

The Tromsø meeting of the parties to the 1973 Agreement on the Conservation of Polar Bears: a comment on three aspects of the meeting report

By Nigel Bankes

Considered:

Meeting of the parties to the 1973 Agreement on the Conservation of Polar Bears, Tromsø, Norway, [17 - 19 March 2009 Outcome of Meeting](#)

A few weeks ago (March 17 - 19, 2009) the parties to the 1973 Polar Bear Agreement met in Tromsø to consider the further implementation of the Agreement. This is a significant breakthrough. Apart from a meeting of the parties back in 1981 when the Parties decided to continue the Agreement in force as contemplated by Article X(6) of the Agreement and in informal meeting of the range states in 2007, the parties have never considered the further implementation of this Agreement.

The meeting was clearly timely. The United States has listed polar bear as threatened throughout its range, Greenland has decided to place a moratorium on the export of polar bear hides, there is a continuing loss of sea ice in the Arctic and while the precise implications of this remain contested (especially by Inuit hunters) it seems clear that there is significant loss of habitat for both bears and the seals on which they depend.

At the end of the meeting the parties issued a report on the "Outcome of the Meeting". That report deals with harvest management, climate change, habitat protection, contaminants and pollution, activities in polar bear areas (industrial development, shipping, tourism), safety measures, plans for action, the use of traditional ecological knowledge, scientific advice, the application of the *Convention on International Trade in Endangered Species* ("CITES"), cooperation with respect to shared populations and monitoring. The parties also agreed to hold biennial meetings with the next such meeting scheduled to be held in Canada in 2011.

This note comments on three elements of this Outcome Report.

The first element I want to comment on is the statement (italicized in the original) that appears at the beginning of the document. This paragraph states as follows:

Climate change has a negative impact on polar bears and their habitat and is the most important long term threat facing polar bears. Action to mitigate this threat is beyond the scope of the Polar Bear Agreement. Climate change affects every nation on the earth and reaches well beyond the five parties to the Agreement so the parties look to other fora and national and international mechanisms to take appropriate action to address climate change.

The second element is the covering note to the entire document (signified by three asterisks next to the title) which reads as follows:

This outcome document is not legally binding and creates no legally binding obligations of the parties to the 1973 multilateral agreement for the conservation of polar bears.

The third element is the recognition of Greenland as a party to the Agreement.

I will deal with each of these separately.

The opening statement

I think that it is useful to break this paragraph out into its three component sentences:

(1) Climate change has a negative impact on polar bears and their habitat and is the most important long term threat facing polar bears.

(2) Action to mitigate this threat is beyond the scope of the Polar Bear Agreement.

(3) Climate change affects every nation on the earth and reaches well beyond the five parties to the Agreement so the parties look to other fora and national and international mechanisms to take appropriate action to address climate change.

The first sentence is an evaluative conclusion or assessment presumably based on the understanding of the parties as to climate change science and polar bear biology. The second sentence also offers a conclusion but of a different order. This second sentence reads more like a legal interpretation of the treaty. It claims that mitigation measures are beyond the scope of the treaty. It does not itself offer any supporting reasons for that conclusion and as such the validity of the conclusion is open to contestation. “Mitigation” of course has a technical meaning in the context of climate change and it means measures to reduce emission or enhance sinks. It is used in contrast to measures of “adaptation” i.e. measures to adapt to the consequences of climate change (such as enhanced protection against sea level rises or storm events.) The third sentence seeks to shift attention away from the Polar Bear Agreement to other fora including in particular, no doubt, the *United Nations Framework Convention on Climate Change* (“UNFCCC”) and its Kyoto Protocol.

The overall claim made in these three sentences seems to be something like this: “climate change is a big problem for bears but mitigation is not something that we need to consider under the terms of this Agreement”.

It is my contention that that claim is wrong as a matter of law for the following reasons.

The Agreement commits each Party to “take appropriate action to protect the ecosystems of which polar bears are a part” while the preamble to the Agreement recognizes that the States of the Arctic Region have “special responsibilities and special interests in relation to the protection of the fauna and flora of the Arctic Region”. If the parties to the Agreement recognize that climate change is the most important threat facing polar bears, and if climate change has anthropogenic causes in the form of greenhouse gas emissions, and if the contracting parties are responsible for a significant portion of those emissions, then how does it follow that mitigation measures in relation to those emissions are necessarily beyond the scope of the Parties’ commitments? In fact, the parties themselves seem to recognize this cannot be when they said in the body of the document (at 2) that:

The parties were also concerned that their common obligations to protect the ecosystem of which polar bears are a part can only be met if global temperatures do not rise beyond levels where the sea ice retreats from extensive parts of the Arctic. A scientific presentation noted that if sea ice is reduced according to present projections, polar bears are likely to be extirpated from most of their range within this century (emphasis supplied).

The fact that other states may contribute to the problem of greenhouse gas emissions and may owe obligations under the UN FCC and Kyoto Protocol is hardly relevant to the question to the proper interpretation of the obligations of the state that are parties to this Agreement.

The contracting parties to this agreement owe obligations to protect the ecosystem of the polar bear under the terms of the Polar Bear Agreement *in addition* to any that they may owe by virtue of the UN FCCC and the Protocol (all except the USA). In other words, the relevant law for these five states includes both sets of rules and in this case the rules are not inconsistent. It is contrary to the idea of the rule of law to conveniently ignore part of the relevant rules in favour of a rule system (Kyoto) that is both still developing and incompletely binding on one party (the United States). The International Law Commission’s rules on state responsibility instruct us in Article 12 that “There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required by that obligation, regardless of its origin or character.” The failure of a contracting party to take appropriate measures to reduce its emissions and/or enhance its sinks is *prima facie* something that is not in conformity with its obligations.

There are “defences” to a finding that a state’s international responsibility is engaged by actions that are not in conformity with its obligations, but none of those defences (including consent, self defence, force majeure, necessity, lawful counter measures) would seem to be remotely relevant here.

“This outcome document is not legally binding”

It is important to emphasise what this statement claims and what it does not claim. It seems to make two claims. It claims: (1) that the statement itself is not legally binding, and (2) that it does not create legally binding obligations. At one level both propositions are perfectly clear. If one has in mind the sources of international law as articulated in Article 38 of the Statute of the International Court of Justice then one can say that this meeting report: is not a treaty; it does not represent custom; and it does not establish a principle of law recognized by the world’s legal systems. Given all of this it is fairly easy to concede that the statement is not binding and cannot itself create legal obligations.

But the statement does *not* claim that it is devoid of legal effect and I think that it is clear that the document is of some legal significance. It may, for example be used to estop the state parties from denying that climate change has a negative effect on polar bears and polar bear habitat. It may estop them from denying that climate change represents the most important long term threat facing polar bears. It makes it difficult for any party to deny that anthropogenic climate change may trigger the common obligations of the parties to protect the ecosystem of which polar bears are a part. And presumably (see below) Greenland can rely on it as evidence of international recognition of its separate personality under international law and Denmark can rely on it as recognition or acquiescence that it is no longer the subject of obligations under the Agreement. These are not insignificant legal consequences.

Greenland as a party to the treaty

The original parties to the Agreement included Denmark on behalf of Greenland. Over the last number of years Greenland has been evolving towards some separate autonomous status claiming a separate international personality. Greenland is not covered by Denmark’s participation in the European Union but has a separate Partnership Agreement with the EU. The recognition of Greenland as a party to the Polar Bear Agreement (and presumably, as noted above, Denmark is no longer a party) represents another step along the peaceful road to external self-determination and possible independence.

The author is a member of a group working on [Conservation Hunting and Sustainable Development](#) through the Canadian Circumpolar Institute at the University of Alberta.