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ARCTIC LAW: EVEN MORE SUSTAINABLE? ROLES OF THE US AND EU

Joseph F. C. DiMento and Jessica Pierucci*

I. INTRODUCTION

The existing regime of Arctic governance addressing sustainability is complex and, as we argue quite strong. However, there are gaps in the regime even after recent international, regional, nation-state, and tribal initiatives of great significance. We address some of the most important of these efforts in this Article. Recommendations on how to fill those gaps are numerous and vary by and within international organizations, policymakers, and scholars—often based on regional perspectives. Here, we catalog and explain leading initiatives focusing on those emanating from or implicating the United States (US) and the European Union (EU), both with regard to the rhetoric and articulated policy and also to legal action.

We focus on EU and US contributions to new sustainability law in the Arctic for several reasons. First, together these governments represent an important percentage of Arctic nations. Both entities have made the protection of the Arctic a major priority in their international policies. While the Russian Federation has a gigantic presence in the Arctic, measured both by coastline and land mass, the period we have covered primarily was one in which the Russian Federation was excluded from the Arctic Council and other international Arctic organizations, and access to its proposals has not been readily available.¹

Preliminarily, we explain our understandings of sustainability in Section II; these go beyond traditional environmental indicators to encompass many socio-economic interests, including that of Arctic peoples, notably the Indigenous. This is followed by Section III, which includes the record of relevant Arctic governance. Section IV documents gaps in the record and how those are determined. Therein we indicate the entities that are striving to fill those governance gaps. This includes a description of the jurisdictional competencies of the EU and US as some potentially influential initiatives are outside of the control of these two major actors in international law. Section V distinguishes between procedural and substantive initiatives. We summarize the former activities of consultation, participation, and hybrid procedures. Under hybrid procedures, the international community determines which nation-states and other actors have various degrees of

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¹ Contributions are being proposed by other entities, including non-Arctic nations, international organizations, and NGOs, but they are not the subject of this Article.

sovereignty in the zones of the Arctic waters. This section on procedure also recognizes the increasing importance of litigation, petitions, submissions, and other adversary forms of attempting to promote greater Arctic sustainability. Following this are substantive gap fillers of several kinds; these range from approaches that develop the United Nations Convention on the Law of the Sea (UNCLOS) framework for making further commitments on protecting and preserving the marine environment to the regulation of offshore energy activities to single pollutant and single species actions including through treaty-making.

II. MEANINGS OF SUSTAINABILITY

Whether actions and development are sustainable depends on the definition of sustainability. Our research and work on this topic, like that of many Arctic scholars, has adopted a broad understanding of sustainability law and governance.²

These definitions come from the World Commission on Environment and Development, which has stated that “[s]ustainable development requires meeting the basic needs of all and extending to all the opportunity to satisfy their aspirations for a better life,” and also “requires the promotion of values that encourage consumption standards that are within the bounds of the ecological possible and to which all can reasonably aspire.”³ Further, our work recognizes that sustainable Arctic development has three goals: “economic development, social development, and environmental protection.”⁴ This understanding includes the sustainability of Arctic cultures; cultural sustainability is a touchstone that distinguishes the Arctic peoples’ goals. In our understanding, sustaining people, cultures, and traditions is entirely compatible with protecting the Arctic’s physical environment. It is also true, however, that pursuing these goals can bring tension with some of the classic objectives of environmental protection. Seeking to achieve such objectives, such as the protection of species, can occasionally lead to clashes with traditional practices of hunting, herding, and whaling.⁵ Additionally, the construction of infrastructure and energy facilities, opening Arctic areas to resource exploitation and mining can damage the environment and disrupt lifestyles and traditions. However, these projects also generate employment and funds to improve

² See, e.g., Joseph F. C. DiMento & Jessica Pierucci, *The Concept of Sustainability in International Law: A Research and Policy Bibliography*, 28 Sw. J. INT’L L. 361 (2023); see also Meetika Srivastava, *A Study on Sustainability and Sustainable Development: Detailed Explanation of the Terms and Its Evolution, Concept and Meaning Including Discussion on How to Enable Sustainable Development*, 1, 1 (2012), <https://papers.ssrn.com/abstract=3652024>; see also Ulrik Pram Gad et al., *Introduction: Sustainability as a political concept in the Arctic*, in *THE POLITICS OF SUSTAINABILITY IN THE ARCTIC I* (Ulrik Pram Gad & Jeppe Strandsbjerg eds., 2019).

³ U.N. SECRETARY-GENERAL, REP. ON THE WORLD COMM’N ON ENV’T AND DEV.: OUR COMMON FUTURE A/42/427, sections 15, 27 (1987).

⁴ Arctic Council, *Fairbanks Declaration* 1, 6 (May 11, 2017), <https://oaarchive.arctic-council.org/server/api/core/bitstreams/864abbae-8249-4c9d-9d02-d04e132526b2/content>.

⁵ See *infra* Part V (discussing examples, including the EU Seal Regime).

education, provide healthcare, and make daily life more comfortable for many of the Arctic's inhabitants.⁶

Addressing sustainability requires an assessment of the conditions of the entity being analyzed. In the Arctic, those conditions are well documented, although changing in some dimensions more so than in other regions of the world. We do not repeat those assessments here.⁷

III. THE RECORD

Arctic governance addressing environmental protection and, more generally, sustainability is strong and quite comprehensive. This includes an expansive array of laws, rules, and practices, from international laws to local agreements among Indigenous peoples groups, governments, and businesses.⁸ A 2017 volume aiming to catalog and summarize the various laws applicable to the Arctic spans 1,484 pages, including sections on laws related to law of the sea and its boundaries, shipping, fisheries, the environment, Indigenous peoples, and disputes.⁹ Given that there is no singular overarching Arctic treaty and none is likely forthcoming—in light of strong opposition by most of the Arctic states, despite regular academic suggestions for the creation of such a comprehensive system¹⁰—analysis of laws applicable to the Arctic requires a study of many overlapping laws. These range from substantive international treaties and broad international cooperation agreements, such as UNCLOS, to the soft law body of the Arctic Council, to state laws applicable to the Arctic, such as US laws regarding the Arctic Indigenous population.

Despite this multi-layered legal regime, there are gaps, both procedural and substantive, in the protection of the Arctic. Many of these gaps are currently being considered at the international level, regionally, and by individual nation-states.¹¹

IV. GAPS AND THEIR DETERMINATION

Determining the most needed areas for more effective governance involves a number of analyses. There are official sources such as the UN

⁶ This is the same understanding of sustainability law proposed in a prior work by DiMento and coauthors and it is largely repeated in this section. See Joseph F. C. DiMento et al., *Arctic Sustainability Law: Almost Sufficient*, 47 N.C. J. INT'L L. 247, 257 (2022).

⁷ For comprehensive and up to date assessments, see DiMento et al., *supra* note 6. See also *Arctic Report Card: Update for 2023*, NOAA IN THE ARCTIC, <https://arctic.noaa.gov/report-card/report-card-2023/> (last visited Dec. 12, 2024); see *Assessments*, ARCTIC COUNCIL, <https://arctic-council.org/explore/work/assessments/> (last visited Dec. 12, 2024).

⁸ See JOSEPH F. C. DIMENTO, *POLAR SHIFT: THE ARCTIC SUSTAINED* 1, 87-130 (2022); see DiMento et al., *supra* note 6, at 249-50.

⁹ See *THE ARCTIC IN INTERNATIONAL LAW AND POLICY* (Kristina Schönfeldt ed., 2017).

¹⁰ See Outi Penttilä, *Transboundary Environmental Harm in the Arctic: In Search of Accountability for an Oil Spill*, 10 Y.B. POLAR L. 1, 21-23 (2018).

¹¹ See DiMento et al., *supra* note 6, at 276-77.

Sustainability Goals, which is one important benchmark.¹² However, those goals are numerous and highly ambitious and, as stated, not easily operationalized in the Arctic case—although generally consistent with Arctic needs.

We base our list on an extensive new literature search,¹³ a comprehensive literature search from our earlier work, and expert opinion from that work both in the form of a survey and interviews.¹⁴ We include herein laws and legal strategies proposed, advocated, or considered. These sources identify several areas where there is a strong position, if not a consensus, on needs.

A. Gap Foci

Gaps are found in all sectors: the marine environment; the atmosphere (air quality, broadly understood); land degradation, including erosion; resource conservation; population protections (of peoples and cultures); climate change; emergencies and disaster preparedness; diet and food availability; infrastructure characteristics and maintenance; national security; offshore energy activity regulation (including oil pollution and liability regimes); wildlife protection; services for people; and governance process including the use of litigation. We focus here on some of the gaps we consider the most significant based on our earlier work and on more recent sources.

B. Gap Fillers

In looking at the US and EU roles as sources of contributions to greater Arctic sustainability law, some explanations of jurisdiction are in order first. A subnational or sub-regional entity, for example, may favor or promote a new law or policy but not have the authority constitutionally to implement it. This is the case for both the EU (in relationship to Member states) and the US (in relationship to US states). For the former—as discussed below—the EU may articulate a broad Green Economy¹⁵ strategy but have little influence on a Member state's decision to continue fossil fuel exploitation. For the latter, an example would be how Alaska

¹² *The 17 Goals*, U.N. DEPT OF ECON. AND SOC. AFF.: SUSTAINABLE DEV., <https://sdgs.un.org/goals> (last visited Dec. 12, 2024).

¹³ Focusing on work published from 2022 to the present as of September 2024.

¹⁴ See DiMENTO, *supra* note 8, at 9-11.

¹⁵ See Green Economy, UN ENVIRONMENT PROGRAMME, <https://www.unep.org/regions/asia-and-pacific/regional-initiatives/supporting-resource-efficiency/green-economy> (last visited Dec. 12, 2024) (defining “Green Economy”).

may and often does have different interests and positions than those taken by the US, like oil exploration and drilling in sections of the Arctic.

1. Jurisdiction

The Arctic has not historically been of major significance to Europe or the US.¹⁶ However, EU interest in the pole has varied in the last decades—less when Greenland withdrew from the EEC, a bit more when the Barents Euro-Arctic Council was created, and with the entry into the EU of Sweden and Finland.¹⁷ Another period was in the implementation of the Northern Dimension which “proved to be unsuccessful in engaging Arctic affairs and increasing regional awareness in Brussels.”¹⁸ However, in the first decade of this century, EU’s attention again turned to the region, although not without controversy.

Often perceived as an “external Arctic actor,” the EU has had difficulties proving its regional legitimacy and credibility to all Arctic states. However, despite much debate on its role in the Arctic, the EU holds a strong, multidimensional regional presence. This includes its regulatory and research footprint, a proven impact on the Arctic’s climate, its role as a key trade partner for all Arctic states, and its participation in regional regimes. The European Union is part of the Arctic, linked to the Arctic and simultaneously affects and is affected by the Arctic.¹⁹

While three Arctic States—Denmark, Finland, and Sweden—are members of the EU, the EU maintains close relationships with two additional Arctic States, Iceland and Norway, and one additional Arctic entity, Greenland (through the Kingdom of Denmark²⁰), through either the European Economic Area (EEA) or the association of Overseas Countries and Territories (OCTs).²¹ The EU is a Barents Euro-Arctic Council member and a “party to UNCLOS and all its connected agreements with direct or indirect Arctic relevance.”²² While the EU is not an official Observer of the Arctic Council as it awaits a decision on its application,²³ it is represented by its Arctic member states, Denmark, Finland, and

¹⁶ *European Union: Country Backgrounder*, THE ARCTIC INST., <https://www.thearcticinstitute.org/country-backgrounders/european-union/> (last updated Aug. 1, 2022) [hereinafter *European Union*]; see also DiMENTO, *supra* note 8, at 36-41.

¹⁷ See *European Union*, *supra* note 16. Of note, Russia withdrew from the Barents Euro-Arctic Council in 2023 and in 2024 Finland announced plans to withdraw at the end of 2025. Astri Edvardsen, *Norway to Consider the Future of the Barents Euro-Arctic Council as Finland Withdraws*, High North News (Nov. 27, 2024), <https://www.highnorthnews.com/en/norway-consider-future-barents-euro-arctic-council-finland-withdraws>.

¹⁸ *Id.*; see also *The EU in the Arctic*, EU EXTERNAL ACTION (Jan. 1, 2024), https://www.eeas.europa.eu/eeas/eu-arctic_en.

¹⁹ See *European Union*, *supra* note 16.

²⁰ *The Kingdom of Denmark*, ARCTIC COUNCIL, <https://arctic-council.org/about/states/denmark/> (last visited Dec. 12, 2024).

²¹ See *European Union*, *supra* note 16.

²² *Id.*

²³ *Arctic Council Observers*, ARCTIC COUNCIL, <https://arctic-council.org/about/observers/> (last visited Dec. 12, 2024).

Sweden, and six Observer member states, France, Germany, Italy, the Netherlands, Poland, and Spain.²⁴

These connections have not, however, made for a smooth evolution of positive EU-Arctic relationships, nor overlap with interests, including those of several European countries over extractive resources in the North.²⁵

For our purposes, it is unimportant which and how many Arctic states support official EU positions. It is the substance of the new initiatives implemented or proposed that we present here.²⁶

Similarly, the Arctic has been of varying importance to the US. It is currently of considerable concern for several reasons, ranging from sustainability to national security.²⁷ Arctic sustainability falls within the interests, sometimes countervailing, of both the federal government and the states, most notably Alaska. However, interest does not always translate to jurisdiction. The federal position is tantamount. As Zengjun noted:

The US territorial sovereignty over Alaska is the geographical precondition for its Arctic country status, and the premise for all its rights in the Arctic and its pursuit of leadership in the regional order. However, for a long time, the development of Alaska has lagged far behind that of the continental United States due to its detached geographical location and other limitations, Protecting the rights of local people to subsistence and development thus becomes the priority of the state government.²⁸

But this priority is subservient to the federal paramountcy doctrine, which gives jurisdiction to the federal government in issues such as foreign commerce, affairs, and defense, which includes power over the sea surrounding Alaska.²⁹

²⁴ See *European Union*, *supra* note 16; see also *Arctic Council Observers*, *supra* note 23.

²⁵ For more on EU-Arctic relationships, see Julien Lebel & Annika E. Nilsson, *EU Engagement in the Arctic: Challenges to Achieving Ambitions in an Area outside Its Jurisdiction*, 15 ARCTIC REV. L. & POL. 47, 47 (2024). In particular, “[t]he strong integration of the Green Deal in the EU’s Arctic policy is, however, in contradiction with the interests of several European countries regarding extractive resources in the Circumpolar North.” This is notably the case with Norway (a major “exporter of oil and gas”) and Greenland (home to significant “rare earth minerals”). “[W]ithout more attention to conflicting political priorities among various Arctic actors as well as how different political goals within the EU affect the Arctic, future EU Arctic policies are likely to have less influence on the region’s future than sector-specific regulations that guide the behavior of EU members by influencing global norms and global trends.” *Id.* at 67.

²⁶ For the generation of new initiatives this is the case. However, as discussed later with regard to implementation of the BBNJ Treaty, “*articulation with European Union Law*” could also be a complex point. The EU’s participation in the future institutions will be accompanied by a declaration of competences, which will specify the matters for which the Member States have transferred competence to the EU, in order to clarify the extent of obligations incumbent on each and, at the same time, the division of responsibilities between them (Article 67 of the BBNJ Agreement).” Pascale Ricard, *The Advent of the 2023 “BBNJ” Agreement: A Preliminary Legal Analysis*, 53 ENVTL. POL’Y & L. 427, 437 (2023).

²⁷ See Kuang Zengjun, *New Developments in US Arctic Strategy and Their Implications for Arctic Governance*, 99 CHINA INT’L STUD. 107, 107 (2023).

²⁸ *Id.* at 118.

²⁹ Nora Refai, *The Beaufort Sea Boundary Dispute: A Consideration of Rights of Inuit in Canada*

Two federal cases focusing on Alaska illustrate this point. In 1982, in a case regarding “whether the state or federal government held the right to lease mineral resources of the ocean seabed,” the US District Court of Alaska concluded that “claims of sovereign power over the oceans whether made by one of the several states... or by any other native tribe is inconsistent with national sovereignty and must fail.”³⁰ Further, “the District Court found that a tribe under federal jurisdiction ‘loses all elements of external sovereignty including the capacity to acquire sovereignty over or ownership of unclaimed lands.’”³¹

In 1989, the Ninth Circuit Court of Appeals provided a less stringent standard, declaring “aboriginal rights may exist concurrently with a paramount federal interest, without undermining that interest.”³² As applied to the Indigenous people asserting rights in the case, the court further held that the “federal government's paramount interests in the [outer continental shelf] do not extinguish the asserted aboriginal rights of the Villages. That it subordinates those aboriginal rights is certain.”³³ This precedent may provide an avenue for consultation with Indigenous people in federal decisions impacting Alaska Native populations, though federal interests still appear to take priority.³⁴

Alaska has several Arctic-specific laws that influence sustainability variously understood, but additional Alaskan interests may be inconsistent with the leading jurisprudence on paramountcy and make claims under this precedent challenging.

V. IN PROGRESS, PROPOSED, AND SUGGESTED INITIATIVES FOR ARCTIC SUSTAINABILITY

With a challenge and goal as significant as Arctic sustainability—which is also a global concern—we offer this Article as part of continuing international law efforts to build a successful regime. For the present work we distinguish between procedural and substantive initiatives.

In the following sections, we address first, under procedural requirements, consultation and participation of affected groups; hybrid procedural/substantive means of allocating jurisdiction and control over resource management of large parts of the Arctic; and the ever more utilized advocacy and/or adversarial strategies of litigation, petition, and submissions.

Second, substantive initiatives focus herein on the protection of the marine environment, including conservation of biodiversity in areas beyond national jurisdiction; liability for offshore energy source pollution, including oil pollution;

and the United States, 60 ALTA. L. REV. 267, 301 (2022) (citing *Inupiat Cmty of Arctic Slope v. United States*, 548 F. Supp. 182, 186-87 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984) and *United States v. Maine*, 420 US 515, 522-23 (1975)).

³⁰ *Id.* at 301 (citing *Inupiat Cmty of Arctic Slope v. United States*, 548 F. Supp. 182, 185 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984)).

³¹ *Id.*

³² *Id.* at 302 (citing *Village of Gambell v. Hodel*, 869 F.2d 1273, 1277 (1989)).

³³ *Id.*

³⁴ *Id.*

mandating more comprehensive environmental studies in more cases; the adoption of species and single pollution source focused treaties; and other future actions.

A. Procedural

1. Consultation and Participation of Affected Groups

Procedural reforms have a potentially major influence on substantive outcomes of Arctic governance.³⁵ Involvement in law-making, for example, is a major factor in determining the reach and acceptability of outcomes.

Throughout the development of modern environmental law, the various methods of participation and decision-making have been identified as a major component of effectiveness of lawmaking. There are numerous national, subnational, regional, and other international participation requirements—the description of which is addressed comprehensively elsewhere.³⁶ The involvement of affected people is accepted widely, although by no means universally. But what that involvement entails is a critical question. Consultation with affected groups, what that consultation requires, participation through actual lawmaking activities like negotiating treaties at the international level is variably appreciated.³⁷

The record of both the EU and the US is one of leadership on these questions—but there is more to be done.

For example, in general, the US has not included Indigenous peoples in treaty negotiations, though many Indigenous advocates have urged otherwise.³⁸ Needed then is further empowerment of interest groups not historically involved in the creation and development of sustainability governance actions.

First, consultation with these groups, such as Indigenous peoples in the Arctic, must be improved. Consultation is insufficient if it is nothing other than informing people and awaiting their responses. What is advocated by certain Indigenous groups and recommended here is to involve these entities in mandated consultation processes with specific responsive criteria about why or why not the “lead agency” is accepting proposed positions. That is a basic minimum. Additionally valuable to the creation of more effective sustainability initiatives is to have these groups participate in the negotiating processes for Arctic initiatives.

In 2017, several Indigenous organizations, including some from the Arctic, submitted Local Communities and Indigenous Peoples (LCIP) Platform proposals to enhance Indigenous participation before the United Nations Framework Convention on Climate Change (UNFCCC) with the goal of achieving

³⁵ Jona Razzaque, *Information, Public Participation and Access to Justice in Environmental Matters*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 58 (Erika Techera et al. eds., 2d ed. 2020). The article succinctly summarizes the point that strong substantive rights and laws are not enough.

³⁶ See, e.g., Razzaque, *supra* note 35; Sabrina Urbinati, *The Community Participation in International Law*, in BETWEEN IMAGINED COMMUNITIES OF PRACTICE: PARTICIPATION, TERRITORY AND THE MAKING OF HERITAGE 123 (Nicolas Adell et al. eds., 2015).

³⁷ See generally Razzaque, *supra* note 35.

³⁸ Refai, *supra* note 29, at 280.

a negotiating body status similar to state parties for decision-making under UNFCCC.³⁹ The state parties denied the full aspirations of the LCIP Platform but did create the LCIP Platform Facilitative Working Group, which includes seven state party representatives and seven Indigenous organization representatives and is the “first formal space wherein [Indigenous peoples] can participate on an equal footing with state parties within the UNFCCC.”⁴⁰ As another example, in November 2021, the Inuit succeeded in becoming the first Indigenous Peoples organization to receive provisional consultative status in the International Maritime Organization (IMO).⁴¹ They are presently working towards receiving full consultative status in 2025. The ultimate goal is to have multiple Indigenous organizations achieve this status by 2030 to ensure “Indigenous Knowledge is utilized in all areas of IMO’s work,” including conversations about biodiversity beyond national jurisdiction and the Central Arctic Ocean Fisheries Agreement.⁴² In the Arctic Council (AC), a regional intergovernmental forum of cooperation, coordination and interaction among the Arctic states, Indigenous organizations are permanent participants.⁴³ In contrast to Observers who “have no entitlement to participation in formal decision-making,” the six permanent participant organizations can impact the decisions reached by the member states through active involvement.⁴⁴ Yet there is more to be done to ensure Indigenous voices are fully heard before the Arctic Council, notably multiple scholars argue for elevating the status of Indigenous organizations to include voting powers.⁴⁵

A recent dispute over management of caribou herds demonstrates the complexities of indigenous rights and resource management in the Arctic and highlights the need for clearer governance frameworks. The case involves treaty interpretation and the reach of “participants” in management activities.⁴⁶

³⁹ Yuko Osakada, *From Victims to Contributors: A Human Rights Approach to Climate Change for the Indigenous Peoples of the Arctic*, 13 Y. B. POLAR L. 16, 32-34 (2022).

⁴⁰ *Id.* at 34-35.

⁴¹ Press Release, Inuit Circumpolar Council, International Maritime Organization (IMO) Position Paper (Nov. 22, 2023), <https://www.inuitcircumpolar.com/news/international-maritime-organization-imo-position-paper/>.

⁴² *Id.*; Wayne D. Garnons-Williams et al., *Indigenous Leadership on Climate Change and the Arctic*, 46 CAN.-U.S. L.J. 98, 102 (2022).

⁴³ *About the Arctic Council*, ARCTIC COUNCIL, <https://arctic-council.org/about/> (last visited Dec. 13, 2024); see also Garnons-Williams et al., *supra* note 42, at 112.

⁴⁴ Anna Sharapova et al., *Indigenous Rights and Interests in a Changing Arctic Ocean: Canadian and Russian Experiences and Challenges*, 13 ARCTIC REV. L. & POLITICS 286, 287 (2022).

⁴⁵ See, e.g., Gudmundur Alfredsson, *Indigenous Peoples in the Arctic Council: A Unique Feature?*, 13 Y. B. POLAR L. 3, 14-15 (2022) (Listing five suggestions for the Arctic Council to improve Indigenous participation, including voting rights, independent expert appointments, funding Indigenous participation, fully funding an Indigenous Peoples’ Secretariat, and participation in related intergovernmental organizations.); Garnons-Williams et al., *supra* note 42 at 112 (Dr. Dalee Sambo Dorough comments, “Because Inuit Nunaat homeland ... is so important to us, we should not be merely permanent participants. We should have an equal seat at the table. We should also have the right to vote.”).

⁴⁶ Jocelyn Shepel, *Treaty Interpretations Spark Disagreements at N.W.T. Appeal Court Over Caribou Management*, CBC NEWS (Oct. 25, 2024), <https://www.cbc.ca/news/canada/north/colville-lake-caribou-plan-court-appeal-1.7362229>; Sahtu Dene and Métis Comprehensive Land Claim Agreement, Sept. 6, 1993, Sahtu Dene and Métis Land Claim Settlement Act, S.C. 1994, c. 27.

This inclusion of Indigenous organizations reflects an evolving change in understanding international public law. Since its recognized beginnings, generally understood as emanating from the time of the Peace of Westphalia (1648) and based on the work of early theorists and the teachings of Grotius, international law has been predominantly derived by and for sovereign states.⁴⁷

2. Hybrid Procedural

A hybrid between procedural and substantive initiatives that implicates which national laws will govern parts of the Arctic is the determination regarding which national laws will address, *inter alia*, but here, in our case, the sustainability of parts of the Arctic. This requires an understanding of the jurisdictions associated with the zones of the UNCLOS and how those zones are established for individual nations. For delineation questions, the Commission on the Limits of the Continental Shelf makes recommendations to states on the establishment of the outer limits of the continental shelf beyond two hundred nautical miles.⁴⁸ In the Arctic, the five Arctic coastal states have or soon will have sent Commission submissions on the outer limits of the continental shelf.⁴⁹ The delineation of the Arctic states' continental shelves will determine which parts of the Arctic Ocean seabed are parts of the "common heritage of mankind." China has referred to this phrase in its efforts to pursue access to Arctic resources. Notably, "[b]enefits derived from a 'common heritage' area are subject to 'equitable sharing' among states."⁵⁰ Ultimate determinations, no matter how they are made (as the Commission's findings are recommendations), likely will have a significant influence on the sustainability of the Arctic as nation-states differ on their assessment of priorities of use and protection of the seas.⁵¹ A strong proregional sustainability position on the meaning of common heritage treatment is by no means guaranteed. And the US has had a skeptical view of its application.

⁴⁷ JAMES CRAWFORD, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3-4 (Ninth ed. 2019).

⁴⁸ *Commission on the Limits of the Continental Shelf (CLCS): Purpose, Functions and Sessions*, OCEANS & LAW OF THE SEA, https://www.un.org/Depts/los/clcs_new/commission_purpose.htm (last updated Nov. 4, 2024) [hereinafter *CLCS*].

⁴⁹ *Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982*, OCEANS & LAW OF THE SEA, https://www.un.org/Depts/los/clcs_new/commission_submissions.htm (last updated Jan. 9, 2025).

⁵⁰ Under UNCLOS, the phrase defines "rights and duties for UNCLOS members in extracting resources." Ryan R. Migeed, *Ending the Game of Environmental Politics in the Arctic: How the Arctic States Can Achieve Dispute Resolution Using Existing Legal Frameworks*, 27 OCEAN & COASTAL L.J. 35, 57 (2022).

⁵¹ See *CLCS*, *supra* note 48 ("Under the Convention, the coastal State shall establish the outer limits of its continental shelf where it extends beyond 200 M on the basis of the recommendation of the Commission. The Commission shall make recommendations to coastal States on matters related to the establishment of those limits; its recommendations and actions shall not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts.").

Nonetheless, both the US and EU can advocate for strong stewardship for future generations and equitable sharing.⁵²

a. Cooperation, Participation and War

A considerable factor in the extraordinary history of the international treatment of the Arctic has been the extent to which Arctic nations have cooperated in seeking solutions to common and world challenges. This has been facilitated through institutional arrangements such as the AC and the Northern Dimension but also through informal means.

Tragically, presently overshadowing the need for greater participation and cooperation among entities with Arctic sustainability interests—is war.

Both the EU and the US had, for many years, variably cooperative relations with the Russian Federation and, before that, the USSR. Suggested and hoped for additions to the international sustainability law of the Arctic must recognize at the time of this writing the complete breach of those relations caused by the Russia-Ukraine war.⁵³ Even though interest groups in the pan-Arctic desire additional initiatives to sustain the Arctic, actions to pursue those in common have been hindered.⁵⁴ The Arctic Council Seven, that is all Council members except the Russian Federation, paused Council proceedings in response to the Russian invasion, but at the same time expressed the desire to continue the AC's work.⁵⁵ Russia held the AC chairmanship when the war started and AC work halted, but 2023 marked the transition to Norway's term as chair and with that a gradual resumption of certain operations, notably the resumption of virtual Working Group meetings in 2024.⁵⁶

Also, The Northern Dimension, a common policy of the EU, is constituted by Russia, Norway, and Iceland, with Belarus as an observer. Belarus' involvement in the Russian aggression led the EU, Iceland, and Norway to suspend all activities of the Northern Dimension policy that involved Russia and Belarus

⁵² Michela Massimi, *The Fraught Legacy of the Common Heritage of Humankind Principle for Equitable Ocean Policy*, 153 ENV'T SCI. & POL'Y 1, 1 (2024).

⁵³ See Stefan Kirchner & Federica Cristani, *International Disaster Risk Reduction and Response Law Made in the Arctic*, 4 Y.B. INT'L DISASTER L. 21, 22-23 (2023) ("With the invasion of Ukraine by Russia on 24 February 2022, the scenario for Arctic governance . . . has been put under serious challenge."); see also Timo Koivurova & Akiho Shibata, *After Russia's invasion of Ukraine in 2022: Can We Still Cooperate with Russia in the Arctic?*, 59 POLAR REC. 1 (2023) (Koivurova and Shibata argue that treaty based cooperation is better able to continue despite issues with Russia but soft law cooperation, including through the Arctic Council, lacks the legal obligation to continue through the Russia-Ukraine war. While there are benefits to soft law, including of flexibility, in this circumstance a serious risk of any cooperative efforts surviving exists).

⁵⁴ See generally Koivurova & Shibata, *supra* note 53.

⁵⁵ Timo Koivurova et al., *Arctic Cooperation in a New Situation: Analysis on the Impacts of the Russian War of Aggression* at 5 (2022), <https://julkaisut.valtioneuvosto.fi/handle/10024/164521>; Koivurova & Shibata, *supra* note 53, at 4.

⁵⁶ *Arctic Council Advances Resumption of Project-Level Work*, ARCTIC COUNCIL (Feb. 28, 2024), <https://arctic-council.org/news/arctic-council-advances-resumption-of-project-level-work/>.

on March 8th of 2022.⁵⁷ Included among the Northern Dimension policy foci are the environment (including nuclear safety), public health, social well-being, and culture—all parts of Arctic sustainability.⁵⁸

3. Litigation, Petitions, and Submissions

After five decades of climate change law-making, many are frustrated, angry, and feeling impotent in the face of the larger forces that obstruct what they consider meaningful governance initiatives. Litigation and other forms of petitioning and adversarial submissions that not long ago were considered of very limited practical value are now major strategies advocated and employed in the EU and the US. Cases have been initiated; some have been successful; and new legal theories of causes of action are under serious consideration.

Perhaps unsurprisingly, the US has seen a large number of cases in the Arctic or with implications for Arctic sustainability.⁵⁹ Recent cases originating in Alaska include Alaskan youth suing entities over Alaska's resource development contributing to climate change,⁶⁰ a suit over "the fate of polar bears living along Alaska's Beaufort Sea,"⁶¹ a suit over the National Marine Fisheries Service (NMFS) "decision not to delist the Arctic ringed seal as an endangered species,"⁶² a second suit over seals challenging the NMFS final rules on bearded seal and Arctic ringed seal critical habitat designations,⁶³ a challenge to oil and gas development in the National Petroleum Reserve in Alaska,⁶⁴ a challenge to a

⁵⁷ Peter Stano, *Northern Dimension Policy: Joint Statement by the European Union, Iceland and Norway on suspending activities with Russia and Belarus*, EU EXTERNAL ACTION (Mar. 8, 2022), https://www.eeas.europa.eu/eeas/northern-dimension-policy-joint-statement-european-union-iceland-and-norway-suspending-activities_en.

⁵⁸ *Northern Dimension Policy Framework Document* 1, 5, https://www.europarl.europa.eu/cmsdata/124360/nd_framework_document_2006_en.pdf (last accessed Dec. 13, 2024).

⁵⁹ The U.S. Climate Change Litigation database compiled by the Sabin Center for Climate Change Law at Columbia Law School lists 31 cases which explicitly mention the Arctic as of September 5, 2024. The cases focus on a variety of Arctic resources and were brought by a variety of plaintiffs. The U.S. database includes over 1800 cases in total. *Search US Cases*, CLIMATE CHANGE LITIG. (June 16, 2016), https://climatecasechart.com/search/?fw_search=arctic.

⁶⁰ *Sagoonick v. State*, 503 P.3d 777, 782 (Alaska 2022) ("A number of young Alaskans — including several Alaska Natives — sued the State, alleging that its resource development is contributing to climate change and adversely affecting their lives. The case was dismissed.").

⁶¹ *Alaska Wildlife All. v. U.S. Fish & Wildlife Serv.*, No. 23-35299, 2024 WL 1169411, at *1 (9th Cir. 2024) (the Ninth Circuit issued an unreported memorandum opinion). The Alaska Wildlife Alliance views the outcome as a "victory" for polar bear protection. *See Victory in Our Lawsuit to Protect Beaufort Sea Polar Bears!*, ALASKA WILDLIFE ALL. (Mar. 20, 2024), <https://www.akwildlife.org/news/polar-bear-alaska-lawsuit-oil-gas-harassment>.

⁶² *Alaska v. Nat'l Marine Fisheries Serv.*, No. 3:22-CV-00249-JMK, 2024 WL 1199714, at *1 (D. Alaska 2024) (an appeal is currently pending before the Ninth Circuit).

⁶³ *Alaska v. Nat'l Marine Fisheries Serv.*, No. 3:23-CV-00032-SLG, 2024 WL 4298114, at *1 (D. Alaska 2024) (The court granted Alaska's request to set aside the rules. The court's analysis reflects how institutions consider the Arctic as a region even in the analysis of domestic decision making.).

⁶⁴ *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, 701 F. Supp. 3d 862 (D. Alaska 2023) (the organizations challenging development lost at the District Court. They appealed to the Ninth Circuit and the case was argued in February 2024. A decision is pending).

proposed gold mine by Alaska Native tribes,⁶⁵ a challenge by Alaska Native corporations and oil and gas lessees to a moratorium on oil and gas programs in Arctic National Wildlife Refuge's Coastal Plain with other Alaskan Native corporations and environmental organizations as defendant-intervenors,⁶⁶ and a dispute over 20,000 acres of land the state alleges should belong to Alaska.⁶⁷ Many of these cases are still awaiting a final decision, and the outcomes could set precedents for the level of environmental protection of wildlife, land, and people in Alaska moving forward.

Further, a 2021 decision by the Supreme Court of Canada expanding the definition of "aboriginal peoples of Canada" to potentially include Inuit residents of Alaska based on their migration history could open a new avenue for litigation and inclusion under the Canadian Constitution.⁶⁸ Section 35(1) protects hunting and fishing rights which "could arguably trigger fiduciary duties" to Inuit in Alaska.⁶⁹ Although not a US case, this decision could allow Alaska's Inuit population to be included in a Canadian delegation to Beaufort Sea negotiations.⁷⁰

The EU has also seen litigation on Arctic sustainability issues, much of it related to Indigenous people. Sáminuorra, a Sámi youth organization, was among a group of applicants challenging the EU's 2021-2023 climate change mitigation legislation in the Court of Justice of the European Union (CJEU) based on "infringement of their fundamental rights to 'life and physical integrity, the rights of children, the right to pursue an occupation, the guarantee of property, and the right to equal treatment' under the Charter of Fundamental Rights of the European Union."⁷¹ In a pending case challenging oil exploration, including "the expansion of oil exploration encroaching on Sami territory," before the European Court of Human Rights, two of the six individual applicants are Sámi.⁷² In 2022, the Finland Supreme Court determined a fishing restriction was contrary to a fundamental right to culture found in the Constitution of Finland and, therefore, inapplicable to the

⁶⁵ *Orutsararmiut Native Council v. U.S. Army Corps of Engineers*, No. 3:23-CV-00071-SLG, 2024 WL 4349692, at *1 (2024) (The court granted declaratory relief citing concerns over the chance of a spill in the environmental impact statement (EIS) but approving of other challenged EIS findings. Decisions on mining often reflect very different views, including among Indigenous peoples, on the importance of various foci in considerations of sustainability.).

⁶⁶ *Alaska Ind. Dev. & Export Auth. v. Biden*, 685 F. Supp. 3d 813 (D. Alaska 2023) (the District Court upheld the moratorium. An appeal is currently pending before the Ninth Circuit).

⁶⁷ *Alaska v. U.S. Dep't of the Interior*, No. 3:22-cv-00078-SLG, 2023 WL 2424270, at *1 (D. Alaska, Mar. 9, 2023) (still in litigation, this is only a procedural decision).

⁶⁸ See Refai, *supra* note 29, at 296; see *R. v. Desautel*, No. 38734, ¶ 4 (Can. 2021).

⁶⁹ Refai, *supra* note 29, at 296.

⁷⁰ See *id.*

⁷¹ Linnéa Nordlander, *Litigating Climate Change in the Arctic: The Potential of Sámi Human Rights Claims*, 13 J. HUM. RTS. & ENV'T 416, 420 (2022); Case T-330/18, *Carvalho v. Eur. Parliament & Council of the Eur. Union*, ECLI:EU:T:2019:324, ¶ 46 (May 8, 2019); Case C-565/19 P, *Carvahlo & Others v. Eur. Parliament & Council of the Eur. Union*, ECLI:EU:C:2021:252, ¶ 26 (Mar. 25, 2021) (the case was dismissed based on lack of standing).

⁷² Nordlander, *supra* note 71, at 421; *Greenpeace Nordic & Others v. Norway*, App. No. 34068/21, ¶¶ 1-2 (Dec. 16, 2021), <https://hudoc.echr.coe.int/eng?i=001-214943> (the case was filed in 2021 and is currently pending).

Sámi population.⁷³ Although originating from a different region, one additional case is worth mentioning for its discussion of climate change's impact on Indigenous culture. In 2022, the United Nations Human Rights Committee decided Australia failed to protect Indigenous inhabitants of the Torres Strait Islands from impacts of climate change that have damaged their ability to fully practice their cultural traditions.⁷⁴ This decision adds to the growing body of international climate change litigation seeking to protect Indigenous rights that could have powerful implications in the Arctic.

EU Seal Regime litigation is background for understanding some of the tensions in descriptions of sustainability. The complex and turbulent history of sealing regulation in the EU has been detailed elsewhere.⁷⁵ In short, "[t]he 2009 European Union (EU) Seal Regime banning the importation of seal products into its market on moral grounds devastated the lives of Inuit and other Indigenous peoples in the Arctic and generated a series of cases before the EU courts and World Trade Organization (WTO) dispute settlement body."⁷⁶ The current ban, post-litigation, includes an exemption for Inuit seal products, but "Inuit communities, despite being fully compliant with the regulation, are still, in practice, unable to export their products to the EU."⁷⁷ The 2009 ban was "heavily criticised" by Greenland and Canada, and scholars have noted an impact on Greenland's resource management and political relations with the EU because of this EU policy.⁷⁸ Sustainability is deeply complicated in the case of the EU Seal Regime as cultural sustainability of the Inuit traditional practice of seal hunting is in tension with protecting seals through asserted environmental sustainability. This also implicates the sometimes tension between animal rights and protection of indigenous culture—an important and thorny issue more thoroughly addressed in an evolving literature.⁷⁹

⁷³ See Stefan Kirchner et al., *Towards a Holistic Cross-Border Environmental Governance in the European Arctic*, 9 J. TERRITORIAL & MAR. STUD. 31, 35 (2022); KKO:2022:26 - *Fishing Restriction Imposed on the Sami Indigenous People and Its Relationship to Their Fundamental Rights (game offence)*, SUP. CT. OF FIN. (2022), https://korkeinoikeus.fi/en/index/ennakkopaatokset/shortsummariesofselectedprecedentsinenglish/2022_1/kko202226.html.

⁷⁴ Global Climate Change Litigation Database, *Daniel Billy and others v Australia (Torres Strait Islanders Petition)*, SABIN CENTER FOR CLIMATE CHANGE LAW, <https://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/>; Daniel Billy v. Australia, Comm. No. 3624/2019, U.N. Docs. CCPR/C/135/D/3624/2019 (2022).

⁷⁵ See, e.g., Michael Fakhri, *Markets, Sovereignty, and Racialization*, 25 J. INT'L ECON. L. 242, 242 (2022).

⁷⁶ *Id.*

⁷⁷ Malgosia Fitzmaurice & Robert C. Steenkamp, *Marine Mammals in the Polar Regions*, in THE ROUTLEDGE HANDBOOK OF POLAR L. 279, 297 (Yoshifumi Tanaka et al. eds., 2023).

⁷⁸ Lebel and Nilsson, *supra* note 25, at 54.

⁷⁹ See, e.g., Will Kymlicka & Sue Donaldson, *Animal Rights and Aboriginal Rights*, in CANADIAN PERSPECTIVES ON ANIMALS AND THE LAW 159, 159 (Vaughan Black, Peter J. Sankoff, & Katie Sykes eds., 2015) ("Animal advocates in Canada are stymied by the relationship between animal rights (AR) and Aboriginal rights, and have failed to find a way of discussing the relationship that is morally coherent and politically viable."); Stefan Kirchner, *Cross-Border Forms of Animal Use by*

Another example of this sustainability tension comes from Norway. In 2021, the Norwegian Supreme Court found a wind power project disrupting Sámi reindeer husbandry “violate[d] Sámi rights to culture.”⁸⁰ This case highlights a similar tension between cultural sustainability of Sámi reindeer husbandry and environmental sustainability when “land in Sápmi is used to develop wind and hydropower plants, the development of which is accelerating in order to mitigate climate change.”⁸¹

More cases can be expected. For instance, one scholar notes that in the EU Sámi litigants could bring claims under the European Convention of Human Rights based on climate change impacts on Sámi culture and traditions.⁸² The outcome of pending US cases may influence the direction of subsequent litigation to address the precedent set by the decisions.

B. Substantive

Substantive gaps are several.⁸³ As noted, we focus on a few that are of greatest urgency and have reasonable chances of being addressed by new initiatives.

1. The Marine Environment

UNCLOS requires state parties “to protect and preserve the marine environment,” cooperate on “conservation of the living resources,” and adopt measures “against pollution.”⁸⁴ However, “UNCLOS is only a ‘framework’ for

Indigenous Peoples, 111 AJIL UNBOUND 402, 405–06 (2017) (focusing on Sámi reindeer herding practices); Maneesha Deckha, *Unsettling Anthropocentric Legal Systems: Reconciliation, Indigenous Laws, and Animal Personhood*, 41 J. INTERCULTURAL STUD. 77, 193 (2020) (Addressing the question “Is it possible to care about animal equality and also respect cultural equality for marginalized cultural groups?” and focusing on seal hunting in Canada.).

⁸⁰ Nordlander, *supra* note 71, at 431; *Decision on a License for Wind Power Development at Fosen Declared Invalid*, SUP. CT. OF NOR. (Oct. 11, 2021), <https://www.domstol.no/no/hoyesterett/avgjorelser/2021/hoyesterett-sivil/hr-2021-1975-s/>.

⁸¹ Nordlander, *supra* note 71, at 431.

⁸² *Id.* at 417.

⁸³ In our earlier work, we listed the following as areas for further development of Arctic sustainability law and governance: more fully protect the Central Arctic Ocean from unregulated fishing; protect biodiversity in areas beyond national jurisdiction; establish additional marine protected areas; create an active Arctic Regional Seas Programme; more fully protect cultural resources; more fully incorporate Indigenous knowledge and perspectives in law; impose stricter liability rules to regulate offshore energy installations; mandate environmental impact studies in more cases; incorporate elements of ecosystem-based management in existing rules. See DiMento et al., *supra* note 6, at 307–28.

⁸⁴ See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force on Nov. 16, 1994). The US notably has not ratified UNCLOS. It maintains that it follows most of its provisions through customary international law. Both for Arctic affairs and more generally in issues of ocean regulation, management, and conflict resolution, we maintain that US worldwide influence would be enhanced if it overcame the narrow opposition in the US Senate and ratified this central law of ocean governance. Khaled Elmahmoud, *American Pick and Choose or Customary International Law?*, EJIL: TALK! (2024), <https://www.ejiltalk.org/american-pick-and-choose-or-customary-international-law/>.

making further commitments” and a source of general legal obligations.”⁸⁵ There remain considerable gaps in the extent to which state parties provide required “substantive content” for protective measures, including on pollution.⁸⁶ Several actions should be taken. These include addressing the critical need for greater fisheries protection in the Central Arctic Ocean,⁸⁷ creating additional marine protected areas, and further involving Indigenous peoples in marine resource management.

a. Greater Fisheries Protection

As for fishing in the Central Arctic, there has been progress. However, both the US and EU can take leadership roles in implementing existing law and building on it.

Existing law includes The Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (CAOFA), which entered into force in 2021 following the five Arctic coastal states and the EU, China, Iceland, Japan, and Korea signing an agreement to prevent unregulated fisheries in the Central Arctic Ocean: the areas outside the Exclusive Economic Zones (EEZ) of the five Arctic coastal states are not included in national fishery regulations.⁸⁸

Considered a landmark action in international environmental law, CAOFA provides for at least a sixteen-year moratorium on commercial fishing in the Central Arctic.⁸⁹ Only the Central Arctic Ocean, where there is permanent sea ice, is subject to the fishing prohibition.⁹⁰

CAOFA is a major step forward in Arctic sustainability both for the conservation of the fisheries resources and recognition of the important roles of Indigenous peoples in the management of the Central Arctic.⁹¹ CAOFA will last for sixteen years starting from its entry in force date. It will be extended automatically in five-year increments unless any of the signing Parties objects to the extension.⁹² So, it is possible that the Central Arctic can still be exposed to commercial fishing activities.

⁸⁵ Migeed, *supra* note 50, at 56; United Nations Convention on the Law of the Sea, *supra* note 84, at 192.

⁸⁶ Migeed, *supra* note 50, at 56.

⁸⁷ Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, June 25, 2021 [hereinafter Agreement to Prevent Unregulated High Seas Fisheries].

⁸⁸ Office of the Spokesperson, *The Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean Enters into Force*, U.S. DEP'T OF STATE (June 25, 2021), <https://www.state.gov/the-agreement-to-prevent-unregulated-high-seas-fisheries-in-the-central-arctic-ocean-enters-into-force/>.

⁸⁹ Agreement to Prevent Unregulated High Seas Fisheries, *supra* note 87, at 13.

⁹⁰ *Id.*; see also Erik J. Molenaar, *The Central Arctic Ocean Fisheries Agreement and Arctic Indigenous peoples*, 164 MARINE POL'Y 1, 4 (2024).

⁹¹ See Molenaar, *supra* note 90, at 5-7.

⁹² Agreement to Prevent Unregulated High Seas Fisheries, *supra* note 87, at 13.

i. The US Role

The US interest in fisheries in the Arctic predated the Agreement. A Senate Resolution in 2007 had directed the US “to initiate international discussion and take necessary steps with other Nations to negotiate an agreement for managing migratory and transboundary fish stocks in the Arctic Ocean.”⁹³ The United States followed a “precautionary approach to fisheries management,” focusing on “the need to avoid unregulated fishing, and on the ‘social, economic, cultural and subsistence needs’ of Arctic Indigenous communities.”⁹⁴ The US led CAOFA negotiations which culminated in an October 2018 signature in Greenland.⁹⁵ Further leadership through US fisheries initiatives can come in several ways. Most obviously, perhaps, the US can engage in active diplomacy focusing on the continuation of the Agreement’s moratorium after its possible sixteen-year termination date.⁹⁶ Also, it can adopt approaches such as the Fishing-for-Litter Initiative in Germany; this allows fishing vessels that have accidentally collected plastic nets to return them for disposal without risk of punishment.⁹⁷ Other leadership actions that the US can take, or join onto, have been identified.⁹⁸

ii. The EU Role

The EU’s Common Fisheries Policy (CFP) applies broadly to all ships fishing in waters under EU member state jurisdiction and EU ships fishing outside EU member state jurisdictions.⁹⁹ This means the CFP applies in the Arctic.¹⁰⁰ The CFP’s overall goals include “ensur[ing] long-term sustainability for fisheries.”¹⁰¹ This aspiration positions the EU as a potential leader in promoting sustainable fisheries policies in the Arctic in line with both the CFP and its obligations under CAOFA. To further fisheries-focused sustainability efforts in the Arctic, the EU could promote the CFP sustainability goal among non-EU ships in the Arctic using “its position as a major fishing market” to influence others.¹⁰² Further, as a party

⁹³ Molenaar, *supra* note 90, at 4 (citing SJ Res. No. 17 of 2017 (PL 110-243, June 2, 2008)).

⁹⁴ *Id.*

⁹⁵ *The Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean Enters into Force*, *supra* note 88.

⁹⁶ See Agreement to Prevent Unregulated High Seas Fisheries, *supra* note 87, at 13.

⁹⁷ Savannah Artusi, *Coastal Marine Debris in Alaska: Problems with Plastics, Pollution, & Policy*, 39 ALASKA L. REV. 279, 310 (2022).

⁹⁸ See *The Central Arctic Ocean Fisheries Agreement – What It Is, Is Not and Might Be*, WWF ARCTIC (Nov. 21, 2023), <https://www.arcticwwf.org/newsroom/features/the-central-arctic-ocean-fisheries-agreement-what-it-is-is-not-and-might-be/>.

⁹⁹ Lebel and Nilsson, *supra* note 25, at 59.

¹⁰⁰ *Id.*

¹⁰¹ *The Common Fisheries Policy Today and Tomorrow: a Fisheries and Oceans Pact Towards Sustainable, Science-Based, Innovative and Inclusive Fisheries Management*, at 1, COM (2023) 103 final (Feb. 21, 2023).

¹⁰² Lebel and Nilsson, *supra* note 25, at 59 (citing Nengye Liu & Elizabeth A. Kirk, *The European Union’s Potential Contribution to Protect Marine Biodiversity in the Changing Arctic: A Roadmap*, 30 INT’L J. MARINE & COASTAL L. 255 (2015)).

to CAOFA, the EU can advocate for the continuation of the agreement beyond its sixteenth year.¹⁰³

In addition, the EU and Norway remain in dispute over Arctic fisheries issues, one reason Norway has rejected EU membership.¹⁰⁴ Working toward resolution of these issues could ease tensions surrounding fisheries in the Arctic.

b. Creating Additional Marine Protected Areas

Marine Protected Areas (MPAs) are often suggested as an institution that can add to Arctic sustainability in its environmental and social ecological senses. They still are lacking in the Arctic,¹⁰⁵ although pursued in concept by many, including the Arctic Council (AC) in the PAME framework for Arctic MPAs¹⁰⁶ and the OSPAR Commission in a 2016 proposal and recent report detailing proposed actions.¹⁰⁷

PAME proposed an MPA network to manage selected “ecological areas identified for conservation measures under national laws.”¹⁰⁸ If the AC is able to turn this framework into a binding agreement, the resulting network would aim to improve biodiversity conservation efforts by connecting the EEZs of the individual Arctic states together under a single network.¹⁰⁹

It remains the case that it is more facile to make these recommendations than to get the several interests and institutions that are affected by them to agree on type and place. PAME’s most recent Work Plan describes several activities

¹⁰³ See Agreement to Prevent Unregulated High Seas Fisheries, *supra* note 87, at 11.

¹⁰⁴ Lebel and Nilsson, *supra* note 25, at 58; Zachary Lavengood, *Arctic Politics and the EU-Norway Fishing Dispute*, THE ARCTIC INST. (2021), <https://www.thearcticinstitute.org/arctic-politics-eu-norway-fishing-dispute/>; Frederik Scholaert, *EU-Norway Fisheries Relations: An Overview of the Northern Fisheries Agreements*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, 1 (2024), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/766225/EPRS_BRI\(2024\)766225_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/766225/EPRS_BRI(2024)766225_EN.pdf).

¹⁰⁵ See Gabriela Argüello, *Opportunities for Protecting Biological Diversity in the Arctic Ocean*, 13 Y. B. POLAR L. 127, 132 (2022) (“While numerous MPAs have been established in areas within national jurisdiction, very few MPAs exist today in ABNJ (none of them in the Arctic Ocean).”).

¹⁰⁶ See *Framework for a Pan-Arctic Network of Marine Protected Areas*, ARCTIC COUNCIL (Apr. 2015), <https://oaarchive.arctic-council.org/items/542f295a-31b1-4cd9-9a59-af78239d999f>; see also Argüello, *supra* note 105, at 135.

¹⁰⁷ Lena Avellan, *OSPAR Arctic Waters Report: Evidence and Opinions for Action*, OSPAR COMMISSION, 84-85, 94 (2024), <https://www.ospar.org/documents?v=57836>.

¹⁰⁸ Migeed, *supra* note 50, at 61.

¹⁰⁹ *Id.*

related to MPA formation.¹¹⁰ One is “Revisiting the Framework for a Pan-Arctic Network of MPAs (2015) for potential updates,” led by the MPA Expert Group.¹¹¹

The United States and the Arctic nations that are Members of the Arctic Council are in strategic and important positions to, both directly through the Arctic Council and through their other international influences, champion the creation of MPAs in the Arctic and a Pan-Arctic MPA network.

c. Protect Biodiversity in Areas Beyond National Jurisdiction

Considerable progress has been made on the BBNJ Treaty, or the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, adopted in June 2023.¹¹² The treaty addresses environmental threats to the high seas; these include overfishing, climate change, and various sources of pollution. BBNJ establishes a framework for international collaboration. It is a potentially critical contribution to Arctic sustainability governance. However, to enter into force, the BBNJ Treaty must be ratified by 60 countries. As of September 2024, 92 countries have signed the treaty, but only eight have ratified it (Belize, Chile, Cuba, Mauritius, Micronesia, Monaco, Palau, Seychelles).¹¹³ The United States and the European Union have signed but neither has ratified and the US was “initially unconvinced of the need for a new treaty.”¹¹⁴ As for the EU, its Member states committed to depositing the ratification instrument by June 2025 and made a pledge to support funding for its implementation but, as of this writing, have not yet completed ratification.¹¹⁵ No

¹¹⁰ See *PAME Work Plan 2021-2023*, PAME (2021), <https://old.pame.is/index.php/document-library/pame-reports-new/pame-ministerial-deliverables/2021-12th-arctic-council-ministerial-meeting-reykjavik-iceland/808-pame-2021-2023-work-plan/file?it=document-library/pame-reports-new/pame-ministerial-deliverables/2021-12th-arctic-council-ministerial-meeting-reykjavik-iceland/808-pame-2021-2023-work-plan/file>. For further discussion, see Ingvild Ulrikke Jakobsen, *Protection of Biological Diversity in the Polar Regions by Marine Protected Areas*, in *THE ROUTLEDGE HANDBOOK OF POLAR L.* 220, 229 (Yoshifumi Tanaka et al. eds., 2023) (“The Pan-Arctic Network of MPAs is composed of the MPAs and networks of MPAs of the individual States . . . [T]he Framework does not pursue approaches to establishing MPAs in ABNJs. This represents a limitation in the potential of the Framework in creating an ecologically coherent network of MPAs in the marine Arctic. It is emphasised in the Framework that it is necessary to develop a mechanism to facilitate the coordination between States . . . The success of this Framework will thus depend on the efforts of the Arctic coastal States . . . Although this is not a very effective mechanism to ensure compliance, it may contribute to achieve the vision of the Pan-Arctic Network.”).

¹¹¹ *PAME Work Plan 2021-2023*, *supra* note 110, at 16.

¹¹² *Agreement on Marine Biodiversity of Areas beyond National Jurisdiction*, UN (June 19, 2023), <https://www.un.org/bbnjagreement/en>.

¹¹³ *High Seas Treaty Ratification Tracker*, HIGH SEAS ALL. (2024), <https://highseasalliance.org/treaty-ratification/>.

¹¹⁴ Ricard, *supra* note 26, at 428; see also Jacob Katz Cogan, *The United States Signs the High Seas Treaty*, 118 AM. J. INT’L L. 169, 172-73 (2024) (The Biden administration “praised” the treaty and described it as important to meeting ocean protection goals. But the Administration as of early 2024 had “not yet indicated whether it will transmit the treaty to the Senate for its advice and consent to ratification.”).

¹¹⁵ *The EU is ready to ratify the High Seas Treaty*, EUR. COMM’N (June 17, 2024), https://oceans-and-fisheries.ec.europa.eu/news/eu-ready-ratify-high-seas-treaty-2024-06-17_en.

Arctic nation has ratified it.¹¹⁶ Jurisdictional issues discussed earlier also complicate the degree of influence in implementing the Agreement.¹¹⁷ The Russian Federation “dissociated” after the treaty was adopted.¹¹⁸ As the Iceland representative noted, “...this is only the beginning. Nothing has been conserved or protected, no benefits have been shared.”¹¹⁹

It may be some time before the treaty enters into effect. The low rate of ratification makes efforts by interests in the US and EU a crucial area for advocacy. Both entities “can support the Agreement’s rapid operationalization following entry into force, including by contributing to the work of an associated Preparatory Commission, as proposed in UN General Assembly draft resolution A/78/L.”¹²⁰ Without these contributions by the leading powers, the history of international environmental law suggests that it will be years before the Treaty’s effects are realized.¹²¹ Even when it enters into force, the many steps in implementation provided for within the Treaty mean that protection of the ABNJ is years away. The number of actions required provides an important lesson on international public law in general. There are at least nine steps in BBNJ Treaty implementation, several of which can take many months.¹²² So while it is important to heed suggestions for keeping momentum going to ratify quickly and successfully in order to implement the Treaty’s objectives fully, we continue to point out that, alternatively, regional solutions may be more efficient.¹²³

2. Regulation of Offshore Energy Activities and Related Liability Law

Perhaps of greatest significance to all understandings of Arctic sustainability is the management of offshore energy-related activities in the frigid Arctic, including those focused on fossil fuels, especially oil—but not only these: even renewable energy sources can be a challenge to sustainability. Underregulated energy sector activities of many kinds are a major threat.

Untapped energy resources in the Arctic are of mammoth volume. Estimates are that the Arctic contains 13% “of the world’s undiscovered conventional oil resources and 30% of its undiscovered conventional natural

¹¹⁶ See *High Seas Treaty Ratification Tracker*, *supra* note 113.

¹¹⁷ On competence of EU Member States, see generally *supra* Part IV.B.1.

¹¹⁸ See Rachel Tiller & Elizabeth Mendenhall, *And So It Begins—The Adoption of the ‘Biodiversity Beyond National Jurisdiction’ Treaty*, 157 MARINE POL’y 1, 1-2 (2023) (Russia stated, “This instrument is not acceptable. The question of our participation in it is not considered.”).

¹¹⁹ *Id.* at 2.

¹²⁰ Robert Blasiak & Jean-Baptiste Jouffray, *When Will the BBNJ Agreement Deliver Results?*, 3 NPJ OCEAN SUSTAIN. 1, 3 (2024).

¹²¹ *Id.* at 1.

¹²² *Id.* at 1-2.

¹²³ See *id.* at 3; see Sabrina Hasan, *Appraising the Modus of Conservation and Sustainable Use of Arctic Marine Biodiversity of Areas Beyond National Jurisdiction under the Umbrella of the BBNJ Treaty*, 13 Y. B. POLAR L. 175, 191 (2022). It should be noted however that “irrespective of whether the Arctic coastal States become parties to it, regarding waters that remain beyond the jurisdiction of Arctic coastal States, the BBNJ provides for the establishment of marine protected areas, for the exploitation of marine genetic resources and for a mechanism on environmental impact assessment.” [anonymous comment by reviewer of a draft of this paper].

gas.”¹²⁴ Until recently, these have not been of great interest, but melting ice now allows greater access to both resources and to new international transportation routes. Even as recently as a few decades ago, energy resource activities in the Arctic, although begun in small amounts, remained a low priority.¹²⁵

Now—potential environmental impacts of resource exploration, exploitation, and transport—are a considerable concern. Impacts include those on the Arctic ecosystems important for marine biodiversity, pollution of many kinds including noise, and effects on the culture and lifestyle of indigenous peoples. Further complicating the context are shifts in the geographical origins of oil and gas imports following Russia’s invasion of Ukraine.

Among Arctic stakeholders, there has been a rhetorical commitment to leaving at least some of these resources untouched and “in the ground.”¹²⁶ However, that admirable goal is not being realized to the extent needed. Several reasons other than the war in Ukraine. A giant factor is the very serious differences over how to address the threat, which includes impact on fisheries, biodiversity, Indigenous peoples’ health and practices, and more.

We are now witnessing, rather than the disappearance of extraction of hydrocarbons associated with green economy goals, potential short-run increases, including by individual environmentally progressive nations.¹²⁷ The economic stakes both to those who benefit from fossil fuel exploration and exploitation and those flora, fauna, and people who are victims of under regulation, spills, and other polluting incidents are immense. Even nations, including Arctic nations, who are committed to reaching the goals of the Paris Agreement, continue to explore, exploit, and trade in fossil fuels.¹²⁸ At the same time, nation-states and the global environmental community continue to be stymied by several forces opposed to stricter regulation and imposing greater liability regimes.

Looking to the EU as an example, the EU has communicated:

The call in the new Arctic Strategy for limiting fossil fuel extraction aims to speed up for global energy transition. The EU is committed to implementing the Paris agreement, and oil, coal and gas have the biggest impact on climate change. This is why the EU is pushing for oil, coal and gas to stay in the ground, including in Arctic regions.¹²⁹

¹²⁴ *Arctic Oil and Natural Gas Resources*, TODAY IN ENERGY (Jan. 20, 2012), <https://www.eia.gov/todayinenergy/detail.php?id=4650>.

¹²⁵ See Refai, *supra* note 29, at 273.

¹²⁶ See Elena F. Tracy, *For the Good of the Whole Planet, Stop Fossil Fuel Production in the Arctic*, WWF ARCTIC (Nov. 30, 2023), <https://www.arcticwwf.org/newsroom/features/for-the-good-of-the-whole-planet-stop-fossil-fuel-production-in-the-arctic/>. Later in this section, see also the discussion of EU’s “stay in the ground” policy.

¹²⁷ For example, “[i]n September 2022, the Norwegian government decided unilaterally to extend coal mining on Svalbard until 2025.” Lebel and Nilsson, *supra* note 25, at 63.

¹²⁸ See Nicolas Gaulin, *Arctic Governments and Fossil Fuels*, THE CIRCLE (Apr. 2023), <https://www.arcticwwf.org/the-circle/stories/arctic-governments-and-fossil-fuels/>.

¹²⁹ *Questions and Answers on the EU’s Arctic Strategy*, EUR. COMM’N 1, 2 (Oct. 13, 2021), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_21_5164/QANDA_21_5164_EN.pdf [hereinafter *EU’s Arctic Strategy*].

This “stay in the ground” position in the 2021 EU Arctic Policy¹³⁰ is consistent with the International Energy Agency’s clear statement on Net Zero by 2050, “no new oil or gas field developments are needed.”¹³¹ But now countervailing voices are asking: “We witness however soaring energy prices, greater demand. Is this goal realistic?”¹³² In fact, the Arctic Economic Council commented that the EU should “leave Arctic business to the people who live here,” and not only because the EU is still dependent on oil; it is responsible for continuing nontrivial greenhouse gas emissions.¹³³ EU companies remain “heavily invested in Arctic gas.”¹³⁴

The challenge of creating an effective regime of Arctic energy activity is immense. Here, we underscore what will likely remain a considerable need in that regime, no matter what the most optimistic scenario is for comprehensive energy facility management. We address here one stick in that bundle: oil spill liability.

Careful, comprehensive energy facilities management, with new initiatives, can limit damage to sea life, the waters, and coastal communities related to offshore activities. However, where management is absent—and unforeseen circumstances lead to pollution, death, damage, or destruction—current international law that addresses remedial measures is limited. Furthermore, domestic laws of Arctic countries do not create commonly shared obligations.

Imposing liability is not the whole challenge; laws that target needs after the damage has occurred are less desirable from the point of view of international environmental law than prevention. But the regime of Arctic sustainability law practically must include this type of response.

When significant spills occur, the existing legal regime will not be sufficient to cover damage experienced in the North. Practically, this orientation, to compensate fully and more broadly and to restore environments, needs to be strengthened.

a. Oil Spill Liability Law Applicable to the Arctic

To be sure, there is relevant international liability law. Several international agreements, conventions, and national laws related to the protection

¹³⁰ See *Joint Communication on a Stronger EU Engagement for a Peaceful, Sustainable and Prosperous Arctic*, at 1-2, JOIN (2021) 27 final (Oct. 10, 2021).

¹³¹ *EU's Arctic Strategy*, *supra* note 129, at 2; *Net Zero Roadmap: A Global Pathway to Keep the 1.5 °C Goal in Reach: 2023 Update*, INT'L ENERGY AGENCY 1, 163 (2023), <https://www.iea.org/reports/net-zero-roadmap-a-global-pathway-to-keep-the-15-0c-goal-in-reach>.

¹³² *EU's Arctic Strategy* *supra* note 129, at 2.

¹³³ See Lebel and Nilsson, *supra* note 25, at 53; Trine Jonassen, *The AEC on the EU Arctic Policy: “Leave Arctic Business to the People who Live Here,”* HIGH NORTH NEWS (Oct. 15, 2021), <https://www.highnorthnews.com/en/aec-eu-arctic-policy-leave-arctic-business-people-who-live-here>.

¹³⁴ Paula Kivimaa et al., *Evaluating Policy Coherence and Integration for Adaptation: the Case of EU Policies and Arctic Cross-Border Climate Change Impacts*, CLIMATE POL'Y 1, 11, <https://www.tandfonline.com/doi/epdf/10.1080/14693062.2024.2337168?needAccess=true> (last visited Dec. 14, 2024).

of the marine environment and liability for damages thereto are applicable in the Arctic.

International law on oil spill liability is encompassed in the international regime developed by the International Maritime Organization (IMO).¹³⁵ This was originally the 1969 International Convention on Civil Liability for Oil Pollution and the 1971 International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage. The regime was amended in 1992 by two protocols. The current regime is made up of the 1992 Civil Liability Convention (CLC) and the 1992 Fund Convention.¹³⁶ In addition, the Supplementary Fund Protocol was adopted in 2003 to provide for another tier of compensation, establishing an International Oil Pollution Compensation Supplementary Fund. This optional fund offers additional compensation for states that are Members of the earlier 1992 Fund Convention and decide to join the protocol.¹³⁷ All Arctic states except the US are members of the 1992 CLC and 1992 Fund Convention, while three Arctic states, Iceland, Russia, and the US are not members of the Supplementary Fund Protocol.¹³⁸

The regime applies to pollution damage in the territorial seas and the Exclusive Economic Zones (EEZs) of member states.¹³⁹ A preventative provision also applies to collisions beyond the territorial seas if those collisions create threats to cause pollution within a member state's territory.¹⁴⁰ The 1992 CLC places liability for damage on the owner of the ship which was the source of the polluting oil.¹⁴¹ Liability is strict but may be limited, except "if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with the knowledge that such damage would

¹³⁵ The International Maritime Organization lists seven conventions on "prevention of marine pollution" and eight conventions on "liability and compensation." We focus here on the conventions most directly applicable to oil spill liability in the Arctic, though others may have applicability in certain circumstances. See *List of IMO Conventions*, INT'L MAR. ORG., <https://www.imo.org/en/About/Conventions/Pages/ListOfConventions.aspx> (last visited Dec. 14, 2024).

¹³⁶ For more details, see *Explanatory Note*, INT'L OIL POLLUTION COMP. FUNDS 1, 1 (Sept. 2023), https://iopcfunds.org/wp-content/uploads/2023/11/SEP23_e-1.pdf. See also *Liability and Compensation for Oil Pollution Damage*, INT'L OIL POLLUTION COMP. FUNDS 1, 4 (2018), https://iopcfunds.org/wp-content/uploads/2018/06/Text-of-Conventions_e.pdf.

¹³⁷ *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND)*, INT'L MAR. ORG., [https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-\(FUND\).aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-(FUND).aspx) (last visited Dec. 14, 2024).

¹³⁸ *Parties to the International Liability and Compensation Conventions*, IOPC FUNDS, <https://iopcfunds.org/about-us/membership> (last visited Dec. 14, 2024) [hereinafter *International Liability and Compensation Conventions*].

¹³⁹ International Maritime Organization Protocol of 1992 To Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, Nov. 27, 1992, 1956 U.N.T.S. 255, Art. 2 [hereinafter *International Maritime Organization Protocol*]; see generally *International Liability and Compensation Conventions*, *supra* note 138.

¹⁴⁰ International Maritime Organization Protocol, *supra* note 139, at Art. 2.

¹⁴¹ *Id.* at Art. 3.

probably result.”¹⁴² The Convention also requires that covered ships have financial security or insurance in specified sums, which equates to the owner’s liability with respect to any one incident.¹⁴³ The regime applies to vessels “carrying oil in bulk as cargo.”¹⁴⁴ The 1992 protocol extended the scope to cover pollution damage in the EEZ, or equivalent area.¹⁴⁵ Here, environmental damage is limited to “reasonable measures to reinstate the contaminated environment” and also covers preventive measures if “there was a grave and imminent threat of pollution damage” in the absence of an actual spill.¹⁴⁶ Coverage under the 1992 protocol extends to vessels adapted to carry bulk oil, even if unladen.¹⁴⁷ Some states party to the 1969 Convention have not yet ratified the 1992 regime, which will eventually replace the CLC of 1969.¹⁴⁸

Significant to the changing conditions of the Arctic, which are making it more open to transit for purposes other than carriage, is the definition of ship. “Ship” under the 1992 CLC means:

any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.¹⁴⁹

Under this regime, ballast and bunker spills other than those of tankers are not covered.¹⁵⁰ This means cruise ships fall outside the scope of the 1992 CLC regime.

Applicable to cruise ships instead is the Bunker Convention. Ratified by 107 countries,¹⁵¹ the convention more broadly defines “ship” as “any seagoing vessel and seaborne craft, of any type whatsoever.”¹⁵² However, only Russia has

¹⁴² *Id.* at Arts. 3-6.

¹⁴³ *Id.* at Art. 5, Art. 7.

¹⁴⁴ *Id.* at Art. 1.

¹⁴⁵ *International Convention on Civil Liability for Oil Pollution Damage (CLC)*, INT’L MAR. ORG., [https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-\(CLC\).aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx) (last visited Dec. 15, 2024) [hereinafter *Convention on Civil Liability for Oil Pollution Damage*].

¹⁴⁶ *See id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Convention on Civil Liability for Oil Pollution Damage*, *supra* note 145.

¹⁴⁹ International Maritime Organization Protocol, *supra* note 139, at Art. 1.

¹⁵⁰ Ilker K. Basaran, *Can the Civil Liability Convention for Oil Pollution Withstand the Pressure of a Major Oil Spill in the Arctic Ocean?*, ARCTIC Y.B. 1, 2 (2018), https://arcticyearbook.com/images/yearbook/2018/Scholarly_Papers/17_AY2018_Basaran.pdf.

¹⁵¹ *Status of IMO Treaties*, INT’L MAR. ORG. 1, 536 (2024), <https://www.wcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/Status%202024.pdf>.

¹⁵² *International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER)*, INT’L MAR. ORG. (Mar. 23, 2001), [https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Civil-Liability-for-Bunker-Oil-Pollution-Damage-\(BUNKER\).aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Civil-Liability-for-Bunker-Oil-Pollution-Damage-(BUNKER).aspx). Here, too, environmental damages are limited: “‘Pollution damage’ ... (a) ... provided that compensation for impairment of the environment other than loss of profit from such impairment shall limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and (b) the cost of preventive measures and further loss or damage caused by preventive measures.” *Id.*

ratified among the Arctic states. Canada, Denmark, Finland, Norway, and Sweden all signed but have not ratified. The US and Iceland have not signed.¹⁵³

In addition; the Ballast Water Management Convention (BWM Convention) aims to protect the marine environment by preventing ships' ballast water from transporting invasive aquatic species between regions through management techniques and standards.¹⁵⁴ The BWM Convention has a similarly broad definition of "ship," applying to "a vessel of any type whatsoever."¹⁵⁵ Most Arctic states are among the ninety-seven parties to the convention, but Iceland and the US have not signed or ratified it.¹⁵⁶

Also of relevance, but not sufficient in addressing damage to the Arctic environment and its peoples, are other international agreements and conventions and national laws applicable in the Arctic.

Under the International Convention on Oil Pollution Preparedness, Response, and Cooperation (OPRC Convention), parties are required to have plans in the event of an oil pollution incident.¹⁵⁷ They also have a duty to inform coastal authorities and provide assistance in an emergency.¹⁵⁸ An Annex to the OPRC addresses some aspects of remediation.¹⁵⁹

Under Annex V of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), parties are required, "where practicable," to restore marine areas.¹⁶⁰

The Polar Code developed by the IMO and enforced through SOLAS and MARPOL¹⁶¹ contains provisions that are relevant to prevention of spills which can have implications for liability through existing and evolving other regimes. In addition to provisions addressing safety measures, it covers pollution prevention from oil pollution and from noxious liquid substances.¹⁶² "In Arctic waters any discharge into the sea of oil or oily mixtures from any ship shall be prohibited."¹⁶³

¹⁵³ See *Status of IMO Treaties*, *supra* note 151, at 534-36.

¹⁵⁴ *International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM)*, INT'L MAR. ORG. (Feb. 13, 2004), [https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Control-and-Management-of-Ships%27-Ballast-Water-and-Sediments-\(BWM\).aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Control-and-Management-of-Ships%27-Ballast-Water-and-Sediments-(BWM).aspx).

¹⁵⁵ *International Convention for the Control and Management of Ships' Ballast Water and Sediments*, Sept. 8, 2017, U.N.T.S. 3281 ("'Ship' means a vessel of any type whatsoever operating in the aquatic environment and includes submersibles, floating craft, floating platforms, FSUs and FPSOs.").

¹⁵⁶ *Status of IMO Treaties*, *supra* note 151, at 553-54.

¹⁵⁷ *International Convention on Oil Pollution Preparedness, Response and Cooperation*, Nov. 30, 1990, 1891 U.N.T.S. 77, Art. 3.

¹⁵⁸ *Id.* at Art. 4.

¹⁵⁹ *Id.* at Annex.

¹⁶⁰ *Convention for the Protection of the Marine Environment of the North-East Atlantic*, Sept. 22, 1992, 2354 U.N.T.S. 67 (Treaty has been subsequently amended in part to adopt Annex V. Amended version including Annex V available at https://www.ospar.org/site/assets/files/1169/ospar_convention.pdf).

¹⁶¹ *International Code for Ships Operating in Polar Waters (Polar Code)*, INT'L MAR. ORG., <https://www.imo.org/en/ourwork/safety/pages/polar-code.aspx>.

¹⁶² *International Code for Ships Operating in Polar Waters (Polar Code)*, Nov. 2014, MEPC 68/21/Add.1 Part II-A (entered into force Jan. 1, 2017).

¹⁶³ *Id.* at 1.1.1.

The Code covers ships quite broadly although for certain vessels it is not mandatory, including fishing vessels, yachts, and ships less than 500 gross tonnage.¹⁶⁴ Given that “fishing vessels constitute the largest overall shipping presence in Arctic waters” and yacht passage is growing rapidly in the Northwest Passage in particular, these exclusions are notable.¹⁶⁵

The reach and effectiveness of the Code are evolving. Assessments of its value in promoting sustainability vary with some concluding there “are notable gaps in the documents, especially related to the environmental protection, pollution ... of various types of vessels.”¹⁶⁶ Independent of implications for a liability regime, the Code provides a framework and a place to continue to address Arctic sustainability. Even here, however, the meaning of sustainability is relevant. For example, “in addition to reducing the environmental risks posed by HFOs [heavy fuel oils] there are economic and social consequences, including dependence on such fuels by Indigenous peoples.”¹⁶⁷

Furthermore, individual Arctic states have some liability laws. Shared provisions include those distinguishing damages caused by fault, negligence, or violations of statutory law from damages resulting from compliant behavior; application of liability rules to specified territories and zones; and compensation for economic losses to defined businesses, such as fishing.¹⁶⁸ There also is an orientation in some judicial settings to make damages from the operation of mega projects and marine transportation of hydrocarbons a matter for human rights claims.¹⁶⁹

A more recent change is a heavy fuel ban, but it includes considerable exemptions and other weaknesses, including insufficiently short compliance

¹⁶⁴ International Code for Ships Operating in Polar Waters (Polar Code), *supra* note 161.

¹⁶⁵ Hendrik Schopmans, *Revisiting the Polar Code: Where Do We Stand?*, THE ARCTIC INST. (Jun. 11, 2019), <https://www.thearcticinstitute.org/revisiting-polar-code/>.

¹⁶⁶ Ekaterina Uryupova, *Climate Change and Challenges of Navigation in the Arctic: How Safe are We?*, THE ARCTIC INST. (Apr. 30, 2024), <https://www.thearcticinstitute.org/climate-change-challenges-navigation-arctic-how-safe-are-we/>.

¹⁶⁷ Jiayu Bai & Aldo Chircop, *The Regulation of Heavy Fuel Oil in Arctic Shipping: Interests, Measures, and Impacts*, in GOVERNANCE OF ARCTIC SHIPPING: RETHINKING RISK, HUMAN IMPACTS AND REGULATION 265, 265 (Aldo Chircop et al. eds., 2020).

¹⁶⁸ See generally Oil Pollution Act, 33 U.S.C. §2701. The Oil Pollution Act (OPA) is the key federal law on oil spill liability in the US which allows for recovery of natural resource damages. *Oil Pollution Act of 1990*, U.S. COAST GUARD, https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/About_NPFC/opa/ (last visited Dec. 15, 2024). For a recent comparison of Norwegian and Russian law on these matters, see generally KRISTOFFER SVENDSEN, LIABILITY AND COMPENSATION FOR OFFSHORE OIL POLLUTION DAMAGE IN THE ARCTIC: COMPARING NORWEGIAN AND RUSSIAN LAW (2024).

¹⁶⁹ See *The Environment and Human Rights*, (Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention of Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct., at 59 (Nov. 15, 2017); see also Jason Rudall, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 112 AM. J. INT’L L. 288, 288 (2018) (ordering Nicaragua to pay Costa Rica compensation for environmental damage stating that such damage is compensable under international law).

periods.¹⁷⁰ Voluntary measures are also extant, including the Arctic Shipping Enterprise Pledge by some large US businesses and the Ocean Conservancy to oppose the use of Arctic shipping routes.¹⁷¹

b. Gap Fillers: Modifications and Improvement in Liability Requirements

Nonetheless, international and national laws are not adequate to fully address post-event liability for transboundary oil pollution.¹⁷²

We realize that more specific and stricter liability laws face considerable opposition from industrial and even nation-state states. However, the costs to the Arctic and its people can be great if improvements are not made. Addressing the liability gap convincingly is beyond the reach of this article, and seemingly beyond the reach of many commentators in international environmental law. However, some suggestions are worth promoting by the EU and US. Among them, considering the particular characteristics of the Arctic environment:

- 1) The understanding of “costs of reasonable measures of reinstatement” admissible for compensation under applicable international law should be expanded.¹⁷³ The unique characteristics of the Arctic environment leave unanswered what would be reasonable. However, experts conclude that negative effects on biodiversity in the region “may prevail for more than 50 years before natural elimination processes make it disappear.”¹⁷⁴
- 2) A broader definition of application to non-oil carriage “ship” needs to be applied, particularly to the 1992 CLC regime, because passenger ships likely will continue to increase the number and size of their cruises in the Arctic.¹⁷⁵ The Bunker Convention, with a broader definition of ship, has only been ratified by one Arctic state.¹⁷⁶ With increasing numbers of ratifiers and with growing knowledge of the impacts of cruise ships on the

¹⁷⁰ Samuel Wat, *Heavy Fuel Oil Ban Comes into Effect in the Arctic, with a Big Exemption*, CBC NEWS (July 1, 2024), <https://www.cbc.ca/news/canada/north/heavy-fuel-oil-ban-arctic-july-1-1.7250470>; Georgina McCartney, *New Shipping Fuel Requirements in Arctic Risk Worse Oil Spills, Report Says*, REUTERS (July 1, 2024), <https://www.reuters.com/business/environment/new-shipping-fuel-requirements-arctic-risk-worse-oil-spills-report-says-2024-07-01/>.

¹⁷¹ Cheng Zhang & Jia-qi Yang, *Prevention and Control of Ship-Source Pollution in the Arctic Shipping Routes: Challenges and Countermeasures*, 31 ENVTL. SCI. & POLLUTION RES. 40436, 40439 (2024).

¹⁷² Radhika Kannan, *The Effectiveness of Environmental Law in Preventing Transboundary Pollution from Oil Drilling in the Arctic*, 45 COLUM. J. ENVTL. L. 241, 255 (2020).

¹⁷³ See International Maritime Organization Protocol, *supra* note 139, at Art. 1 (here, loss or damage includes “compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.”).

¹⁷⁴ Basaran, *supra* note 150, at 11.

¹⁷⁵ “Ship” under the 1992 CLC “means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.” International Maritime Organization Protocol, *supra* note 139, at Art. 2.

¹⁷⁶ See *supra* Section V.B.2.a discussing ratification details.

marine environment, there may be greater pressure for presently nonparticipant countries to join.

- 3) An expansion of the types of damage coverage to include damage to the marine environment. Now, some claims are not recognizable for non-economic damages, such as loss of recreational fishing spots, whereas loss of revenue for reduced income from parking or mooring fees is recognizable.¹⁷⁷ More importantly, despite the existing regimes, certain types of environmental damage need greater coverage. These may include those that only manifest over long periods of time, those that are significant to smaller populations, such as those affecting indigenous peoples' harvest food and smaller fisheries, and those that science is discovering now, such as with regard to plastics and microplastics.¹⁷⁸ This situation reflects both substantive law but is another example of the procedural gap of absence of effective avenues of sufficient involvement of remote and politically marginalized peoples.¹⁷⁹
- 4) An increase in the limits on amounts to be paid. Even with the increase in the 1992 CLC, 1992 Fund Convention, and more recent Supplementary Fund Protocol concluded in 2003, coverage is likely to be insufficient should a disaster occur. At a minimum, EU member states should recognize the new tier. At this point, all Arctic states except the US are members of the 1992 CLC and 1992 Fund Convention, while three Arctic states, Iceland, Russia, and the US, are not members of the Supplementary Fund Protocol.¹⁸⁰ Only 33 states have become parties to the Supplementary Fund Protocol, while 122 are parties to the 1992 Fund Convention.¹⁸¹ The significantly lower number of parties to the Supplementary Fund could make it more challenging to realize its higher fund amounts in the Arctic and elsewhere should a spill occur.¹⁸²
- 5) Other than IMO rules and those required by flag states, damages in the High Seas, beyond the jurisdiction of Arctic nations, need to be more fully covered to include coverage to the marine environment.¹⁸³

¹⁷⁷ Basaran, *supra* note 150, at 5-6, 12; see also Lars Rosenberg-Overby, *Working Paper on the Legal Framework for Civil Liability for Vessel-Sources Oil Spills Regions*, COMITÉ MAR. INT'L 1, 1 (2017), <https://comitemaritime.org/wp-content/uploads/2018/05/2017-12-15-Civil-Liability-WP-Final.pdf> ("[C]opy the Norwegian model of extending the application of the CLC 1992 (as impended nationally) to oil pollution on the High Seas as that would benefit both the environment and the polluting ship owner.").

¹⁷⁸ See discussion *infra* Section V.B.4.b.

¹⁷⁹ See *supra* Section V.A on procedural gaps.

¹⁸⁰ See *International Liability and Compensation Conventions*, *supra* note 138. The US considers that the 1990 OPA makes ratification unnecessary. However, as noted at note 182 *infra*, this does not appear to be the case when measured by actual amounts of damage covered at least for certain years.

¹⁸¹ *International Liability and Compensation Conventions*, *supra* note 138.

¹⁸² For some funds including under national laws such as the US OPA for certain years, the Total Removal and Claims Expenditures far exceed the Amounts Recovered, and Revenues have been a fraction of Expenditures. See generally U.S. DEP'T OF HOMELAND SEC., U.S. COAST GUARD, REPORT ON IMPLEMENTATION OF THE OIL POLLUTION ACT OF 1990 (2004).

¹⁸³ This change benefits both the would-be polluting ship owner and the environment. Significant

Other more ambitious changes have been recommended but they are not evaluated here.¹⁸⁴

Realistically, historically speaking, a solution for oil pollution liability may not actually happen until there are more environmental disasters, such as the Exxon Valdez oil spill¹⁸⁵ or the 2020 Russian spill in Norilsk,¹⁸⁶ or a military or security concern arises. But waiting for disaster is “irresponsible,” so even these noted small steps should be taken now.¹⁸⁷

3. Mandate More In-depth Environmental Studies and in More Cases

Now, Arctic regions face increasingly significant development pressures, including proposed large-scale projects, such as international airports, ports, and energy production facilities. There is a new scale of the proposed project; new actors are involved or want to be involved, and new impacts result from the changing climate. What’s more, geo-engineering projects that can have major environmental effects have moved from the mostly opposed idea stage to attracting major funding for in-depth research and possible trials.¹⁸⁸

These changes suggest the need for more environmental impact analysis and greater depth of environmental analysis in those already required. Environmental impact assessment (EIA) is widely undertaken in Arctic nations.

However, there are some gaps in the EIA framework that limit its effectiveness. “Although international legal norms apply to the region, the Arctic lacks a coherent EIA system, and the development of Arctic-specific EIA norms does not seem to be a priority in Arctic governance.”¹⁸⁹ Now there exists “a

economic risks for investors could follow, which might impede economic development relevant to the overall focus on sustainability of peoples. The trade off on this policy choice is merited as stricter liability rules could encourage other policies to improve economies, such as focusing on renewable energy sources.

¹⁸⁴ Their feasibility is not addressed in this short section. For example, Kannan’s on having “a regional insurance treaty drafted and incorporated by insurance companies.” Kannan, *supra* note 172, at 275.

¹⁸⁵ See generally *Exxon Valdez*, DAMAGE ASSESSMENT, REMEDIATION, AND RESTORATION PROGRAM (2020), <https://darrp.noaa.gov/oil-spills/exxon-valdez>.

¹⁸⁶ Daria Shapovalova, *Oil Spill in Siberia: Are We Prepared for Permafrost Thaw?*, THE ARCTIC INST. (June 11, 2020), <https://www.thearcticinstitute.org/oil-spill-siberia-prepared-permafrost-thaw/>; see also Agence France-Presse, *Russian Mining Giant Pays \$2B Fine for Arctic Spill*, COURTHOUSE NEWS SERV. (Mar. 10, 2021), <https://www.courthousenews.com/russian-mining-giant-pays-2b-fine-for-arctic-spill/>.

¹⁸⁷ Penttilä, *supra* note 10, at 25.

¹⁸⁸ David Gelles, *This Scientist Has a Risky Plan to Cool Earth. There’s Growing Interest*, N.Y. TIMES (Aug. 1, 2024), <https://www.nytimes.com/2024/08/01/climate/david-keith-solar-geoengineering.html> (“Harvard University has a solar geoengineering program that has received grants from the Microsoft co-founder Bill Gates, the Alfred P. Sloan Foundation and the William and Flora Hewlett Foundation”); see also Christopher Flavelle & Ian C. Bates, *Warming Is Getting Worse. So They Just Tested a Way to Deflect the Sun*, N.Y. TIMES (Apr. 2, 2024), <https://www.nytimes.com/2024/04/02/climate/global-warming-clouds-solar-geoengineering.html>.

¹⁸⁹ Romain Chuffart & Julia Jabour, *Environmental Impact Assessment in the Polar Regions*, in THE ROUTLEDGE HANDBOOK OF POLAR L. 189, 203 (Yoshifumi Tanaka et al. eds., 2023). See also, Timo

complex and overlapping constellation of international, regional and domestic requirements that balances project development activities with regard to environmental protection and social impacts.”¹⁹⁰ To be sure, there is applicable international treaty law, like the Espoo Convention.¹⁹¹ Arctic States have domestic EIA law. The AC and its precursor, the Arctic Environmental Protection Strategy (AEPS), offered “examples of good practices to enhance the quality of EIAs and harmonize EIA” procedures across the Arctic, both in domestic and transboundary contexts.¹⁹² In 1997 the Arctic States in the Alta Declaration received “with appreciation the ‘Guidelines for Environmental Impact Assessment (EIA) in the Arctic’ and the ‘Arctic Offshore Oil and Gas Guidelines’ developed under the AEPS, and agree[d] that these Guidelines be applied.”¹⁹³ Among the appreciations at the time, these guidelines, for the first time, focused on issues that are particular to the Arctic—damage to permafrost and inclusion of traditional knowledge in assessment—among others.¹⁹⁴ However, critics note that the “1997 EIA Guidelines have had close to no impact on domestic legislations.”¹⁹⁵ More recently in 2019, an AC document addressed “good practices” and “meaningful engagement with recommendations for large-scale projects.”¹⁹⁶ These recognize the specific characteristics of the Arctic environment, underscore the need for input from Indigenous peoples and locals, and encourage States to apply the principles of the Espoo Convention to increase cooperation across the Arctic.¹⁹⁷ Nonetheless, the 2019 document “suffer[s] from the same weaknesses as the 1997 EIA Guidelines” providing no “oversight” nor “compliance mechanisms.”¹⁹⁸ Finally, Arctic EU members Denmark, Finland, and Sweden must comply with EU standards.¹⁹⁹

Koivurova, ENVIRONMENTAL IMPACT ASSESSMENT IN THE ARCTIC: A STUDY OF INTERNATIONAL LEGAL NORMS (2002) for a detailed discussion of EIA issues and laws impacting the Arctic region; Timo Koivurova, Transboundary Environmental Assessment in the Arctic, 26 IMPACT ASSESSMENT & PROJECT APPRAISAL 265 (2008). More recently, see Timo Koivurova et al., ENVIRONMENTAL IMPACT ASSESSMENT IN THE ARCTIC: A GUIDE TO BEST PRACTICE (2016).

¹⁹⁰ Chuffart & Jabour, *supra* note 189, at 203.

¹⁹¹ The Convention creates obligations in transboundary contexts. Canada, Kingdom of Denmark, Finland, Norway, and Sweden have ratified. Iceland, Russia, and the US are signatories. See Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 2, 1991, 1989 U.N.T.S. 309.

¹⁹² Chuffart & Jabour, *supra* note 189, at 203.

¹⁹³ *The Alta Declaration*, ARCTIC COUNCIL 1, 2 (1997), https://library.arcticportal.org/1271/1/The_Alta_Declaration.pdf.

¹⁹⁴ Chuffart & Jabour, *supra* note 189, at 194.

¹⁹⁵ *Id.* at 203.

¹⁹⁶ *Id.* at 204.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*; see also *Good Practices for Environmental Impact Assessment and Meaningful Engagement in the Arctic*, ARCTIC COUNCIL 1 (2019), <https://oaarchive.arctic-council.org/items/16e80a06-f002-452b-bfb0-6a24b4e5d93b> [hereinafter *Good Practices*].

¹⁹⁹ EU Directives make EIA mandatory for numerous public and private projects (83/377/EEC); make the directive consistent with the Espoo Convention (97/11/EC); align the participation requirements with the Aarhus Convention (2003/35/EC); add covered projects of several kinds that create CO₂ emissions (2009/31/EC); and address, *inter alia*, developer obligations and public

While the US has been a pioneer in developing EIA and the EU has been a leader in articulating its commitment to the great importance of environmental assessments, greater attention to the application of EIA in the Arctic is needed. Among foci that both governments can foster are the dissemination of EIA best practices for large-scale projects, land-use planning and EIA integration, regional environmental analysis, and sustainability analysis, which includes socio-economic conditions.²⁰⁰ Also, “EIA can be made stronger by including assessment not only of hard or quantitative, but also qualitative, value-based, and sometimes interpretive contributions. [And] impact assessment should be done for privately negotiated agreements.”²⁰¹

Further, The EU and the US can play roles in requiring assessments to include impacts on biodiversity, use of traditional knowledge, understanding of socio-cultural impact, and an expansive reading of the public, including those who live in places remote from the “lead agency,” that is the manager of the EIA process.

4. Species and Particular Pollutant Substance Focused Treaties

A focus on an individual species or a particular pollutant can make international efforts at improved governance more manageable than efforts at creating more overarching environmental law, thus filling specific gaps in the Arctic regime.

a. Individual Species

Relevant to polar species protection in the Arctic are international treaties and national actions. Regarding first the former: relevant are four significant treaties. Under the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES), to which all Arctic states are party, the Arctic beluga whale and narwhal, and the polar bear are protected but only as Appendix II species.²⁰² Appendix I “prohibits all trade,” while Appendix II “requires international cooperation for trade in species protected under national legislation,”

participation (2011/92/EU). It should also be noted that some non-legally binding guidelines apply to the Arctic states as well as under nations. See e.g., *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments*, SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY 1 (2004), <https://www.cbd.int/doc/publications/akwe-brochure-en.pdf>.

²⁰⁰ DiMento et al., *supra* note 6, at 325; see also *Good Practices*, *supra* note 198, at 59.

²⁰¹ DiMento et al., *supra* note 6, at 325; see also Bram Noble & Kevin Hanna, *Environmental Assessment in the Arctic: A Gap Analysis and Research Agenda*, 68 ARCTIC 341, 350 (2015) (in Greenland, negotiated agreements are part of the formal requirements for Strategic Social Impact Assessments. Participants in the process are project proponents, local governments, and the national government).

²⁰² *Beluga Whale*, NOAA FISHERIES (2024), <https://www.fisheries.noaa.gov/species/beluga-whale>; *Narwhal*, NOAA FISHERIES (2022), <https://www.fisheries.noaa.gov/species/narwhal>; *Polar Bear*, CITES, https://cites.org/eng/gallery/species/mammal/polar_bear.html (last updated Jan. 12, 2021); *List of Contracting Parties*, CITES, <https://cites.org/eng/disc/parties/chronolo.php> (last visited Jan. 28, 2025).

thus providing less protection.²⁰³ More specifically the 1973 Agreement on the Conservation of Polar Bears²⁰⁴ is an agreement between the five Polar Bear Range States, Norway, Canada, Greenland, Russia and the US, to proactively engage in polar bear conservation efforts.²⁰⁵ The agreement was followed up more recently with the 2015-2025 Circumpolar Action Plan to further cooperation on conservation efforts through specific objectives aimed at combatting current threats to polar bears, including the “primary threat” of climate change impacts.²⁰⁶

The Bern Convention brought forth a regional treaty that applies primarily to Europe.²⁰⁷ The Convention divides species protection levels in the Appendices, with significant Arctic species such as the polar bear, walrus, blue whale, and narwhal listed in Appendix II.²⁰⁸ Under this appendix, “species require special protection and all forms of deliberate capturing, keeping, and killing, as well as deliberate disturbance, of such species, are prohibited.”²⁰⁹ Nonetheless, Canada, Russia, and the US are not parties to the convention, and other Arctic states have made broad reservations.²¹⁰ The Convention on the Conservation of Migratory Species of Wild Animals (CMS) also has an appendix structure listing migratory species eligible for protection including polar species, but similarly has a minimal impact on the Arctic because Canada, Denmark, Russia, and the US are not parties.²¹¹

However, despite limited application, these and other species protection treaties²¹² have led some commentators to conclude “there is no need to expand this network consisting of hard and soft law obligations...by introducing new treaties. The main issue is how to make existing legal instruments operate more efficiently.”²¹³

Relevant to that conclusion for the purposes of this article, both the EU and US can use their influence in the species treaties they have ratified to further protect species either exclusive to the Arctic or of great importance to it. They can also act independently.

²⁰³ Fitzmaurice & Steenkamp, *supra* note 77, at 288.

²⁰⁴ Agreement on the Conservation of Polar Bears 2989 UNTS 243 (concluded Nov. 15, 1973, entered into force May 26, 1976).

²⁰⁵ *The 1973 Agreement on the Conservation of Polar Bears*, POLAR BEAR RANGE STATES (2017), <https://polarbearagreement.org/resources/agreement/the-1973-agreement-on-the-conservation-of-polar-bears> (The official signatories are the “Governments of Canada, Denmark, Norway, the Union of Soviet Socialist Republics and the United States of America.”).

²⁰⁶ *Circumpolar Action Plan*, POLAR BEAR RANGE STATES, <https://polarbearagreement.org/circumpolar-action-plan>.

²⁰⁷ Fitzmaurice & Steenkamp *supra* note 77 at 287.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 287-88.

²¹¹ *Id.* at 289-90.

²¹² Relevant bilateral agreements include the Agreement between the Government of Canada and the Government of the United States on the Conservation of the Porcupine Caribou Herd, Can.-U.S., July 17, 1987, T.I.A.S. No. 11259; and the Agreement Between the Government of the United States of America and the Government of the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population, Rus.-U.S., Oct. 16, 2000, T.I.A.S. No. 07,923.

²¹³ Fitzmaurice & Steenkamp, *supra* note 77, at 301.

i. The US Role

The US has taken action on some specific species. In 2010, the US brought a proposal before the CITES Conference of Parties to uplist polar bears from Appendix II to Appendix I.²¹⁴ Of note, while Greenland, Canada, and Norway opposed the proposal, the EU was in support.²¹⁵ Nevertheless, the proposal was unsuccessful.²¹⁶

One national action is protecting beluga whales, some sub-species of which are seriously threatened with one listed under Appendix II of CITES.²¹⁷ An emergency petition called on Commerce Secretary Gina Raimondo, whose department “oversees NOAA Fisheries, to establish a formal protection zone in the Tuxedni Bay,” an area that is “a unique refuge from incessant anthropogenic noise found nearly everywhere else in Cook Inlet” and “a key foraging location, especially in the fall, winter, and spring,” for beluga whales.”²¹⁸

The US has also undertaken efforts to further protect populations of wild reindeer which have declined dramatically in the last two decades. The US Fish and Wildlife Service has recognized one caribou herd as endangered.²¹⁹ Once numbering over 30,000, only 3,800 animals in that herd now exist.²²⁰

The Beluga and caribou are only one part of the story of sustainable governance of a particular resource. It implicates the application of the larger meaning of sustainability as that plays out in the regional politics of Indigenous peoples, the protection of lifestyles and cultures, and animal law rights. That history is a long and complicated one most notably involving Indigenous peoples’ conflicts with international actions on whale conservation and protection, even when populations of many whale species are stable or growing.

b. A Particular Pollutant Focus

A recently recognized threat to the Arctic is that of plastics pollution. Not only an aesthetic insult (accumulation areas), or a threat to wildlife (entanglements,

²¹⁴ Nikolas Sellheim, *CITES and the Polar Bear*, POLAR RSCH. & POL’Y INITIATIVE (Aug. 24, 2019), <https://polarconnection.org/cites-and-the-polar-bear/>.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Daniel Cusick, *Greens Petition NOAA Fisheries for Greater Beluga Protection*, E&E NEWS BY POLITICO (July 18, 2024), <https://www.eenews.net/articles/greens-petition-noaa-fisheries-for-greater-beluga-protection/> (“Environmentalists made a legal appeal to NOAA Fisheries to protect the whales in their critical habitat from industrial noise and development.”).

²¹⁸ *Id.*

²¹⁹ Dianne DuBois, *Reindeer Population Wins Endangered Species Protection in Time for Holidays*, CTR. FOR BIOLOGICAL DIVERSITY (Dec. 12, 2022), <https://biologicaldiversity.org/w/news/press-releases/reindeer-population-wins-endangered-species-protection-in-time-for-holidays-2022-12-12/>.

²²⁰ Christi Heun, *Federal Protections for Reindeer Just in Time for the Holidays*, DEFENDERS OF WILDLIFE (Dec. 21, 2022), <https://defenders.org/blog/2022/12/federal-protections-reindeer-just-time-holidays>.

ingestion, smothering, starvation, abrasions),²²¹ the chemical contamination associated with plastics has raised health concerns for Arctic peoples (from inflammation to excess carcinogenicity).²²²

A United Nations resolution to end plastic pollution adopted in March 2022 cemented a goal to “forge an international legally binding agreement by 2024.”²²³ The resolution includes a focus on “the marine environment.”²²⁴ Pursuant to the resolution, the UN Environment Programme created an Intergovernmental Negotiating Committee (INC) to negotiate the legally binding instrument. The INC has held five sessions, most recently ending December 1, 2024.²²⁵ However, the fifth session failed to end in a treaty by the end of 2024 due to “persisting divergence in critical areas,” according to the United Nations Environment Programme (UNEP) Executive Director, Inger Andersen.²²⁶ Negotiations will therefore resume in 2025.²²⁷

i. Roles of US and EU

A recently published analysis of the EU’s participation finds the EU has been highly engaged throughout the negotiations, focusing on recommending policies and principles in line with the EU’s internal workings, including “the environmentally sound management policy, the waste hierarchy, the precautionary principle, the polluter pays principle, and extended producer responsibility.”²²⁸ The EU is a member of the High Ambition Coalition to End Plastic Pollution,²²⁹ which advocates for addressing the full plastics lifecycle in a binding instrument, in opposition to the Gulf Cooperation Council and others aligned with the petrochemical industry, which advocates for voluntary measures “mainly

²²¹ See Melanie Bergmann et al., *Plastic Pollution in the Arctic*, 3 NAT. REV. EARTH & ENV’T 323, 323 (2022).

²²² To this point actual health effects have not been sufficiently studied but generalizations from non-Arctic populations and uptake models considering the food chain in the Arctic region have been published. See, e.g., Mohammad Sadiq Saeed et al., *Human Health Risk Model for Microplastic Exposure in the Arctic Region*, 895 SCI. TOTAL ENV’T 165150 (2023). For discussion of health impacts by Indigenous advocates in the context of plastics treaty negotiations, see *Indigenous Groups Call for Health Protections in Plastic Deal*, FRANCE 24 (Dec. 1, 2024), <https://www.france24.com/en/live-news/20241201-indigenous-groups-call-for-health-protections-in-plastic-deal>.

²²³ Keisha Rukikaire & Moses Osani, *Historic Day in the Campaign to Beat Plastic Pollution: Nations Commit to Develop a Legally Binding Agreement*, U.N. ENV’T PROGRAMME (2022), <https://www.unep.org/news-and-stories/press-release/historic-day-campaign-beat-plastic-pollution-nations-commit-develop>.

²²⁴ Environment Programme Res. 5/14, at 1 (Mar. 7, 2022).

²²⁵ *Intergovernmental Negotiating Committee on Plastic Pollution*, U.N. ENV’T PROGRAMME, <https://www.unep.org/inc-plastic-pollution> (last visited Dec. 16, 2024).

²²⁶ Vibhu Mishra, *Plastic Pollution Treaty Negotiations Adjourn in Busan, to Resume Next Year*, UN NEWS (Dec. 1, 2024), <https://news.un.org/en/story/2024/12/1157646>.

²²⁷ *Id.*

²²⁸ Qi Xu et al., *Reflections on the European Union’s Participation in Negotiations of the Global Plastic Pollution Instrument under International Environmental Law*, 11 FRONT. MAR. SCI. 1, 15 (2024).

²²⁹ See *id.* at 6.

address[ing] midstream and downstream approaches such as waste management.”²³⁰ Notably in relation to the Arctic, Canada and Norway, both “fossil fuel-producing nations,” have also joined the High Ambition Coalition along with Denmark, Finland, Iceland, and Sweden.²³¹ The only absent Arctic States are the US and Russia.²³² After the fourth round of negotiations, an EU official suggested it would be “very difficult” to conclude negotiations by the end of the year given “delaying tactics by countries wanting to lower the ambition.”²³³ Their prediction was accurate. According to an EU note, the main points of disagreement continue to be whether to address the entire lifecycle of plastic and how binding to make provisions of a final instrument with “mainly major oil producing countries” contributing to delays in resolving these issues.²³⁴ During the fifth round of negotiations, the EU remained steadfast in their commitment to a meaningful treaty addressing plastic production despite pushback.²³⁵

The US State Department published a media note shortly after the conclusion of the fourth round of negotiations that stands in contrast to the EU’s outlook stating the US is “optimistic that the text of the agreement can be finalized by the end of 2024.”²³⁶ The note shares a recognition of the need to address both downstream and upstream measures in the plastic lifecycle and discusses US contributions to the draft text focusing on emissions from both plastic production and waste management facilities, but word choice in discussing downstream initiatives leans toward leaving specifics of upstream choices to individual countries.²³⁷ An in-depth NPR analysis of the U.S. influence on negotiations published shortly before the fourth round concludes that the US “bears a lot of the blame” for “floundering” negotiations, including by “declin[ing] to back a binding

²³⁰ Marjo Vierros et al., *Building Global Momentum Towards Managing Marine Plastic Pollution Through SDG 14*, 1 OCEAN & SOC’Y 1, 10 (2024).

²³¹ Hiroko Tabuchi, *Saudi Arabia Leads Pushback Against Global Plastic Treaty*, N.Y. TIMES (Nov. 30, 2024), <https://www.nytimes.com/2024/11/30/climate/saudi-arabia-global-plastic-treaty.html>; End Plastic Pollution by 2040, HIGH AMBITION COALITION TO END PLASTIC POLLUTION, <https://hactoendplasticpollution.org/> (last visited Jan. 28, 2025).

²³² High Ambition Coalition to End Plastic Pollution, *supra* note 231.

²³³ Joe Lo, *EU Warns “Delaying Tactics” Have Made Plastic Treaty Deal “Very Difficult,”* CLIMATE HOME NEWS (June 18, 2024), <https://www.climatechangenews.com/2024/06/18/eu-warns-delaying-tactics-have-made-plastic-treaty-deal-very-difficult/>.

²³⁴ *Fourth Session of the Intergovernmental Negotiating Committee to Develop an International Legally Binding Instrument on Plastic Pollution*, COUNCIL OF THE E.U. 1, 2 (June 12, 2024), <https://data.consilium.europa.eu/doc/document/ST-10991-2024-INIT/en/pdf>.

²³⁵ Leonie Cater & Hanne Cokelaere, *EU Won’t Surrender to Oil States in Plastic Treaty Negotiations*, POLITICO (Nov. 29, 2024), <https://www.politico.eu/article/eu-wont-surrender-oil-states-plastic-treaty-negotiations-oil-gas-countries-pollution-busan/>.

²³⁶ *Outcomes of the Fourth Negotiating Session on a Global Agreement to End Plastic Pollution*, U.S. DEPT OF STATE (May 2, 2024), <https://www.state.gov/outcomes-of-the-fourth-negotiating-session-on-a-global-agreement-to-end-plastic-pollution/>.

²³⁷ *Id.* (“We recognize that downstream measures alone will not be enough to end plastic pollution. The United States supports each party being obligated to take measures to identify and control chemicals, including polymers, that present a risk of concern to human health or the environment. As part of these obligations, the U.S. approach also focuses on driving down the demand for new plastic.”).

global agreement,” focusing on the influence of oil, gas, and plastic producers.²³⁸ NPR’s follow-up analysis after the negotiations discussed optimism about talks ending in an agreement at the conclusion of the November-December 2024 round but continued to note US reluctance to support limits on plastic production and “instead throwing their weight behind measures like recycling that are favored by the country’s fossil fuel and petrochemical industries.”²³⁹ This stands in sharp contrast to the EU and High Ambition Coalition’s hopes for a more impactful instrument.

In the months leading up to the fifth round of negotiations, the Biden administration shifted to a position supporting reducing plastic production, but kept a “middle ground” by continuing to “oppose[] mandatory production limits.”²⁴⁰ This shift was criticized by industry groups.²⁴¹ The US State Department media note published after the unsuccessful fifth round of negotiations notably includes the words “high level of ambition” when discussing the country’s collaborative approach to the session and “resolve[s] to make more progress in the next stages.”²⁴² However, given the “return of an oil-friendly Trump administration,” the US may “become more hostile to a plastics treaty” in subsequent negotiations given the administration’s history of backing out of the Paris Agreement on climate change.²⁴³

This, then, is a role the US can play differently. The US took leading positions with other single-substance threats, such as the Minamata Convention on Mercury.²⁴⁴

Arctic Indigenous communities see the necessity for limiting plastic production in their daily lives as “communities in the Arctic are among the world’s

²³⁸ Michael Copley, *Talks for a Plastic Pollution Treaty Are Stalling. Could the U.S. Be Doing More?*, NPR (Apr. 23, 2024), <https://www.npr.org/2024/04/23/1246293403/plastic-pollution-un-treaty-negotiations-waste-fossil-fuels-climate-change>.

²³⁹ Michael Copley, *With a Deadline Looming, Countries Race for a Global Agreement to Cut Plastic Waste*, NPR (Apr. 30, 2024), <https://www.npr.org/2024/04/30/1248187732/plastic-pollution-waste-treaty-negotiations-climate-change-fossil-fuels>.

²⁴⁰ Allyson Chiu, *‘A Once-in-a-Lifetime Opportunity’: The World’s Fight to Curb Plastic Waste*, WASH. POST (Nov. 25, 2024), <https://www.washingtonpost.com/climate-solutions/2024/11/25/global-plastics-treaty-pollution-waste/>; Andrew Jeong, *Divided Over Whether to Stop Making Plastic, U.N. Treaty Talks Collapse*, WASH. POST (Dec. 1, 2024), <https://www.washingtonpost.com/climate-environment/2024/12/01/plastic-pollution-treaty-global-un-busan/>.

²⁴¹ Chiu, *supra* note 240.

²⁴² *Outcomes of the Fifth Negotiating Session on a Global Agreement to End Plastic Pollution*, U.S. DEPT OF STATE (Dec. 2, 2024), <https://www.state.gov/outcomes-of-the-fifth-negotiating-session-on-a-global-agreement-to-end-plastic-pollution/>.

²⁴³ Tabuchi, *supra* note 231; Chiu, *supra* note 240; Valerie Volcovici, *Exclusive: In Shift, US Backs Global Target to Reduce Plastic Production, Source Says*, REUTERS (Aug. 14, 2024), <https://www.reuters.com/sustainability/shift-us-backs-global-target-reduce-plastic-production-source-says-2024-08-14/>.

²⁴⁴ *Mercury*, U.S. DEPT OF STATE, <https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/u-s-actions-to-reduce-mercury-pollution-from-transboundary-sources/> (last visited Dec. 16, 2024).

most impacted by climate change and plastic pollution.”²⁴⁵ Alaska Community Action on Toxics and the International Pollutants Elimination Network published a joint report detailing the myriad negative impacts of plastic on Indigenous communities and listing recommendations for an impactful plastic pollution instrument in April 2024 before both groups attended the fourth round of negotiations as observers.²⁴⁶ Their recommendations focus on the toxic chemicals in plastics and the necessity of a binding instrument that will decrease plastic production by shifting to “more sustainable materials.”²⁴⁷ Their aims appear generally in line with the EU and High Ambition Coalition goals. However, it is unclear whether Indigenous views will be meaningfully reflected in a final treaty. Indigenous representatives at the fifth round of negotiations “felt silenced” by “closed door” negotiations and a flood of industry lobbyists who outnumbered the International Indigenous Peoples' Forum on Plastics by nearly nine to one, leading a forum leader to call this disparity “a cruelty” in “contradiction of the entire purpose of this meeting.”²⁴⁸

5. Other Future Actions

We have attempted to include proposals and initiatives that will improve the effectiveness of the legal regime on Arctic sustainability. This short piece has not addressed all leading ideas. Among those are both process and substantive proposals. These include the very specific goals, such as managing ship ballast water;²⁴⁹ the more general, involving subnational and Indigenous governments in negotiating and decision-making including in contentious areas such as Indigenous land claims;²⁵⁰ the comprehensive, including adopting a comprehensive environmental protection treaty for zones of the Arctic within the jurisdiction of individual countries;²⁵¹ and establishing a strong Arctic UNEP Regional Seas Programme.²⁵² A few are strongly advocated but not widely endorsed, such as

²⁴⁵ Sonam Lama Hyolmo, *Plastic Pollution Talks End & Arctic Peoples Return Home to a ‘Sink’ of Plastic*, MONGABAY ENVTL. NEWS (2024), <https://news.mongabay.com/2024/05/plastic-pollution-talks-end-arctic-people-return-home-to-a-sink-of-plastic/>.

²⁴⁶ Pamela Miller et al., *The Arctic’s Plastic Crisis: Toxic Threats to Health, Human Rights, and Indigenous Lands from the Petrochemical Industry*, IPEN 1, 16 (2024), https://ipen.org/sites/default/files/documents/ipen-alaska_report-2024-final-compressed.pdf.

²⁴⁷ *Id.* at 46.

²⁴⁸ Jennifer McDermott, *Negotiators Fail to Reach an Agreement on a Plastic Pollution Treaty. Talks to Resume Next Year*, AP NEWS (Dec. 2, 2024), <https://apnews.com/article/plastic-pollution-treaty-south-korea-75187319a8cebc6e54fc1557ff40b266>; Cate Bonacini & Lindsey Jurca, *Fossil Fuel Lobbyists Flood Final Scheduled Round of Global Plastics Treaty Negotiations*, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (Nov. 27, 2024), <https://www.ciel.org/news/inc-5-lobbyist-analysis/>.

²⁴⁹ See, e.g., Xinli Qi et al., *Environmental Impacts of Arctic Shipping Activities: A Review*, 247 OCEAN & COASTAL MGMT. 106936 (2024).

²⁵⁰ See, e.g., Ken S. Coates & Else Grete Broderstad, *Indigenous Peoples of the Arctic: Re-taking Control of the Far North*, in THE PALGRAVE HANDBOOK OF ARCTIC POLICY AND POLITICS 9 (Ken S. Coates & Carin Holroyd eds., 2020).

²⁵¹ See, e.g., Penttilä, *supra* note 10, at 210-11 (summarizing proposals for a comprehensive treaty system for the Arctic).

²⁵² See, e.g., DiMento et al., *supra* note 6, at 317-19.

removing any distinction between Permanent Participants and Members of the Arctic Council.²⁵³

VI. SUMMARY AND CONCLUSIONS

We focus on the EU and US roles in initiating new sustainability law in the Arctic. We chose these sources for several reasons. First, together these entities make up an important percentage of Arctic nations. Both have made the protection of the Arctic a major priority in their international policies. Both have major geopolitical and economic interests in preserving the Arctic and being perceived as a steward of its sustainability. Finally, both have considerable lawmaking potential and the capacity to influence other nations to join effective new contributions. As previously mentioned, there are reasons why we have not addressed the other gigantic Arctic presence, the Russian Federation.

Within the EU and US, there has been some progress in moving to fill gaps in a regime of governance for sustainability in the Arctic. On the positive side, care of the fisheries resources of the Central Arctic has been undertaken, although not yet permanently; protection of biodiversity beyond areas of national jurisdiction has moved a step forward; and greater use of environmental impact analysis has been made, and both the EU and the US have provided venues for, and even initiated adversarial actions. These have brought new actors into the efforts to promote sustainability in the Arctic. And although not successful everywhere, these legal actions have made for much greater global visibility of the victims of a less sustainable Arctic.

However, movement has been limited—if nonexistent—in several areas of need, including protection against certain kinds of pollution, recognition of the need for greater protection of newly threatened species, and stricter management of potentially highly polluting energy activities.

There are a few reasons for this mixed progress. The long and extraordinarily influential war that Russia began with Ukraine effectively stopped cooperative activity on some of these initiatives. Secondly, the varying interests in the Arctic translate to important differences substantively on the need for or characteristics of some of the proposed changes. Third, political differences on approaches to implementing the overwhelmingly important climate change law have led to quite varied conclusions on what should be done on some critical items such as fossil fuel exploration and the need for and pace of phasing out exploitation. Fourth, while the commitment to climate change action (mitigation and adaptation) is strong in rhetoric and even law and treaty-making, nations in the Arctic and those whose actions affect the Arctic remain—some increasingly—committed to promoting sustainability in the larger sense of cultural, social, and economic protection. Thus they take certain culturally and economically protective actions

²⁵³ See, e.g., Refai, *supra* note 29, at 268-69; Gudmundur Alfredsson, *Indigenous Peoples in the Arctic Council: A Unique Feature?*, 13 Y. B. POLAR L. 1, 3 (2022) (both discussing the current level of involvement of Permanent Participants and potential improvements).

that may jeopardize improvement in some elements of stewardship of the physical environment.

The EU and US share many positions on the need for additional initiatives, but they disagree at least to some degree on the extent of involvement of Indigenous peoples in major decisions that affect sustainability, the pace with which fossil fuels must be phased out as energy sources, the approach to be employed in developing liability regimes for energy activity environmental impacts, and the strategies to pursue in specific treaty choices such as regarding plastics manufacture, use, and disposal regulation.

Moreover, disagreements on some matters, like the need for stricter fossil fuel extraction law in the Arctic, shift with changes in political administrations, most notably in the Democratic versus Republican platforms in the US, but also within the EU, where nationalistic and less environmentally focused political parties have gained ground if not dominance.²⁵⁴

²⁵⁴ This has been particularly disruptive during recent US Presidential administrations. For example: “The Northern Bering Sea Climate Resilience Executive Order (EO), one of President Obama’s last executive orders, withdrew 115 million acres of federal waters on the outer continental shelf from oil and gas leasing.” Exec. Order No. 13,754, 81 Fed. Reg. 240 (Dec. 9, 2016). The President clarified this action in the Presidential Memorandum of December 20, 2016 (Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing). While the Outer Continental Shelf Lands Act (OCSLA) section 12(a) authorizes a president to “withdraw from disposition any of the unleased lands of the outer continental shelf,” 43 U.S.C. § 1341(a), there is no clear statutory executive authority to reverse prior withdrawals.

That did not stop President Trump from trying. Implementing an America-First Offshore Energy Strategy, EO No. 13,795 (Apr. 28, 2017), revoked EO 13,754 and attempted to undo President Obama’s OCSLA withdrawal—that is, to reopen the North Bering Sea area to oil and gas leasing. Environmental groups and Alaska Natives sued, alleging that the president does not have authority to revoke prior withdrawals under OCSLA. In March 2019, the U.S. District Court for the District of Alaska agreed with the plaintiffs and invalidated the section of EO No. 13,795 that attempted to reverse the withdrawal. “The text of Section 12(a) refers only to the withdrawal of lands; it does not expressly authorize the President to revoke a prior withdrawal. Congress appears to have expressed one concept—withdrawal—and excluded the converse—revocation.” *League of Conservation Voters v. Trump*, 363 F. Supp. 3d 1013, 1021 (D. Alaska 2019). The federal government appealed, but by the time the Ninth Circuit ruled, President Biden had already issued yet another executive order that the Ninth Circuit determined mooted the controversy. Part of Biden’s wide-ranging EO 13,990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Jan. 20, 2021), revokes EO 13,975. “Pursuant to section 12(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1341(a), Executive Order 13754 and the Presidential Memorandum of December 20, 2016, are hereby reinstated in their original form, thereby restoring the original withdrawal of certain offshore areas in Arctic waters and the Bering Sea from oil and gas drilling.” See EO 13,990, sec. 4(b).” Erin Flannery Keith, *Arctic Law Progress for Vulnerable Ocean Resources*, 36 NAT. RESOURCES & ENV’T 51, 52-53 (2022).