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The Arctic Ocean, Environmental Stewardship, and the Law of the Sea

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The Arctic Ocean, Environmental Stewardship, and the Law of the Sea

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Tore Henriksen*

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INTRODUCTION

The five coastal States (Canada, Denmark on behalf of Greenland, Norway, the Russian Federation, and the United States) have been concerned with establishing that the Arctic Ocean is subject to the law of the sea.¹ Further, they have assumed and recognized a special responsibility for the protection and preservation of the marine environment of the Arctic Ocean. They have described it as “stewardship.” The stewardship role is not restricted to the waters under their national jurisdiction. It includes the Arctic Ocean and its unique ecosystem, which encompasses areas within and beyond national jurisdiction.

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1. Ilulissat Declaration, May 28, 2008, 48 I.L.M. 362.

The history of stewardship can be traced to the Old Testament and to indigenous communities.² The concept does not have a single definition. There are several versions of the concept describing different forms of responsible management of natural resources.³ It has been reinterpreted by environmental ethics to accommodate new understandings of the relationship between human beings and nature.⁴

The claim of an environmental stewardship role may have raised some eyebrows.⁵ It could give the impression that the coastal States are claiming some kind of exclusivity or proprietary rights over the Arctic Ocean and its resources. Under the law of the sea (as reflected in the 1982 United Nations Convention on the Law of the Sea, hereafter UNCLOS), non-Arctic States enjoy rights and freedoms (fishing, shipping, and marine scientific research) on the high seas and within the maritime zones of coastal States in the Arctic Ocean.⁶ The reference to the law of the sea as well as international law in the Ilulissat Declaration suggests that this is not such an attempt. It rather implies that the concept is integrated in UNCLOS or at least does not conflict with it. The objective of this Article is to investigate the possible status of stewardship under UNCLOS. A variety of actors at different levels from landowners and corporations to indigenous peoples and local communities may be ascribed a stewardship role. This Article will investigate the stewardship role of States, coastal States, and non-coastal States in the conservation of natural resources and protecting the environment of the oceans.

An environmental stewardship suggests that States have a responsibility to act on behalf of a greater community—that of present and future generations. The concept certainly has ethical and political meaning. The question to be addressed in this Article is whether the concept has some legal implications, and whether it adds any substance to the obligations under UNCLOS. It is asserted that it at least provides some legal guidance in the decision-making of States at the national and international level.⁷

In the following sections, an attempt to scope the concept of environmental stewardship will be undertaken (Section I) before investigating its status under the law of the sea (Section II). Prior to concluding (Section 5), this Article will examine to what extent stewardship has been undertaken by the coastal States and other States in the Arctic Ocean (Section III).

2. Richard Worrell & Michael C. Appleby, *Stewardship of Natural Resources: Definition, Ethical and Practical Aspects*, 12 J. AGRIC. & ENVTL. ETHICS 263, 264–65 (2000).

3. *Id.*

4. *Id.*

5. LILLY WEIDEMANN, INTERNATIONAL GOVERNANCE OF THE ARCTIC MARINE ENVIRONMENT: WITH PARTICULAR EMPHASIS ON HIGH SEAS FISHERIES 59 (2014).

6. United Nations Convention on the Law of the Sea arts. 17, 58, 87, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

7. Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 314–26 (2013).

I. ENVIRONMENTAL STEWARDSHIP

A brief description of environmental stewardship is necessary in order to assess its applicability and relevance to the law of the sea. Stewardship is a metaphor used for someone exercising authority on behalf of someone else.⁸ Different concepts have been used to describe such a role, including public trusteeship, guardianship, custodianship, and agency.⁹ The stewardship role or similar concepts have primarily been used in common law systems.¹⁰ It has been used to describe management of common natural resources by government on behalf of the community.¹¹ These resources may include riverbeds, fish, forests, and groundwater.¹²

The concept is generally described as a responsibility or duty to treat a valuable or scarce resource with a certain degree of care through the use of control or dominion, based on some values for the benefit of someone.¹³ It is a concept that “seeks to achieve certain identifiable social objectives through the manipulation of the bundle of rights and duties that constitute property.”¹⁴ These objectives may include public interests such as satisfying basic human needs.¹⁵ Stewardship may expand to include protection of biodiversity, sustainability, responsible use, and conservation of the resources in respect of not only present generations but also future generations and nature.¹⁶ Stewardship is not the exercise of proprietary rights but rather of fiduciary obligations.¹⁷ What makes stewardship distinctive is the duty to conserve and the duty to preserve.¹⁸

Stewardship includes the following elements: the object of the responsibility (what), the duty holder (who), the beneficiaries (for whom), and the values to be promoted through the stewardship (for what).¹⁹ The identification of the object of the responsibility determines the nature of the stewardship. Environmental stewardship would include properties of common interest such as the climate, living marine resources, rivers, and ecosystems. They are common natural resources in the

8. Worrell & Appleby, *supra* note 2, at 266.

9. Peter H. Sand, *Public Trusteeship for the Oceans*, in *LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES* 521, 534–35 (Tafsir M. Ndiaye & Rüdiger Wolfrum eds., 2007).

10. Mary Turnipseed et al., *Using Public Trust Doctrine to Achieve Ocean Stewardship*, in *RULE OF LAW FOR NATURE: NEW DIMENSIONS AND IDEAS IN ENVIRONMENTAL LAW* 365, 367–68 (Christina Voigt ed. 2013) (discussing stewardship as a core element of the “public trust doctrine”).

11. *Id.* at 367.

12. *Id.*

13. Mark Shephard & Paul Martin, *The Political Discourse of Land Stewardship Reframed as a Statutory Duty*, in *ENVIRONMENTAL DISCOURSES IN PUBLIC AND INTERNATIONAL LAW* 71, 76–77 (Brad Jessup & Kim Rubenstein eds., 2012).

14. RICHARD BARNES, *PROPERTY RIGHTS AND NATURAL RESOURCES* 297 (2009).

15. *Id.*

16. Worrell & Appleby, *supra* note 2, at 269–70.

17. Peter H. Sand, *Sovereignty Bounded: Public Trusteeship for Common Pool Resources?*, 4 *GLOBAL ENVTL. POL.* 47, 48 (2004).

18. BARNES, *supra* note 14, at 157.

19. Emily Barritt, *Conceptualising Stewardship in Environmental Law*, 26 *J. ENVTL. L.* 1, 3 (2014).

sense that they are “a subject of public concern to the whole people”²⁰ These are resources that cannot be subjected to ownership or sovereignty. The scope of stewardship may vary from parts of the environment, such as a river, to the whole environment and even the planet.²¹ The duty holders are those in control of the object or in the best position to steward it. At the international level, the duty holders would include States competent to regulate the activities of their nationals and others by exercising their territorial sovereignty, sovereign rights over natural resources, and jurisdiction over their vessels and nationals. There are three possible groups of beneficiaries of environmental stewardship: current generations, future generations, and the environment.²² Where common natural resources are the object, the beneficiaries logically include future generations. These natural resources are necessary for fulfilling their needs. There is an obvious parallel to the concept of sustainable development.²³ The identification of beneficiaries is important to ensure that the duties are complied with. Ideally, the beneficiaries may take action to challenge decisions.²⁴ The exercise of stewardship within the international legal framework requires the international community of States to represent the interests and values of the beneficiaries. States will have a double role. Stewardship is a constellation of rights and duties. Environmental stewardship is, in essence, representing anthropocentric values. It is about how humans are to use their dominion for the benefit of present and future generations. Therefore, the concept is criticized for implying a separation between humans and nature.²⁵ By including the environment as a beneficiary, stewardship will include ecocentric elements. The steward is then required to take into consideration the intrinsic value of all living organisms irrespective of their usefulness or importance to human beings.

II. ENVIRONMENTAL STEWARDSHIP IN INTERNATIONAL LAW

A. Introduction

Stewardship has an obvious role in environmental ethics. The concept is seldom used in international legal instruments. Other concepts are used to describe the responsibilities of the community of States for protecting the environment and/or its resources for the benefit of a particular group.²⁶ Examples include the

20. MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 144 (2014) (quoting Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455 (1892)).

21. Edith Brown Weiss, *In Fairness to Future Generations and Sustainable Development*, 8 AM. U. J. INT'L L. & POL'Y 19, 20 (1992).

22. Barritt, *supra* note 19, at 6–9.

23. Turnipseed et al., *supra* note 10, at 368–69.

24. Sand, *supra* note 17, at 56–57.

25. Clare Palmer, *Stewardship: A Case Study in Environmental Ethics*, in ENVIRONMENTAL STEWARDSHIP: CRITICAL PERSPECTIVES—PAST AND PRESENT, 63, 70–74 (R.J. Berry ed., 2006); Worrell & Appleby, *supra* note 2, at 271–72.

26. PHILIPPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 234 (Cambridge University Press, 3d ed. 2012) (1995).

International Whaling Commission, which is charged with “safeguarding for future generations the great natural resources represented by the whale stocks.”²⁷ The conservation of biological diversity and “change in the Earth’s climate and its adverse effects are a common concern of humankind.”²⁸ The common concern concept can be seen as a response to the “globalization of environmental concerns”²⁹

These examples indicate that there is a common responsibility or interest for States to care for nature for the benefit of humankind. Humankind includes both present and future generations. The need for common responsibility is particularly present where a natural resource is not subject to the sovereign rights of a single State or where there is need for global cooperation to address a global environmental problem.³⁰ Like climate change, it is difficult to trace back environmental harm to the actions of specific States and collective action is necessary.³¹ Such common responsibility is most clearly articulated in the only Arctic-specific environmental treaty, the 1973 Polar Bear Agreement. The contracting parties recognized “the special responsibilities and special interests of the States of the Arctic Region in relation to the protection of the fauna and flora of the Arctic Region.”³² The common responsibility stems from the fact that the polar bear is not subjected to the sovereignty of one State but is shared between these States.

Edith Brown-Weiss has formulated the common responsibility as a theory of intergenerational equity, which

states that we, the human species, hold the natural environment of our planet in common with other species, other people, and with past, present and future generations. As members of the present generation, we are both trustees, responsible for the robustness and integrity of our planet, and beneficiaries, with the right to use and benefit from it for ourselves.³³

Is there use or benefit to introducing “environmental stewardship” into

27. International Convention for the Regulation of Whaling pmbl., Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 74.

28. United Nations Framework Convention on Climate Change pmbl., May 9, 1992, 1771 U.N.T.S. 107; see Convention on Biological Diversity pmbl., June 5, 1992, 1760 U.N.T.S. 79.

29. Jutta Brunnée, *The Stockholm Declaration and the Structure and Processes of International Environmental Law*, in *THE FUTURE OF OCEAN REGIME-BUILDING: ESSAYS IN TRIBUTE TO DOUGLAS M. JOHNSTON* 41, 45 (Aldo Chircop et al. eds., 2009).

30. PATRICIA BIRNIE ET AL., *INTERNATIONAL LAW AND THE ENVIRONMENT* 129–30, (3d ed. 2009); Yoshifumi Tanaka, *Protection of Community Interests in International Law: The Case of the Law of the Sea*, in 15 *MAX PLANCK YEARBOOK OF UNITED NATIONS LAW* 329, 335–36 (A. von Bogdandy & R. Wolfrum eds., 2011).

31. Jutta Brunnée, *Common Areas, Common Heritage, and Common Concern*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 550, 553 (Daniel Bodansky et al. eds., 2007).

32. Agreement on the Conservation of Polar Bears pmbl., Nov. 15, 1973, T.I.A.S. No. 8409, 27 U.S.T. 3918.

33. Weiss, *supra* note 21, at 20.

international environmental law? Is it not covered by a “common concern of mankind” or a similar concept? Moreover, does it have any normative content or function?³⁴ It has been described as an approach supporting a responsibility towards the environment.³⁵ The environmental stewardship concept clearly includes the legal responsibility of States to take action to address these common concerns. The common concern concept is a “participation rule” recognizing the legal interest or standing of States regarding a particular environmental problem.³⁶ Further, the stewardship concept displays the different roles of States in protecting the environment: on one side the responsibility of taking care of nature, and on the other side a beneficiary serving in the capacity as a user of the natural resources and having a legitimate interest in maintaining the intrinsic values of nature. Without a fixed content, stewardship may function as a collective legal term covering the different types of collective responsibilities of States with respect to the environment. Even if it does not have a separate legal meaning, it may have an important guiding function. Identifying areas of environmental stewardship will assist in clarifying the scope of legitimate interests of other States (beneficiaries)—in compliance with the responsibility to protect and preserve the environment.

B. *Environmental Stewardship and the Law of the Sea*

The relevance of environmental stewardship with respect to UNCLOS relates to whether States have common or collective responsibility on behalf of a larger community to protect the marine environment and to conserve its natural resources. Some indications of such responsibility may be found in its preamble, which sets out the goals and purposes of UNCLOS. It stresses the importance of UNCLOS to the “progress for all peoples of the world.”³⁷ Further, the close connections between the problems of the oceans and the need for them to be considered as a whole are recognized.³⁸ Therefore, the purpose of UNCLOS is to establish “a legal order for the seas” that, inter alia, will promote conservation of their living marine resources and the protection and preservation of the marine environment.³⁹ This suggests that UNCLOS is an exercise of stewardship in a broad sense as States recognize their common responsibility for an orderly utilization of the seas and for the protection of the environment and natural resources for the benefit of all people.

34. Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 19, 31 (Alan Boyle & David Freestone eds., 1999).

35. BARNES, *supra* note 14, at 155.

36. Brunnée, *supra* note 29, at 55.

37. UNCLOS, *supra* note 6, pmb1.

38. *Id.*

39. *Id.*

C. *Common Heritage of Mankind*

In the following, a more in-depth investigation will be made of the parts relating to living marine resources and protection and preservation of the marine environment. First, the concept that perhaps is the most coherent regarding stewardship is the “common heritage of mankind.”⁴⁰ The seabed and subsoil in areas beyond national jurisdiction, known as the Area, and its mineral resources comprise the common heritage of mankind.⁴¹ States are prohibited from making sovereignty claims to the Area or its mineral resources. The Area is a global commons similar to the high seas.⁴²

Contrary to the high seas and its resources, the rights to the mineral resources of the Area are represented by the Authority, an international organization set up under UNCLOS.⁴³ All of its State parties are automatically members of the Authority.⁴⁴ The Authority is charged with the role of exercising stewardship, as it is required to ensure that the activities are carried out for the benefit of all mankind.⁴⁵ The stewardship is primarily directed at regulating access to, and the exploitation of, the mineral resources. It also includes managing the economic benefits derived from these activities.⁴⁶ The Authority also regulates mining activities to protect the marine environment of the Area—its flora and fauna—from their harmful effects.⁴⁷ UNCLOS provides for procedures to resolve disputes over the Authority’s exercise of competence.⁴⁸ The beneficiaries, the State parties to UNCLOS, have thus been provided with procedures for ensuring that the Authority is exercising its responsibility for the benefit of mankind.

D. *Protection and Preservation of the Marine Environment*

Do the environmental protection obligations of Part XII of UNCLOS, which cover activities other than deep seabed mining, provide for environmental stewardship, in light of the components described above? Part XII includes the traditional norm originating from the Trail Smelter case.⁴⁹ States have an obligation “to ensure that activities under their jurisdiction or control . . . [do] not [] cause damage . . . to other States and their environment . . . or . . . spread beyond the areas where they exercise sovereign rights.”⁵⁰ This obligation has been extended to

40. *Id.*

41. *Id.* at art. 136; *cf. id.* at arts. 1(1)(1), 133.

42. *Id.* at art. 136; *cf. id.* at art. 89.

43. *Id.* at art. 136; *cf. id.* at art. 157.

44. *Id.* at art. 156(2).

45. *Id.* at arts. 140(1), 153.

46. *Id.* at arts. 140(2), 153.

47. *Id.* at art. 145.

48. *Id.* at arts. 186–191; *cf. id.* at pt. XV.

49. Stuart B. Kaye, *The Impact of the Trail Smelter Arbitration on the Law of the Sea*, in *TRANSBOUNDARY HARM IN INTERNATIONAL LAW* 209, 217 (Rebecca M. Bratspies & Russell A. Miller eds., 2006).

50. UNCLOS, *supra* note 6, at art. 194(2).

include areas where States enjoy sovereign rights and areas beyond national jurisdiction.⁵¹

The 1972 Stockholm Conference on the Human Environment laid, as Jutta Brunnée describes, the “foundation for a shift in international environmental law from its predominant focus on trans-boundary pollution to a conceptual framework with a much broader outlook.”⁵² The complexity of the threats to the environment could not be adequately addressed by the traditional bilateral approaches.⁵³ Principle 24 of the Stockholm Declaration identified collective action as an essential means:

Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.⁵⁴

Further, Principle 1 of the Stockholm Declaration underscored the “solemn responsibility [of man] to protect and improve the environment for present and future generations.”⁵⁵ Taken together, these principles suggest an environmental stewardship role of States in addressing these global challenges. The ongoing negotiations on UNCLOS had already accepted the need for a broader approach to preservation of the marine environment.⁵⁶ The negotiations were still influenced by the Stockholm conference.⁵⁷

The introductory section (Articles 192–196) of Part XII sets out the framework for the subsequent substantive provisions.⁵⁸ The opening provision instructs States to protect and preserve the marine environment.⁵⁹ The obligation is applicable to all States as a general principle of international law.⁶⁰ The obligation to protect and preserve the marine environment is a broad and positive obligation that is framed as both an individual and a collective responsibility for the duty bearers, similar to stewardship. The positive aspect of the obligations following from the duty to preserve the environment is that they require States to also take measures to maintain and improve environmental quality.⁶¹ The object of the

51. RACHAEL LORNA JOHNSTONE, OFFSHORE OIL AND GAS DEVELOPMENT IN THE ARCTIC UNDER INTERNATIONAL LAW: RISK AND RESPONSIBILITY 51 (2015).

52. Brunnée, *supra* note 29, at 42.

53. See U.N. Conference on the Human Environment, *Declaration of the United Nations on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, Proclamation 7 (June 5–16, 1972) [hereinafter *Stockholm Declaration*].

54. *Id.* at princ. 24.

55. *Id.* at princ. 1.

56. 7 CTR. FOR OCEANS LAW AND POLICY, UNIV. OF VA., UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY para. 192.3–192.4 (Myron H. Nordquist et al. eds., 1995) [hereinafter *Virginia Commentary*].

57. *Id.* at paras. XII.11, 194.3–194.4.

58. UNCLOS, *supra* note 6, at arts. 192–198.

59. *Id.* at art. 192.

60. *Virginia Commentary*, *supra* note 56, at para. 192.8.

61. *Id.* at para. 192.9.

obligation, “marine environment,” is not defined. It necessarily includes the surface of the sea, possibly the air space above, the water column and the seabed, and their respective biological components (species, ecosystems, and habitats).⁶² The biological components are explicitly included in the specification of the obligations and the definition of pollution.⁶³ These objects do not only include those with economic and other values to humans but also other components of the environment.⁶⁴ The obligation is therefore applicable to all the marine space and its physical and biological components. This means that the object is not delimited by the territorial jurisdictions established under UNCLOS. The obligation is not restricted to transboundary activities or impacts.⁶⁵

The main focus of the obligation to protect and preserve the marine environment has been pollution from different sources.⁶⁶ This is reflected in the substantive part of UNCLOS Part XII where States are instructed to prevent pollution of the marine environment from different sources, including from vessels and land-based activities.⁶⁷ The obligations to conserve living marine resources are regulated in separate provisions.⁶⁸ Consequently, UNCLOS has a sectoral approach. In recent years, marine environmental law has broadened to include the prevention of environmental degradation and protection of marine biodiversity, irrespective of cause. For example, in Agenda 21, one of the outputs of the Rio Conference on Environment and Development, there was a call for new approaches to management of the oceans.⁶⁹ These approaches were to be integrated in content and precautionary in scope. The Convention on Biological Diversity (CBD),⁷⁰ adopted at the Rio Conference, and the 1995 Fish Stocks Agreement (FSA)⁷¹ are some of the international instruments reflecting an understanding that protection and preservation of the marine environment is not only about preventing pollution. Other human activities affecting the environment, such as fishing, must be included in the obligation.⁷² Decisions by the International Tribunal for the Law of the Seas suggest that there is a development towards a more integrated concept of marine environmental protection. In its 2015 advisory opinion, the Tribunal established that “relevant conservation measures concerning living resources enacted by the

62. *Id.* at para. 192.11.

63. UNCLOS, *supra* note 6, at arts. 1(1)(4), 194(5).

64. *See id.*

65. Virginia Commentary, *supra* note 56, at para. 192.

66. UNCLOS, *supra* note 6, at art. 194(3); BIRNIE ET AL., *supra* note 30, at 387–88.

67. UNCLOS, *supra* note 6, at arts. 207, 211.

68. *Id.* at arts. 61, 117–119.

69. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, ¶ 17.1, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. II) (Aug. 12, 1992).

70. Convention on Biological Diversity, *supra* note 28.

71. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. 3 [hereinafter UNFSA].

72. BIRNIE ET AL., *supra* note 30, at 384–86.

coastal State for its exclusive economic zone . . . constitute an integral element in the protection and preservation of the marine environment.”⁷³ The obligation to protect and preserve the marine environment includes human activities other than those causing pollution.

To conclude, the object of the obligation of States is the marine environment—both its physical and biological components. It is neither defined by specific human activities nor by their effects. Consequently, all States are duty holders as activities under their jurisdiction or control may affect the marine environment. They are also the beneficiaries. The protection and preservation of the marine environment are, according to the preamble of UNCLOS, in “the interests and needs of mankind as a whole.”⁷⁴ The reference to mankind suggests that protection of the marine environment is not only about promoting national interests but also about community interests.

Thus, the obligation to protect and preserve the marine environment under UNCLOS requires States to exercise environmental stewardship. Since stewardship is about addressing collective concerns, it is to be conducted through cooperation, establishing some form of legal framework to address these problems.⁷⁵ UNCLOS sets out a general obligation of cooperation.⁷⁶ States are to cooperate in “formulating and elaborating international rules, standards and recommended practices and procedures.”⁷⁷ The geographical scope and format of the cooperation depend on the issue at hand. The cooperative stewardship is to be conducted on a source-based approach. The UNCLOS includes detailed rules on the competence of the Authority to regulate mining in the deep sea but provides more of a general framework for regulating other human activities that may lead to pollution of the marine environment.⁷⁸ With respect to vessel source pollution, the “competent international organization”—the International Maritime Organization (IMO)—is charged with establishing globally applicable international rules and standards to prevent pollution from vessels and to re-examine these from time to time.⁷⁹ The strength of the collective stewardship may vary. One of the challenges recognized in recent years is how to ensure a more holistic or ecosystem-based approach to the protection and preservation of the marine environment when the present legal

73. Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Case No. 21, Advisory Opinion of Apr. 2, 2015, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf [<https://perma.cc/V8E2-49KF>]; *see also* Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Cases 3 and 4, Order of Aug. 27, 1999, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Order.27.08.99.E.pdf [<https://perma.cc/CN93-WX8F>].

74. UNCLOS, *supra* note 6, at pmbl.

75. Brunnée, *supra* note 31, at 567.

76. UNCLOS, *supra* note 6, at art. 197.

77. *Id.*

78. *Id.* at art. 194(4); *cf. id.* at arts. 207–12.

79. *Id.* at art. 211(1).

regimes are sectoral and delimited on the basis of territorial jurisdiction.⁸⁰

A necessary element of environmental stewardship is the right of the beneficiaries to ensure that the duty bearers fulfill their responsibilities.⁸¹ The challenge is that the States (in capacity as coastal States, flag States, or port States) are both stewards and duty bearers.⁸² With the exception of the Authority, the institutional arrangements, set up to implement the obligation to cooperate, do not provide for a clear distinction between the two roles by assuming a separate stewardship.⁸³ The States still are the stewards. The right of a port State under UNCLOS to take enforcement measures in respect of foreign-flagged vessels for violations of international rules and standards in areas beyond its national jurisdiction is an example of enforcement of community interest.⁸⁴ The port State may take enforcement measures with respect to a foreign-flagged vessel voluntarily in one of its ports for illegal discharges of pollution even if the violation has not taken place in its exclusive economic zone or territorial sea.⁸⁵ However, it is more adequate to describe this as an exercise of stewardship. The port State is in fact assisting the flag State in enforcing its obligations under UNCLOS.

The obligations of a State towards the international community are described as *erga omnes* obligations.⁸⁶ This means that all States have a legitimate interest in how States are complying with this obligation. The obligations of the stewards are such norms. The obligation to protect and preserve the marine environment probably qualifies as an *erga omnes* obligation.⁸⁷ Part XV of UNCLOS on dispute settlement provides the beneficiaries with means to ensure that the stewards fulfill their responsibilities.⁸⁸ Part XV is applicable to disputes under Part XII on protection and preservation of the marine environment. It does not necessarily entitle any State to bring a case of violation before an international tribunal or court.⁸⁹ This is particularly evident where the effects of inadequate stewardship do not set identifiable marks. Then, other types of procedures for ensuring compliance with stewardship responsibilities may be more effective. They include the compliance and enforcement procedures established under the different multilateral

80. See Yoshifumi Tanaka, *Zonal and Integrated Management Approaches to Ocean Governance: Reflections on a Dual Approach in International Law of the Sea*, 19 INT'L J. MARINE & COASTAL L. 483, 483–84 (2004).

81. Barritt, *supra* note 19, at 7.

82. BARNES, *supra* note 14, at 297–98.

83. *Id.* at 298.

84. UNCLOS, *supra* note 6, at art. 218; Brunnée, *supra* note 31, at 558; Tanaka, *supra* note 30, at 350–51.

85. Brunnée, *supra* note 31, at 558.

86. Jochen A. Frowein, *Obligations Erga Omnes*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 1, 3 (2015).

87. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 66 (2001); BIRNIE ET AL., *supra* note 30, at 131, 234.

88. UNCLOS, *supra* note 6, at arts. 279–99.

89. BIRNIE ET AL., *supra* note 30, at 233.

environmental agreements.⁹⁰ These procedures may include regular reporting obligations on national implementation to be assessed by the treaty bodies and the other contracting parties and further enforcement measures in cases of non-compliance.

E. *Living Marine Resources*

The establishment of 200 nautical miles of exclusive economic zone (EEZ) meant a radical extension of the jurisdiction of coastal States over living marine resources. Approximately 90% of the harvest of living marine resources is undertaken within 200 nautical miles.⁹¹ The coastal States were considered better managers than the regional fisheries management organizations established for the high seas.⁹² Under UNCLOS, the coastal State enjoys sovereign rights for the purpose of exploring and exploiting, conserving and managing the living marine resources of its EEZ.⁹³ In addition to harvested fish stocks, living marine resources include dependent and associated species.⁹⁴ It has exclusive competence to regulate access to the harvest of the living marine resources and to regulate how the harvest is to be performed. Still, this does not give the coastal State status as a proprietor.⁹⁵ Under certain conditions it is obligated to give other States access to its living marine resources.⁹⁶ Furthermore, the coastal State has obligations to conserve the living marine resources within its EEZ and to cooperate with other States on conservation when fish stocks are transboundary.⁹⁷ Other States are entitled to invoke the dispute settlement procedures of UNCLOS Part XV where the coastal State has violated its conservation obligation or the obligation to permit other States to fish in its EEZ.⁹⁸ Therefore, it may be more natural to describe the coastal States as being stewards than proprietors.⁹⁹ An argument against describing it as stewardship is the wide discretion of the coastal State in determining the right of access and the restrictions on the use of dispute settlement procedures.¹⁰⁰ The potential beneficiaries have

90. SANDS ET AL., *supra* note 26, at 135–59.

91. R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 288–89 (3d ed. 1999).

92. *Id.*

93. UNCLOS, *supra* note 6, at art. 56(1)(a).

94. *Id.* at art. 61(4).

95. A.V. LOWE, *Reflections on the Waters Changing Conceptions of Property Rights in the Law of the Sea*, 1 INT'L J. ESTUARINE & COASTAL L. 1, 7–9 (1986); *see also* Sand, *supra* note 17, at 48–49.

96. UNCLOS, *supra* note 6, at art. 62(2).

97. *Id.* at arts. 61(2), 63, 64.

98. *Id.* at arts. 286–296; *cf. id.* at art. 297(3) (explaining the limitations on the applicability of arts. 286–296).

99. *See* MARGARET A. YOUNG, *TRADING FISH, SAVING FISH: THE INTERACTION BETWEEN REGIMES IN INTERNATIONAL LAW* 37 (2011); Richard Barnes, *The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?*, in *THE LAW OF THE SEA: PROGRESS AND PROSPECTS* 246 (David Freestone et al. eds., 2006).

100. *See, e.g.*, Donald McRae & Gordon Munro, *Coastal State “Rights” Within the 200-Mile Exclusive*

limited opportunities to hold the coastal State responsible. In any case, the fact that the coastal State has an international legal obligation to ensure that the living marine resources of its EEZ are not endangered by over-exploitation indicates it has an environmental stewardship role.¹⁰¹ The obligation is now recognized, as referred to above, to be part of the obligations of States to protect the marine environment.¹⁰²

In areas beyond national jurisdiction, such as on the high seas, all States are entitled to exercise the freedom of fishing.¹⁰³ The freedom is subjected to several conditions, including the obligations to conserve the living marine resources and to cooperate with relevant coastal States and other States fishing on the high seas.¹⁰⁴ The obligations are owed to a larger community, not only to the States actually exercising the freedom.¹⁰⁵ The high seas are a global commons or common property similar to the Area. Consequently, environmental stewardship may be an appropriate description of the regulatory regime established under UNCLOS. In contrast to the Area, there is no single regime (like the Authority) competent to regulate access to the resources and to regulate the harvest for the conservation of the living marine resources and the protection of the marine environment.

States are to cooperate through regional fisheries management organizations (RFMOs) on the conservation and management of living marine resources.¹⁰⁶ The RFMOs, normally intergovernmental organizations, are set up under a treaty competent to adopt legally binding conservation and management measures (e.g., on total allowable catches, by-catch and other technical regulations, allocation of national quotas, and enforcement schemes).¹⁰⁷ The obligation is less stringent than with respect to the Area, as States are not required to become members of RFMOs to access the high seas fisheries.¹⁰⁸ The obligation of non-members of conservation is not well defined. However, under the FSA, the RFMOs are accorded an exclusive competence to regulate fishing activities within their regulatory area. Nonmembers are required to agree to apply the conservation measures adopted by the RFMOs to be entitled to access the regulated fisheries.¹⁰⁹ This will strengthen the *erga omnes*

Economic Zone, in RIGHTS BASED FISHING 97, 104 (Philip A. Neher et al. eds., 1989).

101. TANAKA, *supra* note 30, at 366–67 (arguing that the conservation measures of the coastal State primarily are affected by its own interests, which does not suggest a stewardship role).

102. Brunnée, *supra* note 31, at art. 567.

103. UNCLOS, *supra* note 6, at art. 87(1)(c).

104. *Id.* at arts. 117–119.

105. See Turnipseed et al., *supra* note 10, 365–79.

106. For an overview of RFMOs, see FOOD AND AGRICULTURAL ORGANIZATION OF THE UNITED NATIONS, fao.org/fishery/rfb/search/en (select this hyperlink; then search text field HTML input box to browse through the collection of Regional Fishery Body fact sheets).

107. EVELYNE MELTZER, THE QUEST FOR SUSTAINABLE INTERNATIONAL FISHERIES: REGIONAL EFFORTS TO IMPLEMENT THE 1995 UNITED NATIONS FISH STOCK AGREEMENT: AN OVERVIEW FOR THE MAY 2006 REVIEW 56 n.43, 66 (2009).

108. See Rosemary Rayfuse, *Regional Fisheries Management Organizations*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 439, 441–42 (Donald R. Rothwell et al. eds., 2015).

109. UNFSA, *supra* note 71, at art. 8(4).

character of the conservation obligations.¹¹⁰ Further, the RFMOs have been accorded an extensive competence in ensuring compliance with their regulations. The high seas fisheries regime has gained a clearer cooperative stewardship character. The FSA provides for dispute settlement procedures for beneficiaries—fishing as well as non-fishing States—to ensure that the responsibilities are carried out according to UNCLOS and FSA.¹¹¹

F. *Preliminary Conclusion*

As pointed out by Mary Turnipseed,¹¹² States have accepted their role as stewards of the oceans through the *Future We Want*, the outcome of the 2012 United Nations Conference on Sustainable Development:

We therefore commit to protect, and restore, the health, productivity and resilience of oceans and marine ecosystems, and to maintain their biodiversity, enabling their conservation and sustainable use for present and future generations, and to effectively apply an ecosystem approach and the precautionary approach in the management, in accordance with international law, of activities having an impact on the marine environment, to deliver on all three dimensions of sustainable development.¹¹³

Environmental stewardship remains, for now, more a description of, or an approach to, the legal responsibilities (the duality of rights and obligations) with respect to the environment than a legal norm. It may still have a legal character in the sense that it requires States to include a broad set of values and interests in their environmental politics and to look beyond sectors and jurisdictions. This is particularly important because of the need for more holistic and integrated approaches to environmental protection.

III. ARCTIC ENVIRONMENTAL STEWARDSHIP

A. *Overview*

The 2008 Ilulissat Declaration by the five Arctic coastal States set the stage for this Article. The coastal States have described themselves as stewards, implying both a right and a duty to protect the “unique ecosystem” of the Arctic Ocean.¹¹⁴ It is their sovereign rights and jurisdiction over parts of the Ocean that give them a “unique position to address these possibilities and challenges.”¹¹⁵ Their geographical nearness to the Ocean legitimatizes their special responsibilities or stewardship. However, they recognize that other States have legitimate rights and

110. Brunnée, *supra* note 31, at 558–59.

111. UNFSA, *supra* note 71, at arts. 27–32.

112. Turnipseed et al., *supra* note 10, at 366.

113. G.A. Res. 66/288, ¶ 158 (July 27, 2012).

114. Ilulissat Declaration, *supra* note 1, at 1.

115. *Id.*

interests in the use and protection of the Arctic Ocean.

Does the stewardship concept have a substantive meaning as suggested in the previous section? Alternatively, is it merely a “tool designed to shore up their own special claims in and over the region” as argued by some?¹¹⁶ The following section investigates if and how environmental stewardship is exercised in the Arctic Ocean. More specifically, who are the respondents to the common concerns—the stewards? Do they include entities other than the coastal States?¹¹⁷ Oran R. Young describes Arctic Stewardship as “a way of thinking” on developing a coherent discourse.¹¹⁸

The practice of the Arctic coastal States, and of the Arctic Council, will be investigated. The rationale behind focusing on the Arctic coastal States and the Arctic Council is a presumption that they may have a stronger sense of stewardship due to their nearness and dependency on a healthy marine environment. Further, the Arctic Council was established to promote cooperation on the protection of the Arctic environment. Franklyn Griffiths argues that the Arctic Council may be the principle locus for cooperative stewardship.¹¹⁹ Other States and institutions are entitled and required to exercise environmental stewardship with regard to the Arctic marine environment. Non-Arctic States have rights to navigate, undertake marine scientific research, and fish in Arctic marine waters. With these rights come the responsibilities under UNCLOS and obligations under different multilateral environmental agreements. Further, activities under these States’ jurisdiction in areas beyond the Arctic region may affect the Arctic marine environment. The major threats to the Arctic marine environment, such as the impacts of climate change, are caused by activities outside of the Arctic. Thus, the States’ obligations with regard to emissions of greenhouse gases or other long-range pollutants may be described as part of Arctic environmental stewardship. In this Article, the focus is on the Arctic itself. The involvement of other States and the relationship to other international regimes will be included in the investigation of the Arctic Council.

B. *The Arctic Coastal States and Environmental Stewardship*

Some of the coastal States have claimed a stewardship role in their Arctic policies.¹²⁰ The Ilulissat declaration indicated, however, a collective stewardship

116. Page Wilson, *Society, Steward or Security Actor? Three Visions of the Arctic Council*, 51 COOPERATION & CONFLICT 55, 62 (2016).

117. *Id.* at 6–7.

118. Oran R. Young, *Arctic Stewardship: Maintaining Regional Resilience in an Era of Global Change*, 26 ETHICS & INT’L AFF. 407, 408 (2012).

119. Franklyn Griffiths, *Stewardship as Concept and Practice in an Arctic Context* 5–6 (Cyber Dialogue 2012: What is Stewardship in Cyberspace?, Conference Paper, 2012) at 5–6, http://www.cyberdialogue.citizenlab.org/wp-content/uploads/2012/2012papers/CyberDialogue2012_Griffiths.pdf [<https://perma.cc/MC25-XB2C>].

120. Wilson, *supra* note 116, at 7.

role.¹²¹ Its focus on the unique ecosystem of the Arctic Ocean suggested that the coastal States apply an ecocentric approach to the protection of the marine environment of the region.¹²² At the 2010 Arctic Coastal States Meeting in Chelsea, Canada, this responsibility was expanded to include the Arctic's potential resources: "Managed sustainably and through good stewardship, these resources can contribute to economic prosperity and social well-being, including for indigenous peoples, for generations to come."¹²³ The establishment of the "Arctic 5" forum was controversial as it was viewed as undermining the Arctic Council.¹²⁴ The issues highlighted by the coastal States, such as strengthening the measures regulating Arctic shipping and search and rescue capabilities and increasing the capacity of pollution preparedness, response, and scientific cooperation, have been channelled through or undertaken under the purview of the Arctic Council.¹²⁵

The cooperation between the Arctic 5 has, in recent years, concentrated on the regime for regulation of fishing activities on the high seas of the Central Arctic Ocean. In July 2015, they signed the Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean.¹²⁶ Here, they commit themselves *only* to license vessels flying their flag to engage in commercial fishing on the high seas where there is an RFMO competent to regulate the fishing activities.¹²⁷ In starting these talks, they identified themselves as "the States whose exclusive economic zones border the high seas area in question to take the initiative on this matter."¹²⁸ Contrary to the 2008 Ilulissat Declaration, they did not describe

121. See Ilulissat Declaration, *supra* note 1, at 2.

122. *Id.*

123. Lawrence Cannon, Foreign Affairs Minister of Canada, Summary of Arctic Ocean Coastal States Meeting (Mar. 29, 2010), www.arctic-report.net/wp-content/uploads/2012/01/2010.03-Arctic-Ocean-Coastal-States-meeting-Chelsea-Canada-March-2p010.pdf [<https://perma.cc/5KFM-8NCQ>].

124. WEIDEMANN, *supra* note 5, at 61; see also Press Release, Iceland Protests a Meeting of Five Arctic Council Member States in Canada (Feb. 18, 2010), <http://www.mfa.is/news-and-publications/nr/5434> [<https://perma.cc/CXE2-ZNBA>].

125. See *Arctic Council Works to Prevent Arctic Marine Oil Pollution*, ARCTIC COUNCIL, <http://www.arctic-council.org/index.php/en/resources/news-and-press/news-archive/843-arctic-council-works-to-prevent-arctic-marine-oil-pollution> [<https://web.archive.org/web/20150329053627/http://www.arctic-council.org/index.php/en/resources/news-and-press/news-archive/843-arctic-council-works-to-prevent-arctic-marine-oil-pollution>] (Mar. 4, 2014) (discussing strengthening of the shipping industries); *Nuuk Prepares to Welcome Ministers*, ARCTIC COUNCIL, <http://www.arctic-council.org/index.php/en/resources/news-and-press/news-archive/131-nuuk-prepares-to-welcom-ministers> [<http://www.arctic-council.org/index.php/en/resources/news-and-press/news-archive/131-nuuk-prepares-to-welcom-ministers>] (May 12, 2011) (discussing strengthening search and rescue between the Arctic States); EPPR, eppr.arctic-council.org [<https://perma.cc/38V7-FH56>] (last visited Apr. 13, 2016) (discussing the group's aim at pollution preparedness and response).

126. Declaration Concerning the Prevention on Unregulated High Seas Fishing in the Central Arctic Ocean, Can.-Den.-Nor.-Russ.-U.S., July 16, 2015, <https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf> [<https://perma.cc/8M7D-EEG9>] [hereinafter Declaration Concerning High Seas Fishing].

127. *See id.*

128. *Chairman's Statement from Meeting on Arctic Fisheries* (Feb. 24–26, 2014), <http://naalakkersuisut.gl/en/Naalakkersuisut/News/2014/02/Arktisk-hoejsoefiskeri> (follow

themselves as stewards.¹²⁹ The reason may be that the initiative concerned the high seas areas of the Central Arctic Ocean, which are beyond their jurisdiction. The commitments of the 2015 Declaration are reasoned on the “crucial role of healthy marine ecosystems and sustainable fisheries for food and nutrition” and in the “interests of Arctic residents, particularly the Arctic indigenous peoples, in the proper management of living marine resources in the Arctic Ocean.”¹³⁰ There is no reference to stewardship. The Declaration also does not imply an ecocentric stewardship role for the coastal States. On the contrary, it clearly sends a signal that the Central Arctic Ocean is not to be considered a marine reserve. It is interesting to note that the same States in respect of the 1973 Polar Bear Agreement have recognized their “special responsibilities and special interests in relation to the protection of the fauna and flora of the Arctic Region.”¹³¹ Young argues that it is “easier to make a case that harm to species or ecosystems are actionable when they have obvious consequences for human welfare.”¹³² The coastal States have done no more than comply with their obligation not to allow vessels flying their flag to be involved in fishing activities on the high seas unless there is some organization or arrangement competent to regulate fishing.¹³³ In that sense, they are exercising an element of environmental stewardship.

C. *Arctic Council and Environmental Stewardship*

From the founding document of the Arctic Council, the Ottawa Declaration, environmental protection is one of the central common concerns of the Arctic States.¹³⁴ The Arctic Council is set up as a high-level forum for “promoting cooperation, coordination and interaction . . . on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.”¹³⁵ In addition to the five Arctic coastal States, Iceland, Sweden, and Finland are also members of the Arctic Council. NGOs representing Arctic indigenous peoples have status as permanent participants.¹³⁶

The Arctic Council does not have international personality. Further, it is not competent to adopt decisions that are binding on its member States.¹³⁷ Page Wilson describes it as a “society of sovereign States”—a forum to discuss common interests

“Chairman’s Statement from Nuuk Meeting February 2014” hyperlink).

129. See Declaration Concerning High Seas Fishing, *supra* note 126.

130. *Id.* at 1.

131. Agreement on the Conservation of Polar Bears, *supra* note 32, at 1.

132. Young, *supra* note 118, at 411.

133. See UNFSA, *supra* note 71, at art. 18.

134. See *Declaration on the Establishment of the Arctic Council*, Can.-Den.-Fin.-Ice.-Nor.-Russ.-Swed.-U.S., Sept. 19, 1996, 35 I.L.M. 1387 (1996).

135. *Id.* at 2.

136. *Permanent Participants*, ARCTIC COUNCIL (last updated Feb. 22, 2016), <http://www.arctic-council.org/index.php/en/about-us/permanent-participants> [https://perma.cc/YDZ8-GQFB].

137. Wilson, *supra* note 116, at 3.

of the region.¹³⁸ The Arctic Council is not competent, according to Griffiths, to “negotiate measures of cooperative stewardship.”¹³⁹ This does not promote it as a (separate) steward.

The Arctic Council—through its working groups—has mainly been involved in producing scientific-synthesis reports on the main pollution problems, including climate change threatening the Arctic environment and its ecosystems.¹⁴⁰ The scientific information provided was important in developing the 2001 Stockholm Persistent Pollution Convention.¹⁴¹ The Arctic Council has had a policy-shaping role within and beyond the Arctic, which should not be underestimated. It has been accorded a more active role in recent years as the focus has broadened to include adaptation to effects of climate change, such as how to deal with possible negative effects on increased maritime activities in the marine Arctic like shipping and petroleum activities.¹⁴² Two legal instruments have been negotiated under the auspices of the Arctic Council: the 2011 Search and Rescue Agreement¹⁴³ and the 2013 Arctic Oil Pollution Preparedness and Response Agreement.¹⁴⁴ Other task forces have been established by the Arctic Council, including research cooperation and cooperative arrangements for oil pollution prevention, which may lead to legally binding agreements.¹⁴⁵ The two agreements were initiated at the recommendation of the 2009 Arctic Marine Shipping Assessment (AMSA), commissioned and approved by the Arctic Council.¹⁴⁶ Another AMSA recommendation was the adoption of mandatory requirements for vessels operating in Arctic waters through the IMO.¹⁴⁷ The Polar Code, including mandatory elements, was adopted in Spring 2015 and will enter into force in January 2017.¹⁴⁸

138. *Id.* at 2.

139. Griffiths, *supra* note 119, at 6.

140. Timo Koivurova et al., *Innovative Environmental Protection: Lessons from the Arctic*, 27 J. ENVTL. L., 285, 293–94 (2015); Svein Vigeland Rotttem, *A Note on the Arctic Council Agreements*, 46 OCEAN DEV. & INT'L L. 50, 51–52 (2015).

141. Koivurova et al., *supra* note 140, at 297–98.

142. *Id.* at 307.

143. Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, Arctic Council, Can.-Den.-Fin.-Ice.-Nor.-Russ.-Swed.-U.S., May 12, 2011, <http://www.arctic-council.org/index.php/en/document-archive/category/20-main-documents-from-nuuk> (follow “Arctic_SAR_Agreement_EN_FINAL_for_signature_21-Apr-2011.pdf” hyperlink).

144. Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, Arctic Council, Can.-Den.-Fin.-Ice.-Nor.-Russ.-Swed.-U.S., May 15, 2013, <http://www.arctic-council.org/eppr/agreement-on-cooperation-on-marine-oil-pollution-preparedness-and-response-in-the-arctic/> (follow “Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic” hyperlink).

145. See *Task Forces of the Arctic Council*, ARCTIC COUNCIL, www.arctic-council.org/index.php/en/about-us/working-groups/task-forces [https://perma.cc/X8PS-CB74] (last updated Sept. 9, 2015).

146. Arctic Council, *Arctic Marine Shipping Assessment 2009 Report* 6–7 (2009), http://pame.is/images/03_Projects/AMSA/AMSA_2009_report/AMSA_2009_Report_2nd_print.pdf [https://perma.cc/2T3R-SSBW].

147. *Id.* at 6.

148. Int'l Maritime Org. [IMO], MEPC 68/21/Add.1, *International Code for Ships Operating*

Even if the Arctic Council has become more active, it is still not conducting cooperative or autonomous stewardship, but rather, a restricted form of stewardship. The Arctic Council has not described itself as having a stewardship role, either. The Arctic Council is portrayed by Griffiths as undertaking “a host of related but separated activities that have yet to be linked”¹⁴⁹ Rather, its work could be described as instructive for the Arctic States in their efforts to fulfill their stewardship responsibilities.¹⁵⁰

The States are required to cooperate at an appropriate level to develop necessary rules and standards to protect the marine environment.¹⁵¹ States have wide discretion under UNCLOS on how to institutionalize their common responsibilities. The regional level may be appropriate for taking initiative on developments within competent international organizations such as the IMO.¹⁵² The coastal States of the region bear a special responsibility for providing infrastructure to the shipping industry. It was therefore natural that the agreements on search-and-rescue and on oil pollution preparedness and response were adopted through the Arctic Council.¹⁵³ The same is applicable to the obligation to cooperate on research programs, on marine pollutions, and on monitoring of marine pollution.¹⁵⁴

The 2013 Kiruna Vision for the Arctic¹⁵⁵ and the 2015–2025 Arctic Marine Strategy Plan (AMSP)¹⁵⁶ may provide insight into how the Arctic States plan to execute their common responsibility in the coming years and the role accorded to the Arctic Council. The instruments do not set out a clear division of responsibility between the Arctic Council and the member States. Under the AMSP, “the Arctic Council provides strong institutional support for the stewardship of the Arctic marine environment.”¹⁵⁷ Under the Vision, the Arctic Council is to be strengthened, as the States shall “pursue opportunities to expand the Arctic Council’s roles from policy-shaping into policy-making.”¹⁵⁸ The negotiations and adoption of the abovementioned agreements under its auspices may be examples of such new role.

in *Polar Waters* (Nov. 21, 2014), <http://www.imo.org/en/MediaCentre/HotTopics/polar/Pages/default.aspx>.

149. Griffiths, *supra* note 119, at 7.

150. Wilson, *supra* note 116, at 6.

151. UNCLOS, *supra* note 6, at art. 197.

152. *Id.* at art. 211(1).

153. *Id.* at arts. 98(2), 199.

154. *Id.* at arts. 199, 200, 204.

155. Arctic Council Secretariat, *Vision for the Arctic* (May 15, 2013) [hereinafter *Vision for the Arctic*], <http://www.arctic-council.org/index.php/en/document-archive/category/425-main-documents-from-kiruna-ministerial-meeting#> [https://web.archive.org/web/20150220015710/http://www.arctic-council.org/index.php/en/document-archive/category/425-main-documents-from-kiruna-ministerial-meeting].

156. Arctic Council, *Arctic Marine Strategy Plan 2015–2025* (Apr. 2015), <http://www.pame.is/index.php/projects/arctic-marine-strategic-plan> [https://perma.cc/SYA2-L45U].

157. *Id.* at 18.

158. *Vision for the Arctic*, *supra* note 155, at 5.

Among the tasks or objectives is to improve knowledge and understanding of the Arctic, inside and outside the region.¹⁵⁹ The knowledge does not only include natural science, important under the AMSP. It also includes knowledge on possible ways of strengthening the governance of the region, which was provided by the Arctic Ocean Review.¹⁶⁰ A healthy Arctic environment is the priority task and objective; it is achieved by applying an ecosystem-based approach to management, which balances conservation and sustainable use, for the well being of present and future generations.¹⁶¹ Further, there is a focus on how to address climate change and its impacts both at the local and international level.¹⁶² The AMSP highlights the Arctic Council as a forum for regional and international cooperation on scientific research. Scientific research is important to inform decision-making. The Arctic States declared that “there is no problem that we cannot solve together through our cooperative relationships on the basis of existing international law and good will.”¹⁶³ This statement suggests that the Arctic Council could be used for specifying and implementing their common responsibilities, including through undertaking more specific legal obligations. They are to exercise “leadership in regional and global forums to address challenges affecting our home.”¹⁶⁴ This may include working through the IMO bodies to adopt ships’ routing measures to protect vulnerable areas of the marine Arctic and through the UN Framework Convention on Climate Change to have new restrictions adopted on emission of greenhouse gases. It remains to be seen if the Arctic States exercise such coordinated stewardship as their interests may not be identical.

Non-Arctic States have responsibilities for the protection and preservation of the Arctic marine environment and the conservation of its living marine resources.¹⁶⁵ As the Arctic Council developed during the early 2000s, there was an increased interest among non-Arctic States to become observers in the Arctic Council.¹⁶⁶ It was seen as a way of influencing Arctic governance.¹⁶⁷ The criteria for becoming an observer State have been revised in recent years.¹⁶⁸ The conditions are set to ensure that the observers do not bring in their own, and potentially

159. *Id.* at 4.

160. PAME, The Arctic Ocean Review Project, *Final Report: 2011–2013*, at 11 (May 2013), http://www.pame.is/images/03_Projects/AOR/Reports/126082_pame_sept_2.pdf [<https://perma.cc/6E6P-FF2L>].

161. *Vision for the Arctic*, *supra* note 155, at 2–3.

162. *Id.* at 3.

163. *Id.* at 2.

164. *Id.*

165. *See supra* Section 3.

166. Piotr Graczyk & Timo Koivurova, *A New Era in the Arctic Council's External Relations? Broader Consequences of the Nauk Observer Rules for Arctic Governance*, 50 POLAR REC. 225, 225 (2014).

167. *Id.*

168. *See* Arctic Council, *Observer Manual for Subsidiary Bodies* (2013), <https://oarchive.arctic-council.org/bitstream/handle/11374/939/EDOCS-3020-v1A-2015-11-25-Observer-manual-with-addendum-finalized-after-SAO-Oct-2015.PDF> (establishing criteria for observer status at the Arctic Council).

conflicting, agendas into the work of the Arctic Council.¹⁶⁹ They have to document both the capability and willingness to cooperate as well as to recognize that the law of the sea provides the international legal framework.¹⁷⁰ Interestingly, their efforts in “bringing Arctic concerns to global decision-making bodies” would help qualify for and maintain the status of observer.¹⁷¹ By taking part in and contributing to the work of the Arctic Council and its working groups, the non-Arctic States are provided with insights and knowledge about environmental challenges, which may be addressed by relevant international organizations of which they are members (such as the IMO). When non-Arctic States have firsthand knowledge about the environmental challenges, it may facilitate for adoption of necessary regulations within relevant international organizations and multilateral environmental agreements.

D. *Assessment*

It is the Arctic States and, in particular, the Arctic coastal States that are conducting Arctic marine stewardship. The Arctic Council is more an instrument for the Arctic States than an independent actor. The stewardship concept has not been used frequently after the Ilulissat Declaration. This indicates that it was used more as rhetoric to legitimize the intervention of the Arctic coastal States when the region attracted international attention. However, the Arctic States have exercised common responsibility, partly through the two above-mentioned agreements, initiating or supporting processes within other legal regimes, and through the policy-shaping tasks of the Arctic Council. However, when exercising practical responsibility beyond intervening in emergencies and distress at sea (cf. the two Arctic agreements), they seem less inclined to specify these responsibilities. Their responsibilities are referred to in general terms such as ecosystem-based management. The introduction by the United States of “Arctic Ocean Safety, Security and Stewardship” as one of the themes for its chairmanship may change that.¹⁷² A task force was established to assess the needs for a regional seas program or similar program for increased cooperation in Arctic marine areas.¹⁷³ Another example of reluctance to specify the environmental stewardship follows from one of the AMSA recommendations: the Arctic coastal States were asked to harmonize their regulations of shipping within their own jurisdiction with the mandatory

169. Graczyk & Koivurova, *supra* note 166, at 229, 232, 234.

170. Arctic Council, *Rules of Procedure*, annex 2, paras. (2)(a), 6 (2013), https://oarchive.arctic-council.org/bitstream/handle/11374/940/2015-09-01_Rules_of_Procedure_website_version.pdf.

171. *Id.* at para. (6)(g).

172. U.S. Dep’t of State, *U.S. Chairmanship of the Arctic Council*, STATE.GOV, <http://www.state.gov/e/oes/ocns/opa/arc/uschair/index.htm> (last visited Sept. 9, 2015).

173. Arctic Council, Iqaluit Declaration 2015, at para. 43 (Apr. 24, 2015), <http://www.arctic-council.org/index.php/en/document-archive/category/604-declaration-sao-report?download=2740:iqaluit-declaration-final-signed-version> [https://web.archive.org/web/*/http://www.arctic-council.org/index.php/en/document-archive/category/604-declaration-sao-report?download=2740:iqaluit-declaration-final-signed-version].

regulations to be developed through IMO.¹⁷⁴ Following the entry-into-force of the Polar Code in 2017, there may be more focus on this issue. The increased participation of non-Arctic States in the work of the Arctic Council may also contribute to highlighting the performance by the Arctic States of their self-proclaimed stewardship role.

CONCLUSION

Critical voices argue that Arctic stewardship is used to support sovereign claims of the Arctic States.¹⁷⁵ The assessment of the relevant UNCLOS provisions suggests that environmental stewardship is a proper description of the responsibilities of States to address the common challenges to the marine environment. The problem in regard to stewardship is its framework character and sectoral approach. UNCLOS does not instruct a clear, collective stewardship, but leaves it to the relevant States to organize. Still, the concept may have an important function—even not as a legal concept—in highlighting the common or collective responsibility of States in respect to the world community to protect and preserve the environment (including the living marine resources), particularly important to address global challenges such as climate change and loss of biodiversity. The argument for, and exercise of, Arctic environmental stewardship has been legitimizing the maritime claims of States. Protection of the Arctic marine environment is on the agenda, and there is recognition of the need for specific measures to implement the more general obligations of UNCLOS, by the Arctic States themselves and through relevant international bodies. However, the work has been influenced by the character of UNCLOS. The groups of duty bearers are larger than the Arctic five or eight. It is natural that the States of the Arctic Region that are directly affected by the environmental consequences of inaction take the initiatives, including through the Arctic Council. The Arctic Council has become an important instrument to put the Arctic, in general, and its marine environment, in particular, on the international agenda. However, is this enough to ensure that all States take their stewardship role seriously? Particularly the non-Arctic States? Involving them in the Arctic is as important as speaking the case of the Arctic in different international fora.

174. *Arctic Marine Shipping Assessment 2009 Report*, *supra* note 146, § (I)(C).

175. Wilson, *supra* note 116, at 7.