

Briefing Paper, No. 4/2020



The Northern Sea Route

International Law and Russian Regulations

Mika Okochi

*Associate Professor at Tokyo University of Marine Science
and Technology, Visiting Fellow at the European Institute
for Asian Studies*

March 2020

Abstract

This paper aims to clarify the EU's contribution to the establishment of the Arctic order. In forming Arctic policy and legal order, it is essential to examine current international and Russian domestic laws, which practically control the shipping route through the Arctic Sea, i.e. the Northern Sea Route (NSR). Discussions of those laws would indicate how the EU can contribute to a safe and sustainable use of the NSR, and form a stable Arctic order. The points that necessitate further discussion are (i) the legal status of the NSR and (ii) correlations between international and Russian domestic laws for the safe transportation of nuclear materials. A comprehensive legal system applicable to the NSR and the Arctic will be further shaped by coordinating international and domestic laws. Two conclusions can be drawn from the discussions. First, a possible theoretical EU contribution to the shaping of the Arctic order lies in verifying the relationship between international law and Russian regulations so that the NSR and the Arctic order will also benefit the EU. Second, a practical aspect of the EU's involvement in the shaping of an Arctic order is that the EU can contribute by providing reliable navigation capabilities that cover the Arctic region. The NSR needs to address technological issues, e.g. anti-spoofing measures, to maintain regular operation of GNSSs such as GLONASS. Consequently, the EU can cooperate with Arctic states in order to harmonize these rules and contribute to a safe, stable and sustainable Arctic regional order.

Keywords: The Northern Sea Route, Arctic Policy, Nuclear Material, Safe Transport, Russia

Briefing papers published by the European Institute for Asian Studies are summaries of facts which are related to a certain issue and often include a proposed course of action. This paper expresses the views of the author(s) and not of the European Institute for Asian Studies.

1. Introduction

The 2016 Joint Communication on an integrated European Union policy for the Arctic clarified the EU's strategic interest in the establishment of a safe, stable and sustainable Arctic regional order under the rule of international law. In forming Arctic policy and legal order, it is essential to examine the content of current international and Russian domestic laws, which practically control the shipping route through the Arctic Sea, i.e. the Northern Sea Route (NSR).



The Water Area of the Northern Sea Route by the NSRA
Source: http://www.nusra.ru/en/ofitsialnaya_informatsiya/granici_smp.html

Indeed, Russia has a leading role in regulating navigation in the NSR. For instance, as the peak of the 2020 NSR shipping season approaches, a nuclear-powered icebreaker for the Russian state nuclear power corporation Rosatom, the *Arktik*, is nearing completion. A Floating Nuclear Power Plant (FNPP), *Akademik Lomonosov* was also towed from Murmansk to Pevek in Northeastern Russia to enhance power supply. For exploitation and transportation of oil and gas within the Arctic region, nuclear-powered icebreakers and FNPPs may prove helpful.

Consequently, the NSR, which is the shortest shipping route connecting Europe and Asia, is standing at the crossroads of safe and sustainable use, by shouldering the task of transporting dangerous materials such as oil, Liquefied Natural Gas (LNG) and nuclear materials. At the same time, the NSR is not yet fully open for merchant vessels carrying EU member states' flags, since the legal status of the NSR is not yet determined in international law treaties. Those arguments concerning the NSR lead to the question of how the EU can shape the Arctic order so as to benefit from stable and secure energy transportation routes via the NSR.

In shaping the Arctic order, it is worthwhile to consider current international and Russian domestic laws relating to the NSR and safe transport of dangerous materials, nuclear ones in particular, which are subject to meticulous rules. Discussions of those laws would indicate how the EU can contribute to a safe and sustainable use of the NSR, and form a stable Arctic order. The points that necessitate further discussion below are (i) the legal status of the NSR and (ii) correlations between international and Russian domestic laws for the safe transportation of nuclear materials.

2. The Legal Status of the Northern Sea Route

In the first place, the legal status of the NSR is closely intertwined with *the legal status of the Arctic Sea*. Here Russia has woven an assertion of its sovereign waters based on legal theories, i.e. internal waters, historic waters and the sector principle. In such cases, *baselines* (low-water lines along the coast used for measuring the breadth of territorial waters) are crucially important, since they enable water areas to the landward side to be placed under Russian sovereignty. Furthermore, *historic waters* can also be recognised as *internal waters*. Meanwhile, the *sector principle*, by which lands and islands located between lines of longitude between the easternmost and westernmost parts of the coastline to the North Pole fall under Russian sovereignty, has not been widely accepted by international legal practitioners.

Alongside these theoretical assertions, Russian domestic law subtly shifted from claiming sovereignty in the Arctic Sea, to a more functional role enabling safe navigation in the NSR. For example, Article 14 of the Russian Federal Act on internal maritime waters, territorial sea and the contiguous zone of the Russian Federation of 1998, describes the NSR as “the historical national unified transport of communication of the Russian Federation in the Arctic”. It is clear that the NSR is considered as one inseparable historical unit of transport in spite of the legal status of the water areas where it is located. Later, the area of the NSR was defined as “a water area adjoining the northern coast of the Russian Federation, including internal sea waters, territorial sea, contiguous zone and exclusive economic zone of the Russian Federation” by the Federal Law on Amendments to the Merchant Shipping Code, in 2012. This definition reflects the classification of water areas from the United Nations Convention on the Law of the Sea (UNCLOS) of 1982, apart from full sovereignty. These laws were coherently enacted in accordance with international law, which is a component of the Russian legal system since the 1993 Constitution.

Further speaking, an oft-cited supporting evidence for Russian regulations, Article 234 of UNCLOS authorises coastal states with the right to enforce laws and regulations to prevent marine pollution in “ice-covered areas”, which includes the NSR. For these sea areas, the International Code for Ships Operating in Polar Waters (Polar Code) requires vessels to follow a stringent criteria of design, equipment and rescue. To adhere to the Polar Code, the coastal state’s authority, e.g. the Northern Sea Route Administration (NSRA) has been tasked with the responsibility to ensure safe navigation, through permission for navigation, icebreaker assistance, pilot assistance and radio communication between ships and the NSRA. Such responsibilities were transferred to Rosatom under the Federal Law in 2018.

In summary, Russian regulations strengthen *de facto* coastal state control over the NSR, although the legal status of the NSR and the Arctic Sea is not made clear in these regulations. An overview of the regulatory structures of the NSR concerning safe transport of nuclear materials can clarify the Russian regulations’ significance in the creation of an international order for the NSR and the Arctic Sea.

3. Correlations between International and Russian Domestic Laws

The second point of discussion covers how and which Russian domestic regulations correlate with international law and thus determine the legal status of the NSR.

The *regulatory structures of the NSR are multi-layered*, consisting of treaties, non-binding international standards and Russian laws. Furthermore, the transport of nuclear materials is being discussed in an issue-centric manner under the auspices of the International Maritime Organization (IMO) and the International Atomic Energy Agency (IAEA). Within this multi-layered legal mechanism, the Russian authoritative entity maintains effective controls over the NSR.

As an example, the UN lists classes of dangerous goods in a Recommendation (the so-called Orange Book, a guidance document developed to harmonise dangerous goods transport regulations) where nuclear materials are categorised as class 7. The IAEA then oversees the transport of nuclear materials following their regulations. Finally, the IMO edits the International Maritime Dangerous Goods Code (IMDG Code). The IMDG Code contains the Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Nuclear Waste in Flasks on board Ships (INF Code), which stipulates transport methods and designs of vessels. As a result, each state enacts domestic legislation implementing these international standards in order to fulfil obligations prescribed by the International Convention for the Safety of Life at Sea (SOLAS).

The above characteristics of the complicated international legal mechanism are likewise reflected in the Russian legal structure. Russian domestic control over the safe transport of nuclear materials is ought to be placed under the international legal mechanism. The Federal Law on the Use of Atomic Energy of 1995 prescribes construction and operation of vessels with nuclear installations and radiation sources to follow the IAEA's regulations. In compliance with this Federal Law, Russian domestic regulations demand safety measures such as the construction and certificates of packages. Furthermore, physical protection of nuclear materials requires protective measures include the setting up of a security plan to prevent unauthorised actions, delaying intrusion and neutralizing violators.

Thus, from theoretical and practical standpoints, Russian regulations are significantly effective in creating a Russia-led Arctic order. On the other hand, an integrated order applicable to both the NSR and the Arctic is still under dispute. Such a newly emerging order might absorb non-binding international standards and domestic regulations. At the same time, they can also become mandatory by their incorporation into treaties.

4. Conclusion

Two conclusions can be drawn from the discussions on the legal status of the NSR. First, a possible theoretical EU contribution to the shaping of the Arctic order is that under current international law, it is difficult to clearly define which Russian regulations constitute a violation of international law or whether they could develop into binding rules. Therefore, it is imperative to categorise Russian domestic regulations item by item (e.g. two-way routes, permission of entry and reporting to the NSRA at noon Moscow time, etc.) in comparison to the international legal order making process. The EU should verify the relationship between international law and Russian regulations so that the NSR and the Arctic order will also benefit the EU.

Second, a practical aspect of the EU's involvement in the shaping of an Arctic order is that the EU can contribute to providing reliable navigation capabilities that cover the Arctic region. For instance, in ensuring safe navigation, vessels must rely on Global

Navigation Satellite Systems such as the Russian GLONASS for data to determine location and route. The Arctic regional order and the NSR need to address technological issues, e.g. anti-spoofing measures, to maintain regular operation of GNSSs.

A comprehensive legal system applicable to the NSR and the Arctic will be further shaped by coordinating international and domestic laws and regulations. The EU can cooperate with Arctic states in order to harmonize these rules and consequently contribute to a safe, stable and sustainable Arctic regional order.

European Institute for Asian Studies – EIAS a.s.b.l.

26 Rue de la Loi, 10th Floor
B-1040 Brussels

Tel.: +32 2 230 81 22
E-mail: eias@eias.org
Website: www.eias.org

LinkedIn: European Institute for Asian Studies
Facebook: EiasBrussels
Twitter: @EIASBrussels