

Establishment of the Arctic Council

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A new "high level forum" for cooperation in the Arctic has been established by the eight states with sovereignty over territory in that region: Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden and the United States. This new entity, called the Arctic Council, ended its organizational phase and took up its new responsibilities in September of 1998 at its first ministerial-level meeting held at Iqaluit,⁽¹⁾ Northwest Territories, Canada. At that meeting, the chairmanship of the Council passed from Canada to the United States, which will hold that position for the next two years.

The Arctic Council is the only major intergovernmental initiative for the Arctic involving all eight Arctic states. It has two primary objectives. The first is to promote environmental protection and follows from the work of the Arctic Environmental Protection Strategy, an effort begun by the same Arctic states in 1991 to address environmental issues affecting the entire region and, in particular, to develop multilateral responses to pollution in the Russian Arctic. The second objective of the Arctic Council concerns sustainable development. This relates to the economic circumstances of the indigenous people and other residents of the Arctic in the context of preserving the environment. To these ends, the Council has endorsed a number of cooperative activities to be carried out primarily through a series of subsidiary bodies.

Of particular significance is the role played by indigenous communities in the work of the Council. Four organizations representing indigenous people have been recognized as "Permanent Participants" who participate in all aspects of the Council's work. Although they do not vote, the organizations participate in the same manner as states in most other respects. Integration of non-governmental organizations to this degree into the work of a body comprised of states is unusual and reflects the critical role that Arctic indigenous people play in regional matters.

Another special aspect of the Council is its establishment as a "forum" and not an international organization. This choice of structure is consistent with recent examples of informal cooperation among states, and has an important impact on how the Council carries out its work.

This Current Development discusses these salient features of the Arctic Council, as well as elements of its history and structure.

I. HISTORY OF THE COUNCIL

The Arctic Council is an outgrowth of the Arctic Environmental Protection Strategy (AEPS), announced by the eight Arctic states in 1991 and based on a proposal by the Finnish Government to initiate a process to address Arctic-wide environmental issues. The AEPS, along with a Declaration on the Protection of the Arctic Environment, was approved by Arctic ministers at Rovaniemi, Finland, in June 1991 as a political--but not a legal--commitment to establish a more comprehensive structure for cooperation. The AEPS identified five key objectives:

- To protect the Arctic ecosystem including humans;
 - o To provide for the protection, enhancement and restoration of environmental quality and the sustainable utilization of natural resources, including their use by local populations and indigenous peoples⁽²⁾ in the Arctic;
- To recognize and, to the extent possible, seek to accommodate the traditional and cultural needs, values and practices of the indigenous peoples as determined by themselves, related to the protection of the Arctic environment;
- To review regularly the state of the Arctic environment;
- To identify, reduce, and, as a final goal, eliminate pollution.⁽³⁾

Although "sustainable economic development" is mentioned in the AEPS, the primary emphasis was on environmental issues. The Arctic states, taking advantage of the opportunity for cooperation presented by the end of the Cold War, were particularly interested in giving an international scope to efforts to clean-up toxins in the Russian Arctic.

As part of the AEPS, the Arctic states established four working groups. States, observers and indigenous groups would send appropriate experts to assist in the work of those described below:⁽⁴⁾

- The Arctic Monitoring and Assessment Program (AMAP) monitors levels and assesses the effects of anthropogenic pollutants in the Arctic. AMAP produces assessment reports on the status and trends in the condition of Arctic ecosystems, detects emerging problems, their possible causes and the potential risk to Arctic ecosystems, and recommends responses.
- The Conservation of Arctic Flora and Fauna (CAFF) working group facilitates the exchange of information and coordination of research on species and habitats of flora and fauna in the Arctic. In particular, CAFF looks at the practices of Arctic states with respect to conservation and management of Arctic species and the relationship to and use of such species by indigenous groups.
- The Emergency Prevention, Preparedness and Response (EPPR) working group provides a framework for cooperation in responding to the threat of environmental emergencies. EPPR gathers experts to consider cooperation with regard to actions in response to significant accidental pollution from any source,

coordination and harmonization of preventive policies, and establishment of a system of early notification in the event of significant accidental pollution or the threat of such pollution.

- The Protection of the Arctic Marine Environment (PAME) working group takes preventive and other measures directly or through competent international organizations regarding marine pollution in the Arctic irrespective of origin.

The working groups have produced extremely valuable results. A good example is AMAP's extensive analysis of Arctic pollution issues which was released in conjunction with the fourth and final AEPS Ministerial in Alta, Norway, in June, 1997.⁽⁵⁾

Some states, however, felt that the AEPS comprised only part of what the states in the region should discuss with respect to the Arctic. Since the late eighties, the Canadian Government urged the establishment of an Arctic Council to handle a wide range of environmental, economic development and maritime policy issues. In 1995, Canada began to advocate the transformation of the AEPS into a new international organization which would not only subsume the existing AEPS programs but would also address the broader issue of sustainable development.

The United States, in particular, had difficulty with the notion of creating a new international organization. However, it ultimately agreed to the formation of a council without legal personality. The result was the Declaration on the Establishment of the Arctic Council, signed at Ottawa on September 19, 1996 (the "Ottawa Declaration").

II. THE MAIN THEMES OF THE NEW COUNCIL

The Ottawa Declaration marked a shift in focus for the Arctic states from environmental protection alone to the broader concept of sustainable development. The Declaration provides that the Council is a high level forum designed to: "provide a means for promoting cooperation, coordination and interaction among the Arctic states, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic."⁽⁶⁾ The Council also oversees and coordinates programs established under the AEPS, namely those supervised by the four original working groups discussed above.

In the two-year period following adoption of the Ottawa Declaration, the Arctic states and Permanent Participants worked on rules of procedure and terms of reference for a sustainable development program, as well as new mandates for the Council's programs. Those rules, terms of reference and mandates were approved by the Arctic Ministers in their Declaration at Iqaluit (the "Iqaluit Declaration").⁽⁷⁾

Environmental Protection

The Declaration renewed the mandates of the four existing working groups, all of which were heavily involved in environmental protection issues. It also specified work to be undertaken by those groups for the following two years. The Arctic Council's contribution to environmental protection, as with sustainable development, is essentially an amalgam of the working groups' efforts. Thus, for example, the Arctic

Monitoring and Assessment Program continues with its primary task of preparing an assessment of the Arctic environment with respect to persistent organic pollutants, radionuclides, heavy metals and acidifying substances. In the future, the AMAP will focus on filling gaps in data identified in its assessment reports and on establishing appropriate systems for observing trends in Arctic pollution.⁽⁸⁾ The working group on Conservation of Arctic Flora and Fauna, which focuses on protecting plants and animals, as well as native habitats, will continue its present studies, as well as begin new studies of particular Arctic species. The CAFF will undertake further work in the field of biological diversity, including the development of a monitoring program.⁽⁹⁾

The working group on Protection of the Arctic Marine Environment, whose mandate is to address policy and non-emergency response measures related to protection of the marine environment from land and sea-based activities, will undertake a Regional Programme of Action for the Protection of the Arctic Marine Environment from Land-Based Activities. It will focus initially on persistent organic pollutants and heavy metals. This will be followed by studies on other contaminants and activities which degrade marine and coastal environments.⁽¹⁰⁾ In addition, and of particular importance for the Council's future work, the Council agreed to continue development of an Arctic Council Action Plan to Eliminate Pollution of the Arctic. This was an initiative proposed by Norway to review information obtained from studies undertaken by the AMAP and others, and to develop responses, including pollution prevention and remediation plans.

The Sustainable Development Program

In the Ottawa Declaration, the Arctic states agreed to "oversee and coordinate a sustainable development program."⁽¹¹⁾ There was considerable disagreement, however, about the program's content. This lack of accord mirrors the current confusion over the meaning of this important and tremendously popular phrase. Despite the central place this topic has at the United Nations and in international environmental diplomacy,⁽¹²⁾ there is no generally agreed upon definition of sustainable development. At its most basic level, sustainable development links the notions of economic development and environmental protection; it suggests that economic growth should be promoted in a manner that preserves and protects the environment. Such a broad definition, however, does not provide an easy basis for developing or choosing among potential programs. As a result, the Ottawa Declaration called on the parties to negotiate terms of reference for the Council's sustainable development program.⁽¹³⁾

It was not possible for the Arctic states to agree to a comprehensive sustainable development program, or even a list of priorities. Instead, at Iqaluit the Council decided that the Sustainable Development Program would consist of a series of specific projects to be managed by the Senior Arctic Officials (SAOs), each Arctic state's designated point of contact for Arctic issues. As a focal point for discussions on the issue, the Council established a Sustainable Development Working Group consisting of the SAOs and representatives of Permanent Participants, to facilitate completion of work on these projects and to propose possible priority areas for the future.

The Ministers authorized work to proceed in a series of areas which correspond to specific projects submitted to the SAOs by various Arctic states and Permanent Participants. Among these was a Canadian project proposal, "The Future of Children and Youth of the Arctic," which would involve efforts to promote

the health and education of children and youth. The United States proposed a project for improving systems that provide telemedicine services to remote areas in the Arctic. Another United States proposal concerned providing technology to improve local Arctic sanitation systems. Several proposals were also advanced by Permanent Participants. The Saami Council, for example, put forward two project proposals designed to study and resolve problems related to fisheries management systems.

The Senior Arctic Officials, both working among themselves and through the Sustainable Development Working Group, will now attempt to develop these projects and implement them, to the extent that an agreement can be reached among the Arctic states in each instance. At this early stage of the Council's existence, the Sustainable Development Program primarily consists of a series of unrelated projects proposed by different parties. It will be up to the SAOs to integrate the projects and to link them to the activities of the working groups.⁽¹⁴⁾

Participation by Indigenous Groups

The Ottawa Declaration recognized three indigenous groups as Permanent Participants: the Inuit Circumpolar Conference, the Saami Council, and the Association of the Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation.⁽¹⁵⁾ At Iqaluit, the Council added the Aleut International Association.⁽¹⁶⁾ Creating the category of Permanent Participation is a unifying theme of the Council, and one that sets it apart from other bodies. These Permanent Participants are more than observers; they have the right to participate in all meetings and activities of the Council,⁽¹⁷⁾ and their representatives sit alongside Ministers and SAOs. Like states, they also have the right to present proposals for cooperative activities.⁽¹⁸⁾ Two such proposals from the Saami Council were singled out by Ministers at Iqaluit for completion and implementation under the guidance of SAOs.⁽¹⁹⁾ As a result of the role given to the Permanent Participants, the Council is vitally focused on the needs and views of the indigenous Arctic residents, particularly issues related to sustainable development.⁽²⁰⁾ By virtue of the input of the Permanent Participants, the Council is significantly more effective than it would be if only states were present.

It is interesting to note that the Council not only presents an opportunity for the indigenous groups to express their views to and seek support from the Council, but it facilitates a dialogue between indigenous populations of particular states and the governments of those states. In some cases, that dialogue has historically proven difficult for domestic reasons. That indigenous groups can participate prominently and "at the table" with states at this forum fosters particularly positive international and domestic interactions.

The Biennial Chairmanship

After the establishment of the Council in Ottawa, the Canadian Government enthusiastically took up its responsibilities and oversaw two years of work on the formation of the Council. The Council now has its first ministerial mandate to undertake new work, including projects under the Sustainable Development Program. As chair, the United States is in charge of facilitating the first active phase of the Council's existence. To that end, the United States Government has established a secretariat located within the Department of State,⁽²¹⁾ and will host a series of Senior Arctic Officials meetings with the active support and involvement of the State of Alaska. During its chairmanship, the United States plans to emphasize the central themes of

environmental protection and sustainable development, as well as public awareness of Arctic conditions through dissemination of information and public outreach programs. The first U.S.-hosted meeting of the Senior Arctic Officials took place in May, 1999, in Anchorage, Alaska. The U.S. chairmanship will culminate in a ministerial meeting in Alaska in the fall of 2000.

III. ELEMENTS FOR COOPERATION UNDER THE NEW COUNCIL

The 1996 Ottawa Declaration set forth key understandings on the purpose and structure of the Arctic Council, and required that further work be done to flesh out the details of how the Council would operate. In particular, the Arctic states agreed to negotiate rules of procedure for the Council (the "Rules of Procedure"), and terms of reference for a sustainable development program (the "Terms of Reference").⁽²²⁾ Those negotiations took up much of the subsequent two years, but eventually resulted in the two documents which establish the necessary procedures under which the Arctic Council will operate.⁽²³⁾

Structure and Governance

The highest level of interaction within the Council occurs at "ministerial meetings" held in the usual course every two years. Between those occasions, the work of the Council is directed by the SAOs in consultation with representatives of the Permanent Participants. The SAOs meet at least twice a year, and may opt to meet more often; they met nine times between 1996 and 1998. The SAOs oversee the work of the Council's subsidiary bodies, which include the four main AEPS working groups. The SAOs are also in touch by phone and fax, often through the coordinative efforts of the Host Country, which maintains the Council's secretariat. Decisions are made by consensus of all eight Arctic states. This rule of decision-making, which was memorialized in the Ottawa Declaration, applies equally to all Council subsidiary bodies.⁽²⁴⁾

The Rules of Procedure, which apply to all bodies of the Council, specify how meetings are run and how decisions are taken. They are relatively lengthy and detailed for an informal body which has no legal authority to bind its members. Nevertheless, the Rules serve the purpose of establishing an agreed framework for cooperation. Negotiation of the Rules clarified points of difference among the Arctic states on issues such as how the Council's activities would be approved, and how and under what circumstances Observers could participate in the Council's work. The Rules also tie disparate parts of the Council together. Under AEPS, the working groups had their own rules of procedure and manner of doing business; their failure to coordinate programs and policies was a matter of some criticism and concern. Under the Council regime, the Council's Rules apply to all the subsidiary bodies, including these working groups.⁽²⁵⁾

The Rules determine the manner in which proposals for new activities are considered and are ultimately placed before the Ministers for decision. The underlying rationale is that all cooperative activities must be pursuant to a ministerial mandate created at the biennial ministerial meetings.⁽²⁶⁾ Activities with such mandates can be worked on and implemented by the SAOs.⁽²⁷⁾ In the absence of a mandate, a new proposal can be worked on by SAOs ultimately for submission to the Ministers, but the SAOs cannot implement a plan on their own. The United States supported this approach to underscore that the Council is a forum for exchanging views; it is not an operational body which should be expected, for example, to respond to emergencies. As the United States delegation pointed out on many occasions, the Arctic states are in no way

restricted from taking actions, including emergency actions, as necessary. But such actions do not have to be of the Arctic Council per se--states or groups of states are always free to act individually or collectively independent of the Council. The Council has no general role in coordinating Arctic policies, other than in spheres specifically agreed upon in advance.

Funding

The programs of the Arctic Council are funded voluntarily by individual Arctic states. Under current practice, states propose projects or identify working groups they wish to support, and those governments that are interested take the lead in implementing and paying for them. Thus, for example, Norway pays for a secretariat for AMAP, Iceland for PAME, the United States and Iceland for CAFF, and Denmark provides most of the funding for an Indigenous Peoples' Secretariat located in Copenhagen. There are no assessed contributions and not all states give money to all projects. This funding approach is not satisfactory to a number of governments. Many would like to see financial burdens shared more broadly and, in their view, more "equitably." The United States, which provides support to various bodies on a voluntary basis and to which these entreaties for money are often directed, replies that it never agreed to fund programs other than on a non-assessed basis. Nor does the Ottawa Declaration require states to fund any particular programs.

Terms of Reference for Sustainable Development

As noted above, it was agreed in the Ottawa Declaration that terms of reference for the Council's sustainable development program had to be adopted by the Council. It was suggested that the Terms of Reference should set forth an overall substantive direction for the program in order to provide an outline for the types of projects that might be pursued under this rubric. The competing view, ultimately accepted, was that the Terms of Reference should primarily set forth elements for what should be included in proposals for sustainable development-related projects. Thus, the Terms of Reference serve as a kind of gloss on the Rules of Procedure, providing a list of items for inclusion in proposals, in addition to those specified in the Rules of Procedure.⁽²⁸⁾

The Terms of Reference are thus procedural in nature. They require, for example, that proposals to the SAOs and Ministers for cooperative activities clearly describe issues to be addressed, provide for participation by more than one Arctic state and identify the benefits to be realized by the cooperative activity.⁽²⁹⁾ An important element of any proposal is the inclusion of anticipated financial needs and implications, and suggestions for the ways those needs and implications are to be handled. Proposals which fail to contain the requisite elements would not be ready for approval by the SAOs, and thus could not be forwarded to Ministers for acceptance.

Marine Mammal Issues

Since the Council has not reached consensus on a list of agreed sustainable development themes, some potentially controversial issues remain below the surface of the debate. For example, a number of the Arctic states view restrictions on trade in marine mammal products as a barrier to sustainable development. In their view, it would be desirable to remove legal restrictions, such as those contained in the U.S. Marine Mammal

Protection Act.⁽³⁰⁾ The United States delegation to the Arctic Council firmly maintains that these types of issues should be discussed in fora with appropriate jurisdiction, such as the International Whaling Commission (IWC) and the World Trade Organization, and not in the Arctic Council. Marine mammal issues are quite contentious among the Arctic states and political disagreements outside the Council have already had an impact within it. Thus, for example, in the aftermath of Canada's allowing several bowhead whales to be taken in 1996 contrary to IWC policies, the U.S. Secretary of Commerce certified that this action diminished the effectiveness of the IWC's conservation program,⁽³¹⁾ and President Clinton ordered the State Department to oppose Canadian efforts to address takings of marine mammals and trade in marine mammal products within the Arctic Council.⁽³²⁾

That marine mammal issues have prompted such consequences as the above Presidential order indicates that a concerted attempt to debate these policies within the Council may jeopardize the delicate process of building this new institution and engendering a mood and practice of cooperation. Although, at this stage, the avoidance of certain issues that could result in discord may imply certain limitations in what the Council can accomplish, the restraint shown by the members may also indicate their resolve to make the Council a success.

Participation of Observers

The Arctic states decided to continue the tradition under AEPS of extending invitations to outside organizations and non-Arctic states with significant expertise and experience in the Arctic who could contribute to the work of the Council and its subsidiary bodies by participating as Observers.⁽³³⁾ Negotiation of terms for admission and participation of Observers proved particularly controversial in light of some states' concerns about the role that might be played by organizations involved in animal rights issues. Some states felt that actions by such organizations could, in some instances, warrant exclusion from Council activities, and that any Arctic state should be able to insist on such an exclusion at any time. Others felt that once given the status as an Observer, the organization should not be barred from participation in Council activities absent a decision to that effect taken by consensus of the eight states.

The result was a compromise under which Observers are designated by the Council for the two year period between ministerial meetings. However, the rules provide that "[a]ny Observer that engages in activities which are at odds with the Council's Declaration shall have its status as an Observer suspended."⁽³⁴⁾ In practice this means that, since all decisions are taken by consensus, suspension of such an Observer during the period between ministerials would require the concurrence of all the Arctic states that the Observer was engaging in activities "at odds with the Council's Declaration." Certain states and organizations which had been active under AEPS were grandfathered in under the Rules and, thus, retain their Observer status absent a decision to remove them.⁽³⁵⁾ Others may apply to the Council, and, if accepted, retain the status for the period between ministerial meetings.⁽³⁶⁾ All Observers are invited to all the meetings of the Council and those of its subsidiary bodies.

IV. THE COUNCIL AS A "HIGH LEVEL FORUM"

The establishment of the Arctic Council as a forum without legal personality, and thus not as an "international organization" as that term is understood under international law, was an objective of the United States and is consistent with a tendency in recent American diplomatic practice to seek an informal cooperative structure when that structure is adequate for the purposes of the issues involved. The best known example is probably the Organization for Security and Cooperation in Europe (OSCE), which, despite its high profile, very significant responsibilities and title, is not an international organization. Other well-known examples are Asia-Pacific Economic Cooperation (APEC), a forum among states in that region which meets annually to address economic and trade issues, and the Group of Seven Major Industrialized Countries.⁽³⁷⁾ The United States has preferred an informal structure in many bilateral contexts outside of the Arctic context such as the United States-Russia Joint Commission on Economic and Technological Cooperation, formerly known as the Gore-Chernomyrdin Commission, and a series of similar bi-national commissions.⁽³⁸⁾

In each of these cases, there had to be some agreed structure to facilitate the group's purposes--an understanding of what topics would be relevant, when meetings would take place, and how decisions (if any) would be reached. These bodies often have the benefit of secretariat services, provided on the basis of voluntary contributions by one or more member states, and the contribution of in-kind resources, such as experts, resources and facilities to advance the group's purposes. The advantage of informal cooperation, which is relevant to varying degrees among these organizations, includes each state having an unfettered ability to determine whether and to what extent it will pay for the activities of the organization. Even though a traditional international organization can create internal procedures which require consensus decision making or otherwise limit the ability of the organization to require payments over the objection of a state, a powerful presumption exists with respect to informal organizations that payments will not be required of recalcitrant states. In these situations, the mechanisms to enforce contributions do not exist and there is no purpose to use, for example, voting procedures to attempt to require payment. Of course, there is nothing to prevent states from making a political, as opposed to a legal, commitment to provide resources; the United States has done so on a significant scale with respect to the Arctic Council. However, if a state loses support within its government for a particular effort, or if funds are not made available by legislative authorities, funding is easily terminated without legal consequence.

As a political matter, informal organizations, while allowing states to raise and address important and sometimes controversial issues, tend to make decisions on the basis of consensus of all members. Meetings tend to be result-oriented, with strong pressure to announce programs or issue statements or communiqués at their conclusion. A body that requires consensus will, by definition, only make announcements in its name which are acceptable to each state, assuring that no state will be out-voted or embarrassed.

Cooperation through informal organizations can simplify governmental efforts to comply with domestic laws, such as those related to participation in international organizations, and there may be no need to go through the sometimes lengthy process of seeking new legislation in order to fund the organization, as could be required with respect to assessed contributions to an international organization. On the whole, for the United States, cooperation with informal groups falls rather easily into existing presidential constitutional authorities to manage the foreign policy of the United States.⁽³⁹⁾

All this suggests that the Arctic Council's status as a forum, and not as an international organization, has an important impact on how it operates and how states interact within it. Because the Council acts solely through consensus, individual Arctic states can have confidence that the Council will not be used either to impose policies with which they disagree or to require participation (and thus payment) for programs which are not matters of priority for them. States are also assured that there is no limitation on their ability to act in their national interest, as there is no requirement that any particular issue or type of cooperation be handled through the Council.

Through years of effort, the Arctic Council has taken its first steps from conception to reality. The basic elements and structure of the Council have been established, and can now facilitate meaningful cooperation. At the very least, the negotiations over the Council's key constituent documents served to highlight differences and similarities in expectations with respect to the Council's operation, and will provide a common baseline for further work. The Council's working groups already have years of experience in their areas of expertise. What remains is for the states, indigenous groups and their representatives to build on the environmental protection and sustainable development themes that are the focus of the Council--to develop programs and strategies that have coherence, and are consistent with the policy objectives of all the Arctic states. As the new chair of the Council, the United States has before it the challenge and opportunity to provide an impetus to pan-Arctic cooperation at this formative stage of the Council's existence.

1. As of April 1, 1999, Iqaluit became the capital of the new Canadian territory of Nunavut. It is a town of approximately 4,000 inhabitants, mostly Inuit, located on Baffin Island in Northern Canada. By holding the Council's Ministerial Meeting in Iqaluit, the Canadian Government emphasized the essential linkage between the Council and the indigenous communities of the Arctic.

2. On use of the phrase "indigenous peoples," see *infra* note 20.

3. Arctic Environmental Protection Strategy, 2 Yb. Int'l Env. L. 585 (1991).

4. See *id.* at 619, 623, 627; See also Declaration on the Protection of the Arctic Environment, 2 Yb. Int'l Env. L. 581 (1991). These working groups operated semi-autonomously, with groups of specialists meeting regularly under the leadership of a chairman proposed by countries taking the lead in the particular working group's activities. The working groups were, nevertheless, subject to mandates established for them at AEPS ministerial meetings and contained in the declarations released at those meetings, and coordinated through the efforts of designated senior officials.

Small secretariats were established by interested states on a voluntary basis to support the groups' work. Denmark also established an "Indigenous Peoples' Secretariat" to assist indigenous groups in their participation in the AEPS.

5. Arctic Pollution Issues: A State of the Arctic Environment Report (Arctic Monitoring and Assessment Programme, 1997) (on file at the U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, Office of Oceans Affairs [hereinafter Office of Oceans Affairs]).

6. Declaration on the Establishment of the Arctic Council, para. 1(a), 35 ILM 1387 (1996) [hereinafter Ottawa Declaration]. The Declaration also provides that the Council "should not deal with matters related to military security." Id. at 1388 n. 1.

7. The Iqaluit Declaration (Sept. 18, 1998) (on file at the Office of Oceans Affairs) [hereinafter Iqaluit Declaration].

8. Report of Senior Arctic Officials to the Arctic Council 6-7 (Sept. 17, 1998) (on file at the Office of Oceans Affairs) [hereinafter Report of Senior Officials].

9. See id. at 10.

10. See id. at 12-14.

11. Ottawa Declaration, *supra* note 6, para. 1(c).

12. Sustainable development has been a major international topic since the first "Earth Summit" in Rio in June 1992--the United Nations Conference on Environment and Development (UNCED). The key documents negotiated by UNCED, the Rio Declaration on Environment and Development, and Agenda 21: Programme of Action for Sustainable Development, do not provide a true definition of the term. See Agenda 21: The United Nations Programme of Action From Rio, UN Doc. DPI/1344, UN Sales No. E.93.I.11 (1993). Discussions on sustainable development are now carried out within the UN system under the auspices of the Commission on Sustainable Development, which was established by the UN General Assembly in Resolution 47/191, UN GAOR, 47th Sess., Supp. No. 49, Vol. 1, at 141, UN Doc. A/47/49 (1992) and by the Economic and Social Council in Decision 1993/207, ESCOR, Supp. No. 1, at 94, UN Doc. E/1993/93 (1993), and which monitors implementation of Agenda 21. The tension between developing states, which emphasize sustained economic growth as a means to reduce poverty, and developed states, which emphasize the need to ensure that economic growth is environmentally sustainable, makes arriving at a satisfactory definition and approach a difficult task.

13. See discussion *infra*, Part III.

14. The Council also welcomed a new plan to establish a University of the Arctic, a cooperative effort among universities with an interest in Arctic studies. The University of the Arctic was proposed by a working group of the Circumpolar Universities Association, which sought the Council's support for its endeavor. This is an example of a program or project not under the auspices of the Council but deemed worthy of endorsement. Those outside the Council may find it difficult to appreciate the distinction between the projects of the Council and those simply endorsed by it. Indeed, the press at Iqaluit seemed as interested in the University of the Arctic as in any of the Council-developed programs, however, the legal difference is significant. Unlike the

Council's programs, programs administered by other organizations which are only endorsed by the Council are not subject to direction by the Ministers and SAOs. These programs do not need to follow the Council's basic procedures, which include careful development and vetting of proposals and acceptance by a consensus of the Arctic states.

15. Ottawa Declaration, *supra* note 6, para. 2.

16. The Ottawa Declaration provides for admission of new Permanent Participants, but requires that at any time the number of Permanent Participants must be less than the number of Arctic states. *Id.* Capping the number at seven prevents the number of overall participants--states and indigenous groups--from becoming unmanageable. However, it also raises difficult issues of how the Council can and should choose among groups to fill the remaining three slots.

In the period between the Ottawa and Iqaluit meetings, the Russian Permanent Participant changed its name to the Russian Association of Indigenous Peoples of the North, and that name is reflected in the Iqaluit Declaration.

17. See Arctic Council Rules of Procedure Rule 4 (Sept. 18, 1998) (on file at the Office of Oceans Affairs) [hereinafter Rules of Procedure]. See also Rules of Procedure, *id.* Rule 5, and the Ottawa Declaration, para. 2, *supra* note 6, 35 ILM at 1388-89, which both provide that the "category of Permanent Participation is created to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council." In essence, the Permanent Participants have the same rights as states members, with the exception of decision-making (which is by a consensus of the states) and the right established in the Rules of Procedure for the "Heads of Delegation of the Arctic States [to] meet privately at their discretion." Rules of the Procedure, *supra* Rule 6. The latter rules reflect the potential need for states to discuss matters, such as funding or sensitive political issues, or admission of new Permanent Participants, alone. In practice, Heads of Delegation meetings have not excluded Permanent Participants.

18. See Rules of Procedure, *supra* note 17, Rule 26.

19. See Iqaluit Declaration, *supra* note 7, paras. 7-9.

20. An issue of significant disagreement within the Council has been whether Council documents can use the word "peoples" to describe the indigenous groups. In the international context the United States has viewed the "s" as inappropriate because it may imply sovereign rights under international law. Thus, the United States has opposed inclusion of the word "peoples." A dispute over this issue was resolved for the Ottawa Declaration by use of the term once, with a footnote stating that "[t]he use of the term 'peoples' in this Declaration shall not be construed as having any implications as regard the rights which may attach to the term under international law." Ottawa Declaration, *supra* note 6, para. 2 n. 2, 35 ILM at 1388. This footnote compromise follows a precedent from the International Labour Organisation Convention No. 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, Art. 1(3), 28 ILM 1382 (1989), and has been employed in a number of other AEPS and Council documents. However, the Iqaluit

Declaration, *supra* note 7, and the related Report of Senior Officials, *supra* note 8, used neither the footnote nor the "s" (other than in proper names and quotations).

21. The Arctic Council Secretariat is located in the U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, Office of Oceans Affairs, Washington, D.C. 20520. Further information on the Council is available at the Council's web site, <http://arctic-council.usgs.gov>.

22. Rules of Procedure, *supra* note 17, and Arctic Council Terms of Reference for a Sustainable Development Program (Sept. 18, 1998) (on file at the Office of Oceans Affairs) [hereinafter Terms of Reference].

23. The United States originally presented draft rules modeled on those used by the Antarctic Treaty System for Antarctic Treaty Consultative Meetings. See Revised Rules of Procedure (1997), Antarctic Treaty Consultative Meeting XXI, Decision 1, Final Report of the Twenty-first Antarctic Treaty Consultative Meeting 121 (May 19-30, 1997). Other delegations held that a short list of essential rules was all that was needed. The final rules number some forty-seven paragraphs and two annexes.

24. Ottawa Declaration, *supra* note 6, para. 7, 35 ILM at 1389. See also Rules of Procedure, *supra* note 17, Rule 7.

25. *See id.*, *supra* note 17, Rule 28. Subsidiary bodies of the Council may establish operating guidelines which are consistent with the Rules of Procedure. *Id.* Rule 31. Such guidelines must be approved by the SAOs, and are intended to be supplementary in nature. They should facilitate the work of the groups, but may not conflict with the rules being followed by the Council as a whole.

26. *See id.*, *supra* note 17, Rule 26.

27. *See id.*, *supra* note 17, Rule 23. SAOs can guide the Council's work through "written communications, including telefax communications" as well as at meetings. *Id.*, Rule 14.

28. Annex I to the Rules of Procedure, *supra* note 17, lists elements for inclusion of proposals for cooperative activities "as a guide." Elements listed in the Terms of Reference, however, must be included in proposals which fall within the Sustainable Development Program. Thus, a major distinction between sustainable development and other proposals is that the former must address a mandatory list of elements. The rationale for the distinction is that the Council has no experience with sustainable development projects as such. It is important to have information available in some key areas so that SAOs and Ministers can make appropriate determinations.

29. Terms of Reference, *supra* note 22, para. 2.

30. U.S. Government marine mammal policies are required to be consistent with the Marine Mammal Protection Act of 1972, 16 U.S.C. §§1361-1407 (1994 & Supp. 1997). The Act establishes a moratorium on taking and importation into the United States of marine mammals and marine mammal products, with certain exceptions. Marine mammals and marine mammal products can be imported if certain conditions are met, for

example, the affected animal was not pregnant, nursing or less than eight months old at the time of the taking, and the affected population has not been designated as depleted. In addition, Alaska natives are exempted from the moratorium on taking provided the taking is for subsistence purposes or is done for handicraft purposes and is not accomplished in a wasteful manner.

31. See letter from Michael Kantor, Secretary of Commerce, to the President (Dec. 12, 1996) (on file at the Office of Oceans Affairs).

32. The President acted in connection with a report to the Congress under the Pelly Amendment to the Fisherman's Protective Act of 1967, as amended, §8(a), 22 U.S.C. §1978 (1994). President's Message to Congress on Canadian Whaling Activities, in I Pub. Papers 143 (Feb. 10, 1997). The President's message noted the certification by the Secretary of Commerce to the effect that Canada had "conducted whaling activities that diminish the effectiveness of a conservation program of the [IWC]." *Id.* The President concluded that "Canadian whaling on endangered whales warrants action at this time. Accordingly, I have instructed the Department of State to oppose Canadian efforts to address takings of marine mammals within the newly formed Arctic Council. I have further instructed the Department of State to oppose Canadian efforts to address trade in marine mammal products within the Arctic Council." *Id.* at 144.

33. "Observer status . . . is open to [such states and organizations] that the Council determines can contribute to its work." Ottawa Declaration, *supra* note 6, para. 3, 35 ILM at 1389.

34. Rules of Procedure, *supra* note 17, Rule 37

35. Rules of Procedure, *supra* note 17, Annex 2. Germany, the Netherlands, Poland, the United Kingdom, the Nordic Council, the Northern Forum, the United Nations Economic Commission for Europe, the United Nations Environmental Program and the International Arctic Science Committee obtained Observer status.

36. At Iqaluit, the Arctic states accorded Observer status to three such organizations: the Standing Committee of Parliamentarians of the Arctic Region, the World Wide Fund for Nature, and the International Union for Circumpolar Health.

37. The "G7" becomes the "G8" when the Russian Federation participates.

38. The United States has bilateral commissions with Mexico, South Africa, and Ukraine, among others. With the resignation of Victor Chernomyrdin as Russian Prime Minister, the informal name of the U.S.-Russian body has changed to the Gore-Stepashin Commission.

39. To the extent that cooperation by the United States involves participation in particular programs or activities, there must be a proper legal basis for that participation. Thus, if the Department of Energy wishes to provide personnel or other in-kind resources to advance an Arctic Council EPPR project in the Arctic, its activities and provision of resources must be consistent with relevant legislation.

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