

New Developments in Russian Regulation of Navigation on the Northern Sea Route

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Abstract: The regime of navigation on the Northern Sea Route (NSR) is still largely based on legislation adopted by the Soviet Union, and features certain deviations in the way Russia's international legal rights and obligations are implemented. In recent years the Russian Federation has demonstrated interest in revising NSR legislation with the preparation of one single comprehensive Federal Act on the NSR, and also a Federal Act to introduce amendments to pre-existing legislation. The latter option has gained the support of legislators, as the newly promulgated Federal Law on the NSR, dated July 28th 2012, No. 132 FZ, established grounds for further specific regulatory acts to have effect on commercial navigation on the waters of the route.

The primary purpose of this article is to discuss the processes leading up to this long-awaited decision, as well as the implications of the new legislation for navigation on the NSR.

The *creative legal ambiguity* of the Russian domestic legislation has historically allowed for divergent arguments, voiced by Russian scholars, in respect to the assumed legal basis for the Russian extended authority to regulate navigation on the NSR and the limitations thereof. Alternative views have provided grounds for different legislative proposals and for heated discussions leading to the adoption of the most recent law. This article will trace the development of the legal thinking in Russia with respect to the allocation of jurisdiction on the NSR.

Key words: Northern Sea Route (NSR) and legislation, new NSR law, NSR navigation, Article 234 of UNCLOS, Russian law, Russian Arctic

1. Introduction¹

As sea ice recedes, the Arctic Ocean is impacted with increasing human activity on an unprecedented scale. Fragile Arctic marine ecosystems will unequivocally be put under imminent threat by the projected increase in Arctic marine shipping. The Northern Sea Route (NSR) is likely to be the most heavily utilized route, at least in the foreseeable future.² While the development of a coherent and effective regime to ensure sustainable navigation in the Arctic (i.e., the Polar Code) is of great importance to the international maritime community,³ the national level of governance regarding navigation in the Arctic is more significant than elsewhere in the world.⁴ For this reason, the role of Russia as the largest Arctic coastal state which controls traffic along the NSR cannot be underestimated.

Prior to the new Federal Law on the NSR, dated July 28th 2012, No. 132 FZ, it was generally acknowledged in Russia that the regime of navigation in the NSR was based on outdated national legislation inadequate to address modern challenges, and there was urgent need for substantial amendment. Since Russian accession to the United Nations Convention on the Law of the Sea (UNCLOS) in 1997, there have been several attempts to bring the provisions of Russian national legislation into line with international law. In particular, reports indicate efforts were made to propose amendments to the Regulations for Navigation on the Seaways of the Northern Sea Route (the 1990 Regulations).⁵ However, the consensus within Russia was to first clarify the legal status of the NSR and provide the legal basis for further developments before considering introduction of any new elements to the Regulations. Early attempts consisted of a comprehensive Federal Act on the

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1. The article has been written under the FRAM – High North Research Centre for Climate and the Environment Flagship Research programme «Sea Ice in the Arctic Ocean, Technology and Systems of Agreements,» at the Faculty of Law, University of Tromsø.
 2. Arctic Council, *Arctic Marine Assessment Report*, April 2009, 2nd printing, 5, <http://www.pame.is/amsa/amsa-2009-report> (accessed November 7, 2012)
 3. However, the work on the Polar Code is slower than initially planned. The IMO Sub-Committee on Ship Design and Equipment has recently decided to extend the target completion of Step 1 (only SOLAS ships) in finalization of the Polar Code from 2012 to 2014. It has also been decided to put the work on environmental protection temporarily in abeyance. See: IMO Report to the Maritime Safety Committee, Sub-Committee on Ship Design and Equipment, DE 56/25, February 28, 2012, para. 10.33.
 4. Article 234 of UNCLOS often described as the «Arctic exception» clause allows for a significant degree of unilateralism.
 5. *The Regulations for Navigation on the Seaways of the Northern Sea Route*, approved September 14, 1990, published in June 1991, http://www.arctic-liaison.com/docs/nsr/legislation/Rules_of_navigation_on_the_seaways_of_the_Northern_Sea_Route.pdf.

NSR.⁶ In preparing this document, the assistance of the Council for the Study of Productive Forces of the Russian Academy of Science was instrumental. More recent attempts to introduce various legislative amendments were conducted by the Russian Ministry of Transport. The new 2012 Federal Law on Amendments to Specific Legislative Acts of the Russian Federation Concerning the State Regulation of Merchant Shipping in the Water Area of the NSR is thus a culmination of a series of prolonged processes.⁷ The act was signed by the President on July 28th 2012, officially published on July 30th 2012, and *vacatio legis* for the law was established at 180 days. This is a clear indication of the desire of the Russian authorities to have a newly refurbished legal regime completed prior to the opening of the 2013 navigational season. It is widely believed that this legislation will soon be followed by more detailed regulatory acts.

The overall aim of this article is to examine whether the recent legislative initiative of the Russian Federation reflects the adoption of a new approach to the regulation of navigation in the NSR. Ambiguity concerning the legal standing of the NSR has allowed for the emergence of differing views regarding the role of Russia as an Arctic coastal state in regulating shipping activity within this transportation corridor. Therefore, while the need for amendment has been well recognized, there is dissonance amongst national policy-makers concerning the extent of the authority which Russia may exercise with regards to regulation of the NSR. While the new proposal seems to reflect a significant shift in Russian legal thinking, it has faced significant opposition on crucial issues such as the new definition of the NSR. However, when recent developments are considered in light of previous proposals, critical development of legal concerns pertaining to the NSR may be observed.

The paper begins with setting a brief political background, then proceeds with consideration of the most peculiar aspects of the current legislation, specifically those reminiscent of the Soviet approach to international law. This analysis is followed by a short review of the academic discussion regarding this issue. Finally, the text of the newly-adopted bill will be scrutinized in light of formerly proposed texts, to trace the development of the legal arguments. With the broad perspective of the analysis, this paper will examine the processes which will inform, to some

6. One version published in Bunik Ivan, *Mezhdunarodno-pravovye osnovanya regulirovaniya Rossiei sudohodstva po Severnomu Morskemu Puti* (International legal grounds for the Russian regulation of navigation on the Northern Sea Route), A Thesis for a degree of Candidate of Science in Law, Moscow: MGIMO University 2007. See also: Granberg, Alexander; Peresypkin, Vsevolod (eds.) *Problemy Severnogo morskogo puti* (Problems of the Northern Sea Route). Moscow: Nauka 2006.

7. The text of the new law is available at: <http://www.rg.ru/2012/07/30/more-dok.html> (accessed November 7, 2012).

degree, the future approach of the Russian Federation towards its role as a coastal state in regulating Arctic marine shipping.

2. Background

It has been more than 25 years since Mikhail Gorbachev, during his address in Murmansk in 1987,⁸ proposed opening the NSR to international navigation. Shortly after this speech the Soviet Union collapsed. While Gorbachev's speech has often been viewed as a pivotal moment, the process of development of a coherent Arctic policy, together with a comprehensible and unambiguous legal regime for navigation in Russian Arctic waters, has not yet come to pass. In fact, the end of the Cold War left Russia with a significant heritage in terms of Soviet legislation for the legal regulation of navigation in the waters adjacent to Russia's northern coast. Despite fundamental change in the Russian legal discourse on the NSR since then, arguably the legacy of the former doctrinal approach may still be affecting contemporary legal thinking.

The term *creative legal ambiguity* has been used to describe the piecemeal nature of Russian legislation regulating the NSR.⁹ Given that to date the primary strategic interest of the Russian Federation in the Arctic is to utilize the natural resources of the region, interest with respect to the NSR is to facilitate the development and cost-effective utilization of the coastal infrastructure to support resource extraction projects.¹⁰ The development of the NSR would not only assist in the full-scale exploration of hydrocarbons in the region, but would also significantly impact the efficiency of the whole Northern transport corridor – a corridor comprised of the NSR, northern inland waterways, and railways. Vladimir Putin, in his speech during the International Arctic Forum held in Arkhangelsk in September 2011, clearly stated the NSR would be transformed into a globally significant world trade route, an international artery capable of competing in all respects with other traditional seaways such as the Panama and Suez Canals.¹¹ It remains to be seen how Russia

8. Gorbachev, Mikhail, *Murmansk Speech*, October 1, 1987, http://www.barentsinfo.fi/docs/Gorbachev_speech.pdf (accessed November 7, 2012).

9. Franckx, Erik, *Maritime Claims in the Arctic: Canadian and Russian Perspectives*. (Dordrecht: Martinus Nijhoff Publishers, 1993):193.

10. Security Council of the Russian Federation, *Osnovy gosudarstvennoi politiki Rossiiskoi Federatsii v Arktike na period do 2020 goda i dalneishuyu perspektivu*, September 18, 2008, <http://www.rg.ru/2009/03/30/arktika-osnovy-dok.html>.

11. Putin, Vladimir, Speech at the International Arctic Forum «The Arctic – Territory of Dialogue,» Arkhangelsk, September 28, 2011, <http://www.rusembassy.ca/node/607> (accessed July 7, 2012).

will reconcile the numerous economic interests with security-related concerns, while still maintaining the NSR as a national asset. However, it is increasingly evident that national security considerations, the basis of Soviet-era Arctic policy, are being superseded by Russia's pragmatic commercial ambitions.¹²

3. Peculiarities of the Current Regime of Navigation on the NSR – Is there Adequate Legal Basis within the Framework of UNCLOS alone?

This section considers some of the issues related to the regime of navigation on the NSR prior to the new legislation of 2012, entering into force on January 26, 2013. Once the legislation becomes effective, some elements will be overhauled, whereas others will continue to await revision.

Over the course of the last two decades Russia has unequivocally displayed political will in promoting the use and development of the NSR by the global maritime community, while at the same time continually stating the NSR will remain under exclusive national control.

Russian scholars have proposed various solutions to address this discrepancy, based on alternative theoretical assumptions that can be subcategorised as influenced by either nationalist or internationalist schools of thought. From the legal perspective, it is imperative that Russia does not act beyond generally recognized principles and norms of international law and binding international treaties, which form an integral part of its legal system in accordance with article 15 (4) of the Constitution of the RF.¹³ This was further confirmed by the resolution of the Plenum of the Supreme Court dated October 10, 2003.¹⁴

12. For this point see Åtland, Kristian, «Russia's Armed Forces and the Arctic: All Quiet on the Northern Front?» *Contemporary Security Policy* (32:2) 2011, 267–285; and Blunden, Margaret, «Geopolitics and the Northern Sea Route,» *International Affairs* (88: 1) 2012, 115–129.

13. The Constitution of the Russian Federation, December 23, 1993, <http://www.rg.ru/2009/01/21/konstitucia-dok.html> (accessed November 7, 2012).

14. Plenum Verhovnogo Suda Rossijskoj Federacii, Postanovlenie ot 10 oktjabrja 2003 g. N 5 g. Moskva, O primenenii sudami obshej jurisdikcii obshepriznannyh principov i norm mezhdunarodnogo prava i mezhdunarodnyh dogovorov Rossijskoj Federacii, (The Plenum of the Supreme Court of Russia, the Resolution No 5 On Application of Generally Recognized Principles and Norms of International Law and the International Treaties of Russia by Courts of General Jurisdiction), October 10, 2003, <http://www.rg.ru/2003/12/02/pravo-doc.html> (accessed November 7, 2012).

Navigation on the NSR is still governed by the 1990 Regulations,¹⁵ which were later supplemented with the more specific 1996 Guide to Navigating Through the NSR; 1996 Regulations for Icebreaker and Pilot Guiding of Vessels through the NSR; and the 1996 Requirements for the Design, Equipment, and Supplies of Vessels Navigating the NSR. On June 18, 1998, the same year when the Federal Law on the Territorial Sea¹⁶ and the Federal Law on EEZ were adopted,¹⁷ the Ministry of Transport extended the application of the 1990 Regulations in unchanged form.¹⁸ Some scholars are of the opinion that these regulations can no longer be applied, as they have never been approved by the Government and therefore lack a legal basis in a Federal Act. For example, Pavel Savaskov points to the fact that the Constitution of the RF does not allow a ministerial act to serve as a source of law.¹⁹ However, the majority of commentators still situate the 1990 Regulations at the core of the Russian regime for the NSR, and ship-owners seeking to navigate the NSR are required to observe them.

This article shall address only the most striking peculiarities of the 1990 Regulations. The most notable of those peculiarities is the possible application of the regulations to the High Seas and the application to state vessels. In particular, the definition of the NSR included in Art. 1.2 of the 1990 Regulations stipulates that the NSR may «include seaways suitable for leading in ice.» This article was undoubtedly intended to extend the possible application of the regulations beyond

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15. Kolodkin, Anatolii; Gutsuliak, Vasilii; Bobrova, Iulia, *Mirovoi okean. Mezhdunarodno-pravovoi rezhim. Osnovnye problemy* (The world ocean. International legal regime. Basic problems.) Moscow: Status, 2007, 204.
 16. Federal'nyj zakon ot 31.07.1998 N 155-FZ (red. ot 21.11.2011) O vnutrennih morskikh vodah, territorial'nom more i prilezhashej zone Rossijskoj Federacii (Russian Federation Federal Act on the Internal Maritime Waters, the Territorial Sea and Contiguous Zone of the Russian Federation, July 31, 1998, No. 155- Φ3, as amended), <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=121959>.
 17. Federal'nyj zakon ot 17.12.1998 N 191-FZ (red. ot 21.11.2011) Ob iskljuchitel'noj jekonomich-eskoj zone Rossijskoj Federacii (Russian Federation Federal Act on the Exclusive Economic Zone of the Russian Federation, December 17, 1998, No. 191- Φ3 as amended), <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=121958>.
 18. Prikaz Mintransa RF ot 18.06.1998 N 73 O normativnyh aktah po voprosam Severnogo morskogo puti i Arktiki (Order of the Ministry of Transport of the Russian Federation, *On Normative Acts related to the NSR and the Arctic*, June 18, 1998, No. 73), <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=EXP;n=280974>.
 19. Savaskov, Pavel, «Pravovoi rezhim Arktiki,» in: Zagorskii Andriy (ed), *Arktika: Zona Mira i Sotrudnichestva*, (Moscow: IMEMO RAN, 2011): 38.

the border of the EEZ.²⁰ Such a reading follows from an analysis of preceding legal acts, in particular the 1984 Edict,²¹ which entered into force only after adoption of the 1990 Decree.²² The latter, by virtue of Art. 12, restricted the spatial scope of application of the 1984 Edict to the EEZ. However, an explicit exception was made in relation to Art. 3 of the 1984 Edict, which formed a legal basis for the 1990 Regulations. Art. 12 of the 1990 Decree specifies that all the measures taken in application of the 1984 Edict, can only be taken within the borders of the EEZ. The same article explicitly exempts measures pursuant to Art. 3 of the 1984 Edict from this spatial limitation. As a result, the regulation of navigation in the marine areas adjacent to the Northern coast of the Soviet Union was explicitly recognized to be possible anywhere the NSR seaways were located, irrespective of whether within or outside the EEZ. Thus Art. 3 served as a primary legal basis for the 1990 Regulations. It should be noted that at the time of writing none of the legal acts mentioned here has been revoked.

Despite the vague wording of Art. 234 of UNCLOS, its inapplicability to areas beyond 200 n.m. from baselines is beyond dispute. Additionally, the same level of clarity is found within UNCLOS Art. 236, which stipulates that state vessels are exempt from measures adopted through Art. 234. This was ignored at the time of drafting the 1990 Regulations which apply to all vessels. Therefore, it is understandable that some academics claim that Russian jurisdiction over the waters adjacent to its northern coast was not meant to be primarily based on Art. 234,

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20. Article 1.2 reads: The essential national transportation route of the USSR, which is situated within the inland waters, territorial sea (territorial waters), or exclusive economic zone adjoining the USSR northern coast, and includes seaways suitable for guiding ships in ice. The extreme points of which in the west are the western entrances to the Novaya Zemlya straits and the meridian running from Mys Zhelaniya northward. And in the east, in the Bering Strait, by the parallel 660N and the meridian 168058'37»W.
 21. Ukaz Prezidiuma VS SSSR ot 26.11.1984 N 1398-XI Ob usilenii ohrany prirody v rajonah Krajnego Severa i morskikh rajonah, privilegajushih k severnomu poberezh'ju SSSR (Edict of the Presidium of the USSR Supreme Soviet of November 26, 1984 On Intensifying Nature Protection in Areas of the Extreme North and Marine Areas Adjacent to the Northern Coast of the USSR), <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=ESU;n=3418>.
 22. Postanovlenie Sovmina SSSR ot 01.06.1990 N 565 O merah po obespecheniju vypolnenija Ukaza Prezidiuma Verhovnogo Soveta SSSR ot 26 nojabrja 1984 g. «Ob usilenii ohrany prirody v rajonah Krajnego Severa i morskikh rajonah, privilegajuwih k severnomu poberezh'ju SSSR» (Decree of the Council of Ministers of the USSR, June 1, 1990, On measures for Securing the Implementation of the Edict of the Presidium of the USSR Supreme Soviet of November 26, 1984 «On Intensifying Nature Protection in Areas of the Extreme North and Marine Areas Adjacent to the Northern Coast of the USSR»), <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=ESU;n=3426>.

and, as a result, the jurisdiction would not be restricted by the specific conditions to be adhered to in the application of this article.

After Russia's ratification of UNCLOS in 1997, two significant legal acts were adopted regulating activities in Russia's maritime zones. Despite an effort to bring national legislation into conformity with UNCLOS provisions, the NSR was again treated in a singular manner. While Art. 32 of the 1998 Federal Act on the EEZ borrows nearly verbatim the language from UNCLOS Art. 234,²³ Art. 14 of the 1998 Federal Act on the Territorial Sea provides a new definition of the NSR. According to the latter the NSR is an «historically formed single national communication of the Russian Federation in the Arctic».²⁴ According to several authorities this formulation might serve no other purpose than to indicate that the waters enclosed by the system of straight baselines are additionally to be regarded as historic waters. There is no doubt that this definition of the route as a 'single national communication' was not meant to claim the whole route as internal waters.²⁵ Nevertheless, one observer has concluded that by virtue of such wording the whole of the NSR has been claimed historic.²⁶ Douglas Brubaker, while largely ignoring factors of historic significance due to lack of substantial evidence, notes the possibility that the whole route has been claimed historic.²⁷

The interpretation of the controversial wording of Art. 14 of the Federal Act on the Territorial Sea is not clear cut, especially as no specific regulations regarding navigation pursuant to this article were ever adopted or approved by the Government, despite the fact that this Act explicitly requires such approval. There is evidence that this clause was highly controversial at the time of its adoption. Ivan Bunik, for instance, refers to a letter reflecting the position of the Ministry of Foreign Affairs of the Russian Federation. In the letter, addressed to the Chief of State Legal Department of the President, the ministry argues against referring to the NSR as a historically formed single communication in the Federal Act, claiming that such definition of the route as internal or territorial waters would not be accepted internationally. As a result, an attempt to exercise national jurisdiction

23. See *supra* note 16.

24. See *supra* note 15.

25. Egorov, N. P. (et al.) «Pravovoi rezhim sudokhodstva v Arktike» (The legal regime of navigation in the Arctic) Alexander G. Granberg and Vsevolod I. Peresypkin (eds.), *Problemy Severnogo morskogo puti* (Problems of the NSR), (Moscow:Nauka, 2006):482–501.

26. Savaskov, *supra* note 18, 35.

27. Brubaker, R. Douglas, *The Russian Arctic Straits*. (Leiden, Martinus Nijhoff Publishers, 2005):145.

over navigation within the NSR would contravene international law.²⁸ This internal conflict may have led to a deadlock, with no new or amended regulations for navigation implementing Art. 14 having ever been adopted. As a consequence, it is unclear from the international legal perspective whether the national status of the route provides any modification to the normally applicable legal regime of navigation in respective maritime zones. The lack of clarification regarding Russia's position on the legal standing of the route is of utmost importance, as it determines the scope of assumed jurisdiction. As discussed further, the initial lack of a similar definition of the NSR in the new law was one of the hotly debated elements of the proposal.

An important observation must be made regarding Russian legislative practice. This practice, as reflected in adopted national legislation, exhibits a positive tendency to gradually bring domestic legislation in line with the principles of UNCLOS. If one compares specific provisions relating to the regime of navigation in the Arctic of the 1984 Edict on the EEZ, the 1984 Edict, and the 1990 Decree with provisions of the Federal Acts adopted in 1998, it is readily apparent that the line of loose implementation of UNCLOS has largely been abandoned. Yet, some uncertainty remains with regards to the official attitude to the legal status of the NSR, and consequently the scope and legal basis for Russian regulatory powers. This peculiar creative legal ambiguity has previously led several Russian academics to divergent conclusions with regards to the legal basis for the Russian claim on the NSR within international law.

3.1 A Review of Academic Discussion on the NSR

The central issue in the debate amongst Russian academics on the NSR lies in an assessment of UNCLOS, and how is it situated with regards to the sources of international law relating to the legal regime of the Arctic. In particular, the discussion is focused on the question of whether UNCLOS Art. 234 fully reflects special circumstances to be taken into account when evaluating the scope of Russian jurisdiction over the NSR – historically formed single national transport communication of the Russian Federation in the Arctic.²⁹ The peculiarity of the Soviet/Russian approach to the legal standing of the NSR has been commented upon by western academics. As noted by Erik Franckx, the argument for the NSR being a

28. Bunik Ivan, *Mezhdunarodno-pravovye osnovanya regulirovaniya Rossiiy sudohodstva po Severnomu Morskemu Puti* (International legal grounds for the Russian regulation of navigation on the Northern Sea Route), A Thesis for a degree of Candidate of Science in Law, Moscow: MGIMO University 2007, 117.

29. *Supra* note 23.

single, indivisible national transportation route has long been viewed as a trump card by Soviet and Russian scholars, an overriding anomaly unlikely to be squared within the regime of either marine expanses or land territories.³⁰ A similar line of reasoning was noted by William E. Butler,³¹ who refers to Vyshnepolskii's argumentation, which emphasizes the coastal nature of the NSR. This coastal nature was not solely determined by the legal status of water expanses, but rather by the nature of its utilization and development. While such view renders the jurisdiction distinct of changing natural conditions, at the same time it is hardly compatible with the principles of modern law of the sea. For the purpose of simplicity, an attempt is made to categorize the modern views of Russian scholars into two dominant streams.

The first line of reasoning (well exemplified in the works of Anatolii Kolodkin, V. Yu Markov, A. P. Ushakov,³² Alexander Kovalev,³³ Irina Mikhina;³⁴ M. E. Volosov³⁵) widely starts from the assumption that, when establishing domestic legislation, Russia should draw largely from the provisions of UNCLOS. The legal basis for extended jurisdiction beyond internal waters is found in Art. 234. Nonetheless, those same proponents of UNCLOS still sometimes refer to the Russian Arctic sector as being a zone of special interest, allowing national authorities to take stricter measures to ensure ecological, economic, political, and strategic security.³⁶ In addition, it is argued that increasing openness and enhanced access to the route does not discharge Russia from its obligation to regulate navigation in this «historically formed national single transport communication».³⁷ Certain peculiarities are argued to be of vital significance, in particular the system of straight baselines enclosing waters in critical straits. Allegedly, no right of innocent passage is preserved pursuant to Art. 8(2) of UNCLOS, since the right of innocent passage

30. *Supra* note 8, p.226, (in particular see note 481 in this book).

31. Butler, William E., *The Soviet Union and the Law of the Sea*, (Baltimore: Johns Hopkins Press, 1971): 113.

32. Kolodkin, Anatolii, Markov V. Yu., and Ushakov A. P., *Legal Regime of Navigation in the Russian Arctic*, (Lysaker: The Fridtjof Nansen Institute) INSROP working paper No. 94, 1997, 38.

33. Kovalev, Alexander, *Contemporary Issues of the Law of the Sea: Modern Russian Approaches*. (Utrecht: Eleventh International Publishing, 2004).

34. Mikhina, Irina, *Mezhdunarodno-pravovoi rezhim morskikh prostranstv Arktiki* (International legal regime of marine expanses of the Arctic), A Thesis for a degree of Candidate of Science in Law, Moscow Sojuzmorniiprojekt, 2003.

35. Volosov M.E. *Mezhdunarodno-pravovoi rezhim Arktiki*, Bekyashev K. A. (ed.) *Mezhdunarodnoe publichnoe pravo* (International Public Law), (Moscow: Prospekt, 2005), 466–474.

36. *Supra* note 14, 201.

37. See *supra* note 24, 492.

never existed within these waters.³⁸ Curiously, the NSR is often compared to the Norwegian Indreleia, insofar as both routes have been developed and exploited exclusively by the efforts of a respective country.³⁹

A second stream of reasoning stems from the school of thought which holds that the series of historical, economic, political, geographical, environmental, and other factors at play within the polar region require that the Arctic marine expanses must be approached from a different perspective than marine expanses in general.⁴⁰ For example Alexander N. Vylegzhanin points out that the legal regime of the Arctic and the Arctic Ocean is governed not only by the international law of the sea and UNCLOS, but mainly by customary international law.⁴¹ The proponents of the theory that the regime of navigation in the NSR was formed long before UNCLOS, assume that Russia may assert some special rights within sector lines, fully cognizant that these lines do not constitute state boundaries. Accordingly, the sector lines are seen as a delineating tool for the zone of primary responsibilities and interests of a coastal state, where it may apply the rule of law through national legislation.⁴² Some academics argue that apart from the waters in straits, the Kara, Laptev and East-Siberian seas might also be qualified as historic waters.⁴³ Others point to the legal basis for Russian jurisdiction over the NSR as not being found solely in Art. 234, but rather as formed through consistent and prolonged exercise of control over navigation. It is argued that this control was never met with suf-

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38. For opinions to the contrary see: Brubaker, R. Douglas, «The Legal Status of the Russian Baselines in the Arctic,» *Ocean Development & International Law*, 30 (3) 1999: 191–233; Franckx, *supra* note 8 at 185.
 39. See for example: Kolodkin A. L., and Volosov M. E., «The legal regime of the Soviet Arctic,» *Marine Policy*, March 1990: 158–168.
 40. Kulebyakin, Vyacheslav, *Pravovoy rezhim Arktiki (The legal regime of the Arctic)*. In: Blishchenko, I. P., (ed.), *Mezhdunarodnoe morskoe pravo (International maritime law)*. (Moscow: Izdatelstvo Universiteta Druzhby Narodov, 1988): 134–144.
 41. Vylegzhanin, Alexander, «What is the Law Applicable to Protection of the Arctic Environment,» *The Circle*, (1) 2009, (Oslo:WWF International Arctic Programme): 20.
 42. Vylegzhanin, Alexander, «The Contemporary Legal Framework of the Arctic Ocean: Are there Impacts of Diminishing Sea Ice?» <http://www.mgimo.ru/files/213526/Alexander-Vylegzhanin.pdf> (Accessed July 9, 2012).
 43. Vylegzhanin, Alexander, «Aktualnye problemy mezhdunarodno-pravovogo obespecheniya morskoy deyatel'nosti» (Topical problems of international legal regulation of maritime activity). Voytlovskii, Genrikh (ed.) *Teoriya i praktika morskoy deyatel'nosti 7*, (Theory and practice of maritime activity 7) (Moscow: SOPS 2006): 58; see also: Barsegov, Yu. G... et al. *Arktika: Interesy Rossii i mezhdunarodnye usloviya ikh realizatsii (The Arctic: the Interests of Russia and international conditions of their realization)*, (Moscow:Nauka, 2002):27–28.

ficient opposition from other states.⁴⁴ Accordingly, this would give Russia rights similar to those enshrined in Art. 234 of UNCLOS, but in practice the jurisdiction would be based on the mixture of historic title and customary law, and would be independent of future changes brought by receding sea ice levels.

In addition, the issue of the incomplete application of UNCLOS to the Arctic, or the dominance of customary norms within the region, is still sometimes argued to be due to lack of interest on behalf of the negotiators of the Convention, who declined to fully address the specific issues of the Arctic and implicitly decided to grant significant leeway to coastal states.⁴⁵ This last argument does not seem to be very persuasive, as Art. 234 was expressly negotiated between the US, Canada and the Soviet Union. Article 309 does not allow any additional reservation unless explicitly permitted by the Convention, which has led to UNCLOS being referred to as a 'package deal,' providing the legal framework for the Arctic Ocean. Yet Russia made a declaration upon its ratification of UNCLOS which excluded the binding procedures provided for in s. 2 of part XV of the Convention with regards to historic bays and titles.⁴⁶ This declaration was made in accordance with Art. 298 (a) (i), and Canada is reported to have made a similar declaration.⁴⁷ While this statement cannot have the effect of a reservation on the applicability of UNCLOS, there is little doubt that it was done in consideration of the Arctic. Yet UNCLOS applies to the Arctic as much as it does to any other part of the global ocean. The point advocated for by several Russian academics is that although the norms of UNCLOS may be applied to the Arctic maritime region, in doing so, ignoring the Arctic states' historic interests in the region would be both unacceptable and unlawful.⁴⁸

44. See for example: Bunik *supra* note 27, 91; Gureev S. A. «A presentation during a conference on the development of maritime activities in the conditions of globalization,» Voytolovskii Genrikh K. (ed.) *Teoriya i praktika morskoy deyatelnosti* 3 (Theory and practice of maritime activity 3), (Moscow: SOPS 2004): 123; Ovlashchenko A. V., and Pokrovskii I. F. «Problemy pravovogo rezhima severnogo morskogo puti» (Problems of the Legal Regime of the Northern Sea Route), *Transportnoe Pravo* (Transport Law)(2) 2007, 21–26; Popov, Vyacheslav, *Severnyiy Morskoii Put' kak Ekonomicheskii Komponent Rossii* (Northern Sea Route as an Economic Component of Russia), http://morvesti.ru/analytics/index.php?ELEMENT_ID=8002 (accessed July 9, 2012).

45. See: Voitolovskii Genrikh K. *Nereshennye problemy Arkticheskogo morepolzovaniya* (Unsolved problems of Arctic sea use) *Vestnik MGTU*, tom 13, №1, 2010, 90–104, http://www.vestnik.mstu.edu.ru/v13_1_n38/articles/17_voitol.pdf (accessed July 9, 2012).

46. Declaration of the Russian Federation upon ratification of the UNCLOS, March 12, 1997, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

47. Declaration of Canada upon ratification of the UNCLOS, November 7, 2003, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm

48. Bunik, Ivan, and Vylegzhanin Alexander, «International Legal Problems Related to Arctic Exploration» in IPY – 2007/08 News No 5–6 (July–August 2007): 27 http://www.ipyeaso.aari.ru/Documents/MPG_News_5-6_.pdf.

The Preamble to UNCLOS states that matters not regulated in the Convention are subject to the rules and principles of general international law. The Statute of the International Court of Justice lists international custom as one of the sources of international law.⁴⁹ The problem with utilizing custom as supporting a principle of international law is the high burden of proof which rests with a claimant state. In fact, any arguments based on an emerging or disputed principle of customary law will always feature a certain degree of arbitrariness. The only outright claims by Russia to historic waters are the Sannikov and Laptev Straits, a claim which was contested by the US.⁵⁰ The system of Russian Arctic baselines was also contested, and there is no doubt that any further claim would also be immediately challenged.⁵¹ While effective occupation may form a basis of a historic title to marine areas,⁵² it would be extremely difficult for Russia to provide evidence supporting this claim. In this respect, the activities of the US Coast Guard between 1964 and 1967, and the Soviet response to these actions, are of particular importance.⁵³ Conversely, Russia could argue that the US was the only state which challenged their claims, and except for the above-mentioned incidents in the 1960s, the US never exercised the Freedom of Navigation Programme at any later stage. Therefore, should Russia decide to forward some broader claims based on historic title, these claims would not be without points supporting their position. Again, this will require substantial documentation, particularly regarding foreign acquiescence.⁵⁴

While Soviet and now Russian scholars have exhibited a tendency to support broad, often very far-fetched claims to waters adjacent to the northern coast of the country, these often fanciful claims were rarely officially approved by the authori-

49. The Statute of the International Court of Justice, Article 38 (1) (b) <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

50. Limits in the Seas No. 112, «United States Responses to Excessive National Maritime Claims,» March 9, 1992: 11.

51. *Ibid.* 28.

52. Pharand, Donald. *Canada's Arctic Waters in International Law*, (Cambridge: Cambridge University Press, 1988):95.

53. See for example: Timtchenko, Leonid, «The Northern Sea Route: Russian Management and Jurisdiction Over Navigation in Arctic Seas.» Alex Oude Elferink and Donald Rothwell (eds.), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (The Hague: Kluwer Law International, 2001):269–291.

54. The Ministry of Economic Development and Trade has recently announced a call for scientific contribution to seek legal and historical justification for amendments regarding the baselines system in the Arctic. According to the newspaper *Izvestiya*, Russia is preparing to extend its borders, focusing more on straight baselines as a tool. See: Zhebit, Marija, *Rossija sobiraetsja uvelichit' territoriju*, <http://izvestia.ru/news/511452> (accessed July 10, 2012).

ties.⁵⁵ An example of these scholarly opinions offered is the broad interpretation of the 1926 Decree on Proclamation of Lands and Islands Located in the Northern Arctic Ocean as Territory of the USSR.⁵⁶ Under this interpretation, the Decree would have included icebergs and surrounding seas in the interpretation of lands and islands over which sovereignty was established. However, these extreme claims have given way to more recent, better-grounded views.⁵⁷

While Russian authorities have remained largely unresponsive to the work of scholarly critics, these same authorities have permitted the situation of legal ambiguity to persist. This was likely due to concern about lodging any straightforward claims which could then be exposed to immediate denunciation by the international community. At the same time this lack of clarity and formal minimalism permitted the Soviets, now Russians, to avoid confrontation and maintain *de facto* control over the NSR. Now with increasingly favourable navigational conditions and improved technological solutions, this arrangement is no longer tenable. Russia must work to provide a clear, and most crucially, legitimate position regarding the status of the NSR. As will be demonstrated in the following section, legislative proposals over recent years have grown out of differing assumptions relating to the perceived breadth of Russia's jurisdiction as an Arctic coastal state. In particular, the drafts published in 2006 and 2007 seemingly rely on additional legal bases beyond Art.234 alone, and only recently has there been wide acknowledgement that Russia should observe provisions of UNCLOS as a package deal, with no deviations permitted.

4. Recent Legislative Proposals

According to Vsevolod Peresypkin, preparation of new legislation regarding the NSR has been commenced through two largely parallel processes.⁵⁸ The first one related to drafting of an entirely new Federal Law on the NSR prepared by experts from the state scientific organization, the Council for the Study of Productive Forces of the Russian Academy of Sciences. While alternative texts have likely

55. Franckx, Erik. «Nature Protection in the Arctic: Recent Soviet legislation.» *International and Comparative Law Quarterly* 41(2) 1992: 371.

56. See for example: Butler, William E. *Northeast Arctic Passage*, (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978): 71–77.

57. Timtchenko, Leonid. «The Russian Arctic Sectoral Concept: Past and Present.» *Arctic* 50(1), 50 Years of Northern Science 1997: 29–35.

58. Peresypkin, Vyacheslav, «Natsional'noe dostojanie Rossii» 2010, (The National patrimony of Russia) http://www.morvesti.ru/analytics/index.php?ELEMENT_ID=7666&sphrase_id=328897.

been drafted, only two versions of that project were publically accessible, published in works of Vsevolod Peresypkin and Alexander Granberg;⁵⁹ and Ivan Bunik⁶⁰.

The second process, based upon the premise that it was not appropriate to overhaul existing legislation with a comprehensive and separate Federal Law on the NSR, was undertaken by the Ministry of Transport, and resulted in a promulgation of the new Federal Act introducing amendments to existing legal acts.⁶¹ One of the motivating reasons for taking such an approach must have been that it was easier to amend existing legislation than to adopt a full-fledged new bill. An additional reason for such decision may lie in the recognition that there is no legal foundation to consider the NSR as itself a self-contained legal notion. Consequently, the waters of the NSR would be seen merely as a geographically determined area, whereas the main objective of regulation would be control of commercial navigation. Such an approach would weaken the arguments of some Russian lawyers that the NSR, in contrast to the wider concept of the North-East Passage, is to be regulated solely by national rules.⁶² This analysis will not touch upon a number of private proposals which were announced with little publicity and have little chance of success, given the peculiarities of the Russian political scene.

4.1 The Law on the NSR – the Council for the Study of Productive Forces' Proposal

The two available texts of the draft Law on the NSR were published in 2006 and 2007 respectively. The draft published in a book edited by Alexander Granberg and Vsevolod Peresypkin was prepared by the working group under the guidance of Granberg and Arthur Chilingarov – a controversial but influential President's Envoy to the Arctic and Antarctic. The group included Vladimir Mikhailichenko, Genrikh Voitlovskii, Alexander Vylegzhanin, and Anatolii Kolodkin.⁶³ The aim of this draft was to realize the 2001 Maritime Doctrine. The authors of the project refer directly to Art.234 as providing the legal basis for Russia's jurisdiction. However, the definition of the NSR includes the historic formation factor, and like the language of the 1990 Regulations, explicitly leaves room for the application to the High Seas.

59. Granberg, Alexander; Peresypkin, Vsevolod (eds.) *Problemy Severnogo morskogo puti* (Problems of the Northern Sea Route). Moscow: Nauka 2006: 565–562.

60. *Supra* note 27, 170–179.

61. *Supra* note 6.

62. Mikhina, *supra* note 33, 185.

63. *Supra* note 58, 499.

Additionally, in this draft a special regime would be established to regulate the access of state vessels. These vessels would need to obtain special permission through diplomatic channels prior to entering the area. This was justified by the fact that the NSR had been historically formed and its seaways could be located within internal waters.⁶⁴ According to UNCLOS Art. 25, a Coastal State may establish special conditions of admission to internal waters. Nonetheless, as it is possible for a given ship while navigating along the seaways of the NSR to circumnavigate particular straits and avoid entering internal waters, the legal basis for falling under such regulation would likely be contested.

An item of interest is how the draft legislation addresses the wording of Art. 14 of the 1998 Federal Act on Territorial Sea given it includes an undefined reference to the Russian Arctic sector. Particular attention should be given to Art. 8 of the draft, where UNCLOS Art. 234 is repeated nearly word for word. The most notable difference is that the spatial limitation, «within the EEZ,» is replaced by «within the Arctic Sector.» Such a reference leaves some doubt with regards to what may be perceived as constituting the factual legal basis for the regulations. Not only would the spatial scope have been extended beyond 200 n.m. from the baselines, contrary to international law, but the sector principle is not recognized in international law. Irrespective of the view of the international legal community, the sectoral concept is still featured in Russian legal thinking.⁶⁵ However, as Art. 234, under current circumstances, is of overriding pertinence, continuous utilization of a drafting methodology of this type is simply another means of creating legal ambiguity. This is accomplished through the inclusion of certain clauses, which, though not illegal per se, could later be arguably interpreted in favour of the Russian Federation. This would become relevant in the event that Russia ever lodges specific far-reaching claims should certain measures not be allowed under Art. 234. Finally, it is important to note that the text of the proposal included no reference to the fundamental safeguards of Art. 234, such as the «due regard» clause, or reference to the support of best available scientific evidence.

A slightly different version of the above proposal may be found within Bunik's dissertation.⁶⁶ This proposal directly searches out the legal basis for the historically-grounded target environmental jurisdiction outside of UNCLOS. It provides the definition of the Arctic sector according to which Russia enjoys sovereignty over lands and islands, as well as sovereign rights and jurisdiction in areas around

64. Ibid.

65. *Supra* note 47, 28.

66. *Supra* note 27, 170–179.

those lands and islands. These rights in addition to several others are for the purpose of environmental protection, arguably in accordance with international law.

The definition of the NSR closely resembles the definition as provided in Granberg and Peresytkin's draft. However, in Bunik's proposal there is no explicit reference to Art. 234. *Lex specialis* to the normally applied regime of navigation is not seen only in Art. 234, but in historic title to functional environmental jurisdiction, logically linked to the existence of the Russian Arctic sector. Consequently the alleged jurisdiction would not be restricted by the specific limitations of UNCLOS. In his commentary Bunik acknowledges that it is in the national interest to provide favourable conditions for international navigation, while maintaining that foreign navigation must be exercised in accordance with Russian national legislation.

This short overview of the two versions of the proposed new legislation is intended to demonstrate the former line of thinking taken by Russian preparatory bodies. It is evident that this approach downplays the role of UNCLOS and Art. 234, despite the indisputable application of this article. Neither version of the draft legislation regarding the NSR is thought to have been evaluated by the State Duma, as any record of such a consideration would have already been archived.

4.2 The Ministry of Transport Initiative – Success at Last

The second process, undertaken by the Ministry of Transport, resulted in the promulgation of the new Federal Law on Amendments to Specific Legislative Acts of the Russian Federation Concerning the State Regulation of Merchant Shipping in the Water Area of the NSR. The official recognition of the significance of this initiative has been reflected in the fact that, while the Ministry was instrumental in the preparation of the text, it was the federal government which took the legislative initiative. The approach taken by the Ministry of Transport in preparing the legislation has been criticized, *inter alia*, for impairing Russia's national interest in the Arctic.⁶⁷ This slowed the drafting process, which was initially planned for completion by the end of 2011. Taking into account the controversies, in addition to the fact that the new law provides only a general framework within which sub-

67. Vitaly Kluev representing the position of the Ministry of Transport, for example during the Round Table *Severnnyiy morskoiy put' – magistral' strategicheskoiy vazhnosti*, March 23, 2012, see *infra* note 76; and the Parliamentary Hearings at the Council of Federation, April 24, 2012, see *infra* note 78, laid down the ministerial position featuring restrictive interpretation of the UNCLOS with only one exception being article 234. Vladimir Mikhailichenko, the executive director of the Non-commercial Partnership of the Coordination of the NSR Usages, on the former occasion, and Alexander Matveev, the chairman of the Council of Federation Subcommittee on the Northern Territories and Indigenous Peoples, on the latter, voiced dissent in their respective speeches.

sequent more specific rules and regulations must be developed, the internal debate preceding the establishment of this legislation will be analysed. This analysis will be performed using the official records, including the texts of five different drafts published on the Ministry of Transport website and the three versions of the draft submitted for the State Duma.⁶⁸ Such an approach allows for the new legislation be situated within the internal debate which occurred prior to its adoption. In addition, considering the process by which this legislation came about may provide some insight into actions Russia may choose to take in the future.

4.2.1 *The Rationale of the New Law*

The explanatory note states the overall purpose of the new act is to adopt measures to ensure maritime safety within the waters of the NSR.⁶⁹ Accordingly the proposed provisions are to bring the management of the NSR in line with the 2001 Maritime Doctrine. The administrative reforms conducted at different stages after the collapse of the Soviet Union contributed to the lack of clarity in the division of prerogatives between State and private subjects. Murmansk and Far East Shipping Companies have been privatized, nuclear icebreakers have been transferred under management of Rosatomflot, and the Administration of the NSR has been re-established with much-diminished authority.

It needs to be borne in mind that a combination of Russia's anxiety to effectively promote the use of the route and the new realities of a free market has resulted in a substantial rise in «icebreaker» fee rates, which has prompted companies such as Norilsk Nickel to develop their own ice-reinforced fleet. According to Peresypkin, the Russian government began to subsidize the nuclear icebreaking fleet in 2007, as evidenced by the level of state contribution rising threefold in the period between 2007 and 2011.⁷⁰ Following this significant capital investment, the rationale of current legal developments is to strengthen the position of Russian authorities in their ability to manage this highly important transportation system. However, as the essential elements of the current legislation were drafted during a period of state monopoly and a centrally-planned economy, they do not sufficiently address current challenges facing the NSR. Prior to specific measures regarding maritime safety and prevention and control of marine pollution being adopted, several fundamental issues required clarification. This clarification involved the legal status

68. See the previous drafts, published March 2010, July 2010, February 2011, April 2011, and June 2011 at <http://www.mintrans.ru/documents/>

69. For the official record of documentation submitted throughout the legislative process see: [http://asozd.duma.gov.ru/main.nsf/\(Spravka\)?OpenAgent&RN=608695-5](http://asozd.duma.gov.ru/main.nsf/(Spravka)?OpenAgent&RN=608695-5) (accessed September 12, 2012)

70. *Supra* note 57.

and the legal regime of the NSR, which consequently provides the adequate legal basis for any specific measure to be enacted.

The new law introduces amendments to the following legal acts: the Merchant Shipping Code of the Russian Federation, No. 147-FZ; the Federal Law No. 155-FZ «On the Internal Waters, the Territorial Sea and the Contiguous Zone of the Russian Federation;» and the Federal Law No. 147-FZ «On Natural Monopolies».

4.2.2 *The Legal Status/Definition*

As discussed above, one of the most fundamental issues and subject of numerous heated debates was the issue of the legal definition of the NSR. The final text stipulates in clause 2 that Art. 14 of the 1998 Federal Act on the Territorial Sea shall be amended to state:

Navigation in the water area of the NSR, historically formed national transport communication of the RF, shall be carried out in accordance with generally accepted principles and norms of international law, international treaties of the Russian Federation, this Federal law, other federal laws, and other regulatory acts issued in conformity with them.⁷¹

Most interestingly, all four proposals published by the Ministry of Transport between March 15th 2010 and April 14th 2011 emphasized the historic formation of the route and defined the NSR as a national asset. However, the draft introduced by the Government for evaluation by the Duma, and which was approved after the first reading, did not include such reference. Moreover, just days before the second reading, the text prepared by the working group under the State Duma Committee for Transport, which included several proposed amendments, was published along with charts listing specific amendments recommended for adoption, as well as a separate list of amendments which were recommended for rejection. Curiously, the amendment proposed by Alexander Matveev, the chairman of the Council of Federation Subcommittee on the Northern Territories and Indigenous Peoples, to include into the definition of the NSR the «historic formation» wording, was rejected. Instead, the NSR was to be defined simply as a water area, the navigation wherein was to be carried out primarily in accordance with the treaties of the Russian Federation. Surprisingly, probably just prior to the second reading, the text and the charts were simply substituted with a new version. This time, an almost identical amendment was proposed by Chilingarov, and the working group recommended this proposal for acceptance. The previous version was deleted from the Duma's website with no official record.

71. Translated by the author.

The inclusion of such a last-ditch effort is likely an indication that the proponents of the unilateralist/nationalist argument would not easily surrender their position. This is particularly astonishing considering the members of the working group, representatives of the Ministry of Transport, have persistently objected to such a definition in face of heavy opposition, recognizing the necessity of providing legal grounds to define the NSR as national and historically formed.⁷² This approach has previously been disapproved in several documents, including the Opinion of the State Duma Committee for Transport on the draft Federal Law,⁷³ the Opinion of the Expert Assembly of the National Association of Pilotage Organization,⁷⁴ and the Opinion of the Council of Federation Committee on Northern Affairs and Indigenous Peoples.⁷⁵ Furthermore, Mikhailichenko, the executive director of the Non-commercial Partnership of the Coordination of the NSR Usages,⁷⁶ had stated that the partnership was preparing an official letter to the Russian State Duma, indicating his group's support for the inclusion of the «historic formation» element.⁷⁷ Chilingarov has explicitly reiterated that the NSR needs to be defined as national, with respect to the effort made to develop the route and its particular significance for the country.⁷⁸ Similarly, Matveev, in his welcoming speech during the parliamentary hearings held in the Federal Council on April 24, 2012, remarked that while Russia has ratified UNCLOS, the effort made

72. For instance, see: *supra* note 66.

73. Zakljuchenye Komiteta Gosudarstvennoj Dumy po transportu po proektu federal'nogo zakona № 608695–5 (Opinion of the State Duma Committee for Transport on the draft Federal law), [http://asozd2.duma.gov.ru/main.nsf/\(ViewDoc\)?OpenAgent&work/dz.nsf/ByID&C9D4361FEA29F0D5C325794900455961](http://asozd2.duma.gov.ru/main.nsf/(ViewDoc)?OpenAgent&work/dz.nsf/ByID&C9D4361FEA29F0D5C325794900455961) (accessed November 7, 2012).

74. Zakljuchenye ekspertnogo soveta Nekommercheskogo partnerstva «Nacional'noe obyedinenie lozmanskikh organizacij» na proekt federal'nogo zakona № 608695–5 (Opinion of the Expert Assembly of the National Association of Pilotage Organization) <http://blog.pravo.ru/blog/expertise/3078.html> (accessed September 12, 2012).

75. Zakljuchenye Komiteta Soveta Federacii po delam Severa i malochislennykh narodov (Opinion of the Council of Federation Committee on Northern Affairs and Indigenous Peoples), <http://severcom.ru/activity/section5/doc340.html> (accessed September 12, 2012).

76. The partnership comprises federal and regional government officials, Russian shipping companies and international research institutions, for more information visit: <http://www.pame.is/index.php/amsa/on-focus/84-non-commercial-partnership-of-the-coordination-of-the-northern-sea-route-usages>.

77. The Round Table Severnyiy morskoiy put' – magistral' strategicheskoiy vazhnosti, March 23, 2012. The full coverage of the round table is at: http://ria.ru/press_video/20120328/608434075.html (accessed November 7, 2012).

78. Chilingarov's speech during the Conference: «Security and Cooperation in the Arctic – New Frontiers,» Murmansk, April 12, 2012. Press release with the citation is at: <http://nw.ria.ru/economy/20120412/82111824.html> (accessed November 7, 2012).

by Russia to develop the NSR must be taken into account. Therefore, as he pointed out it was unacceptable to change the legal status of the NSR to merely a water area, with navigation to be regulated primarily pursuant to international treaties of the Russian Federation.⁷⁹ On the contrary, the Deputy Director of State Policy for Maritime and River Transport of Russia, Vitalii Klyuev, has emphasized on several occasions that Russia may restrict the principle of the freedom of navigation solely on the basis of Art. 234.⁸⁰

Furthermore, the text introduced for the first reading highlighted the significance of international treaties, pursuant to which the navigation must be carried out. Only the most recent alternative placed «generally accepted principles and norms of international law» in the text before «international treaties.» It might be argued that this either brings the wording in concordance with Art. 15 of the Russian Constitution, or, perhaps also relevant here, leaves open the possibility to argue for an international custom in relation to the navigation in the NSR in case the application of UNCLOS for some reason becomes problematic.

In order to assess the significance of the internal debates related to the definition of the NSR, one must look to other provisions of the new Federal law. It is clear that the line of reasoning taken by the Ministry of Transport, supported by the Ministry of Foreign Affairs, was to fully recognize the overriding relevance of UNCLOS as a binding treaty. This position, which limited the breadth of national jurisdiction over the waters of the NSR, has now prevailed. The unusual incorporation of the «national clause» has had no repercussions on other provisions of the final text. This necessarily should lead to the conclusion that such insertion serves no other purpose than a symbolic one, an acknowledgment of the importance of the NSR in the Russian national psyche. At the same time, one must not ignore the presence of the nationalistic elements in Russian legal and political thinking, which succeeded in securing insertion of this wording into the final text of the Federal law.⁸¹

79. Matveev speech during the Parliamentary Hearings at the Council of Federation, April 24, 2012, transcript available at <http://www.council.gov.ru/events/parliament/item/195/>, (accessed November 7, 2012).

80. Ibid.

81. A closer look at the most recent commentary to this Federal Law, authored by Vitalii Klyuev, leaves nothing but sheer bewilderment. It is baffling to see how he contradicts his former position by including the continental shelf and high seas in the notion «the water area of the NSR.» Therefore it is probably best to refrain from any conclusion on this point. See: Klyuev, Vitalii, «Commentary on the Federal Law No 132-FZ of July 28, 2012.» *The Arctic Herald*, No 3, 2012, Moscow, p. 74; compare with *supra* notes 66 and 79.

4.2.3 Borders

An important new element of the recent law is establishment of NSR borders, previously only described in the 1990 Regulations.⁸² Thoughts had varied as to where the borderline should be and what body would be responsible for the decision. Interestingly, experts from the oldest and largest Russian polar research institute, the Arctic and Antarctic Research Institute (AARI), had examined ice conditions in the South-eastern segment of the Barents Sea and reached some conclusions. In their letter dated December 8th 2010, they stated that current ice coverage permitted the extension of the area of application of measures under Art. 234 westwards, as far as the Kanin Nos-Mys Kostin Nos line.⁸³ Should this recommendation be accepted, the spatial scope of application of any NSR navigational regulation would include the Pechora Sea, including its petroleum resources. As a matter of fact, the initial versions of the proposal featured such an extension. This idea, however, has been vigorously criticized by the representatives from companies planning exploration activities in the area.

When the new legislation was introduced for first reading in the Duma, as a result of persistent private business pressure, the text stipulated that the borders would have to be further determined by the Government. Later, probably due to the persistence of the lobby, it was decided to determine clear geographical coordinates and include them in clause 3 of the final text of the Federal law to satisfy the concerns of corporations seeking to operate in the eastern part of the Barents Sea. The effect of this decision was that the borders remained as had been previously described in the 1990 Regulations. However, these borders have now been fixed in Federal law. This small but critical side-issue demonstrates the power which private commercial entities now wield inside modern Russia.

Significantly, no attempts have been recorded to include clauses assuring the application of future regulation to areas beyond 200 n.m. from the baselines. There now appears to be general acceptance that it is unrealistic under international law to assert unilateral rights to regulate navigation throughout the whole of the Russian sector up to the North Pole.⁸⁴

82. ...the extreme points of which in the west are the western entrances to the Novaya Zemlya straits and the meridian running from Mys Zhelaniya northward, and in the east, in the Bering Strait, by the parallel 66N and the meridian 16858'37»W.»

83. Peresypkin, Vsevolod, «Razvitie Severnogo Morskogo Puti» (The development of the NSR) 2012, http://www.morvesti.ru/analytics/index.php?ELEMENT_ID=13995&sphrase_id=328917 (accessed September 12, 2012).

84. Although it is still sometimes voiced that Russia has an international legal duty to provide for regulations applicable to the high-latitude seaways partially located in the High Seas, see *supra* note 73.

4.2.4 *The NSR Administration*

The proposed establishment of the NSR Administration (NSRA) as a separate institution was welcomed with no particular controversy as the need to strengthen state control over northern navigation widely recognized in Russia. We can also anticipate that Russia will strictly manage the opening of the NSR for reasons of safety and security.⁸⁵ The revival of the NSRA is welcomed by commentators, who view this as a necessary step to address the increased interest displayed by the international community in using the NSR. The history of central management of the NSR is often evoked, in particular the 1964 liquidation of Glavsevmorput. This had been the main administrative body of the NSR, founded in 1932 and tasked with developing and administering the NSR. While the NSRA was revived in 1971, it is often believed that the lack of centralized management in the period between 1964 and 1971 at least partially contributed to an increased American presence in the Arctic waters during this period.⁸⁶

The core of the discussion concerned prospective functions of the NSRA, with two approaches generally being suggested. The first sought to establish the NSRA as a Federal state institution,⁸⁷ which, in addition to performing administrative functions, would also provide maritime services for which it would be entitled to collect tonnage dues. Alternative versions of the proposals featured various legal constructs defining those services. Such proposals included services on safety assurance of navigation, prevention of pollution from vessels, and pilotage of vessels through recommended routes. The most unusual proposal was the regulation of navigation on the seaways of the NSR, and a fundamental change was decided upon only between the first and the second readings in the State Duma.

According to Art. 3 of the final text, the NSRA is to be established as a Federal state public institution,⁸⁸ financed exclusively from Federal budgetary estimates. The NSRA will not regulate navigation or collect any dues, but will solely exercise administrative functions. These functions will include: receiving, reviewing and issuing permits for navigation in the NSR in accordance with clear and transparent standards to be developed pursuant to international treaties, national legislation, and the regulations for navigation in the NSR; monitoring of hydro-meteorolog-

85. Brigham, Lawson, «Russia Opens its Maritime Arctic,» *Proceedings Magazine* – May 2011 Vol. 137/5/1:299.

86. Mikhailichenko, Vladimir, *Perspektivy Razvitiya Severnogo Morskogo Puti* (The Prospects of the Northern Sea Route), *Teoriya i praktika morskoy deyatel'nosti 14* (elektronnoe izdaniye) (Theory and practice of maritime activity 14 (electronic edition)), (Moscow: SOPS 2007), http://www.morskayakollegiya.ru/publikacii/nauchnye_trudy/arhiv/14/reports/mich.pdf.

87. Federal'noe Gosudarstvennoe Uchrezhdenie.

88. Federal'noe Gosudarstvennoe Kazennoe Uchrezhdenie.

ical, navigational and ice conditions; coordinating of hydro-meteorological and informative services; and the provision of recommendations regarding navigation.

4.2.5 Fees

The costs of services, added to the already heavy expenditures related to activities in harsh northern conditions and remote areas, has often been singled out as a critical factor hindering significant interest in navigation along the NSR.⁸⁹ With the proposed legislation comes hope for long awaited development regarding «icebreaker» policy and related service rates. Prior to addressing the proposed amendments, a short review of the existing system is provided.

Most crucially, Art. 8.4 of the 1990 Regulations stipulates that payment for services rendered by the Marine Operations Headquarters and the Administration shall be collected in accordance with the duly established rates. The current rates are set by the 2011 Order on setting of rates for services of the icebreaker fleet on the NSR.⁹⁰ It is important to highlight the changes which this order has brought about. The rates established in 2005⁹¹ and amended in 2006 have now been determined as providing the maximum level to be charged.⁹² The new order allows for flexible rates to be collected at a maximum level or at a lower rate. The rates are still based on a paying potential, depending on the type of cargo carried, where a cargo of cars would be charged sixteen times more than a cargo of wood-related products. It is difficult to see the rational connection between the fee rate and the amount of service rendered or the risk imposed on the environment.

However, a key element of the discussion is the definition of what services are to be charged for, and whether it is possible to use the NSR without having to pay any fees. According to Art. 1.4 of the 1996 Regulations for Icebreaker and Pilot Guiding of Vessels through the NSR, 'guiding' means that a vessel is under constant control by either the West or East Marine Operations Headquarters, which may prescribe one of any five types of guiding. The latter may include shore-based,

89. See the statement of John Lyras in Ragner, Claes, Lykke, (ed.), *The 21st Century – Turning Point for the Northern Sea Route?* (Dordrecht/Boston/London: Kluwer Academic Publishers, 2000): 241.

90. Prikaz Federal'noj sluzhby po tarifam ot 7 ijunya 2011 g. № 122-t/1 g. Moskva (Federal Rates Service, Order of June 7, 2011 №122-t/1. Moscow), <http://www.rg.ru/2011/06/29/tarif-dok.html>.

91. Prikaz Federal'noj sluzhby po tarifam ot 26 ijulja 2005 g. №322-t g. Moskva (Federal Rates Service, Order of July 26, 2005 №322-t. Moscow), <http://www.garant.ru/products/ipo/prime/doc/6653698/>.

92. Prikaz Federal'noj sluzhby po tarifam ot 5 dekabrya 2006 g. №337-t/9 g. Moskva (Federal Rates Service, Order of December 5, 2006 №337-t/9. Moscow), <http://www.garant.ru/products/ipo/prime/doc/6653698/>.

aircraft, conventional, or icebreaker guiding; or icebreaker assisted pilotage.⁹³ Obligatory icebreaking assistance, unrelated to actual navigational conditions, is established in critical straits: Vilkitskii, Shokalskii, Laptev, and Sannikov.⁹⁴

Judicial practice reveals some ambiguity regarding the nature of the «ice-breaking» fee. On the one hand, the Federal Arbitration Court of the West Siberian District, in a decision dated November 8, 2010, argued that navigation of the NSR was not possible without some type of guiding. As a result, service fees were payable whether or not the services were actually rendered or necessary in any given situation.⁹⁵ Therefore, even when no icebreakers are physically deployed, ship owners are obliged to pay for the complex of services rendered by Marine Operations Headquarters (MOH). This could involve as much cost as shore-based instruction.⁹⁶

Alternatively, the Federal Arbitration Court of the North Western District, in its ruling dated June 16, 2008, stated that as the vessel Norilsk Nickel was technically capable of independent navigation in given conditions and did not order any assistance, the guidance service fees charged by the Murmansk Shipping Company were groundless.⁹⁷ A brief analysis of the judicial reasoning in these two different cases reveals that once a ship owner demonstrates that a given vessel is capable of independent navigation, they do not have to pay for unnecessary services. This position is not clearly expressed in the current legislation.

The final text of the recent Federal law establishes a new sphere of activities which are to be regulated by the Law on Natural Monopolies,⁹⁸ namely ice-breaking assistance and ice pilotage.⁹⁹ The charges for ice-breaking assistance and ice pilotage are to be determined in conformity with the legislation of the Russian

93. See 1.4 of the Regulations for Icebreaker and Pilot Guiding of Vessels through the NSR, http://www.arctic-lia.com/docs/nsr/legislation/Regulations_for_Icebreaker_and_Pilot_guiding_of_vessels.pdf

94. 1990 Regulations, Article 7(4).

95. Federal'nyj Arbitrazhnyh Sud Zapadno-Sibirskogo Okruga, Postanovlenie ot 8 nojabrja 2010 g. po delu N A70-14602/2009 (The Federal Arbitration Court of the West Siberian District, decision in Case between Reskom-Tyumen and Atomflot N A70-14602/2009) <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=AZS;n=88408> (accessed November 7, 2012).

96. *Supra* note 92.

97. Federal'nyj Arbitrazhnyh Sud Severo-Zapadnogo Okruga, Postanovlenie ot 16 ijunja 2008 g. po delu N A42-6288/2006 (The Federal Arbitration Court of the North Western District, decision in Case between Norilsk Nickel and Murmansk Shipping Company N A42-6288/2006) <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=ASZ;n=89639> (accessed November 7, 2012).

98. Federal'nyj zakon ot 17 avgusta 1995 g. N 147-FZ «O estestvennyh monopolijah» (Federal Law No. 147-FZ *On Natural Monopolies*, as amended), <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=131676>.

99. Clause 1 of the final text, see *supra* note 6.

Federation on natural monopolies, with regard to tonnage of the vessel, ice-class, distance of its pilotage, and navigational season. Of significance is clause 3 of the Federal law, which explicitly stipulates that fees for the assistance of an icebreaker and ice pilotage shall be correlated with the amount of service rendered.

This final version differs significantly from previous proposals, which assumed there was adequate legal basis for introducing a tonnage due to be paid by all users of the NSR. Several different approaches have been proposed; first, that the dues be levied for utilization of the NSR infrastructure, and more recently, that the fees be levied for ensuring safety at sea and pilotage in the NSR. The rationale behind those initiatives was to allow the administration to collect tonnage fees for the complex of services, however defined. Yet the clear obligation to levy charges only for specific services rendered, and not for passage itself, has left Russia in a difficult position, attempting to find adequate legal basis for obligatory fees to be collected all year round.¹⁰⁰ Article 234 allows significant leeway to the coastal state in establishing a robust environmental protection regime, though obligatory year-round icebreaking assistance cannot possibly pass the test of reasonableness and proportionality. This, together with significant pressure from the domestic shipping industry, has resulted in retraction of tonnage dues. It should be noted that specific rates for services have yet to be established. As long as the flexibility of the system appears to be in line with the international legal obligation to charge exclusively for services rendered, issues may still emerge related to the principle of non-discrimination. The transparency of the system can only be assessed once more detailed regulations are in place.

4.3 Recent Developments to Take Effect in Navigational Season 2012

Following the official policy of facilitating access to the NSR by foreign-flagged vessels, the Federal Marine and River Transport Agency on June 19, 2012 published a new document entitled «The Procedure of granting permission for the escorting of ships along the NSR.»¹⁰¹ This document expands upon existing 1990 Regulations and Regulations for Icebreaker and Pilot Guiding of Vessels through the NSR. The procedure for submission of applications for permission to navigate through the NSR has been revised. The most significant development is to be found in Clause I.1, which stipulates that ships proceeding towards the NSR without entering ports or internal waters of the Russian Federation need only send an application and

100. See UNCLOS, Art. 26.

101. See: http://www.morflot.ru/files/docslist/20120619103513-Procedure_of_granting_permission_for_the_escorting_of_ships_along_the_NSR.doc

declaration regarding the ship's readiness to navigate in the NSR no later than fifteen days before entering the area. This is a substantial change compared to the four-month period which had previously been stipulated, which also included the burdensome requirement of compulsory vessel physical examination in one of the Russian ports prior to voyage along the NSR. According to Clause I.2 the decision regarding the permit is now to be taken within ten days.

A slightly different regime, as set out in Clause II, applies to ships proceeding toward the NSR from inland waterways and seaports of the Russian Federation, as the latter must still undergo a survey carried out by a port master. Clause III allows ships navigating in ice-free areas of the NSR, or ships with an ice class rating which enables them to independently proceed along the NSR, will only need to follow the instructions of the Headquarters of Marine Operations stipulating a recommended route to a definite geographic point. Ice-breaking services will not be compulsory.

5. Conclusion

As the NSR becomes increasingly navigable, the Russian Federation has been pressed to clarify its position regarding its ability as a coastal state to adopt regulatory measures on foreign shipping. While the decisions are ultimately to be taken by its politicians, it is critical that Russia act in accordance with the international legal framework currently in place.

Most importantly, Russia is bound to abide by the provisions of UNCLOS. The legal regime of navigation in the NSR, although largely based on jurisdiction found under Art. 234, features deviations which cannot possibly be attributed to the ambiguous wording of this article. Admittedly, the regime has not been tested in practice due to constraints imposed by ice coverage and difficult geopolitical setting. Therefore, the scope of competence regarding control of the NSR assumed by Russia is difficult to evaluate.

The adoption of the new Federal law is a vital move forward, but it remains merely an initial step in the process of formation of a new national regime of navigation in the waters of the NSR. What remains to be accomplished is the adoption of a new set of regulations to substitute for the outdated regulations from 1990. Russia's implementation of international law often exhibits a particular degree of dissonance between the existing legislation and its implementation in practice.¹⁰²

102. See Blankenagel, Alexander, «Constitutionalism in Russia: Presentation and Reality.» *The Russian Socio-Legal Tradition Report*, (Oxford: Wolfson College, 2012): 15–16, for an excellent viewpoint on the peculiarity of Russian constitutionalism, orientated towards superficial appearance and neglecting substance in implementation of legislation.

Therefore, we will have to wait for the actual implementation of the new legislation in order to fully assess the effectiveness of the regime. There is a distinct possibility for the emergence of a transparent, non-discriminative and lawful legal regime. Such conclusion is based not only on a comparison of the elements of the new Federal law with elements of the current regime, but also on the observed tendency to tailor legal argumentation to take account of the modern international law of the sea. At the same time, the clear endorsement for the balance of interests found within UNCLOS, seen as providing an exhaustive legal framework for the allocation of jurisdiction in the Arctic waters, has faced some substantial criticism. The inclusion of the «national/historic» clause into the definition of the NSR at the last moment may lead to further ambiguity. However, the direction of recent legal developments and argumentation is a cause for optimism.

Several reasons may be identified for which Russia appears to have chosen such a path of non-confrontation and strong endorsement of international law. Whilst these reasons may easily form a subject for separate study, it seems appropriate to briefly address them here.

Firstly, the current path pursued by the authorities should not be seen as undermining Russia's national interests in the Arctic. If the overarching goal is to develop the Russian northern transportation system in order to assist the exploration of the natural resources on off-shore and on-shore sites, Russia should not hesitate to promote the utilization of the route, especially as cross-polar navigation is likely soon to become a viable option. Moreover, the availability of financial resources for the development of the marine infrastructure depends widely on the benefits to be gained in exchange for particular maritime services.

Secondly, the lack of compulsory ice-breaking assistance to some extent will be compensated by the obligation to carry documents of insurance, or other financial security of civil liability, against pollution or other damage caused by the vessel, as this will stand as one of the requirements for obtaining a permit to enter the NSR. Taking into consideration the increased cost of insurance premiums where no additional services are ordered, ship-owners may find it more economical to rely on services provided by the Russian Federation. In this respect, another aspect to be taken into account is the strict time pressures on the maritime shipping industry, which will likely view the assistance of ice-breakers as a more suitable and cost-effective option.

Finally, clear reliance on Art. 234, despite its inherent ambiguity, would be better received by the international community. As a result, this reliance would lend further legitimacy to the regime and will likely more easily secure compliance. Similarly, Canada has recently argued for the legitimacy of its unilateral manda-

tory NORDREG regulations by relying on Art. 234.¹⁰³ Despite the NORDREG's zone of application is broader than claimed internal waters, this might help to divert attention from the controversial internal waters claim, dually based on historic title and straight baselines.¹⁰⁴ The focus on Art. 234 as «an Arctic exception» may be implicitly welcomed by the US. As indicated by several commentators, the Americans are mostly concerned about the precedent-setting claims relating to freedom of navigation in straits.¹⁰⁵ Further reliance on Art. 234 might thus lead to some tacit compromise regarding northern navigation, postponing for the time being disputes related to the right of passage in waters enclosed by straight baselines and baselines themselves.

Once Russia adopts national legislation with few or no controversial elements, it should be easier to actively influence the harmonization processes with regards to regulation of Arctic shipping. For instance, the Russian proposal to supplement the Preamble of the Polar Code with a procedure of accounting for national rules and regulations established prior to the harmonized system, might be more easily accepted if said national rules exhibit little or no deviations from accepted principles.¹⁰⁶ On the whole, analysis of the new Law on the NSR permits us to conclude that a clear legal framework has indeed been set out in recognition of applicable international law. However, it is advisable to refrain from any final conclusions until more specific regulation is in place.¹⁰⁷

103. Northern Canada Vessel Traffic Services Zone Regulations (SOR/2010-127) (NORDREG), <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2010-127/>, mandatory as of July 1, 2010, see Art.4; for Canada's argumentation on interrelation of NORDREG and Art. 234 see: Canada, *Comments on Document MSC 88/11/2*, IMO Doc. MSC 88/11/3, October 5, 2010.

104. Dufresne, Robert, *Controversial Canadian Claims over Arctic Waters and Maritime Zones*, Parliamentary Information and Research Service, Library of Parliament, Ottawa, January 10, 2008, 2-5.

105. Brubaker, Douglas, *Environmental Protection of Arctic Waters – Specific Focus the Russian Northern Sea Route*. Doctoral Thesis, University of Stockholm, 2002, 306.

106. The Russian Federation, *Procedure of accounting for national regulations*, IMO Doc. DE 55/12/23, 1 February 2011.

107. Already after the present publication was completed the Ministry of Transport of the Russian Federation has adopted the Order of January 17, 2013, Moscow, № 7, *On the Adoption of the Regulations of Navigation in the Water Area of the Northern Sea Route*. The regulations, a cornerstone of a newly refurbished regime, set out transparent rules for, *inter alia*, icebreaker's assistance and ice pilotage; as well as they establish clear criteria for admission of ships, determined by the period and area of operation, ice-class and ice conditions. This recent enactment confirms the general conclusions of the present article.

Новые разработки в области регулирования судоходства по Северному морскому пути в РФ.

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Резюме: Правовой режим судоходства по Северному морскому пути до сих пор в некоторой степени основывается на законодательстве, принятом во времена Советского Союза, и проявляет определенные несоответствия в реализации международных прав и обязательств Российской Федерацией. За последнее время Российская Федерация проявила заинтересованность в усовершенствовании законодательства в сфере регулирования отношений, связанных с плаванием судов по СМП. Были рассмотрены два основных пути совершенствования: подготовка отдельного комплексного федерального закона о СМП и подготовка федерального закона, вносящего изменения в существующее законодательство. Второй вариант получил поддержку законодателей, так как новый федеральный закон о СМП от 28 июля 2012 года, № 132 ФЗ, установил рамки для принятия последующих подзаконных нормативных актов, регулирующих торговое мореплавание в акватории СМП.

Главной задачей данной статьи является обсуждение процессов, приведших к принятию долгожданного решения, а также значимость нового законодательства для регулирования СМП. «Креативная правовая неясность» российского национального законодательства исторически позволяла российским ученым иметь расхождения во мнении касаясь предполагаемой правовой основы для обширных полномочий Российской Федерации в области регулирования мореплавания по СМП а также связанных с ними ограничений. Существование альтернативных мнений дало основу для разработки разных законодательных проектов, и в результате оживленной дискуссии был принят новый закон. Автор данной статьи предпринимает попытку проследить развитие правового мышления в отношении оценки юридических полномочий, касающихся регулирования Россией судоходства по СМП.