

What's New in Arctic Law?

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September 2019 set yet another record for the lowest ice extent at the Arctic Ocean¹. This record reaffirms the worsening of the ongoing environmental and ecological challenges that the Arctic has been increasingly facing due to the loss of sea ice. However, the more sea ice disappears, the more the Arctic Ocean opens up, thus creating easier maritime access, which results in increased human activities. Apparently, in addition to natural resources exploitation, one clear indicator of human activity is international trade through the greater volume of maritime traffic at the Northern Sea Route. Therefore, one of the obvious Arctic realities is the gradual increase in maritime shipping. The adverse effect of human activities further accelerates the threats to the Arctic environment. Arctic biodiversity, natural resources, and the identities and cultures of local inhabitants, including diverse groups of indigenous peoples, are particularly vulnerable to these new developments. They face existential threats. Hence, fighting climate change and its consequences to the Arctic

environment are repeatedly articulated in any discussions on the governing of the region.

The main legal challenge in the Arctic therefore lies in a possible structure of governance that is capable of responding to the threat to its natural environment. Obviously, ice melting due to the effect of global warming has been and is the major issue in the Arctic. Law cannot ban a natural course of action, e.g. sea ice melt. Instead, law prescribes how to regulate human behaviour in a certain direction to achieve certain goals. The reduction of atmospheric greenhouse gas emissions is a goal set by international climate change law. For almost the last three decades, the international community has continued to set a limit for sovereign nations to agree on the permissible level of emissions. International climate change law even provides various flexible mechanisms for industrialised nations, e.g. clean development mechanisms, to possibly meet the overall global collective target for lowering the atmospheric emission levels. However, a (states') consent-based international legal framework hardly offers a mechanism to make reluctant nations join the efforts to strictly follow and regulate emission levels. Major powers

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¹ Gloria Dickie, 'The Arctic and Climate Change (1979–2019): What the Ice Record Tells Us', *Mongabay Series: Covering Climate Now*, 18 September 2019, <https://news.mongabay.com/2019/09/the-arctic-and-climate-change-1979-2019-what-the-ice-record-tells-us/>.

such as the United States present their explicit disagreement on the issue of reducing emissions. US President Donald Trump even opposes efforts to limit climate change, both in national and international contexts².

The Arctic Council's Ministerial meeting, held in May 2019 at Rovaniemi in Finland, once again reflected the US' position. For the first time in the twenty-three-year history of the Arctic Council, a ministerial meeting ended with no joint declaration being adopted due to the US' reluctance about the use of language concerning combatting climate change. According to Mike Pompeo, the US Secretary of the State, 'Collective goals, even when well-intentioned, are not always the answer. They are rendered meaningless, even counterproductive, as soon as one nation fails to comply'³. In the Arctic Council meeting, the US is in fact the 'one nation' that took a position against that of the other seven Arctic nations. This difference in position has brought some disappointment to the efforts of the Arctic Council to fight climate change and the future of sustainable Arctic development. Some analysts explained that the lack of unanimity on the

substantial issue of climate change in the Arctic Council meeting will weaken the future of Arctic cooperation within the framework of the Arctic Council—a cooperation that has proved effective over the past years.

Much of the heated debate with the US at and around this time was about the increasing presence of non-Arctic states in the Arctic cooperation, particularly the increasing presence of China. The US (as Pompeo stated) views China's increasing presence in the Arctic as 'an arena of global power and competition'. He referred to the Polar Silk Road, which is an expansion of China's Belt and Road initiative to the Arctic. The US sees China's increased bi-lateral relationship with Russia and investment in infrastructure development in the Arctic as the expansion of its strategic move into the region, which the US is concerned about. According to Pompeo, this move would make the 'Arctic Ocean to transform into a new South China Sea'⁴. China's visibility in the Arctic in recent years has indeed been explicit, exemplified by a number of factors, including its gaining of observer status at the Arctic Council in 2013; regular scientific expeditions to the Arctic since

² Frank Jotzo, Joanna Depledge, and Harald Winkler, 'US and International Climate Policy under President Trump', *Climate Policy* 18, no. 7 (2018).

³ Tom Bateman, 'Arctic Council Fails to Agree on Declaration as US Holds Out on Climate Change', *Yle News*, 08 May 2019, https://yle.fi/uutiset/osasto/news/arctic_council_fails_to_agree_on_declaration_as_us_holds_out_on_climate_change/10770803.

⁴ Michael R. Pompeo, 'Looking North: Sharpening America's Arctic Focus', speech at Arctic Council Meeting, 06 May 2019.

2012; ownership of yet another ice-breaker vessel (the first domestically built one) for polar expeditions—the *Snow Dragon II*; increased bi-lateral trade and economic cooperation with Russia; investment in infrastructure development, in particular in the Russian Arctic; increased investments in mining and mineral sectors in Greenland; entering a free trade agreement with Iceland since 2013; and joining in the efforts to build an Arctic railroad to provide a transport corridor.

However, this author believes that China's increasing Arctic engagement will not give the country any special legal claims. Firstly, the rules of international law are clear enough in the Arctic. As with any other state, China has a right to freedom of navigation as long as it complies with the provisions set by the law of the sea, particularly the UNCLOS. As a result, international law does not deny China's maritime access to the Arctic. Secondly, China has expressed its clear commitment to abide by the sovereignty of the Arctic states and to the core values these states held in the Arctic when it joined the Arctic Council as an observer. This commitment was reiterated in its white paper on the Arctic that it adopted in early 2018, which eventually means that China would not act contrary to what sovereignty entails for the Arctic states. Thirdly, in its white paper, China stated its intention to join the efforts to combat

climate change in the Arctic, recognising its widespread consequences not only within, but also beyond, the Arctic. In this context, China, alongside its regional cooperation arrangements (such as with the Arctic states through the efforts of the Arctic Council) also highlights the efforts undertaken within the framework of the United Nations. Fourthly, China's participation in the Arctic's legal development, such as in the adoption of the Polar Code and the Central Arctic Ocean Fisheries Agreement, reflects its commitments to work with nations within and beyond the region. None of these threatens the international Arctic legal framework. However, China's increasing strength in the global economy, investments in the Arctic, and expansion of the current BRI project to the Arctic (through the Polar Silk Road) will probably put the country in a better negotiating position in any Arctic developments. Yet, Pompeo's claim of making the Arctic Ocean 'a new South China Sea' is not justified.

Rather, recent discussions of the US' interest in buying Greenland have caused some concerns and also some questions about whether international law allows a sovereign territory or a part of a sovereign territory to be bought or sold. The status of Greenland is relatively unique. It is an island over which Denmark exercises sovereignty. It has self-government status with its own parliament and thus has the authority to

decide on all domestic matters except for foreign and security policy. The island, with a population of 56,000 residents, is financed through a budget consisting of a two-thirds share from Denmark and the rest mainly from fishing activity. Immediately after the US' expression of interest in the possibility of buying the island, the Danish government denounced any such likelihood, saying Greenland 'is not for sale'⁵. Recently, in the Arctic Circle Assembly held on 10–13 October 2019, US Senator Lisa Murkowski, in response to a question on this issue, denounced the possibility of buying a whole nation⁶. However, it has not been uncommon in the past to buy or sell a whole territory. We are aware of Russia's sale of Alaska to the US in 1867 for 7.2 million dollars because Russia thought at that time the territory was worthless land. At earlier times, such selling and buying were done, and thereby the territorial borders of countries were reshaped, but to what extent this practice is now valid remains to be examined. Buying or selling territory has not so far become an established practice in international law. However, we are also aware that there is an active market for proprietary interests

in public lands, such as the Chinese state-run Heilongjiang Beidahuang Nongken Group's purchase of 800,000 acres of Argentinian land to grow crops for export to China or South Korea's Daewoo Logistics' lease of 3.2 million acres of farmland in Madagascar⁷. Yet, selling these lands clearly does not have any effect on national sovereignty.

Despite all these tensions, there are indeed some reasons for optimism about Arctic legal developments. Last August, the US became the fourth party to ratify the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean⁸. The agreement was signed earlier in 2018 by ten signatories, including all five Arctic coastal states plus four non-Arctic states (China, Japan, Korea, and Singapore) and the European Union. Given that in the summer the ice-free Arctic Ocean would allow access to fishing, this agreement is a legally binding treaty implementing a precautionary approach to protect the central Arctic Ocean from commercial fishing, which the major fishing nations, including non-Arctic ones, came to by consensus. This is promising and eventually is likely to set the standard for non-parties to comply with the

⁵ Eve Conant, 'Greenland Is Not for Sale', *Culture*, 16 August 2019,

<https://www.nationalgeographic.com/culture/topics/reference/greenland-not-for-sale/>.

⁶ Arctic Circle Assembly 2019 (answer to a question to Lisa Murkowski on 11 October 2019).

⁷ Joshua Keating, 'Why Don't Countries Buy Territory Like They Used To?', *Foreign Policy*, 5 June 2012, <https://foreignpolicy.com/2012/06/05/why-dont-countries-buy-territory-like-they-used-to/>.

⁸ US Department of State, 'The United States Ratifies Central Arctic Ocean Fisheries Agreement', 27 August 2019, <https://translations.state.gov/2019/08/27/the-united-states-ratifies-central-arctic-ocean-fisheries-agreement/>.

normative principles embodied in the agreement.

However, a major disappointment for non-Arctic states is the third legally binding instrument adopted under the auspices of the Arctic Council—the Agreement on Enhancing International Arctic Scientific Cooperation, signed in May 2017 and entered into force on 23 May 2018. While the purpose of the agreement was to reduce obstacles to international scientific cooperation and to promote the movement of people and equipment across borders for the effective and efficient development of scientific knowledge of the Arctic, it does not apply to the non-Arctic states even when they cooperate with one or another of the eight-member states of the Arctic Council. It has been argued that non-Arctic states 'are left behind at the original legal situation and trapped in an inferior status in Arctic science',⁹ and therefore, an avenue to provide at least those with competitive research abilities access to enjoying similar treatment is a demand from the non-Arctic states. For an inclusive Arctic governance framework, Arctic states might consider a possible amendment to the agreement, similar to the one we witnessed for the Central Arctic Ocean Fisheries Agreement.

On the human rights front, even though the Arctic is populated by four million people, and 90% of the population are non-indigenous, most discussions concern issues related to indigenous peoples. During the last year, one of the main issues has been the Arctic railroad project, which has caused tension among the Sámi communities, particularly in Finland. The railroad will connect the Arctic Ocean by linking Kirkenes (Norway) to Rovaniemi (Finland). The impact of the project will surely fall upon the Sámi and their reindeer herding practices. Reindeer herding is an emblem to the Sámi. Given that the vast territory is used as grazing lands for reindeer herding, construction of the railroad will create an obstacle because access to grazing land will be limited. Moreover, possible noise from the construction and subsequent operation will force the relocation of the reindeer. The Sámi's rights concerning the practice of culture are expected to be vulnerable, which eventually will constitute yet another threat to the maintenance of their exercise of a right to self-determination given that the process has not ensured their engagement at its initial phase. According to the president of the Sámi Parliament, they were not aware of the plan until they heard about it on a media channel in the summer of

⁹ Liu Han, 'Influence of the Agreement on Enhancing International Arctic Scientific Cooperation on the approach of non-Arctic states to Arctic scientific activities', *Advances in Polar Sciences* 29, no. 1 (2018).

2017¹⁰. This process has caused disappointment to the Sámi because their rights to be informed, to participate and to be consulted were ignored during the planning process.

During late September 2019, the Saami Council—an organisation representing all four Sámi-inhabited countries and a permanent participant in the Arctic Council—adopted a new Arctic Sámi Strategy¹¹ highlighting the measures for a meaningful and effective engagement of the Sámi in all aspects of political, diplomatic, cultural, educational and policy-making processes. The strategy suggests that the Sámi have to have an influential role, in addition to political

participation, to help set agendas based on their own strategy and priorities through partnership, education, and advocacy. The strategy, as communicated through various influential channels to national and transnational authorities, explicitly set standards and principles that the Sámi expect states to observe. Given that a right to self-determination for indigenous peoples is about the promotion of meaningful and effective inclusiveness and partnership in the process of democratic governance, the strategy set yet another milestone for the exercise of a right to indigenous self-determination.



¹⁰ Linnea Rasmus, 'Sámi Parliament in Finland Disappointed with Arctic Railroad Working Group', *Yle Sapmi*, 20 December 2018, <https://thebarentsobserver.com/en/arctic/2018/12/sami-parliament-finland-disappointed-arctic-railroad-working-group>.

¹¹ Saami Council, 'The Sámi Arctic Strategy', September 2019, http://www.saamicouncil.net/fileadmin/user_upload/Documents/Eara_dokumeanttat/FINAL_Saami-Arctic-Strategy_with_attachment.pdf.