

Environmental Governance through the Arctic Council: the Arctic Council as Initiator of Norms of International Environmental Law

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Comments and questions are welcome. <rlj [at] unak.is>

Hypothesis: The Arctic Council can be at least as effective in setting standards for environmental protection in the Arctic through soft-law instruments as through hard-law treaties.

1. The Centrality of Environmental Governance to the Arctic Council System

- Gorbachev: six priorities for Arctic cooperation:
 - 1) Nuclear weapons-free zone in Northern Europe
 - 2) Reducing and restricting naval activity in Northern Europe
 - 3) Cooperative development of hydrocarbon resources in the Arctic
 - 4) Scientific cooperation
 - 5) "cooperation of the northern countries in environmental protection"; and developing "jointly an integrated comprehensive plan for protecting the natural environment of the North"
 - 6) Opening NSR to foreign ships.
- (The Murmansk Speech, Gorbachev, 1987)

Gorbachev

According to existing data, the reserves there of such energy sources as oil and gas are truly boundless. But their extraction entails immense difficulties and the need to create unique technical installations capable of withstanding the Polar elements. (The Murmansk Speech, 1987)

- AEPS 1991 & Arctic Council 1996 Working Groups
 - 1) AMAP (Arctic Monitoring and Assessment Programme)
 - 2) CAFF (Conservation of Arctic Flora and Fauna)
 - 3) EPPR (Emergency Prevention, Preparedness and Response)
 - 4) PAME (Protection of the Arctic Marine Environment)
 - 5) Sustainable Development (Task Force 1993-1996; Working Group since 1996)
 - 6) ACAP (Arctic Contaminants Action Program) (Originally a plan under AMAP; independent Working Group since 2006)

2. Sources of International Law

- Formal Sources of International Law
 - Treaties
 - Custom
 - General Principles
 - Judicial Decisions
 - Publicists
- Norms of International Law (Ontology: Dworkin)
 - Rules
 - Principles
 - Policies

- Norms of International Law (Force: hierarchy)
 - Hard Law: treaties, custom and general principles
 - Soft Law: declarations, principles, resolutions
 - Non-legal standards: guidelines, frameworks, strategies

Dinah Shelton:

There is no accepted definition of “soft law,” but it usually refers to any international instrument other than a treaty that contains principles, norms, standards or other statements of expected behaviour. The term “soft law” is also sometimes employed to refer to the weak, vague, or poorly drafted content of a binding instrument.

‘Normative Hierarchy in International Law’, (2006) 100(2) American Journal of International Law, 319).

3. “Principles” in international law

- Three meanings of “principle”
 - General principles of (civilised) nations: about *origin* of norm
 - Principles as overarching standards or “pillars” of the legal system (Cançado-Trindade) (cf rules): about *ontology* of norm
 - Principles as political commitment to stated goals (really “policies” in Dworkin’s sense): about *bindingness* of norm

Dinah Shelton:

They [soft-law norms] are not law and do not need to be in order to influence conduct in the desired manner. (‘Normative Hierarchy in International Law’, 322).

4. Sources of International Environmental Law in the Arctic

- Treaties, eg UNCLOS, Espoo Convention, Aarhus Convention, IMO treaties, etc. Subject specific and/or regional; no comprehensive global environmental treaty
- Custom, eg as identified by ICJ And ITLOS
- Principles, eg Stockholm and Rio Declarations (general)
- Guidelines, resolutions, etc (subject specific) (eg IMO, IWC)
- Arctic Council declarations and decisions
- Arctic Council Guidelines and Frameworks (subject specific) (eg Guidelines on EIA and Offshore Oil and Gas; Black Carbon Framework)

Finland’s Strategy for the Arctic Region:

The consensus decisions made by the Council Member States are not legally binding, but the Council’s recommendations are considered to have major political weight. (Prime Minister’s Office Publications 8/2010, 37).

5. The Arctic Council’s Role in making and/or shaping environmental norms

- Treaties of the A8:
 - Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic 2011 (SAR)
 - Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic 2013 (MOPPR)
 - Scientific research cooperation?

- Implementation *under* the treaties
- Establishment of 'fora' (eg Arctic Coastguard Forum 2015)
- Frameworks: eg black carbon and oil spill pollution prevention and response.

6. Challenges with 'Binding' Agreements

- Weakness of commitment
- No provision for enforcement
- Exclusive of non-Arctic States and Permanent Participants
 - Indigenous Peoples as central to search and rescue or oil spill clean-up: first responders; nearest harbours; real-time monitors of weather, ice, sea and wildlife; providers of emergency supplies; vulnerable to impacts on food, energy and cultural security.
 - non-Arctic States as providers of knowledge, resources and technology for search and rescue and oil-spill clean-up.
- Hostage to international relations outside of the Arctic and domestic politics

Gorbachev:

Certainly, judging the situation only from the speeches made by top Western leaders, including their "programme" statements, everything would seem to be as it was before: the same anti-Soviet attacks, the same demands that we show our commitment to peace by renouncing our order and principles, the same confrontational language: "totalitarianism", "communist expansion", and so on. Within a few days, however, these speeches are often forgotten, and, at any rate, the theses contained in them do not figure during business-like political negotiations and contacts. (The Murmansk Speech, 1987)

7. Three Recent Non-Legal Processes under Arctic Council

- Black Carbon Framework
 - Participating States should:
 - create an inventory and projection for black carbon and methane reductions
 - submit national reports to the AC (to be made public)
 - raise awareness
 - Expert Group:
 - is composed of experts appointed by A8, permanent participants *and observers* implementing the Framework
 - collates the data
 - can propose improvements to the framework and "propose options for consideration in order to establish a collective baseline, undertake the analysis and identify options for quantitative goal(s)" (Annex III)
 - make recommendations, including targets
- Framework Plan for Arctic Oil Spill Pollution Prevention (implementation lead by EPPR; support from PAME. First report by Norway submitted to EPPR: www.psa.no/tfopp This is a review of risks, available preventive technology and process, and preliminary gap analysis)
- Arctic Coast Guard Forum

8. Working Group contribution to norm-shaping

- Choice of study
- Policy findings feed into norm-shaping elsewhere: "up" to international governance; "down" to domestic governance: eg:
 - PAME → Polar Code
 - PAME & CAFF → Framework for a Pan-Arctic Network of Marine Protected Areas
 - AMAP → Minamata Convention on Mercury
 - CAFF → CBD Ecologically or Biologically Significant Marine Areas: "Arctic" region
 - CAFF → conservation strategies implemented in domestic law, eg in Greenland
- Inclusive of observer contributions

9. Problems with non-binding regulatory approaches

- Standards non-binding!
- Subject to political change
- Weak follow-up
- Unpersuasive before international courts & tribunals

Dinah Shelton:

Such instruments may express trends or a stage in the formulation of treaty or custom, but law does not come with a sliding scale of bindingness, nor does desired law become law by stating its desirability, even repeatedly. ('Normative Hierarchy in International Law' 321).

10. Conclusions

- To understand environmental protection in the Arctic, need to consider *governance* in broad sense and not look only to legal instruments
- Treaties have their place but are limited in what they can offer (content, enforcement & participation)
- Non-binding instruments in the Arctic are more inclusive of indigenous peoples and observer States; can be more ambitious; and are more flexible

Dinah Shelton:

Nonbinding norms and informal social norms can be effective and offer a flexible and efficient way to order responses to common problems. They are not law and they do not need to be in order to influence conduct in the desired manner. ('Normative Hierarchy in International Law' 322)