

AGORA: THE END OF TREATIES

INCREASING RELEVANCE OF TREATIES: THE CASE OF THE ARCTIC

*Timo Koivurova**

The Arctic was one of the main theatres for strategic military confrontation during the Cold War between the blocs led by the United States and the Soviet Union. There was no place for multilateral cooperation, other than for very limited issue areas, such as the 1973 Agreement on Conservation of Polar Bears¹ between the five states with polar bear populations. Yet, the warming of relations by the end of the Cold War changed all this. Inspired by Secretary-General Mikhail Gorbachev's speech in 1987, in which the Soviet leader proposed various possible areas for Arctic cooperation, differing ideas for international cooperation were advanced. Canadians, in particular, were trying to advance international treaty-based general cooperation for the Arctic, but this never came to pass and it was eventually Finland who was able to broker soft-law collaboration between the Cold War rivals.

Soft Law As A Primary Means of International Arctic Cooperation

Before moving to examine the start of the Arctic international cooperation, it is important to keep in mind from the outset that the structure of the Arctic governance system is almost opposite to that of the other polar region, Antarctica, given the frequent comparisons between these two areas. Since the seven sovereign states agreed not to consolidate their claims over the continent with the 1959 Antarctic Treaty,² there are currently no sovereigns in the Antarctic. This contrasts starkly with the Arctic, where all land, islands, and much of the waters are under the sovereignty and jurisdiction of the Arctic states on the basis of international law. The structure of the Arctic governance system is thus very much influenced by the fact that eight sovereign nation-states ultimately determine how the region is governed, even if international law and cooperation also plays a role.

The Arctic international cooperation started with the soft-law approach between eight states (Sweden, Finland, Norway, Denmark, Iceland, Russia, Canada, and the United States). After two negotiating rounds in 1989 and 1990, the Arctic states were able to sign a Declaration and adopt a strategy for Arctic Environmental Protection³ in 1991 (so-called Rovaniemi process). Environmental issues were seen as topical enough to allow the eight states to create a platform for international cooperation in the region: building mutual trust while also protecting the environment—an area of co-international operation, which was blossoming with

* *Research Professor for the Northern Institute for Environmental and Minority Law, Arctic Centre (University of Lapland) & chair of the thematic network on Arctic law, University of the Arctic.*

Originally published online 6 May 2014.

¹ Agreement on Conservation of Polar Bears, Nov. 15, 1973, 27 U.S.T. 3918.

² The Antarctic Treaty, Generated from the Conference on Antarctica, Washington, D.C., U.S.A., Dec. 1, 1959.

³ Declaration on the Protection of Arctic Environment, Arctic Environmental Protection Strategy, Rovaniemi, Finland, June 1991.

the spirit of the 1992 Rio Conference on Environment and Development. This Rovaniemi process was later merged into the Canadian initiative of the Arctic Council from 1996 to 1998, which still operated in a very similar manner to its predecessor. The main environmental protection and sustainable development work was conducted in its working groups, which were coordinated by senior Arctic officials, and policy direction was given by biennial ministerial meetings. The Arctic Council was also created via a declaration, not a treaty: the 1996 Declaration on Establishment of The Arctic Council⁴ (The Ottawa Declaration). The United States, in particular, insisted that no treaty was needed⁵ to advance the cooperation between the eight Arctic states.

In addition to the pan-Arctic inter-governmental cooperation taking place in the Arctic Council, the same model for international cooperation was chosen in the European part of the Arctic. The Barents Euro-Arctic region⁶ was established in 1993 via a declaration, having two layers of cooperation: one between governments (Barents Euro-Arctic Council) and the European Commission; and the other between the northern counties of Finland, Sweden, Norway, and the Northwest of Russia (Barents Regional Council).

For a long time, the stakeholders in Arctic international cooperation celebrated the virtues of soft-law international cooperation as it seemed clear that soft-law cooperation enables better participation by the region's actors. The organizations of Arctic indigenous peoples were given a unique status as permanent participants in the Arctic Council, with states needing to consult them before taking any decisions. Indigenous peoples of the Barents region had their own working group⁷ and counties of the region could advance their mutual cooperation in the Barents Regional Council. Also, the other features that are generally taken up as the good sides of soft law were seen as supporting the chosen forms of cooperation in the Arctic. The adoption of soft-law instruments and decisions is flexible for the simple reason that it does not establish international legal obligations for states. Such structures can be established with flexibility because no domestic structures (e.g., procedures within national Parliaments) are involved, and since there is a degree of malleability, they can also be steered in a manner that meets the changing demands of governance. Additionally, various rules and practices related to treaty-making were seen as encumbering treaties far too much to advance the goals of international cooperation in the region. The fact that guidelines, recommendations, and best practices adopted under the auspices of the Arctic Council or the Barents Euro-Arctic Council were not legally binding was viewed in a positive light since they were seen as enabling international soft-law influence in the Arctic regions, without the delaying formalities related to treaty-making.

Gradually, the full realization of global climate change impacts in the region transformed the way the region was perceived. This was, in effect, the consequence from the scientific assessment the Arctic Council itself sponsored, the 2004 Arctic Climate Impact Assessment (ACIA),⁸ which established the Arctic as an early warning place of global warming. ACIA projected serious impacts on the Arctic environment, its ecosystems and local and indigenous communities. Warming in the Arctic was predicted by ACIA to be increasing at twice the rate as compared to the rest of the world. It is important to underline how dramatically our view of the Arctic changed with the realization of climate change impacts in the region, most graphically demonstrated by the rapidly melting Arctic Ocean sea ice. Instead of the "frozen desert"⁹ image that had influenced the work of the Rovaniemi process, it became almost the opposite, a region undergoing a vast and

⁴ [Declaration on the Establishment of the Arctic Council](#), Joint Communique of the Governments of the Arctic Countries on the Establishment of the Arctic Council, Ottawa, Canada, Sept. 19, 1996.

⁵ Evan T. Bloom, *Establishment of the Arctic Council*, 93 AJIL 712 (1999).

⁶ [About Us: Cooperation in the Barents Euro-Arctic Region](#), BARENTS EURO-ARCTIC COUNCIL.

⁷ [Working Group of Indigenous Peoples](#), BARENTS EURO-ARCTIC COUNCIL.

⁸ [ARCTIC CLIMATE IMPACT ASSESSMENT, ARCTIC COUNSEL & ARCTIC SCIENCE COMMITTEE \(2004\)](#).

⁹ Timo Koivurova, *Limits and Possibilities of the Arctic Council in a Rapidly Changing Scene of Arctic Governance*, 46 POLAR RECORD 146 (2010).

long transformation process, entailing also many economic opportunities, from new shipping routes and northward moving fisheries to hydrocarbon riches.

Treaty Approach Takes Over

The reality of climate change seemingly had many consequences for the way the Arctic states viewed how international policies should be advanced in the region. First of all, the Arctic Council, an inter-governmental forum mostly focused on sponsoring scientific assessments and producing soft-law guidance, became the focal point for treaty-making. Under the auspices of the Arctic Council, the eight Arctic states adopted in 2011 the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic¹⁰ at the Nuuk Ministerial Meeting of the Council, an agreement that has now entered into force. The second legally binding agreement—Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic¹¹—was adopted at the Kiruna Ministerial Meeting in May 2013. These two are the first legally binding agreements that the eight Arctic states have negotiated for their Arctic regions.

The Arctic Council has also acted as one catalyst to negotiate legally binding rules to govern shipping in the Polar Regions. The International Maritime Organization has already adopted two soft-law instruments to govern shipping in the Polar areas, the first in 2002 focusing on the Arctic, and the second in 2009 to cover both Polar Areas (Guidelines for Ships Operating in Polar Waters¹²). The Council's Arctic Marine Shipping Assessment¹³ (AMSA) recommended that the member states work towards making the 2009 Polar Code a legally binding document, a work that for several reasons, among them the AMSA recommendation, has progressed to the stage of a draft 2014 mandatory Polar Code.¹⁴

There are also other processes to respond to the change via legal means. The Arctic Ocean's five Coastal states (United States, Russia, Canada, Denmark, and Norway) convened in 2008 in Ilulissat, Greenland, making the point in their Ilulissat Declaration¹⁵ that they are the stewards of the rapidly changing Arctic Ocean. These states have also taken proactive steps in case the Central Arctic Ocean fishery becomes possible with the retreating sea ice and warming waters. They now agree that the sea ice has withdrawn to the extent that the future establishment of a regional fisheries management organization via a legally binding agreement for the Central Arctic Ocean could be considered, even if the five nation-states currently still focus on improving scientific understanding of the Arctic marine environment in part to determine whether fish stocks of commercial interest may in the future occur in the Central Arctic Ocean. In addition, in their 2014 meeting,¹⁶ the states agreed that interim precautionary measures are needed to prevent future commercial fisheries in the absence of appropriate regulatory mechanisms.

There is even a negotiation process to improve the situation of the Saami indigenous people, who inhabit four Arctic states and are represented as permanent participants in the Arctic Council by the Saami Council, via an international treaty. After an initial preparatory work under the auspices of the Nordic Council, the representatives of Finland, Sweden, and Norway and their respective Saami parliaments proposed a draft Nordic Saami Convention.¹⁷ The basic idea behind the draft—which is now being negotiated between the

¹⁰ [Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic](#), 2011, 50 I.L.M. 1119.

¹¹ [Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic](#), May 15, 2013.

¹² INT'L MARITIME ORG. [IMO], [GUIDELINES FOR SHIPS OPERATING IN POLAR WATERS](#) (2010).

¹³ [ARCTIC MARINE SHIPPING ASSESSMENT 2009 REPORT](#), ARCTIC COUNCIL (2009).

¹⁴ [Shipping in polar waters: Adoption of an International Code of Safety for Ships Operating in Polar Waters \(Polar Code\)](#), IMO.

¹⁵ Arctic Ocean Conference, Ilulissat, Greenland, May 27-29, 2008, [The Ilulissat Declaration](#) (May 28, 2008).

¹⁶ [Overview: Protecting Life in the Arctic](#), THE PEW CHARITABLE TRUSTS.

¹⁷ [Nordic Saami Convention](#), Fin.-Nor.-Swed.

Nordic states—is to accommodate the self-determination of Saami people within the territory of three nation-states and improve the cross-border contact and cooperation of Saami communities in these countries.

Importantly, there has been increasing voices calling for an overarching Arctic treaty, originally envisioned by the Canadians, to enable better coordination of the responses to climate change in the Arctic, especially now when the Council is being served by a permanent secretariat. Finland was the first of the Arctic states to officially propose this in its revised 2013 Arctic strategy:¹⁸

Finland has been actively involved in the efforts to bolster the Arctic Council. Institutionally, the Council's position has been strengthened by appointing a permanent secretariat; drafting binding international agreements between the Council Member States; producing research papers of major importance; and extending the Council's agenda from environmental aspects to issues related to policies, the economy and international law. **Finland supports the plan to establish the Council as an international treaty-based organisation.** (emphasis added)

Even if calls for an overarching Arctic treaty have become more frequent, most of the Arctic states are not ready for this. The five Arctic Ocean coastal states emphasized in their Ilulissat declaration that there is already an overarching legal framework for the region, the law of the sea and that there is “no need to develop a new comprehensive legal regime to govern the Arctic Ocean.” This still captures the current consensus among most of the states and other stakeholders in the Arctic.

Why Is This Change Taking Place?

To a long-time observer of Arctic international affairs, it has been slightly surprising why the celebrated aspects of soft law so quickly were replaced by the emphasis on favorable aspects of treaties and hard law in general. The Arctic has not only been a place for soft-law governmental cooperation under the auspices of the Arctic Council and the Barents Euro-Arctic Council, but also a region where various kinds of transnational Arctic networks flourish, from Arctic science (International Arctic Science Committee¹⁹ and International Arctic Social Sciences Association²⁰) and educational organizations (The University of the Arctic²¹) to indigenous (Indigenous Peoples Secretariat²²) and sub-governmental cooperation (The Northern Forum²³) to the most recent addition—the Arctic Council-sponsored Arctic Economic Council.²⁴ For a long time it seemed that these soft-law forms of cooperation at various levels and between different actors should be enough; after all, these were bottom-up initiatives serving special needs and enabling flexible international cooperation between differing types of actors in a changing Arctic political landscape.

It seems evident that the motivation behind most Arctic-specific treaty processes is climate change and its dramatic transformational consequences for the Arctic, especially the new possibilities this change entails such as economic activities entering into the region. Evidently, with offshore oil and gas development as well as various types of shipping accessing the region, search and rescue and oil spill preparedness and response are needed to tackle the possibility of accidents in this region where distances are vast and infrastructure for responding to accidents is scarce. Given the rapidly thinning and retreating sea ice in the Arctic Ocean, which

¹⁸ Prime Minister's Office Finland, [Finland's Strategy for the Arctic Region 2013](#), Government Res. at p. 44, Aug. 23, 2013.

¹⁹ See [INTERNATIONAL ARCTIC SCIENCE COMMITTEE](#).

²⁰ See [INTERNATIONAL ARCTIC SOCIAL SCIENCES ASSOCIATION](#).

²¹ See [UNIVERSITY OF THE ARCTIC \(UARCTIC\)](#).

²² See [ARCTIC COUNCIL INDIGENOUS PEOPLES SECRETARIAT](#).

²³ See [THE NORTHERN FORUM](#).

²⁴ See [ARCTIC ECONOMIC COUNCIL, ARCTIC COUNCIL](#) (Jan. 28, 2014).

is projected to be ice-free during summer months by 2030–2040, legal rules responding to shipping and possible fisheries are needed.

States remain primarily responsible for ocean governance. National ocean governance is done (also) via legal acts and mandates, so it is nearly impossible to think that soft law could somehow be used to regulate these issues on an international plane. In order for the national agencies to work together in the Arctic in an effective manner, they need international treaties to provide clear rules and guidance.

When we look back, it seems apparent that soft law was enough as long as the challenges facing the region were moderate enough. When the Arctic was perceived as inhospitable, inaccessible frozen desert, it was enough that governments developed their cooperative ideas on the basis of soft law, given that treaties were not needed for such moderate normative instruments, projects, and programs. This view of the importance of treaties is, of course, very comforting for international lawyers: when things get serious, international legal instruments, treaties, are needed. To put it in even more glorious terms for us: when the new Ocean rises from underneath the ice, international treaties will be used to respond to the grave challenges that this transformation entails. This, I think, is a correct conclusion, but not the whole story.

We do live in a world with multiple layers of governance, most of which also have importance in the Arctic. Even if the treaty form has become the tool of choice to respond to the challenges posed by climate change in the region, it is still only part and parcel of the whole landscape of hard- and soft-law governance applicable globally, regionally and in the Arctic. Soft-law still plays a role in the Arctic (as do many of the transnational networks), especially by complementing legal agreements, but also in one other important way: a general cooperation forum giving political direction to the Arctic can remain a soft-law body, such as the Arctic Council. Even if there are calls for an overarching Arctic treaty, very few see a need for creating a legal foundation for a body that primarily provides political direction to the region and sponsors scientific assessments. Legal treaty form is not necessary for the states to come up with a standing forum where important political direction is given regarding what should be done in the region, and for identifying, via assessments, what are the main challenges for the region. The individual challenges, such as the increasing possibility of accidents or oil spills, do require treaties to be negotiated, but the overarching political forum need not necessarily be enshrined in a treaty form.

This speaks to a lesson that can be drawn from the work of the Arctic Council. Soft-law form is increasingly being used to provide the basis for general standing cooperative forums for nation-states. Even if the Arctic Council has not been established via an international treaty, the member states and the permanent participants have created a very elaborate set of rules for how it functions. The work of the Council, now when it has finally received its permanent secretariat, is set to continue to strengthen but this does not necessarily mean that it would be negotiated to a treaty form. In fact, given that the Council has been able to catalyze some of these treaty processes, it seems to have retained its niche discussed above, together with retaining the full participation by the region's original inhabitants, the indigenous peoples' organizations (permanent participants). The same can be said of the Barents Euro-Arctic Council, the Council of Baltic Sea States²⁵ and even the Organization for Security and Cooperation in Europe,²⁶ which all have retained the soft-law status but can still provide functions for which treaty law is not necessary.

²⁵ See COUNCIL OF THE BALTIC SEA STATES: From Idea to Action: Empowering Cooperation in the Baltic Sea Region.

²⁶ See ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE.