

Global Challenges in the Arctic Region

Sovereignty, environment and
geopolitical balance

Edited by
Elena Conde and Sara Iglesias Sánchez



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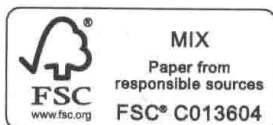
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Global Challenges in the Arctic Region

Bringing together interconnected discussions to make explicit the complexity of the Arctic region, this book offers a legal discussion of the ongoing territorial disputes and challenges in order to frame their impact into the viability of different governance strategies that are available at the national, regional and international level.

One of the intrinsic features of the region is the difficulty in the determination of boundaries, responsibilities and interests. Against this background, sovereignty issues are intertwined with environmental and geopolitical issues that ultimately affect global strategic balances and international trade and, at the same time, influence national approaches to basic rights and organizational schemes regarding the protection of indigenous peoples and inhabitants of the region. This perspective lays the ground for further discussion, revolving around the main clusters of governance (focusing on the Arctic Council and the European Union, with the particular roles and interest of Arctic and non-Arctic States, and the impact on indigenous populations), environment (including the relevance of national regulatory schemes, and the intertwinement with concerns related to energy, or migration) and strategy (concentrating in geopolitical realities and challenges analyzed from different perspectives and focusing on different actors, and covering security and climate change related challenges).

This collection provides an avenue for parallel and converging research of complex realities from different disciplines, through the expertise of scholars from different latitudes.

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1 Introduction

Elena Conde and Sara Iglesias Sánchez

Overview

The two polar regions of the planet—the Arctic Ocean and the continent of Antarctica—have traditionally been neglected within international relations, mainly because of their geographical remoteness and inhospitable conditions. Regardless of their common features, each polar space has its own particular traits which have influenced the respective legal regimes applicable in the regions. Antarctica is referred to as a “global common” and is governed by the principle of “Common Heritage of Mankind.” Until recently, the Arctic remained a completely frozen maritime space and its legal status had been shaped by different branches of Public International Law—mainly the Law of the Sea, regional regimes—the newly adopted treaties under the auspices of the Arctic Council or the legal framework provided by the European Law for some of the Arctic States, and the domestic law of the eight Arctic States.

The new position of the Arctic as a major issue in the geopolitical, economic and scientific international agenda has been mainly due to the complex process of climate change. Despite the existing uncertainties, it seems undeniable, in the light of existing facts and scientific studies, that the Arctic will soon lose an even greater part of its ice and for even longer periods. This will definitely foster all kinds of human activity in the region, creating a world of opportunities and risks.

The opening of new passages through the Arctic Ocean brings with it trade and tourism in the region. The sea ice retreat makes the exploitation of the extended continental shelf resources easier. But along with these possibilities, there are several risks to be aware of: safe navigation, sustainable exploitation of resources, rights and lifestyle of indigenous populations, the extent of the Arctic Seabed Area and even classic security threats. All these factors may lead to disagreements, even conflict, among the interests of the coastal states—the powerful *Arctic Five*—and those other states interested in using the new ice-free areas. Any such conflict will have to be resolved on the premises of existing international law or by making new regulations. It is therefore likely that new arrangements will

have to be made, especially concerning shipping and fishing in the high seas, in order to adapt to the needs of the most powerful Arctic States and which will create a new international balance.

States, international organizations and fora—of which the Arctic Council is a particularly remarkable one—indigenous population and other stakeholders will be the ones to define the political future of this region. As pointed out above, the Arctic is undergoing a process of unprecedented transformation. No state acting alone can address the challenges associated with these changes. The main question therefore is how to enable the existing cooperation mechanisms to continue to protect the critical resources of the Arctic marine environment and the traditional lifestyle of indigenous peoples whilst benefiting from the new opportunities. To achieve this task, international law will be the key instrument to ensure stable Arctic governance.

Considering the current state of affairs in the Arctic, this collective volume is the culmination of work developed by a team of researchers led by Professor Elena Conde (Complutense University of Madrid, Spain) under the auspices of the national research project: *The Race for the Arctic: Issues of International Law Arising in the Light of Climate Change* (reference number: DER2012-36026), funded by the Spanish Ministry of Economy and Competitiveness.

Objective

This book gathers essays written by the members of this research project, including the two editors, as well as valuable studies developed by other renowned academics and practitioners who have devoted their research to the Arctic region. The objective of this book is to provide a genuine representation of the legal and political complexity of the Arctic, bringing together relevant and interconnected discussions about this region. As an academic work, this collection of essays aims to offer an avenue for parallel and converging research on the complex issues arising in different areas and relies on the expertise of scholars from a variety of disciplines.

The volume is divided into five parts. Our goal has been to emphasize the connection between different subjects and academic disciplines in order to highlight the complexity of the Arctic region—a reality that can only be captured through a multidisciplinary study. Part I is devoted to issues of sovereignty in the Arctic, which are strongly linked to environmental and geopolitical issues which are later discussed in Parts IV and V. The discussion of sovereignty in the region lays the ground for further discussion in Part II, which revolves around the main clusters of governance, namely the Arctic Council and the European Union. The human dimension of the challenges which the region is facing is examined in Part III, with particular regard to indigenous peoples and climate induced migration. As is apparent from this description, the structure of the book does

not rely on a rigid dogmatic approach, since these five parts are closely intertwined with each other. The different chapters are therefore included in the different parts of the book on the basis of the “center of gravity” of their overall approach to global challenges in the Arctic region.

Structure

Turning towards the specific contents of this volume, Timo Koivurova, offers in his introductory chapter (Chapter 2), a general view of the importance of studying Arctic law from a multidisciplinary perspective. This chapter sets the scene for the remainder of the volume, introducing the wide range of problems affecting the Arctic region.

Part I deals with the legal challenges posed by particular territorial issues that strongly shape the balance of power and coexistence in the Arctic region. The rationale of this part is aimed at providing an overview of some of the legal difficulties that arise when analyzing the region from the point of view of territorial sovereignty and navigation rights. It also offers a legal perspective on the impact of sovereignty issues which relate to environmental protection. The discussion of these issues centers on classical doctrines in Public International Law—sovereign rights over the extended continental shelf (Elena Conde and Zhaklin Yaneva), the disputed status of the oceanic passages (Suzanne Lalonde) and the interpretation of international treaties (Marta Sobrido)—as well as on modern aspects of sovereignty in a multipolar world, considering sustainable development and environmental responsibilities (Claudia Cinelli and Sven G. Kaufmann).

The chapter by Conde and Yaneva (Chapter 3) deals with the very controversial and still present problem of delimitation of maritime boundaries in the Arctic. Maritime delimitation has resulted in disputes over the extension of the outer continental shelf between the Arctic States and between those States and the International Seabed Authority (who acts on behalf of the general interests of all humanity). As this topic has been widely studied, the intention of both authors is to offer a summary of the positions of the Arctic States regarding their extended continental shelves, and to review the legal trends that these developments may hide for future decades. Nevertheless, it is emphasized that besides the difficulties that Arctic States face in tracing the outer limit of their shelves, the correct implementation of Article 76 of the LOS Convention and the remaining uncertainties around some geological features have urged them to participate in a remarkable scientific cooperation which, ultimately, can be used as a diplomatic tool to resolve the existing disputes. Therefore, on the basis of the existing legal provisions—UNCLOS and the Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf—and recent state practice in the field, this contribution studies the possibilities offered by scientific cooperation and the different submissions

made by the Arctic States, posing questions regarding what will actually remain of the International Seabed Area in the region after the delineation process and what will be its legal status.

The analysis of Public International Law issues in the Arctic continues with Lalonde's chapter (Chapter 4) on navigation routes and oceanic passages. Indeed, Lalonde centers her study on one of the most debated and controversial legal issues posed in the Arctic region as a result of the positions and policies developed by Canada and Russia towards the Northwest Passage and the Northern Sea Route respectively. After a thorough review of the positions of both states, claiming sovereignty over the mentioned maritime passages, the author considers that Canada and Russia regard these routes as part of their national wealth and that, consequently, they should use their authority in a responsible way, taking into consideration the required good governance of the Arctic.

The position of the European Union on the Svalbard waters is carefully analyzed by Sobrido (Chapter 5). The 1920 Treaty of Paris recognized Norwegian sovereignty over Svalbard, imposing numerous conditions, such as the principle of non-discrimination for all vessels and nationals of States which are parties with regard to fishing rights. The progressive expansion of marine coastal states during the 1970s raised doubts on the scope and interpretation of the terms used in the Treaty of Paris, particularly on its applicability to Svalbard's exclusive economic zone and/or continental shelf. Now, the European Union as a whole is not a party to the Treaty of Paris. However, the Union defends and manages the fishing interests in Svalbard waters corresponding to those Member States who are parties. This issue might turn into a legal conflict as the actual debate goes far beyond the scope of fishing and encompasses many other areas.

Part I continues examining modern approaches to sovereignty issues with Kaufmann's chapter (Chapter 6) which offers an in-depth analysis of the principles of sustainable development, stewardship sovereignty and the protection of the Arctic marine environment. This chapter analyses several issues which arise from the commitment of Arctic coastal states to develop their stewardship role under international law. For this purpose, the chapter focuses on the possibilities of resorting to the principle of sustainable development in areas which are effectively or potentially subject to the extended continental shelf regime. First, Kaufmann offers an assessment of the shortcomings of current international law in sovereignty issues. Second, he unveils the potential implications of the stewardship role of Arctic coastal states under International Environmental Law. As a result of the foregoing analysis, the author argues in favor of the possibility to materialize environmental state responsibility on the basis of the principle of sustainable development, therefore highlighting the potential of this principle for resolving the contentious interplay between the principle of state sovereignty and the need to preserve the environment.

Part I concludes with Chapter 7 by Cinelli, who offers a critical analysis of sovereignty from the perspective of sustainable development. The author examines the legal status of ice in the Arctic with a focus on off-shore operations and pollution responses from a European perspective. Cinelli deals also with the stewardship role that Arctic coastal states have in protecting and preserving the Arctic marine environment in cooperation with non-coastal states, non-Arctic States and other stakeholders such as international organizations like the International Maritime Organization or the European Union. She identifies two trends: creeping jurisdiction and creeping cooperation, which give rise to a disordered interaction within the current regulatory framework, composed by soft and hard law instruments, which leads to a governance impasse. In addition, the chapter focuses on the EU's approach towards Arctic ice-covered marine areas, analyzing the applicability of the Offshore Safety Directive 30/2013 in the Arctic.

Part II of the book is devoted to the analysis of the existing international fora and governance mechanisms which function as venues for coexistence and cooperation in the Arctic region. This part brings together, in particular, three contributions which explore the role of the Arctic Council and of the European Union, with a particular focus on fisheries.

Chapter 8 offers an analysis on the Arctic Council, the most prominent regional forum for Arctic governance. Humrich engages with the fundamental question of institutional dynamics and efficiency. Having offered an account of the history of intergovernmental cooperation in the Arctic, he demonstrates how this history can be viewed as efficient and as inefficient. Both perspectives, however, share an important feature, assuming that state governments act on the primary interest of dealing with problems effectively. The second section of this chapter departs from this frame in order to reorient the focus from intergovernmental institutional dynamics towards transnational civil society in the Arctic region.

In Chapter 9, Professor Stokke examines another pressing governance issue: whether international institutions for governing Arctic fisheries are robust enough to cope with the challenges of a warming Arctic, including the withdrawal of ice, unsettled jurisdictional issues, and the possibility that spatial shifts of commercial fish stocks imply greater availability in international waters. The author develops and applies a "bifocal" approach to this subject matter, combining core insights from geopolitical thinking with those of institutionalism, one that highlights the interplay of regime characteristics and the configuration of state interests on contested issues. This bifocal optic, argues Stokke, can better account for the empirical pattern of cooperation and conflict over Arctic fisheries than each of those optics on its own. The chapter goes on to derive certain policy implications for topical Arctic fisheries issues, including the viability of the US initiative for an Arctic high seas fisheries arrangement and how best to combat illegal, unreported or unregulated fisheries in Arctic waters.

The interests of the European Union in the Arctic, regarding navigation routes and maritime governance, are studied in Chapter 10 by Iglesias Berlanga. The first section outlines the different navigation routes and the main legal problems related to each of them, also highlighting the advantages and disadvantages derived from ice navigation and the regulatory measures available. Subsequently, the author examines the applicable legal framework in the polar areas, with special reference to the recently adopted International Code for Ships Operating in Polar Waters (the Polar Code).

Part III brings together three contributions that engage with the human dimension of the Arctic. This part of the book is obviously concerned with the situation of indigenous peoples and with the population of the Arctic. In particular, the three chapters unveil the challenges that climate change and the Arctic peculiarities entail for the legal framework regarding indigenous peoples and migrants.

The first contribution (Chapter 11) examines the challenges for the judicial protection of Arctic Indigenous Peoples within two European judicial systems: the Court of Justice of the European Union and the European Court of Human Rights. This chapter, written by Iglesias Sánchez, offers an overview of the case law of these courts with regard to the rights and interests of Arctic indigenous peoples. Despite the fact that the number of cases that have been brought before these two international/supranational courts on such issues has been relatively low, the author identifies some common points of interest which highlight parallel problems in the European approach to indigenous rights. First, the author examines the situation of Arctic indigenous peoples with regard to their access to justice and, particularly, regarding the protection of collective interests. Second, the chapter analyzes the difficulty in articulating the material claims taking into account the specificity of indigenous rights in the framework of these two legal systems, in which an individualistic conception of rights is strongly embedded.

Fernández Egea and Torrecuadrada explore the interconnection between indigenous rights, the protection of animal life and international trade. Their contribution (Chapter 12) focuses on the issue of the ban on Arctic seals trade in the European Union and the interests and rights of Inuit and explores the tension between the need to safeguard environmental interests and the rights of indigenous peoples, on the one hand, and the imperatives of international law, such as World Trade Organization (WTO) rules. For this purpose, the first part deals with the impact of climate changes on Arctic indigenous peoples. The second is devoted to describing the case study on trade obstacles concerning seal hunt and the EU exception concerning Inuit products before the WTO bodies. As a conclusion, the authors highlight the challenges arising from the difficult combination of moral and environmental interests with the interests of the Inuit.

The chapter by Arenas-Hidalgo (Chapter 13) dwells on the particular issue of climate change induced displacement, questioning the alternative of migration as an adaptation strategy in the Arctic. It is a fact that climate change and the environmental degradation that follows are part of the most important causes that provoke the current phenomenon of population displacement. In this chapter, Arenas-Hidalgo analyzes both the national and international approach to native community relocation in the Arctic. The author carries out a critical examination of the evolution of this issue along the last decades: from the first legal instruments established to protect populations against arbitrary displacement to the current consideration of this subject as a community-based adaptation strategy within the framework of International Environmental Law.

Environmental concerns and the perspective of sustainable development are latent in almost every chapter of this collective volume. However, the three chapters in Part IV offer a closer focus on different topics which revolve around the richness of the natural resources in the Arctic and the delicate balance of its environment: the crucial connection between knowledge and natural resources; the relations between the EU and Greenland from the perspective of sustainable development; and the effectiveness of specific regulatory regimes with regard to the reduction of carbon emissions in this region.

In Chapter 14, Bertelsen and Justinussen explore the links between knowledge and natural resources as a crucial connection for the sustainable development in the Arctic region. The authors focus, in particular, on the Icelandic and Faroese experience with marine resources, renewable energies (geothermal, hydro, tidal and wind power) and offshore oil and gas. This selection is motivated by the fact that these two case studies provide illustrative examples of how human capital of small Arctic societies can contribute to socio-economic and politico-constitutional development.

The specificities of the EU–Greenland relations with regard to Arctic sustainable development are analyzed by Pelaudeix (Chapter 15). The EU is paying significant attention to its relationship with Greenland as an Overseas Territory, and is trying to extend its cooperation with the autonomous island. In this context, the chapter offers an analysis of the efforts that different EU institutions have deployed in order to support this cooperation in the field of sustainable development, as well as the legal framework underpinning this relationship.

The chapter by Shapovalova (Chapter 16) explores the problematic issue of the effectiveness of current regulatory models of gas flaring from the point of view of the reduction of black carbon emissions in the Arctic. The chapter tests the effectiveness of two legal models: the Russian and the Norwegian. For this purpose, after having offered an overview of the actions collectively taken by Arctic States, a second section of the chapter is devoted to the analysis of the regulatory models for gas flaring in Norway and Russia. Finally, a third section outlines a proposal for the