

# THE LEGAL REGIME OF NAVIGATION IN THE RUSSIAN ARCTIC

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## INTRODUCTION

Ever since the existence of a Northeastern Passage was proven in 1648 and the mapping of the northern coastline completed following the expeditions of Vitus Bering (1725-1728) and the Great Northern Expedition (1733-1743),<sup>1</sup> Arctic marine shipping above the Eurasian continent has been continuously developed, first by Imperial Russia, then by the Soviet Union, and, at present, by the

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1. A. G. Granberg et al., *Istoriia Severnogo morskogo puti* [History of the Northern Sea Route] in PROBLEMY SEVERNOGO MORSKOGO PUTI [PROBLEMS OF THE NORTHERN SEA ROUTE] 9, 10 (Alexander G. Granberg & Vsevolod I. Peresyplkin eds., Moscow, Nauka 2006); N. D. KOROLEVA ET AL., *Pravovoi rezhim sudochodstva v Rossiiskoi Arktike* [Legal Regime of Navigation in the Russian Arctic] 4, 61 (Moscow, Soiuzmorniiproekt 1995).

Russian Federation.

The present contribution intends to clarify the contemporary legal regime applicable to navigation in these northern Eurasian waters. It will do so by relying first and foremost upon Russian primary sources or on authors directly relying upon such sources. Moreover, it will only look at the issue from a “foreign navigation” point of view. If indeed global warming will influence the Arctic, as predicted by the Arctic Climate Impact Assessment, it is submitted that the opening up of the Arctic to foreign shipping will first occur in the Northeastern Passage.

It seems, therefore, a useful exercise to have a closer look at the present-day legal regime applicable to foreign shipping in the Russian Arctic. The Russian Ministry of Transport’s official policy of opening up these waters to foreign shipping<sup>2</sup> is not a completely new one. The present contribution will therefore start with a brief overview of past initiatives in this respect (Part I). It will then have a look at the present legal regime as it is applied today (Part II). In a concluding part, some recent changes to this legal regime will be highlighted, as well as some expected initiatives for the near future (Part III).

## I. PAST INITIATIVES

A first initiative to open up the Russian Arctic to foreign navigation was made by the then Soviet Minister of Merchant Marine, Viktor Bekayev, on March 28, 1967.<sup>3</sup> Some Soviet scholars had argued that the so-called “sector decree,”<sup>4</sup> which claims that all lands and islands, both those already discovered and those still to be discovered, in the Soviet sector belong to the USSR, also included ice blocks and surrounding seas.<sup>5</sup> In view of this argument, the importance of this first attempt to open up the Northern Sea Route at the beginning of the 1967 shipping season,

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2. A. N. Olshevsky, *Keynote Address at the Arctic Operational Platform Project Workshop Proceedings: Principal Trends of the Development of the Northern Sea Route Regulations*, in ARCTIC OPERATIONAL PLATFORM PROJECT WORKSHOP PROCEEDINGS, Deliverable No. D.6.5, at 11-12 (2005), available at [http://www.arcop.fi/reports/workshop\\_report6.pdf](http://www.arcop.fi/reports/workshop_report6.pdf).

3. Terence Armstrong, *The Northern Sea Route in 1967*, 11 INTER-NORD 123, 123 (1970).

4. 1926 Decree of the Presidium of the Central Executive Committee of the USSR, On the Proclamation of Lands and Islands Located in the Northern Arctic Ocean as Territory of the USSR, 32 SOBRANIE UZAKONENII I RASPORIAZHENII RABOCHE-KREST'YANSKOGO PRAVITEL'STVA SSSR [COLLECTED LAWS AND DECREES OF THE WORKERS AND PEASANTS GOVERNMENT OF THE USSR] 203 (Apr. 15, 1926) (Rus.), translated in N.D. KOROLEVA ET AL., *supra* note 1, at 105.

5. E. A. KOROVIN, *SSSR i poliarniie zemli* [The USSR and Polar Lands], 3 SOVETSKOE PRAVO [SOVIET LAW] 43, 46 (1926).

*i.e.* during the hey days of the Cold War, should not be underestimated. However, this first offer was never actually taken up by foreign shippers, as it appears to have been tacitly withdrawn in the wake of the Suez Canal crisis. Apparently, the Soviet authorities did not want to offend their Arab allies by appearing to provide an alternative route to the Suez Canal.<sup>6</sup>

One had to wait two decades for Gorbachev to renew a similar offer during his Murmansk speech held on October 1, 1987. “Depending on the evolution of the normalization of international relations,” he stated at that occasion, “we could open the Northern Sea Route for foreign shipping subject to the use of our icebreaker pilotage.”<sup>7</sup> It took another two years for the first foreign currency to be generated by the Northern Sea Route.<sup>8</sup> Even then, however, no foreign vessel was involved. Instead, the Soviet vessel *Tiksi* was chartered, for hard currency, by the foreign owners of the goods to be transported from Hamburg to Osaka using the Northern Sea Route during the summer of 1989.<sup>9</sup> It was, therefore, only in the summer of 1991 that a foreign vessel, the French *Astrolabe*, was finally able to make a through passage at the very moment that an aborted *coup d’état* took place—and only months before the final disappearance of the Soviet Union from the political map of the world.<sup>10</sup> Earlier that same year, an article in the Soviet newspaper Pravda, entitled “Flags in Hot Ice: For the First Time the Northern Sea Route Opened for Foreign Shipping,” had confirmed the adoption of the “Regulations for Navigation on the Seaways of the Northern Sea Route”<sup>11</sup> which would become operational on June 1, 1991.<sup>12</sup> The *Astrolabe*, receiving its official authorization on the first

6. Terence Armstrong, *The Northern Sea Route in 1968-70*, 12 INTER-NORD 118, 119 (1972).

7. Mikhail Gorbachev, Speech at the Ceremonial Meeting on the Occasion of the Presentation of the Order of Lenin and the Gold Star Medal to the City of Murmansk (Oct. 1, 1987) (transcript published in IZVESTIYA, Oct. 2, 1987, at 1, 3) (Rus.) (translated by author).

8. G. Ovchinnikov, *Za valyutu cherez Severnyi Ledovityi* [Through the Arctic Ocean Against Hard Currency], IZVESTIYA, Sept. 9, 1989, at 1 (Rus.).

9. Erik Franckx, *New Developments in the North-east Passage*, 6 INT’L J. ESTUARINE & COASTAL L. 33, 33-40 (1991).

10. Erik Franckx, *The Soviet Maritime Arctic, Summer 1991: A Western Account*, 1 J. TRANSNAT’L L. & POL’Y 131, 140-44 (1992) [hereinafter Franckx, *The Soviet Maritime Arctic*].

11. 1990 Regulations for Navigation on the Seaways of the Northern Sea Route, approved Sept. 14, 1990, 29 IZVESHCHENIYA MOREPLAVATELIAM [NOTICES TO MARINERS] (June 18, 1991) (Rus.) [hereinafter 1990 Regulations], available at [http://www.morflot.ru/about/sevmorput/rus/Rules\\_MMF\\_1990\\_Russ.doc](http://www.morflot.ru/about/sevmorput/rus/Rules_MMF_1990_Russ.doc). English translations are available at the official website for the Ministry of Transport of the Russian Federation, Federal Agency of Sea and River Transport, [http://www.morflot.ru/about/sevmorput/en/RULES\\_OF\\_NAVIGATION.doc](http://www.morflot.ru/about/sevmorput/en/RULES_OF_NAVIGATION.doc), and in KOROLEVA ET AL., *supra* note 1, at 133-39.

12. V. Chertkov, *Flagi v goriachikh V’dakh* [Flags in Hot Ice], PRAVDA, Jan. 21, 1991,

day of July of that very year, must therefore have been one of the first vessels to have made use of these 1990 Regulations. Despite the fact that these regulations had been approved by the USSR Minister of Merchant Marine on September 14, 1990, on instruction of a Decree of the Council of Ministers of June 1, 1990, they took a rather long time to be published.<sup>13</sup> The present author received a bilingual Russian-English copy from A. Kolodkin and M. Volosov upon the occasion of a visit to Moscow during the month of October, 1991.<sup>14</sup>

## II. CURRENT LEGAL REGIME

The current legal regime of Arctic marine shipping in the Northern Sea Route is still based on these same 1990 Regulations.<sup>15</sup> The approach of giving a rather detailed account of these 1990 Regulations in order to clarify the legal regime applicable to navigation along the Northern Sea Route is also to be found in other recent Russian writings on the law of the sea,<sup>16</sup> as well as in Russian contributions to specialized workshops.<sup>17</sup> It therefore seems appropriate to start this analysis with a short overview of the content of these 1990 Regulations (Part II.A.).

However, these 1990 Regulations are not the only Russian regulations to be followed by foreign ships on the Northern Sea Route. According to the Head of the Administration on the Northern Sea Route,<sup>18</sup> three other texts adopted in 1996 regulate the present-day legal regime of this sea route, namely the 1996 Guide to Navigating Through the Northern Sea Route (Part II.B.),<sup>19</sup> the

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at 6 (Rus.).

13. Franckx, *The Soviet Maritime Arctic*, *supra* note 10, at 137.

14. ERIK FRANCKX, MARITIME CLAIMS IN THE ARCTIC: CANADIAN AND RUSSIAN PERSPECTIVES 315-18 (1993) [hereinafter FRANCKX, MARITIME CLAIMS IN THE ARCTIC].

15. A. L. KOLODKIN ET AL., MIROVOI OKEAN, MEZHDUNARODNO-PRAVOVOI REZHIM, OSNOVNYE PROBLEMY [THE WORLD OCEAN, INTERNATIONAL LEGAL REGIME, BASIC PROBLEMS] 264-66 (Moscow, Status, 2007); N. P. Egorov et al., *Pravovoi Rezhim Sudokhodstva v Arktiki* [The Legal Regime of Navigation in the Arctic], in PROBLEMY SEVERNOGO MORSKOGO PUTI [PROBLEMS OF THE NORTHERN SEA ROUTE] 482, 493 (Alexander G. Granberg & Vsevolod I. Peresypkin eds., Moscow, Nauka, 2006).

16. V. N. GUTSULIAK, MEZHDUNARODNOE MORSKOE PRAVO (PUBLICHNOE I CHASTNOE) [INTERNATIONAL LAW OF THE SEA (PUBLIC AND PRIVATE)] 96-98 (Rostov na Don, Feniks, 2006).

17. I. Mikhina, *The Legal Regime of Navigation in the Russian Arctic*, in ARCTIC OPERATIONAL PLATFORM PROJECT WORKSHOP PROCEEDINGS, Deliverable No. D.6.1, at 33, 35-36 (Mar. 25, 2003), available at [http://www.arcop.fi/reports/workshop\\_report1.pdf](http://www.arcop.fi/reports/workshop_report1.pdf).

18. A. G. Gorshkovsky, *Rules to be Followed on the Northern Sea Route*, in ARCTIC OPERATIONAL PLATFORM PROJECT WORKSHOP PROCEEDINGS, Deliverable No. D.6.1, *supra* note 17, at 67-68, 71.

19. 1996 Guide to Navigating through the Northern Sea Route, translated in HEAD DEPARTMENT OF NAVIGATION AND OCEANOGRAPHY OF THE MINISTRY OF DEFENCE OF THE RUSSIAN FEDERATION NOTICE TO MARINERS 81-84 (July 13, 1996) (copy kindly obtained from

1996 Regulations for Icebreaker and Pilot Guiding of Vessels through the Northern Sea Route (Part II.C.),<sup>20</sup> and the 1996 Requirements for the Design, Equipment, and Supplies of Vessels Navigating the Northern Sea Route (Part II.D.).<sup>21</sup>

The basic legal framework applicable to foreign shipping in the Northern Sea Route, comprised of these four basic documents, has not changed much since then. Indeed, all of these documents, except the 1996 Guidelines to Navigating,<sup>22</sup> are still made available by the Russian Ministry of Transport through its official website in Russian and some of them also in English,<sup>23</sup> in exactly the same version as they were adopted more than ten years ago.

### A. 1990 Regulations

Since these rules date back to the early 1990s, this Part starts from a previous analysis made by the present author, to which more recent Russian writings on this subject are added.

In these regulations, the Northern Sea Route is defined as:

the essential national transportation line of the USSR that is situated within its inland seas, territorial sea (territorial waters), or exclusive economic zone adjacent to the USSR Northern Coast *and includes seaways suitable for leading ships in ice*, the extreme points of which are limited in the west by the Western entrances to the Novaya Zemlya Straits and the meridian running north through Mys Zhelaniya, and in the east (in the Bering Strait) by the parallel 66° N and the meridian 168°58'37" W.<sup>24</sup>

This definition immediately raises the difficult question of whether

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R. Douglas Brubaker) [hereinafter 1996 Guide to Navigating].

20. 1996 Regulations for Icebreaker and Pilot Guiding of Vessels through the Northern Sea Route (Rus.) [hereinafter 1996 Regulations], *available at* [http://www.morflot.ru/about/sevmorput/rus/Regulation\\_Construction\\_Ships.doc](http://www.morflot.ru/about/sevmorput/rus/Regulation_Construction_Ships.doc), *also translated in* 1996 Guide to Navigating, *supra* note 19, at 84-89.

21. 1996 Requirements for the Design, Equipment and Supplies of Vessels Navigating the Northern Sea Route (Rus.) [hereinafter 1996 Requirements], *available at* [http://www.morflot.ru/about/sevmorput/rus/Regulation\\_Construction\\_Ships.doc](http://www.morflot.ru/about/sevmorput/rus/Regulation_Construction_Ships.doc). English translations are available at the official website for the Ministry of Transport of the Russian Federation, Federal Agency of Sea and River Transport, [http://www.morflot.ru/about/sevmorput/en/SHIP\\_DESIGN\\_Eng.doc](http://www.morflot.ru/about/sevmorput/en/SHIP_DESIGN_Eng.doc), and in 1996 Guide to Navigating, *supra* note 19, at 317-23.

22. For discussion, see *infra* section II.B.

23. Russian Ministry of Transport Official Website, <http://www.mintrans.ru> (in Russian) (last visited Apr. 4, 2010).

24. 1990 Regulations, *supra* note 11, art. 1(2) (emphasis added).

or not the Northern Sea Route, and by implication the field of application of these 1990 Regulations, is limited to the 200 nautical mile limit, or whether the italicized text allows these regulations to apply beyond that limit as well. Given the legislative antecedents as well as their interpretation in the Soviet doctrine, it was believed that the latter option was the more probable one.<sup>25</sup>

This is clearly confirmed by later writings on this topic. Lukachuk in his monograph on international law, for instance, is crystal clear when he states, "[The Northern Sea Route] also passes through parts of the high seas."<sup>26</sup> Moreover, the fact that at times the route passes through the high seas does not undermine the unitary character of this transport line of communication, for it is argued that the presence of ships in these parts of the high seas is impossible without prior or posterior navigation through waters falling under Russian sovereignty.<sup>27</sup> This definition is also said to clarify the distinction between the Northern Sea Route and other constructs such as the Northeastern Passage or the Northeast Passage, since the Northern Sea Route is said to form a basic part of those other, much broader constructs.<sup>28</sup> Stated negatively, if ships want to sail between ports of Europe, Asia, and America by making use of only the Northeastern Passage or the Northeast Passage, they have to remain outside so-called "Russian waters" and the Northern Sea Route.<sup>29</sup> However, since the same authors making the latter assessment also underline at the same time that the northern boundary in the definition of the Northern Sea Route remains undefined and includes high latitude routes, even those crossing the North Pole,<sup>30</sup> they rather blur the distinction just made. The incorporation into Soviet legislation of Article 234 of the 1982 United Nations Convention on the Law of the Sea<sup>31</sup> led to similar uncertainties as to the exact scope application.<sup>32</sup> If the new Russian legislation on the exclusive economic zone<sup>33</sup> remedied quite a few shortcomings already noted by the present author

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25. FRANCKX, *MARITIME CLAIMS IN THE ARCTIC*, *supra* note 14, at 189-90.

26. I.I. LUKASHUK, *MEZHDUNARODNOE PRAVO: OSOBENNAIA CHAST'* [INTERNATIONAL LAW: SPECIAL PART] Ch. VI, para. 10 (Moscow, Wolters, 2005).

27. KOLODKIN ET AL., *supra* note 15, at 264.

28. Granberg et al., *supra* note 1, at 9.

29. KOROLEVA ET AL., *supra* note 1, at 49, 99.

30. *Id.* at 49, 99; *id.* at 50 map, 100 map.

31. United Nations Convention on Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397-581, *available at* [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf). The scope of application of this article is strictly limited to the exclusive economic zone.

32. Franckx, *Maritime Claims in the Arctic*, *supra* note 14, at 178-79, 188-89.

33. 1998 Federal Act on the Exclusive Economic Zone of the Russian Federation, as amended, No. 191-3, art. 32 (Dec. 17, 1998) (Rus.). Original Act translated at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS\\_1998\\_Act\\_EZ.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_EZ.pdf).

elsewhere with respect to the former Soviet legislation on the issue, such as the “due regard” requirements<sup>34</sup> or the requirement that ice must be covering the area for most of the year,<sup>35</sup> it is noteworthy that the new Russian legislation now adds a sentence stating that the limits of such areas shall be published in Notices to Mariners. It seems therefore safe to conclude that the door is still left open for the possible application of these 1990 Regulations beyond the two hundred mile limit. Also, the western lateral boundary of the Northern Sea Route has become unclear after some recent high level statements.<sup>36</sup> The question here is whether the field of application of the legal regime of the Northern Sea Route also includes the southeastern ice-covered part of the Barents Sea,<sup>37</sup> or not.

A second salient feature of this definition, especially when viewed against the later enactment of Russian federal acts on different maritime zones, is that a special article on the Northern Sea Route is to be found in the Federal Act of 1988 relating to the internal maritime waters, territorial sea and contiguous zone, in a chapter entitled: “Characteristics of the legal regime of sea ports of the Russian Federation, internal maritime waters, and the territorial sea.” It reads:

Navigation on the seaways of the Northern Sea Route, the historical national unified transport line of communication of the Russian Federation in the Arctic, including the Vil’kitskii, Shokal’skii, Dmitrii Laptev and Sannikov Straits, shall be carried out in accordance with this Federal Act, other federal laws and the international treaties to which the Russian Federation is a party and the Regulations for Navigation of the Seaways of the Northern Sea Route approved by the Government of the Russian Federation and published in *Notices to Mariners*.<sup>38</sup>

No such entry, however, is to be found in the Federal Act relating

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34. Erik Franckx, *The New USSR Legislation on Pollution Prevention in the Exclusive Economic Zone*, 1 INT’L J. ESTUARINE & COASTAL L. 155, 163-64 (1986).

35. Franckx, *Maritime Claims in the Arctic*, *supra* note 14, at 218 n. 358.

36. ERIK FRANCKX, *Should the Law Governing Maritime Areas in the Arctic Adapt to Changing Climatic Circumstances?* in CLIMATE GOVERNANCE IN THE ARCTIC 119-33 (N. Banks et al. eds., Berlin, Springer, 2009).

37. Gorshkovsky, *supra* note 18, at 67; Granberg et al., *supra* note 1, at 10.

38. 1998 Federal Act on the Internal Maritime Waters, the Territorial Sea and Contiguous Zone of the Russian Federation, as last amended on Sept. 8, 2007, Nos. 155-3, 261-3 (July 31, 1998) (Rus.), art. 14 (translated by author). English translation also to be found at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS\\_1998\\_Act\\_TS.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_TS.pdf).

to the exclusive economic zone, adopted only a few months later,<sup>39</sup> even though by far the longest part of the Northern Sea Route runs through the Russian exclusive economic zone.

Essentially, the basic aim of these 1990 Regulations is to allow navigation on a non-discriminatory basis for vessels of all states, while giving careful consideration to environmental concerns.<sup>40</sup> The 1990 Regulations provide the basic framework within which these operations have to take place. Requests are to be addressed to the Administration of the Northern Sea Route.<sup>41</sup> In order for this Administration to be able to make a decision, these requests need to contain a minimum amount of information.<sup>42</sup> Special requirements will have to be met by the vessel and the master of the ship. If the latter has not the required experience, a state pilot will be assigned.<sup>43</sup> Civil liability of the owner for environmental damage must be secured before entering the area.<sup>44</sup> Inspection of the vessel while *en route* may be undertaken under certain circumstances.<sup>45</sup> Once allowed to use the Northern Sea Route, the vessel must follow the route assigned to it, unless otherwise instructed.

The vessel will be guided by means of either shore-based, aircraft, conventional, icebreaker leading, or icebreaker assisted pilotage and appropriate radio contact must be maintained.<sup>46</sup> Compulsory icebreaking pilotage is provided for in the Vil'kitskii, Shok-al'skii, Dmitrii Laptev, and Sannikov straits.<sup>47</sup> The Administration of the Northern Sea Route, located in Moscow, with its two regional headquarters located in the ports of Dikson and Pevek, exercises general control over shipping operations.<sup>48</sup> Navigation may be temporarily suspended<sup>49</sup> and vessels not complying with the above-

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39. 1998 Federal Act on the Exclusive Economic Zone of the Russian Federation, *supra* note 33.

40. 1990 Regulations, *supra* note 11, arts. 2, 1(4).

41. *Id.* art. 3.

42. It concerns information relating to the vessel (name, IMO number, flag, port of registry, name and address of shipowner, tonnage, full displacement, main dimensions, output of engines, construction and material of propeller, speed, year of construction, ice class, classification society, last examination date, bow construction, insurance, list of deviations of the 1996 Requirements), as well as the intended journey (expected time of navigation and aim of journey). Standard letter of the Head of the Northern Sea Route Administration addressed to the owners or masters of vessels (intending to sail the Northern Sea Route), available at [http://www.morflot.ru/about/sevmorput/en/pamyatka\\_sudovladeltsu.doc](http://www.morflot.ru/about/sevmorput/en/pamyatka_sudovladeltsu.doc) (Rus.), translated at [http://www.morflot.ru/about/sevmorput/en/Commemorative\\_booklet.doc](http://www.morflot.ru/about/sevmorput/en/Commemorative_booklet.doc).

43. 1990 Regulations, *supra* note 11, art. 4.

44. *Id.* art. 5.

45. *Id.* art. 6.

46. *Id.* art. 7.

47. *Id.* art. 7(4).

48. *Id.* art. 8.

49. *Id.* art. 9.



mentioned requirements may be ordered to leave the Northern Sea Route along a specified route.<sup>50</sup> Finally, the Administration of the Northern Sea Route and its Marine Operations Headquarters are not to be liable for damage suffered by a vessel or property located on board any vessel unless one can prove the Administration's negligence.<sup>51</sup>

It should be finally noted that the permission granted by the Administration of the Northern Sea Route does not allow the vessel to conduct marine scientific research, fish, or engage in tourism, the latter being all activities for which an additional permission of the Ministry of Foreign Affairs of the Russian Federation is required.<sup>52</sup>

The Russian Federation is a party to all Annexes but VI of the International Convention for the Prevention of Pollution from Ships and Protocol to the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78),<sup>53</sup> as well as the Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention).<sup>54</sup>

According to R. Douglas Brubaker, there is an ongoing process of harmonization of national law with the International Convention on Civil Liability for Oil Pollution Damage (1969 CLC), the Protocol to the International Convention on Civil Liability for Oil Pollution Damage (1976 Protocol), the Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage (1992 Protocol), and Appendix D of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea

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50. *Id.* art. 10.

51. *Id.* art. 11.

52. Standard letter of the Head of the Northern Sea Route Administration addressed to the owners or masters of vessels, *supra* note 42 (last paragraph).

53. International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, and Protocol to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978 [MARPOL 73/78], 1340 U.N.T.S. 61, 17 I.L.M. 546.

54. Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, May 30, 1996, 1996 Austl. T.S. No. 3, 11 I.L.M. 284, *available at* <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/dfat/treaties/1996/3.html?query=+%28%2827+november+1992%29+and+%28on%29%29>.

(1996 HNS Convention).<sup>55</sup>

When this country overhauled its Commercial Navigation Code in 1999, totally new rules on liability and compensation were adopted based on the 1996 HNS Convention. However, problems remain with respect to the practical implementation in Russian law of the compulsory insurance certificate, which involves conditions, forms, and issuing authority as far as the Northern Sea Route is concerned, and authors have recommended that the 1990 Regulations should therefore be amended.<sup>56</sup>

It will be easily understood that only a broad general framework is provided for. For instance, details like the rates of the fees to be paid by foreign ships for the services rendered, even though duly foreseen to be adopted,<sup>57</sup> were initially only predicted for the month of July, 1992.<sup>58</sup> As indicated below,<sup>59</sup> these rates have recently been augmented.

### B. 1996 Guide to Navigating

This guide, which is a very sizeable document of more than 300 pages, has been prepared by the Russian side under the International Northern Sea Route Programme, a joint Norwegian-Japanese-Russian venture which ran from 1993 to 1999.<sup>60</sup> It consists of three main parts. In the first part, a general overview is provided both of the geographical and navigation conditions, which runs for eight pages, and of the hydro-meteorological conditions, which runs for seventy-four pages including many maps and graphics. This part concludes by providing the full text of both the

55. R. DOUGLAS BRUBAKER, *THE RUSSIAN ARCTIC STRAITS* 88 (2005); International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, available at <http://www.admiraltylawguide.com/conven/civilpol1969.html>; Protocol to the International Convention on Civil Liability for Oil Pollution Damage, Nov. 19, 1976, 16 I.L.M. 617, available at <http://sedac.ciesin.org/entri/texts/civil.liability.oil.pollution.damage.1969.html>; Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage, Nov. 27, 1992, 1996 Austl. T.S. No. 2, available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/dfat/treaties/1996/2.html?query=%28%2827+november+1992%29+and+%28on%2929>; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, May 3, 1996, available at <http://www.admiraltylawguide.com/conven/noxious1996.html>.

56. Egorov et al., *supra* note 15, at 496-97.

57. 1990 Regulations, *supra* note 11, art. 8(4).

58. I. Ivanov & A. P. Ushakov, *The Northern Sea Route – Now Open*, 12 INT'L CHALLENGES 15, 17 (1992).

59. For discussion, see *infra* section III.

60. L.G. Tsoy et al., *Report on Current Regulations and Practices and Impact of IMO Guidelines*, in ARCTIC OPERATIONAL PLATFORM PROJECT FRAMEWORK, Deliverable No. D.2.2.1, at 7 (2004), available at <http://www.arcop.fi/reports/D221.pdf>.

1990<sup>61</sup> and the 1996 Regulations.<sup>62</sup>

The second, and most substantial, part of the 1996 Guide to Navigating consists of a detailed navigational description of the Kara, Laptev, East Siberian, and Chuckchi Seas with their straits and islands. This part extends for 195 pages and ends with a fifty-seven page listing of aids to navigation, including floating, radio and lighted aids.

The document concludes with a third part, which consists of a sixty-five page reference section where the practice of ice navigation is addressed under different conditions, with or without the assistance of icebreakers, followed by a short, two page section on salvage and rescue support. This third part closes by providing the full text of the 1996 Requirements,<sup>63</sup> as well as a large, forty-two page section with illustrations of the appearance of the visual aids to navigation, different straits and islands, and ice manoeuvres. Despite the detailed nature of the descriptions given in this document, it does not replace the nautical charts or other more detailed nautical publications.

### C. 1996 Regulations

All ships intending to use the Northern Sea Route should submit a request to the Administration of the Northern Sea Route, at least four months in advance, including detailed information on the vessel, possible deviations from the 1996 Requirements,<sup>64</sup> certification of insurance of liability for possible pollution damage, and approximate date and purpose of the voyage.<sup>65</sup> For an additional fee, this timeframe may be shortened to one month, but in either case the owner receives an answer within ten days.<sup>66</sup> If the response is positive, an inspection needs to take place at the expense of the owner.<sup>67</sup> Ships not completely satisfying the 1996 Requirements, as well as floating structures, can be guided through the Northern Sea Route for an additional fee.<sup>68</sup>

The ship informs the Administration of the Northern Sea Route of the estimated time of arrival at least ten days before entering the route,<sup>69</sup> and provides a corrected time two to five days before

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61. 1996 Guide to Navigating, *supra* note 19, at 81-84.

62. *Id.* at 84-89.

63. *Id.* at 317-23.

64. For discussion, see *infra* section II.D.

65. 1996 Regulations, *supra* note 20, art. 2(1).

66. *Id.* art. 2(3).

67. *Id.* art. 2(4).

68. *Id.* art. 2(5).

69. *Id.*

arrival.<sup>70</sup> The information contained in this notification, in addition to vessel draft and contact information, mostly concerns information on cargo and crew.<sup>71</sup> When entering the Northern Sea Route, at least two pilots need to be taken on board, and the vessel must be brought under the control of the West or East Marine Operations Headquarters for icebreaking support and organization.<sup>72</sup> Despite the instructions given by the guiding icebreaker or the advice and recommendations provided by the ice pilot, the master retains ultimate responsibility for the vessel.<sup>73</sup> When a vessel does not comply with the above, it can either be expelled from the route,<sup>74</sup> forced back into a convoy,<sup>75</sup> or possibly receive delayed assistance,<sup>76</sup> but in all these cases the extra expenses incurred will be borne by the master of the vessel. The ship, which is required to have the latest nautical charts and navigational publications on board,<sup>77</sup> needs to report back at least twice a day to Marine Operations Headquarters.<sup>78</sup> The position of the vessel, which is instructed even in clear or open water not to deviate considerably from the recommended route,<sup>79</sup> is thus closely checked by the Russian authorities at all times.

#### *D. 1996 Requirements*

Given the extremely hazardous navigation conditions that can be encountered when sailing the Northern Sea Route, a detailed set of requirements have been adopted in order to ensure the safety of navigation and the protection of the Arctic marine environment from pollution. These requirements, which must be fulfilled before travelling along the Northern Sea Route,<sup>80</sup> as also referred to in the 1996 Regulations, apply to all vessels with gross registered tonnage of 300 tonnes.

At a minimum, these vessels have to possess at least the Russian Federation Register of Shipping ice classes of L1, UL or ULA,<sup>81</sup> which approximately correspond to the Lloyd's Register 1A,

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70. *Id.* art. 2(7).

71. *Id.* art. 2(6).

72. *Id.* arts. 2(8), (13).

73. *Id.* art. 3(2), (3).

74. *Id.* art. 2(17).

75. *Id.* art. 2(18).

76. *Id.* art. 2(21).

77. *Id.* art. 4(2).

78. *Id.* art. 2(22).

79. *Id.* art. 4(6).

80. 1996 Requirements, *supra* note 21, art. 2(10).

81. *Id.* art. 2(2).

1AS and AC1 ice classes.<sup>82</sup> Additional requirements are subsequently provided. First, the hull must be of a double-bottom type which normally can not be used for storage of petroleum products or other harmful substances.<sup>83</sup> Second, the machinery plant, as well as the propeller blades, must fulfil certain specific requirements.<sup>84</sup> Third, equipment to treat waste water must be on board, as well as a bilge water separator together with storage tanks sufficient for a thirty day navigation period.<sup>85</sup> Fourth, there are special requirements that help to ensure the stability of the vessel under ice conditions, such as potential ice accretion on horizontal and lateral surfaces of the ship, which must be observed.<sup>86</sup> Fifth, minimal navigation and communications equipment needs to be present.<sup>87</sup> Sixth, certain provisions and emergency facilities are required, including, for example, a double store of fuel and lubricants sufficient for thirty days, spare parts, and certain tools such as portable gas-welding equipment.<sup>88</sup> Finally, as regards the crew, its size must be sufficient to allow for a three-shift watch, and the master should have at least fifteen days' experience steering vessels under ice conditions along the Northern Sea Route.<sup>89</sup>

Russian vessel-source pollution standards for the Northern Sea Route are stricter, at least in some dimensions, than normal MARPOL 73/78 requirements. While the 1996 Requirements allow for discharges of bilge water if the petroleum content is less than fifteen parts per million, other petroleum contaminated discharges, such as ballast water from tankers, is prohibited.<sup>90</sup> Garbage disposal at sea is also prohibited.<sup>91</sup>

### III. RECENT CHANGES AND FUTURE LEGAL REGIME

As demonstrated under Part II, the bulk of the present-day legal regime applicable to foreign ships in the Northern Sea Route dates back to the early 1990s. A few recent additions should never-

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82. L. G. Tsoy & A. N. Yakovlev, *Consistency of the Northern Sea Route Regulations with Other National and International Rules*, in ARCTIC OPERATIONAL PLATFORM PROJECT WORKSHOP PROCEEDINGS, Deliverable No. D.6.5, at 20 (Sept. 8, 2004), available at [http://www.arcop.fi/reports/workshop\\_report6.pdf](http://www.arcop.fi/reports/workshop_report6.pdf).

83. 1996 Requirements, *supra* note 21, art. 3(1).

84. *Id.* art. 4(1)-(6).

85. *Id.* art. 5(1)-(3).

86. *Id.* art. 6(2), (5).

87. *Id.* art. 7(1)-(3).

88. *Id.* art. 8(1)-(3).

89. *Id.* art. 9(1), (2).

90. *Id.* art. 5(2).

91. H. KITAGAWA, THE NORTHERN SEA ROUTE: THE SHORTEST SEA ROUTE LINKING EAST ASIA AND EUROPE 128 (2001), available at [http://www.sof.or.jp/en/activities/pdf/06\\_02.pdf](http://www.sof.or.jp/en/activities/pdf/06_02.pdf) (Jap.).

theless be mentioned here to complete the picture. First, as predicted,<sup>92</sup> the fees to be paid by foreign ships for the services rendered were augmented in 2005. Fees depend upon the cargo being transported, and range from a low of U.S. \$5.08 per ton for timber products to a high of U.S. \$84.71 per ton for vehicles. Special rates apply, varying between U.S. \$8.52 for bulk liquid cargo and U.S. \$19.71 for other cargoes, with respect to the transport of cargo to the Far North carried out according to the federal budget and regional funds.<sup>93</sup> A separate set of fees were introduced at that time for vessels not intended for cargo transportation, such as vessels sailing in ballast or research vessels,<sup>94</sup> but these fees were cut in half a year later for vessels which received authorization to conduct marine scientific research in the internal waters, territorial sea, exclusive economic zone or continental shelf of the Russian Federation in order to realize the research policy of the government.<sup>95</sup> The ice breaking fees, which have been increasing regularly, also create a difficulty under the new economic conditions prevailing in the Russian economy. By early 1994, for instance, these fees had increased 1376 times when compared to 1989.<sup>96</sup> These fees are predicted to increase further in the near future.<sup>97</sup> New legislative initiatives, discussed below, explicitly include ice breaking fees in the determination of the overall fees established to use the Northern Sea Route.<sup>98</sup>

Furthermore, the number of open ports in the Arctic has increased substantially. Initially, only the port of Igarka, located some 418 miles inland on the Enisei river, had been opened to foreign ships. The Russian government later started to publish yearly lists of open ports.<sup>99</sup> For 2007-2008 this list includes forty-one Arctic ports open to foreign cargo vessels. Additionally, there are six

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92. KIMMO JUURMAA, *ARCOP Final Report*, in ARCTIC OPERATIONAL PLATFORM PROJECT WORKSHOP PROCEEDINGS, Deliverable No. D.016.017, at 65 (Apr. 30, 2006), available at <http://www.arcop.fi/reports/D016.pdf>.

93. *July 26, 2005 Order of the Federal Rates Service, On the Changes of Rates for Services of the Icebreaker Fleet on the Northern Sea Route*, 27 INFO. BULL. OF FED. RATES SERVICE 173, tbls. 1, 3 (Oct. 4, 2005), available at [http://www.morflot.ru/about/sevmorput/en/Order\\_322\\_t\\_Eng.doc](http://www.morflot.ru/about/sevmorput/en/Order_322_t_Eng.doc). Conversion of Rubles into U.S. dollars calculated at conversion rate of April 24, 2010.

94. *Id.* tbl. 2.

95. *December 5, 2006, Order Amending the Order of the Federal Rates Service of July 26, 2005, No. 322-T, On the Changes of Rates for Services of the Icebreaker Fleet on the Northern Sea Route*, Annex I, available at [http://www.morflot.ru/about/sevmorput/rus/Prikaz\\_337\\_t9\\_Russ.doc](http://www.morflot.ru/about/sevmorput/rus/Prikaz_337_t9_Russ.doc).

96. Granberg et al., *supra* note 1, at 23.

97. A.G. Granberg et al., *O kontseptsii razvitiia Severnogo morskogo puti* [On the Concept of the Development of the Northern Sea Route], in PROBLEMY SEVERNOGO MORSKOGO PUTI [PROBLEMS OF THE NORTHERN SEA ROUTE], *supra* note 1, at 502, 519.

98. Egorov et al., *supra* note 15, at 500.

99. Granberg et al., *supra* note 1, at 19.

more ports for cargo vessels and twenty more ports for tankers with regulated access for foreigners, where these foreign flagged vessels, staffed with Russian crewmembers, are allowed entry.<sup>100</sup> This list has been subject to change.<sup>101</sup>

Detailed communication rules applicable to the Northern Sea Route have also been enacted recently, providing detailed contact information about radio-channels and telephone, fax, Inmarsat and e-mail numbers and addresses of the competent shore-based facilities, pilot services and icebreakers, relevant when sailing the northern Sea Route.<sup>102</sup>

There were indications that the abovementioned legal framework was in the process of being overhauled in a piecemeal fashion.<sup>103</sup> However, more fundamental changes to Arctic marine shipping appear to be in the pipeline. First, a draft law was submitted to the State Duma in 1998, entitled "On the Arctic Zone of the Russian Federation," which would have consolidated Russian sovereignty over its Arctic waters by relying once again on the sector theory.<sup>104</sup> This draft, however, did not succeed, for Russian scholars have recently argued that it has been replaced by a new draft law on Northern Sea Route.<sup>105</sup> According to these authors, one of which participated in the actual preparation of this piece of

100. Instruction of the Government of the Russian Federation, *On the Authorization for Cargo Ships and Tankers Flying a Foreign Flag During 2007-2008 to Call at Arctic Ports and Points, Located on the Territory of the Russian Federation*, No. 1855-p, annexes 1-3 (Dec. 29, 2006) (Rus.).

101. No updates for later shipping season (2008-2009 and following) have been posted on the official webpages of the Ministry of Transport of the Russian Federation. Moreover, the 2007-2008 list has even been removed. From other, more recent documents it can nevertheless be deduced, first, that some of these ports have in the mean time been closed, such as Uelen, *see Instruction of the Government of the Russian Federation: On the Closing of Sea and River Ports (Points) for Entry and Servicing of Foreign Ships*, No. 752-p, annex (May 26, 2008) (Rus.); second, that certain ports, not mentioned in the list for 2007-2008, have also explicitly been closed, such as Kovda and Umba in the Murmansk Region, *see id.*; third, that other ports, already to be found in the 2007-2008 list, have in the mean time formed the subject of a separate instruction, no longer limiting in time their status as open ports, such as Varandei, *see Instruction of the Government of the Russian Federation: On the Granting of the name "Varandei" Sea Port*, No. 475-p, para. 3 (Apr. 11, 2008) (Rus.) as well as Vitino and Dudinka, *see Instruction of the Government of the Russian Federation*, No. 2060-p, only art. (Dec. 31, 2008) (Rus.).

102. Ministry of Transp. of the Rus. Fed'n, Fed. Agency of Sea & River Transp., *Communication Directions for During the Arctic Navigation Period 2008-2009 When Sailing the Seaways of the Northern Sea Route (Including 2009 Additions and Amendments)*, Moscow, 2008, available at [http://www.morflot.ru/about/sevmorput/rus/ukazi\\_po\\_svyazi.rar](http://www.morflot.ru/about/sevmorput/rus/ukazi_po_svyazi.rar).

103. L. G. Tsoy, *The Northern Sea Route – Requirements to Ships and Interrelation Between Ice Classes*, in ARCTIC OPERATIONAL PLATFORM PROJECT WORKSHOP PROCEEDINGS, Deliverable No. D.6.7, at 39-41 (Sept. 29, 2005), available at [http://www.arcop.fi/reports/workshop\\_report7.pdf](http://www.arcop.fi/reports/workshop_report7.pdf).

104. A. A. KOVALEV, CONTEMPORARY ISSUES OF THE LAW OF THE SEA: MODERN RUSSIAN APPROACHES 180 (2004).

105. KOLODKIN ET AL., *supra* note 15, at 269.

draft legislation, the new draft law provides for an authorization procedure for foreign warships, and possibly also for ships carrying nuclear weapons, radioactive material, or any other environmentally harmful substances on board. Above the Northern Sea Route over-flight by foreign warplanes would be prohibited, whereas the conduct of hydrographical surveys in that zone would be strictly regulated.<sup>106</sup> This legislative activity seems to be moving along a course set out by the Russian maritime doctrine adopted by President Putin in 2001. In this doctrine, where the Arctic receives due attention, the order of things is rather clear: first one should secure the national interests of the Russian Federation with respect to the Northern Sea Route, then one may consider its central state administration and the icebreaker service, and only last should one rely on the principle of “equal access for relevant transporters, including foreign transporters.”<sup>107</sup>

It is therefore likely that substantial changes are to be expected concerning the legal regime applicable to foreign shipping in the Russian Arctic in a not too distant future.

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106. *Id.* at 274-75.

107. Instruction of the President of the Russian Federation, *Maritime Doctrine of the Russian Federation for the Period until 2020*, No. 1387-p (July 27, 2001) (Rus.), translated in Int'l Oceanographic Comm'n, *National Ocean Policy: The Basic Texts from Australia, Brazil, Canada, China, Colombia, Japan, Norway, Portugal, Russian Federation, United States of America*, 241 (Paris, UNESCO 2007), available at [http://ioc3.unesco.org/abelos/index.php?option=com\\_docman&task=doc\\_download&gid=267](http://ioc3.unesco.org/abelos/index.php?option=com_docman&task=doc_download&gid=267).