THE ARCTIC COUNCIL AT 10 YEARS: RETROSPECT AND PROSPECTS

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I. INTRODUCTION

Established pursuant to a declaration signed by representatives from the eight Arctic states on 19 September 1996,[1] the Arctic Council ("Council") is a decade old. Such a milestone offers an opportunity to look back at what has been achieved by the Council in carrying out its mandate as a forum for facilitating regional cooperation in addressing both environmental protection and sustainable development challenges in the North. The 10-year mark also provides a window to look ahead at looming environmental and developmental pressures and to assess whether the Council should be strengthened to meet these pressures, perhaps by being given a firm legal foundation.

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[1] See *Joint Communiqué and Declaration on the Establishment of the Arctic Council* (1996) 35 I.L.M. 1382 [*Arctic Council Declaration*].

An increasing number of articles are warning of accelerating thinning and losses of ice in the Arctic.[2] Partly as a result of reduced sea ice, the region seems to be on the verge of a new development era. Increased accessibility will likely result in an expansion of oil and gas, minerals, and fisheries resource extraction, as well as an expansion of shipping and tourism operations. All of these commercial activities are accompanied by significant environmental, social, and cultural issues.

This article provides a 10th anniversary assessment of the Arctic Council's work, regional ocean governance arrangements, and challenges facing the Arctic Council through a two-part analysis. First, a retrospective look highlights the two phases of region-wide cooperation in the Arctic: the *Arctic Environmental Protection Strategy*'s creation and development, followed by the founding of the Arctic Council and the implementation of its programs and projects. Second, a prospective view is provided, in which two future realities facing the Arctic Council are discussed: 'soft sleddings'[3] and 'hard' questions. Soft sleddings are likely to continue at least in the near term, with the Council continuing its track as a discussional and catalytic forum rather than a regulatory or decision-making entity. Hard questions will increasingly face the Council and its constituents — questions regarding whether a treaty framework is needed to strengthen regional cooperation and, if so, a determination of the type of treaty arrangements and provisions that are most appropriate for the Arctic.

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[2] See e.g. Richard A. Kerr, "Climate Change: A Worrying Trend of Less Ice, Higher Seas" *Science* 311:5768 (24 March 2006) 1698; Ian Joughin, "Climate Change: Greenland Rumbles Louder as Glaciers Accelerate" *Science* 311:5768 (24 March 2006) 1719; Robert Bindschadler, "Climate Change: Hitting the Ice Sheets Where It Hurts" *Science* 311:5768 (24 March 2006) 1720; Sergey A. Zimov, Edward A.G. Schuur & F. Stuart Chappin III, "Climate Change: Permafrost and the Global Carbon Budget" *Science* 312:5780 (16 June 2006) 1612; Eric Rignot & Parnir Kanaguratnam, "Changes in the Velocity Structure of the Greenland Ice Sheet" *Science* 311:5763 (17 February 2006) 986; Jonathan A. Foley, "Tipping Points in the Tundra" *Science* 310:5748 (28 October 2005) 627.

[3] See Part III.A, below, for more on soft sleddings.

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II. RETROSPECT

The initial plan for Arctic-wide cooperation was launched in 1987 in Murmansk by the Soviet Union's then-Secretary-General Michail Gorbachev. The Soviet leader proposed that the Arctic states initiate cooperation in various fields, one being protection of the Arctic environment.[4] This idea was furthered when Finland convened a conference of the eight Arctic states—Canada, Denmark, Finland, Iceland, Norway, Sweden, the Soviet Union, and the United States—in Rovaniemi in 1989 to discuss the protection of the Arctic environment. After two additional preparatory meetings in Yellowknife, Canada and Kiruna, Sweden, the eight Arctic states, as well as other actors, met again in Rovaniemi in 1991 to sign the *Rovaniemi Declaration*,[5] by which they adopted the *Arctic Environmental Protection Strategy (AEPS)*,[6] signalling the commencement of the first phase of the Arctic cooperation ("*AEPS* cooperation").[7] The second phase began with the signing of the *Arctic Council Declaration* and continues to this day. Each of the two phases is discussed below in the order in which events unfolded and the work progressed.

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[4] Gorbachev proposed that: a nuclear weapon-free zone be declared in northern Europe; naval activity be limited in the seas adjacent to northern Europe; peaceful cooperation be the basis for utilizing the resources of the Arctic; scientific study of the Arctic be given great significance for all mankind; the countries of the North cooperate in matters of environmental protection; and the Northern Sea Route be opened by the Soviet Union to ice-breaker escorted passage. For an analysis, see Donald R. Rothwell, *The Polar Regions and the Development of International Law* (Cambridge, University Press, 1996) at 229-31.

[5] *The Declaration on the Protection of the Arctic Environment 1991* (14 January 1991) online: Arctic Council <http://www.arctic-council.org> [*Rovaniemi Declaration*].

[6] *Arctic Environmental Protection Strategy*, Canada, Denmark, Finland, Iceland, Norway, Sweden, Union of Soviet Socialist Republics, and United States, 14 January 1991, 30 I.L.M. 1624, s. 2.1(v) at 1631 [*AEPS*].

[7] On the negotiation process see Rothwell, *supra* note 4 at 229-42.

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A. THE FIRST PHASE OF THE ARCTIC COOPERATION PROCESS: *AEPS* COOPERATION

The *AEPS* contained very ambitious objectives, such as "[t]o identify, reduce, and, as a final goal, eliminate pollution."[8] The guiding principles were also laid down in very ambitious terms.[9] Six pollution problems were chosen as priority areas: persistent organic contaminants,[10] oil pollution,[11] heavy metals,[12] noise,[13] radioactivity,[14] and acidification.[15] After briefly describing each of the six problems, the *AEPS* went on in section 4 to review the international mechanisms—international treaties and other normative instruments—for the protection of the Arctic environment in regard to each problem, after which section 5 took up the *AEPS* action plans to combat each of the identified problems.

The *AEPS* also contained obligations requiring the Arctic states to establish working groups specialized in certain aspects of pollution problems in the region. It laid the basis for establishing the Arctic Monitoring and Assessment Programme (AMAP),[16] Protection of the Arctic Marine Environment (PAME),[17] Emergency Prevention, Preparedness and Response (EPPR),[18] and Conservation of Arctic Flora and Fauna (CAFF)[19] Working Groups. Each Arctic state was required to establish a national agency responsible for coordinating the Arctic cooperation and to then notify other states once this had been done.[20] The *AEPS*

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[8] *AEPS*, *supra* note 6, s. 2.1(v) at 1631.

[9] *Ibid.*, s.2(.2) at 1631-33.

[10] *Ibid.*, ss. 3.1 at 1634-36, 4.1 at 1644, 5.1 at 1650-51.

[11] *Ibid.*, ss. 3.2 at 1636-38, 4.2 at 1645, 5.2 at 1651-52.

[12] *Ibid.*, ss. 3.3 at 1638-1640, 4.3 at 1646, 5.3 at 1652-53.

[13] *Ibid.*, ss. 3.4 at 1640-41, 4.4 at 1647, 5.4 at 1653.

[14] *Ibid.*, ss. 3.5 at 1641-42, 4.5 at 1647-48, 5.5 at 1653-54.

[15] *Ibid.*, ss. 3.6 at 1642-43, 4.6 at 1648-49, 5.6 at 1654-55.

[16] *Ibid.*, s. 6 at 1655-59.

[17] *Ibid.*, s. 7 at 1659-60.

[18] *Ibid.*, s. 8 at 1660-63.

[19] *Ibid.*, s. 9 at 1663-68.

[20] *Ibid.*, s. 9.1(vii) at 1667 reads: "By October 1991 each Country will identify to the others its national agency designated to coordinate the cooperation envisaged by this section."

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emphasized the national conditions under which cooperation was to continue:

> The countries agree that the terms and conditions of the cooperation and exchanges provided for in this section will be subject to the laws and regulations of the countries ... Each country will make its best efforts to provide resources adequate to carry out its responsibilities under this section. It is understood that the ability of each country to carry out activities is subject to the availability of funds, and that countries will seek to ensure long-term funding for necessary projects.[21]

The Arctic states also agreed "to hold regular meetings" to assess the progress made and to "coordinate actions [that will] implement and further develop the Arctic Environmental Protection Strategy".[22] Even though the Senior Arctic Affairs Officials (SAAOs) were not explicitly mentioned in the *AEPS*, this form of contact developed informally after the 1991 Rovaniemi Ministerial Meeting and was recognized by the 1993 Nuuk Ministerial Meeting. The addition of SAAOs gave more permanency to the *AEPS* cooperation structure through the introduction of designated high-level officials responsible for monitoring and providing guidance in the implementation of the *AEPS*. Paragraph 5 of section 10 of the *AEPS* enumerated the terms of reference of *AEPS* cooperation, which provided the cooperation process with a broad mandate for protecting the Arctic environment.[23] Paragraphs 3 and 4 established the rules for the participation of non-Arctic states: the three international organizations of the Arctic indigenous peoples were accorded the legal status of observers,[24] and the criteria for observer status in

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[21] *Ibid.*, s. 9.1(viii)-(ix) at 1667-68.

[22] *Ibid.*, ss. 10, para 1 at 1668, 10 (i) at 1668.

[23] *Ibid.*, s. 10, para 5 at 1668-69: "The Meetings on the Arctic Environment shall serve to: i) identify and coordinate actions to implement and further develop the Arctic Environmental Protection Strategy; ii) initiate cooperation in new fields relevant to the environmental protection of the Arctic; iii) make necessary recommendations in order to protect the Arctic environment; iv) improve existing environmental regimes relevant to the Arctic; and v) assess and report on progress on actions agreed upon".

[24] *Ibid.*, s. 10, para. 4 at 1668: "In order to facilitate the participation of Arctic indigenous peoples the following organizations will be invited as

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the *AEPS* cooperation was outlined.[25] The decision-making procedure was not made explicit in the *AEPS*; the parties only agreed on the next meeting's time and place.

The first ministerial-level follow-up meeting to the *AEPS* cooperation's creation was held in 1993 in Nuuk, Greenland, where the *Declaration on Environment and Development*[26] was signed by representatives of the eight Arctic states. The *AEPS* institutional structure was extended somewhat at the 1993 Nuuk Ministerial Meeting. The working groups' mandates were elaborated and a new Task Force on Sustainable Development and Utilization (TFSDU) was established.[27] The ministers requested that the SAAOs convene at least once a year.[28] Importantly, the Danish government promised to establish a secretariat to enhance the participation of the representatives of the organizations of Arctic indigenous peoples to the work of the *AEPS* cooperation.

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observers: the Inuit Circumpolar Conference, the Nordic Saami Council and the U.S.S.R. Association of Small Peoples of the North".

[25] *Ibid.*, s. 10, para. 3 at 1668: "The decision to invite observers should be based on a pragmatic and functional evaluation of their involvement in and contribution to Arctic environmental questions".

[26] *The Nuuk Declaration on Environment and Development in the Arctic*, 16 September 1993, online: Arctic Council <http://www.arctic-council.org/> [*Nuuk Declaration*]. The Preamble of the *Nuuk Declaration* acknowledges the Rio Conference as follows: "Recognizing the importance of applying the results of the United Nations Conference on Environment and Development to the Arctic region." For information on the Rio Conference and links to related documents, see IISD, "Five Years After Rio: What was the Earth Summit," online: International Institute for Sustainable Development (IISD) <http://www.iisd.org/rio+5/earthsummit.htm> [Rio Conference]. Two documents from the Rio Conference that are often referred to are the *Rio Declaration* and *Agenda 21*. *Rio Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/6/Rev.1, (1992), 31 I.L.M. 874 [*Rio Declaration*]; *Agenda 21*, Report of the United Nations Conference on Environment and Development, online: United Nations Department of Economic and Social Affairs, Sustainable Development Department <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>.

[27] *Nuuk Declaration*, *supra* note 26 at art. 2. The idea of establishing the TFSDU was to reaffirm the commitment of ministers to sustainable development and sustainable use of renewable resources.

[28] *The AEPS Nuuk Report*, 16 September 1993, final para, online: Arctic Council <http://www.arctic-council.org/> [*Nuuk Report*].

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This secretariat eventually became the Arctic Council's Indigenous Peoples' Secretariat (IPS).[29]

The 1993 Nuuk Ministerial Meeting was clearly influenced by the 1992 Rio Conference on Environment and Development,[30] as evidenced by the ambitious normative guidance outlined in the *Nuuk Declaration*. Transparency of environmental information and participation of both the public and indigenous peoples in environmental decision-making were supported.[31] The Arctic states promoted a precautionary approach to development with environmental implications, including the use of prior assessments and systematic observation of such development's impacts. The Arctic states also supported internationally-transparent impact assessment procedures. This guidance encouraged implementation of the provisions of the *Espoo Convention,*[32] which had been concluded in 1991 under the auspices of the United Nations Economic Commission for Europe (UNECE).[33] The provisions underlined the importance of "prior and timely notification and consultation regarding activities that may have significant adverse transboundary environmental effects".[34] Finally, the states agreed to "undertake to consider the development of regional instruments concerned with the protection of the Arctic environment".[35]

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[29] IPS, online: Arctic Council Indigenous Peoples' Secretariat <http://www.arcticpeoples. org/>. The *Nuuk Report* includes the statement made by the Minister for the Environment of Denmark in its Annex: "The Danish Government and the Greenland Home Rule Government have noticed the recommendations of the indigenous peoples' organizations regarding a special program area within the *AEPS* to address all issues related to the participation of indigenous peoples...Government of Denmark, in cooperation with the Greenland Home Rule Government, is pleased to announce that we can support this recommendation not only verbally, but also by offering to establish a small Secretariat for this purpose in Denmark." Svend Auken, "Participation of Indigenous Peoples", *Nuuk Report*, *ibid.*, Annex.

[30] See *supra* note 26 and accompanying text.

[31] *Nuuk Declaration*, *supra* note 26, arts. 6-7.

[32] UNECE, *Convention on Environmental Impact Assessment in a Transboundary Context*, 25 February 1991, 30 I.L.M. 800 [*Espoo Convention*].

[33] *Nuuk Declaration*, *supra* note 26, art. 8.

[34] *Ibid.*, art. 9.

[35] *Ibid.*, art. 11.

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The second follow-up meeting of the *AEPS* cooperation took place in Inuvik, Canada in March 1996, where the *Inuvik Declaration* was adopted.[36] At the time, negotiations to establish the Arctic Council were already underway,[37] and the SAAOs were given instructions to prepare for the establishment of the Arctic Council.[38] The *Inuvik Declaration* concentrated on setting priorities for the work of *AEPS* cooperation organs and envisaged that the TFSDU would become a working group — a development that was abandoned with the establishment of the Arctic Council.[39]

B. THE SECOND PHASE OF THE ARCTIC COOPERATION PROCESS: THE ARCTIC COUNCIL

The Arctic Council was established in September 1996 in Ottawa, Canada. The Arctic states signed the *Arctic Council Declaration*[40] and issued a joint communiqué to explain the newly created body.[41] However, the integration of the *AEPS* cooperation process

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[36] *The Inuvik Declaration on Environmental Protection and Sustainable Development in the Arctic*, 21 March 1996, online: Arctic Council <http://www.arctic-council.org/> [*Inuvik Declaration*].

[37] See e.g. the *Inuvik Declaration*'s statement that "[w]e are fully committed to the earliest possible establishment of the Arctic Council". *Ibid.*, art.15.

[38] The *Inuvik Declaration* states: "The SAAOs, with the assistance of the Permanent Participants, will also undertake to develop revised Terms of Reference for SDU [Task Force on Sustainable Development and Utilization] and an initial workplan for the Arctic Council's sustainable development work, to be presented for discussion to the Arctic Council Senior Arctic Officials." *Ibid.*, art.6. Hence, the plans for the Arctic Council were clearly well advanced since the terms "Permanent Participant" and "Senior Arctic Officials" are used in the documents establishing the Arctic Council.

[39] The representatives at the Inuvik meeting agreed to establish a Sustainable Development and Utilization (SDU) Working Group (*Ibid.*, art. 5). The priorities for the SDU were: "...to continue to cooperate with the current terms of reference of the Task Force on SDU and with specific direction from the SAAOs, pending the expeditious creation of the Arctic Council." (*Ibid.*, art. 6).

[40] *Arctic Council Declaration*, *supra* note 1.

[41] *Ibid.* On the history of the negotiation process, see David Scrivener, "Arctic Environmental Cooperation in Transition" (1999) 35 (192) Polar Record 51-58.

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into the Arctic Council did not take place immediately. The final *AEPS* Ministerial Meeting took place in Alta, Norway in June 1997, where the *Alta Declaration* was adopted.[42]

The establishment of the Arctic Council amended the forms of Arctic cooperation previously based on the *AEPS*. The *Arctic Council Declaration* substantially extended the *AEPS* cooperation's terms of reference, which had been focused mainly on protecting the Arctic environment. The Arctic Council's mandate was defined broadly to cover "common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic".[43] In principle, this yielded a very large mandate for the Council since "common issues" could include almost any international policy issue, except for "matters related to military security".[44] There were two pillars supporting the Council's mandate: protecting the environment and sustainable development. Environmental cooperation was now considered to be the principal focus, with the four working groups of *AEPS* cooperation continuing as such under the umbrella of the Arctic Council.[45] A new working group called the Sustainable Development Working Group (SDWG) was established to address the mandate's other focus of cooperation on sustainable development.[46]

The *Arctic Council Declaration* amended and elaborated the rules of participation. It provided for three categories of participants: Members, Permanent Participants and Observers. In Section 2, "Member" was defined to include only the eight Arctic

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[42] *The Alta Declaration on the Arctic Environmental Protection Strategy*, 13 June 1997, online: Arctic Council <http://www.arctic-council.org/> [*Alta Declaration*]. The SAAOs reported to the Ministers: "This is the final SAAO Report to Ministers before the integration of *AEPS* activities into the newly established Arctic Council, whose first meeting will take place in the fall of 1998". *SAAO Report to the Ministers of the Fourth Ministerial Conference on Environmental Protection and Sustainable Use of Resources in the Arctic Environment*, 1997, Alta, Norway at para. 4.

[43] *Arctic Council Declaration*, *supra* note 1, art. 1(a).

[44] *Ibid.*, art. 1, para a, accompanying footnote.

[45] *Ibid.*, art.. 1, para b.

[46] *Ibid.*, art. 1, para c reads: "The Arctic Council is established as a high level forum to ... c. adopt terms of reference for, and oversee and coordinate a sustainable development program."

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states, and the criteria for Observers were laid down.[47] The three organizations that represented the Arctic indigenous peoples as observers in the *AEPS* were made Permanent Participants.[48] In addition, the *Arctic Council Declaration* specified the criteria necessary to be granted Permanent Participant status and the procedure used to decide that status.[49] The Indigenous Peoples' Secretariat, established under the *AEPS*, was to continue under the framework of the Arctic Council.[50]

The decision-making procedure developed in *AEPS* cooperation was made explicit in the *Arctic Council Declaration*. Section 7 provides: "Decisions of the Arctic Council are to be by consensus of the Members", which was to be undertaken only after "full consultation"[51] with the Permanent Participants. Although Permanent Participants do not have formal decision-making power, they are in a position to exert much practical influence on the decision-making of the Council.

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[47] *Ibid.*, art. 3. This part of the *Arctic Council Declaration* reads: "Observer status in the Arctic Council is open to: a. Non-arctic states; b. inter-governmental and inter-parliamentary organizations, global and regional; and c. non-governmental organizations that the Council determines can contribute to its work".

[48] *Ibid.* Article 2 of the *Arctic Council Declaration* enumerates the following as Permanent Participants: "The Inuit Circumpolar Conference, the Saami Council, and the Association of Indigenous Minorities of the North, Siberia, and the Far East of the Russian Federation." As a result of the succession of Russia to the U.S.S.R, the former U.S.S.R.'s Association of Small Peoples of the North was changed to the Association of Indigenous Minorities of the North, Siberia, and the Far East of the Russian Federation, which has since changed and is now named the Russian Association of Indigenous Peoples of the North.

[49] *Ibid.*, art. 2, para. 2 reads: "Permanent participation is equally open to other Arctic organizations of indigenous peoples with majority Arctic indigenous constituency, representing: a. a single indigenous people resident in more than one Arctic State; or b. more than one Arctic indigenous people resident in a single Arctic state." Decisions by the Arctic states on whether this criterion is fulfilled must be unanimous (*Ibid.*, art. 7). Article 2 further states: "the number of Permanent Participants should at any time be less than the number of members."

[50] *Ibid.*, art. 8.

[51] *Ibid.*, art. 2. This is significant because organizations of indigenous peoples are often not given a voice in the decision-making procedures of international bodies.

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The first meeting of the Arctic Council took place in Iqaluit, Canada in September 1998 wherein a declaration was also adopted.[52] As the first meeting of the Arctic Council, the practical aspects of the functioning of the Council figured prominently. For example, the *Arctic Council Rules of Procedure*[53] and *Arctic Council Terms of Reference for a Sustainable Development Program*[54] were adopted, as required by the *Arctic Council Declaration*.[55] The *Rules of Procedure* provide guidance on how the Arctic Council and its cooperative bodies are to work together in practice. Ministerial meetings are held biennially and meetings of Senior Arctic Officials (SAOs)[56] are convened between these meetings,[57] and the details of how to organize these meetings are

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[52] *The First Ministerial Meeting of the Arctic Council Iqaluit, Canada,* 17-18 September 1998, art. 23, online: Arctic Council <http://www.arctic-council.org/> [*Iqaluit Declaration*].

[53] *The Arctic Council Rules of Procedure as adopted by the Arctic Council at the First Arctic Council Ministerial Meeting, 17-18 September 1998*, (Iqaluit, Canada), arts. 3-25, online: Arctic Council <http://www.arctic-council.org/> [*Rules of Procedure*]. The *Rules of Procedure* of the Arctic Council organizes the work in the Council in a detailed and systematic manner, a state of affairs, which was lacking in *AEPS* cooperation. The Rules cover topic areas as how to convene different types of meetings under the Council, the launching process for programs and projects, and the function of subordinate bodies.

[54] *Terms of Reference for a Sustainable Development Program as adopted by the Arctic Council at the First Arctic Council Ministerial Meeting, September 17-18 1998* (Iqaluit, Canada) art. 1, online: Arctic Council <http://www.arctic-council.org/> [*Terms of Reference*].

[55] *Supra* note 1, art. 1, para c reads: "The Arctic Council is established as a high level forum to...adopt terms of reference for, and oversee and coordinate a sustainable development program." Article 6 of the *Arctic Council Declaration* requires: "The Arctic Council, as its first order of business, should adopt rules of procedure for its meetings and those of its working groups." (*Ibid.*, art. 6.)

[56] The name "Senior Arctic Affairs Officials (SAAOs)" was changed in the *Iqaluit Declaration* to "Senior Arctic Officials (SAOs)". According to the *Rules of Procedure* adopted by the *Iqaluit Declaration*: "Each Arctic State shall designate a SAO, and each Permanent Participant shall designate a representative, to act as a focal point for Arctic Council activities, and shall inform the other Arctic States and Permanent Participants of the designation through the Host Country. The Host Country shall provide the chairperson for the SAO meetings, subject to the concurrence of the Arctic States represented at the SAO meeting" (*Rules of Procedure*, *supra* note 53, art. 21).

[57] Article 4 of the *Arctic Council Declaration* states: "The Council should normally meet on a biennial basis, with meetings of senior arctic officials taking

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regulated. The *Rules of Procedure* also provide guidance for the Council's creation and functioning of other cooperative activities, for instance, the establishment of working groups, task forces, and other bodies.[58] The *Terms of Reference for the Sustainable Development Program* did not really lay down any substance for the program,[59] but did set out a procedure by which proposals for cooperative activities would be processed.[60]

The 1998 Iqaluit Ministerial Meeting granted Observer status to several entities, including a number of European countries, United Nations programs, and non-profit organizations, and also accepted the Aleut International Association as a Permanent Participant in addition to those already accepted in the 1996 *Arctic Council Declaration*. [61] The Iqaluit Ministerial Meeting added little in the field of environmental protection. Certain instruments concluded by the environmental protection working groups were welcomed,[62] and guidance was given to the working groups.[63] The Arctic Council Members were encouraged to take joint action in international environmental protection fora.[64]

In October 2000, the second Ministerial Meeting of the Arctic Council took place in Barrow, Alaska, where the *Barrow*

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place more frequently, to provide for liaison and co-ordination. Each Arctic State should designate a focal point on matters related to the Arctic Council" (*supra* note 1).

[58] *Rules of Procedure, supra* note 53, arts. 28-31.

[59] *Ibid.*, art 1, which only provides: "The goal of the sustainable development program of the Arctic Council is to propose and adopt steps to be taken by the Arctic States to advance sustainable development in the Arctic, including opportunities to protect and enhance the environment, and the economies, cultures and health of indigenous communities and of other inhabitants of the Arctic, as well as to improve the environmental, economic and social conditions of Arctic communities as a whole".

[60] *Ibid.*, arts. 2-3.

[61] *Iqaluit Declaration, supra* note 52 , art. 3.

[62] *Ibid.*, art. 23.

[63] See e.g. *ibid.*, art. 16.

[64] See *ibid.* generally. For instance, article 19 of the *Iqaluit Declaration* states: "**Strongly welcome** the establishment of an Intergovernmental Negotiating Committee under the auspices of United Nations Environment Programme to work towards the conclusion of a global agreement on POPs by the year 2000, and **encourage** the Arctic States to act together to assist the early conclusion of such a global agreement" [emphasis in original] (*Ibid.*, art. 19).

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Declaration was signed.[65] By this time, the meeting participants were able to note that the "Arctic Council ... has successfully taken on the responsibilities of the Arctic Environmental Protection Strategy",[66] although some problems remained as to the coordination of activities.[67] The Council's position of Chair transferred from the United States to Finland at the Barrow Ministerial Meeting.[68] It was during the U.S. Chair-period that regular meetings of the Working Group Chairs were established.[69] It was also during the U.S. Chair-period that two new Permanent Participants were accepted.[70]

The Arctic Council Members adopted the *Action Plan to Eliminate Pollution in the Arctic (ACAP)*[71] and determined that the *ACAP* would be a basis for developing and implementing actions under the Council's auspices with respect to pollution prevention and remediation.[72] It was decided that an *ad hoc* steering group would be established "awaiting a review of the structure of the Arctic Council organization".[73] The Arctic Climate Impact Assessment Project (ACIA) was established as a joint project of AMAP, CAFF, and the International Arctic

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[65] *The Barrow Declaration on the occasion of the Second Ministerial Meeting of the Arctic Council*, 13 October 2000, online: Arctic Council <http://www.arctic-council.org/> [*Barrow Declaration*].

[66] *Ibid.*, Preamble.

[67] *Ibid.*, art. 19. Article 19 of the *Barrow Declaration* reads: "**Take note** that as the Arctic Council has evolved and taken over the structures established under *AEPS*, some overlap of functions has occurred among the new and existing institutional structures of the Council ... " [emphasis in original].

[68] *Barrow Declaration*, *supra* note 65, art. 25.

[69] See the Arctic Council's *Rules of Procedure*, *supra* note 53, art. 28; see also *Barrow Declaration*, *supra* note 65, art. 12. For the minutes and agendas of Working Group Chairs meetings, see online: Arctic Council <http://www.arctic-council.org/>.

[70] *Barrow Declaration*, *ibid.*, art. 22: "**Approve** the Arctic Athabascan Council and the Gwich'in Council International as Permanent Participants in the Arctic Council and **welcome** those organizations to the Arctic Council" [emphasis in original].

[71] *Arctic Council Action Plan to Eliminate Pollution in the Arctic (ACAP)*, 13 October 2000, online: Arctic Contaminants Action Program (ACAP) <http://acap.arctic-council.org/>.

[72] *Barrow Declaration*, *supra* note 65, art. 2, para. 2.

[73] *Ibid.* at art. 2, para 3.

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Science Committee (IASC); it had a steering committee to coordinate its work.[74] The joint project's task was to evaluate and synthesize knowledge on the topics of climate variability and change, increased ultraviolet radiation, and the resulting consequences for Arctic ecosystems and societies.[75] The *Barrow Declaration* welcomed the opportunity presented for the Council Members to bring "Arctic issues to the attention of the global community through the preparatory processes associated with the ten year review of Agenda 21".[76] The Barrow Ministerial Meeting also endorsed the results of the environmental protection working groups of AMAP,[77] CAFF,[78] EPPR,[79] and PAME.[80] It also provided more principled guidance to the work of the SDWG by adopting the *Sustainable Development Framework Document.*[81]

The 2002 Ministerial Meeting in Inari, Finland placed high emphasis on the Arctic Council's role as an international partner in global and regional environmental protection efforts.[82] The *Inari Declaration* noted that AMAP reports had made an influence in regional and global treaty negotiations, especially those of the UNECE *Aarhus Protocols on Persistent Organic Pollutants (POPs) and Heavy Metals* and the global *Stockholm Convention on POPs.*[83] The Inari Ministerial Meeting voiced its

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[74] *Ibid.*, art. 3.

[75] *Ibid.*

[76] *Ibid.*, art. 7. See *Agenda 21*, *supra* note 26.

[77] *Ibid.*, art. 8.

[78] *Ibid.*, art. 9.

[79] *Ibid.*, art. 10.

[80] *Ibid.*, art. 11.

[81] *Framework Document (Chapeau) for the Sustainable Development Program* (13 October 2000), online: Arctic Council <http://arctic-council.org/> [*Sustainable Development Framework Document*].

[82] See *The Inari Declaration on the occasion of the Third Ministerial Meeting of the Arctic Council*, 10 October 2002, arts. 9-11, "Arctic Council as a Partner in International Cooperation," online: Arctic Council <http://www.arctic-council.org/> [*Inari Declaration*].

[83] *Inari Declaration*, *supra* note 82, art. 5. The Ministerial Meeting also welcomed, in article 5, the UNEP's global assessment of mercury and its international efforts to outline and consider policy options to counter this threat, and it agreed to intensify the Council's efforts to achieve global cooperation on this issue. It also noted the Arctic Council project on

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concern over radionuclides, which originated from reprocessing plants of European non-Arctic states but ended up in the Arctic, and it urged these countries to continue with their plans for substantially reducing releases of radioactivity from these plants.[84] The *Inari Declaration* outlined the role for the Arctic Council in the complex setting of international cooperation. Importantly, the Ministerial Meeting identified the roles of both the Arctic Council and its Permanent Participants in influencing various regional and international policies.[85] It was acknowledged that duplication of work being done by other international cooperation bodies should be avoided by enhancing synergies with these organizations,[86] and that capacity-building through various means was an important part of circumpolar cooperation.[87] In addition, the Council's working groups were given guidance and a large and varied number of actors were approved as Observers on a temporary basis,[88] with final approval being declared in 2004 by the Reykjavik meeting.[89]

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mercury in this context. All the protocols, including these two, can be downloaded from the UNECE website at <http://www.unece.org/env/lrtap/status/lrtap_s.htm>; the *Stockholm Convention on Persistent Organic Pollutants* can be downloaded from the Convention's website at <http://www.pops.int/>.

[84] *Ibid.*, art. 6.

[85] *Ibid.*, art. 9.

[86] *Ibid.*, art. 13.

[87] *Ibid.*, art.12.

[88] *Ibid.*, art. 13, para. 5.

[89] *The Reykjavík Declaration on the occasion of the Fourth Ministerial Meeting of the Arctic Council*, November 24, 2004, online: Arctic Council <http://www.arctic-council.org/> [*Reykjavik Declaration*]. The following were approved as Observers at the Reykjavik meeting: Observer states—France, Germany, the Netherlands, Poland and the United Kingdom; International organizations—the Conference of the Parliamentarians of the Arctic Region, the International Federation of Red Cross & Red Crescent Societies (IFRC), the International Union for the Conservation of Nature (IUCN), the Nordic Council of Ministers (NCM), the Nordic Environment Finance Corporation (NEFCO), the North Atlantic Marine Mammal Commission (NAMMCO), the United Nations Economic Commission for Europe (UNECE), the United Nations Environment Programme (UNEP), the United Nations Development Program (UNDP); Non-governmental organizations—the Advisory Committee on Protection of the Seas (ACOPS), the Arctic Circumpolar Route (ACR), the

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The 2004 Ministerial Meeting in Reykjavik, Iceland was dominated by the outlining of policy and other measures on the basis of the results of two major scientific endeavours of the Arctic Council, those of ACIA and the *Arctic Human Development Report (AHDR)*, discussed further below. The Reykjavik Meeting Ministerial discussed the upcoming International Polar Year (IPY) 2007-08[90] and the role the Arctic Council should play in its implementation. The meeting outlined the role of the Arctic Council as providing political support for the IPY, but also decided to develop Arctic Council proposals for the IPY Joint Committee.[91] As in other years, the Reykjavik Ministerial Meeting took note of the activities of the various working groups and programs functioning under the auspices of the Arctic Council, but it went further by raising the difficult question of financing Arctic Council activities. With the increasing number of Arctic Council projects funded by different kinds of agencies, especially International Financial Institutions (IFIs), the problem of financing activities has been a difficult one to resolve.

The financing issue was discussed at the Selfoss, Iceland meeting of SAOs in May 2004 on the basis of the discussion paper prepared by an officer of the Nordic Environment Finance Corporation (NEFCO), in which the possibility for an Arctic

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Association of World Reindeer Herders, the Circumpolar Conservation Union (CCU), the International Arctic Science Committee (IASC), the International Arctic Social Sciences Association (IASSA), the International Union for Circumpolar Health (IUCH), the International Work Group for Indigenous Affairs (IWGIA), the Northern Forum, the University of the Arctic (UArctic), the World Wide Fund for Nature (WWF).

[90] This IPY is fourth of its kind, the most recent being organized fifty years ago (1957-58). It is, of course, not a year, but years, and it is typically not the same as those named (2007-08). The IPY will start in March 2007 and will end in March 2009, enabling summer field seasons in both poles. The purpose of the IPY is to stimulate cooperation and coordination of polar research and to increase the research's visibility and awareness. See IPY, online: International Polar Year <http://www.ipy.org/>.

[91] *Reykjavik Declaration*, *supra* note 89, "Circumpolar and International Cooperation on Sustainable Development" at 1.

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Council project support fund was outlined.[92] The aim of the envisaged fund was to avoid the problems of the current *ad hoc* financing of Arctic Council projects, by establishing a fund through which IFIs and other funders could be encouraged to contribute to the realization of Arctic Council projects. In the discussions, some concerns were raised, including whether this would result in decision-making power being transferred away from the Members of the Arctic Council.[93] The 2004 Reykjavik Ministerial Meeting supported a pilot phase for the Arctic Council project support instrument to mobilize financing for specific, already approved Arctic Council projects, which would have as their focus actions against pollution in the Arctic. The meeting also requested the SAOs, together with NEFCO and ACAP, develop a set of guidelines for the management of the project support instrument's pilot phase.

C. THE ARCTIC COUNCIL'S WORKING GROUPS AND THE ACAP AND ACIA INITIATIVES

The main work of the Arctic Council has taken place within the five working groups of the Council.[94] The representatives for the working groups have mainly come from the various national ministries and other government bodies of the Council Members and the framework organizations of Arctic indigenous peoples, but the programs and projects have had a much more varied structure of representation. The main focus of this Part of the

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[92] See e.g. "Discussion paper", An Arctic Council Project Support Fund (PSF), online: Arctic Council <http://www.arctic-council.org/>.

[93] See the draft minutes of the Svartsengi SAO meeting, Arctic Council Meeting of Senior Arctic Officials, Svartsengi, Iceland, 23-24 October 2003 [incorrect year (2004) in original], online: Arctic Council <http://www.arctic-council.org/>.

[94] The Arctic Council is empowered, through its *Rules of Procedure*, to establish Working Groups/Task Forces (*supra* note 53, Part IV) and programs and projects (*ibid.*, Part III, Annex I). Working groups and task forces are the more permanent bodies of the Arctic Council, whereas the programs and projects serve temporary functions and have a more varied structure of representation. If programs and projects evolve into more seemingly permanent bodies, a ministerial meeting may elevate their status to that of a working group or task force.

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article is on how the Arctic Council's established working groups and initiatives (the ACAP and ACIA) have conducted their work, the ways their priorities have changed, and what they have been able to deliver. This can only be done in a cursory manner, as a plethora of activities have occurred within each of the working groups and programs.[95]

1. ARCTIC MONITORING AND ASSESSMENT PROGRAMME (AMAP) WORKING GROUP

In contrast to Antarctic environmental cooperation, Arctic cooperation commenced its work by first assessing existing and future environmental problems through the work of a specific task force and later working group, the Arctic Monitoring and Assessment Programme (AMAP), before any environmental protection measures were concluded.[96] Thus, from the beginning, AMAP has been the core activity of Arctic cooperation; hence, a closer look at its development and priorities is provided. The AMAP Secretariat is located in Oslo, Norway, and has been from the beginning.

The AMAP Task Force, established by the 1991 *AEPS*, changed to a working group in 1993. The primary objective for the AMAP, as defined in 1991, was to measure levels of anthropogenic pollutants and to assess their effects in relevant component parts of the Arctic environment. The *AEPS* required that the assessments be presented in status reports to relevant fora as a basis for establishing what steps must necessarily be taken to reduce pollution.[97] More specifically, the AMAP was created to make integrated assessment reports on Arctic ecosystems' status and trends, to identify possible causes for changing conditions, detect emerging problems and their possible causes, and evaluate the potential risks to Arctic ecosystems, including indigenous

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[95] See the list of activities and programs of the working groups of the Arctic Council. "Activities", online: Arctic Council <http://www.arctic-council.org/>.

[96] For a comparison of the two polar regimes, in particular their capacities in the field of environmental protection, see Timo Koivurova, "Environmental Protection in the Arctic and the Antarctic: Can the Polar Regimes Learn from Each Other" (2005) 33: 2 International Journal of Legal Information 204-18.

[97] *AEPS*, *supra* note 6, s. 6 at 1655-57.

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peoples and other Arctic residents. This work provides the AMAP with a basis for making recommendations of actions that are required to reduce risks to Arctic ecosystems.[98]

AMAP assessments are based upon published scientific data that is obtained not only from AMAP's own monitoring programs and traditional knowledge, but also from existing national and international monitoring and research programs. Each Arctic country is required to define its National Implementation Plan (NIP) to address and incorporate AMAP's recommendations at a national level.

During the first phase of its functioning, AMAP was directed to establish comprehensive monitoring programs in relation to its priority fields (persistent organic chemicals, heavy metals, and radionuclides). The 1993 Nuuk Ministerial Meeting also directed the AMAP Working Group to conduct its work together with existing international monitoring organizations in the field of climate change and ozone depletion, and to identify whether there were any gaps in the work of these international bodies from the Arctic perspective.[99] The priority for the second phase of the AMAP's work, as guided by the 1996 Inuvik meeting, was the finalization of the *State of the Arctic Environment Report (SOAER)* by early 1997, which was presented to the final *AEPS* cooperation meeting in Alta.[100] This report was the first important outcome of AMAP's work, as it has provided an Arctic perspective to decision-makers, regionally and globally. For instance, the AMAP report showed that POPs end up in the Arctic because of prevailing wind patterns, even though these substances are only marginally produced in the Arctic region.

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[98] *Ibid.*, s. 6.1 at 1657-59.

[99] *Nuuk Report*, *supra* note 28, "Arctic Monitoring and Assessment Programme (AMAP)".

[100] *Alta Declaration*, *supra* note 42, Preamble. The information in State of the Arctic Environment Reports (SOAERs) is presented in a clear and understandable manner for non-scientific audiences such as the general public, decision-makers, environmental managers, and schools. Another type of AMAP report, Arctic Assessment Reports (AARs), being more technical as well as extensively referenced are known as scientific reports. Both SOAERs and AARs can be downloaded from the AMAP website, online: Arctic Monitoring and Assessment Programme <http://www.amap.no/>.

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The Arctic Council's first request for the AMAP Working Group, from the 1998 Iqaluit Ministerial Meeting, was to focus on reviewing information regarding the impacts of environmental contamination on the health and development of children and youth.[101] The meeting encouraged the AMAP to complete Phase I of a Multilateral Cooperation Project on Phase-out of PCB Use and Management of PCB-contaminated Wastes in the Russian Federation.[102] They also endorsed AMAP's intention to assess, in cooperation with CAFF, the effects of climate change and ultraviolet radiation on Arctic ecosystems.[103]

The 2000 Barrow Ministerial Meeting requested AMAP to prepare updated assessments on several highly important topics over the course of the coming years.[104] It welcomed the AMAP report on Phase I of the Multilateral Cooperative Pilot Project for the Phase out of PCB Use in the Russian Federation and requested AMAP to coordinate the implementation of Phase II of the project.[105] The Barrow meeting noted with satisfaction that the Global Environment Facility (GEF) had approved funding for the "RAIPON/AMAP project on Persistent Toxic Substances (PTS), Food Security and Indigenous Peoples of the Russian North".[106]

The finalization of the *Arctic Pollution 2002 Report* of the AMAP[107] was appreciated by the 2002 Inari Ministerial Meeting, who considered the implications of the report's findings as they pertained to the Arctic Council's policies at both the national and international levels.[108] The *Arctic Pollution 2002 Report*

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[101] See *Iqaluit Declaration*, *supra* note 52, art. 8.

[102] This is part of a cooperative, three-part pilot project relating to Polychlorinated biphenyl (PCB) use and the management of PCB-contaminated waste in the Russian Federation, which is meant to serve as an example of a cooperative project under ACAP, to which all Arctic states are to provide funds and other support. See *ibid.*, art. 17.

[103] *Ibid.*, art. 21.

[104] *Barrow Declaration*, *supra* note 65, art. 8.

[105] *Ibid.*, art. 17.

[106] *Ibid.* "RAIPON" is the Russian Association of Indigenous Peoples of the North.

[107] AMAP, *Arctic Pollution 2002*, State of the Arctic Report, online: Arctic Monitoring and Assessment Programme <http://www.amap.no/> [*Arctic Pollution 2002 Report*].

[108] *Inari Declaration*, *supra* note 82, art. 5.

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documented increasing mercury levels in some parts of the Arctic, and the Arctic Council agreed to address this problem through global cooperation.[109]

The 2004 Reykjavik Ministerial Meeting requested the AMAP continue its work and deliver assessments of the oil and gas industry's impact on and acidification of the Arctic by 2006, and to be prepared to propose effective measures to counter the threats identified in these assessments. It approved the AMAP's *Strategic Plan 2004+*[110] and welcomed the efforts of the AMAP and ACAP to address the emerging chemical contaminants problem. The Reykjavik meeting noted with satisfaction the completion of the GEF-funded study on the impacts of persistent toxic substances on the food security of Russian indigenous peoples.[111] It also supported the ongoing development of the Risk Assessment Methodology by the AMAP Working Group and the EPPR Working Group, which has as its aim the prevention of and preparation for emergencies in radiological and other hazardous chemical fields. Moreover, the Reykjavik Ministerial Meeting encouraged the two working groups to develop a coordinated Geographic Information System for the support of the Arctic Council's activities.[112]

2. PROTECTION OF THE ARCTIC MARINE ENVIRONMENT (PAME) WORKING GROUP

At the 1991 Rovaniemi meeting, the eight Arctic states committed themselves to take preventive and other measures, directly or through competent international organizations, to protect the Arctic's marine environment from various sources of pollution.[113] The *AEPS* established priorities related to this commitment, to not

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[109] *Ibid.*

[110] *AMAP Strategic Plan 2004+, AMAP Report 2004:5*, online: Arctic Monitoring and Assessment Programme <http://www.amap.no/>.

[111] *Reykjavik Declaration*, *supra* note 89, "Actions against pollutants". A copy of Persistent Toxic Substance report is available online: Arctic Monitoring and Assessment Programme <http://www.amap.no/Resources/PTS_project.htm>.

[112] *Ibid.*, "Emergency Prevention Preparedness and Response".

[113] *Rovaniemi Declaration*, *supra* note 5.

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only take preventive measures directly or through competent international organizations, but also to follow the relevant provisions of the *UN Convention on the Law of the Sea*,[114] to maintain international standards regarding the discharges of pollutants, to take part in international cooperation to fortify the recognition of the sensitivity of ice-covered parts of the Arctic Ocean, and to ensure the protection of the Arctic marine environment from accidental pollution.[115]

The PAME Working Group was established at the 1993 Nuuk Ministerial Meeting to implement the priority areas identified in the *AEPS*. In the 1993 *Nuuk Report,*[116] which accompanied the *Nuuk Declaration*,[117] the ministers expressed their concerns—on the basis of the information provided by AMAP—of problems related to radioactive waste disposal that was taking place in Arctic waters (Russian waters in particular). They were also concerned about threats to the Arctic marine environment from land-based and maritime sources identified in other studies. Consequently, the Nuuk meeting established the working group as a joint process to ensure protection of the marine environment from both radioactive waste disposal and pollution caused by land-based and marine sources.[118]

Clearer priorities for the work of PAME were identified by the 1996 Inuvik Ministerial Meeting. PAME was asked to develop both a Regional Programme of Action for the Protection of the Arctic Marine Environment from Land-based Activities (RPA) and guidelines for offshore petroleum activities. The working group was also asked to collect information on present and future

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[114] *United Nations Convention on the Law of the Sea*, 10 December 1982, U.N. Doc. A/Conf. 6/122, 1833 U.N.T.S. 396, 21 I.L.M. 1261 [*Law of the Sea Convention*].

[115] *AEPS*, *supra* note 6, s. 7 at 1659-60.

[116] *Nuuk Report*, *supra* note 28.

[117] *Nuuk Declaration*, *supra* note 26.

[118] The *Nuuk Report* recommended "a joint process to execute the outcome of the United Nations Conference on Environment and Development (UNCED) (*Agenda 21*, c. 17, *supra* note 26). The PAME Working Group was established to manage the initiative and to report findings before the next Ministerial Meeting. *Nuuk Report*, *supra* note 28, "Protection of the Arctic Marine Environment".

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shipping activities and their effect on the environment, and to evaluate the effectiveness of existing international arrangements.[119]

The 1998 Iqaluit meeting confirmed the priorities identified by the previous meeting. PAME had already started to work on how the RPA could be implemented in Russia. The 1998 Iqaluit Ministerial Meeting requested PAME to support Russia's development and implementation of a Russian Programme of Action for the Protection of the Arctic Marine Environment from Land-based Activities (Russian NPA-Arctic).[120] The 1998 Iqaluit meeting also mandated PAME to assess the current and potential shipping activities in the Arctic in light of what, if any, additional Arctic shipping measures were required. This included working on an *International Code of Safety for Ships Operating in Polar Waters* (*Polar Code*) under the auspices of the International Maritime Organization (IMO).[121]

In 2000, the Barrow Ministerial Meeting directed PAME to determine whether additional Arctic shipping measures, in addition to the *Polar Code*, were necessary, on the basis of a Norwegian led snap-shot analysis of maritime activities that were taking place in the Arctic. The Barrow meeting also confirmed the other priority areas, and urged representatives involved in the RPA and ACAP to develop complementary activities to avoid overlaps.[122]

The 2002 Inari meeting, again endorsing the existing priority areas for PAME, requested PAME to develop a strategic plan for protection of the Arctic marine environment, which would be used to lay a foundation for a more coordinated and integrated approach for managing the challenges of the Arctic coastal and marine environments.[123] The Inari Ministerial Meeting also

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[119] *Inuvik Declaration*, *supra* note 36, art. 6.

[120] *Iqaluit Declaration*, *supra* note 52, art. 25.

[121] *Ibid.*, art. 26. *Guidelines of Ships Operating in Arctic Ice-Covered Waters* were subsequently adopted by IMO as recommendary provisions. See IMO MSC/Circ. 1056, MEPC/Circ. 399 (23 December 2002).

[122] *Barrow Declaration*, *supra* note 65, art. 11.

[123] *Inari Declaration*, *supra* note 82, art. 5.

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endorsed the revised *Arctic Offshore Oil & Gas Guidelines,* first developed by PAME in 1997.[124]

The 2004 Reykjavik Ministerial Meeting urged the implementation of the *Arctic Marine Strategic Plan (AMSP).*[125] PAME developed the *AMSP* through not only the various Arctic Council working groups and mechanisms, but also via regional and global bodies. The Reykjavik meeting encouraged the Members, working groups, and relevant regional and international bodies to apply the ecosystem approach, described below, to the Arctic marine environment as outlined in the *AMSP.* The Reykjavik meeting addressed environmental problems resulting from shipping activities in the following ways: by endorsing the *Arctic Waters Oil Transfer Guidelines*;[126] by requesting PAME to evaluate the existing measures pertaining to port reception facilities for ship-generated waste and cargo residues; and by requesting that a comprehensive Arctic marine shipping assessment be undertaken by PAME.[127]

3. EMERGENCY PREVENTION, PREPAREDNESS, AND RESPONSE (EPPR) WORKING GROUP

The Emergency Prevention, Preparedness and Response (EPPR) priority was established by the 1991 *AEPS* and was later to

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[124] PAME, *Arctic Offshore Oil & Gas Guidelines* (12 October 2002), online: Protection of the Arctic Marine Environment Working Group <http://old.pame.is/sidur/uploads/ ArcticGuidelines.pdf> [*Offshore Oil & Gas Guidelines*]. The *Offshore Oil & Gas Guidelines* are a revised form of the *Guidelines* as they were first adopted by the Alta meeting in 1997. The revision was based on comments from a variety of representatives, including Arctic governments, regional governments, non-governmental organizations, indigenous groups, industries, and members of the scientific community.

[125] PAME, *Arctic Marine Strategic Plan* (2004), online: Arctic Portal <http://arcticportal.org/pame/amsp> [*AMSP*].

[126] This was eventually adopted in November 2004 as PAME *Guidelines for Transfer of Refined Oil and Oil Products in Arctic Waters (TROOPS)*, online: Arctic Portal <http://arcticportal.org/en/pame3>.

[127] *Reykjavik Declaration, supra* note 89, "Protecting the Arctic Marine Environment" at 4. See PAME, *Arctic Marine Shipping Assessment: The Arctic Council's Response to Changing Marine Access*, Progress Report, October 2006, online: Protection of the Arctic Marine Environment, Arctic Marine Shipping Assessment <http://arcticportal.org/pame/amsa>.

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become one of the working groups of the *AEPS* cooperation and the Arctic Council. The *AEPS* identified the initial priorities for the EPPR as including an exchange of information on all relevant issues in the field of emergency prevention and response, and the establishment of a system for early notification in the event of significant accidental pollution or an imminent threat of such an incident.[128] Its mandate and work partly overlapped with that of the AMAP, as the EPPR was designed at this first phase to engage in assessing the risks for significant accidental pollution and to undertake studies with the AMAP on the effects of accidental pollution.[129] Emphasis was also laid on bilateral and multilateral international cooperation to improve response capabilities in the event of significant accidental pollution.[130]

The EPPR continued working on the above-mentioned priorities[131] until the 1996 Inuvik meeting, at which time a call was made for further actions. The priorities for the EPPR were clarified and expanded, and included completion of the *Arctic Guide for Emergency Prevention, Preparedness and Response.* Further development of preventative, mitigation and response measures for oil and gas accidental releases in the Arctic—a field of policy that overlaps with some of the other working groups—was also named as a priority. Other priorities established were the

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[128] *AEPS, supra* note 6, s. 8.1(i)-(x) at 1662-63.

[129] *Ibid.*, s. 8(1v) at 1662.

[130] *Ibid.*, s. 8(1x) at 1663.

[131] EPPR submitted its progress report [*Nuuk EPPR Report*] about coordination to the Nuuk Ministerial in 1993. The report included recommendations, including six priorities for the approval of Ministers: notification and mutual assistance, research and development, a risk assessment model, protection of the marine environment, international agreements and arrangements, and further cooperation. The *Nuuk EPPR Report* included a list of national contact points and a reporting system for notification of emergency and common assistance in the Arctic area. EPPR perceived two international conventions particularly relevant for its action: the *International Convention on Oil Pollution, Preparedness, Response, and Cooperation, 1990*, 30 November 1990, 1891 U.N.T.S. 77, 30 I.L.M. 733 (entered into force 13 May 1995), and the *1992 UNECE Convention on Transboundary Effects of Industrial Accidents*, 17 March 1992, 31 I.L.M. 1330. The review of relevant existing international legal tools was also seen as important. See Evelyn M. Hurwich, "Arctic" (1993) 4 Y.B. Int'l Env. L. 335-37.

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preparation of an analysis of existing accident reporting systems' effectiveness and the refining of the Risk Analysis on Environmental Threats to the Arctic.[132] The Inuvik Ministerial Meeting also requested the EPPR analyze the adequacy and effectiveness of existing international agreements and arrangements in the Arctic. A new priority established was to increase the involvement of indigenous peoples in accident prevention and response.[133] The 1996 Inuvik Ministerial Meeting indicated inconsistencies in the data used to prepare an environmental risk assessment matrix, the aim of which was to enable governments to take preventive action; the most relevant and serious areas, those of the military, were excluded from the matrix.[134]

Later meetings made fewer substantive additions or changes to the EPPR. The 1997 Alta meeting, while retaining the basic priorities for the EPPR Working Group, did issue a specific request. The Alta Ministerial Meeting called for the development of a "Field Guide for Arctic Oil Spill Response" and a strategic plan of action for this program area.[135]

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[132] *Inuvik Declaration*, *supra* note 36, art. 6, para. 6.

[133] *Ibid.* at art. 6.

[134] Evelyn M. Hurwich, "Arctic" (1996) 7 Y.B. Int'l Env. L. 203. In 2002, the EPPR Working Group completed the Circumpolar Map of Resources at Risk from Oil Spills in the Arctic. The publication includes a series of GIS-based circumpolar maps showing areas of highest risk because of sensitive natural resources and subsistence communities. Circumpolar Map of Resources at Risk from Oil Spills in the Arctic, online: Emergency Prevention, Preparedness and Response <http://eppr.arctic-council.org/> or <http://www.eppr.akvaplan.com /intro/catalogue.htm>.

[135] *Alta Declaration*, *supra* note 42, art. 9. *A Field Guide for Oil Spill Response in Arctic Waters* was subsequently completed in September 1998 that analyzes the pros and cons of various response methods, such as mechanical recovery, in-situ burning, and chemical dispersion. It also describes the coastal sensitivities of the Arctic. EPPR Working Group, *A Field Guide for Oil Spill Response in Arctic Waters* (Yellowknife, NT: Environment Canada, Prairie and Northern Region Environmental Protection Branch, Northwest Territories Division, 1998). In 1999, Finland proposed development of a Memorandum of Understanding on Arctic Emergency Cooperation which would change the nature of the EPPR to an operational group. However, this was not approved by the EPPR Working Group. See David L. VanderZwaag, "Arctic" (1999) 10 Y.B. Int'l Env. L. 306.

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The EPPR continued its mandated work, which included researching and producing reports. In 2000, the EPPR Working Group finalized an analysis of the adequacy and effectiveness of agreements and arrangements relevant to land-based maritime or nuclear accident responses.[136] The EPPR also provided a forum for information exchange over national activities relating to contingency planning and emergency response. It endorsed the Canadian and U.S. bilateral project to develop a standardized approach to shoreline cleanup assessment technology, although the other states were not interested in expanding this to a circumpolar level.[137] The 2004 Reykjavik Ministerial Meeting directed the EPPR to include natural disasters within its activities. The Reykjavik meeting also noted the completion of the *Shoreline Cleanup Assessment Technique (SCAT) Manual*.[138]

4. CONSERVATION OF ARCTIC FLORA AND FAUNA (CAFF) WORKING GROUP

The Conservation of Arctic Flora and Fauna (CAFF) Working Group had its origins in the 1991 *AEPS*, which recognized, in light of scientific and traditional knowledge, that economic development projects, long-range movement of pollutants, and degradation of habitats posed grave threats to Arctic flora and fauna.[139] The *AEPS* identified the problem that most existing agreements protecting flora and fauna had no special Arctic focus, which was especially problematic given the Arctic indigenous peoples' traditional livelihood and cultures. Hence, there was an identified need for a forum whereby scientists, indigenous

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[136] The Arctic Council, in its *Barrow Declaration*, endorsed the main conclusion of the analysis, namely: "the international conventions and instruments currently in force, adopted or still under preparation appear to cover the present needs for Arctic cooperation in the field of prevention of, preparedness for and response to environmental emergencies on land or sea". *Barrow Declaration, supra* note 67, art. 10. See David L. VanderZwaag, "Arctic" (2000) 11 Y.B. Int'l Env. L. 265.

[137] See David L. VanderZwaag & Stacey Ferrara, "Arctic" (2001) 12 Y.B. Int'l Env. L. 299.

[138] *Reykjavik Declaration, supra* note 89, "Emergency Prevention Preparedness and Response" at 5.

[139] *AEPS, supra* note 6, s.9 at 1664.

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peoples, and conservation activists could exchange data and information relating to shared species and habitats. The end result was the establishment of CAFF as a working group in 1992, which was later recognized in the 1993 *Nuuk Declaration*.[140]

At the 1996 Inuvik meeting, various priorities for CAFF were identified. They included the development of a Circumpolar Protected Area Network (CPAN)[141] and assisting countries with the implementation of the *Circumpolar Murre Conservation Strategy and Action Plan*.[142] The Inuvik Ministerial Meeting also acknowledged the important link to the *UN Convention on Biological Diversity*[143] by urging CAFF to develop a draft Arctic strategy relating to the Convention's goals.

The 1997 Alta meeting continued with these priorities, but also welcomed the *Strategy for the Conservation of Biological Diversity in the Arctic Region* (*Biodiversity Strategy*), and noted the need to develop a long-term plan to give effect to the *Biodiversity Strategy*. The Alta Ministerial Meeting also endorsed the further development of the *Circumpolar Eider Conservation Strategy and Action Plan*.[144]

By the time of the 1998 Iqaluit meeting, the focus of CAFF had broadened. The Iqaluit Ministerial Meeting endorsed CAFF's *Strategic Plan for the Conservation of Arctic Biological Diversity* as an overall framework for CAFF activities and its timely implementation through the creation of more detailed work plans.[145] It also welcomed CAFF's intention to prepare an overview of the status and trends in changes to ecosystems,

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[140] *Nuuk Declaration*, *supra* note 26, art. 2.

[141] See CAFF, Circumpolar Protected Area Network (CPAN)—Strategy and Action Plan (1996), online, Conservation of Arctic Flora and Fauna, Arctic Portal <http://arcticportal.org/en /caff>.

[142] CAFF, Circumpolar Murre Conservation Strategy and Action Plan, online, Conservation of Arctic Flora and Fauna, Arctic Portal <http://arcticportal.org/en/caff>.

[143] *Convention on Biological Diversity*, 5 June 1992, 31 I.L.M. 818.

[144] *Alta Declaration*, *supra* note 42, art. 9.

[145] CAFF, *Strategic Plan for the Conservation of Arctic Biological Diversity* (September 1998), online: Arctic Portal <http://www.arcticportal.org/arctic-council/working-groups/caff-document-library/caff-organizational-documents>.

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habitats, and species in the Arctic. Moreover, CAFF was urged to identify what elements would be needed for a program to monitor circumpolar biological diversity and to assess, in collaboration with AMAP, the effects of climate change and UV-B radiation on Arctic ecosystems.[146]

CAFF has undertaken programs to implement its goals. The Circumpolar Biodiversity Monitoring Program (CBMP), launched in 2004, is aimed at producing reports on how Arctic biodiversity is changing, especially in light of climate change. The CBMP is being led by Canada, and is expected to culminate with publication of a 2010 Arctic Biodiversity Assessment.[147] Also, through support from the Global Environment Facility, CAFF is collaborating with UNEP/GRID-Arendal and the Russian Federation in implementing a project on Integrated Ecosystem Management in the Russian Arctic (ECORA).[148] The project aims to develop and implement ecosystem management strategies in three model areas of the Russian Arctic.[149]

5. SUSTAINABLE DEVELOPMENT WORKING GROUP (SDWG)

The impetus for the creation of the *AEPS* Task Force on Sustainable Development and Utilization (TFSDU) came as a result of the Rio Conference.[150] The 1993 Nuuk meeting participants reached an understanding that in addition to

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[146] *Iqaluit Declaration*, *supra* note 52, arts. 20-21.

[147] See CAFF, *Framework Document: Circumpolar Biodiversity Monitoring Program*, CAFF CBMP Report No. 1 (2004). CAFF's documentary library includes 10 "Habitat Reports", including reports on principles and guidelines for a circumpolar protected area network, as well as a summary of legal instruments and national frameworks for Arctic marine conservation. It also includes "Technical Reports" on topics such as seabird harvest regimes in circumpolar nations, and the conservation value of sacred sites of Arctic indigenous peoples. CAFF, online, Arctic Portal—Conservation of Arctic Flora and Fauna <http://arcticportal.org/en/caff>.

[148] ECORA, online: Arctic Portal—Conservation of Arctic Flora and Fauna <http://arcticportal.org/en/caff>. See Part III.A.1(h), below, for more on the activities of UNEP/GRID-Arendal, an official United Nations Environment Programme centre located in Southern Norway.

[149] *Ibid.* The areas include: Kolguev Island in the eastern Barents region, Kolyma River Basin in Yakatia, and the Beringovsky District in Chukotka.

[150] Rio Conference, *supra* note 26.

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environmental protection, issues of sustainability should also be considered. Although substantial differences of opinion as to what constitutes sustainable development existed among the states and other participants, the conflicting views did not prevent the TFSDU from identifying 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*.[151] As discussed above, the 1996 Inuvik Ministerial Meeting considered transforming the task force into a working group, but the idea was overridden with the establishment of the Arctic Council, which named sustainable development as one of two key components in its mandate. The Sustainable Development Working Group (SDWG) was established under the umbrella of the Arctic Council in 1998.[152]

The SDWG had different priorities as compared to its predecessor. The Terms of Reference for a Sustainable Development Program, which were adopted at the 1998 Iqaluit meeting, outlined only a procedure by which proposals for sustainable development projects would be adopted.[153] The *Sustainable Development Framework Document*,[154] adopted by the 2000 Barrow Ministerial Meeting,[155] identified seven priorities for the Sustainable Development Program:

i) Health issues and the well-being of people living in the Arctic;
ii) Management of natural, including living, resources;
iii) Sustainable economic activities and increasing community prosperity;
iv) Education and cultural heritage;

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[151] See Evelyn M. Hurwich, "Arctic" (1995) 6 Y.B. Int'l Env. L. 301-02; *Agenda 21*, supra note 26.

[152] *Iqaluit Declaration*, *supra* note 52, art. 9.

[153] *Ibid.*, art. 1.

[154] *Sustainable Development Framework Document*, *supra* note 81.

[155] *Barrow Declaration*, *supra* note 65, art. 1.

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v) Children and youth;
vi) Management of natural, including living, resources; and
vii) Infrastructure development.[156]

The SDWG, whose secretariat has been located in Ottawa, Canada since 2003, has a number of on-going projects that relate to the seven priorities.[157]

To assist the work of the SDWG, the *Arctic Human Development Report (AHDR)* was published in 2004.[158] The *AHDR* identified major gaps in knowledge, including in the areas of cumulative changes in cultural identity and social well-being, industrial influences on community viability and governance arrangements, and innovations in the Arctic.

6. ARCTIC COUNCIL ACTION PLAN TO ELIMINATE POLLUTION IN THE ARCTIC (ACAP)

The 2000 Barrow meeting endorsed the Arctic Council's Action Plan to Eliminate Pollution in the Arctic (ACAP),[159] a separate program focused on pollution prevention and remediation. The 2000 Barrow Ministerial Meeting established an *ad hoc* ACAP Steering Committee while "awaiting a review of the structure of the Arctic Council organization".[160] According to the 2000 *Barrow Declaration*, the steering committee would provide a mechanism to supervise the implementation of the ACAP, and would be responsible for reporting to the SAOs. It was composed of Arctic Council Members and Permanent Participants representatives, with the active involvement of the Council's

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[156] *Sustainable Development Framework Document*, *supra* note 81; see also the SDWG's website, online: Sustainable Development Working Group <http://portal.sdwg.org>.

[157] Topics include: the Future of Children and Youth in the Arctic, Survey of Living Conditions in the Arctic, Emerging Infectious Diseases, and Freshwater Fishery Management in the Barents Region For the complete list, see online: Arctic Council <http://www.arctic-council.org>.

[158] *Arctic Human Development Report (AHDR)* (Akurey, Iceland: Stefansson Arctic Institute, 2004).

[159] *Barrow Declaration*, *supra* note 65, art. 2.

[160] *Ibid.*

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Working Group Chairs and Observers.[161] The 2002 Inari meeting and the 2004 Reykjavik meeting extended the mandate of ACAP,[162] whose secretariat is located in Washington, D.C.[163]

The priorities of ACAP for its first phase were selected on the basis of the findings by AMAP related to POPs, heavy metals, radioactivity, and the depletion of the ozone layer.[164] Ongoing projects include among others: Multilateral Cooperation Project on Phase-out of PCB Use and Management of PCB-contaminated Wastes in the Russian Federation; Reduction/Elimination of Dioxins and Furans Released in the Russian Federation; Reduction of Atmospheric Mercury Releases from Arctic States; Environmentally Sound Management of Stocks of Obsolete Pesticides in the Russian Federation; and Implementation of the Cleaner Production Methodology in the Arctic Zone of the Russian Federation.[165]

According to ACAP Steering Committee reports, the ACAP has confronted implementation problems. Funding limitations continue to be a problem, for example, the Reduction of Mercury Releases project has secured funding for the first two phases (assessment and prioritization and selection of a pilot site) but not for the third phase (pilot project implementation), and the Cleaner Production Program's financial arrangements for a fourth phase are still uncertain.[166] Lack of clear national legislation and limited coordination of actions between federal and regional or local administration in the Russian Federation have also been described

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[161] *Ibid.*

[162] *Inari Declaration*, *supra* note 82, art. 5; *Reykjavik Declaration*, *supra* note 89, "Actions Against Pollutants" at 4.

[163] *Reykjavik Declaration*, *supra* note 89, "Other" at 9.

[164] Arctic Council Action Plan to Eliminate Pollution in the Arctic (ACAP), *List of Approved Activities and Proposals for Future Activities* (June 2001) at 2, online: Arctic Council <http://www.arctic-council.org> [*ACAP Activities List*].

[165] *Ibid.*

[166] Arctic Council Action Plan to Eliminate Pollution in the Arctic (ACAP), *Steering Committee Meeting Report No. 2004:1* (Washington, D.C., 24-25 March 2004), online: Arctic Contaminants Action Program <http://acap.arctic-council.org/media.php?mid=16>.

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as serious problems hindering progress in ACAP's PCB projects.[167]

7. ARCTIC CLIMATE IMPACT ASSESSMENT (ACIA) PROJECT

The Arctic Climate Impact Assessment (ACIA) was endorsed in the 2000 Barrow Ministerial Meeting as a joint project between AMAP, CAFF, and IASC. As it had been commenced during the U.S. Chair-period, under the Clinton administration, the U.S. was willing to finance the project. The ACIA was requested to evaluate and synthesize knowledge on climate variability and changes of increased ultraviolet radiation in the Arctic, and to support policy-making processes and the work of the Intergovernmental Panel on Climate Change (IPCC). The Barrow meeting participants also urged the ACIA to address the environmental and human health, social, cultural, and economic impacts and consequences resulting from climate change, and to include policy recommendations.[168]

By the 2002 Inari Ministerial Meeting, the work on the ACIA had progressed to the extent that the meeting made a point of noting its concern of ongoing, significant warming in most of the Arctic. It also recognized that the impacts of global climate change will have large consequences in the Arctic, and that the Arctic can act as an early warning of global climate change. The 2002 Inari meeting specifically noted the innovative methodology used in making the ACIA, namely that indigenous knowledge was used in parallel with modern science.[169]

The *ACIA Synthesis Report*[170] was published in 2004 and was forwarded to the Arctic Council and the international science community. The report identifies prevailing trends of climate change in the Arctic and the implications of Arctic warming for

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[167] Bob Dyer, Chairman of ACAP, *ACAP Progress Report to Senior Arctic Officials* (Syktyvkar, Russia, 26-27 April 2006) at 4.

[168] *Barrow Declaration, supra* note 65, art. 3.

[169] *Inari Declaration, supra* note 82, art. 8.

[170] *Impacts of a Warming Arctic, ACIA Overview Report* (Cambridge: Cambridge University Press, 2004) [*ACIA Synthesis Report*]; see generally the *Arctic Climate Impact Assessment Final Scientific Report* (Cambridge: Cambridge University Press, 2005).

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the rest of the world. It also identifies four sub-regions[171] on the basis of different natural characteristics within the respective parts of the Arctic. The ten key findings of the *ACIA Synthesis Report* are as follows:

i) The Arctic climate is now warming rapidly and much larger changes are projected;
ii) Arctic warming and its consequences have worldwide implications;
iii) Arctic vegetation zones are very likely to shift, causing wide-ranging impacts;
iv) Animal species' diversity, ranges and distribution will change;
v) Many coastal communities and facilities face increasing exposure to storms;
vi) Reduced sea ice is very likely to increase marine transport and access to resources;
vii) Thawing ground will disrupt transportation, buildings, and other infrastructure;
viii) Indigenous communities are facing major economic and cultural impacts;
ix) Elevated ultraviolet radiation levels will affect people, plants, and animals; and
x) Multiple influences interact to cause increased impacts to people and ecosystems.[172]

On the basis of these dramatic findings, released just before the 2004 Reykjavik meeting, the expectations for the Arctic Council to do something substantial were apparent. The 2004 Ministerial Meeting did adopt some important decisions, firstly recognising that there are grave risks from climate change to the Arctic. The 2004 Reykjavik meeting also urged that the findings of ACIA be disseminated to various fora and that they be taken into account

[171] The regions are as follows: sub-region (I) East Greenland, Iceland, Norway, Sweden, Finland, Northwest Russia and adjacent seas; sub-region (II) Siberia and adjacent seas; sub-region (III) Chukotka, Alaska, Western Canadian Arctic and adjacent seas; sub-region (IV) Central and Eastern Canadian Arctic, West Greenland, and adjacent seas. *ACIA Synthesis Report*, *ibid.* at 112-21.

[172] *Ibid.* at 10-11.

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not only in climate change research but also in Arctic national and international climate policy-making, both in terms of mitigation and adaptation. Importantly, the ACIA will also influence the next 2007 Scientific Report by the IPCC.[173]

Finally, and possibly most significantly, the 2004 Reykjavik Ministerial Meeting acknowledged the need to further organize the work of the Arctic Council and its subsidiary bodies based on the ACIA's findings, which could mean considering the re-organization of the Council's structure to better meet the demands of climate change. The Council has established a "focal point" (FP) to discuss options for ACIA follow-up activities. Those involved in this FP are the Chair of the SAOs, the Chairs of the Arctic Council working groups, and one representative from the Permanent Participants.[174] The SAOs were directed to report on progress in future organizing climate change work of the Council at the 2006 Salekhard meeting.[175] A matter for criticism after the Reykjavik Ministerial Meeting was that the meeting was not able to agree on updating of the ACIA, in light of the IPCC's regular updating format. ACIA follow-up is under development, and at the moment the discussions are centred on when and in what form the ACIA 2 will be implemented. This will be one of the main questions for Norway, the incoming Chair of the Arctic Council.[176]

D. RETROSPECTIVE EVALUATION

It can be seen from the foregoing that the Arctic cooperation process has become more institutionalized with time. *AEPS* cooperation started with very vague and general provisions in the

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[173] *ACIA Status Report to the SAOs* (Khanty-Mansyisk Autonomous District, Russian Federation, 12-14 October 2005), n. 14 [on file with authors].

[174] Arctic Council Meeting of Senior Arctic Officials, Minutes, Yakutsk, Russia, 6-7 April 2005 at 8-9, online, Arctic Council <http://www.arctic-council.org/Meetings/sao/2005%20km/Yakutsk%20minutes.doc>; Interview by Päivi Kähkönen & Jaana Ojuva of the Finnish Senior Arctic Official, Ambassador Erik Ulfstedt, 10 May 2006 [on file with the authors] ["Ulfstedt Interview"].

[175] *Reykjavik Declaration*, *supra* note 89, "Climate Change in the Arctic" at 2.

[176] Ulfstedt Interview, *supra* note 174.

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AEPS. The rules on participation, decision-making procedures, and the mandate of the process all became much more specific with the establishment of the Arctic Council. The process has since become more detailed in its organizational structure, even though the Council is lacking a formal legal status. While the Council has been frequently described as a soft-law organization, intended to operate outside of international law,[177] the amount and intensity of the work done in the Council's working groups and programs has grown by the day.

AEPS cooperation, which has continued in the Arctic Council via its environmental protection working groups, started with very ambitious goals:

> i. To protect the arctic ecosystem, including humans;
>
> ii. To provide for the protection, enhancement and restoration of environmental quality and the sustainable utilization of natural resources, including their use by local populations and indigenous peoples in the Arctic;
>
> iii. To recognize, and to the extent possible, seek to accommodate the traditional and cultural needs, values and practices of the indigenous peoples as determined by themselves, related to the protection of the Arctic environment;
>
> iv. To review regularly the state of the Arctic environment; [and]
>
> v. To identify, reduce, and, as a final goal, eliminate pollution.[178]

Although the *AEPS* goals are fairly abstract, they form a background against which the success of the two stages of Arctic cooperation—the *AEPS* cooperation and the Arctic Council—may be evaluated. As was shown above, Arctic cooperation participants have addressed the protection of the Arctic

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[177] See Evan Bloom, "The Establishment of the Arctic Council" (1999) 93 Am. J. of Int'l L. 712-22.

[178] *AEPS*, *supra* note 6, s.2.1 at 1631.

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ecosystems, restoration of environmental quality, sustainable utilization of natural resources, and the role played by indigenous peoples. Through the AMAP program, they have also regularly reviewed the state of the Arctic environment and at least made an attempt to reduce pollution in the Arctic.

The Arctic cooperation has occurred without a legal mandate, since neither the *AEPS* cooperation nor the Arctic Council was adopted by way of a treaty, but rather through signed declarations. This has resulted in the Arctic cooperation having had only a limited influence on implementing *AEPS* objectives at the national level. In order for the Arctic Council and its participants to make management impacts, they need to be able to influence the content of national environmental laws, as well as other laws and regulations, especially the ways in which they are implemented in the Arctic region. Since much of the Arctic falls within the functioning of national and sub-national legal systems, it is these systems that ultimately determine whether the objectives of the *AEPS* have been and can be met.

A prime example of the Arctic cooperation's limited influence on national incorporation of regional objectives is painfully shown by the *Guidelines for Environmental Impact Assessment in the Arctic*, an instrument that was adopted at the 1997 Alta meeting and was meant to harmonize the way environmental impact assessment should be done in the Arctic—both nationally and in a transboundary context. Even though the Arctic states agreed to apply the *EIA Guidelines* in practice, the Alta Ministerial Meeting failed to establish any real follow-up mechanisms to oversee how the *EIA Guidelines* would, in effect, be implemented.[179] Research conducted by the Northern Institute for Environmental and Minority Law (NIEM/Arctic Centre) on behalf of the Finnish Ministry for the Environment found that

[179] The only follow-up was creation of the Arctic Environmental Impact Assessment (ARIA) website where information about EIA laws and procedures, responsible agencies, and so on, can be found. The ARIA website, which also contains the *Guidelines for Environmental Impact Assessment in the Arctic (EIA Guidelines)* is a very useful tool for researchers and those who are in general interested in EIA procedures, but it does not contain any connection to actual supervision of how the *EIA Guidelines* are applied and implemented in the Arctic (online: Arctic Centre <http://arcticcentre.ulapland.fi/aria/>).

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only a few of the Arctic stakeholders—environmental NGOs, indigenous peoples' organizations, companies, and administrative agencies—even knew that the *EIA Guidelines* existed. The *EIA Guidelines* did not appear to have influenced any environmental impact assessment processes in the Arctic.[180]

It might, however, be too rigid to judge the success of Arctic cooperation merely by looking at how it has been able to fulfil objectives in environmental protection at the national level. The Arctic Council has been successful in being a catalyst for the production of information that has made a clear impact on the way international, even global, environmental protection treaties have been negotiated. The Council and its participants have been able to increase the pressures needed to successfully conclude an international environmental protection treaty on persistent organic pollutants and the inclusion of Arctic perspectives in negotiation processes.[181]

The Arctic Council has also acted as an energizer for Arctic indigenous peoples, according them a unique position in an inter-governmental forum as Permanent Participants.[182] This has

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[180] See Timo Koivurova, *Environmental Assessment of Natural Resource Exploitation in the Arctic: Towards Strategic Environmental Assessment, Circumpolar Connections: Proceedings of the 8th Circumpolar Universities Cooperation Conference* (Whitehorse, Canada: Circumpolar Universities Association, 2003) at 32-37. See also Timo Koivurova, "The Problems in Implementing the Guidelines for Environmental Impact Assessment in the Arctic" in Kees Bastmeijer & Timo Koivurova, eds., *Theory and Practise of Transboundary Environmental Impact Assessment* (Leiden, Netherlands: Martinus Nijhoff Publishers, forthcoming).

[181] For example, the global *Stockholm Convention on Persistent Organic Pollutants*, 23 May 2001, 40 I.L.M. 532 at the Preamble reads: "Acknowledging that the Arctic ecosystems and indigenous communities are particularly at risk because of the biomagnification of persistent organic pollutants and that contamination of their traditional foods is a public health issue". See e.g. Lars-Otto Reiersen, Simon Wilson, & Vitaly Kimstack, "Circumpolar Perspectives on Persistent Organic Pollutants: the Arctic Monitoring and Assessment Programme" in David Leonard Downie & Terry Fenge, eds., *Northern Lights Against POPs: Combating Toxic Threats in the Arctic* (Montreal & Kingston: McGill-Queen's University Press, 2003).

[182] Timo Koivurova & Leena Heinämäki, "The participation of indigenous peoples in international norm-making in the Arctic" (2006) 42 (221) Polar Record 101-09.

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worked to not only strengthen the identities of specific Arctic indigenous peoples, but also their common identity as northern indigenous peoples. By working together in the Arctic Council, these indigenous organizations have been able to set common policy agendas and even take joint action in international negotiation processes.[183]

Another important function of the Arctic Council has been identified by the academic Oran Young:

> Where, then, does the comparative advantage of the Arctic Council lie? It may come as a surprise to some to realize that the council's most important role is probably generative in nature. Through its very existence, the council has become a symbol of the emergence of the Arctic as a distinct region in international society.[184]

With all its shortcomings, the Council has indeed made it possible to perceive the Arctic as a distinct political region. This achievement, especially in light of Arctic cooperation commencing as recently as 1991, is substantial. However, as will be discussed further below, it is relevant to ask whether the present capacity of the Arctic Council is sufficient, especially in terms of environmental protection, to counter the huge management demands being raised by climate change in and economic globalization of the region.

III. PROSPECTS

Getting a firm grip on the likely future of the Arctic Council and its roles in advancing national, regional, extra-regional, and global

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[183] In the global negotiations over persistent organic pollutants, the Arctic indigenous peoples formed a coalition to combat a shared threat, and successfully so. See Mika Flöjt, "Arktinen episteeminen yhteisö kansainvälisissä POPS-neuvotteluissa" in M. Luoma-Aho, M. Moisio & S. Tennberg, eds., *Politiikan tutkimus Lapin yliopistossa* (P.S.C. Inter, Rovaniemi 2003) at 359-79.

[184] See Oran R. Young, "The Structure of Arctic Cooperation: Solving Problems/Seizing Opportunities" (2000) at 15, online: Standing Committee of Arctic Parliamentarians <http://www.arcticparl.org/resource/images/conf4_sac.pdf>. This paper was prepared at the request of Finland in preparation for the Fourth Conference of Parliamentarians of the Arctic Region, Rovaniemi, 27-29 August 2000.

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governance arrangements[185] is not easy for at least four reasons. First, the northern political seascape is subject to considerable flux, with governments waxing and waning in the priority given to the Arctic region as a whole and also varying in their specific priorities for the Arctic. For example, following the election of a new Conservative Canadian government in January 2006, Prime Minister Stephen Harper took a strong Arctic sovereignty and security position, advocating that Canada increase its military presence in the North.[186] The nature of governmental vision beyond sovereignty concerns remains uncertain, as an overall 'Northern Strategy' or vision has yet to be issued.[187] Second, with the Chair of the Arctic Council rotating every two years, the Council's strategic directions are subject to shifts. For instance, Norway, the Council's Chair as of October 2006, has indicated that its three priorities will be sustainable use of natural resources, climate change, and reviewing the Council's structure.[188] Third, scientific findings, including those related to climate change, are not static, and hold the potential to influence political, social, and

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[185] See David VanderZwaag, Rob Huebert & Stacey Ferrara, "The Arctic Environmental Protection Strategy, Arctic Council and Multilateral Environmental Initiatives: Tinkering While the Arctic Marine Environment Totters" (2002) Denver J. Intl L. & Policy 131 at 156-66; David VanderZwaag, "International Law and Arctic Marine Conservation and Protection: A Slushy, Shifting Seascape" (1997) 9 Georgetown Intl. Env. L. Rev. 303 at 324-39.

[186] During the election campaign Stephen Harper pledged to purchase three new heavy naval ice breakers and to build a new deep water docking facility in the Iqaluit region: "Harper Stands up for Arctic Sovereignty" (Winnipeg, 22 December 2005), online: Conservative Party of Canada <http://www.conservative.ca/EN/1091/36512>. See also Dene Moore, "Far North poses quandry: PM wants to assert Arctic sovereignty, premier pushes for territorial control, residents want place to call home," *The Chronicle Herald* (Halifax), 15 August 2006 A5. Some doubt whether naval icebreakers will actually be built. See Graham Fraser, "Northern Exposure: Is the Conservative government all talk and no action on Canadian sovereignty in the Far North." *The Nova Scotian* (Halifax) (26 August 2006) 3-4.

[187] See Canadian Arctic Resources Committee, "Renewing the Northern Strategy" (2006) 30:1 Northern Perspectives 1.

[188] *Final Report of the Twenty-Ninth Antarctic Treaty Consultative Meeting*, Edinburgh, United Kingdom, 12-23 June 2006 at para. 119, online: Antarctic Treaty Secretariat <http://www.ats.aq/29atcm/reportes.php>.

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economic agendas relevant to the Arctic Council.[189] For example, the Council might be pressured to become more proactive in addressing governance issues beyond national jurisdiction in the Arctic if commercial interests are fuelled by clearer pictures regarding the pace and scale of melting ice.[190] Fourth, a broad array of organizations, devoted to promoting Arctic cooperation, has the potential to affect Council project and program directions.[191]

There are, however, two future realities that the Arctic Council will face. The first is that the Council is likely, at least in the near term, to move ahead through soft sleddings as a discussional and catalytic forum rather than a regulatory or decision-making entity.[192] The second is that the Council and its constituents will increasingly face hard questions to which answers must be sought. Topics confronting the Council include whether a treaty

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[189] See Terry V. Callaghan *et al.*, "Uncertainties and Recommendations" (2004) 33 Ambio 474. On the role of science generally in influencing regional regimes, see Donald F. Boezch, "The role of science on ocean governance" (1999) 31 Ecological Economics 189.

[190] For differing views at the national level regarding how quickly expansion of Arctic commercial shipping will occur and how urgent governmental responses are, see David Barber, Louis Fortier & Michael Byers "The Incredible Shrinking Sea Ice" *Policy Options* 27:01 (December 2005-January 2006) 66, online: Institute for Research on Public Policy <http://www.irpp.org/po/>; Rob Huebert, "The shipping news part II: how Canada's Arctic sovereignty is on thinning ice" (2003) 58:3 International Journal 295; Franklyn Griffiths, "The shipping news: Canada's Arctic sovereignty not on thinning ice" (2003) 58:2 International Journal 257; Franklyn Griffiths, "Pathetic Fallacy: That Canada's Arctic Sovereignty Is on Thinning Ice" (2004) 11:3 Canadian Foreign Policy 1.

[191] Those organizations include the Barents Euro-Arctic Council, the International Arctic Science Committee, the Nordic Council of Ministers, the Northern Forum, and the Standing Committee of Parliamentarians of the Arctic Region. See Richard Langlais, "Arctic co-operation organizations: a status report" (prepared for the Standing Committee of Parliamentarians of the Arctic Region, 5 June 2000), online: Conference of Parliamentarians of the Arctic Region <http://www.arcticparl.org/resource/images/conf4_langlais.pdf>.

[192] For a further discussion of the non-legally binding approaches of the Arctic Council in contrast to Antarctica, see Davor Vidas, "The polar marine environment in regional cooperation" in Davor Vidas, ed., *Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention* (Cambridge: Cambridge University Press, 2000).

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framework is needed to solidify and strengthen regional cooperation,[193] as well as the type of treaty arrangements and provisions that would be most appropriate for the Arctic, if it is determined that such a framework should be adopted.[194]

A. SOFT SLEDDINGS

While each of the Arctic Council's working groups can be expected to continue undertaking many projects and assessments that may carry governance implications and in some cases recommendations,[195] two areas of Council activity hold particular promise to influence governance strengthenings and responses. First, further implementation of the numerous strategic actions called for in the *AMSP*,[196] adopted by the 2004 Reykjavik Ministerial Meeting, holds perhaps the greatest promises. The *AMSP* provides an impetus to apply the ecosystem approach in the Arctic[197] and calls for the establishment of representative networks of marine protected areas.[198] Second, follow-up activities to the ACIA, though still in the formulation stage, may be important for furthering climate change policy responses. A review of the Arctic Council's structure appears imminent in light of Norway's announced intent to emphasize the issue during its Chair-period, which it will hold until 2008.[199] Such a review

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[193] For one of the more recent advocacies, see Samantha Smith, "Time for an arctic convention?" Editorial, WWF Arctic Bulletin No. 1.04 (2004) at 3, online: World Wide Fund For Nature <http://assets.panda.org/downloads/ab0104.pdf>.

[194] For a discussion of the various views expressed by authors that cover the spectrum from the need for a global Arctic Convention to a regional seas agreement, see Part III.B.1 of this paper.

[195] For example, AMAP was expected to deliver two reports to the Arctic Council's Ministerial Meeting in October 2006, on Acidifying Pollutants, Arctic Haze and Acidification in the Arctic and the Arctic Council Assessment of Potential Impacts of Oil and Gas Activities in the Arctic. *Progress Report from the AMAP Board to the SAO Meeting* in Syktyvkor, Russia, 26-27 April 2006 at 1, online: Arctic Monitoring and Assessment Programme <http://www.amap.no/> .

[196] *AMSP*, *supra* note 125.

[197] *Ibid.* at 8-9.

[198] *Ibid.* at 11.

[199] See *supra* note 188 and accompanying text.

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promises to open the door to consideration of a number of Council strengthenings, such as the establishment of a permanent secretariat and firmer funding commitments.

1. FOLLOWING THE TRACKS LAID BY THE ARCTIC MARINE STRATEGIC PLAN

The *AMSP* urges actions on many fronts, due to its wide-ranging goals[200] and acknowledgement that the two largest drivers of change in the Arctic are climate change[201] and increasing economic activity.[202] The *AMSP*'s suggested actions that hold the greatest governance relevance include the following: conducting a comprehensive assessment of Arctic marine shipping; developing guidelines and procedures for port reception facilities for ship-generated wastes and residues; examining the adequacy of Arctic Council's *Offshore Oil & Gas Guidelines*;[203] 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; considering revision of the RPA; 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. Each of these proposed *AMSP* actions is discussed below.

a) Conducting a Comprehensive Assessment of Arctic Marine Shipping

The AMSA, led by the PAME Working Group with Canada, Finland, and the U.S. as lead countries, has set an ambitious

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[200] *AMSP*, *supra* note 125 at 3. The four goals are: reduce and prevent pollution in the Arctic marine environment; conserve Arctic marine biodiversity and ecosystem functions; promote the health and prosperity of all Arctic inhabitants; and advance sustainable Arctic marine resource use. See Part II.C.1, above, for more on the *AMSP*.

[201] *Ibid.* at 3.

[202] *Ibid.* at 4.

[203] *Offshore Oil & Gas Guidelines*, *supra* note 124.

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workplan.[204] The AMSA proposes to document the current level of marine shipping activities in the Arctic[205] and to project levels of shipping in 2020 (based upon increasing economic uses, especially oil and gas) and in 2050 (based upon changing ice conditions due to climate change). It also proposes to define Arctic Large Marine Ecosystems (LMEs) with their geographic boundaries, identify sensitive areas within LMEs, and to calculate emission volumes and other environmental impact information for Arctic LMEs, as well as the probabilities of accidental releases for shipping activity levels in the years 2020 and 2050. The AMSA will then describe potential social and economic impacts for each area, review international and national legal frameworks governing Arctic marine shipping, and develop regulatory recommendations where needed. A two-part reporting process has been established. The first part, an overview of present shipping activities in the Arctic and an AMSA progress report was scheduled to be delivered at the October 2006 Arctic Council's Salekhard Ministerial Meeting. A final report will be submitted to the Ministerial Meeting in the autumn of 2008.[206]

The *AMSP* opens a wide window to possibly move the Arctic shipping agenda ahead within the International Maritime Organization (IMO). The *AMSP* calls for IMO recommendations to be developed based upon the AMSA's findings.[207] Various recommendations loom as possibilities for IMO submission, including the following: the prohibition of heavy fuel oils being carried or used as fuels in the Arctic;[208] the designation of at least

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[204] PAME, "AMSA—Arctic Marine Shipping Assessment Work Plan—December 2005 version" (December 2005), online: Protection of the Arctic Marine Environment <http://old.pame.is/>.

[205] An electronic survey questionnaire, designed to capture all Arctic shipping data for the calendar year 2004, was sent to all Arctic Council Members in February 2006. PAME, "PAME Progress Report to Senior Arctic Officials," (Syktyvkor: 26-27 April 2006) at 1.

[206] PAME, "Working Group Meeting Report NO. I-2006" (Oslo: 1-3 March 2006) at 1-2.

[207] *AMSP*, *supra* note 125 at 10.

[208] As proposed for the Antarctic, see *Final Report of the Twenty-Eighth Antarctic Treaty Consultative Meeting*, Stockholm, Sweden, 6-17 June 2005, Decision 8 (Use of Heavy Fuel Oil (HFO) in Antarctica) at para. 94, online: Antarctic Treaty Secretariat <http://www.ats.aq/28atcm/reportes.php>; see also

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some Arctic waters as special areas where strict standards would apply to pollution from oil, noxious liquid substances, and garbage;[209] and the establishment of particularly sensitive sea areas.[210]

b) Developing Guidelines and Procedures for Port Reception Facilities

Norway is leading a project to assess the port reception facilities for ship-generated wastes and cargo residues in the Arctic. There are three phases to the project, as described in the September 2006 PAME meeting report. The first requires that the availability and measures of port reception facilities be assessed. Second, gaps in existing coverage and places for possible improvement in availability will be identified. In the last phase, a recommendation for harmonized guidelines in relation to port reception facilities will be developed.[211]

Norway's submission "Use and carriage of heavy grade oil on ships in the Antarctic Sea" to IMO's Marine Environment Protection Committee, MEPC54/6/4 13 January 2006.

[209] Since Arctic states already have extensive powers to control marine pollution from ships in ice-covered waters within their 200 n.m. exclusive economic zones pursuant to Article 234 of the *Law of the Sea Convention*, *supra* note 114, states could choose to only request special area designation of Arctic waters outside 200 n.m. zones and northern waters not covered by ice most of year. For the strict special area standards, see IMO, *MARPOL 73/78 Consolidated Edition, 2002* (London: IMO, 2002) at Annex I (Oil) Regulation 10; Annex II (Noxious Liquid Substances) Regulation 5, and Annex V (Garbage) Regulation 5. For a further discussion, see Edgar Gold, *Gard Handbook on Protection of the Marine Environment*, 3d ed. (Arendal, Norway: Gard, 2006) at 208, 214, 233.

[210] Following a broad interpretation of Article 234 of the *Law of the Sea Convention*, Arctic states might only seek IMO designations in selected ocean areas outside 200 n.m. zones, if, of course, shipping risks and pressures would eventually warrant designation. *Ibid.* See IMO, Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, Resolution A. 982 (24) (adopted 1 December 2005).

[211] PAME, "Working Group Meeting Report No. II-2005" (Aalborg: 19-20 September 2005) at Appendix VIII.

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c) Examining the Adequacy of Arctic Council *Offshore Oil & Gas Guidelines*

Once the Arctic Council's *Assessment of Potential Impacts of Oil and Gas Activities on the Arctic* is published, the *AMSP* calls for an examination of the adequacy of Arctic Council's *Offshore Oil & Gas Guidelines*.[212] This may open the door to further considering the governance issues surrounding hydrocarbon exploration and exploitation. One issue that could be examined is the progress that has been made in identifying areas for special protection, and even prohibition of, hydrocarbon activities in light of ecological and cultural sensitivities. Other possible areas for consideration include the need for bilateral agreements and possibly a regional agreement for addressing seabed activities carrying transboundary threats, and the feasibility of zero discharge operational practices in remote regions.[213]

d) Identifying Areas for New Guidelines and Code of Practice

No Arctic Council initiatives appear to have yet addressed the creation of new guidelines or codes as an avenue of governance advancement in the Arctic. Still, a number of potential candidate areas stand out. They include regional guidance for controlling tourism levels and impacts,[214] ballast water exchanges with their

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[212] *AMSP*, *supra* note 125 at 10. The Arctic Council's *Assessment of Oil and Gas Activities in the Arctic* was expected to be submitted to the October 2006 Ministerial Meeting but was delayed with finalization expected during 2007-08.

[213] The *Offshore Oil & Gas Guidelines* already urge institutional strengthening in the regional context including cooperation in "bilateral and multilateral initiatives to address the needs, in concert with the public and with oil and gas industry operators." *Offshore Oil & Gas Guidelines*, *supra* note 124 at 12.

[214] Various initiatives have already been taken in developing guidance for the tourism industry. The Sustainable Arctic Tourism Association (SATA), founded in October 2005 and growing out of the Sustainable Model for Arctic Tourism project (SMART) has adopted six principles, or guidelines, for sustainable tourism and is committed to developing a certification system for tourist operations in the Arctic region. See SATA, "Principles and Guidelines,"

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threats of invasive species,[215] whale watching and other wildlife observing activities,[216] noise concerns,[217] and conduct of bioprospecting beyond national jurisdictions.[218]

(2005), online: Sustainable Arctic Tourism Association <http://www.arctictourism.net/sat_principles.htm>. The WWF has developed Ten Principles for Arctic Tourism, a Code of Conduct for Tour Operators in the Arctic, and a Code of Conduct of Arctic Tourists. See WWF, "Linking Tourism and Conservation in the Arctic" (undated), online: World Wide Fund For Nature <http://assets.panda.org/downloads/wwf_tourism_conservation.pdf>.

[215] Such guidelines might be based upon the *Practical Guidelines for Ballast Water Exchange in the Antarctic Treaty Area* [*Ballast Water Exchange Guidelines*] adopted by Resolution 3 at the Twenty-Ninth Antarctic Treaty Consultative Meeting where Parties recognized the fact that the *International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004* (signed at the IMO International Conference on Ballast Water Management for Ships, 13 February 2004; adopted by the Conference in *Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting from the Work of the Conference*, 16 February 2004, IMO Doc. BWM/CONF/36) has yet to enter into force, and noted the Convention's provision that states bordering enclosed and semi-enclosed seas should endeavour to cooperate with neighbouring Parties, including through regional agreements, to harmonize procedures. The *Ballast Water Exchange Guidelines* are attached as an Annex to Resolution 3. See *Final Report of the Twenty-Ninth Meeting*, *supra* note 188 at 16-17.

[216] Such guidelines might be based upon the International Association of Antarctic Tour Operators (IAATO), *Marine Wildlife Watching Guidelines (Whales and Dolphins, Seals and Seabirds) for Vessel and Zodiac Operations*, IAATO (January 2003), online: International Association of Antarctic Tour Operators <http:iaato.org/wildlife.html>.

[217] See Antarctic and Southern Ocean Coalition (ASOC), "An Update on Recent Noise Pollution Issues," Information Paper 61, Submitted to the Twenty-Ninth Antarctic Treaty Consultative Meeting (2006), online: Antarctic Treaty Secretariat <http://www.ats.aq/Atcm/atcm29/ip/atcm29_ip061_e.doc>.

[218] While Arctic states obviously maintain rights to control access to bioprospecting within their exclusive economic zones, issues of access and possible benefit sharing from commercial development of biochemical and genetic resources beyond EEZs in the Arctic loom on the horizon. For further discussions, see Part III.B.4 of this paper; "In Search of a legal regime for bioprospecting in Antarctica" (Information Paper 13, submitted by France to the Twenty-Ninth Antarctic Consultative Meeting, 12-23 June 2006), online: Antarctic Treaty Secretariat <http://www.ats.aq/Atcm/atcm29/ip/atcm29_ip013_e.doc>.

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e) Promoting Application of the Ecosystem Approach

Perhaps no other principle and strategic action item in the *AMSP* holds more potential power for governance change than the ecosystem approach.[219] The *AMSP* urges the identification of Arctic LMEs and the identification of both environmental and socioeconomic indicators of ecosystem health. The *AMSP* also urges the promotion of pilot projects demonstrating the application of ecosystem-based management.[220]

Considerable efforts have already been made to identify LMEs in the Arctic. The World Wide Fund For Nature (WWF) has identified 200 ecoregions around the globe, 11 of which are in the Arctic.[221] Particular WWF emphases have been on protecting the Arctic ecosystems of the Barents,[222] Bering,[223] and Beaufort

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[219] Key features include: consideration of multiple scales, a long-term perspective, recognition that humans are an integral part of ecosystems, an adaptive management perspective and a concern for sustaining production and consumption potential for goods and services. *AMSP*, *supra* note 125 at 8.

[220] *Ibid.* at 11.

[221] See WWF, "Arctic ecoregions," (21 December 2006), online: World Wide Fund For Nature <http://www.panda.org/about_wwf/where_we_work/europe/what_we_do/arctic/what_we_do/ecoregions/index.cfm>.

[222] See, for example, "Barents Sea Environment and Conservation" (20 December 2006), online: World Wide Fund For Nature <http://www.panda.org/about_wwf/where_we_work/europe/what_we_do/arctic/what_we_do/marine/barents/index.cfm>; Maren Esmark & Nina Jensen, "The Barents Sea Cod—The Last of the Large Cod Stocks WWF—Norway Report 4/2004," (10 May 2004), online, World Wide Fund for Nature <http://assets. panda.org/downloads/wwf_codreport_2004.pdf>; WWF-Russia & WWF Barents Sea Program, "Analysis of illegal fishery for cod in the Barents Sea, WWF-Russia report" (11 August 2005), online: World Wide Fund For Nature <http://www.panda.org/about_wwf/where_we_work/europe/what_we_do/arctic/what_we_do/marine/barents/publications/index.cfm.

[223] See David Banks *et al.*, eds., *Ecoregion Based Conservation in the Bering Sea: Identifying Important Areas for Biodiversity Conservation* (Washington, D.C.: WWF and Anchorage, Alaska: The Native Conservancy of Alaska, undated); Sumner MacLeish, *The Bering Sea Ecoregion: A Call to Action in Marine Conservation* (Washington, DC: WWF and Anchorage, Alaska: Beringia Conservation Program, undated), both available online: World Wide Fund For Nature <http://www.worldwildlife.org/wildplaces/bs/pubs/1_Bering_Sea_Ecoregion.pdf>.

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Seas.[224] The U.S. National Oceanic and Atmospheric Administration's LME Program Office has compiled five-part summaries[225] for seven of the Arctic LMEs: Barents Sea, Beaufort Sea, Chukchi Sea, East Siberian Sea, Kara Sea, Laptev Sea, and Norwegian Sea.[226] PAME has adopted a working map of 17 Arctic LMEs that is also being used in the AMAP Oil and Gas Assessment for describing impacts of oil and gas activities.[227]

While the ecosystem approach is still subject to considerable uncertainties[228] and global discussions,[229] it has the potential to be a prime vehicle for catalyzing the development of bilateral and sub-regional agreements and management arrangements in the Arctic. Relatively few transboundary marine conservation agreements exist in the Arctic,[230] and transboundary integrated planning initiatives have yet to occur.

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[224] See WWF, "Beaufort Sea" (20 December 2006), online: World Wide Fund For Nature <www.panda.org/about_wwf/where_we_work/europe/what_we_do/arctic/what_we_do/marine/beaufort/index.cfm>.

[225] The five-part information summaries cover productivity, fish and fisheries, pollution and ecosystem health, socioeconomic factors, and governance. See NOAA, "LMEs of the Polar Oceans," LME Programs, online: Large Marine Ecosystems Information Portal <http://www.lme.noaa.gov/Portal/jsp/LME_PO.jsp>.

[226] *Ibid.*

[227] Frand Stone, *PAME Report to the Senior Arctic Officials*, (Syktyvkor: 26-27 April 2006).

[228] See e.g. Donald R. Rothwell & David L VanderZwaag, "The Sea Change Towards Principled Oceans" in Donald R. Rothwell & David L. VanderZwaag, eds., *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges* (London: Routledge Press, 2006) at 6.

[229] See e.g. "Report of the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its seventh meeting" (June 2006), online: Division for Ocean Affairs and the Law of the Sea <http://www.un.org /Depts/los/consultative_process/consultative_process.htm>.

[230] For a discussion of the limited number of transboundary agreements or arrangements, which cover, for example, the conservation of polar bears, narwhals, and belugas, see Richard A. Caulfield, "Resource Governance" in *Arctic Human Development Report*, *supra* note 158; Nigel Bankes, "Exploring the roles of law and hierarchy in ideas of resilience: Regulating resource harvesting in Nunavut" in Fikret Berkes *et al.*, eds., *Breaking Ice: Renewable Resource and Ocean Management in the Canadian North* (Calgary: University of Calgary Press, 2005).

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Norway could well be a leader in fostering the ecosystem approach in the Arctic through its commitment to develop an integrated management plan for the Barents Sea. Norway has recently developed an integrated management plan for the Norwegian waters of the Barents Sea,[231] in which they pledge a governmental commitment to seek cooperation with Russia to ensure an integrated management regime for the entire Barents Sea.[232]

f) Promoting the Establishment of Protected Areas, Including a Network

While the *AMSP* urges the establishment of marine protected area networks in the Arctic in light of the World Summit on Sustainable Development target,[233] it does not provide any details on how a network might be realized. This could prove to be one of the biggest challenges for the Arctic Council in light of growing offshore economic development interests and the very limited designation of Marine Protected Areas (MPAs) in the Arctic.[234] The Conservation of Arctic Flora and Fauna (CAFF) Working Group has exerted considerable effort in highlighting the need to increase MPAs in the Arctic region[235] and describing

[231] See "Integrated Management of the Marine Environment of the Barents Sea and the Sea Areas off the Lofoten Islands," *Report No. 8 (2005-2006) to the Storting* (31 March 2006) at 7-12, online: Norwegian Ministry of Environment <http://www.regjeringen.no/upload/MD/Vedlegg/STM200520060008EN_PDF.pdf>.

[232] *Ibid.* at 11; see also Norwegian Ministry of Foreign Affairs, The Norwegian Government's High North Strategy (2006) at 18, online: Norwegian Ministry of Foreign Affairs <http://www.dep.no/ud/english/news/speeches/political_staff/032171-090546/dok-bn.html>.

[233] *AMSP*, *supra* note 125 at 11.

[234] Only about 2.5% of Arctic sea areas are protected versus over 17% of Arctic lands protected. See Igor Lysenko, "Arctic Protected Areas—The Potential for Future Monitoring," Circumpolar Biodiversity Monitoring Program Launch, 5-9 September 2005 [on file with authors].

[235] See e.g. CAFF Habitat Conservation Report No. 5, "Circumpolar Protected Area Network (CPAN)—Gaps in Habitat Protection in the Circumpolar Arctic: A Preliminary Analysis" and CAFF Habitat Conservation Report No. 6, "Circumpolar Protected Area Network (CPAN)—Strategy and Action Plan", online: Arctic Portal—Conservation of Arctic Flora and Fauna

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existing national legal frameworks for designating and managing MPAs.[236] However, CAFF has had difficulty in moving from words to action, and its report to SAOs in April 2006 was not optimistic. CAFF's Circumpolar Protected Areas Network (CPAN) initiative was described as "dormant" in light of the lack of a country lead.[237]

g) Considering Revision of the Arctic Council Regional Programme of Action for the Protection of the Arctic Marine Environment from Land-based Activities

The timing and breadth of the Arctic Council's revision of the Regional Programme of Action for the Protection of the Arctic Marine Environment from Land-Based Activities (RPA) still remains uncertain. The *AMSP* simply urges consideration of broadening the scope to cover source categories beyond the initial high priorities of POPs and heavy metals.[238] Canada, as lead country in advancing RPA implementation, agreed to explore the possible expansion of the RPA scope to address medium priority source categories (specifically radionuclides, petroleum hydrocarbons, and physical degradation of habitat).[239] However, a one-page report submitted by PAME to the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (GPA) Second Intergovernmental Review[240] was very general regarding plans for RPA revision. The report stated that "[t]he PAME Working Group is currently considering the need for amendments to the *Arctic RPA* to address additional

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<http://arcticportal.org/arctic-council/working-groups/caff-document-library/habitat-reports>.

[236] CAFF Habitat Conservation Report No. 8, "A Summary of Legal Instruments and National Frameworks for Arctic Marine Conservation," online, Arctic Portal—Conservation of Arctic Flora and Fauna <http://arcticportal.org/arctic-council/working-groups/caff-document-library/habitat-reports>.

[237] CAFF, "Progress Report Presented to the Senior Arctic Officials," (Syktyvkar, 26-27 April 2006) at 4.

[238] *AMSP*, *supra* note 125 at 11.

[239] PAME, Working Group Meeting Report No. II-2005, *supra* note 211 at 18.

[240] GPA Second Intergovernmental Review (Beijing, October 2006).

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priority source categories, examine its overall scope and improve it compatibility with the stated needs of the GPA".[241]

h) Calling for Periodic Reviews of International, Regional Agreements, and Standards

The *AMSP* cuts a wide swath for reviewing the implications and adequacies of international and regional agreements and the standards that are applicable to the Arctic marine environment. The *AMSP* calls for "periodic review" and also encourages further analyses of the applicability of a regional seas agreement to the Arctic.[242] While the *Arctic Marine Shipping Assessment* promises to be the next major international and regional review exercise, there is another key initiative worth noting, although it is tangential to the Council. The UNEP/GRID-Arendal and the Standing Committee of Parliamentarians of the Arctic Region convened an international seminar on Multilateral Environmental Agreements (MEAs) and their relevance to the Arctic.[243] Seminar participants called for an audit to assess MEAs relevant to the Arctic and to examine the need and options for developing an Arctic Treaty or Arctic Framework Convention.[244]

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[241] PAME, Status of Implementation of the Regional Programme of Action for the Protection of the Arctic Marine Environment from Land-based Activities (RPA Arctic) (2006) [on file with the authors].

[242] *AMSP*, *supra* note 125 at 11.

[243] See e.g. UNEP, GRID-Arendal, Nordic Council of Ministers & www.arcticparl.org, *Background report for the seminar on Multilateral Environmental Agreements and their relevance to the Arctic* (Arendal, Norway, 21-22 September 2006).

[244] "The Arendal Seminar on multilateral environmental agreements and their relevance to the Arctic," (Arendal, Norway, 21-22 September 2006) at 2, online: United Nations Environment Programme, Global Resource Information Database-Arendal <http://polar.grida.no/_documents/mea_recommendations.pdf>.

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i) Promoting Implementation of Contaminant-Related Conventions or Programs and Possible Additional Global and Regional Actions

The *AMSP* provides a wedge for further influencing global and regional agendas for addressing contaminants of Arctic concern. It reads:

> Promote, where appropriate, the implementation of contaminant-related conventions/agreements and programs, noting in particular the Stockholm Convention, and possible additional global and regional action on mercury and emerging substances of concern.[245]

The most obvious targets for urging additions of substances for control are the *Stockholm Convention on Persistent Organic Pollutants*[246] and the UNECE protocols on POPs[247] and heavy metals.[248] UNEP's Governing Council, at its 24th Session in February 2007, was to consider the need for further action in mercury including the possibility of a legally binding instrument.[249] It remains to be seen whether the Arctic Council itself will be proactive on that front.

2. MOVING BEYOND THE ARCTIC CLIMATE IMPACT ASSESSMENT

Although addressing climate change will largely hinge on resolving the major challenges under the *Kyoto Protocol*,[250] such as working out industrialized country commitments beyond 2012, bringing developing countries aboard and progress on other

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[245] *AMSP*, *supra* note 125, s. 7.3.5 at 11.

[246] *Supra* note 181; *supra* note 83.

[247] UNECE, *Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants* (24 June 1998) online: United Nations Economic Commission for Europe <http://www.unece.org/env/lrtap/pops_h1.htm>.

[248] UNECE, *The 1998 Aarhus Protocol on Heavy Metals*, (24 June 1998), online: United Nations Economic Commission for Europe <http://www.unece.org/env/lrtap/hm_h1.htm>.

[249] GC UNEP, 23d Sess., 10th Plen. Mtg., UN Doc. UNEP/GC.23/11 (2005) Dec. 23/9 at para. 37, online: UNEP <http://www.unep.org/gc/gc23/>.

[250] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997, 37 I.L.M. 22.

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fronts,[251] the Arctic Council has initiated a process for developing regional follow-up activities to the ACIA.[252] Subsequent to an AMAP Workshop on Follow-up of the ACIA held in Oslo, Norway in June 2005[253] and a meeting of an AMAP Climate Expert Group in February 2006,[254] the "Focal Point" (FP) group tasked with coordinating follow-up activities within working groups and with developing action proposals for the 2006 Ministerial Meeting, made a progress report to the SAO meeting in April 2006 with quite a long list of possible activities in both the scientific and policy areas.[255] For example, the FP group suggested that an annual "State of the Arctic Report" might be produced to highlight one or more key climate change issues and further assess the state of knowledge of the current Arctic carbon cycle and its possible change under a global warming scenario. While the FP group felt rather uneasy about how far it should go in making policy recommendations,[256] they did set out some potentially strong mitigation follow-up activities, including that

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[251] See Meinhard Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Toronto: Thomson Carswell, 2005). At the Eleventh Conference of the Parties to the *UN Framework Convention on Climate Change* (9 May 1992, 31 I.L.M. 849 [UNFCCC]) (and the First Meeting of Parties to the *Kyoto Protocol*) in Montreal in December 2005, two processes were initiated to assist in working out long-term cooperative actions for addressing climate change, a UNFCCC dialogue process including up to four workshops and the *Ad Hoc* Working Group under the *Kyoto Protocol*. See International Institute for Sustainable Development MEA Bulletin, No. 7 (8 June 2006) at 1-2; Meinhard Doelle, "The Cat Came Back, or the Nine Lives of the Kyoto Protocol" (2006) 16 J. Envtl. L. & Prac. 261.

[252] See *supra* note 173 and accompanying text; see Part II.C.7, above, for more on the ACIA.

[253] AMAP, "AMAP Workshop on Follow-up of ACIA June 15-17, 2005, Oslo, Norway" *AMAP Report 2005:3*, online: Arctic Monitoring and Assessment Programme <http://www.amap.no/documents/index.cfm?action=getpile&disrub=&FileName=ACIA%20workshop%20report%20%20Final.pdf>.

[254] Summary of Meeting of AMAP Climate Exert Group, (Oslo, Norway, 15-16 February 2006) (Final Version, 20 March 2006) [on file with the authors].

[255] Status Report Prepared by the Arctic Council "Focal Point for ACIA Follow-up Activities," (Syktyvkar: 26 April 2006) [On file with authors] [*ACIA Status Report 2006*].

[256] *Ibid.* at 2.

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an ACIA implementation reporting process be established. Such a process might require the Members to report back to the Council on how they have considered ACIA findings in implementing their commitments under the *UN Framework Convention on Climate Change*[257] and other agreements, and the Council could then issue periodic reports on the information provided.[258]

Arctic Council Members' views have varied widely on how urgent and strong responses should be.[259] These differences of opinion amongst Members make it difficult to make progress and reach a consensus on the most appropriate types of procedures that should be implemented. One of the Permanent Participants, the Inuit Circumpolar Council (ICC),[260] has already been quite critical of the limited commitments in the ACIA policy document issued in November 2004.[261]

If the FP process is to continue beyond the 2006 Ministerial Meeting, numerous questions also exist over the future composition and structure of the FP. For example, should

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[257] UNFCCC, *supra* note 251.

[258] *ACIA Status Report 2006*, *supra* note 255 at 6.

[259] The United States has been particularly concerned about the role of the Arctic Council in addressing mitigation measures and at the SAOs meeting in April 2006, the U.S. noted that while adaptation can fall under the competence of Arctic Council discussions and solutions, mitigation is a matter to be discussed within the framework of the UNFCCC. See Arctic Council Meeting of Senior Arctic Officials, Syktyvkar, Russia, 26-27 April 2006.

[260] The Inuit Circumpolar Conference's General Assembly approved a new logo and a new name (Inuit Circumpolar Council) at the 10th General Assembly in Barrow, Alaska on 10-13 July 2006. ICC, online: Inuit Circumpolar Council <http://www.inuit.org/index.asp?lang =eng&num=286>.

[261] For a good review of the 'politics' surrounding formulation of the ACIA Policy Document and its major shortcomings, such as its being declaratory in nature and short on specifics, see Sheila Watt-Cloutier, Terry Fenge & Paul Crowley, "Responding to Global Climate Change: The Perspective of the Inuit Circumpolar Conference on the Arctic Climate Impact Assessment" in Lynn Rosentrater, ed., *Evidence and Implications of Dangerous Climate Change in the Arctic* (Oslo, Norway: WWF International Arctic Program, January 2005) at 57-68. See also "Arctic Council Policy Document on Global Warming" (2005) 99 Am. J. of Int'l L. 256-257. The Arctic Climate Impact Assessment Policy Document, issued by the Fourth Ministerial Meeting, is available online: Arctic Climate Impact Assessment <htpp://www.acia.uaf.edu/PDFs/ACIA_Policy_Document.pdf>.

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representatives be included from all the Council's working groups or just those with a prime interest in FP tasks? Should there be national representation and, if so, should this be experts in science, policy, or perhaps both? How should Permanent Participants be represented and what should be the role for organizations with Observer status? Should the FP be given detailed terms of reference, and how will FP tasks be supported financially? Should the work of the FP be simply devolved to one of the existing working groups?[262]

3. REVISITING THE STRUCTURE OF THE ARCTIC COUNCIL

With Norway as the Chair of the Arctic Council from October 2006 through 2008, an important source for ascertaining what might be envisaged for strengthening the operations and functions of the Council is a set of ideas already issued in a 2005 report to the Norwegian Parliament prepared by Norway's Ministry of Foreign Affairs,[263] as the ideas contained within the report will likely guide the Council's work. The report noted the Norwegian position that Arctic Council should have a permanent secretariat and gave notice that the Norwegian Government would seek to establish the secretariat in Tromsø.[264] The report also included a governmental commitment to consult with other Council Members about introducing more binding arrangements for financing joint initiatives beyond the first step of establishing a project fund in cooperation with the Nordic Environment Finance Corporation (NEFCO) as agreed to in 2004.[265] The Norwegian Government pledged to propose to the Arctic Council an international research fund for the High North under its auspices with a focus on climate change issues, biodiversity, and

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[262] The questions were raised in the *Status Report on ACIA Follow-up Activities* submitted to SAOs in April 2006. *ACIA Status Report 2006*, *supra* note 255 at 2.

[263] Norwegian Ministry of Foreign Affairs, *Opportunities and Challenges in the North*, Report No. 30 (2004-2005) to the Storting (Oslo: Ministry of Foreign Affairs, 15 April 2005), online: Norwegian Ministry of Foreign Affairs <http://www.regjeringen.no/en/dep/ ud.html?id=833>.

[264] *Ibid.* at 39.

[265] *Ibid.* at 38.

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indigenous issues.[266] The report also set out the Norwegian Government's view that the Council's sphere of responsibility should be expanded to include political and project-related cooperation with the Council "able to contribute to shaping the framework for national and international measures".[267]

Additional working groups have already been proposed. In an ACAP progress report to SAOs in April 2005, the Chair of ACAP recommended that ACAP be established permanently as the Arctic Council Action Program to Eliminate Pollution in the Arctic[268] Working Group. At the Conference on Cultural Cooperation in January 2006, Ministers of Culture and other representatives for Arctic Council Members requested SAOs to consider the possibility of creating a working group of the Arctic Council dedicated to enhancing the social and cultural environment of Northern territories.[269] Given the large number of international agreements and processes in the environmental and trade fields, the Arctic Council might further reflect on structural ways to enhance giving an 'Arctic voice' in the various fora. For example, an International Cooperation Working Group, or at least a coordinating committee for external relations, might be formed.[270]

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[266] *Ibid.* at 39.

[267] *Ibid.*

[268] Bob Dyer, "ACAP Progress Report to Senior Arctic Officials" (Syktyvkar: ACAP, 26-27 April 2006) at 12. The SAO meeting subsequently approved the idea for a final decision by the Arctic Council. This working group was given the name of the Arctic Contaminants Action Program, see below, Part V.

[269] "Conference on the cultural dimension of cooperation between the Arctic Council Member States" (Khanty-Mansiysk, January 18, 2006), *Report of Senior Arctic Officials to Ministers at the Fifth Arctic Council Ministerial Meeting* (Salekhard, Russia, 26 October 2006) at 45 Annex 2, online: Arctic Portal <http://archive.arcticportal.org/287/01/SAO-REPORTTO_ MINISTERS.pdf>. Other areas, of course, could also be considered for working groups, such as fisheries and marine living resources.

[270] The *Reykjavik Declaration* only encouraged in general continued outreach efforts including efforts by the chair of SAOs, even though it emphasized the importance of international cooperation. *Reykjavik Declaration*, *supra* note 89, "Circumpolar and International Cooperation on Sustainable Development", "Other". For a list of chair activities to promote the Arctic Council within and outside the Arctic region, see *Report of Senior Arctic*

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Getting all Council Members to agree to major structural changes to the Arctic Council may be a difficult task. In 2001, SAOs undertook a review of Council structures, and Members could not agree on whether there was a need for a permanent secretariat with obligatory funding.[271] There was a general feeling that the number of working groups should remain limited in order to avoid more meetings and in light of limited resources.[272]

B. HARD QUESTIONS

At least four difficult questions, discussed in detail below, loom on the horizon regarding the future of Arctic regional governance. Is one or more legally binding agreements needed? If a shift towards 'hard' law occurs for the Arctic, what type of treaty approach should be adopted? If a treaty approach is followed, of what should the details consist? How should issues pertaining to Arctic Ocean areas beyond national maritime zones be addressed?

1. IS ONE OR MORE LEGALLY BINDING REGIONAL AGREEMENTS NEEDED?

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.[273] Suggested benefits include: encouraging greater political and bureaucratic commitments; establishing firmer

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Officials to Ministers at the Fourth Arctic Council Ministerial Meeting, (Reykjavik: 24 November 2004) at Annex 3.

[271] Chair of Senior Arctic Officials, "Review of the Arctic Council Structures, 18 October 2001," SAO/2001/B/10 [on file with authors].

[272] *Ibid,* s. 4.10.

[273] See e.g. Donald R. Rothwell, "International Law and Protection of the Arctic Environment" (1995) Intl & Comp. L.Q. 280; Samantha Smith, *supra* note 193. Even a global treaty for the Arctic rather than a regional agreement has been suggested. See Melissa A. Verhaag, "It Is Not Too Late: The Need for a Comprehensive International Treaty to Protect the Arctic Environment" (2003) 15 Georgetown Int'l Envtl. L. Rev. 555. Recently the Nordic Council, the parliamentary body of Nordic cooperation, adopted the following recommendation: "The Nordic Council recommends to the Nordic Council of Ministers that in cooperation with the Arctic Council the aim is to create a legal system pertaining to the Arctic" 26 April 2006 decision (translation from Finnish, Timo Koivurova) [on file with authors].

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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.[274]

However, various reasons have been put forward against—or at least questioning—a treaty-based approach.[275] Reasons given include the following considerations: difficulty in getting consensus on the need for an agreement;[276] 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.[277]

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[274] See David Scrivener, *Environmental Cooperation in the Arctic: From Strategy to Council*, Security Policy Library No. 1/1996 (Oslo: The Norwegian Atlantic Committee, 1996) at 27; Linda Nowlan, *Arctic Legal Regime for Environmental Protection*, IUCN Environmental Policy and Law Paper No. 44 (Gland, Switzerland: IUCN, 2001) at 58-59.

[275] For a review of disadvantages, see Nowlan, *ibid.* at 59-60; Young, *supra* note 184 at 9-10. For recent papers suggesting implementation of existing international agreements rather than negotiation of a new binding regional regime, see Olav Schram Stokke, "The Law of the Sea Convention and the Idea of a Binding Regime for the Arctic Marine Environment" (Paper prepared for the 7th Conference of Parliamentarians of the Arctic Region, Kiruna, Sweden, 2-4 August 2006), online: Conference of Parliamentarians of the Arctic Region <http://www.arcticparl.org/>; Ambassador Hans Correll, "Reflections on the possibilities and limitations of a binding legal regime for the Arctic" (Address at the 7th Conference of Parliamentarians of the Arctic Region Kiruna, 3 August 2006), online: Conference of Parliamentarians of the Arctic Region <http://www.arcticparl.org/>.

[276] The United States, in particular, has been wary of a regional seas type agreement for the Arctic. Young, *supra* note 184 at 12.

[277] Status of ratifications of the *1998 Aarhus Protocol on POPs* as of 29 November 2006, online: United Nations Economic Commission for Europe <http://www.unece.org/env/lrtap/status /98pop_st.htm>; Status of ratification of the *1998 Aarhus Protocol on Heavy Metals* as of 29 November 2006, online: United Nations Economic Commission for Europe <http://www.unece.org/env/lrtap/status/98hm_st.htm>.

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Besides the concerns expressed above surrounding a move to a legally binding regional approach, other factors may explain the lack of progress to date in further legalizing regional cooperation. One factor could be the lack of multiple 'champions' to push the legalization case.[278] Also, thus far primacy has been given to addressing extra-regional and global sources of pollution and environmental threats.[279] Further, politicians lack a sense of urgency and crisis regarding the need to further strengthen regional legal arrangements.

Climate change combined with increasing accessibility of natural resources in the Arctic hold the potential to become tipping points that could result in the adoption of a legally binding approach. For example, if a state outside the Arctic region suddenly supported mineral exploration or fishing on the Arctic Ocean beyond national jurisdictions, Arctic states might be forced to at least more seriously consider the need for new treaty provisions.

2. IF A SHIFT TOWARDS 'HARD' LAW OCCURS FOR THE ARCTIC, WHAT TYPE OF TREATY APPROACH SHOULD BE FOLLOWED?

At least three main approaches to treaty formulation stand out from international practice in other marine regions around the globe. The first, most common approach is to adopt a framework convention and subsequent protocols. This approach was followed

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[278] For example, the World Conservation Union (IUCN) has been cautious about pushing a position in regard to an Arctic legal instrument or instruments. A meeting of Arctic experts, convened by the IUCN Environmental Law Program and the Council of Environmental Law (an IUCN member) in Ottawa in March 2004 was not able to reach consensus on the need for a new agreement or agreements. IUCN Resolution 3.037, adopted at the World Congress in 2004, merely requested "the IUCN Commission on Environmental Law (CEL) to participate in the Work of the Arctic Council, if needed, by making its services and expertise available to the Arctic Council in relation to appropriate legal frameworks ... ." Res. 3.037 *Arctic legal regime for environmental protection* (24-25 March 2004), online: World Conservation Union <http://www.iucn.org/places/Canada/prog/arctic.htm>. The IUCN's Commission on Environmental Law has appointed an Arctic Task Force to further discuss governance issues.

[279] See e.g. text accompanying *supra* note 82.

for the Mediterranean Sea.[280] There the *Barcelona Convention*,[281] first adopted in 1976 and amended in 1995, sets out the overall legal framework for cooperation, including objectives, principles, and institutional structures, while six protocols set rules and standards in the areas of contingency planning and emergency response,[282] ocean dumping,[283] land-based marine pollution and activities,[284] special area protection,[285] seabed activities,[286] and

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[280] United Nations Environment Programme Mediterranean Action Plan, *Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and Its Protocols* (Athens, 2005) [UNEP, *Mediterranean Convention and Protocols*]. Other regions that have adopted a framework convention-protocol approach include Kuwait, South-East Pacific, the Caribbean, the South Pacific, and Black Sea. For an overview of the agreements, see Gold, *supra* note 209 at 256-68. For a critique of the slow adoption of amendments to protocols and the lack of entering into force of some protocols, see Suh-Yong Chung, "Is the Convention-Protocol Approach Appropriate for Addressing Regional Marine Pollution?: The Barcelona Convention System Revisited" (2004) 13 Penn. State Env. L. Rev. 85.

[281] *Convention for the Prevention of the Marine Environment and Coastal Region of the Mediterranean*, UNEP, *Mediterranean Convention and Protocols*, *supra* note 280.

[282] *Protocol concerning cooperation in preventing pollution from ships and, in cases of emergency, combating pollution of the Mediterranean Sea* (Valetta, Malta, 25 January 2002), (2004) 261 Official Journal of the European Union 40 (entered into force 17 March 2004); UNEP, *Mediterranean Convention and Protocols*, *ibid.*

[283] *Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea* (entered into force 12 February 1978). An amended *1995 Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea* has yet to enter into force. UNEP, *Mediterranean Convention and Protocols*, *ibid.*

[284] *Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources and Activities* (entered into force 17 June 1983), but 1996 amendments have yet to enter into force. UNEP, *Mediterranean Convention and Protocols*, *ibid.*

[285] *Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean* (entered into force 12 December 1999). UNEP, *Mediterranean Convention and Protocols*, *ibid.*

[286] *Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and Its Subsoil* (not yet in force). UNEP, *Mediterranean Convention and Protocols*, *ibid.*

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hazardous waste movements.[287] A second, possible approach is creating an agreement with attached annexes that address specific issues of concern, which was applied in the North-East Atlantic[288] and Baltic Sea[289] regions. A third approach might be labelled the incremental treaty system approach, represented by the Antarctic region. There a general agreement on Antarctic cooperation was first adopted in 1959.[290] Over the years, states having Antarctic interests added agreements to address priority concerns including the conservation of marine living resources,[291] the conservation of seals,[292] minerals,[293] and environmental protection.[294]

If Arctic states adopt a treaty approach, they might seek guidance from the regional experiences elsewhere,[295] but a unique 'tailored for the Arctic' agreement might also be considered. A short and simple agreement might be negotiated, setting out objectives and principles of cooperation, formalizing the Arctic Council structures, strengthening financial commitments, and

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[287] *Protocol on the Prevention of Pollution of the Mediterranean by Transboundary Movements of Hazardous Wastes and Their Disposal* (not yet in force). UNEP, *Mediterranean Convention and Protocols, ibid.*

[288] *Convention for the Protection of the Marine Environment of the North-East Atlantic*, 22 September 1992, (1993) 32 I.L.M. 1069 [*OSPAR Convention*].

[289] *Convention on the Protection of the Marine Environment of the Baltic Sea Area*, 9 April 1992, (1992), [*Helsinki Agreement*] online: Helsinki Commission <http://www.helcom.fi/Convention/en_GB/text/>.

[290] *The Antarctic Treaty*, 1 December 1959, 402 U.N.T.S. 71.

[291] *Convention on the Conservation of Antarctic Marine Living Resources*, August 1, 1980, 19 I.L.M. 841. For a critique, see David J. Bederman, "CCAMLR in Crisis: A Case Study of Marine Management in the Southern Ocean" in Harry N. Scheiber, ed., *Law of the Sea: The Common Heritage and Emerging Challenges* (The Hague: Martinus Nijhoff Publishers, 2000).

[292] *Convention for the Conservation of Antarctic Seals*, 1 June 1972, 11 I.L.M. 251.

[293] *Convention on the Regulation of Antarctic Mineral Resource Activities*, 25 November 1988, 27 I.L.M. 868 (not in force).

[294] *Protocol on Environmental Protection to the Antarctic Treaty*, 4 October 1991, 30 I.L.M. 1455. For reviews of the treaty system, see Rothwell, *supra* note 4 at 110-54; Joe Verhoeven, Phillippe Sands & Maxwell Bruce, eds., *The Antarctic Environment and International Law* (London: Graham & Trotman, 1992); Kees Bastmeijer, *The Antarctic Environmental Protocol and Its Domestic Legal Implementation* (The Hague: Kluwer Law International, 2003).

[295] For a detailed review of possible guidance to be gained from the Antarctic legal regime in particular, see Nowlan, *supra* note 274 at 40-54.

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committing countries to work towards implementing the ecosystem and integrated management approaches through a system of sub-regional transboundary cooperation agreements and arrangements.[296]

3. IF A TREATY-BASED APPROACH IS FOLLOWED, OF WHAT SHOULD THE DETAILS CONSIST?

Even if countries agree on the need to shift to a legally binding approach, the greatest difficulty will likely be agreeing upon the details, which is a problem in many areas of ocean and coastal governance. Some of the issues that need to be resolved before a treaty agreement can be reached include the following:

- Determining the geographical scope of coverage (marine, coastal, and terrestrial);[297]
- Deciding on guiding objectives and principles;[298]
- Reaching agreement on how 'strong' the principled approaches and measures should be, such as whether the special cultural and environmental conditions in the Arctic call for strong versions of the precautionary principle;[299]

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[296] For the importance of a subregional focus on managing shared natural resources and shared ecosystems, see Oran R. Young, "Arctic Governance: Preparing for the Next Phase" (presented at the Arctic Parliamentary Conference, Tromsø 11-13 august 2002) at 8 (footnote: Article commissioned by the Standing Committee of Parliamentarians of the Arctic Region (SCPAR) prepared for a discussion of the future of Arctic governance) online: Conference of Parliamentarians of the Arctic Region <http://www.arcticparl.org/resource/static/conf5_scpar2002.pdf>. For a previous suggested draft for a "tailored treaty," see Donat Pharand, "Draft Arctic Treaty: An Arctic Region Council" (Canadian Arctic Resources Committee, 1991), online: Canadian Arctic Resources Committee <http://www.carc.org/pubs/v19no2/5.htm>.

[297] See e.g. David VanderZwaag, "Regionalism and Arctic Marine Environmental Protection: Drifting between Blurry Boundaries and Hazy Horizons" in Davor Vidas & Willy Østreng, eds., *Order for the Oceans at the Turn of the Century* (The Hague: Kluwer Law International, 1999) at 231-34.

[298] See e.g. Donald R. Rothwell & David L. VanderZwaag, eds., *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges* (London: Routledge Press, 2006).

[299] See Simon Marr, *The Precautionary Principle in the Law of the Sea: Modern Decision Making in International Law* (The Hague: Martinus Nijhoff

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- Getting consensus on what functional areas should be included, for example, fisheries, biodiversity conservation, vessel-source pollution, ocean dumping, land-based marine pollution activities, radioactive and hazardous wastes, seabed activities, energy, tourism, climate change, and cooperation in scientific and technical studies;
- Working out institutional structures and processes, for instance, an executive secretariat, subsidiary bodies, meetings of parties, and periodic summits;
- Determining financial arrangements, including voluntary funds and assessed contributions;
- Deciding if and how decision-support tools should be incorporated, for example, environmental impact assessment, strategic environmental assessment, and integrated management of ocean and coastal areas;[300]
- Considering appropriate reporting and compliance mechanisms, such as the creation of a compliance committee to hear complaints;[301]
- Ascertaining how to address the threats of transboundary or high seas environmental harm and liability;[302]

Publishers, 2003); Richard G. Hildreth, M. Casey Jarman & Margaret Langlas, "Roles for a Precautionary Approach in Marine Resources Management" (2005) 19 Ocean Yearbook 33.

[300] See e.g. Timo Koivurova, *Environmental Impact Assessment in the Arctic: A Study of International Legal Norms* (Burlington, Vt.: Ashgate Publishing Co., 2002). The Mediterranean region is presently considering the legalization of integrated coastal area management through a protocol binding on Party states. See UNEP, Mediterranean Action Plan, First Meeting of the Working Group on the *Integrated Coastal Areas Management (ICAM) Protocol*, Split, Croatia, 27-29 April 2006, Working document on the Draft—Protocol on Integrated Management of Mediterranean Coastal Areas, UNEP(DEPI) MED WG. 287/3 (10 April 2006).

[301] See e.g. United Nations Environment Programme, *Manual on Compliance and Enforcement of Multilateral Environmental Agreements* (Nairobi, UNEP, 2006).

[302] For recent development on the Antarctic where a specific Annex VI has been added to the 1991 Madrid Protocol to address potential liabilities arising from environmental emergencies, see David J. Bederman & Soniya P. Keskar, "Antarctic Environmental Liabilities: The Stockholm Annex and Beyond" (2005) 19 Emory Intl L. Rev. 1383. One of the key provisions allows Parties to

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- Reviewing the options for dispute avoidance and resolution;
- Addressing the participatory roles and procedures for non-governmental organizations, intergovernmental organizations, non-Arctic states, and other groups, especially indigenous groups;[303] and
- Resolving how an Arctic regional agreement or agreements would relate to other regional[304] or sub-regional[305] agreements.

4. HOW SHOULD ARCTIC OCEAN AREAS BEYOND NATIONAL MARITIME ZONES BE ADDRESSED?

With predictions that even the 'High Arctic' Ocean may become nearly 'ice free' at least seasonally by 2100,[306] it seems likely that Arctic states will eventually have to face the issues surrounding the legal status of and possible management arrangements for areas of the Arctic Ocean beyond national maritime zones. Even after extended continental shelf claims beyond 200 nautical miles

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recover the costs of response actions where an operator does not take prompt and effective response action, for example, to deal with a fuel spill from a cruise ship. Annex VI to the *Protocol on Environmental Protection to the Antarctic Treaty, Liability Arising from Environmental Emergencies*, 17 June 2005, (2006) 45 I.L.M. 5.

[303] Issues of indigenous rights have yet to be fully resolved for the Arctic, and pressures for greater empowerments of indigenous groups and communities are not likely to subside. One possible route suggested for further indigenous rights development is the creation of a human rights agreement specific to the Arctic which would include a complaint procedure. See Dalee Sambo Dorough, "Equality and Self-Determination in the Arctic" 110-18 at 116 in *Arctic Human Development Report*, *supra* note 158.

[304] One of the major issues is the relationship to the *OSPAR Convention*, *supra* note 288, which covers quite a large Arctic sector. The possible options include, among others, calling for general cooperation with the OSPAR regime and exempting a regional agreement's coverage of the OSPAR region.

[305] For a discussion of the various subregional arrangements, such as the North American Marine Mammal Commission, the Norwegian/Russian regime governing fisheries in the Barents Sea and the 1973 Polar Bear Conservation Agreement, see Young, *supra* note 296 at 8-10.

[306] *ACIA Synthesis Report, supra* note 170 at 30.

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are resolved,[307] various control issues may arise, including those that relate to fisheries, shipping, bioprospecting, as well as minerals exploration and exploitation of the deep seabed.

At least three main options exist for addressing ocean governance beyond national maritime zones: a law of the sea approach; a regional *sui generis* approach; and a multilateral Arctic Ocean agreement approach. Complicating the governance picture for the Arctic Ocean are the differing visions of states towards governance of the high seas in general and the still unfinished international processes for discussing high seas governance issues. These processes include, among others, the *Ad Hoc* Open-ended Working Group on Protected Areas under the *Convention on Biological Diversity* and the *Ad Hoc* Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction established by the UN General Assembly. The three options for approaching governance of the Arctic Ocean beyond national jurisdiction and complications arising from states' divergent views are canvassed below.

a) Law of the Sea Approach

One answer to jurisdiction and management for the Arctic Ocean beyond national maritime zones is to apply traditional law of the sea in both its customary and conventional forms.[308] Under such an approach, flag state jurisdiction would prevail as the prime principle for controlling activities[309] with various freedoms potentially open to all states, including freedom of navigation and

[307] See Ron MacNab, "Outer Continental Shelves in the Arctic Ocean: Sovereign Rights and International Cooperation," Canadian Polar Commission, Meridian (Spring/Summer 2006) 1-3.

[308] See R.R. Churchill & A.V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester, UK: Manchester University Press, 1999).

[309] *Law of the Sea Convention, supra* note 114, art. 92. Article 92 provides for the exclusive jurisdiction on the high seas by the flag state except in exceptional cases expressly provided for in international treaties or the *Law of the Sea Convention*.

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freedom of shipping.[310] Mineral exploration and exploitation of the deep seabed would come under the jurisdiction of the International Seabed Authority.[311] Various responsibilities would fall upon states to control activities of their vessels and nationals on the high seas, including the specific duties to conserve fish stocks[312] and to cooperate with other states in seeking to manage fish stocks jointly exploited,[313] and the general responsibility to protect and preserve the marine environment.[314]

b) Regional *Sui Generis* Approach

A number of scholars have noted the special Arctic Ocean situation may provide grounds for the five Arctic coastal states to claim jurisdiction over the high seas beyond national maritime zones. The consequences of having a high seas enclave, within what is arguably a semi-enclosed sea with special cooperation obligations,[315] has been suggested as a basis for special treatment in international law.[316] The high seas concept developed historically from ocean-based freedoms, like navigation, that have not been traditionally exercised in the 'core' waters of the Arctic Ocean.[317]

If a *sui generis* approach is followed, the five states surrounding the zone locked area might follow two possible paths. They could decide to divide the area into sections with each

[310] *Ibid.*, art. 87. Article 87 sets out traditional freedoms which also include freedom of overflight, freedom to lay submarine cables and pipelines and freedom to construct artificial islands and other installations.

[311] For a critique of the environmental controls established to date, see Dionysia-Theodora Avgerinopoulou, "The Lawmaking Process at the International Seabed Authority as a Limitation on Effective Environmental Management" (2005) 30 Colum. J. Envtl. L. 565.

[312] *Law of the Sea Convention, supra* note 114, art. 117.

[313] *Ibid.*, art. 118.

[314] *Ibid.*, art. 193.

[315] *Ibid.*, art. 123, lists the obligations that "States bordering an enclosed or semi-enclosed sea" must "endeavour, directly or through an appropriate regional organization", to fulfill.

[316] See Douglas M. Johnston, "The Future of the Arctic Ocean: Competing Domains of International Public Policy" (2003) 17 Ocean Yearbook 596 at 600-02.

[317] *Ibid.* at 600.

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nation responsible for managing its own portion.[318] Alternatively, they could negotiate cooperative management arrangements, perhaps as part of a broader regional treaty also covering national maritime zones and even land areas.[319]

Both paths remain tenuous. Dividing up the Arctic Ocean core has received scant scholarly or state support.[320] Following either path could raise substantial objections from states concerned with an Arctic Club unilaterally excluding other states from exercising high seas freedoms. Whether Arctic states would be willing to adopt a *sui generis* approach remains to be seen.[321]

c) Multilateral Arctic Ocean Agreement

A third approach would be for Arctic states to take the lead in engaging the broader community of states (those with actual or potential interests in the Arctic) to negotiate a specific management regime for the Arctic Ocean beyond national jurisdiction. One option might be to seek an international agreement to maintain the area as a marine protected area, which could possibly be open to a few uses such as tourism and marine scientific research.[322]

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[318] *Ibid.* at 616.

[319] *Ibid.* at 616-17. See also J. Enno Harders, "In quest of an Arctic legal regime: Marine regionalism—a concept of international law revisited," (1987) 11 Marine Policy 285 at 296-98. For a discussion on how states have addressed high sea enclaves in other contexts, see Olav Schram Stokke, ed., *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press, 2001).

[320] See Donald R. Rothwell & Stuart Kaye, "Law of the Sea and the polar regions: Reconsidering the traditional norms" (1994) 18 Marine Policy 41 at 51; E. Franckx, *Maritime Claims in the Arctic: Canadian and Russian Perspectives* (Dordrecht: Martinus Nijhoff Publishers, 1993) at 79-81, 90-92, 152-53, 168-70, 229-31, 237-38.

[321] Rothwell & Kaye, *ibid.* at 51.

[322] For a suggestion that an "international park" be established in the Arctic Ocean, see Barry Hart Dubner, "On the Basis for Creation of a New Method of Defining International Jurisdiction in the Arctic Ocean" (2005) 13 Mo. Envtl L. & Pol'y Rev. 1. However, the author seems to unrealistically suggest extension of a "no development" zone to baselines of the eight surrounding countries, which assumedly means territorial sea baselines. Sweden and Finland do not have coastlines on the Arctic Ocean.

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d) Complications of State Views and International Processes Addressing High Seas Governance

The views of states towards high seas governance in general are obviously in conflict. The different perspectives became obvious at the fifth UN Open-ended Informal Consultative Process on Oceans and Law of the Sea in 2004, where the question of marine biodiversity beyond national jurisdiction was a central topic for of discussion.[323] Some states took the position that there was not a "governance gap" for deep sea biodiversity and that law of the sea provisions provide an adequate foundation for controlling uses such as bioprospecting.[324] Other states argued that there was a governance lacuna, including a need to develop an international framework for regulating bioprospecting and ensuring a sharing of benefits to developing states.[325]

Various international processes have been initiated to further international discussions and debates on high seas governance issues. These working group processes have yet to run their course.[326] The *Ad Hoc* Open-ended Working Group on Protected Areas, established under the *Convention on Biological Diversity*,[327] has been tasked with addressing not only how to enhance establishment of MPAs within national jurisdiction but also how marine protected areas might be established beyond national jurisdiction.[328] The *Ad Hoc* Open-ended Informal

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[323] Discussions were organized around the theme "New sustainable uses of the oceans, including the conservation and management of the biological diversity of the seabed in areas beyond national jurisdiction." See *Report of the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting* (7-11 June 2004), UN Doc. UNGA A/59/122 at para. 1, online: Division for Oceans and the Law of the Sea <http://www.un.org/Depts/los/consultative_process/consultative_process.htm>.

[324] *Ibid.* at para. 91.

[325] *Ibid.* at paras. 90, 93.

[326] For a good overview, see Kristina M. Gjerde & Graeme Kelleher, "High Seas marine protected areas on the horizon: legal framework and recent progress" (2005) 15:3 Parks 11.

[327] *Convention on Biological Diversity*, *supra* note 143.

[328] The mandate was bestowed in February 2004 at the 7th Conference of the Parties through Decision VII/28, "Protected Areas (Articles 8 (a) to (e))",

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Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction met in February 2006 with directions from the General Assembly to address four topics relating to high seas governance.[329] The working group process demonstrated again states' divergent views towards high seas governance, including regarding whether new international legal provisions are required. Such provisions could include an implementation agreement to the *Law of the Sea Convention*[330] to address marine biodiversity issues beyond national jurisdiction.[331]

In light of the fluid state of international discussions, it seems unlikely that Arctic states will reach a consensus, at least in the near term, over the need for a multilateral agreement specific to the Arctic Ocean that would extend beyond national maritime zones. This 'wait and see' attitude seems likely to prevail, since a breakthrough resulting from general, global discussions could provide a foundation for addressing the 'High Arctic' specifically.[332] For example, if a global listing process was established for designating MPAs on the high seas, the Arctic Ocean beyond national jurisdiction might be dealt with under a global regime instead of in an Arctic-specific treaty.

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online: Secretariat to the Convention on Biological Diversity < http://www.cbd.int/decisions/default.aspx?m=cop-07>.

[329] Resolution adopted by the General Assembly: *Oceans and the Law of the Sea*, GA Res 59(24) UN GAOR, 59 Sess., UN Doc. A/Res/59/24 (2005) at para.73.

[330] *Law of the Sea Convention*, *supra* note 114.

[331] See *Report of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction*, 20 March 2006, UNGA A/61/65 at paras. 55, 58, online: Division for Ocean Affairs and the Law of the Sea <http://www.un.org/Depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm> [Ad Hoc *Working Group Report*].

[332] There was wide support at the February 2006 Working Group meeting on marine biological diversity beyond national jurisdiction for continuing discussions under the auspices of the General Assembly and it was recognized that the General Assembly would decide on a relevant course of action at its sixty-first session. See "Summary of trends prepared by the Co-Chairpersons", in *Ad Hoc Working Group Report*, *ibid.* at Annex I para. 20.

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IV. CONCLUSION

Looking retrospectively from the tenth anniversary of the Arctic Council in September 2006, many positive achievements of the Council stand out. Perhaps the greatest contribution has been the sponsoring of numerous scientific studies that have been instrumental in waking the world to the transboundary pollution and climate change challenges facing the Arctic. The Council's ACAP initiative has nurtured projects trying to address the serious pollution problems, in the Russian Federation in particular. Pursuant to the *AMSP*, the Council has launched assessments of shipping and oil and gas activities in the Arctic that carry special environmental and social risks. The Council provides a new model for how indigenous peoples can participate in intergovernmental cooperation.

Looking back over the past ten years also brings to light some of the continuing weaknesses and shortcomings of the Arctic Council process. Uncertain and limited funding, lack of a permanent and stable secretariat, and primary reliance on the goodwill of national government departments, ministries, and officials that are often over-taxed with existing responsibilities, have been problematic for the Council. A 'study and talk' mentality has prevailed with numerous projects and workshops promoted and carried out, in some cases even resulting outright failures.[333] Moving from words to actions has been challenging in light of the Council's limited role as a discussional and catalytic forum—a soft law body—with law and policy controls remaining within individual member states.

Looking prospectively from the Council's first 10 years, regional cooperation at least in the near term is almost certainly to continue soft sleddings, flexibly and opportunistically moving ahead without a binding, region-wide agreement. The *AMSP* holds particular promise for nudging cooperation ahead in understanding and addressing issues such as: safe shipping; adequate reception facilities; application and implementation of the ecosystem approach; and development of regional guidelines

[333] An example of such a failure is the *Guidelines for Environmental Impact Assessment in the Arctic*, discussed above in Part II.D.

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that could extend to ballast water, tourism operations, whale watching, wildlife observing, and perhaps even bioprospecting in high seas areas of the Arctic Ocean. The ACIA also seems likely to be followed-up with further 'soft' initiatives, such as encouraging further climate impact studies and placing the international spotlight on indigenous community plights to adapt to climate change impacts.

While moving from soft sleddings to one or more regional, legally binding agreements for the Arctic region has been suggested by various writers and organizations, such a move is more likely to be done in a slow creep rather than a leap. As discussed in Part III.B above, four hard questions remain to be resolved. Answers are needed to questions regarding whether legally binding agreements are desirable, and then, if a shift towards hard law is agreed upon, an approach for formulating the treaty would have to be chosen. A large number of the treaty's details would need to be addressed, and the areas beyond the national maritime zones should also be considered. Unless participants of the Arctic Council fully confront these questions, there is a danger of the Council becoming a façade under which unilateral and uncoordinated policies can proceed. With its current structure, finances, and status, there is not much the Council can do to respond to growing development challenges. Bolstering the Arctic Council framework with firm legal foundations continues to be an option worthy of serious consideration, and as noted in Part III.B.1 of this paper, strong arguments support such a development.

A few things are certain at the Council's 10-year mark. Globalization pressures, climate change threats, and transboundary pollutants have not gone away. Effective global governance and ocean governance remain distinct goals. Regional cooperation in the Arctic, although progressing, has yet to fully mature. Moving beyond the present 'slushy situation' is likely to be 'messy' and will involve political, social, and economic debates as to the future of the Arctic. Whether the Arctic's current terrestrial and marine environments will be able to wait for sluggish human resolutions remains to be seen.

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V. POSTSCRIPT

At the Fifth Arctic Council Ministerial Meeting in October 2006 in Salekhard, Russia, the 2006-08 Chair of the Arctic Council, Norway, further crystallized its agenda.[334] The main areas of regional cooperation emphasized were long-range pollution, climate change, pollution prevention and reduction of hazardous substance releases, as well as protection of the marine environment and conservation of biological diversity. Norway committed to arranging a conference to further explore integrated resource management in the Arctic and to work toward developing a common approach to ecosystem-based management. Notice was also given that a process would be initiated to examine the Arctic Council's organization with a view to improving its effectiveness and efficiency. A secretariat in Tromsø for the Norwegian, Danish, and Swedish Chair-periods from 2006 to 2012 was also confirmed.

The 2006 *Salekhard Declaration*,[335] issued by Ministers representing the eight Arctic Council Members, was very tentative in addressing the serious threats raised by climate change. The need to share expertise and best practices in adapting to climate change being used by indigenous and other residents was highlighted, and SAOs were directed to report on adaptation 'lessons learned' and other results at the 2008 Ministerial Meeting. SAOs were further directed to keep under review follow-up on the ACIA and its policy document based upon the latest scientific findings and to report on follow-up activities at the next Ministerial Meeting. Ministers also decided to keep under review the need for an updated assessment of climate change in the Arctic in light of the Intergovernmental Panel on Climate Change (IPCC) fourth assessment report and the results of the International Polar Year 2007-08.

The *Salekhard Declaration* also addressed organizational aspects of the Arctic Council. Ministers approved transitioning the

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[334] Arctic Council Secretariat, Norwegian chairmanship 2006-2008, online: Arctic Council <http://arctic-council.org>.

[335] *Salekhard Declaration on the Occasion of the Tenth Anniversary of the Arctic Council*, Fifth AC Ministerial Meeting, 26 October 2006, online: Arctic Council <http://arctic-council.org> [*Salekhard Declaration*].

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Arctic Council's ACAP into a working group with its name changed to the "Arctic Contaminants Action Program". [336] Ministers also requested "SAOs to examine the organization of the Arctic Council with a view to improve its effectiveness and efficiency and to report back to the next Ministerial in 2008".[337]

The *Salekhard Declaration* again highlighted the difficulties in ensuring adequate financing for regional cooperation. The Salekhard meeting noted that the Arctic Council Project Support Instrument (PSI) was not yet operational and indicated that the innovative funding initiative might be terminated at the Sixth Ministerial Meeting if the initiative was not operational at that time. Ministers reiterated invitations to Arctic Council Members, Observers, and others to pledge contributions to the PSI and "emphasize[d] the need for reinforcing efforts to finance circumpolar cooperation".[338]

[336] *Ibid.* at 6.
[337] *Ibid.* at 9.
[338] *Ibid.* at 8.

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