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## Commentary

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**Author for correspondence:**Kong Soon Lim, Email: [kong.lim@outlook.com](mailto:kong.lim@outlook.com)**Abstract**

In recent years, two soft law instruments have emerged to promote sustainable development in the Arctic, namely the Arctic Investment Protocol by the World Economic Forum Global Agenda Council on the Arctic and the Arctic Economic Council's Code of Ethics. These instruments seek to foster sustainable development through responsible investment and good business practices. The emergence of these soft law instruments by non-State actors demonstrates an interest from the business sector and Arctic stakeholders to develop business norms and standards of sustainable development that are specific to the region. In understanding the potential and scope of these instruments, this paper considers the role of both instruments in driving sustainable development in the Arctic.

**Introduction**

The melting of the ice caps has transformed the Arctic region from an ice-covered mass into an ice-free ocean, unlocking its economic potential. This in turn has led to a renewed interest in Arctic exploration and development as investors seek to tap into the Arctic's abundance in natural resources. These economic opportunities that have encouraged domestic investment and attracted foreign investments to the region require unique legal solutions to ensure their sustainability in the vulnerable Arctic environment (Koivuova, 2017, p. 12). However, as infrastructure and energy investments in the Arctic are often capital-intensive and are transborder in nature, the regulation of these investments through domestic legislation of individual Arctic States are incapable of providing a holistic regulatory regime. Arguably, the lack of clarity, certainty and predictability has led to the emergence of soft law instruments from the business sectors and Arctic stakeholders to develop Arctic-specific business norms and standard of sustainable development. These non-binding soft law instruments that seek to modulate businesses and investments in the Arctic are the World Economic Forum (WEF) Arctic Investment Protocol and the Arctic Economic Council's (AEC) Code of Ethics. These instruments reflect an expressed interest and support from various business sectors and stakeholders on sustainable development in the Arctic. As rightly observed by Jonas Gahr Store, former Norwegian foreign minister, these instruments mark the beginning in the development of "broadly shared norms" in the Arctic (Gahr Store, 2015, Dec 10).

Tellingly, the Protocol and Code of Ethics initiated by non-State actors demonstrate a departure from the State-centric law-making process in shaping sustainable development in the region. The collaboration between non-State actors with minimal interference from States reflects a multi-sector partnership effort to identify challenges in the region and to address them accordingly (Weiss, Seyle, & Coolidge, 2013). The loose organisational structure of these non-State actors allows for an efficient and effective implementation of such instruments as contrasted with the bureaucratic and lengthy process of law-making by States (Ibid.).

The use of the term soft law instruments in this paper refers to "non-state soft law" manifested in the increasingly blurred lines between the domain of public and private laws as well as pluralism in the sources and actors of international law due to globalisation (Olsson, 2013, p. 190; see also Cutler, 2002; Reisman, 2005). The erosion between public and private laws through the role of private forums consisting of mainly non-State actors (i.e. WEF and AEC) may raise new concerns on the yardstick of the sustainable development in the Arctic. However, the separation between public and private regimes at this juncture do not provide a meaningful distinction as the discussion below will demonstrate that these soft law instruments are merely a reflection on the parallel recognition of sustainable development by private actors.

This paper is divided into three sections. The first section begins with an overview of sustainable development in the Arctic. The second section considers an outline of the Arctic Investment Protocol and the Code of Ethics. The third section considers the substantive content and the potential of these of instruments in influencing the behaviour of Arctic actors.

## Towards sustainable development in the Arctic

Sustainable development is a common theme that appears in the Arctic policies of all Arctic States as well as observer States of the Arctic Council. Yet the frequent use of that term is paradoxical as the key economic potential of the Arctic involving the exploration and exploitation of its natural resources is contradictory with the very concept of sustainability (Poppel, 2018, pp. 309–310). The raw materials extracted from the Arctic are non-renewable and cannot be replaced in any manner. Standing in contrast against this background, sustainable development has been the focus of the Arctic Council from the very beginning as encapsulated in the first paragraph of the Declaration on the Establishment of the Arctic Council, the Ottawa Declaration, 1996, which declared that the role of the Arctic Council is to

“... provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of *sustainable development* and environmental protection in the Arctic.”

(Arctic Council, 1996)

In strengthening sustainable development, the Arctic Council's Sustainable Development Programme was established at the Ministerial Meeting in Iqaluit in 1998. The terms of reference guiding the programme outline the goal of sustainable development in the Arctic,

“[to] propose and adopt steps to be taken by Arctic States to advance sustainable development in the Arctic, including opportunities to protect and enhance the environment, and the economies, cultures and health of indigenous communities and of other inhabitants of the Arctic, as well as to improve the *environmental, economic and social conditions* of Arctic communities as a whole.”

(Arctic Council, 1998)

Thus, sustainable development in the Arctic extends beyond the Arctic's environment but it also encompasses economic and social conditions of Arctic communities. In the broadest sense, the Arctic Council adopts a similar but simplified pursuit of sustainable development outlined in the commonly cited Report of the World Commission on Environment and Development (WCED, 1987, p.65). These three pillars of sustainable development have been “shaped to fit” and “lodged [themselves] in international dialogue” through repeated usage over the years as policymakers search for right indicators on the concept sustainable development (Søndergaard, 2018, pp. 107–108). From there on, the three core pillars of sustainable development, namely the environment, the economy and society, have become a norm incorporated in Arctic policies and strategies of the respective Arctic States and Arctic Council declarations. Thus, sustainable development has achieved an almost constitutional status in Arctic governance as it is deeply rooted within the core purpose of the Arctic Council and continuously affirmed in all Arctic Council's declarations from the first Ottawa Declaration, 1996, to the recent Fairbanks Declaration, 2017. But what does sustainable development within the context of Arctic businesses and investments imply? Can investments in the Arctic be environmentally, economically and socially sustainable?

Various policy and domestic measures have been adopted by individual Arctic States in implementing parallel action plans on sustainable development under the global initiatives of the United Nations (Poppel, 2018, p. 315). All Arctic States have engaged in global initiatives on sustainable development, including the Sustainable Development Goals (2016–2030). Whilst these

domestic action plans do not necessarily focus on Arctic businesses and investments, they have mapped out the contours of sustainability in Arctic development through their respective objectives, targets or indicators.

For instance, in the United States' National Strategy for the Arctic Region, the reference to sustainable development is briefly mentioned in relation to strengthening international cooperation and partnerships (United States, 2013). Similarly, in Canada's strategy on Planning for a Sustainable Future, a shared Arctic leadership model is proposed to allow engagement with various stakeholders on Arctic conservation goals, social and economic priorities of indigenous communities living in the Arctic (Canada, 2015). Norway in its High North Strategy emphasised on sustainable development in value creation through cross-border economic corporation in the Barents region (Norway, 2006; Norway, 2014). In Denmark's Strategy for the Arctic 2011 to 2020, sustainable development is focused on ensuring self-sustaining growth and development in Greenland through the adoption of high standards in the exploitation of resources with high returns for society (Denmark, 2011). Russia in its Arctic policy viewed sustainable development of its Arctic region as a matter of national interest to ensure sustainability in the use of the Arctic's natural resources and diversification of supply chain whilst protecting the environment (Pelyasov, 2013, p. 353; Russia 2012). The above policies reflect the inherent interests by Arctic States to extract the Arctic's natural resources whilst recognising the need to ensure sustainable development in the region.

Despite the common grounds on sustainable development, the present-day Arctic is still far from the vision of a completely integrated region that is shaped by common interests and aims. The institutionalisation of the Arctic Council as it evolves from a decision-shaping to a decision-making body has led to the conceptualisation of the Arctic as a political region of interstate governance. The notion of Arctic regionalism as a forum of governance is not entirely new (e.g. Baerenholdt, 1997; Exner-Pirot, 2013; Griffiths, 1988; Keskitalo, 2004; Knecht, 2013). As observed by Griffiths nearly three decades ago, there are three levels of interaction in Arctic regionalism: firstly through “minimal” interaction established by bilateral relationships, secondly through “coordinate” interaction via multilateral accords and thirdly the vision of an “integration region” where Arctic States delegate their sovereignty to regional institutions to coordinate key policy areas (Griffiths, 1988, pp. 3–4). Griffiths concludes that the Arctic is “at least a minimal region” and “it is neither now nor soon likely to acquire the characteristics of an integration region” (Ibid., p. 4). However, Arctic States through the Arctic Council as a decision-making body have been slow to respond to the changes and challenges in the region. This is due to the limited mandate of the Arctic Council that focuses primarily on environmental, social and scientific issue, whilst matters such as Arctic security and the economy are outside its scope (Halinen, 2016; p. 30). Attempts to broaden the Arctic Council's original objectives have also been resisted by powerful Arctic States, demonstrating a general unwillingness by Arctic States to subordinate their sovereign interests and the exercise of power (Ingimundarson, 2014, p. 189). These constraints are further amplified in the absence of a cross-border regulatory or oversight regime to ensure that businesses and investments in the Arctic contribute towards sustainable development. Thus, despite the various policy measures on sustainable development adopted by Arctic States and Arctic Council, there remains uncertainty over the implementation and execution of such policies alongside with economic policies on ground level. As noted by

several Arctic leaders, the engagement of Arctic issues must “go local” to ensure that Arctic communities have a voice in responsible economic growth and to encourage resilience in local communities (Kristoffersen, 2017, Oct 23; Sweeney, 2016, May 4).

### Soft law instruments on Arctic investment

Filling this important gap, business forums such as the WEF and the AEC have facilitated discussions amongst Arctic stakeholders, businesses and investors on sustainable development in the Arctic. The WEF initiated its Global Agenda Council on the Arctic 2012–2014 with members from the public and private sectors to understand the context and shape the future agenda of Arctic development. On the other hand, the AEC was established as an independent organisation during the Canadian chairmanship of the Arctic Council in 2014 with the vision of making the Arctic a favourable place of business and a mission to facilitate sustainable economic and business development (AEC, 2019a). The membership and participation of the WEF and AEC that is open to all, including stakeholders from non-Arctic region allows the Arctic to benefit from openness on a global dimension (Fredrikson, 2018, April 12).

The Arctic is a global concern as the effects of climate change in the Arctic have repercussions on climates and environmental conditions for the rest of the world. Equally, the economic opportunities in the Arctic come with great risks and potential negative impacts that affect other regions beyond the Arctic. The WEF through its Global Agenda Council on the Arctic and AEC seek to strike a balance between the economic opportunities and the challenges in Arctic development. The Arctic community and Arctic stakeholders through the WEF and AEC have initiated soft law instruments to develop Arctic specific business norms and standards of sustainable development. These non-binding soft law instruments in self-regulating the conduct of businesses and investments in the Arctic seek to avoid the perception of a free-for-all investment opportunity leading towards a “race towards the bottom” (Meyer, 2009, p. 888). These soft law instruments that are driven by sustainable development are the WEF’s Arctic Investment Protocol which was released in 2016 and the AEC’s Code Ethics introduced in 2018.

### WEF’s Arctic Investment Protocol

The Global Agenda Council on the Arctic in their Report on “*Demystifying the Arctic*” outlined two key economic pressures that contribute towards development in the region. Firstly, through the rich natural resources of the Arctic and secondly, the thinning of the Arctic ice that increases the viability of seasonal shipping in Arctic waters and the opening of new Arctic shipping routes (World Economic Forum, 2014). Whilst the Report recognises the opportunities in the exploration of Arctic resources and shipping, these opportunities come with pressing challenges that must be addressed to ensure sustainability in Arctic development.

The Report identifies four pressing challenges in the Arctic, namely (i) the need for protection of the Arctic environment and new collaborative models to secure sustainable growth, (ii) the need to boost investment, (iii) the need to ensure better human and environmental safety with the increase in shipping and off-shore activity and (iv) the need for science in the Arctic (Ibid.). These challenges reflect the unique and specific issues that arise due to the vulnerable Arctic environment. In dispelling the wrong perceptions on the region, the Report also addresses the pervasive myths concerning the Arctic, in particular, the notion that the

Arctic is an uninhabited, lawless region and its wealth in resources is readily available to be developed (Ibid.).

Following the release of the Report, the Global Agenda Council on the Arctic launched the WEF’s Arctic Investment Protocol at the 2016 World Economic Forum Davos Meeting. The Protocol demonstrates a framework of responsible investment and good business practices in the region. The Protocol seeks to overcome the challenges arising from the growing dichotomy in Arctic development, as investment opportunities in the region comes with inherent negative impacts on the natural Arctic environment. Six key principles on responsible Arctic development are outlined in the Protocol to “promote sustainable and equitable economic growth” in the region whilst ensuring community well-being and resilient societies (World Economic Forum, 2015). The principles are as follows:

#### Principles of Responsible Arctic Development

1. Build resilient societies through economic development
2. Respect and include local communities and indigenous people
3. Pursue measures to protect the environment of the Arctic
4. Practice responsible and transparent business method
5. Consult and integrate science and traditional ecological knowledge
6. Strengthen pan-Arctic collaboration and sharing of best practices

(Ibid.)

The Protocol received support from senior executives of multinational corporations, investment firms and industry groups (such as Statoil, Shell, Barclays, Guggenheim Partners, Pt Capital, Spanida CIS, Tschudi Shipping Company AS, China Ocean Shipping Group Co and Norwegian Shipowners’ Association) whom were members of the Global Agenda Council on the Arctic (Ibid.). Guggenheim in endorsing the Protocol described it as “a solid foundation upon which to build for the future” through the adoption of higher standards and sound practices for sustainable development (Guggenheim, 2016, Jan 21). Guggenheim emphasised that based on its projections on public and private infrastructure projects planned, it is estimated that over USD 1 trillion is needed in Arctic investments over the next 15 years (Roston, 2016, Jan 21; Miner, 2016, May 20). Among the USD 1 trillion, the energy (USD 192.7 billion), the mining (USD 79.5 billion) and the renewable energy (USD 60.6 billion) are the top three sectors requiring further investment (Roston, 2016).

By 2017, the perceived support towards the Protocol has toned down as only Guggenheim Partners, the Icelandic-Arctic Chamber of Commerce and the AEC have formally endorsed the Protocol. Despite the earlier backing from senior executives of various multinational corporation and industry group in the discussion and release of the Protocol, no other multinational corporation or industry group has expressly accepted the Protocol. The works of the WEF’s Global Agenda Council on the Arctic was ceased in 2016 before it was transferred and absorbed by the AEC. In line with its core mission as an independent organisation facilitating business development and sustainable economic activities in the Arctic, the AEC endorsed the Protocol at its 2017 Annual Meeting (AEC, 2017). The AEC in its statement to the 2019 Arctic Council Ministerial Meeting, Rovaniemi has called for the Arctic Council to consider endorsing the principles of the Protocol (AEC, 2019b).

### AEC’s Code of Ethics

The proposal for an Arctic code of ethical business was suggested by Tero Vauraste, Vice Chair of the AEC during the plenary session of the UArctic Congress 2016 at St Petersburg, Russia (Vauraste, 2016). Vauraste opined that as Arctic trade is an integrated part of Arctic society, it ought to create “value chains” to

ensure sustainable economic development in the region; these value chains should flow towards its creation instead of being consumed. Value chains can be created through trade within the Arctic or within the broader global value chains that observe an ethical code of business conduct (Ibid.).

In 2018, the AEC released its Code of Ethics as a reflection of the ethical values of the organisation and as a guide to businesses and investors under its umbrella (AEC, 2018a). The Code of Ethics contains parallel principles with those outlined in the Protocol and it is intended to further strengthen, encourage and realise the application of good investment principles in the Arctic (Vauraste, 2017). The Code of Ethics outlines six fundamental values of the AEC; these values include collaboration, sustainability, transparency, competency, innovation and peace (AEC, 2018a). These fundamental values reiterate the emphasis of the AEC's approach in managing regional development and non-Arctic interest based on the principles of collaboration, partnership, innovation and peace, which would allow the AEC to work closely with its members and stakeholders to promote responsible economic growth (AEC, 2015). The fundamental values are further supplemented by general rules of conduct on business integrity, transparency, complying with applicable laws in an ethical, sustainable and socially responsible manner, in addition to respecting fundamental human rights and zero tolerance on corruption (AEC, 2018a).

Flowing from the principles in the Protocol, the AEC Working Group on Investment and Infrastructure seeks to expand and build a coalition of support around the principles of the Protocol in moving forward (AEC, 2018b). Three progressive phases have been outlined by the Working Group. The first phase involves identifying and setting out guidelines as a foundation for responsible investments in the region (Ibid.). The proposed guidelines are intended to be parallel with globally applicable principles on responsible investments and to facilitate responsible investments in the region based on terms set by Arctic businesses, the Arctic community and with the participation of financial institutions (Ibid.).

In January 2019, the AEC released its online submission platform requesting stakeholders to submit best practices to strengthen the Protocol. The consultation was intended to formulate and outline concrete examples in applying the principles of the Protocol. The second phase of the Working Group focuses on building a coalition of support for the principles through engagement with stakeholders and attracting capital to fund the region (AEC, 2018b). Lastly, the third phase of the Working Group considers the need to create an Arctic business inventory to assist parties who are interested to invest in the Arctic (Ibid.).

In summary, the works of WEF's Global Agenda Council on the Arctic which begun as an initiative to address the challenges in the Arctic has led towards the codification of the Protocol. Similarly, the Code of Ethics emerged as a response to the need for the creation of value chains in the Arctic economy. These instruments are now ushering the development of practical and industry-oriented standards as Arctic business norms. The substantive provision of these instruments and its potential in influencing the behaviour of Arctic actors are considered in the next section.

### Fostering sustainable development through soft law instruments

The Protocol and the Code of Ethics are soft law instrument which are best described as quasi-legal rules, they are simply not law at all (e.g. Weil, 1983, p. 415; Guzman & Meyer, 2010, p. 172). However,

both instruments do provide a neutral common ground for discussion between businesses and investors together with Arctic stakeholders to facilitate sustainable development in the Arctic. These soft law instruments seek to balance the delicate relationship between sustainability and harnessing the economic potential of the Arctic. Both the Protocol and the Code of Ethics also do provide a contemporary view on the current state of law. These instruments reflect the parallel recognition by private actors on the settled jurisprudence of sustainable development in the Arctic as recognised by Arctic States. The substantive contents of both instruments resonate four common themes in fostering sustainable development: (i) long-term perspective on businesses and investment, (ii) respecting local communities, (iii) encouraging good business practices and (iv) strengthening collaboration.

In examining the first common theme, the Protocol adopts a long-term view on Arctic investments and development through building resilience in the Arctic community (World Economic Forum, 2015). The Protocol identifies the need for the creation of job opportunities and development of human capital to ensure resilience in Arctic communities (Ibid.). Likewise, the AEC takes a long-term view in facilitating sustainable Arctic economic and business development. In its Second Strategic Plan 2019–2021, the AEC recognises economic growth as a key pillar to ensure responsible economic development in the Arctic (AEC, 2018c). As economic growth in the Arctic is highly dependent on investments, the AEC acknowledges that robust parameters are required to encourage responsible investments (Ibid.).

The second common theme refers to the principle of respecting Arctic communities and indigenous groups. In respecting to the rights of the locals, the Protocol encourages consultation with local communities before the undertaking of developments that may adversely affect traditional practices and the livelihood of the locals (World Economic Forum, 2015). Similarly, the Code of Ethics upholds the principle by recognising that businesses and investments must be conducted in accordance with fundamental human rights (AEC, 2018a).

In fostering sustainable development, both instruments encourage the development of good business practices. The Protocol requires businesses to be conducted in a fair, legal and transparent manner as well as actively fighting corruption (World Economic Forum, 2015). It also encourages businesses and investments to evaluate and address pros and cons of potential economic development to the communities and the environment (Ibid.). The Rules of Conduct in the Code of Ethics calls for businesses to be conducted in an open, transparent and honest manner with compliance with domestic laws (AEC, 2018a). The Code of Ethics emphasises on high ethical standards in building trust-based relationship with the Arctic communities and stakeholders (Ibid.).

The fourth common theme in both the Protocol and the Code of Ethics seeks to strengthen collaboration between Arctic stakeholders. The Protocol encourages public–private partnership and promotes dialogues for the adoption of common standards and best practices (World Economic Forum, 2015). The AEC also recognises collaboration as a key factor in facilitating knowledge transfer and scientific exchanges between industry and academia (AEC, 2018a). The AEC's emphasis of collaboration is demonstrated through the works its five working groups on maritime transportation, responsible resource development, connectivity, investment and infrastructure and energy (AEC, 2019a). For instance, the AEC's Maritime Transportation Working Group has advocated for the adoption of the International Code for Ships Operating in Polar Waters (Polar Code) to allow

harmonisation in the regulation, navigation, ship safety and environmental maritime issues in the Arctic (AEC, 2019c). The AEC has also collaborated with its members in identifying the challenges and making recommendations in the implementation of the Polar Code (Ibid.).

Whilst both instruments have encouraged and facilitated discussions on sustainable development by businesses and investors in the Arctic, it remains an early stage to evaluate the effectiveness of the Protocol and the Code of Ethics. The influence of both instruments will grow as the AEC expands its membership and outreach efforts beyond the Arctic. The AEC has welcomed 5 new members in 2018, and it now has over 40 members comprising of business organisations and indigenous groups.

The development of the Protocol and the Code of Ethics demonstrates the democratisation of law-making through normative content. Such normative content refers to the communications between designated parties on what must be done or forborne, which are accompanied by signals of acceptance and expectation of the right (Reisman, 2005, p. 16). The expectation and commitment would in turn transform the norm into “controlling practice” or “performative utterances” (Reisman, 2005, p. 16; D’Amato, 2009, p. 899). For these instruments to be effective as legal norms, a full application of the practice is unnecessary so long as there is an expectation that the norm sustains the belief of its continuing relevancy in shaping behaviour of businesses and investors who are the subjects of these instruments. Arctic businesses and investors in accepting or agreeing to observe the Protocol and Code of Ethics would create a legitimate expectation that they will give reasonable consideration on the content of such instruments.

## Conclusion

The Protocol and the Code of Ethics demonstrate an apparent consensus on what constitute responsible business conduct or investment in the Arctic. Despite the non-binding and non-enforceable nature of the Protocol and the Code of Ethics, the AEC hopes that States, businesses and investors alike will commit to abide with these rules (Vauraste, 2017). It remains to be seen whether these soft law instruments can achieve a broad consensus globally in influencing the behaviour of businesses and investors in the Arctic. Nonetheless, the alignment of these instruments with globally accepted values and industry-based standards allows them to be easily penetrated and absorbed into industry practices in the Arctic.

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