

The Northeast Passage and the Northern Sea Route:

Unity in Division?

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I. Introduction

The present contribution intends to have a closer look at two denominations often encountered in the legal literature, namely the Northeast Passage and the Northern Sea Route, in order to find out whether these concepts cover the same ground or whether they are rather to be considered as different from one another as far as their respective fields of application are concerned. In Western literature one often encounters the notion Northeast Passage (Butler 1978), in order to distinguish it from the Northwest Passage (Pharand and Legault 1984). With global warming having a serious impact on the Arctic, the predictions by Peter Wadhams, Professor at the University of Cambridge and former director of the Scott Polar Research Institute, are now that the ice may well totally disappear during summer in as little as four years' time (Collins 2012). This of course opens entirely new perspectives for both the Northeast and Northwest Passages, as they substantially reduce the distance necessary for ships to sail from the Atlantic to the Pacific Oceans. As already stated by the present authors elsewhere, it is however highly probable that the increase in traffic will first occur in the Northeast rather than the Northwest Passage and in fact, 2010 can be viewed as the breakthrough year for trans-Arctic commercial shipping using the Northeast Passage (Franckx and Boone 2012). This only further emphasizes the timeliness of trying to bring some clarity to these different concepts.

For indeed, Northern Sea Route is the term normally encountered in Russian law of the sea treatises (Kolodkin et al. 2007, 263-269). Russian authors very often find it essential to stress the importance of the difference, but when trying to explain the distinguishing elements the picture becomes rather hazy (Koroleva et al. 1995, 48-49 and 98-99; Timchenko 1994, 193-194, 1997, 31 and 2001, 269-271). The present contribution will therefore try to come to grips with this apparently important distinction in Russian eyes at this specific junction in time where this issue is becoming quintessential in view of the increased shipping, national as well as international, which is taking place in the area since 2010 and has been only increasing thereafter.

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II. Possible meanings of the term Northern Sea Route

A. Western interpretation

It might suffice here to take the recent work of a Western scholar with a keen interest in the Russian Arctic as a starting point for the discussion, for he distinguished no less than five possible meanings of the notion Northern Sea Route (Brubaker 2006, 29-30).

1. It is a route between Novaia Zemliia and the Bering Strait used solely by Russian vessels or vessels under charter to a Russian agency with special permission.
2. Arctic powers base themselves on international law, but on national law as well because of history. International shipping meeting the conditions laid out by the Russian Federation is tolerated.
3. A national route confined to the 200 nautical mile zone, *i.e.* only covering the internal waters, territorial sea and exclusive economic zone. International shipping is tolerated on the basis of Article 234 of the 1982 Convention.
4. A distinction is made between the Northern Sea Route and the Northeast Passage. Both are governed by overlapping but not identical legal norms: the former is governed by the Russian regime, while the latter, linking the Atlantic and the Pacific Oceans, by international treaties and international customary law.
5. Only the Northeast Passage is focused upon, linking the Atlantic and the Pacific Oceans, subject to international treaties and international customary law.

It goes without saying that this is a rather confused state of affairs. We will therefore now turn to the Russian authors in order to find out how they themselves conceive this distinction.

B. Russian approach

What becomes perfectly clear after reading the Russian authors on the subject, is that the Northeast Passage is the broader concept, of which the Northern Sea Route forms a part, be it a substantial part (Granberg et al. 2006, 9-10). Or stated negatively, if ships want to sail between ports of Europe, Asia and America by only making use of the Northeast Passage, they have to remain outside so-called Russian waters and the Northern Sea Route (Koroleva et al. 1995, 49 and 99). Not that every Russian understands the distinction very well, for an anecdote has it that when Yeltsin was on a working visit to Murmansk he was asked how the government intended to solve the problems with “Sevmorput”. This is the Russian acronym for the Northern Sea Route, which reads in full “Severnoy morskoy put’”. Yeltsin is said to have turned to one of his staff with the question “What is that again?” (Babich 2007).

Further analysis of Russian legislation reveals that the notion of Northern Sea Route was included in the Federal Act on the Internal Maritime Waters, the Territorial Sea and Contiguous Zone of

the Russian Federation (1998 (July) Federal Act, Art. 14). Under the heading "Navigation along the waterways of the Northern Sea Route" this article 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."

It is noteworthy to mention that no such entry is to be found in the Federal Act adopted only a few months later relating to the exclusive economic zone of the Russian Federation, even though by far that zone is predominant in the geographical scope covered by the Northern Sea Route (1998 (December) Federal Act).

A definition of this geographical scope is to be found in the Regulations for Navigation on the Seaways of the Northern Sea Route of 14 September 1990 (1990 Regulations, Art. 1 (2)), which stipulates:

"the essential national transportational 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 Novaia Zemliia Straits and the meridian running north through Mys Zhelaniia, and in the east (in the Bering Strait) by the parallel 66° N and the meridian 168°58'37" W."

Based on these provisions, one could argue that the two major distinguishing factors of the Northern Sea Route, when compared to the Northeast Passage, are *primo* that the former is limited to the 200 nautical miles extent of the exclusive economic zone whereas the latter includes the high seas, and *secundo* that the Barents Sea, located to the west of Novaia Zemliia, is excluded from the former, but not from the latter. This would imply that if foreign ships stay out of the Russian exclusive economic zone in the Kara Sea, Laptev Sea, East Siberian Sea and the Chukchi Sea, the regime of the Northern Sea Route would not be applicable to them. This interpretation of the relevant Russian legal enactments is however not as straightforward as it might seem at first glance.

As far as the strict limitation of the Northern Sea Route to the exclusive economic zone is concerned, the addition of the small sentence "and includes seaways suitable for leading ships in ice" in Article 2 (1) of the 1990 Regulations opens the door to much wider interpretations. And this is exactly what Soviet and Russian scholars have been arguing. In 1993, one of the present authors reached the conclusion, based on legislative antecedents and their interpretation in Soviet learned writings that these additional words allowed for the application of these regulations beyond the exclusive economic zone (Franckx 1993, 189-190). More recent Russian legal writings do not seem to undermine that finding. The fact that at times its 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 (Kolodkin et al. 2007, 264). Moreover, Russian authors who underline the distinction between the two concepts, argue that vessels can make use of the Northeast Passage as long as they stay outside the Northern Sea Route, albeit at the same time affirming that the northern boundary of the Northern Sea Route remains undefined and includes high latitude routes, even those crossing the North Pole (Koroleva et al. 1995, 49 and 99 and maps on 50 and 100). It seems therefore safe to conclude that the door is still left open for the possible application of these 1990 Regulations beyond the 200-mile zone.

With respect to the lateral boundaries of the Northern Sea Route, *i.e.* the second distinguishing factor, a similar tendency needs to be noted. The question here is whether the field of application of the legal regime of the Northern Sea Route also includes the south-eastern, ice-covered part of the Barents Sea, and eventually even ice-covered parts of the Bering Sea. As far as the Barents Sea is concerned, several authors have already argued for a broadened application of the regime of the Northern Sea Route (Gorshkovsky 2003, 67; Granberg et al. 2006, 10). Babich argues in this respect that in so far as ships are also guided through ice-covered waters of neighbouring seas such as the Barents and the Bering Seas, the use of the terms eastern and western Arctic region is justified. He then continues by stating that the Northern Sea Route is made up of all natural navigational routes from the Barents to the Chukchi Sea (Babich 2007). By introducing new notions, the latter author does not really help to clarify the discussion.

III. Spatial extent of the Northern Sea Route

Against this background, it is not surprising that when one looks at maps depicting the Northern Sea Route in Western and Russian publications, differences have to be observed. In Western literature one often encounters maps depicting the Northern Sea Route area by a line starting in the west at the northern tip of Novaia Zemliia running straight to the North Pole and then back to the middle of the Bering Strait (Brubaker 1999, 208). This implies that the notions of Northern Sea Route and Northeast Passage are very similar, for east of the Barents Sea both totally overlap. Consequently, no through shipping is as possible except for ships subjected to the regime of the Northern Sea Route. This position is still believed to apply today, for in a more recent article Brubaker writes: “The NSR [Northern Sea Route] is defined to lie between the western entrances to the Novaya Zemlya straits and the meridian running from Mys Zhelaniya northward and in the Bering Strait by 66°N and 168°58’37”W, apparently including high seas areas through ambiguous formations” (Brubaker 2010, 60; see also Brubaker and Ragner 2010, 18, where a similar map can be found as the one used by Brubaker in 1999).

Russian map evidence is always somewhat more complex. Oftentimes, more information is depicted on the map than the mere area of application of the Northern Sea Route regime. Stressing the fact that not one, but a plural form of routes is available for shipping depending on the local conditions (Babich 2007), additional information often includes high latitude crossings (Koroleva et al. 1995, maps on 50 and 100).

IV. Conclusions

What conclusions can be drawn from the above analysis? An assumption may be made that the Russians have a tendency of stressing the importance of the difference between the Northern Sea Route and the Northeast Passage. This naming issue is more than a mere reference to the history of this shipping route above the Eurasian continent, only mastered at great cost and effort by Imperial Russia, later followed by the Soviet Union, and today continued by the Russian Federation. By making this distinction and creating a *fleur artistique* around the exact field of application of the Northern Sea Route concept, Russia seems to be willing to increase its control over present-day shipping. Here, especially stronger control over foreign shipping seems to be of particular concern. A previous study by the present authors clearly indicated that foreign companies, who deliberately wanted to make use of the Northeast Passage, but not the Northern Sea Route, were highly unsuccessful even though their management had explicitly stated that they would not ask for Russian ice-breaker assistance because the high cost involved would simply outweigh the advantages of using this shorter route (Franckx and Boone, 2012).

The fact is that up till now not one foreign vessel has made the transit from the Atlantic to the Pacific Oceans above the Eurasian continent without having been subjected to the Northern Sea Route regime. By means of a kind of “unity in division”, the Russian Federation has so far been able by this constructive ambiguity to ensure that foreign vessels operate by their rules. From a Western perspective, as a consequence, the difference between both concepts seems of little importance. As formulated by one author: “The Northern Sea Route (NSR) is the Russian name for what is often known outside Russia as the Northeast Passage (NEP)” (Ragner 2008, 1).

But most of this Russian legislation dates back to the 1990s, at a time when foreign shipping was not yet an issue. And even though attempts have been made recently to overhaul this legislation and to adapt it to quickly changing present-day circumstances, these efforts have so far come to naught. After the elections this year, however, the time for the new rulers to tackle this urgent problem becomes apropos. It will be interesting to see at that time whether the “division” or rather the “unity” will carry the day.

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