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## **Alternatives for an Arctic treaty**

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# Alternatives for an Arctic Treaty – Evaluation and a New Proposal

This article examines alternative proposals for an Arctic treaty that have been put forward by scholars and international organisations. The numerous proposals on record draw their inspiration from various sources: chief among these is the Antarctic Treaty System (ATS), but maritime regimes and even principles such as the common heritage of humankind are represented as well. The goal of the article is to examine the proposals in depth to ascertain what is viable and what is problematic in each. This analysis will aid in outlining a new treaty that can accommodate both the political realities in the Arctic and the societal goals pursued in the region.

## 1. Introduction

During the past twenty years, there has been a lively debate about the possibility of creating a legal co-operation mechanism for the Arctic region. A speech by the then-Secretary-General of the Soviet Union Mikhail Gorbachev in Murmansk in 1987 served to energise the discussion. The Soviet leader proposed in the spirit of glasnost, but still in the midst of the Cold War, that the Arctic States initiate cooperation in various fields, including protection of the environment.<sup>1</sup> Even before this, the five Arctic range States of the polar bear had been able to conclude the Polar Bear Treaty in 1973,<sup>2</sup> which still serves as testimony to the possibility of Arctic States concluding a multilateral treaty if mutual concern is pressing enough.

It was the protection of the environment that came to serve as the starting-point for Arctic-wide co-operation between the eight Arctic countries (the Nordic States, the Soviet Union (now the Russian Federation), Canada and the US), first in the form of the Arctic Environmental Protection Strategy (AEPS) of 1991, and thereafter the Arctic Council, which was established in 1996. However, neither of these co-operation mechanisms was given legal form, and thus the search for a legal treaty continued. This endeavour has persisted because many have felt that the way the Arctic Council operates, in particular how it carries out its mandate of environmental protection, is not sufficient. Scientific studies suggest that the consequences of climate change may be twice as intense in the Arctic as in the rest of the world, and with the retreating sea ice and warming temperature, many are predicting a new economic development era in the Arctic, with increased

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<sup>1</sup> For an analysis, see D.R. Rothwell, *The Polar Regions and the Development of International Law* (Cambridge University Press, 1996), at 229-31.

<sup>2</sup> The 1973 Agreement on the Conservation of Polar Bears (Oslo, 15 November 1973).

shipping, hydrocarbon and mineral exploitation, etc., along with the related environmental risks.<sup>3</sup> It would seem clear that with its current weak institutional structure, soft-law status and *ad hoc* funding system, there is not much the Arctic Council can do to ensure that this development is sustainable. Scholars and organizations have pursued the idea of finding new teeth for the Council by transforming it via an Arctic treaty, drawing on the experience from various regimes and governance arrangements functioning in the international sphere.

This article aims to examine alternative visions for an Arctic treaty proposed by scholars and organisations and to draw lessons from these proposals to recommend a proposal for a treaty that would be viable, taking into account both the political realities present and the societal goals being pursued in the Arctic. First, it is important to sketch in a general manner the various alternatives propounded by scholars and organisations for an Arctic treaty. It will become apparent in the following pages that the Arctic is not only a place for imagination in general, but also a source of inspiration for legal innovation as testified by the numerous and diverse suggestions for an Arctic treaty. These alternative models will then be analysed in the concluding section from the viewpoint of their viability. An attempt will also be made to identify one possible way to design an Arctic treaty in a general way, which, at least for the present author, seems a viable one. Before that, however, it is crucial to examine the present governance system of the Arctic in order to evaluate the suitability of the various alternatives for an Arctic treaty and give the basis for the argument for the best alternative.

## 2. An Extremely Complex System of Governance in the Arctic

Before discussing the prevailing governance system in the Arctic, it is pertinent to try to define the precise area that constitutes the Arctic. The question of where the southernmost boundary of the Arctic should be drawn is complicated, since several different criteria can be presented. Possible natural boundaries are, for instance, the tree line (i.e., the northernmost boundary where trees grow) or the 10°C isotherm (i.e., the southernmost location where the mean temperature of the warmest month of the year is below 10°C). In Arctic-wide co-operation, the Arctic Circle has been used as a

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<sup>3</sup> For a recent warning of this type, see 'Drawing Lines in Melting Ice', *The Economist* (18 August 2007), 47

criterion for membership: only States possessing areas of territorial sovereignty above the Arctic Circle have been invited to participate.<sup>4</sup>

## 2.1. Legal Status of the Arctic

Within this approximate region, all the levels of law - international law, European law and national legal systems - come into play, as much of the region falls under the sovereignty and sovereign rights of the eight Arctic States. Sovereignty has been established over all land areas by the eight Arctic States, but a large portion of the Arctic waters falls within these States' Exclusive Economic Zones (EEZs) or continental shelves. Taking a closer look, we can identify three federal States (the US, Canada and Russia), with varying kinds of mandates accorded to their sub-administrative units (the State of Alaska, the northern territories of Canada, and the various entities of the Russian Federation), wherein indigenous peoples have been given different powers and rights. Finland, Sweden and Denmark are Member States of the EU, but since Denmark's Greenland chose not to become part of the EU, it possesses extensive autonomous powers in the form of home-rule. Iceland and Norway, which are members of the European Free Trade Association (EFTA), are bound by considerable European law as parties to the European Economic Area Agreement,<sup>5</sup> with the exception of the Svalbard Islands, which was excluded from the EEA agreement by a special Protocol<sup>6</sup> due to its unique status established through an international treaty in 1920.<sup>7</sup> The eight States of the region have committed themselves to a large number of international treaties and are, of course, also bound by customary international law.<sup>8</sup>

All of the land area - continents as well as islands - is firmly under the sovereignty of the Arctic States, and the Arctic waters now largely fall under their exclusive maritime jurisdiction.<sup>9</sup> The core

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<sup>4</sup> Iceland also has areas of territorial sovereignty above the Arctic Circle, as its territorial sea extends above the Circle. For an analysis of the various definitions, see T. Koivurova, *Environmental Impact Assessment in the Arctic: A Study of International Legal Norms* (Ashgate, 2002), at 25-28.

<sup>5</sup> Agreement on the European Economic Area, [1994] O.J. L1/494.

<sup>6</sup> Ibid. A special Protocol was adopted as part of the EEA Agreement to the effect that Norway may decide whether to apply the EEA Agreement to Svalbard or not (Protocol 40). Norway decided to exclude the Islands. See Ulfstein, Geir, **PLEASE INCLUDE THEIR FIRST INITIALS** *The Svalbard Treaty: From Terra Nullius to Norwegian Sovereignty* (Scandinavian University Press, 1995), at 299.

<sup>7</sup> Treaty Relating to Svalbard (Paris, 9 February 1920)

<sup>8</sup> For a good overview of the governance framework in the Arctic, see *Arctic Human Development Report* (Stefansson Arctic Institute, 2004), especially Chapters 5 and 6.

<sup>9</sup> One exception is tiny Hans Island between Greenland and Canada's Ellesmere Island over which both Canada and Denmark assert sovereignty; thus it was left out of the maritime boundary delimitation agreement between the two countries. For an analysis, see M. Carnaghan and A. Goody, *Canadian Arctic Sovereignty; Challenges to Canada's*

of the Arctic Ocean remains part of the high seas as well as some holes encircled by the EEZs of Arctic coastal States.<sup>10</sup> The deep sea-bed is governed by the International Sea-Bed Authority<sup>11</sup>, although some Arctic States are developing claims to the Commission on the Limits of Continental Shelf to extend their continental shelf to deep sea-bed ridges of the Arctic Ocean floor.<sup>12</sup> There are also on-going and potential future disputes concerning the location of some of the maritime borders, especially those between Canada and the US in the Beaufort Sea, and Russia and Norway in the Barents Sea, although in general it can be noted that the Arctic States have resolved their maritime boundary disputes peacefully through negotiations, conciliation and judicial procedures.<sup>13</sup> With such a complex framework of governance it is no wonder that the actual Arctic-wide co-operation process, a short overview of which will now be provided, has started with a soft-law approach, enabling us to view the Arctic as a distinct political region.<sup>14</sup>

## 2.2. Arctic Co-operation

The first stage of Arctic-wide co-operation started with the 1991 AEPS. In the Strategy, six high-priority environmental problems facing the Arctic were first identified (persistent organic contaminants, radioactivity, heavy metals, noise, acidification and oil pollution), international environmental protection treaties that apply in the region were identified, and, finally, specific actions to counter the threats were laid out. As part of the environmental protection action by the eight Arctic States, four environmental protection working-groups were established: Conservation of Arctic Flora and Fauna (CAFF), Protection of the Arctic Marine Environment (PAME),

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*Arctic Sovereignty, c. Hans Island*, Canadian Library of Parliament, Political and Social Affairs Division (PRB05-61E, 26 January 2006), available at <<http://www.parl.gc.ca/information/library/PRBpubs/prb0561-e.htm>>.

<sup>10</sup> These are the so-called Banana Hole in the Norwegian Sea, the Barents Sea Loophole, and the Bering Sea Doughnut Hole.

<sup>11</sup> The International Sea-bed Authority was established by the United Nations Convention on the Law of the Sea, and the Agreement relating to the Implementation of Part XI of the Convention. See United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) ('UNCLOS'); and Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea [PLEASE STATE THE DOCUMENT NUMBER, FULL DATE AND CITY WHERE IT WAS SIGNED], Article 156. The deep sea-bed authority governs the deep sea-bed (the so called Area, the ocean bottom beyond the continental shelf's of the coastal states) on behalf of the humankind.

<sup>12</sup> See the various submissions to the Commission on the Limits of Continental Shelf by the Russian Federation in 2001 and Norway in 2006, and reactions to these by other States, on the Commission's website at <[http://www.un.org/Depts/los/clcs\\_new/clcs\\_home.htm](http://www.un.org/Depts/los/clcs_new/clcs_home.htm)>.

<sup>13</sup> For an analysis, see T. Koivurova, *Environmental Impact Assessment in the Arctic: A Study of International Legal Norms* (Ashgate, 2002), at 56-64. The most recent was the conclusion of an Agreement between the Government of the Kingdom of Norway on the one hand, and the Government of the Kingdom of Denmark together with the Home Rule Government of Greenland on the other hand, concerning the delimitation of the continental shelf and the fishery zones in the area between Greenland and Svalbard (Copenhagen, 20 February 2006).

<sup>14</sup> This argument has been made by Oran Young. See O. Young, 'The Structure of Arctic Cooperation: Solving Problems/Seizing Opportunities' (paper prepared at the request of Finland in preparation for the Fourth Conference of Parliamentarians of the Arctic Region, Rovaniemi, 27-29 August 2000) available at <<http://www.arcticparl.org/?/report/ReportID/8>>.

Emergency Prevention, Preparedness and Response (EPPR), and the Arctic Monitoring and Assessment Programme (AMAP). Three ministerial meetings (following the signing of the Declaration and the Strategy) were held in this first phase of Arctic co-operation, generally referred to as 'AEPS co-operation'.<sup>15</sup>

The establishment of the Arctic Council in 1996 broadened the mandate of the co-operation to all common issues facing the Arctic (excluding matters related to military security), especially those relating to environmental protection and sustainable development. The four environmental protection working-groups of the Strategy were integrated into the structure of the Council, and one new working-group was established (the Sustainable Development Working-Group (SDWG)). In the absence of a permanent secretariat, the work of the Arctic Council is heavily influenced by the priorities that the chair-State lays out for its two-year chair period, at the end of which a ministerial meeting is organized. Senior Arctic Officials (SAO), a group of high-level officials, guides the work of the Council in between the ministerial meetings. The Arctic Council has also adopted new programmes related to environmental protection, such as the Arctic Council Action Plan to Eliminate Pollution in the Arctic (ACAP), which was recently turned into a sixth working-group,<sup>16</sup> and the Arctic Climate Impact Assessment (ACIA). One unique aspect in the Arctic Council is the role it gives to the region's indigenous peoples: they are normally accorded the status of non-governmental organizations (NGOs) in different inter-governmental organisations and forums, but the Arctic Council defines them as permanent participants, a distinct category of membership between members proper and observers, whom the Arctic Council member States must consult prior to any consensus decision-making. The group of observers is large, and consists of inter-governmental and non-governmental organisations as well as States that are active in the Arctic region.<sup>17</sup>

### 2.3. Formalising Arctic Management?

The structure of Arctic governance thus seems extremely complex. Since the region hosts such a wide variety of governance arrangements, this has enabled scholars and organisations to come up with a wide variety of proposals for an Arctic treaty. Yet, it has to be borne in mind that since it is a very complex governance system, it will not be easy to come up with an overarching legal regime

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<sup>15</sup> For a recent analysis, see T. Koivurova and D. VanderZwaag, 'The Arctic Council at 10 Years: Retrospect and Prospects', 40:1 *UBC Law Review* 40:1 (2007), 121, at 124-128.

<sup>16</sup> It was re-titled the Arctic Contaminants Action Program.

<sup>17</sup> For an analysis, see T. Koivurova and D. VanderZwaag, n. 15 above, at 128-159.

for the whole region. David VanderZwaag *et al.* point to this complexity, and the fairly recent nature of Arctic-wide co-operation, arguing that in the near future formal approaches in Arctic governance seem unlikely.<sup>18</sup> Olav Schram Stokke has suggested that ‘the best answer would seem to be a flexible approach to norm-building that seeks productive interplay with existing institutions’, by which he means, e.g., the interplay between the United Nations Convention on the Law of the Sea (UNCLOS), the Arctic Council and other regional regimes, rather than aiming for an overarching legal regime, which, according to him, lacks political support from the Arctic States.<sup>19</sup> Hans Corell suggests that there already exists a legal regime functioning in the Arctic – the UNCLOS and the other treaties in force in the Arctic – and we should now focus on their implementation.<sup>20</sup> Yet, he also argues that we need to examine whether the present regime needs strengthening, and, if so, political support for that purpose should be built up by ‘engaging the general public, business, politicians and governments’.<sup>21</sup>

### 3. Inspiration from the Antarctic

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<sup>18</sup> D. VanderZwaag, R. Huebert and S. Ferrara, ‘The Arctic Environmental Protection Strategy, Arctic Council and Multilateral Environmental Initiatives: Tinkering While the Arctic Marine Environment Totters’, [PLEASE STATE THE VOLUME AND ISSUE NUMBERS] *Denver J. Intl L. & Policy* (2002), 131, at 166-171.

<sup>19</sup> O. Schram Stokke, ‘The Law of the Sea Convention and the Idea of a Binding Regime for the Arctic Marine Environment’ (paper prepared for the 7th Conference of Parliamentarians of the Arctic Region, Kiruna, Sweden, 2–4 August 2006), available at <<http://www.arcticparl.org/resource/images/Underlagsrapport%20eng-rysk3.pdf>>.

<sup>20</sup> H. Corell, ‘Reflections on the Possibilities and Limitations of a Binding Legal Regime’, 37:4 *Environmental Policy and Law* (2007), 321.

<sup>21</sup> *Ibid.*, at 324.

Scholars and organizations looking for a new direction for the work of the Arctic Council have drawn on experience connected with the other pole, the Antarctic, and its well-established structures of governance. At first sight, this approach may seem misdirected, given that the two poles show more differences than similarities: the Arctic consists of ocean surrounded by continents, whereas the Antarctic is a continent surrounded by ocean; the Antarctic has no permanent human habitation, while the Arctic is inhabited by indigenous peoples and other local communities. Most profoundly, much of the Arctic is under the sovereignty and sovereign rights of the Arctic States, while Antarctic sovereignty claims have been frozen for the time being, and there are thus no territorial sovereigns in the Antarctic.<sup>22</sup>

Yet, the two polar areas also resemble each other in many respects. Both have extreme climatic conditions that make it difficult to access the regions, they receive less radiation from the sun than other parts of the globe, and the ecosystems have had to adapt to very cold and dark environments with short but light growing seasons. In such conditions, the ecosystems are simple, containing only a few key species, and are thus more vulnerable to human-induced pollution than those of more temperate areas. Both areas are among the major regions for governmentally sponsored scientific research, and they face similar environmental challenges, such as the effect of global environmental problems and an increase in tourism.

It is also important to stress that even though the differences between the two regions are enormous from the viewpoint of governance, we should not underestimate their similarity in the minds of the general public and human institutions. After all, regime formation is not always a rational process, and thus the imagined commonality of the poles may enable the polar regimes to draw lessons from each other, even in designing an Arctic treaty. In addition, in many countries, for one reason or another, polar issues are dealt with together, and many of the Arctic States (e.g., the US, Norway, Sweden, Finland and Russia) are also Consultative Parties to the Antarctic Treaty System (ATS). Recently, the polar regimes themselves have started to monitor each other's actions.<sup>23</sup> The

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<sup>22</sup> Yet, a number of countries still hold the view that they possess some sort of sovereignty in the Antarctic. See P. Vigni, 'Antarctic Maritime Claims: "Frozen Sovereignty" and the Law of the Sea', in O. Elferink and D.R. Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff, 2001). Recently, the UK government announced plans to claim sovereignty over a large area of the seabed around British portion of Antarctica, which then has provoked e.g. Chile to make a similar kind of announcement. See <http://news.bbc.co.uk/2/hi/americas/7052297.stm> [PLEASE AUTHOR, TITLE AND DATE OF THE ARTICLE]

<sup>23</sup> Resolution 3 (2007) of the XXX Antarctic Treaty Consultative Meeting in New Delhi (11 May 2007), available at <[http://30atcm.ats.aq/30atcm/Documents/Docs/fr/Atcm30\\_fr002\\_e.doc](http://30atcm.ats.aq/30atcm/Documents/Docs/fr/Atcm30_fr002_e.doc)>, stated: 'Long-term Scientific Monitoring and Sustained Environmental Observation in Antarctica. The Representatives...*Noting* that the Arctic Council Ministerial Meeting of 26 October 2005 [sic] urged all member countries of the Arctic Council to maintain and extend long-term monitoring of change in all parts of the Arctic as well as to create a coordinated Arctic observing network'. For an



Salekhard Ministerial [WAS THIS A DECLARATION?] of the Arctic Council even went so far as to:

**Welcome** the Edinburgh Declaration on the International Polar Year 2007-2008, adopted by the Antarctic Treaty Consultative Meeting of 2006 proposing closer collaboration with the Arctic Council and **request** the SAOs to explore ways and means of promoting such collaboration. (original emphasis)<sup>24</sup>

The most far-reaching argument made by some scholars is to borrow the idea of international community interest, present already in the Antarctic Treaty of 1959,<sup>25</sup> and apply it to the Arctic. The ATS<sup>26</sup> itself, even though not, strictly speaking, part of the common heritage of mankind (CHM),<sup>27</sup> is open to any member State of the UN that conducts substantial research activity there.<sup>28</sup> This has not been enough for some developing States, who, for a number of years, challenged the ATS in the UN as a club of developed States and wanted to replace the ATS with a new regime which would apply the CHM principle.<sup>29</sup> This debate has clearly also influenced scholars who have argued for a more representative regime to be established in the Arctic. One suggestion is to conclude an international agreement to maintain the area as a marine protected area, which could possibly be open to a few uses such as tourism and marine scientific research.<sup>30</sup> Even a global treaty for the Arctic modelled on the ATS has been suggested since much of the region's pollution problems presently originate from outside the Arctic.<sup>31</sup>

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overview, see T. Koivurova, 'Environmental Protection in the Arctic and Antarctic: Can the Polar Regimes Learn From Each Other?', 33:2 *International Journal of Legal Information* (2005), 204.

<sup>24</sup> Available at [http://www.arctic-council.org/Meetings/Ministerial/2006/SALEKHARD\\_AC\\_DECLARATION\\_2006.pdf](http://www.arctic-council.org/Meetings/Ministerial/2006/SALEKHARD_AC_DECLARATION_2006.pdf) p.3. [PLEASE STATE THE AUTHOR, TITLE, DOCUMENT NUMBER, FULL DATE. SIMPLY A WEBSITE CITE DOES NOT CONICIDE WITH THE STYLE USED IN RECIEL]

<sup>25</sup> The Preamble to the Antarctic Treaty recognises 'that it is in the interest of all mankind that Antarctica shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord'. See Antarctic Treaty (Washington, 1 December 1959), Preamble.

<sup>26</sup> The ATS is built on the Antarctic Treaty of 1959 and the inter-connected web of other treaties, of which only the 1991 Environmental Protocol to the Antarctic Treaty (Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991)) is directly linked to the 1959 Treaty. The other treaties are the Convention on the Conservation of Marine Living Resources (Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) (Canberra, 20 May 1980)) and the Convention on the Conservation of Antarctic Seals (Convention on the Conservation of Antarctic Seals (CCAS) (London, 11 February 1972)).

<sup>27</sup> See J. Brunnée, 'Common Areas, Common Heritage, and Common Concern', in D. Bodansky, J. Brunnée and E. Hey (eds) *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), 550, at 563.

<sup>28</sup> See Antarctica Treaty, n. 25 above, Articles XIII and IX (2), which create two categories of members, those who do not conduct substantial research activity but have become parties (Non-Consultative Parties), and those who do (Consultative Parties) and thus have full rights to participate in Antarctic Treaty Consultative Meetings.

<sup>29</sup> See D.R. Rothwell, n. 1 above, at 451-452.

<sup>30</sup> See B. Hart Dubner, 'On the Basis for the Creation of a New Method of Defining International Jurisdiction in the Arctic Ocean', 13:1 *Mo. Env'tl L. & Pol'y Rev.* (2005), 1. The author, however, unrealistically suggests extending a 'no development' zone to the baselines of the eight surrounding countries, which assumedly means territorial sea baselines.

<sup>31</sup> See M. A. Verhaag, 'It Is Not Too Late: The Need for a Comprehensive International Treaty to Protect the Arctic Environment', 15:4 *Georgetown Int'l Env'tl. L. Rev.* (2003), 555.

A very important proposal that also borrowed some elements from the ATS was that advanced under the auspices of Canadian private research institutions and drafted by the pioneer of Arctic legal research Donat Pharand. This proposal for an 'Arctic Region Council' was even introduced by Canada at the 1991 ministerial meeting that adopted the AEPS as the starting-point of the initiative that culminated in the establishment of the Arctic Council.<sup>32</sup> In contrast to the Arctic Council, the Arctic Region Council would have been adopted via an international treaty. In its preamble in particular, it called attention to environmental protection and conservation, emphasising the importance of regional co-operation in developing the Arctic for peaceful purposes in the interest of all humanity, very much echoing the dedication of the Antarctic to peace, science and environmental protection in the Antarctic Treaty.<sup>33</sup> Other similarities to the 1959 Antarctic Treaty can also be found. For instance, the proposed treaty's scope of application is defined as being north of 60°N north latitude, which is the same latitude in the south that was used to define the Antarctic Treaty's scope of application.

In considering membership in the Arctic Region Council, the proposal makes a distinction between founding members and 'Admitted Members', manifesting somewhat the similar distinction in the ATS between Consultative Parties, which have full rights, and Non-Consultative parties, which have more limited rights. Yet, the similarities in terms of membership status between the Arctic Region Council proposal and the ATS are still quite far-reaching, given that the former envisages a regime that functions very much on the basis of the activity and decision-making of the eight Arctic States and the Arctic regional actors, while the ATS draws its member States from various geographical regions.<sup>34</sup> The Arctic Region Council proposal calls for a plenary body called the Assembly consisting of all the members and a Commission with the eight founding members plus four elected Admitted members, the Assembly being responsible for discussing general policy

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<sup>32</sup> See D.R. Rothwell, n. 1 above, at 242-244.

<sup>33</sup> D. Pharand, The 'Draft Arctic Treaty: An Arctic Region Council Proposal' (Canadian Arctic Resources Committee, **PLEASE STATE THE DATE**) can be found at <<http://www.carc.org/pubs/v19no2/5.htm>>.

<sup>34</sup> See Antarctic Treaty, n. 25 above, Article 3, Membership, reads: 'The founding Members of the Council shall be the eight States whose territory projects north of the Arctic Circle... The admitted Members may be States, Governmental and Non-Governmental Organizations, territorial and regional governments. Such States, organizations, and governments are eligible for membership if they have demonstrated a substantial interest in the work of the Council and a capacity to further its purposes. Admission shall be decided by the Assembly upon the recommendation of the Commission. Commentary: To permit participation of all those with sufficient interest, the Council is open to membership of other States (such as France, Germany, Japan, the United Kingdom), organizations of States (such as the European Community), NGOs (such as the ICC [Inuit Circumpolar Conference]) and territorial governments (such as Alaska, Yukon, N.W.T., Greenland) and regional governments (such as Chukotka, Nunavut and the Nordic Sami Council)'. At present, there are 45 States that are parties to the Antarctic Treaty, of which 27 are Consultative parties, with power to take part in decision-making in ATCMs. The Non-Consultative Parties can participate in ATCMs but do not have the right to take part in decision-making.

orientation and the Commission for implementing these policies. A final clear similarity between the Arctic Region Council Proposal and the 1959 Antarctic Treaty is that the Arctic proposal envisages a review conference after the treaty has been in force for twenty-five years; the Antarctic Treaty stipulates that the review will take place after 30 years.<sup>35</sup>

The direct possibility of borrowing some elements from the ATS to formalise Arctic co-operation has been well captured by Philippe Sands:

The adoption of the Arctic Environmental Protection Strategy and the establishment of the Arctic Council provide a useful opportunity to develop new legal arrangements and institutions to govern an ecosystem which transcends national boundaries and requires international co-operation for its adequate protection to be assured. *The soft law approach currently envisaged provides a first step; ultimately, it will be necessary to establish appropriate institutional arrangements and substantive rules, perhaps similar to those applied in the Antarctic*, to ensure that agreed obligations are respected and enforced.<sup>36</sup> (emphasis added)

This kind of approach was adopted by the World Conservation Union (IUCN). According to Linda Nowlan, who did a study for the IUCN project on the topic, ideas could be borrowed from the more developed polar regime, the ATS, and especially the annexes to the 1991 Madrid Protocol.<sup>37</sup> One possibility Nowlan outlines is to formalize Arctic co-operation through an international treaty. The treaty would contain principles, substantive legal obligations, and some innovative features that take into account the Arctic context, especially its indigenous peoples. The core of the proposal would be to have the five annexes to the Madrid Protocol - Impact Assessment, Conservation of Antarctic Flora and Fauna, Waste Disposal and Waste Management, Prevention of Marine Pollution, and Area Protection and Management<sup>38</sup> - transposed to become the main substantive obligations of a potential Arctic regional treaty. Although Nowlan has put forward these possibilities, she also - and correctly - points out the problems in such an approach.<sup>39</sup>

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<sup>35</sup> Ibid., Article XII (2a).

<sup>36</sup> P. Sands, *Principles of International Environmental Law* (2nd ed.) (Cambridge University Press, 2003), at 731. This can be contrasted with Gail Osherenko's and Oran Young's view, according to which 'simplistic comparisons between the Arctic and the Antarctic do more to confuse the analysis of prospects for international cooperation in the Arctic region than to shed light on this topic, See G. Osherenko and O. Young, *The Age of the Arctic* (Cambridge University Press, 1989), at 244.

<sup>37</sup> L. Nowlan, *Arctic Legal Regime for Environmental Protection* (IUCN Environmental Policy and Law Paper No. 44), Parts V and VI, available at <<http://www.iucn.org/themes/law/info04.html>>.

<sup>38</sup> A sixth annex, which had been stipulated in Article 16 of the Protocol, was adopted as Annex VI, Liability Arising From Environmental Emergencies, by the 28th ATCM in Stockholm on June 14, 2005; it is currently being ratified by the Consultative Parties. See the text at <http://www.ats.aq/uploaded/ANNEXVI.pdf> [PLEASE STATE THE TITLE, DOCUMENT NUMBER AND FULL DATE OF THIS DOCUMENT]

<sup>39</sup> See L. Nowlan, n. 37 above, Part VI. Problems that she highlights include: (1) the time and expense of formal treaty negotiations could act as a barrier to continuation of soft law development; (2) a formal new organization, such as a

A recent interesting proposal to learn from one of the treaties forming the ATS had been advanced by Rosemary Rayfuse.<sup>40</sup> According to her, the Arctic States could take advantage of the possibilities provided by the International Polar Year (IPY), which commenced in March 2007 and will run until March 2009.<sup>41</sup> During this period, there will be enormous media attention focused on the polar areas, highlighting the common problems the two regions face, which will certainly increase the possibility of using Antarctic inspiration in the development of the Arctic Council. Rayfuse suggests that the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)<sup>42</sup> could be used as a model for developing a comprehensive treaty regime for the Arctic Ocean, for areas that are beyond national jurisdiction. She suggests that ‘the treaty could also establish a regime responsible for the integrated and holistic management of all ocean-related activities in the Arctic Ocean areas beyond national jurisdiction, including fishing, shipping, bioprospecting, scientific research and other matters relating to protection of the marine environment’.<sup>43</sup>

#### 4. Focusing on Arctic waters

As the Arctic’s mostly ice-covered waters form a predominant part of what is usually considered to be the Arctic, it is no surprise that many proposals have been put forth for an Arctic co-operative regime focusing on Arctic waters. As is well known, the UNCLOS contains one article specifically tailored to Arctic, rather than Antarctic, conditions.<sup>44</sup> Article 234 accords Arctic coastal States extended environmental protection powers within the limits of their exclusive economic zones if ice

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treaty secretariat, could be expensive to operate; (3) a comprehensive regime can be difficult to obtain support for, and consequently difficult to implement - the best example of this phenomenon is UNCLOS, which took eleven years to from negotiation to coming into force, and is still not implemented worldwide; and (5) many international treaties are already taking the special needs of the Arctic into account such as the Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001) - pursuing Arctic specific goals in existing global regimes may be faster, less expensive, and more effective for the environment.

<sup>40</sup> R. Rayfuse, ‘Melting Moments: The Future of Polar Oceans Governance in a Warming World’, 16:2 *RECIEL* (2007), 196..

<sup>41</sup> This International Polar Year (IPY) will be the fourth of its kind, the most recent being organized fifty years ago (1957-1958). It is not a single year but a two-year period loosely corresponding to the two years mentioned in the name (2007-2008). The fourth IPY will start in March 2007 and end by March 2009 to allow for two summer field seasons at both poles. See generally <<http://www.ipy.org/>>.

<sup>42</sup> See CCAMLR, n. 26 above.

<sup>43</sup> See R. Rayfuse, n. 40 above, at 216.

<sup>44</sup> For a view from a scholar who took part in the UNCLOS negotiations, see K. Hakapää, ‘Vessel-Source Pollution in the UN Law of the Sea Convention: Some Assessment as of Today’, *Liber Amicorum Bengt Broms: Celebrating His 70<sup>th</sup> Birthday (16 October 1999)* (PMS Print Oy Helsinki, 1999), 97 at 113-116.

is present in an area for most of the year.<sup>45</sup> This led the Arctic Council to develop special navigational rules for the Arctic waters, which were later adopted as a non-binding International Maritime Organization's (IMO) Polar Code.<sup>46</sup>

Given the 'constitutional' nature of the UNCLOS, which for the most part codifies the present law of the sea, it is no wonder that scholarly suggestions have focused on how to apply this Convention to the very particular circumstances prevailing in the Arctic region, although there are also proposals which argue that special rules should apply to the Arctic waters<sup>47</sup> or which have suggested the possibility of finding inspiration in other regional sea governance arrangements functioning in different parts of the world.<sup>48</sup> One scholarly debate has centred on the question of whether the Arctic Ocean should be regarded as a semi-enclosed sea as defined in Article 122 of the UNCLOS. If it were so classified, the littoral States would have greater obligations to cooperate in regard to environmental protection.<sup>49</sup> Another possibility would be to conclude an Arctic convention, which could be supplemented by protocols basing themselves on the UNCLOS.<sup>50</sup>

A more concrete proposal has been laid out by the World Wide Fund for Nature (WWF), which has observer status in the Arctic Council. In a seminar hosted by Arctic parliamentarians on 28 November 2005, WWF laid out one of the first concrete, albeit preliminary, proposals for an Arctic

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<sup>45</sup> UNCLOS, n. 11 above, Article 234 reads: 'Ice-covered areas. Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence'. These criteria are largely overlapping since if ice is present in an area for most of the year, the other conditions are normally also fulfilled.

<sup>46</sup> The 1998 Iqaluit meeting of the Arctic Council gave a mandate to the PAME working group to assess current and potential shipping activities in the Arctic in light of what, if any, additional Arctic shipping measures were required. This included working on an *International Code of Safety for Ships Operating in Polar Waters (Polar Code)* under the auspices of the International Maritime Organization (IMO), which eventually lead the IMO to adopt these as *Guidelines for Ships Operating in Arctic Ice-Covered Water* (IMO MSC/Circ. 1056, MEPC/Circ. 399, 23 December 2002).

<sup>47</sup> See D.M. Johnston, 'The Future of the Arctic Ocean: Competing Domains of International Public Policy', 17 *Ocean Yearbook* (2003), 596, at 600-602. For a very early proposal to this effect, see W. Lakhtine, 'Rights Over the Arctic', 24 *American Journal of International Law* (1930), 703-717.

<sup>48</sup> See T. Koivurova and D. VanderZwaag, n. 15 above, at 180-183.

<sup>49</sup> See UNCLOS, n. 11 above, Article 122, reads: 'For the purposes of this Convention, "enclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal states'. There is a wide outlet from the Arctic Ocean to the Atlantic Ocean at the Greenland Sea, and this outlet is not within the EEZs of the coastal States. For a view that the Arctic Ocean cannot be classified as a semi-enclosed sea, see E. J. Harders, 'In Quest for an Arctic Legal Regime: Marine Regionalism – A Concept of International Law Evaluated', 11:4 *Marine Policy* (1987), 285-298. For a recent argument, see D. Pharand, 'The Arctic Waters and the Northwest Passage: A Final Revisit', 38:1/2 *Ocean Development and International Law* (Jan-Jun 2007), 3-69.

<sup>50</sup> D. Brubaker, *Marine Pollution and International Law* (Belhaven Press, 1993), 294-432.

treaty. Its idea was to first establish a preparatory commission under the auspices of the Arctic Council to conclude an ambitious nature protection treaty. WWF envisages the substantive content of the treaty as being based on already existing standards found in the UNCLOS, the Straddling Stocks Convention<sup>51</sup> and the Polar Code. The WWF proposal includes the following policy areas as the key regulative content for a treaty that would apply beyond the national maritime jurisdiction: creating a network of marine protected areas and special management areas, including a stronger set of regulations for the construction and operation of ships increasingly operating in Arctic waters; and the basing of fishery management policies on the UN Straddling Stocks Agreement. The WWF treaty proposal also includes ecosystem-based management modeled on CCAMLR, as also suggested by Rayfuse, and regional standards to reduce the risk of transboundary effects of oil spills, as well as the development of an international means to respond to oil spills.

The WWF proposal also envisages a structure to supervise and develop the treaty, based firmly on the existing structure of the Arctic Council with respect to membership categories and decision-making. Furthermore, the role of technical/scientific advice and monitoring is very similar to that which already exists in the Council, especially in the AMAP programme, but more integrated in character. A more controversial proposal was to have the new agreement contain a dispute-resolution clause, but one that would have excluded territorial disputes from its ambit. This preliminary proposal does not elaborate on the relationship between the agreement and the Arctic Council, but as it seemingly would take on almost all of the Arctic Council's present tasks, it is reasonable to conclude that the proposed structure would replace the Council, although questions remain as to how the Arctic Council's current sustainable development mandate would fit in with this proposal.<sup>52</sup> [PLEASE ADD A LINE STATING HOW STATES HAVE RESPONDED TO THIS WWF PROPOSAL]

However, WWF seems to have recently taken a stronger stance on the treaty issue since they now argue that the UNCLOS-based solution is no longer adequate because of climate change and claims by Arctic littoral States to extended continental shelf. The newly elected director of WWF Arctic, Dr. Hamilton, states, 'We need a new approach, which includes thinking about a solid Arctic Treaty

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<sup>51</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995).

<sup>52</sup> R. Hansson, 'Climate Change, Energy and Governance in the Arctic', PowerPoint presentation at a seminar organised by the Arctic Parliamentarians in Oslo (28 November 2005) (on file with the author). See also S. Smith, 'Editorial', 1 *WWF Arctic Bulletin* (2004), 3, available at <<http://assets.panda.org/downloads/ab0104.pdf>>.

and a multilateral governance body... This is the only way to ensure the implementation of sustainable development regimes and help the Arctic adapt to the severe impact of climate change and ultimately stabilize the world's climate'<sup>53</sup>

## 5. Evaluation and an Outline for an Arctic Treaty

The proposed models for formalising Arctic co-operation now functioning under the Arctic Council are interesting in themselves as they manifest imaginative ideas in international legal thinking. Yet it also seems fairly clear that all of the above-reviewed proposals contain problems that make them vulnerable to criticism. However, there are bits and pieces in most of the proposals that certainly would lend themselves to use if and when an Arctic treaty is concluded in the near or mid-term future.

Drawing inspiration from the ATS to design an Arctic treaty is problematic in many respects. First and foremost is the vast difference in the legal basis on which the two polar regimes have been created. The presence of territorial sovereigns in the Arctic does not allow much room to develop a collective model like the one in the ATS since it is precisely the non-presence of territorial sovereigns in the Antarctic that has enabled the creation of the present ATS. The other idea is to design an Arctic treaty on the basis of inspiration from the ATS, which is also hard to defend. The argument that international society, or at least a more extensive group of countries than the Arctic States (as in the Arctic Region Council proposal), would be able to conclude a comprehensive protection treaty for the Arctic seem extremely optimistic, given the presence of eight territorial sovereigns eagerly protecting and even trying to enlarge their jurisdictional domain.

The focus on marine areas holds more promise, at least when the proposal in question is based on the present law of the sea as now mostly codified in the UNCLOS and related agreements. There is a clear tendency to perceive that the future reality in the Arctic is geared towards governing the Arctic waters, given the consequences of climate change and increased shipping, offshore hydrocarbon exploitation and fisheries in the region. If the focus of Arctic-wide co-operation eventually turns in this direction, there are plenty of already existing legal rules on which to base the regional marine approach in the Arctic. WWF Arctic's proposal is particularly interesting as it

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<sup>53</sup> See the press release on the WWF website at **PLEASE STATE THE TITLE OF PRESS RELEASE AND DOCUMENT NUMBER**

<[http://www.panda.org/about\\_wwf/where\\_we\\_work/europe/what\\_we\\_do/arctic/index.cfm?uNewsID=111440](http://www.panda.org/about_wwf/where_we_work/europe/what_we_do/arctic/index.cfm?uNewsID=111440)> (28 August 2007). The press release was given on 17 August 2007.



builds on the already existing Arctic Council structure and details an ambitious marine environmental protection regime, which would no doubt be viable from the viewpoint of making development in Arctic waters sustainable. Yet, at least in the near or even mid-term, such a change seems unlikely. First, at present it seems far too ambitious an approach, given the soft work that the Arctic Council is currently conducting. Second - and this criticism applies to all the proposals that focus on Arctic waters in designing an Arctic treaty - it would effectively transform the focus from the whole of the Arctic, including both terrestrial and marine environments, to its marine component. It can be convincingly argued that Finland and Sweden, the two Arctic Council members which do not have a coastline on Arctic waters, would not want Arctic-wide co-operation to move in this direction. Most of the proposals reviewed above, with the exception of that of WWF Arctic, also suffer from being distanced from the present Arctic-wide co-operation now functioning under the Arctic Council.

It is unlikely that any major change in the present Arctic Council will take place in the short-term since Arctic-wide co-operation has developed incrementally, step-by-step, from the AEPS to the Arctic Council. Even though this co-operation has developed rather rapidly, the Council was intentionally built on the foundation of the AEPS. Like its predecessor, the Council has remained a soft-law creature, and the four environmental protection working-groups, the institution of Senior Arctic Officials and ministerial meetings, which were already part of the AEPS, have continued almost unchanged. Even the new Sustainable Development working group had a predecessor in the AEPS under the name of Task Force on Sustainable Development and Utilisation. However, the rules concerning participation, the decision-making procedure and the mandate of the process became more specific with the establishment of the Arctic Council, and it has since become more detailed in its organizational structure.<sup>54</sup>

Importantly, the Arctic Council has become much more ambitious, especially in recent years, compared with the AEPS. This is mostly due to the fact that the working-groups, most of which began to function at the beginning of the 1990s, have only in recent years been able to deliver substantive suggestions and conduct important scientific investigations. Above all, the

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<sup>54</sup> For example, the Arctic Council Rules of Procedure were adopted by the first ministerial conference of the Arctic Council in Iqaluit in 1998. The Arctic Council Rules of Procedure as adopted by the Arctic Council at the First Arctic Council Ministerial Meeting (Iqaluit, 18 September 1998) can be downloaded from the homepage of the Arctic Council (archives > founding documents) at <<http://www.arctic-council.org>>. The Rules of Procedure of the Arctic Council organize the work in the Council in a detailed and systematic manner, a state of affairs which was lacking in AEPS cooperation. The Rules cover topics such as how to convene different types of meetings under the Council, the launching process for programmes and projects, and the function of subordinate bodies.



commissioning of the Arctic Climate Impact Assessment (ACIA) by the Arctic Council, a massive scientific undertaking involving 300 scientists and experts in indigenous knowledge, has even challenged the present structure and status of the Arctic Council with its dramatic findings.<sup>55</sup>

An argument can be made that by commissioning the ACIA, the Arctic Council has, in the language of resilience studies, created a resilience loop.<sup>56</sup> According to the theoretical framework by an interdisciplinary group of resilience scholars, if the application of a governance arrangement does not meet its intended purpose - for example, a fisheries regime intended to sustain a certain fish stock - this may lead via social learning to either single-loop learning, correcting the strategies of a regime if the outcome is not achieved, or double-loop learning, that is, 'correcting mismatches by first changing or supplementing existing values and norms, and then changing strategies or behaviour'.<sup>57</sup> The way to evaluate whether the intended goal has been achieved is scientific assessment: for instance, commissioning an investigation of the current sustainability of the stock, which, if the results show that the stock is depleted, might, in turn, lead to social learning by either changing the strategies or even revising the existing values and norms on which the governance arrangement is built.

With the ACIA exposing the dramatic changes resulting from climate change to the Arctic environment, it is also possible to presume that climate change consequences call into question whether the Arctic Council should change its strategies, or even start reconsidering the basis of the regime, since, given the present structure and status of the Council, there is not much that it can do to contribute to mitigation of climate change; in particular, it is unable to make a positive contribution to the on-going process of ecological-social adaptation in the Arctic region to the consequences of climate change.

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<sup>55</sup> The ten key findings of the ACIA Overview Report are as follows: i) the Arctic climate is now warming rapidly and much larger changes are projected; ii) Arctic warming and its consequences have worldwide implications; iii) Arctic vegetation zones are very likely to shift, causing wide-ranging impacts; iv) animal species' diversity, ranges and distribution will change; v) many coastal communities and facilities face increasing exposure to storms; vi) reduced sea ice is very likely to increase marine transport and access to resources; vii) thawing ground will disrupt transportation, buildings, and other infrastructure; viii) indigenous communities are facing major economic and cultural impacts; ix) elevated ultraviolet radiation levels will affect people, plants, and animals; and x) multiple influences will interact to cause increased impacts to people and ecosystems. See *Impacts of a Warming Arctic: ACIA Overview Report* (Cambridge University Press, 2004), at 10-11.

<sup>56</sup> The author realised this idea during discussions with Professor Nigel Banks from the University of Calgary.

<sup>57</sup> A. Diduck, *et al.*, 'Unpacking Social Learning in Social-Ecological Systems: Case Studies of Polar Bear and Narwhal Management in Northern Canada', in F. Berkes, *et al.*, (eds) *Breaking Ice: Renewable Resource and Ocean Management in the Canadian North* (University of Calgary Press, 2005), 269, at 271-272.

The release of the ACIA findings just before the 2004 Arctic Council ministerial in Reykjavik did point to some social learning processes starting in the Council. The ministers representing the eight Arctic States noted with concern the research results, committed themselves to transmit the information to all the relevant stake-holders, and encouraged Member States to take this information into account in mitigating and adapting to climate change. From the perspective of social learning, it was highly important that the ministers asked the SAOs [PLEASE SPELL THIS OUT] to report on the progress made in further organising the work of the Council and its subsidiary bodies in view of the ACIA findings.<sup>58</sup> Norway, the current chair, has, in its programme for its 2006-2008 chair-period, stated that it will examine the Arctic Council's organization with a view to improving its effectiveness and efficiency.<sup>59</sup> Many connected ambitious assessments are now underway in the Council: for instance, to assess the state of hydrocarbon activities, shipping and biodiversity in light of the consequences of climate change in the region.<sup>60</sup> In this way, the resilience loop shown by the ACIA can also serve as a catalyst for the Arctic Council to revise even its own fundamental elements, one of which is its legal status.<sup>61</sup>

It is important to realise that the commonly heard argument that Arctic environmental problems come from outside, and thus need to be dealt with primarily in other forums,<sup>62</sup> will gradually become less convincing when the consequences of Arctic climate change open up the region for various kinds of economic activities by Arctic and non-Arctic States and their residents and companies, with concomitant environmental problems for the region. It is this gradual shift to issues that can be managed by the Arctic States themselves that makes the creation of an Arctic treaty necessary.

#### 4.1. Outline for an Arctic Treaty

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<sup>58</sup> The section entitled 'Climate Change in the Arctic' from the Reykjavik Declaration [PLEASE ADD THE FULL TITLE AND FULL DATE OF THE DECLARATION] can be downloaded from the website of the Arctic Council at <[http://www.arctic-council.org/Meetings/Ministerial/2004/Reykjavik\\_Declaration.pdf](http://www.arctic-council.org/Meetings/Ministerial/2004/Reykjavik_Declaration.pdf)>.

<sup>59</sup> The programme for the Norwegian 2006-2008 chairmanship can be downloaded at <<http://www.arctic-council.org/Default.htm>>.

<sup>60</sup> For an analysis, see T. Koivurova and D. VanderZwaag, n. 15 above, at 162-173.

<sup>61</sup> Another development that manifests the 'resilience gap' in the Arctic Council, and induces us to think about the future status of the Council is the human rights petition whereby the Inuit of the US and Canada have asked the Inter-American Commission on Human Rights to declare that the US has breached many of their human rights through its irresponsible climate policy. The petition can be downloaded from the Earth Justice website at <<http://www.earthjustice.org/news/press/007/inter-american-commission-on-human-rights-Hearing-on-Global-Warming.html>>.

<sup>62</sup> Compare this with, e.g., H. Corell, 'Reflections on the Possibilities and Limitations of a Binding Legal Regime', 37:4 *Environmental Policy and Law* (2007), 321, at 322-323.

The various processes by IUCN, WWF Arctic, UNEP Grid-Arendal and Arctic parliamentarians that have studied the possibility of an Arctic treaty have ended up with recommendations containing two features: an audit to assess the effectiveness and relevance of existing regimes as a basis for the second step, a discussion concerning the possibility of developing an Arctic treaty.<sup>63</sup> In their August 2006 meeting in Kiruna, the Conference of Arctic parliamentarians asked that their governments and the institutions of the European Union:

In light of the impact of climate change, and the increasing economic and human activity, initiate, as a matter of urgency, an audit of existing legal regimes that impact the Arctic and to continue the discussion about strengthening or adding to them where necessary.<sup>64</sup>

In a seminar co-hosted by UNEP Grid-Arendal and the Standing Committee of the Arctic Parliamentarians on Multilateral Agreements and Their Relevance to the Arctic in September 2006, the participants agreed on one overall recommendation:

The participants of the Arendal Seminar recommend that UNEP, the Arctic Parliamentarians, the Arctic Council, the Nordic Council of Ministers, and Contracting Parties, governing bodies and secretariats to the MEAs [multilateral environmental agreements] support and cooperate on an audit to assess the effectiveness and relevance of MEAs in the Arctic and to examine the need and options for improving the existing regime as well as the need and options for developing an Arctic Treaty or Arctic Framework Convention. The audit should take into account recommendations from the Kiruna Conference of the Parliamentarians of the Arctic Region and the Arendal Seminar.<sup>65</sup>

A similar conclusion was reached by the IUCN, which convened an expert meeting in Ottawa on 24-25 March 2004 to discuss whether the ATS could provide the needed input for the development of environmental protection in the Arctic. The expert meeting was divided over the way environmental protection could and should be developed in the Arctic and whether a treaty approach was what was needed. The main approach to Arctic governance advanced at the meeting

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<sup>63</sup> The only exception is the Nordic Council, which went further and adopted the following recommendation directed at the Nordic Council of Ministers: 'The Nordic Council recommends to the Nordic Council of Ministers that in cooperation with the Arctic Council the aim is to create a legal system pertaining to the Arctic.' See Pohjoiset merialueet käsittävästä oikeustieteellisestä tutkimuksesta ja Arktista koskevasta oikeusjärjestelmästä (In English: Legal Research pertaining to the Northern marine Regions and Arctic Legal Regime) (26 April 2006 decision) A/1392/medborgar.[IS THIS THE DOCUMENT NUMBER?]

<sup>64</sup> See the report of the Seventh Conference of the Parliamentarians of the Arctic Region, Kiruna, Sweden, 2-4 August 2006 (Recommendation No. 28, 4 August 2006), at 23, available at <[http://www.arcticparl.org/resource/images/Arktiska\\_rapport\\_070125.pdf](http://www.arcticparl.org/resource/images/Arktiska_rapport_070125.pdf)>.

<sup>65</sup> See Report on Recommendations from the Adrenal Seminar on Multilateral Environmental Agreements and their Relevance to the Arctic, Adrenal, Norway, 21-22 September 2006 (Adrenal, 22 September 2006), at 2, available at <[http://polar.grida.no/\\_documents/mea\\_recommendations.pdf](http://polar.grida.no/_documents/mea_recommendations.pdf)>.

was not to borrow from the Antarctic experience but to first study which environmental threats to the Arctic should be addressed at which level: i.e., universal (global treaties and processes), regional (the Arctic Council), bilateral, national and sub-national.<sup>66</sup>

Hence, there clearly seems to be pressure from various observers of the Arctic Council to at least examine the applicable treaties carefully, studying in particular how these treaties are implemented in the region and whether, on the basis of that analysis, an integrated Arctic treaty approach is called for. What these actions by observers of the Arctic Council serve to demonstrate is that pressures are building to adopt a treaty approach.

In the mid-term perspective, it seems evident that the consequences of climate change in particular will press the Council to turn to the issue of a treaty since, with its present status as a soft-law forum,<sup>67</sup> commissioning assessments and even providing soft guidance in some cases, it can do little to induce sustainability in the region. The ACIA and other assessments of the Council's working groups will bring increasing pressure to formalise the co-operation, which may lead to real discussions about whether a treaty approach should be chosen for the Arctic. This internal process within the Arctic Council organs will likely prompt the negotiation process more than pressure from the observers (such as IUCN, WWF or the Arctic parliamentarians) of the Council. If the observers can push the audit to be commissioned by the Council, this will clearly speed up the internal process within the Arctic Council.

If this internal process in the Council leads to a treaty approach, it is possible to foresee a process of formalisation building on the present structure of the Council. One possible way forward is to choose a framework treaty which formalises the current membership and decision-making procedure of the Council, adds certain guiding principles related to environmental protection and sustainable development to the treaty, and gives a mandate to the Council to adopt protocols to counter threats to environmental protection and challenges to sustainable development on the basis of scientific assessment. The reason for adopting a framework treaty is that it would provide the shortest possible time-frame for adopting a treaty approach, since it would not require substantial

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<sup>66</sup> See W.E. Burhenne, 'The Arctic: Towards a New Environmental Regime?', 37:2/3 *Environmental Policy and Law* (2007), 249-256, at 255.

<sup>67</sup> The possible benefits of establishing a treaty include encouraging greater political and bureaucratic commitments, establishing firmer institutional and financial foundations, transcending the vagaries of changing governmental viewpoints and shifting personnel, giving 'legal teeth' to environmental principles and standards, and raising the public profile of regional challenges and cooperation needs. For an overview of the pros and cons of the treaty approach, see T. Koivurova and D. VanderZwaag, n. 15 above, at 178-180.

changes to the present structure and thus would shorten the time needed to achieve consensus in the negotiations. It would also leave doors open to enter into substantive regulation via protocols when the time is ripe; in this regard the already existing treaty and customary law norms applicable to the Arctic States provide a good starting-point. The protocols can thus serve in many cases as regional implementation treaties of more general conventions, and if treaties are not available or apply only to some Arctic States, independent protocols can be opted for. Good suggestions for the content of individual proposals have already come from WWF Arctic and the studies of Nowlan<sup>68</sup> and Rayfuse.<sup>69</sup>

The treaty should formalise much of what already exists and contain the standard non-mandatory dispute-resolution provision to the effect that States must peacefully resolve their disputes with mechanisms of their own choosing. Many of the other standard provisions found in treaties concerning termination, withdrawal, and so forth should not be articulated, as they are governed by the customary law of treaties; the raising of these issues would pose delicate and time-consuming problems in negotiations, which could take years to resolve. Issues such as liability and mandatory dispute-resolution would be best left fully out of the framework treaty, allowing the political will to resolve these issues to develop.

Of vast importance would be the re-structuring of the work of the six working-groups of the Council in order to ensure that scientific information/traditional knowledge flows in an integrated and effective way to the Council, creating pressure to adopt protocols to the framework treaty. Currently, almost all the working groups conduct their own assessments, although the AMAP programme is the key working group in this field. In order to ensure an integrated flow of scientific information/traditional knowledge to the Council, which has also been proposed by WWF Arctic,<sup>70</sup> AMAP should be given a clearer role as the scientific assessment body of the Council, while the other working groups could focus more on policy response strategies on the basis of this information/traditional knowledge. This sort of re-organisation of the tasks of the working groups was contemplated in 2006 by the then incoming chair Norway when it circulated a short paper on the reform of the Arctic Council, in particular on how the tasks of the existing working groups should be re-organised, proposing:

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<sup>68</sup> See L. Nowlan, n. 37 above.

<sup>69</sup> See R. Rayfuse, n. 40 above.

<sup>70</sup> See R. Hansson, n. 52 above.

1. a group to monitor and assess the Arctic environment and ecosystems (AMAP and part of CAFF);
2. an Environmental Action Group to implement practical action (PAME, ACAP, EPPR and part of CAFF);
3. an Economic group (part of SDWG); and
4. a Social and Cultural group (part of SDWG).<sup>71</sup>

An especially important point would be to institutionalise the updating of the ACIA within the AMAP programme, in a format similar to the Intergovernmental Panel on Climate Change's periodic assessments. In fact, the so-called focal point process to implement the Reykjavik ministerial decisions made on the basis of the ACIA has been initiated by the Council, but the current chair (Norway) has pointed out that the measures taken so far are not sufficient.<sup>72</sup> The ACIA should, however, be re-focused to better cover how the Arctic governance systems and human communities are impacted by climate change, and how their adaptive capacity could be enhanced, since the main focus has been on natural sciences.<sup>73</sup> The baseline for these social assessments was created with the Arctic Human Development Report (AHDR) undertaken during the Iceland's period as chair from 2002-2004.<sup>74</sup>

If this kind of framework treaty approach is adopted, the difficult questions of permanent funding and a secretariat must be confronted. The importance of having an independent staff dedicated to Arctic interests cannot be overstated, and the current chair (Norway) has already taken the first steps in this direction by establishing, together with the next chairs, Denmark and Sweden, a secretariat for the Council until the end of 2012.<sup>75</sup> The secretariat, if properly staffed and financed, could also assume the task of co-ordinating the implementation of existing treaties applicable in the Arctic.

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<sup>71</sup> Summarised in Arctic Athabaskan Council, 'Improving the Efficiency and Effectiveness of the Arctic Council: A Discussion Paper' (presented at the SAO meeting in Troms, Norway (April 12-13, 2007)). The paper can be downloaded from the Arctic Council's website (meetings > Senior Arctic Officials > 2007) at <<http://www.arctic-council.org/>>.

<sup>72</sup> 'Paper prepared by Norway on the topic of revising the Arctic Council Focal Point, Draft Text for a discussion paper on the future of the Focal Point for ACIA Follow-up at the upcoming Focal Point meeting', in *Report to SAOs from Focal Point for ACIA Follow-up Activities* (Arctic Council, 2006), Annex 8, which can be downloaded from the Arctic Council website (meetings > ministerial meetings > 2006), at <<http://www.arctic-council.org/>>.

<sup>73</sup> See generally, the *Arctic Climate Impact Assessment Final Scientific Report* (Cambridge University Press, 2005).

<sup>74</sup> See *Arctic Human Development Report*, n. 8 above.

<sup>75</sup> See 'Common objectives and priorities for the Norwegian, Danish and Swedish chairmanships of the Arctic Council (2006-2012)' (Arctic Council, 2006), available at <[http://www.arctic-council.org/News/Formannskapsprogram\\_ArcticCouncil.pdf](http://www.arctic-council.org/News/Formannskapsprogram_ArcticCouncil.pdf)>.

One of the greatest concerns in moving towards an Arctic treaty is the possibility that the status of the organisations of Arctic indigenous peoples might be called into question. As will be recalled, they are not NGOs in the work of the Arctic Council, but participate on an equal footing in the work of the Council, from ministerial meetings down to individual working groups. Even though the decisions will be made by the Arctic States, these decisions can only be made after full consultation with the six Arctic indigenous peoples' organisations, which possess the status of permanent participants.<sup>76</sup> In reality, this has meant that if all six permanent participants object to a certain project or decision, it will not proceed to the stage of decision-making.<sup>77</sup> It is questionable whether the status of the indigenous peoples' organisations can be retained if the above-outlined treaty is negotiated, since in almost all other inter-governmental organisations, regimes and negotiation processes, the status of indigenous peoples is only that of an NGO, with concomitant observer status.

It should be emphasised that the danger of downgrading the status of the indigenous people's organisations and lessening their general influence in decision-making is not due to constraints laid down by the customary law of treaties. According to that body of law, States are perfectly free to create a treaty that permits the participation of indigenous peoples as permanent participants since they are not accorded actual decision-making power, but must only be fully consulted before decision-making by the member States. Indeed, the biggest obstacle to establishing participatory rights for indigenous peoples in an Arctic treaty would arise from the factual setting. When an international treaty is concluded, different officials are involved than in the creation of a soft-law instrument. Foreign ministries and their legal offices would be involved, and their views might result in indigenous peoples' being given the status they normally have in international treaty negotiations or inter-governmental organisations: that of an NGO. Another possible obstacle would be the involvement of national parliaments, which normally have some kind of power over treaty-making, a fact that also poses a challenge to the position of indigenous peoples. If the Arctic indigenous peoples' organisations were downgraded to the status of observers, with the usual NGO status, this would have unfortunate consequences for the whole Arctic co-operation process, especially its environmental protection mandate. This is not only because of the importance of these

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<sup>76</sup> These organisations are: the Arctic Athabaskan Council, the Gwich'in Council International, the Aleut International Association, the Inuit Circumpolar Council, the Saami Council, and the Russian Association of Indigenous Peoples of the North.

<sup>77</sup> See generally, T. Koivurova and L. Heinämäki, 'The participation of indigenous peoples in international norm-making in the Arctic', 42:221 *Polar Record* (2006), 101.

organisations in the environmental and sustainable development work carried out in the Council, which has been substantial, as they have been able to convey their views on how environmental protection should be carried out in an area in which indigenous people have lived sustainably for ages. Indigenous organisations have also made a distinct contribution in providing their traditional knowledge to make the Arctic Council's scientific assessments even more compelling for the general public and decision-makers.<sup>78</sup>

If we think of future possibilities to create an Arctic treaty with a stronger environmental protection mandate, retaining the status of indigenous peoples in the formalised Arctic Council is essential. First, the status given to Arctic indigenous peoples legitimises the work of the Arctic Council as truly representing the people who live there, the original occupants of the region. Second, irrespective of whether all Arctic indigenous peoples still live in a sustainable way in a close relationship with their environment, this popular image is conveyed in international forums and in the public eye. This has a vast significance from the perspective of legitimising the environmental protection mandate of the Council, as it can and must present itself as safeguarding this special relationship with the still relatively undisturbed environment of the Arctic indigenous peoples. These reasons alone speak volumes for retaining the status of indigenous peoples if and when an Arctic treaty is negotiated.

The process of negotiating the framework convention should ideally be initiated by one or more of the members of the Arctic Council, or its six permanent participants. Many of the proposals for an Arctic treaty reviewed above do not build on what is already in existence: the Arctic Council, which is a direct outgrowth of the AEPS. The proposal advanced here differs fundamentally from most of the other proposals since it focuses on formalising the present structure of the Arctic Council with minor additions. Even the WWF's preliminary proposal, which rightly builds on the existing Arctic Council structure, differs greatly from the proposal advanced here. For the present author, it seems too ambitious to aim for negotiations to conclude far-reaching protocols on environmental protection as in the proposal laid out by WWF Arctic. A more realistic goal is to try to establish a framework convention, which could, in time, with increasing scientific knowledge of climate change consequences in the region, form the basis for adopting protocols on various environmental policy areas. WWF Arctic's proposal also does not sufficiently take into account the other policy

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<sup>78</sup> For an analysis see, e.g., L-O. Reiersen, S. Wilson, and V. Kimstack, 'Circumpolar Perspectives on Persistent Organic Pollutants: The Arctic Monitoring and Assessment Programme', in D.L. Downie and T. Fenge (eds) *Northern Lights Against POPs: Combating Toxic Threats in the Arctic* (McGill-Queen's University Press, 2003).



area of the Council, sustainable development, and its proposal focuses too heavily on Arctic waters, which may be unacceptable to Finland and Sweden, which do not have Arctic coastlines.

Even though pressure to formalise the Arctic co-operation now functioning under the Arctic Council is building up, it is clear that there are many obstacles to negotiating an Arctic framework convention, the adoption of which is more pressing day by day. If the Arctic Council continues without a legal mandate, there is a great danger of it becoming a façade under which unilateral and uncoordinated development-oriented policies of the States in the region can proceed; a scenario which already dominates much of the development in the Arctic. By exposing the vulnerability of the Arctic human and ecological systems to the consequences of climate change and economic globalisation, the various scientific assessments commissioned by the Council are likely, in time, to induce social learning within the Council which, it is to be hoped, will lead to serious discussions concerning the possibility of creating an Arctic framework treaty.

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