Leading By Example: Canada and its Arctic Stewardship Role

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Abstract: The notion that Canada is the steward of the fragile Arctic environment is a part of the fabric of the Canadian narrative about the country’s relationship with the Arctic region. In light of political, legal and environmental changes impacting Arctic politics, this paper argues that it is important to examine the circumstances which led to the creation and success of Canada’s stewardship role and its implications for Canadian and international shipping in the Arctic region before any changes are made to the governance of the region through unilateral legislation changes or new international agreements. This paper explores the origins of Canada’s image as the steward of the Arctic environment which started with the 1970 Arctic Waters Pollution Prevention Act legislation and addresses the central research questions, how did Canada’s role as the steward of the Arctic environment begin and evolve and how important is the Arctic Waters Pollution Prevention Act for international acceptance of Canada’s stewardship role and maritime jurisdiction in the Arctic region?

Keywords: Stewardship; Arctic Waters Pollution Prevention Act; Environmental Protection; International Maritime Law; Arctic; Canada; Polar Code

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Introduction

The notion that Canada is the protector of the fragile Arctic is a part of the fabric of the country’s narrative about its relationship with the Arctic region and its national self-image. Franklyn Griffiths, a renowned Canadian and Russian Arctic scholar, defined stewardship as ‘locally informed governance that not only polices but also shows respect and care for the natural environment and living things in it’ [Griffiths, (2009) p. ii]. In addition to the fragility of the Arctic region, Ted McDorman, well-known Arctic legal scholar, states that ‘[v]essels in polar waters have increasingly attracted public attention in recent years as a consequence of global climate change and diminishing ice in both the Arctic and the Antarctic’ [McDorman, (2015) p. 141]. The role of Canada as the Arctic’s protectors is a position that Canada has taken and promoted globally since 1970 with the passing of the domestic pollution prevention legislation, 1970 Arctic Waters Pollution Prevention Act (AWPPA) and through the subsequent inclusion of an ice-covered waters clause, Article 234 into the 1982 United Nations Convention on the Law of the Sea (UNCLOS) agreement which Canada became a party to in 2003 [Lalonde, (2015), p. 13]. Both the AWPPA and the UNCLOS clause have exponentially expanded Canada’s jurisdiction over the waters in the Arctic region in the name of environmental protection. With the combination of Canada’s establishment and enforcement of its role as environmental protector and the increased use and interest in the Arctic region in recent years, Canada’s Arctic region is becoming a more active and important political arena.

There have been major changes in the Arctic in the 21st century with receding and thinning Arctic ice coverage, increasing international interest in the development of natural resources and shipping routes in the Arctic region and the development of international cooperation through the Arctic Council and the Polar Code maritime standards for vessel construction and operational procedures. For Canada, a re-examination of the stewardship
role and its purposes and implications is important in light of the fact that the Government of Canada has been considering amending the AWPPA legislation. Focusing on the formative years of the stewardship role between 1970 and 1982, this paper addresses the research questions, how did Canada’s role as the steward of the Arctic environment begin and evolve and how important is the AWPPA to the international acceptance of Canada’s stewardship role and maritime jurisdiction in the Arctic region?

The AWPPA in the Literature - A Review:

According to two Canadian federal government civil servants who have been involved in the re-examination of the AWPPA standards and their implications, the Government of Canada has considered amending the legislation (interviews with two Government of Canada civil servants, Gatineau, Canada, 8 November 2012). Current academic literature in political science and international politics, however, is limited in its description and analysis of the history and importance of the legislation, particularly as it relates to Canada’s stewardship role in the Arctic. As such, most academics are poorly positioned to offer informed critique and advice on the legislation and its broader legal, social and political value during this critical stage of amendment consideration. At present, many scholars who write on subjects and issues concerning the Canadian Arctic do acknowledge the controversy originally caused by the creation of the 1970 AWPPA; the legislation did not follow international maritime law on coastal state jurisdiction at that time and proposed limited coastal state interference in vessel traffic on the basis of pollution prevention [e.g. Byers, (2009), p. 44-8]. Despite the acknowledgement of the historical debate over the legislation, there are limited examples of academics describing or providing detailed analysis of the act and its regulations and their legal and cultural implications.
The international law text, *International Law Chiefly as Interpreted and Applied in Canada*, 7th edition by Hugh M. Kindred et al. [(2006), p. 1006-1007], for example, gives a good summary of the AWPPA and its regulatory powers, but their work is a short piece within a very large text and does not specify which regulations apply to which regulatory powers. Nor does Kindred et al. discuss who is responsible for managing and enforcing the regulatory powers for the Government of Canada or any broader implications of the legislation.

Griffiths (2003) also provides some analysis of the legislation when he refutes the argument that global warming threatens Canada’s claims to sovereignty in the Arctic, which Griffiths argues is the position most forcefully presented by Arctic and military scholar Rob Huebert [(2003), p. 259]. When discussing the AWPPA Huebert (2001) states that

‘[w]hile such a system works reasonably well when few vessels enter the Northwest Passage, it is clear that it will not work when the number of voyages increases due to ice reduction’ [(2001), p. 92].

Notably, though, Huebert made his comments, and Griffiths his rebuttal to them, about the AWPPA at a time with the NORDREG shipping monitoring system was not mandatory, a subject covered later in this paper. Griffiths, however, cites the existence of, and international adherence to, the AWPPA and its *Shipping Safety Control Zones* as a key indication that Canada’s authority in the Arctic is secure despite alarmist concerns with the impact of global warming on Canada’s authority in the Arctic [Griffiths, (2003), p. 262-63]. Griffiths returns to the subject of stewardship in his 2009 article, ‘Toward a Canadian Strategy’ and in it, Griffiths argues that the role as stewards of the Arctic has proven to be a very effective way for Canada’s promotion, extension and establishment of its maritime jurisdiction. Griffiths also encourages the government to continue cultivating its stewardship role.

Political scientists John Kirton and Don Munton also discuss the AWPPA in their 1987 work, ‘The Manhattan Voyages and Their Aftermath’ and they provide one of the best
available discussions about the parameters and history of the legislation and the government’s battle with the international community over the maritime legal implications of the legislation. D.M. McRae also provides a short, but clear, account of the AWPPA and its legal implications in his 1987 work on the negotiation of Article 234; an article of the United Nations Convention on the Law of the Sea largely seen as helping to legitimize Canada’s implementation of the AWPPA. Similarly, Richard B. Bilder (1970) in his article ‘The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea’ is another example of a clear account of the legal and political issues involved in the creation of the AWPPA shortly after it happened. As good as the work of Kirton and Munton, McRae and Bilder is in starting the process of outlining the AWPPA and its history, there are two noticeable drawbacks to the overall existing literature on the AWPPA as evidenced in their work.

The first noticeable drawback is that the three abovementioned works are that they were written in 1970 and 1987, thereby alluding to the limited amount of discourse about the legislation, but also to the importance of the evolution of the legislation in the 1970s and 1980s. The limited amount of current discourse, however, is problematic given that the AWPPA is a key part of the foundation upon which Canada’s jurisdiction over the Arctic waters is based and international interest in, and commercial use of, the Arctic has increased in the 21st century. Second, the work on the AWPPA to date does not get into the influence of the AWPPA on the Canadian societal perceptions of the Arctic region and Canada’s role in the Arctic region. The limited literature and the Canadian government’s consideration to amend the legislation are the motivating factors behind the need to reinvigorate an academic discussion about the AWPPA.

Some of the best work on how the AWPPA works and its legal implications, however, exists within in law-based publications by legal scholar and Arctic expert Donat Pharand in
his seminal 1988 text *Canada’s Arctic Waters in International Law* and the writings of another legal expert Ted McDorman (2009; 2015). Donat Pharand’s (1988) work is held up as a must-read text to comprehend the legal framework of Canada’s authority in the Arctic and its progression over the decades, which includes the enactment of the AWPPA. While written in 1988, the book remains an important source of material to understand the steps taken in Canada’s jurisdictional spread northward, though it is lacking in its account of current events and jurisdictional changes. Some more recent work in 2007 by Pharand complements his 1988 text and provides a more contemporary perceptive of his views on Canada’s Arctic jurisdiction.

McDorman offers more recent views on the AWPPA, such as his chapter within his own 2015 co-edited volume, *International Law and Politics of the Arctic Ocean*. In this chapter McDorman discuss the AWPPA and its relationship with Article 234. He stated that Article 234 ‘arose from negotiations between Canada, the United States and Soviet Russia [but] was aggressively pursued by Canada as a means of attaining international legal justification for its 1970 Arctic Waters Pollution Prevention Act’ with the United States ‘explicitly accepting that article 234 is part of customary international law’ [(2015), p. 143]. In his earlier work, *Salt Water Neighbours*, McDorman also noted that the AWPPA received support by the inclusion of Article 234 into the law of the seas agreement which permitted limited state control over shipping in ice covered regions for the purposes, but points out that this article did not deter the United States from maintaining its protest to Canadian claims to own the Northwest Passage [(2009), p. 93-5].

Another key issue that has newly begun to be discussed in the literature about the AWPPA and Arctic shipping is the development of the Polar Code and its implications on individual state authority over their Arctic coastal waters. According to the International
Maritime Organization’s (2015) description of the Polar Code, it has a very similar mandate as the AWPPA though it pertains to both the Arctic and Antarctica;

‘The Polar Code is intended to cover the full range of shipping-related matters relevant to navigation in waters surrounding the two poles – ship design, construction and equipment; operational and training concerns; search and rescue; and, equally important, the protection of the unique environment and eco-systems of the polar regions’ (International Maritime Organization, 2015).

The Polar Code has been under development since the 1990s, with a retired Canadian civil servant and former Polar Code negotiator indicating that the Polar Code development has been a slow, arduous process due to the need to account for the opinions and demands of so many actors across and within various levels of different state governments. For example, there have been concerns on how the Polar Code might impact the jurisdiction and sovereignty of individual member states and their abilities to control and restrict access to their waters in the Arctic region and concerns, like these, have dragged out the negotiation process over decades (interview with a Former Polar Code Negotiator, Ottawa, Canada, 19 November 2012).

McDorman (2015), for example, gives his perceptive of the consequences of the Polar Code for Canada’s Arctic jurisdictional framework by addresses the relationship between Article 234 and the Polar Code. McDorman states that both Canada and the Russian Federation have raised concerns about the implications of the Polar Code on Article 234 and that the legally binding Polar Code overrides Article 234 meaning that ‘rights under article 234 would be overtaken by the Polar Code’ [(2015), p. 145]. As a result, the

‘Polar Code-article 234 situation is one of a right in a treaty to enact and enforce unilateral legislation (the LOS Convention) being potentially in conflict with the intention, expressed or implied, in the Polar Code that States may only enact regulations consistent with the Code and that a coastal State has no enforcement rights within their 200 nm [nautical mile] EEZ [Exclusive Economic Zone]…. but there is little question that the Polar Code may frustrate the application by a State of its rights under article 234’ [(2015), p. 147].
McDorman goes on to suggest that there is evidence within the Polar Code negotiations that the Canadian and Russian Federation concerns about, and attempts to address, the implications of the Polar Code under their unilateral location navigation rules and regulations ‘may be a difficult issue’ [(2015), p. 156].

Lastly, another author to engage the debate over the Polar Code’s implications is law of international economy expert Armand de Mestral (2015). De Mestral also discusses the implications of the AWPPA and Article 234 on the development of international awareness about the need to protect the environment and the repercussions of the Polar Code on Canada’s environmental protection legacy and Arctic jurisdiction. Complementing McDorman’s (2015) work, de Mestral argues that Canada’s participation in the Polar Code negotiations ‘does not reflect any weakening of Canada’s legal position’ largely because the Polar Code regime will cover the whole of the Arctic region. As a result ‘no ship will be able to sail in Arctic waters without meeting the conditions set by the international insurance market, which in fact are based on the AWPPA and its Regulations’ [(2015), p. 123].

**Methodology**

This paper takes an empirical approach and uses a combination of sources, such as interviews, archival materials and government websites and legislation, as well as secondary sources, like academic journal articles and books. Some interviews were conducted as part of this project in 2012. The interviews were done in Canada in Ottawa, Ontario and Gatineau, Quebec, as well as by email correspondence. The interviews in person were conducted with federal government civil servants. Two of those interviewees explicitly expressed a preference to not be quoted or referred to in this work, with their sole exception to their stated preference being their willingness to go on the record using pseudonyms in order to comment that the Canadian government is considering amending the AWPPA legislation. These
interviews were vital for revealing the Canadian government’s contemplated changes to the AWPPA, as well as suggesting some of the motivating factors behind the considered changes.

The email correspondents agreed to be quoted in this paper using pseudonyms and these interviews were done with people involved in the implementation of the AWPPA legislation and other related operational guidelines and laws. These individuals helped to provide insight into the day-to-day implementation of Canada’s Arctic jurisdiction which can be found on the government websites, in legislation and within descriptive academic accounts of Canada’s stewardship and the AWPPA legislation.

Supplementing the historical focus of this analysis was archival material obtained from the Library and Archives of Canada. The archival materials collected were primarily used to provide examples of how the Canadian public and government viewed the AWPPA during the time of its creation and the government’s efforts to get international support for it during the 1970s and early 1980s. Finally, other sources, such as the secondary sources outlined in the brief literature review are also used throughout this work. It is not the intention of the author to repeat the already existing works about the AWPPA, but to develop upon them and remind academics about their content in light of the possibility of the AWPPA being amended.

**The Development of the Stewardship Image**

The idea of Canada as a noble protector of others predates the AWPPA and the narratives surrounding it. This noble protector legacy is evident in Canada’s association with the foreign policy doctrine liberal internationalism. Jahn argues that there is no one readily available definition of liberal internationalism [Jahn, (2013), p. 13], but it is informed by ideas of involvement in other sovereign states, such as in the form of aid or military actions,
in order to preserve liberal ideals like freedom of speech, religion and the press and for the protection and promotion of democratic ideals.

Canada’s association with liberal internationalism was most pronounced between the post-Second World Was era and the 1960s. Canada’s international image was linked with Canada’s peacekeeping legacy and its role as a middle power. For example, Canada image as a helpful and cooperative global citizen is linked to Canada’s involvement in brokering an end to the Suez Canal crisis in 1956 and Canada’s high degree of involvement in the United Nations in the initial years after the end of the Second World War [Kelly, (2011), p. 22; Kirton and Munton, (1987), p. 70]. Canada’s association with the broad middle power image, like other states who are successfully seen as embodying the role and image, became viewed ‘to be potentially more trustworthy because they can exert diplomatic influence without the likelihood of recourse to force’ [Cooper et al., (1993), p. 18].

Using its perceived broker status, Canada attempted to change maritime jurisdictional boundaries in the 1950s and early 1960s, but with no success. According to Elliot-Meisel ‘Canadian interest in legally defining the Arctic waters moved from the domestic front to the international arena in the late fifties’ after the Canadian federal government attempted, but failed, to use international forums and negotiations to advance Canada’s interests about its coastal jurisdiction [Elliot-Meisel, (1998), p. 130]. As a result of the lack of progress in the 1950s and 1960s in international negotiations over territorial seas extensions and fishing rights, Canada became disillusioned and frustrated because many of its proposals were being rejected and the fact that coastal states were having to make many concessions and sacrifices during slow international conferences [Bilder, (1970), p. 4, 22-24]. During the first UNCLOS negotiations in 1958 Canada became the unofficial spokesman for states that historically did not have fishing rights in foreign waters or did not have a very developed coastal fishery, but the unsatisfactory agreements led to the second UNCLOS negotiations in 1960 [Elliot-

During the second international attempt to develop a standardized set of maritime laws Canada had campaigned for a ‘six-plus-six’ formula for territorial seas. If Canada had been successful, the formula would have put the first six nautical miles off a state’s coast exclusively under the coastal state’s jurisdiction and the next six nautical miles would be high seas, with the exception of fishing rights which would have remained under the control of the coastal state. In the end, Canada managed to get the United States to support its ‘six-plus-six’ proposal, but its efforts failed to pass the two-thirds majority voting procedures by one vote [Elliot-Meisel, (1998), p. 130-133].

The importance of these laws of the sea negotiations for the development of Canadian stewardship idea is that they demonstrate that maritime jurisdictional concerns had been simmering for years leading up to the formation of the stewardship role. The role itself was partly crafted from the problems Canada had tried to resolve at the international level but with no success. It also demonstrates early attempts by the Canadian government to get international support for its ideas through casting itself in the role of the intermediary between states in a weaker negotiating position and larger, more power states.

The failure of the 1960s negotiations added to growing concerns with the lack of safety regulations, preventive measures and repercussions for poor business practices in the Arctic region. Around the same time Canadians expressed worry about what would happen if an oil spill occurred in the Arctic if, for example, a commercial oil tanker ran aground or had an incident with the ice and icebergs in the region. The concern about oil spills in the Arctic was fueled by another oil spill in Canadian waters – the running aground of the Liberian oil tanker Arrow in 1970. The Arrow oil spill was ‘[t]he most significant spill off Canada’s East Coast … spill[ing] over 10,000 tonnes of oil off Nova Scotia’ (Transport Canada, 2014).
The concerns about ships in the Canadian Arctic became a political hot topic within Canada because of the research voyages of the S.S. Manhattan during its attempt to see if the Canadian Arctic was a viable route to ship oil by supertanker. The Arrow incident in Nova Scotia highlighted that dealing with an oil spill is an extremely difficult task in an accessible place like Nova Scotia on Canada’s East Coast. In the more isolated Arctic region, however, dealing with an oil spill could be next to impossible depending on its location and time of year. Adding to the concerns generated from the Arrow incident was another, lesser known, incident in the Canadian Arctic occurred when two barges sunk [Kirton and Munton, (1987), p. 78, 85].

A good illustration of how the Arrow incident was being linked by media reports to the circumstances of the S.S. Manhattan voyage is how two news stories about the two vessels were reported in The Globe and Mail newspaper on Saturday 21 February 1970. The Globe and Mail ran two stories, with one about the Arrow oil spill clean-up titled, ‘Scientists to check for possible repercussions in drilling Arrow for oil’ which encased a separate story (continued from page one of the paper) titled “Bar Manhattan if not safe: PM” about the S.S. Manhattan voyages (The Globe and Mail, 1970). Additionally, the Arrow news article quoted former Prime Minister John Diefenbaker saying that ‘[t]here is no greater problem facing Canada than pollution’ [Sanger, (1970), p. 10]. The way both pieces are written and the way they are stylistically presented conveys the impression that the S.S. Manhattan voyage could descend into another Arrow disaster. See Figure 1, for a copy of the news articles.
The parallels between the Arrow incident and the hazards and implications of the S.S. Manhattan voyages were raised again, for example, on March 13 by Donald Newman of The Globe and Mail. Newman quoted the Minister of Transport, Donald Jamieson, who said that with the Arrow incident

‘[w]e are developing a hell of a lot of experience of dealing with future spills….Whether the same techniques would be of use in warm water, or in the summertime, or in other conditions quite different is open to doubt’ (Newman, 1970).

What the Arrow incident emphasized was the difficulties associated with responding to oil spills in terms of logistics – manpower, costs, plan development for different scenarios and environmental conditions and so on. The fact that the incident was caused by a foreign vessel around the same time as the controversial Arctic voyages of another foreign vessel heightened the public’s awareness through increased media coverage and comparisons between the two situations.

Domestically, the decision to enact the legislation in April 1970 was seen as a positive thing both in terms of its representation of Canada’s authority over the Northwest Passage and its protection of the environment. The Globe and Mail covered the legislation with the
strong article title, ‘Bold and Necessary’ to describe Canada’s move to protect the Arctic environment. An editorial in *The Montreal Star* also came out defending Canada’s move to protect the environment stating:

‘There is nothing surprising about the hostile reaction of the United States to Canada’s plans for pollution control around the Arctic Islands….Now that the inevitable has happened, Canada must be prepared to stand firm in the face of growing pressure until international law is sufficiently developed to ensure the kind of environmental protection that is needed if the world is to remain liveable’ (*The Montreal Star*, 1970).

The legislation also saw Canada break ‘decisively with the liberal-internationalist traditions that had dominated Canadian foreign policy since the Second World War’ [Kirton and Munton, (1987), p. 70]. The AWPPA challenged the international maritime law interpretations of the definition of innocent passage by promoting the use of limited state interference in voyages for environmental protection purposes [Elliot-Meisel, (1998), p. 143].

At the same time, the AWPPA was also reported as Canada’s response to its projected moral responsibility to protect the environment; a moral tone akin to its middle power status which according to Cooper et al. ‘using normative lenses, middle power behaviour takes on a certain smugness, occupying the moral high ground of the politics of the ‘warm inner glow’’ [Quotation in original text] [Cooper et al., (1993), p. 18]. A *The Montreal Star* editorial reflected that:

‘The strength of the Canadian stand lies in the fact that it is *not simply a selfish* attempt to expand the national jurisdiction at the expense of other nations. Rather, it is a practical effort to deal with a real threat whose dimensions are becoming increasingly visible’ [Italics and underlining added] (*The Montreal Star*, 1970).

The Canadian public quickly came on-board with the AWPPA legislation with Kirton and Munton stating that

‘[t]he domestic demand for a straightforward declaration of sovereignty died almost instantly, as the public responded enthusiastically to Ottawa’s creativity and cleverness’ [(1987), p. 93].
The change in domestic demands for a sovereignty declaration occurred because the Canadian government put considerable effort into framing the AWPPA as a selfless act of environmental guardianship which was a position that had public appeal.

As part of the Canadian government promotion its decision to enact the AWPPA Ivan Head, then Prime Minister Pierre Trudeau’s chief advisor, reiterated the stance of Canada’s moral responsibility in 1972. Head states:

‘The delicacy of the ecological balance and the frailty of all forms of life in the Arctic required, in the Canadian view, prevention of oil spills, not haphazard attempts at clean-up after the event, the current norm of behavior….Population pressures elsewhere in the world and escalating U.S. demands for energy and minerals will undoubtedly cause Canada to be described from abroad as a selfish and self-indulgent country more concerned with protecting the high standard of living of its own citizens than of sharing its space and resources with the needy of the world’ [Italics and underlining added] [Head, (1972), p. 242-3].

Originally, Prime Minister Trudeau did not intend for the AWPPA to be a declaration of Canada’s sovereignty over the Arctic Archipelago region [Elliot-Meisel, (2009), p. 211], but its later development into a symbol of Canadian sovereignty.

Mitchell Sharp (1985), the Secretary of External Affairs at the time of the S.S. Manhattan incident, later summed up how this legislation reflects not only Canada’s response to the S.S. Manhattan upset, but how the tone for the government’s image of Canada’s approach toward pursuing its Arctic interests and agenda began to take shape.

‘The new nationalist approach was given substance by the declaration of Canada’s responsibilities with respect to the protection of the environment in Arctic waters and by the leadership given by Canada in the Law of the Sea negotiations to extend the jurisdiction of coastal states over the adjacent continental shelf and the waters above them. These were Canadian interests, pursued vigorously over a long period, skillfully and, to a remarkable degree, successfully’ (Sharp, 1985).

Ultimately, the AWPPA challenged international maritime law interpretations of the definition of innocent passage by promoting the use of limited state interference in voyages for environmental protection purposes in ice covered areas [Elliot-Meisel, (1998), p. 143].
An interesting word that was associated with the Government of Canada’s enactment of the AWPPA was selfish (as previously noted in quotes presented earlier in this section). Specifically, the angle that Canada was not selfish by enacting the AWPPA is particularly noteworthy [e.g. Head, (1972), p. 243; *The Montreal Star*, (1970)]. Within this context the etymology of the word selfish, Canada’s use of it, and association with it, is revealing. The anticipation of being described as selfish appears to be an expected reaction by Canadian officials from foreign government and commercial response to the AWPPA which suggests defensiveness on the part of Canadian policy makers who recognize that the AWPPA lacked international support. It also suggests a self-reassuring attitude within Canada that the Government of Canada did the right thing by enacting the AWPPA.

For example, in 1970 Canada faced its heaviest opposition from the United States who was keen to make the AWPPA a matter of international debate. The Government of Canada’s approached establishing its jurisdiction over the Arctic region through environmental protection, which proved to be a powerful combination. During the government’s effort to gather international support

‘most diplomats judged the United States to have a strong legal case against Canada and recognized the self-interest in Canada’s measures, most also felt that Canada would win the battle for world public opinion. Their judgment rested on the appeal of environmental protection, the acknowledged cloudiness and bias of the international law of the sea with regard to pollution, and Canada’s effective use of the precedent of U.S. President Truman’s unilateral 1948 extension of jurisdiction over the continental shelf’ [Kirton and Munton, (1987), p. 94-5].

There developed, therefore, international support for the AWPPA once Canada started to outline its case for assuming the custodianship of part of the Arctic environment rather than portraying itself as the outright owners of it. The appeal of environmental protection, however, had as much to do with the protector role being played by Canada and how it went about asserting this role, as it did with the act of protecting, given that the AWPPA was seen by some as a self-interested measure.
As a result of Canada’s repetition of its ‘not selfish’ narrative, the country comes across imploring others to understand that Canadians were breaking with international law in order to protect the environment because international environmental protection standards were lacking in the early 1970s. Canada’s framing of its motives distracts away from the issues of sovereignty expansion and assertion and it assures Canadians that its government’s actions were a sign of the strength of the Canadian national character, rather than a self-serving endeavour. The overarching narrative cast Canada as bold and noble. The narrative also glossed over the implications of environmental protection legislation for Canada’s creeping jurisdiction over large portions of the Arctic region which were still in contention. In the end, the narrative portrays Canada as a morally responsible state taking action for the communal good and assuming the burden of Arctic protection for the sake of the world and future generations.

To emphasize its seriousness with the enactment of the AWPPA legislation, the Canadian government restricted the International Court of Justice (ICJ) from having the power to rule on the legality of the AWPPA by opting out of the jurisdiction of the ICJ to rule on this matter. This broke from Canada’s liberal internationalism tradition of using international institutions to promote peace and international cooperation. The Canadian government argued that it was forging new law that lacked precedent, but that the law was necessary for the protection of the Arctic’s unique environmental conditions and it would not allow the ICJ to prevent its efforts due to outdated international maritime law [Bilder, (1970), p. 2].

Some international news outlets gave support toward Canada’s stewardship narrative. The New York Times, for example, printed an article which stated that:

‘The United States has rejected with unseemly sharpness Canada’s bid to extend her control over the Northwest Passage in order to prevent pollution of her Arctic territories. That rejection is sure to exacerbate relations with Canada while failing to

In the narrative, Canada’s morally-elevated position of champions of the Arctic came from its resistance to the International Court of Justice which led to Canada’s stewardship persona developing throughout the 1970s. Canada’s position became solidified and integrated further by how it conducted itself internationally during the 1970s and 1980s when one of Canada’s primary objectives with the Arctic was to bridge the legitimacy gap that occurred when it unilaterally enacted the AWPPA [Bilder, (1970), p. 28].

Canada set out to gain international approval by

‘participating wholeheartedly in the preparatory work for the third United Nations Stockholm Environmental Conference. The Canadian goal is the international acceptance of adequate standards reflecting mankind’s newly acquired knowledge and concern in environmental matters’ [Head, (1972), p. 243].

The 1972 Stockholm Conference had more than just the Government of Canada’s participation; the conference was led by Maurice Strong, a Canadian, who was appointed by UN Secretary-General U Thant. U Thant selected Strong ‘to lead it as Secretary-General of the Conference and as Undersecretary General of the UN responsible for environmental affairs’ (*MauriceStrong.net*, n.d.). An interesting point about this appointment is that in 1969, three years before the Stockholm Conference, Trudeau discussed Canada’s concerns about Arctic pollution with U Thant and stated in a news conference afterward that ‘[w]e owe it to the world to do something [on pollution]’ [*The New York Times*, (1969), p. 7]. It is very likely, therefore, that Trudeau’s earlier dialogue with U Thant may have been a motivating factor behind the 1972 Stockholm Conference.

Canada’s clearest efforts and success for international recognition for the AWPPA standards happened through Canada’s initiation of the proceedings for the creation of Article 234 in the 1970s negotiations for a law of sea convention with the United States and the Soviet Union [McDorman, (2015), p. 143]. Article 234 was negotiated in the 1970s and
1980s and it permitted exceptions for state interference for pollution prevention in ice-covered waters [Kindred et. al., (2006), p. 460-461], and its existence is generally seen as confirmation of Canada’s right to enforce the AWPPA regulations (Elliot-Meisel, 1998).

The United States even supported and participated in the negotiation of Article 234 while simultaneously maintaining its formal protest against Canada’s position that the Northwest Passage is under Canada’s exclusive control [de Mestral, (2015), p. 122]. As de Mestral (2015) noted about the negotiations,

‘[l]eft unsaid, but assumed by the Canadian delegation to be true, was the sense that, in the view of the United States, the waters of the Canadian Arctic archipelago were safer in Canadian hands than if at the mercy of the general international community’ [de Mestral, (2015), p. 119].

With Article 234 helping to secure international acceptance, to a large degree, for the AWPPA, Canada’s stewardship role obtained legitimacy and the idea of Canada protecting the Arctic environment and changing global opinion in the process firmly took form. As Pharand notes the progression of events, ‘the validity of the Arctic Waters Pollution Prevention Act has now been confirmed internationally by the “ice-covered areas” provision, Article 234 of the 1982 Law of the Sea Convention’ [Quotations in original text] [Pharand, (2007), p. 26].

**The AWPPA in Action**

Now that the circumstances behind the creation and the evolution of Canada’s Arctic stewardship role have been outlined, it is important to look at what is the AWPPA and its practical implications of its regulations and their enforcement. The AWPPA was announced on the 8 April 1970 as a series of precautionary measures to prevent a shipping incident rather than focus on how to respond to an incident if it were to occur. The legislation originally established a 100 nautical mile pollution prevention zone within which the Government of Canada has the right to prohibit and penalize any vessel that does not comply
with strict operational and vessel construction standards. This zone was extended to 200 nautical miles in 2009 in Bill C-3 which came into effect as of the 1 July 2010 (Foreign Affairs, Trade and Development Canada, 2013). In 1970, the major international debate over the AWPPA was that it did not follow existing international maritime law about coastal state jurisdiction over foreign vessels [e.g. de Mestral, (2015), p. 112; Caldwell, (1990), p. 47-50)]. The legislation ‘came into direct conflict with traditional doctrine on freedom of the seas, for it applied Canadian jurisdiction to foreign-flag vessels’ [McRae, (1987), p. 101].

According to Kirton and Munton, the AWPPA was part of a three-tiered approach toward Canada’s jurisdictional framework, which included the extension of Canada’s territorial seas from 3 to 12 nautical miles and the establishment of a 200 nautical mile fishing zone [(1987), p. 67]. Kirton and Munton argue that:

‘Externally, the events of April 1970 showed the capacity of a Canadian government armed with few physical resources to act unilaterally in ways that potentially threatened important security interests of the United States. Domestically, they [the three-tiered approach] displayed the government’s ability to withstand the sustained pressure of an assertive Canadian public demanding considerably more ambitious actions’ [(1987), p. 70].

The AWPPA did more than assert Canada’s unilateral ability to enact legislation with limited resources that went against the United States’ interests. The legislation helped deter large-scale shipping by making it more difficult to operate in the Canadian Arctic and bought Canada a reprieve from investing in emergency response capabilities by limiting access to the Arctic. At the same time, the legislation asserted Canada’s authority over the use of the waters in the Arctic Archipelago region. Additionally, despite the government’s attempt to not make the AWPPA an assertion of sovereignty, it developed into one over time and has become a key feature of Canada’s jurisdictional framework over the waters in the Canadian claimed portion of the Arctic region.

The act is straightforward in its terms and in its requirements for vessels wanting to enter and use Canada’s Arctic waters. First, the AWPPA highlights that there is no
discrimination between the applications of its standards on domestic or foreign vessels – Article 12(1), (2) and (3) [Revised Statutes of Canada, (1970), p. 12-14]. Vessels, regardless of their origin, are to be treated equally under the AWPPA. Second, Article 12(2) of the AWPPA exempts state-owned foreign vessels, like military and coast guard vessels, from the construction standards outlined within the AWPPA and within the *Arctic Shipping Pollution Prevention Regulations* with the understanding that foreign states have taken precautions to have equivalent construction standards to Canada’s and that the foreign state-owned vessels take precautions to reduce the danger of waste deposits in Canada’s waters.

Aiding the preventive measures of the AWPPA is the shipping monitoring services of Canada’s *Northern Canada Vessel Traffic Services* (NORDREG) zone. Created in 1977 as a voluntary registration system for ships of 300 or more gross tonnage, the NORDREG zone is Canada’s way of tracking vessels using its Arctic waters [Byers, (2009), p. 70-1]. As part of the *Canada Shipping Act, 2001*, NORDREG encompasses the waters protected by the AWPPA, through its *Shipping Safety Control Zones* and some additional area, most notably the whole of the Hudson Bay (Justice Laws Website, 2015a; Justice Laws Website, 2015b; Canadian Coast Guard, 2013). In December 2008 Bill C-3 was introduced and it extended Canada’s AWPPA coverage from 100 to 200 nautical miles [Becklumb, (2009), p. 1] and it came into force in 2010 around the same time as NORDREG became mandatory. As such, it is now impossible to enter into the area protected by the AWPPA without entering into the NORDREG monitored waters.

As of 2010, NORDREG became a mandatory registration system (Canadian Coast Guard, 2013). The NORDREG regulations pertain to all vessels of 300 gross tonnage or more; that are engaged in towing or pushing another vessel, if the combined gross tonnage of the vessel and the vessel being towed or pushed is 500 gross tonnage or more; and are carrying as cargo a pollutant or dangerous goods, or that are engaged in towing or pushing a
vessel that is carrying as cargo a pollutant or dangerous goods (Canadian Coast Guard, 2013). The creation of the NORDREG system and the move to make it mandatory for vessels to register with it is one of several steps which began in 1970 with the Canadian government’s three-tier approach toward jurisdictional expansion, of which the AWPPA was the core element.

Despite the shaky legal start of Canada’s argument for limited coastal state involvement in foreign shipping through the Arctic Archipelago’s waters in the 1970s, the AWPPA, its regulations and the NORDREG zone have generally been respected. In addition to international complication, when given a hypothetical scenario about what would happen if a vessel sought to enter Canada’s waters without conforming to the AWPPA, its regulations, or the NORDREG registration stipulations, a correspondent within the Canadian Coast Guard stated that the following is the hypothetical procedure to be undertaken:

‘If there is a problem with the issuance of a clearance to that vessel, the MCTS [Marine Communication and Traffic Services] Officer will consult with the Transport Canada Ship Safety Officer for advice. If the vessel is non-compliant (e.g. defective navigation equipment), the vessel might be denied, by Transport Canada, the clearance to proceed until the problem is fixed’ (email correspondence with a Canadian Coast Guard Officer, 19 March 2012)

The correspondent stressed, however, that Canada has not had any issue with vessels required to register under the NORDREG or AWPPA stipulations refuse to recognize Canada’s authority to enforce the NORDREG registration system, even when NORDREG was not mandatory, so there are no examples of how events have unfolded during an actual non-compliance scenario. A trade-off, however, of the lack of compliance problems is that there is ample evidence to suggest that the present framework Canada has for asserting its jurisdiction on the basis of pollution prevention has been very successful.

Despite success of the current jurisdictional framework, however, there has been at least one case of confusion created by poor inter-departmental communication, some illegal shipping and cases of unreported transit. In 1999, for example, ‘miscommunication between
Canadian government agencies saw the Chinese icebreaker and research vessel *Xue Long* (Snow Dragon) sail into Tuktoyaktuk, NT with customs officials caught unaware’ [Williams and Burke (2015) p. 119]. In 2007, however, an illegal shipping incident occurred when ‘a group of young men referring to themselves as the Wild Vikings … [sailed] the yacht *Berserk* through the Northwest Passage. After failing to report to Canadian immigration officials, the Wild Vikings were arrested in Gjoa Haven, NU’ [Williams and Burke (2015) p. 119].

Even with these two example, and the limited volume of traffic to date threw or within the Canadian Arctic Archipelago waters, Canada has been successful with enforcing its jurisdiction in the Arctic region, as well as pursuing and removing those who fail to follow proper procedures.

Additionally, the Northwest Passage and surrounding Arctic waters have been used by foreign submarines which has raised questions around whether these unreported transits challenge Canada’s authority over the waters surrounding the Arctic Archipelago, including the Northwest Passage, but some leading experts insist that is not the case. According to Pharand, from the perspective of sovereignty

‘[n]either the United States nor Canada has confirmed any … submarine crossing[s]. Under these circumstances … such submarines cannot be counted as foreign naval ships passing as of right and cannot contribute to making the Northwest Passage an international strait’ [Pharand, (2007), p. 37].

There is no consensus, however, on the implication of submarine use of the Northwest Passage or surrounding archipelago waters on the legal status of the waterway or Canada’s authority over Arctic waters [e.g. Byers, (2010), p. 77]. The relative infrequency of such passages plus their covertness both indicate that Pharand’s assessment that the transits do not affect the issue of the legal status of the Northwest Passage remains the most sound conclusion for now.

The most important thing to take away from this section is the AWPPA and its key regulations have outlined a complex set of guidelines and laws for the Canadian enforced
governance of shipping in its Arctic region, despite a few incidents of reported and suspected illegal or unreported transits. This framework has developed over time and the Canadian Arctic is not a Wild West-like area devoid of rule; it is an area where activities are governed by strict regulations that so far appear to be working to prevent large-scale shipping related environmental incidents. Overall, the Government of Canada has layered its jurisdiction over the Canada’s portion of the Arctic region with the prevention of environmental incidents being a core element of its jurisdictional framework.

Summary Thoughts

Canada has effectively secured its right to enforce the AWPPA and it has maintained support for its enforcement over the years in addition to developing its jurisdictional framework to entrench Canadian authority of the waters within and surrounding the Arctic Archipelago. Questions remain, however, about the implications of amending the legislation on Canada’s stewardship role and international jurisdiction. There are also concerns which have been raised in literature by writers, such as McDorman (2015) and de Mestral (2015), about international maritime law and the implications of the negotiations for a Polar Code on Canada’s environmental protection framework. These are not easily addressed inquiries, but as this paper has suggested, the role of steward of the Arctic environment has been vital to the establishment and international acceptance of Canada’s jurisdiction over the waters within and surrounding the Arctic Archipelago and it is important to remember how and why this role developed.

If Canada’s right to monitor, dictate and enforce terms over the use of the Arctic’s waters has largely been internationally accepted in practice because of its environmental stewardship role then it is conceivable that any amendments to the AWPPA, or weakening of the right to use UNCLOS Article 234, might detract from this role. Overall, therefore, Canada
should approach any amendments to the AWPPA and the potential future ratification of the Polar Code with caution until such time as more due diligence can be done into the potential adverse implications of either decision on Canada’s authority over international shipping in the Arctic Archipelago waters.
References


