

Ocean Governance in the Arctic: Conflict, Cooperation, Challenges

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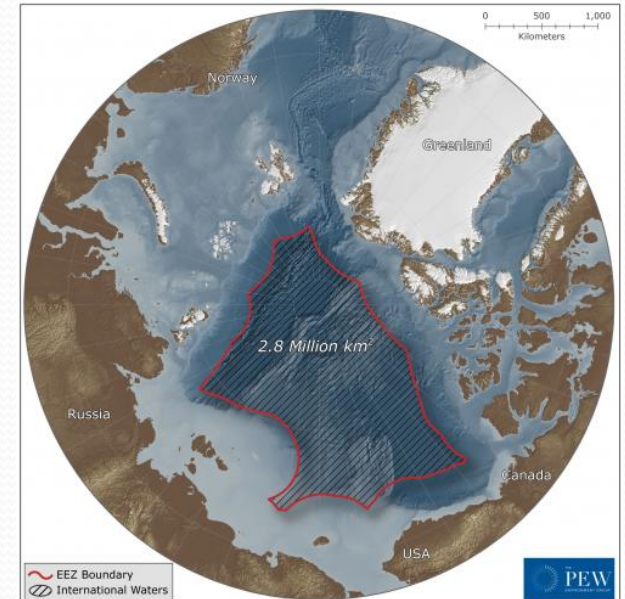
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Changing Arctic Environment

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Introduction

- Three words help capture the present state of Arctic Ocean governance
 1. **Conflict** – Jurisdictional disputes still hover over parts of the Arctic
 2. **Cooperation** – Numerous cooperative agreements and arrangements have been forged at the bilateral, regional and global levels
 3. **Challenges** – A sea of ocean governance challenges still confronts the region, e.g.,
 - + Sorting out future governance arrangements for the central Arctic Ocean (CAO) beyond national jurisdiction
 - + Identifying and protecting areas of heightened ecological and cultural significance



- A three-part “speed cruise” follows

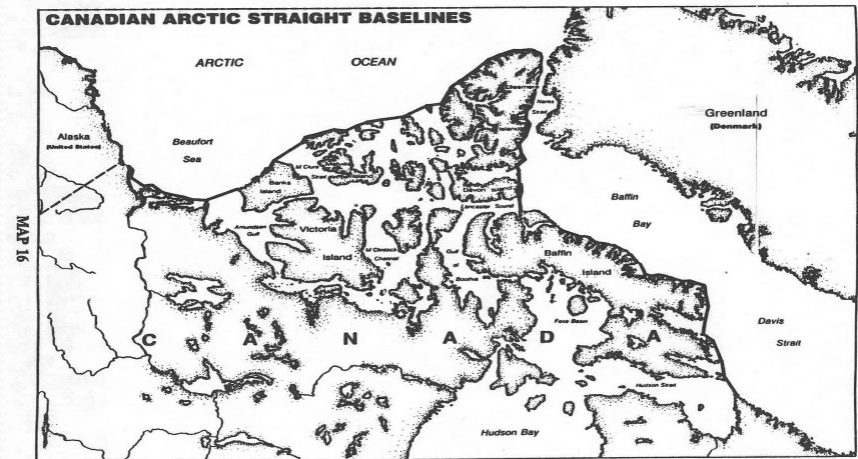


1. Conflict

Four key jurisdictional tensions relevant to shipping hover over the Arctic

(i) Legal status of the Northwest Passage

- Canada maintains the NWP consists of internal waters
- + Drew straight baselines around the Canadian Arctic Archipelago, effective January 1, 1986 (full national sovereignty over the internal waters enclosed)
- + Has unilaterally established “zero pollution” standards for oil, garbage and waste disposals from Arctic shipping pursuant to the *Arctic Waters Pollution Prevention Act*
- + Has imposed special construction, design, equipment and crewing standards



(Roach and Smith 1996)

- + Two main legal foundations for internal waters status
 - Historic waters (subject to Canadian exclusive control over many years with the acquiescence of other States to the exclusive authority)
 - Waters within straight baselines drawn around a “fringe of islands” along the coast
- + Two main arguments can be made against the Canadian drawing of straight baselines around the Arctic Archipelago
 - The islands are not in the “immediate vicinity” of the coastline as required by Art. 7(1) of the UN Law of the Sea Convention
 - The drawing of straight baselines “must not depart to any appreciable extent from the general direction of the coast” (Art. 7(3))



- U.S. legal stance – NWP is an international strait subject to the right of transit passage by foreign ships
- + Transit passage substantially limits controls a coastal State like Canada could impose on foreign ships navigating through strait waters
 - Coastal State cannot impose its own pollution control or safety at sea standards (international standards apply) (Art. 39)
 - Coastal State can designate sea lanes and prescribe traffic separation schemes for navigation where necessary to promote the safe passage of ships but IMO approval is required (Art. 41)
 - Coastal State cannot prohibit foreign ship transits because of risky cargoes, such as hazardous or radioactive wastes



- + Considerable debate exists over whether the Northwest Passage has become a “strait used for international navigation”
 - Little question that Northwest Passage meets the geographic condition set out by the Law of the Sea Convention (Art. 37) (Connecting one part of the high seas or an exclusive economic zone with another part of the high seas or an EEZ)
 - Big issue is what constitutes the legal litmus for navigational usage
 - Potential vs. actual usage
 - Volume of traffic required
 - Number of different flagged vessel transits



(ii) Tensions over the extent of special legislative and enforcement powers bestowed on coastal States by Article 234 of the Law of the Sea Convention over ice-covered waters



- Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climate 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. (emphasis added)

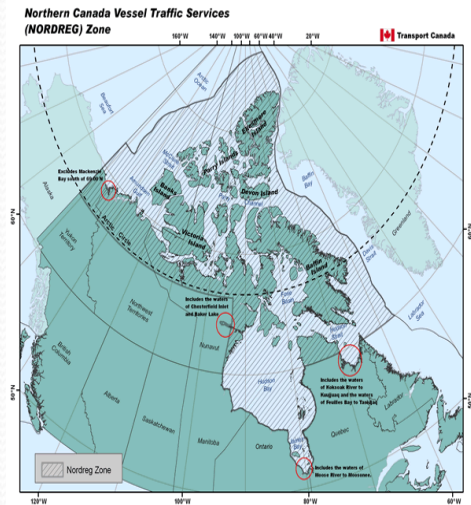
- Various issues continue to surround the practical implementation of Article 234
- + What exactly does ice-covered waters for “most of the year” mean?
- + Is the Article applicable to an ice-covered strait used for international navigation?



- + Can Article 234 be used to justify unilateral coastal State imposition of ship reporting and possibly routing measures?
 - Effective 1 July 2010 Canada imposed mandatory reporting requirements for certain classes of vessels preparing to navigate within the Northern Canada Vessel Traffic Services (NORDREG) Zone which covers the Shipping Safety Control Zones and other northern waters such as Hudson and James Bay

- * Vessel coverages

- > Vessels of 300 gross tonnage or more
- > Vessels engaged in towing or pushing another vessel if the combined gross tonnage of the vessel and the vessel being towed or pushed is 500 gross tonnage or more
- > Vessels carrying as a cargo a pollutant or dangerous goods or engaged in towing or pushing a vessel with such a cargo



- A tussle, led by the United States, ensued within the IMO
 - * U.S. questioning whether Canada’s NORDREG system was in compliance with SOLAS, chapter V requirements
 - > Canada should have worked through the IMO for formal approval
 - > A vessel traffic services (VTS) zone may only be made mandatory within the territorial sea of a coastal State
 - > Not clear that NORDREG gives “due regard to navigation”



- Canada responded in a very “diplomatic fashion”
 - * Submitted an explanatory document of its own
 - > Clarifying Canada’s reliance on Art. 234 for its unilateral imposition of NORDREG
 - > Noting that foreign sovereign immune vessels would be requested to voluntarily comply with NORDREG
 - > Requested IMO to bring the NORDREG system to the attention of member Governments which in fact occurred through an IMO information circular (SN.1/Circ. 291, 5 October 2010)



(iii) Beaufort Sea boundary between Canada and the United States

+Canada claims the 141st meridian as the Beaufort Sea boundary

- Based upon 1825 Great Britain-Russia Treaty

- Boundary language of the Treaty refers to the meridian line “in its prolongation as far as the Frozen Ocean”

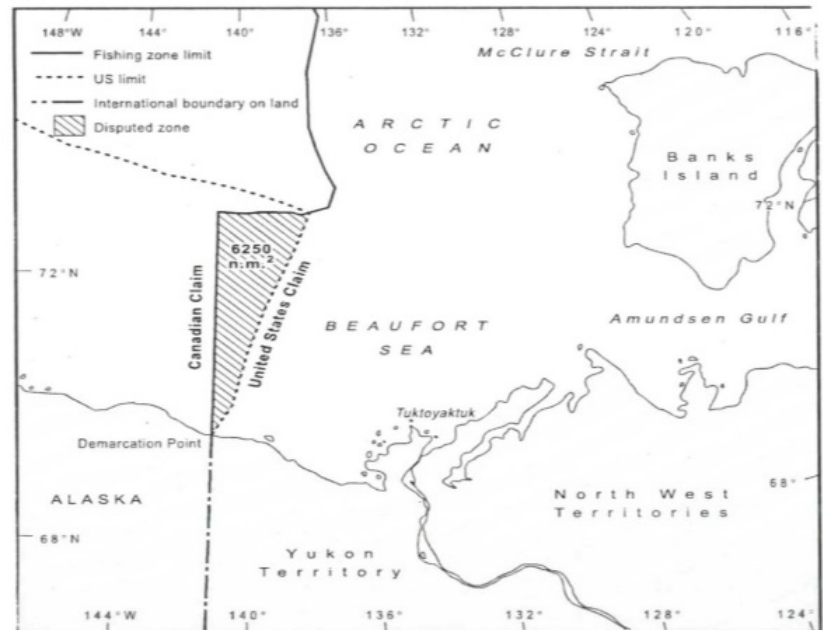
+US argues an equidistance line should apply

- Based upon customary international law relating to maritime boundary delimitation

- Views the 1825 Treaty as only delimiting the land boundary

+Some 6250 square NM in dispute

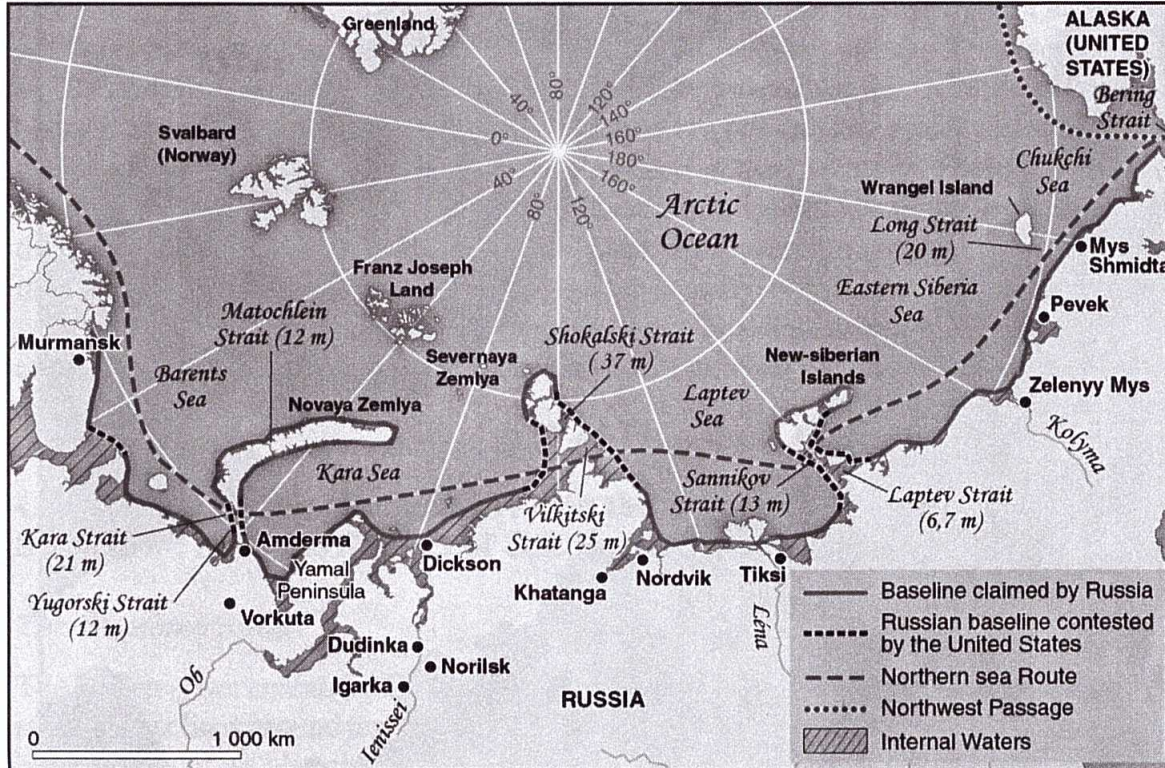
+Not clear which country has jurisdiction over shipping activities in the disputed area



(Gray 1997)

(iv) Legal status of straits within the Northern Sea Route

+The United States also contests Russia's claim to internal waters status of the Vilkitski, Shokalski, Dmitri Laptev and Sannikov Straits and the drawing of straight baselines around the associated island groups



(Lalonde and Lasserre 2014)

2. Cooperation

Substantial cooperation has occurred at the bilateral, regional and global levels



(i) Bilateral

Two quick examples

- Canada - USA
- + Joint Marine Contingency Plan for the Beaufort Sea (CANUSNORTH, latest revision 2013)
- + North American Aerospace Defense Command (NORAD) which extended cooperative surveillance to the maritime domain in May 2006
- + Informal moratorium on petroleum exploration/exploitation in the disputed zone

- + In 1988 Canada and the United States reached a “stalemate” Agreement on Arctic Cooperation
 - Parties agreed to set aside their jurisdictional dispute over the legal status of the Passage by “agreeing to disagree”
 - United States agreed that its icebreakers would be subject to Canadian consent for transits within waters claimed by Canada to be internal
 - Countries agreed to share research information regarding the marine environment gained through icebreaker navigation
 - Clear that commercial and naval vessels not included



● Norway – Russian Federation

+ *Treaty on Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (2010)*

- Boundary dispute festered for over 30 years with Russia arguing for a sector line and Norway relying on a median line
- Agreement essentially split the difference and includes provisions on future cooperation concerning fisheries and possible overlapping hydrocarbon deposits
 - * Parties agree to apply the precautionary approach to the management of shared fish stocks and to continue setting total allowable catches, quotas and other regulatory measures through the Norwegian-Russian Joint Fisheries Commission
 - * Parties agree to negotiate a unitization agreement in case of a transboundary hydrocarbon deposit



<http://www.fni.no/news/newspics/delelinje200.jpg>

(ii) Regional

Two main routes for regional cooperation

- Arctic Council and its “progeny”

- + The Arctic Council, established pursuant to a non-legally binding Declaration adopted in Ottawa on 19 September 1996, has become the main institutional vehicle for furthering regional cooperation

- Eight Arctic States included as members

- * Canada

- * Norway

- * Denmark/Greenland

- * Russian Federation

- * Finland

- * Sweden

- * Iceland

- * United States of America



– Indigenous organizations (now six in number) elevated to status of Permanent Participants

- * Aleut International Association
- * Arctic Athabaskan Council
- * Gwich'in Council International
- * Inuit Circumpolar Council
- * Russian Association of Indigenous Peoples of the North (RAIPON)
- * Saami Council



– Six Working Groups established

- * Arctic Monitoring and Assessment Program (AMAP)
- * Emergency Prevention, Preparedness and Response (EPPR)
- * Conservation of Arctic Flora and Fauna (CAFF)
- * Protection of the Arctic Marine Environment (PAME)
- * Sustainable Development Working Group (SDWG) (1998)
- * Arctic Contaminants Action Program (ACAP) (2006)

- Rotating chairship among Arctic States (every two years)
- Ministerial meetings on a biennial basis

- Observer status open to

- * Non-Arctic States

- > First observer states were France, Germany, Netherlands, Poland, Spain and the United Kingdom
- > China, India, Italy, Japan, Singapore and South Korea added in May 2013

- * Inter-governmental and inter-parliamentary organizations

- * Non-governmental organizations

- Overall objective is to promote cooperation on common Arctic issues, in particular issues of sustainable development and environmental protection

- Substantial limitations in governance

- * Largely a “talk and study” forum

- * Cannot address military and security issues

- * No powers to directly develop regional environmental standards, e.g., for oil and gas exploration/development



- + Two regional agreements have been negotiated by Arctic Council task forces
 - Aeronautical and Maritime Search and Rescue Agreement
 - * Agreed to at the May 2011 Nuuk Ministerial Meeting
 - * Delineates areas of national search and rescue (SAR) responsibilities in the Arctic
 - * Calls for further cooperation in joint exercises and training
 - * Provides for expedited cooperative national responses to SAR incidents



- Agreement on Cooperation on Marine Oil Pollution Preparedness and Response (2013)
 - * Pledges Parties to maintain effective national oil pollution preparedness response systems
 - * Calls for cooperation in response operations
 - * Promotes joint exercises and training



+ Arctic Economic Council (AEC)

- Established as an independent organization under Canada's chairship of the Arctic Council.
- Comprised of up to 42 business representatives appointed by the eight Arctic States and Permanent Participants
- Tasked with facilitating business opportunities and responsible economic development in the Arctic
- Includes various shipping interests, e.g.,
 - * Arctia Shipping Ltd. (Finland)
 - * Danish Shipowners' Association
 - * Norwegian Shipowners' Association
 - * SOVCOMFLOT (Russian Federation)
- Has met twice (September 2-3, 2014 and April 23, 2015)



- Regional cooperative efforts by the five Arctic coastal States (Arctic 5)

- + 1973 Polar Bear Conservation Agreement

Five States having polar bears (Canada, Denmark/Greenland, Norway, Russian Federation, USA) agree

- To protect polar bear dens and ecosystems
- To prohibit takings with few exceptions

- * Subsistence hunting
- * “Self-defence” to save human life
- * Scientific purposes



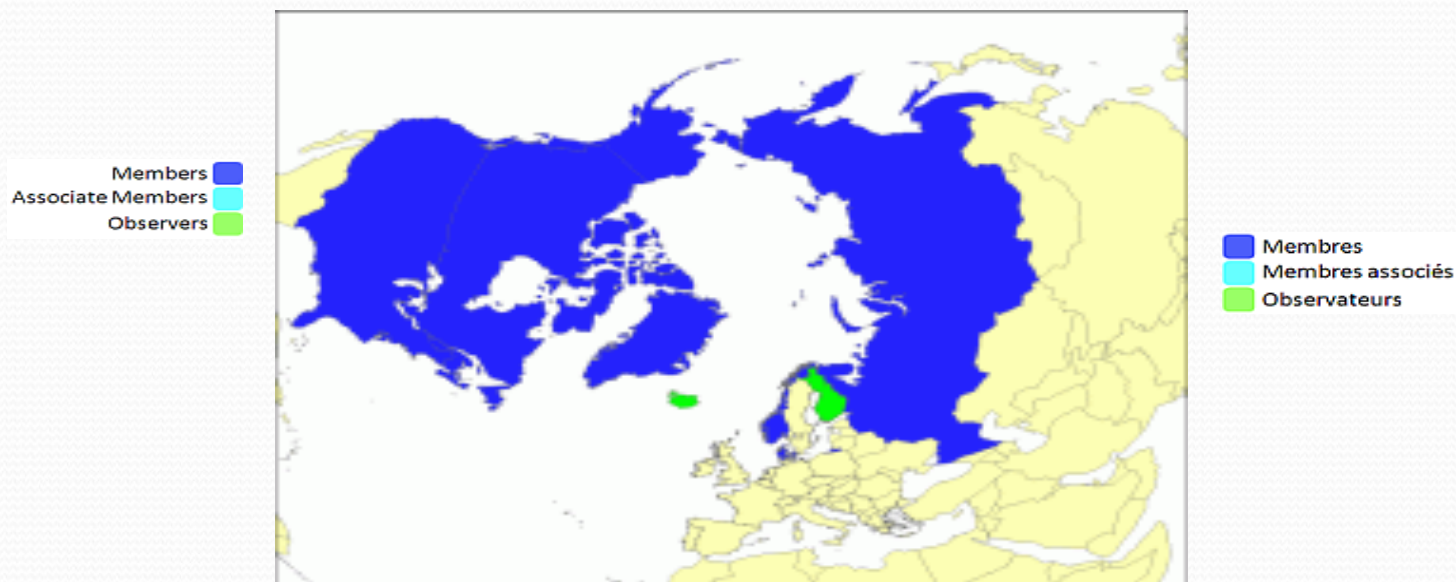
+ Arctic 5 Declaration Concerning the Prevention of Unregulated High Seas Fishing in the CAO

- Adopted on July 16, 2015 in Oslo, Norway
- States agreed to various interim measures to address potential commercial fishing in the high seas of the CAO
 - * Not authorizing fishing vessels to conduct fishing in the high seas area until one or more regional or subregional fisheries management organizations or arrangements have established management measures
 - * Establishing a joint scientific research program to promote ecosystem understandings
 - * Coordinating monitoring, control and surveillance activities



- + Establishment of a new Arctic Regional Hydrographic Commission (ARHC)
 - To facilitate cooperation in undertaking surveys and enhancing nautical charting
 - Members include Canada, Denmark, Norway, Russia, USA
 - Has met on an annual basis (1st meeting in October 2010)

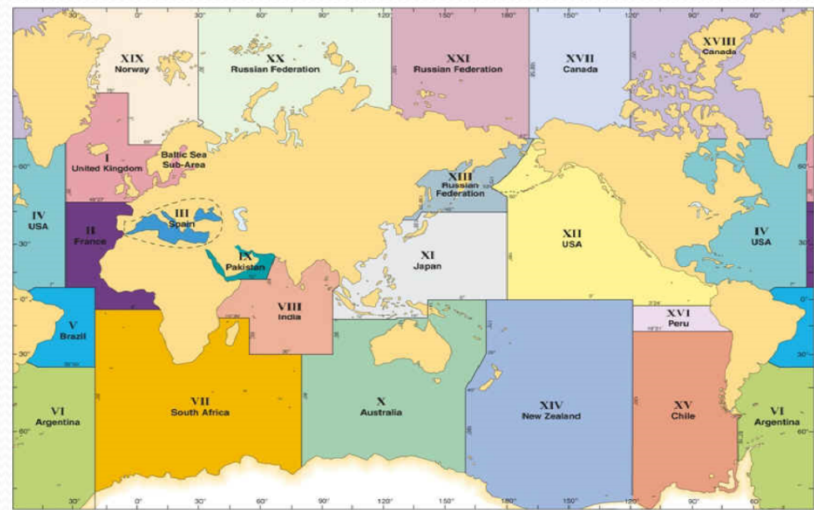
Arctic Regional Hydrographic Commission (ARHC) *Commission hydrographique régionale de l'Arctique (CHRA)*



(iii) Global

Arctic-related cooperation fostered primarily through

- Various multilateral environmental agreements
- IMO's Polar Shipping Code (just covered)
- World-Wide Navigational Warning Service
- + Cooperative effort of IMO and the International Hydrographic Organization
- + Globe divided into 21 regions called “NAVAREAS” where countries are charged with collecting and issuing navigational warnings through the Global Maritime Distress and Safety System (GMDSS)
- + Five NAVAREAS in the Arctic



3. Challenges

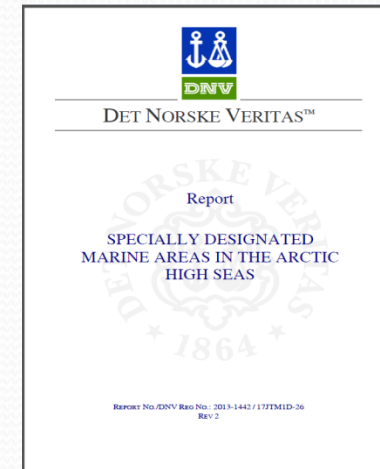
Because of time constraints, only a “swift six” will be flagged

(i) Sorting out future governance arrangements for the CAO

- Arctic 5 Declaration on CAO Fishing (July 2015) is only a “starting point”
- + Still need to bring other interested States on board
- + Still need to flesh out a scientific cooperation program
- + Still need to operationalize cooperation in maritime monitoring, control and surveillance
- Arctic States have yet to agree on whether, and if so, how to take actions within the IMO to address future shipping activities in the CAO



- + A 2014 report for PAME on Specially Designated Marine Areas in the Arctic High Seas set out various options such as
 - Designating the entire high seas as a PSSA with associated protective measures including vessel traffic and ship reporting systems
 - Establishing one or more PSSAs for “core ice areas” with area to be avoided status
- + At PAME’s September 2014 meeting, a decision was reached to take a number of interim steps before pursuing actions within the IMO including
 - A paper investigating the possibility for IMO to designate a PSSA located entirely on the high seas
 - A paper exploring whether dynamic areas to be avoided might be established
 - Papers have yet to be written
- + At PAME’s February 2015 meeting, PAME invited AMAP and CAFF to denote high sea areas of the CAO particularly vulnerable to international shipping activities



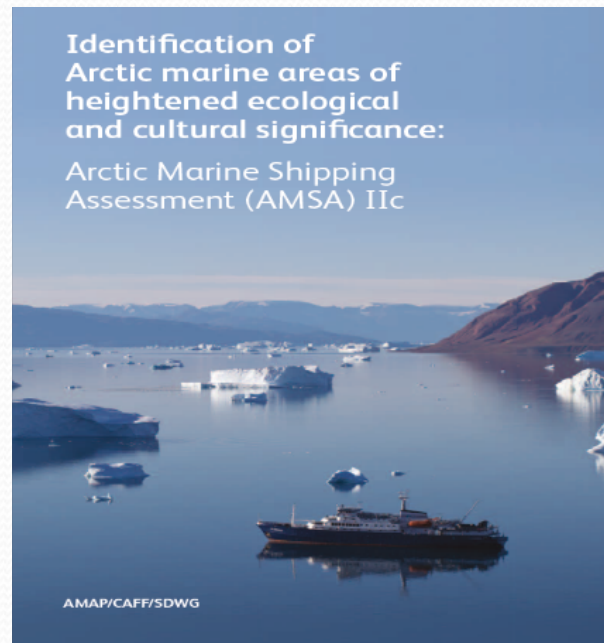
(ii) Identifying and protecting areas of heightened ecological and cultural significance in national waters

- The Arctic Council's *Arctic Marine Shipping Assessment* (AMSA 2009) flagged this as a key challenge



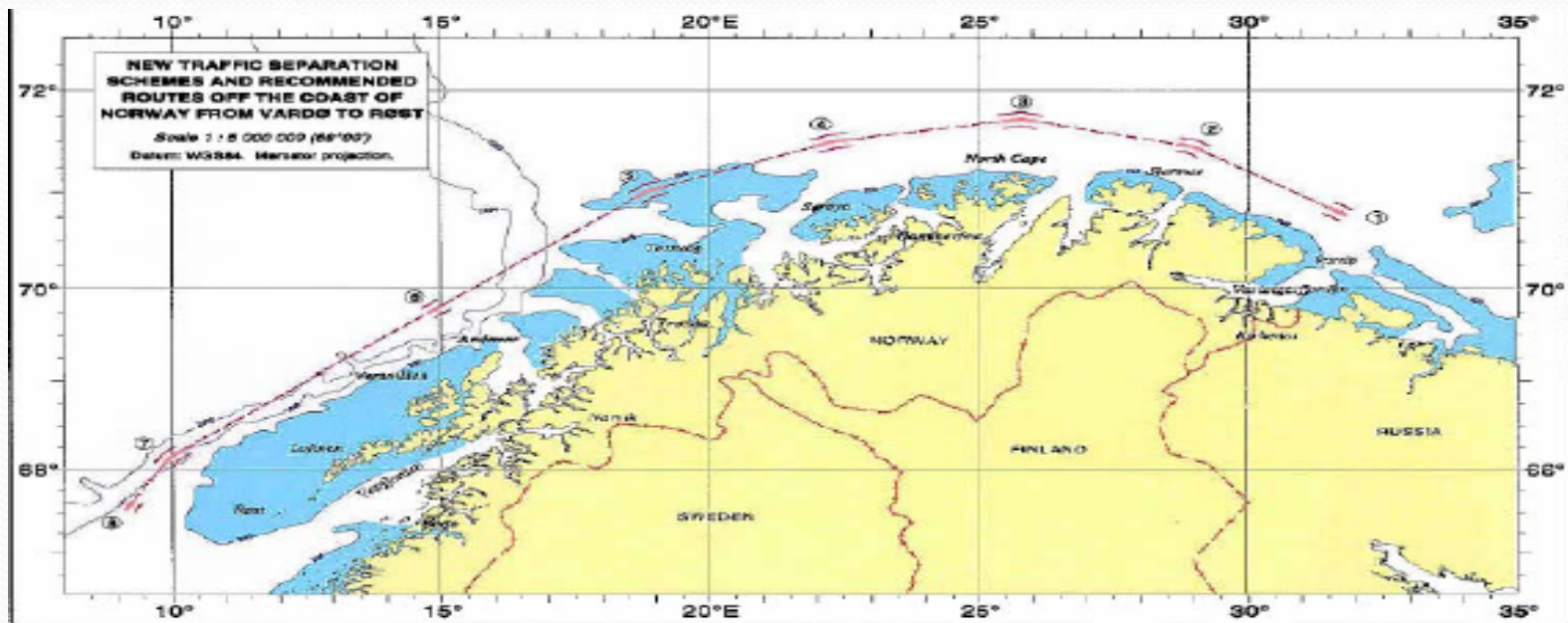
- + Arctic States urged to conduct surveys on Arctic marine use by indigenous communities (Recommendation II.A)
- + Arctic States encouraged to ensure effective coordination mechanisms are in place to engage coastal communities in helping to reduce the impacts from shipping (Recommendation II.B)
- + Arctic States urged to identify areas of heightened ecological and cultural significance and to take protective measures (Recommendation II.C)

- Some progress has been made in identifying significant marine areas with a 2013 report prepared by three of the Arctic Council's working groups

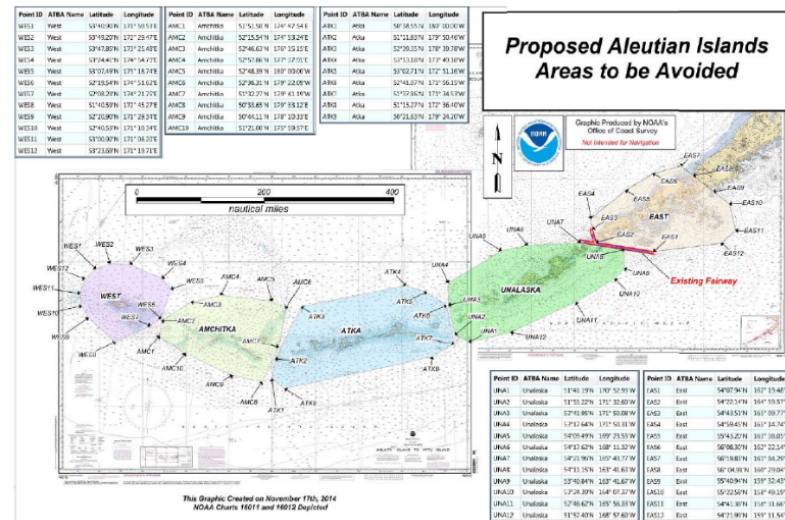


- + Identified a total of about 97 areas of heightened ecological significance comprising more than half of the ice-covered part of the marine Arctic
- + Admitted the lack of details on areas of heightened cultural significance

- Protective routing measures through the IMO for environmental purposes are very limited in Arctic waters
 - + Off Northern Norway
 - Traffic separation schemes and recommended routes established through IMO effective on 1 July 2007
 - Tankers of all sizes and other cargo ships of 5000 gross tonnage and over engaged in international voyages are encouraged to navigate about 30 nautical miles from land



+ Vessel routings off Alaska



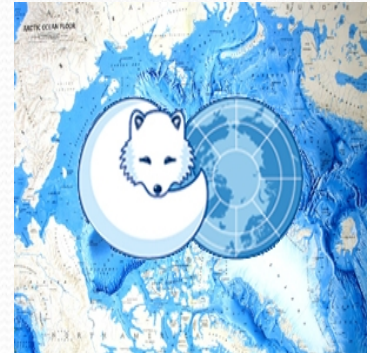
Chartlet 1

NCSR 2/3/5
Annex Page 3

- Five recommendatory areas to be avoided off the Aleutian Islands
 - * Applicable to ships 400 gross tonnage and above on international voyages
 - * Providing 50 NM buffer zones
 - * Approved by the IMO's Maritime Safety Committee at its 95th session in June 2015
 - * Measures take effect on January 1, 2016

(iii) Working out future directions for the Arctic Council

- Lots of lingering issues, e.g.,
 - + How might the engagement of non-Arctic States be strengthened?
 - + How might financing of Arctic Council activities be enhanced?
 - Secure funding for Permanent Participant involvements
 - Adequate funding for Council projects and assessments
 - + Should additional regional agreements be negotiated? e.g.,
 - Framework treaty further formalizing the Arctic Council and national commitments
 - Agreement on offshore oil and gas operational standards
 - + How might the “Arctic voice” be better communicated in international fora?

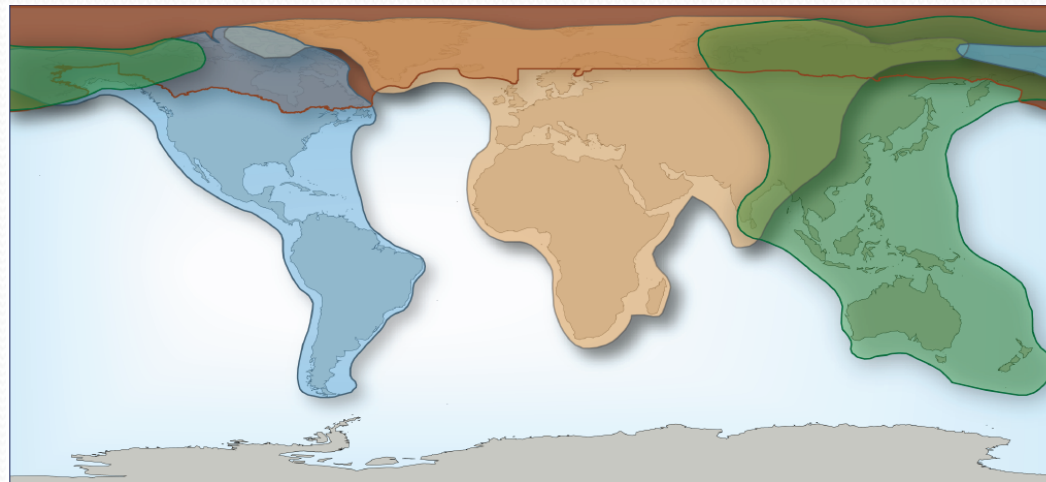


- Some promising avenues from the Arctic Council's Iqaluit Declaration of April 24, 2015
- + Has tasked Senior Arctic Officials with providing further guidance on engaging with Observers
- + Commits to identifying new approaches to funding Permanent Participants
- + Decision taken to establish a Task Force on Arctic Marine Cooperation to consider possible ways forward for enhancing cooperation including through a regional seas program
- + Directed the Scientific Cooperation Task Force to work towards completing a legally-binding agreement on scientific cooperation by the 2017 Ministerial meeting



(iv) Conserving Arctic migratory bird populations

- A long neglected issue
- + At least 279 bird species from outside the Arctic take advantage of the highly productive summer breeding seasons
- + The Arctic hosts some 80% of the global goose populations
- CAFF Working Group still in the early stages of carrying out priority actions under its Arctic Migratory Birds Initiative (AMBI) to strengthen conservation efforts in the four main flyways of the world

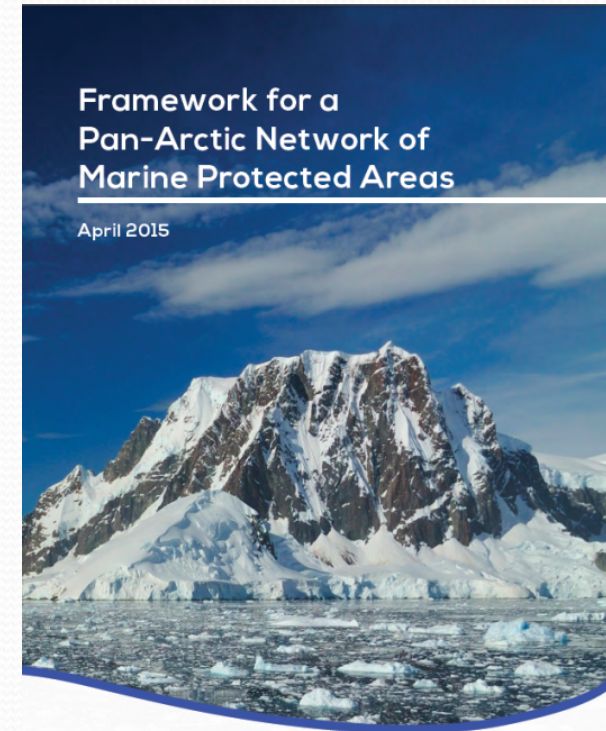


Map 1. AMBI Flyways



(v) Establishing a regional network of MPAs

- The latest Arctic Council initiative to promote the establishment of an MPA network suggests a long voyage is ahead in moving from paper to practice
- PAME's Framework for a Pan-Arctic Network of Marine Protected Areas stands out as being “politically cautious”
 - + No regional target adopted for MPA designations
 - + Leaving priorities and timelines for possible additions of MPAs to each Arctic State
 - + Administrative details yet to be worked out
- Further “paper steps” promised in PAME's Workplan 2015-2017
 - + Updated inventory of existing Arctic MPAs
 - + Desktop study on area-based conservation measures in the Arctic



(vi) Further addressing vessel-source marine pollution issues (Navigating beyond the Polar Code), e.g.,

- Ensuring effective ballast water management in polar waters
- Considering further heavy fuel oil (HFO) bans
- Controlling black carbon emissions
- Possibly designating one or more Emission Control Areas (ECAs) in the Arctic
 - Areas where more stringent air pollution controls for SO_x, NO_x and particulate matter might be imposed
 - An Emission Control Area has already been established for sea areas off the Atlantic and Pacific coasts of Canada and the U.S.



General view of the North American Emission Control Area (IMO, MEPC.1/Circ. 723, Annex 1, p. 7, 2010)

Conclusion

- Many other challenges relating to Arctic shipping governance hover on the horizon but no time to cover
- + Ensuring sustainable marine tourism development in the Arctic
- + Further addressing noise pollution from ships
- + Delineating extended continental shelf boundaries in the Arctic
- + Ensuring adequate infrastructure to support safe and sustainable northern shipping



- One final nautical image captures the “bottom line” regarding law of the sea and ocean governance in the Arctic
- An unfinished voyage!

