

Selected Master Theses

Port safety warranties in Charterparties in the context of the Ukrainian-Russian War

When the time charterer redelivers on short notice

The law of the sea challenges pertaining to the regulation of navigational rights and freedoms on the Northern Sea Route: Russia’s excessive maritime claims

Preface

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4.2 Does Article 234 allow NSR’s prior authorisation regime?

According to Article 234, Russia has implemented the 2020 Navigational Rules. They, *inter alia*, subject navigation through the NSR to an obligatory prior notification and authorization system and require ships and their crews to adhere to specific requirements.⁽¹⁾ Rules are purportedly formulated with the intention of ensuring that vessels operating within this region adhere to safety and environmental standards.⁽²⁾

Although there are instances where the Coastal State prior authorization regime is legally recognized, such as entering a State’s internal waters, UNCLOS does not provide an evaluation of the legality of Russia’s implementation of a permitting regime for the passage of merchant vessels, either in the territorial sea or the EEZ.⁽³⁾ There is a prevailing consensus among commentators that the imposition of prior authorization as a condition for the exercise of rights and freedoms of navigation is incongruent with the UNCLOS.⁽⁴⁾ This perspective is substantiated by a joint statement issued by the US and the USSR, as well as resolutions put forth by the Senate Foreign Relations Committee⁽⁵⁾ , which assert that according to UNCLOS:

All ships (...) enjoy the right of innocent passage in the territorial waters, for which neither prior notification nor authorization is required. ⁽⁶⁾

On signature and upon ratification of UNCLOS, Italy and Netherlands expressed the same opinion.⁽⁷⁾

Regarding the prior authorization procedure in the EEZ, Roach arrives at a singularly proposed result:

(...) as reflected in the UNCLOS, ships of all States, regardless of cargo, have the freedom to navigate in the EEZ of other states as well as on the high seas without prior permission or notification. ⁽⁸⁾

The requirement of obtaining prior authorization for ships entering the NSR by Russia can be attributed to Russia’s belief that Article 234, as a *lex specialis*, allows it. The enduring inquiry is whether Article 234 confers authorization on Russia to arrive at such a determination.

According to American legal doctrine, the imposition of unilateral requirements by Coastal States for prior notification and authorization to pass territorial waters and the EEZ is deemed unjustified and fails to satisfy Article 234’s “due regard to navigation” requirement.⁽⁹⁾ It is further highlighted that he improper interpretation and implementation of Article 234 by Russia can be characterised as a deceptive practice, as its claims and asserted rights are not in accordance with UNCLOS and are used to justify “creeping jurisdictional behaviour”.⁽¹⁰⁾

Fahey also asserts that Russia shall not necessitate prior authorization for accessing ice-covered regions of the NSR, and if foreign-flagged vessels are obligated to seek explicit permission from Rosatom by default, this requirement seems to resemble a *de facto* prohibition on navigation.⁽¹¹⁾ Nevertheless, Bartenstein states that prior authorization is a highly effective method of taking preventive action, thus contending that such a broad interpretation of Article 234 falls within the ambit of “due regard to navigation” obligation.⁽¹²⁾

Due to the varying perspectives offered by legal scholars on this matter, to gain insight into the objectives of the prior authorization regime implemented on the NSR and its compatibility with UNCLOS, particularly Article 234, it is instructive to examine the 2020 Navigational Rules.

Paragraph 5 of the Rules provides a comprehensive enumeration (a-k) of the specific documents that are required to be provided by the vessel to Rosatom to request permission for entry into the NSR.⁽¹³⁾ Firstly, the issuance of a permit is contingent upon the formal submission of all requisite information regarding the vessel and voyage, as outlined in Appendix No. 1, which comprises 27 sub-points.⁽¹⁴⁾ Several types of information need to be mentioned:

- 1) Port (place) of departure of the vessel;
- 2) Port (place) of destination of the vessel;
- 3) Planned number of crew members and passengers on board the ship, etc.⁽¹⁵⁾

It seems that the aforementioned information does not have a significant impact on the decision-making process for granting or rejecting permission to navigate in the NSR. Furthermore, it appears that Russia is not receiving any valuable information pertaining to the scope of Article 234, which specifically addresses marine preservation and the prevention of pollution caused by vessels. The legitimacy of Russia’s ability to demand the provision of such formalistic rather than practical information within the scope of its prescriptive powers, as outlined in Article 234, is subject to scrutiny.

Secondly, the act of navigation, as an exercise of a right or freedom, is initially considered to be legitimate unless there exists substantiating evidence indicating otherwise.⁽¹⁶⁾ Under the prior authorization regime, the burden of proof is shifted to the ship and consequently to the Flag State, as it requires the vessel to adhere to substantive standards and have the required certificates on board.⁽¹⁷⁾ So, to say it another way, the Flag State must prove to Rosatom that the ship can lawfully enter the NSR. Paragraph 5 of the Rules stipulates that the vessel is obligated to provide the polar navigation vessel certificate (Polar Certificate) as well as the classification certificate, among other required certificates, amounting to a total of five.⁽¹⁸⁾

The requirement in question appears to be incongruous with the UNCLOS, as UNCLOS prohibits the practice of “pre-emptive” verification of whether vessels engaged in innocent passage within territorial waters, as well as those exercising the freedom of navigation within the EEZ, possess the requisite documentation on board.⁽¹⁹⁾ The responsibility to ensure that a vessel carries relevant documents on board does not lie with Russia as a Coastal State, but rather with the Flag State.⁽²⁰⁾

In relation to the authority of enforcement, it is exclusively the Flag State that guarantees the proper surveying and certification of vessels.⁽²¹⁾ Moreover, within the framework of “checks and balances”, it is the Port State Control that is acknowledged as having a crucial function in ensuring adherence to regulations pertaining to the surveying and certification of vessels.⁽²²⁾ Thus, Russia’s purported authority to verify the presence of required documentation on a ship on an ordinary basis extends outside Russia’s jurisdiction as per the general enforcement provisions of the UNCLOS. (See Section 2.3 in respect to Russia’s enforcement powers in territorial waters and Section 2.4 in respect to the EEZ).

It might also be argued that the efficacy or need for prior authorization in mitigating vessel-source pollution has diminished with the implementation of the Polar Code.⁽²³⁾ The compelling nature of the argument advocating for Russia’s close control over vessel navigation in the NSR was persuasive prior to the adoption of enforceable international rules and standards.⁽²⁴⁾ Nevertheless, given the present circumstances, the requirement for the vessel to provide the Polar Certificate to Rosatom appears to be an outdated practice.

Finally, the fundamental inquiry revolves around whether the prior authorisation regime is primarily driven by a genuine commitment to safeguarding navigation safety and the Arctic environment as outlined in Article 234, or if it serves as a mere guise for Russia’s nationalistic displays and geopolitical manoeuvring.⁽²⁵⁾ Currently, it seems that Russia perceives the requirement to grant foreign vessels the right of innocent passage in territorial sea and freedom of navigation in the EEZ contained by the NSR as a substantial constraint on its sovereignty⁽²⁶⁾ and a possible risk to its national security⁽²⁷⁾ . The reasoning is understandable: as the regulatory framework provided by UNCLOS is insufficient to effectively address the issue of prior authorization regime, due to the inherent ambiguity and flexibility of Article 234, Russia utilises it to advance its diverse constituencies and interests, thereby consolidating them in the translation of power to exert control over the NSR.⁽²⁸⁾

The examination of Russia’s pertinent practice does not support the assertion that prior authorization is adequately effective in achieving the goals of Article 234, hence negating the apparent conflict with navigational rights and freedoms. Neither Russia’s stance is reconcilable with the applicable articles of UNCLOS, since it continues to put onerous requirements on commercial shipping that are increasingly counterproductive in terms of fostering the international viability of the NSR. Therefore, it might be argued that a mere notification scheme lacking authorization or other compliance mechanisms may present a more favourable alternative to the existing Russian approach.⁽²⁹⁾

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