Legal Framework for Arctic Scientific Cooperation: Bilateralism, ‘AC-ism’, or Universalism?

Akiho Shibata
Professor of International Law
Director, Polar Cooperation Research Centre
Kobe University GSICS
Kobe University PCRC

www.research.kobe-u.ac.jp/gsics-pcrc/index.html

- Dedicated research centre for Arctic and Antarctic legal and policy studies, focusing on their international aspects; first of its kind in Japan, and probably in Asia.

- Established in October 2015, in order to implement the Japanese government’s Arctic Challenge for Sustainability (ArCS) project at Kobe University

- **International collaboration:** UArctic polar law thematic network; Arctic Centre, U. of Lapland; Polar Law Institute, U of Akureyri; Arctic University of Norway (UiT)?

- **International symposia:**
  - The Future Design of the Arctic Ocean Legal Order *(28-29 July 2016)*, with Professors Henriksen, Sergunin, Gavrilov, Baker, Lalonde, and Morishita, Amb. Shiraichi, and Mr. Israel (Co-chair, AC-TFAMC)
  - Emerging Arctic Legal Orders in Science, Environment and the Ocean *(Dec. 2015)*, with Ambassador Halinen, Professors VanderZwaag, Johnstone, and Nishimoto
The main question and argument

Main question:
Will the new Agreement on Arctic scientific cooperation being negotiated under the Arctic Council SCTF (‘AC-ism’) really enhance international collaboration in Arctic science, and what will be its relationship with 2003 Japan-Norway Science and Technology Agreement (bilateralism), and with the UN Convention on the Law of the Sea and the Spitsbergen Treaty (universalism)?

Main Argument:
Yes, but only if the AC Agreement is legally linked to and implemented with the bilateral and universal legal frameworks applicable to Japan. For this, Norwegian cooperation will be crucial.
Basic legal assumptions and facts:

- Scientific activities, including Arctic science, do not occur in legal vacuum: They are conducted within an established legal framework, which both regulates and enable scientific activities.

  - In the territories: exclusive sovereign regulation by the territorial State: domestic law controls
  - In the ocean: different rules for EEZ/Continental shelf and high seas: international rules + domestic rules apply.
  - In the air: different rules for territorial space, international airspace, and outer-space apply
  - In the Antarctic Treaty area: “Freedom of scientific investigation...shall continue, subject to the provisions of the present Treaty.”
  - In the Svalbard islands: “equal liberty of access and entry for any reason...to the waters, fjords and ports...; they may carry on all maritime, industrial, mining and commercial operations...”
  - In the Arctic?: New Agreement on Enhancing International Arctic Scientific Cooperation (expected to be finalized in July 2016, and signed by A8 foreign ministers in May 2017)
AC-ism: Main elements of the Agreement

- Closed treaty, only for A8 countries
- Purpose and the core obligation: To improve the legal environment for international Arctic scientific cooperation; by obliging its State Parties to facilitate relevant scientific activities. Cf. facilitate access to the research areas and infrastructure; facilitate process of obtaining permits for marine scientific research; facilitate data sharing; etc.
- Beneficiary: “participants”: scientists and institutions from A8 States
- Functional scope (pending): Benefits given to “joint activity”. Crucial provision for non-Arctic states
- Geographical scope (pending): general/specific; high seas?
- Saving clause: no prejudice to other agreements
Bilateralism: 2003 JPN-NOR agreement

- Japan has concluded similar agreements with other A8 (except two) countries. Scientists tend to prefer bilateral scheme: “No need of multilateral framework”?

- Purpose: Develop cooperative activities: cooperation at the project level. Implementing arrangements (MoU) by relevant institutions and universities.

- Legal nature: Framework agreement: Joint Committee to exchange views on policy issues. 5th meeting in February 2015: “sharing of research infrastructure...important element in developing cooperation in polar research”.

- Not yet a binding agreement to the policy of “facilitating access to research infrastructure in the Arctic”. 2017 AC Agreement goes beyond what is currently provided in 2003 JPN-NOR agreement.
Universalism: UNCLOS and Spitsbergen T.

- UNCLOS: “All States...have the right to conduct marine scientific research (MSR) subject to the rights and duties of other States as provided for in this Convention”. No need of special, regional agreement for the Arctic?

- Land areas in the Arctic are not covered. MSR in the territorial seas (or Arctic coastal areas, where scientific knowledge is most needed) is under coastal States’ exclusive right of regulation and authorization. MSR in EEZ under coastal States’ consent procedure: may withhold the consent if “direct significance for the exploration and exploitation of natural resources”.

- 1920 Spitsbergen Treaty (open treaty): Does not by itself provide for freedom of access and scientific research in the Svalbard. Detail arrangements by MoU: cf: 1991 Agreement of Cooperation between NIPR, Japan and the NPRI, Norway on Japanese Arctic Research in Ny Alesund Article 17: “For time being there is open access for foreign scientists to Svalbard.”

- AC Agreement has the legal potential to improve even further the current legal framework as provided in general international law and in universal treaties applicable to Arctic scientific cooperation.
AC-ism within Universal and Bilateral legal frameworks: Need of creative linkages

- AC Agreement will bring an added value to the Arctic scientific cooperation, potentially improving the legal environment for conducting Arctic science beyond the existing universal and bilateral legal frameworks. But this is among the A8 countries.

- Whether Japan and Japanese scientists will receive the benefits, either directly or indirectly, from the AC Agreement depends on:
  a. Whether the term “joint activity” will include those involving Japanese scientists;
  b. Whether, through an article on “Cooperation with Non-Parties”, A8 State Parties extend the same benefits through bilateral and other agreements with non-Arctic States.
Legal implication of the term “joint activity” under AC Agreement

Country R’s obligation to facilitate access to the research area

Researcher from country R (Arctic territorial State)

From Norway (A8 State)

From US (A8 State)

From Japan (non-A8 State)

Research area of A8 country R

NO!
Science Diplomacy for the benefits of Arctic science as an international public value

1. Widest scope of the term “joint activity”: This can be ensured only by Norway and other A8 countries who have the decision-making power in AC-SCTF. From the perspective of Japan and other non-Arctic States actively engaged in Arctic science, Pattern ⑤ should be included in the scope of “joint activity”. This is good also for promoting Arctic science as international public value.

2. The “spirit of the AC Agreement” should be extended to non-Arctic, scientifically active States, utilizing bilateral agreements and in the implementation of UNCLOS. This can be legally encouraged by a strong provision on “Cooperation with Non-Parties” in the AC Agreement.
Conclusion

The new Agreement on Enhancing International Arctic Scientific Cooperation does have the potential to enhance Arctic scientific cooperation also for Japan, if:

(1) Norway and other Arctic States recognize the extension of its benefits to scientists from non-Arctic States actively engaged in Arctic science, such as Japanese scientists, is beneficial for promoting Arctic science in general;

(2) Norway and other Arctic States, with negotiating powers in the Task Force, make efforts not to exclude non-Arctic States’ scientists from the scope of “joint activity”; and

(3) Norway and other Arctic States, through the provision on “Cooperation with non-Parties” in the Agreement, extend its spirit/benefits to non-Arctic States actively engaged in Arctic science through their relevant bilateral agreements and through implementation of relevant provisions in universal agreements, such as UNCLOS.