

# CURRENT DEVELOPMENTS IN ARCTIC LAW

Volume 9

2021  
University of Lapland  
Rovaniemi

# Current Developments in Arctic Law

Volume: 9 (2021)

Editor: Kamrul Hossain

Publisher: University of Lapland

Current Developments in Arctic Law is produced in cooperation within UArctic Thematic Network on Arctic Law

© UArctic Thematic Network on Arctic Law

Current Developments in Arctic Law is licensed under the Creative Commons Attribution 4.0 International License

Cover: Zofia Hyjek

ISSN: 2343-3418

# Table of Contents

<b>Editor's Note .....</b>	<b>1</b>
----------------------------	----------

*Kamrul Hossain*

<b>Finland's plans of the Arctic Ocean rail line are buried deep beneath the ice – or are they really?.....</b>	<b>4</b>
---	----------

*Juho Kähkönen & Soili Nystén-Haarala*

<b>The Polar Express Submarine Cable: The First Transarctic Cable and Security Concerns in the Arctic.....</b>	<b>7</b>
--	----------

*Daria Shvets*

<b>Marine Autonomous Ships in the Arctic: Prospects and Challenges.....</b>	<b>15</b>
---	-----------

*Sabrina Hasan*

<b>Multilevel Governance and Interregional Cooperation in the Arctic and North....</b>	<b>20</b>
--	-----------

*Juha Saunavaara & Marina Lomaeva*

<b>A Note on U.S.-China Cooperation in the Arctic: Opportunities and Challenges..</b>	<b>26</b>
---	-----------

*Yuanyuan Ren*

<b>Russia's current Arctic policy and law.....</b>	<b>42</b>
--	-----------

*David Baramidze*

<b>Schrödinger's Euro-Arctic: The New Arctic Policy of the European Union and the Limits of Arctic Exceptionalism.....</b>	<b>48</b>
--	-----------

*Stefan Kirchner*

<b>Trade Law and the Protection of the Arctic Environment</b>	
<b>The legality of Norway’s proposed heavy fuel oil ban under the General Agreement on Tariffs and Trade.....</b>	<b>54</b>

*Emily Tsui*

<b>Promoting sustainable investment in the Arctic: the role of the Arctic Investment Protocol and the Arctic Economic Council’s Code of Ethics.....</b>	<b>74</b>
---	-----------

*Federica Cristani*

<b>Traditional cultural expressions: challenges of the Russian Intellectual property law for indigenous communities of the Russian North.....</b>	<b>78</b>
---	-----------

*Pavel Tkach*

<b>Balancing Indigenous Rights and International Environmental Concerns in Polar Bear Management: New Developments in Canadian Modern Treaty Contexts.....</b>	<b>89</b>
--	-----------

*Dwight Newman, QC & Gabrielle Robitaille*

<b>Exploring gender equality among caregivers: a sub-study based on the Nordic network.....</b>	<b>97</b>
---	-----------

*Shahnaj Begum, Päivi Naskali, Minna Zechner, Marjo Outila, Eva-Maria Svensson, Lena Wennberg, Joan R. Harbison, Arnrún Halla Arnórsdóttir & Trine Koitberg*

## Editor's Note

### **A Bottom-up Approach to Arctic Governance: Making local voices heard in higher-level policy decisions**

The impacts of climate change, both negative and positive, dominate any discussion on the Arctic today. Clearly, the region faces an environmental upheaval, with climate change the main driver of this transformation. Among the challenges confronting the Arctic are a disproportionate rise in temperature compared to the rest of the globe; faster melting of sea ice, facilitating the transit of ships through the Arctic Ocean; a surge in on- and off-shore resource extraction; an increase in maritime transportation and intercontinental trade and investment; and a proliferation of infrastructural projects undertaken in partnership with rising economic powers. These developments hasten climate change and bring negative environmental consequences for the region and its population. To be sure, some of the consequences cited – increased trade, investment and infrastructure development – contribute to economic prosperity and the region-building process. Yet they also entail risks, for they bring external powers into Arctic

affairs, contributing to geopolitical tensions among actors within and beyond the region. Governance of the Arctic is often viewed in terms of the state actors' interests, which have been criticized as unbalanced, disproportionate and unsustainable. More significantly, the processes of governance in place overlook the Arctic subjects, who are directly affected by the ongoing transformation of the region.

The physical space of the Arctic is composed of the circumpolar territories of the eight sovereign states surrounding the Arctic Ocean. Five of the states have coastlines and sovereign rights up to certain limits in the ocean. The central Arctic Ocean lies beyond national jurisdiction. Human settlements within the Arctic include local diverse, traditional and Indigenous communities, making the region unique. However, the states administering the Arctic territories are often guided by national priorities, and tend to disregard unique regional interests. States also fail to acknowledge the differences between their Arctic and non-Arctic territories; all Arctic territories are administered from capitals well to the south of the Arctic Circle.

The prevailing Arctic governance framework is built on a set of national and international regulatory tools and accompanied by interstate institutional co-operation frameworks, one example being the Arctic Council. As it stands, this structure embodies a primarily top-down approach to governance, one disregarding the norms and values rooted within and among the Arctic societies and the people living in the region. Consequently, governance suffers from a lack of adequate knowledge on distinctive socio-cultural, economic and environmental consequences; everyday needs and challenges; and the interrelationship between people, nature and the region's pristine environment. Unless a bottom-up approach is integrated within the Arctic governance framework, policy choices in governing the region will prove to be ill-informed and arbitrary.

In general terms, governance refers to co-ordinated social functions to direct or guide the actions of groups of people at all levels – from local communities to international society – towards a common outcome. In such a process, actors having the power of decision-making interact with other players and processes in formal and informal roles

to influence the decisions made. This approach then ensures the actors' endorsement of norms, policies, procedures and practices, thereby making them accountable. A meaningful and effective governance framework requires tools to identify specific challenges, adopt strategies and actions through negotiations, and contribute to norm-building for regulatory frameworks. The notion of governance calls attention to "the capacity for making deliberate choices, revising and employing knowledge for making those choices, and for organizing collectively to navigate challenges and opportunities."<sup>1</sup> In other words, it is a process in which people, communities and groups can participate, and one which these actors also have an opportunity to change and shape. At the end of the day, governance entails more than just the official institutionalization of legal processes; it is also about inclusion of the voices of those directly affected and seeing to it that those voices are reflected in policy decisions.

The institutional structure of Arctic governance, one institution being the Arctic Council, recognizes Indigenous peoples' participation, which is indeed a step forward. Yet, over three million

---

<sup>1</sup> Arctic Resilience Report 2016, the Stockholm Environment Institute and the Stockholm Resilience Centre, pp. 129-130.

people, a full 90 per cent of the region's population, remain largely voiceless in institutional settings. In 2019, local leaders from thirteen Arctic cities formally inaugurated the Arctic Mayors' Forum (AMF), an institutional structure to provide local citizens a voice in Arctic development. This marked a significant advance in bottom-up governance. As a transregional structure, the AMF promotes bottom-up inclusion of voices to democratize the structure of governance in the Arctic. The task ahead is to create a better policy for coordinating efforts toward inclusive Arctic governance.

The present volume of *Current Developments in Arctic Law (CDAL)* comprises twelve papers, academic and non-academic alike, touching upon a range of issues and providing insightful information on Arctic law and policy today. The contributions deal with the following: the proposed Arctic Ocean railroad; security concerns relating to the transarctic submarine cable; challenges posed by and prospects for autonomous marine shipping in the Arctic; issues related to multilevel governance and inter-regional cooperation in the region; geopolitical perspectives on US-China cooperation and the European Union's role in the Arctic; the link between

trade law and the Arctic marine environment; sustainable development and the Arctic investment protocol; Indigenous peoples' rights from the viewpoint of traditional cultural expression as embodied in Russian legislation; environmental concerns in the Canadian polar bear regime; and gender equality among caregivers in the Nordic Arctic.

The contributions compiled in the volume are not peer-reviewed, and opinions expressed in the papers are those of the individual authors. This qualification notwithstanding, I hope that the articles will engage scholars as well as members of the general public and foster an interest in learning about Arctic law and policy. I am grateful to all the contributors for their insightful thoughts and deliberations. I sincerely thank Ms. Punam Noor for her technical support in putting the papers together and formatting them for the volume.

*Kamrul Hossain*

*December 10, 2021*

## **Finland's plans of the Arctic Ocean rail line are buried deep beneath the ice – or are they really?\***

*Juho Kähkönen\*\* & Soili Nystén-Haarala\*\*\**

Northern Finland is located only a few dozen kilometres from the northernmost Norwegian ports of the Arctic Ocean. Before the Second World War, Finland had a port and a direct connection to the ice-free Arctic Ocean. In the peace agreement with the Soviet Union in 1944, Finland lost this connection. Since then, discussions have from time to time popped up on how Finland could develop its logistics to the High North. Melting of the Arctic sea ice has strengthened the desire to gain more substantial logistical access to the Arctic Ocean. Often these discussions have included visions of the Arctic Ocean rail line.

The latest attempt to open a railway to the Arctic Ocean started in the early 2010s. An important step was the year 2017 when the Finnish Minister of Transport and Communication requested to explore the possibilities of a new Arctic railway in cooperation with the Norwegian transport

authorities. According to the Ministry, a route to the Arctic Ocean would strengthen Finland's security of supply and improve Finland's logistical position and accessibility. At that stage, the projected cost to Finland was approximately two billion (one thousand million) euros.

There were several options. Two of them would cross the region of Lapland to Norwegian ports, either Kirkenes or Tromsø. One suggested connecting the Russian railway system to the Kola Peninsula. Additional two alternatives would pass through Sweden to the Norwegian harbour Narvik. In the bigger picture, the Arctic Ocean railway is tied to the vision of being connected with the European railway network through an undersea tunnel from the capital city Helsinki to Tallinn, Estonia. The access to the Arctic Ocean would open a connection to the Northeast Passage, shortening the distance from Central Europe to Chinese ports considerably. However, only if and when the ice would melt.

These Arctic railway plans gained plenty of attention nationally and locally. Interest groups of several industries and the Regional Council of

---

\* Authors work on the JustNorth project (Horizon 2020).

\*\* Researcher, Faculty of Law, University of Lapland

\*\*\* Professor of Commercial Law, especially Russian Law, University of Lapland, Faculty of Law.



Lapland were among the active supporters of the megaproject. The Sámi Parliament, Reindeer Herders' Association and several northernmost municipalities opposed the project, with the support of non-governmental organizations, such as Greenpeace.

The main arguments for the Arctic railway included new business opportunities and strengthening of the national security of supply. The opponents argued the megaproject's negative impacts on the indigenous Sámi culture, risks to traditional livelihoods, especially reindeer herding, as well as the local ways of living. The confrontation was visible in public discourse and demonstrations against the rail line gained much attention. The line from the Norwegian port of Kirkenes through the Sámi Homeland to Rovaniemi was the primary option. It was calculated to cost less for Norway and would have supported the development of the Kirkenes harbour.

The controversial project lost much of its national support after the Finnish-Norwegian working group announced in its report in 2019 that the potential volumes of cargo would be too small to justify the high costs of the railway. After the report, the Finnish Minister of

Transportation and Communication took a mainly neutral stance on the Arctic railway. The Regional Council of Lapland, representing Lapland's municipalities, remained the leading supporter. However, the northernmost municipalities have mainly continued their opposition towards the planned railway.

The Arctic Ocean rail line suffered a significant setback after the redraft of Lapland development plans was accepted by a vote of 43 to 3 in the Regional Council of Lapland. The vote was supposed to mean the end of railway planning. However, Markus Lohi, the Council Chair, confirmed the decision, which overrode the earlier will of the Board of the Regional Council to continue the planning process in a slightly obscure way: *"Because the will of the council was so broad, the Lapland Regional Council will not support the Arctic Ocean route [...] In the light of current information, the Arctic Ocean line is not economically viable, and it won't become so in the near future either. However, it could happen in the coming decades.* (The Finnish Broadcasting Company Yle 19.5.2021 [Lapland council scraps plans for controversial Arctic rail line | Yle Uutiset | yle.fi](#)").



Map. The Arctic railway transit corridor. Foto: Arctic Corridor

A few months later, on the 15th of October 2021, The Regional Council of Lapland announced a new proposal that did not surprise those who had followed the Finnish Arctic railway plans for decades. It suggested a new railway plan that would be a loop not entering the Sámi homeland but instead connecting the existing northernmost railways in Kolari and Kemijärvi. This new loop would connect the municipalities of Kittilä and Sodankylä to the existing railway network in Kemijärvi and Kolari. According to the Regional Council of Lapland, the railway would foster tourism, mining, and forestry. No cost

analysis yet exists, and the planning is at an early stage. Critics claim the new loop railway plan is only a trick to get the existing railway further north, a step closer to the melting Arctic Ocean. Either way, the rail line plans continue to divide the local communities.

*“Critics claim the new loop railway plan is only a trick to get the existing railway further north, a step closer to the melting Arctic Ocean.”*

## **The Polar Express Submarine Cable: The First Transarctic Cable and Security Concerns in the Arctic**

*Daria Shvets\**

### **Introduction**

The interest of various stakeholders in the development of telecommunications in the Arctic is growing every year. From local communities' representatives to Arctic states officials and foreign investors, one of the key elements of telecommunications growth is an extension of submarine cables network. In contrast to densely populated areas where thousands of kilometers of cables are laid, the installation of cables in the Arctic is a pioneer industry. Due to severe climate conditions such as extreme temperatures, ice covered areas, non-accessibility of cable ships to the region and inexpediency of laying cables for small rural communities, for a long time laying a cable in the Arctic was not considered feasible. However, this is changing with more and more projects coming to the region. There are

already several examples of successfully completed short line projects in the Arctic. Also, various big scale projects were planned to cross the Arctic but finally were not implemented. The summer 2021, the first transarctic cable entered construction phase – the *Polar Express* fibre optic line. This project is planned to change the Arctic future and extend communications in the Arctic. However, apart from benefits to be brought by this cable to the north<sup>1</sup>, it may also raise several security concerns to the unique Arctic region. This article aims at bringing a light on such security aspects and provides the updated picture on submarine cables' in the Arctic.

### **Submarine cable projects in the Arctic**

Government officials from Arctic states have expressed the hope that the Arctic shall benefit from new fibre optic infrastructure, including submarine cables<sup>2</sup>. With the establishment of the Task Force on Improved Connectivity

---

\* Universitat Pompeu Fabra, Public International Law department (Barcelona, Spain).

<sup>1</sup> M. Salmnen, G. Zojer, K. Hossain, "Comprehensive Cybersecurity and Human Rights in the Digitalising European High North", in M. Salminen, G. Zojer, K. Hossain (eds.), *Digitalization and Human Security, A Multi-Disciplinary Approach to Cybersecurity in the European High North*, Switzerland: Palgrave Macmillan, p. 29.

<sup>2</sup> Final report: Rovaniemi Ministerial meeting - 7 May 2019, 'Improving Connectivity in the Arctic Arctic Council Secretariat', 2019, p. 22.

in the Arctic in 2017<sup>3</sup> the improved connectivity became one of the priorities for the Arctic development agenda. In May 2021, Foreign Ministers of the Arctic States, at the 12th Ministerial meeting of the Arctic Council, adopted a Reykjavik Declaration where they highlighted among the priorities the development of resilient infrastructure such as connectivity in the Arctic<sup>4</sup>. Since the Russian Federation has recently taken the chairmanship in the Arctic Council for several upcoming years in its strategy until 2023 titled “Responsible governance for a sustainable Arctic” it has announced the development of telecommunications systems for the wellbeing and prosperity in the Arctic<sup>5</sup>. That said, there is a continuously supported interest in submarine cables development followed by the practical implementation from several

telecommunications companies in accordance with submarine cables regulation under international law<sup>6</sup>.

One of the first lines completed in the Arctic was *Svalbard Undersea Cable System* laid in 2004 with the purpose to connect Svalbard with Norway mainland. An important remark is that laying a cable in the Arctic requires the presence of a special cable ship suitable to navigate and lay a cable in the cold Arctic waters that makes the project implementation more complicated than cable installation in another area. Also, a concern was expressed by the Arctic Council that “providers need to select their submarine fiber routes carefully, given the risk of ice scour in some areas, and to ensure reliable service backup plans to carry end-users”<sup>7</sup>. Another project performed in 2009 was the *Greenland Connect cable*

---

<sup>3</sup> See more at [https://www.uarctic.org/news/2019/5/task-force-on-improved-connectivity-in-the-arctic-tfica-report-improving-connectivity-in-the-](https://www.uarctic.org/news/2019/5/task-force-on-improved-connectivity-in-the-arctic-tfica-report-improving-connectivity-in-the-arctic#:~:text=At%20the%20Arctic%20Council%202017,and%20to%20work%20with%20the)

[arctic#:~:text=At%20the%20Arctic%20Council%202017,and%20to%20work%20with%20the](https://www.uarctic.org/news/2019/5/task-force-on-improved-connectivity-in-the-arctic#:~:text=At%20the%20Arctic%20Council%202017,and%20to%20work%20with%20the)

<sup>4</sup> REYKJAVÍK DECLARATION, 20 May 202 Arctic Council Secretariat, 2021, Paragraph 15, available at the the Arctic Council’s open access repository: [oarchive.arctic-council.org](https://oarchive.arctic-council.org).

<sup>5</sup> “Responsible Governance for Sustainable Arctic”, RUSSIAN CHAIRMANSHIP 2021-2023, paragraph 5 ‘Socio-economic development’, available at <https://arctic-council.org/about/russian-chairmanship-2/>.

<sup>6</sup> Read more about the legal regulation of submarine cables under international law in D. Shvets, “The Legal Regime Governing Submarine Telecommunications Cables in the Arctic: Present State and Challenges”, in M. Salminen, G. Zojer, K. Hossain (eds.), *Digitalization and Human Security, A Multi-Disciplinary Approach to Cybersecurity in the European High North*, Switzerland: Palgrave Macmillan pp. 175-203.

<sup>7</sup> TELECOMMUNICATIONS INFRASTRUCTURE IN THE ARCTIC a circumpolar assessment, Arctic Council Secretariat, 2017, available at [http://library.arcticportal.org/1947/1/2017-04-28-ACS\\_Telecoms\\_REPORT\\_WEB-2.pdf](http://library.arcticportal.org/1947/1/2017-04-28-ACS_Telecoms_REPORT_WEB-2.pdf).

system connecting Canada, Greenland and Iceland. In 2017 *Greenland Connect North* cable followed. The line is located on the west coast of Greenland, connecting small towns there<sup>8</sup>.

Apart from local lines, several initiatives to lay the transarctic cable have been developed. The first is *ROTACS (Russian Optical Transarctic Cable System)* to connect Tokyo and London emerged in early 2000s. The planned length was 16.000 (sixteen thousand) kilometers but this project has not entered into the construction phase. Another project was *Polarnet Cable Project*. In the framework of this project an extensive marine survey operation was conducted and from that time it became clear that such a long cable line may be installed in the Arctic. The project was under discussion for about 10 years however, received no further development. The *Arctic Connect Project* cable system was initiated by Finnish company Cinia and Russian telecom company Megafon to connect Norway with Tokyo. Even though the development phase of the

project has progressed as planned and the funding for this phase has been secured, it was decided by stakeholders to put the development project on hold as it was announced in May 2021. The *Quintillion Submarine Cable System* was initially planned to connect Tokyo with London and be performed as a long line crossing the Arctic. However, it was not fully implemented as initially planned and only the first stage was accomplished resulting in a cable line connecting small towns on the west coast of Alaska<sup>9</sup>.

### **The Polar Express fibre optic line**

Among all the projects to lay a cable across the Arctic, only the cable *Polar Express*<sup>10</sup> entered an actual construction phase. This is the unique project of a transarctic submarine fiber-optic communication line with total length of 12,650 (twelve thousand six hundred fifty) kilometers. The project will connect Murmansk to Vladivostok along the shortest route from Europe to Asia. In contrast to previous cable projects, the interesting feature of this

---

<sup>8</sup> For the visual reflection of submarine cables in the Arctic as well as in other regions see Submarine cables map by Telegeography, available at <https://www.submarinecablemap.com>.

<sup>9</sup> D. Shvets, "The Legal Regime Governing Submarine Telecommunications Cables in the Arctic: Present State and Challenges", in M. Salminen, G. Zojer, K. Hossain (eds.), *Digitalization and Human Security, A Multi-Disciplinary Approach to Cybersecurity in the European High North*, Switzerland: Palgrave Macmillan, p. 187, pp. 175-203.

<sup>10</sup> See updated information on the Polar Express submarine cable official website, available at <https://xn--e1ahdckegffejda6k5a1a.xn--p1ai/>.

cable is that it appears to be fully state-driven: owned, installed, and further maintained by the Russian Federation. Ministry of Transport of the Russian Federation and the Federal agency for maritime and river transport are customers of this project. Federal State Unitary Enterprise Rosmorport acts as the Contractor/developer. Operator Marsat (Morsviazsoutnik) is also Federal State Unitary Enterprise. Finally, Perspective Technologies Agency joint-stock company engaged as a contractor to install the cable is the only stakeholder that does not appear to be fully state owned. However, this fact does not change the legal title on Polar Express submarine cable system. After the completion of works, the ownership and maintenance rights of the cable will fully belong to the state. The Polar Express cable is already under construction and planned to be completed in 2026. First 4 kilometers of the cable line were laid this summer. Also, this cable is being laid in the framework of the Russian Arctic strategy until 2035 signed by the President of the Russian Federation.<sup>11</sup>

The Polar Express cable aims to provide the geographically shortest route for telecommunications traffic between Europe, Asia and America and thereby minimize the delay in the transmission of information, to develop the port infrastructure of the Northern Sea Route and form the digital ecosystem of the region as well as expand the international infrastructure of backbone fiber-optic communication lines.

### **Security concerns**

After understanding the relevant picture of cable projects in the Arctic, the next point to address is security concerns that may rise in connection to the activity of submarine cables laying in the Arctic, especially in the light of the Polar Express cable under construction. The following paragraphs list several security concerns this author formulates, although is non-exhaustive and, perhaps, several other positions may be added.

---

<sup>11</sup> Decree of the President of the Russian Federation dated 26 of October 2020 №645 'On the strategy of development of the Russian Arctic zone and ensuring the national security until 2035' contains directions of development, steps and programs to be implemented by the Russian Federation in the Arctic. Paragraph 13 (ii) of the strategy mentions the development of transarctic fibre optic line connecting biggest ports and settlements in the Russian Arctic that highlights the priority and significance of this project for the Russian Federation.

The first would be *scientific concern*. After the construction of the Polar Express cable, the Russian Federation will exercise total control over the cable itself and its infrastructure under domestic law. Since the Polar Express cable is planned to be laid very close to the Russian coast, it would fully fall into the Russian jurisdiction according to the international law of the sea<sup>12</sup>. Not only the cable itself but also all the infrastructure, including, for instance, landing stations. It might raise concern from the scientific point of view. Cables are known for their contribution to scientific research by accommodating various sensors measuring temperature, salinity, and other ocean characteristics. There might be a risk of noncooperation from the Russian government possessing the ownership on the Polar Express cable in sharing scientific results since the exclusivity of results might have an extraordinary value. The Arctic still keeps many secrets and some areas of scientific research remain under discovered. The unique data and knowledge obtained

with the help of submarine cables might be limited in access and even marked as 'secret' should the Russian Federation require so. Even in the case of willingness to such scientific cooperation, the exclusive jurisdiction and state ownership of the cable might result in delays and bureaucratic procedures to obtain permissions and licenses for sensors installation initiated by foreign scientists.

The next concern would be a *geopolitical concern*. No doubt, the Polar Express cable will strengthen the connectivity infrastructure not only of the north but the whole Russian telecommunications by bringing the possibility to reroute data flows. However, there is the other side of the coin. It may contribute to Russian's isolation in cyberspace. During last years the idea of creating "Runet", the closed Internet space for Russian citizens only, to be separated from the world web has been actively promoted by the Russian government. There were several steps<sup>13</sup> and announcements by government

---

<sup>12</sup> According to the United Nations Convention on the Law of the Sea 1982 the ocean is divided into several maritime zones where coastal states may exercise certain rights and freedoms but simultaneously are subject to various obligations. The logic employed by the convention is that closer the maritime zone is located to the coastal state's shore, more rights it is entitled to exercise (territorial sea by way of example). In contrast, the far maritime zone is located from a coastal state, less rights and freedoms it has (for instance, the high seas as maritime zone not belonging to any state and reserved for peaceful purposes).

<sup>13</sup> One of the legislative steps for the "isolation" of the Russian Internet was the adoption of Federal Law dated 1<sup>st</sup> of May 2019 №90. It foresees the creation of the internal infrastructure allowing networks

officials towards it. The very aim of it is to ensure Russian independence from the outside world should threats in cybersecurity appear. The Russian telecommunications agency Roskomnadzor already has extensive powers to block or decrease the speed of certain websites (for instance, twitter, facebook, linkedin) that may appear a threat in the opinion of this authority to Russian cybersecurity. Installation of the Polar Express cable may contribute to the closeness of the Runet as there will be more capacity to run the Internet independently without any foreign dependence, using Russian analogues and internal resources. The Deputy Chairman of the Security Council of the Russian Federation, Dmitry Medvedev, announced that even if the likelihood of disconnecting Russia from the global network exists, the country is ready for it<sup>14</sup>.

Another concern to follow is *cybersecurity concern*. For now, until the cable project is not completed and non-operative, it is difficult to predict how it will operate. However, in the future, there is a probability that it will be

connected to other fibre optic lines to actually connect Europe and Asia. This is the very idea of laying a transarctic cable, to reduce distance and increase speed of connections by rerouting flows. It was confirmed by the General Director of Morsvyazspudnik, that it is possible to attract foreign partners to the project and create lines that will connect the Murmansk Region with Europe and the Primorsky Territory with Asia<sup>15</sup>. Nevertheless, the attraction of foreign partners won't change the governance over the Polar Express cable in the Russian waters and there is a possibility of controlling and copying data coming through the cable since no external control might be exercised. Although practices of spying and listening through special devices are practices dated back to the previous century and war times, it is not possible to fully exclude this concern even in our time. The data in possession is great leverage that might be employed by a state to promote its interests in the international arena.

Then comes *human security concern* of Arctic communities in cyberspace and

---

operators to be independent from foreign sources and be ready to cover any connection fault internally. It demonstrates that the Russian Federation is ready for the total cut from Internet should the geopolitical situation come complicated and requiring to do so.

<sup>14</sup> Russian Gazette, 01.02.2021, available at <https://rg.ru/2021/02/01/medvedev-rf-gotova-sdelat-runet-avtonomnym-no-ne-hochetsia-do-etogo-dovodit.html>.

<sup>15</sup> See the website Morskie vesti, available at <http://www.morvesti.ru/analitika/1692/92097/>.



in connection to submarine cable installation. The first transarctic cable will definitely bring changes to the lives of remote Russian communities living in the north. Those services that are now considered in certain areas as luxury will be available at a low cost and on a permanent basis. For instance, telemedicine, online education, ordering goods through Internet or the possibility of conducting high quality videoconference are among such services. On the other hand, it may loosen the indigenous way of living, local traditions, practices and customs<sup>16</sup>. Being more accustomed to the use of telecommunications and thus being more dependent on it, they will at the same time become more vulnerable to its failures and disruptions.

*Environmental security* might also be included in the list of security concerns in the Arctic. Even though the impact from submarine cables in the Arctic cannot be compared with other more harmful activities such as oil and gas exploitation, adjacent areas are nevertheless affected during cable

installation. Noise, vibration, damage of the seabed during the cable burial affects local flora and fauna. The same applies to cable maintenance operations, as cable faults and damages cannot be avoided. It is visible from the experience of cables in other parts of the world. The risk of cable damage is even bigger in the Arctic due to cold waters and moving ice. Should the cable fault happen, a cable ship shall arrive at the place of damage to fix the problem. It is not always possible for cable ships since certain areas may be covered by ice and for this, services of ice breakers are required. That increases the presence of ships in the Arctic, time for repair operations and impact on living organisms.

Finally, according to the Russian Arctic Development Strategy until 2035, I.3 (ж)<sup>17</sup>, there is an increase in conflict potential in the Arctic. This might be titled as *military security*. The Strategy further explains that in the Arctic certain strategical objects intended to restrain the aggression against the Russian Federation are located<sup>18</sup>. In addition, there is a need to increase

---

<sup>16</sup> See more on human security concerns as a result of digitalization in the High North in M. Salminen, G. Zojer, K. Hossain (eds.), *Digitalization and Human Security, A Multi-Disciplinary Approach to Cybersecurity in the European High North*, Switzerland: Palgrave Macmillan.

<sup>17</sup> Russian Arctic Development Strategy until 2035 in Russian is available at <http://publication.pravo.gov.ru/Document/View/0001202010260033>.

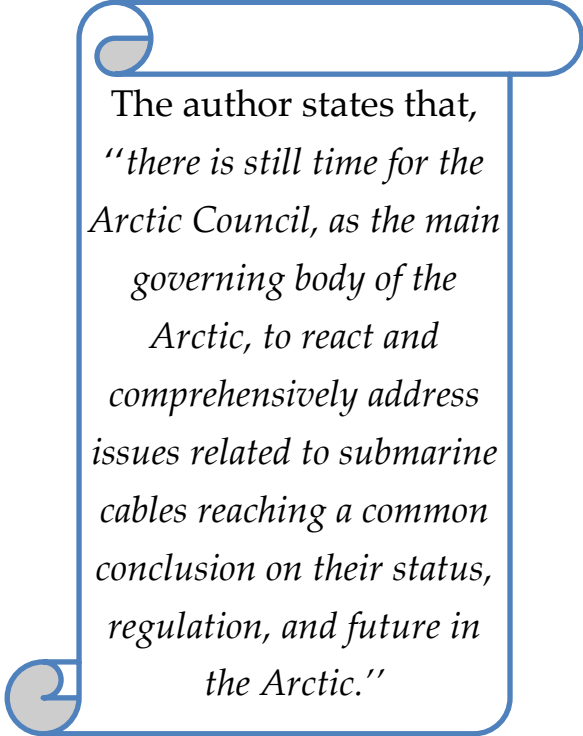
<sup>18</sup> Ibid, paragraph II, 5 (ж).

military capabilities of the Armed Forces of the Russian Federation in the Arctic<sup>19</sup>. Moreover, the whole section III (19) is dedicated to description of main objectives to ensure military security, defense and protection of the state border of the Russian Federation in the Arctic. Should the military conflict rise in the region (and the possibility of military conflict exists since nonregulated disputes exist between Arctic states), the Polar Express cable would be among the targets. The history knows cases of cutting cables of enemies during the war to limit its communications capability<sup>20</sup>.

## Conclusion

Submarine cables are getting more and more attention as the infrastructure of the future for the Arctic plays a significant role in such infrastructure development. The Polar Express cable would likely be not the only one and more cables will come to the north in the future. Arctic and non-Arctic states are equally interested in connecting to the first transarctic cable and prolongation of lines to extend it to other regions of the world. At the same time, the Polar Express cable may

complicate relations in the region between the Russian Federation and the other Arctic and non-Arctic states. Several security concerns might appear in relation to cable laying activity in the Arctic, namely scientific, geopolitical, cyber security, human security, environmental and military concerns. This is without prejudice to any other concern that may appear in the region. As a final point, the author believes that there is still time for the Arctic Council, as the main governing body of the Arctic, to react and comprehensively address issues related to submarine cables reaching a common conclusion on their status, regulation, and future in the Arctic.



The author states that,  
*“there is still time for the Arctic Council, as the main governing body of the Arctic, to react and comprehensively address issues related to submarine cables reaching a common conclusion on their status, regulation, and future in the Arctic.”*

---

<sup>19</sup> Ibid, paragraph II, 7 (τ).

<sup>20</sup> D. Colombos, *The International Law of the Sea* (Russian translation), edited by A. Zhudro, M. Lazarev, translated by V. Zaitseva, N. Kuzminskiy: Moscow, Progress, 1975, p. 474.

## Marine Autonomous Ships in the Arctic: Prospects and Challenges

Sabrina Hasan\*

Due to climate change and global warming, the Arctic Ocean is changing and opening doors for commercial shipping. The geographic nature and ecosystem of the Arctic Ocean make it different from the rest of the oceans and seas. Falling within the category of ice-covered area, *article 234* provides certain rights to coastal states concerning ice-covered areas within the limits of exclusive economic zone and this article has gained much attention to be tested further as a result of the changing Arctic?<sup>1</sup> Meanwhile, the International Code for Ships Operating in Polar Waters (Polar Code)<sup>2</sup> has entered into force and the prospect of the Marine Autonomous Ship (MAS) in the Arctic is also apparent. Starting with the question to identify MAS as a “ship” within existing legal frameworks to the need for amendments of IMO (International Maritime Organization) instruments,

MAS operation is already under consideration of the international maritime community to find out the answers to such questions. IMO has already completed the regulation scoping exercise for the use of Marine Autonomous Surface Ships.<sup>3</sup> However, little attention has been given to the MAS operation in the Arctic exclusively from the legal perspective to exercise states jurisdiction. Seeing the interest of the international maritime community in accepting MAS operation, the question arises whether the prospect of MAS in the Arctic Ocean needs a revision of *article 234* and any other regulatory framework for exercising jurisdiction over MAS within and beyond areas of national jurisdiction.

Unlike the Antarctic, the Arctic ocean is encircled by five coastal states (Canada, Denmark / Greenland, Norway / Svalbard, Russia and the United States) who have claimed exclusive economic zones (EEZ) in the Arctic Ocean. Article 234 of UNCLOS provides states with a special right to adopt and enforce

---

\* PhD Candidate, South China Sea Institute, Xiamen University

<sup>1</sup> Chircop, Aldo E., Floris Goerlandt, Claudio Aporta, and Ronald Pelot. *Governance of Arctic Shipping: Rethinking Risk, Human Impacts and Regulation*. Cham, Switzerland: Springer, 2020.

<sup>2</sup> MEPC 68/21/Add.1 Annex 10. The International Code for Ships Operating in Polar Waters (Polar Code), [www.imo.org/en/MediaCentre/HotTopics/polar/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf](http://www.imo.org/en/MediaCentre/HotTopics/polar/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf).

<sup>3</sup> MSC.1/Circ.1638, Outcome of the Regulatory Scoping Exercise for the Use of Marine Autonomous Surface Ships (MASS), 3 June 2021, [https://wwwcdn.imo.org/localresources/en/MediaCentre/PressBriefings/Documents/MS.C.1-Circ.1638%20-%20Outcome%20Of%20The%20Regulatory%20Scoping%20ExerciseFor%20The%20Use%20Of%20Maritime%20Autonomous%20Surface%20Ships...%20\(Secretariat\).pdf](https://wwwcdn.imo.org/localresources/en/MediaCentre/PressBriefings/Documents/MS.C.1-Circ.1638%20-%20Outcome%20Of%20The%20Regulatory%20Scoping%20ExerciseFor%20The%20Use%20Of%20Maritime%20Autonomous%20Surface%20Ships...%20(Secretariat).pdf)

environmental laws and regulations in ice-covered areas within their EEZs that are more stringent than general international standards. Four of the five Arctic coastal states have ratified the UNCLOS. Though the United States has not signed the Convention but generally accepts that the Convention reflects customary international law.<sup>4</sup> Thus, all five coastal states are entitled to exercise rights under article 234 of UNCLOS within the EEZ of the Arctic Ocean. At the present, the central Arctic Ocean, which has a significant area of high seas, appears to be inaccessible to ships and can only be reached by passing through the five Arctic States' EEZs or territorial seas via the Northwest and Northeast Passages.<sup>5</sup> However, considering the Climate reports, during summer in the next decades the whole Arctic may become ice-free,<sup>6</sup> and open for shipping through the "Transpolar Sea Route"<sup>7</sup>. Current scientific models predict an

ice-free Central Arctic Ocean in summer by mid-century and possibly sooner. This could soon open up a direct shipping route across the North Pole, linking markets in Asia, North America and Europe.<sup>8</sup> The Transpolar Passage, like the Northern Sea Route and the Northwest Passage, could be appealing in a world where timing makes the difference between profit and loss. The Northeast Passage is two to three weeks faster than the Suez Canal for trips between Europe and Asia. The Transpolar Passage could save two days if it crossed the Arctic straight through.<sup>9</sup> Meanwhile, the prospect of autonomous shipping in the Arctic seems to receive wider acceptance from the technologists considering the safety risks or intermediate risks of manned ships to humans.<sup>10</sup> As such Aker Arctic, the

---

<sup>4</sup> See President Regan, Statement—U.S. Oceans Policy, 10 March 1983, 22 I.L.M. 464–465.

<sup>5</sup> Hartmann, Jacques. "Regulating Shipping in the Arctic Ocean: An Analysis of State Practice." *Ocean Development & International Law* 49, no. 3 (2018): 276–99. <https://doi.org/10.1080/00908320.2018.1479352>.

<sup>6</sup> See IPCC, 2021: Summary for Policymakers. In: *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Masson-Delmotte, V., P. Zhai, A. Pirani, S. L. Connors, C. Pöan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M. I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T. K. Maycock, T. Waterfield, O. Yelekli, R. Yu and B. Zhou (eds.)]. Cambridge University Press. In Press.

<sup>7</sup> Bennett, Mia M., Scott R. Stephenson, Kang Yang, Michael T. Bravo, and Bert De Jonghe. "The Opening of the Transpolar Sea Route: Logistical, Geopolitical, Environmental, and Socioeconomic Impacts." *Marine Policy* 121 (2020): 104178. <https://doi.org/10.1016/j.marpol.2020.104178>.

<sup>8</sup> Bennett, Mia. "The Arctic Shipping Route No One's Talking About." *CRYOPOLITICS*, April 23, 2019. <https://www.cryopolitics.com/2019/04/23/transpolar-passage/>.

<sup>9</sup> Melia, N., K. Haines, and E. Hawkins. "Sea Ice Decline and 21st Century Trans-Arctic Shipping Routes." *Geophysical Research Letters* 43, no. 18 (2016): 9720–28. <https://doi.org/10.1002/2016gl069315>.

<sup>10</sup> Bergstrom, Martin. "Autonomous in the Arctic – fortune or folly?" *The Pace Technology*, Page 58, <https://search.abb.com/library/Download.aspx?DocumentID=9AKK107045A7567&LanguageCode=en&DocumentPartId=&Action=Launch>

model autonomous ship is under in-housing trial for development.<sup>11</sup>

The United Nations Conventions on the Law of the Sea (UNCLOS)<sup>12</sup> permits flag states to enjoy the right of navigation in the high seas having exclusive jurisdiction.<sup>13</sup> The United Nations Convention on the Law of the Sea (UNCLOS) allows flag states to have exclusive jurisdiction over the high seas and enjoy the right of navigation. The UNCLOS contains rules that govern navigation in different zones, including “innocent passage” through territorial seas (UNCLOS Articles 17-26 and 52), “right of transit passage” through international straits (UNCLOS Article 38), the “right of passage through archipelagic sea lanes” in archipelagic waters (UNCLOS Article 53), in the EEZ (UNCLOS Article 58(1)) and “freedom of navigation” on the high seas (UNCLOS Article 87(1)(a)). The level of state control over foreign-flagged vessels navigating in the various maritime zones is what distinguishes the various types of navigational rights.<sup>14</sup>

Initiating to magnify the laws to regulate MAS under UNCLOS, the task would be shuttered by the different provisions by their wordings, which do not constitute any literal meaning that could comply with the specs of MAS to consider them regulatable under the UNCLOS. Beginning with the territorial sea, where ships of all states enjoy the right of the innocent passage under Article 17 of UNCLOS, all foreign ships enjoy the right of innocent passage, and the meaning of innocent passage has been further expanded in Article 19 concerning ships activities to be counted as non-innocent. It is now crucial to determine whether Article 19 requires the inclusion of additional activities that can be counted as non-innocent activities to ensure the peace, good order or security of coastal states and whether Article 21, which mentions the right of coastal states to make laws and regulations, needs to be more detailed and specific concerning the innocent passage of MAS since they would enjoy the right of the innocent passage in the same way as manned ships.<sup>15</sup>

---

<sup>11</sup> Aker Arctic Technology Inc Newsletter, Model Testing of Autonomous Ships, March 2018, [https://akerarctic.fi/app/uploads/2019/05/arctic\\_passion\\_news\\_1\\_2018\\_Model-testing-of-autonomous-ship.pdf](https://akerarctic.fi/app/uploads/2019/05/arctic_passion_news_1_2018_Model-testing-of-autonomous-ship.pdf)

<sup>12</sup> Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397 (entered into force Nov. 1, 1994)

<sup>13</sup> Article 90 of UNCLOS

<sup>14</sup> Hartmann, Jacques. “Regulating Shipping in the Arctic Ocean: An Analysis of State Practice.” *Ocean Development & International Law* 49, no. 3 (2018): 276–99. <https://doi.org/10.1080/00908320.2018.1479352>.

<sup>15</sup> Veal R, Tsimplis M and Serdy A, “The Legal Status and Operation of Unmanned Maritime Vehicles” (2019) 50 *Ocean Development & International Law* 23

The limitations on the right of coastal states to adopt laws and regulations concerning innocent passage are mentioned under Article 21(2) of UNCLOS. However, MAS will put various scenarios into practice, raising the question of whether these restrictions are justified in the cases of MAS or whether IMO should adopt a common policy agreed by all states in general. Stronger passage rights for ships lying within territorial seas forming part of a strait used for international navigation is subject to the regime of transit passage under Articles 37-44 and also require clarification in the cases of MAS as well as under Article 35, where the straits are governed by longstanding international conventions.

While Article 58 provides the right to enjoy the exclusive economic zone as to Article 87, the rights and duties must be consistent with the laws and regulations of coastal states. MAS has not been intended to navigate only within national water but also in international water, thus, the jurisdiction of flag states and the freedom of seas needs to be applied pertinent to rules of international law. Article 90 gives the rights of navigation

in the high seas to all ships of any state. Will this right lead to complications in the cases of navigation of MAS in the Arctic? Thus, it is notable to consider whether MAS shall enjoy the same freedom of high seas in the Arctic as other oceans or there should be some restrictions or limitations. IMO might serve the gap by setting up international standards to be followed. Furthermore, the requirement under *Article 98(1)* which mentions the duty of the master to assist any person found at sea in danger of being lost also needs revision in the cases of MAS in the Arctic.<sup>16</sup> Should a ship without a master be exempted from this duty or method of radio communications would be used to impose this duty?

According to Henrik Ringbom, the legal regime being established by UNCLOS is neither complete nor static, nor it was intended to be so.<sup>17</sup> The UNCLOS provisions have prescribed the general methods of balancing jurisdiction over shipping and other uses of the ocean. However, with time due to the changes in practices, application and interpretation of laws by courts and tribunals, advancement of technologies, climate change, protection of the environment and its

---

<sup>16</sup> Ringbom, Henrik. "Regulating Autonomous Ships—Concepts, Challenges and Precedents." *Ocean Development & International Law* 50, no. 2-3 (2019): 141–69. <https://doi.org/10.1080/00908320.2019.1582593>.

<sup>17</sup> Ringbom, Henrik. *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea*. Leiden: Brill Nijhoff, 2015.

resources, new issues have arisen alongside the old challenges. Therefore, there seem to be differences between the jurisdictional arrangements under UNCLOS and their actual application by States. Hence, the lack of a clear and concrete definition of the term “ship” or “vessel” and the wordings of UNCLOS provision would create challenges while regulating MAS as well as enforcing rights and duties.

Considering that MAS will be safer and environmentally friendlier than the conventional ships, it will be more suitable for the Arctic. However, the MAS operation is already in the confrontation of facing regulatory challenges under the law of the sea. Hence, to accommodate MAS within the legal frameworks, it is important to give attention to the prospects of MAS operation in the Arctic including the high seas and the regulatory challenges that it might face. Special consideration should be given to the special nature of the Arctic ocean foreseeing the MAS operation in the Arctic high seas.



## **Multilevel Governance and Interregional Cooperation in the Arctic and North**

*Juha Saunavaara\* & Marina Lomaeva\*\**

### **Why to focus on multilevel governance and interregional cooperation**

A series of seminars and workshops focusing on the multilevel governance and interregional cooperation was organized in 2021 (mainly online). The institutional framework of this initiative were Japan's Arctic Challenge for Sustainability (ArCS) II project and the Human Resource Development Platform for Japan-Russia Economic Cooperation and Personnel Exchange (HaRP). The former includes the research program "Elucidating the Complex Dynamics of Arctic Politics and Its Contribution to Japan's Arctic Policy" that has a subgroup focusing on non-state actors and paradiplomacy. The latter is an undertaking funded by Japan's Ministry of Education, Culture, Sports, Science and Technology (MEXT), which focuses on the areas

covered by the 2016 Japan-Russia 8-point Plan for Economic Cooperation and includes 8 specialized sections corresponding to these points. One of these sections is called "SDGs: Environment, Resource Development, Multicultural Education", and its participants have demonstrated a particular interest in the Arctic-related matters.

The intellectual premise of this series is the notion that international relations and cross-border activity are not a field or domain that solely belongs to nation-states and national governments. In fact, a wide range of actors from subnational governments and multinational companies to NGOs and epistemic communities are involved in and possess capacities to plan and implement their own initiatives. Although the increasing influence of such actors on issues transcending national borders has long attracted the attention of researchers (as manifested by the emergence of such concepts as multi-level governance, two-level games, paradiplomacy etc.)<sup>1</sup>, recent studies focusing on international

---

\* Hokkaido University Arctic Research Center, juha.saunavaara@arc.hokudai.ac.jp.

\*\* Hokkaido University Arctic Research Center, m.v.lomaeva@arc.hokudai.ac.jp.

<sup>1</sup> Putnam, P. (1988). Diplomacy and domestic politics: the logic of two-level games. *International Organization*, 42, 3, Summer 1988; Duchacek, I. D. (1990). Perforated sovereignties: Towards a typology of new actors in international relations. In H. J. Michelmann & P. Soldatos (Eds.), *Federalism and international relations: The role of subnational units*. Oxford; Aldecoa, F. & Keating, M. (Eds.) (1999).



relations and governance research in the Arctic context argue that too much weight has been given to sovereign states and geopolitics, and there is a lack of research focusing on multi-stakeholder collaboration, multilevel governance, and the role of indigenous organizations and subnational entities, for instance<sup>2</sup>.

Although a number of books, articles and edited collections concerning these issues have been published during the recent years<sup>3</sup>, the organizers of the series considered it important to bring together scholars and other stakeholders / practitioners around the same (virtual) table. The starting point

for this series was a series of the following questions:

- What are possibilities and limitations of different actors and forums for interregional cooperation?
- What issue areas are meaningful for cooperation between non-state actors?
- What can and should be done at the subnational level?
- Can top-down initiatives lead to fruitful cooperation at the regional or local level?
- How can national and regional actors support local initiatives?

---

*Paradiplomacy in action: The foreign relations of subnational governments.* London; Dickson, F. (2014). The Internationalisation of Regions: Paradiplomacy or Multi-level Governance? *Geography Compass*, 8(10), 689–700. doi:10.1111/gec3.12152; Kuznetsov, A. S. (2015). *Theory and Practice of Paradiplomacy: Subnational Governments in International Affairs.* Abingdon: Routledge.

<sup>2</sup> Knecht, S. and Laubenstein, P. (2020). Is Arctic governance research in crisis? A pathological diagnosis. *Polar Record*, 56, e35. DOI: <https://doi.org/10.1017/S0032247420000352>; Tsui, E. (2020). Looking around: Opportunities of Using Paradiplomacy Scholarship in the Arctic Discussions. In T. S. Axworthy, S. French & E. Tsui (Eds.), *Lessons from the Arctic: The role of Regional Government in International Affairs.* Mosaic Press.

<sup>3</sup> Rowe, E. W. (2018). *Arctic Governance: Power in Cross-Border Cooperation.* Manchester: Manchester University Press; Sergunin, A. (2019). Subnational Tier of Arctic Governance. In M. Finger and L. Heininen (Eds.), *The Global Arctic Handbook.* Cham: Springer; Ackren, M. (2019). Diplomacy and paradiplomacy in the North Atlantic and the Arctic – A comparative approach. In M. Finger & L. Heininen (Eds.), *The Global Arctic handbook.* Cham: Springer; Kossa, M. (2019). China's Arctic engagement: Domestic actors and foreign policy. *Global Change, Peace & Security*, 32(1), 19–38. doi:10.1080/14781158.2019.1648406; Landriault, M., Charter, A., Rowe, E. W. and Lackenbauer, P.W. (2020). Governing Complexity in the Arctic Region. Abingdon: Routledge; Kossa, M., Lomaeva, M., and Saunavaara, J. (2020). East Asian subnational government involvement in the Arctic: A case for paradiplomacy? *The Pacific Review*, 34(4).

- What opportunities can be offered by public-private partnerships?
- What can be achieved through multilateral cooperation, and what role do bilateral ties play?

### Workshop and seminar series

This series is based on cooperation between various actors. The organizations and projects that have been involved in all workshops and seminars include Hokkaido University

Arctic Research Center, HaRP, ArCS II project, and the UArctic Thematic Network on the Arctic in Asia, Asia in the Arctic. In addition, various other actors, such as UiT – the Arctic University of Norway, University of Lapland, Moscow State University, Khabarovsk State University of Economics and Law, and UArctic Thematic Network on Arctic Law, have contributed to the planning and implementation of different events.

Table 1: Multilevel Governance and Interregional Cooperation series
Online workshop “Multilevel Governance and Interregional Cooperation: Vol.1 – The Pacific Arctic” held on January 12, 2021 <a href="https://russia-platform.oia.hokudai.ac.jp/en/event/5486">https://russia-platform.oia.hokudai.ac.jp/en/event/5486</a>
Online workshop “Japan-Russia Interregional Cooperation in the Arctic and North – Theory and Practice” held on March 3, 2021 <a href="https://russia-platform.oia.hokudai.ac.jp/en/report/5871">https://russia-platform.oia.hokudai.ac.jp/en/report/5871</a>
Online workshop “Multilevel Governance and Interregional Cooperation: Vol.2 – The Barents Region” held on June 9, 2021” <a href="https://russia-platform.oia.hokudai.ac.jp/en/report/6318">https://russia-platform.oia.hokudai.ac.jp/en/report/6318</a>
Online workshop “Sustainable Regional Development, International Cooperation and the Protection of the Arctic Environment” held on September 14, 2021 <a href="https://russia-platform.oia.hokudai.ac.jp/en/report/6866">https://russia-platform.oia.hokudai.ac.jp/en/report/6866</a>
International online conference “Cross-border interregional cooperation in the Asia-Pacific Region as a driver for the development of the Russian Far East and the Asian Arctic” held on October 18, 2021 <a href="https://russia-platform.oia.hokudai.ac.jp/en/report/7175">https://russia-platform.oia.hokudai.ac.jp/en/report/7175</a>
Seminar on “Strengthening Region-building through Multilevel Governance and Interregional Cooperation: Urban Sustainability through the Arctic Mayors’ Forum: Part 1” held on November 15, 2021

## **Key actors**

Although there has been variation between different workshops and seminars (also reflecting the geographical focus of individual events), most speakers and participants of the series have come from Russia and Japan (which was an anticipated outcome, determined by the design and institutional framework of this series), followed by Norway and Finland. The speakers represent various academic institutions, local, regional and national governments, NGOs and private enterprises.

The Russian speakers represented not only the central venerable research and educational institutions (such as Moscow State University, Saint Petersburg State University, Moscow State Institute of International Relations and Higher School of Economics) but also regional centers of the Arctic and northern research in both the western and eastern part of the Russian Arctic Zone (Kola Science Centre, Economic Research Institute of Far Eastern Branch of the Russian Academy of Sciences Khabarovsk State University of Economics and Law). The latter are playing a prominent role in the regional networks on the Arctic-related issues, providing advice to the local and regional authorities and

private companies, cooperating with environmental NGOs, and at times also acting as a conduit for cross-border cooperation of the actors in these networks with the neighboring regions in the Barents, Bering and Far East regions. Most Japanese speakers, on the other hand, came from research centers in the regions with a long history of paradiplomatic (sister-city and sister-region) engagement with the Russian Far East (Hokkaido, Niigata and Kobe), which have also played a major part in shaping Japan's Arctic policy.

This series at the intersection of the two research avenues – the Arctic and north-related cross-border cooperation, and the Northeast Asian countries' (such as Japan and China's) cross-border cooperation with the Arctic countries' regions – provided a good opportunity to take stock of the actors involved, their past and current projects and forums, which may be useful in streamlining further collaboration and establishing links between the existing networks.

## **Recurrent themes and key findings**

While the workshops and seminars described above have placed focus on different actors and geographical areas, several recurrent themes and

discussions related to the multilevel governance may be identified:

- *The past, present, and future of different forums and organizations supporting international and interregional cooperation in the Arctic* (How initiatives such as Barents Euro-Arctic Cooperation and the Northern Forum have contributed to development of the Arctic and north; what can be achieved through more recent initiatives such as the Arctic Mayor's Forum and Bering / Pacific-Arctic Council, etc.)
- *The role and added value of cross-border interregional cooperation* (What can be achieved through interregional cooperation in the Arctic and north; can interregional cooperation act as a driver of economic development; what is the value of cultural exchange across national borders; does cross-border interregional cooperation provide benefits to the entire participating regions, or are these benefits only felt by a small number of actors directly involved in these activities, etc.)
- *Challenges attendant on cooperation between different types of non-state actors in the Arctic and north* (How to identify objectives and working methods that are common to different actors; how non-state actors' international activity is supported/restricted by national governments, etc.)
- *Local and regional actors, international cooperation, and the protection of the Arctic environment* (How local communities (both indigenous and non-indigenous) have contributed to the protection of the environment and how their leverage could be increased; the role of NGOs/NPOs and international environmental cooperation, etc.)
- *The role of science and academic cooperation in the sustainable development of the Arctic and north* (Can academic community contribute to the regional development and strengthening ties between different regions; how science-policy interaction and industry-academia-government cooperation can contribute to the sustainable development of the Arctic, etc.)
- *Different types of settlements and projects, and their relation to the sustainable development of the Arctic and north* (Should the development be based on relatively small settlements, or does the Arctic need bigger cities as engines of growth;

can the large-scale industrial projects, which are often based on the “fly-in, fly-out” model, support the sustainable development, or should it be based on greater number of locally owned SMEs, etc.)

Although aiming at holistic circumpolar approach, many of the presentations given during the series focused on the Eurasian Arctic, especially those concerned with the issues related to the Russian Arctic, the Far East and East Asia. The smaller share of speeches elaborating on the developments in the North American Arctic is mainly due to the difficulties of timing and time-differences between different continents (which is clearly an issue also affecting the interregional cooperation in the Arctic and north).

#### **Future activities**

The series will continue with “Strengthening Region-building through Multilevel Governance and Interregional Cooperation: Urban Sustainability through the Arctic Mayors’ Forum: Part 2” workshop, which is going to be held in Tromsø at the beginning of February 2022. The two events focusing on the Arctic cities will pave the way for a publication of a special issue in a peer reviewed journal.

Furthermore, the issues discussed during the series are also going to be included in the forthcoming publication by the ArCS II program focusing on international relations and cross-border cooperation. While the world is gradually opening after the shock caused by the still ongoing COVID-19 pandemic, the experience gained from online and hybrid events is so valuable and rewarding that we are most certainly going to continue this series in the future.



*The series will continue with “**Strengthening Region-building through Multilevel Governance and Interregional Cooperation: Urban Sustainability through the Arctic Mayors’ Forum: Part 2**” workshop, which is going to be held in **Tromsø** at the beginning of **February 2022** .*

# A Note on U.S.-China Cooperation in the Arctic: Opportunities and Challenges

Yuanyuan Ren\*

## Introduction

On March 18<sup>th</sup> and 19<sup>th</sup> 2021, the first U.S.-China high-level diplomatic meeting of the Biden administration took place in Anchorage, Alaska against the backdrop of fast deteriorating bilateral relations between the two countries since the beginning of 2020.<sup>1</sup> Nevertheless, the meeting started with angry rebukes and several sanctions were placed by both sides after the meeting finished.<sup>2</sup> On October 6<sup>th</sup>, 2021, the U.S. and Chinese top officials met again in Zurich, Switzerland, which resulted in an agreement in principle that the U.S. President Biden and Chinese President XI will hold a virtual summit by the end

of the year.<sup>3</sup> Finally, the two powers appeared to try to ease some tensions.

How would the Arctic navigate the new U.S.-China competition? What are the effects of ongoing U.S.-China tensions in other areas on China's engagement in the Arctic? If U.S.-China Arctic cooperation is optimal and feasible, where are the best opportunities and main constraints to the collaboration? This note attempts to answer these questions by focusing on three key areas in which the two countries have opportunities to interact with each other and develop dialogue and collaboration: (1) the application of the United Nations Convention on the Law of the Sea (UNCLOS)<sup>4</sup> to the Arctic Ocean, with a focus on the issue of freedom of navigation; (2) the implementation of new Arctic treaties, such as the Agreement on Enhancing International Arctic Scientific Cooperation and the Agreement to Prevent Unregulated High Seas

---

\* Post-doctoral Hauser Global Fellow, Visiting Scholar at the U.S.-Asia Law Institute, New York University School of Law, [yuanyuan.ren@nyu.edu](mailto:yuanyuan.ren@nyu.edu).

<sup>1</sup> Humeyra Pamuk, Michael Martina & David Brunnstrom, *U.S., Chinese Diplomats Clash in First High-level Meeting of Biden Administration*, REUTERS (Mar. 18, 2021), <https://www.reuters.com/article/uk-usa-china-alaska-idAFKBN2BA2II>.

<sup>2</sup> See Econsult Solutions, *After US and China Alaska Meeting: A 2021 Outlook for US-China Relations*, Apr. 9, 2021, <https://econsultsolutions.com/us-and-china-alaska-meeting-2021-outlook-us-china-relations/>.

<sup>3</sup> David E. Sanger, *Biden and Xi Jinping of China Agree to Hold a Virtual Summit*, THE NEW YORK TIMES (Oct. 6, 2021), <https://www.nytimes.com/2021/10/06/us/politics/biden-xi-jinping-china-summit.html>.

<sup>4</sup> U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

Fisheries in the Central Arctic Ocean; and (3) China's trade and economic activities in Alaska.

## **Situating the Arctic in U.S.-China Relations**

### *The Arctic for China*

The diminishment of Arctic sea ice is opening new shipping routes and making natural resources more accessible in the Arctic, a dramatic change that has presented unprecedented opportunities and challenges for both Arctic and non-Arctic states. As a non-Arctic country, China's contemporary involvement in the region started in the 1990s through its conduct of scientific research and expeditions. In June 2017, Beijing introduced the Polar Silk Road, also known as "Arctic Silk Road" or "Ice Silk Road," as an integral part of its Belt and Road Initiative (BRI).<sup>5</sup> In January 2018, China released its first Arctic

Policy White Paper, detailing China's interests and goals in the Arctic.<sup>6</sup> Over the last three years, however, some Chinese companies have experienced a few setbacks in their Arctic engagement. For instance, In July 2019, the Alaska Gasline Development Corporation (AGDC) did not renew its 2017 nonbinding agreement with three Chinese state-owned companies for a \$43 billion liquefied natural gas (LNG) development project in Alaska.<sup>7</sup> In May 2021, the Arctic Connect project was suspended for further assessment.<sup>8</sup>

Overall, there is no doubt that China identifies the Arctic as a strategically valuable region for its development and influence. Nevertheless, the Arctic does not constitute a foreign priority or a "core national interest" for Beijing. There are strong indications that China is becoming more confident about its participation in the Arctic. On the other hand, given its autocratic system, poor

---

<sup>5</sup> See NATIONAL DEVELOPMENT AND REFORM COMMISSION & STATE OCEANIC ADMINISTRATION OF THE PEOPLE'S REPUBLIC OF CHINA, *Vision for Maritime Cooperation Under the Belt and Road Initiative*, (Jun. 20, 2017), available at [http://www.xinhuanet.com/english/2017-06/20/c\\_136380414.htm](http://www.xinhuanet.com/english/2017-06/20/c_136380414.htm).

<sup>6</sup> See THE STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, *China's Arctic Policy*, (Jan. 26, 2018), available at [http://english.gov.cn/archive/white\\_paper/2018/01/26/content\\_281476026660336.htm](http://english.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm).

<sup>7</sup> See Elwood Brehmer, *AGDC President Outlines Path Forward; China Deal is Dead*, ALASKA JOURNAL OF COMMERCE (Jul. 24, 2019), <https://www.alaskajournal.com/2019-07-24/agdc-president-outlines-path-forward-china-deal-dead>.

<sup>8</sup> See Winston Qiu, *Trans-Arctic Cable Project Arctic Connect Comes to a Suspension*, SUBMARINE CABLE NETWORKS (May 29, 2021), <https://www.submarinenetworks.com/en/systems/asia-europe-africa/arctic-connect/trans-arctic-cable-project-arctic-connect-comes-to-a-suspension>.

record of complying with international law elsewhere, and the potential dual civil-military use of the projects that it has been investing in the Arctic, the suspicion China faces in the region is unlikely to be dispelled in a foreseeable

future. These suspicions and skepticism inevitably cast a shadow on China's bilateral and multilateral cooperation in the Arctic, including U.S.-China Arctic relations.



### *The Arctic for the United States*

The United States is an Arctic state as well as an Arctic coastal state by virtue of Alaska. Although it has substantial interests in the Arctic,<sup>1</sup> the country has been behaved as “a reluctant Arctic power.”<sup>2</sup> The Arctic has been a

“stepchild” to the more pressing concerns of the U.S. security planners and strategists.<sup>3</sup> The U.S. Arctic policy has been incoherent and inconsistent.<sup>4</sup> The last U.S. national Arctic Strategy was published eight years ago by the Obama administration,<sup>5</sup> which highlighted climate change and the

---

<sup>1</sup> See generally Congressional Research Service (CRS), *Changes in the Arctic: Background and Issues for Congress*, R41153, available at <https://sgp.fas.org/crs/misc/R41153.pdf> (last updated on 12 October 2021).

<sup>2</sup> See Rob Huebert, *United States Arctic Policy: The Reluctant Arctic Power*, 2 SCHOOL OF PUBLIC POLICY (SPP) BRIEFING PAPERS 1 (2009); Andreas Østhagen, *The United States as an Arctic Actor*, The Arctic Institute, Center for Circumpolar Security Studies (Dec. 12, 2011), <https://www.thearcticinstitute.org/united-states-arctic-actor/>.

<sup>3</sup> Michael T. Corgan, *US Security Policy in the American Arctic*, in ROUTLEDGE HANDBOOK OF ARCTIC SECURITY 152 (Gunhild Hoogensen Gjørsv et. al., 2020).

<sup>4</sup> For a more detailed overview of the evolution of the U.S. policy regarding the Arctic, see *id.*, at 153-161.

<sup>5</sup> THE WHITE HOUSE, *National Strategy for the Arctic Region*, May 10, 2013, [https://obamawhitehouse.archives.gov/sites/default/files/docs/nat\\_arctic\\_strategy.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/nat_arctic_strategy.pdf).



importance of international cooperation to the U.S. Arctic policy. It was superseded by many events<sup>6</sup> and basically ignored by the Trump administration. Between 2019 to 2021, several U.S. military branches released their own Arctic strategies.<sup>7</sup> Many of these military strategies emphasized great power competition and depicted China as a rule-challenger in the Arctic. In short, they tend to overstate the divergence of the national interests of the U.S. and China in the Arctic, downplay their shared concerns, and neglect the issues where both countries could benefit from cooperation.

The Biden administration is expected to form a new national Arctic strategy. For example, climate change would be very likely put back on the U.S. Arctic agenda and the U.S. may take more leadership on the issue.<sup>8</sup> Accordingly, many commentators have suggested

that combating Arctic climate change is an urgent issue for the U.S. and China to collaborate and coordinate.<sup>9</sup>

Taken together, the Arctic does not constitute a focal and priority issue in both Chinese and the U.S. foreign policies. This “*low-low*” status presents both challenges and opportunities for the U.S.-China Arctic cooperation: On the one hand, when both sides return to the negotiating tables, the Arctic may not gain enough attention and therefore be put in a far-off place. On the other hand, as a low priority region for both the U.S. and China, the Arctic offers many unique opportunities for the two powers to develop cooperation and achieve *win-win* results. For example, there are many non-traditional security issues in the Arctic region, such as climate change, scientific research, and marine environmental protection, where the

---

<sup>6</sup> For instance, in May 2019, for the first time since its creation, the Arctic Council failed to reach agreement on a final declaration due to the U.S. government’s anti-climate stance. See generally Timo Koivurova, *How US Policy Threatens Existing Arctic Governance*, ARCTICTODAY (Jan. 17, 2020), <https://www.arctictoday.com/how-us-policy-threatens-existing-arctic-governance/>.

<sup>7</sup> For a quick overview of these military strategies, see David Auerswald, *A U.S. Security Strategy for the Arctic*, WAR ON THE ROCKS (May 27, 2021), <https://warontherocks.com/2021/05/a-u-s-security-strategy-for-the-arctic/>.

<sup>8</sup> See *Republican Senator: Expects Climate Changes as US Arctic Policy Priority with Biden Administration*, HIGH NORTH NEWS (Oct. 12, 2020), <https://www.highnorthnews.com/en/republican-senator-expects-climate-change-us-arctic-policy-priority-biden-administration>; Edward-Isaac Doveve & Paul LeBlanc, *Obama Swipes at Trump for “Four Years of Active Hostility” on Climate Change in Glasgow Speech*, CNN (Nov. 8, 2021), <https://www.cnn.com/2021/11/08/politics/obama-glasgow-speech/index.html>.

<sup>9</sup> See, e.g., Pavel Devyatkin, “*Science Cooperation with the Snow Dragon: Can the U.S. and China Work Together on the Arctic Climate Crisis?*” THE ARCTIC INSTITUTE (Apr. 15, 2021), <https://www.thearcticinstitute.org/science-cooperation-snow-dragon-us-china-arctic-climate-crisis/?cn-reloaded=1>.

two countries naturally share common interests and concerns. Some of these opportunities have been identified and described by other authors elsewhere.<sup>10</sup>

Based on some new developments in the Arctic as well as the U.S-China relations over the last few years, the subsequent discussion chooses to focus on three other issues in which the U.S. and China could develop trust and cooperation, namely, the freedom of navigation in the Arctic, the implementation of new Arctic treaties, and Alaska-China economic relations. Before proceeding it is worth noting that the Arctic issues are usually not clear-cut, and they may overlap in specific sub-issues.

### **Freedom of Navigation in the Arctic Ocean**

With respect to the freedom of navigation (FON) in the Arctic Ocean, the United States and China have shared national interests but different

practices. As its international trade and shipping expand under the BRI framework, navigational freedom is becoming essential to China. FON has long been vital to the U.S.' national and security interests. As the sea ice melts in the summer months, there are three alternative shipping routes for international trade and other needs in the Arctic Ocean: the Northern Sea Route ("NSR") between the Atlantic and the Pacific north of Russia, the Northwest Passage ("NWP") through the Canadian Arctic Archipelago, and the transpolar route (the "Central Route") across the North Pole area. The legal statuses of the NSR and the NWP have been contentious for decades. As a potential major user of the Arctic Sea routes, China is concerned with the existing absolute control of Russia and Canada over the NSR and the NWP in the Arctic Ocean. Nevertheless, Beijing has been careful not to take a clear side regarding the disputes. By contrast, the U.S. has formally challenged the sovereignty and control of Russia and

---

<sup>10</sup> See, e.g., Nong Hong, "How Cooperation on Climate Change, Polar Research Can Help Thaw U.S.-China Relations," ICAS, (May 3, 2021), <https://chinaus-icas.org/research/how-cooperation-on-climate-change-polar-research-can-help-thaw-us-china-relations/>; Liz Bowman & Qingchao Xu, *China in the Arctic: Policies, Strategies, and Opportunities for the Alaska*, Center for Arctic Policy Studies, (Feb. 2020), <https://uaf.edu/caps/our-work/Bowman%20and%20Xu%20China%20in%20the%20Arctic%20Final18Feb2020.pdf>; Heather A. Conley ed., *U.S-Sino Relations in the Arctic: A Roadmap for Future Cooperation*, Center for Strategic and International Studies, (Jan. 2017), available at [https://csis-prod.s3.amazonaws.com/s3fs-public/publication/170127\\_Conley\\_USSinoRelationsArctic\\_Web.pdf?Ri2iQmeBhGEHKyPQg0SnyeA8U0a0xeDN](https://csis-prod.s3.amazonaws.com/s3fs-public/publication/170127_Conley_USSinoRelationsArctic_Web.pdf?Ri2iQmeBhGEHKyPQg0SnyeA8U0a0xeDN); Ingrid Lundestad & Øystein Tunsjø, *The United States and China in the Arctic*, 51 (259) POLAR RECORD 392 (2015).

Canada over the two main Arctic passages.

The ongoing U.S.-China tension in the South China Sea (SCS) also shows that the two countries have very different interpretations of the FON rules. Particularly, the U.S. asserts that China's historic claims within the nine-dash line in the SCS infringe the freedom of navigation in the region. In this context, how could the two countries develop trust and cooperation to ensure and promote the freedom of navigation in the Arctic Ocean?

To answer this question, we need to have a closer look into the possible legal bases for Canada and Russia to control and regulate the NWP and the NSR. In a nutshell, there are two principal legal grounds argued by Canada and Russia: historic titles and Article 234 of UNCLOS.

### *Historic maritime claims and the freedom of navigation*

In the Arctic, Canada and Russia have long asserted sovereignty over large

Arctic waters based on historic grounds. Specifically, Canada claims that the NWP waters are its *internal waters* based on historic titles and, therefore, they fall under the full sovereignty of Canada. Despite that Russia's treatment of its NSR waters under the law of the sea is less clear, it has *de facto* placed the shipping of all foreign vessels through the NSR under its absolute control based on the doctrine of historic waters and Article 234 of UNCLOS.

As mentioned above, China also claims that its sovereignty over the Nansha Islands and their adjacent waters in the SCS "has been formed over a long course of history."<sup>11</sup> Although China has repeatedly committed itself to respecting the freedom of navigation in the disputed areas in the SCS, it has never clarified its commitment in detailed legal terms. To challenge China's various claims in the SCS, the U.S. has routinely conducted naval patrols and aerial surveillance through its freedom of navigation operations (FONOPs) program in the region.<sup>12</sup>

---

<sup>11</sup> See, e.g., PRC Ministry of Foreign Affairs, *Foreign Ministry Spokesperson Hong Lei's Remarks on Vietnam's Statement on the Chinese Government's Position Paper on Rejecting the Jurisdiction of the Arbitral Tribunal Established at the Request of the Philippines for the South China Sea Arbitration*, 12 December, 2014, available at [https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1218756.shtml](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1218756.shtml).

<sup>12</sup> See generally Eleanor Freund, *Freedom of Navigation in the South China Sea: A Practical Guide*, Belfer Center for Science and International Affairs, (June 2017), <https://www.belfercenter.org/publication/freedom-navigation-south-china-sea-practical-guide>.

Overall, although China's historic claim in the SCS is quite different from the historic maritime claims in the Arctic,<sup>13</sup> it is unlikely that China would join the U.S. to challenge the control of Russia and Canada over the NSR and the NWP waters *on the basis of historic titles*.

### *Article 234 of UNCLOS and the freedom of navigation*

However, to focus just on historic maritime claims in the SCS and the Arctic regarding the U.S.-China FON cooperation would be to miss half the picture. Another key legal basis used by Russia and Canada to regulate the NSR and the NWP waters is Article 234 of UNCLOS. The provision allows a coastal state to take unilateral action including enacting laws and regulations to protect the "ice-covered areas" from pollution from vessels within their economic exclusive zones (EEZs).<sup>14</sup> To date, the Article 234 has raised numerous legal questions especially in light of the reduction of

sea ice cover and the enforcement of the new mandatory International Code for Ships Operating in Polar Waters (the "Polar Code").<sup>15</sup> Especially, Article 234 is an *environmental* claim. However, both Canada and Russia have used it to support their *sovereign* control over the whole water areas of the NWP and the NSR. Moreover, both countries set *prior authorization* regimes to permit vessels to navigate in the waters rather than *prior notification*.<sup>16</sup> Furthermore, contrary to the requirement of Article 236 of UNCLOS,<sup>17</sup> both Russia and Canada require *all* vessels to obtain prior authorization to enter and transit the NSR and the NWP waters. Thus, the U.S. has repeatedly protested Russia's NSR regime and the Canadian Arctic navigation regime. In short, under the new circumstances, how to balance the coastal state's responsibilities to protect the maritime environment and pay due regard to the freedom of navigation in the Arctic waters remains highly debatable.

---

<sup>13</sup> A more detailed analysis of the differences between the historic maritime claims in the SCS and the Arctic is provided in another article entitled "*China in the Arctic Ocean and the South China Sea: Beyond the (In)consistency Debate*," by this author. The article is available upon request.

<sup>14</sup> See UNCLOS, *supra* note 4, art. 234.

<sup>15</sup> The text of the Polar Code is available at <https://www.mardep.gov.hk/en/msnote/pdf/msin1540anx1.pdf>.

<sup>16</sup> For a comprehensive discussion, see Jan Jakub Solski, *Northern Sea Route Permit Scheme: Does Article 234 of UNCLOS Allow Prior Authorization?* 35 OCEAN YEARBOOK 443 (2021).

<sup>17</sup> Article 236 excludes the category of state vessels from the coastal state's regulation under Arctic 234. See UNCLOS, *supra* note 4, art. 236.

Unlike the issue of historic maritime claims, the implementation of Article 234 and the Polar Code does not necessarily create legal dilemmas for Beijing in terms of co-promoting the freedom of navigation in the Arctic Ocean. Looking ahead, it could serve as a fertile topic for U.S.-China Arctic FON dialogue concerning marine environmental protection and EEZ regime in general. For instance, China may join hands with the U.S. (and others) to address the inconsistency of Canada's and Russia's Article 234 regulatory regimes with Article 236 of UNCLOS because this specific issue is completely irrelevant to three countries' (Canada, Russia, and China) historic maritime claims in the Arctic and the SCS. This joint effort could also facilitate the navigation of China's *governmental* marine scientific research icebreakers and other vessels in the Arctic EEZ waters of Canada and Russia.<sup>18</sup> Moreover, as China's naval

presence in foreign EEZs increases in the future, its positions on the navigation of warships could also evolve.<sup>19</sup>

Finally, the U.S.-China cooperation regarding the interpretation and application of UNCLOS in the Arctic, including Arctic FON collaboration, could be developed through negotiating Memoranda of Understandings (MOUs) or joint statements on some finely defined issues. In this regard, it is worth noting that, in 1989, the U.S. and the Soviet Union (USSR) harmonized their positions regarding the innocent passage of warships in the territorial sea.<sup>20</sup> Unfortunately, much conversation on social media now often plays up U.S.-China military confrontation in the SCS and beyond. Only a little audience knows that the two countries are actually the drafters and parties of the Code for Unplanned Encounters at Sea (CUES).<sup>21</sup> Even in the

---

<sup>18</sup> Of course, according to Article 246 (2) of UNCLOS, consent would be still needed for *conducting marine scientific research (MSR)* from coastal states in their EEZs and on their continental shelves. See UNCLOS, *supra* note 4, art. 246 (2).

<sup>19</sup> See also Kimberly Hsu & Craig Murray, *China's Expanding Military Operations in Foreign Exclusive Economic Zones*, U.S.-China Economic and Security Review Commission Staff Research Backgrounder, June 19, 2013, available at [https://www.uscc.gov/sites/default/files/Research/Staff%20Backgrounder\\_China%20in%20Foreign%20EEZs.pdf](https://www.uscc.gov/sites/default/files/Research/Staff%20Backgrounder_China%20in%20Foreign%20EEZs.pdf).

<sup>20</sup> *Joint Statement by the United States of America and the Union of Soviet Socialist Republics, Uniform Interpretation of Rules of International Law Governing Innocent Passage*, September 23, 1989, 28 (6) INTERNATIONAL LEGAL MATERIALS 1444-1447 (1989).

<sup>21</sup> On April 22, 2014, the CUES was signed by 21 Pacific nations at the 14<sup>th</sup> Western Pacific Naval Symposium in Qingdao, China. The text is available at <https://news.usni.org/2014/06/17/document-conduct-unplanned-encounters-sea>.

East Asian seas, the U.S. and China have signed MOUs on Rules of Behavior for Safety of Maritime and Air Encounter<sup>22</sup> and Notification of Major Military Activities Confidence-Building Measures Mechanism<sup>23</sup> to increase mutual trust and dialogue. These existing military confidence-building measures and mechanisms between the U.S. and China could inspire the two countries to develop constructive channels for their collaboration and trust-building concerning navigation in the Arctic Ocean.

### **Cooperation Opportunities regarding New Arctic Treaties**

#### ***The Agreement on Enhancing International Arctic Scientific Cooperation***

The Agreement on Enhancing International Arctic Scientific Cooperation was negotiated under the auspices of the Arctic Council (AC) during the U.S. chairmanship of 2015-2017. The Agreement was adopted by the eight Arctic states on May 11<sup>th</sup>, 2017 and entered into force on May 23<sup>rd</sup>, 2018.<sup>24</sup> Since the Agreement would be binding under international law and the issue is significant for non-parties, many non-Arctic observers in the AC, including China, were invited to participate in the negotiating process.<sup>25</sup> The goal of the Agreement is to “enhance cooperation in scientific activities in order to increase effectiveness and efficiency in the development of scientific knowledge about the Arctic.”<sup>26</sup> According to the Agreement, if scientists coming from

---

<sup>22</sup> Memorandum of Understanding between the Department of Defense of the United States of American and the Ministry of National Defense of the People’s Republic of China Regarding the Rules of Behavior for Safety of Air and Maritime Encounters, November 10, 2014, available at [https://dod.defense.gov/Portals/1/Documents/pubs/141112\\_MemorandumOfUnderstandingRegardingRules.pdf](https://dod.defense.gov/Portals/1/Documents/pubs/141112_MemorandumOfUnderstandingRegardingRules.pdf). It is worth noting that, in line with the rules of the CUES, the MOU has no specific geographic limitation, such as territorial sea, that could bring in political disagreement. For a further discussion, see Yan Yan, *Maritime Confidence-Building Measures: Assessing China-US MOU on Notification of Major Military Activities and Rules of Behavior*, in *MARITIME ORDER AND THE LAW IN EAST ASIA* 171 (Nong Hong & Gordon Houlden eds., 2018).

<sup>23</sup> Memorandum of Understanding between the United States of American Department of Defense and the People’s Republic of China Ministry of National Defense on Notification of Major Military Activities Confidence-Building Measures Mechanism, November 4, 2014, available at [https://dod.defense.gov/Portals/1/Documents/pubs/141112\\_MemorandumOfUnderstandingOnNotification.pdf](https://dod.defense.gov/Portals/1/Documents/pubs/141112_MemorandumOfUnderstandingOnNotification.pdf).

<sup>24</sup> The Agreement is available at <https://oaarchive.arctic-council.org/handle/11374/1916>.

<sup>25</sup> For a further discussion, see, e.g., Akiho Shibata & Maiko Raita, *An Agreement on Enhancing International Arctic Scientific Cooperation: Only for the Eight Arctic States and Their Scientists?* 8 *Y. B. POLAR L.* 129 (2016).

<sup>26</sup> *Supra* note 32, art. 2.

non-parties countries partner in a project with scientists from an Arctic state, they would effectively benefit from the provisions of the Agreement.<sup>27</sup> Moreover, the Arctic states shall meet to review the implementation of the Agreement no later than one year after the enforcement of the Agreement, and from then on as decided by the Parties. Such meeting would invite Permanent Participants as well as observers to observe and provide information. Scientific cooperation activities with non-parties regarding the Arctic may also be taken into account when reviewing the implementation of the Agreement.<sup>28</sup>

To date, no countries have invoked the Agreement to overcome a barrier to Arctic research. In addition, the awareness of the Agreement is low in both the U.S. and China.<sup>29</sup> On the other hand, as suggested by Heather A. Conley and others, utilizing the Agreement can help establish

transparency and new norms regarding Arctic scientific collection, data monitoring and analysis.<sup>30</sup> It could facilitate U.S.-China Arctic scientific cooperation and access to some key Arctic research.

### *The Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean*

The Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (“CAOF Agreement”) was initiated by the five Arctic coastal states (Canada, Denmark, Norway, Russia, the United States) in June 2010. In December 2015, five other fishing countries and entities (China, the European Union, Iceland, Japan, and Republic of Korea) started to be invited to participate in the treaty-making process. Therefore, the negotiation of the Agreement has been known as the “Arctic Five-plus-Five process.”<sup>31</sup> China has the world’s largest distant-

---

<sup>27</sup> *Id.*, art. 17 (2).

<sup>28</sup> *Id.*, art. 12.

<sup>29</sup> See John Farrell, *How the US Government is Implementing the Agreement*, in SUPPORTING IMPLEMENTATION OF ARCTIC SCIENCE AGREEMENT (Science Diplomacy Action Synthesis No.3), January 2019, at 17, available at <https://www.uarctic.org/media/1599347/science-diplomacy-action-synthesis-no-3-arctic-science-agreement-dialogue-panel-supporting-implementation-of-the-arctic-science-agreement-31jan19.pdf>.

<sup>30</sup> Heather A. Conley et. al., *America’s Arctic Moment: Great Power Competition in the Arctic to 2050*, A Report of the CSIS Europe Program, March 2020, at 6, available at <https://www.csis.org/analysis/americas-arctic-moment-great-power-competition-arctic-2050>.

<sup>31</sup> See generally Joji Morishita, *The Arctic Five-plus-Five Process on Central Arctic Ocean Fisheries Negotiations: Reflecting the interests of Arctic and non-Arctic Actors*, in EMERGING LEGAL ORDERS IN THE

water fishing (DWF) fleet<sup>32</sup> and is interested in the Arctic maritime resources, especially in the high seas area of the CAO, and therefore participated in the negotiations actively.<sup>33</sup> The CAO Agreement entered into force on June 25<sup>th</sup>, 2021.<sup>34</sup>

The CAO Agreement adopted a precautionary approach to the conservation and management of the high seas fishing in the CAO. The parties agreed to ban unregulated fisheries in the high sea portion of the CAO for sixteen years to allow time for scientists to study the fish and fish habitat in the region and their suitability for commercial fishing.<sup>35</sup> During this period of time, a Joint Program of Scientific Research and Monitoring (JPSRM) will be put in place under the framework of the Agreement.<sup>36</sup> At the same time, the

JPSRM program could also further the study on the ecosystem of CAO and has a potential to contribute to the ongoing treaty negotiations on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ) and the protection of marine biodiversity in the Arctic Ocean. On the other hand, given the limited scientific knowledge regarding fisheries resources in the CAO, there are many challenges in implementing the CAO Agreement.<sup>37</sup> In this context, how to put this new treaty into practice offers specific opportunities for the U.S. and China to collaborate and enhance mutual trust regarding the Arctic. In fact, the U.S. and China have long worked together to combat illegal, unreported, and unregulated (IUU) fishing in other regions. For example, they have cooperated in patrolling high seas

---

ARCTIC: THE ROLE OF NON-ARCTIC ACTORS 109-131 (Akiho Shibata, Leilei Zou, Nikolas Sellheim & Marzia Scopelliti eds., 2019).

<sup>32</sup> See Miren Gutierrez et. al., *China's Distant-water Fishing Fleet: Scale, Impact and Governance*, ODI Report, June 2020, at 8, available at [https://cdn.odi.org/media/documents/chinesedistantwaterfishing\\_web.pdf](https://cdn.odi.org/media/documents/chinesedistantwaterfishing_web.pdf).

<sup>33</sup> See Nengye Liu, *How Has China Shaped Arctic Fisheries Governance?* THE DIPLOMAT (Jun. 20, 2018), <https://thediplomat.com/2018/06/how-has-china-shaped-arctic-fisheries-governance/>.

<sup>34</sup> The text of the Agreement is available at <https://www.dfo-mpo.gc.ca/international/agreement-accord-eng.htm>.

<sup>35</sup> *Id.* art.13.

<sup>36</sup> *Id.* art. 4.

<sup>37</sup> For a more detailed discussion, see, e.g., David L. VanderZwaag, *Governance of Fisheries in the Central Arctic Ocean: Cooperative Currents, Foggy Future*, in GOVERNING MARINE LIVING RESOURCES IN THE POLAR REGIONS 92-108 (Nengye Liu et. al. eds., 2019) (discussing five aspects of the uncertainty regarding the implementation of the Agreement, including how to deal with future “exploratory fishing” under the Agreement, the compatibility of coastal states’ fisheries conservation measures, the unsettled outer continental shelf boundaries in the CAO, how to coordinate scientific research and cooperation, and the implications of a new BBNJ treaty for future Arctic fisheries).



illegal driftnet fishing in the North Pacific Ocean under the U.S.-China Shiprider Memorandum since 1993.<sup>38</sup>

### **An Alaska Perspective on U.S.-China Economic Relations**

In June 2018, then-Governor of Alaska Bill Walker completed an *Opportunities Alaska: China Trade Mission* in China to expand Alaska's export and investment relationship with China.<sup>39</sup> However, since the Trump administration started a tariffs war against China, Alaska's economic relationship with China has been caught in the crossfire. For instance, seafood is a top three economic driver for Alaska and one of the leading employers contributing to more than 60,000 jobs in Alaska alone.<sup>40</sup> China plays a vital role for Alaska's

seafood industry and maintained the top export partner for Alaska in 2020.<sup>41</sup>

Amidst the on-going U.S.-China trade war, China has imposed up to 37 percent levy for the U.S. seafood in retaliation of U.S. tariffs on Chinese goods. This plunged Alaska's seafood exports to China by 46 percent from a high in 2017.<sup>42</sup> While some nontariff trade barriers were removed by Phase One trade agreement signed by the U.S. and China in January 2020,<sup>43</sup> most Alaska seafood products continue to face a 32 to 40 percent final tariff in the Chinese market.<sup>44</sup> At the same time, Beijing has lowered the applied most favored nation (MFN) import tariffs for certain seafood products from other

---

<sup>38</sup> *The Memorandum of Understanding between the Government of the United States of America and the Government of the People's Republic of China on Effective Cooperation and Implementation of United Nations General Assembly Resolution 46/215 of December 20, 1991*, signed in Washington, D.C., on December 3, 1993. The MOU expired on December 31, 2019.

<sup>39</sup> Austion Baird, *China Trade Mission Delegates Return Home*, ALASKA NATIVE NEWS (Jun.7, 2018), <https://alaska-native-news.com/china-trade-mission-delegates-return-home/35506/>.

<sup>40</sup> USTR 301 Committee, *Section 301 Tariffs Public Hearing Proceedings*, August 23, 2018, at 11, <https://ustr.gov/sites/default/files/enforcement/301Investigations/0823USTR.pdf>.

<sup>41</sup> See The U.S.-China Business Council, *2021 State Export Report: Goods and Services Exports by U.S. States to China Over the Past Decade*, May 2021, [https://www.uschina.org/sites/default/files/state\\_export\\_report\\_2021\\_full\\_report.pdf#page=21](https://www.uschina.org/sites/default/files/state_export_report_2021_full_report.pdf#page=21).

<sup>42</sup> Chu Daye & Tu Lei, *Alaska's China Exports Hurt by Trade War, Highlighting Lose-lose Situation*, GLOBAL TIMES (Mar. 19, 2021), <https://www.globaltimes.cn/page/202103/1218886.shtml>.

<sup>43</sup> See Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China, January 15, 2020, available at [https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic And Trade Agreement Between The United States And China Text.pdf](https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic%20And%20Trade%20Agreement%20Between%20The%20United%20States%20And%20China%20Text.pdf).

<sup>44</sup> Department of Commerce, Community, and Economic Development, *State of Alaska FY2022 Governor's Operating Budget*, December 15, 2020, at 372, available at [https://omb.alaska.gov/ombfiles/22\\_budget/DCCED/Proposed/budget\\_summary\\_dcced.pdf](https://omb.alaska.gov/ombfiles/22_budget/DCCED/Proposed/budget_summary_dcced.pdf).

countries under the World Trade Organization (WTO) rules.<sup>45</sup>

Particularly, because of labor shortages, a significant amount of Alaska's seafood is often sent to China for processing before re-exporting to other countries, including the U.S. However, many re-imports of Alaskan seafood processed in China are *not* exempt from the current retaliatory U.S. tariffs. In other words, those Alaska companies that reprocess U.S.-harvested seafood in China for re-exporting to the U.S. market are immediately affected.<sup>46</sup> Consequently, Alaska's congressional delegation has urged the U.S. Trade Representative (USTR) to remove U.S.-caught seafood from the tariff lists.<sup>47</sup> According to current USTR Katherine Tai, the U.S. government will be launching a new worker-centered trade strategy towards China and a key element of the

revised approach involves the launch of a new exclusion review process for Section 301 tariffs on Chinese exports.<sup>48</sup>

In addition, since September 2020, approximately 3,600 cases have been filed in the U.S. Court of International Trade (CIT), challenging the imposition of a third and fourth round of tariffs on products from China by the USTR Office pursuant of Section 301 of the Trade Act of 1974.<sup>49</sup> The lawsuits have been consolidated behind the initial HMTX lawsuit.<sup>50</sup> If the lawsuit is successful, it would effectively end the tariffs on Chinese goods and the U.S. government should refund any duties paid by plaintiffs pursuant to List 3 and List 4. To date, the exact impacts of Phase One trade agreement and the ongoing Section 301 litigation on Alaska seafood companies and the Alaska-China trade relations remain

---

<sup>45</sup> This annual tariff adjustment plan did not affect the retaliatory tariffs on U.S. exports to China. For more information, see USDA FOREIGN AGRICULTURAL SERVICE, *Report: China Lowers Applied MFN Tariff Rates on Selected Agricultural Products*, CH 2019-0199, January 5, 2020, available at <https://www.fas.usda.gov/data/china-china-lowers-applied-mfn-tariff-rates-selected-agricultural-products-0>.

<sup>46</sup> See Alaska Seafood, *Alaska Seafood 2019 US/China Tariff Overview*, (Jan. 15, 2020), <https://uploads.alaskaseafood.org/2020/01/ASMI-Tariff-Overview-Jan-2020.pdf>.

<sup>47</sup> See, e.g., *supra* note 48.

<sup>48</sup> Kate McNulty, Christopher Adams & Erin Biel, *U.S. Trade Representative Previews New China Strategy*, GLOBAL POLICY WATCH (Oct. 7, 2021), <https://www.globalpolicywatch.com/2021/10/u-s-trade-representative-previews-new-china-strategy/>.

<sup>49</sup> See United States Court of International Trade, *In Re Section 301 Cases*, Slip Op 21-81, July 6, 2021, <https://www.cit.uscourts.gov/sites/cit/files/21-81.pdf>.

<sup>50</sup> In September 2020, HMTX Industries LLC, a U.S. importer that paid duties under List 3 and List 4A, brought the first of the Section 301 lawsuit to the CIT, seeking a refund of duties paid. *Id.*, at 7.

unclear and deserve further investigation.

Furthermore, China is also interested in oil, gas, other resource extraction and various infrastructure investments in Alaska, such as port, rail, and telecommunications projects. The Alaskan North Slope contains some of the country's largest oil and natural gas fields. Generally speaking, China's participation in the Arctic development has already been seen problematic, particularly in light of its use of government-linked trades, state-owned investments and loans to attract and influence Arctic actors.<sup>51</sup> China's preferential treatment for state-owned enterprises (SOEs) has long been a hot button issue between the U.S. and China.<sup>52</sup> In sum, any Chinese direct investment in Alaska would be subject to the scrutiny and review process of the Committee on Foreign Investment in the United States (CFIUS).

Overall, although there are significant frictions at the nation-to-nation level, the Alaska-China economic

relationships remain strong. Therefore, the conflicts of interests can arise between the U.S. federal government and the state of Alaska, especially regarding foreign commerce.<sup>53</sup> How much role that a state can play in foreign commerce under the federalism principles becomes a highly relevant question for Alaska in terms of promoting its economic relationship with China in the current context.<sup>54</sup>

## Conclusion

The fast-changing Arctic adds a new dimension to contemporary U.S.-China relations. Whereas tensions on some issues between the U.S. and China may be irreconcilable, meaningful and substantial dialogues would help manage them and prevent spillovers that hinder the rosy prospects for the U.S.-China cooperation in other areas such as the Arctic. As discussed in this note, there is a wide range of concrete, feasible opportunities for U.S.-China cooperation regarding the Arctic. Of course, shared interests and lofty intentions are no guarantee for

---

<sup>51</sup> See, e.g., MARK E. ROSEN & CARA B. THURINGER, UNCONSTRAINED FOREIGN DIRECT INVESTMENT: AN EMERGING CHALLENGE TO ARCTIC SECURITY 51- 61 (2017).

<sup>52</sup> See, e.g., OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *U.S. Statement on the Trade Policy Review of China*, October 22, 2021, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/october/us-statement-trade-policy-review-china>.

<sup>53</sup> See generally Sam Karson, *Caught Between Superpowers: Alaska's Economic Relationship with China amidst the New Cold War*, 36 (1) ALASKA L. REV. 47 (2019).

<sup>54</sup> *Id.*

collaboration. To facilitate the U.S.-China collaboration in the Arctic, some tentative policy recommendations are provided as follows:

- Increasing the awareness of the Arctic among policymakers in both the U.S. and China and placing the Arctic issues front and center when the two countries return to the negotiating tables. The truth is there are many “*Arctic opportunities*” for the two countries to develop trust and collaboration, particularly regarding climate change, scientific research, marine environmental protection and IUU fishing, international trade, and the development of Arctic international law.
- Using a *bottom-to-top* approach to promote the U.S.-China Arctic cooperation. Those individuals, companies, institutes, and agencies who are involved with the specifics of various Arctic issues have good chance to engage in or create bilateral cooperation programs and networks, which will in turn inform the relevant decision-making processes.
- Scholars, journalists, and diplomats are all ultimate agents for securing a peaceful and sustainable order of the Arctic. These individuals have international professional

responsibilities to link U.S.-China tensions on other issues with China’s participation in the Arctic in a constructive way. For instance, in a Congressional Research Service (CRS) report to Congress concerning the Arctic, the authors have kept suggesting the U.S. government to consider suspending China’s Observer status on the Arctic Council as a punitive cost-imposing measure for unwanted Chinese actions in the SCS.<sup>55</sup> Several U.S. military Arctic policies and reports have also linked China’s assertiveness in the SCS to its engagement in the Arctic, contending that China is a challenger to the rule-based order in the Arctic. These suggestions are neither feasible nor true. They are not helpful and constructive for fostering cooperation in the Arctic region, including the U.S.-China Arctic cooperation.

- Increasing the awareness of existing U.S.-China bilateral cooperation initiatives and programs<sup>56</sup> as well as the new effective Arctic agreements and arrangements among Arctic scientists and scholars in both countries. In China, this can be improved by producing and providing informative, timely reports and conference proceedings for a broader

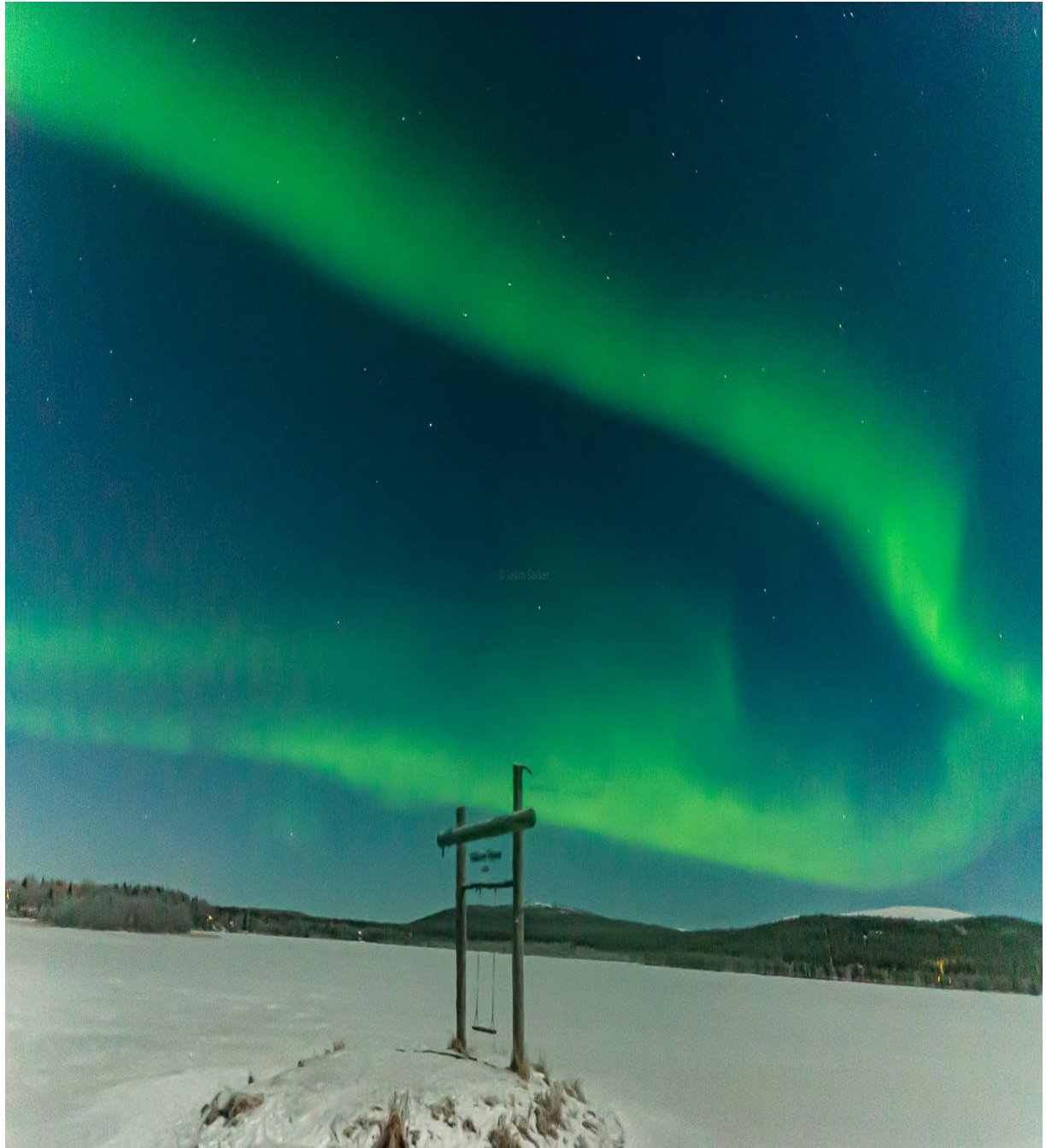
---

<sup>55</sup> See *supra* note 9, at 38.

<sup>56</sup> For instance, *U.S.-China Dialogue on the Law of the Sea and Polar Issues* and biannual *U.S.-China Track II Dialogue on Maritime Affairs and International Law* have had limited participants and audience.

audience as well as encouraging meaningful interactions among Arctic natural scientists, social science scholars, industry practitioners, and policymakers in the related fields.

The author recommends: *“Increasing the awareness of the Arctic among policymakers in both the U.S. and China and placing the Arctic issues front and center when the two countries return to the negotiating tables.”*



© Jasim Sarker

## Russia's Current Arctic Policy and Law

*David Baramidze\**

Since the end of the 20th century, the Russian Federation has developed a number of state programmes reflecting various aspects of Arctic development. The first such document that fixed the modern Russia's state interests in the Arctic was the Sub-programme "Arctic Research and Exploration" within the Federal target programme "World Ocean" in 1995. The development of the Arctic was defined as an independent object of state policy. The realisation of the resource potential of the Russian Arctic was identified as a priority. However, such a programme was not comprehensive and could not encompass the full range of large-scale goals and objectives.

It can be asserted that the final comprehensive version of Russia's Arctic policy was formed in 2008 with the adoption of the Fundamentals of the Russian Federation State Policy in the Arctic for the period up to 2020 and for a further perspective (hereinafter – the 2008 Fundamentals). As distinct from the previous documents, the 2008

Fundamentals emphasised the need and importance to take account of natural, climatic, socio-economic, demographic and other special conditions of the Arctic. The main aspect of the new Arctic policy remained unchanged – the use of the Arctic zone of Russia as a strategic resource base. The Strategy for the Development of the Arctic Zone of the Russian Federation and the National Security Efforts that followed in 2013 concordantly supplemented the provisions of the 2008 Fundamentals.

Today, in light of the adoption of the Fundamentals of the State Policy of the Russian Federation in the Arctic for the Period up to 2035 (hereinafter referred to as the 2020 Fundamentals), Russia has finally consolidated its national priorities in the Arctic. Consequently, the primary goal is to improve the quality of life of the population in the Russian Arctic, including indigenous minorities. Among the other goals is the preservation of the Arctic as a territory of peace, stable and mutually beneficial partnership. Among other challenges, the major socio-economic projects are connected with the development of the Northern Sea Route as a national transport link.

---

\* Candidate of Law Sciences and Associate professor, Department of Environmental, Labor and Natural Resources Law Udmurt State University, Izhevsk, Russia

An undoubted favourable achievement is the legal delineation of boundaries of the Arctic and the Arctic zone. Meanwhile, the conceptual basis for contouring the southern boundaries of the Russian Arctic zone is not on the agenda of discussion by the legislative or executive authorities. The actual boundaries of the Arctic zone of Russia are established by the Presidential Decree of 2014. However, in the authors' opinion, the problem is the absence of a scientifically substantiated criterion for attributing the northern territories of Russia to the Arctic zone. Since 2014, the said Presidential Decree was supplemented twice. In 2017, the northern territories of the Republic of Karelia were included in the Arctic zone, and in 2019 some areas of the Republic of Sakha (Yakutia) were added. In the present situation, the tasks have been already formulated, the budget funds have been allocated, but there appear new territories with the specifics to be taken into account. For instance, the northern territories of Yakutia, recently included in the Arctic zone, have an insufficiently developed transport infrastructure. This circumstance forces the government to look for additional sources of funding. Meanwhile budget funds have already been allocated for specific tasks.

Special attention is paid to the protection of the natural environment of the Arctic. The 2020 Fundamentals focus on the following main objectives in the sphere of ecological protection and environmental safety: a) development, on a scientific basis, of a network of specially protected nature areas and water basins, in order to preserve the ecological systems and their adaptation to the climate change; b) preservation of fauna and flora of the Arctic, protection of rare and endangered plants, animals and other organisms; c) further work towards elimination of the overall damage caused to the environment; d) improvement of the environmental monitoring system, the use of modern information and communication technologies and systems for making measurements from satellites, offshore and ice platforms, research vessels, ground stations and observatories; e) inculcation of the best available technologies, minimizing atmospheric emission and pollutant discharge into water bodies and mitigation of other types of negative impact on the environment during economic and other activities; f) securing the rational use of natural resources, including in places of traditional residence and economic activities of small-numbered peoples; g) development of a comprehensive system for managing

waste of all hazard classes, construction of modern environmentally friendly waste disposal facilities; h) implementation of a set of measures to prevent toxic substances, infectious disease agents and radioactive substances from entering the Arctic zone of the Russian Federation. The truly serious attention to the environmental problems is dictated by Russia's recognition of the unique natural properties of the Arctic which combine the vulnerability of the ecological systems, on the one hand, and the global importance of the Arctic in stabilization of climatic processes (as based on the research of the Arctic and Antarctic Research Institute), on the other hand.

The key objectives of economic development of the Arctic zone of the Russian Federation are: a) state support of entrepreneurial activities, including support of small and medium-size business, with a view to create attractive conditions for private investment and its economic efficiency; b) increased participation of private investors in realisation of investment projects on the Arctic shelf, with preservation of state control over it; infrastructural development of mineral resource centres logistically linked with the Northern Sea Route; (c) increasing the scope of geological exploration for

the development of hydrocarbon deposits and solid minerals through public and private investment; encouraging the development of hard-to-recover hydrocarbon reserves, increased oil and gas recovery factors, advanced petroleum refining, production of liquefied natural gas and gas chemical products; d) creation of due conditions for increasing the efficiency of development and extraction (yield) of aquatic biological resources, stimulation of fish products output with high added value and proper development of aquaculture; e) intensification of reforestation, stimulating the development of forest infrastructure and advanced processing of forest reserves; f) stimulation of local production of agricultural raw materials and foodstuffs; (g) development of cruise travel, ethnic, ecological and industrial tourism; h) preserving and developing the traditional economic activities, handicrafts and trades contributing to necessary employment and self-employment of people representing small minorities; i) providing access of people from small-numbered nations to natural resources necessary to maintain their traditional way of life and traditional economic activities; j) developing due mechanisms for participation of people from small minorities and their representatives in



decision-making on the issues connected with industrial activities in their traditional habitat and traditional economic occupation; k) bringing the system of secondary vocational and higher education in the Arctic Zone of the Russian Federation in line with the estimates of the need for qualified personnel; l) providing state support to the economically active Russian population willing to relocate (resettle) to/in the Arctic Zone of the Russian Federation and engage in labour activities there.

The priorities for international cooperation include: (a) bilateral strengthening of good-neighbourly relations with the Arctic states within the multilateral regional cooperation framework, in particular, the Arctic Council, the Arctic Five and the Barents Euro-Arctic Council; stepping up the international economic, scientific, technological, cultural and cross-border cooperation as well as collaboration in the study of global climate change, environmental protection and efficient development of natural resources in compliance with high environmental standards; b) to maintain the Arctic Council's position as the key regional association coordinating the international activity in the region; c) to ensure the Russian presence in the Svalbard (Spitsbergen)

archipelago on the terms of equal and mutually beneficial cooperation with Norway and the other states – parties to the Svalbard Treaty as of 9 February, 1920; d) maintaining interaction with the Arctic states on delineation of the continental shelf in the Arctic Ocean, taking the national interests of the Russian Federation into account, on the basis of the international law and reached agreements; e) promoting the efforts of the Arctic states to create a unified regional system for search and rescue, prevention of technological catastrophes and elimination of their consequences, as well as coordination of rescue forces' actions; f) active involvement of the Arctic and extra-regional states in mutually beneficial economic cooperation in the Arctic zone of the Russian Federation; (g) assistance to small-numbered peoples in cross-border cooperation, cultural and economic contacts with kindred nations and ethnic groups residing outside the Russian Federation, as well as assistance in participation of small-numbered minorities in international cooperation on ethnocultural development within the framework of inter-state contacts and in accordance with the international agreements of the Russian Federation; h) communicating the results of the Russian Federation's activities in the

Arctic to the international community at large.

The state programmes under review directly reflect the overriding principle of sustainable development formulated by the Rio Declaration of 1992, which proclaims equal development of social, economic and environmental spheres. However, if one turns to the Russian legislation which focuses on the realisation of the Arctic policy provisions, the predominance of economic interests becomes evident.

For instance, Russia has for a long time been working on a draft project intended to regulate the whole range of factors connected with the development of the Arctic zone. The environmental component should be of paramount importance. The law may contain the norms reflecting natural, climatic and socio-economic specifics of the Arctic – increased vulnerability to anthropogenic impact, the weak ability for self-purification and recovery, continuing thawing of the permafrost, climatic change and underdevelopment of transport infrastructure. Several draft laws were prepared; however, they were withdrawn for further revision due to the complexity of defining the subject of legal regulation. Nevertheless, in 2020, the Federal Law №193-FZ “On

State Support of Entrepreneurial Activity in the Arctic Zone of the Russian Federation” was adopted. It is notable that Article 1 (subject and objectives of regulation) states that the Law “defines the legal status of the Arctic zone”; however, it almost entirely focuses on support of investment and entrepreneurial activities in the Arctic. At the same time, the term “legal status of the Arctic zone” is a complex legal category including, among other things, environmental and other features. The provisions of the Law enshrine a variety of measures of state support for entrepreneurial activities. For instance, the residents of the Arctic zone may be granted tax benefits and partially reimbursed the paid insurance premiums.

It should as well be noted that the Russian environmental legislation has also been supplemented with a number of references to the Arctic natural environment. For instance, Federal Law No. 174-FZ (adopted in 1995) “On Environmental Expertise” until recently referred all capital construction projects in the Arctic zone of Russia, without exception, to the objects of state ecological expertise. Thus, an excessive requirement was established, unreasonably hampering the economic activities and efficient

realisation of environmental regulations. Undoubtedly, the norms of environmental and natural resource law of Russia are fully applicable in the Arctic zone of the Russian Federation. However, the absence of a special law that would comprehensively take into account the natural and climatic features of the Arctic nature not only significantly increases the ecological risks in the Arctic region, but also discredits the feasibility of using the resource potential of the Arctic zone.

Thus, it is obvious that the Arctic policy in the present-day Russia has been

finally formed. The primary goals, tasks, national interests and benchmarks have been defined. Regretfully, a fair question can be raised – whether such state programmes have a mandatory nature. Some researchers believe that the state programmes contain the norms having the status of principles or declarations. However, quite often, governmental strategic documents do not enshrine efficient mechanisms of realisation of intended objectives, including the institute of liability for non-compliance with provisions of a particular programme.



## **Schrödinger's Euro-Arctic: The New Arctic Policy of the European Union and the Limits of Arctic Exceptionalism**

*Stefan Kirchner\**

On 13 October 2021, the European Union (EU) presented its new Arctic policy. The Joint Communication by the European Commission's High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions (EU, 2021) is entitled "A stronger EU engagement for a peaceful, sustainable and prosperous Arctic". The new policy document outlines the EU's vision for its own future role in the Arctic region. In this short text, the EU's new Arctic policy is presented with a particular focus on the question of how the EU sees itself and in how far it buys into the idea of Arctic exceptionalism.

The document is somewhat contradictory right from the start as the policy falls within the remit of the High Representative for Foreign Affairs, even though the European Union "is in the Arctic" (EU, 2021: 1). The EU begins by recognizing its own "environmental

footprint" (EU, 2021: 1; see Koivurova et al., 2021) and its shared responsibility for sustainable development and the well-being of the people who live in the Arctic (EU, 2021: 1). The term "responsibility" (EU, 2021: 1) is to be understood in a specific context, that is, in light of the EU's economic power and its demand for resources from the Arctic region (EU, 2021: 1). That the EU recognizes that it does have responsibilities in the region is not to be understood as an attempt to take away anything from the sovereignty of the eight Arctic States. In fact, the EU emphasized that "[t]he Arctic States have the primary responsibility for tackling challenges and opportunities within their territories" (EU, 2021: 1, footnote omitted). The EU sees its own role in connection with its own legislative competences for the EU Arctic (EU, 2021: 1) and in international cooperation with regard to issues that transcend nation States (EU, 2021: 1). The EU recognizes the increasing interest of non-Arctic States in obtaining observer status with the Arctic Council (AC), the most important diplomatic forum in the Arctic (EU, 2021: 3). For the EU, it is this increasing interest that "reflects the new geopolitical environment" (EU, 2021:

---

\* Research Professor, Arctic Centre, University of Lapland.

3). This part of the policy document seems to have been prepared prior to the rejection of Estonia's - very reasonable - bid for observer status. Today, one can wonder if the rejection of the application by the northernmost non-Arctic State in 2021 marks the turn of the tide when it comes to the Arctic Council's willingness to accept new observers (cf. Kirchner, 2021) or if this rejection was specifically directed against Estonia. Given that the Arctic Council decides on the basis of unanimity and that there is no requirement for the AC to publish its reasons for a decision.

Already the AC ministerial meeting in Rovaniemi in 2019 highlighted the risk of a politization of the work of the AC. So far, the AC is contributing to maintaining the idea of the Arctic as a region where cooperation is possible despite significant political differences. The European Union's new Arctic policy not only perpetuates this approach, the EU also appropriates it (EU, 2021: 2 et seq.). The EU not only portrays itself as an insider actor in the Arctic (EU, 2021: 1) but sees the outside interest in the Arctic as a "threat" (EU, 2021: 2). Accordingly, the "new geopolitical environment" (EU, 2021: 3) is created by non-Arctic interest in the Arctic. This view appears dangerously short-sighted.

The wish on the part of decision-makers in Brussels that the EU is perceived as an insider in the Arctic is understandable and indeed the EU needs to strengthen its ties to its own Arctic and other Arctic partners outside of the European Union (Kirchner, 2021). The ability to cooperate in the Arctic, similar to cooperation on board the International Space Station (ISS), is important for Arctic States. The EU, however, is not a member of the AC, in fact, it is only "a *de facto* observer" (Koivurova et al., 2021: 7) but does not enjoy observer status *de jure*. By making the narrative of the Arctic as a place where political differences impact cross-border cooperation less than elsewhere, the European Union risks sending a wrong signal. On one hand is the EU cognizant of the increased militarization on the Russian side of the border (EU, 2021: 3), on the other hand do the ongoing conflicts with Russia, such as the war against Ukraine, the interference in domestic politics and the support for the illegitimate regime in Minsk, apparently not feature in the EU's plans for its own future in the Arctic. The good cooperation across borders on numerous technical and scientific issues, from research to search and rescue operations, shows that Russia can become a valued partner in the Arctic. For many State governments across the EU, the interference by the

current government in Moscow remains unacceptable. The EU would be well advised to avoid even the appearance of appeasement. However, by self-identifying as Arctic right at the start of the policy document, the EU set itself on a course for cross-border cooperation. This includes cooperation with all Arctic actors, including Russia. With regard to EU member States and non-members that have been particularly impacted by activities that are attributed to the current government in Moscow, the EU has now placed itself in a position in which it has to be able to explain the special nature of cooperation in the Arctic. The pressure to do so will only grow as questions over gas supplies from Russia, interference by Belarus in Lithuania and Poland become louder. The Arctic provides Russia and the West with an opportunity to overcome political differences but the European Union will have to be able to explain the reasons for this opportunity and the EU's reasons for emphasizing the opportunities for cooperation.

In the words of *Durfee and Johnstone*, "Cooperation in the Arctic is not new, though the scope had increased dramatically since the end of the Cold War" (Durfee & Johnstone, 2019: 3; see also Hønneland, 2020: 153 and Dodds & Nuttall, 2019: 150 et seq.). One

possible explanation for the willingness, and ability, of States to cooperate with each other in the Arctic, despite serious political differences, that is commonly heard in the Arctic is that the Arctic is particularly dangerous and that operations in the region require technical expertise and skills. In a way, the parallels between cooperation in the Arctic and cooperation in outer space are visible. Indeed, the Arctic is seen by many in the Arctic as a special case, as an exception where political rules that apply everywhere else simply do not apply in the same way. Today, there may be doubts as to whether this exceptional nature of the Arctic can be maintained (see also Lackenbauer & Dean, 2020: 341 et seq.). In some ways, due to climate change and globalization, the Arctic is becoming more like the rest of the world. International treaties, rather than soft law, gain in importance and the Arctic Council has played a role in the legalization of international Arctic politics (cf. Koivurova et al., 2020: 73 et seq.). This could contribute to the end of exceptionalism.

The European Union's new Arctic policy document emphasizes the cooperation with the EU's existing partners and particular emphasis is placed on the situation of Greenland

(EU, 2021: 4). For example will the European Commission open an office in Nuuk (EU, 2021: 4). Were Greenland to gain independence, the EU would have a *de facto* embassy on day one. Until then, this office is a tool to keep Greenland closer to Europe. Although the EU sees itself as an Arctic actor now, it looks at the Arctic as 'the other'. This is visible by the localization of the new role of the EU's Special Envoy for Arctic Matters within the European External Action Service (EU, 2021: 4). This emphasis on the EU's own Arctic territories and on the established partners, rather than on Russia, and the distancing that comes with approaching the Arctic through the lens of foreign policy reduces the need to justify the willingness to cooperate with Russia in the Arctic.

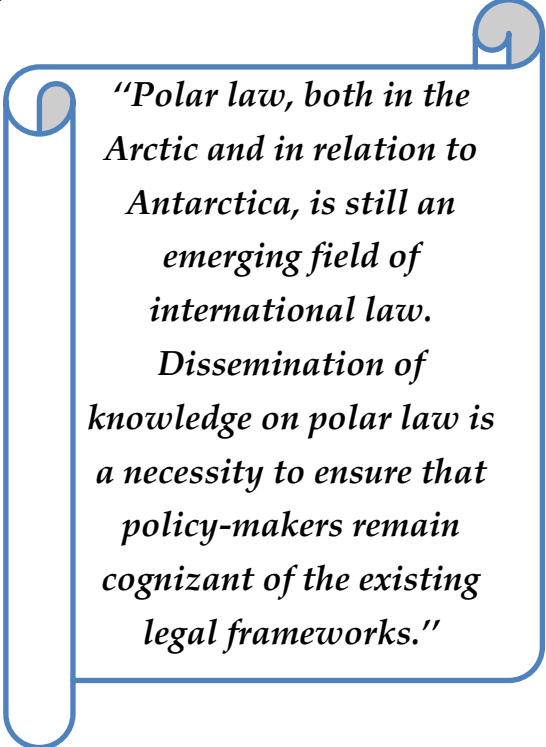
Cooperation is a core value of polar law (Scott & VanderZwaag, 2020: 12). It is essential to communicate this characteristic of polar law. Polar law, both in the Arctic and in relation to Antarctica, is still an emerging field of international law. Dissemination of knowledge on polar law is a necessity to ensure that policy-makers remain cognizant of the existing legal frameworks. During the preparatory phase of the new EU Arctic policy, the EU showed some openness to local inputs and listened to voices from the

region. But this approach was by no means immersive. By continuing to look at the Arctic from the outside, while recognizing its responsibility and desiring to be more of an Arctic insider, the European Union wants both: the benefits of being inside the Arctic, including as an insider of international Arctic governance, while continuing to utilize foreign policy tools and structures. This approach is similar to the approach the EU has towards indigenous peoples, often seeing the right of indigenous peoples as a foreign policy topic, although there are seven indigenous peoples within the European Union: in addition to the Sámi of Northern Europe, including the northernmost parts of EU member states Sweden and Finland, the Kali'na, Lokono/Arawak, Palikur/Pahikweneh, Teko, Wayana and Wayapi peoples in French Guiana. While small in number, the indigenous persons who live in different parts of the European Union are citizens of the EU. Right now, the EU is lacking a coherent approach to both indigenous peoples and to the Arctic.

The EU's new Arctic policy contains a number of positive and noteworthy developments, in particular in relation to climate change and the protection of the natural environment. It remains to be seen, however, whether the EU can

continue its approach of being simultaneously within and outside the Arctic. The new Arctic policy is a step in the right direction and the European Union appears to be listening more to those who live in the Arctic. By perceiving the Arctic as both an issue of foreign and of internal policies, the EU might even contribute to stemming the apparent trend to an end of Arctic exceptionalism. The Arctic remains a special place and the level of cross-border cooperation that is visible in the Arctic, despite political differences, remains exceptional. The EU will have to find a balance between the need to cooperate with difficult partners and the essential duty to defend its values. In order to remain a credible actor, not only in the Arctic but globally, the EU might be better served in the long run by defending its values forcefully if needed. The examples of the handling of Brexit, open to cooperation when it makes sense while remaining steadfast on essential topics, such as Good Friday Agreement and the prevention of the emergence of a hard border on the island of Ireland, can - despite all shortcomings - help Arctic actors to predict how the EU will handle future conflicts with Arctic partners, in particular the Russian Federation. A willingness to cooperate in an important region that faces many challenges therefore should not be

misunderstood as appeasement. It will be important for the EU to communicate this to non-Arctic partners, such as Ukraine.



*“Polar law, both in the Arctic and in relation to Antarctica, is still an emerging field of international law. Dissemination of knowledge on polar law is a necessity to ensure that policy-makers remain cognizant of the existing legal frameworks.”*

**Sources:**

European Union [European Commission / High Representative of the Union for Foreign Affairs and Security Policy] (2021). *Joint Communication to the European Parliament, the Council, the European Economic and Social Council and the Committee of the Regions*, JOIN (2021) 27 final, 13 October 2021.

Klaus Dodds & Mark Nuttall (2019). *The Arctic*. Oxford: Oxford University Press.

Mary Durfee & Rachael Lorna Johnstone (2019). *Arctic Governance in a Changing World*, Lanham: Rowman & Littlefield.



Geir Hønneland (2020). *Russia and the Arctic - Environment, Identity and Foreign Policy*, London: I. B. Tauris.

Timo Koivurova, Alf Håkon Hoel, Malte Humpert, Stefan Kirchner, Andreas Raspotnik, Małgorzata Śmieszek & Adam Stępień (2021). *Overview of EU actions in the Arctic and their impact* <https://eprd.pl/wp-content/uploads/2021/06/EU-Policy-Arctic-Impact-Overview-Final-Report.pdf> (Website last visited 13 October 2021).

Timo Koivurova, Pirjo Kleemola-Juntunen & Stefan Kirchner (2020). "Arctic regional agreements and arrangements", in: Karen N. Scott &

David L. VanderZwaag (eds.), *Research Handbook on Polar Law*, Cheltenham: Edward Elgar, pp. 64-83.

P. Whitney Lackenbauer & Ryan Dean (2020). "Arctic Exceptionalisms", in: Kristina Spohr & Daniel S. Hamilton (eds.) & Jason C. Moyer (assoc. ed.), *The Arctic and World Order*, Washington D.C.: Johns Hopkins University, pp. 327-355.

Karen N. Scott & David L. VanderZwaag (2020). "Introduction to Polar Law", in: Karen N. Scott & David L. VanderZwaag (eds.), *Research Handbook on Polar Law*, Cheltenham: Edward Elgar, pp. 1-17.



© Jasim Sarker

## 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

Emily Tsui\*

**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.<sup>1</sup> The melting of the Arctic ice, caused by rising carbon emissions and accelerated by pollutants such as black carbon,<sup>2</sup> contribute to global warming through the loss of ice's albedo effect and rising sea levels.<sup>3</sup> The Arctic is home to immense biodiversity, and pollution destroys habitats and species that constitute a loss for the global commons.<sup>4</sup> 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.<sup>5</sup> Striking the right balance between these two objections is crucial to the success of the international community in reaching

---

\* Juris Doctor/ Master of Global Affairs '21, University of Toronto.

<sup>1</sup> 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>>.

<sup>2</sup> 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.

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

<sup>4</sup> 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.

<sup>5</sup> 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.<sup>6</sup>

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<sup>7</sup> 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),<sup>8</sup> 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.<sup>9</sup> Russian-flagged ships account for over half of HFO fuel use and almost a quarter of HFO carriage as fuel.<sup>10</sup> HFO is a highly pollutant substance, is extremely viscous, and slowly degrades in near-zero temperatures.<sup>11</sup> In ice-covered waters, ice could trap oil from a HFO spill, allowing the oil to

---

<sup>6</sup> Lotta Manninen, "The Paris Agreement & The Arctic Region" (2017) 6 *The Arctic Yearbook* 246.

<sup>7</sup> "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-miljoovern-pa-svalbard-15-juni-2001-nr.-79-svalbardmiljolooven/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/>>.

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

<sup>9</sup> 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](https://theicct.org/sites/default/files/publications/HFO-Arctic_ICCT_Report_01052017_vF.pdf)> [ICCT Report].

<sup>10</sup> ICCT Report at vi.

<sup>11</sup> 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.<sup>12</sup> There is also limited oil spill cleanup infrastructure in this remote region, which magnify the difficulties presented during a clean-up.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup>

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.<sup>16</sup> Individual States, such as Norway, are currently considering more stringent bans in the interim in parts of its waters.<sup>17</sup> 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.<sup>18</sup> The 1920 *Treaty of*

---

<sup>12</sup> 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].

<sup>13</sup> ICCT Report at 2.

<sup>14</sup> 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/>>.

<sup>15</sup> 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>>.

<sup>16</sup> 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/>>.

<sup>17</sup> 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/>>.

<sup>18</sup> §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*<sup>19</sup> 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.<sup>20</sup> 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").<sup>21</sup>

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.<sup>22</sup> 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,<sup>23</sup> regulations like Norway's proposed one may become more common.<sup>24</sup>

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.<sup>25</sup> The Arctic Council Working Groups examines HFO use and recommends action for States.<sup>26</sup> At these forums, States could resolve

---

<sup>19</sup> *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>>

<sup>20</sup> 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/>>.

<sup>21</sup> 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/>>.

<sup>22</sup> 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.

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

<sup>24</sup> 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>>.

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

<sup>26</sup> 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).<sup>27</sup> In the GATT,

shipping relates to Article V, which guarantees the freedom of transit for goods in transit.<sup>28</sup>

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.<sup>29</sup> In the past, it has shown that it 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.<sup>30</sup> 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

---

<sup>27</sup> *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](https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_maritime_e.htm)>; Vitaliy Pogoretsky, "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.

<sup>28</sup> GATT Article V.

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

<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

Under Norway's proposed regulations, vessels operators face fines or imprisonment<sup>33</sup> 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)*<sup>34</sup> and the 2019 *Russia – Measures Concerning Traffic in Transit (Traffic in Transit)*.<sup>35</sup> The Panel's

---

<sup>31</sup> 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.

<sup>32</sup> GATT Articles V:2, V:4.

<sup>33</sup> See footnote 16.

<sup>34</sup> *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*].

<sup>35</sup> *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.<sup>36</sup> Other cases relating to Article V:2 have been settled,<sup>37</sup> 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."<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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

---

<sup>36</sup> *Traffic in Transit* at para 7.196.

<sup>37</sup> 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](https://www.wto.org/gatt_docs/English/SULPDF/91490056.pdf)>.

<sup>38</sup> Emphasis added. *Ports of Entry* at para 7.401.

<sup>39</sup> *Ports of Entry* at para 7.402.

<sup>40</sup> 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>>

<sup>41</sup> Valles at 188.



goods.<sup>42</sup> 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.<sup>43</sup> However, the Panel in *Traffic in Transit* declined to address this issue.<sup>44</sup> 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.<sup>45</sup> 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).

---

<sup>42</sup> "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](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art5_jur.pdf)>; *Ports of Entry* at para 7.402.

<sup>43</sup> *Traffic in Transit* at para 7.209.

<sup>44</sup> *Traffic in Transit* at para 7.199.

<sup>45</sup> 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.”<sup>46</sup> 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<sup>47</sup> 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.<sup>48</sup> However, the Panel<sup>49</sup> 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).<sup>50</sup> 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,<sup>51</sup> and their health would be affected by a HFO spill.<sup>52</sup> 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.<sup>53</sup> The consequences of a HFO spill could have a “particularly severe” impact on Arctic wildlife and the marine environment.<sup>54</sup>

---

<sup>46</sup> GATT, Article XX(b).

<sup>47</sup> “Consultations.”

<sup>48</sup> 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.

<sup>49</sup> 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](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*].

<sup>50</sup> *US – Gasoline* at 39.

<sup>51</sup> 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>>.

<sup>52</sup> 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.

<sup>53</sup> PAME Report at 13.

<sup>54</sup> 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.<sup>55</sup> Furthermore, Panels will consider alternatives.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> In 2019, only 165 out of a total of 1729 entering the Arctic Polar Code Area used HFO.<sup>59</sup> 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.<sup>60</sup>

#### 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."<sup>61</sup> This requires examining firstly, the content of the

---

<sup>55</sup> *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=O:/WT/DS/332ABR.pdf&Open=True>>.

<sup>56</sup> 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](https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm)>.

<sup>57</sup> Stoll & Strack at 512.

<sup>58</sup> 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*.

<sup>59</sup> PAME Report at 18.

<sup>60</sup> 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>>.

<sup>61</sup> 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<sup>62</sup> and sea turtles,<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> This approach would be consistent with the WTO Agreement’s preamble, which emphasizes the protection and preservation of the environment.<sup>66</sup> 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.<sup>67</sup> 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.

---

<sup>62</sup> *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](https://www.wto.org/english/tratop_e/dispu_e/gatt_e/92tuna.pdf)>.

<sup>63</sup> *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*].

<sup>64</sup> “Consultations.”

<sup>65</sup> *US – Gasoline* at 9-10.

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

<sup>67</sup> *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.”<sup>68</sup> In *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*,<sup>69</sup> the Appellate Body interpreted “arbitrary and unjustifiable discrimination” to mean “whether discrimination can be reconciled with, or is rationally related to, the policy objective.”<sup>70</sup> 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.”<sup>71</sup> In *Traffic in Transit*, the Panel determined that the phrase “which it considers necessary” includes an objective requirement.<sup>72</sup> Furthermore, the Panel determined that “emergency in international

---

<sup>68</sup> GATT Article XX.

<sup>69</sup> *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (2014) WT/DS400/AB/R (Appellate Body Report).

<sup>70</sup> Trebilcock & Trachtman at 193.

<sup>71</sup> GATT Article XXI(b).

<sup>72</sup> *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.<sup>73</sup> An emergency must go beyond political or economic differences between States.<sup>74</sup> 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.<sup>75</sup>

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.”<sup>76</sup> This includes climate change and increased human activity in the region.<sup>77</sup> The paper also later states that climate change is a security challenge requiring a global response.<sup>78</sup> 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.<sup>79</sup> An alternative

---

<sup>73</sup> *Traffic in Transit* at paras 7.73-7.77.

<sup>74</sup> *Traffic in Transit* at para 7.75.

<sup>75</sup> 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.

<sup>76</sup> *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/engb/pdfs/stm201620170022000engpdfs.pdf>>. [Norway’s White Paper].

<sup>77</sup> Norway’s White Paper at 14.

<sup>78</sup> Norway’s White Paper at 40.

<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup> 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.

---

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

<sup>81</sup> *The Svalbard Treaty*, Article 2.

<sup>82</sup> 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.”*



## Tables of Authorities

### Legislation

*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, online: <https://www.sysselmannen.no/en/heavy-fuel-oil-ban-in-the-protected-areas/>.

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

*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);

*Lov om miljøvern på Svalbard (svalbardmiljøloven)*, LOV-2001-06-15-79, translated by Google, online: <https://lovdata.no/dokument/NL/lov/2001-06-15-79>.

*The Svalbard Treaty*, (entered in force: 14 August 1925), Article 2, online: <https://www.jus.uio.no/english/services/library/treaties/01/1-11/svalbard-treaty.xml>.

*WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867



UNTS 154 (entered into force 1 January 1995).

#### Government Documents

“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>>.

*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>>

#### Jurisprudence

*Brazil – Measures Affecting Imports of Retreaded Tyres*, (2007) WTO Doc WT/DS332/AB/R (Appellate Body Report), online: <<https://docs.wto.org/dol2fe/Page>

[s/SS/directdoc.aspx?filename=Q:/WT/DS/332ABR.pdf&Open=True](https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/332ABR.pdf&Open=True)>.

*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>>.

*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](https://www.wto.org/gatt_docs/English/SULPDF/91490056.pdf)>.

*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>>.

*United States – Restrictions on Imports of Tuna* (1994), WTO Doc DS/29/R (Panel Report), online: <[https://www.wto.org/english/tra\\_top\\_e/dispu\\_e/gatt\\_e/92tuna.pdf](https://www.wto.org/english/tra_top_e/dispu_e/gatt_e/92tuna.pdf)>

*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&CatalogueI](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueI)

[dList=14573&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](#)>.

Secondary Material: Monographs

Comer, Bryan, et al. *Prevalence of heavy fuel oil and black carbon in Arctic shipping, 2015 to 2025* (Washington: International Council on Clean Transportation, 2017), online: <[https://theicct.org/sites/default/files/publications/HFO-Arctic\\_ICCT\\_Report\\_01052017\\_v\\_F.pdf](https://theicct.org/sites/default/files/publications/HFO-Arctic_ICCT_Report_01052017_v_F.pdf)>.

Congressional Research Service. *Changes in the Arctic: Background and Issues for Congress*, (15 December 2020), online: <<https://fas.org/sgp/crs/misc/R41153.pdf>>.

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) 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>>

Trebilcock, Michael & Joel Trachtman. *Advanced Introduction to*

*International Trade Law*, 2<sup>nd</sup> ed (Cheltenham, UK: Edward Elgar, 2020).

Secondary Material: Articles

Aksenov, Yevgeny, 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.

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

Harris, Paul. "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.

Heath, J Benton. "Trade and security among the ruins" (2020) 30 Duke J Comp Intl L 223.

Hop, Haakon 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>>.

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

Meltofte, Hans, Henry P. Huntington & Tom Barry. "Introduction" in Tom Barry et al., eds, *Arctic*

- Biodiversity Assessment 2013* (Reykjavik: Conservation of Arctic Flora and Fauna, 2013).
- Pogoretsky, Vitaliy. "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.
- Smith, Laurence C & Scott R Stephenson. "New Trans-Arctic shipping routes navigable by mid-century" (2013) Proceedings of the National Academy of Sciences E1191, online: <<https://www.pnas.org/content/pnas/110/13/E1191.full.pdf>>
- Stoll, Peter-Tobias & 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.
- Valles, Cherise. "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.
- van Vaerenbergh, Pieter & Angshuman Hazarika. "Climate Change as a Security Risk: Too Hot to Handle?" (2020) J World Trade 417.
- Wang, Zhaojun, 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.
- Online Resources
- "Analytical Index of the GATT – Article V, Jurisprudence " (June 2020) *World Trade Organization*, at para 1.4.1 online: <[https://www.wto.org/english/ress/publications\\_e/ai17\\_e/gatt1994\\_art5\\_jur.pdf](https://www.wto.org/english/ress/publications_e/ai17_e/gatt1994_art5_jur.pdf)>.
- Brzozowski, Alexandra . "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/>>.
- Climate & Clean Air Coalition. "Black Carbon" online: <<https://www.ccacoalition.org/en/slcps/black-carbon>>.
- Coelho, N.F. "Norway: HFO ban in Svalbard proposed" (11 November 2020) *De Maribus*, online: <<https://demaribus.net/2020/11/11/norway-hfo-ban-in-svalbard-proposed/>>.
- Gosnell, Rachael. "The Complexities of Arctic Maritime Traffic" (30

- January 2018) *The Arctic Institute*, online: <https://www.thearcticinstitute.org/complexities-arctic-maritime-traffic/>.
- Groenning, Ragnhild. "The Norwegian Svalbard Policy – Respected or Contested?" (22 November 2017) *The Arctic Institute*, online: <https://www.thearcticinstitute.org/norwegian-svalbard-policy-respected-contested/>.
- Hancock, Lorin. "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>.
- Humpert, Malte. "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/>.
- International Maritime Organization, "Introduction to IMO" online: <https://www.imo.org/en/About/Pages/Default.aspx>.
- Leahy, Stephen. "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/>.
- Magnus Eger, Karl. "Effects of Oil Spills in Arctic Waters" (2010) *Arctic Knowledge Hub*, online: <http://www.arcticsearch.com/Effects+of+Oil+Spills+in+Arctic+Waters>.
- National Snow and Ice Data Center. "Thermodynamics" (3 April 2020), online: <https://nsidc.org/cryosphere/sea-ice/processes/albedo.html>.
- Paris, Costas. "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>.
- Prior, Sian. "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/>.

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>>.

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>>.

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>>

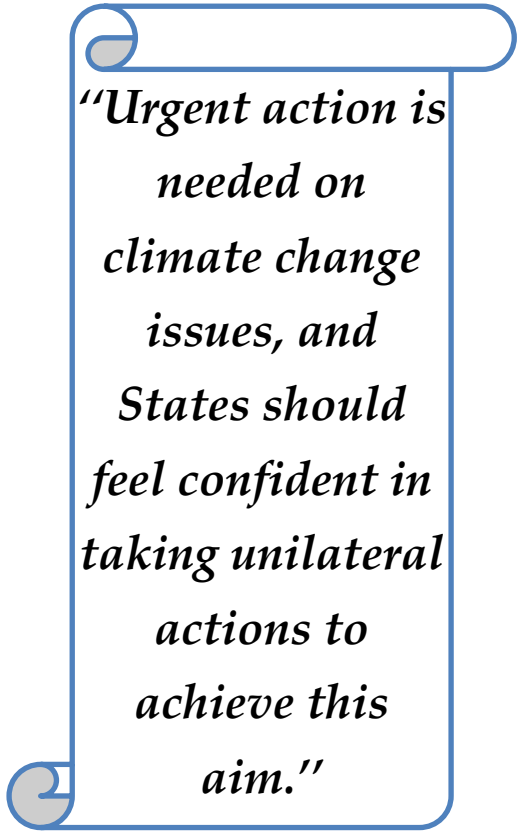
Taylor, Matthew, Matthew Weaver & Helen Davidson. "IPCC climate change report calls for urgent action to phase out fossil fuels – as it happened" (8 October 2012) *The Guardian*, online: <<https://www.theguardian.com/environment/live/2018/oct/08/ipcc-climate-change-report-urgent-action-fossil-fuels-live>>

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](https://tc.canada.ca/en/marine-transportation/arctic-)>.

World Trade Organization. "Maritime Transport" online: <[https://www.wto.org/english/tra top\\_e/serv\\_e/transport\\_e/transpo rt\\_maritime\\_e.htm](https://www.wto.org/english/tra top_e/serv_e/transport_e/transpo rt_maritime_e.htm)>.

World Trade Organization. "WTO rules and environmental policies: GATT exceptions" online: <[https://www.wto.org/english/tra top\\_e/envir\\_e/envt\\_rules\\_excepti ons\\_e.htm](https://www.wto.org/english/tra top_e/envir_e/envt_rules_excepti ons_e.htm)>.



***"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,<sup>1</sup> and attracting a large amount of foreign investment (e.g. from China).<sup>2</sup> The increasing economic and investment interests in the region may have a (negative) impact on “sustainable development”<sup>3</sup> 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 [...]”,<sup>4</sup> 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”.<sup>5</sup>

---

\* Senior Researcher at the Centre for International Law, Institute of International Relations Prague (CZ) and Visiting Senior Researcher at the Arctic Governance Research Group, Arctic Centre of the University of Lapland (FI). This contribution is built on a presentation given at the National XIX Legal Research Conference 2021, Sustainable and Responsible Law for Society, organized by the Faculty of Law and the Arctic Centre of the University of Lapland on 25-27 August 2021.

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

<sup>2</sup> 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>.

<sup>3</sup> For the scope of this paper, we intend “sustainable development” as was described in the 1987 Brundtland 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>.

<sup>4</sup> 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>.

<sup>5</sup> 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,<sup>6</sup> Chapter 22 on Trade and sustainable development of the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA),<sup>7</sup> Section IV on “Investment and sustainable development” of the China-EU Comprehensive Agreement on Investment<sup>8</sup> and the Preamble of the Canada - China BIT.<sup>9</sup> 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,<sup>10</sup> and provides a framework of reference for

---

<sup>6</sup> 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](https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm).

<sup>7</sup> 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>.

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

<sup>9</sup> 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->.

<sup>10</sup> Arctic Investment Protocol. Guidelines for Responsible Investment in the Arctic (2016), [https://arcticeconomiccouncil.com/wp-content/uploads/2020/01/aecarcticprotocol\\_brochure\\_ir456\\_v16.pdf](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,<sup>11</sup> which launched, in January 2019, an online platform requesting stakeholders to submit best practices in order to strengthen the Protocol and monitor its implementation.<sup>12</sup>

In order to further strengthen the principles included in the Protocol, in 2018, the Arctic Economic Council issued a Code of Ethics,<sup>13</sup> 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

---

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

<sup>12</sup> 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/>.

<sup>13</sup> 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.<sup>14</sup>



© Jasim Sarker

---

<sup>14</sup> 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.<sup>1</sup> 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.<sup>2</sup> 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

---

\* Junior Researcher, Arctic Centre University of Lapland, Arctic Governance research group

<sup>1</sup> 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)

<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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

---

<sup>3</sup> 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)

<sup>4</sup> 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.<sup>5</sup> 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).<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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

---

<sup>5</sup> 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)

<sup>6</sup> *ibid*

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

<sup>8</sup> 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)

<sup>9</sup> *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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

The Russian academic literature defines traditional cultural expressions

---

<sup>10</sup> *ibid* (no.5)

<sup>11</sup> 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](https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf)

<sup>12</sup> *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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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,

---

<sup>13</sup> 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)

<sup>14</sup> 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)

<sup>15</sup> *ibid* (no.5)

paragraph 6 that exhaustively excluded folklore from objects that the copyright can protect.<sup>16</sup> Numerus clausus list of article 1304 did not include traditional cultural expressions itself to objects of neighbouring rights.<sup>17</sup> 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.<sup>18</sup> 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

---

<sup>16</sup> *ibid* (no.5)

<sup>17</sup> *ibid* (no.5)

<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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 reproducers to receive consent from original performers.<sup>21</sup> 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.<sup>22</sup> As a result, de-jure, indigenous performers can enjoy neighbouring rights to their

---

<sup>19</sup> *ibid* (no.5)

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

<sup>21</sup> *ibid*

<sup>22</sup> *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.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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

---

<sup>23</sup> *ibid* (no.5)

<sup>24</sup> *ibid* (no.5)

<sup>25</sup> 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...



## References:

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>>

Gavrilov E.P. (2018) "Intellectual Property Law of the Russian Federation: Legislation and Doctrine". In Patents and Licenses, 2018, N 8

Gazizova A.S. (2019). "On the protection of knowledge, cultural expressions and genetic resources". In Russian Law Journal, 2019, N 2  
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](http://kulturu-hotyat-zashitit-reestrom-intellektualnoj-sobstvennosti.html)>

Savina V.S. (2020). "Public law restrictions and prohibitions in intellectual property law". In IP. Copyright and related rights, 2020, N 2 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](https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf)>

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>>

Novoselova L.A. (2017) "Intellectual Property Law. Textbook", Moscow, Russia: Statut

Federal Law of 18.12.2006 N 230-FZ "Civil Code of the Russian Federation. Part Four"

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)*<sup>1</sup> 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.<sup>2</sup> 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)*<sup>3</sup> with scarcely a mention of Indigenous harvesting,<sup>4</sup> 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.<sup>5</sup>

---

\* BA, JD, BCL, MPhil, DPhil; Professor of Law & Canada Research Chair in Indigenous Rights in Constitutional and International Law, University of Saskatchewan.

\*\* JD candidate; Research Assistant, University of Saskatchewan College of Law.

<sup>1</sup> 2021 FCA 184.

<sup>2</sup> 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

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

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

<sup>5</sup> 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.<sup>6</sup>

## II. The *Makivik Corporation* Case

*Makivik Corporation v Canada (Attorney General)*<sup>7</sup> 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.<sup>8</sup>

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

---

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.

<sup>6</sup> 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.

<sup>7</sup> *Makivik Corporation*, *supra* note 1.

<sup>8</sup> See especially Daniel W. Dylan, “Wildlife Management, Privative Clauses, Standards of Review, and Inuit Qaujimagatuqangit: 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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> Harvesting is set out in NILCA as to only be restricted “to the extent necessary to effect a conservation purpose.”<sup>12</sup>

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

---

<sup>9</sup>*Makivik Corporation, supra* note 1, para 27.

<sup>10</sup>See *ibid*, para 28

<sup>11</sup>See *ibid*, para 16-18.

<sup>12</sup>*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.<sup>13</sup>

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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup>

---

<sup>13</sup>See *ibid*, para 40.

<sup>14</sup>See *ibid*, para 49.

<sup>15</sup>*Ibid*, para 2.

<sup>16</sup>*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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

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

---

<sup>17</sup>*Ibid*, para 96.

<sup>18</sup>*Ibid*.

<sup>19</sup>See *ibid*, para 95.

<sup>20</sup> 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.<sup>21</sup> 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.”<sup>22</sup> 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.”<sup>23</sup>

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.<sup>24</sup> In doing so, the Court also drew upon specific modern treaty

---

<sup>21</sup>See *ibid*, para 109

<sup>22</sup>*Ibid*.

<sup>23</sup>*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.

<sup>24</sup> 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.<sup>25</sup> They are what provided the court a means of review that supported declaratory

---

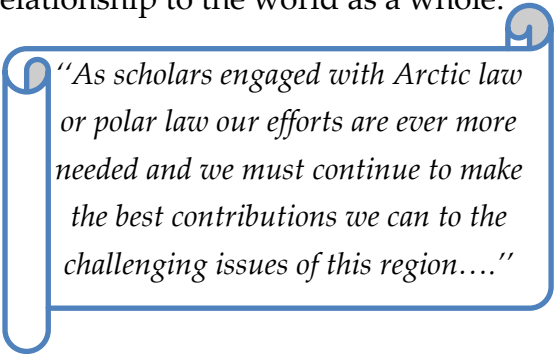
Consult", in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers (eds) *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017).

<sup>25</sup> Dwight Newman, "International Indigenous Rights Law and the Contextualized Decolonization of the Arctic", in Ken S. Coates & Carin Holroyd (eds) *The Palgrave Handbook of Arctic Law and Politics* (Cham, 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.



*“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....”*

## Exploring gender equality among caregivers: a sub-study based on the Nordic network<sup>1</sup>

**Lead author:** *Shahnaj Begum*

**Other Contributors:** *Päivi Naskali, Minna Zechner, Marjo Outila, Eva-Maria Svensson, Lena Wennberg, Joan R. Harbison, Arnrun Halla Arnórsdóttir and Trine Kvitberg*

### 1. Introduction

This study is part of an ongoing project, “Understanding gender inequality among caregivers in the ageing sector in the Nordic countries” (short name: NIKK-AGE-Caregivers), which is funded by the Nordic Council of Ministers’ Nordic Gender Equality Fund (NIKK). The purpose of this project has been to develop a broader research network and at the same time to conduct a small study on gender equality amongst caregivers within Finland, Sweden, Norway and Iceland.

An additional aim has been to promote new knowledge that contributes to the enhancement of gender equality in the eldercare sector.

Care has been discussed in an extensive range of feminist, social and political research (Pritlove et al., 2019; Zechner 2010) and it has been identified as a multifaceted and complex concept that encompasses the emotional, economic, personal and social aspects of care. Researchers have revealed that “despite its universality, the worlds of caring and the ways of providing it vary depending on time and culture” (Anttonen & Zechner, 2011, p.15). Care includes both informal (family-based) and formal (services-based) care (Heintze, 2013). Informal care is given by family and or other close persons, such as neighbours and friends, and formal care is attainable from the care services, which may be public or private (Zechner, 2010). The Nordic countries share comparable welfare policies as well as similar socio-

---

<sup>1</sup> **Acknowledgement:** This work is primarily funded by the Nordic Council of Ministers’ Nordic Gender Equality Fund. The project was partially supported by the North Calotte Council (Pohjoiskalotin neuvoston).

**Contributors:** Post-doctoral Researcher Dr. Shahnaj Begum, University of Lapland & Affiliated Post-doctoral researcher at Centre of Excellence in Research on Ageing and Care (CoEAgeCare), University of Helsinki; Professor Päivi Naskali, University of Lapland; Associate Professor (tenure track) Minna Zechner, University of Lapland; University Lecturer Marjo Outila, University of Lapland; Professor Eva-Maria Svensson, University of Gothenburg; Lena Wennberg, Doctor of Laws & Former Associate Professor, Umeå University; Adjunct Professor Joan Harbison, University of Dalhousie; Adjunct Arnrun Halla Arnórsdóttir, University of Akureyri; Dr. Trine Kvitberg, VID, DNK.

economic, cultural and political features. The primary responsibility for providing care and assistance for the disabled and the ageing lies with the municipalities (Heintze, 2013, p.20). An ageing population is one of the major concerns in the Nordic region, and the demand for caregivers is increasing in all of the countries. At the same time, each country pursues a policy of gender equality at all levels in its policies.

### **1.1 The aim and objectives of the NIKK-AGE-Caregivers project and Nordic added value**

The project aims to bring about an environment in which researchers in the four countries establish networks, cooperation and collaboration. Sharing experiences and convening forums for dialogues on the substantive issues bring added value in knowledge building, which will help to identify concrete challenges and develop a research platform and research agenda. These efforts also serve to broaden the network and highlight the needs related to the proposed theme: care work, caregiving and gender (in)equality. In this light, the project will prove to be highly significant, creating added value for Nordic knowledge. The main purpose of the project, which it has succeeded in

realising, has been to form a network of scholars in order to strengthen cooperation amongst its members, who have met not only virtually but in two face-to-face workshops during the project period. The workshops conducted brainstorming exercises on the following issues and questions:

Comparison the caring politics, gender segregation in the field, and the position of immigrant employees in different Nordic countries. In what way are women as caregivers in the elderly service sector multiply vulnerable? Do they suffer from inequality and social injustices from diverse perspectives? How do the dynamics in the care sector create a complex situation? How do the policies prevailing in the labour market interact in the Nordic welfare model when compared to other job sectors?

This study is mainly based on a synthesis of existing literatures, small data sets from interviews and discussions, and suggestions by the project participants made in workshops during the period from 2019 to 2021. This paper proceeds as follows. Section 2 discusses the definition of gender equality and some examples of (in)equality practices in the Nordic countries. Section 3 goes on to describe the context of the study and Section 4 the data collection processes. Section 5 examines caregiving and gender

equality based on the literature reviews and interview data. Section 6 concludes the study and puts forward salient policy recommendations.

## **2. Conceptualising Gender Equality with Nordic perceptions and practices**

There is no absolute definition of gender equality, given that equality is a changing phenomenon influenced by the transformation of societal functions. It is argued that gender equality is a matter of removing unfair obstacles and ensuring that everyone, regardless of gender, has the same opportunities (Elomäki et al., 2021; Bettio and Sansonetti, 2015, p. 11). In the legal context, the rule of law is the source of gender equality (World Development Report, 2012). Gender equality is context dependent even though one finds uniform legal prescriptions of equality before the law. Hence, for meaningful gender equality, one needs to invoke the concept of gender justice.

Gender equality entails not an only equal distribution of men and women in all domains of society, but also refers to equal rights, responsibilities and opportunities for women and men and girls and boys (UN Women). In social justice theories, it has been stated that inequality occurs when the status,

rights and opportunities of individuals or groups are not equal (Svensson, 2021; Alkire et al., 2015). The notion is linked to fairness, and what is fair depends on maximisation of happiness or wellbeing in the experience of the majority of people.

Previous research has asserted that to create a fair society and to diminish gendered hierarchies it is essential to establish gender equality, which involves considerations of sameness and difference (Elwér et al., 2012). From the sameness standpoint, men and women are fundamentally the same and fairness is achieved through equal opportunities, which eliminate socially constructed gender differences (Verloo and Lombardo, 2007; MacKinnon, 1997; Moller, 1989). From the difference standpoint, women and men are basically different and fairness is created by valuing (Elwér et al., 2012; Verloo & Lombardo, 2007) and embracing the differences or taking them into account. Therefore, equality does not mean that everything is the same for everybody, but rather that everyone (despite differences in gender, ethnicity, sexual orientation disability and age) has similar chances to participate. Among other things, there should be no structural barriers hindering access to or participation in

the care sector; it is not equality to assume that care is a task for women.

Differences in gender roles and unequal treatment in society create discrimination against women (Svensson, 2021; Begum, 2019; Svensson and Gunnarsson, 2012; Parvikko, 1992, p.93). This is very visible in the care sector, where the eldercare sector, for example, is characterised by a high proportion of women and low pay. Social justice contributes to equality with a particular emphasis on fairness and change (Kalsem and Williams, 2010).

Historically, the Nordic countries have been more progressive in addressing gender equality than the other European countries (Kantola et al., 2020; WEF, 2021). Efforts to address gender issues in the Nordic region (Finland, Sweden, Norway and Iceland) began more or less in the same period. The goals of gender equality in the countries were described as follows: “a kind of nationally encapsulated journey, a linear process of evolvment where everyone together continuously strives towards the goal of equality between women and men vis-à-vis power and resources, participation and influence” (Lane and Jordansson, 2020). It has been also discussed that changes are taking place

in the Nordic welfare society, threatening its ideals regarding gender equality (Eräranta and Kantola, 2016; Hirsto et al., 2014).

Nordic feminist legal scholars have asserted that gender equality and human rights law and policies applying to women are blind spots in politics (Gunnarsson and Svensson, 2017). Legislation is the main means to pursue women’s rights (Ylöstalo, 2012, pp. 33–37). The public sphere, for example, sectors such as politics and working life, is seen as the central forum for this work but, as Hanna Ylöstalo has noted, structural obstacles in society prevent women benefitting from the possibilities available to them (Ylöstalo, 2012, p. 33). Nordic legal feminist scholars also have emphasised that the state should take every initiative to achieve equality of outcome by establishing an equal distribution of power and influence, economic equality, equal responsibility and the sharing of unpaid and domestic care work (Wennberg, 2008, pp. 339–343; Svensson and Gunnarsson, 2012). Ylöstalo (2012, pp. 44–50) also refers to the concept of diverse equality, asserting that it is not enough to concentrate on gender when analysing gender identities and power relations but rather that other differences must be taken into account as well.



Gender segregation allows for inequality and the Nordic welfare society has a high level of gender segregation (Tanhua, 2020). Segregation separates women's and men's work and teaches women and men different types of skills, which in turn divides power relations so that men are at the peak of economic power, whereas women have the primary responsibility for caregiving (Hirdman, 1988). The possession of power allows one to formulate, to include and exclude within the power structure. Power also relates to representing and giving a voice to, or to subordinating and silencing (Pylkkänen, 2009, p.14). Pylkkänen highlights the following factors for gender equality: political rights, education and wage labour (Pylkkänen, 2009, p. 11). Hence, gender equality is closely linked to a given country's politics, policies and practices (Sinevaara-Niskanen, 2015; Magnusson, Rönnblom and Silius, 2008). Over the past decade, labour market organisations, employers and trade unions have started to focus on individual women's opportunities to pursue careers achieve a work-life balance (Lane and Jordansson, 2020).

In the Nordic countries, the perception of gender equality is largely uniform, and alternative approaches adhered to among ethnic groups are ignored.

Feminist experts (Naskali, P., and Keskitalo-Foley, 2017) studied intersectionality in Finnish adult education and revealed that ethnicity and race were not discussed in their data in adult education. Segregation is stronger in education and working life in Finland than it is on average in Europe (Tanhua, 2018; Bettio and Vershchagina, 2009). SEGLI's research provides new insights into the causes of occupational segregation using an intersectional perspective (SEGLI is a new type of equality project that addresses gender segregation based on factors such as ethnicity or social class). Scholar Inkeri Tanhua (2018), who worked in the SEGLI project, mentioned that ethnic segregation is one issue where gender influences career choices. Hence, it is also important to see how educational and social practices influence students' and the young generation's perceptions of their future and to probe the causes of care work-related segregation, especially in eldercare sector.

The Finnish labour market is strongly segregated according to gender (THL, Gender Equality). Women work more in the public sector, and men in the private sector. The most sectors with the highest proportion of women in 2019 were health and social services (women 86%); education (women 68%);

and accommodation and restaurant operations (women 68%). In 2018, only 9.2 per cent of employed persons in Finland worked in equal occupations, that is, occupations with at least 40% men and women (THL, Gender Equality; Statistics Finland, 2018). Previous research has revealed that immigration has alleviated gender segregation in some female-dominated areas, such as in community care, but has increased segregation in some male-dominated areas. At the same time, ethnic segregation has begun to emerge (Kazi et al., 2019). Many care responsibilities are unpaid work, even in the Nordic countries (Tanhua, 2018 & 2020). Here gender equality focuses on age, gender and ethnicity, discussing issues in an intersectional perspective.

### **3. Context of the Study (Nordic welfare states)**

Due to low birth rates and improved life expectancy, the Nordic countries now have a rapidly ageing population. The demand for caregivers and informal help is increasing apace as well (Stone, 2016, p.99; Ladegaard, 2012). Despite this increasing demand, the eldercare sector is not being given the attention it requires. Notable shortcomings are that wages in the care sectors (both private and public) are

very low compared to those in other sectors in the job market (Olakivi, 2018; Elwér et al., 2012) and working environments tend to be unattractive (Aalto et al., 2013). Significantly, both the eldercare professions and family care are female-dominated (Karsio et al., 2020). Often family caregivers are women who hold a job and also spend a great deal of time taking care of their children, older parents and relatives. As a result, care management in the Nordic states has sparked some debate and criticism (Esping-Andersen, 1990). It has been argued that the way in which care services in the Nordic states are organised is gendered and imbalanced because of prevailing societal power structures in both family and working life (Anttonen and Sipilä, 1996; Pfau-Effinger, 2005). The overwhelming majority of care providers in these countries are also women, and a significant number have an immigrant background (Armstrong, 2020, p.1).

Budget cuts and reductions in welfare services and social benefits, as well as public-sector employment policies (Kantola & Verloo, 2018; Villa & Smith, 2014), have seriously affected women's prospects of entering the labour market (Karamessini & Rubery, 2014). These changes "may lead to the familialisation of care and hinder

women's access to the labour market" (Sihto, 2019, p.13). The cuts in public service funding and the restricting of eligibility criteria for eldercare also mean that women are further burdened by family/informal care or that they need to restrict their employment for family care reasons (Karsio et al., 2020). Tasks in the educational, economic and certain other occupational sectors are strongly segregated by gender (SEGLI, 2018), which leads to several forms of inequality in the Nordic countries.

The boundaries between male and female work vary historically as well as with class, physical location, racialisation, immigration status and age, among other social locations (Armstrong, et al., 2008). For example, a recently published article in Finland (Hautamäki, 2018) indicates explicit segregation in the choosing of job paths for the second generation of immigrants. The article quoted a Muslim immigrant girl, Pazilaiti Simayijiang. She wanted to study medicine at the university and was qualified to apply, but her student counsellor (*opinto-ohjaaja*) encouraged her to apply to a vocational school and to pursue a career as a nurse or midwife. The girl sensed a discriminatory tone in the attitude and went on to comment "if you have an average grade of nine and blue eyes, no

one will question your academic dreams. It's different if you wear a scarf" (my translation).

The Nordic countries differ considerably across different types of care provision, with eldercare being one example (Jakobsson et al., 2013; Rauch, 2007). Caregiving to older people has less of an effect on employment in the Nordic welfare states than elsewhere in Europe (Bolin et al., 2008; Kotsadam, 2011; 2012). Finland offers a form of support for informal care, the informal care allowance (ICA). This provides a combination of cash and time off for carers and replacement services to the person being cared for during the carer's time off (Morgan and Zechner, 2021). It is important to compare informal care for older and people with disabilities because care services for these two groups tend to differ even in the same country (Jeppsson et al., 2009). People with disabilities prefer not to receive care; they prefer to receive help and assistance instead since they see care as patronising (Zechner, 2010). Studies have indicated a decline in intergenerational care, attributed mostly to the expansion of public services. Reductions in these services are sometimes blamed for observed increases in support by adults for ageing parents (Daatland, 2001;

Sundström et al., 2002; Ulmanen and Szebehely, 2015), which also increases gender inequality.

### **3.1 A general overview of the eldercare system and immigrant- or migrant-related policy and law.**

There have been many changes in the governance and organisation of publicly funded eldercare services in the Nordic countries (Meklin et al., 2009; Valokivi, 2019; Armstrong and Armstrong, 2020). Eldercare is mainly delivered as a combination of formal and informal help in Finland, Sweden, Norway and Iceland. There is little knowledge about the distribution between provider types in different service categories (Meagher and Szebehely, 2013, p. 87). Following is a synopsis of the different pieces of legislation and policies with a bearing on the eldercare system. It includes the framework legislation, the share of residential and home-based care, integration of immigrant and related policies, such as recruitment systems, as well as the development trends in Finland, Sweden, Norway and Iceland in recent decades.

#### ***Eldercare service provision and policies in relation to immigrant workers in Finland***

The Finnish Constitution grants access to healthcare and social services as social rights to all citizens who needed such access. Eligibility for services is based on needs, no means-testing is in use (Morgan and Zechner, 2021). Finnish eldercare policy is a part of the national welfare policy (Valokivi, 2019). *The Social Welfare Act (1301/2014)* remains the major framework for social service provision, including eldercare services. According to the Social Welfare Act, local authorities are obliged to organise social services, provide social assistance and pay social allowances to their residents. From the beginning of 2023 this responsibility will be shifted to 21 newly created wellbeing services counties (and Helsinki, which is an area), with these mostly coinciding with the present hospital districts (Sote-uudistus, 2021). The municipalities and counties have the responsibility to organise services, but actual provision of services is carried out by public actors through outsourcing as well as by for-profit and non-profit actors. The more specific major law on the care of older adults is the *Act on Supporting the Functional Capacity of the Older Population and on Social and Health Services for Older Persons (980/2012)*, which contains more specific guidelines on how to support older populations. Especially important is section 14, which states

that long-term institutional care is only provided where there are medical grounds showing that it is necessary for the safety of the client or the patient. This portrays the primacy of ageing in place in Finnish care policies.

Ageing in place is also supported by the informal care allowance, governed by the *Act on Informal Care Allowance* (Laki omaishoidon tuesta, 937/2005). The allowance is used to support informal care for clients of all ages, but it is mostly used for eldercare; often carers are spouses, rather many of them men (Linnosmaa et al., 2014). The allowance offers the carer a monetary benefit, days off and insurance to cover occupational hazards and occupational illnesses, as well as coaching, training and health and wellbeing check-ups (Morgan and Zechner, 2021). In 2020 there were 55,797 informal caregivers who received the allowance, out of whom 38,494 were caring for somebody aged 65 or older (Sotkanet, 2021). Since 1994 the share of women among informal carers has been declining, but it is still 70 % (Linnosmaa 2014, p. 17; Noro, 2018). The gender gap was smaller among older age groups. The financial assistance minimum in 2021 was €413.45/month and the minimum in transition to “more demanding” care was €826.90 /month (Kuntaliitto, 2021; Noro, 2018).

The *Health Care Act* (Terveydenhuoltolaki) 1326/2010 governs healthcare provision as well as preventive measures, which are important given the health issues that older adults often face. In practice, eldercare in Finland consists of informal care and services that are mostly organised publicly and include home care, service housing and care homes. Assistive services and devices are also available, but services such as cleaning and shopping are often bought directly from the market. Despite the rather wide array of services on offer, past decades have seen increasing reports on unmet care needs in Finland (Kröger et al., 2019). There are more reports of older adults who have to choose whether to buy medication or food (Verbist et al., 2012).

Finland, like many other countries, is increasingly relying on foreign-born workers in its social and healthcare sectors (Näre, 2013). Migrant care workers find it difficult to get their qualifications officially recognised. This means that many registered nurses end up working as assistant nurses at lower pay (Vaittinen, 2017). According to Olakivi (2018, p. 14) “the main winners are the employers, who, instead of improving the quality of care work to attract indigenous professionals, can recruit migrants as a

compliant workforce that is willing—or forced—to work in poor conditions” (Näre, 2013; Wrede, 2010). A recent study reports that in Helsinki the percentage of migrants working as registered or practical nurses increased from 4% to 11% in the period from 2004 to 2013 (Olakivi, 2018, p. 14; Statistics Finland, 2016) yet the proportion of migrants working as head or ward nurses remained almost non-existent, that is, below 1% (Statistics Finland, 2016). According to scholars and migrant care workers, such recruitment tendencies misrecognise the true skills, competencies, and interests of migrant workers (Näre, 2013; Adhikari and Melia 2013). These trends in caregiving suggest inequalities with regard to migrant workers.

The authority in charge of residence permits in Finland is the Finnish Immigration Service (Migri). Its web page explains “when you are applying for a residence permit in order to work in Finland, you should notice that there are specific residence permit applications for certain types of work” (Migri). The pre-determined categories of work when applying for a residence permit are restaurant worker, cleaner or childminder; specialist; EU Blue Card; top or middle management in a company; visiting teacher, lecturer, instructor or consultant; au pair;

athlete, coach or trainer, or sports judge or referee; working holiday; internship; internal transfer within a company; researcher; volunteer; and seasonal worker in agriculture or tourism. Care work is not specifically mentioned. Despite this there are numerous efforts especially by private companies to recruit migrants care workers for care and cleaning work (Näre, 2013; Koivuniemi 2020; Keränen, 2020). In 2014, the employment rate among persons 20 to 64 years old was 63.7 % for immigrants and 73.7 % for people with a Finnish background (THL, Työelämä).

#### *Eldercare service provision and policies in relation to immigrant workers in Sweden*

The views on eldercare have shifted throughout history, changing from a view of it as a private family matter to one considering it a societal and public concern. In Sweden publicly financed and high-quality eldercare services are available to all citizens, that is, all social groups, according to their needs rather than their ability to pay, (Sipilä 1997; Vabø and Szebehely, 2013).

Eldercare in Sweden is regulated in the *Social Services Act* (SFS 2001:453, Section/Chapter 5). The social services (governed by the Social Service Board

in each municipality) are responsible for promoting housing of good quality for the elderly and assisting with domestic help and service if needed. Since the 1980s, the Swedish welfare state project has gradually entered a period of budget cuts. Fewer people get services and care, now often granted in a more limited form, and the definition of needs has changed (Numhauser, 2017).

Today, women are well integrated in the labour market—84.5 % in 2017—but still the labour market is characterised by gendered disparities and gender inequalities. Unpaid care work in the private sphere of the family is still to a large extent a women's concern (Statistic Sweden (SCB), 2018). The public care sector finds itself challenged by demographic changes in combination with large numbers of workers reaching retirement age. The government has responded by appointing a national coordinator for the sustainable supply of skills in publicly financed care (Dir. 2019:77). The mission is to initiate and support change that could promote a good work environment by adopting new welfare technologies, thereby facilitating the work of the staff and providing increased quality for patients and users of welfare services and care.

In 2009 the *Act on System of Choice in the public sector* (SFS 2008:962) came into force in the healthcare and social welfare services. This new approach in Swedish social policy has also found expression in the introduction of choice in primary care, deregulation of the pharmacy market, freedom of choice in childcare, and tax deductions for household services. Privatisation in eldercare means outsourcing, with different care companies competing for contracts; care provision as such remains a public matter, financed through tax revenues (Andersson, 2013, 170-89). The majority of small municipalities have chosen not to introduce the free-choice system, while for the most part the larger ones have adopted it. In 2012 the National Board of Health and Welfare (Socialstyrelsen) took the view that it was too early to draw any conclusions on whether this marketisation has increased the quality in elder services and care. However, for persons with “reduced autonomy” the risk of becoming disadvantaged by the free-choice system and increased disparities among different groups seems tangible (Socialstyrelsen, 2012).

National values for elder services and care, such as living in dignity and having a feeling of wellbeing, were adopted in *the Social Services Act in 2010*, echoing internationally agreed

wellbeing objectives (Svensson et al., 2021). These values, however, do not form the legal basis for assessing whether a person is eligible for services and care. The *Discrimination Act* (2008:567) prohibits discrimination in the social services sectors and private performers of services and care are covered by the prohibition. Municipal autonomy, varying economic conditions and the political priorities established in each municipality entail a risk of discriminatory practices and inequality in outcomes.

Elder services and care provided in the private sphere by family and close persons have increased during the last decades. Even though there is no legal support for denying help and services with reference to the availability of family members and/or close persons, it has been shown that domestic help and services (hemtjänst) have been provided to a lesser extent for those cohabiting with a partner. Domestic help is largely provided by close persons, mostly women, and this practice is significantly more widespread among non-Nordic immigrants (Ulmanen 2016, SCB 2018).

According to the *Social Services Act* (2001:453), social services have to be of a good standard. Appropriate education and experience are required

of the staff. (Chapter 3, para 3). The same applies to private domestic services and private residential care in special housing, with providers and performers needing an authorisation to offer services and care from the Health and Social Care Inspectorate (Chapter 7, para 1-2). The *National Board of Health and Welfare (Socialstyrelsen)* has issued recommendations on the basic knowledge that ought to be required for work in the elder services and care sector (SOSFS 2011:12 (S)). For example, sufficient knowledge of the Swedish language is required. The Board (Socialstyrelsen, 2017) also issues national guidelines for care in the case of dementia. The *2010 Introduction Activities Act* (Etableringslagen, 2010:197) sought to achieve faster establishment on the labour market for newly arrived immigrants and their accompanying relatives. The main objective was to create work incentives by making compensation conditional on active participation in establishment measures. Yet another legal reform was introduced in 2018 for the establishment of immigrants on the labour market and in social life (Prop. 2016/17:175). The legal amendments issued in Regulation (2017:820) harmonised the regulations for this group with rules valid for other jobseekers. Collective agreements on the labour market set the level for



wages and set priorities. The salaries are then individually decided in negotiations between the parties at the local level. The procedure is the same for those employed in the private and public sectors. Salary levels for caregiving are low-paid, but quite equal for men and women (See Facts and Figures). Facts about the salary levels of immigrants are not available.

Household services are to a large extent provided by immigrants and are identified as precarious work in Sweden. One of the objectives for introducing a tax deduction for household services was to make this kind of work “white” and thereby prevent exploitation. The social democratic Swedish welfare state had as one of its objectives to liberate individual persons from family and market dependency, thereby changing class and gender-based structures. Family responsibilities in the law for providing eldercare disappeared. Autonomy in relation to the labour market as well as in relation to the family (defamilialisation) was among the important objectives, not least in social law, and the ambition here was to include women in the labour market.

#### *Eldercare service provision and policies in relation to immigrant workers in Norway*

In Norway, local care service provision is influenced by the central government through legislation, regulations, judicial decisions, monitoring and substantial block grant funding. Eldercare is largely a municipal responsibility and health services try to offer the lowest level of effective care. Municipalities regulate the category of services and the volume of care depending on clients’ needs. Home healthcare services are defined as the lowest level of care in Norway (Holm et al., 2017). The substantial variety in “the municipalities’ demographic, geographic and economic character has resulted in diverse mixes of traditional residential care facilities, home-based care and intermediate solutions” (Vabø and Burau, 2011, Gautun and Hermansen, 2011). Older people’s services are regulated mainly by the *Municipal Health and Care Service Act* (Act 2011-06-24-30), which merged, and replaced, the *Municipal Health Act* and the *Social Services Act* (Act 1991-12-13-81). In the year 2011, not more than 60% of total expenses in the care sector were spent on older people, but in 1998, 74% of spending went towards services for older people (Kjelvik, 2011).

The governmental reform “Leve hele livet” (“Living all your life”) (St.meld.nr 15 (2017-2018) gives the municipalities in Norway a greater

responsibility for eldercare. The reform is a new and different approach to implementing measures for the future elderly healthcare policy. An important factor is the anchoring of the reform in local political consideration of the proposed solutions presented in "Living all your life" and in creating an age-friendly Norway. In order to assist the municipalities in carrying out the reform, the government provides guidance: Kompetanseløftet 2020, Omsorgsplan 2020 and Demensplan 2020. The "Leve hele livet" reform could therefore facilitate municipalities and others in learning from each other and in implementing good and innovative solutions in the services.

The willingness to prioritise financial resources for the elderly sector is very different in the municipalities. In small municipalities with lower populations and many elderly people, there is a greater willingness to prioritise elderly care. Small municipalities often have solutions that involve the whole community in various elderly care activities.

Some urban municipalities in Norway with larger populations often arrange international culture and sporting events that are given high economic priority and attention. As a result, the elderly sector suffers from a lack of

attention, poor financial resources and having few permanent employees in full-time positions. A possible solution to this problem is that the state would earmark funding for elderly care.

In general, there are equal salaries for men and women in the elderly care sector. This also applies to immigrants. Salary compensation is dependent on education, competence and seniority. This also applies to immigrants. In Norway the elderly care sector is an arena for integration for immigrants (Eide et al., 2017). Increased immigration, including people with refugee experiences, has highlighted a need for more knowledge on effective integration measures. Within integration policies, the utilisation of ordinary workplaces has received increased attention in recent years. However, measures that utilise the ordinary workplace as an arena for training and qualification are manifold, from variants of work-first approaches, in which the aim is to get refugees and immigrants into work-related activities quickly, to longer programmes that combine job training and formal education, with the aim of building formal competence and human capital. Drawing on a comparative case study of seven local integration programmes, researchers (Eide et al., 2017) examined how the health and social care sector is

used as a component in qualification and training of refugees and immigrants. The study builds on interviews with employees of the institutions participating in the programmes. The researchers focused on how local measures may strengthen the human capital and attachment to the employment market of the participants.

### *Eldercare service provision and policies in relation to immigrant workers in Iceland*

Over the last 20 years, there have been changes in policy regarding the care of older adults in Iceland to keep older people at home for as long as possible (Sigurveig et al., 2016). This is reflected in the *Act on the Affairs of the Elderly*, No. 125/1999. In Iceland, there are few laws and policies that influence caregiving. In *Laws on health care staff* (34/2012), which provide the quality framework for the healthcare professions, there is no mention of staff who do not have a legally valid job title, which caregivers do not have, or of informal staff. In the laws there is a focus on ensuring service, such as health-related homecare and social support services (which are governed by a special law, the *Laws on social service* (40/1991), also service driven), but no mention of how to ensure the quality of care and ethical

rights, such as dignity and autonomy. According to *Municipalities' Social Services Act*, No. 40/1991, social care services are to be provided to older people living in normal houses; these services include social home help, day-care services at some centre and the like. Social home help includes help with domestic tasks (IADL), meals on wheels and similar services. Home healthcare offers personal assistance with daily living (PADL) and homecare provides nursing (Sigurveig et al., 2016, p.235).

The *Directorate of Health* oversees the quality of health service in Iceland. There are a number of policies and regulations on the matter of caregivers. In the minimum requirements for the operation of healthcare (2019), there is a stipulation to follow the Regulation on Supervision issued by the Medical Director of Health regarding the operation of health services and minimum professional requirements (2007). The regulation states the following where staffing is concerned: "Only healthcare workers who have an operating license provide the service. The number of healthcare workers must take into account the scope and nature of the service and the circumstances at each time". Another policy in this area is Defining Criteria for manpower in Nursing Homes

(2015), which comes closest to defining the quality of caregiving in the country and includes guidelines describing the requirements for nursing and living space (2007). As regards social services as part of homecare, the area where many caregivers work, there are no formal quality guidelines except for those some local authorities have put together for the standard of care they want to provide. The criteria for labour in nursing homes set the recommended proportion of skilled persons among staff at 77.87% and the minimum proportion at 57.13%. By way of example, a 2019 audit of one Icelandic nursing home, Sunnuhlíð (in Reykjavik, Northeast Region), concluded that the ratio was 45% and that was rather high compared to other Icelandic nursing homes. In this audit it was also stated that just under a third of nurses in Sunnuhlíð, or four of thirteen, were of foreign origin. There was no mention in the audit of the gender distribution among the staff.

The government policy on *immigration integration* (2007) states that the work participation rate in Iceland is among the highest in the world, especially among immigrants. This is encouraged with statements about guaranteed access for foreigners who are allowed to stay and work in Iceland and the policy extends to the labour market at

large. Measures are taken if immigrants lose their jobs in the domestic labour market, with an emphasis on individualised services and active participation of the individual. How this operates in practice is hard to say. But *Laws on the working rights of foreigners* (97/2002) support this, as does the *Equal Treatment Act*, regardless of race and ethnic origin (85/2018). In the *Laws on matters regarding immigrants* (116/2012) there is no safeguard put forward for job security or recruitment; the legislation only mentions a social framework that applies to services provided by the state and local authorities. A report from the Minister of Social Affairs and Housing of Iceland on the status and development of immigration issues in 2016 states that an increase in possibilities for immigration would necessitate expanded opportunities for continuing education and work-related studies. The report puts forward a proposal for a special plan on the behalf of the government. Implementation planning on important issues of immigrants' population for the period 2016-2019. One additional goal is that immigrants should enjoy opportunities and rights in the labour market equal to those enjoyed by others. No research was found on the progress or outcome of this plan. However, a report from the State Audit from the year of 2018 points

out that unemployment is more common among immigrants than other Icelanders. In this light, it is clear that no exceptions are made for immigrant workers, publicly anyway.

#### **4. Empirical study and the research process**

In order to better understand how policies are implemented at the ground level, we carried out a small empirical study, undertaken by the lead author. Twenty caregivers and managers from Nordic countries— Finland, Norway, Sweden and Iceland – involved with elderly care were interviewed using a semi-structured questionnaire. The questionnaire encompassed the following themes and issues: elderly care sector (formal and informal, public and private) in their country; qualifications for caregivers and recruiting policies; impact of the corona pandemic in the care service sector; social problems and professional challenges; implications of marketisation in health and social care services; recognising equality and inequality; present situation of immigrant caregivers; number of men and women working in the care sector; present work atmosphere and future expectation and needs in this sector to promote gender equality among caregivers.

To find the caregivers, e-mails were sent to managers of three institutions in Finland, Sweden and Norway. Some of the informants were located using a snowball technique from existing networks. The interviews were conducted between May 2020 and September 2021. A sample of the research questions was sent via e-mail to managers of care homes and to other individual caregivers. Respondents were also called via telephone to explain more about the aim of the interviews. Permission was received for the study by e-mail from the managers of the care homes. In the case of individuals, some permissions were received by e-mail and others orally before conducting the interviews. A total of 20 interviews were conducted, sixteen of care professionals and four of managers. The distribution by country is as follows: six from Finland, two from Sweden, ten from Norway and two from Iceland. Among the twenty informants, six have immigrant backgrounds; three were men and seventeen were women. The age of the caregivers ranged between 25 and 55 years. Ten interviews were done face to face, the rest via telephone, zoom or e-mail. Not all informants answered all the questions. The discussion below is based on a combination of a literature review and the empirical data from the interviews.

## 5. Discussions on care work, caregivers and gender equality

In the Nordic countries, although the demand for caregivers is increasing in the care service sector, people are not interested in applying for jobs in the sector. The reasons for this include the relatively low status of the work, the low salary levels, stressfulness of the work and unfavourable working conditions. When older people need care because of their increasing fragility, they need services that provide direct emotional and social support (Brody, 1985). Care work encompasses caring for and caring about others, which entails both physical care and emotional care (Cancian and O liker, 2000). But this caring work is traditionally ascribed a low status and is dominated by women (Elwér et al., 2012), an observation confirmed by all twenty informants. The managers and all the female informants mentioned that there is need for more male caregivers to balance out the gender distribution in the profession and to make it more gender equal. However, it is good to keep in mind that men are likely to experience downward labour mobility in relation both working conditions and social prestige if they start to work in the female-dominated care sector (Zechner and Anttonen, 2022). Men can

do some of the work better, for example, lifting heavy clients. Previous studies show that it is difficult to evaluate gender equality in this sector because of the high proportion of women (Elwér et al., 2012).

Care work and support should not be seen as part of human nature, or something natural for women that does not require professional skills. Yet, it is often considered an instinctive ability of women that does not require skills and training (Tuominen, 2003). One point that was raised with reproach by the 20 informants was that care involves skills and responsibility with a combination of love and affection. Cancian and O liker's (2000) research revealed the prevalence of this view whereby care work requires little training for caregivers and thus they may be paid less and given little respect (Cancian and O liker, 2000, P. 9). In this regard, the manager of a nursing home from Norway stated the following: "Women like caring work very much, but the salary is low compared to their job responsibilities; they have too little time to do all work. They are very stressed; we need more people. They (caregiver) can use their education if they have time to read and come up with innovations. Now nurses are just running and running".

Working environments are very important in all sectors. Caregivers informally take on bigger responsibilities and risks when caring for clients, because of the shortage of workers in the healthcare system (George, 2008). Informants from Finland and Norway noted that because of the shortage, some caregivers who work regularly in the sector easily become tired, which impacts their health and wellbeing negatively. All women caregivers believe that wages and the status of care work would improve if society's perception of care work and the working environment improved and more men were employed in the sector. This view is supported to some extent by previous research (Elwér et al., 2012; Kröger and Vuorensyrjä, 2008, p. 225; Korvajävi, 2003).

Caregiving is generally thought to be a female duty in any society but this perception could differ between societies of distinct character and culture (Abellan et al., 2017). In this regard, a care manager from Finland stated that the most influential things shaping caregiving services are caregivers' family, financial situation and education, as well as government policies. Sociologist Stefánsson Kolbeinn in his interview (2019, published online) points out that the

strong family ties of Icelanders and the culture that prevails there can have an effect. "I cannot rule out that this is strong in our culture as well, I think there is an interplay of these views and it can be difficult to realise which comes first. Is there is a strong culture for this and that is why we have not developed these resources well enough or has the culture been shaped in this way because the resources have been inadequate"? (Google translation from Icelandic)

In their research on the care service in the UK context, Hussein, S. and Christensen, K. (2017, p.763) note the following: "Personalisation and marketisation in particular create niche markets for migrant men where new roles that embrace gender diversity are created. Despite these circumstances, care work remains women's work and some migrant men who want to access this sector face by several challenges". One might rather say that there is nothing in care work which would prevent from men taking it up. It is not valued and low paid and can cause lower status in hierarchies (Hussein and Christensen, 2017; Palle et al., 2019). In stating the importance of male care professionals' role in a nursing home, women caregivers from Norway and Iceland mentioned that men can be good caregivers when this care work

reinforces a valuable identity for them and if it fits prevailing cultural beliefs about gender. Men will focus on caregiving work more intently than on other work when they know and realise that caring work is morally more meaningful than other work (Cancian and Oliker, 2000, P. 6-7; Palle et al., 2019).

Women do most of the unpaid and paid caregiving (Elwér et al., 2012). All twenty respondents talked about the low salaries in the care sector. Informants also mentioned how difficult it was for them to manage during the last year with the Covid-19 restrictions. They were separated from the social community since they were giving services to older people who were in a vulnerable situation. In this regard, an informant from Finland commented, “though relatives of the clients and Government have praised our work during this pandemic, it is not enough; the salary needs to be increased and the work environment should be improved”. In the care sector, equality requires sharing the satisfactions and burdens of caregiving. All the care professionals interviewed mentioned that quality care work requires qualified and highly motivated people who give enough time to fulfilling the needs of care receivers.

Both the literature review and informants’ experiences gave rise to a striking observation: for the most part, women remain the primary caregiver at home even when they are employed in a poorly paid caregiving job. These issues continue and exacerbate gender inequality in the public sector and politics, as well as at home. Informants also mentioned that individuals, communities and society are convinced that women are better at caring, partly because the gendered pattern has been so resistant to change (Cancian and Oliker, 2000, p.132). Policies in this regard are most likely to reinforce gender inequality, which encourages men to specialise in earning money and women to focus on unpaid family caregiving. The success of care worker policies in effecting gender equality depends on how well the policies, along with other social forces, bring men actively into domestic and paid care (Cancian and Oliker, 2000, p. 121).

Caring for others has also been considered natural in the Nordic tradition. The caregivers’ main goals are to relieve the care receivers’ sufferings and to support the health and wellbeing (Arman et al., 2015) of older people. To deliver quality services and to support older peoples’ health and wellbeing, it is important to ensure caregivers’ socio-economic



position and wellbeing. Caregivers' issues are essentially neglected, discussed less than they should be and not researched sufficiently. For example, Martinsen (2006) and Dahlberg (2008) have emphasised the lack of a caring consciousness regarding care receivers. This claim is also relevant for caregivers. An OECD report (Colombo et al., 2011) indicates that size of the working-age population is expected to shrink. Women between the ages of 25 to 54 years with a higher education are most likely to be employed as care workers (Stone, 2016; International Labour Office, 2013). Since care work is physically stressful and predominately low-paid, the availability of care workers has become more challenging in the Nordic countries, a point clearly articulated by care professionals from Finland, Sweden, Norway and Iceland. Based on informants' comments, it can be said that the situation and status of an occupational nurse (*sairaanhoitaja*) in Norway is better than in Finland. Many Finnish nurses have gone to work in Norway. Five interviewees (nurses) cited two reasons: the higher workload in Finland and higher salary and more free time in Norway. A female informant from Finland (*sairaanhoitaja*) remarked, "our union in Finland does not work properly for our wellbeing. We also had to do practical nursing in

Finland, which is a waste of our valuable education. Here in Norway we have received proper recognition".

However, the Government has already carried out an extensive reform in Finland, namely the "family leave reform" (*perhevapaaudistus*), which will make the care done at home more equal and help women to get back into and stay in the labour market. Recently, a trend has emerged whereby immigrant women and men both are involved in the care sector in the Nordic countries, especially in long-term services and support. Many Finnish care professionals are also working in Norway. According to previous research and informants from the four countries, more immigrant men and women are being recruited in this sector. Many private family care receivers rely on private migrant workers (Bednarik et al., 2013), a trend which was cited by an immigrant male caregiver from Sweden. Among my informants were two male immigrant caregivers and one female caregiver who were giving services with just a few weeks' training. They do not have any nursing-related education. Informants from Norway mentioned that the proportions of native and immigrant care professionals in their institution are about 60 and 40, respectively. The migrants are from

Finland; from Asian and African countries, such as the Philippines, Thailand and Eritrea; Eastern Europe; Russia; and other countries. Most of the immigrants do practical nursing work. Language is the main barrier for some, hindering them from performing their job like native workers.

The empirical study elicited mixed comments from native care professionals about their immigrant colleagues. According to native caregivers, for example, “some men are working very fast, which shows lack of love and devotion for the work, whereas women caregivers from Asia show more respect, which older clients like it very much”. A Muslim immigrant caregiver from Norway stated that she was a doctor in her native country but had not received a license to practice in Norway. She was working as a nurse in a private institution where I care for a disabled man and older people. When she went to another institute for a job interview, she had to face the prospect that she could not use the hijab if she were hired, which she found to be a violation of her human rights. She stated: “I am working in a private institution; because of the language barrier I could not apply in many places. I have an immobile client who is in wheelchair; it is difficult for me to move him from one

place to another. I am receiving a very small salary, and the attitude of the clients’ relatives toward me is not nice. This may be because I am Muslim; especially last Christmas his sister’s attitude was racist”.

The workforce in the care sector is also becoming more diverse nationally, as a growing number of people with immigrant backgrounds are being recruited. Such diversification is, however, far from evenly distributed (Olakivi, 2018). In 2001, only 1% of all employees in health and social services in Finland had an immigrant background, and by 2013 this had risen to 3% (Statistics Finland, 2016). It is difficult for immigrant care workers to get their qualifications recognised, a problem acknowledged by the care managers and all immigrant informants. Managers and immigrant informants made the same point. In this kind of situation, private organisations are making more profit and immigrants are facing more inequality than other workers.

In the health and social services in Helsinki, the percentage of employees with an immigrant background grew from 3% in 2001 to 9% in 2013 (Olakivi, 2018). In health services in Helsinki in 2013, 9% of all employees were foreign-born, whereas in social services, the

same proportion was 12%. In residential care for older and disabled people, the proportion of foreign-born employees was 19%. At the same time, the proportion of migrants among all employees in Helsinki was 10%. Immigrant care workers are underrepresented in managerial positions (Olakivi, 2018; Aalto et al., 2013: 66; Näre, 2013). Finland has courses specifically planned for migrants to attain the qualification of practical nurse (Nieminen, 2011). In Norway, the elderly care sector is an arena for immigrants (Eide et al., 2017). Increased immigration, including people with refugee experiences, has actualised the need for more knowledge on effective integration measures.

Immigrant care workers need work permit from the authorities. Of the people working as nurses, some have a degree, some have completed various courses, and some have at least taken language courses. Those who do not have nursing degree, are working as assistants to nurses. Temporary workers can work as caregivers but they do not have a permanent contract. Those who have no skills or education are paid much lower salaries and do not receive long-term work-related benefits, as they have short-term contracts. According to researcher

Antero Olakivi (2018), migrant care workers are presented in diverse ways as active, independent and enterprising but also as cheap and disposable labour. He observes. "The recruitment of migrant care workers can also violate the interests of older clients if the language (or other) skills of migrants are conceived as deficient."

Many researchers in the fields of law and gender have found that unequal power is most often rooted in age, gender, ethnicity and class (Gunnarsson and Svensson, 2017; Ylöstalo, 2012; Svensson and Gunnarsson, 2012; Stenström, 1997, p. 45), which, according to some caregivers, is because of reduced budgets in municipalities. Additionally, some of the Norwegian caregivers stated that nursing homes and care institutions recruit people for care work from the street without requiring any education.

Previous studies on the role of managers in the care sector have revealed that the increasing tendency to recruit migrant workers is a practice guided by illegitimate, managerial and economic interests and managers' biased, stereotypical conceptions of migrant workers (Carter, 2000; Näre, 2013). However, most developed countries, including the Nordic

countries, have managed well with immigration schemes for recruiting foreign workers, but such schemes are relatively rare when hiring migrant workers in care services (Spencer et al., 2010). People without an immigrant background who have other options in the job market have rather little interest in the care profession. This trend gives a different picture of gender inequality in Nordic society. Care workers, especially immigrant women in practice, at times do two full-time jobs, one at home, the other at work. On many occasions, the societal mindset and expectations suggest that the care profession is the easiest one, and mainly meant for women.

## **6. Conclusion**

The political situation is changing all the time and countries are cutting their welfare provision because of their current economic conditions and politics. Care includes strong professionalism, responsibility and affection. It is very depressing that care work has not been seen as skilled work and thus has not been valued and respected properly. Women have remained the primary domestic caregivers. Today, women still do more of the caregiving, with society trying to maintain that they are more likely to understand care receivers' needs.

Women continue to dominate the caregiving sector, even though many women are breadwinners in the Nordic countries. Women's majority in formal and informal care affects gender inequality; they lose paths to justice. It is also very disappointing that there are no signs that men are becoming caregivers in equal numbers. Gender-neutral policies seem to have intensify the distinctions between men's and women's employment. Law and government policy and programmes affect cultural beliefs and families' private struggles. Men can be effective caregivers if they have adequate resources of time and money and if they have learned appropriate skills and standards of caring.

In the empirical data respondents raised the point that the value of care work and the compensation offered are a mismatch; salaries remain low. Lack of sufficient workers often results in extreme pressure on existing caregivers, which affects both their physical and mental wellbeing. As a result, the quality of the work may suffer and it may fail to be as effective as desired. Because of overload and tiredness, some caregivers decide to take early retirement. This again brings other negative incentives for them: a low salary throughout their career, followed by a lower pension due to

early retirement, amounts to multiple vulnerabilities. As in other countries, in the Nordic countries being a wage-earner remains a source of respect, privilege and social power.

It is essential to hire properly qualified and well-paid care professionals in eldercare service institutions. Since most of the caregivers are women, this approach should go hand in hand. It has been stated that in all domains “of welfare an anti-racist dimension must become inseparable from promoting a feminist perspective” (Langan, 1992). We need to find the causes of and means to mitigate gender segregation. Pursuing this goal will not only be thought-provoking but also one possible way to promote equality. Based on the foregoing discussion, some recommendations and suggestions may be put forward:

- There should be some initiatives with a focus on the organisational level to mitigate segregation in educational institutions, in particular those that teach courses and give training leading to qualifications as care professionals.
- Revising the gendered images of care would help to encourage men’s caregiving and improve caregiving in general. Labour market organisations and relevant unions should make care

work more respected and rewarding, which would influence gender patterns in the sector.

- To improve both the rights and responsibilities of both men and women, a combination of measures should be used, such as better working conditions, higher status and salaries for the work, and sharing the responsibility for care giving.

### References:

- Aalto, A. et al. (2013). Ulkomaalaistaustaiset lääkärit ja hoitajat suomalaisessa terveydenhuollossa: haasteet ja mahdollisuudet. Helsinki: National Institute for Health and Welfare.
- Abellan A. et al., (2017). Partner care, gender equality, and ageing in Spain and Sweden. *International Journal of Ageing and Later Life*, 11(1): 6989.
- Act on Health Care Professionals (Laki terveydenhuollon ammattihenkilöistä) 28.6.1994/559 (Finland). Available at: <https://www.finlex.fi/fi/laki/ajantasa/1994/19940559> (14.11.2021)
- Act on Social Welfare Professionals (Laki sosiaalihuollon ammattihenkilöistä) 817/2015

- (Finland). Available at: [https://www.finlex.fi/fi/laki/alkup/2015/2015081\(14.11.2021\)](https://www.finlex.fi/fi/laki/alkup/2015/2015081(14.11.2021))
- Act on Support for Informal Care (Laki omaishoidon tuesta) 2005/937 (Finland). Available at: [https://www.finlex.fi/fi/laki/ajantasa/2012/20120980\(21.3.2019\)](https://www.finlex.fi/fi/laki/ajantasa/2012/20120980(21.3.2019)).
- Act on Supporting the Functional Capacity of the Older Population and on Social and Health Services for Older Persons 2012/980 (Finland). Available at: [https://www.finlex.fi/fi/laki/ajantasa/2012/2012098\(14.11.2021\)](https://www.finlex.fi/fi/laki/ajantasa/2012/2012098(14.11.2021))
- Act on the Affairs of the Elderly, no. 125/1999 (Iceland).
- Adhikari, R. and Melia, K. M. (2015). The (mis)management of migrant nurses in the UK: a sociological study. *Journal of nursing management*, 23(3), 359–367.
- Alkire, S. (2015). *Multidimensional Poverty Measurement and Analysis*. Oxford: Oxford University Press.
- Anttonen, A. and Zechner, M. (2011). Theorizing care and care work. In Birgit Pfau-Effinger & Tine Rostgaard (eds.) *Care between work and welfare in European societies*. Houndmills: Palgrave Macmillan, 15–34.
- Anttonen, A., and Sipilä, J. (1996). European social care services: Is it possible to identify models? *Journal of European Social Policy*, 6(2), pp. 87-100.
- Arman, M. et al., (2015). The Nordic Tradition of Caring Science: The Works of Three Theorists. *Nursing Science Quarterly*, Vol. 28(4), pp. 288–296.
- Armstrong, P. and Armstrong, H. (2020). *The privatization of care: The case of Nursing homes*. Routledge new York & London: Ageing and society series.
- Armstrong, P. et al., (2008). *Critical To Care: The Invisible Women in Health Services*. University of Toronto Press.
- Bednarik, R. et al., (2013). The 'Care Gap' and Migrant Workers. In K. Leichsenring, J. Billings, and H. Nies, eds. *Long-Term Care in Europe: Improving Policy and Practice*. Basingstoke: Palgrave Macmillan.
- Begum, S. (2019). *Ageing and Gender in the Nordic Arctic*. PhD dissertation, Publisher: University of Lapland, Acta Universitatis Lapponiensis 378. ISBN 978-952-337-103-3. ISSN 0788-7604.
- Bettio, F. and Vershchagina, A. (2009). *Gender Segregation in the Labour Market. Root Causes*,

- Implications and Policy Responses in the EU, Luxembourg. Available at: <http://ec.europa.eu/social/main.jsp?catId=738&furtherPubs=yes&langId=en&pubId=364> (2011.2021).
- Bettio, F. and Sansonetti, S. (2015) Visions for Gender Equality. Publisher: European Union.
- Cancian, F. M. and Olikar, SJ (2020). Caring and Gender. Rowman & Littlefield Publishers, Inc. AltaMira Press
- Carter, J. (2000). New Public Management and Equal Opportunities in the NHS. *Critical Social Policy*, 20(1), 61–83.
- Collins, P. (2015). Intersectionality's Definitional Dilemmas, *Annual Review of Sociology*, 41(1), pp. 1–20.
- Colombo, F., et al. (2011). Help Wanted? Providing and Paying for Long-Term Care. OECD Health Policy Studies. Paris: OECD Publishing.
- Daatland, S. (2001). Ageing, families and welfare systems: Comparative perspectives. *Gerontol Geriat* 34, pp. 16–20.
- Dahlberg, K. et al., (2008). Reflective lifeworld research. (ed.) Lund: Studentlitteratur.
- Dir. 2019:77. [National coordinator for a sustainable competence provision within publicly financed eldercare] Sweden. Available at: <https://www.regeringen.se/4adb10/contentassets/a01d70ccea7f4af5b26409a51b2f60e0/dir.-2019-77.pdf> (20.11.2021)
- Eide, HMK. et al., (2017). The Social Care Sector as Arena for Integration: A Fast and Easy Way to Stable Employment for Refugees and Immigrants? *Tidsskrift for velferdsforskning*, 20(4).
- EIGE Available at: <https://eige.europa.eu/gender-mainstreaming/concepts-and-definitions> (24.10.2021)
- Eige, concepts-and-definitions.
- Elomäki A. et al. (2021). Changing Feminist Politics in a 'Strategic State'. In: Keskinen S., Stoltz P., Mulinari D. (eds) *Feminisms in the Nordic Region. Gender and Politics*. Palgrave Macmillan, Cham. [https://doi.org/10.1007/978-3-030-53464-6\\_4](https://doi.org/10.1007/978-3-030-53464-6_4)
- Elwér, et al., (2012). Gender (in)equality among employees in eldercare: implications for health. *International Journal for Equity in Health* 11:1. Available at:

- <http://www.equityhealthj.com/content/11/1/1> (14.11.2021)
- Eriksson, K. (2007). Becoming through suffering – the path to health and holiness. *International Journal for Human Caring*, 11(2), pp. 8-16.
- Eriksson, K. (2010). Concept determination as part of the development of knowledge in caring science. *Scandinavian Journal of Caring Sciences*, 24, pp. 2-10.
- Erlandsson, S. et al., (2013). Chapter 2 Marketising trends in Swedish eldercare: competition, choice and calls for stricter regulation.
- Eräranta, K. and Kantola, J. (2016). The Europeanization of Nordic Gender Equality: A Foucauldian Analysis of Reconciling Work and Family in Finland. *Gender, Work and Organization*, Vol. 23 No. 4, pp. 414–430
- Gautun, H. and Hermansen, Å. (2011). Eldreomsorg under press: Kommunenes helse- og omsorgstilbud til eldre [Eldercare under pressure: The municipalities' health- and care services for the elderly] FAFO-Report No. 12. FAFO, Oslo.
- George, A. (2008). Nurses, community health workers, and home carers: Gendered human resources compensating for skewed health systems. *Global Public Health*, 3(1):75-89.
- Gunnarsson, Åsa and Svensson, Eva-Maria. (2017) Gender equality in the Arctic and North; socio-legal and geopolitical challenges. *Nordic Journal on Law and Society*, 01(01-02), pp. 6-15 International Labour Office (ILO). 2013. Domestic Workers Across the World: Global and Regional Statistics and Extent of Legal Protection. Geneva: ILO.
- Harju, J. (2019) HS "Sote-alalla on pian valtava työvoimapula, kun väestö ikääntyy". Available at: <https://www.hs.fi/kotimaa/art-2000006264104.html> (20.11.2021).
- Hautamäki, T. (2018). Sinä sopisit hoitajaksi Jos on yhdeksikön keskiarvo ja siniset silmät, kukaan ei kyseenalaista akateemisia haaveita. Toisin on, jos sattuu käyttämään huivia. Kotimaa (Suomen Kuvalehti, 05.01.2018 06:00).
- Health Care Act (Terveydenhuoltolaki) 30.12.2010/1326 (Finland). Available at: <https://www.finlex.fi/fi/laki/ajantasa/2010/20101326>. (14.11.2021)
- Heintze, C. (2013). On the Highroad – The Scandinavian Path to a Care System for Today A Comparison between Five Nordic Countries and Germany. P. 20 Publisher:



- Economics and Social Policy  
Unit of the Friedrich-Ebert-  
Stiftung, Godesberger Allee.
- Hirdman, Y. (1988.) Genussystemet :  
Teoretiska Funderingar Kring  
Kvinnors Sociala Underordning  
(Uppsala: Maktutredningen)
- Hirsto, H. et al., (2014).  
“(Re)constructing economic  
citizenship in a welfare state –  
intersections of gender and  
class”, *Equality , Diversity and  
Inclusion: An International  
Journal*, Vol. 33(2), pp. 122–139.
- Holm, S.G.et al., (2017). Allocation of  
home care services by  
municipalities in Norway: a  
document analysis. *BMC Health  
Serv Res* 17, 673. Available at:  
[https://doi.org/10.1186/s12913-  
017-2623-3](https://doi.org/10.1186/s12913-017-2623-3) (20.11.2021)
- Hussein, S. and Christensen, K. (2017).  
Migration, gender and low-paid  
work: on migrant men’s entry  
dynamics into feminised social  
care work in the UK. *Journal of  
Ethnic and Migration Studies*,  
43(5), 749–765.
- Jakobsson, N. et al. (2013). Informal  
eldercare and care for disabled  
children in the Nordic countries:  
prevalence and relation to  
employment. *Nordic Journal of  
Social Research*, 4. DOI:  
10.15845/njsr.v4i0.225
- Jakobsson, N., and Kotsadam, A.  
(2010). Do Attitudes Toward  
Gender Equality: Really Differ  
Between Norway and Sweden?  
*Journal of European Social Policy*,  
20(2), 142-159.
- Jeppsson G. et al., (2009). Family as  
failure? The role of informal  
help-givers to disabled people in  
Sweden. *Scandinavian Journal of  
Disability Research*, 11(1), 35-49.
- Kalsem, K. and Williams, V. (2010).  
Social Justice Feminism. Faculty  
Articles and Other Publications.  
13. Available at:  
[https://scholarship.law.uc.edu/f  
ac\\_pubs/13](https://scholarship.law.uc.edu/fac_pubs/13) (24.04.2018).
- Kantola, J. et al., (2020) Tasa-  
arvopolitiikan  
suunnanmuutoksia.  
Talouskriisistä tasa-arvon  
kriiseihin. Helsinki:  
Gaudeamus.
- Karsio, O. and Anttonen, A. (2013).  
Marketisation of eldercare in  
Finland: legal frames,  
outsourcing practices and the  
rapid growth of for-profit  
services, In book: Marketisation  
in Nordic eldercare: a research  
report on legislation, oversight,  
extent and  
consequences Edition:  
Stockholm Studies in Social  
Work

- Karsio, O. et al., (2020). Vanhuus, vaiva ja tasa-arvo [Old age, ailment and equality]. In Johanna Kantola, Paula Koskinen Sandberg ja Hanna Ylöstalo (eds.) Tasa-arvopolitiikan suunnanmuutoksia. Helsinki: Gaudeamus, 227–242.
- Kazi, V. et al. (Ed.) (2019). Kotoutumisen kokonaiskatsaus 2019: Tutkimusartikkeleita kotoutumisesta. TEM oppaat ja muut julkaisut 2019:10. Helsinki: Työ- ja elinkeinominist.
- Keränen, T. (2020). Suomeen palkataan Filippiineiltä satoja sairaanhoitajia suoraan vakipaikkoihin – taustalla hoitoalan paheneva työvoimapula. Available at: : <https://yle.fi/uutiset/3-11233650> (11.11.2021)
- Kjelvik, J. (2011). Mindre del av utgiftene går til eldre, [Less spending on elderly] Samfunns-speilet 2/2011, SSB Oslo.
- Kolbein, S. (2019). Ísland kemur illa út (Iceland is doing badly) Available at: [https://www.visir.is/g/2019191119722/island-kemur-illa-ut-?fbclid=IwAR0jR4uxS2RBJq\\_rmPf8I5teHN9U1tUPHh41oU0JEFzms0fmospYeZff6Xtc](https://www.visir.is/g/2019191119722/island-kemur-illa-ut-?fbclid=IwAR0jR4uxS2RBJq_rmPf8I5teHN9U1tUPHh41oU0JEFzms0fmospYeZff6Xtc) (20.11.2021).
- Korvajävi, P. (2003). “Doing gender”-theoretical and methodological considerations. In Where have all the structures gone? Doing gender in organisations, examples from Finland, Norway and Sweden. Volume 33. Edited by: Gunnarsson E, Andersson S, Rosell AV, Lehto A, Salminen-Karlsson M. Stockholm: Center for women’s studies; 2003:45-76.
- Kröger, T. et al., (2018). Hoivatyö muutoksessa Suomalainen vanhustyöpohjoismaisessa vertailussa. University of Jyväskylä– YFI Publications 62018
- Kröger, T. et al., (2019). Care poverty: unmet care needs in a Nordic welfare state. International Journal of Care and Caring Publisher: Policy Press.
- Kuntaliitto (2021). Available at: <https://www.kuntaliitto.fi/sosiaali-ja-terveysasiat/sosiaalihuolto/iakkaiden-palvelut/omaishoito> (11.11.2021)
- Körger and Vuorensyrjä 2008 mention it <https://www.julkari.fi/bitstream/handle/10024/101112/kroger.pdf?sequence=1>
- Ladegaard, I. (2012). In Sweden, helping and caring are on the

- rise. *Science Nordic*, December, 20<sup>th</sup> 2012.
- Lane L, and Jordansson B. (2020). How Gender Equal Is Sweden? An Analysis of the Shift in Focus under Neoliberalism. *Social Change*, 50(1):28-43.
- Langan, M. (1997). Who Cares? Women in the Mixed Economy of Care. In: Ungerson C., Kember M. (eds) *Women and Social Policy. Women in Society (A Feminist List)*. Palgrave, London. Available at: [https://doi.org/10.1007/978-1-349-25908-3\\_24](https://doi.org/10.1007/978-1-349-25908-3_24) (20.11.2021).
- Linnosmaa, et al. (2014). Available at: [https://www.julkari.fi/bitstream/handle/10024/125550/URN\\_ISBN\\_978-952-302-144-0.pdf?sequence=1&isAllowed=y](https://www.julkari.fi/bitstream/handle/10024/125550/URN_ISBN_978-952-302-144-0.pdf?sequence=1&isAllowed=y) (11.11.2021)
- MacKinnon, C. (1987). *Feminism unmodified*. Cambridge: Harvard University Press.
- Magnusson, E. et al., (2008). Introduction. In *Critical Studies of Gender Equalities: Nordic Dislocations, Dilemmas and Contradictions*. *Journal Nora : Nordic journal of feminist and gender research*, 13(3), pp. 148-152.
- Martinsen, K. (2006). *Care and vulnerability*. Oslo: Akribe forlag.
- Meld.St.15. (2018). *Leve hele livet En kvalitetsreform for eldre*. Available at: <https://www.regjeringen.no/no/tema/helse-og-omsorg/innsikt/leve-hele-livet/id2547684/>. (20.11.2021).
- Migri (Finnish Immigration Service). Available at: <https://migri.fi/en/working-in-finland> (20.11.2021).
- Moller, O. (1989). *Justice, gender and the family* New York: Basic Books; 7.
- Morgan, F. and Zechner, M. (2021). *Uncovering Familialism: Cash-for-Care Schemes in England and Finland*. *International Journal of Care and Caring* (pre-published)
- Naskali, P. and Keskitalo-Foley, S. (2017). Intersectionality in Finnish adult education research: insights from the Journal *Aikuiskasvatus* 2010–2016. *European Journal for Research on the Education and Learning of Adults*, 1-15.
- Nieminen, S. (2011). *Maahanmuuttajasairaanhoitajien työlää t tiet ammattiin*. In A. Laiho & T. Ruoholinna (eds.), *Terveysalan ammatit ja koulutus* (pp. 224–246). Helsinki: Gaudeamus.

- Noro, A. (2018). Omais- ja perhehoidon kehitys vuosina 2015–2018
- Näre, L. and Nordberg, C. (2016). Neoliberal Postcolonialism in the Media: Constructing Filipino Nurse Subjects in Finland. *European Journal of Cultural Studies*, 19(1), 16–32.
- Näre, L. (2013). Ideal Workers and Suspects. Employers' Politics of Recognition and the Migrant Division of Labour in Finland. *Nordic Journal of Migration Research*, 3(2), 72–81.
- Olakivi, A. (2018). The relational construction of occupational agency performing professional and enterprising selves in diversifying care work. PhD dissertation. ISSN 2343-273X (print): Unigrafia Helsinki 2018.
- Palle, S. et al., (2019). Yes, The Guys Can Do It!": Migrant Male Care Workers In *Canadian And Swedish Nursing Homes*, 56 (4): 1052-1068.
- Parvikko, T. (1992). Conceptions of Gender Equality; Similarity and Difference. In Keränen, Marja (ed.) *Gender and Politics in Finland*. Ashgate publishing limited: USA.
- Perhevapaaudistus (2021). Available at: <https://www.kela.fi/perhevapaaudistus> (13.11.2021).
- Pfau-Effinger, B. (2005). Welfare state policies and the development of care arrangements. *European Societies*, 7(2), pp.321-347.
- Pritlove C. et al., (2019). "It's Hard Work": A Feminist Political Economy Approach to Reconceptualizing "Work" in the Cancer Context. *Qualitative Health Research*. 29(5):758-773.
- Puthenparambil, J. et al., (2017). Users of home-care services in a Nordic welfare state under marketisation: the rich, the poor and the sick. *Health and Social Care in the Community* (2017)25(1), 54–64.
- Pylkkänen, A. (2009). Trapped in Equality: Women as Legal Persons in the Modernisation of Finnish Law. *Suomalaisen Kirjallisuuden Seura/Finnish Literature Society*, Helsinki, 2009, 277.
- Rauch, D. (2007). Is There Really a Scandinavian Social Service Model?: A Comparison of Childcare. Reasons for gender segregation of occupations and opportunities to alleviate segregation in vocational schools (Ammattien sukupuolenmukaisen eriytymisen syyt ja mahdollisuudet lieventää

- eriytymistä ammatillisissa oppilaitoksissa).
- Regjeringen. Care Plan (2020). The Norwegian Government's plan for the care services field for 2015–2020 Available at: [https://www.regjeringen.no/contentassets/af2a24858c8340edaf78a77e2f9cb7/careplan2020\\_eng.pdf](https://www.regjeringen.no/contentassets/af2a24858c8340edaf78a77e2f9cb7/careplan2020_eng.pdf) (28.10.2021)
- SEGLI (2018) Promoting gender equality and mitigating segregation in education and working life. Available at: <https://www.kaikkienduuni.fi/english> (26.10.2021)
- SFS. 2001:453. The Social Services Act [Socialtjänstlagen], Sweden. Available at: [http://www.ilo.org/dyn/natlex/natlex4.detail?p\\_isn=60673](http://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=60673) (20.11.2021).
- SFS. 2008:567. The Discrimination Act [Diskrimineringslagen]. Available at: [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/diskrimineringslag-2008567\\_sfs-2008-567](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/diskrimineringslag-2008567_sfs-2008-567) (20.11.2021).
- Sigurveig H. et al. (2016) Care of Older Adults in Iceland: Policy Objectives and Reality, *Journal of Social Service Research*, 42:2, 233-245.
- Sihto, T. (2019). Placing women? How Locality Shapes Women's Opportunities for Reconciling Work and Care. Jyväskylä: University of Jyväskylä, 2019, 97 p. (JYU Dissertations ISSN 2489-9003; 153)
- Sinevaara-Niskanen, H. (2015). Setting the Stage for Arctic Development: Politics of knowledge and the power of presence. *Acta Universitatis Lapponiensis* 304, Rovaniemi: Lapland University Press.
- Social Welfare Act (2014). Sosiaalihuoltolaki 30.12.2014/1301. Finlex Data Bank. Available at: <https://www.finlex.fi/fi/laki/ajantasa/2014/20141301?search%5Btype%5D=pika&search%5Bpika%5D=sosiaalihuoltolaki> (20.11.2021).
- SOSFS 2011:12 (S)Utkom från trycket den 5 december 2011 Socialstyrelsens författningssamling Ansvarig utgivare: Chefsjurist Eleonore Källstrand Nord 3 Socialstyrelsens allmänna råd om grundläggande kunskaper hos personal som arbetar i socialtjänstens omsorg om äldre, Sweden. Available at: <https://www.socialstyrelsen.se/globalassets/sharepoint->

- [dokument/artikelkatalog/foreskrifter-och-allmanna-rad/2011-11-28.pdf](#) (20.11.2021).
- Sote-uudistus, (2021) Available at: <https://soteuudistus.fi/uudistustyhyesti-> (11.11.2021).
- Sotkanet (2021). Available at: <https://sotkanet.fi/sotkanet/fi/index> (11.11.2021).
- Statistic Sweden (SCB, 2018) [https://www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201\\_2017b18\\_br\\_x10br1801eng.pdf](https://www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201_2017b18_br_x10br1801eng.pdf)
- Statistics Finland (2016). Statistics available on request from the Statistics
- STM. Available at: [https://stm.fi/documents/1271139/3899844/Kuntainfo\\_5-2017\\_verkkoon.pdf/150c056a-abe9-4e68-acce-b0793c271bb7/Kuntainfo\\_5-2017\\_verkkoon.pdf](https://stm.fi/documents/1271139/3899844/Kuntainfo_5-2017_verkkoon.pdf/150c056a-abe9-4e68-acce-b0793c271bb7/Kuntainfo_5-2017_verkkoon.pdf) (26.10.2021)
- STM. (St.meld.nr 15 (2017-2018)) Leve Hele livet. Available at: <https://www.helsedirektoratet.no/tema/leve-hele-livet-kvalitetsreformen-for-eldre/St%20Meld%2015%20-%20engelsk.pdf/> /attachment/inline/8561e891-57dd-447b-a184-895b739d74ce:c3c28dd80df596a4c8a05ffe6e5cf2e291198ba0/St%20Meld%2015%20-%20engelsk.pdf (20.11.2021).
- Stone, R.I. (2016). The Migrant Direct Care Workforce: An International Perspective. *Journal of the American Society on Aging*, Vol: 40(1), pp. 99-105.
- Sundström, G. et al., (2002). The shifting balance of long-term care in Sweden. *The Gerontologist*42(3): 350-355.
- Svensson, E-M & Gunnarsson, Å. (2012). Gender Equality in the Swedish Welfare State. *Feminist Law*, 2 (1): pp. 1-31.
- Svensson, E-M and Pylkkänen, A. (2004). Contemporary Challenges in Nordic Feminist Legal Studies, In Svensson, Eva-Maria and Pylkkänen, Anu and Niemi-Kieiläinen (eds.) *Nordic Equality at a Crossroads: Feminist legal Studies Coping with difference*. England: Ashgate Publishing limited.
- Svensson, E-M (2021). In the Pan-Arctic Report Gender Equality in the Arctic, p. 39-40, Available at: <file:///Users/xsveev/Downloads/Pan-Arctic Report-GEA3-2021-10.pdf> (20.11.2021).
- Svensson, E-M. et al. (2021). The Capabilities Approach and the Concepts of Self Determination, Legal Competence and Human Dignity in Social Services for Older People.' In: *A Multidisciplinary Approach to*

- Capability in Age and Ageing, Hanna Falk Erhag, Ulrika Lagerloef Nilsson, Therese Rydberg Sterner, Ingmar Skoog (eds.). Springer Nature Switzerland AG.
- Svensson, E-M and Gunnarsson, Å. (2018). Structuralism versus Individualism in Swedish Gender Equality Policy and Law. *NORA-Nordic Journal of Feminist and Gender Research*: Routledge, Taylor & Francis Group.
- Svensson, E-M. (2017). Gender Equality in the Governance of the Arctic Region. *Nordic Journal on Law and Society*, 1(01-02): pp. 16-64.
- Tanhua, I. (2018). Introduction to the research of the SEGLI project, (updated 8.2.2019)
- Tanhua, I. (2020). Gender equality and Nordic welfare societies. Norden. Available at: <https://stm.fi/documents/1271139/8492720/Report+Gender+equality+and+Nordic+welfare+societies.pdf/60fcbf91-669b-4d10-9b16-01a51657eb58/Report+Gender+equality+and+Nordic+welfare+societies.pdf>
- THL Gender Equality (2018). Available at: <https://thl.fi/en/web/gender-equality/gender-equality-in-finland/work-and-income> (31.10.2021)
- THL Työelämä. Available at: <https://thl.fi/fi/web/maahanmuutto-ja-kulttuurinen-moninaisuus/kotoutuminen-ja-osallisuus/tyoelama> (29.10.2021)
- Tilastokeskus (2018) Työelämä, Available at: <http://www.stat.fi/tup/tasaarvo/tyoelama/index.html#segregaatio>.
- Tuominen, MC. (2003). *We are Not Babysitters: Family Childcare Providers Redefine Work and Care*. Rutgers University Press.
- Ulmanen, P. (2017). Family care in the Swedish welfare state: extent, content and consequences. Work in progress: Paper to the Transforming care conference, Stockholm University.
- Ulmanen, P. and Szebehely, M. (2015). From the state to the family or to the market? Consequences of reduced residential care in Sweden. *International Journal of Social Welfare*, 24(1): 8192.
- UN Women. Concepts and Definitions; complemented by the expert with parts of language from other known definitions. Available at <https://www.un.org/womenwat>

- [ch/osagi/conceptsanddefinitions.htm](https://www3.weforum.org/docs/WEF_GGGR_2021.pdf) (24.10.2021).
- Vabø, S.I and Burau, V. (2011). Universalism and the local organisation of elderly care. *Inter-national Journal of Sociology and Social Policy*, 31 (4/5), 173-184
- Vabø et al., (2013). Marketisation in Norwegian eldercare: preconditions, trends and resistance. In *Stockholm Studies in Social Work Marketisation in Nordic eldercare: a research report on legislation, oversight, extent and consequences* Edited by Gabrielle Meagher and Marta Szebehely.
- Vaittinen, T. (2017). The Global Biopolitical Economy of Needs: Transnational entanglements between ageing Finland and the global nurse Reserve of the Philippines. <https://trepo.tuni.fi/handle/10024/101993>
- Valokivi, H. (2019). The aged people in the transitional elder care policy and service system in Northern Finland. In: Naskali, P., Harbison, J. R. and Begum, S. (ed.) *New Challenges to Ageing in the Rural North. A Critical Interdisciplinary Perspective*. Cham: Springer Nature, 47–64.
- WEF (2021) World Economic Forum's Global Gender Gap Report, p. 9, Available at: [https://www3.weforum.org/docs/WEF\\_GGGR\\_2021.pdf](https://www3.weforum.org/docs/WEF_GGGR_2021.pdf) (11.11.2021)
- Verbist, G. et al. (2012). The Impact of Publicly Provided Services on the Distribution of Resources: Review of New Results and Methods, OECD Social, Employment and Migration Working Papers, No. 130, OECD Publishing, Paris,
- Verloo, M. and Lombardo, E (2007). Contested gender equality and policy variety in Europe: Introducing a critical frame analysis approach. In *Multiple meaning of gender equality: A critical frame analysis of gender policies in Europe*. Edited by: Verloo M. Budapest: Central European University Press.
- World Development Report (2012). Gender Equality and Development. World Bank. Available at: <https://openknowledge.worldbank.org/handle/10986/4391> (10.08.2017).
- Wrede, S. (2010). Nursing: Globalization of a Female-Gendered Profession. In E. Kuhlmann & E. Annandale (eds.), *Palgrave Handbook of Gender and Healthcare* (pp.



- 437–453). London: Palgrave Macmillan.
- Ylöstalo, H. (2012). Tasa-arvotyön tasa-arvot. Finland: Tampereen Yliopisto.
- Zechner, M. (2010). Informaali hoiva sosiaalipoliittisessa kontekstissa [Informal care in the context of social policy]. *Acta Universitatis Tamperensis* 1543. <http://acta.uta.fi/teos.php?id=11353>
- Zechner, M. and Anttonen, A. (2022). Care as work. In Costanzo Ranci & Tine Rostgaard (eds.) *Research Handbook of Social Care Policy*. Edward Elgar Publishing (forthcoming).



© Jasim Sarker

# CURRENT DEVELOPMENTS IN ARCTIC LAW

Volume 9

**Contact:**

Northern Institute for Environmental and Minority Law  
Arctic Centre  
University of Lapland  
PO Box 122, Rovaniemi, Finland