Extracting industries in the North: What about Environmental Law and Indigenous Peoples' Law?

Guest Editorial Note

A conference with the above-mentioned titled was organized 17–19 November 2013 at Faculty of Law, University of Tromsø, the Arctic University of Norway. The research group on Sami Law and Indigenous Peoples' Law and the K.G.Jebsen Centre for the Law of the Sea co-organized the conference.

The background for the conference is the increased focus on the Arctic and its possible large deposits of minerals on land and in the subsoil of the Arctic Ocean. These new possibilities lead to new challenges. The organizers invited researchers to come to Tromsø to discuss the implications of extractive industries for the Indigenous Peoples' Rights and the protection of the environment. At the conference, 17 papers were presented. Nine of these papers are published in this issue of Nordic Environmental Law Journal.

Some of the papers raise general questions relating to Indigenous Peoples' Law and Environmental Law while others look into the situation in Arctic countries. *Susann Skogvang* in her paper lays out the main question of the conference: If rights of indigenous peoples and environmental concerns have been adequately addressed in extractive industries of the North. She is particularly concerned with the practice of the state of giving the responsibility of fulfilling international obligations in respect of indigenous peoples to the companies involved in extraction. There is a reciprocal relationship between environmental law and human rights as indigenous peoples is dependent on sustainable use of the resources for their survival and by the recognition that their traditional uses of the natural resources contributes to sustainable development. *Mattias Åhren* provides an overview and assessment of human rights and use of natural resources in the territories of indigenous peoples. He gives insight to the development of human rights over three periods where the right to property, right to non-discrimination and right of self-determination have developed to include indigenous peoples. The right of indigenous peoples to property was accepted early but was in practice difficult to implement because their traditional use of land and resources was not recognised as relevant in establishing property right. The new understanding of the right

to non-discrimination as treating different cases differently meant a requirement of the state to accept the practices of the indigenous peoples as basis of property rights. The property right gives the indigenous peoples a right to refuse extracting industries access to their territory and a right of prior consent. He also argues that although the state may expropriate land to provide for extracting industries, the requirement of proportionality will seldom be fulfilled due to the negative consequences of the industry for the indigenous people. Åhren further argues that the right of self-determination is applicable although its content is not yet clear. It involves a right to influence the outcome of the decision-making. In her paper, *Ingvild Jakobsen* gives an overview and assessment of the international legal framework for protection of the environment from effects of extracting industries. There are different types of risks related to such activities spanning from pollution to destruction of habitats. The presentation is limited to the central legal norms and instruments. The point of departure is the principle of sovereign rights over natural resources and the duty not cause environmental damage to the environment of other states and to areas beyond national jurisdiction. This principle is found in the UN Convention on the Law of the Sea and in the Convention on Biological Diversity, which is presented by the author. The obligation under the first mentioned convention to protect the marine environment also include land-based activities such as mining that may affect the marine environment. Although the Convention on the Law of the Sea implies obligations to act in relation of both land-based and activities at sea, they are according to Jakobsen not specific as to what states are required to do. The Convention on Biodiversity includes both procedural as well as substantial obligations and are applicable to extracting industries on land and at sea. They include an obligation to take measures to regulate activities, which is likely to have adverse effects on biodiversity. Jakobsen also addresses the regional cooperation on the matter through the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR convention) and the Arctic Council. Even if the OSPAR Convention both regulates the environmental impacts of extractive industries on land and at sea it is applicable to only parts of the Arctic. The Arctic Council has primarily been concerned with mapping the environmental status of the Arctic. However, it has also issued guidelines on offshore gas and oil in the Arctic. The Arctic Council has done work on best practices on ecosystem-based management, which may be relevant for regulating extractive industries.

There are six papers with a national perspective on extractive industries and implications for indigenous peoples and the environment covering Norway, Russia, USA, Greenland, Finland and Sweden. *Ole Kristian Fauchald* addresses the legal framework for regulating the environmental consequences of mining for minerals in Norway. The responsibility for ensuring that environmental considerations are taken into account is shared between different authorities with the risk of fragmentation: mining authorities (license to mining), local government (land use and planning, environmental impact assessment) and environmental protecting agency

(pollution permissions). Although environmental considerations are relevant and obligatory under the Mineral Act, they do not qualify as minimum obligations of result. The author also questions how and when these considerations come into play. For instance, the requirement of mining license is dependent on information on the anticipated production level to be provided by the company. The mining activity must be consistent with the zoning plans adopted by the municipality. Further, plans regulating mining activities may require environmental impact assessment before they may be adopted. However, there are ambiguity concerning when and how such assessments may be undertaken and how environmental considerations can be included in the plans. Pollution from mining activities may originate both from discharges from the mining activtities and from the treatment of wastes from the mining. EU legislation is made applicable in Norway through the EEA agreement both on discharges and waste. Particularly challenging is the use of marine waste deposits. The Norwegian legislation is inadequate in relation to treatment of the wastes. The Nature Diversity Act is applicable. The author particularly draw the attention to the requirement under the Act to base decisions on adequate knowledge base when public decisions are taken. Further, the requirement of applying the precautionary principle when taking such decisions when there is inadequate information on the effects on nature. The author stresses that these principles are relevant when considering using the seabed of fjords as waste deposits.

Ruslan Garipov sets out to investigate the Russian legislation to protect traditional livelihood of indigenous people, which are affected by extraction of natural resources. Indigenous peoples make 400.000 individuals occupying 60 % of Russian territory. Large parts of the natural resources of Russia are located in these areas. The extracting industries causes *inter alia* pollution and restriction on the access to resources in areas of indigenous peoples. According to the author, the Russian Constitution guarantees the rights of indigenous peoples consistent with international law and sets out to protect traditional living area of small communities. The value of these provisions are weakened by the fact that Russia has not accepted central human rights of indigenous peoples. Another major challenge is the lack of implementation of legislation set up to protect areas and to ensure against negative environmental impacts.

The point of departure of the paper of *Michael Burger* is the litigation on the drilling of Shell on the continental shelf of the Beaufort Sea off the north coast of Alaska. Exploitation permits issued by federal authorities have been challenged in court by both indigenous peoples' associations and environmental NGOs. The author describes the arguments by the parties through different and competing storylines, spanning from homeland to frontier, reflecting linkage and view of the nature. The purpose of the paper is to assess the purpose of US natural resources law and whether it functions as a mediation of disputes. The land claims of Alaska was according to the author resolved through the 1971 Alaska Native Settlement

Claims. It is a pending question whether the act also is applicable to hunting and fishing rights in the waters of Alaska. The act provided the indigenous peoples with property rights and other economic benefits. Burger goes on to present the legal framework for offshore oil and gas drilling, which includes extensive requirements of environmental review during the different phases of exploration and exploitation, including of the effects on wildlife. Before the federal court, representatives of indigenous peoples portrayed the areas as their ancestral land whereas the oil company and federal government argued it neutral place. The court found that the drilling permit had not adequately addressed the effects on wildlife. In later rounds, some of groups of the indigenous peoples has described the areas as a developing world, in the sense that indigenous peoples may benefit from the oil industry through jobs and economic growth. The author argues that the US system is consistent with international human rights of indigenous peoples. However, he is somewhat uncertain whether the Free, prior, informed consent is complied with, which hinges on the uncertainty regarding the status of rights to fish and hunt at sea.

Kristina Labba in her paper focuses on the major threat to reindeer herding in Sweden, which is loss of land. It includes mining activities. Reindeer herding is depending on large areas for grazing in different seasons and for calving. In recent years, more licenses for exploration and exploitation of minerals have been granted in these areas. The purpose of the paper is to identify the inconsistencies between the property rights and cultural rights of the Sami and the Swedish mining and environmental legislation. The Mining Act is liberal and has been subjected to criticism for not including international standards for protection of human rights of indigenous peoples (such as free, prior, informed consent). The author illustrates through a concrete example how the interests of indigenous people has to yield to the interests of mining. The Swedish mining policy and legislation has been criticised by the UN special rapporteur that asks for giving the Sami interests higher weight. A pending complaint to CERD may have consequences for Swedish legislation.

The focus of the contribution of *Rutherford Hubbard* is mining in Greenland and the role of free, prior and informed consent (FPIC). The failure of obtaining FPIC poses according to him significant risk for the investors. He argues for an increased role of corporations to improve FPIC. The author presents the legal basis for FPIC and discusses whether the extended autonomy provided to the indigenous people of Greenland complies with the requirement of FPIC. He argues against, as the decision-making on mining is located to an agency where the representatives of the elected bodies have limited influence. The different impact assessments to be undertaken before licences are given provides limited place for the indigenous people according to the author. He argues that contact and dialog should be maintained through traditional cultural processes. Hubbard argues that the risk posed to companies are reduced if they themselves provides for the FPIC. The responsibility of the state is fulfilled, as it is required to ensure that such consent is present.

The object of the investigation of *Timo Koivurova and Anna Petrétei* is the new Finnish Mining Act and how Sami rights and interests have been taken into account in its development. They have reviewed different drafts. The early drafts were developed based on Article 27 of the Covenant on Political and Civil Rights including both substantive and procedural rights and obligations. As reindeer herding is not an exclusive Sami activity, a new draft was developed based on consultations with the Sami Parliament. Under the final draft, it was the rights of indigenous peoples that were to be protected. The authors investigate the practice under the act. There have been accorded few permits in Sami areas. The authors have interviewed representatives from the mining industry. They see the protection of Sami interests as an obstacle to mining in these areas. The interviewees also highlighted the negative image of the industry created by media. An early dialog with the Sami Parliament focusing on the positive sides of mining may be one measure to improve the standing of the mining industry.

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