

## *Chapter 12*

# **Power, Order, International Law, and the Future of the Arctic**

*Nengye Liu*

We are living a fast-changing world. This feels extremely true in 2020. While the whole world is in the grip of the COVID-19 pandemic, the climate continues to inexorably change—causing serious floods in China,<sup>1</sup> forest fires in California, the Amazon and Siberia,<sup>2</sup> and the melting of the Greenland icesheet and the Arctic ice shelf in Canada.<sup>3</sup> Moreover, geopolitical competition, especially the United States-China rivalry, is becoming more and more intense. It is clear now that the two largest economies of the world are not just fighting a trade war. Rather, they are accelerating the decoupling process in almost all aspects of their bilateral relationship, from technology to higher education. In 2020, U.S.-China relations hit their lowest point since the establishment of diplomatic relations in 1979. When Chinese diplomats in Houston were burning secret documents just before the Chinese Consulate was to be shut down by the Trump administration with three-days' notice,<sup>4</sup> the story went viral in social media with the poignant reference to the Second World War when it had been the Japanese diplomats who were expelled from Washington D.C. All these factors generate a feeling that the world we are familiar with is collapsing. However, what exactly was this world we used to know from a normative perspective? What are implications of the current changes in world order for the Arctic and its governance? In this chapter, I aim to briefly examine the relationship between power, order, and international law; explain the roots of Western anxieties of China's rise; discuss driving forces of the current development of international law in the Arctic; and imagine some desirable futures for Arctic governance.

### **Rules-based International Order**

It is fair to say that the contemporary world, the world as we have known it since 1990/91, if not to say 1945, was to a large extent dom-

inated and constructed by the United States and its allies. Certainly, since the end of the Cold War, we have been living in a “rules-based international order”—to use the terminology of Western think tanks, politicians, and government policy papers. This order is defined as “the framework of liberal political and economic rules, embodied in a network of international organizations and regulations, and shaped and enforced by the most powerful nations.”<sup>5</sup> The term “rules-based international order” has in recent years been frequently used in Defense Strategies of Australia, the United Kingdom and the United States. For example, “rules-based order” was mentioned 48 times in the 2016 Australia Defence White Paper.<sup>6</sup> There is broad agreement in the West that China is a major challenger to the existing rules-based order.<sup>7</sup> For example, Chatham House suggested in its 2015 Report that:

The danger today is that this questioning of US global leadership has opened the space for other countries to pursue a ‘might is right’ approach to their own policy priorities. The Chinese leadership is taking steps to turn its contested claims over islands in the South China and East China seas into a *fait accompli*.<sup>8</sup>

The Arctic is no exception. The United States Coastal Guard’s 2019 Arctic Strategic Outlook explicitly states that “China’s pattern of behaviour in the Indo-Pacific region and its disregard for international law are cause for concern as its economic and scientific presence in the Arctic grows.”<sup>9</sup> This is echoed by the United States Department of Defense’s Arctic Strategy in the same year,<sup>10</sup> and this language only gained intensity in Secretary of State Michael Pompeo’s speech at the Arctic Council’s Ministerial Meeting in Rovaniemi, Finland on May 7, 2019.<sup>11</sup>

In the author’s opinion, a so-called “rules-based international order” is a neutral term. It very much depends on who is talking about it, to define its meaning. For example, a 15<sup>th</sup> century Ming Dynasty official of Imperial China would well think of a “rules-based international order” as a China-dominated tributary order in East Asia.<sup>12</sup> Likewise, a Japanese diplomat at the climax of the Second World War would believe the “Greater East Asia Co-Prosperity Sphere”<sup>13</sup> to be a rules-based international order. Indeed, during the ascent to world power status of the Japanese Empire, Prime Minister Fumimaro Konoe announced a “New Order in East Asia” must be established in 1938.<sup>14</sup>

Second, when discussing China's challenge to the current rules-based international order, Western literature, intentionally or unintentionally, has tended to focus on rules. And as long as China is seen as strictly following contemporary international law, which is at the core of rules-based international order,<sup>15</sup> the existing system does not appear to be under pressure from a rising power. This is of course an incumbent's view. What is more interesting is to examine the real implications of China's rise for the order.

There is always a hidden power structure in any order. A country might be very powerful. Nevertheless, no matter which kind of power a country boasts, be it hard/military power, soft power<sup>16</sup> or sharp power,<sup>17</sup> power alone cannot directly determine the development of international law. There are numerous cases that small or less powerful countries played a significant role in the making of international law. For example, it was Arvid Pardo, Permanent Representative of Malta to the United Nations, who proposed the application of the concept of "common heritage of mankind"<sup>18</sup> to the deep seabed mining, which was incorporated in the United Nations Convention on the Law of the Sea (UNCLOS).<sup>19</sup> On the contrary, the United States, which was no doubt the dominant power during the negotiation of the UNCLOS (1973–1982), refused to ratify the UNCLOS given national interests concerns.

Henry Kissinger, in his book *World Order*, describes order as "The concept held by a region or civilization about the nature of just arrangements and the distribution of power thought to be applicable to the entire world."<sup>20</sup> Power is therefore crucial in determining international order. Once there is an established order, it will eventually be legitimized by international law. In the meantime, established international law can demarcate the boundary of rights and obligations, so as to guide countries' behaviour within an order.

The relationship between power, order and international law is vividly reflected in the history of Arctic governance. The Svalbard Treaty, which celebrated the one hundred years anniversary of its adoption in 2020, is a great example of post-World War I power politics. During the 1920 Paris Peace Conference, the Allied Supreme Council, dominated then by colonial powers such as the British Empire and France, in the absence of the Soviet Union and Germany, granted Norway 'full

and complete' sovereignty over Svalbard archipelago in the Svalbard Treaty.<sup>21</sup> Meanwhile, in order to balance the interests of other rising powers, such as the United States, the Svalbard Treaty created an innovative regime to allow contracting parties 'equal rights of fishing and hunting in the territories specified in the Treaty and in their territorial waters.'<sup>22</sup>

The relationship between power, order and international law as discussed above may therefore well explain the root anxieties of the West regarding the rise of China in the Arctic—even though China in its first ever Arctic Policy White Paper in 2018 did reaffirm its commitment to existing international law in the Arctic. According to the Arctic Policy White Paper:

China is committed to the existing framework of international law including the UN Charter, the United Nations Convention on the Law of the Sea (UNCLOS), treaties on climate change and the environment, and relevant rules of the International Maritime Organization, and to addressing various traditional and non-traditional security threats through global, regional, multilateral and bilateral mechanisms, and to building and maintaining a just, reasonable and well-organized Arctic governance system.<sup>23</sup>

Nevertheless, concerns from the West remain.<sup>24</sup> One common suspicion of China's potential practice in the Arctic is China's disregard of the Arbitral Award unilaterally initiated by the Philippines in the South China Sea. This is up to further debate because China has territorial claims in the South China Sea, but not in the Arctic. There are a lot of "alarmist" news regarding Chinese activities in the circumpolar region, e.g., China opened a new research station in Iceland in 2018;<sup>25</sup> China's second ice-breaker was set for the Arctic since 2020;<sup>26</sup> China has been promoting the "Polar Silk Road"<sup>27</sup> as part of its ambitious Belt and Road Initiative.<sup>28</sup> However, so far, there is no concrete evidence that any Chinese activity in the Arctic is in violation of international law. It is believed that the real fear is a changing order that might be resulted from shifting power, as reflected by China's fast developing scientific capacity, its unmatched demographic strength, and relentlessly growing geo-economic influence. Eventually, a new order could then be materialised by changing international law in the Arctic.

## **Current Development of International Law**

The Arctic, a region within the Arctic Circle, is largely an ice-covered ocean surrounded by land. In recent years, there has been a wave of significant development of international law in the Arctic. At the global level, the Polar Code<sup>29</sup> was adopted by the International Maritime Organization (IMO) in 2015, which aims to strengthen safety requirements of commercial shipping in the Arctic.<sup>30</sup> Moreover, the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (CAO Agreement)<sup>31</sup> was achieved among Arctic and non-Arctic States in 2018. Furthermore, the United Nations General Assembly had held three Intergovernmental Conferences since 2018, with the aim to adopt a legally binding instrument for the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (BBNJ).<sup>32</sup> The negotiations over BBNJ, which intends to cover a legal gap of high sea governance, is probably the most important development regarding international law of the sea after the entry into force of the UNCLOS. Because it is commonly agreed that the Law of the Sea is part of applicable international law in the Arctic,<sup>33</sup> the BBNJ will no doubt have significant impact on governing the high sea portions of the Arctic, such as the Central Arctic Ocean (CAO) around the North Pole.<sup>34</sup> At the regional level, the Arctic Council is the most important forum for regional cooperation. Under the auspices of the Arctic Council, three legally binding instruments were enacted among eight members of the Arctic Council, including the Agreement on Enhancing International Arctic Scientific Cooperation (2017),<sup>35</sup> the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (2013),<sup>36</sup> and the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (2011).<sup>37</sup> It must be pointed out that non-Arctic states can only become observers and have no voting rights in the decision-making process of the Arctic Council.

The main driving force of the above-mentioned developments, however, is outside of the existing rules-based order in the Arctic. They are driven by global environmental changes in the Anthropocene.<sup>38</sup> The Polar Regions (Arctic and Antarctica) are probably among the worst affected areas on the planet suffering from human-induced global warming.<sup>39</sup> Ironically, it is this climatological transformation that is

opening up the previously ice-covered Arctic seas, and is attracting a lot of economic interest from industrialized countries. For example, because of the thought of an ice-free CAO during the summer months by mid-century, it is predicted that a direct transpolar shipping route that connects Asia and Europe will be available in 20 years' time.<sup>40</sup> For the same reason, commercial fishing may occur in the CAO in the foreseeable future. International law must then respond to further regulate increased human activities in the Arctic.

Within the multi-level governance structure of the Arctic, it is noted that incumbents have been taking the driver's seat for the development of international law, which means the existing rules-based order is, to a large extent, maintained so far. For example, the Polar Code was originally a German initiative in the 1990s,<sup>41</sup> which was further pushed by Arctic states, in particular the United States, Norway and Denmark in the IMO. The CAO Agreement was a U.S. initiative to put a regulatory framework in place for the CAO before it is too late, originating from Joint Resolution No. 17 of 2007 of the U.S. Congress.<sup>42</sup> Nevertheless, there are signs that the international law-making process in the Arctic is reflecting a shift in power and order in the region. The CAO Agreement is once again a good example. In 2015, the Arctic Five (Canada, Denmark (on behalf of Greenland), Norway, Russia and the United States) invited China, Japan, South Korea, Iceland and the European Union (EU) to negotiate a legally binding treaty on the prevention of unregulated fisheries in the CAO.<sup>43</sup> The reason behind this was that without effective cooperation from states and entities with significant fishing interests in the high seas, Arctic coastal states alone would not be able to achieve sustainable fisheries management in the CAO.<sup>44</sup> It is particularly interesting to see China and South Korea. Both are non-Arctic but important distant water fishing (DWF) states, and both were invited as equal partners to the negotiations. The People's Republic of China only began distant water fishing in 1985, but it has grown to become the largest DWF state in the world, with 2,654 fishing vessels operated by 169 companies on the high seas of the Pacific, Indian, Atlantic and Southern oceans, as well as in the exclusive economic zones (EEZs) of 42 countries.<sup>45</sup> China's large DWF fleet has drawn a lot of international attention. For example, it is reported that over 300 Chinese DWF vessels have been fishing in Galapagos's waters, just outside Equator's exclusive economic zone since 2017.<sup>46</sup> This kind of pow-

er cannot simply determine the development of international fisheries law in the Arctic. Nevertheless, it guarantees China to be invited to the negotiation table with the Arctic states and play a role in the adoption and future development of the CAO Agreement.

### **Desirable Future for the Arctic**

What will the Arctic's future look like in 2040—a region facing the impact of global environmental change and geopolitical competition at the same time. It is notable that the Arctic is becoming more and more securitized (and militarised). When the Trump administration approved a plan in 2020 to build more Polar icebreakers,<sup>47</sup> it was obvious that the United States began to try to balance a rising power to maintain existing order in the Arctic. As long as China keeps expanding its presence in the region, it is expected that the U.S.-China competition will intensify. This is not a desirable future<sup>48</sup> for the Arctic—an “exceptional” area in some respects because of its relatively long tradition of being a low-tension area, with a spirit of cooperation having prevailed among the region's states over three decades now for the protection of its vulnerable environment.

Another aspect to achieve a desirable future of a low tension, better environment in the Arctic is for China to adopt an Arctic Policy 2.0. By firmly committing itself to follow current international law that is applicable in the region, China hopes to ensure Arctic states that it will not challenge the existing rules-based order. Nevertheless, according to my power-order-international law theoretical framework, China's global rise with all its consequences felt in the Arctic will inevitably shake the existing order. This is the root of anxieties from the Arctic states on China—a feeling that is fair, understandable and cannot easily be discarded.

China has been defending very hard its legitimate interests in the Arctic, such as shipping and fisheries. Indeed, China has gradually become an “interpretive power,” trying to re-interpret existing international law for its own benefit. For example, the most visible dimension of China's Polar Silk Road is the use of Arctic shipping routes, especially the Northeast Passage along Russian coastline, which is estimated to greatly shorten the distance between Northern China and the Eu-

ropean market.<sup>49</sup> Even though Chinese officials keep quiet about the legal status of the Northeast Passage and Northwest Passage, Chinese academics have widely agreed that China should not support those as internal waters of Russia and Canada respectively.<sup>50</sup>

To successfully shape a new order, China's leadership would have to provide an alternative vision—one that is more inclusive and better than the existing one. A good example where China could learn from the United States is Washington's role in the establishment of the 1958 Antarctic Treaty.<sup>51</sup> Based on its dominant power, with the aim of containing the expansion of the Soviet Union, the United States initiated the adoption of the Antarctic Treaty.<sup>52</sup> The Antarctic Treaty goes beyond the colonial order of the Antarctic by devoting the whole continent to peace and science under collective governance. The bifocal approach of the Antarctic Treaty also takes care of existing claimants by neither denying nor accepting their territorial claims.<sup>53</sup> The Antarctic Treaty System has been stable over the past 60 years.

Therefore, if China wants to win the hearts of the Arctic states, including two major powers United States and Russia, Beijing will need to construct a new vision that is beyond its own national interests. The Chinese government has been promoting President Xi Jinping's "Community for a Shared Destiny of Mankind" since 2013.<sup>54</sup> This concept may have potential to serve China's role in the Arctic. Nevertheless, it is quite vague when it comes to the implementation of this concept regarding what exactly China wants to achieve in the Arctic. So far, the Polar Silk Road is largely an economic initiative of building shipping infrastructure and developing oil and gas, which might even be contrary to China's commitment to combat climate change.<sup>55</sup> Essentially, in an Arctic Policy 2.0, China should shed light on its detailed plan to strike a delicate balance between economic development and environmental protection in the Arctic. For example, rather than use climate change as an excuse to get involved in Arctic affairs, China, the largest greenhouse gas (GHG) emitter in the world, should draw a roadmap of reducing GHG in coming year in order to help reduce global warming in the Polar Regions. Such a plan, with support of concrete state practice, may play a positive part in making a new rules-based order in the Arctic. And this in turn might facilitate a smoother rise of China in the Arctic region.



## **Conclusions**

There are several possible futures for the Arctic. Geophysically and climatologically, the region might be doomed with complete ice-melting, rapid permafrost thawing, increasing forest fires, resources grabbing, geopolitical competition or even conflict. However, one would hope that the urgency of combating climate change with all its consequences for the Arctic would act as a catalyst for cooperation among various powers. In any case, a sustainable and peaceful Arctic would be of interest for everyone. In this chapter, I only discussed how to achieve a desirable outcome of a peaceful Arctic future—and how this might be achieved where one of the (rising) global—albeit exogenous - powers, namely China, to pursue policies as outlined above. The future of the Arctic depends first and foremost on the actions of the Arctic states and their peoples. But it will be determined by them in interplay with others, who are increasingly pushing onto the scene.

## Notes

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