



PUBLICATIONS ON OCEAN DEVELOPMENT

# THE EUROPEAN UNION AND THE ARCTIC

edited by  
Nengye Liu  
Elizabeth A. Kirk  
Tore Henriksen

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## The European Union and the Arctic

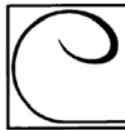
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# The European Union and the Arctic

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Nengye Liu  
Elizabeth A. Kirk  
Tore Henriksen



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# Foreword

The European Union has a terrestrial, although not a marine, presence in the Arctic as a result of parts of the territory of Finland and Sweden lying north of the Arctic Circle. The EU has for some years been engaged in the Arctic in a variety of ways, including through its partnership agreements with Greenland, its participation in the Northern Dimension policy, its membership of the Barents Euro-Arctic Council, and its financial support for research in and concerning the Arctic. The likely disappearance of sea ice cover in the Arctic, at least in the summer, by the middle of this century offers the prospect of new uses of the Arctic, including the development of commercial shipping routes between the Far East and Western Europe, fisheries in the high seas part of the central Arctic Ocean, and exploration and exploitation of oil and gas offshore. The EU has a potential role to play in all these developments. Since 2008 the EU has been developing an integrated and comprehensive policy for the Arctic through a series of communications from the European Commission, endorsed by the Council and the European Parliament.

The three editors of the book have brought together a formidable team of experts to explore the issues raised by the EU's increasing engagement in the Arctic. The result is a series of papers of great intellectual weight, many of them ground-breaking. Recent years have seen the publication of a considerable number of books on Arctic law and politics—so much so that one long-time commentator on Arctic affairs has observed rather wistfully that such publication has become a cottage industry. However, these books have little or nothing to say about the EU and the Arctic. To the best of my knowledge, this is the first book, at any rate in English, to deal exclusively and comprehensively with the EU's interest and involvement in the Arctic. For this reason its publication is much to be welcomed, and I hope that it will attract a large and appreciative readership.

*Robin Churchill*

Emeritus Professor of International Law, University of Dundee, UK

November 2016



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The editors sincerely thank the EU FP7 Post-Grant Open Access Fund for supporting the open access of the book. We also thank Glen Jeffries at the Faculty of Law, UiT/Arctic University of Norway for his editorial assistance.

## List of Contributors

### *Alyson J.K. Bailes*

was born in Manchester, Britain on April 6th, 1949 and passed away in Scotland on April 29th, 2016. She graduated from Oxford University with a MA degree in 1971 and worked for more than 30 years for the British Foreign Service. She was British Ambassador to Finland from November 2000 to June 2002. Ms. Bailes was the Director of SIPRI in 2002–2007, an adjunct at the University of Iceland 2008–2016 and a guest professor at the College of Europe in Brugge 2010–2015. Ms. Bailes published extensively on matters such as foreign policy, Nordic cooperation and Arctic matters.

### *Richard Caddell*

is a Senior Research Associate and Nippon Foundation Senior Nereus Fellow at the Netherlands Institute for the Law of the Sea, Utrecht University and a Lecturer in Law at Cardiff University. His main research interests engage international and EU environmental law, the law of the sea, biodiversity conservation, fisheries and Polar law. He regularly acts as a legal advisor to national governments, inter-governmental bodies and NGOs on environmental and marine issues. Dr Caddell is also an academic member of Francis Taylor Building, Inner Temple, London, the UK's foremost environmental and planning law barristers.

### *Mar Campins Eritja*

is professor at the Faculty of Law of the Universitat de Barcelona (UB). Her main fields of research are International and EU Environmental Law and she has led and participates in several research projects and authors monographies and articles. Visiting professor at several universities, she is also member of a Consolidated Research Group at the UB, the UB Water Research Institute and the Centre d'Estudis de Dret Ambiental de Tarragona (CEDAT). She has also served in several management post at the School of Law and the UB Rectorate. She is now Vice-dean for research and international relations at the UB School of Law.

### *Michael Fakhri*

is an Associate Professor at the University of Oregon School of Law, where he is also the co-director of the Food Resiliency Project. Fakhri is the author of *Sugar and the Making of International Trade Law* (2014).

*Martin Hennig*

is a Postdoctoral Research Fellow, Faculty of Law, UiT The Arctic University of Norway, Tromsø, Norway (martin.hennig@uit.no). His main research interest is within the field of European and international trade law. In his research, Dr. Hennig assesses the impact that transborder trade has on national social and health policy. Lately, he has studied the effects of international trade on the fundamental human rights of minority groups such as the Canadian Inuit.

*Tore Henriksen*

is a Professor of Law at the UiT/Arctic University of Norway. He is the Director of the K.G. Jebsen Centre for the Law of the Sea, established in 2013. Prof Henriksen has published on international fisheries law as well as international maritime law.

*Tina Hunter*

specialises in Energy and Petroleum Law, and is a Professor and the Director of the Aberdeen University Centre for Energy Law (AUCEL). She teaches and researches in the areas of national and international petroleum law, unconventional petroleum regulation, Arctic petroleum law and governance, International investment protection in the energy sector, and resources law and policy. She has received academic qualifications in marine sediments, geology, political science, applied science, and law, completing her PhD at the University of Bergen, Norway.

*Henning Jessen*

is an Associate Professor for Maritime Law and Policy at the World Maritime University (WMU) in Malmö, Sweden since 2016. Between 2008–2012, he was a Professor for Transport Law and Maritime Law at the University of Applied Sciences Bremen, Germany. Between 2012–2016, he was an Associate Professor for Public Maritime Law, with an emphasis on the Law of the Sea, at the University of Hamburg, Germany. His main research areas are: Law of the Sea (UNCLOS), International Environmental Law, International Economic Law (WTO Law), Environmental Aspects of Uses of the Sea (esp. relating to “Offshore Oil & Gas”), Carriage of Goods by Sea Law / International Aspects of Transport Law, Comparative Law, EU Law.

*Elizabeth A. Kirk*

is Professor of International Environmental Law and co-director of the Centre for Marine Ecological Resilience and Geological Resources at Nottingham Law School, Nottingham Trent University. She is also Chair of the Governing

Board of the IUCN Academy of Environmental Law and sits on the Managing Board of the European Environmental Law Forum. Elizabeth qualified as a solicitor in Scotland in the early 1990s. She then spent some time in Canada, studying then working as a researcher at the University of British Columbia before taking up an academic post at the University of Dundee, ultimately joining Nottingham Law School in 2016.

*Timo Koivurova*

is a Professor and the Director of the Arctic Centre of the University of Lapland. His expertise covers, among others, Arctic legal and governance questions, international environmental law and indigenous rights. He is one of the key scholars dealing with the Arctic regional cooperation, including in particular the Arctic Council.

*P. Whitney Lackenbauer*

is a Professor in the Department of History and co-director of the Centre on Foreign Policy and Federalism at St. Jerome's University in the University of Waterloo, Canada. A prolific author on Canadian Arctic sovereignty and security issues, his recent books include *Whole of Government through an Arctic Lens* (co-edited, 2017), *The Canadian Rangers: A Living History* (2013), *Canada and the Changing Arctic: Sovereignty, Security and Stewardship* (co-authored 2011, French translation 2015), and *Arctic Front: Defending Canada in the Far North* (co-authored 2008). Whitney is also editor of the *Documents on Canadian Arctic Sovereignty and Security (DCASS)* series.

*Suzanne Lalonde*

is a Professor of International Law and the Law of the Sea at the Law Faculty of the University of Montreal and a research associate with the ArcticNet network of excellence in Canada. She holds a PhD in Public International Law from the University of Cambridge, King's College obtained in 1997 under the supervision of Professor James Crawford. Her current research focuses on core international legal principles, especially those pertaining to sovereignty and the determination of boundaries on land and at sea, with a particular emphasis on the Arctic. She is the Canadian member of the International Law Association Committee currently investigating State practice in relation to straight baselines.

*Nengye Liu*

is a Senior Lecturer at Adelaide Law School, University of Adelaide Australia. He was educated in Wuhan University (China, LLB and LLM) and Ghent

University (Belgium, Doctor of Law). Dr Liu has published more than 50 articles in fields of the law of the sea and international environmental law. He has presented research results in more than 20 countries across five continents; convened three international conferences in Scotland (EU-Arctic 2015), Australia (South China Sea 2016) and China (Polar Governance 2017); and succeeded in over 20 funding applications, including, for example, a prestigious European Union Marie Curie Fellowship. He also serves as the Associate Editor of the *Yearbook of International Environmental Law* (Oxford University Press).

*Kristmundur Þór Ólafsson*

was born in Gothenburg, Sweden in 1981 and graduated from the University of Iceland with a MA degree in International Relations in 2009. Mr. Ólafsson worked for the Icelandic Ministry for Foreign Affairs in the years 2011–2013 and currently works as a senior advisor at the Icelandic Centre for Research. He has co-authored several papers on Sub-regional cooperation, Nordic cooperation and security policy.

*Andreas Østhagen*

is a Senior Fellow at The Arctic Institute, in Washington, DC and a PhD-student at the University of British Columbia in Vancouver, Canada. His work predominantly examines the issues of maritime security, territoriality and boundary disputes.

*Andreas Raspotnik*

is a Senior Fellow at The Arctic Institute in Washington, DC. He completed his PhD at the University of Cologne, Germany, and the University of Edinburgh, United Kingdom in October 2016. His dissertation discusses the European Union's Arctic policy steps between 2007 and 2014 from a critical geopolitics perspective.

*Henrik Ringbom*

is Professor II (part-time) at the Scandinavian Institute of Maritime Law at the University of Oslo and Adjunct Professor at the Åbo Akademi University in Turku/Finland. His previous work experience includes being Head of Unit for Marine Environment, Training and Statistics at the European Maritime Safety Agency (EMSA) in Lisbon (2007–2012), Research Fellow at the University of Oslo (2003–2007) and Administrator at the Maritime Safety Unit of the European Commission in Brussels (1997–2003). He has published widely in the field of European and international shipping law and is the author of the

book 'The EU Maritime Safety Policy and International Law' (Brill, 2008) and editor of 'Jurisdiction over Ships' (Brill, 2015). Dr Ringbom is also Chairman of the Finnish Maritime Law Association.

*Adam Stepień*

is a political scientist at the Arctic Centre of the University of Lapland. His broad research interests include: policy coherence, Arctic governance, law and cooperation, Arctic indigenous governance, participatory decision-making, as well as development cooperation partnerships. Adam took part in a number of projects on the EU-Arctic nexus. The latter is also the topic of his ongoing PhD.



# Introduction

*Nengye Liu, Elizabeth A. Kirk and Tore Henriksen*

The European Union (EU) is a global actor, which considers itself

well placed to shape international ocean governance on the basis of its experience in developing a sustainable approach to ocean management, notably through its environmental policy, integrated maritime policy, reformed common fisheries policy, action against illegal, unregulated and unreported (IUU) fishing and maritime transport policy.<sup>1</sup>

Over the past decade, the EU has adopted a number of pieces of legislation regarding ocean governance with internal and external dimensions, such as the Marine Strategy Framework Directive<sup>2</sup> and the Maritime Spatial Planning Directive.<sup>3</sup> The Arctic is also on the EU's Agenda. The EU aims to ensure sustainable development in and around the Arctic region on the basis of international cooperation.<sup>4</sup>

Climatically, ecologically, culturally, socially and economically, the Arctic is changing in many ways with implications throughout the region and around the world.<sup>5</sup> For example, Arctic sea ice has been retreating rapidly over the past decade. The extent of sea ice in the Arctic Ocean has set a new record low

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\* Dr Nengye Liu, Senior Lecturer, Adelaide Law School, University of Adelaide, Australia; Prof Elizabeth A. Kirk, Nottingham Law School, Nottingham Trent University, United Kingdom; Prof Tore Henriksen, K.G. Jebsen Centre for the Law of the Sea, UiT/Arctic University of Norway.

1 Joint Communication of the European Commission and High Representative of the Union for Foreign Affairs and Security Policy of 10 November 2016 on International ocean governance: an agenda for the future of our oceans, JOIN (2016) 49, 4.

2 Directive 2008/56/EC of 17 June 2008 on establishing a framework for community action in the field of marine environmental policy [2008] OJ L164/19.

3 Directive 2014/89/EU of 23 July 2014 on establishing a framework for marine spatial planning [2014] OJ L257/135.

4 JOIN (2016) 49, 7.

5 Introduction, Arctic Biodiversity Assessment, Arctic Council Working Group Conservation of Arctic Flora and Fauna, 2013. <<https://www.arcticbiodiversity.is/index.php/the-report/chapters/introduction>> accessed 7 April 2017.



for the wintertime of 2017.<sup>6</sup> Due to climate change, increased human access to formerly ice-covered areas, and the potential for increased activities such as fishing, shipping, tourism, bioprospecting, mining, and oil and gas operations, present significant legal challenges.<sup>7</sup> Questions therefore arise as to whether the Arctic governance regime is adequately designed to address global environmental change, or needs to evolve to tackle challenges. One example of how governance is responding is the establishment of a legally binding regime to achieve sustainable management of fisheries in the high seas portion of the central Arctic Ocean.<sup>8</sup> Another development of the current regime is the regulation of maritime activities through the adoption of the International Code for Ships Operating in Polar Waters (Polar Code)<sup>9</sup> in the International Maritime Organization (IMO). In this book, our focus is what roles the EU can, and should play in shaping the Arctic governance regime to ensure sustainable development in the Arctic region.

The EU is inextricably linked to the Arctic region by a unique combination of history, geography, economics and scientific achievements.<sup>10</sup> Three Arctic countries are EU Member States (Denmark, Sweden and Finland) and the EU maintains close relations with Iceland and Norway through the European Economic Area.<sup>11</sup> Canada, Russia and the United States are also strategic partners of the EU. The EU has a strategic interest in playing a key role in the Arctic region<sup>12</sup> and strong political will to enhance Arctic governance. In 2007, the EU

6 'Arctic Ice Sets New Record Low for Winter' (*MarineLink*, 22 March 2017) <<http://www.marinelink.com/news/arctic-record-winter423442>> accessed 7 April 2017.

7 R. Rayfuse, 'Melting Moments: The Future of Polar Oceans Governance in a Warming World' (2007) 16 (2) *Review of European, Comparative and International Environmental Law* 268.

8 For details of the negotiations among five Arctic coastal States (Norway, Denmark, Canada, Russia and United States) and five key high sea fishing entities (China, Japan, South Korea, Iceland and the EU)—Arctic 5+5 process, see Chapter 10.

9 IMO, Res. MEPC. 264 (68) (May 15, 2015) and IMO, Res. MSC.385 (94) (Nov. 21, 2014). International Code for Ships Operating in Polar Waters, adopted 15 May 2015 <<http://www.imo.org/en/MediaCentre/HotTopics/polar/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf>> accessed 9 April 2017.

10 European Commission Communication of 20 November 2008 on the European Union and the Arctic Region, COM (2008) 763, 1.

11 The Agreement on the European Economic Area, which entered into force on 1 January 1994, brings together the EU Member States and the three EEA EFTA States—Iceland, Liechtenstein and Norway—in a single market, referred to as the "Internal Market" <[www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAAgreement.pdf](http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAAgreement.pdf)> accessed 9 April 2017.

12 JOIN (2016) 49, 2.

published the Integrated Maritime Policy,<sup>13</sup> which has a strong international dimension. The European Commission tends to “promote Europe’s leadership in international maritime affairs, enhance the impact of the EU at multilateral level, strengthen regional cooperation with neighbouring countries in shared sea basins, and develop and extend bilateral relations with key partners.”<sup>14</sup> The European Commission has specifically set out the EU’s interests in the Arctic and has published three Arctic policy documents between 2008 and 2016.<sup>15</sup> In April 2016, the EU adopted its latest Arctic policy. It focuses on advancing international cooperation in responding to the impacts of climate change on the Arctic’s fragile environment, and on promoting and contributing to sustainable development, particularly in the European part of the Arctic.<sup>16</sup>

However, it must be pointed out that the EU does face constraints on its involvement in Arctic governance, given the fact the EU has no coastline bordering the Arctic Ocean. Five coastal States of the Arctic Ocean, the so called Arctic Five—the US, Russia, Canada, Norway and Denmark through Greenland—believe that they hold the stewardship of the Arctic.<sup>17</sup> While the EU is willing to, and has been trying to shape Arctic governance, several questions need to be addressed: 1) What internal challenges is the EU facing in the European Arctic? 2) How could the EU pursue its involvement within relevant Arctic governance regimes at the multilateral level (e.g., the United Nations Convention on the Law of the Sea, Convention on Biological Diversity)? 3) At regional level, how could the EU strengthen regional cooperation in the Arctic, while the EU has yet to be officially accepted as an observer to the Arctic Council—the most important forum for regional cooperation? 4) What strategies should the EU develop regarding effective engagement with the Arctic Five? 5) Over which Arctic issues, such as climate change, biodiversity, ecosystem-based management, marine protected areas, energy, fisheries, tourism,

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13 European Commission Communication of 10 October 2007 An Integrated Maritime Policy for the European Union, COM (2007) 575.

14 International dimensions of the EU’s Integrated Maritime Policy: questions and answers, Brussels, 15 October 2009 <[http://europa.eu/rapid/press-release\\_MEMO-09-453\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-09-453_en.htm?locale=en)> accessed 13 April 2017.

15 COM (2008) 763; Joint Communication of the European Commission and High Representative of the European Union for Foreign Affairs and Security Policy of 26 June 2012 on Developing a European Union Policy towards the Arctic Region: Progress since 2008 and Next Steps, JOIN (2012) 19; JOIN (2016) 49.

16 JOIN (2016) 49, 2.

17 The Ilulissat Declaration, Arctic Ocean Conference, Ilulissat, Greenland, 27–29 May 2008 <[https://www.regjeringen.no/globalassets/upload/ud/080525\\_arctic\\_ocean\\_conference\\_outcome.pdf](https://www.regjeringen.no/globalassets/upload/ud/080525_arctic_ocean_conference_outcome.pdf)> accessed 9 April 2017.

international navigation and indigenous people, could the EU exert most influence, and even play a leadership role?

“The European Union and the Arctic” brings together academics from international law and political science to address the questions outlined above. The book is divided into three parts. The first part examines the EU’s current Arctic policy framework and the EU’s participation in various international and regional Arctic forums. The second part encompasses the EU’s engagement with the Arctic Five, providing analysis of examples of some of those relationships. The third part identifies shipping, fisheries, marine mammals and offshore activities as four key areas in which the EU could exert its influence in the Arctic. It explores the EU’s potential contributions to regulate those human activities in the Arctic.

## 1 Part 1: The EU’s Arctic Policy Framework

This part primarily focuses on the first three questions outlined above: the internal challenge the EU is facing in the European Arctic; how could the EU pursue its involvement within relevant Arctic governance regimes at the multilateral level; and how the EU can strengthen regional cooperation in the Arctic, while it has yet to be officially accepted as an observer to the Arctic Council.

In chapter 2, Adam Stepień and Timo Koivurova discuss challenges and opportunities for effective EU Arctic policy-making, which addresses the first and second research question of the book. They draw out the two distinct dimensions of the EU’s Arctic policies—one addressing the Circumpolar Arctic and one the European Arctic. The questions of coherence and added value of the EU Arctic policy are considered, leading to three challenges for the EU: balancing between Circumpolar and European Arctic policy spaces; influencing general sectoral EU policy-making; and managing multiple channels of interaction with Arctic actors and stakeholders.

Chapter 3 by the late Alyson J.K. Bailes and Krismundur Ólafsson of the University of Iceland argues that questioning whether the EU is an Arctic actor is redundant when the Union is clearly present through a number of sub-regional structures and partnerships. As a founding member of the Barents Euro-Arctic Council (BEAC, since 1993), through its own Northern Dimension (ND, since 1999), and through its increasing bilateral engagement with the ‘West Nordic’ nations of Greenland, Iceland and the Faroe Islands. The chapter thus addresses the third question outlined in our introduction—how the EU can strengthen regional cooperation in the Arctic, while it has yet to be officially accepted as an observer to the Arctic Council.

## 2 Part 2: The EU and the Arctic Region

Part 2 of the book explores the EU's effective engagement with the Arctic Five in Arctic governance. Chapter 4 by Mar Campins Eritja deals with the EU's relationship with Greenland, which has, due to its location in the Arctic, acquired a unique strategic relevance for the EU and other economic powers interested in the Arctic's resources. The chapter describes how an enhanced relationship between the EU and Greenland may support the EU's policy objectives in the Arctic. The chapter focuses on the recognition of the Greenlandic population's rights as indigenous peoples by the EU in the achievement of Arctic sustainable development. Special attention is paid to the exploitation of offshore oil and gas resources in Greenland's waters, and the participation of the Greenlandic population in the decision making process according to Greenland's regulation and the applicable EU secondary law.

In chapter 5 Andreas Østhagen and Andreas Raspontik investigate the complex and ambiguous relationship between Norway and the EU. Although Norway has pro-actively worked to get the EU more involved in Arctic governance issues, it has, from the European Commission's first Communication on Arctic issues in 2008, been sceptical of various policy and legal steps taken by the EU. This chapter demonstrates that the EU's manifold Arctic policy endeavours hold a distinct regional element in Norway, beyond the characterisation of the High North (Norwegian Arctic) as a distinct foreign policy. The chapter argues that Norway's relationship with the EU in the Norwegian Arctic must be understood as a continuation of Norway's larger EU-policy, where the balance between separation and further integration is crucial.

Chapter 6, written by two of Canada's leading experts on Arctic sovereignty and foreign policy issues—Whitney Lackenbauer and Suzanne Lalonde, seeks to correct misconceptions about the state of the Canada-EU Arctic relationship. In Canada, the EU's efforts to constructively engage in the Arctic have been met with scepticism and distrust. In turn, Canada's Arctic policy is often cast in a harsh light in the EU. To explain Canada's approach to Arctic issues, they provide a rich overview of Canada's historical engagement with the region and the development of its Northern Strategy, explaining why it places a high priority on sovereignty, economic development for the benefit of Northerners, environmental protection, and governance (particularly by Arctic States and Northern Indigenous peoples). The authors then bring the Arctic policies of Canada and the EU into dialogue, suggesting that evolving policy positions point towards an increasingly convergent, cooperative agenda between Canada and the EU on Arctic issues. Nevertheless, divergent interests and messaging associated with shipping and freedom of the seas/navigation rights,

the rights of Indigenous peoples and the trade in marine mammals, resource development, and environmental stewardship could continue to complicate the relationship.

Tina Hunter in chapter 7 examines the relationship between the EU and Russia in the Arctic, focusing on the development of the Arctic petroleum resources, combined with further development of the Northern Sea Route. This chapter compares Russian policy and conduct in the Arctic with that of the EU. In undertaking this comparative analysis, it necessarily examines similarities and differences in policy of these two actors in the Arctic, and the cooperative nature of their relationship.

Chapter 8 by Michael Fakhri compares the US marine mammal conservation laws and the 2015 EU trade import ban on seal products. This chapter argues that whoever regulates animals is in effect regulating land and water of where animals live. To regulate a space leads to regulating people by restricting their activities. The seal regimes are principal ways each authority negotiates its relationship with Arctic indigenous communities and expresses power in the Arctic. The chapter therefore considers seal hunting laws as part of a much broader jockeying for control and authority—sovereign power—in the Arctic. Sovereignty is employed as an analytical concept that is pluralist and relational, involves the regular negotiation of authority and jurisdiction, and constitutes a complex relationship to land. It claims that sovereign power is only as legitimate and as good as one's relation to Arctic indigenous communities.

### **3 Part 3: The EU and Regulating Human Activities in the Arctic**

Part 3 discusses the EU's potential role in regulating human activities in the Arctic. This part identifies shipping, fisheries, marine mammals and offshore operations as key areas where the EU exerts most influence. The EU's role in relation to Arctic shipping is explored by Henrik Ringbom in Chapter 9. This chapter explores whether the EU's cautious policy on Arctic shipping is dictated by legal necessity or could there be ways to take a more assertive stance, if the political situation permitted? The EU's own statements related to Arctic shipping are discussed, while legal options and restraints for EU measures in this area are assessed. A number of non-regulatory ways in which the EU could play a role in Arctic shipping are mentioned as well.

In Chapter 10 Nengye Liu examines the EU's potential contributions to the governance of high sea fisheries in the central Arctic Ocean. Due to Arctic sea ice melting and other impacts of climate change, it is now widely recognized

that fish stocks in the Arctic Ocean may occur both within areas under current fisheries' jurisdiction of the coastal States, and in the high seas portion of the central Arctic Ocean. To achieve sustainable management of fisheries in the high seas portion of the central Arctic Ocean, non-Arctic States, especially high sea fishing States, such as the EU, must also be involved in any regulatory efforts. Based on both desk-top studies and field research, this chapter focuses on the EU's possible internal and external actions that could help achieve sustainable management of potential fisheries in the high sea part of the central Arctic Ocean.

In chapter 11, Martin Hennig and Richard Caddell evaluate the legal controversies surrounding the regulation of marine mammals under EU law. This issue has long presented considerable regulatory difficulties for the EU, which has sought to balance its longstanding support for the traditional rights of indigenous peoples against its legal obligations to address popular concerns over animal welfare. This chapter examines the effectiveness of the specific policies introduced by the EU in respect of the hunting of seals and whales by Arctic indigenous peoples, weighed against its overarching policy objectives towards the High North. As regards seal hunting, this chapter demonstrates that the legislative intervention of the EU may have achieved its aim of enhancing animal welfare, yet at the same time it has fundamentally undermined the interests of Inuit sealers. Similarly, this chapter argues that while the EU has pledged to promote Arctic interests within relevant international organisations, it has proved to be a somewhat inconsistent ally to the indigenous communities of the High North in their bid to secure subsistence hunting and trade entitlements for marine mammal products.

In Chapter 12 Henning Jessen explores the role of the EU in influencing offshore oil and gas operations in the Arctic and the way in which its activities may link with the activities of other organisations working on these issues. The EU actively seeks to contribute to the existing efforts of the Arctic States "to develop joint approaches and best practice to address the potential environmental impact and safety concerns related to increasing activities in the region". This referral also relates (inter alia) to the new intra-EU standards on offshore oil and gas drilling as governed by Directive 2013/30/EU on the safety of offshore oil and gas operations. Some of the existing "joint approaches and best practices" applicable in the Arctic are highlighted in this chapter. This discussion includes both the EU approach and the wider legal framework of best practices and safety standards relating to offshore operations that deserve enhanced future political attention and support—both by the EU and other stakeholders.



**PART 1**

*The EU's Arctic Policy*







# Formulating a Cross-cutting Policy: Challenges and Opportunities for Effective EU Arctic Policy-making

*Adam Stępień and Timo Koivurova*

## 1 Introduction

The European Union (EU) has been developing its over-arching Arctic policy for almost ten years, starting with the EU Parliament's Resolution<sup>1</sup> and European Commission's Communication<sup>2</sup> in 2008. Over the years, the Union has made much progress in clarifying its approach to the Arctic, moving towards more nuanced and cautious approaches, as visible from the Joint Communication<sup>3</sup>

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\* Adam Stępień, Researcher, Arctic Centre, University of Lapland, Finland, corresponding author, [astepien@ulapland.fi](mailto:astepien@ulapland.fi).

\*\* Timo Koivurova, Professor, Director of the Arctic Centre, University of Lapland, Finland.

\*\*\* The chapter draws upon: Adam Stępień, Timo Koivurova and Paula Kankaanpää, 'Strategic Assessment of Development of the Arctic: Assessment Conducted for the European Union' (2014) <[www.arcticinfo.eu/sada](http://www.arcticinfo.eu/sada)> accessed 7 March 2016; Adam Stępień, Timo Koivurova and Paula Kankaanpää, *The Changing Arctic and the European Union* (Brill/Nijhoff 2016); Timo Koivurova and others, 'The Present and Future Competence of the European Union in the Arctic' (2012) 48 *Polar Record* 361; Adam Stępień, 'The EU Needs a Two-Tier Approach towards the Arctic: A General Policy for the Circumpolar Arctic and a Concrete Strategy for the European Arctic' [10 December 2015] <<http://www.the-arcticinstitute.org/2015/12/EU-needs-two-tier-approach-towards-the-arctic.html>> accessed 7 March 2016.

1 European Parliament, Resolution of 9 October 2008 on Arctic governance [2008] P6\_TA(2008)0474.

2 European Commission Communication of 20 November 2008 on the European Union and the Arctic Region, COM (2008) 763.

3 Joint Communication of the European Commission and High Representative of the European Union for Foreign Affairs and Security Policy of 26 June 2012 on Developing a European Union Policy towards the Arctic Region: Progress since 2008 and Next Steps, JOIN (2012) 19.

from 2012, EU Council Conclusions,<sup>4</sup> and the latest Joint Communication<sup>5</sup> from 2016. The latest of this series of policy statements is even titled ‘An integrated European Union policy for the Arctic’. Yet, the EU Arctic policy remains a work in progress and faces a number of structural challenges.

The EU exerts an influence on Arctic regions in a variety of forms. This includes affecting regional development in Northern Fennoscandia, the EU’s environmental and economic footprint, shaping international Arctic-relevant norms and taking part in regional governance. It is not easy for the EU to act in a coherent manner in the Arctic given the broad scope of the Union’s presence, as well as the fact that the EU itself is a very complex governance entity and the Arctic is a very heterogeneous policy environment. Consequently, we need to ask whether establishing an overarching EU Arctic policy framework, first, can make EU Arctic activities more coherent (i.e. synergetic and lacking contradictions), and second, whether—as is often assumed without reflection—it can actually enhance the EU’s performance as an actor in the Arctic. If yes, what policy instruments could lead to such an enhancement? While much existing literature discusses the EU’s participation in Arctic co-operation and its relations with Arctic States, this chapter focuses on the EU policy-making relevant for the Arctic, predominantly of internal nature. A large part of the EU’s Arctic policy is about what the EU can do itself that is of importance for Arctic regions. We believe that in the long-term, the EU’s constructive influence in the Arctic will depend primarily on mechanisms and instruments enhancing procedural coherence, which entails setting up a coherent Arctic-relevant decision-making process in the EU.

This chapter begins with the presentation of a broad spectrum of the EU Arctic-relevant policies and the way in which these have been brought together under the umbrella of the “EU Arctic policy”. Building on this overview, we consider the questions of coherence and added value (within the EU’s overall policy system) of the EU Arctic policy. This yields three challenges: balancing between Circumpolar and European Arctic policy spaces, influencing general EU decision-making within various policy fields, and managing multiple channels of interaction with Arctic actors and stakeholders. We offer some ideas as regards addressing these challenges.

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4 Council of the European Union, Conclusions on Developing a European Union Policy Towards the Arctic Region, Brussels [14 May 2014].

5 Joint Communication of the European Commission and High Representative of the European Union for Foreign Affairs and Security Policy of 27 April 2016 on An Integrated European Union Policy for the Arctic, JOIN (2016) 21.

## 2 The EU Arctic Policy: “A Sum of Many Parts”

In 2013, the former EU Commissioner for maritime affairs and fisheries referred to the 2012 EU policy statement on the EU Arctic policy an “all-encompassing policy document”.<sup>6</sup> At the same time, EU institutions acknowledge “the cross-sectoral nature of Arctic issues” that Arctic policy strives to encompass.<sup>7</sup> What are “all” the issues and sectors that the EU Arctic policy is to cut across?

Tonami and Watters<sup>8</sup> described Japanese Arctic policy as a “sum of many parts”. This could be said about every Arctic policy adapted by Arctic and non-Arctic States over the last decade. In particular, the policies of Arctic States are multifaceted, combining matters of typically internal and external nature. They refer to socio-economic development and environment of their northernmost regions, to investments in the North, alongside international co-operation. The EU-Arctic nexus is similarly complex. The EU originally emphasized the external dimension of its Arctic policy (international co-operation remains a central aspect of the EU’s presence in the region). However, the Union’s Arctic policy increasingly encompasses questions of regional socioeconomic development in the northernmost parts of Europe as well as issues—of primarily internal character—where the EU acts towards the Arctic, such as climate change mitigation. The multidimensional—internal, cross-border and external—character of the EU’s Arctic policy is visible especially in the Joint Communication published in 2016.<sup>9</sup>

Within this broad EU-Arctic landscape, two distinct yet interconnected geographical and policy spaces can be distinguished: the pan-Arctic, Circumpolar, maritime space of external affairs and the European Arctic policy domain, primarily of a terrestrial and internal nature. The EU influences both the European and Circumpolar Arctic by three channels: its internal regulations, its funding programs and co-operation with international partners.

Firstly, the EU makes policies and legislates in areas where the Union has acquired competences from its Member States. The EU is a *sui-generis* organization that has pooled competences from its Member States and manages some policy areas at the supranational level. Some of these competences are exclusive, such as commercial policy or the conservation of living biological

6 Maria Damanaki, speech at Arctic Frontiers conference, Tromsø, Norway, 21 January 2013.

7 See Council of the European Union 2014, n. 5 above, 35.

8 Aki Tonami and Stewart Watters, ‘Japan’s Arctic Policy: The Sum of Many Parts’ [2012] Arctic Yearbook 2012, 93, <<http://www.arcticyearbook.com/index.php/articles/21-japan-s-arctic-policy-the-sum-of-many-parts>> accessed 7 March 2016.

9 JOIN (2016) 21.

resources.<sup>10</sup> In some areas, the EU shares competences with its Member States, including in the fields of transport, energy, economic, social and territorial cohesion, as well as the environment. Shared competence means that once the EU regulates a particular issue, actions of Member States are limited. There are also fields of complementary competence, where the EU institutions are allowed to act without constraining Member States' competences, including tourism, culture and education.<sup>11</sup>

Secondly, the EU's influence is visible via numerous funding instruments. The Union budget is a major source of financing for Arctic research with about EUR 150 million on Arctic-related research spent during the previous multiannual seven-year financial perspective (which encompassed the International Polar Year).<sup>12</sup> That effort is likely to be matched or exceeded under Horizon 2020 program running from 2014.<sup>13</sup> Further, the EU provides funding for regional development and cross-border co-operation. EU structural programs are of key importance for northernmost Finnish and Swedish regions, which face challenges of remoteness and sparse population, in some cases being among the poorest regions with the lowest development potential in their respective states.<sup>14</sup> The same can be said about the EU-supported cross-border co-operation programs in the North (such as Northern Periphery and Arctic Program or Northern Dimension partnerships). Moreover, the EU provides support for development of education and training in Greenland as a part of the EU-Greenland Partnership Agreement.<sup>15</sup>

Thirdly, the EU takes part in co-operation with other actors (including Arctic States). For example, the EU, Canada and the US adopted the Galway Statement on Atlantic Ocean Co-operation,<sup>16</sup> which includes joint efforts in Arctic research. Since 2010, and in the aftermath of the seal ban, the EU has

10 Article 3, The Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47.

11 Articles 3–6, TFEU.

12 JOIN (2012) 19.

13 JOIN (2016) 21.

14 Lise Smed Olsen and others, 'Sustainable Business Development in the Nordic Arctic' (Nordregio Nordic Centre for Spatial Development 2016).

15 Council Decision 2014/137/EU of 14 March 2014 on relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other, [2014] OJ L76/1, together with Programming Document for the Sustainable Development of Greenland 2014–2020, 2014/137/EU.

16 Galway Statement on Atlantic Ocean Co-operation. Launching a European Union—Canada—United States of America Research Alliance [24 May 2013] <[https://ec.europa.eu/research/iscp/pdf/galway\\_statement\\_atlantic\\_ocean\\_co-operation.pdf](https://ec.europa.eu/research/iscp/pdf/galway_statement_atlantic_ocean_co-operation.pdf)> accessed 7 March 2016.

organized regular meetings with representatives of Arctic indigenous people.<sup>17</sup> The EU's special relationship with Greenland<sup>18</sup> revolves primarily around fisheries and enhancing human resources.<sup>19</sup> The EU's Raw Materials Initiative<sup>20</sup> emphasizes resource diplomacy and securing resource imports from stable and well-governed regions. The co-operation with Greenland (and potentially Canada) is supposed to be a step towards achieving that objective.<sup>21</sup> The EU is also involved in developments in northwest Russia via its regional and cross-border funding (e.g. Kolarctic program).<sup>22</sup> EU funding finds its way to the Russian Arctic also via the Northern Dimension (ND), a Finnish initiative from the 1990s, which developed into a common policy of the EU, Iceland, Norway and Russia from 2006. Different "partnerships"—through which ND cooperation is organized—support, among others, feasibility studies for much desired East-West transport connections in the European North or environmental infrastructure in northern Russian settlements.<sup>23</sup>

The EU can also influence development of international norms and decision-making that are of relevance for the region. EU competences as regards setting rules for maritime transport make the European Commission's Directorate General Mobility and Transport (DG MOVE) (responsible for transport) an important actor in any international negotiation referring to maritime traffic. This has included negotiations in the International Maritime Organization (IMO)<sup>24</sup> as regards the mandatory Polar Code (International Code for Ships

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17 Adam Stepień, 'Incentives, Practices and Opportunities for Arctic External Actors' Engagement with Indigenous Peoples: China and the European Union', in Timo Koivurova and Tianbao Qin (eds) *Arctic Law and Governance: the role of China, the EU and Finland* (Hart Publishing, 2017).

18 Greenland left the European Economic Community—the EU's predecessor—in 1985.

19 The government of Denmark, itself a member of the EU, represents the Faroe Islands and Greenland (as parts of the Kingdom of Denmark) as non-EU territories in a number of policy areas.

20 European Commission Communication of 4 November 2008 on the raw materials initiative—meeting our critical needs for growth and jobs in Europe, COM (2008) 699.

21 For example, European Commission—MEMO/12/428 13/06/2012 Greenland's raw materials potential and the EU's strategic needs <[http://europa.eu/rapid/press-release\\_MEMO-12-428\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-428_en.htm)> accessed 7 March 2017. However, so far Greenlandic raw materials production and export to the EU has not materialized.

22 Kolarctic (ENPI, 2007–2014) Program's website at <<http://www.kolarcticenpi.info/en>> accessed 7 March 2016.

23 European External Action Service website, Northern Dimension <[http://www.eeas.europa.eu/north\\_dim/](http://www.eeas.europa.eu/north_dim/)> accessed 7 March 2017.

24 The European Union or the European Commission is not a member of the International Maritime Organization. However, as many aspects under discussion in the IMO are in the

Operating in Polar Waters), concluded in 2015 (in force 1 January 2017).<sup>25</sup> The European Commission is also one of the key players in the international negotiations on the protection of biodiversity in areas beyond national jurisdiction;<sup>26</sup> a process that is potentially of high importance for the future governance of the Central Arctic Ocean. Owing to the exclusive EU competence as regards conservation of marine biological resources under common fisheries policy, the European Commission would be among key non-Arctic actors in the discussion on any future Arctic fisheries management scheme.<sup>27</sup> In addition, as a party to the Stockholm Convention on Persistent Organic Pollutants (POPs)<sup>28</sup> as well as the UN Economic Commission for Europe (UNECE) Convention on Long-range Transboundary Air Pollution (LRTAP)<sup>29</sup>—international instruments targeting POPs—the EU can influence the placing of new Arctic-relevant POPs on the list of substances to be eliminated or restricted.

At the regional level, the European Commission is a full member of the Barents Euro-Arctic Council and provides a significant portion of the funding for cross-border co-operation in the Barents region. In the Arctic Council, the EU acts in practice as an observer and its representatives are active in several of the Arctic Council's working groups, including the Conservation of Arctic Flora and Fauna (CAFF) and the Protection of Arctic Marine Environment (PAME).

The EU's regulatory power, its relations with trade partners and its influence on international processes are relevant for the Arctic because the EU's internal market, its economy and population exert a noticeable environmental and economic footprint on the region. Among others, the 2010 EU *Arctic Footprint and*

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scope of competences shared between the Member States and the Union, the EU and Member States meet before the IMO (and its committees) meetings in order to speak, where possible, with a single voice.

25 International Code for Ships Operating in Polar Waters (Polar Code), MEPC 68/21/Add.1, <<http://www.imo.org/en/MediaCentre/HotTopics/polar/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf>> accessed 7 March 2016.

26 For example, Stephen Hodgson, Andrew Serdy, Ian Payne, Johan Gille, 'Towards a Possible International Agreement on Marine Biodiversity in Areas Beyond National Jurisdiction' (2014) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/536292/IPOL\\_STU\(2014\)536292\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/536292/IPOL_STU(2014)536292_EN.pdf)> accessed 7 March 2016.

27 For example, establishing a Regional Fisheries Management Organization for the Arctic Ocean.

28 Stockholm Convention on Persistent Organic Pollutants 22 May 2001 (entry into force 17 May 2004), 2256 UNTS 119; 40 ILM 532 (2001).

29 Convention on Long-range Transboundary Air Pollution, 13 November 1979 (entry into force 16 March 1983), 1302 UNTS 217; 18 ILM 1442 (1979).

*Policy Assessment Report*<sup>30</sup> and the 2014 *Strategic Assessment of Development of the Arctic report*<sup>31</sup> outlined the scope of such EU's links with the Arctic. For example, a relatively high percentage of emissions produced in the EU find their way into the Arctic,<sup>32</sup> as Europe is the closest highly industrialized region to the Arctic. Various EU policies that influence European emissions of persistent organic pollutants, such as Polychlorinated biphenyls (PCBs), mercury, acidifying pollutants (sulphur and nitrogen oxides) or short-live climate pollutants (black carbon and methane), contribute to the amount of contamination reaching the Arctic environment via wind patterns and ocean currents. Approximately a quarter of the mercury emissions reaching the Arctic from southern latitudes is emitted within the EU, primarily due to Europe's proximity to the region. In 2013, the EU contributed 11% to global carbon dioxide emissions (although the figure would be different if it included the EU consumption of goods produced elsewhere in the world).<sup>33</sup> The EU accounts for 30%–40% of fish imports from Arctic countries, and 24% of final demand for products from the Arctic oil and gas industry.<sup>34</sup>

The Arctic footprint of the European population, economy and market is influenced by various EU policies, making the EU one of the actors shaping—albeit often from afar—Arctic realities. Climate and energy policies provide the clearest examples. Climate change is widely considered one of key drivers of the Arctic's transformation.<sup>35</sup> The EU introduced mitigation actions, including via energy transition, regulations supporting renewables, energy efficiency and the emissions trading system.<sup>36</sup> The EU also significantly supports climate research including Arctic research projects.<sup>37</sup> Furthermore, the EU action on

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30 Sandra Cavalieri and others, 'EU Arctic Footprint and Policy Assessment: Final Report' 1 <<http://www.endseurope.com/docs/10119a.pdf>> accessed 7 March 2016.

31 Stępień, Koivurova and Kankaanpää 2014, n. 1 above.

32 Cavalieri and others 2010, n. 31 above.

33 Jos GJ Olivier and others, 'Trends in Global CO<sub>2</sub> Emissions 2014 Report' (2014) PBL Netherlands Environmental Assessment Agency and the Institute for Environment and Sustainability (IES) of the European Commission's Joint Research Centre (JRC) Report.

34 Cavalieri and others 2010, n. 31 above.

35 *Arctic Biodiversity Assessment. Status and Trends in Arctic Biodiversity* (2013) <<http://www.abds.is/>> accessed 7 March 2016; *Snow, Water, Ice and Permafrost in the Arctic* [2011] AMAP Report to the Arctic Council chapter 4 59 <<http://amap.no/swipa/>> accessed 7 March 2016.

36 See, for example, the website of the EU Climate Action at <[http://ec.europa.eu/clima/policies/ets/index\\_en.htm](http://ec.europa.eu/clima/policies/ets/index_en.htm)> accessed 7 March 2016.

37 Website of the Horizon 2020 EU Framework Program for Research and Innovation at <<http://ec.europa.eu/programs/horizon2020/>> accessed 7 March 2016.



climate change should in principle affect European long-term demand for Arctic hydrocarbons.

The EU can also set rules for maritime traffic via its Member States' port state and flag state authority. For instance, EU legislation requires Member States to provide information on ice conditions, recommend routes and icebreaking services, as well as request from vessels certification documents commensurate with the ice conditions.<sup>38</sup>

REACH Regulation<sup>39</sup> and POPs Regulation<sup>40</sup> are good examples of EU policies affecting long-range pollution. While these policies are primarily important for the environment of highly industrialized regions in Europe, they are also relevant for regulating contaminants reaching the Arctic.

The best-known case of the EU's formally internal rules influencing Arctic regions—owing to the EU's leverage as a major market—is the regulation banning the placing of seal products on the EU market.<sup>41</sup> Originating both from animal welfare concerns and the introduction (or the processes leading to the introduction) of bans by several Member States, and underpinned by powerful campaigns by animal rights organizations, the so-called seal ban significantly affected the livelihoods of both commercial sealers in Canada and Inuit hunters. The latter, while in principle exempted from the ban, claimed they were impacted owing to the overall collapse of the global seal skin market following the introduction of the EU ban.<sup>42</sup> The ban caused outrage among many Arctic communities as well as Inuit organizations and—for several years—led Canada to prevent the EU from gaining formal observer status in the Arctic Council.

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38 Directive 2009/17/EC of 23 April 2009 amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system [2009] OJ L31/101.

39 Regulation 1907/2006/EC of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L396.

40 Regulation (EC) No 850/2004 of 29 April 2004 on persistent organic pollutants and amending Directive 79/117/EEC [2004] OJ L158/7.

41 Regulation (EC) No 1007/2009 of 16 September 2009 on trade in seal products [2009] OJ L286/36.

42 Nikolas Sellheim, 'The goals of the Eu seal products trade regulation: from effectiveness to consequence' (2015) 51(3) *Polar Record* 274; Dorothee Cambou, 'The Impact of the Ban on Seal Products on the Rights of Indigenous Peoples: A European Issue' (2013) 5 *Yearbook of Polar Law* 389.

The EU's influence on the Arctic could also entail setting examples of standards and best practices. This becomes of particular importance as increasing number of countries currently call for defining Arctic standards for various activities.<sup>43</sup> However, while the EU has certainly exerted influence as a standard-setter in regions such as Central-Eastern Europe, the EU's sway in the Arctic is comparatively minimal, as Arctic actors usually have confidence in their own Arctic expertise and management/governance frameworks.<sup>44</sup> Nonetheless, there are a few promising areas for the EU's "rule by example" to be also visible in Arctic affairs. SafeSeaNet<sup>45</sup> (information on ships, ship movements, hazardous cargoes, etc.) and CleanSeaNet<sup>46</sup> (mainly oil spill monitoring) run by the European Maritime Safety Agency (EMSA) are good examples of internal EU solutions that could be presented as good practices to be reproduced—in the long-term—in Arctic waters.<sup>47</sup>

The EU's influence on the Circumpolar Arctic is significant, but the Union is even more important in the policy space of the European Arctic. There, the EU's influence is much more direct, repositioning the Union as an Arctic internal—rather than external—actor and a key player in the European Arctic affairs. The northernmost territories of Finland and Sweden are located in the Arctic region<sup>48</sup> and the European Economic Area (EEA) Agreement<sup>49</sup> means that large parts of EU legislation are applicable in Iceland and Norway.

The early EU policy reflection on the Arctic—manifested in documents published between 2007 and 2010—clearly had an external and maritime

43 For example, U.S.-Canada Joint Statement on Climate, Energy, and Arctic Leadership, 16 March 2016, The White House, Office of Press Secretary <<https://www.whitehouse.gov/the-press-office/2016/03/10/us-canada-joint-statement-climate-energy-and-arctic-leadership>> accessed 13 June 2016.

44 Piotr Kobza, 'Civilian Power Europe in the Arctic: How Far Can the European Union Go North?' (2015) EU Diplomacy Paper 01/2015, Brugge and Natolin: Collage of Europe.

45 European Maritime Safety Agency website at <<http://www.emsa.europa.eu/ssn-main.html>> accessed 7 March 2016.

46 European Maritime Safety Agency website at <<https://portal.emsa.europa.eu/web/csn>> accessed 7 March 2016.

47 Gunnar Sander and others, 'Changes in Arctic Maritime Transport' in Adam Stępień, Timo Koivurova and Paula Kankaanpää (eds), *The Changing Arctic and the European Union* (Brill/Nijhoff 2016).

48 As defined by the Arctic Human Development Report or Arctic Council's Arctic Monitoring and Assessment Program, while there are many definitions of "the Arctic". See, Joan Nymand Larsen and Gail Fondahl (eds.) *Arctic Human Development Report: Regional Processes and Global Linkages*, TemaNord 2014:567, Nordic Council of Ministers, 2014, doi:10.6027/TN2014-567.

49 Agreement on the European Economic Area, OJ No L 1, 3.1.1994, p. 3.

focus.<sup>50</sup> The Arctic Ocean, interactions with Arctic coastal States and sea-dependent indigenous peoples (like the Inuit) comprised Arctic policy space for the EU policy-makers. However, the idea that the EU should develop its own overarching approach to the Arctic activated various actors from the European part of the Arctic, who felt that the EU formulates Arctic policy ignoring the part of Europe located above the Arctic Circle, that is the northernmost regions of Finland, Sweden and Norway.<sup>51</sup> Crucially, these actors would like to use the greater EU interest in the Arctic to emphasize their own priorities and to encourage the Union's support to developing responses to various economic, demographic, social or accessibility challenges faced by Europe's northern communities. Reacting to these calls, the EU Arctic policy had gradually acquired a second, European Arctic dimension. That has become particularly visible in the 2016 Joint Communication.

European Arctic regions are directly affected by EU environmental, transport, energy and competition legislation. For example, the EU's Natura 2000 network—based on the Habitats and Bird Directives<sup>52</sup>—establishes a very strong conservation framework for large swaths of European Arctic ecosystems. In the 1990s, for example, a major hydropower project in Northern Finland did not come to pass due to the requirements of Natura 2000 and the threat of the European Commission's legal action against Finland.<sup>53</sup> Similar examples of the EU's central role in the region are numerous. The EU legislation creates baselines for environmental impact assessment procedures.<sup>54</sup> Policies supporting renewable energy developments<sup>55</sup> boost wind power investments

50 COM (2008) 763; Resolution of 9 October 2008 on Arctic governance [2008] P6\_TA(2008)0474.

51 See, for example, Northern Sparsely Populated Areas network, The NSPA position on the future EU Arctic Policy, <<http://www.nspa-network.eu/media/11809/nspa%20position%2000%20arctic%20final.pdf>> accessed 7 March 2016. Norwegian northernmost regions are not part of the EU, but are strongly affected by EU regulations via the EEA Agreement and take part in numerous EU funding programs. They have proven over the years to be particularly active in lobbying for the EU Arctic policy.

52 Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7; Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds [2010] OJ L20/7.

53 Timo Koivurova, 'The Case of Vuotos: Interplay Between International, Community and National Environmental Law' (2004) 13 *Review of European Community & International Environmental Law* 47.

54 Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26.

55 European Commission 2013 <[http://ec.europa.eu/clima/policies/2030/index\\_en.htm](http://ec.europa.eu/clima/policies/2030/index_en.htm)> accessed 29 January 2014; Renewable energy in 2011 accounted for 31.8% of energy produced in Finland (90% of energy produced regionally in Lapland), Finland's 2020 national

in the North. The decisions on the structure of trans-European transport networks have implications for the chances of infrastructural projects in the North obtaining funding. Various pieces of legislation influence how mining—one of the key industries in Northern Fennoscandia—is conducted, including rules on waste management or chemicals.<sup>56</sup> The EU's Raw Materials Initiative<sup>57</sup> calls for increased domestic EU production of metals and other minerals.<sup>58</sup> In the mid-term, the EU Climate Adaptation Strategy<sup>59</sup> and its implementation will likely be of importance in the northernmost part of Europe, the fastest warming region in the continent.<sup>60</sup> The priorities of EU funding programs also influence northern regional development strategies.<sup>61</sup>

As elsewhere, not all Arctic stakeholders judge EU policies to be advantageous. Not untypically, perceptions of specific EU rules vary between different interest groups. A few instances can be mentioned here. Reindeer herders are often unhappy with what they consider too high a population of predators (wolves, bears, wolverines, lynxes), which is partly linked to protective EU environmental regulations.<sup>62</sup> The EU directive enforcing new international standards on sulphur content in marine fuels<sup>63</sup> establishes emission limits

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- target is 38%; 46.8% in Sweden (2020 target–49%); 65% in Norway (2020 target–67.5%). See: Eurostat data on the share of energy from renewable resources <<http://epp.eurostat.ec.europa.eu/portal/page/portal/energy/data/database>> accessed 7 March 2016.
- 56 For example, Directive 2006/118/EC of 12 December 2006 on the protection of groundwater against pollution and deterioration [2006] OJ L372/19; Directive 2006/21/EC of 15 March 2006 on the management of waste from the extractive industries and amending Directive 2004/35/EC [2006] OJ L102/15.
- 57 N. 21 above.
- 58 See also Kim van Dam and others, 'Mining in the European Arctic' in Adam Stepień, Timo Koivurova and Paula Kankaanpää (eds), *The Changing Arctic and the European Union* (Brill/Nijhoff 2016).
- 59 European Commission Communication of 16 April 2013 "An EU Strategy on Adaptation to Climate Change", COM (2013) 216.
- 60 See, for example, Santtu Mikkonen and others, 'Trends in the Average Temperature in Finland, 1847–2013' (2015) 29 *Stoch Environ Res Risk Assess* 1521.
- 61 For instance, Finnish Lapland formulated the so-called Arctic smartness portfolio as a part of the regional "smart specialization" within the EU. Regional Council of Lapland, Arctic Smartness Portfolio, <<http://www.lappi.fi/lapinliitto/arctic-smartness-portfolio>> accessed 7 March 2016.
- 62 See, for example, Hannu Heikkinen and others, 'Managing Predators, Managing Reindeer: Contested Conceptions of Predator Policies in Finland's Southeast Reindeer Herding Area' (2011) 47 *Polar Record* 218.
- 63 Directive 2012/33/EU of 21 November 2012 amending Council Directive 1999/32/EC as regards the sulphur content of marine fuels [2012] OJ L327/1.

for Finnish maritime transport in the Baltic Sea. This could potentially raise transport costs for Lapland's resource exports, and therefore it resulted in critical industry voices as regards the EU policy.<sup>64</sup> While for some stakeholders the Natura 2000 constitutes a welcome additional protection for the highly fragile sub-Arctic environment, for others it appears to be a far-reaching constraint on regional development, disproportionately affecting northernmost regions.

In sum, on one hand, the EU shares a number of similarities with other external Arctic actors, such as China or Japan. The EU's industrialized centers are far from the region, but influence the Arctic in various ways. On the other hand, owing to direct EU presence as a policy-maker and funding-provider in Northern Europe, the EU is a *sui generis* case in the landscape of Arctic governance. It is an influential yet secondary external player as regards circumpolar affairs, and at the same time a crucial actor in the European part of the Arctic.

### 3 Coherence and Added Value of the Overarching EU Arctic Policy

The above overview suggests that an overarching EU Arctic policy is bound to be a “sum of many parts”, and the spectrum of issues that the EU Arctic policy is to encompass is very broad. The resulting “all-encompassing” Arctic policy framework is bound to be multifaceted. Moreover, the EU Arctic policy is also component-driven,<sup>65</sup> which means that it brings together issues anchored in various sectoral policies, policies that are primary/antecedent—in terms of time and the position in the policy system—to the cross-cutting Arctic framework. These characteristics of the EU Arctic policy raise questions as to whether a framework bringing together these different “parts” can genuinely facilitate better EU performance as a polity affecting the Arctic.

The 2012 Joint Communication of the Commission and High Representative of the Union for Foreign Affairs and Security Policy together with accompanying Staff Working Document<sup>66</sup> were the most wide-reaching EU Arctic policy documents. They brought together a large number of EU Arctic-relevant policies,

64 Discussions during the 2013 9th Fennoscandian Exploration and Mining Conference, Levi, Finland, 30 October 2013.

65 See, Peter J May and others, ‘Policy Coherence and Component-Driven Policymaking: Arctic Policy in Canada and the United States’ (2005) 33 *Policy Studies Journal* 37.

66 European Commission and the High Representative of the EU, The inventory of activities in the framework of developing a European Union Arctic Policy, Joint Staff Working Document Accompanying JOIN (2012) 19, SWD (2012) 183 final.

activities and projects. However, wide-reaching did not mean more coherent and “bringing together” did not signify anything else than a new labelling of existing activities under vague and abstract headlines of “knowledge, responsibility and engagement”.<sup>67</sup> Adele Airoidi stated in her analysis of the EU Arctic policy<sup>68</sup> that these “three abstract catchwords [...] do not quite translate into a clearer vision nor in a better defined and developed program than in 2008” (when the first Arctic policy document was published). Many measures or actions listed in the Communication were “statements of fact rather than commitments to action, which appear to be in great part a continuation or intensification of existing activities at EU, bilateral or multilateral level”.<sup>69</sup>

The 2016 Joint Communication<sup>70</sup> is an attempt to introduce more focus into the EU’s key Arctic statement. To a certain degree that has been achieved, as the emphasis is on fewer issues—those where the EU’s leverage in Arctic affairs is the clearest. The document identifies three “priority areas” for the EU’s action in the Arctic:

- Climate change and safeguarding the Arctic environment
- Arctic (primarily European Arctic) and Arctic-related economic development
- International cooperation

However, these areas still encompass a variety of issues including climate research, adaptation, investments, coordination of EU funding, biodiversity protection, innovative Arctic technologies, transport and communication links, space technologies, maritime safety, dialogue with indigenous people and the EU’s participation in regional co-operation. It is unclear how these aspects are interrelated, though the relative chaos of the 2012 document has not been repeated. There are still no overarching objectives that guide the EU’s approach towards the region. Regional development trajectories to which the EU funding and policies are to contribute are not defined. Many mentioned actions are already ongoing or are included in the “Arctic policy” as a part of pre-existing general EU policy frameworks, such as climate mitigation, investments, research, or air pollution policy. Some statements that refer to future or planned activities are vague and do not include clear commitments on the side

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67 JOIN (2012) 19.

68 Adele Airoidi, ‘The European Union and the Arctic: Developments and Perspectives 2010–2014’ (2014), *TemaNord* 2014:565, Nordic Council of Ministers.

69 *Ibid.* See also, Andreas Østhagen, ‘The European Union—An Arctic Actor?’ (2013) 15 *Journal of Military and Strategic Studies* 71.

70 JOIN (2016) 21.

of the EU. That should not be seen as criticism, rather an acknowledgement that the formulation of an “integrated” EU Arctic policy is highly unlikely, despite the claim contained in the title of the 2016 policy document.

Rather than providing direction and consistency for the multifaceted EU activities, the 2012 and 2016 joint communications still serve primarily as public relations statements directed towards both Arctic actors and the public of the EU. They justify EU Arctic engagement and highlight the role of the EU in the Arctic.

Can the EU Arctic policy-making go beyond listing activities and justifying the EU’s interests in regional affairs? Can the Arctic policy-making truly bring together various EU activities and make a positive difference in the EU’s presence in the Arctic? These questions invoke two interrelated notions: added value (making a positive difference) and coherence (bringing together).

First, an overarching Arctic policy is expected to “make a difference”. Added value can be understood as something that appears when a cross-cutting policy is more than just a “sum of its parts”, when the act of bringing together is followed by changes in policies and actions or in new activities.

“Bringing together”<sup>71</sup> means not only producing an inventory but also introducing some minimal degree of coherence and coordination into the EU Arctic-relevant policies and activities. Østhagen<sup>72</sup> submits that the “natural end goal of the EU’s Arctic policy development is a coordination of EU policies interlinked with, or influencing, the Arctic region”. Coordination can be seen as a set of practices and arrangements (institutional, functional) to enhance the coherence of the polity’s activities,<sup>73</sup> a crucial element of “procedural coherence”.<sup>74</sup> On the one hand, coherence can be understood as minimizing contradictions between different aspects of EU regional presence (consistency, negative coherence). On the other hand, enhancing positive coherence means finding synergies in order for different actions to strengthen one another, to

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71 Carmen Gebhard, ‘Coherence’ in Christopher Hill and Michael Smith (eds), *International Relations and the European Union* (Oxford University Press 2011).

72 See Østhagen, n. 70 above, 84–85.

73 Tom Jones, ‘Policy Coherence, Global Environmental Governance and Poverty Reduction’ (2002) 2 *International Environmental Agreements: Politics, Law and Economics* 389; Evert Meijers and Dominic Stead, ‘Policy Integration: What Does It Mean and How Can It Be Achieved? A Multi-Disciplinary Review’, *Human Dimensions of Global Environment Change: Greening of Policies—Interlinkages and Policy Integration* (2004) <[http://userpage.fu-berlin.de/ffu/akumwelt/bc2004/download/meijers\\_stead\\_f.pdf](http://userpage.fu-berlin.de/ffu/akumwelt/bc2004/download/meijers_stead_f.pdf)> accessed 7 March 2016.

74 Gebhard 2011, n. 72 above.

avoid duplications and to use resources more efficiently.<sup>75</sup> Coordination and coherence can have horizontal (various EU institutions and agencies), vertical (EU and its Member States) and regional (EU and other Arctic actors) dimensions. EU policies so far refer primarily to the horizontal coherence between various DGs of the European Commission and the European External Action Service's Arctic-relevant activities. They do not advance coordination with and among Member States.

The EU institutions have pronounced that one of the tasks of the EU Arctic policy framework is to introduce more coherence into the EU policy-system (across its external and internal dimensions) as regards the Arctic. The 2012 Joint Communication was described as a pathway towards a “coherent approach”.<sup>76</sup> In 2014, the European Parliament called for the formulation of a “united EU policy on the Arctic” and a “coherent strategy and concretized action plan on the EU’s engagement in the Arctic”,<sup>77</sup> while the Council of the European Union (EU Council) requested the European Commission to work towards “further development of an integrated and coherent Arctic Policy”.<sup>78</sup> Following the EU Council’s request, the 2016 Joint Communication is presented as an “integrated EU policy”. It is unclear what “integrated” is to mean in the EU Arctic context. It certainly does not refer to establishing an overarching policy, the objectives of which would overshadow sectoral approaches, as is supposed to be the case, for instance, with the EU’s Integrated Maritime Policy. Rather, integration refers to juxtaposing different policies and actions and—confusingly—integrating (i.e. anchoring) the “Arctic policy” into the EU’s pre-existing regulatory and policy system.<sup>79</sup>

The challenge of introducing coherence or integration is a result of the component-based character of the Arctic policy. Policy statements are collections of actions arising from general policies. These actions are thus not designed or chosen based on an Arctic-specific assessment of needs or on Arctic-specific

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75 *Ibid.*; Stefano Bertea, ‘Looking for Coherence within the European Community’ (2005) 11 *European Law Journal* 154 DOI: <<http://dx.doi.org/10.1111/j.1468-0386.2005.00255.x>>; Hartmut Mayer, ‘The Challenge of Coherence and Consistency in EU Foreign Policy’ in Mario Telò and Frederik Ponjaert (eds), *Globalisation, Europe, Multilateralism Series: EU’s Foreign Policy: What Kind of Power and Diplomatic Action?* (Ashgate 2013).

76 JOIN (2012) 19, 17.

77 European Parliament, Joint Motion for a Resolution on the EU strategy for the Arctic, 10/12 March 2014. B7-0229/2014, B7-0230/2014, B7-0231/2014, B7-0232/2014.

78 Council of the European Union, Conclusions on developing a European Union Policy towards the Arctic Region 2014.

79 Adam Stępień and Andreas Raspotnik, ‘The EU’s new Arctic Communication: Not-so-integrated, not so-disappointing?’, *ArCticles: Arctic Centre Papers* 1/2016.



objectives. Moreover, the identification of focused and concrete objectives would require making political choices. In the case of the 2012 and 2016 documents, the EU policymakers wanted to satisfy all stakeholders and include all relevant issues. Policymakers circumvent politicized policy choices by avoiding controversial topics such as extraction of hydrocarbons and minerals or sealing and whaling. Furthermore, tensions between different objectives and values are obscured by labelling developments, technologies, actions or desired outcomes as sustainable, responsible or resilient, without providing details on the contextualized meaning of these words.

The abovementioned shortcomings of the EU Arctic policy documents and lack of synergies between actions are not, however, a result of the failure of EU policymakers. Rather, they are outcomes of the character of this region-focused policy field as a component-based framework. Aiming at formulating a coherent set of EU-Arctic objectives and drafting comprehensive yet focused documents is extremely challenging if not impossible. Instead, the EU policymakers should focus on strengthening the procedural dimension of coherence which comprises mechanisms for enhancing consistency in Arctic decision-making.<sup>80</sup>

The questions of procedural coherence and added value of the EU Arctic policy have three practical challenges for the Arctic policy-making in the EU. The first challenge is how to bring together various policy fields, in particular those specifically aimed at European and Circumpolar Arctic. The second challenge is how to facilitate the relatively marginal cross-cutting Arctic policy framework to make a tangible difference in the way the EU interacts with the region through sectoral policies and actions. The third challenge is managing the EU's interactions with Arctic stakeholders and actors. The 2012 Joint Communication rendered all three challenges visible. The 2016 Joint Communication constitutes a step towards addressing them.

#### 4      **Challenge One: Balancing Diverse Spaces: European and Circumpolar Arctic**

The diverse set of issues that fall under the umbrella of the EU Arctic policy-making reflects two dimensions of the EU's presence in the region. Marine issues, energy and the Arctic Council belong to the Circumpolar Arctic, global Arctic or Arctic Ocean policy space. Regional economic development,

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80      As argued by one of the authors in Adam Stępień. "Internal Contradictions and External Anxieties: One 'Coherent' Arctic Policy for the European Union", (2015) 7 *Yearbook of Polar Law* 249.

investments, European Economic Area, Barents co-operation, transport and raw materials comprise the European Arctic dimension of the EU's Arctic policy. We believe that the challenge of bringing together different Arctic-relevant EU policies and actions is to a great extent about balancing and clarifying the EU's role in these two interconnected but distinct policy areas.

The confusion between these two spaces is visible in interactions between the EU and Arctic stakeholders, in the European Parliament debates,<sup>81</sup> as well as, most recently, the reactions and misinterpretations of the content of the 2016 Joint Communication.<sup>82</sup> Often different actors refer to divergent understandings of what constitutes "the Arctic". Some policy-makers and stakeholders talk about the distant, exotic High Arctic, populated by Inuit hunters and symbolized by diminishing Arctic Ocean sea-ice and currently very limited offshore oil extraction. Climate change, shipping and pan-Arctic co-operation stand out as key issues to be tackled. Others, when they discuss the Arctic in the EU context, think about Northern Fennoscandia and the North Atlantic. The challenges of regional development, reindeer herding and transport accessibility in remote, sparsely populated areas are therefore highlighted.

The Circumpolar and European Arctic policy spaces entail different problems, issues, and roles for the EU. Circumpolar Arctic questions are primarily of a maritime nature and the EU's presence is mainly visible via international co-operation, where the EU has encountered a discouraging backlash manifested in the lack of formal status as an observer in the Arctic Council.<sup>83</sup> Involvement in circumpolar affairs yields interactions with stakeholders from maritime industries, fisheries, energy and global environmental NGOs.

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81 See for example, the European Parliament, Debate on the EU Strategy for the Arctic, 17 April 2013, Strasbourg, <<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20130417&secondRef=ITEM-018&language=EN>> accessed 7 March 2016; see also, Andreas Østhagen, 'The Arctic and the Need for Greater Differentiation in a Non-Coherent Region' (2012) The Arctic Institute <<http://www.thearcticinstitute.org/2012/02/arctic-and-need-for-greater.html>> accessed 15 March 2015.

82 Based on the authors observations from a number of meetings and seminars following the publication of the 2016 Joint Communication.

83 However, in the Ministerial Meeting in Kiruna in May 2013, the Arctic Council accepted the EU's application for observer status. The implementation of this positive decision was then suspended until the EU resolves problematic questions with Arctic Council members (primarily, the seal ban dispute). Notwithstanding the suspension, the EU was allowed to observe Council meetings on par with other observers and is often called "observer-in-principle", that is. without having a formal, symbolic status (Arctic Council, 'Kiruna Declaration' <<http://www.arctic-council.org/index.php/en/document-archive/category/5-declarations>> accessed 7 March 2016.).

In contrast, European Arctic challenges are chiefly terrestrial. In this European Arctic policy space, the EU is a policy-maker, regulatory actor and a source of funding. Among relevant stakeholders in this policy space are Europe's northernmost regions (in Brussels grouped within the Northern Sparsely Populated Areas network),<sup>84</sup> the Sámi, reindeer herders, local businesses, the mining industry, and national environmental NGOs.

In the Circumpolar Arctic, the EU occupies a back seat, and for many Arctic stakeholders it remains a secondary actor. In the European Arctic, the EU is a key player, and EU institutions are targets of intense regional lobbying. Some actors in the Circumpolar Arctic appear to be anxious about the EU's presence,<sup>85</sup> while many in the European Arctic are contrastingly anxious that the EU's interest and involvement in the Arctic are not strong enough.

The 2016 Joint Communication is clearer than previous documents in terms of distinguishing the two geographic policy spaces. However, introducing clearer wording may not be enough to accommodate diverse interests that play out within the EU-Arctic nexus. In an analysis for the Arctic Institute, Stępień<sup>86</sup> proposed to resolve the intermingling of European Arctic and Circumpolar Arctic policy fields by formulating the EU Arctic policy as a two-tier framework: an overarching policy for the Circumpolar Arctic, and within it, a focused strategy for the European Arctic. A Circumpolar Arctic policy could then retain its current set of general, vague objectives or policy keywords. It would include maritime issues, climate change mitigation, climate and ocean research, earth observation, involvement in the Arctic Council, and the EU's role in shaping Arctic-relevant international norms.

A focused strategy for the European Arctic would address challenges arising from the Arctic transformation as they are manifested in the Europe's northernmost regions. A short list of specific goals or targets would need to be identified together with Nordic States, northernmost regions and local stakeholders, with the involvement of the EEA partners. Relevant issues here include cooperation within the Barents region (Barents Euro-Arctic Council, where the European Commission is a full member) and transport networks extending to Russia and Norway.

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84 Northern Sparsely Populated Areas (NSPAs) network website at <<http://www.nspa-network.eu/>> accessed 7 March 2016.

85 See Stępień, 2015, n. 81 above.

86 Stępień, 2015, n. 1 above.

Building on the experiences of the EU macro-regional strategies,<sup>87</sup> the precondition for the feasibility and effectiveness of such a strategy is that concrete action plans are agreed and that all relevant actors commit to the targets and to the implementation of actions. “Strategy” is a word often avoided by external Arctic actors. This is owing to the notion that strategy entails a certain degree of control over the geographic space and is aimed at achieving concrete goals towards securing specific interests. Calling the whole EU (Circumpolar) Arctic policy “a strategy” could therefore trigger anxiety among Arctic states.<sup>88</sup> However, the EU’s more coherent approach towards the European Arctic could certainly constitute “a strategy”; exactly because the EU institutions, Member States and EU actors have a great deal of control over developments in the region and have direct, tangible interests in its sustainable development. Indeed, when the calls for a “coherent strategy” are voiced—such as in the 2014 European Parliament Resolution—usually they refer to the European Arctic affairs.<sup>89</sup>

The 2016 Joint Communication makes a step towards devising a European Arctic strategy. In 2017, the European Arctic Stakeholder Forum together with a network of EU funding programs attempt to identify overarching key investment and research priorities for the European Arctic. The Forum is to include regional and national authorities as well as other stakeholders, with participation of Norway, Iceland and Greenland. The Forum is supposed to deliver its proposals for priorities by the end of 2017.

Several possible goals for the European Arctic strategy could be envisaged. Actors will face the need to jointly address climate adaptation in Europe’s fastest warming region, with increased flooding, impacts on winter roads and winter tourism raised among future concerns.<sup>90</sup> Strategic targets could include also the North-South and intra-regional (East-West) transport networks, digital connectivity, as well as tackling developmental or demographic problems specific to these sparsely populated areas. The challenges faced by the Sámi have to be highlighted, including energizing traditional livelihoods in light of

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87 European Commission, ‘Report Concerning the Added Value of Macro-Regional Strategies’ (2013) SWD (2013) 233.

88 It was for this very reason that the word “strategy” was not used in, for instance, the United Kingdom’s Arctic policy statement, according to the statement by a UK official at the “In the Spirit of Rovaniemi Process” conference on 25 November 2015 in Rovaniemi, Finland.

89 European Parliament 2014; European Parliament, Debate on the EU Strategy for the Arctic, quoted above.

90 Mikkonen and others 2013; Lapin Liitto (Regional Council of Lapland), Lapin Ilmastostrategia 2030 (Lapland’s Climate Strategy 2030). 2011. Julkaisu 27/2011.

expanding resource extraction.<sup>91</sup> Further, the development of Arctic towns could be supported, as in the Europe's northernmost regions these relatively small settlements play a socio-economic role similar to large population centres in Central Europe. The challenges they experience do not fit well to either urban or rural development programs.<sup>92</sup>

Owing to economic, demographic and social challenges that trouble northern Fennoscandia,<sup>93</sup> a policy referring to the European Arctic is likely to acquire emphasis on economic development. The 2016 Joint Communication stands as clear proof of such dynamics.

It is unlikely that the strategy will include long-term institutional arrangements, mechanisms for policy co-ordination, and dedicated funding instruments supporting specific European Arctic priorities, adding to existing programs. The EU has adopted an approach to its macro-regional strategies (for the Baltic Sea Region, Danube, the Alps, Adriatic-Ionian Region or for Atlantic) based on the principles that no new institutions are to be created, no new funding instruments established and no new regulations adopted ("3xNO"). Therefore, the proposed Arctic Stakeholder Forum is to be a temporary, short-lived mechanism—finalizing its work in 2017—with its legacy to be carried on in the framework of loose annual stakeholder conferences rather than any institutionalized arrangement.

Instead of creating new programs, the strategy would streamline existing financing, prevent duplications and in the long-term affect priorities for funding instruments. The concept of the European Arctic Stakeholder Forum is heading precisely in that direction. In addition, ideas indirectly supporting European Arctic strategic priorities within already operating programs could be considered. A good example of such a mechanism is the Seed Money Facility within the EU Strategy for the Baltic Sea Region (EUSBSR).<sup>94</sup> It provides seed grants for work on proposals directed to various EU programs for projects that match the EUSBSR priorities.

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91 Based on the consultations leading towards the drafting of the Strategic Assessment of Development of the Arctic report, as well as consultations on "Streamlining EU funding in the European Arctic carried out by the European Commission, see European Commission, Public consultation on streamlining EU funding in the European Arctic, <[http://ec.europa.eu/dgs/maritimeaffairs\\_fisheries/consultations/arctic-eu-funding/doc/consultation-paper\\_en.pdf](http://ec.europa.eu/dgs/maritimeaffairs_fisheries/consultations/arctic-eu-funding/doc/consultation-paper_en.pdf)> accessed 14 February 2015.

92 Adam Stępień and others, 'Socioeconomic and Cultural Changes in the European Arctic' in Adam Stępień, Timo Koivurova and Paula Kankaanpää (eds), *The Changing Arctic and the European Union* (Brill/Nijhoff 2016).

93 *Ibid.*

94 Seed Money Facility website at <<http://seed.eusbsr.eu/>> accessed 7 March 2016.

In terms of institutional arrangements, currently the EU Arctic policy is coordinated jointly by the European External Action Service (EEAS) and the DG Maritime Affairs and Fisheries (DG Mare), with the involvement of various Commission DGs and agencies such as the European Environment Agency and European Maritime Safety Agency. The coordination is conducted via the Arctic Inter-Service Group, which serves primarily information purposes.<sup>95</sup> However, the European Arctic strategy could be ultimately led by the Commission's units responsible for regional development, transport or environment. While any additional organizational arrangements may be difficult for the Arctic policy as a whole, the European Arctic strategy—similarly to macro-regional strategies—could be supported by networks of responsible officials from different Member States, EEA States and regions.<sup>96</sup> Moreover, regional stakeholder forums and conferences—as proposed in the 2016 Communication—could strengthen the long-term interaction between actors.

## 5 Challenge Two: Influencing Sectoral Policy-making in the EU

The precondition for a cross-cutting framework to have added value is its capacity to influence EU sectoral decision-making processes.<sup>97</sup> Only actions dedicated to coordination, dialogue and outreach have been so far carried out within the EU Arctic policy itself.<sup>98</sup> In order for Arctic policy to enhance the EU's presence in the Arctic, the actions need to be taken within sectoral policies, such as environment, transport, energy, external relations, or international ocean governance. The critical aspect is therefore the interlinkage between the Arctic policy-making and sectoral, substantial policies.

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95 Personal communication (by A. Stępień, on file), policy officer, European Commission DG Environment (August 2015); policy officer, European Environment Agency (July 2015).

96 Jonathan Metzger and Peter Schmitt, 'When Soft Spaces Harden: The EU Strategy for the Baltic Sea Region' (2012) 44 *Environment and Planning A* 263; Sandrine Moretti and Jan Martinsson, 'Multi-Level Governance in the European Union for the Baltic Sea Region: An Actor's Mapping Perspective' 1 <<http://groupsaces.com/eusbsr-governance/>> accessed 7 March 2016.

97 Basing on David Dery, 'Policy by the Way: When Policy Is Incidental to Making Other Policies' (1998) 18 *Journal of Public Policy* 163; Grant Jordan and Darren Halpin, 'The Political Costs of Policy Coherence: Constructing a Rural Policy for Scotland' (2006) 26 *Journal of Public Policy* 21.

98 Albeit even such coordinating activities entail using existing sectoral structures and programs, as no arrangements exist for the EU Arctic policy.

May et al.<sup>99</sup>—building on Dery’s<sup>100</sup> concept of a “policy by the way”—proposed a notion of “component-driven policies” to describe the Arctic policies of Canada and the USA. May et al. and Dery suggest that for identity-based and space-based policy domains (such as youth policy or regional policies) it is sectoral, primary policies that determine the content of cross-cutting frameworks. That undermines the possibility for these frameworks to be coherent, but also limits the influence of the cross-cutting policies on polities’ tangible actions. Sectoral policies have a much longer history, established communities of stakeholders and advocacy coalitions, as well as well-grounded institutional arrangements. The component-driven character of the EU Arctic policy is visible from the policy documents, which so far have simply collected existing Arctic-relevant activities. The role of EU Arctic policy-makers has been not to propose new objectives and set a course for EU Arctic action, but rather to choose among different possible sets of Arctic-relevant actions, prioritize and organize them in a sensible manner.

Arctic policy within the EU is a rather marginal policy topic. EU services are not willing to invest any greater resources even in coordination activities.<sup>101</sup> It is unlikely that it will follow the path of, for instance, environmental or climate policies, which over the years have moved to a central position in policy systems worldwide.

In some cases, the new “Arctic dimension” is primarily an act of re-labeling. The 2007–2013 Northern Periphery Program was renamed for the current financial perspective<sup>102</sup> as the Northern Periphery and Arctic Program, but without adding any tangible Arctic dimension that would distinguish it from its 2007–2013 predecessor. Conversely, the changes that occurred in program priorities and operation are connected with the new set-up and objectives of the overall EU regional and cross-border policies, not with a new Arctic labelling.<sup>103</sup>

Notwithstanding, the very fact of considering issues from a new, Arctic perspective constitutes an intrinsic added value. The increased attention and visibility of Arctic issues within the EU has had a certain leverage. This is visible,

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99 May and others 2005, n. 66 above; also, Peter J May, Joshua Sapotichne and Samuel Workman, ‘Policy Coherence and Policy Domains’ (2006) 34 *Policy Studies Journal* 381.

100 Dery 1998, n. 98 above.

101 Personal communication (by Adam Stępień, on file), policy officer from European Commission DGs for Environment (August 2015) and Maritime Affairs and Fisheries (April 2015), European Environment Agency (July 2015).

102 The EU’s multiannual budget operates via seven-year financial perspectives.

103 Personal communication (by Adam Stępień, on file), Ole Damsgaard, Northern Periphery Program Secretariat, February 2014.

for instance, in the process of adopting the EU Directive on the safety of offshore oil and gas extraction,<sup>104</sup> which includes several references to the Arctic. Another good example is research. In a survey conducted among European research organizations,<sup>105</sup> several respondents suggested that a strong visibility of Arctic topics in the Horizon 2020 research program could be partly attributed to EU Arctic policy-making.<sup>106</sup> The interest in the Arctic resulted also in the launch of the EU-Polarnet project, which is to develop the European Polar Research Program and enhance the coordination of European Polar research infrastructures.<sup>107</sup>

The process of developing a cross-cutting Arctic policy also translates to increased EU exposure to Arctic actors and stakeholders. For instance, the EU adopted a conciliatory position in the Convention on International Trade in Endangered Species (CITES)<sup>108</sup> as regards banning international trade in polar bear products. Instead of trade prohibition, the EU proposed requesting information on health of polar bear populations, on the levels of harvesting and trade and on feasibility of tagging regime for polar bear products.<sup>109</sup> The EU action in this way demonstrated sensitivity to Inuit, Greenlandic and Canadian concerns.

In the future, Arctic policy-making may play a role in the EU's actions regarding international ocean governance and as regards the protection of biodiversity in areas beyond national jurisdiction and establishing marine protected areas in the high seas. The preparatory work on a new global agreement

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104 Directive 2013/30/EU of 12 June 2013 on safety of offshore oil and gas operations [2013] OJ L178/66.

105 A survey conducted by one of the authors via surveymonkey.com among participants to the EU-Polarnet network in November 2015.

106 It is worth noting that the Horizon 2020 program follows Seventh Framework Program, which encompassed research efforts within the International Polar Year 2007–2009. In addition, major EU satellite surveillance and observation programs (Galileo and Copernicus) include services critical for Arctic navigation and environmental monitoring.

107 However, the respondents highlighted that there are many drivers shaping research priorities and the eight-year long increased interest in the Arctic is only one of them.

108 Convention on International Trade in Endangered Species of Wild Fauna and Flora, concluded 3 March 1973, entry into force 1 July 1975, 27 UST 1087; TIAS 8249; 993 UNTS 243.

109 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Sixteenth meeting of the Conference of the Parties Bangkok (Thailand), 3–14 March 2013, European Union Proposal Regarding Ursus Maritimus (Polar Bear), CoP16 Inf. 44, <<https://www.cites.org/sites/default/files/eng/cop/16/inf/E-CoP16i-44.pdf>> accessed 7 March 2016.



has already started under the UN General Assembly.<sup>110</sup> While these issues are of special importance for the Central Arctic Ocean, the EU position is likely to be shaped primarily by global concerns and balancing with developing States' interests.<sup>111</sup>

While the new Arctic perspective on problems and stronger interactions with stakeholders is of intrinsic value, the EU should build on these qualities and consider procedural opportunities for enhancing the way Arctic policy-making influences the EU's sectoral activities and actions.

The primary means is facilitating internal flows of information, in order to raise awareness of the specific impacts EU actions have in the North. The Arctic Inter-Service Group of the European Commission serves such information purposes, but it operates only among lower officers responsible for Arctic matters. How, if at all, that information is conveyed within specific DGs depends on the particular case and on the personal interest of policy officers.<sup>112</sup> The tangible co-operation going beyond information exchange within the EU services occurs, not on an on-going basis, but during the work on policy statements (2012 or 2016 communications and accompanying staff working documents) or cross-sectoral activities, such as preparation of a survey for Streamlining EU Arctic funding consultations.<sup>113</sup> Some policy ideas and instruments are, however, worth exploring in this context.

One such policy idea is "Arctic footprint management". Major external actors take part in shaping Arctic realities owing to long-range pollution, economic influence via market leverage and resource demand, as well as via influence on private actors under their jurisdiction. Due to these "Arctic footprints", polities like China, the EU and Japan have in their policy arsenals the capacity to control their impact on the Arctic. "Footprint management" requires three steps. First, polities need to assess and acknowledge their impact on the Arctic.

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110 See, Oceans and Law of the Sea website of the United Nations, ('Preparatory Committee established by General Assembly resolution 69/292') at <<http://www.un.org/depts/los/biodiversity/prepcom.htm>> accessed 7 March 2017.

111 Sébastien Duyck, 'Conservation of Marine Living Resources and Fisheries Management in the Arctic: Perspectives from Non-Arctic Actors' in Timo Koivurova and Tianbao Qin (eds), *Arctic Law and Governance: the role of China and Finland*, pp. 181–204 (Hart Publishing / Bloomsbury, 2017). Also, the European Commission has carried out major consultation process before its stances towards international ocean governance questions are formulated.

112 Personal communication (by Adam Stępień, on file), European Commission policy officers, DG Maritime Affairs and Fisheries (April 2015), DG Environment (August 2015).

113 Personal communication, policy officers (by Adam Stępień, on file), European Commission DG Maritime Affairs and Fisheries (April 2015).

Second, there needs to be a mechanism for communicating the knowledge on Arctic footprints to sectoral—primarily domestic—policy-making. This way, the awareness of Arctic footprints becomes a part of policy processes. Third, a regular monitoring of the polity's footprint has to be carried out.

The EU has shown a responsible approach early in its Arctic policy-making by commissioning the EU Arctic Footprint and Policy Assessment Report.<sup>114</sup> Following the project results, the EU partly acknowledged its own responsibility for the Arctic environment in the 2012 Joint Communication.<sup>115</sup> However, EU officials have not been successful in channeling Arctic-specific concerns into general policy-making yet. Moreover, despite suggestions from the European Environment Agency<sup>116</sup> and the EU Arctic Information Centre initiative network,<sup>117</sup> a periodic monitoring and reassessment of the EU's Arctic footprint has not been adopted. On the other hand, the footprint approach has proven interesting enough that the European Commission is conducting studies—based on a similar methodology—for EU policy impacts on the South Mediterranean region and the Eastern Partnership countries.<sup>118</sup>

Better coordination among EU institutions, between the EU and its Member States as well as coordination with the activities of other actors present in the Arctic is in principle a basis for better flow of information. It could prevent any unnecessary overlaps and could help to identify gaps that the EU policies and EU funding could fill. Certainly, the very process of Arctic policy-making leads to a better overview of what Arctic-relevant activities different departments, agencies and EU actors engage in. The European Commission also commissioned an inventory of a broad range (EU, Member States, institutions and private sector) of European Arctic initiatives.<sup>119</sup> The 2016 Joint Communication proposed establishing the European Parliament's delegation and the Council's working party dedicated to northern cooperation and Arctic issues. While especially the latter is unlikely to be established, neither addresses the key need for

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114 The authors of this chapter were involved in the work on the Arctic Footprint study (Cavalieri and others 2010, n. 31 above).

115 JOIN (2012) 19 4.

116 Personal communication (by Adam Stepień, on file), policy officer, European Environment Agency (July 2015).

117 The authors work at the Arctic Centre which has been leading this network.

118 Personal communication (by Adam Stepień, on file), European Commission policy officer, DG Environment (August 2015).

119 Björn Dahlbäck and others, 'European Arctic Initiatives Compendium' (2014) <[www.artcticinfo.eu](http://www.artcticinfo.eu)> accessed 7 March 2016. The study was carried out in the framework of the "Strategic Environmental Impact Assessment of development of the Arctic" project.

the intra-EU flow of information: from the officers responsible for Arctic affairs to the teams working on Arctic-relevant policy and regulatory developments.

One concrete way in which Arctic concerns (including Arctic footprints) can be communicated to general policy-making processes is via regulatory impact assessments (IAS). IAS are conducted by the European Commission and EU services—sometimes with input from external experts or consultancies—in order to consider different alternatives and review the expected impacts of applied policy instruments, including for different constituencies and regions.<sup>120</sup> The European Commission's IAS of proposed policies or regulations could incorporate a special focus on how new policy or legislative proposals influence the Arctic.<sup>121</sup> Due to the complexity of both Arctic realities and EU policy frameworks, the identification of policies that have consequences in the Arctic constitutes a major challenge and requires stakeholder engagement. Taking Arctic issues into account is particularly important in areas where EU policies designed for a broad European constituency may yield specific consequences in the context of Arctic-specific challenges, such as remoteness, long distance, Arctic nature-based livelihoods, sparse population or vulnerability of Arctic environment. This is likely the case for regulations or policies in fields like transport, environment, ocean governance or rural policy.<sup>122</sup>

A significant part of information on Arctic-specific concerns and impacts would need to be acquired from a broad spectrum of Arctic actors and stakeholders. This leads us to the third problem related to coherence and added value of EU Arctic policy-making, namely handling interactions between EU institutions and Arctic stakeholders.

## 6 Challenge Three: Managing Multiple Interactions with Arctic Actors and Stakeholders

More effective and meaningful participation of Arctic stakeholders in decision-making processes is a vital component of a response to social and

120 More transparent and better impact assessments are at the core of the new Better Regulation agenda of Juncker's Commission (Better regulation for better results—An EU agenda, Communication from the Commission 2015).

121 As was already partly suggested (regarding environmental impacts) in the Commission's 2008 Arctic Communication. See European Commission (2008). Communication COM/2008/0763 from the Commission to the European Parliament and the Council—The European Union and the Arctic Region.

122 Kirsi Latola and others, 'Activities Affecting Land Use in the European Arctic' in Adam Stępień, Timo Koivurova and Paula Kankaanpää (eds), *The Changing Arctic and the European Union* (Brill Nijhoff 2016);

environmental changes and to the rising complexity of Arctic governance. It is crucial to enhance two-way communication between Arctic stakeholders and EU decision-makers as well as to facilitate spaces for stakeholders to enter into dialogue with each other. So far, Arctic inhabitants, communities, businesses, local governments and organisations still lack appropriate information on the EU's role, interests and relevant activities in the region.<sup>123</sup>

Enhanced participation enables understanding of values and livelihoods that might be neglected from the perspective of densely populated European economic centres, where human-environment relations (e.g. subsistence use of forests) may not be as vital for culture and identity as in the North.<sup>124</sup> EU cohesion and co-operation programs in the North are an example of added value provided by stakeholder involvement. There, the key role of local actors in setting objectives has resulted in the alignment of local perceptions of needs and challenges and the goals of EU-funded programs.<sup>125</sup>

However, when carrying out stakeholder engagement activities, the EU institutions need to take into account the limited capacities of many Arctic actors<sup>126</sup> and better coordinate various stakeholder consultations mechanisms. Recently, a number of processes carried out by different EU services have involved the same groups of stakeholders, including: 'Strategic Environmental Impact Assessment of Development of the Arctic' commissioned by the DG Environment; operation of the Arctic NGO Forum (overseen by DG Environment project on creating space for exchange between NGOs focused on Arctic, primarily environmental, issues);<sup>127</sup> the DG MARE consultations on streamlining Arctic funding; and the work with stakeholders within the EU-Polarnet process leading to the European Polar Research Program, supervised by the DG Research. The 2016 Joint Communication adds to these processes the European Arctic Stakeholder Forum, goal of which is to identify overarching investment and research priorities, partly overlapping with the aims of the EU-Polarnet. Moreover, annual stakeholder conferences and the EU Arctic Policy Assessment<sup>128</sup> process are to complement this landscape of spaces for engagement.

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123 This assessment is based on 'Strategic Assessment of Development of the Arctic', n. 1 above.

124 Latola and others 2016, n. 123 above.

125 According to feedback received in the stakeholder consultations.

126 Adam Stepień and others, 'Arctic Indigenous Peoples and the Challenge of Climate Change' in Elizabeth Tedsen, Sandra R Cavalieri and Andreas Kraemer (eds), *Arctic Marine Governance: Opportunities for Transatlantic Co-operation* (Springer 2014).

127 Arctic NGO Forum website at <<http://arcticngoforum.org/>> accessed 7 March 2016.

128 The EU Arctic Policy Assessment process is to examine the implementation of the EU's Arctic policy until 2019, see the Arctic Centre website at <<http://www.arcticcentre.org/>>

Furthermore, the EEAS and the European Commission have engaged Arctic indigenous organizations within the format of the so-called Arctic Dialogue. First taking place in 2010, this dialogue has become more regular starting from 2013. However, these meetings are mainly filled with presentations on various indigenous-relevant EU projects rather than discussing challenging issues. The discussions should be more focused and concrete, including practical, pressing matters and EU strategic interests in the Arctic. Possible questions could include the EU's strategic interest in developing EU-domestic resource extraction or infrastructural projects potentially supported by the EU.<sup>129</sup> The interaction with indigenous peoples needs to be linked up to other stakeholder engagement processes.

In the context of stakeholder engagement it must be remembered that indigenous people are also rights-holders. The participation of indigenous people (in particular the Sámi) in decision-making should be addressed in the light of evolving international indigenous rights (including land rights and the principle of free, prior and informed consent), primarily the UN Declaration of the Rights of Indigenous Peoples.<sup>130</sup> Responsible decision-making with regard to EU policies that may affect Arctic indigenous communities requires their meaningful participation. The concept of establishing a more permanent presence of the Arctic indigenous peoples or the Sámi in Brussels remains relevant.<sup>131</sup> Such representation has to be independent from state and regional authorities and would need to address the constraints of indigenous organisations' human and financial capacities.

Better streamlining of different consultation mechanisms would avoid stretching the capacities and patience of Arctic academics, NGOs, policy-makers, and in particular local and indigenous communities. The 2016 Joint Communication does not deliver on such streamlining. Moreover, clear feedback on how consultation outcomes influenced specific decision-making is necessary to ensure participants remain engaged.<sup>132</sup>

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EN/News/uutinen?ln=x4ueznur&id=6244f2bc-27a7-4bec-8e69-bf5b097b03df> accessed 23 July 2017.

129 Stępień 2015, n. 1 above.

130 United Nations Declaration on the Rights of Indigenous Peoples (2007), General Assembly Resolution 61/295, New York, 13 September 2007.

131 This was already suggested at the 2010 'Arctic Dialogue' meeting. See the website of the European Commission's DG Maritime Affairs and Fisheries at <<https://webgate.ec.europa.eu/maritimeforum/content/1831>> accessed 4 March 2014.

132 See, for example, Stępień and others 2014, n. 1 above.

## 7 Conclusion

The scope of EU engagement in the Arctic is vast. The broad set of Arctic-relevant issues brings two distinct dimensions to the EU's presence in the Arctic: the Circumpolar and European Arctic. These spaces entail different foci (maritime versus terrestrial, environmental versus economic) and different composition of relevant stakeholders. In the European Arctic the Union is a key player, while in the pan-Arctic affairs it takes a back seat. The very diversity of Arctic-relevant policies, activities and external interactions suggests that it is unlikely that concrete, focused and operationalizable objectives of EU Arctic policy will ever be proposed. While abstract objectives may be necessary in order to give EU Arctic policy a recognizable identity and a narrative, such objectives will not translate into policy coherence across sectors and will not cause the EU Arctic policy to have an added value within the EU's policy system. The EU needs to focus on procedural mechanisms and instruments for coherent policymaking. Three challenges can be highlighted in this context: first, balancing between European Arctic and Circumpolar policy spaces; second, exerting effective influence on general policy and decision-making processes in the EU; and third, managing the multiplicity of interactions with Arctic actors and stakeholders. There are options that the EU should consider in order to address these three challenges. Distinguishing between the European and Circumpolar Arctic affairs and maybe even adopting a separate focused strategy for the European Arctic could lead to a clearer overarching framework. The 2016 Joint Communication takes the first steps in this direction. There is a need for better visibility of Arctic issues in EU policy-making, including via assessment, acknowledging and monitoring of the EU's Arctic environmental, economic and regulatory footprints. The intra-EU coordination and information flows regarding Arctic concerns could be improved, with regulatory impact assessments supported by stakeholder engagement playing a central role. Eventually, the numerous instances of interactions with Arctic actors should be streamlined in order to avoid overstressing the limited capacities of Arctic stakeholders. Considering the character of a cross-cutting policy dedicated to a transnational region, the EU Arctic policy is likely to remain a constant work in progress. By focusing now on procedural aspects of its interaction with the Arctic region, the EU can in a more realistic fashion make an increasingly positive contribution to the state of the Arctic and its governance in the long-term.

# The EU Crossing Arctic Frontiers: The Barents Euro-Arctic Council, Northern Dimension, and EU-West Nordic Relations

*Alyson J.K. Bailes and Kristmundur Þ. Ólafsson*

## 1 Introduction and Background

When the Arctic Council's Ministerial meeting of April 2015 decided to further defer a decision on the European Union's (EU) application for observership,<sup>1</sup> this represented at worst a symbolic and diplomatic setback. In reality, the EU was extending its footprint into the Arctic zone well before the current public excitement over the region began. By 1995 it had three members—Denmark, Finland and Sweden—who were also founders of the Arctic Environmental Protection Strategy (AEPS), the leading platform for Arctic-wide inter-governmental cooperation on which the Arctic Council (AC) was founded in 1996.<sup>2</sup> The fact that Denmark's autonomous territories of the Faroe Islands and Greenland opted out of their motherland's EU membership was balanced by the entry of Norway and Iceland into the European Economic Area (EEA) and Schengen Treaty system in the 1990s. The remaining State members of the AC—Canada, the Russian Federation and the United States—are all long-standing partners of the EU and have concluded many cooperation agreements that include their Far Northern regions. In these and other ways, including substantial business and trade links, and sectoral policies e.g. on shipping, fishing and climate change, the EU helps to shape both the network of political and economic relationships and the regulatory landscape characterizing the

\* Alyson J.K. Bailes, Adjunct Professor, University of Iceland, Iceland. Alyson Bailes sadly passed away on 29 April 2016.

\*\* Kristmundur Þ. Ólafsson, Senior Advisor, Icelandic Centre for Research, Iceland.

1 See para. 51, Iqaluit Declaration (communiqué of the Arctic Council Ministerial meeting, 24 April 2015) <[https://www.utanrikisraduneyti.is/media/nordurslodir/ACMMCA09\\_Iqaluit\\_2015\\_Iqaluit\\_Ministerial\\_Declaration\\_2015\\_signed.pdf](https://www.utanrikisraduneyti.is/media/nordurslodir/ACMMCA09_Iqaluit_2015_Iqaluit_Ministerial_Declaration_2015_signed.pdf)> accessed 17 July 2016.

2 See <<http://www.arctic-council.org/index.php/en/about-us/arctic-council/20-year-anniversary>> accessed 17 July 2016.

Euro-Atlantic segment of the Arctic.<sup>3</sup> It has also, of course, engaged in an open process of policy-forming on Arctic issues since 2008 and recently published an integrated EU policy for the Arctic outlining the Unions' ambition to play a key role in the Arctic region.<sup>4</sup>

There remains one mode of EU involvement that has been little noticed in policy discussions or academic study, but which arguably owes much of its value precisely to its low profile and non-contentious nature. Like most other parts of the greater European space, the High North is crisscrossed by what will here be called *sub-regional*<sup>5</sup> groupings of neighbour countries linked by land and/or a common sea space. The oldest and smallest, Nordic Cooperation, is limited to the five Nordic States with their special-status territories.<sup>6</sup> One of Europe's most successful post-Cold War creations, the Barents Euro-Arctic Council (BEAC) launched in 1993, has however counted the European Commission (now the European Union) as a full member from the start.<sup>7</sup> In 1999, moreover, the EU created its own Northern neighbourhood framework in the form of the Northern Dimension (ND),<sup>8</sup> which continues today—following a make-over in 2006—as a four-way grouping of Iceland, Norway, Russia and the EU with its Member States. To complete the picture,<sup>9</sup> the West Nordic Council (WNC)<sup>10</sup> has been growing in prominence since it adopted that name in 1997 (formerly the West Nordic Parliamentary Council). It consists of the three non-EU members Iceland, Greenland and the Faroes and has no formal link to Brussels, but each of its member nations is increasingly engaged with the EU on issues fully relevant to the Arctic.

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3 These connections are discussed at greater length in Alyson J.K. Bailes, *The Arctic as European Periphery*, International Security Network 2015 <<https://www.stratfor.com/the-hub/arctic-european-periphery>> accessed 17 July 2016.

4 The relevant documents including contributions by the European Parliament, European Commission papers of 2008 and 2012, and Council conclusions of 2009 and 2014, are available at the EEAS webpage <[http://eeas.europa.eu/arctic\\_region/](http://eeas.europa.eu/arctic_region/)> accessed 17 July 2016.

5 The rationale for the term is that the UN considers Europe as a whole to be a 'region'. Similar localized institutions are found within other large 'regions', notably in Africa and the Americas.

6 <<http://www.norden.org>> accessed 17 July 2016.

7 <<http://www.beac.st/en/About/Members>> accessed 17 July 2016.

8 <[http://eeas.europa.eu/north\\_dim/index\\_en.htm](http://eeas.europa.eu/north_dim/index_en.htm)> accessed 17 July 2016.

9 The Nordics, Russia and the EU also take part in the Council of Baltic Sea States (CBSS, <<http://www.cbss.org>> accessed on 17 July 2016) together with Poland and Germany, but since it has (so far) no Arctic connections or activities the CBSS is not covered in this paper.

10 <<http://www.vestnordisk.is/english/>> accessed 17 July 2016.



The purpose of this chapter is to introduce the BEAC, ND and WNC in greater detail and to consider what place they hold in the bigger picture of EU-Arctic relations. What are their capabilities, prospects, and limitations? Does the EU itself recognize their importance within its potential Arctic tool-box? How effectively has it been using them in pursuit of general influence and standing, and concrete impacts corresponding to its policy goals? Is anything changing and could anything be improved in this respect?

To set the analytical scene, this introduction concludes with some general remarks on sub-regional institutions, their role in international governance, and how the EU has interacted with them historically. The next three sections—II, III and IV—apply the paper's research questions in turn to the BEAC, the ND, and the WNC with its individual members. Section V presents the conclusions.

### 1.1 *Sub-regional Institutions*

Sub-regional groupings in Europe and elsewhere vary greatly in size and membership. Their frequently overlapping boundaries reveal how often they reflect 'constructed', rather than natural spaces;<sup>11</sup> and they tend to cluster in some areas more than others—for instance, in Northern and Central rather than Western and South-western Europe. The smallest groups, such as Benelux, Nordic Cooperation, and the Visegrad cooperation of the Czech Republic, Hungary, Poland and Slovakia,<sup>12</sup> are easy to explain as sets of like-minded neighbours with shared historical/cultural features, who find advantage in pooling efforts and forming common fronts to deal with larger partners. One co-author of this paper has in another context called them 'brotherhood' groupings.<sup>13</sup>

In the late 1980s and 1990s, Europe generated several larger groups that could more neutrally be called 'neighbourhood' ones, with members who were not necessarily homogenous in nature or interests, but held the management of a given physical space in common. These were explicitly designed to cross east-west dividing lines and help avoid, or at least limit the impact of new dividing lines with countries remaining outside the EU and NATO.<sup>14</sup> The regional

11 Iver B. Neumann, *Uses Of The Other: "The East" in European Identity Formation*, Minneapolis: University of Minnesota Press, 1998.

12 <<http://www.visegradgroup.eu/about>> accessed 17 July 2016.

13 Alyson J.K. Bailes, 'Understanding the Arctic Council: A "Sub-regional" Perspective' (2013) 15(2) *JMSS* 31 <<http://jmss.org/jmss/index.php/jmss/article/view/527/513>> accessed 27 July 2016.

14 Andrew Cottey, 'Sub-regional Cooperation in Europe: An Assessment' (2009) 3 *Bruges Regional Integration and Global Governance Papers* <[http://cris.unu.edu/sites/cris.unu.edu/files/BRIGG\\_3-2009\\_revised\\_version.pdf](http://cris.unu.edu/sites/cris.unu.edu/files/BRIGG_3-2009_revised_version.pdf)> accessed 17 July 2016.

cooperation frameworks were a way to work for understanding and stabilization through the new contacts involved as much as through their concrete actions. In the fluid environment created by the collapse of Communism in Europe they also often sought to stimulate local democracy and empower the oft-neglected peripheries of nations through profitable cross-border cooperation.<sup>15</sup> Russia was drawn into them in the South-east (Black Sea groupings), as well as in the Northern instances already mentioned.

The typical weaknesses of such groups are dictated above all by the diversity of their members. Differences of size and wealth, as well as of strategic stance and political culture, tend to rule out common binding legislation or systematic harmonization of standards. *A fortiori* such groups cannot become defence unions, and they more typically operate by sidelining difficult security issues and bilateral disputes (a process conceptually recognized as *de-securitization*).<sup>16</sup> In institutional typology they are easily viewed as 'weak' for these reasons, but also because of the lightness of their governance structures, without large (or any) secretariats, with minimal budgets or project management capacities, and with typically low political and public profiles.<sup>17</sup> Some groupings, notably on the Eastward periphery of Europe and in Central Asia, can fairly be described as paper institutions that offer little except a chance for their members to talk discreetly and for countries to show off when hosting meetings.

The better functioning groups, however—and the BEAC is often cited in this category—can be remarkably productive using 'softer' or 'messy' governance methods such as politically binding declarations, coordinated spending programmes, externally funded infrastructure designs, exercises and training, and networking activities.<sup>18</sup> These measures can bring tangible benefits in areas of non-military security such as border control (with anti-crime, anti-smuggling and anti-trafficking elements), environmental safety including

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15 Alyson J.K. Bailes 'The Role of Subregional Cooperation in Post-Cold War Europe: Integration, Security, Democracy' in Andrew Cottey (ed.) *Sub-regional Cooperation in the New Europe*, (London, 1999). This effect was often cited in the 1990s in relation to the BEAC, when Russian Foreign Minister Kozyrev was also the MP for Murmansk and encouraged initiatives by the local authorities.

16 De-securitization is the opposite of securitization and means declining to recognize something as a security issue even if it has the obvious characteristics of a threat. Actors may do this if they are powerless to respond, but also in order to establish communication and cooperation with *prima facie* opponents. For a classic statement of the theory see Barry Buzan, Jaap de Wilde and Ole Wæver, *Security: A New Framework for Analysis*. (Boulder, Colorado: Lynne Rienner publishers 1998).

17 Dai, Xinyuan. *International Institutions and National Policies* (New York: Cambridge University Press, 2007).

18 For a systematic listing of such strengths and weaknesses see Bailes, n. 13 above.

nuclear clean-up, coordinated infrastructure planning *inter alia* for energy supply, disease control, and response to civil emergencies (accidents and natural disasters). Further, the primary sub-regional institution may gain 'depth' by sponsoring sub-state networks of neighbouring provincial authorities, sectoral experts and researchers, and non-State analogues (banks, hospitals, universities, youth groups etc).<sup>19</sup>

The interaction of sub-regional groupings with more powerful regional ones is by no means free of contradictions. In the early 1990s, some applicants for North Atlantic Treaty Organization (NATO) and EU membership mistrusted Western support for groups like the Council of the Baltic Sea States (CBSS) and Central European Initiative because they feared they might get trapped permanently in such 'waiting rooms': condemned to a second-best that denied them true strategic protection or full free market access. The fact that the Visegrad cooperation (and its economic counterpart, CEFTA) manifestly helped the Czech Republic, Hungary and Poland to get into NATO faster had eased such concerns by the mid-1990s and made it possible to see the groups as useful training schools for the integration-minded.<sup>20</sup> NATO and the EU for their part, however, were nervous of candidates 'ganging up' and responded by strengthening their emphasis on individual entry negotiations based on individual merits. In retrospect, they probably failed to grasp how important the sub-regional groups were in sublimating historical disputes that would otherwise have disturbed candidates' progress, or even the peace, in more parts of Europe than just the Western Balkans.

The EU had a more concrete reason for concern because the adoption of economic and functional standards at neighbourhood level might have preempted and diverged from its own regulatory requirements, thus making adaptation unnecessarily hard for countries once started on the accession track. It was, in fact, in the North European cases—CBSS and BEAC—that Brussels first chose to address this problem proactively by entering the groups concerned and seeking to lead on issues related to Community competence. As it turned out, countries bent on accession concentrated on EU models from the start in frameworks like the PHARE programme;<sup>21</sup> and their efforts to find ways of

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19 See Bailes, n. 15 above.

20 See Cottey, n. 14 above.

21 The PHARE programme was a specific EC programme as was the main funding instrument used to prepare Central and Eastern European countries for accession. Implementation of PHARE was largely de-centralised to the recipient countries and among the sub-programmes provided were cross-border programmes that were intended to support cooperation between PHARE countries and the adjoining border regions of the EU. The PHARE was the predecessor of the 'Instrument for Pre-Accession Assistance

TABLE 1 *Comparison of the three sub-regional structures, key facts*

Organization	BEAC	ND	WNC
Website	<i>www.beac.st</i>	<i>http://www.eeas.europa.eu/north_dim/</i>	<i>http://www.vestnordisk.is/</i>
Year founded	1993	1999	1997*
Secretariat?	Kirkenes	(Varies for each programme)	Reykjavik
Members	Denmark <i>Finland**</i> Iceland <i>Norway</i> <i>Sweden</i> <i>Russian Fedn.</i> European Commission	<i>Denmark as EU State</i> <i>Finland as EU State</i> <b>Iceland***</b> <b>Norway</b> <i>Sweden as EU State</i> <b>Russian Federation</b> <b>European Union</b> (+other EU member States in national role)	Greenland Faroe Islands Iceland ****
Observers	Canada, France, Germany, Italy, Japan, Netherlands, Poland, UK, US	Canada, US	

\* *Existed from 1985 as West Nordic Parliamentary Council of Cooperation*

\*\* *Those in italics can hold the rotating chairmanship and participate in regional-level cooperation*

\*\*\* *Those in bold are the formal signatories and 'owners' of the forum*

\*\*\*\* *The Western coastal provinces of Norway are included for some cultural/social purposes*

cooperating—nonetheless—with non-candidates like Russia often provided useful groundwork for the EU's own neighbourhood strategies.<sup>22</sup> This link was

(IPA)' used for the current enlargement countries. European Parliament, Briefing: The PHARE Programme and the enlargement of the European Union, No 33 /1998. <[http://www.europarl.europa.eu/enlargement/briefings/33a1\\_en.htm](http://www.europarl.europa.eu/enlargement/briefings/33a1_en.htm)> accessed on 22 July 2016.

22 Based on interviews conducted by Alyson J.K. Bailes with EU Commission officials conducted in May 2015.

manifest when the EU in 2009 adopted its first Baltic Sea regional strategy,<sup>23</sup> taking the work of the CBSS as one of its main inspirations and foundations.<sup>24</sup> In this regard, as well as through the practical solutions they sought for geographically limited and specialized challenges, the more successful regional groups could be seen both historically and today as relating to Brussels in a mode of rational *subsidiarity*.<sup>25</sup> This hypothesis can be explored in more detail through the case-studies of sections 2 and 3.

## 2 The Barents Euro-Arctic Council<sup>26</sup>

The Barents Euro-Arctic Council was founded on a Norwegian initiative in 1993, with the five Nordic countries, Russia and the European Commission as members and several other NATO members as observers (see Table One). Its focus area is the Northernmost segment of Scandinavia (historically known as 'Nordkalotten') which includes the Norwegian-Russian frontier and the northernmost provinces of Sweden and Finland. From the start, BEAC has had a two-tier structure, with the inter-governmental Council complemented by a Barents Regional Council (BRC)<sup>27</sup> where representatives of the provincial authorities (and of the Sami community) meet to discuss cross-border issues including the use of project funding.

The Council was strengthened in 2008 by the establishment of a dedicated secretariat in Kirkenes; it is however still relatively small, having just three employees with very limited financial means.<sup>28</sup> Much still depends on the energy

23 European Commission, Communication: European Union Strategy for the Baltic Sea Region, Brussels, 10.6.2009 COM(2009) 10 June 2009. <[http://ec.europa.eu/regional\\_policy/sources/docoffic/official/communic/baltic/com\\_baltic\\_en.pdf](http://ec.europa.eu/regional_policy/sources/docoffic/official/communic/baltic/com_baltic_en.pdf)> accessed on 17 July 2016.

24 See Bailey, n. 22 above.

25 As used in the EU, subsidiarity is the principle that tasks should be handled at the lowest (in this context, most local) feasible level.

26 This section draws largely on Ingmar Oldberg, *The role of Russia in Regional Councils: A comparative study of neighbourhood cooperation in the Baltic Sea and Barents Euro-Arctic regions*, Centre for Arctic Policy Studies (Reykjavik, 2014) <[http://ams.hi.is/wp-content/uploads/2014/08/The-role-of-Russia\\_Online.pdf](http://ams.hi.is/wp-content/uploads/2014/08/The-role-of-Russia_Online.pdf)> accessed on 17 July 2016; and on Alyson J.K. Bailes and Kristmundur P. Ólafsson, 'Northern Europe and the Arctic Agenda: Roles of Nordic and other Sub-regional Organizations' (2013) 5 *The Yearbook of Polar Law* 45–73.

27 The Barents Regional Council (BRC) comprises 13 regions/provinces in the north of Finland, Sweden, Norway and Russia.

28 It is funded by the 'inner four' BEAC members only. For an insight into its work see <<http://www.beac.st/newsletter/Newsletter-1-2015>> accessed 17 July 2016.

and priorities of the Chairmanship, which rotates annually between the four contiguous countries (only): Finland, Norway, Sweden and the Russian Federation. Added 'depth' is given to the structure through 16 working groups serving either or both of the Councils—five of them report to both the regional and governmental levels. There are several multi-functional programmes such as the Action Plan on Climate Change in the Barents Region<sup>29</sup> and the Cooperation Programme on health and social issues (2012–2015).<sup>30</sup> The scope and importance of this regional cooperation has increased steadily as economic activity and the utilization of natural resources in the region has increased.

Original Norwegian motives for launching the initiative were both Russia-related and EU-related.<sup>31</sup> In the early 1990s when Russia's internal development was uncertain, there were fears of a collapse of public services in the country's industrialized and militarized North-west that could trigger a surge of Westward migration. Meanwhile, Russia's troop withdrawals from Central Europe made its remaining capacities in the Kola peninsula loom proportionally larger as a cause of concern for Norway in particular. Against this background BEAC was designed not only to ease tension and to build understanding and shared interests for general stabilization purposes, but to find acceptable ways of aiding the population in the Russian Western Arctic so that pressures for migration were reduced. The prospect of EU funding was attractive in this context, but the Commission's participation had two larger merits in Norwegian planners' eyes. First, it signalled multilateral backing for the small Nordic countries as they sat down to work with a much larger and still potentially threatening neighbour. Secondly, in the run-up to Norway's EU membership referendum, it was hoped that the distinctly Euro-sceptic North Norwegian population might be won over by using EU money for local projects. This last hope was proved vain by the 'No' vote on Norwegian accession in 1995, but the other rationales for EU participation still hold good and seem to be well appreciated by other actors.

The BEAC's main fields of activity have been: local economic development, including the fostering of trade and investments; transport, visa matters and

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29 Barentsinfo, *Workshop on Development of a Draft Action Plan on Climate Change for the Barents Region* <<http://www.barentsinfo.fi/beac/docs/ClimateChangeActionPlanWorkshopMarch2012Minutes.pdf>> accessed 19 July 2016.

30 Barentsinfo, *4th Co-operation Programme on Health and Related Social Issues in the Barents Euro-Arctic Region 2012–2015* <[http://www.barentsinfo.fi/beac/docs/JWGHSCooperation\\_Programme\\_2012\\_2015\\_ENG.pdf](http://www.barentsinfo.fi/beac/docs/JWGHSCooperation_Programme_2012_2015_ENG.pdf)> accessed 19 July 2016.

31 This paragraph is based on one of the author's own (Alyson J.K. Bailes) observations as a diplomat at Oslo in 1991–4.

cooperative border management (to ease movement for the ‘good’ and keep out the ‘bad’); energy cooperation; environment protection—especially pollution clean-up on the Russian side—and climate policy; health issues; support for indigenous peoples; democratic development, culture, education and science; and cooperation in civil emergency management. On the face of it, successful activities in all these fields can claim a ‘subsidiarity’ role: they address and are adapted to the region’s very distinct local needs—and can be kept close to the people through the BRC—without risk of challenging or duplicating the EU’s regulatory framework, which all five Nordics adhere to in relevant fields under the EEA. Locally generated finance, which in practice has mostly come from Norway, eases the burden on collective European funds. From the EU viewpoint, the BEAC (like the ND, see below) is particularly helpful in addressing important issues at regional level and which can have a substantial impact on local communities facing new challenges and opportunities. While the EU is channeling funds to the region under several of the EU’s regional schemes<sup>32</sup> it has recognized the need to both increase the funding level and make it more coordinated and effective.<sup>33</sup> BEAC provides a platform that the EU could potentially look towards in order to achieve goals that fit a wider regional strategy at the same time the Union could count on other Council members’ buy-in.

Secondly, the BEAC’s effectiveness in stabilizing relations with Russia eases tensions in a delicate border zone that might otherwise have demanded a higher pitch of attention and engagement from both the EU and NATO. While in the nature of things non-quantifiable, this effect seems to be real and has been credited,<sup>34</sup> notably, with paving the way for the Russian-Norwegian Treaty on Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, signed in 2010.<sup>35</sup> Further, the BEAC’s low profile and ‘de-securitized’

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32 These include €24 million for the ‘Kolarctic’ border region, €21 for Karelia, €34.4 million for ‘Botnia-Atlantica’ (northernmost provinces of Norway, Sweden and Finland), the ‘Interreg IVA North’ and ‘Northern Periphery and Arctic’ programmes, and funds applicable in the North from the Baltic Sea basin programme.

33 Joint Communication of the European Commission and High Representative of the European Union for Foreign Affairs and Security Policy of 27 April 2016 on An Integrated European Union Policy for the Arctic, JOIN (2016) 21.

34 This can be seen at the joint declaration made after the joint Barents Summit in Kirkenes, Norway 2013 held at ministerial level. <[http://www.barentsinfo.fi/beac/docs/Barents\\_Summit\\_Declaration\\_2013.pdf](http://www.barentsinfo.fi/beac/docs/Barents_Summit_Declaration_2013.pdf)> accessed 19 July 2016.

35 Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (adopted

nature have allowed it to continue functioning quite normally through periods of Russia-West strain (not least in 2014–15), thus *inter alia* providing a channel for informal messages and explanations between the two sides. This facility may be helpful not least for the Commission in cases where the EU is embroiled in the given dispute.

Last and not least as an aspect of the BEAC's value, it is indisputably—and more clearly so than the ND—an organ of Arctic management, offering the EU a direct corridor of involvement into the latter. The Nordkalotten region lies largely above the Arctic Circle, and (as just noted) is a local test-place for the Russia-West relationship that provides the main diplomatic challenge in Arctic cooperation generally. Its material challenges are a microcosm of those affecting the whole populated Arctic, especially in terms of climate change; the contradictions and choices in economic development; the strains on the human population; and the daunting risks of civil emergencies (accidents and natural disasters) for which response capacities are all too slight. Its waters constitute the Western end of the Northern Sea Route (NSR) over Russia which has so far witnessed the main, though not consistent, growth in trans-Arctic shipping.<sup>36</sup> On land, the Barents region includes some of the largest population centres above the Arctic Circle: Russia's Murmansk and Arkhangelsk both have around 300,000 inhabitants, offering a useful reminder that not only the indigenous peoples need help in navigating a changed Arctic future. In governance terms, the BAEC and Arctic Council may learn from each other about viable solutions in building consensus: the latter's 2011 agreement on Search and Rescue (S&R) cooperation was preceded by the signing in 2008 of an equivalent agreement among the BEAC's six states members.<sup>37</sup>

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15 September 2010, entered into force 7 July 2011). <<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/NOR-RUS2010.PDF>> accessed 27 July 2016. This Treaty resolved long-standing disputes on the two States' maritime demarcation line, with positive knock-on effects also for fisheries and shipping cooperation. While the BEAC has no direct competence in the matter, relationships built through the Barents cooperation are credited by both sides with having eased the negotiations.

36 While BEAC's agenda has traditionally been land-focused, the Ministerial session of October 2013 issued a communiqué including (para. 18) reference to the importance of the NSR and commending the International Maritime Organisation's proposed safety code for polar shipping. <[http://www.barentsinfo.fi/beac/docs/BEAC\\_14\\_Session\\_Tromso\\_29\\_October\\_2013\\_Communique\\_final\\_ENG.pdf](http://www.barentsinfo.fi/beac/docs/BEAC_14_Session_Tromso_29_October_2013_Communique_final_ENG.pdf)> accessed 19 July 2016.

37 Agreement Between The Governments In The Barents Euro-Arctic Region On Cooperation Within The Field Of Emergency Prevention, Preparedness And Response (Adopted 11 December 2008, entered into force 17 May 2012). <<https://www.barentsinfo.fi/beac/>



All the Nordic states as well as the EU have noted the BEAC's relevance and value in their national Arctic strategy documents,<sup>38</sup> it is clear that this EU recognition goes beyond mere words: the BEAC is consciously used—at least by the EU's External Action Service (and the EU member states who participate)—as a practical, low-key and low-risk channel for consolidating the Union's place and the impact of its funds and policies in the Euro-Arctic zone. The institutional set-up lends itself to this notably through the EEAS's attendance at meetings of the BEAC's Committee of Senior Officials (CSO) which both oversees lower-level activities, and prepares Ministerial decisions. Like the BEAC itself, it is a discreet mechanism for European influence that gains most of its value exactly from being so little known or scrutinized.

### 3 Northern Dimension

First established as an EU policy initiative under the Finnish Presidency in 1999, the Northern Dimension has since 2006 been renewed as a common policy framework,<sup>39</sup> where the EU as an institution, Russia, Norway and Iceland participate on an equal footing and co-financing is the general rule. The re-vamping of the organization in 2006 addressed earlier complaints<sup>40</sup> that it was EU-dominated and over-focused on bilateral interests—especially, the needs of the Finnish-Russian border; it seems to have succeeded in creating a broader and stronger sense of co-ownership, as well as attracting more Russian funds.<sup>41</sup>

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docs/Agreement\_Emergency\_Prevention\_Preparedness\_and\_Response\_English.pdf> accessed 27 July 2016.

38 Such references are found in all five Nordic nations' Arctic strategy documents, and in those of Russia and the European Commission. The EU mentions the BEAC a couple of times in its new *Integrated policy for the Arctic*, JOIN (2016) 21.

39 This was done at the Helsinki Summit in November 2006 with the adoption of the Northern Dimension Policy Framework Document <[http://eeas.europa.eu/north\\_dim/docs/frame\\_pol\\_1106\\_en.pdf](http://eeas.europa.eu/north_dim/docs/frame_pol_1106_en.pdf)> accessed on 19 July 2016 and the *Political Declaration on the Northern Dimension Policy* <[http://eeas.europa.eu/north\\_dim/docs/pol\\_dec\\_1106\\_en.pdf](http://eeas.europa.eu/north_dim/docs/pol_dec_1106_en.pdf)> accessed 19 July 2016.

40 Haukkala, Hiski, *The EU–Russia Strategic Partnership: The Limits of Post-Sovereignty in International Relations* (Routledge, 2010) 159–165.

41 Russian Foreign Minister Sergey Lavrov, (Speech delivered at a meeting with Association of European Businesses in the Russian Federation, Moscow, 14 October 2014). <[http://aeb.ru/upload/iblock/b7f/15\\_10\\_2014-lavrov\\_s-briefing-with-aeb-members-eng.pdf](http://aeb.ru/upload/iblock/b7f/15_10_2014-lavrov_s-briefing-with-aeb-members-eng.pdf)> accessed 28 July 2016. Russian Foreign Minister Lavrov is quoted as saying (of the 2006 re-negotiation): 'Talks were launched, the text was clarified and a concept coordinated,

The parties' common priorities for the future were defined in the 2006 documents as to promote dialogue and concrete cooperation; strengthen stability, well-being and intensified economic cooperation; and promote economic integration, competitiveness and sustainable development in Northern Europe.

While providing a forum for general political dialogue between the partners, the ND primarily operates through the design and funding of cooperative projects, handled through the four sectoral ND partnerships and other ND structures.<sup>42</sup> These are the Northern Dimension Environmental Partnership (NDEP), the Northern Dimension Partnership in Public Health and Social Well-being (NDPHS), the Northern Dimension Partnership on Transport and Logistics (NDPTL) and the Northern Dimension Partnership on Culture (NDPC). Specific policy goals are discussed in each partnership group to guide the related project spending. This cooperation is supported<sup>43</sup> in depth by a network of participants, observer states, International Financial Institutions,<sup>44</sup> EU Member States, universities and research centers. The result might be seen as a kind of hybrid between a technical investment scheme and a regional 'partnership' in the sense used elsewhere by Brussels; but it escapes some of the quandaries of the latter (for example, in the Eastern Partnership) by

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which was jointly conceived by the European Union, Russia, Norway and Iceland. This is the main secret of the Northern Dimension's success. Unlike the EU's Black Sea and Baltic strategies, this project continues to function on the basis of consensus for charting generally acceptable approaches'.

- 42 The secretariat of the NDPHS is co-located with the CBSS, that of the NDPC with the NCM secretariat in Copenhagen, and that of the NDPTL with the European Investment Bank. There are also—at non-state level—a Northern Dimension Institute, a Northern Dimension Business Council and a Northern Dimension Parliamentary Forum.
- 43 Most of the supporting actors are mentioned in the Northern Dimension Policy Framework Document, see note 39 above. This excludes the Northern Dimension Institute which prepares Northern Dimension-related studies and reports, and coordinates the collection of funding for research projects. A good example of the support international financial institutions bring to the partnerships is the NDEP support fund, which is managed by the European Bank for Reconstruction and Development (EBRD). The Fund is intended to catalyse environmental investments by mobilising grant co-financing for leveraging loans from the IFIs, this is intended to have a multiplying effect on environmental investment in the area as they make possible larger IFI loans that finance the major share of the investments. Observer States are cooperation partners in some of the action undertaken and have the ability to support initiatives on an ad-hoc basis.
- 44 The main International Financial Institutions involved are the European Bank for Reconstruction and Development (EBRD), the European Investment Bank (EIB), the Nordic Investment Bank (NIB) and the Nordic Environment Finance Corporation (NEFCO).

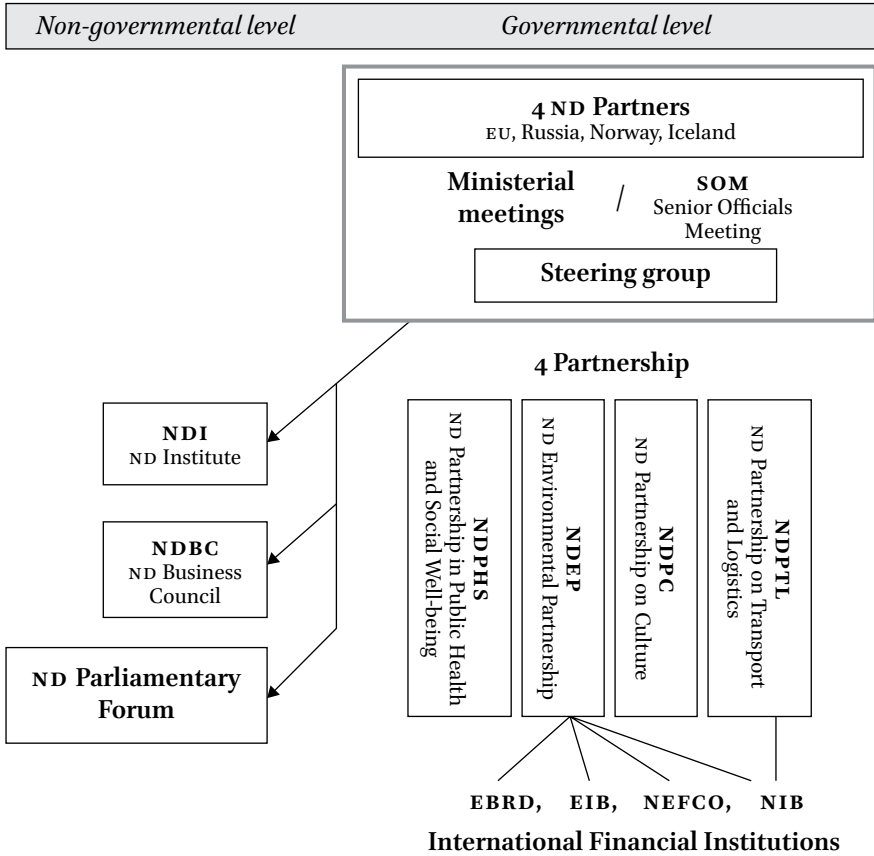


FIGURE 1 *The northern dimension structure.*

focusing on physical development and avoiding overt political conditionality. In this it resembles other, even more specialized EU instruments for High Northern regional funding.<sup>45</sup>

The ND also puts considerable emphasis on cooperation with the other Regional Councils including BEAC,<sup>46</sup> and the Northern Dimension Institute in 2012 published a study suggesting some kind of amalgamation between these groups for project-financing and priority setting purposes.<sup>47</sup> This may

45 As mentioned in n. 32 above.

46 E.g., the Arctic Council (AC), the Barents Euro-Arctic Council (BEAC), the Council of the Baltic Sea States (CBSS) and the Nordic Council of Ministers (NCM).

47 *A Coherent Northern Dimension*, text at <[http://www.ndinstitute.org/images/documents/coherent%20nd\\_final.pdf](http://www.ndinstitute.org/images/documents/coherent%20nd_final.pdf)> accessed 19 July 2016.

be a bridge too far, but all ND participants have committed themselves to 'enhance regional cooperation, improving synergies of regional organization in Northern Europe while avoiding possible duplication'.<sup>48</sup> Pace some issues discussed at the end of this section, reinforcing the ND's centrality should offer the most direct way to strengthen the EU's steering position and hence, the chances of mainstreaming its own priorities into the Councils' work.

As its name suggests, the Northern Dimension's geographical coverage extends over the whole northern fringe of Europe from the European Arctic and sub-Arctic areas to the southern parts of the Baltic Sea, and from North-West Russia in the East to Iceland and Greenland in the West. However, the scale of ND activities within this region differs substantially, with the bulk of programmes and projects hitherto taking place—in order of magnitude—in the Baltic Sea area, and then in North-west Russia, the Barents region and the Arctic region respectively.

The four ND partners are formally equal, but it is the strategic EU-Russia relationship that sets the pace regarding cooperation in the Baltic Sea region and North-west Russia. There, the Northern Dimension is designed to serve the broader cause of partnership, as seen in the way that ND policies and project prioritization mirror those defined in the 'EU-Russia Common spaces'.<sup>49</sup> At the level of project design, the EU has consistently mainstreamed its global priorities into the ND agenda: thus in environmental terms, the EU prioritizes protection measures including water and wastewater treatment, waste management and nuclear safety, and works for energy efficiency in support of the EU strategy for the Baltic Sea region. In the field of transport and logistics, the NDPLT fosters the EU's infrastructure priorities and supports measures in line with the revised TEN-T priorities<sup>50</sup> that are to develop interconnections and eliminate bottlenecks to mobility, complete cross-border routes, cross natural barriers and improve interoperability.<sup>51</sup>

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48 This is one of the stated objectives of the Northern Dimension Policy Framework Document, see n. 39 above.

49 <[http://eeas.europa.eu/russia/about/index\\_en.htm](http://eeas.europa.eu/russia/about/index_en.htm)> accessed 19 July 2016.

50 The priorities are to 1) establish and develop key links and interconnections to eliminate existing bottlenecks to mobility, 2) to fill missing sections and complete the main routes especially their cross-border sections, 3) cross natural barriers and 4) improve interoperability on major routes. The overall objective is to stimulate sustainable economic growth at regional level by increased cohesion, interconnection and interoperability of a trans-European transport network, or in the case of NDPLT by focusing priority projects mutually beneficial for EU countries and the non-EU countries in the region.

51 European Commission, Programming of the European Neighbourhood Instrument (ENI)—2014–2020 Regional East Strategy Paper (2014–2020) and Multiannual

While the ND's cooperative activities in the Baltic Sea and North West Russia are well established and documented, its extension to the Arctic is a work in progress and still somewhat hard to characterize. In principle, the ND's project-based character should allow it to help, like BEAC, in channeling and targeting the EU's existing contributions in the High North, which include a sizeable Arctic research programme<sup>52</sup> and the above-mentioned regional development funds for specific sub-areas.<sup>53</sup> The initial description of the ND's Arctic-related role as an 'Arctic window', however, disturbed the Russians who insisted on limiting the programme to the Euro-Arctic zone, not wishing the ND to become a back door into pan-Arctic governance. More recently, Iceland and Norway have called for 'developing the Northern Dimension's contribution to cooperation in the European Arctic area ... deepening and systematizing cooperation between the ND and BEAC, as well as seeking synergies with other relevant cooperation formats and programmes in the Euro-Arctic region.' Concrete proposals in this regard were expected to be presented to an ND Ministerial scheduled for 2015 in Iceland (but see below), while the EU and Russia agreed to develop ideas for the Baltic segment.

For the present, the practical role of the ND in the High North varies from partnership to partnership. The NDEP has a broad remit with regard to promoting environmental protection in various parts of the region. The partnership includes a specific 'nuclear window' through which the partnership contributes to nuclear safety, cross-border impacts and environmental protection in the Arctic (Kola peninsula, Archangelsk and Murmansk regions). As part of its everyday work the NDEP supports projects that support municipal infrastructure modernisation in Northern Russia and Belarus (waste water treatment and district heating modernisation) with the aim of tackling pollution (nutrient input to the sea, CO<sub>2</sub> emissions and black carbon emissions).<sup>54</sup> The ND Partnership on Transport and Logistics (NDPTL)<sup>55</sup> has a mandate to facilitate improvement of transport links and logistics—supporting international trade and people-to-people contacts—in the whole ND area, including

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Indicative Programme (2014–2017). (2014) <[https://eeas.europa.eu/enp/pdf/financing-the-enp/regional\\_east\\_strategy\\_paper\\_2014\\_2020\\_and\\_multiannual\\_indicative\\_programme\\_2014\\_2017\\_en.pdf](https://eeas.europa.eu/enp/pdf/financing-the-enp/regional_east_strategy_paper_2014_2020_and_multiannual_indicative_programme_2014_2017_en.pdf)> accessed 19 July 2016.

52 European Commission, Report: *Arctic Research Funded by the European Union* (European Commission 2014) <[http://ec.europa.eu/research/bioeconomy/pdf/arctic\\_research\\_funded\\_by\\_the\\_research\\_and\\_innovation\\_eu\\_en.pdf](http://ec.europa.eu/research/bioeconomy/pdf/arctic_research_funded_by_the_research_and_innovation_eu_en.pdf)> accessed 19 July 2016.

53 See n. 32 above.

54 <<http://ndep.org/projects/>> accessed 19 July 2016.

55 <<http://www.ndptl.org/home>> accessed on 19 July 2016.

the European Arctic and Barents regions. Providing the only current forum for transport ministries in the Baltic Sea and Barents/Euro-Arctic regions to meet and plan together, it holds much potential for connecting these areas and linking them to global developments in transport and logistics. The remaining two ND partnerships have covered High North issues in a more generalized way, one exception being an NDPHS working group on indigenous health which was however discontinued when Canada left the partnership. In all these fields the ND structures maintain good contact with BEAC counterparts.

Despite the many similarities between the Northern Dimension and the other inclusive Councils of the region—the BEAC, AC and CBSS—its linkages, both political and practical, with the direct EU-Russia relationship are unique and raise special issues. When West-Russia relations are troubled, the ND offers the EU—and its member states—a kind of ‘back door’ for positive cooperation and the exchange of messages.<sup>56</sup> In terms of strategy and political sensitivity, this role of the organization arguably outweighs its potential as an extra entry point into Arctic governance, where it is anyway ill-suited to channel issues of high policy. The question is whether the EU (as a whole) is willing and able to behave accordingly, and whether Moscow can be counted on to comply.

At the time of writing, despite Russian anger over and counter-measures against the EU’s Ukraine-related sanctions,<sup>57</sup> Russia’s tactics in all the regional groups seem to be to compartmentalize that issue and continue low-key cooperation as normal.<sup>58</sup> It is the EU side that has needed to think twice, given the range of feelings among such members as the Baltic States—who are present in the ND (unlike in the BEAC) with veto rights, and who have faced more serious Russian threats and provocations since 2014 than most nations of the Northern flank. Not only had the regular ND Ministerial planned for 2015 been

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56 Utilizing meetings within regional constructs for the exchange of messages and to have special bilateral meetings is common practice especially during high level meetings. This is based on the author’s (Kristmundur Þór Ólafsson) own observations as an employee of CBSS in Stockholm 2010.

57 European Parliament Briefing: Economic impact on the EU of sanctions over Ukraine conflict, (European Parliament, 2015). <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/569020/EPRS\\_BRI\(2015\)569020\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/569020/EPRS_BRI(2015)569020_EN.pdf)> accessed 19 July 2016.

58 The most striking success for this tactic was the positive outcome of the Arctic Council meeting at Iqaluit in April 2015 (n. 1 above), followed by an *ad hoc* meeting in Washington that brought together the US and Russian Foreign Ministers.

postponed,<sup>59</sup> but the EU's economic sanctions<sup>60</sup> have been interpreted in such a way as to block EU-sourced financing for new ND-related projects.<sup>61</sup> Care has been taken to avoid damage to purely humanitarian and shared causes such as public health; but whether transient or not, this situation prompts the question whether an institution combining membership of all EU states with a local focus can durably match the success of the smaller High Northern groups (so far) in de-politicization and crisis avoidance. While it delays any stronger ND entry into Arctic affairs, it might also raise doubts over how that development might affect the apparent political stability of other organizations working there.

#### 4 The West Nordic Council and Its Member

The West Nordic Council (WNC) started as a purely inter-parliamentary grouping by bringing together delegations from the parliaments of Iceland and the self-governing nations of Greenland and the Faroe Islands. The Council now has a one-person secretariat based in Reykjavík and, impelled largely by Arctic developments, ministers and officials from the three member territories have in the last couple of years also started meeting systematically to discuss West

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59 By contrast, a meeting of the ND's Public Health and Social Well-being partnership 'at Ministerial level' took place in November 2015 in Berlin, see the NDPHS website at <[http://www.ndphs.org/?mtgs\\_pac\\_11\\_berlin](http://www.ndphs.org/?mtgs_pac_11_berlin)> accessed on 19 July 2016. States can of course opt to send a lower-level delegate. A meeting of the ND Parliamentary Forum has already taken place as planned at Reykjavik on 10–11 May 2015, where all participants (including Baltic parliamentarians) agreed on 'encouraging all the Partners to continue regional cooperation enhancing mutual understanding in the interest of the peaceful and sustainable development of the ND region'. See <[http://www.ndptl.org/c/document\\_library/get\\_file?folderId=10722&name=DLFE-2409.pdf](http://www.ndptl.org/c/document_library/get_file?folderId=10722&name=DLFE-2409.pdf)> accessed 19 July 2016.

60 The reference is to the EU's Ukraine-related measures progressively adopted since March 2014 <[http://europa.eu/newsroom/highlights/special-coverage/eu\\_sanctions/index\\_en.htm#5](http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm#5)> accessed 19 July 2016. They include suspension of EIB and EBRD funding for regional cooperative projects, though it is stated that 'projects dealing exclusively with cross-border cooperation and civil society will be maintained'.

61 In the ND context this has been interpreted to preclude funding for any activity discussed/agreed later than 16 July 2014, and it has serious implications for future action under the four ND partnerships many of whose projects are EIB- or EBRD-dependent. It remains to be seen whether Russia might counter-withdraw its own funding which stands at some €60 million for the NDEP alone. There are obvious implications also for the CBSS, where high-level meetings appear to have been suspended since early 2014.

Nordic cooperation, with a current focus on building a common trade area.<sup>62</sup> The WNC has been increasing its ambitions in international relations and has a pending application for observer status of the Arctic Council.<sup>63</sup> What sets the WNC apart from the other regional formats discussed above is that none of its member is an EU member state while all of the partners have a close association with the EU.

Developments in the Arctic have increased the importance of North-West Atlantic and brought new challenges, responsibilities, opportunities and interest from the world's leading powers. The willingness of the WNC countries to have a say in shaping the future of the Arctic coordination has led to an increased international scope for the Council which could provide a useful fora in which the WNC countries could share experience, expertise and information on issues of regional concern strengthening their position in consultations with leading nations and the EU.

There is no formal link between the EU and the WNC and EU policies and programmes therefore are not directly influencing the decision making of the WNC, but, along with important bilateral cooperation agreements between the EU and the members of the WNC, help form the background against which those decisions are taken. The recently published EU Arctic Strategy<sup>64</sup> does not mention the WNC specifically as a multilateral fora with Arctic relevance like the BEAC and ND, but rather mentions Greenland and the EEA countries as important partners where the EU can play an influential role in the application of EU rules relevant for the Arctic through the EEA. This is not surprising in light of the limited capacities and scope of the Council hitherto. It is however possible that the WNC could be a platform where the EU could try to engage more actively and consult with the WNC countries on matters relevant to the region in order to mobilize local actors to contribute to EU objectives in the area of climate change and sustainable development. The EU's role as a major contributor to Arctic research and the association of West Nordic states to European funding programmes is an example of this EU angle where joint research projects especially relating to issues like environmental sustainability

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62 There is already a free trade agreement (Hoyvik Agreement) between Iceland and the Faroes although this has thrown up some problems. For a general introduction to West Nordic cooperation see Egill Þór Nielsson, 'The West Nordic Council in the Global Arctic, Centre of Arctic Policy Studies (Reykjavik, 2014) <[http://ams.hi.is/wp-content/uploads/2014/03/the\\_west\\_nordic\\_council.pdf](http://ams.hi.is/wp-content/uploads/2014/03/the_west_nordic_council.pdf)> accessed on 19 July 2016.

63 <<http://arcticportal.org/library/news/1294-west-nordic-council-annual-meeting>> accessed on 24 July 2016.

64 JOIN (2016) 21.



and climate change, create a basis for discussion and reactions to Arctic developments. Each WNC member nation is increasingly engaged with the EU on issues fully relevant to the Arctic and that has also been the case with the WNC council itself.

Each year the WNC holds an Annual General meeting which is the Council's supreme authority and which in turn is usually followed by a themed conference, devoted to studying issues of joint concern in more detail.<sup>65</sup> Recent thematic topics have included the management of natural resources, the question of food safety, and the idea of creating a common Arctic strategy.<sup>66</sup> This last effort is now mandated to go ahead and will draw upon strategies already adopted by the Icelandic and Faroese parliaments.<sup>67</sup> A joint West Nordic approach to Arctic cooperation can be rationally given, on the one hand, the small size of the three players and their separateness, politically as well as geographically, from the mainstream of European integration. On the other they all have similar aims in Arctic affairs that combine interests in drawing profit from new economic development in the Arctic (shipping, fisheries, and possible oil/gas finds in their waters), and concern over the disruptive environmental changes and the growing risks of major civil emergencies in the region.

The relationship of the EU with the Faroes and Greenland<sup>68</sup> are quite particular as the Faroes voted to opt out when Denmark joined the EU in 1973,<sup>69</sup> and Greenland followed suit right after it gained Home Rule and withdrew from the Community in 1985.<sup>70</sup> Today the EU maintains a strong relationship

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65 <[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/deea/dv/0503\\_/0503\\_u.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/deea/dv/0503_/0503_u.pdf)> accessed 19 July 2016.

66 <<http://www.vestnordisk.is/vestnordisk-rad-holder-temakonference-i-grindavik/>> accessed on 25 July 2016.

67 See the texts at, respectively, <<http://www.mfa.is/media/nordurlandaskrifstofa/A-Parliamentary-Resolution-on-ICE-Arctic-Policy-approved-by-Althingi.pdf>> accessed 19 July 2016, and <<http://www.government.fo/foreign-relations/the-faroe-islands-and-the-arctic/>> accessed 19 July 2016.

68 Today it belongs to the EU's Overseas Countries and Territories (OCT) scheme. <[http://ec.europa.eu/europeaid/countries/greenland\\_en](http://ec.europa.eu/europeaid/countries/greenland_en)> accessed 19 July 2016.

69 For further information see: <<http://www.government.fo/foreign-relations/missions-of-the-faroe-islands-abroad/the-mission-of-the-faroes-to-the-european-union/the-faroe-islands-and-the-european-union/>> accessed 19 July 2016.

70 A Treaty on Greenland's withdrawal from the Community was made—the Greenland Treaty, <<http://naalakkersuisut.gl/en/Naalakkersuisut/Greenland-Representation-to-the-EU/European-Union-and-Greenland/The-Greenland-Treaty-of-1985>> accessed 19 July 2016.

with the Faroes<sup>71</sup> through bilateral agreements while with Greenland the basis for relations is the Greenland Treaty of 1985.<sup>72</sup> Iceland being a member of the European Economic Area (EEA) and the Shengen treaty it remains outside the EU. Iceland did apply for EU membership and made fast progress in negotiations; but a more traditional centre-right government taking over in 2013 has effectively reversed that step.

Through these relations the footprint of EU regulation and the influence of EU polices reach far northwards in the Arctic as they provide an opportunity for the EU to have a strong influence on the economic, social and environmental policies in the Arctic. As a major trading partner and consumer of products coming from Arctic it is only natural to assume that the emphasis put on sustainable development, climate change and safeguarding of the Arctic environment in the new EU Arctic policy translate into how the EU conducts itself in its relations to all of those countries. The new Arctic strategy mentions the new EU-Greenland Partnership agreement since 2014 and that ‘The EU will further engage in policy dialogue at the appropriate political and technical levels on issues of common concern, such as global issues (energy, climate change and the environment, and natural resources)<sup>73</sup> and Arctic issues.’ and furthermore adds that, Arctic policy and Arctic issues will continue to remain an important element of the EU’s close relations with Iceland and Norway.’ Their new approach to Greenland extends the room for direct dialogue with the home-rule government without running into Danish objections. The presentation of EU Arctic policy as such has become steadily more nuanced, to the point where Icelandic specialists acknowledge it as almost identical with their own approach—and thus, potentially, with the concerted goals to be adopted by the three West Nordic players. As a result, Arctic issues not only offer a life-line for maintaining positive Iceland/EU relations after the halt of accession talks, but could even inject new substance into that relationship, independent

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71 See n. 69 above. The Faroes have a bilateral fisheries agreement and a free trade agreement with the EU (as well as similar agreements with Norway and Switzerland) and since 1998 they have maintained an office in Brussels to work directly with the EU institutions.

72 See n. 70 above.

73 This is a particularly sensitive issue in Greenland given current proposals for new mineral mining, where China has been an interested partner and where observers (i.a. in Denmark) have voiced concern about the environmental and social consequences. One of the schemes would, moreover, involve extracting uranium ore as a by-product: see Cindy Westergaard, ‘The European Union, its Overseas Territories and Non-Proliferation: The case of Arctic yellowcake’, SIPRI Non-Proliferation Papers no. 25. 2013, at <<http://www.nonproliferation.eu/web/documents/nonproliferationpapers/cindywestergaard50f42aa9586fe.pdf>> accessed 19 July 2016.

of what happens over the EU's AC observership (which, incidentally, Iceland supports).

Is there a case for the EU also to seek institutional relations with the WNC itself? It is certainly in the broader European interest to encourage rational cooperation among the three small and vulnerable nations involved, and to make sure that their emergent joint policies take account of relevant EU positions and instruments. However, there are also arguments against haste. The WNC is the smallest and institutionally weakest of the North's sub-regional groups, already facing other demands for association and partnership that risk over-burdening it. The most effective outlet for WNC proposals is through the larger Nordic Council<sup>74</sup> and it would be wrong to distract attention and resources from that channel. Moreover, the tolerance of West Nordic élites for an EU role—not only as a milch-cow, but in the interests of wider Arctic balance and governance—does not necessarily extend to their less well informed and more suspicious publics. The best near-term approach could be for the EU to keep itself informed on West Nordic developments, and inject ideas as appropriate, through its bilateral diplomacy with Iceland and Greenland in particular.

## 5 Summary and Conclusions

The contributions of sub-regional bodies to Arctic affairs is shaped by their own strengths and weaknesses. The strategic value and functionality of these structures offers the EU venues to work with and through to have an influential role in shaping the future developments of the European part of the Arctic by the promotion of its policies and financial instruments. The 'weak' features of bodies like the BEAC and ND gives them opportunity to operate in de-securitized and almost de-politicized mode even amidst serious strategic tensions.

The regional structures have provided a common platform where State and non-State actors have been able to find common position and solutions on the great challenges being faced in the Arctic region and their loose governance methods threaten neither sovereignty, nor distinct State and ethnic identities; and the money they draw in and/or redistribute is welcome to all. Anything that they do for stability, understanding, and non-military cooperation among

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74 While not discussed in this paper, the Nordic group's institutional engagement with and influence in Arctic affairs is considerable and growing: see Bailes and Ólafsson, n. 26 above.

Arctic neighbours is in the broad interests of the EU, as a 'soft-power' actor that relies on its regulatory strength, funds, and image rather than military might.<sup>75</sup> Anything the groups can do for economic, social and functional development in Arctic land areas expands the chances of profitable trade and cooperation for the rest of Europe, both with and through these zones. It may even be argued that the successes of 'soft' or 'weak' institutionalization in the European segment of the Arctic have made European models and influences more effective across the whole circumpolar space than the *prima facie* clout of the small Nordic nations might suggest.<sup>76</sup> Last and not least, should Greenland and/or the Faroes gain full independence at any time, the sub-regional networks would offer them a 'home to go to' for support, guidance and restraint, even if they continued to reject more direct EU links.<sup>77</sup>

*Pace* many Arctic analysts, moreover, the groups' cumulative limitations are only damaging for the Arctic's chances of stability and sustainable development if the gaps they leave are not or cannot be filled by others. In fact, some key Arctic challenges are covered by global instruments like the UN Convention on the Law of the Sea,<sup>78</sup> the military balance is looked after (for good or ill) by the Russia-NATO relationship;<sup>79</sup> and as this paper has tried to show, the EU itself influences economic, social and functional development in far more ways than most analyses give credit for.

From published facts and the testimony of officials interviewed for this project, it is clear that these realities are not lost on officials in Brussels. The

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75 Bretherton, Charlotte and John Vogler. *The European Union as a Global Actor* (2nd Edn, Routledge, 2006).

76 There are no comparable inter-governmental groups in the Pacific segment. For more on this see Bailes, see n. 3 above.

77 A further point might be made that strengthening a European common front in the Arctic could help offset growing Chinese (and other Asian) efforts to play a role there. However, it is Russia that in reality has most reason for concern about infiltration and competition from a rising China, and the small European Arctic nations have welcomed rather than resisted Chinese overtures. See Marc Lanteigne, 'China's Emerging Arctic Strategies: Economics and Institutions' Centre for Arctic Policy Studies, Occasional paper (Reykjavik, 2014) <[http://ams.hi.is/wp-content/uploads/2014/11/Marc\\_Lanteigne2.pdf](http://ams.hi.is/wp-content/uploads/2014/11/Marc_Lanteigne2.pdf)> accessed 22 July 2016.

78 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994 31363 UNTS 1833, 1834, 1835.

79 For more on this argument see Alyson J.K. Bailes, 'Institutions and Stability in Lassi Heininen and Regis Rouge-Oikarinen (eds), *The Arctic Case' in NGP Yearbook 2011: Sustainable development in the Arctic region through peace and stability*, (Nordica Geographical Publications, 2012) 43–56.

strategic vision and practical coordination of EU Arctic policies has been steadily improving since 2008, with the fact that the Commission's 2012 report was co-authored by the High Representative<sup>80</sup> was one milestone. The recently published EU policy for the Arctic is also co-authored by the High Representative recognized the value of regional cooperation fora, not only for the value of sharing experience, expertise and information but as partners to be included in developing an ambitious climate adaptation agenda for the Arctic region. The policy mentions the importance of relations with the EEA countries and Greenland and gives honourable mention to the BEAC and ND policy frameworks as successful cooperation frameworks. The policy does however emphasize the need to enhance the collaboration and coordination between different EU funding programmes as well as bring together the EU institutions, Member States and regional and local authorities in order to help identify investment and research priorities in the region. Behind such words lie concrete EU interests and ambitions to place a European mark on Arctic developments (at least in the Euro-Atlantic zone); to promote generic EU policies where applicable; to use neighbourhood cooperation funds in a more targeted, coherent and productive way; and to its deepen relations with both state and non-state players active in the region.

By and large, the EU's approach in recent years has registered steady improvements on all these fronts. It will remain important for Brussels to avoid an over-assertive *Besserwisser* ('one who knows better') approach, and to accept more indirect ways of spreading European ideas on occasion—notably through the Nordics, and perhaps also through private sector actors and NGOs. The Russian side is currently more sensitive than ever to European/Western 'ganging up', and it remains to be seen whether the Northern Dimension in particular can avoid lasting damage from some EU members' insistence on extending sanctions to the financing of its collectively sponsored projects. The de-politicization and humble profile that allow sub-regional cooperation to make its most characteristic contributions may, it seems, be among the hardest characteristics for EU politicians to absorb and emulate. That could raise questions in some minds about how the EU would use any stronger status it may eventually gain in the Arctic Council. The answer matters, because a peaceful Arctic is ultimately in the interest of all Europeans.

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80 European Parliament and European Council, Communication on Developing a European Union Policy towards the Arctic Region: progress since 2008 and next steps, JOIN(2012) 19, 26 June 2012. <[http://eeas.europa.eu/arctic\\_region/docs/join\\_2012\\_19.pdf](http://eeas.europa.eu/arctic_region/docs/join_2012_19.pdf)> accessed 19 July 2016.

**PART 2**

*The EU and the Arctic Region*





# Strengthening the European Union—Greenland’s Relationship for Enhanced Governance of the Arctic

*Mar Campins Eritja*

## 1 Introduction

Greenland (Kalaallit Nunaat: “*the Country of the Greenlanders*”) is the largest island in the world, with an area of about 2.2 million square km (of which 80% is permanently covered by ice), more than 44,000 km of coastline,<sup>1</sup> and a population density of 0.14 inhabitants per square km in the ice-free areas.<sup>2</sup>

Due to its location in the Arctic, Greenland, an autonomous territory still dependent on Denmark, has acquired a unique strategic relevance for the European Union (EU). In an international context where economic powers such as China or South Korea have expressed great interest in the Arctic and especially in the huge potential of natural resources, hydrocarbons and strategic minerals, the EU’s presence in the region is undoubtedly connected with the need to strengthen its relationship with Greenland, a matter that is back into focus in the political debate.

This Chapter aims to describe the current legal framework concerning the relationship between Greenland and the EU, as well as some of the reasons for the interest of the EU in Greenland with special attention to those specially related to the exploitation of hydrocarbons. To ensure the effectiveness of its collaboration with Greenland and, by extension, its presence in the Arctic region, the EU intervention must be “accepted” and seen as “legitimate”

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\* Mar Campins Eritja, Professor, Department of International Law and Economics, Universitat de Barcelona; Centre d’Estudis de Dret Ambiental de Tarragona (CEDAT).

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1 NASA, *Ice-Bridge Arctic 2015* <[http://www.nasa.gov/mission\\_pages/icebridge/index.html#.Vb-xELfTOf4](http://www.nasa.gov/mission_pages/icebridge/index.html#.Vb-xELfTOf4)> accessed 1 September 2015.

2 Government of Greenland, *Greenland in Figures (2014)* <[www.stat.gl/publ/da/GF/2014/pdf/](http://www.stat.gl/publ/da/GF/2014/pdf/)> accessed 1 September 2015.



by local players. Therefore, this Chapter will also discuss the recognition by the EU of the Greenlandic population's rights concerning participation in the context of offshore extractive operations. Although the issue has never been high on the EU political agenda, indigenous rights protection is one of the reasons why the EU has justified its interest in the Arctic. However, EU law has so far been scarcely affected by the evolution of international law regarding the rights of indigenous peoples. Finally, this Chapter will focus on how the current EU—Greenland relationship can be used to strengthen this dialogue. The privileged and unique position of Greenland may serve potentially to strengthen the role of the EU in the region, and ultimately, an enhanced cooperation has mutual benefit.

## 2 The General Current Legal Framework for the Greenland and the EU Relationship

Greenland and the EU have a special relationship. Greenland is an autonomous territory of a Member State (Denmark) of the EU that has exercised its right of withdrawal from the EU. In spite of not being a part of the EU, Greenland historically remains closely associated to the EU through an important partnership. Besides, as one of main EU Overseas Countries and Territories (OCTs), Greenland has a geostrategic location between Europe and America. At the same time, Greenland is also strategically important to ensure the EU's presence in the Arctic.

### 2.1 *Greenland's Self-governance Process*

In order to fully understand the role of Greenland in the EU's Arctic strategy, it is necessary to refer briefly to the State-building process in which this territory has been immersed since the 1970s. Greenland has been and still is a territory dependent on Denmark. Political parties on the island were established in the 1970s, which have been pressing for a new institutional relationship with Denmark and strengthening aspirations towards independence. This is a process that began with the adoption of the Home Rule Act of 1978,<sup>3</sup> which was adopted as a result of Denmark's accession to the European Economic Community (EEC) in 1973. Through the Home Rule Act, a wide autonomy

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3 Act No. 577 of 29 November 1978, The Greenland Home Rule Act, English translation available at <[http://www.stm.dk/\\_p\\_12712.html](http://www.stm.dk/_p_12712.html)> accessed 1 September 2015.

regime for Greenland was established. Until the early 2000s, the position of the Greenlandic government under the leadership of Premier Jonathan Motzfeldt was to urge slow construction of a politically and economically viable State and prioritize the relations with the Nordic countries. It was not until the turn of the century that Greenland had to face the choice between building a new independent State through a process of expedition, an option at that time presented by the government of Premier Hans Enoksen (between 2002 and 2009); or first turn Greenland into an economically autonomous actor and deal with the political process of independence later, a more pragmatic approach which has been defended by the government of the Premier Kuupik Kleist since 2009.<sup>4</sup>

2009 marked a turning point in this process. On 25 November 2008, 75.5% of Greenlanders voted in favour of a proposal for broad autonomy developed by the Greenlandic-Danish Self-Rule Commission. As a result of this decision Act N° 473 on Greenland Self-Government (AGSG) was passed by the Danish Parliament on 12th June 2009,<sup>5</sup> which replaced the Home Rule Act of 1978. The Act of 2009 allows the government of Greenland to assume legislative, executive and judicial powers, which Danish authorities had until then. By virtue of the Act, Denmark keeps its power regarding foreign affairs, defence and economic policy. However, the importance of being an “Arctic State” is clear to Denmark. For this reason, its Arctic strategy, which was presented in 2011,<sup>6</sup> focuses on cooperation with the Faroe Islands and Greenland in a win-win approach to Arctic issues.

The preamble to the AGSG refers to “the people of Greenland” and acknowledges their capacity as “a people pursuant to international law with the right of self-determination.” Consistent with this provision, the Act contains a specific regulation on the access of Greenland to independence. Its chapter eight

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4 Alex Kjoer Sorensen, *Denmark-Greenland in the Twentieth Century* (Commission of Scientific Research in Greenland-Kristen Caning, Greenland, 2006); Damien Degeorges, *The role of Greenland in the Arctic*, (2012) 7 Laboratoire de l'IRSEM, 16 <<http://www.defense.gouv.fr/irsem/publications/laboratoire/laboratoire-de-l-irsem-2012/laboratoire-de-l-irsem-n-7-2012>> accessed 1 September 2015.

5 Act no. 473 of 12 June 2009, Act on Greenland Self-Government, English translation available at <[http://www.stm.dk/\\_a\\_2957.html](http://www.stm.dk/_a_2957.html)> accessed 1 September 2015.

6 Ministry of Foreign Affairs of the Danish Government, Department of Foreign Affairs of the Government of Greenland, Ministry of Foreign Affairs of the Government of the Faeroes, *Denmark, Greenland and the Faroe Islands: Kingdom of Denmark Strategy for the Arctic 2011–2020* (2011) <[http://usa.um.dk/en/~media/USA/Arctic\\_strategy.pdf](http://usa.um.dk/en/~media/USA/Arctic_strategy.pdf)> accessed 1 September 2015.

establishes that if the people of Greenland adopt a decision in favour of independence by referendum, appropriate negotiations should be started between the Danish government and the Greenlandic government (Naalakkersuisut), so as to adopt an agreement that regulates Greenland's way out of Denmark's territory. This agreement, which must be submitted again to referendum, must have the consent of the Danish Parliament, as established in Section 19 of the Danish Constitution.<sup>7</sup>

## 2.2 *Current Relationship between Greenland and the EU*

Denmark's accession to the EEC in 1973 was strongly opposed in Greenland. Although 70.8% of the Greenlandic population voted against the accession in the referendum of October 1972,<sup>8</sup> they could not prevent the incorporation of the territory into the EEC as a part of the Kingdom of Denmark. Again, in February 1982 Greenland's population expressed its position against its continuance in the EEC with a negative vote of 53.02%. As a consequence, the Danish government presented a proposal to change the legal status of Greenland within the EEC, signing a new Treaty in 1984. Greenland formally withdrew from the EEC in 1985.<sup>9</sup> Therefore, the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) do not apply to Greenland. The island, as part of a EU Member State, has been associated to the EU as one of the OCTs, a status created to incorporate former French, Dutch and British colonies. Since then, the current legal framework for relations between the EU and Greenland consists of three main instruments: the Decision of Association<sup>10</sup> together with the Joint Declaration on relations

7 Translation in English available online at <[http://www.servat.unibe.ch/icl/dao0000\\_.html](http://www.servat.unibe.ch/icl/dao0000_.html)> accessed 1 September 2015.

8 On the whole process, see Alex Kjoer Sorensen, n. 4 above, 145.

9 Treaty of 30 March 1984 amending with regard to Greenland, the Treaties establishing the European Communities, [1985] OJ L29. See also, Friedl Weiss, "Greenland's withdrawal from the European Communities" [1985] 10 *European Law Review* 173; and Frederik Harhoff, "Greenland's Withdrawal from the European Communities" [1983] 20 *Common Market Law Review* 13.

10 Council Decision 2014/137/EU, of 14 March 2014, on relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other, [2014] OJ L76.

between the EU and Greenland;<sup>11</sup> the Fisheries Agreements;<sup>12</sup> and the Overseas Association Decision with the OCTs.<sup>13</sup>

Greenland has had constant cooperation with the EU since 2007, which has been consolidated by the Decision of the Council 2014/137/EU for the 2014–2020 period. The Council Decision 2014/137/EU has a twofold aim: first, the Decision pursues strengthening the cooperation with Greenland to face its major challenges—sustainable diversification of its economy in particular. Second, the EU’s action aims to contribute to improving the capacity of Greenland’s administration to formulate and implement national policies, particularly in areas of mutual interest.

According to Article 3 of the Council Decision 2014/137/EU, the main areas for cooperation for the 2014–2020 period are: a) education and training, tourism and culture; b) natural resources, including raw materials; c) energy; d) climate; e) the social sector, mobility of the workforce, social protection systems, food safety and food security issues; and f) research and innovation in areas such as energy, climate change, disaster resilience, natural resources, including raw materials and the sustainable use of living resources. The

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- 11 At that time, Joint Declaration by the European Community, on the one hand, and the Home Rule Government of Greenland and the Government of Denmark, on the other, on partnership between the European Community and Greenland, [2006] OJ L208; and Joint Declaration by the European Union of 19 March 2015, on the one hand, and the Government of Greenland and the Government of Denmark, on the other, on relations between the European Union and Greenland, <[https://ec.europa.eu/europeaid/sites/devco/files/signed-joint-declaration-eu-greenland-denmark\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/signed-joint-declaration-eu-greenland-denmark_en.pdf)> accessed 2 February 2016.
- 12 At that time, Council regulation (EEC) 224/85 of 29 January 1985, on the conclusion of the Protocol on the conditions relating to fishing between the European Economic Community, on the one hand, and the Government of Denmark and the local Government of Greenland, on the other, [1985] OJ L29; Council Regulation (EC) 753/2007 of 28 June 2007, on the conclusion of the Fisheries Partnership Agreement between the European Union on the one hand, and the Government of Denmark and the Home Rule Government of Greenland, on the other hand [2007] OJ L172; and Council Decision 2015/2103 of 16 November 2015, on the signing, on behalf of the European Union, and the provisional application of the Protocol setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Community on the one hand and the Government of Denmark and the Home Rule Government of Greenland, on the other hand [2015] OJ L305.
- 13 At that time, Council Decision 80/1186/EEC of 16 December 1980, on the Association of Overseas Countries and Territories with the European Economic Community, [1980] OJ L361; and Council Decision 2013/755/EU on the association of the overseas countries and territories with the European Union [2013] OJ L344.

amount of financial assistance from the EU is EUR 218 million for the 2014–2020 period. This amount is allocated almost entirely to the education sector. In turn, this financial contribution is executed by the Greenlandic administration through a Programming Document for the Sustainable Development of Greenland (PDSG),<sup>14</sup> which defines the priorities for the 2014–2020 period (education, professional training and secondary schooling). The Association has been strengthened by the Joint Declarations on relations between the EU and Greenland and Denmark in 2006 and 2015.<sup>15</sup> While it is a programme document and so is not legally binding, it confirms the EU's ties with Greenland and reiterates the geostrategic importance of Greenland to the EU.

The first fishery agreement between the EU and Greenland was carried out in 1985 following the withdrawal of this territory from the EEC.<sup>16</sup> In 2007, the Council adopted Council Regulation (EC) No 753/2007 of 28 June 2007 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Government of Denmark and the Home Rule Government of Greenland.<sup>17</sup> In January 2013, Council Regulation (EU) No 927/2012 of 16 July 2012,<sup>18</sup> set out fishing opportunities in the Exclusive Economic Zone (EEZ) of Greenland and the EU financial contribution. It was followed by Council Decision 2014/48/EU on the conclusion of the Protocol setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement.<sup>19</sup> With the current EU Decision 2015/2103/EU,<sup>20</sup> a new Protocol applying to the fishing relations between the EU and Greenland for the period January 2016 to December 2020 was adopted and completes this EU regulation.

Finally and according to Annex II of the TFEU concerning OCTs, Greenland also benefits from the special regime described in Part IV of the TFEU and Protocol n° 34 applicable to OCTs. This regime is developed in the Overseas

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14 Programming Document for the Sustainable Development of Greenland 2014–2020, annexed to Council Decision 2014/137/EU on relations between the European Union on the one hand and Greenland and the Kingdom of Denmark on the other, [2014] OJ L76.

15 [2006] OJ L208 and Joint Declaration by the European Union, on the one hand, and the Government of Greenland and the Government of Denmark, on the other, on relations between the European Union and Greenland, 19 March 2015 <[https://ec.europa.eu/europeaid/sites/devco/files/signed-joint-declaration-eu-greenland-denmark\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/signed-joint-declaration-eu-greenland-denmark_en.pdf)> accessed 2 February 2016.

16 [1985] OJ L29.

17 [2007] OJ L172.

18 [2012] OJ L293.

19 [2014] OJ L28.

20 [2015] OJ L305.

Association Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union,<sup>21</sup> which replaces the former Decision of 2001.<sup>22</sup> The main purpose of the Decision 2013/755/EU is to establish an association with the OCTs on the basis of “objectives, principles and values shared by the OCTs, the Member States to which they are linked and the Union”.<sup>23</sup> This specially means “the enhancement of the OCTs competitiveness, the strengthening of the OCTs’ resilience, the reduction of their economic and environmental vulnerability and the promotion of cooperation between them and other partners” and respect for “the fundamental principles of liberty, democracy, human rights and fundamental freedoms, the rule of law, good governance and sustainable development”.<sup>24</sup>

In Decision 2013/755/EU two specific situations are found with regard to Greenland, which has a different position comparing to the rest of OCTs. Firstly, Article 3 of Annex II of the Decision provides that all OCTs other than Greenland receive EUR 229.5 millions to carry out the objectives of the Decision. Greenland alone receives EUR 218 millions for the same period. Secondly, the Decision mentions specifically the importance of proper waste management in fragile island environments of the OCTs and refers to the application of Article 198 of the EURATOM Treaty regarding radioactive waste. Greenland again is an exception that the EURATOM Treaty does not apply to.<sup>25</sup>

### 3 The Recognition and Development of the Rights of the Greenland Population by the EU

The EU has expressed great interest in the huge potential of Arctic natural resources, especially hydrocarbons. The offshore exploration and exploitation of hydrocarbons involve several activities from seismic exploration to dismantling the infrastructure when the operation ceases. Depending on their dimensions and the technology used, offshore activities have considerable economic, social and environmental impact.<sup>26</sup> In particular this is a very

21 [2013] OJ L344.

22 [2001] OJ L314 and [2001] OJ L324.

23 Para. 1, Article 3, Overseas Association Decision 2013/755/EU.

24 Para. 2, Article 3, Overseas Association Decision 2013/755/EU.

25 Para. 23, Preamble, Overseas Association Decision 2013/755/EU.

26 National Research Council of the National Academies, *Responding to Oil Spills in the US Arctic Marine Environment* (The National Academies Press, 2014). The Arctic Council has also addressed the issue through several instruments: See Ruling adopted within the

sensitive issue for the indigenous communities inhabiting the Arctic region and therefore for Greenlandic population, of whom 85% are Inuit. Although it has positive impacts such as economic growth (i.e. employment opportunities, better health and education), its social and cultural impact on Arctic indigenous communities has been questioned (i.e. urbanization of the region, alteration of landscape and cultural, economic and traditional issues, reduction of hunting).<sup>27</sup> Therefore it is necessary to clarify indigenous peoples' rights to participate in the decision-making processes relating to offshore exploration and exploitation.

### 3.1 *The Rights of Indigenous Peoples in General International Law*

Contemporary international law addresses the situation of indigenous peoples from a quadruple perspective:<sup>28</sup> i) international treaties protecting human rights at the universal level (the Universal Declaration of Human Rights of 1948 and the International Covenants on Human Rights of 1966);<sup>29</sup> ii) the establishment of specific UN bodies (Working Group on Indigenous Populations, UN

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Arctic Council Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, (2011) <<https://www.ifrc.org/docs/idrl/N813EN.pdf>>; and Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic (2013) <<http://www.arctic-council.org/eppr/agreement-on-cooperation-on-marine-oil-pollution-preparedness-and-response-in-the-arctic>> accessed 1 September 2015; See also the non mandatory *Arctic Offshore Oil and Gas Guidelines*, Arctic Council (PAME Working Group, 3rd edition, 2009) <<http://www.pame.is/index.php/projects/offshore-oil-and-gas>> accessed 1 September 2015.

27 National Research Council of the National Academies, *Cumulative environmental effects of oil and gas activities on Alaska's North Slope* (The National Academy Press 2003) <[http://dels-old.nas.edu/dels/rpt\\_briefs/north\\_slope\\_final.pdf](http://dels-old.nas.edu/dels/rpt_briefs/north_slope_final.pdf)> accessed 1 September 2015. See also, Rachel Lorna Johnstone, *Offshore Oil and Gas development in the Arctic under International Law: Risk and Responsibility*, (Brill, 2015) 59.

28 See Antoni Pigrau Solé, "Los pueblos indígenas ante el Derecho Internacional", in Antoni Pigrau Solé, (Ed.), *Pueblos indígenas, diversidad cultural y justicia ambiental. Un estudio de las nuevas constituciones de Bolivia y Ecuador* (Tirant lo Blanch 2013) 61. See also, Siegfried Wiessner, "La Déclaration des Nations Unies sur les droits des peuples autochtones" in *United Nations Audiovisual Library of International Law* (UN Bureau des Affaires Juridiques 2009) 2 <[http://legal.un.org/avl/pdf/ha/ga\\_61-295/ga\\_61-295\\_f.pdf](http://legal.un.org/avl/pdf/ha/ga_61-295/ga_61-295_f.pdf)> accessed 1 September 2015; and Patrick Thornberry, *The Rights of Minorities and Indigenous Peoples*, in Forum Deusto, *Los Derechos Humanos en un mundo dividido*, (Deusto University 1999) 163, 165–185 and 168–169.

29 Universal Declaration of Human Rights of 10 December 1948, UNGA Resolution 217 A (III); International Covenant on Civil and Political Rights of 16 December 1966, 999 *U.N.T.S.* 171, and International Covenant on Economic, Social and Cultural Rights of 16 December 1966, 993 *U.N.T.S.* 3; Resolution 2200 A (XXI) AGNU, 16 December 1966.

Permanent Forum on Indigenous Issues, Special Rapporteur on the Rights of Indigenous Peoples, and the Expert Mechanism on the Rights of Indigenous Peoples, replaced in 2007 by the Working Group on Indigenous Populations); iii) the consideration of indigenous people in the framework of the International Labour Organisation (ILO) in particular through the Indigenous and Tribal Peoples Convention N° 169 of 1989;<sup>30</sup> and iv) the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007.<sup>31</sup> However, the case for the Greenlandic population is quite unique in that, if Greenland becomes fully independent, it will be the only Arctic country with a majority indigenous population.

At the international level, the rights of the Arctic's indigenous peoples are fundamentally contained in two texts.<sup>32</sup> ILO Convention N° 169 of 1989 on the Indigenous and Tribal Peoples has already had an impact on States' public policies. ILO Convention N° 169 particularly recognizes the rights of ownership over the lands indigenous peoples traditionally occupy (Article 14); the right to participate in the use, management and conservation of natural resources on their land (Article 15); and the right not to be moved from the lands they occupy (Art. 16). The UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly in 2007 recognizes the right not to be forcibly moved from their lands or territories (Article 10); the right to the lands, territories and resources traditionally owned or otherwise used or acquired (Article 26); the right to the preservation and protection of their environment and the productive capacity of their lands or territories and resources (Article 29) and the right to use their own means of subsistence and development, and to engage freely in all their business activities, traditional and other (Article 20).

30 Convention N° 169 concerning Indigenous and Tribal Peoples in Independent Countries of 27 June 1989 <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312314:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312314:NO)> accessed 1 September 2015. So far only 22 States have ratified it (amongst them only Denmark and Norway in the Arctic area); ILO <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO)> accessed 1 September 2015.

31 Resolution adopted by the UN General Assembly 61/295 United Nations Declaration on the Rights of Indigenous Peoples (2007) <[http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf)> accessed 1 September 2015.

32 For a deeper analysis, See Antoni Pigrau Solé, Mar Campins Eritja, Xavier Fernández Pons, "Union européenne et droits des peuples autochtones de l'Arctique: Terres, ressources et consentement", in Nathalie Herve-Fournereau (Coord.), *Peuples autochtones et intégrations régionales*, Réseau Thématique Pluridisciplinaire BIODISCEE, CNRS INEE (Université de Rennes, forthcoming 2017), 2 ff.



The right to be consulted appears in both texts. Article 6 of the ILO Convention N° 169 states that

governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.

In a more specific way, in other hypothetical cases, consultation is the obligatory procedure when any restriction over the rights of land and resources occurs. When the State is the owner of mineral or hydrocarbon resources including sub-surface resources, the governments “shall establish or maintain procedures through which they shall consult these peoples, (...) before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.” (Article 15); and “whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.” (Article 17)

The UNDRIP also refers to the obligation to take certain measures “in consultation with the indigenous peoples” in various articles (Article 15.2, 17.2 36.2 and 38). But in certain cases, the Declaration refers explicitly to the fact that the consultation should be carried out to obtain the free, prior and informed consent of the indigenous peoples. That is the case in Article 19, concerning the adoption and implementation of legislative or administrative measures, and in Article 32, regarding the right of indigenous peoples to determine and develop priorities and strategies for the development or use of their land and other resources. The mention of obtaining the consent and the use of such adjectives as ‘prior’, ‘free’ and ‘informed’ show the way consultation should be done carried out, but that does not imply that there is an absolute right to veto from the indigenous community over the adoption of the measure. However, these considerations should apply to all regulations that stipulate consultation and not only those which explicitly mention free, prior and informed consent.<sup>33</sup> Moreover, the consultation should be a public process under the responsibility

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33 Resolution adopted by the General Assembly on 22 September 2014, A/RES/69/2, Outcome Document of World Conference on Indigenous Peoples (2014) <<http://wqip2014.org/wp-content/uploads/2013/03/N1446828.pdf>> accessed 1 September 2015.

of the State involved and cannot be delegated to other actors such as private companies.<sup>34</sup>

Finally,<sup>35</sup> concerning the right of participation, the ILO Convention N° 169 provides the right of indigenous peoples to participate in the formulation, implementation and evaluation of national and regional development plans which may affect them directly (Article 7) and in the use, management and conservation of their natural resources (Article 15). The UNDRIP also refers in a general way to the right of indigenous peoples to participate, if they so choose, in the political, economic, social, and cultural life of the State (Article 5) and “in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions” (Art. 18).<sup>35</sup> Aware of this obligation, the indigenous communities of the Arctic have demanded a greater involvement in decision-making processes that may affect them,<sup>36</sup> in so far as the

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34 Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II. Doc. 56/09 (2009), par. 291 <<http://www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf>> accessed 1 September 2015.

35 See also Articles 23, 27 and 41.

36 The Declaration of the Inuit Circumpolar Conference on sovereignty in the Arctic of April 2009 considers that the right “to freely determine our political status, freely pursue our economic, social, cultural and linguistic development, and freely dispose of our natural wealth and resources” is fundamental as it refers to the rights recognised by the Declaration of 2007, which specifically mentions “the right to own, use, develop and control our lands, territories and resources and the right to ensure that no project affecting our lands, territories or resources”; Inuit Circumpolar Council, *A Circumpolar Inuit Declaration on Sovereignty in the Arctic* (2009) <<http://www.inuitcircumpolar.com/sovereignty-in-the-arctic.html>> accessed 1 September 2015. In May 2011 a new Declaration on Resource Development Principles in Nunaat identifies “many principles that are relevant to the governance and carrying out of resource development in Inuit Nunaat, including the importance of the rule of law and recognition of the rights of Inuit as an Arctic indigenous people under both international and domestic law”; Inuit Circumpolar Council, *Arctic Circumpolar Inuit Declaration on Resource Development Principles in Inuit Nunaat* (2011) <<http://www.inuitcircumpolar.com/resource-development-principles-in-inuit-nunaat.html>> accessed 1 September 2015. The Athabaskan Council also pointed out that: “It is important, however, that as European states and the institutions of the EU develop a policy or dimension for the Arctic that “common concern” is not confused with “common property.” Nordic Council of Ministers, *Arctic Conference: Common Concern for the Arctic, Europe and the Arctic: A View From the Arctic Athabaskan Council, Ilulissat*, (2008) 6 <<https://www.norden.org/no/nordisk-ministerraad/samarbeidsministrene-mr-sam/arktis/common-concern-for-the-arctic/den-europeiske-union-og-arktis/europe-and-the-arctic-a-view-from-the-arctic-athabaskan-council-aac-pdf>> accessed 1 September 2015.

respect for their interests can only be ensured through more participatory processes.<sup>37</sup>

### 3.2 *The Rights of Arctic Indigenous Peoples in the EU Law*

Strictly speaking, although three of the EU Arctic Member States have indigenous peoples in their territories (Saami in Finland and Sweden, and Inuit in Denmark-Greenland), it cannot be said that the EU has a genuine policy for the protection of these communities. In fact, the Saami are the only indigenous peoples within the EU who are recognized as such and to whom participation in issues affecting their status as indigenous peoples is ensured. It is not a surprise, then, that the EU founding Treaties have never made any mention of indigenous peoples. The only exception is a very short reference in the Act of Accession of Austria, Sweden and Finland of 4 May 1994. Protocol 3 refers to the Saami people.<sup>38</sup> Its two articles recognize the dependence of the Saami regarding certain traditional activities and restrict the European Community (EC) competence on the internal market in terms of reindeer breeding, in which the Saami are attributed exclusive rights. However, the EU has been developing several initiatives for the protection of the indigenous peoples in two complementary dimensions: a) international cooperation and human rights protection, and b) the strategy for the Arctic.

#### 3.2.1 International Cooperation and Human Rights Issues

The EU has incorporated cooperation and assistance to indigenous peoples as part of a wider cooperation and development programmes. The incorporation has been effected from a welfare perspective, in which it is assumed that these communities have to face economic, social and political marginalization and constant violation of human rights originating from and aggravated by the underdevelopment of the areas where they are located.<sup>39</sup> This is indeed, the approach that has traditionally supported the EU action in this area. In this

37 Anika E. Nilsson (Dir.), *Arctic Resilience Interim Report 2013* (Stockholm Environment Institute—Stockholm Resilience Centre, 2013), 23 <<http://www.sei-international.org/mediamanager/documents/Publications/ArcticResilienceInterimReport2013-HighRes.pdf>> accessed 1 September 2015.

38 Protocol N° 3 on the Sami People, [1994] OJ C241, 352.

39 As an example, the 2002 Council's position refers to the possibility of integrating the groups of indigenous peoples into political dialogue with the third country partners, as an integral part of the clauses of respect for human rights of the cooperation and association agreements; See Council Meeting General Affairs and External Relations of 18 November 2002, 2463rd, General Affairs, 14183/02 <[http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/gena/73248.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/73248.pdf)> accessed 1 September 2015.

regard, the position adopted by the Council, the European Parliament and the Commission in December 2005<sup>40</sup> in which the primary objective was poverty eradication in the framework of sustainable development stands out. To do this, it establishes the use of social dialogue as the principal means to defend the rights of indigenous peoples and emphasizes the role of “full participation and free, prior and informed consent” of the indigenous communities in regards to those issues affecting them as the main mechanism to safeguard their rights. A key element is the participation of these communities in all stages of the adoption and implementation of projects and programmes that affect their livelihoods. The Commission has been establishing practical methods to guarantee the consultations, especially emphasizing the creation of contact points within the key services used to liaise with these groups,<sup>41</sup> as well as the creation of an informal network comprising organisations of indigenous peoples.<sup>42</sup>

However, in contrast to what happens within the Arctic Council, which has significantly strengthened the participation of indigenous peoples in decision-making processes,<sup>43</sup> the EU approach regarding these communities is much more limited. Despite the stance taken by the Commission and the European Parliament in this regard, the EU practice does not seem to be particularly sensitive to the demands of the indigenous peoples of the Arctic region. On the one hand, the EU approach is limited to the rights of minorities, the only dimension that is included in the TEU (Article 2) and in the

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40 Statement of the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on the development policy of the European Union entitled “The European Consensus”, [2006] OJ C46, par. 97, 101 and 103.

41 The European Commission’s / RELEX’s Programming Guide for Strategic Papers—Programming Cycle. Democracy and Human Rights [2008] <[http://ec.europa.eu/europeaid/sites/devco/files/programming-guide-strategy-papers-democracy-human-rights-200812\\_en\\_2.pdf](http://ec.europa.eu/europeaid/sites/devco/files/programming-guide-strategy-papers-democracy-human-rights-200812_en_2.pdf)> accessed 1 September 2015.

42 Report from the Commission to the Council of 11 June 2002. Review of progress of working with indigenous peoples, COM (2002) 291 final <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:r12006>> accessed 1 September 2015. There are contact points in the RELEX (Human Rights and Democracy Network), Development (Civil Society), Environment (CBD and Indigenous People Office) and the EuropeAid Co-operation Office (Human Rights and Democracy Network). The contact points cooperate closely with the geographical departments of the different services, the Commission delegations, and the representations of the Member States.

43 Timo Koivurova and Leena Heinamaki, “The participation of indigenous peoples in international norm-making in the Arctic” (2006) 42 (2) *Polar Record* 101.

Charter of Fundamental Rights of the EU (Preamble and Article 21).<sup>44</sup> That said, it has to be remembered that the EU has no mechanism to apply these principles beyond the territory of its Member States (Article 6, TEU). On the other hand, from the perspective of the international recognition of the specific rights of indigenous peoples, it is worth noting the scant participation of the EU in different international instruments. The EU has an almost insignificant presence in the ILO Convention N° 169, which has only been ratified by three Member States (Denmark in 1996, The Netherlands in 1998 and Spain in 2007). Furthermore, although the EU has repeatedly expressed its support for the UNDRIP of 2007,<sup>45</sup> and allegedly uses this instrument as a basis for the periodic review of its human rights policy,<sup>46</sup> it should not be forgotten that in the case concerning the trade ban in seal products, the Court of Justice of the European Union (CJEU) dismissed the mandatory character of the UNDRIP noting its non-binding nature. Regarding this instrument, it considered that

a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law (...). The document relied on by the applicants is a declaration and thus does not have the binding force of a treaty. It cannot be considered that that declaration can grant the Inuit autonomous and additional rights over and above those provided for by Union law.<sup>47</sup>

It is noteworthy that the CJEU did not even consider any interaction between the UNDRIP and other sources of international law, for example, the ILO Convention N° 169, the legal relevance of which was totally ignored. The CJEU therefore confined the rights claimed by the plaintiffs to the categories and

44 [2010] OJ C83.

45 European Union Delegation to the United Nations, 20 October 2014, New York—European Union Statement delivered by H.E. Ioannis Vrailas, Deputy Head of the European Union to the United Nations, United Nations General Assembly Third Committee on Item 65 a & b: Rights of Indigenous People <[http://eu-un.europa.eu/articles/en/article\\_15604\\_en.htm](http://eu-un.europa.eu/articles/en/article_15604_en.htm)> accessed 1 September 2015.

46 Declaration by Catherine Ashton, High Representative of the European Union for Foreign Affairs and Security Policy and Commission Vice-President on behalf of the European Union on the occasion of the International Day of the World's Indigenous Peoples, 9 August 2013; 9 August 2014, Brussels—Statement by the Spokesperson on the occasion of the International Day of the World's Indigenous Peoples <[http://eu-un.europa.eu/articles/es/article\\_12500\\_es.htm](http://eu-un.europa.eu/articles/es/article_12500_es.htm)> accessed 1 September 2015.

47 Case T-526/10 *Inuit Tapiriit Kanatami and Others v European Commission* [2013], Digital Reports (Court reports-general) ECLI identifier: ECLI:EU:C:2013:625, par. 112.

specific parameters of the EU Charter of Fundamental Rights. Moreover, the CJEU decided that, “the guarantees accorded by the rights to property cannot be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity”.<sup>48</sup> It also denied the indigenous peoples’ right to be heard, since the TEU did not establish any mandatory duty for consultation, and noted that the Commission had met several times with representatives of the indigenous peoples during the elaboration of the regulations.<sup>49</sup>

### 3.2.2 The EU’s Arctic Strategy and Indigenous Peoples

The interest of the EU for the Arctic region was initially very one-sided, and did not appear until the end of the 1990s, as part of the Finnish initiative that gave finally birth to the Northern Dimension.<sup>50</sup> Within it, an “Arctic window” highlighted the need to involve Arctic indigenous peoples in the decision making process. In practice, it was not a big change, since the political interest that the region aroused then remained limited. However, it at least showed the recognition by the EU of the singularity of the Arctic with its special human, environmental and socio-economic conditions. Since then, the EU has also developed a specific strategy for the Arctic, set out in three Commission’s Communications (2008, 2012 and 2016).<sup>51</sup> However, the approach of the Commission concerning indigenous peoples appears to be fragmentary and limited.

48 *Ibid.* par. 109. For a deeper comment, See Antoni Pigrau Solé, Mar Campins Eritja, Xavier Fernández Pons, n. 32 above, 21.

49 Case T-526/10 *Inuit Tapiriit Kanatami and Others v European Commission* [2013], Digital Reports (Court reports-general) ECLI identifier: ECLI:EU:C:2013:625, par. 113.

50 Political Declaration on the Northern Dimension Policy of 24 November 2006 and Northern Dimension Policy Framework Document of 24 November 2006 <<http://ndep.org/wp-content/uploads/Political-Declaration-on-the-Northern-Dimension-Policy.pdf>> and <<http://ndep.org/wp-content/uploads/Northern-Dimension-Policy-Framework.pdf>> accessed 1 September 2015. The Northern Dimension represented a new approach to external borders of the EU and its adjacent areas and seeks to promote security and stability in the region, while taking advantage of the potential of the region in terms of both natural resources and economic dynamism.

51 European Commission Communication of 20 November 2008 on the European Union and the Arctic Region, COM (2008) 763.; Joint Communication of the European Commission and High Representative of the European Union for Foreign Affairs and Security Policy of 26 June 2012 on Developing a European Union Policy towards the Arctic Region: Progress since 2008 and Next Steps, JOIN (2012) 19; Joint Communication of the European Commission and High Representative of the European Union for Foreign Affairs and Security Policy of 27 April 2016 on An Integrated European Union Policy for the Arctic, JOIN (2016) 21 final.

In its 2008 Communication, the Commission identifies two political goals that are essential for this purpose: i) the protection and preservation of the Arctic in accordance with its population (avoiding and mitigating the negative impact of climate change and supporting adaptation to inevitable changes); and ii) the promotion of sustainable exploitation of Arctic resources. To achieve the first goal, the Commission included the requirement for the participation of Arctic indigenous peoples by establishing a regular dialogue, although it did not set up a specific institutional framework. In this context, the financial measures taken by the EU in several areas of this region have been of particular importance, especially the ones related to the European Neighbourhood Policy.<sup>52</sup> The second of these goals has a particular impact on the right of indigenous peoples to exploit their land and resources, since climate change impacts clearly on four areas essential for sustainable development of the Arctic and its populations, as mentioned in the 2008 Communication: hydrocarbons, fishing, transport and tourism.

Over the course of four years there were no major advances in the realisation of these goals. In the 2012 Communication, the Commission dilutes the significance of indigenous peoples' involvement in a more general commitment to dialogue with Arctic countries, indigenous peoples and other interested stakeholders. In addition, direct references to action for the protection of indigenous peoples are scanty. The Communication merely mentions, among a long list of measures carried out in each dimension since 2008 (within three big areas: knowledge, responsibility, commitment), the actions of financing sustainable development of local communities, conducting regular dialogues and creating platforms to ensure that representatives from indigenous communities are informed and consulted on EU policies.<sup>53</sup> Even with this limitation, the Commission's Communication highlights the role of the EU-Greenland relationships as being to promote "an enhanced dialogue on Arctic issues that would not only allow the EU to gain additional understanding of remote Arctic

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52 European Union, *European Arctic Initiatives Compendium*. Preparatory Action, Strategic Environmental Impact Assessment of development of the Arctic (Arctic Centre, University of Lapland 2014), <[https://lauda.ulapland.fi/bitstream/handle/10024/61853/European\\_arctic\\_initiatives\\_compendium\\_pdfA.pdf?sequence=2](https://lauda.ulapland.fi/bitstream/handle/10024/61853/European_arctic_initiatives_compendium_pdfA.pdf?sequence=2)> accessed 1 September 2015. In particular, Northern Periphery and Arctic Programme Secretariat, *The Northern Periphery and Arctic Programme 2014–2020* (2014, updated 2016) <[http://www.interreg-npa.eu/fileadmin/Programme\\_Documents/Approved\\_Cooperation\\_Programme\\_Jan2016.pdf](http://www.interreg-npa.eu/fileadmin/Programme_Documents/Approved_Cooperation_Programme_Jan2016.pdf)> accessed 1 September 2015.

53 JOIN (2012) 19, p. 12. This materialised between 2008–2012 in several « Arctic Dialogues » supported by the Commission, the last one took place in October 2014 <<https://webgate.ec.europa.eu/maritimeforum/en/node/3655>> accessed 1 September 2015.

societies, and also allow for the sharing of valuable know-how on issues of mutual concern”.<sup>54</sup>

The Council welcomed these initiatives,<sup>55</sup> but also required the Commission and the High Representative “to present proposals for the further development of an integrated and coherent Arctic Policy by December 2015”.<sup>56</sup> Among its suggestions, it highlighted in particular the Council support to “strengthening the partnership between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other which aims at promoting the sustainable development of Greenland and the diversification of the economy” in a way that “also encourages an enhanced dialogue and cooperation on global and Arctic issues”.<sup>57</sup> To this end, the 2016 Communication focuses on three main areas: climate change and the environment, sustainable economic development and international cooperation. In particular, the Communication wish to enhance the cooperation with indigenous peoples in order to ensure respect for their rights in the development of the Arctic policy and in the promotion of sustainable economic activities. Despite this focus on sustainable economic activities, the EU engagement is still too weak, it does not take into account the realization of specific actions and relies primarily on the annual dialogue with indigenous representatives organized by the Commission.

#### 4 The Legal Framework for Offshore Oil Extraction and the Participation of the Greenlandic Population in the Decision Making Process

The protection of the rights of the indigenous peoples in relation to the exploitation of hydrocarbons is mostly addressed by the internal legal system of each Arctic State. Thus we need to examine Greenlandic law and in doing so we will check the issues raised against the EU specific regulations.

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54 *Ibid.* p. 11.

55 Council Conclusions of 8 December 2009, on Arctic issues <[http://ec.europa.eu/mari\\_timeaffairs/policy/sea\\_basins/arctic\\_ocean/documents/arctic\\_council\\_conclusions\\_09\\_en.pdf](http://ec.europa.eu/mari_timeaffairs/policy/sea_basins/arctic_ocean/documents/arctic_council_conclusions_09_en.pdf)> accessed 1 September 2015; Council Conclusions of 12 May 2014, on developing a European Union Policy towards the Arctic Region <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/142554.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/142554.pdf)> accessed 1 September 2015.

56 *Ibid.*, par. 15.

57 *Ibid.*, par. 13.



#### 4.1 *The Relevance of Greenlandic Offshore Hydrocarbons Resources*

From a geological point of view, Greenland is one of the most interesting countries in the world. Its mineral and other natural resources are particularly important.<sup>58</sup> In 2008 the *US Geological Survey* carried out an evaluation of existing resources in the Arctic Circle and estimated that three main basins around Greenland could hold around 50,000 million barrels of oil and gas. In offshore areas of Northeast Greenland there would be estimated 31,000 million barrels of oil, while in the seabed between Greenland and Canada there would be another estimated 17,000 million.<sup>59</sup>

For years, Greenland has been struggling to consolidate an economically viable as well as sustainable hydrocarbon industry. Its future development, however, faces double challenges: on the one hand, the exploitation of these hydrocarbons is essential for Greenland's economic development. According to the vision of those in favour of political independence of Greenland from Denmark, the exploitation of those resources as well as fishing and navigation through Arctic waters are the basis for the construction of Greenland as a future sovereign State.<sup>60</sup> On the other hand, from the environmental point of view, the management of these resources raises huge challenges in reconcil-

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58 See Kenneth J. Bird, Ronald R. Charpentier, Donald L. Gautier *et al.*, *Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle* (U.S. Geological Survey 2008) <<http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>> accessed 1 September 2015.

59 As other Arctic States, this has led Denmark, jointly with Greenland, to submit three claims with regards to the extension of its Continental Shelf beyond 200 nautical miles. The first one (June 2012) affects the Continental Shelf south of Greenland, an area divided between the South-Western part of the Labrador Sea and Eastern part of the Irminger Sea. The second claim (November 2013) relates to the Continental Shelf off the Northeast of Greenland, affecting the area between Greenland and Svalbard. The third claim (December 2015) relates to the Northern Continental Shelf of Greenland. See Commission on the Limits of the Continental Shelf (CLCS) Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission by the Kingdom of Denmark, <[http://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_dnk\\_61\\_2012.htm](http://www.un.org/depts/los/clcs_new/submissions_files/submission_dnk_61_2012.htm)> accessed 27 October 2015; <[http://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_dnk\\_68\\_2013.htm](http://www.un.org/depts/los/clcs_new/submissions_files/submission_dnk_68_2013.htm)> accessed 17 October 2015; and <[http://www.un.org/depts/los/clcs\\_new/submissions\\_files/dnk76\\_14/dnk4\\_clcs76\\_2014\\_en\\_fr.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/dnk76_14/dnk4_clcs76_2014_en_fr.pdf)> accessed 10 September 2016.

60 Vestergaard Pedersen, "Regulation of Climate Matters in Greenland" [2012] 1 *Carbon & Climate Law Review* 47. See also Marc Auchet, "Greenland at the crossroads. What strategy for the Arctic?" [2011] 66 *International Journal* 957; Coco C.A. Smits, Jan P.M. van Tatenhove, Judith van Leeuwen, "Authority in Arctic governance: Changing spheres of authority in Greenlandic offshore oil and gas developments" [2014] 14 *International Environmental Agreements* 329.

ing economic growth based on hydrocarbons extraction, which is managed by limited human resources, with the conservation of the Arctic's highly sensitive environment.

Offshore oil drilling in the Arctic began in the mid-seventies. Since then, at least 61 large oil and gas fields have been located within the Arctic Circle. Norway and Russia are the main oil and gas exporters from the region; further west, Iceland and Greenland are also actively working on oil and gas exploration in their areas of jurisdiction.<sup>61</sup> However, technical difficulties of carrying out offshore extraction of hydrocarbons in the region are obvious. The cost of prospecting and exploiting these resources in such a remote place and under such tough weather conditions affect the viability of exploitation. Navigation through Arctic waters, construction of artificial platforms, access to platforms through ice, and connecting sub-marine wells to onshore facilities are some of the difficulties.<sup>62</sup> In addition, beyond geopolitical factors, the price of crude oil fell on the international market following the 2008 financial crisis, which provides less incentive for offshore oil drilling in the Arctic. This explains why, since 2014 some major companies have announced their intention to stop prioritizing their operations in Greenland, despite the willingness of the Greenlandic government "(...) to promote prosperity and welfare by creating new income and employment opportunities in the area of mineral resources activities" and its optimism about opening new wells between 2014 and 2018.<sup>63</sup> For example, the British petrochemical company

61 Philip Budzik, *Arctic Oil and Natural Gas Potential* (U.S. Department of Energy, Energy Information Administration, 2009) <[http://www.eia.gov/oiaf/analysispaper/arctic/pdf/arctic\\_oil.pdf](http://www.eia.gov/oiaf/analysispaper/arctic/pdf/arctic_oil.pdf)> accessed 1 September 2015.

62 These difficulties meant that major projects in the region began to develop quite late. The KANUMAS project (Kalaallit Nunaat Marine Seismic) was not up and running until 1989, with the granting of prospecting licenses by the Danish Government to a consortium of companies (ExxonMobil, Statoil, BP, Japan National Oil Company, Texaco, Shell y Nunaoil) to investigate the oil potential in the Northwest and Northeast of Greenland. See Graça Ermida, "Strategic decisions of international oil companies: Arctic versus other regions" [2014] 2 *Energy Strategy Reviews* 265; Kevin Casey, *Greenland's New Frontier: Oil and Gas Licences Issued, Though Development Likely Years Off* (The Arctic Institute, 2014) <<http://www.thearcticinstitute.org/2014/01/greenlands-new-frontier-oil-and-gas.html>> accessed 1 September 2015; Joanna Kay and Stine Thorup, "Oil and Gas in Greenland—Still on Ice?" (*Notes From The Field—An English Law Perspective On The Oil & Gas Market*, November 2014) <<https://www.andrewskurth.com/pressroom-publications-1165.html>> accessed 1 September 2015.

63 Government of Greenland, *Greenland's Oil and Mineral Strategy 2014–2018*, FM (2014) 133 <[http://naalakkersuisut.gl/~media/Nanoq/Files/Publications/Raastof/ENG/Greenland%20oil%20and%20mineral%20strategy%202014-2018\\_ENG.pdf](http://naalakkersuisut.gl/~media/Nanoq/Files/Publications/Raastof/ENG/Greenland%20oil%20and%20mineral%20strategy%202014-2018_ENG.pdf)> accessed 1 September 2015.

Cairn Energy, which is the only company that has been continuously drilling in coastal areas of Greenland, has not yet achieved commercial use of these resources. This resulted in other oil companies, including Norwegian Statoil, French GDF Suez and Danish Dong Energy, giving up their exploration licenses. Currently, companies hold only 15 licenses to explore Greenlandic waters,<sup>64</sup> but none of them seems to be actively drilling. However, that does not mean the hydrocarbon industry has given up exploiting the hydrocarbon resources in the region. In fact, the Greenlandic government has tried to maintain current levels of exploration activity in the hope that it will find other commercially viable wells. The Greenlandic government announced the launching of the first field with a reserve of about 500 million barrels of oil in 2020 and a second one in 2025 with a reserve of about 2,000 million barrels. In order to facilitate the exploration operations the government committed to grant new licenses between 2014 and 2018 in five new areas: Jameson Land (2014, onshore, East Greenland), South-West Greenland (2014, offshore), Disko-Nuussuaq (2016, offshore, West Greenland), Baffin Bay (2016/2017, Northwest Greenland), and Davis Straight (2018, West Greenland).<sup>65</sup>

#### 4.2 *Greenland's Domestic Legal Framework*

Six months after the adoption of the Act No 473 on Greenland Self-Government (AGSG), the Greenlandic Parliament approved the Mineral Resources Act (MRA).<sup>66</sup> The AGSG and the MRA are intimately related and should be read in light of the internal political context, which considers economic benefits from

64 Mineral License and Safety Authority, *List of Mineral and Petroleum Licences in Greenland*, Government of Greenland [2015] <[https://www.govmin.gl/images/stories/minerals/list\\_of\\_licences/list\\_of\\_licences.pdf](https://www.govmin.gl/images/stories/minerals/list_of_licences/list_of_licences.pdf)> 14–17, accessed 1 September 2015. Exploration and exploitation licenses for hydrocarbons have been granted since 2002 (usually in joint ventures) to: Capricorn Greenland Exploration A/S (CAIRN: Edinburgh); NUNAOIL A/S (Greenland); Husky Oil Operations (Canada); PA Resources AB (Sweden); Conoco Philips Global NVE Greenland Ltd (Norway); Shell Greenland (Anglo Dutch); Maersk Oil Kalaallit Nunaat A/S (Greenland); Tullow Greenland Exploration Ltd (UK); ENI Denmark BV (Denmark); BP Exploration Operating Company Ltd (UK); DONG E&P Grönland A/S (Denmark); Statoil Greenland A/S (Norway); Chevron East Greenland Exploration A/S (USA), Greenland Petroleum Exploration Co. Ltd.

65 Government of Greenland, *Greenland's Oil and Mineral Strategy 2014–2018*, 8 February 2014, FM 2014/133, <<http://naalakkersuisut.gl/~media/Nanoq/Files/Publications/Raastof/ENG/GOMS%202014%202018%20Appendices%20ENG.pdf>> accessed 1 September 2015.

66 Act No. 7 of 7 December 2009 on Mineral Resources and Mineral Resource Activities, unofficial translation <[https://www.govmin.gl/images/stories/faelles/mineral\\_resources\\_act\\_unofficial\\_translation.pdf](https://www.govmin.gl/images/stories/faelles/mineral_resources_act_unofficial_translation.pdf)> accessed 1 September 2015.

the exploitation of mineral and hydrocarbon resources to be inseparable from Greenland's aspirations for greater political independence.

As mentioned above, the AGSG does not use the term indigenous peoples or Inuit to refer to the Greenlandic population, nor does it consider that being from Greenland implies belonging to a particular ethnic group. As such, the Greenlandic legislation does not give special acknowledgment to Greenlanders as "indigenous peoples". Similarly, the MRA does not specifically refer to the subsistence or hunting activities of Greenland's population in its description of the characteristics of indigenous peoples, but talks about the protection of cultural values and the protection of animal and plant environment, and calls for a "rightful utilization of the soil, the sea, the subsoil or natural resources." Part 13 of the MRA relates specifically to environmental protection (Article 51 to 54), climate protection (Article 55 to 58) and to nature conservation (Article 59 to 62), in order "to help to protect the environment so that society can develop on a sustainable basis respecting human conditions of life and respecting preservation of animal and plant life."

Since the MRA came into force in January 2010, the government of Greenland has acquired the "right of use of and the right to exploit mineral resources in the subsoil in Greenland" (Article 2(1)). Since then, the Greenlandic authorities have assumed full powers over mineral resources in the subsoil. In so doing, the system of joint management between Greenland and Denmark and Denmark's power of veto, which had been in force since 1979, has come to an end. It is the government of Greenland which now grants drilling and exploitation licenses directly<sup>67</sup> and it is entitled to all the revenue derived from mining and hydrocarbon exploitation.<sup>68</sup>

The MRA seeks sustainable exploitation of mineral resources and hydrocarbons and proper use of the subsoil. Furthermore, it is intended to ensure that these activities are carried out in accordance with the requirements relating to health, safety, the environment, resource use and social sustainability, as well as in accordance with international best practice recognised in similar

67 The summary of licenses granted until 2013 in Government of Greenland, Greenland's oil and mineral strategy 2014–2018 (appendices), n. 65 above, 8–18, <<http://naalakker.suisut.gl/~media/Nanoq/Files/Publications/Raastof/ENG/GOMS%202014%202018%20Appendices%20ENG.pdf>> accessed 1 September 2015.

68 MRA Explanatory Notes, part 1.2.3, p.10, "The revenue definition", cited on Lisa Campion, Catherine Peterson and Zhen Zhang, "Greenland", in Vermont Law School Institute for Energy and the Environment, *The Arctic Offshore Oil and Gas Guidelines in Greenland and The Russian Federation* (Arctic Offshore Oil and Gas Guidelines White Paper No. 5, 2011) 1, note 9, p. 12 <[http://www-assets.vermontlaw.edu/Assets/iee/Baker\\_ArcticOffshoreOil5.pdf](http://www-assets.vermontlaw.edu/Assets/iee/Baker_ArcticOffshoreOil5.pdf)> accessed 1 September 2015.

conditions, Best Available Technology (BAT) and Best Environmental Practices (BEP). To this end, the MRA (Article 55) establishes the obligation

to prevent, limit and combat pollution and other impacts on the climate from activities that may directly or indirectly: (i) Endanger human health; (ii) Damage animal or plant life or natural or cultural values on or in the soil, in the sea or in the subsoil; (iii) Obstruct the rightful utilisation of the soil, the sea, the subsoil or natural resources; (iv) Impair human conditions of life; (v) Impair recreational values or activities.

The rights granted to indigenous peoples can be explained by the special relationship, from a spiritual and material point of view, that they have with their land and territories. In the MRA, the protection of nature should take priority over the granting of operating licenses. Licenses are subordinated to the “consideration for avoiding impairment of nature and the habitats of species in designated national and international nature conservation areas and disturbance of species for which the areas have been designated” (Article 60).

The Greenland Bureau of Minerals and Petroleum (BMP) prepares the Strategic Environmental Impact Assessment (SEIA) to identify existing gaps or to recommend specific measures of mitigation and monitoring. In turn, applicants should prepare an Environmental Impact Assessment (EIA) as well as a Social Impact Assessment (SIA). Both proceedings require the participation of the interested public before the BMP and the government of Greenland sanctioning of license applications.

Under the EIA, once the applicant identifies that an offshore hydrocarbon project has significant environmental impact, the BMP has to facilitate the exercise of the right to public participation. However, the MRA does not define the length or format that such participation should take, it only provides that an opportunity for a public hearing should be given. In addition to relying on the SEIA, the EIA is complemented with the documentation available in the National Environmental Research Institute (NERI), especially in what relates to environmental impact assessment of seismic activities in Greenland waters.<sup>69</sup> This requirement reflects, albeit indirectly, the importance that the Greenlandic law assigns to the protection of marine mammals. The BMP

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69 David Boertmann, Jakob Tougaard, Kasper Johansen, Anders Mosbech, *Guidelines to environmental impact assessment of seismic activities in Greenland waters* (NERI Technical Report No. 785, National Environmental Research Institute—Aarhus University, 2nd ed. 2010) <<http://www2.dmu.dk/Pub/FR785.pdf>> accessed 1 September 2015.

publishes specific guidelines for the preparation of EIAs, specifically related to the exploration or exploitation of hydrocarbons on the coast of Greenland, and which take into account “present use of natural resources,” including hunting, fishing, and tourism; and further requires that the “cumulative impacts with other human activities in and near the license area should be considered”.<sup>70</sup>

In the event that a project may have a significant impact on social conditions and human development, the applicant has to prepare a SIA in addition to the EIA, which must consider not only the consequences on land and resource use, the health and socio-cultural characteristics of the population, but also other factors such as the level of employment generated by the activity or degree of improvement of their socio-economic conditions. While it’s clear that the MRA does not detail when or to what extent impact should be assumed by the applicant, nor does it detail the criteria for assessing such impact, it is important that the law introduces the notion of social sustainability in the development of this procedure. Thus, before the BMP grants a license to operate offshore, the applicant must engage in a process of consultation and public hearings with the population and relevant stakeholders.

However, it should be noted that even if the SIA results indicate a potential social impact, the MRA leaves the BMP with sufficient discretion to authorise the project should it deem it appropriate. Therefore, the Greenlandic government may decide that the economic benefits of a project outweigh damages arising from the socio-cultural impact generated, and grant the license. In these circumstances, the licensee and the BMP use the SIA to develop a Benefit and Impact Plan (BIP) that serves to develop and implement an Impact Benefit Agreement (IBA). In fact, this is one of the purposes of the SIA to “assist mining companies and their consultants in implementing the Impact Benefit Agreement.”<sup>71</sup> Moreover, it is worth noting that one of the main aims of the SIA is to engage all relevant stakeholders in consultations. To do so, the applicant is required to provide a “non-technical brief” before the public hearings in order to identify the issues and ensure that through the SIA concerned groups have an influence on topics to be studied by the SIA with the support

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70 *BMP Guidelines—for preparing an Environmental Impact Assessment (EIA) report for activities related to hydrocarbon exploration and exploitation offshore Greenland* (Danish National Environmental Research Institute, Greenland Institute of Natural Resources and Bureau of Minerals and Petroleum, 2011) <[https://www.govmin.gl/images/stories/petroleum/BMP\\_EIA\\_Guidelines\\_Jan\\_2011.pdf](https://www.govmin.gl/images/stories/petroleum/BMP_EIA_Guidelines_Jan_2011.pdf)> accessed 1 September 2015.

71 *Guidelines for Social Impact Assessments for mining projects in Greenland* (Bureau of Minerals and Petroleum, Greenland, 2009) <[https://www.govmin.gl/images/stories/minerals/sia\\_guideline/sia\\_guidelines.pdf](https://www.govmin.gl/images/stories/minerals/sia_guideline/sia_guidelines.pdf)> accessed 1 September 2015.

of the BMP. Stakeholders may include—but are not limited to—the public sector, non-governmental organizations, affected communities, individuals and enterprises. The government itself usually provides a list of stakeholders that the applicant should consider. It is questionable however, to what extent these stakeholders, and particularly indigenous peoples actually feel linked to the BMP (or more generally involved with the MRA's process), when in fact, the main interest of this organization is the extraction industry, and not the interests the affected local communities may have. While the MRA promotes procedures to involve local communities in decision making with regards to oil exploration and exploitation, one of the main criticisms of it has been the lack of transparency on those processes. This is coupled with a lack of commitment by Greenland to ratify the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.<sup>72</sup> (Denmark's signature does not include the territory and the areas governed by the AGSG.)<sup>73</sup>

#### 4.3 *The Applicable Secondary EU Law*

Despite the actions of the EU institutions mentioned above, the lack of integration of indigenous peoples into specific EU policies is still significant. In fact, the biggest challenge is how to incorporate these issues into the specific measures taken by the EU institutions through the regular development of EU legislation. In this sense, it's important to point out that the relevance of the above statements is compromised when put into practice in some of the policies most affecting sustainable development of the Arctic region. A clear example is the case of offshore oil drilling in the Arctic. The EU law has so far been scarcely affected by the influence of the evolution of international law regarding the rights of indigenous peoples in the context of offshore hydrocarbons drilling and the extractive sector.

The EU Member States control hydrocarbon resources in their territories. They are also responsible for licensing the exploitation of these resources. In order to ensure that these licenses are granted in a way that is fair and

72 UN/ECE Convention of 25 June 1998, on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, Denmark, *UNTS*, vol. 2161, p. 447. International Work Group for Indigenous Affairs (IWGIA), "Greenland", *2015 Yearbook* <[http://www.iwgia.org/images/stories/sections/regions/arctic/documents/IW2015/Greenland\\_IW2015\\_web.pdf](http://www.iwgia.org/images/stories/sections/regions/arctic/documents/IW2015/Greenland_IW2015_web.pdf)> accessed 1 September 2015.

73 *Ibid.*, Declarations and reservations Upon Signature: Denmark <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII13&chapter=27&lang=en#EndDec](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII13&chapter=27&lang=en#EndDec)> accessed 1 September 2015.

transparent, national governments are obliged to follow a common set of rules. The requirements for licensing procedures of EU companies to be used by Member States for the prospection, exploration, and exploitation of oil and gas under their jurisdiction are laid out in the Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons.<sup>74</sup> This Directive ignores the participation of local populations on the process of granting those licenses. Concerning the indirect affect on their rights, the Directive merely provides in Article 4, on the delimitation of the geographical areas covered by a license, that it should be done “in such a way that it does not exceed the area justified by the best possible exercise of the activities from the technical and economic points of view”; and also that “the duration of an authorization does not exceed the period necessary to carry out the activities for which the authorization is granted.” According to Article 5, the procedures for granting authorizations should be established in a transparent way on the basis of objective and non-discriminatory criteria.

In order to prevent and respond to accidents at offshore drilling oil facilities such as the 2010 *Deepwater Horizon* in the Gulf of Mexico, the EU adopted Directive 2013/30/EU on the Safety of Offshore Oil and Gas Operations.<sup>75</sup> The Directive applies to the territorial sea, the EEZ and the continental shelf of Member States and Parties of the European Economic Area. The Directive mentions the Arctic in Recital 52 to point out its vulnerability to the phenomenon of climate change and in Article 33 to demand high safety standards for offshore oil and gas extraction operations, internationally and within global and regional powers. Under Article 33, the Directive 2013/30/EU states that “the Commission shall promote high safety standards for offshore oil and gas operations at international level in relevant global and regional fora, including those relating to Arctic waters”. This includes a series of mandatory actions: as,

74 [1994] OJ L164. A flexible approach to the territorial scope of EU law has been applied by the European Court of Justice when considering that “Since a Member State has sovereignty over the continental shelf adjacent to it albeit functional and limited sovereignty (...) work carried out on fixed or floating installations positioned on the continental shelf, in the context of the prospecting and/or exploitation of natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying EU (...). A Member State which takes advantage of the economic rights to prospect and/or exploit natural resources on that part of the continental shelf which is adjacent to it cannot avoid the application of the EU law provisions”, See Case C-347/10, *A. Salemi v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* [2012] Digital reports (Court Reports-general) ECLI identifier: ECLI:EU:C:2012:17, par. 35 and 36.

75 [2013] OJ L178.



for EU registered companies, duties include establishing risk and emergency response plans; preparing a Major Hazard Report (MHR) for the offshore installation; keeping resources at hand in order to put them into operation when necessary; facilitating the independent verification of technical solutions concerning safety operations, and becoming fully liable for environmental damages caused to protected marine species and natural habitats. National authorities of Member States are responsible to ensure that companies are well financed and have the necessary technical expertise, and to verify safety provisions, environmental protection measures, and emergency preparedness through the setting up of national supervisory mechanisms. In addition, citizens have the right to access the information on the installations' safety.

However, Directive 2013/30/EU only covers accidental pollution related to oil or gas operations at sea, and does not directly deal with prevention of operational pollution. In case of an accident, "Member States shall require companies registered in their territory and conducting, themselves or through subsidiaries, offshore oil and gas operations outside the Union as licence holders or operators to report to them, on request, the circumstances of any major accident in which they have been involved." (Article 20.1).<sup>76</sup> Moreover, the Directive does not apply to major accidents occurring on the high seas (except in the case of operations carried out on the continental shelf of a Member State, or in the case "where there is a risk of the foreseeable transboundary effects of major accidents affecting third countries" according to Article 31.3).<sup>77</sup> The Directive states that Member States "shall require operators and owners to ensure that their corporate major accident prevention policy document referred to in paragraph 1 also covers their production and non-production installations outside of the Union" (Article 19.8). As a result, in this area, the Directive can be considered to have some extra-territorial effect. The absence

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76 Private stakeholder companies have noted that such a duty to report major accidents, even when occurring outside the EU "is in contradiction to Article 20 (...) which ascribes this duty to operators, who are the entities in overall control of offshore operations. In practical terms, it would be ineffectual to obtain a report from a contractor; in legal and contractual terms, such a requirement would probably compromise the owner in the country where the incident occurs." International Association of Drilling Contractors, "Letter on The implementation of Directive 2013/30/EU on the safety of offshore oil and gas operations addressed to the British Department of Energy and Climate Change and the Health and Safety Executive" (Department of Energy & Climate Change and Health & Safety Executive 2014) <<http://www.iadc.org/wp-content/uploads/2014/02/IADC-response-to-UK-CD-272-.pdf>> accessed 1 September 2015.

77 Jose Juste Ruiz, "La directive européenne sur la sécurité des opérations pétrolières et gazières en mer", (2014) 23 (1) *Revue juridique de l'Environnement* 28.

of any mention of indigenous peoples or local communities in the procedures for granting exploitation concessions is particularly striking. In fact, the obligations included in the Directive regarding their participation are scarce and limited to Article 5 which requires that competent authorities “have previously ensured that early and effective public participation on the possible effects of planned offshore oil and gas operations on the environment pursuant to other Union legal acts, in particular Directive 2001/42/EC or 2011/92/EU as appropriate, has been undertaken.” If this has not happened, Member States should ensure that “a) the public is informed (...); c) relevant information about such planned operations is made available to the public (...); d) the public is entitled to express comments and opinions at a time when all options are open before decisions to allow exploration are taken”.

In spite of the fact that there is a specific mention of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on environment<sup>78</sup> and of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on assessment of the effects of certain public and private projects on environment,<sup>79</sup> as amended by Directive 2014/52/EU of 16 April 2014,<sup>80</sup> none of these rules apply to the territory of Greenland.<sup>81</sup>

## 5 How a Strengthened EU-Greenland Relationship Contributes to the EU’s Policy Objectives in the Arctic

With limited population, Greenland’s main challenge is managing a vast territory rich in natural and mineral resources, which attracts the interest of some major world powers. In turn, the main challenge of the EU is strengthening its role as part of the inner circle of Arctic governance. To do so, it has to consider its relationships with and its presence in the Arctic strategically. In such a

78 [2001] OJ L197.

79 [2014] OJ L26.

80 [2014] OJ L124.

81 The same is true regarding the Directive 2004/35/EC on Environmental Liability, which addresses the liability for damage caused to the environment, including those caused by offshore installations; the Directive 85/337/EEC on Environmental Assessment, as amended by Directives 97/11/EC, 2003/35/EC and 2009/31/EC, which harmonises the principles of environmental impact assessments of projects; the Waste Framework Directive 2008/98/EC; or the Directive 92/91/EEC on health and safety of workers in the mineral-extracting industries through drilling.

context, an enhanced cooperation between Greenland and the EU has mutual benefit.

Firstly, the governance system of the Arctic has traditionally been characterised by the predominance of, in particular, the five coastal States of the Arctic Ocean. The core of the Arctic cooperation has traditionally been identified with the “Arctic Five”. Greenland, as part of the “Arctic Five”, thanks to certain Danish benevolence, is a unique case in that context. Beyond its role as one of the “Arctic Five”, the Greenlandic sub-delegation takes the floor with its own representative in the Arctic Council meetings, though the national delegation is led by Denmark. Greenland is also very proactive in other *Arctic fora*. It is represented at the Conference of Arctic Parliamentarians, jointly with the representatives of the Arctic Council Member States and the representatives of the European Parliament. Greenland could therefore contribute to further involving the EU in the Arctic governance system.

Secondly, without being a sovereign State, Greenland is a territory that is directly responsible for many key areas related to the development of the Arctic. It is legally bound to a Member State of the EU as an autonomous territory. This situation could see future developments such as Greenland’s independence from Denmark or even a possible (re)joining of the EU.<sup>82</sup> If Greenland becomes independent, it is very important for the EU to ensure it has a strong domestic economy. A politically independent but economically dependant Greenland would imply risk for the development of the whole Arctic region. This is because of the interest that some non-Arctic stakeholders have in the region’s natural and mineral resources and the risk of them being capable of ‘informally’ driving Greenland’s natural resources management policy. The EU assumes its role as an economic “safety net” for Greenland and defends a strong relationship that allows the EU and Greenland to jointly tackle global challenges in the management of the Arctic. On the one hand the EU is committed to promoting the development of Greenland, in particular, the diversification of its economy on the basis of a resources management policy which is environmentally, socially and financially sustainable; on the other hand, it demands Greenland considers the potential role it may have as supplier of strategic raw materials for the EU, according to the principles of free trade.

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82 In that sense Damien Degeorges, *The role of Greenland in the Arctic*, n. 4 above and André Gattolin, *Rapport d’information fait au nom de la commission des affaires européennes sur l’avenir du Groenland*, (Sénat française, session ordinaire de 2014–2015, N° 152, 2014) <<http://www.ladocumentationfrancaise.fr/rapports-publics/144000755/>> accessed 1 September 2015.

Thirdly, the identity of Greenland is closely linked to indigenous peoples of the Arctic, who are neither part of the “Arctic Five” nor Members of the Arctic Council (though they have the status as Permanent Participants). The role of Greenland as ambassador for Arctic indigenous peoples before regional and international *fora* is obvious. In that context, the EU has had a significant evolution from the perspective of traditional human rights, to a mainstreaming approach towards indigenous peoples’ rights. Notwithstanding, it should be pointed out that on the EU’s side there is still room for greater coherence and consistency. It has been shown that the EU lacks mechanisms to guarantee the participation of local communities in the decision-making process concerning offshore oil drilling operations. It is also worth mentioning some historical institutional miscommunications between representatives of Arctic indigenous peoples and the EU institutions. Although there are international legal instruments that are potentially applicable to prevent or alleviate the adverse impact on communities and the environment of Greenland’s offshore hydrocarbon activities, the CJEU has given a very restrictive interpretation to the UNDRIP or the No. 169 of the ILO Convention. For this reason, it is essential to avoid any hint of condescension by the EU actions that may affect Greenland and the Arctic indigenous peoples. Two examples may illustrate to what extent certain aspects require more attention by the EU.

The first relates to the EU ban of seal products in the EU market, established under the Regulation (EC) No 1007/2009 of 16 September 2009, on trade in seal products.<sup>83</sup> Seal hunting is highly integrated in Greenlandic traditions. Although it is directly linked to the subsistence of indigenous communities, it is usually carried out on a bigger scale and has a considerable commercial component. Regulation (EC) No 1007/2009 established an exception that relates to the commercialisation of seal products captured specifically by indigenous communities, which entered into force in 2013.<sup>84</sup> When the exception came into force, the Greenlandic authority was already prepared to implement the certification system required by the Regulation. It almost immediately got acceptance by the EU as an authorised body to issue certificates

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83 [2009] OJ L286, 36. This has been amended by Regulation (EU) 2015/1775 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010, [2015] OJ L262 and Commission Implementing Regulation (EU) of 13 October 2015 laying down detailed rules for the implementation of Regulation (EC) 1007/2009 on trade on seal products, [2015] OJ L271.

84 [2010] OJ L216, 1.

for seal products.<sup>85</sup> With this, the Inuit communities of Greenland became at that time the only indigenous communities benefiting from the exception of the regulation, unlike the Canadian Inuit communities. The ban was finally amended in 2015 in order to reflect the WTO ruling of 22 May 2014.<sup>86</sup> However, in spite of that change and although exports from seal products are becoming less important to the economy of Greenland, there is still a general feeling on the part of the Greenlandic population that the Greenland's lifestyle and traditions continue to be misunderstood by the EU.

Whaling is another sensitive issue in the relationship between Greenland and the EU. According to the International Convention for the Regulation of Whaling the number of whales killed under the Aboriginal Subsistence Whaling (ASW) provision must align with subsistence needs.<sup>87</sup> Greenland, like other traditional whaling countries in the region (Norway or Iceland), is in favour of increasing the number of whale species for which hunting is permitted by the International Whaling Commission (IWC). This policy often clashes with the more conservationist EU perspective, which supports the setting of catch limits for ASW in certain conditions and the 1986 moratorium on commercial whaling. This has caused some confrontations in IWC meetings, in which Denmark representing the interests of Greenland and Faroe Islands<sup>88</sup>

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85 See, Commission Decision of 25 April 2013, recognizing the Greenland Department of Fisheries, Hunting and Agriculture for the purposes of Article 6 of Commission Regulation (EU) 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) 1007/2009 on trade in seal products, C(2013)2277 final; and Commission Decision of 26 October 2015, recognizing the Greenland Department of Fisheries, Hunting and Agriculture in accordance with Article 3 of Implementing Regulation (EU) 2015/1850 laying down detailed rules for the implementation of Regulation (EC) 1007/2009 on trade in seal products, C(2015)7274 final.

86 WT/DS-EU-Measures prohibiting the Importation and Marketing of Seal Products <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds400\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm)> accessed 10 March 2017. See also Commission decision (EU) 2017/265 of 14 February 2017 including the Government of Northwest Territories of Canada as a recognized body in the list referred to in Article 3 of Implementing Regulation (EU) 2015/1850 laying down detailed rules for the implementation of Regulation (EC) 1007/2009 on trade in seal products, C (2017) 757, [2017] OJ L39.

87 International Convention for the Regulation of Whaling [1946], 161 UNTS 72, Art. I (Schedule). See also IWC, *Aboriginal / Subsistence Whaling (with opened reference to the Alaska and Greenland Fisheries)* (1982) and IWC *White Paper on Management and Utilization of Large Whales in Greenland*, (2013), IWC/64/ASW 8, 2012 <<https://archive.iwc.int/pages/search.php?search=!collection84>> accessed 30 November 2016.

88 Final Act of the Intergovernmental Conference (IGC), which agreed the *Treaty on European Union* (1992), Declaration N° 25.

in international negotiations, had to reject common positions adopted by the EU. For example, the IWC rejected Denmark's proposal to increase Greenland's ASW quota in 2008, on the grounds that an increasing commercial use was being made of the catches.<sup>89</sup> Confrontations were intensified in July 2012, when the IWC rejected again a new proposal to increase the Greenland's ASW catch limit.<sup>90</sup> Following this refusal, in 2013 Denmark threatened to withdraw from the IWC if it did not adopt a more flexible position regarding Greenland.<sup>91</sup> A compromise finally has been made, not without difficulties, between the opposing views of the EU and the Danish/Greenlandic authorities. Denmark succeeded at the September 2014 IWC meeting, and its proposed catch limits were approved with the backing of the EU.<sup>92</sup>

## 6 Final Remarks

Greenland is an important gateway to the Arctic for the EU and plays a bridging role as an EU partner. On the one hand, still bound to one of the EU Member States, it has a proactive role in distinct Arctic *fora*; on the other hand, while being granted the status of OCT, it has a strong relationship with the EU based on a partnership agreement which partially provides for its social and economic development.

One of the key elements of this relationship is the legitimacy that must necessarily support the EU's action with regard to the Inuit community of Greenland. Therefore, this legitimacy must be built within the framework

89 IWC, *Annual Report of the International Whaling Commission 2009* (2010), 22 <[https://archive.iwc.int/pages/view.php?ref=64&search=!collection2&order\\_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=4](https://archive.iwc.int/pages/view.php?ref=64&search=!collection2&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=4)> accessed 1 September 2015.

90 IWC, *Annual Report of the International Whaling Commission 2012* (2013), 15 <[https://archive.iwc.int/pages/terms.php?ref=67&search=!collection2&k=&url=pages%2Fdownload\\_progress.php%3Fref%3D67%26size%3D%26ext%3Dpdf%26k%3D%26search%3D%2521collection2%26offset%3D0%26archive%3D0%26sort%3DDESC%26order\\_by%3Drelevance](https://archive.iwc.int/pages/terms.php?ref=67&search=!collection2&k=&url=pages%2Fdownload_progress.php%3Fref%3D67%26size%3D%26ext%3Dpdf%26k%3D%26search%3D%2521collection2%26offset%3D0%26archive%3D0%26sort%3DDESC%26order_by%3Drelevance)> accessed 1 September 2015.

91 Chair's Report of the 2013 IWC Bureau Meeting, 3–4 September 2013, 4–5 <[https://archive.iwc.int/pages/view.php?ref=1797&search=asw%2C+2013%2C+greenland%2C+year%3A2013&order\\_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=1](https://archive.iwc.int/pages/view.php?ref=1797&search=asw%2C+2013%2C+greenland%2C+year%3A2013&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=1)> accessed 1 September 2015.

92 IWC/65/ASW02, 65th Meeting of the International Whaling Commission, Aboriginal Subsistence Whaling Sub-Committee <[https://archive.iwc.int/pages/view.php?ref=3539&search=!collection98&order\\_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=1](https://archive.iwc.int/pages/view.php?ref=3539&search=!collection98&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=1)> accessed 1 September 2015.

of respect for the rights of indigenous peoples and local communities, an element that should provide the EU with better possibilities to interact into the Arctic scenario.

Unfortunately, however, the current legal EU framework does not guarantee a full commitment with Arctic indigenous peoples. From the EU point of view, protection of the Arctic local communities continues to be an area to be further developed as it still lacks effective mechanisms to guarantee their participation in the decision-making process related to the exploitation of hydrocarbon resources. The study of EU regulation on oil and gas offshore extraction identified the limitations of their participation in the decision-making process and the right to be consulted through their representatives.

In the short and medium term, the EU should continue to have an essential role to enhance the diversification of Greenland's economy. In the long term, though difficulties for Greenland's independence do exist, new opportunities may appear in the EU-Greenland relationship, such as Greenland being considered as a third State or even Greenland's accession to the EU. In this situation, the EU will be critical for Greenland to secure a sustainable economy. This is especially true in the context in which some other non-Arctic powers, such as China, have shown a much more pragmatic approach in their interest in Greenland. In turn, this vested economic contribution from the EU could result in reinforcing the EU's political links with the island, and consequently, the EU presence in the Arctic. Playing a stronger and more constructive role in effectively helping solve the region-specific challenges related to meaningful participation with local and indigenous peoples will also give the EU the opportunity to increase collaboration with other Arctic and non-Arctic interested players.

# Partners or Rivals? Norway and the European Union in the High North

*Andreas Østhagen and Andreas Raspotnik*

## 1 Introduction

Ever since the European Union (EU) became actively engaged in Arctic affairs, its related relationship with Norway—as its immediate Arctic/northern neighbour—can be characterised as paradoxical. Although Norway has pro-actively worked to get the EU more involved in Arctic (governance) issues, it has, from the European Commission’s (the Commission) first Communication on Arctic issues in 2008,<sup>1</sup> been sceptical of various policy and legal steps taken by the EU. As a matter of fact, this apparent “enthusiasm and scepticism”, illustrates much of Norway’s relationship with the EU; not only in the Arctic, but also in the overarching relationship between these two international actors.

Norway’s liaison with the EU can generally be characterised as not ‘in’ but neither really ‘out’ of the EU. Although Norway is not a EU Member State, it is politically and economically closely connected to the Union via a broad range of agreements and other forms of cooperation.<sup>2</sup> A member of the European Economic Area (EEA) since 1994—when the bid for EU membership failed for a second time—Norway adheres to the majority of European legislative acts. Accordingly, Norway can be characterised as the “most integrated outsider” to the Union.<sup>3</sup> And yet, in Norway, the EU is often portrayed as something far removed from its political processes, separated in the domain of foreign policy.

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\* Andreas Østhagen, Research Fellow, Norwegian Institute for Defence Studies, Oslo, Norway and PhD candidate, Liu Institute for Global Issues, University of British Columbia, Canada.

\*\* Andreas Raspotnik, Senior Fellow, The Arctic Institute, Washington DC, United States.

1 Commission of the European Communities, ‘The European Union and the Arctic Region’, COM (2008) 763.

2 K. Keil and A. Raspotnik, ‘The European Union’s Gateways to the Arctic’ (2014) 19(1) *European Foreign Affairs Review* 101, 104.

3 Christophe Hillion, ‘Integrating an Outsider: An EU Perspective on Relations with Norway’ (2011) *Europautredningen Rapport* #16 8.



The Arctic, however, is closely linked to Norwegian national identity. As the region saw a surge in global attention almost a decade ago, Norway found itself faced with the EU pursuing a more active role in what constitute 'core' interests for Norway in a wide range of policy areas. Ever since this particular regional activeness by the Union, the Norway-EU relationship has been challenging. Norway is grappling with the desire to get European engagement in Arctic affairs, while simultaneously safeguarding its sovereign rights and interests.

This Chapter investigates the complex and ambiguous relationship between Norway and the EU. It asks: Why does the Arctic relationship between Norway and the EU take on these paradoxical traits? Which conditional elements can explain Norway's ambivalence towards the EU in Arctic/northern affairs?

We will in turn argue that it is somewhat futile to separate the Arctic domain from the overarching Norway-EU relationship. Although useful for policy-makers in the Norwegian Ministry of Foreign Affairs (MFA), such separation is a symbolic action that does not help explain the larger trends in the relationship between the Scandinavian country and the politico-economic union of (currently) 28 Member States. At the same time, only discussing Norway-EU relations omits an essential and often neglected domestic actor in Norway, namely the Norwegian Arctic itself. Hence, we need to recognise how the EU's Arctic quest relates not only to Norway and the Arctic as a foreign policy domain, but also to the northern parts of Norway and the Arctic as a domain linked to regional and economic development.

We examine these relationships in the light of three examples: (1) the discussions embedded in the broader Arctic governance theme, (2) the EU's impact on, and efforts to regulate, industrial policies of relevance to the Norwegian Arctic, and finally (3) regional development and the indigenous peoples' aspects of the Union's Arctic engagement. In sum, studying these domains will help to answer the questions laid out above. However, before scrutinising how the Arctic has figured in this ambiguous relationship, we first need to briefly conceptualise the larger context of Norway's liaison with the EU. Afterwards, we will examine the EU's Arctic relationship with Norway, through each of the illustrations described, before returning to the questions posed above.

## 2 Norway and the EU: It's Complicated

Norway's relationship with the EU can—at best—be characterised as ambiguous. By 2017, the Norwegian government had twice initiated the process of negotiating membership terms, only for the prospect of membership to be rejected by national popular vote at the final stage. This section elaborates on

the broader relationship between these two actors, in which the Arctic is only one of many policy issues, albeit one of growing importance.

### 2.1 *Rejecting the EU, Twice*

In 1972, with Denmark, Ireland and the United Kingdom seeking European Community (EC) (the European Union's predecessor) membership, Norwegian politicians surmised that it would serve the country's interests to join the Union as well. Labour Prime Minister Trygve Bratteli strongly argued for Norwegian accession, motivated by both economic and security interests.<sup>4</sup> Yet, when the choice was given to the Norwegian citizens, 53.5% voted against membership, while 46.5% were in favour of it. Norway consequently chose to stay out, as the EC went from its initial six founding members to a total of nine member states. After the end of the Cold War and the (re)-appearance of a range of new States across Central and Eastern Europe in early 1990s, accession talks were initiated to bring formerly non-aligned Austria, Finland and Sweden into the EU. It was at this point that Norwegian politicians again deemed it imperative for Norway not to be left behind again. Then Labour Prime Minister Gro Harlem Brundtland actively tried to persuade the Norwegian population using the same argument as in 1972 concerning economic benefits, but also emphasising the democratic imperative of joining the Union.<sup>5</sup> It was thought that the effect of the Finnish and Swedish population having voted 'yes' a few months earlier, with 56.9% and 52.3% respectively in favour of EU membership, would constitute the final rationale for Norway to join the EC. Norway could not afford to stand-alone when all of its Nordic neighbours apart from Iceland (Denmark joined in 1973) had joined. The referendum in 1994, however, produced almost the exact same result as 22 years earlier, namely 52.2% against and 47.8% in favour of the EC membership.

Albeit difficult to sum up, an extensive body of research has pointed to some factors about why Norway decided to stay out of the Union. One essential argument is that Norwegian geography and political structures determined the two negative outcomes. Yes-votes are more likely to come from the urban centres and capitals, but in Norway counties and local governments are conceived as more autonomous than their Finnish and Swedish counterpart, so

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4 N.R.K. Skole, 'Trygve Bratteli Om EEC' (1967) <<http://nrk.no/skole/klippdetalj?topic=nrk:klipp/507187>> accessed 1 March 2016.

5 Gro Harlem Brundtland, *Madam Prime Minister: A Life in Power and Politics* (Farrar, Straus and Giroux 2002) 311–317.

it lacks the urban centres and capitals to pull the vote towards yes.<sup>6</sup> A second argument is concerned with the cost-benefit analysis of membership that each citizen performs before voting, where the former so far has outweighed the latter. This was in particular due to the EC's poor track record in a few policy areas key to Norway, such as fisheries and agriculture.<sup>7</sup> Finally, the idea, or conceptualisation, of the EU as a liberal 'project' intent on eroding the arguably successful Norwegian social democratic model, is frequently used in anti-membership campaigns.<sup>8</sup> The influence of such ideas also ties into the argument that the no-votes are driven by an underlying apprehension concerning the Union's supranational development, eventually eroding national State—Westphalian—sovereignty. Assimilated under Danish rule for four centuries (1524–1814), Norway only became an independent State in 1814, and truly autonomous after the dissolution with the imposed personal union with Sweden in 1905. Therefore, as the story goes, the EU constitutes a threat to a relatively 'young' Norwegian State, resembling an all too familiar oppressive dominator to Norwegian citizens.<sup>9</sup>

It is not this Chapter's purpose to question and validate the accurateness of the outlined arguments. However, in the context of Norway's Arctic relationship with the EU, it is important to recognise and understand why Norway twice has chosen to remain outside the Union and looks likely to remain outside in the foreseeable future.

## 2.2 Current Relationship

Norway did not sever ties with the EU after the referendum in 1994. Instead, Norway—together with Austria, Finland, Iceland, Liechtenstein and Sweden

6 Clive Archer, *Norway Outside the European Union: Norway and European Integration from 1994 to 2004* (Routledge 2005); Ingrid Sogner and Clive Archer, 'Norway and Europe: 1972 and Now' (1995) 33(3) *Journal of Common Market Studies* 389; Norges offentlige utredninger (NOU), 'Utenfor Og Innenfor: Norges Avtaler Med EU' (Utenriksdepartementet 2012) 2012:2.2.

7 Stephan Kux and Ulf Sverdrup, 'Fuzzy Borders and Adaptive Outsiders: Norway, Switzerland and the EU' (2000) 22(3) *Journal of European Integration*; Espen Barth Eide, 'We Pay, but Have No Say: That's the Reality of Norway's Relationship with the EU' *The Guardian* (27 October 2015) <<http://www.theguardian.com/commentisfree/2015/oct/27/norway-eu-reality-uk-voters-seduced-by-norwegian-model>> accessed 1 March 2016; Archer, n. 6 above.

8 *Ibid.*

9 Heming Olaussen, 'Fortsatt Nei Til EU' *Aftenposten* (27 November 2014) <<http://www.aftenposten.no/meninger/debatt/Fortsatt-nei-til-EU-7802845.html>> accessed 1 March 2016; Tor Bjørklund, *Mot Strømmen: Kampen Mot EF 1961–1972* (Universitetsforlaget 1982); Sieglinde Gstöhl, *Reluctant Europeans: Norway, Sweden, and Switzerland in the Process of Integration* (Lynne Rienner Publishers Inc 2002) 60.

and the then 12 EC member states—signed the European Economic Area (EEA) agreement, which eventually entered into force in 1994. The EEA was initially described as a staging platform for EU membership.<sup>10</sup> Yet, for Norway, the agreement has come to constitute a permanent affiliation with the EU, standing outside the Union while simultaneously being inside the economic area.<sup>11</sup> Accordingly, Norwegian politicians have described the EEA as the best and the worst of both worlds.<sup>12</sup>

The agreement provides access to the EU's single market, but without the benefits, participatory or democratic rights that come with EU membership. Some policy areas are also specifically excluded, such as common fisheries and agriculture policies, justice and home affairs, foreign policy and monetary coordination. The EEA implies that Norway has to accept and implement all EU legislation relating to the economic area without an official vote in the formation of the legislation. Nevertheless, it grants Norway a formal veto mechanism, in addition to several consultative mechanisms. Critiques argue that these measures do little to remedy the democratic deficit inherent in this set-up.<sup>13</sup> As a matter of fact, a recent study concluded that Norway only issued reservations to 17 out of more than 6000 legal acts with EEA relevance.<sup>14</sup> Additionally, as European integration has expanded far beyond the realms of an economic area, Norway now participates in a number of other institutional constructions and political or financial commitments. For example, Norway is a member of the Schengen area, participates in EU programmes and actions, and contributes financially to economic and social cohesion in Europe.<sup>15</sup>

Debate on the potential for Norwegian membership of the EU has, since 1994, been a somewhat dismal affair, and it is currently not high on the political or academic agenda.<sup>16</sup> Often trapped in a starch dichotomy between the 'yes' and the 'no' interest groups, uncertainty about what membership would actually entail has left the debate dominated by speculation and scare tactics. Similarly, as the EU has increased tremendously both in terms of Member

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10 Brundtland, n. 5 above, 293–309.

11 Norges offentlige utredninger (NOU) 19.

12 Martin J. Kristoffersen, 'EØS Var En Avtale Som Egentlig Ingen Ville Ha' *Nationen* (11 October 2015) <<http://www.nationen.no/politikk/eas-var-en-avtale-som-ingen-ville-ha/>> accessed 1 March 2016; Olaussen.

13 *Ibid.*

14 Norges offentlige utredninger (NOU) 20.

15 Hillion, n. 3 above, 9.

16 Keil and Raspotnik, n. 2 above, 104.

States (from 12 in 1994 to 28 in 2016) and policy domains,<sup>17</sup> the ability to understand the full range of the EU's machinery is a challenge for Member States, let alone Norway as a non-member. In turn, as Norway experienced an economic boom from the 2000s onwards that even surpassed its European partners, the prospects of an eventual EU membership dimmed. In 2014, polls responded that only 16.8% of Norwegians supported a membership bid, whereas 74% were against and 9.2% were undecided.<sup>18</sup> With the subsequent crises over the Euro and migration engulfing EU politics, membership has not become more popular. At the same time, Norway's economy has been sheltered by a relatively large public sector fuelled by natural resource industries, in tandem with financial regulations.<sup>19</sup> With Iceland's recent failed bid for membership in mind,<sup>20</sup> a possible (inevitable?) economic downfall for Norway might make the prospects of EU membership seem more appealing. Similarly, as the UK embarks on leaving the Union, proponents of a renegotiation of the EEA treaty perceive potential room for manoeuvre to secure a better deal.<sup>21</sup>

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- 17 Simon Bulmer, *Economic and Political Integration in Europe: Internal Dynamics and Global Context* (Blackwell 1995); Desmond Dinan, *Ever Closer Union? An Introduction to European Integration* (4th edn, Palgrave Macmillan 2010).
- 18 'Nordmenn Har Aldri Vært Mer Mot EU' *Dagens Næringsliv* (28 November 2014) <<http://www.dn.no/nyheter/politikk/Samfunn/2014/11/28/0550/nordmenn-har-aldri-vrt-mer-mot-eu>> accessed 1 March 2016.
- 19 Henrik Horjen, 'Mener Eurokrisen Seiler Forbi Norge' *Aftenposten* (13 June 2012) <<http://www.aftenposten.no/okonomi/Mener-eurokrisen-seiler-forbi-Norge-6848184.html>> accessed 1 March 2016; Cecilie Langum Becker and Kari Vartdal Riise, 'Derfor Bommer Eurokrisen På Norge' *Dagens Næringsliv* (4 September 2012) <<http://www.dn.no/nyheter/2012/09/04/derfor-bommer-eurokrisen-pa-norge>> accessed 1 March 2016.
- 20 Iceland initiated accession discussions with the EU after a parliamentary vote in 2009, but then abandoned negotiations in 2013 and officially withdrew its application in 2015. The fisheries conflict regarding mackerel and herring was one of the motivating factors behind this decision, see *inter alia* Graham Avery, Alyson J.K. Bailes and Baldur Thorhallsson, 'Iceland's Application for European Union Membership' (2011) *LXIV Studia Diplomatica* 93; Alyson J.K. Bailes and Baldur Thorhallsson, 'Iceland and Europe: Drifting Further Apart?' (Finnish Institute of International Affairs (FIIA) 2013) FIIA Briefing Paper 139 <<http://www.fiaa.fi/assets/publications/bp139.pdf>> accessed 1 January 2014; Minister for Foreign Affairs Iceland, 'Government Considers Iceland No Longer an EU Candidate (Reykjavík, 12 March 2015)' <<http://www.mfa.is/media/gunnar-bragi/Bref-ESB-ENS-pdf.pdf>>; Sigmar Arnarsson and Debra Justus, 'Changing Nature of Arctic Fisheries' in Adam Stepień, Timo Koivurova and Paula Kankaanpää (eds), *Strategic Assessment of Development of the Arctic. Assessment conducted for the European Union* (Arctic Centre, University of Lapland 2014) 64.
- 21 Kathrine Kleveland, 'EØS Er Bedre Enn EU' *Dagbladet* (4 November 2015) <<http://www.dagbladet.no/2015/11/04/kultur/meninger/eos/storbritannia/kronikk/41796213/>> accessed 1 March 2016; 'Sovereignty, Autonomy and Britain's Relationship with Europe' *The*

For now, however, Norway and the EU have come to a mutual understanding that arguably does not fully satisfy anyone. Norway contributes financially—through the so-called EEA (and Norway) grants<sup>22</sup>—while also participating in EU policy implementation and the growing number of European-wide bodies and agencies, yet without allowing full integration and/or having direct decision-making participation. Espen Barth Eide, former Foreign Minister of Norway put it rather critically when stating “We pay, but have no say: that’s the reality of Norway’s relationship with the EU”.<sup>23</sup> Although a number of Norway’s policy areas are kept separate from the European market, it is important to note the extent to which EU legislation is incorporated—and even determines—Norwegian policy on everything from safety regulations to public ownership and state aid.<sup>24</sup> Hence, it can be concluded that Norway is “mainly a rule-taker rather than a rule-shaper of European policies”.<sup>25</sup>

One aspect, however, of the Norway-EU relations that is often neglected in literature, is the degree to which Norway can assert informal influence in the EU policy-making process. Norway is, by most definitions, a State with limited (global) capacities and influence. Yet, this is not to discount that Norway has capabilities in certain domains, where the country’s reputation, wealth and geography come into play. A disputed concept, the idea of the EU’s open decision-making procedures still enables a wide range of actors to participate in EU policy-making in Brussels. However, the key aspect here is *participation*. Many of the arenas where influence can be wielded and decisions are being made are informal, through lobbying procedures and public consultations. Norway did, eventually, awake to this new reality. Consequently, the Norwegian Delegation to the EU constitutes Norway’s largest diplomatic mission, with over 60 employees.<sup>26</sup> Similarly, a number of Norwegian stakeholders—ranging from regional representations to businesses—are present in Brussels, to monitor and potentially influence specific policy issues where they have key interests.

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*Guardian* (24 February 2016) <<http://www.theguardian.com/politics/2016/feb/24/sovereignty-autonomy-and-britain-relationship-with-europe>> accessed 1 March 2016. On 23 June 2016, a majority of 51.89% of UK citizens voted to leave the European Union in a non-legally binding referendum, the so-called Brexit referendum.

22 For the financial period 2009–2014 Norway contributed €951.78 million of the overall €993.50 million, that supported 86 programmes in 16 countries in Europe, from environmental protection, climate change to human and social development issues, see <<http://eeagrants.org/Who-we-are/EEA-Grants>> accessed 20 November 2016.

23 *Ibid.*

24 See Norges offentlige utredninger (NOU).

25 Keil and Raspotnik, n. 2 above, 104.

26 The Norwegian Mission to the EU, see <<http://www.eu-norway.org/>> accessed 20 November 2016.

From an Arctic perspective and with the High North occupying centre state in Norwegian domestic policy, which is discussed in Section 2.3 below, Norway works to keep Arctic attention high in Brussels, aiming to lead EU Arctic debate and influence it from the outside.<sup>27</sup>

### 2.3 *The Norwegian Arctic*

Norway holds particular clout in the Arctic region, as it is one of only five coastal States (the Arctic Five or A5), and it has a considerable Arctic population and a key interest in the development of the region. In Norway, the Arctic is everything north of the Arctic Circle (66°34N), though there is arguably minimal variation between the immediate areas north and south of the circle. In the northern region, Norway borders Finland, Sweden and Russia. The Norwegian Arctic is separated into three counties (from south to north) of Nordland, Troms and Finnmark, often just termed North Norway, and the Svalbard Archipelago north of the Norwegian mainland. In sum, about 480,000 people inhabit these three counties and about 2,700 people reside on Svalbard.<sup>28</sup> Although it is difficult to specify exactly, the Sámi population in Norway is approximately 40,000 to 50,000, and most of them live in North Norway.<sup>29</sup> Albeit sparsely populated in a European context, the size of the population is relatively high compared to indigenous populations in the North American Arctic.<sup>30</sup>

In its foreign policy engagement, Norway distinguishes between the extreme Arctic (referring to the North Pole and the uninhabited areas in the so-called High Arctic) and the more hospitable and populated parts of North Norway

27 Interview conducted by Andreas Raspotnik with two representatives from the Norwegian MFA working on Arctic matters in Oslo on 24 April 2014. Accordingly, Wegge expounded the Norwegian policy influence in both the Commission's work on the Integrated Maritime Policy (IMP) and the first Communication on Arctic issues, see Njord Wegge, 'Small State, Maritime Great Power? Norway's Strategies for Influencing the Maritime Policy of the European Union' (2011) 35(3) *Marine Policy* 335; Njord Wegge, 'The EU and the Arctic: European Foreign Policy in the Making' (2012) 3(1) *Arctic Review on Law and Politics* 6.

28 Statistics Norway (SSB), 'Folkemengde Og Befolkningsendringer, 1. Januar 2016' (*Folkemengde*, 19 February 2016) <<https://www.ssb.no/befolkning/statistikker/folkemengde/aar-berekna/2015-12-17>> accessed 1 March 2016.

29 Nordic Sami Institute, 'Hvor Mange Samer Er Det Egentlig...?' (*On Sami statistics*, 29 January 2008) <<http://www.sami-statistics.info/default.asp?nc=2807&id=110>> accessed 1 March 2016.

30 See Timothy Heleniak and Dimitry Bogoyavlensky, 'Arctic Populations and Migration', *Arctic Human Development Report: Regional Processes and Global Linkages* (Nordic Council of Ministers 2015).

and Svalbard, deemed the 'High North' (*nordområdene* in Norwegian).<sup>31</sup> It is essential to differentiate between the mainland and the Svalbard archipelago, while at the same time recognising that the latter is a part of the Kingdom of Norway.<sup>32</sup> Norway was granted sovereignty over the Svalbard archipelago with the Svalbard Treaty, signed in 1920 in Paris and entered into force in 1925.<sup>33</sup> The Treaty stipulates that Norwegian sovereignty is, however, subject to certain conditions, e.g. limitations on Norway's ability to tax and use the islands for military purposes, by simultaneously assigning the right of access for commercial operations to nationals of all the contracting parties.<sup>34</sup> Despite this early 20th century diplomatic "package deal",<sup>35</sup> diverging (legal) views exist with regard to the maritime zones beyond Svalbard's territorial sea and the question of whether or not the Treaty applies in these maritime areas.<sup>36</sup> Although claiming to have a right to establish an exclusive economic zone (EEZ) around Svalbard, Norway has not yet chosen to make use of it. Instead it established a Fisheries Protection Zone (FPZ) in 1977, for the purpose of the conservation and management of marine living resources.<sup>37</sup> What is clear, however, is that

31 Jonas Gahr Støre, 'The High North and the Arctic: The Norwegian Perspective' (2012) 2 *The Arctic Herald* 8; Leif Christian Jensen, 'Norway on a High in the North: A Discourse Analysis of Policy Framing' (University of Tromsø UIT 2012); Leif Christian Jensen and Geir Hønneland, 'Framing the High North: Public Discourses in Norway after 2000' (2011) 28(1) *Acta Borealia* 37, 44–52.

32 The Svalbard archipelago lies in the Barents Sea and includes all the islands situated between 74° and 81°N and 10°E and 35°E, *inter alia* Spitsbergen, Nordaustlandet, Edgeøya or Bjørnøya, with a total landmass of 62,400 km<sup>2</sup>.

33 Treaty concerning the Archipelago of Spitsbergen (signed 9 February 1920, entered into force 14 August 1925) 2 *LTNS* 7.

34 As of 4 December 2014, 42 states are parties to the Treaty, see <<http://emeritus.lovdata.no/traktater/>> accessed 20 November 2016.

35 D.H. Anderson, 'The Status Under International Law of the Maritime Areas Around Svalbard' (2009) 40(4) *Ocean Development & International Law* 373, 374.

36 See Torbjørn Pedersen and Tore Henriksen, 'Svalbard's Maritime Zones: The End of Legal Uncertainty?' (2009) 24(1) *The International Journal of Marine and Coastal Law* 141; Robin Churchill and Geir Ulfstein, 'The Disputed Maritime Zones around Svalbard' in Myron H Nordquist, John Norton Moore and Thomas H Heidar (eds), *Changes in the Arctic Environment and the Law of the Sea* (Martinus Nijhoff Publishers 2010); Erik J Molenaar, 'Fisheries Regulation in the Maritime Zones of Svalbard' (2012) 27(1) *The International Journal of Marine and Coastal Law* 3; Andreas Raspotnik and Andreas Østhagen, 'From Seal Ban to Svalbard—The European Parliament Engages in Arctic Matters' (*The Arctic Institute*, 10 March 2014) <<http://www.thearcticinstitute.org/from-seal-ban-to-svalbard-european/>> accessed 11 March 2014.

37 Molenaar, n. 36 above, 14–15.



the EEA agreement does not apply to the archipelago of Svalbard pursuant to the EEA's protocol 40.<sup>38</sup>

Norway's engagement in Arctic affairs can be traced back to Jonas Gahr Støre's decision to place emphasis on the High North (in a Norwegian context) and the Arctic (in an international perspective), when he became Foreign Minister in 2005 as part of the 'red-green' government coalition.<sup>39</sup> The elevation of the Arctic to the number one strategic foreign policy priority in 2005 also coincided with the failed arrest of the Russian trawler *Elektron*, turning Norway's attention towards maritime cooperation with Russia in the Barents Sea. With Russia's planting of a flag at the North Pole's seabed in 2007, worldwide attention turned towards the region and Støre made use of the opportunity to place emphasis on regional development domestically, and multilateral cooperation internationally, via arenas such as the Arctic Council (AC) and the Barents Euro-Arctic Council. Since 2005, Norwegian Arctic policy has—as most national Arctic policies have—revolved around vague concepts of 'sustainability', 'multilateral cooperation', surrounded by a distinct, at least implicit, sovereignty theme of 'our Arctic'.<sup>40</sup> Ultimately the 'red-green' coalition was criticised for failing to deliver on their grand Arctic policy statements.<sup>41</sup> However, the new conservative government that took office in 2013 has arguably changed little, and at times even seemed uninterested in following up Arctic policies set out by their predecessor.

In Norway, Arctic policy is predominantly coined in Oslo, hence south of the Arctic Circle, and led by the Norwegian MFA in cooperation with a range of other ministries. Inherently, a divide exists, as in any other Arctic State, between its foreign and regional policy commitments. Promoting the AC, multilateral cooperation and search and rescue agreements do not achieve much on a regional level (at least immediately). In a Norwegian unitary state structure, demands have been brought forward from the Arctic counties for more regional autonomy, or at least increased participation in national decision-

38 Keil and Raspotnik, n. 2 above, 104.

39 Between the Labour party (Arbeiderpartiet), Socialist Left Party (Sosialistisk Venstreparti) and Centre Party (Senterpartiet).

40 Leif Christian Jensen, Øystein Jensen and Svein Vigeland Rottem, 'Norwegian Foreign Policy in the High North: Energy, International Law and Security' (2011) 35 *Atlantisch perspektief* 1; Jo Inge Bekkevold and Kristine Offerdal, 'Norway's High North Policy and New Asian Stakeholders' (2014) 38(6) *Strategic Analysis* 825.

41 Asle Toje, 'Arktisk Nachspiel' *Dagens Næringsliv* (1 March 2015) <<http://www.dn.no/meninger/debatt/2015/03/01/2057/Globalt/arktisk-nachspiel>> accessed 1 March 2016.

making relating to the Norwegian Arctic.<sup>42</sup> Appeasement from Oslo takes the form of additional regional funds, investment in Arctic-specific services such as emergency response equipment, and enhancing the two universities in Bodø and Tromsø. The interests of those inhabiting the Norwegian north will arguably not always coincide, or even be impacted by, the Arctic foreign policy initiatives by Norway as a State.

It is in this juncture of domestic, regional and international elements that the EU's Arctic policy engages, with the likely outcome that some friction appears. We now turn to some of these frictions and key interests, which interplay with both the state and regional level in Norway.

### 3 The Norwegian Arctic & the European Union

In the context of more EU attention placed on Arctic affairs, the Norwegian Arctic holds a particularly prominent role. In contrast to the Finish and Swedish Arctic territories, North Norway has access to the Arctic Ocean: a geographical fact that to a certain extent hampers the Union's Arctic endeavour. It is also more populous than its Nordic counterparts. While not a geographical part of EU territory, North Norway is more closely linked to the EU than any other non-EU Arctic areas, such as Alaska, the Canadian territories, the Russian Arctic regions and perhaps even Greenland. Moreover, North Norway is integrated in, and exports to, the EU common market, borders EU members Finland and Sweden, and is logistically connected to all major European cities.

In addition to the Norwegian Delegation to the EU, the three Arctic counties in Norway also have their own representation in Brussels.<sup>43</sup> At one point the largest regional office amongst the Norwegian offices in spite of having the smallest population, their presence is legitimised through the very fact that the EU is actively engaging in the Arctic region. At the same time, the representation argues that there is an inherent lack of information concerning the Norwegian Arctic in the EU decision-making system in Brussels: "We find

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42 Arne O Holm, 'Kommentar: Ikke En «jævla Nordlending»' *High North News* (25 May 2015) <<http://www.highnorthnews.com/ikke-en-jaevla-nordlending/>> accessed 1 March 2016; Miriam Stackpole Dahl, 'Nord-Norge Med Innspill Til EUs Arktis-Politikk' (*Norwegian Government*, 6 December 2012) <<https://www.regjeringen.no/no/aktuelt/nord-norge-med-innspill-til-eus-arktis-p/id709356/>> accessed 1 March 2016.

43 North Norway European Office <<http://www.northnorway.org/>> accessed 20 November 2016.

that most bureaucrats in Brussels have very little knowledge of, and interest in, North Norway as such."<sup>44</sup>

Based on this conception of North Norway's relationship with the EU and the EU's Arctic policy engagement—as taking place on both a regional and a foreign policy level—there are some issues that help to explain Norway's ambivalent relations to the EU in the Arctic.

### 3.1 *Discussing Arctic Governance*

Increasing Arctic/High North awareness within the hallways of EU power in Brussels has appeared on the Norwegian agenda ever since the Union's development of an Integrated Maritime Policy (IMP),<sup>45</sup> starting in 2005/2006.<sup>46</sup> Eventually, creating a distinct Arctic understanding took place on a whole spectrum of policy areas, from environmental research, indigenous people's issues to defence and energy security.<sup>47</sup> When the EU initially got engaged with Arctic issues, the mood quickly soured in Norway.

The European Parliament (EP) in 2008 suggested opening "international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, inspired by the Antarctic Treaty" and aimed to cover, in particular, "the unpopulated and unclaimed area at the centre of the Arctic Ocean".<sup>48</sup> Subsequently, extensive deliberation in both the Commission (see its first Communication on *The European Union and the Arctic Region*)<sup>49</sup> and again the EP on a 'lack of governance' in the region initially caused outcry from Norwegian media and politicians.<sup>50</sup> Although both the Commission and

44 Trond Haukanes, Director North Norway European Office; Interview conducted by Andreas Østhagen on 2 February 2016.

45 Commission of the European Communities, 'An Integrated Maritime Policy for the European Union', COM (2007) 575.

46 Kristine Offerdal, 'Arctic Energy in EU Policy: Arbitrary Interest in the Norwegian High North' (2010) 63(1) *Arctic* 30; Kristine Offerdal, 'The EU in the Arctic: In Pursuit of Legitimacy and Influence' (2011) 66(4) *International Journal* 861; Wegge, 'The EU and the Arctic: European Foreign Policy in the Making', n. 27 above.

47 Kristine Offerdal, 'Norge, Nordområdene Og EU' (2011) *Europautredningen Rapport #20*.

48 European Parliament, 'Resolution of 9 October 2008 on Arctic Governance (P6\_TA (2008) 0474)' 15.

49 Commission of the European Communities, n. 1 above.

50 Andreas Østhagen, 'The European Union—An Arctic Actor?' (2013) 15(2) *Journal of Military and Strategic Studies* 71; Raspotnik and Østhagen, 'From Seal Ban to Svalbard—The European Parliament Engages in Arctic Matters', n. 36 above; Andreas Raspotnik and Andreas Østhagen, 'To Svalbard and Beyond—The European Parliament Is Back on Its

the EP have since then moderated such views, questions related to governance have at times appeared in Arctic-related debates in Brussels.

For example, one study conducted on behalf of the then Member of the European Parliament (MEP) Diana Wallis created some 'EU-Arctic' turmoil in Norway. The commissioned analysis examined the robustness of the legal framework concerning the Svalbard Treaty.<sup>51</sup> Although the study only featured the opinion of one MEP out of 751, some Norwegian media reacted as if the EU had threatened Norway, prompting headlines such as: 'The EU challenges Norwegian Svalbard policy'.<sup>52</sup> The Norwegian Government quickly responded with the legal justifications needed for the Treaty and made clear that under no circumstances would a re-negotiation be considered.<sup>53</sup> The EU's interest in the Arctic was perceived as a threat to Norway when, in reality, the friction stemmed from a lack of knowledge about the very role and intentions of the EP and its representatives, respectively.

In general, a tendency seems to exist in Norway to portray the EU as one coherent actor, which often threatens Norwegian interests. The complexity of the multiple interests among 28 Member States and numerous political factions and parties are rather neglected. Particularly when scrutinising the EU institutional policy output, it is necessary to distinguish between the different voices of the Commission, Council of the European Union, European External Action Service (EEAS) and EP, respectively, and their actual impact on the policy process.<sup>54</sup> In this vein one also has to understand an EP debate in February 2014 with some MEPs discussing the legality of the Norwegian interpretation of the Svalbard Treaty, enquiring whether the EU accepts the FPZ surrounding the archipelago. Although the EU acknowledges Norway's practice of the FPZ on the conditions that it is enforced in a non-discriminatory manner

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Arctic Track' (*The Arctic Institute*, 17 March 2014) <<http://www.thearcticinstitute.org/to-svalbard-and-beyond-european/>> accessed 18 March 2014.

51 Diana Wallis and Stewart Arnold, 'The Spitsbergen Treaty: Multilateral Governance in the Arctic' (2011) 1 <<http://dianawallis.org.uk/en/document/spitsbergen-treaty-booklet.pdf>> accessed 10 October 2012.

52 'Norge I Skvis Om Svalbard' *Adresseavisen* (1 November 2011) <<http://www.adressa.no/meninger/article1719680.ece>> accessed 1 March 2016; 'EU Utfordrer Norsk Svalbard-Politikk' *Bladet Vesterålen* (27 October 2011) <<http://www.blv.no/ledere/eu-utfordrer-norsk-svalbard-politikk/s/1-1175899-5784300>> accessed 1 March 2016.

53 Andreas Østhagen, 'Debating the EU's Role in the Arctic: A Report from Brussels' *The Arctic Institute* (19 October 2011) <<http://www.thearcticinstitute.org/european-arctic-ambiguity/>> accessed 28 October 2012.

54 Raspotnik and Østhagen, 'To Svalbard and Beyond—The European Parliament Is Back on Its Arctic Track', n. 50 above.

and respected by all interested parties, some Norwegian media critically covered the MEPS' endeavour.<sup>55</sup> This particular lack of understanding of the EU policy-making system can be traced back to Norway's ambiguous relationship to the Union at large. As both an outsider and an insider (see Section 2 above), the public's interest in internal EU affairs is limited. Had Norway been a full EU Member State and had its own MEPS, some of these debates might have been curtailed by more accurate descriptions from the media and national politicians.<sup>56</sup>

### 3.2 *Regulating Arctic Offshore Oil and Gas Development*

The EU—due to the EEA—plays a varying but significant role in industrial development in the Norwegian Arctic,<sup>57</sup> with several mechanisms and/or policies having both direct and indirect effects on regional oil and gas developments, mining and maritime transportation activities.<sup>58</sup> An example of the Union's role creating Norwegian Arctic turmoil is the contentious debate surrounding the Commission's proposal to introduce a regulation on the safety of offshore oil and gas exploration in 2012. Some MEPS also tried to push for a moratorium on Arctic drilling during the proposal phase.<sup>59</sup> Although

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55 Terje Jensen, 'Stiller Spørsmål Ved Norsk Suverenitet I Vernesonen' *Fiskeribladetfiskaren* (3 March 2014); Eva Aalberg Undheim, 'Såg Ikkje Grunn Til Kritik Mot Noreg' *Nationen* (1 March 2014) <<http://www.nationen.no/eu/sag-ikkje-grunn-til-kritikk-mot-noreg/>> accessed 5 March 2014; Raspotnik and Østhagen, 'From Seal Ban to Svalbard—The European Parliament Engages in Arctic Matters', n. 36 above; Molenaar, n. 36 above.

56 However, surveying EU-related debates in various member states over recent years, such a conclusion is by no means naturally guaranteed.

57 In this context we have chosen to disregard the debate on fisheries. Norway's fisheries policy is excluded from the EEA agreement. Yet, much can be said about EU/Norway relations in this domain, where the EU serves as both the largest market and a regulator in terms of setting market requirements and standards. For the Norwegian Arctic, fisheries are especially crucial, from both a social and an economical perspective. However, this Chapter focuses on other, arguably more directly linked, policy domains only. For related analysis that covered to some extent Norway's relationship with the EU in the domain of fisheries, see *inter alia* Bettina Rudloff, 'The EU as Fishing Actor in the Arctic: Stocktaking of Institutional Involvement and Existing Conflicts' (Stiftung Wissenschaft und Politik (SWP) 2010) SWP Working Paper FG 2, 2010/02 <[http://www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/Rff\\_WP\\_2010\\_02\\_ks.pdf](http://www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/Rff_WP_2010_02_ks.pdf)> accessed 3 April 2012; Timo Koivurova and others, 'The Present and Future Competence of the European Union in the Arctic' (2012) 48(4) *Polar Record* 361.

58 However, mechanisms/policies related to energy exploration and exploitation do in principle not extend to the EEA and hence do not *per se* affect Norway, see *ibid.*, 366.

59 As observed by Andreas Raspotnik during attendances of meetings of the EP's Committees on Environment, Public Health and Food Safety (10 July 2012) and Industry, Research and Energy (11 July 2012), respectively.

the Arctic was only mentioned twice in the 56-page draft document from the Commission's Directorate-General Energy, MEPs from the EU's environment committee proposed to re-write the related sections, adding a paragraph to request a halt in oil and gas drilling in the region.<sup>60</sup> This demand was not added to the final directive based on the simple fact that the Union does not have (and for the foreseeable future will not have) legal jurisdiction over Norwegian Arctic waters.<sup>61</sup> Nevertheless, with the directive having EEA relevance, the Commission's initiative prompted debate in Norway and led again to a public outcry.<sup>62</sup>

Norway regarded these actions as a direct threat to its interests in Arctic offshore development. As with the rest of the Arctic, attention turned towards the potential of Arctic industries in the north of Norway at the beginning of the new millennium with the Barents Sea being perceived as a new global frontier for oil and gas development. Since 1979, seismic activity and exploratory drillings have been taking place in the Barents Sea, with over a hundred wells drilled. Yet, in spite of substantial discoveries, only two producing fields—Statoil's Snøhvit and ENI's Goliat—exist with ENI just starting to produce oil from the Goliat field in March 2016.<sup>63</sup> In general, low oil and gas prices and, equally important, a continuing lack of political commitment in Europe concerning Arctic hydrocarbon resources have halted further development.<sup>64</sup>

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- 60 Andreas Østhagen, 'The EU and The Arctic: A Never Ending Story' (*The Arctic Institute*, 13 September 2012) <<http://www.thearcticinstitute.org/eu-and-arctic-never-ending-story/>> accessed 14 September 2012.
- 61 Arthur Neslen, 'Europe Rejects Ban on Arctic Oil Drilling' *The Guardian* (10 October 2012) <<http://www.theguardian.com/environment/2012/oct/10/europe-rejects-ban-arctic-oil-drilling>> accessed 31 May 2013.
- 62 Thomas Nilsen, 'Norway: "EU Has No Jurisdiction in the Arctic"' *BarentsObserver* (3 October 2012) <<http://barentsobserver.com/en/energy/norway-eu-has-no-jurisdiction-arctic-03-10>> accessed 28 October 2012.
- 63 Ellen Kongsnes, 'Goliat-Oppstart Utsatt Nok En Gang' *Stavanger Aftenblad* (1 March 2016) <<http://www.aftenbladet.no/energi/Goliat-oppstart-utsatt-nok-en-gang-3880857.html>> accessed 1 March 2016; Thomas Nilsen, 'First Barents Oil Production Starts Today' *The Independent Barents Observer* (13 March 2016) <<http://thebarentsobserver.com/industry/2016/03/first-barents-oil-production-has-started>> accessed 14 March 2016.
- 64 Andreas Raspotnik, 'Is the European Union Missing Another Window of Opportunity for Arctic Energy Resources?' (*The Arctic Institute*, 5 December 2011) <<http://www.thearcticinstitute.org/european-union-missing-energy-window/>> accessed 6 December 2011; Henrik Stolen, Gwladys Fouche and Joachim Dagenborg, 'Norway's Rising Oil Costs Hit Arctic Output Hopes' *Reuters US* (16 January 2014) <<http://www.reuters.com/article/oil-norway-delays-idUSL3NoKP4BB20140116>> accessed 1 March 2016; Keil and Raspotnik, n. 2 above.

In order to raise public awareness of the Norwegian Arctic energy and its importance for the EU's energy security, three Norwegian government ministers drafted a joint letter to Miguel Arias Cañete, the European Commissioner for Climate Action and Energy in January 2016. The ministers asked for a "clear message from the Commission that natural gas remains important for the EU's energy mix". A related European statement would be a "welcome signal" for Norwegian investment in exploiting the untapped gas resources in the Barents Sea.<sup>65</sup> Adding to this, Norway's Petroleum and Energy Minister Tord Lien emphasised that a clear signal from the Union could also boost the case for an extended pipeline system from and to the Barents Sea. It currently stops more or less at the Arctic Circle.<sup>66</sup>

Although the EU and its Member States, respectively, are highly dependent on energy imports, its approach to tackle energy shortcuts is incoherent. Some States favour coal and nuclear power, others pay more attention to natural gas. Additionally, strong environmental groups in Europe oppose Norway's proclaimed 'green' gas and are in favour of renewable energy.<sup>67</sup> In sum, despite the potential of the Barents Sea, the future of the Norway-EU energy outlook is anything but straightforward.

### 3.3 *Regional Development and the Sámi*

A third area of both influence and contention between Norway and the EU in the Arctic relates directly to regional development in North Norway. From a regional-financial perspective, the EU covers the Norwegian Arctic via its regional policy. The basic aim of the EU's economic, social and territorial cohesion policy is to reduce disparities between the varying levels of development in different European regions. Accordingly, and with regard to the European north in general, the Treaty on the Functioning of the European Union (TFEU) stipulates that "particular attention shall be paid to (...) regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density (...)" (TFEU, Article

65 Norwegian Ministry of Petroleum and Energy, Norwegian Ministry of Climate and Environment and Norwegian Ministry of Foreign Affairs, 'Letter to EU Commissioner Miguel Arias Cañete' <[https://www.regjeringen.no/contentassets/9ee937288b7c466ba062f6e023d8094b/letter\\_aspaker-helgesenlien-canete\\_29.1.2016.pdf](https://www.regjeringen.no/contentassets/9ee937288b7c466ba062f6e023d8094b/letter_aspaker-helgesenlien-canete_29.1.2016.pdf)> accessed 29 February 2016.

66 Jonas Cho Walsgard and Mikael Holter, 'Norway Says EU Gas Signals Strengthen Case for Arctic Pipeline' *Bloomberg* (12 February 2016) <<http://uk.reuters.com/article/eu-norway-gas-idUKL8N15KiNU>> accessed 1 March 2016.

67 Christian Oliver, 'Norway Urges EU Assurances on Gas Output' *Financial Times* (30 November 2015) <<http://www.ft.com/cms/s/0/b74ad666-9526-11e5-8389-7c9ccf83dceb.html#axzz41wvrOhGU>> accessed 1 March 2016.

174).<sup>68</sup> In particular, the focus has been on three related funds—the European Regional Development Fund (ERDF), the European Social Fund and the Cohesion Fund—and some programmes covered by these funds, e.g. Interreg Nord, Botnia-Atlantica and/or the Northern Periphery Programme. For the new financial period—2014–2020—the latter was even re-named the Northern Periphery and *Arctic* Programme, aiming to add a distinct Arctic-regional development level to the EU's Arctic policy as well as to national Arctic policies of the Union's Member States.<sup>69</sup>

Although there is relatively little difference between the Arctic and non-Arctic communities in Norway, some traits have historically been more prominent in the north. Given the region's sparse population, vast distances, natural geographic barriers and dependency on traditional subsistence (fisheries, reindeer herding and agriculture), the northern counties have historically been poorer (as based on the gross domestic product per capita) than the rest of Norway. As the Norwegian welfare state grew after the Second World War, the north was targeted with regional development funds to help the region overcome barriers that did not exist in the south, such as sparse population, harsh climate and long distances to markets. Today, a system of differentiated employer's social security tax is meant to improve the conditions of operating businesses in the north, as the region enjoys lower tax levels. Similarly, both Finnmark and parts of Troms county have—since 1990—had a lower income tax, return of student loans and a higher rate of child support.

In recent years, however, North Norway has been experiencing relatively high economic development. In addition to the oil-boom, the region's emphasis on seafood and fisheries, industrial products and tourism has helped spur this growth.<sup>70</sup> Former Norwegian Foreign Minister Støre now depicts the future of the High North as one that turns away from a 'black'—hydrocarbon resource—economy to a 'blue' economy, which is based on Norway's leadership in the fields of maritime/ocean knowledge and renewable energy, like hydropower and wind.<sup>71</sup> It is assumed that renewable energy production in

68 Consolidated Version of the Treaty on the Functioning of the European Union, 2012. Official Journal C 326, 26 October 2012.

69 European Commission, 'Northern Periphery and Arctic' (10 January 2015) <[http://ec.europa.eu/regional\\_policy/en/atlas/programmes/2014-2020/UnitedKingdom/2014tc16rftn004](http://ec.europa.eu/regional_policy/en/atlas/programmes/2014-2020/UnitedKingdom/2014tc16rftn004)> accessed 8 June 2015.

70 Elise Holdal, 'Forventer Høyere Vekst I Nord-Norge Enn I Resten Av Landet' NRK (5 May 2015) <<http://www.nrk.no/troms/forventer-hoyere-vekst-i-nord-norge-enn-i-resten-av-landet-1.12344711>> accessed 1 March 2016.

71 Ingrid A Medby, 'From Black Gold to a Blue Economy?' (*The Arctic Institute*, 26 November 2015) <<http://www.thearcticinstitute.org/from-black-gold-to-a-blue-economy/>> accessed 1 March 2016.



the Norwegian Arctic, with an already produced regional power surplus and high theoretical potentials, could have a positive impact on the Union's shift towards 'greener' energy consumption.<sup>72</sup>

The economic development in the north, and specific measures to support the northern counties, has caused problems in Norway's relationship with the EU. In particular, as the Commission revised their state aid regulation (as normal for every 7-year framework period) in 2013 for the 2014–2020 cycle, the whole scheme of differentiated employer's tax came into question.<sup>73</sup> The Commission had a desire to streamline and reduce various state aid regimes in regions and sectors where aid was deemed unnecessary, throughout the EEA.<sup>74</sup> Although this streamlining was not targeted in the Norwegian Arctic at all, the fact that Norway adheres to the EEA-regime, while also stimulating its own Arctic areas, led to a clash with the new EU-regulatory regime. Again, Norwegian media and politicians blamed the EU for meddling in domestic tax regimes.<sup>75</sup> For the north Norwegian counties, this entailed a loss of regional support mechanisms. In 2013, the amount of exempted fees totalled 13 billion NOK (approximately €1.4 billion), where a majority went to support North Norway specifically.<sup>76</sup> Dialogue between north Norwegian actors and the EU is still continuing, as the Arctic environment and related challenges are being used to argue for special exemptions.<sup>77</sup>

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72 Runa Haug Khoury and others, 'Environmental Considerations in the Arctic: Sustainable Resource Exploitation' (Bellona Foundation 2015) <[http://network.bellona.org/content/uploads/sites/2/2016/01/Arktisrapport-versjon-2.0\\_web.pdf](http://network.bellona.org/content/uploads/sites/2/2016/01/Arktisrapport-versjon-2.0_web.pdf)> accessed 1 March 2016; Andreas Raspotnik, 'Renewable Energy Production in the Norwegian Arctic: An Energy Boost for Europe?' *High North News* (11 January 2016) <<http://www.highnorthnews.com/renewable-energy-production-in-the-norwegian-arctic-an-energy-boost-for-europe/>> accessed 1 March 2016.

73 Torjus Kandal, 'Kan Være Smutthull I Differensiert Arbeidsgiveravgift' (*Nordland Fylkeskommune*, 17 December 2014) <<http://www.nfk.no/artikkel.aspx?Aid=43402&Back=1>> accessed 1 March 2016.

74 Norwegian Government, 'Spørsmål Og Svar—Differensiert Arbeidsgiveravgift' (6 June 2014) <<https://www.regjeringen.no/no/tema/okonomi-og-budsjett/skatter-og-avgifter/Differensiert-arbeidsgiveravgift/Sporsmal-og-svar---differensiert-arbeidsgiveravgift/id762193/>> accessed 1 March 2016.

75 Lars Wiker, 'Regjeringen Ber EU Snu Om Arbeidsgiveravgift' *Nationen* (30 April 2014) <<http://www.nationen.no/eu/regjeringen-ber-eu-snu-om-arbeidsgiveravgift/>> accessed 1 March 2016.

76 Norwegian Government.

77 Hege Eilertsen, 'EU-Politikere Skal Turnere Nord-Norge' *High North News* (13 February 2015) <<http://www.highnorthnews.com/eu-politikere-skal-turnere-nord-norge-til-uka/>> accessed 1 March 2016.

Another aspect of the EU's Arctic engagement in Norway concerns the Union's relationship with the indigenous Sami population. The traditional lands of the Sámi people in Norway—Sápmi—stretch from Hedmark county in the middle of Norway, to the Russian border in the north. Most Sámi live in North Norway. Reindeer herding and other traditional Sámi livelihoods, such as fishing, hunting and gathering, are some of the most important preservers of the Sámi cultural heritage. These lands are increasingly under pressure, as, for example, mining companies are investing in the north. The Union's legal engagement with indigenous peoples issues in the Arctic covers a broad variety of policies, e.g. development, trade, animal welfare, environment, education and culture, regional policy or general human rights. However, only a few legal acts apply directly, as for instance Regulation 1007/2009 on trading of seal products.<sup>78</sup> This Regulation,<sup>79</sup> although it does not have a direct impact on Sami in North Norway, serves as prime example for the EU's impact in the Arctic, despite the exclusion of the EU from the region's main governance table. Both Canada and Norway challenged the regulation and brought the case before the World Trade Organization (WTO) in 2009. The WTO upheld the ban in 2014, with two exceptions needing clarification. Accordingly, the regulation was brought into compliance with WTO regulations in October 2015.<sup>80</sup>

The Commission has been aware of the discrepancies between EU institutions and Arctic indigenous peoples and hosted four events as part of an 'Arctic EU-Indigenous Dialogue' between 2010 and 2014. Stępień critically remarked that initially these meetings often lacked continuity and that they were only being used by EU officials to highlight the Union's project with relevance for the Arctic indigenous community.<sup>81</sup>

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78 Timo Koivurova and others, 'EU Competencies Affecting the Arctic' (Directorate-General for External Policies, European Parliament 2010) EP/EXPO/B/AFET/FWC/2009-01/LOT2/0437-39 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/433793/EXPO-AFET\\_ET\(2010\)433793\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/433793/EXPO-AFET_ET(2010)433793_EN.pdf)> accessed 28 November 2015.

79 *Ibid.*

80 Council of the European Union, 'Seal Products Trade: The EU Ban Adapted to WTO Rules' (*Press Release (690/15)*, 1 October 2015) <<http://www.consilium.europa.eu/en/press/press-releases/2015/10/01-seal-products/>> accessed 2 October 2015; Nikolas Sellheim, 'The Goals of the EU Seal Products Trade Regulation: From Effectiveness to Consequence' (2015) 51(3) *Polar Record* 274; Nikolas Sellheim, 'Policies and Influence: Tracing and Locating the EU Seal Products Trade Regulation' (2015) 17(1) *International Community Law Review* 3.

81 Adam Stępień, 'Internal Contradictions and External Anxieties: One "Coherent" Arctic Policy for the European Union?' in Gudmundur Alfredsson, Timo Koivurova and Ju Jubour (eds), *The Yearbook of Polar Law Volume 7* (Martinus Nijhoff Publishers 2015) 260.

#### 4 Concluding Remarks: Arctic Rivals or Partners?

This Chapter has examined the Arctic relationship between Norway and the EU in the light of three examples, namely (1) the discussions embedded in the Arctic governance theme, (2) the EU's impact on, and efforts to regulate, industrial policies of relevance to the Norwegian Arctic, and finally (3) regional development and indigenous peoples. We asked: what can help to explain the ambivalent stance taken by Norway towards the Union, concerning the EU's Arctic engagement?

In general, the EEA agreement, which is the legal backbone of Norway's close association with the Union, affects the relationship between the Scandinavian country and the EU in the (Norwegian) Arctic. This Chapter has demonstrated that the EU's manifold Arctic endeavours hold a distinct regional element in Norway. With academic and public focus often centred around the debate about the EU's AC observer status bid and the seal product issue between Canada and the EU, we argue that this limited conception hinders a greater understanding of the EU's role in the north in general and its relationship with Norway in particular. Despite disagreements on matters such as the ban on seal products, Norway has continuously supported the Union's bid for AC observer status.<sup>82</sup> Moreover, Norway welcomes an increasing EU Arctic engagement. Despite Norway's inability to directly impinge upon the Union's Arctic policy, it holds many levers to influence and shape it.

Norway's relationship with the EU in the Norwegian Arctic must be understood as a continuation of its larger EU-policy, where the balance between separation and further integration is crucial. The Arctic has become yet another avenue for dialogue and cooperation with Brussels, in which both companies and the regional governments of North Norway can assert more influence. The region as an overall policy field has created venues to increase policy coordination in areas such as regional development, research and industrial endeavours, though in turn it depends on to what extent the EU-system and Norwegian actors choose to utilise such coordination. Norway is likely, in any case, to remain the EU's staunchest ally in its Arctic engagement. Geography,

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82 Njord Wegge, 'Politics between Science, Law and Sentiments: Explaining the European Union's Ban on Trade in Seal Products' (2013) 22(2) *Environmental Politics* 255; Adele Airoldi, 'The European Union and the Arctic Region: Developments and Perspectives 2010–2014' (Nordic Council of Ministers 2014) TemaNord 2014:565 30 <<http://norden.diva-portal.org/smash/get/diva2:771155/FULLTEXT01.pdf>> accessed 2 March 2015.

historic ties, and economic and cultural integration are cornerstones of this relationship with the Scandinavian country holding many resource potentials that the EU needs, such as hydrocarbons and renewables.

At the same time, Norway is challenged by the way the EU's various actions are perceived and described in the general debate. A lack of understanding with regards to the complex institutional system and tendencies to scapegoat Brussels for undesirable policy outcomes are fallacies across the EU Member States. This might pose an additional challenge for Norway's relations with the EU in the Arctic, as various Norwegian governments continue to support the EU's northern endeavour, while at the same time portraying EU policies and debate as a threat to Norwegian interests. Such a paradox is only likely to complicate matters for all parties.

For the EU, the Arctic as a region, both from the regional as well as circumpolar perspective, has relatively low priority. While both the Eastern Neighbourhood (for example through the Ukraine crisis) and the Southern Neighbourhood (for example, as a result of the migration crisis) may lead to a step backwards in the Union's supranational integration efforts, the Norwegian Arctic would not have the same impact on the EU's neighbourhood policy.<sup>83</sup> This is a somewhat insurmountable detail Norwegian policy-makers are fully aware of.<sup>84</sup>

Moreover, up to the present, the Union has not yet found its very own Arctic narrative—a broad concept or single organising idea similar to the Northern Dimension or the Barcelona Process that eventually offers a substantive and EU-unique approach to Arctic matters.<sup>85</sup> Likewise, the EU's Arctic policy engagement has so far also lacked sharpness by not comprehensively taking into account the various *Arctics* of the circumpolar north and their different challenges. While the EU takes a back seat in circumpolar Arctic affairs, it is a key player in the European Arctic, with its regulatory competences, financial contributions and social impacts going beyond its Arctic Member States,

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83 Adam Stepień and Andreas Raspotnik, 'Exploring Reasons & Remedies for the EU's Incapability to Devise an "Arctic Policy": The Quest for Coherence' in Lassi Heinen, Heather Exner-Pirot and Joël Plouffe (eds), *Arctic Yearbook 2015* (Northern Research Forum 2015) 434.

84 Interview conducted by Andreas Raspotnik with two representatives from the Norwegian MFA working on Arctic matters in Oslo on 24 April 2014.

85 The Barcelona Process, launched in 1995, formed the basis of the Euro-Mediterranean partnership to manage the relationship between the EU and its Mediterranean neighbours and eventually evolved in the Union for the Mediterranean, see <[http://eeas.europa.eu/euromed/barcelona\\_en.htm](http://eeas.europa.eu/euromed/barcelona_en.htm)> accessed 20 November 2016.

Finland and Sweden.<sup>86</sup> Hence, the EU is not simply an 'Arctic user', attracted by the region's various changes, challenges and/or opportunities, that can publicly be equated with 'non-Arctic' States. However, neither Norway nor the EU have yet found a coherent way to turn these steps to positive action.

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86 Adam Stępień, 'The EU Needs a Two-Tier Approach towards the Arctic: A General Policy for the Circumpolar Arctic and a Concrete Strategy for the European Arctic' (*The Arctic Institute*, 10 December 2015) <<http://www.thearcticinstitute.org/eu-needs-two-tier-approach-towards-the-arctic/>> accessed 11 December 2015.

# Searching for Common Ground in Evolving Canadian and EU Arctic Strategies

*P. Whitney Lackenbauer and Suzanne Lalonde*

## 1 Introduction

In the beloved classic of English literature *Pride and Prejudice*, the heroine of the story, Miss Elizabeth Bennett, woefully misunderstands Mr. Darcy's character and motivations, wrongly believing him to be proud and disdainful following a series of rather unfortunate encounters early on in their acquaintance. As a result, opportunities very much to Miss Bennett's advantage are nearly lost.

The Canadian-EU Arctic relationship has also suffered from similar misconceptions; that is to say, from a lack of true understanding of "character, identity and motivations." And as with Jane Austen's tale, it may well be that Canada and the European Union have let early encounters skew their understanding and taint their vision of the other.

In Canada, the European Union's efforts to constructively engage in the Arctic have been met with scepticism and distrust. The supranational body's actions have been characterised in some quarters as irrelevant and, in others, as intrusive. A recent post on the "Eye on the Arctic" blog coordinated by Radio Canada International by Heather Exner-Pirot, a strategist for Outreach and Indigenous Engagement at the University of Saskatchewan, is representative. "The EU keeps telling us it cares about the Arctic," she asserts. "I'm not sure the Arctic cares about it."<sup>1</sup>

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\* P. Whitney Lackenbauer, Professor, Department of History and co-director of the Centre on Foreign Policy and Federalism at St. Jerome's University in the University of Waterloo, Canada.

\*\* Suzanne Lalonde, Professor of International Law and the Law of the Sea, Faculty of Law, University of Montreal, Canada.

\*\*\* The authors wish to thank Tahnee Prior, a Trudeau scholar and PhD candidate at the Balsillie School for International Affairs, for research assistance and the exchange of ideas on an earlier iteration of this work.

1 Graham Greenleaf, 'The EU's Arctic policy—A means, not an end' (*Eye on the Arctic*, 3 May 2016) <<http://www.rcinet.ca/eye-on-the-arctic/2016/05/03/blog-the-eus-arctic-policy-a-means-not-an-end/>> accessed 22 September 2016.

On the European side, commentators argue that the EU is a “misunderstood Arctic actor.”<sup>2</sup> In turn, Canada’s Arctic policy is often cast in a harsh light. The assessment of Dr. Andrew Foxall, director of the Russian Studies Centre at the London-based Henry Jackson Society, published in *The Guardian* in December 2013, is telling. “It’s often said that the Russians act with their Arctic policy in an aggressive, nationalistic and unilateral way,” Foxall suggests. “The same thing can be said about the Canadians.”<sup>3</sup> Kristine Offerdel of the Norwegian Institute for Defence Studies similarly refers to the “impression abroad of an aggressive Canadian Arctic policy” that continues to persist.<sup>4</sup>

These frames are increasingly relevant to the Canada-EU relationship as increasing global attention is directed towards the dramatic changes in the circumpolar Arctic. First and foremost, the Arctic has experienced some of the most rapid climate change impacts on Earth. For example, Canada has warmed twice as fast as the global average, and its North has warmed nearly three times as fast as the global average. This has generated accelerated thawing of permafrost, increased methane emissions, and major changes in ice and snow conditions. The much-discussed melting of Arctic sea ice holds out the prospect of a longer shipping season and improved navigability of Arctic waters, thereby enabling potential new access to mineral and energy resources, shipping, tourism, and commercial fishing.<sup>5</sup> At the same time, members of the scientific and environmental communities raise concerns about a perceived rush to exploit natural resources of the Arctic Ocean. Such development, critics argue, is

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2 Damien Degeorges, ‘The Arctic: A region of the future for the European Union and the world economy’ (2013) 263 *European Issues*, available on the website of the Fondation Robert Schuman <<http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-263-en.pdf>>, accessed 26 October 2016.

3 Luke Harding, ‘Russia to boost military presence in Arctic as Canada plots north pole claim’ (*The Guardian*, 10 December 2013) <<http://www.theguardian.com/world/2013/dec/10/russia-military-arctic-canada-north-pole>> accessed 22 September 2016.

4 Kristine Offerdel, ‘Interstate Relations: the complexities of Arctic politics’ in Rolf Tamnes and Kristine Offerdel (eds), *Geopolitics and Security in the Arctic* (Routledge, New York 2014) 73, at p. 75.

5 Various authors continue to emphasize the ongoing challenges to shipping in the Northwest Passage. For recent summaries, see Adam Lajeunesse and P. Whitney Lackenbauer, *On Uncertain Ice: The Future of Arctic Shipping and the Northwest Passage* (Canadian Defence & Foreign Affairs Institute, Calgary 2014); Buixadé Farré and others ‘Commercial Arctic shipping through the Northeast Passage: routes, resources, governance, technology, and infrastructure’ (2014) 37 (4) *Polar Geography* 298, 324; and Frédéric Lasserre and Olga Alexeeva, ‘Analysis of maritime transit trends in the Arctic passages’ in Suzanne Lalonde and Ted McDorman (eds), *International Law and Politics of the Arctic Ocean: Essays in Honor of Donat Pharand* (Brill, Leiden 2015).

incommensurate with efforts to limit average global warming to 2°C.<sup>6</sup> These new activities may also threaten the marine environment, negatively impacting both ecosystems and the traditional livelihoods of Indigenous peoples and northern communities.

In the face of rapid environmental change and accelerating international interest in the Arctic, current approaches to regional governance aggregate multiple understandings and visions for the circumpolar North. A notion of multiple Arctics—North American, Northern European, and Russian—points to both convergence and discordance in how different regional actors perceive the North. As Professor Carina Keskitalo of Umeå University observes, “Canada developed a specific understanding of its ‘Arctic’ quite early” that went beyond the Arctic Ocean and its immediate vicinity to encompass its entire Northern territories above 60° North latitude as “Arctic.” At the end of the Cold War, when Canada played a leading role in political negotiations to institutionalize circumpolar relations, its particular understanding of the Arctic in environmental and human terms (rooted in Indigenous subsistence-based livelihoods) deeply influenced the region-building process. Accordingly, Canada’s “historically developed notions of ‘the Arctic’ have been transplanted to northern areas everywhere, with little reflection on whether it is applicable to the different regions or not.”<sup>7</sup>

As an Arctic coastal State with 40% of its landmass north of 60° latitude and 162,000 km of its coastline in the Arctic, Canada’s concern with effectively exercising its sovereignty is understandable. Its emphasis on the human dimensions of the Arctic, and particularly those related to the northern Indigenous peoples, also reflects national realities. Its three northern territories (Yukon, Northwest Territories, and Nunavut) are home to just over 110,000 people (more than half of whom are Indigenous or Aboriginal), spread out in remote communities. Social indicators in Canada’s North are abysmal, pointing to

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6 The Paris Agreement signed on 12 December 2015 seeks to limit global warming to “well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C.” For examples of scepticism that this can be met, see Cristophe McGlade and Paul Elkins, ‘The geographical distribution of fossil fuels unused when limiting global warming to 2°C’ [2013] 517 *Nature* 187, 90 and Climate Central, ‘Earth Flirts with a 1.5-Degree Celsius Global Warming Threshold’ (*Scientific American*, 20 April 2016) <<http://www.scientificamerican.com/article/earth-flirts-with-a-1-5-degree-celsius-global-warming-threshold/>> accessed 22 September 2016.

7 Corinna Röver, Interview with Carina Keskitalo, ‘The notion of the ‘Arctic’ is based on Canadian ideas, according to discourse analysis study’ SciencePoles (2014). See also E.C.H. Keskitalo, *Negotiating the Arctic: The Construction of an International Region* (New York: Routledge 2004).



the challenges of providing social services and infrastructure to small and remote communities. Indigenous peoples, in particular, have experienced numerous challenges associated with rapid changes to their homelands, including threats to language and culture, erosion of traditional support networks, poorer health than the rest of Canadians, and changes to traditional diet and communal food practices.<sup>8</sup> Rich in natural resources, but geographically distant from major markets, the North has long served as an economic “land of tomorrow” in the Canadian political imagination.<sup>9</sup> Buoyed by the prospect of heightened global demand and new access to resources, boosters have trumpeted the Arctic’s “coming of age” in the early twenty-first century. This has rejuvenated national interest in Northern affairs, as well as resurrecting longstanding anxieties about sovereignty, security (in its many dimensions), and the well-being of Northern Canadians.<sup>10</sup>

Canada’s propensity to project its domestic northern strategy, which is deeply embedded in North American Arctic priorities, into the circumpolar sphere should come as no surprise owing to its success in deeply institutionalizing its conception of the Arctic in current instruments of Arctic governance. Canadian politicians and commentators often trumpet how their country led efforts to establish the Arctic Council through the 1996 Ottawa Declaration, which reflected Canada’s preoccupations with the environment and Indigenous peoples,<sup>11</sup> and served as the Council’s first Chair (1996–1998). Canada’s recent chairmanship of the Arctic Council (2013–15) also reflected a strong emphasis

8 See, for example, Indigenous and Northern Affairs Canada, ‘The Community Well-Being (CWB) Index’ <<https://www.aadnc-aandc.gc.ca/eng/1100100016579/1100100016580>> accessed 25 September 2016, National Aboriginal Health Organization, ‘Overview of Inuit Health’ <<http://www.naho.ca/inuit/overview-of-inuit-health/>> accessed 25 September 2016; and Nordic Council of Ministers, *Arctic Social Indicators: ASI II: Implementation* (TemaNord, Nordic Council of Ministers, Copenhagen 2015).

9 See, for example, D.M. LeBourdais, ‘Land of Tomorrow: Arctic Is a Land of Promise Which We Must Hold’ (1938) 89 *Canadian Magazine* 18, 37, 38 and Sherrill Grace, *Canada and the Idea of North* (McGill-Queen’s University Press, Montreal & Kingston 2007).

10 On popular opinion and the Arctic, see the Munk-Gordon Arctic Security Program, ‘Rethinking the Top of the World: Arctic Public Opinion Survey’ reports: vol. 1: 2011 <<http://gordonfoundation.ca/publication/300>> accessed 26 October 2016 and vol. 2: 2015 <<http://gordonfoundation.ca/publication/755>> accessed 26 October 2016. On changing definitions of sovereignty and security, see Wilfrid Greaves and Whitney Lackenbauer, ‘Arctic Sovereignty and Security: Updating our Ideas’ (*OpenCanada* 23 March 2016) <<https://www.opencanada.org/features/re-thinking-sovereignty-and-security-arctic/>> accessed 26 October 2016.

11 See, for example, Thomas Axworthy and Ryan Dean, ‘Changing the Arctic Paradigm from Cold War to Cooperation: How Canada’s Indigenous Leaders Shaped the Arctic Council’

on Northern Indigenous peoples, prompting some commentators to lament its domestic (rather than global) orientation, its comparative lack of emphasis on science and research, and its suggestion that non-Northerners had a limited role to play in agenda-setting or circumpolar dialogue.<sup>12</sup>

Furthermore, as a result of geography and history, it is unsurprising that Canada considers the United States its “premier partner” in Arctic affairs.<sup>13</sup> Although academic and popular commentary often highlights disagreements between these North American neighbours over the status of the waters of the Northwest Passage (NWP) and the maritime boundary in the Beaufort Sea, the common interests of both countries have provided a firm foundation for strong cooperation in the Arctic region. In March 2016, President Barack Obama and Prime Minister Justin Trudeau offered a U.S.-Canada Joint Statement on Climate, Energy, and Arctic Leadership that articulated a common North American commitment to “play a leadership role internationally in the low carbon global economy over the coming decades, including through science-based steps to protect the Arctic and its peoples.” This “new partnership” seeks to “embrace the opportunities and to confront the challenges in the changing Arctic, with Indigenous and Northern partnerships, and responsible, science-based leadership.”<sup>14</sup> While this statement affirms a bilateral “special relationship” between the two countries, it also suggests a leadership agenda that resonates with that of the European Union. Although the EU’s recent integrated strategy focuses on the European Arctic (as well as Greenland, given its relationship with Denmark),<sup>15</sup> its fundamental priorities are consistent with those of the North American Arctic States.

This chapter begins with an overview of Canada’s historical engagement with the Arctic and the development of its Northern Strategy, explaining why

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[2013] 5 (1) *The Yearbook of Polar Law Online*, 7–43, and John English, *Ice and Water: Politics Peoples and the Arctic Council* (Penguin Canada, Toronto 2013).

- 12 For a sample of these views, see Heather Exner-Pirot, ‘Canada’s Arctic Council chairmanship (2013–2015): a post-mortem’ (2016) 22 (1) *Canadian Foreign Policy Journal*, 87, 88.
- 13 On these theme, see P. Whitney Lackenbauer and Rob Huebert, ‘Premier Partners: Canada, the United States and Arctic Security’ (2014) 20 (3) *Canadian Foreign Policy Journal*, 320, 33.
- 14 Prime Minister of Canada ‘U.S.-Canada Joint Statement on Climate, Energy, and Arctic Leadership’ (*Justin Trudeau, Prime Minister of Canada*) <<http://www.pm.gc.ca/eng/news/2016/03/10/us-canada-joint-statement-climate-energy-and-arctic-leadership#sthash.XjRoT2R7.dpuf>> accessed 25 September 2016.
- 15 European Commission (EC), ‘Joint Communication to the European Parliament and the Council: An integrated European Union policy for the Arctic (hereafter “Joint Communication”)’ JOIN (2016) 21.

it places a high priority on sovereignty, economic development for the benefit of Northerners, environmental protection, and governance (particularly by Arctic States and Northern Indigenous peoples). Building on this foundation, we seek to bring the Arctic policies of Canada and the EU into dialogue, highlighting critical interests and issue areas such as the environment and climate change, transport, energy, mineral resources, fisheries, and research. While we argue that evolving policy positions point towards an increasingly convergent, cooperative agenda between Canada and the EU on Arctic issues, divergent interests and messaging associated with shipping and freedom of the seas/navigation rights, the rights of Indigenous peoples and the trade in marine mammals, resource development and environmental stewardship could continue to complicate the relationship.

## 2 Canada's Northern Interests: Historical Developments

Although the vast majority of Canadians live close to the country's southern border (the 49th parallel) with the United States, the Arctic occupies a distinctive place in Canada's national identity. Rich symbolism, imagery and mythology in Canada casts the Arctic as a resource-rich "frontier of destiny," a homeland for Indigenous peoples, a fragile environment in need of protection, and a source of national inspiration. Accordingly, Canada's historic and ongoing dilemma is how to balance sovereignty, security and stewardship in a manner that protects and projects national interests and values, promotes sustainable development and healthy communities, and facilitates circumpolar stability and cooperation.<sup>16</sup>

Inuit and other Northern Indigenous groups have occupied what is now the Canadian North since "time immemorial." As hunter-gatherer societies, their use and occupancy of the lands and waters form a core consideration of what is now widely accepted to constitute Canadian sovereignty. Accordingly, Canada has a recognized legal duty to consult and, where appropriate, accommodate Indigenous groups when their treaty and Aboriginal rights could be impacted. Their inter-connectedness with the land poses special obligations on the Canadian state to ensure that its practices are representative of their rights, interests, and wishes as recognized in both domestic and international law. Furthermore, these Indigenous peoples are transnational in that their

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16 For an introduction to these themes, see Franklyn Griffiths, Rob Huebert, and P. Whitney Lackenbauer, *Canada and the Changing Arctic: Sovereignty, Security, and Stewardship* (Wilfrid Laurier University Press, Waterloo 2011).

memberships include citizens of two or more countries. This is reflected in the Permanent Participant organizations representing them at the Arctic Council today. The Inuit Circumpolar Council (ICC), an NGO that formed in 1977 (nearly two decades before the Council), represents 155,000 Inuit of Chukotka (Russia), Alaska, Canada, and Greenland (Denmark), including just over 50,000 Inuit Canadians. The Gwich'in Council International (GCI) represents the Gwich'in peoples who live in the northernmost third of Yukon and adjacent areas in Alaska and the Northwest Territories. The Arctic Athabaskan Council (AAC) represents 30,000 people of Athabaskan descent who live in Northern Canada and Alaska, with Canadian AAC members including the Dene Nation, the Council of Yukon First Nations, and the Metis Nation of the NWT. Cumulatively, the ongoing vitality of Northern Indigenous peoples makes them an influential force in Canadian domestic politics and in international norm-making in the Arctic more generally.<sup>17</sup>

Apart from short-lived Norse settlements around the turn of the first millennium CE, the earliest European interest in what is now the Canadian North fixated on trying to find a route *through* the region to reach the riches of Asia. The attempts to navigate through the icy labyrinth of islands north of the Canadian mainland from the sixteenth through the nineteenth centuries proved futile, however, and the much-sought after Northwest Passage did not materialize as a feasible commercial frontier. Instead, the fur trade drew both French and English interests further into the northern reaches of the continental mainland. This economic activity played a pivotal role in forging relationships between Indigenous and Euro-Canadian peoples, eventually supplemented by the presence of missionaries, whalers, policemen, and the sporadic appearance of explorers. The British Royal Navy resumed its quest to establish a Northwest Passage in the nineteenth century, and while the search for Sir John Franklin's ill-fated 1845 expedition proved the existence of an Arctic maritime route it also demonstrated its lack of utility. After Confederation in 1867, Euro-Canadians invested their resources and energies into establishing east-west linkages to

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17 See, for example, Natalia Loukacheva, *The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut* (University of Toronto Press, Toronto 2007); Sonia Lawrence and Patrick Macklem, 'From consultation to reconciliation: Aboriginal rights and the Crown's duty to consult' [2000] 29 Can. B. Rev. 252; Canada, 'Aboriginal Consultation and Accommodation—Updated Guidelines for Federal Officials to Fulfill the Duty to Consult' (Canada, March 2011), <<http://www.aadnc-aandc.gc.ca/eng/1100100014664/110010001467>> accessed 29 October 2016; and Timo Koivurova and Leena Heinämäki, 'The participation of indigenous peoples in international norm-making in the Arctic' [2006] 42 (221) Polar Record 101–110.

consolidate the Dominion of Canada. The northern limits of the young country, inherited from the Hudson's Bay Company in 1870, remained ambiguous, and defining them seemed a remote, future consideration.<sup>18</sup>

Canada inherited whatever rights Great Britain had to the High Arctic in 1880, but governed its northern territories in a "fit of absence of mind" until after the Second World War. The Alaska Boundary Dispute between Canada and the United States suggested, in the minds of Canadians, that not only did the United States cast covetous eyes at Canada's Northern territories but that Britain would sell out our interests to court American goodwill.<sup>19</sup> The Government of Canada would have to defend its own national interests in the North. The Klondike Gold Rush prompted the first official assertions of authority in the form of the Northwest Mounted Police and a small field force sent to the region around the turn of the twentieth century, but the expansion of official state activity into the region remained modest before the Second World War. Official expeditions into the Northwest Passage, matched by flag planting and asserting a Canadian "sector claim" up to the North Pole, were complemented by diplomatic activities to confirm Canadian sovereignty over the islands of Canada's Arctic archipelago.<sup>20</sup> The delivery of services to Inuit and other Northern Indigenous groups remained minimal, however, with the government preferring to leave responsibilities for welfare and education to the Hudson's Bay Company and missionaries, and only half-heartedly resourcing assimilationist programs such as residential schools. Instead, the prevailing logic that Indigenous peoples were "best left as Indians" prevailed

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18 For a sweeping overview, see Shelagh Grant, *Polar imperative: A History of Arctic Sovereignty in North America* (Douglas & McIntyre Publishers, Vancouver 2011).

19 The Alaska Boundary dispute, which was resolved by arbitration in 1903, concerned the boundary between the Alaska panhandle and British Columbia. Britain still handled Canada's foreign affairs at the time, and one of three Canadian arbitrators—Lord Alverstone, Lord Chief Justice of England—sided with the Americans in drawing a line that was considerably closer to the American position than to the Canadian. This ignited a firestorm of criticism in Canada amongst nationalists who believed that Alverstone had supported the Americans because Britain, worried about the growing military power of Germany, had sacrificed Canadian interests to bolster Anglo-American relations. See John A. Munro, eds, *The Alaska Boundary Dispute* (Copp Clark Publishing Company, Toronto 1970).

20 On sovereignty in the Canadian Arctic before the Second World War, see Gordon W. Smith, *A Historical and Legal Study of Sovereignty in the Canadian North: Terrestrial Sovereignty, 1870–1939*, P.W. Lackenbauer (ed), (University of Calgary Press, Calgary 2014).

until after the Second World War.<sup>21</sup> Accordingly, the Northern Native economy remained rooted in subsistence hunting and the fur trade, while discoveries of oil, gold, and pitchblend (the mineral from which radium is extracted) prompted the emergence of a mining economy for non-Native Canadians in the Northwest Territories (NWT).

The Second World War ushered in the new idea that the Canadian North also represented a military frontier. The American imperative to build the Alaska Highway through the Canadian Northwest, as well as supporting airfields and an oil pipeline, brought a flurry of new activity into the region. Although undertaken in the name of continental security, these activities also resurrected fears about the United States' encroachment on Canadian sovereignty in this sparsely-populated corner of North America.<sup>22</sup> The Americans withdrew at the end of the war and confirmed Canadian ownership over the Yukon and the infrastructure built therein, but visions of a looming Cold War provided a primary impetus for another round of military-inspired development beginning in the late 1940s. The dictates of geography placed the Arctic at the centre of Cold War superpower geopolitics, and in popular opinion and in the eyes of some Canadian officials, the American security agenda again seemed to pose a potential threat to Canada's sovereignty. In the end, however, the North American neighbours found solutions that affirmed Canada's terrestrial sovereignty.<sup>23</sup> On the other hand, the American behemoth largely dictated the pace of military modernization in Canada's North throughout the

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21 See, for example, Ken Coates, *Best Left as Indians: Native-White Relations in the Yukon Territory, 1840–1973* (McGill-Queen's University Press, Kingston & Montreal, 1991) and William R. Morrison, 'Canadian sovereignty and the Inuit of the central and eastern Arctic' (1986) 10 (1) *Études/Inuit/Studies*, 245–259.

22 See Kenneth Coates and William R. Morrison, *The Alaska Highway in World War II: The US Army of Occupation in Canada's Northwest* (University of Oklahoma Press, Norman 1992) and Shelagh Grant, *Sovereignty or Security? Government Policy in the Canadian North, 1936–1950* (UBC Press, Vancouver 1988).

23 See, for example, P. Whitney Lackenbauer, 'Right and Honourable: Mackenzie King, Canadian-American Bilateral Relations, and Canadian Sovereignty in the Northwest, 1943–1948' in John English, Kenneth McLaughlin, and P.W. Lackenbauer (eds), *Mackenzie King: Citizenship and Community* (Robin Brass Studio, Toronto 2002) 151–68, and Lackenbauer and Peter Kikkert, 'Sovereignty and Security: The Department of External Affairs, the United States, and Arctic Sovereignty, 1945–68' in Greg Donaghy and Michael Carroll (eds), *In the National Interest: Canadian Foreign Policy and the Department of Foreign Affairs and International Trade, 1909–2009* (University of Calgary Press, Calgary 2011) 101–20.

1950s and the major socio-economic, cultural, and environmental impacts that flowed from it.

During this era, Canadian officials began to awaken to the federal government's obligations to Northern residents. The introduction of the Canadian social welfare system meant that Indigenous Canadians now had access to a wide array of programs, from family allowances to old-age pensions, and then housing, schooling, health care, and economic development grants. As a result, the federal government became increasingly involved in the lives of Northerners at a time of tremendous socio-political change. To seek wage employment at military installations or to receive government services, Northern Indigenous peoples (particularly Inuit) who had followed a seasonal cycle, living off the land hunting and fishing since time immemorial, were drawn into small permanent communities sprinkled across the North. As a result, by the late 1960s the vast majority of Indigenous peoples no longer lived in tents or igloos (snow-houses) but in government housing.<sup>24</sup> "In communities, traditional methods of subsistence were difficult for Inuit to maintain because of the lengthy travel distances required to find animal resources, and the need to maintain a steady family income through wage employment," historian Sarah Bonesteel explains.<sup>25</sup> Although federal programs hoped to improve living standards through a diversified economy that would offer wage labour opportunities in industries such as mining as well as the continuation of the subsistence economy, the result of the transition to sedentary, settlement-based living was to produce cultural dislocation and wide-sweeping economic dependency.

The role of the Northern frontier in Canada's future economic prosperity grew in the twentieth century, as Canadians awakened to the idea of exploiting the region's abundant natural resources. Geological Survey of Canada mapping operations in the early postwar period "discovered" gold, silver, nickel, zinc, lead, molybdenum and asbestos in the NWT districts of Keewatin and Mackenzie, leading to the opening of new mines. Exploration in the 1960s shifted to base metals around Great Bear Lake. By that time, Prime Minister John Diefenbaker had articulated a new "northern vision" for Canada that promised "roads to resources" and would generate national prosperity. Only partially implemented, this plan did not extend to the High Arctic or realize the high

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24 On this process, see David Damas, *Arctic Migrants/Arctic Villagers: The Transformation of Inuit Settlement in the Central Arctic* (McGill-Queen's University Press, Montreal & Kingston 2002).

25 Sarah Bonesteel, *Canada's Relationship with Inuit: A History of Policy and Program Development* (Indian and Northern Affairs Canada, Ottawa 2008).

expectations for economic development in Canada's northern territories. Over time, however, mining developments extended to Canada's archipelago, with a lead-zinc mine at Nanisivik on Baffin Island opening in 1976 and the Polaris lead-zinc mine on Little Cornwallis Island that started production in 1982.<sup>26</sup>

Economic development became intertwined with issues of sovereignty, Indigenous rights, and environmentalism in the context of oil and gas exploration. The discovery of the Prudhoe Bay field off the north slope of Alaska in 1968 set off an Arctic exploration boom that persisted until oil prices declined precipitously in the mid-1980s.<sup>27</sup> The viability of these northern projects depended upon the ability to transport resources to market. In 1969, American-owned Humble Oil sent an icebreaker, the *Manhattan*, through the Northwest Passage to determine whether it was a viable commercial shipping route for oil and gas from the Beaufort Sea. In response, the Canadian media reported the voyage as a direct challenge to Canada's Arctic sovereignty. In response, the Liberal government of Pierre Trudeau announced its "functional" approach to Canadian sovereignty in 1970. It cast the Arctic as an ecologically delicate region: Canada needed to extend its jurisdiction northward to ensure that foreign vessels did not pollute Canadian waters. The *Arctic Waters Pollution Prevention Act* (AWPPA) allowed Canada to regulate and control future tanker traffic through the NWP by creating a pollution prevention zone one hundred nautical miles outside the archipelago as well as in the waters between the islands.<sup>28</sup> Although initially opposed to this unilateral measure, the United States supported Canadian-sponsored Article 234 in the 1982 UN Convention on the Law of the Sea (UNCLOS), which gives coastal States "the right to adopt

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26 W.W. Nassichuk, 'Forty years of northern non-renewable natural resource development' (1987) 275 *Arctic*. On Diefenbaker's Northern Vision, see P. Isard, 'Northern Vision: Northern Development during the Diefenbaker Era' (unpublished M.A. thesis, University of Waterloo, 2010).

27 The Norman Wells field had yielded petroleum since the 1920s, but exploration in the northern Yukon, Mackenzie Delta, and High Arctic islands began in the 1950s. On oil and gas activities in the 1970s and 80s, see Robert Page, *Northern Development: The Canadian Dilemma* (McClelland & Stewart, Toronto 1986).

28 The AWPPA (1970, R.S.C. 1985) and its regulations provides specific construction standards for vessels engaged in Arctic shipping, a system of shipping safety control zones, a ban on discharges of oil, hazardous chemicals, and garbage, and requirements for vessels to carry insurance to cover damages from any these discharges. On this period, see J. Alan Beesley, 'Rights and responsibilities of Arctic coastal states: the Canadian view' (1971) 3 *Journal of Maritime Law & Commerce* 1, and Ted McDorman, *Salt Water Neighbors: International Ocean Law Relations Between the United States and Canada* (Oxford University Press, Oxford 2009).



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.”<sup>29</sup>

Alongside environmental considerations encouraging Canadians to reconceptualize the Arctic as mere frontier space to a *place* in need of protection, the idea of the Arctic as homeland gained greater political salience in the Canadian dialogue on development in the 1970s. Indigenous groups had re-emerged as a political force in Canada, and Northern Native leaders would no longer tolerate being left out of discussions related to resource development in their traditional territories. The Berger Inquiry, conducted to look into the socio-economic and environmental impact of a pipeline along the Mackenzie Valley through the Yukon and NWT, elicited unprecedented public engagement on a frontier development project before it began. Justice Thomas Berger’s final report, *Northern Frontier, Northern Homeland*, highlighted competing visions of Canada’s Northern history and the future. “We look upon the North as our last frontier,” he noted of the southern Canadian view. “It is natural for us to think of developing it, of subduing the land and extracting its resources to fuel Canada’s industry and heat our homes. But the native people say the North is their homeland. They have lived there for thousands of years. They claim it is their land, and they believe they have a right to say what its future ought to be.” Berger recommended a ten-year moratorium on any pipeline development so that Aboriginal land claims could be settled and appropriate conservation areas established beforehand.<sup>30</sup> Thus, internal sovereignty claims by Canadian Indigenous groups changed the political dialogue, and Canada embarked upon a process of settling comprehensive land claims with Northern Indigenous peoples whose land rights had not been dealt with by treaty or other legal means—a process that has dramatically transformed Canada’s political landscape and remains ongoing today.<sup>31</sup>

29 See Don McRae, ‘The negotiation of Article 234’ in Franklyn Griffiths (eds), *Politics of the Northwest Passage* (McGill-Queen’s University Press, Montreal & Kingston 1987) 98–114, and Rob Huebert, ‘Article 234 and Marine Pollution Jurisdiction in the Arctic’ in Don Rothwell and Alex Oude Elferink (eds), *The Law of the Sea in the Polar Oceans: Issues of Maritime Delimitation and Jurisdiction* (Kluwer, Dordrecht, 2001) 249–267.

30 Thomas R. Berger, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry* vol. 1 (Minister of Supply and Services Canada, Ottawa 1977) 1. See also Canadian Broadcasting Corporation (CBC) archives, ‘The Berger Pipeline Inquiry’ (*CBC News*) <[http://archives.cbc.ca/IDD-1-73-295/politics\\_economy/pipeline/](http://archives.cbc.ca/IDD-1-73-295/politics_economy/pipeline/)> accessed 26 October 2016, and Martin O’Malley, *The Past and Future Land: An Account of the Berger Inquiry into the Mackenzie Valley Pipeline* (P. Martin Associates Ltd., Toronto 1976).

31 See, for example, Kirk Cameron and Graham White, *Northern governments in transition: Political and constitutional development in the Yukon, Nunavut and the Western*

Domestic drivers dominated the Canadian political agenda for most of the 1970s and early 1980s, but the external dimensions of sovereignty re-emerged with the August 1985 voyage of the US Coast Guard icebreaker *Polar Sea* through the Northwest Passage. Although launched for reasonable operational reasons relating to the resupply of the American base at Thule, Greenland, the Americans refused to seek official permission from Canada, recognizing that this would prejudice their own legal position on international straits globally. In response, the Conservative government of Brian Mulroney announced that Canada was officially drawing straight baselines around the Arctic Archipelago effective 1 January 1986, thus confirming Canada's sovereignty over the NWP as "historic, internal waters." Concurrently, it outlined an aggressive plan to exercise control over its waters and assert its Arctic sovereignty.<sup>32</sup> Canada also promised to negotiate with the United States—a prudent move that, owing to Prime Minister Mulroney's close relationship with President Ronald Reagan, yielded the 1988 Arctic Cooperation Agreement under which, in the interests of safe navigation, the "United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada." By "agreeing to disagree" on the legal status of the passage, the two countries reached "a pragmatic solution based on our special bilateral relationship, our common interest in cooperating on Arctic matters, and the nature of the area"—one that did not prejudice either country's legal position or set a precedent for other areas of the world.<sup>33</sup> With this understanding in place and the perceived "crisis" averted, Canadian political attention associated with Arctic sovereignty faded once again.

With the end of the Cold War, the official discourse in Canada on Arctic affairs shifted away from continental security and narrow sovereignty interests to emphasize circumpolar cooperation and broad definitions of security that prioritized human and environmental dimensions. Canada was an early champion of the Arctic Council and promoted the inclusion of Indigenous

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*Northwest Territories* (Institute for Research on Public Policy, Montreal 1995); Christopher Alcantara, 'To treaty or not to treaty? Aboriginal peoples and comprehensive land claims negotiations in Canada' [2008] 38 (2) *Publius: The Journal of Federalism* 343–369; and Greg Poelzer and Ken S. Coates, *From Treaty Peoples to Treaty Nation: A Road Map for All Canadians* (UBC Press, Vancouver 2015).

32 See Rob Huebert, 'Polar vision or tunnel vision the making of Canadian Arctic waters policy: The making of Canadian Arctic waters policy' [1995] 19 (4) *Marine Policy* 343–363, and Huebert, 'A Northern Foreign Policy: The Politics of Ad Hocery' in Kim Nossal and Nelson Michaud (eds), *Diplomatic Departures: The Conservative Era in Canadian Foreign Policy, 1984–1993* (UBC Press, Vancouver 2001) 84–99.

33 Christopher Kirkey, 'Smoothing troubled waters: the 1988 Canada-United States Arctic co-operation agreement' [1995] 50 (2) *International Journal* 401–426.

Permanent Participants with a seat at the table. In 1997, a Canadian parliamentary committee recommended that the country should focus on international Arctic cooperation through multilateral governance to address pressing “human security” and environmental challenges in the region. Committee chairman Bill Graham reported that environmentally sustainable human development was “the long-term foundation for assuring circumpolar security, with priority being given to the well-being of Arctic peoples and to safeguarding northern habitants from intrusions which have impinged aggressively on them.”<sup>34</sup> The Liberal government under Jean Chrétien (1993–2003) embraced this emphasis on international cooperation, and *The Northern Dimension of Canada’s Foreign Policy* released in 2000 revealed how environmental and social challenges now predominated:

Both the tradition of transnational co-operation and the new emphasis on human security are particularly applicable to the shaping of the Northern Dimension of Canada’s Foreign Policy. The circumpolar world that includes the northern territories and peoples of Canada, Russia, the United States, the Nordic countries plus the vast (and mostly ice-covered) waters in between was long a front line in the Cold War. Now it has become a front line in a different way—facing the challenges and opportunities brought on by new trends and developments. The challenges mostly take the shape of transboundary environmental threats—persistent organic pollutants, climate change, nuclear waste—that are having dangerously increasing impacts on the health and vitality of human beings, northern lands, waters and animal life. The opportunities are driven by increasingly confident northern societies who, drawing on their traditional values, stand poised to take up the challenges presented by globalization. Whereas the politics of the Cold War dictated that the Arctic region be treated as part of a broader strategy of exclusion and confrontation, now the politics of globalization and power diffusion highlight the importance of the circumpolar world as an area for inclusion and co-operation.<sup>35</sup>

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34 House of Commons Standing Committee on Foreign Affairs and International Trade (HCSFAIT), *Canada and the Circumpolar World: Meeting the Challenges of Cooperation into the Twenty-First Century* (1997), ix, 100.

35 Canada, *The Northern Dimension of Canada’s Foreign Policy* (Department of Foreign Affairs and International Trade, Ottawa 2000).

Framed by principles of Canadian leadership, partnership, and ongoing dialogue with Northerners, this new northern foreign policy was rooted in four overarching objectives: to enhance the security and prosperity of Canadians, especially Northerners and Aboriginal peoples; to assert and ensure the preservation of Canada's sovereignty in the North; to establish the Circumpolar region as a vibrant geopolitical entity integrated into a rules-based international system; and to promote the human security of Northerners and the sustainable development of the Arctic.

By the start of the new millennium, developments in Aboriginal self-government and devolution required new economic opportunities that promoted northern interests. Similarly, asserting and ensuring the preservation of Canadian sovereignty was deemed compatible with multilateral cooperation. The focus on diplomacy and circumpolar cooperation meant that traditional preoccupations with "defending" sovereignty slipped to the back burner. The 2000 Canadian Forces' Arctic Capabilities Study recognized that Northern security had evolved to include environmental, social, and economic aspects, but argued that the coming decades would make the region even more vulnerable to "asymmetric" security and sovereignty threats. Accordingly, it argued that the Canadian Forces had to prepare to respond to challenges related to environmental protection, increased shipping as Arctic sea lanes opened due to climate change, heightened commercial airline activity, and "trans-national criminal activity" that would accompany resource development such as diamond mining.<sup>36</sup> These frames, accentuated by the rising tide of evidence about the pace and impacts of global warming in the Arctic, led Canadian journalists and academic commentators to push in the early 2000s for a more proactive Arctic strategy that anticipated emerging security challenges associated with climate change, boundary disputes like Hans Island, the contested status of the waters of the Northwest Passage for international transit shipping, resource development, and heightened international activity in the region more generally.<sup>37</sup>

In December 2004, Paul Martin's Liberal Government announced an integrated Northern Strategy (devised in concert with the premiers of the Northern territories of Yukon, Northwest Territories, and Nunavut—a new, predominantly Inuit jurisdiction created in 1999) built around seven main goals. First, the strategy promised to strengthen Northern governance, partnerships and

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36 Canadian Forces Northern Area (CFNA), *Arctic Capabilities Study* (Yellowknife 2000).

37 Rob Huebert, 'Climate Change and Canadian Sovereignty in the Northwest Passage' [2001] Isuma: *Canadian Journal of Policy Research* 2 (4); See, in particular, the Arctic Climate Impact Assessment (2004).

institutions to provide Northerners with greater control over decisions about their future. Second, it committed to establishing strong foundations for “strong, sustainable, diversified economies where northerners share in the benefits of northern development.” Third, it proposed “to engage all partners in the North in the protection and stewardship of the environment.” Fourth, it sought to promote “healthy, safe and sustainable northern communities” that would “promote self-reliance.” Fifth, the document committed to ensuring that Canada would continue to play a “leading role” in promoting international cooperation, while taking Northerners’ concerns into “consideration in national efforts to reinforce sovereignty, security and circumpolar cooperation.” Sixth, the strategy promised to preserve, revitalize, and promote Indigenous cultures, recognizing and encouraging “the importance of language, traditional knowledge and way-of-life.” Seventh, the government committed to ensuring that “Canada is a leader in northern science and technology, and to develop expertise in areas of particular importance and relevance to the North.” Although the Martin government conducted public consultations on the strategy in 2005, the results were not released before the federal election at the end of that year which saw a change in government.<sup>38</sup>

In 2005, the Liberal Government’s International Policy Statement (IPS) also identified the Arctic as a priority area in light of “increased security threats, a changed distribution of global power, challenges to existing international institutions, and transformation of the global economy.” It was anticipated that the next two decades would bring major challenges requiring creative diplomacy as well as investments in new defence capabilities. “In addition to growing economic activity in the Arctic region, the effects of climate change are expected to open up our Arctic waters to commercial traffic by as early as 2015,” the new policy stated. “These developments reinforce the need for Canada to monitor and control events in its sovereign territory, through new funding and new tools.”<sup>39</sup> Although the Liberal government fell before it could implement its vision, it had intertwined sovereignty and security in political rhetoric and strategic documents.

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38 See Canadian Arctic Resources Committee, ‘Renewing the Northern Strategy’ [2006] 30 (1) *Northern Perspectives* 2.

39 The IPS focused on surveillance, such as infrared sensors for patrol aircraft, unmanned aerial vehicles, and satellites. Canada, *Canada’s International Policy Statement*, Overview (2005), excerpted in Ryan Dean, P. Whitney Lackenbauer, and Adam Lajeunesse, *Canadian Arctic Defence and Security Policy: An Overview of Key Documents, 1970–2012* (Centre for Military and Strategic Studies/Centre on Foreign Policy and Federalism, 2014 Calgary and Waterloo) 39–40.

It fell to the Conservatives, who came to office in January 2006, to implement this agenda and to make Arctic sovereignty and security a major political priority. The Canadian North was a key component of the Conservatives' 2005 election platform, which played on the idea of an Arctic sovereignty "crisis" demanding decisive action. Stephen Harper promised that Canada would acquire the military capabilities necessary to defend its sovereignty against external threats. "The single most important duty of the federal government is to defend and protect our national sovereignty," Harper asserted. "It's time to act to defend Canadian sovereignty. A Conservative government will make the military investments needed to secure our borders. You don't defend national sovereignty with flags, cheap election rhetoric, and advertising campaigns. You need forces on the ground, ships in the sea, and proper surveillance. And that will be the Conservative approach."<sup>40</sup> In short, the new prime minister's political message emphasized the need for Canadian action with a particular attention to conventional military forces, differentiating his government from the Liberals whom he believed had swung the pendulum too far towards diplomacy and human development.

The government's "use it or lose it" approach to Arctic policy dominated the agenda from 2006–09. A spate of commitments to invest in military capabilities to defend Canada's rights in the region, including new Arctic patrol vessels and more vigorous patrolling, reinforced the government's emphasis on "hard security" rather than "human security" like its predecessors.<sup>41</sup> This formulation offered little political incentive to downplay the probability of military conflict in the Arctic, given that the Conservative government was trying to project an image of strength and commitment to defend the country's sovereignty. But this "use it or lose it" rhetoric frustrated and even offended Northerners, particularly Indigenous peoples who had lived in the region since "time immemorial" (and thus resented any intimation that it was not sufficiently "used") and continued to express concerns about their lack of substantive involvement in national and international decision-making. Inuit representatives, for example, suggested that the government agenda prioritized military investments at the expense of environmental protection and improved social and economic conditions in the North. They insisted that "sovereignty begins at home" and that the primary challenges were domestic human security issues, requiring

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40 Stephen Harper, 'Harper Stands Up for Arctic Sovereignty' address in Ottawa, 22 December 2005.

41 See, for example, Kathleen Harris, 'Laying claim to Canada's internal waters' *Toronto Sun* (Toronto 23 February 2007). On Harper's early vision, see Klaus Dodds, 'We are a Northern Country: Stephen Harper and the Canadian Arctic' [2011] 47 (4) *Polar Record* 371–374.

investments in infrastructure, education, and health care.<sup>42</sup> Furthermore, the Inuit Circumpolar Council's transnational *Circumpolar Inuit Declaration on Sovereignty in the Arctic* (2009) emphasized that "the inextricable linkages between issues of sovereignty and sovereign rights in the Arctic and Inuit self-determination and other rights require States to accept the presence and role of Inuit as partners in the conduct of international relations in the Arctic." The declaration envisions the Inuit playing an active role in all deliberations on environmental security, sustainable development, militarization, shipping, and socio-economic development.<sup>43</sup>

### 3 Canada's Integrated Northern Strategy

After the Ilulissat Declaration by the Arctic coastal States in May 2008, official Canadian statements began to adopt a more optimistic and less bellicose tone. In March 2009, Minister of Foreign Affairs Lawrence Cannon acknowledged in a speech that geological research and international law (not military clout) would resolve continental shelf and boundary disputes, and he emphasized "strong Canadian leadership in the Arctic ... to facilitate good international governance in the region."<sup>44</sup> These constructive messages were echoed in *Canada's Northern Strategy: Our North, Our Heritage, Our Future*, released the

42 See, for example, Paul Kaludjak, 'The Inuit are here, use us' *Ottawa Citizen* (Ottawa 18 July 2007); Mary Simon, 'Does Ottawa's northern focus look backwards?' *Nunatsiaq News* (11 April 2008); and the perspectives in Inuit Tapiriit Kanatami, *Nilliajut: Inuit Perspectives on Security, Patriotism and Sovereignty* (Inuit Qaujisarvingat, Ottawa 2013).

43 Inuit Circumpolar Council (ICC), 'A Circumpolar Declaration on Sovereignty in the Arctic' (Ottawa 2009), <<https://www.itk.ca/publication/circumpolar-declaration-sovereignty-arctic>> accessed 26 October 2016. Inuit representatives have opposed state actions that they feel violate their interests, such as Canada's decision to host a meeting for the five Arctic coastal states in March 2010 without inviting Inuit and First Nations to the discussions, and even critiqued a bilateral Canada-Denmark Arctic defence and security cooperation agreement because they were not involved in negotiating it. As such, indigenous voices add to the complexity (and richness) of the Canadian message projected to the rest of the world.

44 Speaking Notes for the Hon. Lawrence Cannon, Minister of Foreign Affairs, "Canada's Arctic Foreign Policy: The International Dimension of Canada's Northern Strategy," Whitehorse, Yukon, 11 March 2009, reprinted in P. Whitney Lackenbauer and Ryan Dean, *Canada's Northern Strategy under Prime Minister Stephen Harper: Speeches and Documents on Sovereignty, Security, and Governance, 2006–15* (Centre for Military, Security and Strategic Studies/Centre on Foreign Policy and Federalism, 2016 Calgary and Waterloo), 77–79.

following July. It emphasized four main pillars: exercising Canada's Arctic sovereignty, promoting social and economic development, protecting Canada's environmental heritage, and improving and devolving Northern governance. The strategy reinforces a message of partnership: between the federal government and Northern Canadians, and between Canada and its circumpolar neighbours. Although it trumpeted the government's commitment to "putting more boots on the Arctic tundra, more ships in the icy water and a better eye-in-the-sky," it also emphasized that Canada's disagreements with its neighbours were "well-managed and pose no sovereignty or defence challenges for Canada." This signaled a rather abrupt change of tone from previous political messaging.<sup>45</sup>

Rather than a "use it or lose it" message, Canada's Northern Strategy stressed opportunities for cooperation in the circumpolar world. The strategy cast the United States as an "exceptionally valuable partner in the Arctic" with which Canada has managed its differences responsibly since the Second World War. It also emphasized opportunities for cooperation with Russia and "common interests" with European Arctic states, as well as a shared commitment to international law. Implicitly, this confirmed that bilateral and multilateral engagement is key to stability and security in the region. "We're not going down a road toward confrontation," Cannon emphasized. "Indeed, we're going down a road toward co-operation and collaboration. That is the Canadian way. And that's the way my other colleagues around the table have chosen to go as well." The foreign minister insisted that his government saw the Arctic as an "absolute priority" and that the needs of Northerners would be at the heart of Arctic policy.

The Department of Foreign Affairs released its *Statement on Canada's Arctic Foreign Policy* in August 2010.<sup>46</sup> This document reiterated the importance of the Arctic in Canada's national identity and Canada's role as an "Arctic power." The overall message mirrored the broader Northern Strategy, outlining a vision for the Arctic as "a stable, rules-based region with clearly defined boundaries, dynamic economic growth and trade, vibrant Northern communities, and healthy and productive ecosystems." These themes—which bear striking resemblance to The Northern Dimension of Canada's Foreign Policy released in 2000—reinforce how recent strategic messaging from Ottawa

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45 Canada, *Canada's Northern Strategy: Our North, Our Heritage, Our Future* (Department of Indian Affairs and Northern Development, Ottawa 2009).

46 Canada, *Statement on Canada's Arctic Foreign Policy* (Department of Foreign Affairs and International Trade, 2010, Ottawa). The following paragraphs are derived from this document.



reflects an approach to circumpolar issues that began under the Liberals but was simply pushed more forcefully by the Conservatives.

The first and foremost pillar of Canada's foreign policy is "the exercise of our sovereignty over the Far North." The "hard security" message has been muted since 2009, and the tone of cooperation with circumpolar neighbours and Northerners has been amplified. Reaffirming that Canada's Arctic sovereignty is longstanding, well-established and based on historic title (rooted, in part, on the presence of Inuit and other Canadians in the region since time immemorial), the statement projects a stable, secure circumpolar world—but one in which Canada will continue to uphold its rights as a sovereign, coastal state. Accordingly, Canada's Arctic Foreign Policy Statement commits Canada to "seek to resolve boundary issues in the Arctic region, in accordance with international law" and to secure its rights to the extended continental shelf. Longstanding disputes respecting the Northwest Passage, Beaufort Sea, and Hans Island are well-managed and pose no acute sovereignty or security concerns to Canada.<sup>47</sup> Leading Canadian academic experts seem to have reached a similar consensus, with previous proponents of the "sovereignty on thinning ice" school largely abandoning their earlier arguments that Canadian sovereignty will be a casualty of climate change and foreign challenges. Instead, academic narratives anticipating potential conflict now emphasize how other international events (such as Russian aggression in the Ukraine) could "spill over" into the Arctic or how new non-Arctic state and non-state actors might challenge or undermine Canadian sovereignty and security.<sup>48</sup>

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47 On 28 November 2012, the Foreign Ministers of Canada and the Kingdom of Denmark announced that they had reached a tentative agreement on where to establish the boundary in the Lincoln Sea. Negotiators are transforming the tentative agreement into a treaty text for ratification by their respective governments.

48 See, for example, Rob Huebert, 'Why Canada, US must resolve their Arctic border disputes,' *Globe and Mail* (21 October 2014); Huebert, 'How Russia's move into Crimea upended Canada's Arctic Strategy' *Globe and Mail* (2 April 2014); Huebert, 'Is Canada ready for Russia's hardball approach to the North Pole' *Globe and Mail* (30 January 2014); Derek Burney and Fen Osler Hampson, 'Arctic alert: Russia is taking aim at the North' *Globe and Mail* (9 March 2015); Michael Byers, 'The Northwest Passage Dispute Invites Russian Mischief' *National Post* (28 April 2015); Chris Sorensen, 'The World's First Ice-Busting Yachts Open the High Arctic' *Maclean's* (30 December 2015); Scott Borgerson and Michael Byers, 'The Arctic Front in the Battle to Contain Russia' *Wall Street Journal* (New York 8 March 2016). For a less alarmist view of Russia, see Adam Lajeunesse and Whitney Lackenbauer, 'Canadian Arctic Security: Russia's Not Coming' (*ArcticDeeply*, 14 April 2016) <<https://www.opencanada.org/features/canadian-arctic-security-russias-not-coming>> accessed 25 September 2016.

Other dimensions of the *Statement on Canada's Arctic Foreign Policy* reflect the interaction between domestic and international agendas in Canada's Northern strategy. Canada's North is home to numerous world-class mineral deposits, and the country has a long-standing reputation for welcoming foreign investment in its resource sector. Trade and investment in resource development, a primary catalyst for the surge in international interest in the Arctic, are upheld as main priorities given that the mining and energy sectors are key drivers of northern economies and offer significant opportunities for economic and social development. Accordingly, the second pillar, "Promoting Economic and Social Development," promotes the idea that creating a dynamic, sustainable northern economy and improving the social well-being of Northerners is essential to unleashing the true potential of Canada's Northern Territories. The statement emphasizes that Canada is actively promoting Northern economic and social development internationally on three key fronts: 1) taking steps to create the appropriate international conditions for sustainable development; 2) seeking trade and investment opportunities that benefit Northerners and all Canadians; and 3) encouraging a greater understanding of the human dimension of the Arctic.

The third pillar, "Protecting the Arctic Environment," suggests that Canada is taking concrete action to protect and manage the unique and fragile ecosystems and wildlife of the Arctic, which are being affected by global forces. Its "comprehensive approach" to environmental protection, built around the idea of sustainability, seeks to balance the frontier-homeland equation, "ensuring [that] conservation keeps pace with development and that development decisions are based on sound science and careful assessment."<sup>49</sup> Recent domestic initiatives have included cumulative impact monitoring programs, scientific research to support regulatory decision-making related to Northern oil and gas management, remediation of contaminated military and mine sites, the creation of new terrestrial and marine protected areas, and the expanded application of the *Arctic Waters Pollution Prevention Act* to the full extent of Canada's Exclusive Economic Zone.<sup>50</sup> In the international sphere, Canada's official

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49 Canada, 'Protecting our Environmental Heritage' (Government of Canada, updated 13 April 2015), <<http://www.northernstrategy.gc.ca/env/index-eng.asp>> accessed 26 October 2016.

50 Kristin Bartenstein, 'The 'Arctic exception' in the law of the sea convention: a contribution to safer navigation in the northwest passage?' [2011] 42 (1-2) *Ocean Development & International Law* 22-52. Pursuant to article 234 of UNCLOS, on 1 July 2010 Canada also implemented mandatory ship reporting (NORDREG) for vessels destined for Canada's

environmental actions pursuant to its Northern Strategy are geared towards: 1) promoting an ecosystem-based management approach together with Arctic neighbours and others; 2) contributing to and supporting international efforts to address climate change in the Arctic; 3) enhancing efforts on other pressing international issues, including pursuing and strengthening international standards for environmental protection; and 4) strengthening Arctic science, building on the legacy of the International Polar Year (IPY, 2007–08).

Science and technology is considered a cross-cutting theme that underpins all of Canada's Northern Strategy priorities. As a world leader in Arctic science (second only to the United States in terms of scientific publications on the Arctic),<sup>51</sup> its research extends beyond the academic sector to the private, not-for-profit, and government sectors (including Indigenous researchers and organizations). Official statements tout that Aboriginal peoples and Northerners played a significant role in Canada's planning, coordination, and implementation of its contributions to IPY, and that Canada's investment of \$156 million was one of the largest by a single country.<sup>52</sup> The government has committed to significant new infrastructure in support of Northern science, including a new polar icebreaker and remote sensing systems to support northern monitoring activities such as sea ice monitoring for navigation support, vessel detection in support of security and safety, and various environmental monitoring activities including pollution detection and marine wind derivation. As a flagship initiative, Canada is investing \$250-million in building the Canadian High Arctic Research Station (CHARS)—a world-class hub for science and technology, based in Cambridge Bay, Nunavut—that it hopes will attract international scientists to work with Canadians.<sup>53</sup>

The fourth pillar commits to "Improving and Devolving Governance and Empowering the Peoples of the North." Domestically, this involves the ongoing

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Arctic waters, replacing the previous voluntary reporting system which had been in place since 1977.

51 Grégoire Côté and Michelle Picard-Aitken, *Arctic Research in Canada: A Bibliometric Analysis* (Science-Metrix for Indian and Northern Affairs Canada, Montreal 2009); Canadian Polar Commission, *The State of Northern Knowledge in Canada* (Canadian Polar Commission, Ottawa 2014).

52 Canada, *Government of Canada Program for International Polar Year: Highlights and Achievements* (Minister of Aboriginal Affairs and Northern Development, Ottawa 2011).

53 Polar Knowledge Canada, 'Constructing the research station' (*Government of Canada*, updated 2 June 2016) <<https://www.canada.ca/en/polar-knowledge/constructingstation/index.html>> accessed 26 October 2016; Jane George, 'Science, high-tech, guide Nunavut's Canadian High Arctic Research Station' (*Nunatsiaq News*, 29 October 2015) accessed 26 October 2016.

negotiation and implementation of land claim and self-government agreements with Northern Indigenous peoples, as well as the negotiation of devolution agreements of federal responsibilities to the territorial governments. In its international dimension, improved governance includes continued support for the Indigenous Permanent Participant organizations of the Arctic Council, and ensuring that Northern governments and Indigenous organizations in Canada have opportunities to actively participate in shaping Canadian policy on Arctic issues. In Canada's view, this high level of engagement with Permanent Participants (as rights-holders<sup>54</sup>) and other Northern stakeholders is vital to ensuring that the Arctic Council continues to respond to the regions challenges and opportunities.

#### 4 The Canadian Arctic Council Chairmanship (2013–15)

The *Statement on Canada's Arctic Foreign Policy* emphasizes the Arctic Council as the leading intergovernmental forum through which Canada advances its Arctic foreign policy. This reflects its strong contributions to the founding and activities of the Council since 1996, including significant government, Indigenous, and academic expertise, leadership, and resources (both human and financial) to the various working groups and task forces. Accordingly, Canada assumed its second tenure as Chair of the Arctic Council from 2013–15 with great optimism. Canada's vision for the Arctic was again reflected in its overarching theme, "Development for the People of the North," and its three sub-themes: Responsible Arctic Resource Development, Safe Arctic Shipping, and Sustainable Circumpolar Communities. These themes, determined by a government-led public engagement process with northern Canadians, focused on enhancing the capacity of Indigenous Permanent Participants, creating conditions for dynamic and sustainable economic growth, and promoting vibrant communities and healthy ecosystems.<sup>55</sup> The federal government's appointment of Leona Aglukkaq (the first Inuk to serve as a Canadian Cabinet

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54 On the distinction between stakeholders and rightsholders, see Statement by Patricia A.L. Cochran Chair, Arctic Council Indigenous Peoples' Secretariat and Chair, Inuit Circumpolar Council, to the Meeting of Senior Arctic Officials of the Arctic Council, Kautokenio, Norway, (19–20 November 2008), <[https://arcticcouncil.longsight.com/bitstream/handle/11374/883/ACSAONO04\\_11\\_Statement\\_IPS\\_Chair.pdf?sequence=1&isAllowed=y](https://arcticcouncil.longsight.com/bitstream/handle/11374/883/ACSAONO04_11_Statement_IPS_Chair.pdf?sequence=1&isAllowed=y)> accessed 24 November 2016.

55 *Canada's Arctic Council Chairmanship, 2013–2015* (Department of Foreign Affairs and International Trade, Ottawa 2013).

minister) as Canada's Minister and Chair of the Arctic Council reaffirmed a national commitment to Indigenous leadership. Although her appointment elicited criticism from some commentators who questioned her mandate and competency because she was not Canada's foreign minister, others were pleased to see an Arctic Indigenous person serve as chair of the Arctic Council for the first time.<sup>56</sup>

During the course of its chairmanship, Canada committed to eleven priority initiatives: strengthening the Arctic Council; creation of a Circumpolar Business Forum; Arctic marine oil pollution prevention;<sup>57</sup> guidelines for arctic tourism and cruise ship operations in the Arctic; protecting Arctic traditional ways of life; promoting traditional and local knowledge; addressing short-lived climate pollutants; facilitating adaptation to climate change; promoting mental wellness in Northern circumpolar communities; migratory bird conservation; and enhancing scientific cooperation in the Arctic. All of the Arctic Council states and Permanent Participants supported these initiatives, the first ten of which Canada proposed and the eleventh (on scientific cooperation) coming from the U.S. and Russia.<sup>58</sup> This agenda invited criticisms from stakeholders who worried that Canada's agenda departed from the Council's traditional emphasis on environmental protection and scientific assessments, instead imposing a parochial Canadian (rather than a circumpolar) vision. "Rather than viewing the Arctic as an increasingly global place, with a legitimate role for non-Arctic actors," political scientist Heather Exner-Pirot suggests, "Aglukkaq prioritized

56 On the debate over Aglukkaq's appointment and the northern consultations, see Heather Exner-Pirot, 'Canada's Arctic Council chairmanship (2013–2015): a post-mortem' (2016) 22 (1) *Canadian Foreign Policy Journal* 86.

57 Arctic States signed an Agreement on Cooperation on Marine Oil Pollution Preparedness and Response at Kiruna Ministerial Meeting in May 2013, but the Arctic Marine Oil Pollution Prevention initiative was revised in light of American and Norwegian concerns, with the U.S. reticent to support language that implied the negotiation of a new international instrument and Norway reluctant to discuss standards. In the end, the Council developed a Framework Plan for Cooperation on Prevention of Oil Pollution from Petroleum and Maritime Activities in the Marine Areas of the Arctic to promote regulatory cooperation in the petroleum and shipping industries to prevent marine oil pollution, protect the environment and local economies, and safeguard traditional livelihoods and ways of life. Canada, 'Highlights of the Arctic Council Program (2013–15)' updated 4 November 2015 <<http://www.international.gc.ca/arctic-arctique/chairman-ship-presidence.aspx?lang=eng>> accessed 26 October 2016.

58 The Kiruna Declaration (2013) referred to eight of these initiatives, with the two initiatives that were not mentioned (Guidelines for Arctic Tourism and Cruise Ship Operations, and Migratory Bird Conservation) captured in the relevant Working Group sections of the Senior Arctic Officials (SAO) Report to Ministers.

activities that supported Northerners, especially Canadian Northerners, and more specifically Nunavummiut, and in particular Inuit.”<sup>59</sup>

The first sub-theme, Responsible Arctic Resource Development, emphasized the sustainable development of natural resources. Canada’s “top priority” along these lines was the creation of a “Circumpolar Business Forum,” intended to bring circumpolar business perspectives and advice to the work of the Council. The Arctic Economic Council (AEC) held its first meeting in Iqaluit in September 2014. As an “independent organization that facilitates Arctic business-to-business activities and responsible economic development through the sharing of best practices, technological solutions, standards and other information,” the AEC’s membership represents a wide range of business interests: “from mining and shipping companies to reindeer herding and Aboriginal Economic Development Corporations.”<sup>60</sup> Although prematurely criticized for potentially undermining the Arctic Council and the unique status of Permanent Participants, as well as for providing “transnational corporations with preferential access to national governments,”<sup>61</sup> the realities of the AEC remain much more modest and aspirational at this stage, offering the prospect of business support to bolster Canada’s desire that Arctic communities benefit from the economic boom that is unfolding in the region.

The Safe Arctic Shipping theme built upon previous Council recommendations, such as the landmark Arctic Marine Shipping Assessment (2009),<sup>62</sup> as well as the ongoing work of multilateral mechanisms like the International

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59 Exner-Pirot, ‘Canada’s Arctic Council chairmanship’ 87.

60 Arctic Economic Council, ‘Backgrounder’ <<http://arcticeconomiccouncil.com/about-us/backgrounder/>> accessed 26 October 2016. AEC members decided to focus their efforts on five overarching themes: establishing strong market connections between the Arctic states; encouraging public-private partnerships for infrastructure investments; creating stable and predictable regulatory frameworks; facilitating knowledge and data exchange between industry and academia; and traditional indigenous knowledge, stewardship and a focus on small businesses. Arctic Economic Council, ‘Messaging’ (*Arctic Economic Council*, 30 September 2014) <<http://arcticeconomiccouncil.com/wp-content/uploads/2015/01/AEC-Backgrounder.pdf>> accessed 26 October 2016.

61 See Lloyd Axworthy and Mary Simon, ‘Is Canada undermining the Arctic Council?’ *Globe and Mail* (4 March 2015). In actual practice, permanent participants have voting privileges within the AEC. See Chris Windeyer, ‘The Arctic Economic Council Makes an Entrance’ (*Arctic Deeply*, 4 May 2016) <<https://www.newsdeeply.com/arctic/articles/2016/05/04/the-arctic-economic-council-makes-an-entrance>> accessed 24 October 2016. On controversy over the AEC, see also Exner-Pirot, ‘Canada’s Arctic Council chairmanship’ 89–90, 93.

62 Arctic Council, *Arctic Marine Shipping Assessment 2009 Report* (Protection of the Arctic Marine Environment Working Group, Oslo 2009).

Maritime Organization (IMO). At the Arctic Council, the Protection of the Arctic Marine Environment (PAME) Working Group developed best practice guidelines for sustainable marine-based tourism and safer cruise-ship operations in the Arctic, encouraging the benefits of tourism for Arctic communities while seeking to mitigate the risks associated with increased activity.<sup>63</sup> This activity also complemented and encouraged the conclusion and adoption of the International Polar Code, negotiated through the IMO, which Canada had long championed and which is expected to enter into force on 1 January 2017.<sup>64</sup> These initiatives reflect Canada's consistent advocacy for the protection of the Arctic environment, and reflect its interests as both a maritime nation and an Arctic coastal state that welcomes navigation in its waters, so long as maritime activities comply with domestic and international rules and regulations.

Work under the third theme, Sustainable Circumpolar Communities, also reinforced the human and environmental dimensions of a changing Arctic. Under Canada's chairmanship, the Sustainable Development Working Group (SDWG) worked with Indigenous communities and health professionals to identify successful approaches to improve mental wellness and resiliency, designed to help Arctic residents (particularly youth) adapt based on solutions that reflect Indigenous cultures and values.<sup>65</sup> The SDWG also developed recommendations to integrate traditional and local knowledge into its work more consistently (a topic of ongoing debate since the founding of the Council) and facilitated PP-led efforts to enhance their capacity and participation in Council

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63 Canada, 'Highlights of the Arctic Council Program'.

64 On the IMO Polar Code, see David VanderZwaag, 'The IMO and Arctic Marine Environmental Protection: Tangled Currents, Sea of Challenges' in Oran Young, Jong Deog Kim, and Yoon Hyung Kim (eds), *The Arctic in World Affairs* (Korea Maritime Institute and Honolulu: East West Center, Seoul 2012) 99–128; Jiayu Bai, 'The IMO Polar Code: The Emerging Rules of Arctic Shipping Governance' 2015] 30 (4) *International Journal of Marine and Coastal Law* 674–699; and IMO, 'Shipping in polar waters' (*International Marine Organization*) <<http://www.imo.org/en/MediaCentre/HotTopics/polar/Pages/default.aspx>> accessed 25 September 2016. On Canada's role, see Peter Kikkert, 'Promoting national interests and fostering cooperation: Canada and the development of a polar code' (2012) 43 *Journal of Maritime Law & Commerce* 319.

65 Results of this project were shared at the Circumpolar Mental Wellness Symposium held in Iqaluit in March 2015. See 'Sharing Hope: Circumpolar Perspectives on Promising Practices for Promoting Mental Wellness and Resilience' (2015), <[https://arcticcouncil.longsight.com/bitstream/handle/11374/411/ACMCA09\\_Iqaluit\\_2015\\_SDWG\\_Sharing\\_Hope\\_Promoting\\_Mental\\_Wellness.pdf?sequence=1&isAllowed=y](https://arcticcouncil.longsight.com/bitstream/handle/11374/411/ACMCA09_Iqaluit_2015_SDWG_Sharing_Hope_Promoting_Mental_Wellness.pdf?sequence=1&isAllowed=y)> accessed 26 October 2016.

activities.<sup>66</sup> With respect to climate change, the Council launched a web-based adaptation portal to facilitate information sharing between Arctic residents, researchers and decision-makers<sup>67</sup> and, building on the Council's ongoing scientific assessment work, developed an action plan to help reduce short-lived climate pollutants (such as black carbon and methane) that warm the Arctic and harm the air quality and the health of Arctic residents.<sup>68</sup> Progress in other priority areas, such as the Arctic Migratory Birds Initiative (a longstanding biodiversity project), also acknowledged the importance of enhanced cooperation between Arctic and non-Arctic countries to conserve vulnerable species

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66 See Arctic Council, Indigenous Peoples Secretariat, 'Draft Recommendations' (from the PP-led workshop on Traditional Knowledge and the Arctic Council held in Reykjavik in February 2014), <<http://arcticpeoplestest.org/traditional-knowledge-workshop/draft-recommendations/>> accessed 26 October 2016. The 2015 Iqaluit Declaration notes that the Ministers of the Arctic states "welcome the recommendations on traditional and local knowledge and recognize the importance of using this knowledge in the work of the Council, instruct the Arctic Council to take relevant actions to implement these recommendations, and note with appreciation the work done by the Permanent Participants to develop their own principles for the use of traditional knowledge." Canada, 'Iqaluit Declaration' (Canada, 2015), <<http://www.international.gc.ca/arctic-arctique/final-declaration-finale.aspx?lang=eng>> accessed 24 November 2016. On PP capacity initiatives, see Jim Gam[b]le, 'The Arctic Council Permanent Participants: Capacity & Support—Past, Present & Future' in Lassi Heininen, Heather Exner-Pirot, and Joel Plouffe (eds), *2015 Arctic Yearbook: Arctic Governance and Governing*, (Northern Research Forum, Akureyri 2015) 385–88.

67 The Arctic Adaptation Exchange project, led by the SDWG, developed an on-line portal that enhances adaptive capacity and fosters the exchange of information/knowledge and the development of best practices by: providing appropriate access to data, knowledge and decision-support tools needed by governments, industry, Arctic indigenous peoples and other residents to manage climate change risks; enabling the sharing of exiting tools and practical adaptation experiences including local and traditional knowledge across the Arctic; and facilitating the development of new practices and tools that support adaptation decision-making (e.g. arcticwide adaptive capacity indices). Canada, the United States, Aleut International Association and Gwich'in Council International collaborated to lead this project. Arctic Council, 'Arctic Adaptation Exchange' <<http://arcticadaptationexchange.com/>> accessed 29 October 2016.

68 See Arctic Council Secretariat, 'Overview of National Submissions under the Arctic Council Framework for Action on Enhanced Black Carbon and Methane Emissions Reductions' (Arctic Council, 2015) <<https://oaarchive.arctic-council.org/handle/11374/1502>> accessed 26 October 2016. The Short-Lived Climate Pollutants (SLCPS) initiative was revised to reflect the concerns of Russia, which wanted the focus to focus solely on scientific research. In the end, the Arctic states and PPs reached consensus to proceed with work focusing on black carbon and methane, which included both supporting science and the development of appropriate national activities to reduce emissions of these pollutants.



and protect traditional Indigenous ways of life. The meat, eggs, and down of migratory birds are important to many Indigenous communities in the Arctic, but most of these species travel to lower latitudes during the winter where they face habitat destruction and pollution. Accordingly, multi-jurisdictional conservation plans, based on rigorous monitoring plans, must reflect the Arctic's connectedness to the rest of the world.<sup>69</sup>

In the end, Canada's chairmanship achieved a mixed success. The official summary report emphasized that it had "worked to support economic prosperity in the region, recognizing that business is essential to support residents and create sustainable communities," and it had "also supported Arctic Indigenous peoples as they continue to adapt to changing social, economic, cultural and environmental conditions."<sup>70</sup> While these areas of emphasis served to reorient the Council's work towards human development, Exner-Pirot noted "many grumblings about Canada's management and leadership of the chairmanship, with some [stakeholders] expressing that it lacked transparency, decisions were made without sufficient consultation, and emphasis was inevitably placed on issues of Canadian domestic concern." Canada's chairmanship did not produce any landmark assessments, yield any binding treaties, or convince other Arctic Council states that Canada's domestic economic priorities were simply transferrable to the rest of the circumpolar world. While tensions with Russia over external developments in the Ukraine and Syria may have inhibited progress on some initiatives, Exner-Pirot concludes that Canada's chairmanship also reflected the shortcomings of Canada's leadership, particularly its propensity to conflate domestic and international agendas.<sup>71</sup>

## 5 The New Liberal Government: A New Way Forward?

On 19 October 2015, Justin Trudeau's Liberal party won the Canadian federal election with a sweeping majority. Although this represented a clear repudiation of Stephen Harper's Conservative government, it should not be misconstrued as an inherent rejection of the 2009 Northern Strategy which, while released under the Conservatives, reflects a longstanding Canadian Arctic agenda built around sovereignty, sustainable development, environmental

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69 Conservation of Arctic Flora and Fauna (CAFF) Working Group, 'Arctic Migratory Birds Initiative (AMBI)' <<http://www.caff.is/arctic-migratory-birds-initiative-ambi>> accessed 17 October 2016.

70 Canada, 'Highlights of the Arctic Council Program'.

71 Exner-Pirot, "Canada's Arctic Council chairmanship," 90–94.

protection, and governance. The change in government, however, is likely to bring a change in tone and emphasis to highlight a *political* departure—even if the main substantive elements of Canada’s Arctic policy are likely to remain intact. Similar to previous administrations, it is likely that Trudeau’s Arctic agenda will continue to focus on domestic issues—particularly those related to the health and resiliency of Indigenous communities. Internationally, this agenda is complemented by a renewed commitment to global climate change mitigation, a “return” to multilateralism and a foreign policy rooted in “responsible conviction,” and a more constructive relationship with the United States.<sup>72</sup>

Respect for and reconciliation with Indigenous peoples lies at the heart of the Liberal agenda. “No relationship is more important to me and to Canada than the one with Indigenous Peoples,” Trudeau highlighted in his mandate letter to each of his Cabinet ministers. “It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.”<sup>73</sup> Accordingly, Canada will place the highest priority on ensuring that its activities in the Arctic (both domestic and international) acknowledge, protect and promote Indigenous peoples’ rights—and, by extension, will insist that other Arctic stakeholders do the same.<sup>74</sup> In May 2016, Canada officially lifted the qualifications to its endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),

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72 See, for example, Matthew Bondy, ‘Justin Trudeau is Putting the ‘Liberal’ Back in ‘Canadian Foreign Policy’ (2015) Foreign Policy <<http://foreignpolicy.com/2015/10/21/justin-trudeau-liberal-canadian-foreign-policy-syria-climate-change/>> accessed 17 October 2016; Lee Berthiaume, ‘A return to multilateralism’ (2015) National Post; and Stéphane Dion, ‘On ‘responsible conviction’ and Liberal foreign policy’ (2016) Maclean’s <<http://www.macleans.ca/politics/ottawa/stephane-dion-how-ethics-inspires-liberal-foreign-policy/>> accessed 17 October 2016. On the new government’s main priorities and their relationship to the North, see Thomas Axworthy, ‘In the North, Justin Trudeau can accomplish great things’ *Toronto Star* (Toronto, 6 March 2016).

73 Prime Minister of Canada, ‘Ministerial Mandate Letters’ <<http://pm.gc.ca/eng/ministerial-mandate-letter>> (*Justin Trudeau, Prime Minister of Canada*) accessed 29 October 2016.

74 The *Statement on Canada’s Arctic Foreign Policy* adopts the phrase Canadian “Aboriginal People,” thus emphasizing individuals living in the North, rather than the plural “peoples” connoting group rights. This reflects a longstanding debate in Canada about Indigenous rights to self-determination under international law. According to some strands of international law, and especially Article 1 of the Covenant, the word “peoples” opens up the prospect of unqualified acceptance of self-determination. See, for example, Andrew F. Cooper, *Tests of Global Governance: Canadian diplomacy and United Nations world conferences* (Tokyo: United Nations University Press 2004) 122–51. The Trudeau Government, however, seems fully prepared to acknowledge Aboriginal peoples as collective entities as well.

which the Conservatives had registered over the requirement for “free, prior and informed consent” from Indigenous peoples on issues that affected them. While disavowing that this new position gives Indigenous groups a “veto” over development projects,<sup>75</sup> Canada’s unqualified support of UNDRIP affirms a strong commitment to welcome “Indigenous peoples into the co-production of policy and joint priority-setting” within the Canadian political community.<sup>76</sup>

Prime Minister Trudeau has also declared that Canada “is back” when it comes to joining global efforts to mitigate climate change.<sup>77</sup> While the Harper government emphasized climate change adaptation measures in its Arctic agenda, the Liberals chastised their predecessors’ alleged “refusal to take meaningful action on climate change,” their lack of funding for science and their “muzzling” of government scientists, and their prioritization of economic growth over environmental protection.<sup>78</sup> In signing the Paris Agreement on climate change, Canada has signalled its commitment to shift course, reduce greenhouse-gas emissions in concert with the international community, and promote a clean-energy future.<sup>79</sup> Along these lines, the U.S.-Canada Joint Statement of March 2016 articulated “a common vision of a prosperous and sustainable North American economy, and the opportunities afforded by advancing clean growth.” Both Trudeau and Obama cited the Paris Agreement as a pivotal moment and committed to reduce methane emissions from the oil and gas sector, as well as advancing climate change action globally. They also

75 Gloria Galloway, ‘Canada drops opposition to UN indigenous rights declaration,’ *Globe and Mail* (9 May 2016);

76 Ken Coates and Bill Favel, ‘Embrace of UNDRIP Can Bring Aboriginal Canada and Ottawa Closer Together’ (*iPolitics*, 19 May 2016) <<http://www.macdonalddlaurier.ca/embrace-of-undrip-can-bring-aboriginal-canada-and-ottawa-closer-together-ken-coates-and-blaine-favel-for-ipolitics/>> accessed 29 October 2016.

77 Jason Fekete, ‘Justin Trudeau says Canada ‘is back at climate-change meeting’ *National Post* (30 November 2015).

78 Liberal Party of Canada, ‘A New Plan for Canada’s Environment and Economy’ (*Liberal*, August 2015) <<https://www.liberal.ca/files/2015/08/A-new-plan-for-Canadas-environment-and-economy.pdf>> accessed 29 October 2016. On the muzzling of government scientists, see for example Verlyn Klinkenborg, ‘Silencing Scientists’ *New York Times* (New York, 21 September 2013); Jonathon Gatehouse, ‘When Science Goes Silent’ *Maclean’s* (3 May 2013); Margaret Munro, ‘Unmuzzling government scientists is just the first step’ *Globe and Mail*, 26 October 2015; and Mark Hume, ‘Federal scientists eager to share their research now that muzzles are off,’ *Globe and Mail* (Toronto, 8 November 2015).

79 Alexa Panetta, ‘Trudeau on climate targets: ‘Canada’s efforts will not cease’ (2016) *Maclean’s* <<http://www.macleans.ca/politics/ottawa/trudeau-on-climate-targets-canadas-efforts-will-not-cess/>> accessed 17 October 2016.

“reaffirm their commitment to working together to strengthen North American energy security, phase out fossil fuel subsidies, accelerate clean energy development to address climate change and to foster sustainable energy development and economic growth.” Both countries also promise to “continue to respect and promote the rights of Indigenous peoples in all climate change decision making.”<sup>80</sup>

Given Canada’s longstanding position that its sovereignty in the Arctic is well-established, there is unlikely to be any reversing of its basic stance on the rights and roles of Arctic states in regional governance. With Prime Minister Trudeau having criticized his predecessor for allegedly politicizing the scientifically-informed legal process to delineate the outer limits of Canada’s continental shelf in the Arctic, Canada is likely to emphasize openness, transparency, the rule of law, and science-based decision-making as it navigates the process established by article 76 of UNCLOS for claims to extended continental shelves.<sup>81</sup> Similarly, the Liberal government is unlikely to succumb to alarmist narratives suggesting that military threats warrant a deviation from our established approach to managing outstanding sovereignty and status of water disputes.<sup>82</sup> While the new government is more likely to emphasize constructive diplomacy rather than to adopt militant rhetoric on Arctic sovereignty issues, it is unlikely to adopt the de-militarization or nuclear-weapons free zone proposals promoted by a small number of left wing groups and

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80 Prime Minister of Canada, ‘U.S.-Canada Joint Statement on Climate, Energy, and Arctic Leadership’ (*Justin Trudeau, Prime Minister of Canada*, 10 March 2016) <<http://pm.gc.ca/eng/news/2016/03/10/us-canada-joint-statement-climate-energy-and-arctic-leadership>> accessed 17 October 2016.

81 After PM Harper “ordered a rewrite of Canada’s international claim for Arctic seabed rights to include the North Pole” in December 2013, Trudeau (as Liberal leader) noted: “I am going to defer to scientists. There has been an awful lot of work done over the past years, and even decades, on mapping out the undersea floor of the North Pole to align with the United Nations regulations.... And I don’t know that it is a place where we need necessarily to have political interference. I trust our scientists and oceanographers in terms of how we’re mapping it.” Steven Chase, ‘Turf war with Russia looms over Ottawa’s claim to Arctic seabed’ *Globe and Mail* (Toronto: 5 December 2013).

82 See, for example, Scott Michael Byers, ‘Arctic Front in the Battle to Contain Russia’ (2016) *The Wall Street Journal* <<http://www.wsj.com/articles/the-arctic-front-in-the-battle-to-contain-russia-1457478393>> accessed 17 October 2016, and Levon Sevunts, ‘Canada’s defence review and the Arctic’ (*Radio Canada International*, 8 April 2016) <<http://www.rcinet.ca/en/2016/04/08/canadas-defence-review-and-the-arctic/>> accessed 17 October 2016.

commentators.<sup>83</sup> Instead, the Liberals have promised to maintain current National Defence spending levels, with “a renewed focus on surveillance and control of Canadian territory and approaches, particularly our Arctic regions, and will increase the size of the Canadian Rangers.”<sup>84</sup> This continuity does not promote a “militarization” of the Arctic agenda, but simply represents a modest investment in appropriate defensive capabilities that help to deter would-be adversaries from attacking North America and, in a direct Arctic context, to support unconventional security and safety missions such as law enforcement and responding to natural or humanitarian disasters.<sup>85</sup>

The Trudeau government is emphasizing international cooperation in line with a more “nuanced” foreign policy. Building on Trudeau’s promise that Canada would have a more “compassionate and constructive voice in the world” under the Liberals after a decade of Conservative rule, in November 2015 newly-appointed Minister of Global Affairs Stéphane Dion called for renewed “engagement” with Russia, despite Canada’s ongoing displeasure with Russian expansionism and aggression in the Ukraine. While the Harper Conservatives had suspended almost all bilateral contact with Russia after the latter invaded Crimea in March 2014, Dion stressed that this extreme stand deviated from the actions of the US and other G-7 partners. “We also need to think about our

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83 See, for example, Ernie Regehr, ‘A Nuclear-Weapon-Free Zone and Cooperative Security in the Arctic’ (Simons Foundation, 14 October 2014) <<http://www.thesimonsfoundation.ca/highlights/nuclear-weapon-free-zone-and-cooperative-security-arctic>> accessed 17 October 2016; Thomas Axworthy, ‘A Proposal for an Arctic Nuclear Weapon-Free Zone’ (2012) *Yearbook of Polar Law* 4 (1) 87–139; and Michael D. Wallace and Steven Staples, *Ridding the Arctic of Nuclear Weapons: A Task Long Overdue* (Rideau Institute, Ottawa 2010).

84 In highlighting the need for “an agile, responsive, and well-equipped military force that can effectively defend Canada and North America,” and by mentioning the Arctic in particular, there is no indication that Arctic defence, security, and safety will be downgraded in importance. Instead, the Liberal party promised to make investments in the Royal Canadian Navy a “top priority,” including completing the six Arctic and offshore patrol ships (AOPS) announced by the Conservatives and the construction of more icebreakers (presumably for the Canadian Coast Guard). Liberal Party of Canada, ‘Defence Platform’ (Liberal, 2015) <<https://www.liberal.ca/realchange/royal-canadian-navy/>> accessed 24 October 2016.

85 P. Whitney Lackenbauer and Adam Lajeunesse, ‘The Canadian Armed Forces in the Arctic: Building Appropriate Capabilities’ (2016) 16 (4) *Journal of Military and Strategic Studies* 7–66. Defence is defined as military actions taken to deter or defeat enemy state actors to protect Canada’s North. Security is defined as precautions taken to guard against crime, attack, sabotage or espionage by criminal or non-state actors. Safety is defined as the actions taken to protect life and limb or to mitigate damages to critical infrastructure and government assets from *force majeure* events. See Canadian Forces Northern Employment Support Plan, November 2012.

national interests because Russia is our neighbour in the Arctic,” the minister explained.<sup>86</sup> While this revised stance provoked debate amongst Canadian commentators, some of whom worried that this would send the wrong signals to an increasingly assertive Putin already “pivoting” towards the Arctic as a “strategic frontier,”<sup>87</sup> the intention to continue cooperation on areas of common ground in Arctic affairs is an eminently sensible one.<sup>88</sup>

While it is premature to determine whether the Trudeau government’s policy priorities really “converge in Canada’s North,” thus investing the region with high political saliency in the country as a whole,<sup>89</sup> the prominent place of the Arctic in the Trudeau-Obama joint statement of March 2016 points in this direction. Emphasizing Indigenous rights and knowledge, as well as “natural marine, land and air migrations that know no borders,” the statement conceptualizes the Arctic as “the frontline of climate change” and articulates four main objectives:

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- 86 Lee Berthiaume, ‘Canada ready to re-engage with Russia, Iran, despite differences, Dion says’ *Ottawa Citizen* (Ottawa, 11 November 2015). During the election campaign in October 2015, Trudeau had told reporters that, if he became prime minister, he would “tell off” Putin “directly to his face” after accusing the Russian leader of “being dangerous” in eastern Europe, “irresponsible and harmful” in the Middle East, and “unduly provocative” in the Arctic. Canadian Press, “Justin Trudeau would tell off ‘bully’ Vladimir Putin ‘directly to his face’ if he becomes prime minister,” *National Post*, 13 October 2015.
- 87 In January 2016, Dion reiterated that Canada hoped to resume dialogue with Russia, despite that country’s military aggression in the Ukraine, and cited the Arctic as a region where Canada would benefit from re-engagement with its circumpolar neighbour. Scott Borgerson and Michael Byers, ‘The Arctic Front in the Battle to Contain Russia’ *Wall Street Journal* (New York, 8 March 2016). See also Matthew Fisher, ‘Allies wait for great defence commitment from Canada while Russia militarizes the Arctic’ *National Post* (4 February 2016) <<http://news.nationalpost.com/news/canada/matthew-fisher-allies-wait-for-greater-defence-commitment-from-canada-while-russia-militarizes-arctic>> accessed 24 October 2016; Eva Salinas & Hannah Hoag [in conversation with Rob Huebert and Heather Exner-Pirot], ‘Canada Wants to Reopen Dialogue with Russia’ (*Arctic Deeply*, 17 February 2016) <<https://www.newsdeeply.com/arctic/articles/2016/02/17/canada-wants-to-reopen-dialogue-with-russia>> accessed 24 October 2016.
- 88 Kari Roberts, ‘Why Russia will Play by the Rules in the Arctic’ (2015) *Canadian Foreign Policy Journal* 21 (2) 112–128; and Adam Lajeunesse and Whitney Lackenbauer, ‘Canadian Arctic Security: Russia’s Not Coming’ (*OpenCanada*, 19 April 2016) <<https://www.opencanada.org/features/canadian-arctic-security-russias-not-coming/>> accessed 24 October 2016.
- 89 Thomas Axworthy, ‘In the North, Justin Trudeau can accomplish great things’ *Toronto Star* (Toronto, 6 March 2016).

- 1) *Conserving Arctic biodiversity through science-based decision making* by achieving national goals for land and marine protected areas, and working “directly with Indigenous partners, state, territorial and provincial governments” to set “a new, ambitious conservation goal for the Arctic based on the best available climate science and knowledge, Indigenous and non-Indigenous alike.
- 2) Collaborating with “Indigenous and Arctic governments, leaders, and communities to more broadly and respectfully” *incorporate Indigenous science and traditional knowledge into decision-making*
- 3) *Building a sustainable Arctic economy* based on scientific evidence, with commercial activities occurring “only when the highest safety and environmental standards are met, including national and global climate and environmental goals, and Indigenous rights and agreements.” Sub-priorities include:
  - a. establish *low impact shipping corridors* and consistent policies for ship operations, taking into account important ecological and cultural areas, vessel traffic patterns, Indigenous and Northern Arctic input, and increased coast guard cooperation of our Coast Guards
  - b. seek a binding international agreement to *prevent the opening of unregulated fisheries in the Central Arctic Ocean*, building “on a precautionary, science-based principle to commercial fishing that both countries have put in place in their Arctic waters”
  - c. ensure that *oil and gas development and exploration* activities “align with science-based standards between the two nations that ensure appropriate preparation for operating in Arctic conditions, including robust and effective well control and emergency response measures”
- 4) *Supporting strong Arctic communities* by “defining new approaches and exchanging best practices to strengthen the resilience of Arctic communities and continuing to support the well-being of Arctic residents, in particular respecting the rights and territory of Indigenous peoples.” This objective stresses that “all Indigenous Peoples in the Arctic are vital to strengthening and supporting U.S. and Canadian sovereignty claims,” and both countries “commit to working in partnership to implement land claims agreements to realize the social, cultural and economic potential of all Indigenous and Northern communities.” Priority areas include “innovative renewable energy and efficiency alternatives to diesel”; community climate change adaptation; “innovative options for housing and infrastructure”; and “greater action to address the serious challenges of

mental wellness, education, Indigenous language, and skill development, particularly among Indigenous youth.”<sup>90</sup>

Indigenous and environmental organizations in Canada applauded the statement, with national Inuit leader Natan Obed stating that “the final language in this document really spoke to Inuit” and heralding it “a tremendous breakthrough for Indigenous people who live in the Arctic.”<sup>91</sup>

## 6 Bringing the EU and Canadian Strategies into Dialogue

The evolution of the European Union’s Arctic policy has been the subject of numerous publications<sup>92</sup> and is dealt with extensively in other chapters in this book. Accordingly, our intention is not to provide yet another summary but rather to use the most recent articulation of European Union policy for the Arctic, released on 27 April 2016 by the Commission and the High Representative for Foreign Affairs and Security Policy as a “Joint Communication to the European Parliament and the Council,” as a way to juxtapose EU and Canadian

90 ‘U.S.–Canada Joint Statement on Climate, Energy, and Arctic Leadership’ (Office of the Prime Minister of Canada, 10 March 2016) <<http://www.pm.gc.ca/eng/news/2016/03/10/us-canada-joint-statement-climate-energy-and-arctic-leadership#sthash.XjRoT2R7.dpuf>> accessed 24 October 2016.

91 Sima Sahar Zerehi, ‘Trudeau–Obama shared Arctic leadership model a hit with Inuit and environmental groups’ (*CBC News*, 11 March 2016) <<http://www.cbc.ca/news/canada/north/trudeau-obama-washington-visit-arctic-promises-1.3486076>> accessed 24 October 2016.

92 Important overviews include Adele Airoidi, *The European Union and the Arctic: policies and actions* (Nordic Council of Ministers, Copenhagen 2008); Adele Airoidi, *European Union and the Arctic: Main Developments July 2008–July 2010* (Nordic Council of Ministers, Copenhagen 2010); Adele Airoidi, *The European Union and the Arctic: Developments and Perspectives, 2010–2014* (Nordic Council of Ministers, Copenhagen 2014); Steffen Weber and Iulian Romanyshyn, ‘Breaking the ice: the European Union and the Arctic’ (2011) 66 (4) *International Journal* 849–860; Kristine Offerdal, ‘The EU in the Arctic: in pursuit of legitimacy and influence’ (2011) 66 (4) *International Journal* 861–877; Timo Koivurova, Kai Kokko, Sebastien Duyck, Nikolas Sellheim, and Adam Stepien, ‘The present and future competence of the European Union in the Arctic’ (2012) 48 (4) *Polar Record* 361–371; Njord Wegge, ‘The EU and the Arctic: European foreign policy in the making’ (2012) 3 (1) *Arctic Review on Law and Politics* 6–28; Andreas Østhagen, ‘The European Union—An Arctic Actor?’ (2013) 15 (2) *Journal of Military and Strategic Studies* 71–92; and Adam Stepień, ‘Internal Contradictions and External Anxieties: One ‘Coherent’ Arctic Policy for the European Union?’ (2015) 7 (1) *Yearbook of Polar Law* 249–289.



policy priorities. Bearing the title “An integrated European Union policy for the Arctic,” the EU document proposes three priority areas:

- 1) Climate Change and Safeguarding the Arctic Environment;
- 2) Sustainable Development in and around the Arctic; and
- 3) International Cooperation on Arctic Issues.

An admonition immediately follows this list of priority issues that the “EU should attach particular importance to research, science and innovation which will play a key role across the three priority areas.”<sup>93</sup> At first glance, these areas resemble the main pillars of Canada’s Northern Strategy and Arctic Foreign Policy (described above).

The introductions to both the Canadian and EU strategies acknowledge the significance and complexity of the changes occurring in the Arctic, with particular attention to climate change. Canada’s Northern Strategy stresses that the “North is undergoing rapid changes, from the impacts of climate change to the growth of Northern and Aboriginal governments and institutions,” and observes that “domestic and international interest in the Arctic region is rising.” The introductory paragraphs of the EU Policy also emphasize that the Arctic is acquiring “a higher profile in international relations”, concluding that “[w]hile the changes affecting the Arctic present opportunities for local communities, they also have the potential to increase tensions in the region.”<sup>94</sup> As discussed, these dynamics make sovereignty Canada’s “first and foremost” priority in Arctic policy. In the case of the EU, the primary policy driver is climate change.

In terms of sovereignty and sovereign rights in the Arctic Ocean, Canada maintains that an established international legal framework is in place and will govern the resolution of maritime boundary disputes and the extended continental shelf.<sup>95</sup> Indeed, each of the five coastal States bordering the Arctic Ocean reiterated their commitment to the legal framework defined by the UN Law of the Sea Convention and to the peaceful settlement of any disputes in

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93 European Commission and The High Representative, ‘An integrated European Union policy for the Arctic’, Joint Communication, JOIN (2016) 21 final, 4.

94 JOIN (2016) 21, 4.

95 With regards to Hans Island, Canada’s only outstanding territorial dispute in the Arctic, the Joint Statement adopted by Canada and Denmark in September 2005 has proven extremely successful in managing the dispute. This statement provided that both parties, without prejudice to their respective legal claims, would inform each other of activities related to Hans Island. Furthermore, all contact by either side with Hans Island would be carried out in a low key and restrained manner.

2008. Although a controversial resolution of the European Parliament in October 2008 called for a new Arctic legal governance regime based upon the Antarctic Treaty (based on the misguided assumption that the region was devoid of governance), subsequent statements by the European Commission have been more sober in recognizing that “an extensive international legal framework is already in place that applies to the Arctic.”<sup>96</sup> The 2016 EU Arctic policy similarly recognizes that the UNCLOS “provides a framework for managing the Arctic Ocean, including the peaceful settlement of disputes.”<sup>97</sup> Thus, while the current regime leaves some difficult questions unanswered—for instance, the resolution of overlapping ECS claims or the true nature of the Commission on the Limits of the Continental Shelf’s recommendations regarding individual claims<sup>98</sup>—the existing legal framework ensures that Canada, as an Arctic coastal state, will be an equal party in any future negotiations and settlement.

The principal perceived “threat” to Canada’s sovereignty in the Arctic stems from outside opposition to its legal position with respect to the Northwest Passage. Successive Canadian governments have declared that all of the waters within Canada’s Arctic archipelago constitute Canadian historic internal waters over which Canada exercises full sovereignty. This assertion of sovereignty necessarily includes the right to govern and control access to the various routes between Canada’s archipelagic islands. Washington, on the other hand, has consistently maintained that the Northwest Passage is an international strait through which the ships and aircraft of all nations enjoy a right of transit passage.<sup>99</sup> Other States have also protested Canada’s governance measures

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96 See, for example, Communication from the Commission to the European Parliament and the Council, ‘The European Union and the Arctic Region’ COM (2008) 763 final, 9–10 <[http://eeas.europa.eu/arctic\\_region/docs/com\\_08\\_763\\_en.pdf](http://eeas.europa.eu/arctic_region/docs/com_08_763_en.pdf)> accessed 29 October 2016.

97 JOIN (2016) 21, 14.

98 On these themes, see Ted McDorman, ‘The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World’ (2002) 17 (3) *International Journal of Marine and Coastal Law* 301–324; Annick de Marffy Mantuano, ‘La fixation des dernières limites maritimes: Le rôle de la Commission des Limites du Plateau Continental’ in Daniel-Heywood Anderson et al. (eds), *La Mer et son Droit: Mélanges offerts à Laurent Lucchini et Jean Pierre Quénedec* (Pedone, Paris 2003) 416; Alex G. Oude Elferink, ‘Causes, Consequences and Solutions Relating to the Absence of Final and Binding Outer Limits of the Continental Shelf’, Robert Volterra, ‘Problems Arising from Submissions by States to the CLCS in relation to Disputed Areas: A Selective Survey of State Practice to Date’ and Bjorn Kunoy, ‘Legal Problems Relating to Differences Arising between Recommendations of the CLCS and the Submission of Particular States’—all three in Clive R. Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Publishers, Leiden 2011) at 253, 273 and 305 respectively.

99 See The White House, Section III “Policy”, sub-section B ‘National Security and Homeland Security Interests in the Arctic’ at paragraph 5, January 9, 2009: “The Northwest Passage is

in the past,<sup>100</sup> and a 2008 Communication of the European Community and a 2014 European Parliament Resolution emphasized freedom of navigation in the newly-opened Arctic routes.<sup>101</sup> Furthermore, Germany's Arctic policy guidelines released in September 2013 announced that the country was "campaigning for freedom of navigation in the Arctic Ocean (Northeast, Northwest and Transpolar Passages) in accordance with high safety and environmental standards."<sup>102</sup> Given Canada's understandable sensitivities with respect to its sovereignty, these challenges to its legal position are bound to elicit concern and generate political friction.

The 2016 EU Arctic policy for the Arctic does not wade into the Northwest Passage controversy, which bodes well for bilateral relations with Canada. Instead, it emphasizes the need for safe and secure maritime activities—a shared priority with Canada. "In view of increasing vessel traffic in the Arctic, including some carrying flags from EU Member States," it asserts, "the EU should contribute to enhance the safety of navigation in the Arctic through

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a strait used for international navigation, and the Northern Sea Route include straits used for international navigation; the regime of transit passage applies to passage through those straits." See also President Obama's 'National Strategy for the Arctic Region' of May 2013: "Accession to the Convention would protect U.S. rights, freedoms, and uses of the sea and airspace throughout the Arctic region, and strengthen our arguments for freedom of navigation and overflight through the Northwest Passage and the Northern Sea Route."

100 For example, in 1978, a Canadian official acknowledged that a "drawer full of protests" had been received following the adoption of Canada's 1970 *Arctic Waters Pollution Prevention Act*. See Ted McDorman, "The New Definition of 'Canada Lands' and the Determination of the Outer Limit of the Continental Shelf" (1983) 14 *Journal of Maritime Law and Commerce* 215.

101 Reference can be made to the 2008 Communication of the European Communities to the European Parliament and the Council, "The European Union and the Arctic Region" in which Member States and the Community were exhorted to "defend the freedom of navigation and the right of innocent passage in the newly opened routes and areas." This call was repeated in paragraph 48 of the recent "European Parliament Resolution of 12 March 2014 on the EU Strategy of the Arctic", which also calls on "the states in the [Arctic] region to ensure that any current transport routes—and those that may emerge in the future—are open to international shipping and to refrain from introducing any arbitrary unilateral obstacles, be they financial or administrative, that could hinder shipping in the Arctic, other than *internationally agreed measures* aimed at increasing security or protection of the environment.

102 Auswärtiges Amt, 'Guidelines of the Germany Arctic Policy—Assume Responsibility, Seize Opportunities' (*Auswärtiges Amt*, September 2013) <[http://www.bmel.de/SharedDocs/Downloads/EN/International/Leitlinien-Arktispolitik.pdf?\\_\\_blob=publicationFile](http://www.bmel.de/SharedDocs/Downloads/EN/International/Leitlinien-Arktispolitik.pdf?__blob=publicationFile)> accessed 24 October 2016.

innovative technologies and the development of tools for the monitoring of spatial and temporal developments of the increasing maritime activities in the Arctic.”<sup>103</sup> The EU policy only references the “North East Passage” (more commonly referred to as the Northern Sea Route)<sup>104</sup> and, even then, only does so with regards to the stated objective of creating a “network for the Arctic and the Atlantic” to cope with any maritime security threats that might result from increasing activity within the Passage. Emphasis is placed on ensuring the effective implementation of the Polar Code and enhancing search and rescue capabilities—all critical issues for Canada. Accordingly, as long as Canada’s position on the status of the waters of the NWP is left uncontested,<sup>105</sup> the European emphasis on enhancing stewardship of the Arctic waters falls into perfect alignment with Canadian priorities under its sovereignty, environmental, and development pillars.

While the 2016 EU Arctic policy is respectful of the sovereignty and primary role of the Arctic States in tackling the issues affecting the Arctic region,<sup>106</sup> it stresses that climate change, the preservation of biodiversity, and the viability of ecosystems in the Arctic are global challenges best addressed through regional or multilateral cooperation. Acknowledging the particularly acute impacts of climate change in the region, the EU Joint Communication also emphasizes the critical role that the Arctic plays as a regulator for global climate and as a sink for long-range pollution. In light of this critical link between the Arctic and global efforts to combat climate change, the EU policy statement declares that the “EU has a *duty* to protect the Arctic environment and

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103 JOIN (2016) 21, 12, under the heading “Safe and secure maritime activities.” Emphasis in the original.

104 As regards shipping activities in Russian Arctic waters, the Northern Sea Route [NSR] is the national maritime transportation route. As Willy Østreng explains, according to “legal regulations in Russia, the NSR stretches from Novaya Zemlya in the west ... to the Bering Strait in the east ... The establishment of the NSR as *separate part* of the Northeast Passage was decided by the Council of Peoples Commissars of the USSR on 17 December 1932, which was the beginning of the NSR as an administered, legal entity under full Soviet jurisdiction and control.” Footnotes omitted, emphasis added. Willy Østreng, ‘The Northeast Passage and Northern Sea Route’ (*ARCTIS*, 2010) <<http://www.arctis-search.com/The+Northeast+Passage+and+Northern+Sea+Route+2>> accessed 24 October 2016.

105 A willingness to “agree to disagree” on intractable issues related to the legal status of the Northwest Passage, as Canada has successfully implemented in its bilateral relationship with the United States, may offer the EU a path to avoid alienating Canadian stakeholders and rights-holders.

106 This important acknowledgment appears in the second paragraph of the seventeen-page document.

strengthen ecosystem resilience.”<sup>107</sup> Given the Trudeau government’s strong support for multilateral efforts to mitigate climate change and its recognition that the Arctic environment cannot be protected simply through domestic or regional action, both the EU and Canada should consider the Arctic as a propitious opportunity for joint leadership.

At the heart of both the Canadian and EU Arctic strategies is a commitment to protect the environment and promote the economic development of the region. It remains to be seen, however, whether the interpretation or relative weight given to these dimensions complicates Canada-EU Arctic relations. These issues intersect most clearly in the case of energy. Canada is a major producer of oil and gas (although derided in some European circles as a generator of “dirty oil” from its oil sands), and its Arctic region—although the site of minimal exploration and development activity at present—could become a significant contributor to global energy supply in the long term as technology, equipment, and expertise advance and melting sea ice improves accessibility. While resource development can generate economic growth and opportunities for Northern peoples, Canada also recognizes that it increased risks of oil spills from offshore oil and gas operations and from ships and applies amongst the highest safety and environmental regulatory standards to oil and gas production in the world.<sup>108</sup> For its part, the European Commission also acknowledges that “Arctic resources could contribute to enhancing the EU’s security of supply concerning energy and raw materials in general,”<sup>109</sup> and seeks to promote the “highest standards of major accident prevention and environmental control” over oil and gas activities in the region.” The recent policy statement also encourages the EU “to share regulatory and technological best practice with international partners to support the safety and preservation of the environment in the region.”<sup>110</sup> Unless the EU decides to adopt an anti-development stance on Arctic oil and gas on environmentalist grounds, their stance on strong regulation of shipping, exploration, and extraction activities is likely to resonate

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107 JOIN (2016) 21, 12. Emphasis in original but added for the word “duty.”

108 Estimates indicate that over one-third of Canada’s remaining total of recoverable conventional sources of oil and natural gas is found in its on- and offshore Arctic region, including 35% of remaining conventional light crude oil (almost 11.9 billion barrels) and 38% of conventional natural gas (146.7 trillion cubic feet (Tcf)). Canada, *Northern Oil and Gas Annual Report 2015* (Ottawa: Indigenous and Northern Affairs Canada, 2015). There is currently no drilling in Canada’s Arctic offshore, although there are an estimated 200 million barrels of oil in the Amauligak field in the shallow waters of the Beaufort Sea and an estimated 240 million barrels of potentially recoverable oil in the Paktoa discovery well.

109 COM (2008) 763.

110 JOIN (2016) 21, 8.

with Canadian interests at the Arctic Council and other multilateral bodies. So too is the shared recognition of the importance of laying the groundwork for future energy security through investments in innovative technologies to support greater energy efficiencies and renewable energy solutions suited to extreme Arctic conditions.<sup>111</sup>

The JOIN (2016) 21 highlights that “close links between research, science and technology, while taking account of traditional knowledge, will ... ensure that development is taken forward in a sustainable way.”<sup>112</sup> Both Canada and the EU strategies place tremendous weight on the importance of science-based decision making, reaffirming that Arctic research represents a key area of collaboration and cooperation. Science “can be used as a catalyst to support a common understanding,” the EU policy suggests, “enabling jointly agreed solutions to be reached and foster peaceful cooperation.”<sup>113</sup> Accordingly, as “a major contributor to Arctic research,” the EU’s fundamental response to addressing climate change impacts in the Arctic is to maintain and even intensify its research efforts.<sup>114</sup> This fits with Canada’s Northern Strategy priorities, and existing mechanisms already make Canada and Europe longstanding partners in science and technology. For example, the Canada-EU Science and Technology Cooperation Agreement (1996, amended in 1998) facilitates scientific cooperation by enabling reciprocal access to programs,<sup>115</sup> and the EU, Canada and the US signed the Galway Statement on research cooperation that led to the establishment of the Transatlantic Ocean (and Arctic) Research Alliance in May 2013.<sup>116</sup> Given Canada’s aspirations to make the Canadian High Arctic

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111 JOIN (2016) 21, 9–10; “U.S.-Canada Joint Statement on Climate, Energy, and Arctic Leadership.”

112 JOIN (2016) 21, 10.

113 JOIN (2016) 21, 13.

114 JOIN (2016) 21, 5. Emphasis in original. The Joint Communication contains a wealth of information on EU funding of Arctic research and ongoing Polar/Arctic programmes and initiatives. Reference is made to the EUR 40 million already committed under the 2016–2017 work programme for Arctic related research and a further commitment is made to maintain current funding levels (around EUR 200 million in the past decade) under the Horizon 2020 programme (2014–2020). Funding for research and innovation activities is also to be provided by the European Structural and Investment Funds (ESIF), a central plank of the EU’s Arctic research efforts.

115 A Joint Science and Technology Cooperation Committee (JSTCC) established under the Agreement meets regularly to identify collaborative activities, tools and initiatives that facilitate international collaboration and to set strategic directions.

116 Under this Alliance, the ERA-CanII project (funded by the European Commission, the Government of Canada and coordinated by the Canadian Foundation for Innovation)

Research Station a world-class hub for scientific research by experts from around the world, it is highly likely that partnerships between Canadian and European scientists seeking “transnational access to research infrastructure and open data resources”<sup>117</sup> will be enhanced.

As a prime example of convergence, both Canada and the EU favour similar approaches for the effective protection of the Arctic’s marine biodiversity and ecosystems.<sup>118</sup> The 2016 EU policy endorses the Arctic coastal states’ July 2015 “Declaration concerning the prevention of unregulated high seas fishing in the Central Arctic Ocean” and recognizes the need for better scientific knowledge of the Arctic Ocean before commercial fisheries can begin. The Joint Communication does, however, specifically refer to the international status of the waters and encourages the consideration of appropriate international measures, such as the creation of a Regional Fisheries Management Organisation (RFMO) for the Arctic and/or the adoption of a Regional Sea Convention. Negotiations are currently underway to transform the 2015 Arctic fishing moratorium into a binding agreement and those negotiations have been broadened so as to involve other major fishing nations, including the EU.<sup>119</sup> Furthermore, the Arctic Council Task Force on Arctic Marine

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facilitates the sharing of information and fosters interaction between the European and Canadian research communities. For example, the ERA-Can II project hosted a Can-US-EU Symposium in September 2013 with the Canadian Embassy in Rome on “fostering transatlantic collaboration for the development and use of Arctic and marine research infrastructure.” See the final report at <<https://ec.europa.eu/research/infrastructures/pdf/Rome%20Symposium%20Final%20Report.pdf>>. The Alliance launched their second project to map the ocean seabed between Halifax, Nova Scotia and Tromsø, Norway, in 2015. Canada, Department of Fisheries and Oceans, ‘Canada, U.S. and European Union Partners Complete Second Project under the Galway Statement’ (*Government of Canada*, 25 August 2015) <<http://www.dfo-mpo.gc.ca/media/infocus-alaune/2015/galway/index-eng.htm>> accessed 24 October 2016.

117 JOIN (2016) 21, 6.

118 For background, see David VanderZwaag, Timo Koivurova, and Erik J. Molenaar, ‘Canada, the EU and Arctic Ocean Governance: A Tangled and Shifting Seascape and Future Directions’ (2009) 18 (2) *Journal of Transnational Law & Policy* 247–87.

119 Canada, China, Denmark, the EU, Iceland, Japan, South Korea, Norway, Russia and the US met in Washington in April 2016 to discuss plans to prohibit commercial fishing in the Central Arctic Ocean until scientists can learn more about the fish stocks and how they are changing. Hannah Hoag reports that “policy talks are discussing three different possible approaches: modifying the signed declaration to include other nations in a non-binding agreement; drafting a new binding international agreement; and negotiating the creation of a regional fisheries management organization.” According to the news report, “[b]oth the U.S. and Canada support a binding agreement on Arctic fisheries.”

Cooperation is currently assessing the need for a regional seas programme or other mechanism, as appropriate, for increased cooperation in Arctic marine areas.<sup>120</sup> The EC Joint Communication also promotes the establishment of marine protected areas (MPAs) in the Arctic as essential tools for the preservation of Arctic biodiversity, which dovetails with PAME's strategic priority to develop a "pan-Arctic network of marine protected areas to strengthen marine ecosystem resilience and contribute to human well-being, including traditional ways of life."<sup>121</sup>

A significant aspect of PAME's approach to marine protected areas in the Arctic is its emphasis on areas of cultural significance and the explicit reference to the goal of enhancing the wellbeing of the Arctic's inhabitants and fostering traditional ways of life. The idea that environmental protection must not be considered in a vacuum, distinct and separate from the lives of the peoples of the Arctic, also lies at the heart of Canada's policy for its northernmost regions. Under the "Protecting our Environmental Heritage" pillar, Canada's two key priorities for the International Polar Year are identified: climate change impacts and adaptation; and, significantly, the health and wellbeing of Northerners and Northern communities. The Northern Strategy emphasizes that "Aboriginal people and Northerners played a significant role in the planning, coordination and implementation of the IPY and were actively engaged in science and research activities." Government programmes, funding bodies and researchers continue to tap into the traditional knowledge and expertise of the Arctic's Indigenous inhabitants.

The idea that Northerners must have a meaningful role in shaping the future of the Arctic region transcends each of the individual pillars of Canada's Northern Strategy and is highlighted in recent EU policy statements as well. Under the "Sovereignty" pillar, for instance, Canada's strategy acknowledges

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Hannah Hoag, "Nations Negotiate Fishing in Arctic High Seas," *News Deeply*, 28 April 2016, <<https://www.newsdeeply.com/arctic/articles/2016/04/28/nations-negotiate-fishing-in-arctic-high-seas>> accessed 24 November 2016. A second round of negotiations will be held in Iqaluit, Nunavut in July 2016.

120 Arctic Council, 'Interviews with co-chairs of the Task Force on Arctic Marine Cooperation' (*Arctic Deeply*, 29 October 2015) <<http://www.arctic-council.org/index.php/en/our-work/8-news-and-events/369-tfame-co-chairs-interviews>> accessed 24 October 2016.

121 PAME, Arctic Marine Strategic Plan (AMSP) 2015–25, Strategic Action 7.2.10 <[http://www.pame.is/images/03\\_Projects/AMSP/AMSP\\_2015-2025.pdf](http://www.pame.is/images/03_Projects/AMSP/AMSP_2015-2025.pdf)> accessed 24 November 2016. Annex 4 to the AMSP provides detailed information on existing and planned MPAs in the Arctic EEZs of Canada, Denmark/Greenland, Iceland, Norway, Russia, and the United States and attests to the progress that has been achieved. The table "Existing MPAs" reveals that Canada has five MPAs covering 29,892 km<sup>2</sup> of its Arctic EEZ.



that “Northerners have an important role to play in shaping regional priorities and actions.” Under the “Promoting Social and Economic Development” pillar, the Canadian policy insists that “Northerners participate in and benefit from development” in the North.<sup>122</sup> The Northern Strategy also recognizes the rights and political influence of Indigenous peoples within the Canadian political and legal system, pledging to continue to pursue the most innovative and consultative approaches for Northern governance. For its part, the EU’s recent policy devotes two paragraphs to the need for meaningful consultation and participation under the heading “Dialogue with Arctic indigenous peoples.” The opening sentence is perhaps the most critical, committing the EU to “continue to engage” with Arctic Indigenous peoples and local communities to ensure that “their views and rights are respected and promoted in the ongoing development of EU policies affecting the Arctic.”<sup>123</sup> This emphasis hopes to dispel lingering distrust stemming from the EU ban on the trade in seal products—the most obvious and politically contentious example of divergent Canada-EU interests.

Sealing is a way of life and an important source of food and income for Canadian Inuit and for thousands of Canadian families in remote coastal communities.<sup>124</sup> Although Canada insists that its seal harvest is lawful, sustainable, humane and strictly regulated,<sup>125</sup> the EU adopted a general ban on the importation and sale of seal products in 2009 in response to popular concerns about the methods used to kill seals. Under this EU regulation, seal products can be

122 *Canada’s Northern Strategy*, 7–8.

123 JOIN (2016) 21, 15.

124 See, for example, *Seals & Nunavut: Our Tradition, Our Future* (Nunavut Tunngavik, Ottawa 1999). See also comments by Jon Burgwald on behalf of Greenpeace Nordic via a blog-post on 21 January 2016: ‘Indigenous communities have shown time and again that they understand how to protect the Arctic ecosystem they call home, and their hunting practices have never been a threat to seal or whale populations ... They hunt because it is a crucial way to sustain themselves and their families in the harsh Arctic environment’. Available at <<http://www.greenpeace.org/canada/en/blog/Blogentry/where-does-greenpeace-stand-on-seal-hunting/blog/55360/>> accessed 24 October 2016.

125 The methods used by Canadian sealers and prescribed in Canada’s *Marine Mammal Regulations* are based in part on the recommendations of the Independent Veterinarians Working Group (2005) and are consistent with the conclusions of the EU’s European Food Safety Authority report released in 2007. Canada maintains that its enforcement of the regulations is thorough, comprehensive, and ensures adherence to catch requirements, licence conditions, and humane harvesting practices. Canada, Department of Foreign Affairs and International Trade, ‘Questions & Answers: Canada’s World Trade Organization Dispute on the European Union Seal Ban—Public Release of Final Report’ 25 November 2013.

placed on the EU market only if a “recognized body” attests that the products result from hunts conducted traditionally by Inuit and other Indigenous communities or from hunts conducted for the sole purpose of sustainable management of marine resources on a non-systematic, not-for-profit basis.<sup>126</sup> This appears to accommodate Indigenous rights, but the actual requirements for Canadian seal products to qualify under the Inuit exemption were unclear and Canadian Inuit groups forcefully argued that the European Economic Community’s 1983 ban on harp seal pup skins (which allowed Inuit-derived products while banning all others) proved how a general ban effectively destroys the market for all seal products.<sup>127</sup>

Subsequent legal processes, which pitted public morality against the human rights of Arctic Indigenous peoples, widened the divide between the two sides. By provoking strong Inuit statements against the EU’s alleged disregard for the rights and livelihoods of Indigenous peoples in the Arctic, the dispute forced Canada to not only challenge the myths and misinformation that underlay the European position but also to mount legal challenges against what it considered to be an unfair law.<sup>128</sup> When attempts to resolve the issue bilaterally

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126 The import of seal products for personal use by travellers and in small quantities is also permitted. Notably, seal products from Canada’s east coast commercial seal fishery would not qualify under either of the exemptions. European Parliament, Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, <[http://trade.ec.europa.eu/doclib/docs/2009/november/tradoc\\_145264.pdf](http://trade.ec.europa.eu/doclib/docs/2009/november/tradoc_145264.pdf)> accessed 24 November 2016. It should be noted that amendments to the 2009 EU seal Regulation which came into effect on 18 October 2015 have eliminated the marine resource management exemption.

127 Government of Canada, ‘Seals: Canada’s Seal Hunt’ (*Government of Canada*, last modified 25 March 2013) <<http://www.canadainternational.gc.ca/eu-ue/policies-politiques/seals-phoques.aspx?lang=eng>> accessed 26 October 2016; and Canadian Arctic Resources Committee, ‘The Anti-sealing Campaign’ (1986) 14 (2) *Northern Perspectives* <<http://www.carc.org/pubs/v14n02/2.htm>> accessed 26 October 2016. Implementing the necessary certification structures and procedures to meet the requirements of the Inuit exemption under the 2009 EU ban were expected to cost more than the possible export revenues generated in the long term.

128 For background on the case, see Peter Fitzgerald, ‘Morality’ May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law’ (2011) 14 (1) *Journal of International Wildlife Law & Policy* 85–136; Nicolas Sellheim, ‘The goals of the EU seal products trade regulation: From effectiveness to consequence’ (2015) 51 (3) *Polar Record* 274–289; Kamrul Hossain, ‘The EU ban on the import of seal products and the WTO regulations: neglected human rights of the Arctic indigenous peoples?’ (2013) 49 (2) *Polar Record* 154–166; Tamara Perišin, ‘Is the EU seal products regulation a sealed deal? EU and WTO challenges’ (2013) 62 (2) *International and Comparative Law Quarterly*

failed, Canada and Norway challenged the EU seal ban through World Trade Organization (WTO) dispute mechanisms<sup>129</sup> and Inuit groups also questioned the legality of the ban under European Union laws.<sup>130</sup> Although the EU defended its position, the legal battle with Canada elicited divergent perspectives within the Union about whether to insist that Canada withdraw its challenge before concluding a Canada–EU Comprehensive Economic and Trade Agreement (CETA).<sup>131</sup>

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373–405; Xinjie Luan and Julien Chaisse, ‘Preliminary Comments on the WTO Seals Products Dispute: Traditional Hunting, Public Morals and Technical Barriers to Trade’ (2011) 22 *Colorado Journal of Environmental Law & Policy* 79–121; and Sellheim, ‘The neglected tradition?—The genesis of the EU seal products trade ban and commercial sealing’ (2013) 5 (1) *Yearbook of Polar Law* 417–450.

129 Following consultations between Canada, Iceland, Norway, the European Communities and European Union, Canada requested the establishment of a panel under the WTO Dispute Settlement Body (DSB) in February 2011. Its final report was circulated to WTO Members on 25 November 2013 and found that the European Union’s ban on imports of Canadian seal products indeed violates its international trade obligations and confirmed that the EU ban is discriminatory and treats Canadian seal products unfairly, but the panel also decided that such a ban can be justified due to some of the public’s concerns regarding seal harvesting. Canada and Norway appealed the report on 24 January 2014 and the Appellate Body issued its final ruling on 22 May 2014.

130 Separately, Inuit and affiliated groups (including the Inuit Circumpolar Council and Inuit Tapiriit Kanatami) filed applications at the European General Court for the annulment of the EU seal ban. The Court dismissed the first application as inadmissible in September 2011. In April 2013, the Court dismissed the second application on the basis that the “basic regulation is intended to improve the conditions for the establishment and functioning of the internal market by laying down harmonising rules for the placing on the market of seal products.” On 3 September 2015, the Court of Justice of the European Union dismissed an appeal of the earlier decisions. See Court of Justice of the European Union, Press Release No. 93/15, ‘The Court of Justice confirms the validity of the regulation on trade in seal products’, (3 September 2015), <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-09/cp150093en.pdf>> accessed 29 October 2016. The CJEU identified three technical legal grounds as justifying its dismissal and also ruled that “Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, which encourages members of the United Nations to obtain prior consent of those peoples before adopting or implementing measures that affect them, does not, in itself, have binding legal force.” For a succinct summary of Inuit concerns, see Mary Simon, ‘Speech: The European Union, Canada, and the Arctic: Challenges of International Governance’ (23 September 2011) <<https://www.itk.ca/media/speech/european-union-canada-and-arctic-challenges-international-governance>> accessed 29 October 2016.

131 In June 2011, the European Parliament approved a resolution that expressed its strong hope that Canada would withdraw its challenge against the seal ban before a Canada–EU

The seal dispute had a direct bearing on Canadian and Permanent Participant support for the EU's application for accredited observer status at the Arctic Council. While the EU had been an *ad hoc* observer since 1998 (originally as the European Community),<sup>132</sup> the European Commission formally applied to become a "permanent observer" in 2008 and its policy released that year identified this as an immediate priority.<sup>133</sup> The prolonged Arctic Council deliberations on observer applications have been documented elsewhere, with recent scholarship confirming that Canada and Russia harboured deep reservations about the EU's application. In Canada's case, Inuit groups strongly urged the government to oppose it.<sup>134</sup> "As long as [the] European Union doesn't have the required sensitivity to the needs of northerners," Canadian Foreign Affairs Minister Lawrence Cannon asserted in 2009, "I see no reason why they should be [...] a permanent observer on the Arctic Council."<sup>135</sup> Accordingly, when the Arctic Member States and Permanent Participants considered fourteen applications for observer status at the Kiruna Ministerial Meeting in May 2013, the Arctic Council "received the application of the EU for observer

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Comprehensive Economic and Trade Agreement (CETA) was ratified. Ashley Fitzpatrick, 'Seal hunt under fire again at European parliament' *The Telegraph* (St. John's, 8 June 2011). That October, about 100 of the 735 members of the European Parliament signed an open letter condemning the Canadian seal hunt and advocating against supporting a CETA until Canada withdrew its WTO seal challenge <[http://www.hsi.org/assets/pdfs/hsi\\_canada\\_meps\\_101711.pdf](http://www.hsi.org/assets/pdfs/hsi_canada_meps_101711.pdf)> accessed 24 November 2016. By contrast, the European Commission appeared to agree with Canada that the CETA negotiations and the WTO challenge were two separate issues. This distinction was clarified in discussions following Lackenbauer's presentation to Members of European Parliament on "Canada's Northern Strategy: Convergence or Divergence with EU Interests?" in Brussels, Belgium, on 23 March 2015.

132 J. Wouters et al., 'The EU and International Organizations' in Michael Smith, Stephan Keukeleire, and Sophie Vanhoonacker (eds), *The Diplomatic System of the European Union: Evolution, Change and Challenges* (Routledge, London 2016) 103.

133 COM (2008) 763, 9.

134 See, for example, Nunavut Tunngavik Inc., 'NTI Urges Canada to Deny the European Union's Application' (*Nunavut Tunngavik*, 25 April 2013) <<https://www.tunngavik.com/blog/news/nti-urges-canada-to-deny-the-european-unions-application/>> accessed October 26 2016. "The EU has demonstrated repeatedly that it does not support Canada's sustainable use of renewable resources," NTI President Cathy Towtongie stated. "The EU demonstrated this through its actions on Canada's seal hunt and its recent lack of support at CITES on the polar bear harvest."

135 Cannon quoted in CBC News, 'Canada against EU entry to Arctic Council because of seal trade ban' (*CBC News*, 29 April 2009) <<http://www.cbc.ca/news/canada/north/canada-against-eu-entry-to-arctic-council-because-of-seal-trade-ban-1.806188>> accessed 26 October 2016.

status affirmatively” but deferred a final decision on implementation until the Council ministers agreed by consensus that all of the concerns of Council members regarding the EU application were resolved.<sup>136</sup> For Canada and various Indigenous groups, this equated to finding specific ways to address well-established concerns about the EU seal product import ban.

Since that time, the EU has repeatedly affirmed its clear intent to respect Indigenous interests and rights, and has sought regular dialogue with Permanent Participants to improve mutual understanding—without conceding on the seal issue. Prior to the final ruling of the WTO Appellate court in May 2014 (which upheld the previous ruling that the EU seal ban was “necessary to protect public morals”),<sup>137</sup> the European Parliament passed a resolution acknowledging “the wish of the inhabitants and governments of the Arctic region with sovereign rights and responsibilities to continue to pursue sustainable economic development while at the same time protecting the traditional sources of the Indigenous peoples’ livelihood and the very sensitive nature of the Arctic ecosystems.”<sup>138</sup> The EU Foreign Affairs Council conclusions on “Developing a European Union Policy towards the Arctic Region,” adopted on 12 May 2014, called on the EU to explore “appropriate ways of ensuring that the representatives of Arctic Indigenous peoples are informed and consulted on EU policies that may affect them.” It also urged Canada to use the current

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136 In the meantime, the decision noted that the EU could continue to observe Council proceedings.

137 The WTO Panel and Appellate Body both rejected the claims of Canada and Norway against the ban itself. They accepted that the ban pursued a legitimate objective (public moral concerns on seal welfare) and was not more trade restrictive than necessary. However, as noted by the European Commission Directorate-General for Trade, “the Appellate Body found that there was a *de facto* violation of the most-favoured nation treatment obligation (Article 1 GATT) because seal products derived from Greenland were treated more favourably than seal products from Canada through the exception for products derived from Inuit hunts. It found that this difference in treatment could in principle be justified under the exception of GATT (Article XX) for public morals but found that the EU had failed to design the legislation to prevent arbitrary discrimination and should have made more efforts to encourage Canadian Inuit to use the exception.” European Commission Directorate-General for Trade, ‘WT/DS400—European Communities—Measures Prohibiting the Importation and Marketing of Seal Products’ <<http://trade.ec.europa.eu/wtodispute/show.cfm?id=475&code=2>> accessed 29 October 2016. For a summary of the key legal findings in the case, see EC-Seal Products (DS400, 401), available at <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds400sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds400sum_e.pdf)>, accessed 29 October 2016.

138 European Parliament, ‘European Parliament resolution on the EU strategy for the Arctic’ (12 March 2014) 2013/2595(RSP) <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0236>> accessed 29 October 2016.

positive momentum in EU-Canada relations to help resolve the remaining issue so as to allow for the full implementation of the Kiruna decision regarding the EU's observer status as soon as possible before the next EU/Canada summit."<sup>139</sup> The remaining issue, not mentioned by name, was the seal ban.

The WTO ruling, coupled with the necessity for consensus support in the Arctic Council for the EU to gain full observer status, encouraged both sides to broker an agreement to overcome the political imbroglio. For the EU, this meant ensuring Canadian Indigenous peoples were treated the same as any other Indigenous communities seeking access for their seal products in markets within the EU. Along these lines, the "Joint Statement by Canada and the European Union on Access to the European Union of Seal Products from Indigenous Communities of Canada," released in August 2014, set out "the framework for cooperation to enable access to the European Union of seal products that result from hunts traditionally conducted by Canadian Indigenous communities and which contribute to their subsistence." Under this agreement, both sides reinforced "the importance of preserving the traditional way of life of indigenous communities" and pledged to:

- pursue discussions on possible participation by Canadian partners in the new European Union Northern Periphery and Arctic Programme;
- explore possibilities for supporting indigenous communities and traditional ways of life through capacity building and exchange of best practices;
- explore how indigenous communities can benefit from the new opportunities to be opened up by the Canada-European Union Comprehensive Economic and Trade Agreement, to develop their economic, social, and environmental potential;
- explore how bilateral European Union-Canada research cooperation, including the incorporation of traditional knowledge, can bring benefits relevant to indigenous communities;
- identify other areas of mutual interest where exchange of expertise and dialogue could benefit indigenous communities, including the marketing of traditional products; and,

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139 Council of the European Union, Foreign Affairs Council meeting, 'Council conclusions on developing a European Union Policy towards the Arctic Region' (12 May 2014) <[http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/142554.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/142554.pdf)> accessed 26 October 2016. Paragraph 14 further invites the European Commission to ensure that EU programs relevant to the Arctic under the EU's 2014–2020 multi-annual financial framework "meet the development needs of local populations and offer better opportunities for circumpolar cooperation and research as well as Arctic economic development."

- continue to engage in regular dialogue with representatives of indigenous communities, with a view to increasing mutual understanding.<sup>140</sup>

In its decision on the Joint Statement, the European Commission noted that, in return, Canada had agreed to “lift its reservations concerning the EU’s observer status in the Arctic Council.”<sup>141</sup>

Since 2014, progress has been made on implementing this agreement<sup>142</sup> and the EU continues to emphasize the importance of substantive dialogue with Arctic Indigenous peoples. Its 2016 policy expresses a clear commitment to “engage with Arctic indigenous peoples and local communities to ensure that their views and rights are respected and promoted in the ongoing development of EU policies affecting the Arctic.”<sup>143</sup> The annual EU Arctic Indigenous Peoples Dialogue meetings between the European Commission and representatives of Arctic Indigenous peoples, held since 2013 to exchange views and agree on areas for further cooperation, have been helpful in building trust and mutual understanding. The Joint Communication also urges the EU to continue to work “on advancing consistency between the EU’s internal and external policy towards indigenous peoples.”<sup>144</sup> For Inuit, who depend on the harvest of sea mammals to provide a livelihood for their families and to maintain their culture and quality of life, this commitment may be tested if a long-standing debate reignites over the commercial trade in polar bears.

Canadian Inuit do not support the US proposal to transfer the polar bear from Appendix II to Appendix I of the Convention on International Trade

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140 See Annex 1: ‘Joint Statement by Canada and the European Union on Access to the European Union of Seal Products from Indigenous Communities of Canada’ to the European Commission Decision, (2014), C(2014) 5881 final <[http://eeas.europa.eu/canada/docs/joint\\_statement\\_c\\_2014\\_5881\\_fi\\_annex\\_en.pdf](http://eeas.europa.eu/canada/docs/joint_statement_c_2014_5881_fi_annex_en.pdf)> accessed 29 October 2016.

141 European Commission Decision on the Joint Statement by Canada and the European Union on Access to the European Union of Seal Products from Indigenous Communities of Canada, 18 August 2014, C(2014) 5881, <<http://www.embassynews.ca/sites/embassynews.ca/files/Commission-Decision-Joint-Statement.pdf>> This page is no longer available, copy on file with the authors.

142 In July 2015, the EU formally approved the Government of Nunavut as a Recognized Body under the Indigenous Communities Exemption of the EU Seal Regime, meaning that the latter would be able to certify sealskins as having been harvested according to the rules of the exemption. Fisheries and Oceans Canada, ‘Government of Canada Congratulates the Government of Nunavut on Important Step to Securing Access to European Markets for Seal Products’ (*Government of Canada*, 31 July 2015) <<http://news.gc.ca/web/article-en.do?nid=1014449>> accessed 26 October 2016.

143 JOIN (2016) 21,15. Emphasis in the original.

144 *Ibid.*

in Endangered Species of Wild Fauna and Flora [CITES]<sup>145</sup>, which would ban all commercial trade. Canada's national Inuit organization, Inuit Tapiriit Kanatami (ITK), maintains that the species does not meet the criteria for an Appendix I listing: the polar bear is well-managed, and the hunt remains within sustainable levels and does not pose an existential threat to the species.<sup>146</sup> The EU, which votes as a block registering 28 votes, helped defeat the US proposal in March 2010. The US resubmitted its proposal at the 16th CITES Conference of the Parties [CoP16] in March 2013, and without EU support it once again failed to garner the required two-thirds majority. The EU's action on this occasion, however, simply reflected a lack of consensus among the European Member States, with the EU tabling an alternative proposal at the same meeting to keep the polar bear in Appendix II but with export limits for each management unit in Canada and providing for a review of trade impacts by CITES to identify further actions. The EU alternative proposal also failed to achieve a two-third majority and was rejected; the polar bear thus remains listed under Appendix II and the controlled trade of polar bear parts has been maintained. Although no proposal to uplist polar bears was submitted to the CITES CoP17 in South Africa in October 2016,<sup>147</sup> the issue may resurface in the future.

Future trends are inherently speculative, but it is appropriate to conclude that EU policies have moved into closer alignment with those of Canada, and vice versa (particularly on issues of climate change mitigation and sustainable energy development). While the European Parliament's past messaging raised

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145 Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243.

146 According to the ITK fact sheet, not only have polar bear numbers not significantly declined but rather there has been a significant increase over the past forty years with the population currently estimated at 20,000–25,000 individuals. Canada is home to 65% of the world polar bear population and only 2% of that population, roughly 300 animals, enter the market each year. And within the Canadian Arctic, polar bear hunting quotas and tags are allocated exclusively to Inuit communities. See ITK, 'Polar Bears, Harvesting and Inuit' (*Inuit Tapiriit Kanatami*) <<https://www.itk.ca/about-itk/dept-environment-and-wildlife/polar-bears/polar-bears-harvesting-and-inuit>> accessed 29 October 2016. On Canada's conservation measures regarding polar bears, see Environment and Climate Change Canada, 'Conservation of Polar Bears in Canada' (*Environment Canada*, 2012) <<https://www.ec.gc.ca/Publications/14C22559-9427-4476-9D85E783E03106B8/ConservationOfPolarBearInCanada.pdf>> accessed 26 October 2016.

147 See Makivik Corp., 'Makivik Congratulates Fellow Canadian Inuit on Continued Polar Bear Trade' (*Makivik Corporation*, 2 May 2016) <<http://www.makivik.org/inuit-continued-polar-bear-trade/>> accessed 26 October 2016; Sima Sahar Zerehi, 'Inuit applaud U.S. decision not to push polar bear trade restrictions' (*CBC News*, 3 May 2016) <<http://www.cbc.ca/news/canada/north/inuit-applaud-us-decision-polar-bear-trade-1.3562940>> accessed 26 October 2016;



legitimate concerns in Canada about the EU's grasp of circumpolar governance, sovereign rights, and Indigenous peoples, the recent Joint Statement reveals a nuanced and mature appreciation of circumpolar affairs. In response, Timo Koivurova recently noted, "the time has come for Arctic states to understand the European Union and acknowledge its investments in research, development, and education in the region, and its contribution to Arctic governance. It should be formally accepted as an observer to the Arctic Council."<sup>148</sup> Canada agrees, with outgoing Arctic Council chair Leona Aglukkaq unambiguously stating in April 2015 that "Canada supports the EU application for full observership [*sic*]."<sup>149</sup> Although the Arctic Council again deferred its final decision on the EU's application at the Iqaluit Ministerial that month, this was a reflection of the frosty relations with Russia since the EU imposed sanctions on that country in September 2014 over the Ukraine crisis. In short, Canada is no longer a primary roadblock to EU Arctic aspirations and, in areas of common interest, is likely to become a more enthusiastic partner.

## 7 Conclusions

The popular media and academic literature typically depicts the Canadian-EU Arctic relationship as confrontational. This narrative is largely unjustified or, at the very least, reflects insufficiently nuanced understandings of both parties' motives and aspirations. It is our hope that such unflattering and harsh assessments have now been laid to rest. Indeed, the Joint Declaration signed on 26 September 2014 by Prime Minister Harper, European Commission President José Manuel Barroso and European Council President Herman Van Rompuy to celebrate the end of negotiations of the Canada-European Union Trade Agreement seems to portend a new era of cooperation and mutual understanding:

We, the leaders of Canada and the European Union ... are committed to strengthening and *deepening our strategic partnership that builds on our shared history and values*. We reaffirmed our commitment to contributing to our mutual prosperity through our continued cooperation.

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148 Timo Koivurova, 'The EU in the Arctic: Correcting Misconceptions' (*Arctic Deeply*, 29 February 2016), <<https://www.newsdeeply.com/arctic/op-eds/2016/02/29/the-eu-in-the-arctic-correcting-misconceptions>> accessed 26 October 2016.

149 Quoted in Lily Haines, 'EU bid to become Arctic Council observer deferred again' (*Barents Observer*, 4 May 2015) <<http://barentsobserver.com/en/arctic/2015/05/eu-bid-become-arctic-council-observer-deferred-again-04-05>> accessed 26 October 2016.

*We welcome the deepening ties in Arctic cooperation, including through the Arctic Council. The EU and Canada are strategic partners in the field of research and innovation ... This Ottawa Summit has given renewed voice and vision to our partnership, and has positioned us to work more closely and effectively together across a range of priority areas, for the prosperity and security of our peoples, and the global community.*<sup>150</sup>

Although Canada and the EU have displayed strong differences on several Arctic issues and policy areas over the last decade, we suggest that recent political and policy trajectories point to increasing policy convergence related to the region. Our overview of the main tenets of Canada's integrated Northern Strategy suggests a fairly consistent approach to Arctic affairs that reflects particular views about sovereignty, security, indigenous rights, economic development, environmental protection, and governance borne of its historical and contemporary experiences. Bringing Canada's interests into dialogue with EU Arctic policy, particularly the integrated policy released in April 2016, helps to counter the pervasive perception of conflicting agendas writ large.

The EU's 2016 Arctic policy notes that "sustainable development faces specific challenges in the Arctic region." Although this statement applies across the circumpolar Arctic, on this particular theme the EU seems reticent to project a vision for the region as a whole. Instead, it refers repeatedly to "the European part of the Arctic," with little to no reference to the North American Arctic (apart from Greenland).<sup>151</sup> While this avoids criticism from Canadians that the EU is seeking to impose a European view of development on the circumpolar world as a whole, it also entrenches the idea that the ideal of "One Arctic" (enunciated by both the Inuit Circumpolar Council and the U.S. Arctic Council chairmanship for 2015–17) must be supplemented by regional variations that reflect multiple Arctics. In Canada's case, criticisms that its Arctic agenda is relentlessly domestic or North American in its assumptions and priorities also suggest the need to articulate and promote a more holistic, comprehensive view to address truly circumpolar challenges. Although some diverging interests, as well as competing interpretations of relevant rules, may be inevitable, we contend that these legitimate points of policy friction need not hinder Canadian-EU collaboration in the Arctic, particularly around the priority areas of climate change and environmental safeguards, science and technology, sustainable development, and international cooperation more broadly.

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<sup>150</sup> Available on the website of the Government of Canada, available at <<http://news.gc.ca/web/article-en.do?nid=888399>>. Emphasis added.

<sup>151</sup> JOIN (2016) 21, 8–13.

# Russian Arctic Policy, Petroleum Resources Development and the EU: Cooperation or Coming Confrontation?

*Tina Hunter*

## 1 Introduction

The Arctic is a place of immense natural resource wealth, both onshore and offshore.<sup>1</sup> Yet it is also an environment with extreme conditions, therefore presenting particular challenges to the development of the resources, especially offshore oil and gas resources.<sup>2</sup> Whilst the melting of the Arctic sea ice poses a significant opportunity for the development of these resources (and the focus at present is the offshore oil and gas resources), the technical and environmental aspects of an operation, combined with the high costs, make such exploitation of resources difficult. However, as sea ice recedes, and technologies improve, there has never been a more opportune time to develop such resources. Such a coalescence of conditions has meant that some of the Arctic States,<sup>3</sup> as well as other States with an interest in these vast resources,<sup>4</sup> are seeking to develop them and advance national interests. In particular, the exploration of

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\* Tina Hunter, Professor, School of Law, University of Aberdeen, United Kingdom.

- 1 The USEIA estimates that the Arctic holds 22% of the World's undiscovered oil and gas wealth. Peter Stauffer, 'us Geological Survey (USGS) Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle' <<http://library.arcticportal.org/1554/>> accessed 5 October 2015.
- 2 Strategic Assessment of Development of the Arctic, 'Developing Oil and Gas Resources in Arctic Waters: The Final Frontier? (factsheet)' (2014) <[http://www.arcticinfo.eu/images/Factsheet/Factsheets\\_Final/oil\\_and\\_gas\\_factsheet.pdf](http://www.arcticinfo.eu/images/Factsheet/Factsheets_Final/oil_and_gas_factsheet.pdf)> accessed 10 August 2016.
- 3 The Arctic States include the Arctic coastal States, (Russia, Norway, Greenland (and therefore Denmark), the United States and Canada), Iceland (whose EEZ extends into the Arctic Ocean), as well as the non-coastal Arctic States of Iceland, Sweden, and Finland.
- 4 In particular a number of major Asian States, including China, Japan and South Korea) have exhibited a huge interest in arctic (and Antarctic) resources. In addition, China has become an observer to the Arctic Council. For Asian nation's interest in the Arctic see Sanna Kopra, 'China's Arctic Interests' (2013) *Arctic Yearbook* 107–124; Fujio Ohnishi, 'Does the sun also rise in the Arctic? Three pillars of Japan's Arctic Economy (2015) *Arctic Yearbook*, 410–412.

abundant Arctic petroleum resources (oil and gas) has been on the agenda of Arctic States,<sup>5</sup> giving rise to a perception of intense competition for petroleum resources of the Arctic.

To date there has already been some development of the mineral and petroleum resources. Regarding petroleum development, which is the focus of this chapter, the Snøhvit gas field and Goliat oil field in the Norwegian sector of the Barents Sea are operational. In the Russian Arctic the Yamal gas field, where its LNG terminal is under development, while the Prirazlomnoye oil field in the Pechora Sea is operational. There are also vast known, but as yet undeveloped petroleum resources in the western Russian Arctic, led by the mega Shtokman gas field in the Kara Sea. Russia sees its economic future tied to the Arctic, In an interview in September 2016, First Deputy foreign Minister Vladimir Titov noted that the Arctic zone of the Russian Federation accounts for over 15% of Russia's GDP, and 20% of its exports, with this expected to rise.<sup>6</sup>

As part of this rush to harness the Arctic petroleum resources, there is a perception that there has been an overt drive by the Russian Federation to remilitarize their Arctic areas in order to drive the resource exploitation in the Arctic.<sup>7</sup> Such militarization has been met with varied reception in the media, with headlines ranging from "Russia is Wrapping the Arctic in a Loving, Militarized Embrace",<sup>8</sup> and "Russia Prepares Militarization of Arctic Ocean after Huge Oil and Natural Gas Strike",<sup>9</sup> to the fearful headline of Defensetech which proclaims "Russia's Arctic Militarization 'Disturbing', US lawmakers

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5 For example, on 21 September 2016 Greenland released a second round of licenses, located onshore at Disko and Nuussuaq, See *Greenland opens second onshore licensing round* (2016) *Arctic Journal*, October 4, 2016, <<http://arcticjournal.com/oil-minerals/2583/greenland-opens-second-onshore-licensing-round>> accessed 29 November 2016.

6 First Deputy foreign Minister Vladimir titov's interview with the ITAR-TASS news agency, September 19, 2016 [http://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJEo2Bw/content/id/2450934](http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJEo2Bw/content/id/2450934).

7 A. Scherbinin, E. Danilova, A. Sentsov, L. Bolsunovskaya and Y. Bolsunovskaya, *The Russian Arctic: innovative possibilities at the turn of the past and the future* (2015) 27 *IOP Science Conference Series: Earth and Environmental Science*.

8 John Dyer, 'Russia Is Wrapping the Arctic in a Loving, Militarized Embrace' (*Vice News*, 22 October 2015) <<https://news.vice.com/article/russia-is-wrapping-the-arctic-in-a-loving-militarized-embrace>> accessed 16 August 2016.

9 Geoffrey Grider, 'Russia Prepares militarization of Arctic Ocean after huge oil and natural gas strike' (2014) *Now The End Begins* <<http://www.nowtheendbegins.com/russia-prepares-militarization-arctic-ocean-huge-oil-natural-gas-strike/>> accessed 29 February 2016.

say”.<sup>10</sup> These headlines, just a minute sample of the multitude of headlines that have occurred in the last few years, demonstrate the wildly varied responses to Russian sovereign military actions the Russian Arctic territory. These headlines have a partial ring of truth, insofar as they describe the return of a large military presence along the breadth of the Russian Arctic. However, given that the focus of this chapter is on the EU and its relationship with Russia in the Arctic region, a consideration of Russian militarisation and the impacts of such militarisation will be confined to the *European Arctic*, defined in the *EU Strategic Assessment of Development in the Arctic* as ‘a region extending from Greenland to northwest Russia’ and incorporating the Greenland Sea, the Norwegian Sea and the Barents Sea.<sup>11</sup>

Military activities in the Russian Arctic have been largely confined to the establishment or reinvigoration of the Arctic naval bases and power,<sup>12</sup> as outlined in the 2015 *Russian Marine Doctrine*.<sup>13</sup> In this Doctrine,<sup>14</sup> Russia seeks to regain its status as a blue water force<sup>15</sup> through a large-scale development of its Navy. The declaration of such expansion and reinvigoration of the Russian navy has been analysed by think tanks in Russia and the US, with the US think tank *Centre for Strategic and International Studies* concluding that such actions mean that the Russia is undertaking a period of aggression and conflict in the Arctic region. Further, the CSIS concludes that Russian military buildup and exercises in the region “are obviously not just about economics or safety but indicate a potentially dangerous attempt to return to cold War parity in the

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- 10 Kris Osborn, ‘Russia’s Arctic Militarization “Disturbing,” US Lawmakers Say’ (*Defenstech*, 12 March 2015) <<http://www.defenstech.org/2015/03/12/russias-arctic-militarization-disturbing-us-lawmakers-say/>> accessed 16 August 2016.
  - 11 Adam Stepien, Timo Koivurova and Paula Kankaanpää, ‘Strategic Assessment of Development of the Arctic: Assessment Conducted for the EU’ (2014) 3 <[http://www.arctic.info.eu/images/pdf/SADA\\_report.pdf](http://www.arctic.info.eu/images/pdf/SADA_report.pdf)> accessed 10 August 2016.
  - 12 Lassi Heininen, Alexander Sergunin and Gleb Yarovoy, ‘Russian Strategies in the Arctic: Avoiding a New Cold War’ (Valdai Club 2015) 36–40 <[http://www.uarctic.org/media/857300/arctic\\_eng.pdf](http://www.uarctic.org/media/857300/arctic_eng.pdf)> accessed 10 August 2016.
  - 13 *Russian Federation Marine Doctrine* (2015) 26 July 2015. Meeting to discuss the new Russian Marine Strategy on board the frigate Admiral Gorshkov <<http://en.kremlin.ru/events/president/news/50060>> accessed 12 December 2015; *Russia Marine Doctrine to 2020* <<http://static.kremlin.ru/media/events/files/ru/uAFi5nvux2twaqjftS5yrIZUVTJan77L.pdf>> accessed 29 November 2016.
  - 14 Amendments incorporated into the Maritime Doctrine of Russian Federation 2020 <[http://www.oceanlaw.org/downloads/arctic/Russian\\_Maritime\\_Policy\\_2020.pdf](http://www.oceanlaw.org/downloads/arctic/Russian_Maritime_Policy_2020.pdf)> accessed 16 August 2016.
  - 15 Blue water force denotes a country with the naval capability to engage in deep-water military operations.

*Arctic*.<sup>16</sup> Other assessments of Russian military activity is perceived in a neutral manner, with military presence logical given the large concentration of nuclear facilities in the region and the direct access it provides to both the Atlantic and Pacific Oceans.<sup>17</sup> Russian Arctic strategy is perceived as less ambitious and aggressive, and more cooperative and realistic.<sup>18</sup> Further, the Valdai Club sees that historical cooperative relationships between Russia and Norway (including the signing of the *Barents Sea Agreement* in 2010 and the agreement between Rosneft and Statoil for the joint development in the Barents Sea) are a good foundation for a strategic partnership between the two countries, based on cooperation rather than conflict.<sup>19</sup>

Whilst few authors reject the notion that Russia's geo-economic and geo-strategic ambitions in the Arctic are considerable, particularly in relation to petroleum resource development, there are two vastly opposing views of Russian military activity in the region. Is Russia an aggressive villain seeking to exploit its Arctic resources in an aggressive manner, or is it maintaining a collaborative and cooperative approach that has been previously demonstrated, particularly in negotiations and agreements relating to Norway and the Barents Sea?

Whichever strategy Russia is undertaking in its resource development, the European Union (EU), as a neighbour and consumer of Arctic resources, has a vested interest in the Russian Arctic Region. This interest is demonstrated by the development of an EU policy towards the European Arctic.<sup>20</sup> This raises the question which is the subject of this chapter: does EU Arctic policy and the Russian Arctic marine policy seek to implement the same broad objectives in relation to natural resources, and are these policies likely to encourage continued cooperation, or, as the US media would have you believe,<sup>21</sup> the 2015 Russian

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16 Heather A Conley and Caroline Rohloff, 'The New Ice Curtain: Russia's Strategic Research to the Arctic' (Centre for Strategic and International Studies 2015) 19.

17 Heininen, Sergunin and Yarovoy, n. 12 above, 15–6.

18 *Ibid.*, 88.

19 *Ibid.*, 36–40.

20 This refers to the area of the policy relating to resources and development of the European Arctic as a whole.

21 Especially in the US media. See for example John Dyer, 'Russia is wrapping the Arctic in a loving, militarized embrace (2015) *Vice News* October 22, 2015 <<https://news.vice.com/article/russia-is-wrapping-the-arctic-in-a-loving-militarized-embrace>> accessed 29 February 2016; Geoffrey Grider, 'Russia Prepares militarization of Arctic Ocean after huge oil and natural gas strike' (2014) *Now The End Begins* <<http://www.nowtheendbegins.com/russia-prepares-militarization-arctic-ocean-huge-oil-natural-gas-strike/>> accessed 29 February 2016; Kris Osborn, 'Russia's Arctic Militarization 'Disturbing', US lawmakers

Arctic Marine Policy setting Russia on a course of conflict with other Arctic States? This chapter undertakes a comparative analysis of the EU and Russian policies in relation to petroleum resources in the Arctic. The purpose of this comparative analysis is to determine whether the policies have diverging interests, thereby possibly driving Russia and the EU to conflict over the use and development of the Arctic, or whether the EU and Russia have common Arctic interests that may lead to cooperation in the Arctic region.

In order to undertake this comparative analysis, this chapter first considers EU Arctic policy in relation to resource development in the Arctic, focusing on petroleum resource development. It then undertakes an analysis of Russian Arctic strategy, examining general Russian marine policy as well as Arctic specific policy. Finally, through an analysis of the two policies and current Russian activity in the Arctic, this chapter will determine whether the policies are broadly similar, seeking to implement the same broad objectives, albeit for different motives: Russia as an Arctic State wishing to secure its natural resources, and the EU to access the natural resource bounty the Arctic has to offer the EU and its Member States.

## 2 The EU and the Arctic

### 2.1 *EU Petroleum Interest in the Arctic*

The EU has a special interest in the Arctic for a number of reasons. First, and perhaps foremost, the EU maintains an interest in the Arctic since three Member States (Sweden, Denmark and Finland), and two European Economic Areas (EEA) (Norway and Iceland) states lie within or have interests associated with the Arctic.

As noted in the introduction above, it is estimated that vast petroleum resources exist in the Arctic.<sup>22</sup> These resources are of particular interest for the EU,<sup>23</sup> given their proximity to European markets. Indeed, the EU is currently a major destination for goods and resources from the Arctic, with 24% of Arctic oil and gas output going to the EU countries. The development of Arctic oil and gas presents a number of challenges and opportunities for the EU economy.<sup>24</sup> Such opportunities include investment opportunities in the Arctic, coupled

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say' (2015) *Defensetech* 12 March 2015 <<http://www.defensetech.org/2015/03/12/russias-arctic-militarization-disturbing-us-lawmakers-say/>> accessed 29 February 2016.

22 Stauffer, n. 1 above.

23 Strategic Assessment of Development of the Arctic, n. 2 above, 9.

24 Strategic Assessment of Development of the Arctic, n. 2 above.

with the opportunity to undertake research and development in the technological and scientific sectors.<sup>25</sup>

## 2.2 *EU Arctic Policy*

Given that the Arctic region already plays an important role in the EU, and is likely to become increasingly important in the future, the EU has developed a policy towards, and strategic assessment of, the Arctic region. A discussion of both the policy and assessment, whilst addressing the global Arctic region, will be confined to the European Arctic<sup>26</sup> within the confines of this chapter.

Given the emerging strategic and economic importance of the Arctic, an EU Arctic policy was first developed in 2008,<sup>27</sup> calling for a united EU policy on the Arctic.<sup>28</sup> The EU Arctic policy is built around three main policy objectives:

- 1) the promotion of the sustainable use of the resources;
- 2) the protection and preservation of the Arctic in unison with its population; and
- 3) international cooperation.

### 2.2.1 Promotion of Sustainable Use of Resources

In the *European Parliament Resolution of 12 March 2014 on the EU Strategy for the Arctic*, the EU acknowledged ‘the wish of the inhabitants and governments of the Arctic region with sovereign rights and responsibilities to pursue sustainable economic development...’.<sup>29</sup> Hence, the EU understands the reality of attempting to balance the inalienable sovereign right of a State to develop its resources with environmental protection. The recognition of a State’s sovereignty lies at the heart of the EU, and developing EU Arctic policy respects the right of any state to develop its resources.

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<sup>25</sup> *Ibid.*, 9.

<sup>26</sup> As defined in the *EU Strategic Assessment of Development in the Arctic* as ‘a region extending from Greenland to northwest Russia’ and incorporating the Greenland Sea, the Norwegian Sea and the Barents Sea. See n. 10 above.

<sup>27</sup> European Commission Communication of 20 November 2008 on the European Union and the Arctic Region, COM (2008) 763.

<sup>28</sup> European Parliament Resolution of 12 March 2014 on the EU Strategy for the Arctic (2013/2595RSP), para. 2.

<sup>29</sup> European Parliament Resolution of 12 March 2014 on the EU Strategy for the Arctic (2013/2595RSP), para. 42.



Russia is home to the majority of the Arctic petroleum resources, holding 43 of the 61 large hydrocarbon fields.<sup>30</sup> These substantial resources clearly demonstrate Russian primacy over the area, with these large deposits critical for the EU in the future. Norway holds one large Arctic oil field to date, that of *Goliat*. In addition, the European Arctic is rich in gas resources, including the giant Shtokman field in Russia, and the *Snøhvit* field on the Norwegian side of the Barents Sea.

The EU strategic assessment of development of the Arctic by Stepien, Koivurova and Kankaapää identified four main areas that need to be considered in the development of Arctic petroleum resources.<sup>31</sup> These considerations are environmental, social, economic, and political/governance issues, all of which are closely interlinked and cannot be considered in isolation from each other.<sup>32</sup> The assessment also recognizes and reiterates that any development of these resources will have impacts and consequences that will be unevenly distributed in the Arctic.<sup>33</sup> However, the EU being a major energy market (importing more than EUR400 billion in oil and gas in 2012)<sup>34</sup> means that EU policy development is firmly focused on how the oil and gas resources of the Arctic region can be developed in a sustainable manner that minimises impact.<sup>35</sup> As a frontrunner of global climate change mitigation efforts, the EU also emphasizes the necessity of implementation of innovative solutions for the development of renewable energy in the Arctic.<sup>36</sup>

The Council of the EU notes the need for long-term resource policy developments in the Arctic States, including the Barents region, and seeks to pursue long-term partnerships and policy dialogues in order to secure access to raw materials and renewable natural resources.<sup>37</sup> To that end, EU policy

30 Philip Budzik, 'Arctic Oil and Natural Gas Potential' (US Energy Information Administration 2009) 4.

31 Stepien, Koivurova and Kankaapää, n. 10 above, 78.

32 *Ibid.*, 78–9.

33 *Ibid.*

34 *Ibid.*, 81.

35 It is important to note that although the EU Arctic policy is focused on oil and gas resources in the Arctic, the EU has also developed policy towards use of more renewable energy and less dependence on oil and gas, cf. reduction of CO<sub>2</sub> emissions in order to meet its energy needs. However, this chapter will retain a focus on Arctic oil and gas resources as part of the energy security mix.

36 European Parliament Resolution of 12 March 2014 on the EU Strategy for the Arctic (2013/2595RSP), A37, A46.

37 Council of the European Union, 'Council Conclusions on Developing a European Union Policy Towards the Arctic Region' (12 May 2014), para. 11.

development is focused on innovative research and education in technology and the Arctic environment, and enhanced funding/investment frameworks for environmentally and socially responsible Arctic petroleum projects.<sup>38</sup>

The latest EU Arctic Policy development occurred in April 2016.<sup>39</sup> In this 2016 EU policy, the need for the sustainable development of the Arctic, including its valuable natural resources, was further enunciated, noting that the European Arctic has significant potential to support growth in the rest of Europe, although it will present some challenges.<sup>40</sup> In the press release of the 2016 EU Policy, Federica Mogherini, the High Representative of the Union for Foreign Affairs and Security Policy/Vice President of the European Commission noted that

a safe, sustainable and prosperous Arctic not only serves the 4 million people living there, our European Union and the rest of the world. It is a region of immense environmental, social, and economic importance to us all ... the Arctic is also crucial in terms of regional and global security and a strategic component of our foreign policy.<sup>41</sup>

The EU also recognises that sustainable economic development of the natural resources of the Arctic creates specific challenges, primarily due to sparse populations and a lack of transport infrastructure.<sup>42</sup> Such challenges are enhanced by an incomplete north-south traffic connection, and the need to strengthening Arctic transport links through trans-European networks. It is recognised that the strengthening of transport links for sustainable development of Arctic natural resources will also require cooperation between EU and EEA member-states.<sup>43</sup>

It is likely that the Arctic will be one of the areas of the earth most affected by climate change,<sup>44</sup> most dramatically demonstrated by the projection that the Arctic Ocean will become largely ice-free in summer within the next thirty

38 Stepien, Koivurova and Kankaanpää n. 10 above, 85.

39 European Commission and The High Representative, 'An integrated European Union policy for the Arctic', Joint Communication, JOIN (2016) 21 final.

40 *Ibid.*, 8–9.

41 European Commission, 'A New Integrated EU Policy for the Arctic Adopted [press release]' <[http://europa.eu/rapid/press-release\\_IP-16-1539\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1539_en.htm)> accessed 16 August 2016.

42 JOIN (2016) 21, 8.

43 *Ibid.*

44 *Ibid.*, 5.

years.<sup>45</sup> A dramatic change in the quantity and quality of ice has already established a commercial shipping route through the Arctic, known as the Northern Sea Route (NSR).<sup>46</sup> An analysis of the NSR transits identifies that although transit numbers are low, there has been a 1000% increase in the number of transits since 2009,<sup>47</sup> signaling the future use of the area and the need for the development of a policy and strategy prior to the mainstream use of the NSR as a sea route.<sup>48</sup>

In view of such increasing shipping in the Arctic, including vessels carrying flags from EU Member States, the 2016 EU Policy recognizes that the EU should contribute to increased safety of navigation in the Arctic, particularly through innovative technologies, and the development of spatial and temporal monitoring tools to increase knowledge for the assessment of risks and the mitigation of identified risks.<sup>49</sup>

The governance of the NSR and the use of oceans within the Arctic are within the remit of the United Nations Convention on the Law of The Sea (UNCLOS).<sup>50</sup> Article 234 of the UNCLOS, or so-called 'Arctic clause', allows States whose Exclusive Economic Zone (EEZ) is ice-covered to 'to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels.'<sup>51</sup> Russia has made use of this clause by developing 'most comprehensive' regulations for the prevention, reduction and control of marine pollution.<sup>52</sup> As the NSR lies mostly in the Russian internal waters and EEZ, it is these regulations that control the shipping on the route.<sup>53</sup>

### 2.2.2 International Cooperation

Given the EU reliance on and interest in the resources of the Arctic, EU policy recognizes the strategic importance of the Arctic, and identifies it as an area of successful international cooperation contributing to peace and security in

45 *Ibid.*, 2.

46 By the end of the 2014–15 season, transits across the northern sea route included both internal transits (wholly within Russian Federation) as well as transits from the Barents Sea to the Bering Strait.

47 Transit numbers rose from 4 in 2009 to 40 in 2013 season.

48 Stepien, Koivurova and Kankaanpää, n. 10 above, 39.

49 JOIN (2016) 21,12.

50 United Nations Convention on Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

51 Article 234, UNCLOS.

52 Stepien, Koivurova and Kankaanpää, n. 10 above, 46.

53 Brubaker R Douglas, 'Straits in the Russian Arctic' (2001) 32 (3) *Ocean Development and International Law* 263.

the region.<sup>54</sup> Thus, there has been an ongoing development and commitment to an EU Arctic policy.

The EU seeks to engage more with Arctic partners in order to address common challenges in a collaborative manner.<sup>55</sup> It also sees the conclusion of the maritime delimitation between Russia and Norway, and ongoing cooperation in the Barents Sea, as positive examples of cooperation.<sup>56</sup> It regards the Barents Euro-Arctic Cooperation (BEAC) as an important hub for cooperation between EU countries (Denmark, Finland and Sweden), as well as Norway, Russia and the European Commission.<sup>57</sup>

In developing its Arctic policy, the EU has taken note of recent exploration activities in European Arctic and Barents Sea, and especially the bilateral cooperation between Norway and Russia, particularly in relation to environmental protection in the prospecting for oil and gas in the region.<sup>58</sup>

As part of the developing Arctic policy, the Council of the EU has identified the need for the EU to enhance its contribution to Arctic cooperation by conforming to international instruments, especially UNCLOS.<sup>59</sup> It also reiterates the importance of respecting international law principles with regard to trans-Arctic ocean routes, including the NSR.<sup>60</sup> Alongside this engagement, the EU seeks to increase dialogue with Arctic States.<sup>61</sup> To date, such engagement has occurred through the development of EU policy, engagement with the BEAC, and seeking admission to Arctic Council (which to date has not yet come to fruition).

The 2016 EU Arctic Policy recognizes that the Arctic region has acquired a higher profile in international relations due to the increasing environmental, social, economic and strategic importance of the Arctic.<sup>62</sup> Furthermore, the 2016 EU Policy notes that changes affecting the Arctic, although presenting opportunities, also have the potential to increase tensions in the area,

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54 JOIN (2016) 21, 3; European Commission and The High Representative Joint Communication 'Developing a European Union Policy towards the Arctic Region: Progress since 2008 and next Steps' JOIN(2012) 19 final.

55 JOIN (2012) 19, 3.

56 *Ibid.*

57 European Parliament Resolution on the EU Strategy for the Arctic (12 March 2014) 2013/2595RSP, para. 7.

58 *Ibid.*, para. 54.

59 Council Conclusions on Developing a European Union Policy Towards the Arctic Region' (12 May 2014), para. 3.

60 *Ibid.*, para. 10.

61 JOIN (2012) 19, 4.

62 JOIN (2016) 21, 3.

rendering constructive international cooperation more important than ever.<sup>63</sup> The 2016 EU Arctic policy recognizes that there is a need for a network for the Arctic and Atlantic to address maritime security threats associated with the opening of the NSR,<sup>64</sup> as well as supporting the soon to be introduced IMO Polar Code.

### 2.2.3 A Developing EU Arctic Policy

An analysis of EU Arctic policy demonstrates that the foundation of EU Arctic policy—the sustainable development of natural resources—remains important in the region and sits alongside the development, utilization and safety of the marine shipping capacity of the region. The EU seeks to undertake such development and utilization within a framework of international cooperation. Such cooperation between the EU and/EU actors and Russia in the Arctic is long standing, spanning the previous twenty years. As the EU seeks to clarify and develop its policy toward the Arctic, the question remains whether the Russian Arctic policy remains cooperative, or whether it is entering a more ‘bullish’ phase with a shifting focus to one of a more aggressive nature, with the cooperative nature of previous relationships in the Arctic shifting with it.

## 3 Russian Arctic Policy—A New Strategy or More of the Same?

Russian Arctic policy is inextricably tied up with Russian marine policy, given that the region includes a huge expanse of ocean. In the 21st century Russia has identified the Arctic as playing a vital dual role: strategic priority and a resource base for future development.<sup>65</sup>

### 3.1 *Post Soviet Interest in the Arctic—The Development of Maritime Policy*

Almost immediately after coming to power, Russian president Vladimir Putin set forth on a path of rebuilding Russia, particularly through the development of Russian industry. A key strategy in this redevelopment of the Russian Federation was the 2001 *Maritime Doctrine of the Russian Federation 2020*

63 *Ibid.*, 4.

64 *Ibid.*, 13.

65 Ekaterina Klimenko, ‘Russia’s Evolving Arctic Strategy: Drivers, Challenges and New Opportunities’ (Stockholm International Peace Research Institute 2014) Policy Paper 42, 1.

(the 2001 Doctrine).<sup>66</sup> The legal basis of 2001 Doctrine is the Constitution of the Russian Federation, the federal laws of the Russian Federation, UNCLOS, international maritime treaties and the use of the ocean.<sup>67</sup> The 2001 Doctrine sets out Russia's national maritime interests, and continues to remain the fundamental Doctrine for the Russian Maritime area. The 2001 Doctrine sets out the inviolability of the sovereignty of the Russian Federation in its internal waters, as well as its sovereign rights over the EEZ and continental shelf.<sup>68</sup> It recognises the sovereign rights and jurisdiction of the Russian Federation in the exploitation, development and conservation of living and non-living marine natural resources.<sup>69</sup> This declaration of interests in the maritime zones under the 2001 Doctrine is similar to the declaration of the UK over its continental shelf in section 1 of the *Continental Shelf Act 1964* and the Norwegian government declaration over natural resources on the Norwegian Continental Shelf in 1963.<sup>70</sup> Other Russian interests specifically articulated in the 2001 Doctrine include freedom of high seas, protection of human life at sea, the prevention of marine pollution the control of marine communications and the creation of conditions conducive to benefit marine economic activity.<sup>71</sup>

In articulating Russian marine interests, the 2001 Doctrine sets out a number of objectives of national marine policy (NMP) related to the development of petroleum resources. These include:

- The preservation of sovereignty of inland waters, the Territorial Sea and the airspace and subsoil of these areas;

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66 Article 1: General Provisions, Vladimir Putin, 'Maritime Doctrine of Russian Federation 2020' (2001) 1 <[http://www.oceanlaw.org/downloads/arctic/Russian\\_Maritime\\_Policy\\_2020.pdf](http://www.oceanlaw.org/downloads/arctic/Russian_Maritime_Policy_2020.pdf)> accessed 16 August 2016.

67 *Ibid.*

68 In accordance with the United Nation Convention of the Law of the Sea (UNCLOS), the Federal Act on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation, 17 July 1998 <[http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS\\_1998\\_Act\\_TS.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_TS.pdf)> accessed 1 December 2016; and the Federal Act on the Exclusive Economic Zone of the Russian Federation, 2 December 1998 <[http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS\\_1998\\_Act\\_EZ.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_EZ.pdf)> accessed 1 December 2016.

69 Putin, n. 66 above.

70 Act of 21 June 1963 no 12 relating to scientific research and exploration for and exploitation of subsea natural resources other than petroleum resources, as amended 6 June 2008 (Norway), Section 2 <<http://www.npd.no/en/Regulations/Acts/Scientific-research-act>> accessed 29 November 2016.

71 Putin, n. 66 above, 2.

- Protection of sovereign rights on EEZ and CS for the development of natural resources, including the construction and operation of artificial islands, installations and other structures, and.
- Protection of the Russian Federation with the marine areas, protection of national borders, including sea and air space.<sup>72</sup>

In addition, the 2001 doctrine outlines the principles of the NMP:

- Compliance with generally accepted norms of international law and international treaties of the Russian federation in the implementation of maritime activities;
- The priority of political (diplomatic, economic, information and other non-military means) means in resolving conflict in the oceans and remove threats to national security;
- The possession of naval capabilities, and its effective use to support marine activities;
- Maintaining maritime capabilities consistent with national interests including the presence of a Russian fleet in remote areas of the oceans; and
- Construction and infrastructure development for the Russian fleet within RF maintenance of fleet to meet existing and emerging challenges; and
- The readiness of specialized fleets, including commercial, research, and fishery vessels.<sup>73</sup>

In developing the 2001 Doctrine, Russia outlines its interests in its seas. These interests in the Arctic can be divided into two main areas—shipping and the NSR, and resource development.

### 3.2 *Shipping and the Northern Sea Route*

Russian interest in the Arctic is not confined to this century, rather going back many centuries, with particular focus since the beginning of the last century. The defeat of Russia at the hands of the Japanese in 1905 illustrated the need for rapid movement of soldiers and goods from the populous west to the east where an increasingly militarized Japan posed a serious threat to the Russian empire. After this defeat, money was made available for the development of the NSR, to enable faster mobilization of troops and resources to the area.<sup>74</sup>

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<sup>72</sup> *Ibid.*, 3.

<sup>73</sup> *Ibid.* 3–4.

<sup>74</sup> Charles Emmerson, *The Future History of the Arctic* (Vintage 2011) 48.

A notable navigation of the NSR occurred in 1932, when a one-year navigation test of the NSR was undertaken by Otto Schmidt.<sup>75</sup> At this time the Soviet government also set up the administrative body *Glavsevmorput*, with the aim of developing Soviet Arctic domains, especially the NSR.<sup>76</sup> Engagement with the NSR and the Soviet Arctic region continued with the deployment of a drifting Arctic research station in the 1937–8 winter.<sup>77</sup> The Russian Arctic zone continued to be developed both on land and sea, with the rapid development of the city of Murmansk from 1938 as a Northern Sea Port (given its largely ice-free status and location), as well as the Kola Peninsula (including Murmansk) and Archangelsk for resource development. During the Soviet era the role of the NSR was the transport of cargo, people and raw materials east and west along the Arctic route rather than as a transit route for cargo from the Atlantic to the Pacific.<sup>78</sup> However, the breakup of the Soviet Union saw the decline of the USSR military might, with the Murmansk Northern Sea Base in particular entering a stage of rapid decay. Such decay was highlighted in August 2000 with the Kursk tragedy, when the Russian Navy lacked the capability to launch a rescue of the crew of the *Kursk*.<sup>79</sup>

Ongoing use of domestic maritime transport in Russia is crucial, particularly in the Far North where shipping is the only mode of transport, and is essential for sustenance. To achieve the development of the north and shipping in the region the Russian government set out a long-term objective in the 2001 Doctrine for the formation of a regulatory framework for marine activities in compliance with international law, taking into account Russian national interests.<sup>80</sup> The importance of development of national interests of the Russian Federation in the Arctic was reiterated under Part 11 of the Basics of the State Policy of the Russian Federation in the Arctic for the Period till 2020 and for a Further Perspective (2008 Russian Arctic Policy).<sup>81</sup> In particular, Article 7 (d) of the 2008 Arctic Russian Policy prioritizes, as a matter of

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75 *Ibid.*, 64.

76 *Ibid.*, 53.

77 *Ibid.*, 64.

78 Claes L. Ragner, 'Den Norra Sjövägen' in Torsten Hallberg (ed), *Barents—ett Gränsland I Norden* (Arena Norden 2008) 116, English translation at <<http://www.fni.no/pdf/clr-norden-nsr-en.PDF>> accessed 16 August 2016.

79 Zoltan Barany, *Democratic Breakdown and the decline of the Russian Military* (Princeton University Press, 2009) 19–43.

80 Putin, n. 66 above, 3.

81 Dimitry Medvedev, 'Basics of the State Policy of the Russian Federation in the Arctic for the Period till 2020 and for a Further Perspective' (2008) <<http://www.arctis-search.com/Russian+Federation+Policy+for+the+Arctic+to+2020>> accessed 16 August 2016.



strategic interest for the Russian Federation in the Arctic, assistance in the organization and effective utilization of the NSR for international navigation under Russian jurisdiction, in accordance with international treaties. Article 8 (b) of the 2008 Arctic Russian Policy identifies that such development of the NSR will necessarily require the security, defense and protection of the Russian border along the NSR.

The recently announced draft 2015 Russian Marine Doctrine (the 2015 Doctrine) set out additional strategies to promote the development of shipping, particularly in the Arctic. At the launch of the Doctrine, Deputy Prime Minister Rogozin outlined a plan for the resurgence of shipbuilding, with an emphasis on icebreakers.<sup>82</sup> The 2015 Doctrine attributes the resurgence of shipbuilding and icebreakers, the largest development in the post-Soviet era, to the growing importance of the Northern Sea Route.<sup>83</sup> To meet the growing importance, Rogozin identified the development of three new atomic icebreakers, which would be ready to accompany ships in the NSR in 2017, 2019, and 2020 respectively.<sup>84</sup> Such commitment to the NSR was further strengthened in 2016 with the release of the Foreign Policy Concept of the Russian Federation.<sup>85</sup> Under this Concept, Russia clearly reiterates the importance of the NSR, stating that the use of the NSR as Russia's national transport route in the arctic, as well as for transit shipments between Europe and Asia is significant for the development of the region.<sup>86</sup>

### 3.3 *Development and Conservation of Natural Resources*

The value of natural resources in the High North has long been identified. As Nansen travelled down the Yenisei River in 1913, he expressed the possibility that Siberia would become a European resource base for the future.<sup>87</sup>

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82 'Russian Maritime Doctrine' President of Russia Website (26 July 2015) <<http://en.kremlin.ru/events/president/news/50060>> accessed 16 August 2016.

83 *Ibid.*

84 *Ibid.*

85 Foreign Policy Concept of the Russian Federation (approved by President of the Russian Federation Vladimir Putin on November 30 2016) <[http://www.mid.ru/en/foreign\\_policy/official\\_documents/-/asset\\_publisher/CptlCk6B6Z29/content/id/2542248](http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptlCk6B6Z29/content/id/2542248)> accessed 4 February 2017.

86 Foreign Policy Concept of the Russian Federation (approved by President of the Russian Federation Vladimir Putin on November 30 2016) Arctic 76 <[http://www.mid.ru/en/foreign\\_policy/official\\_documents/-/asset\\_publisher/CptlCk6B6Z29/content/id/2542248](http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptlCk6B6Z29/content/id/2542248)> accessed 4 February 2017.

87 Emmerson, n. 74 above, 40.

Since the early 20th century Russia has been a natural resources leader in the Arctic—in the early 1930s the value of Arctic minerals for Soviet Russia was identified by Stalin, who stated ...' the Arctic and our northern regions contain colossal wealth. We must create a soviet organisation, which can, in the shortest period possible, include this wealth in the general resources of our socialist economic structure.'<sup>88</sup>

This expansionist policy of Russia in relation to Arctic mineral wealth is also demonstrated by the acquisition of the Barentsburg coal mining operation on Svalbard from Sweden in 1927, with operation continuing until 1998, beyond the end of the soviet era.<sup>89</sup> However, although there is an abundance of resources in the Russian north, there is also an acceptance that the economic exploitation of the Russian High North needs to overcome some major obstacles—the cold, the dark and the ice.<sup>90</sup> Russia was able to largely overcome these obstacles to the development of resources in the region through a massive expansion in the capitals on high north, assisted greatly by the Gulag system, which provided labour to develop necessary infrastructure.<sup>91</sup> The other great tool in the development of Arctic mineral wealth was the pioneering development of icebreakers. Russia developed the first atomic icebreakers, including the *Lenin* in 1959, followed by the *Arctic* class atomic icebreakers with the *Arktika* in 1975, *Sibit* (1977), *Rossiya* 1985, and *Sovietskiy Soyuz* in 1989.

The development of ocean resources, and in particular the development of mineral and petroleum resources was highlighted in the 2001 Doctrine, outlining the need for advanced geological studies of the Russian Arctic,<sup>92</sup> and the need for state control in the development of these resources.<sup>93</sup> The 2001 Doctrine recognizes international law, and the requirement to adhere to international law, especially UNCLOS and the International Seabed Authority, in the development of these resources. The 2001 Doctrine sees the implementation of increased naval activity as critical to the exploitation of these Arctic resources and the navy as essential for the protection and promotion of national interests and the security of the Russian Federation in the oceans.

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88 *Ibid.*, 35.

89 Rachel Nuwer, 'A Soviet Ghost Town in the Arctic Circle, Pyramiden Stands Alone' (*Smithsonian*, 19 May 2014) <<http://www.smithsonianmag.com/travel/soviet-ghost-town-arctic-circle-pyramiden-stands-alone-180951429/?no-ist>> accessed 19 August 2016.

90 Emmerson, n. 74 above, 50.

91 For example the Gulag system at the Solovetsky Islands and Monastery. See Anne Applebaum, *Gulag: A history* (Doubleday, 1994).

92 Putin, n. 66 above, 7.

93 *Ibid.*, 9.

In line with the 2001 Doctrine, Russia has increased military exercises in the region, as well as reinstating the Northern fleet and undertaken regional deployment of military forces. Such militarisation has not gone unnoticed by the Norwegian Intelligence Service (NIS), which notes that

Russia has taken a number of steps to flag and secure its interests in the Arctic. On 1 December 2014, the country formally established a joint military Arctic command, and the Russians have also reopened old bases and established a permanent presence in new locations across the Arctic. An infantry brigade has been re-established on the border with Finland.<sup>94</sup>

The 2013 *Russian Strategy of the Development of the Arctic* (2013 Arctic Strategy)<sup>95</sup> further enforces this development of the Arctic resources. Article 11 of the 2013 Arctic Strategy outlines the use and development of the Arctic resources. In particular, the strategy outlines the implementation of large infrastructure projects in Russia's Arctic zone, particularly the hydrocarbon deposits on the continental shelf of the Barents, Pechora and Kara Seas, and the Yamal and Gydan Peninsulas.<sup>96</sup>

The importance of Arctic natural resources was also identified in the 2015 Russian Maritime Doctrine. Aside from the importance of the NSR, Deputy Prime Minister Rogozin emphasized that 'there are the riches of continental shelf, the development of which calls for an attentive approach',<sup>97</sup> thereby reinforcing the need for the development of atomic icebreakers and the development of the north.

### 3.4 *Longstanding Northern Policy*

There is a clear and longstanding Russian strategy for the development of European Arctic, especially in relation to shipping (the Arctic as both a destination and a transit route) and natural resource development. Such a policy was commenced in former soviet times, and after the collapse of the Soviet Union was resurrected and articulated in the 2001 Doctrine, clarified in the

94 Norwegian Intelligence Service, 'Focus' (2015) Annual assessment 20 <[https://forsvaret.no/fakta\\_/Forsvaret/Documents/Focus2015-ENG\\_hele\\_lav\\_19.05.pdf](https://forsvaret.no/fakta_/Forsvaret/Documents/Focus2015-ENG_hele_lav_19.05.pdf)> accessed 16 August 2016.

95 Russian Strategy of the Development of the Arctic Zone and the Provision of National Security until 2020 (adopted by the President of the Russian Federation on February 8 2013, N°. Pr-232.

96 Russian Strategy of the Development of the Arctic Zone and the Provision of National Security until 2020 (adopted by the President of the Russian Federation on February 8 2013, N°. Pr-232, Article 11(d) and (e).

97 'Russian Maritime Doctrine', n. 82 above.

2008 Russian Arctic Policy, and reinforced in the 2013 Arctic Strategy and the 2015 Doctrine. Such strategies create two fundamental questions. Firstly, is the Russian policy position regarding the Arctic fundamentally different to the policy position of the EU? Secondly, does current Russian Arctic strategy and policy demonstrate a cooperative approach to Arctic development?<sup>98</sup>

#### 4 Russia—EU Interests in the Arctic—Convergence or Divergence?

##### 4.1 *Is Russian Arctic Policy Fundamentally Different to EU Arctic Policy?*

The Russian Arctic policy is clearly articulated in the 2001 Doctrine, which outlines a focus on two main areas in the Arctic: the development of the NSR for both internal and transit shipping, and the exploitation of natural resources in the Russian Arctic, especially the petroleum. The development of these two main areas is seen as long-term strategies, essential for the future of the Russian Federation. This policy approach has been implemented since the beginning of the 21st century, and reiterated in the recent 2015 Doctrine. There is recognition that the development of resources in the Russian Arctic will require infrastructure, and that the European High North lacks sufficient infrastructure at present. Commitment to environmental protection in the Arctic is also recognized by Russia's participation in the petroleum standards developed as part of the Barents 2020 project, providing a great advance in environmental protection for the Arctic.<sup>99</sup>

An analysis of EU Arctic policy in Section 2 reveals that the EU focused on two similar issues to that of Russia. The first issue is that of resource development in the Arctic, arising since the EU is a major petroleum consumer, importing more than EUR400 billion in oil and gas in 2012.<sup>100</sup> This need for access to petroleum resources by the EU, and Russian desire to develop its petroleum resources indicates a symbiotic policy relationship between the EU and Russia, reminiscent of the 1990s when the Energy Charter Treaty 1994 was forged: Russian Arctic policy highlights a commodity it seeks to develop, and the EU policy indicates the EU seeks to acquire Arctic petroleum resources. Regarding the NSR, a symbiosis between Russian and EU Arctic policy also

98 Sean MacCormac, 'The New Russian Naval Doctrine' *Center for International Maritime Security* (24 November 2015) <<http://cimsec.org/new-russian-naval-doctrine/18444>> accessed 16 August 2016.

99 European Parliament Resolution on the EU Strategy for the Arctic (12 March 2014) 2013/2595RSP, para. 54.

100 Stepien, Koivurova and Kankaanpää, n. 10 above, 81.

exists.<sup>101</sup> The EU seeks to protect the Arctic and gain access to shipping routes, and the Russian Federation seeks to develop and control the NSR in order to protect and preserve the Arctic environment for future generations.<sup>102</sup>

#### 4.2 *Does Current Russian Arctic Policy Mark a Shift From Cooperative Arctic Development?*

The EU has clearly and specifically articulated the need for any development of the Arctic to occur through cooperation. In the past, Russia's conduct has been viewed as cooperative in nature, and its Arctic Policy has been overtly cooperative: Article 6(f) of the Basics of the State Policy of the Russian Federation in the Arctic for the Period til 2020 and for a Further Perspective explicitly states that in the sphere of international cooperation, there is a basic objective to maintain a mutually advantageous bilateral and multilateral cooperation between the Russian Federation and the sub-Arctic States on the basis of international treaties and agreements to which the Russian Federation is a party.<sup>103</sup>

However, military activity in the Arctic, especially the remilitarization of the Murmansk naval base, combined with the recent announcement of the 2015 Doctrine, has prompted some authors to question whether this marks a shift in Russian Arctic policy from one of cooperation to one of conflict. Such concern is articulated by Sean McCormac from the Center for Maritime Security (CIMSEC), who notes that 'what is of greatest concern to America's strategic planners is Russia's interest in control of the Arctic and the natural resources in the waters there—Russia's control of the Arctic is a possibility that should not be lightly dismissed'.<sup>104</sup> Given the low oil price at present, the motives of Russia in developing Arctic petroleum resources, which are expensive to extract,<sup>105</sup> are being questioned. Although much of the discussion regarding the development of Arctic resources during 2015 focused on the economic climate and low oil prices, and hence the peril of developing Arctic petroleum

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101 This symbiosis is based on a recognition of current Russian maritime boundaries, and does not incorporate the areas subject to a submission to the Law of the Sea Commission regarding the extension of the limits of the Russian continental shelf.

102 As articulated by Deputy Prime Minister Dmitry Medvedev in 'Russian Maritime Doctrine', n. 82 above.

103 Medvedev, n. 81 above.

104 CIMSEC sees this remilitarization as a move to Russian aggression. See MacCormac, n. 95 above.

105 'Opportunities and Challenges for Arctic Oil and Gas Development' (Wilson Center 2014) <[https://www.wilsoncenter.org/sites/default/files/Arctic%20Report\\_F2.pdf](https://www.wilsoncenter.org/sites/default/files/Arctic%20Report_F2.pdf)> accessed 30 November 2016.

resources, Russian Arctic policy, as demonstrated by the 2001 doctrine and the 2015 Doctrine, is a long-term strategy, designed to fuel a long-term resurgence of economic growth and development.<sup>106</sup>

In order to develop the resources of the region, there is a need for the development of critical infrastructure resources, including the NSR, which is necessary for the transport of resources that are exploited in the region. Russian strategy to date, which has also been demonstrated in the Soviet era, is to develop critical infrastructure in the region. Such critical infrastructure development has been based largely (although not exclusively) on the use of prison labour under the gulag system,<sup>107</sup> and militarization for the development of infrastructure.<sup>108</sup>

Western media has reported, often with appropriate scaremongering, that Russia plans to reopen military bases it abandoned after the Soviet Union collapsed.<sup>109</sup> Journalists have raised fear about such a move, citing such militarization comes at a time heightened tensions with the West over Ukraine that 'saw Russia increase its air patrols probing NATO's borders, including in the Arctic.'<sup>110</sup> The Centre for Strategic International Studies (CSIS) questions whether recent Russian military exercises and the opening of previously closed soviet-era military bases in the arctic are proportional to the use of the NSR or to deploy in search and rescue and oil spill response Agreements that Russia has signed.<sup>111</sup> In its analysis, CSIS interprets Russian activity as a form of aggression, and 'Russia's military buildup and demonstrations of capability are obviously not just about economics or safety but indicate a potentially dangerous attempt to return to Cold War Parity in the Arctic.'<sup>112</sup> Such a view is at odds with Norway, Russia's neighbour, which has concluded that the relationship between Russia and the West is not at its coldest since the Cold War.<sup>113</sup> Russia itself

106 International Institute for Strategic Studies, 'Russia in the Arctic: Economic interests override military operations' (2012) 19 (9) *Strategic Comments* vi–viii.

107 See for instance Magadan-Yakutsk road ('the road of a million bones') and Smolensky Islands.

108 See for example the establishment of the port of Murmansk from the first world war period, and in particular the development of Murmansk during and after World War 2.

109 L. van Geuns and S de Jong, 'West Should Respond to Russian Militarization of the Arctic' *Atlantic Community* (7 September 2015) <<http://www.atlantic-community.org/-/west-should-respond-to-russian-militarization-of-the-arctic>> accessed 16 August 2016.

110 *Ibid.*

111 Conley and Rohloff, n. 16 above, IX, 15.

112 *Ibid.*, 19.

113 Trude Pettersen, 'Norwegian Intelligence Service: Russia Is More Confident and Unpredictable' (*The Independent Barents Observer*, 24 February 2016) <<http://www.thebarentsobserver.com/2016/02/norwegian-intelligence-service-russia-more-confident>>

has also iterated its position regarding militarisation in the Arctic, with first Deputy foreign Minister Titov dispelling any perception of militarization in the arctic:

... Russia does not see any challenges in that area [the Arctic] that would have a military dimension. Russia will continue to oppose any attempts to portray the region as an area of future conflict, and intends, for its part, to promote the idea of the arctic as a territory of peace and cooperation.<sup>114</sup>

It is critical to note that one motive articulated by Russia for increased militarization in the Arctic is its leadership and commitment to the binding (hard law) components of the Arctic Council, Search and Rescue in the Arctic Agreement (SAR),<sup>115</sup> and Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (MOPPR).<sup>116</sup> Russia has argued that the remilitarization of the region is required in order to meet the SAR and MOPPR obligations. Such claims are rejected by western (dominantly the US) authors, who instead cite aggression and conflict associated with Ukraine as reasons for military action.<sup>117</sup> Although doubted by some academics, the role of the military in civilian maritime activities is evidenced in several Arctic States, including the US and Norway. The Norwegian Coast Guard is a part of the Norwegian Navy, to ensure that it receives the necessary training personnel and maintenance to undertake operations from their northern base in Sortland.<sup>118</sup> Similarly, the US Coast Guard (USCG) is one of the five branches of the US military, and the only military organisation within the Department of Homeland Security.<sup>119</sup> The role of the USCG is to safeguard US maritime interests around the world.<sup>120</sup> This is not

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-and-unpredictable> accessed 19 August 2016. Note that the Norwegian intelligence service report for 2016 is only available in Norwegian at present, and therefore there is a reliance on reports in the media regarding the content of the report.

114 First Deputy foreign Minister Vladimir titov's interview with the ITAR-TASS news agency, September 19, 2016 <[http://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/2450934](http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2450934)> accessed 4 February 2017.

115 Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (signed 12 May 2011, entered into force 19 January 2013).

116 Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (signed 15 May 2013, entered into force 25 March 2016).

117 See van Geuns and de Jong, n. 113 above; Conley and Rohloff, n. 16 above.

118 Forsvaret (the Norwegian Armed Forces) website, The Navy <<https://forsvaret.no/en/organisation/navy>> accessed 16 August 2016.

119 US Coast Guard, 'Doctrine for the US Coast Guard' (2014) 59 <[http://www.uscg.mil/doctrine/CGPub/Pub\\_1.pdf](http://www.uscg.mil/doctrine/CGPub/Pub_1.pdf)> accessed 16 August 2016.

120 *Ibid.*

dissimilar to the Russian Coast Guard that has been taken under the auspices of the Federal Security services of the Russian Federation (the FSB) in order to secure and protect national interests. Such Russian militarisation of the Arctic can be viewed within the lens of infrastructure development, given that establishment of military bases provides essential infrastructure that can be built on and extended for civilian purposes, such as for petroleum resource development.<sup>121</sup> In the 2016 EU Policy, the European Commission specifically identified the challenges of sustainably developing Arctic natural resources due to the lack of transport links and infrastructure.<sup>122</sup> The need for infrastructure in the high North was also identified by the Norwegian government in the Barents 2020 report in 2006, which concluded that Norway has ‘well developed infrastructure in northern parts of the country. In Russia, much of this experience is lacking, and supply systems are of an inferior standard compared with those on the Norwegian side of the border.’<sup>123</sup> The role of the military in establishing infrastructure in a region that lacks sufficient infrastructure is recognised by the US military, which notes that ‘the infrastructure required to support military operations is similar in nature to that which is required by a nation’s population as a whole.’<sup>124</sup> In addition, there is also recognition that often the military is the only organisation with the capacity, skills and materials to establish critical infrastructure in areas where infrastructure is lacking or destroyed.<sup>125</sup> The lack of threat that the Russian militarisation poses in the Arctic has been the subject of a study by the Norwegian Intelligence Service (NIS).<sup>126</sup> Whilst the NIS acknowledges that ‘Russia has demonstrated increased military capacity, as shown in Ukraine annexation and the Syrian campaign,’<sup>127</sup> it has established that Russia presently poses no immediate military threat to Norway, although Russia’s increased presence in the North and upgraded military power has increased the

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121 The essential use of military in the Arctic region for operations (such as search and rescue) has also been recognized by the US military. See Col. John L. Conway III, ‘Search and Rescue in the High North: An Air force Mission?’ (2013) 27 (6) *Air and Space Power Journal* 4–24.

122 JOIN (2016) 21, 8.

123 Norwegian government, *Barents 2020: A Tool for a forward-looking High North Policy* (2006), <<https://www.regjeringen.no/globalassets/upload/ud/vedlegg/barents2020e.pdf>> accessed 12 February 2016, p 15.

124 Alan L. Webster, ‘*The Role of the Army in Infrastructure and Capacity Building*’ (2010) p. 15 <<http://handle.dtic.mil/100.2/ADA522051>> accessed 16 August 2016.

125 *Ibid.*, 15.

126 Norwegian Intelligence Service, ‘Focus’ (2015) Annual assessment 20 <[https://forsvaret.no/fakta\\_/ForsvaretDocuments/Focus2015-ENG\\_hele\\_lav\\_19.05.pdf](https://forsvaret.no/fakta_/ForsvaretDocuments/Focus2015-ENG_hele_lav_19.05.pdf)> accessed 16 August 2016.

127 Pettersen, n. 113 above.



ability of Russia to influence Norway's freedom to act in the region.<sup>128</sup> Indeed, the NIS has concluded that:

despite significant military and security policy shifts in 2014, NIS maintains that Russia does not, in the current situation, pose a military threat to Norway. Threats arise from a combination of capability and intention, and although Russia's capability is increasing it is currently difficult to envision any rational basis for Russian military action against Norway in the short to medium term.<sup>129</sup>

Thus, it would appear that Norway has concluded that Russia poses no military threat to Norwegian sovereignty. Such a conclusion is also supported by the EU, which recognizes that there is a lack of facilities and services in the region, and that the Russian government seeks to upgrade facilities and services in the region.<sup>130</sup> The EU also recognizes that there are severe shortcomings to Arctic marine infrastructure, particularly hydrographic surveys for extensive knowledge of the bathymetry.<sup>131</sup> Russia is naturally a State, along with Norway, that is likely to play a role in the region. It is likely that the role Russia plays will be particularly related to maritime affairs, and include port reception facilities for ship waste, a place of refuge in bad weather, oil spill contingency planning equipment depots, provision of hydrographic surveys, and provide refueling stations for the NSR. However, what remains questionable, is how well these critical roles will sit with other international actors.

A commonality that exists between Russian and EU Arctic policy is that of cooperation. Whereas legal instruments dominate international cooperation and use of Antarctica, the Arctic has been dominated by international cooperation, particularly in the form of 'soft law'. The development of soft law in the Arctic, based on cooperation has been led by the Arctic Council, of which Russia has played a leading and cooperative role to date. As well as developing a body of soft law, the Arctic Council has developed a number of legally binding instruments in relation to resource development and increased maritime activity in the Arctic: an agreement on search and rescue in the Arctic (SAR), and cooperation on marine oil spill preparedness and response in the Arctic (MOPPR). In doing so, the Arctic Council has morphed from soft law to hard law, from non-binding to binding instruments. In undertaking this

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128 *Ibid.*

129 Norwegian Intelligence Service, n. 94 above.

130 Stepien, Koivurova and Kankaanpää, n. 10 above, 42.

131 *Ibid.*, 39.

transformation to hard law, Russia has continued to play an integral role in, and is an integral part of, the Arctic Council, demonstrated by Russia recently assuming the Chair of the Arctic Council.

A similar demonstration of Russian commitment to cooperation rather than conflict within the region is its active participation for over 20 years in the Barents Euro-Arctic Council (BEAC),<sup>132</sup> a forum for intergovernmental cooperation on issues concerning the Barents Region, comprising Russia (Arkhangelsk, Karelia, Komi, Murmansk and Nenets), Norway, Sweden and Finland, Iceland, and the European Commission. To date, Russia has not indicated that it seeks any changes to the cooperative nature of BEAC. Russia has not indicated any change to BEAC, nor has it withdrawn support for the forum. Russia remains committed to the focus of BEAC on economic development and transport.<sup>133</sup> Within BEAC, Russia has identified the future potential of the NSR that would benefit the Barents Region and all members of BEAC, providing economic and business opportunities to all,<sup>134</sup> including Arctic members and the EU. Support of BEAC was demonstrated by the Russian foreign Minister Lavrov at the XV meeting,<sup>135</sup> where Russia affirmed its commitment to BEAC:

the principle of continuity, taking into account the interests of all participants in Barents cooperation, including the indigenous population. We prioritise the promotion of the region's sustainable social and economic development, putting in place modern infrastructure and making the region more competitive and attractive to investors through the effective utilisation of its industrial, scientific, innovative, and resource potential, as well as in compliance with environmental requirements.<sup>136</sup>

The establishment of several regional bodies has contributed to cooperation and stability in the region. Previously a region of weak governance, the creation

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<sup>132</sup> See Chapter 3 as well.

<sup>133</sup> Joint Communiqué, XV Session of the Barents Euro-Arctic Council (15 October 2015) <<http://formin.finland.fi/public/default.aspx?contentid=335913&contentlan=2&culture=e>> accessed 12 August 2016.

<sup>134</sup> *Ibid.*, art 9.

<sup>135</sup> <[http://www.mid.ru/en/sovet-gosudarstv-barenceva/evroarkticeskogo-regiona-sber-/-/asset\\_publisher/ovP3hQoCPRg5/content/id/1846132](http://www.mid.ru/en/sovet-gosudarstv-barenceva/evroarkticeskogo-regiona-sber-/-/asset_publisher/ovP3hQoCPRg5/content/id/1846132)> accessed 18 August 2016.

<sup>136</sup> Russian Ministry of Foreign Affairs, Comment by the Information and Press Department on Foreign Minister Sergey Lavrov's Participation in the 15th ministerial meeting of the Barents/Euro-Arctic Council (2015) <[http://www.mid.ru/en/sovet-gosudarstv-barenceva/evroarkticeskogo-regiona-sber-/-/asset\\_publisher/ovP3hQoCPRg5/content/id/1846132](http://www.mid.ru/en/sovet-gosudarstv-barenceva/evroarkticeskogo-regiona-sber-/-/asset_publisher/ovP3hQoCPRg5/content/id/1846132)> accessed 16 August 2016.

of the Arctic Council in 1996 along with the Barents Regional Council have been an innovative arrangement, leading the former Norwegian Foreign Minister to recently declare that *in the Arctic there is less risk of conflicts arising from the region, but greater risk that tensions may spillover from elsewhere*.<sup>137</sup> Russian support for such a regional cooperative approach is reiterated in Article 7 (c) of the 2008 Russian Arctic Policy, enunciating that strategic Arctic priorities for the Russian Federation include strengthening cooperation with the Arctic Council and BEAC.<sup>138</sup> This support has again been reiterated in the 2016 *Foreign Policy Concept of the Russian Federation*,<sup>139</sup> with Russia recognizing the special responsibility that Arctic states bear for the sustainable development of the arctic region.<sup>140</sup> Recognizing such responsibility, Russia also advocates enhanced cooperation in the Arctic Council and the Barents Euro-Arctic Council.<sup>141</sup>

Another strong indicator of the cooperative nature of Russian Arctic policy is its respect for the international law framework governing the Arctic Region. In 2008 the five Arctic states declared at Ilulissat that UNCLOS would be the 'governing international law' regarding the development of the Arctic.<sup>142</sup> In particular, Russian recognition of and deference to UNCLOS includes the resolution of conflicting continental shelf claims;<sup>143</sup> a State's right over mineral resources in the territorial sea and continental shelf,<sup>144</sup> a State's duty to protect marine ecosystems,<sup>145</sup> and special provisions regarding ice-covered waters of the EEZ that authorizes Arctic coastal States to enforce shipping environmental protection.<sup>146</sup>

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137 Johan Store Støre, 'Is This a New Era for the Arctic?' (*World Economic Forum*, 5 January 2016) <<https://www.weforum.org/agenda/2016/01/is-this-a-new-era-for-the-arctic/>> accessed 19 August 2016.

138 2008 Russian Arctic Policy, n. 80, above.

139 Foreign Policy Concept of the Russian Federation (approved by President of the Russian Federation Vladimir Putin on November 30 2016) <[http://www.mid.ru/en/foreign\\_policy/official\\_documents/-/asset\\_publisher/CptlCk6B6Z29/content/id/2542248](http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptlCk6B6Z29/content/id/2542248)> accessed 4 February 2017.

140 *Ibid*, Article 76.

141 *Ibid*.

142 Ilulissat Declaration, Arctic Ocean Conference (Ilulissat, Greenland 27–29 May 2008) <[http://www.oceanlaw.org/downloads/arctic/Ilulissat\\_Declaration.pdf](http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf)> accessed 12 February 2016.

143 Article 76, UNCLOS.

144 Article 9, UNCLOS.

145 Article 192, UNCLOS.

146 Article 234, UNCLOS.

Russia's commitment to UNCLOS<sup>147</sup> was demonstrated in April 2010 in the delimitation of the maritime border between Russia and Norway in the Barents Sea. After being contested by both States for almost 40 years, a cooperative approach was utilized to delimit the border in order to enable both states to pursue economic activities. The maritime delimitation, whilst a surprise to the international community, including Norway, has been interpreted as the commencement of a Russian cooperative phase regarding the Barents region and the High North. To date, there have been no actions by Russia that indicate aggression and conflict. There has been a peaceful establishment of Russian military in the Arctic Region, which has been viewed by the NIS as not posing a threat to Norway. Furthermore, in the 2016 *Foreign Policy Concept of the Russian Federation*,<sup>148</sup> the Russian government reiterated its peaceful approach to the Arctic, stating that 'The Russian Federation believes that the existing international legal framework is sufficient to successfully settle any regional issues through negotiation', including the issue of defining the outer limits of the continental shelf in the Arctic Ocean.<sup>149</sup>

## 5 Conclusion

This paper has examined and analyzed EU and Russian Arctic policies in order to determine whether EU and Russian Arctic policies, which since 2015 has focused on the remilitarization of the Arctic, are divergent, thereby creating conflict within the region. Russia has demonstrated a respect of the international interests that govern the seas, and has engaged with the development of soft law in the region. To date, Russia has complied with all international legal instruments, and initiated the peaceful maritime delimitation of its border with Norway. It has demonstrated leadership within the Arctic Council, especially in the establishment of SAR and MOPPR, and played a leading role in BEAC. Furthermore, it has demonstrated the use of the NSR from as early as

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147 Russia undertook this delimitation in accordance with Article 74 and Article 83 of the United Nation Convention on the Law of the Sea, regarding the delimitation of the EEZ and the Continental Shelf with opposite or adjacent coasts.

148 Foreign Policy Concept of the Russian Federation (approved by President of the Russian Federation Vladimir Putin on November 30 2016) <[http://www.mid.ru/en/foreign\\_policy/official\\_documents/-/asset\\_publisher/CptlCk6B6Z29/content/id/2542248](http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptlCk6B6Z29/content/id/2542248)> accessed 4 February 2017.

149 *Ibid*, Article 76.

the 1930s, which correlates to Russia's exploitation of natural resources in the Arctic. Such strength in the Arctic was diminished in the period after the collapse of the Soviet Union, where naval bases were deactivated, military bases closed, and the region largely abandoned. However, since coming to power in 2000, Russian President Vladimir Putin has reviewed and revised the value of the Arctic. Since 2001, the Arctic has been reestablished as a priority for the Russian Federation, particularly the development of its resources and the development of the NSR. This commitment was reiterated in 2008 with the Arctic Policy, and again in July 2015 when Russia released its draft Maritime Doctrine, which reiterated the importance of the Arctic.

In reiterating the importance and value of the Arctic, areas that were previously of strong military importance, particularly Murmansk and the Kola Peninsula, are again being activated to assist in the development of the resources that EU wants to access. In particular, Murmansk is of vital importance, due to the ice-free port. Russia sees increased naval presence there vital to achieving economic growth and development. The utilization of the military on the Arctic is logical given it is the most prepared and trained for the area, demonstrated by the incorporation of the Coast Guard as a branch of the military in Norway and the US, since only the navy can provide the essential personnel, equipment and training to conduct Arctic operations. Other commercial areas, such as around Norilsk, have always remained militarized for development, demonstrating that military capacity and infrastructure is best able to deal with this in this hostile environment.

The argument that Russian militarization of the Arctic is due to Russian aggression is fanciful, rejected by Russia's closest neighbour, Norway. Rather the evidence demonstrates that Russia is reengaging in the region, reopening and remilitarizing regions in the areas that were decommissioned at the end of the cold war, when there was little use for the regions in the post conflict era. Evidence indicates that there are no alarming trends of aggression and conflict in the Arctic, or that Russia is seeking to reverse its trend of cooperation in the region. In 2001 Russia set in motion a policy of focus on the Arctic and resourcing the Arctic, one that has been strengthened and enhanced by the 2015 Doctrine, and the maritime delineation with Norway under a 76 of the UNCLOS.

Certainly there is a focus on military activity and increased personnel in the Arctic, in part tied to agreements on SAR and OSPR. Rather, increased military activity is also tied to the use of the military to develop regional infrastructure that is needed. Such militarization clearly has made the EU and the US nervous. However, this action has not indicated a rise in conflict in the region, or a move away from cooperation. Rather, it indicates that although there is

conflict and tension between the EU and Russia in other regions of the world, particularly the Ukraine, there is a commonality in Russian and EU Arctic policy, which is fundamentally based upon a mutual respect for the UNCLOS. This commonality is two fold. Firstly, the EU and Russia have a commercial interest in the NSR for shipping and navigation, with an emphasis on freedom of navigation and the right of innocent passage. Secondly, natural resources are of interest to both the EU and Russia. Russia wants to secure and delineate them, and the EU wants to form long-term partnerships to secure access to them. Thus there is a commonality of Arctic policy interests between Russia and the EU, which appear to be ushering in an era of cooperation, not conflict and the threat of war.

# Gauging US and EU Seal Regimes in the Arctic against Inuit Sovereignty

*Michael Fakhri*

## 1 Introduction

It is worth comparing US and EU Arctic power because both have had an ambivalent policy position on the Arctic; and both have recently started to devote significant political and financial resources towards a coherent Arctic strategy.

The US intensified its Arctic policy on 12 January 2009, when the George W. Bush administration released a presidential directive establishing a new policy for the Arctic region.<sup>1</sup> On 10 May 2013, Barack Obama's administration released a document entitled *National Strategy for the Arctic Region* supplementing the 2009 directive.<sup>2</sup> With the directive and strategy in tow, the Obama administration was very politically active in the Arctic as highlighted by several events: In May 2011, as part of the US chairmanship of the Arctic Council, Secretary of State Hillary Clinton attended the Arctic Council ministerial meeting, held in Nuuk, Greenland accompanied by US Interior Secretary Ken Salazar. They were the first US Cabinet members to attend an Arctic Council meeting. In February 2014, the Obama administration appointed retired Coast Guard Admiral Robert J. Papp, Jr. as the first Special Representative

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\* Michael Fakhri, Associate Professor, University of Oregon School of Law, United States of America.

- 1 *National Security Presidential Directive 66/Homeland Security Presidential Directive 25* (2009). The first federal policy addressing the Arctic was by Richard Nixon in his two-page *National Security Memorandum 144* (1972); this was followed by Ronald Regan with *National Security Directive 90* (1993). In 1994, Bill Clinton issued *Presidential Directive 26*—but this was not publicly circulated and received little attention. See Chanda L. Meek and Emily Russell, 'The Challenges of American Federalism in a Rapidly Changing Arctic' in Dawn Alexandria Berry, Nigel Bowles and Halbert Jones (eds), *Governing the North American Arctic* (Palgrave Macmillan UK 2016); Michael T. Corgan, 'The USA in the Arctic: Superpower or Spectator?' in Lassi Heininen (ed), *Security and Sovereignty in the North Atlantic* (Palgrave Macmillan UK 2014).
- 2 *National Strategy for the Arctic Region* (2013) <[https://obamawhitehouse.archives.gov/sites/default/files/docs/nat\\_arctic\\_strategy.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/nat_arctic_strategy.pdf)> accessed 19 July 2017.

for the Arctic Region. And in September 2015, during Obama's trip to Alaska was the first time a US president travelled north of the Arctic Circle. It was also the longest and most engaged visit a sitting president made to Alaska since 1923.<sup>3</sup> All of these events were to some degree the US exercising its political muscle in international Arctic politics. This was also the Obama administration's attempt to try to bring Arctic policy home and direct domestic attention due north. As Special Representative Papp recently stated, '[Americans] are detached from our Arctic. Alaskans understand it, but the rest of the country really doesn't think about the United States being an Arctic nation.'<sup>4</sup>

Finland was the first to push the EU towards developing an Arctic policy when in 1997, as part of its first EU presidency, it put forward the Northern Dimension policy. This was then approved by the European Council in 2000.<sup>5</sup> The Northern Dimension policy raised more questions than answers and commentators continued to wonder what the EU's role in the Arctic was and should be.<sup>6</sup> The European Commission then produced two official Communications

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- 3 Dermot Cole, 'Since Harding in 1923, Presidential Stops in Alaska Have Brought the Unexpected and Memorable' *Alaska Dispatch News* (Anchorage, 28 August 2015) <<https://www.adn.com/we-alaskans/article/presidential-journeys-alaska-and-lesser-momemts-history/2015/08/29/>> accessed 19 July 2017; Klaus J Dodds, 'Northward Ho! Obama, Diefenbaker and the North American Arctic' (2016) 52(2) *Polar Record* 252; Ronald O'Rourke, Congressional Research Service, 'Changes in the Arctic: Background Issues for Congress' (R41153, 31 May 2016) <<https://fas.org/sgp/crs/misc/R41153.pdf>> accessed 19 July 2017.
  - 4 Erica Martinson, 'Now Trending in DC: Arctic Issues' *Alaska Dispatch News* (Washington, DC, 10 June 2016) <<https://www.adn.com/arctic/2016/06/10/now-trending-in-dc-arctic-issues/>> accessed 19 July 2017. See also Philip E. Steinberg, 'US Arctic Policy: Reproducing Hegemony in a Maritime Region' in Robert W Murray and Anita Dey Nuttall (eds), *International Relations and the Arctic: Understanding Policy and Governance* (Cambria Press 2014); Donald R Rothwell, 'The United States and Arctic Straits: The Northwest Passage and the Bering Strait' in Suzanne Lalonde and Ted L. McDorman (eds), *International Law and Politics of the Arctic Ocean* (Brill 2015).
  - 5 European Council, *Action Plan for Northern Dimension with External and Cross-border Policies of the European Union 2000–2003* (14 June 2000) Doc. No. 9401/00 NIS 78.
  - 6 Hanna Ojanen, 'The EU and Its' Northern Dimension': An Actor in Search of a Policy, or a Policy in Search of an Actor?' (2000) 5(3) *European Foreign Affairs Review* 359; Moritz Pieper and others, 'The European Union as an Actor in Arctic Governance' (2011) 16(2) *European Foreign Affairs Review* 227; Andreas Østhagen, 'The European Union—An Arctic Actor?' (2013) 15(2) *Journal of Military and Strategic Studies* 71; Kamrul Hossain, 'EU Engagement in the Arctic: Do the Policy Responses from the Arctic States Recognise the EU as a Legitimate Stakeholder?' (2015) 6(2) *Arctic Review on Law and Politics* 89.



in 2008 and 2012.<sup>7</sup> Despite these two Communications, most EU politicians and policymakers remained ambivalent to the Arctic. In response, some commentators argued that it was in the EU's interest to devise a rigorous Arctic policy that was more coherent than the piecemeal initiatives to date.<sup>8</sup> On 27 April 2016 the EU released its most articulate position to date with its *Integrated Policy for the Arctic*.<sup>9</sup>

While both the US and EU have published new policy documents, their relationship to the Arctic is still unclear. They have framed their Arctic political activity in terms of matters of environment, sustainable development energy and security and it remains to be seen how each authority will pursue an agenda that navigates these multiple—and at times competing—demands.<sup>10</sup>

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- 7 European Commission, *The European Union and the Arctic Region* (11 November 2008) <eeas.europa.eu/arctic\_region/docs/com\_08\_763\_en.pdf> accessed 17 October 2016; European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, *Developing a European Union Policy Towards the Arctic Region: Progress Since 2008* (26 June 2012) <[https://eeas.europa.eu/arctic\\_region/docs/join\\_2012\\_19.pdf](https://eeas.europa.eu/arctic_region/docs/join_2012_19.pdf)> accessed 17 October 2016.
- 8 Kristine Offerdal, 'The EU in the Arctic: In Pursuit of Legitimacy and Influence' (2011) 66(4) *International Journal* 861; Steffen Weber and Iulian Romanyshyn, 'Breaking the Ice: The European Union and the Arctic' (2011) 66(4) *International Journal* 849; Timo Koivurova and others, 'The Present and Future Competence of the European Union in the Arctic' (2012) 48(4) *Polar Record* 361; Antje Neumann, 'European Interests as Regards Resource Exploitation in the Arctic: How Sustainable Are European Efforts in This Regard?' (2012) 4 *Yearbook of Polar Law* 619; Mar Campins Eritja, 'European Union and the North: Towards the Development of an EU Arctic Policy, The Polar Oceans Governance' (2013) 27 *Ocean Yearbook* 459; Kathrin Keil and Andreas Raspotnik, 'The European Union's Gateways to the Arctic' (2014) 19(1) *European Foreign Affairs Review* 101; Cécile Pelaudeix, 'China's Interests in the Arctic and the EU's Arctic Policy: Towards a Proactive EU Foreign Policy?' (2015) 7 *Yearbook of Polar Law* 128; Vicente Lopez-Ibor Mayor, 'The EU Needs a New Arctic Strategy' (2016) 7(1) *Global Policy* 119.
- 9 Joint Communication of the European Commission and High Representative of the European Union for Foreign Affairs and Security Policy of 27 April 2016 on An Integrated European Union Policy for the Arctic, JOIN (2016) 21 <[https://eeas.europa.eu/arctic\\_region/docs/160427\\_joint-communication-an-integrated-european-union-policy-for-the-arctic\\_en.pdf](https://eeas.europa.eu/arctic_region/docs/160427_joint-communication-an-integrated-european-union-policy-for-the-arctic_en.pdf)> accessed 17 October 2016.
- 10 Stéphane Roussel and John Erik Fossum, 'The Arctic Is Hot Again in America and Europe: Introduction to Part I' (2010) 65(4) *International Journal* 799; Patrizia Vigni, 'The Governance of the Arctic Environment: The EU and US Contribution' in Christine Bakker and Francesco Francioni (eds), *The EU, the US and Global Climate Governance* (Ashgate 2014); Adam Stępień, 'Internal Contradictions and External Anxieties: One "Coherent" Arctic Policy for the European Union?' (2015) 7 *Yearbook of Polar Law* 249; Adam Stępień and Andreas Raspotnik, 'The EU's New Arctic Communication: Not-So-Integrated, Not-So-Disappointing?' (Arctic Institute, 2015) <[http://www.arcticcentre.org/blogs/The-EU%](http://www.arcticcentre.org/blogs/The-EU%20and%20the%20Arctic)

Moreover, within the US and EU, the degree of political interest in the Arctic remains uneven.<sup>11</sup>

Political uncertainty has not meant inaction and both the US and EU have enacted laws that have effected Arctic inhabitants. Some of the most controversial legislation has been seal hunting moratoriums that have provided an exception for indigenous hunters. In this chapter, I compare the respective seal regimes—the US marine mammal conservation laws and the EU trade import ban—because seal hunting is a practice that not only provides sustenance and income to Inuit and other indigenous peoples, it is also defines self-hood in the Arctic. I therefore consider the US and EU's respective seal regimes as a principal way each authority negotiates its relationship with Arctic indigenous communities and expresses power in the Arctic.

I will first explain my analytical approach. I then argue that even though the US and EU have new policies, their relationship to the Arctic remains uncertain partly because geographic concepts about the Arctic itself are complex. After, I study the US seal regime and how it relates to indigenous hunting rights—I show that what is at stake in the governing of seals is sovereign power in the Arctic. From the experiences in Alaska, I treat sovereignty as a method of analysis to examine the EU seal regime.

## 2 Sovereignty as an Analytical Concept

Before commencing the legal study, I should explain how I use sovereignty as an analytical concept since the term is inherently contentious. One way to understand sovereignty is as an exclusive exercise of power over a determined territory by a single authority. But this concept does not capture the multiple ways that sovereignty is expressed and defined in practice.<sup>12</sup> Sovereignty is

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E2%80%99s-new-Arctic-Communication-not-so-integrated,-not-so-disappointing/ne2t4glg/65469626-3128-4ae2-96e3-c38b75cf387d> accessed 19 July 2017.

- 11 Philip E. Steinberg, 'Maintaining Hegemony at a Distance: Ambivalence in US Arctic Policy' in Richard C. Powell and Klaus Dodds (eds), *Polar Geopolitics?: Knowledges, Resources and Legal Regimes* (Edward Elgar 2014); see also Østhagen, n. 6 above.
- 12 Jean L. Cohen, 'Whose Sovereignty? Empire Versus International Law' (2004) 18(3) *Ethics & International Affairs* 1; Antony Anghie, 'Rethinking Sovereignty in International Law' (2009) 5(1) *Annual Review of Law and Social Science* 291; Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1(1) *Asian Journal of International Law* 61; Betsy Baker, 'International Law and the Arctic: How Territoriality, Human Rights, and Sovereignty Can Shape Sovereignty' in Robert W Murray and Anita Dey Nuttall (eds), *International Relations and the Arctic: Understanding Policy and Governance* (Cambria Press 2014); Guy-Serge Côté and Matthew Paterson, 'Ecological Sovereignty and Arctic Politics' in Robert W.

pluralist and relational, involves the regular negotiation of authority and jurisdiction, and constitutes a complex relationship to land.

While sovereignty is about the authority to rule over people and things within a particular territorial jurisdiction, it is not necessarily established through military exercises, flag planting, or regular scientific expeditions. Instead, I take sovereignty as a historically contingent concept, which in the Arctic can be understood within the context of Inuit and other indigenous peoples' 'long history of struggle to gain recognition and respect.'<sup>13</sup> I do not assume that sovereignty over land and territory in the Arctic (or anywhere for that matter) is something that is ever determinatively settled.<sup>14</sup> Instead, it is a concept that people deploy in different ways when they argue over who gets to create the rules and institutions that govern territory. Thus, examining international legal and political disputes as disagreements amongst sovereigns may not completely capture political dynamics in a case; it may be more illuminating to understand what is at stake by examining how sovereign power is defined through those disputes.

In order to better understand the stakes it also helps to make a distinction between the concepts of self-determination and sovereignty, even though their meanings significantly overlap and people often use the terms interchangeably. I understand self-determination as a group's ability to obtain their needs and express their desires within an existing system—to play the game in a way that serves their own interest. Sovereign power is a group's ability to define the rules of the game and determine the space in which those rules apply.

I will show how due to a particular colonial and legal context, debates about seal hunting (and other hunting rights)—not claims in terms of land title or maritime boundaries—are one significant way that contemporary sovereignty is understood, contested, and negotiated in Alaska. By using sovereignty as way to organize legal concepts, the fight over seal hunting laws becomes a story about the broader jockeying for control and authority in the Arctic. The EU is not making direct claims to any land or seaways in the Arctic, but as two residents of the North Slope Borough in Alaska explain, 'Regulation of animals

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Murray and Anita Dey Nuttall (eds), *International Relations and the Arctic: Understanding Policy and Governance* (Cambria Press 2014); Jessica M. Shadian, *The Politics of Arctic Sovereignty: Oil, Ice, and Inuit Governance* (Routledge 2014).

13 *A Circumpolar Inuit Declaration on Sovereignty in the Arctic* (April 2009) para. 2.1 <<http://iccalaska.org/wp-icc/wp-content/uploads/2016/01/Signed-Inuit-Sovereignty-Declaration-11x17.pdf>> accessed 17 October 2016.

14 *Contra* Michael Byers, *International Law and the Arctic* (Cambridge University Press 2013) 10–16, 235; David L. VanderZwaag and Jonathan R. Edge, 'Canada–Russia Relations in the Arctic: Conflictual Rhetoric, Cooperative Realities' in Suzanne Lalonde and Ted L. McDorman (eds), *International Law and Politics of the Arctic Ocean* (Brill 2015) 242.

extends to regulating the land and water on and in which the animals live, which then leads to “regulating” people by restricting their activities.<sup>15</sup> The meaning of seal hunting and the implications of the law become even more complicated when considering how seal hunting connects to a global economy.<sup>16</sup> Sovereignty, therefore, serves as a useful concept to examine how the EU’s new seal regime changes how different bodies exercise authority and jurisdiction over Inuit seal hunting practice and commerce.

Also, I take claims to sovereign power to be only as legitimate and as good as one’s relation to Arctic indigenous communities. Or as Mary Simons, former President of Inuit Tapiriit Kanatami, famously put it in the context of Canada, ‘Sovereignty begins at home.’<sup>17</sup> The international corollary is that ‘Arctic sovereignty begins with Inuit [and indigenous peoples].’<sup>18</sup> This is true for all Arctic states, but especially true for the US and EU since they have such a historically and geographically equivocal Arctic presence. Thus, the EU seal regime should be measured against contemporary Arctic legal and political developments in which indigenous peoples are granted at least autonomous legal and procedural standing as a right.<sup>19</sup>

In sum—since indigenous peoples such as the Inuit have a clear claim to their presence in the Arctic, only by gauging and comparing the US and EU’s relationship to indigenous communities can one truly understand how US and EU power operates in the Arctic.<sup>20</sup>

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- 15 Glenn W. Sheehan and Anne M. Jensen, ‘Emergent Cooperation, Or, Checkmate by Overwhelming Collaboration: Linear Feet of Reports, Endless Meetings’ in Rebecca Pincus and Saleem H. Ali (eds), *Diplomacy on Ice* (Yale University Press 2015) 215.
  - 16 Gary Kofinas, ‘Subsistence Hunting in a Global Economy: Contributions of Northern Wildlife Co-Management to Community Economic Development’ (1993) 4 *Making Waves: A Newsletter for Community Economic Development Practitioners in Canada* <<http://arctic.circle.uconn.edu/NatResources/subsistglobal.html>> accessed 20 September 2016.
  - 17 Mary Simon, ‘Inuit and the Canadian Arctic: Sovereignty Begins at Home’ (2009) 43(2) *Journal of Canadian Studies/Revue d’études canadiennes* 250.
  - 18 ICC Canada Staff, ‘Arctic Sovereignty Begins with Inuit’ (2008) 1(4) *DRUM* 1 <<http://iccalaska.org/wp-icc/wp-content/uploads/2016/01/December-2008-Drum.pdf>> accessed 17 October 2016.
  - 19 Timo Koivurova, ‘The Status and Role of Indigenous Peoples in Arctic International Governance’ (2011) 3 *Yearbook of Polar Law* 169; Leena Heinämäki, ‘Towards an Equal Partnership between Indigenous Peoples and States: Learning from Arctic Experiences?’ (2011) 3 *Yearbook of Polar Law* 193; Antje Neumann, ‘Indigenous Peoples’ Participation in the Context of Area Protection and Management: International Approaches versus Regional Approaches in the Arctic’ (2011) 3 *Yearbook of Polar Law* 247.
  - 20 Inuit, like all people, are always defining and redefining the nature and meaning of that claim, see for example *A Circumpolar Inuit Declaration on Sovereignty in the Arctic*

### 3 Multiple Understanding of the Arctic

Even though both the US and EU have new revitalized Arctic policy agendas, their geopolitical relationship to the Arctic remains a matter of debate. This stems in part by the fact the 'Arctic' is a multifaceted concept. The Arctic may be understood in various geographic terms: the area north of Arctic Circle (latitude 66 degrees, 32 minutes north), north of the tree line (which roughly follows the 10°C summer isotherm), or the territory surrounding the Arctic Ocean. Instead of thinking of the Arctic as having a particular boundary you get a better understanding of Arctic geopolitics if you think of it as 'structurally more of a multifold extension of the northerly regions of the eight Arctic states'.<sup>21</sup> If you think in these terms, the Arctic is then defined by how those States and their citizens deploy a complex mix of domestic and international laws to govern the North.

By any geographic definition, the US Federal Government may claim to be an Arctic power because of the fact that part of Alaska is situated in the Arctic Circle. Nonetheless, many residents in Alaska will use the phrase 'Alaska and the United States' designating an indefinite relationship between what is now the State of Alaska and the 48 states that comprise the contiguous continental United States (the 'Lower 48').<sup>22</sup> The European Commission makes geographic claims to the Arctic based on the fact that three of its members, Denmark, Finland, and Sweden have territory in the Arctic Circle. But that claim is fraught with political uncertainties: Denmark's claim to Arctic geography is based on the fact that Greenland and the Faroe Islands are countries within the Kingdom of Denmark. But Greenland's autonomy and sovereignty increases every year, and the Faroese are divided over the future of their

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(April 2009) <<http://iccalaska.org/wp-icc/wp-content/uploads/2016/01/Signed-Inuit-Sovereignty-Declaration-11x17.pdf>> accessed 17 October 2016; Inuit Circumpolar Council Nuuk Declaration 2010 (1 July 2010) <<http://inuit.org/icc-greenland/icc-declarations/nuuk-declaration-2010/>> accessed 17 October 2016. See also Fiammetta Borgia and Paolo Vargiu, 'The Inuit Declaration on Sovereignty in the Arctic: Between the Right to Self-Determination and a New Concept of Sovereignty?' (2012) 4 *Yearbook of Polar Law* 189. Of course, the Inuit Circumpolar Council like all alliances includes its own internal disagreements and tensions, see Gary N. Wilson and Heather A. Smith, 'The Inuit Circumpolar Council in an Era of Global and Local Change' (2011) 66(4) *International Journal* 909.

21 Timo Koivurova, 'The Arctic Council: A Testing Ground for New International Environmental Governance' (2012) 19(1) *Brown Journal of World Affairs* 131, 141.

22 See the following for a history of the complexities of Alaska statehood, Gregory W. Kimura (ed), *Alaska at 50: The Past, Present, and Future of Alaska Statehood* (University of Alaska Press 2010).

constitutional relationship with Denmark thereby complicating Denmark's Arctic geography.<sup>23</sup> Moreover, Greenland and the Faroe Islands, though part of the Kingdom of Denmark, are not members of the EU. Finland and Sweden are relative newcomers to the EU, joining in 1995 and have showed some leadership within the EU to develop an Arctic policy.<sup>24</sup> Nonetheless, Sweden only recently began presenting itself as an 'Arctic' nation in foreign relations and developed its first significant Arctic strategy only in 2011;<sup>25</sup> Finland articulated its Arctic policy only in 2010.<sup>26</sup>

The Arctic may also be understood as the space comprised by the multiple institutions that focus on Arctic life, politics, and geography.<sup>27</sup> The Arctic Council, since its inception in 1996, has become a principal intergovernmental forum that addresses issues faced by the Arctic governments and indigenous

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- 23 R. Adler-Nissen, 'The Faroe Islands: Independence Dreams, Globalist Separatism and the Europeanization of Postcolonial Home Rule' (2014) 49(1) *Cooperation and Conflict* 55; U.P. Gad, 'Greenland: A Post-Danish Sovereign Nation State in the Making' (2014) 49(1) *Cooperation and Conflict* 98; Jeppe Strandsbjerg, 'Making Sense of Contemporary Greenland: Indigeneity, Resources and Sovereignty' in Richard C. Powell and Klaus Dodds (eds), *Polar Geopolitics?: Knowledges, Resources and Legal Regimes* (Edward Elgar 2014).
- 24 See Ojanen, n. 6 above; Ida Holdhus, 'Developing An EU Arctic Policy: Towards a Coherent Approach?' (Master's Thesis in Peace and Conflict Studies, University of Oslo 2010) <<https://www.duo.uio.no/handle/10852/12984>> accessed 19 July 2017.
- 25 Sverker Sörlin, 'The Reluctant Arctic Citizen: Sweden and the North' in Richard C Powell and Klaus Dodds (eds), *Polar Geopolitics?: Knowledges, Resources and Legal Regimes* (Edward Elgar Pub 2014). On understanding the EU's involvement in the Arctic as a mix between external and internal factors see Clive Archer, 'The Arctic and the European Union' in Robert W. Murray and Anita Dey Nuttall (eds), *International Relations and the Arctic: Understanding Policy and Governance* (Cambria Press 2014).
- 26 Lassi Heininen, 'Finland as an Arctic and European State' in Robert W. Murray and Anita Dey Nuttall (eds), *International Relations and the Arctic: Understanding Policy and Governance* (Cambria Press 2014).
- 27 The Arctic Ocean is primarily governed under the auspices of the 1982 UN Convention on the Law of the Sea. A series of relevant 'sub-regional' entities include the Nordic Council, Nordic Council of Ministers, West Nordic Council, Barents Euro-Arctic Council, Northern Dimension, and Council of Baltic Sea States, see Alyson J.K. Bailes and Kristmundur Th. Ólafsson, 'Northern Europe and the Arctic Agenda: Roles of Nordic and Other Sub-Regional Organizations' (2013) 5 *Yearbook of Polar Law* 45. On the EU's role in some of these organizations see, Alyson J.K. Bailes and Kristmundur Th. Ólafsson, 'The EU Crossing Arctic Frontiers: the Barents Euro—Arctic Council, Northern Dimension, and EU-West Nordic Relations' Chapter 3.

peoples.<sup>28</sup> It is constituted by eight Member Countries and six indigenous Permanent Participants, all of which occupy territory in the Arctic by any geographic definition.<sup>29</sup> The Arctic Council allows States and organizations to seek official observer status: to date this includes 13 non-Arctic States,<sup>30</sup> 13 intergovernmental and inter-parliamentary organizations,<sup>31</sup> and 13 non-governmental organizations.<sup>32</sup> The fact that the number of official observer applicants is increasing every year is indicative of the fact that the Arctic Council has quickly become a site of global focus and politics. In fact, some Arctic Council members worry that their power will be diluted if the Arctic Council membership is opened up too widely.<sup>33</sup>

The European Commission has been able to send observers to Arctic Council meetings on an ad-hoc basis, which means it is treated like other

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- 28 Timo Koivurova and Pitor Graczyk, 'The Future of the Arctic Council: Navigating Between Sovereignty and Security' in Robert W. Murray and Anita Dey Nuttall (eds), *International Relations and the Arctic: Understanding Policy and Governance* (Cambria Press 2014); Kristin Bartenstein, 'The Arctic Region Council Revisited: Inspiring Future Development of the Arctic Council' in Suzanne Lalonde and Ted L. McDorman (eds), *International Law and Politics of the Arctic Ocean: Essays in Honor of Donat Pharand* (Brill Nijhoff 2015). On the tension between regional and Arctic Council governance see Valur Ingimundarson, 'Managing a Contested Region: The Arctic Council and the Politics of Arctic Governance' (2014) 4(1) *The Polar Journal* 183.
- 29 Canada, Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, Russia, Sweden, and the United States. Aleut International Association, Arctic Athabaskan Council, Gwich'in Council International, Inuit Circumpolar Council, Russian Association of Indigenous Peoples of the North, and the Saami Council.
- 30 France, Germany, the Netherlands, Poland, Spain, Switzerland, United Kingdom, People's Republic of China, Italy, Japan, South Korea, Singapore, and India.
- 31 International Council for the Exploration of the Sea, International Federation of Red Cross & Red Crescent Societies, International Union for the Conservation of Nature, Nordic Council of Ministers, Nordic Environment Finance Corporation, North Atlantic Marine Mammal Commission, OSPAR Commission, Standing Committee of the Parliamentarians of the Arctic Region, United Nations Economic Commission for Europe, United Nations Development Program, United Nations Environment Program, World Meteorological Organization, and West Nordic Council.
- 32 Advisory Committee on Protection of the Seas, Arctic Institute of North America, Association of World Reindeer Herders, Circumpolar Conservation Union, International Arctic Science Committee, International Arctic Social Sciences Association, International Union for Circumpolar Health, International Work Group for Indigenous Affairs, National Geographic Society, Northern Forum, Oceana University of the Arctic, and World Wide Fund for Nature-Global Arctic Program.
- 33 Yareth Rosen, 'How Many Observers Can Arctic Council Handle?' *The Independent Barents Observer* (Fairbanks, AK, 16 March 2016) <<http://thebarentsobserver.com/arctic/2016/03/how-many-observers-can-arctic-council-handle>> accessed 29 July 2016.

observers in practice but has to apply every time it wants to attend. Since 2008, it has set its sights on trying to receive accreditation as a more permanent Observer to the Arctic Council and put its bid forward at the Kiruna Ministerial meeting in 2013.<sup>34</sup> This can be understood as the EU's attempt to increase its prominence in Arctic geopolitics.<sup>35</sup> But Arctic Council members have pointed to the EU seal regime and its insensitivity to indigenous hunters as a principal reason to block EU's membership bid. Until recently, the EU's Observer status has been vetoed by Canada as an explicit response to the seal hunt dispute (described below).<sup>36</sup> In 2014, Canada dropped its opposition to the EU's application to the Arctic Council after striking a deal on implementing exemptions for indigenous peoples from the EU seal regime<sup>37</sup> and as part of its bilateral trade negotiation (Comprehensive and Economic Trade Agreement).<sup>38</sup> Nonetheless, some Greenland representatives in Danish Parliament called for their government to veto the EU's bid for the Arctic Council if the EU did not do away with its seal regime banning the importation of sealskin, even with an indigenous exception.<sup>39</sup> The EU's membership was left off the agenda (along with other observer applications) at the 2015 Ministerial Meeting of the Arctic Council in Iqaluit, and only Switzerland was the only national government to win observer status at the 2019 Fairbanks Ministerial meeting, the EU will now have to wait at least until the next Ministerial meeting in 2017 in Finland.

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- 34 European Commission, *The European Union and the Arctic Region* (11 November 2008) COM(2008) 763 final <eeas.europa.eu/arctic\_region/docs/com\_o8\_763\_en.pdf> accessed 17 October 2016.
- 35 Andreas Østhagen, 'In or Out? The Symbolism of the EU's Arctic Council Bid' [2013] *Arctic Institute* <<http://www.thearcticinstitute.org/in-or-out-symbolism-of-eus-arctic/>> accessed 3 August 2016.
- 36 'Canada against EU entry to Arctic Council because of seal trade ban', *Canadian Broadcasting Corporation News* (29 April 2009) <http://www.cbc.ca/news/canada/north/canada-against-eu-entry-to-arctic-council-because-of-seal-trade-ban-1.806188>> accessed 29 July 2016.
- 37 Duncan Depledge, 'The European Union in the Arctic' <<http://www.worldpolicy.org/blog/2015/06/24/european-union-arctic>> accessed 19 September 2016.
- 38 European Commission Press Release, 'Canada-EU Summit—A new era in Canada-EU relations: Declaration by the Prime Minister of Canada and the Presidents of the European Council and the European Commission' (26 September 2014) <[http://europa.eu/rapid/press-release\\_STATEMENT-14-288\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-14-288_en.htm)> accessed 24 October 2016.
- 39 Kevin McGwin, 'EU Seal Ban: A Seal of Disapproval' *The Arctic Journal* (Nuuk, 18 February 2015). Russia is blocking the EU on more geopolitical terms, see Duncan Depledge, 'The EU and the Arctic Council' (*European Council on Foreign Affairs*, 20 April 2015) <[http://www.ecfr.eu/article/commentary\\_the\\_eu\\_and\\_the\\_arctic\\_council3005](http://www.ecfr.eu/article/commentary_the_eu_and_the_arctic_council3005)> accessed 18 September 2016.



The EU has some pan-Arctic institutional presence through its parliamentarians who are members of the Conference of Parliamentarians of the Arctic Region. The Conference views the Arctic Council as the primary forum for Arctic cooperation. The Standing Committee (which includes one EU parliamentarian amongst a total of 11 members) works to promote the work of the Arctic Council and participates in the meetings of the Arctic Council as an Observer.

The US, because of its possession of Alaska, was invited to be a founding member of the Arctic Council. While the US was skeptical of the need for the Arctic Council it nonetheless joined at the Council's inception in 1996. But like the EU, it now has significantly increased the political resources it puts towards participating in the Arctic Council, especially since it held the chairmanship from 2015 to 2017.<sup>40</sup>

## 4 The US and Alaska

### 4.1 *Hunting Rights and Sovereignty*

In order to understand US Arctic presence and policy, one must understand the historical legal relationship between the US and Alaska. In Alaska, the meaning and delineation of sovereign power remains a live debate. In the past, like today, hunting rights have played a central role in territorial debates over Alaska.<sup>41</sup> I provide brief historical context as to how sovereignty in Alaska is the product of constant negotiation and is in practice dispersed across an array of authorities. From within this context, I then discuss the legal regime governing marine mammal hunting and provisions made for indigenous hunting rights as it relates to seals.

In Alaska, sovereignty has been the means through which indigenous peoples and settler colonists have defined their relationship between each other, and negotiated authority and jurisdiction over land. Indigenous claims to sovereignty in Alaska today arise from assertions of the inherent powers of self-governing communities that have lived with particular lands from time immemorial. Indigenous communities first engaged with sovereignty as a

40 Diddy R.M. Hitchins, 'An Alaskan Perspective: The Relationship between the US and Canada in the Arctic' (2011) 66(4) *International Journal* 971.

41 Hiroo Nakajima, 'The Monroe Doctrine and Russia: American Views of Czar Alexander I and Their Influence upon Early Russian-American Relations' (2007) 31(3) *Diplomatic History* 439; 'The North Pacific Sealing Convention' (1911) 5(4) *American Journal of International Law* 1025; Garrett Boyle, 'Mutiny against the MMPA: A Look at Alaska SB 60' (2013) 30(2) *Alaska Law Review* 207.

legal and political concept tied to notions of nationhood and the state in their encounter with European migrants. The US lays legal claim to Alaska, and by extension to the Arctic, through the colonial doctrine of discovery.<sup>42</sup> It began when the US purchased what is now the State of Alaska from Russia in 1867 through the Treaty of Cession.<sup>43</sup> Article 3 of the treaty deemed the tribes to be uncivilized and granted the US Federal government the power to subject almost all aboriginal peoples in the area to US federal law.<sup>44</sup> Thus, the treaty followed the logic that Russia was the initial discovering nation, and the US became its successor to legal title of the land used and occupied by indigenous peoples. Indigenous tribes were enraged that no one sought their consent or even consulted with them. The US Federal Government's legal claim was that indigenous tribes only retained the right to the use and occupancy of the land as if they were tenants; this conflicted with native understanding of their relationship to the land.<sup>45</sup> As it stands today in US law, indigenous communities retain the sovereign power of self-government which cannot be extinguished; but Congress in effect passes laws that alters indigenous authority and jurisdiction. Herein lies the space where Alaska Natives negotiate with or resist against US Federal law to define their sovereign power. If we understand authority as the power over someone or something, and jurisdiction as the scope of said power, Congress and the US Federal Government significantly control the levers of indigenous sovereignty.<sup>46</sup> While indigenous peoples as US citizens have some leverage with the executive and legislative branch of US government, like for any citizen, this is power is determined by how well people can organize themselves and exert collective will within the national system.

The US federal government has recognized 229 Alaska Native governments, but without specifically identified territory. The result is that questions over sovereign powers of authority and jurisdiction most often arise through conflicts over subsistence hunting. In fact, subsistence and self-government remains to be the most legally complex and politically heated issue in Alaska

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42 Robert T. Anderson, 'Alaska Native Rights, Statehood, and Unfinished Business' (2007) 43(1) *Tulsa Law Review* 17.

43 Treaty Concerning the Cession of Russian Possessions in North America (30 March 1867) 15 Stat. 539, TS No. 301.

44 The US considered Unangans to be 'civilized' Russian subjects, and ostensibly could choose Russian or American citizenship through the Treaty. In practice, the United States did not recognize the civil rights of Unangans until 1966, see Barbara Boyle Torrey and Agafon Krukoff, *Slaves of the Harvest: The Story of the Pribilof Aleuts* (Tanadgusix Corp 1978).

45 See Anderson, n. 42 above.

46 Benjamin W. Thompson, 'The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination' (1999) 24(2) *American Indian Law Review* 421.

today. But this is not a new issue. Ever since 1867, tribes in Alaska have been fighting for hunting, gathering, and land rights.<sup>47</sup> The struggle was made more acute after the Second World War when Alaska native peoples, demanding more land rights from the US federal government, came up against non-native desires to take of advantage of the postwar economic boom.<sup>48</sup> When Alaska became a state in 1959, the federal government deliberately avoided the issue. Instead, it authorized the newly created state to select 103.35 million acres of 'vacant, unappropriated, and unreserved' land as its own from federal public land (representing about 28% of Alaska's total land base); while at the same time it recognized but did not define native rights.<sup>49</sup> The clash between Native tribes and the new State government was then over which lands were 'vacant, unappropriated, and unreserved' and which were lands necessary and part of Native subsistence use.<sup>50</sup>

Today, this conflict continues between Native governments and the State government over different understandings of hunting rights. Alaska's Constitution does not recognize indigenous rights as such or grant any preference for subsistence hunting. Moreover, the State of Alaska's Department of Fish and Game has had a bias in favor of sport fishing and hunting by urban non-natives.<sup>51</sup> The US government did not address Native hunting rights until the passing of the 1971 Alaska Native Claims Settlement Act (ANCSA), which forms the basis of the modern relationship between tribes in Alaska and the US Federal government.<sup>52</sup> The act fundamentally transformed indigenous relations with the US Federal government and significantly curtailed Native sovereign power.<sup>53</sup> First, the ANCSA extinguished Aboriginal title claims based on prior conveyances, use and occupancy, right, or foreign law.<sup>54</sup> This, however, was not an effort to permanently abolish Native rights; instead the ANCSA then redefined indigenous powers of self-determination. In lieu of title claims, all Alaska Natives alive on 18 December 1971 received the right to obtain stock

47 David S. Case and David A. Voluck, *Alaska Natives and American Laws* (3rd ed, University of Alaska Press 2012) 24–33.

48 Sophie Theriault and others, 'The Legal Protection of Subsistence: A Prerequisite of Food Security for the Inuit of Alaska' (2005) 22(1) *Alaska Law Review* 35.

49 Alaska Statehood Act, Pub. L. 85–508, 72 Stat. 339 (7 July 1958) sections 4, 6.

50 See Theriault and others, n. 48 above; Anderson, n. 42 above.

51 See Case and Voluck, n. 47 above, 293–294.

52 Pub. L. No. 92–203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601–1629h (2000)).

53 Dalee Sambo Dorough, 'Inuit of Alaska: Current Issues' in Natalia Loukacheva (ed), *Polar Law Textbook* (Nordic Council of Ministers 2010).

54 43 USC § 1603.

in one of the newly created thirteen regional corporations and in more than two hundred village corporations. The ANCSA conveyed approximately forty-five million acres of land to the Alaska Native Corporations through fee title, along with a cash payment of almost \$1 billion.<sup>55</sup> Thus, land in Alaska was and remains governed in part through Alaska Native corporations created by the ANCSA and in turn through Alaska state corporate law.

The ANCSA also extinguished 'any aboriginal hunting or fishing rights that may exist.'<sup>56</sup> Then, US Congress requested that the Secretary of Interior and State of Alaska take positive measures to protect native hunting rights. This did not happen and the question of subsistence hunting was left unaddressed (along with other key issues such as federal services and Native government). While Native tribes retained their sovereign hunting rights, the meaning and definition of those rights remained a matter to be decided by tribes in their debates with the Federal government through Congress and disagreements with the Federal government through the courts.

The 1980 Alaska National Interest Lands Conservation Act (ANILCA)<sup>57</sup> was an attempt to further settle Alaska Native hunting and fishing rights. It did this by granting exclusive access to hunting, gathering, and fishing to all rural residents. Thus, it did not create rights to Native peoples in law and left the issue to the fact that most rural residents are Native. In 1989, the Alaska Supreme Court found this provision to be unconstitutional since it made a distinction between rural and non-rural Alaskans.<sup>58</sup> To date, distinct Native subsistence hunting rights are not granted in positive law as a rule and are only provided through exceptions to wildlife management statutes such as the 2000 Migratory Bird Treaty Act, the 1972 Marine Mammal Protection Act (MMPA), and the 1973 Endangered Species Act.<sup>59</sup>

#### 4.2 *The Economy of Seal Hunting Rights and Indigenous Sovereignty*

In Alaska, seal hunting is at the intersection of three aspects of village economies: subsistence, government transfer, and the market economy.<sup>60</sup> It also has a broader existential meaning in which seal hunting is how indigenous

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55 Case and Voluck, n. 47 above, 35, 75, 79.

56 43 USC § 1603(b).

57 Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended at 16 U.S.C. §§ 3101-3233. (2000)).

58 *McDowell v State*, 785 P.2d 1 (Alaska 1989).

59 Theriault and others, n. 48 above.

60 Lee Huskey, 'Alaska's Village Economies' (2004) 24(3) *Journal of Land Resources & Environmental Law* 435.

groups in the Arctic socially and culturally define themselves. In other words, seal hunting in the Arctic is a practice that is embedded within several economies—and those economies are conjoined through indigenous understandings and expressions of sovereign power and rights of self-determination. Indigenous groups make choices through this matrix to determine what seal hunting means and how it should be valued, and often those choices are conditioned by law.

US law grants Indigenous peoples in Alaska seal hunting rights as an exception to the MMPA. US Congress first enacted this on 21 October 1972.<sup>61</sup> It prohibited US citizens on the high seas from harassing, hunting, capturing, or killing ('taking') protected species or anyone doing the same in US waters. It also prohibited importation of marine mammals and marine mammal products into the US.<sup>62</sup> To some degree, US Congress passed the MMPA as a response to a public animal cruelty campaign against the hunting of harp seal pups in Canada, and general concerns about other marine mammals.<sup>63</sup> Like the current EU seal regime, it was not specifically a response to species that were endangered. Native groups, in order to exercise their hunting rights, had to seek permission from the appropriate Federal Secretary.<sup>64</sup>

In 1994, the MMPA was significantly amended marking a shift in conservation policy from hunting moratorium to wildlife management. It also provided Native peoples more opportunities to define their hunting rights and be part of that management.<sup>65</sup> As usual in the case when rights are granted, this did not resolve anything and instead signaled the beginning of a long, costly, and complex negotiation and contest between different federal and state agencies, sovereign tribes, and non-native hunters.<sup>66</sup> What follows is an examination of how the law configured the political, social, economic, and social attributes of hunting (and the concomitant debates) in a particular way.

The MMPA operates within a convoluted system of government management. After the 1989 Alaska Supreme Court ruling, 'the federal government took over the management of fish and wildlife for subsistence purposes on

61 16 USC §§ 1361–1423h (2000).

62 16 USC § 1371(a).

63 H.R. REP. No. 707, 92d Cong., 2d Sess. (1971), reprinted in 1972 USCCAN 4144.

64 Other exceptions include taking for the purpose of scientific, commercial, and ecological activities.

65 Susan C. Alker, 'The Marine Mammal Protection Act: Refocusing the Approach to Conservation' (1996) 44(2) *UCLA Law Review* 527.

66 Kate Wynne, 'The Marine Mammal Protection Act: An Overview of Recent Changes' *Alaska's Marine Resources* (Fairbanks, September 1995) <<http://nsgd.gso.uri.edu/aku/akug95003.pdf>> accessed 17 October 2016. For the initial implementation process, \$2.5 million were authorized to set up the new system but were not released immediately.

Alaska public lands in 1990 (approximately 60% of Alaska lands), leaving the state to manage the remaining 40% of Alaska lands, including Native lands.<sup>67</sup> The result is that hunting rights are governed by multiple legal regimes through a federal and state management system that is 'complicated and sometimes conflicting.'<sup>68</sup>

In sum, hunting rights to date are entangled in three, uneasy bundles of sovereign power: Native-US Federal relations, Native-State of Alaska relations, and the constitutional division of power between the Federal and State government. Since tribes in Alaska are within the fold of US imperial adventures, US executive power and local tribes negotiate and contest the meaning, limits, and extent of sovereign power through US administrative law and not international law.<sup>69</sup> It is helpful to understand the administrative structure before turning to the actual legislation.

The amended MMPA provides a structure to implement the Alaska Native hunting right exception, authorizing (but not requiring) the US Federal government to develop a co-management system with Alaska Native organizations.<sup>70</sup> In 1997, the Indigenous People's Council for Marine Mammals (a coalition of Tribal marine mammal commissions/councils and other Native organizations in Alaska), U.S. Geological Survey Biological Resource Division (which falls under the auspices of the Department of Interior), Fish and Wildlife Service (Department of Interior), and National Oceanic and Atmospheric Administration (NOAA Fisheries is under the auspices of the Department of Commerce) developed a Memorandum of Agreement to provide the foundation and direction for the use of co-management funds provided under the MMPA.<sup>71</sup> The result has been a number of place-specific or animal-specific

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67 Alaska Federation of Natives, *2016 State Priorities* <[www.nativefederation.org/wp-content/uploads/2016/02/2016statepriorities-2.5.2016.pdf](http://www.nativefederation.org/wp-content/uploads/2016/02/2016statepriorities-2.5.2016.pdf)> accessed 17 October 2016.

68 *Ibid.*; Case and Voluck, n. 47 above, 265; Jordan Diamond, Greta Swanson and Kathryn Mengerink, 'Rights and Roles: Alaska Natives and Ocean and Coastal Subsistence Resources' (2012) 8(2) *Florida A&M University Law Review* 219.

69 There is, however, a strong argument made in the US that international law is increasingly becoming the platform from which Alaska Natives, and all indigenous groups in the US, to assert their rights in relation to the US government, see Dorough, n. 53 above; Case and Voluck, n. 47 above, 1–20.

70 16 USC § 1388.

71 Memorandum of Agreement for Negotiation of Marine Mammal Protect Act Section 119 Agreements (August 1997) <<https://alaskafisheries.noaa.gov/sites/default/files/umbrellaagr97.pdf>> accessed 17 October 2016; this was updated with Memorandum of Agreement for Negotiation of Marine Mammal Protect Act Section 119 Agreements (October 2006) <<https://alaskafisheries.noaa.gov/sites/default/files/umbrellaagro6.pdf>> accessed 17 October 2016.

cooperative agreements and concomitant agencies.<sup>72</sup> The result is a complex system of shared responsibility in which each commission or committee is a place of back-and-forth discussion between the US Federal government and Native tribal councils—the theory being that these are ‘government-to-government’ negotiations and neither has principal control over decision-making. The meaning and effect of co-management is not only a matter of administrative design but also arises through implementation. For example, State troopers will sometimes not cite someone for a violation and leave the matter to the appropriate tribal council. In sum, co-management can be understood as the complex, pluralist legal regime through which questions of authority and jurisdiction over hunting are decided both through agreement, implementation, and interpretation.<sup>73</sup>

The US government in many respects defines Native rights, but Alaska Natives assert those rights as a matter of sovereign power because of pre-colonial contact history. The MMPA defines Alaska Native organization to mean a group designated by or formed through US law, which represents or consists of Indians, Aleuts, or Eskimos residing in Alaska. Thus, tribes retain inherent sovereignty but derive their standing in government-to-government negotiations from the US itself; they may, for example, obtain official designation as an Alaska Native Tribe, authorization through a co-management bodies, or legal personality through incorporation. An Alaska Native, as a US citizen, may also assert her Native rights by suing the appropriate federal or state agency in court, thus granting the final word on hunting rights to the US judiciary.<sup>74</sup>

The US government expresses its sovereignty through two agencies which have different jurisdiction, each of which negotiates with Alaska Native organizations. The Secretary of Commerce (through NOAA Fisheries) has jurisdiction over mammals that are members of the order of Cetacea and members of the order Pinnipedia (other than walruses). The Secretary of the Interior (through the US Fish and Wildlife Service) has jurisdiction over all other marine mammals.<sup>75</sup> Because each agency operates out of its own Federal

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72 Alaska Beluga Whale Committee, Alaska Eskimo Whaling Commission, Aleut Marine Mammal Commission, Alaska Native Harbor Seal Commission, Cook Inlet Marine Mammal Council (disbanded in 2012), Ice Seal Committee, Traditional Council of St. George Island, and Tribal Government of St. Paul.

73 Eric Smith, ‘Some Thoughts on Comanagement’ (1996) 4(1) *Hastings West-Northwest Journal of Environmental Law and Policy* 1.

74 See for e.g. *John v. United States*, 247 F.3d 1032 (9th Cir. 2001).

75 16 USC § 1362(12)(A). In fact, the legislation grants NOAA the jurisdiction and grants the power to whatever Secretary of the department in which NOAA is operating.

department, they each operate within a distinct institutional history, has a different Secretary with her or his own particular agenda, and must respond to different political pressures. As a result, each agency enforces the law in its own way.

The US seal regime's laws are just as complex as its administrative structure. Through the MMPA, Congress first delimits indigenous hunting rights in Alaska in terms of ethno-cultural membership and geography. It does this by designating and defining the category of 'Alaska Native' and only granting hunting rights to 'any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean'. Then, Congress grants anyone who meets these defined identities the right to take any marine mammal if the taking meets the following criteria:

- (1) is for subsistence purposes; or
- (2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing ...; and
- (3) in each case, is not accomplished in a wasteful manner.<sup>76</sup>

Last, the US Federal government retains final authority to restrict or revoke this hunting right if the appropriate Secretary determines 'any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted.'<sup>77</sup> In other words, the Secretary retains a conservation trump card against Alaska Natives.

Each one these points have been legally contentious. First, on the question of who is allowed to hunt and the category of 'Alaska Native': unlike the Alaskan Constitution, the MMPA singles out Alaska Natives and in doing so recognizes indigenous sovereignty to some degree. What makes the issue more antagonistic amongst people in Alaska is the fact that hunting rights are now embroiled in a constitutional debate that was triggered when the Alaska Supreme Court ruled in 1989 that ANILCA's provision privileging rural—and mostly Native—residents was unconstitutional because it contravened the 'equal access' clause of the Alaska Constitution.<sup>78</sup> Native and pro-Native groups argue that the Alaska Constitution should be amended to bring it into compliance with ANILCA; while non-native groups argue that ANILCA

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<sup>76</sup> 16 USC § 1371(b).

<sup>77</sup> *Ibid.*

<sup>78</sup> *McDowell v. State*, 785 P.2d 1, 9 (Alaska 1989).



should be amended to bring it into compliance with the Alaska Constitution.<sup>79</sup> Additionally, some conservationists oppose the government granting Native tribes subsistence rights because they worry that such rights will ‘open the door’ to commercial hunting.<sup>80</sup> From another perspective, if an Alaska Native no longer ‘dwells on the coast of the North Pacific Ocean or the Arctic Ocean’, moving for example to an urban center like Fairbanks in the interior of the State, this suggests that she or he will likely lose their hunting rights.

Next, hunting practice criteria are also a matter of significant disagreement: hunting must be for the purpose of subsistence or making authentic handicrafts/clothing, and is not wasteful. To start with the overarching requirement of non-wastefulness, the criticism has been that ‘interpretation has been ambiguous, and enforcement arbitrary’, and such debates have eroded the relationship between indigenous hunters and government managers.<sup>81</sup>

ANILCA identifies the elements to subsistence, requiring Alaska Natives to show the hunt is a matter of economic and physical reliance, cultural or social value, and custom and tradition.<sup>82</sup> Not only are there legal debates over the meaning of subsistence, but there are also socio-economic questions as to whether subsistence hunting should be treated more like a commercial commodity or as a communal right for Alaska villages.<sup>83</sup> The more acute problem,

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- 79 Alaska Federation of Natives, *2016 State Priorities* <[www.nativefederation.org/wp-content/uploads/2016/02/2016statepriorities-2.5.2016.pdf](http://www.nativefederation.org/wp-content/uploads/2016/02/2016statepriorities-2.5.2016.pdf)> accessed 17 October 2016; Jack B. McGee, ‘Subsistence Hunting and Fishing in Alaska: Does ANILCA’s Rural Subsistence Priority Really Conflict with the Alaska Constitution?’ (2010) 27(2) *Alaska Law Review* 221.
- 80 Alma Soongi Beck, ‘The Makah’s Decision to Reinstate Whaling: When Conservationists Clash with Native Americans over and Ancient Hunting Tradition’ (1996) 11(2) *Journal of Environmental Law & Litigation* 359, 362.
- 81 Martin Robards and Julie Lurman Joly, ‘Interpretation of Wasteful Manner within the Marine Mammal Protection Act and Its Role in Management of the Pacific Walrus’ (2007) 13(2) *Ocean & Coastal Law Journal* 171.
- 82 16 USC § 3113. See also Jennifer L. Tomsen, ‘Traditional Resource Uses and Activities: Articulating Values and Examining Conflicts in Alaska’ (2002) 19(1) *Alaska Law Review* 167; Case and Voluck, n. 47 above, 266–267. The Katie Johns litigation remains one the most politically contentious, legally complicated, and popularly (in)famous series of cases on federal, tribal and state interests over jurisdiction of Alaska Native subsistence rights, *John v. United States*, 247 F.3d 1032 (9th Cir. 2001). See Heather R. Kendall-Miller ‘Katie John—Her Life and Legacy’ (Native American Rights Fund) <[www.narf.org/cases/katie-john-v-norton/](http://www.narf.org/cases/katie-john-v-norton/)> 17 October 2016.
- 83 Jeremy David Sacks, ‘Culture, Cash or Calories: Interpreting Alaska Native Subsistence Rights’ (1995) 12(2) *Alaska Law Review* 247; William M. Bryner, ‘Toward a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Natives’ (1995) 12(2) *Alaska Law Review* 293.

however, is the sovereign power question of who gets to decide what is subsistence hunting. In the division of power in Alaska, the State authority and legal regime is often rigid and backward looking, while the Federal system of co-management with tribes tends to be more accommodating and responsive to indigenous claims.<sup>84</sup> Nonetheless, Federal conservationist legislation that carves out indigenous exception such as the MMPA do not grant tribes a mandatory role in the federal government's decision-making on whether and how much to limit subsistence hunting. Moreover, the Federal government makes these decisions through executive orders, which does not provide tribes with clarity since these orders are more easily made and unmade than legislation (the corollary is that they are more negotiable). More problematic is the fact that each federal agency has their own concept of when or how they engage in co-management consultations.<sup>85</sup>

The requirement that hunting be for the purpose of making 'authentic' handicraft or clothes, the other criteria for allowable indigenous hunting, is vexing. One Federal agency (Fish and Wildlife Service) decided to only look to the past and limit 'authentic' articles to those 'commonly produced' before the enactment of the MMPA (in this case it was products made from sea otter skin). The Federal Court of Appeal struck down their legislation and held that legislation sufficiently defined authentic native handicrafts as being 'made at least in part of "natural materials", and ... [produced] ... in traditional native ways, such as weaving, carving, and stitching.' Thus, the court held that the agency had no discretion to impose what it deemed to be as additional requirements.<sup>86</sup>

The final way that Congress delineates its authority over hunting rights is through wildlife protection powers. While seals are not currently endangered, this may change as the climate rapidly changes raising the issue of seal protection in the future. Alaska Natives' rights are respected, however, by the fact that the Federal Government are accountable to them (and the courts) a very specific burden of proof showing 'substantial evidence on the basis of the record as a whole' that a species or stock of marine mammal is depleted.<sup>87</sup> The US Federal government rarely exercises this authority, but when it does the political stakes are high. This is exemplified in the case when the Federal government banned all gray whale hunting on conservation grounds contra their treaty with the Makah tribe in the Northern Pacific (in the State of Washington); the

84 See Theriault and others, n. 48 above; Diamond, Swanson and Mengerink, n. 68 above.

85 Elizaveta Barrett Ristroph, 'Alaska Tribes' Melting Subsistence Rights' (2010) 1(1) *Arizona Journal of Environmental Law & Policy* 47, 71–72.

86 *Didrickson v United States Department of the Interior*, 982 F.2d 1332 (9th Cir. 1992).

87 16 USC § 1371(b)(3).

Tribe forcefully responded through a long legal battle and extra-administrative measures.<sup>88</sup>

The reality of everyday life is that communities' cultural, economic, and social practices and ensuing meanings are always responding to changing conditions.<sup>89</sup> Subsistence hunting, like all community practices, is embedded in the past but also alive in the present. Thus, as indigenous communities change so does their sense of subsistence hunting's meaning and purpose. What is consistent is that subsistence hunting remains central to indigenous self-understanding in Alaska.

The legal complexity of the seal regime in Alaska is the result of that fact ever since statehood in 1959 sovereignty remains—in the words of a doyen of indigenous law in the US—a matter of 'unfinished business' in Alaska.<sup>90</sup> And as long as it remains a matter of 'unfinished business' the US's claims to sovereignty in the Arctic will be politically tenuous.

## 5 EU Seal Regime

In 2009, the EU enacted regulations whose aim was to ban the importation of seal products into its market.<sup>91</sup> It made exceptions for indigenous communities, marine resource management, and personal use by travelers. The indigenous community exception only allowed seal products that result from Inuit or other indigenous communities if they met the following criteria:

- (a) seal hunts conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical region;

88 See Beck, n. 80 above; Paul Gottlieb, 'U.S. Halts Makah Whaling Study After Seven Years Over "New Scientific Information"' (*Peninsula Daily News*, 23 May 2012) <[www.peninsuladailynews.com/article/20120523/NEWS/305239987](http://www.peninsuladailynews.com/article/20120523/NEWS/305239987)> accessed 13 July 2016.

89 Chanda L. Meek, 'Comparing Marine Mammal Co-Management Regimes in Alaska: Three Aspects of Institutional Performance' (Doctoral Dissertation, University of Alaska 2009) <<http://www.uaf.edu/files/rap/Meek%20dissertation%2009.pdf>> accessed 2 August 2016; Ristroph, n. 85 above.

90 See Anderson, n. 42 above.

91 Parliament and Council Regulation (EC) 1007/2009 on trade in seal products, [2009] OJ L286/36 (Basic Regulation). The exceptions are contained in Commission Regulation (EU) No. 737/2010 laying down detailed rules for implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products, [2010] OJ L216/1 [Implementing Regulation].

- (b) seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions;
- (c) seal hunts which contribute to the subsistence of the community.<sup>92</sup>

This seal ban created an international maelstrom including a series of cases before the EU courts and WTO. I first provide a summary of these cases as part of the larger political context surrounding the 2009 EU seal regime since the current 2015 seal regime was drafted in response to these cases. Using the sovereignty analytic developed in the previous section on Alaska, I then examine the process that led to the current seal regime and the text of the regime itself.

### 5.1 *Seal Ban Cases*

Inuit groups in Canada were frustrated that they had no practical way to take advantage of the indigenous community exception because the EU did not create any administrative structure to clarify and enforce the measure in a way that applied to them. As exemplified in Alaska, the terms of the measure were not self-explanatory and also required significant administrative structure in order to be effective. The EU did put into place a mechanism that allowed (the mostly Inuit) Greenlandic hunters to benefit from the exception.<sup>93</sup> Nonetheless, Inuit groups in Canada and Greenland came together in their broader concern that even with an indigenous exception, such legislation would cause the entire seal market to collapse. In alliance with all seal hunters they called for an end to the whole seal regime.

This position was partly based on experience: international animal welfare activists had successfully led anti-seal hunt campaigns in the 1970s and 1980s that caused the US to ban the importation of all seal products in 1972 and the EU to ban the importation of the white pelts of the youngest pups in 1983.<sup>94</sup> This in effect reduced the price of seal pelts and significantly diminished all seal hunting. The Inuit position was also based on contemporary economic conditions: by the European Commission's estimate, 30% of global trade in seals is within the EU market.<sup>95</sup> The EU's ban would likely cause surplus seal products to flood other markets thereby depressing the global price. Moreover,

92 Implementation Regulation, article 3.

93 See Chapter 4.  
■ AQ: verify as instruction in correction.

94 Peter L. Fitzgerald, "Morality" May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law' (2011) 14(2) *Journal of International Wildlife Law & Policy* 85.

95 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seal Products', COM (2008) 469 final.

Inuit hunters and their communities' livelihood would be affected since not all seal products they produced would satisfy the specific, exceptional conditions laid out in the EU regulation. Even if the products did meet the regulatory exception, Inuit traders would have to bear the administrative and financial burden proving the hunt and product meet EU criteria, thereby raising the cost of production. Moreover, Inuit access to the international seal product markets depends upon the marketing channels created and maintained by the much larger Atlantic seal hunt. The ban would do away with these channels, which would in effect deny Inuit hunters market access.<sup>96</sup>

Inuit were also angry that animal welfare activists, celebrities, and the regime itself characterized seal hunting as a cruel and barbaric practice. They were frustrated that animal welfare activists and EU officials did not understand the reality of the seal hunts, conditions in the Arctic, or the centrality of seal hunting in almost all aspects of Inuit life. This had economic implications for even if Inuit seal products made it to the European market, they would be tainted by demonizing moralistic language. Moreover, Inuit heard this complaint as patronizing especially since their identity was at stake. For example, at the 2014 Oscars, comedian Ellen DeGeneres raised funds by posting a selfie photo and sent about \$1.5 million to the Humane Society, which strongly opposes the seal hunt. In response, Killaq Enuaraq-Strauss, a 17-year-old Inuk woman from Iqualuit and Degeneres fan, posted a video, where she told Degeneres in the most considered and considerate way, 'We do not hunt seals ... for fashion. We hunt to survive.'<sup>97</sup> This triggered an online campaign and Inuit flooded Twitter with selfies posing with seal fur and affirming the importance of hunting seal for food, clothing, and traditional reasons (#sealfies).

Like the Inuit, some commentators questioned the exception's legitimacy or effectiveness and predicted that the seal regime would shut down all seal trade and hunts, commercial or otherwise. Some found that the EU seal regime contravened indigenous human rights since it potentially threatened Inuit livelihood and way of life.<sup>98</sup> Others focused on the incoherence of the

96 Tamara Perišin, 'Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges' (2013) 62(2) *International and Comparative Law Quarterly* 373; Elizabeth Whitsitt and Nigel Bankes, 'The WTO Panel Decision on the EU's Rules on the Marketing of Seal Products: Who Won and Who Lost?' (*ABlawg*, 10 January 2014) <<http://ablawg.ca/2014/01/10/the-wto-panel-decision-on-the-eus-rules-on-the-marketing-of-seal-products-who-won-and-who-lost/>> accessed 29 September 2016.

97 Killaq Enuaraq-Strauss, 'Dear Ellen' (*YouTube*, 23 March 2014) <[https://www.youtube.com/watch?v=eRPEz57\\_l\\_M](https://www.youtube.com/watch?v=eRPEz57_l_M)> accessed 24 October 2016.

98 Dorothée Cambou, 'The Impact of the Ban on Seal Products on the Rights of Indigenous Peoples: A European Issue' (2013) 5 *Yearbook of Polar Law* 389; Kamrul Hossain, 'The EU

legislation pointing out that it served multiple conflicting purposes namely the protection of animal welfare concerns, the need to harmonize a fragmented internal market, and an attempt to protect indigenous rights.<sup>99</sup> The Court of Justice of the European Union (CJEU) upheld the Regulations on the basis of Article 95 of the EC Treaty and determined that the principal objective of the EU's Sealing Regulations '... is not to safeguard the welfare of animals but to improve the functioning of the internal market.'<sup>100</sup> The WTO Panel found that that hunting methods used by indigenous hunters '... can cause the very pain and suffering for seals that the EU public is concerned about' and as such the indigenous community exception bore no rational connection to the EU's alleged concern for animal welfare.<sup>101</sup> One Member of the European Parliament (MEP) agreed that the legislation did not clearly serve animal welfare purposes and stated,

[t]here is something not strictly rational about singling out seals for special treatment. They are not an endangered species—even the WWF says so. We do not get anything like the clamour about hunting seals on behalf of wasps or woodlice or wolverines or worms. Then again, democracy is not strictly rational.<sup>102</sup>

Others have pointed out that not only did the European and WTO courts have ample evidence that seals did not necessarily suffer in the hunts, but that the EU legislation was disconnected from scientific and social reality of seal hunting communities.<sup>103</sup> The EU's position that the legislation's purpose was to

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Ban on the Import of Seal Products and the WTO Regulations: Neglected Human Rights of the Arctic Indigenous Peoples?' (2013) 49(2) *Polar Record* 154.

99 See Fitzgerald, n. 94 above; Whitsitt and Bankes, n. 96 above; Nikolas Sellheim, 'The Goals of the EU Seal Products Trade Regulation: From Effectiveness to Consequence' (2015) 51(3) *Polar Record* 274.

100 Case T-526/10 *Inuit Tapiriit Kanatami and Others v Commission* (General Court, 25 April 2013), paras 35, 83.

101 WTO, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products—Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para. 7.275.

102 Quoted in Fitzgerald, n. 94 above, 129.

103 Nikolas Sellheim, 'The Right Not to Be Indigenous: Seal Utilization in Newfoundland' (2014) *Arctic Yearbook* 546; Nikolas Sellheim, 'Direct and Individual Concern' for Newfoundland's Sealing Industry?—When a Legal Concept and Empirical Data Collide' (2015) 6 *Yearbook of Polar Law* 466; Nikolas Sellheim, 'The Narrated "Other"—Challenging Inuit Sustainability Through the European Discourse on the Seal Hunt' in Kamrul Hossain and Anna Petrétei (eds), *Understanding the Many Faces of Human Security* (Brill 2016).

protect animal welfare was not strengthened since it defended the seal regime at the WTO as a measure necessary to protect public morals<sup>104</sup> and not in terms of exceptional provisions in the GATT that allowed states to restrict trade if it was necessary to protect animal life and health.<sup>105</sup>

One reason that the issue bubbled up onto international politics was because the price of seal pelts doubled from 2001 to 2004 due to a thriving seal population and new markets in Russia, Ukraine, Poland, and China. Inuit hunters and struggling communities in Newfoundland were excited about the prospect of revived market.<sup>106</sup> With the new booming market, animal activists reinvigorated their international campaign against seal hunting. Moreover, animal activists were empowered by 2009 Treaty on the Functioning of the European Union which placed a legal obligation on the EU and Member States to 'pay full regard to welfare requirements of animals' when enacting and enforcing EU policies.<sup>107</sup>

Inuit groups quickly mobilized against the 2009 EU seal regime. In April 2009, the Nunavut Premier Eva Ariak asked the Federal Government of Canada to oppose the EU's bid to seek Observer Status at the Arctic Council. The Federal Government accommodated this request, which was a political blow to the EU trying to position itself as an Arctic power—the EU seal regime was now one of the major issues in Arctic politics. Meanwhile, both the Governments of Nunavut and Canada mounted a campaign to convince EU parliamentarians to vote against the legislation.<sup>108</sup>

When that failed, Inuit Tapiriit Kanatami (representing Inuit interests in Canada) lead advocacy groups from Canada and Greenland, associations of hunters from Canada and Greenland, individual Inuit hunters, and other representatives from the seal hunting industry from Canada, Greece, and Norway in a series of suits in EU courts. The General Court found the challenge inadmissible primarily on the grounds that the measure in question was a legislative

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104 General Agreement on Tariffs and Trade (14 April 1994) (GATT) 1867 UNTS 187, 33 ILM 1153 (1994), article XX(a).

105 GATT, article XX (b).

106 Clifford Kraus, 'New Demand Drives Canada's Baby Seal Hunt' *New York Times* (New York City, 5 April 2004), <[http://www.nytimes.com/2004/04/05/world/new-demand-drives-canada-s-baby-seal-hunt.html?\\_r=0](http://www.nytimes.com/2004/04/05/world/new-demand-drives-canada-s-baby-seal-hunt.html?_r=0)> accessed 24 October 2016.

107 Article 13, Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47.

108 'Canada against EU entry to Arctic Council because of seal trade ban' (*CBC News*, 29 April 2009) <<http://www.cbc.ca/news/canada/north/canada-against-eu-entry-to-arctic-council-because-of-seal-trade-ban-1.806188>> accessed 24 October 2016.

and not regulatory measure.<sup>109</sup> The Court of Justice of the European Union (CJEU) upheld this finding on appeal.<sup>110</sup>

Inuit Tapiriit Kanatami then lead the group to challenge the implementing measure before the European courts. This time the courts did not address the admissibility question and instead focused on the substance of the legal claims. The General Court of the CJEU dismissed the applicants claims that: 1) the Commission did not have the appropriate legal basis to enact the regulation and; 2) that regulation breached proportionality and subsidiary rights, and fundamental rights.<sup>111</sup> The applicants lost their appeal before the CJEU.<sup>112</sup> Part of the applicants' argument was that General Court erred in finding not applying Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, especially since the Declaration was mentioned in the Recital of the measure. Article 19 provides that 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.' The CJEU held that the Declaration was not binding and the reference to it in the Recital only provided reasoning for the indigenous exception and did not acknowledge a legal obligation—which in effect denied Inuit rights to self-determination within the EU.

While the EU court cases proceeded, Canada and Norway challenged the EU seal regime before the WTO.<sup>113</sup> Their claims were that the regime was discriminatory and contravened 'Most Favored Nation' and 'National Treatment' obligations under the General Agreement on Tariffs and Trade (GATT) and

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109 Case T-18/10 *Inuit Tapiriit Kanatami and Others v Commission* (General Court, 6 September 2011) ECR 11-5599; Article 263, TFEU: '[a]ny natural or legal person may ... institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory of direct concern to them and does not entail implementing measures.'

110 Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Commission* (Grand Chamber, 3 October 2013).

111 Case T-526/10 *Inuit Tapiriit Kanatami and Others v Commission* (CJEU, 25 April 2013).

112 Case C-398/13 P *Inuit Tapiriit Kanatami and Others v Commission* (CJEU, 3 September 2015).

113 WTO, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products—Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R; WTO, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products—Reports of the Appellate Body* (22 May 2014) (WTO AB Seals) AB-2014-1 and AB-2014-2.



Technical Barriers to Trade Agreement (TBT). They also claimed that regime violated the TBT because it was not ‘necessary to achieve a legitimate objective’ and constituted an ‘unnecessary obstacle to trade’. Much like the CJEU, the WTO Appellate Body (AB) held that the EU Seal regime was not a ‘technical regulation’ and therefore the TBT did not apply.

The AB did hold that EU seal regime contravened GATT Article I:1 (Most-Favored Nation) because it unjustifiably discriminated against all seal products from Canada and Norway in favor of seal products from Greenland. It followed, however, with the conclusion that the EU could provisionally justify its ban as a general exception under GATT Article XX(a) as a measure necessary to protect public morals. The AB’s conclusion was provisional because the AB also found that the EU seal regime favored Greenlandic Inuit hunters over Canadian Inuit hunters because the EU did not pursue ‘cooperative arrangements to facilitate the access of Canadian Inuit to the [indigenous community] exception’; the AB held that as a result the EU had not shown that their ban was not arbitrary or unjustifiable suggesting that if the EU treated all indigenous hunters equally it would be WTO compliant.<sup>114</sup>

## 5.2 *The Process Leading to the New Seal Regime*

Inuit leaders throughout the whole fight against the EU through the courts did not assert their hunting rights in explicit terms of sovereignty and instead framed the issue as a matter of human rights, WTO law, and EU law. Nonetheless, after the series of cases were decided, one can see how sovereignty—understood as the authority to decide what rules applied to seal hunting—was in practice negotiated and contested amongst national and transnational Inuit advocacy groups, the Government of Canada, the Government of Nunavut, the WTO courts, the EU courts, the EU Parliament, EU Council, and EU Commission in the process of developing the new seal regime.

Several months after the WTO AB report was released, all the relevant authorities and groups adjusted to the new legal landscape, politically regrouped, and mobilized. Canada and the EU ironed out their economic differences and negotiated a framework to ensure the indigenous exception would allow actual access for Inuit seal products into the product, while also finalizing the text of the Canada-EU bilateral trade agreement.<sup>115</sup> In return,

114 WTO AB Seals para. 5:337.

115 European Commission, ‘On the Joint Statement by Canada and the European Union on Access to the European Union of Seal Products From Indigenous Communities of Canada’ C(2014) 5881 final; ‘Canada, EU strike deal on indigenous-hunted seal products:

Canada agreed to support the EU bid for Observer Status at the Arctic Council. Thus, the EU was able to preserve its ability to enact its seal regime and in effect govern seal hunts in the Arctic while also garnering more support for its position in the Arctic Council.

Indigenous groups were cautiously favorable with the prospect of an effective indigenous exception. But since details were still not worked out it was unclear whether the Inuit would have meaningful input in the process or whether the new seal regime would actually benefit indigenous people. Duane Smith, president at the time of ICC Canada statement captures the concern of how much power the EU may retain when he stated, 'Hopefully, [Canada and the EU] resolve this issue so that we don't have to deal with this every time the EU has elections.'<sup>116</sup>

The European Commission released its proposal for a new seal regime on 6 February 2015.<sup>117</sup> Inuit hunting advocacy groups, such as Inuit Sila from Greenland took a two-pronged approach. They continued to outright oppose the seal import ban. But seeing that the process was continuing, in the alternative they also argued that the EU had to make an active effort undoing the stigma against seal products and inform consumers that sealskin is sustainable and legal, and invest in businesses that help increase the sale of seal products.<sup>118</sup> The EU Parliament took up some of those points and successfully fought the Council of the European Union and the European Commission to include a provision in the regime that requires the European Commission to inform the public as such.<sup>119</sup> Parliamentarians also successfully added more language in

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Joint statement gives Inuit seal products access to EU market; non-aboriginal sealers left on the floe edge' *NunatsiaqOnline* (Iqaluit, 13 October 2014) <[http://www.nunatsiaqonline.ca/stories/article/65674canada\\_eu\\_strike\\_deal\\_on\\_indigenous-hunted\\_seal\\_products/](http://www.nunatsiaqonline.ca/stories/article/65674canada_eu_strike_deal_on_indigenous-hunted_seal_products/)> accessed 24 October 2016; Jim Bell, 'EU Trade Deal Good for Nunavut Fish Harvesters, Tootoo says', *NunatsiaqOnline* (Iqaluit, 29 April 2016) <[http://www.nunatsiaqonline.ca/stories/article/65674eu\\_trade\\_deal\\_good\\_for\\_nunavut\\_fish\\_harvesters\\_tootoo\\_says/](http://www.nunatsiaqonline.ca/stories/article/65674eu_trade_deal_good_for_nunavut_fish_harvesters_tootoo_says/)> accessed 24 October 2016.

116 Chris Plecash, 'Seal Deal Clears Way for EU Observer Status at Arctic Council' *Embassy* (Ottawa, 22 October 2014) 1 <<http://www.nationalnewswatch.com/2014/10/22/seal-deal-clears-way-for-eu-observer-status-at-arctic-council/#.WXEjRYqQxE4>> accessed 20 July 2017.

117 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1007/2009 on trade in seal products' (Proposal for New Seal Regime) COM(2015) 45 final.

118 Kevin McGewin, 'Let Them Eat Brussel Sprouts' *The Arctic Journal* (Nuuk, 10 February 2015).

119 Article 5a, European Parliament and Council Regulation (EU) 2015/1775 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010 (Basic Regulation 2015) [2015] OJ L 262/1.

an explicit effort to emphasize that hunting is a matter of self-determination. The Commissions proposal framed hunting rights in the following way:

seal hunting is an integral part of the socio-economy, nutrition, culture and identity of the Inuit and other indigenous communities, making a major contribution to their subsistence.<sup>120</sup>

Parliamentarians managed to add the statement that 'seal hunting was a major contribution to indigenous subsistence and development, providing food and income to support the life and sustainable livelihood of the community, preserving and continuing the traditional existence of the community.'<sup>121</sup> Also, references to hunting as 'cruel' were removed and references to indigenous rights were placed more centrally as an effort to reduce the assumption in many people's mind that all seal hunting was inhumane.

After the release of the proposed new seal regime, the Governments of Greenland and Nunavut came together and released a joint statement emphasizing the role that seal hunting played in their way of life, sense of self, and human rights.<sup>122</sup> They concluded by encouraging 'the EU to work with us in a manner that respects for our way of life and the United Nations Declaration on the Rights of Indigenous Peoples, to ensure all Indigenous peoples have equal access to, and benefits from, the implementation of the Indigenous Communities Exemption.'<sup>123</sup> This communicated that the respective Inuit governments' tactic was to accept that the new EU seal regime was going forward and work to ensure that that Inuit rights of self-determination were as protected as much as possible within this new law.

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120 Proposal for New Seal Regime, COM(2015) 45.

121 Basic Regulation 2015, recital para. 2. Cristian-Silviu Buşoi, 'EU Seal Products Trade Rules Must Respect Inuit Culture' *The Parliament Magazine* (Brussels, 13 July 2015) <<http://www.theparliamentmagazine.eu/articles/opinion/eu-seal-products-trade-rules-must-respect-inuit-culture>> accessed 24 October 2016.

122 The Government of Nunavut is a semi-autonomous body governing a mostly Inuit community. Because Nunavut is a Canadian territory, it is created through federal law (unlike provinces which are created by the Canadian Constitution). This means it theoretically has a more direct relationship with the Federal government than the provinces.

123 Government of Greenland, 'Joint Statement of the Governments of Greenland and Nunavut regarding the Revision of the EU Seal Ban Regulation' (24 April 2015) <[http://naalakkersuisut.gl/~media/Nanoq/Files/Attached%20Files/Udenrigsdirektoratet/Joint%20statement%202015/240415\\_Joint%20Statement%20ENG.pdf](http://naalakkersuisut.gl/~media/Nanoq/Files/Attached%20Files/Udenrigsdirektoratet/Joint%20statement%202015/240415_Joint%20Statement%20ENG.pdf)> accessed 24 October 2016.

While the EU Parliament was able to find some compromise with the Council and Commission on meeting Inuit demands for enhancing references to indigenous self-determination, the regime by the very act of its existence is in effect a co-management system in which the EU shares sovereign power with the Governments of Nunavut, Greenland, and Canada. The EU seal regime forces Arctic authorities to engage in 'government-to-government' negotiations over seal hunting with the EU.

Under the new regime, the EU sets the rules and approves recognized bodies which implement the rules. The new criteria only focus on the hunting methods and do not scrutinize the seal products themselves. But, in order to comply with WTO law, due regard for animal welfare was now included as a determining factor. Now seal products from indigenous hunts will only be allowed into the EU market if they meet the following criteria:

- (a) the hunt has traditionally been conducted by the community;
- (b) the hunt is conducted for and contributes to the subsistence of the community, including in order to provide food and income to support life and sustainable livelihood, and is not conducted primarily for commercial reasons;
- (c) the hunt is conducted in a manner which has due regard to animal welfare, taking into consideration the way of life of the community and the subsistence purpose of the hunt.<sup>124</sup>

To date, the EU has authorized the Governments of Greenland<sup>125</sup> and Nunavut<sup>126</sup> to implement the indigenous exception. Thus, Inuit governments retain some power in how the system is managed since they assess the

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<sup>124</sup> Article 1, Basic Regulation 2015.

<sup>125</sup> European Commission, 'Decision Recognising the Greenland Department of Fisheries, Hunting and Agriculture (APNN) in accordance with Article 3 of Implementing Regulation (EU) 2015/1850 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products' C (2015) 7274 final, <[http://ec.europa.eu/environment/biodiversity/animal\\_welfare/seals/pdf/C\\_2015\\_7274\\_en.pdf](http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/C_2015_7274_en.pdf)> accessed 24 October 2016.

<sup>126</sup> European Commission, 'Decision recognising the Department of Environment, Government of Nunavut in accordance with Article 3 of Implementing Regulation (EU) 2015/1850 laying down detailed rules for the implementation of Regulation (EC) No1007/2009 of the European Parliament and of the Council on trade in seal products' C (2015) 7273 <[http://ec.europa.eu/environment/biodiversity/animal\\_welfare/seals/pdf/C\\_2015\\_7273\\_en.pdf](http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/C_2015_7273_en.pdf)> accessed 24 October 2016.

conditions of the hunt that generated the seal products according to the EU indigenous exception. Then (if appropriate), the respective authorized government agency issues the attesting document, which accompanies the seal product into the EU market. This document is what confirms the legality of the seal product and all subsequent invoices related to the product must contain a reference to the number of the attesting document.<sup>127</sup> As we saw in Alaska, terms such as 'subsistence' and 'tradition' are complex, dynamic ideas best determined by the communities themselves.

Much like the US Secretary of the Interior or Commerce in Alaska, EU authorities, however, retain the final word. Disputes over the authenticity or correctness of the attesting document are to be determined by each EU Member States.<sup>128</sup> It is unclear what this means, and one can imagine Inuit hunters having to navigate an inconsistent, fragmented dispute resolution system. Moreover, in order to respond to the WTO ruling and the AB concerns about the seal regime being arbitrary and unjustified in its ability to distinguish between commercial and subsistence hunting, the new seal regime accords the Commission heightened powers to scrutinize indigenous hunters: if the Commission has evidence that indigenous hunts are 'commercial' it may prohibit the placing on the market or limit the quantity that may be placed on the market of seal products resulting from the hunt concerned. Thus, the Commission is the final arbiter of interpreting what is meant by 'subsistence' and what is 'commercial', what is 'traditional', and what constitutes appropriate consideration for animal welfare. From Alaska, we learned that this interpretive authority is a key power in governing seal hunts.

The language empowering the Commission to conduct 'appropriate consultations' is not clear as to whether this is mandatory or only permitted. Nor does it explain whether the Commission has to consider the input from experts and stakeholders when making its final decision.<sup>129</sup> As a result, the standard of proof is unclear. Much like how each US Federal agency interprets its duty to consult Alaska Natives, Inuit seal hunters will have to see how the EU Commission will interpret its duty.

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127 Basic Regulation 2015.

128 Article 4, Basic Regulation 2015.

129 Basic Regulation 2015, recital para. 5: 'It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. It is also important that the Commission carry out appropriate consultations with the countries of origin concerned and with relevant stakeholders. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.'

The new seal regime forces the Governments of Canada, Nunavut, and Greenland to expend resources on implementing the new regime and responding to market conditions that they could have otherwise spent on other services for Inuit communities. For example, the Government of Canada allocated CAD 5.7 million over five years to build the Inuit seal industry and create the certification system for the EU market.<sup>130</sup> The Government of Greenland spent large sums of money to counter negative public perception and promote and document the sustainability of the seal hunt.<sup>131</sup>

Even with all these provisions that distribute decision-making power across different authorities, the EU still retains significant power in affecting the seal product market. The seal products market has still not recovered from 2009 mainly due to public perception in the EU that all seal products are illegal or immoral. The market is at the mercy of how quickly the EU works with the respective authorities to get the new seal regime up and running. For example, Danish and Greenlandic MEPs have been frustrated with how slow the Commission has been in launching an awareness-raising campaign. In fact, the Commission has interpreted their duty to raise public awareness to be about ‘informing the public and competent authorities in order to facilitate the implementation of the regulation and of its exceptions’ and explicitly not as a strategy to ‘restore consumer confidence.’<sup>132</sup> This approach will undoubtedly limit the ability of seal product prices to rise.

While Inuit governments work hard to ensure that Inuit rights of self-determination are protected within the new system, Inuit hunter advocates are consolidating their efforts on a parallel tract and continue to challenge the legitimacy of the new seal regime itself.<sup>133</sup>

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130 Jim Bell, ‘Nunavut MP says \$5.7M Sealing Fund is “Huge for Inuit”’ *NunatsiaqOnline* (Iqaluit, 23 April 2015) <[http://www.nunatsiaqonline.ca/stories/article/65674nunavut\\_mp\\_says\\_5.7m\\_sealing\\_fund\\_is\\_huge\\_for\\_inuit/](http://www.nunatsiaqonline.ca/stories/article/65674nunavut_mp_says_5.7m_sealing_fund_is_huge_for_inuit/)> accessed 24 October 2016; ‘Federal Money Flowing to Nunavut to Certify, Promote Sealskin’ *NunatsiaqOnline* (Iqaluit, 29 January 2016) <[http://www.nunatsiaqonline.ca/stories/article/65674federal\\_money\\_flow\\_to\\_nunavut\\_to\\_certify\\_promote\\_sealskin/](http://www.nunatsiaqonline.ca/stories/article/65674federal_money_flow_to_nunavut_to_certify_promote_sealskin/)> accessed 24 October 2016.

131 Bill Justinussen and Randi V. Evaldsen, ‘Seal Ban Undermines EU Credibility in Arctic’ *The Arctic Journal* (Nuuk, 15 April 2015).

132 Parliamentary Questions, ‘Answer given by Mr Vella on behalf of the Commission’ E-000747/2016 (17 March 2016), <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2016-000747&language=EN>> accessed 24 October 2016.

133 ‘Greenland Group in Iqaluit to Partner Against EU Seal Product Ban’ CBC News (16 January 2015); ‘Despite Exemption, NTI [Nunavut Tunngavik Inc.] still opposed EU Seal Skin Ban’ *NunatsiaqOnline* (Iqaluit, 6 August 2015); Inuit Sila Press Release, ‘Inuit Seal Hunters Unite in Struggle for International Justice’ *Arctic Journal* (Nuuk, 28 September 2015).

## 6 Conclusion

Since indigenous peoples constitute the core of the Arctic, one can consider the US as occupying the semi-periphery. While the US government has territory in the Arctic, its history as a colonizing power has been at the forefront of its complicated relationship with sovereign indigenous communities in Alaska. This is one reason that the US's claims as an Arctic State are not straightforward. Alaska Natives have struggled over a number of decades to assert and define their sovereign power; the US Federal Government and Alaska State Government have each responded accordingly to those claims while still asserting their own authority and addressing their own political needs. As such, US sovereignty in the Arctic is the product of a colonial relationship enacted through a complex domestic legal regime based on administrative, constitutional, corporate, and Alaska Native laws.

The EU can be understood as lying on the periphery of the Arctic because it has an even more limited relationship to territory in the Arctic (through northern Finland and Sweden) and is not a member of the Arctic Council. There are of course limits to comparing the EU to the US since it does not make any colonial claims over Inuit and other Arctic indigenous peoples. Nonetheless, the EU's new seal regime, like its US counterpart, governs Inuit seal hunts directly effecting how Inuit relate to the land. This strikes at the heart of the Arctic and has threatened international acceptance of the EU as an Arctic player.

If EU politicians and civil servants examine their relationship to the Arctic in terms of sovereign power they are presented with several choices: EU officials may continue down the path of trying to balance animal welfare activist desires, market harmonization regulations, EU Arctic policies, and Inuit livelihood. Thus, they would try to signal to Arctic peoples that they are indeed responsible Arctic actors by taking the time to investigate domestic co-management systems more deeply and systemically, with an acute awareness of Inuit self-determination rights. They would have to invest significant amounts of political and financial resources in order to ensure that the new EU seal regime is implemented in a way that aligns with contemporary Arctic law and politics.<sup>134</sup>

What the study of the US seal regime highlights, confirmed by political reality thus far, is that putting such a scheme into effect is no easy task—and that even if done with the best intentions the process will be fraught with

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134 Cf. Shadian, n. 12 above.

missteps and challenged by popular protest. Even though law is a common way to express power in a way that includes multiple agendas and interests, it does not necessarily resolve ambiguities. Instead it pushes and reshapes political agendas in a particular direction. What the EU may learn from the US and Alaska is that while the new seal regime is the product of resolved court disputes, it is very likely only the beginning of a long, legally complex negotiation with Inuit leaders in Canada and Greenland and will remain a matter of 'unfinished business' for a while.<sup>135</sup> The EU seal regime, if fully operationalized, will likely be even more complicated than the US seal regime in Alaska since it will be enmeshed in the web of Federal Canadian laws, Nunavut laws, Inuit indigenous laws, the increasingly autonomous legal system of Greenland,<sup>136</sup> Danish law, WTO law, international human rights law, EU law, and the respective domestic laws of EU Member States.

If EU officials choose that path they must also live with a particular irony. Under the new law and with the new administrative structures, the EU will be able to claim that they are to some degree addressing Inuit self-determination rights. Take away the irony and all that is left is the EU projecting sovereign power beyond its existing territorial boundaries, and reconfiguring Inuit relationships to seals, land, and water. One key aspect of sovereign power is to determine what is the norm and what, or as in this case who, is the exception. Sovereign power is most often constituted through defining difference and then implementing law to reconcile with this purported difference. In fact, this was the classic way in which imperial power operated over the past several centuries. Colonizing powers first would legally define indigenous as different or exceptional, then enacted laws that tried to bridge, redefine, or contain that difference. Such a 'dynamic of difference' would justify the enactment of positive laws and the presence of the colonizing power.<sup>137</sup> In Alaska, it was as recent as the early 1970s when the US Federal Government abolished Native claims to land title, only to start anew by redefining the meaning of Native sovereign hunting rights as an exception to conservation laws.

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135 See Anderson, n. 42 above.

136 Natalia Loukacheva, *The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut* (University of Toronto Press 2007).

137 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005); Karin Mickelson, 'The Maps of International Law: Perceptions of Nature in the Classification of Territory' (2014) 27(3) *Leiden Journal of International Law* 621.



The EU seal regime also enacts this dynamic of difference since it characterizes seal hunting as immoral, bans the importation of seal products thereby killing the market, and then categorizes indigenous hunters as an exception to the ban. The regime attempts to reconcile that indigenous difference and reconstruct the market by creating conditions for Inuit and indigenous hunters 'to place [seal products] on the market'.<sup>138</sup> This in effect increases the EU's influence in the Arctic since it is now dictating the rules of the seal market. The new legislation defines indigenous communities as people sharing a history of conquest or colonisation.<sup>139</sup> But one could also read it as a definition that brings with it the echoes of conquest and colonialism into the present since the EU is also implicitly laying claim that it has the authority to define who is or is not indigenous.

EU officials could also take another path and measure their new seal regime against Inuit sovereign power and presence. In doing so, they would have to account for the fact that their seal regime raises questions of the EU's legitimacy in Arctic politics and international law writ large. With that they would have a series of options. EU officials may do away with distinctions between subsistence and commercial as well as indigenous and non-indigenous, and focus on only allowing seal products that result from hunts that consider the seals' welfare into the European market. These EU measures would still have to comply with WTO law, but this would be feasible in partnership with exporting countries. This approach would focus on the method of the hunt and not the identity of the hunter. Or EU officials may trust domestic and international legal regimes regulating seal hunts and enforcing standards of humane treatment.<sup>140</sup> This would mean that the EU would treat Inuit hunting rights, and really all hunting, as the rule leaving it to domestic and international laws to determine

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138 New Basic Regulation article 2. See also Elizabeth Whitsitt, 'A Comment on the Public Morals Exception in International Trade and the EC—Seal Products Case: Moral Imperialism' (2014) 3(4) *Cambridge Journal of International and Comparative Law* 1376; Sellheim, 'The Narrated "Other"—Challenging Inuit Sustainability Through the European Discourse on the Seal Hunt' n. 103 above.

139 New Basic Regulation article 1: "other indigenous communities" means communities in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.'

140 Nikolas Sellheim, 'Seal Hunting in the Arctic States. An Analysis of Legislative Frameworks, Incentives and Histories' (2015) 7 *Yearbook of Polar Law* 188.

when such rights offended legal standards of ethical treatment. With that, EU officials may want to abandon their seal regime all together and focus their Arctic efforts on other issues. This would enhance Inuit communities' ability to confront other challenges of everyday life and determine for themselves how they want to build a livelihood from seal hunting.



**PART 3**

*The EU and Regulating Human Activities in the  
Arctic*





# The European Union and Arctic Shipping

*Henrik Ringbom*

## 1 Introduction

The European Union (EU) has no specific policy on Arctic shipping. Even though the Union has significant policy and economic interests in the projected increased use of Arctic sea routes, existing EU documents on Arctic policy tend to deal with maritime transport issues quite superficially and highlight the need for international rules and global solutions—thus de-emphasizing the role of regional actors like itself. The most recent EU policy document describes the Union's role as that of a mere monitor.<sup>1</sup>

There may be good policy reasons for the EU to avoid an ambitious and potentially controversial policy that specifically targets shipping in the Arctic. Such reasons could include, for example, a general preference for global solutions in shipping policy; policy considerations for the EU with respect to the Arctic more generally; or policy considerations with respect to the EU's bilateral relationships with some of the key Arctic states. The present chapter, however, does not evaluate the EU's policy in political terms. Rather, the scope of the chapter is limited to exploring the extent to which alternative approaches are even conceivable from a legal point of view. Is the EU's cautious policy on Arctic shipping, in other words, dictated by legal necessity or could there be ways to take a more assertive stance, if the political situation permitted? The availability of legal options to the EU is key to any political assessment of its Arctic shipping policy.

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\* Henrik Ringbom, Professor II, Scandinavian Institute of Maritime Law, Faculty of Law, University of Oslo, Norway; Adjunct Professor (Docent) Department of Law, Åbo Akademi University, Turku/Åbo, Finland.

1 The Joint Communication of the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy 'An Integrated European Union Policy for the Arctic' (JOIN (2016) 21 final) of 27 April 2016, at pp. 12, 13 provides that the EU should "support international efforts to implement the International Polar Code" and "should contribute to enhance the safety of navigation in the Arctic through innovative technologies and the development of tools for the monitoring of.... the increasing maritime traffic in the Arctic".

The chapter begins by outlining the general setting for a potential EU shipping policy for the Arctic. First it introduces briefly the general EU policy with respect to the Arctic (section 2.1), followed by a review of Arctic navigation more generally (section 2.2). EU's own statements related to Arctic shipping are discussed in section 2.3. Section 3 assesses the legal options and restraints for EU measures in this area. Since the scope of the analysis is limited to legal matters, a number of non-regulatory ways in which the EU could play a role in Arctic shipping are mentioned only very cursorily in section 3.2. Finally, section 4 provides some concluding observations on the EU's Arctic shipping policy to date.

## 2 The Setting

### 2.1 *The EU and the Arctic*

The EU has significant interests in the resources of the Arctic area. The EU is the principal destination for goods and natural resources from the region. One third of the fish caught in the Arctic is sold in the EU market, and 88 per cent of the EU's iron ore output is produced in the Barents Region.<sup>2</sup> EU activities and decisions affect developments in the Arctic, in terms of investment, projects and funding, but long-distance air and sea transport to Europe is also a major source of pollutants that contaminate the Arctic.<sup>3</sup> Shorter transit shipping routes, which could reduce the distance between Northern Europe and Asia by as much as half, could obviously be of significant economic interest in terms of savings in fuel and other operational costs.<sup>4</sup>

2 Joint Communication from the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, 'Developing a European Union Policy towards the Arctic Region: progress since 2008 and next steps' (JOIN (2012) 19 final), p. 5.

3 Arctic environment: European perspectives—Why should Europe care? European Environment Agency, Environmental issue report No 38/2004. See also Adam Stępień and Timo Koivurova, 'The Making of a Coherent Arctic Policy for the European Union: Anxieties, Contradictions and Possible Future Pathways', in Adam Stępień, Timo Koivurova and Paula Kankaanpää (eds.) *The Changing Arctic and the European Union—A Book Based on the Report "Strategic Assessment of Development of the Arctic: Assessment Conducted for the European Union"* (Brill 2015), 23–24.

4 An oft-cited example is the route between Rotterdam and Yokohama, which measures 11,200 nm via the Suez Canal, but only 6,500 nm via the Northern Sea Route. Generally on the EU's economic interests in Arctic shipping, see Andreas Raspotnik and Bettina Rudloff, 'The EU as a Shipping Actor in the Arctic', Working Paper FG 2, 2012/Nr. 4, Stiftung Wissenschaft und Politik, Berlin, 2012.

While such examples of closely intertwined interests between the EU and the Arctic would appear to justify a close relationship between the two regions, that relationship is in reality quite complicated. So far at least the EU has not managed to exercise a strong influence over Arctic policies and there are few signs that this will change in the near future.

The most obvious obstacle to the EU assuming a dominant role in the Arctic, not least with respect to shipping, is geography. None of the EU's Member States has a coastline in the Arctic. This not only effectively limits EU jurisdiction to take legislative or enforcement measures in the region under the law of the sea, but also raises questions about its interests in doing so. An outsider might be forgiven for questioning why, in these circumstances, the EU needs an Arctic policy at all and why its policies could not be implemented through the adoption of national Arctic policies by the individual Member States that do have clearer links to the Arctic.

Seen from the EU's point of view, however, the question is more complex. First of all, the Union's formal relationships with the various Arctic States<sup>5</sup> vary from state to state. Two of the Arctic states are EU Member States (Finland and Sweden), albeit neither has a coastline facing the Arctic Ocean. Two coastal States in the Arctic region (Norway and Iceland) are very closely associated with Union through the Agreement on the European Economic Area (EEA).<sup>6</sup> Greenland belongs to EU Member State Denmark, but has exited from the EU and is hence not subject to EU laws; rather, it is associated with the Union as one of the overseas countries and territories (OCTs) with a specific Partnership Agreement governing the mutual relationships.<sup>7</sup> The remaining Arctic States (the USA, Canada and the Russian Federation) are all strategic partners in the EU's external relations, governed by continuously developing bilateral treaty relationships in trade and other areas of cooperation,<sup>8</sup> though the relationship

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5 This term refers to the eight states that are members of the Arctic Council (AC), i.e. Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden and the USA.

6 Iceland was also a candidate country for EU membership following an application made in 2009, but the application was withdrawn in 2013. In March 2015, Iceland's government finally requested that "Iceland should not be regarded as a candidate country for EU membership". See <[http://ec.europa.eu/enlargement/countries/detailed-country-information/iceland/index\\_en.htm](http://ec.europa.eu/enlargement/countries/detailed-country-information/iceland/index_en.htm)> accessed 20 August 2016.

7 The current Partnership Agreement covers the period 2014–2020 and focuses on education and training. See Council Decision 2014/137/EU on relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other [2014] OJ L76/1. See also Chapter 4.

8 The EU and the USA have the largest bilateral trade and investment relationship in the world, covering roughly half of the world GDP, and a Transatlantic Trade and Investment



with Russia, which is the EU's biggest neighbour and its third biggest trading partner, has seriously deteriorated following the Ukraine conflict.<sup>9</sup>

The EU's close and strategic relationships with all key players in the Arctic region, combined with its significant economic and other interests in the Arctic and its emerging 'Integrated Maritime Policy', which includes an international dimension,<sup>10</sup> suggest that the EU needs an Arctic policy, not only to protect its interests in the region itself, but also for the sake of credibility and consistency in its foreign policy generally. The lack of a coherent EU policy with respect to a large region in its immediate vicinity, which is also considered to be among the strategically most interesting parts of the world at the moment, would not fit well with the EU's more general foreign policy objectives, e.g. in relation to climate change, and its "ambition for a stronger Union, willing and able to make a positive difference in the world."<sup>11</sup>

The second consideration for EU Arctic policy relates to the division of roles and responsibilities between the EU and its individual Member States, i.e. why policies should be adopted at the EU level rather than by the individual

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Partnership (TTIP) is currently being discussed <[www.euintheus.org/transatlantic-trade-and-investment-partnership-ttip/](http://www.euintheus.org/transatlantic-trade-and-investment-partnership-ttip/)> 20 August 2016. Current negotiations with Canada similarly aim at enhancing an already intense cooperation between the EU and Canada. The EU and Canada expect to finalize a Comprehensive Economic and Trade Agreement (CETA) and a Strategic Partnership Agreement (SPA) by the end of 2016 <[http://eeas.europa.eu/canada/index\\_en.htm](http://eeas.europa.eu/canada/index_en.htm)> accessed 20 August 2016.

9 <[http://eeas.europa.eu/russia/about/index\\_en.htm](http://eeas.europa.eu/russia/about/index_en.htm)> accessed 28 November 2016. Despite the EU's halting of most cooperation programmes with Russia and its imposition of targeted sanctions, its cooperation with Russia has continued in fora such as the Barents Euro-Arctic Council (BEAC). See e.g. G. Stang *EU Arctic Policy in a Regional Context*, Study for the European Parliament, Directorate-General for External Policies/Policy Department, (EP/EXPO/B/FWC/AFET/2015-01/03) 2016 at 16-17.

10 See the European Commission Communications 'Towards a Future Maritime Policy for the Union: A European Vision for the Oceans and Sea' (COM (2006) 275 final) and 'An Integrated Maritime Policy for the European Union' (COM (2007) 575 final). In preambular para 42 of Directive 2008/56 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) [2008] L164/19 it is held that "[t]he serious environmental concerns ... relating to the Arctic waters, a neighbouring marine environment of particular importance for the Community, need to be assessed by the Community institutions and may require action to ensure the environmental protection of the Arctic."

11 'Shared Vision, Common Action: A Stronger Europe—A Global Strategy for the European Union's Foreign and Security Policy 2016, Executive Summary at 11.

Member States, some of which already have seats at the Arctic Council.<sup>12</sup> This consideration touches on a key legal aspect of the EU's foreign relations, i.e. the division of formal external competence between the EU and its Member States. From an EU-law point of view, the Union clearly possesses formal competence to engage in matters relating to the Arctic and in some areas, notably on "the conservation of marine biological resources under the common fisheries policy", that competence is exclusive.<sup>13</sup> As to shipping, Treaty on the Functioning of the European Union (TFEU) Article 4(2) provides for a shared competence between the EU and its Member States in matters such as environment, transport and energy. In addition, several Arctic issues of potential EU regulatory interest deal with matters that are already subject to existing EU legislation; on the basis of the so-called ERTA principle, these matters are subject to the exclusive competence of the Union.<sup>14</sup> Current EU rules on maritime safety, environmental protection or oceans management might clearly be "affected" or have their scope altered by policies adopted for the Arctic. It is hence perfectly arguable not only that the EU has competence to regulate Arctic shipping and involve itself in international negotiations on this topic, but that its competence to do so at least to some extent excludes a parallel competence by its Member States. On this view, the EU as such, rather than its Member States, should engage in international negotiations on these matters.

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12 In addition to the Nordic EU member states that are full members of the AC, seven EU member states (France, Germany, Italy, the Netherlands, Poland, Spain, and the UK) are observers at the Arctic Council.

13 Article 3(1)(d), Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47. Other a priori exclusive Union competences under the same article that may be of particular relevance for Arctic cooperation are the customs union and the common commercial policy of the EU. Even outside fields of exclusive EU competences member states have a duty of loyal cooperation with the Union in matters relating to external policy. See e.g. Opinion 1/94, Competence of the Community to conclude the WTO agreements, [1994] ECR I-5267, para. 108.

14 The principle was originally laid down in case law, first in Case 22/70 AETR [1971] ECR 263, but has subsequently been codified in the founding Treaty. TFEU Article 3(2) provides: "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope." See also TFEU Article 216(1) and the 1998 Declaration concerning the competence of the EU with regard to matters governed by UNCLOS, which lists a series of EU shipping law instruments that are deemed to be relevant for transferring competence exclusively to the EU. <[www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm)> accessed 28 November 2016.

As a starting point, therefore, it is clear that the EU has important economic and policy reasons, as well as legal backing in the form of competences that are at least in part exclusive, to be closely involved in matters relating to Arctic governance.<sup>15</sup> Yet the Union has not been successful in translating its interests and internal authority into a leading role in the Arctic policy scene.

The Arctic region has no international regulatory body of its own. The main intergovernmental forum for the region is the Arctic Council (AC), which was established in 1996 by a political declaration as a consensus-based forum for political cooperation among the eight participating states, rather than as an international organization.<sup>16</sup> Following considerable efforts by the EU to enhance its formal liaison with the AC, its request for formal observer status was turned down, or at least postponed, at the Ministerial meeting in Kiruna in May 2013.<sup>17</sup> The AC attached conditions to granting the EU observer status; these conditions have yet to be met to the satisfaction of AC members.<sup>18</sup> In addition to the principal original concern relating to seal hunting,<sup>19</sup> other issues, such as the Ukrainian crisis, now appear to have delayed acceptance of the EU's request,

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15 See also Claudia Cinelli, 'Law of the Sea, The European Union Arctic Policy and Corporate Social Responsibility', 30 *Ocean Yearbook* (Brill 2016) 245–254.

16 The AC accordingly lacks a mandate to negotiate new treaties and its decisions are not binding. See the 1996 Ottawa Declaration and other background documents available at [www.arctic-council.org/](http://www.arctic-council.org/). Later, however, the Arctic Council has played an important role in developing two international treaties, both of which have relevance to shipping in the region. See section 2.2.2 below. The term 'Arctic Council System' has been introduced to accommodate such developments. See Erik Jaap Molenaar 'Current and prospective roles of the Arctic Council System within the context of the law of the sea', (2012) 27 (3) *International Journal of Marine and Coastal Law* 553.

17 The decision of the Council was written in somewhat cryptic terms: "The Arctic Council receives the application of the EU affirmatively, but defers a final decision on implementation until the Council ministers are agreed by consensus that the concerns of Council members, addressed by the President of the European Commission in his letter of 8 May are resolved, with the understanding that the EU may observe Council proceedings until such time as the Council acts on the letter's proposal." The reluctance of the Council is all the more notable as at the same meeting India, China, Japan, Italy, South Korea and Singapore were granted observer status.

18 See also the rulings of the WTO Panel and Appellate Body in European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400 and WT/DS401 and the Joint Statement by Canada and the European Union on access to the European Union of seal products from indigenous communities of Canada, Commission decision C (2014) 5881 final, Annex.

19 The original seal trade Regulation from 2009 has since been amended by Regulation 2015/1775 amending Regulation 1007/2009 on trade in seal products and repealing

which requires unanimity by the AC's current members.<sup>20</sup> More generally, too, there appears to be no strong enthusiasm for an increased EU role among the current AC members. This lack of enthusiasm may stem from uncertainties about the EU's policy ambitions and visions for the Arctic region. It has, for example, been pointed out that the EU lacks clarity about the core purpose or goal of its Arctic policy<sup>21</sup> and that its influence is sometimes weakened by its complex administrative structure, with a multitude of institutions having different roles and motives and an unclear internal division of responsibilities.<sup>22</sup>

In the absence of regulatory EU measures governing the Arctic, the Union's Arctic policy is set forth in certain non-binding policy documents issued by various EU institutions since 2008. The European Commission (the Commission) adopted its first communication on an Arctic policy in 2008.<sup>23</sup> Compared to subsequent communications, this first Arctic policy document included certain quite specific policy objectives and action proposals for the future development of the Arctic and visions for the role of the EU in that development. The document was not well-received by the Arctic counterparties, however, who criticized the Commission for being ignorant about the Arctic and unclear about its own role and level of commitment.<sup>24</sup> Subsequent Commission documents issued in 2012, which were by and large endorsed by the Council,<sup>25</sup> generally emphasized matters that were not particularly controversial politically, such as the Union's ability to contribute to research, investment and cooperation in the region.<sup>26</sup> These documents highlighted the benefits of the EU's permanent presence around the table in the AC. The European Parliament has adopted a somewhat sharper stance and has repeatedly called for a

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Commission Regulation 737/2010 [2015] OJ L 262/1. The aim of the amendment is to reflect the outcome of WTO rulings referred to in the previous footnote.

20 See also Stępień and Koivurova n. 3 above, 36.

21 Andreas Østhagen, "The European Union—An Arctic Actor?" (2013) 15 (2) *Journal of Military and Strategic Studies* 84; Raspotnik & Rudloff n. 3 above, 14 characterizes the EU's Arctic policy-making as a "step-by-step-learning-by-doing process".

22 Stępień and Koivurova n. 3 above 25–29. For example, within the Commission, Arctic shipping involves four different General-Directorates (DGs MARE, MOVE, ENTR and ENV) and a lack of coordination between them could easily create uncertainties as to the Commission's policy objectives.

23 European Commission Communication of 20 November 2008 on the European Union and the Arctic Region, COM (2008) 763.

24 See e.g. Stępień and Koivurova n. 3 above, 52.

25 Council conclusions of 12 May 2014 on developing a European Union Policy towards the Arctic Region.

26 JOIN (2012) 19.

“coherent strategy and a concretised action plan on the EU’s engagement on the Arctic”, including on some shipping-related questions,<sup>27</sup> but it, too, has accepted that a focus on socio-economic and environmental issues represents a “strategic choice ... integral in ensuring legitimacy and local support for the EU’s Arctic engagement.”<sup>28</sup>

The most recent EU document, issued by the Commission in April 2016, is even less specific about purpose and strategy. This document identifies three generic priority areas—climate change and the environment, sustainable development and international cooperation—for a future integrated EU Arctic policy, but offers very little information as to what the Commission’s ambitions, visions and strategies are more concretely. Policy responses to various identified issues are limited to action in the fields of research, science and innovation.<sup>29</sup> Apart from that, the core purpose and goals of an EU policy for the Arctic remain unclear.

## 2.2 *Shipping in the Arctic*

### 2.2.1 The Environmental Context

The reduction of sea ice in the Arctic Ocean creates new opportunities for maritime activities in the region. Fishing, petroleum activities, marine scientific research, naval activities and commercial shipping are expected to increase as the sea ice cover becomes thinner and eventually recedes for part of the year. For commercial shipping this increase is already noticeable, in terms of carriage of passengers as well as cargo. Cruise vessel traffic in the Arctic has increased significantly in the past decades,<sup>30</sup> while cargo transport is stimulated by the greater accessibility and exploitation of Arctic resources and by the prospect of sea routes between Europe and Asia that are almost down to half the length of current routes.<sup>31</sup>

27 See section 2.2.3.

28 European Parliament resolution of 12 March 2014 on the EU strategy for the Arctic (2013/2595 (RSP), hereinafter the ‘2014 European Parliament resolution’) para. 2.

29 JOIN (2016) 21. The Council Conclusions on the Arctic of 20 June 2016 endorsed the policies outlined in the Joint Communication.

30 The Association of Arctic Expedition Cruise Operators estimates that some 70,000–80,000 passengers per year have taken cruises in the Arctic during the years 2005–2013, Svalbard and Greenland being the main destinations. See also the PAME Report on Arctic Marine Tourism Project, 2014, pp. 18–24 <[www.pame.is/images/03\\_Projects/Arctic\\_Marine\\_Shipping/Arctic\\_Marine\\_Tourism\\_Project/AMTP\\_Workshop\\_Report\\_March\\_2014.pdf](http://www.pame.is/images/03_Projects/Arctic_Marine_Shipping/Arctic_Marine_Tourism_Project/AMTP_Workshop_Report_March_2014.pdf)> accessed 20 August 2016.

31 See Raspotnik and Rudloff, n. 4 above; and Tore Henriksen, ‘Protecting Polar Environments: Coherency in Regulating Arctic Shipping’, in Rosemary Rayfuse (ed.) *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing 2015) 363–384.

Currently two routes have relevance for trans-Arctic passages. First, the Northern Sea Route (NSR) covers all routes across the Russian Arctic coastal seas from Kara Gates (Novaya Zemlya) to the Bering Strait.<sup>32</sup> The second route is the Northwest Passage (NWP). This route is not defined in Canadian law, but is commonly understood as referring to the maritime routes that span the straits and sounds of the Canadian Arctic archipelago along the Northern coast of North America between the Atlantic and Pacific Oceans.<sup>33</sup> In the future, if and when ice coverage continues to decrease, an alternative route could be the “trans-polar route” that runs straight across the Arctic Ocean,<sup>34</sup> without involving passage in either Canadian or Russian territorial waters (though entry and exit to the Arctic Ocean would still be through the exclusive economic zones (EEZs) of the US/Russia in the Bering Strait or Canada/Greenland/Norway on the Atlantic side).

An increase in shipping activities in the Arctic presents not only opportunities, but also significant risks. Maritime activities in this particular region are likely to score badly in any environmental risk assessment, considering the nature of the risks and circumstances involved.

The Arctic environment is unique in terms of its biological and geographic features. Features such as low temperatures, extreme seasonal variations and light conditions which, in turn, bring about extensive seasonal migrations of birds and mammals and a short but intense feeding period, make the Arctic ecosystem particularly vulnerable to change. The risks associated with climate change already place Arctic marine biodiversity under significant pressure, and human activities in the area will further increase such pressures.<sup>35</sup> As

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32 Article 5(1) of the Merchant Shipping Code of the Russian Federation. According to statistics from the Northern Sea Route Information office, 207 transits have been made in the years 2011–2015, with the peak of 71 crossings in 2013. See <[www.arctic-lia.com/nsr\\_transits](http://www.arctic-lia.com/nsr_transits)> and <[www.pame.is/index.php/projects/arctic-marine-shipping/northern-sea-route-shipping-statistics](http://www.pame.is/index.php/projects/arctic-marine-shipping/northern-sea-route-shipping-statistics)> accessed 20 August 2016. See also Erik Franckx ‘The “New” Arctic Passages and the “Old” Law of the Sea’, in Henrik Ringbom (ed.) *Jurisdiction over Ships—Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 194–216.

33 The number of transits has increased from only a few per year in the 1980s to 20–30 per year in 2009–2013. Most transits are completed by icebreakers on coastguard and research duties, small vessels or adventurers, passenger ships offering Arctic tourism opportunities, and tug and supply vessels, sometimes with barges. See <[www.enr.gov.nt.ca/state-environment/73-trends-shipping-northwest-passage-and-beaufort-sea](http://www.enr.gov.nt.ca/state-environment/73-trends-shipping-northwest-passage-and-beaufort-sea)> accessed 20 August 2016.

34 See Malte Humpert and Andreas Raspotnik ‘The Future of Arctic Shipping Along the Transpolar Sea Route’, (2012) 26 *Ocean Yearbook* 281.

35 According to the biodiversity working group of the Arctic Council Conservation of Arctic Flora and Fauna (CAFF), climate change “is by far the most serious threat to Arctic

far as shipping is concerned, the most obvious risks relate to (accidental and deliberate) releases of oil and other harmful substances into the sea, physical disturbance by noise, collisions with marine mammals and the introduction of invasive species to the region through ships' hulls or ballast water. In addition, ships give rise to air pollution, of which the emission of soot particles, or 'black carbon', is particularly relevant for the Arctic region, as it contributes to the acceleration of the ice melt by reducing the reflectivity of snow and ice.

The likelihood of maritime incidents in Arctic waters is increased by the unusually difficult operating conditions in the area. Sea ice can be very powerful and its movements difficult to predict. In addition, few seafarers have practical experience of dealing with the challenges presented by such conditions. Furthermore, icing of the ship itself can lead to serious stability problems, weather conditions can and do change rapidly in the region and even basic infrastructure like charts, navigation aids, various types of forecasts and communication equipment are considerably less developed in the Arctic than in other navigating areas. Finally, Arctic conditions present a variety of challenges related to low temperatures, such as the outdoor working environment and the increased likelihood that equipment and systems will malfunction. All of this means that maritime incidents are more likely in Arctic waters than elsewhere.

Moreover, the consequences of accidents in the Arctic are likely to be more serious than in warmer waters. Oil and other hazardous materials are more difficult to remove in icy conditions and the natural cleaning process through the dissolving, decomposition or evaporation of the substances is significantly impeded by low water and air temperatures.

Finally, capacity to take responsive measures should an accident occur is limited by the fact that ships navigating in the Arctic are usually far away from land-based support infrastructure for search-and-rescue or pollution response. Even if an incident were to occur close to a shore-based station, rescue operations in icy conditions will pose special challenges and there will be very little shore-based infrastructure, including hospitals or other medical support for injured crews and passengers, to support a large-scale response.

In order to identify and deal with these challenges, in view of the changing circumstances and increasing pressures for economic use of the Arctic, the Arctic Council in 2004 asked its working group on Protection of the Arctic Marine Environment (PAME) to conduct a comprehensive assessment of

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biodiversity and exacerbates all other threats". Arctic Biodiversity Assessment 2013, Report for Policymakers, available at <[www.arcticbiodiversity.is/index.php/the-report/report-for-policy-makers/key-findings](http://www.arcticbiodiversity.is/index.php/the-report/report-for-policy-makers/key-findings)> accessed 20 August 2016.

Arctic shipping. The outcome was the 2009 'Arctic Marine Safety Assessment (AMSA) Report', which includes an extensive analysis of the status, prospects, risks and challenges of Arctic shipping. The AMSA Report concluded with 17 recommendations, which were approved by the Arctic Council ministerial meeting in 2009.<sup>36</sup> Progress with the implementation of these recommendations is continuously monitored, with the latest update being from April 2015.<sup>37</sup>

## 2.2.2 The Legal Context

### 2.2.2.1 General

Shipping in the Arctic is predominantly regulated by global international rules. Most of these rules have global application in that they apply worldwide, irrespective of the location of the operation, but some include more specific rules for the particular characteristics of the region.

Two types of rules must be distinguished. First, there are jurisdictional rules that govern what measures states may, must or must not take with respect to ships. These rules are currently laid down authoritatively in the 1982 UN Convention on the Law of the Sea (UNCLOS),<sup>38</sup> which currently has 169 contracting parties, including the EU<sup>39</sup> and all Arctic coastal States other than the USA.<sup>40</sup> While the general regime for jurisdiction over ships laid down in UNCLOS applies to the Arctic, certain additional subtleties apply to the region in terms of the law of the sea. These are discussed in section 2.2.2.2 below.

The second type of rules are technical rules that apply to each ship. These include rules on ship construction, discharge standards, manning conditions

36 <[www.pame.is/index.php/projects/arctic-marine-shipping/amsa](http://www.pame.is/index.php/projects/arctic-marine-shipping/amsa)> accessed 28 November 2016.

37 Status on Implementation of the AMSA 2009 Report Recommendations, April 2015. <[www.pame.is/images/03\\_Projects/AMSA/AMSA\\_Documents/Progress\\_Reports/AMSArecommendations2015\\_Web.pdf](http://www.pame.is/images/03_Projects/AMSA/AMSA_Documents/Progress_Reports/AMSArecommendations2015_Web.pdf)> accessed 20 August 2016.

38 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

39 See <[www.un.org/depts/los/](http://www.un.org/depts/los/)> 20 August 2016. It should be noted that the European Union, as a party to UNCLOS under its Annex IX on participation by international organizations, has no jurisdictional advantage over individual states. The jurisdictional opportunities to regulate shipping are hence the same for the EU as for individual states. Whether the measures in question should be introduced by the EU as a whole or individually by its member states is essentially an internal consideration to be sorted out by the EU itself. See e.g. UNCLOS Annex IX, Article 4.

40 UNCLOS' provisions on shipping are widely considered, including by the USA, to be indicative of international customary law and hence binding on all states irrespective of formal ratification.



etc. These technical rules are usually adopted by the IMO, the most important rules being set forth in the International Convention for the Safety of Life at Sea (SOLAS), the International Convention for the Prevention of Pollution from Ships (MARPOL) and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW).<sup>41</sup> All three conventions have recently been modified through the inclusion of particular requirements for navigation in polar regions as discussed in section 2.2.2.3.

#### 2.2.2.2 *Jurisdictional Rules*

##### The General Scheme

The rights and obligations of States to take measures in the Arctic are governed by the UNCLOS. The five Arctic coastal States have specifically emphasized that the UNCLOS 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. We therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.”<sup>42</sup>

Under the UNCLOS, the roles and obligations of a State depend on the capacity in which the State acts and the maritime zone concerned. The main responsibility for ensuring the safety and environmental performance of ships, irrespective of the area concerned, lies with the ship’s flag State. Apart from every State’s obligation to “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag,”<sup>43</sup> The UNCLOS imposes a number of minimum criteria on flag States’ legislation, by reference to the “generally accepted” international rules and standards.<sup>44</sup> For example, the UNCLOS requires flag States to adopt such measures regarding the construction, equipment and seaworthiness of ships as are necessary to

41 These three conventions were adopted in the 1970s and have been repeatedly updated through new protocols and amendments. By now all three conventions have been ratified by more than 150 States, including the flag states representing more than 95 per cent of the world’s merchant tonnage. See <[www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx](http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx)> accessed 20 August 2016.

42 The 2008 “Ilulissat Declaration”, <[www.oceanlaw.org/downloads/arctic/Ilulissat\\_Declaration.pdf](http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf)> accessed 20 August 2016. The Arctic coastal states’ emphasis on the adequacy of UNCLOS for Arctic governance had its background in the growing interest in Arctic resources worldwide, uncertainty over the precise maritime borders that apply in the Arctic and growing calls for a special treaty regime for the Arctic Ocean, similar to the one governing Antarctica.

43 Article 94(1), UNCLOS.

44 Articles 94(5) and 211(2), UNCLOS.

ensure safety at sea.<sup>45</sup> States are free to exceed these international rules and standards by imposing additional obligations on their own ships, and these obligations will normally apply irrespective of where a ship navigates.

Alongside flag States' jurisdiction, the UNCLOS offers certain prescriptive and enforcement powers to coastal States, in the form of rights (rather than obligations) over foreign ships that transit their waters. The jurisdictional balance between the coastal and maritime interests differs in respect of each maritime zone, depending on the geographical proximity of the zone in question to the coastal state.

On the high seas, a flag State's jurisdiction over its ships is in principle exclusive "save in exceptional cases expressly provided for in international treaties and [UNCLOS]";<sup>46</sup> thereby largely ruling out coastal state jurisdiction by the Arctic coastal states beyond their exclusive economic zone ('EEZ').<sup>47</sup> Within its EEZ, however, a coastal state has jurisdiction to prescribe rules for foreign ships for the purpose of protecting and preserving the marine environment, but only rules giving effect to 'generally accepted international rules and standards established through the competent international organization'.<sup>48</sup> A corresponding limitation in the territorial sea (up to 12 nm from the

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45 Article 94(3), UNCLOS.

46 Article 92(1), UNCLOS. One such exception that is of relevance for present purposes is art 221, which offers a coastal state, in the case of 'major casualties involving major environmental damage', the possibility to take proportionate action to protect its coastline and related interests.

47 All Arctic states implement a 200 nm EEZ, but this type of zone has not been established around the Svalbard Archipelago. The 1920 Treaty of Spitsbergen grants Norway territorial sovereignty subject to certain access requirements for other treaty partners and also recognises Norway's right to non-discriminatory conservation measures in its 'territorial waters'. A fishery protection zone established in the archipelago in 1977 remains controversial. See e.g. Geir Ulfstein and Robin Churchill 'The Disputed Maritime Zones around Svalbard', in Myron H. Nordquist, John Norton Moore, and Tomas H. Heidar (eds) *Changes in the Arctic Environment and the Law of the Sea* (Nijhoff 2010) 551–593, Torbjørn Pedersen and Tore Henriksen, 'Svalbard's Maritime Zones: The End of Legal Uncertainty?' (2009) 24 (1) *International Journal of Marine and Coastal Law*, 142 and Erik Jaap Molenaar, 'New Maritime Zones and the Law of the Sea' in Henrik Ringbom (ed.) *Jurisdiction over Ships—Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 256–258.

48 Articles 56(1) and 211(5), UNCLOS. The reference to internationally accepted rules as a maximum level applies largely even to defined areas of the EEZ "where the adoption of special mandatory measures ... is required for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic" under article 211(6).

baseline)<sup>49</sup> applies to coastal-State rules that relate to the design, construction, manning or equipment of foreign ships.<sup>50</sup> Apart from these limitations, a coastal State's sovereignty extends to its territorial sea, which means that the coastal state has jurisdiction to prescribe and enforce its own laws in this zone, subject only to the general right of ships to exercise the right of innocent passage.<sup>51</sup> In "straits used for international navigation" specific rules apply to limit the coastal states' jurisdiction further.<sup>52</sup> Inside the baseline, i.e. in internal waters, the coastal state enjoys territorial sovereignty and its prescriptive and enforcement jurisdiction is not limited under the law of the sea.<sup>53</sup>

In other words, the legal possibility for an Arctic coastal State to impose its own national rules on foreign ships navigating in its coastal waters is mainly limited to ships within its own internal waters.<sup>54</sup> Beyond that, national rules are permissible only to the extent that they do *not* relate to the design, construction, equipment and manning of ships within the territorial sea, and even such rules must not have the practical effect of denying or impairing foreign ships' right of innocent passage.<sup>55</sup> Beyond the territorial sea, unilateral coastal State legislation is essentially ruled out.<sup>56</sup> In addition to these limitations on the national rules, a range of other UNCLOS provisions limit the ability of states to take enforcement measures against ships that fail to comply with the rules while in transit through their coastal waters.<sup>57</sup>

UNCLOS does not deal in detail with the jurisdiction of port States to impose requirements on foreign ships that visit their ports. While it is widely acknowledged that ships have no general right of access to ports and that the

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49 Article 3, UNCLOS. Apart from Greenland, which implements a 3nm territorial sea, all Arctic States have declared a 12 nm territorial sea.

50 Article 21(2), UNCLOS.

51 Articles 17–26, UNCLOS.

52 UNCLOS Part III, see in particular arts 41–44.

53 The exception to this is UNCLOS art 8(2), which provides that the right of innocent passage shall apply in "new" internal waters, that is, areas that were not previously internal waters but enclosed by straight baselines under UNCLOS art 7. The applicability of this exception has not been raised with respect to the Arctic internal waters. See e.g. Erik Jaap Molenaar, 'Options for Regional Regulation of Merchant Shipping Outside IMO, with Particular Reference to the Arctic Region', (2014) 45 (3) *Ocean Development and International Law* 275. On UNCLOS art 8(2), see also Robin R. Churchill 'Coastal Waters' in *The IMLI Manual on International Maritime Law*, Volume 1 (OUP 2014) 14–16.

54 Article 2(1), UNCLOS.

55 Article 24(1)(a), UNCLOS.

56 Art 211(5), (6), UNCLOS.

57 See e.g. Articles 220 and 24(1), UNCLOS.

port state accordingly may impose conditions on access,<sup>58</sup> the more precise limitations as to how port States may exercise their jurisdiction are not clear. The question is particularly unsettled with respect to a port state's jurisdiction over matters that take place beyond its maritime zones.<sup>59</sup> Section 3.3 below addresses this question.

#### Arctic Peculiarities

Two peculiarities relating to the jurisdictional scheme in the Arctic should be highlighted. First, there is some political uncertainty as to which maritime zones are involved, when it comes to the areas within NSR and the NWP. Both Canada and Russia claim sovereignty over parts of their Arctic waters based on historical title. The Canadian system of straight baselines around the Arctic islands was established in 1985<sup>60</sup> and effectively causes large parts of the Northwest Passage to lie within Canadian internal waters, where Canada has full sovereignty. However, the Canadian claim is contested by many parties, including the US<sup>61</sup> and several EU member states who lodged diplomatic protests when Canada established the baselines, regarding them as inconsistent with international law and rejecting Canada's claim that historical title could provide an adequate justification for them.<sup>62</sup> Similarly, Russia has also established straight baselines to enclose some of the Russian Arctic straits that form part of the NSR and that would otherwise form part of the territorial sea.<sup>63</sup>

The second peculiarity regarding coastal States' jurisdiction over foreign ships in the Arctic follows directly from UNCLOS. Article 234 accepts a broader environmental prescriptive and enforcement jurisdiction for coastal States.

58 See e.g. articles 25(2) and 211(3), UNCLOS.

59 See e.g. Henrik Ringbom 'Global Problem—Regional Solution? International Law Reflections on an EU CO<sub>2</sub> Emissions Trading Scheme for Ships' (2011) 26 (4) *International Journal of Marine and Coastal Law* 613, Robin Churchill, 'Port State Jurisdiction Relating to the Safety of Shipping and Pollution from Ships—What Degree of Extraterritoriality?' (2016) 31 (3) *International Journal of Marine and Coastal Law* 442.

60 Arctic Waters Pollution Prevention Act, R.S.C. 1985, c. A-12 (AWPPA).

61 See e.g. Ted L. McDorman, *Salt Water Neighbors, International Ocean Law Relations Between the United States and Canada* (OUP 2009) 236–244.

62 Molenaar, n. 53 above 275. See also J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims* (Nijhoff, 2012, 3rd ed.) 112, which includes an excerpt from a communication by several European Community Member States to Canada dated 9 July 1986, in which the EC member states conclude that they "cannot ... in general acknowledge the legality of these baselines".

63 See e.g. R. Douglas Brubaker, 'Straits in the Russian Arctic', (2001) 32 (3) *Ocean Development & International Law* 263–287.

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.<sup>64</sup>

By including no references to international rules, the article clearly goes beyond the ordinary jurisdiction of coastal States, both in the EEZ and in the territorial sea. While strictly speaking the language limits its applicability to the former, it is reasonable to construe the article as extending jurisdiction to the territorial sea as well, as otherwise the jurisdiction in the EEZ would be more extensive than that in the territorial sea.<sup>65</sup> Other parts of the article nonetheless impose important qualifications on the extent of this jurisdiction.

First, the area must be subject to “particularly severe climatic conditions” and it must be covered by ice for “most of the year”, creating obstructions or exceptional hazards to navigation. There is some uncertainty as to what exactly is meant by ‘presence of ice covering the area’ and how to calculate the ‘most of the year’ requirement,<sup>66</sup> but regardless of how these requirements may be interpreted, the result is that the area covered by the article will shrink over time due to warming temperatures in the Arctic. A second condition to the applicability of the article is that pollution of the marine environment in the area could cause “major harm to or irreversible disturbance of the ecological balance”. This condition may not impose a significant limitation, as it is well known that a single incident may cause significant and long-lasting

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64 See e.g. Kristin Bartenstein: ‘The “Arctic Exception” in the Law of the Sea Convention: A contribution to safer Navigation in the Northwest Passage’ (2011) 42 (1–2) *Ocean Development & International Law* 24 and Aldo Chircop: ‘The Growth of International Shipping in the Arctic: Is a regulatory Review Timely?’ (2009) 24 (2) *International Journal of Marine and Coastal Law* 372.

65 See e.g. Donat Pharand, ‘The Arctic Waters and the Northwest Passage: A Final Revisit’, (2007) 38 (1–2) *Ocean Development and International Law* 47 and Henriksen n. 31 above, 374. But see Chircop n. 64 above, 371.

66 Chircop n. 64 above 370; Molenaar n. 53 above, 276; Henriksen n. 31 above, 380–381.

ecological damage.<sup>67</sup> Thirdly, any laws adopted on this basis “shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence”, which calls for particular justification of measures that go beyond IMO standards. Finally, any laws and regulations adopted under this article must be non-discriminatory and adopted “for the prevention, reduction and control of marine pollution”. Presumably measures aimed at enhancing maritime safety (and through that environmental protection) in the area, such as ship construction requirements, collision avoidance rules, routing and reporting systems etc., would satisfy this requirement, but purely safety-related rules, such as rules regarding evacuation of passengers and crews, lifeboat requirements etc. might not be covered by the article.<sup>68</sup>

Even under this article, in other words, Arctic coastal States cannot promote purely national interests. The measures they adopt must aim at preventing, reducing and controlling marine pollution from ships and must be necessary and reasonable for that purpose. So far only Canada and Russia have made use of this jurisdiction, by adopting special legislation for Arctic shipping,<sup>69</sup> but Denmark has indicated its preparedness to use the jurisdiction provided under Article 234 for Greenland’s coastal waters.<sup>70</sup>

The only recent international discussion on the reach of Article 234 in relation to Arctic Shipping was a debate at the IMO’s Maritime Safety Committee in 2010 on the legality of Canada’s mandatory ‘Northern Canada Vessel Traffic Services Zone Regulations’ (NORDREG). The debate centred on whether or not Canada was obliged to seek IMO approval before making NORDEG mandatory.<sup>71</sup> Before this debate, which in the end was inconclusive, certain EU Member States had issued *Notes Verbales* to Canada. The European Commission,

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67 The grounding of the Exxon Valdez in Alaska in 1989 is the main oil spill in Arctic waters to date and a number of injured natural resources have still not recovered. In November 2014 the report from the Exxon Valdez Oil Spill Trustee Council, <[www.evostc.state.ak.us/index.cfm?FA=status.injured](http://www.evostc.state.ak.us/index.cfm?FA=status.injured)> accessed 20 August 2016, concluded that “[r]ecovery for most injured resources has taken much longer than was originally projected. However, this Update contains a large number of resources moving to recovered status. This shift marks an important stage in recovery from the Spill. While this is a positive step forward, there remain thirteen resources and four services that are still recovering from the Spill.”

68 See also Chircop n. 64 above, 371.

69 See ns. 60–63 above.

70 Kingdom of Denmark Strategy for the Arctic 2011–2020 <[http://naalakkersuisut.gl/~/media/Nanoq/Images/Udenrigsdirektoratet/100295\\_Arktis\\_Rapport\\_UK\\_210x270\\_Final\\_Web.pdf](http://naalakkersuisut.gl/~/media/Nanoq/Images/Udenrigsdirektoratet/100295_Arktis_Rapport_UK_210x270_Final_Web.pdf)> accessed 20 August 2016, 18.

71 For a summary see IMO Doc. MSC 88/26 paras. 11.28–11.39 and Annex 28).

however, declined to do so, reportedly due to a lack of certainty about whether Canada's action warranted a diplomatic protest and because of potential broader implications for the EU's Arctic policy.<sup>72</sup>

If the Canadian and Russian straight baseline claims were held to be invalid, the critical sea passages in the areas concerned would form part of the territorial sea of the two States. Moreover, depending on the interpretation of straits "used for international navigation", it may be that the passages would be subject to the regime of transit passage, which would provide even more extensive navigational rights for ships. This situation has given rise to a discussion on the relationship between the regime for transit passage under UNCLOS Part III section 2 and the special Arctic jurisdiction under Part XII, section 8 (Article 234). While it seems plausible to argue that the regime for ice-covered waters constitutes *lex specialis* over the straits regime,<sup>73</sup> states with large navigational interests in the areas have sometimes taken an opposite approach.<sup>74</sup> In the absence of any authoritative ruling on this question, there is no certainty on this matter. Since the issue presupposes that the straight baseline delimitations made by Canada and Russia are deemed to be unlawful, Canada and Russia have understandably not expressed strong views on this matter, but their views are likely to differ from those defending strong navigational rights in the areas. The EU has made no explicit pronouncements on this matter.

### 2.2.2.3 *Technical Rules*

IMO rules generally set a minimum standard to be upheld by flag States in any sea area in the world, including the Arctic Ocean. The main obligation to implement and enforce these obligations rests on the flag State, but most IMO conventions include references to a supplementary layer of monitoring and control of ships' compliance with the rules. Port State control (PSC) applies to any ship present in a port, irrespective of its flag or its flag State's formal adherence to the IMO convention in question. In spite of the global approach of the IMO conventions in general, some of the key conventions include stricter

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72 See Molenaar n. 53 above, 78.

73 *Ibid.*, 275.

74 See Roach and Smith n. 62 above, 318–320, 478–479 and 494. See also the position paper on Arctic shipping issued by the International Chamber of Shipping (ICS) in 2014: "ICS believes that the UNCLOS regime of transit passage for straits used for international navigation (as codified in Part III of UNCLOS) takes precedence over the rights of coastal States under Article 234." <[www.ics-shipping.org/docs/default-source/resources/policy-tools/ics-position-paper-on-arctic-shipping.pdf](http://www.ics-shipping.org/docs/default-source/resources/policy-tools/ics-position-paper-on-arctic-shipping.pdf)> accessed 20 August 2016. The paper provides no further justification for this belief, however.

regimes for certain sea areas, which are deemed to be in need of specific protection. This is notably the case with the “special areas” of MARPOL Annexes I (oil), II (other hazardous and noxious substances), IV (sewage), V (garbage) and the “Emission Control Areas” (ECAs) of MARPOL Annex VI on air emissions. So far, however, the Arctic (as opposed to Antarctica)<sup>75</sup> has not received such special area status.

The special safety and environmental implications of navigation in polar waters were recently recognised through the IMO’s adoption of the International Code for Ships Operating in Polar Waters (the Polar Code) in 2014 and 2015. The Code will be implemented as amendments to MARPOL, SOLAS and the STCW Conventions, and enters into force on 1 January 2017. The Code applies to all ships above 500gt, but does not extend to state ships, pleasure craft or fishing vessels.

The Polar Code contains comprehensive detailed requirements on CDEM standards for ship safety as well as operational standards for discharge of different substances into the sea by vessels navigating in Arctic and Antarctic waters. The mandatory part<sup>76</sup> of Part I of the Code addresses issues such as ship structure; stability and subdivision; watertight and weather tight integrity; machinery installations; fire safety/protection; life-saving appliances; communications; manning and training. The Code seeks to minimize the risks involved in operating ships in polar areas by offering overarching goals and functional requirements for flag states to implement, hence allowing them a certain discretion in the implementation.

By contrast, Part II of the Code on environmental protection is more prescriptive in its approach. The Code prohibits discharge of oil or oily mixtures from any ship into Arctic waters, effectively making the Arctic Oceans a de facto special area under MARPOL, without, however, including the ban of heavy fuel oil, which has been implemented for Antarctica.<sup>77</sup> Similarly, the

75 The Antarctic area is a special area under MARPOL Annexes I (oil), II (noxious liquid substances) and V (garbage). See Regulations I/10 and II/1 and V/5.

76 The Polar Code includes two main parts, Part I on maritime safety and Part II on pollution prevention. Both parts include a mandatory section A and recommended guidance in section B.

77 MARPOL Annex I Reg. 43. But see also the Polar Code, Part II-B, section 1.1 recommending that ships apply its rules when operating in Arctic waters. See also Nengye Liu ‘The European Union’s Potential Contribution to Enhanced Governance of Arctic Shipping’ (2013) 73 (4) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 714–15 and the 2009 Arctic Marine Shipping Assessment (AMSA), n. 36 above, 60, considering the prospect of banning the carriage of heavy grades of oil and of discharging other hazardous substances as potential future IMO measures to the protection the Arctic environment.



Code also prohibits the discharge of noxious liquid substances or any mixture containing such substances into Arctic waters, while the discharge of sewage and garbage within polar waters is prohibited unless performed in accordance with MARPOL Annexes IV and V, respectively, and with certain additional requirements specified in the Code.<sup>78</sup>

#### 2.2.2.4 *Regional Rules*

As noted above, the Arctic, unlike many other maritime regions, has no regional regulatory body of its own. Due to its constitutional structure, the Arctic Council has no authority to issue regional rules for Arctic shipping, or even binding decisions for its own members. Despite such constraints, however, the Council's activities have played a very important role in developing a maritime and shipping policy for the region. Based on a comprehensive assessment of the challenges and opportunities linked to increased shipping activities in the region,<sup>79</sup> the Arctic Council in 2009 adopted a set of recommendations to guide future action by the Council itself, its constituent states and others. Under the broad headings of "Enhancing Arctic Marine Safety", "Protecting Arctic People and the Environment", and "Building Arctic Marine Infrastructure", the Council adopted 17 concrete recommendations. Some of these related to action at IMO and other international organizations, while others were to be implemented by the Arctic states through national measures.

Two of AMSA's recommendations have already resulted in binding regional treaties. The Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (Arctic SAR) was adopted in 2011. Secondly, an Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic (Arctic MOPPR) was adopted in 2013. Both agreements focus on response action in case of accidents in the Arctic area and both implement related IMO conventions.<sup>80</sup>

As to prescriptive standards for ships, however, the work within the AC, including the AMSA recommendations, has been cautious and has repeatedly

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The 2009 AMSA and related follow-up work undertaken by the Arctic Council's working group Protection of the Arctic Marine Environment (PAME) are available at <[www.pame.is/index.php/projects/arctic-marine-shipping/amsa](http://www.pame.is/index.php/projects/arctic-marine-shipping/amsa)> accessed 20 August 2016.

78 Polar Code, Part II-A, sections 2.1.1, 4.2 and 5.2.

79 See n. 36 above.

80 The Arctic SAR implements the 1979 International Convention on Maritime Search and Rescue (SAR), while the 2013 Arctic MOPPR implements the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) and parts of the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties. Both Arctic agreements are binding on the eight Arctic States.

emphasized the desirability of harmonized rules and global solutions for the region and the need for consistency with UNCLOS and international law.<sup>81</sup> This holds true for the 2015 Arctic Marine Strategic Plan, which covers the period 2015–2025.<sup>82</sup> In October 2015 a new international forum, the “Arctic Coast Guard Forum” was formed, which may play an important role in coordinating the implementation of the shipping regulations in the future.<sup>83</sup>

#### 2.2.2.5 Conclusion

The desirability of global rules to protect the Arctic from the threats associated with shipping appears to be universally accepted. From a legal point of view, too, global rules are clearly the least problematic and most embracing solution, as they offer the greatest possibility to legislate and take enforcement action with respect to the broadest range of ships. The legal framework beyond that, however, includes a number of uncertainties, notably relating to the possibilities for individual States to introduce legislation that exceeds the global rules. Apart from the more general uncertainty related to the reach of port States’ prescriptive jurisdiction over foreign ships, the legal status of the waters of the key Arctic shipping routes (NSR and NWP) is not clear, and UNCLOS Article 234 includes a number of unclear provisions for which there is neither uniformity of views among States nor authoritative interpretations by courts or tribunals.

Recent developments have illustrated that these questions have not gone away and the looming boom in Arctic shipping calls for a clarification of the matter. For example, does the adoption of the Polar Code, which represents a significant advance in substantive standards, impose limitations as to how far Arctic coastal states can adopt new standards beyond that, based on UNCLOS Article 234? Presumably the Polar Code does not directly impose such a limitation, in view of various caveats to exclude such effects.<sup>84</sup> Nonetheless, it may

81 Apart from the recommendations themselves (see notably recommendations I(a), I(b) and I(c), II(c), II(d), II(e) and II(g)), this policy is also obvious in subsequent policy discussions within the Council. See e.g. the regular reviews of progress with the recommendations, the latest one being from 2015, <[http://pame.is/images/03\\_Projects/AMSA/AMSA\\_Documents/Progress\\_Reports/AMSArecommendations2015\\_Web.pdf](http://pame.is/images/03_Projects/AMSA/AMSA_Documents/Progress_Reports/AMSArecommendations2015_Web.pdf)> accessed 20 August 2016.

82 <[www.pame.is/images/03\\_Projects/AMSP/AMSP\\_2015-2025.pdf](http://www.pame.is/images/03_Projects/AMSP/AMSP_2015-2025.pdf)> accessed 20 August 2016.

83 The Forum includes coastguards or similar agencies from the eight Arctic states and is designed to be an operational entity that can control collective resources and coordinate communications, operational plans, and at-sea activity in the area.

84 The new SOLAS Ch XIV, Reg 2(5) provides: “Nothing in this chapter shall prejudice the rights or obligations of States under international law.” See also MARPOL Article 9(2).

well have more indirect consequences in the form of altering the conditions for unilateral action listed in the Article.<sup>85</sup> The IMO debates on NORDREG illustrate the divergence of views on the Arctic coastal states' legal latitude to regulate international shipping.

### 2.3 *The EU Policy for Arctic Shipping*

Like the EU's more general Arctic policy, its positions on shipping and law of the sea issues in the region have not been very precise or well explained. The development of these positions during the brief history of EU Arctic policy documents appears to be towards ever-weaker policy statements and towards a focus on uncontroversial aspects of the EU's participation. While the earlier policy documents included some indications of a future EU Arctic policy, the more recent policy statements by EU institutions have been remarkably cautious.

First, regarding the law of the sea and passage rights in the Arctic, the EU has been careful not to take an explicit position in sensitive Arctic issues involving maritime delimitation and zones in the region.<sup>86</sup> More indirectly, however, its policy has tended to side with the navigational interests in the Arctic. All three EU institutions (Commission, Council and the Parliament) have chosen to highlight "the importance of respecting international law principles, including the freedom of navigation and the right of innocent passage".<sup>87</sup> This contrasts with the EU's own maritime safety and environmental policy for its member states, which has been distinctively port and coastal state-oriented.

Second, regarding substantive requirements for ships sailing in the Arctic, the EU's emphasis has been on the desirability of international—that is, global—rules, with a particular emphasis on the Polar Code and its

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85 See Henriksen n. 31 above, 379–383, concluding that the Code may "provide a frame of reference for the exercise of the extended jurisdiction, with any deviations requiring particular justification."

86 See also at ns. 61 and 71 above.

87 2014 Council conclusions n. 25, para 10. Similar statements were made in the Council conclusions of 8 December 2009 on Arctic issues, para. 16; 2012 Joint Communication n. 2 17; and 2014 European Parliament Resolution n. 28, para. 48. The European Parliament came closest to criticising the Arctic coastal states, when calling on "the states in the region to ensure that any current transport route—and those that may emerge in the future—are open to international shipping and to refrain from introducing any arbitrary unilateral obstacles, be they financial or administrative, that could hinder shipping in the Arctic, other than internationally agreed measures aimed at increasing security or protection of the environment". (*Ibid.*, para. 50).

implementation.<sup>88</sup> The EU institutions have also endorsed the regional regulatory initiatives for the Arctic, notably in the form of support for the implementation of the Arctic SAR and MOPPR Conventions, but also by endorsing the entire range of recommendations adopted in the 2009 Arctic Marine Shipping Assessment.<sup>89</sup>

Third, when it comes to the EU's own contribution to Arctic shipping, focus has been on matters where the participation of the Union could support and provide benefits to the region as a whole. A particular emphasis has been placed on the monitoring capabilities developed by the EU and their potential usefulness for inducing compliance with existing (international) rules in the region. The role of the European Maritime Safety Agency (EMSA) has been specifically highlighted in this respect.<sup>90</sup> The only exception to this cautious stance has been the European Parliament, which in its 2011 resolution specifically called for the EU to adopt supplementary port-State measures in case the international negotiations at the IMO did not produce the desired results for the Arctic.<sup>91</sup> This element no longer featured in the Parliament's next resolution of 2014, however.

As noted above, the most recent joint communication by the Commission and the High Representative for Foreign Affairs and Security Policy, issued in April 2016, is remarkably free from topics that could generate controversy, both generally and in respect of the Union's maritime policy. Under the priority area of climate change and the environment, the joint communication states that the EU "should encourage full respect for the provisions of UNCLOS ... including the obligation to protect and preserve the marine environment" (p. 7) and encourages states to ratify the IMO's 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments (p. 8). Under

88 See e.g. the 2014 European Parliament Resolution n. 28 para. 48 and most recently the 2016 Council Conclusions on the Arctic n. 29, para. 9.

89 2014 Council Conclusions n. 25 above, para. 9. This aspect no longer features in the 2016 conclusions n. 29 above.

90 *Ibid.*, para 9 and the 2014 European Parliament Resolution n. 28 above, para. 49.

91 The European Parliament specifically called upon its fellow EU institutions to act if the IMO negotiations on the Polar Code failed to produce results on soot emissions and heavy fuel oil: "in the event that such negotiations in IMO do not bear fruits, (the European Parliament) requests the Commission to put forward proposals on rules for vessels calling at EU ports subsequent to, or prior to, journeys through Arctic waters, with a view to imposing a strict regime limiting soot emissions and the use and carriage of heavy fuel oil". European Parliament resolution of 20 January 2011 on a sustainable EU policy for the High North (2009/2214 (INI)) (hereinafter the '2011 European Parliament Resolution'), para. 67.

the heading of sustainable development, the joint communication refers only to research and development tasks. The EU should, for example, “contribute to enhance the safety of navigation in the Arctic through innovative technologies and the development of tools for the monitoring of ... the increasing maritime activities in the Arctic” (p. 12).<sup>92</sup> The joint communication calls for close cooperation between the newly created Arctic Coast Guard Forum and the European Coast Guard Functions Forum (p. 13). The only proposal for EU action set forth in the joint communication is a proposal that the Council and European Parliament establish working parties/delegations on Arctic matters “to meet the challenges ahead” (p. 17).

Accordingly, very little in these policy documents indicates a desire by the EU or any of its institutions to take an active role in steering Arctic shipping policy. Rather, the EU appears to view itself as a facilitator with a set of useful tools that could benefit the Arctic states should they wish to make use of them.

### 3 The EU’s Regulatory Options

This section explores what options, if any, the EU has within the existing international legal framework to take action to improve safety or environmental protection standards for ships operating in the Arctic. Regulatory action at the global level (section 3.2) is distinguished from regional (EU) measures (3.3). The section concludes with a brief mention of some existing practical tools by which the EU could make a concrete contribution to Arctic shipping.

#### 3.1 *Global Rules*

While the EU on its own is obviously not in a position to draft global rules for the Arctic, or even “generally accepted” ones that flag states were bound to follow under UNCLOS,<sup>93</sup> it may nonetheless play a significant role in the making

92 2016 Joint Communication n. 29. Interestingly, the joint communication in this context refers to research programmes designed to cope “with maritime security threats resulting from the opening of the North East passage”.

93 The obligation to apply “generally accepted” international rules, e.g. in UNCLOS arts 94(5) and 211(2) applies irrespective of whether the flag state has formally signed up to the rules and standards in question. The level of acceptance required for a rule to qualify as “generally accepted” is not certain, but it is widely considered that “generally acceptance” requires that the rule or standard in question is of global origin and application. See e.g. the Final Report of the International Law Association’s Committee on Coastal State Jurisdiction relating to Marine Pollution over Vessel-Source Pollution, 2000 (‘ILA Report’) <[www.ila-hq.org/en/committees/index.cfm/cid/12](http://www.ila-hq.org/en/committees/index.cfm/cid/12)> accessed 20 August 2016.

of such rules elsewhere. Coordinated approaches by 28 EU Member States (and three EEA States), many of which are key maritime States, have a significant potential to shape regulatory outcome at the global level, including at the IMO. The EU as such is not a member of the IMO, but this does not prevent it from coordinating the position among its Member States at the IMO negotiations. To some extent this way of proceeding has already been used successfully in the Arctic context,<sup>94</sup> and there are many additional regulatory issues where such a coordinated approach could be used to strengthen the existing IMO rules for Arctic navigation. Potential examples include the introduction of a ban on carriage and use of heavy grades of oils in the Arctic,<sup>95</sup> the adoption of Arctic ship reporting and routing systems, creating MARPOL special areas for the Arctic, introducing tighter emission standards or training requirements for ships operating in Arctic waters. It has even been proposed that Arctic waters might justify a new loadlines standard.<sup>96</sup> The IMO could also decide to identify the Arctic Ocean or parts thereof as a “particularly sensitive sea area” under its Resolution A.982 (24).<sup>97</sup>

94 E.g. in the context of negotiating the Polar Code, where EU member states' positions were subject to advance coordination at the EU level. In the absence of identified exclusive competences, however, the coordination was 'light' with an option for states to opt out if their interests diverged from the common position. Personal communication with the EU/EMSA representative at IMO at the time, Mr Marten Koopmans, 17 November 2015.

95 See Liu n. 77 above. The European Parliament in its 2011 resolution n. 91 above, para. 28 took a different, or at least more explicit, approach than the other EU institutions by stressing that “a similar ban might be appropriate in Arctic waters to reduce risks to the environment in case of accidents”.

96 See A. Chircop et al., CMI Working Paper (2014) 'Polar Load Lines for Maritime Safety: A Neglected Issue in the International Regulation of Navigation and Shipping in Arctic Waters?', <[www.comitemaritime.org/Uploads/Arctic%20and%20Antarctic/CMI%20Polar%20Load%20Lines%20Paper%20\(Final\)\(14%20October%202014\).pdf](http://www.comitemaritime.org/Uploads/Arctic%20and%20Antarctic/CMI%20Polar%20Load%20Lines%20Paper%20(Final)(14%20October%202014).pdf)> accessed 20 August 2016.

97 The full name of the resolution is “Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas”. While designation of an area in the Arctic as a PSSA would not in itself alter the jurisdictional rights and obligations of states in the area, it would serve to highlight the special nature of the area and provide a framework for further protection measures. See e.g. Henrik Ringbom, *The EU Maritime Safety Policy and International Law* (Brill 2008) section 6.4.1, Markus J Kachel, *Particularly Sensitive Sea Areas—IMO's Role in Protecting Vulnerable Sea Areas* (Springer 2008). In an Arctic context Liu, n. 77 above, 730 has proposed the creation of a 200nm PSSA around the Svalbard archipelago. See also Laura Boone 'International Regulation of Polar Shipping', Molenaar et al. (eds.) *The Law of the Sea and Polar Regions, Interactions between Global and Regional Regimes* (Brill, 2012) 212.

Contributing to the global regulatory scheme clearly represents the least controversial policy approach for the EU. Global rules are most effective; they are authoritative and unproblematic from a jurisdictional point of view; and they involve little political tension as a matter of principle. Yet this approach is probably unsatisfactory as the sole means for the EU to develop Arctic policy, as a commitment to global rules includes no guarantee of result. In fact several of the measures mentioned above presuppose acceptance by the coastal States concerned or by States whose interests are most directly affected by the measure.<sup>98</sup> They are hence unlikely to be adopted without the endorsement of the Arctic coastal States. Moreover, even if the measures in question were successfully adopted, the enforcement of such global rules would not lie in the hands of EU Member States, but would mainly rely on the flag States of the ships operating in the Arctic. An additional consideration which is specific to the Arctic is that even if global rules were to be agreed for the area, the extent to which those rules would actually stop the coastal States (Canada and Russia) from implementing separate unilateral rules under UNCLOS Article 234 remains unclear.<sup>99</sup>

### 3.2 *EU Rules*

The possibilities for the EU to introduce its own supplementary rules to regulate Arctic shipping are governed by the law of the sea. The differentiation in UNCLOS between rights and obligations of States acting in different capacities calls for a distinction between the scenarios where the EU acts in the capacity of a flag State, coastal State or port State.

#### 3.2.1 Flag State

From a jurisdictional point of view, the easiest way to complement or even exceed the international requirements would be to act in the capacity of a flag state, i.e. by imposing requirements that apply to ships flying the flag of EU/EEA Member States. Both under UNCLOS and the IMO conventions, the international standards represent minimum standards for flag States, who are thus free to complement them as they see fit. By tonnage, roughly a fifth of the

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98 See e.g. Regulation 13.2 of the revised MARPOL Annex IV, in force on 1 January 2013, under which a special area for sewage will take effect only upon receipt of sufficient notifications on the existence of adequate reception facilities from party states whose coastlines border the relevant special area.

99 See at ns. 84 and 85.

world's fleet fly the flag of an EU/EEA Member State,<sup>100</sup> though a somewhat smaller proportion appears to apply to ships operating in the Arctic.<sup>101</sup>

However, as a matter of policy the EU has not normally favoured regulating international shipping by means of flag State rules.<sup>102</sup> The reasons for this are easily understood. Requirements that only apply to ships flagged in Member States involve obvious risks of subjecting these ships to a competitive disadvantage in relation to other ships of non-member flag States. In view of the ease by which ship operators may change the flag of their ships, such an approach involves a risk of outflagging, which in turn would reduce both the effect of the requirement and the size of the EU's fleet. With respect to ships operating in the Arctic, the prospect of outflagging seems particularly real, as this type of trade supposedly involves a relatively low number of ships, which are specifically constructed and equipped for the trade.

### 3.2.2 Coastal State

As the EU has no Member State with coastal waters in the Arctic neither 'ordinary' coastal State jurisdiction under UNCLOS nor the specific jurisdiction under Article 234 is available to the EU or its member states. It seems legally possible that the EU could adopt requirements for coastal states bordering the Arctic oceans that would bind (only) Norway and Iceland under the EEA Agreement,<sup>103</sup> but not even that would provide access to jurisdiction under Article 234 in view of the limited presence of ice in the coastal waters of

100 See e.g. <[www.ecsa.eu/images/files/STAT\\_ECSA\\_2013\\_4.pdf](http://www.ecsa.eu/images/files/STAT_ECSA_2013_4.pdf)> accessed 20 August 2016.

101 29 out of the 207 transits of the Northern Sea Route in 2011–2015 were made by ships flagged in an EU/EEA Member State. See <[www.arctic-lio.com/nsr\\_transits](http://www.arctic-lio.com/nsr_transits)> 20 August 2016.

102 Only a handful of the more than 40 EU maritime safety legal instruments are directed exclusively at ships flying the flag of a member state. See Ringbom n. 97 above, chapter 4. A relatively recent example is Directive 2009/21 on compliance with flag state requirements [2009] OJ L31/132.

103 The Agreement on the European Economic Area, ([1994] OJ L 1/1, as amended) guarantees the main elements of the internal market throughout the area. For an EU act to apply in the EEA, the act needs to be EEA relevant (i.e. belong to the substantive and geographical scope of the EEA Agreement). These elements were recently challenged by EEA states in connection with Directive 2013/30/EU on safety of offshore oil and gas operations [2013] OJ L 178/66. See Cinelli n. 15 above, 247 et seq. The author knows of no precedent of EU acts that exclusively target EEA member states. An instrument targeting both port and coastal state responsibilities in the EU/EEA with respect to Arctic shipping would not fall within that category, however.



Iceland and (mainland) Norway.<sup>104</sup> Consequently, the extent of such jurisdiction would in any case be quite limited.

### 3.2.3 Port State

In light of the above, the principal option available to the EU to regulate shipping in the Arctic would be in the port state capacity, which is also the jurisdictional mechanism preferred by the EU to regulate maritime safety more generally.<sup>105</sup> Roughly one third of the ships making use of the transpolar routes have their point of departure or arrival in the EU.<sup>106</sup> It can thus be expected that if trans-Arctic traffic were to boom, one of the end ports would be located in the EU.

There are many ways to influence shipping through measures taken in ports. The least controversial ones focus on implementation only, typically in the form of port state control. The Arctic has no PSC regime of its own, but all coastal States in the area participate in the Paris MOU,<sup>107</sup> which is also closely calibrated with the EU's own PSC legislation.<sup>108</sup> PSC serves only to implement international (IMO and ILO) rules, but represents a very powerful tool for ensuring that the rules, including the Polar Code once it enters into force, are implemented in practice. The enforcement measures taken in cases of non-compliance have been strengthened over time and by now include quite drastic consequences, such as the "banning" of a ship from an entire

104 The exercise of jurisdiction based on UNCLOS article 234 by Norway in the Svalbard Archipelago would be justified from a climate point of view, but would have to be subject to the 1920 Treaty Concerning the Archipelago of Spitsbergen.

105 The main parts of EU maritime safety and environmental legislation target ships of any nationality that (voluntarily) enter a port within the Union. Ringbom n. 97 above, chapter 5.

106 According to statistics provided by the NSR Information Office (<[www.arctic-llo.com/nsr\\_transits](http://www.arctic-llo.com/nsr_transits)> accessed 20 August 2016), 36 per cent of the transits that were not heading for Russia in 2011–2015 were destined for a European port.

107 Paris Memorandum of Understanding on Port State Control, 1982, latest amendment from 27 May 2016. <[www.parismou.org](http://www.parismou.org)> accessed 29 November 2016. The text of the MOU does not include a geographical scope of coverage, but operates with the (undefined) terms 'region of the memorandum' or 'Paris MOU region'. Under section 9.2, the MOU is open to participation for maritime authorities of "a European coastal State and a coastal State of the North Atlantic basin from North America to Europe". Maritime authorities of all Arctic States except the US are already signatories to the Paris MOU, and there is close cooperation with the US Coast Guard. There are thus no immediate legal hurdles for extending the application of the regime to the Arctic region.

108 Directive 2009/16 on port State control [2009] OJ L 31/57, as amended by Directive 2013/38 [2013] OJ L 218/1.

region's ports.<sup>109</sup> Even without a change of legislation or MOU, it is feasible to target Arctic shipping by means of special attention and "concentrated inspection campaigns" for ships coming from or heading towards Arctic waters. More permanent target arrangements, such as an inherent inspection priority of ships arriving from Arctic waters, would probably necessitate a change of the Directive and/or the MOU, but would be unproblematic in terms of international law.

Apart from PSC, which represents an administrative tool to enhance maritime safety and environmental protection, judicial penalties may also be invoked for violation of international rules. As far as pollution is concerned, this could also be done without further regulatory change, even for violations that occur outside the maritime waters of EU Member States. UNCLOS Article 218 permits port states to institute proceedings against violations of international (MARPOL) pollution standards, even if there is no link between the spill and the state in question. The principle is already incorporated in EU law, as far as oil and noxious liquid substances are concerned, through Directive 2005/35, but has not been widely applied in practice.<sup>110</sup>

Port States could also influence shipping by unilaterally implementing international rules that have been adopted but that have not yet entered into force, for ships operating in the Arctic that visit EU ports.<sup>111</sup> For example, the 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments, which has not yet entered into force, set forth rules relating to ballast water management.<sup>112</sup> Requiring ships that operate in the Arctic and enter EU ports to have the necessary equipment on board to prevent the introduction of non-indigenous species through their ballast waters might very well be a justifiable measure in view of the sensitive Arctic marine environment.

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109 *Ibid.*, art 16, Paris MOU, section 4.

110 Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements [2005] OJ L 255/11. The European Maritime Safety Agency (EMSA) studied the practical implementation of the rules in 2011 and concluded that few states had applied the rules on pollutions beyond their coastal waters. (Unpublished study, on file with author).

111 Precedents of EU requirements advancing the application of international rules ahead of their international entry into force include Council Regulation No 3051/95 on the safety management of roll-on/roll-off passenger ferries (ro-ro ferries) [1995] OJ L 320/14 and Regulation 782/2003 on the prohibition of organotin compounds on ships [2003] OJ L 115/1.

112 See also Liu n. 77 above, 727.

A more far-reaching alternative would be to implement rules that have been adopted only in the form of recommendations at the international level. The Polar Code's Part B includes several examples, including a ban on the carriage and use of heavy grades of oil in the Arctic.<sup>113</sup>

### 3.2.4 Legal Considerations

The extent to which the EU could legally require ships entering its ports to comply with requirements aimed at improving maritime safety and environmental protection in the Arctic depends on a series of considerations.

First, whether the substantive nature of the rule in question is relevant. In particular, whether a State may legally assert jurisdiction depends on whether the rules in question relate to 'static' features of the ship or to questions of operation or behaviour.<sup>114</sup> In the former case, e.g. specific ice-class requirements or equipment requirements for ballast water treatment, it is easier to find a jurisdictional basis for the requirement, given that any violation of the requirement will 'follow' the ship and hence also occur within the port where the state's jurisdiction is undisputed. By contrast, it would be more difficult for a port State to assert jurisdiction in respect of (non-static) operations or behaviour that occur outside its coastal waters, where it has no prescriptive jurisdiction. Potential examples including a zero discharge policy of oil discharges<sup>115</sup> or rules on 'grey water' discharges from ships in the Arctic.<sup>116</sup> Discharge rules without an international foundation will not be covered by the broad jurisdiction provided to port states under Article 218(1) of the UNCLOS. Potentially, but much less certain, alternative bases for jurisdiction could be one of the accepted bases for extra-territorial jurisdiction under international law or merely the requirement of a sufficient 'substantive connection' between the matter under regulation and the port State.<sup>117</sup>

Second, the choice of measures taken to enforce the requirement in question plays a role. For example, it has been convincingly argued that refusing a ship the right of access to a port (or other losses of entitlement to which the ship or its flag State has no specific right) requires a less solid prescriptive

113 See above at notes 77 and 91 and Liu n. 77, 728.

114 See e.g. Churchill n. 59, above 450 et seq.

115 See e.g. Canadian Arctic Shipping Pollution Prevention Regulations (ASPPR) CRC c. 353, s. 29.

116 This matter is not regulated in MARPOL, but the ASPPR n. 115 above, s. 28 prohibits the discharge of any waste, with the exception of untreated sewage, in the Arctic waters.

117 See in particular Bevan Marten, 'Port State Jurisdiction, International Conventions and Extraterritoriality: An Expansive Interpretation' in Henrik Ringbom (ed.) *Jurisdiction over Ships—Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 105.

basis than punitive enforcement measures, such as fines and other types of sanctions.<sup>118</sup> Accordingly, the legal basis for a measure may be easier to establish where the consequence of non-compliance is denial of (subsequent) access to the port State. Measures of this type are particularly effective in a regional context, such as in the EU, where the refusal could be implemented jointly by all EU/EEA States, hence extending the ban to all ports in the region. Moreover, coordinated implementation of port State jurisdiction among a larger group serves to avoid the risk of ‘ports of convenience’ whereby ship operators could evade the requirements by simply choosing another port of destination.

Third, other types of legal obligations may limit a State’s options to exercise port state jurisdiction against foreign ships. As one example, specific treaty obligations may impose such limitations. While this is not a common feature in the IMO conventions, other areas of international law, notably international trade law, may impose important limitations in this respect.<sup>119</sup> As another example, more general international law principles impose certain general reasonableness criteria, which may also serve as limitations. Port entry requirements may, for example, not be discriminatory or constitute an abuse of right by the port state.<sup>120</sup> They must be adopted in good faith and must be proportional to the objective they seek to achieve. In this respect it has been suggested that the objective of a measure in itself should play a role in its legal justifiability and that a measure that aims at protecting common values or resources should enjoy a stronger claim to legality.<sup>121</sup> Measures aimed at protecting the Arctic against the risks involved with shipping are likely to score high on such an assessment. Also, measures that serve to implement standards with an international basis (e.g. in the form of non-binding measures, or international rules that have not yet entered into force) will presumably be easier to justify than purely unilateral port State requirements.

In conclusion, there are few very concrete standards or limitations to rely upon in this area of law. The legality of any particular measure will need to be assessed based on all the interests involved, including those of ship operators

118 Erik Jaap Molenaar, ‘Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage’ (2007) 38 (1–2) *Ocean Development and International Law* 225–257 at 229.

119 See Churchill n. 59 above, 450 et seq. See also Andrew Serdy, ‘The Shaky Foundations of the FAO Port State Measures Agreement: How Watertight Is the Legal Seal against Access for Foreign Fishing Vessels?’ (2016) 31 (3) *International Journal of Marine and Coastal Law* 422.

120 Article 300, UNCLOS.

121 See e.g. Sophia Kopela, ‘Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons’ (2016) 47 (2) *Ocean Development and International Law* 89; Cedric Ryngaert & Henrik Ringbom, ‘Introduction: Port State Jurisdiction: Challenges and Potential’ (2016) 31 (3) *International Journal of Marine and Coastal Law* 379.

in the region and the Arctic coastal States. Nevertheless, it is clear that port States have considerable latitude in deciding on the content of such requirements and hence also that the EU has some regulatory leeway to implement port State requirements aimed at improving safety and protecting the environment in the Arctic.<sup>122</sup>

### 3.3 *Non-regulatory Measures*

The EU can obviously contribute to the safety and efficiency of Arctic shipping in a number of other ways than by regulation. EU institutions have emphasized these types of measures when drafting their Arctic policy documents. Nonetheless, while these measures may be important, they are not of interest from the point of view of legal assessment and will be discussed only superficially here.

A particular feature of the development of the EU's maritime policy in the past decade, which has not received much attention in literature, relates to maritime information. Through a variety of means, data relating to maritime safety, compliance and ship movements is being collected, in particular by the EU Maritime Safety Agency (EMSA). A number of satellite and AIS-based databases have been established which can be of key relevance not only for monitoring and surveillance of shipping activities in the Arctic, but also in assisting in rescue operations etc. Not only does available data include information on ship movements, safety standards and some information on hazardous cargoes on board, but EMSA also operates a satellite service for detecting oil spills, which could be valuable for monitoring deliberate and accidental oil spills in Arctic waters, where other types of surveillance mechanisms are more limited.

Another aspect of EMSA's operational work relates to pollution response activities. EMSA manages a small fleet of oil recovery vessels that can be brought in to assist with pollution emergencies in EU waters. Extending their potential scope of activity to the Arctic Ocean has not yet been proposed, but the collaboration between EMSA and the Arctic Council, notably through the Emergency Prevention, Preparedness and Response (EPPR) Working Group, which was established under the Arctic Environmental Protection Strategy (AEPS), is an indication of close collaboration between the two institutions in this field.

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122 Generally, see Bevan Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer 2014); Molenaar n. 118, above; and Ringbom, n. 97 above, section 5.1.

#### 4 Concluding Observations

Judging from the EU's policy documents on Arctic policy, the Union is not going to play a significant role in the development of shipping in the Arctic region. The main impression that one derives from those documents is one of caution, in jurisdictional matters as well as regarding substantive standards. That tendency has been strengthened during the eight years since the adoption of the Commission's first communication on the topic, to the extent that the latest policy document hardly pronounces on shipping issues at all.

This chapter has sought to assess the EU's legal latitude in a prospective way through an analysis of the relevant limitations of the law of the sea and other international law. The author concludes that there is room for a more ambitious policy, certainly in terms of identifying regulatory ambitions at global (IMO) level, but also for the EU to adopt regulatory measures alone, notably in the form of requirements placed on ships trading in Arctic waters and visiting ports of EU/EEA Member States. The fact that many of the ships that are expected to operate in the Arctic area in the future either fly the flag of an EU/EEA Member State or travel to or from an EU/EEA port provides an important jurisdictional link that has not been utilized so far. Outside the realm of law of the sea, the EU could also introduce legislation aimed at conduct in the Arctic directed at citizens and companies under its jurisdiction, rather than at ships. As to rule enforcement, many of the operational tools and facilities developed by the EU and EMSA could easily be extended to or find specific application in the Arctic, which would contribute to sharing the implementation burden of the Arctic States.

The EU should not find it difficult to identify an interest or motivation to engage in this field. It has an interest in ensuring that regulation of Arctic shipping is handled in a responsible way that conforms with its own external policy ambitions. EU members represent a significant proportion of flag States with interests in the Arctic, and the EU is one of the regions that have most to gain by further developments of shipping in the Arctic. Apart from that, ensuring safe and environmentally sustainable shipping in the Arctic is a global concern, and arguably any State or region with influence has a responsibility to do its part to ensure that shipping in the Arctic can be developed in an orderly manner. The EU regularly emphasizes its responsibility for global environmental concerns in areas beyond its own jurisdiction.<sup>123</sup> Indeed the Union's "regular" maritime safety and environmental policy is not confined to

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123 See e.g. Joanne Scott & Lavanya Rajamani 'EU Climate Change Unilateralism' (2012) 23 (2) *European Journal of International Law* 469–494.

the region's coastal waters, but repeatedly extends further to the extent that has been deemed consistent with international law.<sup>124</sup> A coherent policy on Arctic shipping would thus seem necessary if only to ensure consistency with the EU's own more general policies for maritime safety, environmental policies, climate change etc.<sup>125</sup>

A separate question is whether such EU action on Arctic shipping is called for in a substantive sense.<sup>126</sup> The brief review above has already identified several areas in which the Arctic environment lacks adequate protection from the safety and pollution risks associated with ships. Examples include the absence of a ban on the carriage of heavy fuel oil, the lack of air emissions rules (including soot particles), separate loadlines rules, PSSA, including routing systems, reporting schemes etc. Others have pointed out that regulatory inadequacies may also be found in the realm of private maritime law, such as the lack of special marine insurance law requirements for Arctic conditions, the interpretation of 'seaworthiness' in the context of polar navigation, or the insufficient availability of compensation for pollution damage occurring in the Arctic.<sup>127</sup>

The identification of regulatory gaps or inadequacies in the rules governing Arctic navigation does not necessarily indicate that the EU is the best institution to address those gaps. In most cases it is probably not, if the effectiveness of regulation is used as the relevant standard. Clearly both the formal coverage and political legitimacy of any rule would be enhanced if it were adopted at global level, by the IMO or another competent international organisation. The key strength of the EU in the regulation of shipping lies in its capacity to exert pressure on such organizations to implement their rules in a harmonized manner, and to act on its own if required to avoid results that are unacceptable from the point of view of its own policy objectives. This chapter has illustrated

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124 See e.g. the EU rules in relation to classification societies or various port state requirements that relate to matters taking place beyond the EU's territories as assessed in Ringbom n. 59 above. See also Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 (1) *American Journal of Comparative Law* 87.

125 It may be noted in this context that under Article 7 of the TFEU "the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers."

126 The EU has sometimes been criticized for not taking a more active stance in relation to Arctic shipping. See e.g. Liu n. 77 above, 708, 717.

127 See e.g. AMSA n. 36 above 63–66 and Lars Rosenberg Overby et al., CMI Report (2016): 'Report on the Legal Framework for Civil Liability for Vessel-Source Oil Spills in Polar Regions', available at <[www.comitemaritime.org/Uploads/Work%20In%20Progress/Polar%20%28%20previously%29%20Arctic%20and%20Antarctic/Report%20on%20Civil%20Liability%20%28Rosenberg%20Overby%20et%20al%29.pdf](http://www.comitemaritime.org/Uploads/Work%20In%20Progress/Polar%20%28%20previously%29%20Arctic%20and%20Antarctic/Report%20on%20Civil%20Liability%20%28Rosenberg%20Overby%20et%20al%29.pdf)> accessed 20 August 2016.

that the international regulatory framework offers scope for the EU to exercise all these functions even with respect to Arctic navigation, albeit recognizing that there exist certain legal limits to the actions available.

Accordingly, the most useful role for the EU is probably to exercise pressure on the global legislator and to represent a fall-back solution, a second line of defence in case the global rule-makers fail to adopt the desired policies. Nonetheless, the EU's failure to indicate its policy ambitions or priorities in this field, and its lack of willingness to exercise its regulatory powers, make it difficult for the EU to play such a role. The absence of signals on these matters represents a significant missed opportunity for the EU to play a role in shaping the future (global) Arctic shipping policy and beyond. Similar considerations apply to other related international discussions underway, including notably the negotiation of a new implementing agreement to UNCLOS on the protection of biodiversity in areas beyond national jurisdiction.<sup>128</sup> While this chapter has focused on EU's Arctic shipping policy, it is possible—if not probable—that a similar discrepancy between, on the one hand, the EU's substantive interest, formal competence and jurisdictional opportunity to act and, on the other hand, its limited exercise of such powers or opportunities holds true for many other EU policies in the Arctic.

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128 On the progress of these negotiations, which were initiated by the UN General Assembly through Resolution 69/292 (2015), see e.g. <[www.un.org/depts/los/biodiversity/prepcom.htm](http://www.un.org/depts/los/biodiversity/prepcom.htm)> accessed 20 August 2016.



# The European Union's Potential Contribution to the Governance of High Sea Fisheries in the Central Arctic Ocean

*Nengye Liu*

## 1 Introduction

Fisheries<sup>1</sup> have always been an essential part of the EU's Arctic policy. The EU in its first Arctic policy published in 2008 (COM (2008) 763) noted that: "in spite of harsh conditions, melting of ice and new technologies will gradually increase access to Arctic living and non-living resources".<sup>2</sup> Section 3.2 of the COM (2008) 763 was devoted to fisheries. It is stated that the EU's policy objective is to ensure exploitation of Arctic fisheries resources at sustainable levels whilst respecting the rights of local coastal communities.<sup>3</sup> This was reaffirmed in the EU's 2012 Arctic policy (JOIN (2012) 19)<sup>4</sup> and 2016 Arctic policy (JOIN (2016) 21).<sup>5</sup>

\* Nengye Liu, Senior Lecturer, Adelaide Law School, University of Adelaide, Australia.

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1 In this chapter the focus is on marine capture fisheries rather than aquaculture.

2 European Commission Communication of 20 November 2008 on the European Union and the Arctic Region, COM (2008) 763, 2 <[eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0763:FIN:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0763:FIN:EN:PDF)> accessed 26 October 2015.

3 COM (2008) 763, 7.

4 "The EU supports the exploitation of Arctic fisheries resources at sustainable levels based on sound scientific advice, while respecting the rights of local coastal communities." Joint Communication of the European Commission and High Representative of the European Union for Foreign Affairs and Security Policy of 26 June 2012 on Developing a European Union Policy towards the Arctic Region: Progress since 2008 and Next Steps, JOIN (2012) 19, 10 <[eeas.europa.eu/arctic\\_region/docs/join\\_2012\\_19.pdf](http://eeas.europa.eu/arctic_region/docs/join_2012_19.pdf)> accessed 26 October 2015.

5 "It will be necessary..... to establish the appropriate international measures..... to ensure the long-term conservation and sustainable use of resources in the Arctic high seas." Joint Communication of the European Commission and High Representative of the European Union for Foreign Affairs and Security Policy of 27 April 2016 on An Integrated

Arctic sea ice is melting at an alarming rate. A recent report from NASA has found that the Arctic has lost almost 95% of its older ice cover since 1984.<sup>6</sup> Due to this loss and other impacts of climate change, the marine ecosystems of the Arctic Ocean<sup>7</sup> are experiencing unprecedented change.<sup>8</sup> It is now widely recognized that fish stocks in the Arctic Ocean may occur both within areas under current fisheries' jurisdiction of the coastal States, and in the high seas portion of the central Arctic Ocean.<sup>9,10</sup> The coastal States of the Arctic Ocean, the so-called Arctic Five—United States, Russia, Canada, Norway and Denmark—believe they have a stewardship role in the conservation and management of Arctic marine living resources.<sup>11</sup> However, freedom of fishing in the high seas is enshrined in the United Nations Convention on the Law of Sea (UNCLOS),<sup>12</sup> which is applicable in the Arctic Ocean. To achieve sustainable management of fisheries in the high seas portion of the central Arctic Ocean, key high sea fishing States, such as the EU, must also be involved in any regulatory efforts.

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- European Union Policy for the Arctic, JOIN (2016) 21, 16 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016JC0021&from=EN>> accessed 6 September 2016.
- 6 'See How Arctic Sea Ice is Losing its Bulwark Against Warming Summers' (NASA, 29 October 2016) <<http://www.bbc.com/news/science-environment-36587253>> accessed 18 December 2016.
- 7 There is no accepted definition of the Arctic Ocean. A widely used definition is adopted by the Arctic Monitoring and Assessment Programme (AMAP) of the Arctic Council, which uses the working definition of marine areas north of the Arctic Circle (66°32'N), and north of 62°N in Asia and 60°N in North America (as modified to include the marine areas north of the Aleutian chain, Hudson Bay, and parts of the North Atlantic Ocean, including the Labrador Sea). See Timo Koivurova and Nengye Liu, 'Protection of the Arctic Marine Environment' in Daud Hassan and Saiful Karim (eds), *International Marine Environmental Law and Policy* (Routledge 2017) (forthcoming).
- 8 Arctic Biodiversity Assessment, Arctic Council Working Group Conservation of Arctic Flora and Fauna, 2013 <<https://www.arcticbiodiversity.is/index.php/the-report/chapters/introduction>> accessed 10 April 2017.
- 9 Central Arctic Ocean is defined based on IBRU's Arctic Maps: Status of Arctic waters beyond 200 nautical miles from shore <<https://www.dur.ac.uk/resources/ibru/resources/ArcticmapStatusofArcticWatersbeyond200NM.pdf>> accessed 27 March 2017.
- 10 Declaration Concerning the Prevention of Unregulated High Sea Fishing in the Central Arctic Ocean, Oslo, 16 July 2015 <[www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf](http://www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf)> accessed 27 October 2015.
- 11 The Ilulissat Declaration, Ilulissat, Greenland, 28 May 2008 <[http://www.oceanlaw.org/downloads/arctic/Ilulissat\\_Declaration.pdf](http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf)> accessed 15 March 2017.
- 12 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

In the context of the rise of the EU as a global actor (both as a multilateral player and a bilateral actor),<sup>13</sup> this chapter aims to discuss what roles the EU, as a non-Arctic entity, could play in the governance<sup>14</sup> of potential high sea fisheries in the central Arctic Ocean. This chapter combines doctrinal analysis and field research.<sup>15</sup> It first briefly describes the current international and regional regime for the regulation of fisheries in the Arctic. Then the paper focuses on the EU's potential internal and external actions that could help achieve sustainable management of potential fisheries in the high sea part of the central Arctic Ocean. The EU, as a global regulatory power, a key high sea fishing entity and an important market for fish products, could possibly make its unique contribution to enhance governance of high sea fisheries in the central Arctic Ocean.

## 2 Current Regime

Most of the Arctic Ocean is under national jurisdiction of coastal States (the Arctic Five).<sup>16</sup> There are four high seas pockets in the marine Arctic, namely the “Banana Hole” in the Norwegian Sea, the “Loophole” in the Barents Sea, the “Donut Hole” in the central Bering Sea and the “central Arctic Ocean” around the North Pole. So far, large-scale commercial fisheries are only taking place

13 In details, see for example, *A Global Actor in Search of a Strategy: European Union Foreign Policy between Multilateralism and Bilateralism*, Directorate-General for Research and Innovation, European Commission, 2014.

14 The Commission on Global Governance in its publication *Our Global Neighbourhood* defines Governance as: “Governance is the sum of many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceived to be in their interest”. See also C. Pelaudeix, ‘What is “Arctic Governance”? A Critical Assessment of the Diverse Meanings of “Arctic Governance”’ (2014) 6 *Yearbook of Polar Law* 398–426.

15 Between 9 and 18 February 2015, the author was funded by the Marie Curie Fellowship and conducted a series of semi-structured interviews with representatives from the Secretariat of the NEAFC (London), the Directorate-General for Maritime Affairs and Fisheries of the European Commission (Brussels) and the EU's Delegation to the Food and Agriculture Organization of the United Nations (FAO) (Rome). Interviews were analyzed, regarding the EU's role in the governance of Arctic fisheries.

16 Maritime jurisdiction and boundaries in the Arctic region, Arctic Maps, IBRU <<https://www.dur.ac.uk/resources/ibru/resources/Arcticmap04-08-15.pdf>> accessed 27 March 2017.

in the Sub-Arctic,<sup>17</sup> which represents more than 10% of the global marine fish catch by weight and 5.3% of the crustacean catch.<sup>18</sup> To date, no commercial fishing has occurred central Arctic Ocean. Nevertheless, one of the key impacts of climate change in Arctic marine ecosystem is the northward expansion of various subarctic as well as temperate species, while the abundance and reproductive outcome of indigenous species are in decline.<sup>19</sup> It is therefore a question whether current governance regime of Arctic fisheries is ready for this change.

The international legal framework<sup>20</sup> which applies to fisheries in the Arctic is complemented by regional fora and instruments. The UNCLOS deals broadly with the conservation and management of marine living resources in the high seas in Articles 116–120. The Convention on Biological Diversity (CBD)<sup>21</sup> is another framework convention that provides obligations of its contracting parties for the protection of marine biodiversity. Moreover, in order to sustainably manage straddling<sup>22</sup> and highly migratory fish stock,<sup>23</sup>

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17 Marine ecosystems and the shelf areas off the coasts of Labrador, Newfoundland, Greenland and Iceland, and the Bering and Barents Seas, are often referred to as sub-Arctic systems. See Factsheet, *Changing Nature of Arctic Fisheries?* EU Arctic Impact Assessment 2014; <[http://www.arcticinfo.eu/images/Facksheet/Factsheets\\_Final/fishing\\_regular.pdf](http://www.arcticinfo.eu/images/Facksheet/Factsheets_Final/fishing_regular.pdf)> accessed 18 November 2015.

18 S. Arnarsson and D. Justus, 'Changing Nature of Arctic Fisheries' in Adam Stepien, Timo Koivurova and Paula Kankaanpää (eds) *Strategic Assessment of Development of the Arctic* (Arctic Centre, University of Lapland, 2014) 57.

19 N. Wegge, 'The Emerging Politics of the Arctic Ocean, Future Management of the Living Marine Resources' (2015) 51 *Marine Policy* 333; J.S. Christiansen, C.W. Mecklenburg and L.V. Karamushko, 'Arctic Marine Fishes and Their Fisheries in Light of Global Change' (2014) 20 *Global Change Biology* 352.

20 See L. Weidemann, *International Governance of the Arctic Marine Environment, with Particular Emphasis on High Sea Fisheries* (Springer 2013) 142–159; E.J. Molenaar, 'International Law on Arctic Fisheries' in N. Loukacheva (ed.) *Polar Law and Resources* (Nordic Council of Ministers, 2015) 79–90.

21 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993), (1992) 31 *ILM* 842–847.

22 Stocks occurring both within and in an area beyond and adjacent to the Exclusive Economic Zone, see E. Meltzer, 'Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries' (1994) 25 (3) *Ocean Development and International Law* 255.

23 Highly migratory species are defined as those species listed in Annex 1 of the 1982 Convention. This list includes tuna, tuna-like species (billfish, dolphins, and sharks), and certain cetaceans. These species were categorized and so labeled because they move considerable distances over vast expanses of ocean areas. See Meltzer n. 22 above.

the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement)<sup>24</sup> was adopted in 1995. The Food and Agriculture Organization of the United Nations (FAO) has been actively managing global fisheries by adopting a series of legally binding and non-binding instruments. For example, the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement)<sup>25</sup> was adopted to cope with the problem of reflagging.<sup>26</sup> Part of the FAO Compliance Agreement were reproduced in the Code of Conduct for Responsible Fisheries<sup>27</sup> in 1995. Furthermore, for combating illegal, unreported and unregulated (IUU) fishing, the FAO has produced instruments such as the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU)<sup>28</sup> and the 2009 Agreement on Port State Measures to Prevent IUU Fishing.<sup>29</sup>

International fisheries law however has generally failed to achieve sustainable management of fisheries globally. Churchill argues that it is difficult to escape the conclusion that the UNCLOS has proved virtually useless in preventing the adverse impacts of fisheries on the marine environment.<sup>30</sup> The impact of current and future fisheries on the marine environment and

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24 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) (1995) 34(6) *ILM* 1542–1580.

25 The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (adopted 24 November 1993) (1993) 33 *ILM* 968.

26 The practice of vessel operators reflagging their vessels with flags of convenience, those from other countries or countries not party to fisheries agreements or arrangements to avoid obligation to comply with conservation and management measures. See Weidemann, n. 20 above, 148.

27 Code of Conduct for Responsible Fisheries <<http://www.fao.org/docrep/005/v9878e/v9878e00.HTM>> accessed 19 November 2015.

28 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing <[www.fao.org/docrep/003/y1224e/y1224e00.htm](http://www.fao.org/docrep/003/y1224e/y1224e00.htm)> accessed 19 November 2015.

29 Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (adopted 22 November 2009, not yet in force) <[http://www.fao.org/fileadmin/user\\_upload/legal/docs/2\\_037t-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/2_037t-e.pdf)> accessed 19 November 2015.

30 R.R. Churchill, 'Fisheries and Their Impact on the Marine Environment: UNCLOS and Beyond' in Marta Chantal Ribeiro (ed), *30 Years After the Signature of the United Nations*

marine biodiversity in the Arctic is not likely to be fundamentally different from impacts on the marine environment and biodiversity in other parts of the globe.<sup>31</sup> The physical harm caused by the often highly destructive methods used for fishing, have, in many parts of the world, had a severe impact on the marine ecosystem and it is likely that they will have the same types of impacts in the Arctic.<sup>32</sup> Fishery collapse already happened in the Arctic. For example, the “Donut Hole” stock of Pollock in the Aleutian Basin of the central Bering Sea during the 1980s is the most spectacular fishery collapse in North American history.<sup>33</sup> The key issue therefore is how to develop the current regime so as to achieve sustainable fisheries in the Arctic. Because the central Arctic Ocean has not been disturbed by fisheries so far, a regulatory regime should be in place before commercial fishing occurs. On the other hand, the central Arctic Ocean might be used as a testing ground for the development of international fisheries law that could provide lessons for other parts of the globe.

Many fora and instruments apply to parts of the marine Arctic at regional and bilateral level.<sup>34</sup> Moreover, the North East Atlantic Fisheries Commission (NEAFC) covers part of the Arctic Ocean. The NEAFC Convention Area covers the Atlantic and Arctic Oceans east of a line south of Cape Farewell—the southern tip of Greenland (42° W), north of a line to the west of Cape Hatteras—the southern tip of Spain (36° N) and west of a line touching the western tip of Novya Semlya (51°E).<sup>35</sup> Nevertheless, a gap remains for the regulation of potential fisheries in the central Arctic Ocean.

Sponsored by Alaska Senator Ted Stevens, the United States Congress adopted the S.J. Res.17 in 2008, directing the United States to initiate international discussions and take necessary steps with other Nations to negotiate an agreement for managing migratory and transboundary fish stocks in the

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*Convention on the Law of the Sea: The Protection of the Environment and the Future of the Law of the Sea* (Coimbra Editora 2014) 31.

- 31 E.J. Molenaar, ‘Arctic Fisheries Conservation and Management: Initial Steps of Reform of the International Legal Framework’ (2009) 1 *Yearbook of Polar Law* 433.
- 32 N. Liu and E.A. Kirk, ‘The European Union’s Potential Contribution to Protect Marine Biodiversity in the Changing Arctic: a Roadmap’ (2015) 30 (2) *International Journal of Marine and Coastal Law* 268.
- 33 K.M. Bailey, ‘An Empty Donut Hole: the Great Collapse of a North American Fishery’ (2011) 16 (2) *Ecology and Society* [online] <<http://www.ecologyandsociety.org/vol16/iss2/art28/>> accessed 25 November 2015.
- 34 E.J. Molenaar, ‘International Law on Arctic Fisheries’ in N. Loukacheva (ed.) *Polar Law and Resources* (Nordic Council of Ministers, 2015) 84–85.
- 35 ‘Where is the NEAFC Regulatory Area?’ <<http://www.neafc.org/what-neafc/117>> accessed 19 November 2015; See also ‘Map of the NEAFC Regulatory Area’ <<http://www.neafc.org/page/27>> accessed 19 November 2015.

Arctic Ocean.<sup>36</sup> It is proposed that the United States should support international efforts to halt the expansion of commercial fishing activities in the high seas of the Arctic Ocean before the agreement comes into force.<sup>37</sup> On July 16 2015, the Arctic Five adopted the Declaration Concerning the Prevention of Unregulated High Sea Fishing in the Central Arctic Ocean (Oslo Declaration).<sup>38</sup> The Declaration acknowledges the interest of other States in preventing unregulated high seas fisheries in the central Arctic Ocean and has therefore initiated a so-called “broader process” of developing fisheries management measures for the central Arctic Ocean with non-Arctic States. As a result, China, the EU, Iceland, Japan and the Republic of Korea—the five leading non-Arctic high sea fishing States—have been invited to help develop a regional fisheries organisation or arrangement for the central Arctic Ocean. Known as the Arctic 5+5, the group held its first meeting on fisheries in Washington in December 2015. A series of follow-up meetings has been held since in Washington, Iqaluit in Canada and Torshavn, in the Faroe Islands. The Arctic 5+5 negotiations have made significant progress. Held in Reykjavik, Iceland (15–18 March 2017), the group issued a statement emphasising that consensus had been reached on most issues and that there was a general commitment to conclude the negotiations with a legally binding arrangement soon.<sup>39</sup> The EU has committed to support a multilateral agreement that prevents unregulated high sea fisheries in the central Arctic Ocean until a Regional Fisheries Management Organization/Arrangement (RFMO/A) is in place.<sup>40</sup> The EU’s potential actions to contribute to the establishment of the central Arctic RFMO/A will be further elaborated in section 3.4.

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36 S.J.Res.17—110th Congress (2007–2008), Public Law No: 110–243 (06/03/2008) <<https://www.congress.gov/bill/110th-congress/senate-joint-resolution/17>> accessed 16 December 2015.

37 *Ibid.*

38 Declaration Concerning the Prevention of Unregulated High Sea Fishing in the Central Arctic Ocean, Oslo, 16 July 2015.

39 Chairman’s Statement, Meeting on High Seas Fisheries in the Central Arctic Ocean, Reykjavik, Iceland, 15–18 March 2017 <[http://naalakkersuisut.gl/~/-/media/Nanoq/Files/Attached%20Files/Fiskeri\\_Fangst\\_Landbrug/Eng/Chairmans%20Statement%20from%20Reykjavik%20Meeting%202017.pdf](http://naalakkersuisut.gl/~/-/media/Nanoq/Files/Attached%20Files/Fiskeri_Fangst_Landbrug/Eng/Chairmans%20Statement%20from%20Reykjavik%20Meeting%202017.pdf)> accessed 29 March 2017.

40 Joint Communication of the European Commission and High Representative of the Union for Foreign Affairs and Security Policy of 10 November 2016 on International ocean governance: an agenda for the future of our oceans, JOIN (2016) 49, 7.

### 3 The EU and Arctic Fisheries

#### 3.1 *The EU's Current Role in the Governance of Arctic Fisheries*

The EU has no coast line in the Arctic. This subsequently limits the EU's position on receiving fishing rights: the EU receives rights either by grants from Arctic countries' to fish within their EEZs or by being allocated rights within a RFMO area regarding the high seas.<sup>41</sup> For example, the EU has entered into a mixed sustainable fisheries agreement with Greenland, which provides access to a wide range of fish stocks in Greenland's EEZ. It is reaffirmed in the 2015 Joint Declaration between the EU and Greenland that "sustainably managing fish stocks and the marine environment as well as providing fishing opportunities for the vessels of EU Member States should remain an essential pillar of the partnership between the EU and Greenland and continue to be based on the EU Greenland Fisheries Partnership Agreement and its Protocols".<sup>42</sup>

The EU accounts for over 5% of total fisheries production worldwide, which is 4,889,188 tonnes live weight in 2011.<sup>43</sup> 79% of EU catches are taken in EU waters; 8% are made in countries' waters outside the EU; 13% are taken on the high seas.<sup>44</sup> It is noted that Northeast Atlantic (FAO Fishing area code 27) is the most important fishing area for the EU. 69.62% of total EU catches in 2011 were taken from that area.<sup>45</sup> In terms of value, the EU is the leading importer of fishery products in the world. The EU is the largest fish market in the world, which is about 26% of global fish import with a value about EUR 36 billion in 2011.<sup>46</sup> Main suppliers for the EU include Norway (20%), China (8%), Iceland (5%), Ecuador (5%) and United States (5%).<sup>47</sup>

41 B. Rudloff, 'The EU as Fishing Actor in the Arctic' (2010) SWP Berlin Working Paper <[https://www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/Rff\\_WP\\_2010\\_02\\_ks.pdf](https://www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/Rff_WP_2010_02_ks.pdf)> accessed 23 December 2015.

42 Joint Declaration by the European Union, on the one hand, and the Government of Greenland and the Government of Denmark, on the other, on relations between the European Union and Greenland <[https://ec.europa.eu/europeaid/sites/devco/files/signed-joint-declaration-eu-greenland-denmark\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/signed-joint-declaration-eu-greenland-denmark_en.pdf)> accessed 13 January 2016.

43 5.1, Catches, Facts and Figures on the Common Fisheries Policy, Basic Statistical Data, 2014, European Union <[http://ec.europa.eu/fisheries/documentation/publications/pcp\\_en.pdf](http://ec.europa.eu/fisheries/documentation/publications/pcp_en.pdf)> accessed 13 January 2016.

44 EU SFPAS: Sustainable Fisheries Partnership Agreements <[http://ec.europa.eu/fisheries/documentation/publications/2015-sfpa\\_en.pdf](http://ec.europa.eu/fisheries/documentation/publications/2015-sfpa_en.pdf)> accessed 12 January 2016.

45 Facts and Figures on the Common Fisheries Policy, n. 43 above, 20.

46 Arnarsson and Justus, n. 17 above, 66.

47 Facts and Figures on the Common Fisheries Policy, n. 43 above, 35.



One-third of fish caught in the sub-Arctic are sold on the European market.<sup>48</sup> From the perspective of the Arctic States, the EU often represents the dominate export destination.<sup>49</sup> For example, fisheries generated more than 90% of export earnings in Greenland and the Faroe Islands, around 40% in Iceland and about 6% in Norway in 2010.<sup>50</sup>

The EU however is not a State. A clear picture about the EU's competences and institutional matrix must be drawn so as to better understand how the EU could contribute to governance of high sea fisheries in the central Arctic Ocean.

### 3.2 Competences

The EU has international legal personality<sup>51</sup> and is an international actor. Van Vooren and Wessel define the EU as:

an entity that interacts with third countries and international organizations, in ways which are legally and politically distinguishable from its constitutive Member States. In the global context, this entity has a stand-alone identity composed of values, interests and policies which it seeks to define and promote internationally as its own.<sup>52</sup>

The EU shall act based on the principle of conferral.<sup>53</sup> This means the EU can act only within the limits of the competences, conferred upon it by the Member States in the Treaties to attain the objectives set out therein. The existence of competences could be either expressed or implied.<sup>54</sup>

The EU has strong legal competence in fields of policy, such as trade, shipping and high sea fisheries, that will figure prominently when sea ice on the Arctic Ocean further recedes and becomes predominantly first year ice.<sup>55</sup> In particular, the Treaty on the Functioning of the European Union (TFEU) confers on the EU's exclusive competence in the conservation of marine biological

48 JOIN (2012) 19, 10.

49 Rudloff, n. 41 above, 12.

50 Arnarsson and Justus, n. 18 above, 57.

51 Article 47, the Treaty on European Union (TEU) [2008] OJ C115/15.

52 B. Van Vooren and R.A. Wessel, *EU External Relations Law, Text, Cases and Materials* (CUP, Cambridge 2014) 1.

53 Article 5, TEU.

54 Further discussions see Van Vooren and Wessel, n. 52 above, 76–91.

55 T. Koivurova, K. Kokko, S. Duyck, N. Sellheim and A. Stepien, 'The Present and Future Competence of the European Union in the Arctic' (2012) 48 (4) *Polar Record* 362.

resources under the Common Fisheries Policy.<sup>56</sup> The EU shares competence with Member States in the area of agriculture and fisheries, excluding the conservation of marine biological resources.<sup>57</sup> In general, based on the famous *Commission v. Council* (AETR case) [1971] of the Court of Justice the European Union (CJEU),<sup>58</sup> the material scope of the EU's external competence/treaty-making powers corresponds to the scope of the internal powers from which those treaty-making powers flow.<sup>59</sup> The CJEU, first in the Kramer Case, has specifically held that the EU has implied treaty-making powers in relation to fisheries.<sup>60</sup> It is provided that "it follows from the very duties and powers which Community law has established and assigned to the institutions of the Community on the internal level that the Community has authority to enter into international commitments for the conservation of the resources of the sea".<sup>61</sup> Moreover, it is clearly stated by the TFEU that "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope".<sup>62</sup> Therefore, when it comes to issues regarding the conservation of marine living resources in high sea portion of the central Arctic Ocean, the EU has exclusive competence to act, both internally and externally. This explains why the EU, rather than Member States, such as Spain or Germany, was invited by the Arctic 5 to participate in the negotiations of regulating potential fisheries in the central Arctic Ocean.

56 Article 3 (1) (d), The Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47.

57 Article 4 (2) (d), TFEU.

58 *Commission v. Council* (Case C-22/70) [1971] ECR 263, Para. 19: "With regard to the implementation of the provisions of the Treaty the system of internal Community measures may not therefore be separated from that of external relations" <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61970CJ0022&from=FR> accessed 9 December 2015.

59 Robin Churchill and Daniel Owen, *The EC Community Fisheries Policy* (Oxford University Press 2010) 305.

60 For detailed analysis of the Kramer Case, see *ibid.*, 304–305.

61 *Officier van Justitie v Kramer* (Joined Cases 3,4, and 6/76) [1976] ECR 1279, Para. 33 <[http://www.cvce.eu/content/publication/2006/6/13/44f87937-c661-45e5-904c-58bdda2323ca/publishable\\_en.pdf](http://www.cvce.eu/content/publication/2006/6/13/44f87937-c661-45e5-904c-58bdda2323ca/publishable_en.pdf)> accessed 9 December 2015.

62 Article 3 (2), TFEU.

### 3.3 *Institutional Matrix*

One of the ten priorities for the European Commission, set out by its President, Jean-Claude Juncker, is to strengthen the role of the EU as a global actor.<sup>63</sup> To further this goal, The European Commission has been keen to “speak with one voice in global affairs”.<sup>64</sup> This is reflected in the development of the EU’s 2016 Arctic policy, which is named “An Integrated European Union Policy for the Arctic”. The European Commission is the driving force for the development of the EU’s Arctic policy. The Arctic is too complex for any single Directorate General (DG) of the European Commission to deal with. The European Commission has therefore established an inter-service group on the development of Arctic policy, which involves staff from several DGs to make the policy draft. These mainly include DG for Maritime Affairs and Fisheries (MARE), DG for Mobility and Transport (MOVE), DG for Energy (ENER), DG for Environment, DG for Research and Innovation as well as DG for Regional and Urban Policy. The DG MARE, which is the Commission department responsible for the implementation of the Common Fisheries Policy and of the Integrated Maritime Policy, is playing a coordinating role in the inter-service group. The C1 Unit (Maritime policy, Atlantic, outermost regions and the Arctic) of the DG MARE is the specific unit that is working on the Arctic issues. Together with the European External Action Service (EEAS), the European Commission organized a series of stakeholder consultation workshops in Rovaniemi, Brussels and Reykjavik in 2015 for the development of the EU’s latest Arctic policy, which was adopted in April 2016.

The European External Action Service (EEAS) is an institutional structure set up in 2010 against a decades-old struggle of the Union seeking to project a strong, coherent voice on the international scene, counterbalanced by the Member States’ wish to retain control over various aspects of international relations.<sup>65</sup> It is placed under the authority of the High Representative to help fulfill his/her mandate to conduct the Common Foreign and Security Policy (CFSP) of the EU.<sup>66</sup> As clearly mentioned in its name, it is an institution that provides service. The EEAS is not playing the role as policy makers, such as the European Commission and the High Representative, but rather assists policy

63 President Juncker’s Political Guidelines <[http://ec.europa.eu/priorities/docs/pg\\_en.pdf#page=11](http://ec.europa.eu/priorities/docs/pg_en.pdf#page=11)> accessed 11 December 2015.

64 A Stronger Global Actor—One Year on <[http://ec.europa.eu/priorities/global-actor/docs/stronger-foreign-policy-actor-1-year\\_en.pdf](http://ec.europa.eu/priorities/global-actor/docs/stronger-foreign-policy-actor-1-year_en.pdf)> accessed 11 December 2015.

65 Van Vooren and Wessel, n. 52 above, 20.

66 Article 1 (3) and Article 2 (1), Council Decision 2010/427/EU of 26 July 2010 establishing the organization and functioning of the European External Action Service [2010] OJ L201/30.

makers<sup>67</sup> and ensures consistency between the different areas of the Union's external action and between those areas and its other policies.<sup>68</sup> The Council Decision 2010/427 establishing the EEAS states that "the EEAS and the services of the European Commission shall consult each other on all matters relating to the external action of the Union in the exercise of their respective functions, except on matters covered by the Common Security and Defence Policy (CSDP). The EEAS shall take part in the preparatory work and procedures relating to acts to be prepared by the Commission in this area."<sup>69</sup> The EEAS therefore has been actively involved in developing the EU's Arctic policy over the past years. For example, as mentioned, the EEAS worked with the European Commission to organize a series of stakeholder consultation meetings for the development of the EU's 2016 Arctic policy.

The European Council sets the EU's policy agenda, traditionally by adopting 'conclusions' during European Council meetings which identify issues of concern and actions to take.<sup>70</sup> It has adopted three Conclusions regarding the Arctic in 2009, 2014 and 2016. Although these Conclusions are not legally-binding, they are politically important because the European Council is the EU institution that identifies the strategic interests and objectives of the Union.<sup>71</sup> The Council Conclusions on Arctic Issues in 2009 not only echoed the European Commission's proposal in COM (2008) 763 to extend the NEAFC to the high sea area of central Arctic Ocean, but also moved further by suggesting a temporary ban in those waters before a legal framework is in place.<sup>72</sup> The European Council is in the same line with the United States Congress. However, in the 2014 Council Conclusions on Developing a EU Policy towards the Arctic Region, fisheries was not an issue that was emphasized. The 2014 Council Conclusions only briefly mentioned that the EU should seek to strengthen its support for the protection of the Arctic environment through its policies regarding for example climate change, air pollutants including black

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67 "The EEAS shall assist the President of the European Council, the President of the Commission, and the Commission in the exercise of their respective functions in the area of external relations." Article 2 (2), Council Decision 2010/427/EU.

68 Article 3 (1), Council Decision 2010/42/EU.

69 Article 3 (2), Council Decision 2010/42/EU.

70 The European Council <<http://www.consilium.europa.eu/en/european-council/>> accessed 11 April 2017.

71 Article 22 (1), TEU.

72 Para. 10, Council conclusions on Arctic issues, 2985th Foreign Affairs Council meeting, Brussels, 8 December 2009 <[http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/111814.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/111814.pdf)> accessed 15 December 2015.

carbon, biodiversity and fisheries.<sup>73</sup> This might reflect the fact that the EU's proposal in establishing a legal framework for commercial fishing in the high sea portion of the central Arctic Ocean did not make any progress between 2008 and 2014. The European Council became even less ambitious in its latest Council Conclusions on the Arctic. It merely states "the Council welcomes EU participation in the negotiations on an international agreement to prevent unregulated fisheries in the Central Arctic Ocean, in a field which falls under the EU's exclusive external competence."<sup>74</sup>

The European Parliament is proactive in commissioning studies, adopting non-binding resolutions, organizing hearings, carrying out fact finding missions and so on, to place a parliamentary stamp on EU external relations.<sup>75</sup> The European Parliament was a strong supporter of establishing a comprehensive Arctic Treaty for the protection of the Arctic, as modelled by the Antarctic Treaty.<sup>76</sup> The initiative of an Arctic Treaty is clearly not favoured by any Arctic State.<sup>77</sup> The European Parliament has gradually become more pragmatic, by stating that the formulation of an EU policy on the Arctic should be based on the recognition of the existing international, multilateral and bilateral legal frameworks such as the comprehensive set of rules laid down in UNCLOS.<sup>78</sup> The European Parliament had no specific interest in fisheries

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73 Para. 2, Council conclusions on developing a European Union Policy towards the Arctic Region, Foreign Affairs Council meeting, Brussels, 12 May 2014 <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/142554.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/142554.pdf)> accessed 16 December 2015.

74 Para. 9, Council conclusions on the Arctic, Foreign Affairs Council meeting, Brussels, 20 June 2016 <<http://data.consilium.europa.eu/doc/document/ST-10400-2016-INIT/en/pdf>> accessed 6 September 2016.

75 Van Vooren and Wessel, n. 52 above, 28.

76 Para. 15, P6\_TA (2008) 0474, 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-2008-474>> accessed 18 December 2015.

77 "The law of the sea provides a solid foundation for responsible management by the five coastal States and other users of Arctic Ocean through national implementation and application of relevant provisions. We therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean." The Ilulissat Declaration, Arctic Ocean Conference, Ilulissat, Greenland, 27–29 May 2008 <[https://www.regjeringen.no/globalassets/upload/ud/080525\\_arctic\\_ocean\\_conference\\_outcome.pdf](https://www.regjeringen.no/globalassets/upload/ud/080525_arctic_ocean_conference_outcome.pdf)> accessed 19 December 2015.

78 Para. G, P7\_TA (2011) 0024, European Parliament resolution of 20 January 2011 on a sustainable EU policy for the High North (2009/2214 (INI)) <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0236>> accessed 19 December 2015.

in its 2008 Resolution.<sup>79</sup> The Parliament however pays much attention to Arctic fisheries in its 2011 Resolution. Internally, the European Parliament requests the European Commission to ensure a coherent, coordinated and integrated Arctic policy across key policy areas, including fisheries.<sup>80</sup> Moreover, it is recommended by the European Parliament that DG MARE should be acting as a cross-sectoral coordinator of the Inter-Service Group within the European Commission.<sup>81</sup> The European Commission followed the Parliament's recommendation. Externally, the European Parliament not only supports regulating fishing in the high seas portion of the Arctic by a RFMO that respects scientific advice and has robust control and surveillance programme to ensure compliance, but also believes that fishing within Exclusive Economic Zones (EEZs) of Arctic coastal States must meet same standards.<sup>82</sup> This might be seen by Arctic States as political intrusion. In its 2014 Arctic Resolution, the European Parliament focused on external actions. It once again shows support for the regulation of potential fishing in the high sea parts of the central Arctic Ocean. The European Parliament has however made another political statement, calling for the protection of the international sea areas around the North Pole outside the EEZs of Arctic coastal States by establishing a network of Arctic conservation areas.<sup>83</sup> In March 2017, the European Parliament adopted resolution "An Integrated EU Policy for the Arctic",<sup>84</sup> which echoed the JOIN (2016) 21 published by the European Commission and High Representative. The Parliament reaffirmed its statement in 2014 resolution that fishing on the high seas and within EEZs must be regulated by a RFMO, which respects scientific advice and has a robust control and surveillance programme to ensure compliance with management measures.<sup>85</sup> The European Parliament is supportive

79 P6\_TA (2008) 0474, European Parliament resolution of 9 October 2008 on Arctic governance.

80 Para. 56, P7\_TA (2011) 0024, European Parliament resolution of 20 January 2011 on a sustainable EU policy for the High North.

81 *Ibid.*

82 Para. 22, P7\_TA (2011) 0024, European Parliament resolution of 20 January 2011 on a sustainable EU policy for the High North.

83 Para. 38, P7\_TA (2014) 0236, European Parliament resolution of 12 March 2014 on the EU strategy for the Arctic (2013/2595 (RSP)) <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0236>> accessed 22 December 2015.

84 P8\_TA-PROV (2017) 0093, European Parliament resolution of 16 March 2017 on an integrated European Union policy for the Arctic (2016/2228 (INI)) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0093+0+DOC+XML+Vo//EN&language=EN>> accessed 31 March 2017.

85 Para. 7, P8\_TA-PROV (2017) 0093.

of a moratorium on industrial-scale fishing, including bottom-trawling, in the previously unfished waters of the Arctic.<sup>86</sup>

In general, the EU institutions are well coordinated and share the same view that a RFMO/A shall be in place for the high seas of central Arctic Ocean so as to achieve sustainable fisheries in the future when commercial fishing occurs. The following section will discuss concrete contributions that the EU might make to achieve this objective.

### 3.4 *The EU's Potential Contributions to Governance of High Sea Fisheries in the Central Arctic Ocean*

#### 3.4.1 Internal Actions

As an important flag State and market State for Arctic fisheries, the EU could potentially play a significant part in regulating future high sea fisheries of the central Arctic Ocean directly and indirectly by its internal measures.

It was admitted by the European Commission in 2009 that the Common Fisheries Policy (CFP) then has not worked well enough to prevent problems in European fishing sector, including overfishing, fleet overcapacity, heavy subsidies, low economic resilience and decline in the volume of fish caught by European fishermen.<sup>87</sup> While the EU is eager to promote good maritime governance and responsible fishing in the outside world, bad management of fisheries within the EU<sup>88</sup> might make the EU's effort less convincing for third countries. This is exactly the case, for example, between the EU and Iceland. For example, Gunnar Tomasson, Director of a major Icelandic fishing company Thorfish said, "Today the fishing stocks (in Icelandic waters) are sustainable and we are controlling them very well. But inside the European Union, it is totally the other way around. They are not controlling it; they are overfishing their stocks and they are even paying subsidies to their industry. We do not want to go into the European Union."<sup>89</sup>

86 *Ibid.*

87 European Commission Communication of 22 April 2009 Green Paper Reform of the Common Fisheries Policy, COM (2009) 163, 4–5 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0163:FIN:EN:PDF>> accessed 27 September 2016.

88 The European Commission identified five structural failings for the CFP in 2009: 1) a deep-rooted problem of fleet overcapacity; 2) imprecise policy objectives resulting in insufficient guidance for decisions and implementations; 3) a decision-making system that encourages a short-term focus; 4) a framework that does not give sufficient responsibility to the industry; 5) lack of political will to ensure compliance and poor compliance by the industry. See COM (2009) 163, 8.

89 Claire Marshall, 'Iceland's Fishing Industry Better Off Outside EU' (*BBC*, 21 June 2016) <<http://www.bbc.com/news/science-environment-36587253>> accessed 27 September 2016.

The EU's CFP has been reformed and a new CFP is effective from 1 January 2014. The European Commission believes that a whole-scale and fundamental reform of the CFP and remobilization of the fisheries sector can bring about the dramatic change that is needed.<sup>90</sup> The reformed CFP, consisting of Regulation (EU) 1380/2013 on the Common Fisheries Policy and Regulation (EU) 2015/812 as regards the landing obligation, introduces a number of measures and instruments to achieve sustainability.<sup>91</sup> These include, for example, 1) Fish stocks should be exploited at maximum sustainable yield (MSY) levels;<sup>92</sup> 2) Discarding of fish is no longer acceptable;<sup>93</sup> 3) Multi-annual management plans that will replace the single-stock-based approach, bringing the vast majority of stocks under multi-stock management plans;<sup>94</sup> 4) Regionalisation;<sup>95</sup> 5) Transferable fishing concessions<sup>96</sup> aiming at eliminating overcapacity of fishing fleet and improving the economic result of the fishing industry as a whole.<sup>97</sup> In particular, multi-annual management plans to manage resources at levels that are capable of producing MSY, together with the conservation proposal that is ending the practice of discards and reducing unwanted catches, are considered by

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90 COM (2009) 163, 4–5.

91 Sustainability is at the heart of the proposed reform. See European Commission Communication of 13 July 2011 Reform of the Common Fisheries Policy, COM (2011) 417, 2 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0417&from=EN>> accessed 28 September 2016.

92 These levels can be defined as the highest catch that can be safely taken year after year and which maintains the fish population size at maximum productivity. COM (2011) 417, 3.

93 *Ibid.*, 4. In 2015 the pelagic and industrial fisheries, and in the Baltic the salmon fisheries and fisheries for cod fall under the landing obligation. For all other fisheries, there is no change in 2015. In the fisheries that are not under the landing obligation from 1 January 2015, all catches of undersized fish, not covered by quota, or in excess of catch composition and by-catch rules, must continue to be returned to the sea. See 1 January 2015: the Landing Obligation <[http://ec.europa.eu/fisheries/cfp/fishing\\_rules/landing-obligation/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/fishing_rules/landing-obligation/index_en.htm)> accessed 28 September 2016.

94 *Ibid.*

95 EU fisheries legislation adopted centrally should focus on objectives, targets, minimum common standards and results, and delivery timeframes. While key decisions remain at EU level, Member States will have the flexibility to decide on other measures for fisheries management, under the supervision of the Commission, in full compliance with the provisions of EU law. COM (2011) 417, 7.

96 Transferability of fishing rights that would make it possible for the fishermen to adjust their quota holdings to fit their catch by buying or leasing fishing rights retroactively. See M. Salomon, T. Markus and M. Dross 'Masterstroke or Paper Tiger—The Reform of the EU's Common Fisheries Policy' (2014) 47 *Marine Policy* 79.

97 Council Regulation (EU) 1380/2013 on the Common Fisheries Policy [2013] OJ L354/22, art 21. See also COM (2011) 417, 5.



the EU as two core elements for conservation of marine living resources.<sup>98</sup> It might be too early to assess the effectiveness of the reformed CFP three years after its adoption. There are concerns and criticisms about the reformed CFP.<sup>99</sup> Nevertheless, both the introduction of the MSY-concept for fixing fishing opportunity and the landing obligation are quite positive steps towards better management of European stocks and the protection of marine biodiversity.<sup>100</sup> The CFP will be applicable to EU-flagged fishing vessels in the central Arctic Ocean. A successful CFP would give the EU more credibility and enhance the EU's role as a normative power to promote sustainable fisheries internationally (including the Arctic).<sup>101</sup>

While the EU regulates only its internal market, multinational corporations often have an incentive to standardize their production globally and adhere to a single rule.<sup>102</sup> The EU has succeeded in using market access as a tool to leverage the 'migration' of its frequently demanding norms abroad.<sup>103</sup> One particularly example that may also have an impact on Arctic fisheries in the future could be the EU Regulation to prevent, deter and eliminate illegal, unreported and unregulated fishing (IUU).<sup>104</sup> The Regulation establishes various EU-wide mechanisms to prevent, deter, and eliminate IUU fishing,<sup>105</sup> and to prevent the continued import of IUU fish into the EU market. These include

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- 98 European Commission Communication of 13 July 2011 Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy, COM (2011) 425, 7 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0425&from=EN>> accessed 28 September 2016.
- 99 P. Ørebech "Getting It Right": The Birth of a New EU Common Fishery Policy?—Legislative and Legal Perspectives on the Annuling of the "Five Structural Failings" (2015) 6(2) *Arctic Review on Law and Politics* 111–131.
- 100 Salomon, Markus and Dross, n. 96 above, 83.
- 101 I. Manners 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 235–58.
- 102 A. Bradford, "The Brussels Effect" (2012) 107 (1) *Northwestern University Law Review* 5.
- 103 J. Scott, 'Extraterritorial and Territorial Extension in EU Law' (2014) 62 (1) *American Journal of Comparative Law* 87.
- 104 Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing [2008] OJ L286; Council Regulation (EC) 1010/2009 laying down a detailed rules for the implementation of Council Regulation (EC) No 1005/2008 [2009] OJ L280.
- 105 For a latest overview of the EU IUU Regulation, see E. van der Marel, 'An Opaque Blacklist: the Lack of Transparency in Identifying Non-Cooperating Countries under the EU IUU Regulation' in Lawrence Martin, Constantinos Salonidis and Christina Hioureas (eds.), *Natural Resources and the Law of the Sea: Exploration, Allocation, Exploitation of Natural Resources in Areas under National Jurisdiction and Beyond* (Juris 2017) 237–256.

the prior notification of and authorization to enter EU ports for third country fishing vessels;<sup>106</sup> increased inspections in EU ports;<sup>107</sup> an EU-wide alert system;<sup>108</sup> an obligation for fishery products coming into the EU to be accompanied by a validated catch certificate;<sup>109</sup> increased control over EU nationals' support of and engagement in IUU fishing;<sup>110</sup> the blacklisting of fishing vessels known to have engaged in IUU fishing and a prohibition for blacklisted vessels to enter EU ports;<sup>111</sup> and the possibility to blacklist third countries.<sup>112</sup> The EU IUU Regulation establishes a system of conditional access, using potential sanctions attached to their trade agreements as an incentive to ensure that States with vested interests in trading their fish on the EU market are compliant.<sup>113</sup> In the future, when commercially viable fisheries occur in the central Arctic Ocean, the EU IUU Regulation may play as an effective tool to combat IUU fishing there as well. It will apply to any fishing taking place before any regime has been established (unregulated fishing). The EU IUU Regulation will also apply to any fishing after a regime has been developed in the central Arctic Ocean if that is not consistent with it (illegal fishing). Though the potential impact of the EU IUU Regulation may depend in part on how far States fishing in the central Arctic Ocean export to the EU.

### 3.4.2 External Actions

The EU has emerged as a power that endeavors to extend its regulatory scope beyond EU Member States. This is conceived by scholars as a form of external governance in which internal and foreign policy goals come together.<sup>114</sup> The EU's Common Fisheries Policy has an external dimension as well. As argued by the European Commission, "The EU is one of the very few major players with a strong presence in all of the world's oceans through its fleets and investments, bilateral agreements with third countries and participation in most relevant RFMOs. It is also a main market for fishery products in terms of consumption

106 IUU Regulation arts. 6, 7.

107 *Id.* arts. 9–11.

108 *Id.* art. 23.

109 *Id.* art. 12.

110 *Id.* art. 39.

111 *Id.* arts. 27, 37.

112 *Id.* arts. 31, 38.

113 A.M.M. Miller, S.R. Bush, A.P.J. Mol, 'Power Europe: EU and the Illegal, Unreported and Unregulated Tuna Fisheries Regulation in the West and Central Pacific Ocean' (2014) 45 *Marine Policy* 141.

114 S. Lavenex, "EU External Governance in 'Wider Europe'" (2004) 11 (4) *Journal of European Public Policy* 680–700.

and imports. The EU consumes 11% of the world fishery resources in terms of volume and imports 24% of fishery products in terms of value. This confers a heavy responsibility on the EU to further engage in the tasks of conservation and sustainable management of international fish stocks.”<sup>115</sup> As mentioned above, a successful CFP within the EU would enhance the EU’s credibility to promote good fisheries governance externally.

There are international (FAO) and regional (NEAFC, Arctic Council) bodies for the EU to exert influence on management of high sea fisheries in the central Arctic Ocean. As discussed above, the EU (along with Iceland, Japan, Korea and China) has been invited by the Arctic Five to participate in the so-called ‘Broader Process’ on international regulation of high sea fishing in the Central Arctic Ocean since the Washington Meeting in December 2015.<sup>116</sup> Apart from being a key high sea fishing entities, the EU could also make substantial contributions (funding and expertise) to scientific research with the aim of improving understanding of marine ecosystem of this area. The EU welcomes the broadening of negotiations to involve major fishing nations.<sup>117</sup> Moreover, the EU recognizes the need to obtain more information on ecosystems in the Arctic Ocean before opening up this region to commercial fishing and is keen to ensure the long-term conservation and sustainable use of resources in the Arctic high seas.<sup>118</sup> However, it would be much better for the EU to be involved from the very beginning. Instead, the Arctic Five had reached a position by the Oslo Declaration in July 2015 before extending invitations to those key high sea entities. Furthermore, the EU could potentially play a more influential role if the negotiation would have been conducted in the Arctic Council, where Finland and Sweden, as members of both the Arctic Council and the EU, have voting rights. The Arctic Council is the primary forum for Arctic cooperation. The Arctic Council has not explicitly involved itself in fisheries management issues yet, though there is no jurisdictional obstacle for this.<sup>119</sup> The Arctic

115 European Commission Communication of 13 July 2011 on External Dimension of the Common Fisheries Policy, COM (2011) 424 <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0424&from=EN>> accessed 10 October 2016.

116 For an overview of the Washington Meeting, see E.J. Molenaar, The December 2015 Washington Meeting on High Seas Fishing in the Central Arctic Ocean, The JCLOS Blog <<http://site.uit.no/jclos/2016/02/05/the-december-2015-washington-meeting-on-high-seas-fishing-in-the-central-arctic-ocean/>> accessed 10 October 2016.

117 JOIN (2016) 21, 16.

118 *Ibid.*

119 E.J. Molenaar, ‘Status and Reform of International Arctic Fisheries Law’ in Elizabeth Tedsen, Sandra Cavalieri and R. Andreas Kraemer (eds), *Arctic Marine Governance, Opportunities for Transatlantic Cooperation* (Springer 2014) 113.

Council is established as a high level forum to provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.<sup>120</sup> The Arctic Council has already sponsored numerous scientific studies that have been instrumental in alerting the world to the transboundary pollution and climate change challenges facing the Arctic.<sup>121</sup> The capacity of the Arctic Council was further strengthened by the official opening of its permanent secretariat in Tromsø, Norway in 2013.<sup>122</sup> After welcoming China, India, Italy, Japan, the Republic of Korea and Singapore as new Observer States in the Eighth Ministerial Meeting,<sup>123</sup> it is anticipated that the Arctic Council could play more important role in the future Arctic governance.<sup>124</sup> This might be of particular importance for the development of future governance of high sea fisheries in the central Arctic Ocean.

Although the EU has given up its idea on the extension of the NEAFC to cover the Central Arctic Ocean,<sup>125</sup> the NEAFC is still an important platform for the EU to promote its objectives and principles to achieve sustainable fisheries in the Arctic. As mentioned above, the NEAFC, of which the EU is a contracting party, covers a significant part of the Arctic Ocean. Moreover, the NEAFC is now trying to cooperate and coordinate with the OSPAR Commission to establish and manage high sea marine protected areas (MPAs) in the Northeast

120 Article 1 (a), Declaration on the Establishment of the Arctic Council (Ottawa, Canada, 1996) <<http://www.international.gc.ca/arctic-arctique/ottdec-decott.aspx?lang=eng>> accessed 26 November 2015.

121 T. Koivurova and D. VanderZwaag, 'The Arctic Council at 10 Years: Retrospect and Prospects' (2007) 40 (1) *University of British Columbia Law Review* 121.

122 'Decide to strengthen the capacity of the Arctic Council to respond to the challenges and opportunities facing the Arctic by establishing a standing Arctic Council secretariat, hereinafter the Secretariat, in Tromsø, Norway to be operational no later than at the beginning of the Canadian Chairmanship of the Arctic Council in 2013', Nuuk Declaration On the occasion of the Seventh Ministerial Meeting of the Arctic Council (12 May 2011, Nuuk, Greenland) <[http://arctic-council.npolar.no/accms/export/sites/default/en/meetings/2011-nuuk-ministerial/docs/Nuuk\\_Declaration\\_FINAL.pdf](http://arctic-council.npolar.no/accms/export/sites/default/en/meetings/2011-nuuk-ministerial/docs/Nuuk_Declaration_FINAL.pdf)> accessed 26 November 2015.

123 Kiruna Declaration On the occasion of the Eighth Ministerial Meeting of the Arctic Council (15 May 2013, Kiruna, Sweden) <[https://oaarchive.arctic-council.org/bitstream/handle/11374/93/MM08\\_Final\\_Kiruna\\_declaration\\_w\\_signature.pdf?sequence=1&isAllowed=y](https://oaarchive.arctic-council.org/bitstream/handle/11374/93/MM08_Final_Kiruna_declaration_w_signature.pdf?sequence=1&isAllowed=y)> accessed 26 November 2015.

124 N. Liu, 'The European Union's Potential Contribution to Enhanced Governance of Arctic Shipping' (2013) 73 (4) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 716.

125 The EU never brought this proposal into discussions within the NEAFC. It was a policy suggestion published in the EU's 2008 Arctic Policy.

Atlantic. The NEAFC and the OSPAR are relying on the same scientific advice from the International Council for Exploitation of the Sea (ICES). The NEAFC has established areas closed for fishing to protect Vulnerable Marine Ecosystems (VMEs),<sup>126</sup> which share almost the same boundaries with high sea MPAs designated by the OSPAR. Therefore, the NEAFC plays a key role in the management of cross-sectoral high sea MPAs. Although none of OSPAR high sea MPAs is in the sub-Arctic, they might provide lessons to central Arctic Ocean fisheries management regarding how to operationalize ecosystem approach in high seas.

Finally, the FAO is another forum where the EU may exert influence on governance of high sea fisheries in general, which might be applicable in the Arctic as well. The EU became a member of the FAO in 1991, after the FAO constitution was amended to permit regional economic integration organizations to become members. The EU concluded a Framework Co-operation Agreement with the FAO in order to “step up their co-operation in the food and agriculture sectors including fisheries and forestry”.<sup>127</sup> Because fisheries is under exclusive competence of the EU, the EU could vote on behalf of its 28 Member States in the FAO. When it speaks in one voice, the EU has significant power to play an important role in international decision making processes. This is evidenced by the EU’s influence within the International Maritime Organization to accelerate the process of phasing out single hull tankers globally after the *Erika* and *Prestige* oil spill disasters.<sup>128</sup> The EU has already planned to reinforce support for the development of international instruments for the conservation and management of fish stocks in the context of the FAO, especially on the role of port States and flag States in combating IUU activities.<sup>129</sup>

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126 Map of NEAFC Regulatory Area Showing Existing Fishing Areas and All Closures < <http://www.neafc.org/page/closures>> accessed 10 October 2016.

127 Working Document, Strategic Partnership between the Commission of the European Communities and the Food and Agriculture Organization in the Field of Development and Humanitarian Affairs <[https://eeas.europa.eu/sites/eeas/files/fao\\_ec\\_working\\_doc\\_final\\_en\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/fao_ec_working_doc_final_en_0.pdf)> accessed 11 October 2016.

128 For details, see Nengye Liu, Frank Maes, ‘The European Union and the International Maritime Organization: EU’s External Influence on the Prevention of Vessel-Source Pollution’ (2010) 41 (4) *Journal of Maritime Law and Commerce* 581–594.

129 COM (2011) 424, 7.

#### 4 Concluding Remarks

From 2008 to 2016, the EU's Arctic ambition has appeared to diminish each year. The EU's 2008 Arctic policy emphasised the importance of contributing to multi-level governance in the Arctic. The EU's tone was softened in 2012 to 'constructive engagement' with Arctic States. The EU's latest Arctic policy merely addresses broad issues, such as climate change and sustainable development, with a focus on the European Arctic. Nevertheless, as revealed by this paper, the EU could play a significant role in Arctic governance regarding fisheries. The EU is an important flag State and market State for fisheries in the Arctic. The EU is also a normative power and a market power. The EU's internal actions, such as regulation of IUU fishing, could generate positive impacts on Arctic fisheries. Moreover, although the EU was only invited at a later stage to join the negotiation on the regulation of fisheries in the Central Arctic Ocean, the EU shares same value with Arctic Five for conservation and management of marine living resources in the Arctic. Whatever agreement or arrangement that might be achieved by the negotiation, the EU would be an essential partner to ensure compliance of such a deal.

# On Thin Ice? Arctic Indigenous Communities, the European Union and the Sustainable Use of Marine Mammals

*Martin Hennig and Richard Caddell*

It's okay to eat fish, 'cause they don't have any feelings'.

NIRVANA, *Something in the Way*



## 1 Introduction

Since 2008, the strategic policy objectives of the European Union (EU) in the High North have been to protect and preserve the Arctic in unison with its population, to promote the sustainable use of resources and to contribute to enhanced multilateral governance for this region.<sup>1</sup> More recently, the EU Arctic Policy statement of April 2016 has entrenched supranational commitments to taking account of the traditional livelihoods of the region's indigenous inhabitants and the impact of economic development on its fragile environment, so as to 'contribute to enhancing the economic, social and environmental resilience of societies in the Arctic', while also promoting these objectives through pertinent international fora.<sup>2</sup>

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\* Martin Hennig, Postdoctoral Research Fellow, Faculty of Law, UiT The Arctic University of Norway, Tromsø, Norway (martin.hennig@uit.no).

\*\* Richard Caddell, Senior Research Associate and Nippon Foundation Senior Nereus Fellow, Netherlands Institute for the Law of the Sea, Utrecht University, The Netherlands (j.r.caddell@uu.nl); Lecturer in Law, Cardiff University, UK; Dr Caddell gratefully acknowledges funding from the Nippon Foundation's Nereus Program ([www.nereusprogram.org](http://www.nereusprogram.org)) in facilitating this contribution.

1 Communication from the Commission to the European Parliament and the Council: The European Union and the Arctic Region COM (2008) 763, 3.

2 Joint Communication to the European Parliament and the Council: An Integrated European Union Policy for the Arctic JOIN (2016) 21, 3–4.

Within this relatively truncated timeframe, however, few issues have arguably straddled these overarching policy priorities less comfortably for the EU institutions than the regulation of marine mammals in this region. For many Arctic peoples, the sustainable use of marine mammals remains fundamental to their traditional ways of life and carries great cultural as well as economic significance. Nevertheless, in many European areas outside the Arctic, the hunting of seals and whales has long been considered highly controversial and frequently generates strong and vociferous concerns over animal welfare.<sup>3</sup> This dichotomy has created significant legislative and policy difficulties for the EU institutions, requiring a delicate balancing act in upholding key human rights commitments towards indigenous peoples, while also promoting animal welfare standards as mandated under the EU Treaty. Moreover, the EU has long opposed the commercial harvesting of marine mammals, advancing a common position against these activities in relevant multilateral organizations and adopting an array of legislation to bar such products from the internal market. While seeking to uphold the long-standing special status of traditional enterprises, significant shortcomings have nevertheless become apparent in the ability of the EU to legislate surgically to protect the economic and social rights of a full range of indigenous Arctic communities, while pursuing measures to inhibit the market presence of commercially-derived marine mammal products. This has proved to be especially true in the context of seal products, where the introduction of a series of flawed restrictions on the sale of such items within the common market has damaged the relationship between the EU institutions and Arctic communities in recent years. Although these measures were purportedly well-intentioned towards the Arctic peoples of Europe, concerns have nonetheless been raised within these communities as

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3 Indeed, early iterations of EU policies towards seals—which, as noted below, sought to address widespread public opprobrium over the bludgeoning of pups for their pelts—have been memorably described by EU officials as ‘the only EC directive which appeared to have universal support among the European public’: see Donald McGillivray, ‘Seal Conservation Legislation in the UK—Past, Present, Future’ (1995) 10 *International Journal of Marine and Coastal Law* 19, 48. In a similar vein, the hunting of seals continues to raise ‘serious concerns’ among members of the public and governments in EU Member States, as officially stated by Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L 286/36, preambular recital (4). Meanwhile, commercial sealing has been largely banned by many other states outside the EU, including other Arctic jurisdictions, notably in the United States (US) under the Marine Mammal Protection Act 1972, which also applies an import exemption for non-commercial products ‘owned by a Native inhabitant of Russia, Canada, or Greenland’ under section 108.b.2 (B) [16 U.S.C. 1361 *et seq.*].



to whether the EU can be truly considered a consistent and helpful partner in securing the survival of traditional activities involving the sustainable use of marine mammals.

This Chapter therefore seeks to evaluate the extent to which the EU has been able to reconcile its longstanding support for the traditional practices of Arctic communities with its distinct policy objectives towards marine mammals, in the context of the ongoing development of its overarching strategy for the High North. To this end, Part 2 of this Chapter examines the 'EU Seal Regime' which, in 2009, introduced a general ban on the sale of seal products across the entirety of the EU.<sup>4</sup> The ban, which came into effect in 2010, was met with fierce opposition from, among others, Canadian Inuit seal hunters, whose products were consequently excluded from the EU market. At the heart of the conflict lies the so-called 'IC exception', which creates a potential exemption from the ban for seal products derived from hunts conducted by indigenous communities, whereas access to EU markets is precluded for products yielded from purely 'commercial' hunts conducted by non-indigenous hunters. Thus far, however, due to the burdensome criteria incumbent in invoking the IC exception, these provisions have essentially operated to the sole benefit of Greenlandic Inuit seal hunters, in marked contrast to their counterparts from other indigenous Arctic communities. Opposition to the 'EU Seal Regime' duly resulted in a series of actions before the Court of Justice of the European Union (CJEU), which now spans a total of four separate judgments. The crux of this litigation involved the economic position of Canadian Inuit seal hunters, who contended that there is no basis within the EU Treaties to ban seal products and that these trade restrictions violated the fundamental rights of indigenous peoples. While these arguments having been rejected by the CJEU, this odyssey of litigation has continued further, with the 'EU Seal

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4 For the purposes of this Chapter, the 'EU Seal Regime' refers to the series of provisions introduced by the EU since 2009, namely Regulation (EC) No. 1007/2009 (n. 3) as amended by Regulation (EU) 2015/1775 of the Parliament and of the Council of 6 October 2015 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010, [2015] OJ L 262/1, together with Commission Implementing Regulation (EU) 2015/1850 of 13 October 2015 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products [2015] OJ L 216/1. These instruments, as well as their early and equally contentious forerunners, are discussed below. Given the extensive contemporaneous literature on the development of the individual Regulations, in assessing the treatment of seal products this Chapter focuses primarily on the implications of the recent case law for indigenous Arctic communities. For a comprehensive analysis of the development of Regulation 1007/2009 see Nikolas Sellheim, 'The Neglected Tradition—The Genesis of the EU Seal Products Ban and Commercial Sealing' (2013) 5 *Yearbook of Polar Law* 417, 419–444.

Regime' subject to lengthy proceedings before the World Trade Organization (WTO) dispute settlement system. In 2014, the WTO appellate body eventually ruled that the de facto exclusion of Canadian Inuit seal products from the EU market was unlawful and discriminatory. Based on an analysis of the extensive case law and recent amendments to this legislation introduced in an attempt to excise the discriminatory aspects of the IC exception, it is asked whether the 'EU Seal Regime' can now be considered to be in full compliance with the fundamental rights of indigenous peoples. This Chapter argues that while the EU lawmakers may have finally brought the Seal Regime into broad compliance with WTO law, the tacit promotion of Greenlandic interests and the long exclusion from the market of products derived from other communities has already inflicted serious and long-term damage to the social and economic rights of the Canadian Inuit.

As with seal hunting, whaling is also a politically sensitive issue for the EU. As explored in Part 3 of this Chapter, the commercial harvesting of cetaceans (whales, dolphins and porpoises) has been consistently and staunchly opposed by the EU institutions, with heavy restrictions having been imposed upon the trade in such products within the internal market. This position notwithstanding, considerable allowances have been made for non-commercial hunting as practiced predominantly in the High North, with market restrictions applied in a manner that has largely avoided the controversies raised by the EU Seal Regime. Instead, the treatment of so-called 'Aboriginal Subsistence Whaling' and the trade in cetacean products presents a useful case-study of the role of the EU as a partner to indigenous Arctic communities within multilateral organizations. This is especially true in the context of Greenland which, while outside the formal auspices of the EU itself, has been reliant upon the support of the EU institutions—and the legal contortions of the Danish authorities within this broader process—to pursue its ambitions for larger whaling quotas within the global regulatory body, the International Whaling Commission (IWC). While the Greenlandic Inuit can, on balance, be generally seen to have benefitted from this partnership with regard to the global regulation of whaling, the EU has nevertheless exhibited limited enthusiasm to engage with regional regulatory processes concerning the sustainable use of marine mammals in the Arctic. Moreover, the continued hunting of whales and seals in ever increasing numbers has generated disquiet as to the alleged quasi-commercial nature of these activities, which has started to test the conceptual limits of indigenous subsistence exemptions in pertinent regulatory and adjudicatory fora. Accordingly, as this Chapter demonstrates, the position of marine mammals will continue to pose an intriguing challenge to present and future EU Arctic policies, both within and beyond the formal borders of the Community.

## 2 Sealing in the Arctic

### 2.1 *The Background to the EU Seal Regime and its Legal Controversies*

Animal welfare considerations, especially towards highly charismatic species such as cetaceans and pinnipeds (seals, sea lions and walruses), have long been a preoccupation of European citizens and legislators alike.<sup>5</sup> In response to these concerns, and the heavy political pressures that invariably accompany popular environmental causes, the EU has incrementally adopted an extensive body of animal welfare legislation, motivated to a considerable degree to meet the vociferous public demand for regulation in this field.<sup>6</sup> Nevertheless, such measures—however well-meaning in origin and intent—have regularly transpired to be disproportionately problematic for the EU institutions, repeatedly generating political tensions with neighbouring States due to a marked over-reliance upon sweeping trade restrictions and a perceived lack of prior consultation.<sup>7</sup> Furthermore, the purported exemption clauses contained

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- 5 See McGillivray (n. 3) 48 (noting that the legal debate over seal culling has often turned more on 'ethics and popular sentiment' than competing environmental and economic factors); see also Katie Sykes, 'Sealing Animal Welfare into the GATT Exceptions: The International Dimension of Animal Welfare in WTO Disputes' (2014) 13 *World Trade Review* 471 and Kate Cook and David Bowles, 'Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules' (2010) 19 *Review of European Community and International Environmental Law* 227. Marine mammal conservation is not confined to supranational concern: the development of EU provisions to address the trade in pinniped and cetacean products has been regularly necessitated by the potentially distortive impact upon the common market of purported restrictions on the part of individual Member States, as was repeatedly cited in both the EU Seal Regime itself and the various judgments of the CJEU in response to challenges to this legislation.
- 6 Much of the current EU legislation on animal welfare addresses livestock, animal transportation, scientific experimentation and zoological standards and is generally limited in its treatment of marine species. Instead, seal welfare considerations have emerged on a largely *ad hoc* basis within specific measures pertaining to sealing and the trade in seal products. On the EU animal welfare standards applicable to seals see Robert L. Howse and Joanna Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' (2012) 37 *Yale Journal of International Law* 367, 373–379.
- 7 Indeed, the timing of the first iteration of the EU seal provisions angered the Canadian authorities, having been unilaterally introduced at a delicate point in an extensive—and ongoing—national review of seal hunting. The Canadian Royal Commission, charged with examining this issue, had been especially concerned with assessing the sustainability of these operations and their significance for the traditional ways of life of Arctic indigenous communities in developing targeted national legislation—a process that was then largely

therein have often proved to be insufficiently nuanced to protect a full range of non-commercial interests from collateral economic harm, or have been rendered largely redundant since the practical effect of the measure in question has been to fundamentally undermine the market demand for particular products, irrespective of any special circumstances incumbent in their production. Consequently, such legislation rarely proceeds without challenge and frequently requires modification and subsequent interpretation based upon negotiations with external interests<sup>8</sup> or, as in the context of seals, the intervention of a leading international adjudicatory body.

EU market restrictions on particular seal products—and their propensity to compromise the economic interests of indigenous Arctic peoples—date back over thirty years, with the adoption in 1983 of an equally contentious Directive addressing the trade in pelts of harp and hooded seals.<sup>9</sup> At the material time, and in a similar manner to the development of the more recent EU Seal Regime, a number of Member States were considering the unilateral imposition of

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surpassed by the introduction of heavy restrictions by the EU on the trade in seal pelts; Albert H. Malouf, *Seals and Sealing in Canada: Report of the Royal Commission: Volumes I and II* (Ottawa, Canadian Government Publishing Centre, 1986).

- 8 This position is exemplified by the controversies raised by the introduction of Council Regulation (EEC) 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, [1991] OJ EC L 308/1 (popularly known as the ‘Leghold Traps Regulation’). The Regulation, which was complemented by further standards listing countries from which specific products could be imported, drew a robust response from Canada, Russia and the US, which required its repeated postponement and a series of external agreements with these States. Attempts to reconstitute the Regulation as a more general measure addressing humane trapping standards were subsequently withdrawn by the Commission. For an illuminating discussion of the Regulation and its flaws see André Nollkaemper, ‘The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC “Ban” on Furs from Animals Taken by Leghold Traps’ (1996) 8 *Journal of Environmental Law* 237.
- 9 Council Directive 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom [1983] OJ L 91/30. The Directive was initially conceived as a temporary measure, hence the ban was further extended in 1985 (Council Directive 85/444/EEC of 27 September 1985 amending Council Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived therefrom [1985] OJ L 259/70) and applied indefinitely from 1989 onwards (Council Directive 89/370/EEC of 8 June 1989 amending Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived therefrom [1989] OJ L 163/37).

trade restrictions upon sealskin, largely prompted by environmental campaigns that had generated an outcry in Western Europe over the clubbing of seal pups. Accordingly, so as to avoid uneven access conditions across the common market, the EC imposed blanket restrictions upon the commercial importation of a series of products derived from seal pelts.<sup>10</sup> Although ostensibly introduced due to environmental factors—the Directive cites ‘various studies’ (albeit which were not further substantiated) that had ‘raised doubts concerning the population status of the harp and hooded seals’<sup>11</sup>—critics consider the ecological case for the legislation to have been exaggerated. Indeed, the prevailing scientific evidence indicated that stock numbers were in fact highly buoyant,<sup>12</sup> hence as Gillespie argues the Directive was instead founded upon ‘considerations that had little to do with sustainability in a strict sense’<sup>13</sup> and was seemingly driven more by popular revulsion over the clubbing of anthropomorphically appealing (yet numerically plentiful) seal pups.

As with the current iteration of the EU Seal Regime, Directive 83/129/EEC specifically addressed commercial enterprises and established an exemption clause for products ‘resulting from traditional hunting by the Inuit people’.<sup>14</sup> To this end, the Directive pointedly—and perhaps with shades of undue paternalism—recognized such activities as ‘a natural and legitimate occupation’ that constituted ‘an important part of the traditional way of life and economy’ which is generally pursued in a manner that ‘leaves seal pups unharmed and it is therefore appropriate to see that the interests of the Inuit people are not affected’.<sup>15</sup> The exemption clause itself was not without interpretative

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10 Article 1; the proscribed products were listed in an Annex to the Directive.

11 Preamble to the Directive.

12 In Canada, at least, from which a considerable proportion of commercial seal products were derived prior to the imposition of the EU restrictions, the Canadian Royal Commission concluded on the basis of considerable scientific evidence that ‘[t]he populations of most species of seals were therefore increasing’. This was especially the case for harp and hooded seals, whose elevated numbers actually presented new conservation problems in the form of increased scope for interactions with commercial and indigenous fisheries: Albert H. Malouf, *Seals and Sealing in Canada: Report of the Royal Commission: Volume I* (Ottawa, Canadian Government Publishing Centre, 1986) 25.

13 Alexander Gillespie, *International Environmental Law, Policy, and Ethics* (Oxford, Oxford University Press, 2014) 71–72; similar sentiments are expressed by Donald A. Reid, ‘The EC Directive concerning the Importation of Skins of Certain Seal Pups (83/129/EEC): Its Compatibility with the General Agreement on Tariffs and Trade’ (1996) 5 *European Environmental Law Review* 344, 344.

14 Article 3.

15 Preamble to the Directive.

difficulties, however, not least since the notion of ‘traditional hunting’ was never expressly defined within the Directive. Indeed, this provision attracted suspicion in particular quarters due to its potential scope to constrain products that, while derived from the Inuit, might not necessarily have involved ‘traditional’ hunting methods on a strict construction of that term.<sup>16</sup> This was an uncomfortable irony of the legislation, since a number of Inuit traders had duly amended their longstanding hunting practices to include the use of firearms in a bid to appease the animal welfare concerns raised by seal clubbing, which in turn increased the cost of production and rendered indigenous enterprises acutely vulnerable to market fluctuations.<sup>17</sup> In the absence of any legal proceedings on this issue, these concerns appear to be somewhat unfounded in practice.<sup>18</sup> Fears as to the adverse economic impacts of these provisions would, however, prove to be disconcertingly accurate. Despite the supposedly surgical application of the Directive, its financial implications did not discriminate between producers of seal pup products. Instead the measures precipitated a swift implosion of the European market for pelts, irrespective of origin, which had a disproportionately severe effect upon Inuit producers.<sup>19</sup> An economically viable sealskin industry in Greenland was only restored some

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16 George Wenzel, *Animal Rights, Human Rights: Ecology, Economy and Ideology in the Canadian Arctic* (Toronto, University of Toronto Press, 1991) 49 (attributing the wording of the exemption clause to the influence of ‘[a]nti-sealing activists’ upon the legislators).

17 See further Malouf (n. 12) 13.

18 The precise meaning of this term was never fully resolved. The more recent seal legislation introduced by the EU has adopted a clearer—and more lenient—position on traditional hunting methods, although commentators have voiced concerns that there remains scope to restrict particular Inuit-derived products on this basis: Dorothee Cambou, ‘The Impact of the Ban on Seal Products on the Rights of Indigenous Peoples: A European Issue’ (2013) 5 *Yearbook of Polar Law* 389, 394–395.

19 Indeed, the Canadian Royal Commission observed that indigenous incomes plummeted by up to 85% in some instances: Malouf, (n. 12) 213. The drop in export value of sealskin consequently impinged significantly upon the ability of a number of indigenous communities to fund their regular subsistence activities: Wenzel (n. 16) 124. The human consequences of this dramatic reduction in income, as well as the loss of expression of traditional identities, are difficult to quantify. Nevertheless, this prospect certainly troubled the Canadian Royal Commission, which noted increased social hardships among its indigenous communities as a result: *ibid.*, 245–256. In Greenland, significant ‘social pathologies’ were also observed in the wake of the ban, including a spike in suicides as individuals struggled with the loss of community respect attributed to non-participation in traditional hunting activities: M.M.R. Freeman et al., *Inuit, Whaling, and Sustainability* (Walnut Creek, AltaMira Press, 1998) 157.

two decades subsequent to the introduction of these restrictions,<sup>20</sup> while the social and cultural ramifications of the loss of these traditions for indigenous communities has been—and largely continues to be—overlooked in the ongoing review of market regulation.

Some twenty years subsequent to the indefinite application of the seal pup pelt ban, in September 2009 the European Parliament and the Council adopted Regulation 1007/2009 (the ‘Basic Regulation’), which imposed a general prohibition on the import and marketing of all commercially-derived seal products within the EU internal market.<sup>21</sup> This was a significant departure from the tenor of Directive 83/129/EC, which had prohibited the trade in products from particular seal pups but had left open the possibility of marketing pelts from older animals. Having been initially intended to reinforce the earlier Directives of the 1980s, so as to apply to all harp and hooded seal products, the Basic Regulation ultimately addressed ‘specimens of all species of pinnipeds’ following interventions within the European Parliament.<sup>22</sup> Unlike its legislative forerunner, the 2009 Regulation made no claim as to the ecological necessity of a ban on such products,<sup>23</sup> instead citing consumer anxieties over the origin of certain household products, the widespread concern for animal welfare and the practical need to pre-empt the distortive effect of differing national standards on market access to particular items. In 2010, in order to give practical effect to these amended trade standards, the European Commission adopted Regulation 737/2010 (the ‘Implementing Regulation’).<sup>24</sup> Due to subsequent litigation before the WTO, this provision was later repealed and replaced by Regulation 2015/1850.<sup>25</sup>

The imposition of a blanket ban on trade in all forms of seal products would have been harmful to indigenous peoples, to whom seal hunting has significant cultural and economic implications. The EU, in the form of the so-called ‘IC

20 Nordic Council, *Seals and Society* (Copenhagen, Nordic Council of Ministers, 2008) 43.

21 Regulation (EC) No. 1007/2009 (n. 3). The Basic Regulation was pre-empted by the introduction of national restrictions upon seal products by Belgium and The Netherlands in 2007.

22 Basic Regulation, art 2(1). On the legislative passage of these provisions, which included significant interventions by prominent animal welfare activists, see Sellheim (n. 4) 434–440.

23 Indeed, from a conservation perspective many seal populations are now considered to be numerous: see [www.iucnredlist.org](http://www.iucnredlist.org).

24 Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products [2010] OJ L 216/1 (now repealed).

25 Commission Implementing Regulation (EU) 2015/1850 (n. 4).

exception',<sup>26</sup> has therefore expressly recognised the importance of permitting indigenous hunts and facilitating a degree of market access for such products.<sup>27</sup> This exception is intended in particular to protect the fundamental economic and social interests of Inuit communities engaged in hunting, so as to ensure that their subsistence will not be adversely affected.<sup>28</sup> Traditional seal hunting constitutes an integral part of the culture and identity of members of the Inuit society, and would appear to be recognized as such by the United Nations Declaration on the Rights of Indigenous Peoples.<sup>29</sup> This instrument calls *inter alia* for indigenous communities to be 'secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities',<sup>30</sup> and is expressly referenced in the preamble of the Basic Regulation.<sup>31</sup> While not legally binding, given the traditional reliance upon seal products by the Inuit as a primary form of external trade, this provision would appear to provide a moral and political imperative for the EU authorities to facilitate a clear and workable exception to any purported restrictions on trade in publicly sensitive products such as sealskin. Accordingly, the EU Seal Regime was drafted in a more flexible manner to the preceding seal pup restrictions, with the Basic Regulation applying an expansive definition of 'Inuit' hunters<sup>32</sup> and softening the previously stricter requirements for

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26 The term 'IC exception' was used as shorthand by the WTO Dispute Settlement System to refer to the exemption granted to tradeable Inuit seal products that can be legitimately sold on the EU internal market; this Chapter accordingly uses this phrase in the same manner as the WTO.

27 Under art 3(1) of Regulation 737/2010, the IC exception provides that '[t]he placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence'. Limited non-commercial exemptions were also applied to goods that were for the occasional use of travelers and their families, as well as products derived from hunting conducted pursuant to national law for the purposes of promoting the sustainable management of marine resources (such as the culling of seals for stock control or veterinary reasons).

28 See Regulation 1007/2009, preambular recital (14). The recital further considers seal hunting to be an 'integral part' of the culture and society of Inuit communities.

29 UN General Assembly Resolution 61/295 of 13 September 2007.

30 Art 20(1). Furthermore, the Preamble to the Declaration recognises that 'respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment'.

31 Preambular recital (2).

32 Under art 2(4), the IC exception applies to 'indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognised by Inuit as being members of their people and



'traditional' activities.<sup>33</sup> These clauses are significant since, with the exception of the 1983 seal Directive, 'no other piece of EU secondary legislation has special provisions for the Inuit'.<sup>34</sup>

At first glance, the formulation of the IC exception seemingly reflects the blend of obligations incumbent upon EU lawmakers to reconcile the need to uphold the fundamental rights of indigenous peoples, as derived from pertinent external commitments,<sup>35</sup> with the demands of animal welfare, as expressly established under art 13 of the Treaty on the Functioning of the European Union (TFEU),<sup>36</sup> which requires that:

[i]n formulating and implementing the Union's agriculture, fisheries, transport, *internal market*, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, *pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage*.<sup>37</sup>

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includes Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia). Broad recognition was also made of 'other indigenous communities' under art 2(1) of the 2010 Implementing Regulation, which raises an intriguing theoretical question as to the position of the small pockets of indigenous ethnic communities located elsewhere in the EU, albeit one that is highly unlikely ever to be invoked in practice. In contrast, art 3 of Directive 83/129/EEC merely referred to 'the Inuit people' with no further elaboration as to the specific communities within the contemplation of this legislation.

33 Art 3(1) of the 2009 Basic Regulation. In 2015 these provisions were revised and clarified further and the newly introduced art 3(1)(b) contemplates that 'the hunt is conducted for and contributes to the subsistence of the community, including in order to provide food and income to support life and sustainable livelihood, and is not conducted primarily for commercial reasons'. In a subtle variation to the initial 1983 Directive on harp and hooded seal pup products, art 3(1)(a) now refers to hunts that have 'traditionally been conducted by the community'. This phrasing does not specify that a hunt must exclusively use traditional methods, but instead requires a heritage of seal hunting and using the products for subsistence and small scale economic purposes.

34 Tamara Perišin, 'Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges' (2013) 62 *International and Comparative Law Quarterly* 373, 378.

35 In this regard, the terms of the UN Declaration on the Rights of Indigenous Peoples was considered particularly significant, as reflected in preambular recital (14) of Regulation 1007/2009. This issue is discussed further below.

36 Consolidated version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47.

37 Emphasis added.

In the light of this overarching objective, Regulation 737/1009 also recognizes seals as ‘sentient beings that can experience pain, distress, fear and other forms of suffering’<sup>38</sup> Animal welfare concerns within the Regulation are accordingly centred on the ‘pain, distress, fear and other forms of suffering which the killing and skinning of seals, as they are most frequently performed, cause to those animals.’<sup>39</sup> This is deemed sufficiently serious as to necessitate ‘action to reduce the demand leading to the marketing of seal products and, hence, the economic demand driving the commercial hunting of seals.’<sup>40</sup> While conceding that it ‘might be possible’ to kill seals in a manner that avoids unnecessary pain and suffering, the animal welfare dimension is considered by the Regulation to be so essential that underlying difficulties in ensuring compliance with these provisions require the draconian approach of preventing market access to most such products.<sup>41</sup> Nevertheless, this tone appears to be at odds with other core elements of EU animal welfare legislation. While the offending killing methods are not expressly articulated within either the Basic Regulation or the Implementing Regulation, reference is made to the concerns of the Parliamentary Assembly of the Council of Europe, which called for a prohibition on cruel forms of killing, including the bludgeoning of seals.<sup>42</sup> However, extensive EU provisions on animal welfare—which were adopted a mere eight days subsequent to the Basic Regulation—expressly endorsed the use of a ‘percussive blow to the head’ as a legitimate method of killing smaller

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38 Preambular recital (1).

39 Preambular recital (4).

40 Preambular recital (10).

41 Preambular recital (11). As Fitzgerald observes, this contrasts unfavourably with the approach adopted by the Leghold Traps Regulation, which allowed for the trade in pelts taken by means that were compliant with more humane trapping standards. Notwithstanding concerns over the lack of consultation with interested parties, this legislation therefore operated in a more targeted manner by discouraging the use of particular traps deemed unacceptable by the EU authorities, without imposing a blanket ban on the marketing of fur products per se (and were therefore more likely to meet the WTO standards for the protection of public morals); Peter L. Fitzgerald, “Morality” May Not be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law’ (2011) 14 *Journal of International Wildlife Law and Policy* 85, 125–126.

42 Recommendation 1776 (2006) of 17 November 2006 on seal hunting. The primary concerns of the European Parliament, whose political input had a key role on the development of the EU Sea Regime, were largely confined to ensuring that seals were not skinned prior to death, as had been reported by a number of NGOs: Declaration of the European Parliament on banning seal products in the European Union [2006] OJ C 306E 194.

species.<sup>43</sup> Given the recognised sentience of all animals, neither provision explains precisely how animal welfare considerations render the bludgeoning of seals to be morally unacceptable, yet the same killing method as applied to a 'fur animal' below 5kg in weight remains a valid activity, constrained only by a requirement not to despatch more than 70 individuals in such a manner in any given day.<sup>44</sup>

Inconsistencies in the underlying application of animal welfare standards within the EU Seal Regime were compounded by procedural difficulties in implementing this legislation, since the practical conditions for applying the IC exception proved to be unduly burdensome in practice. While the Basic Regulation was generally supportive of Inuit enterprises, the initial Implementing Regulation introduced a series of administrative requirements that would prove to be difficult for a number of indigenous communities to meet. In particular, the authenticity of such products required verification from a 'recognized body', necessitating the creation of an attestation mechanism to ensure that such items are derived from genuine Inuit hunts and contribute to the subsistence of the community. As the Appellate Body observed, creating a 'recognized body' may entail significant burdens in some instances.<sup>45</sup> As the report in *EC-Seal Products* clearly demonstrates, this was indeed the case for the Canadian Inuit who were unable to establish such an entity prior to the entry into force of the regime in 2010. Accordingly, Canadian Inuit sealers were precluded from exporting their products into the EU, since they did not technically fulfill the criteria for applying the exception. The EU seal regime therefore resulted in the de facto exclusion of all Canadian seal products from the EU market, with commercial products expressly banned and the indigenous communities unable in practice to satisfy the requirements of the IC exception. Given the longstanding economic strength of EU-based fur traders, combined with the virtual lack of market disruption for Greenlandic communities, these provisions carried a discernible scent of protectionism, at least as far as the Canadian authorities were concerned.<sup>46</sup>

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43 Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing [2009] OJ L 303/1.

44 Regulation 1099/2009: Annex I, Chapter II, para. 3.

45 See WTO Appellate Body Reports: European Communities Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R (May 22, 2014) and European Communities Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS401/AB/R (May 22, 2014) paras 5.337–5.338 ('*EC-Seal Products*').

46 Pirišin (n. 34) 378.

The exclusion of Canadian seal products from the common market duly prompted two distinct strands of litigation. Firstly, Canadian Inuit interest groups, hunters' associations and individual hunters brought an action before the Court of Justice of the European Union (CJEU), in an attempt to force an annulment of the Seal Regime.<sup>47</sup> In EU Seal Case I, Regulation 1007/2009 was challenged on several grounds, including that the regime violated the rights of indigenous peoples under international law.<sup>48</sup> However, the case was rejected as inadmissible under art 263 TFEU. According to the General Court, the conditions incumbent in art 263(4), which govern the ability to bring an action for annulment, had not been met, since the contested regulation was not of 'direct and individual' concern to those raising the case.<sup>49</sup> The fact that Canadian sealers were effectively barred from the EU market did not alter this restrictive interpretation of the conditions for the judicial review of these particular legal measures. On appeal, the ECJ confirmed that the action was inadmissible, and emphasized that 'the prohibition on the placing of seal products on the market laid down in the contested regulation is worded in general terms and applies indiscriminately to any trader falling within its scope'.<sup>50</sup> Nevertheless, in the light of the recent decision by the WTO Appellate Body in *EC-Seal Products* analyzed below, the view of the European judiciary that the regulation applies indiscriminately must be regarded as flawed. Indeed, the Appellate Body would subsequently reject this interpretation and rule that Greenlandic and Canadian Inuit hunters had not been subject to equal treatment under the EU Seal Regime.

Whereas the actions in EU Seal Cases I and II were rejected as inadmissible, in *Inuit Tapiriit Kanatami and Others v European Commission* (EU Seal Case III) the General Court decided to consider the substance of the claims brought

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47 See Case T-18/10 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* ECR [2011] II-5599 [EU Seal Case I]. As outlined below, the case was then appealed, but subsequently rejected by the Court of Justice in Case C-583/11 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* ECLI:EU:C:2013:625 [EU Seal Case II]. For a full analysis of these cases, see Martin Hennig, 'The EU Seal Products Ban—Why Ineffective Animal Welfare Protection Cannot Justify Trade Restrictions under European and International Trade Law' (2015) 6 *Arctic Review on Law and Politics* 74.

48 The compatibility of the EU Seal Regime with human rights norms addressing indigenous peoples is discussed further in section 2.2 below.

49 EU Seal Case I paras 68–92.

50 EU Seal Case II para. 73.

by the litigants.<sup>51</sup> In this third iteration of the litigation the General Court dismissed the action; the case was subsequently appealed for a final time to the Court of Justice.<sup>52</sup> In the appeal, the appellants also sought the annulment of Regulation 1007/2009, but on the alternative basis that the contested measure had no legal foundation under the EU Treaties. Among the submissions made by the appellants, it was argued that the EU had erred in adopting the contested Regulation under art 114 TFEU (ex. art 95 EC). This provision allows the EU legislators to adopt secondary legislative measures ‘which have as their object the establishment and functioning of the internal market’, a consideration that was repeatedly emphasized within the preambular paragraphs of the Regulation.<sup>53</sup> With this in mind, the appellants contended that the primary objective of the regulation was clearly the protection of animal welfare, rather than seeking to improve the functioning of the internal market.<sup>54</sup>

The Court of Justice disagreed, however, and confirmed the finding of the General Court that the choice of legal basis for the regulation was correct.<sup>55</sup> According to the General Court, it was clear from the Regulation itself that the principal objective of the measure was to improve the functioning of the internal market, rather than to advance the protection of animal welfare.<sup>56</sup> The EU-wide ban on seal products would thereby remove national distinctions between the respective legal provisions governing the trade and marketing of seal products, which could otherwise have adversely affected the operation of the internal market.<sup>57</sup> Furthermore, in the view of the General Court, the ban would ultimately prove beneficial since it would remove consumer hesitation towards buying common animal products that are *not* made from seals, but which might not be easily distinguishable from those that are, such as leather garments and Omega-3 capsules.<sup>58</sup> These findings notwithstanding, which largely and uncritically echo the originally-stated rationale for the

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51 Case T-526/10 *Inuit Tapiriit Kanatami and Others v European Commission* ECLI:EU:T:2013:215 [EU Seal Case III]. To a considerable degree, the litigants of this action were the same as those in EU Seal Case II.

52 Case C-398/13 *Inuit Tapiriit Kanatami and Others v European Commission* ECLI:EU:C:2015:535.

53 See especially preambular recitals (5), (6), (7), (8), (10), (12), (13), (15) and (21) of Regulation 737/2009.

54 See EU Seal Case III para. 26.

55 See EU Seal Case IV para. 32.

56 *Ibid.*, para. 36.

57 *Ibid.*, para. 38.

58 *Ibid.*, para. 39; see also Regulation 1007/2009, preambular recital (3).

Regulation,<sup>59</sup> the actual effectiveness of a general ban in dispelling or reducing consumer concerns over the presence of seal products within the internal market is highly questionable.<sup>60</sup> One important objection which can—and, indeed, should—be raised is the fact that any seal product that is approved under the IC exception may be freely sold throughout the entire EU internal market. Moreover by virtue of a free-trade clause, these provisions would in fact compel a Member State wishing to impose a national ban upon *all* seal products, irrespective of whether they are derived from either indigenous or ‘commercial’ hunts, to accept the import and sale of ‘EU-approved’ seal products permitted under the IC exception. In certain jurisdictions, such as those that had introduced domestic restrictions pre-dating the EU provisions, the IC exception may accordingly necessitate an unsolicited liberalization of national animal protection laws.

Thus far, the CJEU has rejected pleas for the annulment of the EU Seal Regime that have been submitted by Inuit interest groups and individual sealers. According to the Court, the legislation is in conformity with the broad tenets of EU law. Whereas the EU judiciary has been reluctant to annul the ban, external adjudicatory institutions have nonetheless stated unequivocally that the Seal Regime as it stood in 2009 was not in conformity with international trade law. In its May 2014 report to the *EC-Seal Products* case, the WTO Appellate Body found that these provisions violated the principle of non-discrimination. In this case, Canada and Norway claimed that the package of measures constituted a breach of WTO law and complaints were duly filed before the WTO dispute settlement system. The parties argued that the EU rules on seal products exercised an unjustified exclusionary effect upon Canadian and Norwegian seal products. One obvious inconsistency in the regime, as pointed out by the claimants, was the fact that Greenlandic seal products originating from Inuit hunts were granted access to the EU market under the IC exception, whereas seal products derived from hunts by the Canadian Inuit were denied entry.<sup>61</sup>

The WTO Appellate Body confirmed that the regime was inconsistent with GATT art I:1 because it did not ‘immediately and unconditionally’ extend the same market access advantages to Canadian products as had been accorded to seal products originating from Greenland.<sup>62</sup> The WTO Appellate Body affirmed that a trade ban on seal products could, in principle, be justified within the meaning of art XX(a) of the GATT 1994 as a measure ‘necessary to

59 See especially preambular recital (3) of Regulation 737/2009 and n. 53 above.

60 See Hennig (n. 47) 78–79.

61 *EC-Seal Products* (n. 45) paras 5.329–5.332.

62 *Ibid.*, para. 5.2.3.

protect public morals'. However, in this particular case, the EU had failed to justify the unequal treatment of Greenlandic Inuit products, which were marketable in the EU under this exemption, and those of the Canadian Inuit, which were classified as prohibited products deriving from 'commercial' hunts and were therefore banned.<sup>63</sup> The Appellate Body further noted that the IC exception constituted a significant derogation to the ban, and that the EU had failed to demonstrate 'how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to "commercial" hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare'.<sup>64</sup> In other words, the generous IC exemption granted solely to Greenlandic Inuit products could not be logically based on the objective of improving animal welfare conditions.

Further, the Appellate Body stressed that the IC exception was in essence available exclusively to Greenland, creating a discriminatory effect between countries in which essentially the same conditions prevail.<sup>65</sup> The EU argued that it had engaged in "multiple efforts" to assist the Inuit in Canada to benefit from the IC exception,<sup>66</sup> although the WTO Appellate Body was not convinced that it had made 'comparable efforts' to those made with respect to the Greenlandic Inuit.<sup>67</sup> In this regard, as noted above, it was emphasized that one important flaw in the EU Seal Regime was the requirement for access to the IC exception to be dependent upon the establishment of a 'recognized body', which is to be responsible inter alia for verifying that seal products originate from genuine Inuit hunts.

In the wake of the report of the WTO Appellate Body, the EU has made considerable adjustments to the Seal Regime in order to address the elements that were considered to have contravened WTO law, while seeking to preserve its underlying features. In an attempt to reconcile the IC exception with the overarching EU policy objective of addressing public concerns regarding seal welfare, the Basic Regulation has been substantively amended. Thus in the reformed Regulation 2015/1775, the new art 3(1)(c) provides that Inuit seal products can now only be placed on the EU market if 'the hunt is conducted in a manner which has due regard to animal welfare, taking into consideration the way of life of the community and the subsistence purpose of the hunt.'

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63 *Ibid.*, para. 5.3-3.3.

64 *Ibid.*, para. 5.320.

65 *Ibid.*, para. 5.333.

66 *Ibid.*, para. 5.337.

67 *Ibid.*, para. 5.337.

Besides addressing those aspects of the legislation that were considered to have contravened the WTO Rules, the EU has also engaged with the Canadian and Inuit authorities in order to facilitate the establishment of an attestation mechanism, which will, once again, allow the Canadian Inuit to export seal products into the EU market.<sup>68</sup> More specifically, since 30 July 2015 the Government of Nunavut has been recognized as an attestation body qualified to certify Inuit seal products under EU Seal Regime,<sup>69</sup> thereby facilitating future trading and export opportunities within the common market.

It is certainly an encouraging sign towards future compliance with international trade law that the EU has taken such steps towards addressing the discriminatory features of the Seal Regime. Nevertheless, it remains questionable whether these legislative amendments and the subsequent re-engagement with the Canadian and Inuit authorities can rectify the damage that has been done to the economic interests of the Canadian Inuit sealing community. As observed by Canada in the course of the proceedings before the WTO dispute settlement system, the ban has already taken a heavy economic and social toll on the Inuit community:

The effect of the EU Seal Regime is to exclude from the EU market all seal products derived from seals killed in commercial hunts, regardless of whether they were harvested humanely. In doing so, the EU Seal Regime has effectively shut out Canadian seal products from the EU market. The negative economic impacts of this measure have reverberated through coastal communities in the Canadian Maritimes, where economic opportunities are limited, and in Canada's Inuit communities, where the Inuit have historically relied on the income generated from seal skin sales to supplement their subsistence-oriented lives.<sup>70</sup>

Thus, in light of the legal amendments and the inclusion of the Nunavut Government as an attestation body, the EU is now convinced that the current Seal Regime is in compliance with WTO law.<sup>71</sup> This may very well be the

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68 See Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute European Communities—Measures Prohibiting the Importation and Marketing of Seal Products (WT/DS400 and WT/DS401), 16 October 2015.

69 See Commission Decision of 26 October 2015 recognising the Department of Environment, Government of Nunavut in accordance with Article 3 of Implementing Regulation (EU) 2015/1850 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products, C (2015) 7273 final (art 1).

70 See the Integrated executive summary of Canada, in European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, Reports of the Panel, WT/DS400/R, WT/DS401/R, Addendum, Annex B-1, 25 November 2013, para. 2.

71 *Status Report* (n. 68).



case in principle. However, as noted in section 2.2 below, it may be questioned whether the amended regime does indeed strike a fair balance between the protection of animal welfare and the protection of the human rights of indigenous peoples.

### 2.2 *Animal Welfare v. the Human Rights of Indigenous Peoples*

In light of the report of the WTO Appellate Body in *EC-Seal Products*, which objectively revealed the discriminatory features of the EU Seal Regime, it is clear that this package of European measures has largely failed to effectively reconcile the protection of animal welfare and the human rights of indigenous peoples. As regards animal welfare protection, the current regime still allows for the unrestricted marketing of seal products that fall within the scope of the IC exception, and the generosity of the exemption neither eliminates nor efficiently reduces consumer fears over the availability of allegedly undesirable seal products within the internal market, which had been a primary intention of the legislation in the first place. Similarly, in terms of protecting the human rights of indigenous peoples, the regime has thus far served only to promote the unlawful exclusion of Canadian Inuit hunters from the EU market. It is also questionable whether the Canadian Inuit seal products will ultimately be able to re-enter the EU market in a meaningful economic sense. Not only have prices for seal products plummeted in the wake of this legislation,<sup>72</sup> but market realities have also materially changed. Ironically, given that a central motivation of the EU Seal Regime was to constrain the activities of commercial operators, a particular problem presently confronting Inuit hunters is the absence of a large scale commercial seal industry in Canada. Prior to the introduction of the EU restrictions, the Canadian Inuit were reliant upon synergies with commercial producers in order to export their products to the EU.<sup>73</sup> The disappearance of large-scale producers has therefore inhibited such mutually-supportive logistical collaborations with commercial operators and could negate the economic viability of Inuit hunts.<sup>74</sup>

It is striking that prior to the ruling of the WTO Appellate Body, the EU did not undertake a more thorough evaluation of the possibility that the fundamental rights of indigenous peoples caught by the terms of the Seal Regime

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72 The market value for sealskin decreased by over 50% within a year of the entry into force of Regulation 1007/2009, despite a significant reduction in the numbers of individuals harvested: Nikolas Sellheim, 'The Goals of the EU Seal Products Trade Regulation: From Effectiveness to Consequence' (2015) 51 *Polar Record* 274, 284.

73 *EC-Seal Products* (n. 45) para. 5:334.

74 See Government of Nunavut, *Report on the Impacts of the European Union Seal Ban, (EC) No 1007/2009*, (Nunavut, Iqaluit, 2012) 9.

might be violated in the process of protecting animal welfare. Indeed, as observed by Hossain, a strong case can be made that the regime had undermined the human rights of Canadian Inuit sealers since its inception in 2009.<sup>75</sup> Of particular significance in this regard is art 27 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees the religious, linguistic and cultural rights of minority groups:<sup>76</sup>

[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The notion of a ‘minority’ is not defined in the ICCPR. Nevertheless, as Hossain considers, it is ‘nonetheless a fact that indigenous peoples mostly comprise small minorities except only in a few countries in which they form a majority’.<sup>77</sup> Thus, minority groups like the Canadian Inuit—and, indeed, Greenlanders<sup>78</sup>—should therefore fall within the scope of art 27. Furthermore, the UN Human Rights Committee has emphasized in a general comment to this particular provision that the term ‘culture’ includes the particular ways of life of minority communities, such as hunting and fishing.<sup>79</sup> Moreover, in *Länsman v Finland*, the Human Rights Committee established that art 27 ICCPR requires that members of a minority shall not be ‘denied’ the right to enjoy his or her

75 Kamrul Hossain, ‘The EU Ban on the Import of Seal Products and the WTO Regulations: Neglected Human Rights of the Arctic Indigenous Peoples?’ (2013) 49 *Polar Record* 154, 163–164.

76 International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966; 999 UNTS 171.

77 Hossein (n. 75), 161.

78 It would appear that the Greenlandic Inuit are also protected by art 27 ICCPR. Whereas the Inuit of Greenland constitute a majority of the population within Greenland itself, the territory of Greenland is still far from an independent entity. In recent years, while Greenland has attained a marked degree of autonomy from Denmark it is not yet a fully autonomous state. From this perspective, the Greenlandic Inuit can be considered to constitute a minority of the Danish population and should therefore continue to fall within the scope of art 27 *ratione personae*.

79 Human Rights Committee, General Comment 23, art 27 (Fiftieth session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), p. 209.

culture.<sup>80</sup> It is certainly debatable whether the EU seal products ban serves to *deny* outright the Canadian Inuit the right to enjoy their culture. Likewise, due to their inherently cumulative and subjective nature, it is difficult to establish definitively that the collapse of the sealing industry directly triggered a spate of social malaises within indigenous communities that would amount to a violation of this provision. Indeed, as Sellheim observes, ‘it may be difficult to provide satisfactory legal evidence that the seal products ban adversely affects Inuit culture.’<sup>81</sup> Nevertheless, the discriminatory aspects of the EU Seal Regime, combined with the significant economic losses that market restrictions have inflicted upon such communities, clearly indicate that this legislation presents scope for conflict with the broad spirit—if not necessarily the strict letter—of art 27.

As a concluding remark, it is apparent that the current EU Seal Regime has proved to be insufficient in terms of protecting both animal welfare rights and the fundamental human rights of indigenous peoples, which in this case stand out as conflicting objectives. Consequently, it remains to be seen how the EU plans to make reparations for the financial injustice suffered by Canadian Inuit sealers. A mere re-establishment of EU market access is not, in and of itself, sufficient to remedy this five-year exclusion from the market, which has had a dire negative economic impact upon Canadian Inuit sealers.

### 3 Whaling in the Arctic

As with the hunting of seals, the harvesting of cetaceans by the indigenous peoples of the High North has occurred since the commencement of human settlement in the Arctic. Archaeological evidence suggests that Alaskan whaling may date back as far as 8000 years,<sup>82</sup> while whaling activities in the Canadian Arctic are known to have occurred over the course of 3000 years.<sup>83</sup> Hunting in Greenland may be traced back to 2400 BC,<sup>84</sup> while whaling and

80 Human Rights Committee *Jouni E. Länsman et al. v Finland*, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996).

81 Sellheim (n. 72) 281.

82 International Whaling Commission, *Aboriginal/Subsistence Whaling (With Special Reference to Alaska and Greenland Fisheries)* (Cambridge, IWC, 1982) 36.

83 G.G. Monks, ‘Quit Blubbering: An Examination of Nuu’chah’nulth (Nootkan) Whale Butchery’ (2001) 11 *International Journal of Osteoarchaeology* 136.

84 Richard A. Caulfield, *Greenlanders, Whales and Whaling: Sustainability and Self-Determination in the Arctic* (Hanover, University Press of New England, 1997) 81.

sealing have been continuously conducted by Greenlanders since at least 1050 AD with the settlement of the island by the Thule Inuit.<sup>85</sup> Indigenous hunting therefore significantly pre-dates what has since been identified as the first systematic commercial harvesting activities of the Eleventh Century and the later advent of the era of modern whaling.<sup>86</sup> This long-standing and unbroken heritage of the consumption of marine mammals remains highly significant to many Arctic indigenous communities. Participation in hunting activities confers social status within the community, while the fruits of these labours represent an important source of nutrition in a challenging living environment, as well as a key element of the Inuit identity. Indeed, in many such communities 'true' Inuit status is often connected to the consumption of traditional food sources,<sup>87</sup> notably whales and seals, which are distinguished from 'white man's foods' to which non-wild caught products (and their consumers) are derogatorily referred.<sup>88</sup>

The continued harvesting of whales by Arctic indigenous communities gives rise to the same regulatory dichotomy encountered by the EU in the context of seal hunting: there remains considerable popular support and sympathy for the cultural and nutritional needs of the Inuit, notwithstanding trenchant opposition from the EU institutions and the vast majority of the Member States to the killing of cetaceans. As with the seal provisions, the EU has actively opposed commercial harvesting and, as outlined in section 3.1 below, imposed heavy restrictions upon the marketing of cetacean products within the internal market, subject to limited exemptions for items intended for non-commercial purposes. This specific legislation has generally avoided the opprobrium associated with the EU Seal Regime. Instead, as discussed in section 3.2, the primary legal issues raised by the convergence of the stated EU position towards cetaceans and the interests of indigenous peoples in harvesting whales have involved the multilateral regulation of marine mammals. To this end, the collective negotiating position adopted by the EU towards subsistence whaling represents an intriguing case-study of its approach to key

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85 *Ibid.*, 26.

86 The first coordinated attempts at commercial whaling commenced in the Basque region of Northern Spain. Modern whaling is considered to have commenced in the 1860s with the introduction of the exploding harpoon: J.N. Tønnessen and A.O. Johnsen, *The History of Modern Whaling* (London, C Hurst & Co, 1982) 3.

87 Wenzel (n. 16) 139.

88 Richard A. Caulfield, 'Aboriginal Subsistence Whaling in West Greenland' in Milton M.R. Freeman and Urs P. Kreuter (eds) *Elephants and Whales: Resources for Whom?* (Amsterdam, Gordon and Breach, 1994) 261, 282.

Arctic-centric issues within pertinent international for a, as clearly envisaged within the 2016 Arctic Policy Statement.<sup>89</sup>

### 3.1 *The Regulation of Cetacean Products under EU Law*

As with the corresponding seal provisions outlined above, specific measures have been introduced by the EU to restrict the market presence of cetacean products, which were also largely inspired by popular and institutional opposition to the hunting of whales. Like the EU seal regime, these measures were largely intended to undermine the global market for commercially-derived cetacean products, while simultaneously seeking to preserve the long-standing subsistence hunting entitlements of recognised indigenous communities. The EU cetacean provisions encompass two complementary yet relatively overlooked measures adopted in 1981, namely Regulation 348/81<sup>90</sup> and its implementing legislation, Regulation 3786/81.<sup>91</sup> Regulation 348/81 emerged from the somewhat unexpected context of industrial restrictions upon leather tanning, instituted by the incoming Thatcher administration in the UK in 1979. At the material time, domestic restrictions had been imposed upon the importation of whale products by a number of EU Member States, with the general exception of sperm whale oil, which was still used in a dwindling number of industrial processes. In 1979, proposals for a full moratorium on sperm whaling were narrowly defeated within the global regulatory body, the IWC.<sup>92</sup> These developments nevertheless prompted the UK authorities to immediately lobby for Community-wide restrictions on the importation of whale oil and derivative items.<sup>93</sup> While partly a manifestation of governmental opposition to the

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89 *Arctic Policy Statement* (n. 2) 7.

90 Council Regulation (EEC) No. 348/81 of 20 January 1981 on common rules for imports of whales or other cetacean products [1981] *Official Journal* L39/1.

91 Commission Regulation (EEC) No. 3786/81 of 22 December 1981 laying down provisions for the implementation of the common rules for imports of whale or other cetacean products [1981] *Official Journal* L377/42.

92 On these endeavours see Patricia Birnie, 'The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales' (1985) 12 *Ecology Law Quarterly* 937, 957–959. A moratorium on sperm whaling was eventually adopted at the Thirty-Third Meeting of the IWC in 1981, with this motion co-sponsored by France, the Netherlands and the UK, acting in their capacity as independent contracting parties in the absence of an allied EEC negotiating position.

93 Anonymous, 'UK Harpoons Whalers', *New Scientist*, 12 July 1979 85.

commercial harvesting of whales,<sup>94</sup> these entreaties were also motivated by concerns that the increasingly stringent national constraints on cetacean products could exert a potentially distortionary effect upon the national leather industry, since sperm whale oil was still used to a significant degree by rival producers, for which domestic manufacturers 'rightly feared that its hard-pressed industry could experience unfair competition from non-Community countries'.<sup>95</sup>

Such calls would ultimately find fertile ground within the institutions of the European Economic Community (EEC), with whale conservation occupying a position of some significance upon its operational agenda. In November 1980, both the Commission and the European Parliament considered this issue in considerable depth, advocating legislation to restrict the commercial use of cetacean products, albeit with differing approaches. The Commission proposed a general ban on the importation of whale meat, as well as products that had been treated with whale oil.<sup>96</sup> Meanwhile, in a more extensive intervention, the Parliament called not only for a ban on 'all products which can be shown to derive from cetaceans or to contain products derived from cetaceans' but for the EEC and its Member States to formally pursue a moratorium upon commercial whaling within the IWC.<sup>97</sup> Although a number of Member States would eventually play a significant role in securing a moratorium on commercial hunting at the IWC's historic Thirty-Fourth Meeting in 1982,<sup>98</sup> the EEC ultimately favoured the more targeted proposal of the Commission and confined its policies towards whaling to the specific arena of international trade.

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94 On the growing opposition in Europe to commercial whaling since the 1960s see Charlotte Epstein, *The Power of Words in International Relations: Birth of An Anti-Whaling Discourse* (Cambridge, Massachusetts, MIT Press, 2008) 258–259.

95 House of Commons Debate, 8 December 1980, *Hansard*, Vol. 995 cc.721, 722.

96 COM (80) 788.

97 Resolution Embodying the Opinion of the European Parliament on the Proposal from the Commission of the European Communities and the Council for a Regulation on Common Rules for Imports of Whale Products [1980] OJ C 291/49.

98 At this juncture, paragraph 10(e) of the Schedule to the International Convention for the Regulation of Whaling 161 UNTS 72 (ICRW) was famously amended so as to set commercial catch limits at zero, a position that may subsequently be amended by a three-quarters majority of the contracting parties present and voting, although the stated position against whaling by a significant majority of the parties renders this a remote prospect at present. On the events of the Meeting and voting patterns towards this historic proposal see Patricia Birnie, 'Countdown to Zero' (1983) 7 *Marine Policy* 68.

To this end, Regulation 348/81 established that the importation of a relatively small and specific set of items, listed on an Annex to the provision and including meat, offal, fats, oils and products treated with cetacean oil, would from 1 January 1982 require an import licence<sup>99</sup> to be overseen by a Committee on Cetacean Products.<sup>100</sup> Although Regulation 348/81 was initially requested as a means of stabilising market conditions for cetacean products, this provision was ultimately adopted on explicitly environmental grounds. Indeed, the preamble observes that trade restrictions are an inevitable consequence of the need to ensure the ‘conservation of cetacean species’. Moreover, legal concerns had initially been raised over the UK’s proposals as to whether any future measures could be adopted pursuant to the EEC’s then nascent fisheries competences, as had been favoured by a considerable majority of the Member States at the time. Strong opposition to this approach from Denmark and Germany meant that Regulation 348/81 was ultimately adopted under the auspices of what was previously art 235 of the EEC Treaty (now art 352 TFEU) and was hence a measure of broader environmental law, rather than a fisheries matter.<sup>101</sup> Unlike the various provisions addressing seal products, Regulation 348/81 makes no reference to the Inuit or the exigencies of indigenous subsistence hunting. Accordingly, this provision authorises the trade in Inuit-derived items essentially by default, with import restrictions applying solely to ‘products to be used for commercial purposes’.<sup>102</sup> Instead, as outlined further in section 3.2.2 below, the position of traditional subsistence users of cetacean products—specifically in the context of Greenlanders—is addressed more comprehensively under legislation intended to give effect to commitments

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99 Art 1(1). Under art 3 the Council may amend the Annex following a qualified majority vote, with individual Member States permitted to ban additional products pending such a decision; this process has not occurred to date. Conditions for the practical operation of import licenses were subsequently established under Regulation 3786/81.

100 Art 2(1). The work of the Committee has remained generally obscure, with the sole reference to its activities arising in response to a question from the European Parliament in 1982, in which it was recommended that the Annex of products subject to the controls of Regulation 348/81 ought not to be extended until the provision had been in force for a longer period of time: [1982] OJ C 218. The cetacean provisions therefore offer few obvious lines of comparison with the ‘recognised body’ for attestation envisaged under the amended EU legislation on seal products.

101 A.M. Farmer (ed) *Manual of European Environmental Policy* (London, Routledge, 2012) 9.12. This appears to have been a source of frustration to the UK government, which saw this wrangling as delaying the regulation of its original market-related concerns (n. 95) 723.

102 Art 1(1).

pursuant to the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES).<sup>103</sup> Indeed, the preambular intentions of Regulation 348/81 identify this provision as a temporary measure pending the adoption of more general legislation on the trade in endangered species, hence whale products might have been eventually expected to have been addressed holistically in the context of CITES commitments. Nevertheless, Regulation 348/81 was not ultimately repealed by the first EU CITES Regulation in 1982,<sup>104</sup> nor indeed has it been explicitly subsumed into any of the successive iterations of this legislation, hence it remains the primary regulatory regime for such products vis-à-vis the internal market.

The restrictions upon the trade in cetacean products intended for commercial use established under Regulation 348/81 have also been bolstered to some extent by the application of the Habitats Directive,<sup>105</sup> the cornerstone provision of EU nature conservation law. Under the Directive, the Member States adopt a two-pronged approach to the conservation of threatened species. In the first instance, Member States are obliged to identify and, in tandem with the EU institutions, designate Special Areas of Conservation (SACs) for species of community importance.<sup>106</sup> Moreover, the Habitats Directive mandates that Member States 'shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range'.<sup>107</sup> At present, 'all species' of cetaceans have been so listed, but only one seal species. Thus, under the system of strict protection envisaged by the Directive, art 12(1) prohibits *inter alia* all forms of deliberate capture or killing of cetaceans in the wild. While this provision has obstructed the commercial whaling aspirations of potential new Arctic EU Member States, there is nonetheless scope for subsistence whaling by recognised indigenous communities to be permitted under the Directive. In this respect, art 16(1)(e) allows for the taking of Annex IV(a) species 'under strictly supervised conditions, on a selective basis and to a limited extent ... in limited numbers specified by the competent national authorities'. Although untested in this context, and contingent upon

103 993 UNTS 243.

104 Council Regulation (EEC) No 3626/82 of 3 December 1982 on the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora [1982] OJ L 384/1 (subsequently repealed).

105 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats of wild fauna and flora [1992] OJ L 206/7.

106 These species are listed on Annex II to the Directive. From the standpoint of marine mammals, these specific obligations apply solely to harbour porpoises and bottlenose dolphins, as well as grey and harbour seals.

107 Art 12(1).



the support of both a sponsoring Member State and the European Commission, this derogation could serve to reconcile broad EU support for the subsistence and cultural needs of indigenous peoples with the core conservation objectives advanced by the Directive.

At present, however, the Habitats Directive has no application to the marine Arctic, since its scope is restricted to 'the European territory of the Member States'.<sup>108</sup> Accordingly it does not apply to whales taken in the jurisdictional waters of Greenland, which formally left the EEC in January 1985,<sup>109</sup> or Arctic whaling states such as Norway and Iceland, which have rejected the prospect of EU membership in national referenda, with the uncompromising stance of the Commission towards commercial whaling recognised as a key factor in this regard.<sup>110</sup> Nevertheless, from a trade perspective, these provisions may still exert an influence upon the eventual fate of species harvested beyond its jurisdictional reach, since art 12(2) prohibits the keeping, transport, sale or exchange or offering for sale or exchange of 'specimens taken from the wild'.<sup>111</sup> Specimens are defined in art 1(m) of the Directive as:

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108 Art 2(1). This term gave rise to considerable confusion and the initial transposing legislation of a number of Member States applied the Directive solely to the territorial sea, hence for highly mobile species such as marine mammals, the Directive was initially considered to be of limited value. The ECJ subsequently confirmed the application of the Directive to the full range of jurisdictional waters in *Commission v UK* [2005] ECR I-9017 (para. 117). On the jurisdictional scope of the Directive see Richard Caddell, 'The Maritime Dimensions of the Habitats Directive: Past Challenges and Future Opportunities' in Gregory Jones QC (ed) *The Habitats Directive: A Developer's Obstacle Course?* (Oxford, Hart, 2012) 183, 187–189.

109 Treaty, amending with regard to Greenland, the Treaties establishing the European Communities [1985] OJ L 29/1. See also Council Decision 2014/137/EU of 14 March 2014 on relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other [2014] OJ L 76/1.

110 On the role of whaling in the Norwegian referendum see Steinar Andresen, 'The Making and Implementation of Whaling Policies: Does Participation Make a Difference?' in David G. Victor, Kal Raustiala and Eugene B. Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Agreements: Theory and Practice* (Cambridge, Massachusetts, MIT Press, 1998) 431, 455–456. On the whaling aspects of the Icelandic accession negotiations see Peter Davies, 'Iceland and European Union Accession: The Whaling Issue' (2011) 24 *Georgetown International Environmental Law Review* 23.

111 Art 12(2) applies only to animals taken after the entry into force of the Directive, thereby allowing free trade in pre-existing products, most notably on the lucrative antiquities market. Items taken after this period remain subject to regulation under CITES which, as discussed in section 3.2.2, has generated sporadic controversies over products derived from narwhal tusks.

any animal or plant, whether alive or dead, of the species listed in Annex IV and Annex V, any part or derivative thereof, as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of animals or plants of those species.

This definition serves to further restrict the importation of whale products into the EU, which thereby 'diminishes a potential loophole, namely that the prohibition on the killing of animals *outside* Community waters is not provided for in the Habitats Directive'.<sup>112</sup> Thus, while the Habitats Directive itself offers no formal protection to marine mammals outside EU waters, it does prevent the importation into the internal market of products derived from hunts conducted beyond the physical boundaries of the EU.

In contrast to the EU seal provisions, import restrictions on cetacean products have proved to be relatively uncontroversial. No specific litigation has been generated under these auspices, nor has there been any meaningful assertion of cultural injury or unfair treatment sustained by any indigenous constituency. This may be attributed to three key factors that did not arise in the context of the EU's seal regime. In the first instance, Regulation 348/81 coincided with a precipitous decline in the demand for whale products, for both economic and ecological reasons. At the material time, cheaper alternatives to baleen whale oil were being developed by manufacturers, a process that was somewhat accelerated by the IWC's graduated restrictions on commercial whaling that rendered sourcing this product increasingly cost-prohibitive.<sup>113</sup> Allied to this, a concerted environmental lobby helped to steer consumer demand towards alternative oils as an essential component in industrial manufacturing and, in particular, domestic products.<sup>114</sup> Accordingly, Regulation 348/81 has addressed a niche market within the EU of products that are essentially

112 Peter G.G. Davies, 'The Legality of Norwegian Commercial Whaling under the Whaling Convention and its Compatibility with European Community Law' (1994) 43 *International and Comparative Law Quarterly* 270, 281 (original emphasis).

113 On this process see Heidi Scott, 'Whale Oil Culture, Consumerism and Modern Ecology' in Ross Barrett and Daniel Worden (eds) *Oil Culture* (Minneapolis, University of Minnesota Press, 2014) 3.

114 In the UK, for example, retailers of leather goods came under increasing pressure to discontinue the use of whale oil: 'UK Harpoons Whalers' (n. 93) 85. There is also clear evidence that consumer concerns were shared by a number of Parliamentarians, with strong opposition within the House of Commons to the continued use of any whale products in the UK (n. 95) 724. This was a microcosm of a wider global movement to eschew whale products: see further Epstein (n. 94) 87–164.

marketed to the Inuit diaspora and does not generate the same economic repercussions encountered by the sealing industry with its wider array of potential consumers. Second, the cetacean provisions were unencumbered by the problematic administrative requirements established under the later seal provisions and did not therefore discriminate between importers of non-commercial products in a manner that would disrupt market access by particular communities. Third, and perhaps most significant, the EU provisions on cetacean products have essentially reflected trade entitlements that have been established on a multilateral basis and are widely accepted as a legitimate special case by the international community. Indeed, unlike seals, for which the emergence of a circumpolar supervisory body remains an unlikely prospect, the volume of indigenous whaling in any given season has been largely predetermined by a recognised global regulatory institution. While this process has generated increasing consternation among particular states in recent years, as outlined below, its outcomes have nonetheless been faithfully implemented in a non-discriminatory manner by the EU through these provisions.

### 3.2 *The EU and the Multilateral Regulation of Cetaceans in the Arctic*

In addition to the regulatory challenges experienced in the development of internal legislation to address marine mammal products, another key objective of the EU in its engagement with the Arctic—the enhancement of multilateral governance for this region through pertinent multilateral fora—also invites further scrutiny in the specific context of marine mammals. In the 2008 Joint Communication, this was identified as one of the three main policy priorities for the EU vis-à-vis the Arctic,<sup>115</sup> which sought to facilitate the ‘full implementation of already existing obligations’ within relevant regulatory frameworks.<sup>116</sup> These aspirations were expressed in somewhat more detail in the recent Arctic Policy Statement of April 2016, in which it was considered that the EU ‘should continue its engagement in multilateral environmental agreements that also have particular relevance to the Arctic, and encourage their implementation’.<sup>117</sup> The earlier Joint Communication provided little indication of the specific fora through which this mandate was considered best pursued. However, while neither document expressly referred to marine mammals as such, the 2016 Statement nonetheless identified particular organizations of significance, which might therefore be considered operative priorities for the EU institutions in their external dealings. These include a number of regimes with a clear

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<sup>115</sup> *Joint Communication* (n. 1) 3.

<sup>116</sup> *Ibid.*, 10.

<sup>117</sup> *Arctic Policy Statement* (n. 2) 7.

relevance to cetaceans and the hunting activities of Arctic indigenous peoples, notably the ICRW and CITES. To this end, in engaging with these particular fora, the EU intends to take an 'active negotiating position ... to encourage all countries and regions to assume their responsibilities'.<sup>118</sup>

As a negotiating bloc of contracting parties to a particular treaty, the EU can wield considerable power within multilateral organizations,<sup>119</sup> even those with an extensive cohort of participants. Therefore, from the perspective of Arctic indigenous peoples seeking to secure particular entitlements within such bodies, the EU may constitute a significant ally—or a formidable opponent. In this regard, the sustainable use of cetaceans by indigenous communities presents an illuminating case-study of the implementation of the EU's partnership objectives, engaging three separate regimes in the form of the IWC, CITES and the North Atlantic Marine Mammal Commission (NAMMCO). As this section demonstrates, a review of collective practices towards the issue of indigenous whaling reveals that the EU has generally proved to be a supportive partner to indigenous communities in promoting subsistence hunting activities, notwithstanding its wider objectives in opposing the commercial exploitation of marine mammals. Nevertheless, this support is not unqualified and the EU has also opposed indigenous demands and insisted upon stricter controls over these activities where concerns have arisen over the conservation status of particular species. Moreover, the EU has steadfastly avoided active engagement with NAMMCO, the regional regulator charged with the oversight of the sustainable use of marine mammals in the Arctic, further highlighting the complexities that this particular issue poses for EU policies towards the High North.

### 3.2.1 Qualified Support: The EU and the IWC

On a multilateral level, whaling in the Arctic is regulated predominantly under the auspices of the ICRW and, more specifically, its constituent management body, the IWC. Inaugurated in 1949 to facilitate the stated objectives of the ICRW 'to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry'<sup>120</sup> the IWC has become an increasingly fractious institution as public and governmental attitudes towards the continued commercial hunting of whales has become

<sup>118</sup> *Ibid.*, 14.

<sup>119</sup> For an illuminating discussion of the collective bargaining of the EU in particular regimes see Tom Delreux, *The EU as an International Environmental Negotiator* (Farnham, Ashgate, 2011) 61–134.

<sup>120</sup> Preamble to the ICRW.

steadily more polarised.<sup>121</sup> As observed above, in 1982 the IWC imposed a moratorium on the commercial hunting of whales. A considerable degree of whaling has nonetheless continued within the Arctic, pursuant to objections or reservations entered against the commercial moratorium,<sup>122</sup> for scientific purposes as provided under Article VIII of the ICRW<sup>123</sup> and, most pertinently from the perspective of Arctic indigenous communities, under a recognised exemption 'to satisfy aboriginal subsistence need'.<sup>124</sup>

The aboriginal subsistence exception has been a long-standing feature of multilateral whaling governance, having been introduced in the first global treaty to regulate whaling in 1931.<sup>125</sup> Although absent from subsequent arrangements,<sup>126</sup> it was reinstated within the ICRW Schedule in 1946 following a proposal by the USSR in respect of its indigenous Chukotkan communities.<sup>127</sup> Since 1950, the aboriginal subsistence provisions of the

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121 There is a voluminous literature on the travails of the IWC and the processes by which this organisation has become steadily more beleaguered, hence constraints of focus and space necessitate a peripheral treatment of these issues in this Chapter. Nevertheless, as noted below, the febrile atmosphere within the IWC has impacted to a degree upon negotiations for subsistence quotas for Arctic indigenous communities. For a thorough discussion of the IWC generally see Malgosia Fitzmaurice, *Whaling and International Law* (Cambridge, Cambridge University Press, 2015) 29–121; the emergence of a sustained anti-whaling agenda and its repercussions for multilateral management are outlined comprehensively by Epsetin (n. 94) 87–163 and Sarah Suhre, 'Misguided Morality: The Repercussions of the International Whaling Commission's Shift from a Policy of Regulation to One of Preservation' (1999) 12 *Georgetown International Environmental Law Review* 305.

122 Norway entered an immediate objection to the moratorium and has continued to conduct commercial whaling activities in the Arctic. Iceland withdrew from the Convention in 1991 and rejoined in 2002, subject to a contentious reservation to the moratorium: see further Alexander Gillespie, 'Iceland's Reservation at the International Whaling Commission' (2003) 14 *European Journal of International Law* 977.

123 A limited degree of scientific whaling has been conducted by Iceland, although little research whaling has occurred in the Arctic in recent years. The scientific research exemption has been primarily—and contentiously—invoked by Japan, which the International Court of Justice recently considered to have fallen short of the standards required of Article VIII: *Case Concerning Whaling in the Antarctic (Australia v. Japan; New Zealand Intervening)*; Judgment of 31 March 2014.

124 Section 13 of the ICRW Schedule.

125 Convention for the Regulation of Whaling 1931; 155 LNTS 349. Art 3 prescribed specific entitlements for 'aborigines dwelling on the coasts of the territories of the High Contracting Parties'.

126 International Agreement for the Regulation of Whaling 1937; 190 LNTS 79.

127 Resolution 10 of the 1946 International Whaling Conference.

ICRW Schedule have been successively expanded and amended to establish particular tribal requirements and restrictions on certain stocks.<sup>128</sup> Ultimately, aboriginal subsistence whaling (ASW) is largely regulated on a national level by the parties in question, acting in conjunction with hunting standards and quotas prescribed by the IWC, with the 'parent' government required to apply for a share of the aboriginal allocation on particular stocks, on the basis of a 'need statement' quantifying the volume of whale meat required by the communities in question.<sup>129</sup> Despite widespread opposition to commercial whaling within the IWC, aboriginal hunting has been generally accepted as a distinct category of activity that is of fundamental importance to particular communities; broad endorsement is therefore accorded in principle for hunts that do not endanger the populations in question and to which precautionary monitoring and management measures are applicable.<sup>130</sup>

Nevertheless, subsistence quotas—and their interpretation—have generated occasional discord within the IWC. The aboriginal exemption first received sustained scrutiny in the mid-1970s due to concerns over the potential impact of bowhead whaling by Arctic indigenous communities.<sup>131</sup> This resulted in a contentious decision by the IWC in 1977 to temporarily ban aboriginal hunts for grey and bowhead whales,<sup>132</sup> which would eventually trigger the repudiation by Canada of the Convention in 1981.<sup>133</sup> The bowhead whaling controversy demonstrated that the IWC possessed 'a strong scientific committee but essentially no expertise within its ranks for addressing the socio-economic, cultural and nutritional dimensions of aboriginal whaling'.<sup>134</sup> Consequently,

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128 Alexander Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law* (Cheltenham, Edward Elgar, 2005) 195.

129 The uncomfortably paternalistic title of this administrative requirement appears likely to be reformulated in the near future: *Report of the Aboriginal Subsistence Whaling (ASW) Sub-Committee 2016*; Document IWC/66/Rep03, 20.

130 Randall R. Reeves, 'The Origins and Character of "Aboriginal Subsistence" Whaling: A Global Review' (2002) 32 *Mammal Review* 71, 73.

131 John Walsh, 'Moratorium for the Bowhead: Eskimo Whaling on Ice?' (1977) 197 *Science* 847.

132 For a full account of this issue see IWC (n. 82) 2.

133 See further Ted L. McDorman, 'Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention' (1998) 29 *Ocean Development and International Law* 179. Canada therefore regulates Inuit whaling outside the auspices of the IWC; of the other Arctic coastal states that practice Aboriginal Subsistence Whaling, Denmark (in respect of Greenland), the US and Russia remain parties to the Convention and follow these specific processes.

134 Reeves (n. 130) 72.

an Aboriginal Subsistence Whaling Sub-Committee (ASWSC) was established in 1983 to review quota applications and provide advice on technical management measures. Under the auspices of this body, the IWC has subsequently focused on reducing the numbers of whales struck but not landed,<sup>135</sup> ensuring the sustainability of specific aboriginal hunts<sup>136</sup> and improving humane killing methods.<sup>137</sup> Since 2012, the ASWSC has been supported by an *Ad Hoc* Aboriginal Subsistence Whaling Working Group to address a number of conceptual difficulties with the ASW regime,<sup>138</sup> including challenges to the alleged commercialisation of such hunts, as discussed further below.

In the specific context of Arctic ASW, complications have arisen over purported quotas for the Greenlandic Inuit. As noted above, the harvesting of particular species by indigenous hunters has been sporadically controversial within the IWC; aside from the bowhead whaling restrictions of 1977, concerns were raised over the hunting of humpback whales by Greenlanders in 1985, which also resulted in significant quota reductions for this constituency.<sup>139</sup> As a result of the considerable short-term difficulties raised by this development, Greenland has formed part of the Danish delegation to the IWC since 1985,<sup>140</sup> although Denmark remains the competent negotiating authority concerning Greenlandic ASW. In 1991 the IWC's Scientific Committee endorsed a need statement submitted by Denmark that 670 tons of whale meat was required annually to meet indigenous subsistence demand, a volume that was reapproved by this body in 2007.<sup>141</sup> While there is minimal dissent to the grant of an ASW to Greenland,<sup>142</sup> elements of Greenlandic activities under this broad

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135 Resolution 1981-4: Resolution to the Government of the United States on the Behring Sea Bowhead Whale.

136 Resolution 1998-9: Resolution on Directed Takes of White Whales; Resolution 1994-4 Resolution on a Review of Aboriginal Subsistence Whaling.

137 In this respect, particular concerns have been raised over the Faroese drive hunt—see Resolution 1993-2: Resolution on Pilot Whales and Resolution 1995-1: Resolution on Killing Methods in the Pilot Whale Drive Hunt. More generally the IWC has sought to improve the humane killing element of all aboriginal hunts—see Resolution 1985-3: Resolution on Humane Killing in Aboriginal Subsistence Whaling; Resolution 1997-1: Resolution on Improving the Humaneness of Aboriginal Subsistence Whaling; and Resolution 2001-2: Resolution on Whale Killing Methods.

138 IWC, *Annual Report of the International Whaling Commission 2011* (Cambridge, IWC, 2011) 18.

139 Caulfield (n. 84) 127.

140 *Ibid.*, 129.

141 IWC, *Annual Report of the International Whaling Commission 2008* (Cambridge, IWC, 2008) 19.

142 The only meaningful conceptual opposition to ASW has been raised by India, which has called for indigenous communities globally to find alternative food sources: IWC

umbrella have grown steadily more contentious within the IWC, with concerns raised by the particular species intended to be harvested to meet these nutritional requirements, as well as the alleged commercialization of subsistence catches.

Greenlandic whaling quotas provide an illuminating example of the collective bargaining practices of the EU, as well as the position of individual Member States in seeking to further the objectives of indigenous communities within their dependent territories. Membership of the IWC was first mooted by the EEC in 1979,<sup>143</sup> with a proactive common position against whaling considered as a potential political goal in 1980.<sup>144</sup> The ICRW currently precludes accession by non-states,<sup>145</sup> hence formal membership of the IWC would require an amendment of the Convention as advocated by the European Commission in 1992.<sup>146</sup> Accordingly, none of these proposed approaches were ultimately applied and the EU currently maintains observer status at the IWC. However, in 2007 the Commission adopted a further proposal to advance a common EU position to be followed by the Member States party to the ICRW at future IWC Meetings.<sup>147</sup> To this end, the Commission argued that the current 'EC policy on whales will not be effective in Community waters if it is not backed by coherent worldwide action',<sup>148</sup> calling for an aligned position on inter alia the continuation of the moratorium on commercial hunting and support for aboriginal subsistence hunting, and for all Member States to become parties

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(n. 138) 15. India acceded to the ICRW in 1985 with the specific aim of ending all categories of whaling, including ASW: Anthony D'Amato and Sudhir K. Chopra, 'Whales: Their Emerging Right to Life' (1991) 85 *American Journal of International Law* 21, 47. Ironically, the main constituency objecting to the categorisation of Greenlandic whaling as 'aboriginal' is the Greenlanders themselves, who seek the eventual allocation of a commercial quota: Nordic Council (n. 20) 48. At the IWC's 2016 Meeting a contentious draft Resolution on Food Security tabled by a cohort of African parties was defeated, although it appears likely to be raised again in 2018. While ostensibly a measure that might be viewed as bolstering aboriginal claims, the draft Resolution ultimately sought the official recognition of whales as a general food source of global significance—a proposition that was deemed objectionable by a considerable number of parties, including the EU bloc.

143 COM (79) 364.

144 European Parliament (n. 96).

145 Article III refers to the Membership of 'Contracting Governments' within the IWC (emphasis added).

146 COM (92) 316.

147 COM (2007) 871. The common position was ultimately adopted in EU Council Decision 9818/08.

148 *Ibid.*, 6.



to the ICRW.<sup>149</sup> An official EU common position on whaling was therefore advanced for the first time at the IWC's Sixtieth Meeting in 2008, a development that drew the ire of a number of contracting parties since a 'blocking majority' was now held and coordinated by a non-member that could not be realistically lobbied by other parties at this forum.<sup>150</sup> Despite these concerns, a common position has been elaborated for subsequent Meetings to 2011,<sup>151</sup> and for the medium-term.<sup>152</sup> Meanwhile, Denmark has opted out of the common position by invoking Declaration 25 annexed to the Maastricht Treaty,<sup>153</sup> which allows a Member State to depart from such policies in respect of overseas countries and territories. Denmark continues to represent Greenland at IWC Meetings in a manner that has led to both conflict and consensus with the EU over ASW quotas.

The conflict between Greenlandic whaling aspirations and the EU centres upon EU endorsement of ASW on the condition that 'conservation is not compromised, whaling operations are properly regulated and catches remain within the scope of documented and recognised sustainable needs'.<sup>154</sup> While the metric tonnage of whale meat sought by Greenland has received broad acceptance within the IWC's institutions, there has been profound disagreement over the means by which this is to be secured. In essence, Greenland has sought an ASW quota that incorporates an elevated number of humpback whales, a species that would yield a higher quantity of meat and thus reduce the number of individual animals required, but drawn from stocks for which there remains a degree of conservation concern. Despite having the support of the Scientific Committee, proposals to this effect tabled in 2008 were defeated due to the EU's collective bloc vote, which drew an aggrieved response from Denmark's indigenous representatives.<sup>155</sup> Similar proposals failed to gain sufficient support in 2009, although in 2010 negotiations between Denmark and the EU bloc

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149 *Ibid.*, 9. The current cohort of EU Member States Party to the ICRW numbers twenty-five, with Latvia and Malta yet to accede, while Greece formally withdrew from the Convention in 2013. This also includes the UK, in advance of its prospective withdrawal from the EU in 2019.

150 IWC 2008 (n. 141) 21. Similar concerns have been directed at the EU in its collective activities in other fora: Richard Caddell, 'Biodiversity Loss and the Prospects for International Co-Operation: EU Law and the Conservation of Migratory Species of Wild Animals' (2008) 8 *Yearbook of European Environmental Law* 218, 247.

151 EU Council Decision 7146/09.

152 EU Council Decision 17641/11.

153 Treaty on European Union [1992] OJ C191. On the development of the Danish position see Fitzmaurice (n. 121) 213–214.

154 (n. 147) 9.

155 IWC 2008 (n. 141) 23.

over a reduction in catches of fin whales resulted in a compromise settlement that served to 'reconcile Greenland's requirements while also addressing the European Union's concern for not seeing an increase in the number of large whales struck',<sup>156</sup> thus forming an irresistible majority and securing the requisite consensus to permit a quota on this basis.

Nevertheless, having benefitted from the voting power of the EU bloc in 2010, a subsequent quota request by Greenland submitted in 2012 involving a higher number of humpback whales was again defeated by collective action, with the EU 'unable to support the proposal described', despite reaffirming its general commitment to 'protecting the lives of indigenous peoples, including the protection of livelihoods'.<sup>157</sup> The failure to secure sufficient support for an ASW quota at this meeting would have significant consequences, as administrative restructuring meant that the IWC would meet on a two-yearly basis subsequent to this meeting and Greenlandic quotas would not therefore be reconsidered until 2014. In the meantime the harvesting of particular whales by Greenlanders, which occurred in both 2012 and 2013, was instituted unilaterally by Denmark. Since this was technically conducted without the formal amendment of the ICRW Schedule, a group of (non-EU) parties sought to censure Denmark before the IWC's Infractions Committee. This motion was ultimately rejected,<sup>158</sup> but the frustrations of the Inuit prompted the Danish authorities to warn the IWC that repudiation of the Convention was being seriously contemplated.<sup>159</sup>

In 2014 a solution to the immediate problem of Greenlandic ASW was brokered at the IWC, with the express support and co-leadership of the EU bloc. This time, the Danish proposals were accompanied by an updated need statement, calling for 799 tons of meat drawn primarily from the most abundant available stocks as advised by the Scientific Committee, and explicit recognition that these requests constituted a 'package' alongside an EU-sponsored

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156 IWC, *Annual Report of the International Whaling Commission 2010* (Cambridge, IWC, 2010) 19.

157 IWC, *Annual Report of the International Whaling Commission 2012* (Cambridge, IWC, 2012) 20–22.

158 *Report of the Infractions Sub-Committee*; Document IWC/65/Rep04 2. It has, however, been convincingly argued that the Danish actions constituted a technical breach of the Convention, although the consequences may be unclear since there is no clear consensus on the meaning of an 'infraction' for the purposes of the ICRW: Chris Wold and Michael D. Kearney, 'The Legal Effect of Greenland's Unilateral Aboriginal Subsistence Whale Hunt' (2015) 30 *American University International Law Review* 561, 607.

159 Letter of 1 July 2013 from Denmark to the IWC; reproduced at [https://iwc.int/document\\_3323](https://iwc.int/document_3323).

Resolution on ASW.<sup>160</sup> This change in policy was necessitated by continued opposition among a vociferous minority of parties to the perceived commercial nature of at least some elements of the Greenlandic quota, an issue that the resultant Resolution sought to prioritise within the *Ad Hoc* ASW Working Group.<sup>161</sup> Despite some initial misgivings that the Resolution was overly focused on Greenlandic activities rather than ASW generally, the spirit of partnership between the EU and Greenland—as well as the assistance of a formidable voting majority—ultimately persuaded a sufficient cohort of parties to endorse this package deal in full.<sup>162</sup>

Conceptually, however, the spectre of commercialization continues to defy a clear consensus on the harvesting of marine mammals by indigenous communities. In a whaling context, the IWC has long recognized that a degree of commerciality is inherent in ASW activities. In 1981, in light of the bowhead whaling controversy, the IWC sought to clarify the ASW regime, observing that commercial considerations played a key role in the continued viability of indigenous hunting, since ‘the contemporary whaling system depends on cash income for purchasing equipment’.<sup>163</sup> Nevertheless, objections to a perceived creeping commercialization of Greenlandic operations have been raised within the IWC since 1985.<sup>164</sup> In 2004 the IWC adopted a more extensive definition of aboriginal subsistence use, accepting that:

The barter, trade or sharing of whale products in their harvested form with relatives of the participants in the harvest, with others in the local community or with persons in locations *other than local community with whom local residents share familial, social cultural or economic ties*. A generalized currency is involved in this barter and trade, but the *predominant portion* of the products from such whales are originally directly consumed or utilised in their harvested form within the local community.<sup>165</sup>

Greenland has contended that the distinction between ASW and commercial whaling is ‘artificial’, since there is no concerted effort to secure a profit from these endeavours and that any resultant income merely serves to underwrite

160 IWC, *Report of the 65th Meeting of the International Whaling Commission* (Cambridge, IWC, 2014) 10.

161 Resolution 2014–1: Resolution on Aboriginal Subsistence Whaling.

162 IWC 2014 (n. 160) 11.

163 IWC 1982 (n. 82) 38.

164 Caulfield (n. 88) 264.

165 IWC, *Annual Report of the International Whaling Commission 2004* (Cambridge, IWC, 2004) 15–17 (emphasis added).

the costs of future whaling operations and the increasingly stringent animal welfare requirements for subsistence hunting.<sup>166</sup> Concerns have nonetheless been expressed that whale meat has been sold in increasing quantities to tourists in Greenland, with some parties suggesting that the ASW quotas are being manipulated to generate enhanced revenue streams within a limited economic environment.<sup>167</sup>

The precise threshold by which commercialization is triggered within indigenous activities remains a controversial and ambiguous issue, not least since many Inuit societies have a complex relationship with hard currency.<sup>168</sup> Notwithstanding long-standing support for Inuit hunting activities, the number of whales taken for ASW purposes has approached commercial levels in recent years,<sup>169</sup> a trend that has also raised alarm in the context of seals. Indeed, in *EC-Seal Products*, the WTO's Appellate Body expressly rejected the assertion by the EU that questions of commercialization became 'irrelevant' once a hunt had been approved under the IC exception, ruling that the subsistence or partial use criteria of the seal provisions 'would appear to call for, if not continuous, at least regular reassessments, at a sufficiently disaggregated level, of whether the requirements of the IC exception are fulfilled'.<sup>170</sup> Similar concerns are apparent in the context of whaling, where the 'predominant portion' test remains largely unexplored. Greenland has suggested that the predominant portion of an ASW catch should be construed as comprising at least half of the volume of meat taken.<sup>171</sup> This would appear at first blush to be a relatively low threshold, albeit one that is heavily complicated by questions over the degree of financial supplementation necessary in any given whaling season to meet the ASW hunting conditions imposed by the IWC. At present, given its stated intention to be 'guided by the precautionary principle and by the advice of the Scientific Committee and also taking into account the work of the IWC's ASW Working Group'<sup>172</sup> the EU continues to endorse a degree of local commercialization in Greenlandic subsistence whaling, which 'provides a balanced solution to a complex issue in a manner which is fully consistent

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166 IWC, *Annual Report of the International Whaling Commission 2009* (Cambridge, IWC, 2009) 23.

167 IWC 2012 (n. 157) 22–24.

168 Caulfield (n. 84) 143–144.

169 Indeed, in 2014 ASW accounted for over 9700 individual whales, compared to some 16,039 for scientific purposes and 23,484 taken under reservations to the commercial moratorium: IWC statistics, reproduced in Wold and Kearney (n. 158) 564.

170 *EC-Seal Products* (n. 45) para. 5.326.

171 IWC 2008 (n. 141) 20.

172 IWC 2012 (n. 157) 20.

with the established EU position on whaling'.<sup>173</sup> Nevertheless, given the previous practice of the EU in the pursuit of its common position, this approach may be subject to modification in the light of further IWC clarification of its rules on commercial uses of ASW quotas.

### 3.2.2 Compliance Monitoring: The EU and CITES

In addition to the governance of ASW under the ICRW, oversight of the trade in cetacean products derived from indigenous hunting activities—and their propensity to engage the regulatory attentions of the EU negotiating bloc—has also been addressed through CITES. Unlike more holistic regimes, CITES maintains a highly specific focus upon the conservation problems posed by the international trade in endangered species. CITES operates by listing protected species in one of three Appendices according to their individual conservation status. Under Article 11(1), Appendix I includes all species threatened with extinction which are or may be threatened by trade. Trade in these species is subject to 'particularly strict regulation in order not to endanger further their survival and must only be authorised in exceptional circumstances'. At present twenty-one species of cetaceans are listed on Appendix I, predominantly the larger species of whales. Appendix II addresses all species which 'although not necessarily threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilisation incompatible with their survival'.<sup>174</sup> Additionally, species may be listed in Appendix II if they do not fulfil this criterion, but nevertheless require protection in order to bring trade in such species under effective control; 'all species' of cetaceans not currently listed in Appendix I have been listed in Appendix II. CITES and the IWC have endured a somewhat fractious relationship concerning whales, however, due predominantly to attempted forum shopping by mutual parties seeking to undermine the moratorium on commercial hunting.<sup>175</sup>

The EU maintains a powerful collective presence within CITES. While initially open to participation solely by states, the Convention had nonetheless recognised that its provisions could have implications for treaties that

173 Answer of 5 January 2015 to Written Question E-008007-14.

174 Article 11(2).

175 See Alexander Gillespie, 'Forum Shopping in International Environmental Law: The IWC, CITES and the Management of Cetaceans' (2002) 33 *Ocean Development and International Law* 17; on the current relationship between CITES and the IWC see Richard Caddell, 'Inter-Treaty Cooperation, Biodiversity Conservation and the Trade in Endangered Species' (2013) 22 *Review of European, Comparative and International Environmental Law* 264, 267–269.

maintain a common customs union or removed customs controls between particular countries.<sup>176</sup> In 1983 the so-called ‘Gabarone amendment’ to CITES permitted the accession of ‘regional economic integration organisations’.<sup>177</sup> The amendment entered into effect in 2013, permitting the EU to become a formal party in July 2015.<sup>178</sup> Prior to this, the EU formulated a collective position to be advanced by its Member States at CITES meetings. The EU still bargains collectively within the CITES institutions and each of the EU’s current complement of Member States also remains party to the Convention in an individual capacity. The formal accession of the EU to CITES will not, however, effect the extent of its bloc vote, which will continue to be commensurate with the number of its constituent Member States.<sup>179</sup>

Despite being initially precluded from acceding to CITES, since 1982 the EU has adopted periodic legislation to give effect to the terms of the Convention.<sup>180</sup> As with CITES itself, the EU provisions apply a list-based regime. However, the CITES Regulation departs from CITES practice by allowing for the listing of some Appendix II species in its Annex A which denotes species subject to the most significant restrictions on trade. This is significant since all species of cetaceans are listed on the Regulation’s Annex A.<sup>181</sup> An exemption is however granted to specimens listed on CITES Appendix II ‘including products and derivatives other than meat products for commercial purposes, taken by the people of Greenland under licence granted by the competent authority concerned’, which are instead listed in Annex B of the Regulation.<sup>182</sup> This listing

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176 Art XIV(3).

177 Art XXI(2) (as amended).

178 Council Decision (EU) 2015/451 of 6 March concerning the accession of the European Union to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) [2015] OJ L 75/1. The EU accordingly participated for the first time as an official party to CITES at its Seventeenth Conference of the Parties (COP) to CITES, convened in September and October 2016.

179 Theoretically the EU could be entitled to claim an additional vote as a CITES party in its own right, but has declared that this will not be exercised. The EU will accordingly cast the bloc vote for matters within its competence, whereas individual Member States will vote, based on the pre-established common position: *Implications of the EU’s Accession to CITES*; Document CoP 17 Inf. 20.

180 The inaugural CITES Regulation was adopted by the EEC in 1982 (n. 103); the current iteration of these provisions is Council Regulation 338/97/EC of 3 March 1997 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L 61/1.

181 For a full discussion of the machinations of the EU CITES Regulation in relation to whaling activities see Davies (n. 110) 46–51.

182 Annex 12, x703.

allows for the importation of small amounts of whale products from Greenland, subject to particular administrative and veterinary requirements.<sup>183</sup>

This exemption has proved to be sporadically contentious, primarily in the specific context of the trade in narwhal products. Since 1979 narwhals have been listed on Appendix II of CITES and are hunted and consumed solely by the Inuit of Greenland and Canada,<sup>184</sup> notwithstanding a lucrative market for trinkets carved from the tusks and teeth of these animals. In 1995, concerns over the conservation status of narwhals led to a Review of Significant Trade (RST) in narwhal products under the auspices of CITES, a process that allows for additional scrutiny of the national protection accorded to Appendix II species that are subject to elevated levels of trade.<sup>185</sup> In 2004, the recommendations arising from the RST were considered to have been complied with by both Greenland and Canada.<sup>186</sup> Nevertheless, the trade in narwhal items has attracted the sustained concern of the EU, which has exercised a degree of influence over subsequent regulatory events. In December 2004 the EU's Scientific Review Group (SRG), the advisory authority charged with reviewing compliance with CITES for the purposes of allowing imports of animal products into the internal market, delivered a mixed verdict on narwhals, forming a negative view of Greenlandic products and a positive view of Canadian imports.<sup>187</sup> At the next meeting of the CITES Animals Committee in 2005, however, the EU bloc sought a new RST,<sup>188</sup> a position that was heavily criticised by Denmark (on behalf of Greenland) 'for having been produced without consultation with the range States and for presenting misleading information'.<sup>189</sup> In 2006, a further RST was averted through the adoption of new legislation in Greenland, albeit with significant loopholes—not least an exemption for the

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183 Commission Regulation (EC) No 206/2009 of 5 March 2009 on the introduction into the Community of personal consignments of products of animal origin and amending Regulation (EC) No 136/2004 [2009] OJ L 77/1.

184 Narwhals are primarily regulated on a bilateral basis through the Canada-Greenland Joint Commission on Beluga and Narwhal established in 1991, although a series of other multi-lateral arrangements are applicable to this species: see further Malgosia Fitzmaurice, 'So Much Law So Little Protection! A Case Study of the Protection of the Narwhal' (2009) 1 *Yearbook of Polar Law* 21.

185 Resolution Conf. 12.8: Review of Significant Trade in Specimens of Appendix-II Species.

186 Fitzmaurice (n. 121) 291.

187 Tanya Shadbolt, Ernest W.T. Cooper and Peter J. Ewins, *Breaking the Ice: International Trade in Narwhals, in the Context of a Changing Arctic* (Toronto, WWF, 2015) 39.

188 *The Need for a New Review of Significant Trade in the Narwhal*; Document AC21 Inf.1 (Rev 1).

189 *Summary Record of the Twenty-first Meeting of the Animals Committee of CITES* (Geneva, CITES, 2005) 11.

export of tusks as household items for citizens relocating overseas, permitting substantial transfers of narwhal products to Denmark among the Greenlandic diaspora.<sup>190</sup> Moreover, in 2009 the SRG amended its opinion of Canadian products, thereby allocating the final decision (and an effective veto) over imports from these producers to the national authorities of the individual Member States.<sup>191</sup> Notwithstanding a minuscule market for narwhal products beyond Greenlandic émigré communities, this position evokes an uncomfortable comparison with the more objectionable aspects of the EU's seal provisions: the import exemptions in the EU CITES Regulation apply only to Greenland, whose products are treated under Annex B of the legislation, yet those derived from the Canadian Inuit continue to fall under the more stringent requirements of Annex A.

### 3.2.3 Splendid Isolation: The EU and NAMMCO

A further forum for the regulation of marine mammals in the High North arises in the somewhat more contentious regional context of NAMMCO. The formation of NAMMCO is commonly perceived as a cautionary tale regarding the uncompromising nature of whaling negotiations in the early 1990s.<sup>192</sup> Nonetheless, while disillusionment with IWC practices provided a significant political spur to the establishment of this organisation, NAMMCO also provides management advice on the sustainable use of pinnipeds and on fisheries interactions within the region. NAMMCO has been operational since 1992, although an official basis for the coordination of common policies within the region was established through a series of intergovernmental conferences convened between 1988 and 1992. These initiatives led to the adoption in 1990 of a Memorandum of Understanding, which created the scope to develop a formal management body to advance this process further.<sup>193</sup> In September 1992, the Agreement on Cooperation in Research, Conservation and Management

<sup>190</sup> See further Fitzmaurice (n. 121) 294.

<sup>191</sup> Shadbolt, Cooper and Ewins (n. 187) 39.

<sup>192</sup> See David D. Caron, 'The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures' (1995) 89 *American Journal of International Law* 154.

<sup>193</sup> On the development and early operation of NAMMCO see Alf Håkan Hoel, 'Regionalization of International Whale Management: The Case of the North Atlantic Marine Mammals Commission' (1993) 46 *Arctic* 116, at 118–21 and Brettiny Hardy, 'A Regional Approach to Whaling: How the North Atlantic Marine Mammal Commission is Shifting the Tides for Whale Management' (2006) 17 *Duke Journal of Comparative and International Law* 169, 179–187.



of Marine Mammals in the North Atlantic<sup>194</sup> was signed between Iceland, Norway, Greenland and the Faroe Islands, thereby formally bringing NAMMCO into effect. NAMMCO has nevertheless been treated with a degree of suspicion by a number of anti-whaling states, concerned at the possible proliferation of regulatory alternatives to the IWC.

In marked contrast to its practices within the IWC and CITES, the EU has exhibited minimal interest in working with NAMMCO. Indeed, while the EU holds official observer status within this body,<sup>195</sup> it has yet to attend a single meeting of the NAMMCO Council. This is perhaps unsurprising given the stated collective intent to derive management advice on whaling issues—including ASW matters, on which NAMMCO would appear well-placed to consult—from the IWC,<sup>196</sup> while the EU has tended to hold regional marine mammal organizations in relatively limited regard, exercising similarly minimal engagement even with fora that are considerably more preservationist in outlook.<sup>197</sup> The most profound divisions between these bodies nevertheless relate to seal hunting, with NAMMCO representing an obvious forum for the airing of grievances against the seal products legislation and for which the NAMMCO Council has directed sharply-worded criticism of the EU's refusal to engage with the wealth of available expertise on sustainable hunting issues in the High North.<sup>198</sup> Indeed, despite submitting a series of expert reports on the hunting and killing of seals to the EU,<sup>199</sup> there is little evidence to suggest that the specific work of NAMMCO in this regard exercised even cursory influence over the trajectory of the EU seal regime, a position reflective of the EU's somewhat haphazard approach to consultations with Inuit interests in the context of the sustainable use of marine mammals.

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194 Reproduced at [www.nammco.no](http://www.nammco.no).

195 In 2016 the NAMMCO Council adopted a set of Rules and Procedures for Observers, under which such status will be suspended for an observer that 'engages in activities which are at odds with the NAMMCO Agreement'. While this appears primarily intended to discourage uncooperative personal behaviour at meetings, it may be mischievously speculated whether the EU's position on seal hunting technically meets this requirement from the perspective of a number of NAMMCO participants.

196 (N. 147) 9.

197 Caddell (n. 150) 247–250; see also Robin Churchill and Daniel Owen, *The EC Common Fisheries Policy* (Oxford, Oxford University Press, 2010) 383–385.

198 *EU Import Ban on Seal Products Contrary to International Principles for Conservation and Sustainable Management*, NAMMCO Statement of 2 September 2010.

199 NAMMCO, *Report of the Seventeenth Meeting of the NAMMCO Council* (Tromsø, NAMMCO, 2008) 20.

#### 4 Concluding Remarks

The position of marine mammals remains one of the more complicated elements of the international regulation of marine living resources. In an era of profound change in the High North, the harvesting and consumption of whales and seals continues to form an integral part of the culture, society and diet of many Arctic indigenous communities. Despite popular support for the preservation of these ancient ways of life, it is equally clear that the killing of charismatic marine mammals provokes significant concerns within Western societies, often resulting in legislative and policy responses that have a propensity to cause inadvertent harm to indigenous interests. Few current issues have illustrated this complicated regulatory dichotomy more explicitly than the purported regulation of marine mammals by the EU, which has exposed significant challenges both in governing the presence of particular products within the internal market, as well as advancing wider policy objectives at an international level.

In this regard, the various provisions on seal hunting have greatly undermined the EU's aspirations and credentials for a significant partnership role within the Arctic. While the EU has acted peremptorily in a number of instances to impose market restrictions upon particular animal products deemed morally objectionable, notably to protect particular species<sup>200</sup> or to promote improved trapping standards, few such provisions have provoked the sustained political and legal backlash precipitated by the EU Seal Regime. The initial EEC seal pup pelt ban severely hampered the global market for seal products and damaged Inuit interests in a manner that raised sharp questions as to whether the Community genuinely understood the unique socio-economic conditions of the Arctic.<sup>201</sup> These concerns have been compounded by the seal products ban, which has proved to be insufficiently nuanced to protect Inuit enterprises and has led to a saga of highly damaging litigation that has reflected poorly upon the EU as a regulatory authority and harmed its wider interests among Arctic governance structures. In this context, the various iterations of the seal legislation can be considered to have clearly failed to meet the EU's stated objectives for the Arctic: traditional livelihoods have suffered greatly as a result of the ban, for which the social and cultural ramifications remain poorly

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200 See, for instance, the comparatively more obscure Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur [2007] OJ L 343/1.

201 Wenzel (n. 16) 129.

understood, while these provisions have contributed little to promote sustainable development, to engage the native population or to enhance multilateral governance in the region.

At an international level, the EU's policies towards the whaling interests of indigenous peoples exhibits tentative promise that it may have a valuable partnership role to play within the Arctic. Indeed the EU has proved to be a key constituency in the promotion of subsistence whaling rights, helping to secure aboriginal quotas within the IWC—but essentially on its own terms, using its powerful bloc vote to veto purported allocations from particular stocks. In this manner, while indigenous interests (especially those of Greenland) have benefitted from accepting the EU's interpretation of aboriginal whaling entitlements, a number of adverse consequences have also been apparent for the IWC itself: Inuit hunters have been forced to adopt unilateral quotas when outvoted, there has been a marked deterioration in the transparency of quota allocations due to the prior elaboration of package deals and the issue of ASW has become increasingly polarized in recent years. Of greater concern from the perspective of Arctic constituents is the steadfast refusal of the EU to engage meaningfully with the notion of sustainable hunting, which remains key to the management ideals of the High North, while there is little evidence to suggest that the significant expertise concerning the sustainable use of marine mammals aggregated within NAMMCO will exert any material influence over the future trajectory of the EU's marine mammal policies. Consequently, there is likely to be limited consideration of sustainable use as a distinct management concept in subsequent approaches by the EU towards marine mammals, which leaves the Community vulnerable to similar regulatory missteps as experienced in the seal context, and to wider criticisms that it still does not fully appreciate the unique governance conditions of the Arctic. Moreover, as with an increasing number of regulatory issues affecting the High North, questions have been raised as to whether the EU has genuinely adopted an Arctic-centric approach, or whether such matters have been advanced on an *ad hoc* basis with little coordination with wider policy objectives for this region.<sup>202</sup> Its treatment of marine mammals to date suggests that the EU has largely maintained a single-issue focus and that broader policies towards such species have yet to be effectively integrated into its strategic objectives for the Arctic.

A series of regulatory challenges will continue to confront the EU in addressing marine mammals—and their consumers—in the Arctic. Chief among these will be repairing the damage inflicted upon Inuit communities

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202 Adam Stepién, 'Internal Contradictions and External Anxieties: One Coherent Arctic Policy for the European Union (2015) 7 *Yearbook of Polar Law* 249, 280–281.

by the seal products ban, not least in Canada where the sustained discriminatory nature of these provisions has had a particularly significant impact, while Greenland remains deeply aggrieved by the effects of this legislation upon traditional livelihoods. This has already significantly undermined the EU's aspirations for observer status within the Arctic Council, which appears to be contingent upon progress towards a more sympathetic treatment of seal products.<sup>203</sup> In connection with this, a deeper conceptual question is raised by the increasingly commercial nature of the hunting of marine mammals, which has been exposed both by the seal litigation and ongoing difficulties in regulating ASW within the IWC. The threshold by which a subsistence hunt will graduate to a commercial activity—and the regulatory consequences thereto—raises challenging questions of the current system, but will increasingly require further consideration. Ultimately, however, an effective treatment of these delicate issues is likely to require a more nuanced appreciation of Arctic conditions, as well as greater restraints on EU unilateralism, than has previously been applied in the specific context of marine mammals.

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203 Indeed the Nuuk Observer Rules of 2011 expressly addressed the issue of seals: see further Piotr Graczyk and Timo Koivurova, 'A New Era in the Arctic Council's External Relations? Broader Consequences of the Nuuk Observer Rules for Arctic Governance?' (2014) 50 *Polar Record* 225.

# Joint Approaches and Best Practices—An Integrated and Coherent EU Arctic Policy in Support of Articles 208 and 214 UNCLOS

*Henning Jessen*

## 1 Introduction: A Principle-Fuelled Integrated Arctic Policy of the European Union

Key principles of international environmental law have gradually been integrated into the European Treaties, above all, into the Treaty on the Functioning of the European Union (TFEU) itself.<sup>1</sup> In order to focus on the Arctic relevance of some EU legal acts, this first section provides a short overview of internationally accepted legal principles of marine environmental law and the applicable EU law, which is generally more progressive in substance as compared to a number of other legal orders.

In a 2016 Joint Communication, the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy reiterated that “the EU is well placed to shape international ocean governance on the basis of its experience in developing sustainable ocean management”.<sup>2</sup> This introductory section shall clarify the kind of “experience in developing sustainable ocean management” the Joint Communication refers to. Generally, just like in any other regulatory field, the EU applies its own unique legal instruments, in particular, secondary legislation imposed on its Members in

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\* Henning Jessen, Associate Professor for Maritime Law & Policy, World Maritime University (WMU), Malmö, Sweden.

\*\* This contribution partly draws from the author’s article “The EU’s Offshore Oil and Gas Directive (2013/30/EU) and Arctic Governance: Does Regulatory Activity of Third Parties Have Any Impact?” (2016) 2 OGEI (Oil, Gas and Energy Law, Special Issue on Emerging Issues in Polar Energy Law and Governance) <[www.ogel.org/article.asp?key=3609](http://www.ogel.org/article.asp?key=3609)> accessed 1 November 2016.

1 Consolidated Version of the Treaty on the Functioning of the European Union (2007) OJ C306/50.

2 Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: International ocean governance: an agenda for the future of our oceans (2016) Brussels, JOIN (2016) 49 final, 4.

accordance with Article 288 TFEU. This legislation takes the form of legally binding Regulations and more flexible Directives to further the EU's primary policy objectives. For example, in 2005, as part of the EU's overall "Integrated Maritime Policy", the Commission proposed the adoption of a Directive to implement a broad thematic strategy—the Marine Strategy Framework<sup>3</sup>—to address marine pollution through a long-term programme of diagnosis and action carried out by competent authorities in the Member States and under European regional seas conventions. The continuously evolving EU Arctic policy is a good example for the inclusion of a global environmental policy dimension in EU instruments as advocated since 2008 by the Marine Strategy Framework Directive, which represents the environmental pillar of the EU's "Integrated Maritime Policy".<sup>4</sup> While the Directive does not address specifically the environmental impacts of maritime transport, Arctic matters or other uses of the sea, it has served as a catalyst for governance mechanisms, which, over time, generate new EU actions having direct implications for any marine-related sector. As such, it promotes and applies several internationally-accepted environmental principles, such as:

- the principle of sustainable development,<sup>5</sup>
- the principle of environmental integration,
- the precautionary principle,<sup>6</sup>

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3 Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy, (2008) OJ L164/19; see generally Till Markus/Sabine Schlacke/Nina Maier, 'Legal Implementation of Integrated Ocean Policies: The EU's Marine Strategy Framework Directive', (2011) 26 *The International Journal of Marine and Coastal Law*, 59–90; Ronán Long, 'The Marine Strategy Framework Directive: A new European approach to the regulation of the marine environment, marine natural resources and marine ecological services', (2011) 29 *Journal of Energy and Natural Resources Law*, 1–44.

4 See Recital (7) of Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC (2013) OJ L 178/66.

5 See generally Ronán Long, 'Principles and Normative Trends in EU Ocean Governance', in Clive Schofield/Seokwoo Lee/Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction*, Boston/Leiden, Brill Academic Publishers, 2014, 699–726, at 716.

6 The precautionary principle requires States to take measures to protect the environment where there is evidence of serious environmental damage even if scientific certainty is lacking, see Atapattu, *Emerging Principles of International Environmental Law*, Brill Nijhoff 2007, 204. Historically, the principle is set out in Principle 15 of the 1992 Rio Declaration on Environment and Development, adopted at the UN Conference on Environment and Development, 1992, UN Doc. A/CONF.151/26, (1992) 31 ILM 874 <<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>> accessed 1 November 2016.

- the polluter pays principle,<sup>7</sup> and
- the ecosystem approach.<sup>8</sup>

In addition, Article 191(2) TFEU provides that the EU's policy on the environment shall contribute to the pursuit of a number of objectives, including the precautionary principle and the polluter pays principle.<sup>9</sup> However, Article 191(2) TFEU refers explicitly only to "the regions of the Union". In particular, the first sentence of Article 191(4) TFEU postulates that, "within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations". The EU is cautious not to give an outside impression of being a self-appointed global environmental regulator and the direct effect of EU legal measures is, consequently, generally confined to the EU itself. Nevertheless, explicit intra-EU endorsements of principles of international environmental law—as also confirmed on various occasions by the Court of Justice of the European Union<sup>10</sup>—are of fundamental legal importance. They are especially relevant for the intra-EU persuasiveness of the European Commission's actions in performing its multiple functions of being the guardian of the EU Treaties, the EU's primary executive organ and the most active policy-proposing and agenda-setting EU institution.

Given the transboundary nature of the marine environment and given the original roots of the EU's emerging Arctic policy, strict territorial and "aquitorial"<sup>11</sup> confinement is not particularly helpful in implementation of efficient international environmental rules. This also explains why the EU

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7 See, for example, Ling Zhu, 'Is the Polluter Paying for Vessel-Source Pollution?' (2015) *Journal of Business Law*, 348.

8 All applicable principles have been discussed in the context of the EU's Integrated Maritime Policy by Long, n. 4 above 699–726.

9 The provision states that: "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

10 See, for example, Case 240/83 *Procureur de la Republique v ADBHU* (1985) ECR 531; Case C-379/92 *Re Peralta* (1994) ECR I-3453; Case T-13/99 *Pfizer v European Commission* (2002) ECR II-3305.

11 The term *aquitorial* relates to the territorial sea as defined in Article 3 (et seq.) of UNCLOS but not, however, to the Exclusive Economic Zone (EEZ) or the Continental Shelf regime as also regulated by UNCLOS.

evaluated its own Arctic carbon footprint in 2010.<sup>12</sup> In the wider context, including climate change and the regulation of greenhouse gas emissions (GHG), it has even been argued that if the EU could show that it enforces stricter environmental rules to protect (inter alia) the Arctic environment as compared to the Arctic littoral States, this could also increase the EU's legitimacy and its political influence on Arctic environmental questions.<sup>13</sup> In any case, such steps confirm the general policy objectives of Article 11 TFEU, which broadly states that, "environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."

In sum, since 2005, the EU has followed a long-term, principle-fuelled and goal-based marine environmental policy. In seeking to achieve "good environmental status" of marine waters by 2020, the EU is fully aware of the fact that it cannot create legal obligations for third (non-EU) parties. However, both the sustainability approach and the cooperative elements of the EU's marine environmental policy have a global dimension, extending to areas beyond national jurisdiction and thus far beyond the formal territorial and "aquitorial" boundaries of the EU itself to include areas such as the Arctic region.<sup>14</sup>

## 2 Arctic Governance and Intensifying Political Efforts of the EU

From a historic viewpoint, it has been argued that the EU's initial interest in developing its own Arctic Policy has been largely motivated by geopolitical considerations, in particular by Russia planting its flag on the sea bottom beneath the North Pole on 1 August 2007.<sup>15</sup> It is true that this unilateral symbolic act (also largely geared towards the global media and allegedly privately sponsored) coincides with the EU beginnings to evaluate its own political stance in the Arctic more systematically since 2007–2008. However, it also

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12 'EU Arctic footprint and policy assessment: Final report' (2010, Berlin, Ecologic Institute); see also Kristine Offerdal, 'The EU in the Arctic' (2011) *International Journal* 861, 872.

13 See Offerdal, n. 12 above, at 872.

14 Although associated with the EU Member State Denmark, it must be stressed that (since 1 February 1985) Greenland is not part of the EU (then EEC) territory anymore, following the results of a referendum of 1982. Rather it is included in the list of overseas countries and territories set out in Annex II to the TFEU. In accordance with Article 198 TFEU, the purpose of the association of the overseas countries and territories with the EU is to promote the economic and social development of the overseas countries and territories and to establish close economic relations between them and the EU as a whole.

15 See Offerdal, n. 12, 863.



overlaps with the EU highlighting its own responsibilities in global environmental matters and specifying its own Integrated Maritime Policy in more detail, for example, by passing the Marine Strategy Framework Directive, as discussed above. In fact, the reasons for the EU Commission to deploy more manpower on Arctic issues since 2007/2008 are multi-layered and composed of a number of different political motivations.<sup>16</sup> At the forefront of those EU motives are issues commonly associated with the buzzword sustainable development, in particular relating to global climate change, as well as other environmental concerns.

The emerging EU Arctic policy itself is made up of a continuously evolving network of “soft law” instruments:<sup>17</sup> The Foreign Affairs Council passed Council conclusions in 2009,<sup>18</sup> in 2014<sup>19</sup> and in 2016.<sup>20</sup> Generally, EU Council conclusions are non-binding political instruments. However, a series of official Council conclusions will often pave the way for future legally-binding intra-EU instruments. If the Commission can refer to a series of “bottom up” Council conclusions the desire to enter into a new “hardened” phase of EU policy integration gets more and more persuasive. Remarkably, the title of the Arctic-related conclusions developed from merely addressing an incoherent variety of “Arctic Issues” in 2009 to a more institutionalized “Developing a European Union Policy towards the Arctic Region” in 2014. This may reflect a gradual formulation of a policy on Arctic issues to address EU interests and responsibilities. In particular, paragraph 6 of the 2014 Council conclusions recognised “the efforts of the Arctic states to develop joint approaches and best practice to address the potential environmental impact and safety concerns related to increasing activities in the region” calling for a strengthened collaboration of the EU and its agencies with Arctic Council bodies in addressing “common Arctic

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16 See Offerdal, n. 12, 861–877, who does not deny the EU’s multi-purpose approach to the Arctic and specifically stresses the changing role of Norway in first motivating the EU in a proactive way (to discover the Arctic at all as a dormant policy area) while later having to slow down the Commission and taking a more defensive approach.

17 All EU instruments discussed below are available online at <[http://ec.europa.eu/maritimeaffairs/policy/sea\\_basins/arctic\\_ocean/index\\_en.htm](http://ec.europa.eu/maritimeaffairs/policy/sea_basins/arctic_ocean/index_en.htm)> accessed 1 November 2016.

18 Council of the European Union, Council conclusions on Arctic issues (2009) 2985th Foreign Affairs Council, Brussels. On the substance of these Council conclusions see Offerdal, n. 12, 871.

19 Council of the European Union, Council conclusions on developing a European Union Policy towards the Arctic Region (2014) Foreign Affairs Council, Brussels.

20 Council of the European Union, Council conclusions on the Arctic (2016) (Foreign Affairs Council meeting, Brussels).

challenges". However, in 2016, the coordinated position of the Commission and the EU Member States was reduced in ambition and substance. These conclusions merely reiterated issues raised and addressed by the preceding Council conclusions.

2012 and 2016 witnessed the publications of two more, ambitious, Joint Communications by the European Commission and the High Representative of the EU for Foreign Affairs and Security.<sup>21</sup> In contrast to EU Council conclusions, a Joint Communication (and also a Communication issued solely by the Commission) does not reflect a coordinated approach between the EU Commission, other participating EU institutions and the EU Member States. Rather, a Communication represents a vision of its originator(s) setting out the details for the most important cornerstones of a certain EU policy area. It has been rightly pointed out that sometimes such documents are mistaken for representing official positions of the EU as a whole.<sup>22</sup> However, this is not the case and this is also a reason why Communications can be far more extensive and detailed in nature as compared to Council conclusions.

The 2012 Arctic Joint Communication was built on a broader 2008 joint paper (from the same originators) on climate change and international security<sup>23</sup> and on an earlier 2008 Commission Communication on "the EU and the Arctic Region".<sup>24</sup> The 2012 Joint Communication included a total of 28 action points adopting the strapline of "knowledge, responsibility, engagement".<sup>25</sup> In particular, the 2012 Arctic Joint Communication stressed the considerable financial engagement and contribution of the EU to Arctic research and the EU's support for a sustainable use and management of Arctic resources. The document avoided addressing politically contentious issues (such as the earlier idea of creating a new Arctic Treaty System). The 2016 Joint Communication builds on its 2012 predecessor, stressing that the EU's primary objective is an "integrated" policy for the Arctic, which also

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21 Joint Communication to the European Parliament and the Council: Developing a European Union Policy towards the Arctic Region: progress since 2008 and next steps (2012) Brussels, JOIN (2012) 19 final; Joint Communication to the European Parliament and the Council: An integrated European Union policy for the Arctic (2016) Brussels, JOIN (2016) 21 final.

22 See Offerdal, n. 12, 862.

23 Climate change and international security, Paper from the High Representative and the European Commission to the European Council (2008) S113/08.

24 Communication from the Commission to the European Parliament and the Council: The European Union and the Arctic Region (2008) Brussels, COM (2008) 763 final.

25 See Jason Chuah, "The Development of an EU Arctic Policy? Perhaps Not ..." (2012) 18 *Journal of International Maritime Law*, 251–252.

ensures effective synergies between the various EU funding instruments in the Arctic region. That is also why “knowledge, responsibility, engagement” are still the three cornerstones of an integrated EU Arctic Policy which will highlight, in the future, three key further policy objectives of the EU to

- protect and preserve the Arctic environment in cooperation with the people who live there, and in particular relating to climate change,
- promote sustainable use of resources in and around the Arctic, and
- foster international cooperation on Arctic issues, emphasizing enhanced scientific cooperation.<sup>26</sup>

Finally, the European Parliament passed relevant (non-binding) Resolutions, in particular, an Arctic-specific Resolution of 2014<sup>27</sup> which is based on a broader Resolution of 2011 on a sustainable EU policy for the High North.<sup>28</sup> In sum, the continuously intensified effort of the EU to establish a fully-fledged Arctic strategy has not yet led to any EU hard law (in the form of Directives or even directly binding Regulations). Rather, the evolving EU policy highlights, more and more, the necessity of integrating different policy aspects, such as scientific research, climate mitigation and adaptation strategies or sustainable innovation and investment, in a more coherent way. This political process is characterized by a visible shift from an initial EU approach, which was more focussed on geopolitics, to a more innovation-centred and research-related attitude. For example, the EU has devoted financial resources to create and develop Arctic observatory networks, and to facilitate access to research facilities in the Arctic to scientists from Europe and beyond. This is done by funding projects such as INTERACT, a multi-disciplinary network of 58 land-based Arctic and northern research stations, building capacity throughout the Arctic for environmental monitoring, research, education and outreach.<sup>29</sup> The EU is also initiating a new five-year project (2016–2021) coordinated by Norway to develop an Integrated Arctic Observing System (INTAROS)<sup>30</sup> and two new

26 Joint Communication to the European Parliament and the Council: An integrated European Union policy for the Arctic, Brussels (2016), JOIN (2016) 21 final, 4.

27 European Parliament Resolution of 12 March 2014 on the EU strategy for the Arctic (2013/2595 (RSP)).

28 European Parliament resolution of 20 January 2011 on a sustainable EU policy for the High North (2009/2214 (INI)).

29 <<http://www.eu-interact.org/>> accessed 1 November 2016.

30 The INTAROS project will involve scientists in 14 European countries as well as in a number of countries elsewhere in the world and has a €15.5 million budget.

projects to understand the impact of the changing Arctic on the weather and climate of the Northern Hemisphere. The projects APPLICATE (Advanced Prediction in Polar Regions and Beyond: Modelling, Observing System Design and Linkages Associated with a Changing Arctic Climate) (2016–2020, €8 million budget) and Blue-Action (2016–2021, €7.5 million budget) will involve scientists in 13 European countries as well as in a number of countries elsewhere in the world.<sup>31</sup>

All in all, the evolving integrated EU Arctic policy addresses the whole spectrum of practical measures to promote the sustainable use of Arctic resources. A reply given by the High Representative of the EU for Foreign Affairs and Security on behalf of the Commission to a question of a Member of the European Parliament can serve as a “diplomatic showcase” for the state of EU affairs in Arctic matters. In 2014, the parliamentarian simply asked (inter alia): “Does the EU have specific interests in the Arctic region?”<sup>32</sup> The written reply of the High Representative explicitly referred to the 2012 Arctic Joint Communication and to the other EU soft law instruments. It stressed that the EU would be stepping up its engagement with its partners, under the Joint Communication’s notion of “knowledge, responsibility, engagement”, to jointly meet the challenge of safeguarding the environment while ensuring the sustainable and peaceful development of the Arctic region, in particular through investment in knowledge, promoting responsible approaches to arising commercial opportunities and constructive engagement with Arctic partners.

The question then becomes: Where should the EU pursue these policies? With which partners should it cooperate? The obvious location would appear to be with the Arctic Council. From a global perspective, the Arctic Council is the key international policy coordination forum in Arctic matters.<sup>33</sup> Recent discussions about its continuous enlargement in relation to its governmental,

31 <<https://www.whitehouse.gov/the-press-office/2016/09/28/fact-sheet-united-states-hosts-first-ever-arctic-science-ministerial>> accessed 1 November 2016.

32 See: Answer given by High Representative/Vice-President Ashton on behalf of the Commission, 24 June 2014 “Question for written answer E-002847/14 to the Commission”, S.P.F. Silvestris (PPE), “Subject: The race for the Arctic: European prospects” (11 March 2014), OJ 2014/C 326/01 (written questions by Members of the European Parliament and their answers given by a European Union institution).

33 See generally on the Arctic Council, for example, Betsy Baker, ‘Offshore Oil and Gas Development in the Arctic: What the Arctic Council and International Law Can—and Cannot—Do’, (2013) ASIL Proceedings, 275–279; Lilly Weidemann, *International Governance of the Arctic Marine Environment* (Springer International Publishing, 2014), 49; Svein Vigeland Rottem, ‘A Note on the Arctic Council Agreements’, (2015) 46 Ocean Development & International Law, 50–59; Olav Schram Stokke, ‘International institutions

intergovernmental and non-governmental “non-Arctic” recurring observers demonstrate the political willingness of various third-party stakeholders to participate more actively in emerging Arctic governance.<sup>34</sup> Quite naturally, this political process of continuous “procedural enlargement” includes the EU, which has—on various occasions—already been an *ad hoc* observer to Arctic Council meetings. Although it is not yet among the list of accepted recurring (“non *ad hoc*”) observers to the Arctic Council—in contrast to more than 30 other stakeholders—this is likely to be only a temporary, diplomatic side note.<sup>35</sup> Despite this, it appears prudent for the EU to look for alternative routes to influence the development of policies relating to the Arctic. In the following sections, the EU’s regulation of Arctic offshore operations is discussed as an example of how its regulation can—at least potentially—generate both internal and external policy ramifications in a particular regulatory area with or without cooperation with the Arctic Council.

### 3 A Regulatory Example: The EU’s Offshore Directive and its “Arctic Relevance”

By 2011, the European Commission had warned that the likelihood of a major offshore accident in European waters remained “unacceptably high” referring to 14 past major accidents—globally—in offshore oil and gas operations since the 1980s (for example, well blow-outs and total loss of production platforms).<sup>36</sup> In response to the “wake up call” of the 2010 “Deepwater Horizon” disaster<sup>37</sup> and—less prominently, also as a reaction to the 2009 Montara oil

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and Arctic governance’, in Olav Schram Stokke, Geir Hønneland (eds), *International Cooperation and Arctic Governance* (Routledge, 2007), 164–184.

34 As of 2016, there were twelve non-Arctic States, nine Intergovernmental and Inter-Parliamentary Organizations and eleven Non-governmental organizations (NGOs) with recurring observer status in the Arctic Council. It can be expected that this list is will be extended in the years to come.

35 The Arctic Council received the application of the EU for observer status affirmatively, but deferred a final decision on implementation until the Council Ministers agree by consensus, with the understanding that the EU may observe Council proceedings until such time as the Council acts on the application, see “Roadmaps for international cooperation”, Commission Staff Working Document (2014) Brussels, SWD (2014) 276 final, at 15.

36 See European Commission Press Release (2011) IP/11/1260, 1.

37 See generally: Melissa K. Merry, *Framing Environmental Disaster—Environmental Advocacy and the Deepwater Horizon Oil Spill*, (Routledge, 2014), 77; Sergei Vinogradov,

spill<sup>38</sup>—the Commission prepared legislative action in this policy area. One of the reasons for this initiative was also the fact that—since “Deepwater Horizon”—the tolerance of the general public for environmental damage had reached an all-time low.<sup>39</sup> The intra-EU conciliation efforts finally resulted in Directive 2013/30/EU.

Directive 2013/30/EU on safety of offshore oil and gas operations, entered into force on 18 July 2013 and rests on the broad foundation of Article 191 TFEU.<sup>40</sup> It is explicitly based on the EU’s long-term sustainability objectives, as stressed by the Marine Strategy Framework Directive.<sup>41</sup> In particular, it aims to address “the cumulative impacts from all activities on the marine environment”, and seeks to establish “the linking of particular concerns from each economic sector with the general aim of ensuring a comprehensive understanding of the oceans, seas and coastal areas, with the objective of developing a coherent approach to the seas taking into account all economic, environmental and social aspects (...)”.<sup>42</sup>

The Directive is a complex legal act of 44 Articles and nine Annexes. Highlighting first some of the general administrative requirements, the act mandates the EU Member States to introduce or update legal rules on different levels such as:

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- ‘The Impact of the Deepwater Horizon: The Evolving International Legal Regime for Offshore Accidental Pollution Prevention, Preparedness, and Response’ (2013) 44 *Ocean Development & International Law*, 335–362; Greg Gordon, ‘The Deepwater Horizon Disaster: the Regulatory Response in the United Kingdom and Europe’, in Richard Caddell/Rhidian Thomas (eds), *Shipping, Law and the Marine Environment in the 21st Century: Emerging Challenges for the Law of the Sea—Legal Implications and Liabilities* (Lawtext Publishing Ltd., 2013), 181–210.
- 38 See Stephen Tromans, ‘Pollution from Offshore Rigs and Installations’ in Bariş Soyer and Andrew Tettenborn (eds), *Offshore Contracts and Liabilities* (Informa Law, 2014), 253, 257.
- 39 See Interview with Eero Ailio, Deputy Head of Unit Retail Markets, Coal and Oil at the European Commission: <[http://www.dnv.com/industry/oil\\_gas/publications/updates/Oil\\_and\\_Gas\\_Update/2013/02\\_2013/Preventing\\_major\\_offshore\\_accidents\\_in\\_Europe.asp](http://www.dnv.com/industry/oil_gas/publications/updates/Oil_and_Gas_Update/2013/02_2013/Preventing_major_offshore_accidents_in_Europe.asp)> accessed 1 November 2016.
- 40 See Recital (1) of Directive 2013/30/EU, n. 4.
- 41 See Recital (6) of Directive 2013/30/EU, n. 4, stating that “(...) By reducing the risk of pollution of offshore waters, this Directive should therefore contribute to ensuring the protection of the marine environment and in particular to achieving or maintaining good environmental status by 2020 at the latest, an objective set out (by the Marine Strategy Framework Directive)”.
- 42 See Recital (7) of Directive 2013/30/EU, n. 4.

- independence and objectivity of the competent authority within each EU Member State ensuring it has adequate human and financial resources;
- efficient and early public participation in decisions regarding potential offshore oil and gas exploration operations on the environment;
- participation of the employees in matters affecting safety and human health at work;<sup>43</sup>
- warranties and continued verifications of comprehensive concepts on environmental management and of preventing major accidents by operators/owners;<sup>44</sup>
- updated documentary obligations of the owners/operators to be verified by the competent authority;
- the formulation and continuous improvement of norms and strategies to prevent major accidents, in particular, analysis of causes of accidents;
- the introduction of coordinated internal and external emergency response plans and transboundary cooperation;
- international exchange of information and public transparency.

According to Recital (17) of the Directive, “within the (EU), there are already examples of good standards in national regulatory practices relating to offshore oil and gas operations. However, these are inconsistently applied throughout the (EU) and no Member State has yet incorporated all of the best regulatory practices in its legislation for preventing major accidents or limiting the consequences for human life and health, and for the environment.” Consequently, the Directive seeks to introduce and to serve as a catalyst for implementing those best regulatory practices, necessary to deliver effective regulation, which secures the highest safety standards and protects the environment. Thus, the Directive supports the view that internationally-accepted standards are needed to help ensure safe, environmentally responsible, and effective oil and gas operations since these help establish performance requirements and to mainstream best practices.<sup>45</sup>

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43 See Gordon, n. 37 above, at 207.

44 The term “operator” is legally defined in Article 2(5) of the Directive as “the entity appointed by the licensee or licensing authority to conduct offshore oil and gas operations, including planning and executing a well operation or managing and controlling the functions of a production installation”. The term “owner” is legally defined in Article 2(27) of the Directive as meaning “an entity legally entitled to control the operation of a non-production installation.”

45 See Stephen Green, Paul Steenhof and Brian Walsh, ‘Development of Operational Standards for Arctic Oil and Gas Operations’ (2014) *Oceans—St. John’s*, 1, 3 (DOI: 10.1109/OCEANS.2014.7003107).

Moreover, the Directive has also introduced a legal obligation of regulatory cooperation and it includes some provisions on offshore oil and gas operations *outside* of the EU. This is particularly important in the context of this paper because the Directive also has some “Arctic Relevance”. The act is *inter alia* intended to serve as a future “diplomatic tool” for the EU to further promote the highest standards of offshore safety globally, sharing best practices and improving standards in cooperation with third countries, with a particular emphasis on sensitive sea areas, such as the Arctic. In this context, Recital (52) and Article 33(3) of the Directive addresses matters of possible significance for Arctic governance.

On the policy level, Recital (52) of the Directive classifies the Arctic waters as “a neighbouring marine environment of particular importance for the EU” which plays an important role in mitigating climate change. As a result, the serious environmental concerns relating to the Arctic waters would require “special attention to ensure the environmental protection of the Arctic in relation to any offshore oil and gas operation, including exploration, taking into account the risk of major accidents and the need for effective response”. After that, Recital (52) specifically addresses Denmark, Finland and Sweden as concomitant EU/Arctic Council Member States, encouraging them in particular “to actively promote the highest standards with regard to environmental safety in this vulnerable and unique ecosystem, such as through the creation of international instruments on prevention, preparedness and response to Arctic marine oil pollution, and through building, *inter alia*, on the work of the Task Force established by the Arctic Council and the existing Arctic Council Offshore Oil and Gas Guidelines.”<sup>46</sup>

On the material level of legal obligations, Article 33 of the Directive introduces three sub-provisions on a “coordinated approach towards the safety of offshore oil and gas operations at the international level”. The provision specifically authorizes the European Commission

1. to promote cooperation with third countries that undertake offshore oil and gas operations in the same marine regions as Member States,
2. to facilitate the exchange of information between Member States with offshore oil and gas operations and adjacent third countries with similar operations in order to promote preventive measures and regional emergency response plans, and

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46 The 2009 guidelines are available online <<http://www.pame.is/index.php/projects/offshore-oil-and-gas>> accessed 1 November 2016.



3. to promote high safety standards for offshore oil and gas operations at the international level in relevant global and regional fora, including those relating to Arctic waters.

Although, only Article 33(1) of the Directive includes explicit references to internal “close cooperation” of the Commission with the EU Members “without prejudice to relevant international agreements”, it is clear that intensified intra-EU cooperation and observance of the relevant international agreements by the European Commission is anticipated throughout the Directive. For example, EU Directive 2013/30/EU refers eleven times to “best practices and standards”. Thus, the act acknowledges that the safety of offshore oil and gas operations is governed by a set of rules which are often drafted and substantiated by private business actors and which regularly follow a performance-based approach rather than being based on more inflexible (governmentally imposed) prescriptive requirements.<sup>47</sup> A good example of relevant standards is found in the work of the International Standardization Organization (ISO). One of its specialized committees, Committee ISO/TC 67 on Materials, Equipment and Offshore Structures for Petroleum, Petrochemical and Natural Gas Industries, has already developed close to 200 globally applicable business standards for the offshore oil and gas industry. In 2012, a new Sub-Committee on Arctic Operations (ISO TC 67/SC8) was formed. It followed up with “ISO 19906:2010” which had successfully established Arctic design standards for material, equipment, and offshore structures. ISO TC 67/SC8 has established seven further expert working groups on the technical working level to address questions going beyond the design of offshore structures.<sup>48</sup> The aim of the ISO TC 67/SC8 is nothing less than the “standardization of operations associated with exploration, production and processing of hydrocarbons in onshore and offshore Arctic regions, and other locations characterized by low ambient temperatures and the presence of ice, snow, and/or permafrost”. As a result, completely new standards for offshore oil and gas operations in cold climate

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47 This topic is also discussed by Myron H. Nordquist and Aimee Fausser, ‘Offshore Drilling in the Outer Continental Shelf: International Best Practices and Safety Standards in the Wake of the Deepwater Horizon Explosion and Oil Spill’, in Michael W. Lodge and Myron H. Nordquist (eds), *Peaceful Order in the World's Oceans* (Brill Academic Publishers, 2014), 115–145.

48 Green, Steenhof & Walsh, n. 45 above.

regions are being developed, thus potentially closing a gap in the international standards landscape.<sup>49</sup>

Nevertheless, a remaining weakness is that there is insufficient coordination of existing best practices and standards across institutions. This results in a patchwork of rules. The Arctic Council's guidelines, for example, are based on the same environmental principles and concepts and could possibly be integrated with the works of the ISO,<sup>50</sup> but this is yet to happen. For example, the approach of the Protection of the Arctic Marine Environment Working Group (PAME)<sup>51</sup> aims to improve the safety culture in the oil and gas industry where a huge gap between theory and practice still exists.<sup>52</sup> The PAME working group on Arctic Oil and Gas Safety Management meets twice a year to assess the progress made and to develop its work plans. Its 2009 Arctic Offshore Oil and Gas Guidelines stressed in particular that: "Good and transparent governance, comprehensive but responsive regulatory regimes, and the use of international standards and practices coupled with evolving advances in technology and best practices have lessened the effects of oil and gas activities over time, including those in the offshore. But risks may arise as conditions change or new areas are explored and developed and evidence also shows that accidents will happen and best practices will not always be followed. Governments should continue to ensure that best practices, including oil spill response mechanisms, are in place before activities begin."<sup>53</sup>

Moreover, the Working Group's 2014 Report on "Systems Safety Management and Safety Culture" included a whole section on regulatory regimes and standards, stressing, in particular, Arctic standards and best practices.<sup>54</sup> This report has also identified nine key Arctic safety elements and applies those safety elements in relation to the regulatory requirements for Norway, Canada,

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49 See <[http://www.iso.org/iso/home/store/catalogue\\_tc/catalogue\\_tc\\_browse.htm?commid=652790](http://www.iso.org/iso/home/store/catalogue_tc/catalogue_tc_browse.htm?commid=652790)> accessed 1 November 2016.

50 On the application of general environmental principles by the Arctic Council see Baker, n. 33 above, at 276.

51 See <<http://www.pame.is/>> accessed 1 November 2016.

52 *Lloyd's List* of 29 September 2015, 'Safety issue under-reporting 'endemic', offshore report finds'.

53 Available online at <<http://www.pame.is/index.php/projects/offshore-oil-and-gas>> accessed 1 November 2016, at p. 8.

54 At 11–14, available online at <<http://www.pame.is/index.php/projects/offshore-oil-and-gas/systems-safety-management-and-safety-culture>> accessed 1 November 2016.

Greenland and the United States.<sup>55</sup> Notably, Russia is missing in this comparative analysis as conducted by the Arctic Council working group. Thus, the regulatory picture is still not complete. However, in contrast to the Arctic Council working group, Russia is actively present at the ISO and has even taken on a leading role in the follow-up to the “Barents 2020” project which was initially (from 2007) a bilateral Russian-Norwegian project with the aim of assessing the standards needed for safeguarding people, environment and asset values in the Barents Sea.<sup>56</sup>

There is, therefore, potential for more institutionalized ways of cooperation to agree on international standards to be developed and for better coordination of those standards. There are examples of how such cooperation and coordination may work. For example, the European Committee for Standardization (CEN) has cooperated generally with the ISO under the framework of the Vienna Agreement since 1991.<sup>57</sup> The Vienna Agreement provides a framework for continuous technical cooperation between CEN and ISO, including regular exchanges of information, mutual representation at meetings, and a parallel adoption of standards at European and international levels. The existing cooperation between CEN and ISO has yet to be translated to the Arctic context in the future. In sum, there is scope and potential to bring some of these regulations together in a more coherent way.

In any case, the finalization of the work of ISO TC 67/SC8 will contribute to ensuring safer and more effective Arctic oil and gas operations while also ensuring the protection of the environment and the people working and living in the region. Probably, the biggest advantage of successfully drafting ISO standards for Arctic offshore oil and gas operations is the fact that it would be possible to reference those standards in future regulations or guidelines by Arctic Council Members. Other national States and also the CEN (under the framework of the 1991 Vienna Convention) as well as EU secondary legislation could follow and a good start has been achieved by Directive 2013/30/EU.<sup>58</sup> The EU could therefore continue with this route to influence offshore installations

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55 *Ibid.*, Appendix A—Table A1 (Summary Table of Selected Safety Management Systems Regulatory Requirements for Norway, Canada, Greenland and the United States).

56 Barents 2020 Final Report 2009, Assessment of international standards for safe exploration, production and transportation of oil and gas in the Barents Sea Harmonisation of Health, Safety, and Environmental Protection Standards for the Barents Sea, <[http://www.dnvusa.com/Binaries/Barents\\_2020\\_report\\_%20phase\\_3\\_tcm153-519577.pdf](http://www.dnvusa.com/Binaries/Barents_2020_report_%20phase_3_tcm153-519577.pdf)> accessed 1 November 2016.

57 The text of the Vienna Agreement is available at <<http://www.cencenelec.eu/intcoop/StandardizationOrg/Pages/default.aspx>> accessed 1 November 2016.

58 Green, Steenhof and Walsh, n. 45 above, at 6.

activities in the Arctic. Indeed this route—involving indirect cooperation with the Arctic Council could prove more beneficial than attempting direct.

Alternative routes include influencing actions by EU national companies in the Arctic and influencing the development of legislation in other States. The first of these is provided for in the EU's Offshore Directive discussed above. The directive has established a stringent and complex safety regime to bring the risk of EU-related offshore accidents down to an absolute minimum. It sets out clear—but nevertheless lengthy—rules covering the whole life-cycle of all exploration and production operations from initial design to the final abandonment or decommissioning of platforms and rigs. The EU recognizes that “it may not be possible to enforce application of the corporate major accident prevention policy outside of the EU” (see Recital (38) of the Offshore Directive). However, as a result of Article 19(8) of the Directive, the EU Members will nevertheless ensure that operators and owners also have to include their offshore oil and gas operations *outside of EU marine waters* in their corporate major accident prevention policy documents. This is a commendable step, as “backing out” for purely geographic reasons will not be tolerated by the European regulators at the national level. At some point of time, this provision might even apply to Arctic offshore operations of EU oil majors such as the Italian Eni SpA which began pumping in late 2015 at the Goliat oil field, an offshore oil field in the Norwegian sector of the Barents Sea.

The second can be seen in a recent study focussing on some identified weaknesses of the Brazilian offshore oil and gas safety regime specifically took the UK, Norway and the United States as possible legal role models for a future reform of the applicable domestic Brazilian rules.<sup>59</sup> Remarkably, in 2015, the United States published proposed rules on exploratory drilling on the US Arctic Outer Continental Shelf, which also added to an emerging patchwork of best practices of national regulators in this sensitive area.<sup>60</sup> Just like the applicable European regime(s) the US legislative proposal implemented a mixture of performance-based and prescriptive safety standards. Of course, the draft

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59 See Pietro A.S. Mendes, Jeremy Hall, Stelvia Matos and Bruno Silvestre, ‘Reforming Brazil’s Offshore Oil and Gas Safety Regulatory Framework: Lessons from Norway, the United Kingdom and the United States’ (2014) 74 *Energy Policy*, 443–453; see also a description of a recent fatal offshore oil and gas accident in Brazilian waters: “Explosion Kills At Least 3 at Petrobras Oil Platform”, <<http://www.maritime-executive.com/article/explosion-kills-at-least-3-at-petrobras-oil-platform>> accessed 1 November 2016.

60 See: US Department of the Interior, Bureau of Safety and Environmental Enforcement, 30 CFR Parts 250 and 254, Bureau of Ocean Energy Management, 30 CFR Part 550, (2015) ‘Oil and Gas and Sulphur Operations on the Outer Continental Shelf—Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf; Proposed Rule’, Federal Register, vol. 80, No. 36, Part III.

law made no explicit references to the law of foreign nations. Nevertheless, it could be tentatively inferred from recent literature that other national regimes had not been completely disregarded in the informal consultative process.<sup>61</sup> Additionally, the proposed rules addressed specifically some “multilateralized” guidelines of the Arctic Council on Outer Continental Shelf oil and gas operations.<sup>62</sup>

#### 4 Final Thoughts and Conclusions

The combined and coordinated rule standardization driven by multiple and largely different stakeholders including, inter alia,

- the eight Arctic Council Members,
- the (currently) 32 recurring observers of the Arctic Council,
- the EU as a unique legal entity,
- the International Standardization Organisation (ISO), possibly in cooperation with the European Committee for Standardization (CEN)
- certain national regulators combined, such as the EUOAG,<sup>63</sup> the NSOAF<sup>64</sup> or the IRF<sup>65</sup> and,
- industry associations, such as the International Oil and Gas Producers Association (OGP)<sup>66</sup>

should lead to a “race to the top” of international best practices and safety standards. This has already occurred, for example, as a result of implementing

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61 See, for example, Betsy Baker and Roman Sidortsov, ‘The Legal and Regulatory Regime for Offshore Hydrocarbon Resources in the U.S. Arctic’ (2014) <[http://www.americanbar.org/groups/environment\\_energy\\_resources/resources/energy\\_law\\_us\\_russia.html](http://www.americanbar.org/groups/environment_energy_resources/resources/energy_law_us_russia.html)> accessed 1 November 2016, see especially the concluding sentence of the paper: “Taking a critical and open look at how other Arctic countries address similar issues can help the United States improve its own laws and regulations and to take a leadership role in setting region-appropriate standards for operations in the Arctic offshore.”

62 For example, the 2009 Arctic Offshore Oil and Gas Guidelines of the Arctic Council and the 2014 Arctic Council Offshore Oil and Gas Guidelines on Systems Safety Management and Safety Culture.

63 The EUOAG was established in 2012 with Commission Decision C 18/17 (2012) OJ C 18/8. It is formed by Member States’ authorities covering both offshore safety and related marine environmental protection, <<http://euoag.jrc.ec.europa.eu/>> accessed 1 November 2016.

64 <<http://www.psa.no/nsoaf/category999.html>> accessed 1 November 2016.

65 <<http://www.irfoffshoresafety.com/>> accessed 1 November 2016.

66 <<http://www.iogp.org/Safety>> accessed 1 November 2016.

strict private vetting standards in the oil tanker industry. A real challenge, however, will be a more efficient and visible coordination of this multidimensional race in implementation of Article 208 UNCLOS (“Pollution from seabed activities subject to national jurisdiction”) as well as Article 214 (“Enforcement with respect to pollution from seabed activities”). This will be a difficult task. Nevertheless, the fourth and fifth paragraph of Article 208 UNCLOS request the Members (including the EU) to “endeavour to harmonize their policies in this connection at the appropriate regional level” and “to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment (...)”.

In academic literature, progressive calls have even been made suggesting a new UNCLOS implementation agreement relating to Article 208 and for international standards for offshore drilling.<sup>67</sup> This is currently, however, far from practical reality. For example, there is still no “Arctic Offshore Regulators Forum” on the horizon (as proposed by the PAME working group in 2014). However, the ultimate advantages of such a forum and enhanced international standardization are quite clear. For example, gaps in the international standards landscape could be closed more efficiently. Second, more possibilities would be created to reference emerging or accepted international standards in national laws. This also includes easier methodology for updates via the built-in change process applicable to the international standards themselves. Finally, performance-based approaches could emanate even further as being more safety-efficient in comparison to more prescriptive, governmentally-imposed laws.

Mindful of the already existing multi-stakeholder coordination fora, it would nevertheless be a good development if UNCLOS Member States would recall that Articles 208, 214 UNCLOS do actually exist and that the provisions require a higher degree of harmonization and defragmentation in the 21st century. A comprehensively standardized regulation of the offshore oil and gas industry operating in the Arctic and in other recognized particularly sensitive sea areas will be able to avoid the application of “sub-standards” in the absence of efficient enforcement by national (flag) States (a problem known in the shipping industry for some time).<sup>68</sup> On the contrary, intensified coordination of international and national standards and enhanced international cooperation could lead to better chances of higher safety standards and more efficient mitigation of remaining environmental risks.

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67 See Nordquist and Fausser, n. 47 above, at 143.

68 See generally Jörn-Ahrend Witt, *Obligations and Control of Flag States* (Lit Verlag 2007), 274.

# Conclusion

*Nengye Liu, Elizabeth A. Kirk and Tore Henriksen*

## 1 Introduction

Although the Arctic territory of the EU (the European Arctic) was mentioned in the EU's 2016 Arctic policy, it is fair to say the EU mainly sees the Arctic as an external affair. This is evidenced by the fact that the European External Action Service has been heavily involved in the formation of the EU's Arctic policy. From the Arctic States' perspective, the EU has always been seen as an external power to the region. It is clear from the Ilulissat Declaration that they believe that only the Arctic States, especially the five coastal States, should hold the stewardship of the Arctic.<sup>1</sup> So what kind of power does the EU have in the Arctic?

The questions of the EU's power in the Arctic should be seen in the context of the wider "EU as a power" debate, which has been running for decades. Manners argues that the EU, owing to its particular historical evolution, its hybrid polity, and its constitutional configuration, has a normatively different basis for its external affairs than States do.<sup>2</sup> Meanwhile, Damro believes that because it is fundamentally a large single market with significant institutional features and competing interest groups, the EU could be best understood as exercising its power through the externalization of economic and social market-related policies and regulatory measures.<sup>3</sup> The Arctic has proved to be an interesting testing ground for the EU's power which both illustrates the ways in which the EU wields power and provides some important lessons. In

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\* Dr Nengye Liu, Senior Lecturer, Adelaide Law School, University of Adelaide, Australia; Prof Elizabeth A. Kirk, Nottingham Law School, Nottingham Trent University, United Kingdom; Prof Tore Henriksen, K.G. Jebsen Centre for the Law of the Sea, UiT/Arctic University of Norway.

- 1 The Ilulissat Declaration, Arctic Ocean Conference, Ilulissat, Greenland, 27–29 May 2008. <[http://www.oceanlaw.org/downloads/arctic/Ilulissat\\_Declaration.pdf](http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf)> accessed 11 June 2017.
- 2 I. Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 (2) *Journal of Common Market Studies* 235–58.
- 3 C. Damro, 'Market Power Europe' (2012) 19 (5) *Journal of European Public Policy* 682–699.

this chapter we draw out these conclusions, before going on to explore how these lessons could be applied in future.

## 2 Lessons Learnt

An initial response to the question of the role of the EU in the Arctic is to focus on its role in the Arctic Council and to examine the routes to strengthening that role. There are, however, a number of challenges to this. As we have seen, the Arctic States are not always receptive to EU influence. The EU itself has not always helped its cause, sometimes scoring an own goal in international policy and harming its reputation in the Arctic. As the contributors to this book make clear the Arctic Council is not the only route to EU influence, nor should it be considered the gold standard for interaction. If the EU is to exert “power” in the Arctic a more nuanced approach is required. It has to address the focus of its own EU Arctic policies; recognise the benefits of alternative routes to influence and take a more sophisticated approach to its interactions with and impacts on indigenous and local populations in the Arctic.

At present EU Arctic policies address the Arctic as a whole. As *Stepień* and *Koivurova* demonstrate, there are in fact two dimensions to the EU’s engagement with the Arctic—the Circumpolar and the European Arctic—and the differences between these need to be teased out more. The focus of the EU in each is different. In the Circumpolar Arctic the focus is on maritime and environmental issues, in the European Arctic it is on terrestrial and economic issues. So too is the role the EU plays in each. In the European Arctic it is a key player, but this is not the case in the Circumpolar Arctic, where it acts as an observer, or a less important player. As such it is not easy for the EU to have a single, coherent, Arctic policy. *Stepień* and *Koivurova* suggest that the EU should develop a separate strategy for the European Arctic and note that the 2016 Joint Communication begins this process.

The second step to securing power is, as *Bailes* and *Ólafsson* demonstrate, to use the soft power afforded by membership of sub-regional Arctic bodies. The EU’s membership of these bodies affords it the opportunity to build relations through, for example, joint projects. This route is, however, at some risk due to the lack of understanding of some EU politicians of the benefit of such depoliticised cooperation, particularly as the fruits of such cooperation may appear quite limited at first.

As several of the authors point out, the EU’s policies can and frequently do impact negatively on indigenous peoples and this in turn diminishes the EU’s power in the Arctic by reducing the willingness of key actors to cooperate with



it. A key example of such negative impact is the effect of the EU's policies on sealing and whaling discussed by Hennig and Caddell. The status of indigenous peoples in the Arctic is somewhat unusual: their sovereign rights are, for example, respected in States such as Canada. The EU also proclaims to protect such rights and yet EU policies on, for example, sealing, have undermined the sovereignty of indigenous peoples. There are, however, positive examples that the EU can draw on. Fakhri, for example, compares the EU approach to sealing with that taken by the USA, drawing out similarities in approach of the EU and USA and demonstrating how alternative forms of regulation can be developed that would support indigenous sovereignty rather than undermining it. As Campins demonstrates, though the EU policies have had a negative impact in the EU's relations with Greenland, here again the EU has the opportunity to make a more positive impact through helping Greenland to diversify its economy. There are also less obvious examples of the negative impact the EU can have on indigenous or other stakeholders in the Arctic.

As Stępień and Koivurova note the EU can be "thoughtless" in its interactions with Arctic stakeholders, in that its procedures may lead the stakeholders to have to interact repeatedly with the EU in various contexts. While such interaction will not be problematic for the EU, it stretches the resources of local and indigenous stakeholders. Again solutions to these problems can be found. Stępień and Koivurova, for example, suggest that the EU should focus on procedural aspects of integration, such as reducing the number of interactions required.

One of the challenges in achieving this more nuanced approach is, however, that the Arctic States have differing views of the benefits of working with the EU and this is coupled with the challenge that the EU's relations with the Arctic States is never confined to Arctic issues. The result is that developments in other areas may influence relations in the Arctic, or at least how those relations are interpreted. Norway, for example, may be considered as having a good relationship with the EU, but it views the relationship with the EU in the Arctic as part of their wider relationship. The result is that Norway's cautious approach to integration with the EU in general influences their relationships in the Arctic. And, like many EU Member States, Norway has a tendency to blame the EU when things do not go according to plan. Canada, by contrast, has been portrayed as being at loggerheads with the EU, yet the EU and Canada have signed a declaration welcoming "the deepening ties in Arctic cooperation".<sup>4</sup> The EU's emphasis on the European Arctic and its focus on sustainability, are seen by Lackenbauer and Lalonde to both chime with Canada's aims for

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4 Joint Canada-EU Declaration Ottawa, 26 September 2014, see Lackenbauer and Lalonde, Chapter 6.

the Canadian Arctic and diminish the possibility of conflict between the EU and Canada. This is particularly so as Canada tends to focus on national issues within its Arctic policy. In this way both then are supporting the concept that sub-regional policies are required along side the “One Arctic” focus of the US Arctic Council Chairmanship for 2015–17 and the Inuit Circumpolar Council. The same type of misconception applies in EU-Russian Arctic relations. These relations have to some degree been clouded by Russian military operations elsewhere. Thus Russian re-militarisation of the Arctic has been viewed as a threat. The reality, as Hunter demonstrates, is however that the military is being used to support resource extraction because the military is the only body with the capacity to provide the support required and Russian Arctic policies in fact align with EU interests in the Arctic, in particular in using the Northern Sea Route and in accessing resources within Russian jurisdiction.

The papers presented in the Part 2 on EU-Arctic State relations, therefore go some way to addressing misconceptions about relations between these States and the EU. They demonstrate again, the need for greater clarity and a more nuanced understanding of these relations if the EU is to exert power in the Arctic. By understanding where interests and policies align, the EU will be better placed to forge alliances, either directly, or through regional and sub-regional bodies. Such alliances will enable the EU to better wield its “soft power” in the Arctic and it is by doing this that it is most likely to achieve influence in the Arctic.

A second challenge to taking a more nuanced approach is that the various sectors of interest to the EU may require different approaches. In shipping and fisheries, for example, the key appears to be for the EU to adopt internal measures, or rather measures that apply to its vessels and in its ports. In relation to shipping, however, Ringbom suggests that it is more useful for the EU to exert pressure within the global regulator, the International Maritime Organisation, to secure the adoption of appropriate measures there. In relation to fisheries, Liu emphasizes that the EU is, and should, play a role in the negotiation of any regional fisheries management organisation in relation to potential fisheries in the central Arctic Ocean high seas. In relation to the hunting of marine mammals and in relation to oil and gas activities the EU is urged to rely less on a unilateral approach. In relation to oil and gas this is because a regional approach is required (both under international law and in practice) as Jessen demonstrates. In relation to marine mammals cooperation is urged because the EU’s tendency to act alone has caused significant harm to indigenous peoples in the Arctic. It is, therefore, urged, by Hennig and Caddell, to work with the States and indigenous peoples involved in sealing and whaling in order to arrive at a more nuanced approach to the regulation of these activities.

These conclusions are of importance to Arctic governance as much as to the EU as they demonstrate the interconnectedness of regimes and that the development and implementation of obligations (or norms) in international law is not a linear process. Rather, actors influence their development and implementation in a variety of locations, often in less obvious locales than may be anticipated, and must be flexible in their approach to regulation and governance. It also demonstrates that even seemingly interconnected issues may require States and actors such as the EU to take quite different approaches to the development and implementation of international obligations for their governance.

### 3 Future Application

The Arctic faces a number of challenges some of which (such as how to develop sustainably, how to respond to climate change) chime with the interests of the EU. At the same time, the EU has strong political will to get involved and shape the development of Arctic governance. In this section we outline some key issues for the Arctic and illustrate how the EU may learn from the lessons outlined above to ensure it wields its soft power in the Arctic effectively.

As a normative power, the EU is expected to project its core norms: peace, liberty, democracy, human rights and rule of law<sup>5</sup> to the Arctic. Further, it is suggested by Manners that in addition to core norms, there are four minor norms—social solidarity, anti-discrimination, sustainable development and good governance—within the constitution and practices of the EU.<sup>6</sup> In the EU's 2016 Arctic policy, the EU addresses sustainable development in and around the Arctic as one of its priority areas. However, although the United Nations Agenda 2030 sets out 17 concrete sustainable development goals,<sup>7</sup> the meaning of sustainable development and how to achieve it is still debated. The Arctic, arguably a pristine frontier, could possibly provide lessons for the rest of the world about sustainable development by providing an opportunity to demonstrate how to strike the right balance between economic, social and environmental interests. The EU could play a part in achieving this, not only by providing research funding, technical support and investment in the Arctic,<sup>8</sup> but also by testing and/or transferring the EU's ideas about sustainable

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5 See Manners n. 1 above, 242.

6 *Ibid.*

7 UN Sustainable Development Goals <<http://www.un.org/sustainabledevelopment/sustainable-development-goals/>> accessed 12 June 2017.

8 JOIN (2016) 21, An Integrated European Union Policy for the Arctic.

development in this region, through for example cooperation with Arctic States. In turn, the EU may also learn from its Arctic experience to enhance its domestic policies regarding sustainable development. Some suggestions for how this may be achieved are discussed below along side suggestions for a second issue area of focus.

Climate change has been recognised as a major challenge for the Arctic. For example, on the occasion of the 10th Ministerial Meeting of the Arctic Council, the Fairbanks Declaration recognized that “activities taking place outside the Arctic region, including activities occurring in Arctic States, are the main contributors to climate change effects and pollution in the Arctic.”<sup>9</sup> This underlines the need for climate actions at the local, national, regional and international level to protect the Arctic. The Arctic is warming at more than twice the rate of the global average, resulting in widespread social, environmental, and economic impacts in the Arctic and worldwide, and the pressing and increasing need for mitigation and adaptive actions and to strengthen resilience.<sup>10</sup>

As one of most industrialised regions near the Arctic, the EU has responsibility to combat climate change so as to protect the Arctic. The EU climate and energy package was adopted in 2009 to implement the targeted 20% reduction of GHG emissions compared with 1990 by 2020 along with generation of a 20% share of renewables in EU energy production, and 20% improvement in energy efficiency.<sup>11</sup> Climate change and safeguarding the Arctic environment is also one of three priority areas in the EU’s 2016 Arctic policy. The EU sees its Arctic policy as an important element in implementing the Paris Agreement,<sup>12</sup> which sets out a global action plan to limit global warming to well below 2°C.<sup>13</sup> The EU believes that the Paris Agreement is an ambitious, balanced, equitable and legally binding agreement, which marks a decisive turning point towards comprehensive and collective global action against climate change.<sup>14</sup> However, the United States withdrew from the Paris Agreement under the Trump Administration.<sup>15</sup> This has the potential to undermine global efforts in dealing

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9 Fairbanks Declaration 2017, Arctic Council <<https://oaarchive.arctic-council.org/handle/11374/1910>> accessed 12 June 2017.

10 *Ibid.*

11 EU Climate Change Policies, European Environment Agency <<https://www.eea.europa.eu/themes/climate/policy-context>> accessed 12 June 2017.

12 The Paris Agreement, United Nations 2015. <[http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php)> accessed 12 June 2017.

13 JOIN (2016) 21, An Integrated European Union Policy for the Arctic.

14 *Ibid.*

15 President Trump Announces US Withdrawal from the Paris Climate Accord, The White House <<https://www.whitehouse.gov/blog/2017/06/01/president-donald-j-trump-announces-us-withdrawal-paris-climate-accord>> accessed 12 June 2016.

with climate change, since the US is the second largest greenhouse gas emitter in the world, next to China. In these challenging times, a strong EU is needed to take global leadership, for example to work with China and accelerate joint efforts to reduce global carbon emissions.<sup>16</sup>

The EU has identified sustainable development and climate change as two priority areas of the EU's Arctic policy. These are global concerns and particularly important for the Arctic. In order to effectively implement its policy objectives, there are three aspects that the EU could further address in the future.

### 3.1 *Direct Application of the EU Law in the Arctic*

The EU already regulates EU citizens and companies and could use this power to help achieve sustainable development and/or combat climate change in the Arctic. For example, as discussed by Jessen, inspired by the Deepwater Horizon disaster, Directive 2013/30 on the safety of offshore oil and gas operations, was adopted with specific reference to the Arctic waters. In particular, Article 20 of Directive 2013/30 provides that 'Member States shall require companies registered in their territory and conducting, themselves or through subsidiaries, offshore oil and gas operations outside the Union as licence holders or operators to report to them, on request, the circumstances of any major accident in which they have been involved'. This may provide a model for further action by the EU in relation to the Arctic. Regulations could be adopted, for example, placing restrictions on drilling in particularly fragile environments, or requiring far more stringent measures to be in place to prevent an oil spill than is normally the case to help ensure sustainable development. Given that EU companies such as Shell (Netherlands) and Total (France) are major players in offshore oil and gas activities, any such regulation could have a major impact in the Arctic even without impacting on non-EU companies.

Moreover, with the adoption and subsequent implementation of the Erika III package, the EU now has one of the world's most comprehensive and advanced regulatory frameworks for shipping. The EU maritime safety legislation is applicable to EU-flagged vessels in the Arctic (See Chapter 9). In addition, the EU could lead the international community by enforcing higher standards in Arctic waters. A great example would be to ban the use of heavy fuel oil in the Arctic for all EU vessels. Although vessels are encouraged by the Polar Code not to use such fuel in the Arctic, there is no ban at present.

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16 China and EU Strengthened Promise to Paris Deal with US Poised to Step Away, The Guardian <<https://www.theguardian.com/environment/2017/may/31/china-eu-climate-lead-paris-agreement>> accessed 12 June 2017.

### 3.2 *The EU as a Market Power*

The EU has the world's largest internal market, supported by strong regulatory institutions. The European single market represents the EU's material existence and the most salient aspect of its presence in the international system.<sup>17</sup> Trading with the EU requires foreign companies to adjust their conduct or production to EU standards. While the EU regulates only its internal market, multinational corporations often have an incentive to standardize their production globally and adhere to a single rule. This has the potential to convert the EU rule into a global rule, labelled by Anu Bradford as the 'de facto Brussels effect'.<sup>18</sup>

The EU has been using its market power to exert influence in the Arctic. The seal trade ban, which was discussed by Hennig and Caddell provides an example, albeit it caused a lot of concerns and protest from the Arctic States. The EU's market power however does provide teeth for the EU's normative power when it comes to projecting EU norms to the rest of the world. As discussed by Liu, the EU's Regulation against illegal, unregulated and unreported fishing could be applied in the future, when fisheries occurs in the central Arctic Ocean. With the fact that 1/3 of fish caught in the Arctic are sold in the EU, it is expected that the EU IUU Regulation could play a significant role in regulating fisheries in the Arctic waters by implementing EU standards. A similar case could be drawn in respect of Arctic shipping. When commercial shipping across the Northeast Passage finally becomes viable, most ships' destinations will be the European market, calling at big European ports such as Hamburg, Rotterdam or Antwerp. At that point, EU maritime safety standards could be applicable to Arctic shipping through port State jurisdiction. If the EU is going to incorporate shipping into its emission trading scheme (ETS), then the EU ETS will also have an impact on reducing greenhouse gas emissions from Arctic shipping.

### 3.3 *The EU Playing a Supportive Role in Regional and International Cooperation*

The EU has developed solid relations with all Arctic States, as explained in Part II of the book. In the foreseeable future, the Arctic Council will keep being the most important forum for regional cooperation in the Arctic. Although not an official observer, the EU could exert its influence through its Member States Finland, Sweden, Denmark, or even Norway, who is a member of the European Economic Area. Other EU Member States France, Germany, the Netherlands, Poland, Spain and Italy all have observer status in the Arctic Council. By

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17 D. Allen and M. Smith, 'Western Europe's Presence in the Contemporary International Arena' (1990) 16 (1) *Review of International Studies* 19–37.

18 A. Bradford, 'The Brussels Effect' (2012) 107 (1) *Northwestern University Law Review* 1–67.

speaking in one voice, the EU will be able to influence Arctic Council decision-making processes even without official observer status.

In the 2016 EU Arctic policy, the EU identified international negotiation processes that might have direct relevance to the Arctic. Here it may be able to learn from the discussion in the chapters relating to EU relations with individual States. As Part II of this book made clear, the EU often has shared interests with Arctic States. While these interests may not at first be apparent, they do play a key role in shaping EU-Arctic relations. The EU may then wish to draw on shared interests in these other negotiations to develop an approach to influence, for example, sustainable development, in the Arctic. Examples of areas in which the EU could develop this approach include the multilateral negotiations on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction: a key ongoing negotiation that will be of relevance to the Arctic high seas. The EU is also invited and has been attending the Arctic 5+5 negotiations on fisheries management in the high sea portion of the central Arctic Ocean. It must be pointed out that the EU cannot expect to play a leading role in these processes, but it could be a cooperative partner. Shared interests between the EU and one Arctic State are particularly obvious in the Arctic 5+5 process, where the US takes the initiative and the EU's position is more or less in line with the US. In addition, as mentioned above, the EU is taking on leadership of climate change actions as the US is retreating from the field. Here, the EU could do more, using its diplomacy to ally with other big emitters such as China and India to deal with this global problem.

#### 4 Conclusions

The world has witnessed significant geopolitical change after the Second World War. The EU is now facing a challenging time, addressing issues such as the refugee crisis and Brexit. Nevertheless, as the EU High Representative Federica Mogherini has noted, in a difficult time, the world and Europe need a strong European Union that thinks strategically, shares a vision and acts together.<sup>19</sup> The EU has set out its vision of its role in the Arctic. This book has demonstrated that there are a variety of ways in which the EU can achieve that vision. In this concluding chapter we have also suggested some areas in which the EU may wish to focus its efforts. We wish the EU good luck in its mission to protect the Arctic in the era of the Anthropocene.

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19 Shared Vision, Common Action: A Stronger Europe, A Global Strategy for the European Union's Foreign and Security Policy, June 2016. <[http://eeas.europa.eu/archives/docs/top\\_stories/pdf/eugs\\_review\\_web.pdf](http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf)> accessed 9 June 2017.

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