

New Draft Law on the Russian Arctic Straits – Putin’ Money Where the Mouth is?

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Matter commented on: [Draft Federal Law](#) of the Russian Federation “On the Amendments to the Federal Law on the Internal Sea Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 31 July 1998, No. 155-FZ (on the procedure for the passage of foreign warships and other sea vessels operated for non-commercial purposes in the internal sea waters of the Russian Federation)” (2022 Draft Law).

1 Introduction

The 2022 Draft Law was introduced for consideration in the Russian Duma in August 2022. It deals with the right of entry of foreign warships to internal waters in the Northern Sea Route (NSR) and aims to adjust the regime of innocent passage in the Russian territorial sea. This blog analyses the proposed legislation in the larger context of other documents recently adopted by the Russian Federation (unfortunately only available in Russian):

- Decree of the Government of the Russian Federation of 16 November 2021, No. 1959, “On Approving the List of Geographic Coordinates of Points Determining the Position of Baselines for measuring the breadth of the territorial sea, contiguous zone, exclusive economic zone and continental shelf of the Russian Federation off the mainland coast and islands of the Russian Federation in the Arctic Ocean and on declaring invalid on the territory of the Russian Federation the section “Arctic Ocean” of the list of Geographic Coordinates of Points Determining the Position of Baselines for measuring the breadth of the territorial sea, contiguous zone, exclusive economic zone and continental shelf of the USSR off the mainland coast and islands of the Arctic Ocean, the Baltic and Black Seas, approved by the decision of the Council of Ministers of the USSR ,15 January 1985, No. 56-22 ([2021 Decree on Arctic Baselines](#)), and
- Decree of the President of the Russian Federation of 31 July 2022, No. 512 “On the approval of the Maritime Doctrine of the Russian Federation” ([2022 Maritime Doctrine](#)).

The innocent passage in the Russian Arctic has not been of much utility in recent years. Foreign merchant ships have used the NSR with special permission from the coastal administration, while foreign warships and other State-owned vessels showed little interest in the route, except for the passage by the French Navy’s *Rhône* in September 2018. The latter incident illuminated the question of the normative reach of the [Rules of Navigation in the Water Area of the Northern Sea Route](#), which, according to the author’s analysis in “[New Russian Legislative Approaches and Navigational Rights within the Northern Sea Route](#)”, apply only to merchant ships. Months after the incident, Russia responded with a publication of draft legislation (2019 Draft Resolution, analyzed [here](#)) proposing that foreign warships would become subject to specific requirements of prior notification, pilotage and icebreaker assistance. Although some media outlets quickly picked up a story assuming the new regulations had been [adopted](#), this has never been the case.

The war in Ukraine has had [a cooling effect](#) on the prospects of the commercial use of the NSR. So why bother? First, Russia is on the verge of substantializing its internal waters claim in the Arctic straits. The issue of applicable navigational rights in the Russian Arctic straits is undetermined, contested, and of immense potential importance in the future. So far, the discussion on the legal regime of Arctic navigation has centered on Article 234 of the United Nations Convention on the Law of the Sea (UNCLOS), but its application will eventually be in jeopardy due to climate change, and it does not apply to warships or other sovereign immune vessels. It is precisely the war in

Ukraine, galvanizing the political cleavage between the West and the East, that prompts attention to the military use of the Arctic. Russia's [2022 Maritime Doctrine](#) (para. 21) observes that the role of the factor of force has not declined in international relations; NATO Secretary-General Jens Stoltenberg openly [calls for](#) NATO's increased presence in the Arctic. The harsh reality is that who controls the straits controls the Northeast Passage (NEP). It is theoretically possible to circumnavigate the Russian Arctic straits and use the NEP, but the US experience from the 1960s' (as thoroughly covered by Roach and Smith's [Excessive Maritime Claims](#)) is not particularly uplifting. It is fundamental that when Russia places its bid to consolidate control over the Arctic straits, other states must prepare to react, even if everyone is currently looking the other way.

In the shadow of the war in Ukraine, Russia prioritizes the Arctic and shapes its policy and practice stepwise. An example is the renewed attention to innocent passage in the NSR. Although the adoption of the 2022 Maritime Doctrine hit the news, there has been no foreign media coverage of the 2021 Decree on Arctic Baselines or the 2022 Draft Law. For those who pay attention to the details, there might be a sense of new momentum for Russia's 'regaining the Arctic', to paraphrase the title of the 2013 book by Vyacheslav Zilanov "Россия теряет Арктику?" [Is Russia losing the Arctic?]. While the book criticized mainly the maritime delimitation agreements between Russia and its Arctic neighbors, its title reflected the [zeitgeist](#) of the first two decades of the 21st century in the Russian epistemic community. It was the time of Russia's pursuit to clarify the scope and extent of its jurisdiction in the Arctic, based on its commitment to the international law of the sea, including the UNCLOS, which was often criticized by the more sentimental or nationalistic schools of thought for being too weak. If such a process indeed is taking place, the change is incremental.

Other issues, like fading transparency of the NSR legal regime, have been addressed [elsewhere](#). This blog post limits the discussion to the question of innocent passage in the NSR in light of the three documents: the 2021 Decree on Arctic Baselines, the 2022 Maritime Doctrine, and the 2022 Draft Law. The question of the applicability of transit passage falls outside the scope of this blog.

2 2021 Decree on Arctic Baselines

In November 2021, completing [a decade-long process](#), the Government of the Russian Federation approved the [2021 Decree on Arctic Baselines](#), superseding the [1985 Decree](#). The 2021 Decree includes a complete list of coordinates for measuring Russian Arctic baselines. Given the technical nature of the document, it is difficult to appreciate the extent of change, except that it does not reduce the scope of claimed internal waters. Among the reasons for the update, the explanatory note to one of the drafts mentioned that 90% of basepoints identified in 1985 do not correspond to the current geographical situation. Another note explains the reliance on straight baselines for enclosing lagoons, bays, and straits, including ones historically belonging to the Russian Federation. The Decree is expected to increase the extent of Russian internal waters by dozens of thousands of square kilometers, with no effect on the continental shelf's outer limits. The announced territorial extension of the territorial sea may be primarily due to the identification [of five new islands within the Franz Josef Land Archipelago](#), previously covered by ice.

To the extent that straight baselines have been used to enclose almost all crucial NSR straits, it is prudent to mention that the United States (USA) [objects to \(see p. 526\)](#) the characterization of "certain straits used for international navigation in the NSR" as internal waters.

Although the explanatory note, which is not part of the adopted legislation, touches upon waters historically belonging to the Russian Federation, the Decree is silent on this issue. This is interesting when compared with the 1985 Decree, which specifically mentioned the White Sea, Cheshskaya

Bay and Baidaratskaya Bay as internal waters historically belonging to the USSR. The silence of the new legislation does not mean that Russia drops the historic waters claims. Instead, it simply blurs their specific extent.

3 2022 Maritime Doctrine

The 2022 Maritime Doctrine introduces a new perspective on the potential application of the historic title to the Russian Arctic straits. The document, superseding the 2015 Maritime Doctrine, distinguishes among *vital*, *important* and *other* regions of the world ocean. The Arctic basin, including the water area of the NSR, is considered *vital*. The document attributes such high status also to Russia's maritime zones: internal waters, territorial sea, exclusive economic zone and continental shelf, including the extended continental shelf in the Arctic; and two other geographically determined regions: the Sea of Okhotsk and the Russian sector of the Caspian Sea.

Among the particular challenges and threats to the national security and sustainable development of the Russian Federation in relation to the world ocean, the Doctrine refers to the US strategic course for global dominance, but also the attempts by some States to weaken Russian control over the NSR, and boost foreign naval presence in the Arctic.

Concerning the NSR, the 2022 Maritime Doctrine identifies two interesting strategic priorities. First, to exercise control over the naval activity of foreign states in the water area of the NSR (para. 50 (6)). Second, to ensure the immutability of the historically established international legal regime of internal waters in the Arctic straits of the NSR (para. 50(5)). The latter point is remarkable, as it implies not only that the status of the NSR straits is internal waters (nothing new as these straits have been enclosed with baselines since 1985), but also that this status has been somewhat historically established.

As the present author argued [elsewhere](#), Russia has never openly and publicly asserted the application of a historic title in straits. The only exception was a reference to the Laptev and Sannikov Straits as “historically belonging to the USSR”, made in the Aide Memoire to the USA in response to the Burton Island incident (J. A. Roach and R. W. Smith, [Excessive Maritime Claims](#) (3rd edn, Martinus Nijhoff Publishers 2012): 312-313). However, this claim was not consistently maintained as the Laptev and Sannikov Straits were not mentioned alongside the White Sea, Cheshskaya Bay and Baidaratskaya Bay in the list of internal waters historically belonging to the USSR, as reproduced in the 1985 Decree. Moreover, even at the time of the announcement, it was not clear whether the claim intended to assimilate said waters as internal waters or territorial sea.

Against this background, the 2022 Maritime Doctrine's call to ensure the immutability of the historically established international legal regime of internal waters in the Arctic straits of the NSR is challenging to understand. Should all the internal waters in the Russian Arctic straits be regarded as historic internal waters, or does the reference to historical establishment point to the 1985 Decree on baselines? Finally, is there any difference in the claimed status of different straits? After all, no language invoking a historic title has ever been used concerning most Russian Arctic straits, such as Kara Gates, Vilkitsky or Shokalsky Straits.

This is an essential issue because UNCLOS effectively differentiates among internal waters based on the source of the entitlement. In principle, it does not grant any navigational rights in internal waters. However, by virtue of Article 8(2) of the UNCLOS, where the establishment of a straight baseline has the effect of enclosing as internal waters areas that had not previously been considered as such, a right of innocent passage shall exist in those waters. In the absence of a formal and *a*

fortiori successful claim to historic internal waters, the right of innocent passage has been preserved in all Russian Arctic straits.

Russian legislation does not explicitly recognize the application of the right of innocent passage in any parts of internal waters, but neither does it explicitly deny it. The permission to navigate the NSR does not distinguish among maritime zones, as it applies to the entire ‘water area of the NSR’, including internal waters, territorial sea and the EEZ. Curiously, the otherwise controversial 2019 Draft Resolution (analyzed [here](#)) would constitute the first instance of explicit recognition for the right of innocent passage through internal waters in the NSR, which until the establishment of straight baselines had not previously been considered as such.

Russian international law authors seldom discuss this issue explicitly, except for presenting it as quite an uncomplicated case of [complete sovereignty](#). The United States sticks to its traditional position that [some NSR straits are subject to the regime of transit passage \(p. 527\)](#).

4 2022 Draft Law

The 2022 Draft Law seeks to double down on the call to exercise control over foreign warships in the NSR and preserve the historically established international legal regime of internal waters in the Arctic straits of the NSR, whatever that means.

The draft legislation aims to introduce amendments to the 1998 Federal Law on the Internal Sea Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 31 July 1998, No. 155-FZ (1998 Federal Law on the IWTSCZ). It consists of two legally distinct but politically coherent elements. The first one seeks to add text to Article 12 (2) of the 1998 Federal Law on IWTSCZ, addressing the suspension of innocent passage in the territorial sea. The second deals with the entry of foreign warships and other State-owned ships to internal waters within the water area of the NSR. These issues will be discussed in order.

Suspension of innocent passage

Article 12 of the 1998 IWTSCZL implements Article 25 (3) of UNCLOS and stipulates that innocent passage can be suspended in the Russian territorial sea after it has been announced in advance in Notices to Mariners. The current version of the relevant Russian legislation is not controversial. However, the 2022 Draft Law proposes to allow the announcement of the suspension of innocent passage through the issuance of a navigational warning.

Article 25 (3) of UNCLOS allows for temporary suspension of innocent passage to take effect “after [it] having been duly published”. The exact format of such ‘publication’ is imprecise, apart from the requirement for it to be done in an appropriate manner, as suggested by the adverb ‘duly’. This relates to the ability of the addressee (other States) to take the information into account. The requirement to ‘duly publish’ points to both a form available to the recipient and the temporal aspect of the communicated information: it needs to be communicated in advance. This procedural aspect of the publication is also relevant in the context of a substantive duty of non-discrimination.

As regards the form, there is no one appropriate channel of communication. The Division for Ocean Affairs and the Law of the Sea provides such [a channel for notifications of suspensions](#) submitted to the UN Secretary General, although, for some reason, it has only been used by a few States, primarily Mexico. A well-recognized channel for communication between the coastal state’s administration and potential users of its maritime zones is Notices to Mariners, which according

to SOLAS Convention, Regulation 9, are useful channels for keeping nautical charts up to date. [Notices to Mariners are published weekly in Russia.](#)

While the suspension of innocent passage with only one week's notice, considering all other conditions met, might still be controversial, engaging a much more rapid regime of navigational warnings to convey the message can be explained by only one rationale. The International Maritime Organization (IMO) [defines](#) a navigational warning as a broadcast message containing urgent information relevant to safe navigation. As part of the Worldwide Navigational Warning Service (WWNWS), a global radio and satellite broadcast system for disseminating maritime safety information, established jointly by the International Hydrographic Organization and the IMO, the immediate purchase of navigational warnings is their promptness. Allowing communication about the suspension of innocent passage through radio appears to serve no other purpose than to allow the relevant executive body to potentially prohibit the passage of specific vessels in real time. The explanatory note to the Draft confirms this reasoning by explaining that the addition in Article 12 will allow to *operatively/effectively* (rus. оперативно) suspend the passage of foreign warships and other State vessels in the territorial sea. It is difficult to escape the impression that the proposal might pave the way for a reactionary approach to provocative – from Russia's perspective – instances of the passage of foreign ships through the NSR and lead to discriminatory practice that would be inconsistent with Article 25 (3) of UNCLOS.

There is thus a risk that with this gentle addition to the existing legislation, Russia would qualify the right of innocent passage to the extent that it disappears.

Entry of foreign warships into internal waters

The second component of the draft legislation proposes requiring foreign warships and other State-owned ships (foreign State-owned ships) to seek authorization for passage through internal waters within the NSR at least 90 days before entry. Such vessels, provided the authorization is granted, would need to stick to the itinerary, other parameters and conditions for passage, including compulsory pilotage, as indicated in the authorization. The details of the authorization scheme would be further developed by the Government of the Russian Federation and published in the Notices to Mariners.

The 2022 Draft Law also proposes to cap the number of foreign State-owned ships simultaneously present in internal waters of the NSR to one, unless otherwise indicated in the special authorization. Submarines would be required to navigate on the surface. Moreover, the 2022 Draft Law proposes to let the relevant authorities suspend passage through the internal waters by announcing a navigational warning. If a foreign State-owned ship had already entered internal waters before the issuance of a navigational warning, the latter would include information on the action to be taken.

5 Concluding observations

Unlike the controversial 2019 Draft Resolution (analyzed [here](#)), aiming to impose a few requirements on warships in a way that would have been difficult to justify by reference to international law, the new initiative is based on a straightforward premise that no right of navigation applies in the Russian Arctic straits. If this condition is fulfilled, Russia has the right to deny or regulate access to such waters. In a way, one might be willing to welcome such legislation as it would clarify and substantiate Russia's position on the substantive scope of its sovereignty in the Russian Arctic straits, which in any event would depend on the source for the entitlement. However, should this legislation be adopted, the next round of diplomatic exchange might have to deal with the *enfant terrible* of the law of the sea – a *historic title*. For the 90 years of operation of

the NSR, the USSR and later Russia managed to maintain the necessary ambiguity to keep control over the Arctic straits without resorting to such a clear claim. The ambiguity works both ways. It diffuses the potential for confrontation as it allows both sides to interpret the reality in ways suiting them. However, if the legislation gets adopted in its current shape, other States might wish to request Russia to clarify its position on an international legal basis. In light of the applicability of Article 8(2) of UNCLOS (or potentially also Article 35 (a) of UNCLOS, not addressed in this blog post), it may not be sufficient for Russia to argue ‘internal waters’, without specifying the international legal basis for the entitlement.

One cannot escape a sensation of *déjà vu* when writing another blog post about another Russian draft law aiming to regulate the navigation of foreign warships in the Arctic (the previous one is [here](#)). The never-adopted 2019 Draft Resolution was perceived as a political signal to deter further challenge to Russia’s ambiguous claims. Now, however, the time seems ripe for a more confrontational approach. Given the self-image of a global maritime power (2022 Maritime Doctrine, para. 8), it is hard to believe Russia adopts amendments on the suspension of innocent passage, effectively annihilating the application of the right in the Russian territorial sea. Nonetheless, the strict regulation of the passage of warships through waters claimed as internal would be consequential to the long-held view (although articulated by Russian academics rather than State representatives) that these waters constitute internal waters, subject to the full scope of sovereignty. The climate of antagonism in international relations may help deflect a potential legal challenge (via diplomatic correspondence) as legalistic. After all, the 2022 Maritime Doctrine (para. 22(7)) prepares the ground by warning of the potential “international-legal pressure to discredit the Russian Federation and lower the effectiveness of its maritime activity”.

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