insights

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New Ways to Respond to Climate Change in the Arctic

By Timo Koivurova

Introduction

The impact of climate change in the Arctic has drawn considerable global attention. As numerous scientific studies have shown, climate in the region is an indicator for climate change worldwide. Moreover, climate change in the Arctic has been recognized for some time. Average temperature has risen twice as fast in the Arctic as in the rest of the world.[1] Of particular interest is the rapidly receding and thinning Arctic Ocean sea ice, which demonstrates how quickly climate change progresses—the year 2012 marked the lowest summer sea ice since satellite measurements began in 1979. The rise in temperature will have overwhelming repercussions for the region's ecosystems and render its economic potential more accessible. Sea ice retreat and other changes have brought about opportunities for economic development and, in turn, have prompted numerous studies on how the region's oil and other natural resources could be exploited, its tourism potential increased, and its navigational waterways utilized.

This *Insight* will first briefly review the work of the Arctic Council and examine how this inter-governmental forum has tried to respond to climate change challenges in the region by producing scientific assessments and soft law guidance. Scientific assessments have changed the way the region is perceived, from the frozen desert of the past to the rapidly transforming space of today. This altered perspective has put pressure on the Council to transform from a decision-shaping to decision-making body. This is evidenced by the Council's current push for legally binding agreements between the eight Arctic states: Canada, Denmark, Finland, Iceland, Norway, Sweden, the Russian Federation, and the United States.[2] Finally, a few conclusions are provided in terms of what role international law could and should play in responding to climate change in the Arctic.

Background

International governance in the Arctic contrasts sharply with that of Antarctica. In the Antarctic, the sovereignty question has been "frozen" by the 1959 Antarctic Treaty, meaning that no territorial sovereigns exist on the continent. In the Arctic, however, all land areas are

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firmly under the sovereignty of Arctic states. Most Arctic waters now fall within their maritime jurisdictions, although the core of the Arctic Ocean remains a part of the high seas.

From the viewpoint of governance, the Arctic is very complex. The three federal states—the Russian Federation, the United States and Canada—exercise certain powers at the federal level and some powers at sub-unit levels (e.g., in Alaska (U.S.) or Nunavut (Canada)). Even though the European Union (EU) is not a state under international law, it is functionally very close to being a federal state. Of the Arctic states, Finland, Sweden, and Denmark are EU member states. The Kingdom of Denmark comprises three parts, including the Arctic Faroe Islands and Greenland; the native Inuit population of Greenland recently gained a Self-Rule status (in contrast to its old Home-Rule status), with concomitant enhanced autonomy and a future possibility to secede from Denmark.

Thus, when the time was ripe to commence Arctic-wide cooperation between the Arctic states after the end of the Cold War, an action program rather than an international treaty was adopted. The result is the 1991 Arctic Environmental Protection Strategy ("AEPS").[3] The Arctic Council was established in 1996 in Ottawa, Canada by means of a declaration.[4] Participants in the Council are: member states, permanent participants, and observers. Uniquely in inter-governmental cooperation, regional indigenous peoples' organizations have the status of permanent participants. Member states must fully consult permanent participants before a consensus is agreed upon; this greatly enhances the indigenous peoples' potential to influence decision-making in various bodies within the Arctic Council.

Until recently, Arctic cooperation has functioned for over fifteen years in a fairly consistent mode of operation. Until 2011, the main work was conducted by the six working groups, focused on environmental protection and sustainable development. Senior Arctic officials from each Arctic state coordinated various activities within the Council between biannual ministerial meetings and annual deputy ministers' meetings. But, in response to alarming climate change, the Council has recently strengthened the way it functions. In May 2011, the ministerial meeting decided to establish a permanent secretariat and adopted the first ever legally binding instrument: the Search and Rescue ("SAR") agreement, described below.

Responding to Climate Change in the Arctic

During the period the U.S. held the chairmanship of the Council, from 1998 to 2000, the Arctic Council and the International Arctic Science Committee (IASC) commenced work on the Arctic Climate Impact Assessment ("ACIA"), and their findings were released in a publicly accessible format in 2004.[5] Even though a 2001 report by the Intergovernmental Panel on Climate Change ("IPCC") had already noted that warming is more intense in the Arctic, the Arctic Council-sponsored ACIA report established the Arctic as an early warning region for climate change observation. In addition to revealing serious impacts on the environment, its ecosystems and local communities, the ACIA led to important changes in the way the Arctic is perceived. While the AEPS still conveyed an image of an inaccessible, inhospitable, frozen desert, the ACIA findings demonstrated that the Arctic is a region undergoing dramatic transformation. The public view developed from an understanding of the Arctic as being naturally guarded from human activity to an image of the region as dynamic and rich with economic potential, and therefore requiring stricter governance measures.[6] The ACIA was followed by other key Council assessments on issues that included oil and gas activities and increased shipping in the region.

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The scientific role of the Council has been of importance in two respects. First, because many scientists who were part of the ACIA are also contributors to Intergovernmental Panel on Climate Change ("IPCC") reports, their research has played a big part in our understanding of causes and effects of climate change and ACIA data has been directly used by the fourth IPCC assessment (released in 2007). More importantly, the awareness-raising function of Council-sponsored assessments has influenced governance at different jurisdictional levels in the Arctic as governments commence climate change adaptation planning in the region.

Given the enormity of challenges posed by climate change in the Arctic, the Arctic Council has gradually started to promote legal responses, rather than its traditional soft-law regulation through guidelines, best practices, and manuals. These measures serve their purpose in some policy areas, especially since the region's indigenous peoples' organizations can participate in their drafting. Some of the soft-law guidance has likely made its way into practice, although this is often difficult to verify, given that the Council does not review how its soft-law guidance is being followed.[7] At least two cases indicate how soft-law regulation is limited, particularly where member states have viewed guidance as an intrusion upon their sovereignty. This was the case with the process under the Conservation of the Arctic Flora and Fauna Working Group to establish and monitor the Circumpolar Protected Area Network ("CPAN"),[8] and also in regard to the Environmental Impact Assessment ("EIA") Guidelines.[9] Both normative processes have gradually faded away. CPAN was largely replaced by the Convention on Biological Diversity's Programme of Work on Protected Areas, and the EIA Guidelines were gradually forgotten.

Given the limitations of soft law, the Arctic Council has started to sponsor legal solutions to counter challenges caused by climate change, particularly in the case of sea ice retreat. Partly as a result of another major Council assessment—the 2009 Arctic Marine Shipping Assessment (AMSA)[10]—the Council urged its members to act in concert to come up with more comprehensive, stringent, and mandatory rules on shipping in extreme polar conditions. The legal work to convert the non-binding 2009 Polar Code into mandatory measures is now in progress under the aegis of the International Maritime Organization ("IMO").

The Arctic Council has been able to catalyze the making of international treaties between the eight Arctic states in policy areas of great importance. These include agreements to enhance human and environmental security in a region where there is only a scarce infrastructure for responding to emergencies. The Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic[11] ("SAR") was signed during the May 2011 Council ministerial meeting. The agreement is meant to strengthen search and rescue coordination and cooperation efforts in the Arctic by allocating responsibilities to each Arctic state in its own jurisdiction and by establishing procedures for states to cooperate in cases of emergency. There is also an ongoing process to conclude an agreement on marine oil pollution preparedness and response for the Arctic, which is scheduled to be signed during the May 2013 ministerial meeting. This agreement will likely apply not only in the Arctic Ocean waters but also in the Baltic Sea (Gulf of Bothnia), and may also have a few legally non-binding appendices (e.g., a manual on emergency response).[12] Both treaties are firmly anchored in broader agreements already in existence, such as the 1979 International Convention on Maritime Search and Rescue,[13] the 1944 Convention on International Civil Aviation,[14] and the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation.[15]

The Role of International Law

International law can potentially play many roles in securing better regional responses to climate change. One of these roles has recently been used by the Arctic Council as it began responding to challenges relating to oil spillage and other emergencies in the Arctic via international treaties. The Council's move to use treaties capable of coordinating activities in a more reliable way is only natural, given that regulation involves proactive responses from Arctic states in their respective territories in preparation for risks posed by new economic activities enabled by the effects of climate change. Even if the SAR and the possible oil spills agreement have been negotiated under the auspices of the Council, they will function autonomously since the parties to such agreements will have separate meetings.[16] It also remains to be seen what roles the permanent secretariat and Council working groups will assume over time when these and other agreements are created and implemented.[17]

Frequently states use international treaties to lay foundations for regional cooperation. Legal instruments, such as international treaties or inter-governmental organizations, are often seen as necessary foundations for long-term, committed cooperation between states. An overarching international treaty has been suggested by various actors—most recently by the Arctic Parliamentarians in their September 2012 annual meeting—to govern the Arctic.[18] Arctic states have until now rejected this approach, instead firmly endorsing the Arctic Council as the predominant forum for international cooperation. An overarching Arctic treaty would most likely be able to offer a better platform for integrating the currently fragmented policy and legal activities within the Arctic.

Some argue against a formalization of the Council, given that the region's indigenous peoples' organizations can participate in its work as permanent participants—a status which they enjoy within no other inter-governmental cooperation procedure, being normally dubbed as non-governmental organizations. In a similar vein, the Barents international cooperation has been able to involve the European Commission, national governments, county levels of government, and regional indigenous peoples in its work.[19]

Although the Arctic Council is not a treaty-based organization, it seems to have gradually institutionalized itself to the extent that it can act as a foundation for permanent cooperation between various regional stakeholders. Moreover, the Council has been able to combine its scientific work with soft and hard law mechanisms, a mixture that functions creatively in responding to multi-faceted challenges posed by climate change to the region.

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Endnotes:

[1] *See* Arctic Climate Impact Assessment [ACIA] Synthesis Report, Impacts of a Warming Arctic, *available at* http://www.acia.uaf.edu/pages/overview.html.

[2] Only the states that have territorial sovereignty areas above the Arctic Circle are member states

of the Council.

[3] Declaration on the Protection of the Arctic Environment (June 14, 1991), *available at* http://arctic-council.org/filearchive/Rovaniemi%20Declaration.pdf.

[4] Declaration on the Establishment of the Arctic Council (Sept. 19, 1996), Joint Communiqué and Declaration on the Establishment of the Arctic Council, 35 I.L.M. 1382 (1996).

[5] ACIA Synthesis Report, *supra* note 1.

[6] Timo Koivurova, *Limits and Possibilities of the Arctic Council in a Rapidly Changing Scene of Arctic Governance*, 46 Polar Rec. 146-56 (2010).

[7] There are rare exceptions to this, e.g., the Arctic Marine Shipping Assessment and examination on how states have followed its policy recommendations.

[8] Timo Koivurova, *Governance of Protected Areas in the Arctic*, 5 Utrecht L. Rev. 44-60 (2009), *available at* http://www.utrechtlawreview.org/index.php/ulr/article/viewFile/URN%3ANBN%3ANL%3AUI%3A10-1-101113/94.

[9] Timo Koivurova, *Transboundary Environmental Assessment in the Arctic*, 26 Impact Assessment & Project Appraisal, 265-75, 270-71 (2008).

[10] Arctic Marine Shipping Assessment 2009 Report, *available at* http://www.pame.is/images/stories/AMSA_2009_Report/AMSA_2009_Report_2nd_print.pdf.

[11] Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, 50 I.L.M. 1119 (2011), *available at* http://library.arcticportal.org/1474/1/Arctic_SAR_Agreement_EN_FINAL_for_signature_21-Apr-2011.pdf [hereinafter SAR Agreement].

[12] The Arctic Council's Emergency Prevention, Preparedness and Response Working Group is preparing a separate but related document on Recommended Practices in the Prevention of Marine Oil Pollution to be adopted in the next ministerial meeting of the Council in May 2013.

[13] International Convention on International Maritime Search and Rescue, Apr. 27, 1979, 1405 U.N.T.S. 97, *available at* http://www.admiraltylawguide.com/conven/searchrescue1979.html.

[14] Convention on International Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295, *available at* http://www.icao.int/publications/pages/doc7300.aspx.

[15] International Convention on Oil Pollution Preparedness, Response and Co-operation, Nov. 30, 1990 (entered into force May 13, 1995), *available at* http://www.ecolex.org/server2.php/libcat/docs/TRE/Multilateral/En/TRE001109.txt.

[16] Notably, the SAR Agreement has spurred cooperation between the defense ministers of the Arctic states.

[17] Erik J. Molenaar, *Current and Prospective Roles of the Arctic Council System Within the Context of the Law of the Sea*, 27 Int'l J. of Marine and Coastal L. 553–95 (2012).

[18] *See* Parliamentarians of the Arctic Region, Conference Statement No. 1 (Sept. 5-7, 2012), *available at* http://www.arcticparl.org/files/conference-statement%2C-final-draft1.pdf.

[19] *See* Waliul Hasanat, Soft-law Cooperation in International Law; the Arctic Council's Efforts to Address Climate Change (2012).