

## PERSPECTIVE: LAW AND POLICY DIMENSIONS

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The Symposium was mainly structured along three themes, namely providing an overview, identifying gaps and identifying potential options to address these gaps. The overview related to the

- current status of, and future trends for, Arctic living resources (with a strong emphasis on fish species and only little attention to marine mammals and birds);
- current exploitation of Arctic fish, with specific attention to exploitation by Arctic indigenous peoples;
- expected impacts of climate change on the Arctic Ocean, its adjacent seas, ecosystems and fish stocks; and
- relevant domestic laws, regulations, policies and institutions and international instruments, policies and institutions.

The last item - an overview of the laws, regulations, policies, institutions, etc. - was addressed by the Track 1 session in the afternoon of the opening day (Oct. 19); which comprised four formal presentations.

The first presentation by Dr. Reidar Toresen covered the main fish stocks occurring in the subarctic south and southeast of Svalbard. Attention was among other things devoted to the role and activities of the Joint Norwegian-Russian Federation Fisheries Commission<sup>1</sup> and the functioning of the International Council for the Exploration of the Sea (ICES). Toresen also noted the experience of Norway in integrated, cross-sectoral ecosystem-based oceans management in the Barents Sea and the Lofoten Islands. The ensuing discussion focused on the independence of ICES vis-à-vis fisheries management authorities and ICES' potential role in the Arctic Ocean. The panelists noted that all the Arctic Ocean coastal States are parties to the ICES Convention<sup>2</sup> and that there would not seem to be a reason as such why ICES could not play a greater role in the Arctic Ocean or even formally redefine the ICES areas. A participant also noted the option of cooperation between ICES and the North Pacific Marine Science Organization (PICES).

Kjartan Hoydal's presentation in Track 1 gave an overview of current knowledge about dramatic climatic changes over the centuries in the North Atlantic that have affected the

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<sup>1</sup> It should be noted that the 1975 Agreement (Agreement between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics on Co-operation in the Fishing Industry, Moscow, 11 April 1975. In force 11 April 1975; 983 *United Nations Treaty Series* 7 (1975)) by which the Commission was established, speaks of the "Mixed Commission" (see Art. III).

<sup>2</sup> Convention for the International Council for the Exploration of the Sea, Copenhagen, 12 September 1964. In force 22 July 1968, 652 *United Nations Treaty Series* 237; <[www.ices.dk](http://www.ices.dk)>.

distribution of the ocean fauna and the overall situation of bi-lateral, coastal State, port State and IGO (intergovernmental organization) cooperation in the North East Atlantic. He then focused more in particular on the NEAFC Convention and NEAFC; how it operates and which and types of measures have been taken so far. Separate attention was devoted to NEAFC's management under uncertainty, its measures relating to bottom fishing and its new requirements for engaging in new bottom fisheries<sup>3</sup>.

The presentation by Bill Wilson focused on the Arctic Fishery Management Plan (FMP) agreed to within the North Pacific Fishery Management Council (NPFMC).<sup>4</sup> He addressed, among other things, the Arctic FMP's background, outreach to stakeholders, the context in which it was developed and adopted (see paragraph below), its underlying objectives (e.g., ecosystem-based management), spatial scope and whether or not it affects existing coastal and subsistence fisheries. The discussion focused, among other things, on the appropriateness of the fact that, despite the importance of marine mammals and seabirds for the Arctic marine ecosystem, the adoption of the Arctic FMP ultimately rested with the United States Department of Commerce. One of the participants also noted that while new commercial fisheries in the United States' exclusive economic zone (EEZ) north of the Bering Strait would not be allowed for considerable time, other human activities such as offshore hydrocarbon activities would be allowed to commence. Wilson also shared his thoughts as to when new commercial fishing could be expected to commence, in light of the need for adequate data time series for the most likely target species.

The final presentation, by Lori Swanson, focused on the Northern Bering Sea Research Area and its potential to act as a model for assessing when and under which conditions commercial fishing could be allowed in the area covered by the Arctic FMP.

Moderator Erik Molenaar then made some final comments, noting among other things the applicability of relevant global instruments and global bodies to the Arctic, that important maritime boundaries still had to be agreed on (e.g., Canada/United States, Russian Federation/United States and Norway/Russian Federation) and that the overview in Track 1 was unfortunately not complete due to the absence of presentations focusing on Canada, Iceland, Greenland and the Russian Federation as well as on bilateral cooperation between the United States and the Russian Federation.

## **Future Directions**

The focus of the panel on Future Directions on Oct. 20 was to include:

- Potential solutions to promote conservation and management of future Arctic fisheries;
- Possible steps by Arctic neighboring States to address issues such as transboundary stocks; and
- Actions by the international community to ensure healthy fish stocks in the high seas portion of central Arctic Ocean where there are no current agreements.

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<sup>3</sup> See, *inter alia*, NEAFC Recommendation XVI: 2008 on Bottom Fishing Activities in the NEAFC Regulatory Area.

<sup>4</sup> Council Motion of 5 February 2009 'Arctic Fishery Management Plan', approved by the Secretary of Commerce in August 2009. According to Wilson, the Arctic FMP is expected to come into force at the end of 2009 or the beginning of 2010.

The panelists had agreed that Molenaar would give a more general presentation that would not touch on RFMO, regional fisheries management options (to be addressed by Hoydal) and bilateral approaches in the context of unresolved maritime boundaries (to be addressed by Terje Løbach). Duane Smith, representing ICC Canada, would focus on issues relating to Arctic indigenous peoples and David Sproule would offer insight on the views of Canada.

Molenaar's presentation first of all addressed a number of preliminary issues that will ultimately determine which future options may attract the necessary support, for instance spatial coverage (North of Bering Strait and North of Svalbard? Only high seas or also coastal State maritime zones?), species coverage and the level at which options would be pursued. As regards the global level, a "Declaration on Arctic Fisheries" and the potential role of the United Nations General Assembly (UNGA) were briefly touched on. Other key parameters were

- whether or not future options should include the establishment of new instruments or bodies;
- whether such new instruments should be legally binding or non-legally binding;
- whether participation should be limited to Arctic Ocean coastal States or also include other States and entities; and
- the need for future options to be pro-active/precautionary, fair and equitable and cost-effective.

He then briefly discussed the following non-RFMO options:

- Freeze of fisheries expansion, provided there is a clear exit strategy;
- High seas arrangement modeled on the CBS Convention<sup>5</sup> or the more recent SIOF Agreement<sup>6</sup> in combination with interim measures (e.g., freeze of fisheries expansion with clear exit strategy; the approach in the paragraphs of UNGA Res. No. 61/105 relating to bottom fisheries; or measures on new & exploratory fisheries); and
- Closure of high seas combined with limited access of non-Arctic states to the maritime zones of the Arctic Ocean coastal States.<sup>7</sup>

He finally discussed the need to embed ecosystem-based fisheries management within, or link it to, integrated, cross-sectoral ecosystem-based oceans management.

Hoydal's presentation elaborated on particular elements of his Track 1 presentation, among other things on NEAFC's measures relating to bottom fishing and its new requirements for engaging in new fisheries. Among the main issues discussed by Smith was the need to involve Arctic indigenous peoples in fisheries management, both at the domestic and international level. In the ensuing discussion reference was made to the unique status of permanent participants in the context of the Arctic Council.

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<sup>5</sup> Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, Washington, 16 June 1994. In force 8 December 1995, 34 *International Legal Materials* 67 (1995); <[www.afsc.noaa.gov/refm/cbs](http://www.afsc.noaa.gov/refm/cbs)>.

<sup>6</sup> Southern Indian Ocean Fisheries Agreement, Rome, 7 July 2006. Not in force, <[www.fao.org/legal](http://www.fao.org/legal)>.

<sup>7</sup> E.g., modeled on the so-called 'Loophole Agreements' between Iceland/Norway and Iceland/Russian Federation.

## Views of attending Arctic States

### United States

In his role as moderator of the Future Directions panel and his role as facilitator in the discussion on the closing day, U.S. Ambassador David Balton observed that support for multilateral policy and regulatory responses to Arctic fishing activities would be higher if their spatial scope would be limited to the marine areas north of the Bering Strait and Svalbard, which are - from a fisheries perspective - significantly different from marine areas farther south. It is submitted that the main differences are:

- compared to the areas farther south, relatively little data, knowledge and insight required for science-based and ecosystem-based fisheries management exists for the marine areas north of the Bering Strait and Svalbard;
- compared to the areas farther south, there are no commercial fisheries of any significance in the more northerly areas and no fisheries at all in the high seas portion of the Central Arctic Ocean; and
- whereas the areas farther south are covered by a number of international fisheries management regimes, no such international regimes exist for managing fisheries in the more northerly areas other than the inclusion of the Atlantic sector of the Central Arctic Ocean within the NEAFC Convention<sup>8</sup> Area.<sup>9</sup>

Balton thought there would be insufficient support to change the spatial scope and membership of the instruments and institutions that already apply to the Atlantic sector of the Arctic (i.e., the NEAFC Convention and NEAFC, as well as the suite of mechanisms that the Russian Federation and Norway use for managing fisheries in their boundary area in the Barents Sea).

Balton also took the view that the urgency for multilateral policy and regulatory responses to fishing activities in coastal State maritime zones of the Arctic Ocean is higher than the urgency for such responses with regard to the high seas portion of the Central Arctic Ocean that is not covered by the NEAFC Convention. In his view, however, it would not be too soon to start multilateral discussions on the latter aspect, bearing in mind the need for cost-effectiveness. Such discussions should, in his view,

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<sup>8</sup> Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, London, 18 November 1980. In force 17 March 1982, 1285 United Nations Treaty Series 129; <[www.neafc.org](http://www.neafc.org)>. 2004 Amendments (Art. 18bis), London; 12 November 2004. Not in force, but provisionally applied by means of the 'London Declaration' of 18 November 2005; <[www.neafc.org](http://www.neafc.org)>. 2006 Amendments, London (Preamble, Arts 1, 2 and 4), 11 August 2006. Not in force, but provisionally applied by means of the 'London Declaration' of 18 November 2005; <[www.neafc.org](http://www.neafc.org)>.

<sup>9</sup> It is submitted, however, that while the spatial scopes of the ICCAT Convention (International Convention for the Conservation of Atlantic Tunas, Rio de Janeiro, 14 May 1966. In force 21 March 1969, United Nations Treaty Series No. 9587 (1969); <[www.iccat.int](http://www.iccat.int)>) and the NASCO Convention (Convention for the Conservation of Salmon in the North Atlantic Ocean, Reykjavik, 2 March 1982. In force 1 October 1983, 1338 United Nations Treaty Series 33; <[www.nasco.int](http://www.nasco.int)>) do not explicitly refer to the Arctic Ocean, as there is no agreed definition for, or northern limit of, the Atlantic Ocean, nothing would prevent ICCAT and NASCO from exercising competence in the Arctic Ocean if their members so agree.

start among the Arctic Ocean coastal States but should not long thereafter become more transparent and inclusive. He explicitly mentioned the rights and interest of other States, not only with respect to marine capture fisheries but also with regard to other uses and issues relevant to the Arctic Ocean and its adjacent seas. In response to a question on a possible role for the United Nations General Assembly (UNGA), Balton took the view that it would be more appropriate for a smaller group of States with specific interests in Arctic fisheries to take the lead.

Which outcome the United States would like such multilateral discussions to have can among other things be deduced from recently adopted United States laws and policies, namely:

- Senate joint resolution (SJ Res.) No. 17 of 2007, “directing the United States to initiate international discussions and take necessary steps with other Nations to negotiate an agreement for managing migratory and transboundary fish stocks in the Arctic Ocean;”<sup>10</sup>
- the Arctic Region Policy;<sup>11</sup> and
- the Arctic FMP agreed to within the NPFMC.<sup>12</sup>

Even though this was not stated in plenary, it seems that the United States would like such multilateral discussions to lead as a minimum to a multilateral declaration on Arctic fisheries by which the signatories would confirm the applicability of relevant international instruments to Arctic fisheries, for instance:

- the LOS Convention;<sup>13</sup>
- the Fish Stocks Agreement;<sup>14</sup>
- legally binding and non-legally binding FAO instruments, such as
  - the Compliance Agreement;<sup>15</sup>
  - the PSM Agreement;<sup>16</sup>
  - the International Guidelines on Deep-sea Fisheries;<sup>17</sup>

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<sup>10</sup> Passed by the Senate on 4 October 2007, voted in favour by the House of Representatives on 21 May 2008 and approved by President Bush on 3 June 2008, from then on becoming Public Law No. 110-243, of 3 June 2008 (122 STAT 1569).

<sup>11</sup> National Security Presidential Directive/NSPD-66 & Homeland Security Presidential Directive/HSPD-25, of 9 January 2009. In effect same day; text available at <[www.whitehouse.gov](http://www.whitehouse.gov)> (press release of 12 January 2009).

<sup>12</sup> See note 4 supra.

<sup>13</sup> United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, 1833 *United Nations Treaty Series* 396; <[www.un.org/Depts/los](http://www.un.org/Depts/los)>.

<sup>14</sup> 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, New York, 4 August 1995. In force 11 December 2001, 34 *International Legal Materials* 1542 (1995); <[www.un.org/Depts/los](http://www.un.org/Depts/los)>.

<sup>15</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Rome, 24 November 1993. In force 24 April 2003, 33 *International Legal Materials* 969 (1994); <[www.fao.org/legal](http://www.fao.org/legal)>.

<sup>16</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Text agreed on 28 August 2009, Rome and likely to be adopted without changes by the FAO Conference in November 2009. Text is contained in Appendix F to the Report of the Technical Consultation to Draft a Legally-binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Rome, 23-27 June 2008, 26-30 January 2009, 4-8 May 2009 and 24-28 August 2009 (*FAO Fisheries and Aquaculture Report* No. 914).

- the Code of Conduct<sup>18</sup> and its Technical Guidelines and International Plans of Action (IPOAs); and
- relevant (parts of) UNGA resolutions, such as the paragraphs of UNGA Resolution No. 61/105 relating to destructive fishing practices.<sup>19</sup>

If the necessary support would exist, however, the United States would obviously like to see a multilateral version similar to, or with similar effectiveness of, its Arctic FMP for marine areas of the Arctic that similarly do not yet have significant commercial fisheries and about which little is known.

## Canada

In his presentation in the Future Directions panel on Oct. 20, David Sproule offered some general insights on Canada's views in light of the purpose of this panel. Sproule commented that the limited available resources should at this stage in particular be devoted to scientific research. Even though Canada would not be against a multilateral instrument that would (also) apply to the area of high seas in the Central Arctic Ocean that is not covered by the NEAFC Convention, such instrument should be flexible, adaptable and nimble. A full-fledged regional fisheries management organization (RFMO) would by implication be ruled out. Sproule's presentation did not address the need for, or particulars of, bilateral or trilateral arrangements on transboundary fish stocks with the United States and the Russian Federation.

## Norway

Terje Løbach's presentation in the Future Directions panel on Oct. 20 did not explicitly address the need for, or particulars of, new international instruments or institutions for the Arctic Ocean and its adjacent seas. Løbach nevertheless noted the existence and role of the Arctic Ocean coastal States, ICES, NEAFC and the Joint Norwegian-Russian Federation Fisheries Commission. As regards NEAFC, Løbach repeated that the spatial scope of the NEAFC Convention encompasses the Atlantic sector of the Arctic Ocean.

As regards the Joint Commission, Løbach noted that at the Commission's recent meeting this year, it was agreed that Norway and the Russian Federation would ask ICES to prepare assessments on possible consequences of climate change for stocks managed by the Commission with regard to migration patterns and areas of distribution into the Central Arctic Ocean. Thus the Commission seems to consider that its spatial

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<sup>17</sup> International Guidelines for the Management of Deep-sea Fisheries in the High Seas, Rome, 29 August 2008 (contained in Appendix F to the Report of the Technical Consultation on International Guidelines for the Management of Deep-sea Fisheries in the High Seas, Rome, 4-8 February and 25-29 August 2008 (*FAO Fisheries and Aquaculture Report No. 881*)).

<sup>18</sup> Code of Conduct for Responsible Fisheries. Adopted by the Twenty-eight Session of the FAO Conference, Rome, 31 October 1995, <[www.fao.org/fi](http://www.fao.org/fi)>.

<sup>19</sup> UNGA Resolution No. 61/105, of 8 December 2006, 'Sustainable fisheries, including through the 1995 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, and related instruments', in particular paras 59 and 80-86.

competence with regard to species that are already subject to the Commission's management, would also extend to the high seas within the Central Arctic Ocean.

It is submitted that such an extension would not be inconsistent with the 1975 Agreement by which the Commission was established, as the 1975 Agreement does not define its spatial scope. However, if the managed stocks' zonal attachment to the high seas pockets in the Barents Sea (the Loophole) and the Central Arctic Ocean increases, this may call for increased allocations of fishing opportunities to third States and entities (i.e., other than Norway and the Russian Federation). Moreover, if the distributional ranges of managed stocks would overlap with the maritime zones of Greenland, the Joint Commission would have to cooperate with Greenland.

### **Other observations**

Several presenters at the Symposium noted the difficulty of making predictions on the implications of climate change for the Arctic marine area, its marine environment, marine living resources and biodiversity. That the air temperature in the Arctic region and acidification of the Arctic Ocean would increase seemed generally accepted, however. A number of other concerns were expressed, for instance, on cross-invasions of species and parasites etc., from the Pacific to the Atlantic and *vice versa*. Strict regulation of ships' ballast water management and anti-fouling systems was suggested as a means to help the Arctic Ocean adjust to the unprecedented changes it has to deal with now and in the future.

A few presenters also contended that change would come predominantly from the North East Atlantic, for instance, in the form of species invasions and influx of relatively warm water. This led to an interesting discussion on the need for new instruments for the high seas portion of the Arctic Ocean. It was argued, for instance, that demersal species like cod, haddock and Greenland halibut would not expand far north of Svalbard and Franz Josef Land because the waters are too deep (see Figure 1 below). It was also assumed that the Central Arctic Ocean would be too deep for other commercially exploitable deep-sea species. Moreover, pelagic species like mackerel, blue whiting, herring and capelin are already covered by coastal State arrangements, NEAFC and the Joint Norwegian-Russian Federation Fisheries Commission. As regards species managed by NEAFC, this of course assumes that their range of distribution does not extend beyond the NEAFC Convention Area. Another observation made in this context was that fisheries would not take place in the Atlantic sector of the Central Arctic Ocean as it would be more profitable to catch the same species in more southerly areas. It seems that this assumes fisheries access in such southerly areas as well as the ability to land catch in nearby ports.

In light of the discussion on the possible occurrence of demersal or pelagic fish stocks, it is also worthwhile to examine the bathymetry in the Pacific sector of the Arctic Ocean - shown in Figure 1 - in conjunction with the maritime boundaries shown in Figure 2. This indicates that beyond the EEZs there are relatively shallow areas of high seas.

Figure 1

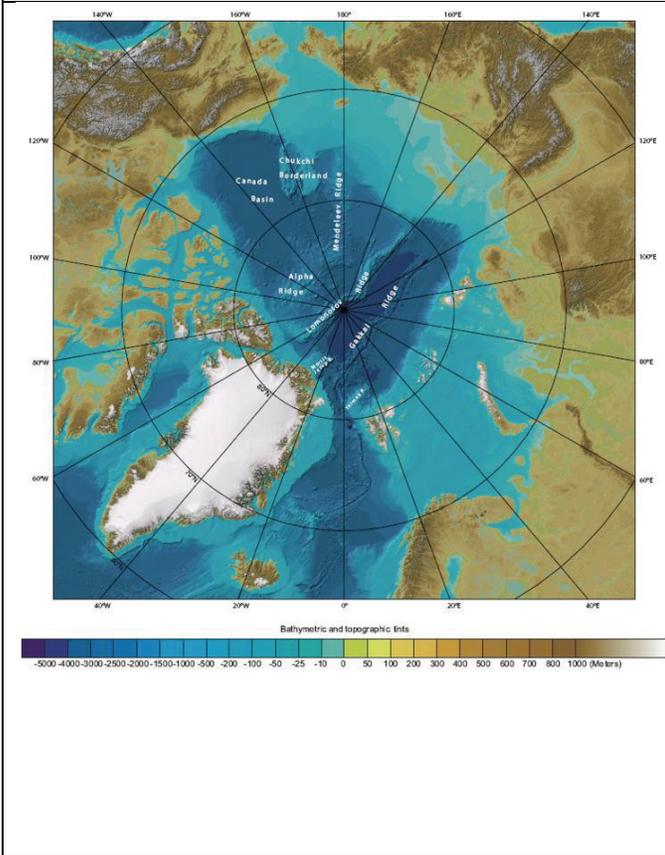
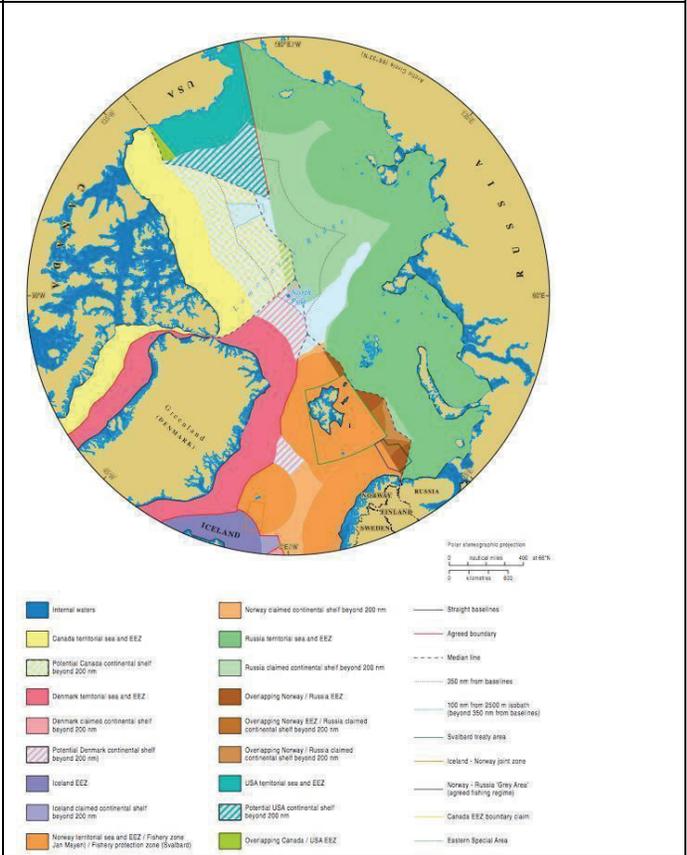
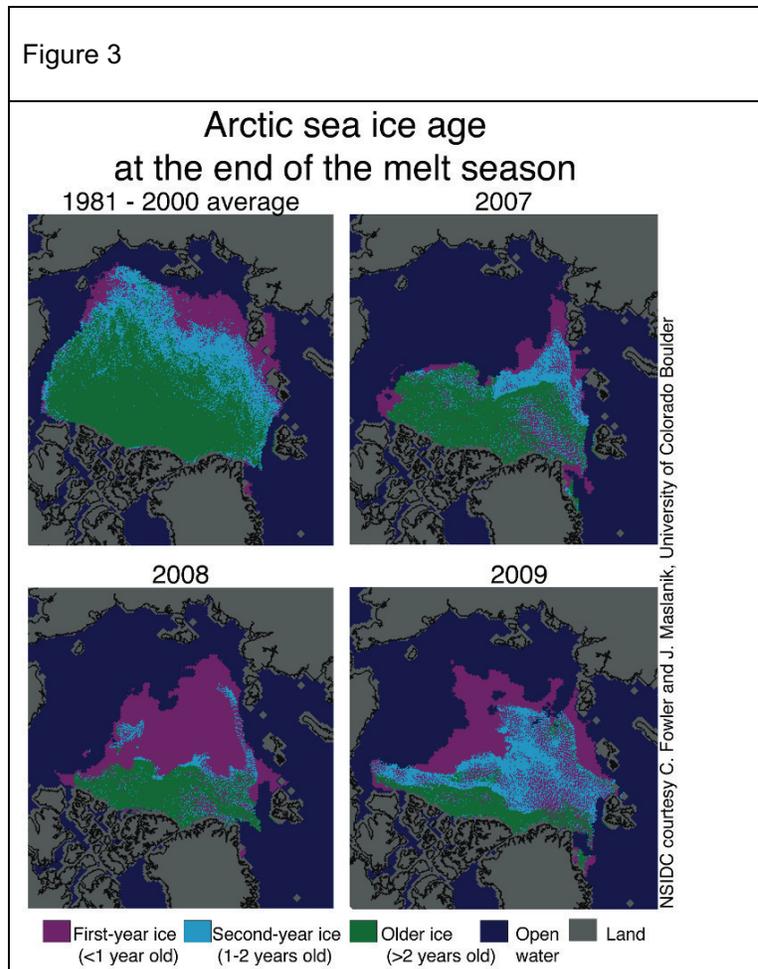


Figure 2<sup>20</sup>



<sup>20</sup> Drawn up by IBRU (<[www.dur.ac.uk/ibru](http://www.dur.ac.uk/ibru)>).

Another factor that will play a role is the presence of sea ice, which would rule out (large-scale) commercial fisheries whatsoever. Not only would fishing operations simply not be possible but commercially interesting fish stocks may not even occur under sea ice. An interesting question is therefore which parts of the Arctic Ocean will be without sea ice first. Reference is in this context made to Figure 3 below, whose images show ice age - a proxy for ice thickness - in 2007, 2008 and 2009 as well as the 1981-2000 average.<sup>21</sup> These images seem to suggest that seasonal melting of sea ice will be much more prominent in the Pacific sector of the Arctic Ocean compared to the Atlantic sector. This could mean that new Arctic fisheries could develop first in the Pacific sector, including in the high seas portion.



<sup>21</sup> Credit: National Snow and Ice Data Center (<[nsidc.org/arcticseaicenews](http://nsidc.org/arcticseaicenews)>), courtesy C. Fowler and J. Maslanik, University of Colorado at Boulder. 2009 saw an increase in second-year ice (in blue) over 2008. At the end of summer 2009, 32 percent of the ice cover was second-year ice. Three-year and older ice were 19 percent of the total ice cover, the lowest in the satellite record.

## Outcome and next steps

The Symposium did not culminate in a formal or tangible outcome in the form of agreed conclusions and/or recommendations by the participants or a report by a Chair. Without a formal outcome, there was also no agreement on next steps. This is noteworthy in view of the well-conceived structure of the Symposium, which focused separately on providing overviews and on identifying gaps and potential options to address these gaps. The panel on the closing morning even bore the title, “Finding common ground: Facilitated discussion of recommendations and next steps.” However, as not all Arctic States were represented, such an outcome would have carried insufficient authority.

