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The Northern Sea Route: Problems of National Status Legitimization under International Law. Part I*

© **Pavel A. GUDEV**, Cand. Sci. (Hist.), leading research fellow
E-mail: gudev@imemo.ru
Primakov Institute of World Economy and International Relations, Russian Academy of Sciences, Moscow, Russia

Abstract. The Northern Sea Route (NSR) for the Russian Federation is a strategically important maritime communication with the status of a historically established national transport artery. Despite its applicability to the Arctic, and therefore to the waters of the NSR, the norms and provisions of the modern international maritime law, and, first of all, the 1982 UN Convention on the Law of the Sea (UNCLOS), Russia declares the important role of the national legislation on the regulation of navigation on the NSR. Such a situation is conditioned by the existing historical practice, the tacit agreement of most states, as well as the special environmental vulnerability of the Arctic region and the desire to prevent the marine environment pollution due to the navigation. Among the main opponents of this approach is the USA, which traditionally disputes the unified permitting regime for navigation along the NSR as an example of Russia's extremely broad interpretation of the norms and provisions of UNCLOS. The first part of the paper will show how those legal approaches used by Russia to introduce the national level of the NSR regulation, i.e., the concept of internal historical waters and the method of straight baselines, do not contradict UNCLOS, as they go beyond its limits and are based mostly on customary norms of international law (the so-called international custom) rather than treaties. The U.S. disagreement with such an assertion is discredited by the fact that Washington is not a full party to UNCLOS, and thus cannot fully enjoy all the prerogatives it has introduced.

Keywords: *Northern Sea Route, Arctic, USA, UN Convention on the Law of the Sea 1982, international straits, right of transit passage, internal waters, historical legal grounds, freedom of navigation, national legislation.*

Common characteristics

Of course, the length of the NSR is its main competitive advantage. However, it must be understood that the NSR route does not have a single fixed route: depending on weather and ice conditions, it can run both north of the Novaya and Severnaya Zemlya archipelagoes; pass through the waters located between the Russian Arctic islands and the main coast, and in the immediate vicinity of the coastline in the event of particularly severe ice conditions. Accordingly, depending on ice conditions and the chosen route, the length of the route can vary from 2.2 to 3 thousand nautical miles.

The NSR route runs through water areas with completely different legal status. Art. 5.1 of the Merchant Shipping Code states: "The water area of the Northern Sea Route is understood as the water area adjacent to the northern coast of the Russian Federation, covering the internal sea waters, the territorial sea, the contiguous zone and the exclusive economic zone of the Russian

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Federation and bounded from the east by the line of demarcation of sea spaces with the United States of America and the parallel of Cape Dezhnev in Bering Strait, from the west by the meridian of Cape Zhelaniya to the Novaya Zemlya archipelago, the eastern coastline of the Novaya Zemlya archipelago and the western borders of the Matochkin Shar, Kara Vorota, Yugorsky Shar straits"[1].

Despite the fact that within the framework of the 1982 UN Convention on the Law of the Sea (hereinafter – the 1982 Convention), the right of innocent passage should operate within the territorial sea, and within the EEZ - 3 of the 6 freedoms of the high seas (navigation, flights, laying cables and pipelines), the NSR is considered by Russia as a single (highlighted by me - G.P.) transport route. Regardless of the water areas under the sovereignty or jurisdiction of the Russian Federation, it passes, the legal regime of passage through it remains the same [1, Gavrilov V., pp. 256-263]. This is largely due to two historical and practical circumstances:

- The NSR route has not been used for international shipping for many decades, and its development, including infrastructure development, was carried out by the efforts of one state - the Soviet Union, and then the Russian Federation, therefore, our country has all the powers to exercise control over navigation;
- Passage along the NSR route in any case involves the intersection of water areas under full state sovereignty, in particular inland waters, including a number of Arctic straits (more on this later), which means that the most rigid regime of entry/intersection of all sea spaces can operate here, and precisely - permissive! At the same time, even the hypothetical possibility of a part of the NSR route outside the zones of sovereignty and jurisdiction of the Russian Federation due to favorable ice conditions, that is, through areas of the open sea, does not exclude the need for further crossing of the internal waters of the Russian Federation.

In this regard, the Rules for Navigation in the NSR indicates that "in the water area of the Northern Sea Route, there is a permitting procedure for navigation of ships (emphasized by me - G.P."[2].

It is also important for us that neither the Barents Sea nor the Bering Sea is included in the NSR[3]. This "curtailed" understanding of the NSR, without including the entire water area of the

[1] Code of Merchant Shipping (CMS) of the Russian Federation. URL: http://ktmrf.ru/glava-1/st-5-1-ktm-rf (accessed 15.05.2020).

[2] Order of the Ministry of Transport of the Russian Federation of January 17, 2013 N 7, Moscow "On approval of the Navigation rules in the water area of the Northern Sea Route". URL: https://rg.ru/2013/04/19/pravila-dok.html (accessed 15.05.2020).

[3] Nevertheless, the NSR is an integral part of the Northern Maritime Transport Corridor (NMTC), the routes of which, in addition to the water area of the Northern Sea Route, cross the waters of the Barents, White and Pechora Seas in the west and the Bering, Japanese and Okhotsk Seas in the east. See: M.N. Grigoryev Forecast of the development of shipping in the water area of the Northern Sea Route for the period up to 2030. Brief Policy. URL: https://wwf.ru/upload/iblock/1ab/prognoz-razvitiya-sudokhodstva-v-akvatorii-smp-na-period-do-2030-goda_kratkaya-an-zapiska.pdf (accessed 16.04.2020).

Barents Sea, is largely due to the norms and provisions of the 1982 UN Convention on the Law of the Sea, in particular Art. 234 Ice-Covered Areas. It states that:

"Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence".

It is no coincidence that the Soviet rules for sailing along the NSR in 1990. attention was focused on the fact that:

"The rules on a non-discriminatory basis for ships of all states regulate navigation along the Northern Sea Route in order to ensure the safety of navigation, prevent, reduce and keep under control pollution of the marine environment from ships, since the existing in the Arctic are particularly severe climatic conditions and the presence of ice for most of the year create obstacles or an increased danger to navigation, and pollution of the sea or the northern coast of the USSR can seriously harm the ecological balance or irreversibly disrupt it, as well as damage the interests and well-being of the peoples of the Far North"[4].

Article 234 is rightfully called the "Arctic exception", as it speaks of considering the special environmental interests of the Arctic states in the field of shipping regulation. In fact, coastal states are empowered to impose national pollution control regulations that may be stricter than relevant international standards. Such powers go far beyond the normal competence of the coastal state in the EEZ. The coastal state has the right to regulate the design, construction, manning and equipment of ships, which it cannot do under normal conditions even in the territorial sea[5].

However, the provisions of this article only apply to areas covered with ice for most of the year (i.e. more than 6 months)! The Barents Sea, although it is one of the ice seas, nevertheless, is never completely covered with ice, there is mainly ice not perennial, but of local origin[6]. It is for these reasons that, when developing the 2012 Law on the Northern Sea Route, it was decided not to extend the national rules for the regulation of shipping with an appeal to Art. 234 of the 1982 Convention for the entire Barents Sea.

[4] Rules of navigation on the routes of the Northern Sea Route. Approved by the USSR Ministry of the Sea Fleet on September 14, 1990. URL: https://pandia.ru/text/80/156/32367.php (accessed 16.04.2020).
[5] Mikhina I. UN Convention on the Law of the Sea and the Development of the Northern Sea Route. Opportunities and Threats for Russia. URL: http://russiancouncil.ru/sevmorput#mikhina (accessed 16.04.2020).
[6] Electronic reference manual for the oceanographic characteristics of the Barents Sea. AARI, 2005. URL: http://www.aari.ru/resources/a0013_17/barents/atlas_barents_sea/_Atlas_Barenc_Sea_seasons/text/Barenc.htm#2p6.7 (accessed 16.04.2020).

In this case, undoubtedly, a departure from the previous approach was allowed, when first, within the framework of the Decree of the Council of People's Commissars of the USSR of December 17, 1932, "On the organization of the Main Directorate of the Northern Sea Route under the Council of People's Commissars of the USSR", its route was defined as "from The White Sea to the Bering Strai"[7]. And then, in 1936, this wording was corrected to "from the Barents Sea to the Bering Strait"[8].

The removal of the entire Barents Sea from the Russian national laws and navigation rules on the NSR is undoubtedly greatly beneficial to some oil and gas and shipping companies. However, in the case of the development of cargo transportation along the NSR not only in the east, but also in the west (to the countries of Western Europe), this situation significantly limits the possibilities of the Russian Federation in the field of preventing pollution of the marine environment and ensuring the safety of navigation. Moreover, scientific evidence suggests that the 2012 decision was reinsurance, and the southeastern part of the Barents Sea is still covered with ice for most of the year, which blocks the passages to the straits of Novaya Zemlya[9]. Accordingly, an updated border of the NSR water area can be established here. It is the inclusion of the Barents Sea (including the Pechora Sea) that can, in turn, significantly increase the volume of traffic along the NSR in order to achieve the planned indicators by 2024[10].

At the same time, the proposal of the Ministry for the Development of the Russian Far East to expand the borders of the NSR by including in its composition the internal sea waters, the territorial sea and the exclusive economic zone of Russia not only in the Barents, but also in the White, Pechora, Bering and Okhotsk seas[11], still looks extremely contradictory. On the one hand, such a solution is capable not only of reaching 80 million tons of cargo turnover by 2024, but also significantly exceeding the required figure. On the other hand, the provisions of Art. 234 can no longer be applicable to new sea areas, which means that the navigation regime on the NSR can no longer be uniform. It will be multi-component and based on the norms of national legislation within the old borders of the NSR; and in relation to a part of water areas - on the requirements of the Polar Code, which assumes less stringent regulation. At the same time, the Polar Code also has its own geographical boundaries (for example, it applies only to the northern part of the Bering and the

[7] SNK Order of 17.12.1932 No. 1873 "On the organization of the Council of People's Commissars of the Union of Soviet Socialist Republic of the Main Directorate of the Northern Sea Route". URL: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=ESU&n=24839#08025104220609278 (accessed 16.04.2020).

[8] Resolution of the Council of People's Commissars of the USSR of 06/22/1936 N 1100 "On approval of the Regulations on the Main Directorate of the Northern Sea Route under the Council of People's Commissars of the USSR". URL: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=ESU&n=31589#09530234917777554 (accessed 16.04.2020).

[9] Peresypkin V. Development of the Northern Sea Route. URL: http://www.morvesti.ru/tems/detail.php?ID=28072 (accessed 17.04.2020).

[10] The May decree got stuck in the ice: how to find 80 million tons of cargo for the Northern Sea Route. URL: https://www.rbc.ru/business/16/01/2019/5c3dde2f9a79471715920f53 (accessed 17.04.2020).

[11] Northern Sea Route. The government is thinking of extending the route to Sakhalin. URL: https://www.kommersant.ru/doc/4349939 (accessed 21.05.2020).

eastern part of the Barents Seas), which means that a fairly large part of the new water areas of the NSR will be outside its scope. Obviously, these maritime areas (for example, the Sea of Okhotsk) will not be able to extend the same model of control over shipping as is currently applied to the NSR, since this would be a direct violation of the norms and provisions of international maritime law. Accordingly, the question arises: will such a division lead to erosion of the current legal status of the Northern Sea Route?

Russian-American contradictions

Despite the fact that the United States generally recognizes the fact that the opening of the Arctic region to international shipping requires special efforts on the part of Russia to ensure the safety of navigation and the protection of the marine environment, nevertheless, it does not share Russia's position on the legal regulation of along the NSR at several points[12].

First, the United States continues to dispute the position according to which part of the Russian Arctic straits (in particular, the Vilkitsky, Shokalsky, Sannikov and Laptev straits) are blocked by straight baselines and the waters within them are considered by the Russian side as internal waters. The USA also believes that the characterization of the NSR as a historically formed national transport artery of the Russian Federation is based on the use of terms that are extra-legal in nature.

Second, the United States does not agree that foreign ships can enter the NSR, which passes through the EEZ and the territorial sea of Russia, only following an official request and obtaining an official permission from the Russian side. Such restrictions, from their point of view, are a violation of both freedom of navigation within the EEZ, the right of innocent passage through a 12-mile territorial sea, and the right of transit passage through the straits used for international shipping.

Thirdly, the United States recognizes that a stricter level of regulation of navigation along the NSR is based on an appeal to the provisions of Art. 234 of the 1982 Convention However, they emphasize that this article, although it allows the adoption of certain laws in ice-covered areas within the EEZ, these measures should be aimed solely at combating the prevention, reduction and control of marine pollution from ships, should be non-discriminatory in essence and relate exclusively to shipping issues. Accordingly, Art. 234 does not provide a legal basis for the introduction of a notification or permission procedure for passage.

The United States believes that the provisions of Russian legislation on the need to use icebreaker and pilotage, if they are mandatory for everyone, then this, from their point of view, also leads to a broad interpretation of Art. 234 of the 1982 Convention. They insist that the ban on the use of foreign icebreakers on the route of the Russian NSR also goes beyond the competence prescribed in Art. 234. The United States believes that these measures, introduced by the Northern Sea Route Administration, must be approved by the International Maritime Organization (IMO).

[12] Digest of United States Practice in International Law 2015. Carrie Lyn D. Guymon (Editor). Office of the Legal Adviser. United States Department of State. pp. 526–527. URL: https://2009-2017.state.gov/documents/organization/258206.pdf (accessed 14.04.2020).

In addition, the wording of the article regarding "areas covered with ice for most of the year" raises the question of its applicability to the NSR in the event that climate change in the Arctic leads to a significant reduction in ice cover, especially in the western part of the NSR.

Fourthly, the United States insists that the regime of navigation along the NSR, introduced by Russia, cannot be applied to government non-commercial service. This is due to the fact that Art. 236 of the 1982 Convention:

"The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service".

Soviet legal practice

The United States acted as an indirect catalyst for the policy of tightening the shipping regime in the Arctic waters of the Soviet Union during the Cold War. So, during 1963-1964 the United States carried out oceanographic research in the waters of the Soviet Arctic, between the Barents and Chukchi seas.

This led to the fact that the USSR Ministry of Foreign Affairs turned to the US Embassy in Moscow with a memorandum, which indicated that the NSR route is located far from any international shipping routes and was traditionally used only by ships flying the USSR flag, moreover, its arrangement and the development of its infrastructure required the attraction of large financial resources from the USSR. It was also noted that the straits of the Kara Sea (Shokalsky and Vilkitsky), as well as Dmitry Laptev and Sannikov, historically (emphasized by me - G.P.) belong to the Soviet Union and have never been used for international shipping. All the norms of Soviet legislation concerning the protection of the state border are applicable to these straits, according to which the entry of foreign warships into the internal waters or the territorial sea of the USSR requires prior permission from the USSR Government through an official request to the USSR Ministry of Foreign Affairs (emphasis mine - G.P.) no later than 30 days before the intended call [2, Roach J., pp. 312-313]. On April 27, 1965, these straits were declared historically (highlighted by me - G.P.) as belonging to the USSR[13], and then compulsory icebreaker and pilotage was introduced for all ships[14].

In a reply from the United States on July 22, 1965, it was indicated that, while recognizing the contribution of the USSR to the development of the NSR and the importance of this route for the protection of Soviet interests, the United States cannot agree that these circumstances create any legal basis for changing the status of water areas to the route of the NSR. From their point of view, despite the fact that the Soviet Arctic straits, primarily the Kara Sea, are blocked by the territorial waters of the USSR, they, nevertheless, should be subject to the right of innocent passage for all ships, as to the straits used for international shipping and connecting one part of the High Sea with another part of the High Sea [2, Roach J., pp. 312-313].

[13] Resolution of the Council of Ministers of the USSR No. 331-112 of April 27, 1965 "On the order of navigation of ships in the straits of Vilkitsky, Shokalsky, Dmitry Laptev and Sannikov".
[14] Notices to Mariners, ed. GUNiO MO USSR, January 1, 1973, vol. 1, no. 20.

In 1967, the United States planned to challenge the aforementioned claims of Moscow to control Arctic shipping by moving two US BO icebreakers from the southern coast of Greenland through the Laptev and East Siberian Seas and further to the Canadian Arctic archipelago.

In a response sent to the State Department on August 25, 1967, it was once again indicated that the Vilkitsky Strait was blocked by the territorial sea of the USSR, and the regime of passage through the Dmitry Laptev and Sannikov straits was also regulated by Soviet legislation in the field of state border protection, within which such the passage requires a special permit obtained in advance [2, Roach J., pp. 316-317].

However, these plans were not destined to come true. American icebreakers were blocked in the ice north of the Severnaya Zemlya archipelago, and the planned cruise, involving a passage through the Vilkitsky Bay, was canceled. However, since then, these incidents of the 1960s are considered by the American leadership as facts of non-recognition by the United States of restrictions on the right of innocent / transit passage through international straits connecting one part of the high seas with another part of it.

After these incidents, but already at a new stage of the Cold War, when the American administration was headed by President R. Reagan, in the USSR in 1984 and 1985 two Resolutions of the Council of Ministers were adopted[15], in which a list of geographical coordinates of points was approved, which determined the position of baselines for measuring the width of the territorial sea, economic zone and continental shelf[16]. The straightening of the initial lines from the mainland around Novaya Zemlya, Severnaya Zemlya and the Novosibirsk Islands and again to the mainland, fixed by the above resolutions, made it possible to declare the straits of Vilkitsky and Shokalsky, Dmitry Laptev and Sannikov, as well as the Kara Gate as internal historical waters of the USSR, thereby determining the permissive procedure foreign ships / ships through these straits [3, Gudev P.A.].

[15] Decree of the Council of Ministers of the USSR of February 7, 1984 and January 15, 1985 on the coordinates of the baselines for counting the territorial waters in some parts of the NSR.

[16] The list of geographic coordinates of points defining the position of baselines for calculating the width of the territorial sea, economic zone and continental shelf of the USSR in the Arctic Ocean. URL: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1985_Declaration.pdf (accessed 16.04.2020).

Fig. 1. Straight baselines of the Russian Federation [17].

Incidentally, the government of Canada followed the same path, establishing in 1985 a solid baseline for counting territorial waters around the entire Canadian Arctic archipelago. As a result, the entrance and exit of the Northwest Passage (NWP) were blocked, and its route ran through the Canadian internal historical waters under the full sovereignty of Canada [3, Gudev P.A.].

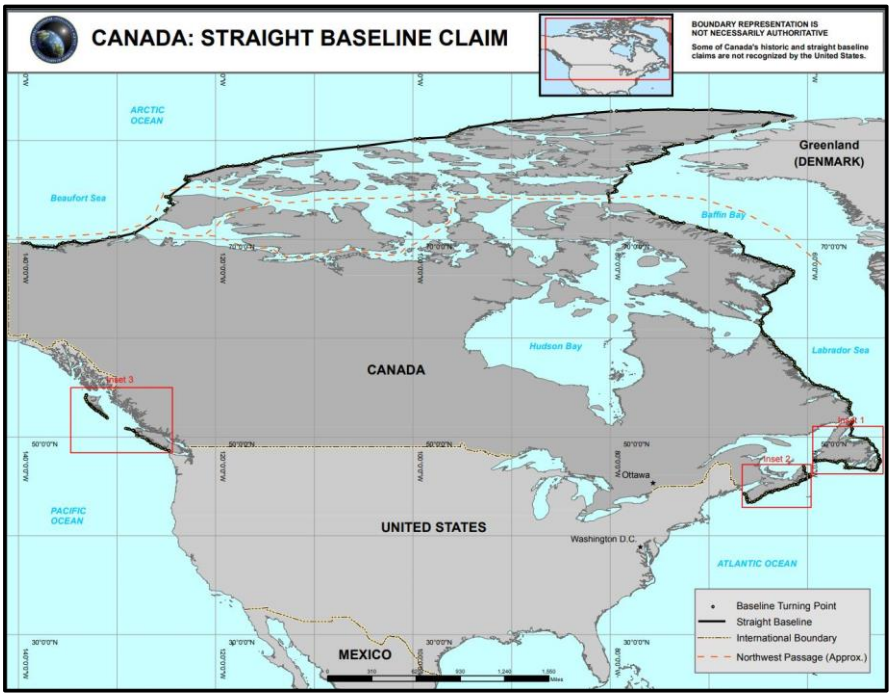

Fig. 2. Direct baselines of Canada in the Arctic [18].

[17] Russia: Straight Baseline Claim. URL: http://www.jag.navy.mil/organization/documents/mcrm/RussiaChart.pdf (accessed 12.04.2020).
[18] Canada: Straight Baselines Claim. URL: http://www.jag.navy.mil/organization/documents/mcrm/CanadaChart.pdf (accessed 16.04.2020).

The practice of Moscow and Ottawa was naturally contested by the United States. The latter pointed to two fundamental points:

- firstly, the drawing of straight baselines of the USSR and Canada was carried out in violation of the provisions of the 1982 Convention, in particular with noticeable deviations from the general direction of the coast (Art. 7 (3)) and exceeding the maximum limit of 24 nautical miles [2, Roach J. , P. 64];
- secondly, the norms and provisions of both the 1958 Convention on the Territorial Sea and Contiguous Zone (Article 5 (2)) and the 1982 Convention (Article 8 (2)) establish that "when the establishment of a straight baseline ... leads to the inclusion in internal waters of areas that were not previously considered as such, in such waters the right of innocent passage applies ... ".

Historic waters concept

Indeed, the adoption of resolutions 1984 and 1985. led to the fact that in a number of cases, due to the establishment of excessively long lines (up to 90 miles), a significant number of bays and gulfs fell into the internal waters of the USSR, which, when drawing straight baselines in strict accordance with the 1982 Convention, should not have been considered as such.

Thus, the established straight baselines cut off the Czech Bay (43 nautical miles) and the Baidaratskaya Bay (31 nautical miles), the entrance to the Ob Bay (more than 50 miles); Motovsky and Kola bays (entrance width about 40 miles), Moller Bay (entrance width about 50 miles). Moreover, in some cases, straight baselines overlap straits, the width of the entrance to which exceeds twice the width of the territorial sea (the Karskiye Vorota - the width of the entrance is about 40 miles, the Vilkitsky Strait - the width of the entrance is about 90 miles, the Shokalsky Strait - the width of the entrance is about 50 miles) [3, Gudev P.A.].

In international practice, the waters of bays, gulfs and inlets belonged to the internal waters of the state on a general basis only if the width of their entrance was less than double the width of the territorial sea - that is, 24 nautical miles[19].

However, in paragraph 6 of Art. 10 of the 1982 Convention, it is stated that "the above provisions do not apply to the so-called 'historical bays' (highlighted by me - G.P.), that is, it is allowed that such bays can be part of internal waters, even if their closing line goes beyond limits of the 24 mile limit.

The problem was only that the existence of the institution of historical waters, confirmed in the 1982 Convention, was not supplemented by the content within its framework of any developed legal norms regarding the criteria and other requisites of historical waters. It did not indicate what factors create historical legal grounds and on the basis of what criteria bays more than 24 miles wide can be classified as historical [3, Gudev P.A.].

[19] Recall that the 12-mile limit of the territorial sea was fixed only within the framework of the 1982 UN Convention on the Law of the Sea (UNCLOS). However, an attempt to introduce this spatial criterion was discussed, albeit unsuccessfully, back in 1958 during the Geneva Conventions on the Law of the Sea.

Nevertheless, the practice of states followed the path of expanding the circle of exceptions for classifying bays as historical waters [4, Gudev P.A., p. 20]. If initially bays were attributed to the historical ones, the width of the entrance to which did not exceed 24 miles, then almost all claims became associated with bays with an entrance width, often very significantly exceeding 24 miles. In addition, historical rights began to be put forward not only in relation to bays, gulfs, but also gulf (bays) type seas. This expansion of the object of historical law was due to the fact that some of the flooded seas are smaller than a number of bays declared historical[20].

As a result, back in 1962, it was concluded that the concept of historical waters began to deviate more and more from the basic concept of historical bays and, although historical bays are historical waters, the concept of "historical waters" turned out to be much broader than the concept of “historical bays”. This statement is fully confirmed in the study prepared by the UN Secretariat “Legal regime of historic waters, including historic bays”. In it, in particular, it is noted: “If the term “historical bays” was used more often than historical waters, it was mainly due to the fact that claims on a historical basis were made more often in relation to spaces that were called or considered as bays. Basically, the theory of historic bays in its basic form is applicable to other maritime spaces besides bays”[21].

Thus, the American point of view that the width of straight baselines should not exceed the double limit of the territorial sea, that is, 24 nautical miles, is nothing more than the position of the American expert community. At the same time, the dispute is incorrect, from the point of view of the United States, the established baselines are practically a tradition for Washington. In any case, under the Freedom of Navigation program, even key American allies - Japan, Taiwan, South Korea - are under pressure every year for doing so[22].

However, international law does not and does not contain any rigid restrictions on the establishment of the maximum width of straight baselines, including those exceeding the limit of 24 nautical miles, and their establishment in general by a number of states was based to a greater extent not on treaty, but on customary law norms of international maritime law [5, Pharand D., p. 28].

As for the American objections to the need to apply the right of innocent passage to waters that were included in the composition of internal waters by establishing a straight baseline, but were not considered as such before, the situation here is somewhat different.

So, despite the fact that the official statement on the application of the status of historical waters was made only in relation to the White Sea, the Czech Bay, Baidaratskaya Bay and a num-

[20] For example, the area of Hudson Bay, declared the historic Gulf of Canada, is 580,000 km^2, while the area of the White Sea, which makes up the historical waters of the USSR, is only 36,000 km^2.

[21] Yearbook of the International Law Commission. 1962. Vol. II. UN, New-York, 1964. P. 6, §34. URL: http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1962_v2.pdf&lang=EFS (accessed 22.02.2020).

[22] Bateman S. State Practice Regarding Straight Baselines in East Asia — Legal, Technical and Political Issues in a Changing Environment. URL: https://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf5/Papers/Session7-Paper1-Bateman.pdf (accessed 12.03.2020).

ber of other water areas outside the Arctic, at the level of the Soviet legal doctrine, all the Arctic seas were traditionally referred to as the historical seas of the USSR, with the exception of Barents, - East Siberian, Kara, Laptev, Chukotka, as well as key Arctic straits [6, Vylegzhanin A.N. et al., pp. 55-57].

Accordingly, the decisions of 1984-1985 only legalized this legal status in relation to a number of water areas, and in a much smaller volume than was accepted at the level of the Soviet legal doctrine. Therefore, the wording of Art. 8 (2) of the 1982 Convention, namely "which were not previously considered as such", can only be provisionally applicable to the above-mentioned waters. Their status of historical waters was in fact equated with the legal status of internal waters under the full sovereignty of the coastal state.

The possibility of applying the status of internal waters to historical seas and gulfs was confirmed back in 1962 by the UN International Law Commission in the course of researching the issue of classifying historical bays as historical internal waters or bays with the status of a territorial sea:

"The question of whether the waters of the gulf are internal waters, or a territorial sea is decided on the basis of the type of sovereignty exercised by the coastal state during the formation of the historical title of this gulf. The exercised sovereignty can be the same as over internal waters or over the territorial sea. In principle, the content of a historical title arising from the continued exercise of sovereignty should not be broader than the content of actually exercised sovereignty. If the corresponding state really exercised sovereignty, as in internal waters, then the declared area would be internal waters, and if in reality, as in the territorial sea, then the status of this area of waters would be the same. For example, if the state claiming the historical title of the waters allowed innocent passage through them, then they can only have the status of a territorial sea"[23].

Common criterion [24] application of the status of historical waters to gulf (bays) type seas and bays surrounded by the shores of one state, which, despite the fact that they connect with the ocean and the width of the entrance to them exceeds 24 nautical miles, may be the internal sea waters of the state, as follows:

- the coastal state exercised sovereignty over these waters for a long time;
- these waters are of important and special economic, defense and strategic importance for a given country;
- there is a tacit recognition of most states [7, Kolodkin A.L. et al., pp. 30–31; 6, Vylegzhanin A.N. et al., pp. 24-25; 5, Pharand D., pp. 6-7].

[23] Yearbook of the International Law Commission. 1962. Vol. II. UN, New-York, 1964. P. 23 §164-166 (A/CN.4/SER.A/1962/Add.l). URL: http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1962_v2.pdf&lang=EFS (accessed: 16 February 2020).

[24] It is important to note that the formation of the norms of international maritime law relating to historical waters proceeded mainly along the path of the development of customary rather than treaty law norms, to a greater extent based on the provisions of the legal doctrine and decisions of international courts.

The first two points can hardly be disputed in relation to the Soviet / Russian Arctic waters, including a number of straits, but the last position is already to a much lesser extent. Despite the virtual absence of objections from other states, the repeated passes of US Coast Guard icebreakers in the 1960s, as well as notes of diplomatic protest from the US Department of State, can only conditionally be considered "tacit agreement". On the other hand, the absence of attempts to pass and protests in the future, especially in the 1980s, raises the question of the weight of these actions on the part of the United States to challenge Moscow's legal claims.

At the same time, it is quite possible to assume that American, and, incidentally, French or British submarines regularly sailed through the waters that the USSR in previous years, and the Russian Federation, up to the present time, is considered as internal historical waters under full state sovereignty. However, as these passages are not public, the information about them remains secret, the question of whether this practice is regarded as an official protest against the Canadian and Russian claims in the Arctic - an extremely controversial [8, Brubaker D., pp. 277]. From our point of view - definitely not!

The main problem is rather that the position of the Soviet leadership throughout the 1960s, as shown above, suffered from a certain contradiction: the waters of the Soviet Arctic straits were first declared internal in the notes of the Soviet Foreign Ministry, and then their legal status was changed to waters of the territorial sea. That is why many foreign jurists [9, Franckx E., pp. 270-271] insist that the overlap of the Arctic straits by a system of straight baselines in 1984-1985 although it may be generally recognized as legitimate, this does not negate the fact that the right of innocent passage should be applied to these internal waters.

Innocent and transit passages: customary or contract law?

The United States, as you know, insists that the right of innocent passage should be applied to the waters of the territorial sea along the NSR, freedom of navigation should be in effect in the 200-mile EEZ, and the convention right of transit passage should be observed in the Russian Arctic straits. However, the very non-participation of the United States in the 1982 UN Convention on the Law of the Sea actually devalues these American statements.

First of all, this is due to the fact that the adoption of the 1982 UN Convention on the Law of the Sea had a number of policy implications [10, Rothwell D., pp. 22-23]. First, certain legal norms were enshrined in its text, which by that time had long been considered as customary[25] rules of law (for example, the treaty right of transit passage).

Secondly, in the text of the Convention, certain legal norms were fixed, which at the time of its conclusion were already a fairly common practice of a number of states, which contributed

[25] Customary law is shaped by a combination of two elements: established, widespread and consistent State practice; as well as a subjective element known as opinion juris. This means that the state is considering a particular customary law as a norm of international law, as a rule, *legally binding* (!) In between the national plan. This is an expression of the will of the state. When other sovereigns also express the will in the same direction, it formed a tacit agreement on the recognition of customary law as international legal norms. [11, Vylegzhanin, Kalamkaryan, pp. 81-83].

to their gradual transformation into customary law (for example, the 200-mile limit of the exclusive economic zone).

Thirdly, the Convention introduced new legal norms, which, however, have not yet received the widest and most consistent application. Their transformation into customary rules of law is possible only if they become generally binding practice of most states and, above all, those of them that still do not participate in the 1982 Convention [12, Harrison J., pp. 51-59; 12, Tanaka Y., pp. 140-141]. This mainly concerns Art. 76 on the definition of the outer boundaries of the continental shelf and the very concept of the Common Heritage of Mankind, but not only [14, Gudev P.A., pp. 172-173].

It is no coincidence in this connection that in 1982 it was declared: "This Convention is not a Convention codifying legal norms. The assertion that, with the exception of Part XI, the Convention constitutes a codification of customary law or reflects existing international practice is factually incorrect and legally unfounded. The strait transit regime used for international shipping and the archipelagic sea lanes regime are two examples of the many new concepts embodied in the Convention"[26].

The United States is inclined to believe that the 1982 Convention has completely and completely codified exclusively well-established rules of customary law. This position, of course, fully meets the military-strategic interests of the United States[27]. This is due to the fact that with such consideration of the role and significance of the 1982 Convention, other countries, including those not participating in it (Iran, North Korea, Syria, Libya, North Korea, etc.), are actually obliged to comply with customary law, allegedly codified in the Convention, since they are binding on absolutely all states. As a result, the United States is constantly focusing on the fact that such norms as the right of transit and archipelagic passage, the right of innocent passage of warships across the territorial sea are already well-established norms of customary international law and all countries are obliged to comply with them unquestioningly [15, Gudev P.A.].

In particular, the US tends to view the right of transit passage as a step towards codifying customary law. They consider that the absence of a legally formulated right of "transit passage" prior to the adoption of the 1982 Convention was solely due to the fact that states were not legally able to expand the border of their territorial sea beyond the prescribed 3 nautical miles, and not to the fact that it was someone either prohibited. Accordingly, this did not prevent American ships and vessels from passing through the designated corridors of the high seas in various international straits. The introduction of the 12-mile limit of the territorial sea required the development of

[26] Constitution for the Oceans. Statements by the President of the Third United Nations Conference on the Law of the Sea, Tomi TB Co URL: http://www.un.org/depts/los/convention_agreements/texts/koh_russian.pdf (accessed 14.04.2020).

[27] Protecting freedom of navigation is critical not only to the social and economic development of the United States but is also a key element of defense policy. All the main elements of the US national security sphere - strategic deterrence, operational presence, crisis response, troop transfer - directly depend on the observance of the principle of freedom of navigation, in particular the right of transit passage. Ensuring the mobility and efficiency of the transfer of aircraft to any region of the world by sea remains one of the priority areas of US policy.

conditions for transit passage in order to preserve the rights of states to pass through international straits [15, Gudev P.A., p. 112; 16, Gudev P.A., p. 178-179]. Therefore, from their point of view, the right of passage of military and civil ships through international straits existed even before the adoption of the 1982 Convention [2, Roach J., pp. 686-691].

As a result, the United States has been consistent advocates of the right of transit passage for all straits that are, or may be, used for international shipping. They have repeatedly opposed the claims of other coastal states that do not recognize or restrict the right of transit passage with respect to the following straits: Bab-el-Mandeb, Bonifacio, Golovnina, Sunda, Gibraltar, Lombok, Hormuz, Torres, Friza, as well as straits on the route of the Russian North sea route (NSR) - Laptev and Sannikov, and the Canadian Arctic archipelago, forming the route of the Northwest Passage (NWP) [2, Roach J., pp. 283-345].

However, in practice, only a few States fully agree that transit passage is a customary law norm - this is Australia[28], UK, Papua New Guinea, USA and France. Some countries (Albania, Spain, China, UAE, Peru) openly refuse to recognize transit passage as a customary law norm. Iran, Morocco, the United Arab Emirates only recognize the right of innocent passage through straits overlapped by territorial waters [17, Lopez M., P. 197]. Iran insists that the United States, as a non-party to the 1982 Convention, has no right to claim that it can use the Convention's right of transit passage, since it is not a valid customary law norm [18, Greene J., p. 9-10].

An established point of view comes from the fact that the transit passage became an international compromise and beyond the scope of both the Convention on the Territorial Sea and the Contiguous Zone of 1958, and customary international law [13, Tanaka Y., P. 106]. The most balanced approach on this issue is that the right of transit passage today is only moving towards becoming a norm of customary law in the future [20, George M., p. 189-205; 21, Bing Bing Ja, p. 123-144; 8, Brubaker D., p. 279].

The same applies to the right of innocent passage of warships. It is obvious that the right of innocent passage arose at the very beginning of the last century simultaneously with the establishment of the institution of the territorial sea [19, Gudev P.A., p. 62]. Since its inception, it has been recognized by everyone and has become a widespread practice in the vast majority of states. There is no doubt that the consolidation of this right in the framework of the 1982 UN Convention on the Law of the Sea was nothing more than a step towards codification of this law, which has long become a norm of customary international law. However, we must not forget that the monotonous and incessant practice of states in recognizing the right of innocent passage through the territorial sea exists only in relation to merchant ships; in relation to the passage of warships, this practice is not universal. Thus, it is clear that so far there are no norms of customary law with respect to the passage of warships through the territorial sea of the coastal State [22, Keyuan Z., p.

[28] True, this did not prevent Australia and Papua New Guinea from attempting to introduce compulsory pilotage through the Torres Strait, which provoked opposition from a number of states, including the United States, who perceived this step as restricting the right of transit passage.

71]. This statement is confirmed by the fact that during the III UN Conference on the Law of the Sea (1973-1982) consensus on this issue was not reached, a number of countries opposed granting this right to warships.

At the same time, the United States itself, prior to the beginning of the Cold War, adhered to the position that the right of innocent passage through the territorial sea could only be exercised if a warship received permission for such a passage from the coastal state. During the Hague Conference on the Codification of International Law, the American representative insisted that the right of innocent passage is generally not applicable to warships. This right, from the time of its inception, has been granted specifically to merchant ships. However, after the end of World War II, the United States, as its naval capabilities increased, changed its position on this issue.

The Soviet Union, for its part, even during the signing of the Geneva Conventions, said that "the Government of the USSR said that the coastal State has the right to establish a licensing procedure of passage of warships through its internal waters" [22, Keyuan Z., p. 71].

The Regulations on the Protection of the State Border of the Union of Soviet Socialist Republics, approved by the Presidium of the Supreme Soviet of the USSR on August 5, 1960, stated that "foreign military ships pass through the internal waters of the USSR and enter the internal sea waters of the USSR with the prior permission of the USSR Government in the manner prescribed the rules for visiting the territorial and internal sea waters of the USSR by foreign military vessels published in the "Notices to Mariners" (Art. 16)[29].

Then, in the Soviet national legislation (Rules of navigation and stay in the internal waters (territorial sea) of the USSR, internal waters and ports of the USSR of foreign warships, approved by the Decree of the USSR Soviet of Ministers of April 28, 1983), it was established that the innocent passage of warships through the territorial sea For the purpose of crossing the internal waters of the USSR, the USSR is allowed along the routes usually used for international shipping in the Baltic, Okhotsk and Japanese seas. At the same time, neither the Rules nor other by-laws contained any mention of the right of innocent passage in the Black Sea and the seas of the Arctic Ocean.

Accordingly, the position of the USSR was based on the fact that the right of innocent passage is granted only for convenience purposes where it is necessary in the interests of navigation. Such routes were not designated in relation to the Black Sea because the geographical position of the Soviet Black Sea coast indicated that it was located away from the routes leading to the ports of any other Black Sea state. So, for example, a passage through Soviet internal waters in the Black Sea and in the seas of the Arctic Ocean could be needed only in case of entering the internal waters and ports of the USSR, but only on the basis of the preliminary permission of the USSR Soviet of Ministers.

[29] Regulations on the protection of the state border of the Union of Soviet Socialist Republics. August 5, 1960. URL: http://shieldandsword.mozohin.ru/documents/statement_border5860.htm (accessed 17.04.2020).

True, after a series of incidents[30] [23, Kraska J., p. 257] in the Black Sea between the United States and the USSR, already at the end of the Cold War, on September 23, 1989, a USA-USSR Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage was signed, known as the Jackson Hole Agreement. It was signed by the US Secretary of State Baker and the USSR Minister of Foreign Affairs E. Shevardnadze. It was recorded that:

"All ships, including warships, regardless of cargo, weapons or engine type, in accordance with international law, enjoy the right of innocent passage through the territorial sea, for which neither prior notification nor permission is required"[31].

In addition, the parties agreed that Article 19 of the 1982 UN Convention on the Law of the Sea contains" an exhaustive list of activities in the implementation of which the passage ceases to be innocent. A vessel passing through the territorial sea and not carrying out any of these types of activities shall carry out innocent passage".

Corresponding changes were also made to the Resolution of the Soviet of Ministers of the USSR of April 28, 1983 No. 384 on the approval of the Rules for navigation and stay in the internal waters (territorial sea) of the USSR, internal waters and ports of the USSR of foreign warships. Resolution of the Soviet of Ministers of the USSR of September 20, 1989 no. 759 in Article 12 "Sea lanes and traffic separation schemes" stated that "foreign warships carrying out innocent passage through the internal waters (territorial sea) of the USSR in order to cross the internal waters (territorial sea) seas) of the USSR without entering the internal waters or ports of the USSR, use sea lanes or traffic separation schemes in those places where they are established or prescribed" [32]. Thus, the 1989 edition excluded from Art. 12 mentioning that the innocent passage of warships through the territorial sea of the USSR for the purpose of crossing the internal waters of the USSR is allowed along the routes usually used for international shipping only in the Baltic, Okhotsk and Japanese seas.

It should be noted that up to the present time the state practice on this issue is rather ambiguous. On the one hand, some states - for example, Germany and the Netherlands - when acceding to the 1982 Convention made a special clarification that the right of innocent passage through the territorial sea applies to all ships, incl. and on warships[33].

[30] Aceves W.J. The Freedom of Navigation program: A study on the relationship between law and strategy. 1990. Pp. 127–128. URL: http://digitallibrary.usc.edu/cdm/ref/collection/p15799coll38/id/82074 (accessed 18.04.2020).

[31] 1989 USA-USSR Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage. Adopted in Wyoming, USA on 23 September 1989. URL: https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1989-USA-USSR-Joint-Statement-with-Attached-Uniform-Interpretation-of-Rues-of-International-Law-Governing-Innocent-Passage.pdf (accessed 19.04.2020).

[32] Council of Ministers of the USSR. Resolution of 28.04.83 No. 384 On the approval of the rules for navigation and stay in the territorial waters (territorial sea) of the USSR, internal waters and ports of the USSR of foreign warships. URL: http://www.lawrussia.ru/texts/legal_383/doc383a544x941.htm (accessed 12.12.2019).

[33] Official information regarding the declarations and statements under articles 287, 298 and 310 of the Convention. URL:https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec (accessed 18.04.2020).

On the other hand, about 40 states require either a notificatio[34], or permissive[35] [35] the order of the passage of foreign warships through their internal waters [2, Roach J., pp. 250-251]. For example, the PRC government, when ratifying the 1982 Convention, declared that the provisions concerning innocent passage through the territorial sea do not call into question the right of the coastal state to request a foreign state to obtain permission or prior notification for the passage of its warships[36]. Some countries (Denmark, Vietnam) have introduced a limit on the maximum number of warships that can be present in their internal waters.

The right of innocent passage has historically played an important role in the naval activities of the largest maritime powers. However, the passage of warships could threaten the security of the coastal state. Accordingly, there is a certain dilemma in international law: do warships have the right of innocent passage through the territorial sea of a coastal state? Some experts even insist that the right of innocent passage of warships across the territorial sea is not a right at all, but a manifestation of goodwill on the part of the coastal state.

Conclusion

Summing up the preliminary results, it should be noted that the permissive regime for navigation on the NSR, advocated by the Russian Federation, is based on the fact that passage along it is impossible without crossing the internal waters under full state sovereignty. In this case, we are talking primarily about the Russian Arctic straits of the New Siberian Islands and the Severnaya Zemlya archipelago. Due to climatic and ice conditions, today there are no routes for the passage of ships north of these territories. Accordingly, regardless of where the ship enters the NSR – from the Barents or Bering Seas, and through which water areas its route passes initially – through the territorial sea or the exclusive economic zone of the Russian Federation, it will in any case be forced to enter the internal waters Russia. This circumstance is one of the key, which allows us to talk about the establishment of a single navigation regime for the entire NSR, which, as we have already mentioned, does not have a fixed route.

The water area of the Russian Arctic straits was classified as internal waters on historical grounds. Despite the fact that the 1982 Convention does not contain clear criteria for this kind of legal qualification, the institution of historical waters itself was formed long before the adoption of the above-mentioned agreement, mainly on the basis of customary law and decisions of international courts. Among the criteria for referring to historical waters, the following are distinguished: important economic and defense significance for the state; by projecting them sovereignty over them for a long time and on an ongoing basis; tacit agreement of other states.

[34] Argentina, Guyana, Egypt, India, Indonesia, Yemen (NDRY), Korea (Republic of), Libya, Malta, Mauritius, Republic of Seychelles, Finland (until 1997), Sweden (until 1994), Croatia.

[35] Albania, Algeria, Vietnam, Bangladesh, Barbados, Bulgaria (until 1987), Burma, Germany, Grenada, Denmark, Iran, Yemen (YAR), Cape Verde, Cambodia, China, Congo, Maldives, Malaysia, UAE , Oman, Pakistan, Philippines, Poland, Romania, Somalia, Sri Lanka, Sudan, Syria.

[36] Official information regarding the declarations and statements under articles 287, 298 and 310 of the Convention. URL: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec (accessed 18.04.2020).

The latter circumstance poses a certain problem for the Russian Federation, since the icebreakers of the US Coast Guard in the mid-1960s made several passes through the Soviet Arctic straits, which can hardly be considered a "tacit agreement", given the active correspondence between the Soviet and American diplomatic departments. On the other hand, the US reaction to the resolutions of the Soviet of Ministers of the USSR in 1984 and 1985, which at the legislative level classified these and other water areas as internal, was "curtailed". They challenged the establishment by the Soviet Union of direct baselines only in relation to the Pacific Ocean, the Japanese, Okhotsk, Bering and Black Seas [24, Nash M. , p. 1796]. This fact does not at all cancel the initial position of the United States on this issue, but it may also testify to the tacit agreement at that time of Soviet Arctic ambitions.

Another problem is the inconsistency of the statements of the Soviet leadership regarding the legal status of the waters of the Arctic straits: before the 1984-1985 decrees in diplomatic correspondence with the United States, they qualified either as a territorial sea or as internal waters. Taking into account the provisions of Art. 5 (2) of the 1958 Convention on the Territorial Sea and Contiguous Zone and Art. 8 (2) of the 1982 UN Convention on the Law of the Sea, internal waters previously treated as such shall apply the right of innocent passage. It can be considered that this is the minimum on which foreign experts insist, challenging the permitting procedure for passage on the NSR.

From our point of view, there is no compelling reason to believe that these waters were not considered by the USSR as being under full state sovereignty and to which the state border protection regime was applicable, that is, the need to obtain permission through diplomatic channels from the Soviet government. The inconsistency of the initial legal qualification was caused rather by the suddenness of the situation: the Soviet Arctic was actually a closed maritime region for the free implementation of certain types of maritime economic activities by foreign states, including military shipping. The emergence of US BO icebreakers in Soviet Arctic waters was undoubtedly an extremely annoying factor for the USSR and required the development of appropriate legal argumentation, which took some time.

In general, the main contradiction that exists between Russia and other countries, primarily the United States, regarding the legal status of the NSR is the question of the full or partial applicability of the norms and provisions of the 1982 UN Convention on Maritime Governance to the waters of the NSR and the Arctic as a whole. For the United States, the answer to this question is extremely unequivocal: Russia, as a party to the 1982 Convention, is obliged to fully implement its provisions in relation to the indicated maritime spaces. The position of Russia is fundamentally the opposite: the legal regime of the Arctic is based on a combination of treaty and customary rules of law, as well as the applicability to it of national legislation developed by our country over the course of decades.

At the same time, it is important to understand that non-recognition of the right of innocent or transit passage to the NSR does not mean the extension of these restrictions to any other

water areas outside the Arctic. This would be an extremely dangerous delusion, since, in accordance with the Vienna Convention on the Law of Treaties of 1969, any other state may consider itself not obliged to comply with certain treaty norms in relation to a country that periodically violates these norms[37]. The ships of the Russian Navy are extremely interested in unhindered passage through the key waters of the World Ocean, including international straits. In addition, as a party to the 1982 UN Convention on the Law of the Sea Russia has undertaken the obligation to respect and comply with the convention norms.

It is only about the fact that the Russian Federation can not only appeal to the unique legal regime of the NSR, which is based both on the norms and provisions of modern international maritime law, and on national legislation, but also in relations with the United States - not to consider itself obliged to take attention to the legal position of Washington on innocent and transit passages, since it is not a full party to the 1982 UN Convention on the Law of the Sea. And only a change in the status of the United States in relation to it can become the basis when in the relationship between Russia and the United States there may be a need for a more detailed discussion of the legal regime of navigation on the NSR.

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