Climate Change and Arctic Governance: Three Images of a Changing Arctic

David D. Caron

Available at: https://works.bepress.com/david_caron/123/
The World Ocean in Globalisation

Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues

Edited by
Davor Vidas
Peter Johan Schei

LEIDEN • BOSTON
2011
Climate Change and Arctic Governance:
Three Images of a Changing Arctic

David D. Caron*

The contributions in this book focus on the challenges that globalisation poses for marine regions. This chapter does so in terms of the Arctic. Let me begin by explaining how I understand the theme. What are 'globalisation' and a 'marine region' – and what are the challenges? 'Globalisation' is a term widely used yet somewhat elusive to define. But at a minimum globalisation is, at least in the case of fisheries, a phenomenon in production and consumption that changes the regime of fishing in any region. A 'region' in turn is not simply any area of the globe – this was a lesson learned by UNEP in its regional seas programme. A region is also to some extent a community of states and of people. In this view of globalisation and regions, the 'challenges' are twofold. First, how do the nations of a region and the region itself respond to the demands of globalisation? And second, does globalisation necessitate a shift from regional governance to global governance?

In terms of the theme of this volume, the Arctic is indeed special. The theme appears to presume that a pre-existing region is challenged by the demands of globalisation. There is a double challenge in the case of the Arctic, where the area seeks to form itself as a region even as it is being challenged by the demands of globalisation. The Arctic is unique among marine regions in that it is feeling the demands of globalisation simultaneously with its emergence as a region. In looking at the Arctic within this theme and with the special case of the Arctic in mind, this chapter argues two points. First, discussions of the Arctic can be understood in terms of

* I thank my colleagues Harry N. Scheiber and Thomas Barnes for their comments and encouragement on this article. I also thank the Berkeley Law of the Sea Institute for its support.
three images – and each of these images tells us something about the Arctic as a region. Second, the circumpolar states will face substantial challenges in attempting to govern the future of the Arctic.

THE IMAGES

There are many conferences and much news today about the Arctic and its future. As I see it, the views expressed can be like ships passing in the dark – they come from different directions, go different places, and are concerned with themselves and somewhat unaware of the others. Needless to say this can be confusing, if not dissatisfying, for audiences. Over the years, I have observed that thoughts about the politics and law of the Arctic are animated by some image of the Arctic – and that these images can then tell us something about the Arctic as a region.

The First Image – The Impassable Area

The first image of the Arctic is the one that has dominated our vision for centuries and which, it is important to recognise, will persist to a significant degree, for reasons I discuss later. This image is in black and white. Pack ice – apparently empty of life, extends to the distant horizon beneath a slate-grey sky. In this image the Arctic is inhospitable and impassable. Here, the threat that the USSR and the USA posed for each other during the Cold War was not that the forces of the other side would come across the ice, but rather that their missiles would come over the ice. Here one does not think of crossing the Arctic Ocean – but rather of heroic explorers reaching the North Pole, only to return quickly.1 It was only in 1908 that Robert Perry, along with Mathew Henson and four Eskimos, were the first people to reach the North Pole. Not until in 1926 did Amundsen and then Byrd become the first to fly over the North Pole. I sailed to the Arctic as navigator and ship salvage diving officer aboard the USCGC Polar Star in June of 1976 and, even then, we met the seasonal ice of the Arctic south of the Bering Straits and the permanent pack ice just north of Alaska; even then, no American surface vessel had broken ice through to the North Pole.

In this image, both law and politics are dormant. As a noted Canadian scholar of the region, Douglas Johnston, wrote in 1970, ‘[t]he Arctic is largely hypothetical’.2 Boundaries with neighbours are sketchy and unclear,

1 For the account of a much-debated ‘dash’ in 1908 to the North Pole, see F.A. Cook, Return from the Pole (New York: Pellegrini and Cudahy, 1951).
but there is no urgency to resolving them. In general, the citizens of the circumpolar states live in more southern regions, and if the native peoples who do live in the North wish to move about as if these unclear boundaries did not exist at all, there is little harm in their doing so. It may very well be that valuable resources exist in the region, but their exploitation, like the exploitation of the manganese nodules of the deep seabed, may not be technically possible and, even if possible, do not yet make commercial sense. It may be possible to refer to an ‘Arctic region’, and it certainly is a region for the indigenous peoples who populate the rim of the Arctic. But in another sense it is a region delineated more by its absence rather than by its presence. ‘There simply have been insufficient incentives to trigger the development of answers to such questions; the severe environment has kept any significant presence out of the area.  

This image is almost gone now – but it not entirely, nor will it ever disappear completely. It may be that climate change will warm the Earth’s atmosphere sufficiently to reduce ice coverage, but that will not alter the angle of the Earth. The first image remains a strong image of the Arctic in the winter season. The Arctic may be getting warmer and more ice-free in summer, but it remains no less dark throughout the winter. The winter ice may become annual, rather than perennial, ice coverage and therefore not as formidable, but it will not disappear. Indeed, one estimate is that it would take an average 30°C rise in temperature globally to render the Arctic ice-free in winter. Recognition of the persistence of winter is crucial, because the warmer visions found in the second and third images must be seen in seasonal terms. Shipping routes will be used for only certain months of the year, not the entire year, and there may be transition periods where the risks of such use increase. Likewise, the anticipated expansion of offshore oil and gas activities must be seen in terms of the ability of such structures to withstand the structural demands of the winter season. The remnant of the image of the Arctic as an inhospitable place is one that calls for caution. In this sense, I feel, the calls made by many for the development of safety infrastructure in the Arctic are a critical point.  

---

2 Sec. e.g. A. Ananthaswamy, ‘Once the South Pole Was Green...’, *New Scientist*, 21 June 2008, p. 37: when the poles were green approximately 100 to 40 million years ago, average mean temperatures in tropics may have been as high as 40° to 50° C.
3 See, c.g., Brigham, chapter 18 in this book, on the challenges facing shipping.
The Second Image – The Ring

The second image is that of the composite photograph depicting the extent to which summer ice has retreated in recent years. Here the centre of the Arctic remains impassable to all but icebreakers. And even for icebreakers such passages take time, consume fuel, and involve some risk. But although the centre remains impassable, there is now a ring of water around the Arctic Ocean. In contrast to the impassable sense of the first image, we now can see the possibility of following the coastline, skirting the land on one side and the ice on the other.

In this image, both law and politics involve ‘proximate bilateralism’. In this image, each Arctic state focuses on its portion of the ring and in turn focuses on its borders with its immediate neighbours. It is in this sense of a focus on one’s immediate neighbours that I say this image involves not only the bilateral, but emphasises proximate bilateralism.

Each coastal asks what value – what oil or gas, what fish – is in its portion of the accessible ring. And quite immediately, each Arctic state becomes more concerned with the location of its borders with its neighbours, in order to understand what belongs to it. The Canadians and the Danes discuss Hans Island and the Lincoln Sea. Canada and the United States discuss a line in the Beaufort Sea, while the United States and Russia discuss the line above the Bering Strait. Russia and Norway look at a part of the ring that has been accessible for a long time, the Barents Sea, and seek to refine the line between them and to further their separate uses of the area. Shared navigational use of the ring becomes an issue between neighbours (and to a lesser extent for states outside of the Arctic region). As the Northwest Passage opens up, the recurring discussion between Canada and the United States takes on a new sense of seriousness. For Russia, whose coastline encompasses almost all of the Northern Sea Route, the previously limited Russian practice regarding the right of such passage is examined more closely.

---

5 L. Tymchenko, ‘The Northern Sea Route: Russian Management and Jurisdiction over Naviga-
Fundamentally, this image is nationalistic and inward-looking. States look outward — but only to understand what is within. In this image there is an emerging Arctic region, but more properly it should be thought of as two emerging Arctic arcs: that along the Northwest Passage, and that along the Northern Sea Route.

The Third Image – The Semi-Enclosed Ocean

The third image is an image of the Arctic in the not too distant future, by 2030 or perhaps as early as 2015. For the first time, there is no summer ice. The image is of a semi-enclosed ocean. And here we should bear in mind that this semi-enclosed ocean is five times larger than the Mediterranean. Likewise, it is important to appreciate that even if the seabed of the Arctic has been substantially divided up between the circumpolar states, a significant part of the superjacent waters of the Arctic Ocean will remain high seas.

This image leads to two significant shifts from the second image. First, one looks not only to one’s neighbours so as to define oneself: one also looks outward across the sea, as each state recognises that it is an inseparable part of the larger arctic region (and here the word ‘region’ is used in its full sense).

Second, like all semi-enclosed areas, the states inside will become concerned with the states outside the sea entirely, and the states outside will become increasingly interested in asserting their interests in the semi-enclosed ocean. Because of both of these shifts, in the third image, law and politics are concerned with governance of a shared area.

In the third image, many of the coastal development projects viewed as possible in the second image have now come about. There are many more people in the Arctic and significantly more activity. The emphasis in the second image, of drawing jurisdictional lines between neighbours along the
ring, increasingly adds and gradually shifts to the drawing of jurisdictional lines into the centre of the Arctic Ocean, particularly on the seabed. Likewise, there is a shift from the drawing of jurisdictional lines along the ring to an emphasis on governance of a shared area, the semi-enclosed ocean.

**The Influence of the Three Images**

The influence of each of these images on law and politics is changing as a result of warming in the Arctic and the social and economic consequences of that warming. It is important to bear in mind that, depending upon one's position, these three images exist simultaneously in many discussions. The general effect of warming is to give more influence to the issues present in the second and third images, and in essence to accelerate our moving from the first toward the third image.

**THE DIFFICULTY OF REGIONAL ARCTIC GOVERNANCE**

If the challenge is governance, then the critically important point is that successful governance of the Arctic is heavily dependent on Russia. It is often said that the policy choices of the United States, China and India are central to the question of climate change. So too will it be the choices of Russia that are central to the future of the Arctic. The Arctic as a semi-enclosed ocean is dominated in terms of coastline by Russia and by Canada. And between the two of them, it is quickly apparent that in terms of population, economic activity, and watersheds emptying into the Arctic Ocean, it is Russia that is most 'present' in the Arctic. That fact is problematic in that the possibilities of successful shared governance are highly dependent on the regulatory capacities of the states involved. And in this regard, the reality on the ground is that the Russian regulatory state is still a work in progress – a circumstance that is probably even greater in the Russian hinterland. This circumstance is further complicated by the distribution of power in the Arctic. States have different levels and types of power. Sometimes bases of power are legally conferred. One legally enshrined source of power in the Arctic is

---

12 The claims of the circumpolar states to the seabed of the Arctic are complicated by the realities of the seabed and the recognition in the 1982 UN Convention on the Law of the Sea that a coastal state’s claim to the (legal) continental shelf can extend further than 200 nautical miles if the shelf itself extends further. Thus ocean surveys of the Arctic seabed are in hot demand as the second image shifts towards the third. On the continental shelf beyond 200 nautical miles, see Part V in D. Vidas (ed.), *Law, Technology and Science for Oceans in Globalisation* (Leiden: Martinus Nijhoff; 2010), pp. 423-569.
the amount of ocean areas controlled by the adjacent state is dependent on the length of that state’s coastline. The United States is a powerful state with only a small percentage of the coastline of the Arctic. Canada has a long coastline but relatively less power as a state. Russia has both the longest coastline of any state in the Arctic and significant power as a state. As Mikhailichenko observes: ‘Russia’s Arctic zone embraces almost one half of the Earth’s circumference in these latitudes’. 13

Given these differences and the centrality of Russia, how are the five different Arctic states to work together when it comes to regional governance? The main institutional effort at Arctic governance at present is the Arctic Council. 14 But although the Council has an innovative structure and has produced important studies in its short existence, it is also an institution of limited capacities, with certain issues beyond its mandate. It is important to note, for example, that the extensive and highly problematic nuclear wastes dumped in the Kara and White Seas are not discussed at the Arctic Council.

Over the past few years, several scholars, warning of a looming land rush in the Arctic, have called for a comprehensive ‘Arctic Treaty’, often making comparisons to the treaty governing Antarctica. 15 Others see the analogy to Antarctica as misplaced and the call for a comprehensive treaty likewise misplaced. 16 Yet others regard the 1982 UN Convention on the Law of the

---

15 See, e.g., S.G. Borgenson, ‘Arctic Meltdown: The Economic and Security Implications of Global Warming’, Foreign Affairs, Vol. 87, March/April 2008, p. 63. See also S. Holmes, ‘Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty’, Chicago Journal of International Law, Vol. 9, 2008, at p. 322, arguing that the Antarctic Treaty could serve as a loose model; and D. Rothwell, ‘The Arctic in International Affairs: Time for a New Regime?’, ANU College of Law Research Paper No. 08-37, 2008, especially pp. 12–13: ‘could the Antarctic model be a useful way forward for the Arctic? There is in principle nothing to stop the Arctic States from looking towards an Antarctic Treaty-type model for the Arctic region... Such a Treaty would, however, only be a starting point. There would inevitably be a need for additional protocols to address specific issues such as navigation and shipping, seabed resource management, marine environmental protection, and the rights and interests of indigenous peoples’.
16 See, e.g., Legal Adviser of the US Department of State, J.B. Bellinger, ‘Treaty on Ice’, New
Sea as providing a comprehensive regime for high-seas commons in the Arctic, and call on the USA to ratify that treaty. 17

In addition, as indicated by the second shift that accompanies the third image, we may expect that the states of the rest of the globe will become increasingly interested in the Arctic. In particular, in the third image, there can be little doubt that the fishing fleets of East Asia and Northern Europe will gradually begin to operate on the Arctic high seas, perhaps in significant numbers. (Recall also that fish are particularly sensitive to water temperatures and have already been observed to be moving northward.) Again governance will become important. At a minimum, we will see, for example, the creation of one or more regional fisheries organisations in the Arctic. And as regional efforts at governance advance, we can expect that states outside the region will ask why the Arctic Ocean should be the province of a handful of states, and will seek to globalise such efforts at governance, at least for those areas beyond national jurisdiction.

Finally, we must acknowledge that cooperative governance as a historical matter is not to be assumed. In particular, in the third image there arises a possibility that was impossible in the first image: the militarisation of the surface of the Arctic Ocean. Is it so far-fetched to imagine the symbolic entry of a convoy of destroyers by 2020, or of an aircraft carrier by 2030? In one sense this might be seen as merely a symbolic militarisation, given the operation of submarines under the Northern ice for many decades. But symbols often matter. Again, at some point, this surface presence will include the military vessels of non-circumpolar nations. Even if unlikely, a general agenda item, perhaps better thought of now rather than later, is the regional demilitarisation of at least the surface waters of the Arctic Ocean.

York Times, 23 June 2008, at p. A21, who argues that although ‘[s]ome nongovernmental organizations and academics say that we need an ‘Arctic treaty’ along the lines of the treaty system that governs Antarctica ... such a treaty would be unnecessary and inappropriate’. 17 Scholars and politicians alike have pointed to the changing situation in the Arctic as demanding US ratification of the LOS Convention; see, e.g., B.G. Sobel, I. Smith and A. Rosencranz, ‘The Melting and Partitioning of a Global Commons’, Environmental Policy and Law, Vol. 37, 2007, pp. 467–470. As is often the case, there also was a crossover between second-image and third-image argumentation. Even as some called for the ratification of the LOS Convention to provide a regime for the high-seas commons in the Arctic, others pointed to the need for the USA to ratify the Convention, so that the USA might make its own extended claims to the continental shelf; see, e.g., D. Moe, ‘US Should Follow Law of the Sea’ (Letter to the Editor), Juneau Empire, 14 April 2009 (arguing that by ‘refusing to sign this treaty, the United States is once again going to be on the outside looking in, while the other countries take control of the Arctic Ocean’).
The changing Arctic presents a wide range of issues, and the ongoing discussions can often talk past each other. Each of the three images of the Arctic described above is important to addressing the Arctic's future. If the prime driver of interest in the Arctic is resource exploitation, then we can rest assured that there will be much discussion in the second image. It is the third image that raises important questions of the national, regional and global governance of the region that we will need to incorporate into the discussions to come.