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Russia's Coastal State Jurisdiction over the Arctic Northern Sea Route

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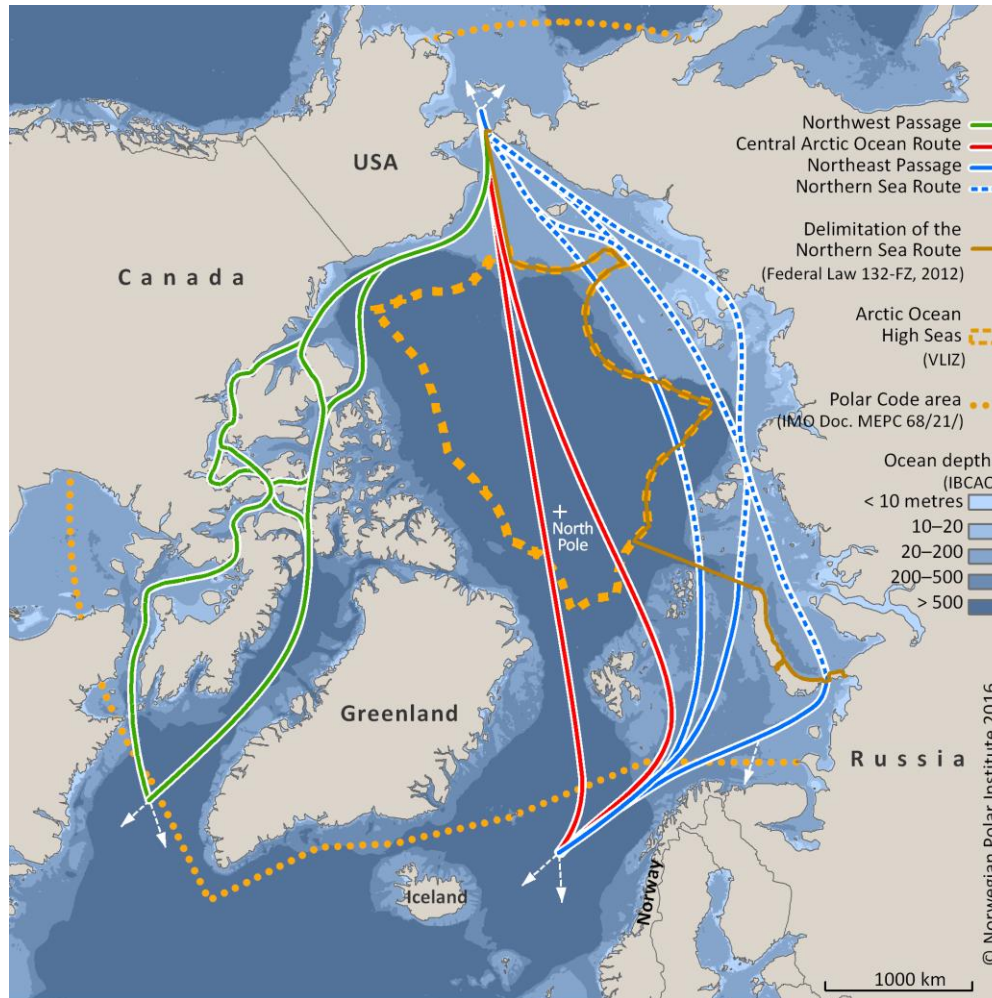


Outline of the presentation

- The context for shipping in the Arctic and the legal regime
- International legal framework and Article 234
- State practice of Russia and other States
 - Prior authorization
 - Notification and reporting
 - Icebreaker assistance and ice pilotage
 - Fees
 - Enforcement of non-compliance
- Concluding remarks

- Note the scope:
 - Geographically defined Northern Sea Route (not the Barents Sea or the Bering Strait)
 - Navigation of commercial ships (not State owned ships)
 - Coastal (not flag or port) State jurisdiction

Setting the stage



- Commercial opportunities including shipping
- Old legal disputes as background
- NSR historically developed for domestic reasons – now turning into “a key commercial route of global importance”
- A distinct legal regime for the NSR
- the law of the sea applies to oceans

International legal framework for the regulation of Arctic shipping

- The Law of the sea, primarily UNCLOS
 - Balance between the
 - coastal State rights and jurisdiction in maritime zones and
 - all States' rights and freedom of navigation
 - safeguarded by the IMO.
- Article 234
 - more extensive rights of a coastal State in ice-covered areas
 - no role of the IMO, instead “due regard” and science
- Polar Code and Article 234
 - *Nothing in this chapter shall prejudice the rights or obligations of States under international law (SOLAS 14/2)*
 - *Nothing in the present Convention shall prejudice ... the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction. (MARPOL 9(2))*

Article 234

Coastal States have the right to adopt and enforce **nondiscriminatory** laws and regulations for prevention, reduction, and control of marine pollution from vessels in **ice-covered areas within the limits of the EEZ, 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.**

The genesis of Article 234

- Canada's 1970 AWPPA
 - Canada's 'feeling' the NWP was Canadian waters
 - Oil found in Alaska made Americans send *Manhattan* to test the feasibility of oil transportation through the NWP 1969/1970
 - Canada's response: A brilliant idea to claim functional jurisdiction (not sovereignty yet) to enact anti-pollution measures
 - Within the Soviet Arctic a similar 'feeling' of exclusiveness (but rather in practice than in strictly legal terms)
- Canada's engagement in multilateral negotiations
- Good timing as UNCLOS III was about to start in 1973
- First, private *quid pro quo* deal between Canada and the USA (support for straits against support for AWPPA), later joined by the USSR who supported both sides
- Agreement between 3 States in May 1976, not objected by any other State

Spatial scope of Article 234 (1/4)

- **“within the limits of the exclusive economic zone (EEZ)”**
- Ordinary meaning of:
 - The EEZ is an area *beyond* and adjacent to the territorial sea (Article 55) and it “cannot extend beyond 200 nm from the baselines” (Article 57).
 - Limits: both inner and outer. Simple!
 - Simple conclusion: Article 234 applies only in the EEZ and not in the territorial sea, but does it make sense?
- What about:
 - The authority to adopt more stringent CDEM standards under Article 234 can be assumed (within purview of AWPPA and, reasonably, a necessity in the context of shipping through the ice)
 - Article 21(2) allows only international CDEM standards in the territorial sea
 - The logic of UNCLOS zonal approach, either no CDEM standards or larger authority in the EEZ than in the territorial sea

Negotiation history. Spatial scope of Article 234 (2/4)



Spatial scope of Article 234 (3/4)

- Ordinary meaning in the **context**
- Elsewhere in UNCLOS not full consistency regarding terminology describing spatial scope
- “Within the limits of (a maritime zone)” used also in Article 111(4) ; and Article 257 states that all States have a right to conduct MSR in the water column “beyond the limits of the exclusive economic zone”.
 - So should “within the limits of (a maritime zone)” in the context of UNCLOS be construed as to mean only outer limits? Possible argument.
- In practice the TS is surrounded by the EEZ (but not all of it ice-covered)
- State practice:
 - Canada and Russia
 - The USA and a number of States objected to Canada’s declaration upon MARPOL accession but now about the TS
 - Message from President Clinton transmitting UNCLOS to Congress

Spatial scope of Article 234 (4/4)

- “(...) 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 (...)”
- There has to be ice (generally) for more than 6 months and causation between present ice and hazards must exist
- But not all ice is equal, the dichotomy is much more complex than ice/no ice

Purpose of laws and regulations under Article 234

- For **prevention, reduction and control of marine pollution**
- What about maritime safety?
 - As long as a measure also is necessary for Article 234's purpose
 - Gradual convergence between safety and anti-pollution measures in the IMO
 - The Polar Code in the Preamble, and in fact in its whole design, recognizes the two come close together
- The same reasoning applies to CDEM standards
 - No outright prohibition in Article 234 and against common sense to exclude it altogether

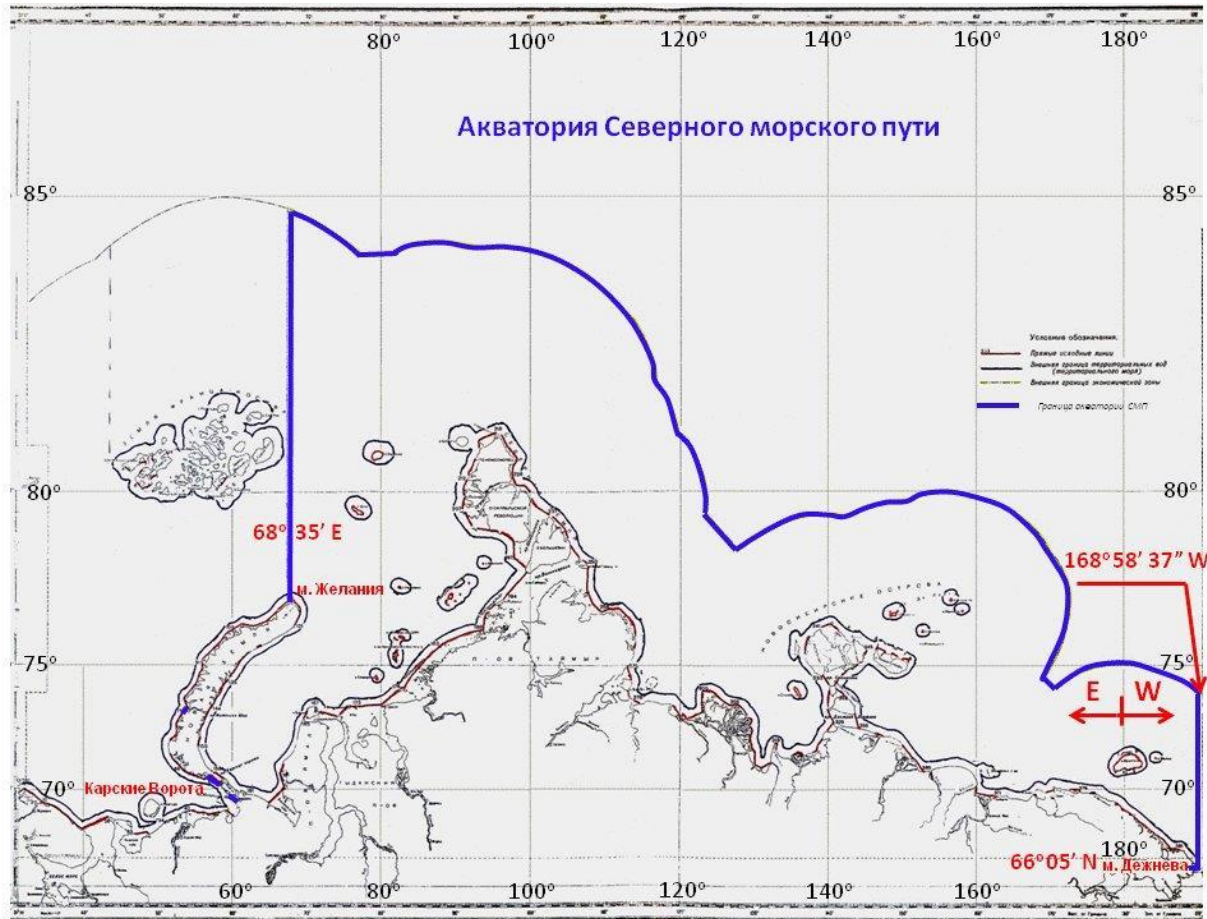
Limitations

- **Due regard** not for specific navigational rights but:
“navigation and the protection and preservation of the marine environment”
- qualified by best available scientific evidence
- Reasonableness and careful balancing between the two
- Due diligence in dealing with science, obtain state of the art scientific evidence by investments or cooperation
- Emulates the IMO, but without the necessity to convince everyone before the adoption of a measure (risks of principal objection)
- All about creating incentives, being open, transparent and reasonable

Russia's legislation

- Baselines and maritime zones
- 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, dated 28 July 2012, No. 132 FZ
- Rules of Navigation in the Water Area of the Northern Sea Route, approved by the order of the Ministry of Transport of Russia, dated 17 January 2013 № 7
 - 1990 Regulations revoked
- Still a very dynamic situation!

The NSR



International legal basis for the NSR legal regime

- Russian Constitution, the Federal Law on the NSR recognize:
 - the rules of an **international** treaty take primacy over inconsistent domestic law
 - navigation in the water area of the NSR shall be carried out according to generally recognised principles and norms of **international law**, international treaties of the Russian Federation, the present Federal Law, other federal laws and other normative legal acts issued in accordance to them.
- But what is the international law then?
- UNCLOS and Article 234
- The NSR as *historically developed national transport communication of the Russian Federation*

The requirement to obtain a permit

- 2013 Rules, Item 2, states: “In the water area of the Northern Sea Route the authorization-based order of the navigation of ships is in force.”
- Criteria for admission of ships to the NSR in according to the category of ice strengthening (**ice class**)
 - Period of the year
 - 7 zones
 - Current ice conditions 3 days forecast (H,M,L) (**suspended until they agree on new methodology**)
 - Category of ice strengthening (RS notations **but now also equivalent notations of foreign ice class**)
 - Icebreaker assistance

Category of ice strengthening of ship	Mode of ice navigation	Kara Sea						Laptev Sea						East-Siberian Sea						Chukchi Sea					
		south-west			north-east			west			east			south-west			north-east			H	M	L			
		H	M	L	H	M	L	H	M	L	H	M	L	H	M	L	H	M	L						
No ²⁾	Ind. ³⁾																								
	IA																								
Ice1	Ind.																								
	IA																								
Ice2	Ind.																								
	IA																								
Ice3	Ind.																								
	IA																								
Arc4	Ind																								
	IA																								
Arc5	Ind																								
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For ships without ice strengthening and with category of ice strengthening Ice1 – Ice3 navigation in the water area of the Northern Sea Route from November 16 to December 31 and from January to June is prohibited.

²⁾ Oil tankers, gas carriers, chemical carriers with a gross tonnage of 10 000 and over without ice strengthening can navigate in the water area of the NSR only in open water assisted by icebreaker during the period from July to November 15.

³⁾ For ships without ice strengthening it is allowed to independently navigate in the water area of the Northern Sea Route only in open water.

What's required from the applicant?

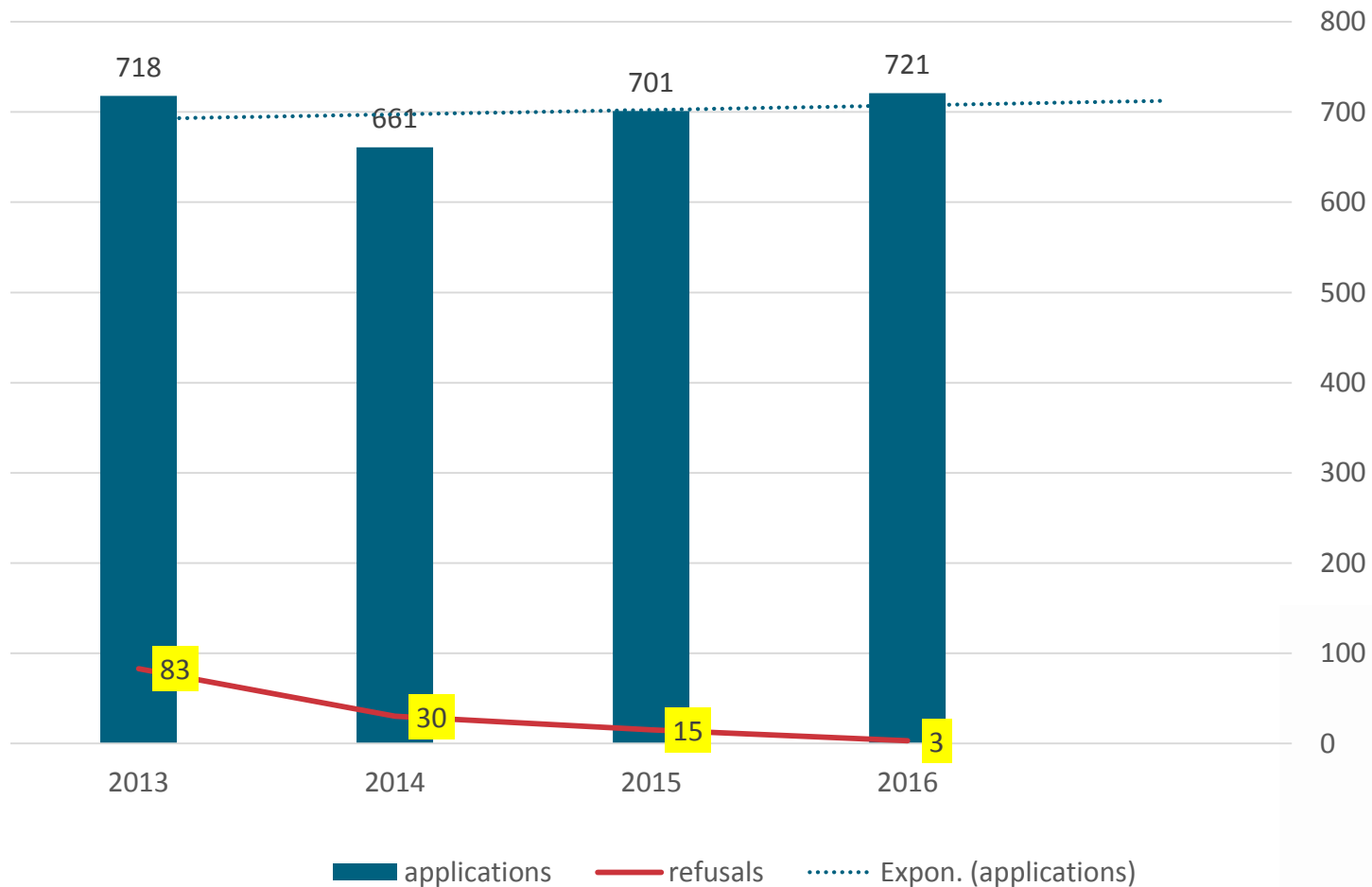
Submit the application 120-15 days prior to entry of the NSR

- 1) information about ship and voyage (2013 Rules in Annex № 1)
- 2) copy of the classification certificate (or an alternative for smaller boats);
- 3) copy of the tonnage certificate (or an alternative for smaller boats);
- 4) copies of documents certifying availability of the insurance of civil liability;
- 5) and 6) for the ship making one-time passage or towing—special approvals from the class society

Also 7) a copy of a Polar Ship Certificate, for ships to which Polar Code applies (an amendment pending final approval and registration)

ANSR has 2 days to put it on the website, 10 days to decide (refusal based on law).

The ratio of application refusals



Prior authorization under international law

A permit scheme is a veiled prior authorization—a controversial but not a new phenomenon.

Two ways of looking at it:

1. Not consistent with the rights and freedom of navigation if the presumption is 'no right unless ANSR grants it'
2. or possibly in line with Article 234 as
 - part of early enforcement/verification of compliance?

What if the practice is fully transparent, predictable and/or perhaps helpful for the purposes of risk assessment and insurance?

Notification and reporting obligations

- Essentially a SRS with detailed reporting obligations
- First notification already 72h prior to arrival to Western or Eastern Boundary (further West or East than the NSR boundaries)
- Daily reports
- Gathering and distribution of information – *useful* for maritime safety and environmental purposes (but necessary?)
- Legality of NORDREG (similar) was questioned by a number of States

Icebreaker assistance and ice pilotage

- A permit may be contingent on the employment of icebreakers (see criteria for admittance)
- Icebreaker assistance and ice pilotage as a natural monopoly
 - Only Russian flagged icebreakers
 - Specifically authorized organizations (Lukoil or Norilsk Nickel too)
- Ice pilotage dealt with in 2013 Rules, Items 31-41, but still not clear who determines if, where and when there is a duty to use ice pilotage

Fees

- A thorny issue within Russia, court cases, changed policy
- New principle for calculation of fees since 2013
 - Fees to be determined with due account of the tonnage of the vessel, its ice class, the distance of icebreaker assistance and/or ice pilotage and the period of navigation
 - In 2014 two Orders:
 - First specifies the methodology for the determination of the ice class, the distance of icebreaker assistance and ice pilotage, and the period of navigation
 - Second provides for **ceiling** for fees, expressed in monetary terms, but only for icebreaker assistance rendered by Atomflot
- Expected future refinement of the scheme (but turns out to be a complex issue, the Federal Antimonopoly Service is working on it)
- New amendment February 2017, the rules on fees also applicable to **Russian** State owned vessels
- Availability of discounts as discriminatory practice?

Non-compliance and enforcement

- The NSR mostly used by Russian vessels
- Russian vessels' non-compliance subject to 'remote monitoring principle'
 - administrative proceedings and monetary fines
- Foreign vessels generally comply with the rules (but it's changing)
 - But what happens if they do not? Not clear.
- 1990 Regulations included a special clause on expulsion, 2013 Rules do not address the issue.
- Revert to other more general laws.

Non-compliance and enforcement

- Foreign non-compliance after 2013
 - *Arctic Sunrise* (Netherlands); *Qingdao China* (Jersey, UK); *Bozdag* (Malta); *Ice Eagle* (Liberia); *Audax* (Curacao); *Dynamogracht* (Netherlands); *Pomor* (Liberia); *Normann* (Liberia); *Sleipner* (Saint Vincent and Grenadines)
- New competence of the Federal Security Service of Russia (FSB)
 - ‘security’ as the rationale behind the law expanding FSB competence

Different stories of noncompliance



Other States' responses to Russia's practice

- The US Diplomatic Note in 2015 reflects the same concerns as the one addressed to Canada in 2010
- Dutch concerns over the *Arctic Sunrise* (a note of protest?)
- NORDREG debate or other responses to Canada's practice
- Otherwise compliance (still very small scale):
 - Private actors
 - China COSCO, *Snow Dragon*, Guide to navigation published through official channels

Concluding remarks

- Who knows what is reasonable in light of best scientific evidence?
- Russia accepts international use but not necessarily international governance (Moe 2017). Is there a problem?
 - The policy is clear but the situation is dynamic
 - The role of the MoD, FSB and the Ministry of Transport, concentration of efforts
- General improvement in terms of transparency and consistency with international law, but still unclear:
 - predictable application of law
 - Enforcement
 - Effect of climate change on the legal regime
- The role of State practice, reactions of other States
 - Reasonableness, due regard and incentives to comply

Thank you!

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