

A Study on the Disputes over Arctic Shipping Routes under the United Nations Convention on the Law of the Sea

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How to cite this paper: Meng, X. R. (2025). A Study on the Disputes over Arctic Shipping Routes under the United Nations Convention on the Law of the Sea. *Law and Humanities*, 1(3), 88-97. ISSN Print: 3079-5117; ISSN Online: 3079-5125.

<https://doi.org/10.63313/LH.9029>

Published: 2025-07-07

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Abstract

The geopolitical game between the United States and Russia in the Arctic shipping routes has led to a security crisis in the region, and the 2022 Ukraine crisis has further exacerbated the risk of conflict there. The United Nations Convention on the Law of the Sea (UNCLOS) system has issues such as different interpretations and applications regarding the innocent passage of warships in territorial seas, the legal status of Arctic shipping routes, and navigation rights. In the geopolitical game in the European Arctic, major powers may exploit these international law rules to take military actions and achieve political goals, increasing the risk of armed conflicts. However, the existing regional cooperation system is insufficient to mitigate such security risks. In addition, the Ukraine crisis has caused geopolitics to dominate regional international relations, which not only increases security risks but also raises the attention of relevant countries to international law. In the future, international laws such as UNCLOS may become important tools for maintaining peace and stability in the Arctic shipping routes.

Keywords

United Nations Convention on the Law of the Sea; Arctic Shipping Routes; Maritime Rights and Interests

1. The Essence of Disputes over Arctic Shipping Routes

Disputes over navigation in the Arctic shipping routes emerged in the 1960s from conflicts between the United States, the Soviet Union, and Canada, and have continued to this day. Other countries have not directly engaged in confrontational conflicts with Russia or Canada. This is either because they believe that maintaining friendly relations with these two countries is more beneficial to their own interests, or because the Arctic shipping routes currently have no significant impact on their commercial shipping, making it unnecessary to engage in immediate conflicts. Therefore, they have remained silent on the positions of Russia and Canada, but this does not mean that other countries will not conflict with Russia and Canada in the future.

In the 1960s, the United States sent warships attempting to enter the Vilkitsky Strait in the Northern Sea Route but was forced to detour due to strong protests from the Soviet Union. [1] In July 1964, the Soviet Union stated to the United States: "The San-nikov Strait and the Dmitry Laptev Strait have historically belonged to the Soviet Union; they have not been used for international navigation, and foreign warships must obtain prior approval from the Soviet government before entering the straits." The United States countered by pointing out that all vessels enjoy the right of innocent passage through the straits used for international navigation as mentioned above. Russia inherited the Soviet Union's position and reaffirmed through legislation in 2012 that "the Northern Sea Route is a historically formed national transport route of Russia" and requires foreign ships to obtain its prior approval before entering. The United States has continued to adhere to its original stance, arguing that the important straits on the Northern Sea Route are "straits used for international navigation," and foreign ships enjoy freedom of navigation, which is subject to the transit passage system in current maritime law.

Canada claims that the waters of the Arctic Archipelago through which the Northwest Passage passes are Canada's "historic internal waters." Therefore, it requires foreign ships to obtain prior approval before entering the Northwest Passage. The United States, however, argues that "the Northwest Passage is a strait used for international navigation, and the transit passage system applies to the routes passing through these straits." Historically, the American oil tanker "Manhattan" in 1969 and the icebreaker "Polar Sea" in 1985 forcibly crossed the Northwest Passage without obtaining prior approval from Canada.

The positions of the above-mentioned countries indicate that the navigation conflicts in the Northern Sea Route and the Northwest Passage mainly manifest as disputes over the navigation systems of the straits along the Arctic shipping routes. If these straits are "straits used for international navigation" as stipulated in the Convention, the rules of freedom of maritime navigation shall apply. "Straits used for international navigation" are an important guarantee for realizing the freedom of navigation on the high seas. The Convention stipulates that "straits used for international navigation" apply the transit passage system, allowing ships and aircraft to "exercise the freedom of navigation and overflight." Therefore, the core essence of the disputes over navigation in the Arctic shipping routes is a legal dispute over "whether the straits along the routes apply the transit passage system stipulated in the Convention."

At the same time, the national strategic interests, security interests, and economic interests behind the navigation disputes in the Arctic shipping routes indicate that the dispute is a "political dispute," i.e., a dispute involving the fundamental interests of the parties concerned, as well as existing security issues and conflict risks. The root cause lies in the geopolitical game between major powers such as the United States and Russia. Major powers may take advantage of the controversial rules in

international law and different interpretations and applications of international law to integrate legal differences into military confrontations and armed conflicts, increasing the possibility of relevant countries using military means to reverse the political process.

2. Existing Issues in the United Nations Convention on the Law of the Sea Regarding Disputes over Arctic Shipping Routes

Under the framework of the Convention, there have long been disputes between Russia and other countries over the interpretation and application of relevant provisions of the Convention regarding the legal status of the Northern Sea Route, navigation systems, and the navigation of warships. [2] Furthermore, with respect to maritime military activities and the use of force, the Convention can only provide principled guidance rather than operational rules. To a certain extent, this has allowed the United States and Russia to conduct their geopolitical game in the form of differing interpretations and practices of the Convention, exposing the European Arctic region to maritime security risks.

First, within the Convention, controversies exist in the theory and practice of innocent passage of warships in territorial seas, which may trigger maritime conflicts in Russia's Arctic territorial seas. The focal point of the dispute over the theory of innocent passage of warships in territorial seas under the Convention is the opposition and divergence between the view that prior notification to or prior consent from the coastal state is required and the view that free navigation is permissible. [3] The dispute between the United States and Russia over the innocent passage of warships in the territorial seas of the Northern Sea Route has a history of nearly 60 years since the 1960s, and the United States and other Western countries have engaged in multiple military confrontations with Russia over issues of freedom of navigation and the Northern Sea Route. The freedom of navigation advocated by the United States consists of a system of international law rules governing freedom of navigation, including innocent passage in territorial seas, transit passage through straits used for international navigation, archipelagic sea lanes passage, and freedom of navigation in exclusive economic zones and on the high seas, which should apply to all ships, including warships. [4] Based on this, the United States claims to have freedom of navigation in the territorial seas of the Northern Sea Route, and NATO also views the Northern Sea Route as open waters, considering it crucial to ensure freedom of navigation and unimpeded access.

Meanwhile, since the Soviet era, Russia's stance on whether warships enjoy the right of innocent passage in territorial seas has undergone multiple changes, following a path of "recognition-opposition-recognition-recognition (amended)". In practice, Russia has claimed to adopt special measures in accordance with the Convention to prevent foreign warships from exercising innocent passage in its territorial seas, particularly in important and sensitive territorial seas. Strict enforcement of this in

practice would inevitably trigger intense conflicts. Therefore, the dispute over the innocent passage of warships in territorial seas is an "institutional factor contributing to the instability of the maritime security order" in the European Arctic region. Second, the legal status of the Northern Sea Route is in dispute, which sows the seeds of potential conflicts between the United States and other Western countries and Russia. The disputes over the legal status of the Northern Sea Route focus on Russia's management of navigation in the Northern Sea Route and the international legal status of certain straits. On the one hand, Russia regards the Northern Sea Route as a historic national transportation artery and advocates exercising internal waters jurisdiction over it, citing Article 234 of the Convention (on ice-covered areas) as the basis for regulating the waters of the Northern Sea Route. It argues that Article 234 grants Russia the right to formulate stricter ship passage standards. However, the United States contends that Russia's regulation of the Northern Sea Route violates the navigation rights stipulated in the Convention. The United States holds differing opinions on issues such as whether the Northern Sea Route meets the criteria of being ice-covered for most of the time as specified in Article 234 of the Convention, and whether Article 234 can apply to ships with immunity, such as warships.

On the other hand, historically, Russia (the Soviet Union) has long claimed that straits with a width exceeding 24 nautical miles, such as the Kara Strait, Vilkitsky Strait, Shokalsky Strait, Laptev Strait, and Sannikov Strait, are internal waters, while the United States considers these straits as international straits, thus asserting that warships enjoy the right of innocent passage. Furthermore, on November 30, 2022, Russia adopted amendments to its Internal Waters Law, requiring foreign warships and other government vessels to obtain diplomatic permission at least 90 days in advance to transit the internal waters of the Northern Sea Route (with a limit of one vessel at a time), and Russia may suspend permission for foreign warships at any time. Straits such as the Kara Strait, Vilkitsky Strait, and Sannikov Strait are classified as internal waters. Therefore, amid the ongoing dispute over the legal status of the Northern Sea Route, Russia's actions to strengthen control over it will exacerbate its disputes with Western countries, leaving a fuse for potential conflicts in Arctic security.

It is evident that the principled provisions within the Convention system leave certain room for state practice. The United States and Russia hold differing understandings and practices regarding the specific application of rules such as the management of the Northern Sea Route, the international legal status of the straits it traverses, and the innocent passage of warships in territorial seas. Although Russia has adopted new laws regulating the route, it is unlikely to gain international recognition. In the future, if NATO enters the Northern Sea Route in the name of freedom of navigation, it could not only strengthen the practice of innocent passage of warships in legal terms but also oppose Russia's internal waters jurisdiction over the

Northern Sea Route through actions, even testing Russia's bottom line and engaging in military deterrence. Among these, the waters of the Northern Sea Route that meet the geographical criteria for international straits under Article 37 of the Convention are among the most likely targets for foreign warships to conduct freedom of navigation operations. [5]

In response to potential provocations by U.S. warships in the waters of the Northern Sea Route, Russia may adopt measures including the use of force to prevent unauthorized passage through the straits of the Northern Sea Route. It is thus clear that Russia and Western countries interpret and apply specific rules differently under the Convention system to pursue interests and define spheres of influence. This is a manifestation of their geopolitical game, with military actions serving as means of geopolitical maneuvering and asserting legal claims. However, this will further increase the risk of armed conflicts in the European Arctic region.

3. Proposals for Resolving Disputes over Arctic Shipping Routes

For any dispute arising from the interpretation or application of the Convention, Part XV of the Convention specifically provides for a dispute settlement mechanism. Utilizing this mechanism to resolve navigation disputes in Arctic shipping routes, particularly through judicial or arbitral means, is one of the dispute settlement options available to States Parties to the Convention in the future. Given that the United States is not a Party to the Convention, disputes between the United States and other States Parties to the Convention cannot be resolved through the Convention's dispute settlement mechanism. This section therefore only discusses the application of the Convention's mechanism for resolving disputes between States Parties to the Convention, particularly the procedures and methods of dispute settlement.

3.1. Applying Peaceful Means Chosen by the Disputing Parties

The Convention first imposes an obligation on States Parties to settle disputes by peaceful means. Article 279 of the Convention stipulates that any dispute between States Parties concerning the interpretation or application of this Convention shall be settled by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations, using the means referred to in Article 33, paragraph 1, of the Charter of the United Nations. [6] Article 280 of the Convention provides that nothing in this Convention impairs the right of any State Party to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

For any dispute between States Parties concerning the interpretation or application of the Convention, States Parties may exercise their right of choice at any time, and they are the determiners of the dispute settlement method. States Parties may, by agreement, choose any peaceful means to settle their dispute before submitting it to the compulsory procedures provided for in Section 2 of Part XV of the Convention.

They may also utilize Article 280 to terminate the procedure if the dispute has already been submitted to the compulsory procedures of Section 2 and the procedure is still ongoing. Furthermore, if the procedure under Section 2 has been completed and a binding judgment or award has been rendered, the disputing parties may, by agreement, substitute the content of such judgment or award, thereby replacing it. [7]

In addition to the above-mentioned priority rights, the principle that disputing parties have the priority to choose the method of settlement is also reflected in Article 281, paragraph 1, of the Convention, which states that "if States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any other procedure."

The Convention encourages States Parties, after any dispute arising from the interpretation or application of the Convention, to give priority to resolving it through peaceful means of their own choice. Even after a binding judgment or award has been rendered, the disputing parties may still substitute it through agreement. All Member States of the European Union are Parties to the Convention, and the EU's basic position is that the Convention provides a basis for dispute settlement. In 2008, the five Arctic coastal States issued a declaration stating that they would continue to abide by the Convention to resolve disputes in an orderly manner. In 2016, the European Commission published the Joint Communication to the European Parliament and the Council - An Integrated European Union Policy for the Arctic, which emphasized that the EU recognizes and supports "in particular the governance system for the Arctic Ocean provided by the United Nations Convention on the Law of the Sea, including the system for the peaceful settlement of disputes".

In summary, resolving Arctic disputes through the means prescribed by the Convention is a consensus among Arctic coastal States. Moreover, there are precedents of resolving Arctic-related disputes through peaceful means. For example, on April 17, 2010, Norway and Russia reached a delimitation agreement on the Barents Sea, resolving a dispute that had lasted for 44 years.

With regard to navigation disputes in Arctic shipping routes, the EU and other countries have not yet resolved them with Russia or Canada through peaceful means of their own choice in accordance with the provisions of the Convention. The prerequisite for applying this method is that Russia, Canada, and other States Parties to the Convention agree and reach an agreement to resolve the dispute. If one party to the dispute refuses to negotiate and reach an agreement, the other disputing parties may apply for the compulsory dispute settlement procedures of the Convention.

3.2. Applying the Compulsory Dispute Settlement Procedures of the Convention

Pursuant to Articles 279-282 of the Convention, if States Parties have not reached an agreement on the choice of a dispute settlement method, or if the dispute remains unresolved after recourse to the chosen method, or if the agreement between the disputing parties does not exclude any other procedure and the period of the agreement has expired, and there is no general, regional, or bilateral agreement or other arrangement providing for the submission of the dispute to a binding adjudicative procedure, disputes between States Parties shall be resolved through the compulsory dispute settlement procedures provided for in the Convention.

Article 287 of the Convention provides that, at the request of any party to the dispute, the dispute may be submitted to a court or tribunal having jurisdiction, namely: the International Tribunal for the Law of the Sea established in accordance with Annex VI to the Convention, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII to the Convention, and a special arbitral tribunal constituted in accordance with Annex VIII to the Convention. The prerequisite for a State Party to submit a dispute to the above-mentioned courts or tribunals for adjudication is that it has made a choice of the above-mentioned courts or tribunals by a written declaration upon signature, ratification, or accession to the Convention, or at any time thereafter.

In its declaration submitted on November 7, 2003, Canada chose "the International Tribunal for the Law of the Sea established in accordance with Annex VI to the Convention" and "an arbitral tribunal constituted in accordance with Annex VII to the Convention" as dispute settlement bodies, "without specifying any priority between them". In its declaration submitted on March 12, 1997, Russia did not choose any of the above courts or tribunals. However, when the Soviet Union signed the Convention on December 10, 1982, it declared, pursuant to Article 287, that it chose arbitral tribunals constituted in accordance with Annex VII to the Convention as the basic body for resolving disputes concerning the interpretation or application of the Convention; special arbitral tribunals constituted in accordance with Annex VIII to the Convention for resolving four categories of disputes: fisheries, protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and dumping; and recognized the jurisdiction of the International Tribunal for the Law of the Sea under Article 292 of the Convention to deal with requests for the prompt release of detained vessels and crews. Russia recognizes the validity and applicability of the Soviet Union's declaration. The choice of dispute settlement bodies by States Parties is a right they freely exercise, and currently, only slightly more than a quarter of States Parties have made such declarations.

The Convention stipulates that "if the parties to the dispute have accepted the same procedure for the settlement of the dispute, the dispute may be submitted only to that procedure, unless the parties otherwise agree". Therefore, if a dispute arises between a State Party to the Convention and Canada concerning navigation in the

Northwest Passage, only those States Parties that have jointly chosen the International Tribunal for the Law of the Sea and arbitral tribunals constituted in accordance with Annex VII to the Convention with Canada may submit the dispute to these two bodies for compulsory settlement. With regard to disputes over navigation in Russia's Northern Sea Route, if there is a joint choice with Russia, the dispute shall be settled by special arbitral tribunals constituted in accordance with Annex VIII to the Convention and arbitral tribunals constituted in accordance with Annex VII to the Convention.

Although the four bodies specified in the Convention are listed in a certain order, the order of choice does not imply priority, and States Parties may freely choose any one or more of them to settle disputes. If some States Parties prioritize different bodies while others place different bodies on an equal footing in the procedure, they should be considered to have chosen the same procedure. If States Parties have chosen more than one of the same procedures in the same order, then in theory, they may institute parallel proceedings in different courts or tribunals. However, some scholars argue that such situations would not arise under the Convention, and if States Parties have chosen more than one of the same procedures in the same order, the court or tribunal with priority in the order should have jurisdiction. [8]

If a State Party has not made a declaration of choice, or has made a declaration pursuant to Article 287 of the Convention but the chosen bodies differ from those chosen by Canada or Russia, this indicates that the disputing parties have not accepted the same procedure as provided for in Article 286 of the Convention. However, this does not mean that the compulsory dispute settlement procedures of the Convention cannot be applied. Article 287, paragraph 5, of the Convention provides that if the parties to the dispute have not accepted the same procedure for the settlement of the dispute, the dispute may be submitted only to arbitration in accordance with Annex VII to the Convention, unless the parties otherwise agree. Accordingly, arbitration under Annex VII to the Convention may be compulsorily initiated by the disputing parties, and is not solely contingent on an agreement or consensus between States Parties. As a State Party to the Convention, if a dispute cannot be submitted to the relevant bodies for compulsory settlement pursuant to paragraph 1 of Article 287, and an agreement cannot be reached with Canada or Russia to submit it to a particular body for adjudication, the disputing party may unilaterally initiate the compulsory arbitration procedure provided for in Annex VII to the Convention for navigation disputes in Arctic shipping routes.

In summary, for navigation disputes in Arctic shipping routes between States Parties to the Convention, priority may be given to freely choosing any peaceful means for settlement. If this priority right fails to resolve the dispute, the compulsory settlement procedures of the Convention may be applied. Disputing parties may submit the dispute to the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII to the Conven-

tion, or a special arbitral tribunal constituted in accordance with Annex VIII to the Convention for settlement. Disputing parties may choose or entrust the above four tribunals to settle the dispute through agreement. Canada and Russia have both declared their chosen tribunals. Other countries wishing to resolve disputes with Canada or Russia through this procedure need to choose the same International Tribunal for the Law of the Sea or arbitral tribunal constituted in accordance with Annex VII to the Convention as Canada, and the same arbitral tribunal constituted in accordance with Annex VII to the Convention or special arbitral tribunal constituted in accordance with Annex VIII to the Convention as Russia. If States Parties have chosen more than one of the same procedures, in theory, parallel proceedings may be instituted in different tribunals. Even if the same procedure is chosen, jurisdictional disputes may arise. For example, in the 2016 arbitration case brought by Ukraine against Russia, Russia argued that the four categories of disputes between it and Ukraine should be resolved by the special arbitral tribunal jointly chosen by the two countries, rather than by the arbitral tribunal constituted in accordance with Annex VII to the Convention, but this argument was rejected by the arbitral tribunal. If the disputing parties have not made a declaration of choice, or have chosen different bodies, the dispute can only be submitted to an arbitral tribunal constituted in accordance with Annex VII to the Convention for settlement.

4. Conclusion

Resolving navigation disputes in Arctic shipping routes through the unilateral strength of a single country is difficult and may even exacerbate or expand the disputes. States Parties to the Convention may consider proposing that the United Nations organize an international conference to study the issues arising from the practice of the Convention since its entry into force, and on this basis, develop and codify relevant rules of the Convention to effectively resolve disputes over navigation in Arctic shipping routes.

In the future, while the confrontational and conflicting nature of competition among Arctic States becomes more prominent, peace and security remain the common pursuit of Arctic States. Security governance in the European Arctic region not only requires informal, practically effective codes of conduct to minimize the risk of accidental conflicts and defuse the possibility of conflict escalation after isolated incidents but also needs to firmly uphold the international order based on international law to provide guarantees for security governance. Particularly in the current situation, all countries should make good use of existing global and regional systems, frameworks, and rules to jointly maintain peace and stability in the Arctic region. They should not introduce conflicts or confrontations into the Arctic, nor should they allow Arctic affairs to become appendages of geopolitics or regional conflicts.

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