

Article

Preliminary Issues on the Northern Sea Route under the Law of the Sea*

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Abstract

The Northern Sea Route (NSR) has recently attracted global attention due to the melting ice in the Arctic Ocean caused by climate change. However, a number of issues currently exist with regard to the NSR that ought to be resolved before it becomes frequently used. These issues include (1) its NSR's legal status in relation to Russia's state practice regarding jurisdiction and control under Article 234 of the United Nations Convention on the Law of the Sea (UNCLOS); (2) the relationships among basepoints and baselines of coastal states in this region, with its ice formations, under UNCLOS; and (3) the potential for the emergence of a local customary norm regarding ice formations in the Arctic region. This paper discusses Russia's state practice with respect to jurisdiction and control in order to clarify the fundamental elements of better future use of the NSR, and then goes on to consider whether the unique conditions in the Arctic region will give rise to any particular customary norm.

Key words: Arctic Ocean, Northern Sea Route (NSR), law of the sea, United Nations Convention on the Law of the Sea (UNCLOS)

Introduction

It has been reported that, due to recent climate change, there is a fairly strong possibility of using the Northern Sea Route (NSR) in the Arctic for commercial purposes in the future (O'Rourke; Østreng et al.; Ragner). However, there are certain preliminary issues with respect to the NSR that

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deserve consideration, particularly under the law of the sea. These preliminary issues are likely to attract considerable concern in the event of frequent and intensive use of the route (Skaridov).

This paper focuses on certain issues from the perspective of international law and the law of the sea. First, the law applicable in the NSR is presented. Following this, a number of important legal issues are discussed, including those related to Article 234 of the United Nations Convention on the Law of the Sea (UNCLOS) concerning Russia's jurisdiction over and control of the coastal state and the relationships of basepoints and baselines in ice-covered areas. Finally, concluding remarks are offered.

I. Arctic Coastal States and the Arctic Ocean

It is helpful to begin with a brief overview of the Arctic coastal states and the Arctic Ocean with special reference to Russia and its NSR. As a birds-eye map of the Arctic Ocean shows, the greater part of the NSR in the Arctic Ocean runs along the coast of Russia. As the main coastal state of the NSR, Russia exercises jurisdiction over ships navigating in Russian waters (Ikeshima 2016a, 124; Laruelle; Marchenko).

The coastal states of the Arctic Ocean are: Canada, Denmark/Greenland, Norway, Russia, and the United States, often called the 'Arctic Five'. The NSR runs mainly along the coast of Russia, but also along that of Norway (Ikeshima, 2016a, 119-120). One may even include the United States' coast in the NSR waters along the Behring Strait (Ashley Roach & Smith, 479-480) as a 'strategic "choke point"' mainly because of 'its proximity to major trading powers such as China Japan and South Korea' (U.S. Coast Guard, 5; Rothwell, 173). In addition, these three Asian countries have been given an observer status along with India, Italy, and Singapore in the Arctic Council (AC) since May 2013 (Ikeshima, 2014, 77; Ikeshima, 2015, 81; Ikeshima, 2016c). This fact shows how significant the NSR will be both inside and outside the AC in terms of Russia's geopolitical and economic position in the Arctic region (Ikeshima, 2016b).

As expressed in the 2008 Ilulissat Declaration,¹ the Arctic Five designate the law of the sea as a legal framework to which they are committed, providing a solid foundation for the responsible management of the area by these five coastal states and other users through the implementation and application of relevant provisions. Indeed, 'no need to develop a new comprehensive international legal regime to govern the Arctic Ocean' (Ilulissat Declaration, paragraph 4) has been identified.

II. Applicable Law in the Arctic Ocean

The question arises as to the law of the sea applicable in the Arctic Ocean. The law of the sea in this case comprises the following: (1) treaty law, such as UNCLOS, the International Convention

for the Safety of Life at Sea (SOLAS), and the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL 1973) as modified by the Protocol 1978 thereto (MARPOL 73/78); (2) customary law; (3) ‘soft law’ such as the guidelines of the International Maritime Organization (IMO); and (4) domestic laws and regulations of the coastal states of the Arctic Ocean (Østreng et al., 241-250).

As is often pointed out, the Arctic Ocean is an ice-covered sea, which cannot be equated to a standard maritime area, due to its geographic and climatic conditions (McDorman; de Mestral; Moore). Therefore, UNCLOS includes a single relevant provision specifically applicable to the Polar regions, both North and South. According to its drafting history, Article 234 of UNCLOS,² titled ‘Ice-covered areas’, was purposefully inserted in the Convention. It prescribes coastal states’ rights to control marine pollution from vessels in ice-covered areas within their exclusive economic zones (EEZs) with particular reference to severe climatic conditions and the presence of ice, which create obstructions or hazards to navigation. When exercising their jurisdiction, however, coastal states are required to pay ‘due regard to navigation and the protection of the marine environment based on the best available scientific evidence’. Therefore, the coastal states’ jurisdiction in the EEZ in ice-covered areas appears rather broad in terms of regulation and enforcement concerning marine environmental protection, although it is subject to the idea of ‘due regard’, without any clearly specified meaning of the term (Churchill & Lowe, 348; Moore, 21-22).

III. Russian State Practice³

Among the Russian maritime laws related to the NSR, the following two are noteworthy: (1) the 1998 Federal Law No. 155-FZ on Internal Sea Waters, Territorial Sea, and Contiguous Zone of the Russian Federation, which was amended by (2) the 2012 Federal Law No. 132-FZ Related to the Governmental Regulation of Merchant Shipping on the Water Area of the NSR. According to the 2012 Federal Law, the NSR is described as ‘a historically developed national transport communication of the Russian Federation’,⁴ in which navigation ‘is carried out according to generally recognized principles and norms of international law’ and Russia’s national legislation.

However, under the newly introduced provision of the 1999 Code of Commercial Navigation,⁵ the NSR comprises ‘a water area adjoining the northern coast of Russia, including its internal and territorial waters, contiguous zone, and EEZ’, with a geographical limitation in the east and the west. What might this difference in the prescription of the Russian legislation mean? One interpretation is that the NSR in Russia is considered not as a constant or fixed track line but as a water area (or plane) constituted by a bundle of lines (or multiple lanes) in the maritime area under Russian jurisdiction and control, as exercised by the Northern Sea Route Administration (NSRA) (Gavrilov, 257; Zhang et al., 142). The NSRA principally governs the operation of the route in the role of a competent domestic agent, granting permissions and receiving remuneration.

Since Russia has *de facto* absolute control over navigation through the NSR under the law of the sea, freedom of navigation in the Russian EEZ and the innocent passage through its territorial waters are, for example, restricted in practical terms in accordance with Russian legislation (Willy Østreng et al., 258-262). One may wonder why this is so in this region. Gavrilov and other authors justify Russia's control in terms of three factors: (1) the history of the development of the Russian NSR, the reflection of which is also visible in domestic legislation prescribing the NSR as 'internal waters'; (2) Arctic coastal states' rights and duties under Article 234 of UNCLOS; and (3) the fact that the integrity and indivisibility of the NSR requires the current treatment, which is based on the unique physical and natural conditions of the maritime areas in the Arctic Ocean (Gavrilov, 259-261; Skaridov, 284-292).

Russia's practice regarding its *de facto* absolute control over the NSR may also have been consolidated by other Arctic coastal states' practices against the background of similar natural conditions. Specifically, two examples share common features typical of the maritime area in the Arctic region, although neither has a direct geographical impact on the NSR *per se*. The first is the long-standing Norwegian practice of drawing straight baselines to demarcate the borders of its territorial sea along the fjord coasts and the *skjaergaard*. The use of the straight baseline system (Ashley Roach & Smith, 59-67) was endorsed by the 1951 judgment of the International Court of Justice (ICJ) in the *Anglo-Norwegian Fisheries* case (Churchill & Lowe, 33-35). The second example is that of Canadian legislation on environmental protection in its maritime areas in the Arctic region under the 1970 Act on Arctic Waters Pollution Prevention, which was amended in 1985, with a view to regulating its waters, which constitute the North West Passage (NWP), as if they were its internal waters (Ashley Roach & Smith, 318-328). Mutual agreement appears to have been reached to settle the conflict between Canada and the United States regarding the application and interpretation of domestic legislation, the latter nevertheless siding against this Canadian practice of 'internalizing' maritime areas for specific purposes.

Legally speaking, however, this 'prerogative' of the coastal states has in practice coexisted with their special responsibility in the region for purposes of their infrastructural management, communication technology, emergency response, search and rescue capability, environmental protection, and so on (Østreng et al., 221-223). Under UNCLOS, Russia has been continuously introducing higher navigation standards and requirements, as in the 1990 Rules of Navigation on the Lines of the NSR, which was subsequently replaced by the 2013 Rules of Navigation in the Water Area of the NSR.

Within this context of coastal states, including Russia, exercising exclusive jurisdiction and control over navigation in the NSR, a question arises regarding the legitimacy of the fee charged vessels navigating through the Russian NSR. Such a fee may be justified by the main cost elements, which include pilotage, maintenance of infrastructure, icebreaker support, and satellite communication (Østreng et al., 222).⁶ How then might the Russian NSR fee system be justified,

while no charge is, in principle, allowed ‘by reason only of the passage through the territorial sea’ under Article 26(1) of UNCLOS?⁷ Article 26(2) allows charges ‘as payment only for specific services rendered to the ship’ in a non-discriminate manner. In this regard, Article 221(1) of UNCLOS, related to environmental protection measures, may be interpreted in favour of this fee system only if enforcement measures taken beyond the territorial waters are proportionate to ‘the actual or threatened damage’ to the environment.⁸ However, the mere possibility of casualties in the region would not justify the fee system. This is because, under Article 26 of UNCLOS, the cost of installing and maintain navigational aids is normally borne ‘solely by the coastal state’ without demanding any contribution from ships sailing through its territorial sea (Churchill & Lowe, 95 & 271).

In effect, the question of whether or not the fee system is operated in a reasonable and non-discriminate manner depends on the relationship between the coastal and user states in terms of economic and market-oriented consideration. In the future, when the NSR becomes frequently used, the amount considered reasonable for this fee, in light of the return the navigating vessel will receive, will be judged on the basis of the balance between supply and demand with respect to the use of the NSR. Therefore, some commentators have observed that, under the 2013 Russian Rules, a transition may be taking place from mandatory icebreaker guiding to a permission-based system (Zhang Xia, et al., 142). It is at present impossible to predict how long this fee monopolization will continue. This is mainly because the feasibility of a transpolar route (O’rourke, 22-23; Østreng et al., 304 & 314), which traverses the centre of the Arctic Ocean, depends on whether or not the NSR will be established as the ‘third’ sea route, in addition to that passing through the Malacca Strait and Suez Canal and that passing through the Panama Canal. Ultimately, the system ought to function for the purposes of safe navigation and the effective protection of the Arctic marine environment against pollution from vessels.

IV. Possible Conflict between International Instruments

There are certain other cases of restrictive laws and regulations implemented in the Arctic region. Furthermore, certain domestic environmental laws may, for example, conflict with international agreements governing the same issue. Thus, the question arises as to the relationship between domestic and international law. Recently, the IMO adopted the International Code for Ships Operating in Polar Waters, or the Polar Code,⁹ in order to legally enforce more effective measures with respect to navigational safety and environmental protection in maritime areas in both the Arctic and the Antarctic Oceans. This legally binding instrument includes both mandatory measures and recommendatory provisions, both of which may be in conflict with the relevant provisions of UNCLOS.

One writer has raised the question as to which legal instrument prevails if a conflict arises between the Polar Code and UNCLOS (McDorman). In practice, it is difficult to judge whether an

Arctic coastal state is allowed to enact, under Article 234 of UNCLOS, a more restrictive statute law than the Polar Code. The state parties concerned ought to adjust and compromise between the two instruments, avoiding a contradiction, although some writes are of the opinion that it would take time for the Polar Code to become applicable to all ships likely to use the Arctic Ocean even after its entry into force (Ashley Roach & Smith, 487).

V. The Basepoints and Baselines in the Arctic Region

Moreover, the sea area of the NSR which is under Russia's jurisdiction and control is further complicated by climate change (Schofield & Sas). Coastlines and their geographical features tend to be subject to sea ice and the water tide in this maritime area. In the 1985 Decree on a comprehensive baseline system for its Arctic coast and islands, Russia therefore adopted a mixture of normal and straight baselines with the information of their coordinates. Along with its ratification of UNCLOS in 1997, and in accordance with the baselines fixed by the 1985 Decree,¹⁰ the 1998 Federal Act on the Internal Maritime Waters, Territorial Sea, and Contiguous Zone fixes the breadth of the territorial sea as twelve nautical miles, while the 1998 Federal Act on the Exclusive Economic Zone sets the breadth of the EEZ to 200 n.m.¹¹ In fact, some basepoints fixed by a series of relevant domestic laws have already lost their locations on the ice, such as on a glacier or ice cap, due to changes in the coastline and ice features, as well as the rise of the sea level.

The dynamic change in basepoints and baselines seriously affects the scope of national claims to maritime jurisdiction and enforcement activities, as is maintained by some scholars (Schofield & Sas). The improvement and updating of Arctic nautical charting is essential, along with future technological development and advanced hydrographic surveys. As the low-water line along the coast shifts and/or ambulates, it is difficult in the Arctic Ocean to fix all of the normal baselines usually drawn in accordance with Article 5 of UNCLOS. In addition, straight baselines may be employed 'restrictively' under certain conditions prescribed in Article 7 of UNCLOS,¹² as ascertained by the 2001 judgment of the ICJ in the *Qatar-Bahrain* case¹³.

VI. The Legal Status of Ice Formations

Considering some countries' state practice regarding the legal status of ice in the Arctic region, one may be tempted to ask whether or not the unique conditions of the Arctic Ocean will lead to an impetus to the emergence of a local customary norm in this region. Having examined state practice concerning basepoints and baselines, some scholars raise a similar question regarding the possibility of the emergence of regional customary international legislation for Arctic baselines (Schofield & Sas). As the treatment of ice formations in fixing basepoints has not been fully established, even among the five Arctic coastal states, it seems too early to suggest that state

practice regarding the legal status of ice in the Arctic Ocean will lead to the emergence of a regional customary norm.

The scope of the present paper precludes a thorough examination of state practice concerning basepoints and baselines, except but for Russia's state practice in the present context. The Russian Law of 29 May 1911 expressly includes ice formations in its delimitation. In this respect, Canada's similar 1985 practice in drawing straight baselines for ice formations, irrespective of protest from the United States, merits mentioning. Similar practices by Denmark, Norway, and Russia in using basepoints for ice formations has remained unchallenged (Schofield & Sas, 326-327). Does this mean that the international community has acquiesced to their practice? This question is rendered more complicated by the lack of international legislation on the status of sea ice. Under these circumstances, therefore, acquiescence cannot be assumed, especially as state practice regarding ice formations attracts the attention of very few states.

Conclusions

In conclusion, the following two points deserve mention. First, certain legal issues remain to be resolved in the present context. Although the NSR in Russia currently falls fully within that country's jurisdiction and responsibility for maintenance and development, this situation may be significantly influenced by currently undefined factors, such as the legal status of ice, the treatment of basepoints, and economic viability. One may ask what might happen if and when a trans-polar route becomes regularly navigable for frequent use by container ships. The as yet undefined legal status of ice formations would make the NSR less reliable and stable due to the ambulant and uncertain basepoints and baselines of Russia, in particular.

Second, the uniqueness of the Arctic Ocean, which depends heavily on natural conditions, such as climate change, means that more time is needed to address the question of whether or not a regional/local customary norm might emerge in the Arctic. This is because very few states have direct national interests in the Arctic region and the legal status of ice, either geographically or psychologically.

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Endnotes

1 The Ilulissat Declaration of 2008

‘[T]he law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims.’ (para. 3)

‘This framework provides a solid foundation for responsible management by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions. We therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.’ (para. 4)

2 Article 234 of UNCLOS reads:

‘Article 234 Ice-covered areas

Coastal states have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.’

3 For Russian official documents and legislation, see the website of the following: United Nations Division for Ocean Affairs and the Law of the Sea, at <<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/RUS.htm>> (accessed 20 July 2016); Northern Sea Route Administration at <http://www.nsr.ru/en/cei_funktsii/> (accessed 20 July 2016); Northern Sea Route Information Office at <http://www.arctic-lio.com/nsr_legislation/> (accessed 20 July 2016).

4 Article 2 of the 2012 Federal Law to amend Article 14 of the 1998 Federal Law, at the website of the Northern Sea Route Administration at <http://www.nsr.ru/en/zakon_o_smp/> (accessed 20 July 2016).

5 According to Article 5.1 newly inserted to the 1999 Code of Commercial Navigation of the Russian Federation, amended by the 2012 Law, the area of the NSR means ‘a water area adjoining the northern coast of the Russian Federation, including internal sea waters, territorial sea, contiguous zone and exclusive economic zone (EEZ) of the Russian Federation, and limited in the East by the line delimitating the sea areas with the United States of America and by the parallel of the Dezhnev Cape in the Bering Strait; in the West, by the meridian of the Cape Zhelanie to the Novaya Zemlya archipelago, by the east coastal line of the Novaya Zemlya archipelago and the western limits of the Matochkin Shar, Kara Gates, Yugorski Shar Straits’.

6 However, no such fee system is in place in the NWP. At the same time, it is not clear what the bill for such an operation as a rescue service given by the Joint Rescue Coordination Centers will amount to. See Østreng et al., p. 330.

7 Article 26 of UNCLOS reads:

Article 26 ‘Charges which may be levied upon foreign ships’

1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.
- 8 Article 221(1) of UNCLOS reads:
Art. 221 ‘Measures to avoid pollution arising from maritime casualties’
1. Nothing in this Part shall prejudice the right of States, ... , to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, ... , from pollution or threat of pollution ...
- 9 This is expected to enter into force on 1 January 2017. For the original text, see the website of the IMO at <<http://www.imo.org/en/MediaCentre/HotTopics/polar/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf>> (accessed 20 July 2016).
- 10 The Russian Federation ratified UNCLOS on 12 March 1997. See the UN official website at <[http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Russian Federation Upon ratification](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Russian%20Federation%20Upon%20Ratification)> (accessed 15 July 2016).
- 11 See the list of the Russian Federation’s legislation at <<http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/RUS.htm>> (accessed 15 July 2016).
- 12 Article 7 of UNCLOS lists up the following conditions:
(1) ‘deeply indented and cut into’ and ‘a fringe of islands’
(2) ‘highly unstable’ coastline ‘because of the presence of a delta and other natural conditions’
(3) ‘the general direction of the coast’ and ‘sufficiently closely linked’
(4) Exceptional case of low-tide elevations: the existence of lighthouses or similar installations with ‘general international recognition’
- 13 The 2001 judgment of the ICJ on straight baselines (*ICJ Report*, 2001, p. 67, para. 212) states, as follows:
‘The Court observes that the method of straight baselines which is an *exception* to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied *restrictively*. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity.’ (emphasis added)