

contingency planning, SAR and services are not addressed to a great extent here, these will have to be in place for more intensive transport to occur. Given these qualifications, with the recommendations forwarded and the law already in place, it is felt the Arctic is solidly on track towards responsible governance with regards to navigation in the 21st century.

traditional economies, industrial preferences would likely dominate. Dangers connected with the opening of the NSR included contributing to the sometimes serious alcohol problems suffered by indigenous peoples; the increased risk for the release of hazardous cargo or material particularly in the Bering, Chukchi and Barents Seas as well as litter into the sea waters, coastline and delta areas; shipping accidents with long term effects on indigenous subsistence including reduction of productivity and revenues from hunting of sea mammals and fishing; illegal fishing; increased industrial activities with risks of continued and increasing pollution, erosion and reduction of pastures and grazing areas; barriers to migrations of domestic and wild reindeer both on land and over river ice; and changed migration patterns of whale and other marine mammals threatening indigenous sources of stable food as well as social relationships. More effort needed to be invested in terms of time and money to organise and conduct further research covering the probable impacts of NSR related activities on indigenous clusters and livelihoods. The extent of the area and the heterogeneity of the indigenous communities embraced by the NSR were of such dimensions it was not possible in a short time to chart completely all the cultural effects and impacts of increased navigation. *At least two precautionary steps could be taken, new or extended legislation with considerable respect for indigenous land use and an effective enforcement and implementation of environmental regulations. Most important of all was the need for the indigenous societies to be included as part of the process of creating the framework for NSR development, and their premises to be viewed and treated on an equal basis* (italics added by author/R. Douglas Brubaker).

Governing Arctic Shipping: Finding a Role for the Arctic Council

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1. Introduction

Considerable attention has been drawn to the consequences of climate change in the Arctic. As numerous scientific studies have shown, the region is a barometer for climate change worldwide.¹ The effects of climate change have been recognised in the Arctic for a long time, and the rise in average temperature in the region will be twice that of the rest of the world, as the snow and ice react swiftly to warming. This will have overwhelming repercussions for the region's ecosystems and render its economic potential more accessible. Of particular interest is the quickly receding and thinning sea ice of the Arctic Ocean, which is opening up the region to economic development; the change has prompted numerous studies on how the region's oil and other natural resources could be exploited, its tourism potential increased and its navigational waterways utilised.² Shipping stakeholders have high expectations regarding the increasing use of Arctic shipping lanes, and with good reason; these routes may greatly reduce distances between the world's major commercial centres.³

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¹ ACIA: *Arctic Climate Impact Assessment* (Cambridge: Cambridge University Press 2005), 1042; See "Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change," in eds. Martin L. Parry et al., *IPCC: Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press 2007), 653–685, <http://www.ipcc.ch/ipccreports/ar4-wg2.htm> (accessed December 15, 2009).

² The Arctic Council has carried out important assessments regarding oil and gas and marine shipping. See the Arctic Council website, www.arctic-council.org (accessed December 15, 2009).

³ For a general overview, see the Background Paper on Arctic Shipping, contribution to the Arctic Transform project. (Lead authors: Erik J. Molenaar, Netherlands Institute for the Law

The main purpose of this article is to examine what role the Arctic Council has played in how shipping is organised in the Arctic. Shipping in general is a heavily regulated use of the seas. All forms of shipping – be their purpose the transportation of goods and tourists, military operations or fishing – are governed by an extensive number of international treaties, most operating under the auspices of the International Maritime Organisation (IMO) and the national regulations of coastal states.⁴ It is thus not at all certain what exactly is the 'niche' to be occupied by the Arctic Council where shipping is concerned.

The first part of the article examines what kind of intergovernmental co-operation the current Arctic Council represents. This analysis is needed to establish what the Council can do in general, which in turn determines what it can do where shipping is concerned. Here the goal is to clarify the general limits on what the Arctic Council can do now and in the future. The second part of the article focuses on the Council's working groups, where its main work is done. The six working groups include representatives from various line agencies of the member states, as well as representatives from the six international organisations of the region's indigenous peoples. The particular focus here is the work related to shipping carried out in the Protection of the Arctic Marine Environment (PAME) working group, although other groups have also done work in this area.

The third part of the article focuses exclusively on the Arctic Marine Shipping Assessment (AMSA),⁵ which was finalised by the most recent ministerial meeting of the Council, in April 2009. This assessment clearly represents the culmination of the Council's work on shipping and thus deserves close attention. The salient points of analysis are how the AMSA was initiated, how it was carried out and the very interesting recommendations it produced.

Fourth, it is useful to ask whether the Arctic Council is capable of responding to changes, whether these be environmental and socio-economic drivers that alter the Arctic (such as climate change or economic globalisation) or institutional challenges. There have been numerous institutional challenges – actual as well proposed – that merit examination when evaluating whether the Arctic Council is equipped to take on more demanding tasks in the field of shipping. One such challenge is the May 2008 Arctic Ocean coastal state meeting, which outlined a shipping agenda. It is also relevant to ask whether

of the Sea and Robert Corell, Heinz Center), <http://arctic-transform.org/download/ShipBP.pdf> (accessed December 15, 2009).

⁴ For an overview, see the IMO website, (Legal, IMO Conventions), <http://www.imo.org/> (accessed December 15, 2009).

⁵ See generally "AMSA: Arctic Marine Shipping Assessment," http://www.pame.is/images/stories/PDF_Files/AMSA_2009_Report_2nd_print.pdf (accessed December 14, 2009).

some other intergovernmental co-operation forum might replace the Arctic Council as the predominant site of Arctic governance in the future, as this would have implications for shipping.

The final section draws conclusions that address the following questions. The first is the type of role the Arctic Council had in shipping work before the AMSA. The second is how much and in what direction the AMSA changed the role of the Council in its shipping policy. Here one focus is whether the Council has been able to find a proper 'ecological box' for itself in its shipping work. The recommendations of the AMSA also call into question what role the Arctic Council will play in shipping in the future, especially as there may be other intergovernmental forums, such as the Arctic Ocean coastal state co-operation, willing to take on at least some of the Council's roles in that area. Here the conclusions from section one will be of use in predicting whether the Arctic Council has the requisite adaptive capacity or will be replaced by some more focused form of intergovernmental co-operation.

2. Limits Set by Arctic-Wide Co-Operation on What Can be Done with Regard to Shipping

The Arctic Environmental Protection Strategy (AEPS)⁶ was adopted by the eight Arctic states (the five Nordic states, the United States, Canada and the Soviet Union/ Russian Federation)⁷ in 1991 in Rovaniemi, Finland. The document did not set out a clear definition of what would be the southernmost boundary for defining 'the Arctic' in the co-operation envisaged.⁸ Although the countries that were invited to take part were states that had areas of territorial sovereignty above the Arctic Circle,⁹ the Circle was not deemed the southernmost boundary of the Arctic, since all the Arctic states and the working groups had defined 'the Arctic' for their own purposes. The Arctic Council was established in 1996 in response to a Canadian initiative¹⁰ and

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 The Soviet Union still signed the AEPS, even though the country was then quickly succeeded by the Russian Federation.

⁸ See Timo Koivurova, *Environmental Impact Assessment in the Arctic: A Study of International Legal Norms* (Aldershot: Ashgate Publishing 2002), 25–28.

⁹ Iceland also has areas of territorial sovereignty above the Arctic Circle, as its territorial sea extends above the Circle.

¹⁰ See David Scrivener, "Arctic Environmental Cooperation in Transition." *Polar Record* 35 (192) 1999: 51–58.

during the period from 1996 to 1998, the AEPS was merged into the Arctic Council pursuant to the Ottawa Declaration.¹¹

The four initial working groups of AEPS co-operation – Conservation of Arctic Flora and Fauna (CAFF), Protection of the Arctic Marine Environment (PAME), Emergency Prevention, Preparedness and Response (EPPR) and the Arctic Monitoring and Assessment Programme (AMAP) – were integrated into the Arctic Council. A new working group was set up when the Arctic Council was established, the Sustainable Development Working Group (SDWG) and in general the mandate of the Council was defined in a broad manner to include all issues confronting the Arctic as a whole.¹² At first sight, this seemed to be a clear departure from the AEPS, which focused on environmental protection. Yet, the AEPS also worked on sustainable development via its Task Force on Sustainable Development and Utilisation (TFSDU), which had more high-level and controversial sustainable development issues on its agenda than the SDWG ultimately dealt with.¹³ Overall, there was thus no real change in the mandate of the AEPS and the Council, as both in practice dealt with issues of environmental protection and sustainable development.

Moreover, the Council's institutional forms did not change much during the transition. The AEPS had Senior Arctic Affairs Officials (SAAO) to co-ordinate the work within the Council, SAAOs normally being high-level civil servants from the foreign offices. SAAOs also prepared the ministerial meetings of the AEPS, which took place in Nuuk (Greenland) in 1993, in Inuvik (Canada) in 1996 and in Alta (Norway) in 1997, this last being the final one. Very much the same structure has been retained in the Council, although its organisation has been clarified through rules of procedure.¹⁴ The work of the Council is still coordinated by Senior Arctic Officials (SAO); only the name has been changed. SAOs prepare the ministerial meetings in the same way as SAAOs did in the AEPS, and ministerial meetings take place after the end of a country's term as chair. These meetings have been held in Iqaluit (Canada

¹¹ See Joint Communiqué and Declaration on the Establishment of the Arctic Council (Ottawa Declaration), 35 I.L.M. 1382, (1996), <http://arctic-council.org/filearchive/Declaration%20on%20the%20Establishment%20of%20the%20Arctic%20Council-1.pdf> (accessed December 15, 2009).

¹² *Ibid.* Ottawa Declaration, para. 1.

¹³ Eva C.H. Keskitalo, *Constructing 'the Arctic'* (Acta Universitatis Lapponiensis 47, 2002), 113–158. (Revised version published as Eva C.H. Keskitalo, *Negotiating the Arctic the Construction of an International Region* (New York and London: Routledge 2004).

¹⁴ The Arctic Council's Rules Of Procedure as adopted by the Arctic Council at the first Arctic Council Ministerial Meeting, 17–18 September 1998. Iqaluit: Arctic Council, <http://arctic-council.org/filearchive/official%20rules%20and%20procedures.PDF> (accessed December 15, 2009).

1996–1998), Barrow (USA 1998–2000), Inari (Finland 2000–2002), Reykjavik (Iceland 2002–2004), Salekhard (Russia 2004–2006) and Tromsø (Norway 2006–2009). The secretariat services for the Arctic Council have customarily been provided by each chair state, but a change was introduced that the three Scandinavian chairs (Norway, Denmark and Sweden) established a secretariat in Tromsø, Norway, that would operate until 2012. They decided that ministerial meetings are to be organised in the spring rather than autumn;¹⁵ accordingly, the ministerial ending Norway's term as chair was organised in April 2009. However, it remains to be seen whether Canada will accept this arrangement when its period as chair starts in 2012.

The only clear change that took place when moving from the AEPS to the Arctic Council was an improvement in the membership status accorded to the region's indigenous peoples or, more specifically, the international organisations representing either one people living in many Arctic states or many indigenous peoples living in one state.¹⁶ Under the AEPS, the indigenous peoples' organisations were observers along with non-governmental and intergovernmental organisations and non-Arctic states. This changed with the Ottawa Declaration, which gave Arctic indigenous peoples' organisations a unique status: they are now permanent participants, whom the members proper must fully consult before making a consensus decision.¹⁷

The level of commitment in Arctic co-operation has been low from the beginning in both the AEPS and the Arctic Council phases. This is manifested in how funding is organised, the kind of legal instruments used in the co-operation and how controversial and high-level the questions are that can be discussed and decided on in the Council. From the very beginning, funding has been ad hoc in the sense that no permanent contributions are required from the eight Arctic states or other participants. There have been discussions of a project support instrument, but this is merely a plan for pooling resources from various actors to help carry out some Council projects, especially those designed to be carried out in Russia.¹⁸ There has been no serious discussion to date on changing the funding system from the present ad hoc system to a stable, permanent mechanism.

¹⁵ "Common Objectives and Priorities for the Norwegian, Danish and Swedish chairmanships of the Arctic Council (2006–2012)," http://arctic-council.org/article/2007/11/common_priorities (accessed December 15, 2009).

¹⁶ Ottawa Declaration, para. 2, *supra* note 11.

¹⁷ *Supra* note 11.

¹⁸ "Final Report of the Svalbard SAO Meeting," 23–24 April 2008 para.12.2., <http://arctic-council.org/filearchive/Sao%20Svalbard%20Final%20Report.pdf> (accessed December 15, 2009).

Another factor signalling the low level of commitment to Arctic co-operation is the way in which the AEPS and the Arctic Council were established. The Rovaniemi Declaration, which launched AEPS co-operation, was signed by the representatives of the eight Arctic states. In a similar vein, the Arctic Council was established via the Ottawa Declaration. Both forms of co-operation were thus created not by an international treaty, but through a signed declaration, effectively keeping the co-operation as a type of soft-law arrangement. According to Bloom, the U.S. Department of State representative in the meetings of the Arctic Council, these forms co-operation were an objective for the U.S. owing to the enhanced flexibility they provide.¹⁹

Finally, Arctic co-operation has not taken up controversial and high-level issues of international co-operation. While this was obvious in AEPS co-operation, which focused on co-ordinating country action in the field of environmental protection, the Arctic Council Declaration at least laid a basis for taking action in all common issues facing the Arctic.²⁰ The Declaration was also promising in describing the Arctic Council as a high-level intergovernmental forum, which could have signalled a body that would tackle rather controversial issues, with the exception of military security.²¹ Unfortunately, this has not taken place. The Council has remained a body that produces, via its working groups, technical recommendations and guidelines and influential scientific assessments. It has not become a regulatory body, although its recent scientific assessments have been accompanied by policy recommendations – the closest that the Council has come to the realm of governance. No serious effort has been made to go beyond the existing paradigm of producing non-binding technical guidance or fairly abstract policy recommendations. Without any legal status, the Council seems likely to continue as a similar sort of body, whose primary focus is to sponsor scientific assessments and to function as a platform for discussions of environmental protection and sustainable development between the established Arctic actors. A slight change was effected in the Tromsø ministerial in the direction of giving the Council a more political role by having political meetings organised every year, rather than only biennially in conjunction with the ministerial meetings.²²

¹⁹ Evan Bloom, "The Establishment of the Arctic Council," *American Journal of International Law* 93 (1999): 712–722.

²⁰ Ottawa Declaration, para.1, *supra* note 11.

²¹ *Ibid.*, first footnote in p. 2.

²² The 2009 Tromsø Declaration provides that the ministers "decide to further strengthen the political role of the Arctic Council by having a meeting at deputy Minister level, with representatives of Permanent Participants, to discuss emerging issues between Ministerial meetings" (emphasis in the original), <http://arctic-council.org/filearchive/Tromsøe%20Declaration-1..pdf> (accessed December 15, 2009).

Overall, while there was a rapid shift indeed from AEPS to Arctic Council co-operation, the underpinnings of the co-operation have remained very much the same. The Arctic Council has become more complex in organisational structure, but the basic features of the co-operation remain unchanged. Hence, from the functional perspective, there is not that much the Arctic Council can do. It can create processes to share information and good practices and even produce non-legally binding documents to guide and adjust practices for the particular Arctic conditions, yet there are no evaluation procedures to determine whether these actions have any real-life impacts. It can also assess environmental and sustainable development challenges to the region and possible ways to counter these. Increasingly, it has found its niche to be co-ordinating extensive assessments, with policy recommendations, of the consequences of climate change and globalisation in the region. The indigenous perspective has been important in all of this work.

3. Working Groups

The main work in the Council has been done in its working groups, especially those that have functioned from the beginning of the AEPS co-operation. It is pertinent to first study whether we can detect a change in priorities during the Arctic co-operation and then examine what has been done in the field of shipping.

The negotiations that led to the adoption of the AEPS envisaged the Arctic as one integrated region for international policy purposes. The AEPS was very much built on the idea of protecting vulnerable Arctic ecosystems from human-induced pollution, both from within the region and, perhaps more importantly, from outside it. The AEPS is an intensely conservationist document, albeit one that takes into account the cultural values of the region's indigenous peoples in protecting the ecosystems. This is apparent from its first two objectives:

- 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.²³

The AEPS was also an ambitious instrument of international environmental protection, given the final promise of its objectives, to do no less than "identify,

²³ AEPS 2.1. (i and ii), *supra* note 6.

reduce, and, as a final goal, eliminate pollution.”²⁴ At the time the AEPS was signed, and during its whole life-cycle until 1997, climate change had no real influence on the work of the Council. The AEPS does refer to climate change – but only in passing – as a matter to be governed by international governance processes.²⁵ It is also useful to remind ourselves that during the 1990s it was still thought that climate change was something to be dealt with in the future and that the Arctic would remain what it has always been – a frozen desert. This perception of the Arctic is well captured in the opening passage of the AEPS:

The Arctic is highly sensitive to pollution and much of its human population and culture is directly dependent on the health of the region's ecosystems. Limited sunlight, ice cover that inhibits energy penetration, low mean and extreme temperatures, low species diversity and biological productivity and long-lived organisms with high lipid levels all contribute to the sensitivity of the Arctic ecosystem and cause it to be easily damaged. This vulnerability of the Arctic to pollution requires that action be taken now, or degradation may become irreversible.²⁶

Here the image is one of ecosystems that are inherently vulnerable because of the cold and hostile environment and thus require stronger environmental protection measures. From the beginning, the AMAP working group was tasked to investigate these vulnerable ecosystems, which had not been studied sufficiently, and to examine the pollution problems that threatened them. There is no sign in the group's work in a region that was undergoing a broad and intense transformation.

This conception of the Arctic was also manifested in the PAME report to the third ministerial meeting of the AEPS in Inuvik in 1996. In section 5, where shipping is discussed, climate change is not identified as a driver. More specifically, in section 5.7, in which conclusions and recommendations are presented, the states are encouraged to evaluate current and future

²⁴ *Supra* note 6, AEPS, 2 (1v)).

²⁵ *Ibid.*, AEPS, 30–31, which provide the following: “Two of the most significant threats to the present Arctic environment may come from climate change, induced by global warming, and the effects of stratospheric ozone depletion. Programs to detect and determine the causes and effects of climate change and ozone depletion are to a large extent being developed by other international groupings and in other fora.” For a general overview see: Timo Koivurova and Waliul Hasanat, “The Climate Policy of the Arctic Council” in eds. Timo Koivurova, Eva C.H. Keskitalo, and Nigel Bankes, *Climate Governance in the Arctic* (Dordrecht, NL: Springer, 2009): 51–76.

²⁶ *Supra* note 6, AEPS 1, “Introduction.”

shipping trends – not because of climate change, but because of economic development.²⁷

It was not the founding of the Arctic Council in 1996 that started to change the image of the region from that of a frozen desert to one of a dynamically changing area, but the process which led to the production of the Arctic Climate Impact Assessment (ACIA).²⁸ It is important to remind ourselves that during the 1990s climate change efforts were focused on mitigating – even stopping – climate change from taking place. The policy discourse and the general media did not yet seriously think of how to adapt to climate change consequences, but rather how to prevent the phenomenon from occurring – much as the international community was able to take affirmative action to reduce Chlorofluorocarbons (CFC's) and, in the long run, to control and eliminate the problem of ozone depletion. This priority in the climate regime was about to change dramatically and, arguably, one of the main reasons for this perceptual change was the ACIA conducted under the auspices of the Arctic Council.

The work carried out in the non-governmental International Arctic Science Committee (IASC) was instrumental in ensuring that the ACIA was completed. Another important factor was the interest of the U.S. as chair of the Arctic Council (1998–2000) in pushing for and funding such an assessment. This occurred during the Clinton Administration, when the U.S. was one of the key players in negotiating the Kyoto Protocol to the UNFCCC, which partly explains the important role the U.S. was willing to play in implementing the assessment. After several seminars on the topic during the U.S. chair period, a decision was made to launch the ACIA, with representatives from CAFF, AMAP, the IASC and indigenous peoples on the steering committee.²⁹

The ACIA was the first regional climate change assessment ever conducted (even the first assessment to consider the effects of ozone depletion in the Arctic) and it focused very much on the consequences of climate change for the region and its indigenous peoples. Although the 2001 Intergovernmental Panel on Climate Change (IPCC) synthesis report also mentions the Arctic

²⁷ See PAME: Protection of the Arctic Marine Environment Report – 1996, 28, http://www.pame.is/images/stories/Work_Plans/Framework_documents/PAME-1996-Report.pdf (accessed December 15, 2009).

²⁸ ACIA: *Impacts of a Warming Arctic*, ACIA Overview Report (Cambridge: Cambridge University Press 2004) [ACIA Synthesis Report]; see generally the ACIA Final Scientific Report, *supra* note 1. See the ACIA website, <http://www.acia.uaf.edu/> (accessed December 15, 2009).

²⁹ See Annika Nilsson, “A Changing Arctic Climate: Science and Policy in the Arctic Climate Impact Assessment,” in eds. Timo Koivurova, Eva C.H. Keskitalo and Nigel Bankes, *supra* note 25, 77–98.

in passing, it was the ACIA that established the Arctic as the early-warning station for climate change, a region where climate change had already caused very concrete problems for ecosystems and human communities and a region that was likely to warm twice as much as the rest of the world.

The ACIA dramatically changed the way we perceive the Arctic as a region. Instead of being seen as an inaccessible frozen region – the image that had influenced the work of the AEPS – the Arctic became almost the opposite, a region undergoing a sweeping and long-term transformation process in all respects. Some of the key findings of the ACIA synthesis report point to a dramatic transformation:

- 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;
- x). Multiple influences interact to cause increased impacts to people and ecosystems.³⁰

It is also worth keeping in mind that the ACIA started to influence the perceptions of the Arctic among the Arctic Council actors even before the synthesis report was released in 2004. As early as the 2002 Inari ministerial meeting, the participants "note with concern the ongoing significant warming of most of the Arctic, and recognize that the impacts of global climate change with increased possibilities of extreme weather events will have large consequences in the Arctic, and that the Arctic can act as an early warning

of global climate changes."³¹ This development culminated with the release of the synthesis report before the 2004 Reykjavik Ministerial, which in turn led to policy recommendations in the Reykjavik Declaration and the acknowledgement of the "the need to further organize the work of the Arctic Council and its subsidiary bodies based on the findings of the ACIA and direct the SAOs to report on the progress made at the 2006 Ministerial Meeting."³²

The ACIA changed the priorities for most of the working groups, directing them to conduct scientific assessments on the consequences of climate change in the Arctic. These 'second generation' assessments – in the fields of oil and gas, marine shipping and biodiversity – have examined or are examining in detail some of the consequences of climate change for the Arctic environment and the growing interest of the business community in making use of the region.

The Arctic Council's work with regard to shipping began to change with the new perceptions of the Arctic. This was apparent in one of the key findings of the ACIA, i.e., that the reduced sea ice is very likely to increase marine transport and access to resources, which prompted the AMSA. Before we proceed to study the AMSA process and its outcome, it will be important to examine what the working groups did in the area of shipping before the assessment.

Two working groups are most important in this respect, the PAME and the EPPR. There is evidently a natural connection between emergency management and shipping, given that shipping does cause many emergencies and catastrophes, e.g., the infamous Exxon Valdez oil spill in Alaska. The EPPR has engaged in many activities geared towards containing oil pollution from shipping in the Arctic, which is defined as one of the priorities in the AEPS. Good examples are the 1998 Field Guide for Oil Spill Response in Arctic Waters,³³ the 2002 Circumpolar Map of Resources at Risk from Oil Spills in the Arctic³⁴ and the 2004 Shoreline Clean-up Assessment Technique

³¹ Para. 8 of the Inari Declaration 2002. Inari declaration was adopted on the occasion of the third Ministerial Meeting of the Arctic Council (Inari: Arctic Council 2002), <http://arctic-council.org/filearchive/The%20signed%20Inari%20Declaration.pdf> (accessed December 15, 2009).

³² Reykjavik Declaration 2004, *Climate Change in the Arctic*. Reykjavik declaration 2004 was adopted on the occasion of the fourth ministerial meeting of the Arctic Council 2004. Reykjavik: Arctic Council, <http://arctic-council.org/filearchive/The%20signed%20Reykjavik%20Declaration.pdf> (accessed December 15, 2009).

³³ See "Field Guide for the Oil Spills Response in Arctic Waters," <http://eppr.arctic-council.org/content/fldguide/intro.pdf> (accessed December 15, 2009).

³⁴ See "Circumpolar Map of Resources at Risk from Oil Spills in the Arctic," <http://eppr.akvaplan.com/>.

³⁰ See *Impacts of a Warming Arctic: ACIA Overview Report* (2004), *supra* note 28, 10–11.

(SCAT) Manual (2004).³⁵ The EPPR has also provided more general risk management systems that are important for shipping. Of particular note are the Arctic Guide,³⁶ which contains information on emergency systems and contact points, an overview of environmental risks, and applicable agreements and is updated annually, and the 1998 Environmental Risk Analysis of Arctic Activities.³⁷

The clearest deliverable of the PAME before the AMSA in the area of shipping was the 2004 Guidelines for Transfer of Refined Oil and Oil Products in Arctic Waters (TROOP).³⁸ The aim of the Guidelines is to "prevent cargo/fuel oil spillage, and the resulting environmental damage, during transfer between any two vessels or between a vessel and shore facility, in either direction,"³⁹ various good practices are recommended to this end. The Guidelines are written for vessels that supply Arctic communities, industries, and other vessels working in the Arctic.⁴⁰ There was also the three-stage 'assessment of existing measures for port reception facilities for ship-generated waste and cargo residues,' half of which was completed before being cancelled⁴¹ when it was found to overlap too much with the work of the IMO.⁴²

Indirectly, all ecosystem-based management (EBM) work has clear implications for shipping, given that the ultimate purpose of such work is to control and manage all ocean uses within the limits of ecosystem resilience. The

³⁵ See "The Arctic SCAT Manual: A Field Guide to the Documentation of Oiled Shorelines in Arctic Environments." Available (for reference) at: <http://eppr.arctic-council.org/> (accessed December 15, 2009).

³⁶ *Ibid.*

³⁷ See *ibid.*

³⁸ See "Arctic Council Guidelines for Transfer of Refined Oil and Oil Products in Arctic Waters," http://www.pame.is/images/stories/PDF_Files/Doc_lib/OilandGasReports/TROOP_-_English_2.pdf (accessed December 15, 2009).

³⁹ *Ibid.*, 3.

⁴⁰ *Ibid.*

⁴¹ This was formally done in the PAME meeting on 6–7 March 2007 in Copenhagen. See "Program for the Protection of the Arctic Marine Environment," *Working Group Meeting Report 2007*, http://www.pame.is/images/stories/PDF_Files/Doc_lib/Meeting_Reports/pame-report-i-2007.pdf (accessed December 15, 2009).

⁴² This was noted already on p. 6 of the minutes of the PAME meeting on 22–23 February 2005 Copenhagen, Denmark: "Some participants noted that the IMO had already prepared Guidelines for Ensuring the Adequacy of Port Waste Reception Facilities (adopted in 2000) which could also be used in this work. The IMO Guidelines provide guidance on the determination of adequacy of reception facilities for ship-generated waste as part of the implementation of MARPOL 73/78." See "Program for the Protection of the Arctic Marine Environment," *Working Group Meeting Report 2005*, http://www.pame.is/images/stories/PDF_Files/Doc_lib/Meeting_Reports/PAME%20report%20I-2005.pdf (accessed December 15, 2009).

recently adopted Best Practices in Ecosystem based Oceans Management in the Arctic (BePOMAR)⁴³ is the clearest contribution of the Arctic Council in this respect. This SDWG- and PAME-led project examined the various EBM systems already in place for governing Arctic waters, which enabled the project to produce guidance for EBM in the region.⁴⁴ The next stage, outlined in the PAME work plan for the period 2009–2011, is to examine how the conclusions from the BePOMAR project could be followed up by the Arctic states and how these activities can be coordinated with activities in the Large Marine Ecosystem (LME) process.⁴⁵ The PAME has also identified 17 large marine ecosystems (based on, e.g., ecological criteria of bathymetry, hydrography, productivity and trophic linkages) for the Arctic seas in order to promote LME management. Currently, this work has moved on in the form of pilot projects, the first two being the Beaufort Sea LME in the border region between the U.S. and Canada and the U.S./Russian Federation West Bering Sea LME.⁴⁶

The CAFF's Circumpolar Protected Area Network (CPAN) also bore some promise, especially when the PAME adopted its Arctic Marine Strategic Plan in 2004 to establish a network of marine protected areas. However, at least as yet, this initiative and the CPAN in general have not begun living up to their potential.⁴⁷

4. *The Arctic Marine Shipping Assessment (AMSA)*

The AMSA brought many strong sides of the Arctic Council to the fore. First, since the Council provides the broadest platform for discussing issues

⁴³ See "Observed Best Practices in Ecosystem-based Oceans Management in the Arctic Countries," http://www.pame.is/images/stories/Ecosystem_Approach/SDWG-PAME_BePOMAR_Observed_Best_Practices_Document1.pdf (accessed December 15, 2009). The larger report is available at: http://www.pame.is/images/stories/Ecosystem_Approach/SDWG-PAME_Best_Practices_in_Ecosystem_based_Oceans_Management_20091.pdf (accessed December 15, 2009).

⁴⁴ The following were found to be the key elements: 1). flexible application, 2). integrated and science based decision-making, 3). commitment to ecosystem-based oceans management, 4). area-based approaches and transboundary perspectives 5). stakeholder participation, and 6). adaptive management.

⁴⁵ See "PAME Work Plan 2009–2011," 3, http://www.pame.is/images/stories/PAME_Work_Plan_2009-2011/PAME.b_work_plan_2009-2011.pdf (accessed December 15, 2009).

⁴⁶ *Ibid.*

⁴⁷ See Timo Koivurova, "Governance of Protected Areas in the Arctic," *Utrecht Law Review*, 5:1 (2009), 44–60, <http://www.utrechtlawreview.org/publish/articles/000101/article.pdf> (accessed December 15, 2009).

between internationally oriented Arctic and non-Arctic actors, it enabled an assessment that is broad and ambitious enough to consider various shipping constituencies. Second, the fact that the region's indigenous peoples are involved in all of the work of the Arctic Council meant that – in contrast to most international marine policy and law – the AMSA could include indigenous perspectives as well. Third, since the Council is an 'open' intergovernmental forum (not one enshrined in a treaty) that can link various actors to discuss, assess and softly guide Arctic developments, it served as an ideal platform for carrying out the AMSA.

As mentioned above, the ACIA concluded, among other things, that reduced sea ice is very likely to increase marine transport and access to resources. At the same time, the 2004 Arctic Marine Strategic Plan by the PAME established the AMSA as a major priority.⁴⁸ It was carried out at various levels of scope with the help of a large number of experts and all shipping stakeholders and conducted together with other Arctic Council working groups (EPPR and SDWG) and, in particular, the Council's permanent participants.⁴⁹ Even town hall meetings with indigenous peoples playing a central role were organised during the end of the process. The AMSA covered all kinds (destinational/intra-Arctic) and types of shipping (fishing, transportation, etc.) – with the exception of naval vessels⁵⁰ – and provided very strong negotiated policy recommendations targeted at various forums and actors, in particular the Arctic states.⁵¹ The goal of this inclusive and high-profile assessment was to map out current and future shipping volumes in various parts of the Arctic marine regions, which it did. The AMSA's findings and policy recommendations were endorsed at the April 2009 ministerial meeting that ended the Norwegian chair period.⁵²

From the viewpoint of governance, the AMSA's most important achievements are its negotiated policy recommendations, which provide interesting

⁴⁸ See section 7.2.2. of the Arctic Marine Strategic Plan, http://www.pame.is/images/stories/AMSP_files/AMSP-Nov-2004.pdf (accessed December 14, 2009).

⁴⁹ See *supra* note 5, 13.

⁵⁰ As provided on p. 11, *ibid.*, "The AMSA covers all types of marine transport under the general topic of "shipping": tankers, bulk carriers, offshore supply vessels, passenger ships, tug/barge combinations, fishing vessels, ferries, research vessels and government and commercial icebreakers."

⁵¹ *Ibid.*, 6–7.

⁵² As provided in the SAO Report to the Tromsø Ministerial Meeting: "Approve the Arctic Marine Shipping Assessment (AMSA) 2009 Report prepared by PAME in association with EPPR and other bodies including its recommendations on enhancing Arctic marine safety, protecting Arctic people and environment and building Arctic marine infrastructure and request SAOs to continue to review its findings and develop appropriate follow up actions."

suggestions as to how to improve Arctic shipping. The recommendations are grouped into three categories: enhancing Arctic marine safety, protecting Arctic people and the environment, and "Building the Arctic Marine Infrastructure."⁵³

Marine safety in the Arctic is to be achieved first by influencing other international organisations, especially the IMO. It is suggested that the Arctic states should decide on a case-by-case basis to identify areas of common interest in marine safety and develop unified positions and approaches with respect to international organisations. Special emphasis is placed on improving the existing 2002 IMO Arctic Code, which is often wrongly called the 'Polar Code,' given that it applies only in the Arctic.⁵⁴ The Code provides important guidance for construction requirements for various types of Polar Class ships similar to those adopted by the International Association of Classification Societies (IACS). They also recommend equipment standards, various types of operational and environmental protection, and damage control measures. The recommendation calls for the Arctic states to influence the IMO measures for Arctic shipping, in particular the Polar Code and the IMO global ship safety and pollution prevention conventions. The first part of the recommendation has already been implemented, with the IMO Assembly adopting the Polar Code at the end of 2009 and the guidelines applying in both Polar Regions.⁵⁵ There is also a process in motion in the IMO to make the substance of the Code legally binding, e.g., by including it in some of the IMO's existing international conventions.⁵⁶

Enhancing marine safety will also require uniformity of Arctic shipping governance from the Arctic states. As is well known, the UN Law of the Sea Convention empowers the Arctic coastal states to take additional measures regarding shipping in ice-covered areas. According to Article 234:

⁵³ See *supra* note 5, 6–7.

⁵⁴ See "Guidelines for Ships Operating in Arctic Ice-Covered Waters," http://www.imo.org/includes/blastDataOnly.asp/data_id%3D6629/1056-MEPC-Circ399.pdf (accessed December 14, 2009).

⁵⁵ See "List of Resolutions Adopted by the Assembly at the twenty-sixth session", A 26/INF.10/Rev.1, 23 November–2 December 2009, http://www.imo.org/includes/blastDataOnly.asp/data_id%3D26999/INF-10-Rev-1.pdf (accessed December 14, 2009).

⁵⁶ SOLAS (International Convention for the Safety of Life at Sea, 1974) amendments may be the main thing, but there are also suggestions to have additional legally binding standards, for instance, to be included in STCW 78 (International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978) and possibly also MARPOL 73/78 (International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto). All these IMO Conventions can be downloaded from the IMO website (path: Legal, IMO Convention), <http://www.imo.org/> (accessed December 14, 2009).

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

This provision mandates those Arctic coastal states that control sea areas under the ice cover for most of the year to adopt and enforce non-discriminatory 'regulations for the prevention, reduction and control of marine pollution from vessels' within the limits of their exclusive economic zones.⁵⁷ Two Arctic states have made use of this provision, Canada and Russia, and availed themselves of stronger powers to control ship traffic partly in order to protect the marine environment.⁵⁸

Much emphasis is also laid on strengthening passenger ship safety in Arctic waters, one expression of that being the recommendation to negotiate an 'Arctic Search and Rescue (SAR) Instrument.' This process is in fact already in motion, as the U.S. State Department and Coast Guard have commenced negotiations to this end using the Arctic Council as their platform and thus deliberately avoiding the EPPR assuming a role in the effort. The goal of the instrument is to focus on enhancing marine search and rescue capability, and the outcome may be a non-binding or legally binding instrument.⁵⁹

⁵⁷ It is important to point out that Article 234 raises various questions of interpretation, as explained by VanderZwaag: "What is required to meet the litmus of 'ice covering such areas for most of the year'? For example, will even partial ice cover suffice if there is an exceptional hazard to navigation? What is the significance of giving special coastal state powers only in the EEZ? Some writers have suggested the EEZ limitation implies that coastal states are given no greater powers than applicable to the territorial sea... while others have supported a bestowing of much broader powers, in particular the right to unilaterally adopt special ship construction, crewing and equipment requirements... Application of Article 234 to international straits used for navigation may also be questioned. Since UNCLOS does not exempt straits from the application of Article 234, questions of interpretation may again rise over the geographical scope of coverage and the breadth of coastal state regulatory powers", 9. See: David VanderZwaag, "Governance of Arctic Marine Shipping," 10 October 2008, by Marine & Environmental Law Institute, Dalhousie University, http://www.pame.is/images/stories/AMSA/AMSA_Background_Research_Documents/History_and_Governance_of_Arctic_Shipping/2.5-Governance-of-Arctic-Marine-Shipping.pdf (accessed December 14, 2009).

⁵⁸ *Ibid.*, 50–73.

⁵⁹ See SAO meeting in Kautokeino on 19–20 November 2008, Norway, final report, para. 3.4., <http://arctic-council.org/filearchive/AC-SAO-NOV08-Final%20Report%20of%20the%20>

In "Protecting Arctic People and the Environment," the AMSA encourages the Arctic states to conduct surveys of Arctic indigenous marine uses, the rationale being that such baseline knowledge makes it easier to assess the impacts of Arctic shipping on indigenous communities. The Arctic states are also urged to establish effective communication channels between shipping stakeholders and indigenous communities, especially in the planning phase of a new marine activity, in order to increase the benefits to indigenous communities and lessen the activity's negative impacts.

The component of the AMSA that provides environmental protection recommendations is very strong. It calls on the Arctic states to protect areas of heightened ecological and cultural significance from shipping and establish specially designated 'Arctic Marine Areas,' which would be regulated under the IMO procedures (Particularly Sensitive Sea Areas, or PSSAs)⁶⁰ and special areas under some of the annexes of MARPOL 1973/1978 (the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto).⁶¹ The lack of such areas has been a clear gap in marine environmental protection in the Arctic, given that much of the Southern Ocean has been deemed a special area, a status that allows parties to take protective measures.⁶²

Furthermore, several specific areas of environmental protection are identified. First, the AMSA calls on the Arctic states to take action on the national and international level against invasive species carried via ballast water. The IMO's International Convention for the Control and Management of Ships' Ballast Water and Sediments (the BTW Convention) is not yet in force, but the Antarctic Treaty Consultative Parties adopted non-legally binding Practical Guidelines for Ballast Water Exchange in Antarctic waters and these were later adopted by the IMO.⁶³ The Guidelines contain procedures for vessels that operate in both Polar Regions. The Guidelines aim to ensure that vessels

Meeting.pdf (accessed December 14, 2009). This was confirmed by an e-mail communication with Julie Gourmley on 28 August 2009 (on file with the author).

⁶⁰ See "Particularly Sensitive Sea Areas" further info at http://www.imo.org/environment/mainframe.asp?topic_id=1357.

⁶¹ See "Special Areas under MARPOL" further info at http://www.imo.org/Environment/mainframe.asp?topic_id=760 (accessed December 14, 2009).

⁶² For the dates of entry into force of special areas under Annexes I, II and V, see: http://www.imo.org/Environment/mainframe.asp?topic_id=760 (accessed December 14, 2009). These MARPOL 73/78 Annexes are I (Prevention of pollution by oil), II (Control of pollution by noxious liquid substances) and V (Prevention of pollution by garbage from ships). All these IMO MARPOL Annexes can be downloaded from the IMO website (path: Legal, IMO Convention), <http://www.imo.org/> (accessed December 14, 2009).

⁶³ "Practical Guidelines for Ballast Water Exchange in the Antarctic Treaty Area" Annex to resolution 3 (2006), http://www.ats.aq/documents/recatt/Att345_e.pdf (accessed December 14, 2009).

operating in both Polar Regions handle ballast water responsibly to ensure that invasive marine organisms are not transported between the regions. Oil spill prevention is deemed to be the highest priority for environmental protection in the Arctic, which is interesting given that it was a priority as early as in the 1991 AEPS. The AMSA's recommendations also encourage the Arctic states to work with the IMO in addressing impacts on marine mammals and reducing air emissions in accordance with the IMO regulations.

The AMSA recommendations on 'Building the Arctic Marine Infrastructure' provide important guidance for the Arctic coastal states as they start building the marine infrastructure and Arctic marine traffic system. The recommendation to increase circumpolar environmental response capacity is relevant for marine environmental protection, and the Arctic states are even urged to conclude circumpolar or bilateral agreements to that end. There is also a general call for the Arctic states to invest in gathering hydrographic, meteorological and oceanographic data, which are also preconditions for safe shipping.

With such highly ambitious recommendations, one would look for a strong follow-up mechanism from the PAME, but the PAME work plan for the years 2009–2011 does not designate a lead country for the AMSA.⁶⁴ The reason for this was explained in the minutes of the last PAME meeting: "...the AMSA was finalized shortly before the 2009 Ministerial meeting in Tromsø, hence no follow-up activities could be developed into projects and included to the PAME Work Plan 2009–2011 at that time."⁶⁵ The PAME meeting in Oslo (30 September to 2 October 2009) approved a matrix which divided the set of 17 AMSA recommendations into three categories: those to be followed up by the PAME, those to be followed up by Arctic Council working groups in general, and "Actions to be followed up within national implementation processes/policies with possible future requests for reporting on national activities."⁶⁶ In addition, the PAME will likely include the AMSA in its 2011–2013 work plan.

⁶⁴ See "PAME Work Plan 2009–2011" at 2, http://www.pame.is/images/stories/PAME_Work_Plan_2009-2011/PAME_b_work_plan_2009-2011.pdf (accessed December 14, 2009).

⁶⁵ See "PAME Working Group Meeting Report No: PAME I 2009," http://www.pame.is/images/stories/FrontPage/PAME_I-2009Report_samsett.pdf (accessed December 14, 2009).

⁶⁶ These are now detailed in the meeting report, in Annex V "Matrix for AMSA Follow-Up," http://www.pame.is/images/stories/FrontPage/PAME_I-2009Report_samsett.pdf (accessed December 14, 2009).

5. Institutional Challenges to the Arctic Council

There are various institutional challenges to the Arctic Council. Perhaps the principal one, and the only one to have materialised to date, is the Arctic Ocean coastal state meeting of May 2008, which seemed to advance a future shipping agenda for the five states. Other emergent challenges manifest themselves in the functioning of the Arctic Council. There are pressures within the Council, partly prompted by the coastal state meeting, for it to renew itself and become a stronger body. A third category of institutional challenges is reflected in proposals for renewing the overall governance framework in the Arctic, an ambition in which the parliaments and parliamentary co-operation have been particularly instrumental.

The five Arctic Ocean coastal states – the United States, the Russian Federation, Denmark-Greenland, Norway and Canada – organised a political meeting (preceded by a senior level official meeting in Norway in October 2007) in May 2008 in Greenland where they issued what is known as the Ilulissat Declaration.⁶⁷ The main motivation for the meeting was for the states to clarify to the media that there is no scramble under way for resources in the Arctic Ocean sea-bed but rather an orderly development, regulated by the international law of the sea. Still, the fact that Denmark chose not to convene a special meeting of the predominant intergovernmental Arctic co-operation forum, the Arctic Council, was met with numerous objections. Of the Arctic Council member states, Finland, Sweden and Iceland were not invited, an action that Iceland was particularly concerned about.⁶⁸

In the Ilulissat Declaration, the coastal states pointed out that the Arctic Ocean is on the threshold of significant changes as a consequence of climate change and melting sea ice, and thus: "...by virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean the five coastal

⁶⁷ Danish Ministry of Foreign Affairs, 2008. The Ilulissat Declaration of the Arctic Ocean Conference, Ilulissat, Greenland, 27–29 May, 2008, <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf> (accessed December 14, 2009).

⁶⁸ In the discussion at the Narvik Senior Arctic Official meeting (18.1.), "Iceland expressed concerns that separate meetings of the five Arctic states, Denmark, Norway, U.S., Russia and Canada, on Arctic issues without the participation of the members of the Arctic Council, Sweden, Finland and Iceland, could create a new process that competes with the objectives of the Arctic Council. If issues of broad concern to all of the Arctic Council Member States, including the effect of climate change, shipping in the Arctic, etc. are to be discussed, Iceland requested that Denmark invite the other Arctic Council states to participate in the ministerial meeting. Permanent participants also requested to participate in the meeting. Denmark responded that the capacity of the venue may be an issue." Narvik SAO meeting 2007, Final Report (28–29 November 2007), <http://arctic-council.org/filearchive/Narvik%20FINAL%20Report-%2023Apr08.doc> (accessed December 14, 2009).

states are in a unique position to address these possibilities and challenges.⁶⁹ They also presented themselves as protecting the environment and indigenous and other communities in the coastal areas of the Arctic Ocean:

Climate change and the melting of ice have a potential impact on vulnerable ecosystems, the livelihoods of local inhabitants and indigenous communities... By virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean the five coastal states are in a unique position to address these possibilities and challenges... The Arctic Ocean is a unique ecosystem, which the five coastal states have a stewardship role in protecting. Experience has shown how shipping disasters and subsequent pollution of the marine environment may cause irreversible disturbance of the ecological balance and major harm to the livelihoods of local inhabitants and indigenous communities.⁷⁰

The Arctic Ocean coastal states perceived that there is 'no need to develop a new comprehensive international legal regime to govern the Arctic Ocean' because

notably, the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims. This framework provides a solid foundation for responsible management by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions.⁷¹

What is interesting is that the coastal states identified a shipping agenda for themselves: "we intend to work together including through the [IMO] to...develop new measures to improve the safety of maritime navigation and prevent or reduce the risk of ship-based pollution in the Arctic Ocean."⁷² They expressed their concern over the risk of accidents and 'therefore the need to further strengthen search and rescue capabilities' and state, "We will work to promote safety of life at sea in the Arctic Ocean, including through bilateral and multilateral arrangements between or among relevant states."⁷³

This meeting posed a direct challenge to the Arctic Council. Even though Denmark insisted in the 2007 Narvik SAO meeting prior to the Greenland conference that coastal state co-operation would not compete with the Council, the meeting caused friction among the Arctic Council members. As it has been mentioned earlier, Iceland has been the most concerned of the

⁶⁹ Ilulissat Declaration, *supra* note 67.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

three states left out of the meeting (the others were Finland and Sweden). It expressed its concern at the Narvik SAO meeting and also at the August 2008 Conference of the Arctic parliamentarians.⁷⁴ This is no wonder, as Iceland plans to become a major port in trans-Arctic shipping.⁷⁵

But concern was also voiced over the way in which the observer category in the Arctic Council has developed. Most worrisome was that the distinction between Arctic and non-Arctic states has been increasingly called into question. The existing six permanent observer states to the Council (Poland, Germany, the United Kingdom, the Netherlands, Spain and France), all member states of the EU, have started to demand a better status from the Council. Now they are observers, having fewer powers than the permanent participants, who represent the Arctic's indigenous peoples' organisations. In fact, there is an ever-longer line of states, as well as the EU, waiting to gain the status of a permanent observer. In this line are big and powerful states, with very clear shipping interests, such as Italy, China, South Korea and Japan. Even the European Commission tried to apply for this status in the last ministerial, but its application was rejected. As the Commission's ideas for action represent the most elaborate articulation of Arctic shipping policy available, it will be useful to examine them here.⁷⁶

The Commission's Arctic Communication identifies potential commercial and environmental advantages of trans-Arctic traffic, although obstacles and risks remain. It notes an interest on the part of the EU in exploring and improving conditions for gradually introducing Arctic commercial navigation, while promoting stricter safety and environmental standards and avoiding detrimental effects. The Commission calls upon Member States and the EU to defend their navigational rights and freedoms in the newly opened routes and areas. The more specific policy actions in the field of transport call for full implementation of existing obligations concerning navigation rules, stress the need to avoid discriminatory practices by any of the Arctic coastal states towards third countries' merchant ships and improve maritime surveillance capabilities in the far North. The Commission also intends to explore support for actions identified in the AMSA, to designate some Arctic

⁷⁴ Para. 36, Parliamentarians of the Arctic Region. 2008. Report of the eighth conference of parliamentarians of the Arctic Region, Fairbanks, USA, 12–14 August 2008, http://www.arcticparl.org/_res/site/file/files%20from%208th%20conference/Conference_Report_Fairbanks_final.pdf (accessed December 14, 2009).

⁷⁵ See AMSA report at 111, *supra* note 49.

⁷⁶ See "Communication from the Commission to the European Parliament and the Council – The European Union and the Arctic Region" COM (2008) 763, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:DKEY=483680:EN:NOT> (accessed December 14, 2009).

navigation routes as PSSAs under the IMO rules, and to support in general any further work to enhance the IMO environmental and safety standards applicable to Arctic waters.⁷⁷

Finally, it is important to note that some parliaments and parliamentary co-operation have outlined proposals for a new governance arrangement for the Arctic, or have at least been working in that area. The Arctic parliamentarians have done work in this regard for a long time, and are currently calling for an audit to examine whether the existing international agreements have been implemented. On this basis they may then urge an evaluation of possible governance alternatives.⁷⁸ The U.S. Senate's Joint Resolution directs the U.S. to initiate international discussions and begin steps toward negotiating an agreement for managing the Arctic Ocean's transboundary fish stocks.⁷⁹ The European Parliament has gone farthest in its approach to Arctic governance. In an October 2008 resolution, it

...suggest[ed] that the Commission should be prepared to pursue the opening of international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty, as supplemented by the Madrid Protocol signed in 1991, but respecting the fundamental difference represented by the populated nature of the Arctic and the consequent rights and needs of the peoples and nations of the Arctic region; believes, however, that as a minimum starting-point such a treaty could at least cover the unpopulated and unclaimed area at the centre of the Arctic Ocean.⁸⁰

In March 2009, the European Parliament put forward the view that the Arctic should use the model of the Antarctic Treaty.⁸¹

⁷⁷ *Supra* note 76.

⁷⁸ As provided in the 2006 Conference Statement from the Kiruna Conference, para. 28: "In light of the impact of climate change, and the increasing economic and human activity, initiate, as a matter of urgency, an audit of existing legal regimes that impact the Arctic and to continue the discussion about strengthening or adding to them where necessary." See "Seventh Conference of Parliamentarians of the Arctic Region," Kiruna, Sweden, 2–4 August 2006, http://www.arcticparl.org/_res/site/File/static/conf7_conference_statement_final_draft.pdf (accessed December 14, 2009).

⁷⁹ S.J. Res. 17, 3 August 2007.

⁸⁰ See "European Parliament Resolution of 9 October 2008 on Arctic Governance," <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0474> (accessed December 14, 2009).

⁸¹ See "European Parliament Resolution on the Opening of International Negotiations with a View to Adopting an International Treaty for the Protection of the Arctic," <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B6-2009-0163+0+DOC+XML+V0//EN> (accessed December 14, 2009); and also the response from the Council of Ministers, http://www.consilium.europa.eu/uedocs/cms_Data/docs/press-data/EN/foraff/111814.pdf (accessed December 14, 2009).

6. Conclusions

As noted in section two, it would be a mistake to think that the Arctic Council could easily be turned into a treaty-based body having regulatory powers. Arctic-wide intergovernmental co-operation, even though changed from the AEPS to the Arctic Council in a fairly short time frame, has been very much the same kind of intergovernmental forum from 1991 to the present day. This being the case, it can be presumed that it is fairly resistant to change, as the present institutional forms have already existed for quite some time. This is not to say that no evolution has occurred in Arctic co-operation: as was argued above, within the limits of the Arctic Council's structure, incremental changes have taken place. In fact, the Arctic Council has been adamant in rejecting any treaty proposals. The previous Arctic Council's chair, Norway, has defended the non-treaty approach against anyone proposing it and even sent its foreign minister to the European Parliament to defend that view;⁸² a similar defensive attitude seems to underlie the work of the current chair, Denmark.⁸³ The SAO meetings have not overtly criticised the Greenland coastal state meeting, although Iceland has expressed concern over why not all Arctic Council members were invited. There is currently no sign from within the Council that it might be willing to rethink its governance structures. Overall, it does seem that the Council has little interest in making any but cosmetic changes to its structure or working methods even if the restructuring has been a long-standing agenda item.

But it is also true that the shipping policy of the Arctic Council has strengthened over the years. It seems fairly clear that before the full realisation of the rapidity of climate change consequences in the region, especially the receding and thinning sea ice, the work that the Council did in the field of shipping was fairly marginal. It was only with the AMSA, a direct outgrowth of the realisation of climate change consequences in the region, which was internalised through the ACIA process (and which passed into the 2004 PAME Arctic Marine Strategic Plan), that serious shipping work started. Now, the PAME has an ambitious process in place for follow-up of the recommendations issued by the AMSA. Each and every recommendation has been made feasible by drawing up a specific plan for its implementation, which will enable a strong shipping agenda for the Arctic Council in the

⁸² See "Statement by the Minister of Foreign Affairs Jonas Gahr Støre" at http://www.eu-norway.org/NR/rdonlyres/BEDA6CB47ADF40A8AB0AEF53CC1077D2/93513/arctic_governanceJGS070508.pdf (accessed December 14, 2009).

⁸³ See e.g., the recent speech notes by the Danish chair of the SAO's, http://arctic-council.org/article/2009/10/the_arctic_is_an_area_of_peace (accessed December 14, 2009).

coming years. And in some cases, the states might very well work directly through the IMO to bolster ship controls, for instance by developing a mandatory Polar code.

Even though there are many problems in the way the Arctic Council in general operates – which may even lead to challenges to its status as the predominant forum for Arctic governance in the longer run – there is no denying that the structure of the Council worked at its best with a project like the AMSA. With its open organisation, it could link with all shipping stakeholders, which is of the utmost importance given that shipping is a global industry. The region's indigenous peoples also had an opportunity to contribute to the assessment and have their interests and rights included in the AMSA recommendations, which is unusual in marine policy and law. The AMSA is clearly one of the Arctic Council's success stories, and it promises to be followed up in various levels of shipping governance.

Even though there are increasing challenges to the Arctic Council, it is likely that the forum will serve as the main Arctic intergovernmental forum in the near future. If it cannot change, which is one possible scenario, it may well be superseded by other forms of Arctic intergovernmental co-operation. In this sense, it seems fairly clear that the Arctic Council needs to find its 'ecological box' in the near future if it wants to counter the vast challenges ahead, in particular those caused by climate change. Yet, in its shipping policy, the Council has been able to find a very suitable niche. By producing the AMSA, the Council succeeded in doing something that no other intergovernmental organisation could do; it assessed the volumes of shipping activities now and in the projected future, as well as their increasing impacts of shipping on the environment and other activities, and readily translated the results of the assessment into strong recommendations for Arctic marine shipping governance. Here, the Council acted as a catalyst for governance action, to be followed up in the Council, by member states, in international governance forums, etc. The PAME action plan for following up on the AMSA recommendations seems viable and gives us hope that the AMSA has changed the Arctic Council's shipping policy for the years to come. Given the problems the Council faces in renewing itself in general, it still remains to be seen whether it will be the Arctic Council or some other intergovernmental body (e.g., Arctic Ocean coastal state co-operation) that will implement shipping policy and the related law in the mid-term future.

International Governance in the Arctic: The Law of the Sea Convention with a Special Focus on Offshore Oil and Gas

*Kamrul Hossain**

1. Introduction

Unlike Antarctica, the Arctic can boast no region-specific treaty that comprehensively covers the challenges it faces, including potential threats to its marine areas. The Arctic states are, however, subjects of many international and regional legal instruments, most of which fall within the area of international environmental law. There are major differences between the two Polar Regions: the Antarctic is a frozen continent surrounded by ocean, whereas the Arctic is frozen ocean surrounded by continents. Significant interests in Antarctica and undetermined sovereignty over the continent have special implications for adopting a multilateral treaty system. In the Arctic, sovereignty over land has for the most part not been a problem. However, with the rapid melting of sea ice due to climate change,¹ there has apparently been a shift in the region's geopolitics. By planting its flag in the seabed under the North Pole in August 2007 and declaring large parts of the Arctic seabed to be its extended continental shelves, the Russian Federation clearly

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¹ See: *IPCC Synthesis Report – "Climate Change 2007 Synthesis Report"*: 30–31, available at: http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf (accessed November 24, 2009). Records of increasing temperatures and the decreases in the range and thickness of Arctic Sea ice suggest that the Arctic region is becoming warmer and that such warming is becoming a trend. See Mark Jarashow et al., "UNCLOS and the Arctic: The Path of Last Resistance," *Fordham Int'l Law J.*:1590.