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Nengye LIU

Singapore Management University, nengyeliu@smu.edu.sg

Jan JAKUB SOLSKI

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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

The Polar Silk Road and the future governance of the Northern Sea Route

Nengye Liu¹ and Jan Jakub Solski^{2*}

¹Macquarie Law School, 6 First Walk, Macquarie University, Sydney, 2109 NSW, Australia and ²Norwegian Center for the Law of the Sea, UiT - The Arctic University of Norway, P.O. Box 6050 Langnes, 9037, Tromsø, Norway
E-mail: nengye.liu@mq.edu.au

Abstract

This article examines China's Polar Silk Road (PSR) and its legal implications for the future governance of the Northern Sea Route (NSR). It first discusses China's economic and geopolitical interests in the so-called Polar Silk Road. The article then focuses on comparing Russian regulation of the NSR and Chinese regulation of foreign vessels as a coastal state. Both China and Russia are contracting parties to the United Nations Convention on the Law of the Sea (UNCLOS). The comparison of domestic legislations aims to provide a detailed analysis on convergence and divergence of their implementation and enforcement of the UNCLOS on issues related to freedom of navigation, especially when it comes to foreign vessels, including military vessels, within national jurisdiction. The comparative study, therefore, helps determine to what extent China could vocally shape the development the NSR regulations in an era of climate change.

Keywords: Arctic; China; Russia; Polar Silk Road; Northern Sea Route

1. Introduction

On 18 March 2021 in Anchorage, Alaska, top diplomats from China and the United States met for the first time after the inauguration of the Biden Administration. In an extremely tense, unusual, and lengthy opening,¹ US Secretary of State Antony Blinken and National Security Adviser Jake Sullivan had a blunt exchange of views with Chinese Foreign Minister and State Councilor Wang Yi and Yang Jiechi, director of the Central Foreign Affairs Commission of the Chinese Communist Party. One key point that is of great interest for international lawyers is their divergent views of the world order. The United States is trying to stabilize a 'rules-based international order'² facing the

*This is a resulting publication of Research Council of Norway Project 'Regulating Shipping in Russian Arctic Waters: between International Law, National Interests and Geopolitics' (SIRAW). The authors would like to thank Sarah Vanderfield for her excellent research assistance.

¹'U.S.-China Summit in Anchorage, Alaska', *C-Span*, 18 March 2021, available at www.c-span.org/video/?510091-1/secretary-blinken-chinese-foreign-minister-clash-meeting-anchorage-alaska.

²Rules-based international order is a term largely created by western think-tanks, while being widely mentioned in western (particularly Australia, the United Kingdom and the United States) defence and foreign policy papers in recent years. According to Chatham House, 'rules-based international order' means 'The framework of liberal political and economic rules, embodied in a network of international organizations and regulations, and shaped and enforced by the most powerful nations.' Chatham House, 'Challenges to the Rules-Based International Order', 2015, available at www.chathamhouse.org/sites/default/files/London%20Conference%202015%20-%20Background%20Papers.pdf. The Atlantic Council has a similar definition: 'The system is predicated on a set of norms and principles pertaining to global

challenge of a rising China. By contrast, the Chinese side completely rejects the legitimacy of a ‘rules-based international order’³ and wants to enshrine an international system that is centred by the United Nations and underpinned by international law, rather than US-anchored.⁴

There is no doubt that the United States is still a dominant power in the world. This means rules-based international order is a reality, though perhaps being shaken by the rise of China in recent years. This is the same case in the Arctic. The United Nations Convention on the Law of the Sea (UNCLOS)⁵ is ratified by most Arctic states, including Russia, while the United States sees the law of the sea as applicable as customary international law.⁶ Moreover, the Arctic Council is the most important regional forum for co-operation. Only eight Arctic states (Canada, Denmark on behalf of Greenland, Finland, Iceland, Norway, Sweden, Russia, and the United States) enjoy voting rights in the Arctic Council. China, together with other major Asian economies, including Japan, South Korea, India, and Singapore, merely hold a back seat as observers.

Nevertheless, China has been expressing mounting interest in the resources-rich Arctic. On 26 January 2018, China published its first ever Arctic Policy White Paper.⁷ In the 14th Five Year Plan (2021–2025) for National Economic and Social Development and the Long-Range Objectives Through the Year 2035 (14th Five-Year Plan),⁸ the top policy blueprint for China’s future development over next decades, it is reaffirmed in the Ocean Chapter (Part 9, Chapter 33) that China aims to ‘participate in pragmatic co-operation in the Arctic to build the “Polar Silk Road” as well as enhance capacity to protect and use Antarctica’.⁹

A rising China in the Arctic could shift the power structure of the existing order and in turn may shake the rules-making in the future. Ironically, although the long shadow of the US-China competition in the Arctic may have attracted a lot of attention,¹⁰ the most important component of China’s Arctic policy is focusing on Russia. This is not only because Russia boasts vast Arctic territory, but also the two countries have been geopolitically getting closer and closer in recent years,¹¹ facing a common ‘threat’ from the West. China National Petroleum Corporation invested heavily in Yamal liquefied natural gas (LNG) projects,¹² which is one of the largest LNG projects in the world. Moreover, China is potentially a significant user of the NSR along Russia’s Arctic

security, the economy, and governance. It consists of: a set of rules encouraging peaceful, predictable, and cooperative behaviour among states that is consistent with liberal values and principles; formal institutional bodies, such as the United Nations (UN) and NATO, that serve to legitimize and uphold these rules, and provide a forum to discuss and settle disputes; and the role of powerful democratic states to help preserve and defend the system’: Kroenig et al., *Global Strategy 2021: An Allied Strategy for China*, 2020, available at www.atlanticcouncil.org/global-strategy-2021-an-allied-strategy-for-china/.

³For example, Xie Feng, Vice Minister of Foreign Affairs comments that ‘the U.S. side’s so-called “rules-based international order” is an effort by the United States and a few other Western countries to frame their own rules as international rules and impose them on other countries . . . The purpose is to resort to the tactic of changing the rules to make life easy for itself and hard for others, and to introduce “the law of the jungle” where might is right and the big bully the small’, 27 July 2021, available at www.china-embassy.org/eng/zmgxss/202107/t20210728_9014327.htm.

⁴See, for example, W. Yi, China Ministry of Foreign Affairs, ‘United under the Flag of the United Nations, Jointly Pursuing the Community for Shared Futures of Human Beings’, 15 December 2021, available at www.gov.cn/guowuyuan/2021-12/15/content_5660789.htm (in Chinese).

⁵1982 United Nations Convention on the Law of the Sea, 1833 UNTS 397 (1982) (UNCLOS).

⁶2008 The Ilulissat Declaration, Arctic Ocean Conference.

⁷The State Council Information Office of the People’s Republic of China, ‘China’s Arctic Policy White Paper’, 2018, available at english.www.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm.

⁸2021, The 14th Five Year Plan of the People’s Republic of China, available at en.ndrc.gov.cn/policies/202203/P020220315511326748336.pdf.

⁹Ibid.

¹⁰N. Liu, ‘Poles Apart, the Long Shadow of US-China Competition’, *The Interpreter*, 3 October 2019, available at www.lowyinstitute.org/the-interpreter/poles-apart-long-shadow-us-china-competition.

¹¹Factbox: Moscow-Beijing Partnership has “no limits”, *Reuters*, 4 February 2022, available at www.reuters.com/world/china/moscow-beijing-partnership-has-no-limits-2022-02-04/.

¹²‘Yamal LNG Project Reaches Full Production Capacity’, *Xinhua*, 12 December 2018, available at en.ce.cn/Business/topnews/201812/12/t20181212_31015291.shtml.

coastline. The NSR ‘not only makes it possible to ship LNG from Yamal to China, but also potentially offers a faster and shorter access to the European market and helps China to decrease its dependency on the Malacca Strait for energy imports’.¹³ More interestingly, China and Russia hold a similar view about the interpretation of general international law,¹⁴ while both strongly oppose the American version of ‘rules-based international order’.¹⁵

This article examines China’s PSR and its legal implications for the future governance of the NSR. It first discusses China’s economic and geopolitical interests in the so-called Polar Silk Road. The article then focuses on comparing Russian regulation of the NSR and Chinese regulation of foreign vessels as a coastal state. Both China and Russia are contracting parties to the UNCLOS. The comparison of domestic legislations aims to provide detailed analysis on convergence and divergence of their implementation and enforcement of the UNCLOS on issues related to freedom of navigation, especially when it comes to foreign vessels, including military vessels, within national jurisdiction. State practice under international law ought to be consistent both at home and abroad. The comparative study therefore helps determine to what extent China could vocally shape the development the NSR regulations in an era of climate change.

2. China’s Polar Silk Road

In 2012, President Xi Jinping took office as the head of the world’s second largest economy and drove China’s relations with the west into a different era. Building upon its rapidly growing economic and military power, the Chinese Government has silently abandoned Deng Xiaoping’s guiding principle for foreign policy – ‘keep [a] low profile with focus on domestic affairs’.¹⁶ Instead, since 2013, several initiatives that reflect Xi’s view of the world order were raised and implemented. The Belt and the Road Initiative (BRI) is probably a signature one.

The BRI is an ambitious infrastructure investment plan to connect China with countries across Eurasia and the Indian Ocean.¹⁷ In order to implement the BRI, the National Development and Reform Commission (NDRC) and the State Oceanic Administration (SOA) published the Vision for Maritime Cooperation under the Belt and Road Initiative in 2017, which for the first time talks about establishing ‘a blue economic corridor leading up to Europe via the Arctic Ocean’ as part of the BRI. It is elaborated in the section ‘ocean-based prosperity’ that:

China is willing to work with all parties in conducting scientific surveys of navigational routes, setting up land-based monitoring stations, carrying out research on climatic and environmental changes in the Arctic, as well as providing navigational forecasting services. China supports efforts by countries bordering the Arctic in improving marine transportation conditions and encourages Chinese enterprises to take part in the commercial use of the Arctic shipping route. China is willing to carry out surveys on potential resources in the Arctic region in collaboration with relevant countries, and to strengthen cooperation in clean energy with Arctic countries. Chinese enterprises are encouraged to join in sustainable

¹³N. Liu, S. Kopra and J. Chen, ‘China and the Polar Regions’, in V. Ulfbeck, Y. Tanaka and R. Johnstone (eds.), *Routledge Handbook of Polar Law* (forthcoming).

¹⁴The Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law, UN Doc. A/70/982-S/2016/600 (2016).

¹⁵Address by Minister of Foreign Affairs of the Russian Federation Sergey Lavrov at the General Debate of the 76th session of the General Assembly’, *United Nations*, 25 September 2021, available at media.un.org/en/asset/k15/k15gowfmds.

¹⁶Should China Continue to Keep a Low-Profile Attitude?, *People’s Daily*, 13 December 2012; X. Yan, ‘From Keeping a Low Profile to Striving for Achievement’, (2014) 7(2) *Chinese Journal of International Politics*, at 153–84.

¹⁷State Council of People’s Republic of China, ‘Action Plan on the Belt and Road Initiative’, available at english.www.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm.

exploration of Arctic resources in a responsible way. China will actively participate in the events organized by Arctic-related international organizations.¹⁸

In 2018, the ‘Polar Silk Road’ was officially mentioned in China’s first ever Arctic Policy White Paper. As elaborated in Part IV, Section 3.1 ‘Utilizing Arctic Resources in a Lawful and Rational Manner’:

China hopes to work with all parties to build the “Polar Silk Road” through developing the Arctic shipping routes. It encourages its enterprises to participate in the infrastructure construction for these routes and conduct commercial trial voyages in accordance with the law to pave the way for their commercial and regularized operation. China attaches great importance to navigation security in the Arctic shipping routes. It has actively conducted studies on these routes and continuously strengthened hydrographic surveys with the aim to improving the navigation, security and logistical capacities in the Arctic. China abides by the International Code for Ships Operating in Polar Waters (Polar Code),^[19] and supports the International Maritime Organization in playing an active role in formulating navigational rules for the Arctic. China calls for stronger international cooperation on infrastructure construction and operation of the Arctic routes.²⁰

It is noted that the ‘Polar Silk Road’ reflects China’s political will to develop and use Arctic shipping routes. So far this is most likely regarding the Northeast Passage,²¹ especially shipping routes along the Russian coastline – the NSR.²² In practice, the NSR probably has most potential for commercial use in a warming Arctic. There were 62 transits of the NSR in 2020, compared to 37 in 2019.²³ Moreover, geopolitically, China and Russia have been moving closer and closer in recent years, which seems to lay a good foundation for economic co-operation along the NSR. For example, only three days after the US-China Dialogue in Alaska, the Russian Minister of Foreign Affairs visited Beijing, which resulted in the China-Russia Foreign Ministerial Joint Declaration on Issues of Global Governance on 23 March 2021 (2021 Sino-Russia Declaration).²⁴ The 2021 Sino-Russia Joint Declaration reaffirmed the Chinese view of the world order by placing importance on ‘international law underpinned by the United Nations’. Moreover, China and Russia upgraded the bilateral relations to a higher level called ‘comprehensive strategic partnership’ in 2019.²⁵ This partnership specifically includes Arctic co-operation, which focuses on:

¹⁸‘Vision for Maritime Cooperation under the Belt and Road Initiative,’ *Xinhua*, 20 June 2017, available at english.www.gov.cn/archive/publications/2017/06/20/content_281475691873460.htm.

¹⁹International Code for Ships Operating in Polar Waters (Polar Code) constitutes technical amendments to Annexes I, II, IV, and V of International Convention for the Prevention of Pollution from Ships (MARPOL) and a new Chapter XIV of The International Convention for the Safety of Life at Sea (SOLAS) with a specific focus on the Polar Regions. The Polar Code entered into force in 2017, which contains mandatory and recommendatory provisions applicable to both maritime safety measures and Part II pollution prevention measures. See IMO, www.imo.org/en/OurWork/Safety/Pages/polar-code.aspx; see also N. Liu, ‘Can the Polar Code Save the Arctic?’, *ASIL Insights*, 22 March 2016, available at www.asil.org/insights/volume/20/issue/7/can-polar-code-save-arctic.

²⁰State Council of People’s Republic of China, *supra* note 7.

²¹The Northeast Passage is defined as the set of sea routes from northwest Europe around North Cape (Norway) and along the north coast of Eurasia and Siberia through the Bering Strait to the Pacific. See B. Ellis and L. Brigham, *Arctic Council Arctic Marine Shipping Assessment 2009 Report* (2009), at 34.

²²1999 The Merchant Shipping Code of the Russian Federation No. 81 FZ of 30 April 1999, SZRF, 3 May 1999 No. 18, Art. 5.1.

²³J. Saul, ‘The Northern Sea Route saw a Record Number of Ships Transit in 2020’, *Arctic Today*, 9 December 2020, available at www.arctictoday.com/the-northern-sea-route-saw-a-record-number-of-ships-transit-in-2020/.

²⁴China-Russia Foreign Ministerial Joint Declaration on Issues of Global Governance’, available at www.fmprc.gov.cn/web/zyxw/t1863317.shtml (in Chinese).

²⁵Russia Agrees to Upgrade Relations for New Era’, *Xinhua*, 6 June 2019, available at english.www.gov.cn/news/top_news/2019/06/06/content_281476701425684.htm.

expanding the development and use of Arctic waterways and cooperation in the areas of infrastructure, resource development, tourism, ecology and environmental protection in the Arctic region on the basis of the rights and interests of coastal States. Supporting the continuation of polar scientific cooperation and promote the implementation of joint Arctic scientific research cruises and joint Arctic research projects. Continuation of Russian-Chinese cooperation in the International Arctic Forum “Arctic-Dialogue Region”.²⁶

Indeed, Chinese companies have been using the Northeast Passage since 2013,²⁷ and boasting ambitious plans. For example, a number of China-Russia projects under the umbrella of the PSR were launched in recent years, such as Yamal LNG, Payakha Oilfield, Zarubino Port in the southeast of Vladivostok, and Arkhangelsk Deepwater Port.²⁸

Nevertheless, it is widely known that through the Article 234 ‘Ice-covered Area’ of the United Nations Convention on the Law of the Sea (UNCLOS),²⁹ Russia has obtained the legal basis for its special coastal state legislative and enforcement jurisdiction over the NSR. The Chinese Government has taken a nuanced position towards the legal status of the NSR so far. As declared in the 2018 Arctic Policy White Paper, China:

respects the legislative, enforcement and adjudicatory powers of the Arctic States in the waters subject to their jurisdiction. China maintains that the management of the Arctic shipping routes should be conducted in accordance with treaties including the 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.³⁰

Meanwhile, Chinese academia raised blunt concerns about Russian regulation of the NSR as its domestic waters. Some suggests China should recognize the NSR as a strait used for international navigation,³¹ which would allow transit passage. Others say the NSR can neither be defined as a strait used for international navigation, nor as internal waters subject to exclusive coastal state jurisdiction.³² They recommend the conclusion of an international convention similar to the Svalbard Treaty³³ that could balance the interests between coastal and flag states. There are also suggestions that East Asian countries (China, Japan and South Korea) should strengthen their co-operation to influence the development of international law on Arctic shipping.³⁴ Given Chinese academia does have strong influence in China’s Arctic policy-

²⁶Joint statement of the People’s Republic of China and the Russian Federation on the Development of a Comprehensive Strategic Partnership for Collaboration in the New Era’, *Xinhua*, 6 June 2019.

²⁷T. Mitchell and R. Milnes, ‘First Chinese Cargo Ship nears end of Northeast Passage Transit’, *Financial Times*, 7 September 2013.

²⁸Z. Chun, ‘China’s Arctic Silk Road Projects’, *China Dialogue*, 9 January 2020.

²⁹For the negotiation history see J. J. Solski, ‘The Genesis of Article 234 of the UNCLOS’, (2021) 52(1) *Ocean Development and International Law*, at 1–19.

³⁰China’s Arctic Policy White Paper, *supra* note 7.

³¹B. Jiayu, ‘Research on the International Law Issues about the Use of the Arctic Routes’, (2012) 8 *Journal of Ocean University of China (Social Sciences)* 6–11 (in Chinese).

³²L. Huirong and L. Xiu, ‘Research on the Legal Status of Northwest Passage’, (2009) *Journal of Ocean University of China (Social Sciences)*, at 3–4 (in Chinese).

³³1920 Svalbard Treaty, 2 LNTS 7. The Treaty Concerning the Archipelago of Spitsbergen (Svalbard Treaty) was adopted in 1920, which granted Norway ‘full and absolute sovereignty’ over the Archipelago of Spitsbergen. In the meantime, equal access for peaceful utilization of natural resources by other countries, such as hunting, fishing and mining were guaranteed. See N. Liu, ‘China and One Hundred Years of the Svalbard Treaty, Past, Present and Future’, (2021) 124 *Marine Policy* 104354.

³⁴Z. Huizhi and W. Liding, ‘Exploration on the Northeast Asia Cooperation of the Arctic Route’, (2015) 74(6) *Northeast Asian Forum* 67–76 (in Chinese).

making process,³⁵ it is imaginable that in the foreseeable future, as a significant user of the NSR, China may want to shape the current regime for its benefit. However, it seems that Chinese academics, so far, have not mastered the fact that the NSR is not a single route, but a set of different sailing lanes where various international law and Russian regulations apply. In the next section, we will elaborate on the detailed regimes of Russian regulation of the NSR, to be compared with Chinese coastal practice on foreign vessels in Section 4.

3. Russian regulation of the Northern Sea Route

The formation of the contemporary legal regime of the NSR can be traced back to the adoption of the 2012 Federal Law,³⁶ which concluded a period of heated discussions regarding the need to overhaul the outdated legal regime rooted in the Soviet times.³⁷ By amending a few Federal Laws, the 2012 Federal Law provided the basic paradigm for the new legal regime and the backbone for more specific regulations. As a result, the 1999 Merchant Shipping Code gained prominence as the most relevant legal act for the legal regime of navigation on the NSR,³⁸ with Article 5.1 providing the definition of the NSR:

[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.³⁹

Article 5.1 of the 1999 Merchant Shipping Code has served as the legal basis for more specific Rules of Navigation in the Water Area of the Northern Sea Route (2013 Rules).⁴⁰ These navigational rules have been further refined. First, primarily in response to the adoption of the Polar Code, the Ministry of Transport of the Russian Federation amended the 2013 Rules in 2017.⁴¹ This proved to be a relatively cosmetic adjustment, adding the requirement for ships to which the Polar Code applies to carry a Polar Ship Certificate. Then, as the competence to adopt the rules of navigation on the NSR moved from the Ministry of Transport to the Government of the Russian Federation,⁴² the latter adopted a new edition of the 2020 NSR Rules of Navigation.⁴³ This most recent development was situated in the context of another major reshuffle

³⁵C. Y. Woon, 'Framing the "Polar Silk Road": Critical Geopolitics, Chinese Scholars and the (Re)Positioning of China's Arctic Interests', (2020) 78 *Political Geography* 102141.

³⁶2012 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 No. 132 FZ, *SZRF*, 30 July 2012 No. 31, at 4321.

³⁷For the analysis of the debates preceding the adoption of the 2012 Federal Law see J. J. Solski, 'New Developments in Russian Regulation of Navigation on the Northern Sea Route', 2013 (4)1 *Arctic Review on Law and Politics* 90–119.

³⁸See 1999 Merchant Shipping Code, *supra* note 22.

³⁹*Ibid.*, Art. 5.1(1).

⁴⁰2013 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, registered by the Ministry of Justice 2 April 2013 No. 28120.

⁴¹2017 Order on the Introduction of Amendments to the Rules of Navigation in the water area of the Northern Sea Route, No. 5, registered by the Ministry of Justice 7 March 2017 No. 45866.

⁴²2018 Federal Law on Amendments to specific legislative acts of the Russian Federation, No. 525 FZ, *SZRF*, 31 December 2018 No. 53 at 8451.

⁴³2020 Decree of the Government of the Russian Federation on Approval of the Rules of Navigation in the Water Area of the NSR, No. 1487 (2020 NSR Rules).

of regulatory competence, with the state nuclear corporation and the operator of nuclear ice-breakers, Rosatom, being assigned with new regulatory and managerial responsibilities.⁴⁴

To better understand the legal status of the NSR, consisting of different maritime zones, one needs to go back to 1985 and the Soviet decree enclosing the key straits of the NSR with straight baselines.⁴⁵ This legal act has left some uncertainty regarding the applicable regime of navigation, if any, through these straits. The legal status of the enclosed waters according to Russian legislation is internal waters. The UNCLOS, in principle, does not grant any navigational right in internal waters, unless they were not considered internal waters before enclosure by straight baselines.⁴⁶ Based on the analysis of state practice and the relevant international law, one can argue that the right of innocent passage has been preserved in all Russian Arctic straits.⁴⁷ Russian international law scholars seldom discuss this issue explicitly, except for presenting it as a quite uncomplicated case of complete sovereignty.⁴⁸ The United States sticks to its traditional position that at least some of the NSR straits are subject to the regime of transit passage.⁴⁹ Noteworthy, in past years, there has been ongoing work dedicated to amending the Russian Arctic baselines.⁵⁰

However, the issue of key relevance is the application of a single regime of navigation in the entire NSR, including internal waters, territorial sea, and the EEZ.⁵¹ The 2020 NSR Rules of Navigation do not distinguish between areas where navigational rights and freedoms apply and areas where they do not apply. This makes it difficult to assert a navigational right in any specific part of the NSR, at least for commercial ships.

One additional complication relates to the question of applicability of the specific regulations to sovereign immune vessels, including warships. The 2020 NSR Rules of Navigation do not explicitly exempt their application to warships,⁵² but good arguments exist that these regulations apply only to commercial vessels.⁵³ Conversely, other authors argue that Russia has applied its NSR regime to all ships.⁵⁴ However, the very development by the Russian authorities in March 2019 of draft legislation addressing the specific aspects of the legal regime of NSR navigation for warships⁵⁵ suggests recognition of a gap in Russian legislation. Further, that this draft has

⁴⁴A. Moe, 'A New Russian Policy for the Northern Sea Route? State interests, Key Stakeholders and Economic Opportunities in Changing Times', 2020 10(2) *Polar Journal*, at 12–14.

⁴⁵1985 The USSR Council of Ministers, Decree of 15 January 1985, DOALOS/OLA (1985).

⁴⁶By virtue of Art. 8(2) of the UNCLOS, see UNCLOS, *supra* note 5, where the establishment of a straight baselines has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage shall exist in those waters.

⁴⁷J. J. Solski, 'New Russian Legislative Approaches and Navigational Rights within the Northern Sea Route', (2020) 12(1) *Yearbook of Polar Law Online*, at 244–5.

⁴⁸See, for example, 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*, at 260, asserts, '[w]ith respect to those areas of the NSR that are within the internal waters of Russia, the area is under the complete sovereignty of the Russian Federation'.

⁴⁹United States of America, Diplomatic Note from the United States to Russia regarding the NSR (29 May 2015) reproduced in C. D. Guymon (ed.), *Digest of United States Practice in International Law* (2015), at 526.

⁵⁰Draft 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. See the discussion in J. J. Solski, 'The Northern Sea Route in the 2010s: Development and Implementation of Relevant Law', (2020) 11 *Arctic Review on Law and Politics*, at 386–7; B. Morgunov, I. Zhuravleva and B. Melnikov, 'The Prospects of Evolution of the Baseline Systems in the Arctic', (2021) 13(8) *Water*, at 1082.

⁵¹See *supra* note 39.

⁵²A. Chircop and M. Czarski, 'Polar Code implementation in the Arctic Five: Has Harmonisation of National Legislation Recommended by AMSA been Achieved?', (2021) 10(2) *Polar Journal*, at 18.

⁵³See Solski, *supra* note 47, at 231.

⁵⁴A. Vylegzhanin et al., 'Navigation in the Northern Sea Route: interaction of Russian and international applicable law', (2020) 10(2) *Polar Journal*, at 14.

⁵⁵1999 Draft Resolution of the Government of Russia on Amendments to the Resolution of the Government of Russia No. 1102, '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'. For a discussion see Solski, *supra* note 47.

not been adopted may indicate a lack of full support within the Russian administration. At the same time, the communication of the clear idea that foreign warships *may* be subject to specific requirements of prior notification, pilotage, and icebreaker assistance is an indicator of Russia's attention to the naval activities of other states in the Arctic.

A closer analysis of the evolution of the Russian legal regime in the last few decades reveals that the 2012 reform and the consequential developments amount to liberalization of the regime of navigation. There has been a clear effort to turn the NSR into an attractive route of global significance.⁵⁶ The legal developments, such as an overhaul of the requirement to undergo inspection in a Russian port,⁵⁷ the possibility to use the NSR without icebreaker assistance and the concomitant requirement to pay fees,⁵⁸ streamlining of the permit processing scheme, and general growth in the regime's transparency, all testify to the attentiveness of the Russian authorities to the needs of users. However, the liberalization tendencies have proven to meet their limits.

A constant feature of the NSR's legal regime is that foreign vessels need to seek and obtain permission to enter and navigate the NSR.⁵⁹ Although devised in a way that imposes limited burden on the users, and with the processing of the applications being generally transparent, predictable, and evenhanded, the permit scheme assumes Russia's right to grant or withdraw permission for the exercise of navigational rights and freedoms in the maritime zones of the NSR.⁶⁰ There is no sign of any discussion within Russia to overhaul the permission-based order of navigation in the NSR.

Moreover, Russian regulations include an extensive system of ship reporting within and on a ship's approach to the NSR. Before approaching the NSR's Western or Eastern boundary,⁶¹ a ship master is required to notify the Marine Operation Headquarters (MOHs) about its planned time of arrival to the relevant boundary 48 hours in advance.⁶² The notification must include detailed information regarding, *inter alia*, the ship, the crew, type and amount of cargo, fuel capacity, destination and the planned time of arrival to the relevant boundary. Further reports are required upon entering and leaving the area of the NSR.⁶³ In addition, after crossing the Eastern or the Western boundary, a daily report with information about the ship and the observed navigational conditions is required.⁶⁴ The MOHs transfer the information collected through reporting to the Administration of the NSR (ANSR) within two hours,⁶⁵ which then allows the latter to disseminate this information to other users via the website.⁶⁶ In this context, it is interesting to observe a

⁵⁶See Solski, *supra* note 50, at 384.

⁵⁷Pursuant to Item 2.11 of the 1996 Requirements for the Design, Equipment, and Supplies of Vessels Navigating the NSR, English version published in the 1996 Guide to Navigating through the NSR, at 317–23, the physical inspection of the vessel to verify compliance with substantive requirements was mandatory in certain Russian ports (Murmansk, Nakhodka, Vladivostok or Provideniya).

⁵⁸Item 7(4) of 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) entitled the West or East Marine Operations Headquarters (MOHs) to prescribe services of shore-based, aircraft, conventional or icebreaker guiding, or icebreaker assisted pilotage, for which a fee was in order. In effect, shipowners were compelled to pay a full fee for navigating the NSR, regardless to whether a ship requested any service. The 2012 Federal Law introduced a new principle to the 1999 Merchant Shipping Code 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'. For discussion see Solski, *supra* note 50, at 395–7.

⁵⁹See 2020 NSR Rules, *supra* note 43, Item 3.

⁶⁰J. Solski, 'Northern Sea Route Permit Scheme: Does Article 234 of UNCLOS Allow Prior Authorization?', (2021) 35 *Ocean Yearbook* 443–72.

⁶¹The Western boundary coincides with meridian 33° E, while the Eastern boundary consists of parallel 62° N and meridian 169°W. As such, these boundaries do not coincide with the boundaries of the water area of the NSR. Instead, they demarcate a wider zone for the purpose of the SRS.

⁶²See 2020 NSR Rules, *supra* note 43, Item 18.

⁶³*Ibid.*, Items 19–22.

⁶⁴*Ibid.*, Item 24.

⁶⁵*Ibid.*, Item 25.

⁶⁶www.nsr.ru/en/home.html.

resurrection of the MOHs. The body was abolished with the introduction of the 2013 Rules,⁶⁷ leaving the ANSR as the principal body for ensuring safety of navigation and environmental protection from vessel-source pollution in the water area of the NSR. The tasks of the ANSR were generally limited to administering the permit scheme and sharing information.⁶⁸ The 2020 Rules of Navigation allocate the task of organizing navigation in the water area of the NSR to Rosatom, through the MOHs.⁶⁹ The MOHs are the recipients of the detailed reports (upon entry, leaving, daily reports).⁷⁰ Moreover, the MOHs provide shipmasters with detailed information on the ice situation, recommend routes and warn about especially dangerous ice phenomena, and if necessary, it can give instructions on actions to be taken to ensure the safety of navigation.⁷¹ The re-introduction of the last element is quite remarkable in the context of real-time decision-making, as the ANSR's mandate in the time between 2013 and 2020 did not include active interference with ships' operations. During that time, only the ships that were operating under icebreaker assistance were required to follow icebreaker's instructions. Those that navigated independently were only required to stick to their navigational plan. The new edition of the navigational rules has tightened, once again, the coastal state control of ships' operation, regardless of whether navigating independently or with icebreaker assistance.

One of the landmark features of the 2012 reform was the decision to allow ships with sufficient ice strengthening to navigate without icebreaker assistance and without the need to pay the fees. Item 30 of the 2020 NSR Rules 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 addition, it may be noteworthy that the 2020 Amendments reinforced the requirement of icebreaker assistance by requiring a copy of the Contract for icebreaker assistance (for ships for which such escort is mandatory according to the criteria for the admission) attached to the application for permission.⁷² As a result, while many ships are exempted from icebreaker assistance and fees, those subject to such a requirement will have to rely on a Russian monopolist.

Finally, given the direction of the 2012/2013 liberalization, it was not unreasonable to expect even more transparency of the NSR legal regime in some remaining areas. With respect to the NSR fees, there have been developments aiming to increase transparency in the NSR fee system, especially those fees charged by Atomflot.⁷³ 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.⁷⁴

With respect to enforcement, there has long been recognition that the capacity to enforce violations needed improvement, and 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.⁷⁵ At the same time, an

⁶⁷For further discussion see J. J. Solski, 'Russia', in R. C. Beckman et al. (eds.), *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States* (2017), at 182.

⁶⁸1999 Merchant Shipping Code, *supra* note 22, Art. 5.1(3).

⁶⁹See 2020 NSR Rules, *supra* note 43, Item 2.

⁷⁰*Ibid.*, Items 18–24.

⁷¹*Ibid.*, Item 30.

⁷²*Ibid.*, Item 5.

⁷³FSUE Atomflot is a Russian company and service base that maintains the fleet of nuclear-powered icebreakers. Atomflot is part of the Rosatom group, based in the city of Murmansk. See eng.arctica-ac.ru/organization/54/.

⁷⁴See Solski, *supra* note 50.

⁷⁵J. Bobrova, 'The Northern Sea Route: National Regime in the Changing International Context', *RIAC*, 7 December 2016, available at russiancouncil.ru/en/activity/policybriefs/severnny-morskoy-put-natsionalnyy-pravovoy-rezhim-v-menyayushch/.

important negative development occurred in the aftermath of the *Boris Vilkitsky* incident.⁷⁶ Since the incident, the ANSR has stopped publishing any information about violations of the Rules of Navigation. It appears, therefore, that the concern for transparency reached its peak in 2018, as it silently gave way to co-ordination and economic efficiency.⁷⁷

The essence of the NSR's regulatory regime is that Russia welcomes the use of the NSR by foreign ships but does not seem to be ready to compromise on some of the unilaterally established parameters, such as the requirement to obtain permission, the requirements to submit reports and prior notification, and specific rules for icebreaker assistance. Other states may be concerned about the consistency of these requirements with international law, particularly Article 234 of the UNCLOS. It is remarkable that although this provision 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.⁷⁸ Although Article 234 has not been referenced in the relevant legislation, when pressed, the ANSR deemed it necessary to refer to this provision explicitly in the note handed to the *Arctic Sunrise* by the ANSR.⁷⁹ This open recognition in an official statement constitutes a development towards clarification of Russia's position on the international legal basis for the regulation of navigation on the NSR.

However, there is also a dose of ambiguity illuminated by the description of the NSR as a 'historically developed national transport line of communication of the Russian Federation'.⁸⁰ It is unclear whether the aim of this clause is to invoke any additional rights over the NSR,⁸¹ render the legal status of the NSR 'still not easy to comprehend',⁸² or assuage nationalistic sentiments.⁸³ In any event, one cannot preclude this being used to support a different narrative in the future, for example if the applicability of Article 234 is called into question because of climate change.

4. China's coastal practice

China has a mainland coastline of 18,000 km and 6,900 islands. The total sea areas claimed under China's jurisdiction is about 3,000,000 km², which include Bohai Sea, Yellow Sea, the East China Sea, and South China Sea. There were several authorities that used to be involved in law enforcement in sea areas under China's jurisdiction. These included the Sea Police of the Border Control Department of the Ministry of Public Security, the Sea Patrol of the Maritime Safety Administration (MSA) of the Ministry of Transport, the State Fisheries Administration of the Ministry of Agriculture, the China Marine Surveillance of the State Oceanic Administration, and the Bureau of Anti-Smuggling at Sea of the China Customs. As part of the effort to become

⁷⁶The conduct of *Boris Vilkitsky*, a tanker serving Russia's flagship Yamal LNG project in April 2018, was deemed by the ANSR a 'gross violation' of the 2013 Rules. The ship was detained and later released to complete its voyage. The incident triggered President Putin to publicly lash at the relevant authorities for restraining development under false pretences. For discussion see Solski, *supra* note 50, at 394.

⁷⁷For the discussion on the interests at stake see Moe, *supra* note 44, at 16; for the discussion on the impact of these interests on the regulatory practice see Solski, *ibid.*, at 397–9.

⁷⁸See Solski, *ibid.*, at 388–9.

⁷⁹In 2013 the *Arctic Sunrise*, operated by Greenpeace International and classified by Det Norske Veritas (DNV) as an 'Icebreaker', applied for permission to enter the NSR four times without success. After the third refusal, the *Arctic Sunrise* entered the NSR without permission and was subsequently required to leave. 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, 'adopted and enforced by the Russian Federation in accordance with the article 234 of the United Nations Convention on the Law of the Sea'. For a more detailed discussion see Solski, *ibid.*, at 389–90.

⁸⁰1998 Federal Law on the Internal Sea Waters, Territorial Sea and Contiguous Zone of the Russian Federation, No. 155-FZ, SZRF, 3 August 1998 No. 31, at 3833.

⁸¹See UNCLOS, *supra* note 46. According to the 2015 US Diplomatic Note to Russia the USA 'does not consider such a term or concept to be established under international law'.

⁸²See Vylegzhanin et al., *supra* note 54, at 3.

⁸³See Solski, *supra* note 50, at 389–90.

a maritime power, the China Coast Guard was established in 2013,⁸⁴ which incorporates most law enforcement authorities, apart from the Sea Patrol. In 2021, China adopted its Coast Guard Law⁸⁵ and comprehensively updated its Maritime Traffic Safety Law⁸⁶ after nearly four decades. It is therefore a good timing to briefly assess China's coastal practice in this new era.

China has been consistently embracing the approach of straight baselines. In 1958, amid tension between China and the United States in the Taiwan Strait, the Chinese Government published the Declaration on China's Territorial Sea, which states that the baseline for measuring the breadth of its territorial sea is 'the line composed of the straight lines connecting basepoints on the mainland coast and on the outermost of the coastal islands'.⁸⁷ This is reflected by the 1992 Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China.⁸⁸ It is provided by Article 3 that 'The People's Republic of China (PRC)'s baseline of the territorial sea is designated with the method of straight baselines, formed by joining the various base points with straight lines.' In 1996, the Chinese Government published a number of geographic co-ordinates to define its straight baselines along large parts of China's coast and the Xisha/Paracel Islands.⁸⁹ The straight baselines around Xisha/Paracel Islands raised some concerns, not only because of sovereignty disputes of the islands between China and Vietnam,⁹⁰ but also whether archipelagic straight baselines can be established by continental states.⁹¹ Moreover, China declared its straight baselines of Diaoyu/Senkaku Islands on 10 September 2012,⁹² which was immediately protested by Japan.⁹³

According to the 1992 Law on the Territorial Sea and Contiguous Zone, China has made it clear that foreign warships must seek approval from the Chinese Government before entry into its territorial sea.⁹⁴ The 1992 Law on the Territorial Sea and Contiguous Zone also provides that competent authority (in this case, Maritime Safety Administration) is entitled to require foreign vessels to exercise their right of innocent passage through China's territorial sea to use designated sea lanes or traffic separation schemes.⁹⁵ China has established several mandatory shipping routes along its coastal waters.⁹⁶ In 2011, the Ministry of Transport published the National Plan for Ship Routeing in Coastal Sea Areas,⁹⁷ and stated that a total of 26 shipping routes should be designated. This includes six trunk lines (Laotieshan Shuidao, Cheng Shan Jiao, Estuary of Yangtze River, Taiwan Strait, Estuary of Pearl River, and Qiongzhou Strait), five port areas (Dalian, Qingdao, Rizhao, Ningbo, and Xiamen) and 15 other lines.⁹⁸ So far, all these shipping routes are within China's territorial sea or in its internal waters or port areas, even for the Taiwan Strait between Mainland China and Taiwan.⁹⁹

⁸⁴State Council, 'The Transformation Plan of the Agencies and Functions of the State Council', No.22, (2013) (in Chinese).

⁸⁵2021 The Coast Guard Law of the People's Republic of China (in Chinese).

⁸⁶2021 Maritime Traffic Safety Law of the People's Republic of China.

⁸⁷1958 The Declaration on Territorial Sea of the People's Republic of China (in Chinese).

⁸⁸1992 The Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China.

⁸⁹1996 The Declaration on Territorial Sea Baselines of the People's Republic of China (in Chinese).

⁹⁰B. Lendon, 'The Tiny Island that could Explode the China-Vietnam Relationship', *CNN*, 20 July 2020, available at edition.cnn.com/2019/08/29/asia/vietnam-china-paracel-islands-intl-hnk/index.html.

⁹¹United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas: Straight Baseline Claim China*, No. 117, (1996), at 8.

⁹²State Council of PRC, *The Declaration on Territorial Sea Baselines of Diaoyu Islands* (2012), available at www.fmprc.gov.cn/diaoyudao/chn/zrhj/201510/t20151009_8521008.htm (in Chinese).

⁹³Permanent Mission of Japan to the United Nations New York, UN Doc. Diplomatic Note PM/12/303 (2012).

⁹⁴1992 Law on the Territorial Sea and Contiguous Zone, Art. 6.

⁹⁵*Ibid.*, Art. 9.

⁹⁶W. Manning, 'The Urgent Need to Implement Ship Routing System in the Coastal Waters of China', (2011) 11 *China Maritime Safety*, at 6 (in Chinese).

⁹⁷www.gov.cn/jrzq/2011-12/22/content_2026715.htm (in Chinese).

⁹⁸www.scio.gov.cn/m/xwfbh/gbwxwfbh/xwfbh/jtysb/Document/1320664/1320664.htm (in Chinese).

⁹⁹Taiwan Straits and Coastal sea areas eastwards Taiwan Island are both China's coastal waters. However, considering the current situation, the national plan only applied to sea areas of the Taiwan Straits bordering with the mainland China', Ministry of Transport, 'Special Interpretation of the National Plan for Ship Routeing in Coastal Sea Areas', 2011, available at www.scio.gov.cn/m/xwfbh/gbwxwfbh/xwfbh/jtysb/Document/1320664/1320664.htm (in Chinese).

Article 19 of the 2021 Maritime Traffic Safety Law further provides the domestic legal basis for the MSA to establish, adjust and publicize ship routeing and reporting areas, traffic control areas, restricted navigation areas, safety operation areas, and outer anchorage. Moreover, foreign submarine, nuclear-powered vessels as well as ships carrying radioactive and other hazardous wastes are required to report to the MSA when entering and leaving China's territorial sea.¹⁰⁰ Furthermore, compulsory pilotage can be imposed in China's coastal waters, rivers, and ports,¹⁰¹ for:

foreign vessels, nuclear-powered vessels, ships carrying radioactive materials, ultra-large oil tankers, bulk liquified gas ship and bulk dangerous chemical ships that may endanger port safety, and vessels whose length, width, and height are close to the limits of the relevant shipping routes.¹⁰²

Nevertheless, given the 2021 Maritime Traffic Safety Law applies to all sea areas under China's jurisdiction,¹⁰³ article 19 raised concerns whether China would unilaterally establish ship routeing and reporting areas for foreign vessels in China's EEZs.¹⁰⁴

The 1998 Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China¹⁰⁵ set up the management regime for several foreign activities in China's EEZs, including fisheries,¹⁰⁶ geological survey,¹⁰⁷ marine scientific research,¹⁰⁸ and laying underwater pipelines.¹⁰⁹ Approval from the Chinese Government is essential for all above-mentioned foreign activities to be carried out in China's EEZs. The 1998 Law on the Exclusive Economic Zone and the Continental Shelf is silent about ship routeing and reporting. Nevertheless, it provides that 'competent authorities can take necessary measures to prevent, reduce and control marine pollution to protect the marine environment of China's EEZ and continental shelf.'¹¹⁰ For example, in the Preamble of the Basel Convention on Controlling Transboundary Movements of Hazardous Wastes and their Disposal,¹¹¹ it is recognized that a state has the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes into its territory. As a contracting party to the Basel Convention, China has banned the transit of hazardous wastes within its internal waters and territorial sea.¹¹² Furthermore, the 2010 Regulation on the Prevention and Control of Marine Pollution from Vessels¹¹³ extends its application to other sea areas under China's jurisdiction (e.g., the EEZ).¹¹⁴ Whenever vessels carrying hazardous waste want to transit China's EEZ, an approval from the Ministry of Ecology and Environment is required.¹¹⁵ There are also mandatory ship routeing systems and ship reporting systems imposed on these vessels.¹¹⁶ This kind of practice is in contrast from many western countries, such as Germany and the United Kingdom, who have

¹⁰⁰See 2021 Maritime Traffic Safety Law, *supra* note 86, Art. 54.

¹⁰¹2021 Ministry of Transport, Rules on Vessels Pilotage (2021 Amendments), Art. 2 (in Chinese).

¹⁰²See 2021 Maritime Traffic Safety Law, *supra* note 86, Art. 30.

¹⁰³*Ibid.*, Art. 2.

¹⁰⁴R. Pedrozo, 'China's revised Maritime Traffic Safety Law', (2021) 97 *International Law Studies* 958–60.

¹⁰⁵1998 The Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (in Chinese).

¹⁰⁶*Ibid.*, Art. 5.

¹⁰⁷*Ibid.*, Art. 7.

¹⁰⁸*Ibid.*, Art. 9.

¹⁰⁹*Ibid.*, Art. 11.

¹¹⁰*Ibid.*, Art. 10.

¹¹¹1992 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, 1673 UNTS 126.

¹¹²2010 State Council of the PRC, The Regulation on the Prevention and Control of Marine Pollution from Vessels, Art. 31(1) (in Chinese).

¹¹³*Ibid.*

¹¹⁴*Ibid.*, Art. 31(2).

¹¹⁵*Ibid.*

¹¹⁶*Ibid.*

declared that the Basel Convention shall not affect navigational rights and freedom as provided by the UNCLOS.¹¹⁷

As mentioned above, China Coast Guard is now the most powerful administration to conduct law enforcement at sea areas under China's jurisdiction.¹¹⁸ According to Article 21 of the Coast Guard Law:

the Coast Guard is entitled to take necessary warning and control measures to stop foreign warships and government ships operated for non-commercial service in China's jurisdictional waters from violating Chinese law and regulations by ordering them to leave the relevant waters immediately; Those who refused to leave and caused serious damage or threat may be subject to being driven or towed away by force.¹¹⁹

It is argued by Sakamoto that Article 21 is potentially in violation of the sovereign immunity as provided by Article 236 of the UNCLOS.¹²⁰ Further, the Coast Guard can establish temporary maritime alert zones in sea areas under China's jurisdiction in case of:

1. carrying out maritime safety and security missions;
2. cracking down crimes at sea;
3. dealing with incidents;
4. protecting and preserving marine resources and marine environment; and
5. other necessary conditions.¹²¹

The maritime alert zone would limit or prohibit foreign vessels' navigational rights in that particular sea area.

5. Concluding remarks

The analysis of coastal state practices of China and Russia reveals quite remarkable commonalities. Both are driven by the concern about the potential adverse effects of uncontrolled foreign shipping in proximity to their coasts. The coastal regulations of both countries show evident traits of efforts to maximize their exclusive authority to prescribe and enforce laws and regulations.

Both have embraced the use of straight baselines attracting international protests. Moreover, both express concern over the operation of foreign warships in their maritime zones, with Chinese legislation being more specific and stringent than Russian NSR regulations. While the NSR regime relies on a system of ship reporting and routeing measures, ensuring in its totality a level of control by the Russian authorities, the recent Chinese legislation seems to follow suit. The reporting requirements for ships exercising navigational rights, the domestic legal basis for additional routing measures, including compulsory pilotage, may raise similar concerns from foreign powers,

¹¹⁷See, for example, 1992 Declarations and Reservations by the United Kingdom to the Basel Convention: 'The Government of the United Kingdom of Great Britain and Northern Ireland declare that, in accordance with article 4(12), the provisions of the Convention do not affect in any way the exercise of navigational rights and freedoms as provided for in international law. Accordingly, nothing in this Convention requires notice to or consent of any state for the passage of hazardous wastes on a vessel under the flag of a party, exercising rights of passage through the territorial sea or freedom of navigation in an exclusive economic zone under international law.'

¹¹⁸For a comprehensive introduction of the Coast Guard Law see C. H. Liu, Z. Xu and Y. C. Chang, 'Coast Guard Law of the People's Republic of China and its Implications in International Law', (2021) 36(3) *International Journal of Marine and Coastal Law*, at 491–503.

¹¹⁹*Ibid.*, Art. 21.

¹²⁰See S. Sakamoto, 'China's New Coast Guard Law and Implications for Maritime Security in the East and South China Sea', *LAWFARE*, 16 February 2021, available at www.lawfareblog.com/contributors/ssakamoto. However, Art. 236 of the UNCLOS only regards the protection and preservation of the marine environment.

¹²¹See 2021 Coast Guard Law of PRC, *supra* note 85, Art. 25.

especially if the specific requirements are adopted unilaterally. The potential for furthering an expansive interpretation of the scope of China's coastal state jurisdiction over foreign vessels navigating in its EEZs might even be more controversial.

China's maritime narrative – projecting the interest in tailoring the regulatory regime of the NSR to match its global maritime agenda, may, ironically, suffer from the more inward-looking approach in its coastal waters. China's ability to successfully develop the PSR would be best served by asserting the full scope of its navigational rights and freedoms. However, China's rhetoric on this question remains much more careful in tone than the one embraced by the USA.¹²² One reason for this may be that the 'coastal-oriented' posture constrains China's capacity to herald a full-fledged maritime position in the Arctic. China's strong 'maritime-oriented' narrative would be more convincing to the international community if supported by a consistent approach in the areas under its own coastal jurisdiction.¹²³ At the same time, it does not come as a surprise that Chinese interests in areas closer to shore take clear precedence over China's more remote interests in the Arctic.

The question of the (in-)applicability of Article 234 (Ice-covered Area) of the UNCLOS in the era of climate change might be another elephant in the room for both Russia and China. Russia's cautious endorsement of Article 234 as the international legal basis for its jurisdiction over the NSR may necessitate an argument emphasizing the object and purpose of the Convention, with the effect of leaving the application of Article 234 independent of the future changes in ice coverage.¹²⁴ Although more challenging to defend internationally, an alternative for Russia might be to stress the historical efforts in developing the NSR and its alleged customary international legal status. Given that both arguments may lead to the same result: Russia's attempt to defend its exclusive control over the NSR, it is not evident that China would take a principled and transparent position on that question either.

To be sure, an outright direct challenge of Russian coastal state regulations, either through clear diplomatic communication or freedom of navigation operation, is a tool, not the goal. It is possible to meet the goals represented by the PSR in the Arctic without upsetting the status quo. The change of the 'order' may occur incrementally, for which the fundamental prerequisite is 'presence', accompanied by the power sufficient to challenge the pre-existing power structures gradually. The Polar Silk Road, via infrastructural developments and under the condition of the generally amicable relationship with Russia, may provide other tools to construct such presence, without forcing China to embrace the western understanding of navigational rights and freedoms. For now, the careful and vague statements testify to the lack of complete satisfaction with the status quo, but the preferred modality of order change may be more akin to erosion than confrontation.

Besides, considering the shared view of the world order being predominantly based on non-interference in domestic affairs as the pillar of the Westphalian understanding of sovereignty, Russia and China may be expected to tolerate, though not essentially accept, each other's security concerns. When the latter gives rise to controversial maritime claims pursued by one, the other might hesitate before publicly confronting them.

¹²²See United States of America, *supra* note 49.

¹²³2019 European Commission, 'EU-China — A Strategic Outlook', at 4, available at ec.europa.eu/info/sites/default/files/communication-eu-china-a-strategic-outlook.pdf.

¹²⁴As suggested by Russian authors see V. Gavrilov, R. Dremluiga and R. Nurimbetov, 'Article 234 of the 1982 United Nations Convention on the Law of the Sea and Reduction of Ice Cover in the Arctic Ocean', (2019) 106 *Marine Policy*, at 5.