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The Northern Sea Route: Problems of National Status Legitimization under International Law. Part II *

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Abstract. The second part of the paper shows that the regime of navigation in the Arctic, particularly on the NSR, defended by Russia today, is much more liberal than that which existed in the Soviet years: up to the Gorbachev's 1987 Murmansk speech the Soviet Arctic was a closed sea region for foreign navigation. Permissive order of passage established today at the level of Russian national legislation applies only to civil ships, and in the framework of the 1982 Convention, measures to protect the marine environment from pollution from ships cannot be applied to warships, military auxiliary ships, and ships on the state non-commercial service. However, the presence on the Northern Sea routes of water areas with the status of internal historical waters, including several Arctic straits, plus the special legal status of the Arctic, which is not limited exclusively to the 1982 Convention, allows Russia to insist on the applicability of the permit regime also to foreign warships. This approach is based mainly on the two states' practice with the longest coastline in the Arctic: the USSR and Canada. Navigation along the NSR in today's ice conditions is not yet possible without passing through the waters of the Russian Arctic Straits, whose waters are classified by the USSR as internal on historical legal grounds. Although under the 1982 Convention, they can be conditionally regarded as international, the lack of permanent transit through them makes it possible not to recognize them as such. However, the Russian Federation's task to turn the NSR into an international shipping route may lead to a weakening of the current legal position. A similar situation may arise concerning the enforcement of Article 234 "Ice Covered Areas" of the 1982 Convention, which gives the Arctic countries additional rights in the field of navigation control. Lack of ice cover in the Arctic during most of the year can significantly strengthen the position of Russia's opponents, who insist on a too broad interpretation of this article on our part. Finally, climatic changes may lead to the NSR becoming more latitudinal, and then the Russian Federation will lose any legal grounds to regulate navigation.
Keywords: *Northern Sea Route, Arctic, USA, UN Convention on the Law of the Sea 1982, international straits, right of innocent passage, right of transit passage, inland waters, historical legal grounds, freedom of navigation, national legislation.*

Permissive or notification order of passage?

As noted above, from the point of view of the norms and provisions of the 1982 Convention, the introduction of a permitting procedure for passage through certain water areas, with the exception of the inland waters of a coastal state, although practiced by a number of countries, is still a direct violation of the convention norms. If to consider the legal regime of the NSR and the Arctic as a whole exclusively as falling under the norms and provisions of the 1982 UN Convention on the Law of the Sea, then the Russian Federation, of course, very broadly interprets its powers granted by Article 234 "Ice-Covered Areas". In relations with the United States, for example, as with the main opponent of our country in the dispute over the legal status of the NSR, the Joint

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Statement on the Unified Interpretation of the Norms of International Law Governing the Peaceful Passage of 1989 has not disappeared and continues to operate. And Russia, as the legal successor of the USSR, must directly follow these agreements.

However, it is not entirely correct to reduce all international maritime law exclusively to one Convention, namely, the 1982 UN Convention on the Law of the Sea, even though it claims to be universal, comprehensive. International custom continues to be the main source of international law. Position of a number of foreign researchers, according to which "the Arctic is governed by the rules of general international law, the main source of which for maritime spaces is the 1982 UN Convention on the Law of the Sea" [1, S. Guanmyao], is not entirely correct.

The legal status of the Arctic Ocean was formed long before the adoption of the 1982 Convention with the prevailing role of customary legal norms, historical legal foundations, legal practice of Russia and Canada as states with the longest Arctic coast [2, Vylegzhanin A.N.] It is also necessary to take into account that during the III UN Conference on the Law of the Sea (1973–1982), during which the text of the 1982 Convention was developed, the Arctic issues were practically not discussed, since other countries expressed their tacit agreement with the fact that the practice and national legislation of the Arctic states are the basis of the legal regime of this polar region. Within the informal group of five Arctic states, which functioned confidentially, it was agreed that all issues related to the Arctic should not be the subject of consideration of the Conference [3, Vylegzhanin A.N., p. 27]. It was also tacitly agreed that the applicability of the Antarctic model and the concept of the Common Heritage of Mankind (CHM) to the Arctic is unacceptable for the Arctic countries. Moreover, the legal regime of the Arctic was viewed as not fully identified with the regimes established by this Convention in relation to other non-freezing seas. Accordingly, the key conclusion, which is often overlooked, is that:

"There is no convincing evidence that at the III UN Conference on the Law of the Sea, the agreed will of the five Arctic states was that the high-latitude Arctic should become the subject of a future Convention on the Law of the Sea. On the contrary, there is evidence that the understanding of these states was different: both polar regions — the Arctic and Antarctic — were delicately excluded from special consideration at the Conference; thus, they were not considered as objects of the 1982 UN Convention on the Law of the Sea, and on quite logical, convincing grounds: both Antarctica and the Arctic already had their own specific legal status for each of these regions (only contractual — in the first case; also usually legal — in the second)"[3, Vylegzhanin A.N., p. 29].

On the basis of the position presented above and taking into account the practice that has developed for decades and the tacit agreement with this practice of other states (albeit with the exception of the United States), the Russian Federation can undoubtedly continue to insist on the applicability of the permitting procedure for passage through all waters of the NSR, including the

territorial sea and the exclusive economic zone, as well as the need to pay for icebreaker and pilotage.

It should be assumed that the current regime of navigation on the NSR is already quite liberalized compared to the Soviet years: until the beginning of Gorbachev's perestroika, it was actually closed for international shipping.

For the first time the idea of its opening for foreign transit was announced back in 1967 by the Minister of the USSR Maritime Fleet Bakaev V.G., but on the assumption of payment of mandatory icebreaking and pilotage [4, Franckx E.]. This Soviet proposal did not find a response from foreign shipping companies, primarily due to the short time span of navigation along the NSR. In 1987 Gorbachev M.S., in his speech in Murmansk, announced once again our country's interest in admitting foreign shipping companies to the NSR in order to profit from the operation of this transport route. It was true that a number of conditions had to be met, namely, the use of compulsory icebreaker and pilotage, as well as the compliance of ships with special ice requirements.

As a result, the permitting procedure for passage along the NSR is consolidated at the level of Russian national legislation now[1]. However, it applies exclusively to civil ships engaged in commercial transport. As for warships, military auxiliary vessels and ships owned by the state and being in state non-commercial service, it can be rightly assumed that the authorization procedure is fixed at the level of the Soviet and then the Russian legal doctrine[2]. The absence of any attempts to pass warships of foreign states along the NSR for many years can be considered direct evidence that the shipping regime defended by Russia did not raise any fundamental objections from either of sides.

However, in September 2018, the auxiliary vessel of the French Navy "RHONE" (A603 RHONE) passed from the Norwegian Tromsø to the Bering Strait through the NSR[3], without requesting any permission to pass from the Russian side (according to published information), including passing through the strait Vilkitskiy Archipelago Severnaya Zemlya[4], the water area of which is considered by our country as internal waters, the passage through which cannot be carried out without official consent. For some unknown reason, the Russian Ministry of Foreign Affairs did not issue any note of diplomatic protest, and the reaction came only from the Russian Ministry of Defense: the head of the National Center for Defense Management of the Russian

[1] Prikaz Ministerstva transporta Rossiyskoy Federatsii ot 17 yanvarya 2013 g. № 7 g. Moskva «Ob utverzhdenii Pravil plavaniya v akvatorii Severnogo morskogo puti» [Order of the Ministry of Transport of the Russian Federation of January 17, 2013 No. 7, Moscow "On approval of the Navigation Rules in the water area of the Northern Sea Route"]. URL: https://rg.ru/2013/04/19/pravila-dok.html (accessed 15 May 2020).

[2] Works and scientific views of the most qualified specialists in the field of international, in particular — maritime law.

[3] Flot NATO vorvalsya v Russkuyu Arktiku [The NATO fleet has broken into the Russian Arctic]. URL: http://nvo.ng.ru/realty/2018-10-04/100_181004flot.html (accessed 12 April 2020).

[4] French Navy. Marine Nationale Loire-class BSAH Rhône (MMSI:227998200) #A603 is departing #CFBEsquimalt, after arriving 2018-09-26 having taken the Northern Sea Route to get there. URL: https://twitter.com/steffanwatkins/status/1046844965190586373?s=20 (accessed 20 April 2020).

Federation, Colonel-General Mizintsev M. said that from now on, passage for these categories of ships/vessels would be allowed only after notifications of the Russian authorities about the purposes and route of navigation [5]. In particular, the following was said:

"In order to eliminate the legal vacuum in terms of the use of the Northern Sea Route, interdepartmental work has been organized to improve Russian legislation, the result of which will be the notification character of the navigation of foreign warships. The work will be completed by the beginning of navigation in 2019" [6].

For this purpose, the Ministry of Defense of Russia prepared amendments to the Decree of the Government of the Russian Federation of 02.10.1999 No. 1102 "On the Rules of Navigation and Stay of Foreign Warships and Other State Vessels Operated for Non-Commercial Purposes in the Territorial Sea, in Internal Sea Waters, in the Naval Bases, the Basing Points of Warships and Seaports of the Russian Federation". They provided for:

- the need for the flag state to submit a notification via diplomatic channels about the planned passage through the territorial sea of the Russian Federation in the water area of the NSR no later than 45 days before the expected date of its start;
- compulsory ice pilotage in the territorial sea and inland sea waters in the water area of the NSR;
- compulsory icebreaker assistance in the territorial sea and inland sea waters in the water area of the NSR, if necessary, due to ice conditions and receiving appropriate recommendations [7].

The following main reason was identified as the rationale for such innovations. So, within the framework of art. 234 of the 1982 Convention "The Russian Federation, in the Navigation Rules for the NSR, has established a permissive procedure for ships navigating along the NSR with compulsory ice pilotage and icebreaker (if necessary, caused by ice conditions) escort, which allows ensuring the safety of merchant shipping in the NSR water area. However, "in accordance with the provisions of art. 236 of the UN Convention, the NSR Rules do not apply to foreign warships and government vessels operated for non-commercial purposes (hereinafter — ships and

[5] Rossiya zakryvaet Sevmorput'. Moskva reshila uzhestochit' pravila pol'zovaniya svoey strategicheskoy vodnoy magistral'yu [Russia closes the Northern Sea Route. Moscow has decided to tighten the rules for using its strategic waterway]. URL: http://nvo.ng.ru/nvo/2018-12-14/2_1026_sea.html (accessed 20 April 2020).

[6] S 2019 goda voennye korabli smogut khodit' po Sevmorputi tol'ko uvedomiv RF [From 2019, warships will be able to navigate the Northern Sea Route only by notifying the Russian Federation]. URL: https://www.interfax.ru/russia/640154 (accessed 20 April 2020).

[7] Poyasnitel'naya Zapiska k proektu postanovleniya Pravitel'stva Rossiyskoy Federatsii «O vnesenii izmeneniy v pravila plavaniya i prebyvaniya inostrannykh voennykh korabley i drugikh gosudarstvennykh sudov, ekspluatiruemykh v nekommercheskikh tselyakh, v territorial'nom more, vo vnutrennikh morskikh vodakh, na voenno-morskikh bazakh, v punktakh bazirovaniya voennykh korabley i morskikh portakh Rossiyskoy Federatsii» [Explanatory Note to the Draft Decree of the Government of the Russian Federation "On Amending the Rules of Navigation and Staying of Foreign Warships and Other State Vessels Operated for Non-Commercial Purposes in the Territorial Sea, in Internal Sea Waters, at Naval Bases, at Basis military ships and seaports of the Russian Federation"]. URL: https://regulation.gov.ru/projects#npa=89000 (accessed 20 April 2020).

vessels), which is due to their sovereign immunity. The Russian legislation also does not take into account the peculiarities of the navigation of foreign ships and vessels in the water area of the NSR through areas located in the territorial sea and internal sea waters of the Russian Federation. At the same time, Russian warships and vessels must use the services of ice pilots and tugs when sailing along the entire length of the NSR" [8].

When analyzing these proposals, it may seem that the Russian Federation has decided to ignore the provisions of art. 236, to refuse to recognize the immunity of foreign warships, to restrict the right of innocent passage through their territorial sea, thereby revising the Soviet-American agreements of 1989 [9]. Thus, Russia unilaterally increases the level of tension in the Arctic, and can provoke the holding of certain events within the framework of the American Freedom of Navigation (FON) program.

From our point of view, another interpretation can be admitted.

On the one hand, the introduction of a notification procedure for navigation on the NSR for warships of foreign states is an unconditional liberalization of the regime, which has been formed for decades and was of a permissive nature, although it is not enshrined in national legislation. The fact that Russia is prepared to take this path, rather than return to closing its part of the Arctic for military navigation, may be seen as a sign of good intentions and not as an attempt to demonstrate additional control.

On the other hand, the introduction of a notification procedure for warships and ships in government non-profit service is not just a departure from previous practice, enshrined, first of all, at the level of the doctrine of law. This is the actual recognition of the extension of the internal historical waters status to a number of water areas of the NSR (primarily, the Arctic straits) by establishing direct baselines within the framework of the 1984–1985 Soviet government decrees is not completely illegitimate. Let us remind you once again: passage through the internal waters of a coastal state can be exclusively permissive.

The 1982 Convention, however, contains art. 8 (2), which states: "When the establishment of a straight baseline in accordance with the method provided for in Article 7 results in the inclusion of areas in internal waters which were not previously considered as such, the right of innocent passage provided for in this Convention shall be applied in such waters". Based on the meaning of this article, the controversial nature of classifying the waters of the Arctic straits as internal by overlapping them with a system of straight baselines indicates that the right of innocent passage should be applicable to these waters, which has long been insisted on by foreign experts [5, Franckx E., p. 270–271].

[8] Ibid.

[9] Todorov A.A. Kuda vedet Severnyy morskoy put'? [Todorov A.A. Where does the Northern Sea Route lead?]. URL: https://russiancouncil.ru/analytics-and-comments/analytics/kuda-vedet-severnyy-morskoy-put/?sphrase_id=35780334 (accessed 12 April 2020).

Paradoxically, but in the draft resolution of the Government of the Russian Federation "On the Rules of Navigation and Stay of Foreign Warships and Other State Vessels Operated for Non-Commercial Purposes in the Territorial Sea, in Internal Sea Waters, in the Naval Bases, the Basing Points of Warships and Seaports of the Russian Federation" contains exactly this provision:

"The provisions of paragraphs 28.1.–28.5. of these Rules shall also apply to innocent passage through the internal sea waters of the Russian Federation in the water area of the Northern Sea Route, which, prior to establishing a straight baseline in accordance with the method provided for in Article 7 of the United Nations Convention on the Law of the Sea of December 10, 1982, were not considered as such" [10].

The contradiction of this situation is that, on the one hand, we reject the approach that a number of Arctic waters were classified as internal waters on historical grounds, and are ready to recognize the extension of the right of innocent passage to them, as required 1982 Convention. On the other hand, we reinforce the notifying nature of innocent passage through the territorial sea and inland waters, which had not previously been considered as such, which very conditionally correlates with both the norms of the 1982 Convention itself and the provisions of the Soviet-American the 1989 Agreement. This raises a reasonable question: was the correct approach chosen initially?

From our point of view, there is no need to downgrade the legal status that was assigned to a number of Arctic waters, primarily the straits, both at the level of Soviet national legislation and legal doctrine. They should be consistently considered as internal historical waters, the passage through which can be exclusively permissive. Moreover, the rejection of this regime and its replacement by a notification procedure for warships, the application of the right of innocent passage through internal waters within the framework of art. 8 (2) of the 1982 Convention may erode the legal status of the NSR as a whole. It is the presence of water areas under full state sovereignty with a permissive procedure for entering them that allows Russia to adhere to a *single* (highlighted by me — G.P.) mode of navigation on the NSR, despite the fact that it passes through sea spaces with completely different legal status.

Functional and geographic criteria for assessing the legal status of straits

As noted above, the position of the Soviet leadership on the unique legal status of the NSR was based, among other things, on the appeal to the fact that it had never been used for interna-

[10] Poyasnitel'naya Zapiska k proektu postanovleniya Pravitel'stva Rossiyskoy Federatsii «O vnesenii izmeneniy v pravila plavaniya i prebyvaniya inostrannykh voennykh korabley i drugikh gosudarstvennykh sudov, ekspluatiruemykh v nekommercheskikh tselyakh, v territorial'nom more, vo vnutrennikh morskikh vodakh, na voenno-morskikh bazakh, v punktakh bazirovaniya voennykh korabley i morskikh portakh Rossiyskoy Federatsii» [Explanatory Note to the Draft Decree of the Government of the Russian Federation "On Amending the Rules of Navigation and Staying of Foreign Warships and Other State Vessels Operated for Non-Commercial Purposes in the Territorial Sea, in Internal Sea Waters, at Naval Bases, at Basis military ships and seaports of the Russian Federation"]. URL: https://regulation.gov.ru/projects#npa=89000 (accessed 20 April 2020).

tional shipping before, and, accordingly, part of the Arctic straits cannot be recognized as international with the right of transit passage.

The position of the United States on this issue is diametrically opposed: they consider that the main criterion for classifying the strait as international is its geographical position only (the connection of one part of the high seas or EEZ with another part of the high seas or EEZ). Moreover, the United States insists that the functional characteristics of the strait should not be limited to only one criterion — it was or wasn't used for international shipping, but should be supplemented with a new one — whether it can potentially be used for international shipping or not [6, Brubaker D.R., p. 267].

The US position, though not illogical, suffers from a certain one-sidedness. In particular, they completely ignore the conclusions of the UN International Court of Justice in the Corfu Strait case (Great Britain vs Albania, 1949), in which the geographical and functional criteria were taken into account as absolutely equivalent. Moreover, the two-part test for assessing the legal status of the strait is supposed to be considered as an established rule of customary law. The rejection of this by the United States is all the more surprising in light of the fact that Americans continue to insist that the entire 1982 Convention is a codification of customary law, and in various kinds of maritime disputes, Washington, more than ever before, appeals to customary law [7, Steinberg P.].

According to some experts, the wording of art. 37 Section II "Transit Passage" of the 1982 Convention – "This Section *applies to straits used for international navigation* (highlighted by me — G.P.) between one part of the high seas or exclusive economic zone and another part of the high seas or exclusive economic zones"— indicates that it deals exclusively with the current, not potential (!), use of the strait.

Today, at the level of the doctrine of law, there is no clear answer to the question: what scale of navigation through the strait is necessary in order to consider it international? It is just obvious that the infrequent or occasional use of the strait rather indicates that its falling into the category of "international" is highly doubtful. In addition, it seems that the use of the strait only by the ships of one littoral state and the absence of the passage through it of ships under foreign flags, also indicate not in favor of its "international status" [8, Rothwell D.].

For the assignment of "international" status, a large-scale calculation of the following criteria is extremely important: the total number of ships passing through the strait, their total tonnage, the value of the cargo on board, the size of these ships and vessels, as well as what flag states they are represented by [9, Pharand D., p. 34–36]. In addition, other countries must somehow express their full interest in this kind of "international" qualification of the strait.

Naturally, the position of the Russian Federation is based on the fact that only the "current", and not the "potential" use of the strait for the passage of ships under foreign flags makes it international from a legal point of view, and in this case the law of transit passage should be applicable to it. Although, it is worth noting here that this logic suggests that as the scale of shipping

grows, such straits can theoretically be qualified as international in one or another perspective [6, Brubaker D., p. 267].

For the Russian Federation, this may certainly mean that the transformation of the NSR into a full-fledged transit route connecting North America and the EU countries with Asian markets may raise the question of revising the legal status of a number of Russian Arctic straits with renewed vigor. This applies equally to the Canadian Northwest Passage, for which the United States will also be able to use stronger arguments for its qualification as consisting of a number of international straits.

Scope and scale of application of Article 234 "Ice-covered Areas"

One of the key elements of the legal position of the USSR and modern Russia in relation to the NSR are the provisions of art. 234 of the 1982 Convention, which states that:

"Coastal states have the right to enact and enforce non-discriminatory laws and regulations to prevent, reduce and control pollution of the marine environment from ships in ice-covered areas within the exclusive economic zone, where climatic conditions are *particularly severe and the presence of ice covering of such areas during most of the year* (highlighted by me — G.P.) create obstacles or an increased danger to navigation, and pollution of the marine environment could cause significant harm to the ecological balance or irreversibly disrupt it. Such laws and regulations take due account of shipping and the protection and conservation of the marine environment, based on the best scientific evidence available."

This article is rightfully called the "Arctic exception", as it speaks of taking into account the special environmental interests of the Arctic states in the field of shipping regulation. In fact, coastal states are empowered to impose national pollution control regulations that may be stricter than the corresponding international standards. Such powers go far beyond the normal competence of the coastal state in the exclusive economic zone (EEZ). The coastal state has the right to regulate the design, construction, manning and equipment of ships, which it cannot do under normal conditions, even in the territorial sea [11].

The wording of art. 234 regarding the fact that states are taking certain measures "within the exclusive economic zone" raises the question of the geographical limits of applicability of this article. Some foreign experts insist that this wording suggests that the article is aimed at regulation in the water area of the EEZ, that is, outside the 12-mile territorial sea. From their point of view, the provisions of art. 234 cannot be applied to the internal waters, the territorial sea, and even more — to international straits.

[11] Mikhina I. Konventsiya OON po morskomu pravu i razvitie SMP. Vozmozhnosti i ugrozy dlya Rossii [UN Convention on the Law of the Sea and the Development of the Northern Sea Route. Opportunities and Threats for Russia]. URL: http://russiancouncil.ru/sevmorput#mikhina (accessed 16 April 2020).

At the same time, the wording "within the exclusive economic zone", as other experts justly point out, can simply mean that such measures can be taken by the state along the entire length of the water area from the coastline to the external border of the EEZ [10, Bartenstein K.]. This explanation is not devoid of a certain logic: how a coastal state, in terms of the norms and provisions of modern international maritime law, can be endowed with greater powers within the EEZ than within the territorial sea?

In general, the most balanced point of view is that art. 234 is reasonably applicable to all marine areas up to the outer boundary of the 200-mile EEZ. With some confidence, we can say in general that the provisions of art. 234 is a fundamentally different model of the navigation regime integrated into the Convention in areas covered with ice for most of the year and aimed at priority protection of the vulnerable marine environment and its biodiversity. Art. 234 is much broader and giving more powers to the coastal state than the regimes of peaceful and transit passage [10, Bartenstein K., p. 45].

The United States is generally prepared to agree to a national level of regulation for shipping in waters under the sovereignty and jurisdiction of Canada and the Russian Federation, but only with respect to American-flagged civilian vessels on commercial flights. This conclusion can be made taking into account the fact that Washington is calmly reacting to the development of Canadian national legislation in this area. Moreover, the American Oil Pollution Act (OPA 1990), if applied to the ice-covered waters of the straits within the American EEZ in the Alaska region, will have very much in common with the provisions of art. 234 of the 1982 Convention, as well as with the Canadian and Russian regimes in the field of Arctic shipping, with one exception — its effect applies exclusively to ships carrying oil products [6, Brubaker D., p. 277].

However, the United States insists that any restrictions imposed under art. 234 (first of all, this is the permissive procedure for passage through the NSR with the obligatory use of icebreaker/pilotage), cannot be applied to warships and American ships in government non-commercial service. Indeed, the Convention contains art. 236, which says that:

"The provisions of this Convention relating to the protection and preservation of the marine environment do not apply to any *warships, naval auxiliary vessels, to other ships or aircraft owned or operated by a State and used at this time only for government non-commercial service*"(highlighted by me — G.P.).

Thus, on the one hand it may seem that art. 236 excludes the above categories of ships and vessels from the scope of art. 234. However, the practice of Russia and Canada, which coincides in this respect with each other, suggests the opposite: both states insist on the priority of the provisions of art. 234 over the provisions of art. 236. In addition, they put the domestic national legislation applicable to the Arctic, which, in turn, was not the subject of consideration of the III UN Conference on the Law of the Sea, 1973–1982, above certain conventional norms.

It is also important to note that, despite the position of Washington, which continues to insist that any measures to control shipping, including those prescribed under art. 234 of the 1982 Convention, must be necessarily agreed with the International Maritime Organization (IMO), the provisions of art. 234 does not in any way provide the slightest suggestion that such an option is mandatory or even desirable. Both the Russian Federation and Canada can take additional measures at the level of their national legislation without taking into account the position of the IMO, and hence the entire international community [11, Chircop A.; 12, Molenaar E.]. Moreover, it can be assumed that the involvement of any international authorities or any other structures in the regulation of shipping in Arctic waters will de facto erode and discredit art. 234, at least in the sense that both the Russian Federation and Canada insist on.

Under the auspices of the IMO, the so-called Polar Code was developed and adopted, applicable to the waters of both the Arctic and Antarctic. Its main task is to contribute to the harmonization of international legislation in the field of shipping, including through the introduction of specific amendments and additions to the key conventions in this area — SOLAS and MARPOL. However, it would be wrong to believe that international norms and provisions of the Polar Code are higher than any national regulatory measures that are provided by the Arctic countries under art. 234 [12].

The gradual reduction of ice cover in the Arctic may raise the question of to what extent the wording of this article, namely “the presence of ice covering such areas for most of the year”, will correspond to the current situation in the region. Freeing the water area of the Russian EEZ from ice conditions may lead to the fact that the existing powers to control navigation on the NSR route will be considered by other countries as increasingly less legitimate.

On the other hand, it is necessary to take into account the fact that during the III Conference on the Law of the Sea (1973–1982), which resulted in the adoption of the above Convention, the concepts of "Arctic" and "ice-covered areas" were most likely considered as synonyms [13, Dremluga R.]. It is obvious that over the years of elaboration of the text of the Convention, in particular art. 234, none of the international experts could take into account the hypothesis of a gradual climate change in the Arctic towards its warming, as well as the associated legal consequences.

Article 31 “General Rule of Interpretation” of the 1969 Vienna Convention on the Law of Treaties states that “a treaty must be interpreted in good faith in accordance with *the usual meaning* (highlighted by me — G.P.) to be given to the terms of the treaty in their context, and in the light of the object and purpose of the treaty” [13].

[12] Banshchikova I. Mezhdu nami taet led? Polyarnyy kodeks i mezhdunarodnoe sotrudnichestvo v Arktike [Is the ice melting between us? Polar Code and International Cooperation in the Arctic]. URL: http://russiancouncil.ru/blogs/estoppel/33946/?sphrase_id=16814907 (accessed 12 May 2020).

[13] Venskaya konventsiya o prave mezhdunarodnykh dogovorov [Vienna Convention on the Law of Treaties]. URL: http://www.un.org/ru/documents/decl_conv/conventions/law_treaties.shtml (accessed 26 April 2020).

Accordingly, if we approach the reading of the provisions of art. 234 on the basis of a terminological approach only, it can be concluded that its effect extends only to areas covered with ice for most of the year, and vice versa — a fundamentally different regulation should be applicable to ice-free water areas. Despite the fact that such a model of reasoning has its own logic, the Vienna Convention of 1969 especially emphasizes the thesis of "usual" rather than terminological meaning. And from this point of view, the concepts of "ice-covered areas" and "Arctic Ocean" for many decades, both before and after the adoption of the 1982 Convention, were considered synonymous [13, Dremluga R.].

In addition to this justification, one more thesis can be put forward. According to it, the initiative of Canada to include the provisions of art. 234, supported by both the USSR and the USA, was motivated by the desire to finally legitimize at the international level those norms of national legislation introduced by this country, as well as by the USSR, on the regulation of Arctic shipping long before the adoption of the Convention. At the same time, it is important to note that the application of these norms was in no way associated with the presence or reduction of the ice cover in the Arctic [13, Dremluga R.].

Reduction of the ice cover in the Arctic may lead to the fact that the traditional routes of the NSR, now passing through the internal sea waters, the territorial sea and the exclusive economic zone of the Russian Federation, will become higher latitudinal. If this happens, the NSR route will completely run through the open sea, that is, it will be outside the zones of sovereignty and jurisdiction of the Russian Federation. In this case, Russia will no longer have any legal powers to control shipping, and the NSR route from the category of a national transport artery under its control may turn into an international shipping route. The need for compulsory provision of icebreaker and pilotage by Russia will no longer exist; navigation will be regulated by the International Maritime Organization (IMO) and regulated by the relevant international conventions. Such a scenario is, of course, still unlikely, since climate changes are most likely cyclical, but it cannot be completely ignored.

Conclusion

Thus, summing up the results of this and the previous publication, it should be noted that Russia's position in relation to the NSR is based on the use of an integrated approach based on a whole series of legal arguments. Each of them individually is not the main one and can, of course, be disputed to one degree or another. However, it is their joint use that makes this model the most stable and unshakable from a legal point of view.

So, firstly, Moscow continues to emphasize that the 1982 Convention is not the only legal regulator in relation to the Arctic. The legal regime here was formed long before its adoption and mainly on the basis of the domestic national legislation of the Arctic states and the norms of customary law. The NSR has never been used for international shipping, its straits cannot be consid-

ered international with the right of transit passage, and the arrangement of its route was a financial burden of the Soviet/Russian leadership. That is why the NSR route is qualified by Russia as a historically established transport artery, which is under its full state regulation.

Secondly, the use of the method of straight baselines led to the spread of the status of inland waters, in which the coastal state has the right to control all types of maritime economic activities over a number of Arctic waters, including key straits along the NSR. Special emphasis is placed here on the fact that these waters are classified as "internal" precisely on a historical basis (!). For many decades, with the virtually tacit consent of other states, except for the attempted passage of the US Coast Guard icebreakers in the 1960s, Russia has projected state sovereignty over these waters, and they have an extremely important economic and defense significance for the country.

Thirdly, this is the use of the norms and provisions fixed in art. 234 of the 1982 Convention, called the "Arctic exclusion" because it gives the Arctic states preferential rights in the control of shipping in order to prevent pollution of the marine environment. The position of the Russian Federation is that the priority of art. 234 above many other articles of the 1982 Convention allows it to introduce a single permissive regime for navigation along the NSR, regardless of which sea zones (territorial sea, EEZ) the passage itself takes place. And, in addition, it allows us to believe that these restrictions are equally applicable to both civilian ships and warships.

Moscow, of course, will never be able to completely abandon the national level of regulation of navigation on the NSR, since to a large extent this is a matter of ensuring its own security. It is in this vein that one should perceive the steps taken by Moscow to centralize the management of shipping along the NSR: from the creation of the NSR Administration in 2013 to the consolidation of management functions in the hands of Rosatom.

In the medium term, if the melting of the Arctic ice continues, and the number of participants in maritime activities in the region increases, then the number of potential security threats may significantly expand. New ones may be added to the already existing non-military challenges [14, Dynkin A.], including: piracy and armed robbery; terrorism acts; illegal trade or transportation of shooting, bacteriological, chemical and nuclear weapons; illegal transportation of narcotic drugs and psychotropic substances by sea; illegal movement of people by sea, including illegal migration. Already, some of these threats are successfully countered by the efforts of the Federal Security Service of Russia (illegal migration, drug smuggling, illegal import/export of flora and fauna). And it is quite obvious that any internationalization of the navigation regime along the NSR, which other, primarily non-regional countries may insist on, will in no way reduce risks and threats in the region, but will rather stimulate their increase.

It could only be assumed that, as the task of turning the NSR into an international transit route is achieved, the legal status of the NSR may be partially liberalized. This is due to the fact that the arrival of foreign shipping companies here will most likely require a partial revision of the

restrictions imposed by Moscow (permitting procedure for passage, fees for icebreaker and pilotage, special requirements for ships and crews). Finally, the growth of transit will inevitably call into question the status of the Russian Arctic straits, and Russia will have less reason to exclude them from the international category.

The United States has been and will remain Russia's main opponent in the regulation of Arctic shipping. Moreover, in general, they are ready to come to terms with the existing regime, but with one exception – so that any rules restricting navigation along the NSR would not be applicable to American warships and ships on state non-commercial service, including the icebreakers of the US Coast Guard.

Despite the fact that American politicians and the military often declare the need to intensify Washington's efforts to challenge Moscow's legal claims in the field of control over shipping along the NSR, including within the framework of the Free-dom of Navigation (FON) program, today it is possible that this is just rhetoric aimed at serving internal interests. Representatives of the US Navy and the Coast Guard (CG) need new ships and icebreakers, and the Russian threat is a good argument along the way.

The United States, of course, will never abandon the protection of navigation freedom throughout the entire World Ocean, as their economic and military-strategic interests require it, but the most balanced point of view is based on the fact that holding certain events within the framework of the FON program, except for diplomatic protest notes, it is still premature. The most dangerous thing for the United States is that in the event of any emergency, American ships (icebreakers) may need help. And such assistance can only be provided by the Russian side, which will undoubtedly completely devalue American efforts to protect freedom of navigation[14]. . In fact, any unsuccessful attempt at passage could be seen by other external actors, China, for example, as proof that the US cannot compete with Russia in the Arctic and that Moscow can safely restrict freedom of navigation in this maritime region[15]. Moreover, taking into account the closure of most of the Russian Arctic by air defense and anti-ship defense systems, any format of FON operations in the Russian Arctic can put our countries on the brink of an armed conflict, which neither side is interested in. Finally, regardless of the success or failure of FON, Russia has the right to view such American actions as a challenge to which it will be forced to respond. And this reaction, quite possibly, will concern an even greater tightening of the navigation regime along the NSR.

For the United States, the situation is also complicated by the fact that challenging Russian legal claims will inevitably be extremely negatively perceived by the closest American ally, Canada, which is defending the national level of navigation regulation on the Northwest Passage (NWP)

[14] Pincus Rebecca. Rushing Navy Ships into the Arctic for a FONOP is Dangerous. URL: https://www.usni.org/magazines/proceedings/2019/january/rushing-navy-ships-arctic-fonop-dangerous (accessed 12 April 2020).

[15] Auerswald David. Now is not Time for a FONOP in the Arctic. URL: https://warontherocks.com/2019/10/now-is-not-the-time-for-a-fonop-in-the-arctic/ (accessed 12 April 2020).

route. Of course, the United States still has the potential to use those countries that have more icebreaking capabilities than the United States themselves, for example, Sweden or Finland, to challenge Russian rules. However, a reasonable question arises here: what will the latter benefit from participating in such an American provocation? Therefore, it is more likely that China, which has two icebreakers and defends the principle of freedom of navigation in the Arctic [15, P. Gudev], will become the one that not explicitly, but indirectly, can support the US legal position.

In general, despite the first measure since the Cold War to protect freedom of navigation in the Barents Sea, in which the US Navy destroyers USS Roosevelt, USS Porter, USS Donald Cook and the British frigate HMS Kent were involved[16], as well as provocative statements by right-wing conservative American experts about the need to increase such operations in the Russian Arctic [17], the prevailing opinion remains unchanged: until the NSR has turned into a real transit route, there is no compelling reason for FON operations in Russian Arctic waters!

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