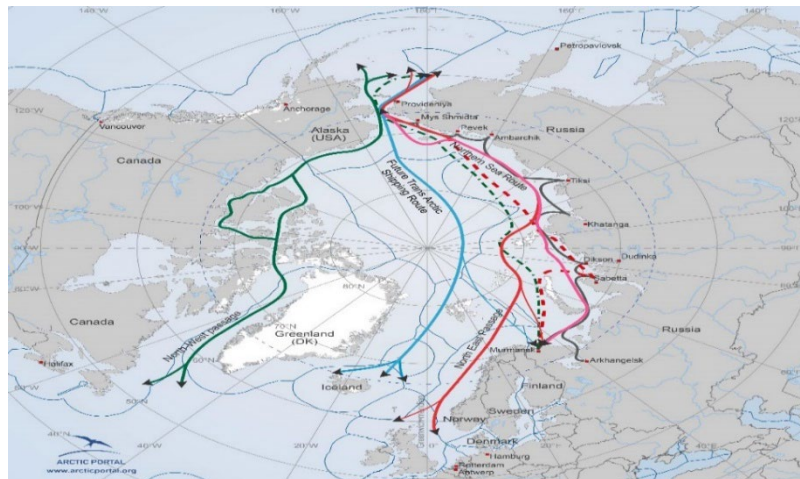


Legal Status of the Arctic Sea Routes

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While climate change is having a negative impact on Arctic ecosystems and communities, it is also creating some important economic opportunities. Especially in recent years, the increasing use of the North Sea Route (NSR) and potential use of the Northwest Passage (NWP) and Transpolar Sea Route (TSR) has become a commercial issue. There are many implications regarding these routes. First, they offer fewer distance and time advantages, less CO₂ due to less fuel and important cost savings for navigation from Asia to Europe and America compared to existing traditional shipping routes (Suez, Panama, and Malacca). Second, some constrains could be pointed. These routes are not accessible in winter and may need escorts during voyages. Also, infrastructure capacity is limited for navigation along the routes and that should be fixed for commercial shipping.

The Northern Sea Route conceptualized by Russia goes through the Siberian Arctic coast and passes along the Russian Arctic straits. The Northwest Passage, on the other hand, connects Europe and Asia via the Canadian Arctic islands and Alaska. In other words, most of the Northwest Passage lies in internal waters claimed by Canada, while the Northern Sea Route is essentially outside Russian territorial waters. As for the Northern Sea Route, Russia has argued that the Northern Sea Route should be legalized as "internal waters", whereas the United States claims it must be defined as "international straits". The route is given a special role referred to as 'vital areas of national interest' within Russian Maritime Strategy in 2022. On the other hand, from the side of the Northwest Passage, Canada, and the United States also make similar claims. Therefore, there is a need to clarify how routes are



expressed and the extent to which parties build political insights in relation to routes.

First of all, the Northern Sea Route has been historically dominated by Russia. It lies within Russia's exclusive economic zone. For decades, Russia has claimed that parts of the Northern Sea Route, including the Vilkitsky, Shokarsky, Dmitry Laptev, and Sanikov Strait, are Russian internal waters. The United States, on the other hand, disputed this claim by classifying the Northern Sea Route as an international strait. It was in the years 1963 and 1964 that the Soviet Union reacted by sending a memorandum against the US icebreakers trying to survey the Laptev and the East Siberian Sea. At this point, the Soviet Union believed that the Northern Sea Route was part of its internal waters, and therefore foreign ships transiting the Northern Sea Route would need to seek permission before sailing according to the article 234 of UNCLOS. On the contrary, the United States claims that permission cannot be sought while navigating international straits. The question remains whether the Northern Sea Route is an international strait or part of internal waters.

The US focus on international straits is based on rights of transit for foreign ships transiting the straits. In light of this reasoning, according to part III of the United Nations Convention on the Law of the Sea (UNCLOS), transit passages are possible if the waters concerned are considered international straits. So, is the Northern Sea Route an international strait, as the US claims?

UNCLOS defines international straits as those *"which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone"*. The issue here regarding the Northern Sea Route is not a geographical criterion, but a functional one. So, has the Northern Sea Route been used as a functional standard for international navigation so far?

Both actual and potential uses of the straits are available for functional criteria. In the 1949 International Court of Justice (ICJ) case of the Corfu Channel, "actual use" was prioritized in the definition of the international strait, and as a result, almost all countries except the United States accepted "actual use" for international straits. In this regard, the fact that the actual use for international

transits is taken into account by all states strengthens the claim that the Russian straits belong to Russian internal waters.

Although the straits within the NSR are not international straits (some are part of Russia's internal waters), in the UNCLOS sense, the potential use and increased shipping activity within the NSR could change this situation. Accordingly, Russia may be forced to accept the right of passage within the NSR as an international strait.

International straits/internal waters controversy is available over the NWP as well. Both parties to the dispute over the legal status of the NWP -Canada and the United States- have distinct claims. The US argues that the NWP is an international strait while Canada tries to delineate it as internal waters that mean full coastal state control. The first thing to note is that Canada has full sovereignty over the islands in the archipelago, so the dispute in question is not a sovereignty dispute. It is more related to the waters -whether they are internal waters or international straits- between these islands.



The controversy over the NWP stems from SS Manhattan's (a US-owned ship) transit through the NWP in 1969 when the U.S. did not seek permission to transit through this route. In response, Canada, in 1970, sought to expand its territorial waters from 3 nautical miles to 12 nautical miles as its first legal claim to Arctic waters sovereignty and adopted the Arctic Waters Pollution

Prevention Act (AWPPA) which underlines the Arctic waters as 100 nautical miles from the mainland into the Beaufort Sea.

In 1988, both parties declared their willingness to accept an agreement on the Arctic waters. The United States signed the agreement, stressing that all transits by US icebreakers would be managed with the approval of the Canadian government. Both parties have reached an agreement without changing their positions on the Arctic Ocean. In other words, they "agreed to disagree" on the issue of the NWP's legal status.

Despite different claims over the NWP's legal status, no definitive dispute has arisen between Canada and the United States since the aforementioned agreement was signed. Note that without Canada's precautions regarding transit within the NWP, transit would likely be internationalized due to increased foreign transit and may be subject to transit rights. The same situation applies to the NSR as well.

For more on this, read...

Keupp M M (Eds), *The Northern Sea Route: A Comprehensive Analysis* (Springer 2015)

Byers M and J Baker, *International Law and the Arctic* (Cambridge University Press 2013)

Byers M and S Lalonde, 'Who Controls the Northwest Passage?' (2009) 42 *Vanderbilt Journal of Transnational Studies* 1133

Ostreng W and Others, *Shipping in Arctic Waters A Comparison of the Northeast, Northwest and Trans Polar Passages* (Springer 2013)

