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## A Developing Maritime Operational Environment: Forward Presence and Freedom of Navigation in the Arctic

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*“Force is never more operative than when it is known to exist but is not brandished”*

-- Alfred Thayer Mahan, 1893

### Introduction

The primary purpose of the US military is to prioritize the deterrence of conflict, but, if and when confronted, engage and win under terms acceptable to the United States and its allies.<sup>1</sup> In the Arctic, aspects of defense-related deterrence continue to advance and prospects for conflict remain very low. However, competitive issues still exist in many sectors of security,<sup>2</sup> which often overlap and have potential to escalate. It is well known that access to and interest in the Arctic continue to increase for many reasons. For example, with continued decreases in sea ice, opportunities to develop natural resources as well as trade and tourism all represent areas of economic excitement. However, significant uncertainties remain a constant factor for new Arctic-related endeavors – including geopolitics. Most notably since 2007,<sup>3</sup> the accelerated exploration of global and regional norms became a necessary academic and political exercise when trying to understand circumpolar dynamics.<sup>4</sup> Within such processes of scholarly and diplomatic deliberation, one of the emphasized topics involves the constant analysis of most every defense-related development in the North. More often than not, rhetoric over anything military in the Arctic leans toward aggressive viewpoints<sup>5</sup> while scholarship treads more carefully.<sup>6</sup> Fortunately, the overall stability of the region allows time and conditions for meaningful dialogue, knowledge sharing, and less straining deliberation toward understanding Arctic defense policy and behavior.<sup>7</sup> Cooperation and competition levels throughout the Circumpolar North currently allow for such high confidence in stability. The Arctic states that maintain military forces and alliance memberships also generally maintain defense-related strategies associated with the Arctic. However, concerns remain involving the lack of clear synergy that often exists between political (national security) and defense-focused Arctic national policies. As an example, developing US Arctic policies indicate national requirements of establishing a strategic Arctic port(s) as well as progressing toward the US Navy’s surface presence in the Arctic. Yet, very few studies provides tangible details concerning operational purposes and criteria. As a result, the practice of military forward presence, especially

the principle involving freedom of navigation, provides an ideal contemporary Arctic (hard) security issue to examine given the current lack of study.

Forward presence and freedom of navigation represent fundamental aspects that enable force projection, which is a basic component of any deterrence strategy. Additionally, both forward presence and freedom of navigation will improve the position of the United States to confront a significant geopolitical, competitive issue involving the status of Russian and Canadian Arctic waters.

Both Canada and Russia maintain definitions of 'internal waters' as maritime domains under their full sovereign control. Canada's internal waters are clearly claimed within a contested straight baseline that envelops the entire archipelago.<sup>8</sup> For the United States and Canada, the issue of the sovereignty over the waters of and transit within the archipelago endures under protest, but under amicable arrangements (particularly the 1988 Canada-US Arctic Cooperation Agreement). With respect to Russia, the status is unresolved but lacks any manageable agreements and involves far more conflicting circumstances. US interpretation of Russian legislation and behavior outlines the following fundamental issues, according to Gudev:<sup>9</sup>

First, the United States continues to dispute the statement that some of Russia's Arctic straits (in particular, the Vilkitsky, Shokalsky, Sannikov and Laptev straits) are cut off by a straight baseline that makes them Russia's internal waters. The United States also believes that the description of the NSR [(Northern Sea Route)] as an historically shaped transportation corridor of the Russian Federation relies on extra-legal terms.

Second, the United States disagrees that foreign vessels may only enter the NSR that goes through Russia's exclusive economic zone (EEZ) and territorial sea after submitting an official request and obtaining official permission from the Russian side. The United States believes that such restrictions violate the freedom of navigation within the EEZ, the right of innocent passage through a 12-mile territorial sea and the right of transit passage through straits used for international navigation.

This begs the question of the circumstances in which foreign vessels can access the surface waters of the NSR (within the EEZ) without permission from Russia. The answer is none, which defies everything about innocent and transit passage in territorial waters, where permission is unnecessary as long as the rules of the United Nations Convention on the Law of the Sea (UNCLOS) are followed. Although Russia has legislation that defines its controls within UNCLOS norms, it also employs a suite of legislation that supplants it. In effect, defining the NSR waters up to the outer limits of the EEZ as internal has the potential to affect customary law.

The statuses of Russian and Canadian Arctic 'internal waters' have been established issues for many decades. However, recent events have elevated the competitive dynamics of both. For example, in early 2019, the Russian Federation developed bold new reporting and compliance requirements for foreign naval vessels<sup>10</sup> seeking access to the Northern Sea Route, in conflict with norms established by UNCLOS.<sup>11</sup>

In mid-2019, the US Secretary of State reaffirmed the nation's counterposition to Russian and Canadian claims in the Arctic during a trip involving the Arctic Council ministerial meeting.<sup>12</sup> Moreover, Secretary Pompeo,

backed by the Secretary of the Navy, confirmed U.S. intent to conduct a Freedom of Navigation Operation (FONOP) through both the Northern Sea Route of Russia as well as the Northwest Passage of Canada as an emphatic reminder of the US position. Considering the relatively recent US maritime strategies involving the Arctic as well as official statements,<sup>13</sup> a clearer understanding of the circumstances and relevant factors requires increased, and perhaps urgent, consideration. As a result, this article considers how such disputes might significantly impact the precedent from which the United States leads in providing global maritime security, as well as concerns regarding potential competitive tensions affecting stability in the Arctic, especially with the slowly increasing access to northern waters<sup>14</sup> and the expected rise in activity. Given these significant geopolitical pressures over much of the geographic space of the Arctic, the United States needs to develop cohesive, actionable security strategies and behaviors for the region's maritime domain in order to meet national security priorities while reasonably avoiding unnecessary competitive escalations. To that end, the first section of this article will present forward presence-related aspects of security in the Arctic. After, the second section will present the concept of and developments impacting freedom of navigation as it relates to the Arctic. Moreover, it is important to clarify the differences between freedom of navigation as an enduring classic principle and the Freedom of Navigation Program as an operationalized modern subset of the concept. Finally, the last section will provide initial contextual analysis of the first two sections.

## Forward Presence

The forward presence of forces provides a means by which to instill and support regional stability, as well as impose deterrence via punishment or denial.<sup>15</sup> Land forces often represent the traditional version of forward presence as a more proactive posture to strategies involving geopolitical management. With regard to the Arctic, and in the context of Russia as the primary adversary, forward presence is proportionately lacking in the regionally traditional sense given the absence of forward-positioned US or alliance land forces. However, options for where land forces could or should be forward postured for Arctic regional stability and deterrence may seem geographically unwarranted since upper Northern Europe, Canada, and Alaska seem to be ideal locations for that purpose already. To clarify this point, it is important to understand that a forward presence often means that forces are based in foreign locations in order to position resources and personnel in proximity to the strategic area of concern. Of course, positioning such capabilities is usually restricted by friendly-nation support and permission as well as feasibility. For the Arctic, though, the United States, Canada, and Northern Europe can simply develop forward presence in their own territories and likely meet the strategic objective involving proximity needs. Obviously, opportunities could be further leveraged for allied nations to fill any gaps in military capabilities or innovations by hosting foreign forces. For example, the US Marines have in recent years cycled a regular presence to northern Norway, demonstrating a forward presence example.<sup>16</sup>

Previously, the legacy enterprise defense systems, originating in the Cold War and involving subsurface and air/aerospace capabilities, dominated defense strategic requirements. As a result, US military Arctic operational capabilities focused on three main components, including: 1) US Air Force abilities to intercept and defeat Soviet aviation-related threats (i.e. bombers), 2) US missile defense forces to employ the suite of capabilities against missile threats, and 3) US Navy subsurface presence, often the leading strategic deterrence mechanism defeating any notion that an enemy could execute an optimum first strike. At the same time, sea ice kept surface

concerns negligible. However, relatively recent changes in the Arctic region and maritime surface represent new challenges and opportunities concerning forward presence and/or force projection. In early May 2020, US and UK naval forces conducted a maritime exercise in the Barents Sea along the northeast coast of Norway. While the media largely misreported the meaning of the event, often in efforts to invoke the sensitive nature of the US' formal Freedom of Navigation Operations (FONOPs) program, officials had provided advanced notification to Russia, making a FONOP not possible by definition. Since a Freedom (big "F") of Navigation Operation cannot be an announced event in accordance with the US' FONOP Program, anything otherwise is considered representative of exercising the global principle of freedom of navigation (small "f").<sup>17</sup> To be sure, prenotification seemed likely to be a courtesy communication since no such action is required. Per UNCLOS, such maritime activity in territorial, contiguous, and EEZ surface waters represents perfectly legal behavior within the context of freedom of navigation. To an extent, prenotification erodes the US' legal position and sets an adverse precedent under international law – a situation readily understood vis-à-vis undisclosed, yet legal, Russian maritime intelligence collection activities.<sup>18</sup>

## *The Developing Arctic Role for the US Navy*

The Department of the Navy realizes the need to build capabilities and enhance its presence in the Arctic. Its most recent strategy indicates a requirement to achieve sustained capabilities, which often serves as the fundamental benchmark for military capabilities.<sup>19</sup> A key component of sustainability that not only helps support freedom of navigation capabilities, but also enables forward presence and force projection, often involves sea basing. According to the Department of Defense (DoD) joint concept, 'sea basing' is defined as:

the rapid deployment, assembly, command, projection, reconstitution, and re-employment of joint combat power from the sea, while providing continuous support, sustainment, and force protection to select expeditionary joint forces without reliance on land bases within the Joint Operations Area (JOA). These capabilities expand operational maneuver options, and facilitate assured access and entry from the sea.<sup>20</sup>

Alternatively, Tangredi offers a broader definition, stating that "sea basing refers to the capability to use the sea in the same way that US forces use overseas regional bases, for deterrence, alliance support, cooperative security, power projection, and other forward operations."<sup>21</sup> Traditionally, forward presence provides a critical role across the globe. Shunk et al. explain that while deterrence requires capacity, communication, capability, and will, physical presence conveys both commitment and intentionality.<sup>22</sup> Furthermore, forward presence (i.e. forward-based forces overseas) helps mitigate threats and instability through deterrence and assurance far more effectively than otherwise.<sup>23</sup> To be clear, such a practice is more common of the United States. However, allied and associated efforts by other nations represent added evidence that illustrates the support and legitimacy of forward presence. For example, NATO's Enhanced Forward Presence program involves four multinational battlegroups in the Baltic states and Poland<sup>24</sup> (see Fig. 1).

Davis accurately explains that when regional powers posture to exploit lesser powers in an environment with culturally-related tensions that increasingly escalate into localized conflict, the psychological dimension of forward presence cannot be overstated.<sup>25</sup> For the Arctic, it is somewhat difficult to apply this understanding or



potential within the region given the lack of similar tension and circumstances at this time. Or, perhaps other conditions exist, and have evolved into an unconventional form, such as regional powers restricting/affecting important identity-related Arctic access or influence to the point of incidental and/or proxy violence. In any case, all options and concepts should continue to be considered.

**Figure 1.** NATO's Enhanced Forward Presence



**Source:** "NATO Enhanced Forward Presence." Ministry of Foreign Affairs of the Republic of Latvia, Updated 19 June, 2020, accessed 30 September, 2020. <https://www.mfa.gov.lv/en/policy/security-policy/nato-enhanced-forward-presence>.

Sustained presence and purpose in the Arctic entails investment and commitment, informed by decades of experience and sustained presence throughout the world. Presence must be physical and not virtual, and requires Sea Lines of Communication (SLOC) to establish security and support for trade and military through principal maritime routes. The Arctic is simply the newest chapter in the centuries-long history of naval affairs in this regard. For the US Navy on the Arctic maritime surface, forward presence takes on an entirely new part of their global mission set. Whereas sea basing may represent the regional static point of conventional naval forward presence, the United States will likely have to rely on a naval forward-deployed version to support/exert military diplomacy in the Arctic when (not 'if') the time comes. To be clear, US global diplomacy and national interests would not be possible to current (or imaginable) standards without military underwriting. The US Navy leads efforts in this regard. However, in the Arctic, US naval forward presence and deployments involving surface combatants, as *the* key enabler of military diplomacy, has not materialized as of yet. The extent to which it is even needed at this time, and in the foreseeable future, is being deliberated. Moreover, requirements to identify and develop such a capability also remain under consideration – a complex and expensive process spanning years and/or decades.<sup>26</sup> Therefore, it can be assumed that the forward-deployed version of the US Navy's forward presence in the Arctic represents the most plausible near-term scenario for approaching the overall

capability needed to support national security and defense priorities. This means that the US Navy would likely have to incrementally establish a forward presence through deployments until nominal infrastructure and organizational improvements can be developed within the region (i.e. near/above the Arctic Circle). Of note, as of 2019, the US Congress has mandated that the Office of the Secretary of Defense study and select Arctic strategic port(s) via the 2020 National Defense Authorization Act. The lead choice is expected to be the Port of Nome, which will require significant expansion.

## Freedom of Navigation and the Arctic

The global security importance of the Earth's oceans – about seventy-two percent of the planet's surface – cannot be overstated. About ninety percent of global trade relies on ocean transport. Nearly forty percent of the world's population lives within 100 km of coasts while eighty percent lives within 160 km, in many of the world's major cities.<sup>27</sup> Within this critical domain, the primacy of sea power remains pivotal, especially as part of great power competition. For the previous several decades, the US' national security strategy has not had to contend with great powers, which is no longer the case.<sup>28</sup> Balance-of-power developments demand new strategies, especially in efforts to uphold normative systems rooted in international law.

Credit for the concept of freedom of navigation and its first historical establishment in international law belongs to the Dutch jurist and philosopher, Hugo Grotius, who introduced the Latin phrase *mare Librium*, meaning 'Free Sea', in 1609.<sup>29</sup> Centuries later, President Woodrow Wilson formally bolstered the principle of 'freedom of navigation' in his Fourteen Points speech to the US Congress in 1918, stating as part of 'the program of the world's peace in Point II the need for "absolute freedom of navigation upon the seas, outside of territorial waters,<sup>30</sup> alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants."<sup>31</sup> From 1979 on, the United States has maintained an official strategy known as the Freedom of Navigation (FON) Program. Two primary efforts delineate the responsibilities and authorities of the program, including: 1) consultations and representations by US diplomats (including diplomatic notes and aide-mémoires), and 2) operational assertions by US military forces.<sup>32</sup> The international legal standing of the program originates from Article 38 of the Statute of the International Court of Justice (ICJ) – the principal legal organ of the United Nations), which codified recognized sources of international law in 1945, including: 1) international conventions, 2) international custom, 3) general principles of law, and 4) judicial rulings and teachings.<sup>33</sup> The second source, 'customary law', represents a key focal point of the US Freedom of Navigation Program in its intent to prevent undue claims of nations from going unchallenged,<sup>34</sup> and therefore become recognized over time as customary law. The program addresses this aspect fairly straightforwardly, stating that:

The DoD FON Program is comprehensive in scope and executed in an even-handed manner, challenging excessive maritime claims based on principle rather than identity of the coastal State asserting the claim. The DoD challenges excessive maritime claims asserted by a wide variety of coastal States including allies, partners, and other nations on a worldwide basis to maintain global mobility of US forces.<sup>35</sup>

This article's consideration of the maritime component of freedom of navigation primarily relies on the United Nations Convention on the Law of the Sea (UNCLOS) as top counsel – which as a convention, is one of the most widely accepted source of international law. As mentioned above, the Freedom of Navigation Program partially fulfills official challenges to claims through operational assertions, also known as Freedom of Navigation Operations, or FONOPs, for which the next section will provide explanation.

## *Freedom of Navigation and UNCLOS Fundamentals*

The Departments of State and Defense are responsible for the Freedom of Navigation Program. However, the Department of Defense, along with the United States Coast Guard (under the Department of Homeland Security), manages operational assertions throughout the world in alignment with international law and national interests. The US Navy maintains the principal archive and manuals of information concerning maritime claims for every nation, as well as select charts.<sup>36</sup> DoD has published annual unclassified reports related to the Freedom of Navigation Program since 1991, which also list each operational assertion conducted during their respective years. The first versions included lists with the 'Country' and 'Excessive Maritime Claim', while more recent versions provide tables with "Claimant", "Excessive Maritime Claim", and "Geographic Area or Location".

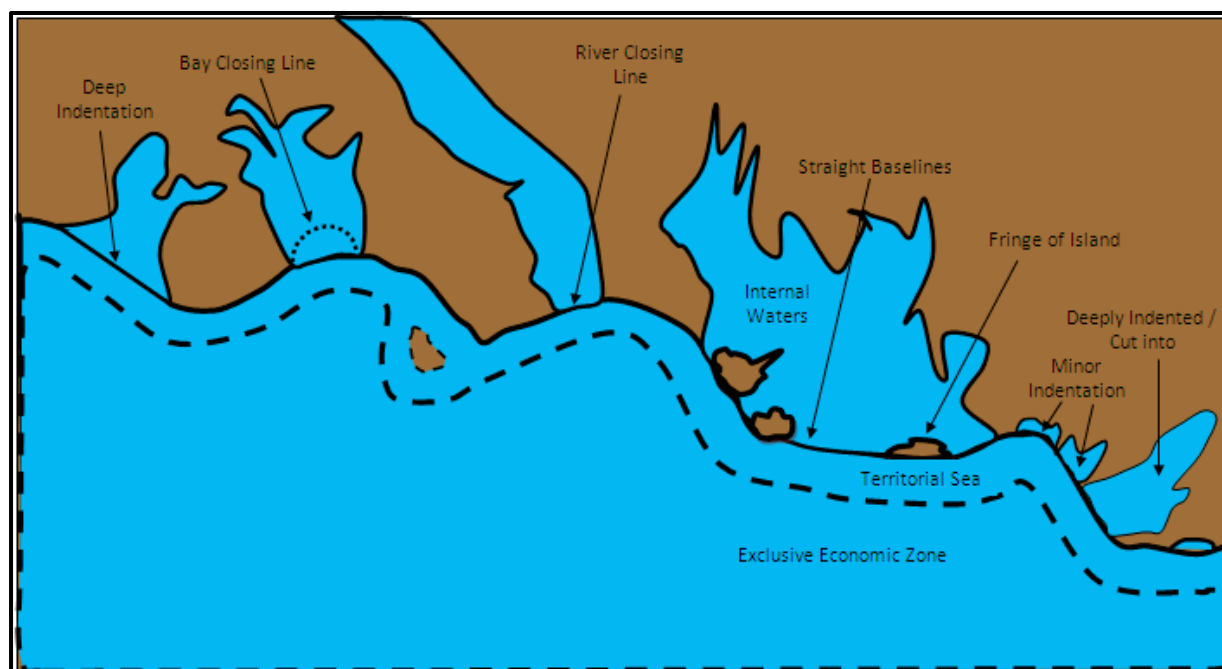
Understanding issues impacting freedom of navigation in the Arctic begins with the definitions of the types of waters established in UNCLOS (see Fig. 2). Two in particular remain key, as follows:

1. Internal waters:<sup>37</sup>
  - a. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
  - b. Where the establishment of a straight baseline<sup>38</sup>...has the effect of enclosing as internal waters areas which had not previously been considered as such, the right of innocent passage...shall exist in those waters.
2. Territorial waters:<sup>39</sup>
  - a. Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

The definition and treatment of waters as 'internal' provide the basis for Russian and Canadian maritime claims, in which the coastal state completely controls the surface waters, water column, sea bed, and below. In territorial waters, by contrast, coastal states must allow innocent and transit passage through surface waters.

Part III of UNCLOS provides details with regard to straits used for international navigation. Many excessive maritime claims are based on straight baselines that extend around the islands that form the straits. Such is the case for Russia with the Vilkitsky, Shokalsky, Sannikov, and Laptev Straits along its NSR coast. For Canada, the disagreement about the strait through the Northwest Passage can be considered beyond the ability of UNCLOS text to resolve, given the unprecedented scale and location of the archipelagic geographic feature as well as a host of complex historical and sovereignty issues.<sup>40</sup>

**Figure 2.** Example illustration of a coastline with boundary features



**Source:** Gardezi, Syed Muhammad Akhtar Hussain, and Ishtiaq Ahmad Choudhry. "Illegal Appropriations in the Sea - Factors Behind Excessive Maritime Claims by Coastal States." *Margalla Papers* 19, no. 2 (2015).

Operationally, the short territorial waters definition above is also interpreted to mean that naval forces "can conduct innocent passage without prior notice or consent (surface vessels and submarines on the surface); can exercise transit passage in international straits in 'normal mode of operation', meaning submarines can remain submerged and ships can operate normally as long as they navigate continuously and expeditiously through the strait. Seaward of any nation's territorial sea, vessels can conduct all military operations without prior permission or notification - which includes collecting intelligence, conducting military exercises, and testing weapons," to name a few.<sup>41</sup>

In short, waters between a coast and a straight baseline are considered *internal* and waters from (any) baseline out to 12nm are *territorial*. Next, Part II, Section 3 of UNCLOS describes provisions involving the 'rights of innocent passage' in territorial waters, which (in general) shall not be restricted to any vessels that follow the rules outlined in the Convention.<sup>42</sup> Additionally, Parts III and IV provide guidelines involving 'rights of transit passage' as well as details concerning archipelagos, respectively;<sup>43</sup> again, without impeding vessel movement, within treaty stipulations.<sup>44</sup> Although both types of 'rights of passage' shall not be limited in *territorial* waters (in general), no such privileges are required for *internal* waters.



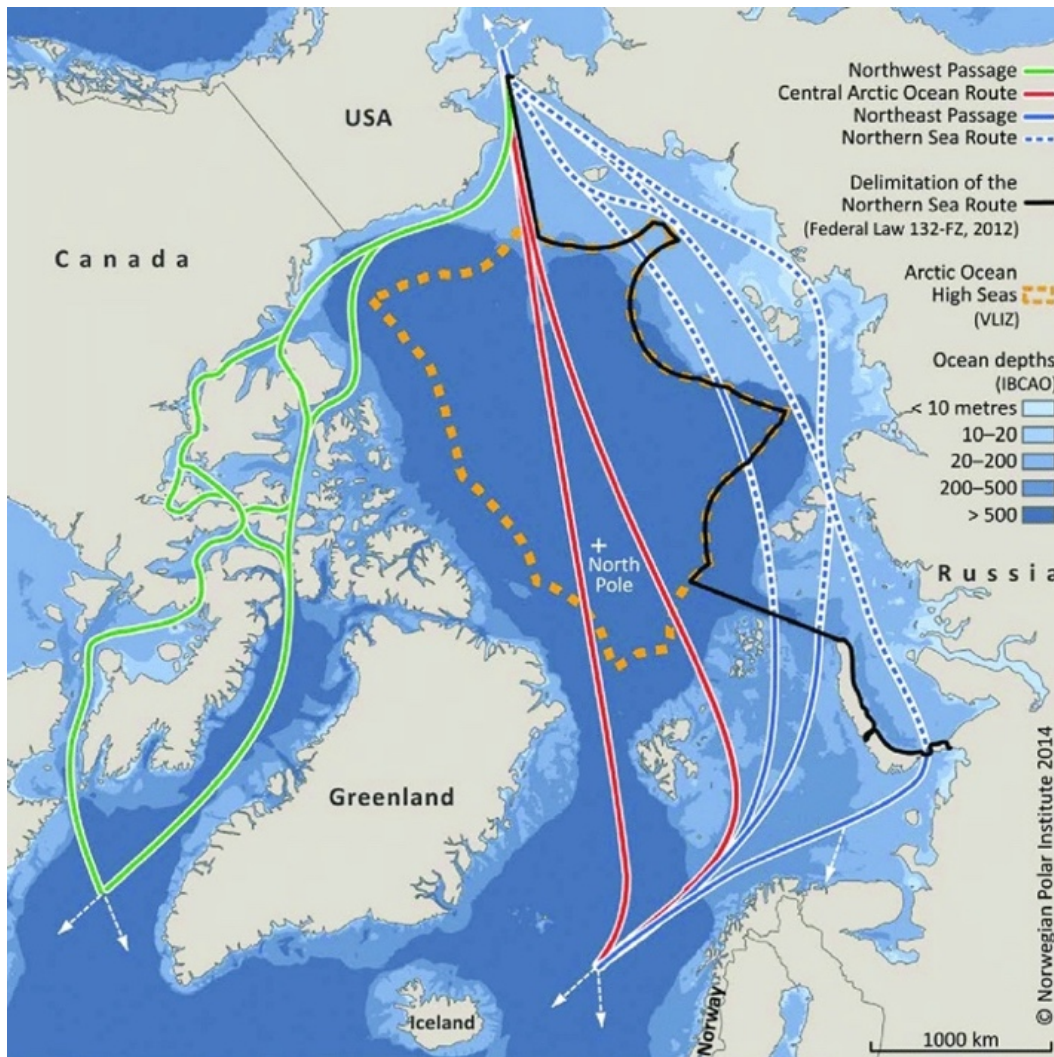
## Discussion

For the Arctic, a two-part daunting challenge converges to confound the United States with regard to maritime definitions: both Russia and Canada claim much of their northern waters to be internal, somewhat beyond the perspectives and norms recognized by other nations (e.g. the United States and European Union in particular with respect to Canada's claims).<sup>45</sup> A short explanation of the bureaucratic process helps to provide an understanding concerning the management of differing national positions. To start with, once a nation becomes a full party member of UNCLOS (i.e. the treaty is ratified or acceded), they generally have ten years to provide their official definitions of associated maritime boundaries as well as any submissions in support of an extended outer continental shelf. Applications for an extended outer continental shelf have important security implications, yet go beyond the scope of this article since the process is significantly peaceable through the mechanisms supported in UNCLOS. The geopolitical issues associated with the sovereign-related aspects of the process are important to understand, if only for an awareness regarding media misinformation. Initial, as well as subsequent, proposed/projected boundaries and claims land within the State Department's responsibility in the United States, and undergo examination by the Office of Ocean and Polar Affairs, managed by a program called 'Limits in the Seas (LIS)'.<sup>46</sup> Within those archives are the official positions of the United States, which are reflected in the Maritime Claims Reference Manual (MCRM), maintained by the Judge Advocate General of the United States Navy (who is also the Department of Defense Representative for Ocean Policy Affairs). Three particular LIS papers provide US national positions concerning Russian and Canadian claims relevant to this article: Nos. 107, 108, and 112. These particular reference documents provide the official published positions and stated rationale of the United States concerning the Arctic maritime claims of Russia and Canada.

### *Russia and the Northern Sea Route*

Part of Russia's legal position on its northern waters originated about two centuries ago with associated legislation and decrees, but did not become deliberately specific until 1984 and 1985 when Russia declared that numerous maritime features came within its internal sea waters.<sup>47</sup> As a result, historical interpretation has a strong impact on contemporary perspectives of the Arctic maritime sovereignty status of the Northern Sea Route. What appears to be Russia's EEZ boundary on many maps actually represents the northern limits of the waters that the Russian Federation manages exactly as if they were internal waters (see Fig. 3). Of note, the boundaries of the Northern Sea Route (see Fig. 3) are not the entirety of Russia's northern coast (see Fig. 4). Just the same, Russia has a long history of promoting use of the NSR for international shipping.<sup>48</sup> However, all signs point to the Russian position and intent to maintain absolute control over all layers of waters up to the outer EEZ boundary.

**Figure 3.** Arctic Maritime Transport Routes



**Source:** Sander, Gunnar, et al. "Changes in Arctic Maritime Transport." Chap. 4 In *Strategic Environmental Impact Assessment of Development of the Arctic: An Assessment Conducted for the European Union*, 35-53. University of Lapland, Finland: Arctic Centre, 2014.

Article 234 of UNCLOS provides much of Russia's legal justification for its position on the NSR.<sup>49</sup> The Article allows for considerable interpretation and application, very much to the advantage of Russia.<sup>50</sup> As a result, Russia conspicuously benefits from opportunities to secure increased operational control of its maritime interests – seemingly, its ultimate strategic objective. Toward this goal, Russia has been careful to be consistent and clear about requirements for access to the Northern Sea Route. Most recently, the Russian government published a new regulation concerning the "Rules of navigation in the water area of the Northern Sea Route."<sup>51</sup>

**Figure 4.** Russian Straight Baseline Claim

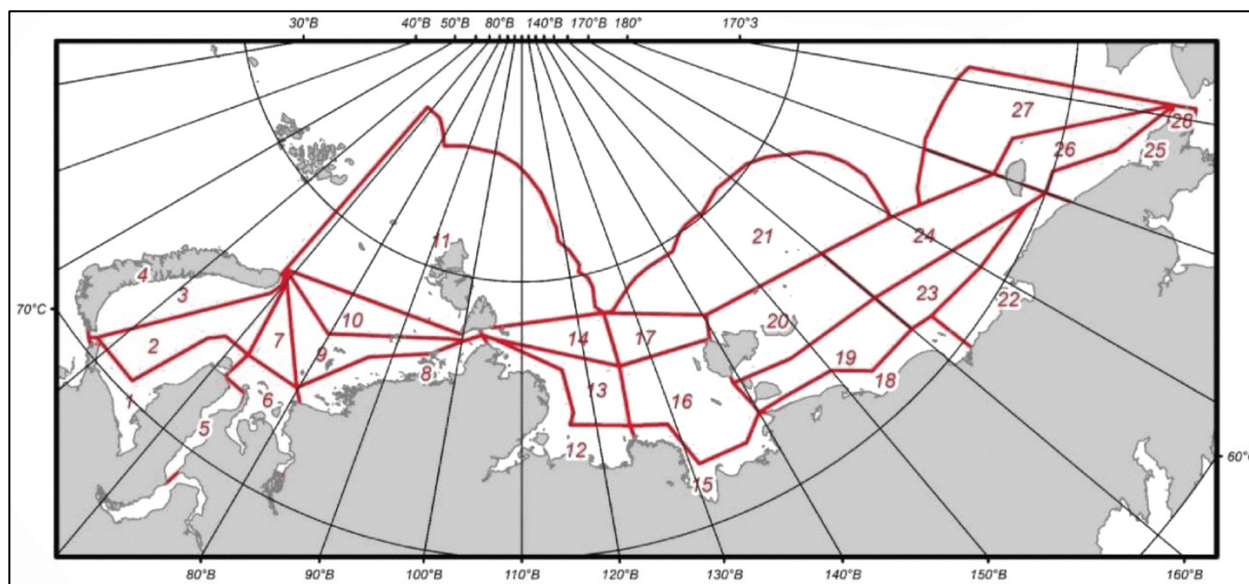


**Source:** Accompanying chart with the Russian Federation Maritime Claim. U.S. Navy Judge Advocate General's Corps. "Maritime Claims Reference Manual." U.S. Navy, Accessed 02 June, 2018. [https://www.jag.navy.mil/organization/code\\_10\\_mcrm.htm](https://www.jag.navy.mil/organization/code_10_mcrm.htm).

The new regulation states commercial vessel-type requirements for access to twenty-eight defined zones (see Fig. 5) of the NSR based on four defined types of sea ice conditions (heavy, medium, light, none), as well as icebreaker escort. This regulation also applies to foreign naval vessels, which have additional requirements for access, as mentioned previously. Directives include forty-five-day notification of the float plan, specifications of the ship, and onboard access of a Russian maritime pilot.



**Figure 5.** Zones of the Northern Sea Route



**Source:** “Постановление Правительства РФ От 18 Сентября 2020 г. N 1487 “Об Утверждении Правил Плавания В Акватории Северного Морского Пути.”

Such conditions provoked strong reactions, which led to the FONOP remarks by Secretary Pompeo as previously mentioned. In this situation, a FONOP in the NSR seems proportionate in response to the assertive mandates declared by Russia. However, the articulated warning seemed haphazard and was confronted by intense responses that explained the short-sightedness of the overture as well as the FONOP. Pincus even stated that a FONOP was operationally too risky, if only based on the lack of access to bathymetric data needed to develop a safe voyage, which Russia has no intent to share.<sup>52</sup> Critical navigation information might be the key to the long game though, given the shelf-life of Article 234, which is only applicable as long as there is sea ice. Additionally, history also provides further strength to the Russian claim with regard to how its role in international law may be leveraged as precedent or customary law.

### *Canada and the Northwest Passage*

Canada has distinguishable Arctic policy eras that help illustrate difficulties encountered while preparing to claim the northern waters as sovereign (i.e. internal) after nearly a century of dominion.<sup>53</sup> Lajeunesse also provides a comprehensive review of seventy-four official documents from 1950-1988 associated with Canada’s Arctic maritime sovereignty.<sup>54</sup> From 1880 until 1985, Canada realized that it needed to build a strong case before claiming sovereignty over the waters of the archipelago. Up until the Cold War, Canada worked to establish sovereign qualifications as outlined by the Montevideo Convention, especially: 1) a permanent population, 2) a defined territory, and 3) government. Sovereign concerns escalated after the Alaska North Slope petroleum discovery in 1968 led to transportation tests, including the transit of the oil tanker *SS Manhattan*<sup>55</sup> through the Northwest Passage (NWP) in 1969 and 1970, which prompted the establishment of the Canadian *Arctic Waters Pollution Prevention Act*.<sup>56</sup> This allowed Canada to further establish sovereign qualifications through

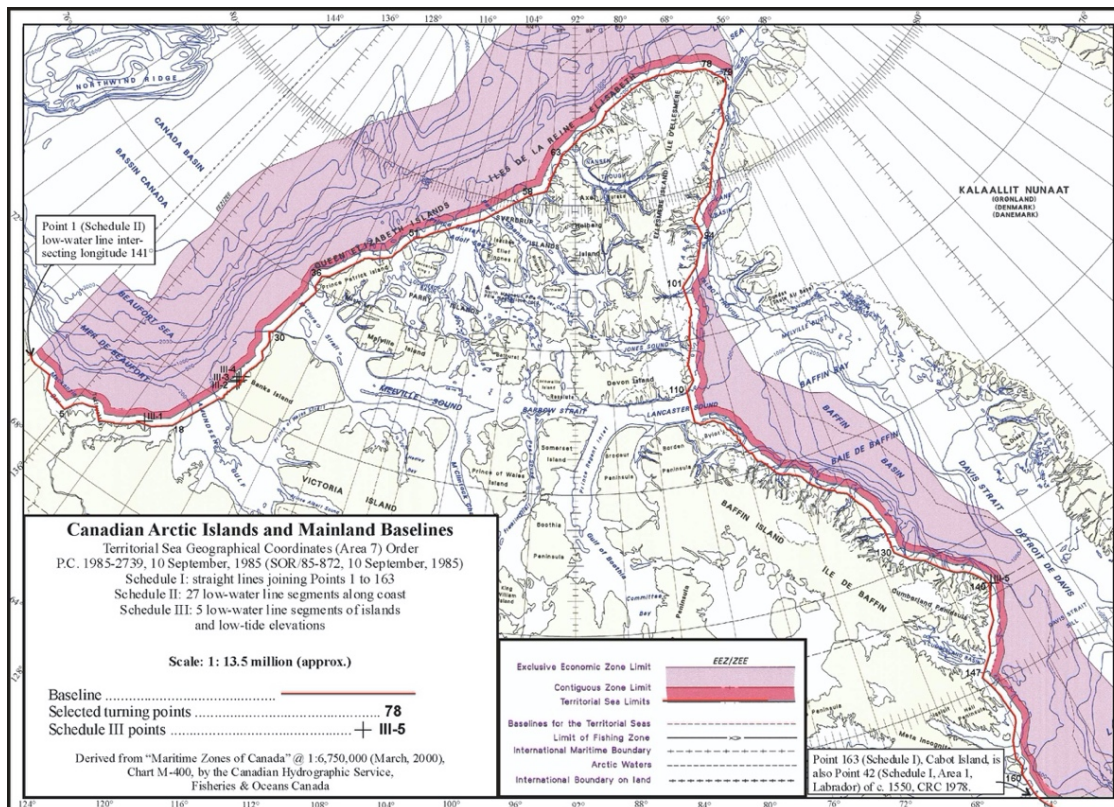


environmental protection (government) without crossing into official claims for sovereignty. Years later, the 1985 voyage of the United States Coast Guard (USCG) vessel *Polar Sea* through the NWP<sup>57</sup> motivated parliamentary political action, and the archipelago soon thereafter became surrounded by an officially declared (de facto 'internal')<sup>58</sup> straight baseline maritime boundary in January 1986 (see Fig. 6), principally assessed by Canada's lead international scholar on the matter, Donat Pharand.<sup>59</sup> Once the straight baselines were officially propagated in 1986, the sovereign qualification of 'a defined territory' was established. Canada announced the waters within the straight baselines as 'internal waters' as part of sovereignty claims over the archipelago waters. Officially, the United States recognizes the Canada claim in the US Navy Maritime Claims Reference Manual, the United States list the sources of Canadian law from January 2017<sup>60</sup> and references the principle in the 'Territorial Sea Geographic Coordinates (Area 7) Order' of the *Oceans Act* and made it effective on 1 January 1986.<sup>61</sup> Unsurprisingly, the United States responded, as stated in LIS paper No. 112:

On September 10, 1985, the Government of Canada claimed all the waters among its Arctic islands as internal waters, and drew straight baselines around its Arctic islands to establish its claim. The United States position is that there is no basis in international law to support the Canadian claim. The United States cannot accept the Canadian claim because to do so would constitute acceptance of full Canadian control of the Northwest Passage and would terminate US navigation rights through the Passage under international law.<sup>62</sup>

To mitigate diplomatic tensions and address operational needs, the United States and Canada followed up with an Arctic Cooperation Agreement in 1988 concerning transit of the NWP, which allows both countries to preserve their respective legal positions.<sup>63</sup>

**Figure 6.** Canada's Arctic Baselines



**Source:** <http://www.marineregions.org/documents/6.10.jpg>; "Territorial Sea Geographical Coordinates (Area 7) Order (Sor/85-872)." Government of Canada.

## *Resolving the Internal Waters Issue*

Although the Russian and Canadian claims concerning internal waters represent distinct geographic and sovereignty situations, they are not mutually exclusive. As a reminder, the archipelagic waters of Northern Canada fall under the UNCLOS' provisions involving 'transit passage' (versus 'innocent passage' for Russia). For the United States, the issue could cause difficulty should matters end up in international court. Undoubtedly, Russia realizes that the United States cannot 'play favorites' by acquiescing to the legal aspects of the issue, to the advantage of its long-time partner and ally – Canada. To do so might set a precedent that Russia could exploit legally in this situation. Moreover, it could open the door to states looking to do the same in other situations. This may seem like a most extreme-case scenario, perhaps, but the nature and ruling of international courts, especially given the lack of appeals processes, tend to invoke a much more careful approach. Furthermore, such issues do not need to be considered only from a legal perspective, since the situation could also be used as diplomatic leverage and a means of hard power (especially in the form of political coercion).

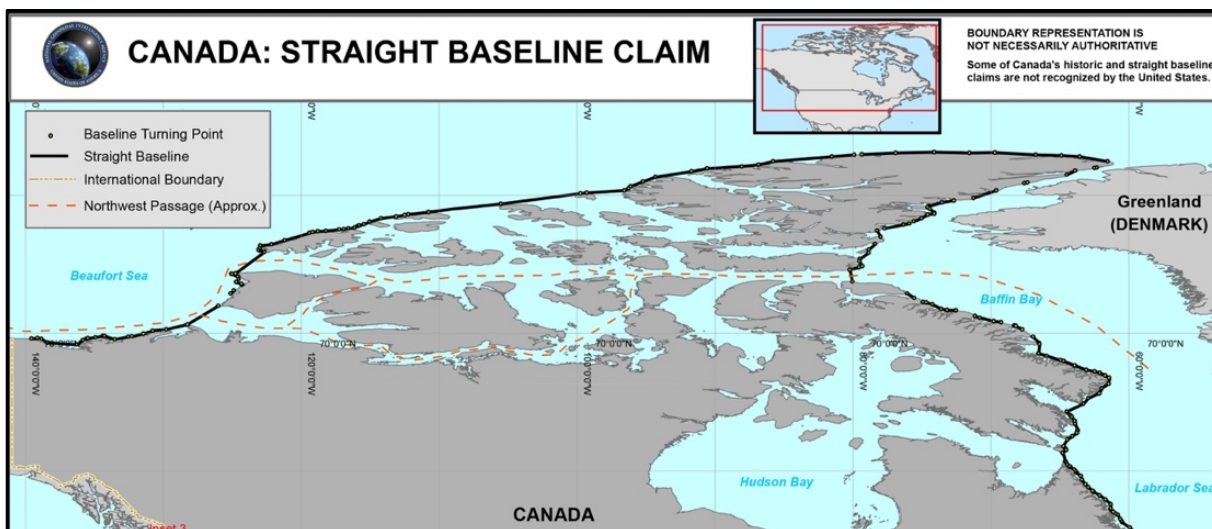
Official positions against excessive maritime claims normally get communicated diplomatically, as needed, to keep the issue alive and ineligible as customary law. Of course, actors could take the matter to international

court – in this case, the United Nations (UN) as the organization with compulsory jurisdiction over the matter.<sup>64</sup> However, unlike national judicial systems, international court rulings tend to be relatively permanent, especially given the lack of international appeals processes. As learned from Canada's history involving its northern waters, states must develop nominal legal circumstances in order to avoid being in a poor position if summoned to international court. However, the United States must be careful to not show bias towards Canada, which would result in a mistake to Russia's benefit. The circumstances between the NSR and NWP (see Fig. 7) have legitimate differences that could merit dissimilar outcomes once resolved.

Russia has considerably more infrastructure and operational capability in the NSR compared to Canada in the NWP – a fact that Russia is all too happy to often promote. The entire NWP severely lacks the critical infrastructure needed to manage significant maritime emergencies effectively, as well as the associated onshore capacity.<sup>65</sup> As such, it is reasonable to assume that during the 'ice-free' season, incursions into the NWP might draw limited resources from the critical resupply and cabotage operations in support of NWP communities. What limited capabilities and presence Canada has throughout the NWP is often focused on essential services. Although able to respond to emergencies, Canada's diversion of resources could easily have negative impacts on seasonal operations and requirements. Conversely, the same would not likely be an issue for Russia.

The differences in maritime circumstances between Canada and Russia remain significantly distinct. Perhaps most importantly, the internal waters of the NWP are enclosed by a set of islands. For Russia, the NSR area claimed as internal waters (from the EEZ to the coast) is almost all water. Unlike Canada, the claims for Russia include very little that can be argued as being representative of international norms. No other nation has such an excessive maritime claim to even begin to serve as a precedent or exemplar. The Russian claim is simply an undue exception that the United States will continue to challenge in order to secure freedom of navigation rights.<sup>66</sup>

**Figure 7.** Canada: Straight Baseline Claim



**Source:** U.S. Navy Judge Advocate General's Corps. "Maritime Claims Reference Manual."



## Conclusion

With the continuing decrease in Arctic sea ice, the ratio of access to and activity in Arctic waters is expected to increase. As shipping interests and presences slowly expand in the North, US national security interests will be inextricably linked. The ability of the US Navy to exercise its long-time role in global maritime security in the Arctic becomes paramount to upholding strategies and norms, especially when considering the important differences between 'naval power' and 'maritime power.'<sup>67</sup> The Russian Federation is already setting conditions to frustrate maritime forces via denial of access – an aspect not entirely unrelated to anti-access/area denial (A2/AD). Although not currently an operational issue for the United States and its allies, clearly the implications, in this direction, could be strategically and operationally problematic at the very least. When this might become problematic is anyone's guess. But for now, there seems to be time to put this problem on the table and consider the variety of options for approaching and resolving this critical national security interest.

It seems that two main concerns continue to frustrate the situation, including: 1) negative impacts to operational capabilities and access, and 2) establishment of dangerous precedents concerning international norms. Continued research might help further unpack security challenges of the future. Questions arise such as 'to what extent does the United States need normal access to the NSR and NWP?' and 'how might other areas of the world react to outcomes that make the current Arctic maritime claims of Canada and Russia permanent?' In addition, 'is the position of the United States based more on principle or pragmatic security rationale?' and 'how might global maritime security be affected by marginalized freedom of navigation in the Arctic?'

For now, the United States must figure out a strategy on how best to resolve the Arctic security issues while discussion endures. A long-term strategy is needed to keep issues constructively in play with realistic goals established. Just as important, the United States needs to approach issues and strategies with separate distinction and meaning.

The vast majority of economic activity relies on a safe and secure global shipping enterprise. *If* the claims from Canada and/or Russia have the potential to negatively impact this planetary system, then all actors need to navigate carefully through these proverbially dangerous waters. If otherwise, then let diplomacy do its work, which often involves the skilled discovery of the tiniest openings for compromise and the development of subsequent agreements and expectations. Forward presence and freedom of navigation significantly enable the United States to provide the security and stability that remain so critical in today's globalized reality. Resolving such Arctic maritime issues goes far beyond just US interests. Although sovereignty remains a top priority, jealously guarded for most any nation, is it worth the price of potentially undermining other global security priorities?



## Notes

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<sup>1</sup> Jacquelyn K. Davis, *Aircraft Carriers and the Role of Naval Power in the Twenty-First Century*, 13 ed., National Security Paper (Cambridge, Mass: Institute for Foreign Policy Analysis, 1993).

<sup>2</sup> The sectors of security include political, military, economic, social, and environmental, as defined by the Copenhagen School. Barry Buzan, "People: States and Fear: National Security Problem in International Relations," (Transasia Publishers, 1987).

<sup>3</sup> Often considered the beginning of a new Arctic era, when 1) Russia planted a titanium flag at the bottom of the Arctic Ocean at the North Pole in 2007 (seemingly state-sanctioned), followed up by a national strategy in 2008, 2) sea-ice models indicated alarming trends of decrease from 1979 to present, and 3) the United States Geological Survey (USGS) published an authoritative report in 2008 estimating considerable oil and gas resources throughout the region. The Circumpolar North has not been the same since.

<sup>4</sup> J. Martin Rochester, *Between Peril and Promise: The Politics of International Law*, 2nd ed. (CQ Press, 2012), 18-39.

<sup>5</sup> Center for Strategic and International Studies, "In Defense of the Arctic: Assessing U.S. Security Concerns," (Washington, DC2017); Mike Nudelman and Jeremy Bender, "This Map Shows Russia's Dominant Militarization of the Arctic," Business insider, accessed 17 September, 2015, <https://www.businessinsider.com/chart-of-russias-militarization-of-arctic-2015-8>; Editorial Board, "A New Cold War Where? In the Arctic, of Course.," *Chicago Tribune*, 17 April 2019.

<sup>6</sup> Sieman T. Wezeman, "Military Capabilities in the Arctic: A New Cold War in the High North?," *Stockholm International Peace Research Institute October* (2016); Lincoln E. Flake, "Contextualizing and Disarming Russia's Arctic Security Posture," *The Journal of Slavic Military Studies* 30, no. 1 (2017); Michał Łuszczuk, "Sustainable Security in the Arctic and Military Cooperation," in *Northern Sustainabilities: Understanding and Addressing Change in the Circumpolar World* (Springer, 2017).

<sup>7</sup> Alyson JK Bailes, "Institutions and Stability: The Arctic Case," *Nordia Geographical Publications* 40, no. 4 (2018).

<sup>8</sup> Suzanne Lalonde, "The Northwest Passage," in *Canada and the Maritime Arctic: Boundaries, Shelves, and Waters*, ed. P. Whitney Lackenbauer, Suzanne Lalonde, and Elizabeth Riddell-Dixon (Peterborough, ON: North American and Arctic Defence and Security Network, 2020).

<sup>9</sup> Paul Gudev, "The Northern Sea Route: A National or an International Transportation Corridor?," Russian International Affairs Council, accessed 17 January, 2018, <https://russiancouncil.ru/en/analytics-and-comments/analytics/the-northern-sea-route-a-national-or-an-international-transportation-corridor/>.

<sup>10</sup> Russian Federation, "О Внесении Изменений В Правила Плавания И Пребывания Иностранных Военных Кораблей И Других Государственных Судов, Эксплуатируемых В Некоммерческих Целях, В Территориальном Море, Во Внутренних Морских Водах, На Военно-Морских Базах, В Пунктах Базирования Военных Кораблей И Морских Портах Российской Федерации," ed. Министерство Обороны (Москва: Правительство России, 2019). As of June 2020, this draft regulation is likely being adopted as well as implemented.

<sup>11</sup> "Russia Tightens Control over Northern Sea Route," The Maritime Executive, accessed 17 January, 2019, <https://www.maritime-executive.com/article/russia-tightens-control-over-northern-sea-route>.

<sup>12</sup> Levon Sevunts, "Washington Plans to Send U.S. Navy through Northwest Passage," Radio Canada International, accessed 30 September, 2019, <https://www.rcinet.ca/en/2019/05/07/u-s-navy-arctic-freedom-of-navigation-operation-northwest-passage/>.

<sup>13</sup> Paul McLeary, "Navy Secretary: US Plans Patrols near Russian Arctic Bases " Breaking Defense, accessed 06 January, 2021, <https://breakingdefense.com/2021/01/navy-secretary-us-patrols-near-russian-arctic-bases/>; Adam Lajeunesse and Rob Huebert, "Preparing for the Next Arctic Sovereignty Crisis: The Northwest Passage in the Age of Donald Trump," *International Journal* 74, no. 2 (2019).

<sup>14</sup> James A. Screen and Ian Simmonds, "The Central Role of Diminishing Sea Ice in Recent Arctic Temperature Amplification," *Nature* 464, no. 7293 (2010): 1.

<sup>15</sup> Dave Shunk, Charles Hornick, and Dan Burkhart, "The Role of Forward Presence in US Military Strategy," *Military Review* 97, no. 4 (2017).

<sup>16</sup> Kyle Rempfer, "New Marine Rotation Arrives in Norway as Corps Preps for a Cold-Weather Fight," *Marine Corps Times*, 29 March 2019.

<sup>17</sup> Big "F" and small "f" are clarifying aspects learned during discussion and correspondence with Stacy Pedrozo, U.S. Navy War College instructor and former FONOPs Officer at the Pentagon.

- <sup>18</sup> Conversation and expert-reviewed feedback from Stacy Pedrozo, U.S. Navy War College, email dated 14 May, 2020.
- <sup>19</sup> Department of the Navy, "A Strategic Blueprint for the Arctic," (Washington, DC: U.S. Department of Defense, 2021).
- <sup>20</sup> "Seabasing - Joint Integrating Concept," (Washington DC: U.S. Navy, 2005).
- <sup>21</sup> Sam J. Tangredi, "Sea Basing: Concept, Issues, and Recommendations," *Naval War College Review* 64, no. 4 (2011).
- <sup>22</sup> Shunk, Hornick, and Burkhart.
- <sup>23</sup> John R. Deni, "Military Engagement and Forward Presence: Down but Not out as Tools to Shape and Win," (Carlisle Barracks, PA: US Army War College, 2016), 17.
- <sup>24</sup> NATO, "Nato's Enhanced Forward Presence," (Public Diplomacy Division (PDD), 2019).
- <sup>25</sup> Davis, 20.
- <sup>26</sup> Troy J. Bouffard and Cameron D. Carlson, "A Surface Presence for the U.S. Navy in the Arctic?," *Canadian Naval Review* 15, no. 2 (2019).
- <sup>27</sup> United Nations, "Factsheet: Oceans and People," (New York, NY: oceanconference.un.org, 2017); Christian Bueger and Timothy Edmunds, "Beyond Seablandness: A New Agenda for Maritime Security Studies," *International Affairs* 93, no. 6 (2017).
- <sup>28</sup> Seth Cropsey and Bryan McGrath, "Maritime Strategy in a New Era of Great Power Competition," (Washington, DC: Hudson Institute, 2018).
- <sup>29</sup> Richard Tuck, "Hugo Grotius," in *Grotius and Law* (Routledge, 2017).
- <sup>30</sup> Wilson's use of the term 'territorial waters' in the Fourteen Points speech preceded the definitions established in UNCLOS, where Wilson's use of the term is not the same as today's use.
- <sup>31</sup> Woodrow Wilson, *Fourteen Points*, Woodrow Wilson: Essential Writings and Speeches of the Scholar-President (NYU Press, 1918).
- <sup>32</sup> Oceans Policy Advisor, "U.S. Department of Defense Freedom of Navigation (FON) Program," ed. Office of the Under Secretary of Defense (Policy) (Washington DC2017).
- <sup>33</sup> Samantha Besson, Jean d'Aspremont, Samantha Besson, and Sévrine Knuchel, *The Oxford Handbook of the Sources of International Law* (Oxford University Press, 2017).
- <sup>34</sup> "Limits in the Seas - United States Response to Excessive National Maritime Claims," ed. Department of State (U.S. Government, 1992).
- <sup>35</sup> Oceans Policy Advisor, 1-2.
- <sup>36</sup> U.S. Navy Judge Advocate General's Corps, "Maritime Claims Reference Manual," U.S. Navy, accessed 02 June, 2018, [https://www.jag.navy.mil/organization/code\\_10\\_mcrm.htm](https://www.jag.navy.mil/organization/code_10_mcrm.htm).
- <sup>37</sup> United Nations, "United Nations Convention on the Law of the Sea," (New York, NY: Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, 1982), Article 8.
- <sup>38</sup> Ibid., Article 7.
- <sup>39</sup> Ibid., Article 3.
- <sup>40</sup> Lalonde.
- <sup>41</sup> Stacy Pedrozo, U.S. Navy War College, email dated 14 May, 2020.
- <sup>42</sup> United Nations, "United Nations Convention on the Law of the Sea," Section 3.
- <sup>43</sup> Ibid., Article 34-54.
- <sup>44</sup> "Chapter 3: Freedom of Navigation," The Fletcher School of Law and Diplomacy, Tufts University, accessed 16 November, <https://sites.tufts.edu/lawofthesea/chapter-three/>.
- <sup>45</sup> James Kraska, "International Security and International Law in the Northwest Passage," *Vanderbilt Journal of Transnational Law* 42 (2009): 1119; Willy Østreng, "The Northern Sea Route and Jurisdictional Controversy," *Centre for High North Logistics* (2010).
- <sup>46</sup> U.S. Department of State, "Limits in the Seas," Office of Ocean and Polar Affairs, accessed 02 June, 2020, <https://www.state.gov/limits-in-the-seas/>.
- <sup>47</sup> Viatcheslav V. Gavrilov, "Legal Status of the Northern Sea Route and Legislation of the Russian Federation: A Note," *Ocean Development & International Law* 46, no. 3 (2015): 258.
- <sup>48</sup> Valery Konyshov and Alexander Sergunin, "In Search for Peace in the Arctic," in *The Palgrave Handbook of Global Approaches to Peace* (Springer, 2019), 704.
- <sup>49</sup> Aldo Chircop, "Jurisdiction over Ice-Covered Areas and the Polar Code: An Emerging Symbiotic Relationship?," *Journal of International Maritime Law* 22, no. 4 (2016); Mark Nevitt, "Climate Change, Arctic Security and Why the U.S. Should Join the U.N. Convention on the Law of the Sea " University of Pennsylvania Carey Law School, accessed 02 October, 2020, <https://www.law.upenn.edu/live/news/10524-climate-change-arctic-security-and-why-the-us/news/cerl-news>.

<sup>50</sup> Dorottya Bogнар, "The Elephant in the Room: Article 234 of the Law of the Sea Convention and the Polar Code as an Incompletely Theorised Agreement," *The Polar Journal* 8, no. 1 (2018); Laura C. Williams, "An Ocean between Us: The Implications of Inconsistencies between the Navigational Laws of Coastal Arctic Council Nations and the United Nations Convention on the Law of the Sea for Arctic Navigation," *Vanderbilt Law Review* 70, no. 1 (2017).

<sup>51</sup> Russian Federation, "Правила Плавания В Акватории Северного Морского Пути," ed. Northern Sea Route Administration (Moscow, Russia: Government of the Russian Federation, 2020). (Adopted, to be implemented)

<sup>52</sup> Rebecca Pincus, "Rushing Navy Ships into the Arctic for a FONOP Is Dangerous," *Proceedings* 2019.

<sup>53</sup> Adam Lajeunesse, *Lock, Stock, and Icebergs: A History of Canada's Arctic Maritime Sovereignty* (Vancouver, British Columbia: University of British Columbia, 2016).

<sup>54</sup> *Documents on Canadian Arctic Maritime Sovereignty: 1950-1988*, ed. P Whitney Lackenbauer and Adam Lajeunesse, Documents on Canadian Arctic Sovereignty and Security (Calgary, AB: Centre for Military, Security and Strategic Studies, University of Calgary, 2018).

<sup>55</sup> Ross Coen, *Breaking Ice for Arctic Oil: The Epic Voyage of the SS Manhattan through the Northwest Passage* (University of Alaska Press, 2012).

<sup>56</sup> J. Ashley Roach and Robert W. Smith, "Straits Used for International Navigation," in *Excessive Maritime Claims*, ed. Vaughan Lowe and Robin Churchill, Publications on Ocean Development (Leiden, Netherlands: Koninklijke Brill NV, 2012), 319.

<sup>57</sup> *Ibid.*, 320-24.

<sup>58</sup> Adam Lajeunesse, "Brief to the Standing Committee on Foreign Affairs and International Development," (Antigonish, Nova Scotia: Mulroney Institute of Government, 2018).

<sup>59</sup> Donat Pharand, "Canada's Sovereignty over the Northwest Passage," *Michigan Journal of International Law* 10 (1989).

<sup>60</sup> U.S. Navy Judge Advocate General's Corps.

<sup>61</sup> Government of Canada, "Territorial Sea Geographical Coordinates (Area 7) Order (Sor/85-872)," accessed 02 June, 2017, <https://laws-lois.justice.gc.ca/eng/regulations/SOR-85-872/>.

<sup>62</sup> United States Government, "United States Responses to Excessive National Maritime Claims," in *Limits in the Sea* (Department of State, 1992).

<sup>63</sup> "Canada-United States: Agreement on Arctic Cooperation and Exchange of Notes Concerning Transit of Northwest Passage," *International Legal Materials* 28, no. 1 (1989); "Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation," Government of Canada, accessed 17 November, 1988, <https://www.treaty-accord.gc.ca/text-texte.aspx?id=101701>.

<sup>64</sup> United Nations, "Article 36 - Chapter 11: Competence of the Court," (New York, NY: International Court of Justice).

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<sup>66</sup> McLeary.

<sup>67</sup> Julian Stafford Corbett, *Some Principles of Maritime Strategy* (New York, NY: Logmans, Green and Co., 1918).

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