

C O M M E N T S

Arctic Stewardship: The Evolution of a New Model for International Governance

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I. Setting the Stage

The eight Arctic countries, Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden, and the United States, are in the initial phases of a profound journey to devise novel mechanisms through which they can collectively assure wise stewardship of the Arctic. This journey is urgent because the Arctic now faces dramatic changes that for the first time in millennia will transform the essential fabric of the region. These changes are not only fundamental, they are happening with unprecedented speed. The Arctic is more deeply affected by the warming of the earth's atmosphere than almost any other region, notable among the many changes are the fact that Arctic temperatures have increased at twice the rate of the global average and as a result, summer sea ice may well disappear within a decade. The disappearance of the ice will result in dramatic changes, not the least of which is that for the first time in human history, the region will be readily accessible, thereby allowing for exploitation of its abundant resources by a global economy hungry for natural resources.

The realization that the Arctic is the world's next new frontier for resource exploitation and development has excited the imaginations of many both in the Arctic region and far beyond. It has also brought about a sharpened awareness among Arctic governments of their self-interest in the orderly management of development. Before turning to an examination of the steps that governments have begun to take to exercise those management responsibilities, it is useful to sketch the system that has been in place for some decades through which nations have governed in the Arctic.

A cursory examination of an atlas reveals that while much of the High Arctic is oceanic, the adjacent land masses lie within the territorial limits of the five maritime Arctic nations, and their exercise of sovereignty therein is well-settled with few disputes as to boundaries. Similarly, in the ocean itself, five of the eight nations bordering Arctic seas have rights that are well-settled according to the United Nations Convention on the Law of the Sea

(UNCLOS). Under UNCLOS, rights and responsibilities in the marine environment are also well-settled regarding the Exclusive Economic Zone and the extended continental shelf. While there are several disputes about borders between countries, it is unlikely these will acquire major foreign policy significance. Additionally, there are a number of claims of rights to exploit the extended continental shelf that have the potential to be in conflict, requiring negotiations for settlement.¹

On the face of it, this existing international legal system would seem adequate to provide the necessary framework for the countries of the region to assure effective governance. But as long ago as the early 1990s, there was sufficient concern about the need for stronger collaboration, primarily to assure adequate environmental protection, that the eight countries came together, at the urging of then-Prime Minister Mikhail Gorbachev of the Soviet Union, and signed in 1991 at Rovaniemi, Finland, an agreement known as the Arctic Environmental Protection Strategy, which "established broad environmental objectives and specific policy plans for national implementation."² Within short order, Arctic nations concluded this agreement was too narrow, and in 1996, through the Ottawa Declaration, established the Arctic Council with a somewhat broader mandate to: "promote cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous peoples and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic." Since then, the Council's work has consisted of a number of largely scientific assessments regarding critical Arctic issues. This work has been done through a number of subsidiary working groups of the Council and, even

1. It is important to note that the United States is not a party to UNCLOS, and while it abides by its provisions as an expression of customary international law, it cannot avail itself of special processes established by UNCLOS, such as those pertaining to resolving claims to resources in the extended continental shelf.
2. Erik Jaap Molenaar, *Current and Prospective Roles of the Arctic Council System Within the Context of the Law of the Sea*, 27 INT'L J. MARINE & COASTAL L. 569 (2012).

when accepted by the Council, has rarely resulted in actual changes in policy or programs by governments or international bodies.

As late as May 2008, the Arctic countries, at least publicly, confidently expressed the view that this combination of hard (UNCLOS) and soft (Ottawa Declaration) law was sufficient to allow them to meet their governance responsibilities. At a special meeting of the five marine Arctic nations, the so-called Ilulissat Declaration was issued, which stated that the foregoing system provided a “solid foundation for responsible management by the five coastal states, and other users of this Ocean, through national implementation and the application of relevant provisions.”³

This apparent complacency on the part of key governments was shortly to trigger a series of analyses and reviews of the overall issue of Arctic governance by several non-governmental organizations. Among the most important of such published reviews were *International Governance and Regulation of the Marine Arctic*,⁴ *Arctic Governance in an Era of Transformative Change: Critical Questions, Governance Principles, Ways Forward*,⁵ and *The Shared Future: A Report of the Aspen Institute Commission on Arctic Climate Change*.⁶ Each of these reports examined with some care the existing system of governance, attempted to identify key future conditions and issues, identified gaps in the then-current system, and recommended actions for filling those gaps. The recommendations were wide-ranging and included such ideas as a new comprehensive legal treaty governing the Arctic, adoption of uniform standards for key resource development activities such as for oil and gas, and substantial measures to strengthen the Arctic Council. None of the reviews shared the perspective of governments that business-as-usual would be adequate to assure the orderly development of the Arctic and its resources.

II. Governance at the Southern Pole

An examination of how the Arctic system has evolved over the past half-decade and what further enhancements might be needed can be informed in important ways by a slight detour to briefly examine the system of governance that has emerged over the past 60 years for Antarctica—the southern polar region. Antarctica is in many ways the antithesis of the Arctic, including having a governance regime quite dissimilar to that now in place, or likely to evolve, for the Arctic. While international governance of Antarctica is not a model for the Arctic, there are lessons that can inform the evolution of 21st century Arctic governance.

The geopolitical context of the two poles could not be more different. Whereas at the core of the Arctic less than

a few meters of ice floats on an ocean, in Antarctica, as much as a mile of ice rests upon a large land mass. More than four million people live and work above the Arctic Circle. In Antarctica, there are no permanent residents and human population is limited to a very few research stations scattered across the continent. In the Arctic, there is extensive industrial activity, including hard-rock mining and oil and gas development. In Antarctica, there is essentially no economic activity other than the presence seasonally of several thousands of tourists. Antarctica has been declared a nuclear-free zone and is essentially demilitarized. In contrast, the Arctic was a key zone of confrontation between the USSR and the United States at the height of the cold war and to this day, submarines ply its waters armed with nuclear missiles. The biodiversity of the two polar regions is globally unique and also quite different from one to the other as symbolized by the presence of penguins only in Antarctica and polar bears only in the Arctic. And notably, a number of countries have existing or potential claims to the Antarctica land mass and adjacent marine waters, but many of these overlap to a significant degree, others are not specific, and none are generally recognized in international law.

International governance of Antarctica emerged more than one-half a century ago out of an extraordinary program of science conducted pursuant to the International Geophysical Year running from July 1957 to December 1958. New scientific learning about Antarctica and its importance to the well-being of the entire globe converged with growing conflicts over territorial claims and gave rise to negotiations to provide an international regime to stabilize the roles of government and others in the region. Negotiations began in Washington, D.C., in 1959, and the resultant Antarctica Treaty was signed in December, taking effect in 1961, when ratified by 12 nations. Subsequently, other treaties were negotiated: the Convention for the Conservation for Antarctic Seals (1972) and the Convention for the Conservation of Antarctic Living Marine Resources (1982)—as well as additional instruments such as the Protocol on Environmental Protection (1991). Together, these have come to be known as the Antarctic Treaty system.⁷ Looking to the words of the treaty itself, among its key purposes are to

- Assure “use of Antarctica for peaceful purposes only”;
- Facilitate “scientific research in Antarctica”;
- Suspend “the exercise of jurisdiction in Antarctica”; and
- Assure “preservation and conservation of living resources in Antarctica.”

Over time, it was recognized that an important new and overarching purpose of this system is to allow governments to assure effective stewardship of Antarctica, mean-

3. Ilulissat Declaration, dated May 28, 2008, issued by the five coastal States bordering on the Arctic Ocean at the Arctic Ocean Conference, Ilulissat, Greenland, May 27-29, 2008.

4. Timo Koivurova & Erik Jaap Molenaar, *International Governance and Regulation of the Marine Arctic*, WWF International Arctic Programme (2009).

5. HANS CORELL ET AL., THE ARCTIC GOVERNANCE PROJECT REPORT (2010).

6. Aspen Institute (2011).

7. NATIONAL RESEARCH COUNCIL (NRC), SCIENCE AND STEWARDSHIP IN THE ANTARCTIC 33 (1993).

ing “making reasoned, forward-looking decisions based on scientific knowledge for the preservation, protection, and conservation of Antarctica for current and future generations, and for Earth as a system.”⁸ This realization would lead eventually to a decision by governments to ban all mineral resource development for a period of at least 50 years.⁹

The very different environmental, economic, social, and political differences between the Arctic and the Antarctica make it unlikely that an eventual evolution of the existing Arctic Council into a structure parallel to that of Antarctica is probable or even useful. But the essential point for informing governance in the Arctic is that over a period of time in Antarctica, a system of instruments and fora has evolved through which governments seek to meet their shared objective of stewardship.

III. Evolution at the Northern Pole

Having declared at Ilulissat in 2008 that the existing system for collective responsibility for the Arctic was adequate, the Arctic countries proceeded nonetheless over the next three years to begin a process of significant transformation in the role and function of the Arctic Council. This trend became apparent at the May 2011 Ministerial meeting held in Nuuk, Greenland. Among the decisions made by the Ministers were the following:

- For the first time, a permanent secretariat for the Council was agreed to, with assured government funding.
- A first legally binding agreement, negotiated under the auspices of the Council, was signed, providing for more effective governmental cooperation in the event of an air or sea accident: the Search and Rescue Agreement.
- A commitment was made to begin to negotiate a similarly binding agreement on oil spill preparedness and response.
- An expert group was established to set the parameters for Arctic ecosystem-based management (EBM) by governments in the Arctic.

Perhaps of equal significance to these achievements was that a U.S. Secretary of State, Hillary Clinton, attended the Ministerial meeting, a first for an American Secretary of State.

While none of these developments alone could be said to constitute a significant change in course, their collective impact signaled that the eight Arctic countries were beginning to move the Council in a new direction—one still evolving. To get a sense of that direction, it is worth noting that the commitment to a permanent Secretariat is in fact an initial step toward the creation of a new interna-

tional institution, notwithstanding its current embryonic nature. The signing of one legally binding agreement and the commitment to develop a second suggests a new model for governance, one where an informally created institution, the Arctic Council, is a forum for negotiating binding international agreements. And the exploration of the role of ecosystem-based management could be the first steps toward assuring a substantive commitment to the principle that stewardship is a defining value for the exercise of government responsibility in the Arctic.

The eighth Ministerial meeting, concluded in May 2013 in Kiruna, Sweden, went further. The Ministers issued a Vision for the Arctic that aspires to set a broad policy course for future cooperation. This was a first since the Ottawa Declaration of 1996. The Vision pledges to strengthen governmental cooperation in the fields of environmental and civil security. And it expresses a commitment to manage the region with an ecosystem-based approach that balances conservation and sustainable use of the environment. It also commits to continued “strengthen[ing] of the Arctic Council to meet new challenges and opportunities for cooperation and [to] pursue opportunities to expand the Arctic Council’s roles from policy-shaping into policy-making.”

Further, the Ministers signed the promised second legally binding agreement, the Cooperation on Marine Oil Pollution Preparedness and Response. That Agreement has important substantive and procedural elements. For example, it mandates that all Arctic countries have a national contingency plan for responding to oil spills¹⁰; that reviews be held of joint spill responses as well as other activities; and that those reviews be made public.¹¹ Finally, it requires inclusion of the Arctic Council in regular assessments of the implementation of the agreement.¹² In sum, the oil spill preparedness and response agreement for the first time includes provisions imposing substantive requirements on governments, requires public involvement in aspects of implementation, and provides for an ongoing role for the Council in oversight.

Finally, the Ministers accepted a number of reports with recommendations, including those on Ecosystem-Based Management and the Arctic Ocean Review. In accepting these reports and endorsing their recommendations, the Ministers asked for follow-up actions to assure that the recommendations be implemented. Each of these decisions contributes to a strengthened foundation for shared stewardship in the development of natural resources of the Arctic.

8. *Id.* at 6.

9. Protocol on Environmental Protection to the Antarctic Treaty, art. 7, Oct 4, 1991.

10. Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, art. 4, Kiruna, 2013.

11. *Id.* art. 11.

12. *Id.* art. 14.

IV. Why the Swerve in Government Action?

With this growing agenda for action through the Arctic Council, the governments have now maintained over the span of two Ministerial meetings an expanding concept of their responsibilities for the Arctic—one that goes well beyond the complacent perspective articulated at Ilulissat in 2008. Admittedly, these actions have been taken through the instrument of the Arctic Council, but by moving to a perspective that envisions the Council as a policy-making entity, perhaps even a forum where governments would account for their implementation actions, the reality of collaborative governance is much greater than might have been anticipated.

There are a number of reasons for this accelerated commitment to action. First, the geoeconomic context of Arctic affairs has undergone significant transformation. As has been noted, as Arctic ice melts easing access to the region's raw materials, global interest in Arctic access has increased dramatically. The interests of many governments and companies to exploit Arctic resources in combination with the anticipated economic contribution that such exploitation could make to Arctic countries' gross domestic product accelerates the interest of the latter to assure orderly development of the region.

In the face of this enhanced global interest in access to the Arctic, the countries of the region have been driven to respond by at least two other factors. In the first instance, they seek to demonstrate to the world that the Arctic is largely within their legal control, save for the high seas, and that they both intend to and are capable of exercising national sovereignty over it. At the same time, they have recognized that in a region characterized by many challenges and shared features and processes, cooperation among the Arctic governments is essential to allow orderly development. One consequence of this imperative to be perceived as in control is that virtually every Arctic nation has articulated a new Arctic national strategy in the last five years. This level of policy-setting at the national level, in combination with more vigorous action at the Arctic Council level, sends clear signals to the international community that the Arctic nations are engaged at both the national and circumpolar level, and that more intrusive actions by other nations at an international level are not necessary.¹³

Further, economic and societal activity in the Arctic is carried out in a dangerous and unprecedented context. Looking to the future, assuring the highest common standards for those activities in order to avoid catastrophic accidents is an important responsibility of Arctic governments. Also, governments recognize that in the past, human activity in the region has often been characterized

by environmental degradation that, among other impacts, makes the Arctic a less-desirable place for human habitation. Particularly in countries that see Arctic development as a keystone of national economic growth, such as Russia, not repeating these mistakes is an important aspect of future development. Thus, cooperative action to establish a shared high set of standards to guide future development in the Arctic through the Arctic Council can well serve national interests.

Finally, the Arctic Council has been strengthened because specific governments see such evolution as responsive to their national policy perspectives. For example, over the past six years, the chair of the Arctic Council has rotated among the Scandinavian countries that at the outset of that period had a shared perspective to strengthen the institutions of the Council. This was achieved at the Nuuk Ministerial in 2011 with the creation of a permanent Secretariat with committed funding. Similarly, the U.S. government has exercised a leadership role in moving the Council forward on a set of substantive issues, including ecosystem-based management and responses to oil and gas development, as these issues have assumed greater domestic importance. These national perceptions about the importance of an effective Council provide critical leadership and political space for the growth of the Council.

V. The Next Plateau

While the decisions at the two most recent Ministerial meetings maintain an upward trend in the trajectory of Arctic Council effectiveness, other decisions, or issues simply not acted upon, indicate that the slope of that trend is still too weak to assure effective Arctic stewardship. Thus, action has been postponed yet again on an agreement to limit short-lived climate-forcing pollutants. There is also little clarity about next steps to set effective and uniform standards for oil and gas development. No specific places in the Arctic have been identified as critical for ecosystem-based management. And the Council has not addressed the future of fishing in the Arctic, although numerous of its technical bodies have expressed concerns about the issue.

The Arctic countries also have made it clear that there are important limits beyond which they will not now consider strengthening the current system. Thus, there appears to be little appetite for the negotiation of a comprehensive, legally binding agreement, even along the lines of a Regional Seas Agreement, to replace the Ottawa Declaration. Further, there is no interest in ceding to the Council, through its Secretariat, any responsibility for implementation of decisions taken by the Council. And, as an overarching principal, there remains a keen interest in assuring that countries of the Arctic solely retain the ability to determine the development future of their respective Arctic regions.

Given the still-early stages in the development of effective action through the Arctic Council and the clear demarcation of points beyond which the governments are not prepared to go, the critical question arises as to whether

13. Although a number of new countries—China, India, Italy, Japan, the Republic of Korea, and Singapore—were admitted to observer status at the recent Ministerial, a revised Observer manual, also adopted, makes clear that the eight Arctic countries intend to remain the decisionmakers.

there are useful steps that could be taken over the next several years that would, nonetheless, result in a more-effective Council. Below are seven such measures that would further enhance the Arctic Council as an effective body for collaboration among the Arctic countries. Implementation of these ideas would strengthen the Council as a policymaking and reviewing body, while assuring that the responsibility for tailoring policy and actually implementing it remains at the national level. Beyond these discrete areas of new or refined action, the Arctic countries could further expand their overarching vision for the system of collaborative governance of the Arctic. This refined vision would retain the Arctic Council at its core and, as argued in an imaginative approach by Erik Molenaar¹⁴ and others, additionally explicitly recognize an evolving network of formal and informal bodies and instruments that, taken as a whole, constitute the Arctic Council System (ACS). He suggests that the ACS could be seen as functionally analogous to the Antarctica Treaty System, with the crucial distinction that the international entity at its center, the Arctic Council, is the instrument of the eight Arctic countries alone and has its existence independent of an international treaty. Important attributes of an ACS could include the following:

- The core instrument for Arctic government cooperation remains the Arctic Council—essentially an informal body made up of the Arctic countries, the Permanent Participants, and governmental and non-governmental observers.
- Legally binding agreements could be negotiated under the auspices of the Council as has been the case with the SAR agreement and the more recent Agreement on Cooperation on Marine Oil Pollution Preparedness and Response.
- Implementation of Council decisions within the territory of Arctic countries, whether pursuant to binding or more informal decisions, would take place through the respective national governments with appropriate reporting to the Arctic Council.
- Where implementation beyond national territory is proposed and would bind other states, appropriate existing international bodies would be responsible, such as has been the case for the Polar Shipping Code, where proposed standards were developed by a working group of the Arctic Council, but currently are under consideration for legal adoption by the International Maritime Organization.
- Where no such arrangement exists, then relevant other states would need to be involved in negotiations of agreements that sought to affect them. This is the case currently envisaged with respect to management of potential fishing activity in the Arctic High Seas. As noted above, viewing such a fisheries agreement

as part of the ACS would certainly be responsive to the technical work done by many of the Council's working groups.

- Finally, occasional Statements and Declarations of the Arctic Council Ministers could be used to set important shared policy directions, such as was done in the recent Kiruna Vision for the Arctic, which defined the Council's role as "policymaking."

Conceptualizing the issues of Arctic governance as integrated into a virtual entity such as the Arctic Council System would explicitly recognize the broad suite of mechanisms Arctic nations have to choose from when deciding how to move from a policy decision (usually within the Arctic Council) to implementation (usually at the national level). This array of implementation mechanisms, all already quite familiar in Arctic or other contexts, can ultimately be seen as connected to one "policymaking" entity not unlike the structure of a wheel, where the hub is the Arctic Council and the wheel as a whole is the Arctic Council System with spokes (national action) and rim (other international action) being a variety of implementation mechanisms.

Beyond the vision of an integrated but virtual Arctic Council System, the governments of the Arctic Council System can work more vigorously to pursue a number of new tools and principles for further building the power of the Arctic Council, the hub of the ACS, as a true instrument of collaborative and engaged policymaking. These would ultimately add to that role the additional responsibility to assure accountability for promised results and effective governance of the region as a whole.

- The Arctic Council should assure that the policy decisions that it reaches are accompanied with *specific recommendations for implementation actions together with appropriate time lines*. Inevitably, implementation will be the responsibility of national governments or other international bodies. With increased specificity, those entities can act more responsibly and be held accountable. The recent agreement on oil spill response begins to incorporate several such specific requirements.
- The AC should establish *clear mechanisms for reporting on actions* taken and the results achieved by those actions. Through such a system, interested parties can know there are real results consequent to the decisions of the ACS and, further, with the kind of feedback inherent in such reporting, corrective and fine-tuning actions can be taken where necessary. For example, a Chairman's Report at the end of each Chair's two-year term could summarize national and international actions to implement the policy decisions of the Arctic Council.
- The AC needs to *more inclusively engage the full range of stakeholders* potentially interested in and affected by its decisions and actions. The Arctic Council is

14. Molenaar, *supra* note 2.

already unique in that it includes several indigenous peoples' organizations as Permanent Participants in the work of the Council. Mechanisms need to be developed to make their participation more-effective. In addition, the Council has provisions for recognizing Observers in its work and has recently accorded observer status to an expanded group of countries. But full engagement of civil society and various economic interests in the Arctic is essential to policymaking if it is to take into account the full range of interests on complex issues. The increased number of non-Arctic nations admitted to Observer status also suggests that at some point, the Council may need to develop rules of procedure for Observers that make a distinction between the role of non-Arctic nations and other Observers that are citizens of Arctic nations, with greater rights accorded to the latter.

- The AC needs to *apply the full range of modern techniques of web-based governance* to its research, analytic, and policymaking function, as well as the reporting and accountability activities suggested above. Interests in the Arctic are dispersed over a very wide geography and amongst peoples and entities with very different capacities. Through e-governance technologies and practices, many of the disparities created by differences in time and space, resource and technical capacity, and proximity to decisionmaking can be overcome. And by using e-governance to do so, the ACS can include a wider variety of interests in its processes, access new and different perspectives, and ultimately build a stronger base of political support for proposed actions. For example, increasing the access of the Permanent Participants to the deliberations of the Arctic Council and its working groups through enhanced e-governance could make their participation more-effective at minimal cost.
- A more-robust AC would require the *creation of a Secretariat capable of managing the complex interaction of interests and issues* across the several institutions and processes that are envisaged to act in separate but mutually supportive ways. That this is already a problem needing attention is exemplified by the fact that at each of the last two Ministerial meetings, the parties have called for more-effective action by the IMO on the Polar Code. But, the reality is that once the ministers depart, there is no entity responsible or capable of following up to give reality to that mandate. A properly invigorated and staffed Secretariat would be able to follow up with Arctic governments to assure timely action by bodies such as the IMO.

Also, a robust Secretariat could assure effective interaction between the technical work done at the Council's direction by its working groups and the political leadership of the Council, thus allowing for clearer and more-rapid identification of acceptable steps for implementation.

- The AC should seek to stimulate the development of a *robust community of "citizens"* committed to and engaged with the task of effective policymaking and implementation. This is already beginning to happen, having a strong base in the scientific experts from within and outside of government who have supported the work of the Council for years. However, increasingly, a growing number of nongovernmental organizations are engaged with the Council. Not surprisingly, economic interests are also collectively engaged with the Arctic, whether possibly through the new "Task Force to facilitate the creation of a circumpolar business forum" created by the Ministers at Kiruna or the privately organized Arctic Circle. These are all welcome advances in creating a body politic engaged with Arctic Stewardship.
- The AC should establish a permanent Arctic Science Panel, whose function would be to recommend to the Council an ongoing *program of critical science issues* requiring coordinated attention across the Arctic and with important implications for policymaking by the Council. A function of governments, through the Council, would be to select those issues of greatest importance from both an Arctic and global systems perspective and provide the funding necessary to address them.

VI. Conclusion

The explicit recognition of an Arctic Council System and a strategic commitment to evolve it as an effective tool for collaborative governance of the Arctic is within the grasp of the Arctic States. It is not a radical departure from the arrangements that are currently evolving in a de facto fashion. But a more-explicit recognition of how such a system could operate would allow the countries to act more effectively. Much that the Council has decided in the last few years, such as the development of agreements in key areas and to base cooperation in ecosystem-based management, are vital steps forward. The additional steps outlined above would move the substantive agenda already agreed by governments more effectively and thus help to assure they meet their stewardship responsibilities in the development of the region's resources.