





# Polar Law Textbook

*Natalia Loukacheva, Editor*

## **Polar Law Textbook**

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# 1. Introduction to Polar Law

*Natalia Loukacheva*

## 1.1 What is Polar law?

There may be multiple approaches to the understanding of this term. For the purposes of this textbook, however, the definition of “polar law” is limited to general international law regulations that are applicable to both the Arctic and the Antarctic (e.g., the UN Convention on the Law of the Sea-UNCLOS). The definition used here also covers international law treaties or conventions that deal with issues specific to the Polar Regions (e.g., for the Arctic – Agreement on the Conservation of Polar Bears; for the Antarctic – Convention on the Conservation of Antarctic Seals, the Convention on the Conservation of Antarctic Marine Living Resources, etc.). At the same time, “polar law” also refers to the domestic law of the eight Arctic States (Canada, Denmark, Finland, Iceland, Norway, Sweden, the Russian Federation, and the U.S.A.) with special reference to the different branches of law that address various Arctic-related matters (e.g., Canada’s Arctic Waters Pollution Prevention Act). It is also inclusive of the laws of sub-national Arctic jurisdictions (e.g., Nunavut Wildlife Act, etc.). Plus, as far as the South Pole is concerned, some regulations resultant from the Antarctic Treaty Consultative Meetings (ATCMs) need to be incorporated in the national legal systems of each of the Consultative parties (and some non-consultative parties do so). Thus, broadly speaking, “polar law” is a developing field of law that deals with the international and domestic legal regimes that are applicable to the Arctic or the Antarctic, or both.

At the same time, aside from the hard law regulations relevant to Polar Regions, one should not discard the benefits of “soft-law” instruments, especially in the Arctic where at the time of writing there is no general international legally-binding Arctic Treaty in place.<sup>1</sup> Unlike the Antarctic Treaty of 1959, which has been in force since 1961, the possibilities of an Arctic treaty are subject to ongoing academic legal discourse and policy developments. On the one hand, the existing web of soft-law – non le-

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<sup>1</sup> For examples of multilateral legal initiatives in the Arctic see: the historic 1911 Convention between Great Britain, Japan, Russia and the United States respecting Measures for the Preservation and Protection of Fur Seals in the North Pacific Ocean; The 1920 Treaty Concerning the Archipelago of Spitsbergen – Svalbard that deals with the issue of the legal status and sovereignty of this archipelago; and the above-mentioned 1973 Agreement on the Conservation of Polar Bears between Canada, Denmark, Norway, the USSR, and the USA.

gally-binding instruments in the Arctic – (e.g., declarations, resolutions, memorandums of understanding, cooperation accords, etc.) that are mainly issued or concluded by various Arctic forums (e.g., the Arctic Council, the University of the Arctic, etc.) or can be signed by other Arctic actors (e.g., indigenous groups, or Northern governments, or industry representatives, etc.), often prove to be efficient in dealing with various Arctic-related matters. On the other hand, despite the numerous pros and cons attached to having an international Arctic Charter or Treaty,<sup>2</sup> the debate over the need for legally binding agreements in the region versus the benefits of soft-law, points to the complexity of this issue. Therefore, any attempt to understand the scope and applicability of “polar law” needs to consider both the hard and soft law approaches.

Despite some obvious similarities between the both Poles, in reality, they each function under divergent legal regulations which can, in part, be explained by their differences. One noticeable distinction is that the Arctic has been inhabited with many Indigenous peoples and other Northerners, whereas the Antarctic has neither permanent residency nor an Indigenous population (although numerous scientists and their families live and work there, and young children even go to school there for short periods of time). For this reason then the application of International Human Rights law in the Antarctic is possible but not to the same degree as in the Arctic (e.g., one can argue that the Antarctic is a “common heritage of mankind” example). Furthermore, in the Arctic, the domestic law of the Arctic States with clearly recognised territorial sovereignty (one exception is an ongoing disagreement between Denmark and Canada over Hans Island) has an important influence on how various issues are dealt with. In the Antarctic, territorial sovereignty claims are “frozen” (Article IV of the Antarctic Treaty). In other words, “polar law” refers to different areas of international law concerning the Arctic and the Antarctic and domestic law but the degree of application of certain legal principles or branches of law may be different in each Polar region. Thus, a detailed analysis within a specific area of law may be needed to understand certain particularities of the legal regime as it applies to Arctic – and Antarctic-related issues.

At the same time, similarities between the Poles in relation to a range of emerging issues, in particular with regard to climate and environmental change, indicate that international environmental law or international law of sea regulations have special significance for both the Arctic and the Antarctic.

For example, the growing number of climate change tourists and other adventurers in both areas has serious ramifications for environmental protection and the preservation of wilderness areas. In addition, growth in

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<sup>2</sup> There now exists a growing academic discourse on this issue: see, for example, *The Circle*, Vol. 1, 2009 (published by the WWF international programme); Danish Ministry of Foreign Affairs, *Ilulissat Declaration*, May 28, 2008; Timo Koivurova, “Alternatives for an Arctic Treaty-Evaluation and a New Proposal,” *RECIEL* 17 (1), 2008: 14–26; Olav Schram Stokke, “A legal regime for the Arctic? Interplay with the Law of the Sea Convention,” *Marine Policy* Vol. 31 (4), 2007: 402–408, etc.

the volume of shipping given the increased level of navigable accessibility due to melting ice also poses new challenges in respect of pollution, has a negative impact on wildlife (e.g., noise) and biodiversity more generally in both Polar areas.

Climate change poses a threat to the extinction of Polar species (e.g., there is now an ongoing debate over the future of the polar bear population in the Arctic and on the possibility of the disappearance of certain micro-organisms in the Antarctic). At issue here is also the question of regulating access to various biological and non-renewable untapped resources that are now becoming more accessible due to the warming climate and the availability of new technologies. Although in the Antarctic the exploitation of minerals is currently forbidden this issue may be revisited in the future.

In the Arctic, for example, the exploration and exploitation of new fields of the offshore non-renewable resources of the seabed is already on the legal and political agenda of several Arctic and other States (e.g., the stance of several policy entities on Arctic Policy). Some of the Arctic Ocean coastal States namely, Canada, Denmark and the Russian Federation, have ratified the UNCLOS and may be able to extend their continental shelves up to the North Pole. Under Article 76 of this convention a country needs to provide scientific evidence to the UN Commission on the Limits of the Continental Shelf which may then allow the country to extend its rights to the potentially lucrative resource-rich seabed in the Arctic Ocean beyond the existing 200 nautical mile Exclusive Economic Zone (EEZ).

For example, the Russian Federation and Norway have made such submissions and Norway has already received recommendations from the Commission. The Russian Federation was, however, asked to submit additional data. Canada has to make its submission by 2013, Denmark by 2014. At the current time of writing, the USA has not acceded to the UNCLOS but it is already studying the outer limits of its continental shelf. The UNCLOS is also applicable in the Antarctic where, for example, some historic claimant States to the Antarctic Treaty (Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom) reaffirmed their interests via Article 76 (see Koivurova 2009 for details).

The utilisation of a “bipolar” approach (namely – the consideration of legal regimes for both Poles) is useful in understanding Polar law which puts emphasis on various areas of international and domestic law. Those areas may cover, for example, the branches of:

- Environmental law, including climate change and biodiversity (both international and domestic)
- Human Rights law (e.g., including the rights of the Arctic’s Indigenous Peoples and self-government) – (both) plus, the viability of the Antarctic approach

- The law of Sustainable Development (both)
- Resources law (non-renewable/renewable) (both)
- Administrative law (both)
- Criminal law (both)
- Trade law and Economics (both)
- Law of the Sea/ maritime law (both, includes maritime boundaries disagreements)
- Transportation law (both)
- Labour law and Social securities (mainly domestic)
- Wildlife law (both, may also fit into resources law)
- Constitutional law (mainly domestic, includes governance and sovereignty claims)
- Sports law (domestic)
- Health law (both)
- The law of International organisations (mainly international)
- Entertainment and Internet law (mainly domestic), etc.

This admittedly inexhaustive list reveals that many issues that are relevant to the Polar areas are addressed in legal regulations for other regions of the globe. These branches of law are functioning in the legal systems of non-Arctic States or States that do not express interest in the Antarctic Treaty System (ATS).

Depending on the stakeholders involved in the particular issues of concern their interests may point to the fact that certain areas of law are more important when the Arctic or the Antarctic are concerned. Since the legal regimes for the Poles differ in a number of ways, (e.g., the Arctic does not have a legally-binding treaty), it is impossible to generalise in respect of which area or branch of law is more important in addressing Polar issues. This will depend on the particular case in hand. Clearly, because of the mounting environmental problems faced (e.g., climate change or persistent organic pollutants) and their potential global consequences, the matter of environmental protection in both Poles has become one of the utmost importance internationally. The impact of those changes not just on biodiversity in the Arctic and the Antarctic but also the health, sustenance and the livelihood of the Arctic's indigenous peoples has therefore helped to introduce a human rights law discourse into the environmental law debate. In other words, depending on the case study in question several areas of law may be of crucial importance. Thus, "polar law" is an inter-disciplinary and developing area of law.

There are also important linkages between Polar Law issues and questions that are addressed in other realms of the humanities and social sciences. Many of the Arctic or Antarctic developments are a result of, or the subject of ongoing political or international relations discourses. For example, various current and emerging security issues in both areas; the adaptation or mitigation capacity-building of communities in facing their



attempt to face the consequences of climate change or bi- or multi-lateral diplomacy and political controversies in the negotiation of outstanding legal disagreements in the Arctic; the impact of the cold war on the outcome of the Antarctic Treaty provisions (e.g., the principle of demilitarization), to name but a few. In other words, as a discipline, “Polar Law” is developing in a multi-disciplinary direction suggesting that it is of the utmost significance for the discipline to utilise information gained from, and maintain linkages with, the various cognate humanities and social sciences (e.g., Human Geography, Anthropology, Economics, Political Science, and International Relations).

Polar Law is also developing as an educational discipline. This textbook is partially based on courses taught in the context of the Master’s programme in Polar Law (University of Akureyri, Iceland) and it is hoped that eventually long-distance courses in Polar Law will be offered internationally. At the same time, recently, several universities have begun to offer special courses or visiting lectures on Polar Law issues within their law school curriculums and in other departments. Moreover, the level of public attention given to the Polar issues has in recent years increased dramatically on the basis of the numerous media statements made. Several Polar-related reports and studies have been commissioned domestically and internationally all addressing legal issues. The continuing legacy of the International Polar Year (2007–09) and materials from numerous conferences that included legal questions also suggest that in the near future “Polar Law” will become as important as it is topical at many educational, political and legal venues.

In addition to its educational value Polar Law is not just a developing academic discipline it is also a practical tool in resolving current and emerging legal issues at both the international and domestic levels. For example, the above-mentioned question of the extension of continental shelves by several Arctic States may potentially lead to the overlapping of continental shelves which may cause legal and political tensions. Most current unresolved legal disagreements in the Arctic concern the delimitation of maritime boundaries (e.g., Canada-USA in the Beaufort Sea, the boundary dispute between Denmark and Canada in the Lincoln Sea). For example, in the Beaufort Sea the boundary issue is of legal and economic importance because of potential access to the deposits of oil and gas which bring the interests of powerful energy corporations into play. Each of these issues will potentially require the expertise of domestic and international energy law specialists. Moreover, access to and ownership of other resources will inevitably pose further questions for legal practitioners.

The question remains, however, whether there is any need to define “Polar law” as a new and specialised area of legal studies, academic and scientific discourse or even a practical discipline? Or is this “bipolar,” inter-disciplinary and where possible multi-disciplinary nexus the best

way to understand the various legal developments currently taking place in the Arctic and the Antarctic?

One can argue that there is no need to determine any special legal regime for both Polar Regions, as international law is universal and if the required criteria are met (e.g., the State has signed and ratified an international convention, which is governed by customary law of treaties, etc.), all relevant international law instruments shall apply to those areas. In other words, there is no need for any distinctive “Polar” international law regime.

Furthermore, in some cases, not all Arctic and other States may recognise existing legal theories or claims that support the interests and current claims of certain Arctic States (e.g., Canada-USA disagreement over control of the Northwest Passage). The USA among others claims that, according to international law, the Northwest Passage is an International Strait and thus is open to international navigation. Canada insists that the waters of the Arctic Archipelago are Canada’s internal historic waters, and thus Canada should have the exclusive say in control over them. Further, in the exercise of its sovereignty in the region and in the protection of its interests in the Northwest Passage, Canada relies on the reinforcement of the application of domestic legislation when it concerns the Arctic. Thus, despite the fact that both Canada and the USA are major allies and economic partners, they “agree to disagree” over the interpretation of international law and tend to use different legal arguments and theories to bolster their own stakes over control and navigation in the waters of the Arctic Archipelago.

This example points to the fact that although international law is universal its interpretation and application may not, in practice, be easy particularly where the Polar Regions are concerned as numerous specific pre-conditions exist which may influence the result. Importantly, this example also indicates that domestic law (i.e., dealing with environmental monitoring; control of and the mandatory regulatory regime for shipping in the Arctic) is also vital (see, e.g., 2009 amendments to Canada’s the Arctic Water Pollution Prevention Act or the anticipated making of the NORDREG – the Arctic marine traffic system mandatory). It further shows that despite the provisions of international or domestic law each of the States in question is pursuing its priorities and its own agenda in meeting this legal challenge. National interest or politically-based differences may not however allow the issue at hand to be dealt with by legal means alone. Clearly then arguments can be deployed against the “Polar law” terminology or the concept as such, but as this textbook shows, Polar Law is evolving and it undoubtedly has its own niche to fill.

The bipolar approach is useful but, as noted previously, given the existing differences between both areas it is not always applicable to the same degree. Historically, the Antarctic has been at the centre of “polar” legal and political discourse since the signing of the Antarctic Treaty and the subsequent legal documents that form the crux of the Antarctic Treaty

System. Several legal developments concern the Antarctic and parallels may be drawn in places with the Arctic (see the chapters by Koivurova, VanderZwaag, and Potts in this textbook).

However, as most chapters in this textbook will show, the situation in the Arctic is different in a number of ways from that of the Antarctic. Over the years, many experts have suggested that useful lessons for the Arctic could be learned from the Antarctic Treaty System. At the same time, despite various differences between the two Poles, especially with respect to their legal regimes and governance systems, to a certain degree, the Arctic experience may be of learning significance to the South Pole (e.g., in the area of environmental monitoring).

The growing importance of both Polar Regions in various aspects of global and regional development also suggests the need for further inquiry into the role of law in dealing with many of the current and emerging issues concerning the Arctic and Antarctic. As this textbook shows, in the context of the fundamental environmental, economic, political and other changes taking place in these regions, law may not be a panacea for all challenges, but it has its own role to play in the regulation and solution of many of them.

Generalisations on this issue are simply not possible here, as each legal challenge may require a solution within a specific area of law or within several areas of law simultaneously, or may even demand additional expertise from other sciences. Thus, specific and detailed analysis of each situation or legal case study may be needed. In conclusion, this chapter summarises some of the most recent tendencies, primarily taking place in the Arctic but which may also have implications for the Antarctic. A more detailed analysis of some of these developments is outlined in the subsequent chapters of this textbook and is now increasingly accessible from within the growing body of scholarship now being undertaken in this field.

The Arctic will have a vital bearing on the future development of the circumpolar nations, non-Arctic States and the globe. Aside from historical perception of the region as “resource rich” or “the last” frontier, within the last two decades the Arctic has become a new scientific and intellectual frontier with promising prospects for development across many fields. At the same time, the Arctic’s growing economic, commercial, geostrategic and political importance is often hampered by increasing problems and pressures, especially in the environmental and social realms. The various stakeholders engaged in the development of the Arctic, moreover, are seeking to pursue their many interests at the global, national, sub-national and regional scales.

In dealing with Arctic-related issues, depending on their agenda and the scope of jurisdiction, the stakeholders employ different approaches that may involve unilateral, bi-lateral or multi-lateral policies or the combination of all three. For example, the apparent desire of the eight Arctic

States to put their national interests first does not imply that unilateral actions in the region are always efficient as certain issues of concern would benefit more from multilateral or bi-lateral approaches. In other words, despite differences and specific national policies or interests in the area, all Arctic States and other stakeholders are to a certain degree inter-dependent and share common areas of concern or benefits that may be best addressed by means of multilateral or bi-lateral diplomacy and collaboration. This cooperation takes place at various levels and in different sectors (e.g., see chapter on Arctic Governance in this book), including the area of law.

As noted above, legal developments take place at the global, regional, national and sub-national levels. They form one aspect of, and are influenced by, the general processes of globalisation, internationalisation and the multi-faceted changes that occur in the regions. Global and local pressures are, moreover, becoming ever more obvious in both Poles. It is no accident that several Arctic States have recently issued or are about to formulate their new or revised Arctic policies (e.g., Norway –2007, Denmark –2008, the Russian Federation –2008, and the USA and Iceland –2009, while Canada released the pillars of its Northern Strategy in 2009 and Finland is expected to release its strategy soon, so as possibly Sweden). Importantly, since Denmark, Sweden and Finland are members of the EU their Arctic policies need to be coordinated with EU Arctic policy. Furthermore, non-Arctic States (e.g., China and Japan) and supranational entities like the EU have also expressed a special interest in Arctic politics and policies (e.g., see: Communication of the European Commission on its Arctic Strategy –2008, and Council of the EU conclusions on Arctic issues –2009 both of which provide policy guidelines).

Potentially emerging and ongoing disagreements among some of the Arctic States and other States over several claims and issues in the area stimulate international attention and legal discourse on the need for a special legal regime for the Arctic. As noted previously, there is already an ongoing discourse on the pros and cons of the Arctic Treaty including attempts to employ the Antarctic “model” to the Arctic. It remains however to be seen whether any kind of general Arctic Treaty will be feasible as numerous impediments exist preventing this becoming a reality.

As it will be shown in this textbook in several areas international law has an important influence on the state of affairs at both Poles (e.g., environmental protection; sovereignty matters; the law of sea; the climate change regime; resources and sustainable development), etc. The opening of the new shipping routes, increased navigation, tourism, economic and commercial activities (e.g., bio-prospecting) in both Polar Regions each present new opportunities but also pose new challenges often requiring legal solutions.

As it will be further seen from several chapters national legal and political developments are also significant and influence the development of any

legal regime in the Arctic. Although the consideration of “Arctic international law” – or the Arctic legal regime is possible (e.g., see Rothwell 1996), the terminology of “Arctic law” is confusing and requires further analysis (e.g., see Loukacheva 2008). Perhaps, one solution is to look at “Polar law” as the developing and evolving concept that covers several legal regimes and branches of law.

The content of this textbook is developed in line with the expertise garnered from different areas of law. Thus, chapters by Koivurova, VanderZwaag and Potts provide us with an analysis of various aspects of international environmental law and the law of sea in relation to the Arctic and the Antarctic (including matters of environmental protection, shipping and marine living resources). The chapter by Bankes provides us with a useful overview of energy resources law highlighting the relevant developments in the Arctic. The chapters by Alfredsson, Kleist, Loukacheva, and Sambo Dorough form the bedrock of the theoretical analysis undertaken here while also highlighting a number of practical examples in the areas of international and domestic human rights law and the constitutional law in the Arctic. They also touch upon the questions of self-governance, sustainable governance and indigenous peoples’ rights.

The textbook also contains valuable information on regional and local economies in the Arctic (see the chapter by Larsen), political matters and international relations (see chapters by Kleist, Diatchkova and Loukacheva). Despite its comprehensive content, the textbook nevertheless leaves room for further research in the area of Polar Law and its connection to other cognate disciplines. Notwithstanding the various limitations imposed (e.g., it was not possible to include more detailed analysis of some developments in both Polar Regions), this textbook is the first educational material of its kind in the field and can be seen as a milestone in the promotion of legal values in both the Nordic community and indeed globally.

## Further reading:

Further reading: Donald R. Rothwell, *The Polar Regions and the Development of International Law*. Cambridge: Cambridge University Press, 1996.

*The Yearbook of Polar Law*. Editors-in-Chief: Gudmundur Alfredsson and Timo Koivurova (special editor for Vol.1 David Leary). Leiden-Boston: Martinus Nijhoff Publishers, Vol.1, 2009.

*The Yearbook of Polar Law*. Editors-in-Chief: Gudmundur Alfredsson and Timo Koivurova (special editor for Vol.2 Natalia Loukacheva). Leiden-Boston: Martinus Nijhoff Publishers, Vol.2, 2010.

Timo Koivurova, *Do the Continental Shelf Developments Challenge the Po-*

*lar Regimes?* In the *Yearbook of Polar Law*, Vol. 1, 2009:477–497.

Natalia Loukacheva, “Legal Challenges in the Arctic,” in *The Borderless North*, Oulu: The Fourth Northern Research Forum, 2008:129–135.

Arctic Human Development Report. Chapters 4, 5 and 6. Akureyri: Stefansson Arctic Institute, 2004.

### Websites:

For a collection of various materials, including websites and documents on the Arctic see online compendium of the Arctic Governance project: <http://www.arcticgovernance.org/compendium>

For information about the Antarctic Treaty System see: <http://www.ats.aq>

## Questions:

1. What is the role of law in dealing with different developments in the Arctic and Antarctica?
2. What is “Polar law” and how does it intersect with various social and other sciences?
3. What are the most topical current and emerging legal issues in the Polar Regions?

## 2. Environmental Protection in the Arctic and Antarctica

*Timo Koivurova*

### 2.1 Introduction

If one compares the two poles, there seem to be many differences: the Arctic consists of ocean surrounded by continents, whereas the Antarctic is a continent surrounded by ocean; the Antarctic has no permanent human habitation, while the Arctic is inhabited by indigenous peoples and other local communities. Yet, the two Polar areas resemble each other in many respects. Both are exposed to extreme climatic conditions, receiving less radiation from the sun than other parts of the globe while their ecosystems have had to adapt to very cold and dark environments with short and bright growing seasons. In such conditions, the ecosystems are simple containing only a few key species. Both regions are also relatively inaccessible, given the extreme conditions, although this is rapidly changing in the context of ongoing climate change.

From the environmental protection point of view it is indeed significant that the Polar Regions are similar. Their ecosystems and environments share important characteristics and are deemed to be more vulnerable to human-induced pollution than other areas of the world. This would seem to suggest then that similar types of environmental protection measures may be called for to protect these unique environments.

Can we then tailor special environmental protection rules to protect the Polar Regions? This is one of the pertinent questions examined in this chapter. Presumably, the most important legal rules and principles applicable in the Polar Regions are contained in international environmental law (IEL). This branch of international law, notwithstanding its importance, nevertheless remains in its infancy given that it was only in 1972 at the Stockholm Conference on the Human Environment that the intensive regulation of international environmental problems by States was effectively launched.

Since international environmental law has grown to be a vast body of rules and principles, some of them legally binding on each and every State in the form of customary international law (CIL), these rules and principles apply also in the Polar Regions. There are also a plethora of near-universal multilateral environmental agreements (MEA) and re-

gional MEAs to consider here which are binding only on States party to these treaties. If Arctic States are parties to these treaties, they also apply in the Arctic, since the States are required to implement the MEAs throughout their jurisdiction. Since IEL applies across the planet, it is reasonable to examine some of the principles and MEAs that apply also in the Polar Regions. For these reasons, it is useful to have an overview of how IEL has evolved and what basic principles of IEL guide State behavior in section 2.

As the Polar Regions are large and indeed rather unique ecosystems it would be interesting to determine whether IEL has developed special rules for such unique conditions. Important work in this respect has already been done in the two Polar regimes – the Arctic Council and the Antarctic Treaty System (ATS).

One way of determining the applicable rules and instruments of environmental protection applying in the Polar Regions is by studying various sources of pollution or environmental problems regulated in IEL and comparing how these general rules and principles have been implemented in and/or adapted to the unique environments of the Polar Regions. It is important to note that, given the normal constraints on the space available, this chapter can only provide a brief overview of the international environmental regulations in place in the Polar Regions. Moreover, national systems of environmental law and European Environmental Law cannot be studied in this article, given that these systems of law include far too many individual rules and principles to be covered in one short chapter.

## 2.2 The Development of International Environmental Law

There are many ways to reconstruct the evolution of IEL with each necessarily being a simplification of the actual process. It is possible to discern at least three stages of evolution each raising certain core features of the way environmental protection developed, the identification of the major tasks and problems etc. To conclude this overview it is important to examine what the current principles of IEL are as well as identifying their current status and content.

With growing awareness of the importance of environmental issues in the industrialised world in the 1960s and 1970s environmental protection emerged as an important domestic policy issue. The real launch of IEL was, however, the UN 1972 Stockholm Conference on the Human Environment, which provided an action plan for the international community over international environmental protection and prompted the UN to establish the United Nations Environment Programme (UNEP). This first period (running approximately from the beginning of 1970s to the start of 1980s) was primarily geared towards protecting the marine environment, with oceans constituting most of the planet's space and ocean ecosystems



already experiencing serious damage from human-induced pollution. States concluded universal treaties on the dumping of waste in the marine environment and on ship-based pollution as well as regionally on land-based pollution of the marine environment. During the United Nations Convention on the Law of the Sea negotiations, which lasted from 1973 to 1982, the international community laid foundational rules to protect the marine environment from all sources of pollution in part XII of that document.

The next significant period in the evolution of IEL ran approximately from the beginning of 1980s to the start of 1990s and saw the emergence of new environmental problems such as air and atmospheric pollution. The 1979 UN Economic Commission for Europe (UN ECE) Convention on Long-Range Trans-boundary Air Pollution (LRTAP), with its subsequent protocols over various substances negotiated during 1980s and 1990s, can be viewed as the beginning of this period. The 1985 Vienna Convention on Ozone Depletion was significant in that it was the first international treaty to combat a global environmental problem, depletion of the ozone layer, with the parties taking more stringent action with the 1987 Montreal Protocol and subsequent amendments and adjustments. The most difficult environmental problem ever confronted – global climate change – was first tackled by the 1992 United Nations Framework Convention on Climate Change (UNFCCC), which became one of the instruments adopted in the 1992 Rio Conference on Environment and Development.

Nature protection does not fit in with this chronology since instances of species protection can be traced back to the beginning of the 20<sup>th</sup> Century. Among the most important treaties here is the 1946 International Whaling Convention (with its administering body the International Whaling Commission), which adopted its famous moratorium on whaling in 1982. In addition, a number of other treaties adopted at the beginning of 1970s, such as the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the latter of which tries to influence species protection by establishing strict controls over the trade in species (or their body parts), and the still Arctic-only 1973 Agreement on Conservation of Polar Bears, could also be cited here. This type of species-specific or habitat-specific international regulation was given a more holistic foundation by one of the treaties signed during the 1992 Rio Conference, the Convention on Biological Diversity, which protects diversity within species, between species and of ecosystems.

The 1992 Rio Conference marks the beginning of the third period in international environmental protection. Before this Conference, environmental protection was not so clearly connected to other policy fields and was instead pursued through various treaties. The 1985 Brundtland Re-

port had however already paved way for the wholesale adoption of the concept of sustainable development, which was ultimately to dominate outcomes at the Rio Conference. The developing States asserted their right to develop while the industrialised north pursued environmental protection. The end result was a compromise to pursue sustainable development, which should take into account environmental concerns but also poverty alleviation, free trade, etc. What this meant for IEL was that the principle of common but differentiated responsibilities, namely, that all States bear some responsibility for environmental protection but that developed States must carry a heavier burden, very much dominated negotiations of the Rio conventions and other instruments, but also future conventions.

The follow-up conference to Rio, the 2002 Johannesburg World Summit on Sustainable Development – with its Declaration and Plan of Implementation – continued even more forcefully with the trend that is apparent today. All major global problems are tightly interlinked and hence to achieve sustainable development we need to pay attention to each of them. Poverty, overpopulation and major diseases each contribute to environmental degradation and vice versa. Another highlight of this third period of the establishment of IEL is the increasing emphasis placed on the implementation of international environmental treaties. From the 1972 Stockholm Conference onwards the speedy and steady adoption of international environmental protection treaties can be seen to have taken place. Yet, at the end of 1990s there was an increasing realisation that even with all of these treaties in force, the state of the environment keeps deteriorating further. With this recognition also came a shift in emphasis to ensuring that real implementation took place in respect of these treaties primarily via a focus on methods of national implementation, capacity-building, the dissemination of information and education.

### *2.2.1 Principles of International Environmental Law*

What is important here is that even though we can distinguish a number of distinct stages in the development of IEL this does not mean that the older treaties are now without legal significance. On the contrary, it is better to see the development of IEL as a process of the accumulation of legally binding standards over how states are obligated to behave as regards the protection of the environment. There are currently in existence a large number of MEAs legally obligating the entire international community. In addition, with this fairly rapid legal development some significant principles have emerged binding all states legally on the basis of customary international law or at least politically, if the principle in question has not yet matured into a principle of CIL. These principles were articulated in the Declaration adopted at the 1992 Rio Conference on Environment and Development.

Only the so-called “no significant harm” (or due diligence) principle is clearly a part of general international law obligating all States. It reads as follows:

States have, in accordance with the Charter of the United Nations and the Principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. (Principle 2)

Another candidate for a CIL principle is the “precautionary principle” which was articulated in Rio principle 15 in the following way:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The principles of common but differentiated responsibilities (principle 7 of the Rio Declaration) and “polluter pays principle” (principle 16, i.e., that national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should bear the cost of pollution) are still widely seen as political principles, but have clearly guided various treaty negotiation processes.

### 2.3 General Comparisons of the Polar Regions from the Perspective of Environmental Protection

Two starting-points are available to us when seeking to examine the environmental protection rules pertaining to the Polar Regions. First, as mentioned previously, there is good reason to examine whether similar environmental protection rules should exist in both Polar Regions. If their ecosystems and environments share important characteristics and are deemed to be more vulnerable to human-induced pollution than other areas of the world, this would indeed seem to suggest that similar types of environmental protection measures might be called for to protect these unique environments. Yet, this is more easily said than done.

Secondly, however, it must be admitted that the Polar Regions remain highly differentiated when it comes to how environmental protection rules are enacted, implemented and applied. Of particular importance here is the issue of whether the regions concerned are part of the sovereign territory of a State or not. If a territory is under the sovereignty of a State, it is this State that has competence in enacting, implementing and applying rules in

respect of environmental protection, notwithstanding the fact that it has to observe all of the MEAs and other IEL rules and principles in the process.

Here the Arctic and the Antarctic differ greatly. In the Antarctic, the sovereignty question has been “frozen” and thus there are no territorial sovereigns on the continent. With sovereignty claims frozen by the Treaty, there are no coastal States in the Antarctic that could establish maritime sovereignty and jurisdiction over the Southern Ocean, meaning that the Southern Ocean can be regarded as a high seas area in respect of the law of the sea, although not in the usual sense (see below 4.2.). Seven States (see below) claimed parts of the Antarctic as their sovereign area before the conclusion of the 1959 Antarctic Treaty. Yet, with this legally binding convention, these “claimant States” agreed not to consolidate these claims into full sovereignty for the duration of the Treaty, which is likely to continue far to the future. The situation in the Arctic contrasts sharply with this. All of the land area – continents as well as islands – is firmly under the sovereignty of the Arctic States, and much of the Arctic waters now fall under their maritime jurisdiction. The core of the Arctic Ocean remains part of the high seas with three high seas areas clearly established, namely, the Barents Sea (loophole), the North Atlantic (banana hole) and the Bering Sea (donut hole).

Environmental protection is a complex issue in the Arctic because competence is divided between various levels of governance. The three federal States – the Russian Federation, the United States and Canada – exercise some powers in respect of environmental protection at the federal level and some at sub-unit level, e.g. Alaska in the USA or Nunavut in Canada. Even though the European Union (EU) is not a state in the eyes of international law, it is functionally very close to being one. As regards environmental protection the “federal level” of the EU can already be seen to have enacted a vast number of directives and regulations in respect of its Member States. The EU Arctic States are Finland, Sweden and Denmark. Yet, it is important to note that the Faroe Islands and Greenland are not part of the EU, while Greenland was recently elevated to the status of self-government (in contrast to its old Home-Rule status), with new powers in the area of environmental protection. The EU’s influence extends also to the European Free Trade Agreement (EFTA) States of Iceland and Norway, which, via the European Economic Area (EEA) agreement are obligated to implement much of the environmental protection rules enacted in the EU. Iceland has, however, applied for membership of the EU. The Svalbard Islands, even though they are under the sovereignty of Norway, are excluded from the EEA agreement, and are governed by an international treaty concluded in 1920 (Treaty Concerning the Archipelago of Spitsbergen). Nevertheless, Norway is competent to enact environmental protection rules for the Svalbard Islands, and in 2001 enacted strong environmental protection rules for the Islands.

It is thus easy to see that the Polar Regions are indeed Polar opposites from the perspective of environmental protection, the details of which will be surveyed when we examine the regional implementation of IEL. At this point, however, it is useful simply to note the basic differences. Since there are no territorial sovereigns in the Antarctica, international institutions have, historically, both enacted and overseen environmental protection efforts in the region. This has also led to the Antarctic Treaty System (ATS) devising and implementing its own environmental protection rules rather than implementing what IEL, and in particular MEAs require. This contrasts starkly with prevailing practice in the Arctic where it is the nation-States (and their sub-units) that primarily have competence in environmental protection, and are also required to implement and apply the obligations of IEL. Yet, if we want to understand international environmental protection rules in the Arctic it is of utmost importance to understand that there is no “Arctic” for these national systems of environmental law and policy: there is only the various States’ environmental policies and laws that also apply in their northern regions. Even if a soft-law body, it is the Arctic Council that enables us to see the Arctic as a specific region – a vulnerable and unique environment that needs to be protected.

For this reason, the way the chapter proceeds is by first giving a brief outline of how the Polar regimes – the Arctic Council and the Antarctic Treaty System – have evolved and how the region has been defined in the context of these regimes. It is interesting to note that even though the Polar Regimes are very different both have done most of their work precisely in the field of environmental protection. Thereafter, given that there are already a large number of environmental regulations and policies applicable in these regions, it is practical but still useful to take only a few examples of how environmental protection is undertaken in each region and compare them. In this way it is possible to clarify the differences which are manifest in the way in which environmental protection is undertaken in each. Finally, given the numerous environmental challenges both Polar Regions face it is imperative to examine some of these challenges and also to ponder whether the Polar regimes could learn from each other in the field of environmental protection.

## 2.4 Overview of the Two Polar Regimes

Before comparing the Polar regimes it will be useful to outline the different ways in which the Polar Regions can be defined. Already here we have clear differences. In the Antarctic, the northernmost boundary can be either that adopted in the 1959 Antarctic Treaty, i.e., 60 degrees south, or the natural boundary known as the Antarctic convergence, a maritime zone where the warm waters of the northern seas meet the cool and less

salty waters of the Southern Ocean which was used in the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR).

While the two definitions of the Antarctic have been enshrined in legally binding treaties, there is no such definition of the southernmost boundary of the Arctic. As a matter of fact, several different criteria can be presented in the drawing of this boundary. Possible natural boundaries are, for instance, the tree line (the northernmost boundary where trees grow), or the 10 degree isotherm, i.e., the southernmost location where the mean temperature of the warmest month of the year is below 10 degrees. In Arctic-wide co-operation, the Arctic Circle has been used as a criterion for full membership, with only those States invited to participate in the co-operation that possess areas of territorial sovereignty above the Arctic Circle. Yet, it has been left for each State and working-group of the Council to define which southernmost boundary it wants to use.

#### *2.4.1 The Arctic Council*

The initial idea of Arctic-wide co-operation was launched in 1987, in Murmansk, by former Soviet Secretary-General Mikhail Gorbachev. The Soviet leader proposed that the Arctic States could initiate co-operation in various fields, one being protection of the Arctic environment. This idea was concretized in part when Finland convened a conference of the eight Arctic States – Canada, Denmark, Finland, Iceland, Norway, Sweden, the Russian Federation and the United States – in Rome in 1989 to discuss the issue. After two additional preparatory meetings – in Yellowknife, Canada, and Kiruna, Sweden – the eight Arctic States, as well as other actors, met again in Rovaniemi in 1991 to sign the Rovaniemi Declaration, by which they adopted the Arctic Environmental Protection Strategy (AEPS). The AEPS identified in its introduction the reason for the strategy:

The Arctic is highly sensitive to pollution and much of its human population and culture is directly dependent on the health of the region's ecosystems. Limited sunlight, ice cover that inhibits energy penetration, low mean and extreme temperatures, low species diversity and biological productivity and long-lived organisms with high lipid levels all contribute to the sensitivity of the Arctic ecosystem and cause it to be easily damaged. This vulnerability of the Arctic to pollution requires that action be taken now, or degradation may become irreversible.

The AEPS identified six priority environmental problems facing the Arctic – (persistent organic contaminants, radioactivity, heavy metals, noise, acidification and oil pollution), most of which can be traced either to prior environmental accidents having an effect in the region (the *Exxon Valdez* oil spill in Alaska and the Chernobyl nuclear reactor accident in the former Soviet Union) or increasing awareness of long-range transport of pollutants to the Arctic from southern centres. It also outlined interna-

tional environmental protection treaties that apply in the region and, finally, specified actions to counter these environmental threats.

The eight Arctic States established four environmental protection working groups: Conservation of Arctic Flora and Fauna (CAFF), Protection of the Arctic Marine Environment (PAME), Emergency Prevention, Preparedness and Response (EPPR) and the Arctic Monitoring and Assessment Programme (AMAP). Three ministerial meetings (after the signing of the Declaration and the Strategy) were held in this first phase of Arctic co-operation, generally referred to as the AEPS process. The meetings were held in 1993 (Nuuk, Greenland), 1996 (Inuvik, Canada) and in 1997 (Alta, Norway). Senior Arctic Officials, normally officials from the foreign ministries of the eight Arctic states, guided the co-operation process between the ministerial meetings. The last ministerial of the AEPS was held after the establishment of the Arctic Council and thus focused on integrating the AEPS into the structure of the Arctic Council.

The Arctic Council was established in September 1996 in Ottawa, Canada, with the Arctic States signing a declaration creating the Council and issuing a joint communiqué to explain the newly created body. With the founding of the Council came changes in the forms of Arctic co-operation that had been based on the AEPS document, clearly extending the terms of reference beyond the previous focus on environmental protection. The Council was empowered to deal with “common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.”

This yielded a very broad mandate, since “common issues” can include almost any international policy issue; however, in a footnote the declaration provides that “the Arctic Council should not deal with matters related to military security”. Environmental co-operation is now included as a principal focus within the mandate of the Council, with the four environmental protection working groups set up in the context of AEPS co-operation continuing under the umbrella of the Council.

The second “pillar” of the Council’s mandate is co-operation on sustainable development, whose terms of reference were adopted in the second ministerial meeting of the Council, held in 2000 in Barrow, Alaska. Co-operation here is managed by the Arctic Council Sustainable Development Working Group (SDWG). Recently, a sixth working-group was established, the Arctic Contaminants Action Programme (ACAP).

The declaration establishing the Arctic Council amends and greatly elaborates on the rules on participation *vis-à-vis* those of the AEPS. It provides for three categories of participants: members, permanent participants and observers. The eight Arctic States are members; the three organizations which represent the indigenous peoples of the Arctic are permanent participants. The declaration also lays down the criteria for

observers, as well as the criteria for the status of permanent participant and the decision-making procedure for determining that status.

The decision-making procedure of the Arctic Council, which had developed in the context of AEPS co-operation, is made explicit in the declaration. Article 7 provides that: “Decisions of the Arctic Council are to be by consensus of the Members.” In Article 2, “member” is defined as including only the eight Arctic States. This decision-making by consensus is to be undertaken only after “full consultation” with the permanent participants, i.e., the organizations of the Arctic indigenous peoples. Although these permanent participants do not have formal decision-making power, they are clearly in a position to exert much influence in practice on the decision-making of the Council.

The function of the Arctic Council is much dictated by its chair States. The first was Canada (1996–1998), followed by the United States (1998–2000), Finland (2000–2002), Iceland (2002–2004) and Russia (2004–2006). Currently, the so-called Scandinavian chairs have taken over with their common priorities for the period 2006–2012, Norway being the first chair with Denmark now acting as the chair. Since the Council has no permanent secretariat, the chair State has a great deal of freedom to choose its priorities during its tenure. This does however undoubtedly hinder the formation of long-term policies (during the Scandinavian chair period, there is also a common secretariat in Tromsø, Norway).

The Arctic Council has in recent years focussed most of its energy on making large-scale scientific assessments, starting with the 2004 Arctic Climate Impact Assessment (ACIA), which established the Arctic as a barometer of climate change. Given the projected intense change in the Arctic, many scientific assessments have been produced with more already underway dealing with the consequences of climate change in the Arctic for oil and gas activities (assessment finalised in 2008 but released in 2009), shipping (2009) and biodiversity (2011). In addition, the Council has increasingly taken action in international environmental protection processes, such as the negotiations on the Stockholm Convention on Persistent Organic Pollutants, which was adopted in 2001 and in the Johannesburg World Summit on Sustainable Development in 2002.

#### *2.4.2 The Antarctic Treaty System*

The impetus for the development of the Antarctic Treaty was the International Geophysical Year (1957–1958). By the time the Geophysical Year was declared, seven States (Chile, Argentina, the United Kingdom, Australia, New Zealand, Norway and France) had made claims for territorial sovereignty over parts of the Antarctic continent. The Cold War had also started, and the two superpowers – the Soviet Union and the United States – had established scientific stations in the Antarctic, although they had not made any claims for territorial sovereignty or recognized the



claims that had been made by others. The sovereignty situation was quite volatile and thus the States concerned – the United States, the Soviet Union, the seven claimant States, and a number of others that had scientific activity in the region – agreed to begin negotiations on the prospects of resolving several problematic issues that had arisen regarding the governance of the Antarctic.

The Antarctic Treaty was concluded on 1 December 1959 and entered into force on 23 June 1961. Perhaps most importantly, the Treaty resolved the sovereignty question in the Antarctic through its famous “agreement to disagree” (article IV). All States could hold to their legal positions as to the sovereignty claims: those who had made them, agreed not to consolidate them during the duration of the Treaty and Soviet Union and the USA did not have to recognise such claims. By “freezing” the sovereignty question for the duration of the Treaty the States that negotiated the Treaty were able to focus on demilitarizing the region and establishing it as a location for scientific research.

According to the Treaty, Antarctic governance was to be implemented in Antarctic Treaty Consultative Meetings (ATCMs) by the original signatory States known as Antarctic Treaty Consultative Parties (ATCPs). The Treaty was not intended to be an exclusive club for its 12 original signatories, however; it provided the possibility for other States to accede to it. If an acceding state wanted to become an ATCP with full rights under the Treaty, it needed to conduct “substantial research activity” in the Antarctic as described in Article IX (2); otherwise, the State could only participate in the ATCMs as a non-Consultative Party.

Initially, the ATCPs conducted Antarctic policy through the means of recommendations as provided in the Treaty. These recommendations, which despite their name were perceived by many States as legally binding internationally, have been an important means for the ATCPs to develop the regime in many policy areas.

A second approach has been to conclude international treaties in order to attract the participation of other than Consultative Parties, particularly in the management of the Southern Ocean. The rationale for this is straightforward. With sovereignty claims frozen by the Treaty, there were no coastal States proper in the Antarctic that could establish maritime sovereignty and jurisdiction over the Southern Ocean, meaning that it could be regarded as a high seas area in respect of the law of the sea, although not in the usual sense (since some of the claimant States have adopted maritime zones for their Southern Ocean waters). If the whole Southern Ocean were deemed high seas, however, it would be open to economic exploitation by all States, including those that had not taken part in the Treaty and whose behaviour the ATCPs could thus not control.

Three international treaties were concluded to address this situation – the 1972 Convention for the Conservation of Antarctic Seals (CCAS), the 1980 Convention on the Conservation of Antarctic Marine Living Re-

sources (CCAMLR) and the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) – but these have not worked as originally planned, because it is mainly the ATCPs that have participated in them.

A third method used to implement Antarctic policy has been to conclude an international treaty connected to the original Antarctic Treaty. This occurred after France and Australia abandoned the CRAMRA as a solution to the mining issue and the need arose to find a new one. The outcome was the Madrid Protocol on Environmental Protection to the Antarctic Treaty, which prohibited mining indefinitely. The Protocol, which was adopted in 1991 and entered into force in 1998, is open only to the contracting parties of the Antarctic Treaty, and, according to its Article 4, is meant to supplement the Treaty, not to modify or amend it. Importantly, the Protocol explicitly defines the legal acts mentioned above that formed the ATS. Article 1e states:

“Antarctic Treaty system” means the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments.” The Protocol also established an organ to administer it, the Committee on Environmental Protection (CEP), which reports annually to the ATCM.

The driving force of the ATS has been the ATCMs, which at first took place biennially but since 1994 have been organized annually. There are now 28 Consultative Parties to the Treaty with full voting rights and 19 non-Consultative Parties, making a total of 47 States in the ATS. In 2004, the permanent secretariat to the ATS commenced its work in Buenos Aires, Argentina.

## 2.5 Environmental Protection: Similarities and Differences in the Polar Regions

It is important to note that both of the Polar regimes have focused their work on environmental protection though this work began in the Antarctica much earlier than in the Arctic. The 1959 Treaty already provided in Art IX (1) that one of the areas in which the ATCMs could make recommendations was in the “preservation and conservation of living resources in Antarctica.” Already in 1964, three years after the entry into force of the Treaty, the ATCMs adopted Agreed Measures for the Conservation of Antarctic Fauna and Flora. These required the Consultative Parties to protect the fauna and flora in the region as well as to establish special protected areas for this purpose. Most of the recommendations adopted in the ATCMs have concerned environmental protection, and much of the environmental regulation that was part of the 1991 Madrid Protocol had already been adopted earlier in the form of recommendations, e.g., Rec-

ommendation XIV-2 in 1987 implementing an environmental impact assessment procedure for the region. Environmental protection has also been the main focus of the associated international treaties that have been concluded, i.e., the CCAS, and the CCAMLR.

A similar focus on environmental protection can be seen in the Arctic. Of all the policy areas which Secretary-General Gorbachev enumerated, it was environmental protection that served as the basis for the Finnish initiative for Arctic-wide co-operation, a process that led to the signing of the 1991 Rovaniemi Declaration and the Strategy for the Protection of the Arctic Environment. Even after the creation of the Arctic Council, with its new emphasis on sustainable development issues, it has been the four environmental protection working-groups (CAFF, PAME, EPPR and AMAP) that have been the main agents of this co-operation.

From the perspective of environmental protection, a clear difference between the Antarctic and the Arctic is that the Arctic has human habitation in general and is home to indigenous peoples. A rough estimate, which naturally depends on how one defines the region, puts the number of people living in the Arctic at 10 million, of whom 1.5 million are of indigenous origin. No permanent human habitation exists in the Antarctic, although there are, of course, many scientists working there part-time. In addition, increasing number of tourists visits the region annually. Both poles thus face different issues where environmental protection is concerned. With no permanent human habitation in the Antarctic, there is no need to take into account considerations such as the necessary balancing of human needs with the goal of environmental protection. In addition, as the Arctic is home to a large number of indigenous peoples, there is a need to take account of their special rights and interests in environmental protection, which are developing in international and national law.

This difference can well be illustrated in the way marine mammals are conserved and managed in the Polar Regions, particularly whales. As is well-known, the International Whaling Commission – established via the 1946 International Convention for the Regulation of Whaling – set up a moratorium against all whaling in 1982, which entered into force in 1986. This controversial decision is still in force, even though the scientific committee has recommended its partial revision. The Antarctic Treaty System – in particular the CCAMLR and Annex II of the Madrid Protocol – ensure that the global whaling regime functions also in the Southern Ocean. However, the situation is very different in the Arctic. First of all, two of the Arctic States withdrew from the Whaling Convention and its Commission because of the moratorium on all whaling: Canada and Iceland. Even though Iceland returned in 2002, it made a reservation to the effect that it could commence – on the basis of sound science – commercial whaling after 2006. Norway objected to the moratorium and is thus not legally bound by it and has continued whaling. It has set its national catch limits for its coastal whaling operations over minke whales. Abo-

iginal subsistence hunting is provided for in the Whaling Convention, and thus the indigenous peoples of Alaska, Greenland and Russia continue hunting on that basis. There is then a stark contrast between how whaling is regulated in the Polar Regions.

There is even a special co-operative body (Commission) to conserve and manage cetaceans (whales and dolphins) and pinnipeds (seals and walruses) in the Arctic, established via the Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic (NAMMCO Agreement). The NAMMCO Commission is an international body for cooperation on the conservation, management and study of marine mammals in the North Atlantic. The agreement was signed in Nuuk, Greenland on 9 April 1992 by Norway, Iceland, Greenland and the Faroe Islands and aims to provide a mechanism for cooperation on the conservation and management of all cetaceans and pinnipeds found in the region.

#### *2.5.1 Differences between the Environmental Protection Approaches of the Polar Regimes*

The approaches to environmental protection in the two Polar regimes have differed markedly. From the outset, environmental protection in the Antarctic has been regulated by international law, simply because the “freezing” of the sovereignty question meant there were no territorial sovereigns in the region that would have their environmental protection systems operating in various parts of the continent. These international environmental regulations have then been incorporated into the national legal systems of the ATCPs. In the Arctic, the situation is the reverse in that national environmental laws apply to most of the region, except for the international areas, e.g. the high seas and deep sea-bed.

In the Antarctic, the institutional structure and the regulations have been adopted in internationally legally binding forms – the so-called hard-law approach. The Antarctic Treaty and its Protocol, as well as the associated agreements, have all been adopted using the conventional treaty format. Even the recommendations, which are easily associated with soft-law in effect, have had to be ratified by the ATCPs and were considered by many States as legally binding already at the start of the ATS.

Arctic co-operation, in contrast, has been based on instruments that are widely regarded as soft-law instruments. AEPS co-operation was implemented through the signing of a declaration and the Strategy for the Protection of the Arctic Environment, and even the Arctic Council was established through a declaration. Since it is the national environmental laws of the eight Arctic States that apply in their Arctic areas, the most the Arctic Council has been able to do – as a soft-law organization – has been to adopt guidelines and recommendations on how the Arctic States should apply their regulations in those areas.

Within these limits, the Council has done lot of useful work: e.g., it has reviewed the international environmental laws and treaties applicable to the Arctic region, produced guidelines and manuals on various fields of environmental protection where application in the Arctic would require special measures, made an inventory of existing nature protection areas, and studied the environmental problems that are damaging the environment. Sometimes these programmes have made a difference, but outright failures have also occurred. The problem is made more difficult by the fact that the Arctic Council does not regularly evaluate whether these projects and guidelines it has produced actually attain their goals.

The two Polar regimes also differ with respect to the basic approach they have adopted in their environmental protection work. The Antarctic approach could be loosely characterized as one of precaution or prudence whereas the Arctic Council has focused on sponsoring vast scientific assessments rather than trying to regulate the issues. The ATS approach can be demonstrated in reference to a number of examples. For example, the CCAS established protection measures for Antarctic seals at a time when there was no major pelagic sealing but only fears that it might become a reality, and many of the protective measures had already been implemented in the 1964 Agreed Measures. The CCAMLR applied the same precautionary approach to the conservation of marine living resources. The main motivation for negotiating the Convention was the increasing level of krill fishing, krill being a key species in the Antarctic marine food chain. Yet, even though there had been a clear increase in the krill catch during the 1970s, there was still no fear of the krill stock being overexploited. The Convention was thus put in place even before any serious likelihood of damage to the environment existed.

A more dramatic example of this precautionary approach can be seen in the way the ATCPs negotiated on mineral exploitation in the Antarctic. Even though no minerals had been mined in the Antarctic, the ATCPs decided that since there was potential for exploitation, mineral development should start only after an international convention had been concluded to regulate mining activities, and especially their environmental impacts.

They also decided, in Recommendation IX-1, that before such a convention could be concluded, there should be a moratorium on all mining activity in the region. The outcome of the negotiations between the ATCPs on the minerals issue was the 1988 CRAMRA, which in principle permitted mineral resource development but also established very strict controls on mining. Even this proved to be too little, however, because, as mentioned earlier, under the lead of France and Australia, the CRAMRA was rejected. This prompted a new set of negotiations between the ATCPs, the outcome of which was the 1991 Madrid Protocol, which prohibited mining indefinitely and established tight regulation on all kinds of human activities in the Antarctic.

The final difference that may be noted between the environmental protection agendas of the two Polar regimes is their stance on international environmental protection efforts. The ATCPs have not found it necessary to try to influence the negotiation processes that aim to combat global environmental problems, whereas the Arctic Council has been active in this regard. For example, the Council actors were active in negotiating what was to become the 2001 Stockholm Convention on Persistent Organic Pollutants, a role readily apparent in the preamble to the Convention “Acknowledging that the Arctic ecosystems and indigenous communities are particularly at risk because of the biomagnification of persistent organic pollutants and that contamination of their traditional foods is a public health issue.”

## 2.6 Similarities between the Environmental Protection Approaches of the Polar Regimes

It is also important to note that the most pressing environmental problems in respect of the Polar Regions are not generated from within the regions themselves, but rather emanate from the outside. It is the commercial centres of North America, Europe and Asia that contribute most to Polar environmental problems primarily through the emission of persistent organic pollutants, heavy metals, greenhouse gases and chlorofluorocarbons. Some of these pollutants travel long-distances from the mid-latitudes to the Polar Regions by prevailing wind patterns and the ocean circulation system causing, ultimately, various environmental and human health problems in the Polar Regions. Yet, even though both regions can be seen as victims of global environmental problems – in the sense that the regions do not really contribute to these problems but suffer from them – it has only been the Arctic Council that has been able to make a difference on how these global problems are tackled, not the Antarctic Treaty System.

As was mentioned above, the Arctic Council actors made a concerted effort to influence the negotiations over what became the 2001 Stockholm POPs Convention. It was the successful AMAP compiled information over how the POPs end up in the Arctic, and the way the region’s indigenous peoples could give a human face to the problem that made a difference in the negotiations. The Inuit could show on the basis of science that because they still eat traditional foods, POPs end up in their body, and for instance cause harm to the human embryo. The Arctic Council has been able to influence only indirectly the problems of ozone depletion and climate change caused by chlorofluorocarbons and greenhouse gases respectively. By sponsoring the Arctic Climate Impact Assessment (ACIA), it was able to feed regional scientific information to the respective global regimes tackling these problems.

Biodiversity protection is undertaken, to some extent, similarly in each of the Polar Regions. Evidently the difference referred to above that the ATS system has drawn up its own rules for biodiversity protection and not simply tried to implement the Convention on Biological Diversity in the Antarctica is important here. Seven of the eight Arctic States are parties to the Biodiversity Convention so except for the U.S. the main work related to biodiversity is focused on the implementation of this Convention in the Arctic. Yet, there are some similarities in biodiversity protection. Both Polar Regions have a conservation treaty for the unique species of the region.

The 1973 Agreement on Conservation of Polar Bears and the 1971 Convention for the Conservation of Antarctic Seals both aim to protect the species in their Polar environments. Both regions have, in their own way, special legal regulations and programmes focusing on certain plants and animals. Annex II of the Madrid Protocol to the Antarctic Treaty on Environmental Protection focuses on the conservation of Antarctic fauna and flora and has, as one of its protective measures, the designation of specially protected species. The CAFF set up its flora and seabirds group to advance biodiversity in a programmatic manner, mobilising already existing resources from the Member States to do this work. Both regions have – at least on the surface – protected area systems in place, which are one of the main means to conserve biodiversity. Annex V of the Madrid Protocol established a system of three classes of protected areas. In a similar vein, even though a soft-law process, the CAFF commenced in the early years of the AEPS the Circumpolar Protected Area Network (CPAN). Yet, such a system is currently non-functioning in the Arctic Council, given that no country is willing to take the lead over the CPAN.

Article 8 of the Madrid Protocol and its Annex I governs the way environmental impact assessment (EIA) is to be undertaken in Antarctica. The trigger for different levels of EIA is to evaluate whether the proposed activity is likely to produce less or more “minor or transitory impact.” As part of the final ministerial meeting of the AEPS in 1997 in Alta Norway, Guidelines for Environmental Impact Assessment in the Arctic were adopted together with another document – Arctic Offshore Oil and Gas Guidelines. The EIA Guidelines instrument provides important guidance for Arctic EIAs, but as independent research has shown, the instrument has not been used and very few are even aware that it exists. The Arctic Offshore Oil and Gas Guidelines, which also contain strict EIA procedures for these particular types of activities, were revised for the third time in the Arctic Council ministerial meeting of April 2009, but it is difficult to say whether it has actually been made use of since the Arctic Council does not evaluate the effectiveness of the instruments it produces.

The only legally binding Article that recognizes the special vulnerability of the Arctic environment (not the Antarctica) is Article 234 of the LOS Convention:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

This provision mandates those Arctic coastal States that control sea areas under the ice-coverage for most part of the year to adopt and enforce non-discriminatory “regulations for the prevention, reduction and control of marine pollution from vessels” within the limits of their exclusive economic zones. Two Arctic States have made use of this provision, namely Canada and Russia, and have availed themselves of stronger powers to control ship traffic partly for the reason of protecting the marine environment. The International Maritime Organisation adopted non-legally binding Guidelines for shipping that applied only in the Arctic (as had been the case for Article 234). These Guidelines provide important guidance for construction requirements for ships entering Arctic waters, similar to those adopted by International Association of Classification Societies (IACS). They also recommend equipment standards, various types of operational measures and environmental protection and damage control. Recently, the IMO Assembly has adopted such Guidelines to apply in both Polar Regions and the IMO has a process in motion to consider making these legally binding by 2012.

Even if it was the Antarctic Treaty Consultative Meeting (ATCM) that adopted the Practical Guidelines for Ballast Water Exchange in Antarctic waters – which were then later adopted by IMO – these contain procedures for vessels that operate in both Polar Regions. The Guidelines aim to ensure that vessels operating in both the Arctic and the Antarctic handle ballast water responsibly and in such a way that invasive marine organisms are not transported between these regions.

## 2.7 Emerging Issues and Conclusions

As the discussion above has shown, there are some similarities – but, more importantly, noticeable differences – between the two Polar regimes. The major question then is whether the Polar regimes have enough in common for the Arctic Council to benefit from the long-standing high-quality environmental protection regime created for the Antarctica and whether there might be something that the ATS could learn from the Arctic Council. It may also be useful here to discuss some of the emerging issues in environmental protection in respect of the Polar Regions.



It is important to stress that even though the differences between the two regions are stark from the viewpoint of governance, we should not underestimate their similarity in the minds of the general public and governments. After all, regime formation is not always a rational process, and thus the imagined commonality of the poles may enable the Polar regimes to draw lessons from each other, even in designing an Arctic environmental protection treaty. In addition, in many countries, for one reason or another, polar issues are dealt with together, and many of the Arctic States (e.g. the USA, Norway, Sweden, Finland and the Russian Federation) are also Consultative Parties in the ATS (and Denmark and Canada non-consultative ones). In recent years the Polar regimes themselves have started to oversee each others actions, this culminated in the joint Antarctic Treaty – Arctic Council meeting at the end of the International Polar Year 6 April 2009, which also served by marking the 50 year celebration for the Antarctic Treaty. The meeting also issued the Washington Declaration on the International Polar Year and Polar Science.

With this as a background, we can ask whether the vulnerable Arctic environment would be best protected by borrowing from the long-standing high-quality environmental protection regime created for the Antarctica, the ATS. The World Conservation Union (IUCN) – a type of hybrid international organisation, given that it has a vast number of states and governments as members – initiated a project on this possibility at the beginning of 2000. The project, however, did not come to any clear conclusions. The most recent attempt to revive the Antarctic model for the Arctic governance was made by the European Parliament, in its October 2008 resolution which:

[...] suggests that the Commission should be prepared to pursue the opening of international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty, as supplemented by the Madrid Protocol signed in 1991, but respecting the fundamental difference represented by the populated nature of the Arctic and the consequent rights and needs of the peoples and nations of the Arctic region; believes, however, that as a minimum starting-point such a treaty could at least cover the unpopulated and unclaimed area at the centre of the Arctic Ocean.

Nevertheless, serious obstacles remain to any attempt for the Arctic to directly borrow from the ATS, particularly in relation to environmental protection. As all claims in respect of territorial sovereignty over the Antarctic continent were “frozen” by the Antarctic Treaty, environmental protection of the Treaty area was and is not based on each territorial State establishing its own environmental protection system but on the ATCMs laying down of international environmental protection rules for the whole region. National legislation serves only to implement what is required by international legislation.

The situation is totally different in the Arctic. The eight Arctic States have established territorial sovereignty and sovereign rights over all of the

land areas and much of the waters as well, with the rest of the waters being part of international areas, the high seas and the deep sea-bed. Accordingly, the States have established their own environmental protection systems governing the way the Arctic environment is protected, within the limits of international environmental law. This structural difference clearly manifests itself in the way environmental protection has been managed at both poles and prevents any easy borrowing from one to the other.

The growing challenge to both regions however comes from global climate change and economic globalisation. The Polar regimes affirmed in their 2009 Washington Declaration that scientific information from the Polar Regions should feed into our overall understanding of the climate science, and in particular the findings produced in the context of the Inter-Governmental Panel on Climate Change (IPCC). Climate change will clearly be the biggest challenge to the Polar Regions in the years to come, and for the Polar regimes that try to keep their development sustainable. In response to the rapid changes now being experienced in the Polar areas various new kinds of economic activities are increasingly being developed. This clearly presents a formidable challenge to the Polar regimes. In the Antarctic, the ATS is well equipped to conserve the environment as well as the region's fauna, flora and ecosystems, but it will face increasing pressures from economic activities particularly from tourism and biological prospecting. The challenge for the ATS then is how it could become active internationally, especially in the climate regime, since together with the Arctic Council they have the potential to deliver a strong message to the global community in respect of the already damaging consequences of climate change in the Polar Regions. Joint international policy encompassing both the Arctic Council and the ATS will also be important in influencing the way the Stockholm Convention on POPs develops as both poles are sinks for persistent organic pollutants which end up there due to atmospheric circulation and ocean currents.

The Arctic is arguably facing very serious development pressures in the near and mid-term future. Given the melting sea ice and warming waters, shipping, offshore oil and gas exploitation, fisheries and tourism are increasing in prominence presenting difficult governance challenges for the Arctic Council. With the rapid environmental and economic changes, discussion over the need for stronger Arctic environmental governance has commenced among various Arctic constituencies, in particular those of the Arctic States and the European Union. It is to be expected however that the principles and rules of IEL and MEAs will continue to play an important role in meeting the challenges faced in respect of environmental protection in the Polar Regions.

## Further reading:

Timo Koivurova, Carina Keskitalo and Nigel Banks eds. *Climate Governance in the Arctic*. Springer, 2009.

Timo Koivurova, *Environmental Impact Assessment in the Arctic: A Study of International Legal Norms*, Ashgate Publishing, 2002.

Timo Koivurova, "The Importance of International Environmental Law in the Arctic." *The Finnish Yearbook of International Law* (2003), Vol. XIV, pp. 341–351.

Timo Koivurova and David VanderZwaag, "The Arctic Council at 10 years: Retrospect and Prospects." *UBC Law Review*, (2007), Vol. 40(1), pp.121–194.

Timo Koivurova and Erik Molenaar, "International Governance and Regulation of the Marine Arctic: Overview and Gap Analysis," Published in January 2009 by WWF International Arctic Programme, Oslo, Norway, at <http://img.custompublish.com/getfile.php/871949.1463.fyuebtvsca/International+Governance+and+Regulation+of+the+Marine+Arctic.pdf.pdf?return=www.arcticgovernance.org>.

Brooks Yeager and Robert Huebert, "A New Sea: The Need for a Regional

Agreement on Management and Conservation of the Arctic Marine Environment."

Published in January 2008 by WWF International Arctic, at [http://assets.panda.org/downloads/a\\_new\\_sea\\_jan08\\_final\\_11jan08.pdf](http://assets.panda.org/downloads/a_new_sea_jan08_final_11jan08.pdf).

### Websites:

Antarctic Treaty Secretariat, at [http://www.ats.aq/index\\_e.htm](http://www.ats.aq/index_e.htm).

The Arctic Council home page, at (<http://www.arctic-council.org/>), see also individual working-group websites, at AMAP (<http://www.amap.no/>), PAME (<http://www.pame.is/>), EPPR (<http://eppr.arctic-council.org/>), ACAP (<http://www.ac-acap.org/>), CAFF (<http://caff.arcticportal.org/?/>), SDWG (<http://portal.sdwg.org/>)

ECOLEX (database providing comprehensive, global source of information on environmental law. ECOLEX is operated jointly by FAO, IUCN and UNEP, at <http://www.ecolex.org/start.php>

WWF International Arctic Programme, at [http://www.panda.org/what\\_we\\_do/where\\_we\\_work/arctic/WWF\\_Arctic](http://www.panda.org/what_we_do/where_we_work/arctic/WWF_Arctic).

## Questions:

1. In what way do you think that the principles of international environmental law are relevant in the Arctic and the Antarctic?
2. How does the task of environmental protection change when humans are living in a region needing such protection measures?
3. What is the biggest environmental threat to the Polar Regions? Can the Polar legal regimes contribute in any way to mitigating climate change and adapting to its consequences?



# 3. Law of the Sea and Governance of Shipping in the Arctic and Antarctic

*David L. VanderZwaag*

## 3.1 Introduction

The 1982 UN Law of the Sea Convention (LOSC), which came into force in November 1994, might be described as setting the legal foundations for marine environmental protection and controlling marine resource exploitations in all the world's oceans, including the Polar seas. Having 320 articles and nine Annexes, the Convention sets out a basic requirement for all states to protect and preserve the marine environment (Art. 194) and to cooperate in developing global standards for shipping (Art. 211) and global and regional standards for land-based marine pollution (Art. 207), ocean dumping (Art. 210) and seabed activities (Art. 208). States also have an obligation to subject all activities under their jurisdiction or control which may cause substantial pollution or significant harmful changes to the marine environment to environmental impact assessment procedures (Art. 206).

While LOSC clearly applies to both the Arctic and Antarctic marine areas, two major differences in application stand out in light of the presence of recognised coastal states and port states in the Arctic but not in the Antarctic. Many of the Convention's provisions focus on clarifying the rights and responsibilities of coastal states in the five zones of national jurisdiction, internal waters, the territorial sea, a contiguous zone, the exclusive economic zone (EEZ) and a continental shelf. While five coastal states (Canada, Denmark/Greenland, Norway, the Russian Federation and the United States) surround the Arctic Ocean and thus those states are clearly bestowed powers to pass and enforce national laws in those zones, the Antarctic does not have generally recognised coastal states. Seven states (Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom) have historic territorial claims on the continent which have been "frozen" by the Antarctic Treaty (Art. IV). The LOSC also recognises the powers of port states over ships choosing to enter their ports, such as the right to inspect vessels for their seaworthiness and to prevent unseaworthy ships from sailing before being re-

paired. While all five Arctic coastal states are clearly port states with corresponding inspection and enforcement powers, the Antarctic continent does not have generally recognised port states in the actual region.

Shipping is a growing concern in both Polar Regions. Cruise ship visits have been on the increase with corresponding human safety and environmental concerns. The Arctic appears to be on the verge of a new era in commercial shipping with vast hydrocarbon and mineral resources and growing interest in transpolar shipping that may substantially cut transport distances between Europe and Asia. Navigation in the Arctic by military vessels and other ships on governmental service is also expected to rise. For example, the Government of Canada has announced a commitment to build new Arctic patrol vessels and to construct a vessel refuelling facility in Nanisivik, Nunavut. Both Polar Regions are remote, raising special challenges for emergency responses and search and rescue in case of accident. Navigating in ice and freezing temperatures are common challenges although the Arctic may be even more treacherous in light of a greater proportion of thicker multi-year ice.

A key social and political difference between the Polar Regions is the presence of indigenous communities and an overall human population of about 4 million in the Arctic, while the Antarctic hosts scientific stations with temporary teams of scientists. The potential human impacts of shipping which are a special concern in the Arctic include the interference caused to traditional hunting and harvesting activities and the overwhelming of small communities with tourists. Indigenous rights over marine areas and resources have yet to be fully resolved in the Arctic adding another layer of political and legal complexity not present in the Antarctic.

This chapter provides a broad overview of the law of the sea and shipping governance arrangements applicable to the Arctic and the Antarctic. The realities and challenges connected with the LOSC are first described for each region. The similarities and differences in regional approaches to addressing shipping safety and vessel-source pollution, including related environmental threats, are then surveyed. The maritime safety and pollution “main sails” are highlighted, namely, the (1974) International Convention on Safety of Life at Sea (SOLAS) and the (1973) International Convention for the Prevention of Pollution from Ships, as modified by the (1978) Protocol Relating Thereto (MARPOL 73/78) as well as further supportive conventions and guidelines (‘jib sails’) to the two central agreements governing international shipping. The chapter concludes by summarising the differences and commonalities in law of the sea and shipping governance approaches in the Polar Regions and highlights the many issues still needing to be resolved such as the adoption of a mandatory code for shipping in Polar waters.

This chapter, by attempting to provide a broad overview of Polar law relating to law of the sea and shipping governance, by necessity omits detailed discussion of some legal topics. A review of international agree-

ments relating to liability and compensation in case of marine accidents, such as an oil spill, is therefore beyond the scope of this paper. The effort to address seafarer working and living conditions, such as food, medical care and wages, through a consolidated 2006 Maritime Labour Convention, is not discussed nor are the international customs and contractual practices of ship owners and commercial interests surveyed. For example, marine insurance contracts may be critical for ensuring Polar shipping ventures actually occur and the cost of insurance may be a major constraint. The International Maritime Organization (IMO) has developed over 50 treaty instruments and hundreds of other measures, including codes and guidelines, over the years to control shipping and only some of the most important and relevant documents to Polar shipping can be summarised.

## 3.2 Law of the Sea Realities and Challenges

### *3.2.1 Arctic Law of the Sea Realities*

The law of the sea reality for the Arctic is at the same time both simple and complex. The LOSC provides as easy to understand division of rights to living and non-living marine resources. Arctic coastal states are given exclusive rights to exploit fisheries, minerals, hydrocarbons and energy resources within their 200–nautical mile (n.m.) EEZs. Where the natural prolongation of continental shelves extends beyond 200–n.m., coastal states have the right to exploit sedentary species, such as shellfish, and mineral resources on the seabed. In the high seas water column beyond national 200–n.m. zones, various freedoms of the sea apply whereby all states may have access to living resources and shipping routes. For the deep seabed beyond national jurisdiction, the International Seabed Authority, a management organisation established pursuant to the LOSC and based in Jamaica, would be responsible for licensing and regulating any mineral exploration or exploitation activity should it arise. The Agreement to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, adopted in 1994, sets out further “rules of the game” in relation to deep seabed mineral policy including provisions on technology transfer and the financial terms of contracts.

The 1982 Convention also clearly bestows substantial coastal state jurisdiction to undertake and control marine scientific research in Arctic waters. Coastal states have the exclusive right to conduct marine scientific research in their territorial seas and such research can only be undertaken with the express consent and under conditions set by the coastal state (Art. 245). Marine scientific research in the EEZ and on the continental shelf is also subject to coastal state consent which should be normally given (Art. 246(2)). Exceptions where consent may be refused

include where a project is of direct significance for the exploration and exploitation of natural resources or where a project involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment (Art. 246(5)).

The LOSC is also straightforward in establishing various state responsibilities both within and beyond national zones of jurisdiction in the Arctic. For example, coastal states are obligated to ensure proper conservation and management measures so living resources in the EEZ are not endangered by over-exploitation and such measures must avoid seriously threatening the reproduction levels of associated or dependent species (Art. 61(2)(4)). States are required to cooperate directly or through sub-regional or regional organisations to ensure the conservation of fish stocks shared across national EEZs (Art. 63(1)) and stocks that straddle an EEZ and the high seas (Art. 63(2)). States must take all measures necessary to prevent, and control pollution of the marine environment from any source (Art. 194(1)) and seek to minimise to the fullest possible extent the release of toxic or noxious substances (Art. 194(3)(a)). States are required to protect and preserve rare or fragile ecosystems and the habitat of threatened or endangered species (Art. 194(5)). The intentional or accidental introduction of alien species to the marine environment which may cause significant harmful changes is to be avoided (Art. 196(1)). States are also required to cooperate in conserving and managing living resources in the high seas and to consider establishing sub-regional or regional fisheries organisations (Art. 118).

With broad acceptance that the Arctic Ocean is a semi-enclosed sea, Article 123 of LOSC urges states bordering such an area to cooperate in managing the conservation of living marine resources, in protecting and preserving the marine environment and in coordinating scientific research activities. Two key criteria must be met for the Arctic Ocean to be considered a semi-enclosed sea as defined in Article 122 of LOSC. First, the Arctic Ocean must be deemed a “sea,” a term that is not defined in the Law of the Sea Convention. Second, the Arctic Ocean must consist entirely or primarily of the territorial seas and EEZs of two or more coastal states.

A further overlay of cooperative obligations emanates from the 1995 UN Agreement on Straddling and Highly Migratory Fish Stocks (Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks). The Agreement urges the application of precautionary and biodiversity protective approaches to fisheries management (Art. 5). The Agreement also calls for the strengthening of existing regional fisheries management organisations and arrangements with management mandates for straddling or highly migratory fish stocks (Art. 13). Coastal states and states fishing on the high seas are to consider es-



establishing a new regional fisheries management organisation or arrangement where no such organisation or arrangement exists (Art. 8(5)). This latter obligation might be described as a “prospective” for the Arctic as it remains to be seen whether viable commercial fish stocks exist in the high seas pocket in the central Arctic Ocean and whether states will wish to support the opening up of new fisheries areas.

The LOSC has cast a complex web of jurisdictional entitlements and limitations for the three categories of states concerned with Arctic shipping – coastal states, flag states, and port states. These categories are reviewed in turn.

### *3.2.1.1 Coastal State Jurisdiction and Control*

Canada, Denmark (Greenland), Norway, the Russian Federation and the United States have coastal frontage on the Arctic Ocean and thus are considered as coastal states which can exert legislative and enforcement control over foreign ships in offshore waters. The amount of control varies with the zones of coastal state jurisdiction. The greatest powers exist in internal waters, the waters closest to the coastal state, and the powers become less according to the distance offshore with least control existing over foreign vessels navigating above an extended continental shelf beyond 200–n.m.

In internal waters, a coastal state has total sovereignty. Thus, if it wishes, the state may prohibit entry of certain ships, such as those carrying hazardous cargoes and may impose “zero discharge” limits on specific pollutants. The only limit on this maximum power is the customary duty to allow foreign ships in distress, such as those facing a major storm, to seek refuge in sheltered waters.

Internal water status can be claimed in various ways. LOSC recognises the right of coastal states to draw closing lines across mouths of geographical bays, ports and harbours and the marine areas on the landward side of the lines are considered internal. A coastal state is allowed to draw straight baselines around a deeply indented coastline or where there is a fringe of islands in the immediate vicinity of the coast, and the waters enclosed would be internal. Internal waters might also be claimed based upon their being recognised as such historically.

Within the territorial sea limit which may extend 12–n.m. from the low-water line along the coast or outside enclosed internal waters, the coastal state has full sovereignty but that sovereignty is subject to the right of foreign ships to enjoy innocent passage. Passage is considered innocent so long as it is continuous and expeditious and not prejudicial to the peace, good order, or security of the coastal state. The Convention lists various activities that are considered non-innocent including: carrying out of research or surveys, any fishing activities and any act of wilful or serious pollution in contravention of the Convention.

While the LOSC allows coastal states to adopt pollution control and navigational safety laws applicable to foreign ships transiting through the territorial sea, it places key limits on this authority. Coastal states cannot impose design, construction, crewing or equipment standards on foreign ships unless giving effect to generally accepted international rules or standards. Coastal states are also prohibited from imposing requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage. Coastal states can require foreign ships to use designated sea lanes or traffic separation schemes, but before doing so the state must consider the recommendations of the IMO and take into account any channels customarily used for international navigation.

Coastal states may also claim a 12 n.m. contiguous zone adjacent to the territorial sea to a seaward limit of 24 n.m. In a contiguous zone a coastal state may exercise necessary control over foreign ships to prevent infringement of its customs, fiscal, immigration or sanitary laws and to punish infringement of such laws committed within its territory or territorial sea. For example, a state might seek to enforce a law prohibiting any garbage disposal in its territorial sea against a foreign ship navigating within the contiguous zone that had previously disposed of garbage in the territorial sea.

In a coastal state's 200-n.m. EEZ, legislative and enforcement jurisdiction over foreign vessels is substantially curtailed. A coastal state cannot impose its own pollution standards on such vessels but is restricted to only imposing international pollution standards. Actual arrests and detention of a foreign ship is only allowed if there is a discharge causing or threatening major damage to the coastline, interests or resources of the coastal state. Monetary penalties may only be imposed for such EEZ pollution infringements.

Where the natural prolongation of a coastal state's continental shelf extends beyond 200-n.m. from the baselines from which the territorial sea is measured, the coastal state has very limited control over foreign shipping activities occurring in waters above the extended continental margin. A coastal state may establish safety zones around artificial islands or structures involved in seabed exploration or exploitation activities, and no such activities may be carried out without the coastal state's consent. A coastal state in exercising its rights over the continental shelf must not cause any unjustifiable interference with navigation or with other freedoms such as fishing.

A coastal state bordering a strait used for international navigation is severely restricted in controlling foreign shipping because of the right of all ships to transit passage. A coastal state may only impose international pollution control standards, not stricter national regulations. Sea lanes and traffic separation schemes may be established but only with IMO approval. A submarine exercising transit passage may remain submerged

whereas an innocent passage through the territorial sea a submarine is required to navigate on the surface and to show its flag.

While the various national zones of jurisdiction are applicable to all the world's oceans including the Arctic, the LOSC has recognised special hazards of navigation in ice-covered waters and has given extra powers for coastal states to pass and enforce laws for control of vessel source pollution for those waters. A coastal state may adopt stricter than international pollution standards normally applicable in the EEZ. Article 234 provides:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment and be based on the best available scientific evidence.

Article 234 leaves open many questions of interpretation. For example, what is the significance of recognising special coastal state powers specific to the EEZ? One interpretation is that coastal states are given no greater powers than those granted for the territorial sea and thus no unilateral right exists to adopt special ship construction, crewing and equipment standards. What extent of ice coverage is required to invoke this article? The application of Article 234 to straits used for national navigation may also be questioned, although the LOSC does not explicitly exempt straits from application.

### *3.2.1.2 Flag State Jurisdiction and Control*

A flag state, referring to the country granting its nationality to a ship and allowing a ship to fly its flag, has extensive jurisdictional control over its vessels. The flag state's national laws including criminal laws, apply to those aboard its ships. The flag state has exclusive jurisdiction over its vessels on the high seas with limited exceptions, for example, if the state consents to boarding and inspection by officials from other states pursuant to a regional fisheries enforcement agreement. A flag state has a duty to ensure that its ships conform to international standards in relation to safety at sea, pollution control and communications.

Two potential "weak links" in the flag state control approach stand out. First is the "flag of convenience" challenge where some states continue to register ships without having adequate capacity and political will to ensure their vessels live up to international standards and commitments. The International Transport Workers' Federation lists over 30 countries, including Antigua and Barbuda, Bahamas, Belize, the Cayman Islands, Liberia and Panama, that are considered flags of convenience

where vessels are registered for the purposes of reducing operating costs and avoiding strict regulations. Second is the sovereign immunity reality. Article 236 of the LOSC exempts warships and government owned or operated ships used for non-commercial service from the marine and environmental protection provisions of the Convention. States are merely required to ensure such vessels act consistent “as far as is reasonable and practicable” with the Convention’s provisions.

### *3.2.1.3 Port State Jurisdiction and Control*

When a vessel is voluntarily within a port or off-shore terminal of a state, the state possesses broad powers of inspection and enforcement. Article 218 of the LOSC recognises the right of a port state to investigate and institute proceedings regarding illegal pollution discharges even if outside its own maritime zones, specifically on the high seas or within the jurisdictional zones of other states (if they request institution of proceedings). Article 219 of the LOSC requires port states to prevent unseaworthy ships from sailing and authorises port states to require a vessel to proceed to the nearest repair yard.

Most marine regions around the globe are covered by memorandums of understanding (MOU) on port state control, including the Paris MOU covering Europe and the North Atlantic and the Tokyo MOU applicable to Asia and the Pacific, whereby maritime administrations agree to cooperate in undertaking inspection of ships visiting their ports to ensure compliance with key international conventions relating to maritime safety and pollution. With the projected increase in Arctic commercial shipping the question arises as to whether the maritime authorities of the Arctic states should develop a new MOU specific to port state control in the Arctic.

### *3.2.2 Arctic Law of the Sea Challenges*

At least four main “law of the sea” challenges can be seen to directly concern Arctic waters. First, two ocean boundary disputes continue to fester in the region. Canada and the United States disagree over the maritime boundary in the Beaufort Sea. Canada and Denmark (Greenland) contest a small area of jurisdiction in the Lincoln Sea. Until such disputes are resolved, ship operators may face uncertainty over which national shipping laws are applicable in a contested zone. While Norway and the Russian Federation had a long-standing ocean boundary dispute in the Barents Sea, they reached a preliminary agreement in April 2010 to finally delineate their maritime border.

Second, the five coastal states of the Arctic Ocean have yet to finally determine the outer limits of their continental shelves. The Russian Federation, made its initial submission for an extended continental shelf to the Commission on the Limits of the Continental Shelf in December 2001, but was requested to submit a revised submission as to a possible

Arctic extension and that submission is expected in 2010 or possibly later. Norway, filing its submission to the Commission in November 2006, received recommendations from the Commission in March 2009 and at the time of writing had yet to formally establish the outer limits. Canada, Denmark (Greenland) and the United States are still in the process of collecting scientific and technical data in order to establish their claims. The United States has not yet acceded to the LOSC and there is increasing pressure on it to become a Party in order to legitimise its potential extended continental shelf through the Commission on the Limits of the Continental Shelf.

Resolving disagreements over the jurisdictional status of some marine waters in the Arctic is a third challenge. For example, the United States and other states have objected to Canada's enclosure of its Arctic Archipelago with straight baselines and the status of those waters as internal. The United States considers the Northwest Passage and parts of the Northern Sea Route off the Russian Federation as straits used for international navigation where the right of transit passage would apply, while Canada and the Russian Federation vehemently contest such status.

The status of maritime zones off Svalbard is also open to contention. While the Treaty of Spitsbergen (Svalbard) adopted in 1920, recognises Norwegian sovereignty over the archipelago subject to equal rights of access, fishing and hunting for other parties, the application of the treaty beyond the territorial sea is disputed. Norway maintains the treaty's application ends at the territorial sea limit and, therefore, Norway is entitled to an EEZ and continental shelf off Svalbard. Tensions over the legal status of waters seaward of the territorial sea have been partly quelled by Norway's restraint in only establishing in 1977 a Fisheries Protection Zone out to 200 n.m., and granting fisheries access to contracting parties to the treaty founded on historical fishing patterns.

A fourth challenge is the need to consider possible future directions for strengthening international cooperation in protecting the marine environment in the large pocket of high seas beyond natural jurisdiction in the central Arctic Ocean. With various freedoms of the sea, including fishing and navigation, a looming challenge is to initiate international discussions on future development and conservation objectives and options for providing further protective measures. Various governance options have been proposed by various authors including the establishment of a regional ocean management organisation (ROMO), the creation of a regional fisheries management organisation (RFMO) and the negotiation of a high seas marine protected area.

Future directions for high seas governance for all the world's oceans, including the Arctic, has become an international cauldron of controversy. The UN General Assembly has established an Ad Hoc Open-ended Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdic-

tion (ABNJ Working Group). The ABNJ Working Group has met three times, most recently in February 2010, and has not been able to resolve deep divisions of opinion over such issues as whether an Implementation Agreement on High Seas Marine Biodiversity should be forged and whether bio-prospecting for genetic resources on the high seas should be subject to a special access and benefit sharing arrangements supportive of developing countries.

### *3.2.3 Antarctic Law of the Sea Realities and Challenges*

With no generally recognised coastal states in the Antarctic region with national zones of jurisdiction and concomitant control over the activities of foreign vessels, the Antarctic law of the sea reality is the primacy of flag state jurisdiction. Each state authorising ships to fly its flag is responsible for ensuring its vessels operating in the Antarctic comply with international treaty and customary law obligations relating to such areas as shipping, fishing, ocean dumping and marine biodiversity conservation. For example, the Basel Convention on the Trans-boundary Management of Hazardous Wastes and Their Disposal requires parties to prohibit the export of hazardous wastes for disposal within the area south of the 60° South latitude, and it is the flag state that bears prime responsibility for ensuring its flagged vessels do not undertake such shipments. While ocean dumping in most regions would be strictly regulated by coastal states, in the Antarctic control measures for potential dumping from outside the region would fall on the shoulders of flag states.

Two main law of the sea challenges continue to hover over Antarctic waters. First is the potentially frayed regulatory nets opened by reliance on flag state jurisdiction as the prime means of controlling human uses. Flag states may not become party to key multilateral environmental or fisheries agreements aimed at protecting Antarctic waters. For example, the Madrid Protocol on Environmental Protection to the Antarctic Treaty, which sets out environmental impact assessment obligations for contracting parties authorising activities in the Antarctic, has only 34 parties. Thus, the danger exists that states not party might allow their flagged vessels to undertake tourism visits to the region without imposing any environmental impact assessment (EIA) requirements.

A second challenge is ensuring territorial claimant states in the Antarctic do not “rock the boat” in relation to contested offshore jurisdiction. For example, while Australia has passed national legislation prohibiting the taking of whales in its 200 EEZ declared off its claimed Antarctic Territory, it has thus far chosen not to enforce the legislation against foreign vessels. Political pressures continue within Australia for the government to take effective action against Japanese whaling allegedly undertaken for scientific research purposes. Potential extended continental shelf claims by territorial claimant states is a further jurisdictional issue.

For example, Australia in making its extended continental shelf claims to the Commission on the Limits of the Continental Shelf gave notice of its potential claim off Antarctica but requested the Commission not to consider the submission relating to the continental shelf appurtenant to Antarctica.

Numerous issues lurk in the background regarding maritime claims in the Antarctic. They include: how to determine baselines for measuring maritime zones where the normal “low-water line along the coast” may not be possible to determine due to ice-cover; whether ice shelves can be equated with land and be used as base points; and how to treat ice for maritime boundary delimitation purposes if claimant states in Antarctica choose to delimit boundaries between themselves.

The legal status of icebergs, which have potential for commercial exploitation, is a further looming issue. Whether coastal claimant states might eventually exert “ownership” rights over icebergs within 200 n.m. zones remains to be seen. A freedom of the high seas approach is also possible where “harvesting” would be open to anyone, but a common heritage of humankind approach whereby exploitation would be subject to equitable sharing of benefits through an international management scheme might also be considered.

### 3.3 Governance of Polar Shipping: Similarities and Polarities

#### *3.3.1 Similarities*

Shipping standards for the two Polar Regions are common on many fronts. Global conventions relating to maritime safety apply to both the Arctic and Antarctic as do some vessel-source pollution and marine environmental protection provisions. Various guidelines, some specifically tailored to address the special challenges of Polar shipping, have also been forged.

##### *3.3.1.1 Maritime Safety Agreements*

The “main sail” agreement setting out international safety standards for shipping in all oceans, including Polar seas, is the (1974) Safety of Life at Sea Convention, (SOLAS) as amended. The Convention casts a broad net of rules and standards in such areas as construction, steering gear requirements, fire detection and extinction, life-saving equipment including lifeboats and life jackets, radio communications, carriage of dangerous goods and maritime security. Chapter V of SOLAS addresses safety of navigation in various ways: by imposing navigational equipment requirements like radar and eco-sounding devices (to display available water depth); by requiring vessels to carry adequate and up-to-date nautical

charts; and by providing for the imposition of mandatory ships routing systems through application to the IMO.

Four other maritime safety “jib sails” are also particularly important. The (1966) International Convention on Load Lines, is aimed at ensuring ships are not overloaded by requiring adequate freeboard, that is, the distance between the ship’s deck and the waterline. The (1972) Convention on the International Regulations for Preventing Collisions at Sea, (COLREGS) sets out various speed, lookout and navigational rules to help avoid collisions and also requires various lighting arrays and sound signals. The (1979) International Convention on Maritime Search and Rescue provides the legal umbrella for countries to cooperate in ensuring that adequate search and rescue capabilities are in place in all marine regions. The (1978) International Convention on Standards of Training, Clarification and Watch-keeping for Seafarers, significantly amended in 1995 and again in June 2010, establishes training and competency requirements for ship officers and crew and covers hours of work and rest.

### *3.3.1.2 Vessel-source Pollution and Marine Environmental Protection Provisions*

The International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), the “main sail” for addressing vessel-source pollution, is applicable to both Polar Regions and establishes detailed marine pollution and protection standards through six annexes. Annexes I (oil) and II (noxious liquid substances) are mandatory for all parties to the Convention while the others Annexes III (harmful substances in packaged form), IV (sewage), V (garbage) and VI (air emissions) are optional.

While substantial differences in vessel discharge standards for the Arctic and Antarctic exist in relation to oil, noxious liquid substances, and garbage as discussed below, two major commonalities stand out. First, Annex VI of the MARPOL 77/78 which seeks to control air emissions such as ozone-depleting substances, nitrogen oxides and sulphur oxides, applies uniformly to ships operating in both Polar Regions. One of the key control mechanisms is to generally limit the sulphur content of ship fuels at 4.5 percent, but special Emission Control Areas can be established where the sulphur content would be capped at 1.5 percent. Amendments to Annex VI in 2008 will gradually decrease the general cap from 4.5 percent to 0.5 percent (effective from 1 January 2020) and the Emission Control Areas standard from 1.5 percent to 0.1 percent (effective from 1 January 2015). The revised Annex VI allows an Emission Control Area to be designated not to just control sulphur oxides but also nitrogen oxides. Neither Polar Region has yet been proposed for special emissions status, thus the general sulphur content standards will apply.

While some differences do exist over how the Antarctic and Arctic regions address sewage discharges from ships, such as which ships are subject to controls, the two regions are also subject to quite similar sew-



age discharge standards. Annex IV to the Protocol on Environmental Protection to the Antarctic Treaty in Article 6 allows untreated sewage from a holding tank to be discharged beyond 12 n.m. from land or ice shelves at a moderate rate while the ship is *en route* at a speed of no less than 4 knots. This is consistent with Regulation 11 of MARPOL's Annex IV which sets a global standard from sewage discharges also applicable to the Arctic so long as coastal states do not adopt stricter standards.

Other global "jib sails" aimed at protecting the marine environment are also applicable to both Polar Regions. The (1972) Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, permits ocean dumping if authorised pursuant to a national ocean dumping permit but prohibits disposal of wastes listed on a global prohibited list, such as industrial and radioactive wastes. A 1996 Protocol to the Convention adopts a precautionary approach whereby only wastes listed on a global "safe list"; such as dredged materials and organic wastes of natural origin, may be disposed of subject to a waste assessment review and a national permit.

The International Convention on the Control of Harmful Anti-fouling Systems on Ships, which came into force on September 17, 2008, requires ships to either not use organotin compounds on their hulls by January 1, 2008 or to have a protective coating to prevent leaching of organotin compounds. Organotin compounds, such as tributyltin (TBT), act as biocides to prevent marine life such as algae and molluscs from attaching themselves to ship hulls and TBT has been shown to cause sex changes in whelks and deformities in oysters.

The International Convention for the Control and Management of Ships' Ballast Water and Sediments, adopted in 2004 but not yet in force, seeks to avoid transfer of invasive alien species across marine regions through ballast water exchange obligations (whenever possible conducting exchanges at least 200 n.m. from the nearest land in water at least 200 metres in depth) and ballast water management systems. Shifting from ballast water exchange to treatment systems to control the levels of viable organisms is to occur for all ships by 2016.

Two global agreements seek to ensure adequate preparations for preventing and responding to pollution incidents. The (1990) International Convention on Oil Pollution Preparedness, Response and Co-operation, requires contracting parties to require ships flying their flags to have on board a shipboard oil pollution emergency plan, to provide a minimum level of pre-positioned oil combating equipment, and to cooperate upon the request of any party in responding to an oil pollution incident. The (2000) Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, extends the obligations to cover carriage and spills of hazardous and noxious substances.

### *3.3.1.3 Shipping Guidelines*

Three key sets of guidelines, adopted under the auspices of the IMO, seek to address the special conditions posed by shipping in Polar waters including remoteness and the dangers posed by ice. First, the Maritime Safety Committee in May 2006 adopted a Circular (MSC. 1/Circ. 1184) on Enhanced Contingency Planning Guidance for Passenger Ships Operating in Areas Remote from SAR Facilities. The guidance document urges companies operating passenger ships in areas remote from search and rescue facilities to develop contingency plans in case of emergencies which should consider, among other things, the possibility of voyage “pairing” where other passenger ships operating in the same area might be used as a search and rescue facility.

Guidelines on Voyage Planning for Passenger Ships Operating in Remote Areas, adopted by the IMO Assembly in November 2007, further urge passenger ships to develop detailed voyage and passage plans. Such plans for ships operating in the Arctic or Antarctic waters should address such factors as safe distance from icebergs, safe speeds in the presence of ice, no entry areas and special preparations necessary before entering waters where ice may be present, such as abandoning ship drills.

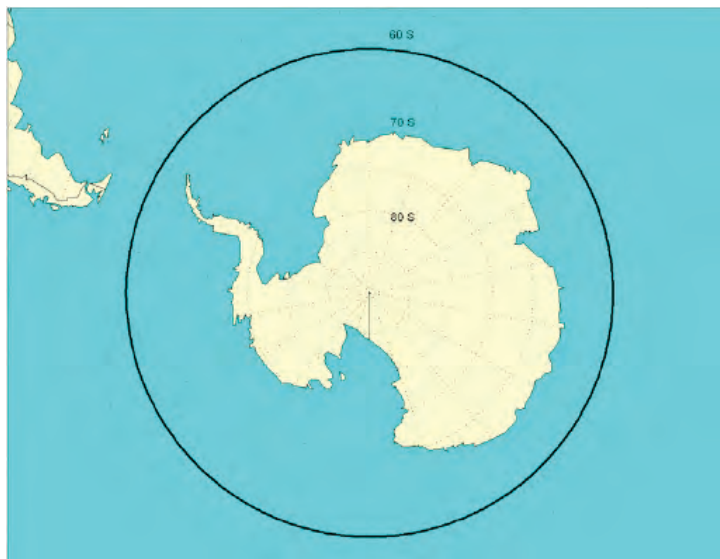
A third set of guidelines was adopted by the IMO Assembly in December 2009 which revised Guidelines for Ships Operating in Arctic Ice-Covered Waters (2002) and extended coverage to both the Arctic and Antarctic waters (See Figures 1 and 2). The Guidelines for Ships

Operating in Polar Waters provide a four-part overlay to existing international maritime agreements in order to address the special situation of ships operating in Polar waters. The Guidelines are applicable to ships subject to regulations under the SOLAS Convention which generally covers passenger ships and cargo ships of 500 gross tonnage or more when engaged on international voyages but not warships, pleasure yachts or fishing vessels. Part A of the Guidelines provides construction, stability and other technical requirements for new Polar Class Ships. The Guidelines, adopting the seven Polar classes recognised by the International Association of Classification Societies (IACS), seek to ensure ships can withstand flooding



*Figure 1: Maximum extent of Arctic waters application*

Source: IMO, Guidelines for Ships Operating in Polar Waters, Assembly Res. A. 1024(26) (2009), p. 9



*Figure 2: Maximum extent of Antarctic Waters application*

Source: IMO, Guidelines for Ships Operating in Polar Waters, Assembly Res. A. 1024(26) (2009), p. 9.

Resulting from hull penetration due to ice impacts, advocate against Polar Class ships carrying any pollutant against the outer shell, urge appropriate anchoring and towing arrangements, and call for all equipment on a ship to not be susceptible to brittle fracture.

Part B, applicable to Polar Class and other ships, sets out various equipment suggestions. These include, among others, the design and location of fire detection and extinguishment systems to avoid freezing temperatures, the provision of personal survival kits capable of protecting against severe weather conditions, the carrying of partially or totally en-

closed lifeboats, and redundancy in key navigational systems such as radar and depth sounding devices.

Part C, also applicable to Polar Class and other ships, sets out various operational suggestions. A checklist of what crew members should consider in an evacuation drill is provided. Carriage of at least one qualified Ice Navigator aboard all ships operating in Polar ice-covered waters is advocated, but with no detail on what would constitute adequate on-the-job training or simulation training. Reserve supplies of fuel and lubricants are urged in light of heavy fuel consumption in heavy ice.

Part D encourages the equipment and preparation for Polar Class and other ships navigating in Polar waters to control damage to the marine environment. Proper equipment and training to ensure minor hull repairs is urged along with the capability to contain and clean up minor deck or over side spills.

A process is currently underway within the IMO to make the voluntary Guidelines for Ships Operating in Polar waters mandatory with 2012 being a target completion date. Various issues are being discussed including the geographic scope of application, appropriate classroom and practical experiences that should be required for ice navigators, possible extension of coverage to barges, fishing vessels and pleasure craft, phase-in requirements for existing ships, and possible expansion to cover ballast water and hull-fouling.

A more general set of IMO guidelines also has potential to be applied to Polar waters. Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (PSSAs), undergoing substantial revision in 2005, provide for the designation of PSSAs for areas particularly vulnerable from international ship traffic where special associated protective measures may be imposed such as areas to be avoided, traffic routeing, mandatory ship reporting, and discharge restriction. However, to date PSSA designations have not been applied to either Polar Region.

### *3.3.2 Polarities*

With the Antarctic listed as a special area under Annexes I (oil), II (noxious liquid substances) and V (garbage) of MARPOL, stricter than global discharge standards have been established for the marine region south of the 60° South latitude. These stricter standards have been further solidified by inclusion in Annex IV to the Madrid Protocol on Environmental Protection. Article 3 of Annex IV prohibits the discharge into the sea of oil or oily mixtures from ships with limited exceptions such as a discharge relating to accidental damage to the ship or equipment. Article 4 prohibits the discharge of any noxious liquid substance and any other chemical substances in quantities or circumstances harmful to the marine environment. Article 5 prohibits disposal of all plastics into the sea from vessels and most other garbage with the exception of ground up food

wastes if disposed of 12 n.m. or more from the nearest land or ice shelf. The question of whether the Antarctic special area designations should be extended northward from the present area south of the 60° South latitude to the Antarctic convergence is under discussion by Antarctic Treaty Consultative Parties.

The MARPOL Convention provides special reception facility requirements to support Antarctic special area designations in relation to oil and garbage. Parties to MARPOL at whose ports ships depart *en route* to or arrive from the Antarctic area must ensure adequate facilities for the reception of oily residues and garbage from all ships. Each Party to MARPOL is also required to ensure that all ships entitled to fly its flag, before entering the Antarctic area, have sufficient capacity on board for the retention of oily residues and garbage and have concluded arrangements for the discharge of oily residues and garbage at a reception facility after leaving the area.

With no area of the Arctic Ocean having been designated as a special area under MARPOL, the pollutant discharge standards for some areas of the Arctic are less strict than for the Antarctic. Unless coastal states choose to impose stricter than global standards pursuant to the special legislative and enforcement powers granted by Article 234 of the LOSC, global standards will apply. Annex I of MARPOL allows oily ballast water discharges from tankers if they are over 50 n.m. offshore at a rate of 30 litres per nautical mile while *en route*, and the Annex also allows oily bilge waste discharges from oil tankers and other ships with a 15 parts per million (ppm) limitation. Annex II allows some discharge of noxious liquid substance residues based on the level of toxicity. Annex V allows considerable garbage deposits, other than plastics, including packing materials if more than 25 n.m. from the nearest land and glass, metal, paper products, rags and similar refuse if more than 12 n.m. from the nearest land.

Canada and the Russian Federation exemplify how coastal states may choose to impose stricter than global discharge standards. Canada prohibits all oil discharges from ships in Arctic waters with limited exceptions, as well as garbage and other waste deposits. The Russian Federation has prohibited the discharge of oily ballast water from tankers and the deposit of garbage for the Northern Sea Route.

Regional differences have also emerged in relation to the carriage of heavy grade oil and the control of ballast water in Polar Regions. A proposal to prohibit the use of carriage of heavy grade oil in the Antarctic was adopted by the IMO's Marine Environment Protection Committee in March 2010 and the ban on the use and carriage of heavy fuel oil by vessels operating in Antarctic waters will take effect from 1 August 2011 through a regulatory amendment to Annex I of MARPOL. In 2007, non-binding Guidelines for Ballast Water Exchange in the Antarctic Treaty Area were adopted by the IMO with various control measures suggested

including the exchange of ballast water before arrival in Antarctic waters. To date regional approaches to addressing heavy grade oil carriage and ballast water controls have not been developed for the Arctic region.

### 3.4 Conclusion

As this chapter has sought to highlight the Arctic and Antarctic are in many ways “poles apart” in relation to law of the sea contexts and shipping discharge standards. While the Arctic, being an ocean surrounded by continents, is largely subject to the jurisdiction of five coastal states, the Antarctic, constituting a continent surrounded by an ocean, remains in a law of the sea “twilight zone” with no generally recognised coastal state offshore jurisdiction and thus the primacy of flag state legislative and enforcement controls. While the Antarctic has been designated as a special area under three of MARPOL’s annexes where stricter than general international vessel-source discharge standards apply for oil, noxious liquid substances and garbage, the Arctic has not yet been globally designated for special pollution control measures.

However, shared commonalities in the areas of maritime safety, vessel discharge standards and marine environmental protection obligations have emerged. For example, The Guidelines for Ships Operating in Polar Waters (2009) establish a common framework for construction and operational requirements for ships in the Arctic and Antarctic. Consistent air emission and sewage discharge standards for ships have been adopted for the two regions. International agreements relating to ocean dumping, anti-fouling agents, ballast water management and emergency preparedness are also applicable to both regions.

The quest for effective governance in both Polar regions is thus far from over. The Guidelines for Ships Operating in Polar Waters have yet to be made mandatory and numerous issues remain to be resolved, such as the geographical scope of applications, the types of vessels covered and the strength of regulatory measures. Efforts continue within the IMO to further tighten controls on sewage and garbage from ships. The regulation of greenhouse gas emissions from ships has become a topic of important but unresolved debate. Pressures to better control vessel noise in order to protect marine mammals have also not abated.

Both Polar Regions are currently experiencing increased attention in respect of the inadequacies of existing shipping governance measures and the need to strengthen international and regional rules and standards. The Arctic Council’s comprehensive Arctic Marine Shipping Assessment (AMSA), published in April 2009, offered numerous recommendations under three themes. For example, to enhance Arctic marine safety, AMSA urged Arctic states: to work through the IMO to augment global ship safety and pollution prevention conventions with specific mandatory requirements for ship

construction, design, equipment, crewing, training and operations aimed at Arctic shipping safety; to explore harmonisation of national Arctic shipping regulatory regimes; and to develop a multi-national Arctic Search and Rescue (SAR) instrument including aeronautical and maritime SAR. To protect Arctic people and the environment, AMSA recommends that Arctic states: identify areas of heightened ecological and cultural significance and implement protective measures from marine shipping impacts; explore the need for specially designated Arctic marine areas as “special areas” or “particularly sensitive sea areas” through the IMO; enhance cooperation in oil spill prevention; and support reduction of air emissions of greenhouse gases, nitrogen oxides, sulphur oxides and particulate matter. To build Arctic marine infrastructure, the third theme, AMSA urges Arctic states: to improve infrastructure in the areas of ice navigation training, navigational charts, communication systems, port services, reception facilities for ship-generated waste, and icebreaker assistance; develop circumpolar pollution response capabilities; and increase investments in securing adequate hydrographic, meteorological and oceanographic data to support safe navigation. At the Sixth Ministerial Meeting of the Arctic Council in Tromsø, Norway, April 29, 2009, Ministers approved the actual establishment of a task force to negotiate an international SAR instrument for the Arctic by the next Ministerial meeting in 2011.

The Antarctic Treaty Meeting of Experts on Ship-borne Tourism in the Antarctic Treaty Area, hosted by New Zealand in December 2009, also produced a set of recommendations to be forwarded to the next Antarctic Treaty Consultative Meeting. For example, Antarctic Treaty Parties are urged to: consider the development of a specific checklist for inspections of tourist vessels in Antarctica; contribute to hydrographic and charting information in the Antarctic Treaty Area; proactively apply port state control regimes to tourist vessels bound for the Antarctic; exchange information on contingency planning preparedness; and consider mechanisms for enhancing coordination with respect to Antarctic-related matters within the IMO.

The time is ripe for the further strengthening of shipping governance and cooperative arrangements to protect the marine environment in both Polar Regions. However, it remains to be seen how far the vested social and economic interests of states and their constituents will constrain progress. The voyage towards safe and sustainable seas in both regions is thus likely to be a long and arduous.

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- International Maritime Organization  
<<http://www.imo.org>>.
- Protection of the Arctic Marine Environment Working Group (PAME)  
<<http://www.pame.is/>>.
- Secretariat of the Antarctic Treaty  
<[http://www.ats.aq/index\\_e.htm](http://www.ats.aq/index_e.htm)>.

## Questions:

1. What are the main differences in the Law of the Sea contexts for the Arctic and the Antarctic?
2. What is the main Law of the Sea challenge for each Polar region?
3. Are shipping activities in the Arctic and Antarctic adequately controlled?
4. What governance strengthening, if any, would you recommend for the Arctic? For the Antarctic?



# 4. The Management of Living Marine Resources in the Polar Regions

*Tavis Potts*

## 4.1 Introduction

The exploitation of marine resources in the Polar Regions includes activities that have occurred for hundreds of years. In the Southern Ocean, uncontrolled industrial exploitation of these natural resources has taken place for centuries, generally following a “boom or bust” cycle until the 1980s with several species hunted almost to extinction. In the Arctic, the human presence in the region over thousands of years has ensured that coastal fisheries and marine mammals have been exploited for generations. This however has predominantly been small-scale coastal and regional fisheries in harmony with the ecosystem. Commercial fishing has however grown to be a major industry in the Arctic with fleets fishing for a variety of species such as cod, haddock, herring, and pollock and supplying world markets.

The two regions have very different regimes for fisheries management. In the Southern Ocean the key regime is the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), an international treaty that regulates marine resources including fisheries on the high seas. In the Arctic region, a mix of instruments and agreements exist to regulate the fisheries industry. This includes agreements between individual countries and regional fishery agreements that cover the high seas also known as regional fishery management organisations (RFMOs).

The issues facing the fisheries sector in the Polar Regions display both common and discrete elements. In the Antarctic, the fisheries sector is managed under a single international system. The key issues here concern the implementation of the ecosystem approach, the management of IUU fisheries, and the intensification of industrial fishing for krill, a small but protein-rich shrimp that lies at the centre of the Southern Ocean food web. In the Arctic, key issues include the improved coordination of fisheries under national and international jurisdiction, the response of the fisheries sector to ecosystems shifts, and improving precautionary and ecosystem approaches.

This paper does not advocate the imposition of an Antarctic style fisheries regime in the Arctic as the two systems are very different. However, what we will explore is the development of the regime in the Antarctic and the somewhat unique policy instruments it has produced to deal with ecosystem and precautionary approaches. This paper asks the question: despite the different ecological and political differences, can some of the innovative approaches in the Antarctic be used in reforming Arctic management?

## 4.2 Antarctic Fisheries Exploitation

The Southern Ocean has been exploited by industrial fisheries for hundreds of years (Kock 2000). The harvesting of seal pelts was initiated on sub-Antarctic islands in the late 1700s. From 1801 to 1822 over 1.2 million Antarctic and sub-Antarctic Fur Seal skins were taken by hunters on South Georgia. Shore-based commercial whaling in this area initiated a period of unsustainable exploitation. Initially, shore-based whaling generated limited impact by restricting harvesting to whaling stations. With the arrival of “factory ships” in the 1920s exploitation exponentially increased, with 1.5 million whales taken until management measures through the International Whaling Commission (IWC) were introduced in 1946 and a Southern Ocean Sanctuary declared in 1994. With current turbulence in the IWC, limited “scientific” whaling of Minke and increasing numbers of Fin whales by Japanese fleets still occurs within the sanctuary.

The 1960s saw the large-scale exploitation of finfish and krill stocks in the Southern Ocean. Soviet fleets targeted the marbled rock cod around South Georgia, with the catch rising 90 000 tonnes in 1968/69, and to a peak of 400 000 tonnes in 1969/1970. In the following years stocks crashed and the fish became commercially extinct. Antarctic krill were experimentally fished in the 1960s, with catches increasing through the 1970s and peaking at 528 000 tonnes in 1980. After a brief hiatus in fishing, krill catches have crept up to higher levels. In the 2007/08 season, 764 000 tonnes were caught. This is driven by technological advances in processing at sea an increase in demand for omega 3 products and feed for global aquaculture.

The 1980s and 1990s have also seen a rapid expansion in the popularity of the Patagonian and Antarctic Toothfish and a rapid expansion in the size of the catch. Landings peaked in the late 1990s at an average of 40 000 tonnes per annum (FAO 2004). There have been considerable management problems with this species as illegal, unregulated and unreported fishing (IUU) has decimated sustainable fisheries and has proved to be a major challenge to the effectiveness of CCAMLR. During the height of the IUU problem in the 1990s, catches from illegal fishing were equal to or exceeding legal catches. For example, in area 48.3 (South Georgia)

legal landings in 1993 were 3000 tonnes while the IUU catch was estimated at 4000 tonnes (CCAMLR 2008). In area 58.5.2 (the Kerguelen Islands) legal landings in 2001 were 2153 tonnes with IUU twice the limit at 4500 tonnes. Current legal and IUU landings in this formerly lucrative area have however dropped substantially with considerable effort being taken to address the problem in recent years. In South Georgia and the Kerguelen Islands the IUU catch was estimated at 0 and 489 tonnes respectively (Brown 2007; CCAMLR 2008).

### 4.3 The Development of CCAMLR

The unsustainable “boom and bust” approach of Southern Ocean fisheries led to growing concern within the Antarctic Treaty nations over the management of fishing activity and the impacts of fishing on the marine ecosystem. Central to this concern was the development of krill fishing. Krill are a keystone species within the Southern Ocean ecosystem, being a major prey for several bird, whale, seal and squid stocks.

The CCAMLR came into force in 1982 (CCAMLR 2010). It has been, by and large, a successful regime in managing the exploitation of Southern Ocean Marine resources. Membership has grown to include most nations fishing in the region and most parties tend to conform to the over 200 regulations and measures that aim to protect the resources and the ecosystem (Brown 2007). The CCAMLR is unique in terms of being the first regional fishery management organisation to recognise and attempt to implement the ecosystem approach (Constable 2000). Early conception of the ecosystem approach is written into the core text of the convention. For example, the boundaries of the CCAMLR regime reflect ecological realities, applying to all marine living resources within the region.<sup>1</sup> The Convention applies a natural oceanographic boundary from the Antarctic Polar Front to the Antarctic continent as stated in Article I of the Convention (Figure 1).

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<sup>1</sup> CCAMLR does not apply to seals or whales, which are covered by the Convention for the Conservation of Antarctic Seals (CCAS) and International Convention on the Regulation of Whaling.

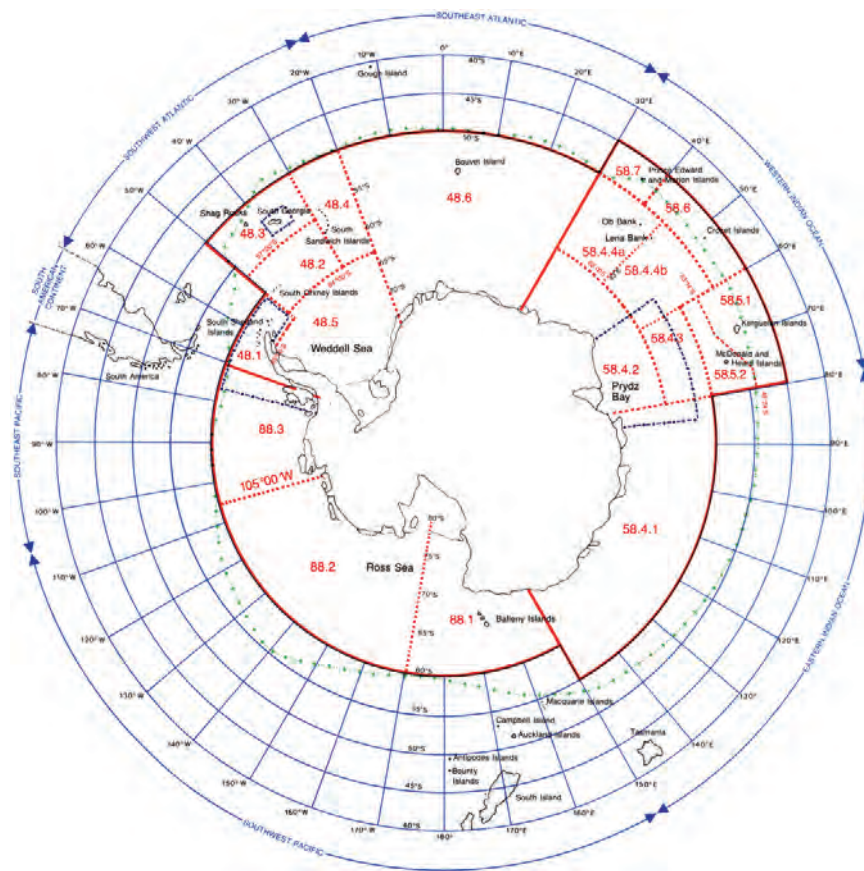


Figure 1. The boundary of CCAMLR (from CCAMLR 2010)

The Convention lays the foundation for CCAMLR as a management regime for the regulation of fisheries resources combined with an ecosystem approach. This “long term” ecosystem management mandate distinguishes CCAMLR from other multilateral, single species based fisheries agreements. The CCAMLR articulated the ecosystem approach (3a and 3b) and the precautionary approach (3c) well before the terms were used in mainstream management. Article 2 specifies the objectives and is highlighted in the box below.

*CCAMLR Article II*

1. The objective of this Convention is the conservation of Antarctic marine living resources;
2. For the purposes of this Convention, the term “conservation” includes rational use;
3. Any harvesting and associated activities in the area to which this Convention applies shall be conducted in accordance with the provisions of this Convention and with the following principles of conservation:
  - a) Prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment. For this purpose its size should not be allowed to fall below a level close to that which ensures the greatest net annual increment;
  - b) Maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the levels defined in subparagraph (a) above; and
  - c) Prevention of changes or minimisation of the risk of changes in the marine ecosystem, which are not potentially reversible over two or three decades, taking into account the state of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species, the effects of associated activities on the marine ecosystem and of the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources.

The CCAMLR, which meets annually in Hobart in Australia, currently has 24 members with voting rights and an additional 8 members who are party to the Convention but who do not have voting rights (See <http://www.ccamlr.org/pu/E/ms/contacts.htm>). The governance structures of the regime consist of a Commission and a Scientific Committee. The Commission functions as the central policymaking and administrative body. The Commission meets annually to review member activities over the past year and for the next year, to review compliance and conservation measures and to review existing regulatory measures. Important decisions are made by consensus in CCAMLR and become legally binding in international law on members after 180 days should no objections be lodged.

The Scientific Committee provides advice that is the basis of management decisions and is supported by two working groups: ecosystem monitoring and management (WG-EMM) and fish stock assessment (WG-FSA). Working groups are also convened for important issues, for example the *ad hoc* Working Group on the Incidental Mortality Arising from Longline fishing (WG-IMAF). The Scientific Committee is in-

tended to be a consultative body for the exchange of scientific information and the formulation of recommendations for the Commission. Agreement on issues is reached via peer review and debate rather than by the consensus approach employed in the Commission.

#### 4.4 Ecosystem and Precautionary Approaches in CCAMLR

The CCAMLR has developed innovative strategies for the implementation of the ecosystem and precautionary approach. The challenges have been formidable, especially within the context of the political and economic pressures that arise with decision-making between 24 national governments and a scientific foray into ecosystem management. Despite these challenges the CCAMLR has developed a comprehensive regime for monitoring, research and decision-making for fisheries within an ecosystem basis as prescribed by Article II, at a time when fishing conventions were less often utilised. The Article II objectives are operationalised by setting a range of conservation measures of which over 200 have been formulated. Measures have been adopted for mesh sizes, area closures, limiting catch, reporting systems and methods, and closed seasons (Brown 2007). They are enforced by system of flag state and CCAMLR-based observation and inspection mechanisms.

The harvest of krill has a variable history in CCAMLR and was the focus for the writing of the convention's ecosystem approach. In recent years, the krill catch has been increasing due to technical improvements that allow rapid processing at sea and the increase in demand for krill products, particularly Omega 3 supplements and high protein feed for aquaculture. In 2007/08 season 764 000 tonnes were harvested across the CCAMLR region.

The CCAMLR has developed resource assessments that account for Article II principles. In 1990 the Commission endorsed the objectives for harvesting the krill resource (Constable 2000).

- To keep krill biomass at a level higher than would be the case for single species harvesting considerations and, in so doing, to ensure sufficient escapement of krill to meet the reasonable requirements of predators;
- Given that krill dynamics have a stochastic component, to focus on the average biomass that might occur over a future period than on the average biomass at the end of that period, as might be the case in a single species context;

- To ensure that reduction of food to predators which may arise out of krill harvesting is not such that land-breeding predators with restricted foraging ranges are disproportionately affected compared with predators in pelagic habitats.

The development of the Krill Yield Model (KLM) establishes catch limits for the annual yield of krill stocks. The yield is determined by a series of rules, based on the objectives above, that are applied to the pre-exploitation biomass of krill ( $B_0$ ) and derive a proportion for harvesting (termed  $\gamma$ ). The decision rules state:

- Choose  $\gamma_1$  so that the probability of the spawning biomass dropping below 20% of its pre-exploitation median level over a 20 year harvesting period is 10%;
- Choose  $\gamma_2$  so that the median escapement in the spawning biomass over a 20 year period is 75% of the pre-exploitation median level;
- Select the lower of  $\gamma_1$  or  $\gamma_2$  as the level of  $\gamma$  for the calculation of yield.

The first part of the rule is based on the target species and is linked to the requirement for stable recruitment in Article II (3a). It attempts to minimise the risk that the target stock will be overfished and recruitment impaired. The second decision rule focuses on the maintenance of ecological relationships between predators and prey as set out in Article II (3b). It limits the effects of harvesting on krill-based predators by setting a target of 75% median escapement (Constable 2000). This level is a compromise figure based on the assumption that in single species fisheries 50% is an acceptable level of escapement and for predators, no fishing is preferred (i.e., 100% escapement). Once criteria 1 and 2 have been calculated the third part of the decision rule results in the lower of the two yields (or levels of harvest) being selected. Choosing the lowest yield means that both criteria in the decision rule can be fulfilled.

Under Conservation Measure 51–01 (2008) the CCAMLR Scientific committee determined that the fishing limit for krill in area 48 would be 3.47 million tonnes in any fishing season (note that the current catch in the total CCAMLR area is 764 000 tonnes). With further application of the ecosystem approach the CCAMLR has developed a mechanism to disperse the fishing effort once a trigger level is reached in order to avoid concentration of fishing in easily accessible areas or other negative effects on local populations of marine animals. Under Conservation measure 51–01 (CCAMLR 2008) in area 48, the Antarctic Peninsula, once a trigger level of 620 000 tonnes is reached the catch must be dispersed into smaller scale units. In further application of a precautionary approach the CCAMLR ruled that until the smaller scale ecosystem units are defined and the total catch dispersed amongst these units the trigger units of 620 000 tonnes would be the maximum catch limit and this would be split

into smaller units around Area 48. For the other side of the continent, in area 58.4.1, the catch of krill was set under the KLM to 440 000t and split into an eastern and western division until further scientific measures are to hand.

Not only does the CCAMLR set precautionary and ecosystem-based catch limits for individual species such as krill and fish stocks, it also endeavours to monitor the health of the ecosystem. The CCAMLR Ecosystem Monitoring Program (CEMP) was established in 1985 (Kock 2007) to monitor key species that could be affected by the removal of prey by fishing activity. CEMP has the following aims:

- To detect and record significant changes in critical components of the ecosystem, to serve as a basis for the conservation of Antarctic marine living resources; and
- To distinguish between changes due to harvesting of commercial species and changes due to environmental variability, both physical and biological.

Monitoring the entire Southern Ocean ecosystem is a huge task, as a result CCAMLR has adopted the notion of indicator species – dependent or related species that were likely to reflect changes in the availability and status of prey resource as a result of fishing. The prey species are selected for their key positions in Antarctic ecosystems and where the potential harvest would have a major effect on the marine system (Kock 2000). A number of parameters are monitored for each species reflecting the potential to respond to changes in the availability of prey or environmental factors. The CCAMLR has produced a set of standardised monitoring procedures that are used by participating member states across a series of Integrated Study Regions (ISR) where interactions between predators, prey, fisheries and the environment are examined in detail.

The key challenge for CEMP is the implementation of ecosystem data into decision rules for fisheries management. This concept is the focus of current and future discussion within the Working Group on Ecosystem Monitoring and Management (WG-EMM). Despite the ecosystem being monitored since 1987 it has only been recently that attempts have been made at using this information to influence decision rules – partially because of the complexity of the ecosystem and ensuring consistent long-term information on predator-prey relationships is available. Current assessments focus on an inspection of trends in the predator parameters coupled with models to explain the trends. This process intends to inform the development of the small-scale management regime for krill and to ensure the dispersed fishing effort minimises the impacts on species dependant or associated with krill.



The CCAMLR has developed several mechanisms that link scientific research with policy formulation above and beyond those that are mentioned here. Key areas of further interest include:

- The approach to managing new and exploratory fisheries that stipulates that fisheries should be managed from the outset, and that new fisheries areas should not be allowed to develop faster than the information required to manage them can be gathered;
- Substantially reducing the bycatch of seabirds in longline fisheries;
- Addressing IUU fishing in the region, including the development of an international catch documentation scheme that attempts to control the illegal catch and trade of toothfish; continuing to implement policy instruments that reduce IUU fishing and working at the global level and with non-CCAMLR member states;
- Applying the ecosystem approach to finfish and strengthening the link to decision-making;
- Developing and managing marine protected areas.

## 4.5 The Management of Fisheries in the Arctic

The Arctic is a highly productive marine ecosystem and represents one of the few regions where fish stocks remain in a relatively healthy state. The Arctic has a wide range of marine ecosystems driven by different oceanographic conditions, and major fishing zones can be found in the North East Atlantic (Norwegian and Barents Seas), the Central North Atlantic (Iceland and Greenland), North East Canada (Newfoundland and Labrador Sea) and the North Pacific (Bering Sea). A range of commercially important species are fished that support international markets including the EU and North America and include Arctic, Pacific and Atlantic cod, capelin, halibut, pollock, shrimp, crab, and herring.

With a changing climate in the Arctic regional fisheries are expected to change in ways that are not obvious. Changes to food-webs are likely to impact on fisheries but the extents of impacts are relatively unknown. Climate change may also prove to be a positive factor in increasing the productivity of certain stocks. However, Arctic ecosystems are complex and not well understood in the context of changing climatic, ecological and oceanographic conditions, and while productivity may increase in some species, decreases could occur in other dependent and associated species. The migration of stocks is a factor that could complicate ecological relationships between stocks and their management. Recent studies have shown that there is potential for populations of commercially important fish species to shift northwards as water temperatures increase but research in this area is considered preliminary. The Arctic Climate Impact Assessment (ACIA 2004) suggests that rising temperatures in the Bering

Sea are resulting in a northward shift in some fish stocks seeking colder and deeper waters potentially affecting predator-prey relationships. Potential future opportunities and/or concerns here relate to the opening up of new fishing grounds in previously inaccessible areas as a result of reduced sea ice cover.

The Arctic is host to a complex set of arrangements in fisheries that relate to a mix of national, bilateral, and international arrangements and jurisdictions. Koivurova and Molenaar (2009) identify the key regimes:

- The International Commission on the Conservation of Atlantic Tunas (ICCAT),
- The bilateral (Canada and the United States) International Pacific Halibut Commission (IPHC),
- The bilateral (Russian Federation and the United States) Intergovernmental Consultative Committee (ICC),
- The Northwest Atlantic Fisheries Organization (NAFO),
- The North Atlantic Salmon Conservation Organization (NASCO),
- The North East Atlantic Fisheries Commission (NEAFC),
- The North Pacific Anadromous Fish Commission (NPAFC),
- The Norway-Russian Federation Fisheries Commission,
- The Western and Central Pacific Ocean Fisheries Commission (WCPFC), and
- The Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea (CBS).

Other bodies that have competence in the region include:

- The OSPAR Convention that delivers assessments on marine pollution, biodiversity and environmental quality;
- The International Council for the Exploration of the Sea (ICES) that provides scientific advice and peer review for fisheries management throughout the region.

New fishing opportunities in an ice-free Arctic require strict management if they are not to be short-lived. In the Arctic such regimes for the high seas areas are already in place, except for the high seas area in the Central Arctic Ocean where only the European sector is covered by an RFMO (e.g., in the Northeast Atlantic the NEAFC regulates fisheries on the high seas. In the Northwest Atlantic the NAFO has a similar function while the loophole in the Bering Sea is covered by a six-party agreement). Existing agreements such as the Norwegian-Russian Fisheries Commission cover the areas under national jurisdiction. The remaining area of high seas in the Central Arctic Ocean is not likely to witness major fisheries development, at least in the short term, but potential exists for a “tragedy of the commons” problem to emerge that leads to unsustainable exploitation (Rayfuse

2007). This area however, will be ice-covered for most of the year for the foreseeable future. The key issue, therefore, is one of improving and developing the existing management regimes in areas under state sovereignty as well as the RFMOs covering the high seas. There is considerable debate over what instruments would apply to areas not covered by an agreement. Should a new instrument be negotiated or should an existing instrument such as NEAFC be extended? (See: Koivurova and Molenaar 2009; Schofield and Potts 2009). These debates are underpinned by the fact that there is a substantial lack of data over potential resources, their extent, their response to climatic shifts and potential impacts.

One suggested area of reform is to further the implementation of ecosystem-based management across the Arctic. This is a particularly difficult issue in this region due to the size and complexity of ecological and social issues, including the separation of knowledge and expertise across sectors and jurisdictions, reflecting the complex mix of domestic and international interests. One example here is that the NEAFC is primarily responsible for the high seas and cross border pelagic fisheries in the Barents Sea, while in the same area, the Norwegian-Russian fishing Commission is responsible for demersal fisheries. The NE Atlantic spans a range of exclusive economic zones, regional environmental agreements such as the OSPAR Commission<sup>2</sup> and five RMFOs, all with a remit or interest in fisheries management.

Despite the challenges faced initiatives to deal with them are emerging (Hoel 2009). One of the main problems however is that Arctic states and actors have divergent views on what form ecosystem-based approaches should take. Should sector-based approaches such as fisheries, shipping, and / or conservation be mixed? What is the appropriate spatial scale? Does room exist for cross border and regional initiatives? Should a soft law or regulatory approach be taken? In this context implementation of the CCAMLR approach has been easier than it could otherwise have been as all actors and interested states are bound by the Convention, Commission and broader Antarctic Treaty regime that predominantly applies to a single sector (fisheries) on the high seas (note, however, that pockets of sovereignty do exist in the Southern Ocean, for example South Georgia (UK), Heard and Macdonald Islands (Australia) and Kerguelen Islands (France)).

In the Northeast Atlantic a shift has taken place over the last decade to move towards ecosystem-based management but these approaches are still relatively new. The International Council for the Exploration of the Sea (ICES), which is providing scientific advice to member states on marine management in this region, has replaced its sectoral advisory

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<sup>2</sup> OSPAR is the mechanism by which fifteen Governments of the western coasts and catchments of Europe, together with the European Community, cooperate to protect the marine environment of the North-East Atlantic.

structure with one Advisory Committee on Oceans Management to improve ecosystem-based scientific to governments. In addition ICES, the North Atlantic Marine Mammal Commission (NAMMCO), NEAFC and the OSPAR Commission are cooperating on joint research and policy-making initiatives to implement an ecosystem-based approach. In 2008 NEAFC signed a “memorandum of understanding” with its environmental counterpart OSPAR in order to progress management on the ecosystem approach. A workshop is planned in 2010 to develop operational guidance and management objectives, significant progress however remains to be made in implementing and ecosystem approach for fisheries and in respect of going further towards integrated management across sectors in the Arctic.

## 4.6 Conclusion and Key Points

What can the development of an ecosystem approach offer the Polar Regions? In order to ensure future healthy marine ecosystems and the continuation of provisioning services to societies, resource management must move towards improved and integrated governance, conservation of species and habitats, restoration of productive potential and elimination of bycatch and discards. The Polar Regions are complex and dynamic social-ecological systems, and the key to understanding and managing them in the face of change is to work with, not against, the linkages that exist between natural and human systems.

Fundamentally, in the Polar Regions we are dealing with very different systems and the transplantation of management regimes or policy instruments from one region to another must therefore proceed only with considerable caution. However, there are some areas where policy learning could progress in terms of instruments and processes to implement an ecosystem approach. The CCAMLR has been developed over 20 years of ecosystem-based and precautionary management and is thus at the forefront of developing innovative tools to manage marine resources in the international sphere. The Arctic has several regimes that operate and overlap in the same marine space. Despite this “patchwork quilt” approach a relatively healthy fisheries stock has been successfully maintained. It is important to acknowledge that both Polar Regions face significant challenges in respect of adapting to climatic change, dealing with the potential impact of new economic sectors including expansion of industrial fishing, and with the reform of regimes from single species to ecosystem approaches. The following points outline key areas of potential synergy and mutual benefit:

- In the CCAMLR a centralised RFMO is able to coordinate scientific analysis, policy formulation, and apply conservation measures on a multi species and ecosystem basis. While arguably the CCAMLR applies to a “simpler” system in terms of jurisdiction, the counter argument is that the CCAMLR coordinates the actions of 34 states that are actively fishing or have coastal, port, and/or market status. In the Arctic, harmonisation should continue to occur between the various national, bilateral and regional fishing agreements and institutions on a regional and ecosystem basis.
- The CCAMLR has delineated its boundaries under Article 1 on the basis of oceanographic and ecosystem considerations instead of arbitrary political boundaries. However, political factors were still important in the determination of boundaries, particularly in terms of sovereign rights. In the Arctic, the boundaries of fishing agreements and new potential area should be moved towards an ecosystem basis, with an exploration of the LME boundaries developed by the Arctic Council in PAME (Protection of the Arctic Marine Environment). This paper acknowledges that in the Arctic, sovereign maritime rights are a particularly sensitive issue and a balance should be found between rights and ecosystem (LME) boundaries.
- Fishing has predominantly been left out of discussions in the Arctic Council and fisheries management is not in the Council’s remit except obliquely in CAFF (Conservation of Arctic Flora and Fauna) and PAME (Protection of the Arctic Marine Environment) documents. The future management of fishing on an ecosystem basis should be brought into the Arctic Council dialogue as this is the key forum for Arctic States, actors and jurisdictions.
- It is clear that several Arctic regimes are in the process of updating themselves to incorporate the ecosystem approach to fisheries e.g., the NEAFC. These reforms should be open and transparent and draw upon the experience of the CCAMLR in terms of CEMP, impacts on dependant species including small-scale management areas and establishing precautionary measures for new and existing fisheries, including the development of environmental impact assessment. In addition there is a clear opportunity for the further exchange of knowledge and experience over what policy instruments work in particular contexts, for example, ecosystem monitoring, certification, enforcement and port/market state controls.

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- Websites:**
- CCAMLR: <http://www.ccamlr.org/>.
- Antarctic and Southern Ocean Coalition: <http://www.asoc.org/>.
- NEAFC: <http://www.neafc.org/>.
- OSPAR: <http://www.ospar.org/>.

### Questions:

1. What is the ecosystem-based approach in fisheries and how does it relate to the idea of integrated management?
2. What are the future challenges in respect of implementing the ecosystem approach for fisheries in the Southern Ocean?
3. Describe the CCAMLR Catch Documentation Scheme and how this attempts to reduce illegal fishing in the Southern Ocean. Could it be replicated elsewhere?
4. What is the OSPAR Commission and how can it potentially work with fisheries management in the NE Atlantic?
5. Describe the various national, bi-lateral and international fishing management regimes in the NE Atlantic and assess their moves toward implementing the ecosystem-based approach? What are the potential challenges and opportunities here?
6. Identify emerging issues and possible solutions in respect of Arctic fisheries?





# 5. Economies and Business in the Arctic Region

*Joan Nymand Larsen*

## 5.1 Introduction

The economies of the high North have a number of common characteristics that set them apart from economies in the world beyond. Important differences between the regions as well as variations between local communities within regions are however also important. While the formal economy of the North is characterised by resource extraction, the local economy can be described as a mixed economy where market and non-market activities all play an important role in supporting community livelihoods. Wage employment, traditional pursuits, and transfer income from government all provide important sources of income. The relative size and importance of the market, non-market, and transfer sector varies throughout the North. The formal and market-based economy is characterised by the role and presence of the large-scale capital and skill-intensive nature of industrial resource production, whereas the informal, subsistence based – non-market – economy is characterised by traditional pursuits of hunting, trapping, gathering, but increasingly with connections to the local market economy.

There is no doubt, however, that the Arctic region is a region of change. Local and regional economies are increasingly experiencing the effects of global change processes and the changes occurring in global markets in far distant places. The Northern economy – local and regional – is no longer an economy operating in isolation or shielded from the effects of external activities or decisions made in distant places. The Arctic region faces several distinct challenges related to economic development and the, primarily, large-scale resource extraction activities upon which it is based here. This includes permafrost and sea ice, remoteness and lack of accessibility, the high cost of production in the North, the availability of human resources for large-scale industrial projects, a fragile eco-system, the consequences of environmental impacts, and the negative spill-over effects of industrial activity for local and indigenous communities, culture and tradition. With rising global demand, and a growing desire for stable and secure resource supplies in world markets, industrial resource extraction activities in the Arctic will likely continue to expand

despite any observed and expected physical, environmental and human costs. Challenges related to climate change and globalisation can however be expected to play a growing role in decisions regarding resource allocation, resource use, ownership and control, with important consequences for Arctic economies and their economic sustainability.

This chapter presents an overview of the economies of the Arctic focusing on the market as well as the non-market or subsistence sectors of the economy. It examines the special characteristics of Arctic economies, their major challenges and opportunities while also addressing the issues surrounding economic development and large-scale resource exploitation in the North, including its impact on Arctic communities and indigenous livelihoods.

## 5.2 Economic Analysis and the Northern Economy

As a point of departure in our look at the Northern economy it is useful to first note a few core ideas in the economic way of thinking, and highlight the two fundamental assumptions about human beings that the study of economics rests upon: all human beings need some of the earth's resources in order to survive. The supply of these resources is limited. This is known in economics as the problem of *scarcity*. Because of this problem, human beings have to make choices, and economies have to find ways to allocate resources among the competing claims of different individuals and groups. If all the things people need were available in unlimited amounts, there would be no economic problem. *Scarcity* is a situation in which there is not enough of a resource to meet everybody's wants and needs. And thus, economics is the study of the choices people make and the actions they take as they attempt to match up scarce resources with their virtually unlimited wants and needs.

People create economies to help them meet their needs. When wants exceed the resources available to satisfy them, there is scarcity. Scarcity is everywhere: people want good health and long life, cultural and material well-being, security, physical comfort, and knowledge to name but a few. In the North we want a good quality of life, meaningful and rewarding jobs, a clean environment, and opportunities to participate in subsistence and cultural activities. Sometimes we need to make choices, and in doing so we face trade-offs. Were all resources perfectly abundant, choices or tradeoffs would be unnecessary. We would not need market institutions or any other mechanism for allocating entitlements to resources. In the North competing interests related to land use and use of renewable and non-renewable resources are a source of conflict between numerous competing stakeholders, and decisions regarding resource allocation and use produce winners and losers. Thus, the fundamental prob-

lem – the economic problem – is the fact that we have limited resources but unlimited wants and needs.

Among the basic core ideas is the principle that there is scarcity everywhere, and because of scarcity we must make choices, and all choices have a cost, also referred to as an opportunity cost. At the same time, human beings respond to incentives; when the cost of something increases we make substitutions – e.g., develop industrial substitutes for natural resources that we deplete. Provided with the right incentives we can find ways to help direct our economy in the direction of socially optimal solutions; e.g., we could think of a hypothetical scenario where a pollution tax is levied on an industrial polluter to provide the incentive to cut pollution and limit the damage to our environment.

The key economic policy objectives designed to improve economic performance – both in and beyond the Arctic – are improvements in economic efficiency, equity, economic growth, and stability. Equity can be defined as economic justice or fairness. An efficient economy is not necessarily an equitable or just one. Economic efficiency could deliver very large incomes to a few leaving the vast majority very low incomes. Indeed, policies geared towards reaching a higher level of efficiency may come at the cost of greater *inequity*, unemployment and displacement for some.

The policy objective of economic growth refers to a rise in income and production per person, and is measured by an increase in Gross Domestic Product (GDP) – which simply refers to the value of all final goods and services produced in an economy in a given year. It results from the ongoing advance of technology, the accumulation of increasing quantities of productive equipment, and improvements in educational attainment. Economic growth can be encouraged or discouraged by the policies that governments adopt, e.g., tax incentives for research and development might stimulate growth. While growth is a key aim of policy, it can have undesirable societal effects, such as the depletion of scarce natural resources and environmental degradation, or it can come at the cost of the livelihoods of local and indigenous communities. Reaching a higher level of economic stability is yet another common policy objective. It refers to the absence of wide fluctuations in the economic growth rate, the level of employment, and average prices. As we will discuss later, economic instability is a common problem in the North. It results, in part, from a lack of economic diversification, and a tendency to target a relatively narrow range of commercial natural resources as the basis for much of a region's formal economic activity. Significant fluctuations in earnings may result if production is concentrated in one or a small number of products and if trade is geared only to a few external markets, as is often the case in the North. Indeed, economic growth, economic stability, efficiency and equity, are all aspects of policy objectives that have significant impacts on the Northern economy. Sometimes reaching these objectives creates conflicts of interest between different Arctic stake-

holders with competing interests concerning the environment, the allocation and use of natural renewable and non-renewable resources, and choice among options regarding the development of local economies.

The formal and industrial segment of much of the Arctic economy is characterised by a relatively narrow natural resource base, including renewable and non-renewable resources such as metallic minerals, precious metals, hydrocarbons, precious and semi precious stones, and fish, all of which has the potential to create significant wealth. Resource development, from exploration to extraction, can be described as highly capital intensive and frequently requiring the import of capital from outside the region. A major driver of the formal economy is the primary natural resource sector and its contribution to exports and trade in external markets far from the Arctic. Thus, a significant share of the resources extracted in the North leaves the North. This contributes to a common phenomenon describing much of the Arctic, namely that what is produced is being exported, and what is consumed is being imported – thereby limiting the sector linkages, restricting opportunities for value added, and dampening the local economic multiplier effects. The regional multiplier effect refers to the amount of economic activity generated from an initial injection of investments into the regional economy, with possible spin-off effects related to infrastructure development, transportation networks, and general increase in demand for goods and services locally – and thus employment and income generation. The bigger the multiplier effect the bigger is the net-benefit for the regional or local economy.

While resources may leave the region in vast quantities, their exploitation can give rise to a number of positive spin-off effects related to its extraction, and important indirect effects related to secondary activities that develop to help support industry. Benefits to economic growth associated with the primary resource trade may include improved utilisation of existing factors, expanded factor endowments, and economic linkage effects, where the resulting linkage effects are referred to as backward, forward and final demand linkages – thus contributing to value added and economic diversification. Still, the reality of large parts of the Northern economy is its limited economic diversification due to high costs of production and the absence of a broad range of resources. High costs also prevent broad scale manufacturing and processing. Petroleum and mineral extraction activities are among the most valuable and leading non-renewable resources in several regions of the North, with reserves located on land, on the coastal shelf, and under the Arctic Ocean. For example, on-shore and off-shore oil and gas activities are substantial in the Arctic, and they have a key role in industrial and overall economic development helping to shape the structure, conduct and performance of Northern industry, and economic activity in general.

However, while exploration and the start-up phase may require significant labour input, resource development is characterised by a process

of eventual declining labour demand and declining output. Significant economic benefits may result from extraction activity, but it may also come at a cost to the environment and the livelihoods of local communities in the North. While the financial returns from resource extraction can be significant, so are the environmental and human costs, and continued large-scale exploitation activities are often met with strong opposition from environmental groups concerned about the damage to the environment. A significant share of the wealth created through large-scale resource extraction often does not remain in the Arctic and may not benefit the residents of the region. Rather, large-scale exploitation activities are frequently carried out to supply markets outside the Arctic using labour and capital inputs from outside the region (AHDR, 2004). A significant share of GDP is generated in the form of resource rents and returns to capital leaving the area when control over resource use and capital ownership is located outside the region.

It is useful to briefly consider the problems of one of the standard measures of economic size and performance in our economy – GDP. While official records will suggest that GDP is high throughout much of the North, thus suggesting that resource development is providing for high standards of living and quality of life regionally as well as locally, it may not accurately reflect what is actually available for consumption and investment in the region – just as it may not reflect actual differences that describe the North between and within local and regional economic settings.

As we will see, GDP as a standard measure of economic size has several limitations when applied to the Arctic context. When we attempt to use GDP as a measure of more than it was intended for – using it also as a measure of our standard of living – limitations are even greater. The GDP measure simply covers activities and transactions that have a market price and which are officially recorded, and thus excludes non-market activities and household production. This drawback has long been recognised and emphasised as a limitation in using GDP as a measure of social welfare. Also, GDP does not discount for flow of resource rents and payment to non-resident workers or flow of income to residents from outside the region. Nor does GDP account for transfers and taxes in and out of the region. Since a large part of GDP in the Arctic comprises returns to fixed capital and resource rents that can be taken out of the region as income to owners situated elsewhere, it is hard to know what part of GDP is available for consumption and investments. GDP also ignores the distribution of income which presents a serious flaw when we attempt to use it indiscriminately to describe both regional and local economic life. An unequal distribution implies unequal opportunities for personal development and well-being, and using GDP *per capita* as a measure of welfare means ignoring information on the distribution of income and hence inequality. This is particularly problematic if some segments of a population live on

the margin, are prevented from full participation, or are denied equal access to the benefits of economic production. GDP has also been criticised for not taking into account the environmental damage and depletion of resources that may result from increased economic activity. More production simply means a higher GDP regardless of what is being produced (see ASI, 2010).

The non-market part of the Northern economy is described by subsistence in the form of customary harvesting, and it continues to play an important role in many parts of the North. Subsistence activity refers to local production for local consumption. The livelihoods of a significant number of indigenous people – including also many non-indigenous residents – continue to depend largely on harvesting and the use of living terrestrial, marine, and freshwater resources. Many of these resources are used as food and for clothing and other products, and make important contributions to the cash economy of local households and communities. Local communities and indigenous people often mix formal sector activities (e.g., commercial fish harvesting, mineral resource extraction, and tourism) with traditional or subsistence activities, which include harvesting a variety of natural renewable resources to provide for human consumption and sustainable community livelihoods. Indeed, subsistence based household production requires substantial monetary investments to help purchase and maintain hunting and trapping equipment. Such investment may conceivably continue to rise with the strengthening integration of market and non-market production, and as climate and environmental change may necessitate further travel to reach hunting grounds thus increasing the demand for modern harvesting and transport equipment for example.

Thus, a mix of wage employment and subsistence based activities constitute important sources of household income in the North. Many communities depend in large part on a combination of subsistence activities, public sector jobs, and public transfers. Communities without strong market connections combine subsistence activities and incomes from the public or corporate economies. A mix of a variety of income sources may be necessitated in part by a number of factors including the small size of the local market economy, limited access to full-time, permanent, and well paying modern sector jobs, the high costs of doing business in the North, and lack of access to markets and resources in general. This also explains why transfer income becomes an important third key source of household income for many. Transfers are a source of income for households in the North. They include direct income, goods and services provided by government, and jobs created by government. The Arctic economy is characterised by a large service sector, with the public sector accounting for a significant share. In the case of Greenland and Nunavut, annual block grant payments from Denmark and Canada make up a major

share of revenue and help finance a large public sector with a significant public administration (AHDR, 2004).

The mix of market and non-market production, and the close ties to outside markets describes well the local Northern economy. New threats and challenges to local communities and indigenous social and cultural sustainability have appeared, most of them fuelled by an increasingly rapid pace of externally forced, disruptive social change such as globalisation and urbanisation. Climate change will likely increasingly impinge on both subsistence and commercial wildlife harvesting and fishing, with serious implications for local and regional economies (ACIA, 2005).

The economic viability of Northern communities is closely linked to what power the local level has when it becomes involved in processes of a potentially global scale. An important factor in achieving community viability is ownership rights to, or other forms of control over natural resources. Some of the principle strategies for human development by people in the Arctic include: forming partnerships with outside actors in developing natural resources; combining subsistence activities with government employment and welfare; negotiating with governments for policies on regional development to create jobs; and using business and political networks to ensure access to international markets (AHDR, 2004).

A common characteristic of Northern communities is their economic vulnerability with significant dependency on the natural environment for direct household production, for wage work or commercial resource extraction activities. Economic life in the North no longer takes place in isolation from the external environment. Existence in modern communities increasingly requires the maintenance of economic relations with the outside. Yet, the strength of these economic relations and the linkages between different sectors differ significantly due to broad variations in physical, natural, financial and human resources. Differences exist with respect to accessibility, remoteness, and economic and population size, ease of access to external markets in terms of distance and road connections, and differences in the natural resource base and infrastructure.

### 5.3 Economic Development in the North

The traditional view of economic development was that of a sustained increase in GDP, and a declining share of agriculture along with an increasing share of manufacturing and service industries. The more contemporary view redefines development in terms of reductions in poverty, inequitable income distribution and unemployment. Broadening this narrow definition, development can be viewed as a process of expanding the real freedoms that people enjoy. Amartya Sen argues that development requires the removal of major sources of “uni-freedom,” including poor economic opportunities, poverty, social deprivation, inadequate housing

and lack of access to education. This broadened view of economic development is not only appropriate but clearly also necessary. In studying the Northern economy, it allows us to go beyond a mere consideration of the contribution of resource extraction to also consider other critical aspects of economic wellbeing, and the many important factors that contribute to living conditions and quality of life.

Thus, while traditionally economic development was equated with economic growth – a rise in GDP – the contemporary view of development is much broader. There is a clear distinction between economic growth and economic development; economic growth is simply an increase in GDP – it refers to a rise in national or *per capita* income or product, whereas economic development implies much more. Economic growth is a prerequisite for achieving economic development but it is not a sufficient condition. Key objectives of economic development centre on raising the standard of living and quality of life with higher incomes, more jobs, better education, greater attention to cultural and human values, and the expansion of the range of economic and social choices available. Also, important to the process of economic development is the participation of stakeholders, where participation in the process of economic development implies participation in the enjoyment of the benefits of development as well as the production of those benefits.

In this context the question arises of whether sustainability and improvements in the quality of life in the North is derived best from gearing our resources towards industrial development, or alternatively, from investing in the small scale economic development of local communities that involves local participation and decision-making, and where benefits accrue more directly to local stakeholders, and economic leakage to outside markets and economic interests is minimised. This also raises questions related to whether sustainability can be achieved by focusing on the extraction of non-renewable resource development, and also, what challenges have to be addressed to reverse regional financial leakages to help strengthen the regional multiplier associated with economic sustainability and local benefits. The net effect of regional investments or resource extraction is often limited because income, profits and rents leak out of the region when ownership and control over resource use is located elsewhere. Where governance and national-local linkages are weak, communities may see little of the revenues from resource extraction. The solution is to find better ways to capture and manage resource wealth and to ensure that it is invested for lasting benefits in support of regional and local economic development.

As described by Bone (2009) with reference to the Canadian North, patterns of resource development follow a classic core/periphery model: capital flows to the North from large companies and national corporations to construct large-scale projects that serve the interests of the whole nation or the south and the international business community. The impacts



of industrial development may include: wages, salaries, and profits; payments to those who supply goods and services to the industrial operator; and the increase in payments to retail stores and their regional supplies that result from local residents and others spending the income generated from the resource project. However economic spin-off effects for local and indigenous communities may be slow to development or may not be generated at all – in particular if the local community does not participate in the industrial activity, or if the local market economy and labour force cannot meet the demands for labour, goods and services of the resource developer.

This in turn means that economic benefits may leak out of the region. Also, while the construction phase of large-scale industrial projects may result in a high level of economic activity, it is often short lived and does not lead to the desired level of economic stability and diversification. Rather, large scale industrial resource extraction places a heavy burden on local infrastructure, services, housing and other facilities. It may draw on local labour otherwise engaged in traditional pursuits, who after the end of the projects may find themselves permanently displaced. Social problems may also result.

Large corporations are a growing force in Northern resource development, and they have the financial resources necessary to conduct exploration on a large scale. Market concentration is what characterises much of the Northern industrial economy, with a high frequency of a mix of oligopoly (a few firms dominating the market) and local monopoly (one firm controlling the entire market).

The combination of market concentration together with ownership and control in the hands of a few economic interests, with headquarters often located outside the region, presents a double exposure that can leave the economic fate of Northern communities in the hands of large outside industrial interests. The growing presence of large corporations in the North can be partly explained by the fact that private capital gravitates toward countries and regions with the highest financial returns and the greatest perceived safety. Their main objective is to maximise profits. They are powerful companies who tend to have substantial bargaining power. Given their size and cost, it is primarily large corporations, especially multinationals, that have the capacity to finance, design, construct, and operate large scale resource development projects. These corporations can contribute to filling various gaps in the North – such as resource gaps related to investment and locally mobilised savings, gaps between targeted government tax revenues and locally raised taxes, and gaps in management, entrepreneurship, and skill. They also contribute to the transfer of technological knowledge, skills and modern machinery and equipment to capital-poor regions.

It is nevertheless possible to identify several possible costs related to relying on this type of private investment, including the negative impacts

on local savings and investment rates associated with reduced local competition; the economic leakage associated with non-retention of profits; or the import of intermediate products from outside the region rather than using local production, which inhibits the expansion of local firms.

In sum, large corporations may suppress local or domestic entrepreneurship, drive out local competitors, and inhibit development of small-scale local enterprises. To overcome these potential drawbacks and costs, it is necessary to arrive at more stringent regulation of foreign investment, a tougher local bargaining stance, clearer adoption of performance standards and requirements, and increased local and domestic ownership and control.

A degree of economic dependency characterises many parts of the North and presents a significant challenge to the achievement of economic development and local sustainability. Economic dependency may be reflected in a situation where the economic linkages between market sectors are few and limited and only a very small fraction of production serves as inputs into other sectors of the domestic economy; resource use is less flexible and adaptable; constraints exist on the ability of product-mix to adapt to shocks and disturbances; and a disparity exists between structure of domestic demand and domestic resource use; and lastly, domestic institutions tend to be directed and controlled to a significant degree by the external environment. This may leave the economy vulnerable and prone to frequent high levels of economic instability (Larsen, 2010).

A related challenge here is the dependency on external markets and the associated economic instability it gives rise to. As noted previously, much of the natural resource extraction in the North is geared to external markets. Theories have been developed to analyse the development of primary exporting countries. Among these is the staple theory (H.A. Innis; R.E. Baldwin; D.C. North; Watkins). A central feature of the staple theory is the spread effects and the process of diversification around the export base and the process of economic development that follows. Benefits to primary-export-led growth may include improved utilisation of existing factors, expanded factor endowments, and linkage effects. The resulting linkage effects are referred to as backward, forward, and final demand linkages.

Empirical evidence in the literature however suggests the contrary, namely, that primary exports may not be as effective in leading the way to economic development as the theory suggests. Weaknesses may result when markets for primary products grow slowly, when earnings are unstable due to price fluctuations, and when expected diversification around the export industry – including linkage creation – may be nonexistent or limited.

Significant instability and fluctuations in earnings may result if production is concentrated in one or a few products and if exports are geared only to a few external markets. A country will remain heavily dependent

on imports of both final and intermediate products, as well as imported personnel in many cases. At the same time, a number of challenges may persist in developing strategies to realise long-run sustained growth, including the existing limits on resource flexibility, the constraints on entering into new and foreign markets, the difficulties associated with a very small and scattered population base which presents barriers to achieving economies of scale in domestic markets. In addition, the region is now faced with new challenges posed by climate change which may alter the composition, availability and value of commercial species in the region's export trade (Larsen, 2010).

The small size of internal markets and a narrow resource base are basic structural features that contribute to making the Northern economy dependent on external trade as a key source of income. Relying on a few primary resources is – as we would expect – a key source of instability in many parts of the North. Economic vulnerability can be largely attributed to a lack of economic diversification, heavy reliance on natural resources, and the associated narrow resource trade that constitutes a primary source of regional income. The high concentration in resource exports together with its high share in the region's GDP help explain the volatility of the formal economy, where even small shocks and disturbances can have large and lasting impacts.

Naturally, not all economic fluctuations are problematic in as much as they reflect long term shifts in consumer tastes, technology, or factor supplies. Economic fluctuations are undesirable however when they serve no useful purpose other than to trigger fluctuations in other variables such as government revenue and investment which may impact on short run macroeconomic stability and long run economic development. It is the sporadic elements of economic fluctuations that are the most problematic. For instance, it is possible for income to fluctuate over time and yet be known in advance with certainty. Events that are predictable or certain do not necessarily have adverse consequences, since regularly reversing fluctuations make it easier to predict the level of exports and income each year and to judge the correct timing for the implementation of stabilisation policies.

In the Arctic region the scope for corrective action in response to larger economic out-swings may be more limited due to various resource constraints and limits to local and regional economic and political control and decision-making. The persistence of economic instability must also be viewed in combination with constraints on the region's human, physical and financial resource endowment in general (*Ibid.*).

Yet, another economic challenge related to resource extraction in the North is the risk it poses to the fragile environment. Environmental impacts of resource development and the depletion of natural resource reserves all add to the costs of resource extraction activities. While resource development projects can be highly controversial with potentially large

shares of net-benefits accruing to stakeholders outside the local region, net economic benefits related to local job and income generation may still warrant their existence, just as opportunities to negotiate contracts that can help facilitate economic diversification and viable economic futures from these projects can help justify their presence in the North.

Sustainable development is development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs. While non-renewable resources are finite and face eventual depletion, local economies do not necessarily need to be worse off than before the resources were exhausted. Sustainable development – in terms of creating a future stream of economic benefits – might be possible to achieve even based on non-renewable resources, if those resources can be converted into benefits that have a lasting benefit, such as e.g., education and training to help create a more diversified economy.

Capacity-building is an important approach to achieving sustainable development. As discussed by Mark Nuttall (2002) capacity-building enhances the capabilities of people and institutions to improve their skills and abilities to solve problems, and strengthen their prospects for achieving sustainable livelihoods. Local communities and regional and national governments can develop the necessary skills and expertise needed to manage their natural resources and environments in a sustainable manner through a process of capacity-building. This includes developing the capacity and skills of community members so they can identify and meet their needs, participate more fully in society, and meet the challenges of, and benefit from, the opportunities of change. It is a process of building relationships between people, groups, and communities and developing the kinds of networks that can support and promote communities and vibrant cultures (Nuttall, 2002).

Under co-management stakeholders share power in managing resources. This commonly refers to a shared decision-making process, formal or informal, between government and user group for managing a resource. It is an institutional arrangement where stakeholders establish a system of rights and obligations; rules indicating actions that stakeholders are expected to take; and procedures for making collective decisions affecting diverse interests. Co-management may include the use of traditional knowledge in resource management, where traditional knowledge refers to a body of knowledge, practice, and beliefs, which has evolved by adaptive processes and then been handed down from generation to generation (AHDR, 2004). One might also see it as management fitted to a smaller scale, with resource users taking more direct responsibility, and including utilisation of local knowledge. It is a flexible and participatory process, which can provide a forum for rule making, conflict management, power sharing, learning, and development among resource users, stakeholders, and government (Kristoffersen and Berkes, 2002).

Fjellheim and Henriksen (2006) discuss the challenges facing indigenous peoples when it comes to large-scale resource extraction in the Arctic. He points to Social Impact Assessments (SIA) as problematic for indigenous peoples. SIA is a tool for decision-making and planning – conducted to balance the interests of different parties, and indigenous peoples are often included as stakeholders. Problems here however include being denied inclusion, effective participation, and procedures that often fail to acknowledge indigenous peoples' values and perspectives.

Fjellheim and Henriksen argue that negotiations are an alternative or supplementary approach to SIA. To overcome the shortcomings of SIAs and to meet international human rights standards their concept of free, prior, and informed consent, direct and binding negotiations with indigenous peoples may be the best approach. "Free, Prior, Informed Consent: recognises indigenous peoples' inherent rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them, based on the principle of prior and informed consent" (Fjellheim and Henriksen, 2006, p. 13 ).

## 5.4 Resource Extraction in the North: Costs and Benefits

As we have seen, a number of unique features characterise Arctic economies, among these are: remoteness and lack of accessibility, small population and economic size, and challenges and limitations with respect to infrastructure and transportation networks. These all present special challenges and add to the cost of resource development in the North. The North is rich in both renewable and non-renewable resources, and depending on how, when and by whom those resources are exploited and used affects the region's prospect for generating long-term benefits from this source of growth and economic diversification. Non-renewable resources cannot be produced, re-grown, regenerated, or reused on a scale which can sustain their consumption rate. These resources often exist in a fixed amount, or are consumed much faster than our nature is able to recreate them. The North has considerable reserves of non-renewable resources such as coal, iron and ferroalloy minerals, non-ferrous minerals and precious metal ores.

Non-renewable resources as a potential backbone for sustainable economic livelihoods raises challenging questions related to how to convert those resources, just as it requires finding solutions to overcoming conflicts of interests between different groups of stakeholders.

All of the Arctic regions are endowed with raw minerals but Russia has the largest reserves. The variety of minerals includes coal, iron ore, nickel, cobalt, chromite, titanium, tungsten, bauxite, zinc, lead, copper, palladium, gold, silver, platinum, diamonds, phosphate, and vermiculite (Economy of the North, 2006). Because of the high costs of resource

extraction many known reserves of Arctic mineral resources are not exploited. Where resource extraction does take place, eventual resource depletion is the reality, but such depletion and its effects on communities in the North can be partly mitigated through investments in human capital and innovation.

Resource-based Northern economies have a number of common characteristics: industrial development and the rate of growth of the economy are closely tied to world demand for the regions' renewable and non-renewable resources. A small range of primary natural resources describes the narrowly based economy, and lack of economic diversification makes the economy vulnerable to economic shocks and disturbances associated with changes in the supply of resources, demand for the resources in world markets, and changes to the world price of those resources. The demand for resources is largely cyclical – with demand for minerals and other non-renewable resources following the global business cycle – giving rise to boom-and-bust cycles that result in more volatile markets and that affect the pattern and prospects of economic development locally. The boom and bust cycle is characterised by the alternating expansion and contraction of economic growth.

Because of the lack of financial resources along with the high cost of extraction, Northern resource development is largely carried out by big corporations including multinational corporations. The North has witnessed an increase in the role and presence of these corporations, who with their capital, managerial expertise, and technology have become a leading force in the development of Northern non-renewable resources. As we saw previously, the involvement of non-local capital interests in industrial development and resource extraction activities, also means that much of the economic benefits generated are not retained or reinvested in the region, thus leaving the net economic benefits for the local or regional economy much smaller than it could otherwise be.

The local economic impact is also determined by the extent of local labour utilisation, which tends to be less than it could be because resource projects often require only a small, but well-trained, labour force, leaving the labour requirement and potential for permanent employment creation somewhat small. In particular, while the construction phase may require a large number of workers, the operational phase usually has only a small demand for labour (Bone, 2009). Northern resource development faces a number of challenges which need to be overcome to generate a more diverse resource base that allows for broader diversification, less economic volatility and better scope for economic sustainability.

In sum, the resource industry has a number of distinct characteristics that make it a less than stable backbone for local economic development in the North: the capital intensive nature of the industry means that larger corporations who possess the financial capital, the expertise, and the infrastructure and technology are often required to undertake exploration

and operations; much risk and uncertainty is associated with natural resource projects and it is primarily larger corporations with access to financial resources who can take on risks of this scale and nature, and who are able to invest large sums of money with no certainty of the size and timing of future returns to investments – with the period from exploration and feasibility studies till actual operation and extraction being potentially several years with no certainty of a future stream of income; capital rich corporations with their greater capacity to undertake risk are also in a better position to face the potential large “sunk costs” related to resource extraction – i.e., when investments are made in fixed capital equipment that cannot be moved to a new location after operations stop; the industry and its impacts on the local and regional economy is determined by demand conditions in external markets which presents considerable risk. Thus, changes in economic conditions and price fluctuations in commodity markets in far distant places – the ups and downs of the global business cycle with changes in consumption and investment spending – have direct local impacts. Due to large capital requirements, ownership and control of the industry tends to be concentrated in a small number of large corporations. Being in the business to maximise profits they may pack up and leave as soon as projects come to an end, searching for new large scale resource extraction opportunities, leaving behind potentially negative consequences for local employment, household income, local demand for goods and services, including also the impact on social and political life of resource development. Thus, resource development activities can be hard to justify if they do not bring substantial economic benefits to regional and local economies, including taxes, royalties, technology transfers, meaningful local employment creation, infrastructure such as roads and other transportation networks, economic linkages upstream to industries that supply goods and services or downstream to industries that process mineral outputs.

While the potential for Arctic natural resource development is enormous, there are a number of financial considerations, such as for example the value of the currency, the cost of fuel, the cost of environmental damage, increased costs related to climate change, a low regional multiplier effect to name but a few, which may render exploration a non-viable venture and thus leave reserves unexplored.

The Arctic is very vulnerable to environmental impacts, and these impacts present another cost of resource exploration in the North. The negative consequences of environmental impacts can be potentially very large because of the fragile environment and also the dependency of indigenous peoples and local communities on country food. The Arctic is vulnerable to the environmental impacts of large-scale resource exploitation projects for a number of reasons, including the cold climate which means that it takes longer for the biological regime to repair itself after environmental damage has occurred. Industrial projects such as mining activity may disturb the

permafrost layer which in turn may make it harder for example for reindeer to access food. In addition, airborne pollutants can enter the Arctic food chain, and may impact on the health of Arctic residents.

For these and other reasons large-scale industrial projects in the North may be discontinued, down scaled, or denied permits to operate. Environmental Impacts Assessments are conducted in the North and may lead to changes in the conduct of industrial development and its scale and location. Growing consideration of the negative spill-over effects of large-scale resource extraction in the North has added to the cost of Northern resource development, including costs for clean-up, decommissioning, and investment in safer and more environmentally-friendly technology.

The extractive industry faces many challenges of its own, such as having access to a safe, healthy, educated and committed workforce; access to capital; a social licence to operate; the ability to attract and maintain good managerial expertise; and the opportunity for a return on investment in a globalised economy with growing risks and uncertainty. Resource development remains one of a number of often competing land uses. As a result, there are often problems and disagreement around issues such as compensation, resettlement, land claims, and protected areas. Also, managing environmental impacts more effectively requires dealing with waste handling, developing ways of internalising the costs of pollution and other environmental damage, and making improvements in the area of impact assessments and environmental management systems.

For most non-renewable resources, supply has kept up with global demand as new resources are being discovered, new technologies increase the efficiency of mineral extraction and processing, and innovations in substitute resources are being developed. But non-renewable means a finite supply and ultimate depletion or running down reserves of the more easily accessible and more commercially profitable and higher grade reserves.

In the longer term, more easily mined or exploited resources will become harder to find, necessitating the exploration of reserves that may be of more marginal commercial value, harder to reach and more costly to access. Yet, as supplies shrink prices of even these reserves will start rising, and extraction may become profitable. Non-renewable resource depletion could be mitigated through investments in human capital and innovation. Before resources disappear mitigation strategies can be employed to help conserve those resources. This could include a reduced rate of resource exploitation, perhaps through economic diversification to spread economic activity among more projects and sectors, or through technical innovation to reduce demand for the resource.



## 5.5 Conclusion: Challenges and Emerging Issues of Northern Economies

This chapter presented some of the basic characteristics and emerging issues of the Northern economy, and discussed some of the costs and benefits, challenges and opportunities, of large-scale resource development. The increasing integration of the Northern economy with global markets, and the growing force of global change impacts the nature of Northern regional and local economies, and presents growing challenges. Global processes such as changing climate may present new risks to the Northern economy and threaten some of the region's commercial resources many of which are highly climate sensitive. Climate change can be expected to alter the composition and stock and flow of resources, although the nature and extent of this is highly uncertain and at best speculative.

The ACIA science report (2005), IPCC (2007) report, and others, describe several possible impacts of projected climate change which highlight the potential range of possible costs and benefits, and their associated uncertainty. While some of the climate change projections and their associated consequences may point to an uncertain future for the Arctic, they are expected to be gradual and will depend on factors such as the availability of resources and the importance of nature-based activities to the region. People and economies will surely adapt, but at a cost and speed that is still unknown. Local as well as regional economies – whether market or subsistence based – may feel the impacts of change. Nature-based activities in the Arctic are clearly sensitive to climate change, but uncertainty clearly remains as to which will be impacted negatively and which positively.

The AHDR (2004) and the ICARP II science reports (2005) argued that new threats and challenges to indigenous social and cultural sustainability have appeared with the increasingly rapid pace of externally forced and disruptive social change, including the withdrawal from traditional hunting, fishing or herding economies. Serious implications for local and regional economies may emerge if the consequences of global change continue to impinge – and at a rapid rate – on both subsistence and commercial wildlife harvesting and fishing, with serious implications for traditional diet and cultural identity (ACIA, 2005). Climate change will increase the need for protective institutions due to increased activity levels, while simultaneously making it harder to build and maintain the institutions.

While the impact of climate change may be negative in some sectors it may be positive in others, and thus, the net economic effect for the regional economy will depend on the relative size of the positive and negative effects. At the same time, we need to remember that uncertainty and economic instability is nothing new for Northern local economies.

Changes that may be regarded as minor elsewhere assume larger importance in Northern communities because of their amplification in a confined eco-system.

There are many other sources of stress facing Northern communities. Their adaptive capacity depends on technology, wealth, institutions, entrepreneurship, infrastructure, human resources, information and skills, income distribution and the social welfare system. Adaptation may be compromised due to limitations with human, technical and natural resources. There are a number of basic options for adaptation to economic change, including: implementing measures to minimise negative impacts and costs; spreading the burden of costs among sectors; substituting with new activities that have fewer costs and are more sustainable; moving industrial activity to other locations; strengthening the adaptive capacity and resiliency of the socio-economic system.

A key challenge facing the North is integrating economic activity with environmental integrity, social concerns, and effective governance systems. In the context of the minerals sector, the goal should be to maximise the contribution to the well-being of the current generation in a way that ensures an equitable distribution of its costs and benefits, without reducing the potential for future generations to meet their own needs. This requires a framework for sustainable development based on an agreed set of principles and an understanding of the key challenges and constraints facing the extractive industry at different levels and in different regions and the actions needed to meet or overcome them.

Attention must also be focused on the respective roles and responsibilities of different actors, and consideration of the rights and interests of the various stakeholders. Policy instruments and institutional frameworks must be implemented that facilitate compliance with minimum standards, performance measures, environmental assessments and protection of our Northern environment.

Achieving sustainable development may include attention to a range of principles, including implementing measures to maximise human well-being, ensuring efficient use of all resources, natural and otherwise, and identifying and internalising environmental and social costs, and maintaining the conditions for viable economic activity. Sustainable development also means a fair distribution of the costs and benefits of economic development, and social and economic freedoms. It means minimising waste and environmental damage and promoting responsible use of natural resources. Sustainable development also depends on support for participatory decision-making, implementation of fair rules and incentives, transparency and accountability, and avoidance of the situation where power is concentrated in the hands of the few. Sustainable development thus requires new integrated systems of governance that can help facilitate the process needed to transform resource extraction activity into sustainable use for future streams of net economic benefits.

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### Questions:

1. Describe the main characteristics of the Arctic market and non-market economy.
2. Outline the costs and benefits of large scale resource development in the North.
3. List and carefully discuss what you consider potentially to be the greatest economic challenges and opportunities in respect of global change in the Arctic.
4. Carefully describe the informal (subsistence-based) economy in the Arctic. Do you believe the informal economy is threatened by global change?
5. What do you see as some of the key challenges of economic development in the North? What do you think is needed to increase the regional multiplier effect in the North?

# 6. Oil and Gas and Mining Development in the Arctic: Legal Issues

*Nigel Bankes*

## 6.1 Introduction

This chapter deals with the legal issues associated with oil and gas and mining development in the Arctic. Mining and later oil and gas developments have both been significant in the Arctic for over a century. In many cases it has been the demand and exploration for these resources (e.g., the Yukon gold rush of the later 1890s and the first part of the twentieth century) that has fuelled the settlement and colonisation of Arctic lands and the homelands of indigenous peoples across the Arctic and introduced indigenous communities to globalised labour and commodity markets. But sometimes, perhaps paradoxically, it is the potential for developing northern oil and gas and mineral resources and the promise of jobs and revenues (resource and tax revenues) that holds out the prospect for greater measures of self-government and autonomy, whether by means of devolution of authority from a central government (as in the case of Yukon, Canada) or self-government and possibly independence (as in the case of Greenland).

Hanging over all talk of resource development in the Arctic is climate change and global warming. Climate change will improve access to these resources but northern communities are considered to be particularly vulnerable to the consequences of human induced climate change. In part this is because the consequences of climate change are expected to be particularly serious in the Arctic<sup>1</sup> but in part also it is because of the lack of adaptive capacity of these communities. But northern governments (e.g., Alaska, Greenland and Canada's Northwest Territories) and in some cases northern communities<sup>2</sup> seem committed to encouraging min-

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<sup>1</sup> See, generally, the Arctic Climate Impact Assessment (Cambridge: Cambridge University Press, 2005); and Timo Koivurova, E. Carina H. Keskitalo and Nigel Bankes (eds.), *Climate Governance in the Arctic*, Springer, 2009 and in this context see especially the chapter by Natalia Loukacheva "Climate Change Policy in the Arctic: The Cases of Greenland and Nunavut," 327–350.

<sup>2</sup> See Ove Hansen and Mette Midtgard, "Going North: the New Petroleum Province in Norway" in Aslaug Mikelsen and Oluf Langille, (eds.), *Arctic Oil and Gas: Sustainability at Risk*, Routledge, 2008, 200–239.

ing and especially oil and gas developments as a means of providing jobs and economic development in isolated areas.

This chapter begins with a description of the resource endowment of the Arctic region and offers a selective chronology of some significant examples of non-renewable resource development projects in the Arctic states. This is followed by a discussion of the ownership of oil and gas and mineral resources within different states. The main part of the chapter then examines the oil and gas and mining regimes of a number of Arctic states and also discusses the resource leasing practises of the Inuvialuit people of the Mackenzie Delta in Canada. The chapter ends with some discussion of environmental issues and some brief conclusions.

## 6.2 The Resource Endowment

The circumpolar states of the Arctic contain significant deposits of oil and natural gas as well as mineral resources both onshore and offshore. A recent assessment by the United States Geological Service (USGS) (2009) notes that of the 6% of the earth's surface encompassed by the area north of the Arctic Circle one third is above sea level and another third represents continental shelves covered by water no deeper than 500 metres. Onshore areas have already been explored with more than 400 oil and gas fields discovered with 40 billion barrels of oil, 1136 trillion cubic feet of natural gas and 8 billion barrels of natural gas liquids. Most of this development has occurred in the West Siberian Basin of Russia and the North Slope of Alaska (Gauthier *et al*, 2009). There has been little exploratory drilling offshore and this, combined with large areas of sedimentary rocks, leads the USGS to conclude that the Arctic remains one of the more prospective areas globally where we can expect to see significant new discoveries. There may be as much as 30% of undiscovered gas (principally the Russian offshore) and 13% of the world's undiscovered oil within this region. Interest in access to these resources is clearly growing not only within Europe and North America but also more globally.

Oil and gas resources are particularly important for half of the Arctic states: Russia, Canada, Norway and the United States. Iceland, Sweden, Greenland and Finland have no domestic production of oil or natural gas and are entirely dependent on imports. Iceland (in the Jan Mayen area) and Greenland both hope that ongoing exploratory drilling will identify producible reserves.

It is harder to obtain statistics and resource assessments that are segregated for Arctic mineral production but the mining industry is important for all of the Arctic states<sup>3</sup> Sweden comprises less than 0.1% of the earth's total area and yet is responsible for 2% of global iron production (princi-

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<sup>3</sup> This paragraph draws on a number of sources but particularly useful is the USGS, Minerals Yearbook, (2007 preliminary edition), available at <http://minerals.usgs.gov/minerals/pubs/country/>.

pally from Kiruna and Malmberget in the Norbotten district of Swedish Lapland). Sweden is also a significant producer of copper, lead and zinc. Canada is currently the third largest producer of diamonds with most of the mines located in the Northwest Territories: the Ekati, Diavik and Snap Lake mines. The three northern territories of Canada have also been significant producers of gold, lead and zinc over the past 50 years. Norway is not a significant producer of hard rock minerals although industrial minerals from mining and quarrying are important. The mining industry is very significant in northern Russia especially in the Kola Peninsula (i.e., iron, copper, nickel, and apatite and nepheline as well as rare earth metals columbium and tantalum), the Komi Republic (i.e., energy minerals but also bauxite, titanium, gold and diamonds) and the Republic of Karelia (i.e., ferrous metals as well as iron, titanium, vanadium and diamonds). In Finland, the Suurikuusikko gold deposit is expected to become Europe's leading gold mine and the Talvivaara nickel deposit is the largest nickel deposit in Western Europe. The Kevitsa mine is another important nickel deposit while the chrome mine east of Kemi in Lapland is one of the world's largest chrome producing mines. The Red Dog lead-silver-zinc mine is a particularly important mine in Alaska. The mine is operated by *Teck-Cominco Ltd.* under an agreement with the NANA Corporation one of the Alaska regional native corporations created by the Alaska Native Claims Settlement Act (ANCSA), 1971. Producing mines in Greenland include the Nalunaq gold mine. Lead-zinc production occurred at the Black Angel Mine from the 1970s to the 1990s and feasibility studies continue with respect to its possible re-opening. Iceland is not an important producer of minerals but in recent years it has used its abundant and cheap electricity generated from both hydro and geothermal to attract investment in mineral processing in the aluminium industry using bauxite imported from elsewhere, principally Guinea and Western Australia.

Historically Arctic resources have seemed far from market and physically hard to exploit, either because of the presence of ice making marine access difficult or impossible, or simply because of the absence of a transportation infrastructure (e.g., a pipeline or a road system). But the dramatic reductions in sea ice cover that have already occurred or are projected to occur will reduce exploration costs and make it easier to transport produced minerals to market. This has led to renewed interest in some world class mineral deposits that have been known for years but have previously been considered inaccessible or uneconomic. Examples include the Mary River iron ore deposit on Baffin Island, Nunavut (Canada) as well as other significant discoveries in the highly mineralised area south of Coronation Gulf in the Kitikmeot region of Nunavut.<sup>4</sup>

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<sup>4</sup> For details see Nunavut, Mineral Exploration, Mining and Geoscience Overview, 2008.

### **Selected mining and oil and gas developments in Arctic states (organised chronologically)**

1890s iron mines at Kiruna and Malmberget (Sweden) connected by rail to ports at Narvik and Luleå; Yukon Gold Rush begins 1897.

1920 Treaty concerning the Archipelago of Spitsbergen, and Protocol, Paris. Recognises Norwegian sovereignty over Spitsbergen and also creates a special open access mining regime for the Svalbard archipelago for parties to the Treaty.

1942 – 1944 Canol Pipeline (Canada – United States). An emergency war measure, this pipeline carried oil from the Norman Wells oilfield in the Northwest Territories, Canada to a refinery in Whitehorse, Yukon from where refined product could be supplied to the Alaska Highway and to U.S. forces in Alaska. The Norman Wells field continues to produce today and was connected to a pipeline to southern Canada in 1985.

1969 Prudhoe Bay oil field discovery, Alaska, USA. Prudhoe Bay is the largest oil field in North America. Oil is brought to market by way of the Trans Alaska Pipeline to Valdez on the south west coast of Alaska. Production peaked at about 2 million barrels a day in 1998. The current debate focuses on getting Prudhoe Bay gas to market.

1971 Alaska Native Claims Settlement Act, settled aboriginal title claims in Alaska and created a series of village and regional corporations to hold land and resource titles.

1977 report of the Berger Inquiry on the proposed Mackenzie Valley Pipeline calling for a ten year moratorium on the construction of a natural gas pipeline from the Mackenzie Delta in Canada to southern markets.

1984 Discovery well drilled in the Norwegian Snøhvit natural gas field (71 degrees N), Southern Barents Sea. The development of Snøhvit was approved by the *Storting* in 2002 and commenced production in 2007. Gas from the field is piped to a liquefied natural gas (LNG) facility onshore at Melkøya. Carbon dioxide from the natural gas stream is re-injected into a saline formation in one of the first commercial scale carbon capture and storage projects in the world.

1988 Discovery of the Shtokman natural gas field in the Russian Barents Sea (73 degrees N). Proposals to develop this major field have been reformulated from time to time and have been very controversial and subject to repeated delays. The current project (*Gazprom*, *Total* and *Statoil*) will see production commencing in 2016 selling gas to Europe via pipeline or internationally through an LNG facility.

1998 First diamond mine (the Ekati mine) opens in the Northwest Territories, Canada.

2000 Discovery-well for the Goliat oil field, Barents Sea (Norway); the government approved the plan for development in 2009 and production is expected to begin in 2013.

2009 First hydrocarbon licensing round for Iceland in the Dreki area.

2009 Greenland takes control of oil and gas and mineral licensing from Denmark.

This section has described the distribution of Arctic oil and gas and mineral resources and has revealed some of the challenges associated with developing those resources and bringing them to market. The balance of this chapter deals with some of the legal issues associated with those developments. The discussion focuses on the public law issues and thus



principally the relationship between the oil and gas and mining industries and the state. But readers interested in this area should also be aware that there is a large body of private law and standard form contracts such as operating and farmout agreements dealing with the legal relationships between the different actors in the industry. The two areas of law and practice however are not hermetically sealed especially in those Arctic jurisdictions (e.g., Russia and to some extent Norway and Greenland) where the government, either directly or through wholly owned corporate entities, acts as both owner and regulator of the resource and joint venture partner in the exploration and production process.

#### Questions about Arctic resource endowments

How does the Arctic compare with other areas of the world in terms of a resource endowment?

How are resources distributed within the Arctic region? What are some of the principal challenges in terms of bringing Arctic resources to market? Is there a shared vision that Arctic resources should be brought to market?

### 6.3 Ownership of Oil and Gas and Mineral Resources

The question of who owns the oil and gas and mineral resources is clearly a crucial starting point in any legal system. An oil and gas operator will want to know from whom it must acquire an exploration or production interest: from the state (and in a federal system is that the federal entity or the sub-federal unit or is there a “two key” system as there was in Russia for a period)<sup>5</sup> or from a private owner?

A legal system may deal with the ownership of natural resources at a number of different levels. Some jurisdictions deal with the issue as part of the constitution.<sup>6</sup> The constitution of the Russian Federation (RF) for example provides that: “Land and other natural resources may be in private, state, municipal and other forms of ownership”. In other cases ownership may be addressed by statute. For example, s.1.1 of Norway’s Petroleum Activities Act (1996) stipulates that “The Norwegian State has the proprietary right to subsea petroleum deposits and the exclusive right to resource management,”<sup>7</sup> And finally, ownership may be addressed as

<sup>5</sup> Elena Andreyeva and Valery Kryukov, “The Russian Model: Merging Profit and Sustainability” in Mikkelsen and Langhelle (eds.), 240–287, at 252–254 and noting that while the two key principles seemed to be embedded in the 1993 Constitution and earlier versions of the subsoil law more recently, there has been a trend to centralisation and with that the loss of the two key ideas in later drafts of the law on the subsoil.

<sup>6</sup> For discussion of different ownership approaches see Yinka Omorogbe and Peter Oniemola, “Property Rights in Oil and Gas under Domanial Regimes” in Aileen McHarg et al (eds.), *Property and the Law in Energy and Natural Resources*, Oxford, Oxford University Press, 2010, pp. 115–131.

<sup>7</sup> See Ulf Hammer, “Models for State Ownership on the Norwegian Continental Shelf” in McHarg, *ibid.*, at 159–166.

part of the general law with the result that the state's claim of title to the resources is not a necessary result but is contingent upon the history of the acquisition of title and subsequent grants in relation to any particular lands. This would appear to be the case in most Arctic states.

The ownership of offshore resources is frequently the subject of distinctive rules which typically recognise public ownership even where that jurisdiction contemplates the possibility of non-state ownership for terrestrial areas. This is the case for example for Alaska and the U.S. offshore areas where the courts have consistently held that there are no private rights (including aboriginal title rights) in the outer continental shelf area beyond the three mile territorial sea (which accrues to the state).<sup>8</sup> Similarly, Sweden recognises that minerals and petroleum may be the subject of private ownership (subject to the terms of the Minerals Act, see discussion below) but the Continental Shelf Act (1966) of Sweden provides (s.2) that "The right to explore the continental shelf and exploit its natural resources belongs to the State." Iceland's 2001 Act on Prospecting, Exploration and Production of Hydrocarbons similarly provides (Articles 1 & 3) that the Icelandic state owns all hydrocarbons seawards from 115 metres from the shore.

### Questions

Who owns the oil and gas and mineral resources in each of the Arctic states? Is the position the same with respect to minerals? What counts as a mineral for these purposes? How are sand, gravel and coal dealt with?

#### *6.3.1 Where the state owns the resources what scheme has it put in place to dispose of those resources?*

Oil and gas and mineral exploration involves significant geological and financial risk. Even where the exploration is successful it may require significant time and investment to develop and produce the resource. Consequently, even where the state owns the resource, it typically finds a means to engage private capital and provide oil and gas and mining companies with the rights to explore for and produce the resource in return for assuming the risk. What do these arrangements look like?

This section describes the oil and gas disposition regime for two territories in Canada (Northwest Territories and Nunavut) and for Greenland. The following section describes the minerals regime for the same two territories and for Sweden. In analysing a disposition law or statute it is useful to have in mind a number of common questions. This chapter

<sup>8</sup> *Native Village of Eyak v Trawler Diane Marie Inc.* 154 F 3d 1090 (9th Cir 1998) cert denied 527 US 1003, and Nigel Banks, "Aboriginal Title to Petroleum: Some Comparative Observations on the Law of Canada, Australia and the United States" (2004), 7 *Yearbook of New Zealand Jurisprudence*, 111–157.

adopts the following questions: (1) How does the state make the decision to dispose of oil and gas or mineral rights? What processes and procedures lie behind that disposition decision? (2) What forms of disposition (or tenure) are available? Is there both an exploration tenure and a production tenure? (3) How does the state decide between competing proposals/applications? (4) How does an explorer move from exploration to production tenure? Are there any relinquishment<sup>9</sup> provisions? (5) How does the government recover its share of economic rent from the exploitation of the resource? Another question that will be of interest to the industry is that of security of tenure. How are existing interests dealt with when the regime changes? Are those interests “grand-parented” and held under the old rules or will the new rules apply and if so to what extent?

#### 6.4 Oil and Gas Regimes: Northwest Territories (N.W.T.) and Nunavut

There is currently oil and gas production in the southern part of the N.W.T. including oil production at Norman Wells and natural gas production in the Fort Liard area which is connected to the extensive natural gas pipeline system in Alberta. This in turn is connected to large markets in eastern Canada and south into the United States. Additional discovered oil and natural gas resources further north in the Mackenzie Delta and the Beaufort Sea have not been developed because of the absence of a pipeline infrastructure and the difficulties of tanker traffic. Pipeline proposals to ship gas down the Mackenzie Valley have in the past been rejected pending the settlement of aboriginal claims in the territory (the internationally celebrated Berger Inquiry, 1977) but have since been revived. At the end of 2009 the Joint Review Panel concluded that the proposed Mackenzie Gas Pipeline (now supported by both producer groups in the Delta and a coalition of indigenous peoples including the Inuvialuit of the Delta area and the Gwich'in and Sahtu peoples of the Mackenzie Valley) will not likely cause significant adverse social and environmental impacts and would most probably make a positive contribution to “a sustainable northern future” (see Report 2009:13) subject to the implementation of a number of recommendations. Final approval of the pipeline awaits review by Canada’s National Energy Board.

There is currently no production of oil in Nunavut although for a period there was small amount of production from the Bent Horn field on Cameron Island (76 degrees N) from 1985 – 1996. This oil property produced throughout the year storing production in a bladder. The produc-

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<sup>9</sup> “Relinquishment” refers to the process by which the explorer must revert back to government part of the lands held under licence at various points in the life of the exploration tenure. The purpose of relinquishment is to create an incentive to the explorer to identify the parts of the exploration block that it is most interested in retaining.

tion was then shipped out every summer on the *MV Arctic*, an ice-strengthened tanker. There is no production of natural gas. There are significant discovered reserves including the Drake and Hecla fields and there have been various proposals to bring these reserves to market including the Arctic Pilot Project which would have seen the use of ice strengthened LNG carriers exiting Davis Strait but none of these prospects have come to fruition.

In Nunavut and Northwest Territories the state (in this case the federal government) disposes of oil and gas rights to oil and gas companies under the terms of the *Canada Petroleum Resources Act (CPRA)*. The disposition system is driven in large part by industry interest meaning that the state decides which areas to open up for bidding on the basis of nominations received from the industry, typically in response to a "call for nominations." The government is not obliged to open lands for bidding just because of a nomination.<sup>10</sup> The government does not typically engage in an environmental assessment (EA) before opening up a new area of land to oil and gas activities. The formal reason for this is that EA legislation (e.g., the *Canadian Environmental Assessment Act*) is largely project or activity driven and since the government's decision to grant an exploration right does not itself involve a physical activity there is no need for an EA until the oil and gas company wants to run seismic tests or drill the first test well. But while there is no requirement for a formal EA, the terms of a modern land claim agreements will generally require the government to consult with the relevant land claim organisations prior to opening lands up for disposition (See, for example, the Nunavut Final Agreement, Article 27). In addition the Call for Nominations will identify at a broad geographical scale environmental concerns of which a potential nominator/bidder should be aware. For example, a December 2009 call for nominations for the Beaufort Sea and Mackenzie Delta area warns interested parties that the area covered includes potential polar bear habitat (listed as of "special concern" under Canada's *Species at Risk Act* (SARA) and that additional mitigating measures may therefore be required at the activity stage. The same Call also referred to potential concerns associated with bowhead whales, grizzly bear and migratory bird habitat. It is evident that these notifications are not intended to preclude nominations; rather they are more in the nature of a warning that an operator may face operational constraints in carrying out its exploration and possible future production activities.

Once the government has decided to open the lands for potential development it issues a Call for Bids. This call will identify the particular blocks of lands that are available for bidding. A recent (2008) bid in the Beaufort/Mackenzie area identified five different parcels varying in size

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<sup>10</sup> The various calls for nominations and bids, the bidding documents and the standard form licences can all be found on the web page for Northern Oil and Gas, Department of Indian Affairs and Northern Development (DIAND), <http://www.ainc-inac.gc.ca/nth/og/index-eng.asp> – follow rights management, rights issuance.

between 40 000 and 200 000 hectares. The bidding documents carry forward and make more specific some of the general environmental concerns identified in the Call for Nominations indicating, for example, that work seasons may be restricted in order to reduce impacts on sensitive habitats or migration routes. The bidding documents for this round also notify bidders that the successful bidder will be bound by the terms of the Inuvialuit Final Agreement (IFA) (the land claims agreement between Canada and the Inuvialuit people of the Mackenzie Delta, 1984).

One of the distinctive features of bidding arrangements under the *CPRA* is that the Act requires that the bid conditions list a single bidding variable that will be used as the *sole* criterion against which to identify the successful bidder. The current practice is for the government to use a “work bid” as the variable and thus the exploration interest will be issued to the bidder proposing to spend the most money engaging in exploratory work (e.g., seismic programmes and exploratory wells) on the property secured by an irrevocable line of credit or similar security for 25% of the bid submitted. The exploration tenure issued out of the bidding round will typically be divided into two periods (e.g., a five year initial term and a four year secondary term) and the tenure holder will typically only be allowed to move from the first period to the second if it has drilled an exploratory well. All Calls for Bids on federal lands in the north require successful bidders to adhere to a statement of principles on Northern Benefits Requirements. The principles cover such matters as: industrial benefits, employment and training, consultation, compensation for damage to hunting and trapping interests, and an annual reporting requirement. The focus is on regional benefits (rather than aboriginal or Canadian ones) and operates on an “in-principle” level that is short on specifics.

The *CPRA* provides for three forms of tenure, an exploration licence (EL), a significant discovery licence (SDL) and a production licence (PL). In order to move from one tenure form to the other the licensee must obtain, respectively, a declaration of significant discovery (DSD) and/or a declaration of commercial discovery (DCD) based in the first instance on the results of drilling operations, and in the second on the economic viability of the discovery. In the event that the EL holder fails to make a discovery the property reverts to the government at the end of the term of the EL as will any lands within the EL that are not covered by the DSD. There are no other relinquishment requirements during the term of the EL. Thus the DSD scheme is designed to allow the licensee to retain the entire area of its discovery within the area of its EL.

The SDL is effectively a holding tenure. It allows the licensee to retain its discovery until it is able to prove that it has an economic project. This is crucial for the industry in the Arctic since in many cases discoveries cannot be brought to market because of the absence of a pipeline infrastructure and the difficulties associated with shipping oil or LNG given

historically prevalent ice conditions. This feature of the leasing regime is clearly designed for Arctic or frontier conditions.

It is a significant feature of the *CPRA* that the rights holder has substantial procedural protections under the statute. For example, decisions about DSDs and DCDs are made by a regulatory tribunal (the National Energy Board – NEB) rather than the government Department that is responsible for granting the oil and gas interests. Furthermore, the NEB's decisions with respect to a DSD may be appealed to the Federal Court.

The forms of the three licences (EL, SDL and PL) are all standardised and thus there is no room for negotiation. There is also no opportunity under the *CPRA* for the government to hold an interest either directly or through a nominated state oil corporation. Indeed, Canada's former state oil company, *PetroCanada* (founded 1975) was privatised in 1991 and in 2009 became part of *Suncor* as a result of a merger between the two companies.

The government recovers economic rent (i.e., the difference between the value of the resources and the costs of exploring for and extracting the resource including an allowance for the cost of capital) for oil and gas developments principally by means of a royalty on production although it is possible at some time that a portion of rents might also be recovered through bonus bids if the government were to move away from work bids as the single bidding variable. The royalty has two elements, a small gross royalty on production (the gross royalty starts at 1% for the first 18 months of production rising by increments of 1% every 18 months to a maximum of 5%) which shifts over to a net profits royalty of 30% once "payout" is achieved (i.e., the licensee recovers all of its allowed costs in relation to that property out of its share of production). The royalty scheme is one that allows the licensee to reduce its risk during the first few years of production by allowing it to recover its sunk costs. The scheme is inherently sensitive to price in the sense that higher prices will allow payout to be achieved earlier and move the government into a profit sharing position. Low prices will defer both payout and the government's net profits interest.

## 6.5 Greenland

Currently there is no oil and gas production in Greenland or on the Greenlandic shelf and only a small number of wells have been drilled to evaluate the resource potential. The Mineral Resources Act (MRA) of Greenland establishes the basic framework by which the industry can acquire both oil and gas and mining rights. The current Act came into force January 1, 2010 replacing the former Act of 1998. This section looks first at the former Act and then considers the current Act.

Both versions of the MRA establish parallel schemes for oil and gas and mining. The former Act contemplates two main forms of tenure: a prospecting licence (which is a non-exclusive licence to conduct preliminary exploration such as seismic), an exclusive exploration licence and an exploitation licence (these may be combined; current practice is to issue the exploration licence and then allow the licensee to convert to an exploitation licence on the terms stipulated in the licence). Section 8(2) provides that any exclusive licence may provide that a state oil company shall be entitled to participate in the licence “on terms to be defined.” Section 3 of the former Act contemplated that the governments of both Denmark and Greenland must agree before granting prospecting licences or exclusive licences. There are currently some 20 or so prospecting licences in force and some 13 exclusive exploration and exploitation licences still in force.

Greenland offers exclusive exploration licences to industry through one of two means: (1) a series of regularly scheduled licensing rounds (2002, 2004 2006, and 2010), and (2) a so called open door procedure. The most recent licensing rounds took place in the Baffin Bay Area and the Greenland Sea Area (Northeast Greenland) (see Letter 2009). The next few paragraphs discuss the Baffin Bay licensing round.

Fourteen blocks are included in the licensing round varying in size between 8,000 and 15,000 square kms. The bidding documents propose a two stage process. The first stage is the pre-qualification of a party who wishes to be the project operator.<sup>11</sup> The aim of pre-qualification is to establish that the operator will be able to carry out activities in accordance with good international practice in similar conditions, and that the overall group will have the necessary financial capability to carry out exploration and exploitation activities in the proposed block(s). Finally, pre-qualification will also establish that the health, safety and environmental (HSE) procedures of the applicant are in line with internationally recognised standards, (see: Baffin Bay, Greenlandic Sea Bidding Documents)<sup>12</sup> Accordingly, prospective operators must submit information designed to respond to the above matters including previous experience in operating in similar physical conditions.

The second stage is the actual bidding round with bids due May 1, 2010. Bids from company groups must include an approved operator. At this time bids for specific blocks will be evaluated principally on the applicant’s technical capability, its financial capability and the manner in

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<sup>11</sup> This was perhaps an unusual prospecting licence. The current version of the “standard terms for prospecting licences” for hydrocarbons (March 2009) does not provide for either preferential bidding rights or any participation by NUNAOIL.

<sup>12</sup> Oil and gas companies frequently put together joint ventures as part of bidding for or acquiring oil and gas interests. They will typically hold these licences as co-owners with one of them appointed as the operator of the block. That party will be responsible for the actual conduct of operations under the terms of an operating agreement. The co-owners will ordinarily contribute to drilling and other operating costs on the basis of their co-ownership position and be entitled to a share of production along the same lines. The bidding documents include a link to a model joint operating agreement: [http://www.bmp.gl/petroleum/licensing\\_round\\_2010.html](http://www.bmp.gl/petroleum/licensing_round_2010.html).

which it proposes to explore and produce from the proposed blocks and in particular its HSE systems and the “quality and scope of the proposed work programme.” If two or more applicants are equally ranked on the basis of these criteria then the choice will be made on the grounds of “the applicant’s willingness and ability to contribute to the Greenland authorities” continued development of a strategic environmental impact assessment,” (see: Bidding Documents at note 12). The decision on a successful bidder will be a joint decision of the Danish and Greenland governments unless full decision-making competence has been transferred to Greenland by that time in which case the decision will be made by the Greenland government.

The bidding documents include a model licence which provides the core terms of the legal arrangement between the parties. Licences will be granted for a ten year exploration period (with possible extensions) extended by a 30 year exploitation period (with possible extensions out to 50 years). The exploration period in turn will be divided into sub-periods and movement from one sub-period to the next will be conditional upon completion of the work programme (e.g., seismic and drilling wells) for that particular sub-period. Furthermore the licensee will have to relinquish 30% of the block at the end of the first and second period. But perhaps the most distinctive part of the licence is the NUNAOIL 12.5% carried interest during the exploration phase of the licence. This interest becomes an ordinary working interest during the exploitation phase.<sup>13</sup> The licensee also commits to cooperate with NUNAOIL and to negotiate and conclude a separate cooperation agreement with a view to developing the “know-how and expertise of NUNAOIL.” NUNAOIL is the state oil corporation of Greenland.

A licensee can move from the shorter term exploration licence to an exploitation licence if it makes a discovery and develops and files an appraisal programme and a feasibility study with the Bureau of Minerals and Petroleum. These studies should establish that the discovery is commercially exploitable and that the licensee intends to exploit the deposit. The licensee is entitled to an exploitation licence that comprises (clause 8.05) “the area in which commercially exploitable deposits have been demonstrated and delineated” based on seismic and drilling data. Once the exploitation licence has been issued the licensee must submit a development plan accompanied by both an EIA plan and an abandonment plan.

The licence provides for a three tier royalty scheme based on net production (i.e., sales of production minus eligible investment and operating costs as from the time that the licensee requests an extension of the licence for the purpose of exploitation). Where eligible costs exceed reve-

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<sup>13</sup> In a carried interest situation the 12.5% of the costs and expenses that would normally be paid for by NUNAOIL are paid for by the other parties to the licence. Once NUNAOIL converts from a carried to a working interest it must pay its 12.5% share of costs and expenses.



nue no royalty is payable and costs can be carried forward from one year to the next.

The open door procedure is not that much different from the regular rounds. The current example is provided by a new “Invitation to apply” issued in January 2010 under the terms of the new Act and inviting applications (on a continuing basis) for the offshore area in southwest Greenland and the Jameson Land area on the central east coast (Invitation 2010). Licences will be granted for up to a ten year exploration period with licences divided into sub-periods with associated work obligation and relinquishment commitments. Pre-qualification and selection criteria and the criteria for choosing between competing applications are essentially the same as for the regular licensing rounds.

The new Mineral Resources Act of Greenland entered into force on January 1, 2010. Henceforward, all decisions in relation to both oil and gas and minerals will be made by the Greenland government alone rather than in conjunction with the Danish government. The transitional provision in the new Act provides that existing licences “remain valid” but “will be regulated” under the terms of the new Act. Similarly, existing procedures and standard licence terms that were in effect on January 1 will continue to apply until changed pursuant to the new Act. This latter is presumably a reference to the current bidding round that is underway and seems to suggest that the existing rules will apply and will not be changed midstream.

The new Act is much longer and more detailed than the old Act (98 sections instead of 34) and contains some new content. This includes a new Part on environmental protection which has discrete sections dealing with: environmental protection and the use of the best available technologies, climate protection, environmental liability (no fault and for a broad range of environmental damages including “pollution of or other negative impact” on climate and nature) environmental impact assessment (no licence for the exploitation of hydrocarbons to be issued before an EIA completed), and social sustainability assessment (the responsibility of parliament to decide whether such an assessment should be required). While in some cases these new parts build on discrete sections of the old Act (e.g., s.31 of the old Act dealing with liability) and draw upon the content of the standard form licences (especially in relation to the criteria for choosing between competing applications) there is much new material here.

That said the core elements of the regime remain the same. Thus the main forms of tenure continue: a non-exclusive prospecting licence and an exclusive exploration licence that can be converted to an exploitation licence and the maximum duration for this interest (50 years in total and no more than 16 years for an exploration interest). The provisions allowing for state participation also continue (s.17(2)). But the Act adds a new form of tenure in the form of a subsoil licence (ss.39– 41) which can be issued for storage purposes or “purposes relating to prospecting, explora-

tion or exploitation of a resource.” This form of tenure would clearly accommodate a natural gas storage project but might also accommodate a carbon capture and storage project.

As the length of the new Act might suggest, it goes into considerably greater detail on a number of matters, for example in relation to the bidding criteria for choosing the successful applicant and in describing the open-door procedure (s.23). The Act explicitly states that an applicant’s performance under previous licences in Greenland will be a relevant criterion (s.24(5)) in selecting the successful bidder and the government reserves the right to appoint the operator for a successful bidding group. The Act also includes quite an unusual provision to the effect that an applicant for a licence must have and maintain a debt equity ratio no lower than 2:1; failing which it will be in breach of the Act.

This new regime will undoubtedly be carefully scrutinised by existing and prospective operators who will be looking to see if it has expanded the discretionary powers of the government or made the terms and conditions for operating in this frontier environment more onerous. International oil companies will perhaps take some comfort from the fact that the government (s.90) still appears to be open to using arbitration in order to settle disputes. This may be particularly important to an investor since Danish investment treaties were generally only concluded with developing countries and economies in transition and in many if not all cases they did not extend to Greenland.

#### Questions regarding oil and gas regimes

What are the principal differences between the CPRA regime and the Greenland regime? Is one regime more “investor friendly” than the other?

How do the regimes described here compare with Norway’s offshore oil and gas regime as laid out in the *Petroleum Activities Act* <http://www.npd.no/en/Regulations/Acts/Petroleum-activities-act/> or Iceland’s regime <http://www.os.is/Apps/WebObjects/Orkustofnun.woa/1/swdocument/33715/kolvetnisl%C3%B6g.pdf?wosid=false> ?

You are the legal advisor to *Arctic Resources Co* (Arco) incorporated in the UK. Arco holds an exclusive exploration/exploitation licence granted under the terms of the old Greenland MRA. Arco wishes to know how the new Act will apply to its rights and entitlements under its licence.

What are the implications of the EU’s Hydrocarbons Directive 94/22/EC for member states (and for states party to the EEA (European Economic Area) agreement (Iceland and Norway)) in the design of oil and gas leasing legislation?

## 6.6 Mining Regimes

This section discusses the mineral regimes for Nunavut, the N.W.T. and for Sweden. Sweden is taken to be reasonably representative of the min-

ing regimes in operation in Norway and Finland. The questions developed above and applied in the context of oil and gas regimes are also relevant here. In addition, mining companies are also interested in the answer to at least two other questions. The first is the question of what land is open to mineral prospecting and ultimately to mining. The second relates to the ability of the miner to hold on to the property through the cyclical pricing of mineral commodities on world markets. In particular, the miner will want to know if the mine is able to maintain its tenure even if it is unable to produce at certain price points in the cycle.

#### *6.6.1 Mining Regulations in Nunavut and the N.W.T.*

There is significant exploration for and production of minerals in these two northern territories (see Bankes 2008). Most of this development occurs on government owned mineral lands but some occurs on lands where the mineral title is owned by indigenous peoples under the terms of a modern land claim agreement. The Northwest Territories and Nunavut Mining Regulations, (formerly known as the Canada Mining Regulations) apply to federally owned mineral rights in the Northwest Territories and Nunavut.<sup>14</sup> They do not apply to mineral lands that are owned by persons other than the state such as aboriginal organisations (pursuant to the terms of a land claim agreement (see discussion below)). The Regulations apply to all hard rock minerals including precious and base metals, rare metals, uranium and diamonds. They do not apply to quarrying materials, coal or petroleum and natural gas which are covered by a separate disposition system based on regulations (see: Territorial Coal Regulations; Territorial Quarrying Regulations) or statute (see the CPRA discussed above).

The Regulations continue what is generally known as a free entry system.<sup>15</sup> The Regulations provide that in order to engage in prospecting and mining activities a person must have “a licence to prospect” (s.8). Licences are available for a nominal fee to individuals and to companies registered to do business in the Territories (s.7). The Regulations provide for two main forms of tenure, the mineral claim and the lease of a mineral claim. The mineral claim is a form of exploration tenure and is acquired through the process of physical staking of lands and subsequent recording of the claim in the mining recorder’s office (ss.13 et seq). Claims may be staked on any lands in the Territories (the mineral title to which is vested

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<sup>14</sup> For a good discussion of the previous version of the regulations see Barry Barton, “The Future of the Free Entry System for Mining in Canada’s North” in M.M. Ross and J.O. Saunders (eds.), *Disposition of Natural Resources: Options and Issues for Northern Lands*, (Calgary: Canadian Institute of Resources Law, 1997), 81–113.

<sup>15</sup> Barton, at 85 suggests that a free entry system has three main characteristics: (1) the right of entry on lands containing Crown minerals, (2) the right to acquire a claim, and (3) the right to a lease and subsequent production. I have offered a critique of mineral free entry systems in Nigel Bankes and Cheryl Sharvit, *Aboriginal Title and Free Entry Mining Regimes in Northern Canada*, Northern Minerals Program, Working Paper No. 2, Canadian Arctic Resources Committee, 1998 and Bankes, “The Case for the Abolition of Free Entry Mining Regimes” (2004), 24(2) *J. Land, Resources, & Envtl. Law*, 317–322.

in the state) except those lands that have been specifically withdrawn.<sup>16</sup> A claim is valid for a maximum of 10 years and is maintained in force by completing and recording representation work (i.e., work designed to prove up the claim ss. 38 et seq). After 10 years the claim holder must proceed to lease (ss.45 & 58) and the lease therefore serves as both a form of retention tenure and a production tenure. Leases are granted for a 21 year term subject to renewal (s. 59). In addition to these two forms of tenure there is an ancillary form of right known as a permit to prospect (ss.29 et seq). Granted for a three year period, and subject to minimum expenditure requirements, the permit to prospect offers the permittee the exclusive right to stake and record claims during the period of the permit. The permit meets the needs of the large well-funded exploration company that is interested in engaging in regional level reconnaissance work.

The Regulations offer considerable security of tenure insofar as the registered owner of a claim who is in compliance with the terms of the Regulations has the right to move to a lease with the right to produce the leased minerals, but this is subject to the proposal complying with all applicable environmental, land-use and water regulations. In practice, exploration operations require land use permits under the terms of the Territorial Land Use Regulations and a proposed mining operation will trigger the need for an environmental assessment and likely some form of water licence and surface leases for the physical facilities associated with the mine. In sum, there is no absolute right to produce. The Regulations provide for a net profits royalty on a sliding scale starting at 5% and rising to 14% on any net value in excess of \$45 million.

## 6.7 Sweden

The rules governing the acquisition of mining rights in Sweden are found in the *Minerals Act* of 1991 and the *Minerals Ordinance*. The Act applies to a broad range of minerals, the concession minerals, (these are the traditional hard rock minerals, rare metal, alum, shale and clay, coal but also oil and gas) and it applies to concession minerals “situated on a person’s own land or on land belonging to another person.” In other words the Swedish legislation, as with the mining laws of Norway and Finland, provides a mechanism whereby a mining operator can obtain access to and exploit concession minerals even where they may form part of a private estate. Access is provided because of the public interest in allowing the development of those resources.

In the absence of the consent of the owner, access to concession minerals is obtained by means of an exploration permit and a concession. An

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<sup>16</sup> Lands may be withdrawn on a case by case basis by Order in Council but s.11 of the Regulations also contains some generic withdrawals including lands that are used as a cemetery but also (and very recently, as of 2008) “lands that are subject to a prohibition on prospecting or staking a claim under a land use plan that has been approved under federal legislation or under a land claim agreement.”

application for an exploration permit is made to the Chief Mining Inspector for a particular area and for particular concession minerals. The Minerals Ordinance (s.1) requires an applicant for a permit to identify the concession minerals to which application pertains. The applicant must also provide particulars as to all private owners who may be affected. A permit (Act s.2.2) “shall be granted if there is reason to assume that exploration of the area could lead to the discovery of a concession mineral.” A permit is granted for three years (Act, s.2.5) but may be extended for a further three year period if the permittee has carried out appropriate exploration work or has acceptable reasons for not doing so. The permit may be extended even further if “special” or “extraordinary” reasons exist (Act, s.2.7). Conditions may be attached to permits to protect the public interest and the permittee will need to provide security for any compensation payments to third parties (e.g., land owners) that may be payable. Exploration work should be carried out in accordance with a plan of operations filed with the owner of the land, with the Chief Mining Inspector and any persons whose reindeer grazing rights may be affected (Act, s.3.4). Parties may object to the proposed plan of operations in which case the matter falls to be determined by the Chief Mining Inspector. Operations shall be carried out in such a way as to cause the least possible damage to the environment and as to the property interests of others (Act s. 3.3) and may not be carried out in particular areas including certain protected areas.

A mineral property cannot be exploited without a mineral concession and an application for a concession must be accompanied by an EIA prepared in accordance with the Environmental Code. A concession must not be contrary to the terms of a detailed development plan or area regulation (Act s.4.2). In the event that there are competing applications for a concession, preference will be given to an applicant holding an exploration permit, or, failing that, to a person who has carried out exploration work within the area in question (Act s.4.3). A concession is granted for a 25 year term and may be extended for a ten year term if production is occurring. If there is no production the concession may only be extended if the concession holder can show that preparatory work to engage in exploitation is underway or if there is a significant exploration or metallurgical programme underway.

The general rule is that the concession holder will be responsible for compensating all affected parties for any damages that they suffer as a result of exploitation activities and the holder may be required to expropriate the lands of owners who may be affected through a process of designating lands (Act, chapters 7, 9 and 10). In addition, and as a result of amendments introduced in 2005, a concession holder is now obliged to pay mineral compensation but at the rather low level of 0.2% of the gross value of production. Of that 0.2%, three quarters accrues to property owners within the concession area and one quarter accrues to the state

(Act, s.7.7). Mining operations are subject to the general corporate tax regime but there are no special mining taxes (see: GS of Sweden, Guide to Mineral Legislation and Regulations in Sweden, 2006:7).

Both mineral exploration and exploitation activities are subject to the terms of the Environmental Code<sup>17</sup> and while a permit is not normally required for exploration activities, oil and gas and mining exploitation activities are defined as “environmentally hazardous activities” and will therefore require a permit from the Environmental Court. A separate permit will be required for any water-related operations associated with the mining activity.

#### **Questions about the structure of mineral regimes**

What are some of the main differences between the minerals regime for Nunavut and the Northwest Territories and the regime applicable in Sweden?

Are there significant differences between the minerals regime in Sweden and those in Norway, Finland and Greenland?

The disposition rules seem to be quite different for oil and natural gas and for minerals. Why is this? But note that the Swedish system seems to apply to both minerals and oil and gas; why is this? Is it simply because the potential for hydrocarbon discoveries onshore in Sweden is considered to be low? Would the regime work in relation to oil and gas?

#### *6.7.1 What happens where the resource is owned by a non – state party such as an indigenous people?*

Some Arctic states (e.g., Canada and the United States) recognise that indigenous people may have title to oil and gas and minerals. In both states this recognition has come about through the terms of modern land claim agreements (Canada) or legislation (in the U.S., ANCSA). In such a case the relevant indigenous owner will be able to decide how (if at all) the mineral resources are to be developed. While an aboriginal owner would be free to develop those resources the financial risk associated with such a venture makes this impractical. As a result indigenous owners have entered into a variety of leasing and joint venture arrangements which may be designed both to provide a fair economic return to the indigenous owners but also economic opportunities to participate in various ways (e.g., equity participation, carried interests, supply and services contracting opportunities etc).

This section discusses the experience of the Inuvialuit. As part of the IFA the Inuvialuit were confirmed as owners of some 5 000 square miles of mineral lands including oil and gas rights. The Inuvialuit have devel-

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<sup>17</sup> Sweden, Environmental Code and Gabriel Michanek, “The Law on Mining and Environmental Protection in Sweden. Any lessons for Finland?” in Koivurova and Stepien (eds.), 161–173. This paragraph relies heavily on Michanek.

oped a set of rules and procedures and standard forms for the different types of commercial interests that developers might require on Inuvialuit lands and have adopted a negotiated concession model for their oil and gas lands. Using that model the Inuvialuit have negotiated concession agreements with *Imperial* (the Tuktoyaktuk concession, October 1, 1986, amended October 1, 1993), with *Shell* (January 1992) and then in 2000 with *Chevron* (two parcels), and *Petro Canada* and one other company (2000). While the details of these arrangements are not publicly available it is possible to give some idea of their terms based in part on publicly available bidding documents that include a model agreement.

The older agreements provide for signing bonuses (for example, \$1 million in the case of the *Imperial* and *Shell* agreements), rental fees (\$100,000 per year for *Shell* and *Imperial*), a three tier royalty (a basic royalty of 5%, an additional royalty of 5% after first payout (i.e., first payout refers to recovery of all development and operating costs; second payout occurs after recovery of all exploration development and operating costs plus a return allowance), and, after second payout, an additional royalty that is the greater of the additional 5% royalty or a 25% NPI (net profits interest). Other bonuses include: a carried interest creating an option to participate (the Inuvialuit interest is financed by the lessee with the lessee recovering the loan from production), commitment wells (in default of drilling a significant penalty is payable), and rigorous relinquishment bonuses (for example in the case of the *Shell* concession, the company was obliged to relinquish 50% of the lands by the tenth anniversary date and a further 30% of the original area by the 20<sup>th</sup> anniversary). The basic concession term was 30 years with renewal options for further 10 year periods.

Some of the features of the 2000 round included: the use of a cash bonus bidding system based upon a prescribed work programme (the Inuvialuit received a total of \$75.5 million for the four parcels); a gross royalty system prescribing 5% for the first 4 years of production, 10% for years 5 – 8, and 15% thereafter; work commitments on each parcel and an Inuvialuit back-in interest. Interestingly, under the bidding documents the Inuvialuit may acquire a 25% working interest in each block upon the declaration of a discovery with the Inuvialuit being responsible for their share of development and production costs accruing from the discovery date.

The exploration phase of the agreements is divided into an initial ten year term with two five year extensions. Relinquishments continue to be required at the end of the initial term and each extension with the ability to retain proven acreage. Continuance beyond the initial term and extensions depends upon commercial production or deemed production. Election to proceed to a renewal term during the exploration phase constitutes a commitment to carry out the work or pay penalties in default. Given the need to secure a transportation system to get any discoveries to market, the agreements negotiated in 2000 condition continuance beyond the

exploration phases on actual production commencing within a number of years of the development of a transportation infrastructure for that particular product (i.e., oil or gas). The lessee's operations are subject to Inuvialuit Land Administration (ILA) rules including amendments to those rules saving only some of the core rights of the lessee.

**Questions regarding resource operations on resource lands owned by indigenous people**

How do the arrangements described here compare with the government oil and gas leasing sections described previously? In negotiating these arrangements are the Inuvialuit acting as owners or as the government? Is there a difference?

Nunavut Tunngavik Inc <http://www.tunngavik.com/>, the land claim organisation for the Inuit of Nunavut, has encouraged mining operations on Inuit owned mining lands. How do its mining policies compare with the leasing policies discussed above?

## 6.8 The Oil and Gas and Mining Industry and the Environment

The discussion to this point has focused on the question of how the oil and gas and mineral industries acquire rights to explore for and produce those resources. But that is clearly only part of the relevant law that governs these two industries. Resource companies are also interested in the overall fiscal and investment regime of the jurisdiction including the overall tax regime and both the investor and the public will be interested in the environmental regime that applies to these projects.

Both industries pose environmental risks. In the case of the oil and gas industry the risks include the noise effects of seismic and drilling operations on marine mammals; disposal of drilling and other oilfield waste; the risk of blowouts and subsequent hydrocarbon contamination; hydrocarbon contamination from leaks and seeps during production and from pipelines and associated facilities; disposal of produced water; gas emissions during production and as part of processing; and habitat fragmentation as a result of seismic lines and access roads. In the case of the mining industry the environmental risks include those arising from acid mine drainage (where background rocks contain sulphides); tailings ponds and their potential breach; sedimentation as a result of milling and other disturbance activities; chemicals used in mineral processing activities such as cyanide used in leaching; groundwater effects as a result of contamination or pumping to lower groundwater levels; fugitive dust emissions from mining activities; and reclamation activities. Uranium mining poses distinctive challenges because of the risks of radioactive contamination.



The infrastructure needs of both industries also pose environmental concerns especially where, as will often be the case in the Arctic, new projects will require new infrastructure. This will often take the form of large linear projects such as pipelines and roads, either winter roads in the form of ice roads or all season gravel roads. Where resource projects are close to tidewater, port developments and the risks of shipping in ice covered waters also pose environmental risks.

It is therefore inevitable and appropriate that oil and gas and mining projects will be subject to significant scrutiny under generally applicable environmental legislation including environmental assessment legislation, water and air permitting rules for emissions, protected area legislation such as national parks legislation and Natura 2000 and reclamation and abandonment legislation. Furthermore, multiple projects in a similar area may require the management of cumulative effects and prompt regulators to establish appropriate thresholds to maintain biological diversity and healthy aquatic and terrestrial ecosystems. In most cases the relevant rules will not be Arctic specific but there have been some efforts to develop Arctic specific rules. One example is the Arctic Council's Arctic Offshore Oil and Gas Guidelines, 2009 developed by PAME the working group on the Protection of the Marine Environment.

Much of this is beyond the scope of this paper but it is worth reflecting on how different jurisdictions deal with the decision to open up new areas to resource activities. In general there is a significant distinction between oil and gas and mining activities. In the case of mining it almost seems to be a given that lands are always open for mining activities. This does not mean that government will always allow mining properties to go from exploration to production but typically governments do not open up new areas for mining; instead the lands are "open" and the acquisition of exploration rights is driven by the industry itself.

In contrast to this, in the oil and gas area, government exercises much more control and generally decides when to put lands up for bidding. This provides the opportunity to identify regional scale environmental and social concerns before exploration commences and perhaps also the time to develop an integrated management plan. In some cases these issues may turn out to be so significant that a decision can be made not to open up the area for exploration at all. Not all jurisdictions however make the most of this opportunity.

The United States has very formal rules for preparing an environmental impact statement prior to any new leasing on the Outer Continental Shelf and Norway requires what is effectively a strategic environmental assessment prior to a new bidding round. In one case the outcome of this process was to close areas round the Lofoten Islands, Bear Island and the Nordland area along the coast south west of Tromsø to oil and gas activities. Exploration continues in the south Barents Sea in part to provide economic and resource support for existing developments

(Snohvit and Galiat) that were originally discovered in an era before a more rigorous approach was adopted in relation to the pre-bid assessment of environmental risks. By contrast and as noted previously Canada's approach is less systematic (for a discussion of different approaches see Annex D of the Arctic Offshore Oil and Gas Guidelines, 2009).

#### **Questions with respect to environmental issues**

How do different Arctic jurisdictions deal with the environmental effects of resource projects and the infrastructure requirements of such projects?

How do national or sub-national environmental laws apply to oil and gas and mining operations in the different Arctic jurisdictions.

## **6.9 Conclusions**

The Arctic area is richly endowed with oil and gas and mineral resources. These resources are becoming increasingly integrated into global trade but in many cases they remain isolated by ice and the lack of adequate infrastructure. We can however expect this to change over the coming decades with the warming Arctic, the loss of sea ice and additional investment in land-based and maritime infrastructure.

While the Arctic may well be richly endowed with natural resources it is also under-explored in comparison with other parts of the world. In this context it is significant that two Arctic states Greenland and Iceland are now aggressively trying to identify oil and gas reserves within their jurisdictions. It would be surprising if some of this exploration did not yield new discoveries which in turn will raise questions as to how to bring these discoveries safely to market.

Increased resource development activity in the Arctic has the potential to increase conflict between indigenous peoples and both the state and the resource industry. This is particularly evident where the state has not settled aboriginal title claims or otherwise identified, delimited and titled indigenous lands. This has not been a focus of the present chapter but the issue is one that raises questions of both domestic law and international law (Bankes: 2009).

## Further reading:

Nigel Bankes, "International human rights law and natural resources projects within the traditional territories of indigenous peoples" (2009), 47 *Alberta Law Review* 457–495.

Nigel Bankes, "Mining and Recognition and Accommodation of Indigenous Interests: Some Options", in Timo Koivurova and Adam Stepien (eds.), *Reforming Mining Law in a Changing World with Special Reference to Finland*, (Rovaniemi: University of Lapland Printing Centre, 2008), 132–150.

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# 7. Arctic Governance

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## 7.1 Introduction

The term “Arctic Governance” has been used in political and international relations discourse for some time though no precise legal definition of this term currently exists. As such, “Arctic Governance” is *per se* not a legal term or concept. Broadly speaking, “governance” can be understood as a process in which political power is exercised by different players with due consideration to the principles of legitimacy, accountability and transparency. The World Bank has outlined the concept of “good governance,” which is further addressed by growing scholarship on this subject. This scholarship suggests that adherence by modern governments and other actors to the principles of human rights, the rule of law and democracy are crucial for the implementation of good governance practices.<sup>1</sup> These principles are relevant to the Arctic settings of governmental practices. Further, in the existing discourse, the term “governance” is often used in relation to, or interchangeably with, the term “government.” The question thus arises, are we dealing with “governance” in the Arctic, government(s), or both?

There is no universally recognized definition of “Arctic Governance.” This developing and evolving concept has been given multiple interpretations by the various stakeholders interested in the subject. The legal discourse often links the concept of “governance” to the right to autonomy that is housed in the concept of self-determination. A number of elements pre-determined by the existing legal and political frameworks, socio-economic and environmental predicaments and the activities of the various actors involved in Northern matters help shape Arctic governance.

This chapter is limited to a general discussion on the approaches to and challenges of the current Arctic governance framework. It looks at how different Arctic jurisdictions tackle the various issues associated with the implementation or application of the right to autonomy/self-government or public governance arrangements drawing conclusions on the challenges of governance in the North.

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<sup>1</sup> On this subject see, for example, Hans Otto Sano and Gudmundur Alfredsson eds. With the collaboration of Robin Clapp. *Human Rights and Good Governance: Building Bridges*. The Raoul Wallenberg Institute Human Rights Library Vol. 9, Martinus Nijhoff Publishers, The Hague/London/New York, 2002.

## 7.2 The Arctic Governance Framework

The increasing importance of the Arctic in global affairs particularly in respect of environmental change; its shifting geo-political and strategic significance; varying internal and external policies regarding the region; and the growing number of actors desiring meaningful power in decision-making processes affecting the circumpolar north; as well as access to, and influence over the re-distribution of, resources have each prompted further inquiries into the nature and the scope of governance in the Arctic.

The various approaches used in the definition of “Arctic governance” each seek to determine the framework for governance in the Arctic but generally take into consideration the following:

- The status and future of Arctic cooperation – as an important factor in the development of Arctic governance;
- The role of existing and potential institutional complexes in addressing pan-Arctic and trans-national issues affecting both the region and the globe more generally;
- The scope, interests and capacities of the actors involved in the coordination of the various agendas concerning the Arctic and the ability to meet the current and future challenges of Arctic governance;
- The adequacy of existing legal and political (formal and informal) arrangements relevant to issues of Arctic governance, etc.

The Arctic governance framework is complex. Many discrete factors influence its development which often requires innovative responses and approaches to governance. Such factors include:

The emergence of the Arctic as a distinct region with increasing collaboration among the eight Arctic states, other states and non-governmental actors to enhance “Northern” values and interests within the circumpolar north and, indeed, globally;

Geopolitical, social, economic, cultural, demographic, environmental, political and legal changes continuously re-shaping existing local, sub-national and trans-regional governance systems, the scope of their jurisdictional capacities, and Arctic governance arrangements;

The particularities of the Arctic with respect to climate, geography, remoteness, underdeveloped infrastructure, low population density and expensive means of communication;

Challenges faced in respect of social ills, unemployment, inadequate housing, limited economic development and high dependency on external transfers and welfare in many parts of the region;

Shortcomings of human, economic and political capacity building in many Northern areas and aspirations on behalf of Northerners for greater partnerships, dialogue and a greater say in the dialogue with national and global communities;

The impact of globalization and global pressures (e.g., in respect of global warming and climate change) on the development of the region, the livelihoods of Northerners and indigenous residents, and on the governance complex in the Arctic;

Emerging environmental concerns and hazards in and beyond the region and the complex linkages between the fragile Arctic eco-biological and global systems (e.g., the ramifications of global environmental changes to the region, such as those in relation to Persistent Organic Pollutants, or the impact of Arctic haze, etc.), that pose new demands on Northern governance frameworks;

Existing and emerging legal and political disagreements regarding “sovereignty;” access to resources, and other claims and interests in the region expressed by several Arctic and non-Arctic stakeholders in an attempt to advance their role and influence in decision-making terms and in respect of the ongoing re-distribution of power.

### 7.3 Arctic Cooperation, Institutional Complex and Actors

The challenges facing the North transcend local, national or regional boundaries and thus require “sustainable” trans-national collaboration. The nature of this collaboration has undoubtedly however been “thickened” by the ongoing evolution of the institutional structures that have emerged over the last twenty years (e.g., the Arctic Council, the Barents Euro-Arctic Council, the Northern Forum, etc.). This institutional complex has been further strengthened by multilateral cooperation arrangements and extensive diplomacy between many Arctic and non-Arctic actors.

The new institutional governance complex that has emerged in the Arctic during this period highlights, among other things, the increasing participation of indigenous peoples (e.g., in respect of their status as Permanent Participants in the Arctic Council). It also points to the growing international involvement of sub-national entities in addressing environmental, cultural, educational, economic, health and other matters that do not breach traditional areas of jurisdiction claimed by states or international organizations. The many multi-level governance participants involved in issues of Arctic governance express their agendas within the context of different forms of collaboration and institutional structures in and beyond the Arctic rim. These activities indicate that the multilateral collaboration of well-organized actors, as opposed to unilateral action, is often beneficial in respect of enhancing Arctic diplomacy. Moreover, the giving of due consideration to the interests of Northerners, indigenous cultures and sub-national collectivities is of the utmost importance in the implementation of Arctic governance arrangements and initiatives.

The growing body of scholarship on this subject has produced analyses of the forms and structures of Arctic governance and the individual

utility of such arrangements. Furthermore, the initiatives and activities of institutions of Arctic ordering and their interaction with institutions of global ordering are also well-documented in the materials issued by the organizations involved. Interests that are specific to the Arctic materialize in various forms of cooperation. As Oran Young put it, those interests indicate, for example, international issues (such as, security, environmental concerns and protection; sustainable communities); intergovernmental matters – that reflect on relations and the allocation of authority among central and all kinds of sub-national units of government; and inter-sectoral issues – e.g., the conflicting interests of many regional players.<sup>2</sup> In a nutshell, the various forms of Arctic collaboration can be classified in the following ways though this list is not in itself exhaustive:

Globally – Arctic actors are involved in cooperation via the United Nations (e.g., the Permanent Forum on Indigenous Issues); the World Trade Organization (WTO) e.g., Greenland;

Regionally-European cooperation (e.g., the EU's stance on Arctic policy and special relations with Arctic areas); Arctic cooperation (e.g., via the Arctic Council); Nordic cooperation (e.g., via the Nordic Council and the Nordic Council of Ministers); North Atlantic cooperation (e.g., Greenland and Iceland); cross-border cooperation among Arctic regions (e.g., Chukotka and Alaska; Nunavut and Greenland);

Functionally – supranational cooperation (e.g., EU); inter-parliamentary cooperation (e.g., summits of parliamentarians of the Arctic region) inter-governmental cooperation (e.g., the Nordic Council of Ministers); non-governmental cooperation (e.g., the International Arctic Science Committee); indigenous cooperation – indigenous internationalism (e.g., the Inuit Circumpolar Council; the Saami Council, etc.);

Sectoral – cooperation in defence and security matters (e.g., Arctic military environmental cooperation); cultural, linguistic and educational cooperation (e.g., University of the Arctic); fisheries, hunting and whaling cooperation – (e.g., the North Atlantic Marine Mammals Commission, the International Whaling Commission); international trade cooperation with relevance to the Arctic – (e.g. NAFTA); environmental cooperation – (e.g., via the Arctic Council); scientific cooperation (e.g., the International Arctic Science Committee), etc.

Despite growing and often successful collaboration, innovation in governance arrangements, and the increasing strength of various regional networks in the Arctic and multilateral regimes, the institutional complex in the rim of Arctic governance is still characterized as nascent and remains marked by fragmentation. The policies and interests of a number of actors attempting to bring their voices to bear on how circumpolar issues should unfold undoubtedly shape this complex. However, the growing number of multi-layered initiatives undertaken by those actors at gov-

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<sup>2</sup> Oran R. Young, *The Arctic Council: Making a New Era in International Relations*. A Twentieth Century Fund Report, 1996:1–81, 35–49.



ernmental and non-governmental, inter-governmental, sub-national, sub-regional and supra-national level within and beyond the circumpolar area, challenge the efficacy of this institutional complex. Furthermore, the shortage of resources or coherence in respect of existing institutions, overlapping agendas, as well as competing individual or ambitious political groups' interests, present challenges to the functionality of Arctic governance and the strengthening of the role of the Arctic globally.

Moreover, the primarily informal nature of many Arctic institutions (e.g., their functionality and grounding in different declarations or reports –“soft law” approach), defines this institutional complex. Ambiguity remains however in categorizing developing Arctic structures in conventional institutional terms. Indeed, the legal capacity of such structures is often limited to non-legally binding arrangements and a consultative mandate. On the one hand, the current web of soft-law declarations and informal arrangements within the institutional collaboration of various Northern forums (e.g., the Nordic Council, the Nordic Council of Ministers, the Arctic Council, the University of the Arctic, etc.), indicate that these measures often prove to be adequate in meeting existing challenges.

Despite the limitations of its consultative mandate however, the activities of NGOs such as the Inuit Circumpolar Council, which represents the Inuit of Alaska (USA), four regions in Canada, Chukotka (the Russian Federation), and Greenland (Denmark), also point to the efficiency of informal strategies in advancing pan-Arctic diplomacy and the rights of indigenous peoples. On the other hand, legal frameworks or hard law instruments, either existing or currently under development, can be highlighted which are relevant to particular issues of governance in the Arctic. For example, (the United Nations Convention on the Law of the Sea; the Agreement on the Conservation of Polar Bears; the Convention on Biological Diversity; the Convention on International Trade in Endangered Species; Human Rights instruments, etc.). Indeed, within existing legal frameworks, it is possible to identify several such areas. For example, one can explore:

Arctic marine governance which may include the legal regime for Arctic shipping, Arctic fisheries or Arctic living marine resources governance; Arctic resource governance embracing Arctic energy governance or Arctic wildlife governance; governance of the High Seas; Arctic environmental governance; climate governance in the Arctic; sustainable development governance in the Arctic; and indigenous governance in the Arctic, etc. However, there is ongoing debate over the benefits of soft-law and hard-law instruments in the region, which currently does not have a legally-binding Arctic treaty. Scenarios dealing with the pros and cons of such a treaty raise questions about the need for a new legal regime in the Arctic; the necessity for new or innovative forms of governance in the Arctic and the need for a re-evaluation of existing institutional and governance ar-

rangements. The question of the need for such a treaty, in respect of the governance of the Arctic, remains however highly contested.

Currently, the possibility of such a treaty is unlikely because of the numerous legal, economic and political limitations surrounding this issue and continuing disagreement among many interested parties on the necessity, possible content and scope of such arrangements. Furthermore, the likelihood that such a treaty would fully address or indeed resolve the challenges of Arctic governance or enhance its efficiency is not promising.

Over time, the tasks, structures and needs of Arctic governance have changed as have the form and scope of the regional and transnational cooperation efforts which affect the circumpolar north. Generally speaking however a number of measures enhancing Arctic governance have been put in place. For example, the Arctic was accorded greater importance in global affairs, especially in connection with the significance of the region as a marker for ongoing global environmental changes. Concerned activists and NGOs, including indigenous actors, have raised the level of public awareness in respect of the negative and often destructive impacts of Southern and global developments and actions on Arctic ecosystems, livelihoods and the health of Arctic peoples. Further, under the auspices of various Arctic bodies (i.e., the Arctic Council), several comprehensive studies and reports have been produced (e.g., the Arctic Human Development Report (2004); the Arctic Climate Impact Assessment (2004); Arctic Marine Shipping Assessment 2009 Report; Arctic Off-shore oil and gas guidelines (2009), etc. Despite ongoing criticism however existing institutional structures, particularly the Arctic Council, undoubtedly now have a greater prominence in the international and regional discourse on the North.

Due, however, to the evolving nature of the current Arctic governance framework many new issues have emerged onto the agenda. Several concrete suggestions have already been made to address these issues. For example, in relation to improving the effectiveness of Arctic governance in meeting emerging issues one authority suggests the need for, “a tripartite “governance complex” for the Arctic involving distinct efforts to stabilize jurisdictional claims and boundaries issues.” An enhanced role for the Arctic Council, and better integration of the contribution of a collection of issue-specific regulatory regimes.<sup>3</sup> In addressing issues of Arctic governance and the idea of the “Arctic Treaty,” representatives of indigenous peoples propose the so-called “co-management model” as their contribution to “peaceful international regional governance.” As an Inuk leader and former chair of the Inuit Circumpolar Council, Mrs. Sheila Watt-Cloutier, notes, “[...] recognizing the importance of the Arctic for the whole of the planet, and the historical stewardship of indigenous peoples of the Arctic ecosystem, consider an Arctic Treaty that

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<sup>3</sup> Oran R. Young, *Whither the Arctic? Conflict or Cooperation in the Circumpolar North*. *Polar Record* 45 (232) 2009:73–82, 77.

charges circumpolar indigenous peoples with the stewardship, through co-management, of the Arctic for the continued benefit of humankind. These proposed international co-management boards, on which the indigenous peoples of the Arctic would be guaranteed majority representation, would integrate traditional and scientific knowledge to ensure sound and peaceful management of the Arctic's natural resources".<sup>4</sup>

Suggestions in respect of meeting the challenges or finding more effective solutions to governance in the Arctic are numerous. Indeed, we can already witness the development of several differing approaches to cooperation and governance within the region including multilateral and bi-lateral, approaches, an "all-government" inclusive approach (i.e., including the involvement of all governmental levels dealing with Arctic matters), an holistic approach and the inclusion of the Human Rights angle/ capacity-building to all governance initiatives or strategies, etc. To some extent, moreover, the objectives, functions, the scope, structures, jurisdictional capabilities, forms of collaboration and institutional tasks in addressing issues of Arctic governance depend on the actors involved.

The number of actors engaged in Arctic governance matters and initiatives is substantial ranging from the eight Arctic states, sub-national Arctic entities and various institutions of Arctic and global ordering to indigenous peoples and their organizations, NGOs, NPOs, environmental advocacy groups, private and public business corporations and multinational companies, investors, developers, as well as concerned Northerners, politicians, academics, scientists and others with specific interest in the region. Moreover a number of non-Arctic states such as China, Germany, Japan, etc., and supranational entities such as the EU has recently also expressed clear interests in becoming more fully involved in how Arctic issues should develop and who should have a say in decision-making processes.

Furthermore, non-state actors such as sub-national Arctic entities, or indigenous organizations, given the increasing legal capacity of indigenous peoples in international law, are now making claims for direct and independent representation in international forums or membership in international organizations and greater involvement in decision-making that affects the North. These trends affect the nature of cooperation in the region posing new challenges and presenting new opportunities for existing Arctic governance frameworks. In this light the need to find an equitable balance between these competing interests when addressing the many issues posed by stakeholders interested in Arctic affairs is of the utmost importance.

This then raises the question, who governs the Arctic at the international, regional, national and local levels? Or indeed who *should* govern the Arctic? Is the Arctic governance framework limited to the eight Arctic States? On specific issues it is limited to the Arctic states with direct

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<sup>4</sup> Sheila Watt-Cloutier, "A Principled Path," in F. Abele et al eds. 2009:69–76, 74.

access to the Arctic Ocean (e.g., the controversial practice of the Ilulissat Declaration, 2008). Do, however, other stakeholders including non-Arctic states, the EU, or other non-state entities have a legitimate role to play in the system of Arctic governance? There is no easy answer to this complex question. The Arctic states have traditionally had the decisive say in international and regional diplomacy related to the circumpolar north. With the changing geo-political significance of the Arctic in global and regional affairs, the emergence of climatic changes presenting both challenges and opportunities to Northerners and others, accelerating external pressures and a global focus on currently untapped resources in the area, many new actors are actively seeking recognition of their status and a stake in various developments affecting the region. As such, different regimes and arrangements shaping the Arctic governance framework at various levels are undoubtedly emerging.

Clearly, tasks and solutions relating to matters of Arctic governance will vary depending on the stakeholders involved, their jurisdictional capabilities (defined by the nature of their legal personality), and their agendas to deal with different levels of governance in the region. Currently, the ongoing re-evaluation of the existing arrangements that define the framework of Arctic governance and the search for innovative approaches and forms of governance is a work in progress. How do some of those forms develop within the Arctic jurisdictions? To answer this question, a general legal framework in respect of the right to autonomy needs to be explored.

## 7.4 The Right to Autonomy

This section begins by looking at the general framework of the right to autonomy, self-determination, and self-governance. It continues by exploring indigenous peoples' right to autonomy. In this chapter the notion of autonomy as being equivalent to self-government in the framework of an internal right to self-determination is employed. The primary focus here is the collective right to autonomy highlighting the territorial concept of autonomy. This concept is applied to autonomous entities with constitutional powers transferred from unitary or federal state authorities to the institutions of regional public or territorial governance although no account is taken of the municipal or local levels of government.

In legal and political theory the concept of autonomy is rather complex suffering from confusion and ambiguity. Autonomy is a vague concept often afforded different interpretations by scholars, representatives of minorities, indigenous peoples and others. The term "autonomy" originates from the Greek "auto" meaning "self" and "nomos" meaning "rule of law." It has many synonyms in modern scholarship and is used in relation to: self-determination, self-government, self-rule, self-reliance,

home-rule, self-legislation, self-administration, self-management, and independence (external self-determination). The term “autonomy” is used in constitutional and international law discourse but there is no legal clarity or static legal definition of it. Arguably, the lack of a precise legal definition makes the concept more amenable to the aspirations of different groups (i.e., minorities and indigenous peoples), depending on each case. Although in law, autonomy is often housed within the concept of self-determination, one can best understand its content and scope in the context of a particular situation.

Analysis of extensive materials and legal scholarship on autonomy suggests the following approaches to its understanding:

- autonomy as means of protecting human rights
- autonomy as a form of conflict resolution
- autonomy as a synonym of decentralization (the principle of subsidiarity)
- autonomy as a form of democratization (the right of effective political participation)
- autonomy and federalism
- autonomy as means to assert the rights etc., of minorities’ and indigenous peoples’.

In international law, the concept of autonomy is evolving. However, among scholars treating autonomy as a principle of international law is not unanimous. An analysis of various sources of international law (e.g., conventions, customs, treaties, and the practices of international organizations, doctrines and documents) reveals that insufficient grounds exist for the recognition of autonomy as a principle of international law. Discourse on this matter is centred on the evaluation of autonomy as a principle of customary international law; autonomy as a distinctive right of minorities; and as the principle of self-determination of peoples. There is no consensus among authorities on this subject. The definition of autonomy and its linkage to peoples’ right to self-determination or minorities’ rights to self-determination suffers from ambiguity. Even the division of the right to external self-determination (e.g., secession) and internal self-determination (e.g., territorial and non-territorial self-governance), does not solve this ambiguity. In some cases, autonomy can serve as a mode of conflict resolution. Without having a strong status in international law the practice of modern autonomous arrangements does however make the right to autonomy more feasible.

The right to autonomy is a part of the concept of the right to self-determination which is broader than just self-governance (e.g., the former can include external self-determination). Although autonomy can be conceptualized within the right to self-determination, because of recognition of the latter in international law, the language of self-determination might

be more palatable for different groups' claims compared to those of autonomy.

Arguably, the right to autonomy can be seen as the realization of the principle of internal self-determination (e.g., self-governance) if the following conditions are in place:

- ethnic, cultural and linguistic distinctiveness;
- voluntary and strongly expressed will of the group/population to achieve autonomy;
- the existence of historical and geographical conditions relevant to each particular case;
- the availability of a legislative body that is elected by the group; and an executive body formed with respect to the principles of democratic participation and representation;
- the presence of a financial base and grounds for economic sustainability;
- the availability of knowledge and human capacity to manage the new entity's own affairs and control its own destiny, etc.

International human rights law offers us a number of options in looking at the right to autonomy. One option is to view the right to autonomy within the framework of peoples' right to self-determination (e.g., common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights of 1966. Another possibility is enshrined in Article 27 of the ICCPR. It deals with the rights of persons belonging to ethnic, linguistic and religious minorities to enjoy their culture by means of effective participation in democratic institutions and power-sharing. The right to autonomy extends to culture (the ability of the minority group to sustain its culture, religion and language). It may extend to maintaining the livelihood of indigenous peoples, including their economic structures and land rights (Human Rights Committee, General Comment 23 (50)). Despite these possibilities, international human rights instruments do not clearly indicate the right to autonomy. There is evolving recognition of this right in the practice and procedures of international bodies, in the international documents and the main sources of international law.

Is the right to autonomy the domain of constitutional jurisprudence? Do existing constitutional autonomous arrangements reduce ambiguities surrounding the concept and the right to autonomy in international law?

Most constitutions do not guarantee the right to autonomy as a constitutional right. Typically, national constitutions do not regulate the right to autonomy or the scope of autonomous units' jurisdiction and its institutions. Analysis of the sources of constitutional law in several states shows however that there is some recognition of the right to autonomy. Autonomous arrangements can be regulated by:

- Constitution (Åland Islands-Finland)
- Constitutional custom (Faroe Islands-Denmark)
- Partial recognition in the constitution (Saami's cultural autonomy in Finland)
- Ordinary legislation (Faroe Islands-Denmark)
- Constitutional laws (federal law of the Russian Federation on national-cultural autonomy, 1996); Act of Greenland's self-government (2009)
- Constitution or Charter of the autonomous entity/region (Italy)
- Organic law (Corsica/France)
- Treaty between Indigenous Peoples and the state
- Special agreement between the national state and sub-national entity

To summarize, the right to autonomy is mainly regulated by means of constitutional law (e.g., the modes of entrenchment and regulation of autonomous regimes at the level of domestic law). However, within the discourses of international and national law ongoing developments point to the importance of indigenous peoples' right to autonomy and its realization within the Arctic states.

## 7.5 Indigenous Peoples' Right to Autonomy

Over the last century, the scope and the interpretation of indigenous peoples' rights have evolved in the course of international human rights law, within constitutional jurisprudence and indigenous law discourse. Historically, demands for indigenous autonomy through self-determination and revitalized new legal status and perception (e.g., claims that indigenous peoples are subjects of international law), have been raised as a reaction against former colonial policies of assimilation, discrimination and integration. The result is that more and more indigenous groups are now pressing for some form of self-governance as a way of taking control of their lives and lands and as a means to preserve their livelihoods, values, and culture. However, the question remains, how does international law regulate the right to indigenous autonomy?

International documents suggestive of a right to autonomy for minorities are relevant to indigenous peoples. They also show that the right of indigenous peoples to autonomy presents a stronger case than that for minorities and that the emerging right of indigenous autonomy is based on the outgrowth of the right to self-determination.

For example, The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-government that were adopted by the U.N. Meeting of Experts in Nuuk (Greenland) in 1991 outlined some elements of indigenous autonomy. Those elements include:

The inherent and fundamental right to autonomy and self-government is as an integral part of indigenous peoples' right to self-determination;

Realization of this right should not constitute a threat to the territorial integrity of the state;

The self-government/self-management/self-administration of indigenous peoples makes up an element of their political autonomy;

Autonomy is seen as a measure for achieving equality and respect for human rights; a vehicle for ensuring sustainable development; political participation in public affairs and decision-making processes within the scope of a given jurisdiction;

Autonomy is essential for indigenous peoples' further development, international cooperation and legal arrangements, and contributes to different forms of development within the state. Although the Nuuk recommendations are not binding on any state they did elaborate on the importance and the crucial elements of indigenous peoples' autonomy.

After long debate, the United Nations Declaration on the Rights of Indigenous Peoples (2007) included provisions for a right to autonomy. Accordingly, Article 3 of the declaration repeats the wording of common Article 1 of the two human rights covenants of 1966 and reads that:

Indigenous Peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4 of the Declaration, which should be read in conjunction with Article 3, states that:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

As with many other international law documents in this area the declaration considers autonomy to be an integral part of the right to self-determination – usually implying its internal form – the exercise of the right to self-government within the boundaries of the respective sovereign state in question. There are of course numerous ongoing debates in respect of the right of autonomy or self-government for indigenous peoples in international law. Moreover, the nature of the claims of indigenous peoples made under international law vary (e.g., historic sovereignty claims; non-discrimination claims; minority claims; self-determination claims, special claims as indigenous peoples – e.g., cultural claims, etc). Importantly, claims for self-government constitute just one aspect of the broad array of issues and international law norms that can be raised under the umbrella of the right to self-determination for indigenous peoples. Those norms may cover areas of social welfare and economic development rights, human rights, land and resource access rights or the cultural rights of indigenous peoples. Thus, the right to self-determination covers



a wide array of situations and encompasses a much broader context than merely the right to self-government by indigenous peoples.

In relation to indigenous peoples' right to autonomy and self-determination, ongoing discourse on the differences experienced in the application of this right for minorities, peoples and indigenous groups, can be summarized along the following lines:

- Indigenous peoples have a right to internal self-determination and internal autonomy as an integral part of this right;
- In some cases, indigenous peoples *as peoples*, can be the beneficiaries of external elements of self-determination (e.g., the case of Greenland); about the interpretation of those elements also see Art.19 in the Draft Nordic Saami Convention;
- Indigenous peoples have a right to self-determination without artificial division on external and internal aspects (e.g., they may be able to choose between internal self-governance and independence);
- Usually, indigenous autonomy is interpreted by scholars as a group right which allows an indigenous collectivity to exercise control over a certain territory; however, in some cases, urban indigenous peoples may be eligible for the exercise of non-territorial and personal autonomy;
- In some cases, indigenous peoples may use the minority rights regime to advance their claims to autonomy (Loukacheva 2005).

It should be emphasized, however, that in the specific case of indigenous peoples, in contrast to that of minorities, self-determination is not interpreted as secession. Indigenous peoples see self-determination as a new partnership between the former colonial power and the indigenous collectivity, which is then assumed to exercise a variety of political and legal options. Such options potentially include various models of indigenous self-governance, self-administration, public governance or other forms of empowerment over the lands and lives of the people concerned. These various options can however be best evaluated on a case by case basis. There is then no need for a special form or type of indigenous autonomy as long as existing models of autonomous arrangements are feasible for indigenous peoples' forms of self-governance and accommodate their special needs and concerns.

Legal and political theory has developed two major approaches to the classification of autonomous arrangements – territorial and non-territorial. Territorial autonomy may take a political, organic, ethnically-based, administrative or cultural form. Non-territorial forms of autonomy may be cultural, personal, or corporate. The choice between territorial and non-territorial principles of autonomous organizations will depend on the size, geographical location, concentration, cultural or ethnic distinctiveness, linguistic integrity, territorial delineation and the will for autonomy of the

group in question. Analyzing the linkages between the principles of territoriality and ethnicity various classifications for such autonomous arrangements have already been proposed. In practise, however, hybrid forms exist which may incorporate both principles. Namely, where ethnicity does not play major role because of the *de facto* majority of the indigenous group, or where ethnicity matters but is not linked to the indigenous peoples' domicile within a designated territory. Thus, scholars identify forms of indigenous peoples' autonomy as regional self-government, ethno-political self-government, land claims, regional autonomies within the state, and autonomous arrangements based on contemporary indigenous political institutions (e.g., Saami parliaments), etc.

It is debatable whether land claims can be seen as a form of indigenous autonomy as they often exclude matters of indigenous self-governance and mainly target economic development or land and resource development and ownership rights. All other types of autonomous arrangements for indigenous peoples can also be said to be common in respect of minorities. Forms of territorial and non-territorial autonomy may vary from case to case. Compared to minorities' claims for autonomy, for indigenous peoples, land rights, usage and ownership of renewable and non-renewable resources and a spiritual connection to their lands, usually have vital significance in their quest for self-government. This special connection is explained not just by the existence of a spiritual bond with the land and with wildlife but also by the need to preserve traditional livelihoods, subsistence activities, indigenous knowledge and peoples' oral history and memory, distinct indigenous cultures and customary rituals and practises. Furthermore, indigenous peoples' autonomy may differ from minority autonomy on the basis of historical grounds and the view of self-government as being an inherent right (e.g., indigenous peoples governed their lands prior to colonization and settlement by outsiders).

For example, concerning the right to autonomy, in some Arctic jurisdictions (e.g., in Canada), it has been suggested by the representatives of indigenous peoples and further affirmed by the Federal government that indigenous peoples have the inherent right to self-government. For instance, the national Inuit organization – Inuit Tapirisat of Canada – has elaborated that the right to self-government includes the following elements:

- it is a pre-existing and fundamental human right and therefore not subject to extinguishment (inherent);
- the inherent right of self-government exists independent of any self-government agreement (non-contingent);
- governments established by aboriginal peoples in exercise of the inherent right constitute an order of government with constitutional status (aboriginal peoples' governments are one of the three orders of

government in Canada that are sovereign within their spheres of jurisdiction);

- the consent of aboriginal peoples is necessary in defining the relationship between aboriginal peoples' governments and federal and provincial governments (consent requirement);
- the inherent right of self-government does not prescribe any particular form of government and therefore encompasses ethnic and non-ethnic forms of government (Inuit are not restricted to traditional forms of government or from joining with others in the exercise of their inherent right of self-government) (Rosemary Kuptana).<sup>5</sup>

These elements point then to the need for the development of a partnership or indeed a special relationship between indigenous collectivities and the various levels of government, especially, with the Federal government. Within the Arctic states the way in which the right to autonomy comes to be expressed in each jurisdiction has been impacted by the nature of the relationship between indigenous forms of social organization and authority and opposing political and legal regimes introduced by the former colonial powers or their modern inheritors.

Differences in perceptions on issues such as governance, legal settings and the livelihoods of indigenous and other groups, require that approaches be undertaken to the development of the issue of indigenous peoples' autonomy which pay due attention to indigenous knowledge, customary law, culture and values. Quite often Western or non-indigenous patterns of governance pre-determine the legal and political frameworks for indigenous self-governance. In most Arctic jurisdictions the reconciliation of indigenous forms of governance with imposed Western patterns is a work in progress. There is also the ongoing challenge of bridging the gap between Southern and Northern visions of governance. Thus, by using mainly Canadian examples, the next section explores some of the major issues faced by Northerners and their governmental structures.

## 7.6 Challenges of Northern Governance

At the national level, the struggle for greater political and legal autonomy in the North led to different approaches to governance by the Arctic states and the introduction by some of various models of governance for sub-national Northern entities. The differences in these models and approaches are rooted in divergent historic relationships, paths of colonization and of the re-conciliation of former colonizers with formerly-colonized (e.g., indigenous peoples or original settlers); the existence of differing stages of constitutional and political development within the

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<sup>5</sup> Rosemary Kuptana, *The Inherent right to self-government: Its nature and source*, (1992), quoted from N. Loukacheva, 2007:36–37.

respective states and their legal systems; and varying socio-economic and other pre-conditions required for the introduction of autonomy.

Models of sub-national governance arrangements in the Arctic jurisdictions are now quite numerous. For example, the so-called form of public government obtained special state support in Canada's Arctic. Thus, all three Canadian territories have these models in place (for details, see Abele et al, 2009). The practices and institutional structures of public government have undoubtedly been altered through the negotiation of indigenous self-government and land claim agreements which have produced various governance solutions across the Canadian Arctic. The territories of Yukon, Nunavut and N.W.T. and several provinces with Arctic areas (e.g., Northern Quebec or the province of Newfoundland and Labrador), have comprehensive land claims agreements that are concluded by indigenous peoples with the Federal government of Canada and with the respective provincial/territorial governments.

In some cases, (e.g., the Inuvialuit, Sahtu and Gwich'in in the N.W.T.), are negotiating indigenous self-government agreements in addition to existing land claims deals. In other cases, self-government provisions are already included in land claims agreements (e.g., the Yukon land claims and the Tlicho agreement in the N.W.T.). Moreover, in some areas where indigenous peoples are the majority of the population (e.g., Nunavut in Canada's Eastern and Central Arctic), structures of public governance, despite being public, because of strong indigenous representation are seen by some authorities as *de facto* indigenous governance. The institutions of public government work closely with the powerful Inuit land claims organization – *Nunavut Tunngavik Inc.*, which represents Inuit beneficiaries – some 85% of Nunavut's population. Regardless of the system of public government and the land claims agreement in place however, the Inuit of Nunavut have also reserved their right to negotiate a separate self-government agreement in the future, if for example, demographic change does not favour the Inuit.

An extensive and growing body of scholarship on the model variations of public government, indigenous self-government and land claim arrangements has sought to further elaborate on the often quite different cases emerging from Northern Canada, Alaska, Greenland, the Russian North, and the Saami areas in Norway, Finland and Sweden. This section is limited, however, to the outlining of some general matters and the challenges that can be seen to be at the heart of governance discourse in Northern Canada. These challenges are seen as both relevant for and similar to the experiences emerging from other parts of the Arctic. However, it is not possible to generalize on these issues across the circumpolar region. As such, a detailed analysis of each case study would be required to evaluate each particular example.

Numerous reports, documents and commentators on the situation in the Canadian Arctic point to the existence of several interconnected mat-

ters which are often seen to be at the core of the discourse on governance in the North. The pillars of governance debate centres on a number of questions but can be loosely summarized into the following major, though non-exclusive, categories.

#### *7.6.1 Institutional capacity and political development in the North:*

Matters of efficacy, quality, innovation, legitimacy, workability, evolution and the facilitation of the existing and emerging governance structures and challenges associated with the implementation of modern political and legal arrangements, transparency and the liability of governmental institutions; interaction, cooperation and partnership among different levels of governmental authority, including indigenous governments, land claims bodies and organizations. The scope of political involvement, influence, decision-making powers and the efficacy of democratic political participation of Northerners in different levels of local, national and trans-national politics.

#### *7.6.2 Northern economic development, fiscal autonomy and sustainability*

Questions relating to the patterns of Northern economies, the infrastructure and fiscal arrangements that define the nature of governmental economic policies and financial mechanisms, the challenges of sustainability and resource development, relationships and jurisdictional capabilities of Northerners, indigenous stakeholders and federal, provincial or territorial authorities on matters of and prospects for sustainable fiscal, resource and economic development.

#### *7.6.3 Human capacity, community wellness and social stability*

This area covers matters such as the addressing of social ills (e.g., addictions, abuse, poor housing and health conditions, high rates of suicide, unemployment, tuberculosis and sexually-transmitted diseases, poverty and welfare dependency) that are present in many Northern communities. Issues of education, the availability and adequacy of educational facilities (e.g., high rates of school drop-outs) closely linked to the needs of human capacity building and the raising of the new generation of Northerners capable of competently filling the workforce shortages in both the public and private sectors seen across the North. It also implies the raising of a new cohort of Northern leaders among indigenous and non-indigenous Northerners who are able to embrace local values, are familiar with traditional knowledge and who can best represent the interests of their communities at national, regional and international *fora*.

#### *7.6.4 Jurisdictional capability and the legal scope of governance and land-claims arrangements in the North*

The legal frameworks currently in place in the North defining various governance, land and resource management structures and regulating all areas of development, social, economic, human, political capital and environmental issues are often limited. Northerners and others as such often question the adequacy, efficiency and legitimacy of such regulations and/or legislative and legal arrangements as often they do not fully take into consideration the specifics of Northern conditions. Indeed, they are usually limited to the principles of national legal systems and constitutional development. Existing constitutional principles and the policies of national governments regarding the North often pre-determine the scope of jurisdictional competence of Northern governments or land-claims bodies. On occasion this presents limitations to the realization and implementation of such arrangements and creates further dependence and reliance on the fiscal and other support mechanisms of central government.

All these areas are interconnected and many external and internal factors influence them. For example, globalization and environmental change, including global warming and climate change impact governance strategies, economic activities and the fiscal autonomy of Northerners. They also question the adaptive and mitigation capacities of Northern communities and the resilience of their governmental institutions in the face of such challenges as well as their ability to seize the opportunities that are presented by such changes.

The nature of intergovernmental cooperation and the success of the partnership among the various stakeholders involved in governance issues (e.g., federal/territorial/provincial/aboriginal governments and land claims organizations) can incrementally aid the further development of current and future systems in respect of public and indigenous governments. For example, due to their territorial legal status, the jurisdictional capacities of Yukon, the N.W.T. and Nunavut, particularly in respect of the ownership of natural resources and the management on Crown lands and offshore areas, are limited. In the hope of increasing economic sustainability and fiscal independence from federal transfers and grants, all three territories initiated resource devolution negotiations with Ottawa. As a result, in 2001 the territorial government of Yukon signed its devolution agreement with the government of Canada which in 2003 led to the transfer of the management of and control over Crown lands and natural resources to the territory; Nunavut and N.W.T. are in the process of negotiating their own natural resource devolution agreements. The negotiation of land claims agreements and self-governance agreements with Northern indigenous peoples in Canada is thus another example of ongoing constitutional development and of a new partnership in this area.

In all cases, the matter of fiscal autonomy and liability is the core challenge. Despite the existing legal and political frameworks in place Northern

governments and indigenous and land claims organizations continue to be challenged by the problems surrounding the non-implementation of land claims agreements or governance arrangements due to the shortage of financial resources, budgetary deficits and a high level of dependency on external transfers and subsidies, mainly from the federal government.

Modern treaties (or comprehensive land claims agreements) are not adhered to for many reasons that are well-discussed in the growing literature on this subject. For example, in some cases, the narrow scope of the land claim and its inadequate focus on economic rights and development explain the non-implementation of the agreement. There are also concerns about non-efficacy, non-commitment and the reluctance of federal government institutions to implement and monitor these treaties. In addition, questions are often also raised about the capability of indigenous governments and land claim organizations to fulfil their duties and responsibilities in respect of land claims. Moreover, the argument that land claims are living treaties and are not concluded with the goal of finality suggests that the federal government should not treat the signing of these agreements as final. The implementation of these treaties in practice, and possible adaptation to changing realities not foreseen or addressed in land claims, may require further modifications and involvement on behalf of all parties.

Fiscal flexibility and self-reliance remain key to attaining sustainable development and to the legitimacy of governance arrangements in the North more generally. The major legal challenge is how to reconcile the idea of autonomous jurisdiction and self-sustainability with financial dependency on the national authorities. The challenge is that quite often existing legal and governance arrangements suggest that Northerners, indigenous self-governing or land claims organizations take control over their own affairs but in *de facto* terms the economic or fiscal settings often do not allow for self-sufficient development and administration of the suggested areas of jurisdiction. One objective of such land claims and self-governance arrangements is to increase economic sustainability and the responsibility and ability of such actors to manage their affairs within the scope of their jurisdiction.

In practice, this is often impossible to implement because of the lack of appropriate economic, human, or financial infrastructure in place and the particularities of Northern geography, climate and other specific conditions – e.g., the high cost of doing business and delivering services or the expensive nature of all means of communication in the Arctic. For example, in all three Canadian Northern territories the government plays a major role in their economic and political development. The government sector is a major employer and has a decisive role in the development of economic projects and initiatives. Government expenditures and services moreover form an indispensable part of territorial economies.

Furthermore, existing arrangements on the taxation of economic activities and Territorial Formula Financing (TFF) do not provide for incentives or sufficient capacity to generate own-source revenues. Public revenues from private sector taxation and businesses are insignificant. High expectations are often raised in respect of the potential for revenues from royalties and the development and exploitation of non-renewable resources though in reality, replacing transfer dependency with resource-revenue dependency does not solve the matter of sustainability in the long-run. As such, resource devolution agreements are not the panacea for financial autonomy they are often perceived to be.

At the same time, any prospects for sustainable economic development and the implementation of governance arrangements and modern treaties are not feasible without prosperous, healthy and vibrant communities. Thus, the building of social wellness, human capital and capacity remain at the top of the political agenda for Northerners, their governments and indigenous organizations.

## 7.7 Conclusion

We are dealing here with multi-level governance in the Arctic and multi-lateral diplomacy and cooperation. Quite often, the implementation of various arrangements in the Arctic, especially those that are related to land and resource-management, require strong engagement and compliance on behalf of local players, e.g. sub-national governments, indigenous organizations, hunters' and municipal councils, etc. Their participation is often important as a means of sustaining traditional indigenous cultures. Furthermore, without the inclusion of Northerners and their governments in decision-making processes at the national and international levels that affect their homelands, the legitimacy of any *ad hoc* actions or solutions that are not rooted in the knowledge of local circumstances can often be hampered by their non-compliance and non-enforcement by local actors. Importantly, sub-national or sub-regional initiatives that deal with various aspects of governance constitute parts of the broader system of Arctic governance. Thus, their role is vital not just within each Arctic state but also within the circumpolar region. Because of growing global and regional interconnectedness and the importance of developments in the Arctic for external actors, the activities of Northerners, their governments and organizations are crucial for the further positive evolution of Arctic governance.

Northerners should have greater input and the decisive say on the various agendas and strategies that concern the Arctic and in the work of various multi-layered structures of governance in the North. One of the enduring challenges for Arctic governance is undoubtedly however the need to strike a balance between Northerners'/Arctic indigenous groups'



aspirations for greater partnership and voice in the re-distribution of power in high-level regional, international, and national forums, and the perceptions and jurisdiction of the respective states, Southerners and the other regional and global actors involved on how Arctic issues should unfold. As outlined above, the multiplicity of issues that underpin the implementation and the realization of governance arrangements at the sub-national level indicate that Northerners are primarily dealing with the most immediate local matters that are crucial for their livelihood. At the same time, because of global environmental changes, the impacts of increasing shipping, tourism, military activities and resource development, new demands are emerging on Northern governments to meet these challenges and have a stronger voice in national and international arenas when their homelands are concerned.

The growing complexity of governance arrangements/models at different levels (sub-national, national, regional or global) raises the question of their integration with each other and the coordination of the interests of the many stakeholders involved in issues of Arctic governance. This will remain a challenge for Arctic governance for many years to come. At each level one can observe existing, evolving or emerging structures and institutions of Arctic governance that are represented by actors with often diverse interests and agendas. In the meantime, we see increasing cooperation and interconnectedness among these actors on issues of common concern. Thus, despite differences in governance models, interests, and in the legal, economic or political realities of the Arctic, governance starts with peoples' ability to make a difference through participation in the power-sharing and decision-making processes that affect their lands and lives.

## Further reading:

- Frances Abele et al eds. *The Art of the State IV Northern Exposure: Peoples, Powers and Prospects in Canada's North*. The Institute for Research and Public Policy (IRPP), Montreal, 2009.
- Natalia Loukacheva, *The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut*, Toronto: University of Toronto Press, 2007.
- Natalia Loukacheva, *On Autonomy and Law*, Institute on Globalization and the Human Condition, Working Paper GHC 05/3, June 2005, pp.1–31. [www.globalautonomy.ca](http://www.globalautonomy.ca).
- Olav Shram Stokke and G. Hønneland eds. *International Cooperation and Arctic Governance: Regime Effectiveness and Northern Region Building*. London: Routledge, 2007.
- Oran R. Young, *Arctic Governance: Preparing for the Next Phase*. Tromsø, Norway. Paper presented at the Arctic Parliamentary Conference, Tromsø 11–13 August, 2002.
- For a compendium on Arctic governance research see: [www.arcticgovernance.org](http://www.arcticgovernance.org).

## Questions:

1. What is Arctic governance and what are the inter-relations between its different levels?
2. What are the main challenges for the realization and the implementation of autonomous/governance arrangements in the Circumpolar North?
3. What are the emerging issues in Arctic Governance?

# 8. Human Rights and Indigenous Rights

*Gudmundur Alfredsson*

## 8.1 Introduction

Indigenous persons and indigenous peoples are, of course, entitled to all human rights, on an equal footing with everyone else, and they have equal recourse to all of the international human rights monitoring institutions and procedures. In addition, the rights of indigenous peoples are specifically addressed in separate international human rights instruments and by separate international monitoring bodies. International human rights standards relevant to the Arctic are to be found in a series of treaties that have been ratified by the respective States, in declarations adopted by vote in intergovernmental organisations, and in case-law stemming from monitoring bodies set up by these same organisations. The key instruments have been adopted under the auspices of the United Nations (UN), International Labour Organisation (ILO), the Council of Europe (CoE), the Organization for Security and Co-Operation in Europe (OSCE), and the Organization of American States (OAS). The two organisations that have paid most attention to the rights and needs of indigenous peoples, in terms of both standard-setting and monitoring, are the UN and the ILO. The human rights performance of States is subject to monitoring under a variety of procedures. Some are treaty-based, involving examination of State reports and quasi-judicial complaints procedures while others are based on the UN Charter and declarations rather than treaty commitments, involving special investigative procedures and the universal periodic review of the performance of all States under the UN Human Rights Council. As treaties are binding upon their ratification by States conventions are the preferred instruments and, for the same reason, whenever possible, decisions from treaty bodies are preferable to recommendations from the extra-conventional procedures. The special measures and special rights put in place for indigenous peoples are intended to overcome discrimination against these groups, and individuals belonging to them and to place them on an equal footing with others. These measures seek to protect, inter alia, cultural ways of life like traditional economic activities, the property and management rights relating to land and natural resources, environmental conditions, and self-governance. Inter-

national human rights law can make a positive difference. As public awareness, official knowledge of human rights and multi-layered monitoring by several intergovernmental and non-governmental organisations (NGOs) slowly improves, so does State performance. The Arctic countries should of course be subject to this type of scrutiny; as democracies they ought to be sensitive to the commentary of these organisations. Obviously, this chapter does not provide a comprehensive picture of all the standards and monitoring instances, but an attempt is made, with emphasis on the United Nations, to raise issues and provide sources of particular relevance to the Arctic.

## 8.2 Human Rights

### *8.2.1 Human Rights as Law*

The promotion and protection of human rights is one of the main purposes of most global and regional organisations. The legal mandates to this effect are clear, see for example Article 1 of the UN Charter, and the moral and political mandates are equally clear. Practically all religions, philosophical schools and ideologies refer to justice, fairness and benefits for the people, even if different labels are attached to their teachings. The mandates also rest on popular support; it is the experience of this author that, given the necessary information and a choice, everyone accepts these rights and freedoms for themselves.

The human rights instruments come under the rules of public international law. There are two main types of instrument: treaties and declarations. Treaty-based standards are binding under international law upon the States that have ratified them. Treaties are also called conventions, charters, covenants, protocols, agreements, etc., but the test is whether the texts concerned have been formally accepted by States (acts of ratification or accession, often preceded by signature), thus committing them to comply with their contents. Some of the human rights treaties enjoy wide acceptance. For complaints procedures under the treaties, when available, a check will have to be made as to whether the country in question had accepted their use.

For the interpretation of human rights treaties and the meaning of signatures, ratifications, accessions, reservations and so on reference should be made to the Vienna Convention on the Law of Treaties (or applicable customary law). As to interpretation, the main tools will be the text of the treaty, its drafting history, the intent of the parties and subsequent developments. All of these considerations play a role in human rights, not least subsequent developments because of case-law and the decisions of the treaty monitoring bodies.

While reservations to human rights treaties are often controversial they are tolerated because it is better to see a State ratify a treaty with exceptions to certain clauses rather than not accept it at all. Still, there are limitations as to the extent of reservations allowed; they should not go against the object and purpose of the treaty concerned. In other instances, the treaties themselves exclude reservations in whole or in part.

In addition to treaties, in line with article 38 of the Statute of the International Court of Justice (ICJ), human rights standards can be based on international custom and general principles, but these sources are infrequently invoked in human rights practice as it is difficult to determine their existence with certainty, except when courts have spoken out. Standards based on international custom and general principles, if established, carry the advantage that they are binding on all States.

Standards set forth in declarations, codes of conduct, standard minimum rules, basic principles, model rules, etc., are not subject to signature or ratification; States adopt them by vote in international fora (such as the General Assembly, the International Labour Conference, etc.). Much of the time, the adoption is by consensus following a lengthy drafting process. Technically they constitute recommendations to Member States. They are sometimes referred to as “soft” law rather than the hard law of treaties and custom.

The consensus method of adoption, which is also used in regard to treaties, helps explain the phrase “minimum standards” as the negotiation process often leads to the adoption of the lowest common denominators to which all States can agree. States may of course follow higher standards in national law; if on the other hand, national law and practices fall below the international minimum standards, the States concerned may become the subject of criticism by international monitoring bodies.

Declaration texts, in whole or in part, may emerge as international customary law. This argument is frequently made with regard to equal rights, non-discrimination in law and in fact, and the prohibition of genocide, slavery and torture. This argument is useful when dealing with countries which have not accepted the relevant treaties and whose general behaviour and particular performance in respect of the issue in hand may leave much to be desired.

### 8.2.2 *The Instruments*

In addition to establishing a human rights mandate the UN Charter also sets forth substantive rules. The preamble refers to the equal rights of men and women, the dignity and worth of the human person, and the equality of nations large and small. Operative articles prescribe non-distinction in the enjoyment of all human rights on the grounds of race, sex, language or religion (articles 1 and 55) as well as self-determination and decolonisation (article 1 and chapters XI-XIII).

Six important instruments constitute the International Bill of Human Rights. They are the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and its two optional protocols concerning individual complaints and the abolition of the death penalty, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) with one protocol on the submission of complaints.

As a non-treaty adopted by vote in the General Assembly in 1948 the question has arisen as to whether most or even all of the UDHR articles constitute international customary law. The Declaration has repeatedly been quoted in other instruments, national legislation and judgements of the ICJ and national courts. The UDHR has also seen active use for monitoring efforts under international resolution-based procedures which in itself is a good indication of the legal expectations attached to the text. On the other hand, UN membership was still very limited in 1948, the UDHR was not adopted by consensus, and its provisions are still being violated by many States. The question remains then whether State practice is consistent enough to amount to consent leading to the creation of custom.

There are, in addition, hundreds of other global and regional human rights instruments, both treaties and declarations in existence with equal rights and non-discrimination, the administration of justice, and labour standards among the most common topics.

### *8.2.3 The Contents*

Human rights instruments cover a very broad scope. This wide range may come as a surprise to many, but human rights have implications for most aspects of our daily lives, including the equal rights of men and women, the prohibition of racial, ethnic and religious discrimination, food, health, the home, shelter, child labour, education, culture, a fair trial, the treatment of prisoners and detainees, capital punishment, the freedoms of expression and association, academic freedom, political and economic participation, democracy and elections, trade unions and strikes, and the functions of civil society organisations and NGOs.

Furthermore, human rights in general and indigenous rights in particular may extend to climate change, pollution and other environment issues, whaling, other wildlife protection issues, property rights and land ownership, as well as the demarcation of indigenous lands, security considerations, and so on. All of these issues and many more have human rights aspects although they are not always so treated by the authorities and in the media.

References are sometimes made in the academic literature to the first (civil and political rights), second (economic, social and cultural rights) and third (solidarity rights relating to development, environment, peace,

etc.) generations of human rights. These references may correctly reflect the chronology of adoption, with the first generation drawing on the longest history. Official UN policy, however, holds all human rights to be of equal value, indivisible, interrelated and interdependent. It is now politically correct, so to say, to refer in alphabetical order to civil, cultural, economic, political, social and solidarity rights.

Perhaps because of the chronological differences civil and political rights are formulated in a strong and straightforward language style. They are absolute, immediate and justiciable. You shall enjoy or you are entitled to this or that right. Limitations are specifically enumerated, like public order, the welfare of society and the rights of others. There should be no delay in implementation with reference to available resources. And the detailed language lends itself to adjudication. Application should be objective and impartial, and independent courts should resolve conflicts.

Economic, social and cultural rights are formulated in a general and often imprecise way, and States are obliged to realize these rights step by step in a progressive manner depending on available resources, as flows from article 2 of the ICESCR. At the same time, many economic, social and cultural rights can already be seen as justiciable. This is also true, for example, for equal enjoyment, non-discrimination, many labour standards, the right to cultural identity, and the right to primary school education. It is likely also that the Committee on Economic, Social and Cultural Rights in handling eventual complaints under a new protocol to the ICESCR will further this type of development.

Solidarity rights, or the so-called third generation rights, are still evolving as reflected in policy-oriented and controversial texts, which are often less than clear for the purposes of law, certainly not justiciable at the present time and not yet subjected to international monitoring. A 1974 Declaration on the Right to Peace and a 1986 Declaration on the Right to Development also fall into this category. That the rights supposedly rest with peoples rather than individuals and/or groups however remains a problem. If a Government is to represent the people, as some supporters want, then Governments will sit on both sides of the table as guarantors and beneficiaries.

Several instruments cut across the so-called generation divide, as for example the conventions on the rights of the child, migrant workers and persons with disabilities. The freedom of association is addressed in both Covenants. Equality before the law in article 26 of the ICCPR has by case-law of the Human Rights Committee been extended to economic, social and cultural rights legislation. The right to property is looked upon by some as a civil right and by others as an economic or social right; to still others it may be a political phenomenon. All points of view may be right depending on the context.

#### *8.2.4 Individual and Group Rights*

The emphasis in most of these human rights instruments is on individual rights. The individual holds the rights and should have access to national implementation and international monitoring. Most human rights texts demonstrate this individualistic approach which borders on ideology for some Governments. All of that is all fine and well, and much of the time this approach corresponds to actual needs, but it is not the whole story. Historical evidence and current news demonstrate that equal enjoyment and non-discrimination for minority and indigenous groups will not be achieved solely means of individual rights.

In addition, several international human rights instruments provide for group rights or special measures to the benefit of groups. These include the International Convention on the Elimination of All Forms of Racial Discrimination (ICEAFRD), the UNESCO Declaration on Race and Racial Prejudice and ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. In these instances, relating for example to physical existence, identity, culture, education and land rights, it is groups such as minorities and indigenous peoples that are entitled to protection in line with their actual needs and circumstances.

Other instruments, such as article 27 of the ICCPR which addresses itself to persons belonging to a group and their enjoyment of rights in community with other members of the group, also contain elements of group rights. As to monitoring, article 14 of ICEAFRD and special procedures foresee complaints from not only individuals but also from groups. International fora and the conduct of dialogues between groups and Governments, as in the context of minorities and indigenous peoples, also recognise the need for, and the inevitability of, group representation.

#### *8.2.5 Equal Rights, Non-Discrimination and Special Measures*

The equal rights rule applies across the board to all the categories of rights and freedoms. It means equal opportunities for enjoying the rights and equal treatment by the authorities relating to that enjoyment in law and in fact. Article 1 of the UDHR reads that “all human beings are born free and equal in dignity and rights.” Article 2 of UDHR, articles 2 of both International Covenants and many other international instruments prohibit discrimination based on several grounds. Article 1 of the UN Charter on non-distinction in the enjoyment of all human rights on the grounds of race, sex, language or religion has already been quoted. These rules underline the UN emphasis on, for example, the elimination of discrimination against women, the eradication of racism and racial discrimination and respect for the rights of minorities and indigenous peoples.

Women and men are entitled to the equal enjoyment of all human rights. Discrimination based on sex and gender is prohibited. Special measures are allowed to correct discriminatory practices. Women are in a



unique position amongst disadvantaged members of society inasmuch as they make up half of the electorate. Women should be encouraged to use existing procedures applicable to equal enjoyment and non-discrimination clauses, including optional protocols to the ICCPR and to the Convention on the Elimination of All Forms of Discrimination against Women.

Equal enjoyment of human rights and freedoms for all and the prohibition of discrimination based on race, colour, descent or national or ethnic origin are fundamental rules of international human rights law. The ICEAFRD has been ratified by over 160 States. Only a handful of States however has authorized the treaty monitoring body CERD to receive and consider complaints from individuals and groups concerning possible violations. Better knowledge of this and other procedures would undoubtedly lead to the more frequent submission of complaints. States which have not yet done so should be encouraged, or actively embarrassed, to accept the relevant procedures.

The rules on equal enjoyment, non-distinction, special measures, dignity and tolerance apply beyond race and sex to all other individuals and groups facing problems of discrimination. Assistance and protection must thus focus on disabled persons, HIV-infected persons and other vulnerable persons and groups in order to empower them in the improvement and conduct of their own lives on equal footing with everyone else.

The elimination of racial discrimination has received particular attention in international standard-setting with discrimination grounded in race clearly prohibited. The leading instrument is the ICEAFRD. Another significant text is the UNESCO Declaration on Race and Racial Prejudice which in article 1 states that “(A)ll individuals and groups have the right to be different, to consider themselves as different and to be regarded as such.”

#### *8.2.6 Minority Rights*

Persons belonging to minorities and the minority groups are of course entitled to equal enjoyment and non-discrimination, as described above. Among the relevant instruments are the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Linguistic and Religious Minorities, the ICPR (in particular article 27), the ICESCR, the ICEAFRD (race is defined in article 1 to encompass national and ethnic origins) and the UNESCO Convention against Discrimination in Education.

These instruments allow for special measures (also called preferential treatment, positive discrimination or affirmative action) to be put in place for the benefit of victims of discriminatory patterns. Such provisions include, for example, article 2(2), of the ICEAFRD where it notes that States encountering patterns of discrimination in the economic, social, political and other fields shall take special and concrete measures to guar-

antee equal enjoyment of all human rights for both individuals and groups.

The purpose of these measures is not the creation of privileges or special status but the achievement of equal enjoyment in law and in fact. Governments have a choice in terms of the measures they adopt but the goal is clear. The measures may result in temporary setbacks for those who have benefitted from earlier discriminatory practices. The arrangements may also have to be semi-permanent, for example with respect to minority schools and land rights which are necessary for maintaining identities and cultures. It is difficult to ensure equal enjoyment of political rights for minority groups, but some degree of self-government over local affairs, guaranteed representation at the national level and access to regional and global fora are necessary (see below on self-governance).

Notwithstanding these standards, discriminatory practices and other violations of minority rights are common phenomena while the monitoring of respect for minority rights still lags behind the standard-setting. One of the few bright spots, relating to article 27 of the ICCPR is the case-law of the Human Rights Committee (see, for example, the *Kitok*, *Länsman* and *Lubicon Lake Band* cases from Sweden, Finland and Canada, respectively) and General Comment No. 23.

The rule of law must apply to minorities, including equal rights, non-discrimination and preferential treatment, just like any other human rights beneficiaries. The rights must be applied on a universal and non-selective basis. Ethnic aspirations may pose threats to the national unity and territorial integrity of States, and Governments tend to be preoccupied with this aspect. Such assumptions should be replaced with appreciation for the benefits of tolerance, pluralism and participation. Minorities should be seen as partners rather than adversaries, and they should not have to see violence as a useful tool for gaining attention or solving their problems.

Positive national experiences teach us that the recognition of and respect for minority rights are viable alternatives to oppression or neglect and that preventive measures are a lot less expensive than post-disaster solutions. A study on constructive national arrangements written by UN Special Rapporteur Asbjörn Eide led to the establishment of a Working Group on Minorities (1995–2006) for the examination of peaceful and constructive solutions to situations involving minorities, in particular with regard to the practical application of the 1992 Declaration and the conduct of dialogue between Governments and groups.

Today, a recently established minority rights forum and an Independent Expert on Minority Issues under the UN Human Rights Council may lend themselves to such dialogues, and CERD and the Advisory Committee under the CoE Framework Convention for the Protection of National Minorities have also emphasised prevention and undertaken field visits. So far this is mostly just talk; the organisations concerned do not have the necessary political support and financial resources to effectively carry out

such mandates. The only success story is the OSCE High Commissioner on National Minorities who seeks to prevent violent ethnic conflicts by bringing Governments and groups together in the search for peaceful solutions.

The whole idea of minority rights, as pursued by the international organisations, is about keeping the groups happy within States. Together, international law and minority rights place an emphasis on national unity and territorial integrity on the one hand and the promotion and protection of minority existence and identities on the other. The realisation of minority rights is intended to benefit all parties: States in terms of political and social stability and economic prosperity; the groups in terms of the preservation of their identities and the improvement of the quality of life for individual members; and the international community in terms of the maintenance of peace and stability which after all is the main reason for its organisational existence.

#### *8.2.7 Civil and Political Rights*

Civil and political rights encompass a wide range of rights and freedoms. The main instruments are the UDHR, the ICCPR and a series of other texts with more specific contents. Other important sources include general comments and the case-law of the Human Rights Committee, other treaty bodies and special procedures.

Civil and political rights cover the right to life, the prohibition of genocide, the liberty and security of the person, the prohibition of torture and other cruel and inhumane treatment or punishment, fair trial, other criminal justice aspects, the freedoms of expression (extends to political speech, the media and the internet), assembly (including political meetings) and association (extends to political parties), elections, and access to public service.

A democratic State is about the right of citizens to vote and run for office in elections. The UDHR and the ICCPR require periodic and genuine elections with universal and equal suffrage, but elections are not enough. Democracy is a process, and respect for human rights is a continuing function. In addition to the freedoms of opinion, speech, assembly and association, equality of all persons before the law and before the courts, the separation of powers, the independence and impartiality of the judiciary, and free and equal participation in political, economic and social life are likewise necessary in a democracy. General education, human rights education and civil society organisations serve a crucial role in shaping, manifesting and asserting the will of the people. Furthermore, there are close links between human rights and good governance, accountability, transparency and non-corruption.

Majority rule is not necessarily friendly to minorities, not least to vulnerable groups with insufficient voting strength to make a difference in

elections. Respect for diverse identities and cultures requires affirmative legislation; a decision-making process is truly democratic when all members of society have not only the formal right but also the factual possibility of effective influence. The test is about actual influence, power-sharing and delegation of power.

#### *8.2.8 Economic, Social and Cultural Rights*

The rules concerning equal enjoyment and non-discrimination apply across the board to all economic, social and cultural rights. Extreme poverty, social exclusion, a lack of education and corruption obviously affect the enjoyment of all human rights. Minorities and indigenous peoples need respect for economic, social and cultural rights no less than for civil and political rights. The world community has accepted that all human rights are indivisible and interdependent, as observed above. Economic, social and cultural rights should not however continue in second place simply because the Soviet Union and her allies expressed a preference for them in order to avoid compliance with civil and political rights.

Economic, social and cultural rights cover, among other things, the rights to an adequate standard of living, family, housing, food, water, health, culture, education, work and social security. Article 2 of the ICESCR spells out the step-by-step or progressive realisation of these rights. Some economic, social and cultural rights may be costly, but others like equal rights can be seen as being “free of charge”; it is not about creating a bigger cake but rather how the cake is divided. Moreover, the rich countries of the north should not be able to hide behind the step-by-step approach for the realisation of rights that require financial expenditures.

The enforcement methods for economic, social and cultural rights should be based on the rule of law. Several treaty – and Charter-based monitoring procedures are seized with economic, social and cultural rights, and a new Optional Protocol to the ICESCR will allow for the right of petition. The same approach should obviously prevail at the national level.

#### *8.2.9 Solidarity Rights*

Lively debates continue about a number of questions relating to the further evolution of solidarity rights, namely, the right to development and the right to peace. As far as the Arctic is concerned perhaps a proposed right to a clean environment could be of interest here. Many human rights, including the rights to life, food, water and health and the freedoms of information and expression already clearly affect the safeguarding of the environment. With the mainstreaming of human rights, now as official UN policy, it should be easier to enter human rights considera-

tions into the elaboration of international standards relating to the environment and climate change.

### 8.3 Indigenous Rights

The rights of indigenous peoples have gained much in recognition and content over the last twenty five years, but even when States endorse the applicable instruments, the results may be less impressive than expected. National implementation comes about slowly while international monitoring of State compliance with the instruments is still fragmented, relatively weak and generally ineffective.

#### *8.3.1 Contents and Monitoring*

Two indigenous-specific instruments have been adopted: the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169, from 1989) and the 2007 UN Declaration on the Rights of Indigenous Peoples. In addition, indigenous peoples, most of whom find themselves in minority situations, are able to benefit from minority rights standards. ILO Convention No. 169 now has 20 ratifications. Compared with many other human rights treaties, however, this is a very low number. In the Arctic region only Denmark and Norway have ratified it; after Denmark's recognition of the Greenlanders as "a people" with the right to independence as an option, however, that ratification has much reduced relevance. As to the UN Declaration on the Rights of Indigenous Peoples, when the draft was before the UN Human Rights Council in 2006, Canada and the Russian Federation cast the two negative votes. After a delay and some watering down of the self-determination language, the General Assembly adopted the Declaration by resolution 61/295 of 13 September 2007. Canada and the United States voted against while the Russian Federation abstained. These responses, as well as the explanations in respect of the votes of some of the Arctic States, to the new declaration can thus be viewed as rather disappointing. ILO Convention No. 169 and the UN Declaration are of obvious relevance to the Arctic States and their indigenous peoples. Their provisions deal with the rights of indigenous peoples to decide their own priorities affecting, inter alia, dignity, ways of life, indigenous property rights to traditionally occupied land and participatory rights concerning the exploration and exploitation of natural resources. Furthermore, the Human Rights Committee, in case-law under article 27 of the ICCPR, as noted previously, has come to similar conclusions concerning the right to traditional economic activities and land rights when these are essential to maintaining indigenous cultures.

A Special Rapporteur on the Rights of Indigenous Peoples, currently Professor Jim Anaya, serves under the UN Human Rights Council as does the Expert Mechanism on the Rights of Indigenous Peoples (2008–) that succeeded the Working Group on Indigenous Populations (1982–2006). A UN Permanent Forum for Indigenous Issues was also established in 2001 under ECOSOC. These vehicles each present significant opportunities for indigenous interventions.

## 8.4 Draft Nordic Sami Convention

Many aspects of the draft Nordic Sami convention that addresses the status and rights of the Sami in three Nordic countries (Finland, Norway and Sweden) are progressive and highly praiseworthy, not least in terms of increased roles for the Sami, the strengthening of their institutions and enhanced self-governance in matters relating to political, economic and cultural affairs, as well as for the overall idea of adopting a treaty with the indigenous peoples as consenting partners. The draft has not, however, been adopted and the debate with wide-ranging opinions expressed on both sides continues. On the one hand it is argued that the text does not go far enough; for example, article 34 of the draft convention that deals with land rights, providing for both individual and group rights, looks like it may fall below the standard set in article 14 of ILO Convention No. 169 that extends land rights to groups only so as to prevent the splitting up of indigenous lands which in turn would harm the peoples' pursuit of identity and culture. On the other hand, certain provisions in the draft convention have given rise to questions similar to those that caused the delay in the adoption of the UN Declaration on the Rights of Indigenous Peoples. These questions, primarily but not exclusively concerning self-determination, have undoubtedly played a role in blocking the adoption of the draft convention. The thrust of draft article 3 and subsequent articles is on internal self-determination, but references to international law as well as the language used in the explanatory notes seem to leave the door open to varying interpretations thus creating a measure of uncertainty. It is unfortunate in such cases when the lines between external and internal self-determination are left blurred.

## 8.5 Right of Self-Determination

Through the exercise of the right of external self-determination, "peoples" are able to determine their international juridical status. Internal self-determination concerns the autonomy of groups within State borders.

### 8.5.1 *External Self-Determination*

The right of self-determination is set forth in a series of international instruments such as the UN Charter, the two International Covenants on Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960, see also resolution 1541 (XV) of 15 December 1960), and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 25/2625 of 24 October 1970). The right of decolonization is also confirmed in the consistent practice of States and international organisations, not least in decisions and opinions by the International Court of Justice in the Namibia, Western Sahara and East Timor cases.

As a matter of law, building on these and other texts and State practice, peoples under overseas colonial rule, or occupation by force after 1945 (when such use of force was outlawed), are entitled to the right of external self-determination. This determination may result in independence, free association, or integration with another country. It may also be achieved by agreement of the parties, as in the break-up of federal States as occurred with Czechoslovakia and the Soviet Union. The choice belongs to the peoples and popular support for the outcome as expressed in referendums or otherwise is, of course, essential.

Hitherto in international law the notion of “peoples” in the context of self-determination means the populations of distinct territories, as evidenced by State practice and in provisions in the UN Charter on non-self-governing territories (rather than non-self-governing peoples) and in the title of the Declaration on the Granting of Independence to Colonial Countries and Peoples. The reference is to a territory that is overseas or geographically separate from the controlling power, irrespective of the composition of the population. It is this overseas element that has facilitated the emergence of the decolonization rule in international law, as States do not as a result have to fear changes in metropolitan borders.

### 8.5.2 *Greenland*

Current developments in Greenland constitute a striking example of what human rights arguments can accomplish. In 2004, a joint Danish-Greenlandic Self-Governance Commission was established with the mandate to make proposals for the legal status of Greenland under both international and Danish law. The Commission was made up of senior parliamentarians as well as officials and lawyers, with equal numbers from both sides. In summer 2008 it completed its work with the submission of a legislative bill and a detailed commentary thereto. In a November 2008 referendum on the self-governance package with almost 72% of the electorate participating, 75.5% of Greenlanders voted yes, while

23.5% said no. The bill was adopted by the Danish Parliament and entered into force in June 2009. Some of the new arrangements granted additional powers to the Self-Rule Government, including the judiciary, police, prison administration and enhanced capacity in the handling of foreign affairs. The Greenlandic language became the official language. Greenlanders are the owners of all natural resources on their land and in the surrounding sea areas. The Self-Rule Government will receive the income garnered from the exploitation of natural resources after, however, offsetting Danish Government subsidies. The new law importantly recognises that the Greenlanders as a people have the right to self-determination and that a decision on independence will be taken by a referendum in Greenland only, that independence will not require a change in the Danish Constitution, and that an agreement on succession matters should be concluded with Denmark. This recognition constitutes a major step away from the previous policy of the Danish Government of looking at and classifying the Greenlanders as an indigenous people within Denmark. This recognition of the Greenlanders as a people with the right to external self-determination is welcome and timely. After WWII, Denmark had listed Greenland as a non-self-governing territory under Chapter XI of the UN Charter and submitted annual reports on the situation there until the General Assembly (in resolution 849 (IX) of 22 November 1954) took note of the integration of Greenland into Denmark through an amendment to the Danish Constitution. The integration process was, however, seriously flawed and entirely one-sided. From the lack of time and options offered to the Greenlanders to the consultation of a municipal body that was not fully representative and had no mandate or authority to take constitutional decisions on behalf of the Greenlanders, the integration could not withstand human rights scrutiny. Furthermore, in Danish reports to the UN about the colonial situation in Greenland during the period 1946–54, some of the information submitted was seriously misleading if not completely inaccurate.

Reference to this broader decolonisation discourse undoubtedly helped in shaping the Greenlandic arguments for the bilateral Self-Governance Commission and played a significant role in the results of its work. In other words, a new State may be created in the Arctic in the years to come. Listening to the current debate in Greenland, that decision would seem for the time being to depend on the local economy growing to the extent that it could substitute for the Danish State's annual budget contribution to the Self-Rule Government. It will be interesting in the years ahead to follow the debate and to see what decision the Greenlandic people eventually will take.



### 8.5.3 *Internal Self-Determination*

As an overseas territory entitled to decolonisation, under public international law the situation pertaining to Greenland is viewed fundamentally differently from those of indigenous and minority groups who live within the metropolitan boundaries of States. In line with current international practice, for example, the Supreme Court of Canada has found that Quebec does not meet the threshold of colonial or other criteria pertinent to the right of external self-determination with a similar finding likely be applied to indigenous groups within Canada. On the other hand, as a matter of justice, why should indigenous peoples be denied what others enjoy when we are talking about peoples or nations with their own identities, territories, and political institutions who previously exercised internal and external control until they were reduced to dependency? Why should they not be subject to decolonisation as well as overseas peoples and countries? These “why-not” questions are especially pertinent because the concepts and principles originally employed to justify dependency status, such as *terra nullius* and discovery, have now been discredited.

In the chapter on self-governance in the 1999 Lund Recommendations on the Effective Participation of National Minorities in Public Life, drafted under the auspices of the OSCE High Commissioner on National Minorities (HCNM), the term self-determination is not employed at all. In its place the notion of self-governance is deployed and it is generally understood that this terminological choice was very much intentional. Self-government is about effective, meaningful and democratic political participation by indigenous peoples and minorities, with the groups running many of their own local affairs but without interrupting the sovereignty and territorial integrity of a State. As to the management of land and the exploration and exploitation of natural resources, the human rights instruments clearly foresee input by the indigenous peoples, as groups, requiring some sort of representative and autonomous institutions. Nevertheless, the term self-determination, with the prefix “internal” added, invites resistance by Governments which fear separatism and even violent conflict relating to secession by groups within their metropolitan borders. This reaction is demonstrated by careful drafting, as in article 1.3, of ILO Convention No. 169 which notes that the “use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.” As a qualification on the right of self-determination in its article 3, the UN Declaration on the Rights of Indigenous Peoples in article 44 specifies that it is not intended to interrupt the sovereignty and territorial integrity of Member States. Indeed, if we are talking about self-government for groups within State borders, it might be more productive in terms of obtaining Government approval, to rely on the terms of self-government or autonomy.

## 8.6 International Monitoring

The development of international human rights standards is well advanced and they have now been widely accepted by States. The priority task now is the realisation of these rights, that is to say, making sure that States follow the rules of the game. Compared to the issue of standards, however, monitoring procedures remain in their infancy. The procedures used and the corresponding institutions implementing them are of quite recent historical lineage being for the most part only 20–30 years old.

The primary responsibility for implementation of these international standards rests with States. They should do so by way of constitutional law, legislation, administrative measures, human rights education and information. If these standards are violated States are obliged to provide effective remedies. Individuals and groups should be able to claim the rights to which they are entitled and seek enforcement. To that end, independent courts, prosecutors and national human rights institutions are necessary. This responsibility extends equally to countries with civil and common law systems and to federal and unitary States.

Governments are more often than not hesitant if not even reluctant partners when it comes to implementing the standards to which they have agreed. On other occasions human rights are conveniently and often selectively used to push foreign policy interests. It is official UN policy, however, that human rights issues are a matter of international concern. States are thus not able to hide their performance behind references to sovereignty, domestic jurisdiction or internal affairs.

Global and regional organisations have set up a number of monitoring procedures and protection mechanisms to check and double-check that States live up to the human rights commitments they make. The monitoring procedures can be divided into two parts as will be illustrated below: those set up under human rights treaties and thus applicable only to ratifying States and those set up by resolutions with universal reach.

Responses from UN procedures are sometimes slow in coming for a variety of reasons, including politics, the lack of financial resources and bureaucracy. Some of the procedures described below therefore authorise the taking of urgent action, making it possible for them to rapidly respond to emergency requests.

### *8.6.1 Treaty-Based Monitoring Procedures*

The major UN human rights treaties, which require regular submission of reports by ratifying States and the corresponding treaty bodies are:

- the International Covenant on Civil and Political Rights - the Human Rights Committee (CCPR),

- the International Covenant on Economic, Social and Cultural Rights - the Committee on Economic, Social and Cultural Rights (CESCR),
- the Convention on the Elimination of All Forms of Discrimination against Women - the Committee on the Elimination of Discrimination against Women (CEDAW),
- the International Convention on the Elimination of All Forms of Racial Discrimination - the Committee on the Elimination of Racial Discrimination (CERD),
- the Convention on the Rights of the Child - the Committee on the Rights of the Child (CRC),
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - the Committee Against Torture (CAT),
- the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families - the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), and
- the Convention on the Rights of Persons with Disabilities - the Committee on the Rights of Persons with Disabilities (CRPD).

The main method available to the treaty bodies is the examination of State reports. In the reports, State Parties describe their performance which is carefully scrutinised in order to make sure that the States live up to the commitments undertaken; recommendations are issued in case of discrepancies. Governments are however likely to inflate their own performance. To counter this the monitoring bodies usually have other sources of information for example in the form of shadow reports issued by NGOs.

Several treaty bodies are empowered to receive complaints concerning alleged human rights violations provided of course that the State involved has both ratified the treaty concerned and accepted the particular procedure. Some of them can receive complaints from individuals and others from both individuals and groups. Important case-law is emerging especially with regard to the hundreds of cases decided by the Human Rights Committee under the ICCPR.

In addition to considering State reports and complaints the treaty bodies can also adopt general comments or recommendations building on their own case-law and experience gathered in the examination of State reports. Dozens of such comments have been adopted often serving to highlight or even supplement many treaty provisions.

#### *8.6.2 Charter-Based Monitoring Procedures*

Given the existence of the wide ranging measures already implemented by the UN in respect of standard-setting and monitoring activities, human

rights issues can be seen to be high on the agenda of many UN institutions, including principal organs like the General Assembly. The highest level body devoted solely to human rights issues is the Human Rights Council (which replaced the Commission on Human Rights in 2006). It is composed of 47 States with many other States, specialised agencies, IGOs and NGOs attending its sessions as observers. The meetings take place in Geneva several times each year.

The Council's agenda covers a wide range of UN human rights activities: policy-making, research and studies, standard-setting, monitoring, technical cooperation, other promotional activities, and so on. The Council appoints the special procedures' mandate holders with fact-finding and investigative mandates. An Advisory Committee of experts serves under the Council.

The Charter-based or extra-conventional procedures are applicable to all countries irrespective of treaty ratifications. The substantive basis of these procedures rests to a large extent on the Universal Declaration of Human Rights, but other texts may also be used. The procedures are administered by the UN Human Rights Council with diplomats rather than independent experts calling the shots. As a result, the outcome may be tainted by political considerations, with practitioners well advised to use the treaty-based procedures whenever they are available.

The special procedures rest on resolution mandates and concern either thematic or country-oriented issues. Among the themes are the rights of indigenous peoples, minority rights, racism, and religious intolerance, for a total of about 40 mandates. The process of choosing themes and especially countries for scrutiny is therefore somewhat political as with other decisions taken by the Council. Large and influential States have thus been able to escape scrutiny by relying on their economic and political strength and lobbying weight.

Special procedures can be used by independent experts entitled Special Rapporteurs, Special Representatives, Independent Experts or working groups all of whom report to the Council. Their mandates require cooperation on the part of Governments as far as country visits are concerned. Most Governments now allow such visits to take place because denial is, in political terms, more costly than granting access.

The human rights performance of States is regularly considered by the Human Rights Council through the Universal Periodic Review. In four-year cycles States submit reports which are then matched with other information such as that emanating from NGOs. Procedures are applicable to all countries but once again Council politics clearly influence outcomes. The submission of complaints to the Council by individuals, groups and NGOs is also possible under a resolution procedure for identifying patterns of gross or systematic violations of human rights rather than individual problems.

The UN Secretary-General, the High Commissioner for Human Rights and other top-level officials are able to undertake good offices actions through direct contact with Governments, on an informal and humanitarian basis, in matters that are not suited to handling under other procedures. Action can be taken within days or even sometimes hours of receiving a request. Unlike the other procedures, good offices are carried out through so-called “quiet diplomacy” in the belief that Heads of State and Governments or foreign ministers are more likely to cooperate if they do not suffer embarrassment in the process.

### *8.6.3 Promotional Activities*

Human rights education constitutes a legal obligation for all States and should take place at all school levels, in formal and non-formal settings, with the preparation of relevant curricula and teaching materials. Knowledge of human rights represents a vital factor in enabling people to claim the rights guaranteed to them in the international instruments and to have their rights respected by others, including public officials.

Promotional efforts focus on cooperation and collaboration. Technical cooperation can include advice in the drafting of constitutional or legislative bills; review of legislation in light of applicable standards; support of infrastructures and independent national institutions; prevention and resolution of conflicts; curriculum development and human rights centred education; the dissemination of human rights information; and the translation of instruments and other materials into national and local languages.

Technical cooperation to the benefit of minorities and indigenous peoples can also contribute to conflict prevention. Standards must be disseminated to the groups and translated into their languages. Traditional customs and alternative methods of conflict resolution outside the court room should also be recognised, as long as access to judicial review is available. Human rights education is especially relevant to this category of rights as denials of justice and fairness are often based on ignorance and prejudice.

### *8.6.4 Other International Instances*

Articles 62 and 68 of the UN Charter assign human rights functions to ECOSOC which examines reports from the Commission on the Status of Women, the Commission on Crime Prevention, the Commission on Sustainable Development, and other functional commissions. ECOSOC is also responsible for awarding consultative status to NGOs, including the granting of consultative status.

The ICJ cannot hear cases brought by individuals, groups or peoples; it is therefore not a human rights court as is the case within the CoE or OAS. Human rights issues, however, can appear before ICJ by way of

contentious cases between States or in advisory opinions requested by UN organs.

The UN High Commissioner for Human Rights (established by General Assembly resolution 48/141 of 1993) and her Office do the paper-work associated with the monitoring procedures described above and service meetings of the Council and the treaty bodies by preparing the documentation, drafting meeting reports and carrying out any action called for, including research and technical cooperation. Her dialogue and “good offices” functions have already been highlighted. Headquartered in Geneva the Secretary-General nominates a candidate for High Commissioner with the nomination being subject to GA approval.

The ILO, UNESCO, the World Bank and other specialised agencies of the UN are active in setting human rights standards and supervising their implementation by means which are often similar to those employed by the UN human rights programme, that is State reports, complaints procedures, fact-finding and technical cooperation. The ILO has adopted hundreds of conventions and recommendations relating to labour standards. UNESCO has adopted instruments like the Convention against Discrimination in Education and the Declaration on Race and Racial Prejudice. The World Bank has in place policy directives for women, children, indigenous and tribal peoples and NGOs, while the Bank’s Inspection Panel entertains complaints.

#### *8.6.5 Regional Organisations*

Regional organisations like the CoE, OAS and OSCE have passed significant human rights instruments, both conventions and recommendations, and put in place monitoring procedures and expert advice. Their work is in some instances more far-reaching than that offered by the UN system itself. The CoE and OAS each have human rights courts which can hear individual cases and pass judgements binding upon States under international law. Under the CoE there is a treaty body for consideration of State reports under the Framework Convention for the Protection of National Minorities. Reference has already been made to standard-setting by the OSCE and their High Commissioner on National Minorities.

#### *8.6.6 Non-Governmental Organisations*

The ability of intergovernmental organisations to address difficult issues and to carry out monitoring activities is, to a large extent, dependent upon input from non-governmental organisations. NGOs like Amnesty International, Human Rights Watch and the Minority Rights Group submit much of the information available on human rights violations and country situations, they contribute good ideas to the standard-setting processes, they provide technical assistance and training, they promote human rights

awareness, and they carry out monitoring activities of their own such as the letter-writing campaigns of Amnesty International. For good governance, Transparency International is a key NGO. The crucial and multiple roles of NGOs enjoy international recognition, even when governments grumble about the information collected and submitted. Article 71 of the UN Charter mandates ECOSOC to grant consultative status to NGOs which allows them to participate in a wide range of UN meetings, including many of the human rights gatherings. Several other UN agencies and regional organisations maintain their own NGO lists.

## 8.7 Concluding Words

The Arctic countries are democratic but their polar areas remain, to varying degrees, subject to remote control from faraway capitals. The areas concerned are very large while the populations living there are often small, and much of the time they are under-represented or not represented at all in the metropolitan capital, parliament and the civil service. The results may be seen in terms of the discriminatory practices which indigenous peoples, minorities and other local communities on the national periphery are often faced with in terms of equal access to, and equal opportunity in, the enjoyment of public services and in terms of participation in political, economic and cultural affairs, the fair sharing of national wealth drawn from their lands, and the maintenance of their own cultures and ways of life.

The human rights picture now drawn invites many questions. A comparative approach reveals major human rights differences in the Arctic States, for example in the scope of self-governance or autonomous arrangements, with some of them generous and others more restrictive. Similar differences exist as to the active protection of identities and cultures, the rights to lands and natural resources, and in the provision of health and social services. Further reading: Miguel Alfonso Martinez, Special Rapporteur of the Sub-Commission, “Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations” in UN document E/CN.4/Sub.2/1999/20.

## Further reading:

- Gudmundur Alfredsson, "Human Rights and the Arctic," in *Yearbook of Polar Law*, Martinus Nijhoff Publishers, Vol. 1 (2009), pp. 233–244.
- Gudmundur Alfredsson, Jonas Grimheden, Bertram G. Ramcharan and Alfred de Zayas, *International Human Rights Monitoring Mechanisms. Essays in Honour of Jakob Th. Möller*, 2nd rev. edition (The Hague: Martinus Nijhoff Publishers, 2009).
- James Anaya, *Indigenous Peoples in International Law*, 2nd edition (Oxford: Oxford University Press, 2004).
- Nigel Banks, "Land Claim Agreements in Arctic Canada in Light of International Human Rights Norms," in *Yearbook of Polar Law*, Martinus Nijhoff Publishers, vol. 1 (2009), pp. 175–232.
- Claire Charters and Rodolfo Stavenhagen (eds.), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples, IWGIA – Document No. 127*, (IWGIA: Copenhagen 2009).
- Jose R. Martinez Cobo, Special Rapporteur of the Sub-Commission, *Study of the Problem of Discrimination against Indigenous Populations*, E/CN.4/Sub.2/1986/7 and Addenda 1–4. Addendum 4 with the conclusions, proposals and recommendations of the Rapporteur is also available as a UN publication with the sales number E.86.XIV.3.
- Erica-Irene A. Daes, Special Rapporteur of the Sub-Commission, *Indigenous peoples' permanent sovereignty over natural resources*, in UN documents E/CN.4/Sub.2/2004/30 and Add.1.
- Erica-Irene A. Daes, Special Rapporteur of the Sub-Commission, *Indigenous peoples and their relationship to land*, in UN document E/CN.4/Sub.2/2001/21.
- Asbjörn Eide, "Indigenous Self-Government in the Arctic, and their Right to Land and Natural Resources," in *Yearbook of Polar Law*, Martinus Nijhoff Publishers, Vol. 1 (2009), pp. 245–282.
- Asbjörn Eide, Special Rapporteur of the Sub-Commission, *Study on Constructive National Arrangements for Minorities*, a report by Special Rapporteur Asbjörn Eide to the UN Sub-Commission for the Prevention of Discrimination and Protection of Minorities, in UN documents E/CN.4/Sub.2/1993/34 and Add.1–4.
- Timo Koivurova, "From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (re)Gain Their Right to Self-Determination," in *International Journal on Minority and Group Rights*, Vol. 15 (2008), No. 1, pp. 1–26.
- Natalia Loukacheva and Matthew Garfield, "Sustainable Human Rights and Governance: The Quest of an Arctic Entity in Transition," in *Yearbook of Polar Law*, Martinus Nijhoff Publishers, Vol. 1 (2009), pp. 283–306.
- Natalia Loukacheva, *The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut*, (Toronto, Buffalo, London: University of Toronto Press, 2007).
- Markku Suksi and André Légaré (eds.), a special issue of the *International Journal on Minority and Group Rights*, Vol. 15 (2008), No. 2–3. On new developments concerning self-government, in both theory and practice. One of the articles deals with Canada, see André Légaré, "Canada's Experiment with Aboriginal Self-Determination in Nunavut: From Vision to Illusion," pp. 335–367.

## Websites:

For answers to the questions and assignments set above readers are encouraged to consult the websites of various inter-governmental and non-governmental organisations.

For the United Nations go to HYPERLINK "<http://www.un.org>" "[www.un.org](http://www.un.org)" and HYPERLINK "<http://www.ohchr.org>" "[www.ohchr.org](http://www.ohchr.org)." The latter site belongs to the UN High Commissioner for Human Rights and there you will find all the instruments, general comments, ratification lists and the relevant meeting and monitoring reports. For explanations of the vote on the Declaration on the Rights of Indigenous Peoples, see Official Records of the General Assembly, in UN document A/61/PV.107 of 13 September 2007 at HYPERLINK "<http://www.un.org>" "[www.un.org](http://www.un.org)." The Permanent Forum has its own website at HYPERLINK "<http://www.un.org/esa/socdev/unpfii/>" "[www.un.org/esa/socdev/unpfii/](http://www.un.org/esa/socdev/unpfii/)." For the texts of judgements and opinions of



the International Court of Justice, go to HYPERLINK "<http://www.icj-cij.org>" "[www.icj-cij.org](http://www.icj-cij.org)."

The instruments and monitoring reports of the International Labour Organization, including ILO Convention No. 169, appear at HYPERLINK "<http://www.ilo.org>" "[www.ilo.org](http://www.ilo.org)." See also HYPERLINK "<http://www.unesco.org>" "[www.unesco.org](http://www.unesco.org)" and HYPERLINK "<http://www.worldbank.org>" "[www.worldbank.org](http://www.worldbank.org)."

For the instruments and monitoring activities of the CoE, including the European Court of Human Rights, see HYPERLINK "<http://www.coe.int>" "[www.coe.int](http://www.coe.int)," and for the websites of the Inter-American Commission and Court of Human Rights, see HYPERLINK "<http://www.oas.org>" "[www.oas.org](http://www.oas.org)." On the OSCE website HYPERLINK "<http://www.osce.org>" "[www.osce.org](http://www.osce.org)" you will find the High Commissioner on National Minorities and the Lund Recommendations.

NGO websites are an essential part of your reading. See Amnesty International at HYPERLINK "<http://www.amnesty.org>" "[www.amnesty.org](http://www.amnesty.org)," Human Rights Watch at HYPERLINK "<http://www.hrw.org>" "[www.hrw.org](http://www.hrw.org)," the International Work Group for Indigenous Affairs at HYPERLINK "<http://www.iwgia.org>" "[www.iwgia.org](http://www.iwgia.org)," the Minority Rights Group at HYPERLINK "<http://www.minorityrights.org>" "[www.minorityrights.org](http://www.minorityrights.org)" and

minorityrights.org" and Transparency International at HYPERLINK "<http://www.transparency.org>" "[www.transparency.org](http://www.transparency.org)."

For an English translation of the draft Nordic Sami convention, see HYPERLINK "<http://www.saamicouncil.net/?newsid=2223&deptid=2192&languageid=4&news=1>" "[www.saamicouncil.net/?newsid=2223&deptid=2192&languageid=4&news=1](http://www.saamicouncil.net/?newsid=2223&deptid=2192&languageid=4&news=1)"

For the case Reference re Secession of Quebec, [1998] 2 S.C.R. 217, go to HYPERLINK "<http://csc.lexum.umontreal.ca/en1998/1998rcs2-217/1998rcs2-217.html>" "<http://csc.lexum.umontreal.ca/en1998/1998rcs2-217/1998rcs2-217.html>."

Research and academic websites often contain much useful information. The Netherlands Institute of Human Rights and the University of Minnesota Human Rights Library maintain excellent databases at "[sim.law.uu.nl/SIM/Dochome.nsf?Open](http://sim.law.uu.nl/SIM/Dochome.nsf?Open)" and "[www1.umn.edu/humanrts/index.html](http://www1.umn.edu/humanrts/index.html)," respectively. Additional information can be found at HYPERLINK "<http://www.bayefsky.com>" "[www.bayefsky.com](http://www.bayefsky.com)." See also, for example, the sites of the Resource Centre for Rights of Indigenous Peoples at "[www.galdu.org/web/?giella1=](http://www.galdu.org/web/?giella1=)" and of Researching Indigenous Peoples' Rights under International Law at "[intel-ligent-internet.info/law/ipr2.html](http://intel-ligent-internet.info/law/ipr2.html)."

### Questions:

1. Has your country ratified the human rights treaties mentioned above? With any reservations? Read your country's State reports for treaties ratified and concluding observations made by the treaty bodies and compare these with the reality as you know it. Has your country accepted the complaints procedures under the treaties? If so, have complaints been submitted and what are the cases about?
2. For other instruments, such as the Declaration on the Rights of Indigenous Peoples, did your country vote in favour when they were adopted? Did your country explain its vote upon adoption? Read your country's UPR report. Has your country issued standing or specific invitations to any of the special procedures for inspection visits? Have any of them visited your State or otherwise commented upon domestic problems?
3. Are you satisfied with the human rights situation in your country? What are the main problems, if any? Do you find that the reports submitted by your State to international organisations tell the full story? How do you go about lobbying Governments for change?

# 9. Greenland's Self-Government

*Mininnguaq Kleist*

## 9.1 Introduction

On June 21, 2009 Self-Government became a reality in Greenland. This was the outcome of a thorough process of deliberation, negotiation and debate which produced recommendations that led to a popular referendum in Greenland, in November 2008, which ultimately saw the endorsement of Self-Government.

The process leading to the introduction of Self-Government had taken approximately a decade – formally beginning in 1999 with the establishment of the Greenland Self-Government Commission, which in 2003 issued its report. The work of a second commission, the Greenland-Danish Self-Government Commission<sup>1</sup> (2004–08) led to another report in 2008 which contained a new draft Act on Greenland Self-Government. On June 21, 2009 the Act on Greenland Self-Government replaced the Home Rule Act (HRA) of 1978 and via this new Self-Government Act Self-Government was formally introduced.

In 2009 the introduction of Self-Government was celebrated with the holding of ceremonial festivities in the capital, Nuuk, where heads of state, royalty, ambassadors, parliamentarians, and other representatives from several countries were in attendance. Symbolically these festivities signified the beginning of a new era – the Self-Government period. A new form of rule had emerged to replace the traditional Home Rule (HR) system which had been in place for 30 years.

This chapter will look at both the contents and context of the Act on Greenland Self-Government. Before dealing directly with the substance of Self-Government in Greenland however it is important to know something about Greenland's history, the Home Rule system, and some of the specific societal issues pertaining to the current socio-economic and political situation. This background knowledge is necessary to better understand the development of the move towards Self-Government in Greenland.

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<sup>1</sup> In the text whenever the Greenland Self-Government Commission and the Greenland-Danish Self-Government Commission are not given their full titles, the first will be denominated "the GSG Commission," and the latter "the GDSG Commission" where it is deemed appropriate for the purposes of clarity.

## 9.2 The History of Greenland – a Short Version

This section is limited to an analysis of events in Greenland's history which are deemed relevant to the broader purposes of this chapter. The main stages of Greenland's historical development include the following highlights:

More than 4,000 years ago – the first peoples arrive. Some of these peoples were the ancestors of the Inuit. Through history Greenland has been inhabited by different Inuit peoples and cultures. Greenland's Inuit people are descended from the people who came to Greenland at the beginning of the first millennium AD.

The Norse first came to Greenland just before the dawn of the first millennium AD, and promptly disappeared again after approximately 500 years. The Norse could thus be said to be the first European colonizers.

1721 – Modern colonization begins with the Norwegian-Danish missionary Hans Egede, who went to re-Christianize the Norse in Greenland, but found “only” the Inuit – whom he Christianized. Hans Egede travelled on behalf of the Danish Crown. Greenland thus effectively becomes a Danish colony.

Until the middle of the 19th century Greenland is administered by the Danish Government without the inclusion of local Greenlandic councils.

By the middle of the 19th century the first local councils are being established in various districts across the country. These councils consisted of Danish civil servants (colonial managers, priests, doctors, etc) and some of the debt-free skilled hunters. These councils had very limited competences and dealt mostly with social assistance and the maintenance of law and order.

In 1911 these councils were replaced by municipal councils (focussing on social assistance, basic education help for the sick, and law and order) and two provincial councils (subsequently merged into one provincial council). The members of the municipal councils were elected by the population – including Danish civil servants who had served in Greenland for at least two years (voting rights were very limited – e.g., women did not obtain the right to vote until 1948). The provincial council<sup>2</sup> debated common matters and questions – including questions posed by the Danish Government. The members of the provincial council(s) were chosen from among the members of the municipal councils.<sup>3</sup>

From 1945 to 1954 Greenland was on the UN-list of non-self-governing territories in accordance with the stipulation of UN-Charter chapter XI (see Alfredsson 2004).

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<sup>2</sup> The top Danish civil servants in Greenland would automatically be the chairman of the provincial councils. This did not change until 1967 when the chairman would be elected from among the members of the provincial council.

<sup>3</sup> There were also a number of other councils in existence designed specifically to deal with loans for house building, guns, tools, and different kinds of social help, etc.

By 1953–54 Greenland is no longer officially a colony becoming instead an integral part of Denmark through the new Danish Constitution of 1953. Greenland also gets representation in the Danish Parliament – the *Folketing* – with two seats.

In 1972–73 Greenland becomes a member of the EEC together with the rest of Denmark, even though the vast majority of people in Greenland vote against this in the 1972 referendum. By the beginning of the 1980s however a new referendum is arranged in Greenland and a “no” vote is returned. In 1985 Greenland finally leaves the EEC and attains the status of an OCT (Overseas Countries and Territories) to the EEC – now EU.

Greenlanders did not however feel that the change in status from colony to integral part of Denmark was sufficient when it came to respecting their wish to be treated on an equal basis with the Danes or to be seen to be an active part of the development process occurring in Greenland. Greenlanders thus often felt like spectators in respect of the developments happening around them. In this light, the beginning of the 1970s saw the creation, in Greenland, of an internal Greenlandic Home Rule committee – this is something both the Danish and Greenlandic side agreed upon, namely, that Greenland had to clearly formulate its wishes before starting work in a joint Greenlandic-Danish Home Rule Commission. In 1975 the Committee makes its recommendations on what Home Rule should contain (seen from a Greenlandic perspective) and these subsequently serve as the basis for further negotiations between Greenland and Denmark.<sup>4</sup>

In 1975 the joint Danish-Greenlandic HR Commission is established. It completes its work in 1978. The result is the Home Rule Act and system, which the *Folketing* accepted and the Greenlandic people subsequently endorsed through a referendum, in 1979.

### 9.3 The Home Rule Act of 1979

When the HRA entered into force on May 1, 1979, Greenland and its population was recognized as being “unique” in the context of the Danish Realm and not just as another part of the territory of Denmark proper.

The HR system is the precursor to the Greenland Self-Government system. Home Rule was based on the HRA and with this Act the first Greenlandic Parliament and the first Greenlandic Government were established. These bodies assumed legislative and the executive power in the fields of responsibility/areas of competence which they gradually took over. In the beginning these areas were few in number, but by the late 1990s almost all 17 major areas listed in the appendix to the HRA had been taken over. Among others these included: education, the health sys-

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<sup>4</sup> The earlier Home Rule process with its committee and commission should not be confused with the later Self-Government process and its commissions.

tem, social affairs, housing, infrastructure, the economy, taxation, fisheries, hunting and agriculture, the labour market, commerce and industry, the environment, the municipalities, culture, the church, etc.

The authorities in Greenland did not however initially attain competence in respect of the exploitation of potential mineral resources through the recommendations of the HR Commission of 1975–78 though they did subsequently gain an increasing role in this area also. By the late 1990s competence in respect of mineral resources were more or less split between Denmark and Greenland through the Mineral Resources Act of 1998.

The Home Rule system was essentially a process where Greenland, initially at least, attained limited competences and authority over its own affairs. Over time, up to 2009, this system was however to evolve into a much more comprehensive package of responsibilities and competences.

In addition to this brief historical “interlude” in order to gain a better understanding of the development of Greenland it is also important to highlight some of the most important societal and economic aspects of Greenlandic life.

## 9.4 The Societal and Economic Development of Greenland

Understanding Greenland’s former colonial past is essential to understanding its modern development. As with many other former colonies Greenland’s society is currently facing numerous social problems (e.g., alcoholism, high rates of suicide, etc.). These problems have deep roots in the changes that were imposed by the former colonizers in practically all areas of life. The same changes that buttressed colonial control looked at from an indigenous perspective, basically sought also to impose a new religion, a new political system, alien norms, hierarchies and ways of life etc., on the indigenous people of Greenland.

The trauma of colonization and its consequences will take generations to remedy because generations of peoples lives have been blighted by its stigma and its impacts. The work of trained people who know about Greenlandic culture has been and still is needed to help remedy some of these problems but providing enough of these educated people has also been a problem in itself.

In the latter years of the Home Rule era more debate occurred and a greater focus was placed on these areas resulting in a slow but positive trend towards change. For example, the level of alcohol consumption has gradually fallen by half and is now comparable to levels in the Nordic countries.

Another pressing issue is the generally low educational level of Greenlanders compared to those in the developed and industrialized coun-

tries. The Greenlandic people do not have a centuries-long tradition of western-style educational provision and historically have not had a large number of educational institutions. During the Home Rule years major efforts were however made on further developing this area, efforts which have only further intensified in the last decade. This latter effort is finally now showing positive results but still more needs to be done. Denmark deserves credit for its continuing assistance in this area (e.g., Danish educational institutions are free and open to all Greenlandic students).

The lack of sufficient numbers of trained and educated people in respect of the numerous areas of society in need of attention has of course had profound consequences. Perhaps the first of which is that many of the trained professionals necessary for these positions have to be “imported” into Greenland. Some stay permanently while others stay only for a few years. When they arrive they need time to learn about Greenland’s unique society so that they can work and function efficiently. When they leave however they take away all their precious expertise with them, and new people have to be trained up again and again. This still affects the functionality of different areas of life in Greenland. More and more Greenlanders are however now finishing their own educational studies and this will undoubtedly see a slow improvement in the situation. Greenland will never however become self-sufficient in all areas needing trained and highly educated people – the population is simply too small. That being said, there is still a lot that can be done in Greenland when it comes to education.

Greenland is a big country with a small population of approximately 56 000 spread all over the country but mainly along the West Coast. Climate and geography pose challenging obstacles to infrastructure and economic development. This means that in Greenland the harsh environment remains a major factor in the quest to further develop Greenland’s public and private sectors. On the one hand, ongoing climate change is creating new opportunities in agriculture across Southern Greenland, as well as in tourism and minerals (see below) while on the other hand, it also makes it harder for hunters and fishermen to sustain their traditional lifestyles in Northern Greenland.

Greenland’s economic development is further affected by a number of additional factors. For example, Greenland receives a major share of its income from the substantial annual Danish block grant and from its shrimp and fish exports. Greenland also has partnership and fishing agreements with the EU, which also generate some income. Tourism is growing but currently forms only a small part of the overall size of the economy.

Greenland has a vast mineral wealth potential with numerous minerals, precious gems and metals such as gold and olivine currently being mined. In addition, zink and lead will in the near future also be mined.

Prospects also exist for the future mining of iron, molybdenum, rubies and diamonds among other things.

There is strong data available suggesting that Greenland has a huge potential in respect of deposits of oil and gas. The potential benefits emanating from their exploitation may make Greenland economically self-sustaining but of course this remains, as yet, conjectural.

The hydropower potentials of Greenland are also impressive and might even attract foreign companies relying on energy-intensive procedures in the production of their products. This could create more jobs, as with the mining industry, thus helping Greenland to further diversify its economy.

An opening up of the Northwest Passage to shipping navigation will make the shipping routes, at least between Europe and Asia, much shorter. It is hoped that this could also create positive economic opportunities for Greenland.

Greenland's geo-political importance (e.g., the location of the U.S. Thule Air Base with its potent radar in the far North of Greenland and the significant military interests attached to it) makes Greenland valuable for Denmark both in a NATO context but also for the USA.

Despite the promising economic possibilities outlined above Greenland, as of 2010, still has a small and non-self-sustaining economy. A number of major challenges and obstacles have to be overcome in order to create a stronger society – mainly in the social and educational areas and in respect of the economy. At the same time however it is possible to discern the emergence of many new opportunities, to track positive tendencies and to witness positive developments as far as Greenland is concerned. It is undoubtedly the case that Greenland's current industrial and economic potential is very impressive.

## 9.5 The Introduction of Self-Government

As noted previously, from 1999 to 2002 Greenland had its own internal Greenland Self-Government Commission – established by the Home Rule Government. The Commission members were Greenlandic parliamentarians, civil servants, academic scholars, etc. The GSG Commission issued its report in 2003 containing recommendations for the path of Greenland's future societal development. The GSG Commission was initially established because it had become clear, from a Greenlandic perspective, that the Home Rule system needed either to be updated or replaced. It was felt by many in Greenland that the HR framework had become too narrow as developments in Greenland had proceeded much faster than anyone could have imagined. Greenlanders naturally therefore wanted to gain more authority and control over their own affairs. Since Greenland was, and still is, part of the Kingdom of Denmark these



changes needed to be negotiated with Denmark with both Danish constitutional law and also international law in mind.

But it was also clear that if Greenland was to strengthen itself internally and become more economically self-sustaining then a lot of work had to be done within the country. It was also crucial that this work had to be done by Greenlanders themselves as they had to define the entire process and take over responsibility for further steps in the development of their own society. And so the GSG Commission came up with a broad set of recommendations addressing various existing and emerging issues pertaining to the further development of Greenlandic society.

For example, one of the most visible and concrete recommendations concerned the public administrative organisation. It was suggested that the number of municipalities (and thus their administrations) be reduced from 18 units to a smaller number in order to rationalize the public sector. On January 1, 2009 this materialised into the creation of 4 large new municipal units.

As indicated previously, another set of recommendations contained some of the GSG Commission's recommendations on the development of the future Greenland-Denmark relationship seen from a Greenlandic perspective. These recommendations focused on the legal and financial arrangements applicable within the context of the ongoing relationship between the two countries.

The GSG Commission was of the opinion that the Greenlandic people are "a people" according to international law with a right to self-determination. The GSG Commission further recommended that the relationship between Greenland and Denmark should evolve into something more like a partnership, and that the Home Rule Act of 1978 should be replaced with a more modern piece of legislation.

During its work the Greenland Self-Government Commission held several conferences and town hall meetings in order to both inform the populace of its work and to foster public debate. With the GSG Commission's report and recommendations Greenlanders expressed their position; they had done their preparatory work and prepared for their negotiations with Denmark.

## 9.6 The Greenland-Danish Self-Government Commission

On June 21, 2004 Greenland's Premier Hans Enoksen and the Danish Prime Minister Anders Fogh Rasmussen signed the mandate and framework of the Greenland-Danish Self-Government Commission.

The mandate, or *kommissorium*, specified the scope of the GDSG Commission's mandate and outlined the framework of the Commission's work – focusing in particular on highlighting the areas in which recommendations were required (see below).

It was also stated here that the members of the GDSG Commission would be parliamentarians from both Denmark and Greenland – 8 members from each country – representing all the parties in the two parliaments. This was required in order to strengthen the democratic mandate of the GDSG Commission's work. The parliamentarians would be the actual members but in addition there would also be a swarm of ministerial civil servants and academic scholars, working as advisors and experts, participating in the ongoing work from both sides.

The Greenland-Danish Self-Government Commission began its work in September 2004.

Naturally the members all took part in the GDSG Commission's general work and in its internal debates though this work was further divided into three working groups with the commission members being divided into these groups:

- The Working group on mineral resources (including oil and gas)
- The Working group on economy and industrial development
- The Working group on constitutional and international law

These working groups were tasked with drawing up concrete proposals to be recommended and presented to the rest of the GDSG Commission. The Commission as a whole was then tasked with deciding on whether to adopt the proposals or ask the working group in question to rework their submission. This was an ongoing process.

The terms of reference section of the mandate stated:

The Commission shall, on the basis of Greenland's present constitutional position and in accordance with the right of self-determination of the people of Greenland under international law, deliberate and make proposals for how the Greenland authorities can assume further powers, where this is constitutionally possible. The Commission shall draw up proposals for a new arrangement which also takes into consideration the fields of responsibilities that have already been assumed by the Greenland authorities under the Greenland Home Rule Act.

The Commission shall base its work on the principle that there must be accordance between rights and obligations. The Commission shall deliberate and make proposals for a new arrangement concerning the economic situation between Greenland and Denmark.

The Danish Government and the Greenland Landsstyre [Greenland Government] are in agreement that it is for the people of Greenland to decide whether Greenland wishes independence, and that the new arrangement shall imply no change to that. Where relevant, independence will have to be implemented through the conclusion of an agreement to this effect under the rules laid down in section 19 of the Danish Constitution. The Commission's proposals for a new arrangement shall contain a provision on Greenland's access to independence in accordance with this (official translation 2008:4).

The working groups were each tasked with forming proposals for their particular subject areas. On April 17<sup>th</sup>, 2008 The Greenland-Danish Self-

Government Commission held its final meeting. Its recommendations had been written into the Commission's report and put into the Draft Act on Greenland Self-Government. In May 2008, in Nuuk, the chairmanship of the GDSG Commission officially handed over the Report on Greenland Self-Government to the Greenland Premier and the Danish Prime Minister. In June, also in Nuuk, the members of the GDSG Commission publicly presented the Report. This was broadcast live across Greenland on both radio and TV.

After the summer of that year a period of open and public debate began where further presentations on the possible Self-Government system were made. From South to North and East to West, an extended "meet the public tour" was completed covering the new recommendations from the GDSG Commission. Where possible all of the political parties present in Greenland's parliament were represented in these discussions. Most parties were in favour of Self-Government, but one party was against its contents – the Democrats. Some of the public meetings were broadcast live nationally either on radio or TV. Numerous meetings for students were arranged, TV- and radio debate programmes aired, printed material distributed to every household, informational advertisements in newspapers, material put on the internet to be downloaded, etc.

On the 25th of November 2008 a popular referendum took place on whether or not the Draft Act on Greenland Self-Government should replace the Home Rule Act. The result was 75.54% in favour of the introduction of Self-Government, and 23.57% against. 71.96% showed up to cast their vote. That is a high number in Greenland.

As a consequence of the referendum result on the 28th of November 2008 the Greenland Parliament asked the Greenland Government to contact the Danish Government and ask them to present the Bill on Greenland Self-Government for the Danish Parliament – the *Folketing*.

The Bill on Greenland Self-Government is now an act of the Danish *Folketing* – the Act on Greenland Self-Government of 2009. In what follows we will now comment on the main sections of this Act – an Act which is evolutionary and historic to Greenlanders.

## 9.7 The Act on Greenland Self-Government of 2009

The Act contains 29 sections, excluding the preamble. In appendixes, the Act has two lists (see below) including in total 33 fields of responsibility (jurisdiction/competences) that can be taken over by Greenland from the Danish state one by one. When taken over, the legislative and executive power, the financing and the administration over the field in question will become Greenland's responsibility.

With Self-Government in place, Greenland will be responsible for the financing of the specific field when it takes over that area of competence

in question. This is viewed under the principle that there should be accordance between rights and obligations mentioned in the mandate for the GDSG Commission. In comparison to this under the Home Rule system, the taking over of new fields of responsibility normally meant an increase in the Danish block grant in order for Greenland to be able to finance the new areas of competence.

The Act has more than 100 pages of written explanatory notes. They function as a guide on how to interpret and understand the sections and provisions laid down in the Act. The explanatory notes also go into deeper detail.

We will now look at the main provisions of the Act comparing some of its elements with those of the previous Home Rule system.

### *9.7.1 The Preamble*

The preamble states:

Recognising that the people of Greenland is a people pursuant to international law with the right of self-determination, the Act is based on a wish to foster equality and mutual respect in the partnership between Denmark and Greenland. Accordingly, the Act is based on an agreement between Naalakkersuisut Greenland Government and the Danish Government as equal partners.

The preamble is an integral part of the Act and its contents serve as the fundamental guiding principles for the interpretation of this document.

There are two main elements in the preamble.

1. Recognition of Greenlanders as a people according to international law with the right of self-determination
2. The Act is based on a wish to foster equality in an agreement based on mutual respect between the Greenland Government and the Danish Government as equal partners.

### *9.7.2 Recognition as a people according to international law with the right of self-determination*

What does this mean? The explanatory notes to the Self-Government Act focus on international law where a mention of the Charter of the United Nations, Article 1, subsection 2 can be found – it reads:

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

This is a very broad provision. The GDSG Commission has chosen not to go into detail on what a recognized people with a right to self-determination would mean. This is because the two sides of the GDSG Commis-

sion could not agree upon the extension of this right. There was a clash between the interpretation of the extension of the Danish state's right through the Constitution and the extension of the Greenlandic peoples' rights through international law.

But who constitute the people of Greenland? First, I will not try to answer this question in a national, ethnic or cultural sense here. That would make the question far too complex given the space constraints of this chapter. Instead I will address the question in a legal sense, though even here limits will have to be observed. I will focus on the right to vote and to run for public office, because in that way you can be said to have the right to partake in the formal ruling of the country and its people. I will use those rights in order to indicate who is part of the Greenlandic people, because rights can be used as an indicative factor (though not the only factor) in telling who is *de facto* part of this group of people. Especially in this case where it is a people with a right to self-determination. For example, it is stated that it is for the Greenlandic people to decide whether or not Greenland becomes independent. This will happen among other things through a referendum. And the individuals who are allowed to vote are legally part of the people.

In a legal sense the individuals who constitute the Greenlandic people are those who have been recognized as a people in its own right. They are, for example: the residents of Greenland who are 18 years of age and above, they have the right to partake in elections, to vote or run for office in Greenland. Through their democratic participation they can partake in the ruling of the country. To be able to vote, one has to be a Danish citizen and to have lived in Greenland for at least 6 months prior to the democratic election or referendum. When one terminates one's permanent domicile in Greenland and moves away from Greenland one loses that right. It can however be regained by moving back into residence in Greenland. Greenlandic students who go to Denmark and study also have the right to vote in Greenland, even though they might study and live in Denmark for several years. Those under eighteen years of age are of course also part of the people as indeed are others who, all other things being equal, have the right to vote in Greenland, but for one reason or another do not vote. They are also part of the Greenlandic people. The above is a highly simplified answer to the question posed but it will suffice for our purposes. Greenlanders are thus Danish citizens and have Danish passports even after Self-Government has been introduced. The right to vote in Greenland is not attached to ethnicity.

Thus, ethnic Danes and Faroese who have lived, and still live, in Greenland for more than 6 months will also be part of "the Greenlandic people" – in a legal sense and as long as the provisions remain as they are now. Remember we are not talking about culture and ethnicity here. A French person, or a person of any other nationality, will not be part of the Greenlandic people, even though he or she might have lived in Greenland

for years, until she/he opts for Danish citizenship first and obtains it. So Danish citizenship is also for the time being at least a prerequisite for being part of the Greenlandic people in a legal sense.

But the right to vote and run for public office in Greenland may change, if the *Inatsisartut* – The Parliament of Greenland, should so decide. And if this happens who constitutes the people of Greenland will also change in a legal sense. The *Inatsisartut* can change the legislation on who has the right to vote in Greenland, because that piece of legislation is an internal Greenlandic matter and not part of the Self-Government Act. If a change in the right to vote should occur it would probably not be based on ethnicity, but rather on how long you have had your permanent residence in Greenland, before you obtain the right to vote in Greenland.

These examples show that the recognition of the Greenlandic people does not only extend to the indigenous people of Greenland, but also to people of other ethnic origin, primarily Danes living in Greenland. This is very much in line with the Government of Greenland being a public government, and not a purely indigenous government. But as the vast majority of the population of Greenland is part of the indigenous group (approximately 88%) this is reflected in the makeup of the governing cabinet.

Under the HRA the Greenlanders were, in the Danish wording, called “*et særligt folkesamfund*” – which roughly translates as “a unique people’s society”. This Danish predicate has no clear definition and is not used under international law and thus has no direct rights attached to it according to international law. As mentioned above, the term “people” is linked to the right to self-determination. The right to self-determination is a right and value, which Greenland along the way most likely will strive to get closer to and perfect – both internally and externally. But other real life factors also play a role, such as the human capacities and abilities of the population, the educational and economic situation, other countries’ interests, political-, geopolitical and military interests, etc. These factors pose interesting and serious challenges to Greenland some of which may even destabilise Greenlandic society, if one is not mindful and sensitive towards them.

Greenland’s right to internal self-determination is limited by the fields of responsibilities which Greenlanders have not yet assumed. Denmark retains formal powers over those fields. But Denmark will not rule or change anything major within those areas without reference to the Greenlandic authorities first. At the same time Greenland cannot by itself realize any policies in those areas in which Greenland has not yet assumed authority. But Greenland can ask to get legislation changed within an area not taken over yet, and if Denmark agrees the Danish *Folketing* will change the legislation.

When Greenland assumes a new field of responsibility Greenland assumes the executive power, the power to legislate, and the responsibility to

finance and administer that particular area. In so doing Greenland will gradually strengthen its own right to internal self-determination. Greenland will also strengthen its external self-determination when it takes over a field of jurisdiction. We will return to this issue later. Now we will examine the second element of the preamble – equality.

### *9.7.3 The Greenlandic and Danish Governments as Equal Partners*

As shown above, the equality-aspect of the relationship between the Greenland Government and the Danish Government is explicitly mentioned in the preamble to the Act. It is further underlined with reference to the specific use of the constructs “mutual respect” and “partnership” in the document.

One of the main reasons to underline this was the desire to show that both the Self-Government system and The Act on Greenland Self-Government are products of the cooperation between the two countries agreed upon after fruitful and constructive negotiation. This is not to say that the negotiations were straightforward or that few differences between the two sides emerged within the GDSG Commission but rather to underline the constructive nature of the process which led to the production of the end product. This could not have been realized without the existence of a certain level of mutual respect or partnership. It is also the result of the 1999–2002 Greenland Self-Government Commission’s recommendation to evolve the relationship between the two countries into a partnership.

The preamble also highlights the values that are important in the interpretation of the rest of the Act. Where, for instance, doubts arise in respect of the outcome of decisions neither Denmark nor Greenland should try to dictate a decision involving both countries but should rather function on the basis of the preservation of mutual respect.

Fundamentally it also means, that even though Denmark is the stronger of the two partners (Denmark retains various sovereign powers and responsibilities whilst also continuing to finance much of Greenland’s public sector budget through the annual block grant, and also retains the competences to interpret and amend the constitution), it is not allowed to unilaterally repeal the Act on Greenland Self-Government without Greenland’s acquiescence, even though it is an Act of the Danish *Folketing* because, from an international law perspective, this would not be in accordance with the principles of equality and mutual respect or with the Greenlandic people’s right to self-determination mentioned in the preamble. It is then these values and ideals that should be kept in mind when interpreting the Act on Greenland Self-Government.

## 9.8 The Main Provisions within the Act

### *Chapter 1 – The Self-Government Authorities and the Courts*

In this provision the tripartite division of power is guaranteed. Legislative power lies with *Inatsisartut* (the Greenland Parliament) while executive power lies with *Naalakkersuisut* (the Greenland Government). Judicial power lies with the courts of law. The first two mentioned are already part of the Self-Government authorities. Judicial power is still under the Danish judicial system (in 2010) but these “Greenland courts” are physically situated in Greenland.

Greenland will explicitly be able to take over authority for the court system in Greenland under the Self-Government provisions, though control over the Supreme Court will remain with Denmark. Cases that involve fundamental questions and principles of law can be dealt with in the future Greenlandic court system and individual cases can be taken all the way up to the Supreme Court of Denmark. As long as Greenland is not an independent state it will not be able to assume responsibility for the Supreme Court but can under Self-Government assume such responsibilities over the rest of the judicial system within Greenland. The assumption of responsibility for the judicial system in Greenland will represent a major milestone in the Self-Government process. Much however still remains to be done in order for this to occur.

Particular note should be made here of the fact that for the first time Greenlandic words are used in a piece of Danish legislation, namely, “*Naalakkersuisut*” (Government) and “*Inatsisartut*” (Parliament).

### *Chapter 2 – The Self-Government Authorities’ Assumption of Fields of Responsibility*

The Act has two lists in its appendix. List I contains five fields of responsibility and List II a further twenty eight. Areas of responsibility from the first list can be assumed whenever Greenland decides it is ready while areas from the second can only be assumed at fixed points in time to be subsequently agreed upon between Greenland and Denmark. These negotiations concern the practical elements that need to be coordinated before Greenland can assume responsibility in the fields concerned. In addition, where there are areas that are not explicitly mentioned in these lists and which exclusively concern and involve Greenland, then Greenland will also be able to assume responsibility for them.

Greenland begins financing a particular field of responsibility when it assumes responsibility for that area. This is new compared to the previous Home Rule system and means that Greenland will gradually assume more and more financial responsibility for its own affairs. It also means that Greenland will have to slowly generate more income in order to take over the financing of these areas.



One cannot foresee when Greenland will be ready to assume responsibility for any given area. Given Greenland's developing situation and the issues identified previously in respect of the economy and the availability of qualified manpower, the setting of fixed timeframes in advance in respect of when the assumption of responsibilities should take place would be unfortunate and have a counterproductive effect.

In addition to the already mentioned judicial system, the police and the prison and probation service other major areas where responsibility can be assumed by the Greenland Government include the mineral resource area, aviation, ship registration and the maritime issues area, the immigration and border control, etc.

In the explanatory notes to the Act one will also find a small number of areas highlighted for which the Greenlandic authorities will not be able to assume responsibility under the Self-Government status. These are the constitution, foreign affairs, defence and security policy, the Supreme Court, nationality (citizenship), the currency and monetary policy. These areas are viewed by Denmark as constituting the last areas of competence which define the state of Denmark, and therefore, these cannot be taken over by Greenland until Greenland opts for full independence.

Greenland has already assumed responsibility for the mineral resource area (including all of Greenland's possible inshore and offshore oil and gas resources) as of January 1st 2010. Control of the mineral resource area is one that Greenland has politically fought for since the 1970s. Not surprisingly Denmark has long been unwilling to give up this area. Within the context of the latest Self-Government Commission's work however the time was finally adjudged to be right for Denmark to consent to Greenland's full jurisdiction in this area. Thus, within this competence Greenland will be able to issue exploration and exploitation licenses on whatever mineral, gas or oil deposits there may be. Greenland has, moreover, assumed executive and legislative power in this area – including financing and administration. Cooperation between Greenland and Denmark in the research field in this general area will however still take place.

### *Chapter 3 – Economic Relations between the Greenland Self-Government Authorities and the Danish Government*

This is a key chapter of the act – as it involves the economy, the block grant, the financing of the various fields of responsibility and potential revenues in respect of minerals, oil and gas resources. In practice these provisions were some of the toughest to negotiate. They took the longest time to negotiate primarily because the stakes are high when one considers the potential mineral, oil and gas resources in and around Greenland. It was however also something of a challenge to properly address the GDSG Commission's stated goal, namely, to put in place a set of provisions which would strengthen Greenland's development towards eco-

conomic self-sustainability. This meant that Greenland would have to assume more economic responsibility and become less dependent on the Danish block grant while at the same time becoming economically stronger.

In what follows only the focal points of these provisions are outlined in detail. Throughout this chapter of the Act the Danish block grant for Greenland is explicitly mentioned in numerical terms: i.e., 3,439,6 million Danish Kroner in 2009 (i.e., 3,4 billion DKK). This chapter of the Act also explains how the grant should be adjusted from year to year following the general price and wage index, and how it will be paid. This mentioning of the amount is new compared to the provisions under the Home Rule system, where the block grant was re-negotiated every 2 or 3 years. In 2009 the Danish block grant was around 55–60% of Greenland's Finance Act's incomes.

The provisions of the Act further deal with how the financing is to be maintained both through and after the various fields of responsibility are assumed by the Greenlandic authorities, including the assets already contained within those fields – Greenland also takes over these.

The explanatory notes to the Act mention that in respect of the areas of responsibility still retained by Denmark it is obliged to maintain a comparable standard to those seen in Denmark except where it can justifiably be claimed that “specific Greenlandic conditions” can be said to apply that may prevent this. This is also a new provision as compared to the Home Rule Agreement. The provisions of Chapter 3 of the Act also state to whom the revenues from mineral resource activities shall fall. Greenland will now receive the revenues.

If however Greenland begins to generate substantial revenues from its mineral activities then it cannot also continue to receive a substantial block grant from Denmark. A specific legal mechanism has thus been created wherein Denmark deducts an amount from the block grant corresponding to the equivalent of 50% of the annual revenues from mineral activities, *after* Greenland has taken the first 75 million Danish Kroner of these revenues (the first 75 million Danish Kroner does not have any consequences for the block grant). This 50% amount will be deducted from the block grant, and it can go up or down from year to year, following the amount of revenue raised from the mineral-based activities.

*Example:*

Revenues from mineral resource activities in 20XX: 275 million Danish Kroner

Greenland gets the whole amount. But Denmark will deduct an amount from the block grant. The actual amount can be deduced by means of the following mechanism:

- Greenland's revenues from mineral resource activities in year 20XX: 275 million DKK
- The first 75 million DKK raised has no consequence for the block grant
- The rest of the revenues that year is 200 million DKK
- Denmark can deduct 50% of the 200 million DKK from the block grant  
(The block grant the following year will be 3,439,6 million DKK minus 100 million DKK. (The block grant of course has to be adjusted according to the general price and wage index. The amount used in the example is the 2009-figure)).
- Greenland's mineral resource activity revenues and block grant income that following year will then be 275 million DKK plus 3,339,6 million DKK

*Conclusion:* Greenland's income will have risen, and Denmark will have saved funds.

This mechanism benefits both countries economically but more importantly it strengthens Greenland's push towards economic self-sustainability. If revenues from mineral resource activities become so substantial that they bring the annual block grant down to zero then the block grant will not rise again. At that point negotiations between Greenland and Denmark will have to reconvene on the subject of their future economic relationship. This point is highlighted in the provisions. We can speculate and perhaps also anticipate that in this situation this new set of negotiations will also involve a fundamental reassessment of the political relationship. As long as revenues from mineral activities remain small or non-existent however the block grant will continue in place.

The revenues that fall under the above mechanism will be revenues from company taxes from mineral/oil companies and royalties on the quantities of resources brought up. Revenues stemming from publicly owned companies involved in mineral resource activities also fall under the above mechanism. Taxation on personal wages does not however fall under the mechanism, and will be Greenland's to collect and disburse.

As of 2010 Greenland has no revenues that fall under the definition used above in respect of mineral resource activities. Nevertheless, *Inatsisartut* – The Greenland Parliament – has already drawn up the necessary legislation to establish a foundation where potential future revenues stemming from mineral resource activities will be deposited much like the oil fund of Norway. This has been done because the prospects for future revenues already look promising. Moreover, if revenues start flowing in substantial amounts it is a prudent measure to avoid an overheating of the economy. When creating a mineral and oil foundation Greenland will also set potential funds aside for the future. As indicated above the

revenues going to this foundation will be those stemming from both in-shore and offshore resources.

#### *Chapter 4 – Foreign Affairs*

In the Act this Chapter is quite detailed, but here we will only focus on the main principles.

As previously noted Greenland will not be able to assume responsibility for foreign affairs under the new Self-Government status. This does not however exclude Greenland from having a foreign “policy” on matters and interests that affect it. The Government of Greenland has a Department of Foreign Affairs to safeguard the interests of Greenland. But as Greenland is not yet a state, even though Self-Government has been introduced, it cannot operate fully as a state on the international scene.

On foreign affairs Greenland has been given some competences mainly in areas which it has assumed – e.g., in respect of fisheries where Greenland can enter into agreements with the EU or bilaterally with other states for that matter. But because Greenland is not an independent state it exercises only limited jurisdiction in the area of foreign affairs. For example, Greenland cannot become a member, in its own name, of some international organisations in which only states can become members. In these cases, Denmark will be the member of the international organisation and speak on behalf of the whole kingdom. However, Denmark will hear the views of, and coordinate with, Greenland on statements – especially when it is relevant to Greenland. In some cases a Greenlandic representative speaks for the whole kingdom.

That being said, Greenland can negotiate and enter into agreements under international law on matters which exclusively concern it and which relate to fields of responsibility already assumed by the Greenland Self-Government. Agreements can be made with other states and international organisations and cooperation with these upheld. For example bilateral fisheries agreements with Norway and Iceland; and, Greenland cooperates and has entered into a partnership agreement with the EU without being a member of the EU – here only states can become members.

The Greenland Government shall inform the Danish Government when such negotiations and agreements are under consideration. And if they are of substantial importance to the Realm, these matters have to be negotiated with the Danish Government before any decision is taken.

Greenland can become a member of international organisations in its own name, when membership is allowed to entities other than states in the international organisation in question. It has to be ensured too that if Greenland becomes a member of the particular international organisation this will not conflict with its agreed constitutional status.

To become member of different international organisations would be a way to strengthen Greenland’s international profile under the context of its Self-Government status, but might also be a path for Greenland to

follow in order to become part of international multilateral negotiations. Of course these organisations would have to allow entities other than states to obtain membership. These could e.g., be international organisations under the UN (not the UN itself, because here only states can become members).

In the Nordic Ministerial Council Greenland is not an independent member. But within the context of Nordic cooperation the Danish Kingdom's three parts (Denmark, Faroe Islands and Greenland) operate as three individual entities.

Where Denmark holds membership in other international organisations or enters into agreements under international law on behalf of the Kingdom of Denmark, Denmark has to hear Greenland first on whether or not the agreement shall apply to Greenland – especially when such issues are of particular interest to Greenland. If the Danish Government deems it necessary to enter into agreements without the Greenland Government's consent the agreement shall, to the widest possible extent, have no effect for Greenland. Nevertheless Greenland is subject to obligations that arise from agreements under international law and which are at any time binding on the Realm. This would for example be the case with regards to human rights conventions.

One can add to the above information that the Kingdom of Denmark is defined by the Danish state as a unitary state with only one (Danish) constitution. The constitution is interpreted to place the constitutional responsibility and powers in international affairs in the hands of the Danish authorities. This includes security policy (Greenland does not have an army, but among other things, Denmark patrols Greenland's waters with its naval ships. As noted previously the US also has a military base in Greenland). Therefore Greenland will not be able to assume responsibility in this area until it becomes independent and forms its own state.

Being a unitary state (in a perfect world) would entail that this unitary state only had "one face" facing outward. This is one part of the reasoning behind Greenland having limited competences in respect of foreign affairs. In terms of membership of the EU, however, Denmark proper is a member while both Greenland and the Faroe Islands are not. This does not exactly fit well with the notion of a unitary state. Indeed it is exactly this difference in the relationship with the EU that will probably pose significant challenges in the future when the EU will likely speak and negotiate ever more on the international scene on behalf of its member states. In these cases one may suspect that there will not be much consideration given to the views and interests of Greenland or the Faroe Islands and in these cases one will probably more often see Greenland dissenting from the EU/Danish position. In such cases the provisions in the Self-Government Act relating to the international agreements Denmark enters into without Greenland's consent will assume ever greater importance.

One example of this is the ongoing Global Climate negotiations where Denmark takes its position under the EU-umbrella with Greenland having more in common with the needs of developing countries and economies. Therefore Greenland is not adopting the same position as Denmark with regard to the obligations it has signed up to.

Greenland has a great need for development, something Denmark has already achieved for itself – being an industrialised and developed country. As such then it has been agreed that Greenland and Denmark will negotiate “Greenlandic terms” separate from the Denmark – EU stance where appropriate. Whether or not Greenland will be able to negotiate internationally in the future on its own behalf will, in part, be decided by possible future “membership” or otherwise of the United Nations Framework Convention on Climate Change (UNFCCC), when the international climate negotiations commence.

That being said the provisions on foreign affairs in the Self-Government Act have not changed much from the latter years of the Home Rule system. Today there is ongoing constructive and cooperative contact between the two countries’ foreign affairs services. The years to come will show how practice will further evolve in respect of how Greenland manoeuvres on the international scene particularly as regards the recognition of Greenlanders as “a people” according to international law with a right to self-determination. The interpretations of these provisions, not to mention their evolution in practice, will be crucial in this process.

#### *Chapter 5 – Cooperation between the Greenland Self-Government Authorities and the Central Authorities of the Realm Regarding Statutes and Administrative Orders*

Succinctly put, the provisions here concern how the Danish Governments’ Bills that may be brought into force for Greenland have to be submitted to the Greenland Self-Government authorities for comments before they are presented to the Danish *Folketing*. The same goes for administrative orders before they are brought into force.

#### *Chapter 6 – Dispute Resolution*

This provision is identical to that on the same subject in the Home Rule Act. It is to be used in cases where the Greenlandic Self-Government authorities and the Danish authorities disagree on a matter and cannot settle things normally. When discussions between the two parties do not lead to an agreement or compromise, but the matter is of fundamental importance and a decision is needed, then this provision is intended for use. In such a case the parties can decide to lay the question before a board consisting of two members appointed from each side and three Danish Supreme Court judges. If the four appointed members however

reach an agreement the case will be considered settled. If not the three Supreme Court judges will make a decision.

The provision was never used under the HRA but is thought of as having a preventive role – nobody wants a case to be brought before such a board – and therefore it can be viewed as being a factor that strengthens dialogue. Thus, the GDSG Commission considered the preventive role of this provision as being a good element to have, notwithstanding the fact that it may never actually be needed.

### *Chapter 7 – Language*

The provision states that the Greenlandic language is the official language in Greenland. In the Act itself no other languages are mentioned. In the Home Rule Act the Greenlandic language had the status of the main language of Greenland and it was explicitly mentioned in the HRA that Danish would, in addition, have to be taught thoroughly in Greenland.

It is stated in the explanatory notes to the Self-Government Act that the Greenlandic language is part of the Greenlandic peoples' cultural identity – and this is why the language is given this new status. Both Greenlandic and Danish can be used in public and official matters. In the explanatory notes one will also find mention of the need to thoroughly teach in Greenlandic, Danish and other languages including English. This is done in order to ensure that the Greenlandic youth will be generally better prepared for higher education both domestically and abroad.

The attainment of this new legal status in respect of the Greenlandic language sees it given the highest legal recognition available in Greenland. What however this actually translates into in real life for Greenlandic society as a whole only time will tell. The GDSG Commission did not have the mandate to decide upon this – on what the internal Greenlandic language policies should be and what the effects on society will be. That is a matter solely for the Greenlandic Parliament and Government to decide upon. We may speculate that in some societal areas where Danish currently dominates that Greenlandic will be strengthened. But as already noted, only time will tell what impact this will have in societal terms while these changes are themselves not without challenges. As indicated in the explanatory notes the provision is not intended to exclude other languages in Greenland, and in fact, the explanatory notes point in the direction of further strengthening education in other languages. A large majority of Greenlanders speak and understand Greenlandic. A minority do not, but are mainly Danish-speaking Greenlanders and Danes. A large group of people speak both languages.

### *Chapter 8 – Greenland's Access to Independence*

This provision states that the decision regarding Greenland's future independence shall be taken by the people of Greenland. The GDSG Com-

mission's mandate emphasized that a provision regarding Greenland's access to independence was one of the things wanted by the two Governments. The way the Greenlandic peoples' right to independence was expressed in the mandate was however somewhat different compared to how it subsequently turned out in the Act itself.

The mandate noted that it is for the people of Greenland to decide whether Greenland *wishes* independence. An act of law is not however needed to guarantee whether or not the Greenlandic people wish for independence. Rather, if an act is needed to guarantee something, in this case, it should be that the decision is *respected* when it is taken. Thus in Chapter 8 the main provision is framed such that the decision regarding Greenland's independence *shall* be taken by the people of Greenland.

If such a decision is taken then negotiations between Greenland's Government and Denmark's Government shall commence with a view to the introduction of independence in Greenland (as it is expressed in the Act) this in order to negotiate all the different practical elements in place between the two countries. The negotiations will not be about whether or not Greenland will become independent – as that will already have been settled through the Greenlandic peoples' prior decision.<sup>5</sup>

In a situation where Greenland has opted for independence there will still be a few fields of responsibility that have not yet been assumed – primarily, areas which could not be taken over until independence was secured. These areas are: – the constitution, foreign affairs, defence and security policy, the Supreme Court, nationality, and the currency and monetary policy.

In any future negotiation scenario Greenland will have to come to the table well-prepared in order to obtain what it requires in respect of the practical elements pertaining to independence. Greenland has however yet to opt for independence and thus it will take some time before the country is ready to stand on its own feet. Greenland currently still relies on the block grant financially while, as of 2010, it continues also to lack sufficient educated capacity in its population to carry out and successfully implement the task of independence or the duties of a fully sovereign state, while authority for a large number of new fields of responsibility remains to be assumed.

While Greenland will probably become independent in the future co-operation will likely remain between the two countries on areas where Greenland continues to require assistance. It is not after all uncommon to see close continuing cooperation between two states especially when, like Denmark and Greenland, they have a historic relationship. Only time will tell however whether or not this will happen. Many factors may be rele-

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<sup>5</sup> The initial decision can be taken through a referendum, but the Greenland Parliament/Government may also make it – if it feels it has a strong mandate, perhaps after an election where the overarching theme was independence. Realistically in connection with such a fundamental decision the people will probably be consulted from the beginning of an independence process. Even though the people would then be heard directly twice in this process (see below).



vant in this case. Namely, how successfully has Greenland developed in educational, health and societal terms? How is the economic situation in Greenland? How have the country's industries developed? What is Greenland's relationship with its neighbouring states – especially the USA, Canada and Iceland? How has the relationship with the Nordic countries evolved? How is cooperation between Greenland and the EU? What can Greenland offer Denmark? And what can Denmark offer Greenland?

In addition to the independence option, the explanatory notes also suggest that “free association” – a form of cooperation where a smaller state (former colony), cooperates with and gets assistance in some areas from a larger metropolitan state – is also a path that Greenland could consider following. Under free association Greenland would be independent but would continue to enjoy formalised cooperation with Denmark or perhaps even another state (not very likely though). This cooperation would then be founded on a form of formalised bilateral agreement while both countries would have their own constitutions. In this way neither of the two countries would be directly limited by the other country's constitution. The Cook Islands has such a relationship with New Zealand; and Palau, the Marshall Islands and Micronesia are in a free association with the USA. Palau, the Marshall Islands and Micronesia are all also full members of the UN.

Returning to the Act itself, when an agreement on independence between the Greenland Government and the Danish Government has been reached the agreement has to be presented to the *Inatsisartut* which has to give its consent to it. Furthermore the agreement has to be endorsed by a referendum in Greenland. The Greenlandic people would then have to give their approval to the stipulated conditions of independence.

Because Greenland is still part of the Danish constitutional law system Greenland's move towards independence would also have to be approved by the Danish *Folketing*. Independence for Greenland would, for the Danish Kingdom, represent an act of relinquishing territory. Under the Danish Constitution in order for this to happen the Danish Parliament has to give its consent (See section 19 of the Danish Constitution).

In the Act it is stated that independence for Greenland shall imply that Greenland assumes sovereignty over the territory of Greenland. In the explanatory notes this is further elaborated as including sovereignty over the land, as well as the sea and airspace above and around Greenland.

The explanatory notes to the Self-Government Act also state that in order to be legally prepared for independence Greenland can begin its own preparations for independence in terms of writing its own future constitution. This would be an act where the legal foundation for a possible future sovereign state is prepared.

Greenland's potential route to independence entails a carefully thought out and thorough process where fundamental decisions will have

to be made and several parties will have to be involved – most importantly and decisively the people of Greenland themselves. There may be some stumbling blocks along the way, but the fundamental trick for Greenland is to come well-prepared for the process – primarily that the people and their society have given themselves the time to develop further. Independence is something that should not be rushed; otherwise it is unlikely to be either viable or tolerable. It may not however be tolerable either for the wait to be too long, particularly if it becomes clear that the establishment of a viable state is already possible because the limitations of not going “the whole way” to statehood would then have become obvious. It is however stated in the explanatory notes that in consenting to this legal process, in respect of its access to independence, that Greenland has not given up any of its current rights under international law.

#### *Chapter 9 – Entry Into Force and Transitional Provisions*

The last chapter in the Act has a more technical character focusing on how existing legislation will be affected – what will be repealed and what remains in force until new legislation comes into place etc.

## 9.9 Conclusions

As of 2010, the Greenland Self-Government Act is a very new piece of legislation and thus it still remains to be seen how it will operate fully in practice. Even though this is a new system in place, in many instances the routines and practices of the Home Rule system continue in the ruling and administration of the country. Much of the previous legislation in numerous areas did not change with the introduction of self-governance but rather continues as before. If anything is to change as regards governing practices in Greenland then these matters will be for the Greenlandic Government and Parliament to decide upon.

The foreign affairs area and its future issues arising between Denmark and Greenland will probably be one of the more interesting areas to follow in the years to come. The legislation directly pertaining to this area has not changed much, but the recognition of Greenlanders as “a people” and the undeniably stronger feeling of Greenlandic self-esteem which self-governance brought along will probably lead to interesting developments and might even lead to Greenland’s greater international involvement in various issues. It will be interesting to follow Greenland’s actions in connection with memberships of international organisations or the cooperation it enters into with such organisations. With the new Self-Government system in place it will also be interesting to see Greenland’s individual stand on different international issues – e.g., on climate issues, whaling, cooperation with the EU, etc. Today Greenland is able to adopt an individual standpoint or “own view” on almost all issues, if it should

wish to do so. This does not necessarily mean though that Greenland will automatically become an independent party to multilateral negotiations. Whether or not this will subsequently change in some areas is perhaps however one of the most interesting future aspects in this regard.

With the introduction of Self-Government some of the fundamental elements in the relationship between Greenland and Denmark have changed (e.g., greater equality was added to the relationship). Furthermore, several outstanding or “open” questions on possible future situations were clarified, e.g., how possible future mineral revenues should be handled and how this should affect the block grant; how a possible future independence process should progress, etc. New recognitions acquired: the recognition of Greenlanders as a people according to international law with a right to self-determination and the recognition of their language as the official language which also means a legal strengthening of an important part of Greenlandic culture. Greenlanders obtained new rights and competences, e.g., the right to take over the resources of the sub-soil and the explicit legal right to take over the judicial system, etc. Developments in these two areas will be particularly interesting to follow in the future. The issue of jurisdiction over resources is crucial to Greenland’s future economic sustainability. The rights to the Greenlandic mineral, gas and oil resources are now controlled and owned by the Greenlandic people who may, or may not, boost Greenland’s economic prosperity. The taking over of the judicial system will also represent a milestone on the path to create something that might in the future become a new independent state.

The introduction of Self-Government fundamentally changed the legal platform and gave Greenlanders the ability to more easily address the new challenges facing modern Greenlandic society. The old Home Rule legal framework was clearly no longer adequate to perform that role. This also shows that the Self-Government system is and will continue to be “a process.” In a couple of decades it will likely have evolved into something that is near its full potential (Greenland will probably have assumed most, if not all, new areas of jurisdiction and responsibilities that it is legally empowered to do so under the Self-Government system).

Greenland is now clearly and explicitly able to assume still more areas of competence relating to the functioning of the Greenlandic society. In this way Greenland’s internal self-determination will be further strengthened as will the means to form and mould its own society. On the question of independence only time will tell how Greenland is able to take advantage of the momentum created thus far. If Greenland opts to do so the Greenlandic people can choose to secede from Denmark. If Greenlanders so wish, they will be able to draft their own constitution which will define their own political status. But Greenland can also choose to stay within the Kingdom. In addition it can also choose to try to develop its relationship with Denmark into a free association – a form of

formalised cooperation between two independent countries each with their own constitution.

Aside from the legal aspects further development should and probably will be within the areas of education, social policy, health, industrial development, the labour market and the economy. Developments within these sectors will be crucial for the further evolution of Greenland's Self-Government status. This will take time, and this is the reason why the process will probably last for decades before the option of independence becomes feasible. At the same time one cannot disregard the fact that in the coming years the likely new discoveries and exploitation of mineral resources and oil may suddenly change the economic prosperity prospects for Greenland significantly for the better.

Before the introduction of Home Rule people in Greenland were not satisfied with the fact that much of their society was run from Copenhagen. Experience of both the period before HR and of the HR process itself have shown that you need to be where things happen, to know the people and their culture, to hear what they have to say, and to live with the consequences of your decisions, otherwise you will instil a form of rule which, ultimately, the people neither identify with nor support.

This was in part the reasoning behind why Greenlanders wanted to control their own country and society and thus why the Home Rule process was introduced. The same fundamental reasoning was behind the introduction of Self-Government. This does not however mean that the new process of self-governance will be easy. It is clear though that Greenlanders as a society and as a nation, wanted, and want to, control their own society because they want to be responsible for their own affairs and in so doing they can identify much better with how their country is run. This is what Self-Government in Greenland is all about.

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things, you will be able to find and  
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## Questions:

1. What does Greenland's right to self-determination mean?
  - a. Internally and externally.
  - b. Which factors limit and which strengthen this right?
  - c. Discuss the possible clash between constitutional rights and rights according to international law in this context.
  - d. Discuss the notion of "equality" in this context.
2. Discuss the issue of voting rights – compare Greenlandic rights in this regard to those of other countries. How do voting rights in Greenland differ from voting rights in other countries?
3. Discuss the economic arrangements under the Self-Government system with regards to the principle that there must be accordance between rights and obligations (as mentioned in the Greenland-Danish Self-Government Commissions mandate).
4. Describe the legal independence process as it is laid down in the Act? What are its strong and weak points?
5. Does the Act on Greenland Self-Government correlate with the right of self-determination according to international law?

# 10. Inuit of Alaska: Current Issues

*Dalee Sambo Dorough*

[The Indians] were told that Columbus discovered America and here is how you are going to live. If a single Native can speak English at that time, he would reply, “No, no, no? We are the first Americans. [...] Our people have one perpetual goal – self-determination, freedom, and peace.

Statement by Mike Roger Silook, Gambell, to the Alaska Native Review Commission, September, 1984.

## 10.1 Introduction

This chapter intends to introduce the reader to the Inuit of Alaska and to a range of current issues facing their distinct communities, especially in light of the 2007 adoption of the UN Declaration on the Rights of Indigenous Peoples. In addition, the need to re-visit the Alaska Native Claims Settlement Act of 1971, which is the key piece of United States legislation impacting Alaska’s Indigenous peoples, will be briefly discussed. Finally, the role and interests of Alaskan Inuit in light of the UN Convention on the Law of the Sea and climate change will be referenced with regard to Alaskan native peoples’ status and rights.

## 10.2 Background and History

The Inuit (of Alaska and those of the entire circumpolar region) have essentially occupied the region since the stabilisation of sea levels.<sup>1</sup> Their pre-history in Alaska dates back to 12,000BC. Inuit oral history and legends has however recorded their migration from Russia to Eastern Greenland. Though once nomadic and consisting of small numbers to ensure survival and mobility, Inuit forebears sustained methods for social

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<sup>1</sup> Inuit or the “real people” are the indigenous peoples settled in the Arctic and sub-Arctic regions of Alaska, Canada, Greenland and the Russian Far East, which now number some 150,000. See, generally, D. Dumond, “Prehistory: Summary,” and D. Anderson, “Prehistory of North Alaska,” in *Handbook of North American Indians*, Vol. 5, ARCTIC (Washington, D.C.: Smithsonian Institute, 1984) at 72–94.

control and order. They lived in relative security where the natural order guided cycles and rhythms. Organised communally, Inuit remain hunters and gatherers relying primarily upon the land, ocean and rivers for sustenance. In all matters, the collective was more important than the individual. Traditional leaders were chosen based upon their ability to hunt and provide for the community as a whole. A balance existed between women and men because the combined skills of both were needed for survival.

Inuit communities remain culturally intact. From the point of first contact with outsiders however they have been adversely impacted. The introduction of diseases for which they had no natural immunity, maltreatment and enslavement, encroachment and exploitation of natural resources by outsiders, and punishment for resistance have all taken their toll. The rapid and radical change that occurred has left a deep, dark mark on their communities. Even today the “social and physical factors” that cause higher mortality rates, addictions, suicide, chronic health issues and other poor socio-economic indicators for Indigenous peoples in the North remain the focus of study by non-natives (see Driscoll and Dotterer, 2009–2010). There is no question that indigenous peoples have been and continue to be victims of subjugation, domination and exploitation. Unfortunately, there are numerous examples of the denial of the right to self-determination of indigenous peoples, which has been identified as one of the contributing factors to the social ills and dysfunction within northern Indigenous communities.

Like the Indigenous peoples of Latin America, the tentacles of colonisation were manifesting themselves as far back as the 1493 Papal Bull purportedly laying claim and undertaking “sovereign acts” within indigenous territory, including southeast and south-central Alaska. However, there was no real, sustained contact with the aboriginal peoples of Alaska (and in particular in the Arctic) until the early 1800s when Russian fur traders arrived and even then contact was limited primarily to coastal areas. In 1867, the Russian government “fabricated”<sup>2</sup> title to Alaska and “sold” the territory for 7.2 million dollars to the United States. The rights of the Alaska Native peoples were not substantively addressed in the 1867 Treaty of Cession (Treaty of March 30, 1867, 15 Stat. 539) nor were they substantively addressed in the 1884 Organic Act, adopted by United States Congress. In addition to a range of political and legal provisions, including the establishment of courts, appointment of a Governor, the Organic Act provided the following language concerning Alaska Natives:

That the Secretary of the Interior shall select two of the officers to be appointed under this act, who, together with the Governor, shall constitute a Commission to examine into and report upon the condition of the

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<sup>2</sup> Many indigenous peoples have asserted that Russia never acquired “title” to Alaska and merely fabricated title due to their need for finances to support their depressed domestic economy as the result of war.



Indians residing in said Territory, what lands, if any, should be reserved for their use, what provision shall be made for their education, what rights by occupation of settlers should be recognized [...].<sup>3</sup>

This language alone suggests the nature of the relationship between the U.S. Commissioners and that of the Indigenous peoples of the territory as well as how their fundamental rights were being addressed by the colonising force. Following this development, the Dawes Act was effectively applied to Alaska through the 1906 adoption of the Alaska Native Allotment Act of 1906 (34 United States Statutes 197), which provided for individual allotment of land as privately held parcels, creating the possibility of loss of lands due to fractionalisation and sale similar to the devastating results of the Dawes Act for Indian peoples throughout the United States.

In addition, the 1926 Alaska Native Townsite Act (Public Law No. 69–280) was adopted, with a similar intent to provide lands on the basis of individual use. In response to a range of conditions, including the massive loss of Indian territory, the 1934 Indian Reorganization Act (IRA) was adopted and later amended (in 1936) to apply to Alaska Natives, providing recognition of the important collective nature of their land rights as well as traditional councils and tribal governments (Public Law No. 74–538). Under the IRA, a number of Alaska Native communities organised themselves for the purposes of self-government, with many still in existence today. The vast majority of Alaska Native traditional councils were maintained, however. Though a couple of Indigenous collectives were organised under “reservation” land systems this approach was not put in place for Inuit in Alaska. The subsequent 1946 Indian Claims Commission was hailed as a new policy to ensure redress of Indigenous rights and the Commission did in fact address issues brought by the Tlingit and Haida in Southeast Alaska. Section 4 of the Statehood Act of 1959 (Public Law 85–508) acknowledged outstanding rights and title of Alaska Native people to lands by stating:

the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property, (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority [...].

Clearly, throughout all of this history as well as the simultaneous gradual codification of international law or the Law of Nations concerning the recognition of sovereignty as well as the territory of indigenous peoples through treaties and other acts, the United States chose to ignore

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<sup>3</sup> See: Commission to examine and report on condition of Indians, SEC. 12. District Organic Act (An Act Providing for a Civil Government for Alaska) 23 Stat. 24 – May 17, 1884.

the fundamental rights and status of Alaska Native peoples. The political organisation and collective demands of Alaska Native people (including Inuit) from statehood until 1971 effectively resulted in the denial of the right to self-determination through the adoption of the Alaska Native Claims Settlement Act of 1971 (hereinafter ANCSA). Even the claims made by Alaskan Inuit in the context of the Indian Claims Commission were summarily dispensed with on the basis that the ANCSA purportedly “extinguished” all claims and titles to land.

### 10.3 The Alaska Native Claims Settlement Act of 1971

The experiment of the ANCSA is a concrete example of the adverse impacts of the denial of a peoples’ right of self-determination.<sup>4</sup> It was not until oil was discovered on Alaska’s north slope that the federal and state governments were prompted to discuss and address the aboriginal right and title of the Alaska Native people to the territory of Alaska. The state and federal governments and private industry felt that congressional legislation would better address and fulfil their interests rather than legal action taken on the part of the Alaska Natives, who would have had very strong and compelling legal arguments to support their assertion of ownership, rights and title. The massive lobbying effort of the various stakeholders culminated in the adoption of the ANCSA. Throughout the process, indigenous peoples had very little direct involvement and the final outcome was not a matter of referendum. Hence, the basic principles of full, effective and meaningful participation and consent were not applied.

The provisions of the Act transferred to the Alaska Native peoples 44 million acres of land and 962.5 million dollars in compensation for all lands lost. These so-called “entitlements” were channelled through twelve regional and two hundred village corporations created by the Act. These are for-profit corporations established under U.S. legislation and chartered by state statutes. To access these “entitlements,” individuals of one-quarter Native blood or more, born on or before December 1971, were eligible to enrol as shareholders of a corporation. The shareholder rolls were then closed. The shares held by Native people are inalienable and the profit making corporations hold the land in fee simple, enjoying a tax-exempt status for a twenty-year period (from 1971 to 1991). Even with a minimal understanding of corporate America, one can imagine the overnight vulnerability of Native ancestral lands under this regime.

A significant omission in the Act was the fact that there was no single provision addressing the right of Alaska Native peoples to self-determination. In fact, many Alaska Natives contend that it was intentionally omitted in order to assimilate Alaska Natives into mainstream society and terminate their distinct relationship with the federal govern-

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<sup>4</sup> See, for example, the four-part Anchorage Daily News series entitled “People in Peril,” 1984.

ment. Equally damaging are the ANCSA provisions that purportedly “extinguished” aboriginal title to all other lands and aboriginal hunting and fishing rights of the Alaska Native people despite their dependence upon a subsistence-based economy (ANCSA, ss. 4 (a), (b) and (c)).<sup>5</sup> Furthermore, many of the village corporations are without resources to generate profits. And, even if they do have such resources, to exploit them for profit is inconsistent with their values, customs, practices, and land and resource use.

In a short period of time it became clear that ANCSA did not reflect and would never reflect the true aspirations of the Alaska Native peoples nor was the corporate structure an institutional structure freely chosen by them. The vulnerability of the corporations and the exposure of Native ancestral lands through taxation, alienation of shares and takeover by more powerful forces continued to be very real.<sup>6</sup> However, the real problems of ANCSA lie in the fact that lands, territories and resources, self-determination, and subsistence were not initially made secure by the Act. The very instrument that was to secure the land and a future for Alaska Native peoples may be the one by which they lose the distinct characteristics and status as indigenous peoples.

In response to this reality and the threats facing Alaska Native communities, the Inuit Circumpolar Conference – which since 2006 has been called Council – (hereinafter ICC)<sup>7</sup> established the Alaska Native Review Commission<sup>8</sup> to gain an understanding of the impact of the Act on the

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<sup>5</sup> For a commentary on the Act, see T.R. Berger, *A Long and Terrible Shadow[:]* White Values, Native Rights in the Americas 1492– 1992, (Vancouver: Douglas & McIntyre, 1991) at 133: “In the Alaska Native Claims Settlement Act of 1971 Congress abolished the aboriginal rights of Alaska Natives, including their aboriginal rights of hunting, fishing and trapping. Congress had spoken. Yet twenty years later Alaska Natives refuse to acknowledge the loss of their tribal right, their right as collectivities, to take fish and wildlife and to regulate their own subsistence activities.”

<sup>6</sup> Despite the so-called “1991 amendments” to the ANCSA, the threats to Native ownership and control remain and the land is still held by the corporations originally created under the Act. See generally E. Smith, “The 1991 Amendments: A Legal Perspective,” 9 *Rural Development Exchange* 3 (1988); and B. Anderson and L. Aschenbrenner, “Amendments Provide Stop-Gap Protection for Native Land and Corporations,” *The NARF Legal Review*, Spring 1988.

<sup>7</sup> The Inuit of the Arctic circumpolar region organised themselves internationally through the Inuit Circumpolar Conference (hereinafter ICC) founded in 1977 in Barrow, Alaska. The goals of the ICC are: To strengthen unity among Inuit of the Circumpolar region; To promote Inuit rights and interests on the international level; To ensure and further develop Inuit culture and society for both the present and future generations; To seek full and active participation in the political, economic, and social development in our homelands; To develop and encourage long-term policies which safeguard the Arctic environment; and To work for international recognition of the human rights of all Indigenous Peoples. The organisation has an internationally elected President and an Executive Council with two elected Inuit from each of the four regions. In addition, the ICC has staff and offices in all four nation-states, as well as a number of Commissions and Working Groups that assist in carrying out their four-year mandates. These mandates are established through their General Assembly, which is held every four years and involve elected delegates from across the entire Inuit territory. The ICC gained United Nations Non-Governmental Organization (NGO) status in 1983 and has been active in the UN’s work as a leading and well-respected indigenous NGO. See generally Dalee Sambo, “Inuit Assert Control Over Arctic,” *Arctic Policy Review*, July/August 1977, *Arctic Coastal Zone Management Newsletter*, August 1983; and A. Lynge, *Inuit* (Nuuk: Attuakkiorfik, 1992).

<sup>8</sup> The Alaska Native Review Commission (ANRC) was established by the Inuit Circumpolar Conference and endorsed by the World Council of Indigenous Peoples. I was the Director of the Alaska Office of the ICC, working as the ICC’s liaison to the ANRC, and responsible for raising the

lives of Alaska Native peoples. The ICC felt that it was important to provide a forum that would allow Alaska's indigenous peoples to speak in their own languages and within their own communities. To conduct the review of the Act, the ICC appointed former British Columbia provincial court Justice Thomas R. Berger of Canada as the sole Commissioner. A well-known advocate of Native rights, Berger's mandate was to conduct a comprehensive review of the social, economic, political and environmental impact of the ANCSA, independent of the ICC or any other organisation in Alaska or elsewhere.

The backbone of the Commission's work was the village hearing process. Sixty-two village hearings were complimented by eight formal roundtable discussions where both indigenous and non-indigenous representatives from throughout the world participated. There are over 98 volumes of transcripts from over 800 hours of tapes. The findings of Commissioner Berger affirmed and re-affirmed what Native people had been saying since the enactment of ANCSA. Berger's report, *Village Journey: The Report of the Alaska Native Review Commission* amplified the desires of Alaska Natives for continued ownership of their ancestral lands, self-government, and recognition of hunting and fishing rights. Alaska Natives expressed their desire to retain their lands through governing institutions of their choice. Many continue to feel that land and all of the renewable and non-renewable resources are key to their survival as distinct communities. The recommendations made by Commissioner Berger reflected these desires and were quite specific as to how to accomplish such objectives.

Following the release of *Village Journey*, from 1985 to 1988, village and tribal leaders from across the state lobbied Congress to amend ANCSA in a fashion consistent with Berger's recommendation and the views of the tribal leadership: to ensure that village lands (held by corporations) could be transferred to traditional governments; to ensure that nothing in the legislation would undermine the inherent rights of self-government and self-determination; and to entrench traditional hunting and fishing rights in both state and federal law. The tribal campaign to amend ANCSA was spearheaded by the Alaska Native Coalition (ANC), a state-wide organisation representing traditional indigenous governments and village corporations.<sup>9</sup>

The corporate-led effort to amend ANCSA solely within the framework of the corporate structure was spearheaded by the Alaska Federa-

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funds necessary to successfully complete its work. The ANRC initiated their work in September 1983 and concluded in September 1985.

<sup>9</sup> The Alaska Native Coalition (ANC) succeeded United Tribes of Alaska (UTA), state-wide organisation of tribal governments that subsequently folded due to financial difficulties. The ANC was distinct from UTA in that it included village corporation and tribal government representatives, both equally concerned about the impact of the ANCSA. The author was the spokesperson for the ANC throughout the legislative lobbying effort and headed up much of their fund raising, lobbying, and public relations work.

tion of Natives (AFN).<sup>10</sup> The AFN, at that time considered the Native “Chamber of Commerce,” has been the most visible and powerful Native institution in Alaska. This “corporate cartel,” has enjoyed a comfortable relationship with major industry in Alaska (including the oil industry) and the Congressional Delegation of Alaska. In addition, they have a great amount of influence over state and federal political agendas.

The lobbying effort was a fierce battle between the ANC and AFN, which divided the Alaska Native community along tribal/corporate lines. Unfortunately, due to many factors, the ANC was not successful in gaining the amendments desired. The resulting law (Public Law 100–241) does not curb the major threats posed by ANCSA. The land can still be lost or sold and there are no provisions to ensure continued Native ownership and control of the corporations. The amendments actually allow corporations to sell new stock to non-Natives. More importantly, however, is the fact that the amendments did not provide for returning land to the traditional and tribal governments.

Furthermore, from 1971 until 1993 Alaska Native traditional and tribal governments enjoyed, at best, a rather vague political and legal status due to the fact that neither the United States’ Congress nor the State of Alaska were willing to acknowledge the existence of tribal governments in Alaska or their inherent powers. In 1993, Ada Deer, a Menominee Indian woman and former Assistant Secretary for Indian Affairs, published the list of federally-recognised tribes, including 226 Alaska Native tribes<sup>11</sup> and further drafted preambular language clarifying the powers, status, authority and the sovereign immunity of Alaska Native governments. This action caused a flurry of political activity prompted by the undercurrents in the stream of non-Native opponents to tribal sovereignty.

For example, in the *Alaska v. Native Village of Venetie* case, the tribe was sued by the State of Alaska for imposing a tax on a contractor intending to build a structure within the tribal community. The State asserted that the Alaska Native Claims Settlement Act purportedly “extinguished” any status of Alaska Native lands as “Indian Country” (*Ibid.*).

The United States 9<sup>th</sup> Circuit Court of Appeals affirmed the right of the tribal government of Venetie, as a legitimate third order of government in the United States, to impose such a tax, stating that ANCSA did not alter the status of Venetie tribal lands as Indian Country. The reaction of political leaders and the general public was swift and definitive: appeal the decision to the Supreme Court in order to unravel the Appellate Court

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<sup>10</sup> The Alaska Federation of Natives is a state-wide organisation controlled by the Native regional corporation executives, most of whom feel personally charged to make the ANCSA a success and who have personally and individually profited from the institutions. For example, the Native and non-Native management of Cook Inlet Region, Inc., a south-central Alaska Native corporation, recently divided \$17 million as the result of a windfall sale of telecom stock, while a majority of the shareholders live at or below the poverty level.

<sup>11</sup> Indian Entities Recognised and Eligible to Receive Services from the United States Bureau of Indian Affairs, Federal Register, Volume 58, No. 202, October 21, 1993.

decision, believing that it was paramount to ensure that the government is the only plenary power that can prescribe the rights and powers of Indians, whenever and wherever they feel it necessary. And, more importantly, the State wanted a decision to confirm that Indian Country did not exist in Alaska. It is no surprise that the conservative U.S. Supreme Court accepted the case and determined that the vague wording of the 1971 ANCSA supposedly did “extinguish” the status of Alaska Native tribal lands as Indian Country and therefore, the tribe had no authority to impose such a tax. The politicians and general public achieved their objective with this sweeping decision and were only then prepared to engage in government-to-government dialogue in an effort to further prescribe the rights, powers and authority of Alaska Native tribal governments.

Despite such legal and political action, tribal governments have persisted and taken on some of the outstanding issues of ANCSA. In 1993, the Alaska Inter-Tribal Council (AITC) was organised and modelled after the Arizona Inter-Tribal Council. This state-wide organisation has been engaged in a number of initiatives to resolve any gray area in terms of the State of Alaska’s recognition of tribes.

For example, in the area of policy development, tribal leaders infused a government-to-government dialogue (which followed the Venetie decision) with the language of the then draft United Nations Declaration, which resulted in the adoption of Administrative Order No. 186 by former State of Alaska Governor Tony Knowles. This order acknowledged the existence of Tribes in Alaska and their distinct legal and political authority. The order was followed by the adoption of the *Millennium Agreement* in April 2001 by both Tribal governments and the State Executive branch.

Before the yearlong dialogue with the State of Alaska tribal governments discussed their strategy and the approach they would need to adopt to gain an agreement that would have genuine meaning within their communities and for their relations with the State of Alaska. One of the first actions was the adoption of a Declaration of Fundamental Principles to guide the work and also to put the State of Alaska on notice as to the principles that the indigenous peoples of Alaska felt were fundamental to their continued existence as distinct collectives. This Declaration of Fundamental Principles provided essential procedural and substantive guidelines for the dialogue with the State. As a result of the tribal leader’s actions, the final *Millennium Agreement* echoes some of the language of the original draft United Nations Declaration, albeit adapted for this specific context. Specifically, Part III entitled “Guiding Principles” states:

The following guiding principles shall facilitate the development of government-to-government relationships between the Tribes and the State of Alaska:

- The Tribes have the right to self-governance and self-determination. The Tribes have the right to determine their own political structures and to select their Tribal representatives in accordance with their respective Tribal constitutions, customs, traditions, and laws.
- The government-to-government relationships between the State of Alaska and the Tribes shall be predicated on equal dignity, mutual respect, and free and informed consent.
- As a matter of courtesy between governments, the State of Alaska and the Tribes agree to inform one another, at the earliest opportunity, of matters or proposed actions that may significantly affect the other.
- The parties have the right to determine their own relationships in a spirit of peaceful co-existence, mutual respect, and understanding.
- In the exercise of their respective political authority, the parties will respect fundamental human rights and freedoms.

In addition, a number of tribal government councils voted to abolish the state chartered city governments. They have also transferred assets from the village corporations created by ANCSA to the tribal governments. Furthermore, they have found creative ways to pool resources without triggering “dissenters’ rights.”

ANCSA represents only one of many examples of the need to address the rights of Alaska’s Indigenous peoples in comprehensive terms and in a manner consistent with international human rights law. In this regard, a careful analysis of ANCSA in the context of international human rights standards would immediately bring out the inconsistencies between domestic United States’ policy and international norms. A primary example is the purported “extinguishment” of the hunting and fishing rights of Alaska Native peoples. Here, even though Article 1(2) of the International Covenants, drafted in 1966, state that “In no case may a people be deprived of its own means of subsistence,” the United States Congress, in 1971, “extinguished” these specific rights. The fundamental rights of participation in decision-making, consent, inter-generational rights, development, and a wide range of other rights have been violated by the terms of ANCSA. However, the denial of the paramount right to self-determination and self-government has been the most problematic for the indigenous communities of Alaska. Therefore, the United Nations Declaration stands as an important document to Alaska Native peoples, including the Inuit. Through the Declaration, Alaskan Inuit can begin to right the wrongs of ANCSA and other destructive and unhelpful laws, regulations and policies.

But rather than characterise indigenous peoples solely as victims of oppression, it is important to underscore the positive reality of indigenous peoples (and their rights) and recent developments that have emerged by virtue of the initiatives of the United Nations and other international and regional organisations. It is necessary to also highlight a few of the sig-

nificant positive developments and demonstrate the importance of the international indigenous human rights standards to bolster their efforts to combat racism, racial discrimination and the denial of rights within their communities.

The first example is that of the Yukon River Inter-Tribal Watershed Council (YRITWC). The YRITWC is an initiative that emerged in 1996 involving over 42 Athabaskan, Yupik (who are Inuit and members of the ICC) and Tlingit indigenous communities from the headwaters of the Yukon River (in Yukon Territory, Canada) to the mouth of the river in southwest Alaska, a 2,300 mile watershed.

An important distinction concerning this indigenous led initiative is that it was conceived of by and for indigenous peoples themselves and was not in response to a real or perceived threat. The Tribes and First Nations of the watershed began with a conference that brought all the indigenous peoples and leaders from the river together to meet one another and discuss their visions for watershed protection. It was determined that an international treaty would be the first step in defining the objectives of the Council and goals of the Tribes and First Nations. The YRITWC is currently focusing on water pollution and toxics having initiated a water sampling and analysis programme in 2009. They do however also intend to consider long-term management and assertion of control and ownership issues.

The Inter-Tribal Treaty was adopted in 2001 (see Accord), and both the treaty and the work of the Council incorporate many of the important principles that have emerged in the draft Declaration. The YRITWC has also been involved in the International Joint Commission (on waterways) due to the threat of mining on the Canadian side of the border and its impact on the U.S. side.

In regard to indigenous justice systems, a number of promising and unprecedented initiatives have been led by three distinct Tribal Courts in the southwest, southeastern and northern regions of Alaska. The first is that of the Orutsararmiut Native Council (ONC), which is the traditional indigenous government in the village of Bethel. The ONC has developed the Mikilgnurnun Alirkutait or Tribal Children's Code. This Yupik community felt that it was critical to safeguard the most vulnerable sector of their society: the children. The ONC took on the task of developing the code by first establishing their long-standing Yupik values, customs, and practices or Yupik custom law as the foundation for the Code.

They followed by reviewing domestic laws and regulations, including the Indian Child Welfare Act, and borrowed what they deemed useful from this text. They also informed themselves about the international indigenous human rights movement and chose to incorporate not only provisions from the original United Nations Declaration but also from the United Nations Convention on the Rights of the Child (CROC). The final



code was adopted by the Council and translated into the Yupik dialect and is now used on a daily basis by the ONC Tribal Court (see Code).

A similar project emerged in Barrow, Alaska on the Arctic slope and relates to their Tribal Court. However, the Barrow Tribal Court is developing an appellate court based upon the traditions of this whaling culture. In addition, other tribes have considered the development of tribal codes that deal with intellectual property in an effort to safeguard themselves from exploitation by outside developers and pharmaceutical companies.

Each of these projects reflect the development of new regimes based upon age old values or, more accurately, on Inuit values and the adaptation of the human rights framework and standards of the United Nations for their particular cultural context. Another approach is that of First Nations and Tribal Governments, as legitimate political institutions, adopting the original United Nations Declaration and various other international human rights instruments within their own communities, making them applicable to their own members. So, not only are Indigenous peoples incorporating such standards, they are moving to ratify them in the way that nation-states ratify the various conventions that emerge from the human rights framework.

Too often indigenous leaders are consumed with the urgent day-to-day issues facing their communities and thus have little time to consider the activities taking place far away in Geneva, New York and elsewhere. Some legitimately ask, what is the point of this work, especially in light of the fact that 25 years or more of annual meetings have produced a text that still remains “indigestible” to some governments (including the United States). It has also been asked by those indigenous peoples who have, and continue, to exercise the right to self-determination, and who view themselves as independent despite the states that have grown up around them and attempted to assimilate and subsume them. These are important questions for those that have been intimately involved in the process. In some instances, indigenous representatives have been able to respond in a direct, proactive and concrete fashion by utilising and giving greater meaning to existing and emerging instruments to safeguard and advance the political right to self-determination, as well as other economic, social, cultural and spiritual rights.

With regard to policy development, the above example concerning the use of the Declaration provisions by Alaska Native tribal governments in their government to government negotiations with the state is a good model as to how the document has been used to re-define political and legal relationships between local governments and indigenous governments. Similar examples undoubtedly abound in other regions of the world.

## 10.4 UN Declaration on the Rights of Indigenous Peoples

The UN General Assembly adoption, on September 13, 2007, of the United Nations Declaration on the Rights of Indigenous Peoples provides us with real potential for re-defining the political and legal relationship between Alaska Natives, including Inuit, and the State of Alaska, the United States government and the third party interests who are some of the most powerful forces impacting our communities. Again, there are many who would regard the United Nations as irrelevant in addressing the issues that face the world community. However, human history and the purposes and principles enshrined in the UN Charter, which captured aspirations to move the world community away from the horrors of genocide and conflict, are highly relevant to the matters that face Alaskans generally and Alaskan Inuit in particular.

## 10.5 The Right of Self-Determination

The fact that the ANCSA did not address the political right of Alaska Native peoples to self-determination will be one of the first areas to test the latitude for re-defining their political and legal relationships consistent with the minimum standards of the UNDRIP. Articles 3 and 4 (respectively) of the UNDRIP provide:

“Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

“Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”

Alaska Native youth are now beginning to feel the impact of the ANCSA provisions first-hand particularly those who are not enrolled shareholders and who have expressed the need to assert their individual and collective identity. They have begun to ask about the true impact of ANCSA upon their communities. They feel that the Alaska Native community must re-examine the impact of the ANCSA, especially in light of the significant developments concerning international human rights law and the UN Declaration on Human Rights.

Those “disenfranchised” by the Act are unwilling to let go of their sense of collective identity or the importance of the right of self-determination. They have begun to ask the tough questions of who is the “self” in self-determination and not only in the context of political rights but also in relation to social, cultural, and economic rights as well. Inuit youth involved with the Inuit Circumpolar Council have become increasingly involved in local, regional, national and international developments.

At the micro-level, the UNDRIP has much to offer in terms of guidelines and standards for sorting out difficult questions and outstanding claims. At the macro-level, Inuit leaders have already taken important steps to address the matter of self-determination in the face of increasing nation-state claims in respect of Arctic sovereignty. One specific example is the November 2008, “Inuit Leaders Summit on Arctic Sovereignty,” which was held in Kuujuaq, Northern Quebec. Inuit leaders from across the circumpolar region discussed the matter of Arctic sovereignty at length.<sup>12</sup> The Inuit leaders involved in this topical discussion recognised the complex nature of sovereignty anchored in international law with many overlapping elements. However, they affirmed that within the Inuit context, the starting point must be the history and reality of Inuit use and occupation of Arctic lands and waters, and the need for Arctic-rim nation states to respect the collective human rights and direct participation of Inuit in all international discussions as well as commitments across the whole of the Arctic region. With regard to self-determination and Inuit participation, the Circumpolar Inuit Declaration on Arctic Sovereignty states:

### **3. “Inuit, the Arctic and Sovereignty: Looking Forward”**

#### *The foundations of action*

- 3.1 The actions of Arctic peoples and states, the interactions between them, and the conduct of international relations must be anchored in the rule of law.
- 3.2 The actions of Arctic peoples and states, the interactions between them, and the conduct of international relations must give primary respect to the need for global environmental security, the need for peaceful resolution of disputes, and the inextricable linkages between issues of sovereignty and sovereign rights in the Arctic and issues of self-determination.

#### *Inuit as active partners*

- 3.3 The inextricable linkages between issues of sovereignty and sovereign rights in the Arctic and Inuit self-determination and other rights require states to accept the presence and role of Inuit as partners in the conduct of international relations in the Arctic.
- 3.4 A variety of other factors, ranging from unique Inuit knowledge of Arctic ecosystems to the need for appropriate emphasis on sustainability in the weighing of resource development proposals, provide practical advantages to conducting international relations in the Arctic in partnership with Inuit.
- 3.5 Inuit consent, expertise and perspectives are critical to progress on international issues involving the Arctic, such as global environmental security, sustainable development, militarization, commercial fishing, shipping, human health, and economic and social development.

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<sup>12</sup> The final outcome of these discussions was “A Circumpolar Inuit Declaration on Sovereignty in the Arctic,” adopted on behalf of Inuit in Greenland, Canada, Alaska, and Chukotka by the Inuit Circumpolar Council, April 2009. See: <http://www.google.com/search?hl=en&source=hp&q=a+circumpolar+inuit+declaration+on+sovereignty+in+the+arctic&aq=2m&oq=inuit+deklar&aqi=g1g-m2>.

- 3.6 As states increasingly focus on the Arctic and its resources, and as climate change continues to create easier access to the Arctic, Inuit inclusion as active partners is central to all national and international deliberations on Arctic sovereignty and related questions, such as who owns the Arctic, who has the right to traverse the Arctic, who has the right to develop the Arctic, and who will be responsible for the social and environmental impacts increasingly facing the Arctic. We have unique knowledge and experience to bring to these deliberations. The inclusion of Inuit as active partners in all future deliberations on Arctic sovereignty will benefit both the Inuit community and the international community.
- 3.7 The extensive involvement of Inuit in global, trans-national and indigenous politics requires the building of new partnerships with states for the protection and promotion of indigenous economies, cultures and traditions. Partnerships must acknowledge that industrial development of the natural resource wealth of the Arctic can proceed only insofar as it enhances the economic and social well-being of Inuit and safeguards our environmental security.

Furthermore, specific examples of the implementation of the minimum standards established by the UNDRIP have emerged in the context of the Inuit in the circumpolar region. To date, the most far-reaching example may be the Labrador Inuit Land Claims Agreement, adopted by referendum, in December 2004. This Agreement not only provides for Inuit rights to lands and resources, including harvesting rights and jurisdiction over management of corresponding activities and resources, but it also recognises the right of the Labrador Inuit to the adjacent ocean zone extending to the limit of Canada's territorial sea. Furthermore, the Agreement specifies Inuit self-government rather than merely public government or an ANCSA type corporate structure. The Agreement provides a more accurate and expansive understanding of lands, territories and resources as well as the real nature of self-determination, which is consistent with international law and its operation in the Indigenous context. Such a comprehensive approach should be seen as a potential model for Alaskan Inuit and their internal dialogue to re-define and re-conceptualise their collective human rights.

## 10.6 Hunting, Fishing and Gathering Rights

With increased pressures on Inuit hunting, fishing and gathering rights there is also an urgent need to address these important collective human rights. The highly problematic provisions of ANCSA are largely the source of the problems that Inuit in Alaska currently face. Though both the State of Alaska and the federal government, through the Alaska National Interest Lands and Conservation Act, attempted to address these outstanding issues by providing for a rural preference for "subsistence," such a measure is far from adequate. In 1978 specifically, the State of Alaska attempted to address the need to secure Alaska Native hunting and

fishing rights through a state statute. They were challenged on the basis of the State's constitutional provisions guaranteeing individual "equal" access to all of Alaska's resources by all citizens in the *McDowell v. Alaska* 1989 case.

With regard to what should be the controlling human rights standards, the UN Charter (adopted in 1945) defines as one of its primary purposes the need to encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." The Universal Declaration of Human Rights (UDHR), which all human beings are to be beneficiaries of, embraces important fundamental human rights such as a "standard of living adequate for the health and well-being of himself and of his family, including food," [Article 25] and "participation in the cultural life of the community [Article 27].

With the actual codification of these fundamental human rights taking the form of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), when read in context, these three instruments (the UDHR, ICCPR, and ICESCR collectively referred to as the International Bill of Rights) provide the minimum standard. The ICCPR and the ICESCR were open for ratification in 1966, five years prior to the adoption of the ANCSA, and eventually both instruments entered into force in 1976. The point of this chronology is to highlight common Article 1(2) of the ICCPR and the ICESCR: "In no case may a people be deprived of its own means of subsistence." This unequivocal language was regarded as a human rights standard in 1966.

The 1971 ANCSA purportedly "extinguished" aboriginal hunting and fishing rights. However, when viewed both in fact and in law, the Indigenous peoples of Alaska maintain their subsistence hunting and fishing rights and have never relinquished this fundamental individual and collective human right. One may recognise the fact that Congress acknowledged the profound relationship that Alaska Natives have to their lands, territories and resources as well as our distinct collective rights to nearly 44 million acres of the state by congressional approval of ANCSA. However, the standards established by the UNDRIP must be recognised as the controlling universal human rights standard concerning Alaska Native subsistence hunting and fishing rights. The United States government ratified the ICCPR in 1991 and is therefore, legally bound to uphold these provisions. In relation to "subsistence," the UNDRIP does not create new rights but rather provides the specific cultural context of Indigenous peoples in the interpretation of the International Bill of Rights and all other international human rights instruments.

The significance of the UNDRIP for Alaska Inuit includes a range of the minimum standards embraced by the document. Specifically, the Declaration elaborates upon equality, self-determination, freedom from discrimination, land, territorial and resource rights, culture, and of course,

subsistence. There are many in the State of Alaska who insist that the state Constitution guarantees “equal access” to the resources of the state and further argue that any recognition of the distinct rights of Alaska Native peoples creates a “privilege” not afforded to others. Such an argument distorts history as well as denies the fundamental human rights of the Indigenous peoples of Alaska.

With regard to equality, the UNDRIP affirms the equal rights of Indigenous peoples (preamble, Articles 2 and 46) as well as their right to be different and to be respected as such (preamble). This language coupled with the long-standing prohibition against racial discrimination creates the broader framework within which “equal access” by Alaska Natives must be understood. Equality does not, however, mean equal treatment. Those who argue for “formal” equality would in fact be supporting racially discriminatory acts in violation of the fundamental human right of Alaska Native peoples to subsistence. Rather, “substantive” equality must guide this debate. In order to ensure “equal access” as well as balancing the competing rights and interests of others, including Indigenous peoples, the history, distinct human rights to equality, subsistence and culture (among other rights) of Alaska Native peoples must be recognised and respected. In order to reconcile these conflicts in law and reality, one approach is being pursued by the Athabascan Indian peoples of interior Alaska (distinct from the Inuit) through a strategy of “community harvest” rights.<sup>13</sup> This strategy is a possible step forward, however, this outstanding issue should be addressed consistent with the standards established under international law, including the UNDRIP, and the aspirations of the Alaska Native peoples in order to once and for all recognise and entrench this fundamental individual and collective human right.

## 10.7 UNCLOS and Climate Change

There is no question that the Arctic Ocean should be of immediate concern to all Arctic indigenous peoples, including the Inuit of Alaska. The insistence by the Canadian government as to control over and sovereignty of the High Arctic Islands as well as the recent moves by the Russian Federation to stake a claim to the seabed of the extensive continental shelf extending from the Russian shoreline, are both trumpeters of the importance of the circumpolar Inuit right to participate in any and all future debates, dialogues and decisions concerning their lands and territories. This includes the related issue of climate change and its impact on Inuit communities and the fragile Arctic environment as well as the escalating speculation about how a significant reduction in the ice coverage

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<sup>13</sup> Additional information can be found at Ahtna Tene Nene’s website, at <http://www.ahtna-inc.com> or [http://www.adfg.state.ak.us/news/2009/7-31-09\\_nr.php](http://www.adfg.state.ak.us/news/2009/7-31-09_nr.php).

will open up the Arctic waterways to increased shipping traffic and expedite oil and gas development, instead of.

Again, the international human rights developments, and in particular, the UNDRIP, which emerged after the formal codification and eventual adoption of the UN Convention on the Law of the Sea (UNCLOS), are necessary benchmarks for determining the shortcomings of the UNCLOS provisions. Even a cursory review of the long list of participants engaged in the decades of drafting of UNCLOS will quickly show that despite their direct rights and interests in the Arctic Ocean, the Inuit, indigenous to the region, did not have any measure of direct, meaningful and effective participation in the preparation of its content. Such a lack of participation, consultation or collaboration must be corrected in any future consideration and implementation of UNCLOS in the Arctic Ocean arena. The right of indigenous peoples in the Arctic to direct participation in all relevant circumpolar regimes and dialogue is reinforced by the UNDRIP specifically in Articles 5, 18, and 27. These provisions were deemed essential to the notion of “partnership and mutual respect” noted in the preamble of the UNDRIP, which was insisted upon by nation-state representatives engaged in the process.

Though some may argue that the UNCLOS provisions dealing with ice-covered areas are fast becoming irrelevant they remain critical to indigenous peoples throughout the circumpolar region. Such provisions were never dealt with in a comprehensive fashion in the context of UNCLOS. Furthermore, indigenous peoples’ interests were wholly ignored in terms of recognition of their distinct resource rights, which have now been affirmed by the UNDRIP. The matters of peaceful uses, peaceful purposes and collective security also need to be scrutinised against the backdrop of the rights and interests of indigenous peoples and should not solely be seen in military terms. An expansive approach that goes beyond freedom of navigation and military and strategic interests would respond to the absence of adequate environmental protections and move us closer to global security. Here again, the UN Declaration would be extremely helpful in providing the human rights based approach to peace and security, which we would all benefit from.

As previously argued by this author and other interested scholars, one potential path forward is the designation of the Arctic Ocean as a semi-enclosed sea, which would trigger important safeguards in response to the concerns and interests of many, including Arctic indigenous peoples. For example (and consistent with the interests of indigenous peoples and members of the Arctic Council), environmental protection, management and conservation of marine resources and marine scientific research are all matters of direct relevance.

The Arctic Council and previous initiatives such as the Arctic Environmental Protection Strategy have been good starting points. However, the Council does not go far enough in light of the political and interna-

tional human rights developments, the expansion of interests, and the urgent issues facing Arctic indigenous inhabitants and each coastal nation-state. A new regime is needed to take into account the dramatic changes impacting this fragile ecosystem. Even the single issue of ice-free navigation of the Arctic Ocean itself necessitates a comprehensive response and new regime that will effectively involve the Inuit as well as other stakeholders. Any such regime must include all Arctic indigenous peoples and must afford them full recognition of and respect for their fundamental human right to participate. Given the adoption of the UNDRIP, the Circumpolar Inuit Declaration on Arctic Sovereignty as well as the existing Arctic Council regime, and the role of Arctic indigenous peoples as permanent participants within the Council, there is ample opportunity to establish a human rights-based approach to a wide range of issues in a collective fashion. In response to this need and in recognition of the positive developments concerning Inuit rights, the ICC has determined that an update of its own Arctic Policy Principles is necessary. Through such an exercise, a programme focused on human rights education of both Inuit and non-Inuit could be initiated. In this way, Inuit and others could strengthen all of the relevant international and regional systems as well as all relevant existing international instruments.

## 10.8 Conclusion and Recommendations

The UNDRIP illustrates the transformation of international human rights law through the infusion of indigenous worldviews and perspectives. The international processes that have emerged in a relatively short period of time represent a tidal change in the ability of indigenous peoples to engage in international legal diplomacy to advance their perspectives. It is clear that the human rights discourse and framework has the capacity to include indigenous peoples and their perspectives. However, it is also clear that there are a number of rights that are considered non-negotiable and that without these very rights, indigenous peoples, nations and communities will remain vulnerable on the international stage. Furthermore, the implementation of the UNDRIP is uncertain in the Alaskan Inuit context. However, this international development should be seen as an important trigger for developments at the local, regional, and international level. Indigenous peoples in Alaska should begin the dialogue about how to operationalise and implement the standards within their specific communities and consistent with their respective values, customs, and institutions. One starting point here may be the reading of the original documents outlined in this article within the framework of the UNDRIP minimum standards and to carefully analyse the shortcomings of the ANCSA, ANILCA, UNCLOS and other relevant laws and policies impacting Alaskan Inuit.



Secondly, comprehensive, inclusive dialogue should take place within Inuit communities as to who is the “self” in self-determination and what are the genuine political aspirations of the peoples concerned. This should be followed by a discussion of how to collectively achieve mutual objectives in a strategic and tactical fashion. The UNDRIP should be recognised as a useful tool in such a collective exercise. At the same time, the history of Alaska Native peoples, including the Inuit of Alaska should be recognised as educational for the purposes of determining the future. The indigenous peoples should be focused on how to realise, enjoy and exercise the important fundamental individual and collective human rights enshrined in the UNDRIP and relate them to their unique status and rights as the Inuit of Alaska. The ultimate objective should be to ensure their continued existence as a distinct culture with the incredible potential to contribute to the common heritage of humankind that is the Arctic.

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## Questions:

1. Was the 1867 cession of Alaska to the United States a legitimate transfer of property rights? If so, what elements make it a legitimate transaction? If not, what rules or principles were overlooked in the transaction?
2. What intrusions into aboriginal lands occurred in the years following the transfer of Alaska to the United States?
3. How did the Organic Act promise Alaska Natives the continued use and occupancy of their aboriginal lands? Explain.
4. Were the provisions of the Indian Reorganization Act sufficient to secure the right of self-determination of the Inuit of Alaska?
5. Did the United States government have the authority to transfer lands to the State of Alaska without the consent of the original owners: the Alaska Native people?
6. Did Congress have the authority to “extinguish” the human rights of Indigenous peoples of Alaska? If so, under what authority? If not, what is the basis for the assertion that they did not have the power to “extinguish” such human rights?
7. Was the Alaska Native Allotment Act of 1906 a useful piece of legislation allowing for Alaska Native use of lands and resources? Why was the General Allotment Act repealed throughout the United States? What effect did this Act have on Alaska Native people?
8. What are the key advantages and disadvantages of the Alaska Native Claims Settlement Act of 1971? Can the provisions be overcome in any fashion?
9. If you were the President of the United States or a powerful member of the United States Congress, what would you do in response to the competing rights and interests of Alaska Native peoples and the other citizens of Alaska?
10. Are the articles of the UN Declaration on the Rights of Indigenous Peoples useful in the context of Alaska Native peoples or have their claims been “settled” by ANCSA?



# 11. Chukotka's Indigenous Peoples: Issues and Prospects for Development

*Galina Diatchkova*

## 11.1 Introduction

This chapter deals with the rights and concerns of the indigenous peoples of Chukotka. To begin with, it sketches a brief historical overview of the situation of the indigenous people in Chukotka. It then turns to look at indigenous interests in the management of local resources and draws some conclusions on the prospects of indigenous political development in Chukotka.

Chukotka, or the Chukotkan Autonomous *Okrug* (District) of the Russian Federation, is located at the north-easternmost extreme of the Eurasian landmass and separated from Alaska by the Bering Strait. It is a territory containing a number of ethnic groups, including indigenous peoples like the Chukchi (12,622 people of the total number in Russia of 15,767 being resident in Chukotka), Eskimos (1,750), Kereks (8 persons), Koriaks (55 of 8,743), Yukagirs (112 of 1509), Chuvans (951 of 1,087), and Evens (1,407 of 19,071) (numbers taken from the Russian census of 2002).

The Chukchi form the largest indigenous group of Chukotka. Beyond this region they also reside in Kamchatskaya *Oblast'*, Magadanskaya *Oblast'*, and Sakha Republic (Yakutia). Their self-designation is *Lyg'oravetl'an* (*the true human being*, in Chukchi), or derived from this word *Luoravetlan* (singular). The Chukchi have a traditional twofold cultural subdivision into nomadic reindeer-herding (70% at the beginning of the 20<sup>th</sup> century), and sedentary marine mammal hunting (30%).

The language of Chukchi belongs to the Chukotko-Kamchatkan family which also includes the Kerek, Koriak, and Itel'men languages (see Vakhtin 2001). Itel'mens mostly live in Kamchatskaya *Oblast'* (9 of 3,180 reside in Chukotka). The Koriaks are close to the Chukchi, their self-designation is *Chauchu* (*the reindeer-herders*, in Koriak), and *Nymylan* (*the coastal inhabitants*, in Koriak). Traditionally they are reindeer-herders and hunters. Kereks' self-designation is *Ankalakku* (*the coast-dwellers*, in Kerek) – they combine subsistence fowling, fishing, reindeer-herding, hunting, and coastal marine mammal hunting. The Eski-

mos, or Yupiit (plural) (*the true human being*, in Yupik) are the native population of the Bering Strait coast. Marine mammal hunting is the primary traditional occupation of the Yupiit. The Chukotka population speaks four languages, which belong to the Eskimo branch of the Eskimo-Aleut family: *Central Siberian Yupik* (called *Chaplinskii* in Russian), *Naukanskii Yupik*, *Sireniskii*, and *Imaklikskii Inupiaq*. Central Siberian Yupik and Naukanskii Yupik belong to the Western, or Yupik, subgroup of Eskimo, while Imaklikskii belongs to the Inuit, or Eastern, subgroup of Eskimo.

The Yukagirs form a small indigenous group in Chukotka; their self-designation is *Vadul* (also *Odul*, *the human being*, in Yukagir). They are considered to be semi-nomadic hunters. Their language belongs to the Uralic-Yukagirian family. The Chuvans are ethnically derived from the Yukagir clans. Their people speak in the Chukchi, Yukagir, and Russian languages. The Evens also constitute a small group of Chukotka's indigenous peoples. Their self-designation is *Even*, also *Lamut* (*local resident*, in Even). They are traditionally semi-nomadic, mainly reindeer-herders and hunters. Their language belongs to the Altaic family, Tungus-Manchurian group.

Specialists note that the mechanisms for the transmission of languages in native families have however been weakened because of changes in their traditional patterns of life during the Soviet period.

## 11.2 Indigenous Peoples and the Natural Environment

The local resources that were available to the various indigenous peoples (whether nomadic, semi-nomadic, or sedentary) had an adaptive influence with regard to their overall lifestyle and their approach to subsistence (see Krupnik 1989 and 1993). Natural factors affected the specific approach to indigenous land use. Over a period of thousands of years highly specialised native sea mammal hunting and reindeer husbandry developed. The latter was characterised by large-scale reindeer breeding among the Chukchi and Koriaks. The state of the habitat environment was defined as natural (unchanged by human influence) or stable: the restoration of natural conditions was faster or at least equally as fast as the alterations caused by human activity (see Yablokov 1996).

In the course of adapting to their natural environment these northern indigenous peoples developed specific principles and practices enabling them to live in balance with that environment. These have included: ecologically compatible occupations and means of transport, collective kinds of property relations, particular types of dwellings and clothing, and specific tools for their household activities and beyond (see Arutiunov 2000, 86). In acclimatising themselves physically to the severe climatic conditions of the North, certain psycho-physiological features evolved that

required particular types of protein-rich foods. The family has become an important information channel for passing along norms of conduct with respect to the given environment; subsistence skills (dwelling, clothing, and tools); methods and customs of land use; language, food, folklore, songs and dances. This continuity of cultural values had a decisive impact on the sustainability of indigenous groups which were mainly governed by customary law.

The sustainability of the reindeer husbandry contributed to Chukchi's political stability (Znamenski 1999). During colonisation, the Chukchi managed through warfare with the Russian Cossacks to protect their territory and to avoid payment of taxes to the colonisers (Al'kor 1935, 78). This led to their status of being "not totally dependent on the government," as stated by the Decree of Empress Catherine II dated 1789. The northern indigenous peoples were however eventually to be colonised by the Russian Empire. Somewhat later, the 1822 Charter of the Russian Empire on Aliens (*Polozhenie ob Inorodtsakh*) outlined how the indigenous peoples of Siberia were to be managed and linked indigenous rights to native territories and their resources (provisions 34, 35, and 37). An authority like Arutiunov (2007) considers this Charter, moreover, to be a document that can even now be regarded as being ahead of its time – particularly in terms of the rights it granted indigenous peoples to the lands they occupied.

Despite the fact that the indigenous peoples of the North were exposed to the legal and economic demands and requirements of the Russian Empire they largely retained their self-sufficiency (see 1822 Charter – provisions 9, 11, 33–35). This helped them in the preservation of their traditional subsistence systems assisting also to maintain the ways in which some of them transfer cultural information even today.

### 11.3 The Soviet Period

While in previous centuries the Northern indigenous peoples had lived and developed in relative isolation, in the 20<sup>th</sup> century that isolation was undermined by the political events of 1917. The consequences of the Russian Revolution eroded the structure of the traditional societies of the North, the subsistence systems, inter-generational relationships, and the cultural transfer of the skills needed to live in such severe climatic conditions. The disruption of the traditional way of life that followed the establishment of the Soviet state in the 1920s was due to forced collectivisation, the liquidation of rights to land and natural resources, and the destruction of traditional self-management. The nomadic population was thus forced into adopting a sedentary style of life. The institution of the family as a device for transferring indigenous knowledge was replaced by

state boarding-schools with its “Russian” standards, forcing out the indigenous outlook, customs and traditions.

The policy towards the indigenous population of the North during the Soviet period, based on class distinction and paternalism, fundamentally altered traditional land use patterns and resulted in a gradual decline of sea mammal hunting and reindeer herding. The extensive industrial development of Chukotka’s natural resources (gold, tin and tungsten mining) during the Soviet period and in particular the unsustainable and environmentally damaging extraction methods used resulted in the creation of multiple centres of industrial pollution and environmental degradation. According to the Report of the Chukotkan State Committee on Environment (2000), extensive destruction of the tundra landscape occurred as well as atmospheric and freshwater contamination, the decline of bio-resource levels, and increases in radioactive contamination, toxic materials and toxic effluents. The “contaminated” and/or affected area of land, as of 1 January 2000, amounted to 49,839 hectares (some 0.07% of the Chukotkan District).

## 11.4 The Post-Soviet Period – Indigenous Movement

The democratisation processes that took place in the USSR at the end of 1980s encouraged initiatives supporting the establishment of indigenous institutions as potentially important tools in the struggle to address a range of problems including environmental degradation, the need to support traditional land use and the preservation of indigenous languages and knowledge.

Institutions representing indigenous interests within Chukotka today include: The Association of Chukotka’s Indigenous Peoples, women’s councils, Elder’s councils, indigenous languages societies, indigenous enterprises, and the Chukotka Union of Reindeer Herders, the Association of Traditional Marine Mammal Hunters of Chukotka, and Yupik community. International organisations like the Inuit Circumpolar Council have also aided in the development of an indigenous infrastructure with modern equipment and the provision of new communication technologies, especially within the Yupik community. The state of local indigenous organisations within Chukotka, their awareness of their rights, their access to the media and the relationships between them and governmental bodies can be tracked due to the monitoring programme supported by the Ford Foundation at the beginning of 2000s. The findings here showed that 1) while rural indigenous associations often had a very formal relationship with various indigenous organisations they did not actually represent these organisations in discussions with the authorities; and 2) most indigenous people were not fully aware of their indigenous rights and laws.



Although Russian officials of the *Okrug* initially supported the emerging indigenous movement during the early 1990s this support soon gave way as political opposition to regional autonomy and local self-government developed. A history of paternalistic control, coupled with a disregard for international standards in respect of human and aboriginal rights thus prevailed. That is why indigenous representatives quickly came to the view that their problems would only be solved by the granting of the right of self-government. The leaders of the local associations thus realised that it was necessary to achieve the status of a political organisation which only then will be recognised by the authorities.

In relation to government policy the leaders insisted that the main directions of government activity should be reflective of indigenous laws and customs, cooperation with indigenous peoples, supporting traditional occupations, and making use of international experience gained in the course of collaboration with indigenous peoples around the globe. The monitoring results pointed to the weakness of the indigenous movement of Chukotka with the reasons for this being their lack of knowledge in respect of legislation related to indigenous rights, their minimal experience in the protection of their rights and their limited access to decision making processes. Respondents interviewed for these findings have recognised the need to create indigenous representative institutions within the regional government bodies to ensure control over the conceptualisation and implementation of the various social, economic and cultural programmes utilised in the region. It has been found that problems existed not only with regard to indigenous representation but also in respect of their underdeveloped knowledge base, the lack of institutional structures and activities and the absence of state support for these activities.

To increase the strength of indigenous institutions participants in the monitoring programme stressed that the next task of Chukotka's indigenous associations should be to: 1) discuss the laws and legislative drafts, social programmes, and information from different organisations; 2) raise issues at the community meetings; 3) maintain indigenous representation in the district *Duma* (Parliament) and government; and 4) collaborate with the regional government of the *Okrug* and other organisations.

In August 2005, the participants of the Roundtable "Indigenous Movement: Issues and Tasks" which was held in Anadyr' also noted the absence of information as a major reason for the weakness of Chukotka's indigenous organisations in conjunction with the need to spread information on indigenous rights. These findings emphasise the importance of systematically transmitting information via special media channels such as newspapers, indigenous Information Centres etc., and also demonstrate the cumulative role of information in the development of the indigenous movement.

## 11.5 Media as an Important Resource for Indigenous Development

Provoked by the democratisation of Soviet society during the late 1980s and early 1990s, the success of Chukotka's indigenous peoples in preserving and revitalising their ethnic identity stimulated many indigenous representatives to use the media to better express their interests. Most Information Centres within Russia address legal issues providing legal and indigenous rights information and advocacy. Citizens are familiar with, and make extensive use of, their "right to be informed." In the mass media (newspapers, magazines, broadcasting, and on the Internet), the overall volume of information on and for different indigenous groups and cultures increased significantly during the 1990s. These media channels have primarily addressed the issues of the social and cultural development of ethnic groups, inter-ethnic relations, and the relationship between central and peripheral regions. The native newspaper within Chukotka was published in the Chukchi language with the addition, during the first half of 1990s, of contributions in the Yupik and the Evens languages. This up-to-date indigenous newspaper, staffed by native journalists, reflected social, cultural, economic and political events among Chukotka's indigenous peoples, and *Murgin Nutenut* ("My Land," in Chukchi) became the main means for the expression of indigenous interests and rights.

During the second half of the 1990s, however, the situation changed. Governor A. Nazarov of the Chukotkan Autonomous District closed the newspaper for what he deemed to be "financial reasons." The journalists were given the sack, and the newspaper was transformed into an attachment to a Russian newspaper *Krainii Sever* ("Far East North," in Russian) and staffed by only one journalist. The contents no longer adequately reflected indigenous movement issues. The disruptive interference by the regional administration in the social channels connecting Chukotka's indigenous peoples, and the dismantling of the creative collective of indigenous journalists, resulted in the disintegration of the indigenous movement against the background of social and economic crisis in Russia and especially in Chukotka. This period, according to the interviews conducted by this author in 2009, and to an analysis of Chukotka's current media output, saw an end to the production of information on indigenous rights. The participants of the 2009 Congress of Chukotka's indigenous peoples also discussed the absence of any critical information on regional politics or indigenous issues in the media. This is the main reason for the lack of knowledge in respect of indigenous rights among current indigenous representatives.

These developments show that the establishment and further operation of indigenous media opened up many channels for the expression of ethnic identity during the 1990s. This, in turn, created an increasingly important informational space for and about indigenous peoples in the media,

as well as a space for indigenous media producers to create media forms in their own languages and from their own cultural perspectives. The media of indigenous peoples is viewed as a necessary and important resource, providing access to information on indigenous rights. In Chukotka, currently, the role of indigenous media is not so influential. This affects its ability to advocate and report on events and activities relating to indigenous movements in the *Okrug*. The indigenous media could, potentially, play an essential role in stabilising the social and cultural conditions of the *Okrug*'s indigenous peoples but, for the reasons already noted, this is currently not the case.

## 11.6 Wildlife Management

During the 1990s, transition to the market economy was accompanied by widespread socio-economic crisis across the country, with Chukotka being one of the most badly affected regions. In these conditions, the growing indigenous movement focused on issues of sustainable development and on the attainment of equal social status within the dominant society which remains represented by ethnic Russians, Ukrainians, Tatars, and others.

The right to the preservation of nature and biodiversity has become an important source in the establishment of new types of partnerships within Chukotka such as, for example, government – research institutions – and indigenous peoples. A unique example is the 1992 Agreement on Greenland Whale Migrations between the native community of *Naukan* (Chukotka) and the Government of Alaska. The objectives of this agreement range from the development of traditional land use and the rational use of bio-resources to the establishment of a network of indigenous observers. The project based on this agreement facilitated the revival of native sea mammal subsistence hunting under critical social and economic conditions and the absence of state food deliveries within Chukotka. First of all, this experience of international cooperation contributed to the sustainable development of native enterprises and the coastal population. Secondly, scientific guidance of sea hunting from the 1990s onwards stimulated the indigenous peoples of Chukotka to acquire patterns of environmental conservation based on international experience (see Ainana *et al* report 1995).

Another example of partnership is the international Pacific Walrus project. During a conference in 1998 in Alaska the project participants – indigenous representatives – remarked that investigations, connected to the walruses were important not only to preserve this mammal but also in maintaining the indigenous culture of the Chukchi and Yupiit. This Chukotka Walrus Harvest Monitoring Project was developed by the Cooperation Agreement on Walrus Monitoring. Its framework was similar to the Russian-American Agreement concerning Joint Environmental Conserva-

tion between the U.S. National Park Service, the *Naukan* community, and the indigenous community of Yupik. The goals of this agreement were to involve indigenous peoples in the programme of bio-resources management and train them in such activities. The cooperation of the Association of Traditional Marine Mammal Hunters of Chukotka (known as ChAZTO), the community of Yupik, and international institutions allowed these organisations to facilitate project activities and develop cultural activities. They also represent indigenous interests at the International Whaling Commission and at the ICC meetings.

It should be noted however that since the 1990s indigenous peoples have become active partners – along with scientists and the governments of Chukotka and Alaska – in the preservation of both the natural and the cultural heritage of Chukotka. Traditional self-sufficiency, based on indigenous knowledge and sustainable forms of land-use, has promoted ecosystem stability. Under current conditions, indigenous participation in environmental programmes and projects promotes the mastering of modern methods of environmental and cultural preservation.

Concern about the environmental situation and the preservation of traditional knowledge resulted in the revival of the ancient way of walrus harvesting in the village of Vankarem, situated in the vicinity of archaeological sites, in 1997. The largest walrus resting site is situated in this area. Traditional harvesting, as opposed to the use of firearms, allows hunters to take out a walrus without disturbing the others around it, avoiding the unnecessary loss of animals. In 2006, the indigenous community of Vankarem worked with an initiative to establish a protected nature territory status for the Cape Vankarem area, with special restrictions on economic activities, and for the development of traditional land-use management. The World Wildlife Fund (WWF) has supported this initiative and worked at creating such a territorial status.

Recognising that a polar bear is a significant resource in the Arctic region, especially in Chukotka, required that additional protection be given to these animals. Thus, the Agreement between the Government of the United States of America and the Government of the Russian Federation On the Conservation and Management of the Alaska-Chukotka Polar Bear Population was signed in Washington, USA (2000). The implementation of this agreement provides a framework for the development of research and management actions including the establishment of enforceable harvest limits. The primary objective of the polar bear programmes within the agreement is to ensure that polar bear populations remain a healthy, functioning component of Bering and Chukchi seas ecosystems. The polar bear is a significant part of the cultures of Yupiit and Chukchi, who have created legends and religious ceremonies about it. In the former Soviet Union, polar bear hunting was banned since 1956. In 1989, this animal was reclassified as a “recovered population,” and the indigenous peoples of Chukotka were allowed to harvest polar bears from the beginning of 1990s.

The 2000 Agreement let indigenous peoples enter into co-management agreements with appropriate governmental, native, and other organisations. Pursuing the goal of preserving traditional knowledge about the polar bear's role in the cultural life of the peoples of Chukotka, from 2004 to 2007 the study "Traditional knowledge about the polar bear, cultural values and practices in Chukotka" was undertaken by the Polar Bear Commission of the Association of Traditional Marine Mammal Hunters of Chukotka. The project was funded by the U.S. National Park Service through the Alaska Nanuuq Commission (see Zdor 2007). The provisions of the 2000 Agreement provide for direct indigenous participation in the joint U.S./Russia Polar Bear Commission which is responsible for overseeing the development and implementation of management and research programmes. Both the United States and the Russian Federation have appointed Commissioners for the Agreement including indigenous representatives from Alaska and Chukotka. The Chukotka/Alaska Polar Bear Management programme is an important example of the implementation of an equal partnership between indigenous groups and the state. Joint agreements on wildlife co-management, building upon a partnership principle involving indigenous peoples, can guarantee the protection of the environment, cultural heritage, and the sustainable use of biodiversity.

### 11.7 Indigenous Representation on Various Government Bodies

As Schweitzer and Gray (2000, 24) note, "the transformation of the local political culture" in the 1990s has resulted in the ending of "reserving positions in the government of Chukotka for natives." In the second part of 1990s, under a totalitarian governor criticism was not tolerated so it was "very difficult to develop even a discussion about native rights and interests, much less an active advocacy movement" (*Ibid.*). From 2000, the residents of Chukotka experienced a further shift in regional policy in the economic and social sphere under Roman Abramovich's leadership as a governor (until 2008). An Indigenous Representative Council was established in 2002 under the Chukotka's government to address indigenous issues, in accordance with Article 1 of the Federal Law of 1999: "On Guarantees of Rights of Small-Numbered Indigenous Peoples" where an authorised representative is defined as an indigenous person or an organisation representing the indigenous peoples' interests.

Despite this it is clear that indigenous peoples still do not influence regional policy effectively. In interviews conducted by this author in 2009 the participants of the Congress of Chukotka's Indigenous Peoples mentioned that the indigenous representative council is not an effective tool because it does not solve the key indigenous problems. Currently,

within Chukotka only two indigenous representatives are present in the regional government. This low level of indigenous representation in government bodies can be explained by the general lack of knowledge and awareness of indigenous rights and of the mechanisms for the election of representatives by indigenous people directly.

In other areas of the North, due to the active advocacy movement, regional governments have developed mechanisms for indigenous participation in decision-making process. In only a few regions of Northern Russia however have indigenous peoples used the right of indigenous representation on regional state bodies. For instance, there is an Assembly of Indigenous Representatives connected to the Parliament of Khanty-Mansiysk Autonomous *Okrug* (6 of 23 deputies are indigenous). This structure effectively provides for indigenous interests in the social policy of the region through the discussion of legislative bills and social programmes related to the indigenous population. Unfortunately, since 2000 indigenous people in Russia have been underrepresented in the Federal state bodies. One of the main reasons for this is the underdevelopment of federal laws on indigenous rights preventing indigenous representatives from effective participation in the policy-making process.

Despite these difficulties at the national level, public organisation such as the Russian Association of Indigenous Peoples of the North, Siberia and the Far East (RAIPON) have undertaken efforts to protect indigenous rights. One of the goals of this organisation is to achieve recognition from the dominant society for indigenous interests and rights. The activities of this organisation concentrate on obtaining the right to self-government and property rights to land and resources. In so doing, the main means for the development of indigenous representation in Russian state bodies are a) the inclusion of guarantees and effective mechanisms for indigenous representation in the federal and regional legislations; b) involving indigenous representatives in the process of making decisions via different state and consultative bodies.

## 11.8 Conclusions

Over a period stretching back thousands of years the indigenous groups of Chukotka have adapted their cultural systems to the Arctic and sub-Arctic environment. Ecologically compatible occupations, the transmission of cultural values from one generation to the next via the family unit formed the basis for the self-sufficiency of these indigenous groups. The traditional lifestyles of indigenous peoples had been preserved more or less intact under the Russian Empire which granted them self-management status as well as the rights to native territories and the resources they contained. These factors had a decisive impact on the sustainability of such northern population groups in pre-Soviet period. These

traditional lifestyles were however severely disrupted during the Soviet period. The dismantling of the self-management structure and of traditional family functions forced through, undoubtedly resulted in the gradual loss of cultural “information” within these societies.

The democratisation processes of the 1990s promoted once again the development of the indigenous movement in Chukotka; established indigenous institutions are currently seeking greater self-determination via indigenous representation in state bodies and equal participation in decision-making. Due to the *Okrug*’s indigenous institutions and international support, especially from the Alaskan government and its native organisations while Chukotka’s indigenous peoples have gradually gained experience in wildlife management.

The crux of the problem is that legal avenues means to protect indigenous rights do not exist. This is because federal legislation concerning indigenous rights remains underdeveloped in that respect; Chukotka’s own legislation on this subject is also insufficient, and there is a basic lack of knowledge on the part of indigenous representatives relating to their own rights. The practice of state paternalism which was revived in the *Okrug* during the latter part of the 1990s ultimately however prevents indigenous peoples from receiving recognition as equal partners in the decision-making process. To effectively solve these problems the creation of stable support for indigenous affairs at the state level is vitally important. To achieve these goals, the indigenous peoples of Russia will continue to attempt to increase their capacity for self-government and for self-determined sustainable communities via the national organisation RAIPON.

#### *Notes:*

Sergei Arutiunov (Сергей Арутюнов), The discussion at the congress “The Arctic Problems: Environment, Society, Heritage”, 2007, 8–10 March, Paris, France.

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### Questions:

1. What factors affected the sustainability of Chukotka's indigenous peoples in the pre-Soviet period?
2. Outline the reasons for the instability of Chukotka's indigenous peoples' development during the Soviet and Post-Soviet Periods?
3. What factors facilitate the development of indigenous representation in the regional government bodies?



# Summary

*Natalia Loukacheva*

Developments in the Polar Regions – the Arctic and Antarctica – are now the subject of much public interest and growing political, academic, scientific, and media discussion. The changes that occur and the processes that take place in the Polar Regions are, moreover, increasingly linked by the existence of a shared concern for certain legal issues. The growing importance of both regions across a divergent range of global and regional development issues prompted further inquiry into the role of law in dealing with many of these issues. This textbook attempts to highlight the importance of law in this framework by drawing on a number of issue-area examples illustrating the importance of legal values in addressing various challenges across the Nordic region, among remote Arctic communities and globally.

The Nordic Council of Ministers, under the auspices of its Arctic Cooperation Programme, endorsed the Polar Law Textbook project which was housed in 2009–2010 by the Master's Programme in Polar Law run by the University of Akureyri situated in Northern Iceland. This project was led by the programme director Dr. Natalia Loukacheva who also served as the textbook editor. The textbook is the result of the cooperative efforts of an international team of experts (academics, practitioners, politicians and Arctic Indigenous peoples) with many years of experience in the field of Polar Law and related studies (see biographies). This collaboration was based on a shared belief that there is a basic need to promote legal knowledge, information and values within the Nordic and Arctic communities and indeed, globally. With the generous support of the NCM it became possible to produce this educational tool which is the first of its kind and it is electronically available on the NCM website and in hard copy form to allow readers interested in Polar Law to access this information easily.

The idea for this textbook developed from the recognition of the need to disseminate information about Polar Law as an emerging field of legal studies – an area of study long overdue greater recognition. By supporting this project the NCM has shown leadership in the promotion of this vital educational initiative which it is hoped will create better opportunities for the residents of the North located in remote Arctic areas, as well as all other interested parties, gain better access to the legal educational tools and information. The objectives of this textbook are numerous and varied:

- to promote legal and inter-disciplinary education in and for remote Northern areas;
- to disseminate new knowledge on the most topical developments in the Polar Regions, developments which are of the utmost importance to the Nordic communities, the Arctic and beyond;
- to strengthen cooperation within the Nordic region and Northern areas of the Arctic States (e.g., the textbook can be valuable for University of the Arctic initiatives and the Arctic Council and its working groups as a follow-up to the legal chapter in the 2004 Arctic Human Development Report);
- It is also hoped that this textbook will provide the basis for future long distance courses in Polar Law and that it shall enhance an interdisciplinary dialogue between the legal and other social sciences in relation to the North; it will also facilitate Nordic synergy by developing further collaboration with various Nordic and Arctic partners in advancing further virtual or standard legal education in this area.

Despite its primary educational focus the textbook contains information which will be useful for those with an interest in Polar Law. The textbook, designed for lawyers and non-lawyers, focuses on the various developments in international and domestic law concerning the Polar Regions. In addition it also explores the relevant aspects of the economic, resource, social and political developments affecting both Polar areas.

The structure of the textbook is different from typical academic books. All chapters have to a certain degree been written in the form of lectures and include information for further reading, documents and a series of questions encouraging students to think about current or emergent issues and analyse the presented material. The textbook is divided into 11 chapters including the introduction, which attempts to define “Polar law” while also outlining the linkages between different areas of law and the other social sciences. The remaining chapters are built around two major areas. The first covers issues of Environmental Law, Law of Sea issues and Resources in the Polar Regions with some linkages made here to Economies and Trade in the Arctic.

The second major focus area is Arctic Governance, International Human Rights, the Rights of Indigenous Peoples, Self-governance and the political situation in some of the Arctic areas. All chapters contain reference to some theoretical materials and to practical examples from specific case studies. The scope of topics covered in this textbook range from questions of environmental protection, shipping and navigation and access to and the development of non-renewable resources and minerals, to questions of marine resources, biodiversity and climate change. Other topics include questions of sustainable development, Arctic cooperation, community well-being, political activism, economic indicators, Indigenous Peoples’ rights and prospects, and the challenges of governance in

the far North. Most chapters begin from the legal basis but where possible the nexus between law and other areas of the social sciences (e.g., international relations, policy and socio-economic studies) is also explored.

Despite its comprehensiveness the textbook is limited in scope and leaves room for further research, cooperation and knowledge in this developing area. This textbook can be seen as the first milestone in what will hopefully become a series of educational materials on Polar law and other related disciplines.

The views expressed in this textbook do not necessarily reflect the position of the Nordic Council of Ministers. The authors hope that this pioneering work will encourage anybody interested in Polar Law to pursue further studies, research or cooperation on the many initiatives which take place within the Nordic, Arctic and global community in relation not just to the Arctic but also to the Antarctic.

Further information about this textbook can be obtained from the textbook editor Dr. Natalia Loukacheva at [natalial@unak.is](mailto:natalial@unak.is) or at [n.loukacheva@utoronto.ca](mailto:n.loukacheva@utoronto.ca) or from the website of the Nordic Council of Ministers [www.norden.org](http://www.norden.org).



# Sammenfatning

Udviklingen i polar regionerne – Arktis og Antarktis – er nu i stigende grad emnet for stor interesse i befolkningen og med voksende politisk, akademisk, videnskabelig, og medie debat. De forandringer der sker og de processer som finder sted i polar regionerne er, endvidere, i stigende grad forbundet via fælles anliggender omkring en række juridiske spørgsmål. Polar regionernes voksende betydning for en række globale og regionale udviklingsmæssige spørgsmål har rejst spørgsmål omkring lovens rolle. Denne lærebog forsøger at belyse vigtigheden af jura indenfor disse rammer ved at fremhæve et antal eksempler som illustrerer vigtigheden af at bringe juraen ind i diskussionen omkring de udfordringer nordnorden, i de fjerntliggende arktiske samfund, samt den globale verden står overfor.

Nordisk Minister Råd har via det Arktiske Samarbejds Program støttet Polar Jura Lærebogs projektet. Projektet har været hjemmehørende i 2009-2010 ved Polar Law programmet ved Akureyri universitet i det nordlige Island. Projektet blev styret af lederen af Polar Law programmet, dr. Natalia Loukacheva, som ligeledes er bogens redaktør. Lærebogen er resultatet af et samarbejde mellem eksperter på et internationalt team bestående af akademikere, praktiserende folk, politikere og arktiske indfødte folk, med mange års erfaring indenfor polar jura og andre relaterede studier (se biografierne).

Dette samarbejde var baseret på en fælles holdning om at der er et behov for at fremme viden om jura, videregiv information og fremme værdier i nordiske og arktiske samfund, samt globalt. Med støtte fra NMR har det været muligt at producere denne lærebog, den første af slagsen, og at gøre den elektronisk tilgængelig på NMRs hjemmeside og ligeledes i prentet bog format, og dermed gøre det muligt for interesserede læsere at have nem adgang til dette materiale.

Ideen bag denne lærebog kom fra erkendelsen af et eksisterende behov for at disseminere information om polar jura som et nyt område indenfor jura studierne. Ved at støtte dette projekt har NMR vist lederskab med at fremme dette vigtige uddannelses initiativ, og det er håbet at det vil skabe bedre muligheder for folk i det nordlige og i de mere fjerntliggende områder i Arktis, samt for andre interessanter, til at have bedre adgang til uddannelses redskaber og information indenfor jura. Formålet med denne lærebog er:

- at fremme jura og interdisciplinær uddannelse i og for de fjerntliggende nordlige områder;

- at disseminere ny viden om de mest aktuelle udviklinger i polar regionerne, udviklinger som er yderest vigtige for de nordiske samfund, Arktis og den øvrige verden;
- at forstærke samarbejdet indenfor den nordiske region og de nordlige områder i de arktiske stater (f.eks. University of the Arctic samt Arktisk råd og dets arbejdsgrupper vil kunne drage nytte af denne lærebog som et follow-up til jura kapitlet i Arctic Human Development Report (2004) rapporten).
- Det er endvidere håbet at denne lærebog vil kunne danne basis for fremtidige lang-distance kurser i polar jura og at det ligeledes vil fremme den interdisciplinære dialog mellem jura og den øvrige social videnskab omkring den Nordlige region; bogen vil ligeledes kunne facilitere dannelsen af nordiske synergier ved at skabe samarbejde med forskellige nordiske og arktiske samarbejds partnere i deres arbejde for at fremme både virtuel og mere standard former for jura uddannelse indenfor dette område.

Trods denne lærebogs primære uddannelses- og undervisnings fokus indeholder bogen information for enhver med interesse i polar jura. Lærebogen, udarbejdet for jurister såvel som andre, fokuserer på en række udviklinger indenfor international samt indenlandsk jura i relation til polar regionerne. Bogen udforsker endvidere relevante aspekter af de økonomiske, ressourcemæssige, sociale og politiske udviklinger der påvirker polar områderne.

Opbygningen af denne lærebog er anderledes end den almene akademiske bog. Alle kapitler er tildels skrevet i form af forelæsninger og indeholder derfor forslag til yderligere læse materiale, samt en række spørgsmål rettet mod elever med henblik på at opfordre elever til at tænke på aktuelle emner og analysere tekstens materiale. Lærebogen er inddelt i 11 kapitler: introduktionen forsøger at komme med en definition for "Polar Jura (Polar Law)" og beskriver forbindelserne mellem forskellige områder indenfor jura og anden social videnskab. De resterende kapitler er opbygget omkring to hovedområder. Det første dækker spørgsmål omkring miljø loven, Law of Sea problemstillinger og ressourcer i polar områderne, hvor der ligeledes fremhæves nogle forbindelser til økonomi og handel i Arktis.

Der sættes også stor fokus på arktiske styreformer, internationale menneskerettigheder, de indfødtes rettigheder og deres fremtid, selvstyre, og den politiske situation i nogle af områderne i Arktis. Alle kapitler indeholder henvisninger til teoretisk materiale samt til eksempler fra specifikke case studier.

Omfanget af denne lærebog strækker over en række spørgsmål om miljø beskyttelse, shipping og navigation, og adgang til - og udvikling af - ikke fornybare ressourcer og mineraler, til spørgsmål om marine ressourcer, biodiversitet, og klima forandring. Andre emner sætter fokus på



spørgsmål omkring bæredygtig udvikling, arktisk samarbejde, samfundets levevilkår, politisk aktivisme, økonomiske indikatorer, indfødte folks rettigheder og udvikling, og udfordringer omkring styreformer i det høje nord. De fleste kapitler tager udgangspunkt i juraen, men såvidt muligt udforskes endvidere forbindelsen mellem juraen og andre områder i social videnskaben (f.eks. internationale relationer, og socio-økonomiske studier).

Lærebogen er omfangsrig men samtidig begrænset idet den peger på områder for videre forskning, samarbejde og viden. Denne lærebog bør ses som en milepæl i det som forhåbenligt vil blive en serie af uddannelses materiale indenfor Polar Jura og relaterede discipliner.

Synspunkterne udtrykt i denne lærebog reflekterer ikke nødvendigvis holdningen udtrykt af Nordisk Minister Råd. Bogens forfattere håber at dette stykke aktuelle arbejde vil øge interessen i at søge studier, forskning, eller samarbejde indenfor de mange initiativer som finder sted i det nordiske, arktiske og globale samfund i relation ikke blot til Arktis men også Antarktis.

Yderligere information om denne lærebog kan indhentes fra bogens redaktør dr. Natalia Loukacheva [natalial@unak.is](mailto:natalial@unak.is) eller [n.loukacheva@utoronto.ca](mailto:n.loukacheva@utoronto.ca) eller fra Nordisk Minister Råds hjemmeside [www.norden.org](http://www.norden.org)

Translated by Dr. Joan Nyman Larsen



# Samantekt

Þróun á heimskautasvæðunum – norður- og suðurskautinu – nýtur nú mikils almenns áhuga og um hana er vaxandi umræða meðal stjórnmalamanna, fræðimanna, vísindamanna og í fjölmiðlum. Þær breytingar og ferli sem eiga sér stað á heimskautasvæðunum eru einnig í auknu mæli tengd sameiginlegum áhuga á tilteknum lagalegum álitaefnum. Aukið mikilvægi beggja heimskautasvæðanna fyrir margvísleg þróunarmál, bæði hnattræn og staðbundin, varð hvatinn að frekari rannsóknum á hlutverki laga við úrlausn slíkra mála. Með þessari kennslubók er reynt að draga fram mikilvægi laga í þessu sambandi með fjölmörgum dæmum um málefni sem sýna mikilvægi lagalegra gilda við úrlausn ýmissa vandamála á Norðurlöndum, í afskekktum samfélögum norðurslóða og á heimsvísu.

Norræna ráðherranefndin styrkti kennslubókina í heimskautarétti í gegnum samstarfsáætlun sína um norðurheimskautssvæðin, en verkefnið var vistað árið 2009-2010 við lagadeild Háskólans á Akureyri í tengslum við meistaranám í heimskautarétti. Verkefninu var stýrt af stjórnanda meistaranámsins, dr. Nataliu Loukachevu, sem einnig er ritstjóri verksins. Kennslubókin er afrakstur af samstarfi hóps alþjóðlegra sérfræðinga (fræðimanna, starfenda, stjórnmalamanna og frumbyggja á norðurslóðum) með margra ára reynslu á sviði heimskautaréttar og í skyldum fræðum (sjá ferilsskrár). Grunnurinn að samstarfinu er sú sameiginlega trú að grundvallarnauðsyn beri til að efla lagalega þekkingu, upplýsingar og gildismat meðal samfélaga á Norðurlöndum, á norðurheimskautssvæðinu og á heimsvísu. Með rausnarlegum styrk frá Norrænu ráðherranefndinni varð mögulegt að búa til námsgagn sem er hið fyrsta sinnar tegundar og aðgengilegt á rafrænu formi á vefsíðu Norrænu ráðherranefndarinnar og einnig í prentaðri útgáfu þannig að allir þeir sem áhuga hafa á heimskautarétti geti nálgast þessar upplýsingar á auðveldan hátt.

Hugmyndin að baki kennslubókinni spratt af skilningi á nauðsyn þess að dreifa upplýsingum um heimskautarétt sem sprotasvið innan lögfræði sviðs sem löngu tímabært er orðið að fá meiri viðurkenningu. Með því að styrkja þetta verkefni hefur Norræna ráðherranefndin sýnt frumkvæði í eflingu þessa mikilvæga menntunarframtaks sem vonandi mun skapa betri tækifæri fyrir íbúa norðursins í afskekktum byggðum norðurslóða, sem og aðra sem eiga hagsmuna að gæta, til að hafa aðgang að námsgögnum og upplýsingum. Markmið kennslubókarinnar eru margvísleg:

- að efla lögfræðilega og þverfaglega menntun á norðurslóðum og í þágu norðurslóða;

- að dreifa nýrri þekkingu á áhugaverðustu þróuninni á heimskautasvæðunum, þróun sem er afar mikilvæg fyrir Norðurlöndin, norðurheimskautssvæðin og fleiri svæði;
- að styrkja samvinnu milli Norðurlandanna og norðursvæða heimskautaríkjanna (t.d. getur kennslubókin komið sér vel fyrir starfsemi Háskóla norðurslóða og fyrir starfshópa Norðurheimskautsráðsins í eftirfylgni þeirra við lögfræðihluta Skýrslu um þróun samfélaga á norðurslóðum (Arctic Human Development Report) sem kom út árið 2004).
- Einnig er vonast til þess að kennslubókin skapi grundvöll fyrir fjarkennd námskeið í heimskautarétti í framtíðinni og að hún efli þverfaglega umræðu milli lögfræði og annarra félagsvísinda um málefni norðurslóða; hún mun einnig stuðla að samlegðaráhrifum með því að ýta undir frekara samstarf ýmissa aðila á Norðurlöndum og norðurslóðum við framþróun lögfræðimenntunar á þessu sviði, bæði í hefðbundnu formi og í fjarnámi.

Þótt megingiltangur bókarinnar sé menntunarlegur hefur hún að geyma upplýsingar sem munu reynast gagnlegar fyrir þá sem áhuga hafa á heimskautarétti. Bókin er ætluð lögfræðingum og lesendum án lögfræðimenntunar og hún beinir sjónum að margvíslegri þróun í þjóðarétti og landsrétti í tengslum við heimskautasvæðin. Til viðbótar kannar hún þá þætti í þróun efnahagsmála, auðlinda, samfélaga og stjórnmála sem snerta bæði heimskautasvæðin.

Uppbygging bókarinnar er ólík því sem gerist í dæmigerðum fræðibókum. Allir kaflarnir hafa að vissu leyti verið skrifaðir sem fyrirlestrar og hafa að geyma upplýsingar um ítarefni, skjöl og röð spurninga sem hvetja nemendur til að hugsa um þau málefni sem nú eru til umræðu eða í deiglu og greina það efni sem reitt er fram. Kennslubókin skiptist í 11 kafla að meðtöldum inngangi sem leitast við að skilgreina “heimskautarétt” og lýsa tengslum hinna ýmsu sviða lögfræðinnar og annarra félagsvísinda. Hinir kaflarnir snúast um tvö meginefni. Það fyrra spannar málefni umhverfisréttar, hafréttar og auðlinda á heimskautasvæðunum með ákveðnum tengingum við hagkerfi og viðskipti á norðurslóðum.

Síðara meginefnið er tilhögun stjórnar á norðurslóðum, alþjóðleg mannréttindi, frumbyggjaréttur, sjálfstjórn og stjórnmálaleg staða tiltekinna svæða á norðurslóðum. Allir kaflarnir hafa að geyma tilvísanir til kennin-galegs efnis sem og tiltekinna dæma úr vettvangsrannsóknnum. Kennslubókin spannar allt frá umhverfisvernd, skipaflutningum og siglingum ásamt aðgengi að og þróun óendurnýjanlegra auðlinda og málma, til spurninga er varða auðlindir hafs, fjölbreytileika lífríkisins og veðurfarsbreytingar. Meðal annarra umræðuefna má nefna spurningar um sjálfbæra þróun, norðurslóðasamvinnu, velferð samfélaga, aðgerðamiðuð stjórn-mál, hagvísu, réttindi og horfur frumbyggja og stjórnunarleg vandkvæði lengst í norðri. Flestir kaflarnir hefjast á lögfræðilegum grunni en kanna eftir því

sem tilefni gefast snertipunkta lögfræði og annarra félagsvísinda (t.d. við alþjóðatengsl, stefnumótun, þjóðfélagsfræði og hagfræði).

Þótt kennslubókin nái yfir vítt svið eru henni takmörk sett og hún skilur því eftir svigrúm fyrir frekari rannsóknir, samvinnu og þekkingu á þessu sviði sem nú er í þróun. Líta má á kennslubókina sem fyrstu vörðuna á þeirri leið sem vonandi verður röð námsgagna um heimskautarétt og skyldar greinar.

Þau viðhorf sem lýst er í þessari kennslubók fara ekki nauðsynlega saman við afstöðu Norrænu ráðherranefndarinnar. Höfundar bókarinnar vona að þetta frumkvöðlastarf muni hvetja sérhvern þann sem áhuga hefur á heimskautarétti til að leggja í frekara nám, rannsóknir eða samvinnu um þau fjölmörgu verkefni sem starfrækt eru á Norðurlöndum, norðurslóðum og á heimsvísu, í tengslum við bæði norðurheimskautsvæðin og suðurskautið.

Frekari upplýsingar um kennslubókina fást hjá ritstjóranum dr. Nataliu Loukachevu í gegnum netfangið [natalial@unak.is](mailto:natalial@unak.is) eða [n.loukacheva@utoronto.ca](mailto:n.loukacheva@utoronto.ca), sem og á vefsíðu Norrænu ráðherranefndarinnar [www.norden.org](http://www.norden.org).

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