Arctic Sovereignty -- and International Law

Slide One – Introduction

Thank you for the introduction -- and my sincere appreciation for the opportunity to participate in this workshop.

This morning, I want to revisit the first chapter of my book, POLAR IMPERATIVE, and review how the evolution of international law has resulted in current interpretations of Arctic sovereignty and Laws of the Seas.

Slide Two  Definitions of sovereignty

The word “sovereignty” has taken on a variety of meanings in recent years. For purposes here, I refer to three definitions.

The first – *de jure* sovereignty – is a term used in international law and defined as having supreme power or title over a specific territory by political or legal right recognized by other nations.

The term *de facto* sovereignty is a generic or general term referring to having power -- “in fact” or in real terms -- but usually without the political or legal right inherent in *de jure* sovereignty. This term is usually applied in the negative, as in the case of a loss of economic, political, or military control by sovereign nation.

The colloquial term “paper sovereignty” refers to a situation whereby two nations have signed an agreement officially recognizing one nation’s sovereign rights, even though the other nation may have “de facto” power or influence that diminishes the sovereign nation’s ability to exert full control.

Slide 3  First Arrivals

The first to arrive to the North American Arctic were Palaeo-Eskimos who migrated westward from Siberia across the ice on Bering Strait around 4000 years ago, eventually reaching as far as
Greenland. The last to arrive were whale hunters referred to as Thule Inuit, the ancestors of the present day Inuit. Because of superior means of travel and weapons, they eventually displaced existing Eskimos.

Yet long before the Thule Inuit reached Greenland, Europeans had already settled in the southern portion of the island. These were Norwegian Vikings, arriving from Iceland around 986 AD – over 250 years before the Thule Inuit and 500 years before Columbus allegedly discovered America.

They established two large farm colonies, overseen by a Catholic Bishop reporting to Rome, locally governed, but paying taxes to the King of Norway and dependent upon trade with the Bergen merchants.

At their peak, the two colonies were believed to have a combined population of over 3,000, a sizable number by New World standards. Yet by 1450 AD, the Viking farmers disappeared without a trace. Inuit oral history suggests that when ships stopped arriving from Norway, the farmers were unable to prevent rape and pillage by foreign fishermen.

The Paleao-Eskimos and Viking farmers had not survived the Little Ice Age. The Thule Inuit did and are recognized as the ancestors of today’s Inuit.

Slide 4 Mercator Scherer maps

The Arctic of the New World remained relatively unknown to most Europeans until the early 19th century. Yet competition among whalers was fierce, especially when added benefits were earned from trade in furs and ivory. Conflicts inevitably arose over the right to establish whaling stations and trading posts.

Initially, there was no thought of creating permanent settlements after the debacle of Martin Frobisher’s alleged discovery of gold in
the 1570s, but competition for furs increased and royal charters were granted to trading companies to protect their rights to specific areas.

In 1670, for example, England granted a royal charter to a group of businessmen for all lands that drained into Hudson Bay. In 1721, the king of Denmark/Norway granted a charter to a Lutheran missionary to create trading settlements on southern Greenland. These were re-issued until 1789 when the government took over full operation of the Royal Greenland Trading Company. And in 1799, the Russian Tsar granted a royal charter to the Russian American Company to include all of what is now Alaska.

While the royal charters allowed nations to stake out sovereign rights in the New World, they also met with opposition – by the French in Hudson Bay, by British and Dutch whalers in Greenland, and by British and Spanish ships in Russian Alaska.

Britain and Denmark successfully used their royal navies to protect their interests, but Russia was unable to halt attacks by British ships, even after signing a treaty with Britain in 1825. By 1860, Russia was virtually bankrupt after the Crimean War and unable to provide naval support to defend against further attacks on its trading posts and merchant ships. As a consequence, Russia sold Alaska to the United States in 1867 to prevent it from falling into the hands of the British.

Britain responded: first, in 1870 by forcing Canada to annex the Hudson’s Bay Company’s lands, then followed in 1880 by the transfer of the Arctic Islands to Canada.

Slide 5– Map of Canada 1880
As a result, the 13 year-old Dominion of Canada had mushroomed to become one of the largest countries in the world in terms of size, but with a relatively miniscule population, and with no navy or even a government ship capable of sailing in ice infested waters to monitor its newly acquired Arctic lands.

By now, a rudimentary form of international law had evolved
which governed the rights of nations to claim newly discovered lands. The Law of Nations, or international law as we know it today, is rooted in Roman Law dating back to 415 BC -- the Laws of the Twelve Tables.

Closely paralleling the Law of Nations was the evolution of Laws of the Sea, with *Mare Liberum* referring to seas open to all nations, and *Mare Clausum*, referring to a closed sea under authority of adjacent nations and restricted to others. Increased exploration of the New World saw the objectives of the Laws of the Sea collide with those of the Law of Nations requiring changes.

Yet there was no attempt to codify these laws until 1632, when King Charles I of England requested terms be set down in “public writing.” And so began a series of treatises written by learned scholars, which would be tested against public acceptance and court decisions.

For the next 200 years, roughly 1650 to 1850, discovery claims of uninhabited or sparsely populated lands were considered adequate if officially declared by a nation state, with sufficient naval power to protect those claims.

Slide 6 British map of the Circumpolar region ca 1859

As it happened, there were unintended consequences from Britain’s transfer of the Arctic Islands to Canada, partly because the simple order-in-council had not defined the boundaries, nor had the transfer been debated and ratified by parliament. (map, British Admiralty had no idea what they were.)

The importance attached to discovery claims would also change. At the 1884-5 Berlin Conference on Africa, it was decreed that a discovery claim of new lands on that continent would only be considered valid if followed in reasonable time by “effective occupation.” Otherwise, such a claim would be “inchoate” or temporary, thus open to challenge by other nations.
Although later interpretations of international law would modify the nature of “effective occupation” and extend the “reasonable time” requirement for remote polar region, -- this was not the case in the early 1900s, hence plans to establish a permanent title became a high priority for Canada’s Department of the Interior and later the newly formed Department of External Affairs.

Government actions were influenced initially by the written opinions of English scholar William Edward Hall, and following his death, by those of by Lassa Oppenheim, a German born scholar living in England.

Oppenheim, like Hall before him, argued that discovery claims alone were not sufficient to maintain title to uninhabited lands, but must be followed up “within reasonable time” by “effective occupation.” He claimed that this could only be accomplished by settlement accompanied by a formal act such as raising the flag or publishing a proclamation. Moreover, “occupation could only be accomplished by an act of a state, or performed in the service of a state, or subsequently acknowledged by a state” (no “squatter’s rights”).

Oppenheim’s interpretation is important in understanding the Canadian government’s actions from 1903 through to 1933 – which included purchase of a government ship, raising the flag ceremonies throughout the islands and eventually, after 1921, construction of RCMP detachments, initiation of an annual patrol, expanded administration acts and diplomatic negotiations. These were costly but necessary to gain other countries’ acceptance of Canada’s sovereign rights to the Arctic Islands.

Slide 7  PCIJ in the Hague

The First World War brought changes to the Arctic quite apart from introducing aviation advances which made the region more accessible. As part of the peace process, the Permanent Court of International Justice was established, its home is seen here at the
Hague in the Netherlands. The intention was to provide peaceful settlements of international disputes, based on the opinion of ten eminent jurists, elected by members of the League of Nations.

Ironically, it was only after Canada had successfully enacted a number of measures to establish permanent title, that a new precedent was established in the 1933 judgement handed down by the PCIJ in the *Norway vs Denmark* dispute over northeast Greenland. In this instance, the Court granted a more lenient interpretation of the time required to establish “effective occupation” when it rejected Norway’s argument that Denmark’s claim to East Greenland had lapsed. As a result of this landmark case, Canada’s sovereign claims to partially uninhabited Archipelago were now considered secure.

The vast majority of cases submitted to the Court took place between 1922-1932, but the ability of international litigation to promote peaceful settlement of disputes between states required a stable situation – something that had quickly disappeared as Germany again threatened aggression. The Court’s last session took place in February 1940, just before Germany’s invasion of the Netherlands.

At the turn of the twentieth century, the United States was considered a potential threat to Canada’s Arctic sovereignty, but the situation reversed with the onset of the Second World War which would require close cooperation of the two countries to defend the continent against enemy invasion.

**Slide 8  Map of WWII Activities**

Since Canada had neither the manpower, nor the financial and technical resources, the United States military was responsible for a major portion of construction in the far north, such as the Alaska Highway, airfields, radar installations, radio and weather stations. The Permanent Joint Board on Defence was the agency that coordinated approval of the projects, with a written caveat that they would not impinge on Canada’s sovereignty.
This did not prevent some ‘de facto’ losses of sovereignty, whether through disregard for customs regulations, labour laws, or enforcement of US military laws on American bases.

The Permanent Court of International Justice was officially disbanded in 1946 and replaced by the International Court of Justice created by the UN Charter. Sometimes called the World Court, it still operates out of the Hague, and is the primary judicial branch of the United Nations. (As a point of interest, the Peace Palace and grounds are owned and administered by the Carnegie Foundation.)

The World Court has been effective in resolving minor disputes between states over the past 70 odd years – but its overall effectiveness in the over 160 cases heard since 1947 is beyond my expertise to give a qualified opinion.

**Slide 9 Cold War Defence**

The Cold War required even more advanced technologies to deal with a potential nuclear war: including sophisticated radar warning systems, ballistic missiles, nuclear powered submarines, and long range bombers. New facilities now stretched from Alaska, across Arctic Canada and Greenland. Again, Canada participated, but the United States played the major role in planning, construction and operations.

Discovery of oil in Prudhoe Bay in 1968 and the voyage of the supertanker SS Manhattan through the NW Passage in 1969 and 1970 resulted in the passage of Canada’s Arctic Waters Pollution Prevention Act. This in turn led to demands for changes to the laws of the seas, which led to negotiation of the UN Conference on the Law of the Sea (UNCLOS) in 1982. Included were special provisions for Arctic coastal states because of environmental concerns, along with extended rights to sea bed mining beyond the continental shelf.
Although most countries ratified the agreement, (with the notable exception of the United States,) the rapidly melting sea ice has elicited suggestions from larger developing countries, especially China, that the terms of UNCLOS should be renegotiated and the Arctic Ocean considered a global commons, open for development by all nations.

As a consequence, it has become increasingly important that the Arctic coastal nations have sufficient diplomatic influence, economic and military power to protect their sovereign rights.

The unity of the eight Arctic countries as expressed in the Arctic Council and in the Ilulissat Declaration in 2007 was considered critical to ensure future peace and stability of the region.

Unfortunately Russia’s actions in the Ukraine now threatens the close cooperation of the Arctic countries – yet another example of how wars, or even the threat of war, can adversely affect the future of the Arctic.

At present, Canada’s Arctic sovereignty over the Arctic Islands and adjacent waters is secure, and will remain so as long as we can effectively administer the region and enforce Canadian laws.

The end of the Cold War witnessed a reduction in the Canadian Armed Forces presence in the far north, including military facilities, equipment and training exercises. Radar installations were downsized and automated. NORAD still functions, with increased satellite support but with fewer ground facilities.

Slide 9 – NORDREG

So far, the Canadian Coast Guard has done an admirable job controlling and monitoring ship traffic in the Arctic. With sophisticated satellite radar tracking equipment operated from their new headquarters in Iqaluit (seen here) they can now identify and monitor any ship entering Canadian waters. But unlike the US Coast
guard, the Canadian coast guard is unarmed.

Thus while they are able to identify ships that disregard Canadian laws, they may not have the ability to enforce those laws – a role I understand will be assigned to the proposed Arctic patrol boats operated by the Royal Canadian Navy. As with everything happening in the Arctic, cooperation will be the key to success.

As noted earlier, interpretations of the Laws of the Sea have evolved over the centuries with continual adjustments to defined limits and uses of territorial waters, freedom of passage, international straits and more recently seabed mining.

As we go forward in the twenty-first century to face the challenges of global warming, increased shipping and mineral development, historical events may seem somewhat irrelevant, but it is critical that we know where we came from before heading into the unknown.

Slide 10 More than a Legal Right

And finally a reminder, Arctic sovereignty is more than just a legal right; it carries with it the responsibility – for welfare and safety of the inhabitants (in Canada the majority are Inuit) and their environment.

Thank you
Comments for Q&A

How secure is Canada’s sovereignty claims?

1) At present, Canada’s title to its Arctic lands is secure – as are those of the other coastal Arctic States: the United States, Norway, Russia, Denmark and Iceland.

   With one exception: i.e. the ownership of Hans Island (1.3 sq km of solid rock) lying between Canada’s Ellesmere Island and Greenland. This has always been in dispute although resolution is reportedly imminent based on scientific data

2) Dispute between Denmark and Canada over maritime boundary in the Lincoln Sea – reached tentative agreement in November 2012.

3) Dispute between the US and Canada over the maritime boundary in the Beaufort Sea is also reported to be close to resolution.

What aspects of Arctic sovereignty are ‘at risk’ in the future?

a) the danger of non-Arctic countries asserting pressure to renegotiate the terms of UNCLOS, which could result in a loss for Canada of existing sovereign rights.

b) Canada’s ability to enforce its laws (notably the AWPPA regulations) over adjacent waters or in the Northwest Passage, which could result in a de facto loss of control – as in the case of ships purposely sailing off course or releasing waste water in Canadian waters.
c) The lack of a mandatory maritime polar code that coincides with Canada’s Arctic Waters Pollution Prevention Act provisions, and Canada’s ability to enforce those regulations.

d) The ability to mount an immediate and effective Search and Rescue operation should a major catastrophe occur (as in the case of a sinking ship).

e) A major oil spill without proven ability to clean up or contain – refer to recent US Coast Guard report.