

An Analysis of New Criteria for Permanent Observer Status on the Arctic Council and the Road of Non-Arctic States to Arctic

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ABSTRACT

According to new criteria for admitting permanent observers to the Arctic Council, aspiring states must recognize the sovereignty and sovereign jurisdiction of Arctic states. Due to inherent mistakes neglecting history, logical and international law, the new criteria are problematic. Under this new situation, non-Arctic states need to weigh advantages and disadvantages before submitting an application. This study argues that observer status will bring more obligations but fewer rights, and will have negative consequences. The permanent observer status is not the best option for non-Arctic states to participate in Arctic governance. There are many roads to Arctic such as UNLOS, FAO, IMO and the Spitsbergen Treaty that offer many opportunities and strong platforms for non-Arctic states participating in Arctic issues. As a result of these new criteria, the Arctic Council is faced with challenges from non-Arctic states. Only when both Arctic and non-Arctic states find the balance based on mutual respect and mutual understanding, will there be a prospect of a settlement of Arctic governance.

Key words : Arctic; Arctic Council; Permanent Observer; China.

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1. Introduction

On 16 September 2012, Arctic sea ice reached the lowest extent ever recorded,¹ which will bring profound changes in geopolitics and international economics. Many non-Arctic countries including China and Brazil are increasing their attention to Arctic governance.

People consider that permanent observer status in the Arctic Council (AC) is the most effective way for non-Arctic states to take part in Arctic governance. Some non-Arctic states look to permanent observer status as a symbol of an important and valuable position in international Arctic affairs, and as a way to affect Arctic issues through engaging in activities of the AC's six working groups. The European Union, China, Japan and South Korea submitted applications for permanent observer status in 2013.² However, the relationship between permanent observer (PO) status and Arctic governance is not as straightforward as it appears.

On 12 May 2011, the Senior Arctic Officials (SAO) Report issued in the Seventh Ministerial Meeting of the Arctic Council in Nuuk, Greenland, set up new Criteria for admitting permanent observers and outlined a role for their participation in the Arctic Council. Those countries that applied for this status must meet very demanding requirements, which includes recognition of "sovereignty, sovereign rights and jurisdiction" of the Arctic countries (hereinafter "new criteria"). The criteria are outlined as follows:

"In the determination by the Council of the general suitability of an applicant for observer status the Council will, inter alia, take into account the extent to which observers:³

- Accept and support the objectives of the Arctic Council defined in the Ottawa declaration.
- Recognize Arctic States' sovereignty, sovereign rights and jurisdiction in the

1 Sea ice extent for September 17 was 3.41 million square kilometers (1.32 million square miles), "Arctic sea ice extent near the minimum," <http://nsidc.org/arcticseaicenews/2012/09/arctic-sea-ice-extent-near-minimum/17> September 2012.

2 About South Korean Option, see "Korea seeks a bigger role in Arctic," <http://view.koreaherald.com/kh/view.php?ud=20120515001396&cpv=0>.

As far as Japanese policy toward Arctic Council, see "Written Statement by the Delegation of Japan at the Second Meeting of Deputy Ministers of the Arctic Council," 15 May 2012, Stockholm, Sweden.

Decision by EU, see "Joint Communication to the European Parliament and the Council: Developing a European Union Policy towards the Arctic Region: progress since 2008 and next steps," p. 2.

http://www.eeas.europa.eu/arctic_region/docs/join_2012_19.pdf.

For Chinese application, see Linda Jakobson, "Northeast Asia Turns Its Attention to the Arctic." Analysis Brief, the National Bureau of Asian Research, December 17, 2012.

3 Annex, "The criteria for admitting observers and role for their participation in the Arctic Council," Senior Arctic Officials (SAO) Report to Ministers, Nuuk, Greenland, May 2011, p. 50.

Arctic.

- Recognize that an extensive legal framework applies to the Arctic Ocean including, notably, the Law of the Sea, and that this framework provides a solid foundation for responsible management of this ocean.
- Respect the values, interests, culture and traditions of Arctic indigenous peoples and other Arctic inhabitants.
- Have demonstrated a political willingness as well as financial ability to contribute to the work of the Permanent Participants and other Arctic indigenous peoples.
- Have demonstrated their Arctic interests and expertise relevant to the work of the Arctic Council.
- Have demonstrated a concrete interest and ability to support the work of the Arctic Council, including through partnerships with member states and Permanent Participants bringing Arctic concerns to global decision making bodies.

Do new criteria make sense logically and legally? What influence do new criteria have on non-Arctic states' interest and rights in the long term if they are an observer of the Arctic Council? Is there another choice available besides permanent observer? It is necessary to weigh advantage and disadvantages before making their final decision of non-Arctic states. The purpose of this paper is to answer these questions.

2. Interpretation of the new criteria

New criteria can be ranked as a rigorous and harsh requirement that is unprecedented in the history of international organizations. The observer system came from the practices of the United Nations (UN), instead of actual provisions of the UN Charter. This system evolved since then, and has been used widely by more and more international organizations.⁴ However, having investigated other international organizations, we can find no match with the Arctic Council in this respect. Except for the resolution on non-government organization (NGO) observer, set previously by the Economic and Social Council–ECOSOC, have other international organizations not prescribed the obligations and responsibilities of observers. Even if so, this resolution is very simple that includes: NGO observers must refer a progress report to ECOSOC every four years and encouraged NGO observers to expand their activity to more regions around the world. In the meantime, the ECOSOC resolution stipulated the withdraw mechanism that observer status will be

⁴ Henry G. Schermers, *International Institutional Law*, 3 rd ed., Alphen and den Rijn, Sijthoff & Noordhoff, 1980, p. 98.

suspended or withdrawn in some cases.⁵

Generally, most international organizations require observers to meet two basic requirements: 1) immediate connection with the given international organization and 2) the capability to participate in and cooperate with it.

We should clarify new criteria of Arctic Council before going further. Firstly, “Sovereignty, sovereign rights and jurisdiction” should be understood as single sovereignty, sovereign rights and jurisdiction claimed by a single nation, instead of the collective Arctic Eight states. It is generally accepted that sovereignty is exclusive, indivisible and irreplaceable; it not something that can be shared.

Secondly, the “three recognitions” principle also calls on POs to recognize sovereignty and jurisdiction that is not yet settled. The principle does not specify what aspects of disputed sovereignty or jurisdiction POs are recognizing’ or whether this implies recognition of settled boundaries in the future. This is problematic because the principle is also all-encompassing. By agreeing, Permanent Observers are implicitly recognizing the legitimacy of both parties’ claims to a contested area, which is illogical. These logic problems are illustrated below.

3. The logic problems of new criteria

3.1 *Hans Islands dispute*

A country’s territory consists of territorial land, territorial water (inland water and sea), territorial space and territorial subsoil. Recognizing territorial land is the core of mutual respecting sovereignty among different countries. However, the dispute over Hans Island between Canadian Ellesmere Island and Greenland has not been settled. Whose sovereignty are non-Arctic states expected to recognize? Does it belong to Canada or Denmark? Undoubtedly, two countries are not able to give an exact answer. No doubt, neither position of non-Arctic states is correct if complying with new criteria.

3.2 *Maritime delimitation disputes*

The delimitation disputes of the United States (US) and Canada in Beaufort Sea and US vs. Russia in the Bering Sea also undermine the new criteria. These disputed waters are closely related to territorial water, continental shelf and EEZ. In these cases, which side should Arctic states require non-Arctic states to take? Whose sovereign rights do

⁵ Article 57, *ECOSOC Resolution 1296, and Resolution 1996/ 31*, 49th plenary meeting, 25 July 1996, p. 58.

non-arctic states recognize? Recognizing one's sovereignty is tantamount to denying another's, which is at odds with the spirit of the new criteria.

Most Arctic states have declared an extension of their outer continental shelf. What attitude should non-Arctic states take before these applications are approved by Commission on the Limits of the Continental Shelf (CLCS)? Should non-Arctic states take no position on a vast piece of sea bed before CLCS recommendation? However, it is contradictory to new criteria, which requires that non-Arctic states must say "YES" or "NO". Ironically, even Arctic states can't recognize each other's sovereign rights. Five countries including the United States expressed its opposition of Russian prolongation in Arctic Ocean in 2001. United States asserted that Russian "submission has major flaws as it relates to the continental shelf claim in the Arctic."⁶

It is curious that Arctic states do not necessarily recognize each other's maritime claims, but some of them demand non-Arctic states to recognize their sovereignty rights and jurisdiction.

3.3 *The unresolved scope of Spitsbergen Treaty application*

If the purpose of the new criteria is to prevent non-Arctic states from interfering in the "internal affairs" of Arctic states, they may be insufficient. The Spitsbergen Treaty gives undeniable equal rights of economic and scientific activities to all parties. In 1920 when the Spitsbergen Treaty was signed, it stipulates treaty application to "both on land and in territorial waters" of Spitsbergen Islands (Article 3). But there has been disagreement over the legal status of EEZ and continental shelf around the Spitsbergen Islands. A few Arctic states such as Russia, Iceland and Denmark maintain that the Spitsbergen Treaty be applicable to EEZ and continental shelf, even as well as outer continental shelf. But Norway, supported by Finland and Canada, insists the treaty be restricted on the Spitsbergen Islands and territorial waters.⁷ Which perspective should non-arctic state recognize? Can we say it still has nothing to do with non-arctic states? Many non-Arctic states including China are parties of the treaty, and are given equal rights to engage in commercial activities (article 2) on the islands and in the related waters. The legal status of the EEZ and continental shelf including outer continental shelf has an important bearing with the interest and right of non-Arctic states.

6 United States of America: Notification Regarding the Submission Made by the Russian Federation to the *Commission on the Limits of the Continental Shelf*, Ref. No. CLCS.01.2001.LOS/USA (Mar. 18, 2002) (attaching the U.S. submission dated February 28). Also, http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS_USA

7 Alex, G. Oude Elferink, *the Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation*. Martinus Nijhoff, 1994, pp. 230-231.

3.4 *The United States and UNCLOS*

Another awkward aspect reflected in the SAO report is that United States is not a party to UNCLOS. Because US has not ratified UNLOS and declared its baseline in Arctic, it is one problem for non-arctic states to define the size or scope of US sovereign rights over the Continental shelf. A 1958 Convention on the Continental Shelf, to which the US is a party, did not specify the extent of the continental shelf.⁸ According to the Truman proclamation of 1945 and customary law, the US has the sovereign rights of continental shelf within 200 nautical miles (nm) with no disputes, but the prolongation of outer continental shelf must be “recommended” by CLCS for legitimacy. However, CLCS has never accepted one application from a non contracting party, so it is thus unclear what size non-Arctic states are expected to recognize exactly in relation to a future US extended continental shelf as long as the latter remains a non-contractor of UNCLOS.⁹

Therefore, the new criteria are illogical and self-defeating. The above analysis focuses on logic problems. More than that, there are many problems in terms of law of the sea.

4. The disputed sovereign rights

4.1 *Disputed historic title applied in Arctic waters*

Both Canada and Russia have claimed historical title in Arctic waters, and take it as part of a legitimate basis to internalize the relevant waters. However, both the 1958 Geneva Convention on Law of the Sea and the 1982 UNCLOS only mentions “Historical Bay” or “Historical Waters”, but have not clarified the definition of “Historical rights”, as well “Historical Bay” and “Historical Waters”. The reasonable legal basis is customary law principle reflected in the 1951 British-Norway Fishery Case by the International Court of Justice (ICJ).¹⁰ This case contains three basic principles: 1) exclusive national jurisdiction, 2) long term control, and 3) the acquiescence by interested stakeholders. It remains to be proved if Russia and Canada fill all three principles exactly and completely. The European Community (EC) clearly disproved these historical waters, and reserved their rights.¹¹ United

8 Article 1, “...areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.” See 1958 *Convention on the Continental Shelf*.

9 Editorial, “Should Observer Participation in Arctic Ocean Governance be Enhanced ?” *Canadian Naval Review*, Vo.7, No. 4 (Winter 2012), pp. 2-3.

10 Fisheries Case (United Kingdom vs. Norway), *ICJ Reports*, 1951, Judgment of 18 December.

States also did not recognized historical waters claimed by former Soviet Union.¹²

For a long time, most non-Arctic states have taken no position on these questions, but new criteria are forcing them to take a stand.

4.2 *Disputed over-length straight baselines*

Apart from historic waters, many over-length straight baselines in the Arctic are another concern. Russia and Canada drew straight baselines along their Arctic Islands, and some of over-length straight baselines have changed previous high sea and territorial waters into internal waters. The question is if these straight baselines are legitimate and the length is in line with international law, which is closely related to attributes of the Northeast Passage and Northwest Passage. In 1985 Russia and Canada drew straight baselines around their respective islands in the Arctic. The United States refused to acknowledge the legitimacy of the Canadian Archipelago as soon as Canada proclaimed it.¹³ The straight baselines met the same opposition as Russia in 1985.¹⁴

The length of straight baseline makes more disputes. Both Canada and Russia are not archipelagic states. Articles 46 and 47 of “Archipelagic Baselines” of UNCLOS are not applicable to both countries.¹⁵ However, neither the 1958 Geneva Convention on Law of the Sea nor 1982 UNCLOS gave a clear answer for the length of straight baselines except for that archipelagic states shall not exceed 100 nautical miles. The reasonable criteria in the Arctic are still the 1951 British-Norway Fishery Case. The International Court of Justice justified that the longest straight baseline drawn by Norway is not beyond 54 nm, but the longest one in Canadian Archipelago exceed 90 nm,¹⁶ while in Russia the straight baselines are more than twice the length of territorial waters, especially Vilikitskogo Strait.¹⁷

11 Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, USA, Limits in the Seas, *United States Responses to Excessive National Maritime Claims*, No. 112, 9 March 1992, pp. 29-30. 12 members of States of the European Community (EC) that opposed Canada declaration, are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Holand and United Kingdom.

12 J. Ashely Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims*, 2nd ed., The Hague, Martinus Nijhoff Publishers, 1996, pp. 202, 216.

13 Ronald Purver, “Aspects of Sovereignty and Security in the Arctic,” in Donald McRae and Gordon Munro, eds., *Canadian Oceans Policy: National Strategies and the New Law of the Sea*, Vancouver: University of British Columbia Press, 1989, p. 175. Also Donald R. Rothwell, “The Candian-U.S. Northwest Passage Dispute: A Reassessment,” *Cornell International Law Journal*, Vol. 26, No. 2, 1993, p. 360

14 Donald R. Rothwell, *the Polar Regions and the Development of International Law*, Cambridge University Press, 1996, p. 186.

15 Article 46 and 47, UNCLOS.

16 M.R. Freeman eds., *Report: Inuit Land Use and Occupancy Project*, Canada Government Cat. No. R2-46 1976.

17 R. Douglas Brubaker, “The Legal Status of the Russian Baselines in the Arctic”, *INSROP working paper*, Fridtjof Nansen Institute, 1996, pp. 207-211. 212-213. Also Erik Franckx, *Maritime Claims in the Arctic: Canadian and Russian Perspectives*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, p. 181.

There are many uncertainties over historical waters and straight baselines. The validity of these waters will likely meet more challenges, and so will the outer continental shelf and EEZ because the latter two are established based on baselines. Non-Arctic states must recognize all these historical waters and straight baselines before they step into the Arctic club while some other Arctic states will be denied entry.

4.3 Contentious prolongation of outer continental shelf

The larger question is the sovereign rights in the Arctic covering outer continental shelf and EEZ. Under UNCLOS, the prolongation beyond 200 nm must be approved on its technical merits by the CLCS to receive legitimacy. The problem is that there is no consensus on the criterion of “oceanic ridge,” “submarine ridge” and “submarine elevation,” which are important criteria for coastal states to delimitate a continental shelf beyond 200 nm. The interested countries always interpret them based on their respective national interest. Supposing an Arctic states’ claim is rejected, what position shall non-arctic states take? The outer continental shelf of delimitation may bring contentious debates.

4.4 Unclear residual rights of EEZ

An equally troublesome question is the clarification of sovereign rights within the EEZ. A large number of “residual rights” have not been defined clearly, such as remaining fishery rights and the legality of military uses of the EEZ. UNCLOS does not give a clear answer to the residual rights to which country they should belong to, but it is universally recognized that the coastal state shall not take full residual rights in the EEZ. The sovereign rights of the coastal state in its EEZ are listed in article 56 of UNCLOS. In principle, interested parties are not allowed to exercise the rights prohibited by international law apart from rights not prohibited because the EEZ’s legal status is different from both territorial water and high seas. The article 59 of UNCLOS stipulated that disputes “should be resolved on the basis of equity and in light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as the international community as a whole.” As a result of the uncertainty of sovereign rights within EEZ in the Arctic, there is much implementation flexibility and many significant differences concerning jurisdiction among the countries. The residual rights within the EEZ are strongly related to non-Arctic states’ interest in Arctic. It is impossible that Arctic states oblige non-Arctic states to give up all potential residual rights gained earlier through the new criteria.

It is generally known that sovereignty is exclusive, not divisible and unshared, but sovereign right is different, and can be divisible. With globalization and international

cooperation, every sovereign state has to share part of its sovereign rights with other stakeholders to maximize its national interest, which is a general trend. However, the Arctic Council surprisingly requires non-Arctic states to recognize early Arctic states' sovereign rights before the delimitation of ownership is cleared.

5. Jurisdiction problems

It is of no doubt that jurisdiction will be problematic if sovereignty and sovereign rights are not clarified, particularly because jurisdiction comes from the former two. It should be noted that the interpretation and implementation of sovereignty shows differences between countries because they are subject to domestic laws.

The most likely disputes are management of Arctic shipping. UNCLOS empowers that "...coastal States adopt and enforce non-discriminatory laws and regulations for ..." in article 234, which consists of so many ambiguous terms. In sum, they include "non-discriminatory" (what criteria to measure?), "severe climatic conditions" (are evaluative criteria subjective?), "exceptional hazards to navigation" (what kind of hazard can be categorized as "exceptional"?), and "irreversible disturbance of the ecological balance" and "the best available scientific evidence" as well. In addition, as far as "most of the year," how long should it be, eight months or ten months? With the rapid melting rapidly of sea ice, this term will bring more disputes in the future.

All these interpretation depend on subjective judgement. These numerous interpretational uncertainties and underlying rationales to "Article 234 is to allow the coastal state to take relatively broad unilateral action..."¹⁸ It is unrealistic to oblige non-Arctic states to meet new criteria before these uncertainties are clarified. The international community has every reason to be suspicious of a creeping jurisdiction in Arctic Ocean that uses step stones to affect the freedom of navigation.

All these questions in the new criteria remain to be clarified. The Arctic council needs to do more to clarify the right of interpretation, and especially if the new criteria can be interpreted as Arctic states' unilateral interpretation and implementation or not. Otherwise, the Arctic Council will be challenged with its legitimacy, authority and effectiveness.

18 Kristin Bartenstein, "The 'Arctic Exception' in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?" *Ocean Development & International Law*, Vol.42, Issue 1-2, 2011, p. 46.

6. Weighing advantages and disadvantages

What are the benefits to non-Arctic states from permanent observer status? What will they suffer from new criteria? These should be carefully calculated.

6.1 *Advantages*

The primary privilege for permanent observers is sitting in at the back of the conference, and receiving some documents, as well learning some information “in advance.” Observers, under authorization of the chair, may make statements, present written statements, submit relevant documents and provide views, and take part in the activities of working groups of the Arctic Council. Perhaps they may get the opportunity to exchange ideas with representatives from Arctic states in the Ministerial meeting.¹⁹

Non-Arctic states regard the observer status as “a more secure position” for “watching how the meetings go,” and “discussing cooperation with stakeholders,” as well “information gathering.”²⁰ Since six existing observers have not shown any protest to new criteria, why do the latter make much of it? New criteria seem not necessarily to mean that non-Arctic states must acknowledge every claim by Arctic states unilaterally or jointly. A combination of crowd psychology and worry over loose opportunities will inspire questions for non-Arctic states after application.

6.2 *Disadvantages*

Concerning information published by the Arctic Council, non-Arctic states can obtain them publicly from the website of the Arctic Council. One concern is whether it is possible for the efficiency of communication with Arctic states that some non-Arctic state dream it to be? It should be noted that The 2011 SAO report stipulates that any presentation by observers must be at the discretion of the Chair, and after Arctic states and Permanent Participants give approval.²¹ Actually, “representatives of the observer states are seldom allowed to speak in meetings of the Arctic Council managed by the Chair of the Senior Arctic Officials, much less in the biennial ministerial meetings of the council. Nor do they have access to discussions among the Senior Arctic Officials themselves or in meetings of the deputy ministers, a recent innovation in the practice of the council.”²²

19 Senior Arctic Officials (SAO) Report to Ministers, Nuuk, Greenland, May 201, p. 51.

20 Shin Hyon-hee, “South Korea seeks bigger role in Arctic.”

<http://www.asianewsnet.net/home/news.php?id=30743>. And “Japan needs to gain voice in Arctic ocean development.” <http://www.yomiuri.co.jp/dy/editorial/T120827002806.htm>

21 SAO Report to Ministers, Nuuk, Greenland, May 201, p. 51.

Does attendance at the scientific activity of working groups make sense? Actually, “...activities of the working groups do not provide an effective venue for real dialogue regarding issues on the new Arctic policy agenda.”²³

Facts prove that the six current permanent observers are not satisfied with their observer status. Germany is “unhappy with what it perceives as a new approach and rules emerging from the Nuuk Ministerial Meeting last spring (2011 Spring-present author), putting various new limitations on Observers.”²⁴ Many realities experienced by existing six observers have proved it is wishful thinking to profit from observer status.²⁵

6.3 Balancing the pros and cons of the situation

Non-Arctic states are not very likely to obtain what they wish as an Arctic permanent observer being that they participate in Arctic governance with contribution and dignity, while taking due responsibility for decisions. To make matters worse, they will likely lose the initiative and flexibility of diplomacy in the future because they have recognized arctic states’ “sovereignty, sovereign rights and jurisdiction” in advance as a package deal. In the coming international negotiations, non-Arctic states will be put at a serious disadvantage because they have given up and remised entire current and potential residual rights in the Arctic Ocean by virtue of the new criteria. Rather, as illustrated above, adopting these criteria has forced non-Arctic states to surrender important user state entitlements to the Arctic Ocean. Some of these rights are being renewed life with the development of science, technology and social progress.

Interestingly, the rights and interests that non-Arctic states seek through permanent observer status can be obtained on existing international instruments at a lower political cost. In a word, the permanent observer status will bring non-Arctic states more obligations than rights and benefits. In conclusion, new criteria make permanent observer status in the Arctic Council a suboptimal choice for non-Arctic states.

22 Oran Young, “Listening to the Voices of Non-Arctic States in Arctic Ocean Governance”, by Oran Young, Research Professor, Bren School of Environmental Science and Management, University of California (Santa Barbara), 2012 North Pacific Arctic Conference, August 9, 2012, p.17.

23 Oran Young, “Listening to the Voices of Non-Arctic States in Arctic Ocean Governance”, p. 18.

24 Back Ground Brief, “Interests and Roles of Non-Arctic states in the Arctic,” Seminar presented by the National Capital Branch of the Canadian International Council and the Munk-Gordon Arctic Security Program. October 2011, p. 8

25 Conference Concept Note, “2011 EWC/KOTI International Conference on Opening the Northern Sea Route and Dynamic Changes in North Pacific Logistics and Resource Security,” Honolulu, Hawaii, August 8-10, 2011, p. 4.

6.4 Evaluation of the negative impact of China staying out of Arctic Council

Some argue that China should take the long view that staying out of Arctic negatively will affect Chinese future interests. The ministerial meeting of the Arctic Council in Nuuk Greenland enacted the first legally binding document in the 15 year history of the Arctic Council, a Search and Rescue Agreement. In addition, it is agreed that the Arctic Council has had a permanent secretariat located in Tromsø. As a result, the Arctic Council is believed to be changed into a legally valid international body instead of a loosely organized forum as was previously the case. It seems that the Arctic Council is evolving to be the central authority in Arctic governance.

There is a need to clarify the role and function of the Arctic Council. In the beginning, the Arctic Council was to be a high-level forum, focusing on the protection of the Arctic environment and sustainable development, which “should not deal with matters related to military security.”²⁶ These principles remain unchanged until today even though some suggested that defense collaboration should be integrated into agenda of the Arctic Council.²⁷ If issues touch resource distribution and military security, Arctic Council could slide into anarchy unless it has authority over these matters.

However, the role and function of the Arctic Council is very limited. Its role and function can be replaced by many existing international instruments and organizations. For instance, Arctic fisheries are managed by FAO or regional fishery management organization, and navigation is controlled by the IMO, and outer continental shelf extension will be recommended by the CLCS. The Arctic Council is limited to environmental protection and search and rescue. Its most prominent function is the work of its six working groups, but the involvement in the working groups doesn't need permanent observer status. For non-Arctic states, staying outside the Arctic Council may create diplomatic leverage that can be used in tradeoffs with Arctic States in the future.

It is noticeable from China's unique international status that China is different from EU, South Korea and Japan in the minds of Arctic states. In the most of international organizations involving China, some nations usually work hard to control China's influence on rulemaking and implementation. On one hand, they demand China take more responsibilities; on the other hand, they prevent China's status from rising to the level that probably challenges their dominance. The new criteria place a high cost on China's entry into the Arctic club. China gains few practical benefits and gains little prestige by joining the Arctic Council.

26 Declaration on the Establishment of the Arctic Council, 1996.

27 Rob Huebert, Heather Exner-Pirot, Adam Lajeunesse and Jay Gullede, “Climate Change & International Security: The Arctic as a Bellwether.” Prepared for Center for Climate and Energy Solution, May 2012.

7. Other roads for non-Arctic states' participation in Arctic affairs

One legally binding treaty following the example of the Antarctic Treaty that includes major non-Arctic stakeholders, is good for non-Arctic states' participation in Arctic governance. But both poles are different in geopolitics, and the Ilulissat Declaration brought an end to the discussion over the suitability of an Arctic Treaty.²⁸ How can non-Arctic states find their roads to the Arctic?

The Arctic is not a without governance. Up to now, there have been lots of international instruments and organizations covering the Arctic which ensure Arctic governance following recognized rules that will create more opportunities for Non-Arctic states in the Arctic other than the Arctic Council. Actually, new criteria are building an environment of forcing non-Arctic states to look elsewhere to pursue their Arctic interests.

7.1 UNCLOS

The Arctic is not something completely unique compared to other waters,²⁹ and UNCLOS has been widely applied in the Arctic Ocean, some clauses of which are designed purposely for Arctic Ocean. In the meanwhile, many bilateral or multilateral agreements are affected strongly by UNCLOS. For instance, The Arctic Environmental Protection Strategy (AEPS) was established with reference to UNCLOS.³⁰ The core position of UNCLOS as the legal framework in Arctic governance has been acknowledged by five major Arctic states. The Ilulissat Declaration points out, "the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea."³¹ There is not much the Arctic Council can do to address these issues. On March, Sergei Lavrov, Foreign Minister of the Russian Federation, reasserted that "everything (in Arctic) must be and should be on the basis of the international convention of the law of the sea and it's a common position of the members of the Arctic Council, including Russia and the US."³²

28 *The Ilulissat Declaration*, Arctic Ocean Conference, Ilulissat, Greenland, 27–29 May 2008.

29 Norway's New Foreign Minister, "Exploitation of Arctic Resources Will Happen," <http://www.spiegel.de/international/world/interview-norway-s-foreign-minister-espen-barth-eide-on-arctic-drilling-a-863558.html>

30 "7. PROTECTION OF THE ARCTIC MARINE ENVIRONMENT," *The Arctic Environmental Protection Strategy (AEPS): DECLARATION ON THE PROTECTION OF ARCTIC ENVIRONMENT*, p. 33, ROVANIEMI, FINLAND, JUNE14, 1991.

31 *The Ilulissat Declaration*, Arctic Ocean Conference, Ilulissat, Greenland, 27–29 May 2008

32 "Exclusive Interview of Sergei Lavrov to the Voice of Russia." Jul 13, 2011
<http://english.ruvr.ru/2011/07/13/53141058.html>

Most of non-Arctic states are parties of UNCLOS that grants their legitimate rights and freedom in the Arctic Ocean, especially in the central Arctic of high sea. Their rights and freedom is unaffected by prolongation of the continental shelf.

7.2 Resolutions set up by IMO

Most non-Arctic states are members of the IMO that manages navigation safety, prevention of maritime pollution and seaman training. Lots of regulations issued by IMO can apply to Arctic shipping. Due to the special environment in the Arctic, the IMO has been committed to unify different navigation standards of Classification Societies. IMO issued “The IMO Guidelines for Ships Operating in Arctic Ice-covered Waters” in 2002. However, it is not mandatory, but voluntary. The international community urged the IMO to make a mandatory law to regulate ice navigation in Arctic.³³ The IMO has started the development of a mandatory code. It is said the new code will be completed after 2015 due to a variety of reasons.³⁴ The IMO provides a forum for non-Arctic states to take part in Arctic affairs. Predictably, the future mandatory guidelines will necessarily reflect ideas of not only of Arctic, but non-Arctic states as well.

7.3 Agreements and Conventions set up by Food and Agriculture Organization of the United Nations (FAO)

Global warming is changing the Arctic Ocean into a world-class fishery ground,³⁵ and Arctic fisheries have attracted much attention around the world. However, the central Arctic Ocean is high sea beyond any national jurisdiction.³⁶ These international waters at present are not governed by any specific international fisheries agreements or regulations. The management of Arctic fishery is being mentioned in many international occasions. Now is the time for the international community to create a precautionary management system for central Arctic Ocean fisheries because this region is no more remote from major fishing ports and fishing fleets than many areas of the world to which pelagic fleets travel since ice has melted significantly in the past three decades.³⁷ Which organization should

33 Øystein Jensen, “The IMO Guidelines for Ships Operating in Arctic Ice-covered Waters: From Voluntary to Mandatory Tool for Navigation Safety and Environmental Protection?” FNI Report 2/2007.

34 Rolf Stange, “IMO: polar code not before 2015,” <http://www.spitsbergen-svalbard.com/2012/03/01/imo-polar-code-not-before-2015.html>

35 “Ocean warming affecting fish populations,”

http://www.upi.com/Science_News/2009/11/03/Ocean-warming-affecting-fish-populations/UPI-17961257275663/#ixzz1nm0TvsQH

36 *Communication from the Commission to the European Parliament and the Council: The European Union and the Arctic Region*, Brussels, November 20, 2008, COM (2008) 763 final, p.9.

37 “An Open Letter from International Scientists,” <http://oceansnorth.org/support-international-arctic-fish->

take legal and rightful management responsibility? One of options is to extend the fishery management organizations of North Atlantic Ocean or North Pacific Ocean to Central Arctic Ocean. Some Atlantic Regional Fishery Management Organizations (RFMOs) covering high sea, such as North East Atlantic Fisheries Commission (NEAFC) and North East Atlantic Fisheries Commission (NEAFC), can regulate fisheries in the Regulatory Area (RA) beyond national jurisdiction, but must operate with the consent of interested states.³⁸ The dominant management international organization usually is the Food and Agriculture Organization of the United Nations. Article 88 of UNCLOS stipulates that states shall cooperate to establish sub regional or regional fisheries organizations, but any RFMOs not including non-Arctic states are not legally binding forces on non-Arctic states. In particular, China has made statements while signing an “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 (the Fish Stocks Agreement)” in 1995, that any inspection and enforcement relating to Article 21(7) and Article 22 (1) f must be authorized by flagship state.³⁹

7.4 *Spitsbergen Treaty*

The Spitsbergen Treaty gives non-Arctic states a strong foothold in Arctic, which justifies their economic and scientific activities in Spitsbergen Islands and adjacent waters. Compared with the Spitsbergen Treaty, a hard law, any recommendations or agreements issued by the Arctic Council is only categorized as soft law.

7.5 *More effective bilateral diplomacy*

Apart from existing international instruments, Korea, Japan and China are trying to create opportunities to set and strengthen bilateral relationship with Arctic states. China has made some progress of cooperation with Nordic countries including Sweden, Iceland, Denmark and Norway. Korea is “striving to bolster cooperation with state agencies, think tanks and businesses”⁴⁰ in the Arctic countries including Russia, Norway, Finland and

eries-agreement

38 “What is NEAFC?” <http://www.neafc.org/fishing-licence-guide/121>

Article XIX, *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, Northwest Atlantic Fisheries Organization, July 2004.

39 Statement of the Government of PRC on Relevant Provisions of the Fish Stocks Agreement (in Chinese), August 4, 1995.

“中华人民共和国政府关于《执行1982年12月10日（联合国海洋法公约）有关养护和管理跨界鱼类种群和高度洄游鱼类种群的规定的协定》的有关规定的声明,” http://www.110.com/fagui/law_13285.html.

English version of this statement, *Law of the Sea Bulletin* 33, 1997, p. 30.

40 “Seeking a bigger role,” <http://thestar.com.my/news/story.asp?file=/2012/5/20/asia/11312163> May 20, 2012.

Denmark in 2012, and will concentrate on the cooperation with Canada and United states in Beaufort Sea in 2013. Korea has made substantive progress that Korean Gas Corp (KOGAS) finalized her first energy deal in North America on December 2010.⁴¹ What is more, Korea and Greenland signed four memorandums of understanding calling for cooperation in resources development, geological survey and Arctic science and technology on September 2012.⁴² Japan is also intensifying the ties with Norway, focusing on energy field and science, and both sides have institutionalized a Japan-Norway Polar Seminar. Due to earthquake and tsunami disaster on March 2012, Japan has to increase its importation of energy.⁴³ Needless to say, Arctic energy provides more alternatives. These bilateral diplomacies have proven practical, and more effective than one permanent observer that is at a huge cost.

8. Outlook of Arctic governance

What is clear is that the Arctic region can't go its own way, carving out a developmental path independent of global forces. Many of the existing impacts in the Arctic originate from outside the region, so the Arctic is the major responder to global climate change. Because of this, climate warming is a global problem requiring international consensus to reduce CO2 emissions from industrialized and major developing countries. In a similar vein, shipping is an international sector that requires consensus on the development and implementation of instruments to reduce environmental impacts, guarantee safety of navigation and develop economically efficient activities.⁴⁴

In the meanwhile, Arctic change is the driving force of the global climate change by affecting exterior weather. For instance, the Arctic Oscillation affects seriously climate in Middle-latitude ranging to China, Korea and Japan through Western Europe countries. It is necessary to find the mechanism of atmospheric circulation and ocean current relationship between Arctic and mid-latitude. Secretary of State Hillary Rodham Clinton said to her counterparts in Nuuk, "This region matters deeply – not just to our citizens, but also to people across the region and the world."⁴⁵ The impacts of climate change and

41 Mia Bennett, "South Korea's growing role in Arctic economic development."

<http://foreignpolicyblogs.com/2011/04/20/south-koreas-growing-role-in-arctic-economic-development/>
April 20th, 2011

42 Chang Jae-soon, "(2nd LD) S. Korea, Greenland agree to cooperate in green growth, resources development," <http://english.yonhapnews.co.kr/national/2012/09/10/8/0301000000AEN20120910001600315F.HTML>
September 10, 2012.

43 Japan's 2012 LNG imports at record high on nuclear woes, <http://www.reuters.com/article/2013/01/24/e-nergy-japan-mof-idUSL4N0AT00Y20130124> Jan 23, 2013

44 Clive Schofield and Tavis Potts, "Across the Top of the World? Emerging Arctic Navigational Opportunities and Arctic Governance," CCLR 4, 2009, p. 479.

globalization have intensified interactions between the Arctic and the rest of our planet. As a result, external actors are moving from the periphery to the centre of Arctic affairs. Only through cooperation between inside and outside Arctic, can Arctic issues be expected to be resolved.

Even though it is difficult to set up one comprehensive treaty like the Antarctic Treaty, it does not mean that it is impossible to establish an agreement concerning with one certain issue area, such as Arctic fisheries. A plausible scenario appears to be one where Arctic and non Arctic states negotiate to address gaps in the Arctic regime on an issue-by-issue basis, sector-by-sector. Many agreements including fishery management and shipping regulation have to include stakeholders outside Arctic region.

Due to misconceptions, Arctic States keep vigilant of non-Arctic presence, especially China.⁴⁶ For example, the deal of Chinese billionaire Huang Nubo bidding on one piece of land in northern Iceland was cancelled time after time by the government in Reykjavik over “suspicions that the land would eventually be converted into an Arctic port to further Chinese shipping interests.”⁴⁷ Even the size of Chinese embassy in Iceland becomes the target hyped up by some media. They hold that cooperation should be limited within the Arctic group, with differences for outsiders.⁴⁸ As a result, “the Arctic Council is in danger of being perceived as an exclusive club, taking major decisions about the Arctic with little regard for the concerns and interests of non-Arctic states.”⁴⁹ What will happen if Arctic states stick stiffly to exclusivity with regard to non-Arctic states? If so, “...whereby non-Arctic states could simply disregard the arrangements, rules and codes of conduct that the Arctic Council creates for the Arctic and instead work outside existing frameworks.”⁵⁰ Moreover, the challenges now facing the Arctic Council may mean that the Arctic Council will gradually be supplanted by sector governance regimes evolving in a piecemeal manner, at last marginalized in Arctic governance.

45 “The Arctic Council’s Historic Nuuk Ministerial,” *The Circle*, 2011, No.2, p.22.

46 Linda Jakobson, “Northeast Asia Turns Its Attention to the Arctic.” *Analysis Brief*, the National Bureau of Asian Research, December 17, 2012.

47 Zachary Fillingham, “Arctic ownership claims.” <http://www.geopoliticalmonitor.com/arctic-ownership-claims>. April 21, 2012. Simon Parry, “Fears over China’s Arctic ambitions as tycoon makes £100 million move on Iceland.” <http://www.dailymail.co.uk/news/article-2033509/Fears-China-s-Arctic-ambitions-tycoon-makes-100-million-Iceland.html>.

48 III. POLICY, article 4, “Strengthen institutions for cooperation among the eight Arctic nations (the United States, Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, and Sweden);” National Security / Homeland Security Presidential Directive on Arctic Region Policy. January 9, 2009. Also, Interview record, “The Arctic states – cooperation or competition?” http://russiancouncil.ru/en/inner/?id_4=1127#top

49 Kristofer Bergh, “Arctic cooperation must become more inclusive,” July/Aug 11, SIPRI, <http://www.sipri.org/media/newsletter/essay/julyaugust11>

50 Kristofer Bergh, “Arctic cooperation must become more inclusive,” July/Aug 11, SIPRI, <http://www.sipri.org/media/newsletter/essay/julyaugust11>

9. Conclusion

The Arctic Council had intended originally to solidify its status as one exclusive club by issuing new criteria. However, due to flaws in logic and international laws, the new criteria are weakening the role and function of the Arctic Council in Arctic governance. The new criteria are impracticable and need to be redefined.

Obviously, Arctic states have “stronger interests and a greater say in the future of the Arctic.”⁵¹ It is said that some scholars from non-Arctic states have the misconception that Arctic should be treated as a common heritage of mankind.⁵² Exactly speaking, only the central Arctic Ocean beyond national jurisdiction belongs to human kinds, and a large part of the Arctic Ocean in reality is under jurisdiction of coastal states. Non-Arctic countries need to understand the reasonable concerns of Arctic states and respect their sovereignty, sovereign rights and jurisdiction on basis of recognized international treaties and dialogues. But In the meantime, Arctic states need to face the realities, and take into account the legitimate interests of non-Arctic states, and adopt a practical and open policy. Nonetheless, only when both Arctic and non-Arctic states find the balance based on mutual respect and mutual understanding, will there be a prospect of a settlement of Arctic governance.

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51 Kristofer Bergh, “Arctic cooperation must become more inclusive,” July/Aug 11, SIPRI, <http://www.sipri.org/media/newsletter/essay/julyaugust11>

52 “China’s Arctic Play: An admiral stakes a territorial claim—and it looks like there’s more to come,” <http://thediplomat.com/2010/03/09/china%E2%80%99s-arctic-play/>. According to communication with Admiral Yin Zhuo, he claimed that he had never asserted “Arctic belongs to all the people around the world.” His original speech was “According to UNCLOS, North pole and vicinity does not belong to any country, but common heritage of mankind.” See also Chinese news report, “尹卓委员：中国不可缺席北冰洋开发.” http://www.cas.cn/zt/hyzt/2010lianghui/2010lhrdht/201003/t20100306_2792772.html. Therefore, it is evident that media misread his original meaning.

The German position, see Christian Schwägerl and Christoph Seidler, “Berlin Enters the Scramble for the Arctic,”

<http://www.spiegel.de/international/world/final-frontier-berlin-enters-the-scramble-for-the-arctic-a-751240.html>