

The ‘Common Arctic’: Legal Analysis of Arctic & non-Arctic Political Discourses

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This paper takes a closer look at the references to commonality, which are a salient, albeit ambiguous feature of the current discussion on Arctic governance. It does so from a legal perspective and with the purpose to unveil a twofold divide in the discussion. Legal and political purposes intersect and they vary depending on whether they are made from an Arctic or a non-Arctic perspective. Despite similar rhetoric, intentions may differ greatly and it is not unusual that different players refer to the law in irreconcilable or controversial ways. In a first step, the variety of references to commonality is charted and the underlying rhetorical strategies are carved out. In a second step, the references’ legal accuracy and their conceptual contribution to the development of a legal framework for Arctic cooperation are analysed. This should enable a better understanding of the diverging intentions and strategies at play in the discussion and the difficulties to reach a common understanding of how to govern the Arctic region.

Introduction

The idea that certain areas, resources, interests and concerns can be common was embraced rather recently in public international law. As a consequence of the ‘Westphalian’ conception of international law as a regulatory means to govern relations between sovereign States, the international legal order is characterized by mainly “relative” (Verdross 1965: 126), decentralized law-making and enforcement. In the absence of a central authority, interstate negotiation and cooperation have proven indispensable for the States’ common interests to emerge and to be addressed (Brunnée 2008: 551). Environmental protection is a field where the shift from bilateralism to “community interests” is particularly marked (Simma 1994: 235 *et s.*). International environmental law developed from a classic bilateral law in its earliest manifestations (*Trail Smelter* case, 1938 and 1941) towards a law based on community concerns thanks to rising awareness, starting in the 1960s, that resources are finite and that pollution problems are often of a global nature (Simma 1994: 238 *et s.*). These community interests notwithstanding, state sovereignty remains key in interstate relations.

This said, arguments put forward in recent debates on Arctic governance by Arctic and non-Arctic states alike frequently revolve around what will be called here ‘commonality’. The word

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'commonality' is used as a generic term to capture diverse terms and expressions that seem intended to frame a 'common Arctic' in some way or another. The precise meaning of these references to commonality varies significantly depending on the context and the perspective in which they are expressed. States' invocations, or even incantations of commonality regarding the Arctic, in particular if they are expressly linked to environmental concerns, must be considered in this apparently contradictory context.

The new interest in the Arctic and the related question of the future of Arctic governance has drawn considerable attention in recent years. Much of the discussion focuses on the question of who are the legitimate players in Arctic governance. Beyond doubt, the states located in the Arctic are entitled to play an active role and they have done so, both individually and collectively. After the end of the Cold War, Arctic cooperation first concentrated on environmental issues under the Arctic Environmental Protection Strategy (Declaration on the Protection of Arctic Environment, 1991). Since the creation of the Arctic Council in 1996, Arctic cooperation has been based on an embryonic institutional structure and its scope broadened to include the wider issues of sustainable development and of well-being of the inhabitants. The main actors of Arctic cooperation are the eight "Arctic States," the Arctic Councils' full members – namely Canada, the United States of America, the Russian Federation, Finland, Sweden, Norway, Iceland and Denmark/Greenland –, and the Permanent Participants, as are called the representatives of indigenous peoples (Ottawa Declaration, 1996). Non-Arctic states and non-state actors may be granted Observer status, provided they have relevant interests and expertise and display adequate deference to the Arctic States' rights and interests (Observer Manual, 2013). France, Germany, the Netherlands, Poland, Spain and the United Kingdom are longstanding state Observers, whereas China, Italy, Japan, Korea, Singapore and India became observers in 2013. Although the Observer status is coveted by non-Arctic States, many of them clearly seek an even more active role in Arctic governance.

This paper scrutinizes the discourse of some players in more detail: China, as an emerging power and new Observer with no official Arctic strategy, but certainly an Arctic agenda (Chen 2012: 369; Jakobson 2010: 2 and 9; Liu *et al.* 2012: 366); Germany, as a longstanding Observer with a well-articulated policy and a century-long history of Arctic research (Germany 2013: 11); the European Union, as a prospective Observer that is expected to issue, after tortuous debates, an official strategy in 2015 (E.U., 2012); and the Arctic states, as the group with the most genuinely Arctic discourse, at least geographically speaking.

The discussion on Arctic governance is shaped by several characteristic features pertaining to the region's natural and legal/political situation. The Arctic is a remote region with a harsh environment and vast stretches of wilderness. It is ecologically sensitive and suffers from serious pollution problems and rapidly warming temperatures. The Arctic might hold considerable undiscovered resources (USGS 2008), which are of interest to Arctic and non-Arctic States and their industries. It includes international areas as well as areas where Arctic states exercise jurisdiction or even sovereignty. The Arctic's warming, the resulting new threats and opportunities, the complicated legal framework and its complex geopolitical links to other parts of the world have given rise to political destabilization in the region (Luedtke & Howkins 2012; Martin-Nielsen 2015). Recent developments in Ukraine further complicate the issue by altering the relations between several states with Arctic interests and the Russian Federation. In this context, states' behaviour suggests that defining a new balance of power and devising an appropriate governance model has

become increasingly urgent, while the challenge is to bring all of the relevant aspects into the frame and to develop a coherent and manageable balance.

This paper takes a closer look at the references to commonality, which are a salient, albeit ambiguous feature of the current discussion on Arctic governance. It does so from a legal perspective and with the purpose to unveil a twofold divide in the discussion. Legal and political purposes intersect and they vary depending on whether they are made from an Arctic or a non-Arctic perspective. Despite similar rhetoric, intentions may differ greatly and it is not unusual that different players refer to the law in irreconcilable or controversial ways. In a first step, the variety of references to commonality is charted and the underlying rhetorical strategies are carved out. In a second step, the references' legal accuracy and their conceptual contribution to the development of a legal framework for Arctic cooperation are analysed. This should enable a better understanding of the diverging intentions and strategies at play in the discussion and the difficulties to reach a common understanding of how to govern the Arctic region.

Commonality in discourses on the Arctic

With respect to the Arctic, commonality is referred to in many different fora, including in political statements, official policy papers and pleas made by diplomats in academic settings. Most of these references do not seek exclusively – if at all – to be convincing from a legal perspective, but 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 law is even expressly mentioned – albeit at times in ways that cast doubt on whether the law is correctly interpreted or understood. How is commonality referred to? What do these references reveal about the legal stances taken by states with regard to the Arctic and what messages do they convey? These are the main questions addressed in this first part.

References to commonality...

The following review of expressions recently used or reported is admittedly anecdotal and focuses on the clearest and therefore sometimes most contentious references. The purpose is to provide a good sense of the variety of references to commonality that may be encountered in the debate on Arctic governance, as they all potentially influence the legal framing of the region and Arctic cooperation.

Different formulations notwithstanding, the references always correlate to either a perspective of regional Arctic commonality or a perspective of global commonality regarding Arctic issues. The 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", according to article 1 (a), is clearly based on the concept of a regional common. Rothwell (2008: 247) explains that the Arctic Council's mandate is to promote "discussion of issues of common interest amongst the Arctic states", obviously considering Arctic commonality as the main motivation for the Arctic Council's establishment. Canada's Northern Strategy stresses the Arctic Council's key role in developing a "common agenda" among Arctic states (Canada 2009: 35). It underscores the need for Canada to work closely with its Arctic neighbours to achieve the Arctic states' "common goals" and emphasizes interests that Canada shares with its Arctic neighbours, such as climate change adaptation, oil and gas development, oceans management and scientific cooperation (Canada 2009: 33 and 35). The United States'

National Strategy for the Arctic Region, for its part, insists on “common interests” that make Arctic states ideal partners of cooperation (U.S. 2013: 9). It highlights the successful cooperation within the Arctic Council, considered a facilitator of cooperation on “myriad issues of mutual interest,” and notes that cooperation has led to “much progress on issues of common concern,” such as search and rescue as well as pollution prevention and response (U.S. 2013: 2 and 9). Although the Strategy concedes that Arctic states share “common objectives in the Arctic region” with non-Arctic states and other non-Arctic stakeholders, it asserts that these objectives must be advanced “in a manner that protects Arctic states’ national interests and resources” (U.S. 2013: 10). Yet, John Kerry, U.S. Secretary of State, when taking over the chairmanship of the Arctic Council in Iqaluit in 2015, explicitly called on the “entire world” to address climate change, the region’s biggest challenge (Kerry 2015). It remains to be seen whether this marks a shift in attitude and whether this “shared responsibility” will indeed yield greater weight for non-Arctic states in Arctic cooperation, as these states have long sought.

Statements from the realm of non-Arctic states have indeed long conveyed the idea that the Arctic is a global common, or at least of global interest. One of the clearest and most striking expressions of global commonality has been to label the “Arctic” as “common heritage of mankind” (Shackelford 2009). The former German Foreign Minister, Guido Westerwelle (2012: 3), used this qualification to describe the Arctic Ocean, whereas Georg Witschel (2010: 34), legal adviser of the German Foreign Office, mentioned it with reference to the high seas of the Arctic Ocean, clarifying however that “[t]his [concept was] particularly relevant as far as sea-bed resources [were] concerned.”

While Chinese academics are more vocal than Chinese officials (Alexeeva & Lasserre 2013), some striking statements are attributable to the official realm. Qu Tanzhou, director of the Chinese Arctic and Antarctic Administration, 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” (Wang 2010; Chinese (slightly different) version: 王茜 2010). Hu Zhengyue, China’s assistant Foreign Minister, called on Arctic states to bear in mind the relationship between the extended continental shelf and the international seabed areas, “which are a common heritage of humankind” (Hu 2009). In their English translation, his words were sometimes received as establishing a link between the coastal States’ continental shelves and the international Area (Chao 2013: 482; Wright 2011: 29). The Chinese Rear Admiral, Yin Zhuo is quoted as saying in 2010 that “[a]ccording to the UN law 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” (Kopra 2013: 110). Yin Zhuo reportedly said, with respect to the Arctic Ocean, that “except for areas of territorial sea, all other parts [were] international waters” and thus a “common legacy of humankind,” which he considered a longstanding legal basis (Anonymous 2013a).

In these statements, not only the term ‘common’, but also the words ‘mankind’ and ‘human’ convey the idea of global commonality. The latter signal furthermore that the interest in the Arctic is not a matter of sheer geographical proximity. Rather, all of humanity, not first and foremost States, has stakes in its inherited wealth, irrespective of the world’s political organisation and of the Arctic’s remoteness.

A variation to the ‘common heritage of mankind’ is put forward by Witschel’s (2010: 34) description of the Arctic region as an “ecological heritage of mankind”. In this expression and its

focus on the heritage's ecological dimension, the interest of humanity appears even more natural. Transboundary, even global commonality unmistakably emerge from this emphasis on humanity over statehood.

The idea of commonality is less obvious, but still perceptible in references that do not use the words 'common' or 'human(kind)', but underscore shared interests or concerns. 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 arctic [sic] but also concerns other members of the international community" (Anonymous 2013b; Chinese version: 李骥志 2013). 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" (Kopra 2013: 110). According to the EU, 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 (E.U. 2012). 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" (Germany 2013: 11).

... and their connotations and intended meanings

All these references to commonality arguably pursue specific rhetorical and political objectives that deserve to be investigated. Political discourse relies mostly on ordinary language, as it is meant to be understood by specialists and laymen alike. And even if technical language is used, it might not be recognized as such, so that it is interpreted in accordance with the ordinary meaning of the words used. According to the Oxford English Dictionary (2014), the semantic field of the term 'common' covers several meanings of 'natural commonality' including to be "of general, public, or non-private nature", of "belonging equally to more than one [...]" or even of "belonging to all mankind alike [...]", but it also extends to 'stipulated commonality' of "belonging to more than one as a result or sign of co-operation, joint action, or agreement". The noun 'commonality' means notably the "state or quality of being in common with, or shared by, others" and "a shared feature".

What conclusions can be drawn regarding references to the word 'common' or variations thereof in discussions on Arctic governance? First of all, commonality implies two different, but related meanings: the idea of collectiveness and, in legal terms, of collective entitlement and the idea of sharing. While the idea of collectiveness suggests that every member of a group that arises out of a given commonality has a legitimate interest, or in some cases even a legal right, in taking part in the shaping of the group's destiny, the idea of sharing points to the joint – and not exclusive – benefiting from the common good, but also to the joint bearing of related burdens.

The connotation of benefiting and of burden-sharing both resonate in the debate on Arctic governance. Non-Arctic states clearly voice their interest in the Arctic's natural resources (cf. EU 2012: 9). Some of the Arctic's significant deposits of natural resources have been exploited for many years, at least on shore. 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. 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 (EU 2012: 6; see also Germany 2013: 1).

Furthermore, the idea of commonality has strong appeal because it implies 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 conceived in a global perspective, as by non-Arctic states, commonality suggests inclusiveness, converging interests and coinciding concerns. Consequently, the interest in having a say appears as if it were a natural right: if the Arctic's development and protection is a global concern, its governance cannot be left to the Arctic states alone. Non-Arctic states indeed mention the physical changes in the Arctic triggered by global warming in the same breath as environmental risks caused by human activity in the Arctic, including resource exploitation and shipping (cf. Germany 2013: 4; EU 2012: 2), which links the issue of global warming to issues that, from a legal viewpoint, are not international issues to the same degree (navigation and research) or even international issues at all (resource exploitation) (LOSC 1982: parts V, VI, VII, XI, XIII). Associating global warming, which undeniably requires global action, with various aspects of Arctic governance arguably intends to tie Arctic governance to global action.

The Arctic states' approach, which seeks exclusiveness, is in stark contrast to this reasoning. Instead of a general, all-encompassing commonality, these states advocate a specific, functional commonality. Their understanding of commonality is selective, as affiliation to the community depends on a set of conditions. Such agreed commonality led to the establishment of the Arctic Council, whose members cooperate upon the (implicit) criterion that they are "Arctic States" given that part of their territories stretch north of the Arctic Circle (Ottawa Declaration 1996).

The difficulty with such selective commonality is to identify a politically and legally convincing specificity. While the 'Arctic Eight' have similar problems and interests, their Arctic nature does not bestow upon them the same kind of functional commonality shared by the 'Arctic Five', *i.e.* the coastal states (Canada, the United States, the Russian Federation, Norway and Denmark/Greenland). These states' commonality is indeed rooted in the law of the sea, which invests them with particular powers and rights and, thus, a particular role in the Arctic. This was underscored by the Arctic Five at an exclusive conference held in 2008 in Ilulissat (Ilulissat Declaration 2008). Concerned that the larger Arctic community could be divided and weakened, the remaining three Arctic states disapproved of the conference, as well as of the following Arctic Five conference held in 2010 in Chelsea (Dodds 2013; Petersen 2012). Since that time, the Arctic Council's members have achieved a balanced compromise between the coastal states' and the non-coastal states' interests. In the *Vision of the Arctic*, adopted at the 2013 Arctic Council's ministerial meeting held in Kiruna, Sweden, the eight Arctic states, after recalling that they have, among other things, "achieved mutual understanding and trust, addressed issues of common concern", reassert their primacy over non-Arctic states in Arctic affairs. Consequently, they confirm that full membership in the Arctic Council and decision-making remains exclusively with them. They also reiterate their commitment to the law of the sea, acknowledging implicitly the coastal states' pre-eminence regarding several issues. While accounting for their varying legal situations, the Arctic states clearly set themselves apart as a distinctive group with specific interests and concerns that warrant their predominant bearing on the region's governance and in doing so, mean to ward off sweeping claims of cooperation coming from non-Arctic states.

The law – and politics – of a ‘common Arctic’

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 is warranted requires some scrutiny. The discourse promotes the idea of a ‘global common Arctic’ and often confirms explicitly that interstate relations regarding Arctic matters should take place within the existing legal framework. Yet, what precisely would make the Arctic a common issue from a legal perspective? What is the legal value and accuracy of references to the ‘common heritage of mankind’ and similar expressions? Is there any legal value to affirmations of the international community’s ‘interest’ or ‘concern’ regarding the Arctic? This part will provide some thoughts on these questions.

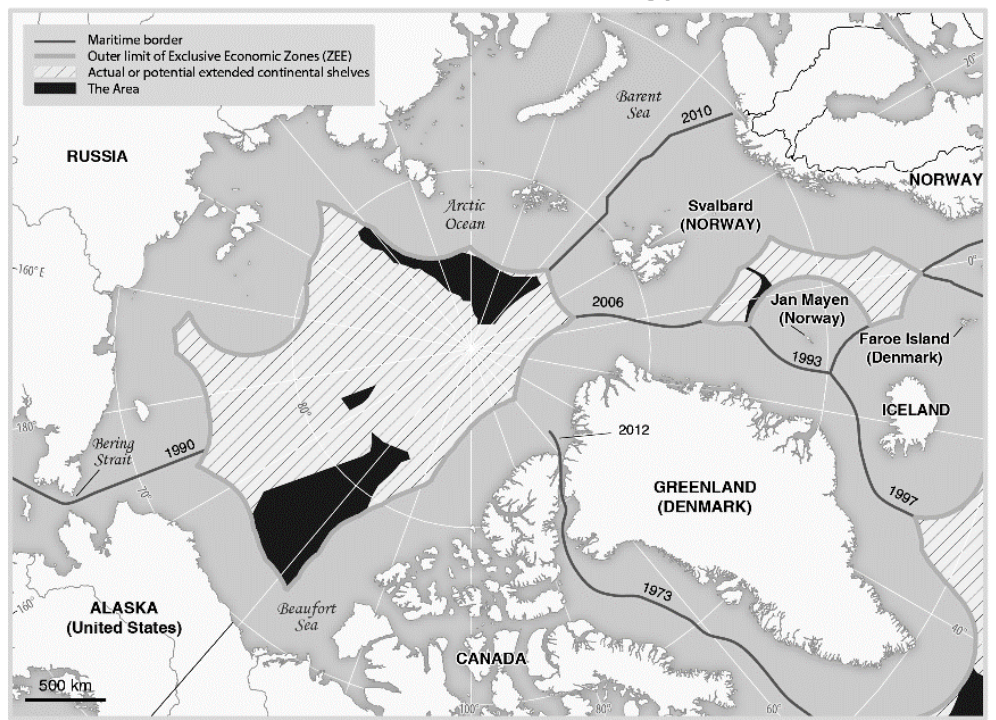
Variations on the theme of ‘common heritage of mankind’

From a legal perspective, references to the ‘common heritage of mankind’ have potentially far-reaching consequences, but it is questionable whether the concept is always referred to properly in the Arctic debate. Emerging amidst newly independent states’ growing concern for resource allocation and their nascent calls for better (economic) chances and a new international economic order (c.f. Declaration on the Establishment of a New International Economic Order 1974), it was put forward in 1967 by Arvid Pardo, a Maltese diplomat with the United Nations (Malta 1967; Pardo 1967). Pardo’s speech contributed to spark off negotiations that eventually led to the conclusion of the 1982 LOSC. The latter confers to the deep seabed – or “Area” – and its resources the status of common heritage of mankind (LOSC: article 136). The initial legal regime underwent substantial modification prior to the convention’s entry into force (Implementation Agreement 1994). However, the Areas’ status still entails that it is an international space (LOSC: article 137), that its exploitation is internationally supervised and that the resulting proceeds are subject to some measure of international redistribution, for the “benefit of mankind” (LOSC: article 140).

The sharing of the benefits for the sake of equity among states and regardless of the individual state’s capacity to actually undertake resource exploitation is the most distinctive feature of the concept of common heritage of mankind (Lodge 2012). The concept’s language further imbeds the resource management in a long-term perspective: regardless of individual States’ capacity to exploit the resources at a given moment, all of humanity, present and future, should benefit from their wealth.

The concept appeals to non-Arctic states, for all states are required to respect the Area’s international nature, but are also entitled to participate in its management and wealth. The concept’s territorial scope is however limited to the Area, that is, “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction” (LOSC: article 1 (1)). The concept therefore only applies beyond the continental shelves’ outer limits. The coastal states’ extensive claims on the Arctic continental shelves suggest that there will be only small pockets of the Area left in the Arctic Ocean (see following map; see also Kullerud *et al.* 2013). What is more, located in the middle of the ocean, likely to remain under permanent ice for some time and arguably not very resource-rich, these pockets currently seem of little economic interest.

The Arctic Ocean floor: continental shelves and remaining pockets of Area



It is the indiscriminate way the common heritage of mankind is referred to in recent debates that make these statements questionable. Considering “the Arctic Ocean” a common heritage of mankind conflates the different maritime zones and ignores the sophisticated distinctions 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. The high seas, although not subject to sovereignty either (LOSC: article 89), are governed by the principle of freedom of the seas (LOSC: article 87). It is of course possible for the international community to collectively limit the freedom. The ‘Arctic Five’, for example, recently appealed in the Declaration concerning the prevention of unregulated high seas fishing in the central Arctic Ocean (2015) to the international community to join efforts to protect Arctic living resources. Under the auspices of the UN General Assembly, preparatory work is underway on a much more comprehensive project, a treaty on the conservation and use of marine biological biodiversity in areas beyond national jurisdiction (Ad Hoc Open-ended Informal Working Group 2015). However, the fact remains that none of the characteristics of the Area’s legal regime – international management and benefit sharing – currently applies to the high seas.

Statements that mention the Arctic’s Area, continental shelves and high seas in the same breath as the common heritage of mankind carry the risk of confusion. Deliberately or not, by omitting to distinguish thoroughly between the different maritime zones, they may create the impression that the whole (marine) Arctic is considered a common heritage of mankind.

With respect to statements made by Chinese officials, translation problems may compound misunderstandings, misinterpretations or misuses. Zhuo, for example, while articulating the view that all parts of the Arctic Ocean, except the territorial sea, are international waters and, as such, part of the “common legacy of humankind”, does not use the exact English expression of the

LOSC, but nevertheless expressly refers to the legal concept (CRI 2013). According to Chinese legal scholars, such Chinese statements do not imply that the Arctic as a whole is indeed a common heritage of mankind, but are meant to remind Arctic coastal states of the consequences of their claims on extended continental shelves for the remaining international seabed (Liu *et al.* 2012: 375 and 378). While this interpretation seems to be in line with “the Chinese persistent principle of respect for sovereignty and the international affairs of other states” (Liu *et al.* 2012: 375), it is difficult to reconcile with several statements’ wordings. And as Jakobson (2010: 13) cautions, there is a risk that repeated misuse of certain legal concepts in political discourse leads to their perception as the prevailing legal situation.

Legally questionable conflation can result from imperfect knowledge of the law or be a rhetorical strategy. As both can be mutually supportive, it may be impossible to tell them apart. In either case, collective management and benefit-sharing might be taken to apply to zones that do not qualify as common heritage of mankind, be they international– *i.e.* the high seas – or under coastal state jurisdiction – *i.e.* the continental shelves and the exclusive economic zone. Slightly different expressions, such as “ecological heritage of mankind” and “common legacy of humankind”, do not give cause for criticism from a strictly legal point of view. The first phrase in particular seems to move intentionally away from the legal term. While neither expression has any legal value, both might however do the political trick. Their lexical proximity to the legal concept, depicting the Arctic as an international space, draws upon connotations that insinuate that the Arctic’s resources call for international management and sharing.

Even references to the principle of common heritage of mankind that are legally correct may appear in a twilight. Winkelmann (2013: 329), for instance, puts emphasis on the support the principle lends to the non-Arctic states’ interest, or entitlement, to take part in discussions that he does not further specify and that would be, from a strictly legal perspective, of a far more limited scope than the one that seems to be politically intended.

Innovations through the concept of ‘common concerns’?

Statements that merely imply commonality, considering Arctic issues of “concern” to or as “a shared interest” of the “international community”, seem driven by a different strategy and less ambitious objectives, for the terms apparently lack legal connotations. Despite the less blunt approach, however, states still convey the wish to be heard and involved in Arctic governance.

Environmental problems that extend beyond borders are arguably best addressed by cooperation (Rio Declaration, 2012: Principle 7). Yet, as Simma (1994: 247) states, it is one thing to recognize community interests such as environmental protection, but quite another to draw meaningful conclusions. Although the international legal order’s cardinal principle of state sovereignty has been questioned for hampering collective action to address serious environmental problems, it systematically prevails in international instruments and practice (Bothe 2006). Even the duty to cooperate for the benefit of the global environment is still based on the principle of states’ sovereignty. In this legal context, it is not surprising that whenever non-Arctic states suggest a more cooperative approach to Arctic governance, the Arctic states insist upon their sovereignty and jurisdiction.

While the duty of cooperation is well-established in international environmental law, it provides little operational guidance. States are left on their own to choose the appropriate *modi operandi* and

to determine their cooperating partners. Consensus emerges on a case-by-case basis among interested states. Regarding the Arctic, the political wrangle over the best governance model and legitimate, legally relevant participants is in full swing (Young 2011). The related question of the best legal approach has given rise to the idea of basing Arctic governance on a comprehensive treaty (see discussion by *inter alia* Jabour 2015; Charron 2015; Young 2011, Duyck 2011; Huebert 2009; Koivurova 2008). While the Antarctic model, as favoured initially by the European Parliament (2008: para. 15), is unacceptable to the Arctic states, the option of a comprehensive legal framework for Arctic governance – provided it takes into consideration the presence of sovereign states in the Arctic – is certainly not *per se* unreasonable. So far, however, the Arctic states have consistently balked at this option.

Meanwhile, non-Arctic states, keen to strengthen their role, assert that their participation in cooperation is as useful as it is warranted and legitimate. They highlight the input they may provide, such as scientific knowledge and expertise (EU 2012: 6) or support for law-making (Germany 2013: 7). They emphasize the Arctic (coastal) states' obligations, particularly regarding navigation and scientific research (Germany 2013: 7; Gao 2012: 143), insisting on what Baker (2014: 490) calls "shared sovereignty". Most importantly, however, they do not tire of stressing the need to combat climate change, the fragility of Arctic ecosystems and the effects that changes in the Arctic cause beyond (EU 2012: 6 *et s.*; Germany 2013: 4 *et s.*).

In this context, Liu *et al.* (2012: 378) contend that the concept of "common concern of humankind" offers a basis for China's participation in Arctic affairs. Its uncertain legal status and scope and its absence in the political discourse notwithstanding, the concept might provide a potential alternative to traditional legal devices that, rooted in a transboundary rationale, fail to yield satisfactory solutions. Regardless of whether they originate within or beyond national jurisdiction, environmental concerns are captured by the concept for they are common to states in the sense that all states benefit from protective actions (Brunnée 2008: 564; c.f. Birnie *et al.* 2009: 128 *et s.*). The concept can be traced back to the 1946 Whaling Convention's slightly different "common interest" (Kiss & Shelton 2004: 32), but it is the Rio instruments that give the "common concerns of humankind" their concrete meaning (Rio Declaration 1992; UNFCCC 1992; CBD 1992). Further treaties address issues of common concern (*e.g.* Ramsar Convention 1971; UNESCO World Heritage Convention 1972; Vienna Convention 1985; Montreal Protocol 1987) and arguably the LOSC and the Fish Stocks Agreement (1995) are among them (Birnie *et al.* 2009: 128). The concept is currently confined to treaty law, where consensus on complex issues and detailed legal regimes are more easily achieved (Brunnée 2008: 565).

The obvious question then is what legal impact, if any, the concept has. Brunnée (2008: 566) suggests that it "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 she proposes accordingly to "conceive of the concept of common concerns as entitling, perhaps even requiring, all states to cooperate internationally to address the concern."

The concept's contribution therefore appears to boil down to another, perhaps broader, duty to cooperate. However, even if states might agree that the environmental changes in the Arctic are of common concern, uncertainties would remain as to the issues to be addressed collectively, as to the states entitled to participate in cooperation and as to their respective roles. The current wrestle to come to grips with these aspects takes place against the backdrop of fragile institutional

achievements, delicate relationships among Arctic states and the latter's apprehension of uncontrollable shifts in power and influence, which make the consensus-finding process very complex. All these aspects are intricately interwoven and the concept of common concerns provides no real guidance to address them.

Recent use of the concept might even bear the risk of discrediting it. Indeed, Liu *et al.* (2012: 379), drawing on the consideration that climate change in the Arctic is a common concern, argue that climate change negotiations should also address related problems, including Arctic biodiversity, navigation, fisheries and indigenous rights. While the authors insist on the coastal states' sovereignty, their argument implicitly plays down the Arctic states' particular situation. Their rights and interests as well as the concern of finding tailor-made solutions to Arctic problems might indeed get lost in climate change negotiations that have their own focus and follow their own dynamics.

The concept of common concerns may perhaps benefit the Arctic debate insofar as it reminds states that "sovereignty is not unlimited or absolute" (Birnie *et al.* 2009: 130). A more cooperative approach might indeed "smooth the hard edges of state sovereignty" (Archer 2014: 404). However, the concept does not question state sovereignty as a pivotal feature in interstate relations, nor can it be used to contest the Arctic states' leading role in Arctic affairs, which remains justified by the law.

Conclusion

It is the tragic irony of the Arctic that the tremendous natural disaster of rising temperatures and melting ice is perceived by many states as an opportunity. New seaways, new resource exploitation sites, new geopolitical areas of influence seem to emerge and have stirred up some political excitement. The physical changes, new activities and evolving interests in the Arctic have caused the need to adapt the governance of the region. In this context, the framing of a 'common Arctic' appears as a strategy used by Arctic and non-Arctic states alike in order to position themselves on the international chessboard. Interpretations of what a 'common Arctic' means diverge however greatly. The Arctic states, interpreting the Arctic as a regional common, insist on their priority for geographical reasons and related territorial sovereignty or sovereign rights. Non-Arctic states, for their part, construe the Arctic, at least in some respects, as an international common, relying on resource-related or on environment-related (quasi-)legal concepts.

As the legal analysis shows, the resource-related concept of common heritage of mankind is misguided and misleading, as it does not apply to the whole Arctic, but only to a marginal part of the central Arctic Ocean. The environment-related concept of common concerns, is of uncertain legal status, but might be a useful reminder that cooperation should be favoured to address the Arctic's environmental problems. However, the ongoing power game in the Arctic must be seen against the backdrop of economic and geopolitical opportunities. Although environmental problems receive indeed much attention in the current debate on Arctic governance, there is reason for concern that references to environmental issues are mere tokenism. Only incisive decisions to address the Arctic's environmental problems and determined action to slow down global warming could prove wrong those who see in the environmental arguments only a fig leaf in the struggle over influence and involvement in Arctic issues.

This is not to say that a comprehensive cooperation scheme could not emerge from an environment-focused collaboration. Given the frequent interrelation between environmental problems and economic and geopolitical issues, the latter would inevitably have to be addressed, at least incidentally. Whatever the scope of cooperation, however, Arctic States' sovereignty and sovereign rights must be respected. 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 or sovereignty. Nevertheless, the Arctic states would benefit from acknowledging non-Arctic states' rights and legitimate interests. Regarding the protection of the Arctic environment, the duty of cooperation on environmental matters and the concept of common concern provide good legal arguments for an inclusive approach. 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. Whether the Arctic Council provides the appropriate forum for broader and more inclusive cooperation and whether such cooperation would benefit from a treaty-based approach instead of the prevailing ad hoc approach are questions that are beyond the scope of this article, but no less relevant. What seems important to note here is that there is more than one way to conceive of a 'common Arctic'. Although they may seem contradictory at first sight, these different approaches can be used in a complementary manner. Indeed, 'common' does not necessarily entail identical status, rights and influence for the interested states. A 'common Arctic' could be a fruitful project, if it means that interested states pursue the shared goal of cooperating on Arctic issues in a peaceful, efficient, environmentally sound and politically differentiated way.

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