

Multilateral versus Unilateral Actions: Balancing the needs for International Governance in the New Arctic.

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Introduction

In May 2008, representatives of five Arctic states meet in Greenland.¹ Each of these states, including Russia, Canada, United States, Denmark (for Greenland) and Norway, has the potential to claim an extended Arctic continental shelf. At the end of the meeting, the head of the Danish delegation that hosted the meeting claimed it a tremendous success and that it had shown how well the existing multilateral framework worked. He then went on to state that there was no need for an Arctic treaty since the five Arctic nations could work out any differences between themselves.² However, this perspective is not universally accepted. Some suggest that Arctic governance is headed increasingly to a “free for all” based on the unilateral actions of interested states.³ There is growing debate as to whether the existing international regime is sufficient, or if Arctic states are increasingly turning to unilateral action. If indeed the latter is occurring, there is a fear that such action will lead to increasing tension and disputes in the north. This discussion paper will consider whether or not the existing multilateral framework is sufficient or if there is a need for new arrangements.

Creating the Situation

The Arctic has remained the least developed international region in the world. Prior to the Second World War it was only the northern indigenous populations with their long history of thriving in the north that were able to live in the region. Individuals from more southern

locations could survive only with the greatest of efforts (and in many instances did not survive !) As a result the entire area tended to be ignored and avoided by the rest of the world. However, by the end of the Second World War technological advances allowed for southerners to enter and habitate in the region. Unfortunately, the onset of the Cold War meant that hostility between the northern states ended any opportunity for the development of an international cooperative regime. Instead of allowing the new technology to foster cooperative behaviour between the circumpolar states, the Arctic became a major strategic location of competition. If a nuclear war had occurred between the USSR and NATO, the Arctic would have become of the principle battlefields.

When the Cold War ended, efforts to develop international institutions and arrangements began in earnest. Of particular note was the creation of the Arctic Environmental Protection Strategy (AEPS) and its successor the Arctic Council.⁴ However, while these organizations have had some success, most notably the production of the *Arctic Climate Impact Assessment*, these efforts have not created a viable multi-lateral Arctic body.⁵ Instead, the existing regime can best be thought of as an immature and fragmented region-system. However events are now developing that are refocusing the attention of the world on the Arctic. The twin forces of climate change and increased resource demand are combining to make the Arctic an increasingly important section of the world. As the ice recedes and the price of oil and gas expand, both Arctic and non-Arctic states are now examining how the Arctic region can be used to their benefit. The question now is the manner in which this increased attention will be managed. Will the Arctic be developed through the use of multilateral tools or will individual states decide whether to act in a unilateral manner? Will the Arctic nations be able to work together to ensure that an increasingly assessable Arctic is developed in cooperatively in a sustainable fashion? Or will it once again become a region of interstate competition?

The Existing Nature of the Arctic Regime

The Arctic not developed a robust multilateral framework of international governance. There are almost no treaties that are specific to the Arctic. The one exception is the 1973 Polar Bear Treaty (Agreement on the Conservation of Polar Bears).⁶ Nominally dealing with the protection of the Polar Bear population in Canada, the US, the USSR, Norway and Denmark, the real rationale of the treaty was to provide for a confidence measurement for the superpowers in a time when NATO and the USSR were attempting to improve relations through detente. Since that time there have been no other specific Arctic treaties. Instead what has developed is a series of international agreements (soft international law), and several general international treaties/conventions that have an impact on the Arctic but are not specific to the region.

The AEPS and Arctic Council

The main international multilateral body that was created for the Arctic is the Arctic Council. An initiative of the Canadian Government, it was first proposed as a means of improving relationships between the Arctic nations as the Cold War ended. The original proposal put forward by the Canadian Government in 1989 did not receive much support. However, the idea of a multilateral Arctic based organization resonated with the Finnish Government, who pursued a related initiative that focussed on providing environmental protection for the Arctic. Working closely with Canadian officials, Finnish officials were successful in gaining the support of all eight Arctic states - (Russia, US, Canada, Finland, Sweden, Norway, Iceland and Denmark for Greenland) for the creation of a new agreement to protect the Arctic environment. This body was called the Arctic Environmental Protection Strategy (AEPS).⁷

The AEPS represents the first multilateral effort encompassing the Arctic in the post-Cold War era. It focussed on examining and remedying transboundary environmental

issues in the north. It included several innovative elements with an emphasis on achieving a shared understanding of mutual problems. Even as late as the early 1990s there remained limited understanding of the magnitude or cause of northern environmental problems. The AEPS established a series of working groups that brought together governmental experts from the eight Arctic nations to achieve a common understanding of trans-boundary pollution in the Arctic. The AEPS also pioneered the inclusion of northern indigenous peoples' organizations as partners. Groups such as the Inuit Circumpolar Conference and Saami Council were granted the status of Permanent Participants that allowed them to fully participate on all elements of the AEPS with few exceptions. The eight state members retain ultimate power over any decision regarding funding. But while the aboriginal groups are excluded from the process in making such decisions, the fact remains that the AEPS seldom made decisions involving financial issues. Hence the Permanent Participants tend to be included in all activities of the AEPS..⁸

However, the AEPS was limited in three ways. First, because it was an agreement and not a treaty, the state parties were not compelled to act. Any contribution to the agreement was voluntary. That meant that the burden was not evenly shared. Some of the member states, such as the United States, were not enthusiastic in their support while others, such as Russia, were either unwilling or unable to allocate resources in its activities. This meant that the other members often had to bare much of the burden to act.

A second limitation of the AEPS occurred with its focus on environmental issues. There is no doubt that such issues needed to be examined in an internationally cooperative fashion. But the circumpolar Arctic faces other issues beyond the environment degradation. There are issues surrounding the social and economic development of the region and its people, as well as issues related to geo-political concerns that need international attention.

The shortcomings of the AEPS led Canada to push for the creation of a new body that would go beyond the AEPS's mandate. Specifically, Canadian officials wanted to create a multi-lateral organization that could address all issues pertaining to the north including international politics and security. Ultimately, the Canadians were successful in creating a new international organization in September 1996 named the Arctic Council. The working groups of the AEPS were transferred to the Arctic Council. The Council also entrenched the role of the permanent participants.

The greatest success of the Council has been in the area of the environment. The Council was instrumental in undertaking the *Arctic Climate Impact Assessment*. This landmark study brought together the world's leading experts in a massive study that not only demonstrated that climate change is occurring in the Arctic but that it was fundamentally changing the very nature of the region. Follow-up studies have shown that the rate of melt is now accelerating and may soon lead to a period of complete open water in the entire Arctic Ocean.

From a scientific and public awareness perspective, this study and the general work of the Arctic Council have been outstanding. However, where it has not been nearly as effective has been in the area of policy development. Because it does not require its members states to act, most of its activities have been conducted on meager budgets. Its ability to act as a multilateral policy development body have also been handicapped by the fact that it is specifically forbidden to address security issues, a requirement insisted upon by the Americans in return for their membership on the council. This restriction has resulted in a general reluctance of the Arctic Council to deal with any issue that relates to geopolitical topics. The Council has also refused to deal with issues pertaining to both fisheries and whaling in the north.

The Arctic Council has also been unable to address policy related issues concerning climate change. Both the American administration of George Bush and the Canadian

Administration of Stephen Harper have opposed the Kyoto Protocol on Climate Change. This has made it difficult to achieve agreement on what steps are necessary to address the problems created by climate change in the Arctic. The Bush administration in particular was reluctant to allow the Arctic Council to provide policy advice. It is now hoped that this will be changed by the new Obama administration. However, it is too soon to know what changes -if any - are coming.

The United Nations Convention on the Law of the Sea (UNCLOS)

The one international treaty that is the most relevant for the Arctic region is the United Nations Convention on the Law of the Sea. The Convention is known as the “constitution of the oceans.”⁹ It has codified existing customary international maritime law and created new elements of international ocean governance.

In general almost all of the provisions of the Convention either have or will have an effect on Arctic waters and most importantly the sections that establish the maritime zones. These are the Exclusive Zone (EEZ) (Part V) and the Continental Shelf (Part VI and specifically Article 76). Part III establishes the rights and responsibilities for the use of international straits. Article 234 is the one article that is specific to the Arctic. It allows coastal states that border ice covered waters to enact special environmental legislation to protect the waters. The Convention also provides mechanisms and techniques for the resolution of disputes (Part XV) and requires that all states that ratify the Convention must resolve any differences in a peaceful manner (Article 279).

While the Convention was completed in 1982, it did not come into force until 1994. Among the Arctic nations, Iceland ratified it in 1984, Finland, Sweden, Norway ratified in 1996, Russia in 1997, Canada in 2003 and Denmark in 2004. However, the United States has not acceded to the treaty.¹⁰ The American Government has maintained that it accepts all sections of the Convention except for Part XI (the section dealing with mining of mineral resources on the high seas and beyond state jurisdiction). However, by not

acceding to the Convention it is unclear how the US can join the specific bodies created by it. In the last days of the Bush Administration, the Americans released a new Arctic Policy.¹¹ The policy statement stated that the American Government viewed accession to the Convention as a priority. The fact that the administration released the document with less than two weeks left in its mandate suggests otherwise. While some observers are hopeful that the new Obama administration will now accede, there have been no statement yet made.

UNCLOS provides the foundation for international ocean governance. However its impact in the Arctic is unknown. While it provides guidance for the rights and responsibilities of international straits and their use for international navigation, the treaty does not provide an answer to whether or not the Northern Sea Route and the Northwest Passage are international straits or internal waters. The Convention does provide alternatives to resolve the dispute but does not compel the states parties to resolve their differences.

Likewise, the creation of EEZ under the terms of UNCLOS created boundary disputes for several of the Arctic nations when they extended their jurisdiction to 200 nautical miles from their coasts. Canada has a dispute with the United States in the Beaufort Sea and a small dispute with Denmark on the delimitation of their EEZs in the Lincoln Sea. Norway and Russia also have dispute in the Barents Sea. The United States and Russia had seemingly resolved their differences in the Bering Sea, but there are suggestions that the Russian Government may not ratify the agreement that had been reached. Once again, the creation of these new zones has generated disputes as Arctic states make overlapping claims. If and when the various states decide to resolve these overlaps the Convention does provide guidance on how to do this.

Currently the greatest attention that the Convention has attracted in the Arctic is due to Part VI. Each of the Arctic states in the position to do so -Canada, US, Norway, Russia

and Denmark- are in the process of determining the outer limits of their extended Continental Shelf. The Convention requires that states claiming control over an extended continental shelf established through geological surveying of their prospective claim. Each state has a 10 year period following their ratification of the Convention to complete this survey. Within this time period, any state making a claim must submit its findings to the relevant UN body -the Commission on the Limits of the Continental Shelf- that will provide an evaluation of the scientific merit of their surveys. It will then be up to the neighbouring states to resolve any overlap that may emerge once the CLCS has approved the technical elements of the claim.

There has been considerable attention focussed on the efforts of Canada, Denmark and Russia to determine the extent of their northern continental shelf. In the summer of 2007, the Russian effort was highlighted by their placement of their flag at the ocean bottom of the north pole.

An interesting debate is now developing as to what these efforts represent. In May 2008, the Danish Government convened a meeting in Ilulissat, Greenland. They invited the Governments of Russia, Canada, United States and Norway to discuss their upcoming claims and to reach an understanding as to how to manage the process in a cooperative and peaceful manner. At the end of the meeting the Danish hosts declared that the meeting was a success. Furthermore, all five participants agreed to a declaration in which they agreed that the existing international framework was sufficient to develop the Arctic in a peaceful and cooperative fashion.¹² They went on to state that there was no need for additional legal instruments and that there was specifically no need for an Arctic treaty that created new multilateral instruments for cooperation.

Are new Multilateral Tools Needed?

This position has been criticized by some. Environmental groups such as the WWF have argued that the lack of existing legal instruments in the Arctic needs to be remedied by the development of a binding multilateral agreement.¹³ Given that the amount of resource development in the Arctic is expected to increase, now is the logical time to develop new rules to protect the environment and not later.

There is also a flaw in the logic of those who suggest that the existing framework is sufficient. The reality is that the Arctic Council has not been able to develop policy. It has been very useful in reaching a common understanding of the environmental problems in the north, but its very structure has prevented it from being able to develop the common agreement to address those problems.

There is even a greater problem in relying solely on UNCLOS. The treaty is indeed a major milestone in the promotion of ocean governance. But a reliance on it for the Arctic as the major instrument is problematic for two reasons. First, by its very nature it does not address issues related to the land mass of the Arctic. It has some articles that deal with land-based marine pollution but these are few and limited. But beyond this it is a treaty that deals with the oceans and not the land. Even more problematic is the continual refusal of the United States to join it. While successive presidents since Reagan have supported the Convention, and both the Departments of Defence and State strongly support it, the American system for ratifying international treaties makes it very unlikely that the US will soon become a party to it. The most recent US Arctic Policy makes a strong call for the American accession to the Convention. But there is still no sign that the Obama administration intends to take action on this issue. The US Senate is required to pass all US treaties by a 2/3 majority. There has been enough Republican Senators who continue to view the treaty as a tool of the 3rd world and the UN to prevent it from passing. It is possible that the most recent changes in the 2008 election may have shifted

the balance of power. However, since the attention of the Government has been almost exclusively on the current economic crisis has meant that it is not yet known if there is a 2/3 majority now in support of the Convention. It is in the American interest to be a party, but this does not seem to influence the thinking of a minority of senators who are enough to block its passage. Thus for the foreseeable future, the US will remain outside of the central multi-lateral instrument for the emerging Arctic regime.

Increasing Unilateral Capability

But while the Arctic states have clearly indicated their reluctance to build upon the sparse multilateral framework in the region, several are now in the process of building up their ability to act unilaterally. Canada, Russia, Norway and the United States are now redeveloping abilities of security forces in the region.

The United States has continued to maintain a powerful military presence in the state of Alaska. It has about 26,000 troops permanently stationed in region as well as three wings of (approximately 22 aircraft/fighter wing) F-15 fighters as well as a number of AWAC surveillance aircraft. The United States also has placed one of its two Ballistic Missile interceptor sites in Alaska at Ft Greely (about 70 miles from the Alaska/Yukon border).

Throughout the Cold War the American Coast Guard saw some of its capabilities decrease and now is only operating three icebreakers (one of which is now in a state of extended refit and may not be repaired). However, there are now discussions underway to decide how to rebuild the Coast Guards' Arctic capability.¹⁴

The Norwegian defence minister announced in the Spring of 2008 that Norway would be refocusing its defence policy to the north and added that the budget would be increased on a continual and substantial manner.¹⁵ The Norwegians are also in the process of building five new frigates (in Spanish yards) that will have a limited ability to operate in

ice conditions.¹⁶

Canada resumed training operations in the Arctic in 2002. It has also announced that it will be building between 6-8 Arctic offshore patrol vessels that are being specifically designed to operate in first year ice. To support this capability the Canadian navy will also be opening a new replenishment site (some are calling it port) in the high Arctic that will allow for the refuelling of these vessels. At the same time, Canada is also developing new means of providing better surveillance in the north including the recent launch of new radar based surveillance satellites.¹⁷

While the post-Cold war period Russian northern armed forces remained large in numbers, their capability was substantially reduced. Most naval and air assets were not maintained and much of the northern fleet simply allowed to rust in its harbour. With the resurgence of the Russian economy brought about by the rise of the price of oil and gas, the Russian Government is now rebuilding its northern capability. Both former President Putin and current President Medvedev have placed the rebuilding of the Russian forces ability to operate in the north as a core priority. To this end, the Russian navy has now commenced surface operations in northern waters in 2008.¹⁸ Likewise the Air Force also resumed long range Arctic air patrols in the fall of 2007 with the return of the TU 95 Bear and TU 160 bombers.¹⁹ The Government has also stated that it now intends to rebuild its navy. The Russians have already built a new large nuclear powered ice-breaker and are now preparing to rebuild their entire fleet.

This list is not exhaustive, but should make it clear that the period of limited military activity in the Arctic is about to end. In particular the main Arctic states with large maritime zones are becoming very concerned about their ability to know what is happening in their Arctic region and to be able to act.

Unilateral versus Multilateral Action

The Arctic is increasingly a very busy international region. However, existing multilateral instruments are sparse and are not designed for a rapidly changing environment. Perhaps more troubling is the unwillingness of Arctic states to develop new instruments of cooperation. Their willingness to invest in improving their northern security capabilities suggests that they do recognize that change is coming. But are ultimately preparing to depend on their own ability to protect their own northern interests.

This in itself is not out of place. States are ultimately responsible for the security of their people, including their northern inhabitants. The military remains one of the best providers of search and rescue and any other disaster relief. Thus there is no question that new security capabilities are needed so that northern states know and can act when their interests are being threatened. But this does not preclude the Arctic states developing new multilateral tools to work cooperatively.

Maritime disputes in the Arctic are numerous and increasing as the northern states develop their continental shelf claims. Why not develop a body or agreed process that can operate strictly for the Arctic states for the purpose of resolving these differences? States will develop oil and gas on a large scale in the near future. While most of these fields will be developed within the control of a specific state, the environmental consequences of an accident or spill will not. Now is the time to develop both a cooperative regime to ensure that any accident is handled as quickly as possible and an international agreement governing search and rescue that goes beyond the current regime.

Other economic activities that will cross national boundaries will require new arrangements. As new fish stocks move north because of climate change, there will be a need for a regional fishery agreement that is both dynamic and effective. Once again it seems that creating such an agreement would be easier to do before national interests become entrenched.

The list goes on, but the fact remains that there will be a growing international presence in the north involving Arctic and non-Arctic states. This will require governance systems that go beyond what the system now provides. The question is when and how will they be developed. Will they be created to respond to an increasing series of disputes that will inevitably arise over time and as such tend to develop in an ad hoc and piece meal basis? Or will they be created in a rational and comprehensive manner that will allow the north to develop as an increasingly important and busy international region.

These are the questions that now face the Arctic nations. It should be clear that there is a need to start thinking about new systems of governance in the north. This is not to suggest that states need to begin to surrender their sovereignty in the north. Instead it is to recognize that the north is changing and if the northern states do not work together there will be a substantial cost that all will have to bare.

Notes

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² Kim McLaughlin, “Denmark Seeks Unity over Arctic Claim,” *Reuters* May 21, 2008, [http://www.alertnet.org/thenews/newsdesk/L21892809.htm].

³ Scott Borgerson, “Arctic Meltdown,” *Foreign Affairs*, vol 87, no 2 (March/April 2008).

⁴ Rob Huebert “New Directions in Circumpolar Cooperation: Canada, the Arctic Environmental Protection Strategy and the Arctic Council,” *Canadian Foreign Policy* 5 no.2 (Winter 1998).

⁵ Arctic Climate Impact Assessment, *Impacts of a Warming Arctic* (Cambridge: Cambridge University Press: 2004).

⁶ *Agreement on the Conservation of Polar Bears*, Oslo, November 13, 1973 [http://pbsg.npolar.no/ConvAgree/agreement.htm].

⁷ *Arctic Environmental Protection Strategy - Declaration of the Protection of the Arctic Environment* June 14, 1991 [http://www.Arctic-council.org/Archives/AEPS%20Docs/artic_environment.pdf].

⁸ Rob Huebert, “The Arctic Council and Northern Aboriginal Peoples,” in *Issues in the North* vol.3, edited by Jill Oakes and Rick Riewe, Edmonton: Canadian Circumpolar Institute, 1998, pp.123-134.

⁹ Stated by Tommy Koh in United Nations, *The Law of the Sea: United Nations Convention on the Law of the Sea with index and Final Act of the Third Conference on the Law of the Sea* (New York: UN, 1983) xxxiii-xxxvii.

¹⁰ Since the US never signed the treaty it now needs to accede rather than ratify. They are basically the same.

¹¹ Office of the President *National Security Presidential Directive/NSPD 66 – Homeland Security Presidential Directive/HSPD 25 – Subject: Arctic Region* January 9, 2009. Located at <http://media.adn.com/smedia/2009/01/12/15/2008Arctic.dir.rel.source.prod_affiliate.7.pdf>.

¹² The Ilulissat Declaration Arctic Ocean Conference Ilulissat, Greenland, 27 – 29 May 2008, [http://www.oceanlaw.org/downloads/Arctic/Ilulissat_Declaration.pdf].

¹³ Timo Kovurova and Erik Molenaar *International Governance and Regulation of the Marine Arctic: Overview and Gap Analysis* (Oslo: WWF, 2009). http://assets.panda.org/downloads/gap_analysis_marine_resources_130109.pdf

¹⁴ Ronald O’Rourke, *Coast Guard Icebreaker Modernization: Background, Issues, and Options for Congress - CRS Report for Congress* RL 34391 (Washington: Congressional Research Service, September 11, 2008) [http://fas.org/sgp/crs/weapons/RL34391.pdf].

¹⁵ Norwegian Ministry of Defence, *Norwegian Defence 2008* (Oslo: 2008) [http://www.regjeringen.no/upload/FD/Dokumenter/Fakta2008_eng.pdf]

¹⁶ Endre Lund, “Norway’s New Nansen Class Frigates: Capabilities and Controversies,” *Defence Daily Industries*, (June 7, 2008) [http://www.defenseindustrydaily.com/norways-new-nansen-class-frigates-capabilities-and-controversies-02329/].

¹⁷ Rob Huebert “Canada and the Changing International Arctic: At the Crossroads of Cooperation and Conflict” in *Northern Exposure: Peoples, Powers and Prospects for Canada’s North* edited by Frances

Abele, Thomas J. Courchene, F. Leslie Seidle and France St-Hilaire (Montreal: IRPP, Forthcoming). [<http://www.irpp.org/books/archive/AOTS4/huebert.pdf>].

¹⁸ The Russian Federal Ministry of Defence, "Russian Navy Resumes Presence in Arctic Area," *News Details* (July 14, 2008). [<http://www.mil.ru/eng/1866/12078/details/index.shtml?id=47433>].

¹⁹ Martin Sieff, "Russia upgrades bomber-ALCM force for the 21st Centaury," *UPI.com* (January 5, 2009). [http://www.upi.com/Security_Industry/2009/01/05/Russia_upgrades_bomber-ALCM_force_for_21st_century/UPI-39951231177215/].