EUROPEAN LAW & GOVERNANCE UNIVERSITY
An International University by
EPLO European Public Law Organization

Contested Passage: Russian and American Readings of UNCLOS on the Northern Sea Route

Theodor Skarvelis

Abstract

As Arctic sea ice retreats and the Northern Sea Route (NSR) attracts commercial and strategic attention, the divergent readings of the United Nations Convention on the Law of the Sea advanced by Russia and the United States have turned into a dispute over navigational rights. This paper reconstructs both positions and asks whether a Freedom of Navigation Operation (FONOP) is a realistic American response. It first examines Russia's regulatory regime under Article 234 and the characterisation of the route's straits as internal waters. It then sets out Washington's counterclaims. The paper argues that a FONOP mission fits only part of this dispute, since an operational assertion can contest only restrictions applying to state vessels; its only plausible target is the internal-waters claim over the NSR's straits, where ice conditions, the absence of ice-capable American warships and potential dependence on Russian assistance make the operation disproportionately risky. It concludes that diplomatic instruments, a published legal position, a renewed protest, joint démarches and pressure to submit the NSR rules to the IMO, offer a lower-risk way of preserving the American legal position.

Keywords: Northern Sea Route, UNCLOS, freedom of navigation operations, Arctic straits, Russia-United States relations

Introduction

The Arctic's temperature is increasing rapidly, and so is the region's connectivity. In the future, the Northwest Passage and the Northeast Passage [1] will compete with the traditional maritime routes of the Suez and Panama Canals. The Arctic's use as a connectivity corridor has increased the regional geopolitics. There is already a dispute regarding the freedom of navigation and the status of some Arctic straits. The United States of America (USA) has expressed its objections most vividly against Canada's and Russia's claims. This paper focuses on the dispute caused by the different interpretation of the United Nations Convention on the Law of the Sea [2] (UNCLOS) between Russia and the USA on the Northern Sea Route (NSR)[3]. Russia is a party to UNCLOS. The USA is not a member but treats the convention as part of the International Customary Law [4]. This difference has caused a debate regarding the

[1] The Northwest Passage comes through the Arctic Ocean along the northern coast of North America, through the Canadian Arctic Archipelago, while the Northeast Passage runs along the Arctic coasts of Norway and Russia, from the Barents Sea in the west to the Bering Strait in the east.

[2] United Nations Convention on the Law of the Sea, opened for signature December 10, 1982, 1833 U.N.T.S. 3 (entered into force November 16, 1994).

[3] The Russian part of the Northeast Passage.

[4] Ingrid Handeland, 'Navigational Rights for Warships in the Northwest and Northeast Passages', in: *Arctic Review on Law and Politics* 13 (2022): 143–59, https://doi.org/http://dx.doi.org/10.23865/arctic.v13.3383, 155.

USA's answer to Moscow's claims and actions in the NSR; some US officials[5] proposed the conduct of Freedom of Navigation Operations (FONOPs)[6], while others recommend a diplomatic approach. Thus, the research questions are: Which Russian and American maritime claims collide on the Northern Sea Route? Which Russian claims can a FONOP target? Is a FONOP a feasible option? Which are the alternatives?

Russian Regulation and Claims

According to Moscow, the NSR is "the historically established national transport communications of the Russian Federation[7]." Russia has created an extensive regulatory system in the NSR. All commercial vessels traversing the route must be digitally registered, must comply with Russian environmental, insurance and technical protocols, while icebreaker and ice-pilotage escort is charged and remains mandatory for most passages. Specifically, commercial ships need to receive permission from the NSR's administration, while the icebreaking and ice-pilotage vessels, and the ones storing and shipping hydrocarbons from the NSR area, must be Russian-flagged[8]. In Moscow's reading, these regulations are necessary for safe navigation and the Arctic environment's protection[9]. This claim is based on UNCLOS' Article 234, which permits the adoption of laws and regulations for the prevention, reduction, and control of marine pollution in ice-covered regions within the EEZ. Notably, Russia issued legislation in 2022 that renders mandatory for foreign warships and state vessels to request permission, at least ninety days in advance, to pass through NSR's internal waters, and only one warship is permitted in each passing[10]. Although Article 236 explicitly grants sovereign immunity to warships and state vessels against all UNCLOS' articles regarding environmental protection, Russia treats all the NSR's straits as internal waters and argues that

[5] Former Secretaries of the Navy, Richard V. Spencer and Navy Kenneth Braithwaite have urged FONOPs in the Arctic, Cornell Overfield, 'FONOP in Vain: The Legal Logics of a U.S. Navy FONOP in the Canadian or Russian Arctic', in: *Arctic Yearbook 2021 - Defining and Mapping the Arctic: Sovereignties, Policies, and Perceptions*, ed. Lassi Heininen et al. (Akureyri, Iceland, 2021), https://arcticyearbook.com/arctic-yearbook/2021/2021-scholarly-papers/375-fonop-in-vain-the-legal-logics-of-a-us-navy-fonop-in-the-canadian-or-russian-arctic, 1.

[6] A FONOP is an operational assertion by US military forces to restrict and protest maritime claims of coastal states regarding the rights and freedoms of the international community, in: *Freedom of Navigation (FON)* (U.S. Department of Defense, 2017), https://policy.war.gov/Portals/11/Documents/DoD%20FON%20Program%20Summary%2016.pdf?ver=qQoJstQf-aYPvAXZjWaHvA%3d%3d.

[7] Todorov Andrey, 'Russia on the Northern Sea Route: Having the Cake and Eating It Too?', in: *World Economy and International Relations* (Moscow) 65, no. 11 (2021): 123–30, https://doi.org/10.20542/0131-2227-2021-65-11-123-130, 125.

[8] Andrey Todorov, 'Dire Straits of the Russian Arctic: Options and Challenges for a Potential US FONOP in the Northern Sea Route', in: *Marine Policy* 139 (May 2022): 105020, https://doi.org/10.1016/j.marpol.2022.105020, 2.

[9] Raul Pedrozo, 'Russia's Arctic Maritime Claims', in: *Ocean and Coastal Law Journal* 29, no. 2 (2024): 197–234, https://digitalcommons.mainelaw.maine.edu/oclj/vol29/iss2/4, 227.

[10] Andrey Todorov, 'New Russian Law on Northern Sea Route Navigation: Gathering Arctic Storm or Tempest in a Teapot?', The Belfer Center for Science and International Affairs, 9 March 2023, https://www.belfercenter.org/publication/new-russian-law-northern-sea-route-navigation-gathering-arctic-storm-or-tempest-teapot.

the route's usage requires passing through Russian territorial and/or internal waters[11].

USA's Counterclaims

The USA's objection to Russian claims regarding the freedom of navigation dates back to the 1960s, when the USA disputed the status of the NSR's straits, describing them as international straits, meaning the vessels possess the right of transit passage[12,13]. In 1985, Russia established its Arctic Ocean's straight baselines[14], which were rejected by the USA[15]. In 2015, Washington protested diplomatically to Moscow about its NSR regulations. Washington argues that the NSR's straits are international and not internal, the regulations violate the freedom of navigation in the EEZ[16], and the right of innocent passage in territorial waters[17]. The USA accuses Russia of infringing the due regard and the non-discrimination clauses of Article 234 by requiring prior permission and prohibiting the usage of non-Russian icebreakers and pilots[18]. Furthermore, the applicability of Article 234 is contested by questioning the NSR's ice coverage and its harsh conditions, while the USA claims that Moscow defies Article 236 concerning warships' immunity[19]. As per Washington, the NSR's regulations must be approved by the International Maritime Organisation (IMO).

FONOP's Targets and Feasibility

The debate about the conduct of a FONOP in the Arctic started in 2019 when the then Navy Secretary Richard V. Spencer advocated for this and stated that an Arctic FONOP is under consideration[20]. This paper opposes this proposition. To explain why an Arctic FONOP should be avoided, the FONOP's targets and feasibility are discussed. Firstly, FONOPs can only be conducted by government vessels to showcase objection to claims that are "excessive" according to the USA's interpretation of international maritime law and affect state vessels[21]. They consist of an initial *démarche* and inter-state negotiations. FONOPS are usually operationalised by one state vessel[22]. Just sailing through the NSR is not a FONOP; it requires a specific Russian claim to be challenged. Interestingly, Russian NSR claims are not included in the FONOP reports. The best

[11] Andrey Todorov, 'The Russia-USA Legal Dispute over the Straits of the Northern Sea Route and Similar Case of the Northwest Passage', in: *Arctic and North* 29 (December 2017): 74–89, https://doi.org/10.17238/issn2221-2698.2017.29.74, 69.
[12] The right of transit passage is the legal freedom of ships and aircraft to navigate through international straits without interference from bordering states.
[13] Todorov, 'The Russia-USA Legal Dispute over the Straits of the Northern Sea Route and Similar Case of the Northwest Passage,' 63.
[14] A straight baseline is a straight line that connects specific points along a jagged coast to measure a country's maritime zones.
[15] Todorov, 'Dire Straits of the Russian Arctic,' 4.
[16] Exclusive Economic Zone.
[17] Todorov, 'Dire Straits of the Russian Arctic,' 3.
[18] Pedrozo, 'Russia's Arctic Maritime Claims,' 227.
[19] Ibid.
[20] Malte Humpert, 'U.S. Navy Plans to Send Surface Vessels Through Arctic', High North News, 11 March 2019, https://en.highnorthnews.com/politics/us-navy-plans-to-send-surface-vessels-through-arctic/122358.
[21] Overfield, 'FONOP in Vain: The Legal Logics of a U.S. Navy FONOP in the Canadian or Russian Arctic,' 12.
[22] Todorov, 'New Russian Law on Northern Sea Route Navigation'.

target would be the unannounced passing of a warship through the NSR's straits without informing Russian authorities, thus challenging not only the strait's internal waters claim, but also the 2022 legislation.

Such a mission poses serious operational and political risks. Even though ice thawing is unprecedented, the USA would still need ice-capable vessels to pass through the East Siberian Sea straits, which remain frozen even during the summer months [23]. Then, there is the ice-besetting phenomenon, which can lead to sinkage or stranding [24]. Meanwhile, the USA possesses only three icebreakers, one of which is fifty years old and no ice-capable warships, while Russia has more than 40 icebreakers [25]. Although the USA has contracted eleven icebreakers, it will take years to compete with Russia in this domain. Essentially, Moscow can easily deny access to any FONOP in the NSR. Also, the USA's vessels might get trapped because of the environmental conditions and require Russian assistance[26]. Navy experts have stressed the dangers of such an endeavour. They propose, beyond the icebreaker fleet's expansion, cooperation with other allies with icebreakers and the deployment of unmanned surface vehicles (USVs) and Unmanned underwater vehicles (UUVs)[27]. Yet again, the Russian Arctic is heavily militarised with bases spanning from Russia's Arctic fleet to its nuclear-deterrence submarines [28]. This gives great incentives to Moscow to invoke security reasons to react aggressively.

Alternatives to a FONOP

Given the geopolitical landscape today, a NSR FONOP could cause a Russian-American military episode in the Arctic, turning the region into a geopolitical theatre. Fortunately, one can find many diplomatic approaches that render a military conflict avoidable. From Washington's side, the first step would be the publication of the USA's formal legal position against Russia's NSR claims, arguing legally for their arbitrariness by the competent authority. Then, Washington should renew and adapt the 2015 diplomatic protest to today's changes towards Russia, for example, by including the Article 236 violation. To continue, close negotiations with like-minded states would be beneficial for promoting joint démarches against Moscow's claims and for urging the flagged commercial vessels to refrain from complying with Russia's NSR regulations, thereby effectively embargoing this route. This would be a blow to Moscow's ambitions to make the NSR a competitive international shipping route. Concurrently, the USA should press Moscow to submit its NSR claims to the IMO to examine

[23] Todorov, 'Dire Straits of the Russian Arctic,' 5.
[24] Ibid, 7.
[25] Pavel Devyatkin, 'China and Russia and the US Icebreaker Race', Responsible Statecraft, 10 July 2026, https://responsiblestatecraft.org/arctic-icebreaker-competition-russia-china/.
[26] Todorov, 'Dire Straits of the Russian Arctic,' 7.
[27] Kyle Cregge and Chris O'Connor, 'Build a Coalition for Northern Sea Route Security', U.S. Naval Institute, 1 August 2023, https://www.usni.org/magazines/proceedings/2023/august/build-coalition-northern-sea-route-security.
[28] Karen Van Loon et al., *Cold Passage: The Northern Sea Route between Legal Ambiguity and Strategic Competition* (Clingendael Institute, 2026), https://www.clingendael.org/sites/default/files/2026-07/Clingendael_Policy_Brief_Cold_Passage.pdf, 9.

their validity and adoption[29]. Each refusal from Russia's part is a delegitimising incident.

Nonetheless, the USA faces two major problems on the diplomatic level. Firstly, Washington is not a party to UNCLOS, meaning that the USA cannot take Russia to the International Tribunal for the Law of the Sea (ITLOS), and cannot invoke Article 297, which allows compulsory proceedings over a coastal state's interference with navigation. If the USA became a signatory member of UNCLOS, its legal position would be upgraded and will have access to dispute settlement mechanisms. Secondly, Canada and Russia have common interpretations and interests in the Arctic maritime routes. The USA shares the same problems with Canada, which remain unresolved. Russia and Canada could jointly promote their interpretations and agendas within the framework of the IMO and UNCLOS concerning the Arctic maritime routes. However, this cooperation is highly unlikely to materialise given their bilateral relations and the Russo-Ukrainian War. The 1988 US-Canada Arctic Cooperation Agreement showcases a different model of approach; the two countries agreed to disagree on their legal positions, but agreed to functional cooperation regarding icebreaker usage and research[30]. Such a bilateral approach could be attempted in the NSR case, but it would be way more difficult given the generally hostile bilateral relations and the disagreement's scope.

Conclusion

Undoubtedly, the USA-Russia disagreement concerning UNCLOS interpretation and NSR's regulation is intractable and will be long-lasting. On the one hand, Moscow has every incentive to control the NSR's navigation, considering the region's importance for Russian national security. Article 234 gives enough loopholes to overregulate the shipping route to Russia's interests. On the other hand, the USA claims to be a guarantor of freedom of navigation. This stance also reflects the American national interests; this is evident from the FONOP program and the USA's determination not to acquiesce. FONOPs in the NSR are viewed as a risky endeavour not worth taking, given Washington's lack of operational capabilities. Nonetheless, the USA can opt for more peaceful alternatives to the Kremlin's claims, which are not necessarily easier but at least they entail less risk and require less time. In any case, Washington should continue expanding its icebreaking fleet and Arctic capabilities to be prepared for all scenarios.

[29] Pedrozo, 'Russia's Arctic Maritime Claims,' 232.
[30] Handeland, 'Navigational Rights for Warships in the Northwest and Northeast Passages,' 144.