

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

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## **Introduction:**

In May 2008 representative of five arctic states meet in Greenland. Each of these states has the potential to claim an extended Arctic continental shelf in the Arctic. These included Russia, Canada, United States, Denmark (for Greenland) and Norway. At the end of the meeting the heads of the Danish delegation who had hosted the meeting stated that it had been a tremendous success and that it had shown how the existing multilateral framework worked. He then went on to state that there was not a need for an arctic treaty and that the five arctic nations can work out any differences between themselves. However, this perspective has not been universally accepted by all. Rather some observers have suggested that the Arctic is headed to an increasingly “free for all” based on the unilateral actions of the interested states. Thus there is a growing debate as to whether or not the exiting international regime is sufficient, or if the 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 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 had allowed for southerners to start to enter and stay longer in the region. Unfortunately, the onset of the Cold War ended any opportunity for the development of an international cooperative regime as this activity increased. Instead the Arctic remained divided into one of the most dangerous areas in the world.

When the Cold War ended efforts to develop international institutions and arrangements began in earnest. Of particular note were the creation of the Arctic Environmental Protection Strategy (AEPS) and its successor the Arctic Council. 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. Instead, the existing regime can best be thought of

as a immature and fragmented and stunted region-system. In all likelihood, this would have been remained the circumstances well into the future.

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 however that is now developing is the manner in which this increased attention will be managed. Will the arctic be developed through the use of multilateral tools or will it be left to the action of the individual states to act in a unilateral manner?

### **The Existing Nature of the Arctic Regime:**

As just mentioned the arctic has not developed a robust multilateral framework. 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). 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 arctic specific 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. While the original proposal put forward by the Canadian Government in 1989, it did not receive much support. However, the idea of a multilateral arctic based organization resonated with the Finnish Government. It 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).

The AEPS represents the first multilateral effort directed at 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. It placed an emphasis on achieving a shared understanding of the problems. Even in the early 1990s there had been very limited understanding to either the magnitude or cause of the environmental problems that threatened the north. 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 states retained the right to be the ones that voted on formal motions, but the practise developed that the body seldom took a formal votes.

However, the AEPS was limited in three ways. First it was an agreement and not a treaty. It meant that 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 other 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 of its activities.

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 was occurring in the arctic but that it was occurring at such a rate as to fundamentally change the very nature of the region. Follow-up studies have shown that the rate of melt is now accelerating and may soon led 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 shoestring budgets. Its ability to act as a multilateral policy development body have also been handicapped by its terms of reference. The Arctic Council is specifically forbidden from addressing security issues. This was a requirement that was insisted by the Americans in return for their membership on the body. This restriction has resulted in a general reluctance of the Arctic Council to deal with any issue that relate to geo-political 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 has been reluctant to allow the Arctic Council to provide policy advice.

**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 Nation Convention on the Law of the Sea. The Convention is known as the “constitution of the oceans.” It has codified existing customary international maritime law and it 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 the arctic waters. The most important elements are 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 ratified the treaty. The American Government has maintained that it accepts all section of the Convention except for Part XI (the section dealing with the mining of mineral resources on the high seas and beyond state jurisdiction.) However, by not ratifying the Convention it is unclear how the US can join the specific bodies created by it.

UNCLOS provides the foundation for international ocean governance. However its impact in the Arctic is not understood. 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 created the disputes as the various arctic states make claims that overlap. If and when the various

states decide to attempt to resolve these overlaps the Convention does provide guidance on how this is to be undertaken.

Currently the greatest attention that the Convention has attracted in the arctic is due to Part VI. Each of the arctic states that are 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 establish 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 then 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 represented. 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 into a peaceful and cooperative fashion. 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. Given that it is expected that the amount of resource development in the arctic is expected to soon increase, it is logical to suggest that the time to develop new rules to protect the environment should be now 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 become party to 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 make it very unlikely that the US will soon become a party to it. 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 3<sup>rd</sup> world and the UN to prevent it from passing. The fact that Republican nominee Senator John McCain has reversed his position and now opposes American accession to it, has only illustrated how unlikely it is that the US will join it. 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 in 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 the abilities of their security forces in the region.

The United States had 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 did see some of its capabilities decrease. It only now operates three icebreakers (of which one is now in a state of extended refit and may not be repaired). However, there now are discussions underway to decide how to rebuild the Coast Guards' arctic capability.

The Norwegian defence minister announced in the Spring of 2008 that Norway would be refocusing its defence policy to the north. At the same time, she also announced that the budget would be increased on a continual and substantial manner. 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.

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.

While the Russian northern armed forces remained large in numbers throughout the post-Cold war period, their capability was substantially reduced. Most naval and air assets were not maintained and in the case of much of the northern fleet simply allowed to rust in harbour. With the resurgence of the Russian economy bought 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. Likewise the Airforce also resumed long range arctic air patrols in the fall of 2007 with the return of the TU 98 Bear bombers. 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 it happening in their arctic region and to be able to act.

#### **Unilateral versus Multilateral Action:**

The Arctic is about to become a much busy international region. The multi-lateral instruments that now exist are sparse and do not seem to be designed for a rapidly changing environment. Perhaps even more troubling is the unwillingness that the main arctic states are showing to develop new instruments of cooperation. Their willingness to invest in improving their northern security capabilities suggest that they do recognize that change is coming. But these current decisions suggest that all of the Arctic nations are signalling that they are ultimately preparing to depend on their own ability to protect their own northern interests.

This by itself is not out of place. States are ultimately responsible for the security of all of their people. This of course includes those who live in the north. The military is still one of the best forces to provide a reaction for search and rescue as well as any other disaster relief. Thus there is no question that the new security capability that is now being rebuilt is needed to allow the northern states to know what is happening in the Arctic and to act on this knowledge when their interests are being challenged or threatened. But this does not mean that the arctic states should not be developing new multilateral tools to deal with a new northern reality.

There are already numerous maritime disputes in the arctic. As the northern states develop their continental shelf claims there will be even more of these. Why not develop a body or agreed process that can operate strictly for the Arctic states for the purpose of resolving these differences? Oil and gas will be developed on a truly huge scale in the coming days. 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 a cooperative regime to ensure that any accident is handled as quickly as possible in a cooperative fashion. Likewise an international agreement governing search and rescue that goes beyond the current regime would also seem to be useful to develop now.

Other economic activities that will cross national boundaries will require new arrangements. As new fish stock 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 can go on, but the point should be clear. There will be a growing increasing international presence in the north that will increase international interaction both between the arctic states and from an increasing number of 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 increasing 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 share.