

Commonality and Arctic Governance: Global and Regional Perspectives

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Abstract: In the ongoing discussion regarding the governance model for the Arctic, references to commonality are a salient feature. Made both by Arctic and non-Arctic States, these references are meant to support demands for either a more exclusive, *i.e.* Arctic, or a more inclusive, *i.e.* international model of cooperation. The purpose of this paper is to outline the various forms of these references to commonality, investigate their intended meaning and assess their legal implications (or lack thereof) for both Arctic and non-Arctic States. This analysis allows for the drawing of some tentative conclusions regarding the underlying motivations that drive these references as well as the hidden politico-legal preferences at play. It also provides the opportunity to reflect on the broader issue of the legal parameters that need to be respected in devising a new governance model for the Arctic.

Key Words: Arctic governance; Approaches to cooperation; Arctic States; Non-Arctic States; Common heritage of mankind

I. Introduction

It is the tragic irony of the Arctic that the tremendous natural disaster of rising temperatures and melting ice is perceived by many as an opportunity. The new interest in the Arctic and the related question of the future of Arctic governance has drawn considerable attention from a wide range of actors, including the political and the academic world. Scholars from the disciplines of political science and law

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have shown particular interest. Much of the discussion focuses on the identity of the legitimate players in Arctic governance. Beyond doubt, Arctic States are entitled to play an active role and they have done so, both individually and collectively. For nearly twenty years, the Arctic Council has been an embryonic institutional structure of Arctic governance.¹ It was created in 1996 with the aim of furthering cooperation in the Arctic region. More specifically, it was created with the intention of bringing together the eight “Arctic States” – that is, the Arctic Council’s full members, namely Canada, the United States of America, the Russian Federation, Finland, Sweden, Norway, Iceland and Denmark – as well as representatives of indigenous peoples.² Non-Arctic States and non-State actors may, upon decision of the Arctic States, participate as observers, provided that they are considered to have relevant interests and expertise and display adequate deference to the Arctic States’ rights and interests.³ Although non-Arctic States covet the observer status, they clearly seek a more active role in Arctic governance. This paper scrutinizes three players in more detail. China, as an emerging power, is difficult to ignore, and while it has no official Arctic strategy, it certainly has an Arctic agenda.⁴ Germany, by contrast, has a well-articulated policy and repeatedly expressed interest in Arctic affairs,⁵ whereas the European Union has been developing its own policy for some

1 Declaration on the Establishment of the Arctic Council, 19 September 1996, at <http://www.arctic-council.org/index.php/en/document-archive/category/4-founding-documents>, 28 February 2015. [hereinafter “Ottawa Declaration”]

2 Ottawa Declaration, para. 2.

3 The State observers are: France, Germany, Netherlands, Poland, Spain, United Kingdom, China, Italy, Japan, Korea, Singapore and India (the last six States obtained observer status in 2013). The European Union is still not admitted, despite repeated applications, the dispute over the European import ban for Canadian fur seal products straining its relationship with Canada. For the conditions of admission, see Arctic Council Observer Manual for Subsidiary Bodies, MM08, 14 May 2013, at <http://www.arctic-council.org/index.php/en/document-archive/category/425-main-documents-from-kiruna-ministerial-meeting>, 28 February 2015.

4 Since 2010, China appears to have been moving beyond a mere “wait-and-see” approach. See Linda Jakobson, China Prepares for an Ice-Free Arctic, *SIPRI Insights on Peace and Security*, No. 2, 2010, pp. 2 & 9, at http://books.sipri.org/product_info?c_product_id=402, 28 February 2015; Gang Chen, China’s Emerging Arctic Strategy, *The Polar Journal*, No. 2, 2012, p. 369; and Liu Huirong, Dong Yue and Chen Yitong, China and the Arctic: The Path of Scientific Research, Law and Policy, *Ocean Yearbook*, Vol. 26, 2012, p. 366.

5 Federal Foreign Office, Germany’s Arctic Policy Guidelines: Assume Responsibility, Seize Opportunities, November 2013, p. 11. [hereinafter “Germany’s Arctic Policy Guidelines”]

time and is expected to issue a strategy in 2015.⁶

Arguments put forward in recent debates on Arctic governance by China, Germany, the EU and the Arctic States alike frequently revolve around the idea of commonality. Its precise meaning, however, varies significantly depending on the context and the perspective in which it is expressed. The idea of commonality is no stranger to public international law, but was embraced rather recently. According to the “Westphalian” conception of international law as a regulatory means to govern relations between sovereign States and this law’s resulting “relative” character,⁷ the international legal order is characterized by decentralized law-making and enforcement. Given the absence of a central authority that could identify and address the States’ common interests, interstate negotiation and cooperation have proven indispensable for such interests to emerge and to be addressed.⁸ Former ICJ justice Bruno Simma observes that the shift from bilateralism to “community interests” is particularly marked with legal developments pertaining to peace and security, relations between developed and developing States, environmental protection and human rights.⁹ Tracing the history of international environmental law, he recalls that it developed from a classic interstate law in its earliest manifestations – embodied by the no-harm rule stated in the *Trail Smelter Case*¹⁰ – towards a law based on community concerns thanks to rising awareness, starting in the 1970s, that resources are finite and that pollution problems are often of a global

6 For the latest steps, see European Commission and High Representative of the European Union, Developing a European Union Policy towards the Arctic Region: Progress Since 2008 and Next Steps (Joint Communication to the European Parliament and the Council), 26 June 2012, JOIN(2012) 19 final. [hereinafter “E.U. Joint Communication”]

7 Alfred Verdross, *Völkerrecht*, 5th edition, Vienna: Springer, 1965, p. 126.

8 Jutta Brunnée, Common Areas, Common Heritage, and Common Concern, in Daniel Bodansky, Jutta Brunnée and Ellen Hey eds., *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press, 2008, p. 551.

9 Bruno Simma, Community Interest in International Law, *Recueil des cours*, Vol. 250, 1997, pp. 235 *et seq.*

10 *Trail Smelter Case* (United States of America v. Canada), 16 April 1938 and 11 March 1941, *Reports of International Arbitral Awards*, Vol. III, 1905-1982. The Trail Smelter facility, established in British Columbia, Canada, emitted toxic fumes that affected forests and farmland across the border in the U.S. State of Washington. The Arbitral Tribunal that was established to settle the dispute set an international precedent by ruling that a State can be held internationally responsible for transnational damage caused by a facility operating on its territory. The no-harm rule (*sic utere tuo ut alienum non laedas*) according to which a State must not use its territory, or allow use thereof, in a way that causes harm beyond its borders, was applied for the first time in an international context.

nature.¹¹ These “community interests” notwithstanding, State sovereignty remains key in interstate relations. States’ incantations of commonality regarding the Arctic, in particular if they are expressly linked to environmental concerns, must be considered in the context of the tension between the States’ awareness that environmental problems require a collective response and their sustained individualist approach to law-making.

The discussion on future Arctic governance, in order to be fruitful, needs to take into account the fact that the Arctic is a special region for several reasons, all of which have an impact on the interests, rights and concerns at play. The Arctic is a remote, ecologically sensitive environment that is still dangerous for human beings and human activities. It is a region of wilderness afflicted by serious pollution problems. It is warming at twice the average global rate, and the significant impacts of this are felt far beyond the Arctic, causing sea levels to rise and meteorological patterns to change. Its huge resource deposits¹² are coveted by Arctic and non-Arctic States, not to mention powerful industries. Last but not least, it is a region where Arctic States exercise jurisdiction or even sovereignty. The Arctic’s warming and the resulting new threats and opportunities have entailed political destabilisation in the region.¹³ Defining a new balance of power and devising an appropriate governance model therefore becomes increasingly urgent. In this context, the challenge is to bring all of the relevant aspects into the frame and to develop a coherent and manageable balance.

The purpose of this paper is to take a closer look at the references to commonality, a salient feature of the current discussion on Arctic governance, and to outline their variety, investigate their intended meaning and assess their legal implications (or lack thereof) for both Arctic and non-Arctic States. This analysis allows for the

11 Bruno Simma, Community Interest in International Law, *Recueil des cours*, Vol. 250, 1997, pp. 238 *et seq.*

12 As for recoverable fossil fuels, the U.S. Geological Survey (U.S.G.S.) estimates that 90 billion barrels of oil, 1,699 trillion cubic feet of natural gas and 44 billion barrels of natural gas liquids remain to be found in the Arctic, approximately 84 percent of which are in offshore areas. See USGS, Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle, p. 4, at <http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>, 28 February 2015.

13 Brandon Luedtke and Adrian Howkins, Polarized Climates: The Distinctive Histories of Climate Change and Politics in the Arctic and Antarctica since the Beginning of the Cold War, *WIREs Climate Change*, Vol. 3, 2012, pp. 153 *et seq.*; Janet Martin-Nielsen, Reconceptualizing the North: A Historiographic Discussion, *Journal of Northern Studies*, No. 1, 2015, p. 61. (to be published)

drawing of some tentative conclusions regarding the underlying motivations that drive these references as well as the hidden politico-legal preferences at play. It also provides the opportunity to reflect on the broader issue of the legal parameters that need to be respected in devising a new governance model for the Arctic. The author will engage in this scrutiny by charting the variety of references to commonality and examining the underlying rhetorical strategies, before moving on to analyse their legal accuracy and their appropriateness in the discourse on Arctic cooperation.

II. The References to Commonality: A First Appraisal

References to commonality with respect to the Arctic take many different forms, including political statements, official policy papers and pleas made in academic environments by diplomats. These references call for an analysis that accounts for the fact that most of them do not seek exclusively – if at all – to be convincing from a legal perspective, while they all strive to be politically compelling. And yet, they are often made in contexts where politics and law are inextricably intertwined and where the legal framework is even expressly part of the rhetoric¹⁴ – albeit at times in a way that casts doubt on the extent to which this legal framework is correctly interpreted or understood. As the survey below will show, references to commonality fall into two broad categories that are underpinned by opposing perspectives. The analysis of the general meanings and connotations of the words used will help outline in more detail the messages that are conveyed by these references.

14 For example, the Ilulissat Declaration (*ILM*, Vol. 48, 2009, p. 382) adopted by the Arctic coastal States at the Arctic Ocean Conference held in Ilulissat (Greenland) on 27-29 May 2008, reaffirms the States' commitment to the existing legal framework for the Arctic, asserting that it provides satisfactory legal guidance for the governance of the various aspects of Arctic politics (see para. 3). The European Parliament, for its part, declared in 2008 that the legal framework should be reinforced by the adoption of an international treaty following the example of the 1959 Antarctic Treaty (see European Parliament resolution on Arctic Governance, 9 October 2008, EU doc. P6_TA(2008)0474, para. 15). This stance may be linked to a French initiative (see Joël Plouffe, *Thawing Ice and French Foreign Policy: A Preliminary Assessment*, *Polar Yearbook*, 2012, p. 66). Michel Rocard, French Ambassador for International Negotiations on Arctic and Antarctic and former Prime Minister, later recognized that an Arctic Treaty was not realistic given the Arctic States' reluctance to the idea (see Speech given by Michel Rocard, at <http://www.ambafrance-ru.org/Discours-de-Michel-Rocard>, 28 February 2015 (in French)).

A. Survey of the References to Commonality

The following review of expressions recently used or reported is admittedly impressionist, but should provide a good sense of the types of references to commonality that may be encountered in the debate on Arctic governance. The idea of commonality is expressed in several ways, and while the word “common” or one of its variations is often explicitly used, the meaning of commonality is sometimes conveyed by other terms, such as “sharing” or “mutuality”. Different formulations notwithstanding, references to commonality always correlate to either a perspective of regional Arctic commonality or a perspective of global commonality regarding Arctic issues. Unsurprisingly, the first and distinctly Arctic perspective of commonality is characteristic of the Arctic States’ view. The Ottawa Declaration, which establishes the Arctic Council as a facilitator of cooperation among Arctic States “on common Arctic issues”, is clearly based on regional commonality.¹⁵ Rothwell explains that the Arctic Council’s mandate is to promote “discussion of issues of common interest amongst the Arctic States”,¹⁶ clearly considering Arctic commonality as a driving force of the Arctic Council’s establishment. Canada, for its part, recalls in its Northern Strategy that the Arctic Council has a key role in developing a “common agenda” among Arctic States.¹⁷ The Northern Strategy furthermore underscores the need for Canada to work closely with its Arctic neighbours to achieve the Arctic States’ “common goals”¹⁸ and goes on stressing interests that Canada shares with its Arctic neighbours, such as climate change adaptation, oil and gas development, oceans management and scientific cooperation.¹⁹ In very much the same manner, the United States’ National Strategy for the Arctic Region insists on “common interests” that make Arctic States ideal partners of cooperation.²⁰ The Strategy highlights the United States’ successful cooperation with its Arctic partners within the Arctic Council, which, according to the Strategy,

15 Ottawa Declaration, Article 1(a).

16 Donald Rothwell, *The Arctic in International Affairs: Time for a New Regime?*, *Brown Journal of World Affairs*, Vol. 15, 2008, p. 247.

17 Government of Canada, *Canada’s Northern Strategy Our North, Our Heritage, Our Future*, 2009, p. 35, at <http://www.northernstrategy.gc.ca/cns/cns-eng.asp>, 28 February 2015.

18 Government of Canada, *Canada’s Northern Strategy Our North, Our Heritage, Our Future*, 2009, p. 33, at <http://www.northernstrategy.gc.ca/cns/cns-eng.asp>, 28 February 2015.

19 Government of Canada, *Canada’s Northern Strategy Our North, Our Heritage, Our Future*, 2009, p. 35, at <http://www.northernstrategy.gc.ca/cns/cns-eng.asp>, 28 February 2015.

20 The White House, *National Strategy for the Arctic Region*, 2013, p. 9, at <http://www.state.gov/e/oes/ocns/opa/arc/>, 28 February 2015.

is a facilitator of cooperation on “myriad issues of mutual interest”.²¹ It also notes that cooperation has led to “much progress on issues of common concern”, citing areas such as search and rescue as well as pollution prevention and response.²² Although it concedes that Arctic States share “common objectives in the Arctic region” with non-Arctic States and other non-Arctic stakeholders, the Strategy asserts that these objectives must be advanced “in a manner that protects Arctic States’ national interests and resources”.²³

Statements from the realm of non-Arctic States, in contrast, express the idea of global commonality, which carries a very different perspective of the Arctic. Indeed, the “Arctic” has been considered to be the “common heritage of mankind”,²⁴ one of the clearest and most striking expressions of global commonality. The former German Foreign Minister, Guido Westerwelle, used this qualification to describe the Arctic Ocean,²⁵ whereas Georg Witschel, legal adviser of the German Foreign Office, mentioned it with reference to the high seas of the Arctic Ocean, but nuanced his statement by adding that “[t]his [concept was] particularly relevant as far as sea-bed resources [were] concerned.”²⁶

Qu Tanzhou, director of the Chinese Arctic and Antarctic Administration (CAAA), is quoted as having mentioned the concept of “common heritage of mankind” in a blurred reference to the Arctic high seas and “resources in the seabed”.²⁷ Hu Zhengyue, China’s assistant Foreign Minister, stressed in an interview in 2009 that it is important for Arctic States to bear in mind the relationship between the

21 The White House, National Strategy for the Arctic Region, 2013, p. 9, at <http://www.state.gov/e/oes/ocns/opa/arc/>, 28 February 2015.

22 The White House, National Strategy for the Arctic Region, 2013, pp. 2 & 9, at <http://www.state.gov/e/oes/ocns/opa/arc/>, 28 February 2015.

23 The White House, National Strategy for the Arctic Region, 2013, p. 10, at <http://www.state.gov/e/oes/ocns/opa/arc/>, 28 February 2015.

24 Scott J. Shackelford, The Tragedy of the Common Heritage of Mankind, *Stanford Environmental Law Journal*, Vol. 28, 2009, p. 109. The author does not specifically analyse the Arctic case.

25 Guido Westerwelle, Climate Change, International Law and Arctic Research: Legal Aspects of Marine Research in the Arctic Ocean, in S. Wasum-Rainer, Ingo Winkelmann and Katrin Tiroch eds., *Arctic Science, International Law and Climate Change*, Berlin: Springer, 2012, p. 3.

26 Georg Witschel, New Chances and New Responsibilities in the Arctic Region: An Introduction, in Georg Witschel et al eds., *New Chances and New Responsibilities in the Arctic Region*, Berlin: Berliner Wissenschafts-Verlag, 2010, p. 34.

27 Wang Qian, Arctic Research Set to Be Beefed up, *China Daily Online*, 6 May 2010. The expression in Chinese is slightly different, but still blurred, at http://www.chinadaily.com.cn/zgrbjx/2010-05/06/content_9813894.htm, 28 February 2015. (in Chinese)

extended continental shelf and the international seabed areas, “which are a common heritage of humankind”.²⁸ In their English translation, his words were sometimes received as establishing a link between the coastal States’ continental shelves and the international area.²⁹ The Chinese Rear Admiral, Yin Zhuo, is quoted as using slightly different words in 2010 and saying that “[a]ccording to the UN [L]aw of the Sea, the North Pole and areas surrounding it do not belong to any country but are common wealth of the whole human population”.³⁰ Yin Zhuo is further quoted as saying, with respect to the Arctic Ocean, that “except for areas of territorial sea, all other parts are international waters” and thus a “common legacy of humankind”, while adding that the latter is a longstanding legal basis.³¹

In these statements, the idea of global commonality is expressed. In addition to the term “common”, the words “mankind” and “human” signal that the interest in the Arctic is not based on mere geographical proximity, but on the stakes that all humans have in it. In other words, it is conveyed that the Arctic is of interest not to States, but rather to all of humanity.

In the same vein, Georg Witschel also described the Arctic region as an “ecological heritage of mankind”.³² This appears to be a less blatant variation on the theme of “common heritage of mankind”. The words “humankind” or “human” arguably allude to the importance of this inheritance for all of humanity, irrespective of the political organisation of the world and of the Arctic’s remoteness. By stressing the ecological dimension, he succeeds in making the invocation of humanity appear even more natural. Transboundary and even global commonality emerge clearly from this emphasis on humanity over statehood.

The idea of commonality is less obvious, but still perceptible in references

28 The original interview, at http://qkzz.net/article/3a3781f6-f289-463e-857b-4e53fffa498d_2.htm, 28 February 2015. (in Chinese)

29 See, to this effect, David C. Wright, *The Dragon Eyes the Top of the World: Arctic Policy Debate and Discussion in China*, Newport: Naval War College, China Maritime Studies Institute, 2011, p. 29. For an opposing viewpoint, see John K.T. Chao, China’s Emerging Role in the Arctic, in Henry N. Scheiber and Jin-Hyun Paik eds., *Regions, Institutions, and Law of the Sea: Studies in Ocean Governance*, Leiden: Martinus Nijhoff Publishers, p. 482.

30 See citation by Sanna Kopra, China’s Arctic Interests, *Arctic Yearbook*, 2013, p. 110. For the original version, at <http://www.chinanews.com/gn/news/2010/03-05/2154039.shtml>, 28 February 2015. (in Chinese)

31 See interview published by China Radio International, at <http://gb.cri.cn/42071/2013/05/15/5892s4116633.htm>, 28 February 2015. (in Chinese)

32 Georg Witschel, New Chances and New Responsibilities in the Arctic Region: An Introduction, in Georg Witschel *et al* eds., *New Chances and New Responsibilities in the Arctic Region*, Berlin: Berliner Wissenschafts-Verlag, 2010, p. 34.

that do not use the words “common(ality)” or “human(kind)”. Indeed, Huang Xing, the Chinese Ambassador to Finland, reportedly said that the healthy development of the Arctic “is a matter which not only concerns the surrounding countries of the [A]rctic but also concerns other members of the international community.”³³ A spokesman of the Foreign Ministry, Hong Lei, is quoted as having declared that “Arctic-related issues are not only regional matters, but also cross-regional matters involving climate change and navigation”.³⁴ The European High Representative for Foreign Affairs and Security Policy noted that the Arctic States and the EU have “a shared interest” in sustainably developing the Arctic’s economy in sectors such as mining, shipping, fishing, sealing and tourism.³⁵ Much in the same way, Germany’s Arctic Policy Guidelines stress the need for “Arctic resources [to be] used in a sustainable way, in the interest of the Arctic countries and of the international community”.³⁶

Before engaging in a legal analysis of these different references to commonality, it seems worthwhile to investigate their possible general meanings and connotations with the aim of assessing their rhetorical and political objectives.

B. Rhetorical Assessment: General Meanings and Connotations of Commonality

Political discourse relies mostly on ordinary language, as it is meant to be understood by specialists and laymen alike. It appears therefore useful to examine the ordinary meaning of the words used. According to the *Oxford English Dictionary*, the word “common” has several meanings, *i.e.* to be “of general, public, or

33 Interview: China Vows to Play Peaceful Role in Arctic Region Development: Chinese Ambassador, *People’s Daily Online*, 19 May 2013, at <http://english.people.com.cn/90883/8249442.html>, 28 February 2015. The Chinese version of the article mentions the achievement of a healthy development of the Arctic region, but does not cite the quoted sentence, at http://news.xinhuanet.com/world/2013-05/19/c_115822967.htm, 28 February 2015. (in Chinese)

34 Sanna Kopra, China’s Arctic Interests, *Arctic Yearbook*, 2013, p. 110. For the original, at http://www.fmprc.gov.cn/mfa_chn/fyrbt_602243/t1006933.shtml, 28 February 2015. (in Chinese)

35 E.U. Joint Communication, p. 9.

36 Germany’s Arctic Policy Guidelines, p. 11.

non-private nature”,³⁷ of “belonging equally to more than one [...]”³⁸ or even of “belonging to all mankind alike [...]”,³⁹ but also of “belonging to more than one as a result or sign of co-operation, joint action, or agreement”,⁴⁰ besides being “of general application, general”.⁴¹ The noun “commonality” means notably the “state or quality of being in common with, or shared by, others” and “a shared feature”.⁴²

In other words, the term connotes, on the one hand, the idea of collectiveness and, in legal terms, of collective entitlement. This means that every member of a group that arises out of a given commonality has a legitimate interest in taking part in the shaping of the group’s destiny. In some cases, the legitimate interest might even grow into a legal right to participate. On the other hand, commonality conveys the idea of sharing. This aspect, which is the counterpart to the collective interests or rights encapsulated by the concept of commonality, has itself two facets. It encompasses the joint – and not exclusive – benefiting of the common good, but also the joint bearing of related burdens.⁴³

The connotation of benefiting as well as that of burden-sharing both resonate in the debate on Arctic governance. Non-Arctic States clearly voice their interest

37 *Oxford English Dictionary* [online], Oxford: Oxford University Press, 2014, “common”, I.

38 *Oxford English Dictionary* [online], Oxford: Oxford University Press, 2014, “common”, I.1.a.

39 *Oxford English Dictionary* [online], Oxford: Oxford University Press, 2014, “common”, I.1.b.

40 *Oxford English Dictionary* [online], Oxford: Oxford University Press, 2014, “common”, I.2.

41 *Oxford English Dictionary* [online], Oxford: Oxford University Press, 2014, “common”, I.5.

42 *Oxford English Dictionary* [online], Oxford: Oxford University Press, 2014, “commonality”, 6.

43 Also see, in this respect, the principle of common but differentiated responsibilities (Rio Declaration, Principle 7, UNCED, The Rio Declaration on Environment and Development, 14 June 1992, UN Doc. A/CONF.151/26, 1992, Vol. I, at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>, 28 February 2015), which structures notably the regimes on climate change and ozone depletion. According to this principle, States bear a common responsibility for the global environment, from which they all benefit, but due to their various degrees of contribution to environmental problems and unequal financial and technological means to address them, the burdens they shoulder through protective measures are differentiated.

in the Arctic's natural resources.⁴⁴ Some of the Arctic's significant deposits of natural resources have been exploited for many years, at least on shore, and the 2008 U.S.G.S. report, which estimates that one fifth of the Earth's undiscovered and recoverable resource deposits of oil and gas are located in the Arctic, further fuelled the non-Arctic States' interest.⁴⁵ At the same time, non-Arctic States, in particular members of the European Union, have also expressed concern as to the preservation of the fragile Arctic environment and to the necessity of limiting the risk of pollution and other environmental destruction that increases significantly with growing commercial and industrial activities, such as navigation and resource exploitation.⁴⁶

Furthermore, the idea of commonality has strong appeal because it implies some natural relatedness to the issue(s) at stake. However, as the distinction between an Arctic and a global perspective of commonality reveals, the notion of relatedness is, in fact, very malleable. When used in a global perspective, commonality suggests inclusiveness, converging interests and coinciding concerns. Not surprisingly, this is the sense given to commonality by non-Arctic States. The inclusiveness of this approach allows these States to present their interest in having a say as if it were a natural right. In other words, the Arctic's development being a global concern, its governance cannot be left to the States of the region alone. By mentioning the physical changes in the Arctic due to global warming in the same breath as changes due to human activity, including resource exploitation

44 E.U. Joint Communication, p. 9, portrays the E.U. as “a major consumer, importer and technology provider of energy and raw materials” that seeks “to build stable and long-term partnerships with suppliers such as Canada, Norway, the Russian Federation, the US and other relevant partners”. China, although certainly not indifferent to the promise of Arctic resources, has adopted a more cautious approach by focusing on scientific research and basic participation in Arctic politics, particularly with respect to climate change negotiations, as explained in Liu Huirong, Dong Yue and Chen Yitong, China and the Arctic: The Path of Scientific Research, Law and Policy, *Ocean Yearbook*, Vol. 26, 2012, p. 377.

45 USGS, Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle, p. 4, at <http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>, 28 February 2015.

46 Environmental preservation is the first point that was addressed in the latest E.U. Joint Communication, p. 6. It is explicitly linked to the issue of resource exploitation in the following point (E.U. Joint Communication, p. 8). In Germany's Arctic Policy Guidelines, both aspects, *i.e.* the economic promises of Arctic resources and environmental concerns, are linked together in the Preamble's first and second paragraph (Germany's Arctic Policy Guidelines, p. 1).

and shipping,⁴⁷ non-Arctic States link the issue of global warming to issues that, from a legal viewpoint, are not international issues to the same degree or even international issues at all.⁴⁸ Associating global warming, which undeniably requires global action, with various aspects of Arctic governance – an issue in which non-Arctic States have interests but not always corresponding rights and powers – arguably intends to tie Arctic governance to global action.

The Arctic States' approach, which draws upon commonality's connotations of exclusiveness, is in stark contrast to this reasoning. Instead of a general, all-encompassing commonality, they advocate a specific, functional commonality. This type of commonality is selective in the sense that affiliation to the community depends on a set of conditions. Members of the Arctic Council cooperate on the basis of this kind of agreed commonality. Upon the (implicit) criterion that they are "Arctic States" because they all have territories that stretch north of the Arctic Circle, they decided to act collectively considering that they share problems and interests.⁴⁹

The difficulty with such selective commonality – as experienced by the Arctic States – is to identify a politically and legally convincing specificity. While the Arctic Council's members, or "Arctic Eight", face similar problems and share several interests, their Arctic nature does not bestow upon them the same kind of functional commonality shared by the "Arctic Five", *i.e.* Canada, the United States, the Russian Federation, Norway and Denmark. The latter group's commonality is rooted in law, as the Arctic Five didn't hesitate to underscore in Ilulissat in 2008. Indeed, as a group invested with particular powers and rights by the law of the sea, they reaffirmed their commitment to the existing – and in their view satisfactory –

47 See, for example, Germany's Arctic Policy Guidelines, p. 4, and E.U. Joint Communication, most visible in the executive summary p. 2.

48 Climate change is a clearly international issue, addressed by a quasi-universal legal regime (United Nations Framework Convention on Climate Change, 9 May 1992, *UNTS*, Vol. 1771, p. 107 [hereinafter "UNFCCC"] and Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, *UNTS*, Vol. 2303, p. 162). Navigation is also a mostly international activity, but it is subject to a complex and often contentious allocation of rights and duties of the various States involved. The provision on polar navigation is reflective of the complexity of the legal regimes on navigation, see United Nations Convention on the Law of the Sea, 10 December 1982, *UNTS*, Vol. 1833, p. 3 [hereinafter "LOS Convention"], Article 234. Resource exploitation is under the exclusive jurisdiction of coastal States (LOS Convention, Parts V and VI), except for activities taking place in international areas, such as high seas fishing and deep-seabed mining (LOS Convention, Parts VII and XI).

49 See Ottawa Declaration.

legal framework.⁵⁰ Unsurprisingly, the remaining three Arctic States disapproved of the conference, expressing concerns as to the consequences of a potential political division within the Arctic community.⁵¹ Since that time, the Arctic Council's members have achieved a balance between the coastal States' and the non-coastal States' interests, all while asserting their primacy over non-Arctic States in Arctic affairs. The Vision for the Arctic, adopted at the 2013 Arctic Council's ministerial meeting held in Kiruna, Sweden, contains indeed both the commitment to the law of the sea – including the implicit acknowledgment of the coastal States' prerogatives – and the reaffirmation that full membership in the Arctic Council and decision-making remains exclusively with the Arctic States.⁵² Regardless of whether the Arctic States consider themselves to be a group of five or eight, they nevertheless set themselves apart as a distinctive group that has interests and concerns that are specific to them and that warrant their predominant bearing on the region's governance. Incidentally, they arguably mean to thwart sweeping claims of cooperation coming from non-Arctic States.

III. References to Commonality: A Legal Analysis

There is little doubt that Arctic States are entitled to participate in Arctic decision-making. However, the opinion prevailing among non-Arctic States to the effect that international cooperation on the Arctic would be the better approach deserves some scrutiny. As the discourse on “global Arctic commonality” is often explicitly based on the understanding that interstate relations regarding Arctic

50 See Ilulissat Declaration.

51 For an analysis of the political fallout at the Ilulissat meeting, see Klaus Dodds, The Ilulissat Declaration (2008): The Arctic States, “Law of the Sea,” and Arctic Ocean, *SAIS Review of International Affairs*, Vol. 33, No. 2, 2013, p. 45. The Russian wish that the “[f]ive Arctic Littoral States [...] show leadership in the Arctic Council” supports the conclusion that the fear of division was not baseless. See U.S. Secretary of State, Secretary Clinton's May 7, 2009 Meeting with Russian Foreign Minister Lavrov, cable to the U.S. Embassy in Moscow, 14 May 2009 cited by Torbjørn Pedersen, Debates over the Role of the Arctic Council, *Ocean Development & International Law*, Vol. 43, No. 2, 2012, p. 152. When Canada convened a similar meeting of the “Arctic Five” in March 2010, then U.S. Secretary of State Hillary Clinton left early, criticising the fact that the indigenous people's representatives and the Arctic non-coastal States had not been invited to the meeting. Interestingly, the Arctic Council was significantly strengthened in the years following the 2010 meeting, see Torbjørn Pedersen, Debates over the Role of the Arctic Council, *Ocean Development & International Law*, Vol. 43, No. 2, 2012, pp. 152 *et seq.*

52 Vision for the Arctic, 15 May 2013, Doc. MM08, pp. 2 & 3.

matters should take place within the existing legal framework, it is worthwhile to ask what precisely could make the Arctic a global issue from a legal perspective. While references to the “common heritage of mankind” hint at a remarkably bold characterisation, others, intentionally or otherwise, draw upon the power of these words. References to a mere “interest” or “concern” of the international community, although less impressive at first sight, may eventually turn out to be more convincing.

A. “Common Heritage of Mankind” and Similar References

From a legal perspective, references to the “common heritage of (hu)mankind” are particularly striking given the far-reaching consequences that arise out of the legal concept’s application. Yet, it is questionable whether the concept is always referred to properly in the Arctic debate. Arvid Pardo made it part of his 1967 proposal of new regulations for a better management of the oceans.⁵³ At the time, calls for better (economic) chances for newly independent States were multiplying, before they culminated in the 1974 claim of a new international economic order (NIEO).⁵⁴ In this context, Pardo, the Maltese Ambassador at the United Nations, urged States to declare the seabed and the ocean floor to be the common heritage of mankind. The objective was to ensure that the benefits derived from exploitation of these resources are equitably shared by all States, regardless of their capacity to undertake such exploitation,⁵⁵ and to prevent a “first come, first served” system.⁵⁶ By considering the resources not only “common”, but also a “heritage”, Pardo imbedded their management in a rationale of equity and in a long-term perspective: regardless of which State had the capacity to exploit the resources of the ocean

53 For Arvid Pardo’s speech, see First Committee, 1515th meeting, 1 November 1967, United Nations General Assembly, 22nd session, UN Doc A/C.1/PV.1515.

54 In the 1960s and 1970s, agenda-making in the U.N. General Assembly shifted due to, and in favor of, the growing number of newly independent and often economically fragile States. The U.N.G.A. became the most important sounding board for ideas of reform and the mouthpiece for corresponding demands. See the Charter of Economic Rights and Duties of States, 12 December 1974, UN Doc A/Res/3281(XXIX), *U.N.Y.B.*, Vol. 28, 1974, pp. 402 *et seq.* Although legally non-binding and lacking support of most developed States, the Charter lent significant political and symbolic weight to the developing States’ claims.

55 For a study, see Michael W. Lodge, The Common Heritage of Mankind, *International Journal of Marine and Coastal Law*, Vol. 27, No. 4, 2012, p. 733.

56 Bruno Simma, Community Interest in International Law, *Recueil des cours*, Vol. 250, 1997, p. 240.

bed, it was all of humanity that should benefit from their wealth and, in one way or another, pass it on to the next generation.⁵⁷

Pardo's speech sparked off negotiations that eventually led to the conclusion of the 1982 LOS Convention. The deep ocean floor – or “Area” – and its resources were indeed declared as common heritage of mankind.⁵⁸ However, the legal regime, which set forth the conditions of exploitation and the redistribution of benefits, was not met with much sympathy from industrialized States. Indeed, considerable modifications were required before these States gave their consent and the treaty entered into force, a process which took several years.⁵⁹ These modifications notwithstanding, the Areas' status as a “common heritage of mankind” entails that “no State [may] claim or exercise sovereignty or sovereign rights over any part of [it] or its resources, nor [...] appropriate any part thereof.”⁶⁰ In other words, the Area belongs to humanity as a whole. It is an international space and while its resources may be exploited under the supervision of an international management scheme embodied by the International Seabed Authority, the proceeds are subject to some measure of international redistribution.

The concept's appeal for non-Arctic States is obvious: it is a legal concept according to which all States are required to respect the international nature of the concerned space and resources and are also entitled to participate in their

57 See Brown Weiss' seminal work on intergenerational equity: Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, New York: Transnational Publishers, 1989.

58 Article 136 of the LOS Convention is a provision of Part XI on the Area.

59 The modifications were laid down in the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 28 July 1994, *UNTS*, Vol. 1836, p. 3. States' general reluctance to internationalize spaces or resources and to establish international management schemes for them has prevented the concept of common heritage of mankind from spreading into other treaties, the only exception being the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (27 January 1967, *UNTS*, Vol. 610, p. 205). Attempts to incorporate the concept in the Convention on Biological Diversity (5 June 1992, *UNTS*, Vol. 1760, p. 79 [hereinafter “CBD”]) and the Treaty on Plant Genetic Resources for Food and Agriculture (3 November 2001, *UNTS*, Vol. 2400, p. 303) failed. As for the Antarctic region, although it is sometimes referred to as a “world heritage of mankind” (see Speech given by Michel Rocard, at <http://www.ambafrance-ru.org/Discours-de-Michel-Rocard>, 28 February 2015. (in French)), the Antarctic Treaty system lacks a characteristic feature of the concept, *i.e.* the redistribution of benefits, as it completely suspends exploitation of natural resources. See Jutta Brunnée, Common Areas, Common Heritage, and Common Concern, in Daniel Bodansky, Jutta Brunnée and Ellen Hey eds., *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press, 2008, pp. 561 *et seq.*

60 LOS Convention, Article 137, para. 1.

management and wealth. However, the concept's territorial scope is limited to the Area, that is, "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".⁶¹ The concept therefore only applies to areas beyond the continental shelves' outer limits.⁶² Coastal States' extensive claims on the Arctic continental shelves suggest that there will be only limited pockets of the Area left in the Arctic Ocean.⁶³ Moreover, as these pockets are located in the middle of the ocean, are likely to remain under permanent ice for some time, and are arguably not the richest parts of the Arctic Ocean's floor, they are currently of little economic interest.

The indiscriminate way in which the common heritage of mankind is referred to in debates on Arctic governance makes the statements that invoke the concept questionable. Considering "the Arctic Ocean" a common heritage of mankind⁶⁴ conflates the different maritime zones and pays no heed to the sophisticated distinctions that exist in the law of the sea. It is no less legally inaccurate to regard "the high seas of the Arctic Ocean" as a common heritage of mankind.⁶⁵ The high seas, although also not subject to sovereignty,⁶⁶ are governed by a legal regime that rests upon the principle of freedom, including freedom of navigation and freedom of fishing.⁶⁷ None of the characteristics of the Area's legal regime – that is, international management and international benefit sharing – applies to the high seas. Hence, they are not a common heritage of mankind.

Statements that mention the Arctic's Area, continental shelves and high seas in

61 See definition in the LOS Convention, Article 1(1).

62 LOS Convention, Articles 76 and 77.

63 Some claims are approved by the Commission on the Limits of the Continental Shelf, others remain to be processed or even to be submitted. For details, at http://www.un.org/Depts/los/clcs_new/commission_submissions.htm, 28 February 2015. See also Lars Kullerud et al, *The Arctic Ocean and UNCLOS Article 76: Are There Any Commons?*, in Paul Arthur Berkman and Alexander N. Vylegzhanin eds., *Environmental Security in the Arctic Ocean*, Dordrecht: Springer-Verlag, 2013, p. 185. For a map showing the (potential) extent of the Arctic continental shelves and the remaining international pockets, see International Boundaries Research Unit (IBRU), *Maritime Jurisdiction and Boundaries in the Arctic Region*, at <https://www.dur.ac.uk/ibru/resources/arctic/>, 28 February 2015.

64 Guido Westerwelle, *Climate Change, International Law and Arctic Research: Legal Aspects of Marine Research in the Arctic Ocean*, in S. Wasum-Rainer, Ingo Winkelmann and Katrin Tiroch eds., *Arctic Science, International Law and Climate Change*, Berlin: Springer, 2012, p. 3 and accompanying text.

65 Georg Witschel, *New Chances and New Responsibilities in the Arctic Region: An Introduction*, in Georg Witschel et al eds., *New Chances and New Responsibilities in the Arctic Region*, Berlin: Berliner Wissenschafts-Verlag, 2010, p. 34 and accompanying text.

66 LOS Convention, Article 89.

67 For the freedom of the high seas and its forms, see LOS Convention, Article 87.

the same breath as the common heritage of mankind carry the risk of confusion.⁶⁸ Deliberately or not, by omitting to distinguish thoroughly between the different maritime zones, they may create the impression that the whole Arctic, or at least the whole maritime Arctic, is considered a common heritage of mankind.

With respect to statements made by Chinese officials, the risk of misunderstandings seems to be compounded by the difficulty of translating them into English. Yin Zhuo, for example, while articulating the view that all parts of the Arctic Ocean except the territorial sea are international waters and, as such, are part of the “common legacy of humankind”, does not use the exact expression of the LOS Convention, but nevertheless expressly refers to the legal concept.⁶⁹ It should be noted, however, that Chinese legal scholars have interpreted Chinese statements as intending only to call on Arctic coastal States to consider the consequences of their claims on extended continental shelves for the remaining international seabed, rather than implying that the Arctic as a whole is indeed a “common heritage of mankind”.⁷⁰ While this interpretation is difficult to reconcile with several statements’ wordings, it seems to be in line with “the Chinese persistent principle of respect for sovereignty and the international affairs of other [S]tates.”⁷¹ Yet, as Jakobson cautions, there is a risk that repeated misuse of certain legal concepts in political discourse may lead to the perception that they reflect the prevailing legal reality.⁷²

Legally questionable conflation can result from imprecise knowledge of the law, but can also be used as a rhetorical strategy. In either case, some of the connotations of collectiveness regarding management and benefits of areas qualifying as common heritage of mankind might be taken to apply to other international maritime zones – *i.e.* the high seas – and even to maritime zones under coastal State

68 Examples are the sources cited *supra* in notes 27, 28, 29.

69 See interview published by China Radio International, at <http://gb.cri.cn/42071/2013/05/15/5892s4116633.htm>, 28 February 2015 (in Chinese) and accompanying text.

70 Liu Huirong, Dong Yue and Chen Yitong, China and the Arctic: The Path of Scientific Research, Law and Policy, *Ocean Yearbook*, Vol. 26, 2012, p. 375 and, more clearly, p. 378.

71 Liu Huirong, Dong Yue and Chen Yitong, China and the Arctic: The Path of Scientific Research, Law and Policy, *Ocean Yearbook*, Vol. 26, 2012, p. 375 and, more clearly, p. 378. The author offers an explanation for references to the “common heritage of mankind” by noting that they are made by “Chinese radical scholars, particularly the non-legal background scholars”, see p. 376.

72 Linda Jakobson, China Prepares for an Ice-Free Arctic, *SIPRI Insights on Peace and Security*, No. 2, 2010, p. 13, at http://books.sipri.org/product_info?c_product_id=402, 28 February 2015.

jurisdiction – *i.e.* the continental shelves and the exclusive economic zone.

The expressions “ecological heritage of mankind”⁷³ and “common legacy of humankind”⁷⁴ do not give cause for criticism from a strictly legal point of view. By using slightly different wordings, they avoid legal inaccuracy. The first phrase in particular seems to move intentionally away from the legal term. It has therefore no legal value, but might do the political trick by drawing upon the legal connotations associated with the expression “common heritage of mankind”. It subtly depicts the Arctic as an international space, which is inherited by and is of ecological value to humankind – that is, to all humans, present and future. Its lexical proximity to the legal concept insinuates that all Arctic resources are international and call for international management and sharing.

B. From “Interests” or “Concerns” of the “International Community” to “Common Concerns”?

A very different rhetoric strategy seems to give rise to statements that merely imply commonality and do not refer to a legal concept, that is, when Arctic issues are considered of “concern”⁷⁵ to or “a shared interest”⁷⁶ of the “international community” and when there is a call to use Arctic resources “in the interest of the Arctic countries and of the international community”.⁷⁷ These statements appear to convey less ambitious objectives, as the words “interest” and “concern” are generally not associated with legal rights, entitlements or duties. They nevertheless express the wish to be heard and involved in processes of Arctic governance.

While cooperation appears to be the most efficient way to address environmental problems that are not confined to one State, Simma rightly observes that the “recognition of community interests is one thing, their impact on the real world

73 Georg Witschel, *New Chances and New Responsibilities in the Arctic Region: An Introduction*, in Georg Witschel et al eds., *New Chances and New Responsibilities in the Arctic Region*, Berlin: Berliner Wissenschafts-Verlag, 2010, p. 34 and accompanying text.

74 See interview published by China Radio International, at <http://gb.cri.cn/42071/2013/05/15/5892s4116633.htm>, 28 February 2015 (in Chinese) and accompanying text.

75 Interview: China Vows to Play Peaceful Role in Arctic Region Development: Chinese Ambassador, *People's Daily Online*, 19 May 2013, at <http://english.people.com.cn/90883/8249442.html>, 28 February 2015 and accompanying text.

76 E.U. Joint Communication, p. 9 and accompanying text.

77 Germany's Arctic Policy Guidelines, p. 11 and accompanying text.

quite another".⁷⁸ The international legal order may have evolved to a system of cooperation,⁷⁹ but there has been no shift in paradigm and sovereignty remains pivotal.⁸⁰ Cooperation among States is limited to topics that fall under the given States' jurisdiction and cannot take place without their consent. Within their jurisdiction, States are free to decide, according to their sovereign will, whether or not they accept to take on commitments. Exceptions to this general rule, *i.e.* limitations to sovereignty that are not based on consent, traditionally hardly extend beyond customary norms applying to new States and peremptory *jus cogens* norms.

In the face of massive and serious environmental problems that require collective action, the obvious question to ask – and which has been asked by scholars⁸¹ – is whether there are limitations to States' sovereignty either as a consequence of their (individual) consent or even without their (individual) consent. In a systematic assessment of a wide range of international instruments, both political and legal, Michael Bothe looks for evidence of limitations to sovereignty for the sake of environmental protection.⁸² He notes that the antagonism between upholding the principle of sovereignty and acknowledging the need for limitations on sovereignty pervades the entire field of international environmental law.⁸³ Not surprisingly, however, he eventually concludes that the principle of sovereignty systematically prevails despite the States' concerns for the environment and the emergence of a general duty to cooperate for the benefit of the global environ-

78 Bruno Simma, Community Interest in International Law, *Recueil des cours*, Vol. 250, 1997, p. 247.

79 Wolfgang G. Friedmann, *The Changing Structure of International Law*, New York: Columbia University Press, 1964.

80 Sovereign equality is the first principle mentioned in the Charter of the United Nations, which reflects its extraordinary importance (Charter of the United Nations, 26 June 1945, U.N.C.I.O. XV, 366, Article 2(1)).

81 See, for example, Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, 3rd ed., Oxford: Oxford University Press, 2009, p. 115.

82 Michael Bothe, Whose Environment? Concepts of Commonality in International Environmental Law, in Gert Winter ed., *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law*, Cambridge: Cambridge University Press, 2006, p. 543.

83 Michael Bothe, Whose Environment? Concepts of Commonality in International Environmental Law, in Gert Winter ed., *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law*, Cambridge: Cambridge University Press, 2006, p. 545.

ment.⁸⁴ Indeed, this duty hardly puts any far-reaching constraints on States' sovereignty. As a mere obligation of best efforts, it does not force States to accept any solutions against their will. Therefore, it is in keeping with the principles of sovereignty and consent. Consequently, the Arctic States insist upon their sovereignty and jurisdiction in the maritime Arctic whenever they are called upon to adopt a more cooperative approach.

The duty of cooperation furthermore provides little operational guidance. It does not impose any particular form of cooperation, leaving it up to States to choose from a range of *modi operandi*. States are also left on their own to determine their cooperating partners. Consensus has to emerge on a case-by-case basis among interested States. It appears from the current debate between Arctic and non-Arctic States that the political wrangle over the legitimate and legally relevant participants in Arctic governance is in full swing. Non-Arctic States assert that their participation in Arctic cooperation is as warranted as it is useful and legitimate, which, considering the powerful economic and geopolitical interests at stake, borders at times on hypocrisy. They stress the valuable input they may provide, *i.e.* scientific knowledge and expertise⁸⁵ or support for law-making,⁸⁶ and emphasize the Arctic (coastal) States' obligations, particularly regarding navigation and scientific research.⁸⁷ Most importantly, however, they do not tire of invoking the need to combat climate change and of emphasizing the fragility of Arctic ecosystems, the environmental problems affecting the region and the effects they

84 Michael Bothe, Whose environment? Concepts of commonality in international environmental law, in Gert Winter ed., *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law*, Cambridge: Cambridge University Press, 2006, p. 545.

85 E.U. Joint Communication, pp. 6 *et seq.* and pp. 15 *et seq.* Luedtke and Howkins state, with respect to the Arctic, that “[t]he ambition to claim political authority through the production of scientific knowledge endures.” See Brandon Luedtke and Adrian Howkins, Polarized Climates: The Distinctive Histories of Climate Change and Politics in the Arctic and Antarctica since the Beginning of the Cold War, *WIREs Climate Change*, Vol. 3, 2012, p. 146.

86 Germany's Arctic Policy Guidelines, p. 7.

87 Germany's Arctic Policy Guidelines, pp. 8 & 9. According to Gao, the impact of Arctic changes on the Chinese territory explains the increased Chinese interest in Arctic research, see Gao Zhiguo, Legal Issues of MSR in the Arctic: A Chinese Perspective, in S. Wasum-Rainer, Ingo Winkelmann and Katrin Tiroch eds., *Arctic Science, International Law and Climate Change*, Berlin: Springer, 2012, p. 143.

cause beyond.⁸⁸

In this context, Liu *et al.* contend that the concept of “common concern of humankind” offers a basis for China’s participation in Arctic affairs.⁸⁹ Although the concept is of uncertain legal status and scope and is not referred to explicitly in the political discourse,⁹⁰ it deserves some scrutiny. It might help reframe approaches to global environmental problems, to which traditional legal devices, rooted in a trans-boundary rationale, fail to provide satisfactory solutions. The concept may be traced back to the 1946 Whaling Convention’s slightly different “common interest”,⁹¹ but it gained its current shape through the Rio instruments. The Rio Declaration’s call for environmental cooperation “in a spirit of global partnership”⁹² reflects its essence, while the Rio treaties, which declare loss of biodiversity and climate change “common concerns of humankind”, give it concrete meaning.⁹³ Brunnée observes that the concept captures environmental concerns that are common to States, regardless of whether they originate within or beyond national jurisdiction, as all States benefit from protective actions.⁹⁴ She also notes that unlike the concept

88 Germany’s Arctic Policy Guidelines, pp. 4 *et seq.* and E.U. Joint Communication, pp. 6 *et seq.* See also Liu Huirong, Dong Yue and Chen Yitong, China and the Arctic: The Path of Scientific Research, Law and Policy, *Ocean Yearbook*, Vol. 26, 2012, p. 374.

89 Liu Huirong, Dong Yue and Chen Yitong, China and the Arctic: The Path of Scientific Research, Law and Policy, *Ocean Yearbook*, Vol. 26, 2012, p. 378.

90 References to “common concerns” in the National Strategy for the Arctic Region seem unrelated to the concept.

91 International Convention for the Regulation of Whaling, 2 December 1946, *UNTS*, Vol. 161, p. 74, Preamble. See Alexandre Kiss and Dinah Shelton, *International Environmental Law*, 3rd ed., Ardsley: Transnational Publishers, 2004, p. 32.

92 Jutta Brunnée, Common Areas, Common Heritage, and Common Concern, in Daniel Bodansky, Jutta Brunnée and Ellen Hey eds., *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press, 2008, p. 564 with respect to Principle 7 of the Rio Declaration.

93 UNFCCC, preambles’ first recital and CBD, preamble’s third recital. According to Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, 3rd ed., Oxford: Oxford University Press, 2009, p. 129, note 144, references to “common heritage” were dropped to avoid inconvenient legal implications.

94 Jutta Brunnée, Common Areas, Common Heritage, and Common Concern, in Daniel Bodansky, Jutta Brunnée and Ellen Hey eds., *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press, 2008, pp. 564 *et seq.* See also Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, 3rd ed., Oxford: Oxford University Press, 2009, p. 128 *et seq.*

of global commons,⁹⁵ it focuses on specific environmental processes or protective actions rather than on the resources or areas themselves, which may help avoid problems arising from the legal regimes applying to these areas or resources.⁹⁶ Besides the climate and biodiversity regimes, which have contributed a great deal to shaping the concept, other treaties also address issues of common concern,⁹⁷ notably the LOS Convention.⁹⁸ Although common concerns might be identified and addressed through customary law, treaty law will probably remain the dominant feature, because, as Brunnée highlights, consensus on complex issues and detailed legal regimes are more likely to emerge from treaty negotiations.⁹⁹

Yet, beyond the regimes' specific rules, what is the relevance of the concept? Bowman argues that it entitles the international community and individual States to make representations to any State regarding the adverse effects of its actions on a matter of common concern and receive due attention in return.¹⁰⁰ In treaty law, consent to the treaty seems indeed give rise to this kind of entitlement.¹⁰¹ However,

95 The "global commons includes those parts of the earth's surface beyond national jurisdictions – notably the open ocean and the living resources found there – or held in common – notably the atmosphere." See International Union for Conservation of Nature and Natural Resources (IUCN) et al., *World Conservation Strategy: Living Resource Conservation for Sustainable Development*, Gland: IUCN, 1980, Chapter 18, para. 1, at <https://portals.iucn.org/library/efiles/html/WCS-004/cover.html>, 28 February 2015.

96 Jutta Brunnée, Common Areas, Common Heritage, and Common Concern, in Daniel Bodansky, Jutta Brunnée and Ellen Hey eds., *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press, 2008, pp. 564 *et seq.*

97 Ex. Convention on Wetlands of International Importance Especially as Waterfowl Habitat (2 February 1971, *UNTS*, Vol. 996, p. 246), Convention for the Protection of the World Cultural and Natural Heritage (16 November 1972, *UNTS*, Vol. 1037, p. 152), Vienna Convention for the Protection of the Ozone Layer (22 March 1985, *UNTS*, Vol. 1513, p. 293) and Montreal Protocol on Substances that Deplete the Ozone Layer (16 September 1987, *UNTS*, Vol. 1522, p. 3).

98 Birnie et al (Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, 3rd ed., Oxford: Oxford University Press, 2009, p. 128) mention the LOS Convention's environmental provisions and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (4 August 1995, *UNTS*, Vol. 2167, p. 88).

99 Jutta Brunnée, Common Areas, Common Heritage, and Common Concern, in Daniel Bodansky, Jutta Brunnée and Ellen Hey eds., *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press, 2008, p. 565.

100 Michael Bowman, Environmental Protection and the Concept of Common Concern of Mankind, in Malgosia Fitzmaurice, David M. Ong and Panos Merkouris eds., *Research Handbook on International Environmental Law*, Cheltenham: Edward Elgar, 2010, p. 503.

101 This aspect is also stressed by Liu Huirong, Dong Yue and Chen Yitong, China and the Arctic: The Path of Scientific Research, Law and Policy, *Ocean Yearbook*, Vol. 26, 2012, p. 378.

according to Brunnée, the concept, as laid down in the treaties, also “signals that States’ freedom of action may be subject to limits even where other States’ sovereign rights are not affected in [a direct transboundary way]” and therefore the concept “has the potential to significantly widen the range of environmental protection obligations owed *erga omnes*”.¹⁰² Alluding to references to *erga omnes* obligations that are “intended to broaden the circle of States bound by the rule”,¹⁰³ she proposes to “conceive of the concept [...] as entitling, perhaps even requiring, all [S]tates to cooperate internationally to address the concern.”¹⁰⁴

Yet, even if States might agree that the environmental changes in the Arctic are of common concern, related questions wouldn’t be answered *per se*. Uncertainties would remain as to the issues to be addressed collectively, as to the States entitled to participate in Arctic cooperation and as to the allocation of their respective roles. These aspects are intricately interwoven. If non-Arctic States were granted a more active part in Arctic governance, the question of whether roles should be differentiated would have to be addressed. A more active role for non-Arctic States supposes, however, that Arctic concerns are considered to be of common concern, in the global sense, but in order for this to occur, the Arctic States’ consent would still be required.

The current wrestle to come to grips with these aspects takes place against the backdrop of fragile institutional achievements, delicate relationships between Arctic States and the latter’s apprehension of uncontrollable shifts in power and influence,

102 Jutta Brunnée, Common Areas, Common Heritage, and Common Concern, in Daniel Bodansky, Jutta Brunnée and Ellen Hey eds., *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press, 2008, p. 566. See also Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, 3rd ed., Oxford: Oxford University Press, 2009, p. 131. *Erga omnes* obligations are “the concern of all States” and “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection” (*Barcelona Traction, Light and Power Co LTD (Belgium v. Spain) (Second Phase)*, *ICJ Report*, 1970, p. 32, para. 33 [hereinafter “*Barcelona Traction*”]). Hence, every State, whether directly injured or not, is entitled to invoke the legal responsibility of the violating State.

103 Christian J. Tams, (*Enforcing Obligations erga omnes in International Law*, Cambridge: Cambridge University Press, 2005, Chapter 3) distinguishes standing issues (discussed in *Barcelona Traction*) from issues of substantive obligations (discussed in *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, *ICJ Report*, 1996 and in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276, Advisory Opinion, *ICJ Report*, 1971).

104 Jutta Brunnée, Common Areas, Common Heritage, and Common Concern, in Daniel Bodansky, Jutta Brunnée and Ellen Hey eds., *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press, 2008, p. 566.

which make the consensus-finding process very complex. It is unclear whether the concept of common concern is of any use in this context. The argument made by Liu *et al.* that climate change is a common concern to be addressed by global governance and that climate change-related problems, such as Arctic biodiversity, navigation, fisheries and indigenous rights, may consequently be included in and solved through climate change negotiations seems problematic, despite the authors' insistence that China will fully respect the Arctic States' sovereignty.¹⁰⁵ Its overtones might suggest that it is meant to play down the Arctic States' interests and rights in the region. Climate change gives rise to the issues listed, but they need to be addressed within relevant and well-balanced legal regimes. The concept may benefit the Arctic debate insofar as it is a reminder to States that "sovereignty is not unlimited or absolute"¹⁰⁶ and that a cooperative approach should be favored. However, as Liu *et al.* appear to agree, the concept does not question State sovereignty as a pivotal feature in interstate relations, including in the Arctic, nor can it be used to contest the Arctic States' leading role in Arctic affairs, as it is justified by their sovereignty.¹⁰⁷

IV. Conclusion

The effects of climate change in the Arctic kindle a power game which has ramifications well beyond environmental concerns. The political rhetoric is obviously part of this game. The promise of huge and accessible resource deposits and new navigable waterways is very attractive for Arctic and non-Arctic players alike, regardless of the immediate economic viability and technical feasibility of these activities. The discourses mask powerful interests, and at the same time they are part of a strategy to implement these interests. The Arctic region is therefore back on the geopolitical radar screen, albeit not primarily for the noble cause suggested by the rhetoric.

There is little doubt that the Arctic is a prominent example of the need for

105 Liu Huirong, Dong Yue and Chen Yitong, China and the Arctic: The Path of Scientific Research, Law and Policy, *Ocean Yearbook*, Vol. 26, 2012, p. 379.

106 Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, 3rd ed., Oxford: Oxford University Press, 2009, p. 130, citing in particular the CBD and the UNFCCC.

107 Liu Huirong, Dong Yue and Chen Yitong, China and the Arctic: The Path of Scientific Research, Law and Policy, *Ocean Yearbook*, Vol. 26, 2012, p. 379.

cooperation. The principal problem (GHG accumulation in the atmosphere) has its roots outside the region, but causes massive changes within the Arctic (notably rising temperatures and melting ice). They affect regions way beyond the Arctic (notably through rising sea levels and altered meteorological patterns) and trigger further changes within the Arctic (by causing increased human activity) that give rise to new threats to the region (notably pollution due to resource exploitation and shipping as well as overfishing). However, not all of these problems can or should be addressed in a specific Arctic context. For matters like climate change, solutions are best elaborated in international settings, while for others, such as the protection of the marine environment, both international and regional action may be required.¹⁰⁸

Solutions to environmental problems must not only be tailored to the predominantly global or predominantly regional nature of the matter, but must also respect the distribution of sovereignty and sovereign rights in the international legal order. In the Arctic, this means that measures related to international areas or activities require a different approach than measures related to areas or activities subject to coastal States' jurisdiction and sovereignty. International cooperation on the Arctic would have to be devised in accordance with this legal framework in order to respect the Arctic States' rights. Nevertheless, the latter have to acknowledge the rights that non-Arctic States hold, primarily regarding navigation, research and fishing. Furthermore, insofar as the protection of the Arctic environment is concerned, the general duty of cooperation on environmental matters and the principle of common concern provide good legal arguments for an inclusive cooperation. The same can be said of the LOS Convention's Article 123, on cooperation of States bordering enclosed or semi-enclosed seas, which applies to the Arctic, if not directly, at least by analogy.¹⁰⁹ According to paragraph (d), bordering States are encouraged to invite "other interested States" to join the cooperative effort.

Therefore, although sovereignty remains a predominant feature of interna-

108 This twofold approach is already followed in navigational matters: where flag States' rights are concerned, collaboration takes place within the IMO, while Arctic States coordinate search and rescue action regionally (see Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic, 12 May 2011, *ILM*, Vol. 50, 2011, p. 1119).

109 LOS Convention, Article 123(d). See Kristin Bartenstein, The "Arctic Region Council" Revisited – Inspiring Future Development of the Arctic Council, in Suzanne Lalonde and Ted L. McDorman eds., *International Law and Politics of the Arctic Ocean: Essays in Honor of Donat Pharand*, Leiden: Brill, 2015, p. 55.

tional law, a host of legal principles and provisions convey the international community's strong preference for cooperation. Hence, Arctic States could benefit from acknowledging that non-Arctic States may have legitimate interests beyond their legal rights and can contribute usefully to cooperation. In the context of ongoing negotiations for a new balance of power in and over the Arctic region, the challenge for Arctic States is to not let their – of course vital – awareness of non-Arctic States' more self-serving interests stand in the way of cooperation. Most importantly, however, States should take determined action to slow down global warming. This would be the most efficient way to protect the Arctic's environment and would reduce the perception that cynical forces are at play in the current debate on the Arctic.