The Northern Sea Route and the Law of the Sea: Some Legal Issues

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Outline

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- The law of the sea as applicable law in the NSR
- Some legal issues under the law of the sea
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  - Jurisdiction and responsibility of the coastal states
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The Northern Sea Route (NSR) in the Arctic Ocean

- The five Arctic Coastal States:
  - Canada, Denmark/Greenland, Norway, Russia, the United States
    - (Among these five, only the US is not yet a party to the UN Convention on the Law of the Sea (UNCLOS).)
- NSR: Russia, Norway, and others
The Arctic Ocean and the law of the sea

- 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)
The law of the Sea applicable in the Arctic Ocean

- Treaty law such as the UN Convention on the Law of the Sea (UNCLOS), SOLAS and MARPOL
- Customary law
- ‘Soft law’ such as the guidelines of the International Maritime Organization (IMO)
- Domestic laws and regulations (of coastal states)
Art. 234 of UNCLOS

‘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.’
Russian legislation on the definition of the NSR (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
- The 2012 Federal Law No. 132-FZ Related to the Governmental Regulation of Merchant Shipping on the Water Area of the NSR, which describes the NSR as

  - where navigation ‘is carried out according to generally recognized principles and norms of international law’ and Russia’s national legislation.
Russian legislation on the definition of the NSR (2)

- 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’ (Art. 5.1 newly inserted to the 1999 Code of Commercial Navigation of the Russian Federation, amended by the 2012 Law)
The NSR in Russia

- Not considered as a constant or fixed track line in the maritime area under Russian jurisdiction and control, but a water area (plane) constituted by a bundle of lines (multiple lanes) (M. Laruelle; Zhang et al.)
- The Northern Sea Route Administration (NSRA) principally exercises jurisdiction to govern the operation of the route as a competent domestic agent on a permissive and remuneration basis.
Russia’s control

- Navigation through the NSR under *de facto* absolute control of Russia:
  - Restriction of the freedom of navigation in Russian EEZ and of the innocent passage in its territorial sea
- Three *justifications* for Russia’s control (V.V. Gavrilov):
  - History: legislation (as ‘internal waters’)
  - Arctic coastal states’ special rights and duties (ex. Art. 234 of UNCLOS)
  - The integrity of the NSR: indivisibility (based on physical and natural conditions)
- Other coastal states’ practice:
  - Cf. Norwegian practice: the *Anglo-Norwegian Fisheries* judgment of 1951
  - Canadian legislation on environmental protection (the 1970 Act on Arctic Waters Pollution Prevention, amended in 1985)
Russia’s responsibility

- However, this ‘prerogative’ of the coastal states coexists with their special responsibility in the region for their infrastructural management, communication technologies, emergency responses, search and rescue capability, environmental protection, etc.

- Under UNCLOS, higher navigation standards and requirements have been prescribed in the 1990 Rules of Navigation on the Lines of the NSR, which was replaced by the 2013 Rules of Navigation in the Water Area of the NSR.
The fee system of the NSR justifiable? (1)

- The main cost elements include:
  - Pilotage, Maintenance of infrastructure, Icebreaker support, and Satellite communication
  - (Cf.) No fee system in the North West Passage

- Art. 26 of UNCLOS ‘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.

- Art. 221 of UNCLOS ‘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 ...
The fee system of the NSR justifiable? (2)

- In a **reasonable** and **non-discriminate** manner?
  - ‘Reasonableness’ depends on the relations between the coastal state and the user state.
    - The balance between supply and demand in the NSR: economic (market-based) consideration
    - Under the 2013 Rules, a transition taking place from mandatory icebreaker guiding to a permission-based order? (Zhang Xia, et al.)

- For the purposes of safe navigation and the protection of the Arctic marine environment against pollution from vessels

- Does this monopoly last forever?:
  - Feasibility of a trans-polar route as the third route
UNCLOS and the Polar Code

- The International Code for Ships Operating in Polar Waters (Polar Code) adopted by the IMO (expected to enter into force on 1 Jan. 2017)
  - The Polar Code and SOLAS/MARPOL amendments adopted in November 2014/May 2015, respectively.
  - Both mandatory measures and recommendatory provisions included.
- Which prevails if a conflict arises between the Polar Code and UNCLOS? (McDorman)
  - Is an Arctic coastal state allowed to enact, under Art. 234 of UNCLOS, a more restrictive statute law than the Polar Code?
Russian Coastlines and the LOSC

- The 1985 Decree on a comprehensive baseline system for its Arctic coast and islands:
  - a mixture of normal and straight baselines with information of the coordinates
- The 1998 Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone fixes the breadth of the territorial sea as 12 n.m., depending on the baselines fixed by the 1985 Decree
  - The Federal Act of the EEZ of 2 December 1998: set to 200 n.m.
- Some basepoints have already lost their location on the ice information such as a glacier and an ice cap due to the change of coasts and ice features plus sea level rise.
Basepoints and baselines

- They directly affect the scope of national claims to maritime jurisdiction and maritime enforcement activities. (Schofield & Sas)
  - The improvement and update of Arctic nautical charting is needed along with future technological developments and advanced hydrographic surveys.
- **Normal** baselines (Art. 5 of UNCLOS):
  - Since the low-water line along the coast shifts and/or ambulates, it is not easy to fix all of them in the Arctic Ocean.
- **Straight** baselines may be employed (Art. 7 of UNCLOS): but ‘restrictively’ (Qatar-Bahrain judgment of 2001)
  - ‘deeply indented and cut into’ and ‘a fringe of islands’ (para. 1);
  - ‘highly unstable’ coastline ‘because of the presence of a delta and other natural conditions’ (para. 2);
  - ‘the general direction of the coast’ and ‘sufficiently closely linked’ (para. 3)
  - Exceptional case of low-tide elevations: the existence of lighthouses or similar installations with ‘general international recognition’ (para. 4)
Practice of Arctic coastal states regarding the legal status of ice

- Any potential for a regional customary international legal rule for Arctic baselines to emerge? (Schofield & Sas)
  - The treatment of ice formations
- Russian Law of 29 May 1911 expressly includes ice formations in its delimitation law
  - Canada’s similar practice of 1985 on straight baselines, regardless of US protest
- Unchallenged practice of Denmark, Norway and Russia in using basepoints on ice formations:
  - Acquiesced? but
  - There is no international legal rule on sea ice.
Concluding remarks

• The NSR under Russia’s jurisdiction and control
  • Russia’s responsibility for the maintenance and development of the NSR
  • But what will happen when a trans-polar route becomes regularly navigable?
  • Undefined legal status of ice;
    • Ambulant and uncertain basepoints and baselines
• Any potential of the emergence of a regional/local customary norm?
  • The uniqueness of the Arctic Ocean dependent on natural conditions such as climate change
Selected references