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Author

Koivurova, Timo

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How to Improve Arctic International Governance

Timo Koivurova*

This Article examines three main approaches on how to improve Arctic international governance. This will be undertaken by studying what the approaches define as the problem in current international governance of the region. This Article argues that what is diagnosed as problematic by the approaches then allows those who follow one of the approaches to recommend certain pathways for improvement of Arctic governance. The Article suggests that it is important to understand these different ways to think of how Arctic governance should be improved, and what common misunderstandings seem to follow a chosen approach, in order for us to add nuance to our discussion on how to improve Arctic governance.

There has been an intensified discussion on how to improve Arctic international governance, especially from 2007 onward.¹ There are scholars who suggest that the current Arctic international governance is fundamentally flawed as there are almost no rules to govern the region.²

* Research Professor and the Director of the Northern Institute for Environmental and Minority Law, Arctic Centre, University of Lapland.

1. This Article is based on the author's presentation at the UC Irvine School of Law symposium on Arctic Governance, on January 30, 2015.

2. See European Parliament Resolution of 9 October 2008 on Arctic Governance, 2010 O.J. (C 9) 41, 43 ("Suggests that the Commission should be prepared to pursue the opening of international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty, as supplemented by the Madrid Protocol signed in 1991, but respecting the fundamental difference represented by the populated nature of the Arctic and the consequent rights and needs of the peoples and nations of the Arctic region; believes, however, that as a minimum starting-point such a treaty could at least cover the unpopulated and unclaimed area at the centre of the Arctic Ocean"); see also Timo Koivurova, *Gaps in International Regulatory Frameworks for the Arctic Ocean*, in ENVIRONMENTAL SECURITY IN THE ARCTIC OCEAN 139–55 (Paul A. Berkman & Alexander N. Vylegzhanin eds., 2013); *New Rules Needed for the Arctic*, WWF GLOBAL (Aug. 17, 2007), <http://wwf.panda.org/?111440/New-rules-needed-for-the-Arctic> [<https://perma.cc/WY7P-2TBP>] ("With the melting of arctic sea ice, which allows the opening of new shipping routes and makes possible the exploration of potentially vast reserves of minerals, oil and gas, WWF believes that the international Law of the Sea Convention (UNCLOS)—the UN body regulating these activities—is no longer adequate for the Arctic. 'We need a new approach, which includes thinking about a solid Arctic Treaty and a multilateral governance body,' Dr. Hamilton added. '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.'").

Some of them are of the opinion that there are rules and institutions in the Arctic, such as the Arctic Council and various multilateral international agreements, but that those are not enough to counter the vast challenges that the region faces, especially from the dramatic impacts of climate change.³ Many of these scholars argue that an overarching international treaty is needed.⁴ And then there are scholars who argue that there are already enough rules and institutions for the region; it is important to have these various institutions work in a concerted manner.⁵

The aim of this Article is to examine these main approaches to improving Arctic international governance. This will be done by first studying what the approach suggests to be the problem in current international governance of the region. Each approach is shaped by the problem it identifies and seeks to tackle that problem specifically. When analyzing each approach, it is important to point to some misunderstandings within each approach in order for us to engage in more meaningful discussions on how to improve Arctic international governance.

The Article will commence by trying to identify why there has been intensifying discourse on improving Arctic international governance since 2007. This is a pertinent question since the Arctic Climate Impact Assessment, which was done under the auspices of the Arctic Council, outlined as early as 2004 that the region faces several dramatic challenges

3. See, e.g., Timo Koivurova, *Alternatives for an Arctic Treaty – Evaluation and a New Proposal*, 17 RECIEL, 14, 20, (2008) (“However, WWF seems to have recently taken a stronger stance on the treaty issue since it now argues that the UNCLOS-based solution is no longer adequate because of climate change and claims by Arctic littoral States to extended continental shelf.”); *New Rules Needed for the Arctic*, *supra*, note 2.

4. See, e.g., LINDA NOWLAN, ARCTIC LEGAL REGIME FOR ENVIRONMENTAL PROTECTION 58 (2001); see also Koivurova, *supra* note 2, at 152 (“The current author—together with Professor Erik Molenaar—concluded that the more viable approach is to direct our efforts to a unifying, legally binding instrument for the region that establishes a regional governance body acting as a voice for the region.”).

5. See, e.g., Hans Corell, *Reflections on the Possibilities and Limitations of a Binding Legal Regime*, 37 ENV. POL. & L. 321, 321 (2007) (“There is already a binding legal regime that applies in the Arctic. Rather than focusing on new regimes, we should concentrate our resources on working with what we have – examine it to determine whether the present legal regime is sufficient and, if not, work towards strengthening it.”); Olav Stokke, *A Legal Regime for the Arctic? Interplay With the Law of the Sea Convention*, 31 MARINE POL’Y 402, 407–08 (2007) (“A legally binding Arctic environmental regime would not serve to enhance any of those functions significantly. Indeed, given the political impediments to reaching circumpolar agreement on a single comprehensive legal regime . . . the best answer would seem to be a flexible approach to norm-building that seeks productive interplay with existing institutions.”); Oran R. Young, *Arctic Governance – Pathways to the Future*, 1 ARCTIC REV. ON L. & POL. 164, 177–78 (2010) [hereinafter Young, *Arctic Governance*]; Oran R. Young, *If an Arctic Ocean Treaty is not the Solution, What is the Alternative?*, 47 POLAR REC. 327, 329 (2011) [hereinafter Young, *Alternative*] (“In my judgment, an effort to move forward on this track under the conditions prevailing at this time would become a dead end and might well divert energy from other more promising initiatives.”); see also Arctic Ocean Conference, *The Ilulissat Declaration*, (May 28, 2008), http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf [https://perma.cc/FM3E-4L6C] (“By virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean the five coastal states are in a unique position to address these possibilities and challenges. In this regard, we recall that an extensive international legal framework applies to the Arctic Ocean as discussed between our representatives at the meeting in Oslo on 15 and 16 October 2007 at the level of senior officials.”).

from climate change.⁶ Before that, in 1997, the Arctic Council's working group, the Arctic Monitoring and Assessment Programme, had put together a synthesis report on various environmental problems haunting the region.⁷ Why, then, did this discourse start only in 2007 and not earlier? By understanding why and for what reasons this discussion started in 2007, it will be easier to comprehend why certain approaches in the Arctic governance discussion emerged.

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I. WHY AND WHEN THE ARCTIC GOVERNANCE DISCUSSION EMERGED

For many scholars ascribing to a realist view of international relations, it must have seemed only a matter of time before the natural resources of the Arctic would be exploited. Indeed, given that there are not that many humans living in the Arctic who would try to combat natural resource development, the Arctic is a tempting place for natural resource exploitation. It was only the inaccessibility of the region, according to this line of thinking, which prevented the vast natural resources from being exploited; as soon as technology was developed to harness these resources, companies and states would enter the region.

Then came the news that Russians wanted to claim vast areas of Arctic seabed. In August 2007, the Russians planted their flag underneath the North Pole on Lomonosov Ridge, provoking heavy protests from the other Arctic Ocean coastal states. As reported by *The Guardian* newspaper:

Russia symbolically staked its claim to billions of dollars worth of oil and gas reserves in the Arctic Ocean today when two mini submarines reached the seabed more than two and a half miles beneath the North Pole. In a record-breaking dive, the two craft planted a one metre-high titanium Russian flag on the underwater Lomonosov ridge, which Moscow claims is directly connected to its continental shelf. However, the dangerous mission prompted ridicule and scepticism among other contenders for the

6. SUSAN JAY HASSOL, ARCTIC CLIMATE IMPACT ASSESSMENT, IMPACTS OF WARMING ARCTIC (2004). *See generally* ACIA, ARCTIC CLIMATE IMPACT ASSESSMENT (Carolyn Symon et al. eds., 2005) [hereinafter ACIA ASSESSMENT].

7. A. NILSSON, ARCTIC MONITORING AND ASSESSMENT PROGRAMME (AMAP), ARCTIC POLLUTION ISSUES: A STATE OF THE ARCTIC ENVIRONMENT REPORT (1997), <http://www.amap.no/documents/doc/arctic-pollution-issues-a-state-of-the-arctic-environment-report/67> (download SOAER97_FRONT.PDF).

Arctic's energy wealth, with Canada comparing it to a 15th century colonial land grab.⁸

BBC News provided the following:

Russian explorers have planted their country's flag on the seabed 4,200m (14,000ft) below the North Pole to further Moscow's claims to the Arctic. The rust-proof titanium metal flag was brought by explorers travelling in two mini-submarines, in what is believed to be the first expedition of its kind. Both vessels have now rejoined the expedition's ships, completing their risky return journey to the surface. Canada, which also claims territory in the Arctic, has criticised the mission. "This isn't the 15th Century," Canadian Foreign Minister Peter MacKay told the CTV channel. "You can't go around the world and just plant flags and say 'We're claiming this territory'," he said. Melting polar ice has led to competing claims over access to Arctic resources. Russia's claim to a vast swathe of territory in the Arctic, thought to contain oil, gas and mineral reserves, has been challenged by several other powers, including the US.⁹

The August 2007 Russian flag planting took place at approximately the same time as the media news in September 2007 that Arctic sea ice coverage had shrunk dramatically.¹⁰ These two almost simultaneous media events solidified for many what was going on in the region. The story line here is that with climate change opening these previously inaccessible regions to the development of plentiful and safe natural resources, the states are engaging in typical power politics to determine who will get to the resources first.

These events also triggered policy actions. In March 2008, the EU High Representative and the Commission issued a joint paper on Climate Change and International Security, where the Arctic was identified as a geo-economical new frontier.¹¹ This was followed by a counteraction from the five Arctic Ocean coastal states—Denmark (Greenland), Norway, the United States, Canada, and the Russian Federation—in May 2008, who issued the so-called Ilulissat Declaration.¹² Coastal states perceived that the Arctic Ocean is at a threshold of significant changes caused by climate change and melting sea ice, and thus: "[b]y virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean the five coastal states are in a unique position to address these possibilities and challenges."¹³ They also presented themselves as protecting the environment and indigenous and other local inhabitants in the Arctic Ocean, in the following way:

8. Tom Parfitt, *Russia Plants Flag on North Pole Seabed*, THE GUARDIAN (Aug. 2, 2007), <http://www.guardian.co.uk/world/2007/aug/02/russia.arctic> [https://perma.cc/LFV2-3EMM].

9. *Russia Plants Flag Under N Pole*, BBC NEWS (Aug. 2, 2007), <http://news.bbc.co.uk/2/hi/europe/6927395.stm> [https://perma.cc/MXN4-KD98].

10. *See Ice Withdrawal 'Shatters Record'*, BBC NEWS (Sept. 21, 2007), <http://news.bbc.co.uk/2/hi/science/nature/7006640.stm> [https://perma.cc/4AQR-GB6B].

11. *High Representative and the European Commission Paper on Climate Change and International Security*, at 8, S113/08 (Mar. 14, 2008).

12. *The Ilulissat Declaration*, *supra* note 5, at 1.

13. *Id.*

Climate change and the melting of ice have a potential impact on vulnerable ecosystems, the livelihoods of local inhabitants and indigenous communities. . . . The Arctic Ocean is a unique ecosystem, which the five coastal states have a stewardship role in protecting. Experience has shown how shipping disasters and subsequent pollution of the marine environment may cause irreversible disturbance of the ecological balance and major harm to the livelihoods of local inhabitants and indigenous communities.¹⁴

The Arctic Ocean coastal states contended that there is “no need to develop a new comprehensive international legal regime to govern the Arctic Ocean”¹⁵ because:

Notably, the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims. This framework provides a solid foundation for responsible management by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions.¹⁶

The European Union Parliament did not accept this view and suggested in its October 2008 Resolution:

[T]hat the Commission should be prepared to pursue the opening of international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty, as supplemented by the Madrid Protocol signed in 1991, but respecting the fundamental difference represented by the populated nature of the Arctic and the consequent rights and needs of the peoples and nations of the Arctic region; [The European Parliament] believes, however, that as a minimum starting-point such a treaty could at least cover the unpopulated and unclaimed area at the centre of the Arctic Ocean.¹⁷

It seems obvious that this perceived change in the Arctic, which culminated in the Russian flag planting and the dramatic news of the sea ice shrinkage in the Arctic Ocean, pushed all these policy actions. These events also convinced many that the Arctic was changing.

14. *Id.* at 1–2.

15. *Id.*

16. *Id.*

17. European Parliament Resolution of 9 October 2008 on Arctic Governance, *supra* note 2, at 43.

II. THE MAIN APPROACHES TO IMPROVE ARCTIC GOVERNANCE

This part of the Article analyzes the various interpretations of what is happening in the region. It argues that how a certain approach defines what is problematic in the region also defines what is suggested as a way of improving Arctic international governance. Additionally, it is important to clarify what type of misunderstanding relates to each approach, given that it is only by trying to correct these misunderstandings that we can actually nuance our discussion on how to improve this governance.

A. *Wild West*

This early approach argues that the problem of Arctic international governance is that there is practically no law in the Arctic, nor any coordinated policy approach between the states. This was forcefully argued in 2008 in *Foreign Affairs*, by Scott G. Borgerson, International Affairs Fellow at the Council on Foreign Relations and a former Lieutenant Commander in the U.S. Coast Guard.¹⁸ He argued that climate change is opening up the Arctic to a resource game, where rules and institutions are scarce:

[T]he Arctic countries are likely to unilaterally grab as much territory as possible and exert sovereign control over opening sea-lanes wherever they can. In this legal no man's land, Arctic states are pursuing their narrowly defined national interests by laying down sonar nets and arming icebreakers to guard their claims. Russia has led the charge with its flag-planting antics this past summer.¹⁹

Borgerson presented his ideal solution to this difficult problem:

The ideal way to manage the Arctic would be to develop an overarching treaty that guarantees an orderly and collective approach to extracting the region's wealth. As part of the ongoing International Polar Year (a large scientific program focused on the Arctic and the Antarctic that is set to run until March 2009), the United States should convene a conference to draft a new accord based on the framework of the Arctic Council. The agreement should incorporate relevant provisions of UNCLOS and take into account all of the key emerging Arctic issues. With a strong push from Washington, the Arctic states could settle their differences around a negotiating table, agree on how to carve up the region's vast resource pie, and possibly even submit a joint proposal to the UN for its blessing.²⁰

The learned lesson from this approach is that interdisciplinarity is crucial. Before 2007, there were not many international legal scholars involved in Arctic issues, and these sorts of misunderstandings could become dominant in even expert circles. It was clear to international legal scholars that there was no such scramble

18. Scott G. Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, FOREIGN AFF., (2008).

19. *Id.* at 73–74.

20. *Id.* at 75.

for resources going on in the Arctic; rather, there was an orderly process on the basis of the UN Law of the Sea Convention (UNCLOS)²¹ of drawing the outermost limits of continental shelves everywhere on the planet, including in the Arctic.²² Even if we do not have to deal with this anymore in expert circles—Scott Borgerson has also changed his mind on this²³—we need to still keep in mind that some segments of the media still believe that there was a scramble for Arctic resources.²⁴

B. *Responsible, Realistic Evolutionary Approach*

According to this approach, even if there is a lot of law (both soft and hard) applicable in the Arctic, there are still gaps in the regulatory landscape.²⁵ This is, in effect, the most popular diagnosis of what is problematic about Arctic governance by Arctic states,²⁶ especially via their work in the Arctic Council, but also via the Arctic Ocean coastal state meetings²⁷ (regarding the fisheries, an area where the

21. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

22. See, e.g., Timo Koivurova, *Do the Continental Shelf Developments Challenge the Polar Regimes?*, 1 Y.B. POLAR L. 477, 477–98 (2009).

23. In the July/August 2013 issue of *Foreign Affairs*, Borgerson wrote:

Just a half decade ago, the scramble for the Arctic looked as if it would play out quite differently. In 2007, Russia planted its flag on the North Pole's sea floor, and in the years that followed, other states also jockeyed for position, ramping up their naval patrols and staking out ambitious sovereignty claims. Many observers—including me—predicted that without some sort of comprehensive set of regulations, the race for resources would inevitably end in conflict. “The Arctic powers are fast approaching diplomatic gridlock,” I wrote in these pages in 2008, “and that could eventually lead to . . . armed brinkmanship.” But a funny thing happened on the way to Arctic anarchy. Rather than harden positions, the possibility of increased tensions has spurred the countries concerned to work out their differences peacefully. A shared interest in profit has trumped the instinct to compete over territory. Proving the pessimists wrong, the Arctic countries have given up on saber rattling and engaged in various impressive feats of cooperation None of this cooperation required a single new overarching legal framework. Instead, states have created a patchwork of bilateral and multilateral agreements, emanating from the Arctic Council and anchored firmly in UNCLOS. By reaching an enduring modus vivendi, the Arctic powers have set the stage for a long-lasting regional boom.

Scott G. Borgerson, *The Coming Arctic Boom: As the Ice Melts, the Region Heats Up*, FOREIGN AFF. July/Aug. 2013, at 76, 79–80.

24. See, e.g., David Francis, *The Race for Arctic Oil: Russia vs. U.S.*, THE WEEK (Feb. 27, 2014), <http://theweek.com/articles/450318/race-arctic-oil-russia-vs> [https://perma.cc/FD2E-B24P]; Tristin Hopper, *A New Cold War: Denmark Gets Aggressive, Stakes Huge Claim in Race for the Arctic*, NAT'L POST (Dec. 15, 2014), <http://news.nationalpost.com/2014/12/15/a-new-cold-war-denmark-gets-aggressive-stakes-huge-claim-in-race-for-the-arctic/> [https://perma.cc/E2Y4-PQ8K]; Seth Robson, *Cold-weather Training Critical as Race for Arctic's Natural Resources Heats Up*, STARS AND STRIPES (Mar. 4, 2015), <http://www.stripes.com/news/cold-weather-training-critical-as-race-for-arctic-s-natural-resources-heats-up-1.332423> [https://web.archive.org/web/20150919050532/http://www.stripes.com/news/cold-weather-training-critical-as-race-for-arctic-s-natural-resources-heats-up-1.332423]; *Arctic Resources: The Fight for the Coldest Place on Earth Heats Up*, RT QUESTION MORE (Apr. 15, 2014), <http://rt.com/news/arctic-reclamation-resources-race-524/> [https://web.archive.org/web/20150510071427/http://rt.com/news/arctic-reclamation-resources-race-524/].

25. See Koivurova, *supra* note 2, at 139.

26. Timo Koivurova, *Can We Conclude an Arctic Treaty? – Historical Windows of Opportunity*, 7 Y.B. POLAR L. 410, 410–425 (2015).

27. See generally Seamus Ryder, *The Nuuk Meeting on Central Arctic Ocean Fisheries*, JCLOS BLOG

Arctic Council has no mandate²⁸). Since it is the gaps in regulations that have been diagnosed as problematic, the cure for this is to identify those areas where law is still needed via those institutions that possess mandates to do this.

This approach builds not only on there already being a kind of overarching legal regime for the Arctic in UNCLOS, which codifies customary law of the sea,²⁹ but also on the accepted fact that there are quite a lot of international treaties regulating, for example, maritime issues and environmental problems that are applicable in the Arctic.³⁰ The emphasis on UNCLOS in this approach is heavy, as the regime is seen as solving most of the puzzles in Arctic Ocean governance. This is one of the issues that remains problematic in this approach, given that UNCLOS (and the customary law of the sea that applies to the United States³¹) does not provide operational regulation, but mainly framework-type general regulation that leaves a lot of room for states to interpret and implement it the way they want.

Paradoxically, even if the Arctic Ocean coastal states perceived the law of the sea and UNCLOS as solutions to Arctic Ocean governance on their own, as interpreted by coastal states, UNCLOS itself prescribes standards that clearly favor regional implementation of its provisions in semi-enclosed types of sea areas (like the Arctic Ocean) rather than by coastal states alone. This is evident in two parts of the UNCLOS: in Article 123, which delineates obligations for littoral states of the semi-enclosed sea,³² and in Article 197, which encourages regional implementation of marine environmental protection standards.³³ According to Article 122:

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 or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.³⁴

There has been some debate over whether this general definition also covers the Arctic Ocean, and not just more conventional bodies of water such as the Baltic or Mediterranean Seas.³⁵ It can be questioned whether the Arctic Ocean is

(Oct. 15, 2014), <http://site.uit.no/jclos/2014/10/15/the-nuuk-meeting-on-central-arctic-ocean-fisheries/> [https://web.archive.org/web/20150810093443/http://site.uit.no/jclos/2014/10/15/the-nuuk-meeting-on-central-arctic-ocean-fisheries/].

28. Arctic Council, *Meeting of Senior Arctic Officials, Narvik, Norway: Final Report*, ¶ 11.4 (Nov. 28–29, 2007); see Ryder, *supra* note 27.

29. See, e.g., *The Ilulissat Declaration*, *supra* note 5. The reason why the Ilulissat Declaration speaks of the law of the sea is that the United States is not a party to the UNCLOS but does accept most of its provisions as codifying customary international law.

30. See TIMO KOIVUROVA & ERIK J. MOLENAAR, WORLD WILDLIFE FUND, INTERNATIONAL GOVERNANCE AND REGULATION OF THE MARINE ARCTIC 17, 35 (2010).

31. See, e.g., Tavis Potts & Clive Schofield, *Current Legal Developments: The Arctic*, 23 INT’L J. MARINE & COASTAL L. 151, 158–59 (2008).

32. UNCLOS, *supra* note 21, at art. 123.

33. *Id.* at art. 197.

34. *Id.* at art. 122.

35. See, e.g., Kristin Bartenstein, *The Arctic Region Council Revisited – Inspiring Future Development of the Arctic Council*, in INTERNATIONAL LAW AND POLITICS OF THE ARCTIC OCEAN 55, 57–59 (Suzanne

“connected to another sea or the ocean by a narrow outlet,” since it meets the Atlantic with a fairly wide open area of water.³⁶ Also, it is questionable whether it consists “entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States,” given that there is a vast high seas area of 2.8 million square kilometers in the middle of the Arctic Ocean.³⁷

If the Arctic Ocean can be defined as an enclosed or semi-enclosed sea, Article 123 defines what is expected of the littoral states involved:

States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:

- (a) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea;
- (b) to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- (c) to co-ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
- (d) to invite, as appropriate, other interested States or international organizations to co-operate with them in furtherance of the provisions of this article.³⁸

Even if it is argued that this convention article would require littoral states to commence cooperation on the various aspects outlined in Article 123, it is difficult to see this as a legal obligation, given that states are only encouraged (“should”) to cooperate with each other.³⁹ Overall, it would seem fairly clear that the Arctic Ocean is not an easy fit for being considered a semi-enclosed sea. Nor would it seem that there would be a legal requirement for the coastal states of the Arctic Ocean to cooperate with each other in those areas stipulated in the article. Of course, nothing prevents states from invoking Article 123 if they wish to commence with regional cooperation. This possibility for the Arctic Ocean coastal states seems to be one argument for littoral states of the semi-enclosed sea types of oceans to take joint regional action.

Another UNCLOS article encouraging states to implement its provisions regionally is Article 197:

States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention,

Lalonde & Ted L. McDorman eds., 2015); Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit*, 38 OCEAN DEV. & INT'L L. 3, 53 (2007); see also Rosemary Rayfuse, *Melting Moments: The Future of Polar Oceans Governance in a Warming World*, 16 RECIEL 196, 210 (2007).

36. UNCLOS, *supra* note 21, at art. 122.

37. *Id.*

38. UNCLOS, *supra* note 21, at art. 123.

39. *Id.*

for the protection and preservation of the marine environment, taking into account characteristic regional features.⁴⁰

It is of interest that—at least so far—UNCLOS and the law of the sea in general have been perceived as governance solutions, but in such a way that each coastal state interprets what they require in the Arctic waters.

Overall, it is clear that the Arctic states cannot be accused of being irresponsible in diagnosing what is problematic in Arctic governance, given that there are a lot of international laws applicable in the Arctic already. Would it not be rational to look for those areas of regulation that have not yet been developed and close the gaps in order to consolidate the governance approach to future challenges the Arctic will face, in particular due to climate change? The Arctic states have also been realistic about where action could be initiated, since, for example, shipping issues are normally addressed in global forums, whereas oil spill prevention can be done regionally.

This is what the Arctic states have done. Under the auspices of the Arctic Council, they have negotiated two legally binding agreements on search and rescue and oil spill preparedness and response—both of these treaties being crucial in enabling better response to emergency situations that are difficult to counter in a region where infrastructure, as well as human presence, is lacking.⁴¹ The Arctic states have also been pushing to make the 2009 non-binding Polar Code for shipping a mandatory International Maritime Organization (IMO) instrument—the action recommended in the Arctic Marine Shipping Assessment (AMSA).⁴² Since navigation can mostly be regulated globally—and via IMO—this is what the Arctic states recommended in AMSA. Finally, they have also commenced early response measures to tackle high seas fisheries—even if such fisheries do not yet exist—and this is done on the basis of the straddling stocks convention,⁴³ to which all the Arctic states are parties.⁴⁴

40. *Id.* at art. 197.

41. Arctic Search and Rescue Agreement (formerly the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic) art. 2, May 12, 2011, T.I.A.S. No. 13-119; Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, May 15, 2013, www.arctic-council.org/eppr/agreement-on-cooperation-on-marine-oil-pollution-preparedness-and-response-in-the-arctic/ [<https://perma.cc/QYR9-XMVT>].

42. ARCTIC COUNCIL, ARCTIC MARINE SHIPPING ASSESSMENT 2009 REPORT 6 (2009); *see* INT'L MARITIME ORG. [IMO], INTERNATIONAL CODE FOR SHIPS OPERATING IN POLAR WATERS (POLAR CODE) (2015).

43. *See* U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December, 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, U.N. Doc. A/ CONF.167/37.

44. The current state of policy negotiations is summarized in the CHAIRMAN'S STATEMENT, MEETING ON ARCTIC FISHERIES (Feb. 24–27 2014), <http://www.pewtrusts.org/~media/Assets/2014/09/ArcticNationsAgreetoWorkonInternationalFisheries-Accord.pdf?la=en> [<https://perma.cc/LBN4-2HEA>]. Useful analysis is provided in Press Statement, U.S. Dep't. of State, Bureau of Oceans and International Environmental and Scientific Affairs, Chairman's Statement at Meeting on Future Arctic Fisheries (May 1, 2013), <http://www.state.gov/e/oes/rls/pr/2013/209176.htm> [<https://perma.cc/H4CJ-NY8U>]; Ed Struzik, *Melting Sea Ice Could Lead To*

This approach has also contemplated how to advance coordination in Arctic governance, since clearly one problem is that there are various isolated hard and soft law mechanisms, which operate independently—with only those goals in mind that are defined in this or that sectorial arrangement. The only Arctic-specific institution is the Arctic Council, but this is still a soft law inter-governmental forum, with limited mandate (environmental protection, assessment, and sustainable development) and no permanent funding scheme.⁴⁵

Yet, these problems have also been addressed in this approach. It is possible to argue that the Arctic Council influences—at least to a limited extent—how various layers of governance in the Arctic relate to environmental problems, given that it produces assessments on environmental threats to the region.⁴⁶ It is also possible to argue that the consolidation of political expertise in the Arctic Council has paved the way for the Council to provide guidance on overall Arctic policy and law and thus bring consistency between various governance arrangements.⁴⁷ Currently, foreign ministers from all the Arctic countries meet in ministerial meetings every second year and provide guidance to the work of the Arctic Council. Yet, since these ministers have broader mandates, it is not impossible to envisage that they can provide broader guidance in Arctic policy and law. Finally, it may also be possible that the Arctic Council becomes a magnet for other normative developments in the region over time, especially if the Council is increasingly seen as a way to provide a systematic approach to Arctic governance—in effect, an Arctic Council System.⁴⁸

C. Systematic, Planned Approach

According to this approach, the problem is not that we would not have enough rules, but that we lack a strong Arctic institution.⁴⁹ The Arctic Council is, as was argued above, only a soft law organization with a limited mandate. This is a problem if one thinks that we need to prepare for a rapidly and dramatically transforming region, requiring strong policy and legal measures, and/or that we need to overcome sectorial governance prevailing in the region and build our governance on

Pressure on Arctic Fishery, YALE ENV'T 360 (May 10, 2012), http://e360.yale.edu/feature/melting_sea_ice_could_lead_to_pressure_on_arctic_fishery/2526/ [<https://perma.cc/334S-FMB9>]; and in Ryder, *supra* note 27.

45. See, e.g., Timo Koivurova & David VanderZwaag, *The Arctic Council at 10 Years: Retrospect and Prospects*, 40 U.B.C. L. REV. 121, 136–37 (2007).

46. See, e.g., HASSOL, *supra* note 6; ACIA ASSESSMENT, *supra* note 6; ARCTIC MONITORING AND ASSESSMENT PROGRAMME (AMAP), AMAP ASSESSMENT 2013: ARCTIC OCEAN ACIDIFICATION (2013); ARCTIC MONITORING AND ASSESSMENT PROGRAMME (AMAP), AMAP ASSESSMENT 2011: MERCURY IN THE ARCTIC (2011).

47. See Young, *Arctic Governance*, *supra* note 5.

48. See Erik J. Molenaar, *Current and Prospective Roles of the Arctic Council System Within the Context of the Law of the Sea*, in THE ARCTIC COUNCIL: ITS PLACE IN THE FUTURE OF ARCTIC GOVERNANCE (Thomas S. Axworthy, Waliul Hasanat & Timo Koivurova eds., 2012). Oran Young also ponders over a governance complex that contains some coordination elements in Young, *Alternative*, *supra* note 5.

49. See TIMO KOIVUROVA & ERIK J. MOLENAAR, *Overview and Gap Analysis*, in INTERNATIONAL GOVERNANCE AND REGULATION OF THE MARINE ARCTIC 43–44 (2009).

ecosystem-based holistic governance.

Accordingly, for this approach, we currently need a structure to be established for the future transformation of the region. This institution would be empowered to make, on the basis of science, legally binding decisions, and coordinate between other Arctic-specific governance rules and regimes. Evidently, such a strong institution would need to be created via an international treaty, with strong decision-making powers (e.g., towards ecosystem-based holistic governance).

This approach advocates making the governance change via an international treaty; unfortunately, there have been many misunderstandings in the scholarly literature on what treaties are and what they can accomplish.⁵⁰ For some, international treaties are effective because they must be enforced or because they contain dispute settlement procedures.⁵¹ This is not an automatic part of international treaties, simply because international law is not national law. States are entitled to make such treaties as they themselves deem fit, as long as the treaties do not violate *jus cogens* norms. In fact, most international treaties contain only voluntary dispute settlement provisions and they are in rare cases enforced; mostly, they have an influence because states voluntarily implement the treaties they have themselves negotiated.

Another common mistake is to think that suggesting an Arctic treaty means the same as suggesting that the Antarctic Treaty System (ATS) should evolve to govern the Arctic.⁵² One major motivation for such a proposition is likely to be that the ATS has functioned so well in maintaining the Antarctic as a demilitarized region and as a region designated for peace, science, and environmental protection. This is not to say that the ATS would not face governance challenges of its own, but to note that the ATS is generally seen as one of the success stories in regional international governance.⁵³ The fact that legally binding international treaties have been used to achieve the goals of the area has prompted some scholars—and even

50. The present author and Erik Molenaar have tried to correct most of these mistakes in our second report to the WWF International Arctic Programme. *See id.* at 55-87.

51. 27 LILLY WEIDEMANN, INTERNATIONAL GOVERNANCE OF THE ARCTIC MARINE ENVIRONMENT: WITH PARTICULAR EMPHASIS ON HIGH SEAS FISHERIES 231 (2014).

52. See, for example, European Union Parliament Resolution of 9 October 2008 on Arctic Governance, *supra* note 2, at 43 where this mistake was made in paragraph 15. The European Union Parliament suggests in paragraph 15:

“[T]hat the Commission should be prepared to pursue the opening of international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty, as supplemented by the Madrid Protocol signed in 1991, but respecting the fundamental difference represented by the populated nature of the Arctic and the consequent rights and needs of the peoples and nations of the Arctic region; believes, however, that as a minimum starting-point such a treaty could at least cover the unpopulated and unclaimed area at the centre of the Arctic Ocean.

See also Sébastien Duyck, *Drawing Lessons from Arctic Governance from the Antarctic Treaty System*, 3 Y.B. POLAR L. 683, 683 (Gudmundur Alfredsson, Timo Koivurova & Kamrul Hossain eds., 2011) (“This article aims to identify some of the lessons one can learn from the governance of another region facing similar challenges to the Arctic As the two Polar Regions differ in many respects, we do not claim that there can be a one-size-fits-all model for Polar governance.”).

53. *See* Young, *Alternative*, *supra* note 5 at 329.

the European Parliament in its first resolution on the Arctic—to suggest the ATS as a viable alternative system to be implemented in the Arctic, even if in modified terms.⁵⁴

In the minds of many, the Arctic and the Antarctic are conceived in the same mental box, and hence, so are the governance arrangements that apply to these areas. For some, this has good reason: in many states, polar areas are administratively handled under the same ministry or committee, since they focus mostly on scientific activities. However, even if there is a tendency to examine these regions together,⁵⁵ the two polar regions are poles apart from a politico-legal viewpoint. The starkly contrasting roles sovereignty plays in the regions should make it especially clear that the ATS model cannot really function in the Arctic other than by way of providing a source of inspiration. Of particular difference, there are no active acknowledged territorial sovereigns in the Antarctic, whereas in the Arctic, all of the land territory comprises sovereign areas of the eight Arctic states.⁵⁶ Moreover, much of the Arctic maritime space also comes under their sovereign rights, as part of either their exclusive economic zones (EEZ) or continental shelves (CS).

Many stakeholders in Arctic governance also mistakenly believe that to negotiate an overarching, legally binding instrument for the Arctic would fully halt the functioning of the Arctic Council.⁵⁷ This is a mistake simply because the Arctic states could set up a separate process to negotiate a legally binding instrument for the Arctic, or its Ocean, which in no way would halt the functioning of the Arctic Council. Occasionally, there have been suggestions⁵⁸ that all treaty making is haunted by the same dilemma as the UNCLOS negotiation, which took almost a decade to negotiate and from 1982 to 1994 to enter into force.⁵⁹ This is not true because UNCLOS was possibly the most ambitious treaty negotiation process for the state community, given that it resolved most of the contentious issues of ocean governance in one single treaty, with its 320 articles and nine annexes. UNCLOS

54. As suggested by the European Union Parliament in its 2008 resolution. See European Parliament Resolution of 9 October 2008 *supra* note 2, at 43; see also Donald R. Rothwell, *The Arctic in International Affairs: Time for a New Regime?*, 15 BROWN J. WORLD AFF. 241, 249–51 (2008).

55. As demonstrated by the Polar Law Symposiums, which formed the basis for the YEARBOOK OF POLAR LAW, and two additional Polar law textbooks. See POLAR L. TEXTBOOK II (Natalia Loukacheva ed., Nordic Council of Ministers 2013), <http://norden.diva-portal.org/smash/get/diva2:701016/FULLTEXT01.pdf> [https://web.archive.org/save/_embed/http://norden.diva-portal.org/smash/get/diva2:701016/FULLTEXT01.pdf].

56. The tiny Hans Island, between Greenland and Canada's Ellsmere Island, is one exception. Both Canada and Denmark assert sovereignty; accordingly, the two countries have excluded it from their maritime boundary delimitation agreement. For an analysis, see MATTHEW CARNAGHAN & ALLISON GOODY, CAN. LIBR. OF PARLIAMENT, POL. & SOC. AFF. DIVISION, CANADIAN ARCTIC SOVEREIGNTY 3 (2006) (discussing challenges to Canadian sovereignty, including Hans Island).

57. See Young, *Alternative*, *supra* note 5, at 329.

58. Young, *Arctic Governance*, *supra* note 5, at 181–82.

59. The Convention was adopted by the Third United Nations Conference on the Law of the Sea and opened for signature, together with the Final Act of the Conference, at Montego Bay, Jamaica, on December 10, 1982. See UNCLOS, *supra* note 21.

has been rightfully called the Constitution for the Oceans.

One line of argument has been that via an international treaty, the strong status that indigenous peoples enjoy in the Arctic Council as its permanent participants would be lost since only states can be parties to international treaties.⁶⁰ This is also incorrect, given that there is nothing in the customary law of treaties, as codified in the Vienna Convention on the Law of Treaties,⁶¹ that would prevent states from giving indigenous peoples that status in an international treaty; after all, indigenous peoples do not have any decision-making power in the Council, other than being consulted by states before decision making.⁶²

If one wants to really create the stronger structures that are believed to be needed to counter the vast challenges the region faces, or advance ecosystem-based governance, one would need to resort to international law and law in general. International law offers various ways to facilitate cross-sectorial coordination, such as the framework-protocol approach, or the agreement-annexes approach. A legal approach would also shield the Arctic issues from changing government agendas and respond to the growing challenge from the broadening group of citizens and NGOs concerned about the state of the Arctic environment (e.g., from oil pollution).

It is also evident that the treaty approach for the Arctic faces difficulties. Currently, only Finland among all the Arctic states is advocating an Arctic treaty of sorts (for Finland,⁶³ that has meant formalizing the Arctic Council structures only). On the other hand, the United States, the soon-to-be chair of the Arctic Council, has identified ambitious governance initiatives for its chair period. The coordinator of the United States' chairmanship, Admiral Papp, presented preliminary elements for the U.S. chairmanship period (which are now confirmed) on November 24, 2014, emphasizing in particular:

Regional Seas Program (RSP) for the Arctic Ocean

- Consider whether a Regional Seas Program might be a useful vehicle to improve Arctic Ocean management.
- An RSP could serve as a mechanism to coordinate and enhance scientific research and potentially to manage increasing human activity in the Arctic

60. See Timo Koivurova, *Alternatives for an Arctic Treaty — Evaluation and a New Proposal*, 17 RECIEL (SPECIAL INT'L. POLAR YEAR ISSUE) 14, 24–25 (2008).

61. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

62. See Koivurova, *supra* note 60 at 16.

63. Finland has been actively involved in the efforts to bolster the Arctic Council. Institutionally, the Council's position has been strengthened by appointing a permanent secretariat; drafting binding international agreements between the Council Member States; producing research papers of major importance; and extending the Council's agenda from environmental aspects to issues related to policies, the economy, and international law. Finland supports the plan to establish the Council as an international treaty-based organization. See PRIME MINISTER'S OFFICE PUBLICATIONS, 16/2013, FINLAND'S STRATEGY FOR THE ARCTIC REGION 2013: GOVERNMENT RESOLUTION ON 23 AUGUST 2013 (2013) at 44.

Ocean, including by promoting safe and secure maritime operations.

- An RSP could also serve to rationalize and organize the growing body of hard and soft law applicable to the Arctic Ocean.⁶⁴

It seems that these very ambitious goals are based on the ideas proposed in the aforementioned reports, so it will be interesting to see how the United States will advance these governance ideas.

Yet, even if a case for an Arctic treaty could be made, it is important to ponder whether this would make sense. It is obvious that the Arctic is impacted by various levels of governance—from global to regional and from national to subnational. Would it make sense to create another layer of governance amidst all these governance frameworks? On the other hand, all regions nowadays have to struggle with our multilevel governance world, so it would seem to haunt other regions as well, not only the Arctic. The main question here is whether a legally binding international instrument for the Arctic could be made to increase synergies between the existing sectorial hard and soft law arrangements and at the same time provide policy direction for the region.

CONCLUSION

The quest for better international governance for the Arctic will continue in the years to come, when the climate change impacts will become more pronounced in the region. Some of the main issues that we can pose on the basis of this article are the following: First, should we endorse the current approach chosen by Arctic states, which is responsible but traditional? There are many good sides to this, as was argued above. In areas where there is limited regulation or no policy response, further regulations should be put in place. In fact, Arctic states have proceeded to regulate in cases of emergencies in general, in oil spills in particular, and in terms of Arctic shipping and fishing. The Arctic states have enacted these regulations in forums that have mandates to address these issues. Yet, it is possible to see this approach as problematic since it does not provide a solution to the underlying problem: that there is no way to coordinate between different governance mechanisms now functioning in their own fields in the Arctic.

It is the second approach, the systematic planned approach, which tries to remedy this by introducing the possibility of bringing more consistency and decision-making power to an institution that could then counter the vast challenges facing the region. This, however, may be too ambitious an approach for some Arctic states, and it is not certain that it could bring these various governance arrangements to work towards the same goals. Yet, this type of approach would certainly have better prospects of creating an Arctic united front for the governance challenges of

64. The official PowerPoint presentation was presented as part of the “Virtual Stakeholder Outreach Forum” on December 2, 2014, and introduced the United States’ priorities for the Arctic region. See ARCTIC COUNCIL UNITED STATES CHAIRMANSHIP, VIRTUAL STAKEHOLDER OUTREACH FORUM, DECEMBER 2, 2014, at 10, http://www.arctic.gov/publications/presentations/Arctic_Council/US_Chairmanship_for_stakeholders.pdf [https://perma.cc/BGR3-7FKPJ].

tomorrow. It will be interesting to see what the United States is able to do during its chair period now that it has signaled that it is ready to search for new governance solutions for the region.

It is important to any discussion of better Arctic governance that we try to make our arguments as clear as possible. As shown above, there are plenty of misunderstandings in the current debate. We must try to avoid new ones. Otherwise, we cannot have meaningful discussions over the future of Arctic governance.