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**“Environmental Governance through the Arctic Council:
the Arctic Council as Initiator of Norms of International
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Environmental Governance through the Arctic Council: the Arctic Council as Initiator of Norms of International Environmental Law.

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1. Introduction

The Arctic Council is a unique intergovernmental forum that has evolved significantly since its creation in 1996. It has expanded the breadth of its interests in these two decades and become increasingly influential in international relations but it is still not an international organisation and it has no formal law-making powers. Although two treaties have been negotiated under its auspices, they are technically treaties of the eight Arctic States and not Arctic Council treaties *per se*.¹ Nevertheless, many norms of international environmental law have emerged from ‘soft law’ instruments and non-binding cooperative frameworks. In this paper, the author will examine the potential for the Arctic Council and its subsidiary bodies to contribute to the body of environmental norms in the Arctic.

¹ Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic 2011 <http://www.arctic-council.org/article/2011/5/arctic_council_ministers_sign_agreement> accessed 15 September 2011 (SAR 2011); Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic 2013 <<http://www.arctic-council.org/eppr/agreement-on-cooperation-on-marine-oil-pollution-preparedness-and-response-in-the-arctic/>> accessed 25 February 2014 (MOPPR 2013).

The main hypothesis to be explored is that the Arctic Council can be at least as effective in setting standards for environmental protection in the Arctic through soft-law instruments as can be achieved through traditional binding treaties. The paper will begin with a review of sources of law, with an emphasis on ‘soft-law.’ It then turns to the Arctic Council and its capacity – both institutional and diplomatic – to set standards for environmental governance. The paper concludes with a review of some of the advantages and disadvantages of reliance on non-binding standards for environmental protection in the Arctic.

2. The Centrality of Environmental Protection in the Arctic Council System

It is necessary to return to the origins of the Arctic Council and its predecessor, the Arctic Environmental Protection Strategy (AEPS), to understand the importance of the environment for trans-Arctic cooperation. In President Gorbachev’s famous speech at Murmansk on 1st October 1987, he identified six priority areas that he saw as ripe for cooperation.² These were:

- 1) A nuclear weapons-free zone in Northern Europe;
- 2) Reductions and restrictions on naval activity in Northern Europe;
- 3) Cooperative development of hydrocarbon resources in the Arctic;
- 4) Scientific cooperation;
- 5) “Cooperation of the northern countries in environmental protection”; and developing “jointly an integrated comprehensive plan for protecting the natural environment of the North”; and
- 6) The opening of the Northern Sea Route to international vessels.

Of these, the latter was fully within Soviet, later Russian, control and the first foreign ship transited the Northern Sea Route in 1991 – the French flagged *Astrolabe*.³

The first two areas followed the inconclusive but nonetheless fruitful Reykjavík summit where Gorbachev and Reagan had met to discuss arms control. But these were both firmly military matters and for that reason, extremely sensitive both for domestic politics and in international relations. They were also largely bilateral matters between the USSR and the USA as the other six Arctic States did not have their own nuclear weapons capacity

² Mikhail Gorbachev, Speech in Murmansk at the Ceremonial Meeting on the Occasion of the Presentation of the Order of Lenin and the Gold Star to the City of Murmansk, 1 October 1987 <www.barentsinfo.fi/docs/Gorbachev_speech.pdf> accessed 8 March 2016.

³ Arctic Marine Shipping Assessment 2009 Report (Arctic Council PAME 2009) 44; Erik Franckx, ‘The Legal Regime of Navigation in the Russian Arctic’ [2009] 18(2) Journal of Transnational Law and Policy, 327, 329.

(even if some of them hosted bases) and the same two States were the only significant naval powers. These two issues, therefore, were not sufficiently attractive to the Western Arctic States.

Gorbachev had recognised already the potential of the Arctic as a new hydrocarbon Mecca: his comments could have been reprinted on yesterday's front page and still seem timely:

*According to existing data, the reserves there of such energy sources as oil and gas are truly boundless. But their extraction entails immense difficulties and the need to create unique technical installations capable of withstanding the Polar elements.*⁴

The climatic, technological and geological barriers to efficient Arctic hydrocarbon extraction have yet to be overcome but Gorbachev's call for research and development cooperation was overshadowed by a continuing narrative of competition and this too was not ready for a trans-Arctic cooperative approach.

That left scientific and environmental cooperation as the most suitable candidates to enhance cooperation in the Arctic and, in the process, rebuild trust after decades of Cold War.

Finland seized on Gorbachev's overture and initiated the *Rovaniemi Process* which in turn led to the AEPS in 1991. Pointedly, this initiative was established at a meeting of eight ministers *for the environment*, not foreign ministers. There were originally just four working groups, all focused on the environment:

- AMAP (Arctic Monitoring and Assessment Programme);
- CAFF (Conservation of Arctic Flora and Fauna);
- EPPR (Emergency Prevention, Preparedness and Response);
- PAME (Protection of the Arctic Marine Environment).

It was on the initiative of the Inuit Circumpolar Council that the Sustainable Development working group was introduced into the AEPS, originally as a task force in 1993. This was just one year after the Rio Conference and Rio Declaration which brought the concept of sustainable development to the heart of international environmental governance. The task force became a fully-fledged working group in 1996. This meant that when the Arctic

⁴ Gorbachev, *supra* note 2.

Council was formed in 1996, these five working groups were already operational. Later, the Arctic Contaminants Action Programme, originally a part of AMAP, became a self-standing working group in 2006.

Therefore, since its origins, environmental protection and preservation has been a core issue for the Arctic Council and its working groups. But coordinated environmental *policy* is not the same as creation of environmental *law*. How can an institution that is not treaty-based, is pointedly not an international organisation, and has no ostensible law-making powers, create law on the environment or anything else in the Arctic?

3. Sources of International Law

To answer this, it is necessary to return to the legal basics: sources of international law.

Every first year law student can recite these based on article 38(1) of the Statute of the Court as follows: treaties; customary international law; general principles of nations (civilised or not); judicial decisions; and the writings of publicists.

Students are also well-versed in the different kinds of norms that exist within legal systems. In Western law schools at least, this usually follows Dworkin's typology of rules, principles and policies. A rule is a straight-forward if/then statement – the major premise - that applies in an all or nothing manner should the conditions be met.⁵ If X, then Y. If this project might cause significant transboundary harm, *then* an environmental impact assessment must be conducted.⁶

A principle is a broader normative statement. Unlike a rule, it cannot be reduced to a simple if/then syllogism. A principle will not conclude the matter but will guide the decision maker. Principles have a dimension of *weight*.⁷ Principles fill the spaces between the rules; they are interpretative tools that assist in reading and applying the rules. Judge Cançado-Trindade views the principles of international law as “the pillars of the international legal system itself.”⁸ Principles bind the rules of international law together; they make it a system and not a mere list of commands. A principle of law “is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.”⁹ The *sic utere tuo* principle is a good example. Often called simply

⁵ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 24.

⁶ *Pulp Mills on the River Uruguay, Case Concerning (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14, paragraph 205.

⁷ Dworkin, *supra* note 5, 44.

⁸ *Pulp Mills*, Separate Opinion of Judge Cançado-Trindade [2010] ICJ Rep 135, paragraph 45.

⁹ Dworkin, *supra* note 5 26.

in English the ‘no harm’ principle, it does not, despite its moniker, require that States prevent all and any transboundary damage. It is a duty of *due diligence*: and diligence cannot be exercised in an all or nothing manner.

However, Dworkin also recognises a third class of values with normative force that are not, strictly speaking, *laws*: these he terms policies. They will also guide the decision-maker but their force is moral or political; it is not *legal*.¹⁰ In international law, we can call this ‘soft law’. It is particularly important in environmental ‘law’ when trying to set out overarching environmental frameworks. There is no comprehensive international environmental treaty but there are some very important *Declarations* – in particular, Stockholm and Rio.¹¹ These contain lists of ‘principles’ but they are not necessarily principles *of law* in a formal sense. Rather, because of their vagueness and their often non-binding character, they may be no more than policies.

The sources of law can also be viewed in terms of hierarchy:

- Traditional or ‘hard law’: treaties, custom and general principles of nations
- ‘Soft law’: international declarations, statements of principles, resolutions, etc.
- Other standards: guidelines, frameworks, strategies, etc.

Dinah Shelton defines soft-law in the following terms:

*There is no accepted definition of ‘soft law,’ but it usually refers to any international instrument other than a treaty that contains principles, norms, standards or other statements of expected behaviour. The term ‘soft law’ is also sometimes employed to refer to the weak, vague, or poorly drafted content of a binding instrument.*¹²

Non-binding instruments are important for fora such as the Arctic Council which do not have any law-making powers. It is easier for non-binding instruments to include non-member States and non-State actors. They are quicker and easier to adopt as they do not get caught up in complex domestic ratification processes; and they are easier to amend than formal treaties which is important when considering the kinds of environmental

¹⁰ *ibid* 22; Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986) 410; see also Ulrich Beyerlin, ‘Different Types of Norms in International Environmental Law: Policies, Principles and Rules’ in *The Oxford Handbook*, Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds) (Oxford University Press 2007) 428.

¹¹ Stockholm Declaration on the Human Environment (1972) 11 ILM 1416; Rio Declaration on Environment and Development (1992) 31 ILM 876.

¹² Dinah Shelton, ‘Normative Hierarchy in International Law’, (2006) 100(2) *American Journal of International Law*, 291, 319.

protection provisions that need to be continuously reviewed and revised to keep pace with technical capabilities.¹³

4. ‘Principles’ in international law

It should by now be clear that the word ‘principle’ has at least three different meanings in the context of international law.

First of all, there are ‘general principles of nations’ – a formal source of international law. The meaning of ‘principle’ in this context relates to the *origins* of the norm. A ‘general principle’ is a norm that is shared by diverse legal systems from around the World. – it comes from *municipal* law and should (in theory if not in practice) be identified through an arduous process of comparative law.¹⁴

Then there is the meaning of ‘principle’ in Dworkin’s sense as one of the overarching values of the legal system itself, or in Cançado-Trindade’s words, a ‘pillar’ of the international legal system. This describes the *ontology* of the norm: what *sort of a norm* is it? It is normatively broader than a rule; it has weight and influences interpretation; but it cannot be applied in an all or nothing form.

And then there is the third sense: the use of ‘principle’ in declarations such as Rio and Stockholm to indicate a *political* commitment to stated goals. In this meaning, the principle is not more than a policy. It is normative because it is prescriptive; but it has no *legal* force. ‘Soft law’ instruments might have principles¹⁵ even ‘general principles’¹⁶ or ‘general environmental principles’¹⁷ but these are not necessarily principles *of law*.

To quote Dinah Shelton once more:

*They [soft-law norms] are not law and do not need to be in order to influence conduct in the desired manner.*¹⁸

¹³ Ibid, 322

¹⁴ *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* [1970] ICJ Rep 3, paragraph 37.

¹⁵ Timo Koivurova, *Introduction to International Environmental Law* (Routledge 2013) 88-89.

¹⁶ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 27-28; David M Ong, ‘International Environmental Law’s “Customary” Dilemma: Betwixt General Principles and Treaty Rules’ (2006) 1 *Irish Yearbook of International Law* 3, 5.

¹⁷ Ong, *ibid*, 22 and 32.

¹⁸ Shelton, *supra* note 12, 322.

5. Sources of International Environmental Law in the Arctic

International environmental law, perhaps more than any other field of international law, relies extensively on soft-law for its development.

In environmental law, there is no comprehensive global environmental treaty but rather each is subject specific and / or regional. In the Arctic, the most important treaties are the UN Convention on the Law of the Sea (UNCLOS);¹⁹ MARPOL on pollution from ships;²⁰ the London Convention on dumping;²¹ OSPAR in the North East Atlantic;²² the Espoo Convention on transboundary environmental impact assessment;²³ and the Aarhus Convention on public participation.²⁴ UNCLOS, MARPOL and the London Convention are truly global – because the ocean is a global commons. OSPAR stretches to the North Pole following sector lines but covers only the North-East Atlantic and does not apply in the maritime zones of Canada, the US and most of Russia. Espoo and Aarhus are treaties of the United Nations Economic Commission for Europe and could cover the entire Arctic but neither is fully ratified amongst the Arctic eight.

Customary international law is an important supplement but difficult to identify. While in theory, it emerges from a sufficient degree of universal, consistent, repeated and long-term state practice and *opinio iuris*, in practice, international courts tend to pronounce it – and they rarely engage in extensive studies of state practice or *opinio iuris* when they do so. The International Court of Justice has been extremely conservative in developing customary international environmental law but it did give us the obligation to conduct the EIA in *Pulp Mills*.²⁵ At the same time, however, it declined to give the EIA any particular content and avoided an assessment of the status of the precautionary approach. The

¹⁹ UN Convention on the Law of the Sea 1982, 1833 UNTS 397 (UNCLOS).

²⁰ International Convention for the Prevention of Marine Pollution from Ships 1973, 1340 UNTS 62 (MARPOL).

²¹ Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (1972) 11 ILM 1294 (London Convention).

²² Convention on the Protection of the Marine Environment of the North-East Atlantic 1992, 2354 UNTS 67 (OSPAR).

²³ Convention on Environmental Impact Assessment in a Transboundary Context 1991 (1991) 30 ILM 800 (Espoo Convention).

²⁴ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (1999) 38 ILM 517 (Aarhus Convention).

²⁵ *Pulp Mills*, *supra* note 6, paragraph 204. See also *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) (16 December 2015) paragraph 104 <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=152>> accessed 8 March 2016.

International Tribunal for the Law of the Sea has been more precocious, endorsing the precautionary principle in the *Seabed Mining* advisory opinion.²⁶

It is unfair to be too critical of the Courts for their conservatism when the state practice and *opinio iuris* on environmental standards are neither universal nor consistent. But the conclusion is nevertheless that customary international law can only take us so far in environmental law.

The Stockholm and Rio Principles represent a step down from binding obligations but nevertheless influence state conduct – they are ‘soft law’. Similarly, subject-specific instruments such as guidelines and regulations of authoritative international organisations contribute to environmental governance. The IMO is probably the most important in governance of shipping in the Arctic to protect the marine environment and human safety through soft as well as binding instruments. The International Whaling Commission’s resolutions present another example. The recent *Whaling in the Antarctic* judgment²⁷ saw the Court stop short of endorsing its resolutions as ‘binding’ but certainly found them persuasive in its interpretation of Japan’s obligations under the parent treaty.

And then we have the Arctic Council. Each ministerial meeting agrees a Declaration that recognises certain priorities, adopts reports, and takes decisions. At the most recent Iqaluit meeting in 2015, the Arctic Council decided to implement “the Framework for Action on Enhanced Black Carbon and Methane Emissions reductions” and “the Framework Plan for Cooperation on Prevention of Oil Pollution from Petroleum and Maritime Activities in the Marine Areas of the Arctic”.²⁸

Finland’s position in 2010 was that:

*The consensus decisions made by the Council Member States are not legally binding, but the Council’s recommendations are considered to have major political weight.*²⁹

²⁶ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, International Tribunal for the Law of the Sea: Seabed Disputes Chamber Case No. 17 (Advisory Opinion) (1 February 2011) <<http://www.itlos.org/index.php?id=109>> accessed 21 February 2012.

²⁷ *Whaling in the Antarctic (Australia v Japan) (Merits)* (31 March 2014) <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=64&case=148&code=aj&p3=4>> accessed 31 March 2014.

²⁸ Iqaluit Declaration, Arctic Council, 2015, paragraphs 24 & 32 <https://oaarchive.arctic-council.org/bitstream/handle/11374/662/ACMMCA09_Iqaluit_2015_Iqaluit_Declaration_low_resolution_web.pdf?sequence=1&isAllowed=y> accessed 8 March 2016.

²⁹ Finland (Prime Minister’s Office), *Finland’s Strategy for the Arctic Region*, Prime Minister’s Office Publication 8/2010, 5 July 2010, 37.

This means we might view at least some of these decisions with substantive content as ‘soft law’.

The Arctic Council, at the level of the ministerial and SAO meetings, also endorses guidelines that emanate from working groups or task forces. It is doubtful that guidelines even constitute ‘soft law’ as they are only very weakly normative. Nevertheless, they contribute to environmental protection in the Arctic by influencing domestic law.

6. The Arctic Council’s Role in making and/or shaping environmental norms

The Arctic Council is not an international organisation but a ‘high-level intergovernmental forum.’ The 2013 Finnish strategy proposed that it become institutionalised on a treaty-basis but the United States has made it quite clear that it has no wish to see the Arctic Council evolve beyond its current status as a high-level intergovernmental forum. Douglas Nord argues that the Arctic Council now shares many of the characteristics of an international organisation and implies that it is well on its way in that direction.³⁰ Nevertheless, although the Arctic Council is a significant actor in international affairs – indeed, aside from States themselves, it is *the* most important actor in Arctic relations - it is not a legal person and persists on the goodwill of the eight Arctic States.

This raises difficult questions about what the Arctic Council can *do*. While academics have been busy writing papers on whether the Arctic Council has evolved or should evolve from a ‘decision-shaping’ body to a ‘decision-making’ one, two treaties have already been agreed through the Arctic Council. These are on Search and Rescue (SAR)³¹ and Maritime Oil Pollution Preparedness and Response (MOPPR).³² This indicates that it can indeed be a forum for the *making* of international law. The treaties themselves are not Arctic Council treaties - they are treaties between the eight Arctic States – and pointedly exclude the permanent participants and observer States. These two treaties exist independently of the Arctic Council – should the Arctic Council disband, these treaties would still be binding on their parties. But it is fair to conclude that without the Arctic Council as a site of diplomatic negotiation on these two issues, these treaties would not have come into existence at all.

The two treaties do not establish significant new legal obligations for the Arctic States. The real work goes on in their *implementation* - for example, through joined exercises

³⁰ Douglas C Nord, *The Arctic Council: Governance within the Far North* (Routledge 2016).

³¹ SAR 2011, *supra* note 1.

³² MOPPR 2013, *supra* note 1.

based on search and rescue or oil pollution emergency scenarios. We can expect more to follow, coordinated by the newly established Arctic Coast Guard Forum. The Arctic Coast Guard Forum was established formally on 30th October 2015 when a signing ceremony was held to adopt a ‘joint statement’. This is not a treaty and, despite being referred to as an ‘organisation’, the Arctic Coast Guard Forum is not an international organisation in the legal sense and is formally presented as “an independent, informal, operationally driven organization, not bound by treaty”.³³

On oil spill pollution, the MOPPR agreement from 2013 contains a set of ‘non-binding operational guidelines’ (Appendix IV). These detail the procedures for notifications of incidents and requests for assistance – setting out what information needs to be transmitted, how, when and to whom. There are also provisions to expedite or waive normal visa and customs regulations to ensure personnel and equipment can be transferred promptly in an emergency.³⁴

At the Iqaluit ministerial meeting in 2015, a new non-treaty based framework for *prevention* of oil pollution was adopted.³⁵ It addresses both hydrocarbon extraction activities and shipping of oil. The framework includes provisions on information sharing, environmental impact assessment, development of common standards, data collection and hydrographic mapping, weather monitoring, and communications. Again, it is not legally binding and the participants can withdraw at any time.³⁶

At the same meeting, the Enhanced Black Carbon and Methane Emissions Reductions Framework was adopted and the Ministers formally ‘decided’ to implement it, ‘called upon’ the Arctic Council observer States to participate and established an expert group to monitor and report.³⁷

³³ Joint Statement of the Intent to Further Develop Multilateral Cooperation of Agencies Representing Coast Guard Functions, 30 October 2015, <http://arctic-council.org/eppr/wp-content/uploads/2015/06/2015_11_05_ACGF_Joint-Statement_Final_Approved.pdf> accessed 8 March 2016.

³⁴ Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic: Appendix IV Operational Guidelines, <http://www.arctic-council.org/eppr/wp-content/uploads/2014/03/NCR-5979727-v1-OPERATIONAL_GUIDELINES_ENGLISH_FINAL_WITH_UPDATE_PROCEDURES_NO_PHONE_NR.pdf> accessed 8 March 2016.

³⁵ Framework Plan for Cooperation on Prevention of Oil Pollution from Petroleum and Maritime Activities in the Marine Areas of the Arctic 2015, Arctic Council <http://arctic-council.org/eppr/wp-content/uploads/2015/04/ACMMCA09_Iqaluit_2015_SAO_Report_Annex_3_TFOPP_Framework_Plan.pdf> accessed 8 March 2016.

³⁶ Ibid, paragraphs. 4.3-4.4.

³⁷ Enhanced Black Carbon and Methane Emissions Reductions: an Arctic Council Framework for Action 2015, Arctic Council <<https://oaarchive.arctic-council.org/handle/11374/610>> accessed 8 March 2016.

The PAME working group has also developed and periodically updated Guidelines on Arctic Oil and Gas.³⁸ These were most recently supplemented in 2014 by the Systems Safety Management and Safety Culture guidance.³⁹ The PAME Guidelines set out procedural standards that are directed to each State's regulatory authorities in the anticipation that the States will introduce them into the regulatory processes under domestic law. However, they also express a hope that they "may also be of help to the industry when planning for oil and gas activities and to the public in understanding environmental concerns and practices."⁴⁰ PAME has a separate set of guidelines on the transfer of refined oil aimed at preventing spills from vessel-to-vessel fuel transfers or from vessels to onshore facilities.⁴¹

7. Challenges with 'Binding' Agreements

An assessment of the two legally binding treaties agreed through the Arctic Council reveals that they lack significant, new, substantive obligations. The Arctic SAR Agreement replicates the IMO Search and Rescue Convention of 1979 to which all the Arctic States are parties. It has provisions to *encourage* cooperation beyond the international minimum – for example, on sharing of information and technology, joint training exercises, and exchange visits of experts – but these provisions are not mandatory.

Likewise, the MOPPR agreement of 2013 does not create significant legal obligations for its parties, with most of it replicating the IMO's International Convention on Oil Pollution Preparedness, Response and Cooperation of 1990. The MOPPR goes a little further than the IMO treaty, in requiring the Arctic States to identify "risks to areas of special ecological significance"⁴² and to take measures to facilitate ease of transfer of personnel, ships and equipment required in an oil spill emergency⁴³ - subject to international *and domestic* law. The Arctic States 'shall promote' cooperation and joint training exercises – but the obligation to promote is an obligation of due diligence, of best efforts, not an obligation actually to conduct any such exercises.⁴⁴

³⁸ Arctic Offshore Oil and Gas Guidelines, 3rd edn, (Arctic Council PAME 2009). The earlier editions were published in 1997 and 2002 respectively.

³⁹ Arctic Offshore Oil and Gas Guidelines: Systems Safety Management and Safety Culture (Arctic Council PAME 2014).

⁴⁰ Arctic Oil and Gas Guidelines, *supra* note 38, 4.

⁴¹ Guidelines for Transfer of Refined Oil and Oil Products in Arctic Waters (Arctic Council PAME 2004).

⁴² MOPPR 2013, *supra* note 1, article 4.

⁴³ *Ibid*, article 9.

⁴⁴ *Ibid*, article 13.

Both treaties of the Arctic States lack any provision for enforceability. Disputes under either agreement shall be settled through ‘direct consultations’ or ‘direct negotiations’ apparently precluding judicial settlement or recourse to counter-measures.⁴⁵

The treaties are also disappointing in their exclusiveness. The permanent participants might sit at the main table in the Arctic Council but when it comes to the creation of a treaty, they are not given a pen. In the MOPPR, indigenous peoples are mentioned in the preamble as potential victims of a spill and as a resource to be tapped; but they are not included in the substantive provisions. In the SAR agreement, they are not mentioned at all. Indigenous peoples have no responsibilities under the treaties and – more importantly – have no rights to invoke the treaties. The treaties allow for possible cooperation with States outside of the Arctic on an *ad hoc* basis but the treaties are closed systems that do not allow for accession by third States.⁴⁶ The message is clear: the Arctic is *our* domain and any contributions from outsiders – even if it is to our benefit – must be strictly on our terms.

There is no structural barrier to treaties for the Arctic that include Arctic and non-Arctic States; and indeed, it is not beyond human imagination to develop treaties that include also indigenous participation. After all, we have a long history of international treaties between colonial governments and indigenous nations that recognise their ability to hold rights and obligations under international law. But the political barriers remain: the Arctic States are not prepared to send any signal that the non-Arctic States might have equivalence in the Arctic; and they remain wary of setting precedents of international treaties in which States and indigenous peoples have the same status.

As a result, even the two treaties that have been agreed are deficient. Indigenous peoples are pivotal to any effective search and rescue or oil spill clean-up in most of the Arctic. The indigenous communities are the first responders; they maintain and manage the nearest harbours; they have the closest boats; they are monitors and interpreters of real-time weather, ice, sea and wildlife conditions; and they have the supplies that will be consumed in an emergency. It is communities of mostly indigenous peoples who will feel the longer term impacts of a search and rescue or oil spill incident – with threats to their food supplies, energy security and cultural survival.

In October this year, a whale watching boat, the *Leviathan II*, sank when it was hit by a wave in apparently tranquil waters off the Vancouver coast. It was a First Nations

⁴⁵ Ibid, article 18; SAR 2011, *supra* note 1, article 17

⁴⁶ MOPPR 2013, *supra* note 1, article 17; SAR 2011, *supra* note 1, article 18.

Ahousaht fisherman who saw the emergency flare and raised the alarm. It was his boat that was first on the scene and rescued more than half of the survivors, before it was joined by others from the Asousaht village as well as the broader Tofino district.⁴⁷ Six lives were lost that day.

When the *Clipper Adventurer* was grounded in the North-West Passage in 2010 – in blessedly calm conditions – the Canadian Coastguard was able to rescue all the passengers and crew. There were fewer than 200 passengers and crew on board⁴⁸ and the passengers were all taken to their intended destination: Kugluktuk in Nunavut. Kugluktuk has a population of around 1400 persons – most of whom had gone fishing when the Coastguard tried to make contact to advise that the 128 passengers would be arriving in a few hours in need of accommodation and supplies.⁴⁹

The community of Kugluktuk prepared a sleeping area in a community hall, gathered blankets and pillows, commandeered the school bus to transport the passengers from the pier, and opened the village store. Fortunately, none of the passengers required medical attention as Kugluktuk's small nursing station is staffed by only 2 nurses. The next morning, a charter flight took the passengers to Edmonton to begin their journeys home. In the short time that the passengers were in Kugluktuk, they consumed the food from the store as well as the community's limited and expensive diesel supply. Northern Canadian villages are not on the national power grid: fuel must be transported. What happens *after* a search and rescue? Who resupplies the community, how and when?

The same *Clipper Adventurer* is still offering cruises through the North West Passage.⁵⁰

⁴⁷ See, e.g., Lisa Johnson, 'Tofino Boat Rescue Triggered by Single Flare that almost Wasn't Seen' CBC News, 27 October 2015, <<http://www.cbc.ca/news/canada/british-columbia/tofino-boat-rescue-story-1.3290892>> accessed 8 March 2016; Dirk Meissner, "'It happened super quick": Giant wave knocked over Leviathan II' CTV News 24 November 2014 <<http://www.ctvnews.ca/canada/it-happened-super-quick-giant-wave-knocked-over-leviathan-ii-1.2671934>> accessed 8 March 2016; Bethany Lindsay and Joanne Lee-Young, 'Five British Citizens Dead, One Person Missing after Whale Watching Vessel Capsizes near Tofino' The Vancouver Sun, 27 October 2015 <<http://www.vancouversun.com/news/least+five+people+dead+after+whale+watching+vessel+capsizes+near+tofino/11467007/story.html>> accessed 8 March 2016.

⁴⁸ Jeanne Gagnon, 'Cruise Ship Runs Aground near Kugluktuk' Northern News Service Online, 2 September 2010 <http://www.nnsl.com/frames/newspapers/2010-09/sep6_10cs.html> accessed 8 March 2016.

⁴⁹ Jane George, 'Stranded Passengers Find Warmth in Kugluktuk' Nunatsiaq Online, 30 August 2010 <http://www.nunatsiaqonline.ca/stories/article/3008109_Stranded-passengers_crew_find_warm_welcome_in_Kugluktuk/> accessed 8 March 2016.

⁵⁰ 'Adventure Canada Cruises' 1800-99-Maris Freighter Cruises <https://www.freightercruises.com/adventure_canada.php> accessed 8 March 2016.

An oil spill is perhaps less likely than a cruise ship emergency but the problems it presents are even more profound. Whether from a tanker or a drilling platform, there will almost certainly be a need for search and rescue of the workers involved. But it is the indigenous peoples' food sources that are contaminated and in the short-term, the interference with shipping means that imported food and fuel supplies cannot get through. In the Arctic, environmental and human security cannot be easily distinguished.

Nevertheless, despite their permanent participation at the Arctic Council, the permanent participants were not included in the treaties. The assumption is that the seven Arctic States will involve their indigenous communities through domestic, vertical arrangements. It is the indigenous communities who will be using their boats, their fuel, sharing their food and medical supplies, and even giving up their beds in an emergency; but they have no rights under the treaties. A more inclusive system is not only necessary to protect the indigenous communities but to facilitate effective search and rescue or oil spill clean-up – for example, by strengthening communications and infrastructure. Investments need to be in genuine *partnership* – not just foreign ministers talking at a table while the rescue goes on at a very local level.

Non-Arctic States were also kept firmly outside of the two Arctic treaties as the eight Arctic States used the opportunity to emphasise their *ownership* over Arctic governance. The processes by which they were negotiated were closed and secretive.⁵¹ In time, the Arctic States may become less suspicious of outside intentions and negotiate in a more inclusive and open manner; but meanwhile, opportunities were lost in the SAR and MOPPR agreements to include non-Arctic States. There is a huge competence gap in the North Atlantic where Iceland and Greenland simply do not have the resources to respond to a major emergency. The United Kingdom has those resources. It also has considerable experience of oil spill clean-up.

The Arctic States are currently negotiating a third treaty on cooperation in Arctic science. Once more, it appears that this will be limited to the Arctic States. There is no space for non-Arctic States to take part, notwithstanding their substantial contribution to scientific research in the Arctic. Indigenous peoples are not at the treaty table either. But whose science is it? For all the talk about integrating indigenous science into Arctic research, the permanent participants are unlikely to be parties to the treaty.

⁵¹ 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, Timo Koivurova & Waliul Hasanat (eds), 139, 162.

The Arctic Council has mostly insulated itself from dramas playing out elsewhere that pit Russia against the seven Western Arctic States but this is more difficult when formal treaties are at stake.

Certainly, judging the situation only from the speeches made by top Western leaders, including their ‘programme’ statements, everything would seem to be as it was before: the same anti-Soviet attacks, the same demands that we show our commitment to peace by renouncing our order and principles, the same confrontational language: ‘totalitarianism’, ‘communist expansion’, and so on. Within a few days, however, these speeches are often forgotten, and, at any rate, the theses contained in them do not figure during business-like political negotiations and contacts.⁵²

This is an extract from Gorbachev’s Murmansk speech – but it seems equally pertinent today. The rhetoric from both sides belies the very real cooperation going on in the Arctic and the efforts made to shelter it from international tensions over the Crimea, Syria or elsewhere. But this still has its limits – and treaty-making with substantive new obligations may be beyond them. Meanwhile, the constitutional ratification processes for international treaties in some States – most notably the United States – become bogged down in domestic politics.

However, one of the most common criticisms directed against treaty-based solutions has been proven inapplicable in the Arctic. This is the criticism that treaty-making is a slow, laborious process and that even once a treaty is agreed, it can take many years for the necessary ratifications to bring it into force. The Arctic eight have demonstrated that with sufficient common purpose, a treaty can be produced in only two years – albeit at the expense of substantive content.

This is not to suggest that these two Arctic treaties are unimportant. They have been symbolic steps in establishing the Arctic as a geopolitical space and emphasising the Arctic States’ authority over it. They have enhanced trust between the eight Arctic States and demonstrated that trust to the outside World in a mutually reinforcing virtuous circle. And most importantly, they have prepared the way for structured cooperation on search and rescue and oil spill response.

⁵² Gorbachev, *supra* note 2.

8. Three Non-Legal Processes under Arctic Council

Three non-legal processes for cooperation in the Arctic show us the potential for constructive cooperation without the need for a treaty basis. The first, the Arctic Coast Guard Forum, exists independently of the Arctic Council and its mandate is not strictly environmental but covers life and safety at sea, and may in future extend to customs and security matters.

The ‘Agreement’ to form the Arctic Coast Guard Forum is strictly speaking a ‘joint statement’ signed by the chiefs of the eight Coast Guard authorities, not government ministers. It has no legal basis. Nevertheless, its terms of reference promote exchange of information, best practices and technology; safe and secure maritime activity; protection of the marine environment; and create common standards for emergency response. It will oversee the joint training exercises that had first begun under the SAR treaty. The terms of reference encourage rather than restrict economic uses of the marine Arctic, including shipping; promote ‘sustainable development;’ and seek to “maximize the potential for Arctic maritime activities to positively impact the communities, lives and culture of Arctic communities including indigenous peoples”.⁵³

This is only possible because of a high degree of trust in the Arctic. The first operations of the Arctic Coast Guard Forum will be civilian but the dual military/civilian nature of coastguard operations creates the opportunity to develop the kind of personal contacts and relations between the staff of each agency that can reinforce mutual trust.

Participation and observation by Coast Guard agencies in other States is possible, subject to the consensus of the eight Arctic States and the Arctic States are encouraged to include all relevant domestic parties in their delegations – including representatives of indigenous peoples.⁵⁴

The Framework Plan for Arctic Oil Spill Pollution Prevention emerged from a short-lived Task Force and was adopted by at Iqaluit. The permanent participants were involved in the Task Force but are not included in the framework plan.⁵⁵

⁵³ Arctic Coast Guard Forum Terms of Reference, Strategic Objectives <http://arctic-council.org/eppr/wp-content/uploads/2015/06/2015_11_05_ACGF_TOR_Final_Approved.pdf> accessed 8 March 2016.

⁵⁴ Ibid, paragraphs ii-iii and xix.

⁵⁵ Framework Plan for Cooperation on Prevention of Oil Pollution from Petroleum and Maritime Activities in the Marine Areas of the Arctic (Arctic Council PAME 2015). Indigenous peoples are “recognized” in the preamble as providers of resources and knowledge.

It does not create legal obligations and is explicitly made subject to the States' domestic laws and regulations.⁵⁶ Mostly, it provides for sharing of information and methods and tools for the collection of information. Participants *may* request and *may* respond to requests for information from one another but there is no obligation to provide it.⁵⁷ The parties 'intend' to conduct environmental and risk assessments but these are already obligations under international law, including article 206 of UNCLOS, the Espoo Convention and customary law recognised in *Pulp Mills*. There is scope for greater collaboration on ocean mapping, oceanographic and forecasting, and communications; monitoring of ocean traffic; identification of environmentally sensitive areas; and cataloguing of resources. The EPPR Working Group is leading implementation.

Then there is the Framework for Action on Enhanced Black Carbon and Methane Emissions Reductions.⁵⁸ This is an Arctic Council instrument that is constructed by and will be developed by the Arctic States. However, for the first time, observer States are encouraged to take part and their participation is integrated into the framework.

Black carbon (or soot) is a short-lived climate forcer. It arises from the incomplete combustion of carbon-based fuels – this can be from diesel engines (including shipping) gas-flaring and burning of biomass. Shipping is a significant source around the World but remains a fairly minor contributor in the Arctic.

Because it is black, it absorbs solar radiation, reduces the albedo effect of the ice and snow that it covers and interferes with clouds. It is 'short-term' because it only lies for a few days or weeks at a time; but while it lies, it speeds up melting. Black carbon is also a direct health concern because it triggers and aggravates respiratory diseases.

Methane remains in the atmosphere for around one decade from its release but is still 'short-lived' in comparison to the other five recognised greenhouse gases.⁵⁹ Nevertheless, by volume, its impacts on climate change are 25 times that of carbon dioxide.⁶⁰ Owing to

⁵⁶ Ibid, chapters 1.3 and 4.4.

⁵⁷ Ibid, chapter 1.4.2.

⁵⁸ *Supra* note 37.

⁵⁹ Arctic Council Task Force on Short-Lived Climate Forcers - An Assessment of Emissions and Mitigation Options for Black Carbon for the Arctic Council, 2011, note 1 <https://oaarchive.arctic-council.org/bitstream/handle/11374/926/3_1_ACTF_Report_02May2011_v2.pdf?sequence=1&isAllowed=y> accessed 8 March 2016.

⁶⁰ United States Environmental Protection Authority, 'Overview of Greenhouse Gases' <<http://www3.epa.gov/climatechange/ghgemissions/gases/ch4.html>> accessed 8 March 2016.

its longer life-span, its effects are not locally concentrated in the same way as black carbon⁶¹.

The black carbon and methane framework is not connected to either the SAR or the MOPPR agreement. It is perhaps because of this, that it is able to be more open to non-Arctic States. The framework is constructed and controlled by the Arctic States – the Arctic States establish the rules and the observers are invited to join in.

Under the new Framework, the Arctic States ‘commit to’ creating emissions inventories and projections for black carbon and to improve inventories and projections for methane emissions. They should each prepare a national report for the Arctic Council which will then be made public.⁶² Monitoring and reporting of emissions is key but there are also intentions to raise awareness of black carbon with the objective of reducing emissions.

The Arctic States then ‘call on’ observer States to join them in this initiative: observers are encouraged to keep their own inventories, take part in meetings and report to the Arctic Council on the same basis as the Arctic eight. The reports of the observer States that participate will be considered by the Expert Group and included in periodic ‘summaries of progress and recommendations’ that will be submitted to the two-yearly ministerial meetings.⁶³

Further, the framework reaches out to non-state actors, especially the private sector, to take steps to reduce emissions, develop technology and share best practices.

The composition of the Expert Group is also inclusive. Each Arctic State can nominate one or two experts as can the permanent participants. But observer States can also nominate a representative to the Expert Group. The limitation of the Observer States to only one participant when the member States and Permanent Participants can nominate up to two is necessary given that there are now twelve observer States.

A treaty-based approach to Black Carbon in the Arctic could not have been this inclusive of the non-Arctic observer States.

The Expert Group’s primary role is to collate the data; but it can also propose ‘improvements’ to the framework and “propose options for consideration in order to establish a collective baseline, undertake the analysis and identify options for quantitative

⁶¹ Arctic Council Task Force on Short-Lived Climate Forcers, 2011, *supra* note 59, paragraph 2.1.3

⁶² Enhanced Black Carbon and Methane Emissions Reductions Framework, *supra* note 37, Chapter 1; see also Annex II on contents of reports.

⁶³ *Ibid*, chapter 3.

goal(s)".⁶⁴ What begins as a *reporting* body can make recommendations, including targets. It remains up to the Arctic Council to adopt the Expert Group's recommendations as policy or not.⁶⁵ This builds in flexibility to the framework: the expectations on States can be revised in light of scientific findings and available technology.

The Arctic eight have responded to outside interest in the Arctic by defending their sovereignty and insisting that the Arctic Council is *the* forum for international governance in the High North. It is important to the Arctic States that they have *ownership* of any Arctic initiatives. Nevertheless, there are plenty things they cannot do effectively alone. These include reducing black carbon and methane impacts. A treaty-based response between the Arctic eight is therefore inadequate: a treaty cannot create obligations for third States and if the Arctic eight try to negotiate a treaty with a broader participation, they renounce their political ownership of the issue. Furthermore, more participants makes it more difficult and time-consuming to reach the necessary consensus.

A framework cannot create binding responsibilities for third States either; but the Black Carbon Framework strikes a balance between Arctic *ownership* of the issue and space for meaningful participation from other interested States.

9. Working Group contribution to norm-shaping

Science also feeds into governance through the working groups. The Senior Arctic Officials direct the research agenda of the working groups but their findings are highly regarded as authoritative and independent scientific assessments. In this way, by directing attention to some issues but not others, the working groups shape the discourse about the Arctic.⁶⁶ The working groups also set geographical boundaries to their inquiries – and these are not all the same. In this manner, they contribute to the definition of 'the Arctic' and determine who and what is Arctic; and who and what is not. Although the working groups do not determine Arctic Council policy, they do make policy recommendations to the Senior Arctic Officials and ministers based on their scientific results.

The working groups are where the observer States can make the most impact. But they have to show up! For example, of the first six observer States, only the Netherlands has

⁶⁴ Ibid, annex III.

⁶⁵ Independent expert monitoring of non-binding environmental instruments is not new; see e.g. Shelton, *supra* note 12, 319.

⁶⁶ Klaus Dodds, 'Anticipating the Arctic and the Arctic Council' in the *Arctic Council: its Place in the Future of Arctic Governance* *supra* note 51, 13.

diligently attended the AMAP meetings compared to an almost perfect record for the Arctic States.⁶⁷ There is an opportunity for the new observer States to do better.

Working group findings also feed into norm-shaping elsewhere. PAME's Arctic Marine Shipping Assessment in 2009 and Arctic Ocean Review were key drivers of the IMO's Polar Code initiative and the transition from non-binding Guidelines for Ships Operating in Polar Waters to the Polar Code – binding through the MARPOL and SOLAS treaties.⁶⁸ This is an example of the Arctic Council working group influencing the development of international law to enhance protection of the marine environment.

In February 2015, an AMAP representative presented scientific findings to government delegates with the aim of influencing the climate change COP in Paris.⁶⁹

But the working groups can also shape domestic law. In April 2015, PAME published a "Framework for a Pan-Arctic Network of Marine Protected Areas" (MPAs) which began quite clearly: "This framework offers guidance; it is not legally binding. Each Arctic State pursues MPA development based on its own authorities, priorities and timelines."⁷⁰ The aim is that each State will implement common standards within its own domestic law – but the nature of the marine environment requires their actions to be coordinated at an international level: an ecosystem based approach. It is only focused on areas within national jurisdiction (ie within the 200 nautical mile EEZ) and identifies the areas most in need of designation⁷¹. It leaves the area beyond national jurisdiction to the IMO. Environmental protection is at the heart of this framework but it integrates essential human interests, recognising humans' place in the food web and the cultural and socio-economic benefits of MPAs.⁷² PAME is working together with CAFF on implementing the Framework in 3 stages: the first is to catalogue existing MPAs; the second is a gap analysis; and the third, depending on the results of the first two stages and agreement of the Working Group representatives, is to develop guidelines.

⁶⁷ Sebastian Knecht, 'New Observers Queuing Up: Why the Arctic Council Should Expand – and Expel' The Arctic Institute, 20 April 2015 <<http://www.thearcticinstitute.org/2015/04/042015-New-Observers-Queuing-up.html>> accessed 8 march 2016.

⁶⁸ Molenaar, *supra* note 51, 157; Timo Koivurova, 'Increasing Relevance of Treaties: The Case of the Arctic' *AJIL Unbound*, 6 May 2014 <<https://www.asil.org/blogs/increasing-relevance-treaties-case-arctic-agera-end-treaties>> accessed 8 March 2016.

⁶⁹ See Sébastien Duyck, 'What Role for the Arctic in the UN Paris Climate Conference (COP-21)?' 2015 *Arctic Yearbook*.

⁷⁰ Framework for a Pan-Arctic Network of Marine Protected Areas (Arctic Council PAME 2015).

⁷¹ *Ibid* 15.

⁷² *Ibid* 6-7.

The final decision whether or not to designate an MPA within its jurisdiction and how to do so remains entirely in the hands of each Arctic State; but PAME's work is *norm-shaping* by collating evidence of sensitive areas; establishing criteria on which to select the location of an MPA; and the standards of protection to be sought.

10. Problems with non-binding regulatory approaches

Non-binding approaches are certainly not the solution to every environmental challenge in the Arctic or elsewhere. Standards that lack legal foundations cannot be enforced. They are more vulnerable to the changing political winds at both international and domestic level. Cooperation is subject to goodwill and at a certain point, even the Arctic cannot withstand the pressure of crises emerging in other parts of the World. Even if 'soft-law' instruments have been important in establishing environmental goals, their implementation is another matter: States are not in fact implementing the provisions of the Stockholm and Rio Declarations in any considered or consistent manner.⁷³

Returning to Shelton:

*Such instruments may express trends or a stage in the formulation of treaty or custom, but law does not come with a sliding scale of bindingness, nor does desired law become law by stating its desirability, even repeatedly.*⁷⁴

Follow-up is also weak. 'Expert Groups' such as that under the Black Carbon Framework have no authority beyond collating the data reported to them by the States themselves. Working groups coordinate scientific research but do not determine policy. In any case, the published conclusions of the subsidiary bodies are still effectively subject to a veto by any of the Arctic States and in practice, objections from the permanent participants. Working groups and expert groups could 'name and shame' if so inclined but will probably not even do that.⁷⁵ In the rare case of international environmental litigation, no Court would entertain the sorts of frameworks and guidelines that they issue as creating binding obligations.⁷⁶

⁷³ Ong, *supra* note 16, 7-8.

⁷⁴ Shelton, *supra* note 12, 321.

⁷⁵ Nevertheless, this is still more than under the two Arctic treaties which have no follow-up mechanisms and have excluded resort to countermeasures or judicial settlement.

⁷⁶ Compare *Pulp Mills*, *supra* note 6, on non-binding nature of UNEP Guidelines on environmental impact assessment; and Ong, *supra* note, 16, 36; but see *Whaling in the Antarctic*, *supra* note 27, on the influence of non-binding resolutions of the International Whaling Commission.

The flexibility that makes non-binding approaches attractive to those who seek to enhance protection of the environment also make them attractive to ambivalent States. Standards can be easily revised downwards as well as upwards.

11. Conclusions

Dinah Shelton concludes that:

*Nonbinding norms and informal social norms can be effective and offer a flexible and efficient way to order responses to common problems. They are not law and they do not need to be in order to influence conduct in the desired manner.*⁷⁷

Arctic environmental cooperation is a good example of this. To understand the Arctic Council's role, it is essential to look beyond the traditional sources of public international law.

There is still a place for treaties and the SAR and MOPPR agreements mark a turning point from *talking about* cooperation to making a firm commitment actually to doing it. The treaties were also of symbolic importance, defining the Arctic as a geopolitical space and the Arctic States as its principal actors – even to the exclusion of the permanent participants. But they contain few substantive obligations. Litigation in international environmental disputes is rare in any case⁷⁸ but the fact that the two Arctic treaties preclude any resort to countermeasures or judicial settlement blurs the practical import of the distinction between legally binding and non-legally binding standards.

The reluctance of the Arctic States to negotiate any binding treaties that might give *rights* to non-Arctic States or indigenous peoples is understandable; but the result is that treaties are exclusive and for that reason are much less effective. An inclusive approach is easier through soft instruments. For this reason, frameworks for cooperation in the Arctic can often better protect the Arctic environment – and better protect human life. In the Arctic, these two cannot be so easily distinguished.

⁷⁷ Shelton, *supra* note 12, 322

⁷⁸ Pierre-Marie Dupuy, 'Formation of Customary International Law and General Principles' in *The Oxford Handbook*, *supra* note 10, 453.