

The evolution of the Arctic Council and the Arctic Council System

International interest in the Arctic increased spectacularly between 2004-2008. This was due to a number of events including the 2004 Arctic Climate Impact Assessment, the dramatic Arctic sea-ice loss in 2007 and Russia planting its flag on the geographical North Pole's deep sea-bed that same year.

As ERIK MOLENAAR writes, the flag planting triggered a broad range of reactions.

SOON AFTER Russian explorer Artur Chilingarov plunked a Russian flag on the sea floor, there was a wide-spread, incorrect perception that the flag-planting heralded the last land-grab on earth and an unchecked resource bonanza, due to an international law vacuum. This was followed by the incorrect assumption that this vacuum had to be filled by a treaty modelled on the Antarctic Treaty.

However, the Arctic Ocean coastal states – Canada, Denmark/Greenland, Norway, the Russian Federation, and the United States – pointed out that “an extensive international legal framework applies to the Arctic Ocean”, namely the law of the sea as per their famous 2008 Ilulissat Declaration. While they did not question the usefulness of new issue- or sector-specific regulation, they saw “no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.”

Rather than a comprehensive reform or overhaul, the Arctic Council has pursued a two-tiered approach of adaptation in this new climate of heightened interest and climate change. The first tier consists of strengthening the Council with the establishment of the Arctic Council Secretariat in 2014.

The second tier involves establishing and expanding the concept of the Arctic Council System (ACS) which has two basic components: the Council's constitutive instrument (the 1996 Ottawa Declaration), other Ministerial Declara-

tions, other instruments adopted by the Arctic Council and the Council's institutional structure. The second component consists of treaties negotiated under the Council's auspices and their institutional components. Two such treaties have been adopted to date: the 2011 Arctic Search and Rescue (SAR) Agreement and the 2013 Arctic Marine Oil Pollution Preparedness and Response (MOPPR) Agreement. Both treaties provide for Meetings of the Parties (MoPs), although none have been convened so far. MoPs can also be convened under a third treaty, the Arctic Scientific Cooperation Agreement, which is to be signed at the 2017 Arctic Council Ministerial Meeting.

The linkage between the Council and this second component is not confined to the instruments' mere negotiation under the Council's auspices, but also comprises a considerable and increasing

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extent of substantive and institutional integration. This relates in particular to the role of the Council's Emergency Prevention, Preparedness and Response (EPPR) Working Group under the Arctic SAR and MOPPR Agreements.

In 2014 and 2015, the Arctic's institutional complexity increased further with the establishment of three new bodies: the Arctic Economic Council, the Arctic Offshore Regulators Forum and the Arctic Coast Guard Forum. While none of these were formally established by the Council or pursuant to a treaty negotiated under its auspices, all three have different extents of integration – substantively as well as procedurally – with the Arctic Council and the broader ACS. Rather than forming part of the Council or the broader ACS, however, they could be regarded as belonging to a new, more peripheral category of Arctic cooperative mechanisms. At any rate, the establishment of these new bodies requires increased efforts on institutional coordination and cooperation.

Despite these developments, the question remains whether the current institutional set-up of the Council will



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be sufficient to address future challenges and ambitions. While support for re-establishing the Council pursuant to a treaty has in the recent past also been expressed by Arctic Council participants – namely by Finland and the Conference & Standing Committee of Parliamentarians of the Arctic Region – the required consensus among the Arctic Council Members to commence such negotiations is not even remotely in sight. A key concern of the Permanent Participants is the risk of losing the very influential participatory status they currently have in the Arctic Council. As international law is inherently dynamic, however, nothing prevents the Arctic states from progressively developing international law by giving Arctic Indigenous peoples a similar participatory status under a treaty.

The currently ongoing engagement of Arctic Council participants in the context of the Council’s Task Force on Arctic Marine Cooperation (TFAMC) provides the best opportunity to assess their appetite for institutional change in the Arctic Council in the near future. The TFAMC has a mandate to “assess future needs for a regional seas program or other mechanism, as appropriate, for increased cooperation in Arctic marine areas”.

At the time of writing, the TFAMC had met once in 2015 and 2016 respectively and is scheduled to meet in June and September 2016 then again in 2017. While some common ground on overarching goals and principles has crystallized, the more fundamental agreement on the core objective of the abovementioned mechanism and its institutional dimension remains entirely absent.

One of the TFAMC’s key challenges is how to address the various interrelated choices on key features of a future mechanism. For instance its substantive mandate, its geographical scope; whether it should be part of the Arctic Council, the broader ACS or a more peripheral category of Arctic cooperative mechanisms; its relationship to (other) Arctic Council bodies; and the participatory status of Permanent Participants (and non-Arctic states).

Some Members also remained unconvinced about the need for any new body at all. This seems motivated at least to some extent by current budgetary constraints and concerns relating to institutional proliferation. Some may also feel the need to proceed cautiously to ensure coherence between their interests and positions in the TFAMC process and the recently commenced negotiations on a possible new UNCLOS Implementation Agreement on biodiversity in areas beyond national jurisdiction. Russia seemed to have more fundamental concerns relating to any initiative that could potentially lead to restrictions on economic development in the ‘Russian Arctic’.

Finally, the Arctic Council’s substantive mandate is almost unlimited, but significantly under-utilized. Yet, more optimal use and associated institutional change are constrained by existing (sub-)regional or bilateral instruments and bodies. In the context of the TFAMC, reference can be made to the OSPAR Commission, whose geographical competence extends all the way to the geographical North Pole. Even if the Arctic states would prefer the OSPAR Commission to relinquish part of its regulatory area, this is unlikely to secure the necessary support among the OSPAR Commission’s Membership. In many other scenarios, however, the Arctic states have no desire at all to replace or subsume existing (sub-)regional or bilateral instruments and bodies, or to preclude new (sub-)regional or bilateral instruments and bodies from being created. Pertinent examples are instruments and bodies relating to the conservation and management of marine mammals and fish stocks, for instance the currently ongoing Broader Process on international regulation of high seas fishing in the central Arctic Ocean. In view of the widening acceptance of ecosystem-based ocean management, however, one would expect increasingly closer coordination and cooperation between the Arctic Council and these formally stand-alone instruments and bodies. ○

