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Canada, the EU, and Arctic Ocean Governance: A Tangled and Shifting Seascape and Future Directions

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Canada, the EU, and Arctic Ocean Governance: A Tangled and Shifting Seascape and Future Directions

Cover Page Footnote

Symposium: Arctic Law in an Era of Climate Change

CANADA, THE EU, AND ARCTIC OCEAN GOVERNANCE: A TANGLED AND SHIFTING SEASCAPE AND FUTURE DIRECTIONS

T. KOIVUROVA, E.J. MOLENAAR, AND D.L. VANDERZWAAG*

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I. INTRODUCTION

It is now widely accepted that global climate change will have dramatic impacts for the Arctic. The rapid warming of the Arctic climate was the first and most prominent of the ten key findings of the 2004 Arctic Climate Impact Assessment (ACIA)¹. In September 2007, the Arctic ice cap was 23% below the last record, set in 2005.² This 2007 record exceeded the computer model predictions used to prepare the Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment Report (AR4) in 2007.³ Perhaps even more important than ice-coverage as such, is the increasing percentage of first-year sea ice. Many scientists fear that the “Arctic meltdown” has become irreversible, even though the 2007 record remained intact in 2008.

Of particular importance to this paper are ACIA’s key findings number four, “[a]nimal species’ diversity, ranges, and distribution will change” and number six, “[r]educed sea ice is very likely to increase marine transport and access to resources.”⁴ While the former predicts changes in the composition of the Arctic marine ecosystem in quantitative, qualitative, spatial, and temporal terms, the latter predicts increased pressure on this ecosystem due to more intensive exercise of existing maritime uses as well as new

1. SUSAN JOY HASSOL, IMPACTS OF A WARMING ARCTIC: ARCTIC CLIMATE IMPACT ASSESSMENT 10 (2004).

2. Press Release, Nat’l Snow & Ice Data Ctr., Arctic Sea Ice Shatters All Previous Record Lows (Oct. 1, 2007), http://nsidc.org/news/press/2007_seaiceminimum/20071001_pressrelease.html.

3. Press Release, Nat’l Ctr. for Atmosphere Res., Arctic Ice Retreating More Quickly than Computer Models Project (Apr. 30, 2007), <http://www.ucar.edu/news/releases/2007/seai.html>.

4. HASSOL, *supra* note 1, at 10-11.

uses. Examples of these are maritime navigation (for the transport of persons and cargo, including for tourism and military purposes), exploration and exploitation of living (e.g., fishing) and non-living (e.g., oil and gas) marine resources, construction of artificial installations, laying of cables and pipelines, overflight and marine scientific research (including bio-prospecting).

In view of these current and predicted threats to the Arctic marine ecosystem, the question logically arises if existing Arctic governance and regulatory regimes are adequately responding to these threats.⁵ The Arctic is covered by a variety of governance and regulatory regimes relating to the protection and preservation of the marine environment and the conservation and sustainable use of marine biodiversity. However, some commentators perceive the planting of the flag of the Russian Federation on the deep-sea bed of the North Pole in August 2007 as the start of the last “scramble for territory and resources”⁶ in human history, likely even to lead to armed conflicts. One of the key messages of the May 2008 Ilulissat Declaration by the five Arctic Ocean coastal states⁷ is that this perception is fundamentally flawed.

The objective of this paper is to examine (in a historical perspective) the roles of the European Union (EU) and Canada in governance and regulation of human activities in the Arctic Ocean. Section two describes the existing “tangled” nature of governance in the Arctic with a focus on law of the sea, approaches and challenges in the region, as well as on EU and Canadian participation in the activities of the Arctic Council. The “shifting seascape” in governance is next highlighted in section three with a review of increasing calls for change from scholars and other groups, recent governance initiatives from the United States and Arctic Ocean coastal states, and evolving EU and Canadian perspectives towards ocean governance. The paper concludes with section four, which surveys possible future directions for strengthening ocean

5. For a recent discussion on Arctic fisheries, see ERIK J. MOLENAAR & ROBERT CORELL, BACKGROUND PAPER: ARCTIC FISHERIES (2009), available at <http://www.arctic-transform.org/download/FishBP.pdf>. For a recent discussion on Arctic shipping, see Erik J. Molenaar, *Arctic Marine Shipping: Overview of the International Legal Framework, Gaps and Options*, 18 FLA. ST. J. TRANSNAT'L L. & POL'Y 289 (2009). For a cross-sectional discussion, see TIMO KOIVUROVA & ERIK J. MOLENAAR, INTERNATIONAL GOVERNANCE AND REGULATION OF THE MARINE ARCTIC: OVERVIEW AND GAP ANALYSIS (2009), available at <http://www.panda.org/arctic>.

6. Scott G. Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, FOREIGN AFF., Mar.-Apr. 2008, at 63.

7. Arctic Ocean Conference, *Ilulissat Declaration* (May 28, 2008), available at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>. [hereinafter *Ilulissat Declaration*]. The five are: Canada, Denmark (on behalf of Greenland), Norway, the Russian Federation and the United States.

governance in the Arctic, with the spectrum of options including, among others, expanding the spatial scopes of the North-East Atlantic Fisheries Commission (NEAFC), established by the NEAFC Convention⁸, and the OSPAR Commission, established by the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) Convention,⁹ and reform by means of an Implementing Agreement under the United Nations Convention on the Law of the Sea (LOS)¹⁰.

II. TANGLED GOVERNANCE

A. *The Law of the Sea and the Arctic Ocean*

1. Introduction

The cornerstones of the current international law of the sea are the LOS Convention and its two Implementing Agreements, the Part XI Deep-Sea Mining Agreement,¹¹ and the Fish Stocks Agreement.¹² The current international law of the sea applies to the marine environment of the entire globe; including, therefore, the entire marine environment of the Arctic Ocean, however defined.

The LOS Convention's overarching objective is to establish a universally accepted, just, and equitable legal order, or "Constitution," for the oceans that lessens the risk of international conflict and enhances stability and peace in the international community. The LOS Convention currently has 160 parties, the Part XI Deep-Sea Mining Agreement has 138 parties, and the Fish Stocks Agreement has 77 parties. All Arctic states are parties to these three treaties, except for the United States, which is not a party to either the LOS Convention or the Part XI Deep-Sea Mining Agreement.¹³ The European Community (EC) is party to all three

8. Convention on Future Multilateral Co-Operation in North-East Atlantic Fisheries, Nov. 18, 1980, 1285 U.N.T.S. 129 [hereinafter NEAFC].

9. Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992 [hereinafter OSPAR Convention], available at http://www.ospar.org/html_documents/ospar/html/OSPAR_Convention_e_updated_text_2007.pdf (in force Mar. 25, 1998); *id.*, Annex V (in force Aug. 30, 2000); *id.* art. 27(2).

10. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS Convention].

11. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 33 I.L.M. 1309.

12. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 34 I.L.M. 1542.

13. See United Nations, Table Recapitulating the Status of the Convention and of the

treaties. This is important in view of the fact that Denmark, Finland, and Sweden are Member States of the European Union¹⁴ and Iceland and Norway are parties to the European Economic Area (EEA) Agreement.¹⁵

The LOS Convention recognizes the sovereignty, sovereign rights, freedoms, rights, jurisdiction, and obligations of states within several maritime zones. The most important of these, for the Arctic, are internal waters, territorial sea, exclusive economic zone (EEZ), continental shelf, high seas, and the "Area."¹⁶ Internal waters lie landward of the baselines. The maximum breadth of the territorial sea is twelve nautical miles (1 nautical mile = 1,852 meters) measured from the baselines. Twenty-four nautical miles is the maximum breadth for the contiguous zone as is 200 nautical miles for the EEZ. However, in many geographical settings these maximum breadths cannot be reached due to the proximity of the baselines of opposite states. In such circumstances, maritime boundaries have to be agreed on by the opposite states. Several of these maritime boundaries have already been established in the Arctic Ocean and negotiations on several others are still ongoing.

The LOS Convention recognizes the sovereignty of a coastal state over its internal waters, archipelagic waters and territorial sea, the airspace above, and its bed and subsoil. Sovereignty entails exclusive access and control of living and non-living resources and all-encompassing jurisdiction over all human activities, unless states have in one way or another consented to restrictions thereon. The LOS Convention also recognizes specific economic and resource-related sovereign rights and jurisdiction of a coastal state with respect to its EEZ and, where relevant, outer continental shelf. Nevertheless, other states have navigational rights or freedoms within the maritime zones of coastal states and with respect to their EEZ, and, where relevant, outer continental shelf, also the freedoms of overflight, laying of submarine cables and pipelines and "other internationally lawful uses of the sea related to these freedoms"¹⁷

Article 76 of the LOS Convention also recognizes that in certain circumstances the continental shelf extends beyond 200 nauti-

Related Agreements, as at 5 February 2009, http://www.un.org/depts/los/reference_files/status2008.pdf (last visited July 19, 2009).

14. Even though EU membership of Denmark does not encompass Greenland.

15. Agreement on the European Economic Area, March 17, 1993, O.J. No. L 1, 3.1.1994. Note that the EEA Agreement does not apply to Svalbard.

16. The LOS Convention defines "[a]rea" as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction." LOS Convention, *supra* note 10, art. 1(1)(1).

17. LOS Convention, *supra* note 10, art. 58(1).

cal miles from the baselines. This is the so-called “outer continental shelf.” Coastal states that take the view that they have an outer continental shelf must submit information on their outer limits on the basis of the criteria in Article 76 to the Commission on the Limits of the Continental Shelf (CLCS).¹⁸ “The limits of the [outer continental] shelf established by a coastal state on the basis of these recommendations [of the CLCS] shall be final and binding.”¹⁹ So far, only the Russian Federation and Norway have made submissions to the CLCS in relation to their outer continental shelves that lie within the Arctic Ocean. The CLCS has, up until now, only made an interim recommendation in relation to the submission of the Russian Federation.²⁰ The CLCS essentially recommended that the Russian Federation make a revised submission as regards the central Arctic Ocean basin.²¹ The Russian Federation is expected to do this in 2010. Canada, Denmark (in relation to Greenland), and the United States are all engaged in activities to enable them to make submissions to the CLCS, despite the fact that the United States is not yet party to the LOS Convention.²² Canada has to make its submission by December 2013 and Denmark by December 2014.²³ It should be noted that it is likely that there will be two pockets of the Area in the central Arctic Ocean and one large high seas pocket.

In the high seas, all states have the freedoms already mentioned above as well as the freedom to construct artificial islands and other installations, the freedom to fish, and the freedom to conduct scientific research. These freedoms are all subject to conditions and obligations.²⁴ The Area and its resources are the “common heritage of mankind” and the International Sea-Bed Authority (ISA) is charged with organizing and controlling all activities of exploration for, and exploitation of, the resources of the Area.²⁵

2. Rights, Interests, and Obligations of the EU and Its Member States

18. *Id.* art. 76.

19. *Id.* art. 76(8).

20. The Secretary-General, *Addendum to Report of the Secretary-General on the Oceans of the Law and the Sea, delivered to the General Assembly*, U.N. Doc. A/57/57/Add.1 (Oct. 8, 2002), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/629/28/PDF/N0262928.pdf?OpenElement>.

21. *Id.* ¶ 41.

22. See National Security Presidential Directive No. 66 & Homeland Security Presidential Directive No. 25: Arctic Region Policy at sec. D(4)(a) (Jan. 9, 2009) [hereinafter Presidential Policy Directive], available at <http://www.whitehouse.gov>.

23. See LOS Convention, *supra* note 10, annex II, art. 4.

24. *Id.* art. 87(1).

25. *Id.* arts. 1(1)(3), 136, 156, 157(1).

The competence of the EU and its Member States regarding the Arctic Ocean is determined by general international law as well as by European Community (EC) law. It goes without saying that EU Member States cannot confer more extensive competence to the EU than they themselves possess in accordance with international law.

The fact that none of the current EU Member States are coastal states with respect to the Arctic Ocean (not even via the EEA Agreement or via Greenland, which chose in the mid-1980s to withdraw from the then EEC, and hence is not part of the EC or EU) is clearly a major feature and constraint of EU policy regarding the Arctic Ocean. While neither the EU nor its Member States can act as coastal states with respect to the Arctic Ocean, they can still act in a wide range of other capacities. For instance, they may act as flag states, port states, market states, or with respect to their natural and legal persons. In a flag state capacity, the EU and its Member States are able to exercise their rights and discharge their obligations with respect to the Arctic Ocean, most notably the freedoms of the high seas in the high seas pockets in the Arctic Ocean (*e.g.*, marine scientific research and the laying of cables and pipelines), the navigational rights and freedoms in the maritime zones of Arctic Ocean coastal states, and the obligations relating to marine living resources and the marine environment connected to these rights and freedoms.

In addition to these rights and obligations, the EU and its Member States may also have various user and non-user interests in the Arctic Ocean. The main user interests would be related to the exploration and exploitation of offshore hydrocarbon resources. As traditional energy resources will be of paramount importance to all EU Member States for at least the next few decades, access to the hydrocarbon resources in the Arctic will be an important security issue. The main non-user interests include the protection and preservation of the marine environment and safeguarding marine biodiversity. The EU and its Member States could argue that they want to become involved in the governance and regulation of the marine Arctic to safeguard these non-user interests, in their own right, or, together with non-Arctic states, on behalf of the international community. Such participation may for instance be aimed at monitoring and ensuring that obligations with respect to the Arctic marine area are complied with.

In case the EU would act, it would also need to have shared or exclusive competence. The distribution of competence between the EU and its Member States is determined by the EC Treaty, the EU

Treaty,²⁶ and other treaties concluded within the framework of the EC and the EU. The scope and extent of EC and EU competence is governed by the principle of conferral and the use of conferred (exclusive) competence is, *inter alia*, governed by the principles of subsidiarity and proportionality.²⁷ The distribution of competence is a dynamic matter in which the judgments of the European Court of Justice (ECJ) play a key role. While adjustments of competence can be a consequence of increasing importance of EC legislation and acts by the EC Commission, it can also be negotiated between EU Member States. The latter adjustments can lead to more competence being conferred to the EC and EU but also to competence being delegated back to EU Member States.

The spheres in which the EC has competence can be gleaned from Article 3 of the EC Treaty, which lists the activities the EC shall undertake for the purposes set out in Article 2. While Article 3 sets out the policy areas which the EU may address, it does not in itself provide a legal basis for specific legislative acts. The specific measures available to the EC are set out in other parts of the EC Treaty. Included in this list are fishing, shipping (transport), and environmental protection.²⁸ In addition, Article 6 of the EC Treaty stipulates, “[e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.”²⁹

EU Member States are generally free to pursue their own policies alongside the EU, unless the EU’s or EC’s competence is exclusive or a subject matter in shared competence is dealt with exhaustively by the EU, leaving the Member States no room for additional measures. The ECJ already ruled in 1981 that the EC has exclusive competence in fisheries conservation and management.³⁰ This exclusiveness relates to community waters and probably also seaward thereof, but is also subject to some exceptions, for instance in relation to enforcement.³¹ The consequential external

26. Consolidated Version of the Treaty on European Union, 2008 O.J. (C 115) 13 [hereinafter EU Treaty].

27. See Consolidated Version of the Treaty Establishing the European Community, art. 5, 2006 O.J. (C 321) E1 [hereinafter EC Treaty]; EU Treaty, *supra* note 26, arts. 4-5.

28. The sectors and spheres listed in Article 3 of the EC Treaty are addressed in more detail in other provisions in the EC Treaty. As regards fisheries, see EC Treaty, *supra* note 27, arts. 32-38; as regards shipping, see *id.* arts. 70-80; as regards environmental protection, see *id.* arts. 6, 174-176.

29. *Id.* art. 6.

30. *Comm’n of the Eur. Community v. U.K.*, 1981 E.C.R. 1045.

31. See Eur. Community, *Declaration Upon Signature of the Fish Stocks Agreement* (June 27, 1996), available at http://www.un.org/Depts/los/convention_agreements/fish_stocks_agreement_declarations.htm#EC; Eur. Community, *Declaration Upon*

competence of the EC in the sphere of fisheries implies that the EC represents EU Member States, for instance in negotiations with non-EU Member States and in regional fisheries management organizations (RFMOs). Subject to some exceptions, EU Member States cannot become members of RFMOs alongside the EC. One of these exceptions relates to “overseas countries and territories” and enables, *inter alia*, Denmark to become a member of RFMOs alongside the EC on behalf of the Faroe Island, Greenland, or both.

Competence with regards to shipping and environmental protection is shared between the EU and its Member States. This mixed competence also means that the EC cannot represent EU Member States in international fora, like the International Maritime Organization (IMO). So far, the EC has, as an intergovernmental organization, concluded an agreement on cooperation with the IMO.³² In areas of shared competence, agreements are often signed by the EC as well as by EU Member States (so-called “mixed agreements”).³³ This requires close cooperation between them.

Competence over offshore hydrocarbon activities is a much less straightforward matter. While the list in Article 3 of the EC Treaty does not include the specific term “offshore hydrocarbon activities,” it could be argued it falls within the scope of the broader term or sphere of “energy” referred to in Article 3(1)(u). As Article 3 does not give the EC a general legal basis for legislation in the field of energy,³⁴ the EC may be able to adopt enactments that rely on one or more of the other bases in Article 3 or pursue one or more of the objectives set out in Article 2 that in one way or another impact offshore hydrocarbon activities undertaken within the maritime zones of EU Member States or seaward thereof by EU Member States or their natural or legal persons. Environmental protection would be an example. It is clear that, at the most, competence would be shared and not exclusive.

3. Canada and the Law of the Sea in the Arctic

Canada might be described as a pioneer in developing state

Ratification of the Fish Stocks Agreement (Dec. 19, 2003), available at http://www.un.org/Depts/los/convention_agreements/fish_stocks_agreement_declarations.htm#EC

32. Int'l Mar. Org. [IMO], *Mitropoulos and EC Commissioner Barrot in Agreement Across Wide-Ranging Agenda*, Feb. 11, 2005, available at http://www.imo.org/about/mainframe.asp?topic_id=1018&doc_id=4701.

33. It is also possible that the agreement is signed only by the EC or only by the EU Member States.

34. EC measures and legislation have mostly been based on the common market.

practice and law of the sea in relation to Arctic marine shipping. Following the 1969 trial transit of the ice-adapted oil tanker, the *S.S. Manhattan*, through the Northwest Passage,³⁵ Canada unilaterally responded to the threat of possible future foreign tanker transits by enacting the *Arctic Waters Pollution Prevention Act*.³⁶ The Act, which is still in force today, established a 100 nautical mile pollution prevention zone in Arctic waters and prohibited all deposits of waste by any person or ship except as provided in regulations.³⁷ The Act also authorized the Governor in Council (federal cabinet) to subdivide Arctic waters into shipping safety control zones and to pass regulations for the control of shipping within the zones, including construction, equipment, and crewing standards.³⁸

Subsequent legal measures followed. Through a *Shipping Safety Control Zones Order*,³⁹ Canada divided its Arctic waters into sixteen shipping safety control zones. Through *Arctic Shipping Pollution Prevention Regulations*,⁴⁰ Canada established a complex array of shipping control measures including a prohibition on the discharge of oil or oily mixtures, with narrow exceptions such as engine exhaust and for the purpose of saving the loss of a ship.⁴¹

To help the codification of the law of the sea "catch up" with the need to protect vulnerable Arctic waters from shipping pollution, Canada also worked multilaterally within the negotiations for the LOS Convention. Working together with the Soviet Union and the United States, Canada was successful in obtaining the insertion of Article 234 into the Convention, which recognizes the special legislative and enforcement powers of coastal states to control marine pollution from vessels in ice-covered waters within the limits of the EEZ.⁴²

The transit of the United States Coast Guard vessel, *Polar Sea*, through the Northwest Passage in August 1985, without officially seeking permission from Canada, raised further law of the sea tensions, to which Canada responded.⁴³ On September 10, 1985, Ex-

35. For a detailed discussion, see John Kirton & Don Munton, *The Manhattan Voyages and Their Aftermath*, in *POLITICS OF THE NORTHWEST PASSAGE* 67-97 (F. Griffiths ed., 1987).

36. Arctic Waters Pollution Prevention Act, R.S.C. 1985, c. A-12 (1970) (Can.).

37. *Id.* § 4(1).

38. *Id.* §§ 11(1), 12.

39. Shipping Safety Control Zones Order, C.R.C. c. 356 (Can.).

40. Arctic Shipping Pollution Prevention Regulations, C.R.C. c. 353 (Can.).

41. *Id.* § 29(c).

42. 4 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 392-98 (Myron H. Nordquist et al. eds., 1991).

43. For a further review of the incident and Canadian responses, see Suzanne Lalonde, *Increased Traffic through Canadian Arctic Waters: Canada's State of Readiness* 38 *REVUE JURIDIQUE THEMIS* 49, 65-69 (2004).

ternal Affairs Minister, Joe Clark, formalized Canada's sovereignty claim over Arctic waters by announcing the drawing of straight baselines (effective January 1, 1986) around the Canadian Arctic Archipelago.⁴⁴ He also declared a governmental intention to construct a Polar Class 8 icebreaker to ensure a greater Canadian presence in the North,⁴⁵ but that icebreaker was never built.

The international legal validity of enclosing the Canadian Arctic Archipelago with straight baselines remains contentious. The United States, the EC, and other countries lodged formal protests against Canada's action.⁴⁶ Whether Canada can justify its claim of internal waters status for the enclosed waters based upon their being historic waters is in doubt.⁴⁷ Whether Canada's straight baseline system meets law of the sea customary or convention requirements has been subject to debate.⁴⁸

A further law of the sea issue hovering over Canada's Arctic waters is whether the Northwest Passage is a strait used for international navigation. The United States and Canada have a long-standing dispute on that front, with the United States considering the Northwest Passage a strait subject to the LOS Convention's transit passage regime,⁴⁹ where coastal state controls would be very limited.⁵⁰ Since the LOS Convention does not define what is meant by "used for international navigation," there is room for argument. Various factors might be used to determine the level of required use, including, among others, the number of ships transiting the strait, the shipping tonnage, and the number of flag states involved.⁵¹ Whether actual or potential use is necessary for a strait to qualify as "used for international navigation" may be a further point of contention.⁵²

In 1988, Canada and the United States reached a "stalemate"

44. Right Honourable Joe Clark, Can. Sec'y of State for External Affairs, Statement in the House of Commons on Canadian Sovereignty, 85/49 (Sept. 10, 1985).

45. *Id.*

46. See ERIK FRANCKX, MARITIME CLAIMS IN THE ARCTIC: CANADIAN AND RUSSIAN PERSPECTIVES 133 (1993).

47. See DONAT PHARAND, CANADA'S ARCTIC WATERS IN INTERNATIONAL LAW 121-25 (1988).

48. See *id.* at 131-84; FRANCKX, *supra* note 46, at 104-07.

49. BUREAU OF OCEANS & INT'L ENVTL. & SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS: UNITED STATES RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS 73 (1992).

50. Pursuant to Article 42 of the LOS Convention, States bordering straits may only adopt marine safety and pollution laws giving effect to international regulations, and pursuant to Article 41, bordering States may designate sea lanes and traffic separation schemes where necessary to promote the safe passage of ships, but only after seeking and receiving IMO approval.

51. See Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit*, 38 OCEAN DEV. & INT'L L. 3, 34-35 (2007).

52. *Id.* at 35-36.

agreement on Arctic cooperation.⁵³ They agreed to set aside their jurisdictional dispute over the legal status of the Northwest Passage. The United States agreed that its icebreakers would be subject to Canadian consent for transits within waters claimed by Canada to be internal. The countries also agreed to share research information regarding the marine environment gained through icebreaker navigation.

Many questions still surround Article 234 of the LOS Convention. What is the precise meaning of waters covered by ice for most of the year? What is the significance of giving special coastal state powers only in the EEZ? Some writers have suggested the EEZ limitation implies that coastal states are granted no greater powers over foreign ships than in the territorial sea,⁵⁴ while another interpretation supports a bestowing of much broader powers, including the right to unilaterally adopt special design, construction, crewing, and equipment requirements.⁵⁵ Such interpretive questions may also relate to straits used for international navigation since Article 233 of the Convention, which seeks to safeguard the legal regime of straits, does not exempt straits from the application of Article 234.⁵⁶

Canada has two ocean boundary disputes in the Arctic in addition to a disagreement with Denmark/Greenland over the ownership of Hans Island. Canada and the United States continue to dispute the location of the ocean boundary in the Beaufort Sea, with some 6250 square nautical miles of area having good potential for hydrocarbon deposits at stake.⁵⁷ Canada maintains that the 141st west meridian should be the boundary line, in light of 1825 and 1867 treaties, while the United States has argued for a strict equidistance line.⁵⁸ Canada and Denmark/Greenland, while delimiting most of the continental shelf through a 1973 agreement, have yet to complete the northern portion of the boundary in the Lincoln Sea.⁵⁹ Canada and Denmark/Greenland also dispute own-

53. Agreement Between the Government of the United States of America and the Government of Canada on Arctic Cooperation and Accompanying Notes, 28 I.L.M. 141 (1989) [hereinafter Agreement on Arctic Cooperation].

54. See D.M. McRae & D.J. Goundrey, *Environmental Jurisdiction in Arctic Waters: The Extent of Article 234*, 16 U. BRIT. COLUM. L. REV. 197, 221 (1982).

55. Pharand, *supra* note 51, at 47-48.

56. See Cynthia Lamson & David VanderZwaag, *Arctic Waters: Needs and Options for Canadian-American Cooperation*, 18 OCEAN DEV. & INT'L L. 49, 81 (1987).

57. DAVID VANDERZWAAG ET AL., GOVERNANCE OF ARCTIC MARINE SHIPPING at App. C (2008).

58. Karen L. Lawson, *Delimiting Continental Shelf Boundaries in the Arctic: The United States-Canada Beaufort Sea Boundary*, 22 VA. J. INT'L L. 221, 241-43 (1982).

59. Dawn Russell, *International Ocean Boundary Issues and Management Arrangements*, in CANADIAN OCEAN LAW AND POLICY 490 (David VanderZwaag ed., 1992).

ership of the uninhabited Hans Island, located in Nares Strait.⁶⁰ The island represents a tiny “gap” in the continental shelf delimitation agreed to in 1973.⁶¹

Through the *Oceans Act*, Canada has brought its offshore jurisdictional zones into line with the LOS Convention. Canada has formally established a twelve nautical mile territorial sea,⁶² a twenty-four nautical mile contiguous zone,⁶³ a 200 nautical mile EEZ⁶⁴ and a continental shelf of at least 200 nautical miles measured from the territorial sea baselines or to the outer edge of the continental margin.⁶⁵ For Arctic waters, of course, those maritime zones extend outward from the straight baseline system established in 1986 around the Arctic islands.

B. *The Arctic Council and the Marine Environment*

1. Introduction

During the Cold War, Arctic-wide cooperation was not possible, except in very limited policy areas, such as the conclusion of the 1973 Polar Bear Treaty⁶⁶ between the five Arctic range states. This was due to the fact that the two superpowers and their allies confronted each other in the Arctic, which was estimated by many as one of the major military strategic hot spots during the Cold War. After all, NATO was a neighbor to the Soviet Union via Norway, and the United States and the Soviet Union shared a border in the Bering and Chukchi Seas. It was the *perestroika* and *glasnost* that opened up opportunities for pan-Arctic cooperation. Secretary-General Gorbachev’s speech in Murmansk in 1987 proposed pan-Arctic cooperation in a number of fields, one of these being the protection of the Arctic environment. Inspired by Gorbachev’s speech outlining various areas for Arctic cooperation, Finland took the initiative in 1989 for pan-Arctic co-operation in one of these policy areas, that of environmental protection; in 1991 the Arctic Environmental Protection Strategy (AEPS) was adopted by the eight Arctic states by means of a declaration.⁶⁷

60. *Id.*

61. *Oceans Act*, S.C., 1996, c. 31 (Can.).

62. *Id.* § 4.

63. *Id.* § 10.

64. *Id.* § 13.

65. *Id.* § 17.

66. Agreement on the Conservation of Polar Bears, U.S.-Can.-Den.-Nor.-Russ., Nov. 15, 1973, 13 I.L.M. 13 (1973), available at <http://pbsg.npolar.no>.

67. Arctic Environmental Protection Strategy § 2.1(v), U.S.-Can.-Den.-Fin.-Ice.-Nor.-Russ.-Swed., June 14, 1991, 30 I.L.M. 1624 (1991).

The AEPS achieved one important thing. Even though the cooperation itself was a fairly low-committal exercise with weak institutional structure, it enabled us to start thinking of societal and environmental problems for the first time from the Arctic perspective (rather than from the perspective of individual country's northern or Arctic region) and tackle them with policy measures.

The AEPS is also vastly important for understanding the current functioning of the Arctic Council,⁶⁸ and the proposals to renew it, since, even though the Arctic cooperation ostensibly was transformed from the AEPS to the Arctic Council during the transitional period of 1996-1998, the basic elements of the cooperation have been in place from 1991, with only slight changes taking place.

Even though there is a new mandate on sustainable development in the Council, the AEPS had a task force on sustainable development and utilization in the Arctic, which had more ambitious goals than the present Sustainable Development Working Group (SDWG).⁶⁹ There are still the same participants in the cooperation, although the Declaration establishing the Council strengthened the status of Arctic indigenous peoples' organizations as permanent participants with power to influence decision-making (they were observers in the AEPS). The same institutional structure has been retained, ministerial meetings convened every two years and senior arctic officials (SAOs) managing the day-to-day activities of the Council. The four environmental protection working groups of the AEPS, namely Conservation of Arctic Flora and Fauna (CAFF), Protection of the Arctic Marine Environment (PAME), Emergency Prevention, Preparedness and Response (EPPR), and the Arctic Monitoring and Assessment Programme (AMAP), were integrated into the structure of the Council. In addition, two new working groups were established, the SDWG and the Arctic Contaminants Action Program (ACAP).

To date, there is no permanent secretariat in the Council, as was the case in the AEPS, although the three Scandinavian states have agreed to maintain the secretariat in Tromsø till 2012.⁷⁰ As

68. See Joint Communiqué and Declaration on the Establishment of the Arctic Council, U.S.-Can.-Den.-Fin.-Ice.-Nor.-Russ.-Swed., Sept. 19, 1996, 35 I.L.M. 1382 (1996) [hereinafter Joint Communiqué].

69. Task Force on Sustainable Development and Utilization (TFSDU) identified five major areas for consideration: first, trade policies, opportunities, and barriers (focusing on the harvesting of marine mammals and fur bearing animals); second, case studies of sustainable renewable resource use; third, an environmental impact assessment; fourth, a communication and education strategy; and fifth, regional applications of Agenda 21. See Evelyn M. Hurwich, *Arctic*, 6 Y.B. OF INT'L ENVTL. L. 298, 302 (1996). Compare this to the present work of the SDWG, <http://portal.sdwg.org/> (last visited Dec. 17, 2009).

70. "A joint secretariat, led by the Chair of Senior Arctic Officials (SAO), will be established in Tromsø for the period 2006-2012," Arctic Council, Norwegian, Danish,

was the case in the AEPS, there is no permanent, mandatory funding mechanism in the Council, although a project support instrument has been created to pool resources for funding of individual projects.⁷¹ Finally, and importantly, both the AEPS and the Arctic Council were established via a declaration as soft-law organizations, not inter-governmental organizations having binding decision-making power.

Hence, even though many have cherished the argument that the Council can be formalized into an inter-governmental organization, given that Arctic cooperation has already once been revised in its short life-cycle, it is important to keep in mind that the foundation of the cooperation has remained much the same, allowing us to conclude that the Arctic Council is fairly resistant to change.

But even though the structure has remained much the same, the Arctic Council has become a stronger forum for cooperation over the years of its existence. In addition to the changes identified above, the working groups have become stronger in status and in terms of their deliverables. This is due to the fact that it was bound to take a few years before these working groups could start functioning effectively. Increasingly, their strategies and deliverables have become more ambitious. The Council ministers have also adopted important, albeit not very strong, policy recommendations connected with major scientific assessments, such as the ACIA. After the release of the ACIA, climate change considerations have become a cross-cutting issue in the Council, placing pressure on the working groups to adjust their work to future challenges. There is also more interest in the work of the Council; major states (like China) are interested in becoming observers.

2. The Role of the EU

The EU plays an important role in the Council even though it participates only as an ad hoc observer. Three of the eight Arctic Council members are Member States of the Union; namely Finland, Sweden and Denmark. Moreover, seven out of the eight non-Arctic states observers to the Council are Member States of the Union: Italy (ad hoc status), Spain, France, the Netherlands, Poland, Germany, and the United Kingdom, who are increasingly de-

Swedish common objectives for their Arctic Council chairmanships 2006-2012, http://arctic-council.org/article/2007/11/common_priorities (last visited Dec. 17, 2009). Individual working groups have had their secretariats from the beginning of the AEPS.

71. See Nordic Env't Fin. Corp., Arctic Council Project Support Instrument, http://www.nefco.org/financing/arctic_council_project_support (last visited July 25, 2009).

manding a better position in the Council.⁷² The current Arctic Council chair, Norway, is trying to meet these expectations in its chair-period by enhancing their participation in the work of the Council.⁷³ As studied below, the Commission is currently planning its future Arctic policy, which may lead to the EU demanding a better position in the Arctic Council.

3. The Role of Canada

Canada played a leadership role in creating the Arctic Council. Canadian Prime Minister Brian Mulroney proposed the idea of the Council during a visit to Leningrad in November 1989.⁷⁴ In November 1990, the Canadian Secretary of State for External Affairs, Joe Clark, declared that he would bring the issue of the Arctic Council to the attention of the other States.⁷⁵ On September 19, 1996, Canada hosted a meeting in Ottawa where representatives from the eight Arctic states signed the Declaration on the Establishment of the Arctic Council.⁷⁶

Canada continues to play an active role in Arctic Council administration and project activities. Canada recently vice-chaired the PAME Working Group.⁷⁷ Canada, along with the United States and Finland, is leading the Arctic Marine Shipping Assessment (AMSA).⁷⁸ Canada, together with Iceland, took a lead role in updating and revising the Arctic Regional Programme of Action for the Protection of the Marine Environment from Land-based Activities.⁷⁹

While Norway, as part of its chairmanship, has committed to reviewing the effectiveness and efficiency of the Arctic Council,⁸⁰

72. See *Non-Arctic Countries Want Membership in Arctic Council*, BARENTSOBSERVER.COM, Oct. 10, 2003, <http://www.barentsoobserver.com/non-arctic-countries-want-membership-in-arctic-council.4516094-16174.html>.

73. See *id.*

74. David VanderZwaag et al., *The Arctic Environmental Protection Strategy, Arctic Council and Multilateral Environmental Initiatives: Tinkering While the Arctic Marine Environment Totters*, 30 DENV. J. INT'L L. & POL'Y 131, 154 (2002).

75. *Id.*

76. Joint Communiqué, *supra* note 68.

77. That vice-chair was Chris Cuddy, Indian and Northern Affairs Canada. For more information on PAME, see Arctic Council, Prot. of the Marine Env't Working Group, Chairmanship 2006-2008, http://arctic-council.org/working_group/pame (last visited Dec. 17, 2009).

78. See Arctic Council, PROT. OF MARINE ENV'T, ARCTIC MARINE SHIPPING ASSESSMENT 2009 REPORT (2009) 10, available at http://pame.is/images/stories/PDF_Files/AMSA_2009_report_2nd_print.pdf

79. PROT. OF MARINE ENV'T WORKING GROUP, DRAFT WORKING GROUP MEETING REPORT NO. I-2008 12 (2008).

80. Senior Arctic Officials have in fact placed the topic "Effectiveness and Efficiency" as a standing item on the SAO agenda. See ARCTIC COUNCIL, MEETING OF SENIOR ARCTIC

Canada has not taken an active role in trying to envision the future of the Council. Academic commentary in Canada has been critical of the Canadian Government's disproportionate emphasis on national defense and security, the marginalization of circumpolar diplomacy, and the lack of a leadership role in promoting regional cooperation.⁸¹ One Canadian author has urged development of a national Arctic strategy that, among other things, should address ways to bring the Arctic Council into the twenty-first century.⁸²

III. SHIFTING SEASCAPE

A. Introduction

As discussed above, the Arctic Council is the predominant inter-governmental forum dealing with the Arctic in general, including also Arctic marine issues. The Council has done important assessment work (sometimes with policy recommendations) relating to the Arctic Ocean and produced non-legally binding guidelines and manuals of good practice. These have often been influential in many international environmental protection processes. Of the Arctic Council Working Groups, the most important marine policy work is done by PAME.

PAME's agenda has become increasingly ambitious with the adoption of its 2004 Arctic Marine Strategic Plan (AMSP), which encourages actions on many fronts.⁸³ PAME developed the AMSP through the various Arctic Council working groups and mechanisms, as well as via regional and global bodies.⁸⁴ The AMSP identi-

OFFICIALS: FINAL REPORT (2008), available at <http://arctic-council.org/filearchive/Sao%20Svolvaer%20Final%20Report.pdf> [hereinafter 2008 ARCTIC COUNCIL SENIOR REPORT].

81. See P. Whitney Lackenbauer, Can. Int'l Council Junior Fellow, *Arctic Front, Arctic Homeland: Re-Evaluating Canada's Past Record and Future Prospects in the Circumpolar North* (Can. Int'l Council, Preliminary Paper, July 2008), available at http://www.canadianinternationalcouncil.org/download/resourcece/archives/foreignpol/cic_lacken; P. Whitney Lackenbauer, Can. Intl. Council Junior Fellow, *From Polar Race to Polar Saga: An Integrated Strategy for Canada and the Circumpolar World* (Foreign Policy for Canada's Tomorrow No. 3, July 2009), available at <http://www.canadianinternationalcouncil.org/download/resourcece/archives/foreignpol/cicfpctno3>.

82. Franklyn Griffiths, Can. Int'l Council Senior Fellow, *Towards a Canadian Arctic Strategy* (Can. Int'l Council, Preliminary Paper, July 2008), available at <http://www.canadianinternationalcouncil.org/download/research/foreignpol/towardsaca~2/cicfpctno1>; Franklyn Griffiths, Can. Int'l Council Senior Fellow, *Towards a Canadian Arctic Strategy* (Foreign Policy for Canada's Tomorrow No. 1, July 2009), available at <http://www.canadianinternationalcouncil.org/download/research/foreignpol/towardsaca~2/cicfpctno1>.

83. ARCTIC COUNCIL, ARCTIC MARINE STRATEGIC PLAN (2004), available at http://www.pame.is/images/stories/AMSP_files/AMSP-Nov-2004.pdf

84. *Id.* at 1.

fies the largest drivers of change in the Arctic to be climate change and increasing economic activity and suggests actions in many areas, for instance: conducting a comprehensive assessment of Arctic marine shipping, which led to the AMSA being finalized in 2009; developing guidelines and procedures for port reception facilities for ship-generated wastes and residues; examining the adequacy of Arctic Council's Arctic Offshore Oil and Gas Guidelines, with revision, in 2009; identifying potential areas where new guidelines and codes of practice for the marine environment are needed; promoting application of the ecosystem approach; promoting the establishment of marine protected areas, including a representative network; calling for periodic reviews of both international and regional agreements and standards; and promoting implementation of contaminant-related conventions or programs and possible additional global and regional actions.

Overall, the Council has clear strengths. It now serves as a high-level platform for all the Arctic, internationally oriented, actors (not those who actually govern the Arctic, such as the Arctic sub-units of federal states and other administrative units).⁸⁵ It has also produced scientific assessments, mainly via its strongest working group, AMAP, which has made a significant difference to regional and even global environmental negotiation processes.⁸⁶ The Council is also the only inter-governmental forum that accords indigenous peoples a very strong status as permanent participants (not NGOs as they are usually deemed).⁸⁷

Yet, it must be acknowledged that with the present weak institutional structure, lack of any permanent funding mechanism, lack of legal status, etc., the Council cannot reasonably be expected to continue to be more than a platform for discussions on Arctic issues and a producer of scientific assessments and non-legally binding guidelines, rather than a governing body. Hence, from the viewpoint of governing the Arctic Ocean (or Arctic marine areas in general) and the coming climate change challenges, it is fairly

85. Even the Northern Forum, an observer to the Council, which ostensibly represents many counties in the north, does not really represent the interests of the counties but serves more as a low-key forum for their mutual cooperation. Contrast this to the draft Arctic Region Council proposal circulated by Canada in AEPS negotiations, which would have directly included those administrative units in its institutional structure.

86. See, e.g., Lars-Otto Reiersen et al., *Circumpolar Perspectives on Persistent Organic Pollutants: the Arctic Monitoring and Assessment Programme*, in *NORTHERN LIGHTS AGAINST POPs: COMBATING TOXIC THREATS IN THE ARCTIC 60* (David Leonard Downie & Terry Fenge eds., 2003).

87. It is good to remember that these organizations do not directly represent the Arctic governance bodies that represent indigenous peoples, but are their international organizations (and need to represent either many indigenous peoples in one Arctic country or one indigenous people in many Arctic countries).

clear that the Arctic Council is limited with its present structure and mandate.

B. Challenges to the Present Regime from the Part of Observers to the Arctic Council

Increasingly, scholars, as well as international and non-governmental organizations that are observers to the Council, have started to criticize the way it conducts its work in general and its environmental protection mandate, in particular. The various processes by IUCN, WWF Arctic, UNEP Grid-Arendal and Arctic parliamentarians that have studied the possibility of an Arctic treaty have ended up with recommendations containing two features: an audit to assess the effectiveness and relevance of existing regimes as a basis for the second step and a discussion concerning the possibility of developing an Arctic treaty.⁸⁸ In their August 2006 meeting in Kiruna, the Conference of Arctic Parliamentarians asked that their governments and the institutions of the European Union, “[i]n light of the impact of climate change, and the increasing economic and human activity, initiate, as a matter of urgency, an audit of existing legal regimes that impact the Arctic and to continue the discussion about strengthening or adding to them where necessary.”⁸⁹

In a seminar co-hosted by UNEP, Grid-Arendal, and the Standing Committee of the Arctic Parliamentarians on Multilateral Agreements and Their Relevance to the Arctic, in September 2006, the participants agreed on one overall recommendation:

The participants of the Arendal Seminar recommend that UNEP, the Arctic Parliamentarians, the Arctic Council, the Nordic Council of Ministers, and Contracting Parties, governing bodies and secretariats to the MEAs [multilateral environmental agreements] support and cooperate on an audit to assess the effectiveness and relevance of MEAs in the Arctic and to examine the need and options for improving the existing regime as well as the need and options for devel-

88. The only exception is the Nordic Council, which went further and adopted the following recommendation: “[t]he Nordic Council recommends to the Nordic Council of Ministers . . . that efforts be made, in co-operation with the Arctic Council, to establish an Arctic treaty.” Nordic Council, Committee Proposal on Jurisprudential Research in the Marine Areas in the North and an Arctic Treaty 3 (Apr. 26, 2006) (on file with author) (emphasis in original).

89. MARTIN PALM, THE SEVENTH CONFERENCE OF THE PARLIAMENTARIANS OF THE ARCTIC REGION 23 (2007).

oping an Arctic Treaty or Arctic Framework Convention. The audit should take into account recommendations from the Kiruna Conference of the Parliamentarians of the Arctic Region and the Arendal Seminar.⁹⁰

A similar conclusion was reached by the IUCN, which convened an expert meeting in Ottawa on March 24-25, 2004 to discuss whether the Antarctic Treaty System (ATS) could provide the needed input for the development of environmental protection in the Arctic. The expert meeting was divided over the way in which environmental protection could and should be developed in the Arctic and whether a treaty approach was needed. The main approach to Arctic governance advanced at the meeting was not to borrow from the Antarctic experience but to first study which environmental threats to the Arctic should be addressed at which level: *i.e.*, universal (global treaties and processes), regional (the Arctic Council), bilateral, national and sub-national.⁹¹

Hence, there clearly seems to be pressure from the abovementioned commentators of the Arctic Council to at least examine the applicable treaties carefully, studying in particular how these treaties are implemented in the region and whether, on the basis of that analysis, a comprehensive/framework instrument for the Arctic is called for. What these actions by observers of the Arctic Council serve to demonstrate is that pressures are building to adopt a treaty approach. Yet, the ultimate problem for those who push for an Arctic treaty is that, at least at present, there are no real signs from the Council and its member states that they would be ready to support the treaty approach, at least in the immediate future.

C. Recent Initiatives from the United States and the Arctic Ocean Coastal States

There are interesting recent developments, some of which can be seen even as challenging the Arctic Council as the main inter-governmental platform for governing the Arctic Ocean.

For many parts of the Arctic Ocean, the presence of ice for most of the year has, so far, rendered national fisheries regulation for those areas unnecessary. But, as diminishing ice-coverage may at-

90. NORDIC COUNCIL OF MINISTERS, THE ARENDAL SEMINAR ON MULTILATERAL ENVIRONMENTAL AGREEMENTS AND THEIR RELEVANCE TO THE ARCTIC 2 (2006).

91. See Wolfgang E. Burhenne, *The Arctic: Towards a New Environmental Regime?*, 37 ENVTL. POL'Y & L. 249, 255 (2007).

tract fishing vessels looking for possible new fishing opportunities, Arctic states may be required to develop national regulations in order to discharge their obligations under international law, including those under the LOS Convention and the Fish Stocks Agreement. The United States is currently engaged in this process with regard to fishing in the maritime zones off Alaska north of the Bering Strait. In the United States, competence over fisheries is shared by the individual states (in this case Alaska) within three nautical miles from shore, and the federal government in the remainder of the United States maritime zones. The North Pacific Fishery Management Council (NPFMC) plays a key role in federal regulation with regard to the maritime zones of the United States in the North Pacific. The NPFMC has adopted various fishery management plans (FMPs) that apply as far north as the Bering Strait, and its King and Tanner Crab and Scallop FMPs also apply to that part of the Chukchi Sea that lies between the Bering Strait and Point Hope. In June 2007, the NPFMC closed the Northern Bering Sea to bottom trawling and directed a research plan to be developed for that area.⁹²

Since October 2006, the NPFMC has also specifically focused its attention on Arctic fishery management. This has led to the development of an Arctic FMP which is likely to be adopted at the February 2009 meeting of the Council. The Draft Arctic FMP proposes, *inter alia*, to “close the Arctic to commercial fishing until information improves so that fishing can be conducted sustainably and with due concern to other ecosystem components.”⁹³

As some of the fish stocks in the EEZ off Alaska are likely to be transboundary, reference should be made to United States Senate joint resolution (S.J. Res.) No. 17 of 2008, directing the United States to “. . . initiate international discussions and take necessary steps with other Arctic nations to negotiate an agreement or agreements for managing migratory, transboundary, and straddling fish stocks in the Arctic Ocean. . . .”⁹⁴ The House of Repre-

92. NEWS & NOTES (N. Pacific Fishery Mgmt. Council), June 2007, at 2, available at <http://www.fakr.noaa.gov/npfmc/newsletters/news606.pdf>.

93. N. PACIFIC FISHERY MGMT. COUNCIL, PRELIMINARY PUBLIC REVIEW DRAFT ENVIRONMENTAL ASSESSMENT / REGULATORY IMPACT REVIEW / INITIAL REGULATORY FLEXIBILITY ANALYSIS FOR THE ARCTIC FISHERY MANAGEMENT PLAN AND AMENDMENT 29 TO THE FISHERY MANAGEMENT PLAN FOR BERING SEA/ALEUTIAN ISLANDS KING AND TANNER CRABS at iii (2008), available at http://www.fakr.noaa.gov/analyses/arctic/ArcticFMP_EA1108.pdf. At its February 2009 meeting, the Council still needs to decide on different “alternatives” and “options” linked to them. See NEWS & NOTES (N. Pacific Fishery Mgmt. Council), Dec. 2008, at 2, available at <http://www.fakr.noaa.gov/npfmc/newsletters/news1208.pdf>.

94. S.J. Res. 17-2, 110th Cong. (2007) (enacted) (passed by the House of Representatives on May 21, 2008, and signed by President George W. Bush on June 3, 2008, thereafter Pub. L. No. 110-243, 122 Stat. 1569).

sentatives voted in favor of S.J. Res. No. 17 in May 2007, and the President signed it on June 4, 2008. The current United States Administration has so far informed Canada and the Russian Federation of S.J. Res. No. 17 of 2008, and has expressed its willingness to engage in exploratory talks on the issue. The United States also brought S.J. Res. No. 17 of 2008 to the attention of SAOs during their meeting in November 2007. During the discussion that followed “[t]here was strong support for building on and considering this issue within the context of existing mechanisms.”⁹⁵ This would seem to indicate that a considerable majority of the Arctic states does not want the Arctic Council to become directly involved in fishery management and conservation.

Pursuant to S.J. Res. No. 17 of 2008, the United States has also approached a number of relevant players, including the other Arctic Ocean coastal states, on their willingness to support a process which would culminate in a general statement or declaration on present and future Arctic fisheries. At the Session of the Committee on Fisheries (COFI) of the United Nations Food and Agriculture Organization (FAO) in March 2009, the United States plans to convene a side event to discuss this process. The United States may approach another Arctic Ocean coastal state, for instance Norway, to co-sponsor this initiative. At this side event, the United States may offer to host a high-level conference on Arctic fisheries in 2010, during which such a general statement or declaration could be adopted.⁹⁶ The European Commission’s Arctic Communication⁹⁷ would seem to be supportive of such an initiative.⁹⁸ Finally, it should be mentioned that on January 9, 2009, President Bush approved the long-awaited Arctic Region Policy⁹⁹ of the United States.

Perhaps the most significant development in regard to managing the Arctic Ocean comes from the part of the five Arctic Ocean coastal states. They started their cooperation with the meeting between senior officials in October 2007 in Norway. This was followed by the May 2008 meeting in Greenland, where the political

95. ARCTIC COUNCIL, MEETING OF SENIOR ARCTIC OFFICIALS: FINAL REPORT 12 (2007), available at <http://arctic-council.org/filearchive/Narvik%20-FINAL%20Report-%2023Apr08.doc>.

96. Information based on conversations between Erik J. Molenaar and a governmental official of the United States in December 2008 and January 2009. Presidential Policy Directive, *supra* note 22, § III(H)(6), does not refer to the possibility of such a process in the relevant implementation section.

97. *Communication from the Commission to the European Parliament and the Council: The European Union and the Arctic Region*, COM (2008) 763 (Nov. 20, 2008) [hereinafter *Arctic Region Communication*].

98. It is observed “[u]ntil a conservation and management regime is in place for the areas not yet covered by such a regime, no new fisheries should commence.” *Id.* at 8.

99. See Presidential Policy Directive, *supra* note 22.

representatives of these countries outlined an agenda for action. In their conference declaration (Ilulissat Declaration) they note that they “. . . see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean” but are willing to work within the framework of existing treaties and institutions, especially the law of the sea.¹⁰⁰ Yet, they did outline several areas for future cooperating including work through the IMO against ship-based pollution, strengthening their search and rescue capabilities, cooperation in sharing data on continental shelf, etc. Interestingly, they also affirmed their intent to continue in the Arctic Council, but also in other relevant forums, signaling that they indeed may pursue a new form of cooperation focusing on the Arctic Ocean.

This new incipient form of cooperation, if it really takes off, may over time challenge the Arctic Council, in that the other three members of the Council have not been invited to these two meetings. It may be that with the melting ice, the Arctic Ocean coastal state cooperation will grow stronger, given that there is a need to take stronger policy actions in higher stake policy areas (fisheries and shipping) than those that can be pursued in the Arctic Council with respect to the Arctic marine area, in particular the Arctic Ocean. This move by the five Arctic Ocean coastal states has already caused friction between them and the three Council members not invited to the Greenland meeting. In the Narvik SAO meeting, Iceland expressed concern over why the Arctic Council members were not invited.¹⁰¹ On the other hand, just before the Greenland meeting, Denmark briefed the SAOs that the meeting would not compete with the Arctic Council.¹⁰²

D. EU Arctic Policy Developments

In connection with its climate policy work, the EU also pro-

100. *Ilulissat Declaration*, *supra* note 7, at 2.

101. See ARCTIC COUNCIL, *supra* note 90, at 20 (providing that Iceland “expressed concerns that separate meetings of the five Arctic states, Denmark, Norway, US, Russia and Canada, on Arctic issues without the participation of the members of the Arctic Council, Sweden, Finland and Iceland, could create a new process that competes with the objectives of the Arctic Council. If issues of broad concern to all of the Arctic Council Member States, including the effect of climate change, shipping in the Arctic, etc. are to be discussed, Iceland requested that Denmark invite the other Arctic Council states to participate in the ministerial meeting. Permanent participants also requested to participate in the meeting. Denmark responded that the capacity of the venue may be an issue.”).

102. In the Svolvær SAO meeting (23-24.4.2008), it was provided that “Denmark updated on preparations for its meeting of the 5 Arctic coastal states. The meeting will focus on issues of concern for the 5 states and is intended to strengthen, and not compete with, other relevant fora. PPs inquired as to their role in the meeting and Denmark confirmed that the conference is intended for governments”. See 2008 ARCTIC COUNCIL SENIOR REPORT, *supra* note 80, at 15.

posed to revisit the governance framework applicable to the Arctic marine area.¹⁰³ The Climate Change and International Security paper identified one policy option to “[d]evelop an EU Arctic policy based on the evolving geo-strategy of the Arctic region, taking into account, [*inter alia*], access to resources and the opening of new trade routes.”¹⁰⁴ The EU is also developing its Arctic policy as part of its newly adopted integrated maritime policy wherein the Commission (DG Mare) promises to produce a report “on strategic issues relating to the Arctic Ocean” within the year 2008.¹⁰⁵

Most recently, the Commission issued its Arctic Communication.¹⁰⁶ In the Introduction to the thirteen page document, the Commission sets out EU interests and proposes action for EU Member States and institutions around three main policy objectives:

- Protecting and preserving the Arctic in unison with its population
- Promoting sustainable use of resources
- Contributing to enhanced Arctic multilateral governance¹⁰⁷

The Communication is structured along these three main policy objectives. One of the salient features within “[p]romoting sustainable use of resources” is the proposal to extend the spatial scope of the NEAFC Convention (see subsection IV.B.). As the section “[c]ontributing to enhanced Arctic multilateral governance” is of most interest for this paper, some more attention is devoted to it

103. HIGH REPRESENTATIVE & EUR. COMM'N TO EU. COUNCIL, CLIMATE CHANGE AND INTERNATIONAL SECURITY (2008), available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/reports/99387.pdf.

104. *Id.* at 11. See also *id.* at 8, which states, “[t]he Arctic: [t]he rapid melting of the polar ice caps, in particular, the Arctic, is opening up new waterways and international trade routes. In addition, the increased accessibility of the enormous hydrocarbon resources in the Arctic region is changing the geo-strategic dynamics of the region with potential consequences for international stability and European security interests. The resulting new strategic interests are illustrated by the recent planting of the Russian flag under the North Pole. There is an increasing need to address the growing debate over territorial claims and access to new trade routes by different countries which challenge Europe's ability to effectively secure its trade and resource interests in the region and may put pressure on its relations with key partners.”

105. The adopted integrated maritime policy provides that, “[a]ttention will also be given to the geopolitical implications of climate change. In this context, the Commission will present in 2008 a report on strategic issues relating to the Arctic Ocean”. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An Integrated Maritime Policy for the European Union*, at §4.4, COM (2007) 574 final (Oct. 10, 2007), available at <http://eur-lex.europa.eu/LexUriServ/LexUrierv.do?uri=COM:2007:0575:FIN:EN:PDF> [hereinafter *Integrated Maritime Policy*].

106. See *Arctic Region Communication*, *supra* note 97.

107. *Id.* at 3.

here. As a general comment, it should be noted that the section contains quite a few sentences that would raise the eyebrows of international lawyers and would have benefited from more accurate drafting. The section contains the following policy objectives:

- The EU should work to uphold the further development of a cooperative Arctic governance system based on the UNCLOS which would ensure:
 - security and stability
 - strict environmental management, including respect of the precautionary principle
 - sustainable use of resources as well as open and equitable access
- The full implementation of already existing obligations, rather than proposing new legal instruments should be advocated. This however should not preclude work on further developing some of the frameworks, adapting them to new conditions or Arctic specificities.
- The EU should promote broad dialogue and negotiated solutions and not support arrangements which exclude any of the Arctic EU Member States or Arctic EEA EFTA countries.
- Arctic considerations should be integrated into wider EU policies and negotiations.¹⁰⁸

Subsequently, a list of policy actions is offered. These include:

- Explore the possibility of establishing new, multi-sector frameworks for integrated ecosystem management. This could include the establishment of a network of marine protected areas, navigational measures and rules for ensuring the sustainable exploitation of minerals.
- Enhance input to the Arctic Council in accordance with the Community's role and potential. As a first step, the Commission will apply for permanent observer status in the Arctic Council.
-
- Explore all possibilities at international level to promote measures for protecting marine biodiversity in areas beyond national jurisdiction, including through the pursuit of an UNCLOS Implementing Agreement.

108. *Id.* at 10.

- Work towards the successful conclusion of international negotiations on marine protected areas on the high seas.¹⁰⁹

A few comments are offered here. First, the preference for implementation “rather than proposing new legal instruments” in the section on policy objectives does not seem to be very absolute in view of the support for the “possibility of establishing new, multi-sector frameworks for integrated ecosystem management.”¹¹⁰ The words “based on UNCLOS”, in the section on policy objectives, nevertheless, indicate that the option of an Implementing Agreement under the LOS Convention is no longer being pursued. At the end of the discussion of this option, in subsection IV.E., some attention is also devoted to an earlier EU proposal for an Implementing Agreement under the LOS Convention. It is not altogether clear, however, why such an initiative with a global scope should be listed in this Arctic Communication. The same comment also applies to the last policy action that is quoted above. While the precise meaning and intention of this policy action is not clear,¹¹¹ it seems to relate to a process at the global level that is intended to have output that applies throughout the globe and not just the Arctic. Or does it imply that the high seas in the Arctic Ocean should be designated as a marine protected area?

The European Parliament and individual Member States have also pressed for stronger positions in their Arctic policy. The European Parliament, in its resolution of October 9, 2008 on Arctic governance:

Suggests that the Commission should be prepared to pursue the opening of international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty, as supplemented by the Madrid Protocol signed in 1991, but respecting the fundamental difference represented by the populated nature of the Arctic and the consequent rights and needs of the peoples and nations of the Arctic region; believes, however, that as a minimum starting-point such a treaty could at least cover the unpopulated and unclaimed area at the centre of the

109. *Id.* at 11.

110. *Id.*

111. The sentences quoted in *infra* note 163 indicate that this policy action should have been merged with the policy action on the Implementation Agreement.

Arctic Ocean.¹¹²

Arguably, however, priority in reform lies with areas within national jurisdiction because the impacts of climate change and the ensuing human activities will occur there first. Limiting reform to areas beyond national jurisdiction would place coastal states in a more advantageous position, vis-à-vis other states, due to lower costs/higher profits or transboundary effects.

The individual EU Member States that have a status of observer to the Arctic Council, which form seven out of eight non-Arctic states observers to the Council, have also started to demand a better position in the Arctic Council, some even suggesting to apply for membership.¹¹³

It can be asked whether the Arctic Ocean coastal state cooperation can be seen as a threat from the perspective of the EU. The EU has participated in the ministers of the Council as an ad hoc observer, given that three of its member states (Finland, Sweden, and Denmark) are members of the Council. In addition, Iceland and Norway have to implement much of the EU regulation as parties to the EEA agreement. On the other hand, it is important to note that Greenland, Svalbard, and their adjacent maritime zones are not covered by the EU or the EEA Agreement, since Greenland chose to exit the then EEC in 1985, following a referendum, and Svalbard was excluded from the EEA agreement given that it is governed by the international 1920 Svalbard Treaty.¹¹⁴ The EU, thus, does not have any Arctic coastline, but it does possess significant fisheries and shipping interests in the opening new sea area, now studied under its climate policy and integrated maritime policy. If the Arctic Ocean coastal state cooperation continues in real, and Greenland self-rule from Denmark is increasing by the day, some even predicting independence in a foreseeable future,¹¹⁵ the

112. EUR. PARL. DOC. P6_TA-PROV(2008)0474 3 (2008).

113. It was reported in *Barents Observer*, e.g., that "Italian Foreign Minister Franco Frattini said his country wants to become member of the organisation because of 'the geopolitical and strategic importance of the Arctic region. . . .'. *Non-arctic Countries Want Membership in Arctic Council*, BARENTSOBSERVER.COM, Oct. 3, 2008, available at <http://www.barentsobserver.com/non-arctic-countries-want-membership-in-arctic-council.4516094-16174.html> [hereinafter *Non-Arctic Countries*].

114. Treaty Concerning the Archipelago of Spitsbergen, Feb. 9, 1920, 2 L.N.T.S. 8. A special Protocol was adopted as part of the EEA Agreement to the effect that Norway may decide whether to apply the EEA Agreement to Svalbard or not (Protocol 40). Norway decided to exclude the Islands. See also GEIR ULFSTEIN, *THE SVALBARD TREATY: FROM TERRA NULLIUS TO NORWEGIAN SOVEREIGNTY* 299 (1995).

115. See ArcticPortal.org, *From Remote Island to Self-Government - Greenland's Journey Towards Independence*, <http://arcticportal.org/features/2009/from-remote-island-to-self-government-greenlands-journey-towards-independence> (recent news release on Arctic Council's website) (last visited Dec. 18, 2009).

EU will find itself excluded from this cooperation altogether. Hence, it is one possible trajectory that the EU will continue to push for other kinds of governance arrangements, where it can play a more influential role than in the Arctic Council or in the Arctic Ocean coastal state cooperation. This would seem to prompt the EU to push for a more comprehensive Arctic legal governance arrangement, at least from the longer term perspective.

E. The Role of Canada

Canada has not been an advocate of formalizing regional cooperation among the Arctic Ocean coastal states, but instead has largely preferred bilateral cooperative arrangements.¹¹⁶ In 1983, Canada forged a marine environmental cooperation agreement with Denmark,¹¹⁷ which pledges the provision of information and consultation over proposed undertakings carrying a significant risk of transboundary pollution in the Nares Strait, Baffin Bay, and Davis Strait region. The agreement has also established joint marine contingency plans for pollution incidents from shipping or offshore hydrocarbon exploration/exploitation. In 1977, Canada agreed with the United States to establish a joint marine contingency plan for the Beaufort Sea and the plan has been periodically revised.¹¹⁸ Canada and the Russian Federation have entered into various agreements relating to environmental and economic cooperation.¹¹⁹

In the wake of the Ilulissat Declaration, it seems likely that

116. For a more detailed summary of Canada's cooperative arrangements relating to marine environmental protection and living marine resource management, see R. Siron, David L. VanderZwaag & H. Fast, *Ecosystem-based Ocean Management in the Canadian Arctic*, in BEST PRACTICES IN ECOSYSTEM-BASED OCEANS MANAGEMENT IN THE ARCTIC (Hakon Hoel ed., Norwegian Polar Inst., Report Series No. 129, Tromsø, Nor. 2009) (published under the auspices of the Arctic Council).

117. Agreement Between the Government of Canada and the Government of the Kingdom of Denmark for Cooperation Relating to the Marine Environment, Can.-Den., Aug. 26, 1983, 1983 Can. T.S. No. 19.

118. Exchange of Notes Between the Government of Canada and the Government of the United States of America Constituting an Agreement Concerning the Establishment of a Joint Marine Pollution Contingency Plan, July 28, 1977, 1977 Can. T.S. No. 25.

119. See Treaty on Concord and Cooperation between Canada and the Russian Federation, June 19, 1992, 1993 Can. T.S. No. 23; Canada-Russian Federation Agreement Concerning Environmental Cooperation, May 8, 1993, 1993 Can. T.S. No. 7; Agreement Between the Government of Canada and the Government of the Russian Federation on Cooperation in the Arctic and the North, June 19, 1992, 1992 Can. T.S. No. 18; Agreement Between the Government of Canada and the Government of the Russian Federation on Economic Cooperation, May 8, 1993, 1994 Can. T.S. No. 38; Memorandum of Understanding Between the Department of Indian Affairs and Northern Development (Canada) and the Ministry of Regional Development of the Russian Federation Concerning Cooperation on Aboriginal and Northern Development, Nov. 29, 2007, available at <http://www.ainiac.gc.ca/ap/pubs/mourus/mourus-eng.asp>.

Canada and the other four Arctic Ocean coastal states will, at least in the near term, avoid a comprehensive regional sea agreement¹²⁰ in favor of sectoral cooperative initiatives. For example, a regional agreement on search and rescue may become a priority in light of increased Arctic shipping.¹²¹ Working through the IMO to better protect the Arctic marine environment from vessel-source pollution has already been occurring through the revision process¹²² for the Guidelines for Ships Operating in Arctic Ice-covered Waters.¹²³ Further regional cooperation may follow in light of recommendations from the AMSA. Designating the Arctic Ocean, or parts thereof, as a special area, where stricter than normal pollution standards for oil, noxious liquid substances and garbage would apply, is a possible governance avenue.¹²⁴

On the domestic front, Canada has substantially shifted, under the leadership of Prime Minister Stephen Harper, towards a sovereignty and security agenda for the Arctic. To defend Canadian sovereignty over the Arctic, the Government has committed to constructing up to eight Polar Class Arctic offshore patrol ships able to patrol the length of the Northwest Passage during the summer navigable season and its approaches year round.¹²⁵ Establishing a Canadian Forces Arctic Training Centre in Resolute Bay, Nunavut and constructing a docking and refueling facility in Nanisivik, Nunavut to serve as a staging area for naval vessels and Canadian Coast Guard vessels operating in the North are further commitments.¹²⁶ In the 2008 Budget, the Government pledged \$720 mil-

120. For a recent call for such an agreement, see Louise Angélique de La Fayette, *Ocean Governance in the Arctic*, 23 INT'L J. MARINE & COASTAL L. 531 (2008).

121. *Iluissat Declaration*, *supra* note 7 (highlighting the need to further strengthen search and rescue capabilities and capacity around the Arctic Ocean). Ministers at the Sixth Ministerial Meeting of the Arctic Council on April 29, 2009, through the Tromsø Declaration, approved the establishment of a task force to negotiate by the next Ministerial meeting in 2011 an international instrument on search and rescue in the Arctic.

122. A correspondence group under the coordination of Canada was established to revise the Guidelines and the Guidelines have been extended to cover Antarctic waters as well. IMO, Mar. Safety Comm., *Report of the Maritime Safety Committee on its Eighty-Sixth Session*, Annex 18, MSC 86/26/Add.2 (2009).

123. IMO Doc. MSC/Circ. 1056, MEPC/Circ. 399 (Dec. 23, 2002).

124. The technical report on Governance of Arctic Marine Shipping, prepared for AMSA, suggested as one option designating the Arctic Ocean beyond national jurisdiction, as a special area. VANDERZWAAG, *supra* note 57, at Finding 11. The AMSA Report subsequently recommended that Arctic states explore the need for special area designations through the IMO. ARCTIC COUNCIL, ARCTIC MARINE SHIPPING ASSESSMENT 2009 REPORT 7 (2009).

125. Press Release, Office of Can. Prime Minister, Prime Minister Stephen Harper Announces New Arctic Offshore Patrol Ships: Canada's New Government to Move Forward With Deep Water Port in Arctic (July 9, 2007), available at <http://pm.gc.ca/eng/media.asp?category=1&id=1742>.

126. Press Release, Office of Can. Prime Minister, Prime Minister Announces Expansion of Canadian Forces Facilities and Operations in the Arctic (Aug. 10, 2007),

lion CDN for the construction of a new Polar Class icebreaker.¹²⁷ In August 2008, the Prime Minister announced the Government's intention to extend the coverage of the *Arctic Waters Pollution Prevention Act* beyond the present 100 nautical miles to 200 nautical miles and to require mandatory reporting from all ships destined for Arctic waters within the same 200 nautical miles zone.¹²⁸

Getting a firm grip on future directions for Canadian Arctic policy is not easy since the Government has largely favoured an incremental approach to policy formulation. In the October 2007 Throne Speech, Stephen Harper pledged to bring forward an integrated northern strategy having four pillars, namely, strengthening Canada's sovereignty, protecting the environment, promoting economic and social development, and improving and developing northern governance.¹²⁹ The speech also announced that Canada would build a world-class Arctic research station to serve the world in cutting edge issues, including environmental science and resource development.¹³⁰

The location and parameters of the proposed Arctic research station remain uncertain. Indian and Northern Affairs Canada prepared a *Visioning Workshop Report* on proposed scientific priorities for the station.¹³¹ The department then commissioned an international panel of experts to provide a critique of the document and further advise on future directions for Arctic research. In an October 2008 report, the panel suggested a change in terminology from "research station," implying "a physical structure—or cluster of structures" to a broader term, "Canadian Arctic Research Initiative."¹³² The panel concluded that such an initiative "will likely require a two-hub model with a logistical hub in a central, accessible location as well as a scientific hub in an attractive and scientifically interesting area."¹³³ The need for a "transparent decision-

available at <http://pm.gc.ca/eng/media.asp?category+1&id=1784>.

127. Press Release, Office of Can. Prime Minister, Northern Strategy – Backgrounder (Mar. 10, 2008), available at <http://pm.gc.ca/eng/media.asp?id=2016>.

128. Press Release, Office of Can. Prime Minister, PM Announces Government of Canada Will Extend Jurisdiction over Arctic Waters (Aug. 27 2008), available at <http://pm.gc.ca/eng/media.asp?category=1&id=2248>. An Act to amend the Arctic Waters Pollution Prevention Act, 2009 S.C., ch. 11 (Can.), receiving Royal Assent on 11 June 2009 and coming into force on August 1, 2009, subsequently formalized the extension.

129. Stephen Harper, Can. Prime Minister, Strong Leadership. A Better Canada. Address from the Throne to Open Second Session of the 37th Parliament of Canada (Oct. 16, 2007).

130. *Id.*

131. INT'L EXPERT PANEL ON SCI. PRIORITIES FOR CAN. ARCTIC RES. INITIATIVE, VISION FOR THE CANADIAN ARCTIC RESEARCH INITIATIVE: ASSESSING THE OPPORTUNITIES app. A (2008).

132. *Id.* at 4.

133. *Id.* at 16.

making process” by which possible models and sites are considered and chosen was emphasized.¹³⁴

Only in July 2009 did the Government of Canada release a Northern Strategy document,¹³⁵ but the document remains quite general and vague on future international policy directions for the Arctic. For example, the Northern Strategy states that Canada will continue to manage its maritime boundary and jurisdictional disputes with the United States and Denmark in a cooperative manner and may seek to resolve them in the future in accordance with international law.¹³⁶ While the Strategy emphasizes Canada’s commitment to ensuring the Arctic Council has the necessary strength, resources, and influence to respond effectively to emerging challenges, no detailed vision for the Council is provided.¹³⁷ One can expect Canada’s policy to evolve through further speeches and funding initiatives.¹³⁸

IV. FUTURE DIRECTIONS

A. Introduction

A range of options for strengthening ocean governance in the Arctic exist. “Soft law” approaches include, among others: harmonization of environmental and technical standards by coastal states in key sectors such as shipping, fishing, and hydrocarbon exploration/exploitation; development of integrated ocean planning initiatives for transboundary marine ecosystems, for example, the Barents, Beaufort, and Bering Seas;¹³⁹ and restructuring the Arctic Council, including by broadening participation.¹⁴⁰

Various “hard law” approaches have also been proposed, in-

134. *Id.* at 17. On February 20, 2009, the Minister of Indian Affairs and Northern Development, the Honourable Chuck Strahl, announced the undertaking of a feasibility study for the proposed Arctic research station with three locations in Nunavut being considered – Cambridge Bay, Pond Inlet, and Resolute. See Indian & N. Aff. Can., Feasibility Study for Canada’s new High Arctic Research Station, <http://www.ainc-inac.gc.ca/nth/st/fs-eng.asp?p1=1036190&p2=1064486> (last visited Jan. 22, 2010).

135. GOV’T OF CAN., CANADA’S NORTHERN STRATEGY: OUR NORTH, OUR HERITAGE, OUR FUTURE (2009), available at <http://www.northernstrategy.gc.ca/cns/cns-eng.asp>.

136. See *id.* at 7.

137. See *id.* at 15.

138. The government’s website, Gov’t of Can., Canada’s Northern Strategy, www.northernstrategy.gc.ca (last visited Jan. 22, 2010), will need to be consulted to track the various updates.

139. The PAME Working Group has already established a Large Marine Ecosystem Expert Group and PAME has committed to moving the ecosystem approach forward in three pilot areas, namely the West Bering, Barents and Beaufort Seas. See PROGRAM FOR PROT. OF ARCTIC MARINE ENV’T, DRAFT WORKING GROUP MEETING REPORT NO. I-2008 16-17 (2008).

140. See *Non-Arctic Countries*, *supra* note 113.

cluding, among others: negotiating a regional seas agreement with protocols;¹⁴¹ establishing a new regional ocean management organization for governing areas beyond national jurisdiction;¹⁴² transforming the Arctic Council into a treaty-based organization;¹⁴³ and forging sectoral agreements for particular priorities such as search and rescue and joint marine contingency planning.¹⁴⁴

Rather than canvassing the full spectrum of governance options, the remainder of the discussion focuses on a few select options, namely adjusting the spatial scope of the NEAFC Convention (subsection IV.B.), adjusting the spatial scope of the OSPAR Convention (subsection IV.C.), and an Implementing Agreement under the LOS Convention (subsection IV.D.). Finally, subsection IV.E. concludes by highlighting the arguments for and against a new, international, legally binding instrument for the governance and regulation of the Arctic Ocean.

B. Adjusting the Spatial Scope of the NEAFC Convention

One of the options for addressing gaps in the regime for the governance and regulation of marine capture fisheries is the development of one or more state-of-the-art RFMOs or Arrangements for species other than tuna, tuna-like species, and anadromous species. This may require adjustments in the competence of existing RFMOs or Arrangements, in particular in geographical terms. An obvious candidate for a spatial adjustment is the North-East Atlantic Fisheries Commission (NEAFC), established by the NEAFC Convention.¹⁴⁵ The five existing members of NEAFC are the European Community (EC), Denmark on behalf of the Faroe Islands and Greenland, Iceland, Norway, and the Russian Federation. Unlike the OSPAR Convention,¹⁴⁶ the NEAFC Convention does not explicitly mention the option of amending its spatial scope. On the other hand, there is also nothing in Article 19, or elsewhere in the NEAFC Convention that would preclude spatial adjustments, as such.

It should be noted that the NEAFC Convention's eastern boun-

141. See de La Fayette, *supra* note 120.

142. Rosemary Rayfuse, *Melting Moments: The Future of Polar Oceans Governance in a Warming World*, 16(2) RECIEL 196 (2007); Rosemary Rayfuse, *Protecting Marine Biodiversity in Polar Areas Beyond National Jurisdiction*, 17(1) RECIEL 3 (2008).

143. Timo Koivurova, *Alternatives for an Arctic Treaty - Evaluation and a New Proposal*, 17(1) RECIEL 14 (2008).

144. The Ilulissat Declaration has already emphasized that search and rescue cooperations are likely to become a high priority in light of increased Arctic support. See *Ilulissat Declaration*, *supra* note 7.

145. NEAFC, *supra* note 8, art. 3.

146. OSPAR Convention, *supra* note 9.

dary and the western boundary north of Greenland do not coincide with the two relevant boundaries of FAO Statistical Area No. 18, entitled "Arctic Sea." While the spatial scope of the NEAFC Convention is identical to the spatial scope of its 1959 predecessor,¹⁴⁷ the two relevant boundaries of FAO Statistical Area No. 18 already existed in 1970 and have not changed since then.¹⁴⁸ The spatial scope of the OSPAR Convention and its two predecessors, the Oslo Convention¹⁴⁹ and the Paris Convention,¹⁵⁰ is also identical to that of the NEAFC Convention (and its 1959 predecessor). Interestingly, the ICES Convention¹⁵¹ stipulates that the spatial mandate of the International Council for the Exploration of the Sea (ICES) is "the Atlantic Ocean and its adjacent seas"¹⁵² but the northern boundaries of the ICES Areas are identical to those of FAO Statistical Area No. 18.

The rationale for the northern boundaries of the predecessor to the NEAFC Convention is not evident. Perhaps they simply demarcated the most northerly range of distribution that commercially significant fish stocks could possibly have, in the most optimistic scenario, and then moved just a bit further north to be on the safe side. It should also be noted that until recently the exact location of the northern boundaries did not have practical relevance for NEAFC.

While spatial adjustments are thus possible, it is submitted that only relatively small geographical adjustments, expansions as well as shrinkages, do not seem problematic. Such adjustments could, for instance, follow maritime boundaries or ecosystem boundaries between different hydrographic regimes, submarine topography, and distributional ranges of certain target species or other species.¹⁵³ A well-known example of an international regulatory regime whose spatial scope was mainly determined by ecosystem boundaries is the CCAMLR Convention, by which the Commission for the Conservation of Antarctic Marine Living Resources

147. North-East Atlantic Fisheries Convention art. 1, Jan. 24, 1959, 486 U.N.T.S. 157 (1964).

148. See the historical FAO statistical charts at FAO Fisheries & Agric. Dep't, Fishing Area Maps, <ftp.fao.org/fi/maps/Default.htm> (last visited Dec. 18, 2009).

149. Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft art. 2, Feb. 15, 1972, 932 U.N.T.S. 3 (1974).

150. Convention for the Prevention of Marine Pollution from Land-Based Sources art. 2, June 4, 1974, 1546 U.N.T.S. 120 (1989).

151. Convention for the International Council for the Exploration of the Sea, Sept. 12 1964, 652 U.N.T.S. 237 (1968).

152. *Id.* art. 2.

153. See Lewis M. Alexander, *Large Marine Ecosystems as Global Management Units*, in *BIOMASS YIELDS AND GEOGRAPHY OF LARGE MARINE ECOSYSTEMS* 339, 339-42 (Kenneth Sherman & Lewis M. Alexander eds., 1989).

(CCAMLR) was established.¹⁵⁴ Even in that case, however, the approximation of the Antarctic Convergence agreed to during the negotiation of the CCAMLR Convention took account of political considerations, thereby causing a small diversion from pre-existing FAO Statistical Areas.¹⁵⁵

For the purpose of adjusting the spatial scope of the NEAFC Convention, account could perhaps be taken of the large marine ecosystems (LMEs) of the Arctic marine area developed by PAME.¹⁵⁶ A quick comparison of these LMEs with the current spatial scope of the NEAFC Convention might suggest that, for instance, the latter's spatial scope could be expanded by including all of LME No. 20, entitled "Barents Sea,"¹⁵⁷ and perhaps even LME No. 58, entitled "Kara Sea."¹⁵⁸ Another option would be to restrict the spatial scope of the NEAFC Convention by excluding the spatial scope of LME No. 64, entitled "Arctic Ocean."¹⁵⁹ The spatial scope of FAO Statistical Area No. 18 could then be adjusted accordingly.¹⁶⁰

A word of caution is warranted here, however. While the Arctic LMEs defined by PAME have taken account of "trophic relationships,"¹⁶¹ this is quite different from a criterion such as "usefulness for conservation and management of target species."¹⁶² And, even if the latter criterion were in fact used, the negotiations on the CCAMLR Convention illustrate that political considerations can override science-based criteria. Another political consideration would nevertheless attribute great weight to the LMEs defined by

154. It is of course acknowledged that regimes for enclosed or semi-enclosed seas are also mainly or exclusively determined by ecosystem boundaries.

155. See James N. Barnes, *The Emerging Convention on the Conservation of Antarctic Marine Living Resources: An Attempt to Meet the New Realities of Resource Exploitation in the Southern Ocean*, in *THE NEW NATIONALISM AND THE USE OF COMMON SPACES: ISSUES IN MARINE POLLUTION AND THE EXPLOITATION OF ANTARCTICA* 239, 261-62 (Jonathan I. Charney ed., 1982) (observing that at the insistence of Argentina, the boundary was drawn further away from Argentine territory in order to exclude the Drake Passage). FAO statistical charts were later modified accordingly. See FAO Fisheries & Agric. Dep't, *supra* note 148; see also F.M. AUBURN, *ANTARCTIC LAW AND POLITICS* 218, 292 (1982).

156. These can be found at <http://www.pame.is/ecosystem-approach>.

157. *Id.*

158. *Id.*

159. Large Marine Ecosystems of the Arctic Region and Linked Watersheds, <http://www.pame.is/ecosystem-approach> (last visited Dec. 18, 2009).

160. The historical FAO statistical charts, *supra* note 148, indicate that this is a common practice.

161. PROGRAM FOR PROT. OF ARCTIC MARINE ENV'T, WORKING GROUP MEETING REPORT No: I-2006 11 (2006).

162. Erik J. Molenaar, *Arctic Fisheries Conservation and Management: Initial Steps of Reform of the International Legal Framework* 26, available at http://doc.nprb.org/web/nprb/afs_2009/Molenaar%20Arctic%20Fisheries%20Conservation%20and%20Management%20final%20version%20to%20YPL.pdf (text submitted to Yearbook of Polar Law March 2009).

PAME. This would be the wish to pursue integrated, cross-sectoral, ecosystem based, ocean governance.

By contrast, large expansions, by which the NEAFC Convention Area would comprise the entire Arctic Ocean, as suggested in the EU Commission's Arctic Communication,¹⁶³ appear much more problematic. This is not so much caused by the interests of the new coastal states, namely Canada and the United States. In fact, Canada would not really be a new coastal state as it currently already has the status of Cooperating Non-Contracting Party (NCP) with NEAFC. In light of this status, Canada may even apply for full membership in the future. NEAFC's existing spatial competence in the Atlantic sector of the Arctic, as well as potential adjustments of this spatial competence, do not appear to have played a role in Canada's decision to apply for NCP status.¹⁶⁴ This does not exclude, however, that such considerations could not play a role in the future.¹⁶⁵ In case Canada would indeed apply for full membership, this would, at any rate, indicate its willingness to accept the substance of the NEAFC Convention, as modified by the 2004 and 2006 amendments.¹⁶⁶ It is less clear if the United States would have significant problems with the substance of the amended NEAFC Convention.

Perhaps more important, however, is whether or not Canada and the United States have fundamental objections to NEAFC's practices on the establishment and allocation of the total allowable catch (TAC) for straddling fish stocks, for the reason that these clearly give preferential treatment to coastal states. The initiative lies here with the coastal states, who first agree on a coastal state TAC while taking account of the scientific advice provided by ICES.¹⁶⁷ However, as the ICES advice relates to the entire stock, the coastal states effectively determine the high seas TAC as well.

163. See *Arctic Region Communication*, *supra* note 97, at 8 (observing that "[i]n principle, extending the mandate of existing management organisations such as NEAFC is preferable to creating new ones.").

164. Email correspondence between Erik J. Molenaar and L. Ridgeway, Dir. Gen., Int'l Policy & Integration, Fisheries & Oceans Can. (Nov. 2008) (on file with author).

165. See generally NEAFC Convention, *supra* note 8, art. 19 (stating that once Canada is a member of NEAFC it can participate in decision making on proposals to adjust the spatial scope of the NEAFC Convention; such decisions require a three-fourths majority).

166. See *id.* art. 19(4) (stating that if Canada would insist on acceding to the 'old' version of the NEAFC Convention, this would not attract the necessary majority pursuant to Art. 20(4) of the NEAFC Convention).

167. *E.g.*, Agreed Record of Conclusions of Fisheries Consultations Between Norway, the European Community and the Faroe Islands on the Management of Mackerel in the North-East Atlantic for 2008 [hereinafter 2008 Agreed Record], annex I, Nor.-Eur. Cmty.-Faroe Is., Oct. 30, 2007, available at http://www.fisk.fo/Admin/public/DWSDownload.aspx?File=%2FFiles%2FFiler%2FFisk%2FPDF%2F301007_Makrelsemjan_2008.pdf. See also North East Atlantic Fisheries Comm'n, Performance Review Panel Report 14, 17 (2006).

The coastal states also allocate the coastal state TAC between them, without specifying which part of each coastal state's allocation should be caught within or beyond areas under national jurisdiction.¹⁶⁸ NEAFC is then charged with determining and allocating the high seas TAC.¹⁶⁹ Even though room for maneuvering seems limited, it should not be forgotten that there are only five Members of NEAFC and three of these are regarded as coastal states, with respect to all three main straddling fish stocks regulated by NEAFC.¹⁷⁰

While Canada and the United States would, as coastal states, of course benefit from such preferential treatment as well, it is not excluded that they would object to such practices in order to be consistent with their user or non-user interests in other RFMOs and Arrangements. Much more problematic, however, are the user interests of states that are not coastal states with respect to the North-East Atlantic Ocean or the Arctic Ocean: *e.g.*, the other states that currently have the status of NCP with NEAFC (Belize, Cook Islands, Japan and New Zealand) and other states with large distant water fishing fleets, such as China and South Korea. Even though fishing opportunities in the high seas pocket of the central Arctic Ocean are likely to be very minimal in the near future, climate change may alter the Arctic marine area, both rapidly and fundamentally, in the medium term. Consequently, it cannot be ruled out that fishing opportunities in the high seas of the Arctic Ocean will be substantial in the medium and long terms. Not only is the size of the high seas pocket enormous, but the fisheries on the nose and tail of the Grand Banks in the Northwest Atlantic also aptly illustrate that just a small area of the high seas may be sufficient.

C. *Adjusting the Spatial Scope of the OSPAR Convention*

In case it is deemed desirable to pursue integrated, cross-sectoral, ecosystem-based ocean governance in the Arctic Ocean, it

168. See 2008 Agreed Record, *supra* note 167, annex I, para. 1.

169. With respect to mackerel, see, *e.g.*, NORTH EAST ATLANTIC FISHERIES COMM'N, PERFORMANCE REVIEW PANEL REPORT OF THE NORTH EAST ATLANTIC FISHERIES COMMISSION RECOMMENDATION ON MACKEREL, RECOMMENDATION I: 2008 (2008), available at http://neafc.org/measures/current_measures/1_mackerel-08.html (stating "[r]ecommendation by the North East Atlantic Fisheries Commission in accordance with Article 5 of the Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries at its Annual Meeting in November 2007 to adopt conservation and management measures for mackerel in the NEAFC Convention Area in 2008.").

170. These are blue whiting, herring and mackerel. The Russian Federation is not regarded as a coastal state for blue whiting and mackerel and Iceland is not regarded as a coastal state for mackerel.

is logical to examine the opportunities and limitations of adjusting the spatial scope of the OSPAR Convention for the reason that the Convention already covers the Atlantic sector of the Arctic Ocean. It is interesting to note that whereas the Arctic Communication refers explicitly to the option of adjusting the spatial scope of the NEAFC Convention, this option is not raised with regard to the OSPAR Convention. Quite surprisingly, the Arctic Communication, in fact, does not explicitly refer to the OSPAR Convention or the OSPAR Commission at all.

There are currently sixteen parties to the OSPAR Convention: two states that are located upstream on watercourses reaching the OSPAR Maritime Area (Luxemburg and Switzerland); the EC; and all coastal states bordering the North-East Atlantic, except the Russian Federation. The spatial adjustment of the OSPAR Convention is specifically mentioned in Article 27(2), which stipulates:

The Contracting Parties may unanimously invite States or regional economic integration organisations not referred to in Article 25 to accede to the Convention. In the case of such an accession, the definition of the maritime area shall, if necessary, be amended by a decision of the Commission adopted by unanimous vote of the Contracting Parties. Any such amendment shall enter into force after unanimous approval of all the Contracting Parties on the thirtieth day after the receipt of the last notification by the Depository Government.¹⁷¹

The states envisaged by this provision can, in view of the list in Article 25, be either coastal states whose maritime zones are adjacent or near to the OSPAR Maritime Area or states that have no such maritime zones (e.g. states whose vessels or nationals are engaged in activities in the OSPAR Maritime Area). While it is not clear which states of the former category the negotiators had in mind when negotiating this provision, Canada and the United States would seem to be among them. The Russian Federation does not need an invitation to accede, as Article 27(1) gives it, as a coastal state to the OSPAR Maritime Area, a right to do so. If desired, an extension of the OSPAR Maritime Area would, in such a case, probably have to follow the amendment procedure laid down in Article 15.

As pointed out earlier, the northern boundaries of the OSPAR

171. OSPAR Convention, *supra* note 9, art. 27(2).

Convention are identical to those of its predecessors, the Oslo Convention and the Paris Convention, which were in their turn modeled exactly on those of the 1959 predecessor to the NEAFC Convention. It was also noted that the rationale for these northern boundaries is not evident.

Similar to the discussion in section III, a distinction can be made between relatively small adjustments and a large adjustment by which the entire Arctic Ocean would be comprised within the OSPAR Maritime Area. Small adjustments, expansions as well as contractions, may for instance be warranted due to changes in the spatial scope of the NEAFC Convention or the creation of an Arctic marine environmental protection regime immediately adjacent to the OSPAR Maritime Area. In view of the discussion above, it is clear that nothing in the OSPAR Convention would preclude such spatial adjustments, as such.

Similarly, nothing in the OSPAR Convention would preclude a large adjustment by which the entire Arctic Ocean would be comprised within the OSPAR Maritime Area, as such. This may, for instance, be warranted if a similar adjustment is made in the spatial scope of the NEAFC Convention and a 100% overlap is desirable. This option would have the considerable advantage of subjecting the entire Arctic Ocean to the OSPAR Commission's competence on cross-sectoral issues and sectoral activities that are not yet subject to the competence of other regional and global bodies. It should also be remembered, however, that the shortcomings of the OSPAR Convention and the OSPAR Commission would be transposed to the Arctic Ocean as well.

More important seem to be the preparedness of Canada, the Russian Federation and the United States to become bound to the OSPAR Convention and the many legally binding decisions, non-legally binding recommendations and other agreements adopted by the OSPAR Commission. Would they be prepared to accept this "acquis" without significant amendments? Perhaps this is one of the main reasons why the Russian Federation is currently not a party to the OSPAR Convention, even though it is a coastal state to the OSPAR Maritime Area. It is also noteworthy that neither the Russian Federation nor the Soviet Union were parties to the Oslo and Paris Conventions.

D. Implementing Agreement under the LOS Convention

It has been suggested that in case a legally binding instrument for the marine Arctic is pursued, one option would be to link it directly to the LOS Convention by means of an Implementing

Agreement, under the LOS Convention.¹⁷² It must be acknowledged that no rule of international law, including the LOS Convention, would preclude this *per se*. Even though the LOS Convention contains various amendment procedures,¹⁷³ at two earlier instances the United Nations General Assembly (UNGA) expressed the international community's preference for an Implementing Agreement instead. These are the Part XI Deep-Sea Mining Agreement and the Fish Stocks Agreement. Pragmatic and strategic considerations may therefore be of overriding importance. This is particularly evident in the case of the Part XI Deep-Sea Mining Agreement, which clearly modifies Part XI of the LOS Convention. Thus, while there is no precedent for an Implementing Agreement with a regional scope,¹⁷⁴ no rule of international law, including the LOS Convention, would in principle prevent the international community from pursuing such an option if the required majority so desires.

This notwithstanding, there are various reasons why an Implementing Agreement under the LOS Convention is not a realistic option. Most importantly, the direct link with the LOS Convention would imply that its negotiation process would fall under the UNGA. Not only would the UNGA decide on the overall objective, scope, and main elements of an Implementing Agreement but it would also determine, implicitly or explicitly, the rules of procedure for its negotiation. As the LOS Convention is a global instrument and the UNGA a global body, it would be difficult to conceive of a negotiation process open to a select group of states instead of all members of the United Nations (UN). However, it is almost unthinkable that the five Arctic Ocean coastal states would support and participate in a negotiation process where they could potentially be confronted by 180-odd states with opposing views

172. This has, for instance, been suggested by the Executive Director of the European Environment Agency (EEA). See Jaqueline McGlade, Executive Dir., Eur. Env't Agency, The Arctic Environment - Why Europe Should Care, Speech Delivered at the Arctic Frontiers Conference, Tromsø (Jan. 23, 2007), available at <http://www.eea.europa.eu/pressroom/speeches/23-01-2007>. The actual wording used in this speech is "Polar Ocean protocol." *Id.* This wording is confusing because it can be interpreted as applying to both the Arctic Ocean and the Southern Ocean. Note that the words "based on UNCLOS" on page 10 of the European Commission's Arctic Communication, *supra* note 97, indicate that the option of an Implementation Agreement under the LOS Convention is no longer being pursued.

173. See LOS Convention, *supra* note 10, arts. 312-316.

174. None of the existing regional marine environmental protection regimes are formally linked to the LOS Convention. While the LOS Convention contains qualified obligations on regional cooperation, it does not provide guidance on the outcome of such cooperation. Likewise, the constituent instruments of RFMOs and Arrangements are not(?) formally linked to the LOS Convention or the Fish Stocks Agreement, even though the Fish Stocks Agreement provides considerable guidance as regards the functions and operation of RFMOs and Arrangements and the substance of their constituent instruments.

and interests.

Such lack of support by the Arctic Ocean coastal states would be obvious if the envisaged Implementing Agreement would apply to the entire Arctic Ocean, including areas under their national jurisdiction. However, even if the instrument would exclusively apply to areas beyond national jurisdiction (high seas and the Area), it is easy to understand that the Arctic Ocean coastal states would fear that the UNGA would not take adequate account of their sovereignty, sovereign rights, and jurisdiction as coastal states when determining substantive and procedural aspects of the negotiation process. States with a claim or the basis for a claim to the Antarctic continent had, to some extent, similar concerns when they were confronted by the Malaysian-led initiative to bring the governance of Antarctica under the scope of the UN.¹⁷⁵ In light of these considerations, it is not surprising that there is no precedent for an Implementing Agreement to the LOS Convention with a regional scope.

Such an instrument might also serve a purpose that is essentially similar to the guidance provided by the Fish Stocks Agreement on the functions and operation of RFMOs and Arrangements and the substance of their constituent instruments. This global Implementing Agreement could then provide guidance on the substance of the regional Arctic instrument and the functions and operation of the bodies established by it.

E. Arguments For and Against a New International Legally Binding Instrument for the Governance and Regulation of the Arctic Ocean

Emphasizing the many benefits that one or more binding agreements might offer, various authors and organizations have advocated for the negotiation of a hard law regime for the Arctic. Suggested benefits include: encouraging greater political and bureaucratic commitments; establishing firmer institutional and financial foundations; transcending the vagaries of changing governmental viewpoints and shifting personnel; giving 'legal teeth' to environmental principles and standards; raising the public profile of regional challenges and cooperation needs; and providing for dispute resolution mechanisms.

However, various reasons have been put forward against—or at

175. See G.A. Res. 38/77, para. 1, U.N. DOC. A/RES/38/77 (Dec. 15, 1983); Christopher C. Joyner, *Antarctica and the Indian Ocean States: The Interplay of Law, Interests, and Geopolitics*, 21 OCEAN DEV. & INT'L L. 41, 48-49 (1990).

least questioning—a treaty-based approach. Reasons given include the following considerations: difficulty in getting consensus on the need for an agreement; lengthy and costly preparatory and negotiation processes involved; risk of legalizing lowest common denominator standards; stifling political and bureaucratic flexibilities; and contributing another layer of complexity to the already fragmented array of multilateral environmental agreements. The lack of implementation of existing agreements relevant to the Arctic and lack of assurance that all Arctic states will readily accept newly negotiated obligations are additional reasons.¹⁷⁶

A few things are certain about the future of ocean governance in the Arctic. The quest for effective transboundary cooperation is not over and voices within the EU and Canada are bound to keep the Arctic treaty debate alive.

176. Timo Koivurova & David L. VanderZwaag, *The Arctic Council at 10 Years: Retrospect and Prospects*, 40 UNIV. BRIT. COLUM. L. REV. 121, 178-80 (2007) (footnotes omitted).

