

Module 4: International Law in the Arctic

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Overview

International law has had a distinct impact on how nation states and others pursue policy goals in the Arctic. This is true today when climate change and economic globalization open the region for human activities that increasingly require legal regulation to be sustainable. This module examines the role of international law in the Arctic as a rule-system that entitles states more legal powers and also constrains states in many fields of policy, such as how inter-state trade is conducted, environment protection is implemented, and Indigenous peoples' status and rights are advanced.

Learning Objectives

Upon completion of this module you should be able to:

1. Assess the nature and role of international law and its impact on domestic policies.
2. Evaluate how sovereignty was acquired in the Arctic.
3. Interpret various international ownership systems in the Arctic.
4. Outline key features of the Law of the Sea and explain its significance in Arctic waters.
5. Evaluate international environmental law in the Arctic.
6. Evaluate international trade law in the Arctic.
7. Assess the importance of international law to Arctic Indigenous peoples.

Required Readings (including web sites)

Bankes, N. and Koivurova, T. (2014). *Legal Systems*. Larsen, Joan Nymand; and Fondahl, Gail (eds.) in the Arctic Human Development Report Regional Processes and Global Linkages, Akureyri: Stefansson Institute.
<http://norden.diva-portal.org/smash/record.jsf?pid=diva2%3A788965&dswid=-4712>

Greenland-Denmark Self-government Commission. (2008). *The Greenland-Denmark Self-government Commission's Report on Self-government in Greenland: Executive Summary*. Accessed at
<http://img9.custompublish.com/getfile.php/953432.1529.dwfvyfwtyy/Report+on+Self-Government+in+Greenland+-+Executive+Summary.pdf?return=www.arcticgovernance.org>

Key Terms and Concepts

- Binding and Non-Legally Binding
- Customary International Law
- Indigenous Peoples
- European Union (EU) and/or European Community (EC)
- International Law
- International Treaty
- Legal Continental Shelf
- Regime
- Peaceful Occupation of Terra Nullius

Learning Material

1.0 Introduction

International law is a state centred legal system although other international institutions and actors play a role in its making and application. It is also a legal system that builds on universal rules rather than regional ones and accords decision-making power to central state governments. Since the beginning of the 20th century, international law has had a strong impact on the Arctic, although not an easy one. In view of the special conditions in the Arctic, states and academics have made efforts to create specifically tailored rules for the Arctic's unique conditions. However, by and large this has not succeeded. The same rules and principles that are applicable to all other regions of the world also apply in the Arctic with few exceptions. Given the inaccessibility of the Arctic region, the most influential international legal development to date has been that of states extending their sovereignty and maritime sovereign rights further into the High Arctic. Since the end of the Cold War, international legal rules related to human rights, environmental protection and free trade have begun to constrain state conduct in their Arctic regions.

4.1 The Nature and Role of International Law and its Impact on Domestic Policies

The development of modern international law is often traced to the *1648 Treaty of Westphalia*, which essentially created the nation state system. Throughout the centuries the fundamental principles (constitutional principles) of international law have evolved. It is important to understand that international law does not only prescribe rules of conduct for states to observe, but also contains rules and principles:

1. By which states are created. There are criteria in international law as to what is expected of a candidate entity to become a state and complex rules on how other states must recognize that would-be state.
2. On the basis of which states' relationship to other states and internal groups are defined. States are prohibited to use force against other states and intervene in each others internal affairs. A state prevailing central government is also presumed in international law to have protection against other internal groups in the state, since the principle of territorial integrity and political independence presumes the central government is the rightful power holder internally. For instance, many Indigenous peoples have found it problematic that the principle of state territorial integrity and political independence make

it difficult to exercise meaningful self-determination given the state is shielded from claims of internal groups.

3. By which co-operation between states can be organized. Only states have an inherent right to participate in treaty-making with other states and can create joint organizations (inter-governmental organizations) via international treaties as regulated in the customary law of treaties. It is interesting to note in the Arctic, states and other actors have intentionally chosen not to use international treaties to create forms of inter-governmental co-operation. For instance, the Arctic Council and the Barents Euro-Arctic Council were established using declarations making it possible to include a region's Indigenous peoples' organizations and northern countries as partners in the co-operation.

In the Arctic the fundamental principles of international law are universal in scope. Consequently, international law does not easily accommodate unique conditions of a region such as the Arctic. Whenever an international treaty is negotiated, the regulated policy issue is transferred under the control of the central government. The central government represents the state in treaty negotiations and is also responsible for implementing the international treaty domestically.

International law has varying status in different domestic legal systems. Even though it is the broadest legal system applicable to all world states, its domestic status and effects are defined in the constitutional law of each respective state. For example, constitutional law needs to define the hierarchical status of international legal rules (e.g. are they equalled to constitutional rules or Acts of Parliament) and how international legal rules become effective in the domestic legal system (e.g. automatically or is there a need to enact legislation to incorporate the international legal rules to domestic legal system).

Learning Highlight 1

See how Saami reindeer herders in Finland were successful in their negotiations with the state forestry board (invoking Article 27). Go to:

<http://www.saamicouncil.net/?newsid=2688&deptid=1169&languageid=7&NEWS=1>

This has a practical effect in the Arctic as seen in Finland, which has incorporated the *International Covenant on Civil and Political Rights* (ICCPR) into its domestic legal system at a level equal to an Act of Parliament. Already in the lower administrative courts, the Sámi Indigenous peoples have been able to invoke Article 27 of the ICCPR to protect their right to practice their traditional reindeer herding livelihood. Finnish administrative courts can apply ICCPR and Article 27 as any other Act of Parliament. In contrast, in Sweden there is a presumption that domestic law is in accord with Sweden's international human rights obligations (except the European Convention on Human Rights, which has been incorporated) with no act of incorporation, which means the Sámi cannot invoke Article 27 in the domestic legal system.

International law now regulates many issues that were traditionally within the domestic jurisdiction of states. International trade law attempts to ensure companies worldwide can sell products and services without hindrance from state trade policies. States are required to treat all

persons under their jurisdiction, not only citizens, according to human rights standards set by international human rights treaties. Also, they are obligated to protect the environment as agreed in international environmental treaties.

Different branches of international law influence domestic policies in their own characteristic ways. International trade regime and Law of the Sea directly protect the interests of states and their foundational treaties – the World Trade Organization (WTO) and the agreements it administers and the *United Nations Law of the Sea Convention* (LOS Convention) – have strong dispute settlement mechanisms. In most disputes an aggrieved state can automatically take another state to third party dispute settlement. This has a strong effect on how these rules are observed since states parties are aware if they breach the respective rules, they can be taken to third party dispute settlement. International environmental and human rights treaties contain different procedures to ensure obligations are observed since these branches of international law protect collective interests (e.g. environment, humans) more clearly than immediate state interests. Human rights treaties rely on independent human rights expert panels to examine and critique the behaviour of state parties. International environmental treaties exert gentle pressure on parties through compliance review bodies that examine ways to bring the deviant state back to compliance.

4.2. Acquiring Sovereignty Over Arctic Land Space

Nation states have acquired title to land territories on the basis of rules of international law. If states can prove they acquired title to territory in accordance with international law, states shield themselves from competing claims of other states and gain general recognition for these territories in international society. Maritime jurisdiction belongs to any state with sovereignty over the land. There are various legal means to acquire title to territory. For instance, a state can cede a territory to another. This occurred in 1867 when the United States purchased Alaska from the Russian Empire. A more interesting manner through which land territory can be acquired is **peaceful occupation of vacant land (terra nullius)**.

International law sets out two requirements by which a state can peacefully occupy a land area seen as vacant. A state must show intent and will to act sovereign and exercise or display such authority in that region. Under this doctrine, European countries subjected vast regions of Africa and Asia to their sovereignty. Even if Arctic Indigenous peoples lived in a region, it was often regarded as terra nullius since no other sovereign state claimed sovereignty over that region.

Polar regions were long protected from nation state interference due to their harsh environments and general difficulties accessing these regions. Both polar regions were anomalies with respect to acquiring title and establishing full sovereignty over them. It was impossible to exercise or display sovereign authority in areas where nation states could not or had difficulty establishing settlement, particularly on the Antarctic continent. Accordingly, nation states began claiming sectors on the basis of longitudes that extended to the South Pole as part of their sovereign areas prior to the 1959 Antarctic Treaty, which “froze” this practice.

Because Arctic seas were under a thick layer of ice, it was possible to equate them to land areas. A comprehensive review by Erik Franckx showed that the Arctic could be divided as a pie via sector claims extending to the North Pole based on longitudes (covering all lands and waters

within this sector) by equating ice to land and acquiring title and sovereignty over it. Although academics frequently discussed this, especially in Canada and the Soviet Union, the actual policies of states followed the development of the Law of the Sea (Franckx, 1993).

Nation states gradually extended their sovereignty into Arctic lands and islands. There were competing land claims between states, but these were resolved peacefully (e.g., Norway, Denmark and the United States claimed part of the Canadian Arctic Archipelago, but these claims were resolved in Canada's favour by the outbreak of the Second World War). The status of Svalbard Islands, which had widely been seen as terra nullius during the 19th century, was resolved after the First World War. The Paris Peace Conference established the Spitzbergen Commission, which drafted the 1920 Svalbard Convention. This Convention gave Norway sovereignty but retained non-discriminatory access and economic rights for all other state parties and their nationals to the convention and prohibited the use of Svalbard for warfare purposes (Ulfstein, 1995). A dispute between Denmark and Norway regarding whether Danish sovereignty extended to eastern Greenland was decided in 1933 by the Permanent Court of International Justice, which held that Denmark had title and sovereignty over Greenland.

By the end of the Second World War most Arctic land was peacefully occupied as terra nullius without regard for the existence of the regions' Indigenous peoples. The only, largely symbolic, dispute over land area remaining is between Denmark and Canada over tiny Hans Island in Kennedy Channel between Canada's Ellesmere Island and Danish Greenland. This dispute is currently being negotiated by the respective states.

The region's Indigenous peoples have begun to challenge the extension of state sovereignty into their home regions. Some disputes result in governance agreements between states and Indigenous peoples or in states enacting legislation transferring powers to Indigenous peoples. The Greenlandic Inuit recently negotiated an extensive autonomy within Denmark with the option to establish an independent state in the future.

4.3 International Ownership Systems in the Arctic

International law defines various ownership systems in international society. There are four prime systems - full sovereignty, sovereign rights, international freedom space and international governance space.

Full sovereignty accords a state with full legislative and enforcement powers over its territory, excluding that of other states. A state must exercise these powers in accordance with international law. States have full territorial sovereignty, which means the right to unilaterally prescribe rules and enforce them with their own national standards over lands, islands and airspace. Also, states have full sovereignty to the outer limit of their territorial sea, which is a maximum 12 nautical miles. The outer limit of territorial sea also serves as the border for the airspace above and the continental shelf beneath. Other states' vessels enjoy innocent passage in the territorial sea, a right that does not extend to internal waters.

Of utmost importance is how the line (baseline) between internal waters and territorial sea is drawn. The coastal state in internal waters can require other states to obtain prior permission for

entry or levy charges. The baseline serves as a line from which other maritime zones are measured, e.g., territorial sea, *Exclusive Economic Zone* (EEZ) and, in some cases, continental shelf. Not surprisingly, even though the LOS Convention requires that if a coast is smooth the baseline must be located at the low-tide mark, many coastal states do not observe this rule. The farther into the sea the coastal state can push its baseline, the farther other maritime zones reach. Many states employ the method of straight baselines espoused in 1951 by the *International Court of Justice* (ICJ) in a dispute between Norway and the United Kingdom. The World Court accepted Norway's use of straight lines between its outermost islands and peninsulas because its coast was so fringed. However, Arctic coastal states have also used straight lines in a questionable manner in some areas.

In 1985, Canada subjected its Arctic Archipelago as part of its internal historic waters, the outer reach was defined using straight lines. This remains a contentious issue between Canada and the United States (who view the Northwest Passage as an international strait), and other states. The European community have objected to the broad use of straight lines. Russia has also connected many of its Arctic islands to the mainland using straight lines, which has deemed navigable parts of the Northern Sea Route as internal waters causing diplomatic protests.

States have sovereign rights over certain maritime regions, particularly over *Exclusive Economic Zones* (EEZ) and continental shelves. States have limited legal powers in these maritime zones. For example, a state has rights over certain resources, mainly hydrocarbons, on its continental shelf. Arctic states enacted EEZs that extend to a maximum of 200 nautical miles from the baseline.

All states have the right to use the high seas as an international freedom space. No state can subject the high seas to its sovereignty and all legal activities can be practiced on the high seas with reasonable regard to other states' usage rights. The Arctic waters include three pockets of high seas: Barents Sea (loop hole), North Atlantic (banana hole) and Bering Sea (donut hole). When the sea ice recedes, a large area of high seas at the centre of the Arctic Ocean will be exposed.

The deep-sea bed area is common heritage to humankind and is governed by the *International Sea-Bed Authority* (ISBA). Exclusive authority over area resources belongs to the international community and is governed by the ISBA. The remaining Arctic Ocean bottom is deep sea-bed once the outer limits of the continental shelves of the Arctic states have been designated by the *UN Commission on the Limits of Continental Shelf* (CLCS). According to present projections, little deep sea-bed will remain after Arctic coastal states have enacted the outermost limits of their continental shelves.

4.4 Law of the Sea in the Arctic

The same rules and principles of the Law of the Sea and the LOS Convention apply to all oceans and seas even Arctic waters and the Arctic Ocean, which are unique oceanic areas. States have not attempted to extend sovereignty or acquire title to ice over these waters on the basis of sector theory or through peaceful occupation. The evolution of the universal Law of the Sea has had a strong impact on Arctic waters and its management.

4.5 Maritime Jurisdiction in the Arctic

Traditionally, states had limited legal powers in the sea. Prior to the Second World War, states had legal power over their own vessels and control of a narrow three to four nautical mile belt of territorial sea. After the Second World War, states rapidly began claiming larger portions of the sea under their sovereignty or control. This creeping coastal state jurisdiction, among other controversial issues, triggered the most ambitious negotiation process the international society of states ever conducted, namely a constitution for the ocean that governs the extent and legal nature of each maritime zone and sets out basic principles for various ocean uses and controls of their harmful impacts. The *United Nations Convention on the Law of the Sea* (LOS Convention) concluded in 1982 and subjected the deep sea-bed to international administration. Since many industrialized states had considerable problems with regulation of the deep sea-bed, the states negotiated an implementing agreement to the LOS Convention, which effectively modified the deep sea-bed regulation of the Convention. It was this agreement that brokered a compromise, resulting in the LOS Convention entering into force in 1994. All Arctic coastal states are parties to the LOS Convention, except the United States, which also accepts most of the rules and principles of the Convention as customary Law of the Sea.

Arctic waters are extensively covered by ice. The inaccessibility of the Arctic Ocean means that various ocean uses, such as offshore hydrocarbon exploitation, shipping, and fisheries have been practiced in limited terms. Ice covered or not, it is relevant to look at the most important rules and principles that apply in the region in view of the impact of climate change.

Maritime jurisdiction in Arctic marine areas has changed considerably with the Law of the Sea tending to grant larger jurisdiction to coastal states over maritime areas adjacent to their coasts. Under the EEZ, a state is granted the right to determine fisheries policy and environmental management but must allow full navigation by other states' vessels. A coastal state is not obligated to establish an EEZ and may alternatively declare a limited fisheries zone since there are associated costs in managing the EEZ. All Arctic coastal states have opted for such a zone reducing the area of high seas. Article 234 of the LOS Convention applies exclusively to the Arctic and provides additional powers over shipping to coastal states in their EEZ.

The extension of the EEZ by coastal states has left small pockets of high seas in the Arctic marine areas. A large portion of high seas in the central Arctic Ocean is still largely covered with ice. The high seas area may become important when climate change melts the Arctic Ocean sea ice. All world states have guaranteed rights to practice peaceful activities in the high seas, such as fishing and navigation.

The media has given attention to continental shelf "claims" by Arctic Ocean coastal states, suggesting an outright geopolitical power-game over who first gets to occupy these resources. In 2009, former United Nations Under-Secretary-General for Legal Affairs Hans Corell pointed out this is a misinterpretation. During the LOS Convention, negotiations over the extent and content of rights over the sea-bed were one of the most difficult issues. The compromise was that:

1. Those states with narrow continental margin could extend their legal continental shelf to the extent of the EEZ, which is 200 nautical miles from the baseline, thereby effectively governing some portion of the deep sea-bed.
2. Those states with broad continental margin, like Russia, were able to assert their position in the negotiations such that under Article 76 it is possible to extend coastal states' continental shelves to the whole continental margin and beyond. States had to accept international scrutiny over the outer limit of the continental shelf. The twenty-one member UN Commission on the Limits of Continental Shelf (CLCS) examined submissions from states that were of the opinion their continental margins extended over 200 nautical miles. Under Article 82 coastal states must transfer a certain amount of resource revenues from exploitation in their extended continental shelf to the ISBA. The ISBA shares these proceeds equitably mainly with developing states.
3. The deep sea-bed is the common heritage of humankind and is administered by ISBA.

Although there was much commotion after Russians planted their flag underneath Lomonosov Ridge at the North Pole, Russia observed its LOS Convention commitments.

Russia was the first state to submit scientific information over the outer limits of its continental shelf to the UN Commission three years before it was required to do so. Those states that perceive they have an extended continental shelf are required to make this submission to the CLCS within ten years of becoming parties to the convention. The Russian submission was returned to Russia for further information on the central Arctic Ocean basin. Russia submitted that Lomonosov Ridge is a natural prolongation of its land territory causing reaction from other states, in particular the United States who argued that Lomonosov Ridge is of oceanic origin and not part of the continental shelf of any state. Russia is now collecting information for a revised submission to the Commission.

In 2006, Norway made a submission to the CLCS regarding its Arctic areas and received recommendations from the CLCS in 2009. This submission also caused reaction from other states. Spain claimed the continental shelf surrounding Svalbard Islands is covered by the Svalbard Treaty and entitles other contracting states non-discriminatory rights over sea-bed resources. Norway and other contracting states interpret the Svalbard Treaty differently. Norway argues since the Treaty speaks only of territorial sea, the Treaty applies exclusively to territorial sea. Therefore, Norway has exclusive rights over the continental shelf resources and the EEZ around Svalbard.

Iceland made a submission to the CLCS in 2009, and submissions are expected from Canada in 2013 and Denmark in 2014. The United States is collecting data over the extent of its continental shelf, but can make an official submission only when it becomes a party. Once the Commission has processed the outer limits the states have enacted, there will be two small portions remaining of deep sea-bed administered by the ISBA. It is possible that some portions of these continental shelves will overlap as in the Lomonosov Ridge. The CLCS does not have the mandate to issue recommendations on overlapping entitlement, but the respective states must negotiate and delimit it. At the May 2008 Ilulissat meeting, the Arctic coastal states agreed to settle these issues in an orderly manner (Koivurova, 2009).

4.6 Regulation of Ocean Uses: Examples of Fishing and Shipping

The LOS Convention regulates various ocean uses in a general manner. Regional seas agreements are needed to manage ocean and sea areas, however, a regional seas agreement is not currently planned for the Arctic Ocean or Arctic waters.

The LOS Convention prescribes general principles on how to manage fisheries, including principles for species that straddle jurisdictional boundaries and extend to the high seas, as well as species that live in rivers and at sea during their life cycle. These general principles were transformed into an implementing agreement of the LOS Convention, which focused on straddling fish stocks managed by Regional Fisheries Management Organizations (RFMO) between coastal states and high seas fishing states. The implementation agreement is innovative because if an RFMO has been established, all states and their fishing fleets that want to fish in the regulatory area of the RFMO need to become involved in the management of the straddling stocks. Most fish stocks are not covered by this implementation agreement, particularly the shared or joint stocks that straddle the EEZs of coastal states.

The United States Congress advanced a proposal to commence negotiations over an Arctic fisheries agreement, yet with no result. This may be warranted with the warming of the ocean temperature as there are predictions that some commercial fish stocks will begin to move north. All eight Arctic states are parties to the implementing agreement (Molenaar, 2009).

Shipping is densely regulated. The International Maritime Organization (IMO) administers a vast number of treaties of which most in principle are applicable to Arctic waters. The basic rule of the LOS Convention is the more seaward a ship is located; the more navigational freedom it has. Coastal states enjoy full sovereignty over shipping in internal waters, but are required to let foreign vessels pass innocently through their territorial sea. In the EEZ freedom of shipping is similar to the high seas with the exception that a coastal state has some powers to control shipping in cases of potential environmental damage.

Learning Highlight 2

Is it more convincing to suggest that states are engaged in power politics to secure hydrocarbons rather than following the rules of international law? Why would states follow the rules of the LOS Convention?

The LOS Convention sets out a navigational standard of performance ceiling for coastal states to regulate navigation in their coastal zones. Coastal states can only prescribe standards for foreign ships that do not exceed generally accepted international rules and standards (GAIRAS), which normally mean the near-universally legally binding shipping conventions adopted under the auspices of the IMO.

An exception to this rule can be found in Arctic waters since a coastal state has powers to regulate and enforce non-discriminatory shipping rules within its EEZ if the waters are ice-covered for most of the year. The reason for this is the vulnerable nature of such waters from human induced pollution. Canada and the Soviet Union/Russian Federation have made use of

this provision. Article 234 was originally tailored only for the Arctic. The IMO non-legally binding shipping guidelines were adopted also only for the Arctic. Recently, the IMO developed guidelines for both polar regions and has a process in motion to consider making these legally binding by 2012.

Since the state where the vessel is registered (flag state) is primarily responsible for ensuring that its ships observe international shipping standards and, if need be, enforce these standards, the LOS Convention requires flag states at a minimum to establish the level of GAIRES to its ships.

4.7 International Environmental Law in the Arctic

International Environmental Law (IEL) is a recent branch of international law. The 1972 *UN Stockholm Conference on Human Environment* is generally considered to be the starting point for serious attention to global and regional environmental problems and measures to combat them. During and after the Stockholm Conference many *Multilateral Environmental Agreements* (MEA) were adopted. This activity accelerated during the 1980s and 1990s. Mention could also be made to the 1979 *Convention on Long-Range Transboundary Air Pollution* concluded under the auspices of the UN Economic Commission for Europe (ECE) and Part XII of the LOS Convention, which contained framework principles for tackling all forms of marine pollution.

The most influential environmental protection conference was organized in Rio de Janeiro in 1992. The *Rio Conference on Environment and Development* was based on the overarching principle of sustainable development, which is defined many times in the the UN Brundtland Report as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. In Rio, not only was a Declaration signed but states also adopted the two most important MEAs to date dealing with biodiversity loss (Convention on Biological Diversity) and climate change (United Nations Framework Convention on Climate Change). Moreover, a strategy called Agenda 21 to holistically combat environmental problems was adopted as were non-binding forestry principles. The follow-up meeting, the Johannesburg 2002 World Summit on Sustainable Development, was not as successful. However, it did produce a Declaration, a plan of implementation and broaden the understanding of sustainable development to highlight linkages between poverty, the environment and the use of natural resources.

The Arctic has not figured notably in the development of IEL. If one holds to a strict view of what constitutes international law, there is only one legal rule specifically tailored to protect the Arctic environment (Article 234 of the LOS Convention) and one international treaty (the Polar Bear Agreement). Article 234 reads:

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.

Under this Article coastal states are given additional powers to control ship traffic in order to reduce and control potential pollution of the marine environment in ice-covered areas. Ice-covered maritime areas are seen as more vulnerable to human-induced pollution.

The Polar Bear Agreement was negotiated in 1973 between Canada, the United States, the Soviet Union/Russian Federation, Norway and Denmark (Greenland) to protect the then endangered polar bear populations and their habitat. New impetus for this work has come from the fact that climate change is melting the sea ice and placing the bears under additional stress and endangerment. This has led the states to organize meetings, the most recent hosted in Norway in 2009 (Bankes, 2009).

Important non-binding international environmental protection was done via the 1991 Arctic Environmental Protection Strategy, which was merged with the Arctic Council in 1996. The Arctic Council cannot make legally binding decisions on how the eight Arctic states conduct environmental protection in their Arctic regions, but it can endorse non-binding guidelines and codes of good practice (normally produced in one of the six working-groups of the Council) regarding how Arctic states should conduct their Arctic environmental protection. One example of this is the Arctic Offshore Oil and Gas Guidelines, a document adopted in 1997, revised in 2002, and the most final version endorsed at the ministerial meeting in Norway in April 2009. The document provides guidance on various stages of offshore hydrocarbon development from Environmental Impact Assessment (EIA) and environmental management to emergency procedures and decommissioning. Since Arctic Indigenous peoples' organizations have a unique status as permanent participants in the Arctic Council, all environmental protection work also takes into account traditional knowledge and livelihoods and views of the region's Indigenous peoples.

Another way the Arctic Council influences international environmental protection is by sponsoring large scientific programs to synthesize data on threats to the Arctic environment. Perhaps the most influential of all the working-groups, the Arctic Monitoring and Assessment Programme (AMAP), has been producing synthesis reports since 1997. A good example of the influence of these reports is the way they influenced regional and global environmental protection negotiation processes. AMAP produced data played a key role in helping influence negotiators that a global convention was needed to tackle persistent organic pollutants (POP) that frequently end up in the Arctic. The outcome was the global 2001 Stockholm Convention on POPs, which specifically mentions Arctic ecosystems and Indigenous peoples as victims of POPs.

A more recent strategy employed by the Arctic Council to influence global and regional environmental protection processes is sponsoring large-scale assessments that contain policy recommendations. Perhaps the most influential of all the assessments undertaken, the Arctic Climate Impact Assessment (ACIA) connected assessments over oil and gas and the Arctic Marine Shipping Assessment (AMSA). The next will be the Arctic Biodiversity Assessment (ABA). With connected policy recommendations, the Arctic Council aims to influence other

regional and global negotiation processes, which are crucial from the viewpoint of the health of the Arctic environment and its ecosystems (Koivurova and Vander Zwaag, 2007).

ACIA has influenced the way climate science is understood in the global climate regime (UNFCCC, Kyoto Protocol and the decisions of the conferences and meetings of the parties), and established the Arctic as a barometer for climate change, but has not achieved a position of influence in the global climate regime. This is partly why the Inuit Circumpolar Council (ICC) launched a human rights petition against the United States as the main culprit of climate change. The Inuit petition to the Inter-American Commission on Human Rights alleges that the United States' irresponsible climate policy violates Inuit human rights, such as the rights to life and property. The Commission declared the petition inadmissible despite its receiving notable attention (Koivurova, 2007).

4.8 International Trade Law in the Arctic

Little is known of the legal rules that guarantee the free flow of goods, services and investments across national borders. The universal trade law system, the *World Trade Organization* (WTO), and its agreements and the regional systems of the Arctic are important. Of the eight Arctic states (five Nordic states, the United States, the Russian Federation and Canada) only Russia is not a member of the WTO. The WTO legal system cornerstone principles are Most Favoured Nation status (MFN) and National Treatment, both apply to trade in goods, services and intellectual property. According to the MFN principle, if a WTO member lowers its customs duty rate for one of its products, it must extend the rate to all WTO members. National treatment means that once a product, service or intellectual property enters the market, WTO agreements require it be treated the same as local products.

Learning Activity 1

How can the vulnerable Arctic environment be best protected? Discuss where the main sources of Arctic pollution are located now and in the future.

The WTO system allows for regional free trade agreements and customs unions. The North American Free Trade Agreement (NAFTA) liberalized trade restrictions between Mexico, Canada and the United States. The European Union (EU) is functionally a federal state and should be considered a customs union that ensures the EU's space is an internal market. This covers Finland, Sweden and Denmark, although Greenland and the Faroe Islands are not part of the EU (both have fisheries agreements with the EU, and the Faroe Islands also has a trade agreement). Recently Iceland applied for EU membership but currently it and Norway are European Free Trade Agreement (EFTA) states and have access to the EU's market through the European Economic Area (EEA) Agreement, although the Svalbard Islands are excluded. Free trade is guaranteed in the Arctic through universal and regional legal mechanisms except in the Russian Federation.

For the most part these rule systems guarantee goods and services can freely flow across borders in the Arctic. The WTO has a dispute settlement mechanism that allows any member to take another member to binding third party dispute settlement (or panels). Panel decisions can be taken to the appellate body. This dispute settlement system ensures states observe their free trade

obligations. The WTO process starts with a compulsory consultation period, followed by a third party dispute settlement with a panel examining the dispute and issuing its report, and finally with the option to take the dispute to the appellate body.

A current Arctic trade dispute relates to sealing in northern Canada. Animal welfare organizations have been concerned with the use of the hakapik, a heavy wooden club with a hammer head and metal hook, to kill seals. The European Community (and prior to this, Netherlands and Belgium) placed an import prohibition on Canadian seal products because of the perception that seals are killed and skinned in ways that cause pain, distress and suffering. The EC Regulation prohibits the importation and sale of all seal products in EC customs territory. However, seal products from traditional Inuit and other Indigenous community hunts and products that contribute to their subsistence are allowed under the regulation. Canada commenced an official trade dispute settlement procedure on November 2, 2009, arguing the EC measure is inconsistent with WTO law. In its first Arctic policy of November 2008, the European Commission addressed the trade dispute and committed to conducting dialogue with Indigenous and other local communities traditionally engaged in the hunting of seals and ensured that the seal ban would not adversely affect the fundamental economic and social interests of Indigenous communities.

4.9 International Law and Arctic Indigenous Peoples

Indigenous peoples international law has evolved rapidly. During the 1980s Indigenous peoples were perceived as a minority groups in international law. This was reflected in the only modern international convention focused on the rights of Indigenous peoples, the 1989 ILO Convention No.169 on Indigenous and Tribal Peoples in Independent Countries. This started to change with the pioneering work of the UN Working Group on Indigenous Populations, which in 1993 produced a draft for the UN Declaration on the Rights of Indigenous Peoples. The draft was ambitious and espoused Indigenous peoples as peoples with a right to self-determination. After long and intense negotiations between the states and Indigenous peoples in September 2007, it was accepted that Indigenous peoples have rights to autonomy and self-government in their internal and local affairs.

This same maxim is observed in the international human rights treaty, the *International Covenant on Civil and Political Rights* (ICCPR). This covenant is one of the rare human rights treaties to contain a separate provision, Article 27, on the protection of minorities, including cultural minorities. In 1993, the body that monitors the Covenant, the Human Rights Committee (HRC) issued a general comment on the interpretation of Article 27, paying particular attention to state parties actively protecting the traditional way of life of Indigenous peoples. In 1999, the HRC began treating Indigenous peoples in its concluding observations to periodic state reports and in its case practice as peoples under Article 1, not just as minorities. This aligns with the evolution of the status of Indigenous peoples as having a right to some measure of internal self-determination within existing states.

Indigenous peoples international law has applied most strongly to Scandinavian Sami and Greenlandic Inuit. In the northern territories of Canada, the United States and the Russian Federation, the domestic legal system has been more important in the advancement of the status and rights of Indigenous peoples. This was reflected at the UN General Assembly when the UN

Declaration on the Rights of Indigenous Peoples was put to a vote in September 2007. Four states, including the United States and Canada, voted against; 11 states, including Russia, abstained and 143 states voted for adopting the declaration (all the Nordic states).

The ILO Convention is an example of how international law plays a role in Nordic countries. Twenty states have ratified the ILO Convention; Denmark and Norway are the only Nordic countries to have ratified it although processes are pending in Finland and Sweden. Finland, Sweden and Norway will soon commence negotiations over a Nordic Sami Convention that will establish a basis for Sami in these three countries to realize self-determination and integrate their societies.

The European Convention on Human Rights is regarded as the strongest of all human rights systems. This is because individuals can challenge states and the European Court of Human Rights (ECHR) can make a legally binding judgment. Therefore, the European Convention is promising for Greenlandic Inuit, Scandinavian Sami and Indigenous peoples of the Russian north. The Court appears to focus on the protection of individual rights rather than group protection, which may be explained by the fact that the instruments it interprets and applies (i.e., the Convention and the Protocols) do not include provisions on minority protection, rather general principles on non-discrimination.

The Organization of American States (OAS) and its human rights system is potentially open to Indigenous peoples in Canada and the United States. Since neither Canada nor the United States ratified the American Convention on Human Rights or recognized the jurisdiction of the Inter-American Court of Human Rights, the only option for Indigenous peoples is to make a petition to the Inter-American Commission on Human Rights on the basis of the 1948 American Declaration of the Rights and Duties of Man. This occurred when the Inuit Circumpolar Council (ICC) submitted a petition to the Commission against the United States regarding its climate policy.

Learning Activity 2

Why have numerous Russian Arctic Indigenous peoples not made a human rights petition against their state?
Analyze the possibilities.

The most promising international human rights treaty for Arctic Indigenous peoples is the ICCPR. Since all Arctic states are parties to it and the Covenant requires all contracting parties to take active measures to protect the culture of Indigenous peoples, in particular their traditional livelihoods (Article 27), the Covenant has a lot of potential for Arctic Indigenous peoples. Further, the Covenant increasingly requires contracting parties to recognize Indigenous peoples are peoples in the meaning of Article 1 and entitled to self-determination. Since all Arctic states except the United States are parties to its Optional Protocol, Indigenous peoples can petition against their states to the Human Rights Committee. Arctic Indigenous peoples have actively used this, especially the Sami. The only meritorious case has been the Lubicon Lake Band from Alberta who accused Canada of allowing oil and gas exploitation and logging on their traditional hunting and fishing grounds. In 1990, the Band won its case, but Canada has not observed the non-legally binding decision of the Human Rights Committee.

Conclusion

International law has a strong impact in the Arctic. International law concentrates power in central governments and relies on universal normative orders; therefore, with very few exceptions, the Arctic's unique conditions do not find recognition in international law. This is probably why increasing inter- and non-governmental co-operation in the Arctic intentionally avoids using international treaties, which would transfer power to Arctic states' southern capitals. As the sea ice recedes, the greater will be the impact of the Law of the Sea in Arctic waters, a branch of international law which relies on nation states. Nation states are increasingly bound by an accumulating set of obligations related to liberating trade, protecting the environment and advancing rights of Indigenous peoples.

Discussion Questions

1. International law provides universal principles for organizing governance. Do you think these principles are well suited for Arctic conditions? If not, how can they be amended?
2. We know from ACIA and Inter-Governmental Panel on Climate Change scientific assessments that climate change will rapidly transform the Arctic. In particular, receding sea ice will invite economic activity to the Arctic (shipping, offshore hydrocarbon exploitation, etc.). Do you think existing governance mechanisms are enough to counter these vast challenges or should new types of international governance be created? What could these involve?
3. Why do you think there has been vast media attention to the "scramble for resources" from the Arctic seabed even though continental shelf entitlements have been developed by coastal states exactly as the Law of the Sea Convention requires?
4. Since the International Covenant on Civil and Political Rights applies to all Arctic states and the individual human rights petition system guaranteed in the Optional Protocol is open to all Indigenous peoples and contains strong protections for the region's Indigenous peoples, why has it not influenced more policies concerning Indigenous peoples? Why have the numerous Russian Indigenous peoples not made use of the Optional Protocol procedure?

Study Questions

1. Considering the fundamental principles of international law, whose interests does international law serve most?
2. Does international law override domestic legislation and policy or have any influence on domestic policy?
3. Why is it important for states to consolidate title to land and develop it as part the state's sovereign territory?
4. What international ownership systems exist in the Arctic as regulated by international law?
5. Are Arctic states struggling to occupy most of the Arctic seabed (by extending their Arctic Ocean continental shelves) or are these developments occurring in an orderly fashion?
6. What actions have Arctic states or other actors taken against climate change?
7. What international trade law system functions in the Arctic and what is its prime purpose?

8. Compare how international law influences the development of Indigenous rights and status in Scandinavia, North America and Russia.

Glossary of Terms

Binding and Non-Legally Binding: In international law there is a clear distinction between legally binding instruments (e.g., international treaties) and non-legally binding instruments (e.g., declarations or action plans). Customary treaty law requires states to observe treaty obligations in good faith. Non-legally binding instruments, such as the Arctic Environmental Protection Strategy, are referred to as soft-law instruments since they provide normative guidance but are not legally binding.

Customary International Law (CIL): CIL is frequently created by two elements: states first follow certain usage (practices), which then gradually start to be perceived as legally required (*opinio juris*). Generally, CIL legally binds all states but regional or bilateral CIL can evolve.

European Union (EU) and/or European Community (EC): Before the Lisbon Treaty entered into force only the European Community (EC) had legal standing in international law and could participate in international treaty making. The Lisbon Treaty changed the legal situation so the EU came to possess legal personality.

Indigenous Peoples: There is no universal definition identifying which groups constitute Indigenous peoples. The Cobo definition captures the most important traits, namely that Indigenous peoples have historical continuity with pre-invasion and pre-colonial societies that developed on their territories. Indigenous peoples consider themselves distinct from other sectors of society and presently form non-dominant sectors of society. Indigenous peoples are also determined to preserve, develop and transmit to future generations their ancestral territories and ethnic identities as the basis of their continued existence as peoples.

International Law: A legal system (also known as public international law or the law of nations) that applies primarily to relations between states. “International environmental law” and “international human rights law” are branches of international law.

International Treaty: A written agreement between states. Many words are used as synonyms for “treaty”, such as “convention”, “covenant”, “agreement”. There are no legal consequences for using alternate terms.

Legal Continental Shelf: The continental shelf is a natural prolongation of land area of a coastal state into the sea, therefore the coastal state does not need to claim it. Legal continental shelf equates with geophysical continental margin, not geophysical continental shelf.

Peaceful Occupation of Terra Nullius (land without an owner): In the past (today almost all land falls under state sovereignty) a state could peacefully occupy vacant (even inhabited) land if it discovered such land and effectively occupied it with the intention of claiming it as a sovereign area.

Regime: Originally a concept developed in international relations, but many international lawyers have begun using it as well. Regime denotes an evolving complex of principles, rules and decision-making procedures with hard-law (treaties) and soft-law elements. A good example is the climate change regime, which was founded by a general framework treaty then complemented by the Kyoto Protocol (setting out legally binding reduction objectives) and finally detailed by the Marrakesh Accords, which were formal non-binding decisions of conference parties.

References

- Bankes, N. (2009). *Climate Change and the Regime for the Conservation of Polar Bears*. In: eds. Koivurova, T., Keskitalo, C. and Bankes, N. **Climate Governance in the Arctic**. Springer. Environment and Policy 50.
- Corell, H. (2009). *The Arctic An Opportunity to Cooperate and Demonstrate Statesmanship*. <http://www.havc.se/res/SelectedMaterial/20090206corellarcticopportunity.pdf>
- Franckx, E. (1993). *Maritime Claims in the Arctic; Canadian and Russian Perspectives*. Martinus Nijhoff Publishers, Kluwer Academic Publishers.
- Koivurova, T. (2007). *International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects*. **Journal of Environmental Law and Litigation**. 22(2):267-299.
- Koivurova, T. (2009). *Do the Continental Shelf Developments Challenge the Polar Regimes?* In: Brill Publishers. **The Yearbook of Polar Law**, 477-499.
- Koivurova, T. and VanderZwaag, D. (2007). *The Arctic Council at 10 years: Retrospect and Prospects*. In: **University of British Columbia Law Review**. 40(1):121-194.
- Molenaar E. (2009). *Climate Change and Arctic Fisheries*. In: eds. Koivurova, T., Keskitalo, C. and Bankes, N. **Climate Governance in the Arctic**. Springer. Environment and Policy 50.
- Ulfstein, G. (1995). *The Svalbard Treaty; From Terra Nullius to Norwegian Sovereignty*. Oslo: Scandinavian University Press.

Supplementary Resources

- Arctic Governance. (2004). eds. Koivurova, T., Joonas, T. ja Shnorro, R. *Juridica lapponica* No. 29. Oy Sevenprint Ltd.
- Arctic Transform (Transatlantic Policy Options for Supporting Adaptation in the Marine Arctic) project's research reports. <http://arctic-transform.org/docs.html>
- Koivurova, T. (2001). *Environmental Impact Assessment in the Arctic: A Study of International Legal Norms*. Ashgate Publishing.
- Koivurova, T. (2007). *Draft for a Nordic Saami Convention*. In: *European Yearbook of Minority Issues*. Martinus Nijhoff Publishers. 6(2006/7):103-136.
- Koivurova, T. (2009). *Limits and possibilities of the Arctic Council in a rapidly changing scene of Arctic governance*. In: *Polar Record*. Cambridge University Press. doi:10.1017/S0032247409008365 1
- Koivurova, T. and Molenaar, E. (2009). *International Governance and Regulation of the Marine Arctic: Overview and Gap Analysis*.

<http://www.wwf.se/source.php/1223579/International%20Governance%20and%20Regulation%20of%20the%20Marine%20Arctic.pdf>

Pharand, D. (1988). *Canada's Arctic Waters in International Law*. Cambridge University Press. Published by the Press Syndicate of the University of Cambridge.

Pharand, D. The 1991 Draft Treaty proposal. <http://www.carc.org/pubs/v19no2/5.htm> Excerpted from the Canadian Institute of International Affairs, National Capital Branch, *The Arctic Environment and Canada's International Relations*. Ottawa: Canadian Arctic Resources Committee, pp.AI-A10.

Review of European Community and International Environmental Law, *RECIEL* 17(1) 2008. Special International Polar Year Issue. <http://www3.interscience.wiley.com/journal/119411557/issue>

Rothwell, D.R. (1995). *International Law and the Protection of the Arctic Environment*. In: *International and Comparative Law Quarterly* 44(2):280-312.

Rothwell, D.R. (1996). *The Polar Regions and the Development of International Law*. Printed in Great Britain at the University Press, Cambridge. Published by the Press Syndicate of the University of Cambridge.

The Yearbook of Polar Law. (2009). Volume 1. Editors-in-chief, G. Alfredssons and T. Koivurova (special editor David Leary).