

Current Developments in Arctic Law

Volume 3, 2015

Edited By

Timo Koivurova

Waliul Hasanat



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Thematic Networks

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Editorial Note

Arctic law remains a dynamic field, as is well shown by this third edition of the *Current Developments in Arctic Law*. With the *Current Developments in Arctic Law*, we are striving to provide short updates on issues of legal significance taking place in the Arctic. This is extremely important, given the pace of change in this field of legal regulation in the region. We also hope that these short updates may induce younger generations to become inspired of these issues and join our growing scholarly community, within the Arctic and beyond.

Our Thematic Network on Arctic Law (of the University of the Arctic) is a unique association of mostly legal scholars but also other legal professionals. There is no similar Arctic law focused grouping, and our membership continues to grow. It is this unique Arctic Law Thematic Network that has put together this third edition of the *Current Developments in Arctic Law*. We want to thank the whole Network and especially the contributing authors for providing these updates, which are widely disseminated and read throughout the Arctic and beyond.

Sincerely,

Research professor Timo Koivurova

Associate professor Waliul Hasanat

Rovaniemi and Rajshahi, 16 December 2015

Short Articles

Sámi Reindeer Husbandry as a Way of Life - Culture, Philosophy, Cosmology and Law

*Dawid Bunikowski**

In this short article, I claim that it is impossible to understand what reindeer husbandry means for the Sámi people without good understanding of the Sámi laws, culture, philosophy, and cosmology. Sámi reindeer husbandry is a way or philosophy of life. The aim is to shed some light on Sámi reindeer husbandry in Finland from the point of view of philosophy, anthropology, culture, and law. However, my point of view is Western and legal-philosophical-anthropological. Thus, as much as possible, Western scholars should follow narratives and language of some chosen Sámi scholars and herders in this respect.

Culture. For the Sámi people reindeer husbandry, hunting, fishing, and shamanism were and are important parts of their traditional way of life and livelihood. There is no Sámi culture at all without reindeer husbandry. If Sámi reindeer husbandry fails, then Sámi culture will be destroyed, too. As Jukka Pennanen rightly says, “Reindeer herding has been, for a long time, a typical cultural element of northern Euroasia and an essential part of traditional Sámi culture and of other indigenous cultures”.¹ Philosophy of life in Sámi culture is closely related to philosophy of Nature. In philosophy we ask and answer the most important questions: whether God is, what really exists, how we know it, and how to live. What seems to be crucial in Sámi culture is the fact that their philosophy, cosmology, and old traditional laws are inseparable.

According to Jelena Porsanger:

The traditional Sámi outlook on life is based on notions that reflect the relationship between humans, Nature, gods and other powers (spirits). This does not mean that humans and Nature are opposed to each other; humans are an integral part of Nature. On the other hand, Nature - both physically and spiritually - is part of Nature of humans and a source of strength for humans. The weakening of this relationship between humans and Nature , and the disruption of this balance, may decrease the strength of humans. (...) The relationship between humans, Nature and gods is not only personal, but also has a moral meaning - the world around us is ethical and just.²

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¹ J. Pennanen, ‘Reindeer Herding - the Defining Cultural Element in the Circumpolar Region’, in J. Pennanen and K. Näkkäläjärvi (Eds.), *Siidastallan: From Lapp Communities to Modern Sámi Life* (The Inari Sámi Museum 2003, publication no. 5), 60.

² J. Porsanger, ‘A Close Relationship to Nature - the Basis of Religion’, in J. Pennanen and K. Näkkäläjärvi (Eds.), *supra* note 1, at 151.

Philosophy, cosmology. Philosophy of Sámi reindeer husbandry is a good phrase. But let us go to the cosmology first. In Sámi cosmology or in the oral tradition (like in the easternmost Kola Sámi) not only "the Sun Man" or the bear "as the ancestor of the people" were crucial elements, but also so was the reindeer. Jelena Porsanger claims then: "In oral tradition, the children of a woman and a wild reindeer turned into reindeer calves and the whole wild reindeer stock originated from them. According to tradition, people and the world around them are one entity, and there is no sharp distinction between the human and the animal³". Now let us turn to the history of the Sámi philosophy of reindeer husbandry. In Sámi reindeer husbandry important was one thing: people followed reindeer. So the Sámi had been nomadic for centuries. This relates to the so called Mountain Sámi (not the Sea Sámi, who lived in permanent settlements and mostly fished). Reindeer were domesticated for milking and transport and meat production. Somehow in the 1200s the Sámi started to herd reindeer intensively⁴, and they always followed them and their migrations. It was a nomadic way of life. Life was somewhere between winter and summer pastures. Life was to move with reindeer herds. Reindeer were monitored every day. Humans and reindeer were still together.

Way of life. As I have found in many narratives and statements of the Sámi people, reindeer husbandry has never been only an occupation or business. This was always something more: it was a comprehensive way of life⁵. The link between reindeer and herders was very strong and direct: it was like living together, but it was also like a spiritual relation: owner/herder-reindeer with earmarks. But this way of life has been dramatically changed due to the closing of the borders in the second half of the 19th century (1852, 1889)⁶ in the European North, between Norway, Sweden, and Finland (under Russian rule), and because of building a fence between Finland and other Nordic countries after WW II. The Sámi were not allowed to cross the border while following their reindeer. Their life became more similar to the life of those who work in agriculture. Also the rules concerning building farm houses did not help in making the old system of reindeer husbandry alive. The Sámi became a part of the towns and villages. "The reindeer-herding families were usually not allowed to found the new farms in their traditional home areas", says about the situation after 1969 (the new reindeer farms law) in Finnish Lapland Kaisa Korpjaakko-Labba, the reindeer herder.⁷ In fact, the Sámi organisational system based on *siida* was depreciated by the Scandinavian states and Finland, which all passed also new rules concerning reindeer husbandry. However, this is still important nowadays that "reindeer herding is based on a yearly cycle, during which the seasons and climatic conditions impart a rhythm to the various phases of herding"⁸. These parts of the traditional seasonal cycle of reindeer herding were, and still to greater extent are, as follows: calving, earmarking, reindeer roaming freely, shooting reindeer to get hides for winter coats (not practised anymore), slaughtering the first reindeer of the year for food, mating season, searching for

³ *Ibid.*, at 152.

⁴ See J. Pennanen, *supra* note 1, at 60. The first source on this topic says that reindeer were domesticated and managed in herds by the Sámi in the 800s. See also *History*, <http://reindeerherding.org/herders/Sámi-finns-finland/>

⁵ For example, Western people know that, *per analogiam*, also Judaism is a comprehensive way of life. It is more than a religion, as it is just one's way of life according to some old beliefs and rules.

⁶ See K. Näkkäläjärvi and J. Pennanen, 'The Assimilation of Sámi Reindeer-herding Administration into the Finnish Government', in J. Pennanen and K. Näkkäläjärvi (Eds.), *supra* note 1, at 66.

⁷ About the law of 1969 on reindeer farms see K. Korpjaakko-Labba, 'Threats to Reindeer Herding', in J. Pennanen and K. Näkkäläjärvi (Eds.), *supra* note 1, at 71.

⁸ K. Näkkäläjärvi and J. Pennanen, 'Reindeer Herding and the Cycle of the Seasons', in J. Pennanen and K. Näkkäläjärvi (Eds.), *supra* note 1, at 62.

and rounding up reindeer, separation and slaughtering, castrating reindeer, herding in winter⁹. And this general philosophy of reindeer husbandry has survived among the Sámi. As one of the reindeer herders said about reindeer herding and the reindeer: "We do not herd them like people believe, we only follow them - from place to place"¹⁰. This seems to be the sense and core of this practical philosophy of both life and Nature.

Law. Sámi reindeer herders always cooperated with each other in units like *siidat*, but there was no necessity to have rules passed by a given state to manage to do it. More, the so called First Lapp Codicil of 1751 as an international treaty recognised not only Sámi right to cross border with reindeer but also Sámi jurisdiction and courts to resolve disputes among Sámi (personal law binding only Sámi people; the law applied by Sámi judges). Due to the domination of the nation state paradigm and modern liberal nationalism, this state of things was changed in the end of the 19th century, as said before¹¹. Here let us focus on the legal history of regulation of Sámi reindeer husbandry in Finland. The old ancient Sámi system of reindeer husbandry was based on a *siida*, the community consisting of some, rather several, families and their herds. The system was based on partnership. The first state regulations, in fact, appeared, in 1898 (on reindeer herding cooperatives) and 1932 (the first Reindeer Herding Act). The Sámi were enforced to resign from their traditional rules of cooperation and solidarity in reindeer husbandry in order to establish new entities – so called cooperatives¹². Now the Finnish system of cooperatives is based on the idea that a reindeer herder or owner are not more important in decision-making process than cooperatives. So is the cooperative. Also these cooperatives are to herd reindeer now, not individual male or female herders independently anymore as it was in the past. The Finnish system of reindeer husbandry focuses on equality: not only Sámi are allowed to be reindeer herders. According to the Reindeer Herding Act of 1990, the main body is the Association of the Reindeer Herding Cooperatives (districts, more than 50 now). This is to administer reindeer husbandry in Finland nowadays. At the central level, the Ministry of Agriculture and Forestry is responsible for this social area and professional occupation.

Threats. In the last decades, some serious regulatory, technological, administrative, economic, and environmental changes came. For example, new legal rules regarding hygiene of slaughter reindeer took into effect, what with some controversies changed the traditional ways of reindeer slaughter¹³. Even now in Lapland there are also many problems and tensions concerning these cooperatives. For example, a number of the reindeer in every cooperative is a result of a decision made by a given cooperative. What to do with a rest of the reindeer, which is not allowed by the cooperative? Another but a bit different problem concerns logging by the only one state-owned forest company in Lapland: some Sámi reindeer herders are against this activity in some areas like

⁹ *Ibid.*

¹⁰ See the programme on 'Sámi people' and interview with a reindeer herder, at <https://www.youtube.com/watch?v=4oawzU517qk>, seconds 46-53.

¹¹ M. Ahren, 'Indigenous Peoples' Culture, Customs, and Traditions and Customary Law - the Saami People's Perspective', *Arizona Journal of International & Comparative Law*, vol. 21:1, (2004), 76-92.

¹² For history of reindeer-herding administration in Finland see K. Näkkäläjärvi and J. Pennanen, 'The Assimilation of Sámi Reindeer-herding Administration into the Finnish Government', in J. Pennanen and K. Näkkäläjärvi (Eds.), *supra* note 1, at 66.

¹³ T. Jomppanen and K. Näkkäläjärvi, 'Reindeer Herding Under Pressure', in J. Pennanen and K. Näkkäläjärvi (Eds.), *supra* note 1, at 68-69.

around Nellim or Inari and went to courts and international bodies to fight for their rights. Tourism, road building, hydroelectric powers, mining and forest companies, rules on herders' retirement, the system of subsidies, emigration of the young Sámi, transition of traditional knowledge, and climate change are other issues.

To sum up: Sámi reindeer husbandry always was and still is a way of life. It is a philosophy of life, too. This is a part of Sámi culture as well. However, the traditional organisation and practices have been changed by the obvious external factors so much. There are some real threats for Sámi reindeer husbandry then. Exclusive rights for the Sami seems one of the options in this field (Article 1 in Protocol no. 3 to the Accession Treaty of 1994).

The Ratification of ILO Convention No.169 in Finland in the Eyes of the Sámi

*Dawid Bunikowski**

The context I would like to start with is related to the 30th anniversary of The Northern Institute for Environmental and Minority Law (the Arctic Centre), with a title “How to Develop Human and Fundamental Rights Research in Finland”, organised in cooperation with the Human Rights Centre. The conference was held at the University of Lapland, both in Rovaniemi and Pyhänturi, on 10-11 September 2015. In one of the sessions of the conference, we heard “the voice(s) of the young Sámi”. That was even the name of the session. And these statements of the young Sámi scholars were really impressive but also emotional. I want to analyse these. I want to analyse what the Sámi think of the ratification of the C-169 (ILO 169) and about Finland and the other Nordic states they live in.

I. It was quite an easy thing to have noticed the two most important and strongest points from these statements. The sense of these is as follows:

1. “We lost respect for the Finnish government”, because it failed to ratify the C-169”.¹⁴
2. Special “ethical guidelines” should be implemented in conducting Sámi research.¹⁵

And here are my logical analysis and questions.

First, let us ask such questions while it concerns statement 1:

1. 1. Why?
- 1.2. What consequences?
 - 1.2.1. What consequences of the ratification?
 - 1.2.2. What consequences of the non-ratification (the lack of the ratification)?

Second, let us ask such questions while it concerns statement 2:

1. 1. Why?
- 1.2. What consequences?
 - 1.2.1. What consequences of the implementation?
 - 1.2.2. What consequences of the non-implementation (the lack of the implementation)?

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¹⁴ Thesis by Anne Nuorgam, a young researcher on Sámi research, University of Lapland.

¹⁵ Thesis by Anne-Maria Magga, Ph.D. student, University of Oulu/University of Lapland.

So first, let us have a look at the possible answers to statement 1:

Ad. 1.1. Why? Because the government promised the ratification, but didn't ratify it.

Ad. 1.2. What consequences then? It depends on the result of the ratification process still.

Ad. 1.2.1. It might be that the result of the ratification will be a wider political and cultural autonomy of the Sámi in Finland, with real indigenous power in natural resources management.¹⁶ On the other hand, it may be that nothing will be changed. As one of the Norwegian professors of political sciences said to me at a conference in Helsinki: "Why didn't Finland ratify it? We ratified it in Norway, and nothing has been changed".

Ad. 1.2.2. The consequences of the lack of the ratification are unpredictable. There will be no pressure of the international law on improving Sámi rights to land. But there will be still a room for a debate in Finland if both parties are interested in. Malaise is one of the options, too.

Now take a look at these possible answers to statement 2:

Ad. 2.1. Why? Because the quality of research must be high. Sámi people, e.g., scholars, should assess such research results like papers. Their knowledge on Sámi culture is just higher. And this is bad to make the reader confused if there are some errors in such a research. (I do not interpret this statement in another way, e.g. that the non-Sámi scholars are not allowed to conduct such a research on Sámi culture at all).

Ad. 2.2. What consequences then? It depends on the result of the implementation process still.

Ad. 2.2.1. The implementation might improve the research quality. It might also make a kind of censorship or fear towards conducting research in the research area.

Ad. 2.2.2. The lack of the implementation leaves the academic world free in this sense that no additional obstacles are created. Nothing is changed then.

II. Now I want to go back to my memory and meetings with the Sámi from Norway and Sweden in Finnish Lapland in the early winter in 2014. This context will show a kind of atmosphere among the Sámi. Here are the following statements:

1) A: "They were still pushing us" (when I asked why the Sámi had not fought for independence with the Nordic states).

2) A: "We don't know who we are" (when I asked about identity).

3) A: "We are a product of something" (like above).

4) B: "I am still considering how these Nordic countries will resolve problems concerning these people, who are still incoming here, if they have not resolved our, Sámi, problems yet?" (when we talked about multiculturalism in the North).

5) B: "Maybe we should be terrorists like they in the Basque Country" [joke] (when I asked why the Sámi had not fought for their rights in a military way like many other nations in Europe did).

And another statement from a Finnish Sámi working in Norway is here:

6) C: "All the Nordic governments were doing awful things towards the Sámi, not only it was the case in Norway, also in Finland, Sweden. All of them".

¹⁶ If we take some provisions really seriously in the implementation process... See Article 14 para 1 sentence 1: *The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised*, and Article 15 para 1: *The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources*.

What I want to say by making the reference to these statements is: this is the common Sámi feeling of trauma (not only in Finland).

III. And some picture must come at the end of this story. Ethically, psychologically, and anthropologically, I would say that what we see now in mutual Sámi-Finnish relations is suspicion, lack of trust, feeling of dishonesty. Aristotle said: if you have promised, then keep your promise¹⁷. In simple words, I do not see the possibility of resolving the problem of the Sámi in Finland right now. There is just no good atmosphere: too much red herring. I think, and I am writing this as a lawyer, but also as a "human", moral philosopher, that everything is in our minds (and is to be resolved there):

- 1) whether we are able to "give" some rights,
- 2) whether we want to keep our minds informed about the nation state paradigm only.

As an internal outsider in this country (Finland), when I am trying to observe the discussion about ILO 169, just in the public media, in the Parliament, in the Sámi Parliament, and in the Sámi community(ies), I still see different narratives and "broken promises". Jonathan Macey¹⁸ said (in context of companies) that good governance is about promises being "kept". Such a good governance might be applied to every institutional relation, I guess. We can call it a good constitutional governance. This keeping of the promise on ILO C-169 is quite confusing while in Finland indeed. Furthermore, I have found the topic of natural resources management and Sámi rights very sensitive for the Finns. And finally, going back to the beginning of this short paper, I can claim: yes, logic is not enough to understand emotions.

¹⁷ See *Nicomachean Ethics*, book IX.

¹⁸ See: J. Macey, *Corporate Governance: Promises Kept, Promises Broken* (Princeton, 2008).

Marine Mammal Regulation in the Arctic: Report for 2015

*Richard Caddell**

The regulation of marine mammals in the Arctic region remains a controversial issue, with difficulties in reconciling competing objectives for the protection of traditional ways of life in the High North and the sustainable use of marine resources, balanced against the conservation of species that have great anthropomorphic and political appeal. In recent years, this complicated balancing act has created significant tensions within and beyond the Arctic. In a more optimistic contrast to the previous reports of 2013 and 2014, the current year has seen considerably more in the way of consensus than conflict – albeit due mainly to a significant defeat of pertinent EU provisions within the Appellate Body of the WTO in the eventual denouement of the lengthy EC Seal Products Case. There were also important meetings of the North Atlantic Marine Mammal Commission (NAMMCO), which addresses pinnipeds and cetaceans in Arctic waters, as well as of the scientific institutions of the International Whaling Commission (IWC), which bears primary responsibility for the regulation of whaling issues in the High North.

A. EC-Seal Products Dispute

As has arguably been the case for most of the current decade, the most significant and contentious issue in relation to the regulation of marine mammals in the Arctic has been the permutations inherent in the EU position towards the trade in seal products. This has resulted in extensive litigation, both within the Court of Justice of the European Union and, latterly, the judicial institutions of the WTO, each of which have been detailed more extensively in previous reports. By way of summary, in 2009 the EU adopted an essentially well-meaning, but ultimately heavily flawed, set of restrictions on the trade in seal products. The offending provision, the controversial Regulation 1007/2009, was introduced primarily due to animal welfare concerns over seal hunting and the purported need to ensure a more uniform series of restrictions in the light of the unilateral decisions of several Member States to promote a ban on seal products. The provision, however, had the practical effect of marginalising indigenous communities outside the EU who were seeking to access the Common Market, which had a particularly pernicious impact upon the Canadian Inuit. Regulation 1007/2009 was unsuccessfully challenged before the Court of Justice of the European Union by a collective of Arctic seal hunting interests, before prevailing before the WTO institutions which, as outlined in 2014, ruled that the EU legislation had a discriminatory effect and must accordingly be amended.

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A timetable for the amendment of these provisions was agreed for October 2015. To this end, throughout 2015, the EU institutions have sought to introduce and adopt the necessary adjustments identified by the WTO. In October 2015 the EU adopted Regulation (EU) 2015/1775 of the European Parliament and of the Council of 6 October 2015 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010. The primary amendment to the previous regime was the introduction of a new concept of “other indigenous communities”, defined as:

“communities in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”.

Likewise Article 3, which addresses the conditions under which such products may be placed on the market was comprehensively revised, as follows:

“1. The placing on the market of seal products shall be allowed only where the seal products result from hunts conducted by Inuit or other indigenous communities, provided that all of the following conditions are fulfilled:

- a. the hunt has traditionally been conducted by the community;
- b. the hunt is conducted for and contributes to the subsistence of the community, including in order to provide food and income to support life and sustainable livelihood, and is not conducted primarily for commercial reasons;
- c. the hunt is conducted in a manner which has due regard to animal welfare, taking into consideration the way of life of the community and the subsistence purpose of the hunt.

The conditions set out in the first subparagraph shall apply at the time or point of import for imported seal products.”

Under the Regulation, products must be attested as having been derived from an indigenous hunt by a recognised body before they may be introduced into the EU market. This is primarily addressed under Commission Implementing Regulation (EU) 2015/1850 of 13 October 2015 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products. The Regulation, adopted concurrently with the amendments to Regulation 1007/2009, establishes detailed rules on the attestation process, as well as conditions upon the importation of seal products by members of indigenous communities for personal use.

Thus far, the amendments appear to have met the conditions imposed under the EC Seal Products Case and has been sufficient to bring the long-running dispute to a successful and more inclusive conclusion.

B. NAMMCO

The NAMMCO Council convened its Twenty-Third Meeting in February 2015. Alongside the usual review of economic and management affairs, strong solidarity was expressed with indigenous communities in the long-running saga of the EC Seal Products Case, with the EU still formulating its response to the WTO findings at the material time. Management advice was provided on walrus hunting and an increase in by-catches of small cetaceans in Icelandic waters was also noted. Strong concerns were also expressed as to the dramatic retreat in sea-ice coverage in the Arctic and its implications for seals in particular. The profile of NAMMCO was raised by collaboration with other bodies, including attending meetings, and it was considered that a closer working arrangement with CAFF would be desirable, given the mutual focus on ringed seals, while closer cooperation had been formalised with ICES in relation to harp and hooded seals. Meanwhile, the Scientific Committee to NAMMCO convened its Twenty-Second Meeting in November 2015. An extensive agenda saw consideration of potential collaboration with other comparable bodies, concerns over environmental changes and their projected impacts upon feeding grounds and the perennial and pressing problems raised by extensive by-catches. Marine disturbance will continue to be a significant area of activity for NAMMCO, which also convened a symposium on human disturbance in the Arctic in October 2015.

C. Arctic Whaling and the IWC

At the 2012 Meeting of the IWC, the working practices of the Commission were reformulated so that this body will meet on a two-yearly basis from 2013 onwards. Accordingly, with the most recent Meeting convened in 2014, there was a relatively limited opportunity to address the management of Arctic whaling. In May 2015, the IWC's Scientific Committee convened its annual meeting in San Diego, USA, with aboriginal subsistence whaling (including that by Arctic communities) occupying a significant position upon the agenda. Further to previous reports, the Scientific Committee has been developing precautionary measures to estimate sustainable catches for each individual hunt sanctioned by the IWC, with a view towards completing this task by 2018, following which each hunt quota will be considered for renewal by the Commission. At this forum the Committee finalised its consideration of the Greenlandic bowhead whale hunt, with the intention of completing the final two assessments (on Greenlandic fin and common minke whale hunts) ahead of the 2018 deadline.

Further to Regulation 2014-1, adopted at the previous meeting, a programme of work was agreed in order to develop a more consistent approach to calculating and negotiating quotas for aboriginal subsistence whaling. Under this umbrella, an expert workshop was convened in September 2015 in Greenland. The meeting considered the further recognition of the cultural and subsistence needs of indigenous peoples in pertinent fora outside the auspices of the IWC and consolidated the current state of knowledge of the aboriginal subsistence whaling currently pursued within the Arctic. A particular outcome of the meeting was consideration of the concept of "need", a vital element in the allocation of indigenous quotas, and the further development of so-called "need statements" as a key aspect of the supporting evidence required in such an application. The expert working group reported its findings to the wider Aboriginal Subsistence Whaling Sub-Committee, which in turn will address this issue ahead of the 2016 Annual Meeting of the IWC.

The Continental Shelf in the Arctic Ocean - Some Basic Rules

*Hans Corell**

When I am following the development in the Arctic, I have noticed that there are often errors in articles in the media about the legal rules that govern the continental shelf in the region. There is talk about claims for territory and “land grabs”. In particular, the submission on 3 August 2015 by the Russian Federation to the Commission on the Limits of the Continental Shelf, in accordance with Article 76, paragraph 8, of the United Nations Convention on the Law the Sea (UNCLOS), has generated a great number of misunderstandings. This submission contains information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured in respect of the Arctic Ocean.

As former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations at the time I was responsible among other things for overseeing the establishment of the three organs under UNCLOS following the entry into force of the Convention in 1994: the International Seabed Authority in Kingston, Jamaica, the International Tribunal for the Law the Sea in Hamburg and the Commission on the Limits of the Continental Shelf with its headquarters in New York. Reference is made to *The United Nations – A Practitioner’s Perspective*.¹⁹

The fact is that the claims relating to the continental shelf have nothing whatsoever to do with territory. States cannot acquire territory in the sea outside the 12 nm territorial sea. This is why the Russian flag planting on the bottom of the Arctic Ocean has no legal significance at all. Rules about the continental shelf are found in Article 76 of UNCLOS. This provision should also be read in conjunction with Article 89: “No State may validly purport to subject any part of the high seas to its sovereignty.” It is critical that the this very important distinction is made clear to the general public.

With respect to the submission by the Russian Federation in August 2015 it should be noted that it is a partial revised submission made with reference to its original submission to the Commission on the Limits of the Continental Shelf of 20 December 2001. It is therefore a perfectly natural step taken in conformity with UNCLOS. The consideration of this partial revised submission will be included in the provisional agenda of the next ordinary session of the Commission.

The role of the Commission is to make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. According to Article 76 of UNCLOS the limits of the shelf established by a coastal state on the basis of such recommendations

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¹⁹ In Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott, and Tim Stephens (Eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015), 346-372, available at <http://www.havg.se/res/SelectedMaterial/rothwellchapter16.pdf>. See also under “The Arctic” at <http://www.havg.se/SelectedMaterial2004.htm>.

shall be final and binding. Therefore, upon completion of the consideration of the submission by the Russian Federation, the Commission will make such recommendations.

It should also be noted that the provisions of Article 76 of UNCLOS are without prejudice to the question of delimitation of the continental shelf between states with opposite or adjacent coasts. Therefore, if there are overlapping claims by neighbouring states, these have to be settled in accordance with ordinary rules regarding settlement of disputes in maritime areas.

In this context reference should be made to a note dated 7 October 2015 from the Permanent Mission of the Kingdom of Denmark to the United Nations to the Secretary-General of the United Nations relating to the delimitation of the continental shelf between the Kingdom of Denmark (because of Greenland) and the Russian Federation.²⁰

Another error that I see constantly is that the Commission on the Limits of the Continental Shelf is referred to as a “UN Commission”. It is not a UN Commission.²¹ It is true that the Commission has its headquarters in New York and that is serviced by the Division for Ocean Affairs and the Law of the Sea as its secretariat.²² This is why the Commission is often erroneously referred to as a UN Commission. However, it is just as independent as the other two organs under UNCLOS.

It is important that these things are made clear to the general public.

²⁰ See http://www.un.org/Depts/los/clcs_new/submissions_files/rus01_rev15/2015_10_07_DNK_NV_UN_001_15-00785.pdf

²¹ See http://www.un.org/Depts/los/clcs_new/clcs_home.htm

²² See http://www.un.org/Depts/los/clcs_new/secretariat_clcs.htm

Indigenous Private Legal Action Against Climate Change in the Arctic

*Jacquie Hand**

The impacts of climate change are well known to be over twice as severe as in the Arctic as in other parts of the world. The Arctic Climate Impact Assessment (ACIA) outlines the many changes this has produced Arctic ecosystems, from reducing and shifting habitats of vulnerable species and changing migration routes to reductions in sea and land ice resulting in extensive erosion of coast lines. These impacts are particularly severe on indigenous peoples' efforts to continue their tradition subsistence way of life.

The indigenous people of North American have initiated a variety of legal challenges in an effort to halt and or mitigate these impacts of climate change. At the international level they have filed two separate petitions with the Inter-American Commission on Human Rights (IACHR). The first, filed by the Inuit people of the Arctic in 2005 asked the Commission to declare that the US violated their human rights by producing unregulated emissions of greenhouse gases which amounted to up to 25% of global emissions. A later petition by the Athabaskan people of the sub-Arctic challenged Canada for its alleged poor regulation of emissions of Black Carbon. Even if the Commission rules in favor of their petitioners, the decision is legally non-binding.

Indigenous people also sought binding rulings in American courts for assistance in adapting to the impacts of climate change as well seeking court supported limitations on the GHG's that are causing the problem. The most ambitious litigation was brought by a traditional Inuit community of approximately 390 people which had seen its community reduced by approximate one half since 1950's as a result of erosion. The higher temperatures resulting from climate change caused the sea ice which had protected the village from fall and winter storm waves to diminish resulting in the erosion which is eating away at the land on which the village is built. In the law suite, *Native Village of Kivalina v. Exxon/Mobil Corp.* 696 F 3d 849 (9th Cir 2012) the village sued Exxon Mobile and twenty-three other energy and utility companies based on their production of carbon dioxide and other greenhouse gases. In 2008 the plaintiffs sought damages for the cost of relocating the village to higher ground (estimated by the U.S. Army Corps of Engineers at between \$95 million and \$400 million dollars) based upon common law nuisance. The case was dismissed by the district court which found that, applying the political question doctrine, the determination of the reasonable level of emissions was best determined by the legislative branch of government. In addition, it concluded that the village could not demonstrate that its injury was sufficiently traceable to the actions of the defendants. The Ninth Circuit affirmed, noting that the common law of nuisance had been displaced by Congress's action in passing the Clean Air Act. In 2013, the US. Supreme Court declined to accept the case, so the Ninth Circuit decision stands.

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Arctic Indigenous Peoples have also made common cause with environmental groups in challenging damaging actions in the Arctic. For example, in *Native Village of Point Hope v. Jewell*, 740 F.3d 489 (2014) a coalition of native and environmental organisations successfully challenged a proposed lease granted to Shell Oil Company for drilling in the Chukchi Sea based upon a failure to perform an adequate environmental impact assessment as required by the National Environmental Policy Act and other federal environmental statutes. Further, the Ninth Circuit rejected an effort later in 2014 by Shell to seek a declaratory judgment that the permit was properly granted which included as defendants the indigenous advocacy organisation Redoil, Inc. as well as a number of environmental organisations.²³ Earlier this year Shell announced it would discontinue drilling in the Arctic for the foreseeable future.

In other litigation a 17-year-old Alaska Native joined other young people in “strategic atmospheric trust litigation designed to compel the state government to adopt and enforce science based Climate Recovery Plans” to fulfil their responsibility under their public trust obligation. In *Kanuk v. Alaska* the Alaskan Supreme Court found that while the public trust includes the atmosphere a remedy must come from the executive or legislature, not the court.²⁴

These examples suggest that given the accelerating impacts on the Arctic, Indigenous Peoples in the North American Arctic can be expected continue to seek to seek remedies and protection from the legal system in a variety of legal venues. The native peoples of the Arctic have also joined forces with environmental groups in litigation focused on preserving the ecosystems which support their subsistence way of life.

²³ *Shell Gulf of Mexico Inc. v. Center for Biological Diversity, Inc.* 771 F.3d 632 (2014).

²⁴ <http://www.courtrecords.alaska.gov/webdocs/opinion/ops/sp-6953.pdf>

The Black Carbon and Methane Framework: Balancing Ownership and Effectiveness

*Rachael Lorna Johnstone**

At the Iqaluit Ministerial meeting in April 2015, the Arctic Council (AC) adopted the Framework for Action on Enhanced Black Carbon and Methane Emissions Reductions, decided to implement it, called upon the observer States to participate and established an expert group to monitor and report on progress.²⁵ The development and structure of the Framework illustrates a model of engagement between the Arctic States and observer States that preserves the AC's leadership in Arctic governance and ownership of Arctic environmental issues while facilitating the necessary international cooperation to meet the needs of complex, transboundary environmental challenges. It also presents an example of the potential for a non-binding normative environmental protection framework to be more effective than a treaty-based approach.

Black carbon (or soot) is a short-lived climate forcer. It arises from the incomplete combustion of carbon-based fuels, for example by diesel engines (including road vehicles and shipping), gas-flaring and burning of biomass. Because it is black, it absorbs solar radiation, reduces the albedo effect of the ice and snow that it covers and interferes with clouds. It is 'short-lived' because it only lies for a few days or weeks at a time; but while it does, it speeds up melting. Black carbon is also a direct health concern because it triggers and aggravates respiratory diseases.

Methane remains in the atmosphere for around one decade from its release but is still 'short-lived' in comparison to the other five recognised greenhouse gases.²⁶ Nevertheless, despite its relatively short-life, by volume, its impacts on climate change are 25 times that of carbon dioxide.²⁷ Methane's impacts are also not locally concentrated in the same manner as those of black carbon.²⁸

The new AC framework was developed by a specially established AC task force (2013-2015) that built on the work of the earlier Task Force on Short-Lived Climate Forcers. Its goal was to develop a strategy to reduce black carbon and methane emissions in the Arctic.²⁹ Originally only consisting of representatives of Arctic States and Permanent Participants, at its first meeting, the

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²⁵ Iqaluit Declaration of the Ninth Ministerial Meeting of the Arctic Council, 24 April 2015, para 24; Enhanced Black Carbon and Methane Emissions Reductions: An Arctic Council Framework For Action.

²⁶ Arctic Council Task Force on Short-Lived Climate Forcers, 'Recommendations to Reduce Black Carbon and Methane Emissions to Slow Arctic Climate Change' 2-4.

²⁷ US Environmental Protection Agency, 'Overview of Greenhouse Gases' <http://www3.epa.gov/climatechange/ghgemissions/gases/ch4.html>

²⁸ *Ibid.*

²⁹ Arctic Council 'Task Force on Black Carbon and Methane', <https://oaarchive.arctic-council.org/handle/11374/76>

Task Force decided to ask the Senior Arctic Officials if they might include representatives from other interest groups, including the observer States and institutions. Through its next five meetings, all the Arctic States and five of the six Permanent Participants were represented, alongside the ACAP and AMAP working groups,³⁰ five observer States,³¹ the European Union, the Nordic Council of Ministers, NEFCO,³² UNEP³³ and WWF³⁴.

Under the Framework, the Arctic States ‘commit to’³⁵ creating emissions inventories and projections for black carbon and to improve inventories and projections for methane emissions. They should each prepare a national report for the AC which will then be made public.³⁶ Monitoring and reporting of emissions is key but there are also intentions to raise awareness of black carbon with the objective of reducing emissions.

The Arctic States then ‘call on’ observer States to join them in this initiative: observers are encouraged to keep their own inventories, take part in meetings and report to the AC on the same basis as the Arctic eight. The reports of the observer States that participate will be considered in the same manner by the Expert Group and included in periodic ‘summaries of progress and recommendations’ that will be submitted to the two-yearly ministerial meetings.³⁷ Further, the framework reaches out to non-state actors, especially the private sector, to take steps to reduce emissions, and develop technology and share best practices.³⁸

By virtue of its adoption at an AC ministerial meeting, the framework is an instrument *of* the AC and it is the Arctic States that are first and foremost required (politically, but not by law) to take part. Observer States are invited to participate and if they do so, they will be treated in a manner equivalent to the Arctic States. This model preserves AC *ownership* of the problem: the AC adopts the framework, the Arctic States take the lead, and observers join the already established scheme. However, given their involvement in the Task Force and the immediate participation of eight observers who had, at the time of writing, already submitted their first reports,³⁹ this model is sufficiently inclusive to meet its goals: goals of black carbon and methane reductions in the Arctic that originate both inside and outside of the Arctic.

The composition of the Expert Group is also inclusive. Each Arctic State and each Permanent Participant may nominate one or two experts. Participating observer States can each nominate one

³⁰ Arctic Council Arctic Contaminants Action Programme and Arctic Monitoring and Assessment Programme.

³¹ China, Germany, India, Japan and the United Kingdom.

³² Nordic Environment Finance Corporation.

³³ United Nations Environment Programme.

³⁴ Worldwide Fund for Nature.

³⁵ This should not be understood as a binding obligation as the framework is a non-binding instrument. It is a political commitment.

³⁶ Framework (note 1), Chapter 1; see also Annex II on the required contents of reports.

³⁷ *Ibid.*, at 3.

³⁸ *Ibid.*

³⁹ European Union, France, Korea, Italy, Japan, Poland, Spain and United Kingdom.

representative to the Expert Group. This apparent limitation on observer States to only one representative, in contrast to a maximum of two for the Arctic States and Permanent Participants must be viewed in light of the numbers. With twelve observer States but only eight Arctic States and six (poorly resourced) Permanent Participants, the AC's two core constituencies could easily have become outnumbered had observer States the option to appoint equal numbers of representatives. This compromise continues to preserve the Arctic States' and Permanent Participants' *ownership* of the issue.

The Expert Group's primary role is to collate the data; but it can also propose 'improvements' to the framework and 'propose options for consideration in order to establish a collective baseline, undertake the analysis and identify options for quantitative goal(s)'.⁴⁰ What begins as a *reporting* body can also make recommendations, including targets. This builds in flexibility to the framework: the expectations on States can be revised in light of scientific findings and available technology and there is potential for it to become more prescriptive over time. It remains up to the AC to adopt the Expert Group's recommendations as policy or not.⁴¹ Once more, the AC holds the reins to steer the direction of the framework in the future; but it does so on the basis of a wider knowledge base.

In recent years, the Arctic Eight have responded to outside interest in the Arctic by defending their sovereignty and insisting that the AC is *the* forum for international governance in the High North. It is important to the Arctic States that they lead any Arctic initiatives. The two recent Arctic treaties (on Search and Rescue and Oil Spill Preparedness and Response⁴²) are closed systems that do not permit accession by non-Arctic States. They were at least as important in symbolically stamping Arctic States' ownership on Arctic issues as they were about creating new obligations.

Nevertheless, there are plenty of issues that the AC cannot tackle effectively alone; these include reducing black carbon and methane impacts. A treaty-based response between the Arctic States would be inadequate. A system that does not include extra-Arctic sources of black carbon or methane emissions does not tackle the problem effectively; and a treaty cannot create obligations for third States.⁴³ However, if the Arctic States attempt to negotiate a treaty with broader participation, they renounces its ownership of the issue. Furthermore, it becomes more difficult and time-consuming to reach the necessary consensus for a treaty-based approach.

The Black Carbon and Methane framework does not create any binding responsibilities – either for the Arctic States or the observers – but it is nonetheless a normative instrument that places expectations on States. It strikes a careful balance between AC ownership and governance on the one hand; and the inclusiveness necessary for the framework to deliver effective results on the other.

⁴⁰ Framework (note 1), Annex III.

⁴¹ Independent expert monitoring of non-binding environmental instruments is not new; see e.g., Dinah Shelton, 'Normative Hierarchy in International Law', vol.100:2 *American Journal of International Law* (2006) 291, 319.

⁴² Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic 2011; and Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic 2013.

⁴³ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, art 34.

A Window of Opportunity for an International Treaty to Protect the Arctic Marine Environment

*Stefan Kirchner**

In a text which has gained a lot of attention, one of the leading expert on the protection of the Arctic marine environment, *Oran R. Young*, abandoned the idea of an Arctic Treaty.⁴⁴ In doing so, he was hardly alone, as it seemed until recently that there was little chance for a comprehensive political settlement in the form of an Arctic treaty. Not only would an Arctic Treaty have to take a local population into account (unlike the Antarctic Treaty,⁴⁵ which had been suggested to serve as a model for an Arctic Treaty⁴⁶), there seems to be very little support for a multilateral approach, despite calls for an Arctic Treaty.⁴⁷ At the time of writing,⁴⁸ an opportunity has arisen to advance the cause of an Arctic Ocean Treaty (AOT).

In autumn 2015 two decisions led to an decreased risk of near term oil spills in the Arctic, albeit without providing any long term protection, let alone legal security for coastal communities in the Arctic against such damage: Shell ended Arctic oil drilling operations⁴⁹ and the U.S. government decided not to issue drilling permits.⁵⁰ Shortly thereafter, the landslide election results in Canada⁵¹ changed the political landscape in North America. This could create some momentum for the United States and Canada to take the lead on efforts to establish a multilateral treaty aimed at protecting the marine environment of the Arctic, at least with regard to the High Seas. Any such treaty would have to create exemptions to the fundamental customary international law rule of the

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⁴⁴ Oran R. Young, 'If an Arctic Ocean Treaty is Not the Solution, What is the Alternative?', vol. 47 *Polar Record* (2011) 327 - 334, DOI: 10.1017/S0032247410000677.

⁴⁵ Antarctic Treaty, 1 December 1959, http://www.ats.aq/documents/ats/treaty_original.pdf

⁴⁶ See Sebastien Duyck, 'Drawing Lessons for Arctic Governance from the Antarctic Treaty System', vol. 3 *Yearbook of Polar Law* (2011) 683 - 713.

⁴⁷ Ed Struzik, 'As the Far North Melts, Calls Grow for Arctic Treaty', *Environment* 360, 14 June 2010, http://e360.yale.edu/feature/as_the_far_north_melts_calls_grow_for_arctic_treaty/2281/

⁴⁸ Late October 2015.

⁴⁹ Sarah Kent, 'Shell to Cease Oil Exploration in Alaskan Arctic After Disappointing Drilling Season', *The Wall Street Journal*, 28 September 2015, <http://www.wsj.com/articles/shell-to-cease-oil-exploration-offshore-alaska-1443419673>

⁵⁰ Chris Mooney, 'In a Major Setback for Arctic Drilling, the Obama Administration Cancels Two Oil Lease Sales', *Washington Post*, 16 October 2015, <http://www.washingtonpost.com/news/energy-environment/wp/2015/10/16/oil-drilling-in-the-arctic-just-received-another-major-setback/>

⁵¹ Tyler Kustra, '7 Insights into the Surprising Results from the Canadian Election', *Washington Post*, 20 October 2015, <https://www.washingtonpost.com/news/monkey-cage/wp/2015/10/20/7-insights-into-the-surprising-results-from-the-canadian-election/>

freedom of the High Seas. This norm has been codified in Article 2 of the High Seas Convention⁵² and Article 87 of the Law of the Sea Convention.⁵³ Exceptions to this freedom would not be a complete novelty, interdictions concerning the transport of weapons of mass destruction are only one example. Unlike near coastal areas, which often are of crucial importance to the food security of local communities, the High Seas in the Arctic Ocean, which is expected to be ice free within decades, is a possible area of protection parallel to the Antarctic Treaty. Due to the human habitation in the Arctic and human rights and indigenous rights to self-determination, the Antarctic Treaty otherwise would not be an appropriate model for an AOT. Hence the term “Arctic Ocean Treaty” rather than “Arctic Treaty” is suggested here. Similar to the Antarctic Treaty, the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Convention for the Conservation of Antarctic Seals (CCAS), an Arctic Ocean Treaty would outlaw fishing, seal hunting and whaling, oil drilling and similar endangering measures while allowing for scientific research. In addition, the AOT would have to impose environmental standards which would go beyond MARPOL and mirror at least the protection afforded to other Particularly Sensitive Sea Areas (PSSAs) and also aim at protecting the atmosphere through an Emissions Control Area (ECA), similar to the Sulphur Emission Control Area (SECA) which has been created for the Baltic Sea. Establishing an Arctic ECA might initially will make cross-Arctic transport more expensive but an increase in the number and areas of ECAs will create economies of scale for the production of ECA compliant ship engines (or such retrofitting). Given that the relevant technical expertise is concentrated in developed countries, this might create an incentive for some states to support the creation of an AOT.

A particular focus of the AOT has to be the protection against oil pollution: in the Arctic, the effects of oil spills can be felt many years later. In the case of the 1989 Exxon Valdez disaster, oil was found in the affected area a quarter of a century later.⁵⁴ The wildlife has not yet fully returned and many jobs which were lost in the wake of the disaster have never been recreated. Due to the harsh climate, cleanup operations are significantly more difficult in the Arctic and sometimes they do not happen at all. In the case of the *Selendang Ayu* disaster, which led to the loss of the lives of six crew members off Unalaska Island in late 2004, it took years to clean up the oil spill and a decade later, the specialized tug that local experts had called for already prior to the incident had yet been realized.⁵⁵ The climate ensures that hydrocarbons dissolve much slower in the water than e.g. in the Gulf of Mexico, the location of the Deepwater Horizon oil spill.⁵⁶

⁵² Convention on the High Seas, 29 April 1958, http://www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf

⁵³ United Nations Convention on the Law of the Sea, 10 December 1982, http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

⁵⁴ Jane J. Lee, ‘On 25th Exxon Valdez Anniversary, Oil Still Clings to Beaches’, *National Geographic*, 25 March 2014, <http://news.nationalgeographic.com/news/2014/03/140324-exxon-valdez-oil-spill-25th-anniversary-alaska-ocean-science/>

⁵⁵ Annie Ropeik, ‘10 Years On, Selendang Ayu Spill’s Legacy Still Evolving’, *Alaska Public*, 12 December 2014, <http://www.alaskapublic.org/2014/12/12/10-years-on-selendang-ayu-spills-legacy-still-evolving/>

⁵⁶ Bob McDonald, ‘Bacteria Helped Gulf Oil Spill, But It’s Not So Easy in Arctic’, *CBC News*, 20 January 2012, <http://www.cbc.ca/newsblogs/technology/quirks-quarks-blog/2012/01/bacteria-helped-gulf-oil-spill-but-its-not-so-easy-in-arctic.html>

The Future Governance of Arctic Fisheries

*Nengye Liu**

Coastal States of the Arctic Ocean, the so-called Arctic Five (United States, Russia, Canada, Norway and Denmark) believe they have a stewardship role for Arctic marine living resources. The famous Ilulissat Declaration in 2008 states that “By virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean, the five coastal states are in a unique position to address these possibilities and challenges.”⁵⁷ This attitude was reflected in the development of international law for the regulation of potential fishing in high sea portion of the central Arctic Ocean. For a long time, the Arctic Five has formed an exclusive club for the discussion of fisheries issues. It has been very difficult for other Arctic countries, such as Iceland, and key high sea fishing entities, such as the European Union to get involved. The 2014 Nuuk Meeting on Arctic Fisheries by the Arctic Five reaffirmed that there is no need at present to develop any additional regional fisheries management organizations (RFMOs) or arrangements for this area.⁵⁸

However, fish do not recognize human boundaries. In order to achieve sustainability for potential fisheries in high sea portions of the central Arctic Ocean, non-Arctic States, especially key high sea fishing States, must be involved. Recently in Oslo, the Arctic Five acknowledged the interest of other States in preventing unregulated high seas fisheries in the central Arctic Ocean (Oslo Declaration).⁵⁹ The first Arctic Five + Five Meeting on Arctic Fisheries was held in Washington D.C, United States between 1 and 3 December 2015 (the Washington Meeting). For the first time, China, the EU, Iceland, Japan and the Republic of Korea were invited by the Arctic Five to discuss issues regarding the prevention of unregulated commercial fishing in the high seas area of the central Arctic Ocean. Although once again the Washington Meeting acknowledged that, at present, there is inadequate scientific information available for purposes of establishing appropriate conservation and management measures for regulating any such fishery,⁶⁰ concrete approaches were considered to prevent unregulated commercial fishing in the high seas portion of the central Arctic Ocean. These include 1) expand Oslo Declaration from 5 to 10 signatories; 2) negotiating a binding international agreement; 3) establish a regional fisheries management organisation for the area.⁶¹

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⁵⁷ The Ilulissat Declaration, Arctic Ocean Conference, Ilulissat, Greenland, 27-29 May 2008.

⁵⁸ Chairman’s Statement, Meeting on Arctic Fisheries, Nuuk, Greenland, 24-26 February 2014.

⁵⁹ Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean, Oslo, Norway, 16 July 2015.

⁶⁰ Chairman’s Statement, Meeting on Arctic Fisheries, Washington, D.C., 1-3 December 2015.

⁶¹ *Ibid.*

Regardless of which option will be adopted, the Washington Meeting has shown a positive future for Arctic fisheries governance. That is to have all stakeholders involved in the decision-making process, so as to achieve sustainable management for Arctic fisheries. A further step would be to include NGOs and indigenous people in discussions, as the Arctic Council has done for years.

A Short Note on Changes in Russian Arctic Law 2015 - Strategic Development Issues

*Rustambek M. Nurimbetov **

This year significant changes to legal regulation of Arctic in Russia seem to be missing or at least, postponed to near future. Despite lots of political conversations has been taken up about importance of Arctic region to Russia as world power, 2015 appears to be quite unfruitful for legal specifications as well as real action of Arctic development. Nonetheless, some strategic formulations and ideological measures have been produced by Russian legal system as preparations for future integrative legal coverage.

However strategic organisational measures have been undertaken to ensure the start of Russian new active policy. In this case, we have to admit, that in opposition to Arctic being an advantageous proclamation without real effort to fulfil, this very area of interest accumulates political and social focus which will inevitably turn in time to legal and economic modernisation of Russian Arctic.

A. Federal Objective Program Concept “World Ocean” 2016-2031 (the Program): This strategic program is approved by Order of Government of Russian Federation 22 June 2015 and establishes the long-term system of measures directed to activation of resource and territorial potential management of Russian seas and provision of Russian presence at crucial areas of World Ocean and Antarctic.⁶²

The Program takes its backgrounds from following strategic documents: Maritime doctrine of Russian Federation until 2020, Strategy of maritime development of Russian Federation until 2030, Basics of Russian Federation’s state policy at the Arctic region until 2020, Strategy of Russian Federation’s activities development until 2020 and further and replaces the similar program “World Ocean” finished in 2013.

In relation to Arctic development it is clearly stated, that one of the goals of Program is to provide scientific presence of Russian Federation in Arctic seas and on Svalbard⁶³. Also the main goal of Program is regulation of governmental funding of marine scientific research. Keeping this in mind we can conclude that starting from this year Russia has finally launched the organised Arctic research direction which purpose is to maintain the high level of exploration and scrutiny.

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⁶² See <http://www.ocean-fcp.ru/>

⁶³ The Order of Government of Russian Federation, 22 June 2015, para 5: “Possible solutions to the problem, assessment of the advantages and risks associated with different solutions to the problem.”

However, it is noted that the place of Russian Federation as one of the countries leading in marine research is highly dependent on success of this Program.

B. State Commission on Arctic development issues: Establishment of State Commission on Arctic development issues (Commission) has been approved by decree of Government of Russian Federation 14 March 2015. As it is stated in above mentioned decree, Commission is a coordinating and advisory body which goals are: clarification of Arctic policy's goals in accordance with changes of domestic and international political circumstances, enhancement of Russian Arctic zone sustainable development projects and programs, coordination of actions being performed by state bodies, municipal governments and other organisations for empowering Russian positions in the Arctic, research and development of Arctic zone, and other aspects of Russian presence. Commission consists of eight working groups, scientific and business councils and secretariat⁶⁴.

Nowadays Commission performs mostly advisory service to Government and is responsible for series of projects devoted to development of Russian Arctic zone. The most significant of those plans is Complex Project on Development of Northern Sea Route. The full text of this project has not been published, because it contains data restricted to distribution. However, official reports from Head of Commission Dmitriy Rogozin and Vice-Prime Minister Arkadiy Dvorkovich indicate that most legal acts regulating transition, ice-breaking and ice pilotage are adopted and measures on NSA security enhancement including new generation of ice breakers, empowered emergency service and hydro-meteorological equipment developed by the end of 2016.⁶⁵

Commission on its latest meetings addresses the main focus of Russian Arctic development – informational support of Russian interests which appears to be especially vulnerable in changing geopolitical circumstances. Presumably that means international cooperation will rise in priority for Russian Arctic development and maintain its traditionally determined role as one of the pillars for Russian Arctic policy.

C. Social anticipation of Federal Law “On Arctic zone”: This year in Russian Arctic development is marked by intensified anticipation of Federal Law “On Arctic zone of Russian Federation”. Remarkably the first project of resembling legal act has been done in 2013, but lack of the properly formulated Arctic doctrine impedes the systematisation of all kinds of actions needed to be conducted for Russian Arctic development. Latest changes in Russian Marine Doctrine certainly reflect growing interest of both Russian government and society to once again make Arctic great priority of national pursuit. In that case, above mentioned programmatic documents and coordination efforts are obviously directed towards formation of integral regulative regime for marine, coastal and inland Russian Arctic development.

The projects of Federal Law regulating Arctic development prepared by experts of Government, North Federal University and other organisations conclude that monetary approach to development is can become highly possible defect that must be avoided on legal level. While resource-oriented policy may seem just as reasonable, social experts warn that without governmental support of sustainable life level improvement, efforts on economic development of the Arctic region will most likely be fruitless.

⁶⁴ See the Decree of Government of Russian Federation, 14 March 2015.

⁶⁵ Report of Dmitriy Rogozin on Vice-Prime Ministers session, 8 June 2015. <http://government.ru/news/18411/>

International Cooperation as a Guarantee of Environmental Safety in the Arctic

Mikhail Permilovskiy and Marina Vilova***

International cooperation contributes to the development of effective interaction between states and ensures their interest in creating a system of international peace and security. The evolution of international cooperation and level of its legitimacy determine the status of environmental security. Environmental safety cannot be maintained without respect for fundamental rights and freedoms of a person and in the absence of scientific and technical cooperation in the field of development of information space. The level of effectiveness of international cooperation and legitimacy of states decisions depend on the result of social communication.

The Arctic is characterised by low stability of ecological systems, their dependence from minor anthropogenic influences, as well as by the presence of particularly unfavourable areas, potential sources of radioactive contamination, a high level of accumulated environmental damage.⁶⁶

By virtue of the principle of the indivisibility of environmental security of the Arctic States, cooperation should be carried out on the basis of reciprocity, subject to the equality of all participants without coercion. International cooperation should be pursued on the basis of a balance of values that ensure the stability of international peace and security. In this case we are talking about sovereign equality of states, prohibition of the use of force and threat of force, settlement of international disputes by peaceful means, respect for human rights and fundamental freedom, and also about the value of saving the environment.

Despite the fact that at present there is a need for international cooperation and the establishment of a unified international regime for the protection of the Arctic environment, in general, the international community has not yet developed a system capable of using information and communication technologies to take measures to ensure environmental safety in the Arctic.

At the same time, the environmental security in the Arctic is possible only in the presence of legitimate international cooperation of the Arctic states. It is necessary to establish a mutually

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⁶⁶ The development strategy of the Arctic zone of the Russian Federation and the national security for the period until 2020, approved by the President of the Russian Federation of 08.02.2013 no. Pr-232, Reference legal system "Consultant".

beneficial regime of bilateral and multilateral exchange of environmental information among the Arctic States.

Thus, international cooperation is a special tool to ensure environmental protection in the Arctic zone, i.e., it is a guarantee of environmental safety in the Arctic. Consideration of international cooperation as a guarantee and not only as a principle, in accordance with the traditional approach, allows evaluating the effectiveness of such cooperation. In other words, from an abstract principle of international law international cooperation is transformed into an efficient mechanism of environmental safety. Accordingly, there is a pressing need to develop priority directions and key criteria of international cooperation, for instance, for the benefit of present and future generations in the field of environmental security in the Arctic. The guarantee of environmental security in the Arctic presumes that Arctic states, regardless of political, economic, and other factors, do not avoid cooperation and exchange of environmental information concerning the environment in the Arctic.

International cooperation, as a guarantee of environmental safety of the Arctic, contributes to the preservation of the environment and to the prevention of negative influence of economic and other activities on nature. The effectiveness of international cooperation depends on the level of integration of states in the process of development of natural resources and on the level of environmental communication in the global information space.

Protection of Indigenous Peoples' Rights in Alaska - Based on Scientific Expeditions During the Project "Heritage of Russian America"

Ivan Saveliev and Sharon Hildebrand***

The project "Heritage of Russian America", headed by Mikhail Malakhov, a hero of the Russian Federation and honorary polar explorer, started in 2009. In the frames of this big project organized 5 scientific expeditions reconstructing routes of Russian pioneers and aimed at study of the Russian impact on history and culture in Alaska, traditions and life styles of indigenous peoples; a comprehensive study of the living conditions of indigenous peoples and their rights.



Expeditions in 2009 - 2012 were targeted at inland areas of Alaska, which experienced the least impact of Russian culture, no more than 20 - 30 years in total. The expedition of 2013, called "Aleutian Islands: under sails of Russian America" covered 2,000 nautical miles along the Aleutian chain, whose population had the most lasting Russian influence: more than 100 years.

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The field legal research on the rights of indigenous peoples was preceded by the preparatory study of evolution and content of these rights.



It should be noted that the legal status of indigenous peoples in Alaska is significantly different from other states of the country, which is connected partially with legal status of indigenous peoples used in Russian America. Prior to adoption of the Russian-American Company Charter in 1821 the legal status of indigenous population was not regulated enough. According to the Charter the Native Americans were divided into two groups: dependent and semi-dependent ones from the company.⁶⁷ The indigenous people acquired the status of full citizens of the Russian Empire. Additional integration into the Russian society was facilitated by the adoption of Orthodoxy.

The situation has changed after the sale of Alaska to the United States. The indigenous people and the Creoles (descendants of mixed marriages) did not get US citizenship, nor were they consulted on the sale of Alaska to Russia. The assimilation policy was pursued quite often at that time. Throughout the U.S. these measures were destructive for Native cultures. Political, economic and cultural dominance over indigenous peoples was a common practice throughout the world.

Native Americans were unable to protect their own culture, to achieve equality with non-indigenous population in regard of economic development and well-being. Poverty, imposition of external policy, racist attitudes determined response or lack of response to mental and infectious diseases among the indigenous population, and "social" diseases (alcoholism, suicide, domestic violence and crime).

⁶⁷ P. A. Tikhmenev, *Historical Review of the Russian-American Company and Its Activities* (Saint-Petersburg, 1863), 55-61 (in Russian)



The imminent assimilation of indigenous peoples was a commonly occurring theme. Assimilation in the society was assessed as a natural and positive phenomenon.

In the 60s indigenous peoples in Alaska loudly declared their rights to the land inherited from their ancestors. Indigenous peoples created organisations and asserted to the courts their rights to land and collecting documents justifying their right to be federally recognised as a tribal nation. Constructive dialogue between government and indigenous organisations helped to find a solution. Central points of negotiations were property rights of indigenous peoples to land and natural resources, political rights and self-government.⁶⁸ The most tangible result of this process was adoption of Alaska Native Claims Settlement Act (ANCSA) in 1971. This law still serves as a model used in USA and other countries for relationships' regulation between indigenous communities and authorities (both on federal and regional levels).⁶⁹

According to this document, indigenous people have rights to land in their villages, as well as monetary compensations in exchange for termination of aboriginal rights. ANCSA created Native Corporations (12 Regional and more than 200 Village Corporations) and they then received ownership rights to 12% of Alaska's territory (178 000 km²). The subsurface rights to resources were given to the Regional Corporations and surface resources to Village Corporations. As the corporations were required by law to enrol only to those who could prove Alaska Native ancestry to a village and regional corporation dependent on their location at the time of enrolment.

⁶⁸ Pullar Gordon, 'Indigenous Self-government and Political Institutes in Alaska' (Russian translation), at http://landclaim.narod.ru/indig_1.htm

⁶⁹ Case S. David, *Alaska Natives and American Laws* (Fairbanks, 1984).



During the project's expeditions enforcement of indigenous peoples' rights were studied. To carry out comprehensive studies, including legal awareness, legal anthropology and other issues a special questionnaire was developed. The mentioned above information was obtained through semi-structured interview.



It is worth noting that after the sale of Alaska Orthodox Church and Orthodox Wards served as not only religious units, but local self-government units as well. The Orthodox Church in Alaska was ruled by the Holy Synod of Russian Orthodox Church until 1917. Orthodox priests governed indigenous settlements; they also registered births and deaths in church books. Our studies have shown that those communities where Orthodox wards still exist have the most active self-government.



Conducted studies show the current level of socio-economic rights' enforcement among indigenous population in Alaska. The health care system is currently organized through the Indian Health Service established in 1955 because of the special government to government relationship with tribes throughout the U.S. The education system is established for all residents of the state by state funding requirement to receive equal funding to all schools dependent on enrolment. ANCSA established payments by congress to the Native and village corporations over a period of 10 years. To this date there are various regional and village corporations that continue to pay dividends to their shareholders for profits made to their corporations. A shareholder is a member of the regional and village corporation as established by ANCSA in 1971.

Alaska Natives have fishing rights for personal use just as all Alaskans. To carry out commercial fishing it is necessary to purchase a license. Indigenous people have historically restricted their harvests to preserve future fishing numbers, however the commercial trollies in the ocean have not been effected by these low numbers and continue to catch fish in large numbers effecting the numbers in the smaller rivers that are used by Alaska Natives. Indigenous people must follow the hunting restrictions for the whole state, however in times of low numbers or for ceremonial purposes, may have a right to hunt with a special permit.

Nevertheless, the possibility of material benefits' obtaining makes indigenous people socially and financially dependent from the government. This fact was also noted in the works of Russians, who served in Alaska in the XIX century.⁷⁰ Indigenous population in Alaskan settlements has high unemployment rates caused by the lack of jobs and lack of business initiative. At the same time, local self-government activities are very efficient.

At present, the State Government uses a grant system to stimulate the activity of local self-governments. The granted projects should be aimed at improvement of public services and utilities; to prepare and implement these projects local corporations often hire a manager.

⁷⁰ P. N. Golovnin, *Overview of the Russian Colonies in North America* (Saint-Petersburg, 1862).

Thus, the results of our theoretical study and the practical field studies conducted during expeditions show a fairly high level of the indigenous people's rights in Alaska, which differs favorably from situation in the "lower 48 states". This fact, *inter alia*, can be seen as a consequence of the legal heritage of Russian America.

[Translated from Russian by Olga Klisheva, UArcitic Research Office Manager] .

Protection of Indigenous Peoples' Cultural Rights in the Russian Arctic: Legislation Review 2015

*Maxim Zadorin **

The cultural rights of indigenous peoples are one of the most important categories of rights, which are directly related to traditional natural resources use and maintenance of ancient ancestors' traditions for future generations. The notion of culture includes the whole range of vital issues and activities in each indigenous community.

Russian Federation adopted in 2015 a number of important legal acts in order to improve the cultural rights protection of indigenous peoples of the North, Siberia and Far East of Russia (hereinafter - the indigenous peoples):

Strategy for Sustainable Development of Rural Territories for the period up to 2030, approved by the Federal Government on February 2, 2015 № 151-p, sets differentiated approach to rural development in Russia. In particular, the traditional economy of the indigenous peoples is counted to be the fourth type of regions with a focal exploration of rural areas and severe climatic conditions. It is indicated that regions with social conditions unfavourable for rural development suffer mainly from depopulation. The complex set of measures is needed to overcome this process, including maintenance of traditional indigenous culture, promotion and support of rural communities' activity through grants on the development of indigenous arts and crafts and folk festivals. For the future development and rational distribution of agricultural production and related industries main attention should be paid to the problematic regions such as the High North territories with their special needs and traditional indigenous life sustenance.

Plan of activities of the Federal Service for Intellectual Property was also adopted in February 2015. Its paragraph 7.4 creates conditions for the active participation of the Russian Federal Service for Intellectual Property in the activities of the World Intellectual Property Organization, particularly in the development of international legal instruments for the protection of traditional knowledge and folklore and genetic resources.

Order of the Ministry of Health of the Russian Federation, March 6, 2015 № 87 approved the unified form of medical documentation and statistical reporting forms used during the clinical examination of certain groups of adults and preventive medical examinations. The paragraph 7 of the clinical examination form indicates a citizen's belonging to the indigenous peoples of the North, Siberia and Far East of the Russian Federation.

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By the Resolution of the Government of the Russian Federation, March 14, 2015 № 228 was approved the creation of *State Commission on Arctic Development* (hereinafter - the Commission). The main tasks of the Commission is to improve the life quality of people living and working in the Arctic zone of the Russian Federation, including the indigenous peoples, to preserve their traditional life styles and economic activities, as well as objects of cultural heritage.

In order to protect the indigenous peoples, including their culture, the Government of the Russian Federation adopted March 31 the *decree on distribution of inter-budget transfers provided to regional budgets within the sub-program “Strengthening the unity of the Russian nation and ethno-cultural development of the peoples in Russia”*. The application form for inter-budget transfers supporting the indigenous peoples’ culture, as well as unified form of agreement between the region and the Federation were approved at the federal level a month earlier.

The Federal Agency for Nationality Affairs was established the same month by the Presidential Decree № 168. The new agency will take responsibility for protection of ethnic and cultural diversity of indigenous peoples in Russia. Previously this area was under authority of the Ministry of Culture.

The power to protect the rights of indigenous peoples was given to the ombudsmen in the Russian Federation in April 2015.

[Translated from Russian by Olga Klisheva, UArctic Research Office Manager] .

Regulatory Issues of Work in the European Russian North

*T. A. Zykina**

Taking into account the remoteness of northern areas and poor transport network, which objectively determine higher costs for production and livelihood, certain specific labor regulations in the High North and equated areas were adopted in Chapter 50 of the Labor Code of the Russian Federation. The particular relevance for research on labor regulation issues in the European North of Russia is based on the fact that not all matters important for working people have a clear and full comprehension in the current legislation. Benefits for employees of the northern territories in Russia include salary increases through the adoption of regional coefficients and the percentage rise to salaries, reduced working hours, right to additional leave, coverage of travel expenses to the place of vacations and others. The particular attention must be paid to analysis of northern workers' rights for coverage of travel expenses to the place of vacation and back.

The procedure, terms and amounts of reimbursement for the costs of travel to the place of vacation in accordance with Article 325 of the Labor Code applies only to employees in organisations financed from the federal budget. For workers of the organisations financed from the regional or local budgets, the amount, terms and procedure of reimbursement of these costs are set by the public authorities of the Russian Federation and local authorities' decisions. Thus, the Paragraph 6 of the Regional Law № 260-33 adopted 10.11.2004 "Payments to public institutions' workers in the Arkhangelsk region, guarantees and compensations for those working in public institutions of the Arkhangelsk region, located in the High North and in equated areas" says that persons, working in the organisations financed from the regional budget and located in the High North and equated areas, have the right to get travel expenses on the territory of the Russian Federation and back covered once in two years, as well as the cost of baggage weighing up to 30 kilograms.

Travel expenses can be covered if the person travels by road, including the personal automobile (excluding taxis), railway transport, river and sea transport (no more than the cost of travel in a cabin of the first category), air transport (no more than the cost of the trip in economy class). Travel expenses on employee's personal automobile to the place of vacation and back are paid at the lower price of travelling by the shortest route.⁷¹ In non-budget organisations travel costs to the place of vacation and back are covered by the employer. At the same time, within the meaning of the law enforcement practice, the adoption of order and conditions of the reimbursement and its amount is the obligation, not a right of the employer.

Russian Constitutional Court in its resolution "On the case on the constitutionality of the Statement 8, Article 325, Labor Code of the Russian Federation, in connection with the complaint

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⁷¹ "Vedomosti" newsletter of the Arkhangelsk Region Assembly of Deputies, 2004, No. 33.

of citizen I.G. Trunova” (adopted 09.02.2012) specifically pointed that the Labor Code of the Russian Federation in the current legislative regulations is binding upon employers not belonging to the public sector and engaged in entrepreneurial and (or) other economic activities in the High North and equated areas, to include in the collective agreements, local acts of the primary trade union organizations, or in employment contracts, that workers can get the reimbursement of travel costs within the territory of the Russian Federation in the amount and under the conditions which shall correspond to the intended purpose of the payment.⁷²

General statements with respect to this benefit are provided to those working in the High North and equated areas, in the Labor Code Article 325, where the procedures, conditions and number of persons to whom the payment can be made are specified. High North workers are entitled to additional vacations, paid every two years by the company, to travel to the place of vacations within the Russian Federation and back on any kind of transport (except taxis). In Addition, companies have to pay for the cost of baggage up to 30 kg (Article 33 of the Russian Federation Law N 4520-1).⁷³

The legislator, however, have not clearly defined, when the employee gets the right to these benefits for the first time. Sometimes there are misunderstandings caused by the fact that some employees provide new employer with references from previous jobs that they did not use the benefit for travel costs coverage to the place of vacation and back in the last two years and, in this regard, get compensations more often than once in two years. It would be reasonable to supply the existing legislation with a statement that you must work at least 11 months to get the travel costs coverage. In practice, such vacation is given to the employee by the end of the 6 month period (Article 122 of the Labor Code) together with other basic and additional vacations he is entitled to.

Another question that has no clear answer is what kind of holidays could be the basis for benefits, and should it be the main vacations or special vacations for those working in the High North and equated areas or it may be other vacations, including vacations without reimbursement. Since the law does not specify which holiday can be the basis for reimbursement, we must follow the general rule and use any legal vacation period provided to an employee.

Kind of a discriminatory statement appears in the Article 325 of the Labor Code. It limits worker's right to get travel expenses covered when he travels together with underage children, as this makes the benefits dependent on kids living with or separately from parents. For example, divorced parents who live apart from their children cannot rely on travel expenses coverage for children who follow them on vacation and back.

Northern European territory of Russia can be called natural resources reserve, its mining and processing supports the economy and creates basis for the export potential of the state. At the same time the European North of Russia, including the High North and equated areas, is home to only about 8 percent of the Russian population, which requires consolidation of the working population in the area. Therefore, benefits are of great practical importance to all workers in the North.

[Translated from Russian by Svetlana Guseva, UArctic Research Office Expert] .

⁷² Bulletin of the Constitutional Court RF. 2012, N 233.

⁷³ “On the State Guarantees and Compensation for People Working and Living in the Far North and Equivalent Areas”. Law of the Russian Federation of 19.02.1993 N 4520-1 (ed. 24.07.2009). Legal-reference system "Consultant Plus”.