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International law and governance of the arctic in an era of climate change

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Conclusions

Change is occurring in the Arctic at an unprecedented pace. This dynamism is, first and foremost, a consequence of biophysical processes and the cluster of developments ordinarily categorised as ‘climate change’.¹ These developments are real, they are occurring now and are not just matters of speculation about the future. Not only have average temperatures increased by as much as 2°C in various parts of the Arctic, but sea ice is receding and thinning, the depth of the active layer of the permafrost is increasing, and Arctic glaciers are melting. These changes have direct impacts on the Arctic in diverse forms. These include: coastal erosion, expected to necessitate the relocation of whole communities; the disruption of infrastructure including roads, airports and pipelines; and a shortening of the season for activities like the use of ice roads. They also may have far-reaching impacts on the overall climate system of the Earth. Coupled with globalisation, these biophysical changes are generating a drastic rise in interest in economic opportunities that will open up in the Arctic during the next few decades.² These opportunities include the prospect of increased commercial shipping in the Arctic Basin, the expansion of offshore oil and gas production, the inception of new commercial fisheries, and the growth of ship-based tourism throughout the Arctic. Projections of future trends involving activities like oil and gas development and commercial fishing are notoriously difficult. Recoverable reserves of oil and gas located in the Arctic may prove to be limited, difficult to access, or otherwise costly to extract. Fishing on a commercial scale may turn out to be a non-starter in this setting. Such projections are also sensitive to conditions occurring in other parts of the world (for example, political conditions in the Middle East or in Europe) as well as to the effects of new technologies that may increase or decrease the

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- 1 E. Elverland, *The Arctic system: International Polar Year 2007/2008*, Tromsø, Norway: Norwegian Polar Institute (2009); M. Sommerkorn, S. J. Hassol (eds), *Arctic Climate Feedbacks: Global Implications* Oslo: World Wildlife Fund International Arctic Programme (2009).; *Climate change widespread, rapid, and intensifying*, IPCC, 9 August 2021, available at: <https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/>; Sofie Bates, *NASA Fieldwork Studies Signs of Climate Change in Arctic, Boreal Regions*, 2 November 2022, available at: <https://climate.nasa.gov/news/3229/nasa-fieldwork-studies-signs-of-climate-change-in-arctic-boreal-regions/>
 - 2 *Background Papers* in R. A. Kraemer (Director), *Arctic TRANSFORM Project*, Berlin (2008); Á. Anderson, *After the Ice: Life, Death, and Geopolitics in the New Arctic*, Smithsonian Books/HarperCollins (2009).

importance of natural resources like fossil fuels. Still, it would be foolish to ignore the probable effects of rapid changes in the Arctic and, consequently, to fail to think about the governance needs that these changes will generate.³

Governance in this context can be defined as a manner of steering human-environment interactions toward socially desirable outcomes and away from undesirable outcomes. What, therefore, are the implications of these changes for governance? What started as a focus on the rush to extract the Arctic's resources leading to serious clashes among major players and even the emergence of a new 'great game' featuring competition for control of the Arctic⁴ has now captured the attention of members of the policy community. The five Arctic coastal States, meeting in Greenland in May 2008, issued the Ilulissat Declaration asserting their dominance in the region "[b]y virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean" and suggesting, rather pointedly, that other States should leave Arctic affairs in the hands of the coastal States.⁵ Since then, both the United States and Russia have issued new Arctic policy statements emphasising the importance they attach to issues arising in the Arctic region.⁶ The government of Canada has adopted a more assertive strategy regarding Canadian interests in the Arctic.⁷ In September 2008, the Nordic Council of Ministers organised a conference, also in Greenland, entitled "Common Concern for the Arctic" that provided a forum for various non-Arctic States and non-State actors to articulate their concerns regarding developments in the Arctic.⁸ The European Parliament adopted a resolution in October 2008 expressing concern about the impacts of climate change on the lives of indigenous peoples and the condition of Arctic ecosystems, and looking forward to negotiations designed

3 C.K. Ebinger, E. Zambetakis, *The geopolitics of Arctic melt*, 85 *International Affairs* 1215 (2009); Arctic Governance Project, *Arctic Governance in an Era of Transformative Change: Critical Questions, Governance Principles, Ways Forward* (2010), available online at www.articgovernance.org.

4 S.G. Borgerson, *Arctic Meltdown, The Economic and Security Implications of Global Warming*, 87(2) *Foreign Affairs* 63 (2008).

5 Ilulissat Declaration, adopted on 28 May 2008, available online at <http://www.um?NR/rdonlyres/BB00B50-D278-4459-A6BE-6AE230415546/0/ArcticOceanConference.pdf>.

6 U.S. Government, *Arctic Region Policy*, National Security Presidential Directive 66, 9 January 2009, available online at www.whitehouse.gov, accessed on 20 May 2016; Russian Federation Government, *Basics of the State Policy of the Russian Federation in the Arctic for the Period Till 2020 and for a Further Perspective*, Publication of the official governmental newspaper *Rossiyskaya Gazeta*, March 30, 2009.

7 Public Works and Government Services Canada, *Canada's Northern Strategy: Our North, Our Heritage, Our Future*, Ottawa (2009); M. Byers, *Who Owns the Arctic?: Understanding Sovereignty Disputes in the Arctic*, Douglas & McIntyre (2010).

8 Nordic Council of Ministers, *Common Concern for the Arctic*, September 9–10, 2008, available online at www.norden.org/conference.arctic.

“to lead to the adoption of an international treaty for the protection of the Arctic”.⁹

In 2008, the European Commission weighed in with a paper setting out EU interests in the Arctic and laying the foundation for a European Arctic policy statement expected to come in the near future.¹⁰ The European Commission has already opened a consultation on the future approach towards the Arctic.¹¹ A year later, the Council of the European Union pushed ahead with a statement entitled “Council Conclusions on Arctic Issues”.¹² Although they have adopted a low-key approach, the Chinese have also made their growing interest in the Arctic known.¹³ China has stepped up its research efforts in the Arctic and joined the European Commission in “permanent observer” status in the Arctic Council.

1 EU ARCTIC POLICY

In May 2019, in Rovaniemi in the north of Finland, the US Secretary of State spoke aggressively against Chinese activities in the Arctic and deplored Russian attempts to seize greater control over Arctic maritime traffic.¹⁴ The tone and timing of the speech raised many eyebrows in Arctic policy circles, which are used to a more cordial and cooperative regional tone and to the willingness of great powers to insulate Arctic matters from global tensions. In fact, Arctic cooperation was actually strengthened following the Crimean and East Ukrainian crises, and most recently, in 2021, through the adoption and the entry into force of a fisheries agreement for the Central Arctic Ocean.¹⁵ How-

9 European Parliament, Resolution of 9 October 2008 on Arctic Governance, available online at <http://www.europa.eu/sides/getDoc.do?pubRef=/EP/TEXT+TA-2008-0474+0+DOC+XML+VO//EN>.

10 European Commission, The European Union and the Arctic regions, November 20, 2008, available online at <http://eur-lex.europa.eu/LexUriSer//LexUriSer.do?uri=CELEC:DKEY=483680:EN:NOT>; L. Phillips, Commission backs Norway’s Arctic vision: no new treaty, Euroobserver, November 11, 2008, available online at <http://euroobserver.com/9/27104?print=1>.

11 See the relevant announcement at the website of the European Commission available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1318

12 Council of the European Union, Council Conclusions on Arctic Issues, in the Arctic Governance Compendium December 8, 2009, available online at www.arcticgovernance.org.

13 L. Jakobson, China Prepares for an Ice-Free Arctic, 2 SIPRI Insights on Peace and Security (2010)

14 The analytical statement of Secretary Pompeo can be found here: <https://www.arctictoday.com/pompeo-russia-is-aggressive-in-arctic-chinas-work-there-also-needs-watching/>

15 International Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, signed 3rd of October 2018, enters into force in 25th of June 2021 and can be available at: <https://faolex.fao.org/docs/pdf/mul199323.pdf>

ever, there were concerns US climate denialism may adversely impact the functioning of the Arctic Council.¹⁶

The perceived shift in Arctic geopolitics and economics led to calls for updating the EU's Arctic policy and adopting a true EU strategy for the Arctic. It is assumed that this means that the EU should identify its key interests, adopt a long-term perspective, pronounce clear goals and provide institutional and financial means for their achievement. Can the EU adopt a credible and effective Arctic strategy? What are the EU's strategic considerations for a region most European citizens only associate with polar bears?

In answering these questions, three aspects should be highlighted. First, the Arctic policy is a mixed bag of politics, economics, and environmental conservation, making policy prioritisation very challenging. Second, there are problems with most objectives the EU could adopt for its Arctic policy. Third, the Arctic is actually a marginal topic within the EU.

The EU Arctic policy domain encompasses many issues, sectors and stakeholders, some interlinked, some connected only via an 'Arctic' label, as it has already been discussed in this Thesis; of both an internal and external nature. The internal dimension refers primarily to the European Arctic, including topics such as sustainable economic development and investment, nature conservation or local climate adaptation. There are also pan-EU domestic actions that have indirect relevance to the Arctic, such as climate policy or the regulation of the EU's energy market. External actions comprise the EU's involvement in the work of the Arctic Council, its bilateral relations with Arctic states, and the Union's role in shaping international norms relevant for the Arctic. Devising an effective strategy bringing together these various elements is a structural challenge, with which all Arctic and non-Arctic States struggle, with varied degrees of success.

The broad scope of issues, often linked only with an 'Arctic' label, means that EU Arctic policymaking has often constituted an exercise in defining which existing EU policies and activities are most Arctic-relevant. The last reiteration of the EU's Arctic policy was the Joint Communication on an integrated European Union policy for the Arctic from April 2016 which was updated in 2021.¹⁷ Policymakers attempted to limit this broad spectrum and focused around three key themes – climate change and environment, sustainable development and international cooperation. While the themes signified a step towards prioritisation, they remained – necessarily – broad. Considering that the EU's current Arctic policy has issues of an internal nature at its core,

16 Dick Zandee Kimberley Kruijver, Adája Stoetman, *The future of the Arctic Security*, Clingendael Report, April 2020, available at: https://www.clingendael.org/sites/default/files/2020-04/Report_The_Future_of_Arctic_Security_April_2020.pdf

17 The joint communication is available at: http://eeas.europa.eu/archives/docs/arctic_region/docs/160427_joint-communication-an-integrated-european-union-policy-for-the-arctic_en.pdf

particularly the sustainable development of the European Arctic, a future strategy would continue to combine various internal and external elements.

It is rather challenging to define clear, convincing and credible goals for the EU's future Arctic engagement. The EU's Arctic policy itself has no effect on some of the key issues it continuously stresses, like global climate change. In other areas, the EU either has little influence or its attempts to use its market power are met with anxiety in the region. Moreover, the Arctic policy may not be the best place to make concrete decisions on regional development projects and investments.

First, climate change mitigation – a central 'priority area' of the EU's Arctic policy – is a global issue, not an Arctic-specific one. It is almost absurd to imagine that a backwater policy such as an Arctic one would significantly influence the EU's overall climate action. Equally, it would be erroneous not to take into account the Arctic environment in any European climate policy. The EU's Arctic engagement should certainly continue to include Arctic climate research and local climate adaptation. But these pillars can only be seen as supportive for climate action, the influence of which shall be seen in practice on the global mitigation decisions.

Second, the EU's role in maintaining Arctic peace and cooperation is marginal. The Arctic region is populated by self-confident and powerful actors, such as Canada, Russia and the US. The 2016 Global Strategy sets a goal for the EU to contribute to an orderly and cooperative Arctic region. But the same Strategy admits that this contribution is to take place at the level of low politics, through the work on climate change, environmental research, sustainable development, and search and rescue issues. However, the Union has precious little to do in terms of influencing the relations between Arctic states or the regional actions of global powers such as China.

Third, as regards rule-based governance of Arctic resource extraction and navigation, an increased EU involvement usually triggers anger or anxiety among Arctic actors, also from close partners such as Iceland or Norway. A good point of reference is the 2009 ban on imports of seal products and the related possibility of using the EU's market leverage to influence activities in the Arctic.

Finally, more specific aims included in an Arctic strategy might enter the domain of sectoral policies, such as transport, environment or the digital market. Is an Arctic policy or strategy – an appropriate place to, for instance, reshape the Trans-European Network for Transport or make concrete investment decisions? Making any concrete decisions is also likely to trigger local tensions and value conflicts.

No decent strategy can be construed on the basis of inaccurate assumptions and false expectations. There is a good awareness of Arctic realities among the handful EU officials who are directly involved in Arctic affairs. Good information is available and the EU has in fact greatly contributed to production (via research funding) and aggregation (via various assessments and reports)

of knowledge about the region. However, the relative marginality of Arctic issues in Brussels means that this information is not necessarily absorbed by all relevant policymakers.

If the EU were to adopt a strategy, its objectives would need to be shared by all member States with the need for some coordination between their activities relevant to the Arctic. Could that be effective for a Union of 27 regarding a marginal policy area where the EU has relatively limited influence? No single narrative for a grand Arctic strategy exists within the EU. Climate change is not to be tackled in the Arctic, it is a global issue. Presidents Putin, Biden and Xi Jinping are not the Arctic destabilisers the media might portray them to be. Thus, what should the EU do?

The EU does indeed influence many Arctic developments, in particular in the European part of the region. It is definitely important that EU policymakers have an opportunity to reflect on this influence and communicate their aims to the EU public and to Arctic actors. There are synergies between different Arctic activities that should be identified and an EU Arctic policy creates possibilities for that to happen.

Changes in the Arctic so far are dramatic mainly in terms of climate change impacts on Arctic environment and livelihoods. EU policymakers should not fall for over-egged geopolitical or economic narratives. However, the region is clearly changing and thus the EU's Arctic policy is indeed in need of an update. Keeping to the current 'priority areas' and using Arctic policy as a vehicle for institutional reflection is a more realistic and likely course of action. An update of the EU's Arctic policy has to be based on realistic foresights and the acknowledgement of the actual role of the EU in the region and its capability to make a difference. A modest option for Arctic strategy-building could be to agree on a small set of clear sustainable development targets specific for the Arctic falling under the jurisdiction of the EU – rather than for the Arctic as a whole – and devise a strategy to implement those targets.

The long-term pursuit of far-reaching goals is impossible without resources and institutional continuity. The Arctic cross-sectoral policy has drawn on disconnected sectoral sources of funding and institutional human resources characterised by fragmentation and lack of continuity. Policymakers should attempt to address these deficiencies before making grand strategic declarations.

2 CHINA'S ARCTIC POLICY

The Arctic is emerging as a new domain for the strategic rivalry between the United States and China. As China expands its engagement in the Arctic, the implications of its presence and activities are an increasingly debated topic in the United States, among the Arctic states, and globally. China has claimed benevolent intentions in peace, development, and improving Arctic governance.

However, given the opaqueness of China's decision-making and capability development, many American policymakers and observers, if not most, remain skeptical or even hostile toward China's potential in the Arctic.

One concern about the Chinese threat in the Arctic is a manifestation of the rising strategic rivalry between the U.S. and China in the era of great power competition. US criticism of China's Arctic policy reached an unprecedented level in 2019. Both the US Department of Defense and Secretary of State publicly cast doubt on China's self-proclaimed status as a "near-Arctic state". Strategic thinkers in the U.S. worry that China's economic engagement in the region could be a precursor to much more invasive political and strategic ambitions. China's Arctic infrastructure development has the potential for dual-use facilities, paving the ground to Beijing's permanent security presence in the region. In their view, the Sino-Russia commercial cooperation in the Arctic is also creating potential opportunities for security collaboration in the context of their strategic alignment vis-à-vis the United States. In addition, many liken China's intentions in the Arctic to that in the South China Sea, which has resulted in the South China Sea being "fraught with militarization and competing territorial claims".¹⁸

China certainly has not helped its own case in the Arctic. Arctic policy-making in China is opaque at best, creating ambiguities in its priorities and ambitions. While Beijing publicly claims that its goals in the Arctic are about "knowledge, protection, development and governance" of the region, it has also declared China's "activities, assets and other interests" in the polar regions as intrinsic to China's national security.¹⁹ China's record of incremental development of overseas power projection capability in the name of asset protections, attested by its naval base in Djibouti and dual-use facilities in the Indian Ocean, suggests a pattern repeatable in the Arctic. Observers only get a glimpse of China's capability when Beijing chooses to publicize information on topics such as the state of its nuclear-powered icebreakers, exacerbating anxieties about what other capabilities are under development.²⁰

On a more strategic level, China's desire to expand outside its power-saturated neighborhood is understood as a rising hegemon's effort to export power and influence outside the overcrowded East Asia. Such efforts, as spearheaded by the Belt and Road Initiative, are integral to its bid for global hegemonic status. The Arctic may not be a power vacuum, but it represents a front where power export is still possible for China. For example, the infra-

18 Elizabeth Buchanan and Bec Starting, WHY THE ARCTIC IS NOT THE 'NEXT' SOUTH CHINA SEA, 2020, available at: <https://warontherocks.com/2020/11/why-the-arctic-is-not-the-next-south-china-sea/>

19 Yun Sun, Defining the Chinese Threat in the Arctic, 2020, The Arctic Institute, available at: <https://www.thearcticinstitute.org/defining-the-chinese-threat-in-the-arctic/>

20 *Ibid.*

structure projects China has proposed in Russia and Iceland represent the Chinese effort to channel its financial wealth into footholds in the region.

Upon understanding the Chinese strategic thinking, the next step is to accurately define the Chinese threat in the Arctic specifically based on concrete evidence. Instead of speculating about China's potential, efforts should be focused on assessing probabilities and capabilities. We need to be vigilant about China's intentions and activities, but also vigorous in gauging the nature and depths of the threat it concretely poses.

Creating an accurate picture of China's threat in the Arctic is important for consensus building and alliance management with other Arctic states, such as the Scandinavian countries. Given their better negotiation positions vis-à-vis China compared to, for example, debt-ridden Africa countries, some may not feel as vulnerable or share the same threat perception about China with the US. Despite their unease with Sino-Russia cooperation in the High North on energy development in Siberia's Yamal Peninsula and the shipping lane through the Northern Sea Route, they may not be convinced of Beijing-Moscow military cooperation in the Arctic given the Russian territoriality about the region.

In addition, the clear definition of China's threat in the Arctic is also essential to the development of a counter strategy. Denying China access to the Arctic and preventing its activities there is not legal, sensible or feasible. It should be acknowledged that susceptibility to the Chinese presence in the Arctic does not equate to vulnerability to Chinese dominance. Some Arctic states might be susceptible to the appeal of Chinese investment or its scientific interest, but it does not mean that they will be compelled to embrace invasive Chinese activities. The question here is not whether China will try to expand activities in the Arctic, because it will. The question is how to develop sophisticated policies to identify and deny malign or ambiguous behaviors while managing and shaping other behaviors that are neutral or potentially constructive.

In this sense, the key to US policy toward China's Arctic influence and activities should begin with solid assessment of China's concrete capabilities instead of speculations about its intentions and potential. A preemptive or complete denial of China in the Arctic may be desirable but not feasible. Chinese economic activities in the Arctic have been welcomed by some Arctic States. The scope and depth of China's military ambitions need much more research and deliberation before consensus could be reached and common actions be developed.

3 POLICY DISCOURSES

Policy agendas are crowded with issues defined in concrete terms.²¹ In the Arctic today, there are numerous significant issues, including: how to delineate jurisdictional boundaries on the seabed; the optimal format of a regulatory code to deal with enhanced commercial shipping; how to anticipate pressures to initiate industrial fishing in the far North; how to prepare for the possibility of oil spills under Arctic conditions; what rules to impose on tour operators, to name a few. All of these issues are likely to give rise to vigorous debates that result in decisions that may have significant impacts on human activities in the Circumpolar North. Underlying such debates are deeper and broader issues regarding the conceptual frameworks employed to organise thinking about specific policy issues and the discourses we develop to bring these frameworks to bear in specific situations. Although they do not prescribe detailed answers to specific policy questions, the influence of such discourses is enormous. They shape the way we formulate questions, and they can direct our thinking in ways that favour some answers and rule out others.²² The current state of change in the Arctic raises fundamental issues about the character and content of the policy discourse used to come to terms with Arctic affairs. Two discourses, in particular, are in competition at this stage: the discourse of geopolitics/political realism and of ecosystem-based management or EBM.

Already quite a while ago, it has been suggested that the Arctic is being overtaken by the discourse of geopolitics/political realism.²³ Many pundits anticipate an era of “high politics” marked by aggressive assertion of jurisdictional claims, a growing competition for control over the Arctic’s natural resources, a remilitarisation of the region, and more or less frequent clashes among leading States active in the Arctic.²⁴ This discourse, which assumes that States are the major players and that relative power among the key States or coalitions of States is the critical determinant of outcomes, anticipates the emergence of a new ‘great game’ in the Arctic. As a region that is sparsely inhabited, but that appears to contain a treasure trove of natural resources, including large quantities of oil and natural gas, the Arctic will become an irresistible target of opportunity for powerful States as well as leading corporations engaged in the exploitation of natural resources. The Arctic will, accordingly, be of interest to influential non-Arctic States, such as China, or associations of States, such as the EU. As we move into a world in which the United States is no longer the world’s sole superpower, it will become harder and

21 J.W. Kingdon, *Agendas, Alternatives, and Public Policies*, Pearson (2nd ed., 2014)

22 K.T. Litfin, *Ozone Discourses: Science and Politics in Global Environmental Cooperation*, Columbia University Press (1995)

23 K.N. Waltz, *Theory of International Politics*, Addison-Wesley (1979)

24 S.G. Borgerson (2008), *supra*.

harder to exclude actors like China, Japan, and the EU when negotiating deals on Arctic issues. The Arctic will become a theatre of operations for extractive industries and military forces, a fact that makes the prospect of an “Arctic meltdown”, giving rise to armed clashes, a real and present danger.²⁵

The alternative policy discourse, based on the concepts of EBM and spatial planning, starts from the premise that the Arctic is a complex and dynamic socio-ecological system. Such systems are prone to the impacts of tipping points, non-linear changes, and system flips that can lead to State changes that are undesirable in anthropogenic terms and that are hard to reverse once they occur.²⁶ On this account, we should focus on large socio-ecological systems (for example, large marine ecosystems), avoid the fragmentation resulting from battles over jurisdictional issues, and devise co-operative regimes that make it possible to address interrelated Arctic issues in an integrated manner. There may be scope for the development of sectoral arrangements (for example, distinct regimes for oil and gas development, fishing, shipping) within this framework. But the key to sustainability lies in accounting for the complex linkages arising from interactions between human activities and biophysical forces.²⁷ A matter of particular importance arising from the application of this discourse to the Arctic centres on the connections between the Arctic and the Earth system as a whole. Nowhere is this more apparent than in climate change. The Arctic is already experiencing far-reaching impacts of climate change, and the region may shift from sink to source with regard to greenhouse gas emissions during the foreseeable future. But other regional/global links are important as well. For example, POPs, which are released in the mid-latitudes, regularly materialise at high levels in the Arctic. The global interest in the Arctic’s oil and gas reserves is fuelled by the needs of industrial societies far removed from the region rather than by demand for energy arising in the Arctic itself.

Yet, this comparative freedom comes at a political price as it raises serious questions about the future of the Arctic Council’s influence in the wake of the new State change. This change is strengthening the connection between the Arctic and global concerns. This may exert pressures that increase incentives to look at Arctic issues through the lens of the geopolitics/political realism discourse.²⁸ Under its current mandate, the Arctic Council is expressly

25 *Ibid.*

26 L.H. Gunderson, C.S. Holling (eds.), *Panarchy: Understanding transformations in human and natural systems*, Island Press (2002).

27 R.G. Rayfuse, *Melting Moments: The Future of Polar Oceans Governance in a Warming World*, 16 *RECEIL* 196 (2007).

28 T. Koivurova, *Alternatives for an Arctic Treaty – Evaluation and a new proposal*, 17 *Review of European Community and Int’l Environmental Law* 1 (2008).

prohibited from addressing conventional security issues.²⁹ It lacks authority that would induce important stakeholders to pay attention to its views regarding regulatory issues associated with the opening of the Arctic to oil and gas development, industrial fishing, or commercial navigation. The fact that the Arctic coastal States have elected to bypass the Council in addressing the delineation of seabed jurisdiction is not a good sign. Powerful outsiders, like China and the EU, are not likely to be content to follow the lead of the Council in addressing Arctic issues, even though they profess to be motivated by a concern for matters of environmental protection and the rights of indigenous peoples. It is possible that the discourses of geopolitics/political realism and EBM will exert influence simultaneously in the handling of Arctic issues in the near future. The two discourses are incompatible with one another in their application to policy issues in the Arctic. The discourse of EBM seeks to transcend jurisdictional boundaries, approach socio-ecological systems in holistic terms, and provide a rationale for collaborative management practices. Whereas the discourse of geopolitics/political realism focuses on matters of control or influence and anticipates more or less severe conflicts between or among those seeking to exploit specific natural resources like oil and natural gas. Nonetheless, there is nothing new about the occurrence of cognitive dissonance in the world of public policy. It is possible that neither of these discourses will triumph over the other in the near future. Many debates about policy issues in the Arctic are likely to take the form of arguments between those who see the issues through either of these two disparate discourses.

4 A REGIME FOR THE ARCTIC OCEAN

What does this analysis tell us about the desirability of establishing a “regional agreement on management and conservation of the Arctic marine environment”,³⁰ “a comprehensive treaty regime for the Arctic Ocean beyond national jurisdiction”,³¹ or a legally binding instrument for the “governance and regulation of the marine Arctic”?³² Given the dramatic biophysical changes arising from the melting of sea ice in the Arctic and the prospect that this process may trigger a rapid expansion of economic activities in the region, it is hardly surprising that those concerned with environmental protection and sustainable development see a need for the creation of new governance arrangements

29 A footnote to the main text of the 1996 Ottawa Declaration on the Establishment of the Arctic Council states that “The Arctic Council should not deal with matters related to military security.”

30 R. Huebert, B. B. Yeager, *A New Sea: The Need for a Regional Agreement on Management of the Arctic Marine Environment*, WWF International Arctic Programme (2008).

31 R.G. Rayfuse (2007), *supra*.

32 T. Koivurova, E.J. Molenaar, *International Governance and Regulation of the Marine Arctic: A Proposal for a Legally Binding Instrument*, WWF International Arctic Programme (2010).

focused on the marine systems of the Arctic.³³ But is a treaty or some other legally binding arrangement focused on the Arctic Ocean the way forward in this connection? There are several reasons to conclude that such a strategy may be neither necessary nor desirable as a means for providing the protection the Arctic Ocean will need in the coming years. The Arctic Ocean is fully covered by UNCLOS which “provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea”.³⁴ Canada, Denmark/Greenland, Norway, and Russia have all ratified UNCLOS. The United States accepts most of its provisions as a matter of customary international law or practice. The Arctic coastal States have made a point of asserting that they “remain committed to this legal framework and to the orderly settlement of any overlapping claims”.³⁵ There is a need for specific regulatory arrangements tailored to emerging uses of the sea and its resources in the Arctic. That said, there is nothing to be gained by establishing an entirely new constitutive framework for the Arctic Ocean, given the status of UNCLOS as an overarching legal regime.³⁶

A new regime focusing on the Arctic Ocean would not be effective in addressing some of the fundamental challenges to the integrity of the marine environment in this region. The land/ocean boundary is artificial in the Arctic. Coastal adaptations by human communities, featuring shore-based harvesting of marine mammals, have been a critical part of the system for millennia.³⁷ Discharges from a number of large rivers (for example, the Mackenzie, the Ob, the Yenesei, and the Lena) ensure that the ocean will feel the effects of activities occurring hundreds of kilometres from the coast. Any regime for the Arctic Ocean that fails to take these considerations into account is likely to fail. A more inclusive regime would need to cover the whole of the Circumpolar Arctic, a fact that makes it inappropriate to think of a regime for the Arctic Ocean that differs in some way from a comprehensive regime for the whole of the Arctic. An effective initiative would also need to pay attention to the importance of spatial/functional crosscuts. Most species of great whales and many species of birds are highly migratory, spending a portion of each year in the Arctic, but also travelling far south in the course

33 R. Huebert, *The Need for an Arctic Treaty: Growing from the United Nations Convention on the Law of the Sea*, 23 (1) *Oceans Yearbook* 27 (2009).

34 *Ilulissat Declaration* 2008.

35 *Ibid.*

36 H. Corell, *The North is not the Wild West*, *The Globe and Mail*, April 28 (2008), available online at: <https://www.havc.se/res/SelectedMaterial/20190115bibliographyhanscorell1.pdf>; Ç. Corell, *The Arctic: An Opportunity to Cooperate and to Demonstrate Statesmanship*, 42 *Vanderbilt Journal of Transnat'l L.* 1065 (2009).

37 I. Krupnik, *Arctic Adaptations: Native Whalers and Reindeer Herders of Northern Eurasia*, University Press of New England (1993).

of their annual migratory cycles. They are covered by functional regimes, such as the arrangements established under the terms of the 1946 International Convention for the Regulation of Whaling and a sizable number of migratory bird treaties to which various combinations of Arctic States are parties. At a minimum, therefore, efforts to create an effective governance system for the Arctic Ocean would have to address the interplay between a spatially defined regime for this area and a variety of functionally defined regimes whose operation affects the area.³⁸ There is no reason to be pessimistic about the prospects for handling these issues of coordination in an effective way. But this matter must loom large in the thinking of those desiring to take steps to protect the Arctic Ocean in anticipation of new human activities stimulated by the melting of sea ice.

5 THE GOALS OF A NEW GOVERNANCE FRAMEWORK

Some of the most serious threats to the integrity of marine systems in the Arctic originate far outside the region so they would not be subject to control under the terms of a regime for the Arctic Ocean. These include emissions of POPs, ozone-depleting substances, and greenhouse gases. Efforts are underway on a global scale to address these problems and some have borne considerable fruit (e.g., the negotiation of the 2001 Stockholm Convention on POPs and the various amendments to the 1987 Montreal Protocol on ozone-depleting substances). In some areas (e.g., POPs), evidence regarding environmental impacts occurring in the Arctic has made a difference in key negotiations.³⁹ Nevertheless, it would be naïve to think that we can take effective steps to protect the marine systems of the Arctic without addressing global concerns that have far-reaching implications for the Arctic Ocean. Does this mean there is no need for specific agreements dealing with human activities affecting the Arctic Ocean? All efforts should be nested into the overarching framework provided by UNCLOS and the global arrangements dealing with issues like POPs, ozone-

38 For a more general treatment of institutional interplay, see O.R. Young, L.A. King, H. Schroeder (eds.), *Institutions and Environmental Change: Principal findings, applications, and research frontiers*, MIT Press (2008).

39 Leonard, David Downie and Terry Fenge (eds), 2003, *Northern Lights against POPs, Combatting Toxic Threats in the Arctic*, Montreal and Kingston, Published for the Inuit Circumpolar Conference Canada by McGill-Queen's University Press, 354 pages, illustrations, maps, tables, figures, appendices., available at: [https://doi.org/10.1038/s43017-022-00279-8](https://www.researchgate.net/publication/272721583_Leonard_David_Downie_and_Terry_Fenge_eds_2003_Northern_Lights_against_POPs_Combatting_Toxic_Threats_in_the_Arctic_Montreal_and_Kingston_Published_for_the_Inuit_Circumpolar_Conference_Canada_by_McGill-; Bergmann, M., Collard, F., Fabres, J. et al. Plastic pollution in the Arctic. <i>Nat Rev Earth Environ</i> 3, 323–337 (2022). <a href=).

depleting substances, and greenhouse gases.⁴⁰ It may be timely to promulgate mandatory rules regarding commercial shipping in the Arctic, to extend the coverage of existing RFMOs, like the North East Atlantic Fisheries Commission, to encompass (a larger sector of) Arctic waters, and to create an association of Arctic tour operators somewhat similar to the International Association of Antarctic Tour Operators (IAATO). Current efforts under the auspices of the Arctic Council to develop co-operative practices dealing with SAR and under the auspices of the IMO to upgrade existing guidelines for shipping under Arctic conditions into a mandatory Polar Code are notable in this connection. The goal will be to develop effective regulatory arrangements covering specific activities that do not fall prey to the problem of sectoral fragmentation.⁴¹ Perhaps the adoption of a sophisticated strategy, under which an Arctic Ocean coordinating body capable of issuing legally binding rules could be established, would be preferable. This could be created alongside regulatory arrangements designed to deal with functionally specific activities, such as commercial shipping or tourism.

The Arctic Council deserves considerable credit for documenting and drawing attention to a number of threats to the integrity of Arctic marine systems, such as the instrumental role it played in building the case for regulating POPs under the terms of the Stockholm Convention. Evidence regarding the effects of climate change in the Circumpolar Arctic, compiled under the auspices of the Arctic Council, was important in negotiations aimed at extending and strengthening the Kyoto Protocol beyond 2012, and fulfilling the mandate of the 2007 Bali Road Map to reach agreement on a more comprehensive and legally binding climate regime, which has been concluded with the Paris Agreement in 2015. The Council may well continue to play a generative role of this sort. The on-going efforts of the Council's Task force on Short-lived Climate Forcers are interesting. But it is highly unlikely that the Council will evolve from its current function as a "high-level forum" for the consideration of Arctic issues into a regulatory body with the authority to make and implement rules regarding the protection of the Arctic Ocean. This is not to belittle the work of the Council, but it does have important implications for the landscape of Arctic governance in the foreseeable future.

40 O.R. Young, *Institutional Linkages in International Society: Polar Perspectives*, 2 *Global Governance* 1 (1996).

41 L.B. Crowder *et al.*, *Resolving Mismatches in U.S. Ocean Governance*, 313 *Science* 617 (2006); Interagency Ocean Policy Task Force, *Interim Framework for Effective Coastal and Marine Spatial Planning*, December 9, 2009, available online at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans/interim-framework>.

6 A COMPREHENSIVE ARCTIC TREATY

An alternative approach features the development of a more comprehensive and legally binding Arctic Treaty (some Europeans prefer to speak of an Arctic Charter).⁴² For example, in its 2008 Resolution on Arctic governance, the European Parliament suggested that:

“... the [European] Commission should be prepared to pursue the opening of international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty, as supplemented by the [Environmental] Protocol signed in 1991”.⁴³

A number of commentators and legal scholars have proposed similar initiatives. Although they vary in significant ways, all these proposals are alike in advocating a regime for the Arctic that is comprehensive, articulated in a legally binding convention or treaty, and open to participation on the part of legitimate stakeholders located beyond the confines of the Arctic per se.

Any effort to create an Arctic Treaty would be politically charged, to say the least. As the Ilulissat Declaration states explicitly, the Arctic Five “... see no need to develop a new comprehensive international legal regime” to govern the Arctic Ocean, much less the Circumpolar Arctic as a whole.⁴⁴ And there is no reason to believe that the Arctic Eight would be any more receptive to a comprehensive agreement along these lines, despite the fact that three members of the Arctic Council (Denmark, Finland, and Sweden) are full members of the EU and two others (Iceland and Norway) maintain close ties to the EU.⁴⁵ It is doubtful whether a comprehensive legally binding Arctic Treaty would be desirable, even if it were feasible politically to reach agreement on the terms of such an instrument. Legally binding treaties have a number of limitations as mechanisms for providing effective governance for complex and dynamic systems that are apt to experience non-linear and abrupt changes that have important implications for efforts to meet needs for governance. Legally binding agreements are attractive as they generate a greater normative pull than informal non-binding arrangements affecting the actions of those expected to comply with their provisions. This is not a trivial virtue. The problem of compliance is arguably the single greatest challenge facing

42 L. Nowlan, Arctic Legal Regime for Environmental Protection, IUCN Environmental Policy and Law, Paper No. 44 (2001 T. Koivurova, Alternatives for an Arctic Treaty – Evaluation and a new proposal, 17 Review of European Community and Int'l Environmental Law 14 (2008).

43 European Parliament, Resolution of 9 October 2008 on Arctic Governance, *supra*.

44 Ilulissat Declaration 2008, *supra*.

45 There are ongoing discussions regarding the possibility of full EU membership for Iceland. But the outcome is difficult to predict at this juncture.

international law.⁴⁶ Yet legally binding agreements typically: (i) require protracted negotiations to reach agreement on their substantive provisions, coupled with time-consuming procedures to meet the requirements for entry into force; (ii) avoid issues expected to prove contentious in the interests of building consensus; (iii) are difficult to adapt to changing circumstances in a timely manner; and (iv) do not accord roles to non-State actors that are commensurate with their importance in the relevant system.⁴⁷ A brief explanation of these limitations as they pertain to the Arctic will illustrate these concerns. Negotiations regarding the terms of legally binding agreements sometimes move forward relatively rapidly. The Montreal Protocol to the 1985 framework convention on stratospheric ozone came two years after the original agreement. The Environmental Protocol to the Antarctic Treaty came less than three years after the collapse of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities. However, more typical are conventions that take four years or more to negotiate and additional years to enter into force. The terms of UNCLOS, which is admittedly an extreme case, took almost 10 years to negotiate and entered into force approximately 20 years after the start of negotiations. There is no basis for assuming that a comprehensive and legally binding treaty for the Arctic could be negotiated quickly and put on a fast track to enter into force on a timetable commensurate with the need to address problems like those associated with the melting of sea ice.

One common manoeuvre designed to speed up the process of treaty-making is to limit the substantive content of such agreements. The Paris Agreement imposed targets regarding reductions of greenhouse gas emissions. It does not include substantive and credible measures of the sort that would be needed to countries into the effort to limit emissions. The Stockholm Convention directs attention to chemicals (the so-called “dirty dozen”) that most signatories had already banned prior to signing the agreement. Even non-binding agreements can lose content as a consequence of efforts to achieve consensus. The text of the 1996 Ottawa Declaration establishing the Arctic Council, for instance, contains considerably less content than earlier drafts of the document. Other members of the Arctic Eight acquiesced in this move as a concession needed to keep the United States engaged in Arctic co-operation. The likelihood that the United States would be prepared to sign and ratify a comprehensive Arctic treaty with real substance, even under the Biden leadership, remains low. Even more important with regard to the Arctic is the fact that legally binding agreements are hard to adapt to changing circumstances, especially once they have entered into force. Most treaties contain provisions for introducing

46 A. Chayes, A. Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press (1995).

47 C. Lipson, *Why Are Some International Agreements Informal*, 45 *Int'l Organization* 495 (1991); K.W. Abbott, Kenneth, D. Snidal, *Hard and Soft Law in International Governance*, 54 *Int'l Organization* 421 (2000).

adjustments. The 1959 Antarctic Treaty even authorises the convening of a review conference at any time following 30 years after its entry into force,⁴⁸ but these provisions are seldom exercised, and adjustments to existing agreements are notoriously difficult to agree on and to implement. The case of the Montreal Protocol, which allows for the acceleration of phase-out schedules without ratification on the part of the signatories, is a prominent exception. Almost certainly, a comprehensive Arctic Treaty would have more in common with the Antarctic Treaty than with the Montreal Protocol with regard to adjustability. This means that reliance on a legally binding treaty for the Arctic would run the risk of setting up a serious mismatch between the pace of change in major biophysical and socio-economic systems in the region and the ability of the associated governance system to evolve and adjust to keep up with these dynamic processes.

Equally troubling in the case of the Arctic is the fact that a legally binding Arctic Treaty would reinforce the capacity of States to control governance in the Circumpolar North. This is problematic in an era marked by the growing importance of global civil society as such a development seems particularly ill suited to Arctic governance during the foreseeable future.⁴⁹ Sub-national units of government (e.g., counties, States, provinces, oblasts, okrugs), the business sector, indigenous organisations, and environmental NGOs all have strong and legitimate interests that differ – sometimes substantially – from the interests of national governments in this realm.⁵⁰ The current mosaic of governance arrangements in the Arctic provides opportunities for a variety of non-State actors to exercise real influence over specific issues arising in the region. As both the content of the Ilulissat Declaration and the fact that the governments of the coastal States deliberately avoided engaging with non-State actors, including indigenous organisations, in crafting the text of the Declaration suggest, there is reason to believe that national governments are well aware of the goal of maintaining their control over Arctic affairs. This effort is likely to fail in the long run.

The growing influence of non-State actors (including business corporations and civil society movements) worldwide has advanced too far to allow for traditional diplomatic practices to assume and maintain supremacy over issues

48 Antarctic Treaty, (adopted 1 December 1959, entered into force 23 June 1961) 402 UNTS 71, Art. XII.2 states that any Contracting Party may call for a review conference “after the expiration of thirty years from the date of entry into force of the present Treaty.” Once that happens, a “Conference of all the Contracting Parties shall be held as soon as practicable to review the operation of the Treaty.”

49 M. Kaldor, *The Idea of Global Civil Society*, 70 *Int'l Affairs* 583 (2003); P.H. Pattberg, *Private Institutions and Global Governance. The New Politics of Environmental Sustainability*, Cheltenham (2007); Anderson (2009), *supra*.

50 O.R. Young, *Can the Arctic Council and the Northern Forum Find Common Ground?*, 38 *Polar Record* 289 (2002).

like those arising in the Arctic today.⁵¹ The negotiation of a traditional legally binding treaty for the Arctic would not be a progressive development in this context. A rejection of the rationale for establishing a comprehensive legally binding treaty for the Arctic should not be read as a denial of the need for regulatory arrangements to govern human activities in the region. It would be unrealistic to expect the Arctic Council to metamorphose into a body with the authority, much less the capacity, to handle regulatory matters in the far North. Under the circumstances, it is appropriate to pursue specific regulatory concerns through existing arrangements authorised to deal with the relevant issues. It makes sense, for instance, to negotiate on the terms of a mandatory Polar Code for Arctic shipping within the setting of the IMO; to rely on the North East Atlantic Fisheries Commission to cover industrial fishing throughout the Greenland and Norwegian Seas; to address issues pertaining to contaminants under the auspices of the Stockholm Convention on POPs; and to make use of the forum provided by the Convention on Biological Diversity to work on matters pertaining to the protection of species and the rights of indigenous peoples in the Arctic.⁵² In some ways, the outcomes of this approach are bound to be messy. Progress is likely to occur at different rates and in different fora regarding different issues. But, a messy process that yields effective governance with respect to important issues and that evolves over time into a governance complex seems preferable to a more comprehensive and orderly process that is unsuccessful.

7 MOVING FORWARD

I have dashed cold water on some of the popular proposals of the day regarding Arctic governance. An Arctic Ocean treaty would not solve the problem of safeguarding the marine systems of the far North, even if it were at all politically feasible to reach consensus on the terms of such an agreement. As a result, the prospects for negotiating a comprehensive and legally binding treaty for the Arctic as a whole seem also dim. Such an instrument almost certainly would be disappointing in terms of substantive content, and could end up doing more harm than good. How should we respond to growing needs for governance in the Arctic during the foreseeable future? Individual observers can and will answer this question in their own ways. In light of the arguments I have presented in the body of this thesis, I would like to offer the following package of recommendations aimed at producing a governance complex or a set of distinct but interlocking institutional arrangements for the Arctic. The international community should strive to frame issues of govern-

51 S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Princeton University Press (2006).

52 1992 Convention on Biological Diversity, 1760 UNTS 79, 31 ILM 818 (1992).

ance in the Arctic in terms of the discourse of EBM and spatial planning and to grant all legitimate stakeholders, including a number of non-State actors, a seat at the table in addressing these issues. Furthermore, the Arctic State and its observer States should make every effort to maintain and even enhance the effectiveness of the Arctic Council, while not expecting the Council to turn into an organisation with the capacity to make regulatory decisions on a variety of subjects, much less to implement and enforce them effectively. The Council has performed particularly well in the development of scientific assessments, a capacity that may prove helpful in applying the precepts of EBM in Arctic conditions. With regard to issue-specific regulatory matters, such as the development of a mandatory Polar Code, the framing of regulations pertaining to Arctic tourism, or the establishment of rules governing industrial fishing in Arctic waters, the international community should proceed in a pragmatic fashion, using appropriate and effective forums for handling key issues as they arise. This could entail, for example, turning to the IMO to improve its mandatory Polar Code for Arctic shipping. This package of recommendations is likely to disappoint those who are wedded to the idea of a legally binding treaty focused on the Arctic Ocean or even a comprehensive Arctic Treaty or Charter. The resulting governance system would be messier than a comprehensive and integrated regime set forth in the provisions of a single treaty. Its virtue, on the other hand, would be a greater opportunity to provide the Circumpolar Arctic with effective governance.

