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Note from the Director

Institutional and governance issues in tackling climate change and natural resources have become more complicated than before, when there existed less information and capacity to address them. In other words, the conventional system, which relies on sovereign states, has begun to face challenges and reveal its limitations, especially in addressing environmental problems while ensuring sustainable growth.

For example, there has been an increased understanding on the importance of cities in curbing GHG emissions, which seem to represent a large portion, possibly 70 percent, of the total GHG emissions of the world. Cities are not necessarily under the full control of their central governments, and they may have the capability for developing and implementing policy measures to control emissions, based on the low emission development scenario. In a way, they could serve a complementary role to the already existing ones that are governed by central governments. In this sense, the first article of this volume well discusses how a decentralized climate change architecture can contribute both to addressing climate change as well as to pursuing a low emission development.

Furthermore, a low carbon development path requires innovation. R&D, and deployment and market developments of new green technologies are all required to realize a low emission development. However, in a situation where conventional energy sources such as coal are still available at a cheaper price, introducing new green technologies to a society can be of a challenge. A study on the Carbon Capture and Storage technology in the U.K. demonstrates such complex issue.

On the other hand, when it comes to the issue of resources, competition for sovereign claims seem to be more apparent, as they are discussed more in the context of sovereign state's resource ownership. Due to the pressure of securing necessary resources combined with developments in new technologies, states have explored more possibilities in exploiting natural resources in those

areas where the exertion of state sovereignty used to be neither apparent nor important. In this sense, it is noteworthy that both cases on the Arctic region and the maritime dispute in Southeast Asia demonstrate a new governance architecture based on soft and cooperative principles that may be a more feasible solution instead of the conventional Westphalian system.

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A Changing Arctic: How Competing Sovereignty Claims Shape the Future of Governance in the Region

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Abstract

Climate change is changing the Arctic in many ways that have profound geopolitical implications for a region hailed for its enormous commercial and economic potential. This paper endeavors to explore the major drivers behind the recent political maneuverings among Arctic littoral states, particularly the US and Canada, and how their political play impact the future prospects of crafting an effective region-wide governance framework. By comparing their policies and strategies towards the Arctic, the results suggests that the chances of creating overarching treaty-based governance mechanisms are slim and that the region will be more likely governed by a web of instruments that are soft-law in nature.

Keywords: Arctic, climate change, governance-building

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1. Introduction

As global climate change runs its course, one region feels its brunt with greater intensity than the rest of the world – the Arctic. Since satellite observations began in 1979, recent data show that the sea ice extent is decreasing at an unprecedented rate.¹⁾ The thawing of the Arctic sea ice has opened up speculations on its economic and commercial significance. In a first-ever wide-ranging assessment of Arctic oil and gas resources in 2008, the United States Geological Survey (USGS) estimated that the region might be home to 20% of the world’s undiscovered but recoverable oil and natural gas resources.²⁾ The warming does not only provide Arctic littoral states access to these resources but also opens up the possibilities of potential new trans-Arctic shipping routes, particularly in the summer months, connecting the Atlantic and the Pacific Oceans; essentially reducing the costs for commercial shippers.³⁾ In the midst of these developments, Arctic states have demonstrated a renewed interest in the region and have reinforced their respective sovereign claims over their respective territories. Hence, this paper asks, how do these often contending sovereign claims influence the policy and legal future of the Arctic? In an effort to understand how these claims shape the governance structure of the region, this paper makes a comparison between the policies and/or strategies of the US and Canada and endeavor to flesh out important insights on how the region will develop.

This following discussion sets the context of the geopolitical interaction among the countries in the region. The US being a non-signatory to the UN Convention on the Law of the Sea (LOS Convention), provides an interesting case as it increasingly projects its presence and interest in the region. Canada on the other hand, presently

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- 1) Arctic Report Card: Update for 2012, http://www.arctic.noaa.gov/reportcard/sea_ice.html.
 - 2) U.S. Department of the Interior, U.S. Geological Survey, “Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle,” May 2008.
 - 3) By using computer models, Smith and Stephenson (2013) investigated how the region will change even under the most modest conditions and projected that open-water vessels (without icebreakers), in theory, will be capable of crossing the Northwest Passage and North Sea Route regularly in the summer by 2050. Laurence C. Smith and Scott R. Stephenson, “New Trans-Arctic shipping routes navigable by midcentury,” *Proceedings of the National Academy of Sciences of the United States of America*, (2013), p.13

the Chair of the Arctic Council has always been vocal regarding its Northern territory, invoking history to galvanize its claim on parts of the Arctic. Part III makes a comparison between their policies in order to provide a comprehensive understanding of the underlying motivations of their claims. As the Arctic increasingly garners the attention of the politicians from all corners of the world, it is not only important but also necessary to enhance the existing governance structure of the region in order to protect it from the dangers that come with exploration and development. Hence, the comparison is essential to offer insights on plausible models for governance or frameworks that could on the one hand diffuse potential sources of conflict and enhance avenues for broader cooperation.

2. Analytical frameworks

This paper uses a two-pronged approach in order to understand how the geopolitical maneuverings in the region influence the future of its governance structure. The first framework is used to provide a more nuanced discussion on the sovereignty claims between the two countries. The insights taken away from using the first framework is used by the second in order to quantify to what extent these claims impact the future of governance in the region.

2.1 Stephen Krasner's four meanings of sovereignty (1999)

Krasner's work on sovereignty provides a very useful analytical framework in order to further enrich our understanding of the concept. He argued that, in practice, the concept has four different meanings: Westphalian sovereignty, international legal sovereignty, domestic sovereignty and interdependence sovereignty⁴⁾.

Westphalian sovereignty is based on the principles of territoriality and the exclusion

4) For an in-depth discussion of the theoretical underpinnings of sovereignty and how it is translated in practice, please see Stephen Krasner, *Sovereignty: Organized Hypocrisy*, (1999).

of external actors from domestic authority structures. This dimension refers to the freedom states exercise in choosing institutions and policies they regard as optimal; rendering them to be juridically autonomous territorial entities. International legal sovereignty refers to establishing the status of a political entity in the international system. This primarily pertains to extending recognition to states, with territory and formal juridical autonomy, as legitimate actors in the international system. Furthermore, interdependence sovereignty refers to the ability of public authorities to regulate transborder movements of people, goods or ideas. This is what most observers refer to when they raise the issue of how globalization poses a threat to state sovereignty as it constrains its ability to control transborder flow. Lastly, domestic sovereignty mainly refers to the structure of domestic political authority and the level of effective control by those who are in power. Effective control refers to the ability of public authority to control developments within their own territory and involves activities such as collecting taxes, minimizing corruption, or controlling crime.

According to Krasner, inherent in the four usages of the term is the essential difference between authority and control. In practical terms, international legal and Westphalian sovereignty largely refer to “issues of authority: does the state have the right to exclude external actors, and is a state recognized as having the authority to engage in international agreements?” Interdependence sovereignty exclusively refers to transborder control whereas domestic sovereignty refers to both issues of authority and control by raising the question of what authority structures are recognized within a state, and how effective their level of control is⁵⁾

The utility of this framework in this research lies upon its potential to provide a more nuanced discussion of sovereignty in the context of a changing Arctic. It highlights not only the issues of territorial disputes but also sheds light on the other equally important dimensions, particularly that of transborder and internal control.

5) Ibid., p.10-25.

Table 1. Analytical Framework

	Dimensions of Sovereignty			
	Domestic	Interdependence	Westphalian	International legal
Country A				
Country B				

Note: Table 1 represents the analytical framework based on Krasner's four dimensions of sovereignty. This table is useful in understanding the underlying reasons behind sovereignty claims of the US and Canada in the Arctic region.

Source: Krasner, 1999, adapted Krasner' work on the concept of sovereignty by author

The analytical framework used in this paper, as represented above, shows the four dimensions of sovereignty as units of comparison to evaluate strategy papers or government reports published by the two countries examined. Moreover, the four dimensions also represent the costs (e.g. loss of transborder control through bilateral or multilateral arrangements) states incur in the search for effective means of governing the Arctic. These costs further substantiate the circumstances that lead states to choose the form of legalization governance mechanisms would take. The relationship between these costs and the state's behavior in deciding on governance structure in the region are better explained under the following section.

2.2 Kenneth W. Abbott and Duncan Snidal's Sovereignty Costs (2000)

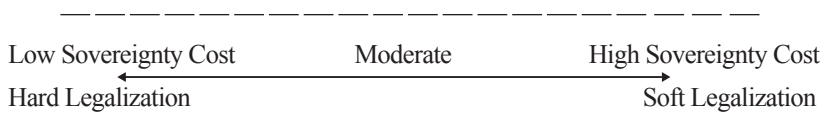
In *Hard and Soft Law in International Governance*, Abott and Snidal primarily explores the underlying factors that compel states to prefer one type of legalization over another. In practice, there are various degrees and forms of legalization along the hard/soft law continuum. On one hand, hard legalization, or commonly referred to as 'hard law,' refers to legally-binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations); delegate authority for interpreting and enforcing the law. At the other end of the spectrum is soft law which refers to international agreements or mechanisms that are weakened along one or more

dimensions of precision, obligation and delegation.⁶⁾

Their main contention is that the state's preference to a certain type of legalization is contingent to the costs involved⁷⁾. In their research they identified 'constraints on national autonomy and sovereignty' as one of the costs that influence state decisions in selecting specific forms of legalization (or what other writers refer to as legislation). They argue that when sovereignty costs are high, states are less likely to choose hard law-based international instruments or agreements, and are more likely to prefer softer forms of legalization. Sovereignty costs are at their highest when states accept external authority to regulate and monitor their behavior and domestic policies (e.g. UN Convention on the Law of the Sea). Sovereignty costs are low when states simply make international commitments that constrain their behavior in particular circumstances, such as voluntary agreements on environmental protection.

Moreover, they also argue that sovereignty costs vary in different issue-areas. In issues relating to national security, sovereignty costs are exceptionally high, whereas in some political economy issues (e.g. harmonization of food and transportation standards), sovereignty costs are low, particularly when state interests line up⁸⁾.

Figure 1. Hard-soft law continuum



Note: Figure 1 represents Abbott and Snidal's (2000) hypothesis establishing the relationship between sovereignty costs and state preference for legalization.

Source: Abbott and Snidal, 2000, adapted by author.

6) Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54 (2000), p.421-456.

7) This research does not necessarily assume Arctic states as unitary, rational actors, rather the determination of sovereignty costs is a result of competing interests and compromises that occur between different governmental players and non-governmental entities (e.g. Aboriginal peoples). This is particularly true for countries such as the US and Canada where various governmental organizations play a crucial role in deciding foreign policy.

8) Ibid.

The utility of this framework rests upon its potential to shed light on how limits to national sovereignty impact state behavior, particularly relating to issues of governance and cooperation. In the midst of the political developments in the Arctic region especially relating to maritime boundary issues, this framework is crucial in qualifying how outstanding (or future) competing territorial claims inform prospective regional governance mechanisms.

3. A changing Arctic

The Arctic region is caught in the middle of perhaps one of mankind's greatest battle – against climate change. Located in the northernmost part of the Earth, the region is a unique area and a crucial element in moderating the global climate.⁹⁾ The Arctic is commonly defined as “the land and sea areas north of the Arctic Circle.”¹⁰⁾ The region encompasses the Arctic Ocean and eight countries including the United States (Alaska), Canada, Russia, Norway, Denmark (by virtue of Greenland, a member country of the Kingdom of Denmark), Finland, Sweden, and Iceland. The region's diverse landscapes – from the sea ice to coastal wetlands, mountains and wide rivers – sustain abundant wildlife and have supported indigenous communities. The climate of the region is characterized by “persistent cold and relatively narrow temperature ranges.”¹¹⁾ However, the region's future now hangs in the balance as the thawing of the sea ice opens up the Arctic to activities, particularly to resource exploration and commercial shipping.

9) In a recently held conference organized by the National Geographic Channel in partnership with Shell, David Vaughn, PSPE Science Leader of the British Antarctic Survey, described the Polar Regions as “twin beating hearts,” and said that “it's difference in temperature between the polar and equatorial regions that drives the circulation on our planet and that's responsible for climate.” *The Arctic: the Science of Change*, 17 September 2013, held at the Royal Society, London. http://images.nationalgeographic.com/wpf/media-content/file/GEC2013__WhitePaper_Arctic-2-cb1383061772.pdf.

10) Ronald O'Rourke, *Changes in the Arctic: Background and Issues for Congress*, Congressional Research Service, August 8, 2013, p. 2.

11) CIA World Factbook <https://www.cia.gov/library/publications/the-world-factbook/geos/xq.html>

3.1. The United States' arctic strategy

“The United States has broad and fundamental national security interests in the Arctic region and is prepared to operate either independently or in conjunction with other states to safeguard these interests.”—National Security Presidential Directive 66 and Homeland Security Presidential Directive 25, January 9, 2009

The US is by virtue an Arctic nation by way of its Alaskan coastline. Historically, the Arctic was of great strategic importance to the United States' nuclear deterrent posture during the Cold War. As part of its strategy to contain the Soviet Union, the US set up bases in Alaska, Canada, Greenland and Iceland. In the 1980s, the domain's relevance to the US was further intensified with the Reagan administration's eagerness to confront the Soviet Union in the maritime domain. However, as the Cold War waned so has the US interest in the region. The decreasing tension in the area meant that the US and the others no longer saw the region as urgently important. In the post-Cold War era, the Arctic has not been at the top of the agenda for US policy makers and the American public.¹²⁾

In 1994, the Clinton administration felt the need to review the country's Arctic policy¹³⁾ to account for the changes in the region. The policy emphasized three core themes: ensuring that natural resource management and economic development are environmentally sustainable; enhancing scientific research; and meeting post-Cold War national security and defense needs. In achieving these broad general objectives, the US emphasized international cooperation under the auspices of the Arctic Environmental

12) Rob Huebert, *United States Arctic Policy: The Reluctant Arctic Power*, The School of Public Policy Briefing Papers Focus on the United States 2 (2009). Ingrid Lundestad, *US Security Policy and Regional Relations in a Warming Arctic*, *Swords and Ploughshares* 17 (2009). Heather Conley and Jamie Kraut, *US Strategic Interests in the Arctic: an Assessment of Current Challenges and New Opportunities for Cooperation*, A report of the CSIS Europe Program, April 2012.

13) “Fact Sheet: Arctic Policy” US Department of State Dispatch (December 26, 1994); available at http://findarticles.com/p/articles/mi_m1584/is_n52_v5/ai_16709524/?tag=content;coll.

Protection Strategy (AEPS). Moreover, the 2009 Arctic Region Policy¹⁴⁾ released in the last days of the Bush administration does not signal a different direction for the United States but provides a clearer picture of US' objectives in the region. The policy reflects growing awareness of how the effects of climate change and increased human activity in the region concerns its fundamental national interests. Thus, the policy lays out six objectives:

It is the policy of the United States to:

1. Meet national security and homeland security¹⁵⁾ needs relevant to the Arctic region;
2. Protect the Arctic environment and conserve its biological resources;
3. Ensure that natural resource management and economic development in the region are environmentally sustainable;
4. Strengthen institutions for cooperation among the eight Arctic nations (the United States, Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, and Sweden);
5. Involve the Arctic's indigenous communities in decisions that affect them; and
6. Enhance scientific monitoring and research into local, regional, and global environmental issues.¹⁶⁾

For the purpose of this paper, I pay particular attention to the aspects of the US Arctic policy related to sovereignty issues which include the policy's focus on the freedom of the seas and on the extended continental shelf and boundary issues. The Obama administration so far has not released any presidential directive that will supersede the existing policy, but has indicated that it will follow up on this policy.¹⁷⁾

The policy highlights the 'freedom of the seas' as a top national priority, where the

14) Arctic Region Policy (2009); National Security Presidential Directive/NSPD 66; Homeland Security Presidential Directive/HSPD 25 available at <http://www.fas.org/irp/offdocs/nspd/nspd-66.htm>.

15) The element of homeland security was added to the Arctic policy to take into account the changes after 9/11.

16) Arctic Region Policy (2009), p.2.

17) Lundestad (2009)

US reiterates that the contested Northwest Passage is an international waterway, and that the Northern Sea Route includes straits used for international navigation, thereby reinforcing the regime of transit passage and rights to overflight in the region. The US argues that any sign of accepting the Canadian (or Russian) claim over the said strategic straits would create legal precedent for other states such as Iran in the Strait of Hormuz, to stress greater control over straits that are now considered to be international under law.¹⁸⁾ Hence, in support of these interests, the policy directs relevant US departments and agencies to develop their capacity to preserve the global mobility of US military and civilian vessels and project sovereign presence in the region, as well as commits to the peaceful resolution of disputes over issues in the Arctic.¹⁹⁾

The latter pertains to the importance of delimiting the area of the Arctic seabed and subsoil in which the United States may exercise its sovereign rights over natural resources. The US, however, is not a party to the UNCLOS; thus, it could not submit a claim under Article 76. Their current Arctic policy instead establishes that the US will abide by the rules laid out under international law in the process of defining the outer limit of their continental shelf. For example, the recent Congressional Research Service (2012) report says:

“Over the years, however, it has submitted observations on submissions made by other states, requesting that those observations be made available online and to the commission. In addition, since 2001, the United States has gathered and analyzed data to determine the outer limits of its extended continental shelf.”²⁰⁾

In addition, the United States has an unresolved boundary dispute with Canada in the Beaufort Sea where it recognizes a boundary in this area based on equidistance, whereas Canada maintains that the boundary is an extension of the land boundary between Alaska and the Yukon.²¹⁾ The policy also urges Russia to ratify the 1990 US-Russia maritime boundary treaty to resolve the issue in the Bering Strait. Despite the current status of the boundary, Russia in practice abide to the terms agreed in the

18) Huebert (2009).

19) US Arctic Policy (2009), p.3.

20) For more details, refer to Congressional Research Service report, “Changes in the Arctic: Background and Issues for Congress,” April 2012, p.13.

21) Ian G. Brosnan, et al., Cooperation or Conflict in a Changing Arctic?, *Ocean Development & International Law* 42 (2011), p.173-210.

1990 maritime agreement and in fact, in a joint statement between Obama and Medvedev in 2011 both countries recognized the significance of the region and declared their intentions to deepen cooperation to better protect and manage the Bering Strait region.²²⁾

3.2. Canada's arctic strategy

“We are a northern country. The True North is our destiny - for our explorers, for our entrepreneurs, for our artists. To not embrace the promise of the True North, now at the dawn of its ascendancy, would be to turn our backs on what is to be Canadian.” – Prime Minister Stephen Harper, August 2008, Inuvik, Northwest Territories mentioned in Canada's Arctic Strategy, *Our North, Our Heritage*

The Canadian Arctic lies at the heart of the country's national identity. Many Canadians including indigenous peoples across the Yukon, Northwest Territories and northern border regions of mainland provinces have called the North their home. With the challenges and opportunities posed by the developments underway in the region, the Canadian government launched the Northern Strategy in 2009. The strategy lays out four important priorities: exercising sovereignty; promoting social and economic development; protecting environmental heritage; and improving and devolving northern governance.²³⁾ In order to meet these priorities, Canada emphasizes exercising sovereignty over the Far North as the number one Arctic foreign policy priority.²⁴⁾ To this end, various initiatives have been launched to enhance the country capacity in the

22) Joint Statement of the President of the United States of America and the President of the Russian Federation on Cooperation in the Bering Strait Region (2011), available at <http://iipdigital.usembassy.gov/st/english/texttrans/2011/05/20110526082231su0.7241262.html#axzz1xOjHm9rw>.

23) Canada's Northern Strategy (2009), p.2, available at <http://www.northernstrategy.gc.ca/cns/cns-eng.asp>.

24) Statement on Canada's Arctic Foreign Policy: Exercising Sovereignty and Promoting Canada's Northern Strategy Abroad (2010), available at http://www.international.gc.ca/polar-polaire/canada_arctic_foreign_policy-la_politique_etrangere_du_canada_pour_arctique.aspx?lang=eng&view=d.

region. For example, the Canada First Defense Policy²⁵⁾ gave the Canadian Forces the necessary augmentation in order to better monitor the country's waters as they gradually open up with the thawing of the Arctic ice.²⁶⁾

In particular, their policy outlines three important elements to assert and exercise their sovereignty in the region: 1) projecting and upholding sovereign presence; 2) enhancing stewardship of the region; and 3) demarcating Canadian domain and advancing their knowledge of the region.

On maintaining a presence in the Arctic, the policy lays out the essential capabilities that are necessary to enhance the country's ability to protect and patrol the land, sea and sky of their Arctic territory. For instance, on land, investments to enhance capabilities include establishing a new Canadian Forces Arctic Training Center in Resolute Bay as well as expanding the Canadian Ranger program (i.e. responsible for providing a 'boots-on-the-ground' Canadian presence in the North) by increasing the number of rangers in existing patrols by 460 over the next four years and the number of community patrols from 56 to 61.²⁷⁾ Other important demonstrations of Canadian sovereignty in the North is the yearly Operation Nunavut (Inuktitut for "land that is ours"), a major military exercise to project sovereignty and enhance capabilities to respond to safety and security challenges. In 2012, approximately 150 Canadian Forces personnel took part in the exercise.²⁸⁾

Secondly, Canada recognizes the potential for environmental incidents and criminal activity (such as illegal entry of people and goods) as the Arctic increasingly becomes more accessible. Hence, the second element of exercising sovereignty concerns itself with safeguarding the Canadian Arctic waters from such risks. As a result, the country

25) "While this [retreating ice cover] promises substantial economic benefits for Canada, it has also brought new challenges from other shores[...]the Government has committed to making sure that Canada has the tools it needs to deal with the full range of threats and challenges to Canada and Canadians." Canada First Defense Policy (2008), p.6, available at http://www.forces.gc.ca/site/pri/first-premier/June18_0910_CFDS_english_low-res.pdf.

26) Alec Crawford, Arthur Hanson and David Runnalls, "Arctic Sovereignty and Security in a Climate-changing World," International Institute for Sustainable Development (2008).

27) Standing Senate Committee on Fisheries and Oceans Report, "Controlling Canada's Arctic Waters: Role of the Canadian Coast Guard," (2009), p.24.

28) National Defense and the Canadian Forces, Operation Nunavut (2012), available at <http://www.jtfn.forces.gc.ca/ops-ops/bg-nunavut-eng.asp>.

amended the Arctic Waters Pollution Prevention Act²⁹⁾ to extend the jurisdiction of the Act from 100 to 200 nautical miles from their coastline, which is the full extent of the exclusive economic zone.³⁰⁾ Moreover, in 2008, the country announced that new regulations would be established under the Canada Shipping Act, 2001, requiring all vessels entering Canadian Arctic waters to report to NORDREG (Arctic Canada Traffic System). Both of these are instrumental in the country's desire to exert more control over the protection of the marine environment in the country's Arctic waters.

Finally, the policy also discusses Canada's interest in defining its domain in the Arctic. Canada, like the rest of the other coastal states, recognizes the importance of determining the full extent of their continental shelf under the auspices of UNCLOS. Currently, the country is engaged in the scientific and technical process necessary to delineate the outer limits of its continental shelf. Canada has not only invested significantly in scientific research and data collection but has also worked closely with neighboring Arctic states in order to come up with a sound submission to the UN Commission on the Limits of the Continental Shelf in December 2013.³¹⁾

In addition, Canada has made it clear in various government reports or strategy statements that it seeks to resolve boundary issues in the Arctic in accordance with international law. Disputes over maritime boundary exist between Canada and the US over the boundary in Beaufort Sea and between Canada and Denmark over a small part of the maritime boundary in the Lincoln Sea. The legal status of a significant waterway, the Northwest Passage (NWP; a possible shortcut linking the Atlantic and Pacific oceans), is also disputed between Canada and other Arctic nations particularly the US. Canada's claim over the NWP as part of its internal waters is mainly based on historic grounds and on the longstanding presence of Aboriginal peoples such as the Inuit in the region. Moreover, Canadian sovereign rights over its Arctic land mass is largely undisputed except for the challenge from Denmark over the Hans Island but is said to

29) This specific legislation resulted in the establishment of Article 234 of the 1982 UNCLOS that allows coastal states to have greater freedom to enact policies or legislations to protect the marine environment in their respective Arctic waters. See D.M. McRae, "Arctic Waters and Canadian Sovereignty," *International Journal* 38 (1983).

30) *Ibid.*

31) Statement on Canada's Arctic Foreign Policy (2010), p.7-8.

be on a diplomatic track since 2005.³²⁾

Despite all these disagreements, Canada declares that it is committed to work collaboratively with its Arctic neighbors in managing and resolving these disputes. More importantly, the Canadian government considers these disagreements to pose no threat to its national security or sovereignty.

32) Canadian Arctic Strategy (2009), p. 13.

4. Analysis and interpretation

4.1. Stephen Krasner's (1999) framework

Table 2. Summary of US and Canadian sovereignty claims in the Arctic³³⁾

	<i>Dimensions of Sovereignty</i>			
	Domestic Control (internal control)	Interdependence (transborder control)	Westphalian (autonomy and territoriality)	International Legal (recognition by other states)
the United States	...	Sovereign control over the territorial waters. Right to navigation and overflight in the region (contesting Canadian claim over NWP)	No official UNCLOS claim. An area in Beaufort Sea (dispute with Canada) Bering Sea (dispute with Russia)	...
Canada	...	The Northwest Passage as part of its internal waters.	Claim over the extended continental shelf; submission pending. Hans Island and an area in Lincoln Sea (dispute with Denmark) Beaufort Sea (dispute with the US)	...

33) In order to isolate how competing claims influence Arctic policies, this research paper pays particular attention to issues both countries disagree on (ie. the legal status of NWP and the unresolved maritime territory in the Beaufort Sea).

The comparison between Canadian and US Arctic policies as shown in the table above reveals that their competing sovereignty claims center primarily on two dimensions of sovereignty: interdependence sovereignty which refers to the ability of a state to control transborder flow and Westphalian sovereignty which relates to the issue of territorial integrity.

At the core of the US and Canadian emphasis on upholding their ability to regulate transborder flow, is their concern over their potential risks that increasing accessibility in the region might pose to their national security. The thawing of the Arctic ice highlighted the commercial and economic potential of the region that has drawn in a growing amount of public attention.

In the midst of these developments, both countries acknowledge the need to strengthen their ability to project their sovereign presence and bolster their ability to uphold their maritime borders. For the US, projecting sovereign presence through measures such as deploying sea and air systems are vital in order to intercept any illegal activities such as terrorism and criminal acts that could potentially compromise its national and homeland security interests in the Arctic. Canada on the other hand, has comparable efforts in the region in order to improve its capacity to patrol and protect its Arctic territory from organized crime and from trafficking of people and drugs³⁴⁾.

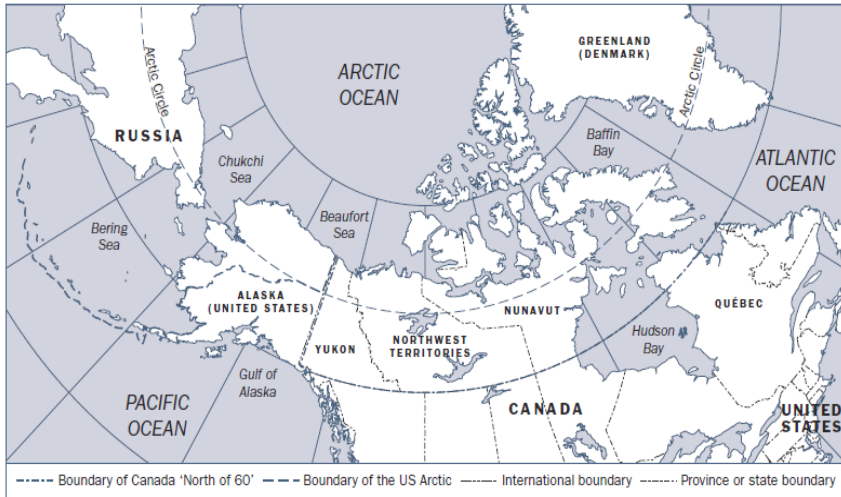
An important point of disagreement regarding this issue is the legal status of the Northwest Passage which due to the thawing of the Arctic ice is increasingly becoming an accessible sea route. The US regards the strategic waterway as an international strait thereby providing any ship the right of passage, whereas Canada claims the NWP to be part of its internal waters where “[Canada] controls all maritime navigation in its waters.”³⁵⁾ Ownership over the NWP would mean that the Canadian government is accorded the right to unilaterally pass laws and regulations concerning the strategic strait when they see fit.

The second disagreement relates to the contested wedged-shaped maritime territory extending from the Alaskan-Yukon border, which is projected to have substantial amounts of oil and natural gas reserves.

34) Standing Senate Committee on Fisheries and Oceans (2009), p.17

35) Canadian Government (note 13), p.7.

Figure 2. Map of Canadian and US Arctic territories



Source: Kristofer Bergh, *The Arctic policies of Canada and the United States: domestic motives and international context*, SIPRI Insights on Peace and Security July 2012.

In recent years, the Arctic region’s energy development and economic potential have been a common narrative in the discourse of Arctic governance. Historically, claims to sovereignty are premised on geographical considerations, that is, states exercise jurisdiction and authority within their defined portions of the earth’s surface. However, with growing demand for new sources of energy, the privilege and rights accorded to a state over the minerals and resources of its claimed bounded space underpin the coastal Arctic states’ desire to map and demarcate, with certainty, the extent of their continental shelves.³⁶⁾

36) Article 76 of UNCLOS establishes the rules that guide states in the process of demarcating the limits of their extended continental shelf. Except the United States, all four Arctic coastal states – Canada, Russia, Norway, and Denmark (of which Greenland is a territory) – ‘are in the process of preparing territorial claims in the Arctic, including claims for expanded Exclusive Economic Zones (EEZs), for submission to the Commission on the Limits of the Continental Shelf’ (Congressional Research Service Report 2012). For detailed discussions on the UNCLOS, please see Joyner 2005; Gerhardt, et al. 2010; Brosnan et al. 2010.

Table 3. Resource interests of the coastal Arctic states

		US	Canada	Norway	Russia	Denmark
Energy	Oil	X	X	X	X	X
	Gas	X	X	X	X	X
	Alternative Energy	X				X
Living	Fish	X	X	X	X	X
	Marine mammals					X
	Aquaculture			X		
	Bioprospecting			X		
Other	Minerals	X	X	X	X	X
	Tourism			X		X

Note: Table 2 summarizes the wide array of resource interests of the five Arctic coastal states based on a survey of their respective strategy papers.

Source: Brosnan, et al., 2011

In several occasions, both countries have declared their commitment to the peaceful and speedy resolution of the long-running spat over parts of the Beaufort Sea. Of late, Canada and the US have shown considerable interest in putting an end to the maritime dispute by undertaking a series of bi-national map seabed mapping mission. The partnership can be perceived as something that was born out of necessity as neither possesses two icebreakers capable for the task and a scientific picture of the seabed is essential to support both countries claim over their respective extended continental shelves.³⁷⁾

The UNCLOS would serve as a possible framework for the resolution of this territorial row; however some observers have expressed their concerns over how the US' failure to ratify the convention would affect the convention's effectiveness and its enforcement.³⁸⁾ Nevertheless, the US recognizes that the only way to attain international legal recognition for their continental shelf is through the LOS Convention. This is evident in their explicit pronouncements of the need for the US government to accede to the convention.³⁹⁾

Finally, it is important to note that the framework does not only provide a clearer

37) See Michael Byers, Peace Competition on Arctic Ice, The Toronto Star, August 2011 <http://www.thestar.com/opinion/editorialopinion/article/1044507--peaceful-competition-on-arctic-ice>; Jon R. Childs and Deborah R. Hutchinson, Joint U.S.-Canadian Icebreaker Surveys in the Arctic, Sound Waves, April 2009. <http://soundwaves.usgs.gov/2009/04/>.

38) : Kristofer Bergh, The Arctic policies of Canada and the United States: domestic motives and international context, SIPRI Insights on Peace and Security July 2012

39) Arctic Region Policy (2009), p.4.

understanding of competing sovereignty claims in the Arctic, particularly between the US and Canada, but it also quantifies the kind of costs involved in dealing with sovereignty issues. It is also significant to emphasize that the concept of sovereignty is not at all monolithic or absolute. The discussion above further substantiates the multidimensional nature of the concept as well as the idea that sovereignty in practice is actually ‘bargained’ in the process of finding efficient means for governance⁴⁰. In practical terms, suggestions to freeze sovereignty claims over important waterways and implement an initiative for joint management should not be seen as something that necessarily erodes state sovereignty. I would argue that it is more useful to interpret it as bargaining one dimension of a state’s sovereignty in order to augment another.

4.2. Sovereignty costs and its implications for Arctic governance

Over the past decades, the region has been subjected to various significant socioeconomic and political changes. Throughout the Cold War, the Arctic was a highly militarized region caught up in the bipolar tension between the Soviet Union and the US together with its NATO allies. The region was turned into their theater of operation where both sides deployed advanced weapons and stationed significant number of armed forces. Under such condition, Arctic-specific issues were primarily ignored⁴¹

It was not until the late 1980s, early 1990s when cooperative arrangements blossomed in the region largely because of drivers such as the waning of the Cold War. A huge leap towards this shift was marked by former Soviet Union’s General Secretary Mikhail Gorbachev in his speech in Murmansk in 1987, where he suggested to turn the Arctic into a “zone of peace”⁴². It is difficult to quantify the extent of the influence this speech to what transpired after, but it has changed the narrative of the region from being a Cold War theater of operation to a place for intergovernmental cooperation. What

40) Karen T. Litfin, *Sovereignty in World Ecopolitics*, *Mershon International Studies Review* 41 (1997), p.167-204

41) Annika Bergman Rosamond, *Perspectives on Security in the Arctic Area*, Danish Institute for International Studies (DIIS) Report (2011).

42) Shih-Ming Kao, et al., *Adoption of the Arctic Search and Rescue Agreement: A shift of the Arctic Regime Toward a Hard Law Basis?*, *Marine Policy* 36 (2011), p.832-838.

transpired afterward laid out the foundations of the current governance structures in the Arctic. In 1991, the eight Arctic states gathered and signed the non-binding Arctic Environmental Protection Strategy (AEPS), which established four working groups to address different issue areas. The AEPS gave birth to the Arctic Council in 1996 and since then the council has been the primary cooperative forum to address issues of sustainable development and environmental protection. The most striking feature of this institutional change was that the organizations representing “indigenous peoples” were given “permanent participants” status in order to “provide for the active participation and full consultation of the Arctic indigenous representatives with the Arctic Council.”⁴³⁾

Despite losing its character as a militarized region, the Arctic continues to be a crucial region; and in the midst of yet another paradigmatic shift, many have questioned how recent changes influence the nature of Arctic governance and if existing governance arrangements prove to be adequate to accommodate both the challenges and opportunities of a changing Arctic⁴⁴⁾.

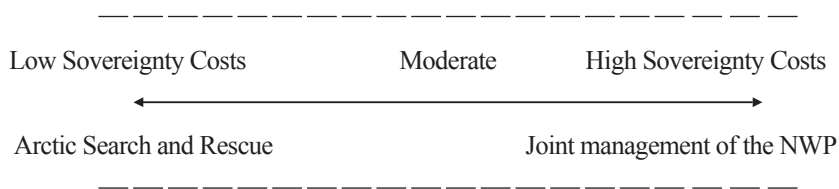
Having expounded on the fundamental drivers behind Canadian and US sovereignty claims, this section explores the relationship between the perceived constraints on national sovereignty and Arctic policies. To realize that objective, this paper uses Abbott and Snidal’s study – as illustrated in Figure 3 - that explore how ‘sovereignty costs’ influence the circumstances that lead states to choose specific forms of legalization. They argue that states would prefer softer forms of legalization over harder forms when sovereignty costs are high, and vice versa.⁴⁵⁾

43) See Article 4 of the Declaration on the Establishment of the Arctic Council (Ottawa Declaration 1996), available at <http://www.arctic-council.org/index.php/en/about/documents/category/5-declarations>, accessed on May 16, 2012).

44) Rosamond, (2011).

45) Figure 3 is adapted from Abbott and Snidal’s various forms of legalization based on three criteria (ie. how precise, how legally binding instruments/agreements are, and how much third-party delegation is appropriated). See Kenneth W. Abbott and Duncan Snidal, “Hard and Soft Law in International Governance,” *International Organization* 54 (2000), p.421-456.

Figure 3. Hard-soft law continuum



Note: As shown in Figure 3, international arrangements or policies could range from highly-legalized to looser, soft-law based instruments. The decision to prefer one form of legalization is highly contingent to the potential constraints international arrangements pose to a state's national sovereignty.

Source: Abbott and Snidal, 2000, adapted by author.

As shown in the figure above, I would argue that disagreement between the US and Canada over the legal status of the NWP and parts of the Beaufort Sea entail significant amount of sovereignty costs largely because both issues touch upon the principle of territorial integrity. The idea of having full authoritative jurisdiction by a state over its claimed bounded space is one of the defining characteristics of statehood.⁴⁶⁾ Essentially, any international arrangement that curtail the relations between a state and its citizens or territory guarantees high sovereignty costs.

I would argue that the US and Canada would likely resort to soft-law instruments in addressing their clash over the legal status of the Northwest Passage. A prime example would be a joint management scheme for the Northwest Passage similar to the Great Lakes Saint Lawrence Seaway System which is jointly operated by Canadian and American public corporations and administered by their respective governments⁴⁷⁾. Such an arrangement will not necessarily insert an external authority into their domestic structures, but rather it provides an opportunity for both countries to create a shipping regime that would best serve their strategic interests. This proposed scheme might be perceived by Canada as a violation of its Westphalian sovereignty as it loses its claim over waterway as part of its internal waters, but a careful examination reveals that the

46) Christopher C. Joyner, *International Law in the 21st Century Rules for Global Governance* (2005), p.223-251.

47) Brian Flemming, *Canada-U.S. Relations in the Arctic: A Neighborly Proposal*. Canadian Defence & Foreign Affairs Institute, (2008).

true issue is mainly about the country's interest in bolstering their capacity to patrol and maintain its borders. I believe that the political feasibility of this suggestion lies upon how the Canadians would interpret this apparent loss of Canadian Arctic [Westphalian] sovereignty and on the nature of the commitments stipulated in a proposed agreement.

At the other end of the spectrum are issue areas or international arrangements where sovereignty costs are relatively low and incidence of legalized agreement is especially high. According to Abbott and Snidal, sovereignty costs are relatively low when states make commitments that constrain their behavior only in particular instances and consequently, they agree to the costs in order to obtain better collective outcomes⁴⁸). For example, in 2011, the Arctic states have agreed on adopting a legally-binding regional instrument that coordinates their search and rescue coverage and response in the Arctic (i.e. The Arctic Search and Rescue Agreement). This instrument does not establish its own institutional arrangements, contains no provisions regarding decision-making procedures and maintains their respect to sovereignty.⁴⁹ In fact, the agreement explicitly states that, "the delimitation of search and rescue regions is not related to and shall not prejudice the delimitation of any boundary between States or their sovereignty, sovereign rights and jurisdiction."⁵⁰

Despite the potential to explain the underlying factors behind the decision to choose a specific form of legalization, the framework suffers a fundamental limitation. It offers little explanation about instances where state decision is not dictated by the level of sovereignty costs. For example, Abbott and Snidal recognize that in some cases, states are willing to accept high sovereignty costs in exchange of material or political resources⁵¹). This is especially true in cases when governments or international financial institutions extend loans to other governments with a specific set of conditions attached to them. These conditions do not only stipulate terms of repayment but demand major changes in policies, personnel and even structures of domestic institutions. This trend provides evidence for Krasner's concept of organized hypocrisy where states deliberately ignore sovereignty norms and rules in order to gain leverage over other

48) Abbott and Snidal, (2000).

49) Kao, et al. (2012).

50) Article 3, Par. 2 of the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic available at <http://www.ifrc.org/docs/idrl/N813EN.pdf>.

51) Abbott and Snidal, (2000).

actors or to acquire material resources.⁵²⁾

5. Conclusion

Despite the dire predictions of what the competing sovereign claims might bring, the US and Canadian experience in managing their interests in the region and handling any potential points of conflict suggest that the Arctic will not again become a theater of war. However, given the sensitivity and the significance of the region to littoral states, the chances of crafting an overarching legal instrument to manage the Arctic remain slim.

I recognize that the possibility of conflict among states has been the prevalent narrative in discussions about the future of the Arctic. However, by comparing the strategy papers of both the US and Canada, I argue that the areas of conflicting interests revealed in the comparison can also be read as areas of cooperation. In fact, the collaborative efforts of the US and Canada in the disputed NWP and Beaufort Sea have proven this point. Furthermore, the comparison provided a more detailed discussion on sovereignty claims in the Arctic by steering the discussion away from the common notions of sovereignty as territorial integrity and jurisdiction by emphasizing equally important dimensions such as transborder control.

Second, I argue that the existing and future governance frameworks in the Arctic will predominantly maintain their soft-law format. That being said, the popular idea among those who mainly think in terms of ‘rule of law’ of developing a legally binding treaty for the region, akin to the Antarctic Treaty System would not be politically feasible and not likely answer the growing demand for governance. The US, for example, has difficulty in ratifying legally binding agreements and has often refused to sign legally binding treaties if they contain provisions that are perceived to threaten their interests.⁵³⁾ Hence, hard-law based approaches will not bring about broader participation in the region. Instead, different arrangements prove to be more

52) Krasner, (1999).

53) Oran Young, “Whither the Arctic? Conflict or Cooperation in the Circumpolar North,” *Polar Record* 45 (2009), p.73-82.

effective in effectively managing the region; one, the UNCLOS should be maintained as the primary legal instrument to deal with maritime disputes; second, the Arctic Council's mandate should be expanded to serve as a regional body that would facilitate issue-specific regimes and arrangements, such as those catering to fisheries, tourism, or search and rescue, in order to avoid overlapping functions and a fragmented governance structure. Furthermore, sovereignty claims to resources and territory have been and will continue to be major factors shaping the current and future governance structures in the Arctic.

Given the dynamic nature of the region and the various fundamental changes underway, it is apparent that the existing governance structure in place is in need of a major overhaul. In the process of finding ways and alternative approaches to creating a more efficient governance system in the Arctic, one of the major challenges that actors would have to overcome is the issue of competing sovereignty claims. At the core of this challenge is the need to fully understand the underlying reasons that drive states' claims to sovereignty.

References

- Abbott, Kenneth W., and Duncan Snidal, "Hard and Soft Law in international Governance," *International Organization*, 54 (2000), p.421-456.
- Bartelson, Jens, *The Concept of Sovereignty Revisited*, *The European Journal of International Law* 17 (2006), p.463-474
- Baylis, John, et al., *The Globalization of World Politics, An Introduction to International relations*, 4th ed. (New York: Oxford University Press, 2008).
- Beeson, Mark, *Sovereignty Under Siege: Globalization and the State in Southeast Asia*, *Third World Quarterly* 24 (2003), p.357-374.
- Bennett, Isabella, and Julie Ginsberg, *ASEAN: The Association of Southeast Asian Nations*(2010), Council on Foreign Relations. <http://www.cfr.org/financial-crises/asean-association-southeast-asian-nations/p18616>.
- Berkman, Paul, Oran Young, *Governance and Environmental Change In Arctic Ocean*, *Science* 324 (2009), p.339-340.
- Brosnan, Ian G., et al., *Cooperation or Conflict in a Changing Arctic?*, *Ocean Development & International Law* 42 (2011), p.173-210.
- Bunyanunda, Mann, *Burma, ASEAN and Human Rights: The Decade of Constructive Engagement 1991-2001*, *Stanford Journal of East Asian Affairs* 2(2002), p.118-135.
- Canada's Northern Strategy: *Our North, Our Heritage, Our Future*, 2009.
- Conley, Heather, and Jamie Kraut, *US Strategic Interests in the Arctic: an Assessment of Current Challenges and New Opportunities for Cooperation*, A report of the CSIS Europe Program, April 2012 available at http://csis.org/files/publication/100426_Conley_USStrategicInterests_Web.pdf.
- Crawford, Alec, Arthur Hanson and David Runnalls, "Arctic Sovereignty and Security in a Climate-changing World," *International Institute for Sustainable Development* (2008), available at http://www.iisd.org/pdf/2008/arctic_sovereignty.pdf.
- Flemming, Brian, *Canada-U.S. Relations in the Arctic: A Neighbourly Proposal*, Canadian Defence & Foreign Affairs Institute, 2008.

- Fujiwara, Kiichi, *Northeast Asia and the Chance of A New Security Architecture* (2009), East Asia Forum. <http://www.eastasiaforum.org/2009/05/01/northeast-asia-and-the-chance-of-a-new-security-architecture/>
- Gerhardt, Hannes, et al., *Contested Sovereignty in a Changing Arctic*, *Annals of the Association of American Geographers* 100 (2010), p.992-1002.
- Hochstetler, Kathryin, et al., *Sovereignty in the Balance: Claims and Bargains at the UN Conferences on the Environment, Human Rights, and Women*, *International Studies Quarterly* 44 (2000), p.591-614.
- Hong, Nong, "The energy factor in the Arctic dispute: a pathway to conflict or cooperation?," *Journal of World Energy Law and Business* 5 (2012), p.13-26.
- Huebert, Rob, *United States Arctic Policy: The Reluctant Arctic Power*, *The School of Public Policy Briefing Papers Focus on the United States* 2 (May 2009), p.1-27.
- Hurrell, Andrew, *On Global Order: Power, Values and the Constitution of International Society* (2007), Chapter 2: *The Anarchical Society Revisited*.
- Ilulissat Declaration, 2008, available at http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf.
- Impacts of a Warming Arctic: synthesis of the Arctic Climate Impact Assessment report*, Arctic Council and the International Arctic Science Committee (2004). Free to download from: <http://amap.no/acia/>
- Joyner, Christopher C., *International Law in the 21st Century Rules for Global Governance*, (Lanham: Rowman & Littlefield, 2005), p.223-251.
- Kao, Shih-Ming, et al., *Adoption of the Arctic Search and Rescue Agreement: A shift of the Arctic Regime Toward a Hard Law Basis?*, *Marine Policy* 36 (2011), p.832-838.
- Krasner, Stephen, *Abiding Sovereignty*, *International Political Science Review*, 22 (2001), p.229-251.
- Krasner, Stephen, *Sovereignty*, *Foreign Policy*, 122 (2001), p.20-29.
- Krasner, Stephen, *Sovereignty: Organized Hypocrisy* (New Jersey: Princeton University Press, 1999).
- Lake, David A., *The New Sovereignty in International Relations*, *International Studies Review* (2003), Vol. 5, No. 3, p.303-323.

- Litfin, Karen T., Sovereignty in World Ecopolitics, *Mershon International Studies Review* 41 (1997), p.167-204.
- Lundestad, Ingrid, US Security Policy and Regional Relations in a Warming Arctic, *Swords and Ploughshares* 17 (2009), p.15-17.
- McRae, D.M., "Arctic Waters and Canadian Sovereignty," *International Journal* 38 (1983).
- O'Rourke, Ronald, *Changes in the Arctic: Background and Issues for Congress*, Congressional Research Service, August 8, 2013, p. 2.
- Raustiala, Kal, States, NGOs, and International Environmental Institutions, *International Studies Quarterly* 41 (1997), p.719-740.
- Standing Senate Committee on Fisheries and Oceans "Controlling Canada's Arctic Waters: Role of the Canadian Coast Guard" (2009), available at <http://www.parl.gc.ca/Content/SEN/Committee/402/fish/rep/rep07dec09-e.pdf>.
- Statement on Canada's Arctic Foreign Policy: Exercising Sovereignty and Promoting Canada's Northern Strategy Abroad (2010), available at http://www.international.gc.ca/polar-polaire/canada_arctic_foreign_policy-la_politique_etrangere_du_canada_pour_arctique.aspx?lang=eng&view=d.
- Stokke, Olav Schram, Environmental Security in the Arctic, *International Journal* 66 (2011), p.835-848.
- United Nations Convention on the Law of the Sea http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
- US Arctic Region Policy. National Security Presidential Directive and Homeland Security Presidential Directive, January 2009, available at <http://www.arctic-council.org/index.php/en/about/documents/category/12-arctic-strategies>.
- Wanandi, Jusuf, East Asian Regionalism and Global Governance, *East Asia at a Crossroads* (2008), p.19-37
- Young, Oran R., *Global Governance: Toward a Theory of Decentralized World Order* in Oran Young, *Global Governance: drawing insights from the environmental experience* (USA: Massachusetts Institute of Technology, 1997), p.273-301.
- Young, Oran R., "Whither the Arctic? Conflict or Cooperation in the Circumpolar North," *Polar Record* 45 (2009), p.73-82.