

# **Current Developments in Arctic Law**

**Volume 4, 2016**

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**UArctic**  
Thematic Networks

# Current Developments in Arctic Law

Volume 4, 2016

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## Editorial Note

There are lots of developments in Arctic law, as is well shown by this fourth edition of the *Current Developments in Arctic Law*. With these yearly volumes, we are striving to provide short updates on issues of legal significance taking place in the Arctic. This is of much importance, 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 fourth 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 the rest of the globe.

Sincerely,

Research professor Timo Koivurova

Professor Waliul Hasanat

Rovaniemi and Khulna, 10 January 2017

## Short Articles

## Why am I Interested in the Philosophy of Law in the Arctic? On Some Chosen But Essential Ethical Challenges of Conducting Research in the Field

*Dawid Bunikowski\**

### 1. Introduction

This short article is a multidisciplinary contribution which covers methodology, ethics, law and philosophy. I consider a few questions here that seem to be of ethical-philosophical character: 1) Why am I interested in the philosophy of law in the Arctic? Does it make any sense?; 2) Should I ask Arctic indigenous people what they want me to do for them (if they want something from me at all)? (If yes or no, why?). In order to open up these questions, I will use legal-philosophical-methodological considerations and some opinions of three indigenous people (IP<sup>1</sup>) whom I have contacted. My argument here is that foreign philosophers of law are important for IP in the Arctic. These academics can conduct research on IP living in the Arctic, because this topic is also ethically important as it concerns justice. Of course, such scholars should be very sensitive when they work with IP and make research on their cultures, embracing a diverse, "bloomy" future.

### 2. The Philosophy of Law in the Arctic

In the beginning, let me ask: What is the philosophy of law in the Arctic?<sup>2</sup> And why should I be interested in this? First, this kind of philosophy is about law and justice in the Arctic: I seek the truth. As a legal philosopher of non-Arctic, non-Nordic, white-European-Catholic origin but residing in one of the Nordic countries, I have a moral and academic right to conduct my research on law and justice, also in this region. I follow Justinian's formula on law and justice given in 534.<sup>3</sup> The lifetime goal of every scholar should be to find out the truth about relationships in the world and the universe: it might be about human or social relations, laws, physics, biology, astronomy, etc. Secondly, the reason of my interest in this particular area is that the problem of the philosophy of law in the Arctic is in fact about justice. Thus, this seems a deeply philosophical-ethical and axiological problem. I recognise the problem of the philosophy of law in the Arctic concerns historical justice: what kind of depreciation do/did the Arctic indigenous people meet?; what kind of *compensation* do they enjoy? For example, are their any customary laws or land rights recognised

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<sup>1</sup> I use 'indigenous people' and 'IP' interchangeably. In this context, I would like to thank Associate Professor Maura Hanrahan from the University of Lethbridge (Southern Alberta, Canada), a member of the UArctic sub-group I lead, for her substantial tips, comments, and advices in this sensitive field of codes of ethics for researchers in IP perspectives. I am grateful to her further for her comments on reconciliation process in Canada and its legal framework concerning IP.

<sup>2</sup> See also D. Bunikowski (ed.), *Philosophy of Law in the Arctic* (Rovaniemi: University of the Arctic, 2016), available at, [http://www.uarctic.org/media/1596449/tn-arctic-law-\\_bunikowski-\\_philosophy-of-law-in-the-arctic.pdf](http://www.uarctic.org/media/1596449/tn-arctic-law-_bunikowski-_philosophy-of-law-in-the-arctic.pdf) (accessed 14 December 2016).

<sup>3</sup> See Justinian's Code (The Institutes of Justinian), available at, <http://classes.maxwell.syr.edu/His381/InstitutesofJustinian.htm> (accessed 03 February 2016).

in a state in the Arctic? It is also a philosophical problem for me while in the West. I think what lacks here is justice - historical justice<sup>4</sup>.

### 3. Western Moral Philosophy and the Arctic

I have learnt that any reaction for the depreciation of many indigenous nations in the Arctic is a matter of historical justice. This is a deep philosophical-moral issue. In fact, the state of things we have in the Arctic very often goes against the principles and ideals of traditional moral philosophy established in the West. If one goes to Cicero's concept of law,<sup>5</sup> Aristotle's ethics,<sup>6</sup> Aquinas' common good,<sup>7</sup> or Kant's categorical imperative,<sup>8</sup> then one becomes convinced to recognise diversity (because diversity is better) and different ways of life in a state. Of course, 'practical' political philosophy (as proposed by Locke) in America and modern liberal nationalism in the Nordic states prevailed in the 19th century: nation states were more important than minorities; legal egalitarianism, educational systems, the enlightenment ideas, many slogans about progress, the new property rights regimes in Canada or Scandinavia, the closing of borders (like in Scandinavia) that was supported by the revival of Christian ethics destroyed many indigenous cultures (like *Saami* or Inuit).

### 4. The Background of the Initial Questions

However, going back to my fundamental questions (1. Introduction), I admit I was "heavily" criticised at some seminars by Finnish scholars.<sup>9</sup>

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<sup>4</sup> See D. Bunikowski, 'Indigenous Peoples, Their Rights and Customary Laws in the North: The Case of the Sámi People' in M. Lähteenmäki, A. Colpaert (eds.), *East Meets North - Crossing the Borders of the Arctic* (Oulu: Nordia Geographical Publications Yearbook, 2014). Available at, <https://wiki oulu.fi/display/psms/NGP+Yearbook+2014> (accessed 14 December 2016).

<sup>5</sup> See Cicero, *On the Laws (De Legibus)*, available at <http://www.nlncrac.org/classical/cicero/documents/de-legibus> (accessed 04 February 2016).

<sup>6</sup> See Aristotle, *The Nicomachean Ethics* (London, 1893), available at, <http://oll.libertyfund.org/titles/aristotle-the-nicomachean-ethics> (accessed 02 March 2016).

<sup>7</sup> See St. Thomas Aquinas, *Summa Theologica* (translated by The Fathers of the English Dominican Province, 1947), available at, <http://www.sacredtexts.com/chr/aquinas/summa/> (accessed 02 March 2016).

<sup>8</sup> See I. Kant, *Grounding for the Metaphysics of Morals: with on a Supposed Right to Lie Because of Philanthropic Concerns* (Translated by J. W. Ellington Hackett, 1993, (1785).

<sup>9</sup> Especially, it happened at this conference: *VI Spanish-Finnish Seminar on Legal Theory* in the University of Eastern Finland Law School, Joensuu, Finland 30 June to 2 July 2016. Finnish philosophers or social thinkers, such as Panu Minkkinen and Eerik Lagerspetz, had some serious objections concerning the sense of my research on the philosophy of law without asking IP whether IP want me to do such research. Minkkinen said that my research on the philosophy of law in the Arctic was a 'political project', having had 'nothing or little common with legal theory'. Lagerspetz queried the sense of my considerations on relationships between 'law' and *Saami* cosmologies and added that it would be fair of asking IP whether they would need such research. To me, many Finnish scholars do not believe that there is something specific and idiosyncratic in the philosophy of law in the Arctic. To make it clear in this point, my research on the philosophy of law in the Arctic is about systematisation of topics and problems of legal theory in the Arctic, such as Western and indigenous concepts of law, the place of indigenous customary law in Western legal systems, etc. Indigenous narratives on law are even more important from the Western ones in this research. Indigenous terminologies should be taken into consideration seriously then. We focus too much on Western methodologies while conducting research on IP. We should go even to indigenous mythologies or shamanism to understand IP. When I think of these issues, I get strong feeling of injustice because of the Western academic patronising or paternalism in relation to IP - the Western academia in its majority, being proud of its own abstract considerations, terminologies, and methodologies, does not understand too much about this mistake. This concerns especially legal science.



in this way: “One who wants to conduct research about indigenous people has to ask them ‘for permit’ to do that and has to ask them what they want from him or her to do for them. This would be fair.” Do I act unfairly then? So, I may think, it perplexingly looks like a foreigner who is a lawyer/philosopher and lives in the Arctic has not such a right to conduct research on justice here. But really?

### 5. Research Ethics on Indigenous People in Finland

While in Finland, no code of research ethics found on IP.<sup>10</sup> Let me allow for making some personal remarks. I remember an American scholar's disappointment when she visited northern Finland: she became surprised for the lack of such a code. Last year, some young *Sami* scholars claimed at a conference in Rovaniemi that non-indigenous scholars should follow their Saami/indigenous rules of conducting research on IP (the problem is that they do not have a code yet). Another problem is that science, which foreign or Western scholars do, should not be a subject of politicisation. Many *Saami* scholars are also political activists. It is not a capricious critique, but it looks like articles should not meet political ends of some indigenous groups only. They should present the truth, above all.

### 6. Questions for IP

So, I asked four selected persons of indigenous origin in the Arctic:

- 1) Do you think this is correct that a Western scholar should ask indigenous people what they want from him in conducting research? (Q1)
- 2) Do indigenous people in the Arctic need foreign scholars like me to show the truth about relevant relationships in the Arctic and make pressure on international academia/community to improve the recognition of indigenous rights? (Q2)

I would like to bring some opinions about the sense of such research like mine.

### 7. Answers of the IP

First of all, this is necessary to highlight that this was not a problem for me that indigenous people are not always keen to respond. In this case, all went enthusiastically good in December 2016 (only one person did not answer). Thus, I will cite and shortly analyse the answers of the following three persons,<sup>11</sup> two of them bravely decided not to be anonymous:

1) Respondent 1. Nils Anders Inga, a *Saami* engineer and activist from Kiruna, Sweden, R1:

Q1: The answer is succinct: “You do not have to directly ask for permit...” He also added: “You have a very good perspective in your subject!”.

Q2: The answer is ‘Yes’, with a statement “...national Nordic states do not like your *Saami* work”. so it is necessary, he says, to contact chosen research institutions that really support *Saami* research. He suggested me with appreciation that I should contact Umeå University.

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<sup>10</sup> For example, in Canada there are strict and mandatory rules for researchers.

See, <http://www.pre.ethics.gc.ca/eng/policy-politique/initiatives/tcps2-eptc2/chapter9-chapitre9/> (accessed 12 December 2016). Canada has recently introduced - Truth and Reconciliation Commission - modelled on South Africa. See, [http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls\\_to\\_Action\\_English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf) (accessed 12 December 2016).

<sup>11</sup> The respondents became knowledgeable about the author through my research works.

2) Respondent 2. *Saami*, R2:

Q1: “My spontaneous and very short answer on your first questions is that of course a western scholar has a right to conduct research on Indigenous people’s rights without asking indigenous people what they want him or her to research on. But, of course it depends on what kind of issues are raised and how the research is done. Ethical guidelines must be followed in all research. In the same time, I think that some kind of connection to IP, by for example talking to and visiting IP on different arenas, can deepen the understanding about IP culture and their situation and thereby benefit both the researcher and the indigenous people, it makes the research credible and more useful.”

Q2: “There is a need for more research about the situation for IP in the Arctic in general, but I do not have any ideas who should conduct it.”

3) Respondent 3. Maura Hanrahan, a Canadian scholar with Mi’kmaq and British ancestry, R3:

Q1: “Indigenous nations have their own protocols and research ethics approval processes (at least most do here in Canada). So at least in this state you have to apply to Indigenous nations to do research. This pertains to research on Indigenous land, with Indigenous people, on Indigenous culture, etc. You can do text-based research or research on material in the public domain without going through this process (...). In my experience the pendulum has at times swung too far the other way with some Indigenous nations insisting on vetting articles for peer-reviewed journals to ensure that research results serve their political ends. This is not surprising given the ongoing political challenges that Indigenous nations face but it can compromise academic integrity (...).”

She added: “In addition, there is a long history of researchers actively disrespecting Indigenous land, culture and people—anthropologists measuring the skulls of the *Saami* in Norway is one sorry example and American museums robbing Inuit graves in Labrador to put skeletons on display is another. Accordingly, in Canada at least, there are strict protocols to which all researchers must adhere.”

Q2: “It is my personal opinion that Indigenous people need non-Indigenous allies – in politics, science, academia, business, law, and just about any other sphere you can name. From a moral perspective, as you allude, it is not hard to make the argument that it is incumbent upon non-Indigenous people to get educated and act as allies. Canada’s Truth and Reconciliation process speaks directly to this in very concrete ways.”

The conclusion, which comes from these opinions, is that: 1) IP need foreign scholars who work on IP, 2) conducting research on IP is sensitive and requires ethics and good sense.

## 8. Conclusions

This article aims to point out that this is important to conduct research on the philosophy of law in the Arctic, because the IP’s problem is related to the value of justice. Such a work is appreciated by indigenous people, as we saw above (R1, R2, R3). A scholar can be happy when he or she sees that her or his work or research is important for indigenous people and they treat him/her as ‘an ally’. Thus, it is the case that the scholar community should follow the truth, as well.

Notwithstanding this, what I perceive is that Nordic governments and societies do not like that foreign speakers posit what these societies did wrong in relation to the *Saami*. They do not like such a critique, especially if it comes from foreign scholars. Why? Maybe these countries do not want to face their histories. Maybe the countries do not want to speak about any lingering forms of colonialism. Many people know that both xenophobia and nationalism have always been problems throughout Europe. The president of the Saami Parliament in Finland once said in 2010 that Finland was only interested in making its own good PR abroad but Finland did not “make it easy to be a *Saami*” here<sup>12</sup>. In the UN reports, this view of Finland is criticised<sup>13</sup>. One may suppose that Finns do not like it but do not express it openly. The government has always made a response in its statements to the UN that “all going to be okey”. The style of these statements might be nicely presented in simple words: “We cooperate with the *Saami* and we want to improve the status of the *Saami* etc.”<sup>14</sup> Words, words, words, Shakespeare would add, would not he?... On the other hand, while thinking of e.g., Canada, one can ask where do we think this strain of stereotype that Canada is the best in the recognition of indigenous rights comes from? At the Queens University, W. Kymlicka ran a multiculturalism policy project,<sup>15</sup> according to which the position of Canada was the best. In global terms, maybe yes. However, we should remember that his theory is based on the very Western understanding of liberal and pluralistic society. Which means it might be really harmful for IP as it does not fit with their non-Western cultures. But Canada is complex. And Finland is more homogenous and smaller.

So, what is the moral claim that a foreigner can be interested in the Arctic and can speak about Arctic indigenous people? Justice. “Render every one his due”, as says Justinian. My argument is: There is the deep sense of the philosophy of law in the Arctic. Historical justice is becoming elementary justice. It is turning to global justice, humanity, and the truth. However, elementary or global justice requires practical and concrete tools and actions. That is what my understanding of the philosophy of law in the Arctic implicitly suggests.

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<sup>12</sup> ‘Statement by Finnish Saami Parliament on the Realization of Saami People’s Right to Self-determination in Finland’ presented by the President of the Saami Parliament of Finland Juvvá Lemet, Klemetti Näkkäljärvi. Available at, [http://www.galdu.org/govat/doc/self\\_determination\\_samiparliament\\_finland.pdf](http://www.galdu.org/govat/doc/self_determination_samiparliament_finland.pdf) (accessed 04 November 2016).

<sup>13</sup> See for instance, ‘Concluding Observations on the Sixth Periodic Report of Finland’, Human Rights Committee, 22 August 2013 (on International Covenant on Civil and Political Rights), available at, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/462/45/PDF/G1346245.pdf?OpenElement> (accessed 05 November 2016).

<sup>14</sup> See ‘Concluding Observations on the 20th to 22nd Periodic Reports of Finland’ adopted by the Committee on the Elimination of Racial Discrimination at its 81st session in 2012. Information provided by the Government of Finland on its follow-up to the recommendations contained in paragraphs 12, 13 and 16 (30 August 2013). Available at, <http://formin.finland.fi/public/download.aspx?ID=119107&GUID=%7B9984DD16-2154-4FEB-9BB6-281AB982EDA8%7D> (accessed 04 November 2016).

<sup>15</sup> See *Multiculturalism Policy in Contemporary Democracies* (Kingston, Canada: Queen’s University), (Multiculturalism Policy Index); available at, <http://www.queensu.ca/mcp/> (accessed 04 November 2016).

## Marine Mammal Regulation in the Arctic: Report for 2016

*Richard Caddell\**

The regulation of marine mammals in the Arctic region continues to raise a number of interesting legal issues, not least the conflict between preservation and sustainable use, the interaction between regulatory regimes and the rights and treatment of indigenous communities in the High North. In comparison to previous reports, which have been largely dominated by the controversies raised by the EU's prohibition on seal products, in 2016 marine mammal considerations were primarily addressed through important meetings of the International Whaling Commission (IWC), addressing whaling issues in the High North, as well as the North Atlantic Marine Mammal Commission (NAMMC), addressing pinnipeds and cetaceans in these waters.

### 1. National Developments

A series of intriguing developments affecting marine mammals have occurred on a national level within the US during the concluding months of the Obama administration. The election of Donald Trump in November 2016 has raised concerns that climate change – dismissed by the President-elect as a hoax – is unlikely to be given particular credence within the next presidential term. Nonetheless, the outgoing President has instituted a legacy of Arctic protection with the adoption of an executive order in December 2016 removing two offshore licensing areas in the Bering Sea (classed under US domestic provisions as falling within the Arctic) from potential drilling activity. Although unpopular with the Alaskan administration, the legal protection accorded to these waters – and the marine mammals located therein – is likely to present a considerable challenge for the incoming administration to overturn, if so minded.

One particularly interesting development was the decision by the US Court of Appeals for the Ninth Circuit to reject a challenge to the listing of certain ice seal species upon the Endangered Species Act, delivered in October 2016. The decision in *Alaska Oil & Gas Association v. Pritzker* is memorable as the Okhotsk and Beringia populations of Pacific bearded seals were not physically endangered in 2016, but were projected to become so by 2095 due to the continued loss of sea ice over shallow waters. This finding, which had arisen out of a petition filed by the Center for Biological Diversity in 2008, gave rise to a controversial ruling in 2012 that these species ought to be proactively listed. Unsurprisingly, perhaps, this was subject to legal challenge, particularly of the modelling process, which can lose accuracy over an extended time frame.

In a far-sighted judgment, however, the Court considered that the volatility incumbent in climate projections “does not deprive those projections of value in the rule-making process” and nonetheless represented the best science available to the decision-maker. Moreover, confirming that such evidence need not be ‘ironclad’, the agency in question was considered to have taken a reasonable decision based on the available evidence. This may amount to a significant decision in

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the context of Arctic species, specially since the Endangered Species Act (in)famously does not advance a definition of the term ‘likely to become endangered’, thereby demonstrating a readiness to use the best available climate data to address regulatory approaches to the increasing challenges posed by diminishing sea ice. Indeed, the US Court of Appeals for the Ninth Circuit has been prepared to be relatively activist in the case of marine mammal protection, also over-ruling as unduly restrictive a previous finding that only polar bear dens could benefit from habitat protection requirements, as opposed to roaming areas, in *Alaska Oil & Gas Association v. Jewell*. These approaches may offer some reassurance that climate mitigation retains traction within the national judiciary, given the general pessimism towards the prospective climate policies mooted by the incoming Trump administration.

## 2. NAMMCO

The NAMMCO Council convened its Twenty-Fourth Meeting in February 2016 in Oslo. Alongside the usual review of economic and management affairs, the Meeting also examined elements of the ecosystem approach to the management of marine mammals. Particular attention was also accorded to hunting methods, with an expert group meeting to assess killing data in large whale hunts also helping to inform the IWC’s deliberations. A series of new whale surveys were also conducted within the NAMMCO Area, which has yielded new data on fin, humpback, minke and pilot whales. The Meeting also confirmed the commitment of NAMMCO to cooperating with other bodies and initiatives, notably with the Joint Commission on Narwhal and Beluga, alongside a commitment to strengthen ties with the IWC, the International Council for the Exploration of the Sea (ICES) and the Agreement on the Conservation of Small Cetaceans of the Baltic, North-East Atlantic, Irish and North Seas (ASCOBANS). Meanwhile, the theme of food security in the Arctic was also picked up by NAMMCO, with the launch of the project ‘Marine Mammals as Food Resource’ in November 2016, to draw attention to traditional livelihoods and food sources in the High North.

## 3. Arctic Whaling and the IWC

Since 2012, meetings of the IWC have been convened biennially, with regular fora for intersessional discussions. The 2016 Meeting was convened in October 2016 at Portorož, Slovenia and involved a typically full agenda. While perhaps not as prominent as in recent years, Arctic issues nonetheless occupied a conspicuous position on the Meeting’s agenda, especially Greenlandic concerns. Greenlandic whaling occurs subject to the IWC’s Aboriginal Subsistence Whaling (ASW) exemption, an issue that has given rise to a series of strong debates at recent meetings, as documented in previous reports. Arctic quotas are relatively settled for the coming years, pending further review in 2018, hence were not under active consideration in 2016.

Nevertheless, the Greenlandic quota is likely to be a key issue at the next meeting. In recent years, IWC Members have raised concerns at the increasing volume of meat taken by Greenlanders – which is alleged in some quarters to be close to a *de facto* commercial quota – and the subsequent sale of these products in Greenlandic restaurants to the burgeoning tourist market. Greenland has contended that these sales are vital in order for it to raise capital to meet the increasingly extensive (and expensive) animal welfare requirements incumbent in ASW. The rules on ASW have not been

formulated with great precision and merely require that “the predominant portion of the products from such whales are originally directly consumed or utilised in their harvested form within the local community”. Defining the ‘predominant portion’ in any given season is a difficult issue and a degree of localized commercial activity is at least tolerated by the main protagonists. Nevertheless, Greenlandic whaling has remained an emotive issue: certain states have argued that these practices constitute a creeping abuse of process, while Greenland has contended that it is a vital aspect of its food security.

The issue of food security did indeed receive concerted attention at the meeting, albeit at the request of African rather than Arctic participants. A draft resolution on food security tabled by Ghana was considered highly controversial, with a suspicion that it was rather more friendly to Japanese interests in securing exemptions to the moratorium on commercial hunting than securing the needs of vulnerable communities. Similar concerns had been raised in the context of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) at its 17<sup>th</sup> COP, also held in 2016, at which point the Parties rejected a role for CITES in addressing food security as a general objective. Similar views were expressed in respect of the Ghanaian intervention, with many of the Parties considering that IWC’s remit in this regard extended solely to ASW matters, an issue that was somewhat marginalised within the draft Resolution. Accordingly, despite attempts to broker consensus, the Resolution was rejected, although is intended to be re-tabled in 2018. Nevertheless, the issue of food security looks likely to be especially hard-fought at the next meeting, with the Greenlandic representatives indicating that steps will need to be taken to protect its population if consensus on Greenland’s whaling quota cannot be achieved then. In recent years this has seen a series of bruising encounters, with Denmark threatening to leave the IWC if an effective solution cannot be brokered. Accordingly the 2018 meeting is likely to be of considerable interest from the standpoint of Arctic whaling.

## Land Claims Settlements in Canadian Arctic: Pragmatism and Instrumentalism at Work

*Diana Ginn\**

### 1. Introduction

In Canada, comprehensive land claims based on Aboriginal title can be pursued through either litigation or negotiation. Generally, the relationship between litigation and negotiation of these claims is understood as one where the Supreme Court of Canada initially prodded the Canadian state to action, and then in a series of decisions developed the legal parameters within which the political realities of negotiation occur. Thus, settlement tends to follow and be shaped by the contours of the legal doctrine. However, settlement of land claims in Canada's Arctic moved ahead of the case law in two key areas, as manifested in: (a) the negotiation of claims based on attenuated physical occupation of the lands in question; and (b) the application to waters and ice of principles developed in relation to terrestrial land. I argue below that this willingness to move beyond the precedents reflects both pragmatism and an instrumentalist approach to land claims in the Arctic.

### 2. Background

Land cession treaties (or at least treaties interpreted as such by the Crown) were signed with First Nations in what is now Canada during the eighteenth, nineteenth, and early twentieth centuries; however, these historic treaties left great swathes of land unaffected, including the Arctic. For nearly 50 years after the last historic treaty was signed in 1923, the federal government showed little interest in entering into further treaty negotiations, although Canada's indigenous peoples sought to have their land rights recognised. The federal government was forced to reconsider its foot-dragging in 1973, following the landmark decision of *Calder et al v Attorney General of British Columbia*.<sup>16</sup> After *Calder*, then Prime Minister Pierre Elliott Trudeau famously conceded, *Perhaps you had more legal rights than we thought you had ...*<sup>17</sup>In *Calder*, the Supreme Court of Canada recognised the existence of an inherent right of Aboriginal title to land, based on historic use and occupation. Where that title had not been extinguished by the Crown, it could ground present-day land claims. A year after *Calder*, the federal government established an office to deal with Aboriginal land claims, and in 1982, protection for Aboriginal rights (including Aboriginal title) was enshrined in the constitution of Canada.<sup>18</sup> Since *Calder* and more particularly since the entrenchment of aboriginal rights, an evolving doctrine of Aboriginal title has been articulated by the courts in Canada.

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<sup>16</sup> [1973] SCR 313.

<sup>17</sup> Indian Claims Commission, *James Smith Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa: Minister of Government Works and Public Services, 2007) 25.

<sup>18</sup> The *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 35.

### 3. The Doctrine of Aboriginal Title and the Concept of Occupation

In 1997, in *Delgamuukw v British Columbia*, the Supreme Court of Canada held that, in order to show Aboriginal title, a claimant First Nation must prove that the land in question was occupied prior to the Crown's declaration of sovereignty, and that this occupation was exclusive.<sup>19</sup> Further, where the claimants rely on present occupation as proof of occupation at the time sovereignty was proclaimed by the Crown, there must be continuity between that earlier occupation and present occupation. Some years later, in *R v Marshall* and *R v Bernard*, Aboriginal title claims in two Canadian provinces (Nova Scotia and New Brunswick) were rejected, on the grounds that the test for occupation had not been made out.<sup>20</sup> While acknowledging that the concept of occupation must take account of the realities of nomadic or semi-nomadic peoples, the Court in *Marshall* and *Bernard* held that the claimants had failed to offer proof of a strong presence on the land, with acts of occupation that could reasonably be interpreted as demonstrating the land belonged to or was controlled by them. A 2014 decision, *Tsilhqot'in Nation British Columbia* appears to employ a less rigorous standard for proof of occupation.<sup>21</sup> Historic usage of 2000 square kilometres of land in British Columbia by about 400 people (with approximately 200 individuals making up the current claimant group) was accepted by a unanimous Supreme Court of Canada as proving Aboriginal title. The Court noted that the *carrying capacity of the land*<sup>22</sup> must be taken into account when judging the sufficiency of occupation. *Tsilhqot'in Nation* has been both applauded and criticised as laying the groundwork for a more flexible understanding of occupation and possession - yet, the comprehensive land claims settlements in the Arctic (primarily the Inuvialuit Agreement of 1984 and the Nunavut Settlement of 1993) foreshadowed the Supreme Court's approach in *Tsilhqot'in Nation* by several decades. The federal government and indigenous peoples have signed land claims agreements covering much of the land and waters in the Canadian Arctic. Given the small numbers of people and the vast tracts of land involved, these claims must, by definition, have been based on sporadic and, at times, attenuated land usage, thus heralding the Supreme Court's most recent approach to occupancy.

### 4. Application of the Doctrine of Aboriginal Title to Water and Submerged Land

Land claims settlements in Canada's Arctic also indicate a negotiated response to a question not yet answered by Canadian courts: can the doctrine of Aboriginal title (with adjustments to take account of international law where necessary) apply to water and submerged land? Both the Inuvialuit Agreement and the Nunavut Settlement cover land and waters. Thus, as with the issue of occupation, in Canada's Arctic the Crown has been willing to negotiate in advance of established legal principles.

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<sup>19</sup> [1997] 3 SCR 1010.

<sup>20</sup> [2005] 2 SCR 220.

<sup>21</sup> [2014] 2 SCR 257.

<sup>22</sup> *Ibidem*, para. 37.



## 5. Pragmatism

I would suggest that the federal government's approach to negotiated land settlements in the Arctic reflects both pragmatism and instrumentalism. A pragmatic assessment of the particular circumstances of that region would include the facts that: (a) historic occupation of the Arctic was by nomadic groups, or very small groups having limited but recurrent contact with large geographic areas; (b) these areas include both terrestrial land and ice; (c) a majority of those living in the Canadian North are indigenous, and this fact, along with the sparse population, means that both overlapping Aboriginal title claims and resistance from non-indigenous occupants were less likely than in southern Canada; and (d) unresolved land claims had the potential to disrupt or slow significant resource development. The last factor would have added impetus to the negotiations, while the third factor would have given the Crown more room to negotiate and, thus, more room to take account of the realities of geography and the sparse human presence in the Arctic.

## 6. Instrumentalism

It also seems likely that the Crown's perspective on Aboriginal claims in the Arctic included an element of instrumentalism. A 2006 research paper prepared by the Library of Parliament notes that an *important dimension of the assertion of Canadian sovereignty includes stewardship, an issue that has been raised by Canada's northern Inuit and Aboriginal peoples. Specifically, "use and occupancy" by Canada's northern inhabitants is significant in terms of the validity of Canada's sovereign claims.*<sup>23</sup> Presumably the Government of Canada was attuned to such arguments when negotiating land claims settlements recognising that stewardship and occupation of Arctic lands and waters. Thus, negotiated settlements in the Arctic represent not only an end in themselves, but a means to a further end, that of acknowledging use and occupancy by Canada's indigenous people, as a way of buttressing Canadian claims to sovereignty in the Arctic.

## References

The *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982.

*Calder et al v Attorney General of British Columbia* [1973] SCR 313.

M. Carnaghan, A. Goody, *Canadian Arctic Sovereignty*, available at <http://www.lop.parl.gc.ca/content/lop/researchpublications/prb0561-e.htm> (accessed 08 December 2016)

*Delgamuukw v British Columbia* [1997] 3 SCR 1010

Indian Claims Commission, *James Smith Cree Nation: Treaty Land Entitlement Inquiry*, Ottawa, 2007.

*R v Marshall and R v Bernard* [2005] 2 SCR 220.

*Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257.

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<sup>23</sup> M. Carnaghan, A. Goody, *Canadian Arctic Sovereignty*, available at <http://www.lop.parl.gc.ca/content/lop/researchpublications/prb0561-e.htm> (08.12.2016)

## Arctic Cruise Shipping: Dreams, Development or Disaster?

*Stefan Kirchner\**

In recent years, cruise ship tours have become increasingly popular. This is also the case in the Arctic. Climate change is making the Arctic Ocean more accessible than at any other time in living human memory. Just how dramatic this development is becomes clear when a number of recent news reports are contrasted with each other: in September 2016, the wreck of the *HMS Terror* was found in the waters of the North West Passage, shortly after the cruise vessel *Crystal Serenity* began a trip through the Northwest Passage.

Climate change has led to dramatic decreases in the surface area which is covered by ice, this opens up new areas for Arctic cruise tourism. This raises concerns about issues like the protection of the natural environment.<sup>24</sup> For small communities along the coast of Norway, the *Hurtigruten* ships have long been a lifeline. Today they also bring tourists and revenue. Small communities in the Canadian Arctic hope for the same today,<sup>25</sup> while at the same time fearing that they might be overwhelmed by tourism.<sup>26</sup>

In the future, the same might apply to Russian communities along the Northeast Passage. In the Northern summer of 2016, both passages were sufficiently ice free to allow for cruise traffic. Given the boom in cruise ship tourism in recent years, the dramatic rate of climate change in the Arctic the fact that sea ice cover is almost routinely at or near record level lows, Arctic cruise tourism is likely to continue experience a boom in the coming years.

This raises the question how local communities and the natural environment can be protected against the potential negative consequences of increases in Arctic cruise tourism, in order to ensure that this new attractiveness of the region as a tourist destination is actually beneficial for the local population, but also save for those who visit the Arctic. Of particular concern is the potential impact on the natural environment and on the health of the local population living near ports.

International law already regulates shipping to a significant level, including, *i.a.*, issues such as safety through SOLAS or the protection of the marine environment through MARPOL. Both

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<sup>24</sup> See Ulrika Nordblom, Cruise tourism in the Arctic – sustainability issues and protection of the marine environment in international law, Master Thesis (Akureyri: University of Akureyri 2016), available at, [http://skemman.is/stream/get/1946/25233/54372/3/Nordblom\\_PL\\_Thesis.pdf](http://skemman.is/stream/get/1946/25233/54372/3/Nordblom_PL_Thesis.pdf) (accessed 8 December 2016).

<sup>25</sup> Ashifa Kassam, ‘Arctic cruise boom poses conundrum for Canada’s indigenous communities’, *The Guardian*, 4 October 2016, <<https://www.theguardian.com/world/2016/oct/04/arctic-cruise-boom-canada-inuit-indigenous-communities>> (accessed 8 December 2016).

<sup>26</sup> *Ibid.*

MARPOL and SOLAS have played a fundamental role in the establishment of the Polar Code, which in turn is based on earlier non-binding rules, and which regulates technical aspects of shipping in Arctic and Antarctic waters. Under the auspices of MARPOL, emission control areas (ECAs) have been established, which include also European and North American waters.

In addition, there is already a significant level of self-regulation through soft law. In general, self-regulation is fairly common in the shipping industry. Many international standards are based on requirements set by insurance companies rather than binding legal norms in the classical, narrow, sense of the term. A common regulatory model is based on states requiring foreign-flagged vessels to have certain insurance documents on board when visiting ports and requiring vessels flying their own flag to have sufficient insurance coverage against e.g. pollution by bunker oil or concerning damages suffered by passengers. As it is in the interest of insurance companies to keep the risk of damages as low as possible, insurance companies (keeping in mind that there are only very few globally operating insurance companies for the shipping sector) then have the practical power over ship owners and / or operators to demand adherence to technical or operational standards.

This approach makes it easy for local, coastal, communities to be forgotten and while for example the Association of Arctic Expedition Cruise Operators (AECO) has published a range of guidelines for its members,<sup>27</sup> these guidelines are based on the technological reality of today's cruise shipping industry. What is necessary in order to facilitate sustainable and healthy Arctic cruise tourism under changing conditions is a change in the technology involved.

While environmental standards also benefit coastal communities, in the context of the shipping industry standards are still applies which would be unacceptable in many other industries which are regulated on a national rather than an international level. Air pollution is one example. Cruise vessels often still burn Marine Diesel Fuel Oil, which is of a significantly lower quality than diesel oils used for example in road transport.<sup>28</sup> Carbon fuels used in the shipping industry have been proven to be carcinogenic<sup>29</sup> and according to the World Health Organisation, approx. 50,000 premature deaths per year can be traced back to emissions from ship fuels.<sup>30</sup> This problem affects in particular crew members who spend long times on board but also residents of port cities. Significant amounts of pollution are actually generated in port because the ships' engines are usually left running in order to ensure that energy is available for all systems on board, ranging from vital ship technology to the electricity supply to passengers' cabins. This causes additional air pollution. The arrival of a cruise vessel means having a small town next door overnight - with the economic possibilities (but also with the risks) which come with it. Depending on local factors such as the vicinity of the port to residential areas, which is significant in major destinations such as

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<sup>27</sup> See [www.aeco.no](http://www.aeco.no).

<sup>28</sup> Cf. Jochen Clemens, 'Das schmutzigste Gewerbe der Welt bleibt auf Kurs', *Die Welt* (14 August 2013), available at <https://www.welt.de/dieweltbewegen/sonderveroeffentlichungen/article118988228/Das-schmutzigste-Gewerbe-der-Welt-bleibt-auf-Kurs.html> (accessed 19 December 2016).

<sup>29</sup> NABU, 'Schiffsabgase sind tödlich, WHO-Studie belegt: Rußpartikel verursachen Krebs', *NABU* (15 June 2012), available at <https://www.nabu.de/umwelt-und-ressourcen/verkehr/schifffahrt/01234.html> (accessed 19 December 2016).

<sup>30</sup> *Ibid.*

Hamburg or Venice, but which is likely to play a role also in small coastal towns, the local population might be exposed to large amounts of potentially deadly air pollution.

There is a technological alternative to letting ships' engines run in port: supplying vessels with energy from land. In 2016, Hamburg was the first European port to offer land-based energy supply to cruise vessels.<sup>31</sup> In particular in small locations in the Arctic, providing land-based (renewable) energy could be doubly beneficial: an initial investment in energy infrastructure (e.g. based on wind or solar energy) could also serve the local community and could lead to energy independence and energy security. While such infrastructure is costly, its existence could help Arctic communities to become potential destinations for cruise and cargo ships. Especially coastal communities which are planning energy-related infrastructure investments anyway might want to consider such an investment. The absence of land-based (renewable) energy sources in port means that ship engines have to run continuously in order to provide energy not only to the ship's systems but also to thousands of passengers and crew members. This is costly for ship operators and provides an unnecessary risk for the health of the local population. Offering land-based energy will make a community more attractive as a potential destination. This in turn can mean economic opportunities which might even mean that it could soon pay off for the community to have invested in renewable land-based energy supplies for vessels.

Well-managed Arctic cruise ship tourism, which takes into account the protection of the natural environment, can be highly beneficial for Arctic communities. It can also be harmful. Local communities which are willing and capable to make significant investments in energy infrastructure, however, can not only limit the potentially deadly consequences for local residents but can also create a distinct economic advantage and thereby market themselves as potential destinations.

This example is meant to show that coastal communities are not merely on the receiving end of Arctic cruise ship tourism but that they can actually play an active role in shaping Arctic cruise ship tourism as well as in protecting the health of local residents. At least as long as the existing combination of international and national regulation as well as industry-internal self-regulation is not sufficient to protect coastal communities as well, such measures appear to be well advised and necessary.

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<sup>31</sup> Almut Kipp, 'Europas erste Landstromanlage für Kreuzfahrtschiffe geht in Betrieb', *Spiegel Online* (2 June 2016), available at, <http://www.spiegel.de/reise/aktuell/hamburg-europas-erste-landstromanlage-fuer-kreuzfahrtschiffe-in-betrieb-a-1095501.html> (accessed 16 December 2016).

## Litigation Concerning Consultation with Indigenous Communities in Nunavut, Canada

*Dwight Newman\**

The appropriate scope of and procedure for consultation with indigenous communities in Canada's Arctic came before the Supreme Court of Canada in a hearing on 30 November 2016. The case, *Hamlet of Clyde River v. Petroleum Geo-Services Inc.*, is an appeal from a Federal Court of Appeal decision on such issues in a distinctively Arctic context.<sup>32</sup> The Federal Court of Appeal decision had accepted the procedures of the National Energy Board as having met the expectations of consultation in the circumstances of that Board's approval of marine seismic testing in Baffin Bay and the Davis Strait off the east coast of Baffin Island in Nunavut. The Inuit community of Clyde River, located in the northeastern part of Baffin Island, has challenged the case through the Supreme Court, arguing that the testing will affect marine mammal life in the area and thus harm the community's indigenous way of life and rights. What the Court decides in the case - perhaps in the range of six to eight months down the road, will have significant implications.

Understanding why requires some context. Indigenous rights are a key protection for many of the human communities across the Arctic. At the same time, indigenous rights generally, and rights to consultation in particular, have direct implications for potential resource development in the Arctic.<sup>33</sup> The ways in which norms of consultation with indigenous communities are developed thus have implications for both human communities and economic growth across the region.

The ways in which the Canadian courts approach questions on consultation with indigenous communities may well serve as an important precedent for elsewhere. Canadian case law on consultation has engaged with many subtle issues,<sup>34</sup> and there is real potential for international exchange on ways of implementing effective legal norms on consultation with indigenous communities.<sup>35</sup> Such consultation, of course, is mandated by international norms on indigenous rights, including in a number of provisions of the United Nations Declaration on the Rights of

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<sup>32</sup> *Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 179.

<sup>33</sup> See generally Dwight Newman, Michelle Biddulph and Lorelle Binnion, 'Arctic Energy Development and Best Practices on Consultation with Indigenous Peoples' *Boston University International Law Journal* Vol.32 (2014) 449.

<sup>34</sup> On the Canadian case law, see generally Dwight Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009); Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014).

<sup>35</sup> For discussion of such comparative possibilities, see Dwight Newman and Wendy Elizabeth Ortega Pineda, 'Comparing Canadian and Colombian Approaches to the Duty to Consult Indigenous Communities on International Treaties' *Constitutional Forum* Vol. 25 (2016) 29.

Indigenous Peoples (UNDRIP) that have been recognised as having broader standing in international law.<sup>36</sup>

Canada's legal doctrine on consultation with indigenous communities is relatively well-developed, following essentially a dozen years of highly active jurisprudence on the topic. In a trilogy of cases in 2004 and 2005, the Supreme Court of Canada effectively developed Canada's modern 'duty to consult' doctrine.<sup>37</sup> Though prior cases had contained references to consultation, what was distinctive in this doctrine was the requirement of proactive consultation - the requirement that governments consult with potentially affected indigenous communities prior to a possible impact on their rights before making a decision that could negatively affect their rights. This is a proactive duty on Canadian (federal and provincial) governments when making decisions that may negatively impact indigenous rights, including commonly in the granting of permits and licenses in relation to resource sector developments.

This duty exists as a freestanding obligation on Canadian governments based on the honour of the Crown and the entrenchment of indigenous rights in section 35 of Canada's *Constitution Act, 1982*.<sup>38</sup> Some particular treaty arrangements have also included specifically defined arrangements on consultation. Some such arrangements on consultation in modern treaty frameworks in the Arctic have given rise to litigation over the precise scope of the treaty consultation obligations.<sup>39</sup> Although the issue may return before the courts, a major Supreme Court of Canada decision arising out of a Yukon case has also examined how consultation obligations under modern treaties coexist with consultation obligations under the general duty to consult doctrine.<sup>40</sup>

In respect of issues on seismic testing in the Eastern Arctic, an early decision rejecting an application for an injunction against such testing offered an early (and arguably predictable) determination that the duty to consult doctrine does apply so as to require governmental consultation with Inuit communities.<sup>41</sup> That decision did not see the courts grant an injunction against such seismic testing. But the *Clyde River* litigation saw the Hamlet of Clyde River

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<sup>36</sup> On the status of consultation in international law, see *Kichwa Indigenous People of Sarayaku v. Ecuador*; Inter-American Court of Human Rights, Judgment of 27 June 2012 (Inter.-Am. Ct. Hum. Rts.) (affirming consultation with indigenous communities as a general principle of international law); International Law Association, Resolution No. 5/2012, Rights of Indigenous Peoples (August 2012, Sofia, Bulgaria) (affirming customary international law nature of consultation).

<sup>37</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 43.

<sup>38</sup> The Constitution Act 1982, sec. 35 (under which "existing Aboriginal and treaty rights are hereby recognized and affirmed").

<sup>39</sup> See *First Nation of Nacho Nyak Dun v. Yukon*, 2015 YKCA 18, leave to appeal to the Supreme Court of Canada granted (June 2016) (deciding on whether consultation in context of Peel River Watershed decisions complied with modern treaty arrangements).

<sup>40</sup> *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53.

<sup>41</sup> *Qikiqtani Inuit Association v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12.

challenge such testing by seeking judicial review of decisions of the National Energy Board to approve this sort of testing in the particular area of Baffin Bay and the Davis Strait.

The issue got to the Supreme Court of Canada largely because there have been ongoing complexities on how the duty to consult doctrine is to be fulfilled in the context of decisions that are made by various administrative boards and tribunals in place of the executive branch of government. Some challenging questions have continued despite a past attempt by the Court to address such issues.<sup>42</sup> Although some of its decisions amount to recommendations to the federal Cabinet for the final decisions, certain types of decisions by the National Energy Board are in fact the final decisions of the Board.

At a technical level, the Clyde River litigation was one case that posed questions in such circumstances about just what relationship the National Energy Board has to the duty to consult and, in particular, whether simply opening its regulatory approval processes to representations on indigenous rights issues sufficiently fulfils the duty to consult indigenous communities on government decisions that may impact their rights. Perhaps because of certain coincidences in the way the case presented itself at the same time as another case in which a different panel of the Federal Court of Appeal had approached matters slightly differently, the Supreme Court of Canada granted leave so as to consider the case.<sup>43</sup>

At a less technical level, the Clyde River case has seen the circumstances of an Arctic indigenous community being put before the world in a realistic way. The community of Clyde River depends on the ocean for both physical survival, given its source of food, and cultural survival. Attention related to the court case has drawn international media attention and even visits by international celebrities, further drawing the world's attention to the practical side of the conflict over seismic testing and its potential impacts on marine mammals.

The Clyde River case was heard at the Supreme Court of Canada on November 30, and it is common for decisions from that Court to take six to eight months, so the final judicial decision on whether more consultation was owing on the approval at issue remains outstanding. In the meantime, the United States and Canada recently made a joint announcement of a moratorium on drilling for oil and gas under any new leases in Arctic offshore regions.<sup>44</sup> Subsequently, the mayor of Clyde River has noted that Prime Minister Trudeau's announcement on the Canadian side of this joint announcement made no mention of seismic testing or of fracking, leaving questions on what all of the implications might or might not be on the sorts of issues the Clyde River community has

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<sup>42</sup> *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43.

<sup>43</sup> See Dwight Newman, 'Indigenous Rights, Canada's National Energy Board, and the Supreme Court of Canada' *JURIST* - Academic Commentary, 11 April 2016, <http://jurist.org/forum/2016/04/Dwight-Newman-indigenous-rights.php>

<sup>44</sup> Dan Healing, 'Canada, U.S. Announce Ban on Offshore Oil, Gas Licenses in Arctic' *Toronto Star* (20 December 2016).

raised.<sup>45</sup> The Premier of Nunavut has raised questions about why the Prime Minister suddenly made this announcement without having consulted in any manner with the Nunavut government.<sup>46</sup>

The Clyde River litigation has the potential to answer only some questions about who makes decisions about resource development in the Canadian Arctic, and there will be ongoing questions about the balance of authority on these questions that affect both human communities and economic growth profoundly. The complex balances at stake offer a tangible example of the ways in which Arctic law must do several things simultaneously: engage with complex environmental and human vulnerabilities; negotiate critical balances of authority as between decision-makers residing in the Arctic and decision-makers located thousands of kilometres to the South; and work to find appropriate reconciliations of the broader needs of human communities and aspirations to Arctic economic growth. The Clyde River litigation is well-worth watching, but is just an additional decision in a developing part of Arctic law.

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<sup>45</sup> ‘Trudeau Promises Ban on Oil Drilling in the Arctic, But What About Seismic Testing?’ *APTN National News* (21 December 2016).

<sup>46</sup> Sarah Rogers, ‘Nunavut Disappointed in Trudeau’s ‘Spur of the Moment’ Plans for the Arctic’ *Nunatsiaq Online* (21 December 2016).



## The Arctic Council as an Actor in the Global Governance

*Margherita Poto\**

### 1. Introduction

The aim of the present work is to draw the basic structure of a model of governance can be effectively applied to the environmental regulatory system in the Arctic.

The paper is structured into two parts: the first part will serve as an expanded glossary of the most commonly used terms in the realm of the global arena reasoning; while, the second part will analyse the Arctic Council as a model where the theoretical framework is already applied and has manifested good chances of further development. In this latter part, in particular, the platforms of actors and the normative tissue will be analysed through the lenses of sustainability logic, which at its main core implies an active engagement of the parties involved.

The underlying idea is that in the rich stream of the global administrative law theory, there are two juxtaposed currents: the market and economic logic vis-à-vis the sustainability-oriented vision. The first one increasingly expanded in the last decades, to the point of collapse and therefore manifested its evident signs of weaknesses. Whereas, the second has stealthily entered the arena of the global dynamics and has progressively earned a prominent place as an alternative camera angle to look at the global challenges, helping to formulate proactive ways forward to the drawbacks of the market-oriented globalisation.

The concept of global village is grounded on the reflection that world has become a global arena, where players, both individuals or communities, interact free of the barriers of territorial borders.<sup>47</sup> They exercise their choices without any limits.

The International community, as well as the regional organisations, such as the Arctic Council in this specific case, are, in fact, societies of individuals, or simple citizens in a supranational public place, perceived as an extension of the private domain. Nations, like individuals, do likewise. From a legal perspective, some of the ideas coming from globalisation are fascinating and possibly useful to the harmonisation and to the dialogues between legal systems and cultures.

Environmental protection is one of the human activities subject to global regulation. The analysis through the global administrative law (GAL) lens can cover a subjective and an objective perspective: both actors and principles can respond to dynamics that in many respects can be

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<sup>47</sup> Marshall McLuhan, *Understanding Media* (London: Routledge Kegan Paul, 1964).

defined as global, since they have an infra and supra-national dimension and they are common to a diverse group of consociates.<sup>48</sup>

Examples of global tools can be the non-hierarchical order and the idea of dialogue between authorities, technical bodies and agencies through a network structure. The global administrative order does not shape the traditional structure of a hierarchical pyramid but is a stratification of different layers, interwoven together, like the coloured fibres of a carpet. The network shape is used to illustrate information spread throughout the global system.

Networks have the great peculiarity of transferring information smoothly to the actors, guaranteeing a high level of transparency. Actors are both international and national, with a variety of possible participants such as non- governmental organisations and civil society in general.<sup>49</sup> They are defined as a set of relatively stable relationships which are of non-hierarchical and interdependent nature between a variety of corporate actors.<sup>50</sup>

The perspective offered by networks underlines five different aspects:

- 1) the concept refers to bodies that exercise both private and public powers;
- 2) the level of institutionalisation in network system is low;
- 3) the heart of network system is the links between the various bodies;
- 4) networks are institutions regulating interactions among subjects; and
- 5) networks facilitate the development of behavioural standards and working practices.

This refers to the safeguard of procedural and judicial principles, to grant a high standard of good administration. Transparency, access to information, and the right to participate are examples of the first series. The right to be heard, and the right to a fair trial, are examples of the second series.

The structure of the Arctic Council (AC) will be therefore studied from this viewpoint, since it has the main features of a player in a global governance system, intended as the output of a non-hierarchical network of international and transnational institutions: it has been established under the premises of being operational as a transnational regime in a multilevel governance system, where governance takes place not only at the national and the international level (such as in international governance) but also at the subnational, regional, or even local levels. The AC, within its structure, allows the application and implementation of good administration principles applicable to the global arena, as enshrined in the participatory rights granted not only to its members, but also to the observers (states, IGOs, NGOs and civil society). In this regard, the AC has established a trans-governmental network, intended as a system in which power is not located in hierarchical system. The role of the AC will be therefore analysed regard to its structures, the procedures that it applies,

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<sup>48</sup> Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law' *Law and Contemporary Problems* Vol. 68:3/4 (2005)15-61. See also Nico Krisch and Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' *European Journal of International Law* Vol. 17:1 (2006) 1-13.

<sup>49</sup> Edoardo Chiti, 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies', *European Law Journal* Vol.10:4, (2004) 402-438.

<sup>50</sup> *Ibid.*

and the normative standards that it follows in the regulatory decision-making (including transparency, participation, and review).

## 2. The Arctic Council and the Participatory Rights of Indigenous Peoples

The AC plays a major role as a facilitator of international agreements and treaties on one hand, while its unique soft law structure has facilitated and strengthened the participatory approach within itself on the other hand.<sup>51</sup> It can be seen as a platform where also non-state actors can play a major role in tackling environmental issues such as climate change and protection of marine resources.<sup>52</sup> In particular, as far as the internal participatory mechanisms are concerned, in the process leading to the creation of the AC, Indigenous Peoples' Organisations (IPOs) were originally included under the traditional status of observers, as in the case of NGOs, and non-Arctic states.

After the adoption of the Ottawa Declaration on the Establishment of the Arctic Council, a specific category for the participation of IPOs was created and the three organisations already recognised as observers were granted the status of Permanent Participants.<sup>53</sup> According to article 2 of the Ottawa Declaration:

“[t]he category of Permanent Participation is created to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council”. The Arctic Council's rules of procedure further stipulate that “[t]his principle applies to all meetings and activities of the Arctic Council”.

Nowadays, the organisations are six and the category of Permanent Participants is still open to all the Arctic organisations with a majority of Arctic indigenous constituency representing: a single indigenous people resident in more than one Arctic state; or more than one Arctic indigenous people resident in a single Arctic state.

The Permanent Participants have almost equal participatory rights as the members to the AC, with an exception in regard to decision-making. Permanent Participants shall be consulted through the preparations of any official meetings, as they can raise issues to be added to the agenda or can propose collaborative activities.

This is why the AC approach to the participation of indigenous peoples is quoted as a virtuous example of civic engagement that shall inspire other international fora best practices. The IP engagement in the AC environmental decisions very much depends on the close relationship that

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<sup>51</sup> Jennifer McIver, 'Environmental Protection, Indigenous Rights and the Arctic Council: Rock, Paper, Scissors on the Ice?' *Georgetown Environmental Law Review* (1997-1998) 147.

<sup>52</sup> Timo Koivurova and Leena Heinamaki, 'The Participation of Indigenous Peoples in International Norm-making in the Arctic' *Polar Record* Vol. 42:221(2006) 101–109.

<sup>53</sup> Sébastien Duyck, 'Participation of Non-State Actors in Arctic Environmental Governance', *Nordia Geographical Publications* Vol. 40:4 (2012) 99-110.

they have with their natural habitat.<sup>54</sup> The protection of natural resources is crucial for the Arctic peoples since their economic and cultural survival depends on those.

Their self-determination is based on the close connection they have with the natural resources. The position of the *Saami* (indigenous Finno-Ugric people inhabiting the Arctic area of Sápmi) well depicts this bond: they view the right of self-determination as crucial, and the right to exercise control over their traditional lands and natural resources as an integral part of it.<sup>55</sup>

## References

Aurélien Baron, 'Participation of indigenous peoples of the Arctic at the Crossroads of Natural Habitat Destruction and Economic Prosperity', *ICL Journal* (2012) available at, [https://www.icl-journal.com/download/cdbd677b2c5332d84829e222821a39a7/ICL\\_Thesis\\_Vol\\_8\\_3\\_14.pdf](https://www.icl-journal.com/download/cdbd677b2c5332d84829e222821a39a7/ICL_Thesis_Vol_8_3_14.pdf).

Edoardo Chiti, 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies', *European Law Journal* Vol.10:4, (2004) 402-438.

Sébastien Duyck, 'Participation of Non-State Actors in Arctic Environmental Governance', *Nordia Geographical Publications* Vol. 40:4 (2012) 99-110.

John B. Henriksen, 'The Continuous Process of Recognition and Implementation of the Sami People's Right to Self-determination', *Cambridge Review of International Affairs* Vol. 21:1 (2008) 28-40.

Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law' *Law and Contemporary Problems* Vol. 68:3/4 (2005)15-61.

Nico Krisch and Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' *European Journal of International Law* Vol. 17:1(2006) 1–13.

Jennifer McIver, 'Environmental Protection, Indigenous Rights and the Arctic Council: Rock, Paper, Scissors on the Ice?' *Georgetown Environmental Law Review* (1997-1998) 147.

Timo Koivurova and Leena Heinamaki, 'The Participation of Indigenous Peoples in International Norm-making in the Arctic' *Polar Record* Vol. 42:221(2006) 101–109.

Marshall McLuhan, *Understanding Media* (London: Routledge Kegan Paul, 1964).

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<sup>54</sup> Aurélien Baron, Participation of indigenous peoples of the Arctic at the crossroads of natural habitat destruction and economic prosperity, *ICL Journal* available at [https://www.icl-journal.com/download/cdbd677b2c5332d84829e222821a39a7/ICL\\_Thesis\\_Vol\\_8\\_3\\_14.pdf](https://www.icl-journal.com/download/cdbd677b2c5332d84829e222821a39a7/ICL_Thesis_Vol_8_3_14.pdf), 2012 (accessed 20 December 2016).

<sup>55</sup> John B. Henriksen, 'The Continuous Process of Recognition and Implementation of the Sami People's Right to Self-determination', *Cambridge Review of International Affairs* Vol. 21:1 (2008) 28-40.

## Autonomy as a Form of Self-determination of Indigenous Peoples

*Agnieszka Szpak\**

In 2007 the *UN Declaration on the Rights of Indigenous Peoples* was adopted by the UN General Assembly (hereinafter: *UN Declaration*). The *UN Declaration* is the most important, however non-binding, instrument on the rights of indigenous peoples. According to the *UN Declaration*, indigenous peoples have a collection of rights: individual ones that persons have as members of the group and collective ones that inhere in the group as a whole (such as land rights) (Art. 1 of the *UN Declaration*). Art. 3 of the *UN Declaration* refers to the right of self-determination of indigenous peoples which means the ability freely to “determine their political status and freely pursue their economic, social and cultural development”<sup>56</sup>. Art. 4 of the *UN Declaration* expressly provides for the right to autonomy or self-governance in the exercise of the right to self-determination<sup>57</sup>. This formula indicates that self-determination should be exercised first of all in the form of autonomy. To make things even clearer the *UN Declaration* contains a clause stating that nothing in the *UN Declaration* may be interpreted as authorising or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of existing States (Art. 46).<sup>58</sup> Many States fear that according the indigenous peoples the right to self-determination may lead to secession. Those fears are however unjustified as indigenous peoples do not want to create a separate State but be able to make free and independent decisions in their own matters.<sup>59</sup> Consequently, indigenous peoples have the right to “maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State”(Art. 5 of the *UN Declaration*).

One may claim that also Arts. 18-19 of the UN Declaration which refer to participation in decision-making envisage some form of autonomy.

Article 18 states that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance

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<sup>56</sup> UN Declaration on the Rights of Indigenous Peoples, 2007, (UN GA res. 61/295), available at, <http://research.un.org/en/docs/ga/quick/regular/61> (15 October 2016).

<sup>57</sup> See also: B. Kingsbury, ‘Claims by Non-State Groups in International Law’, *Cornell International Law journal* Vol. 3 (1992) 501-503.

<sup>58</sup> UN Declaration on the Rights of Indigenous Peoples, *supra* note 56.

<sup>59</sup> L. A. Baer, ‘The Rights of Indigenous Peoples – A Brief Introduction in the Context of the Sámi’, *International Journal on Minority and Group Rights* Vol. 12 (2005) 257; O. Ch. Okafor, ‘Entitlement, Process, and Legitimacy in the Emergent International Law of Secession’, *International Journal on Minority and Group Rights* Vol. 9 (2002) 41-70.

with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.”<sup>60</sup> Art. 19 adds that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them”<sup>61</sup>. The requirement of free, prior and informed consent should be emphasised as it is an instrument that does not allow decisions to be made without the participation of the indigenous peoples concerned. However, generally it does not mean that indigenous peoples have a right to veto.

The legally binding *ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries* does not contain express right to autonomy or any provisions on autonomy but contains some provisions on the obligation of States to consult indigenous peoples and include them in the decision-making in matters that affect them (Art. 6)<sup>62</sup>. This provision clearly refers to the right to participate in governance which may be regarded as an aspect of self-governance. However, it does not mention the free, prior and informed consent. Right to autonomy is expressly mentioned in Art. XV of the *Proposed American Declaration on the Rights of Indigenous Peoples* of 1997.<sup>63</sup> Consequently, autonomy may be regarded as a method of exercising the right to self-determination.<sup>64</sup>

The right to autonomy as a form of internal self-determination of indigenous peoples may also be derived from the general human rights provisions, for example articles 1 (the rights of peoples to self-determination) and 27 of (the rights of persons belonging to ethnic, linguistic and religious minorities to enjoy their own culture) of the International Covenant on Civil and Political Rights (ICCPR).<sup>65</sup> The Human Rights Committee interprets article 27 of the ICCPR as protecting the right of indigenous peoples to preservation of their livelihood, culture, language, traditional activities necessary for their survival and their customs.<sup>66</sup> In General Comment no. 23 the Committee stated that “With regard to the exercise of the cultural rights protected under article 27, the Committee

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<sup>60</sup> UN Declaration on the Rights of Indigenous Peoples, *supra* note 56.

<sup>61</sup> *Ibid.*

<sup>62</sup> The ILO Convention no. 169 on Indigenous and Tribal Peoples in Independent Countries (1989), available at, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169) (accessed 15 October 2016).

<sup>63</sup> Art. XV provides: “Indigenous peoples have the right to freely determine their political status and freely pursue their economic, social, spiritual and cultural development, and accordingly, they have the right to autonomy or self-government with regard to *inter alia* culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, the environment and entry by nonmembers; and to determine ways and means for financing these autonomous functions” – <http://www.cidh.oas.org/Indigenas/Indigenas.en.01/Preamble.htm> (15 October 2016).

<sup>64</sup> S. Allen, ‘Establishing Autonomous Regimes in the Republic of China. The Salience of International Law for Taiwan’s Indigenous Peoples’, *Indigenous Law Journal* Vol. 4 (2005) 197.

<sup>65</sup> Text of the International Covenant on Civil and Political Rights is available at, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 15 October 2016).

<sup>66</sup> See *Ivan Kitok v. Sweden* (1988), *Lubicon Lake Band v. Canada* (1990), *Länsman et al. v. Finland* (1992), *Apirana Mahuika et al. v. New Zealand* (2000) all available at, <http://juris.ohchr.org/> (accessed 15 October 2016).

observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”<sup>67</sup>

Timo Koivurova sums up the work of the Human Rights Committee: “In sum, over the course of some 20 years, the HRC has gradually developed the rights enjoyed by indigenous peoples. In the first phase, indigenous rights were protected pursuant to the protection of minorities set out in article 27; from 1999 onwards the Committee has regarded indigenous peoples as covered by article 1 as well.”<sup>68</sup> Concrete examples of implementing the right to self-determination as self-governance or autonomy are Sami parliaments in Sweden, Norway and Finland. Accordingly, the draft Nordic Sami Convention mentions the right to self-determination in the preamble and article 3 and then it contains the whole Chapter II on the Sami governance (including regulations of the Sami parliaments and Sami organizations).<sup>69</sup>

As P. J. Magnarella indicates, “[a]utonomy does not jeopardize the territorial integrity of a State. It can be structured within constitutional framework of the State and can consist of a combination of political, economical and cultural elements. Autonomy can involve local control over some combination of education, religion, land use, taxation, family law, cultural institutions (e.g., museums, parks, etc.) and municipal government. It does not involve control over foreign policy, national defense, aviation, postal services, monetary policy, etc.”<sup>70</sup> Autonomy may take the form of autonomy based on contemporary indigenous political institutions, for example the Sami Parliaments in the Nordic States. Another form of autonomy involves regional autonomy within the

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<sup>67</sup> General Comment No. 23 of 1994, paragraph 7, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11) (accessed 15 October 2016).

<sup>68</sup> T. Koivurova, ‘From High Hopes to Disillusionment: Indigenous Peoples’ Struggle to re(Gain) Their Right to Self-Determination’, *International Journal on Minority and Group Rights* Vol. 15 (2008) 8.

<sup>69</sup> English text of the draft Nordic Sami Convention is available at, [https://www.regjeringen.no/globalassets/upload/aid/temadokumenter/sami/sami\\_samekonv\\_engelsk.pdf](https://www.regjeringen.no/globalassets/upload/aid/temadokumenter/sami/sami_samekonv_engelsk.pdf) (accessed 15 October 2016). On the role of the Sami Parliaments in the context of the draft Nordic Sami Convention see also: T. Koivurova, ‘The Draft Nordic Saami Convention: Nations Working Together’, *International Community Law Review* Vol.10 (2008) 288. On the autonomy in the context of national minorities see W. Kymlicka, ‘The internationalization of Minority Rights’, *International Journal of Constitutional Law* Vol. 6 (2008)21-23. Although in the end W. Kymlicka claims that there is no right to autonomy for national minorities, one must remember that the situation of indigenous peoples is different and conclusions regarding national minorities does not apply to indigenous peoples.

<sup>70</sup> P. J. Magnarella, ‘The Evolving Right of Self-Determination of Indigenous Peoples’, *St. Thomas Law Review* Vol. 14 (2001-2002) 440.

state such as Nunavut territory in Canada<sup>71</sup> or the Nisga'a territory in Canada.<sup>72</sup> Accordingly, autonomy does not have to take a territorial form meaning that parts of the territory are authorised to self-governance but it may also involve the authorisation of indigenous peoples to enact their own laws, to have their own courts and use their own lands according to their customs, traditions and present and future needs.

One should also remember that “[t]he whole point of self-determination is not to preserve cultural isolation, or a static way of life, but rather to ensure fair terms of interaction, and to enable indigenous peoples to decide for themselves when and how to borrow from other cultures.”<sup>73</sup> This was expressly stated in the jurisprudence of the Human Rights Committee.<sup>74</sup>

To conclude one should claim that in the new millennium more and more indigenous peoples want some form of self-governance as a form of internal self-determination. Such arrangements give them a sense of control over their own destiny, their livelihoods and well-being as well as their ability to preserve and develop their culture, language, customs and traditions. One must remember that indigenous peoples were the owners of their land before they came in contact with the colonisers. Indigenous peoples are the first peoples. Their right to self-determination must not be denied them.

## References

- Allen S., ‘Establishing Autonomous Regimes in the Republic of China: The Salience of International Law for Taiwan’s Indigenous Peoples’, *Indigenous Law Journal* Vol. 4 (2005).  
*Apirana Mahuika et al. v. New Zealand* (2000), available at, <http://juris.ohchr.org> (accessed 15 October 2016).  
 Baer L. A., ‘The Rights of Indigenous Peoples – A Brief Introduction in the Context of the Sámi’, *International Journal on Minority and Group Rights* Vol. 12 (2005).

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<sup>71</sup> *Ibid.*, at 442. See also N. Loukacheva, ‘On Autonomy and Law’ (June 2005), 17-18 available at, [https://www.socialsciences.mcmaster.ca/institute-on-globalization-and-the-human-condition/documents/IGHC-WPS\\_05-3\\_Loukacheva.pdf](https://www.socialsciences.mcmaster.ca/institute-on-globalization-and-the-human-condition/documents/IGHC-WPS_05-3_Loukacheva.pdf) (accessed 15 October 2016).

<sup>72</sup> Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, (*Rodolfo Stavenhagen. Addendum. Mission to Canada, 2 December 2004*) 9 at 27; available at, <http://www.gcc.ca/pdf/INT00000012.pdf> (accessed 15 October 2016). For more details on the Nisga'a autonomy see R. Hoffman, A. Robinson, ‘Nisga'a Self-Government: A New Journey Has Begun’, *Canadian Journal of Native Studies* Vol. 2 (2010) 387-405.

<sup>73</sup> P. N. Musafiri, ‘Right to Self-Determination in International Law: Towards Theorisation of the Concept of Indigenous Peoples/National Minority’, *International Journal on Minority and Group Rights* Vol. 19 (2012) 505-506.

<sup>74</sup> See *Länsman et al. v. Finland case* (1992), para. 9.3 where stated: “The right to enjoy one's culture cannot be determined **in abstracto** but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect **traditional** means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant”.



'Draft Nordic Sami Convention' available at, [https://www.regjeringen.no/globalassets/upload/aid/temadokumenter/sami/sami\\_samekonv\\_engelsk.pdf](https://www.regjeringen.no/globalassets/upload/aid/temadokumenter/sami/sami_samekonv_engelsk.pdf) (accessed 15 October 2016).

General Comment No. 23 of 1994, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11) (accessed 15 October 2016).

Hoffman R., Robinson A., 'Nisga'a Self-Government: A New Journey Has Begun', *Canadian Journal of Native Studies* Vol. 2 (2010).

ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries (1989), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169) (accessed 15 October 2016).

International Covenant on Civil and Political Rights, available at, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 15 October 2016).

*Ivan Kitok v. Sweden* (1988), available at, <http://juris.ohchr.org> (accessed 15 October 2016).

W. Kymlicka, 'The Internationalization of Minority Rights', *International Journal of Constitutional Law* Vol. 6 (2008).

B.Kingsbury, 'Claims by Non-State Groups in International Law', *Cornell International Law Journal* Vol. 3 (1992).

T. Koivurova, 'From High Hopes to Disillusionment: Indigenous Peoples' Struggle to re(Gain) Their Right to Self-Determination', *International Journal on Minority and Group Rights* Vol. 15 (2008).

T. Koivurova, 'The Draft Nordic Saami Convention: Nations Working Together', *International Community Law Review* Vol. 10 (2008).

*Länsman et al. v. Finland* (1992), available at, <http://juris.ohchr.org> (accessed 15 October 2016).

N. Loukacheva, 'On Autonomy and Law', (June 2005), available at, [https://www.socialsciences.mcmaster.ca/institute-on-globalization-and-the-human-condition/documents/IGHC-WPS\\_05-3\\_Loukacheva.pdf](https://www.socialsciences.mcmaster.ca/institute-on-globalization-and-the-human-condition/documents/IGHC-WPS_05-3_Loukacheva.pdf) (accessed 15 October 2016).

*Lubicon Lake Band v. Canada* (1990), available at, <http://juris.ohchr.org> (accessed 15 October 2016).

P. J. Magnarella, 'The Evolving Right of Self-Determination of Indigenous Peoples', *St. Thomas Law Review* Vol. 14 (2001-2002).

P. N.Musafiri, 'Right to Self-Determination in International Law: Towards Theorisation of the Concept of Indigenous Peoples/National Minority', *International Journal on Minority and Group Rights* Vol. 19 (2012).

O. Ch. Okafor, 'Entitlement, Process, and Legitimacy in the Emergent International Law of Secession', *International Journal on Minority and Group Rights* Vol. 9 (2002).

Proposed American Declaration on the Rights of Indigenous Peoples of 1997, available at, <http://www.cidh.oas.org/Indigenas/Indigenas.en.01/Preamble.htm> (accessed 15 October 2016).

Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, (*Rodolfo Stavenhagen. Addendum. Mission to Canada*, 2 December 2004) 9 at 27; available at, <http://www.gcc.ca/pdf/INT00000012.pdf> (accessed 15 October 2016).

UN Declaration on the Rights of Indigenous Peoples 2007, (UN GA res. 61/295), available at, <http://research.un.org/en/docs/ga/quick/regular/61> (accessed 15 October 2016).

## Hans Island : How to Resolve the Dispute?

*Mahatab Uddin\**

While the impact of global warming is causing devastating negative impact on livelihoods of a large number of populations of the world, one silver line of climate change is that it might cause some opportunities of access to mineral resources especially in arctic regions. This is because the increased global temperature is causing melting ices of the arctic. Even a slight increase in global temperature can cause rapid increase of temperature in arctic regions resulting into rapid ice-melting. The arctic states<sup>75</sup> are also concerned regarding potential opportunities on access to mineral resources reserved beneath the arctic sea-beds. Consequently, access to and control over arctic regions has lately become an issue of tensions as well. An instance of such tension is disagreement between Canada and Denmark regarding sovereignty over Hans Island, a 1.3 square kilometre island, which is located on an around 1,100 kilometres away from the North Pole. Both Canada and Denmark claimed their sovereignty over Hans Island since 1973, while arctic border demarcation took place.<sup>76</sup>

The arctic boarder between Denmark and Canada was drawn through establishing a delimiting treaty regarding continental shelf between Canada and Denmark. The treaty was ratified by the United Nations in December 1973 and entered into force in March, 1974.<sup>77</sup> While boarder between Denmark and Canada was drawn through Nares Strait, which is half-way between semi-autonomous Danish territory Greenland and Canadian island named Ellesmere, neither state was able to decide who has sovereign right over Hans Island along with some other islands of the area. For this, at the time of establishing the delimiting treaty, the Danish and Canadian Maritime Boundary Commission drew 2,685 kilometres long maritime boundary, but they left 875 meters of the maritime boundary that concerns the Hans Island undefined.<sup>78</sup> Hence the question of sovereignty over the island remained unanswered and the disagreement continued.

The dispute came in to mass attention for several times while Denmark placed its flag on the island and Canada expressed its diplomatic protest in 1984, 1988, 1995, 2002, 2003 and 2004.<sup>79</sup> In 2005, a Danish official statement that reaffirmed the sovereignty claims of

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<sup>75</sup> Eight states that possess territories extending beyond the 66th Parallel and known as Arctic states are Norway, Sweden, Finland, Russia, the United States (Alaska), Denmark (Greenland), Iceland and Canada.

<sup>76</sup> Agreement between the Government of Canada and the Government of the Kingdom of Denmark, relating to the delimitation of the continental shelf between Greenland and Canada, entered in force on 13 March, 1974, Canada Treaty Series, CTS 1974/9, Art. 2, para 4 and Annex 4.

<sup>77</sup> Full text of the treaty is available at, <http://www2.ecolex.org/server2neu.php/libcat/docs/TRE/Full/Other/TRE-149004.pdf> (accessed 28 December 2016).

<sup>78</sup> Michael Byers, 'Creative Thinking on Sovereignty', *Policy Options* (March 2014), available at, <http://byers.typepad.com/arctic/2014/03/creative-thinking-on-sovereignty.html>, (last accessed on December 28, 2016), See also Ryan Kristiansen, Desolate Dispute : A Study of Hypothetical International Court of Justice (ICJ) Decision, available at, <http://www.journal.forces.gc.ca/vol13/no3/page34-eng.asp> (accessed 28 December 2016).

<sup>79</sup> *Ibid.*

Denmark over Hans Island on the basis of the argument that the island had traditionally been used by the hunters who were inhabitants of the Danish colony Greenland. As a response to this Danish official statement, the Defense Minister of Canada visited the island and placed a Canadian flag there. As a result it spurred angry rebuke from the Danish Government.<sup>80</sup>

Canada's claim of sovereignty over the Hans Island is based on the argument that the island was originally discovered by a British explorer and later transferred to Canada by a British Order-in-Council in 1870.<sup>81</sup> On the other hand, the Danish claim of sovereignty over the island is based on the reasons that include the hunting parties of the Inuit of Greenland had visited the island over the period and used the land for hunting, the island was discovered by a person named Hans Hendrik who was a Danish citizen, and the island has some geological similarities with Greenland.<sup>82</sup>

The International Court of Justice (ICJ) has given high importance to treaty/treaties that clearly define demarcation to resolve international or bilateral disputes regarding boundary of two sovereign states.<sup>83</sup> If no concerned treaty exists, or if no clear direction is found in any existing treaty, the ICJ considers the doctrine of *uti possidetis*.<sup>84</sup> However, if resolving the dispute is not possible through looking at treaty, or even through using doctrine of *uti possidetis*,<sup>85</sup> the ICJ looks at customary uses of the disputed territory by the disputing parties. The aim of looking at the customary uses is to figure out whether any of the disputing parties has successfully managed to establish an effective control over the disputed territory. If all three above stated elements are absent from the dispute, the ICJ prefers choosing equitable principle of resolving the dispute rather than considering geographical, historical, or cultural claims of the disputing states.

In case of the Hans Island dispute, although there is a bilateral demarcation treaty has been ratified by both Canada and Denmark; however, the treaty has not defined border of the Hans Island. It is also impossible to employ the doctrine of *uti possidetis* since the area encompassing Northern Greenland, Hans Island, and Ellesmere Island was never controlled by any single nation. However, both states have some evidences in favour of the third determining factor – 'customary use of the disputing territory' or 'effective control over the disputing territory'.

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<sup>80</sup> 'Canada Island Visit Angers Danes', *British Broadcasting Corporation* available at, <http://news.bbc.co.uk/1/hi/world/europe/4715245.stm> (accessed 2 December 2016), See also Russel Mclendon, 'Canada, Denmark Wage 'Whisky War' on the Rocks', available at, <http://www.mnn.com/earth-matters/wilderness-resources/blogs/canada-denmark-wage-whisky-war-on-rocks> (accessed 28 December 2016).

<sup>81</sup> *Adjacent Territories Order*, 1880 (U.K.), reprinted in R.S.C. 1985, App. 11, No. 14.

<sup>82</sup> Jane George, 'Greenland, Canada Squabbling over Pet Rock' *Nunatsiaq News* 9 April 2004, available at, [http://www.nunatsiaqonline.ca/stories/article/greenland\\_canada\\_squabbling\\_over\\_pet\\_rock/](http://www.nunatsiaqonline.ca/stories/article/greenland_canada_squabbling_over_pet_rock/) (accessed 28 December 2016).

<sup>83</sup> Brian Taylor Sumner, 'Territorial Disputes at the International Court of Justice', *Duke Law Journal* Vol. 53 (2004) 1782, 1804. See also article 38 of Statute of the International Court of Justice, 26 June 1945.

<sup>84</sup> *Ibid.*, at 1804. *Uti possidetis* is a doctrine under which newly independent states inherit the pre-independence administrative boundaries established by the former colonial power. *Ibid.* at 1790.

<sup>85</sup> *Land, Island and Maritime Dispute (El. Sal. v. Hond.: Nicar. intervening)*, 1992 I.C.J. 351, 356, 391–93.

Since the Hans Island belongs to a very small amount of land, also situated in very remote area from main land of both Canada and Denmark, it is understandable that neither party established any permanent settlement there.<sup>86</sup> However, both states have taken several steps to establish their effective control over the island. For instance, Canada has tried to show its effective control through military missions and through its commitment of making ships capable to extend operation in Hans Island.<sup>87</sup> At the same time, Denmark has attempted to demonstrate her effective control by ensuring naval deployments and by keeping reserved military petrol in Greenland; also through standard aerial surveillance on the disputed territory.

Although both states have some evidentiary arguments in favour of their effective control, it is not clear whether these evidences are sufficient enough to prove any party's effective control over the territory. Besides, a fundamental moral question is there – should sovereign right over an arctic island be determined merely on the basis of frequency of visiting the island?

Scholars' view is that if the case is brought before the ICJ, the Court should not grant 'effective control' claim in favour of either party. This is because such decision may create a bad precedence in public international law, which as a consequence can provoke other nations to claim remote uninhabited territories as their own. As a result, the number of border disputes will be increased, the area of global common territories will be put under threat of being occupied, and above all, global peace and security may be endangered. This is more applicable in the context of arctic regions.<sup>88</sup> Already Russia has claimed sovereignty over some arctic territories, which are currently controlled by Denmark.<sup>89</sup> Hence, some academics' view is to resolve the Hans Island issue through applying 'equitable principle' of international law. Solution applying 'equitable principle' might come in a way of dividing the island into two equal part through drawing a straight line from one border to another border of the island, or through dividing the sovereignty over the island in terms of period meaning six months cycle. To apply equitable principle of law, the Court may also come up with any other kind of decision that may deem fit for the Court e.g., offering sovereign rights to the Inuit of both Canada and Greenland.

Whatever the solution both parties agree on, the outcome of the Has Island dispute will have significant 'butterfly' impact over arctic region. Because, the reason of claiming sovereignty over the island by two states for more than three decades is not merely 1.3 square kilometre land area. Instead, the reason lies on the potential of mineral resources that might be available beneath the sea floor of the surrounding waters of the arctic region. Due to global warming and its effect of melting arctic ice, Hans Island is becoming navigable throughout more of the year through water passage from both Canada and Greenland/Denmark. Both states have employed this opportunity in searching mineral resources in the area. Besides, the warmer arctic sea temperatures have made a possibility that the Northwest sea passages will become accessible all around the year. If this

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<sup>86</sup> Dianne DeMille, 'Denmark 'Goes Viking' in Canada's Arctic Islands—Strategic Resources of the High Arctic Entice the Danes', *Canadian American Strategic Review* (March 2005), available at <http://www.sfu.ca/casr/idarcticviking1.htm> (accessed 28 December 2016).

<sup>87</sup> M. Berniet, *Canada's Arctic Sovereignty* (Ottawa: Government of Canada, 2010).

<sup>88</sup> Christopher Stevenson, 'Hans Off!: The Struggle for Hans Island and the Potential Ramifications for International Border Dispute Resolution', *British Columbia International & Comparative Law Review* Vol.30 (2007) 274.

<sup>89</sup> Daniel Howden and Ben Holst, 'The New Cold War' *Independent* (5 January 2005).

happens, the commercial ships will be able to save 2,480 miles to travel from Europe to Asia in comparison with the current route that follows Panama Canal. In that case, a large number of ships will follow the arctic route, which will bring opportunity of collecting revenue for the countries regulating the passage of the route. Hence, although the level of dispute between Canada and Denmark concerning Hans Island is apparently very low, the impact of the sovereign right over Hans Island has actually very high geopolitical impact in arctic zone.

However, the dispute is not likely to be resolved by the ICJ or by any international dispute settlement mechanism. In September 2005, both countries expressed their interest to resolve the issue through diplomatic measures.<sup>90</sup> In July, 2007, Canada has acknowledged that the island was not situated only in Canadian territory, and the international border went roughly through the middle of the island.<sup>91</sup> Although the dispute was about to be resolved in April, 2012 through using both countries' diplomatic track, at last it remained unresolved.<sup>92</sup> The recent discussions on the dispute suggest about two possible scenarios to resolve the issue. One possible scenario is that the island will be divided and be shared between Canada and Denmark.<sup>93</sup> Another possible scenario is creating a condominium.<sup>94</sup>

Last but not the least, whether the dispute on Hans Island is resolved by the ICJ or through following diplomatic measures, the decision-makers should keep in mind that the final outcome of the dispute will have cognizable impact in developing and shaping law of arctic governance. This is because like the arctic region, the arctic governance regime itself is still passing expansion phase. Besides, the potential decision on the Hans Island dispute will also have mammoth impact on any decisions of future territorial dispute/s (of same manner) of arctic zone as well as rest of the world.

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<sup>90</sup> Canada-Denmark Joint Statement on Hans Island (New York, 19 September 2005), available at <http://byers.typepad.com/arctic/canadadenmark-joint-statement-on-hans-island.html> (accessed 28 December 2016).

<sup>91</sup> 'Satellite Imagery Moves Hans Island Boundary: Report' *Canadian Press* (26 July 2007), available at, <http://www.cbc.ca/news/technology/satellite-imagery-moves-hans-island-boundary-report-1.684285> (accessed 28 December 2016).

<sup>92</sup> New Proposal Would See Hans Island Split Equally Between Canada and Denmark' *National Post* (11 April 2012), available at, <http://news.nationalpost.com/news/canada/new-proposal-would-see-hans-island-split-equally-between-canada-and-denmark> (accessed 28 December 2016).

<sup>93</sup> *Ibid.*

<sup>94</sup> Bob Weber, 'Canada, Denmark Should Turn Hans Island into a Condominium: academics' *CBC News* (15 November 2015), available at, <http://www.cbc.ca/news/canada/north/canada-denmark-should-turn-hans-island-into-a-condominium-academics-1.3315640> (accessed 28 December 2016).