

CHAPTER 4: EXAMPLES OF THE ARCTIC-SPECIFIC REGULATORY (AND SELF-REGULATORY) MECHANISMS

4.1

The Arctic Council's Soft-law Processes

Hema Nadarajah

[T]hus the belief in an ice-free north-east and north-west passage to the wealth of Cathay or of India, first propounded towards the close of the 15th century, cropped up again and again, only to be again and again refuted.
- Fridtjof Nansen, 1897

This belief that Fridtjof Nansen writes of in 1897 is one that is fast becoming a reality in the face of increasingly warming temperatures in the Arctic. Alongside these changes, interests from non-Arctic states and non-state actors are also mounting as the region's resources and trade routes are becoming more commercially accessible. In a large part, these biophysical changes have called for a science-based decision-making approach to the region's governance, whether on issues pertaining to jurisdictional claims or on the management of fisheries resources. Soft law is often assumed to be characteristic of areas where decisions are based on the best available and often uncertain scientific and technological knowledge, which would be that of the Arctic.

Soft law refers to written legal instruments, other than hard treaties, that exist in either binding or non-binding forms. Non-binding soft law can exist in various forms, such as declarations, recommendations, resolutions, and official ministerial statements. Given the diversity in these instruments, one could usefully see international law as agreements along a continuum measured by a degree of "softness" or "hardness" at either end of the spectrum. A broad definition of soft law is adopted here, one that includes some binding written legal instruments as well as non-binding ones. The former, henceforth referred to as 'soft treaty', is defined as *a binding instrument containing some combination of permissive language, ambiguity, and redundancy that leaves it devoid of mandatory, clear, new obligations*. The latter will be referred to as "non-binding soft law". If placed along such a continuum, such instruments would fall somewhere between two ends that are either purely legal or purely

political, with soft treaties falling between non-binding soft law and binding hard treaties:

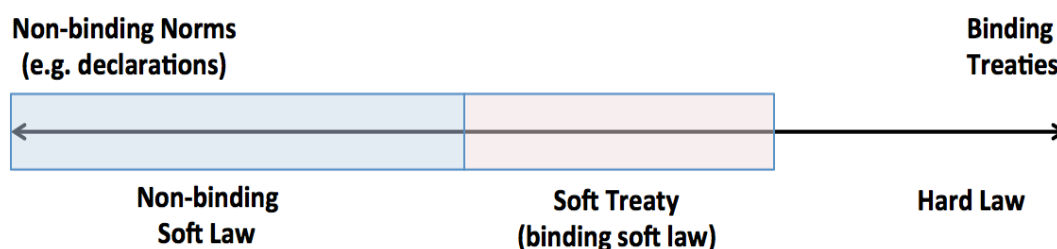


Figure 1: Spectrum of written international law with the shaded segments

Some hard treaties, such as the UNCLOS, the Polar Code, and the Montreal Protocol, govern the region but are not specific to it. Other instruments are specific to the region, such as the Polar Bear Treaty, the Central Arctic Ocean Fisheries Agreement, and the Russia-Norway Boundary Treaty. The hard treaties such as the UNCLOS and the UN Framework Convention on Climate Change (UNFCCC) are global in nature, while the Polar Code is specific to *both* the Arctic and Antarctic. Instruments that are specific to the Arctic and are binding, tend to take on characteristics of a soft treaty, such as those negotiated within the auspices of the Arctic Council or among the Arctic Five.

Having initiated the negotiation of three soft treaties and adopted numerous other non-binding soft law instruments, the Arctic Council had established itself as an institution for soft governance in the region. The Arctic Council itself was created on the foundation of a non-binding soft law instrument – the 1996 Ottawa Declaration. Soft law has since come to characterize the Arctic Council member states’ approach to governance in the region. Unlike the Antarctic Treaty, a hard law instrument, there is no equivalent in the Arctic. This could possibly be due to several reasons: (1) the UNCLOS, a hard treaty, serves the same role since the Arctic is centred on an ocean, (2) UNCLOS supports the Arctic coastal states’ (Arctic Five) desire to “maintain sovereignty and sovereign rights” in the region. It can be observed that, when the Arctic states wish to conclude a hard treaty, such as the Central Arctic Ocean Fisheries Agreement, they do so outside the Arctic Council, and (3) Antarctic remains uninhabited with the exception of scientific communities. In the Arctic, however, the landmass falls under the sovereignty of the Arctic-8.

Although the soft law approach facilitates norm formation, in this case, the structure and form of the Arctic Council may have been just as important. The Arctic Council includes Russia and six NATO states. Prior to the 2022 Ukraine crisis, a soft law approach had long enabled it to shape decisions despite the often-tense relationship between NATO and Russia. While the Arctic is a region within which tension has been low, power dynamics outside of the region risk spilling over into the Arctic as countries increasingly recognize the region as a key geopolitical theatre. These dynamics among regional actors are compounded by increasing interest in the region by non-Arctic states. Soft law may be a way to bridge global and regional policies against a backdrop of rapidly changing environment and regional tensions.

Both the Agreement on Enhancing International Scientific Cooperation and the Central Arctic Ocean Fisheries Agreement are based on the need for science-based cooperation. While the latter instrument was largely precautionary, the former was based on existing practices of scientific research accessibility that always depend on the ongoing consent of sovereign states. The Arctic may be a region that is built on the norm of cooperation, but this does not mean that the soft treaty/soft law regime governing the region is a form of supranational governance. In reality, it remains to be seen if the Agreement can indeed facilitate researchers' accessibility to the Arctic; i.e. whether the Arctic states will really allow improved access to their territories and maritime zones.

Figure 2 below graphically illustrates the non-binding soft law and soft treaty instruments, relative to hard law instruments in the Arctic since 1920, the year the Svalbard treaty was concluded, to 2019, when the most recent Arctic Council Joint Ministerial Statement was adopted. The graph demonstrates that the Arctic has been and is increasingly being governed by softer forms of legalization.

We are observing an increase in the frequency of situations favoring soft treaties. Growing numbers of state and non-state actors can make it more difficult to negotiate hard treaties. Rapid political, technological, and environmental change can make it impractical to use hard treaties that are, to some degree, frozen in time. Soft treaties and other forms of soft law are more flexible and adaptable. They also allow for greater and more diverse

participation. And they might avoid some of the obstacles that can prevent the adoption of hard law, such as ongoing tension between Western states and Russia, while leaving open and even facilitating the possibility that their commitments might later become part of hard treaties or customary international law.

For more on this, read...

Loukacheva N, 'The Arctic Council and "Law-Making"'. (2020) 50 *The Northern Review* 109
<https://doi.org/10.22584/nr50.2020.005>.

