Navigational rights of warships through the Northern Sea Route (NSR) – all bark and no bite?

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This document, originally prepared by the Russian Ministry of Defense, 1 March 2019, has been subject to consultations since then. While it remains to be seen whether or not the Government of Russia ever adopts this Resolution, some of its central ideas deserve comment. To that end this blog post discusses the following points:

1. The background to this proposal;
2. Its central elements;
3. The question of applicable navigational rights within the straits of the NSR;
4. The question of the (in)consistency of the proposed measures with international law and Russia’s earlier positions.

Background

In September 2019, the French Navy’s new offshore support and assistance vessel, the Rhône (A603) transited the Northeast Passage, starting in Tromso, Norway, 1 September and ending in Dutch Harbor, Alaska, on 17 September. There is little explicit information available as to whether the vessel coordinated its plans with Russian authorities beforehand, but Russian sources refer to the voyage as conducted “without warning”. It is clear that the vessel navigated independently, without icebreaker assistance or pilotage, although the Russian news agency Interfax informs that the vessel was “monitored” by the radio intelligence equipment of the Northern and Pacific fleets in their areas of responsibility in the Russian Arctic.

Over the past years, different signals, such as the diplomatic note of 29 May 2015, have been coming from another NATO member State, the United States, indicating the US objections and concerns regarding Russia’s NSR regulatory scheme, and, more recently, its readiness to take concrete action by transiting the Russian Arctic with surface vessels as part of the US Freedom of Navigation Program.

Ironically, the recent tension over the applicable regime of navigation through the Northern Sea Route has arguably arisen, at least in part, due to the liberalization of Russian legislation on navigation in the NSR. The 2012 Federal Law N 132-FZ introduced into the 1999 Merchant Shipping Code Article 5.1, entitled “navigation in the water area of the NSR”. This provision became central to the legal regime of the NSR. It provides, among other things, the definition of the NSR and calls for the adoption of rules of navigation. In as much as the 2013 Rules of Navigation are legally based on Article 5.1(2), other provisions of the 1999 Merchant Shipping Code limit their scope of application ratio personae. Pursuant to Article 1, the 1999 Merchant Shipping Code applies only to relations arising from merchant shipping; Article 3(2) explicitly excludes its application to State vessels. It is worth noting that the previous regime of navigation for the NSR, based primarily on the 1990 NSR Regulations, did not distinguish between commercial and State-owned vessels. That was one of the principal points of criticism of Russian practice.

The 2012 amendment has arguably brought relevant Russian legislation in conformity with UNCLOS. According to Article 236 of UNCLOS,
The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service.

Pursuant to Article 236, other States are required to ensure that such vessels respect Article 234, which has provided the international legal basis for the 2013 Rules of Navigation, only to the extent that is “reasonable and practicable”.

In November 2018 Mikhail Mizintsev, the Head of the National Defense Management Center pledged that by the start of the 2019 navigational season foreign warships would only be able to navigate the NSR following prior notification. According to his statement, this new legislative development was supposed to fill the legal vacuum regarding the use of the NSR.

Central elements of the draft legislation

Andrey Todorov has discussed most of the main points of the proposal elsewhere: see Todorov, “Where does the Northern Sea Route Lead To?”. The draft legislation targets foreign warships and other vessels operated by a State and used on non-commercial service to the extent that they exercise the right of innocent passage in the territorial sea of the NSR. The draft would require:

- The flag State to submit a notification via diplomatic channels concerning the planned passage through the territorial sea of the Russian Federation in the NSR no later than 45 days before the start of the proposed passage. The notification should indicate the nationality of the ships and vessels, the purpose of the passage, the planned route, the passage timeframe, and the ranks and last names of the commanding officer of the unit and of each ship;
- The ship to use the service of mandatory ice pilotage in the territorial sea and internal waters of the NSR;
- The ship to use the service of mandatory icebreaker assistance in the territorial sea and internal waters of the NSR if necessary.

In addition, the draft proposes that foreign warships exercising innocent passage “must have the necessary ice construction, observe special precautionary measures and comply with the requirements relating to the safety of navigation and protection of the marine environment from pollution from ships (as applicable to the waters of the Northern Sea Route).”

The rationale behind the draft legislation is set out in the explanatory note. The main problem the draft seeks to address is the inapplicability of Article 234 of UNCLOS and the 2013 Rules to foreign warships, which, according to the drafters, raises the challenge of ensuring appropriate levels of maritime safety and measures aiming to prevent, reduce and control pollution in ice-covered areas. Interestingly enough, the challenge arising from the applicability of the new legal regime of navigation in the NSR solely to merchant shipping had already, although in a more narrow context, been the subject of earlier deliberations within the Russian Government. On 7 February 2017, President Putin signed a Federal Law N 10-FZ amending Article 5.1(5) of the 1999 Merchant Shipping Code. Its effect was to extend the application of the rules on fees for services for icebreaker assistance and ice pilotage on the NSR, to Russian State-owned vessels. Initially, the draft law had not singled out Russian vessels since it proposed that these rules apply to State-owned vessels in general, including foreign ones. Likely precisely because of international legal considerations, the proposal was not adopted.

Finally, the current draft legislation includes one more important element, namely a clear reference to Article 8(2) of UNCLOS. The very last paragraph of the draft explicitly recognizes a right of innocent passage through internal waters in the NSR, which until the establishment of straight
baselines in accordance with Article 7 of UNCLOS had not previously been considered as such. Pursuant to the same paragraph, ships exercising innocent passage in such internal waters would be subject to the same requirements as in the territorial sea.

**Applicable navigational rights in the NSR and the Russian Arctic straits**

Under international law, coastal State jurisdiction in different maritime zones is usually subject to navigational rights or freedoms of other States. In the context of the NSR, it should be emphasized that Russian legislation recognizes that the water area of the NSR consists of internal waters, territorial sea, contiguous zone and exclusive economic zone of the Russian Federation. As such, it is not controversial or disputable that in the water area of the NSR, other States enjoy the right of innocent passage in the territorial sea and the freedom of navigation in the EEZ. A somewhat more controversial issue arises concerning the applicable navigational rights through different straits enclosed with straight baselines in 1985. Assuming, but only for the sake of argument, that Russian straight baselines are valid, the legal status of waters landward of baselines is that of internal waters. The relevant question for the determination of the applicability of innocent passage is whether the waters had been considered internal waters before 1985. For the sake of time and space constraints, the question of the applicability of transit passage in the NSR is not considered in this blog post.

Curiously, Russian international law literature seldom discusses the applicability of innocent passage within the internal waters of the NSR. Gavrilov, “Legal Status of the Northern Sea Route and Legislation of the Russian Federation: A Note” observes that these areas are under the complete sovereignty of the Russian Federation. Golitsyn, “The Legal Regime of the Arctic” notes that the position of the USSR at the time of the adoption of the 1985 Decree was that none of the straits had been used for international navigation and that the right of innocent passage was not preserved. Gudev, “The Northern Sea Route: a National or an International Transportation Corridor?” concludes his analysis of the exchange of notes between the USSR and the United States in the 1960s, as well as the 1985 Decree with the observation that the 1985 Decree “made it possible to declare the Vilkitsky, Shokalsky, Laptev, Sannikov and Kara Straits historical internal waters of the USSR”.

Source: Buixadé Farré *et al* 2014 (adapted from Stephenson *et al* 2014).

**Do Russian straight baselines delineate historic waters in any of the NSR straits?**

It seems likely that the only valid argument supporting the view that the waters in straits had been considered internal water prior to the establishment of straight baselines would be that Russia has
successfully made a historic waters claim in respect of them. The 1985 Decree, includes the only list of historic waters claims explicitly made by Russia in the Arctic. It refers to only three areas: the White Sea, the waters of Cheshskaya Bay, and only one bay located within the NSR – the Baidaratskaya Bay, as waters “historically belonging to the USSR, internal waters”.

Admittedly, in 1964 the USSR explicitly referred to the Laptev and Sannikov Straits as “historically belonging to the USSR”. In response to the intention of the US vessel Burton Island to traverse the Dmitry Laptev and Sannikov Straits in 1964, the Soviet Ministry of Foreign Affairs presented the Aide Memoire to the USA, which stipulated that the Dmitry Laptev and Sannikov Straits belong historically to the Soviet Union. The relevant passage reads:

> 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. In as much as they are overlapped two-fold by Soviet territorial waters, as well as 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.

The assertion that the Sannikov and Dmitry Laptev Straits “belong historically to the USSR” did not specify whether this meant internal waters or the territorial sea expressly. The note refers to the concepts of “territorial waters” and “internal waters” used in parallel. The 1960 Statute on the Protection of the State Border of the USSR referred to the territorial sea as territorial waters in Article 3. The Soviet authorities deemed the Burton Island a military vessel, subject to the requirement of prior authorization in both the territorial sea and the internal waters under Article 16 of the 1960 Statute in force at that time. Thus, it was not necessary for the Soviets to specify at what points the NSR went through the territorial sea and at what points it went through the internal waters. The lack of decisiveness on the part of the USSR perhaps indicates that it could not find sufficient legal support for an internal waters claim concerning these straits.

In the event that the USSR believed these straits had been historically overlapped with internal waters, this should have been affirmed when the opportunity arose, namely in the 1985 Decree on Baselines. As such, the categorization of the waters in the Laptev and Sannikov Straits cannot be considered to reflect a clear and consistent intent to claim waters as historic internal waters.

Other Russian Arctic straits, including the traditional chokepoint, the Vilkitsky Strait, have never been the subject of a formal and, of course, a fortiori, successful claim to historic internal waters.

The fact that these waters had not been regarded as internal waters before the establishment of straight baselines triggers Article 8(2) of UNCLOS which preserves innocent passage without the need for previous acceptance, acknowledgement or use.

Should the draft legislation be adopted in its current shape, it would constitute Russia’s explicit recognition that Article 8(2) of UNCLOS preserved the right of innocent passage at least in some unspecified parts of Russia’s internal waters in the NSR.

The law of the sea on mandatory prior notification, pilotage and icebreaker assistance for warships in lateral innocent passage

Another important point for the discussion is the question of the consistency of the proposed measures with the international law of the sea.

Although UNCLOS does not explicitly provide for the right of innocent passage of warships, Robin Churchill presents a compelling argument (“The impact of state practice on the jurisdictional framework contained in the LOS Convention”) that all ships, including warships, enjoy such a right through the territorial sea. Also, the Russian draft explicitly recognizes that the proposed measures are meant to apply for ships in innocent passage.
The right of innocent passage limits coastal State sovereignty. Yet under Article 21(1) of UNCLOS, a coastal State may adopt laws and regulations relating to innocent passage in respect of, *inter alia*, the safety of navigation and the regulation of maritime traffic, the preservation of the environment of the coastal State and the prevention, reduction, and control of pollution thereof. A coastal State may also, where necessary, designate sea lanes or traffic separation schemes in the territorial sea. There is no full clarity whether these powers include the right to prescribe mandatory prior notification, pilotage or icebreaker assistance. In any event, Article 24 of UNCLOS stipulates that the coastal State shall not hamper the innocent passage of foreign ships. Moreover, Article 32 of UNCLOS explicitly provides for the immunities of warships and other government ships operated for non-commercial purposes.

**Controversy and State practice surrounding prior notification**

Prior notification has long divided States. Regardless of numerous attempts to address the issue, the question of whether a coastal State has the right to require prior notification from high-risk vessels, such as warships or merchant ships carrying hazardous or noxious materials, including hazardous waste or radioactive materials, remains contentious. Churchill (“The impact of state practice on the jurisdictional framework contained in the LOS Convention”), accurately notes that UNCLOS is “arguably unclear or ambiguous about whether a coastal State may require prior notification of the passage of ships carrying hazardous cargoes through its territorial sea as part of its powers under Article 21”.

When acceding to or ratifying UNCLOS, many States decided to attach declarations expressing their views on prior notification. Bangladesh, China, Ecuador, Egypt, Malta, Montenegro, Serbia all issued declarations under Article 310 in which they claim the right to require prior notification from some categories of ships.

On the other hand, some States felt the need to declare their opposition to the prior notification as incompatible with the right of innocent passage. These States included Germany, Italy, the Netherlands, and the UK. In a similar vein, the USA and the Soviet Union rejected the requirement of prior notification concerning innocent passage of all ships, including warships, regardless of cargo, armament or means of propulsion. Paragraph 2 of the 1989 USSR-USA Joint Statement reads:

> All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.

These clear statements of position indicate that some States feel strongly about prior notification, arguing either for or against the right of a coastal State to require it. Moreover, Russia has taken a clear position in this debate, which helped protect its flag State interests.

**Controversy and State practice surrounding compulsory pilotage**

Pilotage involves the deployment of an experienced officer, usually on board, to guide the ship through exceptionally challenging waters. The crux of the measure lies in the ability of the pilot to share her/his navigational experience in the areas where such experience is vital for the safety of navigation. Traditionally, pilotage has been associated with ports and internal waters, where it can be made mandatory based on the port or coastal State’s sovereignty. Some States have however adopted pilotage seaward of their internal waters.

Although pilotage is considered as one of the oldest means of facilitating navigation, international legal instruments have approached it with remarkable reserve. UNCLOS does not explicitly address pilotage in any of the provisions. Neither does *International Convention for the Safety of Life at Sea (SOLAS), 1974*, despite its Chapter V entitled ‘Safety of Navigation’, where pilotage could
arguably fit well. It is thus notable that even though States have long recognized the benefits of pilotage, including mandatory pilotage schemes, for the safety of navigation, the international community has not yet come to terms with how to specify the parameters of the international legal regime governing pilotage. Moreover, State practice shows that while compulsory pilotage can instigate much controversy for merchant ships exercising the right of innocent passage, it is much more contested for vessels enjoying sovereign immunity. Here one can recall US protests against a Finnish requirement to use pilot service when navigating in Finnish territorial waters, as well as US protests against similar requirements attempted by Italy in the Strait of Messina. Equally relevant is the legislation of States, such as Australia and Norway, which have adopted compulsory pilotage requirements, and which exempts warships and other government vessels not employed on commercial service.

Conclusions

It is difficult to predict how determined Russia is to adopt new regulations for the innocent passage of ships enjoying sovereign immunity within the NSR. It cannot be precluded that the primary purpose of the draft is to send a strong political signal to deter further challenge to its somewhat ambiguous claims. In any event, the adoption of such regulations would certainly be very controversial and unlikely to garner international recognition. It is possible that some amendments to the current legislation will be adopted, but even then it remains to be seen how the new restrictions will be enforced.

At the same time, it will be interesting to see whether new legislation offers more clarification of the Russian official position on the applicability of innocent passage within its straight baselines, on the international legal basis for the legal regime of navigation in the NSR, and on the applicability of different requirements to sovereign immune vessels.

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