

The Northern Sea Route in the 2010s: Development and Implementation of Relevant Law

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Abstract

The 2010s was a busy decade for the Northern Sea Route (NSR). It started with the first shipping season to feature the international use of the NSR for commercial purposes, followed by a significant reform of the domestic legal regime, as well as the adoption of the Polar Code. The traffic has gradually picked up, and although the expectations of a significant surge in trans-Arctic navigation have not materialized, the NSR's annual turnover has grown beyond the old records set by the USSR. While the Russian authorities have struggled to find the most optimal means of development of the NSR, the latter has recently been re-marketed as a Polar Silk Road, part of the grand Chinese One Belt One Road initiative. While Russia has been rebuilding its military presence in the Arctic, the French Navy vessel BSAH *Rhone* unexpectedly navigated through the NSR, inciting strong political, but yet not legal, response.

The present article aims to take stock of the last decade, paying primary attention to the Russian State practice in developing, adopting, and enforcing legislation in the NSR. By describing the current status and identifying some of the regulatory trends, the article will draw cautious predictions on the role of the law of the sea in the management of the NSR in the near future.

Keywords: *Northern Sea Route; Arctic; law of the sea; Polar Silk Road*

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1 Introduction

The 2010s (1 January 2010–31 December 2019) was a busy decade for the Northern Sea Route (NSR). It started with the first shipping season to feature international use of the NSR for commercial purposes, followed by a significant reform

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of the domestic legal regime, as well as the adoption of the International Code for Ships Operating in Polar Waters (Polar Code).¹ Shipping traffic has gradually picked up, and although the expected significant surge in trans-Arctic navigation has not yet materialized, the NSR's annual turnover has grown beyond the old records set by the USSR. While the Russian authorities have struggled to find the most optimal means to develop the NSR, the latter has recently been re-branded as the Polar Silk Road (PSR), part of the grand Chinese Belt and Road Initiative (BRI). While Russia has been rebuilding its military presence in the Arctic, the French Navy vessel BSAH *Rhone* unexpectedly navigated through the NSR, inciting a strong political, but not yet legal, response.

It is common to consider 1 January 1991, when the 1990 Regulations entered into force,² as the date of the formal opening of the NSR to foreign vessels. Although this was certainly a milestone political decision, it did not result in revolutionary changes regarding actual use. It seems that falling cargo turnover in the decades after the collapse of the Soviet Union was just another victim of the abrupt economic transition within the country. It would be difficult to expect a surge in foreign shipping through the NSR when the domestic cargo turnover plummeted approximately fourfold between 1987 and 1998.³

At the same time, Russia's hesitance to tailor national legislation to truly accommodate international interests effectively discouraged international use of the NSR.⁴ The cost of obligatory services and other burdensome requirements on ships critically hindered the prospect of the commercial viability of this route.⁵

However, the NSR was never officially closed to international shipping, at least *de jure*.⁶ In line with the biblical wisdom "you will know them by their fruit", one may as well view 2010 as marking the real opening of the NSR. After all, it was the first shipping season that featured international use of the NSR for commercial purposes (by and for foreigners, i.e., by foreign-flagged ships and/or for shipping to/from a foreign port), preceded by the exploratory voyages of the *MV Beluga Fraternity* and the *MV Beluga Foresight* in 2009.⁷

In the 2010s, Russia set its course to convert the NSR into a route of global significance for world trade, an international artery able to compete with other traditionally used seaways in all respects.⁸ The development of the NSR has remained a priority for Russia's maritime policy, as set out in the 2001 Maritime Doctrine,⁹ as well as the revised version adopted as the 2015 Maritime Doctrine.¹⁰ The documents that articulate Russian Arctic policy, such as the 2008 Basics of Arctic Policy,¹¹ the 2013 Arctic Development Strategy¹² and the 2020 Basics of Arctic Policy¹³ all emphasize the significance of Russia's national interests concerning the NSR, the need for centralized management, and the provision of non-discriminatory access to the NSR, including for foreign vessels.¹⁴

The present article aims to take stock of the last decade, paying primary attention to Russian State practice in developing, adopting, and enforcing legislation in the

NSR. To that goal, the article aims to address the following question: What trends in the development and implementation of Russian Arctic shipping regulations can be observed in the last decade? Through describing the trajectory of the regulatory approaches, the article will draw cautious predictions on the role of the law of the sea in the management of the NSR in the near future. As such, the 1 January 2010 – 31 December 2019 period is approached as a focal point, rather than a frame strictly limiting the scope. Whenever necessary, and sometimes incidentally, the article will hence cover some legal developments that took place before or after the said period.

The next Section gives an overview of the relevant law to facilitate further discussion and unveil some of the trends in the past decade. Section 3 focuses on the main trends in the regulation of navigation for commercial ships, with attention to the operation of the permit scheme, fees for services, and enforcement of non-compliance. Section 4 investigates the inward-looking concerns of economic protectionism and national security, as reflected in legislative activity. Section 5 briefly presents the NSR's *alter ego*, the Polar Silk Road. The last Section sums up the discussion and aims to extrapolate the trajectory a little further.

2 The legal status of the NSR

2.1 The NSR in Russian legislation

The most critical legislative change in the legal regime of the NSR in the last decade was the adoption of the 2012 Federal Law,¹⁵ which amended the 1995 Federal Law on Natural Monopolies;¹⁶ the 1998 Federal Law on the IWTSCZ;¹⁷ and the 1999 Merchant Shipping Code.¹⁸ The last enactment serves as the legal basis for the establishment of the Administration of the NSR (ANSR)¹⁹ and a dedicated set of navigation regulations, the 2013 Rules.²⁰

2.1.1 The pivotal role of the 1999 Merchant Shipping Code

As a result of the 2012 legal reform, the 1999 Merchant Shipping Code has achieved a pivotal role in the domestic legal regime of the NSR. Article 5.1, entitled “navigation in the water area of the NSR,” is central to the legal regime of the NSR, as it provides the parameters for the regulation of navigation, operation of the ANSR, permit scheme, and fees.

There is an important implication for the scope of application of the dedicated set of navigation regulations – the 2013 Rules, based on Article 5.1.1 of the Merchant Shipping Code. Under Articles 1–2, the 1999 Merchant Shipping Code regulates relations arising out of merchant shipping only. Article 3(2), moreover, explicitly exempts State-owned vessels from the application of the 1999 Merchant Shipping Code.

The decision to anchor the 2013 Rules in the 1999 Merchant Shipping Code, thus rendering them applicable only to commercial ships, represents a departure from the

earlier policy of non-discrimination between commercial and State-owned vessels. The 1990 Regulations applied to all ships. This was both controversial and likely to create inconsistencies with Article 236 of the United Nations Convention on the Law of the Sea (UNCLOS).²¹

According to Article 236, the provisions of UNCLOS regarding the protection and preservation of the marine environment, such as Article 234, “do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service”.

Although this aspect of the legal reform eliminates some major inconsistencies between Russian domestic legislation and international law of the sea, it creates a situation where the passage of foreign warships, or other ships enjoying sovereign immunity, is not regulated by the 2013 Rules. To some, such a situation amounts to a legal gap, which was supposed to be addressed by the adoption of specific regulation.²²

2.1.2 Definition and boundaries

An important innovation brought by the 2012 Federal Law was a clear definition of the NSR. Article 5.1 of the 1999 Merchant Shipping Code defines it as:

[A] water area adjoining the northern coast of the Russian Federation, including internal waters, territorial sea, contiguous zone and exclusive economic zone of the Russian Federation, and limited in the East by the line delimiting 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.

This definition determines the geographical scope of the NSR, including its lateral and outer limits. The clarification of the latter component is a particularly important novelty since the 1990 Regulations defined the NSR in such a way that the northern limits could extend beyond 200 nm from Russia’s baselines.²³ As a consequence, the 2013 Rules do not apply seaward of the outer limits of the Russian EEZ.²⁴

2.1.3 Baselines

Russia’s Arctic maritime zones are measured from the baselines established by the USSR Council of Ministers on 15 January 1985.²⁵ These include normal and straight baselines, but the latter enclose almost all crucial NSR straits. The international legal validity of Russian Arctic baselines is not settled, as they are not always consistent with traditional criteria for the establishment of baselines.²⁶ The United States (USA) objects to the characterization of “certain straits used for international navigation” as internal waters.²⁷

There has been considerable attention to this issue throughout the 2010s. In 2010, Russia’s Ministry of Economic Development announced a tender on, among other

things, a scientific contribution to seek legal and historical justification for amendments to Russia's Arctic baselines.²⁸ Then, the 2013 Arctic Development Strategy called for hydrographic work to determine the need for amendments to the list of geographical coordinates of the Arctic baselines.²⁹ In the same vein, the 2015 Maritime Doctrine calls for the clarification of straight baselines along the Arctic coast.³⁰ These calls galvanized more specific discussions and undertakings, such as the assurances coming from the Ministry of Defense to finalize the list of new baseline coordinates by 2020, and extend the geographical scope of historic waters.³¹

Indeed, in March 2020, the Ministry of Defense completed and published a draft Decree.³² If adopted, it would supersede the 1985 Decree, and to that end, it includes a proposed complete list of coordinates for the measurement of Russian Arctic baselines. The explanatory note explains the need to enact a new list of coordinates due to, *inter alia*, the reality that 90% of points do not correspond to the current geographical situation.³³ Notably, the proponents note that the adoption of the new list would allow Russia to extend its Arctic territorial sea by around 109000 km² (size of Bulgaria), in addition to the possibility of extending the EEZ. The draft does not mention historic waters.³⁴

2.1.4 Navigational rights and maritime zones

Russian legislation recognizes that the NSR consists of internal waters, territorial sea, a contiguous zone, and an exclusive economic zone (EEZ). Moreover, it is not controversial or disputable that under international law, other States within the NSR enjoy the right of innocent passage in the territorial sea and freedom of navigation in the EEZ. A somewhat more controversial issue arises concerning the applicable navigational rights through different straits enclosed within straight baselines.

These include the following straits: Matochkin Shar, Kara Gates, and Yugorskii Shar connecting the Barents Sea with the Kara Sea; the Vilkitsky, Shokalsky, Red Army, and Yungsturm Straits connecting the Kara and Laptev Seas; the Dimitri Laptev and Sannikov Straits connecting the Laptev and East Siberian Seas. The Long Strait, which connects the East Siberian and the Chukchi Seas, has not been enclosed with a straight baseline.

Assuming, but only for the sake of argument, that Russian straight baselines are valid, the legal status of waters landward of baselines is that of internal waters. Under the law of the sea, there are three possible scenarios regarding applicable navigational rights in these waters. The first is that no right of navigation exists,³⁵ the second is that innocent passage has been preserved, and the third is that at least some of these straits are subject to the right of transit passage. The latter is officially supported by the USA, which views the NSR to “include[s] straits used for international navigation; the regime of transit passage applies to passage through those straits”.³⁶

Since, except for the Baidaratskaya Bay, Russian straight baselines in the NSR do not delineate historic waters,³⁷ innocent passage has been preserved in all of the

NSR straits.³⁸ Further, it lies outside the scope of this article to determine whether any parts of the NSR should be subject to the regime of transit passage.³⁹

Here, it is worth highlighting that Russian legislation is silent on the applicability of any navigational rights in areas enclosed by straight baselines. Paradoxically, while the Draft Resolution,⁴⁰ represents an assertive move to express discontent about the potential operation of foreign warships in the NSR,⁴¹ it would also constitute Russia's first explicit recognition that Article 8(2) of UNCLOS preserves the right of innocent passage in some unspecified parts of Russia's internal waters in the NSR.

2.2 The prominence of international law in the domestic legal regime of the NSR

2.2.1 UNCLOS and the Polar Code

International law has featured more prominently in the domestic legal regime of the NSR over the last few years. Article 14 of the 1998 Federal Law on the IWTSCZ stipulates that 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."

The international legal framework for the regulation of navigation consists primarily of UNCLOS. The Convention allocates jurisdiction to States in their different capacities as flag, coastal and port States, and in reference to different maritime zones and navigational rights. In the domain of shipping, UNCLOS usually leaves the matter of specific substantive rules and standards to the International Maritime Organization (IMO). To the extent rules and standards can be considered 'generally accepted international rules and standards' (GAIRS), they provide for a mandatory minimum for flag State jurisdiction and an optional maximum for coastal State jurisdiction.⁴² While much of the Polar Code can be regarded as GAIRS,⁴³ it does not prejudice the applicability of UNCLOS,⁴⁴ including Article 234.

It is beyond the scope of this article to provide a comprehensive and thorough analysis of this Arctic '*lex specialis*'. It suffices to underline that Article 234 is a unique clause, although not the only one in UNCLOS, which, owing to its ambiguous language, managed to satisfy multiple delegations with divergent interests. The provision leaves extensive discretion to the coastal State to balance opposing interests, subject to unclear limitations, primarily the requirement to have due regard to navigation. At the same time, Article 234 includes normative standards that, in the event of dispute settlement, may be subject to interpretation by an international court or tribunal.

2.2.2 International legal basis for the 2013 Rules

It is remarkable that although Article 234 grants the coastal State additional and imprecisely limited powers, Russia was, for a long time, hesitant to link the specific requirements of its domestic NSR legal regime with this clause, at least explicitly.⁴⁵

Neither Article 234 nor its domestic implementation – Article 32 of the 1998 Federal Law on the EEZ – have been explicitly referenced in either the 2012 Federal Law or the 2013 Rules.⁴⁶

Moreover, in this context, some attention should be given to Article 14 of the 1998 Federal Law on the IWTSCZ, which describes the NSR as a “historically developed national transport line of communication of the Russian Federation”. This ambiguous provision may appear to invoke some historic rights with respect to the NSR.⁴⁷ The USA “does not consider such a term or concept to be established under international law”.⁴⁸

The NSR covers multiple maritime zones, with most located within the EEZ, where the 1998 Federal Law on the IWTSCZ does not apply. Further, a provision emphasizing the national status of the historically developed NSR in Russian law has never served as a legal basis for specific regulations,⁴⁹ and there is no evidence it has ever been used as an argument to support any specific requirement.

Rather, Article 14 of the 1998 Federal Law on the IWTSCZ presents symbolic recognition of the historical significance of the NSR to the entire nation and the great sacrifices that were made for its development.⁵⁰ A reference to the historical development of a national route may assuage nationalistic sentiments domestically. At the same time, it involves little political cost when maintained alongside other arguments with a firmer basis in international law.

It is, moreover, unlikely that Russia would be able to make a successful claim to historic rights concerning vast areas of the NSR. UNCLOS provides for a comprehensive legal regime for the oceans, addressing rights, obligations, and jurisdiction of States in maritime zones, including rights deriving from historical processes.⁵¹ UNCLOS defines the scope and extent of maritime entitlements, which may not extend beyond the limits imposed in the Convention, and historic rights short of sovereignty must be compatible with the Convention. If a State enjoyed historic rights before accession to the Convention, they would be superseded if found to be in excess of the limits imposed by the Convention.⁵²

To be sure, the Arbitral Tribunal in the 2016 *South China Sea Arbitration* did not deny that historic waters can provide a State with broader rights than it would be entitled to under UNCLOS. However, Russia’s current historic waters claims within the NSR are relatively circumspect⁵³ and, considering international protests, have not met with success. If Russia ever expands the scope of its historic waters claims, it is conceivable that further protests will follow.

Significant to determining Russia’s official position on the international legal basis for its coastal State jurisdiction on the NSR is the ANSR, which provided some clarification on the matter when it, for the fourth time, denied a permit to the *Arctic Sunrise*.⁵⁴ As it turns out, when pressed, the Russian authorities referred to Article 234 of UNCLOS, and not history, to justify Russia’s jurisdiction. In the note handed to the *Arctic Sunrise* and published on its website, the ANSR stated that the ship was refused a permit on the grounds that there had been a:

Violation of the Rules of navigation in the water area of the NSR, adopted and enforced by the Russian Federation in accordance with the article 234 of the United Nations Convention on the Law of the Sea, 1982,— navigation in the water area of the Northern Sea Route from 24.08.2013 to 27.08.2013 without permission of the Northern Sea Route Administration, as well as taken actions in this [sic] creating potentially [sic] threat of marine pollution in the water area of the Northern Sea Route, ice-covered for most part of the year.⁵⁵

This statement is particularly crucial as it came from the governmental body responsible for the management of the NSR. One may compare this statement with the letter sent by the ANSR to another Greenpeace vessel – the *Solo* – in 1992, which entered the NSR without permission. In response, the ANSR referred exclusively to domestic legislation requiring a ship to seek permission and stipulated the consequences of a violation, but it did not mention Article 234.⁵⁶ In 2013, however, the ANSR deemed it necessary to refer to Article 234 explicitly. This appears to constitute a development towards a clarification of Russia's official position. It is evident that Article 234 of UNCLOS has provided support for domestic legislation applicable to navigation on the NSR, and this reality has become more openly recognized in official statements.

2.2.3 Russian implementation of the Polar Code in its capacity as a coastal State

Not much appears to have happened as regards Russian implementation of the Polar Code in its capacity as a coastal State. While it is true that most of the Polar Code obligations are addressed to flag States, one would have expected Russia to have amended its 2013 Rules. The only amendment added was the requirement for ships to which the Polar Code applies to carry a copy of a Polar Ship Certificate.⁵⁷

An interesting issue is that Item 65 of the 2013 Rules introduced a ban on the discharge of oil residues in the entire water area of the NSR before the Polar Code, Part II-A/Chapter 1/1.1.1, prohibited any discharge into the sea of oil or oily mixtures from any ship in the Arctic waters. On its face, the provision implements the ban on discharges in the Polar Code, but one should not forget, however, that Russia perceived such a ban as one of the most controversial issues during the Polar Code negotiations.⁵⁸ It is curious that during these negotiations, Russia sought first to overturn the complete ban and, then, to seek exemptions from it, while already having a similar requirement in its 2013 Rules.⁵⁹

3 Trends and developments in the regulation of navigation by commercial vessels

3.1 Permit scheme

3.1.1 Russian legislation

Article 5.1(4) of the 1999 Merchant Shipping Code stipulates that permits for navigation on the NSR shall be issued on the condition that the vessel complies with

relevant requirements concerning safety of navigation and protection of the marine environment. Items 4 and 5 of the 2013 Rules specify what information is required from the applicant, namely:

- Information about the ship and its voyage according to Annex 1 of the 2013 Rules;
- A copy of the classification certificate or ship's letter;
- A copy of the tonnage certificate or ship's letter;
- Copies of documents certifying the availability of insurance of civil liability for pollution damage or any other damage inflicted by the ship established by international treaties of the Russian Federation and Russian legislation (these include the Civil Liability Certificate (CLC) and the Civil Liability for Bunker Oil Pollution Damage Certificate (CLBC));
- For ships making a single passage, a copy of the certificate from the classification society approving such a single passage;
- For ships carrying out towing, a copy of the certificate from the classification society approving the project of towing; and
- For ships to which the Polar Code applies, a copy of a Polar Ship Certificate.⁶⁰

The applicant is required to complete the Application for Admission to navigate in the Northern Sea Route Area and enclose information on the details of the ship, its name, IMO number and flag; details of the voyage, including the itinerary within the NSR and ports of call prior to entry to the NSR and after leaving the NSR; estimated times of arrival in and departure from the NSR; information about the crew, passengers and cargo, including the type of cargo; details of the experience of the ship's master in navigating the NSR; and details of the construction and design of the ship, its type, class notation, measurements, draught, and tonnage.⁶¹

The ANSR issues a permit based on an application transmitted electronically no earlier than 120 and no later than 15 days before planned entry.⁶² The ANSR responds within ten days of the application, and it publishes the decision on its website.⁶³ When the ANSR rejects an application, it is required to inform the applicant by email of the reasons for refusal.⁶⁴

The processing of the applications has become much more streamlined under the 2013 Rules than before.⁶⁵ However, a lingering and relevant question is: what exactly constitutes a reason for refusal?

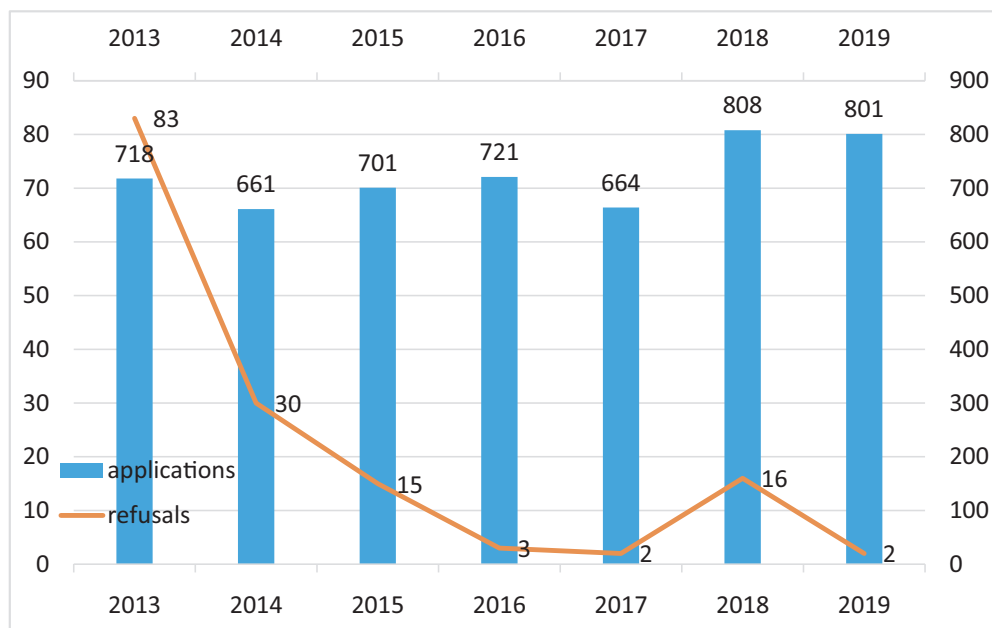
The scope of discretion of the ANSR in deciding on applications appears to be narrow, as it appears to be obliged to grant a permit once the ship has complied with the formal requirements. In summer (i.e., July to 15 November) any vessel can enter the NSR, provided they have managed to obtain relevant certificates, which are contingent on fulfilling substantive requirements. Outside this period, vessels need to have been granted a minimum ice class of Arc4.⁶⁶ The legislation does not seem to allow the ANSR to deny a permit on other grounds – State security, for instance.

It is noteworthy that the 2018 draft amendments to the 2013 Rules proposed to complete Item 11 of the 2013 Rules by establishing specific conditions for the exercise of the right to refuse to issue a permit.⁶⁷ These would explicitly limit the discretion of the NSR to verify whether an application is complete and accurate and whether the planned itinerary corresponds with what would be permissible according to classification certificates, but the draft was not adopted.

3.1.2 The practice of the ANSR regarding the issuance of permits between 2013–2019⁶⁸

In 2013, 83 of the 718 applications did not obtain a permit on the first occasion. 65 ships were granted a permit based on a revised application. Here attention is due the *Arctic Sunrise*, which was operated by Greenpeace International and classified by Det Norske Veritas (DNV) as an ‘Icebreaker’ and which, according to the DNV Rules (1973 Edition), was the second highest ice class at the time of construction. The ship applied for but was refused a permit to enter the NSR four times in a row. After the third refusal, the *Arctic Sunrise* entered the NSR without authorization.⁶⁹ In response to the fourth application, the ANSR denied a permit to the *Arctic Sunrise* on the grounds of the previous violation of the 2013 Rules.⁷⁰

Table 1 NSR permits: applications and refusals.



In 2014, 30 of the 661 applications did not obtain a permit on the first occasion. 24 ships were granted a permit based on a revised application. The ANSR expressly rejected only three of the remaining six applications with the other three applications

being withdrawn by the applicants. The reasons for the rejections were: lacking approval from the class society for the single voyage, tonnage and class certificates, and completed annual surveys.

In 2015, 15 of the 701 applications did not obtain a permit on the first occasion. Out of these, six ships were granted a permit based on a revised application. The ANSR rejected the applications by some vessels (the Bahamian-flagged *BGP Prospector* (Ice1), a Singaporean-flagged *Geo Service 1* (no ice class), Russian-flagged vessel the *Mariya* (Ice1)) applying in October due to “dangerous conditions in November”. Two other applicants had withdrawn their applications, while one, Russian *CIK-85*, had already completed its voyage without a permit before applying for one. In response, the ANSR rejected the application. Of the remaining three, the first did not provide information about annual surveys for the previous two years; the second did not provide a CLBC certificate, and the third’s intended area of operation exceeded the permissible area of operation under the classification certificate.

In 2016, only three of the 721 applications did not obtain a permit on the first occasion. Two of them were granted a permit based on a revised application. The reason for the rejection of the application for the *Nikolay Trubyatchinsky* and the *Sleipner* was due to the same error. Namely, a different ship-owner in the application form and the attachment, and the fact that no name of the classification society was indicated. Once they corrected their application forms, these two vessels obtained permits. One vessel, the *Sakhalin*, did not apply again.

Interestingly, before it submitted its application, the *Sakhalin* had been reported by the ANSR for violating the 2013 Rules, as it had navigated in the NSR without a permit. When it later applied for a permit, the refusal was not grounded on prior violation but the failure to attach a copy of the tonnage certificate to the application. After the application was turned down, the vessel was again found navigating the NSR without a permit. Information about the violations was listed on the ANSR website.

In 2017, two of the 664 applications did not obtain a permit on the first occasion. The reason for one rejection was a lack of information about the annual survey, while the reason for the other rejection was based on the absence of a copy of a classification certificate. Both applicants were granted a permit based on a revised application.

In 2018, 16 of 808 applications were rejected. Of these rejections, one was subsequently annulled, nine ships successfully submitted revised applications, and six ships did not submit a revised application. Common grounds for refusal included lacking copies of documents, including the most recently required Polar Ship Certificate (the possession of which was verified for foreign and Russian ships), the ship’s letter, as well as inadequate information in the submitted forms.

In 2019, two of 801 applications were rejected due to the absence of copies of the Polar Ship Certificate. Neither of the two resubmitted their applications that year.

An analysis of the practice of the ANSR reveals that when the ANSR considers applications for navigation on the NSR, it acts transparently and predictably. Most applications obtain permits on the first occasion. When rejected, most applicants submit revised applications and receive a permit. The number of refusals was lowest in 2016 and 2017, rising slightly in 2018, likely as a result of the entry into force of new amendments to the 2013 Rules, to drop again in 2019.⁷¹ This trend indicates that the practice of the ANSR has become predictable and that interested companies learn how to file a correct application.

With regard to the process, the ANSR has consistently rejected applications based on their incompleteness. The usual reasons for rejections include lacking copies of documents, formal mistakes in the application forms or inconsistencies in the planned itinerary with the operational limits determined based on relevant certificates, and the matrix of admissibility criteria from Annex 2 to the 2013 Rules. All such refusals, except the refusal of the fourth application of the *Arctic Sunrise*, find support in the 2013 Rules.

Interestingly, apart from the *Arctic Sunrise*, the ANSR never again used a prior violation of the 2013 Rules as grounds on which to reject an application, even though there were many instances where applicants obtained a permit despite having been previously identified for non-compliance by the ANSR. There are examples where the ANSR could have raised this issue, but did not. The abovementioned *Sakhalin* was refused a permit on different grounds in 2016, with no mention of previous violations. An example from 2017 is the Maltese-flagged *Bozdag*, which navigated after its permit had expired. After having been reported by the ANSR for a violation of the 2013 Rules on the website, it applied for and obtained a permit the very same day.

Another interesting example was the Russian-flagged *Kapitan Belodvortsev*, classified as Ice1. In 2014, it was first refused a permit, on the grounds that the ship had been decommissioned. It obtained a permit later in 2014 upon submission of a revised application. In 2015, it got a permit but entered the NSR without waiting for it. That the ANSR had reported it for a violation of the 2013 Rules did not prevent the ship from obtaining a permit. Later the same year, it was found navigating the NSR after its permit had expired, and in 2016 it did not bother applying for a permit at all – which did not prevent the ship from navigating the NSR twice that year. The ANSR noted all these violations on its website. Along these lines, one can also mention the *Boris Vilkitsky*, which in 2018 was noted for “gross violation” of the 2013 Rules, but later obtained three new permits.⁷²

If no permit is granted in the first instance, one in principle needs to send a revised application. However, the second application does not differ from submitting additional information as it is done online, using email and pdf scans of documents, and sometimes it takes as little as one day to get a permit in the second instance. Moreover, the ANSR often allows the validity of the permit to be prolonged without having to file a separate application. The decision about prolongation is made public,

but no separate application is registered. Also, the practice has been to grant permits for the entire navigational season, rather than single voyages.⁷³ The length of the permit's validity is limited by the applicant's intent, the validity of relevant certificates, and the terms of access to different areas depending on the ice class of the vessel, period of navigation, and ice conditions.

The flag of the vessel seems to play little or no role, as both Russian and foreign flags appear to be granted or refused permits in equal manner. The lack of a suitable ice class is generally not a problem if the ship indicates details of its voyage itinerary, which is consistent with the area of operation indicated in the relevant ship certificates.

3.2 Fees for services

3.2.1 Previous practice, controversies, and ideas

Russia's policy on NSR fees suffered much turbulence in the aftermath of the dissolution of the USSR and the shift from a centrally-planned to a market-driven economy. The cost of services, together with the already massive expenditures related to activities in harsh northern conditions and remote areas, have often been singled out as a critical factor hindering significant interest in navigating the NSR.

To appreciate the change brought about by the adoption of the 2012 Federal Law, it is important to briefly address the previous Russian practice on NSR fees. Under the 1990 Regulations and related enactments, a controversial issue was whether it was possible to use the NSR without having to pay any fees. The critical element of that discussion was the specification of the services for which a fee was charged.

3.2.2 Fees for what? Icebreaker assistance and ice pilotage.

Under Item 1.4 of the 1996 Regulations for Icebreaker and Pilot Guiding of Vessels through the NSR and Item 7.4 of the 1990 Regulations, the West or East Marine Operations Headquarters (MOHs) were entitled to prescribe one of five types of "guiding" (namely, shore-based, aircraft, conventional or icebreaker guiding, or icebreaker assisted pilotage) to ensure maritime safety and provide favorable conditions for navigation. In effect, a vessel was under the constant control of the MOHs, which had full discretion to prescribe a 'service'. Obligatory icebreaking assistance, unrelated to actual navigational conditions, was established in the Vilkitsky, Shokalsky, Dmitry Laptev, and Sannikov Straits.⁷⁴ This created some ambiguity regarding the basis for the calculation of fees. Russian courts failed to adjudicate disagreements on the interpretation and application of the relevant rules in a consistent manner.⁷⁵

Currently, there is no such blanket requirement to use Russian services of icebreaker assistance or ice pilotage. After receiving the application for the permit to navigate the NSR, the ANSR indicates whether the vessel is entitled to navigate independently or only under icebreaker assistance. The ANSR does not have

full discretion to prescribe icebreaker assistance, as the decision must be based on Annex 2 of the 2013 Rules.

The 2013 Rules provide specific rules for ice pilotage,⁷⁶ but they fail to clarify under which conditions, if ever, ice pilotage is mandatory. Annex 1 to the 2013 Rules, in Point 13, includes a requirement to indicate “information on the length of experience of the ship master of the navigation in ice in the water area of the Northern Sea Route (...)”.

This may suggest that lack of sufficient experience should lead the ship to deploy an ice pilot. Milaković et al. note that a requirement to take on board an ice pilot is stated in a permit.⁷⁷ However, the practice of the ANSR in the issuance of the permits has been to indicate whether and where the ship is permitted to navigate independently or under icebreaker assistance.⁷⁸ Also, the ANSR has never raised the issue of navigating without an ice pilot as a violation of the 2013 Rules in its overview published on the website. It cannot be precluded that the ANSR recommends the use of ice pilotage to individual applicants in direct communication.

3.2.3 The methodology of the determination of the fees

Under the 1990 Regulations, the fees resembled taxes rather than fees for services. For example, a ship carrying cars was charged sixteen times more than a ship carrying wood. Also, during preparation of the 2012 Federal Law, the idea of a tonnage due was considered⁷⁹ but eventually rejected.

The 2012 Federal Law introduced the central principle for the calculation of fees. Article 5.1(5) of the 1999 Merchant Shipping Code, as amended, states that “the payment for icebreaker assistance and ice pilotage in the water area of the Northern Sea Route shall be effected based on the amount of service actually delivered”, with due regard to “the capacity of a vessel, its ice class, the distance of icebreaker assistance and ice pilotage and the period of navigation”.

The primary rationale behind the amendments to the 1995 Federal Law on Natural Monopolies was to provide the State with regulatory tools to prevent market anomalies in the context of a natural monopoly, such as the regulation of prices or tariffs.

These amendments lay down a framework for further development by more specific subsidiary acts. In furtherance of the two principles – that the fees are to correspond with the service actually rendered, and that the State can determine tariffs for the calculation of fees – the Federal Service for Tariffs adopted two Orders on 4 March 2014.

The 2014 Order on Tariffs sets out the general framework for the calculation of fees.⁸⁰ Items 4 to 7 of the 2014 Order on Tariffs specify how to determine the key elements for the calculation of fees, such as the ‘capacity of a vessel’, the ‘ice class of a vessel’, the ‘distance of icebreaker assistance and ice pilotage’, and the ‘period of navigation’.

The 2014 Order on Tariffs for Atomflot establishes a ceiling for fees, expressed in monetary terms, but only for icebreaker assistance rendered by Atomflot.⁸¹ It establishes specific tariffs for the calculation of fees based on the following factors: gross tonnage, the period of navigation, ice class, and the number of zones. The tariffs are meant to be set at a maximum level that Atomflot can charge, but Atomflot is allowed to apply the tariffs at lower levels (i.e., apply discounts). At the moment, other organizations that provide icebreaker assistance are not bound by any Governmental enactment setting maximum tariffs and are relatively free to negotiate fees with their customers.

The fine-tuning of the Russian policy and legislation on fees is not over. There has been some legislative activity to specify the duties of natural monopoly entities, such as to keep separate accounting of income and expenses related to the provision of icebreaking assistance and ice pilotage.⁸²

3.2.4 Summary

Summing up, Russian policy and practice regarding NSR fees has seen significant adjustments over the years. From the perspective of the law of the sea, changing the main principle for the calculation of fees so that they correspond with the service rendered is of paramount significance. At the same time, this principle will be moot unless more specific regulations follow. For now, it appears that the most recent developments aim to increase transparency in the NSR fee system, especially those fees charged by Atomflot. However, the transparency of the entire system has been compromised to a large extent by the ability of the providers of icebreaker assistance to apply discounts – as is the case with Atomflot – and the relatively unconstrained discretion to calculate fees by all other organizations.

3.3 Enforcement of non-compliance

Unlike the 1990 Regulations, which included a clause explicitly providing for the expulsion of vessels in cases of non-compliance with the Regulations,⁸³ the 2013 Rules are silent on enforcement actions. As such, there remains some uncertainty over procedures to enforce non-compliance with the different requirements of the 2013 Rules. This article does not aim to discuss the arcane features of Russian law regarding administrative or criminal offenses. Suffice it to say that the operation of a Russian-flagged vessel is subject to a broad scope of Russian law, and hence, the owner, the operator, or the crew of an unseaworthy vessel may be deemed to have breached different rules.

Common practice, at least in the period between 2014 and 2018, was that when the ANSR identified non-compliance, it published information about the incident on its website, and informed the Federal Service for Supervision of Transport (Rostransnadzor) about the incident.⁸⁴ These incidents did not involve much at-sea enforcement, rather they entailed an administrative investigation combined with the

imposition of penalties after non-compliance was ascertained. The penalties can be strikingly insignificant both for Russian-flagged⁸⁵ and for foreign-flagged vessels.⁸⁶ The remainder of this Section aims to analyze the incidents of non-compliance by foreign ships, relying on information available in the public domain.⁸⁷

Since 2013, the *Arctic Sunrise* (Netherlands);⁸⁸ the *Qingdao China* (UK); the *Bozdag* (Malta);⁸⁹ the *Ice Eagle* (Liberia); the *Audax* (Netherlands); the *Dynamogracht* (Netherlands); the *Pomor* (Liberia); the *Normann* (Liberia); the *Sleipner* (Saint Vincent and Grenadines); and the *Boris Vilkitsky* (Cyprus) have been noted by the ANSR for non-compliance.⁹⁰

Most frequently the violations concerned reporting obligations (Items 14, 16, 19, or 20 of the 2013 Rules), as committed by the *Qingdao China*, *Sleipner*, *Pomor*, *Normann*, *Dynamogracht*, *Audax* and *Ice Eagle*. There is no information available about the consequences of these violations, except the information about non-compliance on the ANSR website.

The incident involving the *Boris Vilkitsky* warrants separate attention. The tanker was due to serve in Russia's Arctic flagship project – Yamal LNG – operated by the joint venture of Novatek, Total, CNPC and the Silk Road Fund. On 12 April 2018, the ANSR noted that the *Boris Vilkitsky* had entered the NSR area on 9 April 2018 in violation of the 2013 Rules.⁹¹ The *Boris Vilkitsky* was classified as an Arc7 vessel, a classification granted by the Russian Maritime Register and Bureau Veritas. However, due to a malfunction in the ship's stern thruster and port steering column, information given by Bureau Veritas on 30 March 2018, the Russian Maritime Register recalculated the vessel's ice class to Arc4. As a result, the *Boris Vilkitsky* was not – in line with Annex 2 of the 2013 Rules – allowed to enter and navigate, even with icebreaker assistance, in the southwestern Kara Sea, where the official ice conditions of 23 March 2018 were described as 'medium'. According to the ANSR, the entry and operation of the ship as well as the lack of information transmitted – required under Item 19 of the 2013 Rules – constituted a "gross violation of the 2013 Rules".

It is not clear whether any investigation followed or whether any penalties were issued in response to the violation. The ship completed its voyage to Sabetta on 12 April 2018 and was later detained by the Russian Coast Guard before it was permitted to leave on 21 April under icebreaker assistance.⁹² In the meantime, the ship applied for a new permit on 17 April 2018, based on its then notation of Arc4. The permit was granted on 19 April 2018. After the ship recovered its Arc7 ice class, it applied on 29 May 2018 and obtained a new permit valid until 3 February 2019. Interestingly, the incident prompted President Putin to comment that: "It is essential only that there are less unsubstantiated pretexts for restraining development. (...) either they do not allow gas carriers into the port under pretenses, then they do not let them depart, but we will deal with this separately, I have not interfered so far".⁹³

Against this background, it is evident that the *Boris Vilkitsky* situation reflects a significant conflict of interests, with potential repercussions for the future shape of the

legal regime. The incident with the *Boris Vilkitsky* took place in the context of a larger power struggle over the NSR between the Ministry of Transport, on the one hand, and Atomflot and Novatek, on the other.⁹⁴ An interesting follow-up to this situation was the proposal by the Ministry of Transport to soften NSR ice class requirements. If adopted, this would allow ships with ice classes Arc4 and Arc5 to navigate the NSR during the winter season.⁹⁵ The draft amendments to the 2013 Rules proposed, among other things, a new subdivision of the NSR into 28 sections (as opposed to current subdivision into seven sections), but the document was never adopted.⁹⁶

In conclusion, for most of the decade, there were signs of goodwill to increase transparency in dealing with non-compliance with the 2013 Rules. Although there was the recognition that the capacity to enforce all violations needed improvement, the ANSR closely monitored all shipping movements on the NSR and flagged instances of non-compliance by both Russian and foreign ships. The lack of precise rules and procedures for enforcement still constitutes a legal gap that most likely exists due to the relative infancy of the NSR legal regime, a gap that is expected to be filled at some point.⁹⁷ At the same time, an important negative development occurred in the aftermath of the *Boris Vilkitsky* incident. Since the incident, the ANSR has stopped publishing any information about violations of the 2013 Rules. This can be considered a setback regarding transparency and predictability in the application process, and the development of law applicable to the NSR.

4 Protectionist measures and security concerns

Liberalization, in the sense of making it more attractive for ships to use the NSR, and acceptance of the constraints imposed by the international law of the sea, have led to a resurgence in economic protectionism and national security concerns.

4.1 Protectionist measures

There have been a series of protectionist measures taken to support the Russian shipping industry as well as the shipbuilding industry. First, Federal law No. 460-FZ, 29 December 2017, introduced an obligation to use Russian-flagged ships for cabotage and transport of hydrocarbons (oil, LNG and coal) loaded within the NSR,⁹⁸ subject to permitted exemptions.⁹⁹ These measures depend on the sovereignty of Russia in ports, and as such, they do not raise much controversy for consistency with UNCLOS.

A more controversial issue relates to Item 21 of the 2013 Rules, which stipulates that only icebreakers registered in Russia are entitled to provide icebreaker assistance. This means that a foreign icebreaker can use the NSR but cannot provide icebreaker assistance to other vessels navigating within the NSR.

In the EEZ, ships enjoy freedom of navigation, including other internationally lawful uses of the sea related to these freedoms. There is little doubt that this freedom would cover the right to navigate with the assistance of icebreakers under a

flag of preference. Moreover, one of the most profound limitations to coastal State powers under Article 234 is the duty of non-discrimination. A requirement to have a Russian flag on board an icebreaker that can render icebreaker assistance appears to constitute discrimination unless there are valid reasons for such regulation. Russian legislation allows different companies to render the service, without any rationalization of the requirement to have a Russian flag. As such, the Russian requirement to use a Russian-flagged icebreaker for assistance in the EEZ does not find support in UNCLOS.

4.2 Security considerations

It is not surprising that increased attention on the Arctic, by Russian and foreign actors, places a spotlight on security considerations.¹⁰⁰ To be sure, security considerations may often play a role in decision-making without being explicitly and publicly disclosed. One example that immediately comes to mind is the permit scheme, discussed above in Section 3.1, where the idea behind it may have been formed predominantly by security considerations.

The liberalization and increasing appreciation of UNCLOS in the Arctic can and has led to tensions related to security. One such example was triggered by the passage of the French Navy's offshore support and assistance vessel, the *Rhône (A603)*, which passed through the entire NSR without warning in September 2018.¹⁰¹

In response, Mikhail Mizintsev, the Head of the Russian National Defense Management Center, pledged that by the start of the 2019 navigational season, foreign warships would only be able to navigate the NSR following prior notification.¹⁰² According to his statement, new legislative developments were supposed to fill the legal vacuum regarding the use of the NSR. In March 2019, a Draft Resolution of the Government of Russia was prepared by the Russian Ministry of Defence and published on the website of the Government.¹⁰³

The draft would require foreign warships and other vessels operated by a State and used on non-commercial service that exercise the right of innocent passage:

- to use the service of mandatory ice pilotage;
- to use icebreaker assistance in the territorial sea and internal waters of the NSR if necessary.

It would also require the flag State to submit a notification concerning the planned passage through the territorial sea of the Russian Federation in the NSR no later than 45 days before the start of the proposed passage.

Besides, the draft proposes that foreign warships exercising innocent passage “must have the necessary ice construction, observe special precautionary measures and comply with the requirements relating to the safety of navigation and protection of the marine environment from pollution from ships (as applicable to the waters of the Northern Sea Route).”

In the end, neither the threat voiced by Mizintsev nor the more specific draft legislation materialized. The impression is that the primary purpose of the draft was to send a strong political signal to deter further challenge to Russia's somewhat ambiguous claims. Even without having been signed, the draft received much publicity in Russian and foreign media, at times even creating the wrong impression that it has entered into force.¹⁰⁴ One also recalls the statement by the Chief of the General Staff of the Armed Forces of the Russian Federation, Valery Gerasimov, who at the meeting with foreign military attachés said, “[O]ur Armed Forces can fully ensure the safety of navigation in the waters of the Northern Sea Route, and therefore there is no need to find warships of other countries in this sea corridor”.¹⁰⁵

In any event, the adoption of such regulations would undoubtedly be highly controversial and unlikely to garner international recognition. This is most likely, or at least partially, the reason that the resolution was never signed.

5 The Polar Silk Road

It is highly revealing that any discussion on the NSR without reference to China's Belt and Road Initiative (BRI) would appear incomplete. The grand vision of the BRI, described as “the largest coordinated infrastructure initiative in the history of the world”,¹⁰⁶ was first officially proposed in 2013.¹⁰⁷ It includes the land-based “Silk Road Economic Belt” and the “21st-Century Maritime Silk Road”.¹⁰⁸ Four years later the latter was extended to the Arctic as the Polar Silk Road (PSR).¹⁰⁹ China's 2018 Arctic Policy commits the BRI to bring opportunities for parties to facilitate connectivity and sustainable development of the Arctic, and jointly build a PSR through developing the Arctic shipping routes.¹¹⁰

Whatever the implications of this initiative,¹¹¹ China stands as the main potential foreign benefactor of the NSR, and it has indicated its interests relatively clearly.¹¹² Notably, both Russia and China embrace UNCLOS as the common framework for their interaction regarding the Arctic and the NSR.¹¹³ Moreover, China's statements are carefully vague, neither contradicting nor condoning Russia's specific requirements or position.¹¹⁴ For now, one may only assume China's potential dissatisfaction with some elements of Russian practice resulting from Russia's interpretation of the law of the sea, such as the mandatory permit scheme, icebreaker monopoly or possible discriminatory practice. Time will show to what extent the position of these two States coincide and to what extent potential differences on some principled issues will matter for the functionality of the NSR/PSR.

6 The way ahead

Over the last decade, the political course to liberalize the legal regime applicable to navigation in the NSR has been relatively stable. Also, in principle, there has been a stable trend to appreciate the limitations imposed by UNCLOS. This is not to

conclude that the practice of Russia in the NSR is fully consistent with UNCLOS. It is evident that there has been significant improvement in terms of the consistency of Russian legislation with international law. Continuing controversies relate to some 'old' practices, rather than to any new claims. For instance, the controversial requirement of prior authorization, or the requirement to use a Russian-flagged icebreaker for assistance have been retained through the legislative reform, rather than introduced as part of that reform. Here it should be emphasized that the draft legislation aiming to introduce specific requirements for sovereign immune vessels would essentially have reintroduced requirements that applied to such vessels before 2012. Among other setbacks, transparency regarding enforcement of non-compliance has dropped rather than risen. Likewise, in individual instances, Russia has acted more assertively than before. The expulsion of the *Arctic Sunrise* from the Kara Sea contrasts with a more tolerant approach towards vessels navigating in the EEZ in the past.¹¹⁵

Another observation relates to the prevalence of the *de facto* state of affairs over a more sophisticated situation *de jure*. Russian reliance on ambiguous policy tools, in addition to the extreme climactic conditions in the Arctic, has discouraged independent use and the assertion of navigational rights and freedoms by foreigners. This allowed Russia to exercise *de facto* control over the NSR. Now, despite the trends discussed above, the permit scheme, the monopoly on icebreaker assistance, new restrictions on the transportation of hydrocarbons and cabotage, plans to establish transport hubs in Murmansk and Petropavlovsk-Kamtchatsky,¹¹⁶ and further consolidation of Atomflot as the single logistics operator may all lead to cementing the *status quo* of the NSR as primarily a national line of communication in the Arctic.

The emergence of the PSR may mark a potential qualitative change in the state of affairs, although of a *de facto* rather than *de jure* character. If viewed through a supply chain lens, the functionality of the PSR would only partially depend on navigational rights and freedoms. Successful supply chains can thrive regardless of the applicable navigational rights. The BRI, with its Silk Road Economic Belt spanning across land territories and utilizing current or future canals, is a good example. China's leverage over the PSR may be a result of its position as a potential source of capital investments and loans for infrastructure development, as well as China's significance as the destination market for energy products. If the PSR turns into a 'stable', 'attractive' or 'useful' supply chain for China, it may continue to function without the need to resolve all the underlying political or legal disputes, at least for some time.

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NOTES

1. The text of the Polar Code is available in IMO Doc MEPC 68/21/Add.1, 5 June 2015, Annex 10, in force 1 January 2017.
2. The 1990 Regulations for Navigation on the Seaways of the Northern Sea Route, approved on 14 September 1990, published on 18 June 1991 in 29 *Izveshcheniya Moreplavatelyam* (1990 Regulations).
3. As reported in I. V. Bunik and V. V. Mikhaylichenko, 'Legal Aspects of Navigation through the Northern Sea Route' in P. A. Berkman and A. N. Vylegzhanin (eds), *Environmental Security in the Arctic Ocean* (Springer 2013), p. 233, there was a drop from 6,579,000 to 1,458,000 tons.
4. Until 2013, the legal regime applicable to navigation on the NSR consisted primarily of the 1990 Regulations, which set out the legal framework for access and navigation on the NSR for vessels of all States. Later these regulations were supplemented with the 1996 Guide to Navigating through the NSR; the 1996 Regulations for Icebreaker and Pilot Guiding of Vessels through the NSR; and the 1996 Requirements for the Design, Equipment, and Supplies of Vessels Navigating the NSR.
5. For a thorough and critical analysis of the legal regime applicable to the NSR before the reforms of 2012/2013, see E. Franckx, 'The Legal Regime of Navigation in the Russian Arctic' (2009) 18 *Journal of Transnational Law and Policy* 327.
6. See J. Solski, 'New Russian legislative approaches and navigational rights within the Northern Sea Route (NSR)', *Yearbook of Polar Law 2020* (forthcoming), where Solski attributes the USSR/Russia's *de facto* control over the NSR to a peculiar amalgamate of policies and practices in addition to the prevalent harsh natural conditions. These include restrictions on cabotage, problematic interpretation of innocent passage, straight baselines and measures with the official purpose of ensuring maritime safety and environmental protection.
7. E. Franckx and L. Boone, 'New Developments in the Arctic: Protecting the Marine Environment from Increased Shipping' in M. H. Nordquist, J. N. Moore, A. H. A. Soons and Hak-So Kim (eds), *The Law of the Sea Convention: US Accession and Globalization* (Mauritius Nijhoff Publishers 2012) pp. 188–190.
8. The 'Foreign Policy Concept Of The Russian Federation, Approved by President of the Russian Federation Vladimir Putin', 30 November 2016, <http://www.mid.ru/en/foreign_policy/official_documents>, all internet links in this article were accessed 03 September 2020, refers, in para 76, to the significance of using the NSR as Russia's national transport route in the Arctic, as well as for transit shipments between Europe and Asia. See also V. Putin, 'Speech at the International Arctic Forum: The Arctic – Territory of Dialogue', Arkhangelsk, (22 September 2011) <<http://archive.government.ru/eng/docs/16536/>> and similar remarks in V. Putin, 'Poslaniye Prezidenta Federal'nomu Sobraniyu [President's Address to the Federal Assembly]' (1 March 2018) <<http://kremlin.ru/events/president/news/56957/work>>, where he expressed an expectation that the volume of traffic on the NSR will grow by up to 80 million tons by 2025 and reiterated the aspiration to turn the NSR into a global, competitive shipping route. The President's Address to the Federal

Assembly was followed by the 2018 Decree of the President of the Russian Federation, on National Goals and Strategic Challenges of the Development of the Russian Federation for the Period to 2024, No. 204, 7 May 2018, <<http://kremlin.ru/acts/bank/43027>>, formalizing the objectives and tasks for the Government to adopt a comprehensive plan of modernization and development of infrastructure, including development of the NSR aiming at an increase of cargo turnover to 80 million tons. This, if materialized, would mean a roughly eightfold increase compared with the volume of traffic in 2017.

9. The Maritime Doctrine of the Russian Federation until 2020, 7 June 2001.
10. The Maritime Doctrine of the Russian Federation, 26 July 2015.
11. The Basics of the State Policy of the Russian Federation in the Arctic for the period until 2020, 18 September 2008.
12. The Development Strategy of the Russian Arctic Zone until 2020, 20 February 2013.
13. The Basics of the State Policy of the Russian Federation in the Arctic until 2035, 6 March 2020.
14. The most recent 2020 Basics of Arctic Policy, *ibid.*, identifies “the development of the NSR as internationally competitive national transport communication line of the Russian Federation” as one of the key national interests in the Arctic.
15. 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, 28 July 2012, No. 132 FZ, *SZRF*, 30 July 2012 No. 31 p. 4321.
16. Federal Law on Natural Monopolies, 17 August 1995, No. 147 FZ., *SZRF*, 21 August 1995, No. 34 p. 3426.
17. Federal Law On the internal sea waters, territorial sea and contiguous zone of the Russian Federation, 31 July 1998, No. 155-FZ, *SZRF*, 3 August 1998 No. 31 p. 3833.
18. The Merchant Shipping Code of the Russian Federation, 30 April 1999, No. 81 FZ, *SZRF*, 3 May 1999 No. 18 p. 2207.
19. Set up by the Order of the Government of Russian Federation № 358-p, 15 March 2013, adopted on the basis of Article 5.1 (3) of the Merchant Shipping Code.
20. Rules of Navigation in the Water Area of the Northern Sea Route, as approved by the order of the Ministry of Transport of Russia, 17 January 2013 No. 7, (2013 Rules).
21. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.
22. See the discussion in Section 4.2.
23. Pursuant to Item 1.2 of the 1990 Regulations, they are applied in Russia’s maritime zones and, possibly in addition, in ‘seaways suitable for leading in ice’. See, for instance, the discussion in Jan J. Solski, ‘New Developments in Russian Regulation of Navigation on the Northern Sea Route’ (2013) 4 *Arctic Review on Law and Politics*, pp. 95–96.
24. The current definition of the NSR is the most precise of all the historical definitions of the NSR. The USA, however, seems not entirely convinced and seeks confirmation that the NSR does not extend into areas of high seas, as well as clarification of the eastern limits of the NSR, see the Diplomatic Note from the United States to Russia regarding the NSR (29 May 2015) reproduced in CarrieLyn D. Guymon (ed), *Digest Of United States Practice In International Law 2015*, p. 526, <https://2009–2017.state.gov/documents/organization/258206.pdf> (2015 US Diplomatic Note to Russia).
25. The USSR Council of Ministers, Decree of 15 January 1985 (1985 Decree), English text available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1985_Declaration.pdf.
26. See J. J. Solski, ‘Russia’ in R., C. Beckman, T. Henriksen, K. D. Kraabel, E. J. Molenaar and J. A. Roach, *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States* (Brill Nijhoff 2017), pp. 178–179.

27. See the 2015 US Diplomatic Note to Russia, note 24.
28. Order of the Ministry of Economic Development of the Russian Federation No 356, 10 August 2010, the issue with reference number 2002-07-10.
29. Items 18 e and 29 в of the 2013 Arctic Development Strategy.
30. Item 61 iii of the 2015 Maritime Doctrine.
31. Solski note 26 above, p. 179.
32. Draft Decree of the Government of the Russian Federation “On Approving the List of Geographic Coordinates of Points Determining the Position of Baselines along the Arctic Coast of the Russian Federation and around the Franz Josef Land Archipelago”, published 12 March 2020 on the Russian official website for publication of draft legislation <https://regulation.gov.ru/>, with an ID 01/01/03-20/00100250.
33. Available *ibid*.
34. The announced extension of the territorial sea may be primarily due to the identification of five new islands within the Franz Josef Land Archipelago, which were previously covered by ice. A. Poplavskii, ‘Pyat’ novykh ostrovov: territoriya Rossii stala bol’she’, https://www.gazeta.ru/politics/2019/08/27_a_12605647.shtml.
35. Russian international law authors seldom discuss this question, but when they do, that is the position they take. See V. V. Gavrilov, “Legal Status of the Northern Sea Route and Legislation of the Russian Federation: A Note” (2015) 46 *Ocean Development and International Law* 256, p. 260.
36. USA, National Security Presidential Directive (NSPD-66) (9 January 2009) <<https://www.hsdl.org/?abstract&did=232474>>.
37. The 1985 Decree includes the only list of historic waters claims explicitly made by Russia in the Arctic. It refers to only three areas: the White Sea, the waters of Cheshskaya Bay, and only one bay located within the NSR – the Baidaratskaya Bay, as waters “historically belonging to the USSR, internal waters”. For a more thorough analysis of the geographical extent of historic waters claims made by Russia in the Arctic, see Solski 2020 note 6.
38. A more detailed argument has been presented Solski 2020 note 6. Here it suffices to refer to Article 8(2) of UNCLOS which preserves innocent passage in areas enclosed by ‘new’ straight baselines without the need for previous acceptance, acknowledgement or use.
39. See Solski 2020 note 6, where he concludes that the applicability of transit passage in the Russian Arctic straits is *in statu nascendi*.
40. Draft Resolution of the Government of Russia on Amendments to the Resolution of the Government of Russia No. 1102, 2 October 1999, “On the rules of navigation and presence of foreign warships and other state-owned ships operated for non-commercial purposes in the territorial sea, internal waters, on naval bases, and bases for stationing warships in seaports of the Russian Federation, <https://regulation.gov.ru/projects#npa=89000> [21 January 2020].
41. See Solski 2020 note 6.
42. E. J. Molenaar, ‘The Arctic, the Arctic Council, and the Law of the Sea’, in R., C. Beckman, T. Henriksen, K. D. Kraabel, E. J. Molenaar and J. A. Roach, *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States* (Brill Nijhoff 2017), p. 34.
43. See the discussion in Ø. Jensen, ‘The International Code for Ships Operating in Polar Waters: Finalization, Adoption and Law of the Sea Implications’ (2016) 7(1) *Arctic Review on Law and Politics* 60, pp. 73–75.
44. Of relevance here is that Regulation XIV-2.5 of SOLAS stipulates that ‘Nothing in this chapter shall prejudice the rights or obligations of States under international law’. Article 9(2) of MARPOL 73/78 stipulates that ‘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’.

45. Russian academics have only recently started to devote attention to this clause. Before the emphasis was often placed on the relevance of customary international law in the Arctic, at the expense of UNCLOS. See, for example, A. N. Vylegzhanin, 'Developing International Law Teachings for Preventing Inter-State Disaccords in the Arctic Ocean' in G. Witschel, I. Winkelmann, K. Tiroch and R. Wolfrum (eds), *New Chances and New Responsibilities in the Arctic Region* (Berliner Wissenschafts-Verlag, 2010), p. 217. V. V. Gavrilov, 'Pravovoye Razvitiye Arkticheskogo Regiona: Predposylki i Perspektivy [Legal Development of the Arctic: Background and Prospects]' (2017) 3 *Zhurnal Rossiyskogo Prava* 148, pp. 153–154, openly confronts the views resonating in Russian scholarship that the Arctic was not discussed during UNCLOS III and that the role of UNCLOS in the Arctic should not be exaggerated at the expense of the established customary international law. In Gavrilov, 'Legal Status of the Northern Sea Route and Legislation of the Russian Federation: A Note', note 35, he discusses the legal status of the NSR in the context of UNCLOS. Also, R. Dremluiga, 'A Note on the Application of Article 234 of the Law of the Sea Convention in Light of Climate Change: Views from Russia' (2017) 48(2) *Ocean Development and International Law* 128, constructs his argument within the framework of Article 234 of UNCLOS, which appears to be an innovation when compared to other works, which devote little attention to Article 234 when discussing the legal regime of navigation on the NSR. A good example of the latter is A. A. Kovalev, 'Pravovoy Status Severnogo Morskogo Puti – Rossiyskoy Natsional'noy Transportnoy Arterii [Legal Status of the Northern Sea Route – Russian National Transport Artery]', (2009) *Ezhegodnik Morskogo Prava 2008, Yubileynoe izdanie k 40-letyu Assotsyatsii Mezhdunarodnogo Morskogo Prava* 182.
46. However, both Article 234 of UNCLOS and Article 32 of the 1998 Federal Law on the EEZ are referenced in the Explanatory Note that accompanied the draft 2012 Federal Law.
47. As argued, for instance, by P. Savas'kov, 'Pravovoy Rezhim Arktiki [Legal Regime of the Arctic]' in A. Zagorskiy (ed), *Arktika: Zona Mira i Sotrudnichestva* (MEMO RAN 2011), p. 38.
48. See the 2015 US Diplomatic Note to Russia, note 24.
49. Article 14 of the 1998 Federal Law on the IWTSCZ in its originally adopted version mandated the Government of the Russian Federation to approve Regulations of navigation on the NSR, but this has never been completed. The 2013 Rules were adopted based on Article 5.1 of the Merchant Shipping Code.
50. During the Parliamentary Hearings at Russia's Council of Federation on 24 April 2012, transcript available at <<http://region.council.gov.ru/media/files/41d4536b6448d2d89cb3.doc>>, most of the voices defending the historical and national reference to the NSR were raised in opposition to the statements by Vitaliy Klyuyev, from the Russian Ministry of Transport, who emphasized that UNCLOS imposes limits on Russia's jurisdiction in the NSR. See J. J. Solski, 'New developments in Russian regulation of Navigation on the Northern sea route' (2013) 1 *Arctic Review on Law and Politics* 90 for a more detailed analysis of the discussions preceding the adoption of the 2012 Federal Law.
51. The 2016 *South China Sea Arbitration*, Award on Merits, paras 230–278.
52. The 2016 *South China Sea Arbitration*, Award on Merits, para 278.
53. See note 37
54. 2013 ANSR Notification No. 77, 20 September 2013, on file with author.
55. *Ibid.*
56. A Letter from V. Mikhaylichenko, Chief of the Administration of the Northern Sea Route, to Mr. Kuiken, Master of the *Solo*, 16 October 1992, reproduced in L. Timtchenko, 'The Russian Arctic Sectoral Concept: Past and Present' (1997) 50 (1) *Arctic* 29, p. 33.
57. Order of the Ministry of Transport on the Introduction of Amendments to the Rules of Navigation in the water area of the Northern Sea Route, adopted by the Order of the Ministry

- of Transport of 17 January 2013, No. 7, 9 January 2017, No. 5], registered by the Ministry of Justice 7 March 2017 No. 45866.
58. D. Bognar, 'Russia and the Polar Marine Environment: The Negotiation of the Environmental Protection Measures of the Mandatory Polar Code', *RECIEL* 2018, pp. 5–7.
 59. *Ibid.*
 60. The last point introduced by the 2017 Order No. 5, note 57.
 61. All this follows from Annex 1 of the 2013 Rules.
 62. Item 6 of the 2013 Rules.
 63. The ANSR keeps records of all the applications, permits and refusals on its website. Decisions regarding foreign vessels are published in English; the rest are published in Russian.
 64. Item 11 of the 2013 Rules.
 65. Solski note 26 above, pp. 197–8.
 66. Arc4 was previously the minimum ice class requirement for ships to navigate on the NSR. See, Item 2.2 of the 1996 Requirements for the Design, Equipment, and Supplies of Vessels Navigating the NSR.
 67. The text of the draft was accessed from <https://portnews.ru/news/268150/>.
 68. The information relied on here is based on an analysis of the data presented on the website of the ANSR. See Table 1 for a graphical representation of the number of applications and refusals over the years.
 69. See Solski note 26 above.
 70. See *supra* note 54.
 71. Amendments effected by the 2017 Order No. 5, *supra* note 57, requiring a Polar Ship Certificate as well as a ship's letter for smaller ships.
 72. See more details about the incident involving this ship in subsection 3.3.
 73. An example of such practice is the permit granted to the *Christophe De Margerie* (Cyprus), on 18 January 2018, valid until 8 February 2019; see Ministry of Transport of the Russian Federation, Federal Agency of Maritime and River Transport, Federal State Institution the Northern Sea Route Administration, Permit No. 2/7, 18 January 2018.
 74. Item 7(4) of the 1990 Regulations.
 75. For a discussion on this practice, see Solski note 50, p. 114.
 76. *Ibid.*, Items 31–41.
 77. A. S. Milaković, B. Gunnarsson, S. Balmasov, S. Hong, K. Kim, P. Schütz, S. Ehlers, 'Current status and future operational models for transit shipping along the Northern Sea Route' (2018) 94 *Marine Policy* 53, p. 55.
 78. Among many of the permits available on the website of the ANSR, the present author could not find a single example of a permit which indicated the obligation to make use of an ice pilot. If such a permit exists, it would constitute an exception rather than a rule.
 79. See Solski note 50, p. 115.
 80. Order of the Federal Service for Tariffs About The Approval of Rules of the Application of Tariffs for the Icebreaker Escorting of Ships in the Water Area of the Northern Sea Route], 4 March 2014, No 46-T/2, registered in the Ministry of Justice of Russia on 16 April 2014, No. 31983.
 81. Order of the Federal Service for Tariffs, About the Approval of Tariffs for the Icebreaker Escorting of Ships Rendered by Fsue 'Atomflot' in the Water Area of the Northern Sea Route], 4 March 2014, No. 45-T/1, registered in the Ministry of Justice of Russia on 31 March 2014, No. 31774.
 82. Order of the Ministry of Transport of the Russian Federation, 6 April 2018, No. 132, On Approving the Procedure for Separate Accounting of Income and Expenses by Types of Activity Related to the Provision of Icebreaker Assistance, Ice Pilotage of Ships in the Water Area of the Northern Sea Route, registered in the Ministry of Justice 13 August 2018.

83. Item 10 of the 1990 Regulations.
84. Solski note 26 above, p. 210.
85. On 2 August 2016, the ANSR reported that the Russian-flagged *Tovra* entered the NSR on 1 August 2016 without a permit. Later, on 27 October 2016, Rostransnadzor reported that a person responsible for maritime safety and the prevention of pollution from the company Bunkernaya Kompaniya, S.V Veretnikov, was fined with 1500 RUB (which is approximately 20 USD) based on Article 11.13(1) of the 2001 CAO. The information was retrieved from <http://rostransnadzor.ru/informatsiya-o-kontrol-no-nadzornojdeyatel-nosti-gosmor-rechnadzora-za-period-s-20-oktyabrya-po-27-oktyabrya/>, which is no longer available on the Internet.
86. Non-compliance with the 2013 NSR Rules by a shipmaster of a foreign vessel will likely constitute an administrative offense under Article 11.7 of the 2001 CAO, which deals with “violation[s] of the rules of navigation”. Article 11.7(1) stipulates that a violation of the rules of navigation can lead to an imposition of an administrative fine of 500 to 1000 RUB (approximately 15 USD) or to the deprivation of a right to sail a vessel for up to one year. However, it is doubtful that this can be imposed on foreign shipmasters.
87. The ANSR, *Non-compliant vessels*, available at http://www.nsra.ru/ru/non_compliant_vessels.html.
88. After entering the NSR without a necessary permit from the ANSR, the vessel was stopped, inspected in the Kara Sea and eventually ordered to leave the NSR under threat of gunfire. See the discussion in Solski note 26 above, p. 212.
89. The same day the *Bozdog* was reported for navigating without a permit (after the previous permit expired), Gazprom Neft applied for a new permit on its behalf. The ship obtained a new permit the following day, 10 January 2017. It is not clear if the vessel suffered any consequences for violating the 2013 Rules, but the expedience of it getting a new permit suggests it did not.
90. All these ships are listed on the ANSR website, with the exception of the *Arctic Sunrise*. The reason may be that the ANSR only lists instances of non-compliance for 2015, 2016, 2017 and 2018.
91. The ANSR, *Non-compliant vessels*, available at http://www.nsra.ru/ru/archive_non_compliant_vessels_2018.html.
92. M. Humpert, ‘Yamal LNG Carrier Boris Vilkitsky Permitted to Leave With Icebreaker Escort’ (27 April 2018) *High North News* <http://www.highnorthnews.com/yamal-lng-carrier-boris-vilkitsky-permitted-to-leave-with-icebreaker-escort/>.
93. As reported by Interfax, ‘Putin Nazval Regulyatornyye Slozhnosti s Gazovozom s Yamal’skim SPG Nadumannymi’ [Putin called regulatory challenges with Yamal LNG as far-fetched], available at <https://www.interfax.ru/russia/610565>.
94. See the article in *Kommersant* by A. Vedeneyeva, Y. Barsukov, ‘Sevmorput’ doshel do Kremlya’ [NSR reached the Kremlin], *Kommersant*, (3 May 2018) <https://www.kommersant.ru/doc/3619227>. They report, based on an anonymous source, that at the time the *Boris Vilkitsky*’s violations took place, there were “dozen[s] of Arc4 and Arc5 ships navigating in the Kara Sea, which did not raise questions”.
95. See note 67
96. *Ibid.*
97. J. Bobrova, ‘The Northern Sea Route: National Regime in the Changing International Context’ (2016) 9 *Russian International Affairs Council* <http://russiancouncil.ru/upload/NorthernSeaRoute-Policybrief9-en.pdf>, p. 9.
98. Federal Law No. 460-FZ On Amendments to the Merchant Shipping Code of the Russian Federation and the Recognition of Certain Provisions of Legislative Acts of the Russian Federation as Invalid, 31 December 2018, <https://rg.ru/2017/12/31/fz-460-dok.html>.

99. The last amendment to Article 4 of the Merchant Shipping Code was introduced by Federal Law No 34-FZ, 1 March 2020 which permits the use of foreign-flagged ships for operations otherwise reserved for Russian ships only, if the Government decides so. On 14 March 2019, the Government adopted a Decree No 435-p, with a list of 28 ships permitted to transport gas and gas condensate loaded within the NSR until 2043.
100. Other authors have investigated to what extent these considerations affect Russian policy and practice in the Arctic. See A. Sergunin, 'Arctic security perspectives from Russia', in P. Whitney Lackenbauer and Suzanne Lalonde (eds) *Breaking the Ice Curtain? Russia, Canada, and Arctic Security in a Changing Circumpolar World* (Canadian Global Affairs Institute 2019), p. 55, who argues that Russian recent practice bears signs of limited modernization, rather than aggressive power projection. See also K. Zysk, 'Russia's Strategic Underbelly: Military Strategy, Capabilities, and Operations in the Arctic', in Stephen J. Blank (ed) *The Russian Military in Contemporary Perspective* (Strategic Studies Institute of the U.S. Army and War College 2019), p. 707, who observes that Russia has been perfectly capable of living with this ambivalence: combining an emphasis on practical cooperation and reassuring and peaceful rhetoric with deterrence of potential competitors, based on the country's armed forces.
101. A. Staalesen, "Izvestia: This is what awaits foreign military vessels on Northern Sea Route", *The Barents Observer*, 7 March 2019, <https://thebarentsobserver.com/en/security/2019/03/izvestia-what-awaits-foreign-military-vessels-northern-sea-route>.
102. Interfax, "S 2019 goda voennye korabli smogut khodit po Sevmorputi tolko uvedomiv RF", 30 November 2018, <https://www.interfax.ru/russia/640154>.
103. Supra note 40.
104. The media – here it is not necessary to refer to examples of sub-optimal reports nor to diagnose why they came about – were quick to pick up a story without due verification of facts, which would require an understanding of the Russian language and the legislative process in that country.
105. O. Vozhyeva, "Eksperty otsenili vozmozhnost' voyennogo konflikta v Arktike", 18 December 2019, MKRU, <https://www.mk.ru/politics/2019/12/18/eksperty-ocenili-vozmozhnost-voennogo-konflikta-v-arktike.html>
106. P. Khanna, *Connectography: Mapping the Future of Global Civilization*, Random House 2016, p. 17.
107. China's Ministry of Foreign Affairs, Speech by China's President Xi Jinping at Nazarbayev University, Astana, 7 September 2013, where Xi Jinping extends an invitation to build the "economic belt along the Silk Road", available at https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1078088.shtml.
108. China's State Council, 'Action Plan on the Belt and Road Initiative', 30 March 2015, http://english.www.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm.
109. The first official mention of a passage through the Arctic Ocean was made in China's National Development and Reform Commission and State Oceanic Administration, 'Vision for Maritime Cooperation under the Belt and Road Initiative', 20 June 2017. However, the idea did not originate in China.
110. China's State Council Information Office, China's Arctic Policy, 26 January 2018 (China's Arctic Policy).
111. There is much uncertainty regarding the BRI in general, for example its geopolitical implications. Likewise, in light of grand ambitions and limited transparency, it is difficult to assess how successful the cooperation between Russia and China has been so far. For a sober analysis of the often optimistically framed bilateral cooperation, see Yun Sun, 'The Northern Sea Route – the Myth of Sino-Russian Cooperation', Stimson, <https://www.stimson.org/2018/northern-sea-route/>.
112. China's Arctic Policy.

113. In this context, see the Arctic Council, Rules of Procedure, 15 May 2013, which made the admission of new observers conditional on the extent to which they recognize Arctic States' sovereignty, sovereign rights and jurisdiction in the Arctic.
114. China's Arctic Policy diplomatically notes that "the management of the Arctic shipping routes should be conducted in accordance with treaties including UNCLOS and general international law and that the freedom of navigation enjoyed by all countries in accordance with the law and their rights to use the Arctic shipping routes should be ensured. China maintains that disputes over the Arctic shipping routes should be properly settled in accordance with international law."
115. In the 1960s, the Soviet authorities were not happy about the presence of American vessels in the same seas but nonetheless tolerated it. For a more recent example, E. Franckx, "The "New" Arctic Passages and the "Old" Law of the Sea' in H. Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015), p. 214, compares the action taken against the *Arctic Sunrise* in 2013 with the action taken against another Greenpeace vessel – the *Solo* – in 1992. Russian authorities displayed a more patient approach to the *Solo* while it navigated within the EEZ of the Kara Sea, as it was allowed to do so for two days without interference.
116. Government of the Russian Federation, Order No 3120-p, 21 December 2019, Plan of the Infrastructure Development of the NSR until 2035.