

Chapter Seven

Justin Nankivell and Kerry Lynn Nankivell

Shifting Ice, Shifting Policies: The Evolution of Ocean Governance in the Arctic

Executive Summary

- All signals suggest that *change is imminent in the Arctic*. Geo-physical change will give rise to necessary evolution in ocean governance to take account of new empirical realities.
- Policy evolution will take place within a dynamic global environment, in which *old and new stakeholders are redefining their needs, interests, and identities*.
- These shifts are *unlikely to be violent or dramatic*, but will likely unfold as manageable, multilateral processes in the political, diplomatic, and legal realms.
- *APEC can contribute to this process*, particularly by giving voice to private-sector perspectives on APEC's core issues, including energy security and resilience, safety and security of maritime transit, and supply-chain security.
- Shifts *may, however, be deeply consequential*, as fundamental concepts in ocean governance are renegotiated to advance the interests of some states over those of others.
- A historical look at Canadian Arctic policy, which has been at the forefront of advocacy for multilateral legal evolution in the Arctic, gives policymakers hints about how this evolution works in policy terms and its potential consequences for all stakeholders.

Introduction

The Northwest Passage, the series of five waterways that cuts through Canada's Arctic archipelago separating the Pacific and Atlantic Oceans, has been conceptualized for centuries through its majestic landscape and mariners' narratives centered on nature's

hostility, isolation, madness, and death. Indeed, Arctic waters are a site of unimaginable beauty where nature exists in its rawest, most challenging form. But, at least since the 1576 voyage of Martin Frobisher, the region has also been known as the “Arctic Grail,” a transit route linking Europe to Asia that promises to collapse distance and expand wealth and prosperity.¹ Indeed, it is both the promise *and* the danger of the Arctic ice that continue to capture imaginations and dictate the terms of humanity’s engagement with the region.

But things are changing on the Arctic horizon. First, the ice is melting at a quickening pace. Over the previous thirty years, sea ice cover has shrunk by 15 to 20 percent, and the existing ice continues to thin at variable rates. Though ice conditions were reportedly “good” in January 2012, most recent analysis of available satellite data suggests an overall decline in the extent of sea ice by approximately 3.2 percent per decade since the 1970s. Before 2005, the extent of January sea ice coverage had never fallen lower than 14 million square kilometers, though it fell below that mark in six of the subsequent seven years.² There is what scientists refer to as a “multiplier effect” being generated. Not only have longer summers prevented new ice from forming, they have also eroded older, multiyear ice. Thus, the overall time for thicker ice to reconstruct through the winter is consistently restricted, causing a loss of ice even if temperatures during the winter months remain constant. Many scientists now believe that Arctic ice is caught in a “death spiral,” and forecast that the Arctic might be temporarily ice-free in late summer as early as 2020 and altogether ice-free for most of the year by mid-century.

Amid a growing appreciation of the Arctic’s new climate is the emerging realization of the Arctic’s true mineral and energy wealth. Estimates suggest that energy resources in the Arctic represent perhaps 25 percent of the world’s undiscovered oil and gas

¹ See Pierre Burton. *The Arctic Grail: the Quest for the Northwest Passage and the North Pole, 1818–1909*. Anchor Publishing, 1988.

² See U.S. National Snow and Ice Data Center at <https://nsidc.org/arcticseaicenews/>.

reserves. The United States Geological Survey concluded in 2008 that there are an estimated 90 billion barrels of oil, 1,670 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids in the Arctic.³ Much of the oil is believed to be within the United States' jurisdiction off Alaska, while the gas is probably largely Russian. As a result, numerous international companies are investing heavily in projects meant to harvest petroleum from the seabed, and Arctic states are moving quickly to map their continental shelves in preparation to file submissions under the UN Convention on the Law of the Sea (UNCLOS).

Ocean Governance in the Arctic: The Case for Multiple Futures

All of this activity does not indicate that there is a scramble for Arctic territory and its resources. Rather, this increased interaction is only evidence of an effort by all Arctic states to advance their long-held interests in the region. These include newly prompted "extra-regional" actors, including the EU and China, which seek to advance their legitimate transit and deep seabed interests in the Arctic sphere. Given that the term "scramble" implies a lawless state of semi-anarchy, the more accurate interpretation of events is that Arctic policies by littoral and other states alike have, thus far, been structured largely in concert with the current rules of international law and within the bounds of neighborly good conduct. Indeed, the Ilulissat Declaration of May 2008 in Greenland declared the intent of the five central Arctic states (the United States, Russia, Canada, Denmark, and Norway) to have all matters in the region, including continental-shelf demarcations, solved by the legal rules contained within the

³ Kenneth J. Bird, Ronald R. Charpentier, Donald L. Gautier, David W. Houseknecht, Timothy R. Klett, Janet K. Pitman, Thomas E. Moore, Christopher J. Schenk, Marilyn E. Tennyson, and Craig J. Wandrey. "Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle," US Geological Survey (2008), full text available at: <https://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>.

existing UNCLOS legal framework.⁴ However, existing disputes about Arctic affairs continue, and it is somewhat unclear how the combination of UNCLOS and customary international law will apply to various scenarios.

This chapter will demonstrate that the future of ocean governance in the Arctic will neither be completely chaotic nor purely ordered; neither completely predictable nor a raw struggle for power. Rather, the shifting nature of the Arctic's geology is giving rise not only to complementary adjustments in states' Arctic policies, but to uncertainty about how to interpret international law in the region. These shifts are unlikely to be violent, but will likely unfold as manageable processes that reflect both political and legal restraints. In any case, there will likely be an evolution. As the geophysics of the region is altered (and the structural incentives of the global economy changed), some stakeholders in the Arctic will increasingly view the existing regulatory frameworks as a series of "rusty chains" reflecting historical diplomatic compromises; others will adhere to positions of relatively black-letter law. Nevertheless, a clear proposition can be distilled from this debate. It is not the formal law's *ability* to bind states that is at issue per se: all Arctic stakeholders are either signatories to UNCLOS or accept its provisions largely as customary. Rather, it is the *suitability* of the conventional interpretations of UNCLOS and the *continued relevance* of those interpretations to a new age that is in question. In an era when many foundational concepts of ocean governance are being reconsidered for political purposes, it is likely that historically agreed-upon rules will necessarily require reconsideration to accommodate new claims to legitimacy in this part of the global commons.⁵

⁴ Arctic Ocean Governance Conference, held at Ilulissat, Greenland (May 27–28, 2008), text available at: <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>.

⁵ This appears to be particularly the case in relation to how China views the current international legal arrangements in the Arctic region. See David Curtis Wright, "The Dragon Eyes the Top of the World," *Naval War College: China Maritime Studies Institute*, no. 8 (2001).

Canada's diplomatic and international legal history of Arctic policy has interesting lessons for contemporary policymakers thinking forward. Since the earliest days in the negotiation of UNCLOS, Canada has been at the forefront of advocacy for new and unconventional norms to be applied to the Arctic Ocean. Canada, above all, led a vanguard of coastal states from both the developed and developing world at UNCLOS to turn key principles of ocean law on their heads to allow UNCLOS to reflect new conceptions of justice better suited to the post-decolonization era. We do well to remember that Canada's lead negotiator to UNCLOS, J. Alan Beesley, came to "bury Grotius, not to praise him," as U.S. negotiator Bernard Oxman recalls vividly from that time.⁶ In the 21st century transition toward Asia-dominated geopolitics, we are likely to witness a similarly nuanced interplay of politics and law used by states to enact broader structural change.

How does this interplay both guide and shape legal change? In the Canadian case, beginning in the 1960s, Canada recognized a political opportunity to advance new concepts of justice in the field of ocean governance. This opportunity opened up as the global community reconsidered fundamental questions about the right to sovereignty over natural resources and the outward extensions of environmental authority over coastal water spaces. These new global ideas about international/domestic ethics and inclusive/exclusive world order conveniently advanced Canadian sovereignty and material interests. Indeed, the history of Canadian policy in the Arctic can be understood as a political chapter in which a single state harnessed the authority of its international lawyers to gain prominence within emerging concepts of international justice related to "special" global areas. The Arctic became the theoretical laboratory where new scientific thought collided with environmental ethics and industrialization. As a result of this unique combination of forces, Canada's Arctic case became one in

⁶ Bernard Oxman, "The Territorial Temptation: A Siren Song at Sea," *AJIL* (2006), 100: 832.

which international law and political necessity intertwined to produce new institutional frameworks. Not only did Canada's Arctic engagement with international law have a profound impact upon the direction of Canadian foreign policy from 1970 onward, but more importantly, it set the stage in structuring multilateral international debates within established multilateral institutions about the right of states' preventative actions, the balance of science, ecology, and sustainable development, and the broader sets of obligations owed between coastal states and seafaring nations.

Why is this historical episode especially relevant? In short, it is relevant because many of these same multilateral debates about justice, sovereignty, and the limits of international law on policy choice are now being engaged by many actors of the Asia-Pacific, including Japan, the Republic of Korea, and China. In the Canadian case, the UN Convention on the Law of the Sea both gave voice to new Canadian interests and interpretations of law, and also put limits on the possible extent and direction of any new evolution. Today, multilateral institutions whose members include the primary stakeholders to the Arctic Ocean will likely play similar roles: states will seek to leverage these institutions to introduce and publicize their preferences for the evolution of ocean governance, but will be forced to do so in ways that are acceptable to the wide community of stakeholders.

APEC will be one such organization, and will no doubt be a forum for this kind of discussion in the coming decade. Though APEC does not have the rule-making power of organizations like the IMO or conventions like UNCLOS, it does have an enduring interest in many of the Arctic region's primary issues: energy security and resilience, the safety and security of maritime transit, supply-chain security,⁷ and private-public dialogue. Though APEC

⁷ APEC was an early and effective meeting place for members and the private sector to discuss the importance of multilateral mechanisms to monitor and improve global supply-chain security following the 9/11 attacks in the US. For their continued work on this topic, see *inter alia*, APEC Committee on Trade and Investment (CTI) Annual Report to Ministers, (2010), appendix 5: Supply-Chain Connectivity (SC) Action Plan, full text available at: http://publications.apec.org/file-download.php?filename=210_cti_AR_App5_SCIActionPlans.pdf&id=1081_toc.

has not yet engaged in Arctic issues, its unique structure and member composition, particularly its wide and effective embrace of private-sector perspectives, will make it the likely site of contributions to the unfolding Arctic debate.

How will this debate unfold? How will evolution be managed? By developing a Canadian retrospective, we can understand how politics can reshape old legal institutions whose validity have begun to be challenged. In so doing, we can begin to appreciate the range of possible future scenarios of a new Arctic Ocean Framework Agreement, one that navigates between the demands of a new polar code under the International Maritime Organization, the needs of states and nonstate actors in the Arctic Council, and other relevant multilateral organizations, and the current framework of UNCLOS.

The Argument for the Northwest Passage: A Canadian Retrospective

Controversy in Canada over the status of Arctic waters began formally in 1969, when the commercially owned United States vessel *Manhattan* tested the waters of the Northwest Passage to see whether new oil discoveries off the east coast of Alaska could be shipped to ports in the eastern U.S. The newly elected Canadian Prime Minister Pierre Trudeau was immediately caught in a legal and political bind. The north was then, and is even more so today, a central component of Canadian collective identity and national heritage. To “lose the Arctic” would be ruinous for Trudeau, tantamount to losing a large swath of territory. Indeed, that the Arctic waters are the “territory” of Canada has largely become embedded in the domestic psyche, not only because the sea ice represents a tangible territorial entity upon which peoples carry out livelihoods and imagined communities are considered connected, but also because the maps of Canada illustrate what appears to be a contiguous landmass extending through to the summit of the northern polar region. Arctic waters are considered to be “geographical territory”

in Canadian public consciousness, whether rightly or wrongly, legally or ethically. Canada thus responded in a hostile fashion to the transit of the *Manhattan* as an American threat to turn sovereign Canadian waters into an American-dominated super-highway for oil and gas. Canada's government formally responded to the *Manhattan's* voyage with legislation, the Arctic Waters Pollution Prevention Act (AWPPA). The AWPPA avoided an explicit assertion of sovereignty over Arctic waters, but declared Ottawa's right to exercise functional jurisdiction, imposing rules and potentially setting limits on ships passing within 100 nm of the coasts of Canada's Arctic archipelago of 19,000 islands.

The legislation was controversial internationally. Many of the world's international lawyers viewed it as illegal or self-serving, while others saw it as a reasonable exercise of pollution-control authority by a coastal state intent on responding to increased transit volumes. Due to the contested nature of the AWPPA, Canada spent the early part of the 1970s attempting to entrench its norms of environmental protection within a range of institutional fora and nonbinding negotiations in the run-up to UNCLOS. With increasing support, Canada sought to have the AWPPA formally codified at UNCLOS, from 1974 to 1982.

Canada's legal diplomacy was welcomed primarily by developing states with substantial coastal interests, and protested by powerful navigational nations. This general dichotomy of interests was a partial reflection of the negotiating period for UNCLOS itself. Canada's Arctic interests presented a threat to established powers that had overwhelming interests in keeping as much of the world's oceans open to navigation as possible. In 1976, after two years of intense, three-party negotiations by the United States, the Soviet Union, and Canada, a compromise between coastal justice and navigational freedom was forged and Article 234 of UNCLOS was constructed. Article 234 validated Canada's environmental protection legislation and gave Canada the ability to administer ice-covered areas for the purposes of environmental protection

to a limit of 200 nautical miles. The three-party negotiations did several things concurrently: first, they granted Canada increased “sovereignty” in Arctic waters under UNCLOS, even though Article 234, *inter alia*, outlines that the passage of warships and government vessels are exempt from its provisions; second, they implied that “ice-covered areas” were a special category that had to be distinguished from other areas of natural fragility; third, the question of Canada’s full sovereignty over the Arctic waters and Northwest Passage was conveniently deferred, leaving somewhat determinable, but not wholly clear in many respects, the extent to which Article 234 could be applied in future scenarios.

The deferral of the question of Canadian sovereign control over the Northwest Passage meant that yet more contested politics and diplomacy would invariably arise. In 1985, the United States Coast Guard sailed the *Polar Sea* through the Arctic archipelago, absent express, final permission from the Canadian government. The voyage was taken, at least publicly, as a direct challenge to Canada’s claim of sovereignty by Canadian officials. In response, Canada declared “full sovereignty” over the Northwest Passage by drawing straight baselines across the top of the Arctic archipelago. Though no explanation was given publicly by Canada as to how this would affect its position under international law, the baselines effectively consolidated a zonal area within which Canada claimed it could treat its Arctic waters as internal waters subject to complete sovereignty beyond the existing legal provisions of environmental protection. The United States and the European Union lodged immediate diplomatic protests, noting that use of straight baselines was illegal in this instance and full Canadian sovereignty in the area was a fiction. The dispute remains today.

Retrospective to Futurist Perspective

Many accounts of Canadian Arctic policy argue that international law matters little to the case, proving it an example of the law’s inability to structure international behavior where national

interests are at stake. However, such a frame is a thin interpretation of a sophisticated political and diplomatic history. In the Arctic case, the policies and strategies of Canada, the United States, and the USSR were much more than just a one-time grappling for maritime zones. To the contrary, each state crafted careful policies to leverage the process of international rule-making for its long-term benefit. Canadian officials, as the materially weakest of the three parties, were particularly clever in the way in which they succeeded in wrapping a nationalistic claim to sovereignty in the Arctic in an internationally appealing call for increased environmental protection that struck a chord of international legitimacy. Canada improved a weak legal case not through power politics, but by using a political argument grounded in a universally understood moral obligation to protect the marine environment and deepen the world's commitment to environmental sustainability. As a result, Canada accomplished much more than extending its own sovereignty or administrative control. The Canadian delegation made a material contribution to the renegotiation of basic principles of ocean governance, elevating the newly enforced need for good stewardship of the world's oceans to compete with the long-held, assumed preeminence of freedom of navigation.

However, to frame Canada's construction of Arctic transit law as subject to overt Canadian manipulation would be an overstatement. In many ways, this body of law has been negotiated over time by Canadian officials who have interacted with, interpreted, and incorporated international perspectives on what can and cannot be accepted as legal in maritime affairs. Indeed, the final determination of whether or not the Canadian claim is valid will probably be made on the basis of whether or not international opinion supports Canada's basic appeal to unusual interpretations of sovereignty and justice. Moreover, whether, or how, Canada and Russia begin to demonstrate that they have equally valid claims in international law in their respective Arctic areas will also be of great significance. Because there is great overlap in their legal posi-

tions related to claims of internal waters, a Russian/Canadian legal union, if constituted properly in diplomatic strategy toward the construction of new multilateral frameworks like an IMO polar code or through well-established open multilateral institutions like APEC, would be a powerful force against an opposing state-based coalition of the United States, the EU, and China.

This specific historical episode provides some heuristics that can be used to understand the range of possible futures of ocean governance in the Arctic.

The first is that a globally evolving political environment creates conditions that are ripe for the emergence of new understandings of old norms. Just as Canada took strategic advantage of the newly transitioning post-colonial environment of the 1970s to socialize and consolidate new understandings of sovereignty and justice in the ocean domain, some others are embarking upon a similar path as the global order transitions today. In this fluid environment, multilateral institutions such as APEC have increased relevance, not less. It is through a process of interaction, interpretation, and negotiation with multilateral forums that new understandings of old concepts can be socialized and consolidated (or rejected).

Second, legal uncertainty and power transitions are as likely to be structured by law in the modern age as by conflict. We should remember that, even in the 1970s, and despite competing interests among super-power rivals, Canadian, U.S., and Soviet heads of state all demonstrated clear preference for establishing dominance through the negotiation of legal frameworks rather than through threats or outright conflict. Policymakers should expect a similar preference to emerge today, given the stakes of conflict and that deepening legalization of states' relations has emerged in most policy areas. The activity and prominence of APEC, particularly its early interest in issues such as energy dialogue (including public- and private-sector input), transportation, and supply-chain security, will no doubt mean that APEC and its working groups

will help to structure dialogue about ocean governance within the language of law and agreed-upon rules and standards of conduct.

Third, international law matters at the beginning of legal disagreements about ocean governance, not just as an end result of diplomacy. States that recognize the benefits of influencing rule-making beyond the point of enforcing hegemony understand they can only alter outcomes by appealing to justice, reasonableness, and universally understood concepts in a negotiation with the international community as a whole about the limits of legality. This indicates that, while new norms and rules cannot be formally introduced unilaterally, authoritative appeal to rules and order is critical to the process of introducing new norms, socializing them, and, ultimately, securing their acceptance as legitimate. New legal norms must be linked to and justified within a given historical context. Socializing new norms and rules cannot be done with insensitivity to the prevailing interests of other states, nor with lack of understanding of the prevailing interpretations of legal concepts. This means that the future of ocean governance in the Arctic cannot be purely chaotic, but will be bounded and ordered by existing agreements, relationships, and institutions, including APEC.

In sum, all signals suggest that change is imminent in the Arctic. As the seascape changes, so multilateral legal and regulatory frameworks will need to evolve to accommodate new empirical realities. Accordingly, new questions embedded in conventionally understood concepts will arise: how do ideas about environmental sustainability structure a new balance between ecologically fragile coastal areas and increasingly important transit trade? How does sovereignty over ocean spaces take into account that permanent sea ice is disappearing and sea levels are rising? How does exclusive ownership of the seabed interact with resources that straddle or migrate between jurisdictions? How does the private sector relate to governments in newly emerging paradigms? What are the limits of accountability and stewardship of sovereign zones for passersby from far-off states?

Furthermore, these questions will furthermore be answered in a time of global political transition in which many states are reevaluating their fundamental needs, interests, and identities. However, that there is a great deal of reconfiguration occurring in the Arctic domain does not mean that ocean governance in the area will be chaotic or conflict-ridden. To the contrary, analysts and practitioners should be prepared for a long, slow evolution in which tectonic shifts in the architectural governance of the region will likely be unavoidable, and the interaction between the demands of international law and politics continued as an outgrowth of forty years of diplomatic history in the region.