
And Then There Is (At Least) One: The WTO as a Safety Net for Trade and Investment Related Legal Issues in the Arctic During Turbulent Times

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ABSTRACT

The Arctic region has been considered a success story in international law since the 1990s, especially due to the role of the Arctic Council (AC), which consists of eight member states—Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden, and the U.S.—the so-called “Arctic 8,” along with several Indigenous people as Permanent Participants, and other observers.¹ However, the international rule of law in the Arctic region has eroded rapidly since 2022. This article illustrates the potential role of the World Trade Organization (WTO) in addressing this issue.

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PRESENT DANGERS IN THE ARCTIC

The title of this article is borrowed from a classic novel *And Then There Were None*, written by Agatha Christie and published in 1939.² In this novel, a group of eight people travel to a remote island, where they are welcomed by agents of a mysterious host, who is not present at the time. While waiting for the host, the guests are murdered in succession. As they are murdered, they try to uncover the suspect—they search the island extensively to find that there is no place to hide and no one else on the island. Tragically, the last two survivors also kill each other out of mutual suspicion that the serial killer must be one of them, although this is not true.

A similar lack of trust is currently prevalent in international law, especially in the Arctic region, after the Russian invasion of Ukraine in February

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2022. Although the AC is considered an established framework of cooperation and rule-making in the Arctic region, it has experienced prolonged stagnation after the beginning of the war in Ukraine. Russia is an indispensable stakeholder in dealing with international legal issues in the Arctic, and the AC has maintained a cooperative and collegial decision-making system. However, the AC's decision-making process has now stalled, due to the collapse of diplomatic relationships between Russia and the other Arctic

states. Moreover, Russia unilaterally withdrew from the Barents Euro-Arctic Council in September 2023,³ another Arctic-specific treaty regime among the Arctic 8.

Legal regimes governing the Arctic region are on the verge of a catastrophe.

ROLE OF GLOBAL LEGAL REGIMES DURING TURBULENT TIMES

In addition to Arctic-specific legal regimes, Russia also withdrew from the European Convention on Human Rights and the Council of Europe (CoE) in March 2022,⁴ in response to requests for a ceasefire or withdrawal⁵ from the CoE Assembly. However, Russia alone cannot be blamed for jeopardizing the international rule of law. The Trump Administration unilaterally

ally withdrew from the 1992 Treaty on Open Skies in 2020,⁶ weakening the international framework for transparency and confidence building between Russia and the Western countries; that contributed to Russian withdrawal from the treaty in 2021.⁷ Furthermore, the Commission of the European Union (EU) adopted a proposal in 2023 that calls for a coordinated withdrawal by the EU member states from the Energy Charter Treaty,⁸ a key trade and investment treaty regime involving Russia and the Western countries. Although withdrawal from treaties is legally allowed as a last resort for any state, serious concerns have been raised questioning whether the withdrawing parties here have exhausted their best efforts to overcome disagreements within the framework of individual treaty regimes. Such frequent recourse to withdraw from important regional treaty regimes by the major powers, regardless of their legitimacy, have left legal frameworks related to security, navigation, environment protection, human rights protection, as well as trade and investment in the Northern Hemisphere, especially in the Arctic region, more vulnerable.

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In stark contrast, there is no indication that Russia (and its counterparts) has considered withdrawing from global legal regimes with broader membership—such as the United Nations, International Monetary Fund, International Atomic Energy Agency, and WTO—as far as the author could gather publicly available information. This implies that such global legal regimes can function as a common infrastructure to maintain the international rule of law, though they are not always specifically tailor-made to address legal issues in individual regional settings.

Needless to say, global legal regimes are not a panacea—the Ukrainian War and the Gaza Crisis are only the latest examples of their failure to prevent hostilities from flaring. However, the role of such global legal regimes should not be underestimated in handling region-specific legal issues, including those in the Arctic.⁹ The next section focuses on the WTO as one such global legal regime.

ROLE OF THE WTO IN MULTILATERAL LEGAL FRAMEWORKS

The WTO is a multilateral intergovernmental organization that provides a detailed set of rules in trade and investment,¹⁰ which could apply to international legal issues that could potentially arise or are already arising in the Arctic region, along with other multilateral treaties on human rights protection, environmental protection, and the laws of the sea.

The WTO rules apply to its 164 member states, including the Arctic 8, and its coverage is broader than that of the rules facilitating trade in goods across borders. In addition to providing detailed rules for trade in goods and services, it also includes rules for investment and intellectual property protection. Not only trading activities conducted between private parties but also trade by state-owned enterprises and government procurement can be subject to WTO rules under certain conditions.¹¹ These rules are not limited to cross-border transactions and transportation; they extend to domestic regulations, including safety standards, labeling requirements, rules of origin, and internal taxes.¹²

The WTO has a multilayered system to settle international trade disputes between the member states. On the one hand, more than 600 disputes have been filed under the WTO dispute settlement mechanism

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since the establishment of the WTO in 1995,¹³ and most have been settled peacefully, even among unfriendly countries or in disputes with high political stakes.¹⁴ A trade dispute between Ukraine and Russia over the freedom of transit (2016–2019), after the Crimean Crisis of 2014, is one such example.¹⁵ On the other hand, the litigation process is not the primary tool for settling international trade disputes. Periodic council/committee meetings and other discussion forums are used to mitigate differences of opinions and concerns among member states,

preventing their escalation into full-blown legal disputes. In this way, the WTO provides rules to be observed, formalized litigation mechanisms, and communication channels to discuss potentially contentious issues.

Among others, the Northern Sea Route (NSR) illustrates the relevance of WTO rules. First, the continued melting of sea ice since the early

2010s has made navigational use of the NSR easier, leading to a significant increase in shipping in the region in recent years.¹⁶ Viable business opportunities exist for the NSR as an alternative route for shipping, both for cargo transportation and cruise shipping, between Europe and Asia. Shipping and shipbuilding companies in China, Korea, and Japan compete for this purpose.¹⁷ Especially for Russia, the NSR is expected to be used not only for transit shipping along its shores but also as an alternative route to export oil and gas extracted in its Arctic regions abroad, despite the significant environmental risks to the Arctic Ocean.¹⁸ Although innocent passage is an established right under the United Nations Convention on the Law of the Seas (UNCLOS) and customary international law,¹⁹ coastal states can impose certain safety requirements and regulations on the vessels navigating through their waters, or entering their ports. However, Article V of the General Agreement on Tariffs and Trade prohibits each WTO member state from overly interfering with goods destined for third-party countries that pass through its land or waters, subject to certain exceptions including national security exceptions.

Second, economically feasible commercial navigation in the NSR requires further technological development for the icebreaking functions of large-scale cargo or container vessels. Developing technologies specifically suitable for the Arctic Ocean (and the Antarctic Ocean) is a niche market that requires massive government support. In this context, Article 5 of the Agreement on Subsidies and Countervailing Duty Measures (ASCM) prohibits export subsidies conditioned to export performances. Such ASCM provisions can deter the excessively generous provision of government subsidies by WTO member states like China, Korea, and Japan. In this way, in addition to UNCLOS rules, the WTO rules can ensure the open and orderly operation of Arctic shipping, and help avoid excessive subsidy competition in the shipbuilding industry. Furthermore, domestic subsidies are subject to complaints from other member states, if they have detrimental impacts on competitors. Subsidies for Green Transformation can be implemented if they distort international trade. Determining the excessive provision of subsidies would help avoid competition, allowing for a more sustainable and responsible development of energy resources in the Arctic; not only for oil and natural gas exploitation, but also for offshore wind energy development. These rules can apply to issues involving shipbuilding of the vessels with icebreaking functions as well as energy development in the Arctic.

Third, sustainable fishing is another growing legal concern in the Arctic region. In this context, the Agreement on Fisheries Subsidies (FSA) was added to the WTO regime in June 2022.²⁰ While awaiting a suffi-

cient number of acceptances or ratifications by two-thirds of the WTO members, the FSA restricts environmentally harmful subsidies on wild capture fishing and fishing-related activities that may lead to overfishing and overcapacity.²¹ Among others, it obliges member states to suppress illegal, unreported, and unregulated fishing activities by nationals and non-nationals (Article 3 FSA) and to refrain from providing subsidies for fishing or fishing-related activities regarding an overfished stock (Article 4 FSA). Enforcing the FSA for the eight Arctic states in the near future would help maintain the sustainability of fishing stocks in the Arctic Ocean.²²

Last but not least, WTO rules have implications not only for the commercial activities of private parties but also for governmental actions involving the trade of goods and services, such as the procurement of patrol vessels by the Coast Guard Agency. The Agreement on Government Procurement (GPA), revised in 2012, requires its signatories to ensure the most-favored nation treatment and national treatment for bidders from other GPA signatories, to make public procurement processes more open and transparent.²³ Russia and China are not yet part of the GPA but have been applying to join it since 2016 and 2008, respectively.²⁴ Even as a non-party at this juncture, disciplines of the GPA could influence Russia's behavior in a way to squarely avoid incompatible procurement measures that would weaken its case for successful GPA accession.

CONCLUSION

Confidence among states (and non-governmental stakeholders) is indispensable for maintaining the international rule of law. To build confidence, stable mechanisms or communication channels are not always necessary. However, such channels significantly contribute to facilitating discussions, especially in turbulent times, when immediate collaborative international action is essential. In this regard, the WTO is an eminent stable common infrastructure that can address multiple aspects of legal issues arising in the Arctic. Invoking the WTO rules, as illustrated in the previous section, would help ensure the maintenance of the rule of law in turbulent times; rather than reverting to power politics. The WTO also maintains communication channels through non-litigation procedures that can help handle politically sensitive issues among the Arctic eight.

Needless to say, the WTO is not perfect. First of all, its coverage is limited to trade and investment-related issues. In addition, even for trade and investment-related issues, the WTO provides substantial deference to measures invoked for national security purposes. Furthermore, its dispute

settlement structure has been seriously limited by a paralyzed appeals system since December 2019. The momentum to overhaul its rules system-wide was lost a decade ago, while the modernization and expansion of the rules are now limited only to a handful of sectors such as information technology and digital trade or trade and investment facilitation, with a limited range for each of them. As the world trading system faces credibility concerns, continuous modernization and accommodation to new environments are still required. Despite this, the importance of global legal regimes like the WTO, in addressing contemporary challenges in the Arctic, cannot be understated.

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To maintain the rule of law in the Arctic, multi-level communication among stakeholders, bridging views of the stakeholders in the Arctic region, and inclusion of non-Arctic states such as Asian observers, is needed. WTO can fulfill these factors, because it provides the communication channels to all stakeholders around the world, including all the Arctic states as well as major Asian stakeholders such as Korea, Japan, India, and China, as a common infrastructure supplementing the regional frameworks. Global trade law regimes like the WTO can serve as a meaningful forum to avoid miscommunication, such as the ones in the aforementioned Agatha Christie novel, which can have irrevocable ramifications in the world. The Arctic is a region with global ramifications; issues in the Arctic can no longer be restricted to a regional institution. Global problems require global solutions and it is now time to outsource stagnation in the AC to global institutions like the WTO.^f

ENDNOTES

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- 11 For example, rules on government procurement apply only to the parties to agreement within the WTO framework.
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- 17 See Tomohiko Kobayashi, “Sustainable Resource Development in the Arctic: Using Export Trade Agreements to Restrict Environmentally Harmful Subsidies,” *Polar Record* 56, (2020): 1-16.
- 18 Malte Humpert, “Russia Sends Oil Tanker Without Ice Protection Through Arctic For First Time,” *High North News*, September 12, 2023, <https://www.highnorthnews.com/en/russia-sends-oil-tanker-without-ice-protection-through-arctic-first-time>.
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