Arctic Sovereignty

Debate rages over whether 'soft-law' approach can cope with hard issues of sovereignty that lie ahead.

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The U.S. air force is preparing for the day this summer when Russian fighters fly into Alaska's air space just as their bombers have done several times since Cold War exercises in the Arctic resumed three years ago. But this time, the Americans won't be scrambling jets out of Elmendorf Air Base to intercept them, as they did in the past.

In what promises to be a milestone in the history of Russian-American relations, the two countries will be co-operating on defence exercises designed to address the possibility of terrorism in the Arctic.

Russia and the United States won't be the only unlikely allies looking out for phantom boats in the Arctic this summer. Over in Resolute in Canada's High Arctic, both the Danes and the Americans, which have been locked in boundary disputes with Canada, will be sending naval vessels into the Northwest Passage to work with the Canadian Navy on similar security-related exercises.

As unlikely as a terrorist attack in the Arctic seems now, it's clear that military thinkers see enough in future climate change, energy, security and environmental scenarios to warrant these kinds of partnerships.

What Arctic governments apparently don't see is the need for a treaty, or a legally binding instrument that would regulate oil and gas development, shipping and fisheries activities that also figure prominently in future scenarios.

In the past two years, the U.S., Russia, Denmark, Norway and Canada have all distanced themselves from embracing the concept. And so far, the Arctic Council, an intergovernmental forum created in 1996 to address a number of issues that indigenous people and the eight Arctic states face, has shown no appetite for such a "hard-law" approach for managing the circumpolar world.

Most everyone seems to be content with the so-called "soft-law" system of regional co-operation and management under existing regulations, such as the Law of the Sea Convention, the International Maritime Organization, and the United Nations Fish Stocks Agreement.

The reluctance comes, in part, from fears that legally binding instruments might compromise an Arctic country's sovereignty over the region. There is also a legitimate concern that negotiating such a complex treaty in this economically important and environmentally sensitive part of the world cannot realistically happen fast enough.

This reluctance, however, may soon change.

With numerous nations and oil companies preparing for the day when widespread oil exploration will be possible in the Arctic Ocean, BP's oil spill in the Gulf of Mexico has crystallized the fears of politicians, scientists, conservationists and indigenous people in the Far North who believe that sovereignty is meaningless if the environmental and cultural integrity of the Arctic is seriously compromised.

A similar-sized offshore spill would likely have even more profound consequences in the Arctic, not only because polar bears, beluga whales, narwhal and walrus would be especially vulnerable, locked in ice as they often are, but because cleanup efforts would be hamstrung for a good part of the year by powerful currents, sea ice and the lack of the well-developed spill-response infrastructure that exists along the Gulf of Mexico.

Even if there were an Arctic sea port, new naval patrol boats, Coast Guard icebreakers and more resources to deal with a disaster in the Arctic, as the Canadian government has promised but so far not delivered, it's questionable whether they would make much of a difference.

"There does not exist today technology that can recover oil from ice," Ron Bowden of Aqua-Guard Spill Response, a company based in North Vancouver, told Canadian MPs matter-of-factly earlier this month.

Given the risks that have been highlighted by the Gulf spill, several experts are now wondering whether the entire Arctic should be protected by a treaty or a framework of legally binding instruments. Not only would this ensure that strict regulations are in place right across the circumpolar Arctic, it would ensure that a

country such as Greenland, which recently dispatched two drilling ships into Davis Strait, would not imperil the sovereignty and environmental interests of its neighbours.

"Bear in mind that since this is a very complex governance system we are talking about, it will not be easy to come up with an overreaching legal regime for the whole region," says Timo Koivurova, research professor and director of the Northern Institute for Environmental and Minority Law at the Arctic Centre, University of Lapland in Rovaniemi, Finland.

"This is a region that is undergoing dramatic change. We know that economic activities are going to enter the region. There is no evidence to suggest that status quo, or the soft-law approach that we have now, will be effective in regulating these activities in the future. What is required is the establishment of regional institutions with legal powers to regulate."

As ambitious and all encompassing as a treaty such as this would be, it is not without precedent.

Fifty-three years ago, scientists from 67 nations joined forces in an attempt to co-ordinate worldwide measurements of the Earth, the oceans, the atmosphere and the sun just as polar scientists from dozens of countries recently did during the International Polar Year. Coming at a time when geopolitical tensions were on the rise, the accomplishments of 1957-58 were extraordinary. Not only did the studies result in the charting of ocean depths and currents and a systematic understanding of the Earth's magnetic field, they inspired the idea of an overarching treaty for governing the continent.

Since the signing of the Antarctic treaty in Washington D.C., 47 countries representing more than about 80 per cent of the world's population have added their names to this complex framework of agreements. In addition to setting aside Antarctica as a scientific preserve, the treaty bans military activities and prohibits resource exploitation on the continent. Many believe it is the main reason why Antarctica is the only continent that has not been the site of a war, a nuclear explosion or a man-made environmental disaster.

The Antarctic Treaty System is not without flaws, but few international agreements have worked quite as well. Since it went into force in 1961, more than 300 recommendations and several separate international agreements have been adopted. Even though a clause in the treaty allows governments to subject the treaty to review after 30 years, no one has done so to date.

The idea of drafting a treaty to deal with Arctic issues is nothing new.

University of Toronto political scientist Franklyn Griffiths came up with a proposal in 1979 that would have set up a demilitarized zone in the Arctic in which polar

nations would co-operate in areas of pollution control and scientific study. Lincoln Bloomfield, the former director of global issues for the National Security Council in the United States, expanded on that idea with a much broader proposal two years later. Russian president Mikhail Gorbachev gave the concept international credibility in 1987 when he called for a treaty on co-operation in the Arctic.

While the concept has evolved, it has never been able to cut through the complexity of the issues in the Arctic. Unlike Antarctica, which has no communities outside of a sprinkling of scientific research stations, there are people living north of the Arctic Circle. Nearly two million people live in Arctic Russia, 650,000 in Alaska, 130,000 in Canada and a little over one million in Greenland, Iceland, the Scandinavian countries and the Faeroe Islands. The cultural and economic interests of these people would have to be represented and accounted for in any future treaty.

Territorial boundaries in the Arctic have also not been resolved. Canada, Russia, the United States, Norway and Denmark (Greenland) are currently in a race to lay claim to a vast region around the North Pole under rules set down by the United Nations Convention on the Law of the Sea. At the same time, the Canadian government is still a long way from resolving those boundary disputes with Denmark and the United States, and establishing once and for all that the Northwest Passage is part of Canada's inland waters and not an international strait.

As sorely needed as an international agreement on managing the Arctic may be, there is no consensus on what an Arctic treaty would look like or whether a treaty or charter is the best way to manage and protect economic, environmental and cultural interests in the region.

As a result, the debate has broken down into the two camps, those -- including Timo Koivurova and Rob Huebert of the Centre for Military and Strategic Studies at the University of Calgary -- who prefer the "hard-law" approach of new treaties and protocols, and those like Oran Young of the Bren School of Environmental Science and Management at the University of California and Caitlyn Antrim, the executive director of the Rule of Law Committee for the Oceans, who advocate a "soft-law" approach of regional co-operation and management under existing regulations.

Young is perhaps the world's leading scholar on the subject of Arctic governance. While based at the Bren School in Santa Barbara, Calif., he is also director of the Institute of Arctic Studies and adjunct professor of political science at the University of Tromso in Norway. No one, except perhaps Franklyn Griffiths, has been on top of this subject longer than he has.

Young believes that fears expressed about future development in the Arctic are substantially exaggerated.

"While it is important to consider the possibility of worst-case scenarios unfolding in the Arctic, I think that this idea of a Wild West-like land rush is far-fetched," he said in a recent interview.

"The development of oil and gas reserves located beneath the continental shelves of the Arctic beyond the limits of the existing exclusive economic zones is highly unlikely during the foreseeable future. There are numerous technological and regulatory issues that would arise regarding such activities, and it is a safe bet that efforts to tap offshore oil and gas reserves located in the Arctic will focus on oil and gas fields lying well within the limits of exclusive economic zones during the foreseeable future."

Young believes that issues pertaining to territorial claims and future shipping practices can be dealt with adequately by the UN Convention on the Law of the Sea (which the Obama administration recently pledged to sign) and the International Maritime Organization, which was set up in 1948 to develop and maintain a comprehensive regulatory framework for shipping.

Nevertheless, Young believes there is good reason to reassess current governance arrangements for the Arctic in light of what is going on. The solution is not a treaty, he adds, but what he calls a "somewhat messy patchwork made up of disparate pieces" -- a soft-law approach that can be adapted to rapidly changing circumstances.

"Even if it were feasible, would we want to have a formally legally binding treaty for the Arctic?" Young wonders.

"There is a tendency to think of formal arrangements like the Antarctic Treaty system, but there are also advantages to having a soft-law approach in addressing Arctic issues. Unlike treaties that are rigid and take tremendous time and effort, informal agreements can be made more quickly. They can have more substance and they can provide for greater adaptability. I think it would be a mistake to set out a rigid set of rules now for a future that is very uncertain."

Caitlyn Antrim sees it much the same way, but is a little more blunt in dismissing the need for an Arctic treaty.

"It seems a waste of time to focus on negotiating a new binding framework convention on the Arctic when the framework is already in place through the Law of the Sea Convention, the International Maritime Organization, the UN Fish Stocks Agreement and other bodies of law and policy," she says.

"As part of the world ocean, a framework negotiation would have to involve every maritime state that might wish to use the ocean for fishing or transit -- not as

complicated as the Third UN Conference on the Law of the Sea, but a time sink that would postpone substantive work to manage the Arctic.

"Instead, why not jump in to develop a fishing regime for international waters and a consultative regime for the coastal state fisheries management agencies.

Refine and enhance the International Martine Organization guidelines for Arctic shipping and incorporate them into national regulations. Develop guidelines for offshore oil and gas technology and practice that has the support of the coastal states. Such actions are already doable under the framework of the Law of the Sea Convention, the International Marine Organization and the Arctic Council. Skip over the time-wasting effort to create a largely redundant framework and buckle down to create useful functional agreements, guidelines and partnerships instead."

Convincing as Young and Antrim have been in swaying Arctic governments to continue with the "soft-law approach," proponents of an Arctic treaty, or some framework for international governance are gaining momentum in the media, from public think-tanks, conservation groups and support from some indigenous leaders.

In 2007, Time magazine ran a cover story asking Who Owns The Arctic. The New York Times followed more recently with the The Battle for the Arctic. Not to be outdone, Russia's Nezavisimaya Gazeta recently published A Very Cold War for Energy Resources. Even the stodgy Financial Times got into the act with a story explaining why the Arctic needs new laws.

Scott G. Borgerson, a fellow at the Council of Foreign Relations, may have best articulated the need for an overarching agreement in the Arctic when he warned in the influential journal Foreign Affairs that the United States cannot afford "to stand idly by" and watch as events unfold in the polar world.

"The Arctic region is not currently governed by any comprehensive multilateral norms and regulations because it was never expected to become a navigable waterway or a site for large-scale commercial development," he wrote.

"Decisions made by Arctic powers in the coming years will therefore profoundly shape the future of the region for decades. Without U.S. leadership to help develop diplomatic solutions to competing claims and potential conflicts, the region could erupt in an armed mad dash for its resources."

The World Wildlife Fund and the Canadian International Council (CIC) are the latest organizations to weigh in on the debate. Both organizations recommend greater powers for the Arctic Council, whose headquarters will move from Norway to Canada in 2012.

While CIC suggests that Canada and the United States should set aside their differences over the Northwest Passage for the time being and jointly assume responsibility for protecting Arctic waters from ships that have no business being there, the World Wildlife Fund report that Timo Koivurova co-authored comes down solidly in support of an all-encompassing treaty or legally binding instrument to govern the region.

Both reports recognize that the polar world is changing and that the Arctic is no longer a wasteland of interest only to missionaries, Mounties, the Hudson's Bay Company and the indigenous people who live there.

"Once in a century, the world shifts," says Edward Greenspon, former editor of the Globe and Mail, who chaired the expert panel of relatively young foreign-policy thinkers.

"On the eve of the Canadian G8 and G20 summits (in Canada), at a time when United States influence is declining, we wanted to get us all to consider bold and innovative ways to seize the opportunities offered by this historic shift."

Even U.S. Secretary of State Hillary Clinton seems to have warmed to the idea of finding a better way of getting Arctic countries to cooperate on issues of mutual concern. While in Canada last April, she caused a stir when she chastised the Canadian government for not inviting the Inuit and other Arctic countries like Iceland and Finland to participate in discussions on the future of the Arctic.

"We need all hands on deck because there is a huge amount to do, and not much time to do it," she said. "The melting of sea ice, glaciers and permafrost will affect people and ecosystems around the world, and understanding how these changes fit together is a task that demands international co-operation."

Rob Huebert has been on top of the Arctic sovereignty and governance issue for some time and looks at it as both a security and sovereignty issue and an environmental imperative.

He believes the time has come for Canada to abandon its "crisis-driven approach" to managing the Arctic and wake up to the fact that developments are rapidly overtaking the country's ability to do something about the challenges that are coming. He's convinced the "soft-law" approach is insufficient to deal with the myriad issues that Canada and other Arctic states will inevitably face in the future.

"The soft-law approach, which relies largely on voluntary co-operation, is insufficient to deal with the challenges that climate change, energy development, fisheries, and increased shipping will bring to the Arctic," he says.

"Over the past 15 years, the Arctic nations have established an initial framework for co-operation in addressing issues of mutual concern in the Arctic. The existing co-operative framework, embodied in the Arctic Council, is characterized by this 'soft law' or essentially 'voluntary approach,' reflecting the lack of appetite of at least some of the Arctic governments for more strenuous treaty arrangements."

Issues are generally brought forward for consideration, first and foremost as technical issues, he notes. As a result, priority is placed on scientific research and problem identification, rather than co-operative remedial action. The existing arrangement that experts like Young and Antrim refer to, he adds, is also a "low-cost" approach, with no permanent secretariat and few real resources for co-operative action.

"Without a stronger framework for co-operative management, the living resources of the Arctic are likely to suffer, essential habitat will be degraded, and the traditional subsistence way of life of many Arctic communities will be endangered," he says.

Huebert points out that a number of global treaties have application to the Arctic, but only one -- the polar bear treaty signed in 1973 -- deals specifically with the region.

Divided as experts are on the issue, there is a recognition among most of them that the audit Oran Young talks about needs to be done to determine whether existing agreements and legal frameworks are sufficient to deal with environmental issues as climate change opens the Arctic to resource development and shipping.

Greenland's plan to explore for oil and gas in Baffin Bay and Davis Strait highlights why this is necessary.

Edinburgh-based Cairn Energy is one of 10 companies that have bought up leases in the region. The speed with which the company got its approvals has been cause for concern for both the Inuit in Canada and for conservationists.

Prior to the approval, no one gave any serious thought to how Canada would respond if a blowout resulted in an oil spill that headed toward Baffin Island. Several government departments were asked to consider the possibility, but no one came up with a plan before Environment Minister Jim Prentice hastily gave his approval to Greenland.

Some see this as a dangerous oversight. Under Greenland's rules, Cairn Energy only has to show that it can start drilling a relief well before the winter freeze-up, not that it can actually complete the process before the region is covered in ice.

To be fair, Canada has begun shipping oil kits to northern communities. And this summer, the U. S and Canadian coast guards will do a simulated oil spill cleanup during Operation Nanook in Resolute. But that's a far cry from what will be required if a real spill occurs in the future.

That future may be coming sooner, some experts believe. In addition to the drilling that will soon start in Davis Strait, the clock is already ticking in the Beaufort Sea where several companies, including BP and Exxon, have spent billions of dollars on oil and gas leases while lobbying both the Canadian and U.S. governments to ease drilling regulations. The clock may start ticking soon in the eastern Arctic of Canada where the Geological Survey is proposing to do seismic testing in Lancaster Sound, a biological hot spot that is supposed to become a marine protected area.

Inuit leaders such as John Amagoalik may be forgiven for wondering what's going on. At a recent meeting, Amagoalik, the director of lands and resources for the Qikiqtani Inuit Association, pointed out that $5 million has already been spent to turn part of Lancaster Sound into a marine protected area.

"Seismic exploration is one of the last things we want," Amagoalik said. "This is Lancaster Sound, and a national marine conservation area project was announced by the prime minister."

What Amagoalik and most Canadians don't realize is that the Canadian government doesn't necessarily see the two things as incompatible.

"Unlike the U.S., Greenland and Norway, Canada does not regulate the leasing process and permits drilling directly within marine protected areas and environmentally sensitive areas," Craig Stewart, Arctic director for World Wildlife Canada, told a parliamentary committee recently.

If "hard-law" advocates like Koivurova and Huebert eventually prevail, the treaty they envision would most likely be overseen by the Arctic Council. It really is the only means for promoting co-operation, co-ordination and interaction among Arctic government states while giving the Inuit and other Arctic indigenous organizations a voice, if not a vote, on these matters.

Getting the Arctic Council onside, however, may be a problem. Most members seem content with the status quo, and there is a genuine feeling among many of them that they're doing a good job.

If, however, an audit demonstrates that there are serious problems with the existing framework -- a distinct possibility from the point of view of Koivurova and Huebert -- pressure might increase to push for a treaty process.

Koivurova believes that one possible way of dealing with the time-consuming issues that worry Young and Antrim is to choose a framework treaty that formalizes the current membership of the Arctic Council, adds certain guiding principles related to environmental protection and challenges to sustainable development. This would shorten the time needed to achieve consensus in negotiations and in putting legal protocols in place when the time is ripe.

"The Arctic Council may not like it," he concedes. "But if it continues without a legal mandate, there is great danger of it becoming a facade under which unilateral and uncoordinated development-oriented parties of the Arctic states can proceed". What may be needed now is for one of the Arctic countries to champion the cause.

Rob Huebert is almost certain that it won't be Canada. Now that the Canadian government has ordered a cost-cutting program review that may delay even further the promises that Prime Minister Stephen Harper made about new Arctic patrol boats, a Canadian Coast Guard icebreaker and an Arctic port three years ago, Huebert doesn't see it straying far from the laissez-faire approach that has characterized Canada's Arctic strategy in the past.

"We see it over and over again in the history of the Arctic," he says. "Unless the issue becomes front page news, the government delays and delays doing something about all the things that need to be done about fisheries, oil and gas development, search and rescue and oil spill cleanups. Unless Canada comes up with a coherent and comprehensive strategy that begins to develop the policy tools now to ensure that Canada's interest are protected in the Canadian North, the Canadian Arctic will be lost by incremental defeats."

Huebert warns that neither Canada, the United States nor any other Arctic country can rely on the goodwill that is driving the "soft-law" approach now.

"Russia may be the big cuddly bear playing nice with the Americans in Alaska this summer," he says. "But what do you think will happen if Canada makes a legitimate claim to Arctic territory beyond the North Pole under the Law of the Sea Convention process? Do you think that the Russians are going to passively accept that claim if there is oil and gas to be found in the area?"

Daunting as the prospects are for a treaty in an environment where the main players seem so reluctant to think differently, Koivurova is still confident the idea is a viable one that will eventually see the light of day.

"The Arctic is not only a place for the imagination," he says." It's also a source of inspiration for legal innovation."

(30)