Trade Law and the Protection of the Arctic Environment

The legality of Norway's proposed heavy fuel oil ban under the General Agreement on Tariffs and Trade

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Abstract: The potential of a heavy fuel oil (HFO) spill in Arctic waters poses a significant risk to the Arctic environment and peoples. In response to the criticism that the upcoming international ban on HFO in Arctic waters is too weak in the interim, Norway introduced a stricter ban on HFO use in Svalbard's waters. This essay examines the legality of Norway's proposed regulations under the *General Agreement on Tariffs and Trade (GATT).* It shows that while these regulations may infringe Norway's obligations under Article V of the GATT, the regulations can be justified under Articles XX and XXI, which should give confidence to other States considering pursuing similar measures

Introduction

Changes to the Arctic environment have profound consequences for the rest of the world.[1] The melting of the Arctic ice, caused by rising carbon emissions and accelerated by pollutants such as black carbon,[2] contribute to global warming through the loss of ice's albedo effect and rising sea levels.[3] The Arctic is home to immense biodiversity, and pollution destroys habitats and species that constitute a loss for the global commons.[4] At the same time, open waters allow for increased maritime traffic in the Arctic region, as Arctic shipping routes will reduce about 40% of the navigational distance from Asia to Europe, minimizing carbon emissions from shipping.[5] Striking the right balance between these two objections is crucial to the success of the international community in reaching

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[1] Lorin Hancock, "Six ways loss of Arctic ice impacts everyone" *World Wildlife Fund,* online: <https://www.worldwildlife.org/pages/six-ways-loss-of-arctic-ice-impacts-everyone>.

[2] Paul Harris, "Climate Change at Sea: Interactions: Impacts, and Governance" in Paul Harris, ed, *Climate Change and Ocean Politics: Politics and Policy for Threatened Seas* (Cambridge: Cambridge University Press, 2019) 3 at 17-18.

[3] National Snow and Ice Data Center, "Thermodynamics" (3 April 2020), online: <https://nsidc.org/cryosphere/seaice/processes/albedo.html>.

[4] Hans Meltofte, Henry P. Huntington & Tom Barry, "Introduction" in Tom Barry et al., eds, *Arctic Biodiversity Assessment 2013* (Reykjavik: Conservation of Arctic Flora and Fauna, 2013) 10.

[5] Yevgeny Aksenov et al. "On the future navigability of Arctic sea routes: High-resolution projections of the Arctic Ocean and sea ice" (2017) 75 Mar Pol'y 300.

the *Paris Agreement*'s target of limiting global warming to 1.5°C above pre-industrial levels before the end of this century.[6]

Arctic coastal states are at the front line of protecting the Arctic environment and managing the increased human activity. States are deploying a combination of multilateral and unilateral regulations that raises safety and pollution standards for this traffic. How do States' unilateral regulations for transit in Arctic waters conform with their obligations in international trade law? This essay examines Norway's proposed regulation[7] of banning ships' use of heavy fuel oil (HFO) in Svalbard's waters as a case study. It shows that while these regulations may infringe Norway's obligations under Article V of the *General Agreement on Tariffs and Trade* (GATT),[8] the regulations can be justified under Articles XX and XXI, which should give confidence to other States considering pursuing similar measures.

Background

One of the Arctic environment's greatest risks comes from the potential spill of HFO from ships transiting through the region. HFO is the most popular type of fuel used in Arctic shipping measured by tonnes of fuel consumed by ships, because of its low cost.[9] Russian-flagged ships account for over half of HFO fuel use and almost a quarter of HFO carriage as fuel.[10] HFO is a highly pollutant substance, is extremely viscous, and slowly degrades in near-zero temperatures.[11] In ice-covered waters, ice could trap oil from a HFO spill, allowing the oil to

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[6] Lotta Manninen, "The Paris Agreement & The Arctic Region" (2017) 6 The Arctic Yearbook 246.

[7] "Consultation - draft law on amendments to the Environmental Protection Act on Svalbard 15 June 2001 no. 79 (Svalbard Environmental Protection Act)" (6 November 2020) *Norwegian Ministry of Climate and Environment*, translated by Google, online: <https://www.regjeringen.no/no/dokumenter/horing-utkast-til-lov-om-endringer-i-lov-om-miljovern-pa-svalbard-15.-juni-2001-nr.-79-svalbardmiljoloven/id2784144/?expand=horingsbrev>; N.F. Coelho, "Norway: HFO ban in Svalbard proposed" (11 November 2020) *De Maribus*, online: <https://demaribus.net/2020/11/11/norway-hfo-ban-in-svalbard-proposed/>.

[8] *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948) [GATT].

[9] Bryan Comer et al., *Prevalence of heavy fuel oil and black carbon in Arctic shipping, 2015 to 2025* (Washington: International Council on Clean Transportation, 2017) at iv, online: <https://theicct.org/sites/default/files/publications/HFO-Arctic_ICCT_Report_01052017_vF.pdf> [ICCT Report].

[10] ICCT Report at vi.

[11] Karl Magnus Eger, "Effects of Oil Spills in Arctic Waters" (2010) *Arctis Knowledge Hub*, online: <http://www.arctis-search.com/Effects+of+Oil+Spills+in+Arctic+Waters >.

pollute the waters for an extended period of time and transporting it to different parts of the Arctic as the ice moves.[12] There is also limited oil spill cleanup infrastructure in this remote region, which magnify the difficulties presented during a clean-up.[13] The effects of the 1989 *Exxon Valdez* HFO spill off the coast of Alaska still linger today, as oil can still be found in the water and biodiversity have not yet fully recovered.[14]

States are aware of the challenges HFO poses to the region. In November 2020, the International Maritime Organisation (IMO) approved a ban on HFO in Arctic waters after 1 July 2024.[15] Multiple environmental organizations have criticized the IMO ban as being ineffective for too long, because it allows individual states to issue exemptions for compliance to individual shipowners until 2029.[16] Individual States, such as Norway, are currently considering more stringent bans in the interim in parts of its waters.[17] Norway currently has a complete ban applicable on HFO use by any vessel in the national park waters in Svalbard, a remote northern archipelago with a unique status in international law.[18] The 1920 *Treaty of*

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[12] Protection of the Arctic Marine Environment Working Group, *Heavy Fuel Oil (HFO) Use by Ships in the Arctic 2019: Arctic Shipping Status Report (ASSR) #2,* (20 October 2020) at 12 online: <https://www.pame.is/projects/arctic-marine-shipping/arctic-shipping-status-reports/749-arctic-shipping-report-2-heavy-fuel-oil-hfo-use-by-ships-in-the-arctic-2019/file> [PAME Report].

[13] ICCT Report at 2.

[14] Stephen Leahy, "Exxon Valdez changed the oil industry forever—but new threats emerge" (22 March 2019) *National Geographic,* online: <https://www.nationalgeographic.com/environment/2019/03/oil-spills-30-years-after-exxon-valdez/>.

[15] Reuters, "UN approves ban on heavy ship fuel in Arctic" (20 November 2020) *Reuters*, online: <https://www.reuters.com/article/shipping-arctic-imo/un-approves-ban-on-heavy-ship-fuel-in-arctic-idUKL8N2HY5IS>.

[16] Sian Prior, "Why the IMO's draft Arctic HFO regulation will not protect the Arctic, and how to fix it" (13 November 2020) *HFO Free Arctic,* online: <https://www.hfofreearctic.org/en/2020/11/13/why-the-imos-draft-arctic-hfo-regulation-will-not-protect-the-arctic-and-how-to-fix-it/>.

[17] Alexandra Brzozowski, "Norway plans heavy oil ban around Svalbard," (9 November 2020) *Euractiv.com* online: <https://www.euractiv.com/section/energy/news/norway-plans-heavy-oil-ban-around-svalbard/>.

[18] §40 of the current HFO ban on Svalbard, referencing §99 of *Svalbard Environment Act* states that anyone who is found violating this ban is punished by fines or imprisonment for up to one year. *Forskrift om nasjonalparkene Sør-Spitsbergen, Forlandet og Nordvest-Spitsbergen, om naturreservatene Nordaust-Svalbard og Søraust-Svalbard, og om naturreservatene for fugl på Svalbard*, FOR-2014-04-04-377, translated by Google, §40 online: <https://www.sysselmannen.no/en/heavy-fuel-oil-ban-in-the-protected-areas/>; *Lov om miljøvern på Svalbard (svalbardmiljøloven),* LOV-2001-06-15-79, translated by Google, §99 online: <https://lovdata.no/dokument/NL/lov/2001-06-15-79>.

Svalbard[19] gives Contracting Parties (including Russia and China) the right to access and commercially exploit resources on the archipelago, while also recognizing Norway's sovereignty over Svalbard.[20] Norway is currently consulting the public on its plans to expand its existing ban to cover all territorial waters of Svalbard, which is slated to come into effect on 1 January 2022 ("proposed regulations").[21]

While Norway's proposed regulations is the focus of this essay, it is only the most recent of unilateral initiatives by Arctic States to introduce stronger environmental restrictions for Arctic shipping activities. Canada enacted the *Arctic Waters Pollution Prevention Act* in 1970 which prohibits all discharge from ships in Arctic waters.[22] This restricts shipping methods of goods to vessels capable of withholding discharge. These regulations are part of the global fight against climate change and against marine pollution, and it is likely that as the deadline for meeting the *Paris Agreement* targets approaches,[23] regulations like Norway's proposed one may become more common.[24]

Other forums are already tackling the issue of Arctic shipping and the environment, so what role does international trade law play in this nexus? The IMO is a specialized agency that focuses on shipping and is implementing the HFO ban in the Arctic.[25] The Arctic Council Working Groups examines HFO use and recommends action for States.[26] At these forums, States could resolve

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[19] *The Svalbard Treaty,* (entered in force: 14 August 1925), online: <https://www.jus.uio.no/english/services/library/treaties/01/1-11/svalbard-treaty.xml>

[20] Ragnhild Groenning, "The Norwegian Svalbard Policy – Respected or Contested?" (22 November 2017) *The Arctic Institute,* online: <https://www.thearcticinstitute.org/norwegian-svalbard-policy-respected-contested/>.

[21] Malte Humpert, "Norway announces plans to ban HFO around Svalbard, leapfrogging proposed IMO regulation" (13 November 2020) *Arctic Today,* online: <https://www.arctictoday.com/norway-announces-plans-to-ban-hfo-around-svalbard-leapfrogging-proposed-imo-regulation/>.

[22] Transport Canada, "Arctic Waters Pollution Prevention Act (AWPPA)" (19 July 2012) *Government of Canada,* online: <https://tc.canada.ca/en/marine-transportation/arctic-shipping/arctic-waters-pollution-prevention-act-awppa>.; "Consultation"; Coelho.

[23] Simon Bullock et al., "Shipping and the Paris climate agreement: a focus on committed emissions" (2020) 2:5 BMC Energy 1.

[24] Costas Paris, "Europe Invites a Trade Battle in its Fight Against Shipping Pollution" (27 September 2020) *Wall Street Journal,* online: <https://www.wsj.com/articles/europe-invites-a-trade-battle-in-its-fight-against-shipping-pollution-11601204401>.

[25] International Maritime Organization, "Introduction to IMO" online: <https://www.imo.org/en/About/Pages/Default.aspx>.

[26] Protection of the Arctic Marine Environment, "Heavy Fuel in the Arctic" online: <https://www.pame.is/projects/arctic-marine-shipping/heavy-fuel-in-the-arctic-phase-i>.

disagreements on national measures through diplomacy and negotiation on the sidelines, since these forums deal with multilateral initiatives. At the same time, in considering a bolder step than that contemplated by the IMO, Norway is poised to upend the negotiated settlement, inviting a challenge from countries such as Russia which would be affected by the lack of a transition period in Norway's ban. One of the methods in which Russia can challenge the validity of Norway's proposed ban, should negotiations fail, is through the WTO's dispute settlement processes. The invocation of trade law is possible, because while the IMO and the Arctic Council may be more suitable forums, trade law nonetheless has a vital role in facilitating the trade of goods along these routes. Shipping is central to the movement of goods in the world economy, which implicates the GATT and the *General Agreement on Trade in Services* (GATS).[27] In the GATT, shipping relates to Article V, which guarantees the freedom of transit for goods in transit.[28]

The potential of the WTO's dispute settlement processes to halt Norway's proposed regulations to protect the Arctic environment raises concerns on whether trade law can adapt to the current environmental crisis.[29] In the past, it has shown that is has been capable of doing so. For example, the GATT Panel's decision in the 1994 *Tuna – Dolphin* case reversed its earlier decision in the 1991 *Tuna – Dolphin* case to allow for states to justify trade restrictions for environmental concerns beyond its territorial limits.[30] The following shows that the progressive evolution of trade law could mean that exceptions in GATT under Articles XX and XXI or GATS Articles XIV and XIVbis may be sufficiently flexible to accommodate Norway's proposed regulations. This essay focuses on the GATT, although the GATS analysis

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[27] *General Agreement on Trade in Services*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183 (entered into force 1 January 1995); Secretariat, "Maritime Transport Services" (7 June 2010) S/C/W/315 *World Trade Organization* at 30, online: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/S/C/W315.pdf&Open=True>.; World Trade Organization, "Maritime Transport" online: <https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_maritime_e.htm>.; Vitaliy Pogoretskyy, "Freedom of Transit and the Principles of Effective Right and Economic Cooperation: Can Systemic Interpretation of GATT Article V Promote Energy Security and the Development of an International Gas Market?, (2013) 16:2 J Intl Econ L 313 at 318.

[28] GATT Article V.

[29] *See* Michael Trebilcock & Joel Trachtman, *Advanced Introduction to International Trade Law*, 2nd ed (Cheltenham, UK: Edward Elgar, 2020) at 187.

[30] Trebilcock & Trachtman at 188, 190.

would be similar given that the wording in the exceptions is identical in both agreements.

Potential Problems under Article V of the GATT

Norway's proposed regulations may limit the freedom of transit under Article V of the GATT. Article V establishes a freedom of transit for all "traffic in transit," which are goods moving from one State across the territory of another State heading towards the final destination State.[31] The relevant clauses are Articles V:2 and V:4, which states:

2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport. ….

4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.[32]

Under Norway's proposed regulations, vessels operators face fines or imprisonment[33] for using HFO departing Country A transiting through Svalbard's waters destined to Country B, which could impede freedom of traffic in transit under Article V:2. If the vessel were in transit in a route that was most convenient, would Norway's proposed regulations be viewed as "reasonable?" under Article V:4?

There are only two Panel reports interpreting Article V:2: the 2009 *Colombia – Indicative Prices on Ports of Entry* (*Ports of Entry*)[34] and the 2019 *Russia — Measures Concerning Traffic in Transit* (*Traffic in Transit*).[35] The Panel's

[31] Cherise Valles "Article V: Freedom of Transit" in Rüdger Wolfrum, Peter-Tobias Stoll & Holger P Hestermeyer eds, *WTO – Trade in Goods* (Leiden, The Netherlands: Brill, 2009) 183 at 186.
[32] GATT Articles V:2, V:4.
[33] *See* footnote 16.
[34] *Colombia – Indicative Prices on Ports of Entry* (2009), WTO Doc WT/DS366/R (Panel Report), online: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/366R.pdf&Open=True> [*Ports of Entry*).
[35] *Russia – Measures Concerning Traffic in Transit* (2019) WTO Doc WT/DS512/R (Panel Report), online: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/512R.pdf&Open=True> [*Traffic in Transit*]

decision in the *Traffic in Transit* case has limited application to Norway's proposed regulations, because the various transit requirements found to be *prima facie* violations of Article V:2 made distinctions based on the place of departure, destination, origin, and entry of traffic in transit, rather than the mode of transit.[36] Other cases relating to Article V:2 have been settled,[37] and *Ports of Entry* provides the most helpful guidance. In *Ports of Entry*, the Panel interpreted "freedom of transit" in Article V:2 as requiring "*unrestricted access* via the most convenient routes for the passage of goods in international transit."[38] For Norway's proposed regulations, vessels using HFO would be restricted from using certain routes, namely those that are close to Svalbard. While transport does not have to be guaranteed on *all* routes, transit must be provided on routes "most convenient" for transport through its territory.[39] Much of the current international shipping through Arctic waters is along the Northern Sea Route, which goes along the coast of Russia and far south of the Svalbard archipelago waters. In the future, the melting ice opens the transpolar shipping route across the Arctic Ocean, and transiting in Svalbard's waters becomes one of the most convenient routes.[40] Article V:2 contemplates multiple "most convenient routes," meaning that if another one exists outside of Svalbard's waters, this clause may not be implicated at all. However, it is not clear if it would be up to Norway or the vessel operator to determine what these "most convenient routes" should be, and whether the route near Svalbard can indeed be ruled out.[41] The second sentence in the provision prohibits States from making distinctions in the treatment of goods that are traffic in transit based on the vessel of the

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[36] *Traffic in Transit* at para 7.196.

[37] The most relevant would have been *Federal Republic of Germany – Restriction on the circulation of Austrian lorries.* Austria enacted a regulation limiting the traffic of certain heavy trucks during night hours on certain Austrian transit roads that was applicable to all trucks, including Austrian trucks. This dispute was settled by consultations. *Federal Republic of Germany – Restriction of Circulation of Austrian Lorries* (1990) GATT Doc DS14/1 (Request for Consultations), online: <https://www.wto.org/gatt_docs/English/SULPDF/91490056.pdf>.

[38] Emphasis added. *Ports of Entry* at para 7.401.

[39] *Ports of Entry* at para 7.402.

[40] Laurence C Smith & Scott R Stephenson, "New Trans-Arctic shipping routes navigable by mid-century" (2013) Proceedings of the National Academy of Sciences E1191 at E1192, online: <https://www.pnas.org/content/pnas/110/13/E1191.full.pdf>

[41] Valles at 188.

goods.[42] Norway's proposed regulation makes the distinction with goods transported with different vessel fuels. Distinctions based on modes of transport has not been interpreted before a Panel.

Article V:4 and the scope of "reasonable" regulations has not been interpreted before the WTO. In *Ports of Entry*, the States did not raise Article V:4 in their arguments. In *Traffic in Transit*, Ukraine argued that a regulation's "unreasonableness" should involve analysing the rationale or purpose of the measure, and whether the means used to address that rationale are adequate and fair.[43] However, the Panel in *Traffic in Transit* declined to address this issue.[44] In a commentary on the Article V:4, Cherise Valles suggests using the approach taken by the Panel in *Dominican Republic – Import and Sale of Cigarettes* of using the dictionary definition of "reasonable," although this interpretation arose in the context of Article X.[45] Norway's proposed regulations are a reasonable solution to limiting the use of HFO in light of the severe consequences of a potential spill in the sensitive Arctic environment. A complete ban on HFO use in the Arctic has also been agreed upon by the IMO, suggesting that Norway's ban is perceived reasonable by the international community as well.

Exceptions under the GATT

If Norway's proposed regulations infringe Article V or any other provision of the GATT (or GATS), Norway can justify these regulations under Articles XX and XXI (or GATS Articles XIV and XIVbis). These articles allow states to enact a range of policy measures that would otherwise be inconsistent with their obligations under the GATT.

Article XX

States' regulations that infringe provisions of the GATT may be justifiable if they fall within the list of policy objectives under Article XX, subject to the introductory provision (the chapeau). Two provisions are most relevant to the topic of trade and the environment: Articles XX(b) and XX(g).

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[42] "Analytical Index of the GATT – Article V, Jurisprudence " (June 2020) *World Trade Organization*, at para 1.4.1 online: <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art5_jur.pdf>; *Ports of Entry* at para 7.402.

[43] *Traffic in Transit* at para 7.209.

[44] *Traffic in Transit* at para 7.199.

[45] Valles at 190-191.

Article XX(b)

Article XX(b) allows States to take national measures "necessary to protect human, animal or plant life or health."[46] This involves examining firstly, whether the measures protect human, animal, or plant life or health, and secondly, whether these measures are necessary.

First, Norway's proposed regulations aim to protect the Arctic ecosystem[47] by preventing HFO spills in the Arctic, which includes the protection of animal and plant life. Panels have not considered a case with a policy with such a broad aim to protect an entire ecosystem, and it is possible that a Panel would dismiss this objective as being too broad.[48] However, the Panel[49] in *United States – Standards for Reformulated and Conventional Gasoline* (*US – Gasoline*) held that a policy to reduce air pollution resulting from the consumption of gasoline would fall under Article XX(b).[50] An analogy between reducing air pollution and reducing HFO spills can be made since both are necessary to protect the health of living beings within the environment or ecosystem. Svalbard's marine ecosystem includes seals, walruses, whales, seabirds, and more,[51] and their health would be affected by a HFO spill.[52] The risk of significant harm to the ecosystem has been scientifically shown to hardly be remote considering increasing vessel traffic and limited cleanup infrastructure in the region. [53] The consequences of a HFO spill could have a "particularly severe" impact on Arctic wildlife and the marine environment.[54]

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[46] GATT, Article XX(b).

[47] "Consultations."

[48] Peter-Tobias Stoll & Lutz Strack, "Article XX. Lit. B" in Rüdger Wolfrum, Peter-Tobias Stoll & Holger P Hestermeyer eds, *WTO – Trade in Goods* (Leiden, The Netherlands: Brill, 2009) 497 at 507.

[49] The US did not appeal the Panel's conclusions on Article XX(b) and Appellate Body did not discuss this issue. *United States – Standards for Reformulated and Conventional Gasoline* (1996) WTO Doc WT/DS2/AB/R at 9 (Appellate Body Report), online: <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=14573&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> [*US – Gasoline*].

[50] *US – Gasoline* at 39.

[51] Haakon Hop et al., "The marine ecosystem of Kongsfjorden, Svalbard" (2002) 21:1 *Polar Research* 167, online: <https://polarresearch.net/index.php/polar/article/view/2136/5387>.

[52] Svalbard's marine ecosystem is also rich with micro-organisms. Hop et al. at 167. The WTO has not decided whether micro-organisms would be protected under this provision, though the language of Article XX(b) appears to protect all things living. Stoll & Strack at 506.

[53] PAME Report at 13.

[54] PAME Report at 13.

Second, while it is possible that Norway's proposed regulations can be challenged as overly restrictive and therefore unnecessary, it appears reasonable considering the impending IMO regulation that will ban HFO use across the entire Arctic region in 2029. The Appellate Body in *Brazil – Retreaded Tyres* stated that Panels will look to the extent of the measure's contributions to its objective in light of the importance of the interests and its impact on international trade. [55] Furthermore, Panels will consider alternatives.[56] In *EC – Asbestos*, the Appellate Body noted that any alternative measures to the ban on asbestos use would be ineffective at allowing France to achieve its desired level of health protection.[57] The sensitivity of the Arctic environment leaves little room for error, thus making the interests extremely important. Currently, the impact of a HFO ban in the Arctic on international trade is largely insignificant. Transport of goods on Arctic shipping routes make up only a small percentage of global trade.[58] In 2019, only 165 out of a total of 1729 entering the Arctic Polar Code Area used HFO.[59] Other alternatives, such as issuing exemptions for certain vessels, are unlikely to protect the Arctic ecosystem to the same degree given the unpredictability of ice conditions in Arctic navigation that creates an ever-present risk for HFO spills.[60]

Article XX(g)

Article XX(g) less clearly applies to Norway's proposed regulations. Article XX(g) allows States to adopt measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[61] This requires examining firstly, the content of the

[55] *Brazil – Measures Affecting Imports of Retreaded Tyres,* (2007) WTO Doc WT/DS332/AB/R (Appellate Body Report) at para 156, online: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/332ABR.pdf&Open=True>.
[56] World Trade Organization, "WTO rules and environmental policies: GATT exceptions" online: <https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm>.
[57] Stoll & Strack at 512.
[58] Zhaojun Wang, Jordan A Silberman & James J Corbett, "Container vessels diversion pattern to trans-Arctic shipping routes and GHG emission abatement potential" (2020) Maritime Pol'y & Mgmt.
[59] PAME Report at 18.
[60] Rachael Gosnell, "The Complexities of Arctic Maritime Traffic" (30 January 2018) *The Arctic Institute,* online: <https://www.thearcticinstitute.org/complexities-arctic-maritime-traffic/>.; Congressional Research Service, *Changes in the Arctic: Background and Issues for Congress,* (15 December 2020) at 65-69 online: <https://fas.org/sgp/crs/misc/R41153.pdf>.
[61] GATT Article XX(g).

measure and its relationship with the objective, and second, whether parallel domestic measures exist.

First, the measure must conserve exhaustible natural resources and "relate to" this objective. Previous Panel decisions have largely discussed "exhaustible natural resources" in the context of living natural resources, such as tuna[62] and sea turtles,[63] but it is possible that an extended understanding is available. Norway's proposed regulations do not name an "exhaustible natural resource" which it seeks to conserve.[64] The regulations could be interpreted as conserving "clean water," similar to how the Panel in *US – Gasoline* accepted the US' position that "clean air" constitutes an exhaustible natural resource.[65] This approach would be consistent with the WTO Agreement's preamble, which emphasizes the protection and preservation of the environment.[66] In *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*US – Shrimp*), the Appellate Body noted that a measure relates to its objective when a "reasonable" relationship exists between the means and ends.[67] Norway's proposed HFO prohibition is clearly linked to the conservation of clean water by preventing the spread of pollutants in the form of black carbon and potential contaminants in the event of an HFO spill.

Second, it is unclear whether the parallel domestic measures that exist are directed at domestic "production and consumption." Norway's proposed regulations are made in conjunction with domestic measures since they apply to *all* vessels entering Svalbard's waters, including Norwegian ones. This suggests that Article XX(g) would apply. However, since the regulations relate to the mode of transport, rather than the "production or consumption" of goods, it is possible that Article XX(g) is not implicated at all. No existing cases cover this distinction.

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[62] *United States – Restrictions on Imports of Tuna* (1994), WTO Doc DS/29/R (Panel Report) at paras 3.50-3.53, online: <https://www.wto.org/english/tratop_e/dispu_e/gatt_e/92tuna.pdf>.

[63] *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WTO Doc WT/DS58/AB/R (Appellate Body Report) at paras 135-142, online: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/58ABR.pdf&Open=True> [*US – Shrimp*].

[64] "Consultations."

[65] *US – Gasoline* at 9-10.

[66] Preamble, *WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995).

[67] *US – Shrimp* at paras 136, 141.

Chapeau

Measures taken within the scope of Articles XX(b) or XX(g) must follow the introductory clause of Article XX (the "chapeau"). Article XX states that the application of measures cannot "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[68] In *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,*[69] the Appellate Body interpreted "arbitrary and unjustifiable discrimination" to mean "whether discrimination can be reconciled with, or is rationally related to, the policy objective."[70] The distinction between vessels using HFO and vessels that do not use HFO is rationally related to the protection of Svalbard's ecosystem by minimizing pollution and reducing the risk of spills. In looking at discrimination "between countries where the same conditions prevail," it is important to consider that any challenges from Norway's HFO ban is likely to come from Russia. While Norway's proposed regulations apply to all countries, Russia might object on the basis that most ships using HFO are Russian-flagged, and the application of the regulations effectively discriminate against Russia. Russia has similar sensitive Arctic environmental conditions and concerns, but instead may consider the transition period necessary to continue the shipment of goods in the interim. On the other hand, since Norway's proposed regulations only applies to the waters around Svalbard, which has a unique ecosystem and a unique international status, it is possible that concerns about ecosystem protection are heightened there than in other parts of Russia.

Article XXI

Article XXI(b) permits States to take measures "which it considers necessary for the protection of its essential security interests…(iii) taken in time of war or other emergency in international relations."[71] In *Traffic in Transit,* the Panel determined that the phrase "which it considers necessary" includes an objective requirement.[72] Furthermore, the Panel determined that "emergency in international

[68] GATT Article XX.
[69] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (2014) WT/DS400/AB/R (Appellate Body Report).
[70] Trebilcock & Trachtman at 193.
[71] GATT Article XXI(b).
[72] *Traffic in Transit* at para 7.102.

relations" is objectively determined, and refer generally to cross-border situations that arises unexpectedly and requires urgent action relating to defence, military, law, and public order interests.[73] An emergency must go beyond political or economic differences between States.[74] Some scholars have argued convincingly that climate change qualifies as an "emergency in international relations" since security could encompass non-traditional threats, such as climate change or pandemics, as stated in different national security strategies and United Nations documents.[75]

Norway's proposed regulations could be exempted under Article XXI(b) as necessary to protect its essential security interests. Norway's most recent white paper on Norwegian foreign and security policy asserts: "Developments in the Arctic are crucial to Norwegian security."[76] This includes climate change and increased human activity in the region.[77] The paper also later states that climate change is a security challenge requiring a global response.[78] A ban on HFO use helps to tackle climate change through reducing black carbon emissions and the risk of a spill in Svalbard's waters.

Whether Norway's proposed regulations is responding to an emergency depends largely on how the final text is worded. While climate change means that the world is accelerating towards an unliveable world by the end of this century, Panels may not interpret this as imminent of an emergency as the outbreak of a war or conflict. Nonetheless, the overwhelming scientific data seems to suggest that urgent action is required to maintain the public order interest of human life.[79] An alternative

[73] *Traffic in Transit* at paras 7.73-7.77.
[74] *Traffic in Transit* at para 7.75.
[75] J Benton Heath, "Trade and security among the ruins" (2020) 30 Duke J Comp Intl L 223 at 239-241; Pieter van Vaerenbergh & Angshuman Hazarika, "Climate Change as a Security Risk: Too Hot to Handle?" (2020) J World Trade 417 at 423.
[76] *The place of the oceans in Norway's foreign and development policy— Meld. St. 22 (2016–2017) Report to the Storting (white paper),* (2017) Norwegian Ministry of Foreign Affairs at 14, online: <https://www.regjeringen.no/contentassets/1b21c0734b5042e489c24234e9927b73/en-gb/pdfs/stm201620170022000engpdfs.pdf>. [Norway's White Paper].
[77] Norway's White Paper at 14.
[78] Norway's White Paper at 40.
[79] Matthew Taylor, Matthew Weaver & Helen Davidson, "IPCC climate change report calls for urgent action to phase out fossil fuels – as it happened" (8 October 2012) *The Guardian,* online: <https://www.theguardian.com/environment/live/2018/oct/08/ipcc-climate-change-report-urgent-action-fossil-fuels-live>.

characterization is that the "emergency" is the threat of HFO spill, which may not meet the temporal requirement of an emergency due to its preventative objective.

Article XXI(b)(iii) also requires that the emergency have a cross-border character. The pollution from HFO powered ships creates black carbon, a type of pollutant that contributes to global warming, affecting everyone everywhere.[80] Additionally, a HFO spill located exclusively in Svalbard's waters may nonetheless have a cross-border nature, due to the unique international status of the archipelago under the *Treaty of Svalbard*. This *Treaty* gives all ships and nationals the right to fish in Svalbard's territorial waters as part of their rights in the archipelago, but only allows Norway to take environmental measures in recognition of their sovereignty over the lands.[81] This right to fish would be impaired in event of an oil spill, which would not only kill the fish, but likely restrict access to the area for an extended period of time during the cleanup. As a result, Norway may have a responsibility under this Treaty to take measures, such as a ban on HFO use, to ensure that the Treaty's Contracting Parties can exercise their right to fish.

Conclusion

Norway's proposed ban on HFO use by vessels transiting through any of Svalbard's waters is a crucial step to take in the protection of the sensitive Arctic environment. This proposed regulation is intended to accelerate the progress on climate action where the results of multilateral negotiations has delayed a rapid response. At the same time, it invites criticism from countries that would be negatively affected by these regulations, which do not have a transition period as the IMO's proposed regulations do, that these measures are unnecessarily harmful to trade, and therefore should be struck down.

Trade law has proven to be capable of adapting over time to responding to international climate crisis.[82] Norway's proposed regulations could survive challenges to it under international trade law, which should be reassuring to States considering imposing similar and more stringent regulations to protect the Arctic marine environment.

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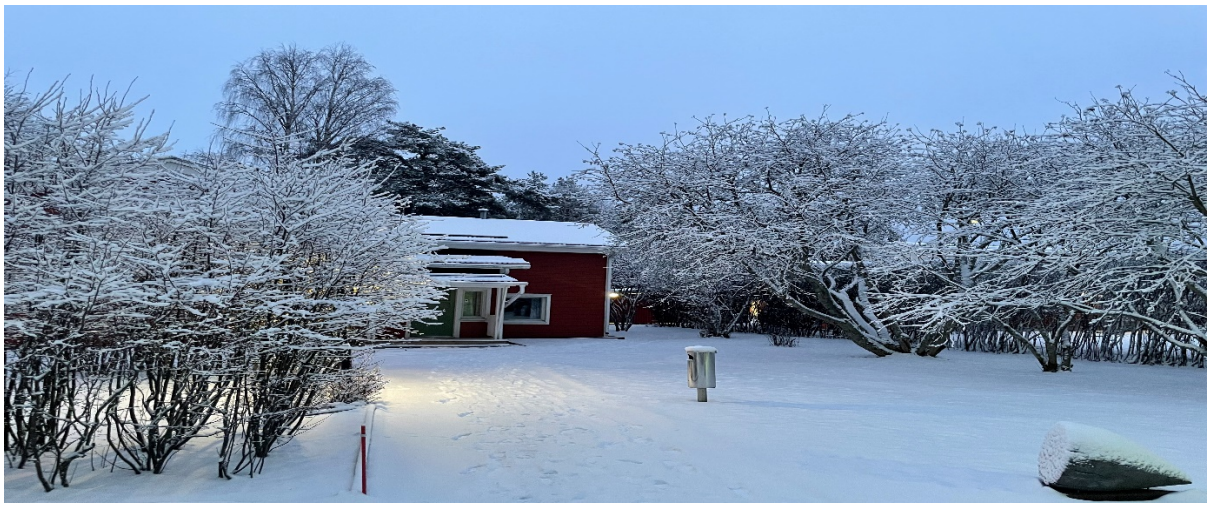
[80]Climate & Clean Air Coalition, "Black Carbon" online: <https://www.ccacoalition.org/en/slcps/black-carbon>.

[81] *The Svalbard Treaty,* Article 2.

[82] Trebilcock & Trachtman at 192.

Urgent action is needed on climate change issues, and States should feel confident in taking unilateral actions to achieve this aim.

''Norway's proposed regulations could survive challenges to it under international trade law, which should be reassuring to States considering imposing similar and more stringent regulations to protect the Arctic marine environment.''



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"Urgent action is needed on climate change issues, and States should feel confident in taking unilateral actions to achieve this aim."

Promoting sustainable investment in the Arctic: the role of the Arctic Investment Protocol and the Arctic Economic Council's Code of Ethics

Federica Cristani*

The Arctic region has become a "great economic frontier", hosting economic activities that exceed US$500 billion per year,[1] and attracting a large amount of foreign investment (e.g. from China).[2] The increasing economic and investment interests in the region may have a (negative) impact on "sustainable development"[3] of the Arctic; and indeed, sustainable development, and its linkage to trade and investment, is a common theme that appears in the Arctic policies of the Arctic States as well as of the observer States of the Arctic Council. We can briefly recall the 2020 Sweden's strategy for the Arctic region, where Sweden committed to "contribute to sustainable trade and investments in the Arctic region, and work to ensure that the increase in economic activity in the Arctic benefits local economic growth […]",[4] or the Strategy for the Arctic 2011–2020 of Denmark, which makes it clear that "[t]here is a close correlation between […] trade and investment opportunities, and […] promoting health and social sustainability".[5]

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[1] Council on Foreign Relations (2014), The Emerging Arctic (), https://www.cfr.org/emerging-arctic/#!.

[2] Guggenheim (2021), The Arctic: One of the Last Great Economic Frontiers, https://www.guggenheiminvestments.com/institutional/firm/sustainable-investing-esg/arctic-is-one-of-the-last-great-economic-frontiers.

[3] For the scope of this paper, we inted "sustainable development" as was described in the 1987 Bruntland Commission Report as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". Report of the World Commission on Environment and Development : "Our common future" (1987), https://digitallibrary.un.org/record/139811?ln=en.

[4] Sweden, Strategy for the Arctic region (2020), https://www.government.se/information-material/2020/11/swedens-strategy-for-the-arctic-region-2020/#:~:text=Sweden's%20strategy%20for%20the%20Arctic%20region%20presents%20the%20Government's%20objectives,and%20the%20environment%3B%20polar%20research%3B.

[5] Denmark, Strategy for the Arctic 2011– 2020 (2011), http://library.arcticportal.org/1890/1/DENMARK.pdf.

When it comes to the relevant international economic regulation, we can count a number of international economic agreements - which also apply to the Arctic region - that include a reference to sustainable development: we can recall, for example, the Preamble of the Marrakesh Agreement establishing the World Trade Organization,[6] Chapter 22 on Trade and sustainable development of the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA),[7] Section IV on "Investment and sustainable development" of the China-EU Comprehensive Agreement on Investment[8] and the Preamble of the Canada - China BIT.[9]

Nevertheless, although these instruments are applicable to the Arctic countries, they do not include a precise reference to the Arctic region and to how "sustainable" investment activities should be promoted there.

An explicit link between investment and sustainable development can instead be found in two soft law instruments specifically drafted for the Arctic region: the World Economic Forum´s Arctic Investment Protocol and the Arctic Economic Council's Code of Ethics. Both instruments aim to foster sustainable development through responsible investment and good business practices.

The Arctic Investment Protocol was adopted in the framework of the World Economic Forum in 2016,[10] and provides a framework of reference for

[6] According to which, "[t]he Parties to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted […] in accordance with the objective of sustainable development […]". Marrakesh Agreement establishing the World Trade Organization (1994), https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

[7] Comprehensive Economic and Trade Agreement between the EU and Canada (2017), https://ec.europa.eu/trade/policy/in-focus/ceta/#:~:text=The%20EU%2DCanada%20Comprehensive%20Economic,of%20the%20agreement%20now%20applies.&text=it%20improves%20and%20secures%20EU,to%20the%20Canadian%20services%20market.

[8] China-EU Comprehensive Agreement on Investment (2020), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237.

[9] According to the Preamble, the Parties "[r]ecogniz[e] the need to promote investment based on the principles of sustainable development". Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (2012), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/778/canada---china-bit-2012-.

[10] Arctic Investment Protocol. Guidelines for Responsible Investment in the Arctic (2016), https://arcticeconomiccouncil.com/wp-content/uploads/2020/01/aecarcticprotocol_brochure_ir456_v16.pdf.

carrying out responsible investment in the Arctic. More specifically, it includes the following six key principles on responsible Arctic development: (1) build resilient societies through economic development; (2) respect and include local communities and Indigenous peoples; (3) pursue measures to protect the environment of the Arctic; (4) practice responsible and transparent business method; (5) consult and integrate science and traditional ecological knowledge; and (6) strengthen pan-Arctic collaboration and sharing of best practices.

The Protocol has received support from multinational corporations, investment firms and industry groups, like Statoil, Shell, Barclays, Guggenheim Partners, Pt Capital, Spanida CIS, Tschudi Shipping Company AS, China Ocean Shipping Group Co and Norwegian Shipowners' Association.

As regards the implementation of the Protocol, a key role is played by the Arctic Economic Council´s Working Group on Investments and Infrastructure,[11] which launched, in January 2019, an on online platform requesting stakeholders to submit best practices in order to strengthen the Protocol and monitor its implementation.[12]

In order to further strengthen the principles included in the Protocol, in 2018, the Arctic Economic Council issued a Code of Ethics,[13] which is specifically intended to businesses and investors. The Code of Ethics is built on six fundamental values: collaboration, sustainability, transparency, competency, innovation and peace.

Both the Arctic Investment Protocol and the Code of Ethics encourage the development of good business practices: the Protocol requires investment to be conducted in a fair, legal and transparent manner, while the Code of Ethics calls for businesses to behave in an open and honest manner.

Both instruments seek to strengthen collaboration among Arctic

[11] Arctic Economic Council, Investments & Infrastructure Working Group, https://arcticeconomiccouncil.com/workinggroups/investments-infrastructure-working-group/.

[12] Arctic Economic Council, Investments & Infrastructure Working Group, Submission Form: Best Practices in line with Arctic Investment Protocol - Guidelines for Responsible Investment in the Arctic, https://arcticeconomiccouncil.com/about/arctic-investment-protocol/.

[13] Arctic Economic Council, Code of Ethics (2018), https://arcticeconomiccouncil.com/wp-content/uploads/2018/06/Code-of-Ethics.pdf.

stakeholders, encouraging the adoption of common standards and best practices when it comes to making investment in the region. Indeed, such instruments can help creating "platforms for cooperation", as recently pointed out by the Arctic Parliamentarians and the Arctic Economic Council.[14]

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[14] Arctic Parliamentarians, Signing of Papers on Sustainable Development in the Arctic (2021), https://arcticparl.org/signing-of-a-papers-on-sustainable-development-in-the-arctic/.

Traditional cultural expressions: challenges of the Russian Intellectual property law for indigenous communities of the Russian North

Pavel Tkach[*]

This year, at the Northern Forum in Yakutsk, the President of the Council of the Association Reindeer Herders of the World, Sergei Kharyuchi, announced the possible creation of the intellectual property register of indigenous people of the North.[1] According to Kharyuchi, the register could include folklore, traditional knowledge in health protection, and surviving in extreme conditions. Grigory Dyukarev, Chairman of the Association of Indigenous Minorities of Taimyr, noted that the indigenous peoples of the Arctic should share the profits that business receives using their knowledge and traditions.[2] The mentioned initiative raised the question of the current recognition cultural identity of indigenous communities in Russia.

This article aims to evaluate legal obstacles limiting exclusive access and use of traditional cultural expressions (folklore) by indigenous communities who invented them and transmitted them from generation to generation. The review of the existing loopholes in the Russian intellectual property law will be concluded by defining the actual consequences of such limitations to indigenous communities.

1. Introduction to the legal and factual definition of the indigenous people in Russian Law.

Definition of the indigenous peoples of the North has been declared in Federal Law of 30.04.1999 N 82-FZ (as amended on 13.07.2020) on guarantees of the rights of the small-populated indigenous peoples of the Russian Federation and Order of the Government of the Russian Federation of 04.02.2009 N 132-r on the Concept of Sustainable Development of the Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation. The definition of the indigenous peoples declared by the

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[1] National Accent (2021) "The rights of Northern people to their culture would be protected by the register of intellectual property" access from <https://nazaccent.ru/content/36776-prava-severnyh-narodov-na-ih-kulturu-hotyat-zashitit-reestrom-intellektualnoj-sobstvennosti.html> (source in the Russian language) (translation by author)

[2] ibid

Federal Law N 82-FZ is a subject of disputes and adverse reactions from the Polar law scientists. The dispute arose because the mentioned law does not recognise the concept of indigenous people itself and only recognises small-populated indigenous peoples. Small-populated indigenous people of the North are the people living in the territories of the traditional settlement of their ancestors, preserving the traditional way of life, economic activity and crafts, numbering less than 50 thousand people in the Russian Federation and realising themselves as independent ethnic communities.[3]

Categorisation of communities according to population created legal discrimination against indigenous communities populated by more than 50 thousand people. Legal discrimination in the mentioned case is reflected by the absence of legal guarantees to indigenous communities other than small-populated ones. In addition, the recognition of the community as a small-populated indigenous community is carried out based on the bureaucratic and complex process of inclusion into the Unified List of Indigenous Communities, instead of globally accepted the right of self-determination. In general, indigenous people in the Russian legislation is a bureaucratic concept, and rights related to freedoms and guarantees of indigenous communities are also linked with the bureaucratic processes and ascertainment.

2. Introduction to the Russian intellectual property law.

The legislation of the Russian Federation on intellectual property law is part of Russian civil law nowadays. In the traditional, comprehensive structure of civil law, the primary regulation of legal relations is expressed in the Constitution of the Russian Federation and the Civil Code of the Russian Federation. The Civil Code of the Russian Federation consists of four Federal Laws, named accordingly - Part One, Part Two, Part Three and Part Four of the Civil Code of the Russian Federation.[4] The Federal Law of December 18, 2006, N 230-FZ "Civil Code of the Russian Federation. Part Four" is devoted to intellectual property rights. This Law came into

[3] Federal Law of 30.04.1999 N 82-FZ (as amended on 13.07.2020) on Guarantees of the rights of the small-populated indigenous peoples of the Russian Federation (source in the Russian language) (translation by author)

[4] Gavrilov E.P. (2018) "Intellectual Property Law of the Russian Federation: Legislation and Doctrine". In Patents and Licenses, 2018, N 8. (source in the Russian language) (translation by author)

force on January 1, 2008, and is currently in force with numerous amendments.

Intellectual property law aims to protect a set of rights that a person (persons) has to the results of their intellectual activity. Mentioned set of rights include exclusive rights that are of a proprietary nature, personal non-proprietary rights that are of a non-proprietary nature and other rights that can have both proprietary and non-proprietary nature. The Civil Code of the Russian Federation regulates the set of rights related to copyright and neighbouring fields, patents, selectional achievements, the topology of integrated microcircuits, production secrets (know-how), means of individualisation, and results of the intellectual activities as a unified technology.[5] Article 1225 of the Civil Code, in the form of an exhaustive list, defines 16 categories of objects that can be protected by the intellectual property law, including the objects that can be considered parts of traditional cultural expressions.

Civil Code of the Russian Federation defines the author as a citizen (person) whose creative work has created the result of intellectual activity (clause 1 of article 1228).[6] Opinion of the Chamber for Patent Disputes dated 07.02.2011 (Appendix to the decision of Rospatent dated 24.03.2011 on application N 2006714356/50) clarified that an author is a natural person.[7] But the definition of work, like the definition of creative activities, is absent in the Civil Code of the Russian Federation (they are absent in other Russian and foreign laws, in international treaties). So the presence of creativity, creative activities, and work resulting from such activities is a rather vague question.[8] If there is no dispute, then it is determined with the author's consent and his counterparties in the contractual relationship, and in the case of a dispute - by the court.[9] The definition of an author does not recognise a legal entity as the author of objects placed under copyrights protection. Nevertheless, the legal entity can hold exclusive rights to particular objects of intellectual

[5] Federal Law of 18.12.2006 N 230-FZ "Civil Code of the Russian Federation. Part Four" (source in the Russian language) (translation by author)

[6] ibid

[7] Rospatent (2011). Decision of Rospatent dated 24.03.2011 on application N 2006714356/50. Moscow, Russia (source in the Russian language) (translation by author)

[8] Savina V.S. (2020). “Public law restrictions and prohibitions in intellectual property law”. In IP. Copyright and related rights, 2020, N 2 (source in the Russian language) (translation by author)

[9] ibid

property law, for example, resulting from an agreement for the alienation of exclusive rights in favour of another person (including a legal entity). In addition, the legal entity can be recognised as the producer of the database(s) following article 1333 of the Civil Code.[10]

As a result, defining approach in the Russian intellectual property is concentration around individualisation of author protection and collectivisation of objects included in the public domain, to which we will pay attention in the further sections.

3. Introduction to the concept of traditional cultural expressions

Traditional cultural expressions (expressions of folklore) means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community.[11] The international definition of the traditional cultural expression is more dynamic and not exhaustive, giving space to define characteristic elements of such a concept. The World Intellectual Property Organisation, in a booklet related to the concept of the traditional cultural expressions, defined that characteristic elements include the facts that objects of traditional cultural expressions are usually:

i. handed down from one generation to another, either orally or by imitation,
ii. reflect a community's cultural and social identity,
iii. consist of characteristic elements of a community's heritage,
iv. made by 'authors unknown' and/or by communities and/or by individuals communally recognised as having the right, responsibility or permission to do so,
v. often not created for commercial purposes but as drivers for religious and cultural expression,
vi. constantly evolving, developing and being recreated within the community.[12]

The Russian academic literature defines traditional cultural expressions

[10] ibid (no.5)

[11] World Intellectual Property Organisation (2005). "Intellectual property and traditional cultural expressions/folklore. Booklet No.1." Geneva. Switzerland, access from <https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf>

[12] ibid

in tight connection with the above-mentioned characteristic elements in a more dynamic definition and acknowledges indigenous communities as the most common stakeholders using the objects of traditional cultural expressions. According to them, traditional cultural expressions are works of science, literature and art, passed down from generation to generation, without specific authors, created and used by indigenous peoples, whose legal personality is determined in accordance with the national legislation of the residence country.[13] The definition implies that the plenitude of the rights and freedoms a particular user can enjoy concerning traditional cultural expressions depends on their legal personality in a particular legal relationship. Legal personality in intellectual property relations is usually determined by three factors: characteristics of the subject (user), characteristics of the object, types of intellectual property rights that the subject wants to enjoy.[14]

By that, we would conclude that indigenous people's rights and freedoms to own traditional cultural expressions are defined by the legal personality of a particular indigenous community, characteristics of a particular object of traditional cultural expressions, and which type of rights and freedoms the community wants to enjoy.

4. Indigenous people in intellectual property relations concerning traditional cultural expressions.

The most common objects of traditional cultural expressions are literature, music and art. Article 1255 of the Civil Code defined these objects as objects of copyright or neighbouring rights.[15] Article 1257 and 1258 define authors and co-authors only as concrete persons, with names and surnames that can be mentioned. One of the features of traditional cultural expressions (folklore) is the lack of concrete author, limiting access to copyright protection in the Russian legal system. That limitation is confirmed by article 1258,

[13] Gazizova A.S. (2019). "On the protection of knowledge, cultural expressions and genetic resources". In Russian Law Journal, 2019, N 2 (source in the Russian language) (translation by author)

[14] Federal Assembly of the Russian Federation (2019). "Analysis of the Russian and foreign legal framework, international legal acts, as well as law enforcement practice in the field of protecting the rights of indigenous peoples of the North, Siberia and the Far East of the Russian Federation", access from <http://duma.gov.ru/media/files/ac56at9WNIN403jBAeKGTGGbqfeyNPfX.pdf> (source in the Russian language) (translation by author)

[15] ibid (no.5)

paragraph 6 that exhaustively excluded folklore from objects that the copyright can protect.[16] Numerus clausus list of article 1304 did not include traditional cultural expressions itself to objects of neighbouring rights.[17] However, according to international law, objects with unknown authors still can be protected by the copyright. Such option has been declared by Berne Convention for the Protection of Literary and Artistic Works of 09.09.1886 (as revised on 28.09.1979) article 15 paragraph 4, according to which in the case of subject to two conditions the domestic legislation of convention country may determine the competent authority representing the author and competent to protect the rights and ensure their observance in other convention countries.[18] The first condition – object should not be published. In other words, the potential protection of the Convention applies only to unpublished objects. The second condition – proved reasons to believe that the author is a citizen of the convention country. For example, the object explicitly mentions that it was created by a member or members of the indigenous community residing on the territory of the convention country. It is worth paying attention, the provision of article 15, paragraph 4 uses the clause "may determine", which does not have an imperative feature and does not oblige any of the convention countries to protect mentioned category of objects. Russia ratified the Convention but did not use the mechanism of article 15, paragraph 4, and prioritise the instruments defined by domestic legislation.

The Russian intellectual property law and related practices imply that the indigenous community's inability to define a concrete author usually leads to the object's inclusion in the public domain. Inclusion into the public domain means that any person can freely use the object without anyone's consent or permission and without payment of remuneration. Nevertheless, it is necessary to note that public domain objects can be freely used only for uncommercial purposes. As a result, the indigenous communities do not have the exclusive rights and freedoms to own expressions of folklore without a defined author because the protection of folklore as objects of intellectual property is constructed from the

[16] ibid (no.5)

[17] ibid (no.5)

[18] Berne Convention for the Protection of Literary and Artistic Works of 09.09.1886 (as revised on 28.09.1979), access from <https://wipolex.wipo.int/en/text/283698>

perspective of the whole society and potential value for society, instead of the rights of indigenous people to freely and exclusively use own culture. The traditional cultural expressions of the indigenous people without defined and concrete author(s) still can receive legal protection, and the indigenous community can receive exclusive rights, but not to traditional cultural expressions itself.

The first, section of the Civil Code dedicated to the regulation of neighbouring rights included performances as objects under protection. Among performances, article 1304 paragraph 1 sub-paragraph 1 included performances expressed in a form that allows their reproduction and distribution using technical means and repeated public performance.[19] In other words, the literature object of the folklore of the indigenous community without a defined author will not be an object of copyright. However, a theatre performance based on that object performed by indigenous community members will be protected by the right neighbouring with copyrights. The difference between copyrights and neighbouring rights can be seen in the absence of exclusive rights of the proprietary nature in the set of rights defined by neighbouring rights.[20] The performances by indigenous communities based on their own folklore will be protected by technical means of protection of neighbouring rights (exclusive marks), obligation in the case of the reproduction to maintain the recognition of an original performance by the audience, and obligation of reproductors to receive consent from original performers.[21] But, the original performers will not be able to profit from the distribution or sharing of the performance script, as the basis of such script will be the folklore objects. Moreover, the Civil Code allows the use of objects of neighbouring rights without the consent of the copyright holder and without payment of remuneration in cases of free use of works for private purposes; informational, scientific, educational or cultural purposes; law enforcement purposes (as evidence in judicial proceedings); short-term use by broadcasting organisation.[22] As a result, de-jure, indigenous performers can enjoy neighbouring rights to their

[19] ibid (no.5)

[20] Novoselova L.A. (2017) "Intellectual Property Law. Textbook", Moscow, Russia: Statut (source in the Russian language) (translation by author)

[21] ibid

[22] ibid (no.5)

own performances. Nevertheless, de-facto, this type of intellectual property rights possess a lot of implicit limitations and potential collisions to holders.

The second, copyright regulation included the translation and processing of another (original) work and composite works (anthology, encyclopedia, database, website, atlas or other similar work) into the list of objects under copyright protection.[23] The authors and (or) co-authors will receive all components of the mentioned above rights under the intellectual property law. Traditional cultural expressions of the particular indigenous community can be published under a holistic collection. However, in that approach, there are several disadvantaging aspects. The author(s) of the collection does not receive exclusive rights for objects included in the collection, and only the author of the original object will have a copyright. Moreover, the copyright for collection, result of processing or translation belonging to the author(s) of collection, processed work, translation does not prevent the others from processing, translation and inclusion of original object.[24]

As we mentioned before, legal entities can produce databases and can be recognised as the author. Following Federal Law of 20.07.2000 N 104-FZ (as amended on 27.06.2018) on the General Principles of Organization of Communities of small-populated indigenous communities of the North, Siberia and the Far East of the Russian Federation, the indigenous communities can separate into indigenous communes, and such communes can obtain the status of non-commercial legal entity.[25] By that, we assume that a particular indigenous commune can produce a database of its own traditional cultural expressions, can be recognised as the author and possess a set of rights under copyright law. However, as we mentioned before, the right to acquire a status of legal entity in the form of the indigenous commune is entitled only to those communities whose population is less than 50 thousand people. That is another discriminative loophole against communities with more

[23] ibid (no.5)

[24] ibid (no.5)

[25] Federal Law of 20.07.2000 N 104-FZ (as amended on 27.06.2018) on the General Principles of Organization of Communities of small-populated indigenous communities of the North, Siberia and the Far East of the Russian Federation (source in the Russian language) (translation by author)

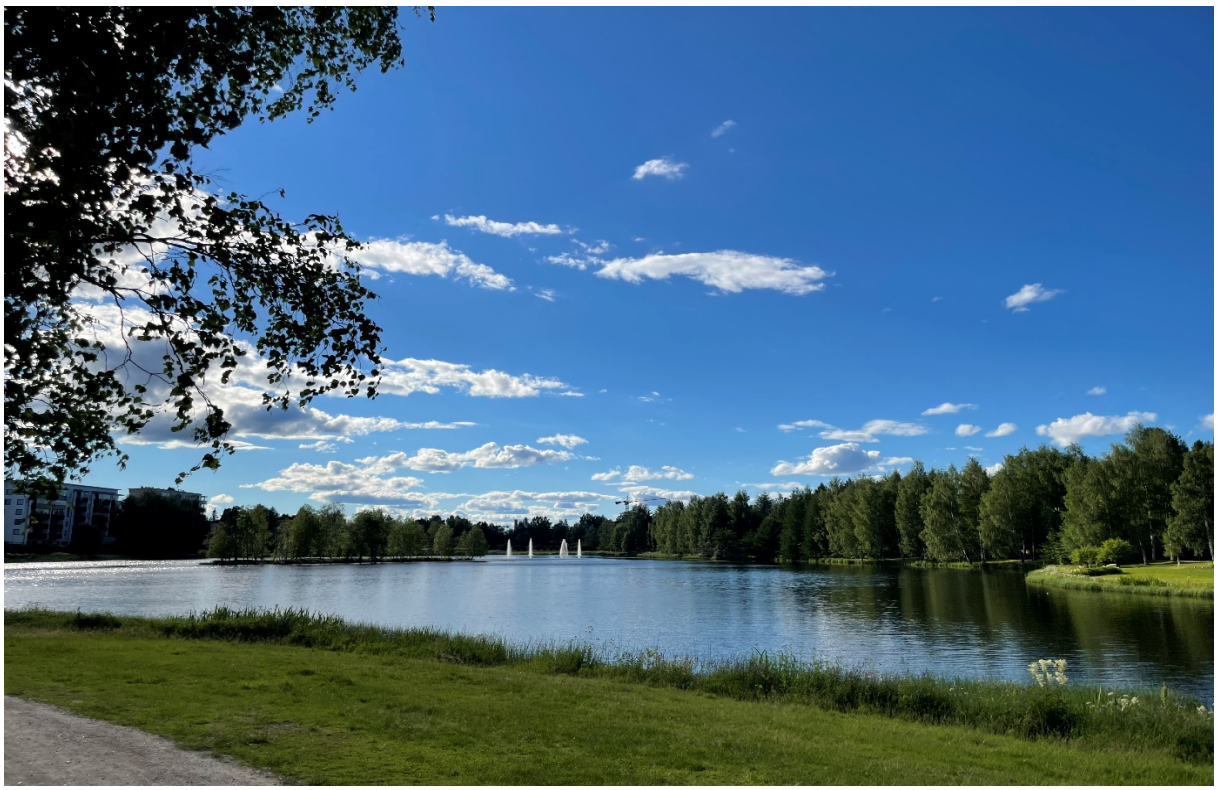
population than the border defined by law.

5. Conclusion

The most obvious conclusion that is possible to make from the contribution loopholes is that the indigenous communities in the Russian Federation rarely can profit from using and sharing their own culture. Lack of values-concentrated regulation of protection the objects of intellectual property law led to the strict necessity of the indigenous communities to determine the concrete author or transform objects of own traditional cultural expressions to the form that will be exclusively protected without the concrete, natural person as an author, or to the form where it would be possible to determine own author even if the original object fell under the category "author unknown" even if there are strong assumptions that the author is a member of a particular community. The international protection of traditional cultural expression cannot be considered sufficient. The most effective tool of international protection is article 15 of the Berne Convention, allowing indigenous communities to demand protection efforts from authorities without strong hope that the request will be satisfied. The most common scenario with traditional cultural expressions of explicitly defined indigenous community, but without explicitly defined concrete author, is subsequent inclusion of the particular object into the public domain. The objects in the public domain cannot be used for commercial purposes and cannot be modified, so the originality is implicitly protected. Nevertheless, indigenous communities cannot demand acquiring exclusive rights for the object, even if they know and can prove that the object is a vital part of their culture. Thus, the community appears in front of a choice: to find the concrete author and acquire exclusive copyright or to make a performance, database, encyclopedia and declare own authorship, but at the same time to fail the protection of the original object from reproducing by other people. In one option – it is complicated to acquire exclusiveness; in another – it is easy to protect, but not exclusively. As a result, indigenous communities are in the ouroboros circle related to folklore objects where it is impossible to define a concrete author.

Nevertheless, the most disappointing, that the intellectual property regulation loophole is not the only challenge that indigenous communities in Russia face. Intellectual property law provided another demonstration of how the

indigenous communities in Russia face disadvantages and bureaucracy related to the population and inclusion into the unified list of the indigenous communities. And this raised a question, how good it would be if the category of the small-populated indigenous community were removed from the Russian legal system, just as we did in this contribution…



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Rospatent (2011). Decision of Rospatent dated 24.03.2011 on application N 2006714356/50. Moscow, Russia
Federal Law of 20.07.2000 N 104-FZ (as amended on 27.06.2018) on the General Principles of Organization of Communities of small-populated indigenous communities of the North, Siberia and the Far East of the Russian Federation
Federal Law of 30.04.1999 N 82-FZ (as amended on 13.07.2020) on Guarantees of the rights of the small-populated indigenous peoples of the Russian Federation

''Traditional cultural expressions (expressions of folklore) means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community.''

Balancing Indigenous Rights and International Environmental Concerns in Polar Bear Management: New Developments in Canadian Modern Treaty Contexts

Dwight Newman, QC[*] *& Gabrielle Robitaille*[**]

I. Introduction

A September 2021 decision of Canada's Federal Court of Appeal in *Makivik Corporation v Canada (Attorney General)*[1] highlights broad, complex issues involving in balancing Indigenous rights and international environmental concerns in polar bear management. These issues are challenging, and the case signals both the ongoing challenges and the developing expectations of achieving a different balance than has been achieved in the past.

The issues of integrating different underlying interests, rights, and values in relation to polar bear management issues have been noted for some time by scholars like Kamrul Hossain as involving a manifestation of international law fragmentation, in which Indigenous rights dimensions of the issue might well be in tension with treaty commitments related to polar bears developed in the context of broader environmental concerns.[2] In respect of the latter, Nigel Bankes, a scholar normally highly attentive to Indigenous rights concerns, has written about the 1973 *Agreement on the Conservation of Polar Bears (ACPB)*[3] with scarcely a mention of Indigenous harvesting,[4] manifesting some of the disconnect of legal regimes on polar bear management oriented to other perspectives from the pertinent Indigenous perspectives bearing on this context.[5]

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[1] 2021 FCA 184.

[2] Kamrul Hossain, "Hunting by Indigenous Peoples of Charismatic Mega-Fauna: Does Human Right Approach Challenge the Way Hunting by Indigenous Peoples is Regulated?" (2008) 10 International Community Law Review 295

[3] *Agreement on the Conservation of Polar Bears*, UNTS 2898, I-50540, Oslo, 15 November 1973, entered into force 26 May 1976.

[4] Nigel Bankes, "Polar Bears and International Law", in Natalia Loukacheva (ed) *Polar Law Textbook II* (Copenhagen: Nordic Council of Ministers, 2013) 123.

[5] For other treatments of note on this and associated questions, see also Martha Dowsley & George Wenzel, "The Time of the Most Polar Bears': A Co-Management Conflict in Nunavut" (2008) 61:2 Arctic 177; Leena Heinamaki, "Protecting the Rights of Indigenous Peoples – Promoting the Sustainability of

In light of these important Arctic issues—with the direct pertinence of polar bears but also with potentially broader-reaching implications implicit in any better-developed means of reconciling the interests and values at stake in this context—any case law development on the issue is of broader interest, and it is in this vein that we turn to the recent Canadian development in the *Makivik Corporation* case. This case sees the application of modern treaties negotiated between the Canadian government and Indigenous peoples in Canada's Arctic regions, along with associated duties of consultation with Indigenous peoples, in finding greater clarity than seems to be possible at this point in time based solely on more general considerations.[6]

II. The *Makivik Corporation* Case

Makivik Corporation v Canada (Attorney General)[7] is an appeal from a judicial review of an administrative decision made by the Minister of the Environment and Climate Change Canada. The Minister, in accordance with the system set out in the Nunavik Inuit Land Claims Agreement (NILCA), varied a decision made by the Nunavik Marine Region Wildlife Board (the "Board"). The case reflects upon a careful balance between Indigenous rights and international environmental concerns in polar bear management. We focus on those aspects of the decision, while noting the significance of the case for Canadian administrative law doctrine in ways examined by other authors.[8]

By way of background, the NILCA at issue within the case is a modern treaty negotiated between Canada and the Nunavik Inuit, represented in the case by the Makivik Corporation, pertaining to the northern and offshore regions of Quebec and Labrador. Article 5 of NILCA establishes a co-management regime for wildlife that designates decision-making authority for the

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the Global Environment" (2009) 11 International Community Law Review 3; Greta Swanson et al, "Traditional Ecological Knowledge in Environmental Decision-making" (2019) 49:4 Environmental Law Reporter News & Analysis 10309.

[6] For a complexity on how different modern treaties in different parts of Canada's Arctic interact, see also Daniel W. Dylan, "The Duty to Consult on Wildlife Matters in Overlapping Northern Land Claims Agreements" (2015-2016) 1 Lakehead Law Journal 45.

[7] *Makivik Corporation, supra* note 1.

[8] See especially Daniel W. Dylan, "Wildlife Management, Privative Clauses, Standards of Review, and Inuit Qaujimajatuqangit: the Dimensions of Judicial Review in Nunavut" (2021), 34 Can J. Admin L & Pract. 265.

NILCA-established Board and Federal and Nunavik Ministers. The Board is an institution of public government and has various powers including setting an annual total allowable take (TAT) and non-quota limitations (NQLs) on harvesting species subject to the regime. The Board is set out in NILCA as the primary regulator and main instrument for wildlife management in the region.

The decisions made by the Board that are related to matters within Federal jurisdiction are subject to a "two-way, conversation-like process" between the Board and the Federal Minister.[9] The Board firstly sends the Minister a private, initial decision, to which the Minister then responds with an acceptance or rejection. The Board is able to reconsider the decision in light of the Minister's reasons, and then create a final decision that may be made public. The Minister may then accept, reject, or vary this final decision with reasons.[10]

The Board establishes a TAT for various subpopulations of polar bears. Polar bear harvesting has cultural, economic, social, and nutritional significance to the Nunavik Inuit, and thus the decision-making process set out in NILCA requires this significance to be considered alongside the other central objective of conservation.[11] Harvesting is set out in NILCA as to only be restricted "to the extent necessary to effect a conservation purpose."[12]

The Board commissioned a study of Inuit traditional knowledge (ITK) that it referred to in its decision-making. The Board decided upon a TAT of 28 bears, and stated that they had concluded that this would be sustainable and consistent with the Inuit's traditional practices.

However, the results of the ITK study contradicted some available scientific data. Specifically, the ITK disagreed with the scientific data that the relevant subpopulation of polar bears had deteriorating body conditions.

The Minister initially rejected the TAT, stating that 28 bears was unsustainable, and suggested that the Board should include a sex-selective harvest NQL. The Minister's rejection did not contain any mention of issues with the ITK

[9] *Makivik Corporation, supra* note 1, para 27.
[10] See *ibid*, para 28
[11] See *ibid*, para 16-18.
[12] *Ibid*, para 23

study or the NQLs that the Board established. The Board's reconsideration affirmed their TAT of 28 bears and rejected the suggestion of an NQL of sex-selection, stating that it was against Inuit values and the natural balance of the wildlife populations.[13]

After the Board's final decision, concerns related to the ITK study were raised by Federal officials. The Board was not given notice of these concerns prior to its final decision. These issues mainly consisted of methodological issues with the ITK study, including gaps of information as to how many individuals were interviewed or the scale of observations made.[14]

The Minister then varied the final decision, which reduced the TAT to 23 bears, added the requirement of a sex-selective harvest, and rejected some of the Board's NQLs. This decision by the Minister is what was then subject to judicial review.

The application judge found that the Minister's conduct failed to uphold the honour of the Crown as it pertained to the NQLs, but declined granting relief. However, on appeal, the Court ultimately decided that the Minister's conduct in relation to the NQLs as well as to the ITK failed to uphold the honour of the Crown, and granted declaratory relief on that basis.

Though there were numerous issues between the parties, many of which pertained specifically to Canadian administrative law, some of the issues dealt with the balancing and integration of Indigenous traditional knowledge and practices alongside scientific and conservation principles. The case also considers the government's obligations to Indigenous peoples in relation to international conservation objectives.

The NILCA establishes the expectation that traditional Inuit knowledge of wildlife is to be integrated with scientific knowledge and research.[15] The Makivik Corporation raised numerous issues with the lack of adequate integration between the two in the Minister's decision, particularly suggesting that the Minister was under an obligation to "find a way to put the two systems together" regardless of their differing conclusions.[16]

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[13]See *ibid*, para 40.
[14]See *ibid*, para 49.
[15]*Ibid*, para 2.
[16]*Ibid*, para 90.

However, the fact that the two systems were in opposition posed a difficulty for how proper integration could take place. A cited article observes that "there is currently no formula or algorithm" determining how to properly integrate the two.[17] Further, counsel for the Makivik Corporation admitted that it is "difficult" to integrate the two when they are in direct disagreement and that it largely becomes circumstantial.[18] The inconsistencies present led to the Court's conclusion that the decision by the Minister and the degree of integration was reasonable.

The difficulties in such an exercise are clear in the Court's suggestion that the Board had engaged in a similar process as the Minister, despite arriving at different conclusions.[19] The question of what specifically qualifies as an adequate integration between the two source of knowledge is left unclear, considering that the Court simply concluded that the Minister's attempt was reasonable in light of those factual uncertainties.[20]

However, procedural flaws that pertained to the Canadian government's conduct in relation to Indigenous issues were ultimately determinative against the government's argument. The Minister's letter to the Board rejecting the initial decision did not disclose any of the reservations concerning the ITK study, despite the Minister having a memorandum that had set out those said methodological concerns. Although the Court stated NILCA does not establish an obligation for extensive dialogue, the requirement set out in NILCA for the Minister to provide reasons for her decisions is to be interpreted purposively within the

[17] *Ibid*, para 96.
[18] *Ibid*.
[19] See i*bid*, para 95.
[20] There was another issue that the judge declined to consider. The application judge had extensively considered the influence of international politics as well as CITES (the Convention on International Trade in Endangered Species of Wild Flora and Fauna) upon the Minister's decision. There had previously been a threat of a trade ban, through the up-listing of the polar bear to Appendix I of CITES, which would effectively halt international trade of the polar bear. The Minister is interpreted to have significantly considered this in her decision especially as it pertained to the economic implications of this for the Inuit: paras 119 and 122. The Makivik Corporation argued that it was unreasonable for the Minister to weigh the Inuit's economic concerns over their cultural concerns. This raises the tension that may often exist between a State's international obligations and their obligations to a rights-bearing community. The Court declined to deal with this portion of the argument related to international politics, instead determining that potential economic impacts are relevant under the scheme of NILCA: para 125.

context of NILCA and its objectives.[21] The purpose behind that requirement cannot be fulfilled "unless the minister's written reasons disclose the real reasons for the Minister's decision to reject."[22] This conclusion is aided by how providing sufficient reasons is significant in reconciliation within Canadian jurisprudence. The Court makes reference to the past Supreme Court of Canada decision in *Clyde River (Hamlet) v Petroleum Geo-Services Inc*. in stating that not only do written reasons "foster reconciliation" but are a "sign of respect [which] displays the requisite comity and courtesy."[23]

Thus, even though the Minister was not required through the NILCA to be in constant dialogue, the Minister failed to adequately implement the NILCA's requirements and was determined to have breached the honour of the Crown. On a similar basis, the Court also determines that the Minister did not reasonably act in accordance with the honour of the Crown in relation to the NQLs. The Minister's failure to communicate denied the Board an opportunity to address the concerns with the NQLs, going against the intention of the NILCA decision-making process.

III. Broader Implications

The Court thus ultimately showed some deference to the Ministerial decision on how to integrate Indigenous knowledge and Western scientific knowledge in relation to the management of polar bears. There is little clear guidance to be discerned on this issue from this decision, and there are ongoing challenges in considering such decisions and the associated balancing of Indigenous rights and treaty commitments within international legal regimes that have been less attentive to Indigenous rights. At the same time, the Court was able to offer a measure of protection by drawing upon Canada's legal doctrines on consultation with Indigenous peoples as an aspect of governmental conduct associated with the honour of the Crown.[24] In doing so, the Court also drew upon specific modern treaty

[21]See *ibid*, para 109

[22]*Ibid*.

[23]*Ibid*, para 111. For the past decision, see *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*., 2017 SCC 40, [2017] 1 S.C.R. 1069. For a past discussion of it in this journal, see Dwight Newman, "Litigation Concerning Consultation with Indigenous Communities in Nunavut, Canada" (2016) 4 Current Developments in Arctic Law 17.

[24] For general analyses of Canada's duty to consult, see Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014) and Dwight Newman, "The Section 35 Duty to

arrangements between the Canadian government and Arctic Indigenous peoples undergirding the conclusions on consultation and honour of the Crown. These realities of how the case played out establish certain broader implications from the case.

Notably, without one definitive means established of reconciling Indigenous knowledge and Western scientific knowledge, governments facing judicial review of decisions on how they have done so will operate within a sphere of some judicial deference. In the absence of courts being convinced as to one particular way being most definitively appropriate, there are only limited ways in which they might review such decisions. As a result, the decision likely implies some continued room for governments to operate in that sphere.

That implication does not take away from the significance of efforts to work through appropriate means of resolution on such issues. Indeed, there is important room for the scholarly community to build upon what work has been done and to carry on to the development of more prescriptive approaches, if more prescriptive approaches can appropriately be identified. If well-reasoned, those approaches could guide governments more clearly in this challenging area of policy-making and shape how courts respond in judicial review contexts where they assess the reasonableness of government action.

In the meantime, established agreements between Indigenous communities and non-Indigenous governments may have central roles to play. The modern treaty arrangements in Canada's Arctic regions are a significant accomplishment in having been attained through successful negotiations. One of the most visible signs of their significance is the existence today of the Nunavut territory on a map of Canada, but their effects reach far beyond that in less immediately visible ways that involved the recognition of many rights in various Indigenous peoples of Canada's Arctic. They form an essential part of what we have previously called the "contextualized decolonization" of the North.[25] They are what provided the court a means of review that supported declaratory

Consult", in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers (eds) *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017).

[25] Dwight Newman, "International Indigenous Rights Law and the Contexualized Decolonization of the Arctic", in Ken S. Coates & Carin Holroyd (eds) *The Palgrave Handbook of Arctic Law and Politics* (Chaim, Switzerland: Palgrave Macmillan, 2020) 427.

relief in the case at hand. Modern treaties in Canada establish rights in tangible ways agreed by the parties and are thus particularly appropriate to apply in the context of contested issues where they offer a resolution on those issues.

One resulting complexity is that in the context of the somewhat fragmented form of international law on such issues, on which specific international treaty regimes and Indigenous rights may not have been brought into any definitively reconciled relationship, a state like Canada with entrenched commitments on Indigenous rights may be expected to take a different approach to its international treaty commitments. The *ACPB*, with its determinations on polar bear management, is particularly notable in the ways it may be affected by domestic commitments on Indigenous rights, especially given the role of polar bears in the life of Inuit communities located across Canada's Arctic region. Those interested in the *ACPB* need to engage in a new wave of thinking on its intersections with Indigenous rights, both from pragmatic predictive perspectives and for the sake of any contemplation of modifications to future normative guidance.

As in so many other contexts, the Arctic region is a complex place that evokes highly complex governance challenges out of proportion to the size of the population of the region. The Arctic states need to be engaged in challenging ongoing work on these governance challenges in light of the unique characteristics of the Arctic and the challenging issues raised. The latest case from Canada's courts on polar bear management is partly yet another reminder of these realities. While it has some specific implications on the respective roles of generalized approaches and more specifically agreed approaches with Indigenous peoples of the Arctic, it also repeats these broader lessons of the ongoing governance challenges to be faced. As scholars engaged with Arctic law or polar law, our efforts are ever more needed and we must continue to make the best contributions we can to the challenging issues of this region that matters both in and of itself and in its relationship to the world as a whole.

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