone regarding vessel discharge, design, construction, equipment and manning standards, would dominate the LOSC straits regime.¹⁸⁸ That seems however in fact to be what is happening concerning the surface traffic, indicating a practice "creeping" towards non internationality. This is postulated since in addition to Russian and Canadian legislation and enforcement measures the U.S.'s own anti pollution legislation, the Oil Pollution Act of 1990 (1990 OPA)¹⁸⁹ including the Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act of 1990 (1990 Monitoring Act)¹⁹⁰ applied in the Arctic has similar though somewhat vaguer requirements than the Russian and Canadian.¹⁹¹ Such practice might indicate as maintained by the Russians an acquiescence by the U.S. of the Russian national regime and hence non internationality.¹⁹² If the chief U.S. consideration concerning straits along the Northern Sea Route is to avoid creeping coastal State jurisdiction over international straits in other parts of the world, negotiating bilateral agreements covering "special circumstances" then perhaps is enough to preserve both the U.S.'s position regarding free navigation and interest in environmental protection.¹⁹³ At the same time the U.S. official declarations and occasional submarine traffic through the Russian Arctic straits counter this trend, though both of these theoretically may not be as solid as they might have been.¹⁹⁴ The weight of authority sees declarations by States without enforcement as sufficient to form

186Russia will probably continue to claim compliance with all of its measures, indicating acknowledgment of Russian Arctic jurisdiction, perhaps through the doctrine of implied if not explicit agreement. See Sections 2.3.3.2. and 4.3.4.2.3.

18728 *International Legal Materials* 142, "Agreement on Arctic Cooperation, 11 January 1988, Canada-United States," (1989) (Canadian - U.S. Agreement). See Sections 2.2.3. and 5.2.6.3. As seen the U.S. sailed only three times under this agreement, perhaps so as to avoid further erosion of its adversarial position.

188Section 5.2.6.5.

189United States Oil Pollution Act of 1990 (OPA), 33 United States Code (USC) 270.

190Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act of 1990, (Monitoring Act), 33 USC 2732.

191See Section 5.2.6.3.

192See Section 4.3.3.2.3.

193Westermeyer, William, and Goyal Vinod, *Arctic*, Vol. 39, No. 4 (December 1986), (Westermeyer and Goyal) pp. 344-347. In maintaining this balance it seems to be relying chiefly upon its status as the world's most powerful State and capable of relying solely upon declarations and clandestine submarine passages and ignoring restrictive measures in key straits should the need arise. See Section 5.2.2.2.

194See Sections 5.2.6.3. and 5.3.4.3.

international customary law, however over time their acceptability may be less unless reinforced by State practice.¹⁹⁵ The occasional submarine transits may supplement the claims, but these secret transits probably are effectively protested against by Russia through its legislation, enforcement measures and probable surveillance.¹⁹⁶

Given that the Russian Arctic straits doubtfully can be considered as presently international, this brings up the next set of issues, a suggestion of which was just presented. What are the generally accepted international jurisdictional limits for straits, both national and international?¹⁹⁷ Do the extensive provisions under the Russian straits regime exceed the applicable international jurisdictional limits for straits, both national and those used for international navigation? These issues will be addressed in Chapter 5.

195See Sections 2.3.2. and 2.3.3.3.

196See Section 4.3.1. and 4.3.3.2.3.

197Since there is a possibility that the Russian Arctic straits may become international, these limits must also be addressed.

Appendix 4

TSC Article 16(4)

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.

PART III
STRAITS USED FOR INTERNATIONAL NAVIGATION
SECTION 1. GENERAL PROVISIONS

Article 34

Legal status of waters forming straits used for international navigation

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

2. The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.

Article 35

Scope of this Part

Nothing in this Part affects:

- (a) any areas of internal waters within a strait, 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;
- (b) the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas; or
- (c) 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.

Article 36

High seas routes or routes through exclusive economic zones through straits used for international navigation

This part 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; in such routes, the other relevant Parts of this Convention, including the provisions regarding the freedoms of navigation and overflight, apply.

SECTION 2. TRANSIT PASSAGE

Article 37

Scope of this section

This section applies to 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.

Article 38

Right of transit passage

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded, except that, 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.

2. 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. 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.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

Article 39

Duties of ships and aircraft during transit passage

1. Ships and aircraft, while exercising the right of transit passage, shall:

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

2. Ships in transit shall:

- (a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
- (b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.

Article 40

Research and survey activities

During transit passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits.

Article 41

Sea lanes and traffic separation schemes in straits used for international navigation

1. In conformity with this Part, States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships.

2. Such States may, when circumstances require, and after giving due publicity thereto, substitute other sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by them.

3. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.

4. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organisation with a view to their adoption. The organisation 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.

5. In respect of a strait where sea lanes or traffic separation schemes through the waters of two or more States concerned shall cooperate in formulating proposals in consultation with the competent international organization.

6. States bordering straits shall clearly indicate all sea lanes and traffic separation schemes designated or prescribed by them on charts to which due publicity shall be given.

7. Ships in transit shall respect applicable sea lanes and traffic separation schemes established in accordance with this articles.

Article 42

Laws and regulations of States bordering straits relating to transit passage

1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic, as provided in article 41;
- (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;
- (c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;
- (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.

2. Such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section.

3. States bordering straits shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of transit passage shall comply with such laws and regulations.

5. The flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits.

Article 43

Navigational and safety aids and other improvements and the prevention, reduction and control of pollution

User States and States bordering a strait should by agreement cooperate:

- (a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and
- (b) for the prevention, reduction and control of pollution from ships.

Article 44

Duties of States bordering straits

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.

SECTION 3. INNOCENT PASSAGE

Article 45

Innocent passage

1. The regime of innocent passage, in accordance with Part II, section 3, shall apply in straits used for international navigation:

- (a) excluded from the application of the regime of transit passage under article 38, paragraph 1, or
- (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.

2. There shall be no suspension of innocent passage through such straits.

TABLE I

Traffic to and from the Ob' and Yenisey, 1920-39

Year	Exports from Siberia, in metric tons unless otherwise stated	Imports to Siberia, in metric tons	Total, in metric tons	No. freighters employed
1920	10,100	-	10,100	10
1921	13,667	8,440	22,107	5
1922	5,837	7,790	13,627	5
1923	24	1,076	1,100	1
1924	4,148	6,523	10,671	3
1925	5,582	7,602	13,184	4
1926	10,070	9,098	19,168	5
1927	11,114	18,314	24,428	6
1928	17,107	12,271	29,378	8
1929	60,060	13,500	73,560	26
1930	125,000	18,000	143,000	46
1931	49,165	14,445	63,610	16
1932	76,480	20,283	96,763	28
1933	36,807 standards of timber	8,409	-	30
1934	39,931 standards	7,490	-	31
1935	49,602 standards	17,175	-	45
1936	139,700	6,100	145,800	not known
1937	111,700	1,800	113,500	not known
1938	174,700	3,100	177,800	45
1939	373,800	2,000	375,800	not known

TABLE II

Traffic from the East to the Kolyma, 1911-36

Year	Number of freighters employed	Imports to Siberia, in metric tons	Remarks
1911-30	Generally 1, sometimes 2.	Always under 1,000	-
1931	2	2,000	-
1932	6	not known	10,000 tons brought to river but much was not unloaded
1933	9	7,000	4 ships and much of the cargo from expedition of 1932
1934	4	7,000	-
1935	6	11,541	1 ship came from and returned to the west
1936	6	not known	3 ships on west to east through trip, 2 on east to west through trip

TABLE III
Traffic from the West to the Lena, 1933-38

Year	Number of freighters employed	Imports to Siberia, in metric tons
1933	2	3,880
1934	3	7,500
1935	5	12,828
1936	5	13,950
1937	3	not known
1938	4	not known

TABLE IV
Shipping of Lend-Lease Goods from the United States to Soviet Arctic Ports by way of the Northern Sea Route, 1942-45.
Ports visited with number of calls made at each.

Year	Number of voyages made	Total tonnage carried (gross long tons)	Arkhangelsk	Ports on Yenisey	Mouth of Khatanga	Mouth of Anarbar	Mouth of Olenek	Tikai	Mouth of Indigirka	Mouth of Yana	Ambarchik	Pevek	Bukhta Provideniya
1942	23	64,000	-	2	3	3	1	11	1	4	9	5	1
1943	32	118,000	1	4	3	2	1	14	3	4	7	6	9
1944	34	128,000	-	4	5	2	-	15	2	5	6	6	14
1945	31	142,000	-	3	5	1	-	14	3	4	6	8	11
Totals	120	452,000	1	13	16	8	2	54	9	17	28	25	35

Transit voyages of MSC vessels through the NSR in 1993

N	Name of vessel	Port(country) of loading	Country of discharge	Cargo, tons	Dates of entry and leaving NSR	Dates of start loading, loading, trip, unloading and ballast trip
1	Kandalaksha	Murmansk	China	14775	25.04-23.05	15.04-31-08
2	Mikhail Kutuzov	Sweden Finland	Japan Japan	11964 5925	04-11-16-1	20.09-16-12
3	Yury Dolgorykiy	Murmansk	China	17812	06.07-21.07	14.06-19.09
4	Kapitan Sviridov	China	Holland Spain	10498 6741	13.08-21.08	30.06-10.09
5	Kapitan Sviridov	Latvia	Japan	17434	08.10-18.10	01.09-13.11
6	Kapitan Botchek	China	England	7009	18.08-04.09	05.07-25.09
7	Tim Back	Latvia	Holland Spain	4822 17600	24.08-03.09	31.06-06.09
8	Tim Back	China	Holland	16705	15.11-25.11	06.10-10.12
9	Kyzma Minin	China	England	12720	18.09-04.10	06.08-08.11
10	Mikhail Strekalovskiy	Murmansk	Thailand	17180	05.09-14.09	09.08-09.10
11	Ivan Bogun	China	Holland	16658	13.09-22.09	16.08-06.10
12	Kapitan Nazaryev	Finland	Japan	13333	10.09-18.09	16.08-20.10
13	Kapitan Chyhchin	China	Germany Holland England	5312 3800 4633	08.10-18.10	16.08-20.10
14	Kapitan Kudlay	Murmansk	Japan	16563	05.11-22.11	
15	Kapitan Vakula	Murmansk	Japan	17080	06.11-19.12	
16	Yury Dolgorykiy			14357	27.10-11.11	
Total for 1993:				256600		

Ship type	Shipowner	No.vessels	No. voyages	Tons cargo	Ports of loading	Ports of discharge
1993						
Tankers	Latvia (Arctic Shipping Service); Germany Finland	7(Samburg, Rundele, Taganrog, Kashira, Ronagi, Aleisk, Leninsk-Kusnezkiy)	18	204826	Arkhangelsk	Frantz-Iosef Land, Novaya Zemlya Amderma, Dudinka, Hatanga, Tiksi, Yana
		1 (Ledo Stern) 1 (Lunni)	7			
Refer 'Amdoda'	Latvia	1 (Atmoda)	Several	20062	Murmansk	Dudinka (Norilsk)
1994						
Tankers	Latvia Finland	5 2 (Lunni, Uiku)	22	173100	Arkhangelsk	Frantz-Iosef Land, Novaya Zemlya, Amderma, Dudinka, Hatanga, Tiksi, Yana
Refer 'Atmoda'	Latvia	2 (Atmoda)	Several	More than 20000	Arkhangelsk, Murmansk	Dudinka (Norilsk)

Note: There were no transit foreign vessels through NSR both 1993 and 1994.

DONAT PHARAND, Q.C., S.J.D., F.R.S.C.

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CONSULTANT

International Law, Law of the Sea and Arctic Affairs

13 August 1996

Dr. Douglas Brubaker,
INSROP, The Fridtjof Nansen Institute
P.O. Box 326, N-1324 Lysaker,
NORWAY

Dear Dr. Brubaker:

Re: The Legal Status of Straits in Russian Arctic Waters

I apologize for not reviewing this paper when I received it toward the end of February. I had to put it aside, my time being fully taken up in preparation for a conference in West Africa, and simply forgot to come back to it.

I consider this a very good paper and, subject to very minor points, ready for publication as a Working Paper. As a general comment, I believe that the discussion on the definition of an international strait is sound and well documented. The originality lies mainly in the section dealing with the question of submerged passage. To my knowledge, this kind of analysis had not been done before. I also agree generally with the conclusions at pages 40 to 42.

As for specific suggestions to improve the presentation of the text, I have only three minor ones. First, I believe the use of illustrations or maps are not only advisable for a ready understanding of the paper but absolutely necessary for certain sections, in particular page 25 and pages 34-35. Second, the very long quotations at pages 12 to 19 should appear in small print, so that the reader will easily make the difference with the rest of the text. Third, although the English is generally quite good and far superior to some previous papers, the text could still stand some editing. I will simply point to four obvious errors of language:

p.10 (top): the first line of the quotation should read "The...straits are regarded (not regarding)

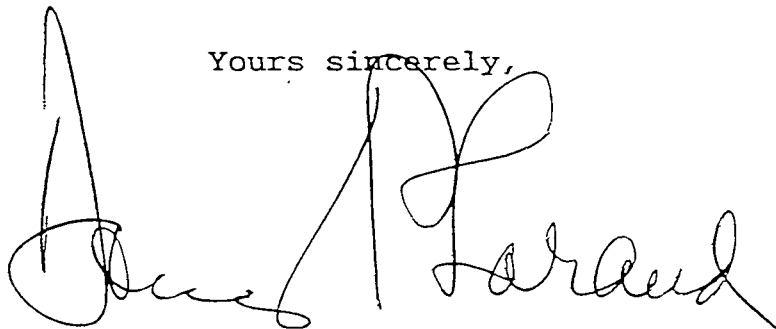
p.22 (line 9): it should preferably read "This also includes non military (instead of war) submarines..."

p.26 (last sentence): It should read "Doctrine which addresses
this issue is divided".

p.39 (last line): "...these transits were secret..."

My suggestions relate only to the form, but you might wish to
consider them.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "James H. Garand". The signature is written in black ink and is positioned below the typed phrase "Yours sincerely,".

The three main cooperating institutions of INSROP



Ship & Ocean Foundation (SOF), Tokyo, Japan.

SOF was established in 1975 as a non-profit organization to advance modernization and rationalization of Japan's shipbuilding and related industries, and to give assistance to non-profit organizations associated with these industries. SOF is provided with operation funds by the Sasakawa Foundation, the world's largest foundation operated with revenue from motorboat racing. An integral part of SOF, the Tsukuba Institute, carries out experimental research into ocean environment protection and ocean development.



Central Marine Research & Design Institute (CNIIMF), St. Petersburg, Russia.

CNIIMF was founded in 1929. The institute's research focus is applied and technological with four main goals: the improvement of merchant fleet efficiency; shipping safety; technical development of the merchant fleet; and design support for future fleet development. CNIIMF was a Russian state institution up to 1993, when it was converted into a stock-holding company.



The Fridtjof Nansen Institute (FNI), Lysaker, Norway.

FNI was founded in 1958 and is based at Polhøgda, the home of Fridtjof Nansen, famous Norwegian polar explorer, scientist, humanist and statesman. The institute specializes in applied social science research, with special focus on international resource and environmental management. In addition to INSROP, the research is organized in six integrated programmes. Typical of FNI research is a multi-disciplinary approach, entailing extensive cooperation with other research institutions both at home and abroad. The INSROP Secretariat is located at FNI.

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