FONOP in Vain: The Legal Logics of a U.S. Navy FONOP in the Canadian or Russian Arctic

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This article examines the legal utility of a U.S. Freedom of Navigation Operation in the Arctic against Russian and Canadian maritime claims. It reiterates that a FONOP can only be conducted against coastal state claims that affect warships or foreign government vessels. It concludes that Russia's Northern Sea Route is not a viable FONOP target, and United States action would be limited to where Russia claims internal waters in its Arctic straits. Canada offers a better target, as its internal-waters claim entirely covers useful navigation routes in the Northwest Passage and some of its environmental regulations in its EEZ may apply to foreign government vessels.[1]

Introduction

The Arctic's growing maritime significance may lead the United States to consider conducting a Freedom of Navigation operation (FONOP) in the Arctic straits. In 2018, then-Secretary of the Navy Richard V. Spencer called for FONOPs in the Arctic (Schreiber, 2019). In 2021, as the Trump administration ended, then-Secretary of the Navy Kenneth Braithwaite likewise pushed for FONOPs in the Arctic against Russian claims, both in the Barents Sea near the Kola Peninsula and, eventually, along the Russian Arctic straits (McCleary, 2021).

Despite these developments, FONOPs would be ineffective challenges against Russian claims and of partial use against Canadian claims. This is because U.S. FONOPs are conducted by government vessels, which are exempt from many navigation restrictions in the Arctic.

First, this article discusses the U.S. government's Freedom of Navigation program's legal effects. It then explores what current Canadian and Russian claims and laws mean for commercial and government vessels navigating in Arctic passages. The article concludes by scrutinizing these restrictions to determine the viable legal targets for a U.S. Arctic FONOP.

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Freedom of Navigation operations

To defend its interpretation of the law of the sea, the United States has coupled diplomatic protest with operational assertions of rights constrained by coastal states since the 1970s. The Freedom of Navigation (FON) program combines diplomatic and military actions to "preserve and enhance navigational freedoms" necessary for U.S. maritime mobility, as well as to reinforce recognition of the UN Convention on the Law of the Sea's (UNCLOS) navigational components (Roach & Smith, 1994: 3–4). In conjunction with diplomatic protest and consultations, the United States conducts Freedom of Navigation operations (FONOPs)—operational assertions of various maritime rights in defiance of coastal state claims deemed excessive by the United States, whether made by allied, neutral, or adversary states (U.S. Department of Defense Freedom of Navigation (FON) Program, 2016).

Although some legal scholars have questioned the practice, FONOPs have legal utility. Some scholars assert that diplomatic protest is sufficient, and operational assertions are legally unnecessary, diplomatically unhelpful, and potentially even an unlawful abuse of rights (Aceves, 1995). In their definitive statement, however, Roach and Smith argue that the FON program simply hedges effectively against the possibility that U.S. protests on paper might be invalidated by sustained U.S. behavior on the seas. They note, "These assertions of rights and freedoms tangibly exhibit U.S. determination not to acquiesce in excessive claims to maritime jurisdiction by other states" (Roach & Smith, 1994: 6). Dale Stephens has offered a similar argument for the utility of such operations (Stephens, 2012).

The U.S. cannot target every excessive claim impinging on navigational rights through the Freedom of Navigation program's operational dimension. In a strictly legal sense, the logic of a FONOP is that a vessel is doing something that the coastal state prohibits that vessel from doing, but that the flag state believes is within the rights of the vessel. A vessel's actions can only protest a restriction that applies to it. For example, government-owned and -operated vessels, including warships, enjoy immunity from environmental regulations under Article 236 UNCLOS (McDorman, 2015). They thus cannot be used to protest excessive environmental regulations on behalf of all vessels—at most they can protest that environmental rules are applied to sovereign immune vessels.

The Department of Defense (DoD)'s annual reports summarizing the claims operationally protested in each fiscal year demonstrate that the program targets restrictions that apply to U.S. naval vessels.[2] Figure 1 illustrates the count of claim types targeted in the U.S. FONOP program from 1991 to 2020. 34 percent of targeted claims were restrictions on innocent passage and 27 percent involved excessive internal water claims. Next came FONOPs against restrictions on military activities in the Exclusive Economic Zone (EEZ) (12.1 percent), security zone claims (9.8 percent), and excessive territorial sea claims (9.3 percent).[3] Restrictions on aircraft and transit passage made up between 7 percent and 6 percent of targeted claims, respectively. The "Other" category (4 percent) mostly involves archipelagic baselines and sea lanes. There was one repeated example of FONOPs targeting a coastal state's requirement that vessels obtain permission before entering the EEZ—the Maldives. However, the Maldives' claim is a universal requirement, that "No foreign vessel shall enter the EEZ of Maldives except with prior authorization…" (Maritime Zones of Maldives Act No. 6/96, 1996, sec. 14).

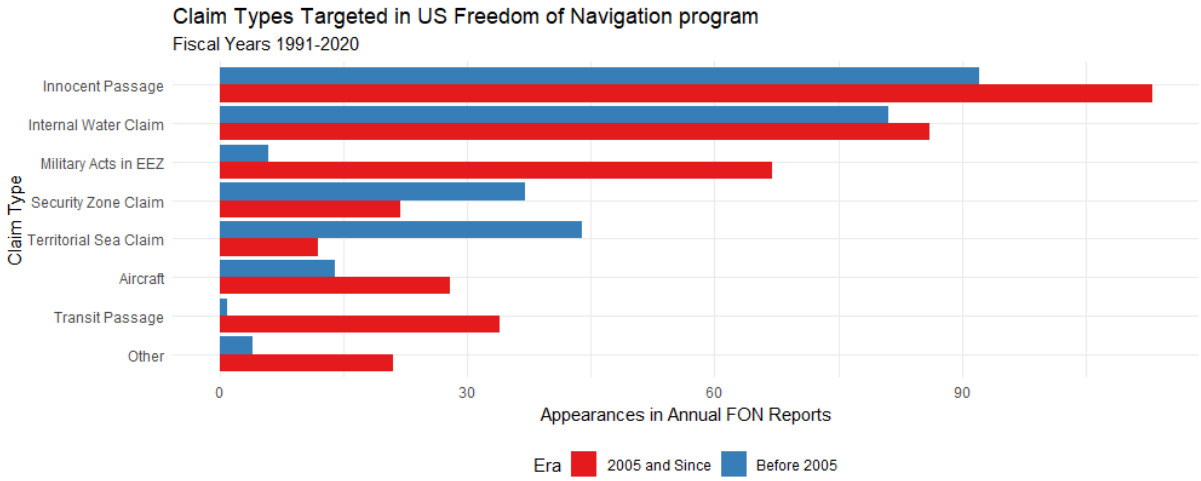

Figure 1. Graphic by author. Data compiled with help from Marian Overfield.

This historical record of U.S. FONOP targets confirms that the U.S. program of operational assertions targets restrictions that apply to warships, whether specifically or as part of a larger class (all government vessels or all foreign vessels). Thus, the U.S. Navy's legal experts appear aware that government vessels may only challenge restrictions that apply to government vessels, while restrictions on commercial vessels alone cannot be targeted in the FONOP program.

Law of the Sea and the Arctic

In general, UNCLOS divides the sea into zones with distinct rules for navigational rights and restrictions. Rights grow and restrictions diminish as one gets farther from shore. In internal waters, the coastal state generally has absolute control over entry and navigation; in territorial seas, foreign vessels enjoy innocent passage rights.[4] On the high seas, navigational rights are unconstrained. In between, rights are based on the high seas regime, but with some constraints for commercial vessels. In addition to these zone-based rulesets, two special regimes may also have bearing on foreign vessel rights in the Arctic: straits used for international navigation and ice-covered areas.

First, UNCLOS recognizes straits "used for international navigation," in which all vessels enjoy the right of transit passage. These straits have both geographical and functional criteria. Geographically, the strait must connect two areas of EEZs or high seas through a channel of territorial seas or internal waters. Functionally, these straits must be "used for international navigation," although scholars debate whether this requires merely possible use or past use, and, if the latter, the threshold. If the waters are considered a strait, the zone remains unchanged – only foreign vessel rights are altered. Vessels enjoy the slightly more expansive rights of transit passage, which permit operation in normal mode (i.e., submarines may remain submerged), while coastal states face more constrained rights, since transit passage may not be suspended (UNCLOS, 1982, Art. 39 and 44).

Second, Article 234, UNCLOS' "ice-covered areas" provision, clearly has bearing in the Arctic. Under Article 234, the coastal state may introduce and enforce more stringent environmental rules applied to their internal waters, territorial sea, and EEZ "where particularly severe climactic 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" (Solski, 2021; UNCLOS, 1982, Art. 234). These rules "shall have due regard to navigation" and may not discriminate among countries. Furthermore, these regulations do not extend sovereignty to the EEZ and do not affect the high seas.

Article 234-based provisions cannot apply to sovereign immune vessels. Article 236 clearly stipulates that "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"(UNCLOS, 1982, Art. 236). Not only is Article 234 situated in Part XII, "Protection and Preservation of the Marine Environment," but the text of Article 234 reiterates that the purpose of any regulations adopted under the article is "the prevention, reduction, and control of marine pollution from vessels." Furthermore, Article 236 reflects the customary international law of sovereign immunity, such as the principle *par in parem non habet imperium* (Proelss et al., 2017: 1591–1595).

Current Canadian claims

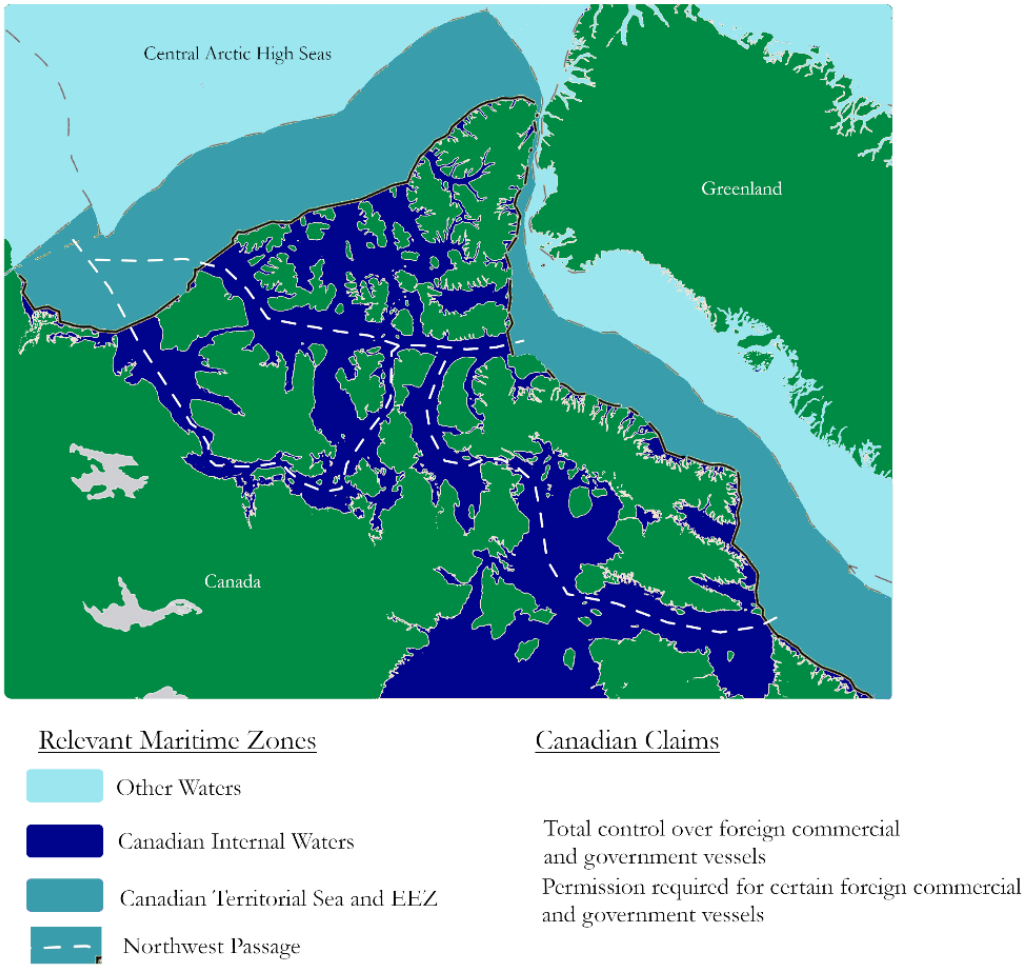

Figure 2: Canadian restrictions on navigation

Canada's claim to control navigation in the Northwest Passage rests on two bases: (1) an internal water claim and (2) two Article 234-based regulations: the Arctic Waters Pollution Prevention Act

and the Northern Canada Vessel Traffic Services Zone Regulations. Canada's internal waters claim is the greatest impediment to navigational rights, as it implies total control over all vessels.

Canada's internal waters claim

Canada's internal water claim entails a major restriction on navigational rights of all foreign vessels. As illustrated in Figure 2, this claim encompasses the entire Arctic Archipelago. To avoid Canada's claimed internal waters entirely, a vessel would need to route between Ellesmere Island and Greenland and then remain north of Canada's islands on a southwest bearing toward the Beaufort Sea. Current conditions make this a perilous route, even in an age of thinning and melting sea ice.

Canadian officials first began publicly describing the Northwest Passage as Canadian internal waters in 1973 (Lajeunesse, 2016: 180). In 1985, responding to media furor over the USCGC Polar Sea's transit of the Northwest Passage, Canada drew straight baselines around its Arctic islands, but formally characterized this as merely delimiting its historic title. Introducing the straight baselines, the Order in Council prefaced the action by noting that "Canada has long maintained and exercised sovereignty over the waters of the Canadian Arctic" (Territorial Sea Geographical Coordinates (Area 7) Order, 1985). Joe Clark, Canada's Secretary of State for External Affairs, described the order as defining "the outer limit of Canada's historic internal waters" (Lajeunesse, 2016: 263; Lalonde, 2018). Per Ottawa, the 1985 straight baselines mark the limits of Canada's purported historic title to internal waters (Lajeunesse, 2016: 263–265).

Canada's claim to internal waters by historic title has been criticized, including by a leading Canadian scholar (Kraska, 2015; Pharand, 1987). Canada's claim certainly struggles to meet the three criteria for historic title (International Law Commission, 1962, para. 80). First, the U.S. clearly operated in the waters of the Northwest Passage from the 1940s to the 1980s from the position that each Canadian island had its own 3 or 12 nautical mile (n.m.) territorial sea, with pockets of high seas throughout the Northwest Passage beyond Canada's territorial sea (Lajeunesse, 2016: 92–95). Second, Canada only first made a public internal water claim in the 1970s, and through the mid-1970s continued to articulate positions contradictory to an internal water claim, including its 12 n.m. territorial sea claim of 1970 (Pharand, 2007: 10). This late notice, combined with a lack of evidence that any British or Canadian explorer staked claim to waters around Canada's archipelagos, significantly undermines a credible historic title claim, which must be consistent and long-standing (Pharand, 2007).

Currently, Professor Lalonde offers the best, if untested, defense of Canada's official historic title position as justified exclusively by Inuit title transferred to Canada, particularly in the 1993 Nunavut Land Claims Agreement (The Nunavut Agreement, 1993, 2.7.1 and 15.1.1; Lalonde, 2020: 120–121). Inuit title, by this theory, is a result of their longstanding use of ice-covered waters, which was then transferred to Canada at some point no later than 1993. Still, to prevail, this novel argument would need to overcome longstanding Western state practice that sea ice is not susceptible to occupation and sovereignty claims (Joyner, 2001: 30).

Even if Lalonde's last defense failed, absent a court case (and Canada has a reservation against compulsory jurisdiction on matters of historic waters), Ottawa would surely continue to consider the Northwest Passage internal waters based on historic title. The implications for commercial and government traffic must be assessed on this assumption. Since historic title leaves no loopholes, Canada would claim total control over foreign traffic. Ottawa would expect all vessels, whether

government or commercial, to request and receive Canadian authorization to enter their waters and comply with any Canadian requirements.

The U.S. has protested this Canadian claim, creating fertile grounds for a FONOP. Through the 1970s, the U.S. maintained that high seas existed among the islands of Canada's Arctic Archipelago wherever waters were more than 3 n.m. from the nearest land. After Canada extended its territorial sea in 1970, and began elaborating its internal waters claim from 1973, the U.S. shifted its language as well. In a 1985 note, the U.S. announced that it "does not share" Canada's view that the Northwest Passage was internal waters (*Cumulative Digest, 1981-88*, 1993: 2047). More concretely, a 2010 U.S. protest held "the Northwest Passage constitutes a strait used for international navigation" (Wilcox, 2011: 517). This latter claim would confer transit passage rights to foreign vessels. This U.S. note, however, was silent on the underlying nature of the Northwest Passage's waters.

Canada's Article 234-based restrictions

Canada has also enacted a separate suite of functional controls on navigation rooted in Article 234 that restrict commercial navigational freedoms, as well as some forms of government vessels.

The Arctic Waters Pollution Prevention Act (AWPPA) is an Article 234-based control that could theoretically extend to government vessels, but in practice does not. Today, it covers all of Canada's Arctic waters, including EEZ, territorial sea, and internal waters. The AWPPA permits the establishment of Shipping Safety Control Zones, from which the minister may prohibit certain types of vessels based, *inter alia*, on the vessel's hull construction, manning, or cargoes. The AWPPA permits regulations that prohibit the operation of certain types of vessels within Shipping Safety Control Zones and notes that the Governor in Council "may exempt from the application of any regulations…any ship or class of ship that is owned or operated by a sovereign power, other than Canada…" (AWPPA, 1985, sec. 12). This would appear to apply to any class-based prohibitions to foreign government vessels by default, requiring a regulation to specifically exempt such vessels.

In fact, the most important regulation restricting navigation under the AWPPA explicitly exempts government vessels. The Arctic Shipping Safety and Pollution Prevention Regulations (ASSPPR) governs when vessels of different ice classes may navigate in the various safety zones. However, the regulation includes a non-application clause for "government vessels and vessels owned or operated by a foreign state" (ASSPPR, 2017, sec. 3). Thus, its restrictions on navigation in Arctic waters apply solely to civilian traffic. The Arctic Waters Pollution Prevention Regulations (AWPPR) includes no such clause, but simply covers waste dumping and required liability coverage, rather than navigation itself (AWPPR, 1978).

The AWPPA and its attendant regulations apply almost exclusively to commercial vessels. The AWPPA does by default apply regulations prohibiting vessels of certain construction or manning characteristics from navigating in Canada's EEZ, territorial sea, and internal waters. However, the regulation implementing this provision includes an explicit exception for all government-owned or -operated vessels. No such exemption exists in regulations against pollution in Arctic safety zones.

Since 2010, the Northern Canada Vessel Traffic Services Zone Regulations (NORDREG), another Article 234-based regulation, has required mandatory reporting of certain vessels' locations at

various prescribed situations and times to Canadian authorities whenever a vessel is in Canada's EEZ (Kraska, 2015: 232; NORDREG, 2010). This effectively requires foreign vessels subject to the regulation to request and receive Canadian authorization before entering Canada's Arctic EEZ. Vessels that must comply with NORDREG are: (1) those with gross tonnage of over 300 tons, (2) vessels towing or pushing another vessel where the combined tonnage is over 500 tons, and (3) vessels carrying or towing pollutants or dangerous goods (NORDREG, 2010, Art. 3).

As a regulation implemented under the Canada Shipping Act of 2001, that Act informs which vessels Canada claims must comply with NORDREG. Paragraph 7(1) of the 2001 Shipping Act provides that the Act's provisions generally do "not apply in respect of a vessel, facility, or aircraft that belongs to…a foreign military force or in respect of any other vessel, facility, or aircraft that is under the command, control or direction of the Canadian forces" (Canada Shipping Act, 2001). While vessels under the command or control of Canadian forces are exempt, the same exemption is not explicitly extended to vessels in temporary service of foreign militaries. Likewise, the exemption speaks only of "foreign militaries," implying that vessels operated by a government but not a military service are also subject to regulations established under the 2001 Act.

In sum, NORDREG applies primarily to commercial vessels, but may also apply to non-military sovereign immune vessels that should be entitled to exemption under Article 236. Vessels subject to the act must file a sailing plan before entering Canada's EEZ in the Arctic and obtain clearance from Canadian authorities, as well as provide daily reports on their position.

Several states have protested the mandatory NORDREG system with arguments that it unlawfully constrains navigation for both government vessels and all vessels. The U.S. objected to the regulations in 2010, while acknowledging the need for action to protect the Arctic. First, the U.S. called the prior permission requirement "a sweeping infringement of freedom of navigation…and the right of innocent passage" that violates Article 234's proviso that any such regulations must have "due regard" for navigation. (Wilcox, 2011: 516) Furthermore, the U.S. objects to the apparent application of NORDREG to both vessels in temporary foreign military service and in non-military government service as a contravention of Article 236 (Wilcox, 2011: 516–517). The U.S. was joined by Singapore, Germany, and other entities in voicing these protests at the International Maritime Organization (IMO), although that body ultimately remained split on whether to act (Kraska, 2015: 245–246).

We can now assess the impact of the most important Canadian laws and regulations governing navigation on foreign commercial and government traffic in the Arctic. The following analysis is summarized in Table 1. Article 234-based regulations provide modest navigational restrictions, primarily on commercial navigation. Canada's internal waters claim is the greatest impediment to all forms of navigation. Because Canada claims internal waters by historic title, its position recognizes no right of innocent or transit passage within Canada's Arctic straight baselines. Both commercial and government traffic must then, according to Ottawa, request and obtain Canadian permission to enter and navigate through these claimed internal waters.

TABLE 1. Canadian Maritime Claims in the Arctic and U.S. Position

	Canadian Arctic internal waters	Canadian Arctic internal waters, territorial sea, and exclusive economic zone	
Canadian Claim	Straight baselines (1985)	Arctic Waters Pollution Prevention Act	Northern Canada Vessel Traffic Services Zone Regulations
Basis	Historical Title	UNCLOS Article 234	UNCLOS Article 234
Effect on Vessels			
Commercial Vessels	Prior permission required	Prohibition on pollution, potential restriction of navigation	Prior permission required for some vessels
Warships	Prior permission required	None	None
Other Government Vessels	Prior permission required	Prohibition on pollution	Prior permission required for some vessels
U.S. Claim			
Navigational Claim	Transit passage rights	All sovereign immune vessels exempt Prior permission requirement violation of Art. 234 "due regard"	
Basis	Strait used for international navigation		

Current Russian claims

The Northeast Passage (NEP) runs along Eurasia's northern coast, connecting the Barents Sea with the Bering Strait. The adjacent coast is mostly Russian, except a small section north of Norway. The Russian components of the NEP vary in ice coverage. The Barents Sea has historically been fairly ice-free, while the Kara, Dmitry Laptev, and East Siberian Seas have all had thicker coverage. Ice melt and thinning in these three seas has been more pronounced than that in the Northwest Passage. Russia's Northern Sea Route (NSR), discussed below, is a sub-area of the NEP, and its restrictions apply only to part of the NEP.

Like Canada and the NWP, Russia's claims to control navigation in the NEP are based on both internal water claims and Article 234-based regulations. In contrast to Canada, Russia's Article 234-based restrictions are the major impediment to navigation, but Russia currently applies them only to non-government vessels.

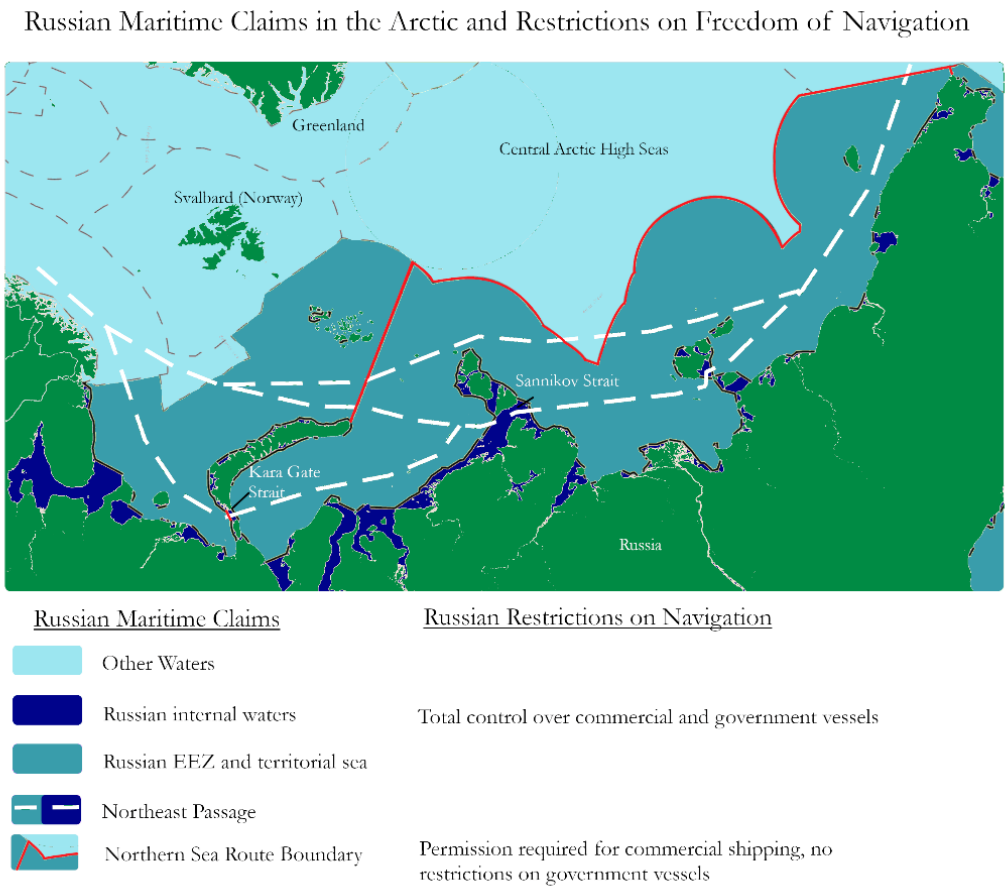

Figure 3: Russian maritime claims in the Arctic

Russia's internal water claims

Russia has claimed internal waters based on straight baselines along parts of the NEP, but its claims are less extensive than Canada's. Unlike Canada, Russia's coastline is not dominated by the islands necessary to justify straight baselines. In 1985, the Soviet Union enclosed Novaya Zemlya, Severnaya Zemlya, and the New Siberian Islands, and thus the Kara Gate, Dmitri Laptev, Vilkitskii, and Sannikov straits, with straight baselines. Other indentations in the coast were also enclosed (Decree 4450, 1985).

Soviet and Russian practice has not made entirely clear whether these are historic or non-historic title claims, although most are inclined to interpret the claim as one to historic title. Before 1985, Russia made some claims to historic title in the Dmitry Laptev and Sannikov Straits, which the United States protested (*Cumulative Digest, 1981-88*, 1993: 1818–1819). The 1985 declaration drawing straight baselines noted that other waters, particularly the White Sea, were historic internal waters, but made no such claim to the various Arctic straits (Decree 4450, 1985). The influential Russian legal scholar A.V. Vylegzhanin argues that these waters are historic based on Russian and Soviet actions dating from the 17th century (Vylegzhanin et al., 2020). Per Vylegzhanin's account, the 1985 straight baselines merely delineated Russia's historic waters, much like the Canadian argument that their 1985 straight baselines did the same. His is a popular argument with other Russian authors (Morgunov et al., 2021; Todorov, 2017).

Russia's current law makes no distinction between internal waters by historic title and internal waters by straight baseline, and thus expects all foreign navigation in these waters to occur with Russian consent. The 1998 Act on Internal Waters, Territorial Sea, and Contiguous Zone, which also governs innocent passage, recognizes foreign vessels' (both commercial and government) right to innocent passage only in the territorial sea (О Внутрених Морских Водах..., 1998, sec. 12.1). Thus, Russian law includes no explicit right to innocent passage even in internal waters where the right might exist subject to Article 8(2) of UNCLOS.

Russia's internal waters claims are a moderate impediment to navigational rights of all vessels. Although Russia is not clear whether its internal waters claim is based on historic title or mere straight baselines, Russian law does not admit the possibility of innocent passage in any internal waters. Thus, Russia appears not to recognize any right to innocent passage in the Kara Gate, Vilkitskii, Dmitry Laptev, or Sannikov Straits. It likewise rejects any transit passage right there, arguing they do not meet the use criteria of a strait used for international navigation. Recognizing neither innocent nor transit passage in its internal waters, Russia implicitly requires all vessels, both commercial and government, to request and obtain Russian permission before entering the Russian Arctic straits.

Russia's Article 234-based claims

Russia, like Canada, also claims control over navigation within certain parts of its Arctic internal waters, territorial sea, and EEZ with regulations rooted in Article 234 UNCLOS. Russian law defines the Northern Sea Route (NSR) as a special area, subject to certain rules "with the goal of ensuring the security of navigation, as well as the prevention, reduction and prevention of pollution to the marine environment from ships…" (McDorman, 2020; L. Zou, 2019; Кодекс Торгового Мореплавания Российской Федерации, 1999, sec. 5.1.2) This, independent of the older Russian and Soviet claim that the NSR is a national transportation route, is a clear invocation of Article 234 of UNCLOS. The NSR's area encompasses Russia's "internal sea waters, territorial sea, contiguous zone, and exclusive economic zone," bounded in the east by the 1990 U.S.-Soviet maritime boundary, and in the west by a meridian running north from Novaya Zemlya (Закон о Северном Морском Пути, 2012; Кодекс Торгового Мореплавания Российской Федерации, 1999, sec. 5.1.1).

The current Russian definition of the NSR area addresses two American concerns about navigational rights. First, the United States and some scholars worried that a previous definition might entail a Russian claim to regulate navigation on the high seas adjacent to the NSR (Brubaker, 1999). That language is no longer present in the current law. Second, Russia's current definition of the NSR is clearly incompatible with the occasional American scholarly claims that Russia has made "an implicit 'historic waters' claim to all the waters" of the NSR (Bouffard, 2021: 2; Fahey, 2018: 172). The Russian legislation covers a clearly identified EEZ that stretches from Russia's coast or well-defined straight baselines, and an EEZ cannot be internal waters. Furthermore, if Russia did consider the entire NSR area internal waters, it would have every incentive to enclose this area with straight baselines and stake a territorial sea and EEZ claim to what is currently high seas and contested outer continental shelf. As we shall see, NSR regulations are also not functionally equivalent to an internal-waters claim.

The NSR regulations apply to non-government traffic. The principal controls are found in the Maritime Shipping Act. Based on that Act, commercial shipping vessels seeking to enter the NSR

area must apply in advance for permission to navigate within the NSR area. Furthermore, such vessels must utilize and pay for Russian icebreaking services and carry adequate insurance (Todorov, 2021: 4, 8; Кодекс Торгового Мореплавания Российской Федерации, 1999, sec. 5.1). Article 14 of the 1998 Act on Internal Waters, Territorial Sea, and Contiguous Zone describes the Northern Sea Route, and lays out similar requirements for foreign pleasure and tourist craft in the NSR area (О Внутрених Морских Водах..., 1998). This *de facto* requires foreign commercial and pleasure vessels to request permission to enter some parts of the Russian EEZ.

The NSR regime currently has no effect on warships. The Maritime Shipping Act makes no claim to affect foreign sovereign immune vessels. First, the Act generally governs merchant shipping, encompassing carriage of goods and passengers, icebreaking, marine scientific research, and other economic activities (Кодекс Торгового Мореплавания Российской Федерации, 1999, sec. 2). Second, the Act's section on the NSR area's icebreaker rules extends those requirements only to "warships, military auxiliary vessels, and other government vessels *belonging to the Russian Federation*…" (Emphasis added. Кодекс Торгового Мореплавания Российской Федерации, 1999, sec. 5.1.5) The Act does not contain an explicit exemption for sovereign immune vessels, but the icebreaker provision reinforces the presumption that all sovereign immune vessels are by default exempt from the Act given Section 2's interpretative guidance. Otherwise, it would be unnecessary to explicitly extend the icebreaker requirements to Russian government vessels. The logical consequence of this provision and the Act's general focus are that foreign government vessels are exempt from all provisions under this law, unless otherwise explicitly stipulated.

Recent developments have not changed the NSR's non-application to government ships. In 2018, the French Navy's BSAH Rhône sailed along the Northeast Passage from the Barents Sea to the Bering Strait. In response, Russian officials announced their intention to introduce new regulations that would require foreign sovereign immune vessels to comply with NSR rules (Todorov, 2019). This would be a concerning development that flies in the face of international law. But, despite assertions by both scholars and media that these rules are in force, they remain mere proposals (Bouffard, 2021; Buchanan & Strating, 2020; Conley & Melino, 2020: 11; Schreiber, 2019).

In 2019, a draft bill was introduced to amend the decree No. 1102 of 1999, "On the Rules for the Navigation and Stay of Foreign Warships and Other Government Vessels." The draft amendment would require foreign sovereign immune vessels to employ icebreakers in the NSR area, as well as oblige sovereign immune vessels to request and obtain prior permission from the NSR Administration to enter the NSR area (Solski, 2019). However, the draft legislation remains, as of November 2021, in consultation and does not appear in consolidated versions of decree No. 1102 of 1999. (*Нормативные Правовые Акты*, 2019; Decree No. 1102 of 2 Oct. 1999, 1999) The necessity of the rule change, evidenced by both Russian officials' comments and the draft legislation, however, further underscores that current rules do not apply to foreign sovereign immune vessels, including warships.

In a 2015 diplomatic protest, the United States reiterated its view that the NSR is "inconsistent with important law of the sea principles related to navigational rights and freedoms" and laid out several critiques. First, the U.S. note held that straits used for international navigation exist along the NSR and that this is incompatible with Russia's internal water claims ("2015 Digest of US Practice," 2016: 526). This position would imply a non-suspendable transit passage right for all foreign vessels in any straits considered international straits, although the U.S. note does not

specify those straits.[6] Second, the U.S. noted that requiring prior permission to enter the EEZ was incompatible with Article 234's "due regard for navigation" clause. This objection implicitly takes the position that commercial vessels navigating in the NSR need not obtain prior notification from Russian authorities. Third, the U.S. noted that the law was ambiguous on whether the NSR rules applied to warships and requested confirmation that this was not the case. Although Russian law still lacks an explicit exception, it appears that foreign sovereign immune vessels are exempt from the prior notification and mandatory icebreaker requirements (2015 Digest of US Practice, 2016: 526–527).

Having laid out Russian legislation, we can summarize the effect of Russian claims on navigation along the Northeast Passage. The following analysis is summarized in Table 2. Where Russia claims internal waters in the Russian Arctic straits, Moscow's position requires all foreign vessels, both government and commercial, to request and obtain permission to enter and navigate. In contrast, Northern Sea Route rules apply exclusively to commercial vessels. Commercial vessels must request and obtain permission from the NSR Administration before entering the NSR area. Overwhelming evidence indicates that, as of November 2021, the NSR's various restrictions and requirements do not apply to foreign government vessels, including warships.

TABLE 2. Russian Maritime Claims in the Arctic and U.S. Position

	Russian Arctic internal waters	Russian Arctic internal waters, territorial sea, and exclusive economic zone within Northern Sea Route
Russian Claim	Straight Baselines (1985)	Northern Sea Route legislation
Basis	Internal waters	UNCLOS Article 234
Effect on Vessels		
Commercial Vessels	Prior permission required	Prior permission required
Warships	Prior permission required	None
Other Government Vessels	Prior permission required	None
U.S. Claim		
Navigational Claim	Transit passage rights	All sovereign immune vessels exempt
Basis	Strait used for international navigation	Prior permission requirement violation of Art. 234 "due regard"

Freedom of Navigation targets in the Arctic

The Freedom of Navigation program's reliance on U.S. government vessels imposes constraints on FONOP targets. To be a valid legal target of a FONOP, a coastal state's maritime law must (a) be excessive to the United States' understanding of international maritime law, and (b) apply to foreign government vessels. Based on these criteria, Canadian internal water and NORDREG claims are susceptible to a FONOP, although a FONOP against the latter would likely have no implications for commercial traffic. In contrast, only Russia's internal water position is a valid target for a U.S. FONOP. NSR regulations do not currently apply to U.S. Navy or other sovereign immune vessels.

FONOP targets in the Canadian Arctic

Canada's internal waters claim is the most viable and substantial FONOP target. Canada's historic internal waters claim permits both commercial and government traffic by foreign vessels only with Canadian permission. Because these restrictions apply to the government vessels, they are susceptible to challenge by government vessels.

To exercise the United States' claimed transit right in the NWP in a FONOP, the U.S. Navy would have to pass through Canada's claimed internal waters to and from Canada's EEZ. The United States, however, may not be able to use Coast Guard icebreakers in light of the 1988 U.S.-Canada agreement. To reinforce that this action is an assertion of transit, rather than innocent, passage rights, the vessel would ideally behave in ways permitted under the former rather than the latter. This might be best achieved with a U.S. Navy submarine, since the normal mode provision of transit passage would permit it to navigate submerged, while an exercise of innocent passage would require it to navigate at the surface throughout the NWP. Several Canadian scholars have argued that clandestine submarine navigation cannot affect Canada's claim (Lajeunesse, 2016: 238–241; Lalonde & Lasserre, 2013; Pharand, 2007). The United States could circumvent this hurdle by simply announcing publicly the activity before and after the transit, thereby making it notorious. More challenging could be any U.S.-Canada agreement on the approval process for submarine navigation in the Northwest Passage, to which Canadian officials have alluded in the past (Byers, 2015: 168–169; Lajeunesse, 2016: 295).

NORDREG is a narrower FONOP target. The mandatory reporting requirements exempt vessels owned by foreign militaries but appear to apply to other government-owned or -operated vessels that meet the weight or pollutant criteria. Such vessels should, by the U.S. interpretation of Article 236 of UNCLOS, be exempt from all environmental regulations. This includes NORDREG, which is based on Article 234 of UNCLOS. Thus, to challenge this specific gap in Canadian law, the United States could use a government-owned or -leased vessel for some non-commercial purpose that would require passing through the NORDREG area. While doing so, the vessel would not obtain prior clearance from Canadian authorities and fail to comply with mandatory reporting requirements. This would assert government-owned vessels' exemption from NORDREG, but such a FONOP would have to emphasize "due regard" to have even a tenuous effect in defense of commercial navigational freedoms.

The AWPPA theoretically opens Canadian claims to a FONOP, but in practice, the AWWPA's implementing regulations do not offer an appealing target. Only the provisions on waste dumping fail to exempt government-owned vessels. To operationally demonstrate the illegality of this measure, a non-warship U.S. government vessel would have to willfully pollute the Canadian Arctic. Not only would this undercut the U.S. government's commitment to marine stewardship, but it would also surely poison U.S.-Canada relations.

FONOP targets in the Russian Arctic

Russia's Arctic claims meet the necessary conditions for FONOPs in a more limited fashion. Only Russia's internal water claim is a viable target for the U.S. Freedom of Navigation program. The U.S. Navy and Coast Guard can sail in the Northern Sea Route area, but it would not be a FONOP.

Russia's internal water claim is not explicitly based on historic title across all the major Arctic straits. Nevertheless, Russian law does not recognize a right to innocent passage in areas enclosed

by straight baselines but previously territorial or high seas. Since this deprives all vessels, including government ones, of possible innocent passage or transit passage rights, it can be challenged by a U.S. government vessel.

The official U.S. claim is that the Russian Arctic straits are straits used for international navigation where transit passage applies. To operationally assert the United States' claimed right to transit passage, the U.S. Navy would have to pass through Russia's internal waters to and from the Russian EEZ. As in the Canadian case, the challenge would be in distinguishing this action from innocent passage. Again, a notorious transit by a submerged submarine might offer the best avenue, but it would be operationally challenging.

The NSR, as currently codified, offers no opening for a U.S. FONOP. The measures apply only to commercial vessels—foreign sovereign immune vessels are exempt from the NSR provisions codified in various Russian laws and decrees. Overwhelming evidence indicates that warships, military auxiliaries, and other government vessels in non-commercial service are not subject to NSR regulations. Russian officials, judging by their statements and legislative proposals, share this position. The only conceivable approach would be for a U.S. government-owned vessel to engage in commercial activity, pass through the NSR area, and defy the regulations. Such defiance could include refusing to obtain prior notice, not engaging Russian icebreakers, or not carrying insurance.

Conclusion

Based on the analysis here, the U.S. Navy will find precious little in the Arctic to target in a FONOP.

Because Russia's Northern Sea Route regime applies to commercial vessels, a U.S. FONOP by a government ship against the NSR regime would have no legal effect. The U.S. Navy or Coast Guard could sail there—but it would not be a FONOP. The United States could target only Russia's internal waters policy in the Russian Arctic straits, although this would secure rights for both government and commercial traffic. If the United States or Asian states, for that matter, are concerned about Russian restrictions on commercial navigation, they would need to rely purely on diplomatic protests, or conceive of new ways to protest with commercial, rather than government, vessels.

Since Canada's Arctic maritime claims impose significant constraints on both government and commercial vessels, any U.S. Arctic FONOP would be of greatest utility against Canada. Canada's internal water claim is expansive, and the United States' counter-position affords significant rights to both government and commercial users. Canadian restrictions covering the EEZ, however, only partially apply to government vessels, and only government vessels would benefit from the FONOP. A Canadian FONOP would have significant diplomatic costs. Such an action would rip open the dispute that Ottawa and Washington have successfully managed since 1988.

Finally, journalists and legal scholars need to press policymakers and analysts calling for an Arctic FONOP to explicitly identify what precisely such an action would target. FONOPs are a common policy prescription, but they can happen only where the operation resists an actual legal claim applying to a warship. In the Arctic, this drives the United States toward a FONOP against Canada and offers little purchase against Russian claims.

Notes

1. The author would like to thank Devon Colmer, Samuel Byers, Andrei Todorov, and the two anonymous reviewers for their comments and suggestions. A further thanks to Devon Colmer for his table-making expertise.
2. These reports note which claims were protested multiple times in a single fiscal year, but do not provide specific counts of how many times certain claims were challenged. Thus, DoD statistics somewhat underplay how common challenges are to internal water claims, and restrictions on innocent passage and military activities are in the DoD FONOP repertoire. Still, these data corroborate the point that the FONOP program targets excessive claims that affect naval vessels.
3. Before 2005, most of these claims were claims to territorial seas wider than 12 nautical miles. Since 2005, these claims revolve more around territorial sea claims from features not entitled to such.
4. Innocent passage rights permit free and expeditious movement by vessels through any state's territorial sea, provided the vessel refrains from certain behaviors. The coastal state may temporarily suspend innocent passage for security reasons.
5. It is not clear why the United States views international strait and internal water status as mutually exclusive in light of Article 35(a) of UNCLOS. Furthermore, the right to transit passage may not apply to some of the Russian Arctic straits due to the exception in Article 38 (1) UNCLOS for straits between an island and the mainland where a navigationally equivalent route exists seaward of the island.

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