

**Seventh Conference of Parliamentarians of the Arctic Region**

**Innovation in the Arctic Governance: The possibilities and limitations of a  
binding legal regime for the Arctic**

*“Reflections on the possibilities and limitations of a binding legal regime  
for the Arctic”*

**Address by**

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Excellencies,  
Distinguished Participants,

First, I would like to thank the organisers of this Conference for inviting me to speak. The topic that I have been asked to address is: *“Reflections on the possibilities and limitations of a binding legal regime for the Arctic”*.

I will argue three points in my presentation:

1. There is already a binding legal regime that applies in the Arctic. Rather than focusing on new regimes, we should concentrate our resources on working with what we have and examine if the present legal regime is sufficient and, if not, work towards strengthening it.
2. We should ensure that the existing regime is implemented and that States that have not yet acceded to or otherwise accepted elements of this regime do so.
3. We should work to build political support to achieve the necessary protection of the Arctic.

Allow me to take as a point of departure the following quote from the Executive Summary of the Arctic Climate Impact Assessment:

“Earth’s climate is changing, with the global temperature now rising at a rate unprecedented in the experience of modern human society. While some historical changes in climate have resulted from natural causes and variations, the strength of the trends and the patterns of change that have emerged in recent decades indicate that human influences, resulting primarily from increased emissions of carbon dioxide and other greenhouse gases, have now become the dominant factor.

These climate changes are being experienced particularly intensely in the Arctic. Arctic average temperature has risen at almost twice the rate as the rest of the world in the past few decades. Widespread melting of glaciers and sea ice and rising permafrost temperatures present additional evidence of strong arctic warming. These changes in the Arctic provide an early indication of the environmental and societal significance of global warming.

And acceleration of these climatic trends is projected to occur during this century, due to ongoing increases in concentrations of greenhouse gases in the earth’s atmosphere. While greenhouse gas emissions do not primarily originate in the Arctic, they are projected to bring wide-ranging changes and impacts to the Arctic. These arctic changes will, in turn, impact the planet as a whole. For this reason, people outside the Arctic have a great stake in what is happening there.” (My emphasis)

The Arctic Climate Impact Assessment was established at the request of the Arctic Council and presented in November 2004.<sup>1</sup> You are all familiar with this significant document, the first effort to comprehensively examine climate change and its impacts in the Arctic region.

There are two elements in this quote that I would like to highlight. First, that climate change will have great impacts in the Arctic. Second, and most importantly, that these impacts are generated from outside the Arctic and that the effects will also occur outside the Arctic. This is of tremendous consequence when you examine the possibilities and limitations of a binding legal regime for the Arctic.

The organisers have asked me to make reflections. Consequently, I will not make a presentation of the existing legal regime in the Arctic. Others will do this. I trust that you have read the very instructive paper prepared for this Conference by Olav Schram Stokke of the Fridtjof Nansen Institute: “The Law of the Sea Convention and the Idea of a Binding Regime for the Arctic Marine Environment”.

My point of departure is therefore that the participants in this Conference already have a general idea of the existing norms in the Arctic – both binding rules and so called soft law.

Let me also make clear at the outset that I am not an expert on the Arctic. But I do have some experience from the Law of the Sea. In 1986-2004, I was chairman of the Swedish delegation in negotiations on maritime delimitation in the Baltic with three neighbouring countries, and in 1994-2004, during my time as the Legal Counsel of the United Nations, the Law of the Sea came within my field of responsibility.<sup>2</sup>

During this latter period, I was also involved in the start-up of the three institutions established by the United Nations Convention on the Law the Sea (UNCLOS): the International Seabed Authority, the International Tribunal for the Law the Sea, and the Commission on the Limits of the Continental Shelf. Finally, last year, I was chairman of the XXVIII Antarctic Treaty Consultative Meeting that took place in Stockholm.

Precisely because of these experiences, I am approaching the topic that I have been asked to talk about with a great sense of humility. Maybe what I am about to say is not so much news. However, what I will attempt to contribute is the national and international lawyer’s perspective on the legal and political realities with respect to Arctic governance.

The title of my presentation is framed in a manner that seems to suggest that there is no binding legal regime for the Arctic. But the fact is that there is already a wide-ranging legal regime that applies there, in particular the UNCLOS, but also some of the global conventions for the protection of the environment. Of special importance is that the UNCLOS rules on the Exclusive Economic Zone and the continental shelf will govern large portions of the Arctic.

In this context we should note that the Russian Federation was the first country to submit an application for the entitlement to the continental shelf beyond 200 nautical miles. The application concerned four areas: the Barents Sea, the Bering Sea, the Sea of Okhotsk and the Central Arctic Ocean. With respect to the latter, the claim went all the way up to the North Pole.

In 2002, the Commission on the Limits of the Continental Shelf presented its recommendations to the Russian Federation regarding the submission. A short summary of the recommendations is contained in the Report of the Secretary-General to the Fifty-seventh session of the General Assembly under the agenda item Oceans and the Law of the Sea.<sup>3</sup> As regards the Central Arctic Ocean, the Commission recommended that the Russian Federation make a revised submission in respect of its extended continental shelf in that area based on the findings contained in the recommendations.

What I just recalled pertains to one Arctic State. We must assume that also other States bordering the Arctic will submit similar applications to the Commission on the Limits of the Continental Shelf. All this should be borne in mind when we discuss how to protect the Arctic.

Another important factor is shipping. Since the sea ice in the Arctic is melting, larger areas of the Arctic will in the future be open to shipping. As Olav Schram Stokke demonstrates, there are limits to the possibilities for coastal states to adopt special regimes for traditional maritime shipping on the high seas.

#### Could the regime that applies in Antarctica be a model?

One question that is sometimes asked is whether it is possible to create a legal regime for the Arctic that is similar to the one that applies in Antarctica?

The 1959 Antarctic Treaty was established immediately after the International Geophysical Year in 1957-58.<sup>4</sup> The 12 nations that had been active in Antarctica during that year, managed to agree that peaceful scientific cooperation in the Antarctic should continue. The Treaty applies to the area south of 60° South latitude.

We should note that the Antarctic continent is some 14 million square kilometres. By way of comparison, this area is nearly one and a half times the size of the United States of America. Antarctica's 14 million square kilometres is also about the same as the Arctic Ocean. The area north of the Arctic Circle is 21 million square kilometres.

The three objectives of the Antarctic Treaty are simple but must be said to be unique in international relations:<sup>5</sup>

- To demilitarize Antarctica in order to establish it as a zone free of nuclear tests and the disposal of radioactive waste, and to ensure that it is used for peaceful purposes only;
- To promote international scientific cooperation in Antarctica;
- To set aside disputes over territorial sovereignty.

A protocol on environmental protection is also part of the treaty regime.

There are presently 45 States parties to the Antarctic Treaty, 28 of them being so called Consultative Parties. The others are Acceding States. No doubt, the fact that the membership includes all the major players on the international arena contributes to the high standing that this treaty has acquired.<sup>6</sup>

Every year the States parties gather for the Antarctic Treaty Consultative Meeting. At these meetings important decisions and measures are adopted relating to the administration of the treaty area.

Particular interest to our Conference is that the parties at this year's meeting in June in Edinburgh adopted the Edinburgh Antarctic Declaration on the International Polar Year 2007-2008. Allow me to quote the following from this declaration:<sup>7</sup>

“We, the Antarctic Treaty Parties, commit ourselves to full support for the scientific endeavours of those engaged in International Polar Year projects and logistics. In particular, we will:

- give political support to the International Polar Year, by championing its aims, both within our own countries and internationally; and
- provide as much financial support as possible for International Polar Year programme projects.

We support the objective of delivering a lasting legacy from the International Polar Year. In particular, we would welcome work by the World Meteorological Organisation and the International Council for Science to synthesise the results from the International Polar Year and to compile a report for the Secretary-General of the United Nations on its key findings. We believe such a report would be of value not only to the Antarctic Treaty Consultative Meeting but also to the Arctic Council and the global community more widely. In addition, we, the Antarctic Treaty Parties, intend to promote outreach from the International Polar Year, not least through distribution of educational material to institutions and the general public.” (My emphasis)

I wanted to share this factual information with you so that you can draw your own conclusions when we now revert to the question whether it is possible to create a legal regime for the Arctic that is similar to the one that applies in Antarctica.

At first glance one might think that this would be a viable option. However, on a closer look, the picture gets complicated.

First of all, as we are aware, there is already an existing regime that applies in the Arctic. This regime gives extensive rights to the coastal States. I do not believe that these States are prepared to accept limitations to their acquired rights. Because this is what they may have to accept, if they agreed to participate in a legal regime which would allow other States to get involved in decision-making that the coastal States are competent to make on their own on the basis of existing rules, in particular UNCLOS.

A most significant difference is that Antarctica is a continent surrounded by sea – not, as is the case in the Arctic, an area consisting of a sea surrounded by territories of sovereign States. It is true that in Antarctica some States have laid claims to territory – sometimes overlapping claims. But the fact that those States have agreed to set aside those disputes is of great relevance here.

Without going into further detail, my conclusion is that, although the Antarctic Treaty must definitely be mentioned among the success stories in the field of international

law, it could hardly serve as a model for organising a comprehensive legal regime for the Arctic.

However, I would not exclude that a specific environmental regime could be created for the Arctic. Maybe such a regime could be established on the basis of UNCLOS Articles 122 and 123 on cooperation of States bordering enclosed or semi-enclosed seas and Article 234 on ice-covered areas.<sup>8</sup> If so, lessons might be learned from the Antarctic Treaty and its 1991 Protocol on Environmental Protection.

#### A non sectored approach to regulating the Arctic?

An opinion expressed by some is that the sectored approach to the regulation of the Arctic is detrimental. In their view, it would be better to have a comprehensive regime that covers all aspects that need to be regulated.

No doubt, a comprehensive regime would be easier to understand. In particular, the rules that apply in the environmental sector are not always easy to comprehend – their relationship and the extent to which they apply in the Arctic. Even experts complain that it is difficult to get this general overview.

However, as I just mentioned, there is already a binding legal regime that covers many different aspects of human activity in the Arctic. To create a specific and non sectored legal regime for the Arctic would require a tremendous effort, including from many States with no specific direct interest or knowledge about the Arctic. Furthermore, to be authoritative, the regime would have to be accepted by the major players on the international arena as is the case with the Antarctic Treaty.

In my view, rather than focusing on new regimes, it would be important to analyse what the threats are and then act accordingly, mainly by making sure that the existing regime is implemented and that States that have not yet acceded to or otherwise accepted elements of this regime do so.

#### The real dilemma

As it appears from the Arctic Climate Impact Assessment, the most difficult element in the equation is to identify factors that are generated through activities elsewhere than in the Arctic.

Consequently, the real dilemma is that the problems that have been identified as threatening the Arctic are not primarily generated in the Arctic. This is a decisive element to bear in mind.

Let us for a moment imagine that there was no legal regime for the Arctic – that we had a clean sheet of paper or a tabula rasa – and that we got together with the aim of creating a comprehensive legal regime for the Arctic. Who should participate? The Arctic States? But since they only have competence to deal with matters over which they have control, would they be able to address, other than partially, the threats to the Arctic that are generated globally?

On reflection, one comes to the conclusion that a meaningful agreement establishing a comprehensive legal regime in the Arctic would have to aim for global participation.<sup>9</sup> The first question to ask before such an endeavour is undertaken would be: Which are the most important issues that need to be addressed? Judging from the scientists – although we know that views differ sharply among some of them – the answer would be: The emissions of carbon dioxide and other greenhouse gases! The threats to the ozone layer!

If this is the case, would we not immediately find ourselves in the realm of the Kyoto and Montreal Protocols and the whole field of environmental agreements that apply generally in the world today?

Let me illustrate by focusing on eight conventions and protocols in the environmental field for which the Secretary-General of the United Nations is the depositary. How many parties are there to these conventions and protocols? Please remember that there are 191 Member States of the United Nations. The latest available figures in the United Nations Treaty Database are the following:

- Vienna Convention for the Protection of the Ozone Layer – 190 parties
  
- Montreal Protocol on Substances that Deplete the Ozone Layer – 189 parties
  
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal – 168 parties
  
- United Nations Framework Convention on Climate Change – 189 parties
  
- Kyoto Protocol to the United Nations Framework Convention on Climate Change – 164 parties<sup>10</sup>
  
- Convention on Biological Diversity – 188 parties
  
- United Nations Convention to Combat Desertification – 191 parties

- Stockholm Convention on Persistent Organic Pollutants – 128 parties

As it appears, there is an almost universal participation in these agreements by the State community. This is an important factor when we look at the Arctic and the possibilities of creating a comprehensive legal regime in a situation where the effects on the Arctic are mainly generated outside the region.

And what about UNCLOS with its comprehensive regime – often referred to as the Constitution of the Oceans? As I said, the Convention already applies to the Arctic. There are even the specific provisions on enclosed and semi-enclosed seas and ice-covered areas that I just referred to. Presently, UNCLOS has 149 parties.

At this point, I would like to draw your attention to the conclusion in Olav Schram Stokke's paper:

“Indeed, given the political impediments to reaching circumpolar agreement on a single comprehensive legal regime for the Arctic – notably the differing interests of the Arctic States on such key issues as shipping and oil and gas activities, and the fact that many of the issues of concern are already regulated in global or regional treaties – the best answer would seem to be a flexible approach to norm-building that seeks productive interplay with existing institutions.”

I agree with this conclusion. It would be counterproductive, I believe, to engage the world community in negotiating a single comprehensive binding legal regime for the Arctic. There is sometimes a superstition that everything will be solved, if new norms are developed – maybe a comprehensive or overarching regime – in a field that is already regulated. But this may not at all be the case. It may even be missing the point, namely the issue of implementation.

Based on my legal experience, I believe that our focus should be on implementing the norms that are already binding upon States irrespective of whether they are Arctic States or members of the global community at large.

We should concentrate our resources on working with what we have and examine if the present legal regime is sufficient

Consequently, I think that it would be important to concentrate our resources on working with what we have and examine if the present legal regime is sufficient or whether there are elements that need strengthening. In this exercise, the distinction between norm setting and implementation must be made.

What should be analysed are existing norms, both binding rules and soft law. This analysis must be done in a systematic manner. First, it is necessary to examine in three separate steps: the situation in the Arctic, the situation in the northern region, and globally. Distinct issues must be identified and these issues must be addressed systematically – but always with our eyes on the entirety.



The questions that need answers would be: What are the threats? Are there norms to address the problem? Are these norms sufficient and established at the appropriate level? Are they applied? If not – why? Is it possible to correct this? What are the remedies? How can one achieve better respect?

This approach must be repeated systematically, sector by sector or should I say topic by topic.

A very important element in this exercise is to establish facts in the way that was done in the Arctic Climate Impact Assessment. I note in this context that this assessment represents “the beginning of a process which should continue with a focus on reducing uncertainties, filling gaps in the knowledge identified during the assessment, and more explicitly including issues that interact with climate change and its impacts.”

#### It is necessary to build political support

The next step is to engage politicians and non-governmental organisations – to create political support. Your presence here testifies to the fact that many take these matters seriously. But, and I am sure that you would agree, the main obstacle is that it is often difficult for politicians with a deeper knowledge and understanding of a particular area to engage colleagues within their parties or elsewhere and convince them that they too should get involved in the subject matter.

What I am referring to here is the well known process of building the necessary political support, based on knowledge, to achieve results.

New international legal regimes or amendments to existing international regimes are the product of a political process in which, ultimately, politicians at the highest level in the States concerned must be involved. This is a pre-condition in order to achieve policy decisions and to give legitimacy to the norms that eventually will be elaborated with the assistance of lawyers and other experts.

It is important to keep in mind that the most sophisticated manner in which to adopt a policy is to lay it down in legally binding norms – at the national level in Statute Law, at the international level in treaties.

In this process one must also bear in mind the political realities: politicians engage in matters that interest the electorate. In order to engage the electorate it is important that the appropriate information is disseminated. You are better placed than I am to answer questions like: What are the facts that the general public needs to know? Are those facts reliable? How does one deal with those who – for one reason or another – are bound to belittle or even deny these facts and their consequences?

In this context the role of the media comes to the forefront. How can one encourage representatives of the media to engage themselves in the matters that we are discussing in this Conference?

As we know, tremendous advances have been made over the past years in the fields of human rights and international criminal law. But we should also note the increasing engagement in environmental matters. We should build on this.

The role of the non-governmental organisations must also be highlighted. What support can one count on from those organisations? They are often the ones who inform and engage the general public in a manner that moves politicians into taking action.

The questions to ask are: Who are the organisations that are particularly interested in these matters. What information do they have? Can they join hands in order to make more impact? From personal experience I can refer to the exemplary coordination among the non-governmental organisations before, during and after the 1998 Rome Conference on the International Criminal Court. Because of this coordination they had, and still have, far more influence than they would otherwise have had.

### The Arctic Council

Obviously, the Arctic Council plays a key role in this context. The question for this Conference to consider is whether the Council could engage the general public, the non-governmental organisations and the media in a more effective manner and raise their awareness of the three pillars of sustainable development: the environmental, social and economic?

### The Tällberg Forum and the High North

Allow me to share with you some thoughts from an event in which I participated about a month ago: the Tällberg Forum which takes place in Dalecarlia in Sweden every summer. The Forum brings together participants from different walks of life from all over the world: heads of state, politicians, businessmen, scientists, journalists, writers, artists, lawyers, representatives of non-governmental organisations and indigenous peoples.<sup>11</sup> This year we were some 450 people from more than 60 countries from all continents.<sup>12</sup>

The Forum asks the question “How on earth can we live together?” – This year with the addition “Getting serious”. The challenge discussed was, on the one hand, the necessity to reconcile the need for economic growth with limited energy resources and the fragilities of the environment, and, on the other hand, the need to strengthen democracy, the rule of law and human rights.

How do we resolve the triple-E equation (economy/energy/environment), we were asked? The combination of frantic economic activity with the exponential rise of population leads to two phenomena: critical shortages of key natural resources and closer interdependences.

During the Forum there were parallel workshops that discussed the situation in ten different places in the world. One of these places was the High North. We focused on the Arctic and noted among other things that the polar bear is threatened by extinction because the polar ice is melting. Another workshop looked at the situation in Bangladesh and its capital Dhaka.

This audience is well aware of the connection between the two. When the ice in the Arctic is gone – and this will most probably be a reality within less than 100 years – there will be no more polar bears. At the same time the melting of land-based ice in the Arctic will cause the sea level to rise maybe by one meter within the same period, affecting millions of people around the world and in particular in Bangladesh.

We discussed the dilemma that the melting of the ice in the Arctic is caused by sharply raising temperature in that area which in turn is caused by the burning of fossil fuel in other parts of the world. And we noted that the most serious effects of this melting will materialize in these other parts of the world rather than in the Arctic itself.

Our conclusion was that something has to be done if we want to reverse this threat. The environmental degradation and the continued burning of fossil fuel need to be addressed. In the plenary Forum our workshop made the following recommendations that I would like to share with you:

- The Arctic is a high speed indicator of global change
- At the same time it is an emerging arena for fossil fuel exploitation
- Thus: it is a region where the triple E-equation (economy/energy/environment) is put to the test
- Nanook – the Polar Bear – is an indicator species. If and when the Polar Bear gets extinct oceans will have risen everywhere
- Therefore: what happens in the High North is relevant to the entire world
- There is a legal regime in the Arctic, n.b. UNCLOS and other treaties
- We need to take stock of the existing norms and present the results in a manner that is accessible to laymen
- We have to look to science: is the existing regime sufficient?
- We need to draw conclusions, come up with ideas, and present these to the general public and politicians
- In particular with respect to oil transport in areas where this did not occur before: do we have a safe regime for that? What actions have been taken by the International Maritime Organisation?
- The International Polar Year 2007-2008 provides a window of opportunity and a platform for change

These recommendations may be of interest also for our Conference and in your endeavours to strengthen the protection of the Arctic.

### Conclusion

To conclude, I revert to my three points: There is already a binding legal regime for the Arctic. Our focus should be on implementation, as well as examining whether the regime needs strengthening. To achieve the necessary protection of the Arctic, we must increase our efforts of engaging the general public, politicians and governments.

Finally, my *praeterea censeo*: Some States carry greater weight than others. I cannot emphasise enough the importance of engaging the major players on the international

arena – also in matters relating to the Arctic. In particular, it is imperative to bring the United States of America on board in order to achieve results in the matters that we are discussing. I note with regret that no US parliamentarians are attending this Conference.

Regretfully, the present US policy of unilateralism is causing tremendous damage to our common efforts at the international level in many fields. Even if there are signs that the United States has begun to re-evaluate this policy, it will take a long time to repair the damage already done.

But we should not forget that the United States is a multifaceted country. There are many who understand and who take exception to the unilateral approach and advocate multilateral action and adherence to international law. Let us hope that these persons will be heard and that the United States will again take the lead on the basis of statesmanship and the rule of law!

Thank you for your attention!

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<sup>1</sup> Available at <http://www.acia.uaf.edu/>

<sup>2</sup> The Division for Ocean Affairs and the Law the Sea is part of the UN Office of Legal Affairs.

<sup>3</sup> [A/57/57/Add.1](#), paras. 38-41.

<sup>4</sup> [http://www.antarctica.ac.uk/About\\_Antarctica/Treaty/](http://www.antarctica.ac.uk/About_Antarctica/Treaty/)

<sup>5</sup> Available at <http://www.ats.aq/>

<sup>6</sup> All the five permanent members of the UN Security Council are Consultative Parties: China, France, the Russian Federation, the United Kingdom, and the United States of America. Among those parties are also many States in the region: Argentina, Australia, Chile, New Zealand, and South Africa. Germany, India, Italy and Japan are also Consultative Parties.

<sup>7</sup> Also available at <http://www.ats.aq/>

<sup>8</sup> Article 122 on Definition reads:

'For the purposes of this Convention, "enclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.'

Article 123 on Cooperation of States bordering enclosed or semi-enclosed seas reads:

"States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:

- (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
- (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
- (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article."

Article 234 on Ice-covered areas reads:

"Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations

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shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.”

<sup>9</sup> The fact that only 45 of the 191 UN Member States are parties to the Antarctic Treaty could be invoked against this argument. But the nature of the Antarctic Treaty is very special and, as it appears, the most important rules to protect the Arctic are contained in global treaties.

<sup>10</sup> Entered into force on 16 February 2005, in accordance with article 25 (1) of the Protocol. Article 25 reads as follows: "1. This Protocol shall enter into force on the ninetieth day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession. 2. For the purposes of this Article, 'the total carbon dioxide emissions for 1990 of the Parties included in Annex I' means the amount communicated on or before the date of adoption of this Protocol by the Parties included in Annex I in their first national communications submitted in accordance with Article 12 of the Convention. 3. For each State or regional economic integration organization that ratifies, accepts or approves this Protocol or accedes thereto after the conditions set out in paragraph 1 above for entry into force have been fulfilled, this Protocol shall enter into force on the ninetieth day following the date of deposit of its instrument of ratification acceptance, approval or accession. 4. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of the organization."

<sup>11</sup> <http://www.tallbergforum.org/>

<sup>12</sup> One of the participants in this year's Forum was Dr Robert Corell, Chairman of the Steering Committee for the Arctic Climate Impact Assessment.